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CHAPTER 1

PRE-TRIAL RELEASE AND DETENTION

The first question a newly arrested defendant typically has for her counsel is: "Can I get out?" To respond meaningfully to this question, counsel must have a firm understanding of the rather byzantine statutory scheme governing pre-trial release and detention in the Superior Court of the District of Columbia, as well as the District of Columbia Court of Appeals' case law on these statutes. The statutes set forth presumptions of release and detention, rebuttable presumptions of release and detention, enumerated factors the court must consider in deciding whether to detain or release and a myriad of other rules and considerations over which counsel must have a firm grasp in order to gain release for her client. Counsel must also have a well-grounded understanding of the various programs and monitoring schemes available through the Pretrial Services Agency ("PSA"), so that counsel can advocate for pre-trial release. This section provides an introduction and overview of pre-trial release and detention in Superior Court. A mere reading of this section, however, is no substitute for a careful reading of the statutory scheme itself.

I. THE STATUTE

A. The Starting Point – D.C. Code § 23-1321

Pre-trial release and detention are governed by the Bail Reform Act, D.C. Code §§ 23-1321 to 1332. All release decisions have constitutional underpinnings in the Eighth Amendment's prohibition of excessive bail, *see, e.g.*, *Stack v. Boyle*, 342 U.S. 1, 4-5 (1951), and the Due Process Clause of the Fifth Amendment, s*ee United States v. Salerno*, 481 U.S. 739, 746 (1987).

In setting release conditions, the court should consider the following: the nature and circumstances of the charge; the weight of the evidence; the person's family ties, employment, financial resources, character, physical and mental condition, past conduct, length of residence in the community, prior convictions, and record of appearance in court; flight to avoid prosecution; or failure to appear at court proceedings. § 1322(e).

1. Non-financial Conditions of Release

Unconditional release is presumed: the defendant "shall" be released "on personal recognizance, or upon execution of an unsecured appearance bond . . . unless the judicial officer determines that the release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." § 23-1321(b). While safety concerns can support imposition of other conditions, they cannot be used to support a money bond, which may be imposed only to minimize the risk of flight. *See* § 1321(c)(3); *Jones v. United States*, 347 A.2d 399, 401 (D.C. 1975); *Villines v. United States*, 312 A.2d 304, 306 (D.C. 1973).

If more is required than personal recognizance or an unsecured appearance bond, the court must impose the least restrictive condition(s) that will reasonably assure appearance or safety. § 23-

1321(c)(1)(B). In addition to the mandatory condition that the client not commit a crime while on release, § 1321(c)(1)(A), other possible conditions include third-party custody; maintaining or seeking employment or an educational program; restrictions on "personal associations, place of abode, or travel"; avoiding contact with witnesses or possession of weapons; reporting to a specified agency; curfew; avoiding use of controlled substances and excessive use of alcohol;[1] medical, substance abuse or mental health treatment, including in-patient treatment; custody except release for employment or education; cash or bail bond; or "any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community."[2] § 1321(c)(1)(B).

Courts should impose non-financial conditions of release flexibly, depending on the individual defendant's situation. *United States v. Leathers*, 412 F.2d 169, 172 (D.C. Cir. 1969). "Third-party custody is the first and preferred condition of release to be used in conjunction with or in lieu of personal recognizance." *Jones v. United States*, 347 A.2d 399, 401 (D.C. 1975). Only as a later resort should a work-release condition or half-way house placement be imposed. *Leathers*, 412 F.2d at 172. Counsel should inform clients that placement in a halfway house may involve temporary incarceration at the jail due to unavailable space in halfway houses. Wait lists are created for individuals ordered to halfway houses. To obtain information on the wait list for halfway house placement, counsel can either call the duty day attorney and request information about the wait list or inquire at the Defender Services Office in Superior Court on the C-level for a list posting the estimated number of individuals awaiting halfway house placement.

Alternative Release Options: Counsel should be creative in suggesting release conditions in those cases where simple release on personal recognizance will not satisfy the court's concerns about safety or risk of flight. The Heightened Intensive Supervision Program (HISP) provides structured programming and close supervision for defendants, and is therefore an alternative to preventive detention in some cases. HISP is administered by PSA (Pre-trial Services Agency), and is available at any point, including the first appearance, in the progression of the case. For any and all requirements of HISP, counsel should contact Pre-trial Services to determine if her client is eligible and the release conditions required of the client. HISP is a program based on a Memorandum of Understanding among PSA, the Department of Corrections (DOC), and the Superior Court of the District of Columbia.

In setting release conditions under § 1321, the severity of the pending charges alone cannot support a finding against the presumption in favor of non-financial conditions if the defendant has ties to the community and sufficient non-financial conditions are available:

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[1] The trial court has statutory authority to require pre-trial drug testing as a condition of release, at least where there is evidence to support an individualized suspicion that the defendant might use illegal drugs. *Oliver v. United States*, 682 A.2d 186, 189-90 (D.C. 1996). *Oliver* did not decide whether an individualized suspicion is always required, but counsel should argue that the Fourth Amendment requires such a finding before drug testing is ordered.

[2] The courts occasionally impose "stay-away" orders under this last section, requiring that clients with drug charges stay out of high drug traffic areas or that alleged prostitutes stay out of areas where prostitution is common. Attacks on the constitutionality of such orders have been unsuccessful. *See Matter of A.H.*, 459 A.2d 1045 (D.C. 1983) (no First Amendment violation where pre-trial release condition included order to stay away from Islamic Center). Counsel should oppose any such condition that is unduly restrictive, impractical or unnecessary.

> The District Judge apparently rested his finding of a risk of flight upon the severity of the sentence that could be imposed on appellant if she were convicted on the murder charge. If this factor were alone determinative, however, release would never be possible in a capital case, and the statutory scheme that Congress so carefully established for such cases would be nullified completely. In evaluating the likelihood of flight, the potential penalty has relevance, but here we are much more persuaded by the stability of appellant's relationship to the community. She has lived in the District for about ten years, and has displayed a record of steady employment, the continuation of which upon release is assured. These community roots strongly dispute any threat of flight. To this we may add that she surrendered voluntarily to the police several hours after the incident giving rise to the indictment.

White v. United States, 412 F.2d 145, 146-47 (D.C. Cir. 1968).

An extensive record of arrests and ensuing court appearances may also establish reliability in meeting court obligations. "Consistent appearance when flight is possible is an important indicator of whether a defendant is likely to appear once again." *Wood v. United States*, 391 F.2d 981, 984 (D.C. Cir. 1968). (*Wood* also quotes *Stack v. Boyle*: "each accused is entitled to any benefits due to his good record." *Stack*, 342 U.S. at 1; *Wood*, 391 F.2d at 984).

2. Money Bonds

While safety is a legitimate consideration in setting non-monetary conditions of release, it cannot be used to justify imposition of a money bond. § 23-1321(c)(3). Money bonds may be imposed *only* to minimize the risk of flight. And even then, if the money bond imposed results in pre-trial detention, the bond must be reduced or other conditions of release imposed in place of the money bond. § 23-1321(c)(3). Thus, if the court decides that monetary conditions are necessary to induce future appearances, it "may impose such a financial condition to reasonably assure the defendant's presence at all court proceedings that does not result in the preventive detention of the person, except as provided in § 23-1322 (b)." § 23-1321(c)(3). This section is intended to:

> prohibit[ ] the judicial officer from imposing a financial bond that results in pre-trial detention. . . .The intent is to eliminate "sub rosa" preventive detention (i.e.[,] preventive detention accomplished by setting money bonds beyond the supposed financial means of the defendant) and to replace it with a more open and honest process.

Bill 9-360, the "Bail Reform Amendment Act of 1991", Council of the District of Columbia Report, 5 (1992). Thus, if a defendant cannot post the bond set, counsel should immediately file a bond review motion, asking the court to reduce the bond or to consider non-financial conditions to assure future court appearances. A defendant who, "after 24 hours from the time of the release hearing, continues to be detained as a result of inability to meet the [financial] conditions of release, shall upon application be entitled to have the conditions reviewed by the judicial officer who imposed them." § 1321(c)(4). If the bond is not lowered or if the defendant cannot make the lowered bond, § 1321(c)(3) provides that the defendant should be released on

conditions, unless the government moves for and obtains an order of preventive detention pursuant to § 1322(b).

Money bonds come in three basic types: cash, surety, and "ten percent." A **"ten percent" bond** requires that 10% of the face value of the bond be posted with the court (at the Finance Office) to be retained until the conclusion of the case and forfeited if the client fails to appear. *See Allegheny Mut. Cas. Co. v. United States*, 622 A.2d 1099, 1100 n.1 (D.C. 1993) (listing factors relevant to determination of bond forfeiture); *accord Indiana Lumbermen's Mut. Ins. Co. v. United States*, 640 A.2d 1036, 1037-38 (D.C. 1994). A **surety bond** requires posting through a bond agency, which will require payment of ten percent of the bond as a non-returnable fee, and may require additional collateral, which must be returned if the client makes all appearances. A **cash bond** requires the client to post the entire amount with the court; the entire amount is returned at the conclusion of the case unless the client fails to appear. Usually, the least onerous of these options is the ten percent bond. Cash bonds are usually ordered only as an alternative to surety bonds – "cash or surety." The cash bond option can be useful because some agencies do not take certain clients (those with a demonstrated history of failures to appear) or certain cases (crimes of violence, life offenses, etc.). Lists of bond agencies are available in the Finance Office and in the yellow pages of the telephone book under Bail Bonds.

Clients held on bond must be released if the grand jury does not return an indictment within nine months of the presentment. D.C. Code § 23-102; Super. Ct. Crim. R. 48(c).

Bond Review Motions:

- ✓ File a bond review motion when defendant cannot post the bond set
- ✓ Ask court to reduce the bond or to consider non-financial conditions to assure future court appearances

B. Three-Day and Five-Day Holds – §§ 23-1322 (a), (b) & 1325(a)

A temporary hold without bond for a period of three calendar days is statutorily permitted if: (1) the government has requested detention without bond for the entire pre-trial period; or (2) the defendant is a narcotics addict.[3] A temporary hold without bond for a period of five business days is statutorily permitted if the defendant is on probation, parole, or release in a pending felony or release for sentencing. Before the court can grant the government's request for either a three-day or five-day hold, the court must determine that there is probable cause to support the arrest.

1. Probable Cause

Any significant restraint on liberty following arrest without a warrant requires a prompt probable cause determination by the court. *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975).

[3] *See* D.C. Code § 23-1323.

> This issue can be determined reliably without an adversary hearing. The standard is the same as that for arrest. That standard – probable cause to believe the suspect has committed a crime – traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof.

Id. at 120 (footnote omitted).

Fourth Amendment strictures may come into play without incarceration. "Even pre-trial release may be accompanied by burdensome conditions that effect a significant restraint of liberty." *Id.* at 114. "[T]he probable cause determination . . . is required . . . for those suspects who suffer restraints on liberty other than the condition that they appear for trial." *Id*. at 125 n.26. *Gerstein* did not specify what conditions call for a probable cause determination. *Id.*

The *Gerstein* requirements are codified in Superior Court Criminal Rule 5(c). In order to obtain conditions of release that constitute a significant restraint on the defendant's liberty, the prosecution must file a sworn statement of facts establishing probable cause. If probable cause is not found, the court must either release the client or give the government until the end of the next working day to perfect the proffer. Generally, "*Gerstein* proffers" are provided to the court and counsel at the initial hearing in the form of the statement of facts from the PD 163 or the arrest warrant affidavit and are signed and sworn to by a police officer involved in the case.

While the initial hearing is generally short and there are pressures from the bench to expedite matters, counsel should be particularly diligent in reading the *Gerstein*. When reviewing the *Gerstein* and preparing for probable cause arguments, it is helpful for counsel to have the D.C. Code Book and D.C. Jury Instructions for the charged offenses. Counsel should compare the factual allegations in the *Gerstein* to the elements of the charged offense and determine whether all of the elements have been met within the four corners of the *Gerstein*. Additionally, if the *Gerstein* does not have a reference to jurisdiction or specific information identifying the client as the individual who committed the offense, these may be other grounds to challenge probable cause. Some additional probable cause arguments may include the fact that there is no physical or scientific evidence to support the allegations; no weapons were recovered; the *Gerstein* relies solely upon information from one unreliable witness; or there are inconsistent statements made by the witnesses cited in the *Gerstein*. Even in cases where probable cause appears to exist on the face of the *Gerstein*, counsel should proffer an argument against probable cause. Submitting on the *Gerstein* often gives the client the impression that no one is fighting for him or her. Establishing good client relations during this first hearing will serve counsel well down the road.

***Gerstein*:**

- ✓ Carefully read the *Gerstein*
- ✓ Review the D.C. Code Book and D.C. Jury Instructions for the charged offenses
- ✓ Compare factual allegations in *Gerstein* to elements of charged offenses

Challenges to Probable Cause based on the *Gerstein* include:

- ✓ No reference to jurisdiction
- ✓ Absence of information identifying your client as the person who committed the crime
- ✓ Physical or scientific evidence does not support allegations
- ✓ *Gerstein* relies solely on information from one unreliable witness
- ✓ If a request for blood, hair, saliva, or semen is made, challenge this request if the government has not established that it has evidence to compare with your client's sample

2. Three-Day Holds – § 23-1322(b) and § 23-1325(a) (Preventive Detention)

a. Section 1322(b)

Once probable cause has been established via the *Gerstein*, pre-trial detention may be ordered if: (1) the person is charged with a crime of violence or dangerous crime as defined in § 23-1331; (2) the person is charged with obstruction of justice (§ 22-722); (3) there is a "serious risk" that the person will obstruct or attempt to obstruct justice; or (4) there is "a serious risk that the person will flee." § 1322(b)(1)(A)-(D).[4] The government must still show clear and convincing evidence that no conditions of release will adequately assure either the defendant's appearance in court or public safety. *See Blackson v. United States*, 897 A.2d 187, 194 (D.C. 2006). If the government is unable to make this showing, the defendant must be released. *See id*. at 198.

The detention hearing "shall be held immediately upon the person's first appearance[5] before the judicial officer unless that person, or the attorney for the government, seeks a continuance." § 1322(d)(1). A government continuance of the detention hearing cannot exceed three calendar

[4] The statute allows the government to seek detention in any case, even petty misdemeanors, based on serious risk of flight. Obviously, counsel should vigorously oppose detention in all cases, but especially in misdemeanor cases. Counsel should raise all applicable constitutional challenges and note that the speedy trial provisions of § 1322(h) (*see infra* Section II.C.1), requiring trial within 100 days, do not adequately protect the rights of those charged with crimes with much shorter maximum sentences than felonies.

[5] Analyzing the comparable provision in the federal statute, *United States v. Montalvo-Murillo*, 495 U.S. 711, 720-21 (1990), held that when the government negligently fails to seek a preventive detention at the defendant's first appearance, it is not barred forever from doing so. However, the Court left open what remedy is available if the delay in seeking detention is "intentional" or "aggravated." *Id*. at 721. On the other hand, the statute expressly authorizes the government to seek detention by *ex parte* written motion after the first court appearance when it "subsequently" learns information indicating that the defendant is eligible for detention. § 1322(d)(7).

days without good cause, and a defense continuance cannot exceed five calendar days without good cause.[6] *Id.*

As a practical matter, in serious cases (e.g., first degree sex abuse, kidnapping, and carjacking) counsel should consider asking the client to waive his three-day rights and continue the hearing for a week or two. A longer continuance will enable counsel to investigate the case and develop positive social factors for release.

One additional matter that arises in serious cases, especially sex offenses, is that the government makes a request for a blood, hair, and saliva order. If one of these orders is granted, a police officer will be permitted to take samples from the client at a date ascertained in the presentment hearing at the jail or at the Metropolitan Police Department. Counsel should object to the government's request for this order if, within the four corners of the *Gerstein*, the government has not established that it has any blood, hair, or saliva to compare with the client's sample. Additionally, counsel can object if the request for all three of these samples is not relevant to the specific items that the police recovered.

Section 1322(d)(1) provides that "[d]uring a continuance, the person shall be detained." Counsel should argue that the government must make a *prima facie* showing of clear and convincing evidence that no combination of conditions can reasonably assure future appearances or the safety of the community before a defendant may be detained during the continuance period. Section 1322 does not directly address this point, but § 1321(b) requires the court to order release at the first appearance, *unless* it determines that release will not reasonably assure future appearances or the safety of the community. Counsel should also argue that findings under § 1322(b)(1)(A)-(D) only establish that the government has a right to seek detention – no more[7] – and that holding a defendant without bond for a total of at least three (usually four or five) days following arrest without even a preliminary finding of dangerousness or risk of flight violates due process.

In practice, a three-day continuance is automatically granted on government request at presentment if probable cause has been established. If detention is also sought under § 1322(a), the court may order that both hearings proceed within the five business days allowed by that section (under the rationale that judicial economy is enough "good cause" for the additional continuance permitted under the statute). While counsel may be able to resist this addition of several days to the § 1322(b) time period, counsel should warn the client that detention will be imposed if the government asks for it and the charge is a dangerous crime or crime of violence.

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[6] Because each defendant has a right to a prompt hearing, hearings in codefendant cases should be severed if one defendant is granted a continuance to which another objects. *See United States v. Araneda*, 899 F.2d 368, 370 (5th Cir. 1990); *United States v. Hurtado*, 779 F.2d 1467, 1476 (11th Cir. 1985).

[7] "[T]he mere fact that the defendant is charged with one of the offenses described in [the statute] and is subject to a hearing is not meant to establish a prima facie case for detention of the defendant, as this issue is a separate one to be determined in the detention hearing." John B. Howard, Jr., Note, *The Trial of Pre-trial Dangerousness: Preventive Detention After United States v. Salerno*, 75 Va. L. Rev. 639, 649 (1989); *see also* K.F. Berg, *The Bail Reform Act of 1984*, 34 Emory L.J. 685, 704 (1985) ("this initial finding [under 18 U.S.C. § 3142(f)(1)(A)-(D)] merely establishes the government's right to a detention hearing on the issue of dangerousness; it is not a sufficient basis by itself for a court to enter an order of detention without hearing further evidence").

Three-day hold cases in the Violent Crimes Unit of the U.S. Attorney's Office are assigned at presentment to individual judges on the accelerated felony calendar.[8]

b. Section 1325(a)

Clients charged with first-degree murder or assault with intent to kill while armed are subject to pre-trial detention pursuant to § 23-1325(a). Unlike § 23-1322, there is no "hold" provision for § 23-1325(a). This section embodies a presumption for release: the client "shall be treated in accordance with the provisions of section 23-1321" – have release conditions set – *unless* there is clear and convincing evidence that no combination of conditions could assure that the client will not flee or pose a danger to the community.

3. Five-Day Holds – § 23-1322(a) for Defendants on Release, Probation or Parole

Once probable cause has been established via the *Gerstein*, a five-day bondless hold may be imposed if the defendant is on release, probation or parole, *and* the court finds the defendant may flee or pose a danger to a person or to the community if released. § 23-1322(a). *The hold is not automatic*; the court should set release conditions as in any other case unless there is an indication of dangerousness or a likelihood of flight, and must find probable cause on the new case.

At the next hearing, which must be held within five business days, the court will hear live testimony to make a probable cause determination and determine release conditions in the new case. In cases where the client is on release in a felony case and the new case is a felony or misdemeanor, the court will also hold a preliminary hearing at that time. While a judge is assigned to the case at presentment, the case will be heard by the commissioner on the preliminary hearing calendar unless the new case is on an Accelerated Felony Trial calendar (AFTC) or Felony I calendar. In those cases the AFTC or Felony I judge will hear the case. The hearing commissioner or new judge cannot change the conditions of release set by the felony judge in the pending felony case. If the client is on release pending sentencing, the judge on the old case will ordinarily advise the commissioner on what release conditions (if any) to impose.

For clients on probation or parole, counsel should determine compliance with supervision and whether the supervising authority intends to commence revocation proceedings immediately or wait until the new charge is resolved. Counsel may also attempt to obtain and provide information that will persuade the supervisor not to recommend revocation. If the parole board takes action to hold the defendant, a bond will usually be set in the new case.

If probation revocation procedures are initiated, the preliminary hearing may be conducted by either the probation judge or a commissioner. This hearing is the first stage of probation revocation. *Gagnon v. Scarpelli*, 411 U.S. 778, 781-82 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 480-83 (1972); *United States v. Peters*, 103 Wash. D.L. Rptr. 2217 (D.C. Super. Ct. 1975)

[8] If the government requests only a five-day hold, counsel should inquire on the record whether it intends to seek § 1322(b) detention if it is unable to secure revocation. This inquiry will protect the defendant's right to a prompt hearing after the five-day hold without any further delay. *See United States v. Alatishe*, 768 F.2d 364, 368-69 (D.C. Cir. 1985) ("preferred course" is to conduct both hearings without further delay).

(Greene, C.J.), reproduced in part in *Matter of A.W.*, 353 A.2d 686, 688-96 (D.C. 1976) (Nebeker, J., concurring). The preliminary hearing serves as the "*Peters* I" hearing.

Peters formulated a two-stage procedure for probation revocation, now known as "*Peters* I" and "*Peters* II" hearings. Super. Ct. Crim. R. 32.1 provides more detailed procedures. If probable cause is found at the *Peters* I hearing, the court may detain a probationer without bond in the probation case, pending the *Peters* II hearing.[9] Release conditions are also set in the new case. If the defendant is ultimately held in the old case, the defense attorney should request a nominal monetary bond in the new case to ensure that the defendant receives jail credit.

4. Hold for Narcotics Addicts

Rarely invoked, § 23-1323 authorizes detention for up to three calendar days if the defendant is charged with a "crime of violence"[10] and may be an addict. The detention must be "under medical supervision, to determine whether the person is an addict." § 1323(a). An "addict" is "any individual who habitually uses any narcotic drug as defined by section 4731 of the Internal Revenue Code of 1954 so as to endanger the public morals, health, safety, or welfare." § 23-1331(5). After the evaluation, the court must treat the person in accordance with the § 23-1321 criteria, but may hold a preventive detention hearing under § 23-1322 or a hearing under § 23-1323(c). *See infra* Section C.

5. Requests for Medical Alerts

If the client is detained at the initial presentment, counsel should interview the client and ascertain if he or she has any medical or mental health needs. When counsel determines that the client may have special medical or mental health needs, including prescription of certain drugs, counsel should request that a "Medical Alert" form accompany the client to the jail. Counsel should either fill out this form or make sure to review it before it is signed by the judge. This notice should inform jail officials and employees that the client should receive special medical attention or care.

C. The Pre-trial Detention Hearing

As discussed above, three statutory provisions authorize detention without bond: (1) the general detention provision, § 23-1322(b); (2) the addict detention provision, § 23-1323; and (3) a special provision applicable if the client is charged with first-degree murder or assault with intent to kill while armed, § 23-1325(a).

1. Section 1322(b)

Detention hearings are initiated by government motion orally while the client is before the court or by *ex parte* written motion any time after presentment. § 23-1322(d)(1), (6), (7). If the client

[9] Although a probationer can be held without bond pending final revocation, Rule 32.1(a)(3) provides time limits within which a final revocation decision must be made.

[10] *See* D.C. Code § 23-1331(4).

is before the court when the motion is made, the detention hearing "shall be held immediately"; however, the government may have a three-day continuance, and the defense is entitled to a five-day continuance upon request. § 1322(d)(1). The accused is entitled to advance notice of the allegations that will be made at the hearing. *United States v. Edwards*, 430 A.2d 1321, 1339-40 (D.C. 1981) ("due process entitles the accused to notice of all the charges about past and present conduct he or she will face at the pre-trial detention hearing." *Id*. at 1351) (Ferren J., concurring). Counsel should assert this right when the detention issue is first raised.

a. Jencks Act applies

Pursuant to Superior Court Criminal Rule 46(f)(1) and 32.1(c), Rule 26.2 (the Jencks Act) applies at detention and probation-revocation hearings. Thus, the government must provide the defense with copies of all Jencks Act statements of any witnesses it calls at the detention hearing for counsel's use during cross-examination, unless it shows "good cause"[11] not to do so. Generally, the government does not provide *Jencks* material until immediately before the hearing begins. However, counsel should make efforts to contact the assigned assistant prior to the hearing and request any *Jencks* material such as police reports, officers' notes, videotapes, or any other relevant information that the government may rely upon. If the government attempts to add testimony during the hearing outside of the information provided in the *Gerstein* and *Jencks* materials, such as additional material that the government may rely upon for dangerousness arguments, counsel should object that she was not given adequate notice of this information and that any admission of such information may require additional time for counsel to prepare to challenge the information. As the Comment to the rule explains, "The production of a witness's prior statements at a detention hearing will assist the Court in its effort to assess the credibility and reliability of the information presented to it."

Typically, the government calls police officers or detectives to provide hearsay testimony to eyewitnesses' accounts. Counsel should request not only the officer's own statements – police reports, running resumes or notes – but also any notes or statements reflecting the eyewitness's account on which the officer's testimony is based. *See Clancy v. United States*, 365 U.S. 312, 314-15 (1961) (memorandum detailing account of witness who was interviewed by FBI agent was agent's statement because agent adopted the memorandum and testified about the interview). If the government chooses not to provide a statement that it is ordered to disclose, the court must "not consider the testimony of [the] witness whose statement is withheld." Super. Ct. Crim. R. 46(f)(2).

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[11] It is recognized…that pre-trial detention hearings are often held very early in a prosecution, and that a particular witness's statement may not yet be on file, or even known about. Thus, the rule recognizes that in a particular case, the Court may decide that good cause exists for not applying the rule.

Comment to Rule 46(f).

Jencks Material:

- ✓ Make every effort to request any *Jencks* material such as police reports, officers' notes, videotapes, or any other relevant information that the government may rely upon

b. Standard of proof

Once the hearing has commenced,

> [t]he government must . . . demonstrate probable cause to believe that the charged crime has been committed by the arrestee, but that is not enough. In a full-blown adversary hearing, the Government must convince a neutral decisionmaker by clear and convincing evidence that no conditions of release can reasonably assure the safety of the community or any person.

United States v. Salerno, 481 U.S. 739, 750 (1987) (construing identical federal statute); D.C. Code § 23-1322(b)(2). The court has discretion to insist that the government produce live testimony rather than hearsay if necessary to determine the weight of the evidence. *United States v. Lewis*, 769 F. Supp. 1189, 1191-93 (D. Kan. 1991).[12] Probable cause that the defendant committed the offense, alone, is not clear and convincing evidence of the defendant's dangerousness. *See Lynch v. United States*, 557 A.2d 580, 582 n.5 (D.C. 1989). The nature of the charge, in and of itself, is not enough to establish clear and convincing evidence of dangerousness. *Pope v. United States*, 739 A.2d 819, 826 (D.C. 1999) (charge of AWIK alone insufficient to justify preventive detention). Even if an indictment has been returned, the defendant has a right to present evidence and have that evidence considered by the judge before ordering detention. *Tyler v. United States*, 705 A.2d 270 (D.C. 1997) (en banc).

c. Rebuttable presumption

The statute creates a rebuttable presumption that no conditions of release will reasonably assure the appearance of the person or the safety of the community if the court finds *probable cause*[13] that the person: (1) committed a dangerous or violent crime while armed with a firearm or imitation firearm; (2) has threatened or attempted to threaten police, witnesses or jurors; (3) committed a dangerous or violent crime and has previously been convicted of committing a dangerous or violent crime while on release for another offense; (4) committed a dangerous or violent crime while on release for another offense; (5) committed 2 or more dangerous crimes or

[12] The accused may testify and present witnesses. § 1322(d)(3)-(4). Tactically, it is unlikely that the defense will want its witnesses deposed so early in the case, as their testimony can later be used to impeach them. § 1322(d)(3). The statute specifically permits the court to rely on defense proffers, § 1322(d)(4), and most judges have been willing to accept defense proffers on factors relating to the defendant's history and character. *See* § 1322(e)(3).

[13] The lesser "probable cause" standard replaced the older, more onerous trigger for the rebuttable presumption – a finding that the defendant committed the requisite offense by a "substantial probability" – in the Omnibus Public Safety and Justice Amendment Act of 2009 (Act number 18-0189).

crimes of violence in separate incidents that are joined in the case before the court; (6) committed robbery in which the victim sustained a physical injury; (7) carried a pistol without a license (D.C. Code § 22-4504(a)), carried a rifle or shotgun (D.C. Code § 22-4504(a-1)), possessed a firearm during a crime of violence (D.C. Code § 22-4504(b)), unlawfully possessed a firearm (D.C. Code § 22-4503), or was in a motor vehicle knowing that there was a firearm inside (new offense that the permanent version of the Omnibus Public Safety and Justice Amendment Act of 2009 will codify); or (8) failed to comply with the requirements of the gun-offender registry while on probation, parole, or supervised release for committing a dangerous crime or a crime of violence while armed with or having readily available a firearm (or imitation) or other deadly or dangerous weapon as described in D.C. Code § 22-4502(a). §§ 1322(c)(1)-(8).[14] Even if the court finds probable cause, the presumption alone cannot satisfy the government's burden of proving by clear and convincing evidence that there are no conditions of release that can assure the safety of the community. The legislative history of the Bail Reform Amendment Emergency Act includes a letter dated January 17, 1992, to the Judiciary Committee, in which the United States Attorney acknowledges that the

> rebuttable presumption acts only to shift temporarily the burden of production to the defendant to come forward with some evidence why he would not pose a danger to the community if released pre-trial. The government must still produce enough evidence to convince the court that there is clear and convincing evidence of the defendant's danger to the community.

In other words, the statute creates only a "bursting bubble" presumption. *Cf. St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). Once the defendant produces some evidence[15] that he would not pose a danger if released, the presumption is no longer relevant and evaporates leaving the government with its full burden of proof. *Id*. at 510-11.

It is essential that the defense present a suitable structured program of release to prevent a finding that no conditions of release will assure safety. *See Blunt v. United States*, 322 A.2d 579, 582 (D.C. 1974) (pointing to defendant's failure to provide appropriate program in upholding conclusion that no other conditions would assure safety). It may be advisable to present witnesses – third-party custodians, relatives, or employers – to testify about proposed release programs.

d. Written findings of fact required

When detention is ordered under § 1322, the court must issue written findings of fact and reasons. § 23-1322(g)(1). The government usually prepares proposed findings, a copy of which is served on defense counsel. Hearing commissioners are especially likely to endorse the proposed findings as submitted. That document will remain in the court file, and will be relied upon if, for example, counsel files a motion for modification of the bond status. Counsel should carefully review the submission, and immediately file any objections, proposing alterations or

[14] Subsections (7) and (8) are newly created by the Omnibus Public Safety and Justice Amendment Act of 2009.

[15] The judge must assume the truth of the evidence the defendant produces rebutting dangerous is true. No credibility assessment is done at this stage. *Cf. St. Mary's Honor Center*, 509 U.S. at 508-09.

amendments. The defendant can appeal the preventive detention order pursuant to § 23-1324, and, as with bond appeals, this right should be exercised in appropriate circumstances.

e. Indictment in 90 days and trial in 100 days

Preventive detention pursuant to § 1322 creates a right to trial within one hundred days from the date of arrest, provided the defense does not request a continuance.[16] § 1322(h). Section 1322(h) authorizes a twenty-day extension on a written government petition, if "good cause" is found. *Best v. United States*, 651 A.2d 790, 792-93 (D.C. 1994), held that the trial court cannot extend the period of pre-trial detention beyond 100 days absent a motion by the government and that the court has no "inherent authority" to extend periods of detention beyond those specified in § 1322(h). If the trial does not begin within the time limits, the "defendant shall be treated in accordance with § 23-1321(a)." § 1322(h)(3). *See Mack v. United States*, 637 A.2d 430, 433-34 (D.C. 1994) (remedy for non-compliance with time requirements is not dismissal, but to reconsider conditions of release).

The statute requires indictment within ninety days of arrest. § 1322(h). If the government actually does consume the bulk of the detention period in the pre-indictment phase, the defense will be hampered by an inordinately brief pre-trial preparation period. Discovery should therefore be sought at the earliest possible opportunity. Counsel should request pre-indictment discovery, and file a motion to compel if it is denied. "[I]f a defendant is locked up, he is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense." *Barker v. Wingo*, 407 U.S. 514, 533 (1972). The resulting "inability of a defendant adequately to prepare his case skews the fairness of the entire system." *Id*. at 532. The defense must obtain discovery as early as possible to compensate for the prejudice it is suffering from the government-requested detention, which gives the government a significant tactical advantage.

2. Section 1325(a)

For defendants charged with first-degree murder or assault with the intent to kill while armed, the statutory presumption is that the court shall treat the defendant "in accordance with the provisions of section 23-1321." Preventive detention may be ordered if the court finds that there is no condition or combination of conditions that will assure that the defendant will not flee or pose a danger to the community. § 23-1325(a).

Although the statute is silent on the subject, *Lynch v. United States*, 557 A.2d 580, 582 (D.C. 1989) (en banc), requires that arrestees, under § 23-1325(a) receive the same type of hearing afforded individuals subject to detention under § 23-1322. The defendant is entitled to counsel,

[16] Some preventive detention cases are highly publicized. Media attention may raise concerns about the fairness of a trial just three months after a publicized finding of dangerousness. A continuance to permit abatement of adverse publicity creates a conflict between the rights to pre-trial liberty and to a fair trial. Counsel should argue that because of this conflict the delay is not "at the request of the person," § 23-1322(d), but is chargeable to the court in its responsibility to assure a fair trial, hence a bond decision should be made at the expiration of one hundred days. (The hearing may be closed only if the defense shows "a likelihood that pre-trial publicity will jeopardize the defendant's fair trial and that there are no 'alternative means reasonably available by which the fairness of the trial might be preserved.'" *United States v. Edwards*, 430 A.2d 1321, 1345-46 (D.C. 1981) (en banc) (citation omitted).)

to cross-examine witnesses, to testify, present witnesses, and to proffer relevant information. Moreover, although hearsay may be allowed, *Lynch* acknowledged that hearsay alone will not always suffice to meet the clear and convincing standard for dangerousness. *Id*. at 582 n.6. If, after considering the § 23-1321(b) factors, the court finds that no release conditions will ensure against flight or danger to the community, the court must explicitly state, orally or in writing, its findings that support probable cause (or more than probable cause) as well as its findings that support clear and convincing evidence of dangerousness and/or flight where no combination of release conditions will protect the community and/or assure the defendant's presence in court.

The government must prove dangerousness by clear and convincing evidence.[17] However, this standard applies to the ultimate determination of dangerousness which the trial court must make, not to each individual fact on which the court relies. *Lynch*, 557 A.2d at 582. In *Lynch*, only probable cause was required as to the charged murder because additional factors (the defendant's juvenile and adult record and drug usage) supported the finding of clear and convincing evidence of dangerousness. When there are no triggering factors other than the charged offense, the government must prove the offense by more than probable cause. *Id*. at 582 n.5; *see also Jones v. United States*, 687 A.2d 574 (D.C. 1996) (clear and convincing evidence of dangerousness was satisfied where charged offense was proven by a "substantial probability," not just probable cause). Moreover, although *Lynch* reiterated that hearsay may be allowed, it acknowledged that hearsay alone will not always suffice to meet the clear and convincing standard for dangerousness. 557 A.2d at 582 n.6.

The clear and convincing evidence standard also applies to a finding that the person may flee. *Kleinbart v. United States*, 604 A.2d 861, 869-71 (D.C. 1992).

If an indictment is not returned within nine months of presentment, the defendant *must* be released. *Price v. United States*, 476 A.2d 644, 647 (D.C. 1984); D.C. Code § 23-102; Super. Ct. Crim. R. 48(c). The nine months begins to run from the date of the first probable cause determination (presentment), not from the date of the preliminary hearing. *Price*, 476 A.2d at 646. If an indictment is returned after release, the person can be detained only after a *de novo* hearing under § 23-1325(a), and a finding that the defendant would either fail to appear at future proceedings or pose a danger to the community if released. *Id*. Substantially before the expiration of nine months, counsel should move for dismissal pursuant to Rule 48(b): "If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the Court . . . the Court may dismiss the indictment, information or complaint." *See Lynch*, 557 A.2d 580; *cf. Salerno*, 481 U.S. at 747 (emphasizing "stringent time limitations of the [federal] Speedy Trial Act" in upholding detention without specific time limit). If the government cannot or will not proffer a substantial and legitimate justification for the delay, the court may be persuaded to dismiss the complaint or set conditions of release.

In 1990, the trial court dismissed two murder complaints due to pre-indictment delays of 105 and 98 days respectively. *United States v. Hargrove*, F-14490-89; *United States v. Watkins*, F-

[17] A judicial finding of substantial probability that the defendant committed first-degree murder while armed with, or having readily available, a firearm or imitation firearm creates a rebuttable presumption that no conditions of release will ensure the safety of the community. § 23-1325(a).

14490-89 & F-159-90 (D.C. Super. Ct. May 2, 1990). The court found a "pattern and practice by the government of misuse of the grand jury process" in cases in which the government persuaded the court to detain the defendants without bond. It found longer delays in first-degree murder cases in which the defendant is preventively detained than in other felony cases, including rapes, robberies and other homicides where preventive detention was not available, and found

> no showing of diligence by the government, no demonstration of the reasonableness of the length of delay by any objective standard, no explanation of acceptable reasons for the delay, and obvious prejudice to the accused, as well as overwhelming evidence that the government's conduct in this case reflects the manner in which it almost invariably chooses to proceed in the processing of all first degree murder cases in the grand jury.

The court also established general procedures for all preventive detention cases on its Felony I calendar, requiring an arraignment within sixty days of presentment or a written explanation by the government of the steps taken to present the case to the grand jury, what additional steps must be taken before indictment, the reasons for the delay, and whether further investigation has revealed any exculpatory information regarding dangerousness. Counsel should urge other courts to follow this procedure.

II. REVIEW AND APPEAL OF CONDITIONS OF RELEASE

A client who has not been released within 24 hours after the initial hearing may apply for review of the conditions by the judicial officer who imposed them. D.C. Code §§ 23-1321(c)(4), 1324(b). Given that clients may not be held based on inability to make a money bond, § 1321(c)(3), counsel should immediately file motions for clients who cannot post a bond. (A sample motion is provided in Appendix A.). "Review of [a] magistrate judge's determination of conditions of release . . . shall be made, upon motion, by the judge to whom the case is assigned. Where the case has not been assigned to a judge at the time the motion is filed, review shall be made by a judge to whom the case is assigned for purposes of review." Super. Ct. Crim. R. 117(b)(1). Bond review motions are often decided without a hearing; in appropriate cases hearings should be sought.[18]

Upon the filing of a bond review motion, PSA is to review its report, seek to verify new information, and modify its recommendation if appropriate. § 23-1303(b). By obtaining new facts or verifying facts previously supplied to PSA, counsel may contribute to a more favorable recommendation. This is often a persuasive factor to highlight. As a practical matter, however, the PSA review is done only if specifically requested by the court.

Motion for bond review: In general, the motion should address the unfavorable factors that influenced the court at the initial hearing, as well as the more positive factors. If lack of

[18] Counsel and PSA are sometimes unable to verify information about the defendant's ties before the first court appearance. If counsel anticipates that information can be obtained overnight, counsel should so advise the court and ask that the client be brought in from jail the next day so that the court can consider oral representations. If the judicial officer setting conditions of release also presides at the preliminary hearing, an oral review motion may be permitted at that time.

community ties is evident, a third-party custodian or residential placement should be obtained. Twenty-four hour residential third party custody may be called for in serious cases. *See Bouknight v. United States*, 305 A.2d 524, 526-27 (D.C. 1973) (Nebeker, J., separate statement). If an employer is willing to rehire the client, a letter to that effect should be attached to the application.

Because successive review applications are rarely effective and because counsel should make as strong a record as possible for appellate review, it is generally more effective to file the motion only after an entire release plan has been established.[19]

Denial of a bond application is immediately appealable. *See* § 23-1324(b). Such appeals are heard without the necessity of briefs, often as a motion for summary reversal, stating the supporting law and facts, with an affidavit by counsel concerning the background information required by Form 4;[20] they are decided on an expedited basis. *Martin v. United States*, 614 A.2d 51, 53 (D.C. 1992), denied a motion for summary reversal of the preventive detention order and, *sua sponte*, summarily affirmed the order. Though the court acknowledged that "*sua sponte* summary affirmance is 'unusual,'" *id*. at 54, to avoid such a result and preserve the right to full briefing and argument on the merits, counsel may wish to file an expedited appeal rather than a motion for summary reversal.

Denial of a motion to reconsider a pretrial detention is also considered an appealable final order, even if the defendant did not appeal the original detention. *Blackson v. United States*, 897 A.2d 187, 192-93 (D.C. 2006). Such a motion can be brought even if based on non-newly discovered information. *Id*. at 193, n. 10 (stating that D.C. Code § 23-1322(d)(6) does not preclude a reconsideration motion based on previously known information).

III. POST RELEASE PROBLEMS: REVOCATION OF RELEASE, CONTEMPT, AND REJECTION OF "TAINTED" MONEY

A. Revocation

Violation of conditions of release may be met with revocation proceedings and prosecution for contempt. *See* D.C. Code § 23-1329(a). If release conditions include a curfew, PSA will call the client at odd hours to ensure compliance, and inform the court of violations. A new arrest occurring after curfew might alone lead to contempt proceedings, as may a failure to participate in drug treatment, positive drug test, or failure to report for testing.

To revoke release, the court must find, after a hearing, that there is clear and convincing evidence of the violation *and* that there is no combination of conditions that will reasonably

[19] Of course, counsel should not hesitate to file successive motions if new release plans can be developed or other circumstances change (including, for example, repeated trial delays chargeable to the government).

[20] The Court of Appeals has stressed the need for careful compliance with the requirements of Rule 9 for filing the affidavit in the form prescribed by Form 4, which requires a detailed interview with the client. *Villines v. United States*, 312 A.2d 304, 306-07 (D.C. 1973).

assure the defendant's appearance or the safety of the community. § 1329(b).[21] Revocation cannot be used as punishment. *Bitter v. United States*, 389 U.S. 15, 17 (1967). *But see Sherrod v. United States*, 478 A.2d 644, 661-62 (D.C. 1984) (no error in mid-trial revocation of bond). *Bitter* reversed a conviction where bail had been revoked after the defendant arrived at court thirty-seven minutes late, finding that the order of commitment "had the appearance and effect of punishment." 389 U.S. at 17.

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***Gilliam v. United States*, 46 A.3d 360 (D.C. 2012).** Court may find violation of Bail Reform Act where defendant appears in court on requested day, but leaves before being officially released by judicial officer.

B. Contempt

Contempt for violation of a release order is usually prosecuted under § 1329, which carries a maximum penalty of six months imprisonment and a fine of $1,000. The government must establish that the defendant violated a condition of release which was in writing and which was sufficiently clear and specific to serve as a guide for the person's conduct. *Smith v. United States*, 677 A.2d 1022, 1030-31 (D.C. 1996); *see also In re Peak*, 759 A.2d 612, 614 (D.C. 2000) (trial court has authority to enter a release order even if underlying injunction is "void"). The proceeding is expedited and heard by the court without a jury, but the defendant enjoys other fundamental procedural protections such as the right to testify and present evidence. *Beckham v. United States*, 609 A.2d 1122, 1125 (D.C. 1992); *In re Wiggins*, 359 A.2d 579, 580-81 & n.5 (D.C. 1976). The government can choose not to use these expedited procedures and instead prosecute the defendant for felony criminal contempt pursuant to D.C. Code § 11-944, which carries a maximum penalty of fifteen years to life imprisonment. *See Caldwell v. United States*, 595 A.2d 961, 964-66 (D.C. 1991). Felony contempt prosecutions are generally unnecessary and should be rare, in part because the trial court may not impose a sentence that is disproportionate to the contumacious act. *Id*. at 968-72. A contempt conviction, based on commission of a new offense while on release, bars later prosecution of the substantive offense if all elements of the substantive offense were proved in the contempt prosecution. *United States v. Dixon*, 509 U.S. 688, 689 (1993).

To be contumacious, the act must be willful. Thus, *Parker v. United States*, 373 A.2d 906, 907 (D.C. 1977), reversed a contempt conviction based on a rearrest; while commission of a crime could be willful, arrest could not. Similarly, late arrival for court is not contumacious unless "the defendant behaved with willful, deliberate, or reckless disregard of the obligation to appear on time." *Thompson v. United States*, 690 A.2d 479, 482 (D.C. 1997) (citing to *Williams v. United States*, 576 A.2d 1339, 1342 (D.C. 1990) (defendant's tardiness on one occasion insufficient to prove elements of contempt); *see also Swisher v. United States*, 572 A.2d 85, 92 (D.C. 1990) (explaining procedures required for contempt hearing based on failure to appear). The act and willfulness must be proven beyond a reasonable doubt.

[21] Counsel should avoid allowing the defendant to speak directly to the court during a hearing on a motion to revoke conditions, because any such statements could be used against the defendant at a later contempt proceeding. *See, e.g.*, *Foster v. United States*, 618 A.2d 191 (D.C. 1992).

C. "Tainted" Money

If release conditions include a money bond, the court can inquire into the source of money or property being used to post bond and reject the collateral if it "will not reasonably assure the appearance of the person as required." § 23-1321(c)(2). This type of inquiry was first initiated in cases related to drug charges; the rationale is that money gleaned through illegitimate or criminal sources would afford no moral assurance of the defendant's reappearance. *United States v. Nebbia*, 357 F.2d 303, 304 (2d Cir. 1966); *United States v. Fedullo*, 525 F. Supp. 1210 (D.N.J. 1981). Such inquiry could present serious Fifth Amendment problems. *Nebbia*, 357 F.2d at 305-06. Because this provision has only recently been invoked, counsel must rely on federal case law to prepare for the inquiry.

IV. EXTRADITION

Extradition is the surrender of a person from one state to another for the purpose of criminal prosecution.

> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.

U.S. Const. art. IV, § 2, cl. 2. Under this provision, one state may demand from another state the delivery of a person who has been accused or convicted of a crime within its jurisdiction. (There is no constitutional authority for extradition in connection with civil matters.)

The states in which the fugitive is wanted and is located are the "demanding" and "asylum" states, respectively. Absent an indictment, *Kirkland v. Preston*, 385 F.2d 670 (D.C. Cir. 1967) establishes that before extradition may be ordered, the asylum state must be independently satisfied that the extradition request shows probable cause. A "fugitive" is anyone being sought by a foreign state; the term does not imply an attempt to flee or hide. *See Walker v. United States*, 775 A.2d 1107 (D.C. 2001) (a conviction establishes probable cause to extradite; the fact that defendant lawfully moved from Maryland to D.C. is immaterial for extradition purposes because "fled" simply means "left" the demanding state). The asylum state must deliver fugitives upon proper demand, *Kentucky v. Dennison*, 65 U.S. 66, 107 (1861), and federal courts can compel performance of this duty. *Puerto Rico v. Branstad*, 483 U.S. 219, 228 (1987) (reversing *Dennison* in part).

Extradition is a two-step process involving the executive (governor), *see Dennison*, 65 U.S. at 102-03, and judicial authorities. In the District of Columbia, the Chief Judge acts in both capacities. *See generally* D.C. Code §§ 23-701 to 707; Super. Ct. Crim. R. 40-I.[22] In ordering

[22] The District of Columbia is required to deliver fugitives to demanding states, but is not a "state" for the purpose of making demands; it follows the removal procedures in Fed. R. Crim. P. 40(a), under which a person arrested on a D.C. Superior Court warrant outside D.C. is treated as if the warrant were issued by the United States District Court for the District of Columbia. D.C. Code § 23-563(c); Super. Ct. Crim. R. 5-1; *Hagans v. United States*, 408 A.2d 965, 966 & n.3 (D.C. 1979).

apprehension and delivery of fugitives, the Chief Judge acts in an executive capacity. *Martin v. Maryland*, 287 A.2d 823, 826 (D.C. 1972). In conducting an extradition hearing, the court acts in a judicial capacity and must afford the accused the same rights to challenge the writ of extradition as if the hearing were upon a writ of habeas corpus. § 23-704(d); *Martin*, 287 A.2d at 826; *see also Outlaw v. United States*, 806 A.2d 1192 (D.C. 2002) (trial court erred in finding no violation of federal rules governing extradition and the right to a probable cause hearing in the jurisdiction of arrest, where the defendant signed a waiver form after being given materially inaccurate information pertaining to his procedural rights that it would have been a probable cause hearing; conviction also upheld on grounds that impact of the error did not prejudice defendant).

A. The Initial Stages

Extradition begins when an arrest warrant, bench warrant or indictment, issued in the demanding state, is forwarded to the MPD Fugitive Squad, which then obtains a D.C. arrest warrant charging the individual as a fugitive. § 23-701. When an arrest is made, in most respects the police process the arrestee like any other defendant.[23] Presentment is in courtroom C-10, on the charge of being a fugitive, with a Special Proceedings case number; case jackets are kept in the Special Proceedings Clerk's office.

At presentment, the fugitive may either demand an extradition hearing or waive formal proceedings pursuant to §§ 23-702(f) and 704(f). If a hearing is waived, the court signs an order for return to the demanding state. Only with consent of the United States Attorney may the court then release the fugitive upon conditions thought necessary to ensure appearance in the demanding state. § 702(f)(2). If the person is detained without bond, the demanding state must arrange transportation within three days, excluding weekends and holidays; the court may extend this for an additional three days if it finds "good reason" to do so. § 702(f)(4).

If extradition is contested, a hearing must be set within thirty days. § 702(b). (Extraditions are always set for Wednesday mornings.) Conditions of release are determined in a manner similar to that authorized by § 23-1321 for criminal defendants. § 702(b). However, the fugitive charge creates "a presumption that the person is unlikely to appear if released, which may be overcome only by clear and convincing proof." *Id.* Moreover, if the requisition from the demanding state has arrived and is filed in the court jacket, the fugitive must be detained. § 702(g).[24]

Before the hearing, the demanding state must forward its requisition (often referred to as "the governor's papers") to the District. These papers contain the formal request for rendition of the

[23] If the client is facing both a D.C. charge and a fugitive warrant, the government must dismiss one and proceed on the other. Dismissal of the extradition request does not end the matter, as the demanding state may seek to renew the action after completion of the District's prosecution. Usually this is accomplished by lodging the out-of-state warrant as a detainer which is executed after completion of the D.C. prosecution.

[24] In determining whether to recommend that a client waive or challenge extradition, counsel should keep two things in mind. First, time in custody in the District before extradition is not credited to any sentence imposed in the demanding state. Second, release is unlikely if the charge is serious or there is any indication of flight or deceit in avoiding the police, but is often granted if the charge is minor or the defendant has previously tried to make arrangements to deal with it. These factors must be thoroughly discussed before the initial hearing.

fugitive and are usually sent to the chambers of the Chief Judge, where counsel may inspect them before the hearing. The government is represented by the United States Attorney's Office, Grand Jury/Intake Section, 555 Fourth Street, N.W., 2nd floor.

Some clients request a hearing and release so that they have thirty days to go voluntarily to the demanding state to surrender themselves. This allows the client to choose the time of arrest, to arrange in advance for counsel or bond, and to avoid the several days in holding waiting to be picked up by the demanding state.

If the client initially challenges extradition but later wants to waive the hearing, counsel should inform the Special Proceedings office, which will arrange for the case to be called in courtroom C-10 the next day for entry of the waiver.

B. The Hearing

Extradition is a "summary procedure," in which the asylum state court "may do no more than ascertain whether the requisites of the Extradition Act have been met." *California v. Superior Court (Smolin)*, 482 U.S. 400, 407-08 (1987). The court must order return to the demanding state upon a finding that the fugitive: (1) is the person named in the requisition; (2) "is substantially charged with a crime in the demanding state;" and (3) is a fugitive from justice – that was in the demanding state at the time the offense was committed. *Martin*, 287 A.2d at 825. These findings may be based solely on properly certified governor's papers. *See, e.g.*, *Maktos v. Matthews*, 194 F.2d 354, 355 (D.C. Cir. 1952).

Most extradition hearings ultimately result in concessions or waivers if the proper paperwork has arrived from the demanding state. To overcome the *prima facie* case created by a properly certified requisition, the fugitive must produce clear and convincing evidence of the defense. *Moncrief v. Anderson*, 342 F.2d 902, 904 (D.C. Cir. 1964). The demanding state has no specific burden of proof; it must only present evidence that is "satisfactory" to the court. Strict rules of evidence do not apply. *Gibson v. Beall*, 249 F.2d 489, 490 (D.C. Cir. 1957); Fed. R. Evid. 1101(d)(3).

C. Defenses

The defenses to extradition are as limited as the findings that the court must make. Defenses that must await return to the demanding state include that the indictment was not drawn up in compliance with the laws of the demanding state, *Dennison*, 65 U.S. at 107; defenses relating to guilt or innocence, *Smolin*, 482 U.S. at 407-08; inability of the indictment to withstand a motion to dismiss, demurrer or MJOA, *id.* at 410-11; Fourth and Fifth amendment arguments, *Martin*, 287 A.2d at 826-27; running of the statute of limitations, *Smolin*, 482 U.S. at 411; Eighth Amendment claims of cruel and unusual punishment, *Pacileo v. Walker*, 449 U.S. 86, 87 (1980); and defenses based on questions of credibility or clerical errors, *Bruzaud v. Matthews*, 207 F.2d 25, 26-27 (D.C. Cir. 1953).

Neither insanity nor alibi is a defense (although the defense may present evidence that the defendant was not in the demanding state when the crime was committed). *Charlton v. Kelly*,

229 U.S. 447, 462 (1913); *Munsey v. Clough*, 196 U.S. 364, 375 (1905). It has not yet been decided whether competence can be raised. *Shreeves v. United States*, 395 A.2d 774, 782 n.11 (D.C. 1978); *see also Lathan v. Reid*, 280 F.2d 66, 69 (D.C. Cir. 1960); *Texas v. Bellone*, SP-1164-81 (D.C. Super. Ct. Oct. 14, 1981) (unpublished oral order) (Moultrie, C.J.) (permitting examination for competence relevant to possible defenses to extradition, i.e., whether fugitive knew his identity and whereabouts on date of alleged offense). Nor has it been clearly decided whether a double jeopardy defense is available. *Barrett v. Bigger*, 17 F.2d 669, 670 (D.C. Cir. 1927).

1. The requisition is not in order on its face

The governor's papers must be "certified as authentic by the governor or chief magistrate" of the demanding state. 18 U.S.C. § 3182.[25] Upon certification, the papers are presumed to be legal and regular. *Lee Won Sing v. Cottone*, 123 F.2d 169, 174 (D.C. Cir. 1941). In addition to the certification, the papers must contain an indictment or affidavit. 18 U.S.C. § 3182. They usually also contain the seal or stamp of the demanding state, an attestation by a clerk of the court that the operative paper is authentic, certification by a judge that the attesting clerk is a clerk of the court, and a certification by a clerk that the judge is a judge of the court. The exact form in which the requisition is prepared depends on the demanding state's requirements for authentication. *See Lee Won Sing* at 171-72. One can defend on the ground that the extradition documents are not in order on their face. *Michigan v. Doran*, 439 U.S. 282, 289 (1978). Defects in the requisition can be corrected by testimony at the hearing. *Tucker v. Virginia*, 308 A.2d 783, 785 (D.C. 1973).

2. The defendant is not the person named

An identity of names between the person sought and the person in court is *prima facie* evidence that they are the same person. *See Jacobs v. United States*, 24 F.2d 890, 891 (D.C. Cir. 1928). However, the warrant may contain a physical description of the fugitive that is demonstrably not the same as the client's, a date of birth that can be disproven, or an FBI number different from the client's. Some of this information may be available via computer through PSA or Legal Services.

3. The fugitive is not charged with a crime

Whether a fugitive is substantially charged with a crime is a question of law, determined from the face of the governor's papers. *Smolin*, 482 U.S. at 409; *Moncrief*, 342 F.2d at 904 n.3. The papers must include an affidavit or indictment; a warrant will not suffice. 18 U.S.C. § 3182. An indictment makes out a prima facie case; its sufficiency cannot be challenged in the asylum state. *Smolin*, 482 U.S. at 410-11. While a finding of probable cause is required, the asylum state cannot review a finding that was made by a neutral judicial officer in the demanding state based on an affidavit, or is evidenced by the existence of an indictment. *Doran*, 439 U.S. at 290; *Ex parte United States*, 287 U.S. 241, 250 (1932). No more inquiry is permitted than whether the

[25] Section 3182 applies to the District of Columbia. *See Kirkland v. Preston*, 385 F.2d 670, 673 & n.5 (D.C. Cir. 1967); D.C. Code § 23-704(e).

document "set[s] forth facts that clearly satisfy each element of the crime" charged. *Smolin*, 482 U.S. at 409; *cf. Smolin*, 482 U.S at 412-22 (Stevens, J., dissenting on the ground that the charge was clearly invalid).

4. The defendant was not in the demanding state when the offense was committed

To be a "fugitive," one need only have been in the demanding state when the offense is alleged to have been committed. The demanding state's indictment creates a presumption of fugitivity. *Moncrief*, 342 F.2d at 904. While the defense cannot present standard alibi evidence, it can present proof that the defendant was in a different state or country at the time of the incident alleged in the indictment. *Id*.

D. Appeals

When the court determines that the government has established its *prima facie* case and that the fugitive has failed to overcome it by clear and convincing evidence, it signs an order of surrender authorizing the accused to be turned over to an agent from the demanding state. The fugitive then has twenty-four hours to appeal. D.C. Code § 23-704(e). An appeal will lie if a judge of the Court of Appeals issues a certificate of probable cause. *Id*. The appeal is treated in an expedited manner. Taking an appeal requires an immediate motion (oral, or with a previously prepared written motion) to stay the order pending appeal, in order to avoid premature return to the demanding state. Counsel should discuss this decision with the client before the hearing begins.

APPENDIX A

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Criminal Division – Misdemeanor Branch

UNITED STATES OF AMERICA

v.

JOHN SMITH

Criminal No. M-0000-00
Judge X
Trial: 00/00/00

APPLICATION FOR REVIEW AND MODIFICATION OF CONDITIONS OF RELEASE

John Smith, through counsel, requests that this Court review and modify present conditions of release, pursuant to D.C. Code § 23-1321(c)(4), to permit his release into third-party custody. As grounds for this motion, counsel states:

On March 6, 2000, Mr. Smith was arrested on a charge of receiving stolen property. Upon presentment before the Honorable _____, on March 7, 2000, the court set a $3,000 surety bond as a condition of release. The Pre-trial Services Agency did not recommend release because it was unable at that time to verify Mr. Smith's present home address.

Mr. Smith has been incarcerated since his arrest. Despite their extensive efforts, Mr. Smith's family and friends have been unable to obtain the funds necessary to meet the premium charged by a professional surety agency for the posting of a $3,000 bond. If present conditions of release are not modified, Mr. Smith will remain in jail pending resolution of this case, because he has no prospect of acquiring the money necessary to secure his release upon conditions as presently set.

Counsel has now verified that Mr. Smith lives at 9999 J Street, S.E., the address that he gave the Pre-trial Services Agency in its interview with him. This address was verified by Mr. Smith's wife, Mary Smith, who was hospitalized at the time of her husband's arrest and therefore could not be contacted by the Pre-trial Services Agency or counsel.

Mr. Smith has only one prior conviction, for burglary in the second degree in 1987, for which he successfully completed his parole. Mr. Smith has never missed a scheduled court appearance, is a long-time resident of this city, and has strong family ties in Washington.

The Bureau of Rehabilitation has agreed to act as third-party custodian for Mr. Smith, and Mr. Smith has agreed to cooperate completely with the Bureau and participate fully in each aspect of the Bureau's program. This organization works closely with Pre-trial Services and keeps it fully abreast of a participant's cooperation. It regularly records such information and makes it available to Pre-trial Services and, through it, to the court. As part of the Bureau's program, Mr. Smith will report to the Bureau when and as required and will avail himself of the vocational training, job placement, and other programs and services provided by the Bureau.

Bonabond, Inc., has also agreed to act as third-party custodian, should the court determine that such placement would be more appropriate. Bonabond requires that each participant maintain regular contact, through personal visits and by telephone, and keep it fully informed of daily activities. It also provides counseling and information regarding job training and placement. Mr. Smith is also willing to fully participate in and cooperate with this program if the court so orders.

Mr. Smith further submits that less onerous conditions of release are mandated by D.C. Code § 23-1321(c)(3) and by equal protection standards. Section 23-1321(c)(3) states that financial conditions cannot be imposed if they result in the pre-trial detention of a person. Moreover, Mr. Smith is being denied his liberty solely because of his poverty even before he has been accorded a trial on the charges against him. Such invidious financial discrimination offends the equal protection guarantee of the Due Process Clause of the Fifth Amendment. *See Tate v. Short*, 401 U.S. 395 (1971) (equal protection prohibits imprisonment of an indigent person because of inability to pay a fine); *Williams v. Illinois*, 399 U.S. 235 (1970) (same); *Smith v. Bennett*, 365 U.S. 708 (1961) (equal protection prohibits a state from limiting post-conviction relief proceedings to those unable to pay filing fees); *Burns v. Ohio*, 360 U.S. 252 (1959) (equal protection prohibits denial of appeal to an indigent person because of his inability to pay filing fees); *Griffin v. Illinois*, 351 U.S. 12 (1956) (equal protection prohibits a state from denying a pre-trial transcript to an indigent defendant so he may prosecute an appeal). Mr. Smith's financial inability to obtain the service of a bondsman not only costs him his liberty, but also affects other fundamental rights, and has a substantial adverse effect on his ability to prepare for trial and sentencing. *See Campbell v. McGruder*, 580 F.2d 521, 531-32 (D.C. Cir. 1978). As in *Williams* and *Tate*, Mr. Smith is imprisoned solely because of his indigence. As in *Griffin* and its progeny, his ability to post collateral with the bondsman bears no rational relationship to the government's interest in assuring his return for trial, and other "less drastic" alternatives are available to the state. Here, the "less drastic" alternatives are the non-financial conditions of pre-trial release that are preferred by D.C. Code § 23-1321 to a surety bond. Thus, the alternative conditions of release proposed herein should be imposed instead of a surety bond.

For the reasons stated above, Mr. Smith requests that this court modify the conditions of release as presently set and order as follows:

a. That Mr. Smith be released into the third-party custody of the Bureau of Rehabilitation;

b. That, in the alternative, Mr. Smith be released into the third-party custody of Bonabond, Inc.;

c. That Mr. Smith reports to the Bureau of Rehabilitation or Bonabond as required;

d. That Mr. Smith be ordered to obtain employment within a reasonable time; and

e. That Mr. Smith resides at 9999 Jay Street, S.E., with his wife.

In the alternative, Mr. Smith respectfully requests that this court reduce his bond to $1,000 with the provision that ten percent of that amount may be deposited with the Clerk of the Court.

In the event that the court denies the defendant's request for modification, it is respectfully requested that this court set forth in writing its reasons for the conditions imposed, pursuant to D.C. Code § 23-1321(c)(4).

APPENDIX B

CHECKLIST OF HELPFUL INFORMATION WHEN INTERVIEWING CLIENT IN PREPARATION FOR BOND HEARING[26]

In addition to gathering preliminary information from the client, it may also be necessary for counsel to memorialize the client's appearance at the time that counsel first meets him in the cellblock, or as soon as possible thereafter. Therefore, at the initial presentment, counsel should do two things: request an order from the judge permitting counsel to take photographs of the client in the cellblock or at the jail the next day and/or ask a fellow colleague to write down or memorialize a description of client's appearance, including any injuries he may have received.

1. Name, address, phone number(s)

2. Aliases or nicknames

3. PDID number

4. DCDC number

5. Social security number

6. Date and place of birth

7. Immigration information if client is not a U.S. citizen – INS number, place and date of entry, and immigration status

8. Length of residence in the District of Columbia

9. Length of residence elsewhere in the metropolitan area

10. Does the client have any identification or mail in his possession? (Usually not, but sometimes yes)

11. Marital status (include common law), name and address of spouse, and whether client supports spouse

12. Number, duration and location of prior marriages

13. Children – number, ages, addresses, and whether client is supporting them

14. Current address and phone number

[26] Although a client may not know all this information during an initial cellblock interview, and counsel may not have time to go through all these questions, the checklist is designed to be as exhaustive as possible and is helpful if counsel needs to prepare a motion for reconsideration of bond.

15. Names, relationships to client, and employers (address and phone number) of people currently living with client

16. Prior addresses for last five years – dates, duration, and persons living with

17. Education – how far in school, last school attended, ability to read and write

18. Military background – branch, dates, stations, discharge type

19. Employer – name, address, telephone number, length of employment, title and nature of work performed, name of supervisor, and possibility of returning to work if released

20. Can fact of arrest be discussed with anyone on the job?

21. Prospective employer – name, address, phone number, and date employment is to begin

22. Prior employment for last five years (include information in 19 and reasons for leaving each job)

23. Student – name of school, type of study, hours attending each day, address, phone number, length of time attended

24. Relatives in D.C. area with whom client maintains any contact – name, address, home and work phone numbers, nature of employment of each

25. Same as #24 for all non-relatives in D.C. area with whom client maintains any contact

26. Who among people in 24 and 25 might be willing to take third-party custody?

27. Prior arrests – charge, court and date[27]

28. Pending charges – date of arrest, offense, case number, status, next court date, judge, conditions of release, name and phone number of attorney

29. Prior releases – conditions of release, any forfeiture of money bond or revocation of non-financial conditions, the reasons, court, date, offense and criminal number

30. Convictions – offense, case number, court, date, sentence (including juvenile record)

31. Prior probation – offense, case number, judge, date, probation officer, conditions, reasons for any revocation

[27] Information provided by the client can be supplemented by checking the client's record and prior case files (fourth floor of the courthouse), and through current and previous parole and probation officers.

32. Prior parole – offense, case number, parole officer, conditions, date paroled, date time expires, reasons for any revocation

33. Current probation or parole – offense, case number, date paroled or placed on probation, judge if on probation, conditions, probation or parole officer, degree of compliance, expiration date

34. Failures to appear in court, abscondences, escapes

35. Present health problems – mental, physical, substance related

36. Prior hospitalization for a mental condition – date of entry, location, doctors' names, diagnoses, treatment received, date of discharge

37. Present or past substance abuse – type of substance, period of use, and treatment received, including facility, address, phone number, counselor's name, duration, tests conducted

38. Use of prescribed medications – type, dosage, reason, doctor (may be needed while incarcerated and may affect drug test results)

39. Available financial resources – money on hand, in bank, or available from friends or relatives, and their addresses and phone numbers

CHAPTER 2

INVESTIGATION

Thorough and creative investigation is critical to a successful defense, and is counsel's legal and ethical obligation. The investigation must include frequent, meaningful consultations with the client, interviews with all potential witnesses (whether government or defense), and complete and continuing discovery.

The Supreme Court has recognized a legal entitlement to investigative assistance since *Powell v. Alabama*, 287 U.S. 45 (1932), reversed the convictions of the Scottsboro defendants. *Powell* held that an accused is entitled to the effective assistance of counsel "during perhaps the most critical period of the proceedings . . . from the time of . . . arraignment until the beginning of . . . trial, when consultation, thorough on going investigation and preparation [are] vitally important." *Id.* at 57. The American Bar Association has specifically identified the duty of thorough investigation as an essential ethical obligation. *See ABA Standards for Criminal Justice* 4-4.1 (1980). Because it is counsel's duty to achieve the best result for the client, "[t]he duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty." *Id.* The system, after all, is designed to free those whom the government cannot *prove* guilty beyond a reasonable doubt.

Counsel has a constitutional duty to make reasonable investigations or to make reasonable decisions that make particular investigation unnecessary. *Strickland v. Washington*, 466 U.S. 668, 691 (1984). The Sixth Amendment requires investigation and preparation, not only to exonerate, but also to secure and protect the rights of the accused. Such constitutional rights are granted to the innocent and guilty alike, and failure to investigate and file appropriate motions is ineffectiveness. *See, e.g., Kimmelman v. Morrison*, 477 U.S. 365 (1986) (failure to investigate and present Fourth Amendment claim was constitutionally ineffective). The court of appeals has reversed convictions due to ineffective pretrial consultation, investigation and preparation. *See e.g., Byrd v. United States*, 614 A.2d 25 (D.C. 1992); *Sykes v. United States*, 585 A.2d 1335 (D.C. 1991); *Harris v. United States*, 441 A.2d 268 (D.C. 1982); *Asbell v. United States*, 436 A.2d 804 (D.C. 1981).

The importance of thorough investigation cannot be over emphasized. Even the most skillful lawyer's effectiveness is undermined by inadequate knowledge of the facts. A lawyer handling an inadequately investigated case is often ineffective not only at trial but also when seeking a disposition without trial. It is not unusual for a prosecutor to dismiss a case or offer a favorable disposition when presented with exculpatory evidence discovered through investigation.

It is counsel's obligation to find out as much as possible about every case, as soon as possible. Speed is essential. Physical evidence disappears, memories fade, and witnesses move away or are forgotten. Thoroughness is just as crucial. Counsel can never gather too many details concerning the facts and circumstances. The obscure or easily overlooked fact may become vital to defense strategy in the midst of trial.

I. FACETS OF INVESTIGATION

A. The Client Interview

Counsel's first step is the interview with the client. Every lawyer has a personal approach to clients, but there are a number of basic rules that are generally followed:

- The client should be carefully advised that all communications between attorney and client are absolutely confidential.

- An in-depth interview should not be attempted during the initial meeting, which is typically in the cellblock on the day of presentment or arraignment.

- The first private interview should be thorough. Counsel must probe for specifics; nothing should be taken for granted, and ambiguities should be clarified. Names, dates, addresses and phone numbers should be obtained. Counsel should consider involving the client in the investigation as counsel's agent, to help in finding witnesses, making introductions, etc. The client should never be involved, however, in any contact or attempted contacts with the complainant or any witnesses the client has been ordered to stay away from. The client should be aware that the success of the defense efforts may depend on the completeness and accuracy of the information the client provides.

- Tell your client the name and phone number of your investigator and let client know that investigator is authorized to speak with client.

- It is critical that counsel and the client are able to find each other; counsel should know the addresses and phone numbers of the client's residence and family members as well as places frequented by the client. If the client does not have a phone or pager, counsel should obtain phone numbers of neighbors, friends or family members who would be willing to take and relay non-confidential messages between counsel and the client. The client should be instructed to notify counsel of any subsequent changes.

B. Discovery

The informal discovery conference is an extremely important investigative tool. **Counsel should request all potentially discoverable material.** Often more than one conference is necessary.

Physical Evidence: Counsel has a right to view, and should view, the physical evidence, including photographs and diagrams, at the time of discovery. This examination should take place well in advance of trial. Counsel should request a letter from the prosecutor authorizing counsel and an investigator to view and photograph the evidence at the property office (2235 Shannon Place, S.E.) or DEA lab (on New York Avenue, Thursday mornings, 9:00 a.m.-11:00 a.m.), or ask to have it brought to the prosecutor's office so counsel can thoroughly examine it. "Viewing Letters" are only valid for one month. Therefore, counsel should plan accordingly.

Photographs: The government will generally have photographs of the scene and a color photograph of the defendant, which may have been taken during the booking process or at the District. The color photograph and the "mug shot" can be obtained with a subpoena served at 300 Indiana Avenue, N.W., Room 4034, and directed to the Chief of Police or authorized representative, setting forth the time, date, and location of arrest, the CCR number, the client's date of birth and PDID number and the date the photo was taken. Allow 5 business days for production of photos. Counsel should also request a copy of all photographs, including the mug shot and color photo of the client through discovery.

C. Crime Scene Investigation

Personal inspection of the scene of the incident, preferably under conditions similar to those at the time of the alleged crime, is imperative. It is important to view the scene as soon as possible, because lighting, weather and structures may change quickly. Counsel should bring an investigator who can take photographs and testify about distances, lighting, etc. Included in Appendix B to this chapter are sources for certified records of street lighting, weather reports, times of sunrise and sunset, aerial photographs, and other information relevant to conditions at the scene.

D. Interviewing Defense Witnesses

Counsel should seek out and talk to every potential defense witness as soon as possible. These include not only alibi witnesses and other obviously important witnesses, but also those who can corroborate even a small part of the defense case. Care should be taken to not only learn what each witness has to say about the case but also facts about the witness—for example, criminal record or reasons for possible bias, which may subject the witness to embarrassing impeachment at trial. In addition, witnesses can often provide leads to other witnesses. Counsel may ask defense witnesses to come to counsel's office for an interview, but if they refuse, an investigator should be sent to interview them. Whether to take signed statements from defense witnesses or to serve a subpoena at the time of initial contact are matters of judgment that will depend on the circumstances. The reverse Jencks Act provisions, Super. Ct. Crim. R. 26.2, must be considered before any defense witness statements or memoranda are written. Investigators should be aware that any witness statements must be produced by the defense upon government request if the witness testifies for the defense at trial.[1] Since statements of defense witnesses may be used to impeach them, investigators should consult with counsel prior to all interviews to determine how the interview should be memorialized.

[1] Disclosure of statements may also be required under *United States v. Nobles*, 422 U.S. 225 (1975). *Nobles* upheld an order precluding testimony by a defense investigator after counsel impeached government witnesses with the contents of the investigator's report, unless counsel provided the government with a copy of the report. Central to the holding was the defendant's waiver of the work-product privilege attached to the document, by seeking to make "a unilateral testimonial use of work-product materials." *Id.* at 240. "{W]here, as here, counsel attempts to make a testimonial use of [work-product] materials, the normal rules of evidence come into play with respect to cross-examination and production of documents." *Id.* at 239 n.14. Rule 26.2 is triggered simply by the defendant's calling a witness even if the defendant does not make testimonial use of work-product.

In *Lopez v. United States*, 801 A.2d 39 (D.C. 2002), the court reversed the trial court's denial without a hearing of defendant's 23-110 motion alleging ineffective assistance of counsel in the failure to interview exculpatory witnesses and present their testimony in a murder case. A hearing was required where the defendant presented the affidavits of two fact witnesses and of one expert witness that supported the defendant's claim of self-defense. The affidavits raised a reasonable probability that the testimony of the witnesses, if consistent with their affidavits, would have affected the outcome of the case. In *Arrington v. United States,* 804 A.2d 1068 (D.C. 2002), the court reversed the trial court's denial without a hearing of a motion for new trial based on ineffective assistance of counsel and a motion for new trial based on newly discovered evidence. The ineffectiveness claim alleged that trial counsel failed to attempt to locate or interview exculpatory witnesses after being provided with several names by the defendant, and the trial court erroneously denied the motion without an evidentiary hearing to determine credibility of defendant's assertions. The newly discovered evidence claim rested on an affidavit from a participant in the crime who stated that defendant was not involved, and again the court held that the trial court should have held an evidentiary hearing.

Interviewing Defense Witnesses:

- ✓ Witness statements must be produced upon government request if the defense witness testifies
- ✓ Consider reverse Jencks Act provisions before witness statements or memoranda are written
- ✓ These statements by defense witnesses may be used for impeachment
- ✓ Investigators should consult with counsel prior to all interviews to determine how the interview should be memorialized

E. Defendant's Criminal Record

The most complete information regarding the defendant's criminal record can be obtained through discovery requests. Counsel can also obtain a record of local arrests by submitting a Criminal History Request Form to the Metropolitan Police Department, Central Records Division, Room 2076, 300 Indiana Avenue, N.W., and checking the computer in the Criminal Information Office Room 4001 at the courthouse.

Have your investigator check all local court records for client in Maryland and Virginia as well.

F. Prosecution Witnesses

The defense must attempt to interview all government witnesses as early as possible. Witness interviews should be conducted either by an investigator or by counsel in the presence of an investigator. Counsel should *never* interview a hostile witness without an investigator being present because in the event the witness's trial testimony varies from the interview statement, counsel would be placed in the untenable position of being an impeaching witness. *See United States v. Vereen*, 429 F.2d 713 (D.C. Cir. 1970); *United States v. Porter*, 429 F.2d 203 (D.C. Cir.

1970); *ABA Standards for Criminal Justice* 4-4.3(e) (1991). The interviewing of government witnesses is discussed in more detail *infra* Section II.B and Appendix C.

PD 251: The PD 251 includes the complainant's name and address, and can be viewed at the police station in the District of the arrest for a few days after the incident. After about 3 months it will then be sent to police headquarters and, about three months after the incident, can be obtained in Room 3061, 300 Indiana Avenue, N.W. To get a PD 251, counsel needs the CCR or CCN number, which is on the court jacket, on the complaint or information in the arrest book at the District in which the arrest was made; and the client name, date of birth and date of offence. The PD 251 may also have the name of any hospital to which the complainant was taken and the number of the ambulance. Hospital records and ambulance runs often contain statements made by the complainant and other useful information.

Criminal Records: Local criminal conviction records are available in the Criminal Information Office, Room 4003 of the Superior Court. Counsel should check the records for both government and defense witnesses, and obtain a certified copy of all judgments of conviction for government witnesses, to use at trial for impeachment. D.C. Code § 14-305. Because of its importance, counsel should usually conduct this search personally rather than rely upon an investigator, even though it is a time-consuming process.

Counsel should not rely solely upon the computer system. Names fed into the computer are sometimes misspelled, and counsel may not have all the information (often including a middle initial) that may be required to retrieve accurate information. Counsel must also review the actual court files to determine whether a conviction resulted. Closed case jackets are available in the Criminal Information Office or in storage in Suitland, Maryland. Because it may take several weeks to obtain a file from storage, the record search must be conducted as early as possible. If the case is still "open," the file should be in the felony or misdemeanor clerk's office. Although counsel is entitled to conviction records for government witnesses who testify at trial, accuracy should be checked in the court records.

In 2005, the confidentiality of juvenile case records changed to allow defense attorneys, among others, "when necessary for the discharge of their official duties" to inspect juvenile case records. *See* D.C. Code § 16-2331(b)(6). Note that defense attorneys are only allowed access to case records, not to social records. The case records should be a helpful source of information for such things as the witness's contacts with the juvenile system (pending cases or adjudications), about the witness's current location (e.g. at Oak Hill or in a residential program) for purposes of finding the witness to interview him or her. Counsel should check with the juvenile clerk's office about the process and procedural requirements to access the records. Super. Ct. Juv. R. 55.

In addition, counsel should check criminal records in United States District Court. Prior to the 1970 Court Reform Act, most crimes were prosecuted there. Those records are located in the Clerk's office, United States Courthouse, 3rd & Constitution *Avenue*, N.W. For anyone who may have been convicted outside the District of Columbia, criminal clerk's offices in those localities should be contacted.

The government must provide records of its witnesses' impeachable convictions, on request, at trial. *Lewis v. United States*, 393 A.2d 109, 115 (D.C. 1978), *aff'd on reh'g*, 408 A.2d 303 (1979); *United States v. Engram*, 337 A.2d 488, 492 (D.C. 1975). Counsel should request disclosure of this information through pretrial discovery. *See Young v. United States*, 478 A.2d 287 (D.C. 1984) (no pretrial *Lewis* request shown, therefore government was only required to supply information available to it at time request was made). Counsel should thoroughly examine the court jackets of all prosecution witnesses. The pretrial services report will provide information about current and prior addresses, employment, school, probation or parole status, and drug or alcohol usage. If a government witness has a juvenile record, counsel must apply to the court for permission to inspect juvenile jackets.

To explore biases, motives to lie, etc., and to obtain potential impeachment material, counsel should find out as much as possible about the government witnesses. Often it is useful to talk to the witnesses' relatives and friends, with whom they may have discussed the incident. Doctors and nurses who treated the witness and ambulance attendants, who are often the first ones on a scene, can also provide useful information.

Government Witnesses:

- ✓ Check records for government witnesses
- ✓ Obtain a certified copy of all judgments of conviction for government witnesses to use for impeachment
- ✓ Interview all government witnesses as early as possible
- ✓ Counsel should *never* interview a hostile witness without an investigator present – if the hostile witness's trial testimony varies from the interview statement, counsel would be placed in the untenable position of being an impeaching witness

G. Medical Records

The law on access to medical records changed dramatically when *Brown v. United States*, 567 A.2d 426 (D.C. 1989), held that the doctor-patient privilege barred disclosure of medical records unless the patient consents or unless those records are "evidence in criminal cases where the accused is charged with causing the death of, or inflicting injuries upon, a human being, and the disclosure is required in the interests of public justice." D.C. Code § 14-307(b)(1). The "interest of public justice" exception requires that the trial court determine whether to issue a subpoena. *Brown*, 567 A.2d at 427. However, it is not clear whether the determination is made *ex parte* or through a full adversarial hearing.

Another issue left unanswered in *Brown* is whether a party has standing to object to issuance of the subpoena. For example, if the government moves to quash a defense subpoena for records of a government witness. The *Brown* court suggests that the government would not have standing because the privilege belongs to the patient.

Obtaining Medical Records: The easiest way to avoid the problems created by *Brown* is to get the witness's consent in a written release of medical records. If consent cannot be obtained, counsel must seek leave of the court to issue the subpoena. Counsel should file an *ex parte* motion, but must be prepared to explain why disclosure to the government should not be permitted. Superior Court subpoenas now include a section in which the court may record its approval under *Brown*.

Finally, *Brown* applies to the government as well, including grand jury subpoenas. Thus, counsel should carefully check how the government gets its information, especially information about the client.

H. Transcripts in Related Proceedings

If evidence relating to the case under investigation has been adduced in some other judicial proceeding, the transcript should be obtained.[2] If the transcript has not been prepared, appointed counsel may move for its preparation at government expense. *See* 18 U.S.C. § 3006A; D.C. Code § 11-2605(b); *Griffin v. Illinois*, 351 U.S. 12 (1956). As a result of the change to the confidentiality of juvenile case records laws, defense counsel may now order transcripts of juvenile proceedings. *See* D.C. Code § 16-2331(a)(4), (b)(6).

I. Tangible Evidence

Tangible evidence must be found and preserved immediately. Potential tangible evidence depends upon the type of crime: crimes of violence and weapon offenses usually involve a physical object such as a gun or knife; burglaries and housebreaking usually involve some sign of entry or use of implements; forgeries and frauds may involve credit card receipts or other business records bearing signatures. In addition, fingerprints, footprints, tire marks, clothing, and hair and blood samples may be found. The proceeds of a crime are also important. Many of these items may be in the custody of the government, and counsel may become aware of them at an early stage or in discovery proceedings; nevertheless, counsel should go to the crime scene immediately and attempt to preserve any tangible evidence by photograph or otherwise. Counsel and the investigator must avoid disrupting the integrity of the evidence or otherwise making it unavailable. Request a *viewing letter* from the prosecutor that authorizes you and your investigator to inspect, copy, and photograph evidence.

Tangible evidence tending to corroborate the defendant's testimony may be found at the defendant's home or through defense witnesses. An alibi, for example, may be corroborated with time cards, purchase receipts or ticket stubs. Much of this evidence may be destroyed or misplaced if not promptly obtained. If evidence cannot be preserved for trial, photographs should be taken.

[2] Counsel must obtain a court order for transcripts of juvenile proceedings.

Tangible Evidence:

- ✓ Tangible evidence must be found and preserved immediately
- ✓ Request a viewing letter from the prosecutor that authorizes you and your investigator to inspect, copy, and photograph evidence

J. Forensic Experts

During discovery, counsel should request copies of all reports of scientific examinations and tests that have been done or pending in connection with the government's investigation, and talk to the experts who prepared the reports.

Autopsy Reports: In murder cases, the autopsy reports may be obtained from the medical examiner's office, located next to the D.C. Jail (19th St. & Massachusetts Avenue, S.E.). The medical examiner will meet with counsel to review the report and accompanying photographs.

Ballistics Reports: Ballistics examinations are done by Metropolitan Police Department ("MPD"), 300 Indiana Avenue, N.W., Room 1064. The officer who conducted the tests will explain the tests and the results to counsel. Ballistics tests may be done on clothing as well as bullets and guns.

Serology, Metallurgy and Other Reports: Serology, metallurgy, and other reports may be created by the FBI. The FBI special agents will also discuss the results of their tests and explain their reports to counsel before trial. The FBI building is on Pennsylvania Avenue between 9th and 10th Streets, N.W. Counsel should ask the agents about any notes they prepared, which they often keep even after they finalize their reports.

Doctors, although more difficult to reach, generally will meet with defense counsel. Other tests commonly conducted are fingerprint comparisons and handwriting analyses. These are administered by both MPD and the FBI.

K. Police Reports

Police reports available to the public include: offense reports (PD 251), which can be easily located with a Criminal Complaint Report (CCR) number; and traffic accident reports (PD 10). The PD 251 and PD 10 may be obtained for $2 in Room 3061, at the Municipal Center, 300 Indiana Avenue, N.W. Other police reports may be disclosed in discovery or become available during trial as *Jencks* material, such as the PD 81 (lists property recovered/seized); PD 252 (lists witnesses' names and addresses); PD 163 (witnesses' names, narrative of events, background information provided by client); PD 379 (juvenile counterpart to the PD 163); PD 124 (results of doctor's examination in sex cases); PD 120 (death report); PD 255 (arrest report); PD 668 (crime scene examination report); PD 313 (arrestee injury report), PD 42 (officer injury report), and PD 99 (citizen complaint form).

A computer print-out (PD 258) of initial communications concerning a reported crime may be obtained by a subpoena *duces tecum* to the Chief of Police or an authorized delegate served upon Ms. Cheyenne Curtis in room 3055 at 300 Indiana Avenue. The print-out often contains the description of the suspect relayed in the 911 call, and may contain witnesses' names and addresses. A computer print-out of the ambulance communications may be obtained by a subpoena *duces tecum* to the D.C. Fire Chief.

L. The Case File

Valuable information about the case is often found in the court files of witnesses and co-defendants. Counsel should locate and inspect the files, and photocopy important documents such as the indictment, information, and arrest warrant with supporting affidavit. All papers in the file should be examined closely for useful information such as the names of government witnesses, prior or current addresses and contacts.

M. Search Warrants

In superior court, executed search and arrest warrants are recorded in a log in Room 4002 chronologically by when the warrant was issued and the person or premises in question, with a cross-referenced alphabetical file under the defendant's name. Copies of the supporting affidavit may be obtained from the clerk. In district court, warrants are catalogued by Magistrate's Docket Number, which can be obtained in Room 1426; the supporting affidavit may be located there or in the file in Room 1622.

II. INVESTIGATORS

While some fact investigation can and should be done by the attorney, the bulk of the investigation, especially the interviewing of government witnesses, should be performed by an investigator, alone or with counsel.[3]

To find a certified CJA investigator, got to www.cjadc.org and have certified investigators apply to work on your case. If you need log-in assistance, please e-mail Brendan Wells at bwells@pdsdc.org.

A. Contacting Witnesses

The investigator must proceed carefully in contacting witnesses. For various reasons, witnesses may prefer not to become involved in a criminal case or to furnish information to the defense. Some witnesses, such as the client's family members or close friends, are more likely to be helpful and willing to testify. **Witnesses should not be interviewed on the telephone**; indeed, contacting a potentially hostile witness over the telephone frequently results in refusal of an

[3] The Criminal Justice Act, D.C. Code § 11-2605, provides for compensation for investigative services rendered to court-appointed counsel. Counsel may incur expenses up to $100.00 without prior court authorization, as provided in the statute, although ratification of the expenditure is set forth in the *Plan for Furnishing Representation to Indigents* (1974). Counsel should obtain a voucher for investigative services from the DSO Office immediately after appointment.

interview. The initial contact should be in person, and the investigator should be fully prepared and aware that this interview may be the only interview the witness will allow.

Sources that may aid in locating witnesses are listed in Appendix B. These lists are not exclusive; imagination is often the key to finding witnesses. The investigator should also go to the place of the crime, preferably at the time of day the event occurred, and inquire of people in the vicinity. There may have been talk in the neighborhood about the offense, and the police will probably have conducted a similar canvass. When looking for defense witnesses, it may be useful to have the defendant accompany the investigator. The place of the interview is likely to affect whether the witness will speak freely. The investigator should attempt to contact the witness at home, preferably in the evening. The witness will have more time, may feel more relaxed and secure, and may therefore be more generous about giving information. The investigator should attempt to interview the witness when the witness is alone, because the presence of other people often inhibits the flow of information.

B. Informing Witness of Investigator's Identity

Countless problems can be avoided if the investigator is properly identified as a defense investigator. The witness should never be led to believe that the investigator is a government official or is acting in any capacity other than as a defense representative. Proper identification is essential to the credibility of the investigator and the work-product. Any suggestion or appearance of deception may compromise the integrity of the defense position. Upon contacting a witness, the investigator should identify him/herself, and state the name of the attorney for whom the investigator is working and the purpose of the contact. The investigator should give the witness a business card with both the investigator's and the attorney's name and title on it. If a written statement is taken, it should include a paragraph, at the beginning, indicating that the witness knows that it is being given to a defense investigator. Another safeguard is the use of an "Identification of Investigator" form on which the witness acknowledges having spoken to or having given a statement to the investigator. A standard form may read:

> _____, an investigator, has spoken to me / interviewed me / taken a signed statement from me, and stated that this was at the request of _____, Esq., court-appointed attorney for the defendant / respondent in United States v. _____ / In re [initials only], No. _____.
>
> Name _____

C. Child or Mentally-Impaired Witnesses

Before interviewing a child or a witness with a mental impairment, the investigator should determine whether the witness has the intellectual capacity to understand the questions that will be asked. It is also imperative to determine whether or not the witness comprehends who the investigator is and whom the investigator represents. If the investigator is unsure how much the witness is really able to understand, it may be safer and wiser to interview the witness in the presence of a family member or a neutral person. The opening paragraph of any written statement should reflect the presence of the third party. The closing paragraph should indicate

that the statement was read to the third party, who should also be asked to sign both the statement and the identification of investigator form.

Provide detailed instructions/guidance to your investigator before they interview a child witness.

D. Reluctant Witnesses

Government witnesses are often reluctant to speak with defense representatives. The investigator should probe such reluctance and seek to persuade the witness to consent to the interview, stressing that the defense is only trying to learn the truth about what happened. The investigator's demeanor is critical. The witness can be advised that he or she may be subpoenaed for trial by the prosecution or defense whether or not an interview is obtained. If the witness feels that he or she is a prosecution witness and hence should not talk to the opposing party, the investigator should inquire whether this attitude has been fostered by the police or prosecutor. *See Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966). The investigator should tell the witness that it is improper and unlawful for a government representative to advise a witness not to speak to the defense or to speak to the defense only in the prosecutor's presence, and that the witness has an absolute right to speak to both sides. *In re J.W.*, 763 A.2d 1129 (D.C. 2000), the court of appeals reversed the trial court's order precluding the DEA chemist from testifying as a sanction for the chemist's refusal to talk to defense counsel without a prosecutor present. A witness may, on his or her own initiative, refuse to talk to defense counsel, but a prosecutor may not take steps to block private interviews. Here there was no showing of government interference and no showing that the chemist acted on order of his superiors, therefore no sanction should have been imposed. If the witness still refuses to speak, the investigator should prepare a memorandum of the attempts and the circumstances of the refusal, including the details of any instructions or "hints" the witness may have received from police or government representatives. A statement from the witness describing any instructions or "hints" might prove useful in an attempt to establish a *Gregory* violation and subsequently obtain sanctions as a result.

E. Taking a Statement

As a rule, the investigator should obtain written statements from potential government witnesses whenever possible. *See supra* Section I.D regarding statements by potential defense witnesses. Written statements may be used at trial to refresh recollection, to impeach credibility, and possibly as substantive evidence under the doctrine of past recollection recorded or statement against interest.

The witness initially should be asked to describe, in a narrative fashion, what the witness knows or saw. During the narrative, the investigator should assess the witness's perceptions, memory, ability to articulate, and probable impact on a trier of fact. The investigator should then probe every detail of the account and anything else the witness may know. Has the witness had any prior contact with the accused or the accused's family or friends? If so, bias may be revealed. Jencks Act foundation questions should be asked. Every contact between the witness and the police, prosecutors or any other government representatives should be elicited. Where was the

contact made? What did they ask? Did they take notes? Was a signed statement given? Did the witness testify before the grand jury? Has witness been subpoenaed?

Other standard questions include, "What have you heard?" "Who else was on the scene before, during and after the offense?" "Who else would know?" "If you were me, how would you find _____?" "What would you do?" "Where would you go?" "Who did you tell about what happened?"

After obtaining all the details from the government witness, the investigator should write out a statement.[4] This may be time consuming, but many witnesses will refuse to sign statements presented to them at a later time. The statement should be in the first person and in the witness's words. It should begin with an identification passage, such as:

> "I am Jean Doe, and I live at 9876 J Street, N.W., Washington, D.C. My social security number is 111-11-1111 and my date of birth is 11/11/11. I am giving this statement to Joe Doe Investigator (and the names of others who are present – Relevant when dealing with child witnesses or when possible competency issues may later arise) who works for [attorney] who is assigned to represent [defendant's name] at [date and time of interview] at [location of interview, e.g., living room of my home].

While the statement is being written, the investigator should ask follow-up questions to clarify ambiguities and add detail. The statement should be as complete as possible, containing every fact and detail the witness has perceived or heard, whether favorable or not. Equally important, the statement should memorialize the fact that certain important details or facts were *not* perceived or are otherwise beyond the witness's knowledge. For example, if the witness says an assailant had a mustache, the investigator should ask, "Did you notice anything else about the face? Once the witness acknowledges that certain information constitutes the extent of his or her knowledge, it is essential to record all that the witness does *not* remember, for impeachment in the event that the witness later embellishes the account. The statement should be written in the witness's own words (including slang used by the witness). The final statement should read as if the witness has written it himself or herself. For instance, "Then I noticed that the guy robbing me had a gun" as opposed to "Then the witness said she noticed the robber had a gun."

When the statement is complete, the witness must be permitted to adopt it. The investigator should review the statement with the witness, ask the witness to read along while the investigator reads the statement aloud, ask the witness to make corrections, deletions and additions, initial all changes, and sign or initial at the bottom of each page. The statement should conclude with a sentence such as, "I have read or have had read to me this X-page statement. I have had the opportunity to make and initial any changes, additions, deletions and corrections I desired. This

[4] If the witness is a defense witness or if the investigator is unsure whether the witness will be a government or defense witness, the investigator should have instructions or guidance from the attorney before taking a statement or even taking any notes in front of the witness. The statement and/or notes taken in front of the witness will likely constitute Jencks (or at least will become the subject of a *Jencks* inquiry and possible inspection by the judge). If the witness does testify for the defense, notes will have to be given to the prosecution upon their request at the conclusion of the witness's direct testimony.

statement is true, accurate and complete to the best of my knowledge." By reading the statement aloud while the witness reads along, the investigator may put the witness at ease and avoid later problems arising from ambiguous sentence construction and poor handwriting. If the witness does not wish to read the completed statement, the investigator should read it aloud, ask if it is correct, and get the witness to sign or initial the bottom of each page. The witness should also initial any words that are crossed out or changed. If the witness refuses to adopt the statement after it is read aloud, the investigator should ask why and at least obtain an oral adoption and a statement that there are no inaccuracies. These attempts should be made even if the witness asks that the investigator have a statement typed for signature later; in reality a second interview is likely to be refused.

F. Written Reports From Investigators

After the investigator interviews a witness, the investigator should prepare a memorandum detailing the "environment" in which the interview took place. These details should include what the witness was wearing, what the inside of the house looked like, who was home and what they looked like, any pets, any phone calls, any food/beverages offered or accepted and what each investigator was wearing. In the event that the witness subsequently denies the visit from the investigator or knowledge of the statement or claims it was forced, these details can be used on cross-examination to confirm and/or corroborate that the circumstances surrounding the statement were voluntary.

The investigator should prepare a separate memorandum to aid in locating the witness for trial. This includes home and work addresses, telephone numbers of the witness, close friends and relatives, places where the witness and friends congregate, and a physical description of the witness. The witness should be given counsel's business card and asked to contact counsel if he or she moves or plans to move.

A written record should be kept of *all* investigative activity on a case, including unsuccessful attempts to locate witnesses. This may be especially important should a dispute arise over the appropriateness of a missing witness instruction and counsel's diligence in attempting to locate the person.

The desirability of other written reports from investigators should be evaluated carefully in light of the reverse *Jencks* rule.

G. Interviewing Police Officers

Police officers are a special class of witnesses. Except for the newest of rookies, most officers have testified before and are aware of the consequences of speaking with a defense investigator. For this and other reasons, some attorneys prefer to interview police officers themselves in the presence of an investigator. If the investigator is assigned to interview police officers, the investigator should be instructed to interview the principal officers: the detective in charge of the investigation; any officers who spoke to witnesses, at the scene or later; the arresting officer and that officer's partner (regarding defendant's statements and condition, and witnesses' comments and condition); and officers who collected or analyzed evidence. If any officer refuses to discuss

the case, the investigator should explore the reasons, *e.g.*, desire to speak first to the prosecutor or a supervisor, or an "office policy." The investigator should offer to return after such consultation or offer the prosecutor's telephone number. Any reluctance to discuss a case and the reasons should be noted.

If the officer will talk, the investigator should elicit the exact location and time of arrest, the manner of effectuating the arrest, and the facts that caused the officer to make the arrest. The investigator should determine whether the client was interrogated and gave any statements or confessions, what the police told the client about the incident, and the complete circumstances of any identification. The investigator should ask whether the officer has interviewed any witnesses and preserved the notes of those interviews, whether the officer has shown photographs to any witness, the results of any identification procedures, and whether any tangible evidence was recovered. The investigator should also ask for the names of other officers involved in the case. Needless to say, the investigator should be reminded not to give out any information to police officers about the client.

H. Self-Incrimination Problems

The investigator may encounter a witness whose statement incriminates the witness in the crime being investigated or some other crime. "It is not necessary for defense counsel or defense counsel's investigator, in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel." *See ABA Standards for Criminal Justice*, 4-4.3 (*The Defense Function*, commentary) (1980). If the problem can be anticipated, the decision whether the investigator should discuss the self-incrimination problem with the witness is made by the attorney, bearing in mind that it is proper but not mandatory for the lawyer or the investigator to caution the witness concerning possible self-incrimination and the need for counsel. *Id.* Ordinarily, an investigator should be instructed that if self-incrimination problems surface for the first time during an interview, the interview should proceed without warnings. If, however, the witness asks a question—such as "could this statement be used against me?"—the investigator may not mislead or deceive. In this as any other context, counsel is responsible for any ethical violations by the investigator. Thus, it is essential to instruct the investigator fully on the ethical obligations of the defense and the importance of the investigator's deference to these obligations.

Three factors must be considered when a party seeks to introduce a statement against penal interest as an exception to the hearsay rule: (1) whether the declarant, in fact, made a statement against penal interest; (2) whether the declarant is unavailable; and (3) what corroborating circumstances exist as an indication of the statement's trustworthiness. *Laumer v. United States*, 409 A.2d 190 (D.C. 1979). One factor in determining whether the statement is trustworthy is the timing of the statement; if it was made close in time to the offense, there would be less opportunity for reflection and fabrication. Also relevant is the relationship between the witness and the declarant, and whether or not the declarant was immediately aware of the consequences of the statement.

If the witness may not be available at trial, it may be best to inform the witness of possible exposure to criminal prosecution as a result of the content of the statement. It is extremely

important to include the witness's awareness of that possibility in the statement, with a sentence such as, "I know just admitting that _____ could get me in trouble, but I still want to give this statement." That sentence could be critical in getting the statement admitted at trial should the witness later assert a privilege against self-incrimination.

I. Instructing the Investigator

In most cases, the investigator should know as much about the case as the attorney before the investigation is even started. This is best achieved through a written memorandum containing all the relevant information and specific instructions, together with copies of any reports or documents that have been obtained.

The investigator should be carefully briefed on the defense theory and all relevant facts to be uncovered. If eyewitness identifications may be in issue at trial, the investigator must be aware of the *Wade-Stovall-Brathwaite* doctrine, and be fully prepared to elicit facts revealing suggestive procedures and other circumstances bearing on reliability and independent source. In addition, the investigator should ask each eyewitness every question, which might be useful on cross-examination at trial. If the defense may be self-defense, the investigator should be briefed on the kinds of evidence that may be used to show that the defendant feared the alleged victim or that the latter was the actual aggressor. If there is a suppression issue, the investigator must know what the issues at the hearing may be—time of arrest, consent, scope of the search, etc.—and what facts are relevant.

In many cases, the investigator should be given a checklist or a list of questions for key witnesses. Counsel should never assume that an investigator will uncover the needed information without guidance. After the investigator has read all the written material, counsel should discuss any questions the investigator has about the case. The investigator should be cautioned not to give government witnesses any indication of the defense theory or anticipated tactics, or to reveal any client secrets. Especially with a new investigator, the attorney should review in detail the intended interviews with the witnesses, including what questions should be asked and which witnesses should be subpoenaed.

APPENDIX A

INVESTIGATION CHECKLIST

1. Investigative memo

2. PD 251 (at district, or Room 3075, 300 Indiana Avenue, N.W.). Information, affidavit in support of warrant, complaint, *Gerstein* (court jacket). Criminal history of defendant (300 Indiana Avenue, N.W., Room 2076).

3. Subpoenas to MPD Room 3061
   a. PD 258 (computer printout)
   b. PD 106 (lookout)
   c. Client's photos (color arrest photo and black and white mug shot)
   d. Ambulance runs (Fire Department, not MPD) – within 30 days to obtain tape-recording on all calls – **NOTE**, you must provide blank cassette)
   e. Radio run

4. Scene
   a. Visit – photos, diagram, location of street lights
   b. Obtain weather information (raining, snowing, sunrise, sunset)

5. Interview witnesses
   a. Government (take complete, detailed, accurate statements and obtain release of records)
   b. Defense (subpoena, get information to locate again, phone numbers, addresses, work hours, dates of birth, etc.)

6. Discovery
   a. Viewing letter for evidence
   b. Autopsy reports
   c. Hospital records
   d. Reports of examinations/tests (FBI and MPD) – ballistics, fingerprints, serology, metallurgy, handwriting, etc.
   e. Photographs
   f. Diagrams
   g. Radio run
   h. Police reports (PD 163, PD 379 (for juvenile cases), PD 81, PD 47, PD 251)

7. Review and carefully examine all physical evidence

8. Gather as much information as possible about government witnesses
   a. Check criminal records (superior court, district court, and surrounding jurisdictions)
   b. Copy all case jackets
   c. School records
   d. Work records
   e. Probation/parole records

f. Hospital records
g. Military records
h. Rental records

9. Obtain defense materials
   a. Transcripts
   b. Retain independent experts (ballistics, fingerprint, handwriting, etc.)

10. Subpoena Office of General Counsel of MPD for any pending civilian complaints against all police officers. Sandra Freeburn or any designee (Room 3061) is authorized to receive the subpoena.

Arrange to pick up client's clothing at D.C. Jail within 15 days, if needed as evidence.

APPENDIX B

I. CRIMINAL INFORMATION

A. Superior Court Criminal Records

For adult cases, you may retrieve a complete criminal record check for individuals charged under the D.C. Criminal Code from the Superior Court Adult Criminal Records Division. This Division is located at:

Superior Court of the District of Columbia
500 Indiana Avenue, NW
Rooms 4000, 4001, 4019, and 4110
Monday – Friday: 9:00 a.m. – 4:00 p.m.
General Information: (202) 879-1010

Closed Felony, Misdemeanor, and D.C. Traffic Cases can be found in Room 4001 of Superior Court. This office is open Monday – Friday, 9:00 a.m. to 4:30 p.m., and can be reached at (202) 879-1373.

Open Felony, Misdemeanor, and D.C. Traffic cases can be found in Room 4000 of Superior Court. This office is open Monday – Friday, 9:00 a.m. to 5:00 p.m., and can be reached at (202) 879-1353.

The Division has an accessible court computer, located in Room 4001, which reflects all criminal cases since 1974. You can get PDID numbers, docket numbers, as well as the disposition of a case by running the case or docket number in the computer. To obtain the information about an individual's prior and pending cases you need at least an accurate name, a PDID number, or a date of birth.

Using the client name, PDID number or docket number you may obtain either a criminal history printout or a case summary printout. A criminal history printout provides a list of a person's past and pending criminal cases, and it includes docket numbers, counts and information on the disposition of the case. Case summary printouts include date, the next pending court date if the case is still active and the judge assigned to the case. To check an individual's criminal record you normally want to request the PDID and case summary printouts on all pending cases and prior convictions.

1. Criminal Case Jackets

Jackets contain pre-trial service reports with names, addresses, employer, friends, and prior record information, all of which can boost your investigative efforts. Jackets also contain all the motions and papers filed during a case.

Closed adult case jackets are available in Room 4001, Criminal Information, of D.C. Superior Court. You need to fill out a green card, (available on the counter), with the date, the

defendant's name, your name and telephone number, and where the file is going and why. Give this card to the attendant and they will pull the file for you. You may only order three at a time, especially if the office is busy. You are not allowed to take the case jackets out of the room, except to copy them. Please remember to place all documents back in their proper order after copies are made.

If a case is more than five years old, it may be stored in the record center in Suitland, Maryland. You may order it in Criminal Information with the order form provided at the desk, or arrange to go out to Suitland to view the file. It takes at least five business days for the records to arrive from Suitland.

Open adult felony, misdemeanor or D.C. traffic case jackets are found in the Case Management Branch (Room 4000), and you can request the case by filling out a green card including the following information: the jacket number, what stage the case is in (e.g., pending sentencing, set for trial), when the next court date is and the name of the judge that the case is before. All of this information is contained in the case summary printout available in Room 4001, as described above.

2. Superior Court Juvenile Criminal Records

While only some clients may have juvenile records, you often need to know whether a juvenile record exists. This information will not be contained within the Pretrial Services Report, nor will it come up on Courtview. Juvenile records will, however, be reported on the pre-sentence report and will be considered by the sentencing judge. Due to the privacy rights of juvenile and various protections within that system, you must obtain a judge's permission to inspect/search for that information. There is special family division form for this captioned: APPLICATION FOR INSPECTION/COPYING OF RECORDS. Fill out that form and have a judge sign off on it (your attorney should handle this). Then, take the form to the juvenile clerk's office and give it to a clerk who will search for the file and give it to you to review in that office. Your attorney will most likely do this, but it could help you to be familiar with the process.

The Juvenile Clerks will usually only release information directly to attorneys. However, this is the process: take the completed and approved form to the juvenile clerk's office (Room 4310 – located in the east wing of the 4th floor, down the corridor to your left), and give the form to a juvenile clerk. Be sure to bring your client's social file number and/or his or her date of birth with you.

Juvenile files come in two parts. There is a case relating to the respondent (a.k.a. defendant). The case file will have a docket number (e.g., 2007 DEL 000094) and will contain pleadings and disposition forms relating to that case. The second file, called the social file, will have a six-digit number and will contain all social reports and disposition reports relating to all of the respondent's cases. Both files should be kept in the same place.

Take notes and/or make copies of the files. If there's a social report in the file that says great things about your client and/or explains his or her involvement with the criminal system, copy it and note the social worker's name and number.

3. Criminal Finance Office

a. Travel arrangements for out-of-town witnesses and experts

Please follow these steps:

1. The judge must sign a subpoena (or issue an order) for the witness.

2. If Superior Court is paying for the expert witness's expert services fee, then the judge must write a separate order authorizing this payment, with the exact amounts and services written in the order.

3. Call Brenda Ford in the Criminal Finance Office of Superior Court at (202) 879-2813. Bring her the judge-signed subpoena and any tentative flight information and/or itineraries. It is beneficial to work out these details ahead of time with the witness. Ms. Ford is located at 600 H Street, NW, Suite 600. The office itself is in Gallery Place. Enter the building and go to the 2nd floor. Go through the double glass doors, sign in, and take the elevator to the 6th floor. From there, the receptionist will call Ms. Ford, and Ms. Ford will let you come in. Make sure to call Ms. Ford first to let her know you are coming. Ms. Ford will make plane reservations for your witness, and Superior Court will pay for these plane tickets. Ms. Ford will take the pink copy of the subpoena even though it has not been served yet.

4. Superior Court will also pay for a hotel room, but not in advance. The witness will be reimbursed. So call a hotel and make a reservation under your witness's name. The Red Roof Inn at 500 H Street, NW, is nearest the courthouse, which is good because Superior Court will not pay for transportation to and from the courthouse. Call (800) RED-ROOF or (202) 289-5959. Ask for the government rate if available, and see if it is the least expensive. Ms. Ford also suggests the Hampton Inn. Your witness must call by 6:00 p.m. the night of check-in and provide a credit card number, or the reservation will be cancelled. (You can hold it on your card, but then the reservation is on you.) Ask the hotel to give you a reservation confirmation number.

5. Fax the witness the airline itinerary and hotel itinerary. Explain to the witness that they will have to pay for the hotel and hold the reservation with a credit card. The witness should also know to bring the itinerary and photo ID to pick up plane tickets at the airport. The witness should keep all receipts of transportation expenses to and from the airport, and from the hotel.

6. When the witness arrives, subpoena the witness using the subpoena that was signed by the judge. Keep the yellow copy, and tell the witness to keep the top copy at all times – the witness will need the subpoena to get reimbursed for hotel and ground transportation expenses.

7. The attorney must fill out a witness voucher, and write in capital letters at the top: FOR TRAVEL EXPENSES ONLY. Witnesses are advised to keep track of all mileage and to

submit an invoice for any parking fees from the airport as well. This will also be handled at the Finance Office on the 4th Floor. Any fact witnesses brought in are entitled to the $40.00/day.

8. The witness will go to the Finance Office on the fourth floor of Superior Court to claim this reimbursement. The witness should bring all receipts (including hotel), the witness voucher, and the subpoena. The witness will need one voucher for each day he or she was here.

9. In the case of payment for an expert, a separate voucher from the Finance Office of Superior Court is required (along with a court order). Note: all vouchers for expert services must be preauthorized by the Court, and will require a court order from the judge assigned the case.

B. District Court Criminal and Civil Records

District Court
Criminal Files and Copies
Room 1225
3rd and Constitution Avenues, NW
(202) 354-3120

District Court
Civil Files and Copies
Room 1225
3rd and Constitution Avenues, NW
(202) 354-3120

District court records include both federal and D.C. convictions, and you need at least a full name to retrieve the records. It is best if you have a middle initial or date of birth to confirm you have the correct person. To perform a complete record check on a person you need to be sure you check for any possible cases in district court. They have both civil and criminal dockets, dating before 1972.

Any federal offense is tried in district court. To look up the records, go to the criminal information desk, located on the west side of the building on the first floor, and use the computer located there. There is an instructional sheet next to the computer explaining the procedure. Take that information to Room 1225 and request to see the case jackets. Be aware many of the cases are on microfilm and microfiche.

C. Maryland Criminal Records

The following website includes cases in all circuit courts in Maryland and all Maryland district courts: http://casesearch.courts.state.md.us/inquiry/processDisclaimer.jsp.

Prince George's County Circuit Court
Criminal Clerk – Room 167 M
Juvenile Clerk's Office – Room 165 M (1st Floor)
14735 Main Street (New Courthouse)
Upper Marlboro, MD 20772
Monday – Friday: 8:30 a.m. – 4:30 p.m.
(301) 952-3344

(301) 952-3240 (civil)
*Have open and closed criminal cases dating back to 1977

Important to note: If you are trying to retrieve records that are too old to be filed in circuit court criminal records in Maryland (PG County) you may need to try **Central Files**. PG County Courthouse has a criminal records computer that contains information on anyone who has had a Maryland district court case. It will provide you with the statewide records including criminal, civil and traffic case information. In the traffic case information, address, DOB and SSN information is included. However, to gain any of this information you will need a district court case number.

Prince George's County District Court
Criminal Clerk – Room 170 B
14735 Main Street
Upper Marlboro, MD 20772
Monday – Friday: 8:30 a.m. – 4:30 p.m.
(301) 952-4080 (direct)
*Open cases are in Room 170 B
*Closed cases are in Room 359 B

Important to note: There is a $1.00 per page fee to copy case jackets in PG County. It also costs $5.00 or more to have documents certified. You may try asking if you can obtain free copies with your PDS ID. If this does not work, try to obtain the money from your attorney before you go. He or she will have to submit a separate reimbursement form to get a refund.

Montgomery County Circuit Court
50 Courthouse Square – Room 113
Rockville, MD 20850
Monday – Friday: 8:30 a.m. – 4:30 p.m.
(240) 777-9466
*Have both open and closed criminal cases

Warrant Office
(240) 773-5360
(240) 773-5325 (fax)

Montgomery County District Court
27 Courthouse Square
Criminal Clerk's Office – Lower Level
Rockville, MD 20850
Monday – Friday: 8:30 a.m. – 4:30 p.m.
(301) 279-1565

*Juvenile records within the Circuit Court are housed on the 3rd floor of the District Courthouse.

Anne Arundel County Court
251 Rowe Boulevard
Annapolis, MD 21401
Monday – Friday: 8:30 a.m. – 4:30 p.m.
(410) 260-1370
(410) 260-1800 (civil)

Baltimore City Court
Borgerding District Court Building
5800 Wabash Avenue
Baltimore, MD 21225-3330
(410) 887-2601

Maryland State Archives
350 Rowe Boulevard
Annapolis, MD 21401
Tuesday – Friday: 8:00 a.m. – 4:30 p.m.
Saturday: 8:30 a.m. – 12:00 p.m. and 1:00 p.m. – 4:30 p.m.
(410) 260-6400

*Maryland State Archives has both district and circuit criminal cases when they are too old to be at the county courthouses.

D. Virginia Criminal Records

Note: Currently we are unable to obtain police reports from the following courts; however, if you call you may be able to find out if there is a criminal case in their jurisdiction. If so, you can then go to the police department for that area and obtain information on the arrest. PLEASE ALSO LOOK UNDER VIRGINIA CORRECTIONAL FACILITIES IN THE HANDBOOK FOR INFORMATION ON INDIVIDUALS WITH INCARCERATION RECORDS IN VA.

If you know the county in which the offense took place, www.courts.state.va.us is a website you can use to get Virginia district and circuit court criminal, civil, or traffic information.

Alexandria District Court
520 King Street – Room 201
Alexandria, VA 22314
Monday – Friday: 8:00 a.m. – 4:00 p.m.
(703) 838-4030

Alexandria Circuit Court
Clerk of the Circuit Court
520 King Street – Room 307
Alexandria, VA 22314
Monday – Friday: 9:00 a.m. – 5:00 p.m.
(703) 838-4044

Criminal records: (703) 838-4047

Arlington County District Court
Clerk's Office – Room 2300
1425 N. Courthouse Road
Arlington, VA 22201
Monday – Friday: 8:00 a.m. – 4:00 p.m.
Criminal: (703) 228-4485
Civil: (703) 228-4590

Take Metro Orange Line to Courthouse stop.

Arlington County Circuit Court
1425 N. Court House Road
Arlington, VA 22201
Monday – Friday: 8:00 a.m. – 5:00 p.m.
Criminal Records: (703) 228-4485/4405

Take Metro Orange Line to Courthouse stop.

Fairfax County Courthouse
4110 Chain Bridge Road
Springfield, VA
(703) 658-3775

Fairfax County Archives
6800 Industrial Avenue
Fairfax, VA 22030
(703) 591-8582

II. LAW ENFORCEMENT/POLICE RESOURCES

A. Metropolitan Police Department

Headquarters: 300 Indiana Avenue, NW

***To get the most up to date telephone numbers for all divisions of the Metropolitan Police Department, visit their website at http://www.mpdc.dc.gov.**

1. Police Reports (PD 251's)

Public Documents Section – Room 3075
Monday – Friday: 7:00 a.m. – 3:30 p.m.
(202) 727-4357

You may pick up copies of police reports (PD 251's) and traffic accident reports (PD 10's) at the counter in Room 3075, MPD Headquarters, by filling out the form entitled "Request for Copy of a Police Report." The PD 251 will have the name and address of the complainant. Initially, it can be **viewed** at the police station in the district of the arrest for up to 90 days after the incident. If you go to a district seeking a PD 251, make sure that you ask to **view** it. At some point (usually after 90 days) it will be sent downtown, and can be obtained in Room 3075, 300 Indiana Avenue, NW. To get a PD 251, you need the CCR number (sometimes called the CCN) which can be obtained from the court jacket, Courtview, investigative memo, lock-up list, or in the arrest log at the District in which the arrest was made. The date, location and type of offense will also be used to locate a 251.

If you cannot wait until the report is transferred to police headquarters, then go look at the PD 251 at the actual District Station where the arrest was processed. Ask at the front desk of the station to **view** the report and give them the CCR number. This is public information so they **must** allow you access to it, although explaining it to them may have negative results. Make sure you have a copy of the letter from MPD general counsel stating that the report is to be made available to the public (letter can be found in the Internship Coordinator's Office). You will need to bring a legal pad with you to transfer/copy the information by hand since they will not photocopy it for you.

If the MPD employee working the desk at the District denies you access to the PD 251, ask for the detective who worked on the case. The detective should have a copy. If the detective is unavailable or denies you access, ask for the Supervisor. Make sure to take names and badge numbers of everyone you have dealt with and provide them, along with exactly what was said, to the attorney.

Homicide PD 251's can also be obtained from:

Det. Sgt. Jeffery P. Christy
Violent Crimes Branch
Homicide Division
3244 Pennsylvania Avenue, SE
(202) 645-9600
(202) 645-5368 (direct)

If you are unable to get a PD 251 through the normal route, you can try:

Delores Hunter
300 Indiana Avenue, NW, Room 4148
(202) 727-5516

2. Statistics of Criminal Activity by Location

Call Steve Reuben at (202) 727-5453. He is an MPD statistician and can provide a breakdown of crimes by type and location, e.g., the number of drug offense in a particular block.

You can also try Brenda Eich in MPD Research and Analysis Division for Drug Statistics at (202) 727-4174. To preserve this resource, please find non-drug crime statistics at www.mpdc.dc.gov, Crime Statistics. If you need MPD drug offense statistics, please use one of the contacts above.

Any other evidence or information in the possession of MPD

All other information or evidence can be obtained by a subpoena addressed to Chief of Police, Cathy Lanier or Authorized Designate, MPD, 300 Indiana Avenue, NW, Washington, D.C. 20001. It will be accepted on her behalf in Room 3075, Monday – Friday, 7:00 a.m. – 3:30 p.m. You will also need to pick up your information from the same room, allowing at least five business days to comply.

*You **MUST** be certain the subpoena that you deliver is dated to allow **five business days** to comply or they **WILL NOT** take it unless the subpoena is signed by a judge.

*Anyone in Room 3075 can accept subpoena service. If they refuse, take the subpoena to the MPD General Counsel's Office, Room 4125, and serve them.

3. Full Color Arrest Photographs

Subpoena is to be served at 300 Indiana Avenue, NW, Room 3075, and should indicate the date and time the photograph was taken, PDID and DOB of individual. Allow five business days from the date of the request before picking up the photo at the same location.

4. Mug Shots

The subpoenas should be served at 300 Indiana Avenue, NW, Room 3075. Write on the subpoena that you are requesting any and all photographs that were taken on [date], along with the individual's PDID and DOB. MPD will not release a photo of a juvenile.

If you receive a subpoena back from MPD with a note of either "Photos not on File," "No Photo available," or "No Photo available, please resubmit," this means that the photos may not have been received by the gallery as of yet, and are still at the lab or the negative is in poor condition. Therefore, you should submit another subpoena to MPD with the words "2nd subpoena – resubmitted upon request of the photo gallery" written at the top of the subpoena. Only in situations where the words "No Photo taken," should you believe that there are no photos available.

5. 911 Calls & Radio Runs

1. Subpoena should be made out to: Custodian of Records, Office of Unified Communication (OUC), 2720 Martin Luther King, Jr., Avenue, SE, Washington, D.C.

2. You will need the date, location and time of incident as well as the CCN and the offense.

3. Wording: any and all PD 258 (event chronology), 911 calls and radio runs relating to offense: _____CCN: _____ near _____ between the time _____ on _____.

4. All subpoenas must be hand delivered.

6. Arrest/CCN Log

Each District station keeps a log of all of the arrests made in that District each day. It includes such information as the CCN, and the date and location of the arrest. This is helpful in locating a PD 251 in an emergency. You will need the date and type of incident. These logs, regardless if it's electronic or paper, are public. Bring with you the letter from MPD General Counsel indicating that the logs should be made available (letters can be obtained from the Internship Coordinator).

7. Cameras – CCTV (Closed Circuit TV)

To obtain footage, call or email Michael Eldrige at (202) 724-4483 or michael.eldrige@dc.gov. Let him know what footage you would like to have saved and he is supposed to save it so that you can then request it through FOIA. They only keep records for 10 days, unless you tell them to preserve it. If footage has been saved as evidence, he should let you know and then it becomes discoverable and you have to ask for it. Email date/time/camera number/CCN. Issue a subpoena to MPD just so your attorney has it as backup.

8. ShotSpotter

ShotSpotter systems are new to the District and are used to track and monitor gunfire. Sensors, about the size of coffee cans, detect the sound of gunfire within two miles. The system pinpoints the location of gunfire. It also determines if the shooter is moving and calculates the direction and speed of travel. Audio is immediately and permanently archived for forensic analysis or court proceedings. Software distinguishes gunfire from such noises as car backfires so police don't respond to false alarms.

Subpoenas for information regarding Shotspotters should be directed to MPD (Custodian of Records, etc...). Requests should include:

- Where ShotSpotter devices are located in the vicinity of the alleged shooting we are defending.

- Any documents, reports, general orders, special orders, or memorandum related to our shooting at the time of the incident.

- Any research pertaining to the accuracy, reliability, failure rate, etc., of these devices.

- Manuals, handbooks, general orders or special orders pertaining to these devices.

- Information pertaining to the training of the FBI/MPD related to use of this technology.

ShotSpotter, Inc., may also have information regarding these devices (www.shotspotter.com). Contact Gregg Rowland, Senior Vice President, at:

3515 Ryder Street
Santa Clara, CA 95051
Office: (408) 329-9219
Fax: (408) 608-0340
gregg@shotspotter.com

9. Patrol System Book (PSS Book)

There is a log in each station listing each patrol car on duty during each shift and who was assigned to which car. This is helpful if you need to find out which officers were on the scene and you only have the patrol car numbers from the radio run. You should go to the District and look at the book or you can subpoena this information at 300 Indiana Avenue, NW, Room 3055 or 3075.

10. Police Property Office ((202) 645-0133)

All evidence recovered by the police is sent to 2235 Shannon Place, SE. If you wish to examine any piece of evidence, your attorney will obtain a letter from the prosecutor, authorizing you to do so. Please retain a copy of that letter for your file. You must know the name of the defendant and the date that the evidence was recovered or seized, and the property control number, which the attorney gets from the prosecutor.

Approximately one week before trial, evidence is moved to the C-Level of the Courthouse, or Room 4105, 4th Floor.

***The MPD Property Office requires that a viewing letter provided by the government to the defense attorney must have been issued within 30 days. If the viewing letter is more than 30 days old, the attorney will not be given access to the evidence. If the viewing letter has expired, contact assigned attorney. If not available, call Lt. Deborah Howard at (202) 645-0130. She may be able to help.**

11. PD 120, Death Report, a.k.a. "Blue Sheet"

This is a report filed in all homicide cases by the homicide detectives. It has quite a bit of important information, as well as a fairly detailed description of the initial police investigation.

Some of the information on the report includes the decedent's full name, DOB, address, gender, race and age. The report also notes the location, the time and the date of the death. The name, address and telephone number of the decedent's next of kin can also be found here. The police detail whether the decedent is a known drug addict or alcoholic, and if it is known whether drugs or alcohol intoxicated the decedent at the time of death.

Investigators usually cannot obtain copies of the PD 120. Attorneys should ask for a copy in discovery, or should subpoena MPD for a copy. As a last resort, a copy of the PD 120 may be obtained from the Medical Examiner's Office, as the ME is given a PD 120 in each case. You can try to subpoena this information, but again there are no guarantees.

12. Spot Check Cards: Citizen Contact Card (PD 106)

Each police District Station keeps the cards on file for officers that stop anyone engaged in suspicious activity. The cards contain information regarding the address of the stop, time of the stop, date of the stop, who was stopped, his or her address and DOB, why he or she was stopped, his or her description and a description of the vehicle, if any. The cards are kept by date. In addition, each District station keeps a juvenile contact forms, PD 379, which is analogous to the PD 106. However, the juvenile forms are kept in alphabetical order.

13. Parole Records

Take subpoenas to 300 Indiana Avenue, NW, Room 2100. The secretary will know exactly who accepts the subpoena. The subpoena should include the DCDC number and the person's name. You should request all parole information. However, you can be more specific if you know exactly what documents you want.

14. Divisions of MPD

Homicide Squad (& Violent Crimes)
3244 Pennsylvania Avenue, SE (202) 645-9600

Other offices in Metropolitan Police Headquarters: 300 Indiana Avenue, NW

Robbery Squad (Robbery is now at each District)		
Sex Offense Branch	Room 3009	(202) 727-4407
Auto Squad	Room 3058	(202) 724-1359
Burglary & Arson	Room 4068	(202) 727-4419
Check & Fraud	Room 3127	(202) 727-4159
Community Relations	Room 4060	(202) 727-0783
Personnel/Records	Room 6061	(202) 727-4261
Transcriber	Room 6066	(202) 671-1540

*You can call to find out if there is a 911 tape associated with case

Public Information Office	Room 4048	(202) 727-4383
General Counsel Office	Room 5125	(202) 727-4129

Unified Communications Division
2720 Martin Luther King, Jr., Avenue, SE (202) 671-2872

Mobile Crime Unit
3521 V Street, NE (202) 727-6716

Major Crash (Combined Hit and Run Division with Traffic Division) 501 New York Avenue, NW	(202) 727-4443
Shannon Place (202) 645-0137 (fax) (evidence viewing hours: 10:30 a.m. – 2:00 p.m.)	(202) 645-0133
Harbor Patrol 500 Water Street, SW	(202) 727-4582
Violent Crime and Gang Task Force	(202) 724-1354

15. MPD Districts

Interview patrol officers and district detectives at their district headquarters.

First District	415 4th Street, SW	(202) 698-0555
Sub-station	500 E Street, SE	(202) 698-0068
Second District	3320 Idaho Avenue, NW	(202) 715-7300
Third District	1620 V Street, NW	(202) 673-6815
Sub-station	750 Park Road, NW	(202) 576-8882
Fourth District	6001 Georgia Avenue, NW	(202) 576-6745
Sub-station	750 Park Road, NW	(202) 576-8222
Fifth District	1805 Bladensburg Rd, NE	(202) 698-0150
Sixth District	100 42nd Street, NE	(202) 698-0880
Sub-station	2701 Pennsylvania Avenue, SE	(202) 727-3622
Seventh District	2455 Alabama Avenue, SE	(202) 698-1500
Delta Task Force	2455 Alabama Avenue, SE	(202) 645-4360
Vice Squad	2455 Alabama Avenue, SE	(202) 645-0029
Traffic Division	501 New York Avenue, NW	(202) 727-4435
Youth and Preventative Services	1700 Rhode Island Avenue, NE	(202) 576-6768
Police Locator #		(202) 727-4410
Police Voice Mail		(202) 727-4410

NOTE: To leave a message for a police officer, you will need to know the officer's name; it is not necessary to have the mailbox number.

16. Police Officer Assignments

Call the Police Locator Number at (202) 727-4410 to find out what district and shift a police officer works. This is the police personnel office. If you need to talk to or subpoena an officer, call the district where he or she works and ask when the officer is on duty.

To catch an officer at the station, you must show up either at the beginning or end of their shift. We have found the officers more willing to talk at the beginning of their shift then at the end. Shifts usually change around 7:00 a.m., 3:00 p.m., and 11:00 p.m., but these times vary from station to station. Call the day before you wish to meet with an officer to confirm his or her working schedule, including their days off.

The officers are usually in the station for thirty minutes, checking in before they hit the streets or checking out before they head for home. There is a period of about 5 or 10 minutes, just before they leave the station after roll call, during which you can talk to them. If you are told that an officer will be working from 3:00 p.m. to 11:00 p.m., find out if he or she will be in the station from 2:30 to 3:00 p.m., or from 3:00 p.m. to 3:30 p.m., and verify that the officer is in fact on duty and has not called in sick or been given a special assignment elsewhere. The officer assigned to the front counter will usually call the officer you need once you arrive.

Follow standard identification procedures with police officers as with other witnesses.

17. Police Officer Records (Retired)

Subpoena: Captain Hershey
Personnel Records
300 Indiana Avenue, 6th Floor

The records are kept in Suitland, Maryland.

B. FBI

One Pennsylvania Avenue, between 9th and 10th Streets, NW
Washington Field Office
General Information: (202) 324-3000 or (202) 324-3447

The FBI may conduct fingerprint, hair and fiber tests for the Metropolitan Police Department. The names of the agents who complete the testing will be listed on the report given to the prosecutor, which is in turn given to the defense attorney. FBI agents are fairly cooperative and willing to discuss their findings with the defense over the telephone or in person. Attorneys should interview the agents. Undoubtedly the agents will describe their conversation with the defense to the prosecution.

C. United States Park Police

1100 Ohio Drive, SW
(202) 619-7310 (24 hours)
Records Section: (202) 619-7120
Monday – Friday: 8:00 a.m. – 4:00 p.m.

To obtain Park Police reports, you need the name of the defendant, the time and date of the incident and any other information you can get. You can subpoena copies of Park Police reports

and interview Park Police officers here. Subpoenas should be made out to Chief, United States Park Police or Official designate. The Park Police have a 413 form for arrest reports. They also have 10343 forms, which are incident reporting forms for incidents such as auto theft, robbery etc. If the defendant is a juvenile, you must have a release form signed by the juvenile. There is a substation in Anacostia Park, but they will not turn over any records.

To submit FOIA requests for Park Police, contact Janine Tyson at (202) 619-7385. Her fax number is (202) 260-2869.

If you need to interview park police officers, they can be found at the substations.

District 1: Central Downtown D.C. (202) 426-6711
960 Ohio Drive, SW, Washington, D.C.
District 2: Glen Echo George Washing Military Park (301) 492-6293
7300 McArthur Boulevard, Glen Echo, MD 20812
District 3: Rock Creek Park (202) 426-7716
960 Ohio Drive, SW, Washington, D.C.
District 4: Greenbelt Area (301) 344-4250
6501 Greenbelt Road, Greenbelt MD 20770
District 5: Anacostia Suitland Parkway (202) 433-1000

*If you need to view evidence with Park Police, you will need to submit a viewing letter. Call Officer Hill at (202) 690-5074 and get further information.

E. U.S. Marshal Service

Subpoenas and FOIA requests can go to Greg Petchel, Assistant Chief of the USMS. His office is located on the C Level of Superior Court by the Marshals' Cell Block.

For questions, you can also contact Ronnie Bolls at (202) 626-2388.

F. Capitol Police

When requesting information from the records department of the Capitol Police you should first try submitting a letter of request on PDS letterhead. The letter should include the following: case name, attorney name, CCN, Capitol File Number, and any other information that will help them to locate the records. These letters can be taken by hand or faxed (see fax and telephone # below).

In the event that you are told you need to subpoena the information, the subpoena should be addressed to:

Custodian of Records
Capitol Police Headquarters
119 D Street, NE
Washington, D.C. 20510-7218

Contact: Sergeant Flanders (Records Department)
Fax: (202) 228-2188
Telephone: (202) 314-7200
6:30 a.m. – 3:30 p.m.

G. Metro Transit Police

Administrative Headquarters
600 5th Street, NW
(202) 962-2121
Records Office: (202) 962-2125 or (202) 962-2126
6:00 a.m. – 4:00 p.m.

To subpoena information from the Metro Transit Police (MTP), including video surveillance footage, speak first with the receptionist inside the door to the right. Tell him or her that you need to speak with the appropriate individual listed below. Make subpoena out to "Custodian of Records."

If you need to subpoena a K-9 activity report, it is filed as a PD 208 at MTP, and not as a PD 222, as it is identified at MPD.

Record Requested	**Custodian**	**Location**	**Phone Number**
Bus	Ebony Johnson	600 5th Street, NW	(202) 962-1257
Payroll	Amy Agcaoili (primary) Romel Ellis (back-up)	600 5th Street, NW	(202) 962-1237
Police Records	Lt. Biggs (primary) Lt. Randy Dawson (back-up)	600 5th Street, NW	(202) 962-6270 (202) 962-2194
Personnel	Carol Ryan (primary) Derrick Eugene (back-up)	600 5th Street, NW 600 5th Street, NW	(202) 962-2384 (202) 961-1181
Employee Benefits	James Davis	600 5th Street, NW	(202) 962-1160
Elevator/Escalator	Cynthia Stevens	3500 Pennsy Drive Hyattsville, MD	(301) 618-1047
Rail	Chris Baker	600 5th Street, NW	(202) 962-1018

If you seek the name or badge number of an MTP officer call (202) 962-2121. Badge numbers for non-sergeants go into the low 400's. Badge numbers beginning with an "S" denotes sergeants. For information on sergeants, call Lt. Triplet at (202) 962-2192.

H. Secret Service

1600 Pennsylvania Avenue, NW
Public Affairs Office: (202) 435-5708

White House Control Office: (202) 395-2020

Do not go to the White House looking for a specific agent. Call (202) 435-5708 to make an appointment to meet the agent at his or her check-in or checkout time.

I. United States Secret Service: Uniformed Division

Headquarters:
1800 G Street, NW
(202) 395-2020

Administration:
(202) 435-7575

Reports can be obtained at the Headquarters office. If you need to locate an officer, call the Foreign Missions Branch (202) 435-6000. (The Foreign Missions Branch is the branch in which most of the officers involved in arrests will belong to – they are the officers patrolling the city, mostly northwest.)

J. Special Police Officers and Security Guards

Reeves Building
14th and U Streets, NW
3rd Floor
Open: 8:00 – 2:00 p.m.

Their desire to help you varies greatly from agency to agency. Some will give you signed statements; some will not discuss the case at all. It is usually advisable not to call ahead. Just arrive at his or her place of employment and ask a fellow employee where to find the person you are looking for. Information concerning SPO's can be obtained at the following address:

Government Supply Accounting Office
4th and G/H Streets
Washington, D.C.

You can find out which SPO's are authorized to carry a handgun by presenting a subpoena to the Government Supply Accounting Office.

K. Amtrak Police

Union Station, inside Gate A
Police Investigations (24 hour)
(202) 906-2235 (Captains Moss & Howell)
Legal Affairs Office
Christine Turnblazer: (202) 906-2943

Subpoenas are not needed for forms and documents, in general. Officers will often speak to investigators. Officers will probably only be involved in incidents that occur in or immediately around Union Station.

L. Federal Protective Services

Director's Office:
Federal Center
3rd and M Streets, SE
Building 74, Room 110
(202) 690-9632

Branch Office:
18th and F Streets, NW, Room 3316

Officers are only in cases that occur in U.S. Government buildings or on U.S. government property. Requested reports will require a subpoena.

M. U.S. Drug Enforcement Administration

Mid-Atlantic Laboratory
1440 McCormick Drive
Largo, MD 20774-5313
Phone: (301) 583-3200
Fax: (301) 583-7305

N. National Zoological Police

Connecticut Avenue, NW

A subpoena should not be needed in requesting reports. The National Zoological Police are only involved in cases that occur on the grounds of the National Zoo.

O. National Postal Police

(202) 636-2220
(202) 636-1524 (fax)
Ask for Officer Jiles or Simms.

P. Prince George's County Police

To request information from P.G. County such as radio runs, police reports, in-car camera footage, and FOIA requests, use the following information:

Attn: John Sfondouris, Director, Records Center
Records Division

Prince George's County Police
4923 43rd Avenue
Hyattsville, MD

If possible, make sure to include the offense date and name of officer(s) involved. The Maryland Attorney General's website, http://www.oag.state.md.us, has sample FOIA (open records) letters.

III. CORRECTIONAL FACILITIES

A. D.C. Correctional Facilities

*Dress code at **ALL** correctional facilities: No shorts. Skirts cannot be above the knee. No tubes, tanks, halter-tops or translucent clothing. No sandals. No overalls or gym clothing.

Keep appropriate clothing in your car or at the office, for emergency visits. **Please be aware of the dress code because you will not be permitted entrance if you violate the order.**

1. Locator Number: (202) 673-8266

2. D.C. Jail (houses both men and women):
   1901 D Street, SE
   Washington, D.C. 20003
   Main number: (202) 673-8136
   Brenda Ward, Deputy Warden of Programs (to schedule visit)
   (202) 673-8202
   (202) 698-4877 (fax)
   Night shift commander: (202) 673-8138
   Video viewing: Brenda Ward (202) 673-8202
   To use or bring AV equipment to the jail, fax a letter (on attorney letterhead) to Brenda Ward that includes the inmate's name and DCDC, case number, date and time you wish to use the equipment, copy of CJA Investigator ID, and the reason for your request. The letter should be faxed to Ms. Ward at (202) 698-4877. She will contact you to give approval.
   Medical records: (202) 673-8229 – Ms. Kain
   Fax: (202) 673-8982
   Inmate records: (202) 673-8270
   Subpoenaing Records from D.C. Jail:
   D.C. Department of Corrections
   General Counsel – Maria Amato
   1923 Vermont Avenue, NW
   (202) 671-2042

3. Corrections Corporation of America – Correctional Treatment Facility (CTF – New Jail):
   1901 E Street, SE (located in back of D.C. Jail)
   Washington, D.C. 20003
   Isaac Johnston, Warden

Sunday – Saturday: 8:00 a.m. – 5:00 p.m.
(202) 547-7822 (Command Center – will direct your call)
Medical Records: (202) 673-8458
Fax: (202) 673-8010

If you wish to visit an inmate during the day, either facility, park in the lot in front of the jail and walk in the front door. Do not stand in line, go to the guard at the desk and inform him or her you are on a legal visit. Show your **CJA ID (two forms of ID – CJA ID and driver's license – will be required at CTF).** The guard will search you and your bag and then send you through the metal detector. When you walk through the door, indicate to the person behind the glass how many people you wish to see. Sign in on the attorney register, and then fill out the forms given to you, one for each person you requested to see. Give the completed forms back to the guard, who will then confirm the person(s) you requested to see are still incarcerated. **You may only see one person at a time.** The forms will be returned to you. The entire system is now computerized and the person behind the glass will enter your name as a visitor on the computer, giving you a computer printout to take with you.

Once upstairs, give the forms to the guard inside the glass cubicle. This guard will note the names and return the forms to you. This guard controls the flow of visitors you request, therefore be aware of the length of time between visitors and alert him or her if it has been unreasonably lengthy. Remember that the inmates must sign their form upon conclusion of your meeting. You will give these forms to the guard downstairs on your way out.

At the D.C. Jail, if you wish to visit an inmate at night, after 8:00 p.m., or on the weekends, park near the guard tower in the back of the jail and tell them you wish to conduct a legal visit. They will let you walk in the back door. At this point, follow the same procedures outlined above.

***The D.C. Jail has head counts of the inmates at 8:00 am, 3:00 p.m., 8:00 p.m., and every hour on the hour throughout the night everyday. (CTF has their counts at 10:00 a.m., 3:00 p.m., and 8:00 p.m. everyday). It is important to plan your visits around these counts because they last for upwards of one to two hours each. If you are inside the institution, you will have to wait until the count is over before you can see the person you wish to visit. The jail freezes so the inmates can all be accounted for. So make sure you are aware of these counts before you go and plan accordingly.**

You must know the person's proper name and their District of Columbia Department of Corrections (DCDC) number to retrieve his or her records. The dates of their incarceration are helpful, but not mandatory.

If the person is or was housed at the jail, on parole, or in a halfway house, direct subpoenas to D.C. Department of Corrections General Counsel at 1923 Vermont Avenue, NW. Please call (202) 671-2042 first to ensure that someone will be there to collect your subpoena.

For Medical Records of a D.C. Jail resident, make the subpoena out to the Chief Medical Officer or authorized representative of the D.C. Jail Infirmary.

The record storage is a little confusing; records are usually at the location of the facility where the inmate was last incarcerated. The records contain excellent information on government witnesses, including the length of incarceration, any medical or behavior problems the person experienced, separation orders, photographs and fingerprints.

Additionally, the jail will destroy inmates clothing after 15 days. Therefore, any clothing that the inmate wore upon arrival will be destroyed if not picked up within the first 15 days of arrival. If the clothing is in any way relevant to your case get it before the 15 days have lapsed.

Visitors' Services Center:
1422 Massachusetts Avenue, SE
(202) 544-2131
9:00 a.m. – 4:00 p.m.
www.vscdcjails.net

VSC has worked with men and women at D.C. Jail for the past 30 years. The organization is geared at reaching out to inmates by: picking up property left at the districts, getting court clothes for clients, helping with third party custody issues, preparing income taxes and resumes, etc.

To get documents notarized at the jail or CTF, call VSC and ask for Betty Gatewood.

4. Juvenile Facilities:

   New Beginnings Youth Development Center
   8400 River Road
   Laurel, MD 20724
   (202) 299-3200

   Youth Services Center
   1000 Mt. Olivet Road, NE
   Washington, D.C.
   (202) 576-8175

For specific rules regarding interviewing detained juveniles who ARE NOT charged in your matter but may have information regarding the incident please speak with your attorney BEFORE attempting an interview.

5. Sussex II State Prison:
   24427 Musselwhite Drive
   Waverly, VA 23891-1111
   (804) 834-2678 (main)
   (804) 834-4050 (legal visits)
   (804) 834-4077 (fax)

If you need to visit an inmate who is housed at Sussex you need to call the above number and ask to speak with Ms. Rollins who is in charge of arranging the visit. You can also fax your request to Ms. Rollins' attention and she will call you back to confirm the time.

6. U.S. Parole Commission:
   90 K Street, NE, Third Floor
   Washington, DC 20530
   (202) 346-7000

7. Court Services and Offender Supervision Agency (CSOSA):
   633 Indiana Avenue, NW
   12th Floor
   Washington, D.C.

To request Parole records, take a release (and subpoena if applicable) to the 12th floor. Indicate that you are requesting Parole records. To follow up, contact David Wisdom, (202) 220-5321. Make sure you include the DCDC number as well as the name and DOB of the individual whose records you are seeking.

8. Other D.C. Department of Corrections Facilities:
   Community Correctional Centers – Halfway Houses
   1901 D Street, SE
   Washington, D.C. 20003
   (202) 673-7130 (Administrative)
   (202) 673-8263 (Records Office)
   (202) 673-7190 (Central Office)

Individual houses and community correctional centers, with their addresses and telephone numbers are:

1355/1357 New York Avenue, NE – (202) 576-8737 (Male Halfway House)

Washington Halfway House for Women
1816 19th Street, NW – (202) 462-8982 (Private Women)

Hope Village – 2840/2908 Langston Place, SE – (202) 678-1077 (Male)

Efforts From Ex-Convicts (EFEC) – 1514 8th Street, NW – (202) 232-1932 (Male)

BUREAU OF REHABILITATION, INC.

Administrative Offices
4601 Presidential Drive, Suite 240
Lanham, MD
(301) 306-1260
8:30 a.m. – 4:30 p.m.

Executive Director, Harry Manley – (301) 306-1250
Asst. Exec. Director, Thomas Leitch – (301) 306-1259
Program Development, Harry Barlow – (301) 306-1258
Personnel, Michael Cohen – (301) 306-1256
Finance, Praneet Mathur – (301) 306-1252

Adult Residential Home
Programs Director – 7 New York Avenue, NE – (202) 842-7056
Shaw #1 – 1770 Park Road, NW – (202) 842-7040
Shaw #2 – 1740-42 Park Road, NW – (202) 842-7043 (Male)
Shaw #3 – 1301 Clifton Street, NW – (202) 842-7053 (Male)
Community Care Center – 3301 16th Street, NW – (202) 842-7046 (Male)

Youth Residential Home
Program Director – 7 New York Avenue, NE – (202) 842-7032
Sheridan – 2520 Pennsylvania Avenue, SE – (202) 842-7060
Lamont – 1855 Lamont Street, NW – (202) 842-7062
California – 2019 19th Street, NW – (202) 842-7049

ICSS Programs (Central Office)
Short-Term Services – (202) 842-7030
Project Transition – (202) 842-7029
Alternatives for Youth – (202) 675-9365

Third Party Custody
Supervisor, Leonard Trotter – 7 New York Avenue, NE – (202) 842-7025

B. Maryland Correctional Facilities

The following websites allow you to search for an inmate held in a Maryland detention facility. They list the arrest date, charges, case number, and bond information:

- http://inmatelookup.co.pg.md.us:8080/inmatelookup?page=SEARCH
- http://www.dpscs.state.md.us/inmate

1. Prince George's County Corrections
   5310 Douglas Street
   Upper Marlboro, MD 20772
   (301) 952-4800

2. Correctional Services
   (301) 952-4800
   *Numbers are on automation system

3. Prince George's County Upper Marlboro Jail
   13400 Dille Drive
   Upper Marlboro, MD 20772

(301) 952-7025 (Inmate information)
(301) 952-7102 (Records)
(301) 952-7126 (Fax)

To conduct a legal visit, call Vicki Taylor ahead of time at (301) 952-7027 in order to schedule the visit and get approval. You will also need to fax a request letter to Ms. Taylor. All visits by investigators are non-contact. According to Ms. Taylor, this is their security policy in order to cut down on contraband to inmates, and as such they only allow attorneys contact visits.

4. Montgomery County Detention Center
   1307 Seven Locks Road
   Rockville, MD 20854
   (240) 777-9960

Before you arrive your attorney will need to fax a letter ahead providing your name and position and explaining whom you are coming to see. **YOU CANNOT GET IN SOLELY ON YOUR CJA ID.** When you arrive, enter at the visitor's entrance where your fax should have already been cleared. Seven Locks conducts count at 7:00 a.m., 11:00 a.m., and 3:00 p.m. If you are meeting with an inmate when count begins you will not be interrupted. Remember to dress appropriately for your interview with the inmate or you will not be allowed in.

5. Maryland Correctional Institution
   18601 Roxbury Road
   Hagerstown, MD 21746
   Records: (301) 733-2800 x1104
   Fax: (301) 416-8422
   8:00 a.m. – 4:00 p.m.

6. Maryland Correctional Training Center
   18800 Roxbury Road
   Hagerstown, MD 21746
   (301) 791-7200 (long distance call)

7. Baltimore Diagnostic and Reception Center
   550 East Madison Street
   Baltimore, MD 21202
   (410) 332-0970

Convicted Maryland prisoners are evaluated here to determine where they should be incarcerated. This office can tell you to which facility a convicted prisoner has been sentenced. You need a full name, DOB and any other information you can find about the person.

C. Virginia Correctional Facilities

The following website will give you telephone number for local jails and state prisons in Virginia:

- http://www.delbridge.net/jails.html

1. Virginia Corrections Information:
   Records: (804) 674-3204
   Research Department: (804) 674-3270

You should be able to receive information regarding whether an individual is incarcerated and if so, at what institution. You will need a full name and a date of birth or social security number. With this information you will be told when the person was incarcerated, their charge, and release date. If you have a notarized release from the individual you can obtain information from their medical file. PLEASE NOTE THAT YOU SHOULD BE VERY SPECIFIC ABOUT WHAT INFORMATION YOU WOULD LIKE TO HAVE IN THE LETTER. Unfortunately, they can only give limited information. If the person is currently incarcerated you should contact the facility at which he or she is housed and speak with their records department for further information.

The office is located in Richmond, Virginia. But they are willing to send copies of their information. The charge is $0.20 per copy, in addition to $1.00 handling fee and then postage. The handling fee for a certified copy is $2.00.

2. Prince William County Correctional Facility:
   Manassas: (703) 792-6026

3. Probation and Parole District #36:
   206 North Washington Street
   Suite 500
   Alexandria, VA 22314-3131
   (703) 518-8000

4. Probation and Parole District #10:
   3300 North Fairfax Drive
   Suite 320
   Arlington, VA 22201
   (703) 875-0100

5. Fairfax County Jail:
   (703) 246-4420

6. Arlington Detention Center:
   Captain Vicki Bandalo
   (703) 228-7284
   (703) 228-4481 (Fax)

Requests for legal contact visits can be sent to Captain Bandalo on attorney letterhead along with a copy of your CJA ID. In the letter, specify that you will be reviewing, amending, and signing documents and that you will need a contact visit.

D. Federal Bureau of Prisons

Visit **www.bop.gov** for the most current information.

Bureau of Prisons
U.S. Department of Justice
320 1st Street, NW, Room 5002
Washington, D.C. 20536
(202) 307-3148

Inmate Locator Line: (202) 307-3126
8:00 a.m. – 2:00 p.m.

IV. HOSPITALS

To obtain medical records, fill out subpoenas to the names and addresses listed below. Hospitals will not release records directly to you without a Records Release Form signed by the patient.

1. Children's Hospital
   Monday – Friday: 7:00 a.m. – 3:30 p.m.
   Main Office: (202) 884-5000
   Records: (202) 884-5267
   Custodian of Medical Records
   111 Michigan Avenue, NW, Suite 300
   Washington, D.C. 20010

2. D.C. General Hospital: **CLOSED**
   Outpatient Clinics Only
   1900 Massachusetts Avenue, SE
   Washington, D.C. 20003

   For records prior to 2002:
   Department of Health
   2100 Martin Luther King, Jr., Avenue, SE, Suite 302
   (202) 698-1732 or (202) 698-2043

   For records from 2002 or after:
   D.C. General Hospital
   Administrative Office
   Contact: Larhanda Usher, (202) 548-5107

3. The George Washington University Hospital
   901 23rd Street, NW
   Main office: (202) 715-4000
   Medical Records Office: (202) 715-4376

4. Georgetown University Hospital
   Records: (202) 444-3184
   Monday – Friday: 8:00 a.m. – 4:30 p.m.
   Custodian of Medical Records
   Medical Records Department
   Bliss Building
   Lower level, Room 144
   3800 Reservoir Road, NW
   Washington, D.C. 20007

5. Greater Southeast Community
   (202) 574-6770
   Monday – Friday: 9:00 a.m. – 4:00 p.m.
   Custodian of Medical Records
   Medical Records Department
   1310 Southern Avenue, SE
   Washington, D.C. 20032

6. Hadley Memorial Hospital
   Registered Records Department
   4601 Martin Luther King, Jr., Avenue, SW
   Washington, D.C. 20032
   Phone: (202) 574-5740
   Monday – Friday: 8:00 a.m. – 4:00 p.m.
   Custodian of Medical Records

7. Howard University Hospital
   Monday – Friday: 8:00 a.m. – 4:30 p.m.
   Serve Subpoenas To:
   General Counsel's Office
   c/o Custodian of Records for whichever department you are subpoenaing
   2400 6th Street, NW, Suite 321
   Phone: (202) 806-2650

8. Providence Hospital
   (202) 269-7173
   Monday – Friday: 9:00 a.m. – 4:00 p.m.
   Custodian of Medical Records
   1150 Varnum Street, NE, 1st Floor
   Washington, D.C. 20017
   *Obtain Providence release form from coordinator

9. St. Elizabeth's Hospital
   Custodian of Records
   Attn: Karen Vest

Room 329, Smith Building
2700 Martin Luther King, Jr., Avenue, SE
Washington, D.C. 20032
Phone: (202) 645-6989
Fax: (202) 645-6588

10. Sibley Hospital
    Fax requests for records to (202) 966-4096
    Attn: Medical Records (Indicate on fax whether you want to pick the records up or want them mailed.)
    Medical Records Department
    5255 Loughboro Road, NW, 1st Floor
    Washington, D.C. 20016
    Phone: (202) 537-4088

11. Veteran's Administration Hospital
    (202) 745-8341
    Monday – Friday: 9:00 a.m. – 11:00 a.m./1:30 p.m. – 3:30 p.m.
    Chief of Medical Records: Rithia Stokely
    50 Irving Street, NW, Room GC206
    Washington, D.C. 20422

12. Washington Hospital Center
    (202) 877-7117
    Monday – Friday: 9:00 a.m. – 3:00 p.m.
    Supervisor: June Smith
    Medical Records Department
    110 Irving Street, NW, Room 2A7
    Washington, D.C. 20010

13. Walter Reed Army Medical Center
    (202) 782-3501 (Main)
    (202) 782-6160 (Records)
    (202) 782-6147 (Special Actions)
    Monday – Friday: 7:30 a.m. – 4:30 p.m.
    6900 Georgia Avenue, NW
    1st Floor (Records Office)
    Room 1R09/1R10
    Washington, D.C. 20307-3001
    Building 2 Room 1R08 (Special Actions Office)

***Medstar emergency helicopter comes from Washington Hospital Center. Medstar helicopter runs are available by subpoena from the Legal Department, but they are only kept for 30 days. After 30 days, they are taped over. Please see the Resource List for further information on Medstar.**

V. OTHER RESOURCES

Aerial Maps

Contact: Mr. Dennis Wardenberg
Office of Planning
801 North Capital Street, NW
Suite 4000
Phone: (202) 442-8981
Fax: (202) 442-7638

Aerial maps are pictures of any location in the city taken by a satellite. The Office of Planning produces these maps for free to government agencies.

You can also find Aerial Maps online at:
http://citizenatlas.dc.gov/atlasapps/custommapsearch.aspx or www.local.live.com

Alcohol-Drug Abuse Service Administration (ADASA)

500 Indiana Avenue, NW, Room C-300, (202) 879-1115
Main Headquarters: 1300 1st Street, NE, (202) 727-5161
33 N Street, NE, 2nd Floor, (202) 727-0202

To subpoena information regarding a person's participation in any of their programs, subpoena Dr. Linda Boyd, Acting Chief of the Criminal Justice Division, at 33 N Street, NE, 2nd floor, Washington, D.C. 20002 (727-0202). You can also hand deliver the subpoena to Ms. Deborah Walls at 33 N Street, NE. Without a release of records, ADASA will not release any records before trial. Mr. Ron Hollis, (500 Indiana Avenue, NW, Room C-300, (202) 879-1115), will also handle alcohol program subpoenas. The above names may change, so call first for accuracy.

Ambulance Runs

D.C. Fire and EMS
1923 Vermont Avenue, NW
Washington, D.C.
Phone: (202) 673-3360

The computer printout of the ambulance run, the FD 151 form, and the tape recording of the ambulance run call, can be requested on one subpoena. You must provide a blank cassette for the tape recording of the ambulance run. The FD 151 will contain the number of the ambulance and the drivers' names who responded, as well as a report of the condition of the patient when they arrived.

When issuing subpoenas for tape recordings of ambulance runs, make sure the subpoena includes the date, time that the ambulance was called, the address to which it was called, and any type of illness or injury that was reported. Subpoenas need not include the injured person's name, PDID

or other identifying information (however, if you have the name it can be beneficial). You can also retrieve an ambulance run with a FD Form-79, but you need to have the patient sign the form in order to get the run. With a subpoena, you must allow 3-5 working days for them to get the information. Try to subpoena runs before the preliminary hearing.

Ambulance Drivers

1923 Vermont Avenue NW
Washington, D.C. 20001
(202) 673-3360

Either on the Ambulance Run subpoena or on a separate subpoena, ask permission to speak with the attendants of the ambulance in question. The Fire Department will make an appointment for you with the drivers at their stations. Drivers usually will not talk without knowing that you have permission for the interview.

American Medical Association

(800) 621-8335

If you are interested in getting information on individual doctors, you can call the American Medical Association, which is headquartered in Chicago. If you have the doctor's name they will either give you the home or work information on the doctor (depending on what the doctor reported to the AMA).

Armed Forces Locator

To serve a subpoena for a person's military record (OPF), contact:

National Personnel Record Center
111 Winnebago Street
St. Louis, MO 63118-4126
Phone: (314) 801-9250
Fax: (314) 801-9270
They accept subpoena by fax.

To receive information for a soldier's or sailor's certificate indicating where an individual is stationed, send a subpoena, along with a letter on attorney letterhead, including as much information as you can regarding the person's full name, rank, last duty assignment/last known military address, DOB, and SSI number, to the appropriate military branch. The phone numbers for certain branches are available directly following as well as under the appropriate branch.

Army: (202) 685-3745
Air Force: (703) 697-4110
Pentagon: (703) 545-6700
Navy: (314) 263-7166

Army

To locate an active-duty member at the US Army:

Army Worldwide Locator
U.S. Army Enlisted Records and Evaluation Center
8899 East 56th Street
Indianapolis, IN 46249-5301

The charge is $3.50, immediate family members and government agencies excluded.

To locate an Army retiree:

Army Reserve Personnel Center
ATTN: ARPC-VSE-VS
9700 Page Avenue
St. Louis, Missouri 63132-5200

To locate an Army separatee:

National Personnel Records Center
9700 Page Avenue
St. Louis, Missouri 63132-5200

The National Personnel Records Center, Military Personnel Records (NPRC-MPR) is the repository of millions of military personnel, health, and medical records of discharged and deceased veterans of all services during the 20th century. NPRC (MPR) also stores medical treatment records of retirees from all services, as well as records for dependent and other persons treated at naval medical facilities. Information from the records is made available upon written request (with signature and date).

Current addresses are not maintained for separatees who are not serving under reserve obligation. In such cases you might want to try a military organization such as the American Legion or VFW (Veterans of Foreign Wars).

Navy
To locate an active-duty member at the U.S. Navy:

Navy Worldwide Locator
Bureau of Naval Personnel
Pers-312
5720 Integrity Drive
Millington, Tennessee 38055-3120
Voice: (901) 874-3388 (Recording 24 hours per day, live assistance available – 7:00 a.m. – 4:30 p.m., central time)

To locate Navy retirees and separatees:

Limited service is available by writing to the address above. Letters will be forwarded, if possible, to the retiree. A locator notice can also be posted in the Navy retiree's newsletter Shift Colors or you may advertise for former shipmates in any of the many veterans' organization magazines.

Air Force

The Air Force Worldwide Locator can locate active duty personnel, as well as retirees, reservists, and guardsmen. Parents, spouses, and government officials may call the number provided below. Letters requesting locator service should be mailed to:

HQ AFPC/MSMIDL
550 C Street, West, Suite 50
Randolph AFB, Texas 78150-4752
(210) 565-2478
Voice: (210) 565-2660 (Live assistance - Monday – Friday 7:30 a.m. – 4:30 p.m., central time)

This service will not help in locating Air Force separatees or Army Air Corps retirees. You may write to the National Personnel Records Center below or contact one of the various veterans' service organizations to help in locating these persons.

National Personnel Records Center
9700 Page Avenue
Saint Louis, Missouri 63132-1500

Marine Corps

The Marine Corps Locator Service can provide the duty station for active duty personnel and reservists. The office is open Eastern Standard Time. Your written request should be mailed to:

Headquarters U.S. Marine Corps
Personnel Management Support Branch (MMSB-17)
2008 Elliot Road
Quantico, Virginia 22134-5030
Monday – Friday: 8:00 a.m. to 4:00 p.m.
(703) 784-3942
Voice: (703) 784-2507

The Marine Corps is not able to assist in locating former Marines. They suggest you place an ad in Leatherneck Magazine. There is a monthly feature called "Mail Call" that

includes locator requests. There is no charge for the service and you may send your request to:

Mail Call Editor
P.O. Box 1775
Quantico, Virginia 22134

Assessment Office

Washington, D.C., Assessment Office
441 4th Street, NW, Suite 480 (Judiciary 1)
Monday – Friday: 8:15 a.m. – 4:45 p.m.

The Assessment Office regulates and maintains records on the property taxes imposed on property owners in D.C. The information you can obtain is normally more current than that which you can obtain through the Lusk's Directory. The Assessment Office has on-line computers, with information that should be no more than two months old. Whether calling on the telephone or going in person, remember to be very cordial! Also, try to provide the square and lot number of the property you are inquiring after.

If the person lives outside of the D.C. Metropolitan area, you can contact the assessment office in the city of residence. You can request the current mailing address for the property owner.

Bail Bonds

John Light has information on people that he has bonded. He may be reached at (202) 638-6538 or at (202) 350-1055.

Bank Information – Each bank wants an original copy of a subpoena to give out information, but they will accept it via mail.

Bank of America – Legal inquiries: (800) 900-9044
Subpoena inquiries can be made to:
Ms. Danielle Baker
Phone: (410) 605-1079
Fax: (410) 605-1055
Corporate Office – 1425 Northwest 62nd Street, Ft. Lauderdale, FL 33309

Chevy Chase Bank –
Subpoena inquiries can be made to:
Ivette McDuffy
6200 Chevy Chase Drive
Laurel, MD 20707
(301) 987-BANK

PNC –

They say to serve any branch and the branch will mail the subpoena to the appropriate party.

(888) PNC-BANK

Wachovia –

Subpoena inquiries can be made to:

Legal Orders Processing
101 North Independence Mall, East
Philadelphia, PA 19106
(215) 973-4680

Beeper Information

The following list of pager companies represents only a small percentage of the pager distributors that operate in the Washington Metropolitan area:

AmeriPage	(301) 421-1323 or (301) 421-0900
USA Mobility	(800) 344-1004
Direct Page	(800) 908-2337
Metrotel	(866) 860-4108
CommTech Wireless USA	(904) 281-0073

You can call these companies to locate records of telephone numbers received by a beeper. Each company has its own requirements and some only keep records for up to three months. You need to call the appropriate pager company and request the information needed. They will advise you from that point.

Building Management

To obtain apartment numbers, verification of residence, length of stay, a forwarding address or a history of the tenants' behavior, you need to talk to the building supervisor, the rental office, or the person who owns the building. Usually these people will let you see the records without a subpoena, but sometimes they will not.

Bus Drivers

Office of Counsel for the Metro Transit Authority
600 Fifth Street, NW
Washington, D.C. 20001
Contact: Mark F. Sullivan at (202) 962-2814

There are two procedures for obtaining the names of and information about Metrobus drivers.

1. Go to Mark F. Sullivan with subpoenas in hand. You need not subpoena him – he will direct you to the correct contacts. You will probably be referred to Mr. Steve Petrucelli, (202) 962-5662, for the driver's schedules, known as "actuals." Next, you

will probably go to Tangy Colbe-Mobley, (202) 962-5663, who can give you the names and addresses of the drivers. One subpoena should go to the "actuals" person that Mark F. Sullivan gives you, and the other should go to the person who can give you the bus driver's name and address.

OR

2. Call Mr. Robert Orr (962-2066) and give him the address of the incident and the time – he will give you the route and bus number. Then call the Operating Department manager (get number from switchboard) and he or she will give you the bus driver's name and address when you give them the information you obtained from Mr. Orr.

Cellular Phone Calls

To trace a call from a cell/car telephone you will need to serve subpoenas on one or all of the following major agencies that serve the D.C. area. Doing this will get you subscriber information. When filling out the subpoena you should request the subscriber information for the call and include the date, time, (if possible) the geographic location from which the call was made, and the telephone number, which was called from the telephone. Depending on the company policies, you can either hand deliver or fax the subpoenas, the company can then fax back the information to you.

To find out what service provider to subpoena, go to: www.fonefinder.net.

Cellular-One
Attn: Neal Carver, Asset Protection Group
7855 Walker Drive
Greenbelt, MD 20770
(301) 220-3600
(301) 489-3125 (Fax)

Directions: Take 495 east to the Kenilworth/Greenbelt exit (Exit 23). Stay in the right lane and turn right. The first traffic light is the intersection for Greenbelt Road. Turn left onto Greenbelt. Take Greenbelt to Walker Drive (the second traffic light). Drive down Walker Drive until you come to Cellular-One on the right.

Cingular Wireless (now AT&T)
*For D.C. Area requests
Legal Center
Contact: Neal Carver
(301) 489-3479
Subpoenas: All Subpoenas can be faxed to the Custodian of Records
*For Nationwide requests
National Subpoena Compliance Center
Phone: (800) 635-6840
Fax: (888) 938-4715

Address: AT&T
P.O. Box 24679
West Palm Beach, FL 33416

Verizon Wireless Cellco DBA Partnership
Phone: (800) 451-5242, option 2
Fax: (888) 667-0028

They accept faxed subpoenas, but must make them out to:

Custodian of Records for Verizon Wireless DBA Cellco partnership
180 Washington Valley Road
Bedminster, NJ 07921

The language on the subpoena should read "any and all call detail and/or incoming and outgoing calls for [number]…" Doing this will get you details of all calls, including restricted calls, etc… instead of just the details of the normal phone bill which won't always include incoming numbers. With questions contact: Bruno Debellis, Subpoena Coordinator, at (908) 306-7596.

Verizon occasionally resells service plans to **ACN Communication Services** but it may still be listed as Verizon on internet searches. Use the following information to subpoena ACN:

ACN Communication Services, INC.
32991 Hamilton Court
Farmington Hills, MI 48334
ATTN: Lisa Lezotte, Legal Department
Phone: (248) 699-3314

Sprint, Nextel, Boost Mobile
Sprint Nextel Corporate Security
Attn: Subpoena Compliance
6480 Sprint Parkway
Overland Park, KS 66251-6100
Phone: (913) 315-0660
Fax: (816) 600-3111

Subpoenas can be faxed to the number above to Attn: Subpoena Compliance. There is no need to mail a hard copy. Sprint maintains cell site information for 60 days. You can fax a request, including the Sprint-assigned case number, asking them to preserve all cell site records for the times and dates that you need. Sprint will not honor the request until it receives the judge-signed subpoena.

Motorola
Motorola Law Department
1303 East Algonquin Rd.
Schaumburg, IL 60196

(847) 523-2324
Fax: (847) 523-0727

If you need to find out who the service provider is for a Motorola phone, you need to provide them with the serial number, model number, and IMEI number (located inside, by the battery next to the serial number). You can fax a copy, but you must mail a hard copy. It usually takes two days.

T Mobile
Law Enforcement Relations Group
4 Sylvan Way
Parsippany, NJ 07054
Phone: (973) 292-8911
Fax: (973) 292-8697

Virgin Mobile
Virgin Mobile USA
Legal Department
10 Independence Boulevard
Warren, NJ 07059
Phone: (908) 607-4000
Fax: (908) 607-4205

Xtreme Mobile (PREPAID)/Phone Tec (reseller for Sprint)
Subpoena Compliance, Xtreme Mobile
Attn: Susan Steady
770 North Drive, Suite B
Melbourne, FL 32934
Direct phone: (321) 751-8993
Main phone: (888) 699-8736
Fax: (321) 751-8980

Child Protective Services

625 H Street, NE
Physical Abuse (MPD): (202) 576-6768
Sexual Abuse (MPD): (202) 727-4151
Neglect (LaShawn Receiver): (202) 727-0995

Citizens and professionals can make confidential reports via the above listed hotlines.

Citizens Complaint Center

Office of Legal Counsel
600 E Street, NW, Room 2200
Washington, D.C. 20530

Monday – Friday: 9:00 a.m. – 5:30 p.m.
(202) 724-7579

Files are kept for the past three years by the last name of the potential defendant on complaints made by one citizen against another. They can provide information on a person's previous aggressive or abusive behavior. This information can be obtained by subpoena from the Chief or Deputy Chief. Take the subpoena to the Misdemeanor Section, U.S. Attorney's Office, 500 Indiana Avenue, NW.

D.C. Bar Association

(202) 223-6600 (Main)
(202) 737-4700 (Lawyer Look-up)
To verify the existence of attorneys in the D.C. metro area.

D.C. Fire and EMS

1923 Vermont Avenue, NW
Washington, D.C. 20001
(202) 673-3360

D.C. Housing Authority

Information to be subpoenaed through:

1133 North Capitol Street, NE
2nd Floor, General Counsel Offices, Suite 210
Main: (202) 535-2835
Fax: (202) 535-2521
Address Subpoena to Custodian of Records for D.C. Housing Authority.

Subpoenas are accepted via fax. Call to ensure receipt of subpoena. They can provide addresses for names or names for addresses of individuals living in public or subsidized housing units. They can also provide information on how long the person resided there, who lives with him or her (children, other relatives, etc.) and where he or she might have lived previously (if it was public housing).

D.C. Superior Court

***Also refer to Criminal Information at the front of the resource section.**

Superior Court for the District of Columbia
Carl Moultrie Building
500 Indiana Avenue, NW
Washington, D.C. 20001

Central Cellblock – C Street Level

Known as "The Bullpen," this cellblock holds defendants awaiting court hearings. Only attorneys holding bar cards can gain access to central cellblock.

PDS CJA/DSO Office – Room C-215

(202) 879-1095

Police Liaison Office – Room 2120

Criminal Assignment Office – Room 1230

This office assigns misdemeanor cases, which have been certified as ready for trial to specific judges, and keeps track of the felony cases being heard by each judge. If you need to know where a particular case is being heard, check with this office.

Juvenile Calendar Control Court – JM Level, JM-2

Certifies juvenile cases as ready for trial.

Juvenile Assignment Office – JM Level, Room 125

Performs the same function for juvenile court as its adult counterpart.

Criminal Finance Office – 4th floor

Civil Files
JM Level, Room 200
(202) 879-1133
Monday – Friday: 9:00 a.m. – 4:00 p.m.
Saturday: 9:00 a.m. – 12:00 p.m.

You can find out if someone has a civil case against him or her and is being sued, or is suing someone else, and if so, the names and addresses of those parties involved and their attorney's name and address, as well as information regarding the conflict that precipitated the suit.

You need to ask at the file clerk's window for the microfilm listings for whatever year you are interested in and look up either the name of the plaintiff or the defendant, (indicated by the P or D after the name) to find out the case number.

You then fill out a case file locator card, available at the desk, give it to the file clerk, (they prefer them in numerical order by year), and he or she will give you the file. You need some kind of ID to leave as security for the file, e.g., your CJA ID, your license, or a bar card.

Landlord/Tenant
409 E Street, NW

(202) 879-4789
Monday – Friday: 8:30 a.m. – 5:00 p.m.
Wednesday evenings: 6:30 p.m. - 8:00 p.m. (emergency use only)
Saturday: 9:00 a.m. – 12:00 p.m. (emergency use only)

To find landlord/tenant files, you need either the name of the landlord or the name of the tenant. These are files of landlords making complaints against tenants. There are books kept by year in which you can look up either the name of the landlord or the name of the tenant, since they keep the lists by both names. You get a case number from these books, and then can get the file of the proceedings with the tenant's address.

For tenants complaining against landlords, you need to go to:

Rental Accommodations Office
941 North Capitol Street, NE
Washington, D.C. 20001
Monday – Friday: 9:00 a.m. – 3:00 p.m.
(202) 442-4477 (calls accepted until 4:45 p.m.)

Small Claims
JM Level, Room 120
(202) 879-1120 – Robert Cann
Monday – Friday: 8:30 a.m. – 4:00 p.m.
Wednesday evenings: 6:30 p.m. – 8:00 p.m.
Saturday: 9:00 a.m. – 12:00 p.m.

You can find the names and addresses of people involved in financial disputes, and the nature of the dispute. Small Claims is the same idea as Civil Court, but involves smaller amounts of money, $2,000 or under.

To find the cases, go behind the counter in front of the file stacks, and look up in the books there, either the plaintiff's or the defendant's name. One side on each page is the defendants' names listed alphabetically, and the other is the plaintiffs' names listed alphabetically. The books date back to 1972.

When you find the number, go back into the file stacks and pull the file yourself. You do not need any kind of ID. The files are organized by year. When you are finished, do not re-file the folders; simply lay them on the table to the right.

Department of Consumer & Regulatory Affairs

941 North Capitol Street, NE
Washington, D.C.
(202) 442-8947, Room 9500 (Director's Office)
(202) 442-4480, Room 2100 (Records Office)

Will provide a certificate of occupancy and information about who owns a building of any sort (apartment complex, parking garage, etc.).

Department of Human Services

801 East Building
St. Elizabeth's Campus
Information: (202) 724-5466
Administration: (202) 727-3211

Note: Addresses of former or current public assistance recipients can be obtained by subpoena from the Office of General Counsel, T. Britt Reynolds, Department of Human Services at 801 East Building, St. Elizabeth's Campus. Allow at least four days for them to locate the information. If the witness is a woman, it is helpful to know if she has ever been married and to whom, because the files are kept by the name of the male member of the family, even if the couple is divorced. Contact the Chief of Legislative Affairs, (202) 724-2127, about any subpoena problems.

Department of Transportation (D.C.) – SEE "TRAFFIC"

Divorce Records

500 Indiana Avenue, NW, Room 4230
(202) 879-1410
Monday – Friday: 9:00 a.m. – 4:00 p.m.

If you know either the husband's or the wife's name, (though you should know both to assure accuracy), you can obtain a copy of the divorce. You need a case number, which you can look up in the same room. It costs $0.25 to copy each page and certified copies cost $1.00. The records date from September 1956 to the present.

Driving Records

District of Columbia

Department of Motor Vehicles
95 M Street, SW
3rd Floor
Washington, D.C.
Phone: (202) 729-7021
Fax: (202) 698-0754

Contact Courtney Himbrick at the number above for registration information, driving records, license photos, etc. If she says we don't even need a subpoena, just fax a request on attorney letterhead including as much information as you have available. Call her to confirm that she's received the request.

Maryland

Maryland Motor Vehicle Association
6601 Ritchie Highway
Glen Burnie, MD 21062
(410) 768-7544

Virginia

Virginia Department of Motor Vehicles

www.dmv.state.va.us

Family Services Administration

609 H Street, NE
Fifth Floor
Washington, D.C. 20002
(202) 727-5947 or (202) 698-6220

FSA provides social services, assessment, case management, and crisis intervention services to vulnerable populations; provides oversight for the homeless programs, domestic violence programs, and refugee resettlement programs.

- Adult Protective Services (APS)

  Investigates reports of abuse, neglect, and expatiation of frail, elderly and disabled adults in the District of Columbia. APS also provides case management, counseling, and support services to vulnerable adults who have been abused, neglected, or exploited.

- Teen Parent Assessment Project

  Assesses the homes of teen parents who have applied for TANF benefits, to ensure that the under-18-year-old parents reside with responsible adults in suitable living arrangements and are attending school. Also provides case management and support services, connects teen parents to community-based services, and focuses on the teen pregnancy prevention efforts in the District

- The Office of Refugee Resettlement

  Fosters the expeditious transition of refugees who resettle in the District of Columbia from dependency on public assistance to economic self-sufficiency and self-reliance. This office provides social services, cash, and medical assistance to eligible refugees and their families through sub-grants to community-based social service agencies that work with refugee populations. Programs concentrate on preparing clients for employment, job placement, English language training and support services.

Fire Fighters and Fire Department FOIA Office

441 4th Street, NW, 1st Floor
(202) 727-1600
Monday – Friday: 8:15 a.m. – 4:45 p.m.

This is a report the Fire Inspector fills out at the scene of the fire, and is a description of his/her findings. It is written in a code that they are happy to explain to you, and indicates if the inspector thought it was arson or not, what started the fire, it anyone was hurt, etc.

The FD 23 is filled out for every fire incident. Information included on this report includes the cause of fire and/or the origin etc. The FD 23A is only filled out for arson cases. Information included on this report includes the names of witnesses and suspects. The FD 193 includes a diagram of the scene in question. <u>These three forms can be subpoenaed from 441 4th Street, NW.</u>

To obtain the report you need to go to their office and fill out a Freedom of Information Act form. You need the date and the location of the fire. If they have the information, they will give it to you right away, but it takes approximately two weeks after the fire for the report to be transferred to their office. Be aware it may cost $1.50 per copy of each report.

To speak with the Fire Inspector, note on the FOIA form this request and an appointment will be made for you.

To speak with fire fighters, retrieve the fire incident report, and then write a letter on attorney letterhead to the Battalion Chief Alvin Carter, 1923 Vermont Avenue, NW, Washington, D.C. 20001. The telephone number is (202) 673-3331. Include the date, location and report number of the fire in your letter. They will call you and set up a time and place for you to talk with the fire fighter(s).

Fire Fighter Locator: (202) 673-3292

<u>Funeral Records</u>

Many funeral homes have a guest log, which is a book for people to sign either at the service or at the reception. This is a good way to find out about people who knew the decedent. These books are given to a family member, most often the one who arranged the funeral. Some funeral homes may keep copies.

<u>Guns</u>

<u>Ballistics websites:</u>

- www.firearmsid.org
- www.afte.org
- www.securityarms.com

<u>Tracing of Guns</u>

If a gun needs to be traced, the following agencies may be of assistance:

ATF
Kevin Shipp
(202) 648-8059
If you need to trace a gun recovered in D.C., you can call Mr. Shipp and he will fax you the information.

National Criminal Information Center
Operations Unit, Room 7235
J. Edgar Hoover Building
9th and Pennsylvania Avenues, NW
Washington, D.C. 20535
(202) 324-2611, ext. 2311

Federal Bureau of Investigation
(202) 324-3000 or (202) 324-7432

The Metropolitan Police Department
Room 2058
(202) 727-4275

In Maryland: State Police Headquarters
Licensing Division
7751 Washington Boulevard
Jessup, MD 20795
(410) 799-0191

Subpoenas should be made out to Major Richard Stuff, Commander of Licensing Division. Include the full name, date of birth, Social Security Number and race. You should expect this to take approximately one to three days. You can fax a copy, to get the search started. However, **YOU MUST MAIL THEM THE ORIGINAL SUBPOENA.** Make sure you call them and let them know that you are faxing and mailing the subpoenas.

Procedures
One procedure for gun tracing is as follows:

1. Obtain the Manufacturer and serial number from the police reports.

2. Call the gun manufacturer. (If you do not have the manufacturer's number, call a gun store, the Virginia yellow pages are a good place to look, and ask them if they have the phone number for that manufacturer.) They should need only the gun's serial number to give you the following information:
*the caliber of gun

*the model number and nomenclature of the gun
*physical characteristics of the gun (color, length, revolver/semiautomatic)
*to whom the gun was sold
*the date the gun was sold
*the address and phone number of the owner of the gun
*possibly a purchase order number or shipping number. This is helpful when calling the next gun owner party.

3. Call the owner of the gun

a. If it is a distributor or store, get the following information:
*when it purchased the gun
*when it sold the gun
*to whom it sold the gun
*the address and phone number of that person or company
*any shipping or purchase order number

b. If it is a private citizen, get the following information:
*when he or she bought the gun
*was the gun stolen or sold (how it left his or her possession)
*if it was stolen, did he or she file a police report
-when, where, what happened
-get the police report
*how often did he or she fire the gun
*distinguishing features of the gun, modifications, new sights etc.
*talk to your lawyer about getting a statement
*find out as much as possible about this person

Haines Criss-Cross Directories

For addresses, proper names, and telephone numbers.
Martin Luther King Public Library also has the Criss-crosses from the last five years for the District of Columbia ONLY.

Addressokey Section: Contains a list of all addresses in D.C., Suburban Maryland and Virginia where phones with published telephone numbers are located. It is indexed alphabetically by street name, then numerically by address. The name of the occupant and the telephone number at that address are listed.

Telokey Section: Indexed by telephone number. Lists the name and address of the person in whose name the telephone is listed

The Library of Congress has Criss-cross directories for most of the major cities in the USA. They are located in the Public Reading Room in the Thomas Jefferson Building.

Homeless Information

The Criminal Practice Institute Manual has a lot of information regarding homeless resources: the names of shelters, soup kitchens, drop-in centers, clothing distributors, etc., are contained in Chapter 10, and it is available from your attorney. **Also see Homeless Information Resource Guide – available from the Internship Coordinator.**

There is a list of homeless shelters for the D.C. Metro area at the websites below:

- http://www.interfaith-metrodc.org/efsd2000/efsd_shelters.htm
- http://www.streetsense.org/links_dir.jsp

Homeless Shelter Records

Shelter Hotline: (202) 727-3250

Most shelters keep track of residents. They must sign in every night, and often must note their social security number. However, shelter management seldom verifies names and numbers. Most shelters are willing to show you the records without a subpoena, although some may require it.

Use this website for a list of Homeless Shelters in D.C. and the surrounding area:

- www.interfaith-metrodc.org/efsd2000/efsd_shelters.htm

Immigration and Customs Enforcement – Department of Homeland Security

Washington District Office
2675 Prosperity Avenue
Fairfax, VA 22031
(800) 375-5283
www.uscis.gov

There are several steps you can take to obtain immigration information on a client or a witness.

Go to the Homeland Security website – http://www.dhs.gov/dhspublic/. At the top of the page, there is a link which says 'Contact Us.' Click on that and it will take you to a page with some general contact info. At the bottom of that page there will be a pull-down menu which says 'Pick a Category.' Pull that down and click on 'Immigration.' This will send you to a page where you can put in your name, email, and type a message to the DHS. Write a simple message, something along the lines of 'looking for immigration information for a witness in a criminal case.' Put in your contact info as well.

Within a day or two of putting in that message, someone from the Immigration and Customs Enforcement (ICE) will call you. With only the witness's first, last name and his DOB, they

should be was able to pull his or her whole immigration file. You can find his or her legal status, where and when he or she entered the country, his or her Alien Resident Number, his or her Social Security Number, how many times he or she has re-applied for temporary protected status, and if there are any deportation proceedings currently pending against him or her. Their procedures have changed many times recently. If you have questions about this process, contact:

Christopher Vetter
Associate Legal Advisor
Commercial and Administrative Law Division
Office of Principal Legal Advisor
Immigration and Customs Enforcement
Phone: (202) 514-8157
Fax: (202) 514-0455

FOIA office of Immigration and Custom Enforcement
Katrina Pablik, Director of FOIA
(202) 245-2305

Internet Logs

American Online (AOL):
To subpoena internet logs or subscriber information from AOL, send a subpoena with a request on attorney letterhead, including as much information as possible, to:

AOL Legal Department
22000 AOL Way
Dulles, VA 20166
Fax: (703) 265-2305

Myspace.com – see "Myspace" in this section

License Tags – Tracing Stolen Tags

Every time a vehicle is stolen, a 251 will be filed, which is available in the Public Documents Section of MPD. This is the Deputy's Office, Room 3075. You will need to know the license plate number and they can tell you the address and date it was found as well as the owner of the car.

The Auto Theft Division (3rd Floor, 300 Indiana) keeps a list of car owners they deal with each year. They also keep a list of tags that have been stolen, whether the car has been recovered or not.

Lock-up Lists

Available from the CJA office. Good for a proper name, warrant numbers and PDID numbers. The lock-up list is a list of people who were locked up on a given day, the charge and the lawyer

assigned. They are useful if you know that someone was locked up on a charge on or around a certain day, and you need to find out the real name, or if you suspect a conflict of interest because of a co-defendant.

Lusk's Real Estate Assessment Directory

Martin Luther King Library
Washingtonian Room
901 9th Street, NW
Washington, D.C.
(202) 727-1126

This book lists every street address in the city, organized by quadrant. It lists the name of the owner of the property, his or her phone number, the square feet, lot number, what the property is being used for, how the area is zoned, what kind of neighborhood it is, and the assessed value of the property.

Marriage Bureau

500 Indiana Avenue, NW, Room 4485
(202) 879-4840
Monday – Friday: 8:00 a.m. – 5:00 p.m.

You can obtain certified certificates of marriage containing information on ages, place of residence, former marriages and relatives of the bride and groom. The Bureau's records, dating back to 1811, are organized by the year and the approximate month of the marriage. Each yearbook contains an alphabetical listing of every groom and is printed next to the name of both the bride and the groom. There is a $5.00 fee for a certified copy of the "Proof of Marriage" certificate unless you bring a written request on attorney letterhead. (The fee for a copy of the entire marriage application $12.00.)

Medical Examiner's Office

19th and Massachusetts Avenues, SE
D.C. General Hospital Complex
Monday – Friday: 8:30 a.m. – 4:30 p.m.
(202) 698-9000
(202) 698-9111 (Records)
(202) 698-9100 (Records Fax)

Autopsy reports are ready roughly five to six weeks after the death. When subpoenaing the ME's report, give the name of the decedent and the approximate date of the autopsy. If you want toxicology reports, you must list it specifically on the subpoena. The turn around time is about three days. If you ask for Ms. Budd, she said you can call first to give the information and then bring the subpoena with you when you pick up the report so you don't have to go there twice.

Medstar

100 Irving Street, NW, 6th Floor
Contact: Brent Al Henry
Vice President of General Counsel
Legal Department
(202) 877-7000

Medstar is the emergency helicopter based as the Washington Hospital Center. Medstar keeps tapes of helicopter runs for 30 days. Issue subpoena at the Legal Department. Include the date and approximate time of the helicopter response. **Also, see Washington Hospital Center in Hospital listing.**

Myspace.com (procedure changes quite often)

To subpoena someone's Myspace page, you must first view his or her profile. At the bottom of the web browser you'll see something like http://:www.myspace.com/viewprofile/friendid then eight or nine digits; these are the ID numbers for that person's page that you need to put on the subpoena. You can also list more than one ID number if you're not sure you have the right person. If the person no longer has a Myspace page, you can try to use his or her email address. The person's mailing address won't help because they don't ask for that information. You can fax the subpoena using the information below:

Custodian of Records
P.O. Box 17839
Beverly Hills, CA 90209

OR

Custodian of Records
1333 2nd Street
1st Floor
Santa Monica, CA 90401
Fax: (310) 356-3485
Phone: (888) 309-1311
Email: compliance@myspace.com

National Capitol Planning Commission

D.C. Office of Planning
801 North Capitol Street, NW
(202) 442-7609

Do aerial maps for free (see aerial maps).

National Press Club Library

13th and E Streets, NW, 13th Floor
Monday – Friday: 9:00 a.m. – 6:00 p.m.
After Labor Day Monday – Friday: 9:00 a.m. – 8:00 p.m.

You can find copies of newspapers form all over the world here.

Newspaper Articles

Martin Luther King Library maintains microfilm of local and some national newspapers. You can also log on to **Nexus** and research articles.

Office of Police Complaints (OPC) and Police Complaints Board (PCB)

1400 I Street, NW
Suite 700
Washington, D.C.
Phone: (202) 727-3838
Fax: (202) 727-9182
Attn: FOIA Officer

Records from old CCRB (Civilian Complaint Review Board) were transferred to MPD. CCRB previously recorded and investigated complaints made by citizens against police officers, and subsequently made recommendations to MPD for action. Only those records made before the closing date are available. The files were kept in two ways: by the officer's name and by the complainant's name. For pending cases, only the complaint form with a narrative of what happened and the complainant's name, address and telephone number is available. For some closed cases, the entire file is open to view; for others, only the complaint form is available. Complaints made after that date are investigated by the Internal Affairs Division and are not available at all.

Please submit a FOIA request to OPC to get civilian complaints on MPD officers.

Potomac Electric Power Company (PEPCO)

John J. Sullivan, Esq. – Suite 1100
701 9th Street, NW
Washington, D.C. 20068
Monday – Friday: 8:00 a.m. – 5:00 p.m.
(202) 872-2282 or 331-6575
(202) 872-3281 (fax)

Post Office

To find out which offices serve which areas, call the National Control Center at (888) 876-5322. The addresses of Post Offices can be obtained from www.usps.gov.

Forwarding addresses can be obtained by going to the Post Office that served the individual's old address. You must bring the appropriate form on CJA letterhead to request the forwarding address. The form, which should include the full name of the person (if possible) and his or her last known address, is available on the USPS website.

Additionally, you can go to http://www.usps.com/ncsc/locators/find-is.html to find the closest postal inspection station to the address for which you are seeking forwarding info. Just fax a request on attorney letterhead to the closest post office to that address.

Zip Codes

To find out the zip codes of anywhere in the USA, call the Main Post Office at 635-5300. Alternatively, you can reference the "United States Zip Code & Post Office Director" found in the Internship Office.

Pre-Trial Services Agency (formerly Bail Agency)

633 Indiana Avenue, NW
Monday – Friday: 7:00 a.m. – 5:00 p.m.
(202) 727-2911

This agency maintains files on every person formerly or currently on bail. Their files contain such information as addresses, relatives, employment history, etc. You should know the date the person was arrested and what he or she was charged with.

Contact Michael Gunn at (202) 727-2943 if the subject is on release or Trudy Van Voorhis at (202) 727-4830 if the subject is pending release. The agency also has a branch in the Courthouse at (202) 727-2937. The main office is open 24 hours a day, seven days a week.

Pre-Trial Services Report

Available in open and closed court jackets for every D.C. case. You need the docket number for the case in order to get the jacket.

A wonderful source of information for addresses, relative's names, friend's names, jobs, school, etc. Pre-Trial Services interviews the defendant upon arrest, and determines if the defendant has ties to the community, if the defendant is working, where he or she is living and with whom, etc. Pre-Trial Services attempts to verify this information.

Prisoner Transport Records

A list kept by the U.S. Marshals of every prisoner they escort each day from either the D.C. Jail or CTF. Can be obtained from the PDS Trial Chief or from the U.S. Marshal's office in the Courthouse.

Public Works

Office of Public Space Permits and Records
613 H Street, NW, Suite 616

In order to establish that a police officer observation point was from a certain distance away from the subject of observation, you should call the Department of Public Works. You will be provided with D.C. street surveys with widths of all D.C. streets. You can get a copy of map section and have it certified for use in trial.

Radio and TV Reports

9904 Colebrook Avenue
Rockville, MD 20854
(301) 279-5538
*Provide uncut, original versions

Video Monitoring Services of America, L.P.
National Press Building
529 14th Street, NW
Washington, D.C. 20045
(202) 393-7110

These agencies will do a search for a particular clip that aired on the news within the past 28 days. They will make a copy of all the clips that aired on every station within that period which pertain to the case you desire. If you wish to obtain information that was on television dating before the 28 days, you must go to each actual television station and request a copy.

Freelance Video Production
4000 Albemarle Street, NW, Room 406
Washington, D.C. 20008
(202) 362-6535
Contact: AJ Piloce

This agency keeps record of news programs for Channels 5 (FOX), 7 (WJLA/ABC) and 9 (WUSA/CBS). When provided with an approximate date and time of the broadcast, the channel, and a description of the event they can search out and compile news broadcasts and copy them to videotape. The service costs $45.00 plus tax per segment (and $5.00 shipping and handling) and your attorney must pay the agency directly.

Videos on Location
11600 Nevel Street
Rockville, MD
(800) 4-VIDEOS

This is a full service video production agency. You can get copies of videos when you give them information about the broadcast.

Real Property Database

The D.C. government maintains a database of tax assessments and sales records for real property (land and houses) online. The link is: http://otr.cfo.dc.gov/otr/cwp/view,a,1330,q,594345.asp.

It's useful if you're trying to find out who owns a building. The two databases aren't duplicates; some properties will show up in one but not another.

Recorder of Deeds

515 D Street, NW
Lot and Square Department - Room 304
Monday – Thursday: 8:15 a.m. – 4:00 p.m., Friday: 8:15 a.m. – 1:00 p.m.
(202) 727-5204

You can locate the current or last owner of any piece of property in the District. Helpful in trying to find witnesses who lived in what are now abandoned buildings.

Rental Car Information

Enterprise
Enterprise Leasing Company, Maryland Regional Office
Lost Vehicles Phone: (301) 208-6860

By calling the number above and providing the license plate number or the VIN, you can obtain the claim number (for a rental car that has been stolen/carjacked). You can then send a subpoena with the claim number asking for all documentation regarding the lost or stolen vehicle. This information may include rental logs and a computer log of all contacts about the investigation of the lost/stolen vehicle. Subpoenas can be faxed to (866) 389-6423.

Roads

613 G Street, NW, Room 616
West Potomac Building

You can find out the width of any road in D.C., and exactly where the D.C./Maryland line is in relation to curbs and sidewalks. They have copies of all the surveyor's maps on file, cards that list how wide the right of way is for any road at any given point, how wide the sidewalk area may be, and how much further back the right of way goes behind the sidewalk to the property line.

School Information

D.C. Public Schools
825 North Capitol Street, NE
9th Floor c/o Leticia Cannady
Administrative Office/Legal Services
Monday – Friday: 8:00 a.m. – 4:30 p.m.
(202) 442-5000
www.k12.dc.us/dcps/schools/schoolsmain.html

To obtain a student's school file, deliver a subpoena to the legal office of DCPS at the above address. The subpoena should be addressed to the DCPS Legal Office. Include the name, address, and DOB of the child. This is for the traditional school file and will not include any disciplinary actions.

The following is unverified information: Disciplinary actions and resolutions are now kept within the individual school administrations. At the end of the school year, all disciplinary actions are expunged, and the students are allowed to start with a clean record the following year. If you are seeking disciplinary records for the current year, you must go to the administrative office of the school that the student is currently enrolled.

If you need a floor plan or schematics for any of D.C.'s public schools, you can get it from D.C. Public Schools Facilities Management. You need to send a written request to Lucian Coleman at lucian.coleman@k12.dc.us and include your phone number and fax number and exactly what school you need a floor plan for. If you need to talk to Mr. Coleman, call (202) 576-7718 and ask for him by name. He'll be able to tell you what floor plans are available and answer any questions.

For records from Prince George's County Schools, take subpoenas to:
Legal Office
Administration Building
14201 School Lane
Upper Marlboro, MD 20072
(301) 952-6242

<u>Social Security Administration</u>

2100 M Street, NW
(800) 234-5772

To get Social Security records, you should have a full name, DOB, and if possible, a Social Security Number. They can find a person's record by just the name and the DOB under some circumstances, but usually they need the number. You must issue a subpoena.

Social Security records contain a person's name, DOB, place of birth, parents' names, last place of employment, children spouse, and benefits received, among other things.

Before it will release a record, the Social Security Administration requires that you receive permission from the person whose record you requested. It will make an exception if you request your client's record, but in all other cases it will refuse to honor the subpoena.

The records of people who have been receiving benefits for a year or more will take 30 to 60 days to obtain, as they are stored all over the country.

Star Power Communications

Ileana Leon, Custodian of Records
105 Carnegie Center
Princeton, NJ 08540
(609) 720-5736 (Joel Fallon)
Fax: (609) 734-3830
Fax and send a hard copy of subpoena via mail.

Streetlight Branch, D.C.

District Department of Transportation, Traffic Services Administration
Electrical Division, Streetlight Branch
2000 14th Street, NW
(202) 671-2710
Contact: Mike Dorsey
Fax (202) 671-2235

If information regarding malfunctioning streetlights is needed, contact the D.C. Streetlight Branch, which owns and maintains streetlights. PEPCO will only have information regarding the same if the D.C. Streetlight Branch has contracted out with them for repairs. To request information form the Streetlight Branch, submit a request on agency letterhead to Chief Abdi. You must allow 10 working days for processing.

Streetlights: Luminosity Test

R and R Lighting, Inc.
813 Silver Spring Avenue
Silver Spring, MD 20919
Contact: Bill Robertson
(301) 589-4997

R and R Lighting, Inc., is a private firm that will conduct luminosity tests. It can test the streetlight to see how much light it emits, and it can test any area near the light to see how much light is received there. Be sure to get an expert voucher from the court as there will be a fee for conducting the test.

Surveyor's Office

614 H Street, NW
8:15 a.m. – 4:00 p.m.
(202) 727-1121

To obtain the exact property lines for land in the District. To get the information, you need the lot and the square information, available from the tax assessor's office or from Lusk's Real Estate Assessment Directory in the Martin Luther King Library, Washingtonian Room.

Tax Information

To get a W-2 Form, write a letter on attorney letterhead, noting the person's name, address and social security number. With your ID, walk the letter over to 300 Indiana Avenue, NW, Room 4154. Address the letter to:

Custodian of Records
300 Indiana Avenue, NW
Room 4154
Washington, D.C. 20001

You can also obtain an initial application registration to open a business. Again, write a letter on attorney letterhead, this time asking for the initial application registration and updated information on current corporate officers. You can get the corporate officers names and addresses. (If there is more than one location of a business, include the address of the business so they know which one to look for).

Taxi-cab Information

D.C. Taxicab Commission
2041 Martin Luther King, Jr., Avenue, SE
Suite 204
Washington, D.C. 20019
8:30 a.m. – 4:00 p.m.
(202) 645-6018

Files of all licensed D.C. cab drivers. The drivers are classified by race, listed alphabetically. You can find out the name of the company the driver works for, and pictures of the drivers are available. No subpoena is necessary.

Taxi Transportation
3441 Benning Road, NE
Washington, D.C. 20002
(202) 398-0500/0512
Contact: Patty Jordan
Direct line: (202) 398-0512

The following can be obtained from Taxi Transportation:

*the name of the individual who called the cab
*which cab answered the call
*where the cab picked the caller up
*how many times the cab went to particular location
*list of destinations for a particular cab

Telephone

Updated information on contacts for subpoena compliance centers for major phone companies and long distance providers: www.tcpalaw.com/free/addr.htm

Payphones – subpoenaing records through major phone companies will cost about $150.00 per day, though smaller companies (like STS and Comm South) do not charge.

*If you don't know which company operates a payphone, call Patricia Walker at (202) 626-9168. She will look it up and call you back (usually takes about a day). Some one at Bell South, (404) 986-5630, may also look it up for you, even if it isn't their pay phone (if you ask nicely).

StarPower/RCN
Subpoenas can be sent to:
Attn: Simona Smith
Phone: (571) 434-3414
Fax: (571) 434-3401

Verizon (for Verizon Wireless, see "Cell Phone" section)
99 Shawan Road, Room 133
Cockeysville, MD 21030
(410) 393-6074
Attn: Security Office
8:30 a.m. – 4:30 p.m.
(800) 286-9669
(410) 393-6062 Fax

If you can't find information on a number through the internet, you can mail a subpoena to Verizon. The subpoena should be made out to Verizon – (state), Inc. The subpoena should have either a name or a telephone number, and an address helps. Verizon will give you the address or name that corresponds to the information you have. If you have more than one name or number to look up, you need a separate subpoena for each. You can also retain full telephone bills, with itemized calls, etc. Request for call logs can cost up to $150.00 per day.

Long distance toll records can also be subpoenaed. This will give you the number of anyone calling long distance collect, and anyone the person in question is calling long distance. Without a letter of consent, Verizon will notify the person, whose record you

are requesting, that the records are being released to someone, unless you have a nondisclosure statement.

Note: Verizon is a local telephone service. A different company may serve outlying areas. With a subpoena, most telephone companies will provide the same information.

Comcast
Comcast requires a judge-signed subpoena for landlines. Fax subpoenas to:
Comcast Legal Demand Center
Fax: (720) 267-2794
Phone: (800) 871-6298 (ext. 4 for a live person)

Television Stations

The following stations will either give you news tapes or let you look at them at the station, sometimes at cost, if the tapes were broadcast. They destroy those not broadcasted fairly quickly, and may not allow you to see them. Make sure you call them as soon as you know you'll be subpoenaing their footage.

Channel 4, WRC-TV (NBC)
4001 Nebraska Avenue, NW
(202) 885-4000 (Main)
(202) 885-4111 (News)
Contact: Matt Glassman
(202) 885-4433 (phone)
(202) 855-4760 (fax)

Call Mr. Glassman and let him know what footage you are looking for, then hand deliver a subpoena to him. He will work on having it ready for you by the time you deliver the subpoena to him.

Channel 5, WTTG (FOX)
5151 Wisconsin Avenue, NW
(202) 244-5151 (main)
Contact: Micheline Bowman
Phone: (202) 895-3297
Fax: (202) 895-3222

Ms. Bowman will accept service by hand or mail. She will waive the fee and mail the material to you.

Channel 7, WJLA (ABC) & Channel 8
1100 Wilson Boulevard
Arlington, VA 22209
Contact: Bill Lord
(703) 236-9300 (phone – you will get his assistant)

(703) 236-2332 (fax)
You can subpoena Mr. Lord via fax. Call his secretary to confirm receipt.

Channel 9, WUSA (CBS)
4100 Wisconsin Avenue, NW
(202) 895-5500 (main)
Contact: Renee Peace-Carr
(202) 895-5519
Subpoena Ms. Peace-Carr in person at the address above.

Radio TV Monitoring Service
3408 Wisconsin Avenue
(202) 244-1901
Provides tapes for Channels 4, 5, 7, 8, and 9, but they are unable to be used in court.

Telephone Book **NEVER UNDERESTIMATE THE PHONE BOOK!**

Maryland, Virginia and D.C. yellow and white pages. If you need a proper name or address, do not forget to try the phone book.

Traffic Information

Bureau of Traffic Services
Department of Public Works
Ms. Karen Benefield, Acting Chief
2000 14th Street, NW
Washington, D.C. 20009
(202) 939-8092

The Bureau of Traffic Services can provide written verification of traffic signal locations, including stop signs and traffic lights. Send a request in writing on attorney letterhead to the attention of Ms. Benefield at the above listed address. If you need a certified statement to verify that a sign or signal exists, or operates at a particular intersection, that information needs to be specified in the letter.

Traffic Signal Timing and Sequencing Information

D.C. Department of Transportation
Traffic Signal Systems Division
William McGuirk, Chief
2000 14th Street, NW
7th Floor
Washington, D.C. 20009

Include in your written request the particular location or intersection of interest, the case number and name, and a waiver due to indigence. No subpoena is necessary.

Tree Division

D.C. Department of Public Works
4701 Shepherd Parkway, SW
Washington, D.C.
Monday – Friday: 7:30 a.m. – 4:00 p.m.
(202) 767-8532/8967

If you ever have a case in which there is an issue about whether the trees in an area in the District of Columbia had leaves or not, or were a certain height or distance apart. etc., there is a division in the D.C. Department of Public Works that deals with these and other pressing questions.

U.S. Naval Observatory

3450 Massachusetts Avenue, NW
Washington, D.C. 20392-5420
Monday – Friday: 7:30 a.m. – 3:30 p.m.
www.USNO.navy.mil
(202) 762-1438

This webpage explains the entire process and the stipulations:

- http://aa.usno.navy.mil/faq/docs/lawyers.html

You can obtain certified copies of sunrise and sunset times for the District of Columbia, on any given date. Everything must be done through the mail. You must send a letter on attorney letterhead that explains your request (specific date and location) along with the names of the parties involved, the basic caption and nature of the case, and whether the U.S. government is or may become involved. The information is processed one to two days after the request is received. They will mail the report directly to the office for a small fee. If there is an emergency, you may call and pick up the report yourself the next morning. Also if a certified copy is not necessary, then log onto the website and scroll down to "Astronomical Applications" and fill in the requested information.

Vendor License Information

614 H Street, NW
First Floor
Monday – Friday: 9:00 a.m. – 3:00 p.m.
(202) 727-7070

Any vendor who sells on D.C. streets has to receive a license from this office. It may be very helpful to know where (which streets) the vendors normally work on. Because the vendors more

around so much, you may try talking to other vendors in the area and ask if they know where a particular individual is or went. The license information that you receive will give you the home address and telephone number, but this information may be seriously outdated. In addition, it may take some time to get this information from the office; they tend to wait until just a few days before trial. You should, therefore, also look into the D.C. Finance and Revenue Department and/or the IRS for the most current information on the vendor's address.

Veterans Administration

1120 Vermont Avenue, NW (Headquarters)
Monday – Friday: 8:00 a.m. – 3:00 p.m.
(202) 273-5400

Bureau of Vital Records

Department of Human Services
Commission of Public Health
State Center for Health Statistics
Vital Records Division
825 North Capitol Street, NE
Washington, D.C. 20002
Monday – Friday: 8:30 a.m. – 3:30 p.m.
(202) 442-9303
Contact: Ms. Julia Randall (202) 442-9299

You can get certified copies of birth/death certificates for the District of Columbia. Keep in mind that you can get very good physical descriptions on death certificates.

You should make your request on attorney letterhead in addition to a subpoena; they can supply you with the birth/death certificate on the spot. You can address your request to:

Vital Records Division/Legal Office
Center for Health Statistics
825 North Capitol Street, NE
Washington, D.C. 20002

Bring the request and subpoena to the legal office.

For birth certificates, you need the name of the child, the names of the mother and father, the mother's maiden name, the sex and date of birth of the child, and the hospital where the child was born, if possible.

For death certificates, you need the full name of the decedent, and the date and place of death. The certificate contains a physical description of the decedent, his or her residence and occupation, names of relatives and the cause of death.

For Maryland, go to this website to find the information you need:
www.dhmh.state.md.us/html/vitalrec.htm

For other jurisdictions, you must contact the State Department of Health, Bureau of Vital Statistics.

Voter Registration Rolls

Martin Luther King Library
Washingtonian Room
901 9th Street, NW
(202) 727-1126

These are bound computer printouts of all the registered voters in D.C. who have voted in the last four years. Includes names, addresses, voter registration numbers, how many times the person voted in the past four years, his or her party, ward and the date he or she registered. There is also an inactive voters roll, which is a list of voters scheduled for removal from the rolls because they have not voted in four years.

Warrant Office

500 Indiana Avenue, NW, Room 4002
Monday – Friday: 8:00 a.m. – 5:00 p.m.
Saturday: 8:00 a.m. – until the Court is down, between 1:00 p.m. and 3:00 p.m.
(202) 879-1380

Montgomery County Warrants Office
(240) 773-5360

If you have the full name and DOB this office will confirm open warrants and tell you the charge. They can only provide information on Criminal and Traffic warrants. If you need information on search warrants you need to call the records office at (240) 773-5340, and they will tell you which unit responded to the call.

Copies of arrest warrants and affidavits in support of arrest warrants are available here, as well as copies of bench and search warrants. The arrest warrant has the name, address, DOB, CCR number and PDID number of the defendant. The affidavit contains that information as well as the complainant's name, address and a brief description of what the police believe happened.

The arrest warrant must be executed (i.e., the defendant already arrested on that warrant), in order for you to see it or the affidavit. You need to know the date the person was arrested on the warrant and the date of the arraignment. If the person has not been picked up, the arrest warrant and the affidavit are not public information. The only other way that you can see an arrest warrant is if the warrant was nollied, canceled and withdrawn

by the USAO because it decided it did not want that warrant executed. The USAO does not have to disclose its reasons.

Bench warrants are public information, and you can see them whether they are outstanding or not, but you cannot make copies.

If a person has an outstanding warrant, his or her case jacket will be housed in the Warrant Office. To obtain the jacket, you need the docket number, which you can retrieve through criminal information.

Washington Metro Area Transit Authority

Subpoenas go to:

Custodian of Records
Jackson Building
600 5th Street, NW
2nd Floor
Washington, D.C.
(202) 962-1013

Washington Gas Light Company

General Information (703) 750-1000
D.C. Division
101 Constitution Avenue, NW
Washington, D.C. 20080

Virginia Division
6801 Industrial Road
Springfield, VA 22151
(703) 750-9500

To obtain information on the names of customers and whether their accounts are active, or closed. You can also subpoena general information on the customer and the shut-off date.

Weather Information

To obtain information on weather conditions, precipitation, etc., in the Washington area on any given date, consult the monthly weather charts that are filed on the I (Library) drive in the Weather Conditions folder. These reports are sent to us as a courtesy of the National Climatic Center in Asheville, North Carolina. They are behind by three months; therefore, if you need to know the information pertaining to a date between now and three months ago, you will need to contact the National Climatic Center and have a certified copy sent or faxed to you.

Weather History can be obtained at www.wunderground.com (enter the city you would like to check, and then click history and enter the date the get the information).

National Weather Service
(202) 842-5474
NWS will provide you with current weather information within the last 30 days. Nothing before that can be provided.
www.nws.noaa.gov

National Oceanic and Atmospheric Administration
NOAA Central Library
1315 East West Highway
SSMC3, Second Floor, E-0C4
Silver Spring, MD 20910
(301) 713-2600 – Monday – Friday: 9:00 a.m. – 1:00 p.m.
(301) 713-2600 x146 – Monday – Friday: 2:00 p.m. – 4:00 p.m.
Fax: (301) 713-4598
www.orh.noaa.gov/er/lwx/climate.htm

NOAA will provide you with climatological information and a **free** report. They are very receptive to our needs so give them a call and see if they can be of any assistance.

Welfare Benefits

If you need to subpoena anything regarding EBT cards (welfare benefits) contact:

Valencia Gregory
Program Analyst
Electronic Benefit Transaction Unit
441 4th Street, NW
Suite 480N
(202) 727-6260
fax: (202) 727-2299

Youth Services Administration (YSA)

2700 Martin Luther King, Jr., Avenue, SE
St. Elizabeth's Campus
801 East Building
Washington, D.C. 20032-0247
Monday – Friday: 8:15 a.m. – 4:45 p.m.
(301) 497-8100 Office of the Administrator

The Youth Services Administration (YSA) administers a citywide system of services for juvenile offenders. Specifically, YSA provides security, supervision, residential and community support services for committed and detained juvenile offenders and juvenile Persons in Need of Supervision (PINS).

Investigation via the Internet

The Internet is an exceptional tool for use in locating individuals, property, and other useful information. However, as it is an ever-changing medium, the information provided herein should be checked periodically, as more capabilities and/or changes may arise. The rule of thumb when searching on the Internet is: Less is more. In many searches you will conduct, you will get more useful information if you search using just the last name and first initial, as opposed to full names and dates of birth.

1. Locating People
   - Google – www.google.com
   - Yahoo People Search – www.people.yahoo.com
   - Zaba Search – www.zabasearch.com
   - Record Checks – www.recordchecks.com
   - People Finders – www.peoplefinders.com
   - Who/Where – www.whowhere.com
   - Directory Assistance – www.411.com
   - Superpages – www.superpages.com
   - Switchboard – www.switchboard.com

2. Locating Businesses
   - Big Book – www.bigbook.com
   - Switchboard – www.switchboard.com
   - City Directory – www.citydirectory.com

3. Newspaper Sites
   - Washington Post – http://www.washingtonpost.com/
   - Washington City Paper – http://washingtoncitypaper.com/
   - D.C. Express – www.expressnightout.com
   - Newspaper Search Engine – http://ceo-express.com/default.asp

4. Locating Attorneys
   - Martindale-Hubbell – www.martindale.com
   - Lawyers.com – www.lawyers.com

5. Courts
   - Public Defender Service for D.C. – http://www.pdsdc.org/
   - D.C. Superior Court – www.dccourts.gov
   - Federal PD for D.C. – http://www.dcfpd.org
   - US District Court for D.C. – http://www.dcd.uscourts.gov/
   - Virginia Court Records – http://www.courts.state.va.us/
   - Maryland Court Records – http://casesearch.courts.state.md.us/inquiry/inquiry-index.jsp
   - US Sentencing Commission – http://www.ussc.gov/
   - The Sentencing Project – http://www.sentencingproject.org/

6. Corrections
   - Vine Link - http://www.vinelink.com – Nationwide Inmate locator
   - Virginia Jails/Prisons – http://www.delbridge.net/jails.html – contact info
   - Federal Bureau of Prisons – http://www.bop.gov/ – Inmate Locator/Contact Info

7. Law Enforcement
   - D.C. crime stats – http://crimemap.dc.gov/presentation/query.asp
   - D.C. crime stats – http://www.crimereports.com
   - D.C. crime stats and neighborhood info – http://dc.everyblock.com
   - MPD Website – http://mpdc.dc.gov/
   - Blank MPD report forms – http://lefande.com/mpdforms/ – If you look to the right hand side of the website and click on the link that says PD163 Arrest Package you will be directed to blank MPD report forms.
   - Office of the Independent Monitor for MPD – http://www.policemonitor.org
   - Weapons/Guns Info – http://www.securityarms.com
   - Ballistics Info – www.firearmsid.com
   - Handguns Basics/Interactive – http://www.genitron.com
   - Association of Firearm and Tool Mark Examiners – www.afte.org
   - Drug Info – http://www.streetdrugs.org
   - Drug Info – http://www.druginfonet.com

8. Other Government Sites
   - D.C. Government Website – http://www.dc.gov/
   - Washington Metro Area Transit Authority – http://www.wmata.com
   - D.C. Public Library – http://www.dclibrary.org/
   - D.C. Water and Sewer Authority – http://www.dcwasa.com/
   - US Department of Education – http://www.ed.gov/index.jhtml

9. Legal Sites
   - Office of the Independent Monitor for MPD – http://www.policemonitor.org
   - National Legal Aid and Defender Association – http://www.nlada.org/
   - Law Library Resource Exchange – http://www.llrx.com/
   - Legal Ethics – http://www.legalethics.com/
   - Find Law – http://www.findlaw.com/
   - ACLU – http://www.aclu.org
   - Immigration Law Resource – http://www.visalaw.com
   - D.C. Bar Website – http://www.dcbar.org

10. Medical Sites
    - Drug Reference – http://www.thegooddrugsguide.com/index.html
    - Information about Prescription Drugs/Drugs – http://www.rxlist.com
    - American Board of Professional Psychology – http://www.abpp.org/
    - American Board of Medical Specialties – http://www.abms.org/
    - American Board of Forensic Psychology – http://www.abfp.com/

11. Other Resource Sites
    a. Weather
        http://www.wunderground.com – click on “history” to get historical weather information for the city you are searching
        http://www.erh.noaa.gov/er/lwx/climate.htm – National Weather Service Forecast Office for Baltimore/Washington
        http://www.ncdc.noaa.gov – National Climatic Data Center (NCDC) is the world’s largest active archive of weather data
    b. Telephones
        http://www.areacodesonlinelookup.com – Area code search
        http://www.fonefinder.net – to look up cell phone service providers
        http://www.payphone-directory.org – Pay Phone Directory
    c. Maps
        www.earth.google.com – Google Earth
        www.maps.live.com – maps, aerial pictures, bird’s eye view
    d. School
        http://www.greatschools.net – K-12 School Resource
    e. Automobiles
        http://www.wsf.carfax.com – Car Fax
    f. Zip Codes
        http://www.usps.com/zip4
    g. Client Services
        http://answerspleaseonline.dc.gov – finding services for clients
    h. D.C. Real Property Database (land and buildings)
        http://otr.cfo.dc.gov/otr/cwp/view,a,1330,q,594345.asp

APPENDIX C

SAMPLE QUESTIONS

The following questions are very basic and include only some aspects of certain offenses. The questions are not designed to replace the specific, detailed questioning of witnesses necessary to elicit the unique facts in a particular case.

I. IDENTIFICATION

A. Questions About the Event Itself

1. Get a detailed narrative of what happened, including where the witness was coming from, what the witness was doing prior to the incident, and where the witness was going.

2. Who was the witness with?

3. What was the witness paying attention to just before the witness noticed the perpetrator for the first time?

4. From which direction did the perpetrator approach (front, rear, side, don't know)?

5. What was the exact location of the confrontation? (Get this in words and try to have the witness draw a diagram of the scene.)

6. Exactly what happened? Was there more than one person involved? (Get the exact and relative roles of the persons involved.)

7. If there was more than one perpetrator, find out which one is supposed to be the defendant. (Where was the defendant at all times, in absolute terms and in relation to the other perpetrators and witnesses?)

8. Which perpetrator made contact with the witness?

9. When did the witness first notice the perpetrator(s)? How far away were they? What drew the witness's attention to the perpetrator(s)?

10. Was anything taken from the witness? What was done with it after it was taken?

11. In which direction or to where did the perpetrator(s) flee? For how long after the incident did the witness keep the perpetrator(s) in sight?

B. Opportunity to Observe

Witness's state of mind

1. What had the witness been doing prior to the incident?
2. Had the witness been drinking or using any drugs?
3. Where was the witness going at the time of the incident?
4. How much sleep had the witness had the night before?
5. Was the witness tired? Preoccupied?
6. Was the witness frightened?
7. Was the witness focusing on a weapon during the incident, or on another individual?

Physical conditions of observation

1. What was the distance between the witness and the perpetrator when the witness first noticed the perpetrator?
2. What was the distance between the two of them during the majority of the incident?
3. What was the duration of the incident? (If it was a long time, split it up into parts. The witness may not have had a good opportunity to view during some of the segments or may have been focusing on one particular item or person.)
4. What was the angle of observation between the witness and the perpetrator?
5. What is the witness's hearing like? Vision?
6. How long did the incident take? (**NOTE**: Time is **very** important. Most witnesses will say that an event took minutes when it actually took seconds. Demonstrate how long a minute is – the time may be cut considerably.)
7. What were the weather conditions like? (Sunny, rainy, overcast, stars out, etc.)
8. What were the lighting conditions? Were there streetlights, house lights, car lights, etc.? Was any of the lighting filtered or obstructed? Get exact locations of all lights. Were the streetlights high or low intensity? Were there any lights available that were not turned on?
9. Were there any physical barriers or obstructions between the witness and the perpetrator, e.g., cars, trees, or other witnesses?

C. Reporting the Incident

Police

1. How was the incident reported to the police? (Call made? Flagging down a car?)
2. Who reported the incident?
3. How soon after the event was it reported?
4. With whom was the incident discussed?
5. Exactly what did the witness say in giving the report?
6. Did the person to whom the report was made make any statements or say anything?
7. Were there other witnesses who talked to the police?
8. Were there other witnesses who did not talk to the police?
9. Did the police read back to the witness what had been written down? Did the witness change anything or adopt it?
10. Did the witness forget to tell the police anything that the witness is now telling you?
11. What was the initial description the witness gave to the police?
12. Did the witness make a written statement?
13. Was the witness under the influence of any drugs or alcohol when speaking with the police?
14. Has the witness spoken with anyone else about the incident?

Prosecutor

1. Has the witness been to the grand jury? Did the witness testify or only meet with a prosecutor? What questions were asked by the prosecutor and the grand jurors?
2. What was the witness's testimony?
3. Did the prosecutor take notes of the meeting?
4. Who else has met with the prosecutor?

5. Is there anything the witness told the grand jury or the prosecutor that the witness has not told you?

6. Is there anything the witness told you that the witness did not tell the grand jury or the prosecutor?

D. Description of the Perpetrator

1. Age

2. Height (relative to witness or another object)

3. Weight

4. Skin color and complexion

5. Nose (shape)

6. Mouth (shape, especially lips)

7. Teeth – color, missing, crooked, straight, crowded, gaps, unusual shape, noticeable crowns

8. Eyes (color, shape, and positioning)

9. Shape of face (broad, narrow, type of forehead, etc.)

10. Glasses?

11. Facial hair (type, style, color, amount)

12. Hair (style, amount, color)

13. Clothing description (style, color, distinguishing features)
    a. Coat
    b. Hat
    c. Pants
    d. Shirt
    e. Shoes
    f. Any other articles?

14. Any distinguishing or unusual features?

15. Was the perpetrator carrying any object? (Get full descriptions of any weapons: style, type, color, size, where the item came from.)

16. Was there anything distinctive about the perpetrator's voice, the way the perpetrator walked, or any unusual mannerisms?

17. Does the description that the witness gave to you differ in any way from that which the witness gave to the police? Did the witness add anything or leave anything out?

E. Evaluation of the Witness – Background

1. Has the witness ever been a victim of a crime before?

2. Has the witness ever been a witness to a crime before?

3. How articulate is the witness?

4. How certain or sure does the witness appear to be?

5. How anxious is the witness to pursue this case?

F. Making an Identification

1. How was the identification made – show-up, photo array, line-up, caught on the scene, second sighting?

2. What did the police say to the witness before the identification? Did the witness overhear anything being said?

3. What did the police say during the identification?

4. What did the witness say in making the identification? (Exact words.)

5. What did the police say after the identification?

6. Did the police write down what the witness said?

7. Were there any other witnesses around during the identification? How close were they to this witness?

8. Were there other identifications made?

9. What did any other witness say about an identification?

10. Was the witness asked to identify anyone but was unable to do so? (Get full details.)

11. On what did the witness base the identification – clothes, face, relative size, body build?

12. How soon after the incident was the identification made?

13. Did the person the witness identified appear to be different in any way from the perpetrator? (Was there different facial hair? Different clothes?)

14. If there was more than one perpetrator, how was each one identified? (Brought out together in a show-up? Pictures together in one photo array? Together in a line-up?)

15. How certain is the witness of this identification? Did police ask this? What was witness's response?

16. Is the witness more certain now than at the time of the original identification? Have there been multiple identifications that now make the person more certain?

17. If there is more than one person, is the witness more certain of one than the other?

G. Show-up Identification

1. Was the witness taken to the suspect, or was the suspect transported to the witness?

2. Was this show-up at the scene of the crime or at another location?

3. Where was the witness at the time of the identification? (Actual position on a diagram or in detailed words, and relative to the perpetrator.) Could the suspect see the witness? Could the suspect hear the witness?

4. What was said by the police before, during, and after the identification?

5. What did the witness tell the police at all stages (before, during, and after the identification)?

6. What description had the witness given to the police? What description did the police have from other witnesses?

7. Were there police around the suspect when the suspect was brought back? Was the suspect handcuffed? In a police car?

8. Who else was present during the identification? Could other witnesses hear what this witness said? Could this witness hear what other witnesses said?

9. Did the suspect have to do anything during the show-up (e.g., say anything, put on or take off an article of clothing)?

10. What were the viewing conditions at the time of the show-up in terms of lighting, distance from the subject, and general opportunity to observe the person being shown?

11. **NOTE:** Ask all the questions in "Making an Identification" above.

H. Second Sighting

1. Did the witness ever see the suspect again on the street? (When? Where? Under what circumstances?)

2. What did the witness do after seeing the suspect again?

3. Was anyone else present?

4. What was the witness paying attention to just before seeing the person again?

5. What was the lighting?

6. Was anything said to or by the suspect?

7. **NOTE:** Ask all the questions in "Making an Identification" above.

I. Photo Identification

1. Was this the first identification?

2. Were there any identifications or failures to identify at the scene?

3. Where were the photos shown?

4. Were the pictures loose or in a book? What kind of photos were they?

5. Did the police say anything to the witness about the pictures (e.g., that the pictures were all of known rapists, that they suspected someone in the pictures or book, etc.)?

6. How did the police handle the pictures? Did they let the witness look through the pictures on his or her own? Did they sit there with the witness? Did they show the witness the pictures one at a time? How did they lay the pictures out – in a row, in a stack, in two rows? In what order?

7. How many pictures were there?

8. Were all the pictures the same? Same size, same color?

9. What did the police say before showing the pictures?

10. Did the police say anything while showing the pictures?

11. Did the police say anything after the viewing? After the identification?

12. What exactly did the witness do? Did the witness look through all of them and then pick out one? Did the witness stop at one picture and make an identification? After identifying one picture, did the witness go through the pictures again or finish going through them? Did the witness ever turn the pictures over and see the back? Was anything on the back?

13. Was the witness aware of any dates on the pictures?

14. Did the witness write anything on any picture?

15. What exactly did the witness say in picking a picture?

16. Was more than one picture picked?

17. How sure is the witness that the identification is correct?

18. Did the picture differ in any way from the witness's memory of the perpetrator?

19. Did the police write anything down at any time?

20. Where in the stack or book was the person whom the witness identified?

21. What drew the witness to the identified picture?

22. How long did the showing take? Who else was present? If there were other witnesses present, did they view the photos together or separately?

23. What other identifications were made?

24. **NOTE:** Ask all the questions in "Making an Identification" above.

J. Line-up Identification

1. Did the witness go to the line-up? Did the witness identify anyone there?

2. What was the witness told before going to the line-up? Was the witness shown photos before the line-up?

3. How did the witness get to the line-up? (Picked up by the police? With other witnesses?)

4. What was the witness told by the police outside the line-up room?

5. Did the witness ask the police any questions?

6. Did the witness talk to other witnesses while waiting outside the line-up room?

7. How many people were in the line-up room?

8. In what position in the line-up was the suspect standing?

9. Did the witness identify the suspect in the presence of other witnesses?

10. What exactly did the witness say in making the identification?

11. What did the police say to the witness outside the line-up room?

12. What did the witness say to other witnesses, or what did the witnesses say to him or her?

13. What did the witness tell the police? (Especially find out the witness's degree of certainty about the identification.)

14. How sure is the witness of the identification?

15. On what basis was the identification made? (Face, clothes, relative body build?)

16. Was there anyone else in the line-up who resembled the person whom the witness identified?

17. Was there anything different between the person the witness identified and the perpetrator?

18. Did the witness look down the line and then identify someone or did the witness just center on one person?

19. Had the witness ever made another identification in this case? When and how? (Get full details.)

20. Had the witness been shown any pictures recently? (When, how many, by whom, what other witnesses, what was said?)

21. Did the witness ask anyone in the line to do anything, say something, turn a particular way?

22. **NOTE:** Ask all the questions in "Making an Identification" above.

II. ALIBI WITNESS

1. Was the defendant with you on [date]?

2. How do you recall that specific day?

3. How do you recall the specific time?

4. When did the defendant arrive?

5. When did you first see the defendant?

6. Where did you first see the defendant (address, exact place, etc.)?

7. Was the defendant alone or with someone else?

8. Who was the defendant with?

9. Where does that person live?

10. Did anyone else see you and the defendant together?

11. Who?

12. Where does that person live?

13. How long was defendant with you?

14. How do you know it was this long?

15. What exactly did defendant do or say? (As specific and detailed as possible.)

16. Did defendant ever leave your presence during this period of time?
    a. When?
    b. How many times?
    c. How long was defendant gone each time?
    d. When did defendant return?

17. When did defendant finally leave?

18. How do you know?

19. Who, if anyone, left with defendant?

20. Where did defendant go?

21. How do you know?

22. How did the defendant act during the period of time the defendant was with you? (As specific as possible.)
    a. Intoxicated? Drugged?
    b. Nervous?
    c. Excited? Calm?
    d. Normal?

e. Angry? Happy? Sad?

23. What is your relationship with the defendant?
    a. Close friend? Casual friend? Know to speak of?
    b. Relative by blood? Relative by marriage?
    c. Employer?

24. How long have you known the defendant?

25. When was the last time you saw the defendant before [date in question]?

26. Where? What was the defendant doing, etc.?

27. Have you seen the defendant since [date in question]?

28. Where? What was the defendant doing?

29. Are you aware that the defendant is charged with [offense]?

30. How did you learn this?

31. What exactly do you know about the offense?

32. Have you ever talked about the offense with the defendant? (If yes, details.)

33. Have you ever talked with police about the offense? (If yes, details as to when, where, what said, etc.)

34. Have you ever talked with the Assistant United States Attorney about this case? (If yes, details as to when, what said, etc.)

35. Have you testified before the grand jury about this case? (If yes, details as to when, what said, etc.)

36. Have you spoken to anyone else about the offense? (If yes, details as to when, what said, by whom, etc.)

37. Did you ever tell the police, the grand jury, or the prosecutor that the defendant was with you on [date of offense]?

38. Have you previously testified as an alibi witness for the defendant?

39. Have you ever been convicted of an offense? (When, where, disposition.)

40. Where do you now live? Phone number? Length of time?

41. Where did you live before that? Length of time?

42. Where do you work? (If unemployed, how long?)

43. What is your position?

44. How long have you been employed there?

45. Where did you work before that? How long? Position?

III. SELF-DEFENSE

All the following questions should be asked of all witnesses (the complainant, eyewitnesses, complainant's friends and relatives, defendant's friends and relatives, police officers). They **must** be asked in cases where the defense may be self-defense – i.e., all homicides, ADWs, assaults, etc. These questions are not exhaustive, but merely guidelines. Additional questions should be asked and tailored to the particular fact situation involved. The investigator must try to elicit specific instances rather than general impressions, e.g., "he's a bad guy," "always fighting."

A. Evidence of Complainant's Aggressive or Bad Character to Show Propensity for Violence

1. Was the complainant a violent, aggressive person? Always getting into fights, arguments, altercations with people? Threatening people? (Specify details as to when, where, with whom, persons present, outcome, etc.)

2. Did the complainant associate with people with a reputation for assaultive behavior toward others? If so, who were these other people and where do they live?

3. Have you ever known the complainant to carry any type of weapon?

4. What kind of weapon?

5. Did the complainant always carry it? Frequently? Occasionally? (Specify.) Who would know the complainant carried a weapon?

6. Has the complainant ever used a weapon on anyone other than the defendant? (If yes, specify details as to when, where, on whom, injuries, persons present, outcome, etc.)

7. Do you know of the above from personal observation or from what others have told you? (If others, specify details as to who, when, where, etc.)

8. Was the complainant violent, aggressive when sober, or violent only when intoxicated or drinking?

9. Was the complainant known to drink to excess? Use narcotics?

10. Was the complainant ever charged, arrested, or tried for any assaultive behavior against anyone? (If so, details as to date, jurisdiction, result.) (Also find out the details of any non-violent charges.)

B. Defendant's Knowledge of Complainant's Violent, Aggressive, or Bad Character

1. Determine whether the defendant was aware of any of the above factors pertaining to the complainant. If the defendant was aware, obtain the specific details as to how the defendant knew, who told the defendant, when the defendant became aware, etc.

2. Had the complainant ever made threats against the defendant in the past?
   a. To the defendant personally? (When, where, who was present, etc.)
   b. To other people concerning the defendant? (When, where, who was present, etc.)
   c. Did the defendant know of these threats? (How? When? Where? What was defendant's reaction?)
   d. Was the defendant ever present when the complainant made threats to others?

3. Did the defendant know of the complainant's reputation for carrying a weapon?
   a. Does the defendant know this from personal observation?
   b. Does the defendant know this from other people?

C. Prior Relationship Between Defendant and Complainant

1. Have the defendant and the complainant had any difficulty with each other in the past?
   a. When – day, date, time?
   b. Where? (Precise place.)
   c. Who else present? (Full names, addresses, telephone numbers.)
   d. Cause of dispute or altercation?
   e. Who spoke first and what exactly was said?
   f. Any challenges or threats made? What and by whom and response?
   g. Who committed first overt act? What was it? Response?
   h. Did defendant attempt to withdraw?
   i. Were any weapons involved? What type? Who had them? How used?
   j. Anyone injured? Nature and what extent?
   k. Why did the defendant do what he or she did?

2. Did the witness ever tell police and/or prosecutor any of the above? If so, what and when?

NOTE: These questions do not attempt to explore the details of the altercation giving rise to the instant offense, an area that of course must be covered in great detail. Specific questions concerning this area are suggested below.

IV. CRIMES AGAINST PERSONS

A. Where

1. Where did offense take place (address)?
2. Where at this address was the exact location of the offense?
3. Where exactly were the participants when the altercation began?
4. Where exactly were the participants immediately prior to the blow being struck?
5. Where exactly were the participants at the time of the (fatal) blow?
6. Where exactly was the witness during all of the above?
7. Where exactly were all other witnesses during all of above?
8. (Homicide case:) Where at this address was the exact place of death?

B. When

1. When did the altercation begin?
2. When did the defendant arrive on the scene?
3. When did the complainant arrive on the scene?
4. When did the witness being interviewed arrive on the scene?
5. When did the other witnesses arrive on the scene?
6. (Homicide case:) When was the fatal blow struck?
7. When was the offense reported?
8. (Homicide case:) When did the decedent die?

C. What

1. What was the cause of the altercation?
2. What exactly took place and what was said and done by the defendant and the complainant during the course of the altercation?
   a. Who spoke first and what was said? Done?
   b. Any challenge or threats made? What? By whom? Response?

c. Who committed the first physical act?
d. What was it?
e. What was the response?
f. Did defendant try to withdraw or "wade" in?
g. Did the complainant retreat?

3. Were any weapons involved?
   a. Who had them?
   b. Where were they?
   c. What type?
   d. Who used them?
   e. Was the weapon used by defendant visible to the complainant?
   f. Was the weapon used by complainant visible to the defendant?
   g. Were any weapons recovered by the police on or near the decedent? By anyone? Turned over to police?
   h. Did the police recover any weapon from the defendant?

4. What, in your opinion, cause defendant to do what he or she did?

5. (Homicide case:) What if anything did defendant say or do immediately after inflicting the fatal blow?

6. (Homicide case:) What if anything did decedent say or do immediately after receiving the fatal blow?

7. (Homicide case:) Did decedent say anything to police after the fatal blow was struck? What? Where? When?

8. (Homicide case:) Did the decedent say anything to anyone else after the fatal blow was struck? What? When? Where?

9. What, if anything, did the witness being interviewed tell the police? Prosecutor?
   a. When?
   b. Where?
   c. To whom?
   d. Sign statements?
   e. Testify at preliminary hearing? Grand jury?

10. What did other witnesses tell the police? Prosecutor?

11. What did the witness being interviewed do during the entire incident?

12. What did the other witnesses do during the entire incident?

D. How

1. How did defendant, complainant, witness, and other witnesses arrive and leave?

2. How long did entire incident last?

3. How were the weapons used?
   a. By defendant?
   b. By complainant?
   c. By anyone else?

4. How were the injuries inflicted on complainant/defendant?
   a. Where?
   b. How severe?
   c. How many?
   d. Where was person treated?
   e. How did person get there?

5. How many times, if any, did the defendant tell the complainant to leave him or her alone? What was said? Did complainant hear it?

6. How far from complainant was defendant when incident began?

7. How far from decedent was defendant immediately before the (fatal) blow was struck?

8. How many times did the complainant tell the defendant to leave him or her alone? What was said? Did the defendant hear it?

9. How far from the complainant and the defendant was the witness during all of the above?

10. How many people participated in the altercation? Who? What did they do?

V. CRIMES AGAINST PROPERTY

A. Where

1. Where did the offense take place (address)?

2. Where specifically did entry into the premises occur?

3. Where specifically did the taking occur?

4. Where specifically was the perpetrator during entire incident?

5. Where specifically were any witnesses during incident?

6. Where specifically were any occupants during incident?

7. What locations did police dust for fingerprints?

8. What items did police dust for fingerprints?

9. Where on the premises or items were prints lifted?

10. Where was the property stolen from or from where to where was it moved?

B. When

1. When did the offenses occur – date, time?

2. When did the perpetrator first arrive? Leave?

3. When was the offense discovered? By whom?

4. When was the offense reported? By whom?

5. When was the offense recovered – date, time?

6. When was property purchased? Where? Price paid? Is there a receipt? Estimate of value at time of taking? Basis of estimate?

C. What

1. What exactly occurred during entire incident?

2. What exactly was said by perpetrator during entire incident?

3. What exactly was said by each of the witnesses during entire incident?

4. What property was taken by perpetrator?
   a. Complete detailed description.
   b. Unusual characteristics?
   c. How was item identified?

5. What tools were used to gain entrance? How used? Marks left on premises? Any recovered?

6. What weapon, if any, did perpetrator use? (Describe weapon and use.)

7. What items, if any, did perpetrator leave at premises? Where are they now?

8. What information was reported to police?

9. What information was reported to insurance company? When? Where? What company? Result?

10. Was the complainant told by the insurance company that no recovery was possible unless a report was first made to the police?

D. How

1. How did the perpetrator arrive? Depart? (Mode of transportation.)

2. How did perpetrator gain entrance to premises where the property was? How did the perpetrator depart the house? (Detail each.)
   a. Breaking?
   b. Jimmying?
   c. Picking locks?
   d. Slipping locks?
   e. Unlocked entrance?
   f. Let in by occupant?

3. How was any property removed from the premises?

4. How was the property recovered?

E. Who

Answers to questions contained in General Identification section should be obtained, if applicable.

VI. UNAUTHORIZED USE OF MOTOR VEHICLE

A. Where

1. Where was car taken from? Address? Exact location at this address?

2. Where was the car's driver? Address?

3. Where was the car recovered? Address? Exact location at this address?

B. When

1. When was the car taken – date, time? Basis for estimate?

2. When was the car discovered missing – date, time? Basis for estimate?

3. When was the car reported missing – date, time?

4. When was the car driven after the theft – date, time? Duration?

5. When was the car recovered – date, time?

6. When was the defendant arrested – date, time? Statements? Others with defendant? Who was driving? Where in the car was defendant?

C. What

1. What kind of car – make, model, year, color, license plate number, manufacturer's number, mileage at time of taking and recovery, condition at time of taking and recovery.

2. What items, if any, were removed from the car by the user?

3. What items, if any, belonging to user were left in the car?

4. What portion of the car was dusted for prints?

5. From what portion of the car were prints lifted?

6. What prior relationship, if any, existed between the owner of vehicle and the defendant?

7. What police officers were involved in the case?

D. How

1. How was car taken?
   a. Keys in car?
   b. Car jumped?
   c. Another key used?
   d. Ignition locked/unlocked?
   e. Windows/door jimmied/broken?
   f. Slashed top?
   g. Tools used? Describe how.
   h. Permission to drive given to anyone?

2. How did participants arrive on scene? Depart?

E. Who

1. Who witnessed the removal? Recovery? (Details, names, addresses, and what seen.)

2. Who was in car at time of recovery? (Details, names, addresses, positions in car.)

3. Who reported vehicle stolen?

4. Who else participated in removal of vehicle? Use of vehicle?

VII. FALSE PRETENSES, FORGERY, AND UTTERING

A. Where

1. Where did the offense take place (address)?
2. Where specifically did the exchange occur at this address?
3. Where specifically was the defendant during the entire incident?
4. Where specifically were all witnesses located during the entire incident?

B. When

1. When did offense occur – date, time?
2. When did the forger/utterer first arrive?
3. When did the forger/utterer leave?
4. When was the offense reported?
5. When was the property recovered?

C. What

1. What exactly occurred during the entire incident?
2. What exactly was said by forger/utterer during the entire incident?
3. What exactly was said by all witnesses to the incident?
4. What type of identification did forger/utterer use?
5. What type of instrument was used by forger/utterer (check, credit card, etc.)?
6. What property and/or money did forger/utterer get?
   a. Complete detailed description?
   b. When purchased?
   c. Value (at time of purchase and at time of taking)?
   d. How is item identified?
   e. Any unusual characteristics?
   f. Condition at time of purchase and time of recovery?

7. What names were on the instrument?
   a. Payee?
   b. Maker?
   c. Endorser?

8. What exactly did forger/utterer write?
   a. When?
   b. Where?
   c. In whose presence?

D. Who

1. Who else was with forger/utterer? (Detail everything they said and did during entire incident.)

2. Who reported incident?

3. Who responded (MPD, FBI, Secret Service)? Detail everything that transpired thereafter.

E. Photograph

Was photograph of forger/utterer taken when the instrument was passed? If so, where was camera, where was forger/utterer at the time of picture, where is picture now?

F. Handwriting Analysis

This is generally applicable if interviewing the arresting or investigating officer. Probe all the details surrounding the taking of a handwriting sample from the defendant: when, where, who was present, what was written, what was said by all, waiver obtained, etc.

CHAPTER 3

COMPETENCE TO STAND TRIAL

As scientific understanding of the human brain, mental illness and cognition has expanded, so has the responsibility of criminal defense lawyers to consider the many ways in which the mental state of an individual may relate to his or her defense in a criminal case. Navigating effectively in an area where mental health and criminal defense intersect is challenging and highly specialized work. Both the subject matter and the strategic issues are complex. In addition, establishing a constructive attorney-client relationship requires skill, sensitivity and, typically, a great deal of time. For assistance in effectively representing individuals with mental illness or mental retardation, counsel may consider calling upon the attorneys at the Mental Health Division (MHD) of the Public Defender Service, which is located on the grounds of Saint Elizabeth's Hospital. MHD can be reached at (202) 824-2860.

This chapter begins with an examination of the legal standards for trial competence, and moves on to explore the practical aspects of litigating that issue in Superior Court. Although this discussion focuses on competence to stand trial, counsel should be aware that mental impairments that implicate trial competence may also have relevance to other important aspects of the defense case, including reliability of confessions validity of waivers of rights (e.g. *Miranda*, consent to search), and others. A client who is or becomes competent for trial may nevertheless have lacked the ability to knowingly and voluntarily relinquish his or her rights, or may have been particularly vulnerable to the coercive pressures of interrogation. Counsel may also wish to explore the viability of an insanity defense in rare cases involving clients charged with serious offenses who exhibited symptoms of a substantial mental disorder at the time of the offense. *See infra* Chapter 34 for a discussion of the insanity defense.

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***Blakeney v. United States*, 77 A.3d 328 (D.C. 2013).** Trial judge did not abuse his discretion in finding there was ample contemporaneous material to support valid retrospective competency evaluation by mental health experts where neither expert questioned feasibility of making valid retrospective assessment of competence, mental health history was well-documented, and defense attorneys were able to describe defendant's interactions with them and their perceptions of his competence leading up to and at trial.

***Hooker v. United States*, 70 A.3d 1197 (D.C. 2013).** Trial court did not abuse its discretion in declining to vacate conviction and order new trial, instead ordering retrospective competency examination of defendant, where case had proceeded to trial one week after and in front of judge unaware of preliminary incompetency conclusion by Department of Mental Health psychologist and recommendation of motions judge to wait 45 days to schedule next hearing where retrospective hearing took place less than one year after trial, trial court had expressed misgivings about DMH psychologist's preliminary findings, and trial court itself had observed at trial "nothing to suggest that [defendant] was not competent."

***Hargraves v. United States*, 62 A.3d 107 (D.C. 2013) (amended).** Trial judge did not err in determining, without holding hearing, that defendant was competent to stand trial based upon St. Elizabeths' finding of competence. See Bennett v. United States, 400 A.2d 322, 325 (D.C. 1979).

I. STANDARDS FOR DETERMINING COMPETENCE

A. The Controlling Legal Principles

1. The Dusky Standard and Due Process

Competence to stand trial requires that the accused have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding," and a "rational as well as factual understanding of the proceedings against him." *Dusky v. United States*, 362 U.S. 402 (1960). Trial of one who is incompetent violates due process. *Cooper v. Oklahoma*, 517 U.S. 348 (1996); *Medina v. California*, 505 U.S. 437 (1992); *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1966). It is not enough for the individual simply to be "oriented to time and place and [have] some recollection of events." *Dusky*, 362 U.S. at 402. A person who "lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope*, 420 U.S. at 171.

> Unless a defendant is competent, the State cannot put him on trial. Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.

Riggins v. Nevada, 504 U.S. 127, 139-140 (1992) (Kennedy, J., concurring) (citing *Drope*, 420 U.S. at 171-72).[1]

In the case that held the *Dusky* standard for competence applicable to children in juvenile delinquency proceedings, the Court of Appeals explained the due process requirement this way:

> In an adult criminal prosecution, the purpose of an inquiry into an accused's competency is twofold: first, to assure that the accused understands the nature of the proceedings against him and is able to consult with his lawyer in order to prepare a defense, recognizing that a proper defense is essential to the accuracy of the guilt determination process, and, second, 'to prevent the infliction of punishment upon a person so lacking in mental capacity as to be unable to understand the nature and purpose of the punishment.

[1] *See also Medina*, 505 U.S. at 457-458 (Blackmun, J., dissenting), "In the words of […] one of the world's leading criminologists, incompetent persons 'are not really present at trial; they may not be able properly to play the role of an accused person, to recall relevant events, to produce evidence and witnesses, to testify effectively on their own behalf, to help confront hostile witnesses, and to project to the trier of facts a sense of their innocence.' Norval Morris, *Madness and the Criminal Law* 37 (1982)."

In re W.A.F., 573 A.2d 1264, 1267 (D.C. 1990) (citations omitted).

2. Competence may be Raised at any Time

The question of a defendant's competence to proceed may be raised at anytime before trial, during trial, or after trial. D.C. Code § 24-531.02(a) provides that "[a] defendant shall not be tried, sentenced, enter a guilty plea, or be subject to revocation of probation or a transfer proceeding if the court determines that the defendant is incompetent." Thus, it is never untimely to raise a question concerning a client's competence. "[T]he right not to stand trial while incompetent is sufficiently important to merit protection even if the defendant has failed to make a timely request for a competency evaluation." *Cooper*, 517 U.S. at 354. In *Drope*, the trial judge denied defense counsel's continuance motion requesting a psychiatric evaluation, and then failed to suspend trial for a competence hearing in spite of accumulating evidence of the petitioner's disturbed mental state. The Supreme Court reversed for the violation of due process: "Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial." 420 U.S. at 181.

Courts are, however, understandably reluctant to entertain motions that unexpectedly prevent a trial from proceeding on the scheduled date. In *Thorne v. United States*, 471 A.2d 247, 249 (D.C. 1983), the court applied an abuse of discretion standard and affirmed the trial court's denial of a day-of-trial request for a competence determination, where the defense had failed to present *prima facie* evidence in support of its request. *See also Lopez v. United States*, 373 A.2d 882, 884 (D.C. 1977) (affirming trial court's decision not to hold an additional hearing on competence where previous determinations were based on the certificate of Saint Elizabeth's Hospital, three letters from a forensic psychiatrist, several long, detailed conversations between the judge and the defendant that illustrated his understanding of the case and the criminal justice process, and the defendant's unequivocal desire to proceed to trial and strenuous objection to a competence hearing).

3. Relationship Between Competence to Stand Trial and Competence to Waive Rights

Resolving a split among the federal circuits, *Godinez v. Moran*, 509 U.S. 389 (1993) held that a defendant who pleads guilty or waives the assistance of counsel need not demonstrate a higher degree of competence than that required to stand trial. A defendant who is competent to stand trial is necessarily *competent* to waive the rights associated with it. However, the Court cautioned that a finding of competence does not satisfy and is distinct from the requirement of a "knowing and voluntary" waiver of the right. While the focus of a competence inquiry is the defendant's mental capacity and whether he presently has the *ability* to understand, "[t]he purpose of the 'knowing and voluntary' inquiry, by contrast, is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision and whether the decision is uncoerced." *Id.* at 401 n.12 (citations omitted). "In this sense there is a 'heightened' standard for pleading guilty and for waiving the right to counsel, but it is not a heightened standard of *competence*." *Id.* at 400-401.

Extra care must be taken when a defendant whose competence has been in question seeks to plead guilty. Likewise, a motion to withdraw a guilty plea submitted on behalf of such a

defendant warrants careful review. "If issues of competency have been raised on the record, the trial court must conduct 'a specialized hearing to determine the competence of a defendant who seeks to plead guilty.'" *Pierce v. United States*, 705 A.2d 1086, 1089 (D.C. 1997) (citations omitted); *see also Hunter v. United States*, 548 A.2d 806 (D.C. 1988) (reversing where trial court denied, without a "specialized inquiry," appellant's motion to withdraw guilty plea, relying on the court's "personal observations" of appellant).

Since a knowing and voluntary waiver of a constitutional right requires competence as a threshold matter, a defendant whose competence is disputed should not be permitted to proceed *pro se*. "[W]here a defendant's competence to stand trial is reasonably in question, a court may not allow that defendant to waive her right to counsel and proceed *pro se* until the issue of competency has been resolved." *United States v. Klat*, 156 F.3d at 1258 (D.C. Cir. 1998). Indeed, where a competent defendant seeks to waive counsel and proceed to trial, the court may not accept the defendant's waiver unless it also determines that the defendant is competent to conduct his or her own defense. *Indiana v. Edwards*, 128 S. Ct. 2379, 2387-88 (2009).

B. What Is Competence in Real Terms

The *Dusky* standard involves legal conclusions; they are the end of the inquiry, not the inquiry itself. Usually, the inquiry begins with determining whether the defendant is laboring under a mental impairment and, if so, the precise nature of the impairment. The standard diagnostic reference used in the United States, the *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. text rev. 2000) ("DSM") (available from American Psychiatric Association Press, Inc., 1400 K Street, N.W., Suite 1101, Washington, D.C. 20005) contains a taxonomy of a vast array of psychological disorders. However, whether a defendant's condition satisfies the diagnostic criteria for any given disorder listed in the manual is not, by itself, determinative of the question of competence to stand trial. A person can have a diagnosable mental disorder and be able to consult rationally with counsel and assist in his defense. Conversely, a person may have a condition that is not listed in the DSM as a discrete mental disorder, and yet be incompetent to proceed. *See Wilson v. United States*, 391 F.2d 460, 463-64 (D.C. Cir. 1968) (analyzing impact on defendant's competence of retrograde amnesia he sustained in crash that occurred during police pursuit).

A discriminating functional analysis of the impact of a defendant's condition is necessary. The "Competence to Stand Trial Instrument" (CSTI), designed by the Laboratory of Community Psychiatry, formerly part of the Harvard Medical School, contains a useful analytical framework.[2] The CSTI requires evaluation of thirteen functions "related to what is required of a defendant in criminal proceedings in order that he may adequately cope with and protect himself in such proceedings." *Id.* It was designed to standardize, objectify, and qualify criteria for competence in terms relevant to, and understood by, both the legal and medical professions. It provides an excellent focus of inquiry in functional terms on the specific areas in which the client's capacity is in doubt, including, *inter alia*,

» appraisal of available legal defenses;

[2] *Competency to Stand Trial and Mental Illness*, a monograph sponsored by the Center for Studies of Crime and Delinquency, National Institute of Mental Health, DHEW Pub. No. (HSM) 73-9105 (1973).

» unmanageable behavior;
» quality of relating to counsel and planning of legal strategy;
» understanding of court procedure;
» appreciation of charges and nature of possible penalties; and
» capacity to disclose to counsel pertinent facts.

A degree of impairment in a particular function does not automatically render the accused incompetent. Ultimately, the court must consider the impairment in the context of the particular case or proceeding. As the designers of the CSTI state:

> [O]ne or another of the items will not be equal nor is it intended to be. Neither will the weight assigned to a given item by the court in reaching a finding on competence for a particular defendant necessarily apply to the next defendant. Considerations of the weight to be assigned a given item in the case of a particular defendant goes [sic] beyond the scope of what should be expected of the examining clinician. The task for the clinician is the providing of objective data, *the import of which is the responsibility of the Court*.

Id. at 99-100 (emphasis added).[3]

The decision in *United States v. Duhon*, 104 F. Supp.2d 663 (W.D. La. 2000) serves as an illustrative example of the painstaking analysis the court must undertake in order to meaningfully assess a defendant's competence. *Duhon* involved a mentally retarded defendant with significant cognitive impairment due to mental retardation. Doctors at the Federal Correctional Institution in Butner certified Duhon as competent for trial after several months of competence restoration classes (similar to those provided at Saint Elizabeth's Hospital),[4] in which incompetent defendants are taught and drilled on basic criminal justice concepts, such as the roles of counsel, court and jury. Not satisfied that Mr. Duhon's ability to retain and recite words was a valid indicator of his competence, the court conducted a hearing to more fully explore Duhon's capacity to participate in his defense and concluded that he was incompetent. *Id.* at 663-76. In so ruling, the court underscored the importance of tailoring the competence inquiry to the specific disability in issue, emphasizing that the focus of a competence inquiry for an individual with mental retardation will be quite different from the focus for a client with mental illness. *Id.* at 671.

Duhon is indicative of a small number of reported decisions that acknowledge the importance of the defendant possessing "decisional" competence. Decisional competence can be conceptualized as the capacity to make "critical defendant-driven decisions in a minimally rational and self-protective manner."[5] In other words, beyond understanding the judicial process,

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[3] *See also* Shapiro, *Psychological Evaluation and Expert Testimony: A Practical Guide to Forensic Work*, 1-27 (1984), for a forensic psychologist's views concerning competence determinations and related issues.

[4] A questionnaire used to guide competence assessment and training at Saint Elizabeth's Hospital appears in Appendix A at the end of this Chapter.

[5] T. Maroney, Emotional Competence, "Rational Understanding," and the Criminal Defendant, 43 Amer. Crim Law R. 1375, 1391 (2006). This article contains a thorough discussion of many core concepts pertaining to adjudicative competence.

the roles of the various players, the nature of the charges, the potential penalties if convicted, a defendant must be able to make rational, self-interested choices concerning the litigation, especially those choices that are indisputably reserved to the defendant personally: whether to plead guilty or not, whether to try the case to a jury or a judge, and whether to testify or not. This decision-making component of adjudicative competence is implicit in that part of the *Dusky* formulation that requires a defendant to have "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding." 362 U.S. at 402. *See Godinez v. Moran*, 509 U.S. 389, 398 (1993) (applying *Dusky* standard to guilty pleas and cataloging the variety of decisions defendants are called upon to make).

Nonetheless, forensic examiners typically devote little attention if any to the quality of a defendant's decision-making. Defense counsel's role uniquely positions him or her to appraise the defendant's decision-making. If counsel perceives that a client's mental impairment is causing him or her to make irrational, self-destructive decisions about the litigation, counsel should carefully consider whether to make an issue of the client's competence to proceed, guided by the considerations discussed in section II.B.

II. PRACTICAL ASPECTS OF COMPETENCE ISSUES

Competence issues usually surface on first contact with the client and require immediate decisions with important consequences. The Pretrial Services Agency report may refer to recent psychiatric hospitalization, or indicate that the client refused to cooperate with the interviewer or was incoherent. The deputy marshals in the cellblock may inform counsel that the client has been acting strangely. The client's friends or relatives may relate a history of mental instability, and, of course, counsel may notice a problem during the cellblock interview. During the brief period between first contact with a client and arraignment or presentment, counsel must decide whether to pursue the question of competence on the record. As discussed below, raising the issue may well have serious consequences, including commitment for a mental evaluation; it may also jeopardize the client's interests with respect to the bail determination. Counsel must be familiar with the procedures followed when questions about the client's mental condition are raised, and take into account certain basic tactical and practical considerations.

A. The Procedural Framework

In 2004, the District of Columbia enacted the Incompetent Defendants Criminal Commitment Act, (D.C. Law 15-358, codified at D.C. Code § 24-531.01 *et. seq.*) (hereinafter the "2004 Act"), establishing a comprehensive procedural framework for addressing issues raised concerning a defendant's competence to proceed. (See Appendix A for Summary of Mental Examination and Treatment Procedures). Before the 2004 Act took effect, procedures for handling competence issues were governed by D.C. Code § 24-501(a), Super. Ct. Crim. R. 120, and a set of procedural guidelines adopted by the Superior Court, entitled "Court Procedures for Mental Examination of Criminal Defendants."[6] The 2004 Act repealed Section 24-501(a) and replaced it with a

[6] The status of these guidelines prior to the 2004 Act was described in the Comment to Rule 120: "[i]n making any determination pursuant to this rule or considering any other course of action with respect to pre-trial mental examinations of a criminal defendant, the Court shall be guided by . . . 'Court Procedures for Mental Examination of

comprehensive statutory scheme. It is important to note that, though Rule 120 and the court's procedural guidelines are still useful references, they are inconsistent with the new statute in several respects and to that extent are superseded. The following sections summarize the key provisions of the 2004 Act, organized into five distinct phases of the pretrial competence process. This summary appears in a more condensed version in Appendix A to this chapter. However, inasmuch as the Act is rather intricate, neither the following narrative nor the appendix is intended to substitute for a close and careful reading of the Act when the need arises.

1. Screening Phase – D.C. Code §§ 24-531.03(a) through (c)

At any point in an adult criminal prosecution, a probation revocation, or a juvenile transfer proceeding, the court may order an examination of the defendant's competence at the request of either party or on its own initiative. However, the court must have a screening examination done before considering whether to order a full competence examination. The screening examination will be performed either in the cellblock or on an outpatient basis, depending on whether the defendant is released or not. The court may be inclined to postpone the release decision pending receipt of the examination results. However, the statute is clear that the screening examination "shall not delay" the court's determination of either probable cause or bond. D.C. Code § 24-531.02(b)(1). Similarly, the fact that the defendant's competence has been questioned cannot be weighed against his eligibility for release at this stage. *See* D.C. Code § 24.531.02(b)(2). The court must set a return date on the screening exam no more than five days later if the defendant is to be released; no more than three days if the defendant is not released.

Screening examinations are conducted by psychiatrists and psychologists employed by the District of Columbia Department of Mental Health, Pre-Trial and Assessment Services Division. Outpatient exams are performed at the Division's Field Office located in Room C-255 at the courthouse. The field office may be reached at (202) 879-1758. If the defendant is not released, the screening examination is conducted in the cellblock, usually the same day. The division typically returns a report of a cellblock examination the same day or the next business day.

In determining whether to order a full examination and where such an exam will take place, the court must consider the screening report, the arguments of counsel, and any other information available to it. Typically, the court will rely heavily on the screening report in deciding what action to take. Therefore, counsel should not hesitate to contact the examiner before the report is completed in order to furnish the examiner with information about the client's past mental health, counsel's observations of the client during the initial interview, and counsel's own views of the client's competence and the appropriate setting for any further evaluation. The examiner may also be willing to allow counsel to be present during the interview of the defendant.

The report will consist of a brief summary of the interview and a conclusion either that the defendant is competent, or incompetent, or that further evaluation is needed. Though the court is likely to rely on the report, it is not bound by the report, and counsel should freely offer his own observations and arguments to the court regarding the defendant's competence. For instance, the

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Criminal Defendants' as approved by the Board of Judges." The procedures were disseminated by means of the Chief Judge's Administrative Order No. 00-27 (July 18, 2000) (C.J. Hamilton).

report may overstate incompetence if the examiner fails to take into account the exhaustion and stress that many defendants, especially those with mental illness, experience due to arrest, booking, overnight detention, and presentment.

The report may also contain recommendations not required by the statute, such as whether the defendant needs mental health treatment, and whether such treatment can be provided in the community or whether the defendant should be hospitalized. These recommendations may be helpful to a court in determining whether to condition a defendant's release on obtaining mental health treatment, *see* D.C. Code § 23-1321(c)(1)(B)(x), but they are not directly relevant to the statutory criteria, discussed in the next section below, for determining whether to order full examination on an outpatient or inpatient basis.

2. Full Examination Phase – D.C. Code §§ 24-531.03(d) through (g)

If the court decides to order a full competence examination,[7] it must determine whether the examination will be done on an outpatient or inpatient basis. The court may not order an inpatient examination unless it makes a case-specific finding that either an inpatient setting is necessary to conduct an adequate exam, or the defendant is unlikely to comply with outpatient examination. If the defendant is released, the evaluation will be done at the Pre-Trial and Assessment Services Field Office. If the client is detained, the Pre-Trial and Assessment Services doctors will go to the jail to conduct the "outpatient" exam.

If the court decides that an inpatient setting is warranted, it may commit the defendant directly to Saint Elizabeth's Hospital[8] or leave it to the Department of Mental Health ("DMH") to place the defendant in a suitable inpatient facility. Inpatient facilities include Saint Elizabeth's Hospital, other physically secure hospitals for the examination or treatment of persons with mental illness, and physically secure or staff-secure facilities for the examination, treatment, or habilitation of persons with mental retardation. D.C. Code § 24-531.01(6).[9] In any case, the examination must be conducted by doctors affiliated with DMH. The court must schedule a hearing for no more

[7] Whenever a full competence exam is ordered, the court may, by design or inadvertence, order a concurrent examination of the defendant's state of mind at the time of the alleged offense. Inherent in this "productivity" or "criminal responsibility" examination is detailed questioning about the circumstances of the offense. Since such questioning implicates the Fifth Amendment, the examination cannot be ordered unless: (1) the defendant affirmatively raises the insanity defense; (2) the defendant has been found to lack the capacity to waive the defense; or (3) the court reasonably concludes that such questioning is necessary to determine the defendant's capacity to waive the defense. *See Briggs v. United States*, 525 A.2d 583 (D.C. 1987); *Anderson v. Sorrell*, 481 A.2d 766 (D.C. 1984); *Frendak v. United States*, 408 A.2d 364 (D.C. 1979). Counsel should view the form court order to ensure that it has been filled out correctly.

[8] If the court orders an inpatient examination at Saint Elizabeth's, but a hospital bed is not available, the court may not lawfully postpone a release determination under the Bail Reform Act in order to keep a defendant at the jail until a hospital bed comes available. Super. Ct. Crim. R. 120(2). If the screening report recommends emergency hospitalization and the court agrees it is warranted, the court may order emergency hospitalization, provided a statutory basis for hospitalization otherwise exists. *Id.*; D.C. Code § 24-531.03(e). In such cases, Saint Elizabeth's typically admits the person even if the hospital is already at capacity.

[9] Prior to the 2004 Act, the court could only commit to Saint Elizabeth's Hospital for inpatient examination. As of this writing, DMH has not made any arrangements for placing defendants in inpatient facilities other than Saint Elizabeth's.

than 30 days later for inpatient exams and 45 days for outpatient exams. For good cause shown, the court can postpone the hearing for up to 15 days.[10]

3. Judicial Determination of Competence – D.C. Code §§ 24-531.03(d), (f), (g) and 24-531.04(c)

Regardless of the scheduled return date, DMH must submit a report to the court as soon as it reaches a conclusion that: (1) the defendant is competent; (2) the defendant is incompetent; (3) an inpatient setting is no longer warranted; or (4) an outpatient setting is no longer warranted. If the report indicates the defendant is incompetent, it must also indicate the likelihood of the defendant attaining competence in the foreseeable future, or state that no opinion has been formed yet on the likelihood. If the court receives a report concerning an inpatient more than one court day prior to the scheduled return date, the court must hold a hearing the next day and have the defendant brought to court. If the court receives a report that an outpatient requires an inpatient setting, it shall schedule a hearing *as soon as practicable*.

At the hearing, any doctors who participated in the examination must make themselves available to testify. The defendant is presumed to be competent and the party asserting incompetence has the burden of proving incompetence by a preponderance of the evidence. At the conclusion of the hearing, the court must: (1) find that the defendant is competent; or (2) find that the defendant is incompetent; and (i) is likely to attain competence in the foreseeable future; (ii) additional time is necessary to assess whether the defendant is likely to attain competence in the foreseeable future; or (iii) is unlikely to attain competence in the foreseeable future.[11]

If the court finds that the client is competent to stand trial, then the criminal case resumes and counsel must take all necessary steps to protect the client's traditional rights. In particular, counsel should ensure that a bond determination is made or the previous determination is reviewed. *See* Super Ct. Crim. R. 120(3). Counsel should review with the client in detail the results of the investigation and the legal steps taken during the pendency of the competence determination.[12]

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[10] Court orders regarding competence examinations are appealable as collateral orders, *United States v. Weissberger*, 951 F.2d 392, 395-97 (D.C. Cir. 1991); *Farrell v. United States*, 646 A.2d 963, 964 (1994), but the standard of appellate review is onerous. For instance, refusal to order a psychiatric examination is reversible only if it is clearly arbitrary and erroneous. *Holt v. United States*, 486 A.2d 705, 707-08 (D.C. 1985) (trial court found record ''wholly bereft'' of any indication of need for such a report). *Johnson v. United States*, 633 A.2d 828 (D.C. 1993), upheld a refusal to grant a competence evaluation requested several months *after* sentencing because the defendant could not satisfy the manifest injustice standard for withdrawal of a guilty plea.

[11] If the only issue raised by the report is the appropriateness of the setting, the court must make new findings on the issue. If the court orders a change from inpatient to outpatient setting, it must determine the defendant's eligibility for pre-trial release if it did not do so previously. § 24-531.03(e), (f)(2)(C), and (g)(2).

[12] Where there appears to be a viable insanity defense, counsel must thoroughly and carefully discuss with the client whether to raise the defense. It is vital that the client understand that an insanity acquittal will likely entail a lengthy period of confinement, followed by an indeterminate period of court-supervised release. This is especially important in misdemeanor or low-level felony cases, when a successful insanity defense may well result in more time in custody than a conviction would. If the defense and the government ultimately agree to a stipulated not-guilty-by-reason-of-insanity proceeding, counsel should insist that the court conduct a thorough inquiry to confirm that the client's reliance on the insanity defense is knowing and voluntary. *See Walls v. United States*, 601 A.2d 54, 57

If the defendant is incompetent and the court makes either finding under (i) or (ii) above, then the court must order treatment for the restoration of competence. If the court finds the defendant to be incompetent and unlikely to attain competence in the foreseeable future, the court must dispense with ordering restoration treatment and proceed to the extended treatment phase discussed below. This latter alternative should enable persons with untreatable conditions such as moderate to severe mental retardation to avoid lengthy and pointless hospitalization, a disposition that was statutorily mandated prior to the 2004 Act. *See Farrell v. United States*, 646 A.2d 963, 964-65 (D.C. 1994) (statutorily-mandated inpatient commitment following judicial finding of incompetence for trial did not violate due process).

4. Competence Restoration Treatment – D.C. Code §§ 24-531.05 and 24-531.06

If the court orders competence restoration treatment, it must order treatment in the least restrictive setting consistent with the goal of restoration of competence. The court must order outpatient treatment, unless it finds either that an inpatient setting is necessary to provide appropriate treatment, or the defendant is unlikely to comply with an order for outpatient treatment. If the court orders inpatient treatment it may commit the person directly to Saint Elizabeth's Hospital or it may direct DMH or the Department on Developmental Disabilities ("DDS"), or both, to designate an appropriate inpatient treatment facility. If the court orders outpatient treatment, it will direct DMH or DDS, or both, to designate an appropriate treatment provider. Outpatient treatment providers are defined to include DMH, DDS, or an entity or individual that is designated by DMH or DDS to provide competence evaluation, treatment, or habilitation and is licensed or certified under D.C. law to provide services to persons with mental illness or mental retardation, or has entered into an agreement with the District to provide such services. § 24-531.01(10). Currently, defendants are ordered into the Outpatient Competence Restoration Program operated by DMH at its clinic at 35 K Street, N.E.

The court must hold a hearing when a period of treatment it has ordered ends or earlier if it receives a report from the treatment provider indicating that: (1) the defendant has attained competence; (2) there is no longer a substantial probability that a defendant will attain competence during the allowable treatment period; (3) an inpatient treatment setting is no longer warranted; or (4) an outpatient treatment setting is no longer warranted. The court must make findings as to the defendant's competence, and, if the defendant is incompetent, the prospects for attaining competence in the foreseeable future.

Subject to specific statutory limitations discussed below, the court can order commitment for restoration treatment for one or more successive periods of up to 180 days at a time, provided the court finds there is a substantial probability the defendant will attain competence or make substantial progress toward that goal. This comports with the Supreme Court's decision in *Jackson v. Indiana*, 406 U.S. 715, 729-30 (1972), wherein the Court held that the mere existence of criminal charges cannot justify depriving a criminal defendant indefinitely of the protections local civil commitment laws afford to people not charged with a crime. Accordingly, the Court concluded that commitment of those deemed incompetent for trial can last only for:

(D.C. 1991) and Chapter 34 for a more thorough discussion of the procedures and commitment that are associated with an insanity acquittal.

> [t]he reasonable period of time necessary to determine whether there is a substantial probability that [the accused] will attain [trial fitness] in the foreseeable future. If it is determined that this is not the case, then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant.

Id. at 738 (footnote omitted). Even if recovery appears substantially probable, continuing commitment must be predicated on a showing that the defendant is actually progressing toward competence. *Id*.

Beyond the protection afforded by *Jackson*, the statute establishes absolute outside limits on how long commitment for competence restoration treatment can last in the most extreme cases. If the defendant is charged with a crime of violence as defined under the Bail Reform Act, the aggregate period of any inpatient confinement cannot exceed the maximum possible sentence the defendant could receive if convicted of the pending charges. For all other crimes, inpatient commitment cannot exceed the lesser of 180 days or the maximum possible sentence the defendant could receive. In addition, the court's commitment authority is also limited by statutorily-mandated dismissal of the underlying charges – after 180 days of treatment without restoration of competence (and after exhaustion of civil commitment proceedings) in non-violent cases, or after five years in all violent cases, except murder, first degree sexual abuse, and first degree child sexual abuse. *See* D.C. Code § 24-531.08.[13]

5. Extended Treatment Pending Civil Commitment – D.C. Code § 24-531.07

If (1) the court finds, based on the report of a treatment provider and any hearing on the report, that the defendant remains incompetent and it is not substantially probable that he will attain competence or make substantial progress toward that goal in the foreseeable future; or (2) the maximum allowable inpatient treatment period expires while the defendant is incompetent, the court must either release the person in the criminal case or authorize continued treatment for up to thirty days to allow for the filing of a civil commitment petition. D.C. Code §§ 24-531.05(d)(2), 24-531.06(c)(4). If a petition for civil commitment has already been filed, the court may order extended treatment pending final disposition of the petition. *Id*. and D.C. Code § 24-531.07(a)(2).

If the court orders continued treatment to allow for filing of a civil commitment petition, it must hold a status hearing 30 days later to determine whether a petition has been filed. If a petition has not been filed, the court must either release the defendant, or, upon extraordinary cause, allow five more days for the filing of a commitment petition. If the court orders the person's

[13] These statutory time limits are tolled to the extent of any period of time when: (1) the defendant was unable to participate in a screening exam, a full competence exam, or treatment to restore competence due to physical incapacity; (2) the defendant failed or refused to participate in a screening exam, a full exam, or restoration treatment; (3) the defendant failed to appear for a screen, a full exam, or restoration treatment; and (4) a screen, a full exam, or treatment was delayed by a motion, petition, or appeal. D.C. Code § 24-531.11. However, if convicted, the defendant is entitled to credit against his sentence for any period during which he was committed as an inpatient for competence evaluation or treatment. D.C. Code § 24-531.05(d)(3).

release, it may stay the release for 48 hours to give DMH, DDS, or both the opportunity to initiate emergency civil proceedings for the person's detention. If a petition is filed within the initial thirty-days of extended treatment, the court may order the defendant's release from the criminal case, or continue treatment pending completion of the civil commitment proceedings. If the court orders the person's release in the criminal case, it must remand him to the inpatient facility. Upon remand to the inpatient facility, the defendant can request a mental health probable cause hearing (described in Chapter 14 of this manual) within the next seven days, and the hearing must be held within 24 hours.

B. Deciding the Defense Position on Competence and Court-Ordered Mental Examinations

In deciding whether to initiate or resist a competence exam in the first instance, counsel should look first to the client's wishes, and consult with the client to the extent the client's mental condition permits. Counsel should advise the client on the procedures for mental examinations, the reasons competence is in question, the possibility of hospitalization, and the likely impact a commitment for examination would have on the case. Once this information is explained, counsel should ascertain the client's wishes. As a general rule, absent the client's explicit assent, counsel should favor a competence examination only in the most dire circumstances, *i.e.*, when the client is so mentally impaired that to go forward would substantially compromise the client's rights and place the client in serious jeopardy.[14] (*See also* Appendix B for flagging possible competency issues with client).

Counsel should not be quick to substitute his or her own judgment for that of the client. The client's choice may be based on reasoning that is quite rational although different from counsel's. A client may wish to avoid raising the issue because of the prospect of compulsory treatment, or unpleasant prior experiences with psychiatric hospitals, and may even prefer detention at the jail rather than the hospital. The client may wish to avoid the lasting stigma of mental illness that attaches when a competence study is ordered. If the offense charged is not very serious, the client may prefer to proceed to disposition of the case as quickly as possible. On the other hand, a client may favor commitment for examination with the hope that hospitalization will offer stabilization or refuge from a hostile world.

Even if the client appears irrational or communication is impossible, counsel should not jump to the conclusion that the defense should request or acquiesce in a mental examination order, especially in the early stages of the case. The exhausting and frightening pre-presentment process can impair the client's communicative ability. Subsequent contacts may yield better

[14] The Rules of Professional Conduct permit counsel to take protective action on behalf of mentally impaired clients who are unable to protect themselves from imminent and substantial harm, but counsel must: (a) maintain a typical client-lawyer relationship as far as reasonably possible; (b) take only such action as is reasonably necessary; and (c) make only those disclosures concerning the client that are reasonably necessary to protect the client's interests. *See* Rule 1.14 – Client with Diminished Capacity and Comment 7 to the rule. Moreover, counsel's first duties are to abide by the client's decisions "as to a plea to be entered, whether to waive jury trial, and whether the client will testify" (*see* Professional Rule 1.2(a)), and to zealously pursue the client's lawful *stated* objectives (*see* Professional Rule 1.3(b)). The client's impairment may substantially compromise his or her ability to make these key decisions rationally or to hold to self-interested objectives. The Professional Rules recognize that "[t]he lawyer's position in such cases is an unavoidably difficult one." Rule 1.14, Comment 8. For a thoughtful treatment of the subject, *see* J.D. King, *Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant*, 58 Am. U. L. Rev. 207 (2008).

communication as counsel develops more familiarity and rapport with the client. The client may also be under the influence of drugs or alcohol, and a later interview will prove more fruitful.

Tactical Disadvantages for Commitment: Commitment for mental examination creates substantial tactical disadvantages. It inevitably causes substantial delays, which may diminish the government's incentive to dispose of the case by way of a plea to a reduced charge. It can also result in a vulnerable client being subjected to the round-the-clock observation of hospital or correctional staff, who may question him or her about the offense and make a record of his or her responses. Although the 2004 Act prohibits the government from using statements the client makes during court-ordered examination, or using the fruits of those statements, it may be difficult for the defense to prove that evidence introduced by the government at trial actually derived from such statements. D.C. Code § 24-531.10.

Alternatives Means to Obtain Psychiatric Treatment: To the extent counsel perceives a need for psychiatric treatment there are alternative means to obtain it. The client can seek treatment, independently on a voluntary basis, or voluntary treatment can be required as a condition of pre-trial release. *See* D.C. Code § 23-1321(c)(1)(B)(x). The Pretrial Services Agency recently established a Specialized Supervision Unit (SSU) designed to supervise defendants with identified mental health needs. SSU oversees "Options," a program operated in conjunction with DMH and one of its contract providers to furnish intensive mental health services to the neediest defendants. Persons facing misdemeanors or other low-level offenses may be certified to the Mental Health Diversion Court, where they can enter into a deferred prosecution agreement and obtain a dismissal after a period of sustained participation in mental health treatment.

Obtaining release without a competence evaluation will allow the defense to explore the client's background more carefully and ultimately to make an un-pressured and informed decision on how, if at all, the client's mental condition should be made a part of the case. If a court-ordered mental exam cannot be avoided, an outpatient exam should be advocated. Then, at least, the client can remain at liberty and counsel can assist the client in obtaining treatment. Given the potential consequences of court-ordered examinations and the availability of alternatives for dealing with mental difficulties, counsel should resolve all doubts against the examination, particularly if that examination will be conducted on an inpatient basis.

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***Blakeney v. United States*, 77 A.3d 328 (D.C. 2013).** Defense counsel must raise issue of defendant's competency with court if, considering all circumstances, objectively reasonable counsel would have reason to doubt defendant's competency.

C. Additional Considerations During Examination Phase

While a full competence evaluation is pending, counsel may and should file appropriate motions in the underlying case. At a minimum, counsel should demand a preliminary hearing under Super. Ct. Crim. R. 5. The 2004 Act mandates that the court hear and decide any issue raised by motion of the defense or prosecution "if the defendant's presence is not constitutionally required, or, as determined by the court, essential for a fair hearing." D.C. Code § 24-531.02(c).

Generally, a defendant is not required to make significant tactical decisions at a preliminary hearing; indeed, the defendant's presence can be waived altogether. *See generally United States v. Dalli*, 424 F.2d 45 (2d Cir. 1970); *United States v. McPherson*, 421 F.2d 1127 (D.C. Cir. 1969); *Dunnivan v. Peyton*, 292 F. Supp. 173 (W.D. Va. 1968). Thus, the court must grant a preliminary hearing notwithstanding that the defendant's competence is in question.

Unless the case is dismissed, the competence examination will go forward and counsel must begin to prepare for the return. In practice, the examination report will be submitted to the court by DMH's Pre-Trial and Assessment Services Division in outpatient and jail exam cases and by the Forensic Inpatient Services Division in hospital exam cases.[15] If neither side objects to the report, it may be considered a sufficient basis for the court to make a finding as to the defendant's competence. If either party objects, the court must hold a hearing. Super. Ct. Crim. R. 102(3). At a hearing, the defendant is presumed to be competent as a matter of law, and the party asserting his incompetence has the burden of proof. D.C. Code § 24-531.04(b).

Counsel should contact the examiner well in advance of the hearing date to determine whether a hearing is likely and to begin preparing for it. Preparation for the hearing should be as comprehensive as for any other important proceeding where the outcome of the case and the client's liberty are at stake. Well in advance of the hearing, counsel should obtain medical records and other data concerning the client. Usually this will require a release signed by the client.[16] Counsel should interview both experts and lay witnesses with knowledge about the client's competence and share such information obtained from third parties as may be appropriate to the case.

Often, counsel must go beyond the four corners of the examiner's report. Counsel should review and obtain copies of all the underlying notes and records. This review may indicate the need to interview as prospective witnesses any other clinicians who have participated in the examination. If counsel deems it appropriate to have the client examined by a defense-selected expert, funds may be requested from the court through the use of a Criminal Justice Act voucher.

Any doctor who participated in the examination is required by statute to be available to testify at the hearing. D.C. Code § 24-531.03(d)(3). The defense may cross-examine[17] and call witnesses,

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[15] The Quality Assurance Branch of the Superior Court's Criminal Division, (202) 879-1361, is responsible for all court liaison with DMH in pre-trial competence matters. It prepares all mental examination orders and forwards them to the appropriate agencies, and receives reports from the various institutions that may be involved in mental health proceedings.

[16] Except in narrowly circumscribed situations, mental health care providers in the District of Columbia are prohibited from releasing mental health information without the patient furnishing written consent on a form which meets the requirements of both the Mental Health Information Act, D.C. Code §§ 7-1201.01 *et seq*., and federal regulations implementing "HIPAA," the Health Insurance Portability and Accountability Act of 1996. *See* Standards for Privacy of Individually Identifiable Health Information, 45 C.F.R. §§ 160 and 164 (2004). A standard form approved for this purpose by the Department of Mental Health appears as Form 3 in Appendix D to the Department's written privacy policy, available in Appendix D, on the Department's website at http://dmh. dc.gov/ dmh/frames.asp?doc=/dmh/lib/dmh/HIPAAPolicy645.1.pdf.

[17] *See* Chapter 29 for an extensive discussion of how to prepare for and conduct cross-examination of expert witnesses such as psychiatrists and psychologists.

including the defendant, other experts, and lay witnesses, such as nursing and other staff members of any institution where the client may have been treated. Counsel's own observations of the client may be freely advanced, and counsel can invite the judge to take note of the client's demeanor in court. As noted above, such first-hand observations may be as probative as a psychiatric opinion. *Lopez v. United States*, 373 A.2d 882 (D.C. 1977); *Whalen v. United States*, 379 A.2d 1152 (D.C. 1977), *rev'd on other grounds*, 445 U.S. 684 (1980); *United States v. David*, 511 F.2d 355 (D.C. Cir. 1975).

Counsel should also make sure that the inquiry does not stray beyond the appropriate boundaries. Some examining clinicians, as well as prosecutors and judges, confuse or conflate such concepts as incompetence to stand trial, legal incompetence (e.g., incapacity to make a valid will), mental illness, need for psychiatric treatment, and dangerousness due to mental illness. Under *Dusky*, the only relevant factors are whether the defendant has a rational and factual understanding of the proceedings and the capacity to consult with counsel with a reasonable degree of rational understanding. 362 U.S. at 402. Counsel should insist that the court weigh the evidence only in light of these factors and make specific factual findings. *See generally Blunt v. United States*, 389 F.2d 545 (D.C. Cir. 1967); *Hansford v. United States*, 365 F.2d 920 (D.C. Cir. 1966) (*per curiam*).

D. Additional Considerations During Treatment Phase

Once competence restoration treatment is ordered, subsequent proceedings may demand even more from counsel. Whatever the anticipated outcome – restoration of competence or permanent incompetence – counsel should seek as prompt a resolution as possible. Pending such resolution, the client will remain confined to a maximum security unit at Saint Elizabeth's Hospital, or, at risk of being so confined if he or she falters in his or her compliance with outpatient restoration treatment. Counsel can help expedite a resolution by insisting on return dates of reasonable duration, keeping informed about the client's progress, and preparing in advance of the return dates, particularly where a contested hearing is anticipated.

If treatment concludes without the client attaining competence and the court orders extended treatment pending disposition of civil commitment proceedings, counsel should request that the court incorporate in its order explicit, self-executing language releasing the client from the criminal case upon disposition in the civil case. Otherwise, if the client obtains a favorable disposition in the civil case, i.e. outpatient status, or outright release, the client's ability to enjoy that status will be delayed pending a further appearance in the criminal case. In its capacity as the petitioner and custodian in civil commitment cases, DMH is authorized to discharge a patient at any point in the civil commitment proceeding. In addition, the Family Court can order dismissal of the petition and release of a patient if it determines that the patient does not meet the criteria for civil commitment. Unless the order in the criminal case clearly releases the client from the criminal case, the hospital will not exercise its discretion to release a defendant that it deems fit for release. Similarly, the order in the criminal case may conflict with any Family Court order granting relief in the civil commitment case.

E. Involuntary Medication

Some defendants object strenuously to taking psychotropic medication and counsel may be called upon to advocate for protection of the client's qualified right to refuse medication. The 2004 Act contains a provision, D.C. Code § 24-531.09(b), intended to codify the Supreme Court's decision in *Sell v. United States*, 539 U.S. 166 (2003). In *Sell*, the Court held that due process forbids the involuntary administration of antipsychotic drugs for the purpose of rendering a criminal defendant competent to stand trial, unless a court first makes several key factual determinations. First, the court must find that important governmental interests are at stake, considering the specific circumstances of the case. While the government's interest in bringing to trial an individual accused of a serious crime[18] is important, special circumstances may lessen its importance. For instance, a defendant's refusal to take drugs may mean lengthy confinement in the hospital, which would diminish the risk of freeing someone who has committed a serious crime. In addition, the government has a concomitant interest in assuring that the defendant has a fair trial. Second, the court must be satisfied that medicating the defendant will significantly further the state's interest in timely prosecution while also assuring a fair trial. It must find that it is substantially likely the defendant will attain competence and substantially unlikely that side effects will undermine his or her ability to assist counsel in conducting a defense. Third, the court must conclude that involuntary medication is necessary to further those interests, in that alternative, less intrusive treatments are unlikely to achieve substantially the same results. Finally, the court must find that administering the drugs is medically appropriate. 539 U.S. at 180-81.[19]

The Court pointed out, however, that its analysis was limited to scenarios where the *sole* rationale for proposing forced medication is to render the defendant competent for trial. It recognized that other justifications, such as dangerousness, may be invoked for involuntary medication and the inquiry in such situations would look much different and could vitiate the need to consider whether forced medication can be justified on competence-restoration grounds. *Id*. 182-83. The 2004 Act acknowledges this by providing that a criminal defendant may be administered medication involuntarily, on grounds other than competence restoration, if the procedures and standards of general application outside the criminal context are satisfied. D.C. Code § 24-109(a). *See* Mental Health Consumer's Rights Protection Act of 2001, D.C. Law 14-56 (codified at D.C. Code § 7-1231.08) and implementing regulations at 22A DCMR §§ 100 *et. seq.* (2004) ("Consent to Treatment"). In fact, Saint Elizabeth's Hospital routinely initiates treatment from the moment defendants are admitted, even if the court has only ordered examination and not competence restoration treatment. Consequently, involuntary medication issues could arise at the very outset of the evaluation process. Assisting criminal defendants confronted with involuntary medication under these generally applicable standards is a highly

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[18] The Act defines serious crime as a dangerous crime or crime of violence within the meaning of the Bail Reform Act, D.C. Code §§ 23-1331(3) and (4).

[19] In so ruling, the Supreme Court effectively overruled an earlier decision issued by the District of Columbia Court of Appeals in *Khiem v. United States II*, 612 A.2d 160 (D.C. 1992). In *Khiem*, the court had ruled that incompetent criminal defendants enjoy "due process protection only from an unreasonable or arbitrary determination that involuntary medication is appropriate." 612 A.2d at 166. The court upheld an internal hospital protocol for arriving at the involuntary medication decision, and affirmed the trial court's deferential review of that decision. *Id*. at 171-73.

specialized undertaking and attorneys in the Mental Health Division of the Public Defender Service are available for consultation at (202) 824-2860.

APPENDIX A

SUMMARY OF MENTAL EXAMINATION AND TREATMENT PROCEDURES
Under the Incompetent Defendants Criminal Commitment Act of 2004

This outline summarizes the provisions of the "Incompetent Defendants Criminal Commitment Act of 2004," D.C. Law 15-358, that govern the process for examination and treatment of criminal defendants whose competence to proceed has been called into question. It does not address other provisions of the Act such as general provisions and provisions dealing with involuntary medication. Citations are to the codification, which appears at D.C. Code § 24-531.01 *et seq.*

EXAMINATION PHASE

Screening examination:

- Court must order a screening examination before it can order a full competence examination. § 531.03(b).

- Ordering a screen does not eliminate requirement that probable cause be found or that a determination be made concerning release or detention. § 531.02(b)(1).

- If the defendant is detained, the exam will be done in the cellblock and the court must set as early a return as possible, in no event more than three days later. §§ 531.03(c)(1) & (2).

- If the defendant is released, the exam will be done on an outpatient basis and the court must set a return date no more than five business days later. *Id*.

- Examiner must submit written report to court in advance of return, indicating "whether the defendant is competent, incompetent, or whether further evaluation is needed" to reach a preliminary determination. § 531.03(c)(3).

- On return of report, court must consider the report, arguments of the parties, and any other information available, and either find the defendant competent, or order a full examination. § 531.03(c)(4).

Full examination:

- Court will order DMH to conduct the exam and submit a written report. §§ 531.03(d)(1) & (2).

- Court must order outpatient[20] examination unless it finds that:
  - placement in an inpatient treatment facility is necessary in order to conduct an adequate examination, or
  - the defendant is unlikely to comply with an order for an outpatient examination. § 531.03(e)[21]

- If court chooses an inpatient setting, it can commit directly to Saint Elizabeth's or it can commit to DMH and let DMH select an appropriate inpatient facility. § 531.03(e).

- Inpatient treatment facilities are defined to include:
  - Saint Elizabeth's Hospital,
  - other physically secure hospitals for the examination or treatment of persons with mental illness, and
  - physically secure or staff-secure facilities for the examination, treatment, or habilitation of persons with mental retardation. § 531.01(6). [22]

- In any case, the exam must be done by a psychiatrist or psychologist affiliated with DMH. § 531.03(d)(1).

- If the defendant is hospitalized or detained, a return date no more than 30 days away must be set; no more than 45 days for released defendants. § 531.04(a)(1); *see also* § 531.03(f)(1). For good cause shown, the court can postpone the hearing for up to 15 days. § 531.04(a)(2).

Reporting:

- DMH must submit a report to the court in advance of the return date, and
  - for inpatients *as soon as* it reaches a conclusion that:
    - the defendant is competent
    - the defendant is incompetent, or
    - an inpatient setting is no longer necessary to conduct an adequate examination and the defendant would not be unlikely to comply with outpatient examination (§ 531.03(f)(2)(A));
  - for outpatients, anytime it determines that an inpatient setting is necessary to conduct an adequate examination or the defendant is not complying with outpatient examination. § 531.03(g)(2).

- If the report indicates the defendant is incompetent, it must also

[20] In this context "outpatient" really means non-hospital. In other words, detained defendants who are not ordered into an inpatient treatment facility will have "outpatient" exams at the jail.

[21] Dangerousness to self or others, standing alone, is not a permissible basis for inpatient commitment under this statute. Hospitalization on a voluntary or involuntary basis is available under the Ervin Act, D.C. Code § 21-541, *et seq*., and mental health services can be mandated as a condition of release under the Bail Reform Act.

[22] Currently, the only inpatient facility willing to accept adult defendants for competence evaluations is Saint Elizabeth's Hospital, regardless of whether the defendant has a mental illness or mental retardation.

  - indicate the likelihood of the defendant attaining competence in the foreseeable future, or
  - state that no opinion has been formed yet on the likelihood. § 531.03(f)(2)(B).

- If the court receives a report concerning an inpatient more than one court day prior to the scheduled return date, the court must hold a hearing the next day and have the defendant brought to court. § 531.03(f)(2)(D).

- If the court receives a report that an outpatient requires an inpatient setting, it shall schedule a hearing *as soon as practicable*. § 531.03(g)(2).

Hearing on the report:

- Any psychiatrist or psychologist who participated in the exam must make him/herself available to testify at the hearing. § 531.03(d)(3). The court may call its own witnesses and conduct its own inquiry. § 531.04(b).

- Defendants are presumed to be competent. The burden of proof rests with the party asserting incompetence and incompetence must be established by a preponderance of the evidence. § 531.04(b).

- After the hearing, the court must make findings regarding the defendant's competence, and, if incompetent, the likelihood of the defendant attaining competence in the foreseeable future. § 531.04(c)(1).

- If the court finds the person to be incompetent, it must order competence restoration treatment, unless it also finds that the person is unlikely to attain competence in the foreseeable future, in which case the court will proceed to the "Jackson phase" (see below). §§ 531.04(c)(3) & (4).

- If the report recommends a change of setting for the examination, the court must make new findings regarding the least restrictive setting and order the appropriate disposition. §§ 531.03(e), (f)(2)(C), and (g)(2).

TREATMENT PHASE

- The court must order treatment in the least restrictive setting consistent with the goal of attaining competence. § 531.05(a)(1). Accordingly, the court must order outpatient treatment, unless it finds that:

  - placement in an inpatient treatment facility is necessary in order to provide appropriate treatment; or

  - the defendant is unlikely to comply with an order for outpatient treatment. § 531.05(a)(2).[23]

- If the court orders inpatient treatment it may commit the person directly to Saint Elizabeth's Hospital or it may direct DMH or DDS (formerly "MRDDA"), or both, to designate an appropriate inpatient treatment facility. § 531.05(a)(3).

- If the court orders outpatient treatment, it must direct DMH or DDS, or both, to designate an appropriate treatment provider. *Id.*

- Outpatient treatment providers are defined to include:
  - DMH,
  - DDS, or
  - An entity or individual designated by DMH or DDS to provide competence evaluation, examination, treatment, or habilitation pursuant to this title that:
    - is licensed or certified under D.C. law to provide services to persons with MR or MI, or both; and
    - has entered into an agreement with the District to provide services to persons with MI or MR. § 531.01(10).

Duration of commitment for treatment:[24]

- **Inpatient treatment/non-violent offenses:** inpatient commitment for treatment cannot exceed the lesser of 180 days or the maximum possible sentence the defendant could receive if convicted of the pending charges. §§ 531.05(b) & (d).

- **Inpatient treatment/violent offenses:** court can order successive periods of inpatient treatment up to 180 days at a time, provided the aggregate period does not exceed the maximum possible sentence the defendant could receive if convicted of the pending charges, and provided the court finds:
  - there is a substantial probability the defendant will attain competence or make substantial progress toward that goal during the period to be ordered; and
  - inpatient treatment continues to be the least restrictive setting. §§ 531.05(c) & (d).

- If the defendant is still incompetent at the end of any maximum allowable period of inpatient treatment, the court must either order the person's release or authorize

[23] As in the examination phase, dangerousness is not a permissible consideration in determining whether inpatient is the least restrictive setting for competence restoration treatment.

[24] The time limits summarized here are statutorily-created caps. Under the circumstances of individual cases, due process may require termination of treatment much earlier. *See Jackson v. Indiana*, 406 U.S. 715, 738 (1972) (defendant may be held only for the reasonable period of time necessary to determine whether it is substantially probable he will attain competence in the foreseeable future; and any continued commitment must be justified by progress toward that goal).

continued treatment pending the initiation of civil commitment proceedings (see Jackson phase below). § 531.05(d)(2).

- **Outpatient treatment**: in all cases, the court can order successive periods of outpatient treatment up to 180 days at a time, provided the court finds there is a substantial probability the defendant will attain competence or make substantial progress toward that goal during the period to be ordered. § 531.05(e)(1).

- **Dismissal of charges**: the duration of treatment, whether inpatient or outpatient, is also limited by the mandatory dismissal of charges: for *non-violent offenses*, charges must be dismissed if the defendant has not attained competence after 180 days of treatment and proceedings for the defendant's civil commitment are concluded or the opportunity for initiating such proceedings has expired. (See Jackson phase below). The corresponding time to dismissal for *violent offenses*, is five years. The statute exempts *murder, first degree sexual abuse, and first degree child sexual abuse* from mandatory dismissal. §§ 531.08(a) & (b).

- The foregoing time limits are tolled to the following extent:
  - Any time in which the defendant is unable to participate in a preliminary screening examination, a full competence examination, or treatment to restore competence due to physical incapacity;
  - Any time in which the defendant fails or refuses to participate in a preliminary screening examination, a full competence examination, or treatment to restore competence;
  - Any time due to the defendant's failure to appear for a preliminary screening examination, a full competence examination, or treatment to restore competence;
  - Any time from the filing of a motion or petition through its disposition, including any appeals, which prevents or delays the conduct of a preliminary screening examination, a full competence examination, or treatment to restore competence, including involuntary medication. § 531.11.[25]

Review hearings:

- The court must hold a hearing upon the completion of any treatment period ordered or upon receipt of a report from a treatment provider that reasonable grounds exist to believe that:
  - The defendant has attained competence;
  - There is no longer a substantial probability that the defendant will attain competence during the allowable treatment period;
  - (For inpatients) inpatient treatment is no longer the least restrictive setting
  - (For outpatients) outpatient treatment is no longer the appropriate setting. § 531.06(a).

[25] However, the defendant is entitled to full credit against any term of imprisonment he may later receive in the case for time committed to an inpatient treatment facility for competence examination or treatment. § 531.05(d)(3).

- In advance of any review hearing, the treatment provider must submit a report addressing:
    - The defendant's competence, including any progress or lack thereof made toward attaining competence;
    - Whether there is a substantial probability that the defendant will attain competence during the foreseeable future, or make substantial progress toward that goal;
    - (For inpatients) whether inpatient treatment continues to be the least restrictive setting;
    - (For outpatients) whether outpatient treatment continues to be the least restrictive setting. § 531.06(b).

- The court must hold a prompt hearing on the report and make findings as to:
    - The defendant's competence, and
    - If incompetent, the probability of attaining competence or making substantial progress in the foreseeable future, and
    - If further treatment is to be ordered, the least restrictive setting for such treatment. §§ 531.06(a) and (c)(1) through (c)(3).

"JACKSON" PHASE

- If the court finds the defendant incompetent and not likely to attain competence or make substantial progress in the foreseeable future, it must
    - Order the defendant's release, or
    - Order continued treatment in the least restrictive setting for up to 30 days to permit the initiation of civil commitment proceedings (§ 531.06(c)(4));[26] or
    - In cases involving mentally retarded defendants, place the individual with DDS for placement in an appropriate habilitative setting. *See* D.C. Code § 7-1303.12a(c).

- If it orders continued treatment, it must hold a status hearing 30 days later to determine whether civil commitment proceedings have been initiated. § 531.07(a).

    - If civil commitment proceedings have not begun, the court must either release the defendant, or, upon extraordinary cause, allow five more days for filing a commitment petition. § 531.07(a)(1).

        - If the court orders the person's release, it may stay the release for 48 hours to give DMH, DDS, or both the opportunity to initiate civil proceedings for the person's detention. § 531.07(d).

[26] In the unlikely event that a petition for civil commitment has already been filed, the court has the additional option of ordering continued treatment pending final disposition of the commitment proceeding. §§ 531.06(c)(4) and 531.07(a)(2).

- If a petition has been filed, the court can order the defendant's release or continued treatment pending completion of the civil commitment proceedings (§ 531.07(a)(2)), or, in cases involving mentally retarded defendants, place the individual with DDS for placement in an appropriate habilitative setting. *See* D.C. Code § 7-1303.12a(c).

    - If the court orders the release of a person committed to an inpatient treatment facility, it must remand the person to the facility.
    - Upon remand to the inpatient facility, the defendant can request a probable cause hearing within the next seven days, and the hearing must be held within 24 hours. §§ 531.07(b) & (c).

APPENDIX B

COMPETENCY ISSUES

1. Why are you here?
    - For treatment to become competent for trial

2. How do you become competent for trial?
    - Know your charge
    - Know what happens in court
    - Know the function of the judge, jury, prosecution, and defense attorneys
    - Be able to cooperate with your lawyer
    - Know what the police say you did
    - Know pleas and what happens when you take them

3. The next time you go to court, what type of hearing will you have?
    - Competency hearing

4. If the court finds you competent for trial, what will they do to you?
    - Set a date for you to enter a plea

5. What will the court do with you while you wait for your date to enter the plea?
    - The judge can do any of the following:
        - Put you out on bond
        - Release you on your own recognizance
        - Put you in jail
        - Send you back to St. Elizabeth's Hospital

6. What happens if the court finds you incompetent?
    - You are sent back to St. Elizabeth's for further treatment and your competency hearing is rescheduled

7. What happens if you never become competent?
    - Civil commitment proceedings are started. If the Mental Health Commission decides you are still dangerous to society or yourself, they recommend inpatient or outpatient commitment to the civil side of the hospital

8. How serious is your charge?
    - For a misdemeanor, you can receive up to one year for each offense
    - For a felony, you can receive from one year to life for each offense

9. What three pleas can you make to the judge?
    - Guilty
    - Not guilty
    - Not guilty by reason of insanity

10. What happens if you plead guilty?
    - The judge sentences you to either
        - Jail
        - Probation
        - Time served
        - Suspended sentence

11. If you plead guilty, what rights do you give up?
    - Right to a trial
    - Right to an appeal

12. What is probation?
    - A sentence in which you are living in the community under the supervision of a probation officer. Examples of probation requirements are:
        - No change of address
        - Mandatory drug screen for use of illicit drugs
        - Receive outpatient mental health treatment

13. What happens if you plead not guilty?
    - The judge sets a trial date

14. What is a trial?
    - A court hearing to determine if you are guilty or not

15. Who has to be present for a trial to take place?
    - You, the defendant
    - Your lawyer, the defense attorney
    - The government's lawyer, the prosecutor
    - The judge
    - Witnesses
    - Possibly a jury

16. Who is the defense attorney?
    - A lawyer assigned to you to represent you in court. He or she tries to prove that you are not guilty

17. Who is the prosecuting attorney?
    - A lawyer that tries to convince the court that you are guilty

18. What is evidence?
    - Something presented to prove what happened, which may include the testimony of witnesses, fingerprints, weapons, etc.

19. What is a witness?
    - Someone who testifies for you or against you because he/she saw what happened (eye witness) or claims to know something about what happened

20. Can you be a witness for yourself?
    - Yes

21. Do you have to be a witness for yourself?
    - No, you have the right to remain silent: no one can make you testify

22. What should you do if you disagree with the testimony of a witness?
    - Quietly tell your lawyer, so he/she can cross examine the witness

23. What does the judge do?
    - The judge makes sure all rules are followed in court
    - The judge imposes sentences on people who are found guilty
    - If there is no jury, the judge decides guilt or innocence

24. If you chose to have a jury trial, what is the function of the jury?
    - A jury listens to the evidence and decides whether or not your are guilty

25. How many people make up a jury?
    - 12

26. How does a jury make its decision?
    - All 12 members must agree on whether you are guilty or not guilty. If they cannot agree, the judge declares a mistrial. The government then has to decide if they will have a new trial on the same charge

27. Can the judge over-rule the jury's decision?
    - No

28. Who has the "burden of proof" in a trial?
    - The prosecutor must prove that you are guilty beyond a shadow of a doubt

29. What happens in the jury finds you innocent?
    - You are released

30. What happens if the judge or jury finds you guilty?
    - You are sentenced

31. What happens if you plead not guilty by reason of insanity?
    - You have a trial to determine if you were so mentally ill at the time of the offense that you did not know what you were doing

32. What happens if you are found not guilty by reason of insanity by the judge?
    - You are sent back to St. Elizabeth's for 50 days to await a Bolton hearing

33. What is a Bolton hearing?

- A hearing when the court decides, based on doctor's testimony, if you are still mentally ill

34. If the court decides that you are not mentally ill at the Bolton hearing, what happens?
    - You are released

35. If the court decides that you are still mentally ill at the Bolton hearing, what happens?
    - You are returned to St. Elizabeth's for treatment for an indefinite period of time. You are kept there until the court agrees that you are well enough to be released. The average stay is for 4-6 years

36. What is plea bargaining?
    - An agreement between you, your lawyer, and the prosecuting lawyer in which you agree to plead guilty to a lesser charge

37. Who is your lawyer? How can you find out if you don't know?
    - Ask any staff member to assist you

38. When can you call your lawyer?
    - At any time. Often the best time is first thing in the morning or late in the afternoon

CHAPTER 4

THE PRELIMINARY HEARING

When the government charges a defendant with a felony or an indictable misdemeanor,[1] such defendant is entitled to an adversarial preliminary hearing before a neutral fact-finder.[2] Super. Ct. Crim. R. 5(b). The stated purpose of this preliminary hearing is to determine whether there is probable cause to believe that an offense was committed and that the defendant committed it. Super. Ct. Crim. R. 5(d). If, following the preliminary hearing, the court finds probable cause to believe that a crime was committed and that the defendant committed it, the case is "bound over" for grand jury action. If not, the court must dismiss the complaint and discharge the defendant.[3] Super. Ct. Crim. R. 5(d).

Rule 5(d) explicitly states that the "purpose of a preliminary hearing is not for discovery." Nevertheless, the preliminary hearing presents defense counsel with an excellent opportunity to learn about the government's case. In addition, the preliminary hearing presents an excellent opportunity for defense counsel to "lock in" a witness that likely will testify at the trial, and to lay the groundwork for the impeachment of other witnesses at trial. The simple fact is that probable cause is almost always founds at preliminary hearings in Superior Court. That said, when counsel thoughtfully and carefully prepares for a preliminary hearing, she can greatly advance her client's ultimate interests of winning at trial or securing a favorable negotiated resolution with the government. Super. Ct. Crim. R. 5(b).

I. PROCEDURES

Time Limits: The preliminary hearing must be held within ten days of presentment if bond is imposed or the defendant is held under D.C. Code § 23-1325(a) (first-degree murder, second-degree murder, and assault with intent to kill while armed). If the defendant is released at presentment, the hearing must be held within twenty days. Super. Ct. Crim. R. 5(d)(2). For those who are held under D.C. Code § 23-1322(a) or (b), the hearing must be held within five days if the government asks for a continuance, or within three days if the arrestee asks for a continuance. § 23-1322(d)(1). Absent the defendant's consent, these time limits may be extended only upon a showing that extraordinary circumstances exist and that delay is indispensable to the interest of justice. *See* Super. Ct. Crim. R. 5(d)(2).

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[1] *See* Super. Ct. Crim. R. 114. Indictable misdemeanors are generally those misdemeanors that are joined with a felony charge against the defendant or a joinable defendant, for example when possession of drugs is charged against the buyer and joined with a felony distribution charge against the seller.

[2] The adversarial preliminary hearing that Rule 5 provides may not be constitutionally mandated. The Fourth Amendment requires prompt judicial determination – which may be based on an *ex parte* showing – that there is probable cause to believe the defendant committed an offense. *Gerstein v. Pugh*, 420 U.S. 103, 120-22 (1975). Although a non-adversarial hearing, where permitted by local rule, is not a "critical stage" of the prosecution, an adversarial preliminary hearing such as that required in this jurisdiction is a critical stage in the prosecution, to which the Sixth Amendment right to counsel applies. *Id*. at 122-23.

[3] If an indictment or information is returned before the scheduled preliminary hearing, as often occurs in drug cases, the right to a hearing is lost. *See* Super. Ct. Crim. R. 5(d)(2).

Immediate Hearing: In general, counsel should request an immediate hearing if the client is likely to be released, i.e., has good social factors such as ties to the community, minimal criminal record, and employment. The government should be apprised, in writing, of counsel's intent to demand an immediate hearing, so that the police officer will be kept available. *See* Appendix B for a sample letter.

Continuance: In general, **c**ounsel should oppose a continuance and move for dismissal if the government is not ready to present evidence on the scheduled date or when the case is called. Judges and commissioners in Superior Court most often adhere to the routine practice of dismissing the case, resulting in the client's release.

Evidence: At the hearing, both hearsay and evidence that was obtained illegally are admissible. Super. Ct. Crim. R. 5(d)(1). However, the court may require a showing that admissible evidence will be available at trial. *See* Fed. R. Crim. P. 5.1 advisory committee's note. The defendant has the right to cross-examine government witnesses. Super. Ct. Crim. R. 5(d)(1). The defendant also has the right to present evidence. *Id*. However, the decision to present evidence is an important one and should be made only after careful consideration. *See infra* Section IV.

Probable Cause: At the preliminary hearing, the government must meet "the standard of probable cause which . . . is roughly equivalent to the standard required for issuance of an arrest warrant or for an arrest without a warrant." *Coleman v. Burnett*, 477 F.2d 1187, 1204 n.96 (D.C. Cir. 1973)*; see also Staley v. Hannon*, 402 A.2d 814, 816 (D.C. 1979). Thus, the constitutional standards for determining probable cause to arrest, developed primarily in connection with motions to suppress evidence, apply equally to preliminary hearings. *Staley*, 402 A.2d at 816 (hearing re-opened for further cross-examination and re-determination of probable cause where court refused to allow counsel to explore reliability and veracity of informant's out-of-court statement that formed basis for finding of probable cause).

The court will find that probable cause exists if each element of the charged offense is established. The reviewing judge does not have to make factual findings. On appeal, however, the appellate court will make a "more careful review" of the probable cause determination when the trial court adopts the government's findings of fact verbatim. *Otts v. United States*, 952 A.2d 156, 164 (D.C. 2008) (vacating *Otts v. United States*, 936 A.2d 782 (D.C. 2007).

If all the elements of the charged offense are not established, there should not be a finding of probable cause and the complaint should be dismissed. A finding of probable cause for only a lesser-included offense can be a significant basis for a motion to reduce bond.

Dismissal: Dismissal of the complaint does not preclude the government from seeking an indictment. Super. Ct. Crim. R. 5(d)(1). When a complaint is dismissed, counsel should consult the grand jury assistant assigned to the case to determine whether the government intends to proceed with the prosecution, and should keep the client fully aware of any potential criminal exposure. To the extent possible, counsel should proceed as if the government is going forward. Investigations are still best at the beginning of the case, when witness memories are fresh and it has not yet been suggested that he or she not speak with the defense. If the government plans to proceed, counsel should continue to investigate and prepare a defense. If a grand jury original

indictment is returned, Super. Ct. Crim. R. 4-I embodies a preference for the issuance of a summons to the defendant to appear in court instead of a bench warrant and requires the government to inform defense counsel when charges are reinstituted.

The Right to a Preliminary Hearing:

- ✓ Request an immediate hearing if the client is likely to be released
- ✓ Oppose a continuance or move for dismissal if the government is not ready to present evidence on the scheduled date
- ✓ If the complaint is dismissed, proceed, to the extent possible, as if the government will go forward by way of grand jury original indictment

II. THE JUDICIAL OFFICER

Except in Accelerated Felony and Felony I cases, magistrate judges usually conduct preliminary hearings, as authorized by D.C. Code § 11-1732(j)(3). An appeal of a magistrate judge's ruling is filed in Superior Court. D.C. Code § 11-1732(k). The Superior Court may also review the magistrate judge's determination *sua sponte*. Super. Ct. Crim. R. 117(g)(2). If a magistrate judge improperly limits cross-examination or the presentation of evidence, counsel should file a motion requesting Superior Court review. The procedures are set out in Superior Court Criminal Rule 117(g)(1). Review by the Court of Appeals is available only upon appeal from the ruling of the Superior Court, *see Speight v. United States*, 558 A.2d 357, 360 (D.C. 1989), and any issue not raised before the Superior Court is waived, *Bruce v. United States*, 617 A.2d 986, 993 (D.C. 1992).

The mechanism for obtaining a stay of the commissioner's order and securing the defendant's release while review is pending is provided in Rule 117(g)(3). Counsel should also request a stay of any formal grand jury action pending resolution of the review.[4] If a defendant is incarcerated as a result of a commissioner's determination, review must take place within one day. Super. Ct. Crim. R. 117(g)(1). Otherwise, the motion for review must be submitted within ten days of the judgment. *Id*. Any *sua sponte* review in Superior Court must take place within thirty days. Super. Ct. Crim. R. 117(g)(2).

Felony I and Accelerated Felony cases are assigned at presentment to a specific judge, who handles all subsequent matters in the case, including the preliminary hearing. A Felony I is any rape, first-degree murder, or sex case with a child victim, and some serious cases involving four or more co-defendants. Accelerated Felony Trial Calendar (AFTC) cases meet the papering criteria of the United States Attorney's Violent Crime Section. Usually the government requests that the defendant be held without bond in these cases. If the client is released, the case may be moved to a normal Felony II calendar.

[4] An indictment issued while review is pending would likely moot the question of the sufficiency and adequacy of the preliminary hearing.

Review of a Magistrate's Ruling:

- ✓ Appeals of a magistrate judge's decision are filed in Superior Court
- ✓ File motions requesting review, e.g., if the magistrate judge improperly limited cross-examination or the presentation of evidence
- ✓ Obtain a stay of the commissioner's order
- ✓ Secure defendant's release while review is pending
- ✓ Request a stay of any formal grand jury action pending resolution of the review, where appropriate

III. CROSS EXAMINATION

It is important you speak with your client BEFORE the hearing. Your cross-examination can be much stronger if you know your case from your client's perspective as opposed to what the government has written in an Affidavit in Support of Arrest Warrant. At a preliminary hearing, the government must produce evidence sufficient to establish probable cause. The court must consider answers to both the direct testimony and the cross-examination. Therefore, thorough cross-examination is critical. *See* Appendix A for sample preliminary hearing questions.

Effective cross-examination in the preliminary hearing is an excellent opportunity to gain firsthand information about the government's case. While "[t]he purpose of a preliminary examination is not for discovery," Super. Ct. Crim. R. 5(d)(1), the fact that a question may produce discovery is of no moment, so long as the question is relevant to probable cause. "[S]ome discovery becomes a by-product of the process of demonstrating probable cause." *Coleman*, 477 F.2d at 1200. Counsel should be prepared to respond to any objection on discovery grounds by showing how the question is relevant to probable cause.[5]

Another frequent objection to cross-examination is that it is "beyond the scope" of the direct. *See Tyler v. United States*, 705 A.2d 270, 277-78 (D.C. 1997). If that objection is sustained, but the questions are relevant to probable cause, counsel should consider calling the witness as a defense witness. *See Poteat v. King*, 487 A.2d 215, 216-17 (D.C. 1984); *In re R.D.S.*, 359 A.2d 136, 139-40 (D.C. 1976). Counsel may be required, however, to proffer the expected testimony. *See infra* Section IV.

Counsel may also be asked to make a proffer regarding questions asked on cross-examination, for example, when the court inquires whether counsel has a basis in fact. However, "[c]ounsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory." *Alford v. United States*, 282 U.S. 687, 692 (1931). *See*

[5] Occasionally, the hearing presents an opportunity to discover facts relating to issues of illegal search or seizure. For example, an officer may testify that he stopped the defendant's car in a routine traffic stop and found a gun in his waistband after noticing a "bulge," establishing probable cause that the defendant was carrying a dangerous weapon. Cross-examining the officer on what the defendant was doing, what the bulge looked like, what drew the officer's attention to the vehicle, etc., in the context of probing the direct testimony, has the ancillary effect of locking in the officer's testimony and developing information useful for a subsequent suppression motion.

also United States v. Pugh, 436 F.2d 222, 225 (D.C. Cir. 1970) ("counsel in many cases cannot possibly have a foundation in fact for all questions, only a well reasoned suspicion that a circumstance might be true"). If the court still requires a proffer, counsel should ask to make it *ex parte* if it would disclose information to which the government is not entitled.

Areas to Explore on Cross-Examination: While counsel should prepare a thorough cross-examination on all relevant areas, particular care should be taken when examining the circumstances and reliability of any eyewitness identification. Counsel should be wary of in-court identifications by the testifying police officer.[6] Prior descriptions and the degree to which they match the defendant's appearance, misidentifications or failures to identify, and the witness's opportunity to observe the perpetrator are all appropriate lines of cross-examination. Counsel should also elicit the witness's exact language in making the identification. The conclusory statement that there was a positive identification might mean that the witness said, "That looks like him," or "I think that's him."

If the government relies on the allegations of a single witness, counsel is entitled to thoroughly question that witness's reliability. The court in *Staley*, 402 A.2d at 816, vacated a finding of probable cause and ordered that the preliminary hearing be reopened for cross-examination regarding the reliability of an informant. A similar conclusion was reached in *Poteat*, 487 A.2d at 216-17, however, not only was the hearing reopened, after a "meaningful proffer," the defense was allowed to call the witness as its own.

Preparation for the Hearing:

- ✓ Investigate the case: speak with your client about the charges BEFORE the hearing, interview witnesses, and visit the crime scene
- ✓ Subpoena relevant documents that may negate probable cause
- ✓ Prepare a written cross-examination

IV. TACTICAL CONSIDERATIONS

In many cases, it will be clear whether the government will be able to establish probable cause. Then, the major benefit of the hearing is the opportunity to obtain information about the case. Consequently, at least during the initial inquiry into each issue, counsel should refrain from objecting to government counsel's questions and should forsake narrow and precise cross-examination for relatively general questions to place as much information as possible on the record. Many of the questions should be non-leading and relatively open-ended. Counsel must be careful to obtain precise, responsive and complete answers. A line of examination that begins with "Did the witness give a description?" or "Was the complainant examined by a doctor?" or

[6] On occasion, the government will offer the testimony of an officer who has investigated the case but has never actually seen the defendant. Unless the officer can establish the basis of the in-court identification, counsel should object. As the officer is walking to the witness stand, ask the client if the officer participated in the arrest or post-arrest processing.

"What did Mr. Smith say regarding . . . ?" should be followed by "Did the witness give any further description to you [or anyone else] at any other time?" "Were any other tests or examinations performed at any other time?" or "Did Mr. Smith say anything else regarding . . . ?" "Is that all the witness said about . . . ?" "Are those the witness's words? Or your words?" "What did the witness say in his or her own words?"

The Sixth Amendment right to confrontation "is basically a trial right" which does not apply at the preliminary hearing. *In re R.D.S.*, 359 A.2d at 140 n.10 (D.C. 1976). However, the defense may call any witness, even a complainant, if there is reason to believe that person would negate probable cause. Counsel may be called upon to give a meaningful proffer of the witness's testimony. *See, e.g., Poteat*, 487 A.2d at 216-17 (after "meaningful proffer," defense could call person who supplied information leading to defendant's arrest). The proffer must be "based on more than mere hope or speculation" and must show "how [the witness's] participation [in a preliminary hearing] would [tend] not to affirm, but to negate probable cause." *In re R.D.S.*, 359 A.2d at 139-40; *see also Beck v. United States*, 402 A.2d 418, 421 (D.C. 1979); *United States v. Davis*, 330 A.2d 751, 753 (D.C. 1975). The defense may also subpoena documents to the preliminary hearing that may negate probable cause.

From a tactical standpoint, it is rarely advisable for the defense to present testimony, especially that of the defendant. The dangers of possible self-incrimination by the defendant, locking in defense evidence, government discovery of defenses and witnesses, and government subpoenaing of defense witnesses to the grand jury are too great, and the likelihood of dismissal is minimal. Moreover, even if the court credits the defense evidence and dismisses the case, the government may indict the case as a grand jury original. When the government is requesting detention, counsel should consider not only whether the evidence will negate probable cause, but also whether the evidence will provide the court with information to consider in determining whether to detain the defendant. *Tyler*, 705 A.2d at 275-76; s*ee also* D.C. Code § 23-1322(b), (d), (e).

The government's case at the preliminary hearing often consists of no more than an officer adopting an affidavit submitted in support of an arrest warrant. However, issuance of an arrest warrant does not foreclose the right to a preliminary hearing or to cross-examination. *Coleman*, 477 F.2d at 1204 n.96. The fact that a judge has made a probable cause finding in signing the arrest warrant is not determinative, because the affidavit was not subject to cross-examination. In addition to cross-examining the officer on the contents of the affidavit, counsel should ask the officer to reread the affidavit, and then ask whether it is correct or whether subsequent investigation requires any modification. In this way, the affiant's testimony is pinned down should it become important at trial.

PRACTICE TIP:

During the preliminary hearing defense counsel should lay the groundwork for the impeachment of the government's witnesses at trial. Hearsay is admissible in preliminary hearings. Typically, the government will present a police officer, who will testify as to what other witnesses told her. In order to produce a transcript that can be used to impeach these other witnesses later at trial, it is critical to ask questions in a manner that exposes the source of the officer's knowledge. Counsel thus should incorporate the source of information in all questions: e.g., "the *complainant* told you that she did not see the perpetrator's face?"; "the *complainant* told you that the gun was silver?"; "the *eyewitness* told you she was fifty feet from the fight?" Should the source witness testify in a contrary manner at trial, counsel can impeach the witness with the "locked in" testimony of the preliminary hearing witness.

The government may make a plea offer at presentment that expires at the preliminary hearing. If the offer is accepted, the preliminary hearing is waived and a date is set for the plea. In many cases, however, counsel does not have adequate time to investigate before the preliminary hearing date and to make an intelligent recommendation to the client concerning the plea decision. One solution is to negotiate a continuance of the preliminary hearing and an extension of time in which to accept the offer. Reasonable extensions that both the government and defense support are generally granted.

Strategies at the Preliminary Hearing:

GOAL: Place as much information on the record

- ✓ Refrain from objecting to government's questions
- ✓ Cross-examine each witness by asking non-leading and open-ended questions
  - Be sure to explore all possible areas including: the circumstance and reliability of any identification, prior descriptions, opportunities to observe, and exact language used
  - For objections on discovery grounds, carefully craft questions and be ready to defend each and every question as relevant to probable cause
  - For objections to questions outside the scope of direct, consider calling the government's witness as a defense witness
  - If asked to make a proffer, request it to be ex parte so as not to disclose information to which the government is not entitled
- ✓ It is rarely advisable for counsel to call witnesses. Counsel MUST consider all dangers (such as self-incrimination, locking in defense evidence, and government discovery of defenses and witnesses) when making this decision
- ✓ If given a plea offer, seek a continuance in order to investigate and intelligently discuss the plea agreement with your client

When defendants are released at preliminary hearings, often times the court issues a stay away order "from the area," or "one block radius from this address." Defendants were being repeatedly re-arrested for violating stay away orders that were often unclear or ambiguous. The Court of Appeals has held that a defendant can only be convicted of criminal contempt if he or she has notice of the specific conditions of the stay away. *See Smith v. United States*, 677 A.2d 1022, 1031 (D.C. 1996). In *Vaas v. United States*, 852 A.2d 44 (D.C. 2004), the court did not address the specific issue regarding the meaning of "one block radius," but did "strongly suggest" that in the future, such orders should set more defined parameters "using maps, if practicable, that can be attached to the stay away orders to provide defendants with clear guidance about this important aspect of a release order." *Id*. The *Vaas* court held this to be particularly important in cases in which the defendant lives in the immediate neighborhood of the location from which he or she is barred. *Id*.

APPENDIX A

SAMPLE QUESTIONS FOR PROBABLE CAUSE AND PRELIMINARY HEARINGS

These questions are not exhaustive, and are only a guide to help counsel think about what questions counsel should consider at the hearing. Counsel should make sure the answer to the question is complete. For example, if you ask an officer what the length of the incident was, and he answers 5 minutes, you can ask more detailed questions so that the officer is unlikely to change his answer later. "Officer, you say it was 5 minutes, could it have been longer/shorter than that?" "Well, how much longer/shorter?" "What makes you say that?"

Basic Identification Questions

Opportunity to observe – for each witness or complainant

1. Time, location and length of incident?
2. What was the lighting like? (Street lights? Where? Daylight?)
3. How long did each witness observe the incident and what drew its attention to scene?
4. How far was each witness from the scene?
5. Where was each witness standing in relation to assailant? (In front? To side? Behind?)
6. Were there any obstructions to the view?
7. Witness's physical condition: Tired? Drinking/drugs? Age? Eyesight?
8. Was offender wearing a mask? A hat?
9. Was there a prior relationship between any witness and defendant?
10. For each witness and each suspect, what was the description given to police: age, height, weight, eye color, complexion, hair, clothing, build, facial hair, distinguishing features?
11. Was there a lookout? When? What was the lookout description?

Identification Procedure

1. What procedure was used? (Show-up, line-up, photo spread, second sighting?)
2. When? Where?

3. What did each witness say?

4. Any non-identifications? Misidentifications?

5. Procedure done with all witnesses together? Separately?

Drug cases

1. Did the lookout give a location for the suspect? Where was the suspect going?

2. What was recovered? Money? Pre-recorded money? Drugs? From defendant, ground or stash?

3. How many people were involved in transaction? What was defendant's role? Were other people around?

4. What was the time of arrest?

5. Identification questions, above.

Robbery

1. Was any property taken? From where? Was it recovered? From where/whom?

2. How was the property identified?

3. What was the number of victims?

4. What was the number of robbers?

5. How was the property taken? (Force? Snatch?)

6. Were any threats made?

7. What was the role of each robber?

8. What was said by each robber? To whom?

9. Were any weapons used?

10. Were any injuries sustained?

11. Identification questions, above.

12. Bias of witnesses?

UUV

1. Driver or passenger?
2. How many people were in the car?
3. How long was the vehicle followed? Attempt to elude? How were vehicle occupants signaled about police presence?
4. Where was arrest made? What was the distance from car at the time of the arrest?
5. Was there any damage to car? What was the extent of the damage (or how was it damaged)? How visible was the damage? From what vantage point did police notice damage?
6. Were any keys in the ignition? Was there damage to steering column?
7. When was the car reported stolen? By whom?
8. Who talked to the owner? What did the owner say?
9. Were fingerprints removed from the automobile?
10. Was anything recovered from the car?
11. Identification questions, above.
12. Bias of witnesses?

Burglary

1. How were the premises entered?
2. Were any tools used? Recovered?
3. Were there any marks or damage to premises?
4. Was anyone inside premises?
5. Were there any witnesses? What did they see? How far were they from the scene?
6. Was property taken? What? Was it recovered?
7. Was the property identified? How? By whom? Basis for identifying?
8. Was property secreted by windows or doors? Any property found outside?

9. Identification questions, above.

10. Bias of witnesses?

Assault

1. Was the complainant injured? How did the injury occur? What is the nature of the injury? Was the complainant hospitalized?

2. Were any threats made?

3. Was there a prior relationship between defendant and complainant?

4. What was the cause of the altercation?

5. What did the complainant say? What did the offender say?

6. Were any weapons used? Were any weapons recovered from defendant or complainant?

7. Identification questions, above.

8. Bias of witnesses?

Sexual offenses

1. What age is the victim?

2. Was there any hospital treatment? When?

3. What is the extent of the injuries? Where? How severe?

4. Lab test results?

5. Where did incident occur?

6. Was there a prior relationship between defendant and complainant?

7. What did assailant say? What did complainant say? Was there a struggle?

8. Was any weapon used?

9. Were any articles recovered from the scene?

10. When was the incident reported to police? Reported to anyone?

11. Circumstances of first report?

12. Identification questions, above.

13. Bias of witnesses?

APPENDIX B

_____

Assistant United States Attorney
Courtroom C-10
Superior Court of the District of Columbia
500 Indiana Avenue, N.W.
Washington, D.C. 20001

BY HAND

Re: United States v. _____
Lock-up No. _____

Dear Assistant United States Attorney:

If you seek to preventively detain my client pursuant to D.C. Code § 23-1322 _____, I will be requesting that the Court hold the preventive detention hearing immediately. Please assure that the officer assisting in preparing this case is not excused before the Court rules on my request.

Sincerely,

_____
Counsel for _____

CHAPTER 5

DISCOVERY AND OTHER PRE-TRIAL MATTERS

I. DISCOVERY PURSUANT TO RULE 16

A. Practice Under Rule 16

Discovery is an on-going process that is difficult to complete because both parties are still interviewing witnesses, awaiting the results of medical examinations and scientific analyses, and otherwise investigating and preparing the case. A uniform practice for dealing with this problem has not evolved. Some judges require that motions be filed by status; some prefer that they not be filed until after status (i.e., after the client has actually decided to go to trial); and some require that motions to late-file be filed within the time allowed by Superior Court Criminal Rule 47-I. Counsel should promptly determine the assigned judge's practices, and request leave to late-file motions so that necessary discovery may be completed. Alternatively, counsel may choose to file motions, reserving the right to supplement once discovery is complete.[1]

Superior Court Criminal Rule 16 is largely derived from, and to be construed consistent with, the federal rule. *See Waldron v. United States*, 370 A.2d 1372, 1373 (D.C. 1977). It applies only to pre-trial discovery, and its expressed limits do not circumscribe "the court's potential discovery powers." *Clifford v. United States*, 532 A.2d 628, 633 n.5 (D.C. 1987).[2] The rule arguably requires defense counsel to attempt to obtain informal discovery from the prosecutor within the time allotted under Rule 47-I(c) for the filing of pre-trial motions. *See (Donald) Lee v. United States*, 385 A.2d 159, 161 n.2 (D.C. 1978); *Rosser v. United States*, 381 A.2d 598, 605 n.6 (D.C. 1977). Although the general practice in felony cases is that the government provides discovery after indictment, Rule 16 is silent regarding when the right to discovery vests. Early discovery facilitates investigation and is indispensable to pre-indictment plea bargaining. *See United States v. Bacon*, 428 A.2d 852 (D.C. 1981) (dismissing as moot a government petition for writ of *mandamus* where lower court granted, in part, pre-indictment requests for discovery, but

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[1] With respect to the problem of obtaining adequate discovery for the timely filing of pre-trial motions, the Court of Appeals in *Duddles v. United States*, 399 A.2d 59, 62 (D.C. 1979), noted:

> [D]efense counsel cannot always be expected to have completed enough discovery within 10 days to provide a sufficient statement of grounds for a motion to suppress. But this is not to say that the defense is compromised by Rules 47 and 47-I. Counsel, during the 10 days, can file a motion for extension of time within which to file a motion to suppress; *e.g.*, an extension until 10 days after completion of timely discovery. Alternatively, counsel can file a motion to suppress based on currently available information, requesting both deferral of a hearing or ruling until completion of discovery and amendment of the motion with further particulars. If counsel has asserted valid reasons for such an extension or deferral, it would be an abuse of discretion for the trial court to compromise a defendant's rights by denying such a motion.

[2] Counsel may also be able to obtain "discovery" under Rule 5(d) (preliminary hearing), 6(e) (grand jury proceedings), 7(f) (bill of particulars), 12(c) (request for notice of intent to use evidence), 15 (depositions), and 17(c) (subpoenas). For a general discussion of appellate review of Rule 16 discovery issues, see *Washington v. United States*, 600 A.2d 1079, 1081 (D.C. 1991); *(James) Wiggins v. United States*, 521 A.2d 1146, 1148 (D.C. 1987); and *(Adrian) Wiggins v. United States*, 386 A.2d 1171, 1174 (D.C. 1978).

defendants were indicted during pendency of appeal). Thus, counsel should seek pre-indictment discovery particularly on the accelerated felony calendar where judges encourage pre-indictment discovery. Rule 16(c) imposes a continuing duty to disclose discoverable material "promptly" once an initial request has been made. *See Smith v. United States*, 491 A.2d 1144, 1148 n.7 (D.C. 1985); *Rosser*, 381 A.2d at 605.

Discovery Practice:

- ✓ Know the discovery and motions practice of the particular judge
- ✓ Request discovery at the earliest possible opportunity (presentment or arraignment)
- ✓ Memorialize requests in writing
- ✓ File a copy of "*Rosser*" letter with the court

Although the rule does not require it, the clearest and most effective way to make a discovery request is to deliver a "*Rosser*" letter to the prosecutor, specifying the types of material desired. The prosecutor should then confirm in writing that all requested material has been produced or that certain material is being withheld pending a defense request for a judicial determination regarding whether it must be produced. *See Mangrum v. United States*, 418 A.2d 1071, 1077 n.12 (D.C. 1980); *Rosser*, 381 A.2d at 607. Alternatively, counsel may file a letter specifying which material has been disclosed and making additional requests. A copy of all correspondence should be filed with the court. Filing a Rosser letter is the most reliable method of memorializing the results of informal discovery. *See id.* at 610. Any unresolved discovery issues should be raised with the prosecutor sufficiently in advance of trial to allow enough time to respond and litigate the matter before the court.

1. Judicial Regulation of Discovery

To secure judicial involvement in the discovery process, counsel must file a motion to compel discovery or for other appropriate relief. The motion must be accompanied by written certification that counsel has made a "bona fide attempt to secure the necessary relief from the prosecutor on a voluntary basis and that the prosecutor has not complied with such request." Super. Ct. Crim. R. 16-II; Super. Ct. Juv. R. 16-I; s*ee also Washington v. United States*, 600 A.2d 1079, 1080-81 (D.C. 1991) (citing *Rosser*). Thus, a motion to compel discovery may be filed only after having sought the discovery at issue without the court's intervention.

Motion to Compel:

- ✓ First seek informal discovery
- ✓ Submit motion to compel in writing, in order to secure a broad range of sanctions
- ✓ Rule 16-II requires a written certification that counsel has made an attempt to secure the requested discovery on a voluntary basis before filing a motion to compel

The trial court is also empowered, "[u]pon sufficient showing," to "order that the discovery or inspection be denied, restricted, or deferred, or make such other order as is appropriate." Super. Ct. Crim. R. 16(d)(1). A motion for a protective or modifying order may include an *ex parte* written statement, which will be sealed and made available for appellate review if necessary. *Id.*

2. Sanctions

Sanctions may be imposed if the government fails to comply, belatedly complies, or cannot comply with a discovery request or order because it has lost or destroyed discoverable material. The range of available sanctions is set out in Rule 16(d)(2): "[T]he Court may order [a] party [who has failed to comply with the rules of discovery] to permit the discovery or inspection, grant a continuance, or prohibit the party from introducing evidence not disclosed, or it may enter such other orders as it deems just under the circumstances." The range of available sanctions is extremely broad, provided that the sanction is just under the circumstances. *See Gethers v. United States*, 684 A.2d 1266, 1272 (D.C. 1996) (quoting *Davis v. United States*, 623 A.2d 601, 605 (D.C. 1993)). The decision as to what sanctions, if any, to impose for a Rule 16 violation is committed to the discretion of the trial court. *See id.; see, e.g., Sheffield v. United States*, 397 A.2d 963, 967 (D.C. 1979).

Sanctions:

- ✓ Courts have the power to sanction parties for Rule 16 failures
- ✓ Counsel should propose alternative sanctions short of dismissal, in addition to requesting dismissal of the case
- ✓ Broad range of orders that should be sought:
  - Enforce right of disclosure or inspection
  - Grant a continuance
  - Prohibit government from introducing evidence not disclosed
  - Seek instruction that absence of evidence is not adverse

A defense failure to provide discovery may also result in sanctions. *Cf. Clifford v. United States*, 532 A.2d 628, 638-39 (D.C. 1987) (finding no abuse of discretion by trial court in excluding defense psychologist from testifying where counsel refused to turn over reports or documents on which expert relied in forming his opinion). The Sixth Amendment right to compulsory process may be implicated, however, if a discovery sanction prevents the defense from putting on a witness. *See Taylor v. Illinois*, 484 U.S. 400, 409 (1988) (rejecting "the . . . argument that [the Sixth Amendment right to compulsory process] may never be offended by the imposition of a discovery sanction that entirely excludes the testimony of a material defense witness"). Preclusion was deemed an appropriate sanction in *Taylor*, where counsel's failure to disclose the names of witnesses pursuant to a state rule was "both willful and blatant," and "the inference that he was deliberately seeking a tactical advantage [was] inescapable." *Id. at 416-17*; *see also Michigan v. Lucas*, 500 U.S. 145, 152 (1991) (suggesting that alternative sanctions are appropriate in most cases).

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***Simmons v. United States*, 999 A.2d 898 (D.C. 2010).** Motion for discovery sanctions for police failure to disclose out-of-court identification procedure in timely manner properly denied where defense counsel knew of procedure more than one month before trial took place and failed to file motion challenging the identification or Rule 16 violation and where officers made in-court identification of defendant and had seen him in neighborhood previously.

a. Lost or destroyed evidence

Brown v. United States, articulated the appropriate analysis for determining whether sanctions should be imposed in situations involving the loss of discoverable material:[3] "While we do not purport to fashion a precise test herein, any appropriate test must require an evaluation of (1) the circumstances occasioning the loss; (2) systematic steps taken toward preservation; and (3) the magnitude of demonstrated materiality." 372 A.2d 557, 560-61 (D.C. 1977),

The first and second factors should be assessed in light of the government's clear obligation to preserve potentially discoverable material:

> [S]anctions for nondisclosure based on loss of evidence will be invoked in the future unless the Government can show that it has promulgated, enforced, and attempted in good faith to follow rigorous and systematic procedures designed to preserve all discoverable evidence gathered in the course of a criminal investigation. The burden, of course, is on the Government to make this showing. Negligent failure to comply with the required procedures will provide no excuse.

United States v. Bryant, 439 F.2d 642, 652 (D.C. Cir. 1971) (*Bryant I*), appeal after remand, 448 F.2d 1182 (D.C. Cir. 1971) *(Bryant II). But see Rodriguez v. United States*, 915 A.2d 380 (D.C. 2007) (police return of pouch to victim of robbery who subsequently discarded pouch because clasp had been broken during robbery did not require court to impose sanctions for failure of police to preserve evidence because police photographed pouch before returning it and absence of pouch had no significant impact on outcome of trial).

In response to *Bryant I*, the Metropolitan Police Department promulgated General Order No. 601.2, which established policies and procedures for preserving discoverable evidence. This Order may be helpful in demonstrating the existence and degree of negligence in the police department's destruction or loss of discoverable evidence. *See Bryant II*, 448 F.2d at 1184; *Marshall v. United States*, 340 A.2d 805, 809 (D.C. 1975); *cf. March v. United States*, 362 A.2d 691, 698 n.8 (D.C. 1976) (appellate courts which lack "direct supervisory authority over . . . day-to-day law enforcement activities," may not directly enforce the general order).
Although a finding of negligence does not automatically require imposition of sanctions, *cf. Jones v. United States*, 343 A.2d 346, 352 (D.C. 1975) (addressing sanctions under Jencks Act), the degree of negligence or bad faith is relevant to the decision whether to impose sanctions and

[3] In considering sanctions under Rule 16, the Court of Appeals has drawn analogies to cases involving lost *Brady* material and lost Jencks Act statements. *See Brown*, 372 A.2d at 559-60.

what sanctions to impose. *See (James) Wiggins v. United States*, 521 A.2d 1146, 1148 (D.C. 1987) (finding abuse of discretion for failure to impose sanction for failure to produce key evidence for defense inspection); *Fields v. United States*, 698 A.2d 485, 489 (D.C. 1997) (affirming trial court's decision to impose no sanction because court, rather than government, lost the evidence and evidence was not material); *United States v. Day*, 697 A.2d 31, 36 (D.C. 1977) (affirming trial court's denial of motion to dismiss because no bad faith in destruction of car); *cf. Arizona v. Youngblood*, 488 U.S. 51 (1988) (holding that there is no due process violation for failure to preserve potentially exculpatory evidence unless police act in bad faith); *Edwards v. United States*, 483 A.2d 682, 684-85 (D.C. 1984) (finding no error in failure to assign Jencks Act sanctions when court did not request them); *United States v. McKie*, 951 F.2d 399, 403-04 (D.C. Cir. 1991) (finding no due process violation because the loss of evidence was not the result of government's bad faith and did not substantially prejudice the defendant). Accordingly, in seeking sanctions for lost or destroyed evidence, counsel should hold the government to the burden set forth in *Bryant I* of demonstrating good faith and lack of negligence.

The third factor identified in *Brown* – materiality – often determines whether sanctions will be imposed. In *Brown*, the police department lost a note given by the assailant to a witness. The defense intended to have a handwriting analysis undertaken in order to show that the defendant was not the assailant. No sanctions were warranted because the loss was inadvertent and the materiality of the note was speculative because its brevity rendered a conclusive handwriting analysis unlikely. Similarly, in *Marshall* the government returned a purse to the complainant, who destroyed it. Although the defense wished to subject the purse to a fingerprint analysis, rain made the purse soggy and molded, thus rendering it unlikely to yield fingerprints. The purse also could have been handled by "a number of people" before its recovery. The court, therefore, reasoned that the materiality of a fingerprint analysis was highly speculative and found no abuse of discretion by the trial court in denying sanctions. *Marshall*, 340 A.2d at 809-10. However, *(James) Wiggins*, 521 A.2d at 1149, reversed a conviction for taking property without right because the government failed to produce and disclose an altered dollar bill which formed the basis for the prosecution. The bill was highly material to the "development of a defense" because it may have supported the "reasonable mistake of fact" defense that was advanced.

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***Bean v. United States*, 17 A.3d 635 (D.C. 2011).** No due process violation in government's failure to preserve actual liquor bottle in POCA case where nothing in record suggested intentional loss or destruction of bottle and where defendant provided no reason as to why trial court should not have credited arresting police officer's testimony at suppression hearing that included description of bottle.

***Sandwick v. District of Columbia*, 21 A.3d 997 (D.C. 2011).** Trial court did not plainly err in failing to sanction government for its failure to preserve photographs of defendant's truck that had collided with pedestrian where photographs were negligently lost and there was no dispute about what they portrayed.

Lost or Destroyed Evidence:

✓ Argue extent of negligence and the materiality of the lost evidence to the case

b. Failure to disclose and belated disclosure

Where the government either erroneously fails to disclose existing materials or makes belated disclosure the defendant is entitled to relief. The Court of Appeals has observed, however, that

> [a]lthough undisclosed evidence may have been properly subject to discovery, Rule 16 does not require a court to impose sanctions against the nondisclosing party. Rather, in considering the imposition of sanctions, the court must consider a number of factors, including the reason for nondisclosure, the impact of nondisclosure, and the impact of the proposed sanction on the administration of justice.

Yoon v. United States, 594 A.2d 1056, 1061 (D.C. 1991). Also relevant is the extent to which the defense could have uncovered the evidence by other means. *See Washington*, 600 A.2d at 1081 (finding no prejudice in allowing prosecutor to introduce belatedly disclosed arrest photo because defendant "obviously had first-hand knowledge of his appearance at the time of his arrest"); *Jackson v. United States*, 589 A.2d 1270, 1271 n.2 (D.C. 1991) (holding that allowing prosecutor to introduce defendant's statement to police which the government had failed to disclose before trial was not reversible error because, among other things, "defense counsel could have inquired of appellant what statements he had made"). *But see Wilson v. United States*, 606 A.2d 1017 (D.C. 1992) (reversing because defendant prejudiced in exercise of peremptory challenges and in decision to go to trial where prosecutor belatedly disclosed defendant's prior impeachable convictions). *Wilson* is discussed further *infra* n.6. The court may limit the government's use of belatedly disclosed evidence. *See (Angel) Davis v. United States*, 623 A.2d 601, 605 (D.C. 1993) (affirming trial court's ruling permitting use of late-disclosed statement in government's rebuttal case); *United States v. McCrory*, 930 F.2d 63, 69-70 (D.C. Cir. 1991) (approving sanction limiting production of undisclosed evidence, but not testimony about it). Most frequently, the relief to which a defendant is entitled is a continuance or recess of the trial to assess and counter the evidence. *See (James) Wiggins*, 521 A.2d at 1149; *(Larry) Lee v. United States*, 454 A.2d 770, 776 (D.C. 1982); *(Donald) Lee*, 385 A.2d at 163.

Mistrial or Exclusion: A mistrial or exclusion of the evidence may be mandated in certain situations. For example, in *Smith v. United States*, 491 A.2d 1144 (D.C. 1985), the government called a police officer in rebuttal to testify about an oral statement the defendant made. Because adequate disclosure of the statement had not been made before trial, and timely disclosure of the oral statement might have altered defense preparation and strategy, the conviction was reversed. *Cf. Cantizano v. United States*, 614 A.2d 870, 873-74 (D.C. 1992) (finding no abuse of discretion and denying mistrial despite government statement before trial that witness had made no pre-trial identification and would make no in-court identification, on cross-examination the witness said she had identified defendant after the line-up); *Thomas v. United States*, 444 A.2d 952 (D.C. 1982) (although confrontation of testifying defendant with undisclosed statement violated Rule 16, error was harmless where trial court mitigated damage by prohibiting government rebuttal witness from testifying about the statement).

Accordingly, in seeking sanctions for belated disclosure of discoverable evidence, counsel should proffer (*in camera* if necessary) how late disclosure prejudiced the defense. *Compare*

Carr v. United States, 585 A.2d 158, 163 (D.C. 1991) (finding no abuse of discretion in denying request for sanctions when defense failed to make adequate showing of prejudice); *and Washington*, 600 A.2d at 1081 (finding no abuse of discretion in admitting arrest photograph and two chemists' reports where defendant failed to show prejudice); *with Yoon*, 594 A.2d at 1061-64 (holding that continuance not sufficient to cure prejudice resulting from mid-trial disclosure of defendant's statement to police, which differed significantly from the defense presentation of the facts in opening statement and on cross-examination). Areas of possible prejudice include investigating the undisclosed information, preparing and filing motions to suppress, obtaining expert witnesses, preparing opening statements and cross-examination, deciding whether a client should testify, subpoenaing witnesses, plea bargaining, and questioning prospective jurors.

Failure to Disclose or Belated Disclosure:

- ✓ Demand sanction appropriate to the case
- ✓ Articulate the specific prejudice of the Rule 16 violation
- ✓ Consider prejudice through the entire history of the case, e.g., tactical decisions at trial, investigation, witness preparation, plea negotiations, and *voir dire*

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***Biles v. United States*, 101 A.3d 1012 (D.C. 2014).** Reversible Brady violation where defense did not know until midtrial that government's warrantless search could not be justified under any exception to warrant requirement and where officer's disclosure of true basis for search—an informant's tip rather than a search incident to arrest—was favorable to winning motion to suppress that would have excluded key evidence of guilt at both of defendant's trials.

***Jones v. United States*, 99 A.3d 679 (D.C. 2014).** No Brady violation for failure to provide full grand jury transcript of complainant's testimony where defendant failed to point to any "favorable or impeaching information."

c. Post-conviction discovery

Post-conviction discovery may be provided and an evidentiary hearing held when specific allegations are able to show reason to believe that, once the facts have been fully developed, the defendant would be entitled to relief. *Brown v. United States*, 726 A.2d 149, 155 (D.C. 1999) (citing *Harris v. Nelson*, 394 U.S. 286, 300 (1969)). Brown sought such relief by asserting that the prosecution had violated *Brady* by withholding bias information about the complaining witness. However, the trial court denied his motion to vacate his conviction because his theory, and the support for it, was deemed "overly broad and speculative." *Id.*

B. Disclosure of Evidence by the Government

1. Statements By the Defendant

Rule 16(a)(1)(A) requires production of:

> any relevant written or recorded statements made by the defendant, or copies thereof, within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government; that portion of any written record containing the substance of any relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent; and recorded testimony of the defendant before a grand jury which relates to the offense charged. The government must also disclose to the defendant the substance of any other relevant oral statement made by the defendant whether before or after arrest in response to interrogation by any person then known by the defendant to be a government agent if the government intends to use that statement at trial.

In *United States v. Bailleaux*, the Ninth Circuit Court of Appeals urged a broad interpretation of "relevant" because the government cannot assess relevance from the defendant's point of view:

> Rule 16(a)(1)(A) can fully serve its intended purpose only if the Government takes a broad view of what is relevant for purposes of that provision. We believe the Government should disclose any statement made by the defendant that may be relevant to any possible defense or contention that the defendant might assert. Ordinarily, a statement made by the defendant during the course of the investigation of the crime charged should be presumed to be subject to disclosure, unless it is clear that the statement cannot be relevant. Where the Government is in doubt, the written or recorded statement should be disclosed, if a proper request is made.

685 F.2d 1105, 1114 (9th Cir. 1982). Rule 16 does not define "statements," and there has been continuing controversy over what the rule encompasses. The Advisory Committee Note to the identical federal rule notes that the definition of "statements" was deliberately left open to permit development by the courts. However, the Note further implies that the definition of "statement" should be broader than that of the Jencks Act, 18 U.S.C. § 3500, and notes that the following types of statements have been held to be discoverable under pre-amendment Rule 16: substantially verbatim and contemporaneous statements, *see United States v. Elife*, 43 F.R.D. 23 (S.D.N.Y. 1967); statements that reproduce the defendant's exact words, *see United States v. Armantrout*, 278 F. Supp. 517 (S.D.N.Y. 1968); a memorandum that was not verbatim but included the substance of the defendant's statement, *see United States v. Scharf*, 267 F. Supp. 19 (S.D.N.Y. 1967); written summaries of the defendant's oral statements, *see United States v. Johnson*, 525 F.2d 999 (2d Cir. 1975); *United States v. Morrison*, 43 F.R.D. 516 (N.D. Ill. 1967); and statements discovered by means of electronic surveillance, *see United States v. Black*, 282 F. Supp. 35 (D.D.C. 1968).

Written or Recorded Statement: Further development of the definition of a "written or recorded statement"[4] of the defendant in the courts has deemed the following items discoverable pursuant to Rule 16(a)(1)(A) when they are in government possession:

- Any statement, letter, or other document written by the defendant, regardless of the time it was made or audience for which it was intended, *see, e.g., United States v. Caldwell*, 543 F.2d 1333, 1352 (D.C. Cir. 1974) (finding post-arrest personal letter to friend, given to government by jailhouse informant discoverable); *United States v. Silien*, 825 F.2d 320, 323 (11th Cir. 1987) (holding that immigration file biographical sheet should be disclosed); *United States v. Scafe*, 822 F.2d 928, 935 (10th Cir. 1987) (allowing that Rule 16 covers letters to defendant's father and fellow inmate, intercepted by prison officials).

- Any transcribed, tape recorded, or videotaped statement by the defendant, regardless of the time it was made or its intended audience, *see, e.g., United States v. Bufalino*, 576 F.2d 446, 449 (2d Cir. 1978); *United States v. James*, 495 F.2d 434, 435-36 (5th Cir. 1974); *United States v. Sherwood*, 527 F. Supp. 1001, 1003 (W.D.N.Y 1981), *aff'd without opinion*, 732 F.2d 142 (2d Cir. 1984); and law enforcement officers' written reports or notes summarizing or otherwise recording the defendant's oral statements to law enforcement officers, *see, e.g., United States v. Harris*, 543 F.2d 1247, 1252-53 (9th Cir. 1976) (finding original interview notes discoverable especially when given by the accused); *United States v. Johnson*, 525 F.2d 999, 1004 (2d Cir. 1975) (holding that written summaries as well as statements copied verbatim are discoverable); *United States v. Lewis*, 511 F.2d 798, 802 (D.C. Cir. 1975) (defendant's oral statements communicated to police are discoverable); *United States v. Fallen*, 498 F.2d 172, 174-75 (8th Cir. 1974) (defendant's statements, before and after commission of a crime, are discoverable); *United States v. Jefferson*, 445 F.2d 247, 250 (D.C. Cir. 1971) (allowing discovery of police officer's handwritten notes); *United States v. Layton*, 564 F. Supp. 1391, 1395-96 (D. Or. 1983) (holding government must disclose all evidence already within the defendant's knowledge); *United States v. Egan*, 501 F. Supp. 1252, 1264 (S.D.N.Y. 1980) (holding that any rough notes or copies of such from law enforcement agents concerning the defendant's statement(s) are discoverable).

Rule 16(a)(1)(A) does not encompass an oral, unrecorded statement made to a citizen, even if the statement is subsequently communicated to a government agent who records it. *See Reavis v.*

[4] Whether a statement is "written or recorded" or "oral" can be critical; all relevant "written or recorded statements" are discoverable; oral statements in the form of a written record are discoverable only if: (1) made by the defendant in response to interrogation; (2) to any person then known to the defendant to be a government agent. Any other oral statements are discoverable only if: (1) the government intends to offer them in evidence at trial, and they were (2) made by the defendant in response to interrogation, (3) to any person then known to the defendant to be a government agent. *See* Super. Ct. Crim. R. 16(a)(1)(A).

United States, 395 A.2d 75, 77 n.2 (D.C. 1978); *Heiligh v. United States*, 379 A.2d 689, 692 (D.C. 1977); *Robinson v. United States*, 361 A.2d 199, 201 (D.C. 1977). It also does not "include statements made by the accused's co-conspirators, even if those statements can be attributed to the defendant for purposes of the rule against hearsay." *United States v. Tarantino*, 846 F.2d 1384, 1418 (D.C. Cir. 1988). The law in this jurisdiction is otherwise silent on co-defendants' statements. *But see (Keith) Thomas v. United States*, 978 A.2d 1211 (D.C. 2009). Rule 16(a)(1)(A) also does not encompass non-verbal communication recorded by a police officer when such physical gestures are ambiguous and non-communicative. *See United States v. Baucum*, 80 F.3d 544, 545 (D.C. Cir. 1996).

With respect to oral statements, the government must turn over only the substance of those made directly to a person known by the defendant to be a government agent, in response to interrogation. *See Rosser*, 381 A.2d at 603-04; *United States v. Cooper*, 800 F.2d 412, 416 (4th Cir. 1986) (remark, "Not yet, I am not finished," to correctional officer who told defendant to stop stabbing another inmate was not in response to interrogation). The substance of the statement must be disclosed even if it has not been recorded or reduced to writing and even if it is intended only to be used in rebuttal. *See United States v. Lewis*, 511 F.2d 798, 801 (D.C. Cir. 1975). Moreover, the "substance" of a statement can "include what it does not say as well as what it says"—that is, if the government intends to impeach the defendant with an omission, the omission is part of the "substance" and must be disclosed. *See Yoon*, 594 A.2d at 1060-61.[5] The government must disclose the substance "accurately and unambiguously" and in sufficient detail to prevent unfair surprise at trial. *See Smith v. United States*, 491 A.2d 1144, 1147 (D.C. 1985). Rule 16(a)(1)(A) requires disclosure of "any written record containing the substance of any relevant oral statement made by the defendant" in response to interrogation by government agents, whether or not the government intends to use the statement at trial.

The traditional rationale for grand jury secrecy – the protection of witnesses – does not apply to the defendant's own testimony, which is producible under Rule 16. If the defendant's grand jury testimony was not recorded, but the prosecutor intends to introduce it orally by means of witnesses who heard the testimony, it is disclosable under 16(a)(1)(A) as an oral statement to a government agent.

For purposes of this and all other relevant subdivisions, the government "possesses" all evidence in the hands of its investigative and custodial agencies including, for example, the Drug Enforcement Administration, *see Bryant I*, 439 F.2d at 650; and the Department of Corrections, *see United States v. Butler*, 499 F.2d 1006, 1008 (D.C. Cir. 1974). In most cases, the prosecutor can discharge the government's obligation by diligently searching, or requesting that a diligent search be made of, the prosecutor's own files and the files of administrative or police agencies investigating the case or the defendant. In *Robinson v. United States*, the Court of Appeals held that the United States Attorney's Office was in possession of a phone call recorded by the District of Columbia Department of Corrections, and that the government had an obligation to preserve that statement for trial. 825 A.2d 318, 328 (D.C. 2003).

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[5] In *Yoon*, after the government rested its case, the prosecutor disclosed that the appellant had spoken with the police on the scene of the shooting at issue and had not mentioned the defense's contention at trial that the decedent possessed a gun. This statement was discoverable under Rule 16, even though the prosecutor intended to use it only if the defendant testified, and the failure to disclose caused substantial prejudice. *Id.* at 1060, 1064.

Items typically discoverable under Rule 16(a)(1)(A) include the PD 47 "waiver of rights" card, the PD 118 "Defendant/Suspect Statement," the section of the PD 163 for "Defendant's Version/Remarks," and the substance of any oral statement to police in response to interrogation. It is not uncommon for the government belatedly to "discover" additional statements, often made to arresting officers, not previously disclosed. Counsel should therefore take great care, by memorializing disclosures in a discovery letter and by other means, to insure that the government has revealed all statements of the defendant. Moreover, counsel should request, as a "written or recorded statement made by the defendant," a copy of all sections of the PD 163 containing information furnished by the defendant, e.g., employment, address, family and associates. *See Townsend v. United States*, 512 A.2d 994, 1000 (D.C. 1986).

Recent practice also has included the government collecting and using recorded telephone calls from jail. These calls are recorded but usually not in response to police interrogation. Counsel should specifically inquire about receiving any jail phone calls the government seeks to use in its case in chief or on rebuttal.

2. Defendant's Prior Record

Rule 16(a)(1)(B) requires disclosure upon defense request of "such copy of the defendant's prior criminal record, if any, as is within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the prosecutor." Ordinarily, the prosecutor can discharge this obligation by turning over a copy of the defendant's FBI "rap sheet," or NCIC report, which should include out-of-state as well as local convictions.[6] Counsel must obtain arrest records if character evidence is being considered, because lack of knowledge of a defendant's arrests can be used to impeach character witnesses.

The government's form discovery letter asserts that the Pretrial Services Agency (PSA) report provides notice of prior convictions. Counsel should independently request from the government an accounting of prior convictions. The PSA report provides limited information. Further, it is the government's obligation to provide the information not the Pretrial Services Agency. In addition, counsel should request certified copies of any convictions pursuant to D.C. Code § 14-305(c) as well as any information regarding any arrests or other acts that the government would use to rebut possible character evidence at trial. *Morris v. United States*, 469 A.2d 432, 436 (D.C. 1983).

3. Documents, Photographs and Tangible Objects

Upon request, the government must permit the defense to:

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[6] The defense can rely on the prosecutor's disclosures regarding the criminal record. *See Wilson v. United States*, 606 A.2d 1017 (D.C. 1992). In *Wilson*, during a pre-trial status conference before the defendant's second trial, the prosecutor represented that the defendant had no impeachable convictions. When the defendant testified, the prosecutor was allowed to impeach him with prior convictions for sodomy and indecent acts. The defense reasonably relied on the prosecutor's pre-trial assurance, especially since the government did not impeach the defendant with these convictions at his first trial, which resulted in a mistrial. *See id.* at 1022. The defendant was prejudiced in his use of peremptory challenges, since "different considerations might well affect jury selection for a defendant who knows he will be impeached with convictions for sex offenses." *Id.* at 1025. He was also prejudiced in deciding whether to go to trial or enter into plea negotiations. *See id.*

> inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places . . . which are within the possession, custody or control of the government and which [1] are material to the preparation of the defense, [2] are intended for use by the government as evidence in chief at the trial, or [3] were obtained from or belong to the defendant.

Super. Ct. Crim. R. 16(a)(1)(C). The latter two categories are straightforward; whether an item is "material to the preparation of the defense" may not be. An item is "material" if it is intended to be used in the defense case or "if there is a strong indication that will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment and rebuttal." *United States v. Felt*, 491 F. Supp. 179, 186 (D.D.C. 1979). To be "material," evidence need not be exculpatory or even favorable. "Inculpatory evidence, after all, is just as likely to assist in 'the preparation of the defendant's defense' as exculpatory evidence." *United States v. Marshall* (*Marshall II*), 132 F.3d 63, 67 (D.C. Cir. 1998).

"Material" under Rule 16:

- ✓ Intended for use by the defense
- ✓ Likely to play a role in discovering admissible evidence, witness preparation, corroborating testimony, or assisting with impeachment or rebuttal
- ✓ Items need not be exculpatory or even favorable

As the drafters of the federal rule recognized, it "may be difficult for defendant to make this showing if he does not know what the evidence is." Advisory Committee Note to the 1974 Amendments. Therefore, courts have required the defense to make only a *prima facie* showing of materiality to obtain discovery. *See (Adrian) Wiggins*, 386 A.2d 1171, 1178 (D.C. 1978) (Ferren, J., concurring); *see also United States v. Thevis*, 84 F.R.D. 47, 51 (N.D. Ga. 1979); C. Wright, 2 Federal Practice and Procedure, Criminal 254 at 66-67 (2d ed. 1982). Reversible error was committed in a cocaine prosecution when the government failed to turn over a wallet taken from the defendant, then bolstered its weak case by using names and telephone numbers found in the wallet on cross-examination to link the defendant to Colombia. *See United States v. Rodriguez*, 799 F.2d 649, 652-54 (11th Cir. 1986). Discovery under this section is subject to the limitations for "internal government documents" and Jencks statements, as set forth in Rule 16(a)(2). *See infra* Section I.B.5.

Discoverable Items: Items typically discoverable under Rule 16(a)(1)(C) include police reports not otherwise exempt from disclosure, physical evidence, medical records, mug shots and *modus operandi* photos of the defendant, photo arrays,[7] line-up photos and videotapes, crime scene

[7] *Washington v. United States*, 377 A.2d 1348 (D.C. 1977), held that the government is not obligated to preserve an array from which no identification was made, at least where the possibility that the array contained a photograph of the defendant is speculative. Arrays from which an identification is made must be preserved. *See Sheffield v. United States*, 397 A.2d 963, 967-68 (D.C. 1979).

photos, photos of complainants' injuries, photos taken by the medical examiner's office, and tape recordings of 911 calls and police radio communications (unless these are *Jencks* material). In an unauthorized use of a vehicle case, the car itself may be discoverable. *In re Q.D.G.*, 706 A.2d 36, 38 (D.C. 1998) (remanding for trial court to consider sanctions where government failed to preserve car). Counsel should request copies of all appropriate items. To view physical evidence at the MPD Public Property Control Branch (2235 Shannon Place, S.E.), counsel should request a "viewing letter" from the prosecutor authorizing inspection by counsel or an investigator and setting forth the evidence or laboratory numbers of the relevant items. The prosecutor must provide a viewing letter with your name and the name of your investigator before you will be allowed to view the evidence. You must then fax over your request to view the evidence 72 hours prior to viewing the evidence. In addition, you should bring the viewing letter with you. Rules regarding viewing evidence change regularly, so carefully read the viewing letter provided by the government.

4. Reports of Examinations and Tests

Rule 16(a)(1)(D) entitles the defense to:

> inspect and copy or photograph any results or reports[8] of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the prosecutor, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

There is no work-product or Jencks Act exemption in this section, and counsel does not have to designate the particular items sought if counsel is unaware of what examinations or tests have been made. Once discovery of this information has been obtained, counsel should interview the government's expert(s) who performed the examinations, tests, or experiments. Many government experts, including those employed by MPD and the FBI, are willing to discuss their reports with defense counsel. Counsel should assume, however, that the discussions will be revealed to the prosecutor. Counsel should also promptly assess the advisability of retaining independent experts to evaluate the government's reports, to make independent tests and evaluations, and to assist defense counsel in preparing for direct and cross-examination of government witnesses. Counsel is entitled to ex parte consideration of a request to retain an expert and an *ex parte* order precluding the custodian of the evidence (e.g., MPD, FBI or DEA) from revealing to the prosecution the identity of the defense expert and the results of that expert's analysis. *See Gaither v. United States*, 391 A.2d 1364, 1367 n.4 (D.C. 1978); D.C. Code § 11-2605(a).

Independent Experts:

- ✓ Consider retaining independent experts to evaluate government's reports, make independent tests and evaluations, and assist defense counsel in preparing for direct and cross-examination of government witnesses

Certain scientific tests that government agents regularly conduct may constitute a mishandling of evidence in violation of Rule 16. *See Whalen v. United States*, 379 A.2d 1152, 1163-64 (D.C. 1977), *rev'd on other grounds*, 445 U.S. 684 (1980). In *Commonwealth v. Gliniewicz*, 500 N.E.2d 1324 (Mass. 1986), the government's expert subjected the defendants' boots to electrophoresis to test for blood, which destroyed that entire portion of the boots. Because the defendants were not informed of the test, and so could not have their own expert on hand to observe it, it was error for the trial court not to have excluded the evidence for discovery violations. *See id.* at 748.

Items typically discoverable under Rule 16(a)(1)(D) relate to drug analyses, medical examinations, ballistics tests, handwriting analyses, hair and fiber analyses, blood and semen analyses, and fingerprint examinations and comparisons.

Counsel should make specific requests for the underlying data and reports of any examination or test. For example, in cases involving fingerprints, DNA, or drug evidence, specific requests should be made.

For requests for fingerprint cases counsel should request the following from the government:

1. Case File: Please provide a complete copy of the fingerprint analysis case file, including all records made by the laboratory in connection with this case. These materials should include: copies of all bench notes, examination worksheets recorded by latent print examiners in the course of analyzing any and all evidence in this case. If the file includes photographs, please include photographic quality copies.

2. Fingerprint Cards and Digital Files: Please provide copies of all fingerprint cards and digitized fingerprint files to which the laboratory had access in connection with this case.

3. Protocols: Please provide a copy of all Fingerprint Technician Quality Assurance and Training Guidelines and Protocols used in the laboratory that analyzed the fingerprint evidence. This includes, but is not limited to, the Quality Manual [see SWGFAST (Scientific Working Group on Friction Ridge Analysis Study and Technology), *Quality Assurance Guidelines for Latent Print Examiners*, version 2.11 (Aug. 22, 2002), §3].

4. Chain of Custody and Current Disposition of Evidence: Please provide copies of all records that document the treatment and handling of fingerprint evidence in this case, from the initial point of collection up to the current disposition.

5. Software: Please provide a list of all Automated Fingerprint Identification Systems (AFIS) used in this case, including name of software program, manufacturer and version used in this case.

6. AFIS & IAFIS Data Files: If AFIS or IAFIS was used in any way in this case, please provide the following:
    - Latent prints: All electronic images of any and all "latent" prints (prints recovered as evidence in this case) entered into an AFIS in this case in standard (.eft or

.wsq) format

- Search results: Hard copy printout or electronic output in easily readable format of the results of any and all AFIS/IAFIS searches run in connection with this case. Information provided should include, but is not limited to:
    - Ranked list of "candidate matches"
    - Identification numbers of all images appearing on the "candidate list"
    - "Match scores" of all images appearing on the "candidate list"
    - Candidate matches: Electronic images of all items appearing on the candidate list in standard (.eft or .wsq) format
    - Client's records: Electronic images of any and all ten-print records associated with or identified to my client in standard (.eft or .wsq) format

These files should include all data necessary to: (i) independently reanalyze the raw data; and (ii) reconstruct the analysis performed in this case.

7. Digital Enhancement: If the fingerprint evidence in this case was digitally enhanced at any time for any reason, please provide
    - A list of all software used for digital enhancement in this case, including name of software program, manufacturer and version used in this case
    - Any existing validation studies of that software
    - Documentation that the enhancement process complied with the requirements the guidelines recommended by the Association for Information and Image Management (AIIM). If the enhancement process did not comply with AIIM guidelines, it is sufficient to respond: "The enhancement process did not comply with the AIIM guidelines."
    - Printouts of any digital enhancements used in the analysis of this case

8. Documentation of Corrective Actions for Discrepancies and Errors: According to SWGFAST, *Quality Assurance Guidelines for Latent Print Examiners,* version 2.11 (Aug. 22, 2002), §8.2, "The specific policies, procedures, and criteria for any corrective action taken as a result of a discrepancy in a technical case review should be clearly documented in writing." Please provide a copy of all documentation of corrective actions maintained by the laboratory that performed fingerprint analysis in this case. If the laboratory does not comply with the SWGFAST requirement that it maintain this documentation, it is sufficient to respond: "The laboratory does not comply with the SWGFAST requirement that it document corrective actions."

9. Laboratory Accreditation: Please provide copies of all licenses or other certificates of accreditation in fingerprint analysis held by the laboratory

10. Laboratory Personnel: Please provide background information about each person involved in conducting or reviewing the fingerprint testing performed in this case, including:
    - Current resume

- Job description
- Copies of all proficiency examinations and their results
- All Testimony Reviews [see SWGFAST, *Quality Assurance Guidelines for Latent Print Examiners,* version 2.11 (Aug. 22, 2002), §10]

For cases involving DNA counsel should request the following:

With regard to any nuclear DNA testing conducted or contemplated in this case, you are asking for the following materials. Much, but not all, of these materials should be found in what is termed by the MPD laboratory the "case" and "batch" files for each DNA test.

1. Case file of DNA testing results: Please provide a legible copy of the complete case file with all records pertaining to DNA testing in this case. For materials that are represented in any format other than black and white copies, please provide copies that are equivalent in content and quality (e.g., x-ray film copies of x-ray films, photographic quality copies of photographs, color copies of electropherograms, and CD-ROM copies of electronic data). The records requested include, but are not limited to, the following, even if located separate from the laboratory "case file."

    a. Hand written bench notes;

    b. Extraction, quantitation, PCR, hybridization, capillary electrophoresis, and final analysis worksheets;

    c. Worksheets and other notes used in calculating frequency statistics;

    d. Any printouts of electropherograms;

    e. Any printouts of electronic quantitation data;
    f. Records of any errors, discrepancies, or trouble-shooting that occurred during the testing in this case, as well as an explanation of actions taken to remedy the problems—such records should include documents maintained pursuant to SWGDAM Standard 14.1.1;

    g. Color photographs or copies of slot blots, restriction gels, yield gels, dot strips, or autorads (if used in testing);

    h. Copies of phone and other communication logs reflecting conversations by laboratory personnel internally and externally with other people about testing in this case; and

    i. Case notes maintained pursuant to SWGDAM Standard 11.1;

2. Data files for testing done in this case: Please provide copies of all data files created and used in the course of performing DNA testing and subsequent analysis of DNA data in this case. These files should include all data necessary to: (a) independently

reanalyze the raw data; and (b) reconstruct the analysis performed in this case (As a non-inclusive example, if the laboratory used Genescan and Genophiler, all electronic data files from both programs should be included). Please provide these data files on a CD-ROM on which the DNA examiner has written the date he or she copied the data onto the CD-Rom, the laboratory case number, and the DNA examiner's initials. Transmit the data intact, as originally collected, whether on a Macintosh or PC platform. In addition, to the extent that this request pertains to commercially available software that was used unmodified in this case, you may respond to this request simply by indicating the name of the software item, the manufacturer, and the version used to create the data files you deliver. However, in the event that data files were created with internally created software or commercial software modified in any way, please provide either a copy of the modified software item or a detailed list of the changes or modifications that were made with regard to the software along with the data files. Data files should include, but are not limited to, the following:

a. Project files;

b. Sample files;

c. Gel files (when gels used);

d. Matrix files (including the data used to compile the matrix files);

e. Analysis parameter files;

f. Sample sheets;

g. Injection lists; and

h. Log files.

3. Statistical information relied upon to interpret tests: Please identify the statistical method used to calculate probabilities in this case. In addition, please provide copies of the materials that were used or relied upon in performing any statistical analyses in this case. These materials should include, but are not limited to, the following:

   a. The complete STR database or databases on CD-ROM, in a format such that the multi-locus genotype is given for each sample tested;

   b. Copies of all documents describing the source or origin of samples in STR databases used, including documents regarding the method by which samples were collected, the background and/or characteristics of the individuals who were the sources of the samples, the choice of populations and sub-populations that were sampled, and the nature of the sampling procedure used to collect the samples;

c. Copies of all documents generated by computer statistical programs (e.g., PopStats) used to aid statistical calculations in this case;

d. Allelic frequency tables relied upon; and

e. Computer data files relating to statistical analyses.

4. Laboratory procedures relied upon when performing tests: Please provide legible copies of all documents that were, or are claimed to have been, followed or relied upon in executing, interpreting, and/or reporting the DNA tests performed in the instant case. These materials should include, but are not limited to, the following:

a. Standard operating procedures of the DNA testing laboratory, including those maintained pursuant to SWGDAM Standard 9.1.1;

b. User manual for any computer statistical program (e.g. PopStats) used to aid statistical calculations in this case;

c. Quality assurance manuals, including those maintained pursuant to SWGDAM Standard 3.1.1; and

d. Quality control manuals.

5. Documentation of laboratory and analyst expertise: Please provide legible copies documenting how the testing laboratory meets scientific community standards and how laboratory personnel have been trained to conduct DNA testing. These materials should include, but are not limited to, the following:

a. Copies of all licenses or other certificates of accreditation held by the DNA testing laboratory;
b. Copies of all audit reports for the last five years relating to the DNA testing laboratory used in this case, including all audit documents retained pursuant to SWGDAM Standard 15.1.2;

c. Copies of any contamination records kept by the laboratory—these materials should include: (i) instances of reagent blanks and/or negative controls registering the presence of DNA and/or positive controls registering the presence of DNA other than that of the control DNA; and (ii) all documents describing actions taken by the laboratory in response to contaminated controls or other forms of contamination;

d. Copies of any control or sample discrepancy logs kept by the laboratory—these materials should include: (i) the case number; (ii) laboratory number; (iii) name of the analyst; (iv) extraction/concentration method; (v) description of the discrepancy; (vi) the cause of the discrepancy; and (vii) the corrective action taken;

e. Copies of any proficiency tests that were taken by the persons who performed the DNA testing in this case—these materials should include: (i) the complete proficiency test case file; (ii) computer data files; (iii) evaluations and/or reports by the testing agency; and (iv) records maintained pursuant to SWGDAM Standard 13.1.1;

f. Current resumes, job descriptions, and descriptions of continuing professional training for all personnel involved in handling, conducting, and/or reviewing the biological material, serological testing, and DNA testing performed in this case, including all materials maintained pursuant to SWGDAM Standard 5.1;

g. A list of the last ten cases at which the persons involved with testing in this case have testified.

6. Explanation of laboratory and computer instruments relied upon to perform tests: Please provide legible copies of documentation about the equipment, reagents, and testing kits used to conduct DNA testing in this case. These materials should include, but are not limited to, the following:

a. A brief description of the kinds of forensic work done in the laboratory and a diagram of the laboratory that clearly designates the work areas for evidence storage, DNA isolation, PCR processing, and DNA typing;

b. A list of all the laboratory instruments used in the DNA testing in this case, including the name of the instrument, manufacturer, and version used;

c. A copy of the instructions provided by manufacturers of commercial tests kits, and protocols and manuals relating to the testing instruments (including user's manuals and machine-run specifications);

d. Documents regarding any modifications from the seller's specifications to any instrument (e.g. the ABI 310) or test kit along with any documentation of what, if any, validation was performed regarding such modifications;

e. Documentation of the maintenance of laboratory equipment maintained per SWGDAM Standard 10.3.2;

f. Materials that document any trouble-shooting or changes that were made to the genetic analyzer instrument used in the instant case, including: (i) copies of any notes, or records of communications relating to trouble-shooting that had to be done on the instrument, including calls to technical support lines and visits to field technicians to repair the instrument; (ii) records of any changes that were made to the instrument in the course of testing samples in this case, including replacement of parts such as laser or CCD virtual camera; (iii) records of all computer resets or reboots that had to be done during the testing in the instant case, including soft resets, cold boots, and/or clear memory resets; and (iv) records of all incidents in which manual control was used to

override genetic analyzer presets;

g. A list of all software programs, filters, and any "macros" used in the DNA testing in this case, including the name of the software program, manufacturer, and version used in this case—if modifications were made to commercial software's default settings or software was created in-house, these modifications and software should be provided;

h. A copy of the instructions provided by manufacturers of the software used in this case;

i. Copies of developmental validation studies pertaining to the STR DNA test performed in this case, as required by SWGDAM Guideline 8.1.1—these materials should include copies of laboratory notebooks, computer data files, unpublished scientific papers, and citations to published scientific papers;

j. Copies of any internal validation studies pertaining to the specific STR DNA test performed in this case, as required by SWGDAM Guideline 8.1.3—these materials should include copies of laboratory notebooks, computer data files, unpublished scientific papers, and citations to published scientific papers.

7. Information regarding evidence control procedures and current disposition of evidence: Please provide legible copies of documentation about the laboratory control of evidence in this case. These materials should include, but are not limited to, the following:

   a. Copies of all chain of custody documents for each item of evidence subjected to DNA testing, starting with the first description or "log entry" for each item and continuing through to the current disposition of that item of evidence—such documentation should show: (i) where and how the materials were collected; (ii) where and how the materials were stored (including temperature and type of container); (iii) the amount of evidence material which was consumed in testing; (iv) the amount of material which remains; and (v) where and how the remaining evidence is stored;

   b. Copies of the lab's internal operating procedures regarding evidence control pursuant to SWGDAM Standard 7.1.

8. Information about DNA testing of other individuals: Pursuant to Rule 16 and *Brady v. Maryland*, please provide all results, analyses, printouts, and raw data with respect to any DNA tests performed in this case on any other individual besides my client. If no testing was conducted on any other individual, please indicate whether a DNA sample was taken from any other individual, and why no DNA testing was conducted in that instance.

9. Evidence of inconclusive DNA typing: Pursuant to Rule 16 and *Brady v. Maryland*,

for any inconclusive DNA typing results please provide a particularized explanation as to why that typing result was determined to be inconclusive (e.g. insufficient quantity of DNA, degraded DNA, inhibited PCR, etc.).

10. Serology: Provide a complete copy of all laboratory protocols and records relating to any serological testing in the above captioned case, including but not limited to the following:

    a. Laboratory protocols;

    b. Laboratory notes;

    c. Photographs;

    d. Diagrams;

    e. Sketches;

    f. Bench notes;

    g. Final reports; and

    h. Draft reports.

For cases involving drug evidence you are requesting any scientific tests performed on the alleged controlled substances in this case. You should request the following materials:

1. Case file: Please provide a complete copy of the chemist's case file, including all records created by the Drug Enforcement Agency ("DEA"), the Metropolitan Police Department ("MPD"), or any other agency that participated in the testing of the alleged controlled substances in this case. These materials should include bench notes, including that of the drug extraction process, memoranda, DEA-7 reports, evidence reports, chain-of-custody reports, reports of equipment calibration checks, negative and positive control data, chromatographs, mass spectra, infrared spectra, communication logs, contamination logs, diagrams, and photographs of evidence and results of any color tests and microchemical crystal tests.

2. Chain of custody: Please provide copies of all records that document the collection and handling of physical evidence, from the initial point of collection to the current disposition.

3. Statistical information: Please provide the ranges of "expected results," including any gas and/or liquid chromatography retention times and peak heights, mass spectroscopy mass-to-charge ratios, UV-Vis and IR absorption peaks and shoulders, thin layer chromatography retention factors of, drug standards, internal standards, solvents, and any other analytes used to interpret the data from each of the tests

performed in this case.

4. Protocols: Please provide a copy of all handbooks, guidelines, protocols and training materials used by each laboratory that conducted testing in this case. These materials should include:

    a. Quality control procedures governing the handling and examination of evidence samples;

    b. Quality assurance procedures employed by the laboratory to monitor and document its performance, including but not limited to internal and external auditing, proficiency testing, and document control procedures; and

    c. Standard operating procedures for each of the methods used to examine the substances in the above-captioned case (e.g., organic extractions, gas chromatography (GC); mass spectrometry (GC/MS); infrared spectrometry (IR)), including procedures for collection of analytical samples from evidentiary materials, i.e., for collection of representative aliquots.

5. Validation studies: Please provide the results of validation studies and calibration curves for each method used to analyze evidence. (If the DEA Mid-Atlantic Laboratory did not perform a formal validation study for the determination of controlled substances using the subject methods, provide a copy of empirical results verifying the laboratory's ability to meet the desired performance characteristics for each testing method that was externally validated, including explicit reference to the original validation record used by the laboratory.)

6. Reagents and materials: Please provide source, preparation, and usage records for any and all reagents or other materials used during testing, including but not limited to the quality control test results of the certified standard on the day the testing for this case was done; the date each reagent was made; HPLC graphs and UV spectra for all reagents; "as prepared" and "as determined" values for all negative and positive controls; records that demonstrate traceability for standards and reference materials used for calibration and quality-control purposes during casework testing.

7. Instruments and equipment: Please provide the make and model of any instruments or equipment used during testing of the alleged controlled substances in this case, as well as manuals and instructions provided by the manufacturer, validation studies pertaining to laboratory equipment, documentation of maintenance of laboratory equipment, and corrective action logs pertaining to laboratory equipment.

8. Laboratory production data: Please provide laboratory production data for the tests performed in the subject case (gas chromatography (GC); mass spectrometry (GC/MS); infrared spectrometry (IR)), including specifics of the instruments and columns, temperature ramping programs, solvent gradient programs, internal and external controls and solvents that were used, the total spectral ranges observed, the

total chromatography run times, and the number of tests performed.

9. Audits and accreditation: Please provide copies of any audit reports for the period beginning one year prior to the testing performed in the above-captioned case to the present, as well as copies of all certificates of accreditation for the DEA Mid-Atlantic Laboratory.

10. Personnel: Please provide background information about each person involved in conducting or reviewing the controlled substance analysis in this case, including a job description, current resume, copies of all proficiency examinations and their results, and any performance evaluations.

5. Expert Witnesses

Rule 16(a)(1)(E) entitles the defense to:

> a written summary of the testimony of any expert witness that the government intends to use during its case-in-chief at trial.

Rule 16(a)(1)(E) further states:

> If the government requests discovery under subdivision (b)(1)(C)(ii) of this Rule and the defendant complies, the government shall, at the defendant's request, disclose to the defendant a written summary of testimony of any expert witness the government intends to use as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subparagraph shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications.

In *United States v. Curtis*, the Court of Appeals held that, in a drug case, "[t]he requirements of Rule 16(a)(1)(E) were satisfied by the government's production of the DEA-7 reports of chemists' analyses, the Certificates of Compliance, and the *curricula vitae* of the chemists who analyzed the substances." 755 A.2d at 1016. The court further observed, "the summary need not be extensive where the expert is not 'expected to testify on matters which touch on new or controversial techniques or opinions.'" *Id.* (quoting, Fed.R.Crim.P. 16 advisory committee's notes regarding the 1993 amendments to the rules).

In *Ferguson v. United States*, however, the court found a violation of Rule 16(a)(1)(E) in the government's vague expert notice provided. 866 A.2d 54 (D.C. 2005). The court emphasized that Rule 16(a)(1)(E) "is intended to minimize surprise that often results from unexpected expert testimony, reduce the need for continuances, and to provide the opponent with a fair opportunity to test the merit of the expert's testimony through focused cross-examination" (quoting Fed. R. Crim P. Advisory committee's notes regarding the 1993 amendments to the rules). The court found lacking the government's "written summary" of the testimony and basis and opinion of the proposed expert testimony.

For Government's Expert Witness:

- ✓ Request with specificity the underlying basis and opinion of any expert
- ✓ Request the expert's CV
- ✓ Obtain any prior transcripts of the expert's testimony in similar cases

6. Information Not Subject to Disclosure

Rule 16(a)(2) exempts from discovery:

> reports, memoranda, or other internal government documents made by the prosecutor or other government agents in connection with the investigation or prosecution of the case, or . . . statements made by government witnesses or prospective government witnesses except as provided in 18 U.S.C. § 3500.

Rule 16(a)(2) does not apply to the defendant's statements or prior record or to results or reports of physical or mental examinations. Accordingly all of those items are subject to disclosure by the government.

The term "internal government document" is not defined by the rule, and neither the Court of Appeals nor any federal court has developed a precise definition. Other case law has included in this term prosecutorial work product, *see, e.g., United States v. Penix*, 516 F. Supp. 248, 252 (W.D. Okla. 1981); intra-agency communications about the case, *see e.g. Gollaher v. United States*, 419 F.2d 520, 528 (9th Cir. 1969); memoranda between prosecutors discussing the immunity of a government witness, *see United States v. Pfingst*, 490 F.2d 262, 274 n.14 (2d Cir. 1973); and documents discussing the decision to charge the defendant, *see United States v. Berrigan*, 482 F.2d 171, 181 (3d Cir. 1973). A "colorable basis" for a claim of selective prosecution may be sufficient to compel discovery of government documents relating to an initial decision to dismiss the complaint against the defendant and the subsequent decision to prosecute him. *See e.g., United States v. Mitchell*, 778 F.2d 1271, 1277 (7th Cir. 1985).

Rule 16(a)(2) does not permit pre-trial discovery of government witnesses' statements, except as provided in the Jencks Act, which requires disclosure if those witnesses testify at a pre-trial motion hearing. *See United States v. Dockery*, 294 A.2d 158, 164 (D.C. 1972); Super. Ct. Crim. R. 12(e) (both parties must produce statements of law enforcement officer called by defendant to testify at pre-trial motion to suppress). In addition, the testimony of a government witness, by itself, is not discoverable under Rule 16. *See McIntyre v. United States*, 634 A.2d 940, 945-46 (D.C. 1993).

Rule 16(a)(3) provides that, except as provided in Rule 6, 16(a)(1)(A), 12(e), and 26.2, no other recorded proceedings before a grand jury need be disclosed to the defense before trial. Rule 6(e)(3) sets forth the circumstances under which the court may order disclosure of grand jury proceedings.

These limiting provisions must give way, however, if such documents or transcripts contain *Brady* information to which the defense is constitutionally entitled. *See (Adrian) Wiggins*, 386 A.2d at 1173 n.3; *infra* Section II; *see also United States v. Starusko*, 729 F.2d 256, 260 (3d Cir. 1984) (finding that exculpatory FBI internal report discussing informant and containing informant's statements must be disclosed despite Jencks Act).

C. Disclosure of Evidence by the Defendant

1. Reciprocal Disclosure

Government compliance with certain defense discovery requests leads to entitlement to reciprocal disclosure of similar items by the defense. When the government discloses materials under Rule 16(a)(1)(C) or (D), the defense, upon government request, must disclose books, papers, photographs, documents and tangible objects in its possession, custody or control, if it intends to introduce them as evidence at trial. Similarly, following government disclosure of materials under Rule 16(a)(1)(C) or (D), the government is entitled upon request to copies of the results or reports of physical or mental examinations and of scientific tests or experiments, which the defendant intends to use as evidence at trial, or which were prepared by a defense witness and relate to that witness's testimony, if the defense intends to introduce the reports or the witness's testimony at trial.

Finally, if the defendant requests disclosure under Rule 16(a)(1)(E) and the government complies, at the government's request the defendant must provide the government with a written summary of any expert testimony the defense intends to use at trial.

Because the defense can be compelled to disclose the results of psychiatric tests of the defendant where an insanity defense has been raised, *United States v. Carr*, 437 F.2d 662, 663 (D.C. Cir. 1970), counsel should be absolutely certain that the results, or the experts who prepared them, will be used at trial, before turning the requested items over to the government.
Reciprocal obligations arise only as to the category of material the government has disclosed. There is no reciprocal right of discovery if the defense requests only copies of the defendant's statements or if the defendant has a constitutional right to disclosure under the principles enunciated in *Brady v. Maryland*, 373 U.S. 83 (1963).

2. Information Not Subject to Disclosure

Rule 16(b)(2) provides that:

> Except as to scientific or medical reports, this paragraph does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's agents or attorneys.

This subdivision establishes a privilege for the defense similar to that provided for the government under Rule 16(a)(2).[9] *See Middleton v. United States*, 401 A.2d 109, 117 (D.C. 1979) (holding that trial court lacked authority under either Rule 16 or the Jencks Act to order disclosure of evidence obtained by defense investigator). *But see* Super. Ct. Crim. R. 26.2 (creating "reverse" Jencks Act).

In *Parks v. United States*, 451 A.2d 591 (D.C. 1982), the trial court refused the defendant's request to admit into evidence the testimony and interview notes of a codefendant's investigator, which concerned a government witness's line-up photo identifications, because they were attorney workproduct. The Court of Appeals found error, although harmless. It held that a defendant may invoke the work-product privilege against a codefendant, as well as the government. The party resisting disclosure must demonstrate that the disputed material was prepared in anticipation of litigation. The showing required to prevail against the privilege depends on whether the material sought is "fact work-product" or "opinion work-product." If it is fact work-product, the party seeking access must demonstrate a substantial need for the material. If it is opinion work-product, the party seeking production can overcome the privilege only by a showing of extreme necessity. If the material is a combination of both, the trial court should view the material in camera, and separate it appropriately, applying both standards. *See id.* at 607-08.

When calling an investigator, expert or other agent of the defense to testify as a witness, the defendant may waive the attorney work-product privilege and hence the guarantees of Rule 16(b)(2) with respect to reports or statements producible under the reverse-*Jencks* rule, Rule 26.2.[10]

2014 Supplement

***West v. United States*, 100 A.3d 1076 (D.C. 2014).** Trial court did not abuse its discretion by permitting prosecutor to introduce an automobile registration document showing that vehicle was registered to defendant, even though government had not produced document in response to Rule 16 discovery request, because admission of vehicle registration was not unfairly prejudicial

[9] *Gaither v. United States*, 391 A.2d 1364 (D.C. 1978), discussed the provision in D.C. Code § 11-2605(a) for *ex parte* authorization of defense expenditures for investigative, expert and other services. The "request for defense related services should be by *ex parte* application," *id.* at 1367 n.3; "eligibility and need for a defense service [should] be determined in an *ex parte* proceeding" in order to avoid disclosure of the defense to the government, *see id.* at 1367 n.4; in passing upon the application, "the trial court should tend to rely on the judgment of counsel," and the resulting "conclusions and opinions need not be reported to either the court or the prosecution," *id.* at 1368.

[10] *United States v. Nobles*, 422 U.S. 225 (1975), a pre-reverse-*Jencks* case, upheld an order, based on "the trial court's broad discretion as to evidentiary questions at trial," directing the defense to disclose statements obtained by an investigator from a government witness when the investigator was called to impeach the witness. The Court confined its ruling to disclosure during trial, to circumstances in which the defendant constructively waives the work-product privilege by calling counsel's agent as a witness, and to production of those documents that are relevant to the witness's testimony as determined by the trial court after *in camera* review. *See id.* at 234-36, 239-40. The result in most circumstances now would be achieved under Rule 26.2, but in unusual circumstances in which reverse-*Jencks* may not apply, *Nobles* is a supplemental vehicle for compelling disclosure of defense work-product.

where defendant knew without discovery that vehicle was registered to defendant and also knew that government might be able to prove this fact in some way other than introduction of vehicle registration.

***Myers v. United States*, 15 A.3d 688 (D.C. 2011).** Failure of Washington Metropolitan Area Transit Authority (WMATA) to provide assault defendant with digital video recording from bus on which assault took place did not constitute discovery violation because recording was not in possession of government where Metro Transit Police were not involved in case, and thus WMATA acted in proprietary, rather than governmental, manner.

II. THE *BRADY* DOCTRINE

Brady v. Maryland, 373 U.S. 83 (1963), and its progeny require that the government disclose to the defendant, upon request, any evidence in its possession that is both favorable and material to guilt or punishment, at a time sufficient for it to be used for trial. The duty arises from the Due Process Clause of the Fifth Amendment and is separate from and independent of any discovery under the Jencks Act, 18 U.S.C. § 3500, or the rules of criminal procedure. Failure to disclose such favorable evidence, regardless of the good or bad faith of the prosecutor, is a violation of Due Process. *See Youngblood v. West Virginia*, 547 U.S. 867 (2006) (reversing the defendant's conviction for sexual assault after ruling that he put forth a valid *Brady* claim that the government failed to produce evidence that two witnesses gave a written statement to a police officer that corroborated the defendant's claim of consensual sexual contact with the complainant).

Brady failed to establish a definition for "materiality;" *Brady* also failed to address the obligation of the prosecutor when no request for exculpatory evidence is made.[11] However, *United States v. Bagley*, 473 U.S. 667 (1985), attempted to address both issues. The majority opinion looked to two cases outside the *Brady* context, in which the materiality of undisclosed evidence was an issue. *See United States v. Valenzuela-Bernal*, 458 U.S. 858 (1982); *Strickland v. Washington*, 466 U.S. 668 (1984). The *Bagley* Court then found the standard from these cases "flexible enough to cover the 'no request,' 'general request,' and 'specific request' cases of prosecutorial failure to disclose evidence favorable to the accused," *Bagley*, 473 U.S. at 682, and borrowed the standard for the materiality of undisclosed evidence from those cases. That standard is the one we know today—whether there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Id.*[12]

The primary issues when litigating *Brady* are: what must be disclosed; who must make disclosure; the timing of the disclosure; and the effect of failure to disclose.

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[11] "[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87 (emphasis added).

[12] Note that the standard of materiality when the undisclosed evidence is perjured testimony appears to be less demanding; the prosecutor must disclose known perjury if "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976). *See* discussion of perjury, *infra* Section A.1.f.

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***Gee v. United States*, 54 A.3d 1249 (D.C. 2012).** Trial court did not err in refusing to grant mistrial or other sanction after government belatedly disclosed detective's notes and a photograph of defendant wearing hooded shirt where defense had already confronted complainant on key statement made in notes and cross-examined detective about statement and where photo was not used in case-in-chief but rather only upon defense inquiry as to whether detective had recovered hooded shirt from defendant's home.

***Miller v. United States*, 14 A.3d 1094 (D.C. 2011).** Reversible error for trial court not to find that government had effectively suppressed material exculpatory evidence in violation of *Brady*, thereby undermining fairness of defendant's trial, when government failed to disclose until evening before opening statements the grand jury testimony of principal eyewitness that gunman had shot pistol with left hand where defendant himself was right-handed.

***United States v. Bailey*, 622 F.3d 1 (D.C. Cir. 2010).** In case where trial court found probable cause to conduct traffic stop based on defendant's running of stop sign, thus leading to arrest for drugs in plain view on back seat, defendant failed to show *Brady* violation in government's inability to locate ticket for running stop sign where, although inability to locate was disclosed only on last day of trial, defendant was able to argue ticket's absence during closing argument to attack witness credibility and government's evidence in general, and where defendant could have recalled witness to further question him regarding apparent discrepancy in testimony.

***Vaughn v. United States*, 93 A.3d 1237 (D.C. 2014).** Government violated its *Brady* obligation to accurately and completely disclose the contents of an Internal Affairs final investigation report of prison guard, which evidenced the officer's prior false reporting and consequent demotion, and which the defense would have been able to use to impeach the officer who testified as to the identity of the defendant on a video recording.

Exculpatory Evidence:

- ✓ Counsel must request all exculpatory and/or inconsistent evidence from government
- ✓ Counsel should memorialize every request in written documents filed with the court

A. What Must Be Disclosed

The obligation of the prosecutor pursuant to *Brady* is to disclose any evidence that is both favorable and material to either guilt or punishment. Evidence is material, and constitutional error results from its suppression by the government "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Bagley*, 473 U.S. at 682. "A 'reasonable probability' of a different result is shown

when the Government's evidentiary suppression 'undermines confidence in the outcome of the trial.'" *Kyles v. Whitley*, 514 U.S. 419, 434 (1995) (quoting *Bagley*, 473 U.S. at 678). Material evidence includes both evidence that is directly exculpatory, and impeachment evidence. *See Bagley*, 473 U.S. at 676-77.

Despite these defining terms, "materiality" remains "an inevitably imprecise standard." *Agurs*, 427 U.S. at 108. For that reason, "and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure." *Id.* However, the "mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the Constitutional sense." *Id.* at 109-10. Although materiality must be evaluated on a case-by-case basis, there are certain situations in which the courts have determined that suppressed evidence was material, and from these cases one can begin to see some boundaries to the rule developing.

In *Boyd v. United States*, the court interpreted *Strickland* as saying that the Supreme Court's language in that case "can fairly be read only as recognizing that a duty of disclosure exists even if it later appears that reversal is not required." 908 A.2d 39 (D.C. 2006). The court also held that the *Brady* determination must be made "with a view to the need of defense counsel to explore a range of alternatives in developing and shaping a defense." Thus, under *Boyd*, it would seem that the defense, upon a showing of materiality, is entitled to all *Brady*-type defenses even if, for example, the client gave an alibi defense upon arrest, but evidence of self-defense existed. *But see Reyes v. United States*, 933 A.2d 785 (D.C. 2007) (no *Brady* violation where government did not have in its possession the information that defendant contended was *Brady* material. *Brady* imposes no duty upon police officers to investigate information that defendant might like to have); *Watson v. United States*, 940 A.2d 182 (D.C. 2008) (government's error in failing to disclose complete criminal history of informant under *Brady* did not require reversal where informant's motive to curry favor and escape further prosecution was fully probed before the jury and evidence apart from informant's testimony was strong); *Tyler v. United States*, 975 A.2d 848 (D.C. 2009) (holding that information that the government had obtained pretrial that defendant's girlfriend was a "pathological liar" was not *Brady* material that needed to be turned over to the defense – even when defense announced it would call her as a defense witness).

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***Porter v. United States*, 7 A.3d 1021 (D.C. 2010).** No *Brady* or Sixth Amendment violation in government's failure to turn over PD-127 "confidential funds" form filled out for informant in case because form immaterial to defense as it was neither exculpatory evidence, as it was consistent with arresting officer's testimony, nor impeachment evidence, because informant did not testify.

1. Impeachment of Government Witnesses

Impeachment evidence challenging the witness's credibility generally falls within the *Brady* rule. *See Giglio v. United States*, 405 U.S. 154 (1972); *Lewis v. United States*, 408 A.2d 303, 307 (D.C. 1979). The importance of impeachment evidence was noted in *Pennsylvania v. Ritchie*,

480 U.S. 39 (1987) (plurality opinion), where the Court remanded for the trial court to re-examine confidential records for materiality:

> [W]hen reviewing confidential records in future cases, trial courts should be particularly aware of the possibility that impeachment evidence of a key prosecution witness could well constitute the sort whose unavailability to the defendant would undermine confidence in the outcome of the trial. . . . Impeachment evidence is precisely the type of information that might be deemed to be material only well into the trial, as, for example, after the key witness has testified.

Id. at 65 (Blackmun, concurring); *see also In re Sealed Case* (*Brady* Obligations), 185 F.3d 887 (D.C. Cir. 1999); *Conley v. United States*, 415 F.2d 183 (1st Cir. 2005) (finding *Brady* violation for withholding of FBI memorandum indicating that key witness had expressed uncertainty about his recollection of the incident); *Silva v. Brown*, 416 F.3d 980 (9th Cir. 2005).

In *Bennett v. United States*, the Court of Appeals held a *Brady* violation had occurred when the government was allowed to redact portions of an important government witness's grand jury testimony showing she lied about another murder she witnessed. 797 A.2d 1251 (D.C. 2002). Given the government's case rested on the credibility of three witnesses, the court held there was a reasonable probability that had the evidence been disclosed the result of the proceeding would have been different leading the court to reverse Bennett's convictions. *Id.* at 1258. The *Bennett* court stated impeaching evidence is exculpatory and thus can be material to guilt or punishment within the meaning of *Brady*. *Id.* at 1256 (*citing Lewis v. Untied States*, 408 A.2d 303, 307 (D.C. 1979)). *See Ginyard v. United States*, 816 A.2d 21, 32 (D.C. 2003) (stating the government's constitutional duty to disclose material evidence favorable to the criminal defendant extends to evidence that could be used to impeach the credibility of a government witness); *Gaither v. United States*, 759 A.2d 655, 662 (D.C. 2000), *mandate recalled and amended by*, 816 A.2d 791 (D.C. 2003); *Brown v. United States*, 726 A.2d 149, 156 n.3 (D.C. 1999). Further support for this proposition is found in:

- *United States v. Bagley*, 473 U.S. 667 (1985) – prosecutor gave defendant affidavits from witnesses that they had given their statements without threats, rewards or promises of reward; failure to disclose the fact that two main witnesses were paid commensurate with the information they could provide about this defendant specifically determined to be material *Brady* impeachment evidence.

- *Giles v. Maryland*, 386 U.S. 66 (1967) – suppression by prosecutor of evidence relevant to the rape victim's credibility (prior unsubstantiated rape claims, prior criminal record, prior history of mental illness, and inconsistent statement given to police the night of the incident) violates *Brady*.

- *U.S. v. Quinn*, 537 F.Supp.2d 99 (D.D.C. 2008) – Government failed to disclose that their "key" witness had made false statements, the witness

was now a target of the investigation and was involved in plea discussions, and they would not use him at trial because they doubted his credibility. The government argued that although they had indications the witness was unreliable, there was no duty to disclose statements of his that they weren't sure were lies. This distinction between "knowing" and being "highly suspicious" was not a sufficient excuse and the government failed their duty to search for *Brady* information when they didn't investigate his credibility. The court found that government affirmatively misled defense on material aspects of the case and ordered a new trial.

a. "Merely cumulative" impeachment evidence

When a witness for the government is impeached at trial by the defense, further undisclosed impeachment evidence may be held not material because it is merely cumulative; that is, the undisclosed evidence does not attack the witness's statements in any new manner. This is true only if the witness was impeached at trial with the same kind of evidence. If the undisclosed impeachment evidence attacks the credibility of the witness in a manner unrelated to the trial impeachment, it is not "merely cumulative" and is therefore material, if admissible.

In *United States v. Cuffie*, the D.C. Circuit held that a co-conspirator witness's perjury in a past expungement hearing [witness was an ex-police officer] is material and failure to disclose the perjury violates *Brady*. 80 F.3d 514 (D.C. Cir. 1996). The court held that the impeachment was not merely cumulative where the trial impeachment involved evidence that the same witness was a drug addict and had violated his oath as a police officer by being involved in the drug conspiracy, but not evidence of witness's perjury in expungement hearing. *Id*. Similarly, in *United States v. Smith*, the D.C. Circuit held that undisclosed impeachment evidence of witness's deal with the prosecutor to testify in exchange for dismissal of two pending felonies, and witness's long history of serious mental illness were material under *Brady*. 77 F.3d 511 (D.C. Cir. 1996). Such information was not "merely cumulative" where the impeachment at trial consisted only of witness admitting under cross-examination that the government had agreed not to charge him with any uncharged, non-violent offenses he may have committed prior to the trial. *Id*.

b. Prior inconsistent statements of witnesses

Substantially inconsistent statements of government witnesses may be sufficiently material to the issue of guilt so as to constitute *Brady* material. *See (Raphael) Smith v. United States*, 666 A.2d 1216, 1224 (D.C. 1995); *Giles v. Maryland*, 386 U.S. 66, 76-77 (1967) (plurality opinion). Although the defense is entitled under the Jencks Act to production of prior inconsistent statements only at trial following the witness's testimony, disclosure under *Brady* may permit counsel to obtain statements before trial and may result in broader disclosure. *See Black v. United States*, 755 A.2d 1005, 1009-10 (D.C. 2000) (trial court erred in not conducting a *Brady* inquiry with regard to statements the government withheld that were inconsistent with the witness's testimony); *United States v. Starusko*, 729 F.2d 256, 263 (3d Cir. 1984); *see also Bullock v. United States*, 709 A.2d 87, 92 (D.C. 1998).

The seminal Supreme Court case is *Kyles v. Whitley*, 514 U.S. 419 (1995). In Kyles, a witness testified at trial that he saw the murderer shoot the victim in the head with a black .32 caliber handgun, then get inside the victim's red LTD and drive away, and that he recognized the defendant as the shooter. The prosecutor's failed to disclose witness's prior statement to the police the night of the incident that he did not see anything until he heard a shot, and then saw an unidentified man driving away in a red Thunderbird. The Supreme Court held that considered together with other impeachment evidence, this information was material and therefore violated *Brady*. *But see Coleman v. United States*, 515 A.2d 439 (D.C. 1986) (finding no Brady violation where prosecutor only disclosed inconsistent statements of other witnesses in police report after the police officer testified). Inconsistencies were not so material as to conclude there was a reasonable probability of a different result to the proceedings because witnesses' credibility was impeached by defense on original cross-examination, and the witnesses admitted under oath that they had told different versions of the events at different times because they were afraid).

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***Thompson v. United States*, 45 A.3d 688 (D.C. 2012).** Trial court did not abuse its discretion in denying motion for mistrial, though government had discovered that a witness had testified incorrectly in a prior proceeding, where prosecution did not discover false testimony until trial was in progress and where defense counsel was able to make ample use of witness's cross-examination through impeachment over the mistaken statement.

Prior Inconsistent Statements:

- ✓ Follow-up and directly ask the witness about all statements he or she has made
- ✓ Request an in camera review to assess all prior inconsistent statements

c. Victim's or witness's character (including prior bad acts)

Because it is permissible to impeach witnesses with their prior bad acts "where '(1) the examiner has a factual predicate for such questions, and (2) the bad act bears directly upon the veracity of the witness in respect to the issues involved in the trial,'" *Sherer v. United States*, 470 A.2d 732, 738 (D.C. 1983) (quoting *United States v. Akers*, 374 A.2d 874, 887 (D.C. 1977)),[13] disclosure of such acts, when known by the prosecution, may be required by the *Brady* rule. Applying this general principle, cross-examination is permitted on prior false reports of similar "crimes" by a key witness. *See Lawrence v. United States*, 482 A.2d 374, 377 (D.C. 1984). The court has also raised the possibility that a witness may be cross-examined about unadjudicated acts of perjury. *See Sherer*, 470 A.2d at 738. Therefore, counsel should specifically request that the prosecutor conduct a search of available law enforcement agency records, as with *Lewis* material, to determine the existence of requested information. Documentation of the content and value of suspected *Brady* material is critical. *See Farley v. United States*, 694 A.2d 887, 890 (D.C. 1997)

[13] *See also Grayton v. United States*, 745 A.2d 274, 280 (D.C. 2000).

(remanding for review of content of police complaint review board investigation and witness statement.)

In Giles v. Maryland, 386 U.S. 66 (1967), a rape trial, evidence of juvenile victim's promiscuity (admissible under state law) was material and prosecutor's failure to disclose was a *Brady* violation. However, in *United States v. Agurs*, 427 U.S. 97 (1976), the Supreme Court held that in a self-defense murder case, evidence of stabbing victim's prior criminal record, including guilty pleas to charges of assault and carrying a deadly weapon, were not material; the character of the victim was already apparent from the uncontradicted evidence at trial that he carried two knives. Notably, however, defense counsel had made no request for such material.

d. Impeachable convictions

A witness's prior impeachable convictions (those offenses involving dishonesty, false statements or fraud, or carrying a possible penalty of death or more than one year in prison, *see* D.C. Code § 14-305), known to the government must be disclosed before or at trial upon the request of the defendant. *See Lewis v. United States* (*Lewis II*), 408 A.2d 303 (D.C. 1979). While neither *Brady*, nor its progeny, has directly addressed impeachable convictions, other cases have expressly held that impeachment evidence is within the purview of *Brady*. *See Bagley*, 473 U.S. at 690-91. The factors favoring the mandatory disclosure of impeachable convictions were articulated by the court in *Lewis II*, 408 A.2d at 309:

> [G]iven (1) the legislative finding inherent in § 14-305 that use of impeachable convictions is likely to affect the outcome, (2) the *Brady*-Agurs concept of due process, and (3) the incongruity of leaving the decision about the potential impact of impeachable convictions of government witnesses in the hands of the prosecutor, we reaffirm our conclusion that the risk of a *Brady* violation from the failure to disclose impeachable convictions of government witnesses is so substantial that the right to a fair trial is implicated in the absence of a pre-trial enforcement mechanism. Although it may be somewhat strained to conclude that potentially all impeachable convictions can affect the outcome, we believe it is more strained to assume, as the government does, that failure to disclose such convictions is not likely to affect the outcome—an assumption contrary to Congress' implicit finding in adopting § 14-305. . . . We therefore reaffirm our holding that if the government knows about a prior conviction of one of its witnesses, usable for impeachment under D.C. Code 1973, § 14-305, then Fifth Amendment due process requires the government to disclose that conviction to the defendant, upon request.

Since disclosure is mandatory upon request, counsel should always include a demand for impeachable convictions of all government witnesses as a *Brady* request in each case. The prosecutor's personal knowledge of the witness's record is immaterial; the government is presumed to "know" any record listed in government records accessible to the prosecution. *See Lewis v. United States (Lewis I),* 393 A.2d 109, 116 (D.C. 1978).[14] There is no obligation to

[14] This standard may exclude records that have been destroyed pursuant to established record-keeping policies, records which are statutorily closed to the prosecutor, or even the temporary inability to access records between the time the request is made and the end of the trial. *See Young v. United States*, 478 A.2d 287 (D.C. 1984).

provide information otherwise available to the defense – especially information that is part of the public record.

Lewis II also established a procedure for requests for juvenile adjudications: (1) upon timely pre-trial request, the prosecutor shall file with the court a record of all such adjudications, together with a representation as to whether the adjudication may indicate a bias against the defendant; (2) if the court determines that the adjudication bears on the issue of bias, it shall be disclosed; (3) if the court determines that there is no bearing on the issue of bias, it shall not be disclosed unless the court is convinced that impeachment of the witness on the basis of the adjudication is likely to be material to the outcome of the proceeding; and (4) after conviction, any undisclosed adjudication shall be sealed and made part of the record on appeal. *See Lewis II*, 408 A.2d at 312; *see also Tabron v. United States*, 410 A.2d 209, 212 (D.C. 1979).

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***Robinson v. United States*, 50 A.3d 508 (D.C. 2012)**. Insufficient basis to find that government suppressed evidence learned "shortly before she testified" of complaining witness's use of PCP morning of offense where witness had repeatedly represented pretrial that she had not been under the influence of any drug at time of offense and where defendants knew from co-defendant's statement that witness was PCP user.

Impeachable Convictions:

✓ Government's mandatory disclosure of all impeachable convictions must be provided before trial

e. Witness bias

Information that a government witness may have a bias in favor of the government or against the defendant is *Brady* material. *See Bagley*, 473 U.S. at 676; *Giglio*, 405 U.S. at 155; *see also In re Sealed Case* (*Brady* Obligations), *supra* (government witness's cooperation agreements constituted *Brady* in that they provided evidence of witness's motive to plant weapons in accused's home); *United States v. Bowie*, 198 F.3d 905, 909 (D.C. Cir. 1999) ("Bias can manifest itself in hostility to one side but it can also take the form of favoring a litigant."), citing *United States v. Schaffer*, 183 F.3d 833, 852 (D.C. Cir. 1999). The most commonly litigated bias pursuant to *Brady* is a witness's potential "liberty interest" bias – that the witness has a criminal case pending in court at the time of trial, or is on probation, parole, or supervised release any of which might be favorably affected by government action. *See Artis v. United States*, 505 A.2d 52 (D.C. 1986); *McNeil v. United States*, 465 A.2d 807, 811-12 (D.C. 1983). The following "liberty interest" cases are instructive:

- *Giglio v. United States*, 405 U.S. 150 (1972) – suppressed evidence was material where assistant prosecutor promised a witness (a co-conspirator

of the defendant) that he would not be prosecuted if he agreed to testify against the defendant; lead prosecutor suppressed the inducement under the claim that he did not authorize the promise.

- *Sterling v. United States*, 691 A.2d 126, 135 (D.C. 1997) – failure of prosecutor to disclose pending possession of heroin charge was not material where the witness's departure from his grand jury testimony caused the government to impeach his testimony at trial; since the impact of the witness's testimony was negligible, the possible use of the pending charge to impeach him would not have impacted the trial result.

- *United States v. Smith*, 77 F.3d 511 (D.C. Cir. 1996) – government failed to disclose agreement to dismiss two pending felony charges against a witness in exchange for his testimony. The witness had only admitted from the stand the government's agreement not to file any new charges against him for any non-violent crimes that he may have committed with which he had not yet been charged. Suppressed evidence was material and failure to disclose violated due process.

Also disclosable are monetary and other material benefits supplied to government witnesses who testify at trial. *See generally (Melvin) Johnson v. United States*, 636 A.2d 978, 980 (D.C. 1994); *Sherer v. United States*, 470 A.2d 732, 739 (D.C. 1983).

Other cases involving material benefits are:

- *Kyles v. Whitley*, 514 U.S. 419 (1995) – state's witness received $1,600 reward for his testimony in murder trial of defendant. Because record is unclear whether this evidence was disclosed to defense, the case was remanded for lower court to determine if disclosure had occurred.

- *United States v. Bagley*, 473 U.S. 667 (1985) – at trial, prosecutor provided affidavits from witnesses that they had received no payment or other inducement for their testimony; defense discovered post-trial that two main government witnesses were under contract to be paid "commensurate with the information given."

If the witness has some desire to minimize or hide his/her own involvement, known to the government, that information is likewise *Brady* material. For instance, in *Kyles*, 514 U.S. 419, the prosecutor suppressed evidence that government's primary witness, who gave police all the information about where and when to locate numerous pieces of evidence, was himself linked to other similar crimes that occurred at the same location where the instant offense occurred. The Court found a *Brady* violation.

Bias can take many forms, and counsel should be alert to request specifically under *Brady* all possibly relevant forms of bias of government witnesses so that the subject may be explored on cross-examination. *See, e.g., (Dennis) Jackson v. United States*, 623 A.2d 571, 583 (D.C. 1993)

(holding that witness's mental or emotional condition is ripe for bias inquiry when witness allegedly told his psychologist that defendant was a "devil"); *In re C.B.N.*, 499 A.2d 1215, 1219-20 (D.C. 1985) (finding "corruption" of the witness – extorting money from the defendant – a form of bias); *Moreno v. United States*, 482 A.2d 1233 (D.C. 1984) (finding bias when witness harbors racial bias against persons of defendant's race); *Beynum v. United States*, 480 A.2d 698, 707-08 (D.C. 1984) (holding that defendant's pending civil suit against witness, or witness's other pecuniary interest in outcome of trial is bias); *Petway v. United States*, 391 A.2d 798, 801 (D.C. 1978) (finding bias when witness disliked defendant); *see also In re Sealed Case*, 185 F.3d 887 (*Brady* Obligations); *United States v. Bowie*, 198 F.3d at 909 (bias may be for one party or against another one).

Extrinsic evidence of bias is always admissible. *See Grayton v. United States*, 745 A.2d at 281 (citations omitted); *Bethea v. United States*, 599 A.2d 415, 417 (D.C. 1991); *C.B.N.*, 499 A.2d at 1218. Counsel should request any extrinsic evidence, such as documents, showing the bias.

f. Perjury at trial

Even before *Brady*, the Supreme Court created a broad duty for the prosecutor to disclose perjured testimony. Due process is violated any time perjured testimony is procured by the prosecutor. *See Mooney v. Holohan*, 294 U.S. 103 (1935); *Hawthorne v. United States*, 504 A.2d 580, 589-90 (D.C. 1986); *United States v. Cuffie*, 80 F.3d 514 (D.C. Cir. 1996). Solicitation of the perjury is not required; even when the perjury comes completely on the whim of the witness, if the prosecutor knows it is false, there is a duty to disclose. *See Alcorta v. Texas*, 355 U.S. 28 (1957).

Mooney and *Alcorta* dealt with perjury concerning the facts of the case, but the prosecutor has a duty to disclose perjury going to the credibility of the witness as well. *See Napue v. Illinois*, 360 U.S. 264 (1959) (finding that prosecutor's failure to correct or disclose a witness's false statement that he had not been promised lenient treatment in another matter in exchange for his testimony against the defendant, violated due process). Whether the defendant has requested any *Brady* material or not, the prosecutor must disclose known perjury if "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976).[15] Other cases about perjury include:

- *Giglio v. United States*, 405 U.S. 150 (1972) – witness denied promise of lenience by another prosecutor, of which examining prosecutor did not

[15]*Agurs*, 427 U.S. 97, divided non-disclosure situations into three categories: 1) perjury; 2) specific requests for exculpatory material; and 3) general or no request for exculpatory material. Each situation had a different standard of materiality. Three of the five Justices in the *Bagley* majority stated in a concurrence that the unified standard announced in that case was "sufficiently flexible to cover all instances of prosecutorial failure to disclose evidence favorable to the accused," *id.* at 685, and it was generally assumed this meant the Court would use a single standard for instances of perjured testimony as well. But *Kyles*, 514 U.S. at 429, expressly discussed that *Bagley* "abandoned the distinction between the second and third *Agurs* circumstances, i.e. the 'specific-request' and 'general- or no-request' situations." Because the first *Agurs* circumstance, perjury, was omitted, it has been inferred that *Kyles* maintained the distinct standard for perjury situations.

know; promise was within government's knowledge, so non-disclosure required reversal.

- *Giles v. Maryland*, 386 U.S. 66 (1967) – victim and her boyfriend, both witnesses at defendant's trial, testified as to factual events in manner totally contradictory to the statements they gave to police: prosecutor made no attempt to correct their testimony despite knowing about the prior statements.

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***Longus v. United States*, 52 A.3d 836 (D.C. 2012)** Government's obligation to disclose known perjury not dependent on whether government called witness in question.

g. Other areas of impeachment

Additional areas of impeachment which fall under *Brady* include the government's knowledge of conditions affecting a government witness's capacity to observe, perceive, or recollect, such as mental illness or retardation. *See United States v. Smith*, 86 F.3d 1237 (D.C. Cir. 1996). Alcohol or drug intoxication at a relevant time, or chronic substance abuse also should be disclosed. *See (Stanley) Jackson v. United States*, 377 A.2d 1151, 1154 (D.C. 1977); *United States v. Kearney*, 420 F.2d 170, 172 (D.C. Cir. 1969). Disclosure of medical or psychological records, certain juvenile records, and other confidential records will only be ordered by the court if the defendant can make a "proffer adequate to overcome [the] privacy interest" of the subject of those records. *See Hammon v. United States*, 695 A.2d 97, 106 (D.C. 1997) (holding that unsubstantiated hearsay that witness was suffering from an undefined psychiatric disorder and was implicated in unspecified homicides was insufficient to overcome the privacy interest). While there is no "formula" for what is adequate, counsel should note that the more detailed and substantiated the request is, the more likely the court will rule the proffer adequate.

2. Self-Defense

Information supporting a claim of self-defense is exculpatory. *See United States v. Agurs*, 427 U.S. 97 (1976); *Johns v. United States*, 434 A.2d 463, 472 (D.C. 1981). Evidence of complainant or decedent's prior acts of violence and reputation for violence is admissible in support of a claim of self-defense, whether or not known by the defendant. *See (William) Johnson v. United States*, 452 A.2d 959, 961 (D.C. 1982). Therefore, counsel should always make a *Brady* request for the complainant or decedent's FBI rap sheet, *see Martinez v. Wainwright*, 621 F.2d 184, 188 (5th Cir. 1980); police reports and investigative files, including grand jury transcripts, on prior violent acts by the complainant/decedent; unadjudicated prior acts of violence by the complainant/decedent; and any witnesses who state that the complainant/decedent had a reputation for violence.

Communicated or uncommunicated threats against the defendant by, or at the behest of, the complainant or decedent, are admissible in support of a claim of self-defense in assault and homicide cases. *See Frost v. United States*, 618 A.2d 653, 663 (D.C. 1992) (citation omitted).

3. Guilt of Someone Other than the Defendant

Evidence tending to show someone other than the defendant committed the crime of which he or she is accused is unquestionably *Brady* material. *See Barbee v. Warden*, 331 F.2d 842, 844 (4th Cir. 1964). The evidence must be more than mere rumor or an unsubstantiated investigatory lead to trigger the disclosure requirements. Hence, failure to disclose that some unidentified person committed the crime does not rise to a *Brady* rule violation. *See Winfield v. United States*, 676 A.2d 1 (1996) (standard for admissibility of third party culpability). In *United States v. Battle*, 754 A.2d 312, 314 (D.C. 2000), the Court of Appeals held that "the trial court erred in excluding evidence of [an] earlier shooting" in which "another person so closely resembling [the accused] had been mistaken for [the accused and had] committed a similar (nonfatal) shooting two weeks before the murder with one of the same pistols used in the murder." With respect to sentencing, an accomplice's confession to being the principal in the offense, even if it implicates the defendant as an accessory, is material to punishment and must be disclosed before sentencing. As general matter however, and as the below listed cases indicate, the government's duty to disclose tends to be construed narrowly and excludes evidence of which the defendant is aware or to which the defendant has independent access. The lead case is *Kyles*, 514 U.S. 419, which held that the cumulative effect of all the suppressed evidence by the government: (list of all cars in crime scene parking lot did not include defendant's car, and testimony of witness was that he drove defendant back to the crime scene the next day to pick up his car; government's main witness knew exactly where and when key evidence would turn up; evidence that same witness was linked to several other crimes at the same location as this murder; and eyewitnesses' sworn testimony at trial that contradicted witnesses' statements to police), was material to guilt or innocence and failure to disclose violated due process. However, the following are cases that find no *Brady* violation on the facts presented:

- *Matthews v. United States*, 629 A.2d 1185 (D.C. 1993) – no *Brady* violation where government failed to disclose statement to the effect that defendant was not involved in the murder, where statement was double hearsay, vague, and unlikely by itself to have significant impact on the trial. Failure of prosecutor to disclose co-defendant's taped confession to police, exculpating the defendant of any involvement in the actual murder itself, was immaterial, where the court found as fact that the prosecutor did disclose the substance of the statement to the defense. Also immaterial was the failure to disclose the transcripts of the co-defendant's plea hearing, since it was readily available to the defense as a public record and the defense was aware of its existence.

- *Johnson v. United States*, 544 A.2d 270 (D.C. 1988) – disclosure during trial of misidentification by witnesses of someone other than defendant as the perpetrator did not violate *Brady* simply because it was not revealed before trial began.

- *Henson v. United States*, 399 A.2d 16 (D.C. 1979) – Since the *Brady* rule is applicable only to evidence unknown to the defendant, it was immaterial

that the prosecution did not disclose a transcript of the defendant's parole hearing, in which witness, a passenger in defendant's car at the time of his arrest, testified as to ownership of the guns defendant was charged with possessing. Defendant was present at his parole hearing with his attorney, and was fully aware of the existence and contents of the passenger's testimony.

- *Frezzell v. United States*, 380 A.2d 1382 (D.C. 1977) – mid-trial disclosure of a statement of a witness who could not be located at the time of the trial, that the assailant was 17-19 years old, 5'7"-5'9" tall. Defendant was 40 years old and 6 feet tall. No *Brady* violation; the information was disclosed, and the court ruled that if defendant needed more time to prepare based on the disclosure, he should have requested a continuance.

- *Smith v. United States*, 363 A.2d 667 (D.C. 1976) – government withheld lab report until trial that none of the defendant's pubic hair had been found in combings of the rape victim's pubic area, nor had any been discovered in victim's bed, where rape took place. Immaterial for *Brady* purposes what evidence did not exist.

- *United States v. Sedgwick*, 345 A.2d 465 (D.C. 1975) – unverified "street rumor" that another person committed the crime, investigated by police until defendant confessed, was not disclosed until mid-trial (after police testify); immaterial because it was inadmissible hearsay.

B. Identification issues

Evidence that an eyewitness identified someone, other than the defendant, as the perpetrator of the alleged offense by name, or in any identification procedure is *Brady* material. *See Cannon v. Alabama*, 558 F.2d 1211, 1215-16 (5th Cir. 1977); *Grant v. Alldredge*, 498 F.2d 376, 382 (2nd Cir. 1974). *But see Johnson*, 544 A.2d at 275 ("the mere failure of a witness to make an identification is not exculpatory."). Similarly, information that a witness stated that the defendant was not the perpetrator is *Brady*. *See United States ex rel. Meers v. Wilkins*, 326 F.2d 135, 136 (2d Cir. 1964) (even where counsel did not request disclosure of the evidence). More commonly, information that a witness gave a description of the perpetrator that differs from the defendant in some material aspect, e.g., height, weight, race, complexion, clothing, age, etc. should be considered *Brady* material. *See Frezzell*, 380 A.2d at 1384-85 (D.C. 1977); *Jackson v. Wainwright*, 390 F.2d 288, 298 (5th Cir. 1968); *cf. Davies v. United States*, 476 A.2d 658, 661 (D.C. 1984) (failure to disclose that witness, who did not testify at trial, had told police that defendant's companion was white, when the trial witnesses described the companion as a light complected black man, did not require reversal because the information was not sufficiently "material," as it had no impeachment value).

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***Mackabee v. United States*, 29 A.3d 952 (D.C. 2011).** Although government's handling of *Brady* obligations "troubling" in that it revealed less than one week before trial both information that one eyewitness failed to identify defendant from group photos including him and a videotaped statement of another eyewitness that included a description that "could not match" defendant, reversal not required where discovery package sent to defense counsel one year earlier contained sufficient information for defense counsel to track down witness that had failed to identify defendant and where discovery package included notes of videotaped statement and defense counsel had opportunity to cross-examine witness regarding his statement.

C. Disclosure of Evidence "in the Government's Possession"

Any exculpatory, material evidence personally known by the prosecutor, or in his or her personal possession, must be disclosed. However, the obligation to disclose is not limited to evidence personally known: evidence held by other agencies acting on behalf of the government, such as law enforcement agencies, also is covered by the *Brady* rule. The District of Columbia Circuit has extended this duty to cover any government investigative agency or jail authority. *United States v. Butler*, 499 F.2d 1006 (D.C. Cir. 1974). The Court of Appeals, however, has declined to embrace this holding. *See March v. United States*, 362 A.2d 691, 700 (D.C. 1976); *cf. Farley v. United States*, 694 A.2d 887, 890 (D.C. 1997) ("the government is responsible for knowing what the police know"). In the *Jencks*/Rule 16 context, however the Court of Appeals in *Robinson v. United States*, held that the United States Attorney's Office was deemed to be in possession of a phone call recorded by the District of Columbia Department of Corrections. In a case in which a threatening statement was captured on a jail phone recording system, the court held that the police "as an integral part of the prosecution team had an obligation to secure the tape recording." 825 A.2d 318, 328 (D.C. 2003).

The prosecutor has no constitutional obligation *sua sponte* to search the investigative files of other agencies for *Brady* material. *See Agurs*, 427 U.S. 109; *Lewis I*, 393 A.2d at 116. Therefore, it is of critical importance that a specific request for such material be made to put the prosecutor on notice that such evidence may exist and to trigger the duty to investigate. These requests should be sufficiently in advance of trial to allow for any investigation prompted by disclosure. *See Young v. United States*, 478 A.2d 287 (D.C. 1984) (when defense does not request a criminal record until the start of the trial, and the computer access to records was temporarily unavailable, the record the prosecutor did disclose was considered the complete record available to the government at the relevant time and there was no *Brady* violation).

Once requested, the collective knowledge of law enforcement is imputed to the prosecutor. *See Kyles*, 514 U.S. 419 (prosecutor's claim that much of the undisclosed exculpatory evidence was not disclosed to him by the police is irrelevant; the knowledge of the police is imputed to the prosecution); *Giglio*, 405 U.S. 150 (witness denied promise of lenience by another prosecutor, of which examining prosecutor did not know; promise was within government's knowledge, so non-disclosure required reversal); *Lewis*, 393 A.2d 109 (criminal record of the government's witness was readily accessible to the prosecution, prosecutor's personal ignorance of that record is irrelevant: government is deemed to know all prior convictions that are listed in government

records accessible to the prosecution. Additionally, government is deemed to have knowledge of information in files of MPD and FBI).

The records of other government agencies may also be considered "in the possession of the government" and, therefore, subject to *Brady* rules for disclosure under certain circumstances.

- *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987) – case remanded where trial court refused to review *in camera* Children and Youth Services files related to defendant's daughter, the alleged victim of parental sexual abuse; state law allowed use of social services' files in some proceedings, and defendant's request for *Brady* material from said files created an obligation for court to review same to determine if such material existed, instead of summarily denying the defendant's motion to turn the files over as *Brady* material.

- *Farley v. United States*, 694 A.2d 887, 890 (D.C. 1997) – complaint filed with the Civilian Complaint Review Board by occupant of private residence against officer who arrested the defendant following an alleged "hot pursuit" into the residence may be *Brady* material. Such complaint goes to the credibility of the officer's statements about entering the residence in pursuit of defendant. Case remanded to determine if complaint was exculpatory and whether it had been disclosed to the defense.

- *United States v. Smith*, 77 F.3d 511 (D.C. Cir. 1996) – error where trial court refused to examine the government witness's available psychiatric history for evidence material under *Brady*. History of mental illness can be admissible for impeachment purposes, and trial court could not determine the materiality or admissibility of such information without a review of the evidence.

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***Myers v. United States*, 15 A.3d 688 (D.C. 2011).** Failure of Washington Metropolitan Area Transit Authority (WMATA) to provide assault defendant with digital video recording from bus on which assault took place did not constitute discovery violation because recording was not in possession of government where Metro Transit Police were not involved in case, and thus WMATA acted in proprietary, rather than governmental, manner.

D. Court's Obligation when Defense Requests *Brady* Material

The court has an obligation to ensure that the mandates of the due process protections of the *Brady* doctrine are followed. In *Boyd v. United States*, the court held that the trial court had an obligation to assure that the government properly discloses *Brady* to the defense. 908 A.2d 39 (D.C. 2006). In *Boyd*, the court remanded the case to the trial court for production of the statements of witnesses that the trial judge had refused to review *in camera*, saying the trial

judge abused her discretion by merely relying on the government's assertions that the statements contained nothing exculpatory. The court held that prosecutorial discretion to identify information that must be turned over pursuant to *Brady* is not unlimited, and "courts have the obligation to assure that it is exercised in a manner consistent with the right of the accused to a fair trial."

In the typical case, the government decides which information to disclose pursuant to *Brady*. *Pennsylvania v. Ritchie*, 480 U.S. 39, 59 (1987). However, if the prosecutor acknowledges the existence of some evidence that could be considered inconsistent, or in any other circumstance where the defendant shows more than mere speculation of the existence of specific exculpatory evidence (e.g., a Department of Social Services file on the victim, transcript of a prior deposition, etc.), it is incumbent upon the trial court to review the evidence and determine if the information is material under *Brady*. Failure of the court to review such information before summarily ruling it to be immaterial often results in the conviction being remanded. A trial court's determination of materiality will not be disturbed on appeal unless the decision was "unreasonable." *Agurs*, 427 U.S. at 114. *See Smith v. United States*, 665 A.2d 962 (D.C. 1995) (court refused, after request of the defendant, to review transcripts of prior juvenile proceeding against a juvenile codefendant for statement of a now-unavailable witness that defendant was not involved in the shooting. Prosecutor implied that the transcript only contains "minor inconsistencies," not contradictory evidence. Trial court abused its discretion by not reviewing the transcript after the prosecutor made the implication).

Court's Obligation to Ensure *Brady* is Followed:

- ✓ Court can not merely rely on government's assertions that statements contain no exculpatory material
- ✓ Request that court make inquiry regarding potential *Brady* material on the record

E. Limitations on Disclosure

Only exculpatory information is covered by *Brady*. "There is no general constitutional right to discovery in a criminal case, and *Brady* did not create one." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (no contention that the information sought – the identity of an undercover agent—would be at all exculpatory; accused was simply trying to learn the identity of key witness before trial); ***cf.*** *Lindsey v. United States*, 911 A.2d 824 (D.C. 2006) (government's failure to make proper *Brady*/*Giglio* disclosures did not constitute reversible error because there was not a reasonable probability that results of proceeding would have been different had evidence been properly disclosed where court delayed proceedings to give government time to make its required disclosures, defense counsel was able to make effective use of information in cross-examining witnesses, and court instructed jury not to hold trial delays against any party).
Information otherwise known to or available to the defendant is not considered *Brady* material. This may include criminal records generally available to the public, such as records maintained by the local clerk of court. It may also include information known to defense counsel. *See e.g.*,

Sterling v. United States, 691 A.2d 126 (D.C. 1997) (failure to disclose witness's pending heroin possession charges prior to trial is not a *Brady* violation because the information regarding the pending charge was available to the public – and, therefore, the defendant – from the clerk of court); *Simms v. United States*, 634 A.2d 442 (D.C. 1993) (no *Brady* violation for governmental nondisclosure of complainant's misidentification at line-up where defense counsel was present at line-up and, therefore, knew about misidentification before trial, and effectively used the information at trial); *Gates v. United States*, 481 A.2d 120 (D.C. 1984) (government provided defense with copy of the scientific report regarding results of blood typing in rape/murder case, report did not explain the findings in layman's terms, and defense failed to appreciate significant information contained in the report; not a *Brady* violation because expert was known and available to defense to interpret the results); *Henson v. United States*, 399 A.2d 16 (D.C. 1979) (it was immaterial that the prosecution did not disclose a transcript of the defendant's parole hearing, in which witness, a passenger in defendant's car at the time of his arrest, testified as to ownership of the guns defendant was charged with possessing; defendant was present at his parole hearing with his attorney, and was fully aware of the existence and contents of the passenger's testimony).

The burden of showing the materiality of inadmissible evidence is far more demanding. While not completely foreclosing the possibility that inadmissible evidence can be material under *Brady*, *Wood v. Bartholomew*, 516 U.S. 1 (1995), held that such evidence (specifically, a polygraph result) could not directly affect the outcome of the trial. Although the appellant argued that the evidence could possibly lead to admissible evidence, the Court found that argument "mere speculation," and insufficient to require disclosure under *Brady*. Counsel must show definitely that specific and admissible evidence would be obtained from the use of the otherwise inadmissible evidence in order to argue the materiality of such inadmissible evidence. While this may be possible at the appellate level (where the appellant can show that the undisclosed evidence, discovered post-trial, led to some directly material evidence), this burden is difficult to overcome at the trial level, since the defendant's knowledge of such material evidence before trial negates the applicability of *Brady*.

- *Wood v. Bartholomew*, 516 U.S. 1 (1995) – government failed to disclose polygraph results in which witness, defendant's brother, showed deception on questions about his own involvement in the murder/robbery; results were not material because they were not admissible, and testimony of defendant's brother and brother's girlfriend, as well as the "accidental shooting defense" (where the weapon was a single shot revolver and the victim was shot twice execution style) made it not reasonably likely that disclosure would have made a difference in the outcome.

- *Smith v. United States*, 666 A.2d 1216, 1224 (D.C. 1995) – witness inability to pass a polygraph is not material because inadmissible, so government failure to disclose the polygraph result does not violate *Brady*.

F. Timing of *Brady* Disclosures

The "prosecution must disclose exculpatory material 'at such time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case.'" *Edelen v. United States*, 627 A.2d 968, 970 (D.C. 1993) (quoting *United States v. Pollack*, 534 F.2d 964, 973 (D.C. Cir 1976)). Information that would require more than a cursory investigation should be disclosed prior to trial; other information can be disclosed during trial without implicating the rule. *See United States v. Engram*, 337 A.2d 488, 492-93 (D.C. 1975) (prior convictions and arrest record need not be disclosed before trial).

There is substantial authority recommending early disclosure of *Brady* material. In *Ebron v. United States*, the court emphasized:

> prosecutors are expected to resolve all reasonable uncertainty about the potential materiality of exculpatory evidence in favor of *prompt* disclosure . . . When the government fails to make prompt disclosure, as required, the opportunity for use of the material by the defense may be impaired, and the administration of justice may be impeded by the necessity for a continuance to allow the defense to make use of the material or by the need for reversal of a conviction.

838 A.2d 1140, 1156 n.13 (D.C. 2003) (internal quotations and citations omitted). In *Sykes v. United States*, the government failed to disclose until two days prior to defendant's murder trial the identities and grand jury testimony of two witnesses whose testimony would have impeached an informant's testimony that he had heard co-defendant admit to the crime, which formed the basis for an adoptive admission against Sykes. 897 A.2d 769 (D.C. 2006). The court reversed Mr. Sykes' convictions, emphasizing the importance of the timely disclosure of *Brady* information and finding a reasonable probability that the outcome of the case would have been different had the defense been able to present the live testimony of the witnesses, as opposed to grand jury transcripts. *But see Stewart v. United States*, 881 A.2d 1100 (D.C. 2005) (rejecting defendant's *Brady* challenge to the government's late disclosure of relevant police reports, holding that, while the government was obligated to disclose the reports, defendant had failed to establish the requisite reasonable probability that the proceeding would have been different with an earlier disclosure).

The defense generally can argue that the danger to the defendant's right to a fair trial outweighs any speculative danger of early disclosure, such as fabrication of testimony or influencing or intimidating witnesses. The ABA Standards call for early disclosure. Standards for Criminal Justice, 11-2.1(c), 11-2.2 (a) (2d. ed. 1980) (disclosure "as soon as practicable following the filing of charges"); 3-3.11(a) ("disclosure at the earliest feasible opportunity"). *See D.C. Rules of Professional Conduct*, Rule 3.8. Special Responsibilities of a Prosecutor (2000). *See also Leka v. Portuondo***,** 257 F.3d 89 (2d Cir. 2001) (reversal based on failure to disclose *Brady* in timely fashion. Nine days before trial state disclosed name and address of off-duty police officer eyewitness who contradicted prosecution witnesses and theory. The Second Circuit outlined the problems with late disclosure: 1) that the limited and late disclosure "could have led to specific exculpatory information only if the defense undertook further investigation. When such a disclosure is first made on the eve of trial, or when trial is under way, the opportunity to use it

may be impaired. The defense may be unable to divert resources from other initiatives and obligations that are or may seem more pressing." and 2) that "the defense may be unable to assimilate the information into its case. Moreover, new witnesses or developments tend to throw existing strategies and preparation into disarray." *Leka***,** 257 F.3d at 101.

There is some tension among cases involving disclosure of material mid-trial. Some of the cases hold that the issue is not preserved for appellate review unless the defendant moves for either a continuance to examine and investigate the disclosed material, or a mistrial because there is not time at this point in the proceedings for a proper investigation. Others hold that it is not necessary for the defense to make these motions to preserve the issue. While the courts have tried to distinguish these cases by the difficulty of recognizing the exculpatory value of the disclosure, the better practice would be for the defense to always move for a continuance or mistrial when midtrial disclosures are made.

- *Curry v. United States*, 658 A.2d 193, 197-99 (D.C. 1995) – government's ten-month delay in disclosing exculpatory statement of witness violated *Brady*. The error was not prejudicial, however, because the witness could not be located and there was no reasonable probability the result would have been different.

- *Johnson v. United States*, 544 A.2d 270 (D.C. 1988) – disclosure during trial of government witnesses' misidentification of the defendant as the perpetrator, and exculpatory grand jury testimony was timely for *Brady* purposes, because defense was able to use the evidence effectively to cross-examine the witnesses. *See also Mercer v. United States*, 724 A.2d 1176 (D.C. 1999).

- *Frezzell v. United States*, 380 A.2d 1382 (D.C. 1977) – prosecutor, in response to a general request for *Brady* material, disclosed mid-trial the statement of a witness who could not be located who gave a description of the perpetrator that was nothing like the defendant; timing of disclosure was sufficient; if defendant needed time after the disclosure to make effective use of statement, it was incumbent on him to request a continuance or a mistrial.

- *But see James v. United States*, 580 A.2d 636 (D.C. 1990) – mid-trial disclosure violates *Brady* when time of disclosure was insufficient for defense to use the disclosed material evidence. Prosecutor disclosed on fifth day of a six-day trial that Augustine, an unavailable witness, had told another witness to get rid of the murder weapon. Prior to this disclosure, Augustine's "spontaneous excited utterance" to an individual named Baptiste that the defendant shot at the victim had been admitted through Baptiste. Because Augustine's statement to Baptiste occurred after his statement regarding the gun, the spontaneity of the statement to Baptiste was questionable, and thus the admissibility of this purported excited utterance was in doubt. Although the defense had not moved for a mistrial

> or continuance when the disclosure was made, it was not reasonable to expect the relevance of the disclosure to the hearsay issue in the statement to Baptiste to be immediately recognizable to the defense (unlike *Frezzell*, where the impact of the late-disclosed statement was immediately recognizable as exculpatory).

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***Williamson v. United States*, 993 A.2d 599 (D.C. 2010).** No *Brady* violation for government to disclose four days before trial two witnesses who would have given conflicting testimony, one of whom would have testified that defendant's truck was at scene but could not identify defendant, and the other who would have testified that he did not see defendant's truck at scene, where testimony would not have had reasonable probability of producing different verdict in case.

G. Method of Disclosure

The defense can initiate a *Brady* demand by a standard request, preferably written or otherwise in the record, *see Rosser*, 381 A.2d 598 (D.C. 1997) for:

> any and all information within the possession of the government that could constitute evidence favorable to the accused, or that may lead to material exculpatory evidence, within the meaning of *Brady v. Maryland*, 373 U.S. 83 (1963), particularly with respect to [insert type of evidence and/or investigative agency with specificity].

The government should then make disclosure by turning over the material to the defense attorney of record.

The government generally should familiarize itself with the evidence in order to make informed responses, and has a continuing duty to disclose *Brady* material. One Superior Court judge has formulated the following procedure for when an issue arises as to whether certain material is producible under *Brady*:

> (1) Upon defense request, the government either should produce the evidence or respond that it has no *Brady* information;
>
> (2) If the government has a "genuine doubt" whether information needs to be disclosed pre-trial, it should provide defense counsel with a general description of the undisclosed information and the reason for the withholding;
>
> (3) Defense counsel may then request that the court make an *in camera* inspection to determine whether the material must be disclosed under *Brady* and, if so, when it is to be disclosed.

United States v. Burnett, 102 Wash. D.L. Rptr. 985 (D.C. Super. Ct. May 14, 1974) (Goodrich, J.).[16]

H. Consequences of Nondisclosure

1. Nondisclosure discovered before trial

Upon learning, before trial, that the government may have failed to disclose *Brady* information, counsel should file a motion to compel disclosure and, if necessary, move to continue the trial so that the information may be obtained, investigated, and incorporated into the defense trial strategy. *See Frezzell*, 380 A.2d at 1385. The standard applied in deciding a pre-trial motion to compel disclosure of *Brady* information is different from the retrospective analysis reviewing courts use in deciding *Brady* claims on appeal. *See Lewis II*, 408 A.2d at 307. In a pre-trial setting:

> there can be no objective, *ad hoc* way to evaluate before trial whether [putative *Brady* material] . . . will be material to the outcome. No one has that gift of prophecy. To argue that the court can apply a material-to-outcome test before trial is to argue a contradiction. It also raises the serious possibility that a defendant may be forced, unfairly, to disclose his or her case before trial, in an effort to carry a virtually impossible burden.

Id. Accordingly, upon a pre-trial motion for discovery of specific *Brady* information, "a defendant is entitled to disclosure [if] 'a substantial basis for claiming materiality exists.'" *Id.* at 308.

In a pre-trial posture, counsel should take the position that the government's duty to disclose all favorable evidence must be complied with without regard to the government's "opinion" of its materiality. *See United States v. Sudikoff*, 36 F.Supp.2d 1196, 1198 (C.D. Cal. 1999); *United States v. Carter*, 313 F.Supp.2d 921 (E.D. Wis. 2004) ("[I]n the pre-trial context, the court should require disclosure of favorable evidence under *Brady* and *Giglio* without attempting to analyze its 'materiality' at trial."). As explained in by the district court in *Sudikoff*,

> This [materiality] standard is only appropriate, and thus applicable, in the context of appellate review. Whether disclosure would have influenced the outcome of a trial can only be determined after the trial is completed and the total effect of all the inculpatory evidence can be weighted against the presumed effect of the undisclosed *Brady* material. … This analysis obviously cannot be applied by a trial court facing a pre-trial discovery request.

36 F.Supp.2d at 1198-99; *see also Carter*, 313 F.Supp.2d at 923 ("[T]he materiality prong presumes that the trial has already occurred and requires the court to determine whether the result could have been different had the evidence been disclosed. But a court deciding whether materiality should be disclosed prior to trial does not have the luxury of reviewing the trial

[16] "[T]he prudent prosecutor will resolve doubtful questions in favor of disclosure." *Agurs*, 427 U.S. at 108.

record."); *Lewis*, 408 A.2d at 307 (D.C. 1979); *Odom v. United States*, 930 A.3d 157, 159 (D.C. 2007); *Boyd v. United States*, 908 A.2d 39, 56-58 (D.C. 2006)

2. Nondisclosure discovered during trial

The same standard applies to mid-trial motions, although the court may have more information pertinent to the materiality determination. *See James v. United States*, 580 A.2d 636, 644 (D.C. 1990) (court must determine whether information disclosed mid-trial was material to the outcome of the trial or "obviously exculpatory"). The defense may seek: (1) to continue the trial in order to investigate the information, *see Frezzell*, 380 A.2d at 1385; (2) to recall witnesses for further cross-examination; (3) to strike witnesses' testimony, *see Wigmore*, Evidence 1390 (Chadbourn rev. 1974); or (4) a mistrial.[17]

Remedies for Brady violations are subject to the discretion of the Court. In *Odom*, the Court of Appeals held that the trial court has discretion to allow defendant to introduce otherwise inadmissible hearsay in order to remedy a perceived *Brady* violation that has impeded defendant from presenting declarant's exculpatory testimony at trial. 930 A.2d 157.

Counsel should always propose sanctions for *Brady* violations.

3. Nondisclosure discovered after trial and post-trial review of *Brady* issues

Bagley, 473 U.S. 667, clarified the standard of materiality applicable in determining whether a conviction should be reversed on post-trial review for failure to disclose *Brady* material.[18] It drew the following standard from *Strickland*, 466 U.S. 668, to govern all prosecutorial failures to disclose evidence favorable to the accused:

> The evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome.

Bagley, 473 U.S. at 682. This standard of materiality is retrospective: "*Brady* . . . and now *Bagley* call for 'retrospective evaluations, i.e., decisions as to whether a defendant's due process rights had been violated by the government's withholding of particular evidence.'" *Coleman v. United States*, 515 A.2d 439, 448 (D.C. 1986) (quoting *Lewis II*, 408 A.2d at 306).

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[17] *James*, 580 A.2d at 643-44, held that counsel's failure to recognize the relevance of *Brady* material disclosed mid-trial, and to move for a mistrial or for reconsideration of a prior evidentiary ruling, neither bars a *Brady* claim on appeal nor subjects the claim to plain error review.

[18] Previously, the standard of materiality depended on whether the defense had made "no request," a "general request" or a "specific request." *Agurs*, 427 U.S. at 106-07.

Although the inquiry is retrospective and must take into account all evidence presented at trial, the reviewing court still must consider the impact of a failure to disclose exculpatory information on defense preparation and strategy. Thus, the prosecutor's failure to comply with a specific *Brady* demand may substantially prejudice the defendant in preparing and presenting the defense:

> [T]he more specifically the defense requests certain evidence, thus putting the prosecutor on notice of its value, the more reasonable it is for the defense to assume from the nondisclosure that the evidence does not exist and to make pre-trial and trial decisions on the basis of this assumption. . . . [T]he reviewing court may consider directly any adverse effect that the prosecutor's failure to respond might have had on the preparation or presentation of the defense case . . . in light of the totality of circumstances and with an awareness of the difficulty of reconstructing in a post-trial proceeding the course that the defense and the trial would have taken had the defense not been misled by the prosecutor's incomplete response.

Bagley, 473 U.S. at 682-83.

On remand, the Ninth Circuit granted a new trial because the *Brady* violation – failing to disclose payments and inducements to key witnesses – undermined confidence in the outcome of the trial. *See Bagley v. Lumpkin*, 798 F.2d 1297 (9th Cir. 1986). *But see Strickler v. Greene*, 527 U.S. 263 (1999) (although certain inconsistent statements of government witness were not disclosed, defendant not entitled to new trial because confidence in verdict was not undermined); *United States v. Bowie*, 198 F.3d 905 (D.C. Cir. 1999) (failure to disclose that police officer witness was on "*Lewis* list" maintained by the Office of the United States Attorney – a computerized list of police officers under investigation – potentially might have opened up a line of cross-examination going to officer's credibility, but would not have been material in that there was no reasonable probability of acquittal had the information been disclosed to the defense). In *Bagley v. Lumpkin*, the court noted that "knowledge of the [payments] could have given Bagley an entirely different trial strategy that might have resulted in his acquittal." 798 F.2d at 1301. The defense might not have waived a jury trial, might have pursued the witnesses' bias on cross-examination, and might have otherwise undermined the witnesses' credibility. *Id.* at 1301-02. *But see Brooks v. United States*, 516 A.2d 913, 917 (D.C. 1986) (in self-defense case, failure to disclose evidence of prior violence by complainant's associate did not affect outcome of trial); *Coleman*, 515 A.2d at 448-49 (inconsistencies in witness's prior statements not sufficiently material to affect outcome of trial).[19]

[19] Non-disclosure of a government witness's juvenile records did not violate due process where the jury learned of the potential bias when defense counsel elicited that the witness would be locked up if he did not testify, the witness testified that he was "locked up at Oak Hill" when he first spoke to police about the appellant, and counsel was aware during trial of the witness's custody and that charges against him were dropped during appellant's trial. *Johnson v. United States*, 537 A.2d 555 (D.C. 1988). For these reasons, and because "the witness was only one of seven eyewitnesses, in addition to the victim," the records were not "material": there was "no reasonable probability that disclosure…would have affected the outcome of appellant's trial." *Id.* at 559-60.

Unlike most trial error analyses, once error has been determined by applying *Bagley*, no harmless error analysis is required. If material evidence was suppressed, the conviction is overturned. The reason the *Chapman* harmless error analysis is unnecessary was explained by Justice Souter:

> Assuming *arguendo* that a harmless error inquiry were to apply, a *Bagley* error could not be treated as harmless, since "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," necessarily entails the conclusion that the suppression must have had "'substantial and injurious effect or influence in determining the jury's verdict,'" *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993), *quoting Kotteakos v. United States*, 328 U.S. 750, (1946).

Kyles, 514 U.S. at 435.

I. Preservation of *Brady* Material

In *Arizona v. Youngblood*, 488 U.S. 51 (1988), the Supreme Court held that in cases where the exculpatory value of the evidence is unknown, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Robinson v. United States*, 825 A.2d 318, 325 (D.C. 2003) (citations omitted). "The Court refused to impose an 'undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution.' Instead, the Court required the defendant to make a showing of bad faith on the part of the police in order to 'limit[] the extent of the police's obligation to preserve evidence to reasonable bounds and confine[] it to that class of cases where the interests of justice most clearly require it, i.e., those cases in which the police themselves by their conduct indicated that the evidence could forma basis for exonerating the defendant.'" *Id.* (citing *Youngblood*, 488 U.S. at 58 (alterations in original)).

Youngblood overturned *United States v. Bryant*, 439 F.2d 642, 652 (D.C. 1971), which had held that there was a due process obligation for prosecutors and law enforcement to "promulgate and enforce" a rigorous and systematic procedure to preserve all discoverable evidence. Before *Youngblood*, unless the government could prove such a procedure was in place and enforced, it could not rely on a good faith claim when *Brady* material or other discoverable evidence was lost or otherwise disappeared.

Since *Arizona v. Youngblood*, 488 U.S. 51 (1988), the stricter rule of *Bryant* only applies to *Jencks* material. So long as the loss of evidence was due to mere negligence and was not intentional or to gain some tactical advantage at trial, there is no constitutional duty to preserve all evidence that could possibly exculpate an accused. Good faith is presumed; unless the defendant can prove bad faith, failure to preserve potentially useful evidence does not violate due process.[20] *See also United States v. Day*, 697 A.2d 31, 34-35 (D.C. 1997). However, in *United*

[20] *United States v. Bryant*, 439 F.2d 642, 652 (D.C. 1971). Counsel should, however, recognize that the court's reasoning in *Youngblood* involved police procedures that at the time were not widely accepted and not consistently practiced. Thus, the court found no "bad faith" when those procedures were not followed. However, in situations in

States v. McKie, 951 F.2d 399 (D.C. Cir. 1991) the police actually lost the crack cocaine that was the basis for the arrest of defendant and the prosecution relied on the lab report of what the lost evidence actually was. "Whatever the continuing vitality of *Bryant* in its original context regarding claims under the Jencks Act . . . it is clear the due process claims such as the one McKie raises here are governed by the standards enunciated in *Arizona v. Youngblood*, 488 U.S. 51 (1988)." *Id.* at 403. Counsel should keep in mind however that tangible objects may nonetheless be producible pursuant to Rule 16. Failure to preserve tangible objects pursuant to Rule 16 may entitle the defense to request sanctions against the government. *See In re Q.D.G.*, 706 A.2d 36, 38 (1998).

III. OTHER DISCOVERY PROCEDURES[21]

A. Alibi Witnesses

If the defense will be alibi, Super. Ct. Crim. R. 12.1(a) requires the defense to disclose, upon written request from the government, the time, date and place of the alleged offense, the place the defendant claims to have been at the specified time and the names and addresses of alibi witnesses.[22] The defense must respond within ten days. Counsel should apprise potential alibi witnesses of the likelihood that detectives may attempt to interview them or that they may receive a witness conference letter from the United States Attorney's Office, and of what their rights are in such situations.

Within ten days of the defense response, but in no event less than ten days before trial, the government must provide the defense with the names and addresses of any witnesses on whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense or to rebut the alibi witnesses' testimony. These provisions require disclosure of the names and addresses of complainants as well as other witnesses. *Shambley v. United States*, 391 A.2d 264, 266 (D.C. 1978). Rule 12.1 also establishes a continuing duty to disclose, authorizes striking the testimony of any witness (other than the defendant) whose identity was withheld improperly under the rule, and makes evidence of a declared, but subsequently withdrawn, intention to rely on an alibi defense inadmissible. *See McKoy v. United States*, 518 A.2d 1013 (D.C. 1986) (prosecutor may not cross-examine defendant about alibi witnesses not called at trial, about whom prosecutor learned through alibi notice).

The trial court has "considerable discretion" in deciding to admit or exclude evidence. *Hall v. United States*, 540 A.2d 442, 446 (D.C. 1988). It should consider: (1) the amount of prejudice

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which the police procedures are widely accepted and practiced according to general orders, it may be possible to distinguish *Youngblood's* "bad faith" requirement in a particular case.

[21] The court has no authority to compel disclosure of the nature of the defense. *Bowman v. United States*, 412 A.2d 10, 12 (D.C. 1980). Disclosure may alert the prosecution in advance to defense trial tactics or, if the client ultimately pleads guilty, suggest that the defendant had maintained a different version of events. In the rare event that a judge requests such disclosure, counsel should respectfully decline to disclose the nature of any defense except an insanity defense. *See* D.C. Code § 24.301(j); Super. Ct. Crim. R. 12.2.

[22] *Williams v. Florida*, 399 U.S. 78 (1970), upheld the constitutionality of a similar statute. *Wardius v. Oregon*, 412 U.S. 470 (1973), held unconstitutional an alibi-notice statute that did not provide for reciprocal disclosure by the government of those witnesses upon whom it intended to rely to rebut the alibi.

that resulted from the failure to disclose; (2) the reason for the non-disclosure; (3) the extent to which the harm caused by non-disclosure was mitigated by subsequent events; (4) the weight of the properly admitted evidence supporting the defendant's guilt; and (5) other relevant factors arising out of the circumstances of the case. *Id.* at 446 n.6 (citation omitted). *See also Taylor v. Illinois*, 484 U.S. 400, 415 n.19 (1988).

The use of preclusion as a sanction against a defendant who fails to comply with an alibi demand can implicate the Sixth Amendment. *Id*.; *Michigan v. Lucas*, 500 U.S. 145 (1991). It is justified only in extreme circumstances. *See id.* at 152 (alternative sanctions are adequate and appropriate in most circumstances); *Escalera v. Coombe*, 852 F.2d 45, 48 (2d Cir. 1988) (remanding for determination, in light of *Taylor*, of whether counsel's failure to comply with alibi notice was "willful and motivated by a desire to obtain a tactical advantage").

(Richard) Smith v. United States, 325 A.2d 180 (D.C. 1974), found reversible error in the admission of testimony by a government witness in rebuttal to the defense of alibi when the government had failed to disclose that witness after defense compliance with the government's alibi demand. *Beynum v. United States*, 480 A.2d 698 (D.C. 1984), however, declined to reverse even though the government presented testimony by a previously undisclosed witness that rebutted the alibi revealed by defense counsel in compliance with Rule 12.1. The government's witness testified during the government's case-in-chief that he saw the defendant at 10:00 p.m. on the night of the offense. This contradicted subsequent testimony of the defendant's alibi witness, who said the defendant was with her at 9:20 p.m., when the offense occurred, and for the rest of the night. Because the government did not know that the defense would present an alibi for the entire night, and not simply for the time of the offense, the government was under no obligation to disclose the identity of its witness.

The timing requirements may be relaxed in extreme circumstances. In *Hall v. United States*, 540 A.2d 442 (D.C. 1988), the government revealed the names of some anti-alibi witnesses on the day of trial, and called them in rebuttal. Eleven days before trial, the prosecutor filed and served an alibi demand on the defense, along with a list of his own anti-alibi witnesses. When he called counsel two days later and learned that counsel had not received the information, he gave the defense the names and addresses over the telephone. The defense reciprocated. The names of the three witnesses the government presented on rebuttal were not on the list, however, because the prosecutor did not learn of the usefulness of the testimony of two of them until the evening before trial, nor of the existence of the third until the afternoon of trial. The court affirmed, noting that the rule contemplates this possibility, and imposes on both parties a continuing duty to disclose additional witnesses of whom they become aware. *See* Super. Ct. Crim. R. 12.1(c). By informing defense counsel of "the identities of his three rebuttal witnesses as soon as he learned of them himself," the prosecutor "took every possible precaution to avoid prejudice at trial." *Hall*, 540 at 446.

B. Government Witnesses

Rule 16 includes no provision for disclosing names and addresses of witnesses. *See Rambert v. United States*, 602 A.2d 1117, 1120 (D.C. 1992). *Davis v. United States*, 315 A.2d 157, 161 (D.C. 1974), held that absent a statutory or constitutional requirement, the government need not

disclose a list of its witnesses except in capital offenses (of which there are none in Superior Court). However, *United States v. Holmes*, 343 A.2d 272, 277 (D.C. 1975), held that in an uncommon case, the government may be required to reveal its witnesses in the interests of fundamental fairness or administrative efficiency if the defense makes a clear showing of particular need, materiality and reasonableness, and the government has an opportunity to oppose the motion and seek a protective order. *See Harling v. United States*, 387 A.2d 1101, 1105 (D.C. 1978). *Holmes*, 343 A.2d at 277, used a test balancing the government's interest in protecting its witnesses and the integrity of their testimony, against the defendant's interest in preparing the defense and deciding whether to go to trial. *See also United States v. Napue*, 834 F.2d 1311, 1318 (7th Cir. 1987) (as part of its "inherent power, exercisable under appropriate circumstances, to assure the proper and orderly administration of criminal justice," court may require government to disclose list of witnesses).

The government has no duty to disclose names of potential witnesses who will not testify at trial, and whose testimony would neither contradict that of a key government witness nor be exculpatory as to the defendant. *United States v. Harrison*, 679 F.2d 942 (D.C. Cir. 1982); *see also Catlett v. United States*, 545 A.2d 1202 (D.C. 1988).

C. Government Informants

Disclosure of the names and addresses of informants is generally required only if necessary to a fair trial on the issue of guilt or innocence, and not for other purposes such as suppression motions. *Compare United States v. Rugendorf*, 376 U.S. 528 (1964), *with McCray v. Illinois*, 386 U.S. 300 (1967). The determination depends on "the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony and other relevant factors." *Rugendorf*, 376 U.S. at 534-35 (citation omitted); *see also Sturgess v. United States*, 633 A.2d 56, 62 (D.C. 1993) (disclosure of informant's identity as eyewitness to cocaine sale was not compelled given strength of identification evidence presented by undercover officer who purchased cocaine from defendant in well lit room in presence of others, fact that defendant was arrested inside same premises two days later, testimony of defendant's wife that defendant had continuing connection to premises, and fact that trial court ordered eyewitness to submit sworn answers to defense counsel's questions); *United States v. Lyons*, 448 A.2d 872, 874 (D.C. 1982) (burden is on defendant to demonstrate that informant is a participant, eyewitness or someone who could give direct testimony at trial; interest in protecting the informant must be balanced, however, against right to prepare defense); *United States v. Price*, 783 F.2d 1132, 1139-41 (4th Cir. 1986) (new trial required where informant was more than a "mere tipster," having been necessary party to an attempted illegal sale, and defendant wished to present defense of duress or entrapment perpetrated by informant).

D. Observation Post

In drug cases, police officers frequently observe drug transactions, often with binoculars, from "secret" observation posts, which may be located in government buildings or large apartment buildings. The locations of observation posts are often material both to the preparation of the defense and for cross-examination on the officers' opportunity to observe. Although the

locations of such posts would appear to be discoverable under Rule 16(a)(1)(C) ("buildings or places . . .within . . . control of the government") or at least through cross-examination of officers at the suppression hearing or trial, the courts have fashioned a privilege similar to that of the informant privilege. *See Jenkins v. United States*, 541 A.2d 1269, 1272 (D.C. 1988); *Thompson v. United States*, 472 A.2d 899, 900 (D.C. 1984). In determining "whether fairness requires that the government's privilege yield to the defense right of cross-examination," the court "must balance the public interest in legitimate criminal surveillance against the defendant's right to cross-examine the government witnesses and exercise its sound discretion in deciding whether to permit withholding of the information." *Hicks v. United States*, 431 A.2d 18, 21-22 (D.C. 1981). In reaching that conclusion at a suppression hearing, "the court should consider, among other pertinent concerns, whether the defense has established that the location of the surveillance post is a material and relevant issue; whether the evidence supports a finding of probable cause; and whether the evidence creates a substantial doubt about the credibility of the observer." *Id*. at 22-23.

At trial, the defendant's interests in disclosure are greater. *Thompson*, 472 A.2d at 900. If the government invokes the privilege, the defendant must establish "that he needs the evidence to conduct his defense and that there are no alternative means of getting at the same point." *Id.*; *accord Anderson v. United States*, 607 A.2d 490, 496 (D.C. 1992). The government can then offer specific evidence of the need to keep the location secret—that the post is still in use, or that the safety of cooperating civilians would be jeopardized. The defense then has the burden to show that, in spite of the proffered reasons for maintaining secrecy, the defendant's interest requires disclosure of the location. *Anderson*, 607 A.2d at 496.

In addition to showing that there is some vantage point in the area from which the officer's view would have been obstructed, the defense must show that "there is some reason to believe that the officer was making his observations from such a location." *Id.* at 497. The defense must be allowed a reasonable opportunity to make this showing, including asking whether the observation post was located in any obstructed vantage points of which counsel is aware. But if the court credits testimony that the officer's view was not impaired, "it will ordinarily be difficult if not impossible, absent other *indicia* of unreliability, for the accused to sustain his threshold burden." *Id.*

The privilege has also been applied to the nature and location of electronic surveillance equipment. *See United States v. Van Horn*, 789 F.2d 1492 (11th Cir. 1986).

IV. MISDEMEANOR PRE-TRIAL PRACTICE

Misdemeanors, non-jury and jury demandable,[23] are assigned at arraignment to a specific judge for all purposes, including pre-trial motions, trials, mental competence hearings, guilty pleas and

[23] Although a misdemeanor for which the maximum period of incarceration is 180 days, there is no plain error when a judge fails to conclude, *sua sponte*, that defendant is entitled to a jury trial on the basis that the aggregate period of incarceration for two offenses exceeds 180 days. *Foote v. United States*, 670 A.2d 366, 369 (D.C. 1996); *see also Turner v. Bayly*, 673 A.2d 596, 602 (D.C. 1996) ("six months" and "180 days" are not equivalent for purposes of conferring right to jury trial for offenses carrying maximum penalty of 180 days and defendants are entitled to jury trial only where maximum penalty is six months or more).

sentencings. Counsel should contact the assistant United States Attorney to determine the expiration date of any plea offer.

The United States Attorney's Office Misdemeanor Trial Section assigns a team of up to four prosecutors to handle each misdemeanor judge's caseload. The most senior prosecutor serves as the team leader, and the prosecutors rotate between court and office duty, which includes providing discovery, working in the witness room, and papering new cases.

A. Diversion

Pre-trial diversion allows some alleged misdemeanants to resolve a pending case without a trial or guilty plea. Diversion is a program of the United States Attorney's office, and "'owes its existence and operation solely to prosecutorial discretion.'" *Irby v. United States*, 464 A.2d 136, 141 (D.C. 1983) (citation omitted). There is no entitlement to diversion. The decision to permit diversion rests with the prosecution. Likewise, the prosecution determines whether or not to terminate an individual from the program. *See Baxter v. United States*, 483 A.2d 1170 (D.C. 1984) (defendant who completed community service work after time limit for completion had expired could not obtain judicial review of termination of diversion); *Wood v. United States*, 622 A.2d 67 (D.C. 1993) (termination based on defendant's false statement did not violate Equal Protection Clause; termination of diversion is not a loss of liberty that rises to constitutional level requiring procedural due process).

The government's discretion is broad, but "'it is not unfettered. Selectivity in the enforcement of criminal laws is . . . subject to constitutional constraints.'" *Federov v. United States*, 600 A.2d 370, 376 (D.C. 1991) (en banc) (citation omitted). *Federov* held that a decision to deny admission into diversion constitutes a decision to prosecute, reviewable for conformity with equal protection principles. Because the defendants – charged with unlawful entry as a result of a political protest – had made out a *prima facie* case of selective prosecution based on assertion of First Amendment rights, the court remanded for a hearing on whether the government could give a "clear and reasonably specific" explanation for its decision to deny them diversion. *Id*. at 383.

Eligibility for diversion and for a particular diversion program depends on the defendant's prior record and the nature of the offense charged.

The diversion program may involve community service, psychiatric treatment, or alcohol treatment. Persons accepted into community service diversion must do forty or more hours of community service, supervised by the Community Services office of the Superior Court's Social Services Division. Restitution may also be required.

B. Motions

Timing: All motions except for bond review, continuance, and dismissal for lack of speedy trial, and *in limine* motions must be filed within twenty days after status hearing or, for non-jury cases, ten days of arraignment or entry of appearance of counsel, whichever is later. Super. Ct. Crim. R. 47-I(c). Pursuant to the Presiding Judge of the Criminal Division order dated May 28, 1996,

on misdemeanor calendars presided over by judges . . . "motions governed by Rule 47-1(c) will be deemed timely filed, without prior approval by the Court, if filed thirty (30) days prior to the date initially set for trial." The time for filing motions may be extended by filing a motion requesting additional time during the initial period. Judges also may have their own filing schedules.

The assigned judge hears motions. Any request to extend the time for filing must be made in writing to the assigned judge and must contain the reasons for the request. Any motions filed late should be accompanied by a motion for leave to late file stating the reasons for the delay. Generally, non-evidentiary motions (e.g., speedy trial) may be heard before trial, while evidentiary motions (e.g., suppression) are heard on the day of trial.

Most judges require the defendant's appearance at any motion hearing absent a written waiver of the right to appear. In some circumstances, such as in court identification suppression motions, counsel may prefer tactically that the client not be present, and waiver must be permitted in such cases. *See Singletary v. United States*, 383 A.2d 1064, 1071 (D.C. 1978). In most cases, the judge will rule on the motion from the bench at the conclusion of the hearing.

If a judge has a personal bias or prejudice against a defendant, counsel should consider a motion asking the court to recuse itself. Such a decision should not be undertaken lightly because of the possible ramifications if the motion is denied. Super. Ct. Civ. R. 63-I requires a judge to recuse himself or herself when a party to a proceeding files the requisite affidavit and is able to establish that the judge has a personal bias or prejudice against the defendant. *See Taylor v. United States*, 451 A.2d 859, 860 n.1 (D.C. 1982) (oral motion for recusal without affidavit or testimony is not in compliance with rule and was properly denied); *see also Gregory v. United States*, 393 A.2d 132, 142 (D.C. 1978).

C. Discovery, Status Hearings and Trial

At arraignment in misdemeanor cases, the government typically provides discovery materials and a plea offer. Questions regarding a plea offer or outstanding discovery matters should be conveyed to the assistant assigned to the case.

Depending on the judge, the calendar call begins between 9:00 and 9:30 a.m. Counsel should advise the client to arrive at the courtroom early. Generally, after a preliminary call of the trial calendar, the judge will conduct status hearings, pleas and sentencings. In light of the court's policy of attempting to resolve misdemeanors expeditiously, last-minute requests for continuances are likely to be denied. See D.C. Superior Court Rule 111(c) (requiring motions for a continuance to be filed at least two days before trial). Similarly, last-minute attempts to strike a plea bargain with the government are likely to result in less generous offers than could have been obtained by earlier efforts. Counsel should consult with the prosecutor, as the United States Attorney's Office has on occasion enforced a policy against trial date pleas to anything other than a plea to the information.

V. FELONY PRE-TRIAL PRACTICE

After presentment, the next court date in a felony case is the preliminary hearing, at which the government must show that there is probable cause to believe that a crime has been committed and that the defendant committed it.

In a few felony cases, a misdemeanor plea offer may be extended at or shortly after presentment. Typically, these cases involve relatively minor felonies where the defendant does not have an extensive record. Normally the plea offer must be accepted by the date of the preliminary hearing, and the plea is entered on the preliminary hearing date or on a date set at that time. If counsel needs more time for investigation before determining whether to recommend that the client enter a plea, it is generally possible to extend the deadline by contacting the assigned pre-indictment prosecutor.

If the case is indicted before the preliminary hearing, the preliminary hearing is not held and counsel and the defendant are merely informed that an indictment was returned. This is called the "rapid indictment process" or "RIP." Typically, the United States Attorney's Office presents the case to the grand jury after the preliminary hearing. After the hearing, the defense generally will not be contacted until an indictment is returned or the case is dismissed. An indictment may contain charges in addition to the ones upon which the defendant was arrested or presented.

Not infrequently, the prosecution will itself subpoena and present "defense" witnesses mentioned by the accused at the time of arrest, and may develop contradictions between these witnesses' testimony and the statement given by the accused. No matter whether it is the government or the defense who causes a potential defense witness to testify in the grand jury, defense counsel must analyze the testimony of that witness as carefully as if the witness were preparing to testify at trial. Any transcripts of grand jury testimony of favorable witnesses may be subject to pre-trial disclosure as *Brady* material.

Indictments may be returned within a few weeks or may take months. Super. Ct. Crim. R. 48(c) and D.C. Code § 23-102 require the grand jury to take action within nine months of presentment, if the defendant has been incarcerated or held on bail. If the indictment has not been returned within nine months, the defendant is to be released or the bail discharged. The court upon written application by the government, within the nine-month period, may extend the nine-month period, if good cause is shown. If the defendant is released on personal recognizance, Super. Ct. Crim. R. 48(b) is authority for dismissal of the complaint due to unnecessary delay in presenting the case to the grand jury.

Although most cases reach the grand jury through the normal process of arrest, presentment, and preliminary hearing, some are presented to the grand jury before any formal proceedings have been initiated against the defendant. Also, a case which has been dismissed at the preliminary hearing for want of probable cause may subsequently be presented to the grand jury. Indictments returned under this procedure are known as "grand jury originals." Usually, when an indictment is returned, the defendant is notified by mail of the date to appear in court for arraignment.[24]

[24] In rare cases in which there is a strong risk of flight, the government may request an arrest warrant for the defendant immediately upon return of the indictment. *But see* Super. Ct. Crim. R. 4-I.

Failure to appear will result in issuance of a bench warrant or a judicial summons for the defendant.

Where plea bargaining appears appropriate, it should be initiated before the return of an indictment. Once an indictment has been handed down and the defendant formally charged with a felony, it is far more difficult to obtain an agreement to reduce the charge to a misdemeanor or a minor felony charge. Although it is often difficult to assess the government's case properly so soon after counsel's appointment, and without full discovery, it is vital that counsel initiate investigation as soon after appointment as possible in order to determine whether a disposition is preferable to trial and, if so, what the plea bargain should be. An offer made by an individual Assistant United States Attorney is not necessarily the government's final offer, and it is sometimes appropriate to consult with the Chief of the Grand Jury Section before treating it as such. The pre-indictment offer is typically the best offer the government will make and so counsel may not want to engage in pre-indictment plea bargaining, to avoid the earlier expiration dates.

Indicted cases are assigned to a particular judge's calendar. At arraignment, the defendant will enter a plea of not guilty and the court will set dates for a status hearing and trial. Motions must be filed within twenty days after the status hearing, which is usually within a month after arraignment. The trial judge may, however, set up an alternative motions schedule. The purpose of the status hearing is to allow counsel for both parties to inform the court of the status of the case and the likelihood of disposition. Unless circumstances have changed or the defendant has violated the conditions of release, the judge must allow the conditions of pre-trial release previously set to remain. *See Salley v. United States*, 413 F.2d 364 (D.C. Cir. 1969). If a defendant has been detained, counsel should continue to make every effort to obtain release through written motions.

VI. PRE-TRIAL INEFFECTIVE ASSISTANCE OF COUNSEL CLAIMS

If the defendant claims before trial that counsel is rendering ineffective assistance, the trial court must, before trial, "conduct an inquiry sufficient to determine the truth and scope of the defendant's allegations." *Monroe v. United States*, 389 A.2d 811 (D.C. 1978); *see also McFadden v. United States*, 614 A.2d 11, 15 (D.C. 1992); *Nelson v. United States*, 601 A.2d 582, 591 (D.C. 1991); *Gordon v. United States*, 582 A.2d 944, 945-47 (D.C. 1990); *Farrell v. United States*, 391 A.2d 755, 760-61 (D.C. 1978).

> [W]hen a defendant requests new counsel, based on pre-trial ineffectiveness, several weeks before trial, and the trial court conducts no inquiry, this court will remand for findings on the issue. The court will also remand when the defendant has made a pre-trial request for new counsel immediately before trial but no inquiry has been made, and thus there is no basis on which to determine whether the claim may have merit. On the other hand, if "there is sufficient evidence on the record to sustain the ruling of the trial court in spite of the court's failure to make a proper inquiry before ruling," this court will affirm. We will reverse

> outright, however, when there is obvious prejudice, or when the trial court's conclusions are unsupported by the pre-trial record.

McFadden, 614 A.2d at 17-18 (citations omitted).

On post-conviction review, if no pre-trial findings were made, the government must prove by clear and convincing evidence that the defendant was accorded representation at trial by an attorney who was prepared within the requisite range of competence. *Matthews v. United States*, 459 A.2d 1063 (D.C. 1983). Specifically, it must show that counsel: (1) conferred with the defendant as often as necessary and advised the client of his or her rights; (2) elicited from the defendant matters of defense and ascertained whether any potential defenses were available; and (3) conducted both factual and legal investigation sufficiently in advance to permit reflection and to determine whether matters of defense could be developed. *Monroe*, 389 A.2d at 821.

CHAPTER 6

GUILTY PLEAS AND PLEA BARGAINING

In every criminal case, the accused must decide between proceeding to trial or entering a guilty plea to one or more charges. The decision is often difficult and requires consideration of a wide variety of factors. This chapter highlights those factors and reviews the current law and basic tactics behind negotiating, entering, and withdrawing guilty pleas.

Counsel must thoroughly investigate the case and obtain discovery before commencing negotiations, and must continue to prepare the case as the negotiation process – which may consume weeks or even months – wears on.

I. PLEA BARGAINING

A. The Decision to Plea Bargain

Effective representation through plea bargaining often requires as much preparation as a trial. Counsel must thoroughly investigate the case and obtain discovery before commencing negotiations, and must continue to prepare the case as the negotiation process – which may consume weeks or even months – wears on. Counsel must then evaluate a number of factors to assess the negotiated bargain and its ramifications.

First, counsel should review and analyze the government's case. Who are the government's witnesses and what is their likely testimony? What is the likelihood that they will appear in court, based on their record of appearances in the case, their attitude toward the case (the defendant, the police, the court system), and other information (e.g., health, plans to move) learned during investigation and discovery? What will be their impact as witnesses? Are they impeachable in any respect? What is the physical or scientific evidence? What are the legal strengths and weaknesses of the government's case with regard to pre-trial motions, evidentiary issues, and the motion for judgment of acquittal? What is likely to be the emotional impact of the case on the trier of fact (judge or jury) and on the judge at sentencing if the defendant is convicted after trial? What additional facts can be proffered at the sentencing hearing?

Second, who will present the government's case? How effective is the prosecutor with juries? Is he or she particularly skilled or inexperienced with respect to certain issues in this case or type of case? How well prepared is the prosecutor? How much emphasis does the government place on this case or defendant?

Third, what are the strengths and weaknesses of the defense case? The same factors relating to government witnesses must also be considered with respect to potential defense witnesses. Should the client testify given available impeachment, including prior convictions? Does the

client want to testify? How effective will the client be on direct and cross-examination? Can the defense succeed without the client's testimony? What are the legal strengths and weaknesses of the defense?

Fourth, what are the stakes? What penalties could the client incur if convicted at trial? Do any of the charges merge? Are any mandatory or enhanced sentencing provisions applicable and, for the latter, are they likely to be invoked? [1] Is release pending sentencing more likely after a plea than following a trial? What other impact on the sentence might a trial or a plea have? Will client face punishment in other cases if convicted, for example, parole or probation revoked? **Additionally, client should be informed of any potential collateral consequences of a plea (and trial), such as cases in other jurisdictions, family court matters and immigration consequences.**[2]

Finally, who is the judge? Does the judge give sentencing concessions following a guilty plea?[3] What is the general range of the court's sentences after trial for the offense(s) for which the client could be, and realistically might be, convicted at trial? What, in comparison, is the general range in sentences by the same judge for pleas to the offense(s) to which the client could plead guilty? How is the evidence at trial likely to affect the court? What are the court's practices during trial and how might these affect the case?

B. The Plea Bargaining Process

Negotiations generally focus on five issues: (1) the offense or offenses to which a plea will be entered and what changes will be dismissed; (2) the factual basis to be proffered to the court by the government and agreed to by the defense; (3) the government's position on bond status between the plea and sentencing ("stepback"); (4) the government's position concerning enhanced sentencing provisions; and (5) the government's position at sentencing ("allocution"). However, although the government may agree not to oppose a particular sentence, such recommendation is not binding on the court. Super. Ct. Crim. R. 11(e)(1)(B).

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[1] The client should be advised, to the extent possible, and with the caveat that the information may not be complete, as to his/her range in the Superior Court Voluntary Sentencing Guidelines.

[2] *Denson v. United States*, 918 A.2d 1193 (D.C. 2006) (requirement to avoid associating with minors is not a direct condition of supervised release – but rather a collateral condition of supervised release imposed by the United States Parole Commission – neither trial court nor defense counsel had a duty to inform defendant of the condition before he pled guilty).

[3] Language in the 1968 ABA standards allowing for sentencing concessions in return for lessening court congestion, has been deleted: "The fact that a defendant has entered a plea of guilty or *nolo contendere* should not, by itself alone, be considered by the court as a mitigating factor in imposing sentence." *ABA Standards for Criminal Justice* § 14-1.8 (2d ed. 1980). This revision could theoretically have profound implications, as it removes the explicit justification for a "break" in exchange for an "early" plea. The ABA Standards do, however, call for concessions under enumerated circumstances, such as when the defendant "is genuinely contrite," § 14-1.8(a)(i), or provides evidence to the government, § 14-1.8(a)(iv), and does not appear to disapprove consideration of early manifestations of remorse or willingness to take responsibility. *Corbitt v. New Jersey*, 439 U.S. 212, 223 (1978), approved a state statute that gave persons charged with first-degree homicide who plead guilty a chance to avoid the mandatory life sentence, and stated that it is "constitutionally permissible to take that fact into account … [I]t is not forbidden to extend a proper degree of leniency in return for guilty pleas."

Considerations that may need to be resolved: There are numerous questions which counsel may have to resolve prior to and during the negotiating process. These include: What are the penalties for the offenses? How will various sentences affect any probation or parole "backup time" the client may have? Would the conviction trigger mandatory or enhanced sentences in the present case or upon a subsequent conviction? Can the conviction be used for impeachment in subsequent proceedings? What civil liabilities does conviction entail? Will the plea have any immigration implications? Will charges in other pending cases be dismissed or reduced as part of the bargain? Will the client be required to testify against a co-defendant or in other cases?[4] Will the government improve its offer in return for the client's testimony or other assistance? Is the offer independent of, or contingent on ("wired to"), the decisions of a co-defendant?[5]

Proffer regarding the facts: What will the government proffer at the time of the plea regarding the facts of the case? For example, if a client who is charged with burglary and sexual abuse pleads guilty to burglary, will the government restrict its factual proffer to evidence regarding the burglary and not include evidence relating to the sex charge? The parties can agree beforehand to limit the factual proffer. Such an agreement is important if the facts of the case are particularly gruesome. If, during its proffer, the government fails to abide by the agreement, the defense may either proceed with the plea, if the facts revealed are not too harmful, or argue that the agreement was violated. The latter requires certification to another judge and an order that the government comply with the terms of the agreement. *See infra* Section II.A.

Detention: The government's position on detention ("stepback") pending sentence can be even more important than its position on sentencing, because if the client is in the community at the time of sentencing, there is a greater likelihood that counsel can develop the kind of community-based program that will persuade a judge to place the client on probation. On the other hand, the government's position on stepback is not binding on the court; counsel should ascertain the particular judge's practices with and without a government waiver.

Sentencing: As to sentencing, the government may agree to support (or not oppose) a particular sentence, to request no more than a certain number of years, or, in rare cases, to waive allocution entirely. The parties may even agree on the precise content of the government's allocution. However, please be reminded that the judge has the ultimate power.

Timing of Plea: Counsel should also consider when the plea is to be entered. Some clients wish to resolve the case as soon as possible. Others may see advantage in delaying the plea. For example, the client may have an opportunity to improve employment status or participate in some treatment or rehabilitative program before sentencing. However, many judges reduce

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[4] Because the privilege against self-incrimination no longer exists after sentencing on a plea of guilty, *see McCarthy v. United States*, 394 U.S. 459, 466 (1969), the government may require as a condition of the plea that the defendant testify at a trial of a co-defendant. The government's willingness to accept an agreement without requiring future testimony should be put on the record, as should all conditions of the bargain.

[5] The government is frequently reluctant to enter into an agreement with only one defendant for fear that the defendant who pled will testify for the co-defendant at trial. Sometimes the government is willing to accept an agreement by the defendant to make a statement under oath at the plea hearing, reciting the details of the co-defendant's role in the offense (an "insulating statement"), which the government can later use for impeachment if the defendant's version changes.

sentencing concessions as the trial date approaches. Again, counsel should find out the particular judge's policies regarding early pleas.

Alford Plea: In very limited situations, an "*Alford*" plea may be acceptable to the government if the client is unable or unwilling to acknowledge guilt.[6] If so, consideration should be given to the plea's impact on the eventual sentence.

Timing of Negotiations: Counsel must also decide when to begin negotiations. In misdemeanor cases, the government often extends a written plea offer at arraignment, typically in the form of a "plea packet" containing the offer and basic police reports. If no plea packet is available, an offer is usually available at the discovery conference. Discussions in felony cases should begin while the case is pending before the grand jury. Such discussions often provide useful preliminary discovery, and the government's interest in saving time and avoiding a trial often results in reaching favorable bargains before indictment.[7] Effective negotiation at such an early stage requires prompt investigation.

Although the U.S. Attorney's Office may extend a pre-indictment offer at presentment or prior to preliminary hearing in non-drug felony cases, it may not do so in cases that require further investigation to determine the potential charges. Pre-indictment offers are rarely extended in felony drug cases, which are on a very fast track in the grand jury section. If a client desires to enter an early guilty plea, counsel should negotiate with the Assistant United States Attorney conducting the grand jury investigation. In drug cases, counsel should contact a supervisor in the Same Day Presentment section of the Grand Jury Division.

Having a specific proposal in mind will facilitate pre-indictment discussions. Counsel should review the factual allegations and make an educated guess as to what charges may be levied and what issues affect the potential for an acceptable bargain. For example, in cases involving monetary loss, a plan involving restitution might satisfy the objectives of all interested parties. Regardless of the outcome, such discussions can occasionally result in fruitful discovery of the government's case. Counsel should not wait until the indictment is returned to seek discovery and investigate the case.

Although succeeding offers tend to be less favorable, pre-indictment offers may be renewed if additional information causes the government to reappraise the strength of its position. If counsel reasonably anticipates that the government's case will not weaken appreciably over time and trial is not in the client's best interests, counsel should think carefully before letting a plea offer expire. Obviously, counsel cannot indicate that an offer has been accepted unless the client clearly desires to plead guilty.

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[6] *See North Carolina v. Alford*, 400 U.S. 25 (1970), discussed *infra* Section II.A. Counsel should ensure that the client does not make admissions or take actions during the plea bargaining process that might evidence consciousness of guilt. Although statements made in connection with, or relevant to, a plea bargain generally may not be used if the plea bargain falls through, Super. Ct. Crim. R. 11(e)(4), some actions by the defendant may. *See Gale v. United States*, 391 A.2d 230, 235 (D.C. 1978) (holding testimony concerning defendant's efforts to make restitution did not fall within the protections of Rule 11, and was admissible at trial).

[7] Some judges also grant greater sentencing concessions for pre-indictment pleas. A pre-indictment plea to a misdemeanor will be certified to a judge in the misdemeanor branch.

Under certain circumstances a prosecutor may reindict the defendant on more serious charges if the defendant does not accept the plea offer. The court in *Bordenkircher v. Hayes*, 434 U.S. 357, 363-65 (1978), found nothing improper in the prosecutor's threat to indict the defendant on additional charges if the defendant did not accept the government's offer. The Court in *United States v. Goodwin*, 457 U.S. 368 (1982), held that there was neither actual nor presumptive vindictiveness in a decision to obtain a felony indictment after a defendant refused to plead guilty to non-jury triable misdemeanors and demanded a jury trial, even though the defendant had not been warned of such action during the bargaining process.

Similarly, *Washington v. United States*, 434 A.2d 394, 396 (D.C. 1980) (en banc), declined to interpret *Bordenkircher* as requiring the prosecutor to advise the defendant on the record that it will "up the ante" if the defendant fails to accept an offer, and upheld the defendant's conviction on additional charges lodged after initial negotiations were unsuccessful, concluding that the indictment resulted from a re-evaluation of the case, which only coincidentally occurred after negotiations broke down.[8]

The government is typically forthcoming about whether other charges are under investigation. The plea agreement should spell out in detail precisely which charges or incidents the government will dismiss or not pursue as part of the agreement.

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***Clark v. United States,* 51 A.3d 1266 (D.C. 2012)**. Trial court did not commit reversible error in sentencing defendant to ten years imprisonment for armed robbery and related offenses, even though prosecutor recommended 20 years in sentencing memorandum despite agreeing in plea agreement not to allocute for more than ten years and then argued at sentencing that ten years would be "very generous," where trial judge rebuked prosecutor for "error," defense counsel responded "okay" to judge's suggestion that sentencing go forward and did not request that sentencing proceed before different judge, and judge agreed with defense counsel that prosecutor should retract recommendation for 20 years and file new sentencing memorandum.

***Johnson v. United States,* 30 A.3d 783 (D.C. 2011)**. Government did not breach plea agreement in which it promised to support defense request for sentence not exceeding mid-point of guideline range for second-degree murder (12 to 18 years) by describing offense as first-degree, premeditated murder, stating the government could have obtained longer sentence than it had agreed to recommend, and urging court to impose more than defense-requested 12 years where government repeatedly advocated for no more than 18 years and stated that such a sentence was appropriate given gravity of offense.

[8] The recommendation in *Harvey v. United States*, 395 A.2d 92, 98 (D.C. 1978), that "the better practice is to bring all the charges in the original indictment unless there are compelling reasons for bringing new or additional charges," is not mandatory. If, however, the circumstances support an inference of vindictive prosecution, the "better practice" may be legally required. *See Wynn v. United States*, 386 A.2d 695, 697-98 (D.C. 1978) (filing of additional misdemeanor charges after case dismissed for want of prosecution found invalid due to "manifestation of vindictiveness").

C. Attorney-Client Communications Regarding Plea Negotiations

> A lawyer may engage in plea discussions with the prosecutor, although ordinarily the client's consent to engage in such discussions should be obtained in advance…
>
> In conducting discussions with the prosecutor the lawyer should keep the accused advised of developments at all times and all proposals made by the prosecutor should be communicated promptly to the accused . . .
>
> Defense counsel should conclude a plea agreement only with the consent of the defendant, and should ensure that the decision whether to enter a plea of guilty or *nolo contendere* is ultimately made by the defendant.
>
> To aid the defendant in reaching a decision, defense counsel, after appropriate investigation, should advise the defendant of the alternatives available and of considerations deemed important by defense counsel or the defendant in reaching a decision.

ABA Standards for Criminal Justice §§ 4-6.1(b), 4-6.2(a), 14-3.2(a), (b) (2d ed. 1980). Lawyers frequently disagree when to begin plea discussions with clients. Some advise clients of the benefits of negotiations early in order to gain advantages from early negotiations and so that later offers to negotiate do not appear to the client as a betrayal by counsel. Others delay mentioning negotiations until they have the client's confidence. As in most matters, common sense and good judgment and the ability to see the client's perspective are indispensable. Ultimately, it is the client who must decide whether to enter a plea of guilty or proceed to trial. *See* D.C. Rules of Prof'l Conduct 1.2(a), 1.4 (2000). When client does accept a plea offer, counsel should spend considerable time going over the terms of the plea, its ramifications and should inform the client of what to expect during the Rule 11 inquiry.

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***Missouri v. Frye*, 132 S. Ct. 1399 (2012).** Counsel has a duty to communicate plea offer and where plea offer has lapsed or been rejected due to counsel's deficient performance, defendant must show both that he would have accepted earlier plea offer if counsel had conveyed it and that plea would have been entered without cancellation by government or rejection by judge.

***Lafler v. Cooper*, 132 S. Ct. 1376 (2012).** Where incorrect advice of counsel leads to defendant's rejection of plea offer, even if defendant otherwise received fair trial, defendant may be able to show prejudice if he went to trial instead of taking plea that offered prospect of less-serious charges or lower sentence.

II. THE ENTRY OF A GUILTY PLEA

A. The Basic Principles

Superior Court Criminal Rule 11 governs the procedure for entering guilty pleas. With a few important exceptions, the Superior Court and federal rules are identical.[9] A guilty plea requires the defendant to admit guilt, unless it is entered pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970). An *Alford* plea permits a defendant to plead guilty while still maintaining innocence:

> [W]hile most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.

Id. at 37.[10] It may be in a defendant's interest to plead guilty to a lesser charge to avoid the risk of conviction of more serious charges, even if the defendant is in fact innocent or, for whatever reason, cannot admit guilt. *Id*. An *Alford* plea is also appropriate when a client, because of intoxication, drug usage or other reasons, has no recollection of relevant events and is therefore unable to acknowledge guilt, and the government has built an overwhelming case.

The consent of the government is required when an *Alford* plea is entered to a lesser offense. If the defendant tenders an *Alford* plea to the indictment, only the court's acceptance is required.[11] Other than the fact that the defendant maintains a claim of innocence, an *Alford* plea is treated precisely the same as a plea in which the defendant admits guilt.

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[9] One important difference is that the Supreme Court rule deletes those sections of the federal rule that permit the parties to agree on a specific sentence and allow the defendant to withdraw the plea if the court does not wish to be bound by it. *See* Fed. R. Crim. P. 11(e)(1)(C), 11(e)(2), 11(e)(3). Sup. Ct. Rule 11(e)(1)(B) contemplates only a recommendation for sentencing as opposed to a specific agreement. *See (Alphonso) Williams v. United States*, 656 A.2d 288, 291-92 (D.C. 1995) (plea violated Rule 11(e) because the parties could not bind court's sentencing discretion; client and government agreed to waive consideration of a Youth Act sentence).

[10] Rule 11(b) authorizes entry of a plea of *nolo contendere*, which entails no adverse civil consequences, and requires the consent of the court "after due consideration of the views of the parties and the interest of the public in the effective administration of justice."

[11] The ABA Standards provide that the court should not reject an *Alford* plea except for specific reasons, stated on the record. *ABA Standards for Criminal Justice* § 14-1.6(c) (2d ed. 1980). Notwithstanding the ABA Standards, counsel may have difficulty convincing the court to accept an *Alford* plea to the entire indictment. Unless the government has agreed to dismiss charges or waive some right, it may be difficult to show the significant benefit to the defendant upon which the Supreme Court relied in accepting Alford's plea in the face of his assertion of innocence. *See Alford*, 400 U.S. at 37.

Rule 11(a)(2) permits **"conditional pleas,"** allowing one to plead guilty while reserving in writing[12] the right to appeal the adverse determination of any specified pre-trial motions.[13] If the defendant prevails on appeal, the plea is withdrawn. *Id*. The consent of the court and the government is required for entry of a conditional plea. *Id*. If the defendant's guilty plea is not conditional, only jurisdictional defenses survive. *Collins v. United States*, 664 A.2d 1241, 1242 (D.C. 1995).

While a defendant has "no absolute right to have a guilty plea accepted[,]" *Santobello v. New York*, 404 U.S. 257, 262 (1971), it is generally an abuse of discretion for the court to refuse to accept a tendered guilty plea for no good reason. *Hockaday v. United States*, 359 A.2d 146, 148 (D.C. 1976) (stating "if no proper cause exists to vitiate the plea, the trial court is obliged to accept it"). *See also United States v. Maddox*, 48 F.3d 555, 558-60 (D.C. Cir. 1995) (while trial court did not err in rejecting defendant's first guilty plea because defendant's reticence aroused suspicion that plea was involuntary, court did err in rejecting second plea based solely on first plea colloquy). This principle applies even if the defendant wishes to plead to one or more counts of an indictment in order to obtain a tactical advantage on the remaining counts at trial. *Punch v. United States*, 377 A.2d 1353, 1358-59 (D.C. 1977).

Rule 11(g) requires a verbatim record of the entry of a guilty plea, i.e., the Rule 11 inquiry and the defendant's answers. This record is particularly important if the defendant later attempts to withdraw the plea. Evidence of a plea of guilty or any statements made during plea proceedings or during discussions with a prosecutor may not be used in a later civil or criminal proceeding against the person making the plea, other than in a prosecution for perjury. Super. Ct. Crim. R. (11)(e)(4); Fed. R. Crim. P. 11(e)(6).[14] *See (Darrell) Johnson v. United States*, 420 A.2d 1214, 1215 (D.C. 1980) (statement made during subsequently withdrawn guilty plea may not be used over objection to impeach defendant at trial). These protections are waivable. *United States v. Mezzanatto*, 513 U.S. 196 (1995) (defendant's agreement that any statements made during plea negotiations could be used to impeach his testimony if a trial took place was enforceable).

The plea agreement must be made part of the record. Super. Ct. Crim. R. 11(e)(2). *United States v. Roberts*, 570 F.2d 999, 1010-12 (D.C. Cir. 1977), held that the government's position on allocution at sentencing was not adequately presented to the court at the time of Roberts' plea, and that it was incumbent on the government to make its intention to ask for a substantial sentence part of the record, for the benefit of the trial court and the defendant, and therefore permitted the defendant to withdraw his plea. Counsel also should make sure that the agreement is written on the waiver form to avoid confusion about the parties' agreement.

Plea Agreement:

- ✓ Make sure agreement is written on the waiver form to avoid any potential confusion
  - o To avoid later disputes and to make a clear record, the entire agreement, including all waivers, reservations and promises, should be written out on the standard waiver-of-trial-by-jury form or in a separate addendum and explicitly stated on the record
  - o The terms of the agreement must be spelled out in detail
- ✓ Thoroughly prepare the client for the plea proceeding
  - o Review the facts the client will admit as part of the factual basis for the plea, and the elements of the Rule 11 inquiry, so that the client is not surprised or confused by the court's questions

One prosecutor's promise binds all future prosecutors in the case. *Santobello v. New York*, 404 U.S. at 262 (concluding new prosecutor bound by former prosecutor's negotiated plea). In determining whether the bargain has been satisfied, "[t]he court will construe any ambiguity against the government." *White v. United States*, 425 A.2d 616, 618 (D.C. 1980); *accord Snipes v. United States*, 507 A.2d 159, 162 (D.C. 1986). However, the *Santobello* rule applies only to promises actually made by the government, not to the defendant's expectations, even if reasonable. *Judge v. United States*, 379 A.2d 966, 967 (D.C. 1977). *But see United States v. Bogusz*, 43 F.3d 82, 94 (3d Cir. 1992) (court is not limited to express language of plea agreement, but must also consider what was reasonably understood by defendant); *United States v. Hammerman*, 528 F.2d 326, 330 (4th Cir. 1975) (prosecutor's prediction is likely to inculcate defendant's belief and reliance and is therefore an essential element of bargain).[15]

Any government promise that "can be said to be part of the inducement or consideration" for the defendant's guilty plea "must be fulfilled." *Santobello*, 404 U.S. at 262. That the government's breach was inadvertent does not lessen its impact. *Id.* Nor does it matter that the breach was of no effect. In *Santobello*, the government breached its promise not to make any sentence recommendation. Despite the sentencing judge's statement that the prosecutor's recommendation did not influence him, the Supreme Court vacated the judgment and remanded for resentencing or withdrawal of the guilty plea. *Id.* at 262-63. The test to be applied is objective – whether the agreement has been breached, irrespective of prosecutorial motivations or justifications for the breach. *United States v. Brown*, 500 F.2d 375, 378 (4th Cir. 1974) (vacating sentence because prosecutor only halfheartedly discharged obligation under plea agreement to make sentencing recommendation).

The trial court in *United States v. Blackwell*, 694 F.2d 1325 (D.C. Cir. 1982), accepted an agreement for a defense witness to plead guilty to possession of marijuana in return for dismissal of a pending gun possession charge. At Blackwell's trial, this witness was warned by the judge and implicitly warned by the prosecutor that she could still be prosecuted if she testified in Blackwell's behalf and admitted possession of the guns. *Id*. at 1329. The court, relying on *Santobello*, stated that both the judge and the prosecutor were bound by the plea agreement, even though sentencing had not yet occurred and the agreement was therefore not yet "final." *Id*. at 1337.

The government may not address an issue that it has agreed to "waive." In *Snipes*, the government had agreed to "waive stepback," i.e., to refrain from asking that the defendant be incarcerated pending sentencing, but brought to the trial court's attention that the defendant was an escapee. The trial court held the defendant without bond pending sentencing. 507 A.2d at 161 n.6. By providing information relevant to "stepback," the government had violated the agreement. *Id*. at 162 (but claim waived by failure to raise it before sentencing, despite several opportunities). The form of relief for breach of agreement is left to the trial court. The Supreme Court has recommended specific performance of the agreement or withdrawal of the guilty plea as appropriate remedies. *Santobello*, 404 U.S. at 263. The court in *White*, 425 A.2d at 619-20,

[15] *Perrow v. United States*, 947 A.2d 54 (D.C. 2008) (Prosecutor did not breach a plea agreement to cap allocution at eight years even though he stated in a sentencing memo that the court was not bound to the cap because the statement was made in the context of explaining the court's prior inquiry regarding the agreement.).

ordered specific performance of an agreement not to oppose "a substantial suspended sentence" and "a residential drug program" at resentencing before a different judge, where the prosecutor made remarks that might reasonably have been read as disapproving a suspended sentence and after the parties noted a preference for this remedy. *See also Green v. United States*, 377 A.2d 1132, 1134-35 (D.C. 1977) (noting courts will specifically enforce agreements made by the government).

Due process does not preclude withdrawal of an offer after it has been accepted but before the agreement has been executed. A prosecutor in *Mabry v. Johnson*, 467 U.S. 504, 506 (1984), proposed that in exchange for a guilty plea to a charge of accessory after a felony murder, he would recommend a 21-year sentence to be served concurrently with the defendant's other sentences. When defense counsel called three days later to communicate the defendant's acceptance, the prosecutor withdrew the offer, proposing instead to recommend a consecutive 21-year sentence. *Id*. The defendant ultimately accepted the second offer, the agreement was executed, and the judge imposed a 21-year consecutive sentence. *Id*. The plea could not be challenged under the Due Process Clause because, unlike in *Santobello*, the defendant was fairly apprised of the consequences of the plea finally accepted, and the prosecution kept its promise with respect to the executed agreement. *Id*. at 510.

To avoid later disputes and to make a clear record, the entire agreement, including all waivers, reservations and promises, should be written out on the standard waiver-of-trial-by-jury form or in a separate addendum and explicitly stated on the record.[16] The terms of the agreement must be spelled out in detail.

Judicial Participation: The trial court cannot participate in plea discussions. In *German v. United States*, 525 A.2d 596, 601 (D.C. 1987), "the trial judge *sua sponte* commented negatively on the strength of the government's case, suggested that a misdemeanor plea would be an appropriate disposition and predicted that only a very light sentence, without incarceration, would result from a conviction." Such commentary was impermissible judicial participation in the negotiation process, violating Rule 11(e)(1). *Id*. However, the conviction was affirmed because the defendant failed to show prejudice (i.e., how he was penalized for exercising his right to a jury trial). *Id*. at 603; *see also, Boyd v. United States*, 703 A.2d 818 (D.C. 1997) (reversal required where judge described in vivid terms the consequences for not pleading guilty).

On the other hand, the trial court cannot accept an illegal bargain. *(John) Jones v. United States*, 386 A.2d 308 (D.C. 1978), expressed strong disapproval where the trial court accepted a guilty plea from three co-defendants with a stipulation that they would resist all subpoenas from their codefendant to testify on their behalf: "there is no question that the government's use of a plea bargain in order to induce or encourage a witness's silence cannot be tolerated. A court's acceptance of this sort of a plea knowing its purpose is, of course, similarly improper." *Id*. at 316 n.7. However, the plea bargain was affirmed for other reasons. *Id*. at 315-16.

[16] The standard waiver of trial by jury form is available in all courtrooms and should be completed prior to the entry of the guilty plea. However, a written waiver form is not required if the record clearly shows that the defendant wished to plea guilty. *See Terrell v. United States*, 721 A.2d 957 (D.C. 1998).

The court and the government must coordinate their individual roles in the plea bargain process. *Green*, 377 A.2d at 1134. Once a court has sanctioned an agreement by accepting the plea, it has the authority to insure that the terms are fulfilled. Judicial refusal to follow a recommendation or enforce a promise does not render a prosecutorial breach harmless. "In the interest of strictly enforcing the prosecutor's promises, the Supreme Court has chosen to rule out any possibility for harmless error based on a subjective inquiry into the sentencing judge's mental process." *White*, 425 A.2d at 618 n.2.

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***Lindsey v. United States*, 84 A.3d 50 (D.C. 2014).** Co-defendants' sentences for simple assault vacated and cases remanded for resentencing by a different judge where original judge warned them, prior to trial, that they would assuredly go to jail if they rejected sentencing agreements offered by government and were convicted of assault.

***Leander v. United States*, 65 A.3d 672 (D.C. 2013).** Error, though harmless, for trial court to make statement about showing leniency in return for a guilty plea before defendant had chosen whether or not to exercise his right to trial where defendant did not plea guilty despite coercion he may have inferred from judge's remarks and no contention that judge imposed harsher sentence because defendant exercised right to go to trial.

***Plummer v. United States*, 43 A.3d 260 (D.C. 2012).** Defendant waived any disqualification on judge's part in expressly declaring after conferring privately with his attorney that he did not object to judge presiding over trial despite judge's conduct of Rule 11 inquiry in which defendant expressed readiness to plea guilty to deceptive labeling, but denied having tried to sell CDs and DVDs, thereby necessitating rejection of plea.

B. The Rule 11 Inquiry

Rule 11(c) specifies the matters that the court must explain to the defendant, and which the defendant must understand, at the time of the plea.[17] The defendant must comprehend the nature of the charge. The court is not required to give the formal definition of the crime, but may use language more comprehensible to the layperson. In appropriate circumstances, the court must explain the elements of the crime and relevant legal principles. *See Austin v. United States*, 356 A.2d 648 (D.C. 1976) (finding defendant understood nature of charges where defendant was fully informed about concept of aiding and abetting and made admissions of aiding and abetting).[18]

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[17] Where the parties agree to a trial on stipulated facts (for example, to preserve certain legal issues for appeal), the defendant waives most of the same rights that would be forfeited by a plea of guilty. It is the trial court's duty to conduct a Rule 11 inquiry to insure that the defendant fully understands the waiver. *United States v. Lawson*, 682 F.2d 1012 (D.C. Cir. 1982); *Legrand v. United States*, 570 A.2d 786, 792-94 (D.C. 1990); *Gaston v. United States*, 535 A.2d 893, 895-96 (D.C. 1988); *Jackson v. United States*, 498 A.2d 185 (D.C. 1985).

[18] In *Henderson v. Morgan*, 426 U.S. 637, 647 (1976), a defendant with an "unusually low mental capacity" pled guilty to second-degree murder. Because neither the court nor counsel informed him that intent to cause death was an element of the offense "his plea was involuntary and the judgment of conviction was entered without due process of law." On the other hand, *McClurkin v. United States*, 472 A.2d 1348, 1356 (D.C. 1984) upheld a plea to second-degree murder in the absence of a formal recitation of the elements because the plea proceeding as a whole informed

The court must apprise the defendant of the maximum possible sentence and any mandatory minimum sentence. Super. Ct. Crim. R 11(c)(1); *see also Gaston v. United States*, 535 A.2d 893, 895 (D.C. 1988) (concluding trial court failed to address core concern of Rule 11 by failing to ascertain whether defendant knew of mandatory minimum penalties). Such advice should include any special provisions such as a mandatory consecutive sentence. *Hicks v. United States*, 362 A.2d 111, 113 (D.C. 1976); *see also Eldridge v. United States*, 618 A.2d 690, 692-97 (D.C. 1992) (Rule 11 inquiry inadequate where court did not discuss effect of revising package outlined at beginning of hearing that included plea to an additional offense).

An intelligent plea requires knowledge of its direct consequences. *Brady v. United States*, 397 U.S. 742 (1970). Consequences are direct when they have a definite and immediate effect on the range of punishment. *Goodall v. United States*, 584 A.2d 560, 563 (D.C. 1990). "Knowing the range of punishment is not limited to knowing just the maximum sentence possible." *Id*. In *Goodall*, the government promised not to oppose consideration of Youth Act sentencing, for which the plea to second-degree murder made the defendant ineligible. *Id*. at 561-62. The trial judge erred by neglecting to inform the defendant that he was ineligible for the benefits of the government's promises. *Id*. at 564.

> The defect in Goodall's plea proceeding was not that he was given a longer sentence than he believed possible, but that he was precluded, unknowingly at the time, from any possibility of alternative sentencing. Although Goodall knew he could be sentenced to life imprisonment, even a remote possibility of alternative sentencing never existed. That a sentence imposed remains less than the maximum possible does not cure a trial court's error of accepting a plea when that plea is based upon manifestly incorrect information.

Id. at 563-64; *see also Eldridge*, 618 A.2d at 697 (appellant suffered prejudice when court imposed consecutive 5-15 year term on added count); *Holland v. United States*, 584 A.2d 13 (1990) (court must warn defendant if restitution may be required). *But see Ramos v. United States*, 840 A.2d 1292 (D.C. 2004) (neither the trial judge nor defense counsel is required to explain collateral consequences of a guilty plea to the defendant).

The court must explain the defendant's constitutional trial rights: the right to retained or appointed counsel at every stage; the right to trial by jury; the right to confront and cross-examine the government's witnesses, with the assistance of counsel; and the right against self-incrimination. Super. Ct. Crim. R. 11(c). Finally, the court must inform the defendant that pleading guilty waives all such rights. *Id*.

The court must also give the following warning: "If you are not a citizen of the United States, you are *advised* that conviction of the offense for which you have been charged may have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." D.C. Code § 16-713(a) (emphasis added). After the advice, the court must allow the defendant sufficient time to decide whether to

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the defendant of the charge, and the defendant admitted conduct constituting the elements of second-degree murder. The "critical inquiry is whether the defendant has been apprised adequately of the substance of an offense, rather than its formal legal components." *Id*.

take the plea. Failure to give that advice is grounds for withdrawing the plea. § 16-713(b). **It is imperative that counsel object to the court asking whether the client is a citizen of the United States, since the client has a Fifth Amendment privilege not to answer.** Some judges misconstrue the statute to mean that the person pleading guilty must state whether she or he is a U.S. citizen. All the statute requires is that the court *advise* individuals that *if* they are not citizens, there could be detrimental immigration consequences.

The court may inquire about the offense, and the defendant's answers may be used in a later prosecution for perjury. Super. Ct. Crim. R. 11(c)(5). The court may ask the government to proffer the facts of the offense and then ask the defendant whether the proffer is true. Some require the defendant to state the details of the offense; some take the defendant's answers under oath. Whatever the procedure, Rule 11(f) requires that the court be satisfied that there is a factual basis for the plea.

Additionally, the plea "must be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known." *Santobello*, 404 U.S. at 261-62. The court must question the defendant personally in order to determine "that the plea is voluntary and not the result of force or threats or of promises apart from the plea agreement." Super. Ct. Crim. R. 11(d).[19] Even if the defendant states that the plea is voluntary, the court may look behind this statement in determining whether the defendant was coerced.[20] Occasionally, the source of undue coercion may be the trial court itself. *See Byrd v. United States*, 377 A.2d 400, 405 (D.C. 1977).

With the defendant's consent, a hearing commissioner may take a plea of guilty or *nolo contendere* and recommend sentence in any criminal matter in which the maximum sentence is 90 days and/or $300 or less. D.C. Code § 11-1732(j); Super. Ct. Crim. R. 117(d), (h). A judge may review the commissioner's order or judgment, *sua sponte*, and must review it on motion by either party. D.C. Code § 11-1732(k).

It is essential that counsel thoroughly prepare the client for the plea proceeding, reviewing with the client the facts the client will admit as part of the factual basis for the plea, and the elements of the Rule 11 inquiry so that the client is not surprised or confused by the court's questions. Of course, by carefully preparing the client for the plea, counsel may learn that the client in fact would prefer to go to trial, or cannot admit the offense designated in the agreement. Counsel should consider preparing a counter factual proffer and present it to the government. Sometimes a plea may hinge on the client disagreeing with a particular fact in the agreement. A Counter

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[19] For a discussion of the relationship between the voluntariness of a plea and possible ineffective assistance of counsel, such as from incorrect legal advice, see *Hill v. Lockhart*, 474 U.S. 52 (1985); *Gaston*, 535 A.2d 893; *United States v. Streater*, 70 F.3d 1314 (D.C. Cir. 1995).

[20] *Compare (John) Williams v. United States*, 408 A.2d 996, 998-99 (D.C. 1979) (lack of any Rule 11(d) inquiry required further hearing on post-conviction allegation that counsel promised defendant he would receive probation), *with (James) Williams v. United States*, 412 A.2d 17, 20-21 (D.C. 1980) (inquiry under Rule 11(d) was fully made, and record conclusively showed that relief should be denied without a hearing).

Factual proffer may help resolve this problem. This preparation should avoid any "breakdown" of the plea.[21]

Although Rule 11 prescribes detailed procedures for entering a plea, Rule 11(h) makes clear that variance from these procedures which does not affect substantial rights is harmless error, and will be disregarded.

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***Bautista v. United States*, 10 A.3d 154 (D.C. 2010).** Court erred when accepting defendant's guilty plea to criminal contempt without advising him of the immigration consequences.

III. COMPETENCE TO ENTER PLEA OF GUILTY

The conviction of an incompetent person violates due process. *United States v. Masthers*, 539 F.2d 721, 725 (D.C. Cir. 1976); even a post-sentence motion to withdraw a guilty plea must be granted if the defendant was incompetent or lacked capacity to enter an intelligent plea. *Pierce v. United States*, 705 A.2d 1086 (D.C. 1997).[22] Courts have traditionally required a greater showing of competence to plead guilty than to stand trial. *See Westbrook v. Arizona*, 384 U.S. 150 (1966) (per curiam) (by analogy – finding of competence to stand trial does not suffice as finding of competence to waive right to assistance of counsel). However, *Godinez v. Moran*, 509 U.S. 389 (1993), held that the competence standard is the same in either context: the defendant must have sufficient present ability to consult with counsel with a reasonable degree of rational understanding of the proceedings. The Court noted, however, that a finding of competence to plead guilty does not end the inquiry; a "second tier" of inquiry is required: whether waiver of the right to trial is intelligent and voluntary. *Id*. at 2687.

The standard Rule 11 colloquy is an inadequate measure of the validity of a plea proffered by a defendant of questionable mental competence. If the issue of competence is raised, the court must conduct a thorough hearing on the defendant's mental state and understanding of actions at the time of the plea. *Willis v. United States*, 468 A.2d 1320, 1323 (D.C. 1983).

The court must determine that the defendant understands the nature of the charges to which the plea is offered. Rule 11(c)(1). *Monroe v. United States*, 463 F.2d 1032, 1035 (5th Cir. 1972), in which the defendant had been diagnosed as borderline mentally deficient, specifically disapproved of the standard questions put to the defendant as to whether he understood the nature of the charges against him; a more probing inquiry was necessary. *See also McCarthy*, 394 U.S. 459 (personally addressing defendant on understanding of essential elements of charge is necessary prerequisite to finding that he understands meaning of charge).

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[21] If the client wishes to plead but cannot admit to a factual proffer, counsel can explain the dilemma to the prosecutor and perhaps negotiate an *Alford* plea, discussed *supra* Section II.A.

[22] *Wallace v. United States*, 936 A.2d 757 (D.C. 2007) (trial court did not abuse its discretion in denying defendant's motion to withdraw guilty plea on grounds of defendant's alleged mental incompetence to enter a plea where court weighed differing testimony of numerous experts about competency in making its determination).

The court must also determine that the plea is made voluntarily. Rule 11(d). The court's inquiry into voluntariness requires consideration of "the totality of circumstances," including "the complexity of the charges, the personal characteristics of the defendant, the defendant's familiarity with the criminal justice system, and the factual basis proffered to support the court's acceptance of the plea." *(Linda) Johnson v. United States*, 631 A.2d 871, 875 (D.C. 1993) (quoting *McClurkin*, 472 A.2d at 1356). The plea may be involuntary if the defendant has such an incomplete understanding of the charge that the plea cannot stand as an intelligent admission of guilt. *See Henderson v. Morgan*, 426 U.S. 637 (1976) (defendant with I.Q. substantially below average found competent to stand trial); *see also Coleman v. Burnett*, 477 F.2d 1187, 1194 (D.C. Cir. 1973) (plea is not voluntary unless accused is aware of its consequences).

IV. WITHDRAWAL OF THE GUILTY PLEA

A. Timing of the Motion

> A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the Court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

Super. Ct. Crim. R. 32(e).[23]

1. Pre-sentence

Factors to be considered for Motions to withdraw guilty Pleas: Motions to withdraw a guilty plea filed prior to sentencing should be granted "if for any reason the granting of the privilege seems fair and just." *Kercheval v. United States*, 274 U.S. 220, 224 (1927); *Bennett v. United States*, 726 A.2d 156 (D.C. 1999). Although the *Kercheval* standard is flexible, several factors can be identified that bear on the court's exercise of its discretion: (1) whether the defendant has asserted legal innocence; (2) length of the delay between entry of plea and desire to withdraw it; and (3) whether the defendant had the benefit of competent counsel. *Gooding*, 529 A.2d at 305-07. All of these factors must be considered "cumulatively in the context of the individual case." *Binion*, 658 A.2d at 191 (quoting *Gooding*, 529 A.2d at 306).

While the court will weigh several factors in consideration of the motion, "'such a factor [i.e. the prisoner's assertion of innocence] not only is important, but may be conclusive.'" *Daramy v. United States*, 750 A.2d 552, 555 (D.C. 2000) (quoting *Bettis v. United States*, 325 A.2d 190, 195 (D.C. 1974)). The courts will also consider the effect of the timing of the motion on the government's ability to retry the case; a brief delay is much less likely to prejudice the government. *United States v. Roberts*, 570 F.2d 999, 1011-12 (D.C. Cir. 1977) vacated the denial of a request to withdraw a plea where the request was made within days after the plea was entered. *But see Bennett*, 726 A.2d 156 (three weeks too long of a delay to withdraw plea). The

[23] Prior to an appeal attacking the voluntariness of a guilty plea, the defendant must move to withdraw the plea pursuant to Rule 32(e) or vacate the sentence pursuant to D.C. Code § 23-110. *Lorimer v. United States*, 425 A.2d 1306, 1308 (D.C. 1981).

prompt filing of a motion to withdraw a guilty plea may also support an assertion that the plea was entered in "haste and confusion." *Binion*, 658 A.2d at 191.

2. Post-sentence

A motion to withdraw a plea that is filed after sentencing is viewed with disfavor, as an attempt to avoid the sentence imposed, and may be granted only to "correct manifest injustice."[24] *See* Super. Ct. Crim. R. 32(e); D.C. Code § 23-110; *Watkins v. United States*, 724 A.2d 1200 (D.C. 1999); *Luckey v. United States*, 562 A.2d 130, 132 (D.C. 1989) (Rule 32(e) "manifest injustice" standard also governs consideration of motion under § 23-110).[25]

The "manifest injustice" standard is justified by the systemic concern for finality of judgments. *See, e.g.*, *McClurkin*, 472 A.2d at 1362 n.19; *High v. United States*, 288 F.2d 427 (D.C. Cir. 1961). The decision whether to allow withdrawal "is committed to the sound discretion of the trial judge whose decision will be disturbed on appeal only upon a showing of abuse of discretion." *McClurkin*, 472 A.2d at 1352; *see also Patterson v. United States*, 479 A.2d 335 (D.C. 1984); *Willis v. United States*, 468 A.2d 1320 (D.C. 1983); *cf. Hilliard v. United States*, 879 A.2d 669 (D.C. 2005) (reversible error to deny defendant a hearing on 23-110 claim fourteen years after his guilty plea where allegations, and affidavits in support thereof, were not refuted by the existing record, and the tape of the original plea colloquy had been destroyed).

Post-sentence withdrawals are permitted only in extreme circumstances, such as upon a showing that the defendant was incompetent at the time of the plea, *United States v. Masthers*, 539 F.2d 721, 726 (D.C. Cir. 1976), or proof that the plea was induced by coercion or perjured information, *Byrd*, 377 A.2d 400 (D.C. 1977), or through ineffective assistance of counsel, *McClurkin*, 472 A.2d 1348. *See also Daramy*, 750 A.2d 552 (court's failure to properly advise client of immigration consequence under D.C. Code § 16-713 resulted in manifest injustice, even absent claim of innocence); *Goodall*, 584 A.2d 560 ("manifest injustice" occurred where court did not inquire whether defendant wished to withdraw plea after it became clear that government's promise not to oppose alternative sentencing was worthless because defendant was ineligible); *(John) Williams*, 408 A.2d 996 (D.C. 1979) (trial court failed to make Rule 11(d) voluntariness inquiry; remanded for hearing on allegation that counsel promised probation would be imposed); *Shepard v. United States*, 363 A.2d 291 (D.C. 1976) (no manifest injustice based on unpersuasive assertion that government witness has recanted).

The Court of Appeals has suggested *in dicta* that a post-sentence motion to withdraw a guilty plea should, at a minimum, be predicated upon a claim of innocence. *See Bettis v. United States*, 325 A.2d 190, 195 (D.C. 1974). Of course such a claim of innocence should have support:

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[24] Motions filed after provisional sentencing under 18 U.S.C. § 4205(c) or after a Youth Act sentence has been ordered are considered pre-sentence motions, though they may be considered post-sentence motions for other purposes.

[25] The "manifest injustice" standard is more stringent than the "harmless error" rule applicable to Rule 11 violations challenged in pre-sentence motions to withdraw a guilty plea. Super. Ct. Crim. R. 11(h); *(Alphonso) Williams*, 656 A.2d at 293-94.

> Normally, in ruling on a motion for withdrawal, a compelling consideration for the trial court is whether the grounds set forth in the motion are tantamount to a claim of innocence. A bald assertion of innocence, however, without any grounds in support thereof, will not give a defendant the absolute right to withdraw his guilty plea.

Patterson, 479 A.2d at 340 (citations omitted).

B. Grounds for the Motion

A motion to withdraw a guilty plea under Super. Ct. Crim. R. 32(e) will be granted if (1) there was a fatal defect in the Rule 11 inquiry;[26] or (2) justice demands withdrawal under the circumstances of the particular case. *Gooding*, 529 A.2d at 305-06; *see also In re J.E.H.*, 689 A.2d 528, 530 (D.C. 1996) (applying only Rule 11 analysis where juvenile stressed the involuntary nature of his plea and failed to assert innocence). Although Rule 11 violations are serious because of the due process concerns inherent in the waiver of constitutional rights, *Gooding*, 529 A.2d at 305 (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)), they justify withdrawal only if they affect substantial rights and are not purely technical. *Id*. at 305 (citing *McCarthy*, 394 U.S. at 471-72[27]). Gooding stated *in dicta* that when a withdrawal motion alleges a fatal defect in the Rule 11 inquiry, the motion is considered without regard to whether it was filed before or after sentence. 529 A.2d at 306.[28]

Another possible ground for withdrawal of a plea agreement is the prosecutor's failure to comply with its terms. *See Gaston*, 535 A.2d at 898 n.9 (failure to honor agreement not to oppose evidence that defendant qualified for addict exception); *United States v. Bullock*, 725 F.2d 118 (D.C. Cir. 1984) (prosecutor agreed not to allocute for more than 10 to 30 years but allocuted for "at least" 10 to 30 years). However, this ground alone will probably seldom provide a basis for withdrawal because in most cases the defendant can move for specific performance of the promises made. *See United States v. Fitzhugh*, 801 F.2d 1432 (D.C. Cir. 1986).

To prevail on a claim of ineffective assistance of counsel, the defendant "must show that the plea 'was motivated by advice received from counsel which fell short of the range of competence demanded of attorneys in criminal cases.'" *McClurkin*, 472 A.2d at 1360 (quoting *Gibson v.*

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[26] When voluntariness is challenged, the court must examine the "entire plea record" and "the totality of the circumstances surrounding the plea." *McClurkin*, 472 A.2d at 1356; *see also United States v. Goldberg*, 862 F.2d 101, 103 (6th Cir. 1988).

[27] *McCarthy* found manifest injustice where the trial court failed to ascertain the factual basis for the plea, and never personally questioned the defendant on whether he was pleading guilty voluntarily and understood the nature of the offenses charged. 394 U.S. at 471-72.

[28] *Wallace v. United States*, 936 A.2d 757 (D.C. 2007) (trial court did not abuse its discretion in denying defendant's motion to withdraw guilty plea where court engaged in "careful, probing, patient, and extensive colloquy" with defendant during which he provided logical responses to court's questions, more than once objected to court's characterization of his statements, and provided detailed answers about matters not related to crime, and where testimony given by mental health experts indicated that defendant was capable of malingering and fabrication of his symptoms).

United States, 388 A.2d 1214, 1215 n.4 (D.C. 1978)); *see also Hill v. Lockhart*, 474 U.S. 52 (1985) (defendant must show deficient performance and prejudice); *Ortiz v. United States*, 942 A.2d 1127 (D.C. 2008) (no abuse of discretion to allow defendant to withdraw his guilty plea where counsel made no effort to save or revive the guilty plea or to refute court's understanding that defendant wanted to go to trial); *Valdez v. United States*, 906 A.2d 284 (D.C. 2006) (case remanded to afford defendant opportunity to set forth fact, by sworn affidavit, that he had not been advised of the immigration consequences of pleading guilty, at the time of his plea, and that if the affidavit is sufficient, the burden would shift to the government to put forth a record even if it must be reconstructed because transcripts of the plea proceeding have been destroyed); *Gaston* 535 A.2d at 898 (plea was not knowing, voluntary or intelligent where defense counsel incorrectly told client she was eligible for the addict exception; manifest injustice occurred when trial court failed to advise defendant of mandatory minimum sentence); *United States v. Streater*, 70 F.3d 1314, 1318-23 (D.C. Cir. 1995) (where defense counsel's incorrect legal advice rose to level of ineffective assistance of counsel and induced defendant's plea of guilty, the plea was involuntary and unintelligent). *But see Mason v. United States*, 956 A.2d 63 (D.C. 2008) (defendant estopped from claiming error in his request to withdraw his guilty plea because of his sworn misrepresentation during the plea colloquy that he was a United States citizen, even though the resulting conviction had adverse immigration consequences).

CHAPTER 7

GRAND JURY ISSUES

I. THE ROLE OF THE GRAND JURY

The Fifth Amendment guarantees that no person shall be prosecuted for "a capital or otherwise infamous crime" unless indicted by a grand jury. Court rules and the D.C. Code require that a grand jury consider the evidence for any offense carrying a possible penalty in excess of one year. D.C. Code § 23-301; Super. Ct. Crim. R. 7(a). Thus, all felony cases must be presented to a grand jury unless the defendant waives the right to indictment.[1]

It is the maximum *potential* punishment and the character of the crime, not the punishment actually imposed, that determines whether the crime is "infamous." *Ex parte Wilson*, 114 U.S. 417, 426 (1885). Indictment is required where punishment for the offense itself exceeds one year, exclusive of enhanced penalties for recidivists under D.C. Code § 22-104, *see Smith v. United States*, 304 A.2d 28, 33 (D.C. 1973), or where the total punishment, including recidivist penalties, exceeds three years, D.C. Code § 23-111(a)(2).

The duty of the grand jury is to determine whether there is probable cause to believe that a defendant or "target" has committed a crime and should be brought to trial.[2] The grand jury may serve up to an eighteen-month term, which the Chief Judge may extend for up to six additional months if it serves the public interest. Super. Ct. Crim. R. 6(g). In practice, a grand jury sits for several months, during which it hears evidence in as many as three or four hundred cases. In felony-one and accelerated-felony cases, the same assistant will usually paper the case, present the case to the grand jury, and try the case.

The grand jury may consist of sixteen to twenty-three members. Super. Ct. Crim. R. 6(a). Twelve or more jurors must concur in order to return an indictment. Rule 6(f). The Chief Judge may replace grand jurors during their term for good cause. Rule 6(g). An indictment may be returned by less than twelve of the original grand jurors so long as the replacement jurors voting for the indictment are sufficiently informed of the evidence presented before their service began. *United States v. Lang*, 644 F.2d 1232, 1239 (7th Cir. 1981). The grand jury must vote on the specific charging language of the indictment. *Gaither v. United States*, 413 F.2d 1061, 1071 (D.C. Cir. 1969).

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[1] *Smith v. United States*, 304 A.2d 28, 31 (D.C. 1973) (defendant may waive right to indictment if done in open court and after being advised by court of the nature of charges and rights being waived); Super. Ct. Crim. R. 7(b).

[2] "For centuries the grand jury's responsibilities have included 'both the determination whether there is probable cause to believe a crime has been committed and the protection of citizens against unfounded criminal prosecutions." *Miles v. United States*, 483 A.2d 649, 653 (D.C. 1984) (quoting *United States v. Calandra*, 414 U.S. 338, 343 (1974). In practice, the grand jury rarely returns a "no true bill" and "ignores" a case. Thus, counsel's most effective grand jury work will often be in use of materials created by the grand jury investigation.

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***Wilson v. United States*, 995 A.2d 174 (D.C. 2010)**. Not abuse of discretion to disqualify retained counsel that had represented at grand jury proceeding defendant's friend who had given him gun where counsel claimed not to remember anything about substance of that representation, thus making it impossible for court to assess whether conflict might arise at trial, and may have been forced to choose at trial whether to use or not to use any remembered information to the advantage or disadvantage of defendant.

A. The Independence of the Grand Jury

The grand jury must be both *independent* and *informed*: independent of the prosecutor and the court, and informed of the evidence. "[T]he grand jury is a constitutional fixture in its own right, belonging to neither the executive nor the judicial branch." *United States v. Udziela*, 671 F.2d 995, 999 (7th Cir. 1982). Its independence is essential if it is to protect innocent persons against hasty or misguided prosecutions.

> The constitutional requirement of an indictment . . . as a predicate to a prosecution for capital or infamous crimes has for its primary purpose the protection of the individual from jeopardy except on a finding of probable cause by a group of his fellow citizens, and is designed to afford a safeguard against oppressive actions of the prosecutor or a court. . . . The constitutional provision is, as has been said, for the benefit of the accused.

United States v. Cox, 342 F.2d 167, 170 (5th Cir. 1965) (footnote omitted).

The expansion of police and prosecutorial activity in conducting investigations, combined with the secrecy of the proceedings, however, has compromised the grand jury's historical independence; "the grand jury in modern times has lost much of its independent force." 8 *Moore's Federal Practice* 6.02[1] at 6-32 (2d ed. 1986).

> Today the grand jury's independence in the criminal justice system has declined with the increasing complexity of the crime and the growth of the role of prosecutors, professional police and investigative forces. . . . It is now the United States Attorney who gathers the evidence for later presentation to the grand jury. He calls and examines witnesses, presents documents, explains the law, sums up the evidence, and requests an indictment. The courts have recognized this leadership role.

United States v. Kleen Laundry & Cleaners, Inc., 381 F. Supp. 519, 521 (E.D.N.Y. 1974), some courts have attempted to use their supervisory authority to limit the extent to which the prosecutor may compromise the independence of the grand jury. *See, e.g.*, *United States v. Hogan*, 712 F.2d 757, 759-61 (2d Cir. 1983); *United States v. Ciambrone*, 601 F.2d 616, 623 (2d Cir. 1979); *ABA Standards for Criminal Justice*, 3-3.5 (2d ed. 1980) (reviewing strictures placed on prosecutors in grand jury).

> When the framers of the Bill of Rights directed in the Fifth Amendment that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury," they were not engaging in a mere verbal exercise.

United States v. Estepa, 471 F.2d 1132, 1136 (2d Cir. 1972) (Friendly, C.J.) (reversing convictions and dismissing indictment because grand jury was misled as to hearsay nature of testimony). *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), "makes clear that the supervisory power can be used to dismiss an indictment because of misconduct before the grand jury . . . 'to ensure the integrity of the grand jury's functions.'" *United States v. Williams*, 504 U.S. 36, 46 (1992) (quoting *United States v. Mechanik*, 475 U.S. 66, 74 (1986) (O'Connor, J., concurring)). Thus, at least in theory, the right to an indictment retains some meaning as a protection for defendants.

B. Quality and Quantity of Evidence Required

The grand jury's "operation generally is unrestrained by the technical, procedural and evidentiary rules governing the conduct of criminal trials." *Calandra*, 414 U.S. at 343. Thus, the indictment may rest entirely on hearsay, *Costello v. United States*, 350 U.S. 359, 364 (1956); *Minor v. United States*, 647 A.2d 770 (D.C. 1994), or on evidence seized in violation of the Fourth Amendment, *Calandra*, 414 U.S. at 358, or the Fifth Amendment, *United States v. Blue*, 384 U.S. 251, 255 (1966); *United States v. Washington*, 328 A.2d 98, 100-01 (D.C. 1974), *rev'd on other grounds*, 431 U.S. 181 (1977). A grand jury can consider information from a variety of sources, including tips and rumors. *United States v. Dionisio*, 410 U.S. 1, 15 (1973).

But the prosecutor's discretion is not unfettered.[3] The quality and quantity of the evidence must not impair the independence of the grand jury. Thus, although no rules prevent the exclusive use of any specific type of evidence, the use of hearsay, absence of live witnesses, or failure to present exculpatory evidence may require further inquiry to determine whether the right to an independent and informed grand jury has been denied.

1. Hearsay

Although an indictment based solely upon hearsay does not violate the Fifth Amendment, *Costello*, 350 U.S. 359, the Court of Appeals has stated a "general preference for live testimony at a grand jury proceeding." *Miles*, 483 A.2d at 654; *Harvey v. United States*, 395 A.2d 92, 97 n.11 (D.C. 1978). But dismissal of the indictment or reversal of a conviction based on the exclusive use of hearsay will not be granted absent "some showing that the integrity of the grand

[3] Although the grand jury is entitled to hear virtually any kind of evidence, including evidence of the defendant's prior convictions, *see United States v. Reed*, 726 F.2d 570, 578-79 (9th Cir. 1984); *United States v. Levine*, 700 F.2d 1176, 1179 (8th Cir. 1983), prosecutors should not present unsupported allegations through their manner of questioning. The Third Circuit has suggested dismissing an indictment where the prosecutor's questioning of a witness made "graphic and misleading reference to Cosa Nostra hatchet men." *United States v. Serubo*, 604 F.2d 807, 818 (3d Cir. 1979); *accord United States v. Samango*, 607 F.2d 877, 883 (9th Cir. 1979) (dismissing indictment, in part, because prosecutor gave grand jury a transcript of prior testimony that contributed no "useful information" but "was an impressive repertory of insults and insinuations").

jury proceedings has been impaired." *Miles*, 483 A.2d at 654; *see also*, *United States v. Rodriguez-Ramos*, 704 F.2d 17, 21-22 (1st Cir. 1983) (grand jury was not misled concerning hearsay nature of testimony). The inquiry must focus on whether the particular use of hearsay prevented the grand jury from exercising its own judgment, independent of the conclusions of the police or prosecutors. The grand jury may not become "a rubber stamp endorsing the wishes of a prosecutor as a result of the needless presentation of hearsay testimony in grand jury proceedings." *United States v. Flomenhoft*, 714 F.2d 708, 712 (7th Cir. 1983) (quoting *United States v. Gallo*, 394 F. Supp. 310, 314 (D. Conn. 1975)).

Specifically, the prosecutor may not mislead the grand jury, even by silence, into thinking that testimony is based on direct observation when it is actually based on hearsay. Nor may hearsay be substituted for direct testimony when there is reason to believe that the grand jury would not indict if it heard the direct testimony. For example, the government may not rely on a police officer's account of a witness's report that the witness has subsequently changed or retracted in a material respect. *Estepa*, 471 F.2d at 1136-37; *see also Wright v. United States*, 564 A.2d 734, 738 (D.C. 1989) (conviction reversed where indictment was based on false testimony).

2. Absence of Live Witnesses

The problem of hearsay is complicated further when the government reads, to a second grand jury, transcripts of testimony taken before an earlier grand jury. This process must not compromise the independence of the indicting grand jury. Thus, the transcripts must be presented in their entirety. They cannot be used to prevent revelation of information learned after the earlier proceedings. *See United States v. Provenzano*, 440 F. Supp. 561, 565 (S.D.N.Y. 1977) (indictment dismissed where prosecutor read transcript of testimony from prior grand jury without disclosing that witness had since recanted). Nor may transcripts be used where the original grand jury was not itself able to exercise an independent role. Most importantly, the second grand jury must be aware that it can, if it desires, compel the attendance of the live witnesses. *See, e.g.*, *Flomenhoft*, 714 F.2d at 712. Especially when the government is dissatisfied with the action of a first grand jury – because of an error in its indictment, a change of circumstances, or the first grand jury's decision to return a "no true bill" – presentation of transcripts to a subsequent grand jury should be scrutinized closely. "Having decided to dismiss the first indictment and return for another indictment before a new grand jury, the government was bound to follow the rules and not to attempt a loose, shortcut procedure fraught with deficiencies of constitutional dimension." *Gallo*, 394 F. Supp. at 316; *see also United States v. Pastor*, 419 F. Supp. 1318, 1323-24 (S.D.N.Y. 1975) (dismissing second indictment where grand jury not told of hearsay quality of evidence or that it could call witnesses from first grand jury); *cf. Flomenhoft*, 714 F.2d at 712 (approving second indictment where "[t]he government offered to call any necessary witness if the second grand jury felt their testimony would be helpful [and] [t]he second grand jury independently decided that their testimony was unnecessary").

C. Subpoena Power

1. Scope of the Power in General

The grand jury has broad power to issue subpoenas to advance its investigation. A "presumption of regularity attaches to a grand jury subpoena," and ordinarily "need" for the subject of the subpoena need not be shown. *United States v. Moultrie*, 340 A.2d 828, 831 (D.C. 1975). Neither must the grand jury show that it cannot obtain the information from another source. *Id*. "Where a legitimate purpose for the grand jury investigation predominates . . . the fact that the government may derive an incidental tactical benefit does not render the proceeding improper." *Brooks*, 448 A.2d at 261; *see also United States v. Beasley*, 550 F.2d 261, 266 (5th Cir. 1977). In felony cases, District of Columbia grand juries are authorized to issue subpoenas nationwide. *See Christian v. United States*, 394 A.2d 1, 42-43 (D.C. 1978); Super. Ct. Crim. R. 17(e)(2). "Superior Court grand juries were intended to have powers comparable to federal grand juries." *Christian*, 394 A.2d at 42. "Everything is identical between both Grand Juries; purpose, standards, functions, powers, qualifications and rules." *Atkinson v. United States*, 295 A.2d 899, 901 (D.C. 1972).

The grand jury may compel the appearance of the defendant's family, friends or associates, even if they may normally be defense witnesses. *See Brooks*, 448 A.2d at 260-61. It can also compel the target of an investigation to appear. *United States v. Wong*, 431 U.S. 174, 179 n.8 (1977). Of course, any "target" of the investigation, or any witness, may assert a Fifth Amendment privilege before the grand jury. *Counselman v. Hitchcock*, 142 U.S. 547, 562 (1892). The Supreme Court has declined to decide whether a witness must be warned of the Fifth Amendment privilege against compulsory self-incrimination before the grand jury testimony can be used against the witness. *See United States v. Washington*, 431 U.S. 181, 188-91 (1977). However, the prosecutor should not mislead a witness on his or her status as a putative defendant by failing to give standard "target warnings." *United States v. Jacobs*, 531 F.2d 87, 90 (2d Cir. 1976). Notwithstanding the lack of clear constitutional imperative, under Justice Department policy, prosecutors must attach a written "Advice of Rights" form to the subpoena of a "target" or "subject" of investigation. U.S. Attorney's Manual, 9-11.250. Failure to provide such warnings may result in suppression of the witness's testimony. *See Brown v. United States*, 518 A.2d 415, 418 (D.C. 1986) (issue not reached because not raised below).

Despite its breadth, the grand jury's subpoena power is circumscribed. "A subpoena may be resisted where the grand jury acts without authority, where the subpoena seeks information unrelated to the grand jury's investigation, or where the subpoena endeavors to gather evidence *primarily* for another purpose." *Christian*, 394 A.2d at 46. For example, the prosecutor may not use the grand jury's subpoena power to compel witnesses to provide information to the government rather than the grand jury. *See United States v. Thomas*, 320 F. Supp. 527, 529 (D.D.C. 1970); *Durbin v. United States*, 221 F.2d 520, 522 (D.C. Cir. 1954)

Even if the grand jury subpoena is properly issued, the prosecutor may not use it as a subterfuge for trial preparation. Once an indictment is returned, the prosecutor may not use a subpoena simply to gather evidence for the trial. *See United States v. Doss*, 563 F.2d 265, 275 (6th Cir. 1977) (en banc) (improper to question defendant in grand jury about case already indicted);

United States v. Fahey, 510 F.2d 302, 306-07 (2d Cir. 1974) (improper to question witness in grand jury about indicted matter, but the testimony may be used to impeach witness at trial); *In re Grand Jury Proceedings*, 632 F.2d 1033, 1041 (3d Cir. 1980) (once defendant indicted, grand jury investigation cannot be used to secure more evidence against defendant unless it is good faith inquiry into other charges within its scope).

However, the grand jury may issue a subpoena, even after the return of an indictment, so long as it continues to investigate other charges or other defendants. *See United States v. Ruppel*, 666 F.2d 261, 268 (5th Cir. 1982); *United States v. Zarattini*, 552 F.2d 753, 757 (7th Cir. 1977) (proper to call witness to grand jury, post-indictment, to investigate new charge).

If the grand jury issues an arguably improper subpoena, the witness (or the defendant, if the witness is an agent of the defendant) should move to quash the subpoena. Such motions are filed with the Chief Judge and the burden is on the moving party to establish the irregularity and/or the impropriety of the grand jury subpoena.[4]

Although courts have held that it is improper to use subpoenas intended for grand jury witnesses for the purpose of prosecutorial investigation, and it is improper for the government to pay fees to witnesses called to the prosecutor's office solely for prosecutorial interrogation, courts may still reject a defendant's new trial motion when the prosecutor's abuse did not lead to subornation of perjured testimony presented at trial. *See Perez v. United States*, 968 A.2d 39, 63 (D.C 2009) (denying defendant's motion for new trial, and holding the abuse of the grand jury subpoena process did not taint the appellants' trial because defense counsel was able to present evidence to the jury of the prosecutor's pressure tactics).

2. Subpoenas Directed to Defense Attorneys or Investigators

United States Attorneys in some jurisdictions have attempted to subpoena defense attorneys or their agents to a grand jury. Such a subpoena "automatically" gives rise to concerns of privilege, and "a preliminary showing must be made by the government before the attorney can be forced to appear before the grand jury." *In re Special Grand Jury No. 81-1*, 676 F.2d 1005, 1010 (4th Cir.), *vacated as moot*, 697 F.2d 112 (1982) (indictment returned without attorney's testimony). Bringing the attorney before the grand jury raises "a strong possibility that a wedge will be driven between the attorney and the client and the relationship will be destroyed." 676 F.2d at 1009.

> We recognize that normally a subpoena is presumed to be regular, and that the subpoenaed party has the burden of showing that the information sought is privileged or that there has been an abuse of the grand jury process. Where the attorney for the target of an investigation is subpoenaed, however, attorney-client privilege considerations and sixth amendment interests arise automatically and a

[4] Rule 17(c) empowers the court to quash a subpoena *duces tecum* on the grounds that compliance would be "unreasonable and oppressive" in that the materials sought are excessive in number, cover an unreasonably long time period or would be unreasonably difficult to obtain. *See Moultrie*, 340 A.2d at 831; *United States v. Gurule*, 437 F.2d 239, 241 (10th Cir. 1970).

> preliminary showing must be made by the government before the attorney can be forced to appear before the grand jury.

Id. at 1009-10 (citation omitted).[5]

The work-product doctrine equally protects the work of a defense investigator called before a grand jury. *Appeal of Hughes*, 633 F.2d 282, 290-91 (3d Cir. 1980), reversed a contempt citation against a defense investigator who had refused to testify about his investigations before a grand jury:

> Here the trial court was faced with the core of the work-product of an agent of the attorney, the very substance of the interviewer's statements. Though [the investigator] would presumably have been speaking from memory, examination into his recollection of the interview might have indirectly revealed his, and [the attorney's] mental processes . . . Even the question as to the manner in which he introduced himself involved an inquiry into his investigative technique. The same questions as to the methods of preparing materials for use in litigation addressed to any attorney would be an invasion of his work-product protection.

See also In re Sealed Case, 676 F.2d 793, 808-10 (D.C. Cir. 1982) (discovery by the government in grand jury proceedings is subject to the attorney-client privilege . . . as well as the work product rule).

3. Grand Jury Directives

A grand jury directive for a voice exemplar, a handwriting exemplar, or fingerprints requires no showing of reasonableness or justification for enforcement. *See United States v. Mara*, 410 U.S. 19 (1973); *United States v. Dionisio*, 410 U.S. 1 (1973).

A directive for a line-up for someone not under arrest, however, may be enforced only upon "a minimal factual showing sufficient to permit the judge to conclude that there is a reason for the line-up which is consistent with the legitimate function of the grand jury." *In re Kelley*, 433 A.2d 704, 707 (D.C. 1981) (en banc). The subject or target of an investigation must be advised in a timely fashion of the right to contest the line-up on *Kelley* grounds, even though the right to counsel does not attach at this pre-accusatory stage. *Brown v. United States*, 518 A.2d 415, 419-22 (D.C. 1986).

The *Kelley* requirement is activated not when the directive is issued but when the government seeks to enforce it. Counsel should move to quash the directive and force the government to

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[5] *But see generally In re Grand Jury Proceedings*, 786 F.2d 3, 5 n.2 (1st Cir. 1986). As stated in *In re Grand Jury Matters*, 751 F.2d 13, 19 (1st Cir. 1984):

> There can be no absolute rule that frees an attorney, merely because he is such, to refuse to give unprivileged evidence to a grand jury. Even when trials are pending, the grand jury's right to unprivileged evidence may outweigh the right of the defense bar and its clients not to be disturbed. The matter is one that turns on particular facts as evaluated by a district court.

make a proper showing under *Kelley*. *Kelley*'s rationale may not apply to other directives not mentioned in the decision (*e.g.*, fingerprints, or voice or handwriting exemplars). *See Brown*, 518 A.2d at 419.

D. Deliberations and Return of the Indictment

The prosecutor instructs the grand jury on the law that it is to apply to each case before it. The prosecutor may not inject himself or herself into the grand jury's deliberations. Additionally, the prosecutor may not give the grand jury erroneous legal advice. However, absent a showing of "actual prejudice to the accused," the indictment will not be dismissed. *United States v. McKenzie*, 678 F.2d 629, 631 (5th Cir. 1982); *United States v. Wright*, 667 F.2d 793, 796 (9th Cir. 1982) (prosecutor's conduct did not significantly infringe upon grand jury's ability to exercise independent judgment).

The prosecutor may analyze the evidence, and point out its significance to the grand jury, but must not mislead the grand jury through legal analysis or argument. It is not *per se* error for the prosecutor to state a personal opinion about the defendant's guilt; "[i]mproper remarks made by a prosecutor can only justify dismissal of the indictment if such remarks so biased the grand jurors that their votes were based upon their bias." *United States v. Heffington*, 682 F.2d 1075, 1080 (5th Cir. 1982); *United States v. Cederquist*, 641 F.2d 1347, 1353 (9th Cir. 1981) (isolated use of elliptical expressions did not require dismissal). The essential question is whether the prosecutor's misconduct was "of such extremity that the will of the grand jury was overborne." *McKenzie*, 678 F.2d at 634.

The grand jury deliberates and votes on each indictment, count by count. At least twelve jurors must concur in each count. The grand jury must also agree on the particular charging language of the indictment. *Gaither v. United States*, 413 F.2d 1061, 1071 (D.C. Cir. 1969). The indictment must sufficiently apprise the defendant of the nature of the accusations so that the defendant can prepare a defense or enter a plea, and must accurately reflect the intent of the grand jury and facts found by the grand jury. *Cain v. United States*, 532 A.2d 1001, 1004 (D.C. 1987). The foreperson must record the number of jurors concurring in each finding, but this record may not be made public without a court order. Super. Ct. Crim. R. 6(c). The defendant is not automatically entitled to see such records. *United States v. Cronic*, 675 F.2d 1126, 1130 (10th Cir. 1982), *rev'd on other grounds*, 466 U.S. 648 (1984); *United States v. Garner*, 663 F.2d 834, 840 (9th Cir. 1981).

II. GRAND JURY WORK FOR PRACTITIONERS

Active representation of clients during grand jury consideration is an important though often neglected part of criminal defense practice. Attention to the grand jury proceedings may reveal one or more bases to seek dismissal of the indictment. More important, it may provide an invaluable opportunity to discover the strengths, weaknesses, and general focus of the government's case. Counsel is faced with a conundrum because of the restricted access to grand jury material. Several of the bases for dismissal mentioned previously require detailed knowledge of the grand jury proceedings. Yet access to these proceedings is available only after some showing by the defense. This section provides a checklist of steps that counsel can take,

from the beginning of the case through post-trial motions, to discover the content of the grand jury proceedings. Obviously, the earlier such discovery is accomplished, the more helpful it will be in trial preparation.

A. Pre-Indictment Representation

1. Relations with the Prosecutor

Superior Court cases are presented to the grand jury by one of four sections of the United States Attorney's Office. Felony One cases are presented by prosecutors from either the Homicide or Sex Offenses Section, who remain assigned to the case through trial. Felony Two cases involving defendants targeted as violent offenders, defendants held without bond, or defendants in the jurisdiction under the Interstate Agreement on Detainers Act generally are presented to the grand jury by prosecutors in the Violent Crime Section, who also retain the case through trial. Other Felony Two cases are presented by prosecutors in the Grand Jury Section, who usually handle the cases only through indictment.

Discussion with the prosecutor during the grand jury stage is often very productive. The possibility of a pre-indictment plea may make the prosecutor willing to disclose certain information, including a defendant's statements, physical evidence, or certain medical and scientific evidence. Moreover, through these discussions, counsel can track the progress of grand jury investigations.

2. Witness Interviews

Super. Ct. Crim. R. 6(e) imposes no obligation of secrecy on witnesses before the grand jury; they remain free to discuss their testimony with anyone. *See In re Investigation before April 1975 Grand Jury*, 531 F.2d 600, 606-07 n.11 (D.C. Cir. 1976); *In re Grand Jury Summoned October 12, 1970*, 321 F. Supp. 238, 240 (N.D. Ohio 1970); Advisory Committee on Rules, Note 2, Fed. R. Crim. P. 6(e). Counsel should make every effort to interview each witness who may have appeared in the grand jury, to learn what the witness said and what the government wanted to know. It is improper for any government agent to instruct witnesses not to discuss their grand jury testimony. *See United States v. Radetsky*, 535 F.2d 556, 569 (10th Cir. 1976), *overruled on other grounds by United States v. Daily*, 921 F.2d 994, 1004 (10th Cir. 1990).

Both defense witnesses and government witnesses may be called before the grand jury. Counsel should prepare defense witnesses to take note of and report on specific details, such as the number of grand jurors present and the questions asked. In any witness interview following grand jury testimony, counsel will want to inquire beyond the substance of the testimony to discover exactly which grand jury is hearing the case (there are three or more Superior Court grand juries sitting at any one time, with different expiration dates) as well as the different concerns expressed in questions of the prosecutor and the grand jurors themselves. The jurors' questions are often an excellent indicator of weaknesses in the government's case.

B. Post-Indictment Issues

1. Errors in the Indictment

Immediately after arraignment, counsel should carefully read the indictment for errors. Even minor errors may provide the basis for further discovery of the grand jury proceedings.

Occasionally, indictments will charge the wrong offense (*e.g.*, distribution in a possession with intent to distribute case), the wrong victim (*e.g.*, confusing the names of two victims), or the wrong date or time. These errors can be explained in many cases by the submission of prepared indictments for the grand jury's consideration. But the submission of erroneous indictment forms to the grand jury does not explain why the grand jury would actually approve an erroneous document. One obvious possibility is that the grand jury did not actually read the indictment, suggesting that it was not acting independently of the prosecution. Alternatively, it may have read the indictment but not noticed the error, suggesting that it was not adequately informed of the evidence.

Such errors may entitle counsel to obtain some portions of the grand jury proceedings under Super. Ct. Crim. R. 6(e)(3)(C)(ii), permitting disclosure upon a showing that there *may* be grounds to dismiss because of events before the grand jury. Suggestions on the face of the indictment that the grand jury either was not independent or was not informed provide just such a basis. *See United States v. Serubo*, 604 F.2d 807, 816-17 (3d Cir. 1979) (ordering disclosure of grand jury proceedings on motion to dismiss indictment).

2. Multiple Grand Juries or Indictments

Counsel should always note whether the case has been heard by more than one grand jury. The date of the grand jury term appears at the top of each indictment. If the grand jury was sworn in after the date on which counsel knows some witnesses testified, or there is other reason to believe that more than one grand jury was used, there may be some question as to how the indicting grand jury was informed of the evidence taken by the earlier grand jury. Routinely, the prosecutor will simply read some of the transcripts to the indicting grand jury. Although this is not improper on its face, there are reasons to investigate further if there is any indication that the indicting grand jury misunderstood any relevant fact.

Similar problems can arise if the government seeks a second indictment (due to, for example, new facts uncovered, or a mistake in the first indictment). Whenever this occurs, counsel should be alert for signs that the second grand jury did not hear some evidence heard by the first grand jury, or did not consider the evidence at all but simply "corrected" an error at the prosecutor's request[6]. As with other post-indictment issues, a showing that the indicting grand jury may not have been independent or informed should be sufficient to get disclosure of the proceedings under Super. Ct. Crim. R. 6(e)(3)(C)(ii).

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[6] Counsel must raise any such issue in order to preserve it. *See Teoume-Lessane v. United States*, 931 A.2d 478 (D.C. 2007). Not plain error for trial judge to fail to raise *sua sponte* issue of prosecutorial vindictiveness based upon addition of a charge to a superseding indictment following a hung jury.

3. Pre-trial Disclosure of Grand Jury Transcripts

There is a strong policy of secrecy surrounding the operations of the grand jury. *See* Super. Crim. R. 6(e)(2). However, a witness may discuss his or her testimony with others without violating Rule 6(e) which prohibits grand jurors, prosecutors and stenographers from disclosing "matters occurring before the grand jury." Super. Ct. Crim. R. 6(e)(1) provides that grand jury transcripts "shall remain in the custody and control of the government unless otherwise ordered by the Court in a particular case." Pre-trial release of a grand jury transcript is only ordered when "the party seeking disclosure has established a particularized need that outweighs time-worn considerations." *United States v. Alexander*, 428 A.2d 42, 53 (D.C. 1981).[7] A party seeking disclosure must show: (a) the material sought is needed to avoid injustice; (b) the need for disclosure exceeds the need for continued secrecy; and (c) the request is structured to cover only the material needed. *Id*. at 53-54; *see also Davis v. United States*, 641 A.2d 484, 493 (D.C. 1994). There is authority in other jurisdictions that a witness may request his own transcript without a showing of particularized need. *See In re Sealed Motion*, 880 F.2d 1367 (D.C. Cir. 1989); *Bursey v. United States*, 466 F.2d 1059 (9th Cir. 1972).

A showing of "particularized need" is not impossible, for the court has recognized that witness impeachment and refreshment of recollection are examples of particularized need. *See Law v. United States*, 488 A.2d 914, 916 (D.C. 1985). However, *Davis* and *Alexander* require that defense counsel assert more than a desire to prepare the witness for trial.

Defense counsel may also obtain pre-trial access to grand jury transcripts by making a specific *Brady* demand for any exculpatory material contained in the grand jury proceedings. *Brady v. Maryland*, 373 U.S. 83, 87 (1963). "[G]rand jury testimony is subject to the duty to disclose under *Brady*." *Wiggins v. United States*, 386 A.2d 1171, 1173 n.3 (D.C. 1978). The government may have presented "defense" witnesses who establish an alibi or some other viable defense. *See, e.g., Brooks v. United States*, 448 A.2d 253 (D.C. 1982). The government's own witnesses may have provided exculpatory information. The government must disclose the names of the relevant witnesses and at least a summary of the information. *See Wiggins*, 386 A.2d at 1173 & n.3; *United States v. Ruggiero*, 472 F.2d 599, 603-05 (2d Cir. 1973).

[7] The discovery rules do not apply to grand jury testimony, unless it is that of the defendant. Super. Ct. Crim. R. 16(a)(3)(a)(1)(A).

Even if the government provides summaries, the defense is entitled to the actual transcripts if they might be admissible, as where the witness is unavailable for trial and the transcript may be admissible as prior recorded testimony. *See Johns v. United States*, 434 A.2d 463, 472-75 (D.C. 1981); *cf. Ready v. United States*, 445 A.2d 982, 990 (D.C. 1982) (inadequate showing that witness was unavailable).

Grand Jury Representation:

Pre-Indictment:

- ✓ Discuss case with prosecution
- ✓ Interview government witnesses
- ✓ Prepare defense witnesses that may be called

Post-Indictment:

- ✓ Carefully read indictment for errors
- ✓ Always note if case was presented to more than one grand jury
- ✓ Any showing that the grand jury was not independent/informed raises potential to obtain disclosure of the proceeding

Obtaining Grand Jury Transcripts:

- ✓ Counsel can obtain pretrial access to grand jury transcripts by making a specific *Brady* request for exculpatory material in the proceeding
- ✓ Defense is entitled to actual transcripts if they might be admissible

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***Jones v. United States*, 99 A.3d 679 (D.C. 2014).** See, *supra*, Chapter 5.I.A.2.b.

III. CHALLENGES TO THE GRAND JURY AND INDICTMENT

A. Challenges to the Composition of the Grand Jury

Challenges may be made to individual jurors or to the entire array.[8] Challenges to individual jurors, however, are quite restricted. Although the Supreme Court has left the question open, the

[8] A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualifications of an individual juror…. Such motion shall be made in the manner prescribed in 28 U.S.C. 1867(e) and shall be granted under the conditions prescribed in that statute. An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears from the record kept pursuant to paragraph (c) of this Rule that 12 or more jurors, after deducting the number not qualified, concurred in finding the indictment.

Super. Ct. Crim. R. 6(b)(2).

Court of Appeals has held that grand jurors may not be challenged for bias. Thus, extensive exposure to publicity does not taint a grand juror. *Khaalis v. United States*, 408 A.2d 313, 333-34 (D.C. 1979). There is a suggestion in *Khaalis*, however, that a specific showing of individual bias may justify further inquiry by the court. *Id*. at 333 n.11. The witnesses who testified are normally the best source of information about individual grand jurors. Occasionally, a witness will recognize that a grand juror is from a neighborhood relevant to the case and knows one or more of the involved individuals. If such a juror can be shown, through affidavits, to harbor strong feelings about the people or the case, the Due Process Clause of the Fifth Amendment may provide a basis for a challenge.

Challenges for lack of legal qualification are more often accepted. Grand juries are, like petit juries, impanelled under the Jury Selection and Service Act, 28 U.S.C. §§ 1861 *et seq.*, made applicable to the Superior Court by D.C. Code §§ 11-1901 *et seq.* The Act establishes broad criteria for selection of jurors and requires each jurisdiction in the federal system to develop and implement a plan.[9]

Challenges may be made to the grand jury as a whole and to the array from which it was selected. Each defendant has "the right to grand and petit juries selected at random from a fair cross section of the community." *See* 28 U.S.C. § 1861; *Campbell v. Louisiana*, 523 U.S. 392 (1998); *Taylor v. Louisiana*, 419 U.S. 522 (1975). The Act prohibits bias in selection of jurors on the basis of race, ethnicity, sex, national origin, and economic status. 28 U.S.C. § 1862.

To establish a *prima facie* violation of the fair cross-section requirement, the defense[10] must show that: (1) a "distinctive"[11] group in the community; (2) is substantially under-represented[12] in the list from which grand and petit jurors are summoned; (3) as a result of systematic exclusion of the group in the jury selection process.[13] *Duren*, 439 U.S. at 364. Once a *prima*

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[9] The district court has adopted a plan and established a three-person jury commission to implement it. The District of Columbia Jury Commission selects jurors in accordance with the plan for grand and petit juries in both federal and local courts. Jurors are randomly selected from a source list compiled every four years by merging the lists of registered voters and driver's licenses. The commissioners establish a qualified juror list by eliminating (on the basis of questionnaires) persons who are disqualified by law, exempted on public interest grounds, or excused for hardship. Persons on the qualified list are summoned for grand jury service by periodic random drawings.

[10] White defendants have third-party standing to raise equal protection claims of discrimination against other racial groups in the selection of grand jurors, and may further claim a due process violation if convicted on an indictment returned by an improperly selected grand jury. *Campbell v. Louisiana*, 523 U.S. 392 (1998).

[11] Groups found to be "distinctive" include blacks, *Smith v. Texas*, 311 U.S. 128 (1940); women, *Taylor*, 419 U.S. 522 (1975); Mexican-Americans, *Hernandez v. Texas*, 347 U.S. 475 (1954); atheists, *State v. Madison*, 213 A.2d 880 (Md. 1965); and daily wage earners, *Thiel v. Southern Pacific Co.*, 328 U.S. 217 (1946). *But see United States v. Diggs*, 522 F.2d 1310, 1317 (D.C. Cir. 1975) (people ages 21 to 29 not cognizable group).

[12] How the degree of under-representation is assessed varies. A group's representation in the jury list may be compared with its representation in the total population, *see, e.g.*, *Duren v. Missouri*, 439 U.S. 357 (1979), or in the eligible population, *see, e.g.*, *Taylor*, 419 U.S. 522, 531 (1975). *See generally* Gerwin, *An Analysis of Jury Selection Decisions, appended to Foster v. Sparks*, 506 F.2d 805, 832-33 (5th Cir. 1975). As to whether the under-representation is sufficiently "substantial," *see, e.g.*, *Castaneda v. Partida*, 430 U.S. 482 (1977); *Turner v. Fouche*, 396 U.S. 346 (1970); *Cassell v. Texas*, 339 U.S. 282 (1950).

[13] The question here is whether the cause of the under-representation is inherent in the method of jury selection. For example, a policy of excusing women on request is systemic exclusion. *Duren*, 439 U.S. at 357. In contrast, *Harlee*

facie showing is made, the burden shifts to the government to show "that a significant state interest [is] manifestly and primarily advanced" by the mechanism that results in the exclusion or under-representation. *Id*. at 367. "Merely rational grounds" do not suffice. *Taylor*, 419 U.S. at 534.[14]

A challenge to the composition of the grand jury requires inspection of the jury selection records of the Jury Commission to develop the necessary database, as authorized by the Act:

> The contents of records or papers used by the jury commission or clerk in connection with the jury selection process shall not be disclosed, except . . . as may be necessary in the preparation or presentation of a motion [challenging selection procedure]. . . .The parties in a case shall be allowed to inspect, reproduce, and copy such records or papers at all reasonable times during the preparation and pendency of such a motion.

28 U.S.C. § 1867(f). This right to inspection is unqualified. *Test v. United States*, 420 U.S. 28, 30 (1975). The defense need not establish a *prima facie* case, by affidavit or otherwise, to obtain access to jury selection records. *Id*. at 29-30 n.2. Counsel may also require expert assistance in compiling and analyzing the statistical data.

Counsel must be careful to comply with the procedural requirements of 28 U.S.C. § 1867. The motion to dismiss the indictment must be made before *voir dire* of the petit jury begins, or within seven days after the defendant discovered, or could have discovered by the exercise of diligence, the grounds therefore, whichever is earlier. 28 U.S.C. § 1867(a). To obtain an evidentiary hearing, the motion must be accompanied by a sworn statement of facts that, if true, would constitute a substantial failure to comply with the Act's provisions. 28 U.S.C. § 1867(d).

B. Motions to Dismiss the Indictment

While instances of impropriety in the grand jury seem to be rare – no doubt because of the secrecy surrounding the grand jury – defense counsel should be aware that motions to dismiss indictments as violative of due process may sometimes be appropriate. Another theory for dismissal is a trial court's supervisory power over a grand jury's work in its jurisdiction. Some instances of impropriety before the grand jury include the following:

1. Presence of Unauthorized Persons

Super. Ct. Crim. R. 6(d) limits the persons who may appear in front of the grand jury to "attorneys for the government, the witness under examination, interpreters when needed and . . .

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v. District of Columbia, 558 A.2d 351 (D.C. 1989), rejected a challenge to the District of Columbia jury selection process predicated on under-representation of Spanish-surnamed persons, because there was no showing that it resulted from systematic exclusion.

[14] The defendant need not be a member of the excluded group. *Taylor*, 419 U.S. at 526. And the fact that members of the under-represented group were actually on the defendant's jury is irrelevant. *See, e.g., Thiel*, 328 U.S. at 225, *Campbell v. Louisiana*, 523 U.S. 392 (1998).

a stenographer or operator of a recording device."[15] The Supreme Court has twice reviewed violations of Rule 6(d). In *United States v. Mechanik*, 475 U.S. 66 (1986), two FBI agents testified jointly in front of the grand jury in violation of Rule 6(d). The Fourth Circuit applied a *per se* rule, and reversed the convictions. The Supreme Court, however, reinstated the convictions, ruling that the error was harmless since it did not affect the outcome of the trial:

> the petit jury's verdict of guilty beyond a reasonable doubt demonstrates a fortiori that there was probable cause to charge the defendants with the offenses for which they were convicted. Therefore, the convictions must stand despite the rule violation. *Id*. at 67; see also *Id*. at 70.

Similarly, in *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), two IRS agents violated Rules 6(d) and 6(e) by reading inaccurate transcripts to the grand jury in the absence of the prosecutor. Relying on *Mechanik*, the Supreme Court affirmed the convictions because there was no showing of prejudice to the defendant. Under *Mechanik* and *Bank of Nova Scotia*, it is evident that prejudice must be shown before a court will reverse a conviction for violations of Rule 6(d). However courts have supervisory power to dismiss indictments where statutes and rules designed to protect the integrity of the grand jury are violated:

> Thus, *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988), makes clear that the supervisory power can be used to dismiss an indictment because of misconduct before the grand jury, at least where that misconduct amounts to a violation of one of these "few, clear rules which are carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions," *United States v. Mechanik*, 475 U.S. 66, 74 (1986) (O'Connor, J., concurring in judgment). *United States v. Williams*, 504 U.S. 36, 46 (1992).

In *Williams v. United States*, 757 A.2d 100 (D.C. 2000), the Court of Appeals considered the government's practice of presenting to grand jurors the unsworn testimony of narcotics "experts" who informed the grand jurors of the behavior of typical narcotics users and sellers. The Court of Appeals held that the detective who appeared before the grand jury should have been under oath, but that the error was harmless under *Bank of Nova Scotia*. *Id*. at 103.

2. Perjury in the Grand Jury

Hunter v. United States, 590 A.2d 1049, 1051 (D.C. 1991), sets forth the basic principles relating to the validity of indictments where false testimony was presented to the jury (citations omitted, emphasis added):

> [O]rdinarily the court does not review evidence presented to the grand jury to determine whether it was sufficient to support the indictment returned. . . . An indictment returned by a legally constituted and unbiased grand jury that is valid on its face is enough to call for a trial on the merits. . . . *However, where false*

[15] The Supreme Court has not reached the question of whether the witness under examination has a right to have her counsel present outside the jury room. *See, e.g., Conn v. Gabbert*, 526 U.S. 286 (1999).

> *material testimony is presented to the grand jury, the court may review the evidence presented to the grand jury to determine whether the defendant suffered any prejudice as a result, depending upon the seriousness of the showing.*

In *Hunter*, a police officer gave false testimony to the grand jury and the defendant moved to dismiss the indictment. The Court of Appeals affirmed the conviction because another witness before the grand jury, the victim, provided ample untainted testimony to support the indictment:

> Dismissal of the indictment is warranted only where it is established that the false testimony substantially influenced the grand jury's decision to indict or where there exists a "grave doubt" whether the decision to indict was free from the substantial influence of the false testimony. *See Sanders v. United States*, 550 A.2d 343, 345 (D.C. 1988)] (citing *Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988). Where no evidence other than deliberately falsified information is presented to the grand jury as to a charge, dismissal of the indictment for that charge would be warranted. *See Wright v. United States*, [564 A.2d 734, 738 (D.C. 1989)].

Hunter, 590 A.2d at 1051-52; *see also Gaffney v. United States*, 980 A.2d 1190 (D.C. 2009) (defendant's admission to two key government witnesses could not support perjury conviction where admission merely contradicted the defendant and was not corroborated by other evidence, thus the evidence did not materially contradict the defendant's grand jury testimony); *Jones v. United States*, 893 A.2d 564, 567 (D.C. 2006) (holding that a witness's inconsistent stories before the grand jury, and later at trial, can be remedied with cautionary jury instructions given that the two witnesses' inconsistent stories in the grand jury and at trial – as well as the details of the immunity letter – were fully aired before the petit jury at trial with a cautionary instruction which asked the jury to scrutinize with care "the testimony of an admitted . . . perjurer" and to consider such inconsistencies in evaluating credibility); *Keys v. United States*, 767 A.2d 255 (D.C. 2001) (no due process violation where complaining witness told prosecutor mid-trial that she had falsely testified in grand jury, but then testified at trial consistently with her grand jury testimony; *United States v. Udziela*, 671 F.2d 995 (7th Cir. 1982) (indictment stands despite perjured testimony because another witness gave sufficient untainted evidence).

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***Williams v. United States*, 75 A.3d 217 (D.C. 2013).** Any error for trial court in denying motion to dismiss indictment containing admittedly false testimony of detective was rendered harmless by petit jury's "supervening guilty verdict" and where testimony was presented to grand jury "without willful misconduct or other extenuating circumstances."

3. Vindictive Indictments

Where a defendant has successfully moved to dismiss a complaint or indictment or obtained a new trial after appeal, a subsequent indictment that contains additional charges may be vulnerable to attack as vindictive. The theory is that a defendant may not be penalized for

exercising a legal right. *See North Carolina v. Pearce*, 395 U.S. 711 (1969) (harsher sentence on retrial after successful appeal only allowed if objective, nonvindictive reasons are stated).

In *Blackledge v. Perry*, 417 U.S. 21 (1974), the defendant was convicted of a misdemeanor, but appealed and was granted a jury trial *de novo* in a higher court. The prosecutor then indicted for a felony. The Supreme Court ruled that the increase in charges violated due process because it penalized the defendant for the exercise of his right to appeal, even though there was "no evidence that the prosecutor acted in bad faith or maliciously in seeking a felony indictment." *Id*. at 28. Due process forbids even the appearance of vindictiveness, which should be presumed from the filing of additional charges after the defendant asserts a right. *See United States v. Schiller*, 424 A.2d 51, 56-57 (D.C. 1980).

Upon a defense motion to dismiss for prosecutorial vindictiveness, if the court determines that the prosecutor's actions give rise to the realistic likelihood of vindictiveness, then the government must rebut the presumption of vindictiveness by explaining its decision. *See United States v. Goodwin*, 457 U.S. 368, 373 (1982); *Schiller*, 424 A.2d 51, 56-57. In determining whether the government has met its burden, the court should consider: (1) the nature of the case; (2) the status of the case; (3) the nature of the right asserted by the defendant; (4) the type of vindictiveness alleged; and (5) the nature of the harm involved. *Schiller*, 424 A.2d at 56; *see also United States v. Mahdi*, 777 A.2d 814 (D.C. 2001) (clarifying standard and procedures for consideration of claims of prosecutorial vindictiveness). Any time a motion to dismiss a complaint or indictment has been granted, and a new indictment increases the charges, defense counsel should consider filing a motion to dismiss because of prosecutorial vindictiveness.

4. Failure to Present Exculpatory Evidence

ABA Standards relating to the Prosecution Function § 3.6(b) (2d ed. 1980) provides that "[t]he prosecutor should disclose to the grand jury any evidence which he knows will tend to negate guilt." The United States Attorney's Manual sets forth the Department of Justice's view of appropriate conduct by prosecutors appearing before grand juries.[16] The Manual advises a prosecutor who is "personally aware of substantial evidence which directly negates . . . guilt," to notify the grand jury of this evidence. *U.S. Attorney's Manual*, § 9-11.334.

The Court in *United States v. Williams*, 504 U.S. 36, 47 (1992), held that federal courts may not exercise their supervisory power to prescribe rules requiring prosecutors to present exculpatory evidence to grand juries. However, the Court did not address whether a failure to present substantial exculpatory evidence could violate due process. Lower courts have recognized due process implications of the government's failure to present exculpatory evidence. *See United States v. Short*, 777 F. Supp. 40 (D.D.C. 1991) (indictment dismissed where prosecutor withheld evidence from the grand jury); *United States v. Reid*, 911 F.2d 1456 (10th Cir. 1990) (court recognized that failure to present exculpatory evidence may necessitate dismissal, but did not find so in this case); *United States v. Samango*, 607 F.2d 877 (9th Cir. 1979) (indictment dismissed for failure to present exculpatory evidence).

[16] The Manual is advisory only, and does not purport to set forth the law or create rights. *See United States v. King*, 590 F.2d 253, 256-57 (8th Cir. 1978).

Counsel should be alert to government overreaching or unfairness in presenting evidence. Prosecutors should be aware that, because of their influence over grand juries, they have an "ethical obligation strictly to observe the status of the grand jury as an independent legal body." Hogan, 712 F.2d 757, 759 (2nd Cir. 1983) (citing *ABA Standards for Criminal Justice* at 3.48 and U.S. Attorney's Manual, § 9-11.015).

5. Use of Grand Jury to Prepare an Indicted Case for Trial

It is well-established that a prosecutor may not use a grand jury to prepare for trial of a defendant who has been indicted. *United States v. Moss*, 756 F.2d 329, 332 (4th Cir. 1984); *United States v. Ruppel*, 666 F.2d 261, 267-68 (5th Cir. 1982). However, where an indictment has been returned, a prosecutor may issue a grand jury subpoena for a witness to testify about unindicted defendants or other crimes. *See Brooks v. United States*, 448 A.2d 253, 261 (D.C. 1982). The rationale of this rule is that the grand jury's purpose is to investigate crimes, not provide pre-trial discovery for the prosecutor. *See United States v. Zarattini*, 552 F.2d 753, 756-57 (7th Cir. 1977).

If defense counsel learns that a witness has been subpoenaed to testify about his already indicted client, he or she may move to quash the subpoena. *See In re Grand Jury Subpoena Duces Tecum dated Jan. 2, 1985 (Robert M. Simels, Esq.)*, 767 F.2d 26 (2d Cir. 1985). Or, if a superseding indictment has been returned, defense counsel may move to dismiss the indictment. *Doss*, 563 F.2d 265; *United States v. Thompson*, 944 F.2d 1331, 1337-39 (7th Cir. 1991). There are other less drastic remedies, such as disclosure of the grand jury transcripts, *United States v. Doe*, 455 F.2d 1270, 1275-76 (1st Cir. 1972); or the exclusion of any testimony of the witness, *see In re Grand Jury Subpoena (Simels)*, 767 F.2d at 30 (collecting cases).

The issue is whether the "sole or dominant" purpose in calling the witness before the grand jury was to gather evidence for trial on the already pending indictment. *Moss*, 756 F.2d at 332 (collecting cases). In deciding this issue, the court should consider all of the circumstances and review a transcript of the grand jury testimony. *See In re Grand Jury Proceedings (Fernandez Diamante)*, 814 F.2d 61, 71 (1st Cir. 1987) ("intent" of prosecutor is not the ultimate issue). Some relevant criteria to "sole or dominant" purpose includes: whether the prosecutor who obtained the original indictment presents the "new" cases; whether the names of other persons and their involvement were known prior to the initial indictment; whether questions asked relate to new crimes or defendants; and whether the questions about the defendant and his crimes are the same as those posed at the first grand jury proceeding.

C. Motions to Dismiss the Complaint

Often, the delay between arrest and indictment is excessive. Super. Ct. Crim. R. 48(c) requires that a held defendant be released after nine months if there is no indictment, unless the court extends the time period after notice to the defendant and upon good cause shown. Counsel need not wait nine months in order to seek dismissal when the government is moving to indict too slowly. Rule 48(b) allows dismissal, without prejudice, when "there is unnecessary delay in presenting the charge to a grand jury . . . against a defendant who has been held to answer to the Court." Judges may be especially inclined to dismiss where defendants have been detained for several months pursuant to § 23-1325(a) or a high money bond.[17] *See United States v. Hargrove*, 118 Wash. D.L. Rptr. 1493 (D.C. Super. Ct., July 10, 1990) (Greene, J.).

Counsel Should Make the Following Challenges to the Grand Jury or the Indictment, Where Appropriate:

- ✓ Challenge the composition of the grand jury
- ✓ File a Motion to Dismiss the indictment based on the following:
  - Presence of an unauthorized person
  - Perjury in the grand jury
  - Vindictive indictments
  - Failure to present exculpatory evidence
  - The use of the grand jury, by the prosecution, to prepare an indicted case for trial
- ✓ File a Motion to Dismiss the complaint when the government is moving to indict too slowly

[17] These motions are not to be confused with motions to dismiss on speedy trial grounds, which require the defendant to meet a higher burden and result in dismissal with prejudice.

CHAPTER 8

THE CHARGING DOCUMENT

The charging document may contain flaws warranting dismissal or further clarification. Such challenges require thorough knowledge of the pertinent law and may be lost if not timely raised. Upon receipt of the charging document, each count should be carefully examined to determine whether it is subject to dismissal or, in the alternative, may be subject to the filing of a bill of particulars in order to learn in greater detail the nature of the prosecution's allegations. Furthermore, some grounds for challenge for dismissal may survive; especially those based on "amendment" or "variance," and may be raised during trial as soon as they appear.

I. NATURE AND PURPOSE OF THE CHARGING DOCUMENT

A. Charging Documents: Indictments, Informations, and Petitions

All felonies must be prosecuted through a grand jury indictment. U.S. Const. amend. V; D.C. Code §§ 16-702, 23-301; Super. Ct. Crim. R. 7(a).[1] A misdemeanor is charged by an "information," signed by an Assistant United States Attorney. A "petition," the charging document in juvenile proceedings, is subject to many of the same challenges as an information. *See* Super. Ct. Juv. R. 7; *In re J.R.G.*, 305 A.2d 529, 530 (D.C. 1973).

An information may be used even if "repeat" or "release" papers increase the possible imprisonment to more than a year. *Smith v. United States*, 304 A.2d 28, 31-32 (D.C. 1973). However, if the possible penalty is increased to more than three years – for example, for a second conviction for possessing an unregistered firearm, where repeat and release papers are filed – the prosecution must proceed by indictment. D.C. Code § 23-111(a)(2).

B. Purposes of the Charging Document

The Sixth Amendment confers a right "to be informed of the nature and cause" of a criminal accusation. The charging document must therefore provide notice of the charges, adequate for preparation of the defense. *See (Nathaniel) Jones v. United States*, 526 U.S. 227 (1999). It must also provide enough detail to permit evaluation of a claim of double jeopardy. *See United States v. Miller*, 471 U.S. 130, 134-35 (1985); *Russell v. United States*, 369 U.S. 749, 763-65 (1962); *(Oliver W.) Johnson v. United States*, 613 A.2d 1381, 1384 (D.C. 1992).

Finally, the indictment secures the Fifth Amendment guarantee "that the accused is to be tried only on such charges as a grand jury has returned." *United States v. Bradford*, 482 A.2d 430, 433-34 n.3 (D.C. 1984) (citing *Russell*, 369 U.S. at 771).

> The purpose of this requirement . . . is "to limit [a defendant's] jeopardy to offenses charged by a group of his fellow citizens acting independently of either

[1] The defendant may waive the right to indictment in open court. D.C. Code § 23-301; Super. Ct. Crim. R. 7(b). When a pre-indictment plea to a felony is being considered, counsel must advise the defendant of the right to indictment and that it will be waived by the plea.

> prosecuting attorney or judge." To allow the prosecutor or the court to guess what was in the minds of the grand jurors at the time they returned the indictment would deprive the defendant of this "basic protection." "For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him."

Bradford, 482 A.2d at 434 n.3 (quoting *Russell*, 369 U.S. at 770-71). These concepts are discussed further in the sections relating to specific challenges to the indictment.

Charging Document:

- ✓ Carefully examine each charge of the charging document to determine if it is subject to dismissal or filing of a bill of particulars

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***Hooker v. United States*, 70 A.3d 1197 (D.C. 2013)**. Despite minor complainant's inability to specify time period in which charged sexual offenses took place, government's evidence was sufficient to establish that dates of offenses were reasonably close to those alleged in amended information.

***Eady v. United States*, 44 A.3d 257 (D.C. 2012)**. Trial court erred in permitting evidence of defendant's release status and prior conviction to prove sentencing enhancement as charged in the indictment.

***Marshall v. United States*, 15 A.3d 699 (D.C. 2011)**. Trial court did not plainly err in allowing obstruction of justice charge to go to jury on factual theory materially at variance with government's pretrial proffer because defendant made no objection to testimony at issue, including no discussion of a need to investigate or for a continuance, obstruction theory ultimately pursued did not completely diverge from pretrial proffer, and variance was direct result of defendant's trial counsel having elicited pertinent evidence after being made aware of trial court's opinion that evidence already admitted was legally insufficient to support conviction for an obstruction of justice charge.

II. PRE-TRIAL CHALLENGES TO THE CHARGING DOCUMENT

The potential challenges to the charging document derive from the purposes of the document, i.e., notice of the charges, prevention of double jeopardy, and, in felony cases, assurance that the accused is tried only on such charges as the grand jury has returned. Counsel should be prepared to file a motion to dismiss or a bill of particulars if one of these purposes is not achieved.

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***Jones v. United States*, 99 A.3d 679 (2014)**. The government may obtain a conviction on a charge contained in an original indictment, but omitted from a superseding indictment, because the filing of a superseding indictment does not automatically mean the original indictment has been dismissed. Practice tip: When the government files a superseding indictment that leaves out a charge from the original indictment, you should seek dismissal of any charges left out of the superseding indictment or, at minimum, make the government put on the record which charges it intends to press at trial.

***Jordan v. United States*, 18 A.3d 703 (D.C. 2011)**. Trial court did not err in refusing to strike nickname from indictment because, although irrelevant, inclusion of nickname was neither inflammatory not prejudicial where prosecutor referred to nickname in passing during opening statement and one witness testified that he knew defendant by nickname.

A. Timing of the Motion to Dismiss

A motion to dismiss must be filed within twenty days after the status hearing or, in non-jury cases, ten days after arraignment or entry of counsel's appearance. With court permission, it may be filed later. Super. Ct. Crim. R. 12(b)(2), 47-I(c). Many judges have courtroom procedures that govern the filing of such a motion, and counsel should obtain the judge's procedures as soon as the case has been assigned to a calendar. Failure to file a timely motion constitutes a waiver of the defect, which cannot then be raised on appeal unless the charging document failed to give fair notice of the charges, thereby causing "substantial prejudice" to the defendant or an "apparent miscarriage of justice." *Clemons v. United States*, 400 A.2d 1048, 1051 (D.C. 1979); *accord Patterson v. United States*, 575 A.2d 305, 306 (D.C. 1990). Given the stringent appellate test, all possible defects should be raised in a pre-trial motion to dismiss. *See Persall v. United States*, 812 A.2d 953 (D.C. 2002) (without deciding that appellant did not waive his challenge to the poor drafting of the conspiracy count in the indictment for failure to raise it pre-trial, the court found no prejudice where the count contained the elements of the offense and adequately protected appellant's interest in notice and avoidance of future prosecutions).

Failure of the charging document to set out the essential elements of the offense or to confer jurisdiction on the trial court may be raised at any time. Fed. R. Crim. P. 12(b)(2); *Bradford*, 482 A.2d at 433. However, a late challenge based on failure to set out the essential elements will permit liberal construction "in favor of validity" – that is, the document will be found sufficient if the necessary facts "appear in any form" or can be found by "fair construction." *Bradford*, 482 A.2d at 433 (citing *Hagner v. United States*, 285 U.S. 427, 433 (1932)); *cf. Porter v. United States*, 769 A.2d 143 (D.C. 2001) (statute of limitations is tolled while an indictment is pending; therefore, the prosecution was not time-barred when a new indictment was returned after the case was dismissed for want of prosecution).

If a motion to dismiss is granted *with prejudice*, failure of the government to appeal within thirty days terminates the prosecution. Dismissal *without prejudice*, however, permits the government

to resubmit the matter to a grand jury or file another information or petition. *Washington v. United States*, 366 A.2d 457, 459 (D.C. 1976).

Practice tip: When the government files a superseding indictment that leaves out a charge from the original indictment, you should seek dismissal of any charges left out of the superseding indictment or, at minimum, make the government put on the record which charges it intends to press at trial.

B. Insufficient Notice of the Charges

"As a constitutional matter, an indictment must contain all the elements of the offenses charged and sufficiently apprise the defendant of the charges so that he or she can prepare to meet them." *Hsu v. United States*, 392 A.2d 972, 976 (D.C. 1978) (quoting *Russell*, 369 U.S. at 763). For example, the burglary indictment in *United States v. Thomas*, 444 F.2d 919 (D.C. Cir. 1971), failed to allege the crime that the defendant intended to commit when he entered the building. Because it was impossible to discern what crime the grand jury had in mind, the indictment failed to state the offense of burglary. *Id*. at 922-23. This requirement applies to all charging documents because notice is a Sixth Amendment requirement in all criminal prosecutions.

The indictment may track the language of the statute defining the offense, but may not stop with a narration of the "generic" terms of the statute.

> "[I]t must state the species, – it must descend to particulars." . . . [The statutory language] "must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged."

United States v. Nance, 533 F.2d 699, 701 (D.C. Cir. 1976) (per curiam) (false pretenses indictment alleging names and dates insufficient for failure to state particular misrepresentations allegedly made) (quoting *Russell*, 369 U.S. at 764-66) (emphasis added); *see also Thomas*, 444 F.2d at 922 (statutory language insufficient to charge first-degree burglary where case law requires proof of entry with intent to commit a specific crime). *But see Bolanos v. United States*, 938 A.2d 672, 686-87 (D.C. 2007) (no miscarriage of justice under plain error standard when charge for aggravated assault while armed (AAWA) omitted language for both subsections of the aggravated assault statute; defendant was on notice since indictment referenced citations for both subsections and trial court instructed jury on both subsections).

The charging document must also provide sufficient details to allow the defendant to prepare the defense and meet the government's case. *Hsu*, 392 A.2d at 976; *Thomas*, 444 F.2d at 926. When the particulars are necessary to the statement of an offense, they must be included in the charging document. *Nance*, 533 F.2d at 701; *Thomas*, 444 F.2d at 923. If a motion to dismiss is denied, omitted information should be sought via a motion for a bill of particulars. *But See Jackson v. United States*, 503 A.2d 1225, 1226-27 (D.C. 1986) (indictment for sex crimes with minors provided adequate notice, though it did not specify date and time that child-complainants were unable to provide; for the same reasons, the government was unable to provide bill of particulars). If the indictment states an offense, but lacks particularity, failure to object at trial

precludes reversal on appeal unless the defendant can demonstrate "substantial prejudice." *Williams v. United States*, 404 A.2d 189, 192 (D.C. 1979).

Likewise, late objection will lead to a liberal construction of the document in favor of validity. *Hsu*, 392 A.2d at 979. Thus, *Bradford* upheld an armed robbery indictment even though it did not allege force, violence, or fear. The allegation that the defendant "stole" property from the immediate possession of the complainant while armed with a pistol, combined with the "armed robbery" caption, gave adequate notice. 482 A.2d at 433-34. The court stressed that this liberal construction was required by the defendant's failure to raise the challenge before the verdict. *Id*. at 433.

Finally, the indictment must allege any "fact in aggravation" – a fact that relates to the offense charged and increases the penalty (for example, that the crime was committed while the defendant was armed with a dangerous weapon, that a pistol was operable, or that the recipient of a controlled substance was a minor). *United States v. Moore*, 540 F.2d 1088, 1089-90 (D.C. Cir. 1976); *Jordan v. United States District Court*, 233 F.2d 362, 367 (D.C. Cir.), *vacated on other grounds*, 352 U.S. 904 (1956). Although the Supreme Court decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), does not address the indictment issue directly, *id*. at 477 n.3, it is clear from the decision that any fact, other than that of a prior conviction, which increases the penalty for a crime beyond the prescribed statutory maximum, must be alleged in the indictment. *Id*. at 490. The defendant must be given notice of prior convictions used to enhance a sentence by way of information. D.C. Code § 23-111(a)(1); *Lucas v. United States*, 602 A.2d 1107, 1111 (D.C. 1992).

When confronted with an indictment that lacks sufficient notice, counsel should consider filing a motion for a bill of particulars before filing a motion to dismiss.

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***Collins v. United States*, 73 A.3d 974 (D.C. 2013).** Trial court did not err by instructing jury on vicarious liability where indictment failed to allege conspiracy because proof of conspiracy is not an element of a crime (distinguishing *Apprendi* and *Cotton*).

***Sandwick v. District of Columbia*, 21 A.3d 997 (D.C. 2011).** Defendant's rights not violated by charging document that failed to allege that he knew of accident and resulting injury before leaving scene where information stated that he had operated a vehicle and failed to stop and provide assistance and his information after having injured someone.

1. Bill of Particulars

A motion for a bill of particulars is a useful but largely neglected device for obtaining information omitted from the charging document and discovery process. It may be filed before arraignment, and must be filed within ten days after arraignment unless the court permits a later filing. Super. Ct. Crim. R. 7(f), 47-I(c). Counsel must certify in the motion that the prosecutor

has refused to disclose the information sought.[2] Rule 16-II. Courts generally give permission to file outside the ten-day limit when the delay is due to attempts to gain the information through discovery. The defendant is entitled to sufficient details of the charge to allow preparation of the defense and to avoid surprise at trial. *United States v. Baker*, 262 F. Supp. 657, 673 (D.D.C. 1966).

Because the presumption of innocence implies that the defendant is ignorant of the facts on which the charges are based, the defendant is entitled to seek particulars that assist in understanding the factual allegations. *United States v. Tucker*, 262 F. Supp. 305, 307 (S.D.N.Y. 1966). Thus, the defendant is entitled at the very least to specification of locations, times, dates, the name of the victim, and how the offense was allegedly committed. *See, e.g., Will v. United States*, 389 U.S. 90, 101 (1967). Vague terms in the document may be clarified through a bill of particulars. *See, e.g., (George) Jones v. United States*, 669 A.2d 724, 728 (D.C. 1995).

The court has broad discretion in granting the motion. *Will*, 389 U.S. at 98-99. Denial is an abuse of discretion if the defendant was surprised at trial or unprepared to meet the allegations, or if the defendant's "substantial rights" were prejudiced. *Wong Tai v. United States*, 273 U.S. 77, 82 (1927); *United States v. Pollack*, 534 F.2d 964, 970 (D.C. Cir. 1976).

The government cannot rely on details contained in a bill of particulars to cure an indictment that does not set out the essential elements of the offense. A rule to the contrary would, in effect, allow the prosecution to amend the indictment, which is impermissible. *Russell*, 369 U.S. at 770.

C. Failure to Protect from Double Jeopardy

The charging document must allege sufficient detail to allow a plea of former jeopardy in the event of a later prosecution. *Russell*, 369 U.S. at 764. In addition to the essential elements, dates, names, and places are required. A challenge alleging insufficient detail to support a plea of former jeopardy is less likely to prevail if raised after the trial, when the crime charged may be determined by reference to the entire record. *Craig v. United States*, 490 A.2d 1173, 1177(1985). *But see Jackson v. United States*, 503 A.2d 1225, 1226-27 (D.C. 1986) (indictment for sex crimes with minors provided adequate notice, even though it did not specify date and time which child-complainants were unable to provide; for the same reasons, the government was unable to provide bill of particulars).

D. Inadequate Articulation of the Essential Elements

The "indictment must accurately reflect the intent of the grand jury and the facts found by the grand jury." *Cain v. United States*, 532 A.2d 1001, 1004 (D.C. 1987). A defendant may not "be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him." *Russell*, 369 U.S. at 770. *But see Bolanos*, 938 A.2d at 683-85 (indictments charging defendants with assault with intent to murder while armed (AWIMWA) were not defective based on the indictments' failure to allege that grand jury had found probable

[2] *But see Joseph v. United States*, 597 A.2d 14, 22 (D.C. 1991) (no ineffectiveness in failing to request bill of particulars where counsel informally obtained information).

cause to believe there were no mitigating circumstances because the government did not submit evidence of provocation or mitigating circumstances to the grand jury).[3]

The indictments in *Russell* alleged that in congressional hearings, the defendants refused to answer questions "pertinent to the subject under inquiry." The element of "pertinence" required the grand jury to agree on what subject was "under inquiry." Failure of the indictment to specify the subject made it possible for the prosecutor or the court to make that determination, thereby leaving room for prosecution based on questions pertinent to a subject different from the one the grand jury considered. The indictments' failure to "descend into particulars" violated the defendants' right to be tried only on the specific charges found by a grand jury. *Id*. at 765.

In *Cain*, however, a sodomy indictment alleged in "two facially identical counts" that the defendant "committed a certain unnatural and perverted sexual practice" with the named complainant. At trial, the prosecutor was allowed to "explicate the text" by alleging that one count related to the defendant's act of oral sodomy as a principal, while the other related to his aiding and abetting another's acts of both rectal and oral sodomy. The court found no error, holding that these were merely alternative methods to commit the crime, not essential elements of the offense. *Cain*, 532 A.2d at 1005.

Again, any ambiguities or omissions should be the subjects of a bill of particulars. *But see Russell*, 369 U.S. at 770 ("a bill of particulars cannot save an invalid indictment").

E. Duplicity and Multiplicity

1. Duplicity

Inclusion of two or more offenses in a single count is called "duplicity" and is prohibited by Rule 8(a). Upon objection, the government must elect one offense on which to proceed. *Murray v. United States*, 358 A.2d 314, 317 (D.C. 1976). Should it refuse to elect, the remedy is dismissal. *United States v. Bradford*, 344 A.2d 208, 210 (D.C. 1975).

Duplicitous charging documents threaten the defendant's right to notice of the charges, freedom from double jeopardy, and a unanimous jury verdict. *Id*. at 211-12.

> [T]he jury deliberations would not only be confused by a duplicitous count but a verdict of guilty would be improper, since a unanimous finding of guilt is required by Super. Ct. Cr. R. 31(a). A general verdict of guilty . . . would not reveal whether the defendant was unanimously found guilty of one crime and innocent of the others or unanimously found guilty of all.

Id. at 212. The *Bradford* indictment charged both voluntary and involuntary manslaughter in one count. Because these are separate crimes, the court affirmed an order dismissing the indictment. *Id*. at 218.

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[3] The case in *Bean v. United States*, 606 A.2d 770 (D.C. 1992), had been remanded for vacation of one merging count and resentencing on the other. In redesignating the surviving count, the trial court invaded the authority of the grand jury; the conviction on the redesignated count was again remanded.

Alleging in the conjunctive ("and") different methods by which a single crime may have been committed is not duplicitous. Indeed, to charge the methods in the disjunctive ("or") would render the indictment deficient because it would not reveal what method the grand jury determined was used. *Marcus v. United States*, 476 A.2d 1134, 1137 (D.C. 1984) (receiving stolen property indictment properly alleged that defendant knew *and* had cause to believe property was stolen, and jury was properly instructed that government must prove either defendant's knowledge or cause to believe it was stolen); *United States v. Miqueli*, 349 A.2d 472, 475 (D.C. 1975) (government did not have to elect between conjunctively charged solicitation for prostitution and for lewd and immoral purposes); *see also Carr v. United States*, 585 A.2d 158, 161 (D.C. 1991) ("[i]t is well-settled that the elements of a charge in an information may be set forth in the conjunctive yet proven in the disjunctive, if that is the extent of the statutory requirement"). Likewise, prosecution under two theories of liability – as a principal or as an aider and abettor – does not render a count duplicitous; either theory, if proven, would show commission of a single crime. *Barker v. United States*, 373 A.2d 1215, 1219 n.5 (D.C. 1977).

The right to a unanimous verdict does, however, require that the jurors reach a "consensus as to the defendant's course of action," agreeing on "just what a defendant did as a preliminary step to determining whether the defendant is guilty of the crime charged." *United States v. Gipson*, 553 F.2d 453, 457-58 (5th Cir. 1977); *see also Ruth v. United States*, 438 A.2d 1256, 1262 (D.C. 1981) (reference to two robberies as predicate of single felony murder count was not duplicitous because language required unanimous finding of *both* robberies, and separate convictions of both robberies demonstrated that finding).

Other cases addressing duplicity include *United States v. Watt*, 911 F. Supp. 538, 549-53 (D.D.C. 1995) (no duplicity in perjury and false concealment counts where each count alleged two or more false statements); *United States v. Shorter*, 809 F.2d 54, 56-58 (D.C. Cir. 1987) (single count alleging tax evasion covering several years not duplicitous where theory is long-term pattern); *United States v. Conlon*, 661 F.2d 235, 239 (D.C. Cir. 1981) (where indictment treated unlawful conflict of interest as ongoing offense, instruction "narrowing" time period to eight separate dates, one or all of which could serve as basis of conviction, did not render the count duplicitous); *United States v. Bolden*, 514 F.2d 1301, 1304 n.2 (D.C. Cir. 1975) (single count alleging robbery of two items from one person is not duplicitous).

2. Multiplicity

Charging a single offense in more than one count is multiplicitous; charging two separate offenses arising from a single act is not. Multiplicity poses a threat of dual sentencing for a single offense, *Smith v. United States*, 295 A.2d 60 (D.C. 1972), as well as increased likelihood of conviction due to the psychological impact of having the jury think the defendant committed several crimes as opposed to only one. *United States v. Alexander*, 471 F.2d 923, 933 (D.C. Cir. 1972); *United States v. Ketchum*, 320 F.2d 3, 8 (2d Cir. 1963)

On objection to multiplicitous charging, the trial court may require the government to elect a count on which to proceed, and dismiss the others. *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 220 (1952);

Legislative intent determines whether an act creates multiple offenses that can be charged in multiple counts: the "unit of prosecution" depends on whether the legislature intended to proscribe an act, a course of conduct, or the result of an act. *See also United States v. Anderson*, 59 F.3d 1323, 1328 (D.C. Cir. 1995) (single predicate drug trafficking offense does not allow multiple convictions for using or carrying firearm "during and in relation to" offense); *United States v. Watt*, 911 F. Supp. 538, 547-49 (D.D.C. 1995) (no multiplicity in counts of both perjury and false concealment based on same alleged false statements). *Compare Murray*, 358 A.2d at 321 n.23 (because negligent homicide statute focuses on consequences – "caus[ing] death" – single auto collision causing multiple deaths generates multiple offenses and allows multiple punishments), *with Smith*, 295 A.2d at 61 (one threat directed at more than one person is a "single unit of prosecution"), *and Alexander*, 471 F.2d at 923 (assault is not multiplied by number of people put in fear; focus is on defendant's act). If the legislative intent is unclear, the rule of lenity requires that the statute be construed to create a single unit of prosecution. *Ladner v. United States*, 358 U.S. 169, 177-178 (1958).

This type of multiplicity is not the same as alleging in separate counts that a single act creates liability under more than one theory. For example, the indictment may allege in separate counts felony and premeditated murder, or voluntary and involuntary manslaughter, based on a single act. *Byrd v. United States*, 510 A.2d 1035, 1036 (D.C. 1986) (en banc); *Bradford*, 344 A.2d at 213 n.11. If the defendant is ultimately convicted on more than one count, vacation of all but one of the convictions is required. *See Ball v. United States*, 470 U.S. 856, 864 (1985). A lesser-included offense may likewise be charged in a separate count. *Salim v. United States*, 480 A.2d 710, 717 (D.C. 1984).

F. Selective and Vindictive Prosecution

Selective prosecution is a ground for dismissal if the accused "was singled out for prosecution among others similarly situated *and* . . . the decision to prosecute was improperly motivated." *United States v. Mangieri*, 694 F.2d 1270, 1273 (D.C. Cir. 1982). Improper motivation is a selection deliberately based on "'an unjustifiable standard, such as race, religion or other arbitrary classification.'" *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (quoting *Oyler v. Boyles*, 368 U.S. 448, 456 (1962)). *Federov v. United States*, 600 A.2d 370 (D.C. 1991) (en banc), discusses in detail the requirements for showing selective prosecution, including the showing necessary to obtain discovery and an evidentiary hearing.

Vindictiveness is any "situation in which the government acts against a defendant in response to the defendant's prior exercise of constitutional or statutory rights." *United States v. Meyer*, 810 F.2d 1242, 1245 (D.C. Cir. 1987). It may involve institution or reinstitution of a prosecution, or filing of additional charges, usually after the defendant has exercised the right to appeal or to go to trial. Due process forbids even the appearance of vindictiveness, which should be presumed from the filing of additional charges after the defendant asserts a right. *United States v. Schiller*, 424 A.2d 51, 56-57 (D.C. 1980); *Meyer*, 810 F.2d at 1245-48. Upon a motion, if the court determines that the prosecutor's actions give rise to a realistic likelihood of vindictiveness, then the government must rebut the presumption with an explanation of its decision. In determining whether the government has met its burden, the court should consider: (1) the nature of the case;

(2) the status of the case; (3) the nature of the right asserted by the defendant; (4) the type of vindictiveness alleged; and (5) the nature of the harm involved. *Schiller*, 424 A.2d at 56.[4]

In *Wynn v. United States*, 386 A.2d 695 (D.C. 1978), the trial court dismissed an information for want of prosecution. Several months later, the government filed a new information, charging additional offenses arising from the same incident, but offered no explanation for adding the previously uncharged offenses.

> Because such tactics suggest an improper motive, we think the added charge of which he was convicted . . . should be vacated. . . . The setting lent itself to be viewed as a manifestation of vindictiveness. An actual retaliatory motive need not exist. It is sufficient if the state of the record is such that it might create apprehension on the part of defendants that if they assert their right to a speedy trial there may be retaliation if the occasion presents itself.

Id. at 697-98; *cf. Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (no impropriety in threat to indict on additional charges if defendant did not accept plea offer); *Washington v. United States*, 434 A.2d 394 (D.C. 1980) (en banc) (no impropriety in addition of charges due to reevaluation of case, which only coincidentally occurred after plea negotiations broke off).

The remedy may extend to dismissal of the charge originally prosecuted. For example, in *Meyer*, 200 defendants were originally charged with one offense; an extra charge was added for the 36 defendants who asserted their right to trial. The trial court's finding of vindictiveness was not clearly erroneous, and its decision to dismiss not only the added charges but the entire prosecution was not an abuse of discretion. 810 F.2d at 1248-49. First Amendment and equal protection principles barred the prosecution in *Dixon v. District of Columbia*, 394 F.2d 966, 970 (D.C. Cir. 1968), where the government filed charges after the defendant filed a misconduct complaint against the police officers involved.

Finally, the conduct of law enforcement officials may be so outrageous that due process principles would bar the government from invoking judicial process to obtain a conviction. *United States v. Kelly*, 707 F.2d 1460, 1468-69 (D.C. Cir. 1983). Counsel should move for dismissal when, for example, "investigating" officers were overly involved in the defendant's allegedly criminal conduct, or the prosecution has engaged in unethical conduct or has manifested bad faith by suppressing exculpatory material. *But see id*; *United States v. (John) Williams*, 504 U.S. 36 (1992) (dismissal of indictment not available remedy where government failed to disclose substantial exculpatory evidence to grand jury).

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[4] In *Schiller*, seventeen defendants were charged in two indictments on allegations arising from a political demonstration. When the trial court granted the defendants' motion to consolidate the indictments, the government returned a superseding indictment of all defendants. The court held that additional charges against each defendant in the new indictment were justified because joinder made possible more allegations based on actions in concert.

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***Simms v. United States*, 41 A.3d 482 (D.C. 2012).** Defendant entitled to rebuttable presumption of vindictiveness when the government subsequently decided to add APO charge after it announced that it was ready to try the defendant on the scheduled trial date.

G. Motion to Strike Surplusage

The defendant may move to strike as "surplusage" any unnecessary allegation in the charging document. Super. Ct. Crim. R. 7(d). For example, any names previously used by the defendant will probably appear in the indictment. Usually, the government will agree that the "alias" should not be revealed to the jury. Any oral agreement to that effect should be placed on the record because indictments may be read by the court during jury selection, or by the prosecutor in the opening statement. If the prosecutor does not agree to delete the alias, a motion to strike it should be filed.[5] Counsel should carefully review the charging document for other prejudicial and unnecessary allegations which may be the subject of a Rule 7(d) motion. *See, e.g., United States v. Watt*, 911 F. Supp. 538, 553-56 (D.D.C. 1995) (denying motion to dismiss four alleged categories of surplusage in lengthy indictment).

File a Motion to Dismiss or for a Bill of Particulars when Charging Document:

- ✓ Does not sufficiently notify the accused of the charges
- ✓ Fails to articulate the elements of each offense
- ✓ Does not protect client from double jeopardy
- ✓ Is duplicitous or multiplicitous
- ✓ Is a product of vindictive prosecution
  - Make a due process challenge when there is evidence that law enforcement action was outrageous (e.g., investigating officers were overly involved in alleged criminal conduct, behaved unethically, or in bad faith suppressed exculpatory evidence)
- ✓ Contains unnecessary allegations

All possible defects should go into the motion to dismiss before going to trial. Obtain judge's procedures for filing a motion as soon as case has been assigned to the calendar.

[5] The alias allegation is not surplusage if it is relevant – for example, to identity. *Bailey v. United States*, 544 A.2d 289 (D.C. 1988). If the alias is ruled relevant, but the government fails to offer proof of it, counsel should renew the motion to strike and seek an immediate cautionary instruction. *United States v. Addonizio*, 313 F. Supp. 486, 490-91 (D.N.J. 1970), *aff'd*, 451 F.2d 49 (3d Cir. 1971). A mistrial is warranted if the unproved alias is sufficiently prejudicial. *Owens v. United States*, 688 A.2d 399, 405 (D.C. 1996).

III. CHALLENGES DURING TRIAL – AMENDMENT AND VARIANCE

The requirement of indictment in felony cases "precludes the possibility that the defendant could be convicted on the basis of facts not found by, or presented to, the grand jury which indicted him." *Scutchings v. United States*, 509 A.2d 634, 636 (D.C. 1986); *see Wright v. United States*, 564 A.2d 734, 738 (D.C. 1989) (convictions reversed because defendant convicted on facts crucially different from facts presented to grand jury). This rule, discussed above in the context of challenges to the facial validity of the indictment, may be violated in one of two related ways during trial – amendment of, or variance from, the indictment.

> An *amendment* of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, by prosecutor or court after the grand jury has last passed upon them. A *variance* occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment.

Gaither v. United States, 413 F.2d 1061, 1071 (D.C. Cir. 1969) (footnotes omitted). Amendment is thus a change in the indictment itself, while variance is a difference between proof at trial and proof at the grand jury stage. A *constructive amendment* is said to occur when variance is substantial.

There are two types of constructive amendment cases – one is where the trial jury is presented with a *factually* different offense from that presented to the grand jury (most common), and the other is where the trial jury is presented with a different offense *legally understood* (rare). *Pace v. United States*, 705 A.2d 673, 676 (D.C. 1998). "In the case where different facts are alleged to have been presented to the grand jury, the test for constructive amendment is whether the prosecution was relying at trial on a complex of facts distinctly different from that which the grand jury set forth in the indictment, rather than a single set of facts common to both." *Id.* (quotations omitted); *see also Robinson v. United States*, 697 A.2d. 787 (D.C. 1997) (convictions reversed where the indictment charged possession of heroin and the trial evidence was of unlawful possession of cocaine); *Wooley v. United States*, 697 A.2d 777 (D.C. 1997) (same).[6] "In the case where a different offense, legally understood, is alleged to have been presented to the grand jury, the test for constructive amendment is whether the structure of the statute defining the crime and the legal consequences the legislature has attached to different acts indicate that the crime charged in the indictment differs in a legally significant way from the crime of conviction." *Id.* (quotations omitted).

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[6] Other constructive amendment cases include: *Stirone v. United States*, 361 U.S. 212 (1960) (indictment alleged interference with interstate movement of sand, but the proof at trial showed only interference with the movement of steel); *(Oliver W.) Johnson v. United States*, 613 A.2d 1381, 1386-87 (D.C. 1992) (constructive amendment was *per se* reversible where the indictment spelled out one particular manner of forgery ("a falsely made signature") while the evidence at trial showed another (the writing of any part of a check without a signatory's authority)); *Joseph v. United States*, 597 A.2d 14, 17 (D.C. 1991) (indictment constructively amended where it alleged that Joseph "assaulted another with intent to kill him," but the government presented evidence of assault on one person with intent to kill another). *But see*, *Peay v. United States*, 924 A.2d 1023, 1028 (D.C. 2007) (despite single charge of destruction of property in which prosecution presented evidence of two factual scenarios supporting conviction, no constructive amendment occurred because trial court addressed both scenarios in a special unanimity instruction and the government did not rely on a set of facts at odds with express language of indictment).

Objection should be raised to amendment or variance as soon as it appears that the government will attempt to alter the terms of the indictment, or proceed with proof different from that presented to the grand jury. Amendment may become apparent either before or during trial. Variance is most likely to appear after at least some of the witnesses have testified, because only then will the defense have access to witness statements and grand jury transcripts. If it appears that variance exists, counsel immediately should object to further proceedings based on material facts not presented to the grand jury. *But see Carter v. United States*, 826 A.2d 300 (D.C. 2003) (An inconsistency between indictment and proof does not constitute a constructive amendment because both relied on the same complex of facts. The trial court did not err where variance between indictment and evidence presented at trial was not proven to be prejudicial or damaging to the defense.).

Counsel Should Raise Objections to:

- ✓ Any changes in the indictment (amendment)
- ✓ Proceeds with proof different from that presented to a grand jury (variance)

A. Amendment

An information may be amended, with leave of court, "at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced." Super. Ct. Crim. R. 7(e); *District of Columbia v. Van Nuys*, 282 A.2d 550, 551 (D.C. 1971). Eve-of-trial or mid-trial amendments are permissible so long as they do not deprive the defendant of adequate notice, or result in the charging of a different offense. *Dyson v. United States*, 485 A.2d 194, 197 (D.C. 1984). The "narrowing" of an indictment through substitution of a lesser-included offense just before trial is permissible and does not amount to an amendment or variance. *(Frederick) Williams v. United States*, 641 A.2d 479, 482 (D.C. 1994).

The substance of an indictment, on the other hand, may not be amended without the grand jury returning a superseding indictment. *Russell*, 369 U.S. at 770-71; *see also Hayward v. United States*, 612 A.2d 224, 226-27 (D.C. 1992); *Ingram v. United States*, 592 A.2d 992, 1005 (D.C. 1991). "If there has been a constructive amendment to an indictment, and the issue has been properly preserved for appeal, *per se* reversal is required." *Peay v. United States*, 924 A.2d 1023, 1027 (D.C. 2007) (citing *Carter*, 826 A.2d at 303 & n.7). However, according to *Smith v. United States*, 801 A.2d 958 (2002), where no objection made at trial to constructive amendment of indictment, plain error standard of review applies on appeal. Therefore, even assuming that there was a constructive amendment of the defendant's indictment when the jury was instructed on a statutory means of committing aggravated assault different from the one described in the indictment, there was no plain error. The court held that there was no risk that the "fairness, integrity, or public reputation" of the proceedings would be affected where the indictment included a citation that encompassed both subsections of the aggravated assault statute (and therefore both means of committing the crime). *Id.* at 961; *see also (Danny) Johnson v. United States*, 812 A.2d 234 (D.C. 2002) (held "plain" error where indictment constructively amended

to accept a plea of guilty to robbery rather than the indicted offense of assault with intent to rob, but that error did not affect substantial rights in that the penalty for the two offenses was the same. The court further rejected all claims, including that there was a constructive amendment in the indictment in allowing the defendant to plead guilty as an aider and abettor rather than as a principal to a burglary count). Minor amendments to the form of the indictment, which do not prejudice the defendant, are permissible. The test is "whether a defense under an indictment as it originally stood would be equally available after the amendment is made, and whether any evidence the defendant might have would be equally applicable to the indictment in the one form as in the other." *(Oliver R.) Johnson v. United States*, 364 A.2d 1198, 1204 (D.C. 1976) (no prejudice from amendment to reflect defendant's true name); *see also Hall v. United States*, 697 A.2d 1225, 1226-27 (D.C. 1997) (prosecution allowed to amend date after opening argument where defense on notice through discovery of actual date and date on indictment was clerical error); *Giles v. United States*, 472 A.2d 881, 884 (D.C. 1984) (trial court properly corrected reference in felony murder count to robbery alleged in Count 5, actually set out in Count 4; no prejudice because defense knew throughout pre-trial proceedings that felony murder was based on Count 4 robbery, yet failed to object before appeal).[7]

B. Variance

A variance occurs when the facts proved at trial "materially differ from the facts contained in the indictment, but the essential elements of the offense are the same." *(Oliver W.) Johnson*, 613 A.2d at 1384-85 (citation omitted); *see also Barker v. United States*, 373 A.2d 1215, 1219 (D.C. 1977) (variance is "proof at trial . . . based on a different set of factual circumstances than was presented to the grand jury"). Variance can violate the right to notice, implicate double jeopardy guarantees, or surprise the defense at trial. Prejudicial variance is reversible error. *Pace*, 705 A.2d at 677.

Variance becomes a constructive amendment – and inherently prejudicial – "when 'facts introduced at trial go to an essential element of the offense charged, and the facts are different from the facts that would support the offense charged in the indictment.'" *Scutchings*, 509 A.2d at 637 (citation omitted). Variance that does not amount to a constructive amendment will not require reversal without a showing of prejudice. *Pace*, 705 A.2d at 677. Thus, *Berger v. District of Columbia*, 597 A.2d 407, 410 (D.C. 1991), found no need to reverse where the variance consisted of the prosecutor checking the wrong box on a preprinted information form and the defense failed to show that it was adversely affected. *See also Carr v. United States*, 585 A.2d 158, 160 (D.C. 1991) (same); *Byrd v. United States*, 579 A2d 725, 728-29 (D.C. 1990) (citation of wrong statute in indictment did not require reversal where it was clear, based on defense presented, that defendant understood nature of charge).

Conjunctive allegations in a single count do not create a variance when the proof at trial shows the commission of some, but not all, of the alleged acts. *United States v. Miller*, 471 U.S. 130

[7] *Giles*, citing *Goto v. Lane*, 265 U.S. 393 (1924), held that the indictment was not "amended," but changed "to show that the parties construed and understood the indictment in a similar way," 472 A.2d at 884; *see also Bolanos v. United States*, 718 A.2d 532, 540 (D.C. 1998) (no constructive amendment where indictment charged rape "while armed with a stick and a firearm" and judge instructed jury that appellants could be "armed with" weapons or have had them "readily available").

(1985) (indictment for defrauding insurance company by consenting in advance to purported burglary, then lying to insurer about value of loss, but trial proof related only to false statements about value; no variance because indictment clearly set out offense for which Miller was convicted).

Similarly, an allegation of a particular offense will permit proof at trial of more than one theory of liability (as a principal or aider and abettor) if the same evidence is presented to the grand and petit juries. *Barker*, 373 A.2d at 1219; *see also Ingram v. United States*, 592 A.2d 992, 1006-07 (D.C. 1991) (no variance in this case; constructive amendment, however, would occur if government presented a different theory of aiding and abetting to grand jury than to petit jury). Variance occurs, however, between alleged acts as an accessory after the fact and proof of liability as a principal, because the distinction in liability has been legislatively preserved. *(McClinton) Williams v. United States*, 478 A.2d 1101, 1196 (D.C. 1984); *cf.* D.C. Code §§ 22-1806 and 22-1805.

If variance occurs, the defense must be prepared to demonstrate the precise nature of the prejudice – that is, the way the defendant was surprised by the trial proof, and the reasons why the defense, prepared on the basis of the allegations in the indictment or matters disclosed through a bill of particulars, cannot meet the new allegations. *Byrd*, 579 A.2d at 728-29; *accord Berger*, 597 A.2d at 409-10; *Carr*, 585 A.2d at 160. A variance is also prejudicial if the defendant is exposed to the risk of another prosecution in contravention of the Double Jeopardy Clause. *Peay*, 924 A.2d at 1028 (citing *Zacarias v. United States*, 884 A.2d 83, 87 (D.C. 2005).

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***Eady v. United States*, 44 A.3d 257 (D.C. 2012).** Trial court erred in permitting evidence of defendant's release status and prior conviction to prove sentencing enhancement as charged in the indictment.

***Marshall v. United States*, 15 A.3d 699 (D.C. 2011).** Trial court did not plainly err in allowing obstruction of justice charge to go to jury on factual theory materially at variance with government's pretrial proffer because defendant made no objection to testimony at issue, including no discussion of a need to investigate or for a continuance, obstruction theory ultimately pursued did not completely diverge from pretrial proffer, and variance was direct result of defendant's trial counsel having elicited pertinent evidence after being made aware of trial court's opinion that evidence already admitted was legally insufficient to support conviction for an obstruction of justice charge.

CHAPTER 9

DOUBLE JEOPARDY

No person "shall . . . be subject for the same offence to be twice put in jeopardy of life or limb." U.S. Const. amend. V. This provision creates separate protections against: (1) a second prosecution for the same offense after acquittal; (2) a second prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969); *see also Gary v. United States*, 955 A.2d 152, 155 (D.C. 2007) (sentence to both imprisonment and a fine violates Double Jeopardy Clause where statute authorized only imprisonment *or* fine as alternatives). In some instances, it protects against a second prosecution for the same offense after mistrial. *United States v. Scott*, 437 U.S. 82 (1978). The Double Jeopardy Clause guarantees only a limited right against multiple punishments and prosecutions for the same offense. Successive prosecutions and multiple punishments are permitted under many circumstances. *See generally United States v. DiFrancesco*, 449 U.S. 117, 130-39 (1980).

Double Jeopardy Protects Against a Second Prosecution for the Same Offense:

- ✓ After acquittal
- ✓ After conviction
- ✓ Multiple punishments
- ✓ In some instances, after mistrial

I. APPLICATION TO TRIALS

Proceedings that are "essentially criminal": Double jeopardy may bar further prosecution if jeopardy has attached in a previous prosecution for the "same offense." If so, the inquiry focuses on the reason for the new prosecution. The Double Jeopardy Clause applies only to proceedings that are "essentially criminal." *Helvering v. Mitchell*, 303 U.S. 391, 398-99 (1938). It applies to juvenile proceedings, which are indistinguishable from criminal proceedings in terms of "the risk that is traditionally associated with a criminal prosecution." *Breed v. Jones*, 421 U.S. 519, 528, 531 (1975). Generally, it does *not* apply to parole, probation, supervised release, or bond revocation hearings, *Jones v. United States*, 669 A.2d 724, 727 (D.C. 1995); disbarment proceedings, *In re Sharp*, 674 A.2d 899 (D.C. 1996); *but see Johnson v. S.E.C.*, 87 F.3d 484 (D.C. Cir. 1996) (license suspension constituted punishment for Double Jeopardy purposes); civil commitment proceedings, *In re Katz*, 638 A.2d 684 (D.C. 1994); civil forfeiture proceedings; *United States v. Ursery*, 518 U.S. 267 (1996); or actions resulting in civil sanctions, *Purcell v. United States*, 594 A.2d 527 (D.C. 1991) (Bureau of Traffic Adjudication hearings). *But see Dept. of Revenue of Mont. v. Kurth Ranch*, 511 U.S. 767, 784 (1994) (a state tax imposed on possession and storage of marijuana, assessed after the state had imposed a criminal penalty for the same conduct, violated the Double Jeopardy Clause).

Test to determine if Civil Statute is "Essentially Criminal": The test for determining whether a nominally civil statute is essentially criminal is two-fold. First, the court examines whether the legislature intended the statute to be civil or criminal. *Hudson v. United States*, 522 U.S. 93, 99-100 (1997); *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 362 (1994). Second, if the legislative intent was to establish a civil penalty, the court then determines whether the statutory scheme is so punitive either in purpose or effect to negate that intention. *Hudson*, 522 U.S. at 99. In making this determination, the factors to be considered include: "(1) whether the sanction involves an affirmative disability or restraint; (2) whether it has historically been regarded as a punishment; (3) whether it comes into play only on a finding of *scienter*; (4) whether its operation will promote the traditional aims of punishment – retribution and deterrence; (5) whether the behavior to which it applies is already a crime; (6) whether an alternative purpose to which it may rationally be connected is assignable for it; and (7) whether it appears excessive in relation to the alternative purpose assigned." *Hudson*, 522 U.S. at 99-100 (citation and internal quotations omitted).[1]

The Double Jeopardy Clause does not bar prosecutions by different sovereigns, even for the "same offense." *See Heath v. Alabama*, 474 U.S. 82 (1985) (two states); *Abbate v. United States*, 359 U.S. 187 (1959) (state and federal courts); *Bartkus v. Illinois*, 359 U.S. 121 (1959) (same). A person cannot, however, be tried in two jurisdictions of the same sovereign. *See Waller v. Florida*, 397 U.S. 387 (1970) (municipal court and state court). However, trial in the Superior Court on charges brought by the United States bars a subsequent trial for the same offense in district court, and vice versa. *See United States v. Shepard*, 515 F.2d 1324 (D.C. Cir. 1975).

A ruling on a pretrial motion to dismiss on double jeopardy grounds is an appealable final order. *See Abney v. United States*, 431 U.S. 651 (1977); *Green v. United States*, 584 A.2d 599, 600 (D.C. 1991); *Gant v. United States*, 467 A.2d 968 (D.C. 1983). If not raised at the appropriate time before trial, the claim may be waived. *Towles v. United States*, 521 A.2d 651, 655 (D.C. 1987).[2]

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***Joya v. United States*, 53 A.3d 309 (D.C. 2012)**. A defendant's waiver of Double Jeopardy protection through successful motion for severance does not amount to waiver of principle that government may not re-litigate an issue resolved in a prior (or simultaneous) trial. See also Jeffers v. United States, 432 U.S. 137 (1977).

[1] *Hudson* disavowed *United States v. Halper*, 490 U.S. 435, 448 (1989), which focused on whether the sanction, regardless of whether it was civil or criminal, was so grossly disproportionate to the harm caused as to constitute punishment. *Hudson* noted that some of the ills at which *Halper* was directed are addressed by other constitutional protections. For example, the Due Process and Equal Protection Clauses protect from sanctions and the Eighth Amendment protects against excessive fines, including forfeitures. *Id*. at 101.

[2] Waiver may be found in other circumstances. For example, the defendant in *Jeffers v. United States*, 432 U.S. 137, 152-54 (1977) (plurality opinion), waived a double jeopardy claim by opposing the government's motion to consolidate two indictments.

A. "Attachment" of Jeopardy

The Double Jeopardy Clause applies only when a defendant has previously been placed in jeopardy. Jeopardy does not attach until the defendant is "put to trial before the trier of the facts." *Serfass v. United States*, 420 U.S. 377, 388 (1975) (citation omitted). In a bench trial, "jeopardy attaches when the court begins to hear evidence." *Id.*; *District of Columbia v. Whitley*, 640 A.2d 710, 712-13 (D.C. 1994) (in bench trial, jeopardy does not attach until the first witness has been sworn and has begun testifying); *see also Lyles v. United States*, 920 A.2d 446, 450-51 (D.C. 2007) (where case is orally dismissed for want of prosecution due to complainant's failure to appear, trial court retained power to rescind oral dismissal that had not yet been formally entered on the docket, as long as there was an absence of undue prejudice to the defendant, when the witness appeared one hour later). In a jury trial, jeopardy attaches when the jury is empanelled and sworn. *Crist v. Bretz*, 437 U.S. 28 (1978); *Routh v. United States*, 483 A.2d 638, 642 (D.C. 1984).

Prior attachment of jeopardy, however, does not automatically bar a second trial. It means only that "the constitutional policies underpinning the Fifth Amendment's guarantee are implicated at that point in the proceedings." *United States v. Jorn*, 400 U.S. 470, 480 (1971) (plurality opinion). "[T]he conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial." *Illinois v. Somerville*, 410 U.S. 458, 467 (1973).

Attachment of Jeopardy:

- ✓ Bench trial: jeopardy attaches when the first witness has been sworn in and begins testifying
- ✓ Jury trial: jeopardy attaches when the jury is empanelled and sworn

B. The "Same Offense"

Blockburger Test: The Double Jeopardy Clause protects only against retrial for the "same offense." Whether offenses are separate or the "same" requires a strict analysis of the statutory elements of each offense and what the government intends to prove in support of each charge.

> [W]here 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 a fact which the other does not.

Blockburger v. United States, 284 U.S. 299, 304 (1932). The *Blockburger* test "emphasizes the elements of the two crimes." *Brown v. Ohio*, 432 U.S. 161, 166 (1977). "'[N]otwithstanding a

substantial overlap in the proof offered to establish the crimes,'" *id*. (citation omitted), offenses are not "separate" unless each necessarily includes an element not included in the other.[3]

Lesser Included Offenses: The *Blockburger* test applies where prosecution for a greater offense follows or precedes prosecution for an included offense. Because the greater offense contains every element of the included offense, prosecution for the lesser offense is barred.[4] In *Brown*, the defendant was wrongly prosecuted for stealing an automobile after having been convicted of operating the same automobile without the owner's consent (essentially joyriding, a lesser included offense). The elements of the two offenses were identical, except that stealing had an added element of intent to permanently deprive the owner of possession. Therefore, the greater offense was barred by double jeopardy. 432 U.S. at 162-64; *see also Harris v. Oklahoma*, 433 U.S. 682 (1977) (per curiam) (felony-murder prosecution precluded subsequent prosecution for predicate felony); *Payne v. Virginia*, 468 U.S. 1062 (1984) (same).[5] *But see*

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[3] Where there are multiple victims as a result of a single act, there may also be an issue as to whether a single offense or multiple offenses have been committed. *Ladner v. United States*, 358 U.S. 169, 178 (1958), held that a single assaultive act directed at two federal officers is a single offense, finding no evidence that Congress intended "to create multiple offenses from a single act affecting more than one federal officer." *See also Bell v. United States*, 349 U.S. 81 (1955) (transporting two women in violation of Mann Act was single offense); *United States v. Alexander*, 471 F.2d 923, 933 (D.C. Cir. 1972) (single act of putting in fear a group of people is single offense because it was collectively directed). *Compare Joiner v. United States*, 585 A.2d 176 (D.C. 1991) (firing single shot toward group of seven people was one criminal act, not seven), *with Speaks v. United States*, 959 A.2d 712, 716-17 (D.C. 2008) (single act of operating car in a manner that caused a grave risk of bodily injury to three children in same car warranted three separate convictions for second degree cruelty to children), *Gray v. United States*, 585 A.2d 164 (D.C. 1991) (firing three shots in direction of three children was three separate crimes), *and Williams v. United States*, 569 A.2d 97, 104 (D.C. 1989) (offense of manslaughter is determined by number of victims who die as result of defendant's actions, not number of acts causing death). The same question arises when the facts show the commission of one offense rather than two or more. *See, e.g.*, *Lennon v. United States*, 736 A.2d 208 (D.C. 1999) (defendant who fails to appear for single court proceeding may be convicted of only one Bail Reform Act violations, not one violation for each underlying charge); *Nixon v. United States*, 730 A.2d 145, 153 (D.C. 1999) (possession of single weapon during single violent act results in single conviction); *Morris v. United States*, 622 A.2d 1116 (D.C. 1993) (where conviction for assault with deadly weapon merged with attempted armed robbery to become one "crime of violence or dangerous crime," associated crimes of possessing firearm during crime of violence merge to single offense); *Bean v. United States*, 576 A.2d 187 (D.C. 1990) (carrying knife and sawed-off shotgun is single violation of § 22-3204); *Cormier v. United States*, 137 A.2d 212 (D.C. 1957) (simultaneously carrying two unlicensed pistols is single offense).

[4] There are exceptions to this rule. Prosecution on the greater offense is not barred where all the events necessary to prove the greater offense have not occurred, or the facts necessary to prove the greater crime are not discovered – despite the exercise of due diligence – before prosecution on the lesser offense. *See Diaz v. United States*, 223 U.S. 442 (1912) (prosecution for murder not barred despite prior prosecution for assault, where victim did not die until after first prosecution); *see also United States v. Jackson*, 528 A.2d 1211 (D.C. 1987) (same where defendant had been *acquitted* of assault with intent to kill complainant who later died).

[5] The Double Jeopardy Clause prohibits dividing a single conspiracy into multiple conspiracies. *Braverman v. United States*, 317 U.S. 49, 52-54 (1942). Recognizing that the *Blockburger* test is of "limited value in deciding double jeopardy claims raised with respect to successive conspiracy prosecutions," *United States v. MacDougall*, 790 F.2d 1135, 1144 (4th Cir. 1986), a number of jurisdictions, including the District of Columbia, have concluded that a "totality of the circumstances" test is preferable. *United States v. Gatling*, 96 F.3d 1511 (D.C. Cir. 1996); *United States v. Liotard*, 817 F.2d 1074 (3d Cir. 1987); *United States v. Thomas*, 759 F.2d 659 (8th Cir. 1985); *United States v. Sinito*, 723 F.2d 1250 (6th Cir. 1983); *United States v. Arbelaez*, 719 F.2d 1453 (9th Cir. 1983); *United States v. Castro*, 629 F.2d 456 (7th Cir. 1980); *United States v. Mallah*, 503 F.2d 971 (2d Cir. 1974). The test requires consideration of five factors:

Childs v. United States, 760 A.2d 614 (D.C. 2000) (in case where jury hangs on felony murder but convicts on lesser-included offense of armed robbery, retrial on felony murder not barred by Double Jeopardy Clause).

The *Blockburger* test establishes the exclusive means for determining whether two offenses are "the same offense" for double jeopardy purposes. *United States v. Dixon*, 509 U.S. 688, 696 (1993).[6] *Dixon*'s application of the *Blockburger* test, however, was expansive. Two defendants had been held in criminal contempt for failing to obey court orders requiring them not to commit criminal offenses. When the government sought to prosecute them for the underlying criminal offenses, the defendants moved to dismiss on double jeopardy grounds. A sharply divided Supreme Court held that the protections of the Double Jeopardy Clause applied to non-summary criminal contempt prosecutions, just as in other criminal prosecutions, and looked beyond the statutory definition of contempt to examine the terms of the court orders forming the basis of the contempt convictions. *Id*. at 697-703.

The Court then applied the *Blockburger* analysis to the two defendants, with different results. As to Dixon, who was ordered not to commit any criminal offense while on pretrial release, the Court concluded that the underlying offense was "'a species of lesser-included offense.'" *Id*. at 698 (citation omitted). The second defendant, Foster, had been held in contempt for failing to obey a civil protection order (CPO) directing him not to "assault . . . or in any manner threaten" his estranged wife. The Court held that prosecution for simple assault was jeopardy-barred, but that prosecution for assault with intent to kill (based on an incident for which he had been held in contempt) and for three counts of threats (based on incidents for which he had been acquitted at the contempt trial) were not. As to the charges for which Foster had been acquitted, the Court remanded for resolution of the collateral estoppel issue not previously addressed by the courts below. *Id*. at 700-703. Counsel should pay careful attention to contempt cases if brought with an underlying case, particularly when deciding whether the government has offered a reasonable plea.

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***Davidson v. United States*, 48 A.3d 194 (D.C. 2012).** Though involuntary manslaughter and negligent homicide are presumptively different offenses under *Blockburger* elements test, negligent homicide intended to be lesser-included offense of every manslaughter committed in operation of a vehicle. *See* D.C. Code § 50-2203.02.

> 1) [the] time periods in which the alleged activities of the conspiracy occurred; 2) the statutory offenses charged in the indictments; 3) the places where the alleged activities occurred; 4) the persons acting as coconspirators; and 5) the overt acts or any other descriptions of the offenses charged which indicate the nature and scope of the activities to be prosecuted.

MacDougall, 790 F.2d at 1144.

[6]*Dixon* overruled *Grady v. Corbin*, 495 U.S. 508 (1990), which had led that a broader, conduct-based standard should apply to cases involving successive prosecutions.

***Haney v. United States*, 999 A.2d 48 (D.C. 2010).** Administrative discipline administered by the District of Columbia Department of Corrections does not bar subsequent prosecution for the same offense under the Double Jeopardy Clause because disciplinary regulations are remedial rather than punitive in nature.

Contempt Cases:

- ✓ Double jeopardy applies to non-summary criminal contempt prosecutions
- ✓ Consider the double jeopardy implications when deciding whether the government has offered a reasonable plea

C. Acquittal

Does Double Jeopardy Apply to Acquittals? An acquittal absolutely bars retrial for the same offense and prohibits a government appeal.[7] *Ball v. United States*, 163 U.S. 662, 671 (1896). The government has had "one fair opportunity" to prove guilt, *Burks v. United States*, 437 U.S. 1, 16 (1978), and the defendant has undergone the ordeal of trial, including the ultimate risk of conviction. "Perhaps the most fundamental rule in the history of double jeopardy jurisprudence has been that '[a] verdict of acquittal . . . could not be reviewed, on error or otherwise, without putting [a defendant] twice in jeopardy, and thereby violating the Constitution.'" *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977) (quoting *Ball*, 163 U.S. at 671). The finality of an acquittal is so basic that retrial is prohibited even if the verdict is based on an erroneous evidentiary ruling that prevents the government from introducing sufficient evidence, *Sanabria v. United States*, 437 U.S. 54, 68-69 (1978), or some other "egregiously erroneous foundation." *Fong Foo v. United States*, 369 U.S. 141, 143 (1962);[8] *accord Towles v. United States*, 521 A.2d 651, 654 (D.C. 1987) (en banc).[9]

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[7] Of course, whether the subsequent prosecution is for the "same offense" is determined through application of the *Blockburger* test, discussed above.

[8] The trial court in *Fong Foo* entered a judgment of acquittal mid-trial because of improper conduct by the district attorney and because it found the government witness incredible. The court of appeals reversed and ordered a retrial, holding that the district court had erred in its rulings and lacked the power to enter their verdict of acquittal. The Supreme Court held that the Double Jeopardy Clause barred appellate review because the district court, however wrongly, had entered a verdict of acquittal.

[9] The defendant in *Towles* was charged with first-degree felony murder, second-degree murder, and other charges. The jury convicted him of first-degree murder and, upon the judge's direction to enter a verdict on each count, found him not guilty of second-degree murder. At a second trial, an amended indictment charged the offenses of which Towles was convicted, including the first-degree and not the second-degree murder. Without defense objection, the court instructed the jury on the "lesser-included offense" of second-degree murder. The jury could not reach a verdict until after a third trial, in which Towles was acquitted of first-degree murder but convicted of second-degree murder. The Court of Appeals ultimately agreed that the "not guilty" verdict rendered by the first jury would provide a double jeopardy bar to a subsequent prosecution or conviction for second-degree murder, even though the first trial court should have instructed the jury not to return any verdict on the lesser-included offenses once it had convicted of the greater offense. However, the court concluded that counsel's failure to raise the issue until after the verdict was a tactical decision, designed to provide a safety valve against a first-degree murder conviction, and waived the claim. 521 A.2d at 655-56.

Generally, the timing of an acquittal is of no consequence. Thus, retrial is prohibited after a trial court has entered a verdict of acquittal mid-trial, *see Fong Foo*, 369 U.S. 141, or after discharge of a deadlocked jury, *see Martin Linen*, 430 U.S. at 573-75.[10] Similarly, the defendant is protected from further jeopardy if denial of a judgment of acquittal for insufficiency of the evidence is reversed on appeal. *Burks*, 437 U.S. at 16; *see Kelly v. United States*, 639 A.2d 86, 89 (D.C. 1994) (failure to seek rehearing after division order remanding case did not waive issue of insufficient evidence precluding retrial on double jeopardy grounds). This is true even if the court erroneously removes the decision from the jury. *United States v. Tyler*, 392 A.2d 511, 514 (D.C. 1978).

Not every acquittal provides a double jeopardy defense to further proceedings. First, jeopardy must have attached. Thus, a pretrial dismissal that would have amounted to an acquittal if entered after trial had begun does not bar retrial. *See Serfass*, 420 U.S. at 391-92. Furthermore, a judgment of acquittal (or other ruling on a matter of law) entered *after* a jury returns a verdict of guilty does not preclude a government appeal. If the government prevails on appeal, a retrial is not required; the jury's verdict of guilty is merely reinstated. *Carlisle v. United States*, 517 U.S. 416, 433 (1996) (holding that a judgment of acquittal entered after the jury's verdict on an untimely motion was beyond the scope of the trial court's power); *United States v. Wilson*, 420 U.S. 332, 352-53 (1975); *United States v. Hubbard*, 429 A.2d 1334, 1337 (D.C 1981).[11]

A jury's verdict of "not guilty" is clearly an acquittal.[12] But a trial court's termination of the proceedings in favor of the defendant may not be so easily characterized. "[T]he trial judge's characterization of his own action cannot control the classification of the action." *Jorn*, 400 U.S. at 478 n.7. Instead, the appellate courts look at the essence of the ruling and consider a defendant acquitted only when

> "the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged." Where the court, before the jury returns a verdict, enters a judgment of acquittal pursuant to Fed. Rule Crim. Proc. 29, appeal will be barred only when "it is plain that the District Court . . . evaluated the Government's evidence and determined that it was legally insufficient to sustain a conviction."

Scott, 437 U.S. at 97 (footnote and citations omitted); *accord Hudson v. Louisiana*, 450 U.S. 40 (1981).

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[10] The court may enter a judgment of acquittal before a case is submitted to a jury, after submission but before a verdict, or after a jury is discharged, regardless of whether it has reached a verdict. Super. Ct. Crim. R. 29.

[11] *United States v. Scott*, 437 U.S. 82, 100 n.13 (1978), suggested that a trial court could serve both the government's interest in appealing and the defendant's interest in avoiding retrial by waiting until after the jury's verdict to enter a judgment of acquittal. *See United States v. Singleton*, 702 F.2d 1159 (D.C. Cir. 1983).

[12] When a jury convicts on a lesser-included offense, its silence on the greater offense is regarded as an acquittal. *Green v. United States*, 355 U.S. 184, 190 (1957); *Price v. Georgia*, 398 U.S. 323, 326-30 (1970). *But see United States v. Allen*, 755 A.2d 402 (D.C. 2000) (where jury expressly indicates inability to reach verdict on greater offense, but convicts on lesser included, double jeopardy does not bar retrial on greater offense); *Johnson v. United States*, 434 A.2d 415 (D.C. 1981) (partial verdict, pending further deliberations, did not trigger double jeopardy because jury not yet discharged).

Acquittals that bar retrial include those based on such affirmative defenses as insanity and entrapment, which, if successful, "necessarily establish the criminal defendant's lack of criminal culpability." *Id*. at 98 (citation omitted). *See, e.g., Tyler*, 392 A.2d 511. On the other hand, a judgment of acquittal based on impairment of the defense from pretrial delay is not a resolution of any of the factual elements of the charged offense and does not bar an appeal. *Scott*, 437 U.S. at 98-99.

Scott also appears to have adopted the rule that the government may appeal any mid-trial termination of a case in favor of the defendant at the defendant's behest, unless that termination is an acquittal. *Id*. at 101. The Court reasoned that when the defendant asks for termination of the trial, there is no danger that the government, which is "quite willing to continue with its production of evidence to show the defendant [is] guilty," is oppressing the defendant by making repeated attempts to convict. *Id*. at 96. Rather, said the Court, the defendant's choice deprives the public of its "valued right" to a full chance to convict. *Id*. at 100 (citing *Arizona v. Washington*, 434 U.S. 497, 509 (1978)). The Court thus analogized the defendant's request for a dismissal on grounds unrelated to guilt or innocence to a defendant's motion for a mistrial. *Id*. at 99-100. The defense must therefore consider, just as in mistrial situations, whether to forgo the right to a verdict by seeking a mid-trial dismissal, with possible retrial.

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***Evans v. Michigan*, 133 S. Ct. 1069 (2013).** A mid-trial MJOA granted in error because judge misconstrued the elements of the offense is an acquittal barring retrial under the Double Jeopardy Clause.

***Evans v. United States*, 987 A.2d 1138 (D.C. 2010).** No double jeopardy violation to retry defendant for felony murder while armed, even though defendant had been found not guilty of predicate felony at first trial but guilty of felony murder while armed, despite inconsistent verdicts, because new trial ordered after parties discovered exhibit excluded from evidence had been submitted to jury.

D. Collateral Estoppel/Issue Preclusion

The double jeopardy bar may also preclude subsequent prosecution for a second offense arising out of the same transaction, if the verdict in the first case resolved an issue of fact that arises in the second. This doctrine of collateral estoppel[13] is set forth in *Ashe v. Swenson*, 397 U.S. 436 (1970). In *Ashe*, several armed men broke into a basement and robbed six poker players. After the defendant was acquitted of robbing one of the players, the state charged him with robbing another. In the second case, the state's evidence was stronger; having been "refined" in light of inadequacies exposed at the first trial, and the defendant was convicted. The Supreme Court adopted the rule of collateral estoppel that where "an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit." *Id*. at 443. The only issue in dispute at either trial – whether the

[13] Collateral estoppel is also currently known by the "more descriptive term 'issue preclusion.'" *Yeager v. United States*, --- U.S. ----, 129 S. Ct. 2360, 2367 n.4 (Jun. 18, 2009).

defendant was one of the robbers – was determined in his favor at the first trial, and could not be relitigated. The Double Jeopardy Clause was violated when the government had the opportunity to use the first trial as a "dry run" for the second, thus subjecting the defendant to the precise ordeal against which the Clause was intended to prevent. *Id*. at 447.

In contrast, an acquittal does not preclude introduction of the same complainant's testimony at a subsequent trial based on a separate incident, where the prior acquittal did not determine an ultimate issue present in the subsequent case. *Dowling v. United States*, 493 U.S. 342, 348 (1990). *Dowling* declined to extend *Ashe* "to exclude in all circumstances . . . relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted." *Id*; *accord Halicki v. United States*, 614 A.2d 499, 505 (D.C. 1992) (jury hung on various armed offenses that defendant was alleged to have aided and abetted, but acquitted on CPWL; evidence of pistol was admissible on retrial). Neither does an acquittal bar consideration of acquitted conduct in determining sentencing. *United States v. Watts*, 519 U.S. 148, 156 (1997). The reasoning behind this deviation from the collateral estoppel rule is the disparity in the required burden of proof between evidence admissibility at sentencing (preponderance) and evidence required to establish guilt at trial (beyond a reasonable doubt). *Id*. at 156. Therefore, a jury finding that the government did not establish *beyond a reasonable doubt* that the defendant committed a specific act does not conclusively resolve the question of whether the government established that fact *by a preponderance of the evidence*.

Furthermore, the doctrine of collateral estoppel does not preclude the government from relitigating a suppression motion it lost in a prior suppression hearing in a different case even though the parties and facts underlying the suppression motion were the same. *McMillian v. United States*, 898 A.2d 922, 936 (D.C. 2006). In *McMillian*, the government attempted to have admitted a McMillian's statement to detectives where he confessed to two separate sets of homicides. In a previous homicide case involving the same confession, the trial court suppressed the evidence, and the government failed to appeal the ruling. Because the prior suppression of evidence was not a "final judgment," i.e. a verdict, collateral estoppel did not apply, and the government was free to relitigate the suppression motion. *Id.* at 933-34.

> [A]pplication of the collateral estoppel doctrine requires the concurrence in different proceedings of the three circumstances of (1) a common factual issue necessary to both adjudications, (2) a prior determination of that issue in litigation between the same parties, and (3) a showing that the determination was in favor of the party seeking to raise the estoppel bar.

Copening v. United States, 353 A.2d 305, 309 (D.C. 1976). The party asserting collateral estoppel bears the burden of proof. *Id*.[14]

[14] Collateral estoppel is grounds for an immediate appeal only if a defendant claims that at a prior jeopardy-attaching proceeding, a fact was determined in such a manner that, if the determination were adopted in the instant proceeding, the double jeopardy clause would foreclose the prosecution. *Jones v. United States*, 669 A.2d 724, 729 (D.C. 1995).

A general verdict or a partial verdict in a multi-count indictment often leaves unclear the extent to which an issue has been resolved in the defendant's favor.[15] While recognizing that this situation makes a reviewing court's task difficult, the D.C. Court of Appeals stressed in *United States v. Felder* that,

> we must be mindful that *Ashe v. Swenson* requires us to examine the record, taking into account the pleadings, evidence, instructions, closing argument and the like and conclude whether a "rational jury" could have acquitted based on an issue other than the one the defendant seeks to bar from reconsideration. . . . Likewise, we must not make the defendant's task even more formidable by straining to postulate "hypertechnical and unrealistic grounds on which the . . . [jury could] conceivably have rested" its conclusions.

548 A.2d 57, 67 (D.C. 1988) (citation omitted).

In *Felder*, the defendant was charged with felony murder while armed, attempted robbery while armed and CPWL. At the first trial, the jury acquitted on the third count, but could not reach a verdict on the first two. The government's theory was that Felder had the pistol in his possession when he committed the other offenses. Felder denied possession of the pistol at any time. He did not contest the government's evidence that the pistol was operable or that he did not have a license for it. Applying a *de novo* standard of review, the court concluded:

> The single rationally conceivable issue in dispute before the jury was whether [Felder possessed (carried) the pistol at the relevant time]. And the jury by its verdict found that he had not." . . . The collateral estoppel component of the Double Jeopardy Clause prevents the government from relitigating these facts.

Id. at 69 (quoting *Ashe v. Swenson*, 397 U.S. at 445).

In contrast, *Halicki* held that an acquittal on a CPWL count did not preclude retrial on other counts, because "the jury's verdict is susceptible to a range of reasonable explanations. This necessarily means that appellant has failed to establish that the verdict constituted a conclusive resolution of a factual question presented at a retrial." 614 A.2d at 502. Similarly in *Martin v. United States*, 647 A.2d 1135 (D.C. 1994), the court held that a defendant's acquittal for carrying a pistol without a license did not conclusively determine in his favor his intent to aid an assault as required for the collateral estoppel doctrine to apply. Unlike *Felder* – where the defendant was the alleged gunman – in both *Halicki* and *Martin*, the government relied on accomplice liability. In neither *Halicki* nor *Martin* did the government argue that either defendant actually possessed a gun, permitting the possible conclusion that the defendants aided and abetted in the underlying crimes without aiding and abetting in the commission of the CPWL offenses.

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[15] In *Yeager v. United States*, *supra* n. 13, at 2367, the United States Supreme Court held that the fact that the jury failed to reach a verdict on some counts was irrelevant to the issue preclusion/collateral estoppel equation. In other words, "[t]o identify what a jury necessarily determined at trial, courts should scrutinize a jury's decision, not its failures to decide." *Id.* at 2368.

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***Thomas v. United States*, 79 A.3d 306 (D.C. 2013) (amended).** Collateral estoppel barred admittance of evidence of weapon in second trial where jury, by finding defendant not guilty of ADW and PFCV during first trial, had already decided that defendant did not pull out gun during encounter.

E. Conviction

Retrial after an unappealed conviction is barred because a conviction is a final judgment. *See North Carolina v. Pearce*, 395 U.S. 711, 717 (1969). As a general rule, retrial is permissible only after reversal on an appeal taken by the defendant. *Ball*, 163 U.S. at 672; *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 308 (1984); *see In re Evans*, 450 A.2d 443 (D.C. 1982) (retrial permitted where reversal was due to trial judge's bias). The reasons behind this rule have varied. Some courts have stated that the defendant waives double jeopardy rights by appealing. *See* cases cited in *United States v. Green*, 355 U.S. 184, 189 n.8 (1957). Others state that the first jeopardy continues until the conviction becomes final, which occurs after appeal, if there is one. *See id*. at 189 n.9.

United States v. Tateo, 377 U.S. 463, 466 (1964), expressed a practical rationale considering both the defendant's and society's interests:

> Corresponding to the right of an accused to be given a fair trial is the societal interest in punishing one whose guilt is clear after he has obtained such a trial. It would be a high price indeed for society to pay were every accused granted immunity from punishment because of any defect sufficient to constitute reversible error in the proceedings leading to conviction. From the standpoint of a defendant, it is at least doubtful that appellate courts would be as zealous as they now are in protecting against the effects of improprieties at the trial or pretrial stage if they knew that reversal of a conviction would put the accused irrevocably beyond the reach of further prosecution. In reality, therefore, the practice of retrial serves defendants' rights as well as society's interest. The underlying purpose of permitting retrial is as much furthered by application of the rule to this case as it has been in cases previously decided.

Accord Burks, 437 U.S. at 15; *United States v. Wilson*, 420 U.S. 332, 343-44 n.11 (1975). Thus, retrial after appeal is permissible even if the sentence has been served. *Fitzgerald v. United States*, 472 A.2d 52, 54 (D.C. 1984) (the government and society have an interest in entering convictions against those guilty of criminal activity in light of the collateral consequences of a conviction).

No retrial is permitted, however, if the "reviewing court has found the evidence legally insufficient," *Burks*, 437 U.S. at 18, such that the case "should not have even been *submitted* to the jury." *Id*. at 16. In considering whether the evidence is sufficient, an appellate court considers all evidence admitted at trial, including evidence that was erroneously admitted. *Lockhart v. Nelson*, 488 U.S. 33, 40-42 (1988); *Thomas v. United States*, 557 A.2d 599 (D.C.

1989) (per curiam). Retrial is also precluded where the trial court grants a motion for a new trial on the ground of insufficient evidence. *Hudson v. Louisiana*, 450 U.S. 40 (1981).

However, a defendant may be retried if the evidence was sufficient to survive a motion for judgment of acquittal, but a new trial is granted "in the interest of justice." *Cf.* Super. Ct. Crim. R. 33. *See Tibbs v. Florida*, 457 U.S. 31, 46-47 (1982).

Guilty pleas have particular implications for double jeopardy issues. For example, *Ohio v. Johnson*, 467 U.S. 493 (1984), held that a defendant could not, on his own initiative, plead guilty only to lesser included offenses listed separately in an indictment and thereby prevent prosecution on the greater offenses listed in the same indictment. The Court reasoned that, at the time the defendant entered his pleas, he had not been placed in jeopardy regarding the greater offenses, the state had not had more than one opportunity to present its evidence against him, and there had been no implicit acquittal on the greater charges (as when a jury renders a guilty verdict on lesser included offenses after consideration of both the lesser and greater charges). *Id.* at 501-02.

In addition, a defendant's breach of a plea agreement may result in trial on the charge to which the plea was entered, as well as any charges dismissed as part of the bargain. *See Ricketts v. Adamson*, 483 U.S. 1 (1987). Finally, entering a guilty plea may bar the double jeopardy claim. *See United States v. Broce*, 488 U.S. 563 (1989) (by pleading guilty to two conspiracy indictments, defendants conceded separate nature of the conspiracies and relinquished right to a hearing).

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***Evans v. United States*, 987 A.2d 1138 (D.C. 2010)**. No double jeopardy violation to retry defendant for felony murder while armed, even though defendant had been found not guilty of predicate felony at first trial but guilty of felony murder while armed, despite inconsistent verdicts, because new trial ordered after parties discovered exhibit excluded from evidence had been submitted to jury.

F. Mistrial

In certain circumstances, the Double Jeopardy Clause protects against retrial after a mistrial. *See United States v. Scott*, 437 U.S. 82 (1978). It preserves "a defendant's 'valued right to have his trial completed by a particular tribunal.'" *Crist v. Bretz*, 437 U.S. 28, 36 (1978) (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)). This notion stems from the historical rule "that once banded together a jury should not be discharged until it had completed its solemn task of announcing a verdict." *Crist*, 437 U.S. at 36. In this context, the Double Jeopardy Clause protects against government overreaching:

> [A] defendant is placed in jeopardy once he is put to trial before a jury so that if the jury is discharged without his consent he cannot be tried again . . . .This prevents a prosecutor or judge from subjecting a defendant to a second

> prosecution by discontinuing the trial when it appears that the jury might not convict.

Green, 355 U.S. at 188 (citations omitted). Even apart from deliberately oppressive tactics of a judge or prosecutor, termination of the first trial before verdict can substantially burden a defendant:

> Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation of wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is completed. Consequently, as a general rule, the prosecutor is entitled to one, and only one, opportunity to require an accused to stand trial.

Arizona v. Washington, 434 U.S. 497, 503-05 (1978) (footnotes omitted).

Nevertheless, while the defendant is entitled to only one trial, society is entitled to "one complete opportunity to convict those who have violated its laws." *Scott*, 437 U.S. at 100 (quoting *Washington*, 434 U.S. at 509). Therefore, under limited circumstances, "a defendant's valued right to have his trial completed by a particular tribunal must . . . be subordinated to the public's interest in fair trials designed to end in just judgments." *Wade v. Hunter*, 336 U.S. at 689. Furthermore, before a defendant can invoke the protection of the Double Jeopardy Clause to bar retrial after a declaration of a mistrial, there must be some event terminating the original jeopardy. *Richardson v. United States*, 468 U.S. 317, 325 (1984); *accord Lydon*, 466 U.S. 294; *Price v. Georgia*, 398 U.S. 323, 329 (1970). The failure of a jury to reach a verdict is not such an event; thus, a mistrial declared *sua sponte* because of a hung jury does not preclude retrial. *Richardson*, 468 U.S. at 325. Due to this rationale in the double jeopardy jurisprudence, in cases where the jury hangs on a greater offense but convicts on a lesser-included, the court has declared that the government may retry the defendant on the greater count. *United States v. Allen*, 755 A.2d 402 (D.C. 2000). The retrial on the greater charge is not considered a successive prosecution for purposes of the Double Jeopardy Clause, but is deemed to be a continuation of the jeopardy that attached in the first trial. *Holt v. United States*, 805 A.2d 949 (D.C. 2002). Ostensibly, a defendant would have to waive his double jeopardy rights with respect to the lesser-included or risk going to trial solely on the greater charge. Thus, counsel should seriously consider requesting the "acquittal first" jury instruction instead of "reasonable efforts."

A mistrial declared upon defense motion ordinarily will not bar retrial. *See Scott*, 437 U.S. at 93; *see also Nero v. District of Columbia*, 936 A.2d 310, 315-16 (D.C. 2007) (retrial not precluded where defense counsel moves for mistrial over objection of defendant since decision to move for mistrial is "within the sound discretion of [defense] counsel"). "[A] motion by the defendant for mistrial is ordinarily assumed to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error." *Jorn*, 400 U.S. at 485 (plurality opinion); *accord United States v. Dinitz*, 424 U.S. 600, 607-10 (1976); *Speaks v. United States*, 617 A.2d 942, 953 (D.C. 1992); *United States v. Harvey*, 392 A.2d 1049, 1051 (D.C. 1978); *Sedgwick v. Superior Court*, 584 F.2d 1044, 1050 (D.C. Cir. 1978). The motion "is deemed to

be a deliberate election on [the defendant's] part to forgo his valued right to have his guilt or innocence determined before the first trier of fact." *Scott*, 437 U.S. at 93.

Implied consent to a mistrial may also remove the double jeopardy bar. The defense in *Anderson v. United States*, 481 A.2d 1299 (D.C. 1984), made a pretrial request that the defendant be referred to by one name; the government agreed to instruct its witnesses as such. When a prosecution witness used the defendant's alias, counsel did not explicitly request a mistrial and also neither opposed it nor offered alternatives. The trial court declared a mistrial. The court looked at the "totality of the circumstances [and concluded] that the defense [had] acquiesced in the declaration of a mistrial." *Id*. at 1301.

Double jeopardy bars retrial when the prosecutor intentionally provokes a defense-requested mistrial.

> Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion . . . does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause. . . . Only where the governmental conduct in question is intended to "goad" the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having succeeded in aborting the first on his own motion.

Oregon v. Kennedy, 456 U.S. 667, 675-76 (1982); *see also Coreas v. United States*, 585 A.2d 1376 (D.C 1991); *Fletcher v. United States*, 569 A.2d 597 (D.C. 1990); *Pennington v. United States*, 471 A.2d 250 (D.C. 1983); *Gant v. United States*, 467 A.2d 968 (D.C. 1983); *Merriweather v. United States*, 466 A.2d 853 (D.C. 1983).[16]

Retrial is permissible when, "taking all the circumstances into consideration, there is a manifest necessity for the [mistrial], or the ends of public justice would otherwise be defeated." *United States v. Perez*, 22 U.S. 579, 580 (1824). If the defense objects to a mistrial, the burden is on the prosecution to demonstrate that the mistrial was compelled by "manifest necessity." This is true even where the government also opposes the mistrial. *Bailey v. United States*, 676 A.2d 461, 465 (D.C. 1996). This burden is a "heavy one," and a "high degree" of necessity is required before the defendant's right to timely resolution of the case is outweighed. *Washington*, 434 U.S. at 505-06; *see Davis v. United States*, 629 A.2d 570 (D.C. 1993) (manifest necessity where defense counsel, not government, was responsible for complainant's non-appearance at trial).

If the defense objects to a mistrial, the court must conduct a two-step inquiry. First, it must determine that there is a high degree of necessity to terminate the trial, which overrides the defendant's double jeopardy interests. *Douglas v. United States*, 488 A.2d 121, 132 (D.C. 1985). Second, the trial judge must then determine whether any alternative measure can alleviate the

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[16] Several states have applied a more liberal alternative. *See, e.g.*, *State v. Kennedy*, 666 P.2d 1316 (Or. 1983) (retrial barred when prosecutor intends, or is indifferent to, resulting mistrial or reversal); *Pool v. Superior Court*, 677 P.2d 261 (Ariz. 1984) (retrial barred when conduct is intentional, prosecution knows it to be prejudicial, and prosecutor pursues it for an improper purpose, with indifference to significant resulting danger of mistrial or reversal); *Commonwealth v. Murchison*, 465 N.E.2d 256 (Mass. 1984) (retrial barred where conduct is intended to goad defendant into moving for mistrial *or* results in such irremediable harm that a fair trial is no longer possible).

problem and permit continuation of the trial. *Id*. In *Douglas*, the trial court was informed during trial that the defendant had filed a complaint with bar counsel against his attorney for failure to pursue pretrial release. The trial court concluded that bar counsel's inquiry was an adversary proceeding that created a conflict of interest for the attorney. Although the defendant and his attorney stated that they wished to proceed with the trial, the trial court *sua sponte* declared a mistrial. The Court of Appeals concluded that there was necessity to discontinue the trial, but that the trial court failed to consider the less drastic alternative of a waiver of the right to conflict-free counsel, after the defendant indicated a desire to continue the trial. Because the record did not show that the mistrial was "manifestly necessary," the defendant could not be prosecuted a second time. *Id*. at 145; *see also Sanchez v. United States*, 919 A.2d 1148 (D.C. 2007) (where juvenile defendant was improperly charged as adult, trial court declared mistrial despite objection by defense and statute requiring trial court to proceed to verdict; thus, mistrial not supported by manifest necessity and retrial barred by double jeopardy).[17]

Declaring a mistrial over defense objection is to be avoided whenever possible. *United States v. Anderson*, 509 F.2d 312, 325 (D.C. Cir. 1974) (citations omitted). The trial court "must always temper the decision whether or not to abort the trial by considering the importance to the defendant of being able, once and for all, to conclude his confrontation with society through the verdict of a tribunal he might believe to be favorably disposed to his fate." *Washington*, 434 U.S. at 514 (quoting *Jorn*, 400 U.S. at 486). Otherwise, the decision to terminate a trial is discretionary, and is accorded great deference on appeal. *See Washington*, 434 U.S. at 510-16; *Hammond v. United States*, 345 A.2d 140 (D.C. 1975); *United States v. Mackin*, 502 F.2d 429, 437 (D.C. Cir. 1974); *United States v. James*, 466 F.2d 475, 477 (D.C. Cir. 1972). However, "review is not of the trial judge's stated reasons, however elaborated, for those reasons are but conclusions drawn from the events at trial; rather [the court's] review must proceed from the events at trial." *Braxton v. United States*, 395 A.2d 759, 769 (D.C. 1978).

Defense consequences of a mistrial: The consequences of a mistrial may or may not be favorable to the defense, depending upon the stage at which the trial is terminated. The defense is perhaps best served by mistrial before presenting its own case because it has had the opportunity to see the prosecution's case-in-chief and to cross-examine the government witnesses under oath. On the other hand, the defense might not seek a mistrial where it appears that weaknesses in the government's case could be cured before retrial or where the defense trial strategy has been revealed. Usually, however, the defense will benefit from a mistrial. Should counsel determine that a mistrial is *not* advantageous, the objection to a mistrial should be stated clearly on the record. Silence may be interpreted as acquiescence. *See Anderson*, 481 A.2d at 1301; *Sedgwick*, 584 F.2d at 1046. Counsel should include the reasons for the objection and why the defense wishes to proceed to verdict. For example, if counsel believes the evidence has gone

[17] Several cases have found that there was no manifest necessity to declare a mistrial: *Vega v. United States*, 709 A.2d 1168, 1169 (D.C. 1998) (retrial of defendants was barred because the judge, without first consulting defendants, declared a mistrial when defense counsel failed to appear for closing argument); *Routh v. United States*, 483 A.2d 638 (D.C. 1984) (trial court failed to explore adequately the degree of necessity for a mistrial after the crime scene evidence technician became ill and unable to testify). By failing to offer persuasive reasons why the witness's testimony was essential, the government failed to demonstrate the requisite manifest necessity); *Coleman v. United States*, 449 A.2d 327 (D.C. 1982) (no manifest necessity for mistrial as to Coleman merely because *Bruton* problem resulted in mistrial as to his co-defendants).

in well and delay will prejudice the defense and the defendant (due to ongoing stigma, problems with witnesses, and other specified problems), counsel should object and propose alternative remedies (e.g., curative instruction, striking of testimony).

If the court grants a mistrial due to prosecutorial bad faith or misconduct, counsel should make that reason clear on the record and file a motion to dismiss the indictment or information on double jeopardy grounds. An evidentiary hearing on the motion may be appropriate. Similarly, counsel should make sure that any judicially imposed acquittal or dismissal reflects a finding that the prosecution's evidence was insufficient as to one or more elements.

A double jeopardy objection to retrial may be waived if not raised before trial under Super. Ct. Crim. R. 12(b). *See Towles*, 521 A.2d at 655-56. *Wesley v. United States*, 449 A.2d 282 (D.C. 1982), held that a double jeopardy claim was waived when appellant had not raised the issue at trial or in his appellate brief. (The issue surfaced during oral argument.) *But see Ball v. United States*, 429 A.2d 1353, 1357 (D.C. 1981) (claim first asserted on appeal); *Wesley*, 449 A.2d at 285 (Belson, J. concurring). Once denied, a motion to dismiss on double jeopardy grounds is a final order for purposes of interlocutory appeal. *Abney v. United States*, 431 U.S. 651 (1977).

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***Davidson v. United States*, 48 A.3d 194 (D.C. 2012).** Retrial for voluntary manslaughter not barred for defendant convicted of lesser-included offense of negligent homicide after jury could not reach verdict under "reasonable efforts" instruction on original charge of voluntary manslaughter where jury had been instructed at defendant's request to expend only "reasonable efforts" to reach verdict on voluntary manslaughter before moving on to negligent homicide, and where defendant had opportunity to object but remained silent when judge and government failed to make mistrial record.

Should Counsel Determine that a Mistrial is *Not* Advantageous:

- ✓ Objections should be clearly stated on the record
- ✓ Include reasons for the objection and why defense wishes to proceed to verdict

II. APPLICATION TO SENTENCING

A. Initial Imposition of Sentence – Merger Issues

The Double Jeopardy Clause bars cumulative punishment for a single offense. *North Carolina v. Pearce*, 395 U.S. at 717; *Wilson v. United States*, 528 A.2d 876, 879 (D.C. 1987). Sentencing courts may "not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments." *Jones v. Thomas*, 491 U.S. 376, 381 (1989). The issue arises most often when a single trial results in multiple convictions.

Whether different counts may support separate sentences is a question of legislative intent. *See, e.g.*, *Missouri v. Hunter*, 459 U.S. 359, 366 (1983); *Albernaz v. United States*, 450 U.S. 333, 344 (1981). One may be convicted of and sentenced for multiple offenses if the legislature so intended. *Peoples v. United States*, 640 A.2d 1047, 1059 (D.C. 1994). An explicit legislative pronouncement is controlling. *See, e.g.*, *Hunter*, 459 U.S. at 368-69 (multiple punishments in single trial for single course of conduct permissible where legislature had made "crystal clear" that it intended multiple punishments). Where explicit legislative guidance is lacking, courts apply the rule of statutory construction set forth in *Blockburger v. United States*, 284 U.S. at 304. *See, e.g.*, *United States v. Woodward*, 469 U.S. 105, 107-08 (1985) (per curiam); *Albernaz*, 450 U.S. at 336-37.

Under *Blockburger*, "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 a fact which the other does not." 284 U.S. at 304.[18] If the offenses are the "same" under *Blockburger*, there is a presumption that the legislature does not intend to punish the "same offense" under two different statutes. *Whalen v. United States*, 445 U.S. 684, 692 (1980). In determining merger issues, the court has adopted the "elements-based" analysis of *Blockburger* over the "pure fact-based" test. *(Lindbergh) Byrd v. United States*, 598 A.2d 386 (D.C. 1991) (en banc) (although not technically a lesser-included offense of theft, receiving stolen property is the "functional equivalent" of a lesser-included of theft; therefore, a defendant should not receive consecutive sentences for RSP and UUV convictions).

The clearest example of the *Blockburger* rule is where a lesser-included offense merges into a greater offense. A "lesser-included" offense is one that consists entirely of some, but not all, of the elements of the greater offense. *Sansone v. United States*, 380 U.S. 343, 350 (1965). Because the lesser offense does not require proof of any facts not also required to prove the greater, it cannot be the subject of a separate conviction. *Blockburger*, 284 U.S. at 304. Thus, because second-degree murder is a lesser-included offense of felony murder, *Towles v. United States*, 521 A.2d 651, 657-58 (D.C. 1987) (en banc), one cannot stand convicted of both for the death of a single victim. *Thacker v. United States*, 599 A.2d 52, 63 (D.C. 1991).

Likewise, felony murder requires proof of all the elements of the predicate felony; the underlying felony merges with the felony murder. *Whalen*, 445 U.S. at 693-94; *Leasure v. United States*, 458 A.2d 726, 730-31 (D.C. 1983); *Garris v. United States*, 465 A.2d 817, 823 (D.C. 1983) (*Garris I*). This result occurs even where the underlying felonies were committed against persons other than the decedent. *Harling v. United States*, 460 A.2d 571, 573 (D.C. 1983). There is no prohibition against multiple convictions or consecutive sentences for premeditated murder and the felony charge that served as the predicate for felony murder, so long as the felony-murder conviction is vacated. *Garris v. United States*, 491 A.2d 511, 514 (D.C. 1985) (*Garris II*); *Harling*, 460 A.2d at 573-74.

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[18] *Blockburger* upheld consecutive sentences arising out of a single sale of narcotics in violation of two separate statutory provisions: one proscribing any sale except in or from the original stamped package and the other proscribing any sale not pursuant to a written order.

Unless the charged crimes "are distinct statutory offenses," the *Blockburger* test does not apply. *(Samuel) Byrd v. United States*, 500 A.2d 1376, 1384 (D.C. 1985), *as amended and adopted*, 510 A.2d 1035 (1986) (en banc). Thus, convictions for both statutory rape and forcible rape cannot stand because "D.C. Code § 22-2801 defines two different means of committing the same offense, [rape,] it is improper to sentence the defendant, either concurrently or consecutively, for both." *Brown v. United States*, 576 A.2d 731, 733 (D.C. 1990) (convictions for statutory rape and assault with intent to commit forcible rape, a lesser-included offense, cannot stand). Likewise, premeditated and felony murder actually constitute the same offense and merge with respect to a single killing: "deliberate and premeditated malice and . . . killing in the course of the enumerated felonies are but alternate modes of proof" of a single element. *(Samuel) Byrd*, 500 A.2d at 1384. Under the same analysis, one may not be convicted of two counts of felony murder arising out of a single killing, even though each is predicated on a different underlying felony. *Garris I*, 465 A.2d at 823; *Wright v. United States*, 513 A.2d 804, 805 n.1 (D.C. 1986); (*David*) *Johnson v. United States*, 883 A.2d 135 (D.C. 2005); *see also Morris v. United States*, 622 A.2d 1116 (D.C. 1993) (convictions for two counts of PFCV merge if based on same actions).

Examples of Merger: For other examples of application of the merger doctrine, *compare Appleton v. United States*, 983 A.2d 970 (D.C. 2009) (multiple PFCV charges merge where they arose out of defendant's uninterrupted possession of a single weapon during a single act of violence); *Davis v. United States*, 641 A.2d 484 (D.C. 1994) (rape while armed merges with carnal knowledge of minor where both stemmed from single assault on single minor); *Simms v. United States*, 634 A.2d 442 (D.C. 1993) (assault with dangerous weapon merges with armed robbery when assault is committed to effect robbery); *and Norris v. United States*, 585 A.2d 1372 (D.C. 1991) (same); *with McCullough v. United States*, 827 A.2d 48 (D.C. 2003) (first-degree murder, obstruction of justice, and conspiracy do not merge); *Ginyard v. United States*, 816 A.2d 21 (D.C. 2003) (aggravated assault does not merge with assault with intent to murder); *Malloy v. United States*, 797 A.2d 687 (D.C. 2002); *Mack v. United States*, 772 A.2d 813 (D.C. 2001) (escape is not a lesser-included offense of APO); *Nixon v. United States*, 730 A.2d 145, 152 (D.C. 1999) (aggravated assault while armed does not merge with assault with intent to kill while armed); *Turner v. United States*, 684 A.2d 313 (D.C. 1996) (possession of a prohibited weapon does not merge with possession of a firearm during a crime of violence); *Tyree v. United States*, 629 A.2d 20 (D.C. 1993) (possession of an unregistered firearm does not merge with CPWL); *Thomas v. United States*, 602 A.2d 647 (D.C. 1992) (an armed offense does not merge with possession of a firearm during that offense); *Robinson v. United States*, 608 A.2d 115 (D.C. 1992) (attempted robbery does not merge with conspiracy to commit robbery); *Monroe v. United States*, 600 A.2d 98 (D.C. 1991) (kidnapping and armed robbery do not merge); *and Pounds v. United States*, 529 A.2d 791 (D.C. 1987) (rape, carnal knowledge, and incest do not merge). When multiple principal participators are each convicted on multiple counts, the counts will not merge when the count was a separate act committed by a different principal perpetrator with a separate purpose impulse. *Brown v. United States*, 795 A.2d 56 (D.C. 2002) (defendant's convictions for three counts of rape and three counts of sodomy based on his participation in a "gang rape" do not merge). In *Pearsall v. United States*, 812 A.2d 953 (D.C. 2002), the court rejected an appeal from a conspiracy conviction on the grounds that it violated Wharton's Rule. Wharton's Rule is an exception to the general principle that both a conspiracy and the substantive offense that is its object are discrete crimes. It applies to offenses like bigamy,

adultery, and dueling where the substantive offense is of such a nature as to require necessarily the participation of two people for its commission. The court held that the Rule does not apply to conspiracy to commit armed robbery and attempted armed robbery.

Two Separate Criminal Acts or One? Convictions that arise out of separate incidents do not merge. The test for determining whether there are two separate criminal acts or one single act is the "fork in the road" test:

> If at the scene of the crime the defendant can be said to have realized that he has come to a fork in the road, and nevertheless decides to invade a different interest, then his successive intentions make him subject to cumulative punishment. . . .

Irby v. United States, 390 F.2d 432, 437-38 (D.C. Cir. 1967) (en banc), *cited with approval* in *Owens v. United States*, 497 A.2d 1086, 1095 (D.C. 1985); *see also Cullen v. United States*, 886 A.2d 870, 874-75 (D.C. 2005) (two counts of misdemeanor sexual abuse merge into one where defendant's actions of touching inner thigh and breast of complainant, separated only by a brief interval, were the results of defendant's original intent to engage in sexual contact without consent). Thus, the Court of Appeals has upheld multiple convictions in *Hunter v. United States*, 980 A.2d 1158, 1163 (D.C. 2009) (two felony threat convictions do not merge where defendant directed one threat to one victim and a second threat to both victims collectively); *Jenkins v. United States*, 980 A.2d 421, 426-27 (D.C. 2009) (no merger of two counts of misdemeanor sexual abuse when defendant engaged in two acts—penetrating the complainant vaginally with his penis, then with his finger—"different in nature and character" under the statute); *Wages v. United States*, 952 A.2d 952 (D.C. 2008) (two PFCV convictions do not merge even though shooting of the two victims occurred with the same gun during the same violent episode because the assaults against each victim were distinct and successive, leading the defendant to a "fork in the road" at which he could have desisted form the violence before shooting the second victim); *Ellison v. United States*, 919 A.2d 612 (D.C. 2007) (two convictions for misdemeanor sexual abuse do not merge where break between completion of vaginal intercourse and repositioning of victim for attempted anal penetration constituted a "fresh impulse," even though duration of sexual encounter was fifteen minutes); *Reeves v. United States*, 902 A.2d 88 (D.C. 2006) (three PFCV convictions do not merge because each count related to a separate, successive assault stemming from a "fresh impulse"); *Baker v. United States*, 867 A.2d 988 (D.C. 2005) (two PFCV convictions do not merge under *Nixon* because the evidence showed a sufficient fork in the road for a fresh impulse under *Stevenson*); *Bailey v. United States*, 831 A.2d 973 (D.C. 2003) (two felony murder convictions merge with their respective premeditated murder convictions; however, two convictions of possession of a firearm during a crime of violence do not merge when not predicated on "single violent act"); *Sanchez-Rengifo v. United States*, 815 A.2d 351 (D.C. 2002) (conviction for three counts of first-degree child sexual abuse while armed and second-degree child sexual abuse while armed did not merge because the offenses were not considered to be part of one continuous course of action); *Stevenson v. United States*, 760 A.2d 1034 (D.C. 2000) (convictions of armed burglary and armed robbery do not merge because the defendant had an opportunity to reflect – reach a fork in the road – between the commission of the burglary, which was complete upon entry into the store, and the robbery of the clerk); *Gardner v. United States*, 698 A.2d 990, 1003 (D.C. 1997) (two rape convictions, where evidence showed brief but appreciable period of time and intervening events between separate

acts); *Spain v. United States*, 665 A.2d 658, 660 (D.C. 1995) (no merger of assault with intent to commit carnal knowledge and taking indecent liberties with a minor child where, between offenses, defendant "lured" complainant back after she got off bed and indicated she did not want to play anymore); *Allen v. United States*, 580 A.2d 653, 657-58 (D.C. 1990) (upholding two drug convictions for acts separated by interval long enough for police car to circle block); *Owens*, 497 A.2d at 1097 (upholding convictions for assault with intent to rob while armed and ADW where defendant attempted to rob complainant at gunpoint and then shot complainant as complainant tried to flee).

Convictions for crimes involving distinct, identifiable victims do not merge. *See Hanna v. United States*, 666 A.2d 845, 855 (D.C. 1995) (upholding multiple convictions for kidnapping, robbery, and ADW of separate, named victims); *cf. Joiner*, 585 A.2d at 178 (only one offense where assaultive act is directed, collectively, at more than one victim).

Counsel should address merger issues at the initial sentencing. To avoid the complications that can arise if some of the convictions are reversed on appeal, however, the Court of Appeals has indicated that trial courts should initially sentence the defendant on all counts and wait to resolve the issue of merger until the appeal is resolved or the time for appeal has passed. *Warrick v. United States*, 528 A.2d 438, 443 n.6 (D.C. 1987); *(Samuel) Byrd*, 500 A.2d at 1388-89; *Garris II*, 491 A.2d 511 (D.C. 1985). Even *concurrent* sentences are prohibited for merging offenses, because "even a concurrent sentence is an element of punishment because of potential collateral consequences." *Doepel v. United States*, 434 A.2d 449, 459 (D.C. 1981) (remanding for resentencing where trial court had imposed concurrent sentences for felony murder and underlying rape).

> The separate *conviction* . . . has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction. Thus, the second conviction, even if it results in no greater sentence, is an impermissible punishment.

Ball v. United States, 470 U.S. 856, 865 (1985) (citations omitted).

If one or more convictions must be vacated on merger grounds, the Court of Appeals will remand the case for resentencing in order to enable the trial court to give effect to its intended sentencing scheme, because "vacating one of the convictions could 'upset an interdependent sentencing structure.'" *Malloy v. United States*, 483 A.2d 678, 681 (D.C. 1984) (quoting *Thorne v. United States*, 471 A.2d 247, 249 (D.C. 1983) (per curiam)); *see also Catlett v. United States*, 545 A.2d 1202, 1218-19 (D.C. 1988); *(Samuel) Byrd*, 500 A.2d at 1389; *Garris*, 465 A.2d at 823.

Whether or not an appeal is anticipated, counsel should bring merger issues to the attention of the trial court, which may agree to impose concurrent sentences. After sentencing, merger issues

may be raised through a motion to correct an illegal sentence under Rule 35(a), or a motion to vacate under D.C. Code § 23-110. *(Samuel) Byrd*, 500 A.2d at 1378 n.5.

Where a double jeopardy violation has occurred, counsel should seek an appropriate remedy. If a violation is not rectified until after the defendant has served some or all of an unlawful sentence, principles of double jeopardy may limit any subsequent sentence that might be imposed. The defendant in *Ex parte Lange*, 85 U.S. 163 (1874), for example, was illegally sentenced to a fine and imprisonment under a statute authorizing a fine or imprisonment; he paid the fine and served part of the prison term before seeking a writ of habeas corpus. The trial court vacated the original sentence and resentenced the defendant to imprisonment. The defendant appealed and the Supreme Court held that he was entitled to release. Because the fine had been paid, imposition of the revised sentence would require the defendant both to pay the fine and to serve a term of incarceration, a result inconsistent with the sentencing statute and the Double Jeopardy Clause. *Id.* at 168; *accord In re Bradley*, 318 U.S. 50, 52 (1943) (same result although sentencing court ordered fine returned).

In *Jones v. Thomas*, 491 U.S. 376 (1989), the defendant received consecutive sentences for felony murder and the underlying attempted robbery, with the sentence for robbery to be served first. The defendant sought post-conviction relief in state court, arguing that the offenses merged. While his petition was pending, the robbery sentence was commuted and fully served. The state court then ruled that the two offenses merged, but rejected Jones' contention that, because he had fully served his robbery sentence and could lawfully have been convicted and sentenced for only one offense, he was entitled to release. The Supreme Court agreed with the state court. It rejected the general proposition suggested in *Bradley*, that a defendant who is given multiple sentences, only one of which could lawfully have been imposed, and has completed one of the sentences, cannot be further punished. *Id*. at 386. It held that further punishment is not prohibited as long as one of the sentences is vacated and the defendant receives full credit for time served. *Id*. at 387. It distinguished *Bradley* and *Lange* in that they involved alternative punishments prescribed in a single statute rather than alternative punishments arising from different statutes. *Id*. at 384.

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***Bailey v. United States*, 10 A.3d 637 (D.C. 2010).** Convictions for second-, third- and fourth-degree sexual abuse merge with first-degree sexual abuse.

Two convictions for first-degree sexual abuse do not merge where defendant penetrated victim with both finger and penis because he acted on "fresh impulse" and engaged in two different types of sexual acts.

***Ball v. United States*, 26 A.3d 764 (D.C. 2011).** Felony APO merges with ADW.

PFCV and felony APO do not merge because PFCV requires use of firearm while felony APO does not, and felony APO requires that defendant knew or should have known victim was police officer.

***Blaize v. United States*, 21 A.3d 78 (D.C. 2011).** Two PFCV convictions do not merge where initial confrontation between defendant and decedent in which defendant pointed gun at decedent and told him to "stop playing" ended when witness talked with defendant to diffuse situation and defendant put weapon away and then, rather than walking away, defendant turned to decedent, removed gun from waistband, and fired.

***Brannon v. United States*, 43 A.3d 936 (D.C. 2012).** Period of at least five minutes between defendant's first swing at officer and subsequent kick of officer while in custody constituted an appreciable amount of time for defendant to form a fresh impulse to engage in a separate APO offense.

***Bryant v. United States*, 93 A.3d 210 (D.C. 2014).** Two PFCV convictions predicated on attempted burglary while armed and ADW merge where there was no more than "a momentary interruption" between first defendant's armed attempt to enter apartment and immediate firing of handgun through door and "no appreciable point" at which second defendant could have reconsidered his actions in providing armed support for first defendant.

***Clark v. United States*, 28 A.3d 514 (D.C. 2011).** Conviction for both violation of CPO and simple assault did not violate Double Jeopardy Clause where defendant prosecuted for violation of CPO for conduct other than assault (here, returning to complainant's residence when he should have known he was in violation of court order).

***Ewing v. United States*, 36 A.3d 839 (D.C. 2012).** Two arson convictions for two separate fires do not merge where fires were started at separate times and locations within apartment and where jury could infer that two fires served separate purposes, one to obliterate evidence on the decedent and the other to destroy the apartment.

***Fadero v. United States*, 59 A.3d 1239 (D.C. 2013).** ADW merges with APOWA (assault on a police officer while armed).

***Fox v. United States*, 11 A.3d 1282 (D.C. 2011).** Convictions for reckless driving and fleeing from law enforcement officer do not merge as greater and lesser-included offenses where basis for fleeing charge was both reckless driving and property damage.

***Graure v. United States*, 18 A.3d 743 (D.C. 2011).** Four convictions of ADW do not merge where convictions reflect jury finding that single fire set by defendant in club constituted attempted-battery assault where victims were in path of physical injury by fire set close to front of club and within 15 to 18 feet of victims who had to retreat both from threat of fire and actual flames.

Aggravated assault while armed merges with mayhem while armed.

***Hailstock v. United States*, 85 A.3d 1277 (D.C. 2014).** Simple assault merges with attempted misdemeanor sexual abuse.

***Hammond v. United States*, 77 A.3d 964 (D.C. 2013).** Trial court did not err in convicting defendant of two counts of UF because unit of prosecution under the statute is each individual unregistered firearm.

***Haney v. United States*, 41 A.3d 1227 (D.C. 2012).** Possession of a single weapon during a single violent act may not give rise to multiple PFCV convictions.

***Harris v. District of Columbia*, 991 A.2d 1199 (D.C. 2010).** One of four convictions for welfare fraud vacated where conviction based on continuing offense of failing to disclose change of address over period of nearly two years and two others based on individual incidents of providing a false address during the same time period.

A person who makes multiple attempts to fraudulently obtain welfare benefits may be convicted on multiple counts.

Conviction for unlawful use of food stamps and welfare fraud do not merge because welfare fraud requires elements of "false statement" or "failure to disclose information," which unlawful use of food stamps does not, and unlawful use of food stamps requires use of either "food stamp coupons or access devices," which welfare fraud does not.

***Harrison v. United States*, 76 A.3d 826 (D.C. 2013).** Two PFCV convictions do not merge when they arise from two separate crimes against two different victims.

***Haye v. United States*, 67 A.3d 1025 (D.C. 2013).** Where criminal contempt charge required defendant to stay away from exact same location from which he was barred, convictions for both unlawful entry and criminal contempt violated his double jeopardy rights.

***Kaliku v. United States*, 994 A.2d 765 (D.C. 2010).** ADW and PFCV merge with armed robbery.

Convictions for threats and kidnapping do not merge because kidnapping does not require proof of the utterance of words, as threats does, and threats does not require some form of seizure or detention, as kidnapping does.

Convictions for kidnapping and sexual assault do not merge, regardless of the purpose of the kidnapping, because kidnapping requires detention or an intent to detain, an element not required for sexual abuse.

***King v. United States*, 74 A.3d 678 (D.C. 2013).** Two PFCV convictions based on underlying carjacking and armed robbery merge because "effectuated by the same violent act at the same moment" where defendant exited vehicle, pointed gun at victim and said "give that shit up," and then took both victim's money and car keys and immediately drove off with both.

***Lester v. United States*, 25 A.3d 867 (D.C. 2011).** Armed first-degree premeditated murder and armed first-degree felony murder merge.

***Mobley v. United States*, 101 A.3d 406 (D.C. 2014).** ADW convictions relating to two officers merge with APOWA convictions relating to same two officers.

Seven PFCV convictions of each co-defendant merge into one for each co-defendant because each possessed single weapon during violent act.

Evidence sufficient to sustain multiple ADW convictions as to multiple officers where defendants fired twenty to thirty shots from Dodge Charger towards front of club where police vehicles were stationed and where reasonable for jurors to infer that defendants knew officers were in vehicles in line of fire.

Trial court's dismissal of APOWA counts because he did not think reasonable fact-finder could conclude that any defendants would be aware of whereabouts of certain officers during transaction did not mandate dismissal of ADW counts involving same officers because officers might still have been in "zone of danger" for purposes of ADW.

***Nero v. United States*, 73 A.3d 153 (D.C. 2013).** AAWA and ADW merge. *See Gathy v. United States*, 754 A.2d 912, 919-20 (D.C. 2000).

Mayhem while armed merges with AAWA when against the same victim. *See Graure v. United States*, 18 A.3d 743, 765 (D.C. 2011).

Felony assault and AAWA merge.

Three convictions for PFCV merge where predicate offenses (ADW, mayhem while armed and AAWA) merge into one and where PFCV convictions arise from defendant's "uninterrupted possession of a single weapon during a single act of violence." *Matthews v. United States*, 892 A.2d 1100, 1106 (D.C. 2006).

***Pelote v. United States*, 21 A.3d 599 (D.C. 2011).** Convictions for fleeing from law enforcement officer and reckless driving merge.

***Plummer v. United States*, 43 A.3d 260 (D.C. 2012).** Deceptive labeling statute, D.C. Code § 22-3214.01, permits multiple convictions and punishments for possession of two kinds of deceptively labeled media at the same time and place.

***Robinson v. United States*, 50 A.3d 508 (D.C. 2012).**
ADW merges with AAWA.

AWIKWA and AAWA do not merge because aggravated assault requires a showing of serious bodily injury and AWIK requires a showing of specific intent.

***Snell v. United States*, 68 A.3d 689 (D.C. 2013).** CPWL does not merge with UF.

UA does not merge with unlawful discharge.

***Snowden v. United States*, 52 A.3d 858 (D.C. 2012).** Double Jeopardy Clause does not prohibit convictions for both PFCV and two predicate armed offenses because armed robbery and AAWA require proof that defendant was "armed with" or had "readily available" a dangerous weapon which need not be a firearm and PFCV requires proof of "possession of a "firearm."

Four convictions for AWIRWA do not merge even though defendant robbed only one individual in group because defendant vicariously liable for actions of second gunman who stood behind the group and moved his gun between "different people."

***Sutton v. United States*, 988 A.2d 478 (D.C. 2010).** Convictions for RSP and UUV do not merge because UUV requires proof that defendant "[took], use[d], operate[d], or remove[d] or cause[d] to be taken, used, operated, or removed, a motor vehicle," where RSP does not, and RSP requires proof that defendant "b[ought], receive[d], possess[ed], or obtain[ed] control" of stolen property "with [the] intent to deprive another of the right to use the property or a benefit of the property," where UUV does not.

***Timms v. United States*, 25 A.3d 29 (D.C. 2011).** Two PFCV convictions merge in case where, although defendant fired 12 shots directly at victim during their encounter, defendant did not have "opportunity to reflect" or to "reach a fork in the road" during commission of offense.

***Tornero v. United States*, 94 A.3d 1 (D.C. 2014).** ADW merges with AAWA.

***Vines v. United States*, 70 A.3d 1170 (D.C. 2013) (amended).** Two convictions for malicious destruction of property do not merge because each conviction was the result of a separate criminal act against a separate victim.

***Walden v. United States*, 19 A.3d 346 (D.C. 2011).** Two convictions for PFCV do not merge where defendant made separate "decision" to shoot one victim after forcing two individuals into stairwell of apartment building at gunpoint.

Convictions for conspiracy and first-degree murder not inconsistent where evidence allowed jury to find that defendant conspired with two individuals to assault victim and separately formed intent to kill that victim.

***Ward v. United States*, 55 A.3d 840 (D.C. 2012).** Multiple PFCV convictions do not merge where defendant separately aimed at and shot victims in different locations.

***West v. United States*, 100 A.3d 1076 (D.C. 2014).** Convictions for possession of PCP and possession of liquid PCP based on same vial of PCP recovered during search of vehicle merge.

***Whylie v. United States*, 98 A.3d 156 (D.C. 2014).** Two convictions for felony stalking based on more than 1500 calls made after a no-contact order was issued and during two different periods merge where all calls were made to complainant at her work place and no facts were established that "distinguished in any legally significant way" the calls that were made during those two periods.

B. Subsequent Increases in Sentence[19]

As a general matter, the Double Jeopardy Clause does not limit the court's power to impose a greater sentence after a successful appeal, so long as the defendant is given credit for time served under the original sentence. *See Bullington v. Missouri*, 451 U.S. 430, 442 (1981); *see also North Carolina v. Pearce*, 395 U.S. at 718-19.[20] The rationale is that when a defendant obtains a reversal on appeal, "the original conviction has been nullified and 'the slate wiped clean.'" *Bullington*, 451 U.S. at 442 (quoting *Pearce*, 395 U.S. at 721).[21]

Principles of double jeopardy bar government appeals of sentences unless clearly authorized by statute. *See United States v. DiFrancesco*, 449 U.S. 117, 132-39 (1980). There is no such statute in this jurisdiction. See D.C. Code § 23-104.

An initial sentence can be increased if necessary to ensure that it is lawful. *Bozza v. United States*, 330 U.S. 160, 166-67 (1947) (where statute required sentence of imprisonment and fine, double jeopardy did not preclude subsequent addition of fine to initial sentence of imprisonment); *cf. Phenis v. United States*, 909 A.2d 138 (D.C. 2006) (sentence inconsistent with controlling sentencing scheme is illegal and may be corrected, even if such correction imposes a stiffer sentence than originally imposed); *David v. United States*, 579 A.2d 1172 (D.C. 1990) (same). Whether a lawful sentence can be increased upon reconsideration is less clear, however. In general, "once a defendant begins serving a sentence, the sentence may not lawfully be increased." *Smith v. United States*, 687 A.2d 581, 583 (D.C. 1996) (citations omitted). Of course, the court may not impose a new sentence that exceeds the maximum sentence authorized by statute. In determining what is authorized by statute, the judge must take into account whatever punishment the defendant has already received. *See, e.g.*, *Ex parte Lange*, 85 U.S. 163 (defendant already paid fine, judge could not vacate original sentence and impose term of imprisonment, because statute permitted imposition of fine or imprisonment, but not both).

Sentence enhancement statutes have presented interesting Double Jeopardy claims in cases involving multiple convictions. The Double Jeopardy prohibition does not bar subsequent prosecution for conduct that served as the basis for sentence enhancement for an earlier conviction. *Witte v. United States*, 515 U.S. 389 (1995). The argument supporting this rule is that "sentencing enhancements do not punish a defendant for crimes of which he was not convicted, but rather increases his sentence because of the manner in which he committed the

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[19] The Double Jeopardy Clause does not prohibit subsequent *reductions* in sentence. *See United States v. Benz*, 282 U.S. 304, 307 (1931).

[20] There is an exception to this rule for sentencing schemes that use a fact-finder, as in some capital sentencing schemes. Principles of double jeopardy bar a subsequent increase, where the initial sentence rests on a determination that the government has failed to prove its entitlement to the greater sentence. *See, e.g.*, *Poland v. Arizona*, 476 U.S. 147, 155-57 (1986) (Double Jeopardy Clause prohibits imposition of death sentence after jury at original proceeding imposed life sentence); *Bullington*, 451 U.S. at 442 (same); *cf. Boswell v. United States*, 511 A.2d 29, 34-35 (D.C. 1986) (Double Jeopardy Clause not violated where trial court abruptly terminates sentencing proceeding without providing government an opportunity to offer evidence).

[21] The Due Process Clause limits the court's authority to increase a sentence. *See Pearce*, 395 U.S. at 723-24 (increased sentences may not be imposed to punish defendants for exercising their right to appeal; rebuttable presumption of vindictiveness established). *But see Alabama v. Smith*, 490 U.S. 794 (1989) (no presumption of vindictiveness where sentence imposed after trial is heavier than sentence imposed after previous guilty plea).

crime of conviction." *Watts*, 519 U.S. at 154 (citing *Witte*, 515 U.S. at 403). Nor does the Double Jeopardy Clause preclude retrial on a prior conviction allegation in a noncapital sentencing proceeding. *Monge v. California*, 524 U.S. 721 (1998).

As a general rule, an initial sentence in which a defendant has a legitimate expectation of finality cannot be increased. The defendant in *United States v. Fogel*, 829 F.2d 77 (D.C. Cir. 1987), for example, was originally sentenced to twelve months house arrest, a $5000 fine, $350 in restitution, and voluntary disbarment. After the defendant began serving his sentence, the judge realized that he had made a technical error. The court resentenced the defendant to three to nine years of imprisonment, suspended execution of that sentence, and placed the defendant on three years probation, with one year to be served under the Residential Intensive Probation Program. *Id*. at 80. The circuit court reversed on double jeopardy grounds, holding that the defendant had a legitimate expectation of finality in the original sentence. The court emphasized that the defendant had already begun serving the initial sentence, that there was no express statutory authorization for increasing the sentence, and that the increase was neither the result of any action on the defendant's part nor necessary to correct the technical defect in the original sentence. (The district court failed to announce that it was suspending imposition of the sentence before sentencing the defendant to probation, a defect that could have been corrected without increasing the severity of the sentence. *Id*. at 88.) *Smith v. United States*, 687 A.2d 581 (D.C. 1996), held that the defendant had a legitimate expectation of finality in his sentence despite the fact that it was the product of a mistake of fact. Unless the mistake goes to a court's very authority to order the original sentence, the trial court's mistaken belief about facts surrounding sentencing cannot serve as the basis for increasing a defendant's sentence. *Id*. On the other hand, the trial court may increase a sentence that has not begun to be served, where it is clear that there has been a mistake or oversight and to conform to the expressed original intent. *Francis v. United States*, 715 A.2d 894, 902 (D.C. 1998) (affirming upward modification of sentence to take into account presentence credit for time spent in halfway house where court expressly intended appellant to serve a term of imprisonment).

No legitimate finality expectation exists when a sentence is overturned based on a defendant's appeal. *See Pearce*, 395 U.S. at 720. Nor can there be any such expectation as to sentences imposed under statutory schemes that allow government appeals of sentences, *see DiFrancesco*, 449 U.S. at 139, in sentences that are unlawful, *see Bozza*, 330 U.S. at 165-67, or where the sentencing court lacks the authority to issue the sentence, *see Smith*, 687 A.2d 581. Finally, there is no legitimate expectation in the finality of a sentence of probation. After revocation of probation, a sentencing judge can execute a previously suspended sentence or, where imposition of sentence was suspended, impose any lawful sentence. *See Roberts v. United States*, 320 U.S. 264, 272-73 (1943).

CHAPTER 10

SENTENCING

"[S]entencing is a critical stage of a criminal trial; to a criminal defendant, perhaps the most important." *United States v. Hamid*, 531 A.2d 628, 643 (D.C. 1987). It "is the time at which for many defendants the most important service of the entire proceeding can be performed."[1]

> Effective legal representation at sentencing is critical to meeting society's urgent interest in reaching determinations that accurately and fairly build upon the past and honestly attempt to create hope for the future…
>
> The first essential element of effective assistance of counsel is counsel able and willing to advocate fearlessly and effectively…

United States v. Hurt, 543 F.2d 162, 167-68 (D.C. Cir. 1976).

Critical decisions such as whether to accept a plea offer depend heavily on potential exposure. Thus, advising clients throughout the case requires a thorough understanding of the potential sentence for each offense, including the statutory limits and all relevant enhancement, mandatory minimum, and credit provisions.

2014 Supplement

***Brocksmith v. United States*, 99 A.3d 690 (D.C. 2014)**. Regardless of whether legislative intent of D.C. Code § 22-1804a(a)(2) envisioned fifteen-year prison term, defendant not entitled to relief from fifteen-year sentence because he did not give court "one reason" to give him a more lenient sentence and suspend a portion of fifteen-year sentence where defendant was already on probation on three other cases at time crime was committed.

***Moten v. United States*, 81 A.3d 1274 (D.C. 2013)**. Trial judge did not err in sentencing defendant for solicitation of prostitution pursuant to D.C. Code § 22-2701 (2009 Supp.), despite the amendment not specifying a penalty for solicitation, where "unambiguous and explicit intent" expressed in legislative history was that penalties for solicitation of prostitution were to remain identical to penalties for engaging in prostitution in 2009 statute.

***James v. United States*, 59 A.3d 1233 (D.C. 2013)**. A mandatory minimum sentence of 30 years imposed upon a juvenile for a premeditated firstdegree execution-style murder of a twelve-year-old rival gang member does not violate the cruel and unusual punishment clause of the Eighth Amendment because the sentencing statute already takes the mitigating qualities of youth into account, limiting the minimum sentence to thirty years for offenders under the age of 18 at the time of their offense, as compared to life imprisonment without opportunity for release for adults.

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[1] *ABA Guidelines for Criminal Justice* (2d ed. 1980), 18-6.3(e) (Sentencing Alternatives and Procedures, Duties of Counsel).

***Ruffin v. United States*, 25 A.3d 1 (D.C. 2011)**. Exception clause of D.C. Code § 48-904.01(a)(2)(B), which limits sentence for marijuana distribution to 180 days in absence of prior conviction, inapplicable regardless of whether prior conviction classified as felony or misdemeanor.

I. THE SENTENCING PROCESS

A. Judicial Discretion in Sentencing

For most offenses, the sentencing court has broad discretion. As a fundamental sentencing principle, "a judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come." *United States v. Tucker*, 404 U.S. 443, 446 (1972); Fed. Rule Crim. Proc. 32; *see also Coles v. United States*, 682 A.2d 167 (D.C. 1996) (sentencing judge has discretion to limit leniency to defendant who refused probation interview and had record of prior convictions). However, the sentencing decision must rest on "reliable information and appropriate considerations." *Grant v. United States*, 509 A.2d 1147, 1155 (D.C. 1986). A sentence that rests on "improper or inaccurate" information or allegations that are "materially untrue" violates due process. *Dorszynski v. United States*, 418 U.S. 424, 431 n.7 (1974); *Townsend v. Burke*, 334 U.S. 736, 741 (1948); *see United States v. Campbell*, 684 F.2d 141, 152-53 (D.C. Cir. 1982).

So long as the information is sufficiently reliable, it need not have been the subject of a charged offense. *See Powers v. United States*, 588 A.2d 1166 (D.C. 1991) (uncharged robbery to which evidence sufficiently linked defendant, where uncharged incident was small part of totality of circumstances considered). The information need not have been introduced at trial nor even be admissible at trial. *See Williams v. United States*, 427 A.2d 901, 904 (D.C. 1980); *Caldwell v. United States*, 595 A.2d 961, 966 (D.C. 1991). Similarly, the defense can make affirmative use of the latitude allowed at sentencing when investigation uncovers mitigating information that could not be used at trial.

The sentencing court may consider hearsay information; however, the court need not consider all hearsay information provided to it. *United States v. Bass*, 535 F.2d 110, 120 (D.C. Cir. 1976) (citing *Williams v. New York*, 337 U.S. 241 (1949)). Due process requires that the judge "may not rely on mistaken information or baseless assumptions and must instead rely only on *reliable* evidence." *Wallace v. United States*, 936 A.2d 757, 780 (D.C. 2007) (emphasis in original) (internal quotations omitted); *see also Scott v. United States*, 419 F.2d 264, 266 (D.C. Cir. 1969). While the court should not place on the defendant the burden of bringing forth evidence or information to rebut hearsay, particularly hearsay from anonymous sources, the court can rely on hearsay that has indicia of reliability and can consider the absence of a denial of the hearsay by the defendant as indicia of reliability. *United States v. Weston*, 448 F.2d 626 (9th Cir. 1971) (remanding for resentencing where sentencing judge had relied on information of serious criminal conduct alleged by unidentified law enforcement officer and an anonymous informant but defendant had denied the allegations); *see also Caldwell v. United States*, 595 A.2d 961 (D.C. 1991) (sentence affirmed where judge relied on hearsay about criminal conduct but

defendant did not rebut or even deny the conduct); *United States v. Bass*, 535 F.2d 110 (D.C. Cir. 1976).

PRACTICE TIP:

Defense counsel should prepare to show the unreliability or falsity of harmful hearsay in written submissions, including the presentence report. If the government presents information of questionable reliability during oral allocution, counsel should consider whether to risk highlighting any support for the claim by calling on the government to disclose whether and how the claim has been verified. *See, e.g.*, *United States v. Needles*, 472 F.2d 652, 658 (2d Cir. 1973); *United States ex rel. Brown v. Rundle*, 417 F.2d 282, 285 (3d Cir. 1969) (favoring requirement of in-court substantiation of disputed allegations made by prosecutor or probation officer). The defense may request a continuance for investigation, but this course runs the risk of revealing no information to rebut the government's claim. *See Caldwell*, 595 A.2d at 967.

The court may consider information that may not be used in other contexts – for example, Youth Act convictions that have been set aside. In *Barnes v. United States*, 529 A.2d 284, 287-89 (D.C. 1987), the court held that rehabilitative purpose of set-aside provision seemed "somewhat hollow" once defendant has acquired new conviction and that one "legitimate" official purpose for which Youth Act records remain viable is to give subsequent sentencing court an accurate account of criminal history. The changes to the Youth Act statute, D.C. Code § 24-906, effective August 5, 2000, explicitly allow the use of set-aside convictions for "determining an appropriate sentence if the person is subsequently convicted of another crime" and for determining second or subsequent convictions for purposes of enhancement. Statements to the presentence report writer, which would be inadmissible on guilt at a retrial, may be considered at sentencing. *Butler v. United States*, 379 A.2d 948, 950-51 (D.C. 1977) (defendant admitted having been intermediary in drug transactions).

The sentencing court may consider conduct for which the defendant was acquitted at trial; however, the court "may not base the sentence on misinformation of a constitutional magnitude." *Greene v. United States*, 571 A.2d 218, 220-21 (D.C. 1990) (affirming sentence based on evidence that sentencing court had "attempted to view the evidence from the jury's perspective, giving effect to the entire jury verdict"). Courts have reasoned that an acquittal does not prove the defendant's innocence, merely the absence of proof beyond a reasonable doubt of the defendant's guilt. *See United States v. Watts*, 519 U.S. 148, 155 (1997); *United States v. Campbell*, 684 F.2d 141, 152 (D.C. Cir. 1982); *United States v. Boney*, 977 F.2d 624, 636 (D.C. Cir. 1992). However, due process requires that the conduct have been proved at least by a preponderance of the evidence. *Watts*, 519 U.S. at 157; *Boney*, 977 F.2d at 636. In *Watts*, the Supreme Court acknowledged that the circuits diverge on the question of whether clear and convincing evidence of acquitted conduct, as opposed to just a preponderance, is required before the judge can "dramatically increase the sentence." *Watts*, 519 U.S. at 156. However, *Watts* is in the federal context interpreting federal statutes and the federal sentencing guidelines system. **If faced with a court that is relying on acquitted conduct, counsel may still want to argue**

that clear and convincing evidence of the conduct is appropriate but counsel should research and be aware of the limitations on the analogy to *Watts* and the federal system.
The court may consider its conclusion that the defendant lied while testifying at trial. *United States v. Grayson*, 438 U.S. 41, 55 (1978) (testimony included "willful and material falsehoods"). Counsel should remain alert to possible burdens such sentencing considerations place on the defendant's constitutional right to testify. The fact that a defendant testified but was nevertheless convicted is not enough. *Cf. United States v. Montague*, 40 F.3d 1251, 1254 (D.C. Cir. 1994) (in the federal system, the court must find the applicability of the guideline perjury enhancement by clear and convincing evidence).

The defendant retains his Fifth Amendment privilege against self-incrimination at sentencing regardless of whether the conviction resulted from a guilty plea or a trial. *See Mitchell v. United States*, 526 U.S. 314 (1999) (defendant did not waive right to remain silent at sentencing by pleading guilty; error for trial judge to hold silence at sentencing against defendant); *Williams v. United States*, 293 A.2d 484, 486-87 (D.C. 1972) ("egregious" error for sentencing judge to ask the defendant, who had been convicted after trial, to disclose the source of his narcotics; privilege still applied because defendant, who still had the options of a motion for a new trial, appeal, certiorari and collateral attack, "had not been finally and irrevocably adjudged guilty"). *See also, Estelle v. Smith*, 451 U.S. 454 (1981) (privilege violated when statements made during a pretrial psychological examination were used against the defendant at a death penalty hearing; the defendant had not been warned before the interview of his right to remain silent or that any statement he made could be used against him at sentencing); *White v. United States*, 451 A.2d 848, 851 (D.C. 1982) (absent such warning, statements at pretrial psychiatric examination cannot be used at sentencing hearing); *Boswell v. United States*, 511 A.2d 29, 32 (D.C. 1986) (the defendant cannot be compelled to make statements that could be used to determine whether prior convictions exist that would trigger enhanced penalties, or penalized for refusing to provide information about prior convictions).
In very unusual circumstances, however, the court may consider refusal to cooperate in the continuing investigation of a crime to which the defendant is linked. *Roberts v. United States*, 445 U.S. 552 (1980). *Roberts*, however, was "careful to note the absence of any reason for the defendant's refusal to cooperate" and that the defendant never claimed that he was "unable" to assist the government. *United States v. Lemon*, 723 F.2d 922, 936 (D.C. Cir. 1983). *Roberts* also cautioned that "legitimate fears of physical retaliation and self-incrimination" merit "serious consideration" if timely asserted before the sentencing court. 445 U.S. at 559.

United States v. Lemon demonstrates the need to watch for constitutional issues beyond due process. *Lemon* vacated a sentence and remanded for resentencing because the sentencing judge relied on allegations that the defendant belonged to a religious group connected to illegal activities. The appellate court found insufficient reliable evidence to support the assumption that the defendant intended to assist in the group's illegal activities. Furthermore, reliance on the defendant's alleged religious affiliation infringed his First Amendment rights. 723 F.2d at 942.

It is also imperative that the sentencing judge adhere to the Code for Judicial Conduct which provides that a "judge should not allow family, social, or other relationships to influence judicial conduct or judgment." In *Gibson v. United States*, 792 A.2d 1059 (D.C. 2002), the Court of Appeals held that the trial judge's remarks at sentencing created an appearance of bias and

vacated the sentence. Before imposing the maximum sentence on Gibson, the judge referred to the murder of his grandfather, the lifetime of pain it caused his mother, and the fact that "the life of a black man was thought to be not worth anything, and therefore, nobody was ever punished." *Id*. at 1065. Similarly, the Code of Judicial Conduct provides that a "judge shall perform judicial duties without bias or prejudice …[and] shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon . . . national origin . . . ." *Mejia v. United States*, 916 A.2d 900, 902 (D.C. 2007) (reversing conviction and remanding for new trial where judge, after a bench trial, made pre-sentencing comments relating to the defendant's national origin and the practice of marriage of young teenaged girls which could lead an objective observer to doubt the judge's impartiality).

Counsel should also be alert to any indication that the court has considered an *ex parte* communication. *See Belton v. United States*, 581 A.2d 1205, 1211-15 (D.C. 1990) (trial court violated ethical obligations by appearing to rely on *ex parte* communications in sentencing determination). Applying Canon 3(A)(4) and 3(C)(1) of the Code of Judicial Conduct, *Foster v. United States*, 615 A.2d 213 (D.C. 1992), found error in a sentencing judge initiating *ex parte* communications with the Parole Board concerning its recommendation on Youth Act sentencing, but found no prejudice because the record did not suggest that the judge's initiation of the communication either biased the judge's opinion or caused the judge to receive information that appellant had no opportunity to challenge. *Cf. In re W.T.L.*, 656 A.2d 1123, 1128-30 (D.C. 1995) (court learned of information inadvertently, appellant was not denied opportunity to challenge it, and it did not appear to have affected court's decision).

Finally, in extreme situations, a sentence may implicate the Eighth Amendment prohibition against cruel and unusual punishment. *Solem v. Helm*, 463 U.S. 277 (1983), concluded that a sentence of life without parole under a recidivist statute was significantly disproportionate to the minor offenses in question, contrary to the Eighth Amendment. In *One 1995 Toyota Pick-Up Truck v. District of Columbia*, 718 A.2d 558 (D.C. 1998), civil forfeiture of a truck valued at $15,500, under the Safe Streets Forfeiture Act following a guilty plea to sexual solicitation, violated the excessive fines clause of the Eight Amendment. *See also Greene v. United States*, 571 A.2d 218, 222 (D.C. 1990). *Cf. Harmelin v. Michigan*, 501 U.S. 957 (1991) (upholding life without parole for possession of large amount of cocaine); *Johnson v. United States*, 611 A.2d 41, 43 (D.C. 1992) (four-year mandatory minimum sentence for distribution of controlled substance is not cruel and unusual punishment). *But see Caldwell*, 595 A.2d at 968-72 (remanding for resentencing on contempt charge, where sentence exceeded sentence for criminal conduct underlying finding of contempt); *Moore v. United States*, 608 A.2d 144, 146-47 (D.C. 1992) (Schwelb, J., concurring, expressing "grave reservations" about constitutionality of 48-year minimum sentence had it rested only on episodes of consensual sex with 15-year-old girl, but not where sentencing court also relied on "indefensible conduct with several other girls").

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***Graure v. United States*, 18 A.3d 743 (D.C. 2011).** Sentence of 368 months for multiple convictions of AWIKWA, ADW, mayhem while armed, second-degree burglary, arson and felony destruction of property did not constitute penalty against defendant for exercising his right to trial where sentence was reflection of trial judge's determination that defendant continued at

sentencing to blame others for his setting fire to club and to fail to acknowledge grave injuries club employee had sustained in fire.

***Johnson v. United States,* 26 A.3d 758 (D.C. 2011).** No abuse of discretion to balance rather than accommodate all three subsections of D.C. Code § 24-403.01(a) in sending defendant to adult prison rather than treatment facility where defendant's severe emotional and intellectual disabilities were outweighed by the dangerousness, brutality and number of his offenses.

***Lindsey v. United States,* 84 A.3d 50 (D.C. 2014).** See, *supra,* Chapter 6.II.A.

***Peterson v. United States,* 997 A.2d 682 (D.C. 2010).** No error to impose mandatory minimum sentence of seven years for unarmed carjacking instead of lesser sentence under Youth Act where defendant explicitly agreed as part of plea deal not to seek the Youth Act and where carjacking statute provided no alternative sentencing options to the mandatory minimum.

***Thorne v. United States,* 46 A.3d 1085 (D.C. 2012).** *Pearce* violation where trial judge sentenced defendant more severely because he exercised his Sixth Amendment right to confront the government chemist at trial.

***Williams v. United States,* 33 A.3d 358 (D.C. 2011).** Under the plain meaning of the gun offender statute, D.C. Code §§ 7-2508.04(a) and (c), the entry of an order certifying a defendant as a gun offender is mandatory and not discretionary, and trial court's failure to apprise defendant at sentencing of his duties as a gun offender did not change mandatory nature of requirement.

***United States v. Jones,* 744 F.3d 1362 (D.C. Cir. 2014).** Sentencing based on facts found by the judge, as opposed to the jury, does not violate the Sixth Amendment right to trial by jury provided the acquitted conduct relied upon is established by a preponderance of the evidence and the sentence imposed does not exceed the statutory maximum for the resulting jury conviction. The sentencing practice is permissible even when consideration of the acquitted conduct multiplies a defendant's sentence severalfold. *See Rita v. United States*, 551 U.S. 338, 352 (2007) ("This Court's Sixth Amendment cases do not automatically forbid a sentencing court to take account of factual matters not determined by a jury and to increase the sentence in consequence.").

B. The Presentence Investigation

The Court Services and Offender Supervision Agency (CSOSA) gathers information in a presentence investigation (PSI), and submits its report to the court. A PSI must be ordered in every case (except traffic cases) unless the court finds, on the record, that it has enough information to sentence without a report. Super. Ct. Crim. R. 32(b); *Wilson v. United States*, 278 A.2d 461 (D.C. 1971); *see also Williams*, 293 A.2d at 487 (trial court erroneously refused to order report). Because guideline calculations have to be done in every felony case, a judge is likely to order CSOSA to complete at least that part of the PSI report. If a PSI report was done in connection with another case recently enough that pertinent information on the client's background and current community ties would still be current, the judge might choose not to

order the rest of the PSI report. Because the guidelines are voluntary, it is possible for the judge to forego ordering even the guidelines calculations section of the PSI report. Counsel might advise a client to waive the investigation and report pursuant to Super. Ct. R. 32(b)(1) if the defendant is charged with a misdemeanor offense, has no record, and stands a very good chance of being placed on probation. A waiver saves the defendant an extra meeting with the probation officer and another trip to court, and allows probation to begin immediately. On the other hand, the client assumes the risk that the court will not act as predicted. Thus counsel should not advise a client to waive the report unless a sentence of probation or "time served" is virtually assured. In any case, the court can order an investigation and report despite the defendant's request to waive that part of the process.

The PSI must include any prior criminal record, and information about the defendant's "characteristics, financial condition[,] and the circumstances affecting the defendant's behavior." Rule 32(b)(2). The reports follow a standard format, covering criminal history (arrests and convictions), family background, employment and military history, substance abuse, and the facts of the current offense.

If a PSI is ordered and the client is on release, the client will be asked to sign a form giving notice of his next court date – the sentencing hearing. This form will also instruct the client where he is to report immediately upon leaving court in order to begin the PSI process. Counsel should accompany the client to this first meeting. It is imperative that the client appears promptly for all appointments. If the defendant is held pending sentencing, CSOSA will conduct the interview at the jail, either in person or over a closed-circuit television system.

Counsel can call CSOSA to find out which officer from the "diagnostic" unit is the PSI writer for the case. The writers generally begin with a review of the probation department's own records, including previous PSIs and supervision files, and court records on pending and previous cases. The writer then interviews the defendant, and seeks verifying sources, such as family and employer telephone numbers. The PSI writer may contact family members, and will contact the prosecutor or review prosecution files.

PRACTICE TIP:

Defense counsel should take the initiative and contact the PSI writer. Most PSI writers will either not contact defense counsel at all or will make only one effort to speak with defense counsel. Defense counsel can offer to assist in connecting the report writer with the client. Particularly in situations where defense counsel knows that the contact information in the bail sheet is inaccurate or out-of-date, assisting the report writer will put defense counsel and the client on better footing with the writer and will make the writer's job easier.

The report writers work under tight deadlines and will likely appreciate any real assistance offered. In addition to offering updated contact information, defense counsel can offer mitigating or sympathetic information about the client that will aid in the report writer's understanding of the client and/or the case. It will be more persuasive to the judge to read any

mitigating facts about the client in the PSI report than merely to hear them from defense counsel at the sentencing hearing. Getting the PSI writer to include some mitigating or favorable information in the report could accomplish more at the sentencing than great advocacy from defense counsel alone. Finally, counsel will want to speak with the PSI report writer about the client's criminal history score if the client is to be sentenced on a felony (under DC's voluntary sentencing guidelines), particularly if counsel has information that previous criminal history, either in the bail sheet or in a previous PSI report, was reported inaccurately.

It is particularly important for defense counsel to contact the PSI report writer if the client has pled guilty as a result of a plea offer and the government's proffer was modified as part of the plea agreement. The PSI writer will likely use the narrative of the crime as reported in the PD 163. If your client has pled guilty to a different or modified set of events, then make every effort to have that version of events be the only version reported in the PSI report. Not only do you want the judge to read the same event facts in the PSI report that the judge heard at the plea hearing, but the event described in the PSI report is the only version of the event that the Bureau of Prisons, who will decide your client's security classification, and the U.S. Parole Commission, who might have to decide in the future whether to revoke your client's supervised release, will ever see. In addition, if your client is convicted of another charge in the future, his criminal history score (under DC's voluntary sentencing guidelines) may depend on how the events for which he was convicted were described in the PSI report. For all of these reasons, it is important to be mindful of how the crime is described in the PSI report and it is defense counsel's responsibility to ensure that the event reported is consistent with the guilty plea.

PRACTICE TIP:

One way to provide the PSI writer with the narrative is to email the proffer to the writer while cc-ing the prosecutor assigned to the case.

Counsel must alert the client to the details of the PSI process, and prepare the client to avoid common mistakes. While seemingly trivial, clients should be reminded to appear promptly for all appointments. Defense counsel should explain to the client that the report writer is unlikely to recommend probation for an individual who gives the appearance of being unable to keep appointments. Speaking with the PSI writer is tantamount to speaking directly with the judge. Information provided by the client will be verified through any available source, including court records. The report writer will ask questions about the "defendant's version" of the case, and report it either verbatim or with editorial comment. A defendant who pled guilty, but reports to the probation officer a version inconsistent with the account at the plea hearing, risks a challenge from the court and possible vacation of the plea.[2] To avoid these problems, the

[2] This course may be based on a concern that the plea was not completely voluntary. At the very least, the court will be unimpressed by the defendant's unwillingness to acknowledge guilt after electing to plead. Some judges place the defendant under oath at the time of the plea, which may lead to a perjury charge if the versions offered to the judge and the probation officer are inconsistent. A conflict between the plea version and the PSI account may also

client should understand the importance of being as candid with the PSI report writer as the client was with the judge at the plea proceeding.

If the conviction follows a trial, counsel and the client must make a tactical decision about whether to discuss the case with the PSI report writer. Upon any retrial, admission of the defendant's statements to CSOSA during the presentence investigation would constitute "error of the clearest kind." *Gregg v. United States*, 394 U.S. 489, 492 (1969), quoted in *Warren v. United States*, 436 A.2d 821, 841 (D.C. 1981). However, a court may one day conceivably find such statements admissible to impeach or rebut the defendant's testimony at a retrial. If the possibility of retrial is minimal, the client may choose to seek whatever sentencing benefits can be gained from acknowledging guilt as a step toward rehabilitation. Of course, statements contradicting the client's own testimony at trial may carry the further implication of perjury.

Because the PSI plays a critical role in both the immediate sentencing decision and later decisions by the USPC, counsel should contact the PSI report writer promptly to offer information balancing the point of view represented by the court files and the prosecutor. Counsel can provide much needed assistance by supplying background information about the client or the case, suggesting further contacts for verification, and relating any referrals counsel has made for the client. Such information may help the report writer see the client as a good candidate for community supervision. Counsel can also alert the report writer to errors in the court records or previous reports, and correct factual inaccuracies before they appear in the current report. Counsel should pay particular attention to the accuracy of prior convictions and their corresponding dispositions from other jurisdictions as such information will matter greatly to the guidelines calculations (for felonies) and will likely matter to the sentencing judge in all cases – reports of such conviction information from other jurisdictions are notoriously unreliable.

The court may disclose the PSI (in whole or in part) to the defense and the government, but cannot disclose it to one and not the other. D.C. Code § 23-103(a); Rule 32(b)(3)(B), (c). Most judges give each party a copy. If a copy is not provided, the court must permit the defendant or counsel to review the report on request, unless disclosure of information in the report would result in harm to the defendant (e.g., a diagnostic opinion that would disrupt rehabilitation) or others (e.g., confidential sources). Rule 32(b)(3)(A). The court must provide a summary of any factual information it has withheld and on which it relies, and give the defense an opportunity to comment thereon. Rule 32(b)(3)(B).

PRACTICE TIP:

Counsel should ask that the court order production of the report several days before the sentencing date so that counsel can review it, discuss it with the client, and prepare a responsive allocution. Counsel should contact chambers to request a copy of the report, which will not be placed in the court jacket but will be sent to the chambers of the sentencing judge. If the report arrives in chambers late, counsel should not hesitate to seek a brief continuance rather than proceed on a cursory reading of the report.

these possibilities.

When the court believes a report is inadequate, it can conduct an evidentiary hearing to develop additional relevant information. *Warren v. United States*, 310 A.2d 228 (D.C. 1973); *cf. Holt v. United States*, 486 A.2d 705, 708 (D.C. 1985) (PSI prepared for misdemeanor case, two months before felony sentencing, not inadequate where it complied with Rule 32 and sentencing judge presided at trial). The court may also permit the defendant to introduce evidence ''relating to any alleged factual inaccuracy'' in the PSI. Rule 32(c)(1).

Indeed, counsel must seek to correct any errors in the report – on the record – before sentence is imposed, to ensure that the sentence rests on accurate information. Counsel should also ensure that the report itself is corrected and that corrected copies are forwarded to CSOSA, which will rely on this report in the event it must prepare other reports for this client in the future, and the DOC and BOP, which will calculate the security classification of the client based on the information in the report. Uncorrected errors will reappear in subsequent reports, which often merely restate background information. Furthermore, the USPC relies on the presentence report for information about the client and the crime for which he was convicted when determining whether to revoke supervised release and how much revocation time to impose. It may be very difficult to prove and correct the error years later when the defendant might face revocation or sentencing on a new charge.

C. The Defense

Counsel's understanding of sentencing practices informs the handling of the case from the day of appointment. While initiating the attorney-client relationship by detailing the likely sentencing options may be counter-productive, even the client who steadfastly maintains innocence and an intention to go to trial must be kept informed about the "exposure" that is risked. A full explanation of sentencing alternatives should be a major part of any discussion of a plea offer. Although it is possible in this jurisdiction to bargain for a specific sentence, binding on the court, this is rarely an option[3]; thus, the primary purpose of most plea bargains is to reduce exposure to incarceration. After a conviction, whether by plea or trial, counsel must continue to advise the client about sentencing alternatives. *See Gaston v. United States*, 535 A.2d 893, 898-99 (D.C. 1988) (ineffective assistance in failing to advise defendant of mandatory minimum sentence).

The ABA prescribes minimum duties for counsel in preparing for sentencing. Defense counsel must:

- become familiar with all available sentencing alternatives, including the practical consequences of each, and with community or other facilities that may be of assistance in devising an appropriate sentencing plan;

- investigate the particular judge's sentencing practices;

[3] *See* Super. Ct. Crim. R. 11(e)(1)(C). The Superior Court Criminal Rules have been modified to allow for sentencing bargaining binding on the court. The United States Attorney's Office rarely offers this type of plea, however.

- fully explain to the client the "consequences of the various dispositions available," as well as "the nature of the presentence investigation process, [] in particular the significance of statements made by the accused" during that investigation;

- seek to verify all information contained in the presentence report, and "be prepared to supplement or challenge it if necessary";

- "present to the court any ground which will assist in reaching a proper disposition favorable to the accused," including any favorable information not contained in the presentence report;

- "in an appropriate case be prepared to suggest a program of rehabilitation based on the lawyer's exploration of employment, educational and other opportunities made available by community services"; and

- "alert the accused to the right of allocution . . . and to the possible dangers of making a statement that might tend to prejudice an appeal."

ABA Standards for Criminal Justice, 4-8.1 (The Defense Function) (3d ed. 1993). Useful discussions of counsel's responsibilities at sentencing (including discussion of the ABA Standards) may be found in *Oesby v. United States*, 398 A.2d 1, 6-7 (D.C. 1979); *United States v. Green*, 680 F.2d 183 at 191-205 (D.C. Cir. 1982) (Bazelon, J., dissenting); and *United States v. Pinkney*, 551 F.2d 1241, 1248-51 (D.C. Cir. 1976).

Counsel should begin preparing for allocution well before the sentencing hearing. Indeed, counsel can often initiate therapeutic or diagnostic referrals before the case has even been resolved by plea or trial.[4] A client with an established record of success in a drug treatment program, for instance, stands out from the crowd of defendants who promise to abstain from drug use as a good prospect for probation.

In devising an individually tailored rehabilitative program, counsel may consult with the Offender Rehabilitation Division of PDS (ORD). Through "Duty Day" staffing, ORD provides daily weekday consultations to PDS and CJA attorneys. Counsel should call the main PDS phone number (202-628-1200) and request the ORD staff person on duty. Typical consultations include sentencing recommendation assessments and referrals to substance abuse and other mental health treatment, employment and vocational training, medical care, and community service placements and referrals to contract mental health experts (e.g. psychologists, psychiatrists). ORD also provides Youth Rehabilitation Act Studies in lieu of the client's detention or confinement by the court for such evaluative purposes; ORD Youth Act Studies are the options for those in halfway houses and in the community. Assigned counsel is responsible to ensure all payments to contract experts through the courts. ORD may work with assigned

[4] When making pre-conviction referrals for treatment or evaluation, counsel should be aware of limitations on, and waivers of, the physician-patient privilege, particularly in instances such as therapy for certain sex offenders which require detailed accounts of the offender's history.

counsel to prepare an individualized sentencing plan. For further information, visit the Offender Rehabilitation tab on the www.pdsdc.org website or call ORD (202) 628-1200. Except for a Duty Day call ORD services are only provided in cases that are not in conflict with PDS representation. Counsel, of course, remains responsible for written and oral allocution, and should not delegate legal obligations to ORD or any other assistant. If the CJA case is a conflict with a PDS case, ORD will not be able to provide a report at sentencing nor prepare a Youth Act Study. However, the CJA attorney may still contact the Chief of ORD, who may be able to provide a referral for these services.

Counsel may also seek other court resources for expert assistance at sentencing. Judges and probation officers can use psychologists and psychiatrists "to assist them in carrying out their duties." D.C. Code § 24-306. With a court order, a mental examination to provide information for sentencing can be performed by Forensic Legal Services (879-1032). Failure to grant a requested psychiatric exam may be an abuse of discretion, particularly if there is a question about competence. *See Leach v. United States*, 334 F.2d 945, 948-51 (D.C. Cir. 1964) (mental examinations can be ordered under § 24-306 or § 24-501(a), relating to competence determinations).

Both counsel and the defendant must be permitted to speak, or "allocute," before sentencing:

> The court also prior to imposing sentence shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.

D.C. Code § 23-103(a); *see* Super. Ct. Crim. R. 32(c)(1); *Warrick v. United States*, 551 A.2d 1332 (D.C. 1988); *Fletcher v. United States*, 524 A.2d 40, 41 n.1 (D.C. 1987); *Grant*, 509 A.2d at 1156 n.16.

In virtually every case, counsel's allocution should begin before the hearing, in the form of a letter or memorandum in aid of sentencing.[5] At a minimum, the written allocution should include relevant social information to support the requested sentence. A letter can address important sentencing issues thoughtfully and comprehensively, meet specific issues directly, anticipate and defuse the government's likely arguments, address the basic purposes of sentencing – punishment and rehabilitation of the offender, protection of the community, and general and specific deterrence – and suggest and analyze sentencing alternatives. It can respond, clarify or correct information presented in the PSI, which should be reviewed before final preparation of the written allocution. Finally, the written allocution can present the client's most sympathetic personal traits and distinguish this client from the many who appear before the court with similar charges.

[5] Whether counsel delivers a letter to chambers or files a memorandum with the Clerk's office and delivers a courtesy copy, counsel must be sure to serve copies on the prosecution so as to avoid *ex parte* contacts with the court. "Such information as [either party] may present shall at all times be subject to the applicable rules of mutual discovery." D.C. Code § 23-103(a); *see Grant*, 509 A.2d at 1155 n.12; *Quarles v. United States*, 349 A.2d 690, 693-94 (D.C. 1975).

Family and community members – teachers, clergy, and employers – can assist the court in arriving at a more complete picture of the client. Because the court is not required to allow such testimony, counsel should anticipate presenting it through a proffer or letters. Letters may be submitted directly to the court or through counsel. Having the letters submitted to counsel may be more helpful, as counsel can glean useful information that may be buried and go unnoticed by the court, and tie together any common themes. The letters should reveal that the writer is aware of the conviction and is nonetheless willing to vouch for the defendant. Even if family and supporters do not allocute orally, their presence in court may be helpful.

The defendant must be present at the hearing and have the opportunity to speak, customarily after counsel.[6] Counsel and the client should prepare carefully to make succinct, realistic statements. Both should avoid clichés and minimization of the offense. Counsel should inform the client of his opportunity to speak so that the client can prepare. Because the client may be very nervous about addressing the court and particularly about speaking extemporaneously, counsel might suggest that client write a statement that client could read to the judge. (If client has literacy problems, counsel should offer to "take dictation" and/or read the client's statement if necessary and desired.) Counsel, of course, bears the responsibility of presenting the client in the most favorable light; the client's own statement should be used as a brief chance to connect directly with the court. "[C]ounsel 'is often better able than defendant himself to bring before the court statements concerning defendant, his prior record, his family, his environment, and facts germane to the mitigation of his punishment.'" *O'Dell v. United States*, 221 A.2d 443, 444 (D.C. 1966) (citation omitted).[7]

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***Elhalaby v. United States*, 999 A.2d 912 (D.C. 2010).** Rule 32(c)(1) requiring court to provide defendant an opportunity to allocute at original sentencing did not apply to defendant's probation revocation hearing where sentence imposed was a modification of original sentence and not a new sentence entirely, and thus trial court did not plainly err in failing to invite defendant to allocute at his probation revocation hearing.

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[6] These fundamental rights flow from the Due Process Clause, and ordinarily pose no issue in superior court. In *Warrick*, however, the trial court imposed a new sentence after remand from the court of appeals ordering it to vacate one burglary conviction (based on intent to assault) and reinstate another (based on intent to steal). It carried out these instructions by completing the paperwork in chambers, without convening a hearing. The court of appeals held that the resentencing was not merely a "housekeeping" chore because Warrick had "never previously been sentenced on the count that 'stuck'," which was arguably less serious than the original, and the right to point this out was a "meaningful one" that required the defendant's presence. 551 A.2d at 1334-35. There is no due process right to presence or allocution where correction of sentence would not affect the total time to be served, *Bennett v. United States*, 620 A.2d 1342, 1345-46 (D.C. 1993), or where a previously imposed sentence takes effect upon revocation of probation, *Applewhite v. United States*, 614 A.2d 888, 891 (D.C. 1992); *see also Mooney v. United States*, 938 A.2d 710 (D.C. 2007) (not an abuse of discretion not to have defendant present at resentencing hearing to correct illegal sentence where trial judge had no discretion other than to impose a mandatory minimum sentence for felony murder).

[7] *United States v. Hamid*, 531 A.2d 628 (D.C. 1987), ruled that the court's lack of knowledge about certain key facts may allow later resentencing. The trial court had found that the defendant and counsel were under duress at the time of sentencing and therefore unable to present mitigating facts, and granted the extreme writ of error *coram nobis*. The facts of *Hamid* were unique; counsel cannot rely on such a collateral attack, but must present mitigation at the initial sentencing.

D. The Prosecution

1. The Government's Allocution

The government is also entitled to allocute. D.C. Code § 23-103(a); Super. Ct. Crim. R. 32(c)(1); *Quarles*, 349 A.2d at 694 (right is not conditioned on exercise of defendant's right). An agreement not to allocute at sentencing, as part of a bargain, will be strictly enforced. *Santobello v. New York*, 404 U.S. 257 (1971). Agreements that fall short of a full waiver of allocution – such as an agreement not to oppose a specific sentence or a term of probation with certain conditions – should be drawn carefully and stated on the record when the plea is taken. If the government fails to abide scrupulously by such an agreement, the defendant is entitled either to withdraw the plea or to be sentenced by a different judge. *Id.* at 262-63; *White v. United States*, 425 A.2d 616, 620 (D.C. 1980); *cf. Braxton v. United States*, 328 A.2d 385, 387-88 (D.C. 1974) (promise to waive allocution at initial sentencing does not implicitly waive allocution on motion to reduce sentence).

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***Clark v. United States*, 51 A.3d 1266 (D.C. 2012).** See, *supra*, Chapter 6.I.B.

2. The Victim Impact Statement

Victims have the "right" to submit a written victim impact statements prior to the imposition of sentence. D.C. Code § 23-1904(b). The statements may contain information concerning "any emotional, psychological, financial, or physical harm done to or loss suffered by the victim." D.C. Code § 23-1904(b). *But see Collins v. United States*, 631 A.2d 48, 50-51 (D.C. 1993) (statute does not limit information sentencing court can consider). The court "shall" consider any written victim impact statement submitted in accordance with D.C. Code § 23-1904 and the impact statement must be included in the pre-sentence report. *See* D.C. Code § 23-1904(c). In addition to filing a written statement, a crime victim has the "right" to make a statement at the defendant's sentencing; however the absence from the sentencing of the victim does not preclude the court from proceeding with the hearing. D.C. Code § 23-1904(e). A "victim" is any "individual who or entity which has suffered direct physical, emotional or pecuniary harm" as a result of or while trying to prevent any felony or violent misdemeanor, while helping another victim, or while helping to capture a perpetrator or prevent the commission of a crime. § 23-1905(2)(A). D.C. Code § 23-1904(d) also grants victims the right to attend parole, post-conviction and record-sealing hearings. The victim may submit in writing an opinion on whether parole should be granted and may make a statement at the defendant's record-sealing hearing. D.C. Code § 23-1904(e).

II. SENTENCING PROVISIONS

A. Introduction – Changes In Sentencing Laws

As of August 5th, 2000, parole was abolished in the District of Columbia.[8] All offenses committed on or after August 5, 2000 are subject to the determinate sentencing system.[9] Because of the Ex Post Facto Clause of the U.S. Constitution, parole cannot be abolished retroactively. Thus, all offenses committed before midnight August 5, 2000 are still subject to the indeterminate (parole-based) system. While the overwhelming majority of cases currently in the system are for offenses allegedly committed after August 5, 2000, this chapter will explain the basic mechanics of both the indeterminate and determinate systems. Counsel should have familiarity with the indeterminate system because aspects of the determinate system were crafted with specific reference to the indeterminate system. Also, it may be the system with which their older clients are familiar. Clients may be on parole or have convictions from the indeterminate system and counsel may need to read and understand records and references to such older sentences. Counsel may also have an opportunity to work on an old case on remand or after reversal by the D.C. Court of Appeals.

B. Felony Cases

1. Indeterminate Sentencing

Indeterminate sentencing for felonies in D.C. specified a minimum and a maximum sentence, and allowed the USPC to determine when, within that range, to release the prisoner. The minimum term may be any period up to "one-third of the maximum sentence imposed." D.C. Code § 24-403(a); *see Blakeney v. United States*, 653 A.2d 365, 370 (D.C. 1995) (sentencing court acted properly in correcting stated, unlawful sentence of "7 to 12" years to "7 to 21" years, where mandatory minimum for offense was seven years); *Heard v. United States*, 686 A.2d 1026 (D.C. 1996) (eighty months to twenty years sentence was proper where maximum sentence for offense was life imprisonment). Thus, unless a mandatory minimum was involved, the minimum sentence may have been as low as one day. The upper limit on a minimum sentence for a charge other than murder was 15 years, even if the court imposed a maximum of life imprisonment. § 24-403(a). Thus, "15 years to life" was the longest possible sentence for armed robbery in the indeterminate system.

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[8] See the National Capital Revitalization and Self Improvement Act of 1997, P.L. 105-33, 111 Stat. 712 (Aug. 5, 1997), *amended* P.L. 105-274, 111 Stat. 2419 (Oct. 21, 1998); D.C. Law 13-302, the Sentencing Reform Amendment Act of 2000. The criminal justice provisions of the Revitalization Act (without the amendments) are codified at D.C. Code § 24-101 *et seq*. (2004 ed.).

[9] Technically, the determinate system applies to all offenses committed on or after 5 p.m., August 11, 2000, and *may* apply to offenses committed from midnight, August 5th, to 4:59 p.m., August 11, 2000. Because it is unlikely that any offenses committed during the week of August 5, 2000, will be prosecuted at this time, this chapter will not discuss the "Revitalization Act System," as enacted by the Council on the Truth in Sentencing Commission recommendations. If counsel has a case where the client is convicted of an offense committed during the week of August 5, 2000, counsel should contact the Public Defender Service for assistance.

The judgment and commitment order (J & C) had to indicate the minimum. *Dobson v. United States*, 449 A.2d 1082, 1083 (D.C. 1982) (remand for correction of sentence necessary if trial court fails to specify minimum). Parole eligibility after serving the minimum sentence did not guarantee parole at or near the minimum date; current parole guidelines may be instructive on when the client who was sentenced in the indeterminate system might realistically expect to be paroled.[10]

2. Determinate Sentencing

a. Sentences of imprisonment

In the determinate system, any sentence of imprisonment or of commitment under D.C. Code § 24-903 will be for a definite term. Instead of defendants receiving two numbers from the court, reflecting a minimum (parole eligibility) and a maximum, defendants receive one number. Defendants are required to serve at least 85% of that number or term. The federal good time statute, 18 U.S.C. § 3624(b)(1), applies to District of Columbia inmates and only allows an inmate to reduce his sentence by 15% (hence the requirement that a defendant serve at least 85% of his term of imprisonment or commitment).

In the determinate system, if the statutory maximum term of imprisonment for an offense is a term of years, the maximum prison sentence a court can impose is the statutory maximum for that offense minus the maximum term of imprisonment authorized for revocation of release. If the offense is specifically designated a Class A felony,[11] the maximum prison sentence a court can impose is the statutory maximum; the maximum term of imprisonment upon revocation of supervised release is not deducted. (For further explanation of the mechanics of life sentences in the determinate system, see *infra* the "Life and Life without Parole Sentences" section.) For offenses that are non-Class A offenses, the amount of time a defendant can be incarcerated on a particular offense (original sentence plus revocation time) cannot exceed the statutory maximum prison sentence for that offense. For Class A offenses, the amount of time a defendant can be incarcerated on a particular offense (original sentence plus revocation time) can exceed the statutory maximum.

b. Supervised Release and Revocation of Supervised Release

If the court imposes a term of imprisonment or commitment under § 24-903, then the court must impose a term of supervised release to follow the imprisonment. D.C. Code § 24-403/01(b)(1). Supervised release is, in essence, the replacement for parole supervision. Offenders on supervised release are subject to the authority of the U.S. Parole Commission ("USPC"). D.C. Code § 24-403.01(b)(6). The USPC has the power to set the conditions of supervised release,

[10] The U.S. Parole Commission regulations governing parole grants can be found at 28 CFR §§ 2.70 *et seq*., 2.80 *et seq*.

[11] All offenses that were life offenses in the indeterminate system, including offenses that still carry the possibility of life imprisonment in the determinate system and armed carjacking are all designated "Class A" felonies in the determinate system. The statute for each Class A felony will specifically designate the offense as such. See e.g., D.C. Code 22-3002(b) ("For purposes of imprisonment following revocation of release authorized by § 24-403.01(b)(7), the offense defined by this section [first degree sexual abuse] is a Class A felony."

modify the term of supervised release, revoke supervised release, impose a term of imprisonment as a sanction for violation of a condition of supervised release ("revocation term") and impose a term of supervised release to follow the revocation term. CSOSA will monitor offenders on supervised release on behalf of the USPC.

The term of supervised release begins the day a person is released from imprisonment and shall run concurrently to any term of probation, parole or supervised release for another offense to which the defendant is subject during the term of supervised release. D.C. Code § 24-403.01(b)(5). If the defendant is imprisoned in connection with a conviction for another crime and the period of imprisonment is thirty days or more, the term of supervised release is tolled until the defendant is released from the term of imprisonment. *Id.*

The length of terms of supervised release shall be as follows:

If the maximum term of imprisonment authorized for the offense of conviction is 25 years or more and	the Court imposes a prison sentence of more than 1 year,	the Court shall impose a term of supervised release of 5 years
If the maximum term of imprisonment authorized for the offense of conviction is 25 years or more and	the Court imposes a sentence of 1 year or less,	the Court shall impose a term of supervised release of at least one day but not more than 5 years
If the maximum term of imprisonment authorized for the offense of conviction is more than 1 year but less than 25 years and	if the Court imposes a sentence of more than 1 year,	the Court shall impose a term of supervised release of 3 years
If the maximum term of imprisonment authorized for the offense of conviction is more than 1 year but less than 25 years and	If the Court imposes a sentence of 1 year or less,	the Court shall impose a term of supervised release of at least one day but not more than 3 years
SEX OFFENSES (where registration is required)	The Court must at least follow the rules above but may instead	impose a longer term up to 10 years or, if the person is required to register for life, up to life.

See D.C. Code § 24-403.01(b)(2).

If the USPC revokes supervised release, it may order the offender to serve a period of imprisonment as follows:

If the maximum term of imprisonment authorized for the offense is life or the offense is specifically designated as a "**Class A**" felony.	Not more than 5 years revocation time, cumulative
If the maximum term of imprisonment authorized is 25 years or more, but less than life	Not more than 3 years revocation time, cumulative.
If the maximum term of imprisonment authorized for the offense is 5 years or more, but less than 25 years	Not more than 2 years revocation time, cumulative.
If the maximum term of imprisonment authorized for the offense is less than 5 years	Not more than 1 year revocation time, cumulative.
SEX OFFENSES	Revocation operates the same as for any other offense

See D.C. Code § 24-403.01(b)(7).

When revoking an offender, the USPC need not require an offender to serve the entire revocation term authorized but may impose a shorter term of imprisonment. The revocation terms in the above chart and in the statute are maximums that cannot be exceeded regardless of the number of times the offender is revoked on that offense. When the USPC revokes an offender, it may also require that the offender serve a term of supervised release after the revocation imprisonment. That term of supervised release may be as long as the statute authorizes, even if the sentencing court originally exercised its discretion and imposed a shorter term, minus any revocation term of imprisonment. Credit is not given for "street time," time spent on supervised release before the revocation.

Example 1: Defendant was convicted of robbery, which has a statutory maximum of 15 years imprisonment. *See* D.C. Code § 22-2801. Because the statutory maximum(15 years) is more than 5 years but less than 25 years and robbery is not a Class A felony, the revocation term cannot exceed 2 years. *See infra* Revocation Table. Because this is a non-Class A offense, the idea is that the offender will not spend more time in prison than the statutory maximum; therefore, the maximum sentence of imprisonment the defendant is facing on the day he is sentenced by the court is 13 years (15 year statutory max *minus* 2 year revocation term). If the sentencing judge gave the offender the maximum prison sentence of 13 years and if the USPC revoked the offender's supervised release and imposed the maximum revocation time of 2 years, the defendant's time in prison would still not have exceeded the maximum prison time statutorily authorized for robbery. If, at sentencing, the court imposes a sentence greater than 1 year, then the court must also impose a 3-year term of supervised release because the statutory maximum is more than 1 year but less than 25 years. If the court imposes a sentence of 1 year or less, the court must impose a term of supervised release but has the discretion to impose a term between 1 day and 3 years.

Assume that the judge imposed the maximum sentence of 13 years. The defendant would serve at least 85% of that 13-year sentence.[12] Upon release from prison, he is supposed to be on supervised release for 3 years. Assume the defendant violates his conditions of supervised release after having served 2 years of the 3-year supervised release term. While the USPC can impose a revocation term of up to 2 years, it decides to impose a revocation term of 6 months. Once the defendant has completed his 6-month revocation term of imprisonment, the USPC can impose an additional term of supervised release up to 2½ years (3 years supervised release authorized by the statute *minus* 6 months served on revocation). Note that the amount of time the defendant successfully spent on supervised release prior to being revoked is irrelevant to the calculations, though it may be relevant to the USPC's decision whether or not to revoke and, if revoked, how long of a revocation term to impose. If the defendant again violates a condition of his supervised release, the USPC can revoke him and impose a sentence up to the amount of

[12] If the defendant earns all of this good time, see D.C. Code 24-403.01(d) and therefore is released after only serving 85% of the term imposed by the sentencing judge, that "extra" 15% is **not** added to the supervised release term or revocation time term. Good time is not like parole. In parole, the amount of unserved time is the amount of time an offender serves on parole and is the amount of time the USPC may impose on the offender upon revocation. Time unserved because of good time is not added to and does not in any way affect the length of the supervised release term or of the revocation term.

revocation time remaining. In this example, the defendant got a 6-month "hit" on the first revocation and still has 18 months "hanging over his head" (2 years from the chart *minus* the 6 months he already did). The USPC can impose the full 18 months or some fraction thereof and may impose an additional term of supervised release (minus all revocation time already served, the first 6-month hit plus whatever fraction of the revocation time the defendant is ordered to serve on this second revocation).

Example 2: Defendant was convicted of armed robbery, which has a statutory maximum of 30 years imprisonment. *See* D.C. Code §§ 22-2801, 22-4502. Armed robbery, which was a life offense in the indeterminate system, is a Class A felony. The maximum revocation term authorized for a Class A felony is 5 years. The maximum prison sentence the defendant can receive is 30 years (the revocation term of 5 years is not subtracted from the statutory maximum for Class A felonies). If the court imposes a prison sentence of more than 1 year, then the court must also impose a 5-year term of supervised release. If the defendant violates supervised release, the USPC can impose a revocation term of 5 years or some fraction thereof. The USPC can also impose another term of supervised release to follow the revocation term, but must subtract the amount of time served upon revocation from the supervised release term authorized by the statute.

Example 3: Defendant was convicted of attempted robbery. *See* D.C. Code § 22-2802. The statutory maximum for attempted robbery is 3 years. The revocation term is 1 year because attempted robbery has a maximum term of imprisonment of less than 5 years. Attempted robbery is not a Class A felony, so subtract the revocation term from the statutory maximum to arrive at the maximum possible prison sentence. 3-year statutory maximum *minus* 1-year revocation term equals 2-year maximum possible prison sentence. Assume the judge imposes a sentence of exactly 1 year. The sentencing judge must impose a term of supervised release but has the discretion to impose any term between 1 day and 3 years. (Had the judge imposed a sentence of more than 1 year, then the judge would have had to impose a 3-year term of supervised release.) Assume the judge imposes a 6-month term of supervised release to follow the imprisonment. Assume the defendant violates his supervised release and the USPC revokes his release and gives him a 3-month "hit" (3 months of the 1-year revocation term they could have imposed). The USPC has the authority both the place the defendant back on supervised release at the end of his term of supervised release and to impose the maximum amount of statutorily authorized supervised release. While the sentencing judge initially gave only a 6-month term, the statute allowed the judge to give as much as 3 years. The USPC is not bound by what the sentencing judge imposed; the USPC can now impose a term of supervised release of 3 years minus the 3 month "hit" the defendant just did in prison. 3 years *minus* 3 months means that the USPC can place the defendant on supervised release for up to 2 years and 9 months. Note that had the defendant been convicted of a sex crime that requires sex offender registration, the maximum statutorily allowable amount of supervised release is the length of the registration – 10 years for some sex offenses and life for others.

The statutory maximums for some felonies are tied to statutory maximums for other felonies, which can seem complicated. The period of supervised release, the revocation time, and the prison sentence that can be imposed are tied to the maximum sentence for the offenses of conviction and not to a percentage of time for the underlying offense. For example, a person

convicted of accessory after the fact faces a maximum possible sentence of up to one-half the maximum imprisonment to which the principal is subjected. If the underlying offense is aggravated assault, the defendant would face a 5-year statutory maximum because 5 years is half the 10-year statutory maximum for aggravated assault. However, even though the maximum prison time the court can impose for aggravated assault is 8 years (10-year statutory maximum *minus* 2 years revocation time), the most prison time the court can impose on the defendant convicted of accessory after the fact (aggravated assault) is not 4 years (½ of 8), but 3 years (5 year statutory maximum *minus* 2 years revocation time). The period of supervised release is not 1½ years, but 3 years (because the sentence for accessory after the fact, like the sentence for aggravated assault, is less than 25 years).

Offenses that enhance a sentence based on a percentage of another offense are calculated similarly. For example, a person convicted of a crime in a case in which repeat papers have been filed pursuant to § 22-1804 faces a maximum sentence of 1½ times the underlying offense penalty for a second conviction and 3 times the underlying offense penalty for a third or subsequent conviction. A defendant convicted a second time for aggravated assault with repeat papers is facing a 15-year statutory maximum (10-year statutory maximum for aggravated assault times 1½) and a 30-year statutory maximum (10 years times 3) for a third or subsequent conviction. Again, even though the maximum prison time the court can impose for aggravated assault is 8 years, the most prison time the court can impose for a third conviction of aggravated assault with repeat papers is not 24 years (3 x 8), but 27 years (30-year statutory maximum *minus* 3-year revocation time). The period of supervised release is 5 years, not 9 (3 x 3), because the statutory maximum for third time aggravated assault with repeat papers (30 years) is greater than 25 years.

3. Voluntary Sentencing Guidelines

Since June 14, 2004, D.C. Superior Court has had a system of voluntary guidelines. The guidelines apply to all felony cases for which a conviction (guilty plea or guilty verdict) was entered on or after June 14, 2004. Begun as a pilot program, the guidelines have now been codified at D. C. Code §§ 3-101, 3-105. The guidelines are promulgated, implemented and revised by the D.C. Sentencing and Criminal Code Revision Commission ("Sentencing Commission"). . The guidelines, using a master grid for all non-drug felony offenses and a drug grid for all drug felony offenses, provide a recommendation to the sentencing judge on both the in/out decision (probation, short split or prison) and the prison sentence length. Shading on the grid gives guidance on the in/out decision: light shading indicates that a probation or short split sentence would be compliant; dark shading indicates that a short-split sentence would be compliant; no shading indicates that only a prison sentence would be compliant. Regardless of shading, prison is an option in each cell of the grids. Guidance on the length of the prison sentence is provided in each cell by a range of months on the grids. A judge who chooses to comply with the guidelines and to impose a prison sentence should impose a sentence that is not less than the lowest number in the applicable range or more than the highest number in the range.[13] The applicable cell determined by finding the offense of conviction ranked in groups on

[13] The judge may also find that one of the specified aggravators or mitigators applies and may then depart above or below the recommended range as far as the statute for the offense of conviction allows. Such departure will be considered compliant.

the Y-axis and by calculating the criminal history score and finding the resulting points score on the X-axis.

The system is voluntary and there is no penalty against the judge if the judge chooses to ignore the guidelines and impose an otherwise lawful sentence. The judge must always impose a lawful sentence consistent with the determinate sentencing system for offenses committed on or after August 5, 2000 or with the indeterminate sentencing system for offenses committed before August 5, 2000. No law requires the judge to consult the guidelines before proceeding with sentencing. Even if the judge chooses to "consult" the guidelines, no law requires the judge to impose a sentence compliant with the guidelines. There may be appealable issues as a result of the sentencing that counsel should litigate, but a judge's decision not to follow the voluntary guidelines is not one of them. The Sentencing Commission asks a judge who does not impose a compliant sentence to explain why s/he chose not to follow the guidelines. This information is to assist in the ongoing evaluative work of the guidelines system that the Sentencing Commission compiles. Note that the guidelines have specific aggravating and mitigating factors that allow the judge to depart (imposing a greater or lesser sentence) than the recommended range; if the judge uses one of the specified aggravators or mitigators to "depart," the resulting sentence is still considered compliant. Sentences imposed pursuant to Superior Court Criminal Rule 11(e)(1)(c) guilty pleas, even if wholly unrelated to the recommended guideline range for that offense of conviction, are also considered compliant.

PRACTICE TIP:

Counsel should acquire a copy of and become familiar with the Voluntary Sentencing Guidelines Practice Manual. The guidelines grid is very simple; however, some of the rules of the system, particularly those related to calculating the criminal history score (the X-axis of the grid) can be complicated. The Practice Manual is FREE and can be downloaded from the Sentencing Commission's website, www.acs.dc.gov (the Sentencing and Criminal Code Revision Commission was previously titled the Advisory Commission on Sentencing, hence the initials in the website address).

The guidelines do apply to indeterminate system cases. While such cases would be rare at this date, an indeterminate sentencing system case (offense committed before August 5, 2000) where the date of *conviction* is on or after June 14, 2004, is a guidelines case. An example of this might be a case with an offense date before August 5, 2000 (an indeterminate case), that was reversed and remanded for a new trial by the D.C. Court of Appeals, where the new trial resulted in a conviction after June 14, 2000 – such a case would be a guidelines case. If, however, the D.C. Court of Appeals remanded a case for re-sentencing, not for a new trial, and that case has an offense date before August 5, 2000 (an indeterminate case), and the conviction in that case was before June 14, 2000, then the case is not a guidelines case. If the indeterminate system case is a guidelines case, then the sentencing range in the appropriate box in the sentencing grid provides the minimum sentence, the parole eligibility number or the "front number." The judge would then multiply that number by 3 to get the back number or maximum release date. For example,

if the offense of conviction was assault with a dangerous weapon and the defendant had no criminal history, then the recommended guideline range (Box 6A on the sentencing grid) would be 18-60 months. If the ADW occurred after August 5, 2000, this would be a determinate system case, and the judge complying with the guidelines would impose a sentence consisting of a single number between 18 and 60 months. If the ADW occurred before August 5, 2000, this would be an indeterminate system case and the judge complying with the guidelines would impose a parole eligibility date (the front number) of between 18 and 60, for example 24 months, and would multiply that by 3 to get the maximum release date. The resulting sentence would be 24-72 months. Note that the guidelines give the front number because the historical data used as the basis for the recommended ranges used the front number of historical indeterminate sentences.

C. Misdemeanor Cases

1. Indeterminate Sentencing

In misdemeanor sentencing, the court imposes a single sentence. If the sentence is 180 days or less, there is no "minimum" or parole eligibility date; the defendant will serve the entire sentence imposed. *See* D.C. Code § 24-408(a) (Parole Board's authority limited to "prisoners whose sentences exceed 180 days"). If the cumulative sentence is for more than 180 days and the offense date is before August 5, 2000, the defendant is eligible for parole after serving one third of the sentence. *Id.* Note that, effective June 22, 1994, the maximum sentence for almost all misdemeanors in DC is 180 days.

2. Determinate Sentencing

For a misdemeanor case in the determinate system, meaning the offense was committed on or after August 5, 2000, the court imposes a prison sentence with a single number. See D.C. Code § 24-403.02. Unlike felonies which have statutory good time that can reduce a sentence by up to 15%, misdemeanor sentences must be served in full, except for the possibility of earned good time, see D.C. Code §§24-221.01 – 221.05. On the positive side, however, at the conclusion of a misdemeanor prison sentence, there is no supervised release or revocation time, and the USPC does not have any jurisdiction over the defendant. The only time supervision might follow a misdemeanor sentence is if the sentencing judge imposed a "split sentence," requiring some period of imprisonment, suspended part of it, followed by a period of probation. If the defendant is on probation, then his compliance will be monitored by CSOSA and the judge will have the jurisdiction to decide whether to revoke for violating any terms of probation. Misdemeanor sentences are served in the custody of the D.C. Department of Corrections.

D. Life and Life without Parole Sentences

1. Aggravating circumstances – generally

In the indeterminate system (offenses committed before August 5, 2000), a life sentence had a parole eligibility date. Offenders were eligible for parole after 15 years for most life offenses,

after 20 years for second-degree murder, and after 30 years for first-degree murder.[14] Life without parole was possible for first-degree murder, first-degree sexual abuse, and first-degree child sexual abuse if specific aggravating circumstances were proven. *See* D.C. Code §§ 22-2104.01, 22-3020. In the change to the determinate system, most offenses that carried life in the indeterminate system became 30-year (Class A) offenses in the determinate system. First-degree murder, second-degree murder, first-degree sex abuse, and first-degree child sex abuse all remain life offenses, but with the abolishment of parole, are all now life without release offenses; all are also Class A felonies.

First-degree and second-degree murder, first-degree sexual abuse, first-degree child sexual abuse and armed carjacking now have a "soft cap" – a sentence above which the sentencing court cannot go unless aggravating circumstances are found. The sentencing court cannot impose a sentence in excess of 60 years for first-degree murder, in excess of 40 years for second-degree murder, or in excess of 30 years for first-degree sex abuse, first-degree child sex abuse, or armed carjacking, unless aggravating circumstances have been indicted and proved beyond a reasonable doubt. If the jury finds the aggravating circumstances, the court can exceed the "soft cap" and impose any term up to life[15] for first-degree murder, second-degree murder, first-degree sex abuse, and first-degree child sex abuse, or up to 40 years for armed carjacking.

In sum, the determinate system has the following structure for excess or enhanced sentencing:

Offense	**Max Prison without Proven Aggravators**	**Max Prison with Proven Aggravators**	**Applicable Aggravator or Enhancement Provisions**
Murder I	60 years	Life without release	§ 22-2104.01 or § 24-403.01(b-2)
Murder II	40 years	Life without release	§ 24-403.01(b-2)
1st Degree Sex Abuse 1st Degree Child Sex Abuse	30 years	Life without release	§ 22-3020 or § 24-403.01(b-2)
Armed Carjacking	30 years	40 years	§ 24-403.01(b-2)

In addition to those aggravating circumstances listed in § 22-2104.01, which are applicable only to first-degree murder, and in § 22-3020, which are applicable only to first-degree sex abuse and first-degree child sex, § 24-403.01(b-2)(2) lists the following aggravating circumstances applicable to all the offenses with a "soft cap": (1) the offense was committed because of the victim's race, color, religion, national origin, or sexual orientation; (2) the offense was committed because the victim was or had been a witness in any criminal investigation or judicial proceeding or was capable of providing or had provided assistance in any criminal investigation or judicial proceeding; (3) the offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; (4) the offense was especially heinous,

[14] First-degree murder also has a mandatory minimum of 30 years. See D.C. Code § 22-2104(b) (formerly §22-2404(b)). Thus, all indeterminate first-degree murder sentences were 30 years – life.

[15] "Life" in the determinate system means life without release. Because parole or early release is abolished in the determinate system, there is no need to distinguish between "life" and "life with parole (or without release)."

atrocious, or cruel; (5) the offense involved a drive-by or random shooting; (6) the offense was committed after substantial planning; (7) the victim was less than 12 years old or more than 60 years old or vulnerable because of mental or physical infirmity; or (8) except where death or serious bodily injury is an element of the offense, the victim sustained serious bodily injury as a result of the offense.

D.C. Code § 24-403.01(b-2)(1) specifies that the court may impose an excess sentence for the eligible offenses only if (1) 30 days prior to trial or the entry of a plea of guilty, the prosecutor files an indictment or information with the clerk of the court and a copy of such indictment or information is served on the person or counsel for the person, stating in writing one or more aggravating circumstances to be relied upon and (2) one or more aggravating circumstances exist beyond a reasonable doubt. Though the statute gives the option of filing by indictment or information, the Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) clearly held that aggravating circumstances used to increase prison sentences as charged in the indictment must be submitted to the jury (except if based upon prior convictions) and proven beyond a reasonable doubt. *See also Keels v. United States*, 785 A.2d 672 (D.C. 2001) (holding that the trial judge's reliance relied on two aggravating factors that she, not the jury, found to impose life without parole sentence – that the murder was especially heinous, atrocious, or cruel, and that the victim was especially vulnerable – was plain error in light of *Apprendi*).

2. Mitigating circumstances

Even if the government satisfies its burden of proof, the judge has unlimited discretion not to impose life or not to exceed the soft cap. While the statute does not refer to mitigation, nothing in it circumscribes the court's traditional and inherent authority to consider any mitigating information. Furthermore, because the statute is structurally analogous to capital sentencing statutes, it is reasonable to infer that the Council intended to incorporate the constitutional requirement in death penalty cases that the sentencer be given the opportunity to consider and give effect to all relevant mitigating evidence. *See, e.g.*, *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978); *cf. Henderson v. United States*, 678 A.2d 20, 24 n.7 (D.C. 1996) (history of theft-related but not violent crimes "does not excuse the offense here"). If the sentencing court does decide to exceed the soft cap, it need not automatically sentence the defendant to the maximum penalty authorized, but may impose any lawful sentence above the soft cap. For example, if the proper procedures were followed and the jury found the indicted aggravated circumstances beyond a reasonable doubt and the sentencing judge decided to exceed the 30-year soft cap for first-degree sexual abuse, the court could impose a sentence of 31 years, 32 years…35 years…40 years, etc., up to and including life.

3. First-degree murder

First-degree murder has a mandatory minimum sentence of thirty years imprisonment. For offenses committed before August 5, 2000, this means that a defendant must serve at least 30 years before becoming eligible for parole. For offenses committed on or after August 5, 2000, the court must impose a sentence of imprisonment of at least 30 years. In both the indeterminate and determinate systems, the sentence for first-degree murder may be life without parole or without release. *See* D.C. Code § 22-2104. However, in the determinate system, the court may

impose a sentence greater than 60 years only after and the jury finds the indicted aggravating circumstances beyond a reasonable doubt.[16] The life without parole provision, in either the indeterminate or the determinate system, does not apply to persons who were younger than eighteen on the day of the murder.[17] § 22-2104(a).

A sentence of life (without release) is mandatory for the deliberate and premeditated murder of a law enforcement our public safety officer, if the defendant knew or "had reason to know" that the victim was an officer and kills while the officer is engaged in, or on account of, official duties. D.C. Code § 22-2106. *See Dean v. United States*, 938 A.2d 751 (D.C. 2007) (finding the reduced *mens rea* of 'a reason to know' that victim is law enforcement officer not unconstitutional because rationally related to legislative objective of deterring criminals from taking life of police officer). D.C. Code § 22-2106(b) specifically defines "law enforcement officer," and in addition to MPD officers, includes Department of Corrections officers, Metro Transit officers and probation, parole, supervised release, community supervision and pretrial services officers of CSOSA and the Pretrial Services Agency. "Public safety employee" is also defined and includes D.C. firefighters and EMT's. See D.C. Code § 22-2106(b)(2).

Most of the aggravating circumstances in D.C. Code § 22-2104.01(b) are derived from Model Penal Code § 210.6, a capital sentencing statute. A wealth of precedent addresses the validity of similar aggravating circumstances in the context of capital sentencing. It is unclear whether capital and non-capital sentencing proceedings are constitutionally similar for purposes of challenging the validity of aggravating circumstances; *Caspari v. Bohlen*, 510 U.S. 383, 396-97 (1994), declined to resolve that issue.

The "heinous, atrocious, and cruel" aggravating circumstance has been held constitutionally invalid in capital sentencing, unless limited by judicial construction. *See*, *e.g.*, *Godfrey v. Georgia*, 446 U.S. 420 (1980); *cf. Henderson v. United States*, 678 A.2d 20, 23 (D.C. 1996) ("the death in this case was a form of torture which was especially heinous, atrocious or cruel"). *See*

[16] D.C. Code § 22-2104.01(b). The aggravating circumstances are that: (1) the murder was committed in the course of kidnapping or an attempt to kidnap; (2) the murder was committed for hire; (3) the murder was committed to avoid a lawful arrest or to effect an escape from custody; (4) the murder was especially heinous, atrocious, or cruel; (5) the murder was a drive-by or random shooting; (6) there was more than 1 offense of murder in the first degree arising out of 1 incident; (7) the murder was committed because of the victim's race, color, religion, national origin, sexual orientation or gender identity or expression; (8) the murder was committed while committing or attempt to commit a robbery, arson, rape or other sexual offense; (9) the murder was committed because the victim was or had been a witness in any criminal investigation or judicial proceeding, or the victim was capable or providing or had provided assistance in any criminal investigation or judicial proceeding; (10) the murder victim was especially vulnerable due to age or a mental or physical infirmity; (11) the murder was committed after substantial planning; or (12) at the time of the murder, the defendant had a prior conviction in any jurisdiction in the U.S., of murder, manslaughter, any attempt, solicitation, or conspiracy to commit murder, assault with intent to kill, or assault with intent to murder.

[17] Note that the aggravating circumstances statute that applies specifically to first-degree sexual abuse and first-degree child sexual abuse and the one that applies generally to first-degree murder, second-degree murder, first-degree sexual abuse, and first-degree child sexual abuse do not preclude a life (without release) sentence for persons younger than 18 years of age at the time the offense was committed. Because aggravators cannot be used to enhance a sentence for first-degree murder for persons younger than 18 years when the crime was committed, a 17-year-old convicted of first-degree murder cannot receive a life sentence while a 17-year-old convicted of second-degree murder can.

generally Arave v. Creech, 507 U.S. 463, 470-74 (1993). *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), probably resolves the constitutionality of discriminatory motive as an aggravator. Because "drive by" and "random" are not defined, that aggravator may be subject to a vagueness challenge; the witness-killing factor is especially vague. The "especially vulnerable" circumstance may be unconstitutional to the extent that it enhances the penalty on the basis of a characteristic of the victim unknown to the defendant, especially if the characteristic would not be apparent to a reasonable person in the defendant's position. *Cf. Henderson*, 678 A.2d at 24 ("the victim's vulnerability due to age [78] was critical"); *cf.* D.C. Code § 22-3601(c) (reasonable belief that victim was not 60 years of age or older is an affirmative defense to senior-citizen enhancement). Generally speaking, counsel should consider how *Apprendi* applies to each aggravator.

D.C. Code § 22-2104.01 sets out some procedures for determining whether an aggravating circumstances applies. The prosecution must give the notice required in D.C. § 22-2014(a), which means that aggravators affected by *Apprendi* must be indicted. A separate sentencing procedure is to be held "as soon as practicable" after the conclusion of the trial. The finding of whether one or more aggravating circumstances exist must be in writing and shall be made beyond a reasonable doubt.

E. "Enhancements," Mandatory Minimums, and Non-mandatory Minimums

1. Introduction

Numerous statutes provide for a longer term of imprisonment (and a larger fine) than what is normally authorized or required for a particular offense. "Permissive" enhancements expand the court's discretion by allowing a longer sentence if specified conditions are shown, but the court need not use them even if they apply. "Mandatory" provisions restrict the court's discretion, eliminating sentencing options on the more lenient end of the range and requiring the court to impose at least a certain sentence upon the showing of specified conditions. The Supreme Court has upheld the constitutionality of mandatory sentences for recidivists. *Rummel v. Estelle*, 445 U.S. 263 (1980) (mandatory life for third felony conviction); *see also United States v. Johnson*, 49 F.3d 766 (D.C. Cir. 1995) (enhancement of sentence for crime committed while under previous criminal justice sentence proper even though defendant not under active supervision of parole authorities), and *Jones v. United States*, 828 A.2d 169 (D.C. 2003) (allowance of sentence increase to life without parole for first-degree sexual abuse due to manner in which victim died).

In the determinate system (offenses occurred on or after August 5, 2000), it is BOP policy that offenders can receive good time credit on mandatory terms of more than one year. Thus, mandatory time can be reduced by 54 days each year (15%).

A few statutes prescribe a non-mandatory minimum or a "minimum maximum." Thus, the requirement that one convicted of felony failure to appear in court be "imprisoned not less than one year and not more than five years," D.C. Code § 23-1327(a)(1), means that the maximum sentence must be at least one year. It does not preclude suspension of that sentence in favor of a period of probation. Lawful sentences under § 23-1327(a)(1) would include sentences such as "1 year, to be followed by 3 years supervised release, suspend all but 6 months, to be followed by 2

years probation" or "1 year, to be followed by 6 months supervised release, suspend all, to be followed by 2 years probation." The judge must impose the 1 year but may suspend any or all of it.

The government must give notice that enhancement provisions apply. D.C. Code § 23-111 sets out the procedural requirements. *But see Edwards v. United States*, 767 A.2d 241 (D.C. 2001) (no error to impose enhanced sentence for commission of new offense while on pretrial release; court not required to give defendant opportunity to affirm or deny release or to make government prove release status where defense did not contest it). The government must file, and serve on counsel or the defendant, any information alleging the prior convictions on which it relies.[18] If the enhancement raises the potential penalty to more than three years, a defendant previously charged by information is entitled to indictment. § 23-111(a)(2). A non-jury charge becomes jury demandable if the information increases the penalty to more than 180 days. D.C. Code § 16-705(b); *Dobkin v. District of Columbia*, 194 A.2d 657, 659-60 (D.C. 1963). It is important for counsel to be aware of the holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), for any case in which the government is seeking an enhancement.

Because enhanced sentencing involves a substantial liberty interest, the courts have "repeatedly mandated strict compliance with the procedures set forth in the code." *Boswell v. United States*, 511 A.2d 29, 31 (D.C. 1986).[19] Enhancement papers must be filed before trial or entry of a guilty plea. § 23-111(a)(1).[20] *Erskines v. United States*, 696 A.2d 1077, 1082 (D.C. 1997) (ten year mandatory minimum sentences must be vacated where government did not file necessary enhancement papers before trial). This means "before the process of impaneling the jury has begun." *Key v. United States*, 587 A.2d 1072, 1073 (D.C. 1991) (citations omitted). Because the papers must be filed before jeopardy attaches, they should be filed before the first witness is sworn in a bench trial and before the Rule 11 inquiry in a guilty plea. Pre-trial notice is necessary to avoid the unfairness of increasing the potential penalty after the trial has begun, ensuring that the defendant can make an intelligent decision about whether to go to trial. *See Arnold v. United States*, 443 A.2d 1318 (D.C. 1982) (finding the government's filing enhancement papers after the jury was selected but before they were sworn constituted harmless error where the record demonstrated that the defendant was fully aware of the government's intention to file the papers); *Robinson v. United States*, 756 A.2d 448 (D.C. 2000) (remanding for resentencing of co-defendant Butler where the government failed to file repeat papers prior to the start of the jury selection process and the government's intention to file was not clear either). *Gaston v. United States*, 535 A.2d 893 (D.C. 1988), dealing with an analogous notice problem, reversed the conviction of a defendant who pled guilty but was not advised that she was ineligible for an exception to the mandatory minimum sentence; the court found both an ineffective Rule 11 inquiry by the judge taking the plea and ineffective assistance of counsel.

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[18] If counsel is served with the information, the defendant need not be personally served. *Willingham v. United States*, 467 A.2d 742, 744 (D.C. 1983).

[19] The judge may not suggest that enhancement papers be filed. *Brandon v. United States*, 239 A.2d 159, 161 (D.C. 1968). Whether to seek an enhanced sentence "is for the prosecution alone to determine." *Lawrence v. United States*, 224 A.2d 306, 309 (D.C. 1966).

[20] The government may seek a continuance in order to file the information if it could not have obtained the necessary facts earlier with due diligence. *Id*.

To challenge the accuracy of the information or to claim that any of the convictions were obtained unconstitutionally, the defense must file a written response. § 23-111(c)(1). The court must then conduct a hearing to determine whether increased punishment is available. *Id*. At the hearing, the government has the burden of proof, beyond a reasonable doubt, on any issue, except that the defendant must prove unconstitutionality of the previous conviction, by preponderant evidence.[21] § 23-111(c)(1).

The court must follow the procedures of § 23-111(b) before imposing an enhanced maximum penalty or a mandatory minimum that applies by reason of a prior conviction.[22] In determining what type of possible enhancement offense a prior conviction may constitute, the sentencing court may not look to police reports or complaint application; examination is limited to statutory definition, charging document, written plea agreement, transcript of plea colloquy, and "any explicit factual finding by the trial judge to which the defendant assented." *Shepard v. United States*, 125 S. Ct. 1254 (2005).[23] Regardless of whether a written opposition is filed, the court must address the defendant before sentencing and inquire whether the defendant affirms or denies the previous convictions. The privilege against self-incrimination applies; the defendant need not respond to the question, and "exercise of the privilege cannot be the foundation of enhanced penalties." *Boswell*, 511 A.2d at 33. The court must also inform the defendant that failure to challenge a prior conviction before sentencing is a waiver. *Smith v. United States*, 491 A.2d 1144, 1149 (D.C. 1985); § 23-111(b). When the defendant receives sufficient actual notice, technical violations will not result in reversal, absent prejudice to the defendant. *Norman v. United States*, 623 A.2d 1165, 1169-70 (D.C. 1993); *see Coleman v. United States*, 628 A.2d 1005, 1009 (D.C. 1993) (notice adequate although prior robbery incorrectly listed as armed robbery); *Logan v. United States*, 591 A.2d 850, 853 (D.C. 1991).

If enhancement provisions overlap, the specific provision takes precedence over the general provision. *See Martin v. United States*, 283 A.2d 448, 450-51 (D.C. 1971) ("a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms"); *accord Lagon v. United States*, 442 A.2d 166, 169 (D.C. 1982) ("[W]here two statutes allow the prosecution to proceed against the defendant as a repeat offender . . . the government [must] proceed under the more specific rather than the more general provision").

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[21] "Identity of names" is *prima facie* evidence the defendant is the person previously convicted, but may not be enough; circumstances such as a common name may require other evidence (fingerprints, photographs, testimony, or other records). *See Boswell*, 511 A.2d at 33-34.

[22] *See Arnold v. United States*, 443 A.2d 1318, 1319 (D.C. 1982); *Fields v. United States*, 396 A.2d 990, 991 (D.C. 1979) ("strict, not substantial compliance, is the rule") (citation omitted); *Irby v. United States*, 342 A.2d 33, 41 (D.C. 1975).

[23] The Court's analysis relied mostly on the legislative history, construction, and interpretation of the federal statute allowing the enhancement. This case is informative in superior court, particularly when counsel are attempting to calculate the client's criminal history score and trying to "match" an out-of-state conviction to a DC criminal statute. According to the Practice Manual, if the default rules are used to match the out-of-state offense, the prosecutor may offer other evidence of the greater seriousness of the client's prior conviction (in an attempt to have more criminal history points assigned to the conviction). Counsel should be aware of *Shepard* and consider all arguments about the reliability of the government's evidence – the possibility, for example, that the police report initially filed does not reliably, and as required by the Constitution and consistent with the presumption of innocence and requirement of proof beyond a reasonable doubt, reflect the conduct of which the client was actually convicted.

Counsel should be alert to problems of "double enhancement" – an attempt to use two or more enhancement provisions. *Henson v. United States*, 399 A.2d 16, 20-21 (D.C. 1979) (single felony cannot be used both to enhance basic sentence for CPWL and as predicate for life papers). More than one enhancement statute may be applied if each is based on a different policy and a separate precondition. *Lagon*, 442 A.2d at 168 (upholding enhancement based on a weapon in the current offense and two prior felony convictions); *see also Bigelow v. United States*, 498 A.2d 210, 214-16 (D.C. 1985) (where defendant had three prior convictions, one could be used to elevate CPWL to felony, and other two could be used as basis for "habitual offender" sentencing).

Rapid changes in the penalties applicable to drug and weapons offenses require constant vigilance and current supplements for statutory materials. Moreover, certain special definitions in enhancement and mandatory minimum statutes may not coincide precisely with definitions of the same terms in other statutes. For example, the offenses that are "crimes of violence" for purposes of increased penalties under § 22-4502 are not the same as the ones that are "crimes of violence" subject to victim impact statements under § 23-1904.

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***Brocksmith v. United States*, 99 A.3d 690 (D.C. 2014)**. Trial court did not err in failing to make necessary inquiries under D.C. Code § 23-111(b) prior to handing down enhanced sentence where defendant informally admitted to prior convictions at sentencing hearing in response to trial court's inquiries and did not contest validity of these admissions on appeal or make any belated attempt to dispute any prior conviction, and where defendant made no showing as to how trial court's failure to comply prejudiced him.

***Daniels v. United States*, 33 A.3d 324 (D.C. 2011).** (CourtView is "modern equivalent" of case jacket, and thus locating a defendant's release information in CourtView is sufficient for imposing an enhanced sentence for having committed a crime while on release).

2. "Release Papers" – § 23-1328

Triggering requirements	**Penalty**
Conviction of a misdemeanor, committed while on release in another case	Maximum of 90-180 days, consecutive to any sentence imposed for the misdemeanor
Conviction of a felony, committed while on release in another case	Maximum of 1 to 5 years, consecutive to any sentence imposed for the felony

Release papers apply only if the crime was committed while the defendant was released in another case. "On release" means release on personal bond, on conditions, or after the posting of a cash or surety bond. It is irrelevant whether the case in which the defendant was released results in a conviction, because the enhancement provision is aimed at people who commit crimes while under court supervision. *Speight v. United States*, 569 A.2d 124 (D.C. 1989) (en banc), held that this scheme does not violate due process.

3. "Repeat Papers" – § 22-1804

Triggering requirements	**Enhanced maximum**
One prior conviction, which is the same as or necessarily includes the current offense	Usual maximum is increased 50 percent
More than one such prior conviction	Usual maximum is tripled

- A prior robbery, ADW, or murder can enhance a current charge of simple assault because the robbery, ADW, and murder convictions each "necessarily include" the current simple assault offense; a prior simple assault cannot enhance a current charge of robbery, ADW, or murder because simple assault does not "necessarily include" a completed robbery, ADW, or murder, the current offense charged.

- If the prior conviction was entered in time to file notice in compliance with § 23-111, it is irrelevant whether that offense was committed before or after the current offense. *Cornwell v. United States*, 451 A.2d 628, 629 (D.C. 1982) (per curiam). The relevant date is the date of sentencing. *See McDonald v. United States*, 415 A.2d 538, 541-42 (D.C. 1980) (per curiam).

- This general statute does not apply where prior convictions trigger more specific enhancement statutes.

- A prior conviction for which one has been pardoned "on the ground of innocence" cannot serve as a predicate for enhancement. A sentence for an offense committed prior to August 5, 2000 that was subsequently set aside pursuant to the federal or D.C. Youth Act cannot serve as a predicate for enhancement.

4. "Life Papers" – §§ 22-1804a & 22-3020

Triggering requirements	**Indeterminate Enhanced Maximum**	**Determinate Enhanced Maximum**
Current felony conviction; before committing current offense, defendant had been convicted of at least two felonies (§ 22-1804a)	Life Imprisonment	30 years
Current crime of violence conviction; previous convictions of two prior crimes of violence (§ 22-1804a(b)(2))	Life without parole	Life without release
Current conviction for sex offense carrying possible life sentence; and victim under age 12, or victim under age 18 and "significant relationship" between defendant and victim, or "victim sustained serious bodily injury," or "defendant	Life without parole (1½ times statutory maximum for non-life offenses)	Life without release (1½ time statutory maximum (for non-life offenses) *See also supra* Section D on Life and Life without Parole Sentences.

was aided and abetted by 1 or more accomplices," or defendant "has been found guilty of committing sex offenses against 2 or more victims," or "defendant was armed with…firearm (or imitation thereof) or other dangerous or deadly weapon" (§ 22-3020(a))		

- One of the two prior felonies must have been committed after initial sentencing for the first. § 22-1804a(c). A multi-count indictment leads to but a single prior "conviction" for purposes of this statute; the timing of the prior convictions must display successive courses of criminal conduct. *Rogers v. United States*, 419 A.2d 977, 981 (D.C. 1980); *Washington v. United States*, 343 A.2d 560, 563 (D.C. 1975). An order of probation is an "initial sentencing." *McDonald*, 415 A.2d at 541-42.

- A prior conviction cannot serve "double duty" for enhancement purposes. Thus, one prior conviction cannot be used both to convert a charge of CPWL into a ten-year felony, and as one of two prior convictions on which life papers for the CPWL are based. *Henson*, 399 A.2d at 21. However, the government can use one prior conviction to elevate a CPWL to a ten-year felony and two others as the predicate for life papers. *Bigelow*, 498 A.2d at 214-16. Also, one prior conviction can be used to enhance each of multiple charges. *Jones v. United States*, 416 A.2d 1236, 1239 (D.C. 1980).

- A prior conviction for which one has been pardoned cannot serve as a predicate for enhancement. § 22-1804a(d). A sentence for an offense committed prior to August 5, 2000 that was subsequently set aside pursuant to the federal or D.C. Youth Act cannot serve as a predicate for enhancement.

5. Armed Offenses – § 22-4502

Triggering Requirements	**Indeterminate Enhanced Penalty**	**Determinate Enhanced Penalty**
Committed "while armed with or having readily available" a dangerous or deadly weapon		
Current conviction is for a crime of violence or dangerous crime, as defined in § 22-4501(f), (g)	Maximum up to life	30 years (except for first-degree murder, second-degree murder, first-degree sex abuse and first-degree child sex abuse)
First-degree murder, second-degree murder, first-degree sex abuse, first-degree child sex abuse	Maximum up to life (statute does not distinguish these offenses from other crimes of violence or dangerous crimes)	Maximum up to life (without release) if authorized by §§ 22-2104.01, 22-3020
If weapon was operable pistol or firearm	5-year mandatory minimum	5-year mandatory minimum

Current conviction is while armed with operable pistol or firearm and is second or subsequent conviction for offense while armed with a pistol or firearm	10-year mandatory minimum	10-year mandatory minimum
Current conviction is after commission in D.C. of prior armed crime of violence	5-year minimum maximum; Youth Act sentencing not available	5-year minimum maximum; Youth Act sentencing not available

- For mandatory minimum to apply, the weapon must be an operable pistol or firearm: the indictment must allege, and the government must prove, operability, and the government must establish that the gun is a pistol (§ 22-4501(a)) or a firearm (§ 7-2501.01(9)).

- A "functional approach" is used in deciding whether an object is a "dangerous or deadly weapon." *Edwards v. United States*, 583 A.2d 661, 662-68 (D.C. 1990) (stationary toilet bowl not a dangerous weapon); *Mitchell v. United States*, 399 A.2d 866, 870 (D.C. 1979) (per curiam) (automobile can be a dangerous weapon).

- While one may be sentenced up to the maximum authorized for committing a crime of violence with a weapon "readily available," one must have committed the offense "while armed with" a weapon in order to receive the mandatory minimum. Thus, for either the principal or an aider and abettor to receive the mandatory minimum, the principal must have had actual possession of a gun. *Abrams v. United States*, 531 A.2d 964, 970-72 (D.C. 1987); *see Morton v. United States*, 620 A.2d 1338, 1339 (D.C. 1993), vacating the mandatory minimum portion of a sentence imposed based on a plea to armed PWID-cocaine, where the defendant was within "arm's length" of a handgun. *Abrams* discussed, but did not reach, the issues of what the indictment must allege and what the jury must find before the mandatory minimum applies. 531 A.2d at 972-73. Actual "use" of the weapon is not required. *Jamison v. United States*, 670 A.2d 373, 375 (D.C. 1996).

- Unless the crime is murder, Youth Act sentencing is available as a means of avoiding the mandatory minimum for a first "while armed" offense.

- The repeat offender provision applies even if the present offense was committed before the conviction for the prior crime, so long as the qualifying conviction exists at the time of sentencing for the later offense. *United States v. Hilliard*, 366 A.2d 437 (D.C. 1976). The weapon used in the prior crime need not have been of the same kind as that used in the current charge, nor need it have been a pistol or firearm. *Lemon v. United States*, 564 A.2d 1368, 1379-82 (D.C. 1989).

- Although assault with a dangerous weapon is listed as a "crime of violence," a first ADW is not subject to life imprisonment under § 22-4502. *McCall v. United States*, 449 A.2d 1095 (D.C. 1982) (per curiam). Assault on a police officer while armed is covered not here but by § 22-405(b) (maximum sentence of 10 years) and § 24-403(c) (mandatory minimum of one year after a previous felony conviction).

- The enhancement does not apply to involuntary manslaughter committed with an object that is not designed as a weapon, absent circumstances from which the jury could infer conscious disregard of a known risk of injuries to others. *Reed v. United States*, 584 A.2d 585, 590 (D.C. 1990) (no enhancement of criminal-negligence manslaughter, based on reckless driving); *cf. Morris v. United States*, 648 A.2d 958, 959 (D.C. 1994) (enhancement applies to involuntary manslaughter committed with operable gun with which defendant was "fiddling," and which was pointed in decedent's direction when it discharged).

- D.C. Code § 22-4504(b) sets out a separate offense of possession of a firearm or imitation, regardless of operability, during a crime of violence or dangerous crime as defined in § 22-4502, with a mandatory term of five to fifteen years in the indeterminate system and a mandatory five-year and a maximum 15-year sentence in the determinate system. *See Hager v. United States*, 791 A.2d 911 (D.C. 2002) (no abuse of discretion in imposing separate sentences of ten to thirty years for manslaughter and ten years to life for "while armed" under D.C. Code § 22-3202, making the sentence for manslaughter while armed twenty years to life).

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***Colter v. United States*, 37 A.3d 282 (D.C. 2012).** Assault with significant bodily injury ("felony assault") is not a "crime of violence."

6. Senior Citizen Victims – § 22-3601

Triggering requirements	**Enhanced maximum**
Conviction for robbery or attempt, theft or attempt, extortion, 1st- or 2nd-degree fraud, and victim was 60 years of age or older at the time of the offense.	Usual maximum is increased 50%

"It is an affirmative defense" to application of the enhanced penalty "that the accused knew or reasonably believed that the victim was not 60 years of age or older." § 22-3601(c). Some guidance in explaining the burdens may be found in instructions on self-defense. *See, e.g.*, *Criminal Jury Instruction* No. 9.505

7. Members of Citizen Patrols – § 22-3602

Triggering requirements	**Enhanced maximum**
Conviction for enumerated crime, committed *while or because* victim is a member of a citizen patrol	Usual maximum is increased 50%

8. Miscellaneous Enhancements – § 24-403

Offense	Triggering requirements	Enhanced penalty
Armed robbery; assault with intent to rape	Prior conviction for a crime of violence (§ 22-4501(f))	2-year minimum
Armed assault on police officer	Prior conviction for same offense or any felony	1-year minimum
Illegal possession of a pistol (§ 22-4503)	Prior conviction in D.C. for same offense	1-year minimum
Possessing implements of crime (§ 22-2501)	Prior conviction for same offense in D.C. or a felony anywhere	1-year minimum

These specific provisions control over general repeat papers. Many of the minimums have been overtaken by stiffer mandatory minimum provisions, but they remain in the code and may be used on rare occasions.

F. Suspended Sentences

1. Probation

Probation is an available sentencing option for any offense not requiring a mandatory prison term. *Beale v. United States*, 465 A.2d 796, 806 (D.C. 1983), *overruled on other grounds*, *Winfield v. United States*, 676 A.2d 1 (D.C. 1996) (en banc). Probation may not be ordered without the defendant's consent. D.C. Code § 16-710(a). It may be supervised or unsupervised.[24] Regardless of the lawful term of imprisonment that could be ordered for the offense, probation can last no longer than five years. § 16-710(b). *See Simmons v. United States*, 461 A.2d 463 (D.C. 1983) (three-year probation for prostitution solicitation not abuse of discretion). The trial court may not impose an order that imposes an obligation that extends beyond the period of probation. *Flores v. United States*, 698 A.2d 474, 483 (D.C 1997).

In ordering probation, the court imposes a sentence of incarceration and then suspends its execution – "ESS." § 16-710(a). If a sentence is imposed but its execution is suspended, no greater sentence may be imposed upon revocation of probation. *Mulky v. United States*, 451 A.2d 855, 856 (D.C. 1982). Time on probation does not count toward the sentence imposed at revocation.

The court may impose any lawful condition of probation that will serve the ends of justice and the best interests of the public and the defendant. § 16-710(a). Every grant of probation includes the general condition that the defendant remains free of criminal involvement. *Wallace v. United*

[24] Deferred sentencing is a separate option that operates similarly to probation. With deferred sentencing, the court holds the sentencing hearing in abeyance after the guilty finding, usually with the proviso that no sentence will be imposed and the case will be dismissed if the defendant complies with conditions set by the court and agreed upon by the parties.

States, 475 A.2d 401, 403-04 (D.C. 1984). Other standard conditions are that the defendant keeps all appointments with the probation officer,[25] notify the probation officer of any change of address, obtain permission before leaving the District of Columbia, and abstain from the use of illegal drugs. These conditions are printed on the form probation order issued by the court.

Special conditions may be added. *See Moore v. United States*, 387 A.2d 714, 715-16 (D.C. 1978) (defendant required to obtain psychiatric treatment); *Willis v. United States*, 250 A.2d 569, 570 (D.C. 1969) (stay-away order permissible);[26] *Merle v. United States*, 683 A.2d 755 (D.C. 1996) (appellant under special order to remain voluntary inpatient in hospital and not leave hospital without special permission); *cf. Huffman v. United States*, 259 A.2d 342, 346 (D.C. 1969) (condition that defendants submit to specified searches "were impossible of performance and were illegal"), rev'd on other grounds, *Huffman v. United States*, 502 F.2d 419 (D.C. Cir. 1974). The court may not impose "pre-conditions" before granting probation, upon which the suspension, imposition or execution of sentence depends. *Butler v. District of Columbia*, 346 F.2d 798 (D.C. Cir. 1965) (per curiam) (essay on citizenship duties). Neither may it require as a condition of probation in one case that the probationer comply with a condition of probation imposed in another, exposing the defendant to double punishment, in violation of the Double Jeopardy Clause. *Hardy v. United States*, 578 A.2d 178 (D.C. 1990).

The court has jurisdiction to modify the conditions at any time during the probationary term. D.C. Code § 24-304(a). A hearing, with assistance of counsel, is required before any modification, unless the modification "is favorable to the probationer." Super. Ct. Crim. R. 32.1(b). The defendant may appeal from modification of probation, but cannot later appeal from an order revoking probation. *Barnes v. United States*, 513 A.2d 249 (D.C. 1986).

Probation should be used creatively as an alternative to incarceration to develop an individualized program that meets the various sentencing objectives. There are rarely government funds available to pay for programs; alternate sources must be sought if money is required. Counsel may consult the Offender Rehabilitation Division (ORD) of PDS for sentencing ideas.

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[25] Requiring that a probationer report to the probation officer and truthfully answer questions relating to the probation status is not custodial interrogation; however, the probationer is free to assert the Fifth Amendment privilege against self-incrimination, and cannot be penalized for doing so. *Minnesota v. Murphy*, 465 U.S. 420 (1984).

[26] *See infra* Sections J and K on orders to pay court costs, restitution, and reparation, and to perform community services.

PRACTICE TIPS:

Particularly in misdemeanor cases, where the client is not exposed to a lengthy period of imprisonment, counsel should discuss with the client the possibility of rejecting probation, especially if the court will impose a number of conditions. Probation cannot be imposed without the consent of the client. *See* D.C. Code § 16-710(a). Some clients may prefer to spend, for example, 180 days in jail (if the judge imposed the maximum on most misdemeanors) than to have to live for five years, the maximum period of probation allowed, complying with a long list of conditions.

If the client is fortunate enough to receive a sentence of unsupervised probation, it is counsel's responsibility to follow up and move for any benefits to which the client may be entitled. For example, if the client received unsupervised Youth Act probation, counsel must consult with client about filing a motion requesting the court to terminate probation early. If Youth Act probation is terminated early, the set aside benefit is automatic. Counsel should file such motion sufficiently in advance of the probation expiration to give the court ample time to rule. If the Youth Act probation term expires, set aside is not automatic and counsel must move the court to set aside the conviction. Because the probation was unsupervised, there is no probation officer or other court or CSOSA personnel charged with the responsibility of moving the court to set aside the client's conviction.

2. Drug Misdemeanors – Probation and Expungement

A defendant convicted of simple possession of a controlled substance, with no prior drug convictions, is eligible for "probation without judgment" under D.C. Code § 33-541(e) [now § 48-904.01(e)]. Sentencing under this provision, however, is not automatic and may be subject to the discretion of the trial judge. *See, e.g.*, *Pernell v. United States*, 771 A.2d 992 (D.C. 2001) (trial judge did not abuse discretion in denying defendant probation under D.C. Code § 48-904.01(e) where judge said such a sentence is "designed for the person who makes a mistake and has a drug problem, and…says…I've made a mistake…" and that defendant, in contrast, "simply indicated that she was wrongly convicted"). If such treatment is granted, probation is ordered without entry of a judgment of conviction. If probation is successfully completed, no conviction is entered and the record can be expunged according to procedures described in Super. Ct. Crim. R. 32(f). If probation is violated, a revocation proceeding may commence and result in entry of a judgment of conviction. If no revocation occurs, counsel should argue for expungement. *See United States v. McNeil*, 115 Wash. D.L. Rptr. 2264 (D.C. Super. Ct. Oct. 26, 1977) (Kennedy, J.). If the court takes no action to revoke, terminate or modify probation during the probationary term, the probationer is entitled to expungement at the end of the term, even if violations are reported to the court after probation expires. *Neal v. United States*, 571 A.2d 222 (D.C. 1990).

Upon successful completion of probation, CSOSA should notify the court, the probationer, defense counsel, and the prosecutor. If the government wishes to contest the notice of successful completion, it must do so in writing within ten days. If necessary, the court can hold a hearing. Upon determining that the person has successfully completed probation, the court enters an order discharging the probationer and dismissing the proceedings, whereupon the clerk retains a non-public record of the case solely for future determinations of whether the person qualifies for § 904.01(e) treatment. Counsel should not rely on these procedures, however, but should set up a system to track when the probation has expired, and check with probation to ensure that a motion for discharge and dismissal has been filed.

PRACTICE TIP:

Because after probation has expired the court does not have the jurisdiction to do anything other than to dismiss the charge against the client and expunge his record, *see Neal v. United States*, 571 A.2d 222 (D.C. 1990), counsel should not check with probation to ensure that the motion to discharge and dismiss has been filed until after probation has actually expired. Note that this is unlike the Youth Act, where counsel should contact probation before Youth Act probation expires because the benefit of set aside is only automatic if Youth Act probation is terminated early.

Once the court acts to dismiss the case and discharge the probationer, expungement is a matter of right, but it is the probationer's obligation to file a motion for expungement. The order directs various agencies to expunge all official records. Probation includes form motions for expungement with the notice of successful completion to the probationer. Again, counsel should not rely on the client to file the motion, but should check with probation to make sure this is complete.

Common reasons for denying § 904.01(e) treatment include a record of non-drug offenses (which do not preclude § 904.01(e) treatment), or underlying facts indicating actual distribution. *See In re D.F.S.*, 684 A.2d 1281, 1282 (D.C. 1996) (refusing to allow § 33-541(e) [now § 48-904.01(e)] to apply to juvenile convictions). However, the court may not deny § 904.01(e) treatment for these reasons as a matter of policy, because adherence to a uniform policy would defeat the discretionary intent of the statute. *Houston v. United States*, 592 A.2d 1066 (D.C. 1991).

G. Youth Act Sentencing

The objectives of the Youth Rehabilitation Act (YRA), D.C. Code §§ 24-901 to 906, are "to give the court flexibility in sentencing a youth offender according to his individual needs," to "separat[e] youth offenders from more mature, experienced offenders," and to provide an "opportunity for a deserving youth offender to start anew through expungement of his criminal record." Report from Chairperson of the Judiciary to the Council members on Bill 6-47, June 19, 1985.

The YRA is available if a plea of guilty or verdict of guilty is entered before the defendant's twenty-second birthday. § 24-901(2), (6); *see Holloway v. United States*, 951 A.2d 59 (D.C. 2008) (defendant's age at conviction or guilty plea, not sentencing, determines eligibility for sentencing under YRA); *Williams v. United States*, 656 A.2d 288, 295 (D.C. 1995) (YRA sentencing not available to defendant who withdraws guilty plea and is convicted after trial, having turned twenty-two in interim).

All crimes, except murder and convictions for a second crime of violence while armed, are eligible for Youth Act treatment. (The important issue with both exclusions is the crime of conviction, not the original charge.)

To impose a Youth Act sentence, the court must determine that the defendant is a "youth offender" and "will derive benefit from the provisions of this subchapter," making a statement of its reasons on the record. § 24-903(c); *see Veney v. United States*, 681 A.2d 428 (D.C. 1996) (en banc).[27] Before making the determination of benefit, the court may order the defendant "committed for observation and study at an appropriate classification center or agency." § 24-903(e). This study will be prepared within sixty days or after any additional period that the court may grant. *Id*. The defendant is entitled to present relevant facts. § 24-903(c).

Youth Act probation may be imposed, with either imposition or execution of sentence suspended, if the court finds that the defendant "does not need commitment." § 24-903(a). No term of probation may exceed five years. D.C. Code § 16-710(b). The term of incarceration "for treatment and supervision" may be anything up to the ordinary maximum term for the particular offense. § 24-903(b).

Youth Act confinement is designed to provide "treatment" – "corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders." § 24-901. As the report from Chairperson Rolark indicates, this treatment is to include "intensive guidance, counseling, educational instruction and job training." Programs may vary, depending on the length of the sentence, and counsel should determine in advance what programs may be available for the client.

Although there formerly existed multiple benefits of a Youth Act commitment, such as the possibility of early release and imprisonment separate from non-youthful offenders, those statutory benefits were rescinded with the change to the determinate system, the abolishment of parole (early release) and the change in custody to BOP. The benefit that remains is the most important one, however. The remaining purpose and benefit of a Youth Act sentence is the possibility it affords for "clearing" the record of conviction. The key to "set aside" is unconditional discharge of the defendant, by the institution or the court. Public access to court records of set-aside convictions must be restricted. *United States v. Doe*, 730 F.2d 1529 (D.C. Cir. 1984). The set-aside is also intended to remove "legal disabilities created by the conviction." *Lindsay v. United States*, 520 A.2d 1059, 1063 (D.C. 1987). Thus, a set-aside conviction cannot be used to enhance penalties or deprive one of voting or contractual rights or

[27] A similar requirement applies to resentencing after revocation of Youth Act probation. *See Handon v. United States*, 651 A.2d 814, 817 (D.C. 1994) (*per curiam*).

other aspects of citizenship. *Barnes v. United States*, 529 A.2d 284, 286-87 (D.C. 1987). However, the records are not "obliterat[ed]," but remain available to law enforcement personnel and court officials for "legitimate" purposes. *Id*. at 287-88; *Lindsay*, 520 A.2d at 1063. In some circumstances, set-aside convictions may be used at trial. *Askew v. United States*, 540 A.2d 760 (D.C. 1988) (challenge to defendant's character witness). Thus, a set-aside is not the equivalent of expungement. A conviction that has been set aside may be used: (1) in determining whether a person has committed a second or subsequent offense for purposes of imposing an enhanced sentence under any provision of law; (2) in determining whether an offense under D.C. Code § 48-904.01 is a second or subsequent violation under D.C. Code § 24-112(h)(14); (3) in determining an appropriate sentence if the person is subsequently convicted of another crime; (4) for impeachment if the person testifies in his own defense at trial pursuant to D.C. Code § 14-305; (5) for cross-examining character witnesses; or (6) for sex offender registration and notification. D.C. Code §24-906(f). This list of allowed uses of set-aside convictions should be scrutinized for legal and constitutional problems. One potential issue of constitutional magnitude is that the statute allows the defendant to be impeached should he testify in his own defense at trial but does not specifically allow for the impeachment of government witnesses with their set aside convictions. This places a burden on the defendant's right to testify. The uses should only apply to convictions for offenses committed on or after August 5, 2000, that have been subsequently set aside.

If the maximum term of probation or imprisonment expires without early termination, a motion should be filed to set aside the conviction *nunc pro tunc*. *See Brooks v. United States*, 458 A.2d 66 (D.C. 1983). The trial court has the authority to set aside convictions *nunc pro tunc* when the probation officer's recommendation of unconditional discharge and set-aside is filed belatedly, but within a reasonable time after the expiration of probation. *Argueta v. United States*, 759 A.2d 1067 (D.C. 2000). On the implications of failures to effectuate set-asides, *see Barnett v. District of Columbia Dep't of Employment Services*, 491 A.2d 1156 (D.C. 1985) (no fraud to fail to mention FYCA conviction erroneously believed to have been set aside).

If YRA probation is ordered, the court has discretion to "unconditionally discharge the youth offender from probation" at any time before the probation expires. This discharge automatically sets aside the conviction, and a certificate to this effect is issued to the defendant. § 24-906(d). Set-aside is also automatic for offenders who are unconditionally discharged from a Youth Act commitment. § 24-906(a). If the sentence of a committed defendant expires before unconditional discharge, the United States Parole Commission has discretion to set aside the conviction. § 24-906(b). This section allows the Commission to correct administrative errors and to address cases in which the sentence structure does not permit release before unconditional discharge.

If the Director of the Department of Corrections determines that a youth offender will no longer benefit from YRA treatment, the Director may order a transfer after giving the prisoner notice and a chance to appeal. § 24-905(a). *See Vaughn v. United States*, 598 A.2d 425 (D.C. 1991). The notice must inform the person of the reasons for the decision that there is no further benefit, that the prisoner has a right to appeal the decision to the sentencing court within thirty days, and that this appeal will stay the Director's action until after the court has ruled. § 24-905(a). A

judicial decision contrary to that of the Director precludes further action to change the defendant's status for six months. § 24-905(b).

Counsel should ask for a split sentence with a period of probation for Youth Act misdemeanant cases, rather than a straight commitment. A split sentence with probation will give the court the jurisdiction to determine whether to grant a set aside. It will also allow the court to terminate probation early, allowing an automatic set aside. Straight commitment gives the authority to the U.S. Parole Commission to determine whether or not to grant a set aside. The USPC has the authority to determine whether to set aside in a conviction in all Youth Act Commitment cases. For clients committed in felony cases, the USPC will receive a recommendation from the Community Supervision Officer and will have the record of the time the client spent in a BOP facility (or contract facility) and the record of his time on supervision on which to base its decision. For misdemeanants, however, it is the Department of Corrections that will make the recommendation. It is the stated policy of DOC that it will forward all disciplinary charges, whether or not substantiated. A client's chance of demonstrating that he is deserving of the set aside are likely greater before the sentencing judge who gave him the Youth Act opportunity than before the USPC; a split sentence with a probation term, even a very short one, will give the jurisdiction to determine the set aside to the court.

If client receives Youth Act probation, counsel should put a note in her calendar or ensure some other sure way of reminding herself to contact the CSO approximately 6 months before probation is to expire to ask if CSO will move for early termination of probation, which would automatically set aside conviction.

If probation is Unsupervised, counsel MUST file a motion with the judge before probation ends, asking for early termination, which automatically sets aside conviction. With unsupervised probation, there is no probation officer with the responsibility of recommending the court either terminate early or set aside the conviction. **Client will not get the benefit of the set aside if counsel does not move for it.** A set aside only "sets aside" the conviction; it does not expunge or in any way seal the client's arrest record. Once a Youth Act conviction has been set aside, it is a "non-conviction" for purposes of arrest records sealing. See D.C. Code § 16-803 *et seq*. to determine client's eligibility to have his arrest record sealed.

H. Modified Sentences of Incarceration

1. Split Sentences

A split sentence is when the court imposes a sentence but suspends execution of that entire sentence and instead orders the defendant to serve only a portion of it initially. A split may be followed, but does not have to be, by a period of probation. In *Boykins v. United States*, 856 A.2d 606 (D.C. 2004), the Court of Appeals found that a sentence that suspended a portion of the prison sentence and the supervised release but did not impose a probation term was a legal sentence, citing the use of the word "may" at D.C. Code § 16-710(a). "[W]hether or not to place a defendant on probation is a matter committed to the court's sentencing discretion." *Id.* at 608.

a. Indeterminate System

To order a split sentence, the court imposes a sentence and suspends "execution of a portion thereof." D.C. Code § 16-710(a) (overruling *Davis v. United States*, 397 A.2d 951 (D.C. 1979)). The portion of the sentence that must be served may be followed by a period of probation. The defendant serves the entire specified term and, if a period of probation is to follow, is released directly to probation supervision. If probation is revoked, the court can order the suspended sentence or any lesser term into effect. *See* § 16-711.

Counsel should consider a split sentence, with or without probation to follow, in indeterminate sentence cases sentenced under the Voluntary Sentencing Guidelines. The Guidelines apply to indeterminate cases (offense occurred before August 5, 2000) for which a plea was entered or guilty verdict returned on or after June 14, 2004, the date the guidelines went into effect. Whereas for determinate system cases, the guidelines recommend the sentence the judge should impose and the defendant may serve only 85% of that sentence, for indeterminate system cases, the guidelines recommend the parole eligibility number and the judge must multiply that number by three to get the maximum release date. The defendant with the indeterminate system case might therefore spend 3 times longer in prison than an otherwise similarly situated defendant with the determinate system case. Further, anecdotally, the US Parole Commission grants initial parole significantly later than did the D.C. Parole Board. So defendants serving an indeterminate system today will spend longer in prison than an otherwise similarly situated defendant with that same sentence would have served under the authority of the DC Parole Board. In light of all that, counsel should consider requesting the court impose a split sentence. Such split sentence must still comply with the guidelines. For example, for an offense in a prison-only (no shading) cell on the grid, the unexecuted part of the imposed sentence must be a number that falls within the recommended guideline range.

To impose a split sentence in the indeterminate system, the court begins with a normal sentence, specifying a maximum and a minimum (felonies) or simply a maximum (misdemeanors). It then specifies the portion to be served immediately, using language such as "execution of all but [the amount of the split] suspended. If the court chooses to impose a period of probation to follow the initial incarceration, the court should also state "the defendant to be placed on probation for [a specified period of five years or less]." The split portion cannot be less than any required mandatory minimum.

b. Determinate System

To impose a split sentence in the determinate system, the court must suspend both a portion of the imposed prison term and the imposed supervised release. The District's sentencing scheme does not permit concurrent terms of probation and supervised release for the same offense. If the court imposes a period of probation to follow the split, a conflict between the supervising authorities, the court in the probation and the USPC in the supervised release, could result. *See Richardson v. United States*, 927 A.2d 1137 (D.C. 2007).

A split sentence in determinate system cases must therefore have the following elements:

(1) an imposed sentence;
(2) an imposed period of supervised release;
(3) suspension of some, but not all, of the prison time; and
(4) suspension of all of the supervised release term.

To impose a legal split sentence, the court must impose both the prison sentence it wants the defendant to serve if probation is later revoked and the amount of supervised release that must be imposed with that prison sentence. Then the court must suspend the amount of prison time it wants to suspend and suspend all the supervised release time. The court imposes a period of probation to follow the executed part of the prison sentence, which probation term cannot exceed 5 years. *See* D.C. Code § 16-710(b). The court must impose a term of supervised release because the law says that every felony prison sentence must be followed by an adequate period of supervised release. The court must suspend the imposed term of supervised release when it is imposing a split sentence because the felony sentence will not be completely served and the supervised release should not begin unless and until probation is revoked and the defendant serves the unsuspended portion of the original prison sentence (or some lesser sentence, if the judge chooses to reduce it upon revocation).[28] If the supervised release were not entirely suspended, it would run concurrently with the probation and the court (through the probation) and the USPC (through the supervised release) would both have jurisdiction in the same case at the same time. Importantly, if the defendant is successful on probation and is never revoked, then the defendant will not serve the suspended prison time nor will he serve any supervised release.

Example: In an aggravated assault case, the judge may impose the following example of a legal split sentence: "6 years in prison to be followed by 3 years supervised release, suspend all but 2 years in prison to be followed by 4 years probation." With this sentence, the defendant will serve 2 years in prison and then be released to do 4 years probation. If the defendant is successful on probation, then he will never serve the remainder of the prison sentence (the 4 years he did not serve of the 6-year imposed sentence) and he will never serve the term of supervised release. If the defendant is unsuccessful and the court revokes probation, then the defendant will serve the remainder of the prison sentence (or less, if the court chooses) and, once released from prison, the defendant will serve the 3-year-term of supervised release.

When calculating a split sentence, the initial prison sentence that the court imposes cannot be greater than the maximum prison sentence allowed for the offense. Splitting a sentence does not change the rules for how the maximum prison sentence must be calculated for non-Class A felonies. A defendant cannot be made to serve more time in prison that the statutory maximum penalty for that offense for non-Class A felonies and cannot be made to serve more time in prison than the statutory maximum penalty for that offense *plus* the revocation term for Class A felonies.

[28] If a lower sentence is imposed upon revocation than was previously imposed, counsel should ask that the court explicitly state that credit is to be given for time already served. *Cf. Brame v. Palmer*, 510 A.2d 229 (D.C. 1986) (Court assumed trial court took into account time previously served in imposing reduced sentence upon revocation).

Split sentences provide many possibilities for creative sentencing. For example, "weekend" sentences are legal in the indeterminate system[29] and qualify as being in "custody" for purposes of the escape statute. *Williams v. United States*, 781 A.2d 740 (D.C. 2001). Split sentences are especially valuable in the indeterminate system because they allow defendants to avoid the USPC because release is automatic at the end of the split. Although less valuable in the determinate system (because the release date is very predictable, unlike in the indeterminate system), split sentences still have some value in the determinate system because they allow supervision (on probation) by the court upon release at the end of the split, rather than supervision (on supervised release) by the USPC. *But see Olden v. United States*, 781 A.2d 740 (D.C. 2001) (trial judge had authority to impose a conditional sentence and require defendant to fulfill a condition of probation – finding a drug treatment program outside of the District of Columbia – while still incarcerated during the front portion of the "split sentence"; any potential conflict between trial court's sentence and power of USPC to release defendant was too speculative since no conflict would arise unless defendant remained incarcerated after completion of the five-year minimum term).

The Voluntary Sentencing Guidelines give guidance to the court on which counts, given the offense of conviction and the defendant's criminal history score, it may impose a "short split." A "short split," defined in the Guidelines Manual, is six months or less. "Short splits" sentences are considered compliant in any shaded cell on the Master and Drug Grids.

2. Work Release

a. Misdemeanors

Work release can be ordered for anyone imprisoned for a misdemeanor, contempt, or failure to pay a fine. D.C. Code §§ 24-241.01 et seq. A "recommendation" for work release by the court on a judgment and commitment order is legally meaningless. The court must enter a specific work release order, *Armstead v. United States*, 310 A.2d 255 (D.C. 1973), and the defendant will be placed in a Department of Corrections halfway house.

Work release privileges may not be revoked except by court order. The Department of Corrections may, however, suspend privileges for up to five days for a violation of its rules. § 24-241.05(a).

The order for work release may be conditioned on payment of restitution from wages earned while on release. *Davidson v. United States*, 467 A.2d 1282 (D.C. 1983). The United States Parole Commission also has authority to place misdemeanants in halfway houses upon eligibility for parole. §§ 24-241.01, 241.02.

[29] This is accomplished by ordering that "execution of sentence is suspended except for that portion between (time) Friday and (time) Sunday for (number) consecutive weekends."

b. Felonies

For felony convictions, the court has the authority to order as a condition of probation a defendant be in custody during nights, weekends or other intervals. D.C. Code § 16-710(b-1). The court may not order a defendant to serve more than a total of one year in custody as a condition of probation. Thus, the court may fashion a sentence, using probation, which allows the defendant to maintain employment. For example, the court could order the defendant to report to custody every night or on a series of weekends.

I. Probation Revocation

1. General Procedures

Judicial authority to revoke probation for violation of a condition is codified at D.C. Code § 24-304. Revocation may be for violating any condition that is either express or "so clearly implied that a probationer, in fairness, can be said to have notice of it. . . . [T]he probationer must have acted, or failed to act, in a way that foreseeably could result in revocation." The standard of proof for revocation of probation is preponderance of the evidence. *Johnson v. United States*, 763 A.2d 707 (D.C. 2000); *Carradine v. United States*, 420 A.2d 1385, 1389-90 (D.C. 1980) (improper to revoke probation for failure to respond adequately to psychiatric treatment when maintaining prescribed level of mental stability had not been a condition; also noting that revocation based solely on mental state would raise serious questions). *Resper v. United States*, 527 A.2d 1257 (D.C. 1987), held that a defendant who was to be released from jail when space became available in a residential program did not violate any condition of probation when she failed to enter the program on her own after being prematurely released by mistake from the jail; the court had not advised her of a contingent responsibility to use "self-help" to enter the program, and imposed no time limit on her entry into the program. Commission of a crime is a violation of probation. *Wallace v. United States*, 475 A.2d 401, 405 (D.C. 1984) ("implicit in every case where [a] prison sentence is suspended and probation granted is the condition that the probationer refrain from any violation of law until his term of probation has been satisfactorily completed"). Probation cannot be revoked for failure to pay a fine or make restitution if the defendant "has made all reasonable efforts to pay yet cannot do so through no fault of his own." *Brown v. United States*, 900 A.2d 184, 191 (D.C. 2006) (quoting *Black v. Romano*, 471 U.S. 606, 614 (1985); *see also Bearden v. Georgia*, 461 U.S. 660 (1983).

Technical violations – failure to report or to advise of a change of address, see *Harris v. United States*, 612 A.2d 198, 203 n.7 (D.C. 1992) – are often the product of communication difficulties or personality differences between the defendant and the probation officer, or other problems that can be resolved short of revocation. Counsel must speak to the probation officer in advance to determine what precipitated the violation report, and what solutions might be satisfactory; this is particularly important in case the probation officer in court is not the client's own probation officer. Postponement may be requested so that the defendant can comply with amended conditions or demonstrate ability to comply with the original conditions. If a personality conflict cannot be resolved satisfactorily, counsel may request assignment of a new probation officer. Counsel should always try to examine the probation file before the hearing, and may seek a continuance to speak with the specific probation officers who made certain notations in the file.

The sentencing court may learn of D.C. rearrests through the Social Services Division, within 48 hours of the arrest. Other violations may be brought to its attention through a report filed by the probation officer, which specifies the alleged violations, discusses general probation adjustment, and makes a recommendation on whether a "show cause hearing" should be convened. The court then decides whether to initiate revocation proceedings by issuing an order for the defendant to appear in court, with counsel, to show cause why probation should not be revoked.

When a probationer is rearrested in D.C., the judicial officer at presentment may order a five-day bondless hold pursuant to D.C. Code § 23-1322(a). If the new case is a felony, the preliminary hearing is held on the same return day, unless the probation judge "formally elects" to handle it. The preliminary hearing in the new case serves as the first of the two revocation hearings discussed *infra* Section 3. If a hold is not imposed at presentment, the sentencing judge can decide whether to issue a show-cause order and revoke probation without regard to the time constraints of the five-day hold provision. A revocation hearing held after the preliminary hearing will be heard by the probation judge.

To expedite this procedure, commissioners in arraignment and presentment court sometimes consolidate counsel in "five-day hold" cases, appointing counsel in the new case to represent the defendant in the probation case as well. The consent of neither prior counsel nor the defendant is sought. The difficulty is that new counsel is unfamiliar with the facts and circumstances of the past case, hence unable to correct errors in government proffers or provide explanations or exculpatory information. New counsel should therefore contact prior counsel immediately and obtain as much information as possible about the old case. If it is particularly complicated or if a special relationship existed between prior counsel and the defendant, the defendant may want to object to the removal of counsel, and new counsel may seek to decline appointment.

The court's decision to revoke is left to it sound discretion; the court is permitted "great leeway and flexibility to tailor the decision on revoking probation to each probationer's needs." *Brown*, 900 A.2d at 188. Revocation "typically involves a two step analysis: (1) a retrospective factual question whether the probationer has violated a condition of probation; and (2) a discretionary determination as to whether violation of a condition warrants revocation…. In making the latter, discretionary decision, the court "must balance the competing interests of the community in safety with the rehabilitative goals of probation." *Id*. (internal quotation and citation omitted).

2014 Supplement

***Washington v. United States*, 8 A.3d 1234 (D.C. 2010).** Error to revoke probation for convictions that preceded the imposition of probation.

2. The Timing of Revocation

Probation can be revoked "[a]t any time during the probationary term." D.C. Code § 24-304(a). It can also be revoked even before it begins, if the defendant commits an offense "of such nature as to demonstrate to the court that he is unworthy of probation." *Wright v. United States*, 315 A.2d 839, 841 (D.C. 1974) (citation omitted). The same principle applies to violation of any

condition that can be violated before probation begins. *Resper*, 527 A.2d at 1259 (contrasting commission of a crime with reporting to one's probation officer).

Similarly, the court can extend its jurisdiction to revoke until after the date on which probation is due to expire, if it takes affirmative action during the term to preserve its jurisdiction. § 24-304; *Brown v. United States*, 666 A.2d 493 (D.C. 1995) (show cause order issued during probationary term extends term). A rearrest does not toll the probationary term. *White v. United States*, 564 A.2d 379 (D.C. 1989). Nor may the court use its contempt power to address violations of probation of which it learns after the probationary period has expired. *Jones v. United States*, 560 A.2d 513 (D.C. 1989).

"[E]x parte extensions of probation are inadvisable because of the potential for prejudice involved." *Valentine v. United States*, 394 A.2d 1374, 1376 (D.C. 1978). But "exigent circumstances may legitimately arise which require such extensions in order to preserve jurisdiction over a probationer which would otherwise be lost due to expiration of the probation term." *Wallace*, 475 A.2d at 403. Wallace found such exigency when the court was notified of violations shortly before the probationary term expired, and upheld issuance of an *ex parte* notice extending probation, followed by a show-cause hearing during the extended term. *Id*. at 404. The probationer must be afforded the procedural rights listed in Rule 32(b) "before any actual modification of the terms and conditions . . . become[s] effective." *Id*. In no circumstance may probation be extended or imposed for a period of more than five years from its beginning. D.C. Code § 16-710(b). *See Payne v. United States*, 792 A.2d 237 (D.C. 2001) (per curiam) (defendant sentenced to period of incarceration with all but thirty days suspended and to three years probation; he served the thirty days over ten consecutive weekends in jail. An order to show cause why probation should not be revoked was issued more than 3 years after sentence was imposed, but within 3 years and one month. Because the probationary term was tolled during the weekends in jail, the trial court still had jurisdiction to revoke probation at the time the show cause order was issued).

3. Deprivation of Liberty Before Revocation

Due process requires that: (1) detention be preceded by a preliminary hearing, with a finding of probable cause to believe that a violation has occurred; and (2) revocation be preceded by a hearing at which it is found that revocation is warranted. *Gagnon v. Scarpelli*, 411 U.S. 778 (1973). In the wake of *Gagnon*, then Chief Judge Greene set out procedures for what are now referred to locally as "*Peters I*" and "*Peters II*" hearings. *See United States v. Peters*, 103 Wash. D.L. Rptr. 2217 (D.C. Super. Ct. 1975), incorporated in the concurring opinion of Judge Nebeker, *In re A.W.*, 353 A.2d 686 (D.C. 1976) (per curiam). Those procedures are now detailed in Super. Ct. Crim. R. 32.1.

A *Peters I* hearing is required only if the defendant is detained pending the final revocation hearing. *Smith v. United States*, 474 A.2d 1271, 1272-73 (D.C. 1983). It is not required if the defendant is held on a different case. *Wallace*, 475 A.2d at 403.

a. The Detention Hearing

The defendant is entitled to notice of the detention hearing, of the alleged violations, and of the evidence to be introduced with respect to probable cause. Rule 32.1(a)(1)(A); *Dent v. District of Columbia*, 465 A.2d 841, 843 (D.C. 1983); *A.W.*, 353 A.2d at 691 (*Peters*). *Peters* also suggests that when the presentment court imposes a five-day hold, it should provide notice of the alleged violations, and that the preliminary hearing will serve as an initial revocation hearing. *Id*. at 693. Hearing commissioners may conduct initial revocation hearings. Super. Ct. Crim. R. 117(f).

The detention hearing may be informal, and reliable hearsay is admissible. Rule 32.1; *Harris*, 612 A.2d at 202; *Patterson v. United States*, 570 A.2d 1198, 1199 (D.C. 1990); *A.W.*, 353 A.2d at 694 (*Peters*); *accord Morrissey v. Brewer*, 408 U.S. 471, 489 (1972) (parole revocation). The defendant is entitled to counsel, to testify, to present evidence, and to question adverse witnesses. Rule 32.1(a)(1)(B)-(D); *cf. A.W.*, 353 A.2d at 694 (*Peters*) (defendant must be allowed "to confront adverse witnesses, unless . . . there would be a specific risk of harm to any witness as a result of such confrontation") (citing *Morrissey*, 408 U.S. at 487). The right of confrontation precludes basing a detention order solely upon a grand jury indictment.

At the conclusion of the hearing, the court must decide whether there is probable cause to believe that the defendant has violated a condition of probation. If so, the defendant "shall be detained [pending a final revocation hearing], unless the court finds by clear and convincing evidence that the person is not likely to flee or pose a danger to any other person or to the property of others." Rule 46(a)(3); *see* Rule 32.1(a)(1).

b. The Final Revocation Hearing

If the defendant is detained, the final revocation – *Peters II* – hearing must be held within sixty days after the detention hearing, or the defendant must be released until a revocation decision is made. Rule 32.1(a)(3). If detention was based on a rearrest, the sixty-day period is tolled by a defense request that the revocation hearing be postponed until final disposition of the new charges. Then, however, the final revocation decision must be made within twenty days after that disposition, or the detention order lifted until the decision is made. Rule 32.1(a)(3).

Greater procedural protections are required at the revocation hearing. *Black v. Romano*, 471 U.S. 606, 611-12 (1985). "[A] probationer subject to a revocation proceeding is entitled to an opportunity to show not only that he did not violate the conditions, but also that there was a justifiable excuse for any violation or that revocation is not the appropriate disposition….[A] probationer is entitled to (1) written notice of the claimed violation of his probation; (2) disclosure of the evidence against him; (3) an opportunity to be heard in person and to present witnesses and documentary evidence; (4) a neutral hearing body; and (5) a written statement by the factfinder as to the evidence relied on and the reasons for revoking probation." *Brown*, 900 A.2d at 188-89 (quoting *Black* 471 U.S. at 612) (citing *Gagnon, 411 U.S. at 786*); *see also* Rule 32.1(a)(2); *Colter v. United States*, 392 A.2d 994 (D.C. 1978) (vacating revocation order where written notice was not provided); *A.W.*, 353 A.2d at 694 (*Peters*). Reliable hearsay is admissible. *Patterson*, 570 A.2d at 1199.

The defendant has limited rights to confront and cross-examine adverse witness. *See Brown*, 900 A.2d 189. Confrontation rights can be limited only if the government establishes "good cause," *Gagnon*, 411 U.S. at 786 – that "a confrontation would present a clear danger to the witness." *A.W.*, 353 A.2d at 695 (*Peters*); *see Harris*, 612 A.2d at 212-13 (Ferren, J., dissenting). That the witness will testify at the criminal trial is insufficient. *A.W.*, 353 A.2d at 695 (*Peters*). If the court finds good cause, it should hear the testimony in camera, and make (on the record) findings on the relative reliability of the government and defense witnesses, and the weight to be given to the testimony heard in camera. *Id*.
Since revocation issues go beyond probable cause, cross-examination that is irrelevant to probable cause, and excludable at a preliminary hearing, may well be admissible at the final revocation hearing. *Id*. at 692 n.8. The court cannot exercise its discretion on whether to revoke without hearing the witnesses' testimony and making a determination on credibility. *Id*. at 691. Thus, a preliminary hearing – or a transcript thereof – cannot replace the final revocation hearing. *Id*. at 691. Therefore, the return of an indictment is an insufficient ground for revocation.

The revocation hearing should be held before the sentencing judge; if that judge is unavailable, a judge must be designated by the Chief Judge. *Id*. at 694. The court must determine whether the defendant has violated the conditions of probation and whether probation should be revoked in the interests of justice. § 24-104. The probationer is entitled to be heard and to present mitigating information. *A.W.*, 353 A.2d at 694-95 (*Peters*).

For all violations other than commission of a new offense the court must find the violation by a preponderance of the evidence. *Harris*, 612 A.2d at 203-07. Both the majority and the dissent in *Harris* declined to address the proper standard to be used when the alleged violation is a criminal offense, though both seem to acknowledge that it may well have to be higher than preponderant evidence. As a matter of law, there is not clear and convincing evidence of a charge of which the defendant has been acquitted. *Roper v. United States*, 564 A.2d 726, 731 (D.C. 1989). Thus, if probation is revoked based on a charge that later results in acquittal, revocation should be set aside. *Cf. A.W.*, 353 A.2d at 695 n.22 (*Peters*) ("'it would be unseemly for the probation court to conclude counter to the result of a criminal trial, that an offense has occurred and that it could provide the basis for revocation'") (citation omitted).

The revocation decision is discretionary, and will not be reversed absent an abuse of discretion. *Saunders v. United States*, 508 A.2d 92, 95 (D.C. 1986); *Jacobs v. United States*, 399 A.2d 38 (D.C. 1979) (reversing revocation order). An appeal from a revocation order becomes moot if the sentence is served before it is resolved. *Smith v. United States*, 454 A.2d 1354, 1356 (D.C. 1983). *But see Brown*, 900 A.2d at 193 (deciding the case on its merits, though defendant had already completed his revocation sentence, because the government did not argue mootness "coupled with the need this case suggests for reemphasizing the due process standards government parole revocation"). The defendant is entitled to a written statement of the evidence upon which the court relied and the reason(s) for revoking probation. The transcript of the hearing may satisfy the written statement requirement but only if it is "complete enough to satisfy the purpose of the written statement requirement, namely, to insure accurate factfinding with respect to any alleged violation and to provide an adequate basis for review to determine if

the decision rests on permissible grounds supported by the evidence." *Id*. at 191-192 (internal quotation omitted).

c. Tactical Considerations

A five-day hold may be ordered at presentment only if the defendant is on probation and "[m]ay flee or pose a danger to any other person or the community." D.C. Code § 23-1322(a). Counsel must bring to the court's attention any circumstances militating against such a finding. Before presentment, counsel should contact the probation officer to discuss the defendant's compliance. If the defendant has been cooperative and the probation officer would not seek revocation but for the new charge, counsel may be able to convince the court not to impose a five-day hold.

If the government may not prevail on the new charge, the defense may wish to postpone the final revocation hearing until the new case is resolved. Conversely, if the probation charge was minor and the new charge is serious, counsel should consider demanding a *Peters II* hearing. Since that hearing requires the government to produce witnesses to the new charge in order to prove the probation violation, the government will often decline to proceed, resulting in the client's release on the probation charge. If the government does proceed, there is an opportunity for discovery and cross-examination with respect to the new offense. If probation is revoked and the new case is dismissed or results in an acquittal, counsel should petition for reinstatement of probation.

4. Sentencing Upon Revocation

Upon revocation, the court may impose any sentence that would have been lawful at the original sentencing, with one important exception: if a sentence was imposed when probation was ordered, but its execution was suspended, the sentence upon revocation can be "no more severe than the original sentence." *Mulky v. United States*, 451 A.2d 855, 856 (D.C. 1982); *see* D.C. Code § 24-304; *cf. Moore v. United States*, 468 A.2d 1331, 1334 (D.C. 1983) (court can impose Youth Act sentence that is longer than original sentence, because Youth Act sentence is less severe in light of its "nonpunitive" nature and rehabilitative purpose).

- If the court gives lesser sentence on probation revocation than it originally imposed, the court must explicitly say "credit for time served" in order for the client to receive credit from the time he has already served, including time served pre-trial and time served on the original sentence, in the case of a split sentence for example.[30]

- If the court simply imposes the original sentence, i.e., orders that the client serve the rest of the sentence originally imposed, the court does not have to say "credit for time served" in order for client to get credit.

[30] "It is presumed that the sentencing judge who resentences a defendant following the revocation of probation is aware of the Bureau of Prisons' guidelines, which expressly provide for [the assumption that the modified, reduced sentence has already taken into account the previous time served unless the record shows credit was not given], and that the judge intends, when ordering a more lenient sentence to be served, the Bureau to apply those guidelines." *Brame v. Palmer*, 510 A.2d 229, 230 (D.C. 1986).

As for initial sentencing, counsel should seek the best available alternatives and propose a specific plan, and may want to focus on the defendant's overall adjustment to probation and the reason for revocation. However, the court need not state that it has considered alternatives to incarceration before revoking probation. *Black v. Romano*, 471 U.S. 606 (1985).

The new sentence may be the subject of a motion to reduce within 120 days under Super. Ct. Crim. R. 35. An appeal may be noted from the revocation order, but it cannot be used to challenge the original conditions of probation, which must be the subject of a timely appeal when they are imposed. *See Barnes v. United States*, 513 A.2d 249 (D.C. 1986).

J. Restitution, Reparation and Community Service

"Reasonable" restitution or reparation may be required as a condition of probation, in connection with any other sentence, or as a sentence itself. D.C. Code § 16-711(a).[31] In ordering restitution, the court must consider:

> the number of victims, the actual damage of each victim, the resources of the defendant, the defendant's ability to earn, any obligation of the defendant to support dependents, and other matters as pertain to the defendant's ability to make restitution or reparation.

§ 16-711(b). The court must specify the manner in which restitution is to be made (16-711(c); the defendant may seek a hearing at any time regarding the restitution plan. § 16-711(d). The period of payment may or may not be the same as the period of probation. If restitution is not a condition of probation, the remedy for non-compliance is a contempt action. The court must also inform the defendant when a plea is entered that restitution may be required. *Holland v. United States*, 584 A.2d 13 (D.C. 1990).

"Actual damage" for which restitution may be required "includes known liquidated damages such as medical expenses, lost wages, and other expenses connected with the crime," but not "pain, disfigurement, suffering, and anguish." *Sloan v. United States*, 527 A.2d 1277, 1290 (D.C. 1987). A restitution order for liquidated damages "can be used as a set-off against any subsequent civil damage verdict." *Id*. at 1290 n.22; *see also Southall v. United States*, 716 A.2d 183, 187-88 (D.C. 1998) (trial court erred in setting a restitution amount to compensate the victim for pain and suffering).

Sloan stressed the need for specific findings of fact in support of a restitution order, and "a factual basis in the record to support the court's determination of the amount of restitution." *Id*. at 1290. If restitution is likely to be ordered, counsel should insist that the government provide reliable information on the nature and amount of the victim's expenses and, where necessary, conduct an independent investigation by interviewing the complainant and obtaining relevant records from hospitals or employers.

[31] *Brown v. United States*, 579 A.2d 1158 (D.C. 1990), upheld payment of child support as a condition of Youth Act probation, but held that, as with restitution, the court must conduct an inquiry to determine the appropriate amount.

Sloan did not resolve whether a restitution award can include losses for which the victim has received compensation through insurance policies or employment benefits. While a civil plaintiff can recover notwithstanding collateral source payments, *see generally District of Columbia v. Jackson*, 451 A.2d 867, 870-73 (D.C. 1982), the restitution statute refers only to the victim's "actual damage," § 16-711(b) (emphasis added), which does not include amounts for which the complainant is otherwise compensated. Including such recovery in a criminal restitution order would also make restitution the functional equivalent of a civil judgment, without the jury trial on damages that is guaranteed by the Seventh Amendment.

Restitution may be ordered as to cases dismissed in a plea agreement, if the defendant agrees to the plan. *Hill v. United States*, 529 A.2d 788, 791 (D.C. 1987) ("not every imaginable restitution plan may be offered as the basis of an alternative to incarceration[, but this plan was] circumscribed by reasonableness"). *Hill* suggests that if a defendant wants to change the terms of restitution, the proper vehicle is a motion for a hearing under § 16-711(d).

The court cannot incarcerate the defendant for failure to pay restitution, unless it finds that the defendant has not made "sufficient bona fide efforts" to pay or that adequate alternative forms of punishment do not exist. *Bearden v. Georgia*, 461 U.S. 660, 661 (1983). It can, however, condition a sentenced misdemeanant's work release privileges upon payment of restitution (out of wages earned while on work release). *Davidson v. United States*, 467 A.2d 1282, 1285 (D.C. 1983).

The court may also order "reasonable" community service as a "condition of probation or as a sentence itself." § 16-712(a). The term of community service cannot exceed five years. In ordering community service, the court must consider the defendant's physical and mental health, age, education, employment and vocational training, family circumstances, and financial conditions. § 16-712(b). A motion to modify or revisit the plan may be made under § 16-712(d).

K. Court Costs

Every sentence must include an assessment of "costs" of the prosecution, pursuant to the Victims of Violent Crimes Compensation Act of 1996, D.C. Code §§ 4-501 to 518. Although the purpose of the Act is to compensate victims of enumerated offenses, § 4-501(6), the requirement affects convictions for all offenses. The court must assess $100 for each violation of D.C. Code §50-2201.05, fleeing from scene of accident; driving under the influence of liquor or drugs; "between $50 and $250 for other serious traffic and misdemeanor offenses;"[32] and "between $100 and $5,000 for each felony offense." § 4-516(a). Wages earned during incarceration, parole or probation may be levied. *Id*. To determine whether a complainant is obtaining compensation from the fund, contact the Crime Victim Compensation Program at 727-8445. On the provisions generally, see *Morris v. District of Columbia Dept. of Employment Services*, 530 A.2d 683 (D.C. 1987).

[32] The assessment applies to *all* misdemeanor offenses, not just "serious" misdemeanors. *Parrish v. District of Columbia*, 718 A.2d 133, 135 (D.C. 1998). Moreover, the trial court may not waive the assessment. *Id*. at 136.

III. COMPUTATION AND SERVICE OF SENTENCE

A sentence which is imposed does not actually commence being served until "the point of 'transfer of a convicted individual from the judiciary, which pronounced the sentence, to the executive, which administers it.'" *Francis v. United States*, 715 A.2d 894, 898 n.9 (D.C. 1998) (quoting *Thomas v. United States*, 388 A.2d 1231, 1232 (D.C. 1978)). In *Francis*, the trial court imposed a split sentence, but stayed its execution at the request of the defense. In the meantime, the trial court realized that it had failed to take into account Department of Corrections policy on credit for time served, so it modified the sentence upward to effectuate its original intent regarding how much time the defendant would actually serve in custody. The Court of Appeals affirmed, reasoning that (1) the increased sentence did not violate double jeopardy because the sentence was stayed and was not yet being served at the time of the upward modification; and (2) as a court of general jurisdiction, the Superior Court had jurisdiction in these unique circumstances to modify the sentence upward to conform to the clear intent expressed by the court at the original sentencing hearing. *Id*. at 899-904.

A. Consecutive or Concurrent Sentences

All sentences run consecutive to one another, unless the court expressly orders that they run concurrently. D.C. Code § 23-112; Super. Ct. Crim. R. 32(c)(2); *see also Bragdon v. United States*, 717 A.2d 878 (D.C. 1998) (separate Youth Act commitments imposed on multiple charges are deemed consecutive unless the sentencing judge explicitly states otherwise). Counsel must ensure that the judgment and commitment order (J & C) accurately reflects that the sentences are to run concurrently, if the judge so orders.

The voluntary sentencing guidelines have rules about when counts must be run consecutively or concurrently with each other and about when consecutive versus concurrent sentencing on counts is left purely to the judge's discretion. For example, one crime of violence per victim per event must be sentenced consecutively to others when there are multiple victims in one event. Multiple non-violence crimes in a single event must be run concurrently. *See* Chapter 6 of the Voluntary Sentencing Guidelines Manual. It is important to note that "crime of violence" is defined in the Manual, see the glossary at Chapter 7, and that this definitional list does not match the definition at D.C. Code § 23-1331(4). "Event" is also defined in the Manual. There is a specific mitigating factor that allows the judge to depart from the recommended sentence if "the consecutive/concurrent sentencing policy results in a guideline sentence so excessive in relation to the seriousness of the offense and history of the defendant that imposition of the guideline sentence would result in manifest injustice." However, "[a] departure based solely on this factor shall not result in a sentence that is less than the sentence that would result if all guideline sentences are concurrent. *See* Mitigating Factor (9) of Section 5.2.3 of the Manual. There is a corresponding aggravating factor if the consecutive/concurrent policies result in too lenient a sentence. *See* Aggravating Factor (10) of Section 5.2.2 of the Manual.

B. Credit for Time in Pretrial Custody

Credit for time served is due "for time spent in custody or on parole as a result of the offense for which the sentence was imposed." D.C. Code § 24-221.03(a). It is given automatically if the

defendant is incarcerated pre-conviction on the current charge, and no other. Time "in custody due to a charge that resulted in a dismissal or acquittal . . . shall be credited against any sentence that is based upon a charge for which a warrant or commitment detainer was placed during the pendency of custody." § 24-221.03(b). Finally, credit is due for "all time actually spent, pursuant to a court order, . . . in a hospital for examination purposes or treatment prior to trial or pending an appeal." § 24-221.03(c).[33] *Shelton v. United States*, 721 A.2d 603 (D.C. 1998) (defendant must receive credit for time served confined at Saint Elizabeth's Hospital pursuant to the Sexual Psychopath Act following his guilty plea and prior to sentencing). Credit for pretrial custody ceases to accrue on the date that the defendant commences service of any unrelated sentence.

When a client has more than one case, counsel must know the client's bond status in each, because the statute provides automatic credit only if the person is convicted in a case in which custody was in place. The following hypothetical illustrates this point:

> Defendant is on release in case A when he is arrested and charged with a new offense, B. A surety bond is set in B, which the defendant does not post. He later pleads guilty to charge A and charge B is dismissed.

This defendant will not receive credit for time in custody before the plea because he will be sentenced on the offense for which he was not in custody. If the court orders credit to which the defendant is not legally entitled, the Department of Corrections will simply ignore that notation. To obtain credit, counsel should ask that the sentence reflect the credit that is administratively foreclosed – that is, that the court impose a sentence reduced by the amount of time served but not credited.

To avoid having to rely on the court's cooperation at the end of the case, counsel should take steps to ensure that credit is being accrued. If the defendant will not be able to post bond in the new case, counsel should move the court to impose a nominal bond in all cases so that the defendant is earning credit for all, regardless of which one ultimately goes to sentencing.[34] If consecutive sentences are ultimately imposed, the defendant will receive credit toward the aggregate.

Department of Corrections computation practices have created an anomaly in credit for split sentences. If the defendant serves the unsuspended portion of the sentence and is released on probation, but the court subsequently revokes probation and reduces the sentence, the defendant may be denied credit for the time already served. Bureau of Prisons treats the reduced sentence

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[33] See 18 U.S.C. § 3585: "A sentence to a term of imprisonment commences on the date the defendant is received in custody awaiting transportation to, or arrives voluntarily to commence service of sentence at, the official detention facility at which the sentence is to be served…A defendant shall be given credit toward the service of a term of imprisonment for any time he has spent in official detention prior to the date the sentence commences – (1) as a result of the offense for which the sentence was imposed; or (2) as a result of any other charge for which the defendant was arrested after the commission of the offense for which the sentence was imposed; that has not been credited against another sentence."

[34] A judge's idea of "nominal" may range from $10 to $1,000. A motion to reduce, reminding the court that the bond was intended to be nominal, may be required if the case that originally held the defendant was dismissed.

as a new sentence, and assumes that the court took the time served into account when it reduced the sentence. Counsel must therefore ask the court to specify "credit to be given for time served" on the Judgment and Commitment Order – an endorsement that in all other cases has no effect on the way credits are computed, but in this situation will compel the BOP to credit the period already served toward service of the reduced sentence. The alternative is for the court simply to consider the time served in imposing the sentence.

Counsel should obtain a copy of the J & C from the clerk or the jacket, and ask the client to forward a copy of the time computation ("face sheet") after the sentence has begun, in order to check the accuracy of the computation and the credit to be given.

C. Credits During Incarceration

An inmate serving a sentence for an offense committed on or after August 5, 2000 (the determinate system) may receive "good time" credit towards the completion of his sentence. D.C. Code § 24-403.01(d) states that such good time credit is controlled by 18 U.S.C. § 3624(b)(1), which allows credit of up to 15% of the inmate's sentence. In practice, BOP credits the credit time when projecting the inmate's release date; disciplinary infractions can reduce the credit and move the defendant's projected release date closer to his maximum release date, 100% of the sentence imposed by the court. For inmates serving time on offenses committed between June 22, 1994 and August 5, 2000, institutional good time is not available. [35] Educational good time and meritorious good time are available to misdemeanants pursuant to D.C. Code §§ 24-221.01 – 221.05. An inmate serving a felony sentence for a "non-violent offense," an offense not included in the definition of crime of violence at § 23-1331(4), may receive up to a one-year reduction in his sentence upon successful completion of a substance abuse treatment program in accordance wit 18 U.S.C. § 3621(e)(2). See D.C. Code § 24-403.01(d-1).

Time spent on probation receives no credit. Time spent on supervised release receives no credit. Effective May 20, 2009, credit for a parolee's "street time" is now available in some instances. *See* Chapter 12, Parole and Supervised Release, Section H., Final Revocation Decision.

D. The Effect of Parole Violator Warrants

Many defendants who await sentencing are also facing parole revocation, based on the new charge or unrelated violations. The status of a parole violation warrant determines whether the client can avoid serving consecutive sentences. The U.S. Parole Commission has the authority to revoke parole and to issue violator warrants for D.C. parolees. The controlling factor is execution of the warrant, not whether the warrant has been issued nor whether parole has been revoked. There are instructions on all parole warrants by the USPC for D.C. parole violators, that if a parole violator is committed on bond or subject to some other hold, the outstanding parole warrant should not be executed but instead as a detainer by the holding authority. A detainer is simply an unexecuted warrant. *See Moody v. Daggett*, 429 U.S. 78 (1976). Unless

[35] Repeal of the Good Time Credit Act (GTCA; D.C. Code § 22-428), effective June 22, 1994, abolished institutional good time. The repeal could not be applied retroactively, however, due to the Ex Post Facto Clause. *See Weaver v. Graham*, 450 U.S. 24 (1981) (statute modifying formula for awarding "gain time"). Thus, institutional good time is available for offenses committed before June 22, 1994.

the bond in the new case is paid or, any other hold is lifted, the parole warrant will not be executed.

If a parole warrant has been issued and lodged as a detainer – but not executed – at the time of sentencing on the new offense, the court cannot make the new sentence concurrent with the parole sentence, because, technically, the defendant is not serving the parole sentence. Therefore, it may[36] be in the client's interest to have the warrant executed, giving the judge the discretion to make any new sentence concurrent.[37] This will also require the USPC to schedule and hold a revocation hearing "within a reasonable time," usually within 60 to 90 days. *See Morrissey v. Brewer*, 408 U.S. 471 (1971).[38]

Execution of a parole warrant means the defendant is in custody on the parole case. The time remaining on the parole sentence, or "backup time," begins to run when the warrant is executed. *See Wells v. United States*, 802 A.2d 352 (D.C. 2002) (defendant not entitled to credit toward D.C. sentence while he was at liberty after being paroled by Virginia authorities, but before D.C. parole officials executed a parole violation against him). Pre-sentence credit on the new case ceases to accrue. *Ali v. District of Columbia*, 612 A.2d 228 (D.C. 1992). *See also Hill v. District of Columbia Board of Parole*, 766 A.2d 497 (D.C. 2000). Since the warrant has been executed, the judge on the new case can make any new sentence concurrent. To do so, the court must be explicit and counsel should insure the court expresses the intent on the Judgment and Commitment Order. *See* D.C. Code § 23-112.

Detainers are placed in the client's Department of Corrections file in the records office at the holding institution. If the USPC does not lift the detainer, it will continue in effect until the client is released in the new case. The warrant will then be executed and the client will be entitled to a formal revocation hearing. At the revocation hearing, the USPC will have the options of reinstating parole, revoking parole and reparoling immediately, or revoking parole and scheduling a rehearing at some time in the future, within the remaining time on the parole term.

E. Defendants Brought to the District from Other Jurisdictions

Defendants incarcerated in other jurisdictions may be returned to the District for trial pursuant to a writ of habeas corpus ad prosequendum or the Interstate Agreement on Detainers (IAD). Upon conclusion of the proceedings in the District (but before execution of sentence), the defendant must be returned to the foreign jurisdiction. Because two jurisdictions are involved, problems occasionally arise in computing and executing sentences imposed in the District.

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[36] Thought should be given to whether it is desirable to have a parole revocation hearing prior to trial or other disposition on the new case because the USPC will not *sua sponte* postpone the hearing to await disposition of the new case. Counsel may, however request that USPC take the parole case off the docket until such time as counsel decides to put it back on, for example when the trial on the new matter has concluded.

[37] Counsel should realize, whether it is possible to post bond and cause execution of the parole detainer warrant, posting bond will change client's status from pretrial detention credit to serving parole term or backup time. Some thought should be given to which is more valuable – pretrial credit or credit against the backup time. One tactic that will both maximize pretrial credit and preserve eligibility for a concurrent sentence is to delay posting bond until the day before sentencing on the new case.

[38] *See infra* Chapter 12, Parole and Supervised Release.

If the defendant is under sentence in another jurisdiction and a D.C. court imposes a consecutive sentence, the defendant will be returned to the foreign jurisdiction, then returned to D.C. for service of the sentence. Technically, a defendant who must return to a foreign jurisdiction is not "delivered into the custody of the Attorney General of the United States," pursuant to 18 U.S.C. § 3568, for the purpose of commencing the District sentence until the defendant is brought back to the District after completion of the other jurisdiction's sentence.[39] *See Crawford v. Jackson*, 589 F.2d 693 (D.C. Cir. 1978); *cf. Millard v. Roach*, 631 A.2d 1217 (D.C. 1993) (granting credit toward D.C. sentence for time served in foreign jurisdiction as equitable relief in unique circumstances).

The D.C. court cannot impose a concurrent sentence; it can effectuate one by requesting a federal designation and requesting that the Federal Bureau of Prisons designate the state institution as the situs for service of the D.C. Code sentence. See 18 U.S.C. § 482(b). This designation is virtually guaranteed if such a recommendation is made on the Judgment & Commitment Order (J & C).

The situation is less clear if the defendant has not yet been sentenced in the other jurisdiction, because there is no sentence to which the District sentence could be concurrent. Counsel should still attempt to persuade the judge to record on the J & C an intent that the sentence commence immediately.[40] If the order does not specify immediate commencement of the sentence, credit is not received until the defendant is actually committed to the custody of the Attorney General to serve it.

IV. INCREASED SENTENCE AFTER RETRIAL

The Due Process Clause limits the court's authority to increase a sentence after retrial. Increasing a sentence to penalize a defendant for seeking a new trial "'would be patently unconstitutional.'" *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969) (citation omitted). Because "due process also requires that a defendant be freed of apprehension of . . . a retaliatory motivation on the part of the sentencing judge," the reasons for an increased sentence must "affirmatively appear" on the record and "be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Id.* at 725-26. Due process forbids only an increased sentence actually motivated by vindictiveness toward a defendant for having exercised the right to appeal.

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[39] Defendants brought to the District by a writ are not entitled to credit on the D.C. sentence for time in pretrial custody here, which is generally credited to the sentence being served in the other jurisdiction. If the other jurisdiction will not give credit for this time, counsel should ask the court to adjust the D.C. sentence to compensate for what would otherwise be "dead time." If counsel can prove to the D.C. records office that the foreign jurisdiction did not give credit for time spent here, it may be possible to have this time "administratively credited." The defendant must undertake this effort; records personnel will not do it automatically. Also, the U.S. Marshal Service's Prisoner Coordination Section will not return the defendant to the foreign jurisdiction until it receives a memorandum from the U.S. Attorney's Office indicating that the District prosecution is concluded. Counsel should contact the prosecutor to ensure that the Marshal Service is notified promptly upon completion of the case.

[40] "_____ to _____ years, sentence to commence as of today. The court recommends a federal designation and that this designation be to the [state] facility to which the defendant is to be returned."

Wasman v. United States, 468 U.S. 559, 568 (1984). A vindictive motive is presumed in the absence of other articulated bases for the increased penalty. *Id*. at 569.

Cases following *Pearce* have limited the situations that give rise to the presumption of vindictiveness. *Wasman*, for example, was pending trial for mail fraud when he was convicted of unrelated false statements. The sentencing judge in the false statements case did not consider the pending mail fraud. *Wasman* was again convicted of false statements after reversal on appeal; in the interim, he had pled nolo contendere to the mail fraud. At the second sentencing for the false statements, the judge took into account the mail fraud conviction. The Supreme Court upheld the stiffer sentence, even though the defendant did not actually engage in any misconduct between the first and second trials; the fact of the conviction was an event that threw "new light upon the defendant's 'life, health, habits, conduct, and mental and moral propensities.'" *Wasman*, 468 U.S. at 570-71 (citation omitted).

Texas v. McCullough, 475 U.S. 134 (1986), also found no due process violation. A jury sentenced McCullough to twenty years for murder. At a retrial after reversal on appeal, the government presented new evidence that McCullough, not his accomplices, actually stabbed the victim. After conviction, McCullough chose to be sentenced by the court, which imposed a fifty-year sentence, pointing to that additional evidence as well as the newly presented fact that McCullough had been released from prison shortly before the homicide. The Supreme Court found those reasons sufficient to rebut a presumption of vindictiveness. It also implied that the presumption might not apply where the trial court itself granted the motion for a new trial and different sentencing authorities were involved. *See Chaffin v. Stynchcombe*, 412 U.S. 17 (1973) (no presumption of vindictiveness where second sentence was imposed by jury).

Alabama v. Smith, 490 U.S. 794 (1989), further restricted *Pearce* and overruled *Simpson v. Rice*, its companion case, holding that the presumption of vindictiveness is not triggered when the first conviction was based on a guilty plea and the second followed a trial; then,

> the increase in sentence is not more likely than not attributable to the vindictiveness on the part of the sentencing judge. . . . [T]he relevant sentencing information available to the judge after the plea will usually be considerably less than that available after a trial.

Id. at 801. The Court of Appeals has declined to presume vindictiveness in the converse situation: where a defendant pleads guilty after reversal of an initial conviction. *Eldridge v. United States*, 618 A.2d 690, 699 (D.C. 1992) ("As long as the total length of the new sentence on the remaining counts does not exceed the total length of [the] previous sentence on all counts . . . and there is no other evidence of any retaliatory motive, such resentencing offends neither due process nor the double jeopardy clause").

The Due Process Clause also limits the prosecutor's discretion to recharge an offense or add new counts. *See, e.g., Blackledge v. Perry*, 417 U.S. 21 (1974); *Wynn v. United States*, 386 A.2d 695, 697-98 (D.C. 1978) (vacating added charge); *United States v. Jamison*, 505 F.2d 407 (D.C. Cir. 1974) (dismissing indictments for first-degree murder). The defendant in *Blackledge* was convicted of misdemeanor assault. After he exercised his right to a trial de novo, the prosecutor

obtained a felony indictment based on the same conduct. The Supreme Court noted that the prosecutor

> clearly has a considerable stake in discouraging convicted misdemeanants from . . obtaining a trial *de novo*. . . . [I]f the prosecutor has the means readily at hand to discourage such appeals – by "upping the ante" . . . – the State can insure that only the most hardy defendants will brave the hazards of a *de novo* trial. . . .
>
> A person convicted of an offense is entitled to pursue his statutory right to a trial *de novo*, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration.

417 U.S. at 27-28; *see also Thigpen v. Roberts*, 468 U.S. 27 (1984) (reaffirming *Blackledge* on similar facts).

If the defendant can show "a realistic likelihood of prosecutorial vindictiveness," the burden is "on the government to answer or explain the allegations." *United States v. Schiller*, 424 A.2d 51, 56 (D.C. 1980). *United States v. Goodwin*, 457 U.S. 368 (1982), however, held that the presumption of vindictiveness did not apply where a prosecutor added felony charges after the defendant, who was originally charged with misdemeanors, insisted on a jury trial. The Court analogized Goodwin's situation to that of the defendant in *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), which held that a threat to add charges if a plea offer was rejected did not violate due process.

CHAPTER 11

POST-CONVICTION LITIGATION

This chapter discusses various avenues for challenging a conviction or sentence (other than the direct appeal) and the types of claims that may be raised. Specifically, the chapter discusses the purposes, procedures, and types of claims which can be made in a Motion for Judgment of Acquittal or arrest of Judgment under Rules 29 and 34, Motion for a New Trial under Rule 35, motions challenging the validity of detention under D.C. Code § 23-110 (with a particular emphasis on claims of inadequate assistance of counsel), motions under the Innocence Protection Act, motions to correct or reduce sentence under Rule 35, motions to seal records, and petitions seeking writs of habeas corpus under the federal code and D.C. Code and petitions for Writs of Error Coram Nobis. The chapter includes an Appendix outlining the time frames in which these post-conviction applications must be made.

I. MOTION FOR JUDGMENT OF ACQUITTAL OR ARREST OF JUDGMENT

The post-trial motion for judgment of acquittal (MJOA) seeks review of the sufficiency of the evidence. Super. Ct. Crim. R. 29(a), (c). A motion for a judgment of acquittal may be made or renewed either when a jury reaches a verdict or when a jury is discharged without having returned a verdict. Super. Ct. Crim. R. 29(c). Upon this motion, the court may set aside the verdict and enter a judgment of acquittal or, if there has been no verdict, simply enter a judgment of acquittal. *Id.* The defense is not required to have made a motion for judgment of acquittal prior to the case's submission to the jury. *Id*. A motion for arrest of judgment alleges that the indictment or information does not charge an offense or that the court lacked jurisdiction. Super. Ct. Crim. R. 34.

Counsel may make or renew a motion for judgment of acquittal or move for an arrest of judgment within seven days after the jury is discharged, a verdict or plea is entered, or within "such further time as the Court may fix during the 7-day period." Super. Ct. Crim. R. 29(c); Super. Ct. Crim. R. 34. Defense counsel should raise these issues as early as possible. *See United States v. Bradford*, 482 A.2d 430, 435 n.4 (D.C. 1984) (construing indictment liberally in favor of validity because the motion for arrest of judgment came "so late"). Counsel who needs more time for a new trial motion should make an oral request immediately after the entrance of the guilty verdict.[1]

There is no distinction between subsections (a), (b), and (c) of Rule 29 for double jeopardy purposes. *Id.* Retrial is thus barred under the Double Jeopardy Clause should a motion for judgment of acquittal be granted after a deadlocked jury is discharged. *See United States v. Martin Linen Supply Co.*, 430 U.S. 564, 575-76 (1977) (judgments of acquittal are acquittals in substance and form).

[1] The seven-day time limit is not jurisdictional, but rather is a claim-processing rule. *Eberhart v. United States*, 546 U.S. 12 (2005) (per curiam). Where the government fails to raise a defense of untimeliness until after the court has reached the merits, it forfeits that defense. *Id*. at 19.

The government may, however, seek appellate review of a successful MJOA after a jury returns a guilty verdict, as reinstatement does not require retrial. *Bradford*, 482 A.2d at 435 n.5.; *United States v. Hubbard*, 429 A.2d 1334, 1337 (D.C. 1981). The Court of Appeals will review the lower court decision under an abuse of discretion standard in order to determine whether, in the light most favorable to the prosecution, "any rational trier of fact could have found the elements of the crime beyond a reasonable doubt." *United States v. Foster*, 557 F.3d 650, 655 (D.C. Cir. 2009) (motion for a mistrial) (quoting *United States v. Dykes*, 406 F.3d 717, 721 (D.C. Cir. 2005).

Motion for Judgment of Acquittal:

- ✓ Defense counsel should attempt to raise issues as early as possible
  - Post-trial MJOA seeks review of the sufficiency of the evidence
  - Motion for arrest of judgment alleges that the indictment or information does not charge an offense or that the court lacked jurisdiction
- ✓ If counsel requires more time, make an oral request for a new trial motion immediately after the entrance of the guilty verdict

II. MOTION FOR NEW TRIAL

A. Motions Filed Within Seven Days

On a defendant's motion, a court may grant a new trial if "the interests of justice so require." Super. Ct. Crim. R. 33. To do so, the trial court must sit "as a thirteenth juror" and decide whether "a fair trial requires that the [claim presented in the motion for new trial] be made available to the jury." *Brodie v. United States*, 295 F.2d 157, 160 (D.C. Cir. 1961) (citations omitted), cited in *Godfrey v. United States*, 454 A.2d 299 (D.C.1982). Even after a bench trial, a court may vacate its judgment, take additional testimony, and enter a new judgment on the defendant's motion. Super. Ct. Crim. R. 33. Motions for new trial may be made on the basis of new evidence or any other ground. *Id*.

A new trial motion based on any ground other than newly discovered evidence must be filed within seven days of the verdict, or within "such further time as the Court may fix during the 7-day period."[2] Super. Ct. Crim. R. 33.[3] As with a motion for an MJOA or an arrest of judgment, counsel who expect to file a new trial motion should consider making an oral motion immediately after the entrance of the guilty verdict and requesting more time. Motions based on new evidence must be filed within three years of the judgment of guilty. Super. Ct. Crim. R. 33. If a case is on appeal, the trial court can only grant the motion once the case is remanded. *Id*.

[2] The time limit is non-jurisdictional as with motions under Rule 29. Therefore, the government will waive an untimeliness objection should it fail to raise this issue prior to the court reaching the merits. *Eberhart*, 546 U.S. 12.

[3] Motions based on newly discovered evidence are treated in the next section.

A Rule 33 motion filed within seven days of verdict may present any legal or factual claim. *See, e.g., Herbin v. United States*, 683 A.2d 437, 440 (D.C. 1996) (remanded to determine credibility of recantation of principal government witness and effect it would have on jury); *Geddie v. United States*, 663 A.2d 531, 533 (D.C. 1995) (raising issue that co-defendant's threats prevented the accused from testifying at trial); *Gant v. United States*, 467 A.2d 968 (D.C. 1983) (motion for new trial based upon prosecutorial misconduct); *Godfrey*, 454 A.2d 293, 301 n.28 (D.C. 1982) (motion for new trial alleging ineffective assistance of counsel). The court may not grant a new trial on a ground not asserted in the motion, and may not initiate the motion. *See United States v. Braman*, 327 A.2d 530, 534 (D.C. 1974) (per curiam). Evidence supporting the claim may have been newly discovered or available to the defendant during trial. *Godfrey v. United States*, 454 A.2d 293, 299 n.19 (D.C. 1982).

A motion for a new trial filed within seven days of a verdict is governed by a "more lenient" standard than a motion filed later in the process, as it is "substantially unaffected by the usual considerations favoring finality of judgments." *Godfrey*, 454 A.2d at 299 (quoting *Sellars v. United States*, 401 A.2d 974, 979 (D.C. 1979)). Denials of motions for new trial are reviewed on appeal under an abuse of discretion standard. *Graham v. United States*, 703 A.2d 825, 830 (D.C. 1997). A lower court's failure to consider a relevant factor, or consideration of a wrongful factor, can be considered an abuse of discretion. *O'Brien v. United States*, 962 A.2d 282, 314 (D.C. 2008) (discussing government's knowing presentation of false evidence).

"Generally, a hearing is not required for a motion for a new trial." *Graham*, 703 A.2d 825, 831 (D.C. 1997) (citing *Geddie*, 663 A.2d at 534). A hearing should be held if: (1) the allegations in the motion raise factual questions outside the record; and (2) are supplemented by adequate supporting materials such as affidavits "disclosing the source of . . . information or verifying the details" upon which the motion is based. *Payne v. United States*, 516 A.2d 484, 501 (D.C. 1986) (per curiam) (quoting *Khaalis v. United States*, 408 A.2d 313, 360 (D.C. 1979)); *see also Wilson v. United States*, 380 A.2d 1001, 1004 (D.C. 1977). However, where a colorable claim is made even without affidavits, the DCCA has reversed a conviction based on the trial court's denial of a hearing on a Rule 33 motion. *Lyons v. United States*, 833 A.2d 481 (D.C. 2003)).

The defense may be entitled to discovery relevant to a motion for new trial. In *Gibson v. United States*, 566 A.2d 473, 478-80 (D.C. 1989), the Court of Appeals remanded to permit discovery of the similarities between the sexual assault for which Gibson was convicted and a series of rapes committed by another man, based upon "compelling facts" indicating that the other man may have perpetrated the rape. The court held that discovery procedures derived from civil and criminal rules can be used to develop a new trial motion "in order that the new trial motion receive fair and meaningful consideration." *Id.* (quoting *Harris v. Nelson*, 394 U.S. 286, 300 (1968)). The trial court's decision whether to grant or deny post-trial discovery is reviewed under an abuse of discretion standard. *See, e.g., Brooks v. United States*, 683 A.2d 1369, 1371 (D.C. 1995) (per curiam).

Tactical Considerations For issues to be raised in motion: The question of whether to raise a particular issue in a post-trial motion for new trial or to pursue it initially on direct appeal requires counsel to make a tactical decision guided by a number of considerations. A motion for a new trial is not necessary to preserve an appellate issue unless the issue requires additional

factual development. However, including a legal claim in a new trial motion may not cure a failure to object at trial for purposes of appellate review. Counsel should move for a new trial if there is a significant likelihood that the judge will grant relief or the claim requires development of the factual record, there is little point in moving for a new trial. Finally, while a new trial motion may serve as a vehicle to provide new authority to a judge who has previously rejected an argument, it also creates a risk that the motion judge may find any error "harmless." *See Davis v. United States*, 564 A.2d 31, 33-35 (D.C. 1989) (setting standard of review for trial court findings relating to harmlessness).

B. Newly Discovered Evidence

When a new trial motion is filed more than seven days after verdict, the defendant must establish that:

> (1) the evidence was newly discovered since the trial; (2) the defendant was diligent in attempting to procure the newly discovered evidence; (3) the evidence relied on is not merely cumulative or impeaching; (4) the evidence is material to the issues involved; and (5) the evidence is of such a nature that in a new trial it would likely result in an acquittal.

Godfrey v. United States, 454 A.2d 293, 299 n.18 citing, *Thompson v. United States*, 188 F.2d 652, 653 (D.C. Cir. 1951) and *Heard v. United States*, 245 A.2d 125, 126 (D.C. 1968) (the ''Thompson-Heard'' test); *accord Byers v. United States*, 649 A.2d, 279 287 (D.C. 1999); *Smith v. United States*, 466 A.2d 429, 432-33 (D.C. 1983). The court must sit "as a thirteenth juror" to "determine whether a fair trial requires that the [claim presented in the motion for new trial] be made available to the jury." *Geddie*, 663 A.2d at 533 (claim that defendant did not testify because intimidated by do-defendants and his associates) (citations omitted). If the credibility of otherwise pertinent newly discovered evidence is questioned, the court must hold an evidentiary hearing in order to assess its credibility. *See, e.g.*, *Thomas v. United States*, 942 A.2d 1180 (D.C. 2008). Failure to do so is reviewed under an abuse of discretion standard. *Id*. (failure to hold an evidentiary hearing to assess credibility of an exonerating letter written post-trial is an abuse of discretion).

A motion for a new trial based on newly discovered evidence must be made within three years of the verdict or finding of guilty. Super. Ct. Crim. R. 33. This time limit is jurisdictional, meaning a court cannot consider the claims beyond the statutory time limits. *Diamen v. United States*, 725 A.2d 501, 506 (D.C. 1999). However, where newly discovered evidence is relevant to a defendant's claim that his constitutional rights have been violated, that evidence may be presented and considered pursuant to D.C. Code § 23-110, and thus is not subject to the Rule 33 time limitations. *See Diamen*, 725 A.2d at 511-12 (discussing claim of actual innocence and affirming conviction).[4] (Ultimately, relief was granted by the D.C. district court under 28 U.S.C. § 2241. *Eastridge v. United States*, 372 F.Supp.2d 26 (D.D.C. 2005).

[4] Motions for a new trial pursuant to D.C. Code § 23-110 are discussed *infra* Section III.

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***Ingram v. United States*, 40 A.3d 887 (D.C. 2012).** No abuse of discretion for trial court to deny without a hearing defendant's motion for a new trial based on evidence to be given by a former co-defendant, where no affidavit was submitted by the former co-defendant and the co-defendant's testimony would have contradicted the "compelling" testimony of other witnesses who had testified at trial.

***Medina v. United States*, 61 A.3d 637 (D.C. 2013).** Trial court did not abuse its discretion in denying motion to overturn conviction or for new trial based on newly discovered evidence where officer witness's testimony at adverse action hearing post-trial did not differ significantly from statements made at trial.

***Paige v. United States*, 25 A.3d 74 (D.C. 2011).** Trial court did not abuse its discretion in denying motion for new trial based upon ineffective assistance of counsel and newly discovered evidence where defense argument that trial counsel had failed to conduct reasonable investigation of potential exculpatory witnesses was contradicted by trial counsel testimony that defense team had interviewed more than two dozen witnesses and had gone door-to-door in neighborhood and where court determined that defendant's claims of "new" evidence – indictment of detective for tax fraud and statements of exculpatory witnesses – were untimely raised, had been previously ruled upon, or could have been known through exercise of "reasonable" or "due" diligence.

***Richardson v. United States*, 8 A.3d 1245 (D.C. 2010).** Not error to deny actual innocence claim based on "new evidence" where "new evidence" constituted an affidavit by a witness whose existence was revealed, at a minimum, on first day of trial but whom defendant never attempted to contact at the time, and where information obtained from affidavit and subsequent hearing testimony demonstrated a discrepancy between witness testimony as to the sequence of events that could have been used for impeachment of identification but not to prove actual innocence.

C. Recanting Witnesses

When a witness asserts he or she did not tell the truth at trial and wants to recant that testimony, a trial judge in deciding a new trial motion based on a recanting witness must first decide whether the recantation is credible.

If the court does not credit the recantation, the new trial motion must be denied. *See Tyer v. United States*, 912 A.2d 1150, 1167 (D.C. 2006) (trial testimony credible and recantation made under "intimidating circumstances"); *Herbin*, 683 A.2d at 441. Denials of new trial motions are reviewed under an abuse of discretion standard. *Tyer*, 912 A.2d at 1166. If the court credits the recantation, it must apply the *Thompson-Heard* newly-discovered evidence test.[5] This is a prospective approach, in which the court must determine whether the evidence is of such a nature

[5]The D.C. Court of Appeals avoided deciding between the *Thompson* standard and the *Larrison* standard, applied in other circuits, until 1991, but explicitly chose the *Thompson* standard in *United States v. Williams*, 233 F.3d 592, 594-95 (D.C. 1991).

that a new trial "would probably produce an acquittal." *United States v. Williams*, 233 F.3d 592, 593-95 (D.C. 2000).

D. Suppressed Exculpatory Evidence and Government Use of Perjured Testimony

A defendant generally must make a strong showing in order to reopen a case following a determination of guilt. A more lenient burden of proof applies when the motion is based on exculpatory evidence that was in the possession of the government or its agents at the time of trial.[6]

> [T]he fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that the newly discovered evidence probably would have resulted in an acquittal. If the standard applied to the usual motion for a new trial based on newly discovered evidence were the same when the evidence was in the State's possession as when it was found in a neutral source, there would be no special significance to the prosecutor's obligation to serve the cause of justice.

United States v. Agurs, 427 U.S. 97, 111 (1976).

Due process requires reversal of a conviction for prosecutorial failure to disclose material exculpatory evidence.[7] Evidence is considered material if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 682 (1985); *see also Catlett v. United States*, 545 A.2d 1202, 1217 (D.C. 1988) (quoting *Bagley*).[8] This standard applies whether the favorable evidence is directly exculpatory or could have been used to impeach a government witness. *Bagley*, 473 U.S. at 676; *Giglio v. United States*, 405 U.S. 150, 154 (1972) (inducements offered to informants who testified at trial).

An even more searching standard of review applies when the government knowingly offers false testimony. "[A] conviction obtained by the knowing use of perjured testimony must be set aside

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[6] The *Brady* doctrine applies to information relevant to sentencing as well as to guilt; *Brady* itself involved suppression of evidence that could have mitigated the defendant's sentence. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

[7] Because both the suppression of exculpatory evidence and the knowing use of perjured testimony violate due process, these claims may also be raised in a motion to vacate sentence and judgment pursuant to D.C. Code § 23-110.

[8] The D.C. Court of Appeals has stated that a trial court's decision regarding materiality under *Brady* is reviewed only for "reasonableness." *Derrington v. United States*, 488 A.2d 1314, 1339 (D.C. 1985); *Davies v. United States*, 476 A.2d 658, 661 (D.C. 1984). These statements have been superceded, however, by the Supreme Court decisions in *Kyles v. Whitley*, 514 U.S. 419 (1995) and *Strickler v. Greene*, 527 U.S. 263, 289-90 (1999), in which the Supreme Court engaged in its own analyses of materiality, displaying no deference to the conclusions of the lower courts. *See also Kyles*, 514 U.S. at 455 (Stevens, J., concurring) ("[W]e should independently review the record").

if there is any reasonable likelihood that the false testimony could have affected the jury's verdict." *Bagley*, 473 U.S. at 679 n.9 (citing *Napue v. Illinois*, 360 U.S. 264 (1959), and comparing this standard to the "harmless beyond a reasonable doubt" test for constitutional error under *Chapman v. California*, 386 U.S. 18 (1967)).[9]

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***Gathers v. United States*, 101 A.3d 1004 (D.C. 2014).**

***Longus v. United States*, 52 A.3d 836 (D.C. 2012).** See, *supra*, Chapter 5.II.A.1.F.

III. PROCEEDINGS UNDER D.C. CODE § 23-110

A. In General

D.C. Code § 23-110 provides a collateral remedy analogous to the relief available to federal prisoners under 28 U.S.C. § 2255. *See Swain v. Pressley*, 430 U.S. 372 (1977); *Spencer v. United States*, 748 A.2d 940, 945 n.3 (D.C. 2000). Like its federal counterpart, it is brought to challenge an illegal detention:

> A prisoner in custody under sentence of the Superior Court claiming the right to be released upon the ground that (1) the sentence was imposed in violation of the Constitution of the United States or the laws of the District of Columbia, (2) the court was without jurisdiction to impose the sentence, (3) the sentence was in excess of the maximum authorized by law, [and] (4) the sentence is otherwise subject to collateral attack, may move the court to vacate, set aside, or correct the sentence.

D.C. Code § 23-110(a).

A § 23-110 motion "may be made at any time," D.C. Code § 23-110(b), by anyone who is in legal custody. *Snell v. United States*, 754 A.2d 289, 291-92 & n.3 (D.C. 2000). In order to be in custody, a defendant's physical movements must be restricted. *Mitchell v. United States*, 977 A.2d 959, 964 (D.C. 2009). A sentence of probation is considered to be custodial. *Snell*, 754 A.2d 289. An order to pay a monetary assessment or fine, however, is not. *Mitchell*, 977 A.2d at 968. Likewise, an obligation to register under the Sex Offender Registration Act is not considered to be a form of custody. *Id*. at 968.

Common grounds for § 23-110 motions include involuntariness of a guilty plea, illegality of a sentence,[10] double jeopardy violations, and ineffective assistance of counsel at trial, in connection with plea proceedings, or at sentencing. *See infra* Section B.[11]

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[9] Pre-trial and post-trial litigation of *Brady* claims is discussed more fully in Chapter 5 of this manual.

[10] An illegal sentence may also be attacked through a motion under Super. Ct. Crim. R. 35(a). However, that rule "presupposes a valid conviction and may not, therefore, be used to challenge alleged errors in proceedings that occurred prior to the imposition of sentence." *Allen v. United States*, 495 A.2d 1145, 1149 (D.C. 1985). Sentence

There is a presumption that a trial court presented with a 23-110 motion should conduct a hearing in order to evaluate the claim. D.C. Code § 23-110(c); s*ee also McCrimmon v. United States*, 853 A.2d 154 (D.C. 2004) (remanding for evidentiary hearing on whether defense attorney's decision not to cross-examine crucial prosecution witness was based on a prior attorney-client relationship between the defense attorney and the government witness); *Haley v. United States*, 799 A.2d 1201, 1214-15 (D.C. 2002) (remanded for hearing); *Jones v. United States*, 743 A.2d 1222, 1225-26 (D.C. 2000) (remanding for hearing on adequacy of counsel's plea advice); *Williams v. United States*, 725 A.2d 455 (D.C. 1999) (hearing required when allegations are neither vague nor conclusory); *Woodard v. United States*, 719 A.2d 966, 969 (D.C. 1998) (hearing required for motion on ineffective assistance where there were "factual disputes clearly raised by the record").

The presumption will be overcome, and no such hearing necessary, if "the motion and files and records of the case conclusively show that the prisoner is entitled to no relief." D.C. Code § 23-110(c); *Freeman v. United States*, 971 A.2d 188, 201 (D.C. 2009). This will be the case when "allegations of the motion itself are vague and conclusory, are wholly incredible, or, even if true, would merit no relief." *Miller v. United States*, 479 A.2d 862, 869 (D.C. 1984) quoting *Gibson v. United States*, 388 A.2d 1214, 1216 (D.C.1978) (per curiam); s*ee also Washington (Anthony) v. United States*, 834 A.2d 899, 903 (D.C. 2003) (affirmed denial of hearing where appellant procedurally barred from asserting ineffective assistance of counsel claim). **Because the court will deny a claim when there is either no dispute or a dispute that can be resolved based on the record, it is advisable to substantiate any allegations in the motion with affidavits or other documents**.[12] *See Bettis v. United States*, 325 A.2d 190, 197 (D.C. 1974) (dispute resolved from the record).

Obtaining Counsel: A court has discretion under D.C. Code § 11-2601(3)(A) to appoint counsel for an indigent person seeking collateral relief if "the interests of justice" so require. *Jenkins v. United States*, 548 A.2d 102, 104-05 (D.C. 1988). A prisoner who seeks the appointment of counsel must therefore proffer the grounds for collateral relief at the time counsel is requested. *Id.* at 106. In order to prevail on an application for counsel, the prisoner must show that his or her § 23-110 motion satisfies the same criteria that would entitle him or her to a hearing on the motion. *Wu v. United States*, 798 A.2d 1083, 1089 (D.C. 2002); *Doe v. United States*, 583 A.2d 670, 672 (D.C. 1990); s*ee also Kyle v. United States*, 759 A.2d 192, 201 (D.C. 2000). The denial

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computation issues may not be litigated under D.C. Code § 23-110. *Alston v. United States*, 590 A.2d 511, 514 (D.C. 1991).

[11] A claim of ineffective assistance of appellate counsel may not be raised in a § 23-110 motion. *Mayfield v. United States*, 659 A.2d 1249, 1251 (D.C. 1995). Rather, litigation of this claim requires a motion to recall the mandate because the "Superior Court does not have authority to rule on the constitutionality of appellate proceedings." *Id*. at 1252 (quoting *Watson v. United States*, 536 A2d 1056, 1060 (D.C. 1987)).

[12] Even this practice may be insufficient to entitle the defendant to a hearing. *See Derrington v. United States*, 488 A.2d 1314, 1338-41 (D.C. 1985). In *Derrington*, the trial court denied a hearing on allegations that the government had failed to disclose a "deal" it had made with a witness in exchange for testimony, and that the witness recanted after trial. The court stated: "The need for a hearing on a § 23-110 motion is diminished where a witness seeks to recant earlier testimony and the trial court has had the opportunity to observe the witness's demeanor and weigh the credibility of the witness at trial. On review of a motion to vacate sentence, the testimony must be considered most strongly in support of the jury's verdict." *Id*. at 1340 (citations omitted).

of a request for counsel is not an appealable order. *Jenkins*, 548 A.2d at 108. When the court determines that a hearing is required, appointment of counsel is obligatory. *Doe*, 583 A.2d at 673.

Although § 23-110 does not provide for discovery, the Court of Appeals held courts should allow discovery when necessary to give "meaning and substance to the objectives of the law." *Gibson v. United States*, 566 A.2d 473, 478 (D.C. 1989) *citing Harris v. Nelson*, 394 U.S. 286 (1968). "[W]here specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief, it is the duty of the court to provide the necessary facilities and procedures for an adequate inquiry." *Id. quoting Harris*, 394 U.S. at 300. This is a fact-specific inquiry, and courts have discretion in determining whether or not discovery is warranted. Given this discretion, a judge may refuse to allow discovery if claims in the § 23-110 motion are "'overly broad, and speculative.'" *Brown v. United States*, 726 A.2d 149, 156 (D.C. 1999) (claim was prosecutor had violated *Brady* by failing to disclose in timely manner that the complaining witness had been arrested three weeks before trial and was not charged with a drug offense) *citing Brooks v. United States*, 683 A.2d 1369, 1371 (D.C. 1995), *cert. denied*, 528 U.S. 1130 (2000). However, failure to provide for discovery where warranted is considered an abuse of discretion. *See Bracey v. Gramley*, 520 U.S. 899, 908-09 (1997) (judge had been convicted of taking bribes in murder trials).[13]

D.C. Code 23-110 "is not designed to be a substitute for direct review," *Head v. United States*, 489 A.2d 450, 451 (D.C. 1985), and preserved claims cognizable on direct appeal should not be litigated through motions under D.C. Code § 23-110. A defendant who has not raised an issue on direct appeal may only raise that issue on collateral attack if he shows "both cause for his failure to do so and prejudice as a result of his failure." *Head*, 489 A.2d at 451; *Wainwright v. Sykes*, 435 U.S. 72 (1977)). The "cause and prejudice" standard is difficult to meet, and defendants can often meet one requirement but not the other. *See, e.g., Strickler v. Greene*, 527 U.S. 263 (1999).

Where an appellate court has disposed of an issue on direct appeal, that issue will not be considered afresh on collateral attack "absent special circumstances." *Doepel v. United States*, 510 A.2d 1044, 1045-46 (D.C. 1986). Such "special circumstances" can consist of an intervening change in relevant law, if that law is one "which would have exonerated the defendant had it been in force at the time of the direct appeal." *Kirk v. United States*, 510 A.2d 499, 504 (D.C. 1986) *citing Davis v. United States*, 417 U.S. 333, 342 (1974)*; see also Pettaway v. United States*, 390 A.2d 981, 986 (D.C. 1978) (strict principles of *res judicata* do not apply to § 23-110 litigation). In deciding whether to bring a claim based on new law, counsel must determine whether principles of retroactivity would bar the new law from being applied. [14]

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[13] Implementing the mandate of *Harris*, the federal system promulgated Rule 6 of Rules Governing § 2255 Proceedings in the United States District Courts, which provides that a judge should grant discovery "for good cause shown." *Bracey*, 520 U.S. at 904.

[14] Such intervening law must be applied in a post-appeal collateral attack in at least three situations: (1) when an intervening decision merely has applied settled precedents to new and different factual situations; (2) where the decision goes to the very heart of the truth-finding function; and (3) where the decision makes clear that the trial court lacked authority to punish a criminal defendant in the first place. *Kirk*, 510 A.2d at 507-08 (citations omitted). In this last category of cases, where jurisdiction was already lacking, the new rule does not so much apply retroactively as reveal the fact that the prior judgment or sentence was void *ab initio*. *Id.* at 508.

Second or Successive Motions: As a general matter, the court is only required to entertain a prisoner's first motion for a specific type of relief. D.C. Code § 23-110(e). When a successive petition is filed, "'[c]ontrolling weight may be given' to the denial of a prior application for collateral relief on the same ground if that denial was on the merits, unless the ends of justice require that the claim be considered anew." *Vaughn v. United States*, 600 A.2d 96, 97 (D.C. 1991) quoting *Sanders v. United States*, 373 U.S. 1, 15 (1963) (citations omitted). *But see Brown v. United States*, 656 A.2d 1133, 1136 (D.C. 1995) (claim should be considered anew where movant was unrepresented in earlier proceeding but had been entitled to have counsel appointed) citing *Vaughn*, 600 A.2d at 97.[15]

Denial of a § 23-110 motion is appealable. Under § 23-110(f), a separate notice of appeal must be filed. *Taylor v. United States*, 603 A.2d 451, 458 (D.C. 1992); *Hall v. United States*, 559 A.2d 1321, 1322 (D.C. 1989). A party may request release pending appeal. D.C. App. R. 9. If such release is denied, the party may appeal the denial under Rule 9. D.C. App. R. 9(b).

A defendant seeking collateral relief from a Superior Court judgment must initially move under § 23-110. Federal habeas corpus relief is available under 28 U.S.C. § 2241 and habeas relief is available under D.C. Code § 16-1901 only where the § 23-110 remedy is unavailable or "inadequate or ineffective to test the legality of the detention." D.C. Code § 23-110(g). *See Swain v. Pressley*, 430 U.S. 372, 384 (1977) (upholding constitutionality).[16]

2014 Supplement

***Strozier v. United States*, 991 A.2d 778 (D.C. 2010).** No abuse of discretion in denying two § 23-110 motions without hearing based on defense counsel's failure to secure presence of *Brady* witness or independent forensic witness where *Brady* witness's grand jury testimony that defendant had been unarmed was entered into evidence and defendant was ultimately acquitted of while armed offense, and defendant failed to demonstrate how he was prejudiced by counsel's decision not to call expert witness.

B. Ineffective Assistance of Counsel

The Sixth Amendment guarantees the right to counsel once the adversarial process has been initiated – including when interrogation commences and extends to all "critical stages" of the proceedings. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2085 (2009) (citations omitted). "[T]he right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v Richardson*, 397 U.S. 7659, 771 n.14 (1970)).[17]

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[15] The same standard applied to a successive § 23-110 motion as to repeated applications for habeas corpus relief, 28 U.S.C. § 2254, D.C. App. R. 9(b), or applications to vacate sentence and judgment under 28 U.S.C. § 2255 (containing identical language). *See Kuhlmann v. Wilson*, 477 U.S. 436 (1986).

[16] Federal habeas litigation is discussed separately in this chapter.

[17] A claim of ineffective assistance may also be raised by a defendant who proceeded *pro se* at trial with an attorney as "stand-by" counsel. *Ali v. United States*, 581 A.2d 368, 379-80 (D.C. 1990) (election to proceed under hybrid form of representation is only partial waiver of Sixth Amendment right to counsel).

Claims of inadequate assistance of counsel can be made before and throughout trial, before sentencing, and post-trial.

A defendant may make a pre-trial claim of ineffective assistance of counsel. Such claims are reviewed on a different standard than post-trial claims. If a defendant claims before trial that counsel was ineffective in investigation, preparation, or some other substantial aspect, "the trial court has a constitutional duty to conduct an inquiry sufficient to determine the truth and scope of the defendant's allegations." *Monroe v. United States*, 389 A.2d 811, 820 (D.C. 1978); *Farrell v. United States*, 391 A.2d 755, 762 (D.C. 1978); *see also Gamble v. United States*, 901 A.2d 159, 164-67 (D.C. 2006).[18] The court "need not attempt to examine every conceivable deficiency in the representation." *Forte v. United States*, 856 A.2d 567, 574 (D.C. 2004). However, it "must make on-the-record findings sufficient to permit meaningful appellate review on the issue of the ability and preparedness of counsel to render effective assistance under the prevailing circumstances." *Fields v. United States*, 466 A.2d 822, 824 (D.C. 1983) (explaining the *Monroe-Farrell* rule[19]*; see also Forte*, 856 A.2d at 574-76; *Woodard v. United States*, 719 A.2d 966, 969 (D.C. 1998) (hearing required on claim of ineffective assistance of counsel where factual record did not support trial court's determinations denying relief); *Stevens v. United States*, 683 A.2d 452, 454-55 (D.C. 1996) (inquiry need not ignore the context of the complaint and can be tailored to that context); *Wingate v. United States*, 669 A.2d 1275, 1284 (D.C. 1995) (inquiry tailored to explore the specifics of the complaint); *McKenzie v. United States*, 659 A.2d 838, 840 (D.C. 1995) (scope of inquiry within court's discretion); *Witherspoon v. United States*, 557 A.2d 587, 593 (D.C. 1989). If the court fails to make adequate findings, the case must be remanded for a *Monroe-Farrell* hearing or the conviction reversed. *See Matthews v. United States*, 459 A.2d 1063, 1065-66 (D.C. 1983) (*Farrell* does not require reversal rather than remand).[20]

Post-trial claims of ineffective assistance of counsel are appropriately raised in a D.C. Code § 23-110 motion.[21] These claims should not be raised on direct appeal in most cases, and are generally unsuccessful when they are made because absent a record made in a collateral proceeding, there is not enough information to permit the appellate court to evaluate the claim intelligently. *Simpson v. United States*, 576 A.2d 1336, 1338-39 (D.C. 1990). However, a defendant will only be able to collaterally attack his or her conviction based on an ineffectiveness claim not raised during the pendency of appeal if he or she can meet the cause and prejudice standard. *Shepard v. United States*, 533 A.2d 1278, 1280-81 (D.C. 1987).[22]

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[18] A defendant can also make a claim under the *Monroe-Farrell* doctrine in regard to ineffective assistance with respect to sentencing counsel. *Johnson v. United States*, 585 A.2d 766, 770-71 (D.C. 1991).

[19] This rule applies retroactively only to convictions not yet reviewed on direct appeal. *Id*. at 826.

[20] Outright reversal, rather than remand, is required if there is obvious prejudice or the trial court's conclusion is unsupported by the record. *McFadden v. United States*, 614 A.2d 11, 16-18 (D.C. 1992).

[21] Ineffectiveness claims may also be raised in a motion for new trial under Superior Court Criminal Rule 33. Ineffective assistance resulting in an unconstitutional guilty plea may be challenged in a motion to withdraw the plea pursuant to Rule 32(e).

[22] "Cause" for failure to raise ineffective assistance of trial counsel in a collateral attack during the pendency of an appeal is established when the same counsel represents the accused at trial and on appeal. *Little v. United States*, 748 A.2d 920, 923 (D.C. 2000).

Therefore, if appellate counsel knows of the grounds for an ineffective assistance of counsel claim during the pendency of direct appeal, counsel should file a 23-110 motion in the trial court at the at that time. *Id*. at 1280; *Doe v. United States*, 583 A.2d 670, 674 (D.C. 1990). If a direct appeal has already been filed and there is a basis for an ineffectiveness claim, counsel should file a motion to hold the appeal in abeyance while a § 23-110 motion is pursued. *See Simpson v. United States*, 576 A.2d at 1339. If the ineffectiveness claim is denied, a new notice of appeal must be filed, and the appellate cases will be consolidated. The duty to investigate various grounds for ineffectiveness "is triggered by what the [client] (and trial counsel) tell appellate counsel in response to a reasonably thorough inquiry, and by what is reasonably noticeable from the trial court's records." *Doe*, 583 A.2d at 674-75.[23] Trial counsel should not represent a defendant on an ineffective appointment of counsel appeal. "It would be a conflict of interest for a lawyer to appeal a ruling premised on that lawyer's own ineffectiveness." *Ramsey v. United States*, 569 A.2d 142, 146 (D.C. 1990). "[W]hen, on appeal, a good faith, legitimate issue of ineffective assistance of counsel exists, trial counsel should move to withdraw as counsel on appeal." *Reavis v. United States*, 395 A.2d 75, 79 n.3 (D.C. 1978).

There is a presumption in favor of a hearing on § 23-110 motions. *Jones v. United States*, 918 A2d 389, 403-404 (D.C. 2007) (remand for evidentiary hearing on inadequate counsel issue where issue of fact raised by defendant's evidentiary submission with motion); *Reaves v. United States*, 694 A.2d 52, 57-58 (D.C. 1997) (discussing need for hearing where communications between counsel and client are in dispute and record insufficient to establish counsel's challenged decision was tactical choice) (citing *Miller v. United States*, 479 A.2d 862, 869-70 (D.C. 1984)); *Hollis v. United States*, 623 A.2d 1229, 1233-34 (D.C. 1993) (defendant entitled to hearing where counsel failed to interview and call co-defendant who could provide exculpatory testimony); *Bruce v. United States*, 617 A.2d 986, 995 (D.C. 1992); *Wright v. United States*, 608 A.2d 763, 765-66 (D.C. 1992); *Gillis v. United States*, 586 A.2d 726, 728-29 (D.C. 1991); *Miller v. United States*, 479 A.2d 862, 869-72 (D.C. 1984).

As with any motion pursuant to § 23-110, a hearing does not need to be held where claims are "vague and conclusory, are wholly incredible, or, even if true, would merit no relief," *Shepard*, 533 A.2d at 1283 (citation omitted); *see also Ready v. United States*, 620 A2d 233, 234 (D.C. 1993); *Tibbs v. United States*, 628 A.2d 638 (D.C. 1993) (upholding denial of hearing on complaint that counsel failed to introduce false testimony). Furthermore, a hearing does not have to be held if the claims raised do not involve any new matters outside of the court record. *See Jones v. United States*, 620 A.2d 249, 253 n.3 (D.C. 1993) *comparing Ellerbe v. United States*, 545 A.2d 1197, 1198-99 (D.C.) ("movant is entitled to a hearing on his [or her] claims regarding the ineffective assistance of trial counsel only when the claims cannot be disposed of by resort to the files and records of the case because the claims involve matters outside of the record"), *cert. denied*, 488 U.S. 868 (1988), *with (Cleveland) Wright v. United States*, 608 A.2d 763, 766

[23] Trial counsel should not represent a defendant on an ineffective assistance of counsel appeal, as this would be a conflict of interest. *Ramsey v. United States*, 569 A.2d 142, 146 (D.C. 1990). If a legitimate claim of ineffective assistance of counsel arises while already on appeal, trial counsel should withdraw as appellate counsel. *Reavis v. United States*, 395 A.2d 75, 79 n.3 (D.C. 1978). If the allegedly ineffective trial counsel does not withdraw, failure to raise an ineffectiveness claim on direct appeal will not bar consideration of a subsequent motion under § 23-110, as such a defect is "not correctable on direct appeal." *Ramsey*, 569 A.2d at 14*; see also Little v. United States*, 748 A.2d 920, 923 (D.C. 2000).

(D.C.1992) ("To uphold the denial of a § 23-110 motion without a hearing, this court must conclude that under no circumstances could the movant establish facts warranting relief.").

Once jeopardy attaches, any claim of ineffective assistance is governed by the *Strickland* standard rather than by the *Monroe-Farrell* standard. *Johnson v. United States*, 746 A.2d 349, 354 (D.C. 2000); *Scott v. United States*, 619 A.2d 917, 922 (D.C. 1993).[24] This inquiry has two-prongs:

> "First, the defendant must show that counsel's performance was deficient.[25] . . . Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."

Strickland, 466 U.S. at 687.[26]

In connection with the first prong, "[j]udicial scrutiny of counsel's performance must be highly deferential. . . . [A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance," where reasonableness is defined as "reasonableness under prevailing professional norms." *Id*. at 687-89; *see also McAdoo v. United States*, 515 A.2d 412, 419 (D.C. 1986); *Hill v. United States*, 489 A.2d 1078, 1080 (D.C. 1985). The court must make this determination "considering all the circumstances," based upon "the facts of the particular case, viewed at the time of counsel's conduct." *Strickland*, 466 U.S. at 688, 690; *see also Smith v. United States*, 608 A.2d 129 (D.C. 1992) (remanding for hearing on whether counsel failed to cross-examine witnesses adequately where impeaching evidence existed, since trial record alone did not show that this was a "reasonable tactical decision."). While this standard of review gives deference to counsel's strategic choices, the strategic choices must have a meaningful explanation, and "the trial court cannot presume that when counsel states he had some reasons for a decision, that those reasons, whatever they may have been, were sound." *Gillis v. United States*, 586 A.2d 726, 728-29 (D.C. 1991).

As for the prejudice requirement, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process

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[24] The only cases in which the trial court is required to conduct an immediate inquiry into allegations of inadequate representation, after jeopardy has attached, are those in which it appears that counsel's performance may be affected by a conflict of interest. *Johnson*, 746 A.2d at 354 (citing *Witherspoon v. United States*, 557 A.2d 587, 590 (D.C. 1989)); *Singley v. united States*, 548 A.2d 780, 786 (D.C. 1988); *Douglas v. United States*, 488 A.2d 121, 136 (D.C. 1985).

[25] *Strickland* replaced the prevailing standard in the District of Columbia, which required the defendant to show "gross incompetence" that "has in effect blotted out the essence of a substantial defense." *Bruce v. United States*, 379 F.2d 113, 116-17 (D.C. Cir. 1967); *see Angarano v. United States*, 312 A.2d 295, 298-99 (D.C. 1973); *see also Battle v. Thornton*, 646 A.2d 315, 322 (D.C. 1994) ("an attorney in any case is responsible for having not only the formal legal training reflected by membership in the bar but also enough additional knowledge, as well as experience, to permit the exercise [of] that degree of reasonable care and skill expected of lawyers acting under similar circumstances") (citations omitted).

[26] The *Strickland* analysis also applies to claims of ineffective assistance of appellate counsel. *Smith v. Murray*, 477 U.S. 527, 533-37 (1986); *Watson v. United States*, 536 A.2d 1056 (D.C. 1987).

that the trial cannot be relied on as having produced a just result." *Strickland*, 466 U.S. at 686. The "defendant need not show that counsel's deficient conduct more likely than not altered the outcome of the case," *id*. at 693, but rather,

> must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

Id. at 694-96; *see also Woodard v. United States*, 719 A.2d at 971 (trial court applied incorrect legal standard to prejudice requirement when it required petitioner to "*prove* that he would not have been found guilty" to establish prejudice) (emphasis in original); *Wright v. United States*, 717 A.2d 304, 309 (D.C. 1998) (prejudice requires showing of reasonable probability of a different outcome).[27]

A court need not consider the two prongs of the analysis in any particular order, and is not required to "address both components of the inquiry if the defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697; *see, e.g. Kinard v. United States*, 635 A.2d 1297, 1305-07 (D.C. 1993) (defendant not prejudiced by counsel's failure to restrict scope of questioning of defendant to "innocent presence" defense, even had counsel erred); *Webster v. United States*, 623 A.2d 1198, 1206 (D.C. 1993) (defendant was not prejudiced by counsel's failure to seek redaction of details of drug buy from chemist's report).

When a jurisdiction provides an appeal of right, due process also guarantees the effective assistance of counsel on appeal. *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985); *see also Griffin v. United States*, 598 A.2d 1174 (D.C. 1991) (motion granted where appellate counsel failed to raise meritorious double jeopardy claim). This right does not extend to petitions for rehearing en banc, *Wise v. United States*, 522 A.2d 898 (D.C. 1987); discretionary appeals, *Wainwright v. Torna*, 455 U.S. 586 (1982) (per curiam); petitions for certiorari, *Ross v. Moffitt*, 417 U.S. 600 (1974); or most post-conviction proceedings, *Coleman v. Thompson*, 501 U.S. 722 (1991); *Pennsylvania v. Finley*, 481 U.S. 551 (1987). Claims of ineffective assistance of appellate counsel should not be brought in a § 23-110 motion, and instead must be presented independently by filing a recall of the mandate directly with the Court of Appeals. *Wu*, 798 A.2d at 1090-91; *Mayfield v. United States*, 659 A.2d 1249, 1252 (D.C. 1995); *Brown v. United States*, 656 A.2d 1133, 1135 n.3 (D.C. 1995); *Head v. United States*, 626 A.2d 1382 (D.C. 1993).

[27] In the unique circumstance where there is "an actual breakdown of the adversarial process," a court may presume counsel's ineffectiveness without resorting to the two-prong *Strickland* analysis. *United States v. Cronic*, 466 U.S. 648, 657-58 (1984); *see Yancey v. United States*, 755 A.2d 421, 428-30 (D.C. 2000) (discussing *Cronic*).

Such motions must be filed within 180 days of the issuance of the mandate. D.C. App. R. 41(f) (2009).[28]

Claims of ineffective assistance may be based on any number of acts or omissions, including:

Failure to move to suppress evidence: *Kimmelman v. Morrison*, 477 U.S. 365, 385-87 (1986); *Watley v. United States*, 918 A.2d 1198 (D.C. 2007) (failure to file Fourth Amendment suppression motion ineffective); *Wright v. United States*, 717 A.2d 304 (D.C. 1998) (failure to file suppression motion did not prejudice accused and therefore was not ineffective); *Washington v. United States*, 689 A.2d 568, 571-73 (D.C. 1997) (identification testimony); *Wright v. United States*, 608 A.2d 763 (D.C. 1992) (Fourth Amendment); *Hockman v. United States*, 517 A.2d 44, 50-52 (D.C. 1986) (statements).

Failure to conduct an adequate investigation: *Cosio v. United States*, 927 A.2d 1106 (D.C. 2007) (en banc) (failure to investigate defendant's relationship with the complainant ineffective where government's case based on complainant's alleged fear of the defendant); *Steward v. United States*, 927 A.2d 1081 (D.C. 2007) (error to dismiss defendant's § 23-110 motion without a hearing or without allowing him to supplement his motion where counsel failed to interview co-defendant or investigate the possibility of calling him as a witness, and where co-defendant stated in affidavit that he would have provided exculpatory testimony); *Stewart v. United States*, 881 A.2d 1100, 1113-14 (D.C. 2005) (no ineffectiveness for failure to interview alibi witnesses where alibi vague, where one witness likely to assert Fifth Amendment privilege if called, and where other not at the scene); *Matthews v. United States*, 629 A.2d 1185, 1194-96 (D.C. 1993) (failure to interview two main defense witnesses); *Gray v. United States*, 6 17 A.2d 521 (D.C. 1992) (remand for hearing on failure to investigate information available from four witnesses); *Gillis v. United States*, 586 A.2d 726 (D.C. 1991) (failure to interview alibi witness); *Rice v. United States*, 580 A.2d 119 (D.C. 1990) (failure to investigate alibi witness where no reason to doubt credibility and evidence of defendant's guilt not so strong as to be outcome determinative); *United States v. Berry*, 123 Wash. D.L. Rptr. 265 (D.C. Super. Ct. December 1, 1994) (Burnett J.) (order for new trial due to trial counsel's failure to obtain expert interpretation of exculpatory medical records and to present testimony regarding them).

No ineffectiveness was found in *United States v. Holmes*, 508 F.3d 1091, 1096-97 (D.C. Cir. 2007) (request for continuance to review newly received discovery enabled admission of harmful evidence and issuance of superseding indictment, but not prejudicial and not foreseeable); *Stewart v. United States*, 881 A.2d 1100, 1114-15 (D.C. 2005) (decision not to cross examine witness about late recovery of a bullet); *Minor*, 647 A.2d at 775-76 (failure to have drugs tested by independent chemist and to call chemist as defense witness to testify that premixed drugs not sold on street); *Sykes v. United States*, 585 A.2d 1335 (D.C. 1991) (failure to interview alibi witness who would likely assert Fifth Amendment privilege and not exonerate defendant was within bounds of "reasonable professional assistance"); *Doe*, 583 A.2d at 673-74 (failure to pursue causation defense); and *Hunter v. United States*, 588 A.2d 680, 682 (D.C. 1991) (second counsel was unfamiliar with trial record during seven-day period for filing new trial motion).

[28] The 180-day time limit does not apply to mandates issued before the rule was promulgated in January 1985, *Hines v. United States*, 547 A.2d 988, 989 (D.C. 1988); *Watson v. United States*, 536 A.2d 1056 (1987).

Ineffectiveness but insufficient prejudice was shown in *Webster v. United States*, 623 A.2d 1198 (D.C. 1993) (mishandling of misidentification defense); *Luchie v. United States*, 610 A.2d 248 (D.C. 1992) (deficient preparation and representation at trial); *United States v. Barbour*, 813 F.2d 1232 (D.C. Cir. 1987) (deficient investigation); *United States v. Debango*, 780 F.2d 81, 86 (D.C. Cir. 1986) (failure to interview witnesses); *Curry v. United States*, 498 A.2d 534, 539-43 (D.C. 1985) (failure to have medical expert review record in rape case); and *United States v. Frost*, 502 A.2d 462 (D.C. 1985) (failure to interview co-defendants).

Neither ineffectiveness nor prejudice was found in *Gamble v. United States*, 901 A.2d 159 (D.C. 2006) (defendant failed to provide support for claim that counsel failed to interview potentially exculpatory witnesses).

Failure to raise legal issues at trial: *Berkeley v. United States*, 567 F.3d 703, 709 (D.C. Cir. 2009) (failure to pursue entrapment defense not ineffective where defendant didn't inform attorney of threats leading to drug sale); *Perez v. United States*, 968 A.2d 39, 88-93 (D.C. 2009) (no ineffectiveness where counsels' decisions not to call certain witnesses were strategic and where defense attorney elicited damaging testimony on cross examination); *Howerton v. United States*, 964 A.2d 1282, 1292-93 (D.C. 2009) (failure to make motions to challenge joinder and to sever not ineffective where motions unlikely to succeed); *Aiken v. United States*, 956 A.2d 33, 48-50 (D.C. 2008) (remanded for hearing to determine ineffectiveness in failing to request Kastigar hearing where unclear from record whether defendant's immunized testimony or derivative evidence tainted his trial); *Washington v. United States*, 689 A.2d 568, 573-75 (D.C. 1997) (failure to request intoxication-defense instruction; no adequate factual basis). *Quallis v. United States*, 654 A.2d 1281 (D.C. 1995) (failure to object to introduction at trial of incriminating statement not provided in discovery, remanded for further hearing); *Taylor v. United States*, 603 A.2d 451, 459-60 (D.C. 1992) (failure to seek severance, not prejudicial); *Mack v. United States*, 570 A.2d 777 (D.C. 1990) (failure to object to damaging hearsay, remanded for hearing); *Young v. United States*, 515 A.2d 1090, 1093-94 (D.C. 1986) (failure to object to consolidation, insufficient prejudice); *Chavarria v. United States*, 505 A.2d 59, 65-66 (D.C. 1986) (failure to request limiting instruction, insufficient prejudice).

Trial performance and decisions: *Mozee v. United States*, 963 A.2d 151, 165-66 (D.C. 2009) (failure to adequately prepare defendant prior to testifying, to cross examine effectively, to object to prosecution's evidence, and to object to erroneous instructions not prejudicial); *Stevens v. United States*, 944 A.2d 466 (D.C. 2008) (failure to introduce evidence, object to hearsay, adequately cross-examine complainant, and consult with defendant regarding testifying troubling, but not prejudicial); *Rivera v. United States*, 941 A.2d 434 (D.C. 2008) (failure to request interpreter for attorney client conversations not ineffective where defense investigator and defendant's wife available to translate; no ineffectiveness where attorney properly prepared witness not to refer to gangs while testifying; no ineffectiveness for failure to call defendant's brother as a witness where his account differed from that of other witnesses); *Brown v. United States*, 934 A. 2d 930 (D.C. 2007) (no ineffectiveness for failure to object to hearsay evidence, and for failure to present defense given in opening due to witness's assertion of Fifth Amendment privilege); *Van Kuhn v. United States*, 900 A.2d 691 (D.C. 2006) (counsel's arguing a reasonable doubt defense with which defendant did not agree was not ineffective); *Cade v. United States*, 898 A.2d 349, 354-56 (D.C. 2006) (no ineffectiveness where counsel's strategy to

concede guilt on armed robbery charge but argue for acquittal on homicide charge); *Brown v. United States*, 726 A.2d 149 (D.C. 1999) (no ineffectiveness with respect to attorney's advice about whether accused should testify at trial); *Williams v. United States*, 725 A.2d 455 (D.C. 1999) (discussing trial counsel's failure to cross-examine complainant on prior inconsistent statement relating to consensual entry of her home by accused, which would have defeated one essential element of burglary charge); *Bowman v. United States*, 652 A.2d 64, 73-74 (D.C. 1994) (no ineffectiveness in failure to call witnesses who had not observed incident in question); *McKinnon v. United States*, 644 A.2d 438, 443-44 (D.C. 1994) (no ineffectiveness in defense counsel's conceding ''permanent injury'' element in malicious mayhem case when defense was alibi) *Smith v. United States*, 608 A.2d 129 (D.C. 1992) (remand for hearing on contention that trial counsel failed to establish location of incident through cross-examination, documentary evidence, and corroborating defense witnesses, all of which corroborate the defendant's testimony).

Failure to introduce exculpatory evidence at trial: *Wright v. United States*, 979 A.2d 26 (D.C. 2009) (no ineffectiveness for failure to call alibi witnesses who would have provided inconsistent, possibly damaging alibis); *Brown v. United States*, 934 A. 2d 930 (D.C. 2007) (no ineffectiveness for failure to call Brady witness who had made statement while under the influence); *Jones v. United States*, 918 A.2d 389 (D.C. 2007) (error to deny § 23-110 motion without a hearing where trial counsel failed to discover and call two alibi witnesses whose affidavits contained exculpatory information); *Long v. United States*, 910 A.2d 298 (D.C. 2006) (abuse of discretion to deny § 23-110 motion without a hearing where defense counsel failed to call alibi witness or other exculpatory witnesses whose testimony would have been neither cumulative nor inconsistent); *Frederick v. United States*, 741 A.2d 427 (D.C. 1999) (vacating conviction and remanding for new trial due to counsel's failure to subpoena critical eyewitness); *Hollis v. United States*, 623 A.2d 1229 (D.C. 1993) (failure to pursue affidavits of co-defendant indicating readiness to exculpate defendant, remand for hearing); *Bruce*, 617 A.2d at 994-97 (ballistic report that corroborated defense theory was not introduced, remand for findings on deficiency and prejudice); *Byrd v. United States*, 614 A.2d 25 (D.C. 1992) (failure to call eyewitnesses who could provide exculpatory testimony, prejudice requiring reversal).

Advice to client: *Hill v. Lockhart*, 474 U.S. 52 (1985) (guilty plea); *Smith v. United States*, 686 A.2d 537, 547 (D.C. 1996) (erroneous advice regarding plea offer); *Matos v. United States*, 631 A.2d 28 (D.C. 1993) (failure to advise client of deportation consequences of guilty plea and failed to request judicial recommendation against deportation); *Eldridge v. United States*, 618 A.2d 690 (D.C. 1992) (failure to advise client of consequences of revised plea bargain); *Kelly v. United States*, 590 A.2d 1031, 1034-35 (D.C. 1991) (counsel advised defendant not to testify); *Johnson*, 585 A.2d at 769-70 (failure to relay plea offer); *Berkeley*, 567 F.3d at 709-710 (advising defendant that if he plead guilty he would be eligible to participate in a drug program for which he was not actually eligible not prejudicial where competent attorney would have advised defendant to plead guilty regardless).

Ineffectiveness at sentencing: *Wong v. Belmontes*, 130 S. Ct. 383, 387 (2009) (per curiam) (failure to put on evidence to "humanize" the defendant in favor of mitigation at sentencing was not deemed prejudicial because the omitted evidence would have been cumulative); *Schriro v. Landrigan*, 550 U.S. 465, 475-77 (2007) (failure to present mitigating evidence not ineffective

where defendant instructed attorney not to present such evidence); *Louis v. United States*, 862 A.2d 925 (D.C. 2004) (court did not err when denying defendant's motion to set aside the judgment of conviction and withdrawal of guilty plea due to the court sentencing defendant to 8-24 years when the government agreed to allocute for 5-15 years); *Dantzler* v. United States, 696 A.2d 1349 (1997) (remanded for hearing to determine whether counsel was ineffective in seeking ''addict exception'').

Conflicts of interest: A "less stringent" standard is applied to a claim that the lawyer had a conflict of interest. *Derrington v. United States*, 681 A.2d 1125, 1133 (D.C. 1996). This standard provides that "[a] Sixth Amendment violation warranting reversal will be established if a convicted defendant demonstrates on appeal that an actual conflict of interest adversely affected his lawyer's performance." *Id*. at 1133 (citations omitted) (internal quotations omitted). The petitioner must be able to "point to specific instances in the record to suggest an actual conflict or impairment of their interests." *Fitzgerald v. United States*, 530 A.2d 1129, 1138 (D.C. 1987) (internal quotations omitted). If able to do so, a defendant "need not demonstrate prejudice in order to obtain relief." *Id*. (quoting *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980)); *see also Freeman v. United States*, 971 A.2d 188, 202-03 (D.C. 2009) (failure to withdraw despite past representation of a witness is not ineffective when no actual conflict demonstrated); *Veney v. United States*, 738 A.2d 1185, 1193-94 (D.C. 1999) (distinguishing actual conflicts from those that are merely hypothetical or speculative); *Gibson v. United States*, 632 A.2d 1155, 1159 (D.C. 1993) (same).

The following cases involved ineffectiveness claims based upon alleged conflicts of interest: *Burger v. Kemp*, 483 U.S. 776 (1987); *Nix v. Whiteside*, 475 U.S. 157 (1986) (counsel not ineffective in threatening to discontinue representing client who intended to commit perjury, thereby dissuading him from taking the stand); *Wages v. United States*, 952 A.2d 952, 960-61 (D.C. 2008) (no actual conflict where counsel represented informant and defendant in the same matter but informant's information not useful and obtained before defendant's arrest); *Lee-Thomas v. United States*, 921 A.2d 772, 777 (D.C. 2007) (allegations of ineffectiveness before and during trial do not render counsel ineffective in advising defendant as to whether or not he should request a mistrial based on alleged ineffectiveness); *Thomas v. United States*, 685 A.2d 745, 750-52 (D.C. 1996) (remanded for hearing where defense counsel had intimate relationship with police officer from same District as investigating officers); *Derrington v. United States*, 681 A.2d 1125, 1134-38 (D.C. 1996) (conviction reversed because of conflict arising when one client might benefit from giving government information harmful to another client); *Stratmon v. United States*, 631 A.2d 1177 (D.C. 1993) (counsel not ineffective for not raising judge's apparent conflict of interest on appeal); *Witherspoon*, 557 A.2d 587 (remanding on whether actual conflict of interest prejudiced defense or whether defendant manufactured conflict by threatening to present false testimony); *Curry*, 498 A.2d 534 (failure to request corroboration instruction and to obtain expert assistance in interpreting records is below professional norm but not enough to require reversal).

Failure to file timely notice of appeal: The "failure of counsel to file a timely notice of appeal when his client instructs him to do so amounts to ineffective assistance of counsel." *Samuels v. United States*, 435 A.2d 392, 395 (D.C.1981); *see also In re Sealed Case*, 527 F.3d 174 (D.C. Cir. 2008) (two to three minute post-sentencing conversation regarding defendant's right to

appeal insufficient where defendant essentially non-responsive). *But see Thomas v. United States*, 586 A.2d 1228 (D.C. 1991) (not ineffective per se if defendant had not instructed counsel to file appeal). The appropriate remedy in such a case is for the trial court to vacate sentence and resentence the defendant in order to permit a timely appeal. *Samuels*, 435 A.2d at 395.

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***Chaidez v. United States*, 133 S. Ct. 1103 (2013).** Under *Teague v. Lane*, rule of *Padilla v. Kentucky* – that effective counsel must advise client of negative immigration consequences of taking a guilty plea – is a new rule that does not apply retroactively to convictions already final on direct appeal when *Padilla* was decided.

***Missouri v. Frye*, 132 S. Ct. 1399 (2012).** See, *supra*, Chapter 6.I.C.

***Lafler v. Cooper*, 132 S. Ct. 1376 (2012).** See, *supra*, Chapter 6.I.C.

***Padilla v. Kentucky*, 559 U.S. 356 (2010).** Advice regarding effect of a criminal conviction on one's immigration status is within ambit of Sixth Amendment right to effective assistance of counsel; therefore, counsel must inform client whether plea carries risk of deportation.

***Hopkins v. United States*, 84 A.3d 62 (D.C. 2014).** Trial court did not err in failing to intervene, sua sponte, to determine whether defendant had knowingly and voluntarily agreed to counsel's concessions in opening where there was no sign of significantly deficient performance on counsel's part and no indication that defendant opposed, did not understand, or was surprised by counsel's concessions.

***Long v. United States*, 83 A.3d 369 (D.C. 2013) (amended).**

***Blakeney v. United States*, 77 A.3d 328 (D.C. 2013).** No bright-line rule that unrebutted expert opinion of defendant's incompetency necessarily creates sufficient doubt to require defense counsel to bring issue to court's attention.

***Blakeney v. United States*, 77 A.3d 328 (D.C. 2013).** See, *supra*, Chapter 3.II.B.

***Portillo v. United States*, 62 A.3d 1243 (D.C. 2013).** Trial court erred in failing to conduct an adequate inquiry into defendant's pretrial ineffective assistance of counsel claim as required by the *Monroe-Farrell* line of cases, particularly where defendant was non-English speaking and had limited education.

***Young v. United States*, 56 A.3d 1184 (D.C. 2012) (amended).** Trial counsel's failure to consult with a narcotics expert before trial and present expert testimony at trial to challenge police officers' accounts of drug sale they said they had observed – where government's case turned largely on credibility of its police officer witnesses and where amount, purity, and price were at issue – fell below norm of reasonable professional standards, and this deficiency prejudiced the defense.

***Kigozi v. United States*, 55 A.3d 643 (D.C. 2012).** Ineffective assistance of counsel and not a tactical decision for lawyer not to consult a defense drug expert where it was critical that decedent may have been under the influence of PCP when making his alleged dying declaration.

***Thomas v. United States*, 50 A.3d 458 (D.C. 2012).** Trial court did not abuse its discretion in denying § 23-110 motion without hearing because defendant did not show that defense attorney's failure to call expert witness on effect of crack on perception and state of mind would have affected outcome of trial where defense was that complaining witnesses were lying, not mistaken, and where the jury was well aware of drug history of each complainant.

***Patterson v. United States*, 37 A.3d 230 (D.C. 2012), *amended, reh'g en banc denied* (Oct. 11, 2012) (per curiam).** Trial court did not err in failing during trial to conduct an inquiry into defendant's dissatisfaction with defense counsel's conduct where defendant's statement that he "could do a lot better as [his] own lawyer" did not constitute a positive demand upon the trial court for leave to proceed without counsel.

Trial court did not abuse its discretion in denying without a hearing defendant's § 23-110 motion in which he alleged his attorney had failed to investigate another suspect's claim of guilt of the charge and failed to present evidence regarding his hand tattoo where other suspect's "unsworn, vague letter" could not have changed outcome of trial and where other suspect's attorney prevented defendant's attorney from interviewing suspect, and where evidence of hand tattoo would have had limited probative value.

***Aiken v. United States*, 30 A.3d 127 (D.C. 2011).** On appeal from remand for a *Kastigar* hearing, Court of Appeals held that the government did not meet its burden to prove by a preponderance of the evidence that no use was made of defendant's immunized testimony regarding another witness's testimony.

***McCrimmon v. United States*, 27 A.3d 121 (D.C. 2011).** Defendant's counsel did not operate under "actual conflict" in violation of Sixth Amendment right to counsel as a result of discussion between himself and crucial prosecution witness over tentative attorney-client relationship where defense counsel testified at remand evidentiary hearing that he had not held back on cross-examining prosecution witness and that any appearance of such was a tactical decision to avoid depicting defendant as powerful figure who called the shots, which would have bolstered government theory that defendant was "mastermind" of conspiracy to commit criminal offenses.

***Paige v. United States*, 25 A.3d 74 (D.C. 2011).** See, *supra*, Chapter 11.II.B.

***Ruffin v. United States*, 25 A.3d 1 (D.C. 2011).** Trial court did not abuse its discretion in denying defendant's § 23-110 motion alleging that counsel inadequately advised him of advantages and disadvantages of taking felony plea offer versus proceeding to trial where counsel informed defendant of parameters of plea and risk of probation revocation if he pled, defendant wanted to take only misdemeanor plea offer, and defendant never admitted to counsel that he was guilty of charged offense such that counsel would have changed his advice about plea.

***Smith v. United States*, 20 A.3d 759 (D.C. 2011).** Trial attorney not ineffective for failing to argue to court or advise defendant that his gun convictions were preempted by Armored Car Act because, although Act operated in District and defendant was an "armored car crew member," facts demonstrated that defendant did not carry gun while "acting in service of" his employer when he carried his loaded weapon to his wife's home in order to sleep for few hours and then have breakfast with his daughter before leaving for work.

***Mungo v. United States*, 987 A.2d 1145 (D.C. 2010).** Counsel not ineffective for failing to object to use of stun belts during voir dire because willingness to accept use of stun belts was tactical decision so that defendant could participate in voir dire process and where counsel took steps to ensure stun belts would not be seen, and defendants' active participation in process demonstrated that wearing stun belts did not instill fear in them, distract them or chill their ability to participate in their defense.

Trial counsel not ineffective for failing to cross-examine testifying medical examiner about former co-worker's dismissal for a lapsed medical license and "sloppy" work because defendants did not show how such lapse would have affected the credibility of the testimony such that confidence in the verdict would be undermined.

Court did not err in determining that attorneys' behavior in making facial expressions at government witness and jurors, slamming down exhibits, and gesturing to jury – although improper and unprofessional as trial strategy – did not amount to deficient representation.

Order denying § 23-110 motion affirmed where allegations that counsel failed to prepare adequately for trial, failed to file certain severance and suppression motions, failed to call certain witnesses, and elicited cross-examination testimony that revealed that defendant was incarcerated were belied by record testimony and court's observations that decisions made by counsel were tactical and there was no reasonable probability that outcome of trial would have been different if alleged omissions had not occurred.

IV. PROCEEDINGS UNDER THE INNOCENCE PROTECTION ACT

The Innocence Protection Act (IPA) took effect in 2002. D.C. Code § 22-4131 *et seq.* (2001). The IPA broadens post-conviction remedies for those who have been wrongfully convicted by, for example, permitting a movant to make a free-standing post-conviction claim of innocence. *See* Addendum to Report on Bill 14-153, *The Innocence Protection Act of 2001* at 5 (Jan. 29, 2002). The IPA was meant to ensure that those who obtain new evidence establishing innocence after the three-year time-limit set out in Super. Ct. Crim. Rule 33 are not precluded from attaining post-conviction relief. *Bouknight v. United States*, 867 A.2d 245, 251 (D.C. 2005). In order to ensure a broader remedy, an applicant may bring a claim under the IPA at any time. D.C. Code § 22-4135(b). In addition, "every measure should be taken to allow wrongfully-convicted individuals the opportunity to prove their innocence with non-biological evidence as well as DNA." *Teoume-Lessane v. United States*, 931 A.2d 478, 489 (D.C. 2007) *quoting* Addendum to Report on Bill 14-153, *The Innocence Protection Act of 2001*, at 5 (Jan. 29, 2002).

For substantive relief under the IPA based on new evidence of innocence – biological or otherwise – an applicant must file a motion requesting that the court either vacate his or her conviction or grant a new trial. D.C. Code § 22-4135(a). The claim must be based on actual innocence, and the applicant must include in the motion an affidavit affirming that he or she is innocent of the crime for which he or she has been convicted. D.C. Code § 22-4135(d)(1). Furthermore, the motion must set forth new evidence which shows that the applicant was actually innocent. D.C. Code § 22-4135(a). "Actual innocence" means, "the person did not commit the crime of which she or he was convicted." D.C. Code § 22-4131(1). A motion to vacate a conviction or grant a new trial on grounds of actual innocence must explain what new evidence proves innocence, how it does so, and in what manner the evidence is not merely "cumulative or impeaching." D.C. Code § 22-4135(c).

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***Meade v. United States*, 48 A.3d 761 (D.C. 2012).** Despite letter from victim stating no rape took place, court did not abuse its discretion in ruling that no evidentiary hearing under IPA was needed where letter would merit no relief even if true, and where defendant failed to show manifest injustice had occurred or that he was actually innocent by clear and convincing evidence.

A. New Evidence Generally

"New evidence" is broadly defined in the IPA. As in Rule 33, it includes evidence that was unknown to the defendant at the time of trial and couldn't have been discovered prior to trial using due diligence. § 22-4131(7)(A). The IPA surpasses Rule 33, however, in that it allows a claim based on evidence which was known to the defendant at the time of trial, but which the defendant was unable to produce or compel, physical evidence the movant could not obtain at the time of the trial, even exercising due diligence, or is evidence obtained as a result of post-conviction DNA testing. D.C. Code § 22-4131(7)

While a petitioner is permitted to offer evidence of which he or she was aware but unable to produce, the petitioner must show that he or she used due diligence in attempting to obtain the evidence prior to trial. *Bouknight*, 867 A.2d at 255. The D.C. Court of Appeals has held that the due diligence requirement is to be analyzed under the IPA in the same manner as it would be analyzed under Rule 33. *Id.* at 256 (no due diligence in attempting to procure witness testimony where defendant failed to subpoena witness but argued that witness would have asserted his Fifth Amendment rights even if subpoenaed). Failure to use due diligence in securing evidence is considered a deliberate withholding of evidence under § 22-4135(d), and thus the petitioner is barred from relying on the evidence in a post-conviction proceeding. *Id*. at 254.

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***Richardson v. United States*, 8 A.3d 1245 (D.C. 2010).** See, *supra*, Chapter 11.II.B.

B. New Evidence and Post-Conviction DNA Testing

Petitioners may seek testing of biological material to prove their innocence. Biological material is defined by statute as, "a sexual assault forensic examination kit. Semen, vaginal fluid, blood, saliva, visible skin tissue, or hair which apparently derived from the perpetrator of a crime or, under circumstances that may be probative of the perpetrator's identity, apparently derived from the victim of a crime. D.C. Code § 22-4131(2). Obtaining testing requires the satisfaction of three-steps. D.C. Code § 22-4133; *United States v. Cuffey*, 2003 WL 23202076, *2 (D.C. Super. Ct. 2003).

First, the movant must show that the biological evidence is in fact evidence from the initial prosecution and that it is still in the custody of the District of Columbia, the United States, or another entity which would have ensured its proper preservation. § 22-4133(a)(1), (2). The movant must also establish that the evidence fits into one of three categories: (a) that the evidence was not subject to DNA testing prior to trial because such testing "was not readily available"; (b) that the evidence was not subject to the particular type of more-accurate DNA testing being requested; or (c) that the evidence was never tested because it was either unknown or unavailable to the movant at trial. § 22-4133(a)(3).

Second, an applicant must assert, by affidavit, his or her actual innocence, identify the evidence sought to be tested and the reason why testing was not previously obtained, and explain how the evidence would help show his or her actual innocence. D.C. Code § 22-4133(b); *see also Cuffey*, 2003 WL 23202076 at *2 (denying request for post-conviction DNA testing on grounds that testing had already been performed and would not yield evidence that would help show his innocence of the crime charged). At this point, the court must provide the government notice and an opportunity to respond unless the court finds it clear from the record the applicant is not entitled to relief. D.C. Code § 22-4133(c).

Third, if the applicant meets the first two conditions, the court "shall" order DNA testing if there is a reasonable probability that the results of the proposed DNA testing would be non-cumulative and would help establish actual innocence. § 22-4133(d). The reasonable probability standard requires more than conjecture or mere speculation. *Cuffey v. United States*, 976 A.2d 897, 898-99 (D.C. 2009) (denied request for DNA testing where amount of victim's blood on jacket made it unlikely that DNA from another individual could be detected). The court may reject the application if the testing, regardless of the outcome, clearly would not result in evidence which would aid the theory of innocence. *Cuffey*, 2003 WL 23202076 at *1 (denied DNA testing where similar testing was already conducted and did not support defense theory). Counsel should be vigilant that the outcome of the testing is not presumed – for the government or the court to presume the results of the tests will be adverse to the petitioner, which there is a temptation to do, would obviate the need for DNA testing.

Initially, there was some concern that D.C. Code § 22-4133 would make frivolous requests for testing more common. *Teoume-Lessane*, 931 A.2d at 488. D.C. Code § 22-4132, which outlines the procedure for pre-conviction DNA testing, is meant to balance out this potential effect. Under § 22-4132, a defendant has a right to notice in open court and to independent testing of biological

evidence. D.C. Code § 22-4132(b).[29] Should the defendant waive independent testing, she or he generally will not be eligible for § 22-4133 post-conviction testing. § 22-4132(b).

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***Mitchell v. United States*, 80 A.3d 962 (D.C. 2013).** Government bears burden of substantiating its claim that it does not possess biological material in response to defendant's application for post-conviction DNA testing.

***Hood v. United States*, 28 A.3d 553 (D.C. 2011).** No due process violation because defendant did not satisfy Innocence Protection Act's materiality requirement where he could not show a reasonable probability that requested testing of trace skin cells on various items of victim's property found at crime scene, even if it resulted in the recovery of a usable DNA profile other than that of defendant or victim, would establish his actual innocence where evidence showed that defendant was alone in house with victim when she was attacked, defendant was only person seen leaving premises after crime, and no one other than defendant and victim was there when police arrived.

C. Burden of Proof for § 22-4135 Motion

After an applicant files an IPA motion, the prosecution is given notice. § 22-4135(e)(1). The judge must then evaluate the new evidence to determine whether or not it shows actual innocence based on five factors:

(A) The new evidence;
(B) How the new evidence demonstrates actual innocence;
(C) Why the new evidence is not cumulative or impeaching;
(D) If the conviction resulted from a trial, and if the movant asserted a theory of defense inconsistent with the current claim of innocence, the specific reason the movant asserted an inconsistent theory at trial; and
(E) If the conviction resulted from a guilty plea, the specific reason the movant pleaded guilty despite being actually innocent of the crime.

D.C. Code § 22-4135(g)(1).

Credibility of the new evidence is an important threshold issue. If the judge determines that the new evidence is not credible, he or she may deny the motion without determining what the

[29] While D.C. Code § 22-4132(b) requires that a judge give a defendant notice as to the availability of pre-conviction testing, the court of appeals has held, despite the plain language of the statute, that it does not mandate notice in any particular way. *Veney v. United States*, 936 A.2d 811, 823 (D.C. 2007) (holding that informing co-defendant and appellant's attorney of rights in front of defendant served as ample notice). Furthermore, while § 22-4132 does state that a defendant "shall" be instructed regarding the availability of DNA testing, this has been construed as a procedural, rather than a substantive, provision. *Teoume-Lessane*, 931 A.2d at 489. As such, a court's failure to instruct a defendant regarding the possibility of DNA testing does not require reversal as a matter of law. *Id.* at 489. Likewise, if it can be shown that a court did not personally notify a defendant of these rights but that the defendant was otherwise made aware of the right to DNA testing, the defendant is not entitled to post-conviction DNA testing without otherwise meeting the requirements set out by § 22-4133. *Veney*, 931 A.2d at 825.

evidence's effect otherwise would be. *Bell v. United States*, 871 A.2d 1199, 1201 (D.C. 2005) (denying motion where judge found that witness recantation was not credible). D.C. Code § 22-4135 requires an evidentiary hearing unless the motion and files conclusively show that the movant is entitled to no relief. D.C. Code § 22-4135(e)(1). However, an application may be denied without an evidentiary hearing, provided that the record sets forth all relevant information. *Bell*, 871 A.2d at 1201-1202.

The burden of proof rests on the applicant. If the applicant proves more likely than not he or she is innocent, the court must grant him or her a new trial. D.C. Code § 22-4135(g)(2). "More likely than not" is a preponderance of evidence standard applicable to civil actions. If the applicant proves by clear and convincing evidence that he or she is innocent, the court must vacate the conviction and dismiss the charge(s). D.C. Code § 22-4135(g)(3).

To date, only one case has successfully received relief under the IPA: Judge Burgess found that Steven Dewitt was more likely than not innocent of first-degree murder based on new eyewitness testimony that another individual had committed the crime, admissions of guilt from the true perpetrator to his colleagues, the statement of another witness who was present at the scene, faulty eyewitness testimony, motive evidence, and testimony about the true perpetrator's modus operandi.

V. MOTIONS TO CORRECT OR REDUCE SENTENCE

A. Motions To Correct Sentence

A motion to correct an illegal sentence may be filed at any time. A motion to correct a sentence that is illegally imposed, however, must be corrected within 120 days. Super. Ct. Crim. R. 35(a). The distinction between these illegalities is important:

> Where the sentence is "illegal" in the sense that the court goes beyond its authority by acting without jurisdiction or imposing a sentence in excess of the statutory maximum provided, then such sentence – because of the gravity of the error, the unqualified deprivation of one's liberty – may be challenged at any time. However, where a court of competent jurisdiction imposes a sentence within the limits authorized by the relevant statute, but commits a procedural error in doing so, it is not an abuse of discretion nor unreasonable . . . to characterize this sentence as one imposed in an "illegal manner" . . . and therefore subject to the 120-day jurisdictional limitation for challenge.

Robinson v. United States, 454 A.2d 810, 813 (D.C. 1982) (failure to comply with recidivist statute is ''illegal manner'' not ''illegal sentence''); *see also Littlejohn v. United States*, 749 A.2d 1253, 1256 (D.C. 2000) (failure to make ''no benefit'' finding under Federal Youth Correction Act is "illegal manner" not "illegal sentence").

An illegal sentence can be corrected at any time because it is considered a nullity. This enables a trial court to *sua sponte* vacate it and "begin again." *Byrd v. United States*, 487 A.2d 616 (D.C. 1985). The trial court may impose a different or greater sentence without violating the Due Process Clause in this situation, as the new sentence is intended to correct the judge's error rather

than to penalize the defendant. *Id.* at 618-19. Such resentencing is also considered proper under the Double Jeopardy Clause. *Prince v. United States*, 432 A.2d 720 (D.C. 1981); *Christopher v. United States*, 415 A.2d 803, 804-05 (D.C. 1980). While there is no time limit for correcting an illegal sentence, the court has discretion to decline to consider a second Rule 35(a) motion based on grounds already presented in an earlier motion. *Neverdon v. District of Columbia*, 468 A.2d 974 (D.C. 1983) (no abuse of discretion to deny motion claiming that Youth Act sentence was unlawful, where defendant had not appealed denial of earlier motion). *But see Dantzler v. United States*, 696 A.2d 1349, 1356 (D.C. 1997) (reaching merits and noting previous claims had been pro se and failed to raise ineffectiveness claim).

The defendant does not need to be present at the time of correction or reduction of an illegal sentence. Super. Ct. Crim. R. 43(c)(4); *Wells v. United States*, 469 A.2d 1248, 1250 (D.C. 1983). Likewise, a judge does not need to provide an opportunity for the defendant to allocute at the resentencing. *Wells*, 469 A.2d at 1250.

B. Motions to Reduce Sentence

A motion to reduce sentence may be filed up to and on the 120th day after the day that: (1) the sentence is imposed; (2) probation is revoked; or (3) the court receives the mandate on appeal affirming the judgment or dismissing the appeal,[30] or any order or judgment of the Supreme Court that has the effect of upholding the judgment of conviction or revocation of probation. Super. Ct. Crim. R. 35(b).[31] This time limit is jurisdictional. *Garcia v. United States*, 542 A.2d 1237, 1241 (D.C. 1988). While the motion is typically brought by the defendant, the court may also reduce a sentence on its own motion. Super. Ct. Crim. R. 35(b). The government is entitled to respond to the motion in either situation, even if the government had agreed not to allocute at sentencing as part of a plea bargain. *Braxton v. United States*, 328 A.2d 385, 388 (D.C. 1974). The court must act on the motion within a "reasonable" time. Rule 35(b); *Garcia*, 542 A.2d at 1240.

Trial counsel should advise their client of the availability of the Rule 35 procedure at the time of sentencing. Any attorney who assures a client that he or she will file a Rule 35 motion bears the responsibility of doing so in a timely fashion. *Cade v. United States*, 311 A.2d 265 (D.C. 1973). While a court has discretion to appoint counsel to pursue a motion to reduce sentencing, there is no Sixth Amendment right to counsel for this purpose. *United States v. Hamid*, 461 A.2d 1043, 1044 (D.C. 1983); *Burrell v. United States*, 332 A.2d 344, 347 (D.C. 1975). This has led to some leniency in interpreting *pro se* requests for sentence reduction, illustrated by the courts' common practice of treating any timely-filed *pro se* letter requesting sentence modification as a Rule 35 motion. *Garcia*, 542 A.2d at 1240.

Motions to reduce sentence can be difficult to bring. Those based on the severity of sentence generally will not be successful when the sentence falls within statutory limits. *Cook v. United*

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[30] The mandate usually issues 21 days from the date of the appellate decision. D.C. App. R. 41. The precise date of issuance in any particular case may be obtained from the court of appeals.

[31] The 120-day period runs from the issuance of the mandate in the direct appeal. The resolution of an appeal from a collateral motion or proceeding does not trigger the right to file a motion for reduction of sentence. *Brown v. United States*, 411 A.2d 631, 632 (D.C. 1980).

States, 932 A.2d 506, 506 (D.C. 2007) (citing to *Crawford v. United States*, 628 A.2d 1002, 1003-04 (D.C.1993)) (not abuse of discretion to deny motion where sentence falls within statutory guidelines and where later enacted voluntary sentencing guidelines would not have compelled a lesser sentence).

C. Reduction of the Minimum Term

The United States Parole Commission has discretion to apply to the sentencing court for reduction of a defendant's minimum sentence if it appears "that there is a reasonable probability that a prisoner will live and remain at liberty without violating the law, and that his immediate release is not incompatible with the welfare of society." D.C. Code § 24-401c. The court "shall have jurisdiction to act upon the application at any time prior to the expiration of the minimum sentence." *Id*. The trial court granted such an application over government objection in *United States v. Forbes*, 113 Wash. D.L Rptr. 305 (D.C. Super. Ct. Jan. 4, 1985) (Board's application indicated that the defendant "has been a model prisoner for many years," "has taken full advantage of the Department of Corrections rehabilitation programs," and "has been a good role model for his fellow inmates").

D. Motions Filed During Appeal

A trial court may entertain a Rule 35 motion while an appeal from conviction is pending. *Johnson v. United States*, 513 A.2d 798, 801 (D.C. 1986). It does not have jurisdiction to actually correct or reduce a sentence during the pendency of appeal, however. *Goins v. United States*, 353 A.2d 298, 300-01 (D.C. 1976); *Franklin v. United States*, 293 A.2d 278, 279 (D.C. 1972) (per curiam). Instead, if the trial court "indicates its willingness to grant the motion, then [the Court of Appeals will] remand the case record for the trial court to grant the requested relief." *Johnson, 513 A.2d at 801*; *Bell v. United States*, 676 A.2d 37, 41 (D.C. 1996) (discussing "case remands" vs. "record remands" and their impact on the jurisdiction of Superior Court and the Court of Appeals).

VI. SEALING ADULT ARREST RECORDS

Criminal record sealing is governed by D.C. Code §§ 16-801 through 805. The two methods of sealing a criminal record are claims of actual innocence, governed by § 16-802, and all other eligible cases, governed by § 16-803. Actual innocence claims, under § 16-802, have more stringent requirements, but with the greater reward of complete erasure that is intended to restore the movant to his or her status before arrest. In cases other than actual innocence, under § 16-803, the movant may in some instances have less of an evidentiary burden, but a successful motion does not result in the records of the arrest or conviction being erased as the records are still available for view under certain circumstances described below. A movant may file a motion to seal under §§ 16-802 and 16-803 at the same time or, if the court denies a motion filed under § 16-802 in a claim of actual innocence, the movant is also free to re-file under § 16-803 for the more limited sealing.

A. Claims of Actual Innocence (D.C. Code § 16-802)

A motion filed under a claim of actual innocence, § 16-802, obviously requires that the movant was not convicted of the case he or she seeks to seal. In addition to a verdict or finding of guilty, pleas of nolo contendere and not guilty by reason of insanity are also considered convictions. D.C. Code § 16-801(3). The movant must be able to produce evidence to satisfy the applicable burden of proof to establish that the offense either did not occur or that he or she did not commit the offense. D.C. Code § 16-802(b).

The burden of proof the movant must meet depends on the number of years that have passed since the date the case ended. If the motion is filed within 4 years after the prosecution was terminated, the movant must prove by a preponderance of the evidence that the offense did not occur or that he or she did not commit the offense. D.C. Code § 16-802(c). If the motion is filed more than 4 years after the prosecution was terminated, the movant must prove by the higher standard of clear and convincing evidence that the offense did not occur or that he or she did not commit the offense. D.C. Code § 16-802(d). An unjustified delay that substantially prejudices the government's response to the motion may cause the court to hold that there is a rebuttable presumption that the motion should not be granted. D.C. Code § 16-802(e).

Movants should file an affidavit to carry their burden of proof in support of their claims of actual innocence.

A successful motion under actual innocence will effectively erase the arrest record. D.C. Code § 16-802(i). Upon granting the motion, the court will order the prosecutor, the police, and other agencies such as the Pretrial Services Agency and Court Services and Offender Supervision Agency to seal all records of the arrest and prosecution. D.C. Code § 16-802(h)(4)-(6). The prosecuting agency, law enforcement, and the court keep a "restricted access" file of the case, but they may only look at the file if granted permission by the court after a finding that there is a compelling need to do so. D.C. Code § 16-802(h)(4)-(7).

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***V.C.B. v. United States*, 37 A.3d 286 (D.C. 2012).** Evidentiary hearing appropriate in case where factual record is inconclusive.

B. Motions Other Than Claims of Actual Innocence (D.C. Code § 16-803)

Other than claims of actual innocence, all other motions to seal an arrest record are filed under § 16-803. Both the movant and the arrest record must qualify to be sealed. A movant is disqualified from filing under § 16-803 to seal a record of any arrest if he or she has: (A) a

conviction in any jurisdiction after the arrest or conviction for which the motion to seal is filed, (B) a pending criminal case in any jurisdiction, or (C) a conviction in any jurisdiction for a felony other than a Bail Reform Act violation or an ineligible misdemeanor listed under § 16-801(9). D.C. Code §§ 16-803(a)-(c), 16-801(5). The arrest record must also qualify to be sealed by meeting the particular time requirements described below.

Unless waived in writing by the prosecuting agency, the following number of years must elapse prior to filing the motion to seal under § 16-803:

Non-convictions

Eligible misdemeanors – two years must elapse after the termination of the case. D.C. Code § 16-803(a)(1).

Felony and ineligible misdemeanors[32] – five years must elapse after the termination of the case. D.C. Code § 16-803(b)(1).

Convictions

Eligible misdemeanors and felony Bail Reform Act violations – ten years must elapse after the completion of the movant's sentence.[33] D.C. Code § 16-803(c)(1).

A motion pursuant to § 16-803 must seek to seal all of the movant's eligible arrests and convictions or waive in writing the right to request sealing of any omitted arrests or convictions, including any arrests or convictions as to which the required waiting period has elapsed. D.C. Code § 16-803(d). In other words, if a movant files before the waiting period is complete for any arrest or conviction, then he or she must waive in writing the right to ever file a motion to seal that arrest or conviction. *Id.* A motion filed under § 16-803 may also be dismissed if it appears that the movant has unreasonably delayed filing the motion and that the delay has prejudiced the government's ability to respond. D.C. Code § 16-803(k).

In deciding whether it is in the interests of justice to grant the motion and order the records sealed, the Court, under § 16-803(h)(1), shall consider:

(A) The movant's interest in having the records sealed,

(B) The community's interest in having access to the movant's records (including the interests of potential employers and public safety), and

(C) The community's interest in the movant's rehabilitation and employability.

The Court may also consider:

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[32] For a list of ineligible misdemeanors, see § 16-801(9).

[33] No felony convictions other than for Bail Reform Act violations may be sealed. In fact, any felony conviction, other than for a Bail Reform Act violation, disqualifies the movant from filing to seal any conviction under § 16-803.

(A) The nature and circumstances of the offense;

(B) The movant's role in the offense and, if not convicted, the strength of the evidence against him or her;

(C) The movant's history and characteristics, including:

i. Character,
ii. Physical and mental condition,
iii. Employment history,
iv. History of drug and alcohol addiction, and any treatment received,
v. Overall criminal history,
vi. Criminal history, and
vii. Efforts at rehabilitation;

(D) The number of arrests and convictions to be sealed;

(E) The time that has passed since the arrests or convictions;

(F) Whether there have been past records sealed for reasons other than actual innocence; and

(G) Any statement(s) made by the victim(s) of the offense.

The burden of proof to be applied to the motion and who must meet the burden differs depending on the type of case and its outcome. For a motion to seal an eligible misdemeanor that was a non-conviction, the prosecutor has the burden of proving by a preponderance of the evidence that sealing the record is not in the interests of justice. D.C. Code § 16-803(i)(1). For a motion to seal a felony or ineligible misdemeanor that was a non-conviction, the movant has the burden of establishing by a preponderance of the evidence that sealing the record is in the interests of justice. D.C. Code § 16-803(i)(2). Finally, for a motion to seal a conviction of an eligible misdemeanor or felony Bail Reform Act, the movant has the burden of establishing by clear and convincing evidence that sealing the record is in the interests of justice. D.C. Code § 16-803(i)(3).

If the court grants the motion to seal filed under § 16-803, the court shall order the prosecutor, the police, and any pretrial, corrections, or community supervision agency to remove from their publically available files all records related to the case. D.C. Code § 16-803(l). The court and prosecutor's office are entitled to retain a copy of the movant's arrest and conviction in a nonpublic file. *Id.* The sealed record may be made available without the movant's permission for use in civil litigation, by order of the court if good cause is shown, by an agency that issues professional or employment licenses if the case might disqualify the movant from being licensed, by any government employer if the employment is at a senior level, and by any licensed school, day care center, educational facility, or child protection agency. A movant must disclose the case in response to a direct question asked in connection with jury service or employment with

any court, prosecutor's office, law enforcement agency, or licensing agency. D.C. Code § 16-803(m).

Type of Claim	**Time Period**	**Burden of Proof**	**Level of Sealing**
Innocence (applies to any offense provided there is not a conviction)	Within four years	Preponderance of the evidence	Sealed for all purposes to restore the movant to status held prior to arrest
	After four years	Clear and convincing evidence	
Non-conviction of an eligible misdemeanor	Must wait at least two years after termination of the case	Prosecutor must establish by preponderance of the evidence that it is not in the interests of justice to grant relief	- Sealed from public view by court, police, and all other agencies - Movant must acknowledge case when directly asked for jury service or when applying to work for any court, prosecutor's office, law enforcement agency, or licensing agency - Movant has no duty to inform any other entity of the arrest or prosecution
Non-conviction of an ineligible misdemeanor or felony BRA	Must wait at least five years after termination of the case	Movant must establish by preponderance of the evidence that it is in the interests of justice to grant relief	Same as above
Conviction of an eligible misdemeanor or felony BRA	Movant must wait at least ten years after completion of the sentence	Movant must establish by clear and convincing evidence that it is in the interests of justice to grant relief	Same as above

VII. WRITS

A. Writ of Habeas Corpus

The Constitution secures the availability of the writ of habeas corpus, the so-called "great writ of liberty" of the English common law. U.S. Const. Art. I, § 9, cl. 2. While the motion to vacate sentence or judgment under to D.C. Code § 23-110 is the exclusive means for challenging the validity of a District of Columbia Superior Court *judgment* through collateral attack, the habeas corpus petition provides the mechanism for challenging the *legality of confinement. See, e.g.,*

Coates v. Elzie, 768 A.2d 997, 1000 (D.C. 2001) (habeas corpus reaches not only the fact, but also the form, of confinement) (citations omitted).

The Superior Court exercises habeas corpus jurisdiction over individuals confined in the District of Columbia by D.C. officials under D.C. Code § 16-1901(a). That section provides as follows:

> A person committed, detained, confined, or restrained from his lawful liberty within the District, under any color or pretense whatever, or a person in his behalf, may apply by petition to the appropriate court, or a judge thereof, for a writ of habeas corpus, to the end that the cause of the commitment, detainer, confinement, or restraint may be inquired into. The court or the judge applied to, if the facts set forth in the petition make a *prima facie* case, shall forthwith grant the writ, directed to the officer or other person in whose custody or keeping the party so detained is returnable forthwith before the court or judge.

D.C. Code 16-1901(b) precludes filing of habeas petition in Superior Court when actions of federal officials are challenged. *Owens v. Gaines*, 219 F. Supp. 2d 94, 99 (2002).

The federal courts exercise general habeas corpus jurisdiction over D.C. Code offenders serving sentences in federal facilities pursuant to 28 U.S.C. § 2241. Federal courts have jurisdiction when the remedy under § 23-110 is "inadequate or ineffective to test the legality of [the] detention," or when the suit is against federal employees. § 23-110(g); *Swain v. Pressley*, 430 U.S. 372, 381 (1977) (upholding constitutionality of § 23-110(g)).[34] Individuals confined in federal facilities or under jurisdiction of federal officials must seek habeas relief under 28 U.S.C. § 2241. *Gant v. Reilly*, 224 F.Supp.2d 26, 39 (D.C.D.C. 2002) (where offender attacks legality of parole revocation decision made by United States Parole Commission, he must seek relief in federal court, since the alleged due process violation arises from the exercise of federal agency's discretion and not a state-level exercise of discretion); *see also Neal v. D.C. Department of Corrections*, 684 F.2d 17, 20 (D.C. Cir. 1982) (citing *Preiser v. Rodriguez*, 411 U.S. 475, 486 (1973)) (federal habeas may also be available to contest an unconstitutional institutional transfer). *But see Beard v. Kindler*, 130 S. Ct. 612, 618 (2009) ("We hold that a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review.")

Further, those petitions must be filed in the jurisdiction in which the petitioner is confined. *Rumsfeld v. Padilla*, 542 U.S. 426 (2004) (habeas corpus relief must be directed against the petitioner's custodian – the person with the ability to produce the prisoner's body before the court); *see also, Knight v. United States*, 892 A.2d 1096, 1098 (D.C. 2006); *Alston v. United States*, 590 A.2d 511 (D.C. 1991) (on motion to correct sentence, held that D.C. courts cannot grant habeas relief to prisoners not incarcerated in D.C. or held by D.C. correctional facilities).

In order to prevail on a federal habeas claim, a petitioner must assert his or her claims with sufficient particularity. *Dye v. Hofbauer*, 546 U.S. 1, 4 (2005). These claims must show that constitutional error resulted in a "substantial and injurious effect" on the petitioner's case. *Fry v.*

[34] D.C. Superior Court judges are fully competent to decide federal constitutional issues; the fact that they do not have the tenure and salary protection of Art. III judges, does not mean that remedy provided by § 23-110 is inadequate or ineffective. *See Swain*, 430 U.S. at 383.

Pliler, 551 U.S. 112, 121-22 (2007) *citing Brecht v. Abrahamson*, 507 U.S. 619, 631 (1993). A petitioner presenting new evidence in a habeas petition must show that the new evidence renders it "more likely than not that no reasonable juror would have found [him or her] guilty beyond a reasonable doubt." *House v. Bell*, 547 U.S. 518, 536-37 (2006) (citing to *Schlup v. Delo*, 513 U.S. 298, 324 (1995).

B. Writ of Error Coram Nobis

The writ of error coram nobis is designed to correct errors not apparent from the face of the record. *United States v. Hamid*, 531 A.2d 628, 631-32 (D.C. 1987); *United States v. Higdon*, 496 A.2d 618, 619 (D.C. 1985). It is available only in extraordinary circumstances – "circumstances compelling such action to achieve justice." *United States v. Morgan*, 346 U.S. 502, 511 (1954); *see also Carlisle v. United States*, 517 U.S. 416, 428-29 (1996) (writ of coram nobis traditionally only used to correct factual errors "material to the validity and regularity of the legal processing itself" such as defendant's death or not being of age (citation omitted)). The defendant must meet the following criteria:

> (1) the trial court be unaware of the facts giving rise to the petition; (2) the omitted information be such that it would have prevented the sentence or judgment; (3) petitioner be able to justify the failure to provide the information; (4) the error be extrinsic to the record; and (5) the error be "of the most fundamental character"

Hamid, 531 A.2d at 634 (citations omitted) (citing *Morgan*, 346 U.S. at 512). *Hamid* is the only case in this jurisdiction to grant such relief in recent years. 531 A.2d 628. In this case, the court found that both counsel and the defendant were under such extreme duress from fear of reprisals by the co-defendant during trial and sentencing that they were unable to present mitigating information at sentencing. The trial court found, and the Court of Appeals agreed, that the situation met each of the five prerequisites, and thus that the writ of error coram nobis was appropriate.

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***Smith v. United States*, 20 A.3d 759 (D.C. 2011).** Trial court did not err in denying writ of error coram nobis where defendant voluntarily and intelligently entered unconditional guilty plea and where trial judge plainly stated that "omitted" information would have been insufficient to prevent sentence or entry of judgment.

APPENDIX

TIME LIMITS FOR POST-CONVICTION LITIGATION

A. Within 7 Days after Jury is Discharged

- Motion for Judgment of Acquittal or Arrest of Judgment (*see supra* Section II) – Counsel should attempt to raise these issues as early as possible; may also make motion for more time because rule allows for "such further time as the Court may fix during the 7-day period."

- Motion for New Trial (*see supra* Section III.A) – for *any* ground other than newly discovered evidence; may also make motion for more time because rule allows for "such further time as the Court may fix during the 7-day period."

B. Within 120 Days

After Sentencing

- Motion to Correct Illegally Imposed Sentence (*see supra* Section VI.A) – court had authority to impose the sentence, but erred procedurally in doing so.

After Sentencing, Probation Revocation, or Final Appellate Disposition

- Motion to Reduce Sentence (*see supra* Section VI.B) – trial counsel should advise client of motion's availability at the time of sentencing.

After Dismissal

- Motion to Seal Pursuant to Rule 118 (*see supra* Section VII) – general time period; extended to three years only if there is good cause and "to prevent manifest injustice" (see below).

C. Within 180 Days of Issuance of Mandate in Direct Appeal

- Motion to Recall the Mandate (*see supra* Section IV.B) – for ineffective assistance of *appellate* counsel.

D. Within 3 Years

After Verdict or Finding of Guilt

- Motion for New Trial Based on Newly Discovered Evidence (*see supra* Section III.B) – the defendant must establish that the evidence qualifies as "new" under the 5-part *Thompson-Heard* test.

After Dismissal

- Motion to Seal Pursuant to Rule 118 (*see supra* Section VII) – must be for good cause and "to prevent manifest injustice"

E. Any Time

- Motion to Correct Illegal Sentence (*see supra* Section VI.A) – sentencing court acted beyond its authority in imposing the sentence.

- Motion for Release under D.C. Code § 23-110 – can be brought at any time, by anyone in custody, in order to challenge an illegal detention.

- Motion for a New Trial or to Vacate a Conviction under the Innocence Protection Act (*see supra* Section V) – must be a claim of innocence based on new evidence.

CHAPTER 12

PAROLE AND SUPERVISED RELEASE

I. INTRODUCTION AND LEGAL BACKGROUND OF PAROLE IN THE DISTRICT OF COLUMBIA

A person who is sentenced in D.C. Superior Court and subsequently placed on parole or supervised release has a right to a hearing before the revocation of such conditional release. Parole revocation is the administrative procedure through which a person, who has been released from a prison sentence on parole or supervised release, is returned to prison for violations of parole. Parole is a constitutionally protected liberty interest; due process requires that a state provide basic rights of fair treatment when it seeks to revoke parole. These fundamental procedures were first explicated in the case of *Morrissey v. Brewer*, 408 U.S. 471 (1972).

In 1997, Congress passed the District of Columbia Self Government Improvement and Revitalization Act ("the Revitalization Act"), D.C. Code § 24-1201 et. seq. Among other things, this legislation abolished the D.C. Board of Parole on August 5, 2000, and transferred the function of parole supervision and parole revocation to the Court Services and Offender Supervision Agency (CSOSA) and the U.S. Parole Commission (USPC), respectively.[1] *See* D.C. Code § 24-131. The first stage of the transfer occurred in August of 1998, when the U.S. Parole Commission acquired the parole grant functions—making parole grant decisions and re-parole decisions. The final stage occurred on August 5, 2000, when the Commission assumed the authority to issue warrants for parole violations, conduct revocation hearings and modify conditions of parole for D.C. Code offenders.

The U.S. Parole Commission has promulgated regulations to govern, respectively, parole grant and revocation of D.C. Code offenders. Those regulations are found in the Code of Federal Regulations at 28 C.F.R. Part 2, Subpart C. Both the grant and revocation regulations are presently published at 65 Fed. Reg. 19996-20011 (April 13, 2000).

In August 2000, the District of Columbia ended its practice of sentencing defendants to parole terms and began sentencing them to terms of supervised release instead. For most purposes, the two regimes are indistinguishable: the rights of a supervised releasee are the same as those of a parolee, the procedures used at a supervised release revocation are the same as those at a parole revocation, the fact-finding process is the same, and the sentencing guidelines are the same. Nevertheless, there are a few key differences between the two systems, and those will be discussed *infra* Part V. Aside from those differences, however, you can assume that whatever is said about the parole process in this chapter applies equally to persons on supervised release.

This section of the manual is designed to assist counsel in providing representation before the U.S. Parole Commission. To that end, we will set forth the basic law regarding the fundamental

[1] The District of Columbia parole statute is found at D.C. Code § 24-401 (repealed). That statute sets forth basic procedures and established the D.C. Board of Parole (D.C. Board) as the body responsible for parole supervision, parole grants, and revocation of D.C. Code offenders. The D.C. Board in turn promulgated rules and regulations governing parole, which are contained in the D.C. Municipal Regulations (DCMR) at 28 DCMR Chapters 1 and 2.

constitutional protections governing parole revocation hearings; we will provide a description of the procedures and rights set forth in the proposed U.S. Parole Commission regulations and provide practice suggestions, including legal challenges to some of the Commission's regulations and practices; and finally, we will address administrative and judicial review available.

II. CONSTITUTIONAL RIGHTS OF A PAROLEE

Due Process: Parole, although a limited liberty, includes the freedom ". . . to be with family and friends and to form the other enduring attachments of normal life." *Morrissey v. Brewer*, 408 U.S. 471, 482 (1972). In *Morrissey*, the leading case on parole revocation, the Court explains that parole is a "liberty interest" that is protected by the Fourteenth Amendment. *Id*. Since, however, "the revocation of parole is not part of a criminal prosecution . . . the full panoply of rights due a defendant in such a proceeding does not apply." *Id*. at 480. Still, *fundamental* due process procedures must be observed when the government seeks to revoke parole. These fundamental protections include:

> (a) written notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the fact finders as to the evidence relied on and reasons for revoking parole.

Id. at 489.

Hearing: In addition to establishing these rights, *Morrissey* also makes clear that a parole revocation hearing is a two-step process. First, *Morrissey* requires a preliminary probable cause hearing reasonably near the time and place of any arrest on a parole violator warrant. The purpose of this hearing is to determine whether probable cause, the minimal showing for imprisoning the parolee prior to the revocation hearing, can be shown. *Id*. at 485. Second, there must be a final hearing to determine whether parole was violated. The final revocation hearing must be held within a "reasonable time" after the arrest. In *Morrissey*, a sixty-day delay was found to be reasonable. In cases where a violation is found, the hearing examiner then must decide whether revocation of parole is the appropriate consequence, or if reinstatement is warranted in spite of the violation(s).

The Supreme Court has affirmed the continuing vitality of *Morrissey*, and expanded it to similar situations. *See Young v. Harper*, 520 U.S. 143 (1997) (Oklahoma pre-parole program which releases prisoners to reduce overcrowding is sufficiently similar to parole as to require the due process protections outlined in *Morrissey*). For due process purposes, there is no difference between revocation of probation and revocation of parole. *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973). Thus, favorable probation revocation cases are applicable to constitutional issues arising in parole cases and counsel should cite to them when appropriate in a parole hearing.

Challenging Due Process:

- ✓ Counsel should cite to favorable probation revocation cases, as there is no difference between revocation of probation and revocation of parole

A. Right to Appointed Counsel

The *Morrissey* court expressly declined to decide whether there is a right to counsel for indigents facing parole revocation. *Morrissey*, 408 U.S. at 489. A year later, in *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), the Court found that there was no inflexible constitutional right requiring appointment of counsel in every probation or parole revocation hearing, but asserted that "there will remain certain cases in which fundamental fairness—the touchstone of due process—will require the State provide at its expense counsel for indigent probationers and parolees." *Id*. at 790. As a matter of constitutional law, then, whether counsel must be appointed is a decision that should be made on "a case-by-case basis in the exercise of sound discretion by the state authority charged with the responsibility for administering the probation and parole system." *Id*. In local revocation hearings before the U.S. Parole Commission, however, appointment of counsel is not at issue. The Commission's regulations for Federal Code offenders provides for appointment of counsel pursuant to the Criminal Justice Act. Its regulations for D.C. Code offenders provide for appointment of attorneys from the Public Defender Service for the District of Columbia, and provide that the parolee or supervised releasee be advised of that right at the time of the preliminary hearing. 28 C.F.R. § 2.101.

B. Right to Notice of Hearing

The notice requirement set forth in *Morrissey* is intended to prevent unfair surprise and to permit the parolee to prepare to contest the alleged violations of parole and present mitigating evidence in the hearing. *Morrissey*, 408 U.S. at 489. The parolee should be given written notice as to the precise grounds on which evidence will be taken during the hearing. *United States v. Webster*, 492 F.2d 1048, 1051 (D.C. Cir. 1974). Due process and 18 U.S.C. § 4214 require that a parolee be given a statement of the charges against him, his rights, and the possible outcome when adjudicated by the Commission. *Short v. United States Parole Comm'n* 549 F. Supp. 118 (D.D.C. 1982); *see also Miller v. Hadden*, 811 F.2d 743, 747 (2d Cir. 1987) (warrant listing allegations provided sufficient notice); *United States ex rel. Carson v. Taylor*, 540 F.2d 1156 (2d Cir. 1976) (due process violated by parole board's refusal to grant parolee access to documents considered at his revocation hearing, and by board's failure to provide notice of one of the grounds for revocation). In practice, this function is usually performed by presenting alleged violators with a copy of the warrant issued by the Parole Commission, which sets forth the charges. Parolees are usually asked to sign that warrant upon their arrest, as evidence of notice. In rare cases, however, a failure to properly notify a parolee of the charges against him, or the consequences of his revocation hearing, can amount to a due process violation. *See, e.g.*, *Vanes v. United States Parole Comm'n*, 741 F.2d 1197 (9th Cir. 1984) (failure to notify parolee that revocation for particular conviction would cause him to lose credit for street time violated due process, even though parolee knew of conviction and admitted to it at revocation hearing).

C. Right to Disclosure of Evidence and File Materials

There is a due process right to disclosure of the evidence against the parolee, prior to the revocation hearing. *Morrissey*, 408 U.S. at 489. The U.S. Parole Commission interprets the due process disclosure obligation to require only disclosure of evidence of the violation, not disclosure of additional evidence to be considered against the parolee in the dispositional portion of the hearing. This is problematic, as the parolee's entire file is clearly considered by the Commission in making the disposition decision after a violation is found. Although the issue was not specifically addressed in *Morrissey*, lower courts have held that due process notice requirements apply to both phases of a parole revocation hearing. According to those cases, evidence to be used in the dispositional phase must also be disclosed prior to the hearing. Thus, a parolee was denied due process when examiners at his parole revocation hearing relied upon undisclosed evidence in deciding that parole should be revoked. *United States ex rel. Carson v. Taylor*, 540 F.2d 1156 (2d Cir. 1976).

D. Right to Preliminary Hearing

When a parolee is arrested on a parole violator's warrant, due process requires that a hearing be held soon thereafter to permit a challenge to the basis for the warrant. *Morrissey* requires that a preliminary probable cause hearing be held reasonably near the time and place of arrest on a parole warrant. The primary purpose of the hearing is to determine whether the government can make the minimal probable cause showing necessary to imprison the parolee pending the revocation hearing:

> . . . [D]ue process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available. Such an inquiry should be seen as in the nature of a 'preliminary hearing' to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions.

Morrissey, 408 U.S. at 485 (internal citations omitted).

In exercising the discretion permitted by *Morrissey* to write the detailed procedures for parole revocation, states have developed practices that combine the probable cause and the final revocation hearing. Combined hearings are constitutionally permissible when there is no prejudice from delay. *Heath v. United States Parole Comm'n*, 788 F.2d 85, 90 (2d Cir. 1986) *cert. denied*, 479 U.S. 253 (1986); *Pierre v. Wash. Bd.*, 699 F.2d 471, 473 (9th Cir. 1983) (no need for separate preliminary hearing where final revocation hearing held 21 days after arrest). What is considered a "prejudicial" delay varies from jurisdiction to jurisdiction. *See Vargas v. United States Parole Comm'n*, 865 F.2d 191 (9th Cir. 1988) (40 days between execution of the warrant and preliminary hearing violates USPC regulations).

The purpose of the preliminary hearing requirement is to prevent pre-revocation hearing imprisonment without a prior finding of probable cause. Thus, courts have found that due

process does not require a preliminary hearing where the probationer is not imprisoned prior to the revocation hearing. *Smith v. United States*, 474 A.2d 1271, 1272-73 (D.C. 1983). Courts have approved elimination of the preliminary hearing requirements in other limited circumstances, the most common of which is when the defendant is detained on other charges, or when there has already been a conviction on a new charge, thereby providing sufficient evidence of a parole violation. *Moody v. Dagget*, 429 U.S. 78, 86 n.7 (1976) (conviction on new charge eliminates need for preliminary hearing, as standard of proof is higher at trial and second hearing would be redundant); *Doyle v. Elsea*, 658 F.2d 512, 516 (7th Cir. 1981) (detention based on new charge obviates the need for preliminary hearing). However, a grand jury finding of probable cause alone is not sufficient, and a client in that position is still entitled to a preliminary hearing before being detained solely on a parole warrant. *United States v. Lewis*, 110 D.W.L.R. 1409 (D.C. Sup. Ct. June 23, 1982) (indictment not an adequate substitute for preliminary hearing).

Under the United States Parole Commission regulations for D.C. Code offenders, the preliminary interview serves additional functions beyond assuring probable cause. It is the vehicle for providing the parolee with notice of the allegations and an opportunity to request counsel, witnesses, and disclosure of evidence. In addition, determination of the type, location, and procedural requirements of the revocation hearing is made at a parolee's preliminary interview under those regulations.

E. Right to Present and Confront Evidence

Parolees have a right to appear and testify at their own revocation hearings. *United States ex rel. Obler v. Kenton*, 262 F. Supp. 205, (D. Conn. 1967). A revocation hearing where a parolee's participation is inhibited is critically flawed. *United States ex rel. Hitchcock v. Kenton*, 256 F. Supp. 296 (D. Conn. 1966). The inability to present evidence and to confront witnesses limits the effectiveness of counsel in violation of due process. *See Green v. Nelson*, 442 F. Supp. 1047 (D. Conn. 1977). In *Nixon v. Quick*, 781 A.2d 754 (D.C. 2001), the court reversed the denial of parolee's petition for habeas corpus that alleged that he had been excluded from his parole hearing during the testimony of his former girlfriend and he had been denied access to a letter from her that was used as evidence against him. The Parole Board urged that the witness was concerned for her safety, but made no finding that excluding the defendant from the hearing was necessary to avoid danger to the witness. The court found the record insufficient to uphold the decision, and deemed the Parole Board's concern for the witness's safety an inadequate basis for curtailment of the parolee's rights.

F. Final Revocation Hearing Decisions

Morrissey requires, as an absolute minimum, that upon revocation, the Commission must issue a "written statement . . . as to the evidence relied on and reasons for revoking parole." *Morrissey*, 408 *United States* at 489; *see infra* Part IV (discusses requirements set forth in the Commission's regulations).

G. Right to a Hearing within a Reasonable Time

The *Morrissey* requirement of prompt revocation hearings was designed to protect the parolee's liberty interest. Thus, when a parolee is in pre-trial detention on the basis of a new criminal charge, a prompt revocation hearing is not required since the parole warrant has not been executed. This rationale essentially serves to approve the practice of lodging detainers against parolees who are imprisoned for new criminal offenses, rather than forcing the Commission to hold such hearings earlier. *Doyle*, 658 F.2d at 516. A "detainer" in this context is an unexecuted parole warrant, which is lodged against the incarcerated parolee but does not execute unless and until the pre-existing hold from the pre-trial case is lifted. While the client is in this posture, the timeliness requirements of *Morrisey* do not apply, as he is not formally detained on the parole warrant, but is instead held on other charges. If and when the hold is released in the pre-trial case, the warrant will execute immediately and the client will continue to be detained. Because the detention is then the result of the parole warrant alone, the ordinary requirements of timeliness under *Morrissey* are triggered for all subsequent proceedings. The Supreme Court registered its approval for this practice in *Moody*, 429 U.S. 78. *See also infra* Part IV.B

Timing Scheme: While the timing scheme set forth in *Morrissey* is rather vague, the U.S. District Court for the District of Columbia has set out a much more transparent schedule for the Commission to follow. In *Long v. Gaines*, 173 F. Supp. 2d 35 (D.D.C. 2001), the court held that the regulations, practices and procedures with regard to revocation hearings violated the parolee or supervise releasee's Fifth Amendment rights. As a result, the court entered a permanent injunction against the U.S. Parole Commission. The U.S. Parole Commission shall fully comply with the following: (1) parolees and supervised releasees arrested for alleged violations will receive a probable cause hearing within five days of arrest; (2) full revocation hearings will occur between 50-65 days from arrest; (3) prior to the revocation hearing, the parolee or supervised releasee will receive all the evidence used in determining whether a violation has occurred and parole should be revoked; and (4) a final determination and notice of action will be issued to the parolee or supervised releasee no later than 86 days after arrest.

Nevertheless, despite the clarity of the court's scheme, in practice, it is not unusual for the Commission to miss these prescribed deadlines. Counsel must take care to note the date on which the parole warrant was executed (not merely issued), and to raise appropriate objections whenever there is an undue delay. A parolee may be entitled to recover damages in a § 1983 lawsuit based upon due process violations where the parolee is imprisoned without a prompt hearing. *Wolfel v. Sanborn*, 666 F.2d 1005 (6th Cir. 1981) (vacated on other grounds); *see also Beck v. Kansas University Psychiatry Foundation*, 580 F. Supp. 527, 535 (1984).

The date on which the warrant is issued is also important. In at least two federal cases, probation or parole warrants have been invalidated because of an unreasonable delay between issuance and execution. *See United States v. Gernie*, 228 F. Supp. 329 (1964) (delay of eleven years); *United States v. Ragen*, 59 F. Supp. 374 (1945) (delay of fourteen years). This is because "[a] parole or probation violation warrant loses its force, with the result that the initiating agency no longer has jurisdiction over the subject if, considering all the circumstances, service is not had within a reasonable time after issuance." *Robinson v. Sartwell*, 264 F. Supp. 531, 534 (1967). Factors to be considered in determining the reasonableness of the delay are said to include: "the time lapse

between issuance and execution of the warrant, the efforts of the Board to serve it, and the conduct of the parolee in frustrating service." *United States v. Kenton*, 252 F. Supp. 344 (D. Conn. 1966).

Right to a Hearing within a Reasonable Time:

- ✓ Take note of the date on which the parole warrant was executed (not merely issued)
- ✓ Raise appropriate objections whenever there is an undue delay
- ✓ Parolee may be entitled to recover damages in a § 1983 lawsuit

H. Waiver of Rights

Since parole is a liberty interest protected by the Constitution, waivers of the rights delineated in *Morrissey* must meet the test for waiver of constitutional rights. They must be knowing, intelligent, and voluntary. *See White v. White*, 925 F.2d 287, 292 (9th Cir. 1991).

Unlike other constitutional rights, most circuit courts of appeals have held that a Rule 11 type of colloquy is not necessary in order to validate the waiver of *Morrissey* rights. *See United States v. LeBlanc*, 175 F.3d 511 (7th Cir. 1999); *United States v. Stocks*, 104 F.2d 308 (9th Cir. 1997); *United States v. Pelensky*, 129 F.3d 63 (2d Cir. 1997); *United States v. Rapert*, 813 F.2d 182, 184-85 (8th Cir. 1987); *United States v. Stehl*, 665 F.2d 58, 59-60 (4th Cir. 1981); *United States v. Johns*, 625 F.2d 1175, 1176 (5th Cir. 1980).

Few courts have addressed what sort of test is appropriate to determine whether a waiver is voluntary, knowing, and intelligent. Although the courts concede that "this conclusion does not change the fact that a defendant's waiver must actually be knowing and voluntary," *Pelensky*, 129 F.3d at 68, most have not defined a test for making such a determination. Most courts have simply reviewed the record and made the waiver determination without explicating the standard. In *LeBlanc*, however, the court expressly articulated a "totality of the circumstances" standard. Under the totality of the circumstances should include consideration of:

> whether the defendant understands the charge against him and the possible sentence . . . whether the defendant understands the procedures he foregoes when he relinquishes his right to a . . . hearing.

LeBlanc, 175 F.3d at 511.

Even in *LeBlanc*, the court focused its determination of these factors by examining the record of the parolee's discussion with the revoking judge. Therefore, in order to preserve a voluntariness issue, counsel should be careful to have the parolee's lack of understanding evident in the record of the hearing. Counsel should be aware that waivers have been found valid despite apparently coercive conduct by parole and prison officials. **Counsel must be careful to make a clear**

record – in writing where possible – of all rights asserted, requests made, and government conduct infringing on the assertion of any rights.

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***Morgan v. United States*, 47 A.3d 532 (D.C. 2012)**. In a probation revocation hearing, the minimum requirements of due process demand a consistent theory where one defendant faces two proceedings concerned with the same offense; however, to violate due process, an inconsistency must exist at the core of the prosecutor's case and must render the findings of the show-cause hearing unreliable.

III. BASES FOR REVOCATION OF PAROLE OF SUPERVISED RELEASE

Parole or supervised release may not be revoked in the absence of a violation by the releasee. The Commission may only revoke because of the releasee's failure to abide by its conditions. The conditions of parole for D.C. Code offenders appear in the regulations at 28 C.F.R. § 2.85. Special conditions may also be added based on the offense and/or the circumstances. There are two broad categories of parole and supervised release violations. The first and most common type of violation is a "technical" or "administrative" violation. Such violations include positive drug tests, failure to keep appointments, or failure to abide by any other condition set forth by the Parole Commission. The second type of violation, known as a law violation, is charged when the Parole Commission believes that a releasee has committed one or more new criminal offenses.

Technical/Administrative Violations: The most common type of alleged violation is a technical, or administrative, violation. Just as in the probation context, a client on parole or supervised release may be required to comply with myriad conditions, including keeping appointments, maintaining employment, frequent drug testing, GPS monitoring, maintaining a curfew, attending specific classes or programs, and more. This combination of conditions is set, modified, and monitored by your client's parole officer. In the District of Columbia, such officers are known as community supervision officers (CSO), and they are employed by CSOSA. The decision of when to initiate revocation proceedings on the basis of technical violations is left largely to the discretion of these CSOs. One or two minor infractions, such as a missed appointment or a positive drug test, will rarely trigger a revocation, but the question of how many infractions are needed before a CSO will request revocation for technical violations depends largely on the disposition of the particular CSO.

When contesting technical violations, counsel should verify that the condition of parole or supervised release alleged to have been violated was an express condition, not merely an implicit understanding. *See Resper v. United States*, 527 A.2d 1257 (D.C. 1987) (failure of probationer to enter a drug program not a proper basis for revocation where court's order did not require him to reach program by his own efforts and no assistance was provided); *Smith v. United States*, 474 A.2d 1271, 1274 (D.C. 1983); *Carradine v. United States*, 420 A.2d 1385, 1389-90 (D.C. 1980) ("mental wellness" not a ground for revocation where it was not an express condition); *Humphrey v. State*, 428 A.2d 440 (Md. 1981) (where time limit not set on fulfillment

of a condition, parolee may not be revoked for failure to enter a drug treatment program within a certain timeframe).

Individuals on parole or supervised release may not be revoked for failing to comply with a condition of parole where it is not within their power to comply with the condition. Accordingly, probationers may not be revoked for failure to access programming that is unavailable to them. *See Humphrey*, 428 A.2d 440. Similarly, parolees may not be revoked for failure to pay fines unless it is proven that they did not make bona fide attempts to pay. *Bearden v. Georgia*, 461 U.S. 660 (1983).

A parole authority may not issue a warrant for a violation that has already been disposed of in a previous revocation proceeding. To this end, at least one federal court of appeals has explicitly held that a parole board did not have the authority to issue a subsequent violator warrant citing the same grounds as a warrant which had already been disposed of in the parolee's favor. *Maslauskas v. United States Bd. of Parole,* 639 F.2d 935 (3rd Cir. 1980).

Law Violations: Courts have addressed a number of issues arising from parole and probation violations that are based upon new criminal offenses. In addressing the quantity of proof necessary to revoke based upon a new arrest, *United States v. Webster* found that neither an arrest nor a charge alone is a sufficient basis for revocation. 492 F.2d 1048 (D.C. Cir. 1974). The question for revocation purposes is whether the government shows by a preponderance of the evidence[2] that the new offense was in fact "committed." *Id*. The D.C. Court of Appeals also found that conviction is not required for revocation, but noted that it would be "unseemly" to base revocation on charge resulting in acquittal. *In re A.W.*, 353 A.2d 686, 695 (D.C. 1976); s*ee also Young v. United States*, 863 A.2d 804 (D.C. 2004). Of course, any new violation that results in a conviction, either through a plea or at trial, will automatically constitute a parole violation, as the standard of proof is higher in the former setting than in the latter.

A parole board may, consistent with due process considerations, issue and execute a parole violator warrant and then formally revoke parole based on the parolee's being charged with a new criminal offense, even though the criminal matter has not yet gone to trial. *Melson v. Sard*, 402 F.2d 653 (D.C. Cir. 1968). The parole revocation hearing on a new charge may be postponed for as long as the parolee is held on another matter and even until the completion of a new criminal sentence when the parolee is sentenced for a new crime. *Moody*, 429 U.S. 78.

Parolees facing revocation based on criminal allegations have a Fifth Amendment privilege against self-incrimination. *See United States ex rel. Carioscia v. Meisner*, 331 F.Supp. 635, 642 (N.D. Ill. 1971) (recognizing Fifth Amendment implications in parole revocation process). In *Melson v. Sard*, 402 F.2d 653, the court held a parolee facing pending charges had use immunity precluding affirmative use of his revocation hearing statements in the pending criminal proceedings, due to the compulsion inherent in having to defend against revocation. However, the circuits appear to be split on the issue of immunity. *See, e.g.*, *Flint v. Mullen*, 499 F.2d 100,

[2] The preponderance standard is not a constitutional mandate per se. No court has prescribed the preponderance standard, although courts have opined that it is clear that parole revocations need not be based upon evidence "beyond a reasonable doubt." However, no court has addressed the preponderance standard on constitutional grounds. Instead, the courts have interpreted state and federal statutory language to require the preponderance standard of proof.

103 (1st Cir. 1974) (per curiam) (no immunity where other evidence sufficient to establish violation); *Lynott v. Story*, 929 F.2d 228, 230 (6th Cir. 1991) (same); *United States v. Brugger*, 549 F.2d 2, 4 (7th Cir. 1977) (same); *Ryan v. Montana*, 580 F.2d 988, 991 (9th Cir. 1978) (same).

The Fourth Amendment exclusionary rule is not applicable at state parole revocation hearings. *Pennsylvania Bd. of Prob. & Parole v. Scott*, 524 U.S. 357 (1998). Thus, revocation of parole can be based entirely upon illegally obtained evidence. In *Barnes v. District of Columbia Board of Parole*, 759 A.2d 1073 (D.C. 2000), the court held that the Parole Board could consider facts underlying a murder charge that had been dismissed in deciding to revoke parole and an attack on the merits of the Board's decision is not subject to judicial review. Because *Barnes* failed to show that the manner in which the revocation hearing had been conducted was unlawful; the denial of his petition for habeas corpus was affirmed.

IV. PAROLE COMMISSION REGULATIONS FOR REVOCATION OF D.C. CODE OFFENDERS

The U.S. Parole Commission regulations governing revocation of D.C. Code offenders, appears in the Code of Federal Regulations at 28 C.F.R. Part 2, Subpart C. Both the grant and revocation regulations are presently published at 65 Fed. Reg. 19996-20011. This section describes those procedures and offers practice suggestions.

A. Parole Supervision, Conditions, and Jurisdiction

When a D.C. Code offender is released to the D.C. Metropolitan Area, the offender will be supervised by CSOSA Community Supervision Officers. When released to another jurisdiction, supervision will be by a U.S. Probation Officer in that area. 28 C.F.R. § 2.91(a). A parolee's sentence continues to run and will expire at the full term expiration date (full term date). The parole term is run concurrently with any other term of parole, probation or supervised release. 28 C.F.R. § 2.92(b). Parole revocation proceedings may by initiated up to the parolee's full term date. 28 C.F.R. § 2.98(c).[3] The issuance of a parole violation warrant tolls the parole sentence, thus preventing the expiration of the parole sentence and preserving the Commission's jurisdiction over the case. 28 C.F.R. § 2.98(d).

Persons on parole or supervised release must adhere to a number of strict rules. The conditions of parole are set forth at 28 C.F.R. § 2.85. In addition to complying with those conditions, parolees must adhere to any additional conditions set forth by the Commission for their individual cases. Parole can be revoked based upon a technical/administrative violation (violating a condition of parole) or allegations of a new criminal offense. As a general proposition, technical violations of parole are not deemed to be as serious as being charged with a new crime.

[3] If the parolee was mandatorily released for an offense committed before April 11, 1987, the parole warrant must be issued earlier – no later than 180 days before his full term date. 28 C.F.R. § 2.98 (c).

B. Steps in the Revocation Process under the Commission's Regulations

The proposed regulations provide for the following steps in the parole revocation process:

1. Warrant Issuance and Execution

a. Regulations

The regulations governing parole summonses and warrants are found at 28 C.F.R. §§ 2.98 through 2.100. The parole revocation process begins with the issuance of either a summons to appear at a parole revocation hearing or a parole violation warrant (parole warrant). 28 C.F.R. § 2.98.[4] A parole warrant may be issued up to the time of the parolee's full term date. 28 C.F.R. § 2.98(c).[5] Issuance of a warrant will prevent the expiration of the parole sentence and preserve the Commission's jurisdiction to decide whether to revoke. 28 C.F.R. § 2.98(d). The issuance of the parole warrant tolls the running of the parole term.

A parole warrant is "executed" when the parolee is taken into custody or arrested on the parole violation warrant. The arrests are generally made by the U.S. Marshals Service. Upon execution of the warrant, a copy of both the warrant and the application for warrant by the Parole/Community Supervision Officer (CSO) is given to the parolee. 28 C.F.R. § 2.99(b). Execution of the warrant obligates the Commission to begin the process of notice and hearing for parole revocation. 28 C.F.R. § 2.99(b). If the parolee is held in custody on another case, however, the parole warrant will not be executed, but will lodge as a detainer (an unexecuted warrant). The warrant will not be executed until the parolee is released from the new charge or sentence. 28 C.F.R. § 2.100; *see also supra* Part II.G.

b. Practice Suggestions

Implications of Warrant Execution: When and if a parole warrant gets executed is critical in three ways: 1) execution is necessary to initiate the revocation process; 2) execution of the warrant is necessary to ensure that the parolee receives credit in the parole case for time served pending a hearing; and 3) execution of the parole warrant is necessary for any subsequent sentence to be served concurrently with the parole sentence. These areas are important when the parolee is held on new charges that are pending in court.

Five-Day Holds: When a parolee is arrested on a new charge and presented in Superior Court, he will be subject to the "five-day hold" provision of D.C. Code § 23-1322(b)(1)(C). At this five-day hold return date, the court will determine whether there is a parole warrant, and set conditions of release in the new case. Assuming a warrant has been issued and release granted in the new case, if a nominal bond is ordered at the five-day hold return date, it ensures that pretrial credit is awarded against any new sentence. However, the nominal bond also prevents the

[4] The process could also be initiated under a summons under 28 C.F.R. § 2.98(1)(i). In practice, however, the Commission does not utilize the summons procedure.

[5] If the parolee was mandatorily released for an offense committed before April 11, 1987, the parole warrant must be issued earlier – no later than 180 days before his full term date. 28 C.F.R. § 2.98(c).

revocation process from going forward, since the parole warrant will not execute. Thus, the client may be prevented from receiving sentence credit in the parole case. When any bond is imposed in the new case, the parole warrant will not be executed because the person is held on the new case. This is because a parole warrant does not execute when another case is holding a parolee. Parole warrants are lodged as detainers when another case holds the prisoner.

Resolution of this issue depends on the facts of your case. If your client could be released in the new case, you should consider with your client the possibility of going forward on the parole revocation prior to resolution of the new case. Obviously, tactical considerations regarding discovery and the difficulties of winning the revocation hearing prior to resolution of the criminal charges are factors to consider. You also should also consider the fact that you will likely be presenting your case without the direct testimony of your client, as it is generally disadvantageous to have clients present testimony in a pending case. This will prevent the U.S. Parole Commission from forwarding these sworn statements to the office of the U.S. Attorney so that the testimony cannot be used against your client at the criminal trial.

Where execution of the parole warrant is a desirable goal, counsel can consider asking for a halfway house release in the new case. Since that is considered a condition of release under the statute, it should serve to execute the warrant, but because pretrial credit is given for time served in a halfway house, it should also ensure pretrial credit in the new case.

Once a parole warrant is executed, the prisoner is thereafter serving the remainder of the parole term. *Ali v. District of Columbia,* 612 A.2d 228 (D.C. 1992); 28 C.F.R. § 2.100(d)(1) (providing that the parole term commences when parole warrant is executed). The *execution* of the parole warrant also makes it possible for the judge in the new case to make any new sentence *concurrent* with the parole term since the parole term is then being served. If the parole warrant has not been executed, however, the new sentence cannot be made to run concurrently with the parole sentence no matter what the judge in the new case orders. This is because there is no requirement that the parole warrant be executed prior to the completion of the new sentence. *See Moody*, 429 *United States*, 78; *Jones v. Clemmer*, 163 F.2d. 852 (D.C. Cir. 1947). In computing the sentence, prison officials *will ignore* the concurrent part of the order when the parole warrant has not been executed and the parole term will be tolled until completion of the new sentence.

2. Written Notice of Alleged Parole Violations

The regulation addressing the notice requirement identified in *Morrissey* is 28 C.F.R. § 2.99(b), which requires that the officer executing the parole warrant shall "deliver to [the parolee] a copy of the warrant application stating the charges against the parolee, the applicable procedural rights under the Commission's regulations, and the possible actions which may be taken by the Commission." The regulations further require that the examiner "review the violation charges with the parolee" during the preliminary interview. 28 C.F.R. § 2.101(c).

3. Preliminary Interviews

a. Regulations

After arrest on a parole warrant, the first interaction between the parolee and the U.S. Parole Commission is the preliminary interview or probable cause hearing. 28 C.F.R. § 2.101. The parolee receives notice of the hearing by way of the warrant application, which is served to the parolee at the time the warrant is executed. This notice requires that the preliminary interview be conducted within five days after the arrest. The purpose of the hearing is to determine whether: (1) there is probable cause to believe that the parolee violated parole; and (2) the parolee should be held in custody pending a final revocation hearing. The Public Defender Service has arranged for Parole division attorneys to be present at the preliminary interviews for representation.

The preliminary interview is conducted by a hearing examiner from the U.S. Parole Commission. *See* 28 C.F.R. § 2.101(a). Since the right to a fair hearing includes the right to a neutral hearing officer, the regulations provide that the officer conducting the preliminary interview cannot be the parole officer who wrote the request for a warrant. 28 C.F.R. § 2.101(a). In practice, this is not a concern because the U.S.P.C. hearing examiners do not supervise any parolees.

At the preliminary interview, the hearing officer is to first ascertain whether the warrant and warrant request were served on the parolee at the time of the arrest. 28 C.F.R. § 2.101(b). The hearing officer will recite the charges against the parolee and find out whether the parolee admits or denies the alleged violations. The parolee is then informed that he may request representation by counsel, witnesses, evidence, and of his right to request a continuance for the same. The parolee also has an opportunity to request a local revocation hearing; failure to do so will be interpreted as a waiver of a local hearing. A request for a continuance will be attributed to the parolee, and could then be used to extend the time limits set out in the regulations for the completion of final revocation hearings. 28 C.F.R. § 2.102(e). If a preliminary interview is continued for counsel or witnesses, the parolee must be given advanced notice of the time and place of the continued hearing. 28 C.F.R. § 2.101(b) and the continuance should be for no more than 30 days.

At the end of the preliminary interview, the hearing officer must: (1) make a recommendation as to whether there is probable cause that the parolee violated a parole condition; and (2) inform the parolee of the recommendation at the end of the preliminary interview. Since the preliminary interview is not recorded or transcribed, the hearing officer must prepare a "digest of the interview," entitled "D.C. Probable Cause Hearing Digest," after the preliminary interview, which is submitted to the Commission along with the recommendation. *See* 28 C.F.R. § 2.101(d).

If the officer decides that there is no probable cause, a Commissioner must review the opinion and effectuate the parolee's release "without delay." 28 C.F.R. § 2.101(d)(1). If the officer recommends probable cause, the Commission has 21 days to make the final probable cause decision. 28 C.F.R. § 2.101(d)(2).[6] The Commission must decide two things: 1) whether there is

[6] Federal regulations provide that the parolee "shall be promptly notified." 28 C.F.R. § 2.48-04.

probable cause to support the violation; and 2) whether the parolee should be released "notwithstanding probable cause." 28 C.F.R. § 2.101(g).

b. Practice Suggestions

The parolee must make several crucial decisions at the preliminary interview. These include: admitting or denying the charges; whether to request counsel, whether to request a local revocation hearing, whether to request witnesses, if any; and whether to continue the preliminary interview for these purposes. The answers that are given to these questions will determine whether the parolee has a "local" or an "institutional" revocation hearing. This is a crucial question, as there are substantial differences between the two types of hearings.[7]
Counsel should make efforts to interview the client as soon as possible after execution of the warrant in order to prepare for the preliminary interview and make the necessary decisions. In addition to detailing the procedures set forth above, counsel should also use this initial client meeting to addresses witness requests that the client may have. Although defense counsel has no subpoena power in the parole setting, a parolee can request that the Commission subpoena other witnesses. As that request is typically made at the probable cause hearing, it is important to discuss the matter with the client in advance of that hearing.

Counsel should advise the client that the Parole Commission will be providing him with a two-part form, which must be reviewed and signed, and that must be presented to the hearing examiner at the time of the probable cause hearing. Part One of that form explains the notice of procedural rights for the preliminary interview, or probable cause hearing. Part Two of the form explains the procedural rights for the revocation hearing. In order to request a local revocation hearing, which is virtually always preferable to an institutional hearing, it must be indicated on the notice of rights form.

Counsel should make all efforts to complete the forms and make the requisite assertions for the client. For example, counsel could obtain copies of the forms and fill them out with the client before the preliminary hearing. Counsel could send a letter to the Parole Commission asserting his client's rights, and setting forth his reasons for a local hearing. At a minimum, counsel must prepare the client for the preliminary interview, and give clear instructions on what will happen and how the client can assert his rights. We recommend that the client say: I want an attorney who is local; I want witnesses who are local; I want to present other evidence which is local; and I want to mitigate any violation that is found using documents and witnesses which are local.

In an effort to provide the necessary information for parolees (and counsel) regarding the procedures of the Parole Commission, we have developed a number of forms. The objective of these forms is to secure the minimal procedures required – the right to a meaningful and counseled hearing. The forms should create a written record for the parolee at the preliminary interview. They include a signed release form and a form requesting release not withstanding probable cause. If using these, or similar forms, counsel should make all efforts to complete the forms with the client to avoid creating a written record of statements that could be used against

[7] As set forth below, a local hearing provides the parolee with access to counsel, witnesses, and confrontation rights, while an institutional hearing provides virtually none of these protections. *See infra* Part IV.B.5.

the client. Copies of these forms can be obtained from the Parole Division of the Public Defender Service.

In some cases, counsel will need to continue the preliminary hearing. That is the only way of having any meaningful opportunity to contest or mitigate the allegations. One exception would be for warrants with allegations that, on their face, do not constitute probable cause. For example, if the client is alleged to have committed a criminal act but the facts alleged do not constitute a crime. The only other exception would be for extremely minor technical violations with a client whose adjustment is otherwise so good that he may be released pending the final hearing.[8] In those rare occasions, a prompt preliminary hearing would benefit the client by assuring his earliest possible release.

A local revocation hearing should always be requested, as it is the only opportunity to ensure a meaningful hearing. *See infra* Part IV.B.5. A hearing that combines the preliminary interview or probable cause hearing with the final revocation hearing may be in the client's best interest. The parolee generally has an interest in having a final decision as soon as possible. Since a combined hearing may be the most prompt resolution, counsel should consider requesting a combined hearing when continuing a case to secure witnesses. The Parole Commission is unlikely to oppose combined hearings, since it has an interest in streamlining the administrative process by taking all of the witnesses and evidence at one hearing. 28 C.F.R. § 2.101 (i) (requiring a combined hearing whenever an adverse witness is requested for a preliminary hearing).

In cases where probable cause is found at the preliminary interview and the violations are relatively minor, counsel should *always* submit a form to the Commission requesting release notwithstanding probable cause pursuant to 28 C.F.R. § 2.101(g). This is particularly true in cases where the parolee was doing well on parole and his or her continued confinement has caused serious disruption to his or her family structure and serves no further penological interest.

Counsel should be prepared to argue both that there is no probable cause for the violations, and that even if probable cause does exist, the parolee should be released to the hearing pending the final hearing.

4. Disclosure of Evidence by the Commission

a. The Regulations

The regulations provide for disclosure of evidence at the preliminary hearing: "the interviewing officer shall review the violation charges with the parolee and *shall apprise the parolee of the evidence that has been presented to the Commission*." 28 C.F.R. § 2.101(c) (emphasis added). Section 2.103(d) further provides for disclosure of evidence:

> All evidence upon which the finding of violation may be based shall be disclosed to the alleged violator *before* the revocation hearing. If disclosure of any

[8]A sample Letter in Support of Release Notwithstanding Finding of Probable Cause can be obtained from the Parole Division of the Public Defender Service.

> information would reveal the identity of a confidential informant or result in harm to any person, that information may be withheld from disclosure, in which case a summary of the withheld information shall be disclosed to the parolee prior to the revocation hearing. The hearing officer or examiner panel may disclose documentary evidence by permitting the alleged violator to examine the document during the hearing, *or where appropriate, by reading or summarizing the document* in the presence of the alleged violator.

b. Practice Suggestions

In practice, the primary evidence that will often be introduced against your client at a revocation hearing is the CSOSA file, a running record of your client's compliance and/or non-compliance while on supervision. The record is maintained by your client's CSO, and includes drug tests, a running record of office visits (often containing the CSO's own comments and observations), copies of any Alleged Violation Reports filed by the CSO during the supervisory period, and copies of any documents (e.g., pay stubs, proof of housing, etc.) given to the CSO by your client. These records are often quite detailed, and they can be invaluable in litigating technical violations, such as failures to report for testing, as well as in the dispositional phase. These records also include notes from conversations with family members, employers and other persons involved in the client's life while in the community. Unfortunately, the records are not turned over prior to a revocation hearing unless defense counsel requests them from CSOSA pursuant to the Freedom of Information Act. *See also infra* Part IV.B.4 and Part VII.

Effective representation requires that counsel review and/or copy the client's parole files and all of the evidence against him as early as possible. The disclosure requirements in the regulations are not adequate for those purposes. There are two problems with the disclosure provided in the proposed regulations: (1) by permitting the examiner to "summarize" some documents, 28 C.F.R. § 2.103(d) does not provide for complete disclosure of all of the evidence; and (2) disclosure appears limited to evidence that could be the basis of the violation finding, rather than the revocation and sentencing decisions (i.e., mitigating information contained in the client's parole file, such as doctors' notes, work history, etc.).

In addition to determining whether there was a violation, the Commission must make two dispositional decisions: (1) whether the parolee should be released "notwithstanding probable cause" following the preliminary interview, 28 C.F.R. § 2.101(d)(3); and (2) whether the parolee's parole should be revoked when a violation is found, § 2.105. A decision to revoke does not necessarily mean the parolee must return to or remain in prison. 28 C.F.R. § 2.105(b). When revocation is ordered, the Commission "shall also determine . . . whether immediate reparole is warranted." *Id*. Since these decisions are based largely upon supervision adjustment, prior criminal conduct, and similar factors, virtually everything in the parole file is relevant to these decisions.

There are strong arguments that the disclosure set forth in the regulations is inadequate disclosure under *Morrissey*.[9] As a practical matter, however, counsel can obtain most of the file

[9] Disclosure in the revocation context for a U.S. Code Offender is discussed in *Kell v. United States Parole Comm'n*, 26 F.3d 1016 (10th Cir. 1994). This case states the following with regard to parole revocation proceedings: "The

materials pursuant to a request submitted to the Commission under the Freedom of Information Act ("F.O.I.A."). When disputes regarding written notice and disclosure arose with the D.C. Board of Parole, the D.C. Freedom of Information Act was used as an additional means of access to and disclosure of the parole file. Eventually, an agreement was reached where a formal request was not needed and both the parole officer's file and the Parole Board's file were made available for review and copying when authorized by a release of information from the client.

Public Defender Service attorneys have taken a similar approach with the U.S. Parole Commission. Entire parole files can be obtained on behalf of clients by submitting F.O.I.A. requests to CSOSA. If the client is supervised by the office of U.S. Parole and Probation, the request should be made through the U.S. Parole Commission. Counsel should be aware, however, that while the Commission acknowledges that it is subject to the federal F.O.I.A., it has refused to provide documents from its files in a timely manner.

F.O.I.A Requests: Counsel should demand disclosure at the preliminary interview and repeat the request in writing. Counsel should also send a F.O.I.A. request as soon as possible to obtain the information, in addition to making requests under the disclosure regulations. The federal F.O.I.A. statute requires disclosure within twenty days. Counsel can obtain a sample F.O.I.A. request through the Public Defender Service. For more on these F.O.I.A. requests, *see infra* Part VII.

5. Final Revocation Hearing

a. The Regulations

The proposed regulations set forth two different types of final revocation hearings – "local" and "institutional." 28 C.F.R. §§ 2.101 – 2.103. The substantive differences in local and institutional revocation hearings are significant. They are set forth at 28 C.F.R. § 2.101 (e), §2.102 (b)-(d), and §2.103. A case is generally scheduled for an institutional hearing only where the parolee or supervised releasee has admitted to the alleged violations or if he has a criminal conviction on a charge which is the basis for the violation. Otherwise, the parolee is entitled to a local revocation hearing.

At an institutional hearing, the alleged violator may present documentary evidence and witnesses, but he may not confront any adverse witnesses. The Commission will not assist the parolee in obtaining any witness for an institutional hearing. 28 C.F.R. § 2.103(b). An institutional revocation hearing must be held within 90 days from execution of the warrant. 28 C.F.R. § 2.102(e).

Counsel representing clients in the District of Columbia are most likely to do so in a local revocation hearing. At a local hearing, the parolee may present both witnesses and documentary

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statute and regulations governing parole revocation proceedings, in contrast [to initial parole determination proceedings], lack provisions requiring the Commission to provide advance access to all evidence that may be used against a parolee." *Id*. at 1022. The applicable statute, 18 U.S.C. § 4214(a)(2)(D), seems to require that the parolee be apprised of all evidence against him regarding parole revocation determinations. Based on the statute, this applies to preliminary and final hearings.

evidence. 28 C.F.R. § 2.103(b).[10] In addition, the parolee, like the Commission, may also request the presence of adverse witnesses. 28 C.F.R. § 2.103(c). The adverse witnesses who are present shall be made available for questioning and cross-examination in the presence of the alleged violator. Counsel does not have subpoena power, but can present the testimony of voluntary defense witnesses, be they fact witnesses or mitigation witnesses. Local revocation hearings must be held within 65 days of the arrest of the parolee or supervised releasee.

The other significant difference between a local and an institutional hearing is the location of the hearing. Local hearings will be held in the Central Detention Facility (D.C. Jail) or CCA/Correctional Treatment Facility, while institutional hearings may be in the District, but could also be in another jurisdiction. Since the Lorton prison complex is closed, most post-conviction offenders are being transferred to different jurisdictions. As a result, institutional hearings for D.C. Code offenders could be in any federal, state, or private prison under contract with the Bureau of Prisons or the District of Columbia Department of Corrections to house D.C. Code offenders. Thus, in practical terms, the parolee will have difficulty obtaining a lawyer who can appear in a different jurisdiction. In short, the parolee will have limited access to counsel or witnesses and a very limited ability to challenge or mitigate the allegations in an institutional hearing.

Obtaining a Local Hearing: In order to obtain a local hearing, the parolee must request one at the preliminary interview and meet the conditions set forth for obtaining one. Failure to do so will result in an institutional hearing. In order to meet the local hearing requirements, the parolee must: 1) have no new conviction; *and* 2) either: (a) deny all of the charged violations; or (b) deny "at least one un-adjudicated charge that may be determinative of the Commission's decision regarding revocation and/or reparole and request the presence of one or more adverse witnesses regarding that contested charge." This appears to mean that if there is a serious violation that is contested, admission on a *less* serious violation will not preclude a local revocation hearing. If the Parole Commission makes a decision to pursue the more serious violation which has been denied, the client is entitled to a contested local hearing. In addition, the Commission retains the ability to certify any case for a local hearing. 28 C.F.R. § 2.102.

b. Practice Suggestions

Two things are clear from the proposed regulations: 1) if a parolee plans to mount any challenge to any of the violations it must be done at a local hearing; and 2) the burden is on the parolee and counsel to make the right representations, otherwise an institutional hearing will be scheduled. Counsel should do everything possible to secure a local hearing. Suggestions for accomplishing that are set forth in the preliminary interview section.

The right to have witnesses present, adverse or favorable, however, is limited in several ways in the revocation context. With regard to any witness (at either the preliminary interview or the final revocation hearing), the regulations provide that "[a]t any hearing, the presiding hearing officer or examiner may limit or exclude any *irrelevant or repetitious statement* or documentary

[10] In local and institutional hearings, evidence deemed irrelevant or repetitious may be excluded by the hearing officer. 28 C.F.R. § 2.103(c).

evidence." 28 C.F.R. § 2.103(b) (emphasis added). Thus, counsel should be prepared to make a record clearly explaining the relevance of each witness, and each witness's individual impact on the evidence.

With regard to the right to confront adverse witnesses, the Commission can excuse the nonattendance of adverse witnesses for "good cause." A finding of good cause "may be based on a significant possibility of harm to the witness, the witness not being reasonably available, and/or the availability of documentary evidence that is an adequate substitute for live testimony." 28 C.F.R. § 2.103(c). It appears that the good cause determination only applies to the exclusion of adverse witnesses. *See John v. United States Parole Comm'n*, 122 F.3d 1278 (9th Cir. 1997); *Egerstaffer v. Israel*, 726 F.2d 1231, 1235 (7th Cir. 1984); *White v. United States Parole Comm'n*, 940 F.2d 1539 (10th Cir. 1991). In *John*, the court held that petitioner was entitled to call adverse witnesses even after conviction on new charge, for the purposes of providing mitigating circumstances to support request for reparole. The Tenth Circuit held the opposite. *See Coronado v. United States Bd. of Parole*, 551 F.2d 275 (10th Cir. 1977).

The criteria for establishing good cause differ in the caselaw. Courts have required there to be a potential for harm or danger to an adverse witness to meet the good cause showing necessary to exclude an adverse witness. *See Galante v. United States Parole Comm'n*, 466 F.Supp. 1266, 1270, n.3 (D. Conn. 1979); *Ready v. United States Parole Comm'n*, 483 F.Supp. 1273 (M.D. Pa. 1980).

However, other courts have held that the reliability of a report or document sought to be introduced in lieu of live testimony has provided "good cause." *See Ball v. United States Parole Comm'n*, 849 F.Supp. 328, 330 (M.D. Pa. 1994). The Tenth Circuit held that the Commission need not even demonstrate "good cause" to excuse the absence of adverse witnesses if the record or report possess substantial indicia of reliability. *See Egerstaffer*, 726 F.2d at 1235; *White v. White*, 925 F.2d 287 (9th Cir. 1991).

- ✓ Do everything possible to secure a local hearing
- ✓ Be prepared to make a record clearly explaining the relevance of each witness and his or her impact on the evidence

6. Final Revocation Decision

At the revocation hearing one or two decisions are made. The first decision is whether there was a violation of parole. If there is no violation found, then parolee must be re-instated with no loss of time spent on parole ("street time"). If a violation is found, a second decision must be made: whether the parolee should be "restored," or "revoked," and, if revoked, whether the parolee should be "reparoled" or returned to prison until a future hearing date. 28 C.F.R. § 2.105. The parolee is entitled to receive a final written decision within 21 business days of the hearing.

If the Commission does not find a violation under the preponderance of the evidence standard, the parolee is not revoked, and loses no street time. When a violation is found by a preponderance of the evidence, there are three dispositional options available to the Commission at the conclusion of a parole revocation hearing. 28 C.F.R. § 2.105. Disposition decisions require the concurrence of two commissioners.

1. **"Restore to parole supervision."** Significantly, if restored to supervision, the parolee does not lose any of his street time. *See United States Parole Comm'n v. Nobles*, 693 A.2d 1084 (D.C. 1997); § 2.105(d). When the Commission restores parole, it may also reprimand, change the conditions of parole or refer to a community treatment center. These options are important when the parolee has relatively minor violations or has been on parole a long time (and loss of street time would be particularly harsh) or when defense counsel is able to secure an appropriate community-based treatment program placement.
2. "**Revoke and Reparole Immediately**." Parole is revoked and the Commission makes a record that a revocation has occurred. Street time is forfeited, but the parolee is released back into the community, i.e., "reparoled." 28 C.F.R. § 2.105(b). Often the D.C. Board of Parole took the position that this was a disposition that had to be justified with special mitigating information. It is recommended that a similar approach be taken with the U.S. Parole Commission. Counsel should argue that the time spent in prison (prehearing) is adequate punishment for the violation(s) and offer community resources (treatment programs, employment, good family support) as indications of a greater chance of successful parole. The criteria for warrant issuance are a good guide to what points to focus on for this argument. All parole plan information should be documented and verified prior to the hearing.

- ✓ Argue that time spent in prison during prehearing is adequate punishment
- ✓ Offer community resources as indications of a greater chance of successful parole

3. **"Revoke and Return to Prison" or "Set Off."** In May 2009 the Equitable Street Time Act, codified at §24-404 and §24-406 became effective. This Act provides that anyone on parole who is convicted of a crime punishable by more than one year automatically loses his or her street time. In this case a person loses all street time accumulated since the last release. Anyone convicted of a crime punishable by a maximum of one year or less will lose street time unless, considering the circumstances of the violation, the person's history and characteristics, and other factors, that forfeiture of street time is "not necessary to protect the public welfare." It also provides that anyone who intentionally refuses to respond to or follow the orders of the Parole Commission (of its agents, such as parole officers) will face the loss of their accumulated street time. A person who stops reporting generally loses the entire time during the loss of contact period.

7. Right to Administrative Appeal

Federal Code offenders have the right to appeal adverse decisions by the Commission to the National Appeals Board: "[a] prisoner or parolee may submit to the National Appeals Board a written appeal of any decision to grant . . . rescind, deny, or revoke parole." 28 C.F.R. § 2.26. This appellate right was recently extended to D.C. Code Offenders. An individual must file the appeal on a standard form within 30 days from the date of entry of the decision. The appeal must include the following: 1) an opening paragraph that summarizes the grounds for the appeal; 2) each ground for appeal must be accompanied with the reasons supporting the appellant's position; and 3) the appellant may attach exhibits, but only those exhibits that are not currently in the possession of the U.S. Parole Commission. 28 C.F.R. §2.26(a)(2).

In addition to filing an appeal with the National Appeals Board, counsel may also consider sending a letter in the nature of a request for reconsideration, setting forth any arguments or additional proffers of evidence appropriate. Counsel can also send such a letter to the Commission prior to its final decision to record the arguments and evidence presented at the revocation hearing. 28 C.F.R. § 2.75(e) provides that the Commission may reopen any case for special reconsideration upon the receipt of new and significant information concerning the prisoner.

Appealing Commission Decisions:

- ✓ File an appeal with the National Appeals Board
- ✓ Submit a request for reconsideration to the Commission prior to its final decision to record the arguments and evidence presented at the hearing

V. DIFFERENCES BETWEEN PAROLE AND SUPERVISED RELEASE

In August of 2000, the District of Columbia ended its practice of sentencing defendants to parole and began sentencing them to terms of supervised release instead. In most respects, the new system looks and operates much like the old. Nevertheless, there are key differences between the two that counsel must understand.

Under the parole system, the full-term date (on which a parole sentence expires) is originally fixed by the judge. For example, under the parole system, the sentencing judge might have given a sentence of ten to thirty years, which meant that the defendant would serve ten years in jail, and then serve the remaining twenty years on parole (though that time could be extended in the event of a revocation). In the supervised release regime, in contrast, maximum supervision terms and maximum jail terms upon revocation are fixed by federal regulation according to the offense. Each offense carries a maximum authorized term of supervised release and a maximum authorized term of imprisonment, or "back-up time," in the event of a revocation. For example, someone convicted of Distribution of Cocaine can be placed on supervised release for up to five years. Regardless of the length of that supervisory period (over which the judge still has some discretion), the total jail time that the client can serve in the event of a revocation is fixed at three

years. 28 C.F.R. § 2.219.[11] In contrast to parole, then, each and every defendant convicted of the same offense faces the same back-up time while on supervised release, regardless of the sentence imposed by the trial judge.

A second major difference between the two systems relates to so-called "good time" credit. 18 U.S.C. § 3624(b) allows that any prisoner serving a term of imprisonment of *more than one year* is eligible to receive credit toward the service of that sentence for good behavior while incarcerated. The statute allows for a fifteen percent credit, or fifty-four days per year, toward his sentence. Accordingly, a defendant who is sentenced to thirteen months in prison can expect to be released after roughly eleven months. Importantly, this benefit does *not* apply to clients on parole. Because clients on parole are in effect still serving their original sentence, and they are given a release date certain upon revocation by the Commission, the good time statute is not triggered. However, clients on supervised release *are* eligible to receive good time each and every time they are revoked, *provided that they are sentenced to a term of imprisonment of more than a year*.[12]

A third major difference between the two systems is that a client on parole can *refuse* to be released from prison onto supervision, while a client on supervised release cannot. As a parolee's release date draws near, he has the option to sign his parole certificate (accepting the terms of his supervision) or to refuse to sign and simply serve the remainder of his sentence. A supervised releasee, however, must be released to supervision on his scheduled release date, regardless of his preference.

There are other small differences between the two systems, but these three are the major ones that counsel are likely to encounter in their practice. The following chart sets forth the differences in a more concise fashion:

	PAROLE	SUPERVISED RELEASE
Back-up Time / Maximum Authorized Prison Term at Revocation	• Determined by judge's original sentence • Same as time *on* supervision	• Independent of judge's original sentence; fixed by federal regulation • Distinct from *length* of time on supervision • Maximum of 1, 2, 3 or 5 years, depending on original offense.
Revocation Sentence	• New parole date set by	• New *sentence* issued

[11] In the event that the release in this example is revoked and sentenced by the Commission to *less* than the full three years, he can be released back on to supervision for the remainder of his supervisory period, plus any applicable extension, but his remaining back-up time is now three years *minus* the time served on the revocation.

[12] Accordingly, counsel will note that, as in the pre-trial context, a sentence of thirteen months may well be more advantageous to a client on supervised release than a sentence of twelve months. The same is not true for a client on parole.

	USPC • Can be delayed due to poor behavior during incarceration • Re-parole can be refused by client in favor of incarceration	by USPC • Cannot be delayed; Client must be released on new release date • Re-release cannot be refused by client
"Good Time" Credit	• Does not apply	• Does apply
Supervision Period After a Revocation	• Recalculated by BOP based on time remaining on *original* sentence • Supervisory term is always getting *shorter* with ever day served	• Resentenced to new term of supervision by the USPC • New supervisory period is based on statutory maximum for original offense • Can become longer than judge's original sentence

VI. CHALLENGES

a. Judicial Review of Parole Decisions

Challenges to revocation hearings are most commonly raised through either a petition for a writ of habeas corpus or mandamus. A sample petition for writ of habeas corpus can be obtained through the Parole Division of the Public Defender Service. Successful challenges to parole decisions are based on the failure to follow constitutional, statutory, or regulatory requirements. In *White v. White*, 925 F.2d 287 (9th Cir. 1991), the petitioner successfully challenged the Parole Commission's denial of the due process right to confront adverse witnesses at a revocation hearing. *Id*. at 292. The court in *White* ruled that admission of some violations did not constitute a waiver of the right to confront and cross-examine adverse witnesses with regard to other violations which were not admitted. *Id*. at 291. The D.C. Court of Appeals found that the D.C. Board of Parole and its Trustee abused its discretion and acted outside of limits created by the regulations of that agency in issuing parole violation warrants without first making written findings and exercising discretion as required by 28 D.C.M.R. § 217. *See Teachey v. Carver*, 736 A.2d 998 (D.C. 1999). The U.S. Parole Commission was also successfully challenged when it executed a parole violator warrant by retaking a parolee into custody under warrant and then refusing to have a revocation hearing because the parolee was serving another sentence. The court ruled the Commission must abide by procedural requirements for parole revocation under the Parole Commission and Reorganization Act and cannot avoid those requirements by withdrawing an executed warrant and lodging it as a detainer. *Thompson v. Crabtree*, 82 F.3d 312 (9th Cir. 1996).

The courts have repeatedly intervened in cases where there is a delay in holding the revocation hearing. *Johnson v. Holley*, 528 F. 2.d 116 (7th Cir. 1975); *Creech v. United States Bd. of Parole*, 538 F.2d 205 (8th Cir. 1976). This is particularly true when the delay is prejudicial.

Goodman v. Keohane, 663 F.2d 1044, (11th Cir. 1981). Courts have also intervened where the U.S. Parole Commission issued a parole violator warrant and improperly held the warrant in abeyance pending the outcome of the new case. *Cronn v. Burkhart*, 830 F. Supp. 946 (N.D. Tex. 1993). *See also Long v. Gaines*, 173 F. Supp. 2d 35 (D.D.C. 2001).

However, courts are generally hesitant to interfere with the decisions of parole-granting bodies and, as a result, review only for denials of constitutional rights or acts outside statutory or regulatory authority or abuses of discretion. Courts will not review on the merits of whether or not parole should be revoked or granted. *See Bennett v. Ridley*, 633 A.2d 824, 826 (D.C. 1993); *White v. White*, 925 F.2d 287, 289-90 (9th Cir. 1991). In fact, the D.C. Circuit has recognized that the Commission's decision of whether or not to revoke or grant parole is "almost unreviewable." *Shelton v. United States Parole Comm'n*, 388 F.2d 567, 576 (D.C. Cir. 1967) (*citing Hyser v. Reed*, 318 F.2d at 240, but adding the emphasis). Parole Commission decisions to grant or revoke parole will be reversed only if they are arbitrary, capricious, or constitute an abuse of discretion.

In contrast to review of factual findings, however, the issue of whether the Commission's action lies within the permissible scope of its authority is a question of law to be reviewed de novo. *Turner v. United States Parole Comm'n*, 934 F.2d 254 (10th Cir. 1991). In *Wells v. Golden*, 785 A.2d 641 (D.C. 2001), the court remanded for further proceedings on appellant's petition for a writ of habeas corpus. It held that the Parole Board's discretion in setting a parole reconsideration ("set-off") date is not unlimited; it is constrained by the Youth Rehabilitation Act and the statute's twin goals of treatment and rehabilitation. The Board cannot impose a 10-year set-off for one sentenced under the Act, against the recommendation of the youth correction officials, simply because the Board believes 10 years of punishment fits the crime, as it appears to have done here. On remand, the set-off date must be reconsidered if the government is unable to provide evidence that the Board's decision took into account the YRA's rehabilitative goal.

VII. ACCESSING INFORMATION FROM THE U.S. PAROLE COMMISSION AND CSOSA IN PREPARATION FOR PAROLE REVOCATION HEARINGS

In order to determine which community supervision officer is assigned to your client, you should contact the intake unit at CSOSA at (202) 585-7430. Provide your client's D.C.D.C. identification number and you will be informed which officer has been assigned to your client. Although all community supervision officers are located in the D.C. area, they are no longer housed in one central office; they are assigned to various offices throughout the community.

Counsel must submit a written F.O.I.A. request pursuant to 5 U.S.C. § 552 to CSOSA to obtain access to client file materials. The request should be sent to CSOSA, F.O.I.A. Specialist, 633 Indiana Ave., NW, 12th Floor, Washington, D.C. 20004. If your client is supervised by the U.S. Parole and Probation Office, the F.O.I.A. request should be made through the U.S. Parole Commission.

In order to obtain information from the USPC file beyond the mandatory disclosure items addressed earlier, you will also need to submit a written F.O.I.A. request to the Commission. You should specify what documents you are seeking in your request. The request should be

addressed to the attention of the Commission's F.O.I.A. Officer and mailed to: United States Parole Commission, Suite 420, 5550 Friendship Blvd., Chevy Chase, MD 20815. If you want to check on the status of your F.O.I.A. request, call the Commission and ask to speak with a F.O.I.A. Specialist at (301) 492-5990. Note that you will not be permitted to review the file in person.

Making F.O.I.A Request: The F.O.I.A. statute, 5 U.S.C. § 552(a)(3), requires that a request for records reasonably describe the records requested. In preparation for a parole revocation hearing, you should always make a general request for "all documents maintained in the parole file and the evidence on which such information is based." Specifically, you should request copies of the warrant, warrant application and any supplemental warrant information, action sheet, chronological resume of parole actions, parole determination record, status report, notification of re-arrest, pre-sentence investigation, progress reports, mental health evaluations, preliminary interview and revocation hearing form, summary of preliminary interview/digest and probable cause determination. You should also request from the CSOSA office copies of the community supervision officer's field notes (you may want to specify a range of time if client was on parole for a long time).

Pursuant to the F.O.I.A., the Commission must make a determination within 10 days as to whether it will comply with the request, and the Commission must provide notification of its decision to the person making the request. Note that the Commission is usually behind schedule in responding to F.O.I.A. requests and you may receive a letter stating this and informing you that you will receive the documents at a later date. If you do not receive a response to your F.O.I.A. request, you should file a F.O.I.A. appeal, pursuant to 5 U.S.C. § 552(a)(6)(ii). This provision allows the agency to make a determination with respect to any appeal within twenty days after receipt of such appeal.

In order to obtain information from the Parole Commission regarding the status of a client's case, you should speak with the analyst who is assigned to your case. Every D.C. Code offender is assigned to a specific Commission analyst. The analyst is responsible for maintaining client files, gathering case information and forwarding this information to the Commission's hearing examiners. It is difficult to reach the analysts by telephone, but the general Commission phone number is (301) 492-5990. In order to learn of the status of your client, you should send a facsimile request to your specific analyst at (301) 492-5525.

FOIA Requests:

- ✓ Make a general FOIA request in preparation for hearing
- ✓ File a FOIA appeal if you do not receive an adequate response to your request

VIII. APPLYING D.C. LAW OVER FEDERAL LAW

As noted at the outset of this chapter, the Revitalization Act abolished the local D.C. Board of Parole in August of 2000, and transferred its authority to its federal counterpart, the U.S. Parole Commission. Recognizing that this federal agency might take a different approach to parole regulation than its locally-based predecessor, Congress made clear that the Parole Commission must use its new powers within the precepts of D.C. parole law and regulations, which remain intact: "The Parole Commission shall exercise the authority vested in it by this section *pursuant to the parole laws and regulations of the District of Columbia*." D.C. Code § 24-131(c) (emphasis added).

The distinction is not a hollow one. In addition to the myriad procedural differences explained throughout this chapter, it is also clear that the two systems are rooted in fundamentally different guiding philosophies. In *Cosgrove v. Thornburgh*, 703 F. Supp. 995, 1003 (D.D.C. 1988), the U.S. District Court for the District of Columbia found "significant disparities" between the two approaches. *Id.* Whereas the District's parole law follows a rehabilitative model, the federal system is primarily concerned with punishment and community safety.[13] These differences are reflected in both the parole grant and revocation processes, and counsel are strongly urged to remind the Commission of this distinction, and its obligation, whenever appropriate.

The Commission explicitly stated its obligation and intention to adhere to D.C. law in drafting the proposed regulations in its prefatory comments to its interim and proposed regulations:

> Under section 11231 of the [Revitalization Act], the U.S. Parole Commission will be given, effective August 5, 2000, the authority presently exercised by the Board of Parole of the District of Columbia. . . . In all respects, the proposed rules have been drafted to conform to District of Columbia law regarding the parole revocation process. See D.C. Code §§ 24-205 and 24-206.

65 Fed. Reg. 20006 (April 13, 2000) (emphasis added).

Although the Commission has professed agreement with this general principle, the proposed regulations do not, in fact, precisely mirror the former District of Columbia rules and regulations governing parole determinations. **For this reason, it is of critical importance that counsel be familiar with not only the Commission's most current regulations, but also with the D.C. statutes, cases, and regulations governing revocation before the former D.C. Board.** The relevant statutes can be found at D.C. Code §§ 24-401.1-409 and the relevant municipal regulations may be found at 28 DCMR Chapters 1 and 2.[14] Efforts have been made throughout this chapter to call attention to areas where the bodies of law differ substantively, but it is strongly recommended that counsel review both sets of rules with an eye towards preserving a record for possible appeal.

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[13] The court went on to find that while the U.S. Parole Commission had been granted substantial authority over D.C. Code offenders, it was *not* free to disregard District of Columbia regulations and guidelines governing parole, which it found to have "the force and effect of law." *Id*. at 1003.

[14] Counsel should also review the statutes and regulations governing parole for Federal Code offenders which are set forth at 18 U.S.C.A. § 4201, et seq. and 28 C.F.R. Part 2, Subpart A.

CHAPTER 13

ANTICIPATING AND USING THE APPELLATE PROCESS

Introduction

This chapter has two objectives. First, it offers counsel who primarily practices as criminal defense lawyers in the Superior Court of the District of Columbia a basic understanding of appellate practice and, specifically, practice before the District of Columbia Court of Appeals. The initial portion of the chapter rests on the premise that trial counsel cannot fully protect their client's interests without appreciating the ways appellate law may affect the clients. If defendants always prevailed in the trial court, appellate substantive and procedural law would not interest their attorneys. In reality, a client's fate often depends on the appellate court. In turn, the appellate outcome often depends on how the trial attorney prepared for appellate review. Therefore, trial attorneys must understand both how to protect their client's interests in the appellate court and how to use the appellate court to advance their objectives in the trial court.

Second, this chapter provides an introduction to appellate practice for attorneys actually handling either appeals in criminal and delinquency cases (at the end of the case following sentencing or disposition) or interlocutory appeals, i.e., appeals during the course of trial proceedings. Counsel handling criminal and delinquency appeals must be thoroughly familiar with the Rules of the District of Columbia Court of Appeals. The Clerk's Office of the Court of Appeals provides numerous helpful guides to appellate practice. Counsel is also invited to contact the PDS Appellate Division for assistance.

I. PREPARING FOR APPEALS

Appellate judges ask three questions about cases that attorneys generally do not hear in the trial court:

1) **"Do we have jurisdiction to hear this case?"** Trial counsel do not encounter this question because their clients have been hauled into court for offenses allegedly committed in the District of Columbia; thus, defense counsel are rarely trying to convince a trial court that it should hear a case. Their clients typically would be satisfied if the court concluded it lacked jurisdiction. On appeal, however, the attorney must persuade the court to hear the case if the client has not prevailed in the trial court. Thus, counsel must know how to answer this question in its efforts to convince the appellate court that it has jurisdiction over the appeal.

2) A second question from appellate judges is, **"What is our standard of review?"** As discussed below, this bewildering question sometimes means, "In deciding whether the trial court's ruling is wrong, how much deference should we give to the ruling of the trial judge?" Sometimes this question also means, "How much prejudice from the alleged error is necessary before we reverse the trial judge?" The answers to these questions often determine the outcome of appeals. And, in turn, the answers to these questions often depend on the actions taken by trial lawyers. **Skilled trial lawyers always have an eye on appellate standards of review and**

strive to make a trial record that presents favorable standards of review if the client should not win in the trial court. Trial counsel's failure to appreciate standards of review may doom the client on appeal and may well constitute ineffective assistance of counsel. On the other hand, a well-made record may facilitate reversal on appeal. Thus, trial counsel must understand appellate standards of review and know how to make an effective record for appeal.

3) The third question from an appellate judge is often, **"Counsel, is this information in the record?"** Again, this question seems odd to a trial practitioner. Trial judges do not willfully blind themselves to information because it is not "in the record." They may reject information under evidentiary or procedural rules, but they do not ask whether information is already "in the record." The "appellate record" is a legal concept that derives from the relationship between appellate and trial courts. Because appellate courts are principally focused on reviewing the actions of trial courts, they limit their inquiry to events they are confident occurred in the "lower" court. Events matter to the appellate court only if they have found their way into the record. Thus, counsel must know what constitutes an appellate record.

These three questions are addressed immediately below.

A. Jurisdiction and Appealability

Like all other litigants, a criminal defendant may appeal a ruling or decision rendered in the trial court only if the appellate court has jurisdiction to consider the appeal. "Jurisdiction" in this context means "authority" or "legal power." Jurisdiction is determined by statute. The District of Columbia Court of Appeals has jurisdiction to hear appeals from "all final orders and judgments of the Superior Court of the District of Columbia." D.C. Code § 11-721(a)(1). In addition, "a party aggrieved by" a final order or judgment entered in Superior Court "may appeal therefrom as of right to the District of Columbia Court of Appeals." D.C. Code § 11-721(b). In criminal cases, the final judgment is the judgment of conviction, entered at the time of sentencing. *West v. United States*, 346 A.2d 504 (D.C. 1975). In delinquency cases, the final judgment is the disposition. *See In re E.G.C.*, 373 A.2d 903 (D.C. 1977). Therefore, defendants in criminal cases and respondents in juvenile cases have an absolute right to appeal after sentencing or disposition.[1] On the other hand, absent an exception to this rule, appellate courts do not have jurisdiction in criminal and delinquency cases until entry of the final judgment. Therefore, unless the defendant can invoke an exception to the "final order or judgment" rule, the defendant cannot appeal a trial court ruling until the end of the case. However, the notice of appeal after judgment gives the appellate court an opportunity to review all decisions by the trial court that preceded the filing of the notice of appeal.

Final Orders: In general, an order is final within the meaning of D.C. Code § 11-721, and therefore subject to appeal, only when it "disposes of the whole case on its merits so that the court has nothing remaining to do but to execute the judgment or decree already rendered." *In re Estate of Chuong*, 623 A.2d 1154, 1157 (D.C. 1993) (en banc) (internal quotation and citation omitted). Criminal sentencings and juvenile dispositions comfortably fit this definition. Most

[1] There is an exception for minor criminal cases. Appeal from minor criminal judgments "where the penalty imposed is a fine of less than $50 for an offense punishable by imprisonment of one year or less, or by fine of not more than $1,000 or both" requires an application for allowance of an appeal. D.C. Code § 11-721(c).

trial court rulings before sentencing or disposition do not fit this standard because they do not dispose of the entire case. However, many orders entered after sentence *do* satisfy this definition because the "case" no longer means resolution of guilt or innocence and because no further court action is anticipated. For instance, an order revoking or adversely modifying the terms of probation is a final order. *Barnes v. United States*, 513 A.2d 249 (D.C. 1986). An order denying discharge and expungement under D.C. Code § 48-904.01(e) and entering an adjudication of guilt is an appealable order. *Neal v. United States*, 571 A.2d 222, 225 (D.C. 1990). The denial of a motion for a new trial is a final order. *In re E.G.C.*, 373 A.2d at 905.

Collateral Order Doctrine: Some orders entered during a criminal case, but before the entry of judgment at sentencing, are considered final for appeal purposes under the "collateral order doctrine." Pursuant to the rule of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), a collateral order is deemed sufficiently final and therefore appealable if it meets three conditions:

> First, it must conclusively determine the disputed question; second, it must resolve an important issue completely separate from the merits of the action; third, it must be effectively unreviewable on appeal from a final judgment.

In re Estate of Chuong, 623 A.2d at 1157 (quotation marks and citations omitted). "[I]nterlocutory orders are appealable if they have a final and irreparable effect on important rights of the parties." *Meyers v. United States*, 730 A.2d 155, 157 (D.C. 1999).

Examples of "Final" Collateral Orders: Rulings denying pretrial liberty are the quintessential example of "final" collateral orders in criminal cases: an order of confinement conclusively determines whether the person should be at liberty; pretrial liberty is certainly important and decided by factors other than guilt or innocence; and wrongfully imposed pretrial confinement cannot be corrected by a post-trial appeal or in a case where the defendant wins an acquittal. *See Stack v. Boyle*, 342 U.S. 1 (1951). Motions to dismiss charges on double jeopardy grounds are also appealable pretrial, in accordance with *Abney v. United States*, 431 U.S. 651 (1977). This is because the Double Jeopardy Clause protects against a second prosecution for the same offense, an important interest that is fully resolved by an order denying the motion to dismiss, an interest that is different from the question of guilt or innocence, and an interest that could not be fully protected by a post-verdict appeal. At the request of either party, the Court of Appeals will expedite pretrial double jeopardy appeals. *See Kelly v. United States*, 639 A.2d 86, 87 (D.C. 1994). A trial court's orders issued during a neglect proceeding prohibiting communication with the respondent's criminal lawyer and barring that lawyer from the courtroom met the requirements of the collateral order doctrine and were immediately appealable. *In re Ti. B.*, 762 A.2d 20 (D.C. 2000). Similarly, an uncharged person may appeal a pre-arrest, court-ordered lineup. *Wise v. Murphy*, 275 A.2d 205 (D.C. 1971) (en banc). And while orders compelling discovery are not final and therefore not traditionally appealable unless the party suffers contempt, under the *Perlman* doctrine, a discovery order directed at a disinterested third party is treated as a final order and is immediately appealable. *See Walter E. Lynch & Co. v. Fuisz*, 862 A.2d 929 (D.C. 2004) (citing *Perlman v. United States*, 247 U.S. 7 (1918)).

On the other hand, the Supreme Court has emphasized that for reasons of judicial efficiency, interlocutory appeals in criminal cases are strongly disfavored. Accordingly, it has "interpreted the collateral order exception 'with the utmost strictness' in criminal cases." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989) (quoting *Flanagan v. United States*, 465 U.S. 259, 265 (1984) (disqualification of law firm from representing more than one co-defendant)). For examples of interlocutory orders that have been deemed nonappealable, *see, e.g.*, *Horton v. United States*, 591 A.2d 1280 (D.C. 1991) (granting government motion for inpatient productivity examination when defense has indicated it will interpose insanity defense); *Gant v. United States*, 467 A.2d 968 (D.C. 1983) (denial of motion to dismiss for prosecutorial vindictiveness); *United States v. Harrod*, 428 A.2d 30 (D.C. 1981) (en banc) (order requiring witness to undergo psychiatric examination).

In many instances, the "final orders and judgments" rule is easier to state than to apply. **Though trial counsel may fairly assume that most interlocutory orders are not appealable, counsel must be vigilant for orders that cannot sit unchallenged until sentencing or disposition.** In making an argument that an interlocutory order fits within the collateral order doctrine, counsel may rely on cases construing 28 U.S.C. § 1291 – the statute regulating the authority of federal appellate courts – because the federal statute is similar to D.C. Code § 11-721.

In addition to § 11-721, three statutes provide the District of Columbia Court of Appeals jurisdiction to hear appeals brought by defendants or respondents challenging trial court orders entered before sentencing or disposition. D.C. Code § 23-1324 authorizes appeals from pretrial detention orders. D.C. Code § 16-2328 allows appeals from orders detaining juveniles before trial or orders transferring juveniles to adult court for prosecution. The procedures for taking appeals pursuant to these provisions are discussed later in this chapter. Finally, D.C. Code § 23-704(e) allows appeal from orders of extradition.

Another statute gives the Court of Appeals jurisdiction over interlocutory appeals brought by the government. The government may appeal rulings before or during criminal or delinquency trials in three situations and any such appeal must be expedited. D.C. Code § 23-104. First, it may appeal an order dismissing an indictment or information as to one or more counts if the ruling did not amount to an acquittal on the merits. *Id*. § 23-104(c); *see, e.g.*, *United States v. Rothmeier*, 570 A.2d 811 (D.C. 1990). Second, it may appeal an order suppressing or otherwise denying the use of evidence on the ground that it was invalidly obtained, but must certify that the appeal is not undertaken for delay and that the evidence constitutes "substantial proof of the charge." D.C. Code § 23-104(a)(1), (b); *see United States v. Williams*, 697 A.2d 1244, 1247-48 (D.C. 1997); *In re J.W.*, 763 A.2d 1129 (D.C. 2000); *In re I.J.*, 906 A. 2d 249 (D.C. 2006) (finding substantial compliance and noting that certification requirement is not jurisdictional). Third, with leave of the trial court, the government may appeal during trial a ruling that involves a "substantial and recurring question of law which requires appellate resolution." If a government appeal is taken during trial, the trial must be adjourned for at least ninety-six hours for the appellate court to act; if there is no decision within that period, the trial court will resume trial on the next business day and deem the appeal void. D.C. Code § 23-104(b), (d).

Writ of Mandamus: In exceptional circumstances, criminal defendants can invoke the jurisdiction of the Court of Appeals by petitioning for a writ of mandamus. Mandamus is

reserved for those rare but important instances where trial judges exceed their lawful powers: when they issue critical rulings yet cannot identify a statute or rule that gives them authority to issue those rulings. Unlike appeals, a petition for a writ of mandamus does not invoke the Court of Appeals' appellate jurisdiction. A petition for a writ of mandamus is considered an original action in the appellate court. Thus, D.C. Code § 11-721 is not the basis of appellate jurisdiction. Rather, the Court of Appeals' authority to issue writs of mandamus derives from the "All Writs Act," 28 U.S.C. § 1651, which authorizes "all courts established by Act of Congress [to] issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

The function of mandamus jurisdiction is to "confine [the trial] court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so." *Anderson v. Sorrell*, 481 A.2d 766, 771 (D.C. 1984) (citation omitted). To obtain the writ of mandamus, the petitioner "must show that [the] right [asserted] is 'clear and indisputable,' and that [petitioner] 'has no other adequate means to obtain relief.'" *Banov v. Kennedy*, 694 A.2d 850, 857 (D.C. 1997); *see Kerr v. United States*, 426 U.S. 394, 403 (1976). "Abuse of discretion sufficient for reversal in an appeal is not enough to warrant mandamus; for mandamus to issue, a decision must qualify as 'usurpation of judicial power.'" *Banov*, 694 A.2d at 858. Generally, mandamus jurisdiction lies where review by direct appeal would be useless because the damage to the petitioner would already have been accomplished and could not be effectively remedied. *See, e.g.*, *Anderson v. Sorrell*, 481 A.2d at 771 (trial court ordered "productivity" examinations of defendant before determining whether defendant intelligently and voluntarily waived insanity defense); *Bowman v. United States*, 412 A.2d 10 (D.C. 1980) (trial court ordered defendant to disclose nature of defense or be barred from presenting any affirmative defense except through own testimony). *But see Horton*, 591 A.2d 1280 (declining to invoke mandamus authority to review order requiring defendant, who intended to interpose insanity defense, to submit to inpatient productivity examination). *See generally* D.C. App. R. 21; *Yeager v. Greene*, 502 A.2d 980 (D.C. 1985); *Helstocki v. Meanor*, 442 U.S. 500 (1979); *Ex parte Rowland*, 104 U.S. 604 (1881).

B. Standards of Review

After an appellate court determines it has jurisdiction over a case, it asks two questions: (1) did the trial court commit error? and (2) if the trial court erred, what remedy is appropriate? The court analyzes each question by applying what are called "standards of review."

1. Did the Trial Court Commit Error: How Much Deference is Owed the Trial Court's Determination?

The question "Did the trial court err?" implicitly assumes that the trial court's action was either right or wrong. This assumption is problematic. On the one hand, some determinations made by a trial judge are either correct or incorrect as a matter of law. For example, a determination that a defendant does not have a constitutional right to cross-examine adverse witnesses for bias is wrong as a matter of law. On the other hand, a determination that the defendant needs a continuance of two weeks, rather than three weeks as requested by defense counsel, cannot easily be said to be right or wrong. This decision is a matter of judgment and judgments are not usually

characterized as right or wrong. Consider also a trial judge's decision, after listening to testimony, to believe a certain witness. How would an appellate court decide whether the judge's credibility determination is right or wrong?

Therefore, the question "Did the trial court err?" requires the appellate court to determine the extent to which the trial court decision under review fits within a category of decisions that can be characterized as either right or wrong. Trial court decisions are typically thought to fall into three categories: (1) issues of law; (2) issues of trial court discretion; and (3) issues of fact. Each category lends itself to a "right/wrong" determination in a different way. Roughly put, legal decisions are either right or wrong; discretionary calls are legally acceptable so long as they reflect a reasonable judgment based on a correct understanding of the applicable law and facts; and factual determinations are acceptable so long as there is supporting evidence that a reasonable judge could have decided to credit. Thus, the first question an appellate court asks is whether the alleged error is an error of law, discretion, or fact, as this categorization helps the appellate court understand what it means to say that the lower court erred.

Dividing rulings into these categories is often straightforward. For example, whether an accused has a right to refuse to speak during custodial interrogation is a pure question of *law*. The same ruling must apply in all trials. Whether the trial judge should give defense counsel 15 or 20 minutes to read Jencks material is a matter of *discretion*. Different trial judges may appropriately reach different conclusions on comparable facts because "[d]iscretion signifies choice" and "the decision-maker exercising discretion has the ability to choose from a range of permissible conclusions." *Johnson v. United States*, 398 A.2d 354, 361 (D.C. 1979). Whether the witness at a suppression hearing is believable is a question of *fact*. "An issue is designated a question of fact if it involves the who, what, where, when and how details of the case; the case specific "historical," "basic," "primary," "discrete," "subsidiary" or "operative" facts." *Davis v. United States*, 564 A.2d 31, 35 (D.C. 1989) (en banc) (citation omitted).

However, categorizing trial court rulings can be difficult. "[T]he proper characterization of a question as one of fact or law is sometimes slippery." *Thompson v. Keohane*, 516 U.S. 99, 110-111 (1995). For example, is the determination that an accused gave a statement "voluntarily" a determination of fact or law? Is the trial judge making a decision about a matter of historical fact – i.e., this defendant's "will" was not overborne by the police interrogation? Or is the notion of a "will" capable of being overborne rather fictional, and, if so, isn't the question of voluntariness really a legal question of what tactics are acceptable in certain circumstances?

Functional Analysis: Such concerns have led the courts to acknowledge that the border between "fact" and "law" is sometimes fuzzy and should be drawn, on occasion, by conducting a "functional" analysis. This functional analysis is an assessment of the institutional competence of trial and appellate courts. If the issue is the type that a trial judge is better situated to determine – for example, whether a witness is credible – then it is more likely to be categorized as a question of fact. If the issue is the type that for reasons of uniformity in the law an appellate court is better situated to determine – for example, whether a statute provides certain rights – then it is more likely to be categorized as a question of law. *Thompson v. Keohane*, 516 U.S. 99 (engaging in functional analysis to determine that custody, for *Miranda* purposes, is a question of law); *Miller v. Fenton*, 474 U.S. 104 (1985) (using functional analysis to explain why

voluntariness of confession is question of law entitled to non-deferential *de novo* review); *Davis*, 564 A.2d 31 (explaining functional distinction between review of law and fact); *see In re J.M.*, 619 A.2d 497 (D.C. 1992) (en banc) (voluntariness of consent under Fourth Amendment is question of fact entitled to highly deferential review).

This functional analysis also helps appellate courts decide whether certain issues should be characterized as matters of trial court discretion. If an appellate court believes that the administration of justice will be advanced by giving trial judges latitude in making certain decisions without fear that those decisions will be second-guessed by appellate judges, then those decisions are likely to be categorized as "discretionary." *Johnson v. United States*, 398 A.2d 354.

After an appellate court categorizes the issue being reviewed on appeal as legal, factual or discretionary, it can apply an appropriate standard of review. This standard is the product of the two lines of inquiry already discussed: (1) the extent to which the trial court's decision can be characterized as right or wrong; and (2) the extent to which the trial court is better equipped than the appellate court to decide the issue being challenged. These two lines of inquiry coalesce in standards of review which give greater or lesser deference to the trial court's decision depending on whether this decision involves a matter of fact, law or discretion.

(a) **A factual finding** – for example, "this witness is not credible when she says the police barged into her house without asking for consent" **– receives enormous deference**. By statute, D.C. Code § 17-305(a), a factual ruling may not be reversed unless it **"is plainly wrong or without evidence to support it."** Put another way, appellate courts will reverse factual determinations only if they are "clearly erroneous." *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985) (construing Fed. R. Civ. P. 52(a)). A factual finding "is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id*. at 573 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). An appellate court will not reverse a factual finding if the lower court's "account of the evidence is plausible in light of the record viewed in its entirety" even though the appellate court is "convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id*. at 574.

Although this standard insulates virtually all credibility determinations from reversal:

> This is not to suggest that the trial judge may insulate his findings from review by denominating them credibility determinations, for factors other than demeanor and inflection go into the decision whether or not to believe a witness. Documents or objective evidence may contradict the witness' story; or the story itself may be so internally inconsistent or implausible on its face that a reasonable factfinder would not credit it. Where such factors are present, the court of appeals may well find clear error even in a finding purportedly based on a credibility determination.

Id. at 575; *see Tursio v. United States*, 634 A.2d 1205 (D.C. 1993) (reversing trial court's credibility finding that prosecutor did not intentionally discriminate in exercising peremptory challenges).

The rationale for the statutory-based deference to trial court factual findings is based in part on the superior position of trial judges – who see and hear witnesses – to determine credibility. However, as the Supreme Court has explained, the rationale extends to matters of fact beyond assessments of credibility because "[t]he trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources." *Anderson*, 470 U.S. at 574-75.

This same rationale also helps explain another way factual findings are vulnerable to reversal on appeal. "Findings of fact which result from a misapprehension as to the applicable law . . . lose the insulation of the 'clearly erroneous' rule." *In re Application of L.L.*, 653 A.2d 873, 880 (D.C. 1995) (citation omitted).

These principles play out in the following way in the context of a hypothetical factual finding about the color of a traffic light. If one witness testifies that the light was green, and another testifies that the light was red, the judge cannot be clearly erroneous in crediting the first witness and finding as a fact that the light was green. If all the witnesses testify that the light was red, and there is no circumstantial evidence on the question whether the light was green or red, there would not be support in the record for the judge to conclude that the light was green. If the judge credits a witness who says the light was green over a witness who says the light was red, because the judge believes that witnesses who say "red" have a "heavy burden of persuasion," but there is no such principle of law, then the judge is clearly erroneous and laboring under a misapprehension of law. If a judge finds that the light was green, but the appellate court is firmly convinced that the light was red, then it will reverse the trial judge's finding as clearly erroneous.

(b) When a trial judge decides **a legal question**, he or she is making a determination that receives **no deference**, because he or she was either right or wrong and because the appellate court believes it has expertise on matters of law. An appellate court accords **"de novo" or "plenary" review** to a trial court's determination of a legal issue and gives no weight to the trial court's finding. *Davis*, 564 A.2d at 35.

(c) When a trial judge makes a **discretionary judgment**, for example, "the defendant is entitled to a continuance of 5 days not 7 days," or "this evidence is more probative than prejudicial," the trial judge is making a determination that receives **great deference**. Appellate courts show deference in this situation because a discretionary decision is a matter of judgment, and because trial judges must have latitude to run their courts without fear that all of their judgments will be second-guessed. A matter of judgment is not either right or wrong. The trial court is entitled to reach a different decision than the appellate judges think they would reach (if they were trial judges), so long as the trial judge's conclusion is not too extreme and shows a correct understanding of the applicable law and facts. Therefore, trial court discretionary rulings are

reviewed under the highly deferential **"abuse of discretion"** standard. This standard affords the trial judge a limited "right to be wrong." *Johnson*, 398 A.2d at 361-367.

Review for abuse of discretion has 3 components:

(1) Was the determination committed by law to the trial court's discretion?

(2) Did the trial court recognize this discretion and, if so, did the trial court purport to exercise discretion?

» Failure to exercise choice in a situation calling for choice is abuse of discretion.

» Adhering to uniform policy in a situation calling for case-specific balancing is abuse of discretion.

(3) Did the trial court exercise its discretion erroneously?

» An informed choice among alternatives requires that the trial court's determination be based upon a firm factual foundation; therefore, does the record reveal sufficient facts upon which the trial court's determination was based?

» Did the judge understand and correctly apply the governing law or did the judge rely on an improper factor?

Id.; *In re J.D.C.*, 594 A.2d 70 (D.C. 1991) (abuse of discretion in order permitting media into juvenile trial, when judge misapplied governing legal principles); *see Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 402 (1990).

So long as an appellate court believes that a discretionary ruling is based on the judge's balancing of legally relevant factors, the appellate court will defer to the trial court's determination. **For this reason, a claim of abuse of discretion stands a better chance of success if framed in terms of misunderstanding or misapplication of principles of law or misapprehension of the relevant facts.** If, for instance, the trial judge weighed probative value against prejudicial impact in deciding to exclude defense evidence, the appellant will fare better by claiming that the court's failure was not in giving more weight to one side of the scale than the other, but in misunderstanding the meaning of prejudice and therefore putting considerations on the prejudice side of the scale that legally did not belong there.

2. <u>What Remedy is Appropriate: How Much Prejudice is Needed for Reversal?</u>

Once it has concluded that a trial court committed error, the appellate court turns to the issue of an appropriate remedy. Appellate courts insist that trial judges be given a fair opportunity to correct their own errors and therefore require litigants to raise their objections in the trial court. They enforce this requirement by penalizing litigants who raise issues for the first time on appeal. In deciding on an appropriate remedy for trial court error, appellate courts look first to

whether the error was "preserved," i.e., whether the issue being raised on appeal was previously raised in the trial court.

Appellate courts are also sensitive to the concern that trials cannot be perfect, in the sense of being free of all error. Therefore, the pertinent inquiry is whether the trial was free of error that might have affected the result.

These two interests – enforcement of the defendant's obligation to preserve errors in the trial court and protection of the defendant against prejudicial (but not harmless) error – lead to the following standards of review with respect to the appropriate remedy for trial court error:

(a) When the error being challenged in the appellate court was brought to the attention of the trial court (that is, when the error was "preserved" because the trial court was given an opportunity to consider the party's position in deciding what ruling to make), then the appellate court will use the "*Kotteakos* standard" to decide whether the trial court's error should produce a reversal of the judgment. This awkwardly phrased standard, also known as the **"harmless error rule,"** attempts to measure the impact of a trial court ruling on the jury's decision-making process.

> [I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Kotteakos v. United States, 328 U.S. 750, 765 (1946); *see* Super. Ct. Crim. R.52(a) (requiring that appellate courts consider only errors affecting substantial rights).

If a court finds the record is in equipoise on the question of whether preserved error was harmful (or harmless), then the court must resolve this doubt in favor of the defendant. This is the same as saying that the government bears the burden of persuasion because it is the beneficiary of the trial court's error. *See United States v. Olano*, 507 U.S. 725, 734 (1993). The Supreme Court believes it is "conceptually clearer" to ask instead whether the record eliminates the appellate court's doubt about whether the error substantially influenced the jury's decision. *O'Neal v. McAninch*, 513 U.S. 432, 436-37 (1995).

(b) When the claim on appeal involves preserved *constitutional* trial error, a burden is placed on the government (which benefited at trial from the error) to prove the error harmless beyond a reasonable doubt – the *Chapman* standard. *Chapman v. California*, 386 U.S. 18, 24 (1967). By its terms, and in application, this stricter standard makes reversal far more likely than under the *Kotteakos* standard. *See Arizona v. Fulminante*, 499 U.S. 279 (1991) (applying *Chapman* standard to introduction of coerced confession); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) (applying *Chapman* standard to unconstitutional limitation on cross-examination); *Bassil v. United States*, 517 A.2d 714 (D.C. 1986) (discussing application of *Chapman* rather than denial of right to challenge credibility of a government witness with affirmative testimony of witness's

reputation for untruthfulness). An appellate court might not apply *Chapman* unless it concludes that the error was preserved as constitutional error (i.e., the defense objected on constitutional grounds).

(c) When the error is brought to the appellate court's attention without first having been presented to the trial court, the appellant must surmount a towering obstacle – the plain error standard –before an appellate court will grant relief. *See* Super. Ct. Crim. R. 52(b) (permitting appellate review of plain error that was not brought to attention of trial court).

For years, the District of Columbia Court of Appeals has cited the standard in *Watts v. United States*, 362 A.2d 706, 709 (D.C. 1976) (en banc): "the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the very fairness and integrity of the trial." *Olano*, 507 U.S. at 732-737, gave a more comprehensive explanation of the plain error standard:

1. an error must exist;

2. the error must be plain (clear or obvious) as a matter of law;

3. the *defendant* carries a burden of showing the error affects substantial rights (i.e., the opposite of *Kotteakos* and *Chapman* which place the burden on the beneficiary of trial error); and

4. the appellate court should exercise its discretion to grant relief only if the error seriously affects the fairness, integrity or public reputation of the proceeding.

(d) In some instances, constitutional error is not capable of being measured under the *Chapman* test and therefore requires reversal without consideration of prejudice. These errors are called "per se" or "structural" errors. *See United States v. Gonzalez-Lopez*, 548 U.S. 1 (2006) (right to retained lawyer of ones choice); *Sullivan v. Louisiana*, 508 U.S. 275 (1993) (deficient reasonable doubt instruction); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (total deprivation of the right to counsel); *Tumey v. Ohio*, 273 U.S. 510 (1927) (trial by biased judge); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (right to self-representation).

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***Henderson v. United States*, 133 S. Ct. 1121 (2013).** Under prong 2 of *Olano*, which requires that any error be plain or obvious, it is sufficient that the error be plain at the time of appellate review.

C. The Appellate Record

1. Composition

The Court of Appeals confines its review of trial court actions to matters "in the record." *See* D.C. App. R. 10. The following items are potentially in the appellate record:

1. The transcript of proceedings. Anything said in a trial courtroom may be part of the appellate record if it is transcribed by a court reporter or recorded by the Superior Court's tape recording system. If a lawyer or judge makes a statement before the tape recorder is turned on or before the court reporter has begun taking notes, the statement will not appear in a transcript of the proceedings and will not be part of the record, unless someone repeats the statement when recording is taking place. **Non-verbal events may often be significant.** If counsel thinks it important for the appellate court to know about such an event – a gesture or movement by a witness or marshal, a judge's or witness's tone of voice, an interjection by a spectator – counsel must verbally describe the event. *See Dyson v. United States*, 450 A.2d 432 (D.C. 1982) (during closing argument prosecutor sat in witness chair while mimicking defendant's testimony).

The trial court should not go "off the record." "The Superior Court is a court of record, and as such all proceedings in cases before it must be 'on the record.'" *Braxton v. United States*, 395 A.2d 759, 767 (D.C. 1978). If this rule is violated, the content of any non-recorded proceedings should be described for the record. So long as words have been recorded during a court proceeding, they can be made part of the appellate record and brought to the attention of the appellate court.

2. The court file. The Superior Court case jacket (with the clerk's entries) and all papers filed in the jacket may be considered by the Court of Appeals as part of the appellate record. If, for instance, counsel has filed a pretrial motion to suppress evidence, that motion can be part of the appellate record. On the other hand, if counsel provides a document to opposing counsel and the judge, but does not file it, the document will not be in the appellate record unless the judge directs the clerk to file the document in the court jacket. For example, defense counsel sometimes submit proposed jury instructions to the prosecutor and judge in open court. If the judge rejects these instructions in whole or in part, the defendant may want to explain to the appellate court why the proposed instructions were superior to the judge's instructions. However, the appellate court will not know the exact content of those instructions unless they were filed in the Superior Court case file. **Counsel should ensure that pleadings are filed in the court jacket, either by filing them with the Clerk's office or by asking the judge in open court to have a copy filed by the courtroom clerk.**

3. Exhibits and Physical Objects Admitted in Evidence. Any item admitted into evidence may be part of the record on appeal. Because any item admitted into evidence has an identifying notation (e.g., "Gov't Exhibit #1"), the Court of Appeals can be confident that the item it examines is the same item considered by the trial court.

4. Exhibits and physical objects not admitted in evidence but preserved by the court for purposes of the record. Sometimes counsel offer items for evidence that are rejected by the trial court. For instance, the trial court may reject defense photographs as more prejudicial than probative. If, after obtaining the unfavorable ruling, defense counsel simply puts the photographs in his or her personal file, the appellate court will not see them. If counsel hopes to argue on appeal that the trial court erred by denying admission of the photographs, it will be important for the appellate court to see the same

photographs that the trial court saw. *But see McCoy v. United States*, 781 A.2d 765 (D.C. 2001) (government permitted to supplement record on appeal with reconstituted array, identical to the original array, consisting of five original photos and four copies). Accordingly, after the trial court rules, counsel should ask the judge to have the clerk preserve the photographs for purposes of the record on appeal. The photographs should carry a notation such as "Def. Exhibit #1 for Identification." The photographs (or any similar item) will be preserved by the Clerk's office exactly as it preserves items admitted into evidence.

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***Freeman v. United States*, 60 A.3d 434 (D.C. 2013).** Convictions for first-degree murder and other armed offenses in connection with road rage incident affirmed where appellate court was able to conduct "independent review" of "exceptionally detailed reconstruction of the record" that included judge's detailed and contemporaneous notes, government exhibits admitted into evidence, and trial counsel's post-trial motion to set aside verdict and grant new trial, identifying several grounds for appeal, but did not include record of jury selection, opening statements, or closing arguments, and where defendant identified no other issue on appeal.

2. Making an Effective Record

The previous discussion about the appellate record and appellate standards of review should demonstrate to defense counsel their unmistakable obligation to make an effective record in three respects: (1) ensure that information relevant to a potential appeal is part of the record, i.e., that the transcript, the court file, or the exhibits preserved for appeal include all the information about the events in the trial court that the appellate court might need to rule in the client's favor; (2) consider framing arguments to the trial court in ways that make the trial court's ruling less likely to receive appellate deference; and (3) present all arguments with specificity to the trial court to prevent review under a plain error standard and, if possible, to obtain review under the standard for constitutional error.

In thinking about how to make an effective record, defense counsel should appreciate the similarity between persuasive lawyering in the trial court and making an effective record. An attorney who wants to persuade a judge to rule her way will explain to the judge why the law is in her favor and why the ruling matters. For example, if she wants to admit evidence, she will explain the legal rules about the right to admit evidence and she will tell the judge what the evidence is, i.e., she will "proffer" the evidence, so that the judge can see how important the evidence is to her client's case. If she is trying to exclude evidence, she will again recite the appropriate rules and explain to the judge how admission will unfairly prejudice her case. A persuasive argument to the trial judge will include both steps.

This two-step argument makes a perfect appellate record. As explained previously, an appellate court cares about both error and prejudice. Error alone will rarely win reversal. Counsel's proffer or explanation to the trial court will help persuade the appellate court that the defendant was truly prejudiced by the trial court's ruling and that defense counsel effectively put the trial judge in a position to understand and evaluate counsel's claim. Moreover, the proffer puts into

the record information the appellate court needs to decide whether the trial court's ruling caused prejudice to the defense.

On occasion, defense counsel will find themselves in a position where making an effective record seems inconsistent with winning an acquittal. These situations are rare. Generally speaking, effective trial court lawyering goes hand-in-hand with effective record preservation.

For example, some attorneys fear that by asking for curative instructions, they increase the likelihood of acquittal but decrease the chances of winning on appeal, because the instruction tends to dissipate the harm that warrants the instruction. However, the failure to request a curative instruction will be held against the defendant on appeal as evidence that trial counsel did not perceive the alleged harm as overly prejudicial. If trial counsel is confident that the curative instruction is not powerful enough to cure the harm, counsel should propose a stronger instruction, explaining why it is superior to the court's proposed instruction. If this suggestion is rebuffed, and the uncorrected harm is extremely prejudicial, counsel should consider requesting a mistrial. These steps, which are designed to win at trial (or prevent an unfair defeat), are precisely the steps needed for an effective appellate record.

Arguments must be precise; objections must be timely, clear and specific. Counsel should not rely on objections made by co-codefendant's counsel unless the judge has made clear that an objection on behalf of one defendant counts as an objection for all defendants. Even in that situation, counsel may want to identify specific prejudice that would befall her client if the court ruled adversely. Specificity and precision are the goal, but they are not always attainable. Counsel should not refrain from making objections simply because they are unsure of the precise legal principle or case name to invoke. In situations where an attorney believes her client is being unfairly prejudiced but legal phraseology eludes her, counsel should explain her position in factual terms, explaining why a certain ruling under specified facts is prejudicial to her client.
Good trial advocacy and good record preservation depend on assessment of facts. Case law is great, but not always at hand and not always necessary to persuade the appellate court that defense counsel preserved her claim. *See Brown v. United States*, 683 A.2d 118, 126 n.9 (D.C. 1996) (claim preserved although defense did not provide trial court with cases to support proposed line of cross-examination).

Counsel should take care not to appear to acquiesce in adverse rulings. Not infrequently, counsel on the losing end of legal arguments, whether in open court or at bench conferences, end the discussion with comments intended to reflect politeness, but which appear in the cold print of appellate transcripts as abandonment of counsel's earlier objection and agreement with the trial court's ruling or rationale. "Thank you, Your Honor" is a prime example. Accordingly, counsel should find ways to be polite while making crystal clear that she has not abandoned her objection. Special care must be taken to make a proper record for appellate review in the following areas:

Rulings admitting or excluding evidence: Federal Rule of Evidence 103 requires that these claims of error be preserved in a particular way. An objection to the introduction of evidence must state the specific ground of objection if the specific ground is not apparent from the context. If the objection is to exclusion of evidence, the substance of the excluded evidence must

be made known to the court by proffer, unless it is apparent from the context. Although the Federal Rules of Evidence do not apply in Superior Court, Rule 103 accurately states District of Columbia law.

The requirement that counsel be specific in objecting to evidence can have important ramifications. For example, the government's evidence may be objectionable because it violates both the rule against hearsay and the defendant's Sixth Amendment right to confront witnesses. If defense counsel objects on hearsay grounds alone, the defendant may have difficulty persuading the appellate court that the constitutional claim is preserved.

If the court excludes evidence, counsel should proffer what the evidence would be, why it is important to the defense, and why its exclusion would harm the defense. If the court limits cross-examination, counsel should proffer what counsel was attempting to elicit and why it is important. Counsel has a right to make such proffers. *See Flores v. United States*, 698 A.2d 474, 480-81 (D.C. 1997) (trial court erred by holding counsel to pre-set time limitation on cross-examination; silent record caused by court's refusal to hear counsel's proffers of additional questions left appellate court unable to find error harmless); *In re Schwartz*, 391 A.2d 278, 281-82 (D.C. 1978) (per curiam) (persistence in attempting to make offer of proof was insufficient to sustain contempt citation against counsel). Counsel is not expected to risk contempt in attempting to proffer evidence after the court has made clear its unwillingness to receive the proffer. *See McBride v. United States*, 441 A.2d 644 (D.C. 1982).

Rulings that affect defendant's decision to testify: In *Luce v. United States*, 469 U.S. 38 (1984), the Supreme Court held that a defendant did not preserve an objection to an *in limine* ruling that he could be impeached with a prior conviction, where the defendant chose not to testify in light of the trial court's ruling. In *Bailey v. United States*, 699 A.2d 392 (D.C. 1997), the Court of Appeals applied *Luce* to hold that a defendant who did not testify could not raise on appeal the trial court's ruling that if the defendant testified and raised a consent defense to a rape charge, then the government could introduce evidence that the defendant committed a prior rape. Counsel should study *Bailey* before making decisions in similar situations.

Discovery and Brady demands: The record must reflect all discovery requests and *Brady* demands. Copies of all relevant letters should be filed in the case jacket. Prejudice caused by late disclosures (whether during or shortly before trial) should be placed on the record.

Severance: Severance motions must be made as soon as the basis for them becomes apparent, Super. Ct. Crim. R. 12(b), and renewed at any point during the trial when prejudice becomes apparent. *See, e.g., Hill v. United States*, 600 A.2d 58 (D.C. 1991) (applying plain error analysis to claim involving *quantity* of *Drew* evidence where trial counsel initially objected only to admissibility); *Wheeler v. United States*, 470 A.2d 761 (D.C. 1983).

Batson challenges: If counsel believes that the other party is exercising its peremptory challenges in a racially discriminatory manner, *see Batson v. Kentucky*, 476 U.S. 79 (1986), and *Tursio v. United States*, 634 A.2d 1205 (D.C. 1993), counsel must ensure that the record reflects the racial composition of the jury panel, of peremptory challenges made by both parties, and of the petit jury. The record should also reflect the race of the parties and potential witnesses, and any

incentive one side may have to empanel a monochromatic jury. A similar record should be made of gender discrimination. *See Nelson v. United States*, 649 A.2d 301, 310 n.12 (D.C. 1994) (emphasizing importance of creating record for *Batson* challenge) and *Robinson v. United States*, 878 A.2d 1273 (D.C. 2005) (error to deny defendant prompt hearing on prima facie showing of discrimination by government in its peremptory strikes of black women from the jury). Finally, counsel should ensure that the *Jury Panel Roster* is signed by the courtroom clerk and placed in the court jacket.

Motions for judgment of acquittal: Defense counsel should move for judgment of acquittal at the end of the government case. If the defense presents evidence after moving for judgment of acquittal, the appellate court will review the entire record – not just the government's evidence – in determining whether the evidence is sufficient. The motion should be renewed at the close of the defense case. *See Wright v. United States*, 513 A.2d 804, 809 (D.C. 1986); *Washington v. United States*, 475 A.2d 1127 (D.C. 1984); *Franey v. United States*, 382 A.2d 1019, 1021 (D.C. 1978).

Closing argument: Before closing arguments, counsel should ask, on the record, whether counsel may object *during* the opponent's closing. *See Carpenter v. United States*, 635 A.2d 1289 (D.C. 1993) (court may require less specificity in objections if contemporaneous objections not permitted). If counsel may object only at the close of arguments, counsel should keep a list and make specific and detailed objections at the bench after the completion of argument. Otherwise, contemporaneous objections must be made. If counsel does not move for a mistrial or request a curative instruction, particularly where counsel's objection has been sustained, the court may adopt the plain error standard of review. *McGriff v. United States*, 705 A.2d 282 (D.C. 1997); *Lee v. United States*, 668 A.2d 822 (D.C. 1995); *Allen v. United States*, 649 A.2d 548 (D.C. 1994).

Jury instructions: Before closing arguments, the court must notify the parties of the instructions it will give; all objections to instructions must be made before the jury retires. Super. Ct Crim. R. 30. Counsel should approach the bench after the jury is instructed, not only to object to any errors but also to renew previous objections or requests. If the court asks whether counsel is "satisfied" with the instructions as given, counsel should say he is satisfied "except for all objections previously made." Also, counsel must recite omitted instructions and modifications on the record or file them in the court jacket. *See Derrington v. United States*, 488 A.2d 1314 (D.C. 1985). Objections to reinstructions must be made before the jury resumes deliberations. *Robinson v. United States*, 649 A.2d 584, 586 (D.C. 1994).

Speedy trial: Counsel must move for a speedy trial early and often, in addition to moving for release or a reduction of bond if the client is incarcerated. A motion to dismiss for want of a speedy trial and a motion for reduction of bond are *not* the equivalent of a demand for a speedy trial. *See Graves v. United States*, 490 A.2d 1086 (D.C. 1984) (en banc). Before and during trial, counsel should allege specific instances of prejudice or anxiety from delay. *See In re D.H.*, 666 A.2d 462, 475 (D.C. 1995). A motion to dismiss should be renewed post-trial, citing specific instances of harm during the trial, such as a witness's failure of recollection.

II. TAKING AN APPEAL

A. Procedural Steps to Start the Appeal

1. Notice of Appeal

In a criminal case, the judgment appealed from is the judgment of conviction, which is entered by the Clerk of the Superior Court at the time of sentencing, not at the time of the verdict. D.C. App. R. 4(b)(1); Super. Ct. Crim. R. 32(d). After pronouncing the sentence in a case that has gone to trial, the court must advise the defendant of the right to appeal and to apply for leave to proceed *in forma pauperis*; the court does not have this obligation if the defendant has pled guilty or *nolo contendere*. Super. Ct. Crim. R. 32(c)(3). **Trial counsel also has a duty to inform the client of the right to appeal.** *See Hines v. United States*, 237 A.2d 827 (D.C. 1968); *Dillane v. United States*, 350 F.2d 732 (D.C. Cir. 1965), *aff'd after remand*, 384 F.2d 329 (D.C. Cir. 1967). **It is trial counsel's responsibility to file a timely notice of appeal with the Clerk of the Superior Court, who must then transmit copies to the other parties and to the Clerk of the Court of Appeals.** *See* D.C. App. R. 3(a), (d); Super. Ct. Crim. R. 32(c)(3).
A notice of appeal must be filed in Superior Court within thirty days of entry of the order or judgment appealed from, unless a different time is specified by statute. D.C. App. R. 4(b)(1). Without a timely notice of appeal, the Court of Appeals has no jurisdiction. *See Jackson v. United States*, 626 A.2d 878, 879 (D.C. 1993); *Barnes v. United States*, 513 A.2d 249 (D.C. 1986); *United States v. Jones*, 423 A.2d 193 (D.C. 1980); *Brown v. United States*, 379 A.2d 708 (D.C. 1977). That the appellant may have acted in good faith is irrelevant. *See Brown*, 379 A.2d 708 (notice lost in mail, appellate court without jurisdiction to consider appeal).

The thirty-day limit may be extended by the trial court for a period not to exceed thirty additional days upon a showing of "excusable neglect." D.C. App. R. 4(b)(4); *see Jackson*, 626 A.2d at 879-81; *see also Stutson v. United States*, 516 U.S. 193 (1996). A strict standard applies. *See Pryor v. Pryor*, 343 A.2d 321 (D.C. 1975); *McKnight v. United States*, 764 A.2d 240 (D.C. 2000).

The Supreme Court has "long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000); *see Jackson*, 626 A.2d at 881-82; *Samuels v. United States*, 435 A.2d 392, 395 (D.C. 1981); *Hines*, 237 A.2d at 828-29. Moreover, the Supreme Court has held

> that counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.

Flores-Ortega, 528 U.S. at 480; *see also In re Sealed Case*, 527 F.3d 174 (D.C Cir. 2008) (two to three minute post-sentencing conversation insufficient to constitute "consultation" as used in *Flores-Ortega*). The appropriate remedy for ineffective assistance of counsel leading to failure

to file a timely notice of appeal is for the trial court to vacate the sentence and resentence the defendant in order to permit a timely appeal. *See Jackson*, 626 A.2d at 881-82.

Only "[u]pon a finding of excusable neglect or good cause" may the Superior Court extend the time within which the notice of appeal must be filed. D.C. App. R. 4(b)(4). Motions for reconsideration of trial court rulings do not toll the time limit. *In re Alexander*, 428 A.2d 812 (D.C. 1981); *Jones*, 423 A.2d at 196 n.4; *cf.* D.C. App. R. 4(a)(2). Nor does a motion to modify sentence pursuant to Superior Court Criminal Rule 35, toll the thirty-day time limit. *See Jackson*, 626 A.2d at 880-81.

If the judgment or order is decided or entered out of the presence of the parties and without notice to them, the thirty-day period starts to run on "the fifth day after the Clerk of the Superior Court has made an entry on the criminal docket reflecting the mailing of notice." D.C. App. R. 4(b)(4). If the Clerk fails to make that entry, the period starts upon actual receipt of the order. *Williams v. United States*, 412 A.2d 17, 20 (D.C. 1980).

2. Compilation of the "Record on Appeal"

It is critical that counsel be sure that the record on appeal is complete because this material constitutes all the information about the case that the Court of Appeals will have. The record on appeal at least potentially includes the transcribed portion of trial court proceedings, copies of the docket entries and all papers in the trial jacket, plus any other exhibits introduced into evidence or preserved for appellate review during the trial court proceedings. *See* D.C. App. R. 10(a). Before filing the brief, counsel must review the actual record in possession of the Clerk of the Court of Appeals. If any item is necessary to appellate review but is not included in the record, it is appellant's responsibility to file a motion to supplement the record or transmit the item. *See Hammon v. United States*, 695 A.2d 97, 102-03 (D.C. 1997) (because appellant had not arranged for transmittal of documents reviewed *in camera* by trial judge, appellate review was limited to defense proffer at trial and trial judge's representations).

a. Preparation of transcript

If the appellant is proceeding *in forma pauperis*, the trial court must consider the notice of appeal as a request for a transcript of the entire trial, except *voir dire* and opening statements. D.C. App. R. 10(b)(5)(B). Appellant is also entitled on request to a transcript of any pretrial evidentiary hearing on a motion to suppress evidence, and may submit requests for transcripts of other proceedings to the trial court. *Id*.

Requesting Transcripts: Immediately after appointment, appellate counsel must determine whether all necessary transcripts have been requested. Occasionally, trial counsel will omit important proceedings, such as pretrial motions, from the initial request. Appellate counsel can minimize the delay caused in ordering additional transcripts by making an early and careful review of the court file, docket entries and transcript order, and by consulting with trial counsel and with appellant about various proceedings in the case.

Counsel may request additional transcripts by filing a form request with the trial judge, through the office of the Appeals Coordinator, describing what additional portions are necessary and why. If the judge refuses to authorize preparation of the additional transcript, counsel should file a motion with the trial court and then, if necessary, with the Court of Appeals, explaining with greater specificity why the additional transcript is needed to represent the appellant effectively. *See Gaskins v. United States*, 265 A.2d 589 (D.C. 1970). A defendant has the right to have trial court proceedings transcribed and made available to appellate counsel and the Court of Appeals to the extent necessary to facilitate appellate review. *Cole v. United States*, 478 A.2d 277 (D.C. 1984). Without question, appellant has the right to a transcript of the trial. *See Gaskins*, 265 A.2d at 592; *Williams v. Oklahoma City*, 395 U.S. 458 (1969). *But see Legrand v. United States*, 570 A.2d 786, 791 (D.C. 1990) (for purposes of collateral attack, appellant entitled to transcript only upon showing of particularized need).

Retained counsel has more specific responsibilities regarding preparation of the transcript. Within ten days of filing the notice of appeal, counsel must order from the reporter the transcript not already on file that counsel considers necessary for the appeal, and file a statement with the Clerk of the Superior Court and the Clerk of the Court of Appeals indicating that counsel has ordered the transcript, the reporter's estimated date of completion, and that counsel has made satisfactory arrangements with the court reporter for payment. *See generally* D.C. App. R. 10(b).

Appellate counsel should check periodically with the court reporter's office regarding preparation of the transcript, which will usually have begun by the time of appointment. The supervisor of the Court Reporting and Recording Division should be able to give an estimated timeframe for completion of the transcript.

Incomplete Records or Transcripts: If all or part of a transcript cannot be prepared, the parties should request leave from the Court of Appeals to prepare a statement of the evidence or proceedings in accordance with D.C. App. R. 10(c). *Cole*, 478 A.2d 277, found that, despite the appellant's inability to proffer specific prejudicial errors, the statement submitted in lieu of the missing transcript did not protect the appellant's due process right to meaningful appellate review, and reversed the conviction. Therefore, if counsel finds that all or part of a transcript cannot be prepared, she should consider filing not only a statement of proceedings in the trial court pursuant to D.C. App. R. 10(c), but also a motion to vacate the conviction, if applicable, citing *Cole*. *Lucas v. United States*, 476 A.2d 1140 (D.C. 1984), on the other hand, found that the appellant's due process rights were not prejudiced by the partial loss of trial transcripts. Although noting that reversal may be warranted if the court cannot ascertain whether a claimed error is prejudicial or if appellate counsel cannot review a "substantial or crucial portion" of the transcript, *Lucas* found that neither situation existed. The standards set forth in *Cole* and *Lukas* have been applied in a number of cases involving incomplete transcripts that resulted from the malfunction of recording devices in Superior Court. *See Egbuka v. United States*, 968 A.2d 511 (D.C. 2009) (reversing due to inadequate record on appeal); *Romero v. United States*, 956 A.2d 664 (D.C. 2008) (reconstructed record sufficient to provide meaningful appellate review); *David v. United States*, 957 A.2d 4 (D.C. 2008) (same); *Williams v. United States*, 927 A.2d 1064 (D.C. 2007) (remanding for Rule 10 procedures).

b. Preparation of record

The Appeals Coordinator's Office prepares the remainder of the record on appeal. Where the appellant is represented by court-appointed counsel, the office prepares a copy of the entire original Superior Court file including Courtview docket entries and forwards it to the Clerk of the Court of Appeals. If appellant is represented by retained counsel, the office prepares only that part of the record designated for appeal and retains the Superior Court file while the case is pending on appeal.

Physical exhibits are not automatically transmitted to the Court of Appeals. If any of these are necessary for proper consideration of the appeal, counsel should file a motion for inclusion in the record. *See* D.C. App. R. 10(e)(2). **It is the appellant's responsibility to insure that the Court of Appeals has before it all materials necessary to its determination of the issues presented**. *Hammon*, 695 A.2d at 102-03.

Exhibits are maintained in the Property Clerk's Office on the fourth floor of the courthouse. If any exhibits are not found in the Property Office, counsel should file a motion in the trial court to reconstitute the record. *See* D.C. App. R. 10(e). The party who removed the exhibits must return them to the custody of the Property Office *and* establish the chain of custody and where and under what conditions the exhibits have been maintained. Frequently the parties can agree as to the authenticity of exhibits that were retained by a party and an unopposed motion to supplement the record can be filed in the Court of Appeals. If the exhibits cannot be located or the record cannot be sufficiently reconstituted and their absence denies meaningful appellate review, under *Cole*, the conviction should be reversed.

3. Transmission of Record and Docketing Appeal

Once the record is complete, the Appeals Coordinator transmits it to the Clerk of the Court of Appeals. *See* D.C. App. R. 11. An appellant who is not proceeding *in forma pauperis* must pay a fee to the Clerk of the Superior Court, *see* D.C. App. R. 11(a), and a docketing fee to the Clerk of the Court of Appeals, *see* D.C. App. R. 12(a). The Clerk of the Court of Appeals then files the record, dockets the appeal, and gives notice to all parties of the date the record was filed. *See* D.C. App. R. 12(b). Appellant's brief is due forty days after docketing. *See infra* Section IIC1.

If the record is incomplete or inaccurate, counsel should file a motion to supplement the record in the trial or appellate court. *See* D.C. App. R. 10(e). The parties may stipulate to an addition to or correction of the record. If the transcripts are not complete and the case is docketed prematurely, counsel should file a motion in the Court of Appeals to stay the briefing schedule.

B. Investigation and Other Preliminary Steps

1. Contact with Appellant

Appellate counsel should contact the client promptly after appointment. This contact will likely be the first information the appellant receives regarding the appeal; in most cases, the appellant will not even have learned of counsel's identity. Thus, counsel should explain counsel's role and

how counsel was appointed to the case. Because many people have misperceptions about the appellate process, counsel should carefully explain the meaning and goals of the appeal, and encourage the client to participate in the appellate process.

If the client is on probation or on bond pending appeal, counsel may obtain a current address from trial counsel, the trial court jacket, the Pretrial Services Agency, or the client's probation officer. Probation officers can be identified by calling (202) 508-1900 for adult clients and (202) 879-4742 for juveniles.

If an incarcerated client is still at the D.C. Jail, counsel should attempt a prompt visit, as the client will likely be transferred quickly. Clients can be located with a PDID or DCDC number through the Records Office at the jail (202) 673-8257. Clients in federal custody can be found through the inmate locator at the Bureau of Prisons (202) 307-3126, or on the BOP website, www.bop.gov. Juveniles are held at the New Beginnings Youth Center in Laurel, Maryland (202) 299-3200. Clients can be visited at the New Beginnings facility. Travel expenses incurred in visiting a client may be claimed under the Criminal Justice Act.

Numerous appellate clients are in federal, state, county and private facilities in other jurisdictions. Such transfers make it difficult to have meaningful attorney-client contact. Because virtually any incarcerated client may be transferred without notice at any time, at least one prompt meeting with the client is critical.[2]

Counsel must periodically apprise the appellant of the progress of the appeal. A copy of the trial transcript should be sent to the client promptly, if the client requests it. Counsel must advise and consult with the client on the issues to be raised, provide copies of all briefs and other pleadings filed by both sides, and inform the client about the oral argument of the case.

2. Contact with Trial Counsel

Appellate counsel should interview trial counsel and review trial counsel's materials to evaluate the case and understand its procedural history. Trial counsel's name and address can be obtained from the Superior Court file.

3. Motions for Bond Pending Appeal

Standard: To obtain an appeal bond, counsel must show by clear and convincing evidence that: (1) the person is not likely to flee or to pose a danger to any other person or to the property of others; and (2) the appeal raises a substantial question of law or fact likely to result in a reversal or an order for a new trial. D.C. Code § 23-1325(c).

The trial court must rule on a motion for bail pending appeal before it will be considered by the Court of Appeals. *See* D.C. App. R. 9(b); D.C. Code §§ 23-1324, 1325(d). If trial counsel has

[2] The Bureau of Prisons no longer honors orders issued pursuant to Super. Ct. Crim. R. 38(b), which authorizes the trial court to "*recommend* to the Attorney General that the defendant be retained at, or transferred to, a place of confinement near … the place where [his] appeal is to be heard, for a period reasonably necessary to permit the defendant to assist in the preparation of [his] appeal." (Emphasis added.)

not already filed a motion for bond pending appeal, appellate counsel may file a motion in Superior Court, serving a copy on the United States Attorney's Office. The trial court retains jurisdiction to rule on the motion, even if a Notice of Appeal has already been filed. *Lofton v. United States*, 926 A. 2d 1104 (D.C. 2007).

Counsel must gather information about the client just as for a pretrial bond review motion, after reviewing the trial jacket for any matters related to bond, such as Pretrial Services Agency reports and bond motions. Counsel may also wish to contact the Pretrial Services Agency to review any other reports they prepared or updated on the client.

The trial court need not find that it committed reversible error before granting bond. *See United States v. Giancola*, 754 F.2d 898, 900 (11th Cir. 1985). Rather, the inquiry is in two parts: first, whether the issue raised on appeal is "substantial," that is "one which is either novel, . . . has not been decided by controlling precedent, or . . . is fairly doubtful," *id.*; and second, whether the issue is critical enough to warrant reversal of the conviction if it is resolved in favor of the defendant. *United States v. Powell*, 761 F.2d 1227, 1231 (8th Cir. 1985); *United States v. Handy*, 761 F.2d 1279, 1280 (9th Cir. 1985); *United States v. Hicks*, 611 F. Supp. 497, 499 (S.D. Fla. 1985).

If the trial court denies the motion for bond pending appeal, counsel should promptly move the Court of Appeals for release. *See* D.C. App. R. 9(b); D.C. Code § 23-1324. If a notice of appeal has already been filed in the case, no notice of appeal from the order denying bail is necessary. The motion for review of the trial court's order must be accompanied by an affidavit conforming to Form 6 of the appellate rules. D.C. App. R. 9. *See generally Villines v. United States*, 312 A.2d 304 (D.C. 1973) (outlining procedures for seeking bail pending appeal). The appellant must follow the relevant procedures governing expedited appeals in D.C. App. R. 4(c)(1).

The standard of review of the trial court's determinations of flight and danger is whether the action is supported by the evidence. D.C. Code § 23-1324. The trial court's evaluation of the merits of the issues raised on appeal receives *de novo* consideration. D.C. Code § 23-1325(d).

4. Examination of the Record

Assessment of an appellate case requires thorough review of the record, including the transcripts, court file and docket entries, and exhibits. A photocopy of the original court file and docket entries may be borrowed from the Office of the Clerk of the Court of Appeals for copying. With the "E" number from the exhibit summary sheet in the case file, the trial docket number, and dates of the trial, the Property Clerk will retrieve the exhibit for counsel to examine. (The item will not be released without written authorization of the trial court; forms can be obtained from the Property Clerk.)

5. Claims of Ineffective Assistance of Trial Counsel

Counsel on direct appeal has a duty to make a reasonable inquiry into the possibility of ineffectiveness of trial counsel, especially if requested by the client or if counsel perceives a possible basis for that claim. *Doe v. United States*, 583 A.2d 670, 674-75 (D.C. 1990). Full

presentation of this issue on appeal generally will require that an additional factual record be made in the trial court.[3] To develop the record, appellate counsel must file a motion and seek a hearing before the trial court under D.C. Code § 23-110. It is vital that counsel files his or her motion under § 23-110 while the direct appeal is pending. *Shepard v. United States*, 533 A.2d 1278, 1280 (D.C. 1987), held:

> [I]f an appellant does not raise a claim of ineffective assistance of counsel during the pendency of the direct appeal, when at that time appellant demonstrably knew or should have known of the grounds for alleging counsel's ineffectiveness, that procedural default will be a barrier to this court's consideration of appellant's claim.

See also Brown v. United States, 656 A.2d 1133, 1135 (D.C. 1995); *Simpson v. United States*, 576 A.2d 1336, 1338 (D.C. 1990) (reiterating importance of developing factual record through hearing before trial court). The *Shepard* rule does not apply when the same attorney represents the client at trial and on direct appeal. *Little v. United States*, 748 A.2d 920, 923 (D.C. 2000).

Pursuant to an administrative order issued in 2005, the Court of Appeals has indicated that it will no longer routinely grant requests to stay criminal appeals pending the resolution of D.C. Code § 23-110 motions. "Counsel may, in an appropriate case, file a motion showing good cause for staying the appeal to await the outcome of the trial court motion." District of Columbia Court of Appeals, Order No. M-225-05 (September 27, 2005). Whether or not the direct appeal is stayed, counsel *must* file a separate notice of appeal if the § 23-110 motion is denied; the two appeals can be consolidated if the direct appeal is still pending. *See Hall v. United States*, 559 A.2d 1321 (D.C. 1989).

6. Stay Pending Appeal

Requirements: If a client will suffer irreparable injury during the time that an appeal is being litigated, counsel should contemplate requesting a stay of the trial court's order pending appeal. The procedural rules for stays pending appeal are found in D.C. App. R. 8. Ordinarily, the appellant must request a stay from the trial judge before seeking a stay in the Court of Appeals. The substantive requirements for a stay pending appeal are comparable to the requirements for an injunction. Appellant must show that: (1) he is likely to prevail on the merits of the underlying appeal; (2) he will be irreparably injured if a stay is not granted; (3) a stay would not substantially harm other interested parties; and (4) a stay would serve the public interest. *Virginia Petroleum Jobbers Ass'n v. Federal Power Comm'n*, 259 F.2d 921 (D.C. Cir. 1958); *Barry v. Washington Post Co.*, 529 A.2d 319 (D.C. 1987).

7. Expedited Appeals in Adult and Juvenile Cases from Pretrial Detention Orders

Both juveniles and adults can appeal from pretrial detention orders before trial. D.C. Code §§ 16-2328, 23-1324. "[P]atently unreasonable or unlawful conditions of release" can be

[3] Other issues, such as the government's failure to produce *Brady* material, or the recantation of a key witness, may also require that an additional factual record be made in the trial court pursuant to § 23-110 and/or Super. Ct. Crim. R. 33.

challenged pursuant to the All Writs Act, 28 U.S.C. § 1651. *Walls v. United States*, 364 A.2d 154 (D.C. 1976).

It can be advantageous to ask the court to reconsider the initial decision on conditions of release before pursuing an appeal. Denial of such a motion to reconsider is appealable. *Blackson v. United States*. 897 A. 2d 187 (D.C. 2006). In juvenile court, however, a respondent who chooses this route loses the statutorily-mandated expedited time frame. *See In re K.H.*, 647 A.2d 61, 62 (D.C. 1994) (juvenile expedited appeal process applies to original order only). In denying the motion to reconsider, the court must provide reasons for not modifying conditions of release that result in the defendant's incarceration. D.C. Code § 23-1321(c)(4); *see In re M.L. DeJ.*, 310 A.2d 834 (D.C. 1973). By seeking reconsideration, the defendant can obtain the record needed for appeal. If the initial bond decision was made by a magistrate judge, it must first be appealed to a judge. *See* D.C. Code § 11-1732(k); *Arlt v. United States*, 562 A.2d 633 (D.C. 1989).

Appeals from pretrial detention orders are considered emergency appeals and are expedited. D.C. App. R. 4(c)(2), 9(a). The appeal takes the form of a motion for summary reversal with a supporting memorandum of law and any other supporting documents, accompanied by an affidavit executed by the client or attorney giving the personal information about the appellant required by D.C. App. R. 9(b), Form 6.

Counsel should advise the Court of Appeals promptly by telephone (202) 879-2700 when planning to file an expedited appeal and notify opposing counsel. D.C. App. R. 4(c)(2)(B). Counsel should immediately file the notice of appeal with the Clerk of the Superior Court and then advise the Clerk of the Court of Appeals that the appeal has been filed, giving counsel's telephone number, the name, address and telephone number of opposing counsel, and an indication of what transcript is required. *Id.* A full transcript of all proceedings after arrest is not required; the only items that must accompany a request for review are a copy of the order, if any, from which the appeal is taken, and any other transcripts or documents filed in Superior Court which counsel believes essential for the court's consideration. D.C. App. R. 9(c)(2)(B). When transcripts are needed, and certainly if the court made only oral findings, counsel should order expedited or "daily" production of the transcript. A motion for summary reversal should be filed, setting forth the relevant facts and the legal claim.

In an adult detention appeal, the court will not necessarily hear oral argument. *See* D.C. App. R. 4(c)(2)(D). The standard of review in a bond appeal is narrow: the order resulting in pretrial detention is to be affirmed if it is "supported by the proceedings below." D.C. Code § 23-1324(b).

A juvenile who has been ordered transferred for criminal prosecution or detained or placed in shelter care has a statutory right to an expedited, interlocutory appeal. *Id*. § 16-2328. A notice of interlocutory appeal must be filed *within two days* of entry of the order to invoke the expedited process. The expedited appeal process applies to the original order of detention, not to subsequent orders denying reconsideration of the detention order. *See In re K.H.*, 647 A.2d at 62. A motion for summary reversal must be filed by no later than 4:00 p.m. on the next calendar day after the filing of a notice of appeal. D.C. App. R. 4(c)(2)(E). The Court of Appeals must hear argument within three days of the filing of the notice of appeal (excluding Sundays) and

dispense with the requirement of filing briefs, resolving the appeal on the papers submitted to the lower court. The court must render its decision on the day after argument. D.C. Code § 16-2328.

8. Remands, Motions for New Trials and Motions for Sentence Reduction

"As a general rule, once a notice of appeal has been filed, the trial court loses the power to take any substantive action with respect to the order or judgment on appeal." *Bell v. United States*, 676 A.2d 37, 40-41 (D.C. 1996) (footnote omitted). Therefore, the trial court cannot grant a motion for a new trial or grant a motion for sentence reduction while the case is on appeal because those rulings would affect the judgment on appeal. *See id*. On the other hand, the trial court retains jurisdiction to entertain and deny a motion for new trial during the pendency of the appeal, *Smith v. Pollin*, 194 F.2d 349 (D.C. Cir. 1952), or to entertain and deny a motion for reduction of sentence despite a pending appeal. *Johnson v. United States*, 513 A.2d 798, 801 (D.C. 1986).

The trial court's denial of the motion for a new trial or the motion for sentence reduction qualifies as a final order. If the defendant wishes to challenge either order, he must file a notice of appeal within thirty days of entry of the order. *See In re E.G.C.*, 373 A.2d 903, 905 (D.C. 1977). The Court of Appeals will consolidate the direct appeal and the appeal from the order denying a new trial or the order denying a sentence reduction.

If, however, the trial court indicates a willingness to grant either form of relief, it should indicate its willingness on the record, and the appellant should then move the Court of Appeals for a remand. The Court of Appeals then remands the *case*, which closes the appellate case and returns jurisdiction to the trial court. If the new trial order merits an appeal, or if the client is convicted after a retrial, the appellant must file a new notice of appeal from the new trial court judgment to reinstate the direct appeal. *Bell*, 676 A.2d at 41. In some instances, the Court of Appeals remands the *record* in a case, most frequently to enable the trial court to make additional factual findings. In such circumstances, jurisdiction remains in the appellate court and "[n]o new notice of appeal is required" to challenge trial court rulings. *Id*.

C. Procedural Steps to Prepare and File Brief

1. Briefing Deadlines

Counsel has forty days from the docketing of the appeal (the date the case record is filed with the Clerk of the Court) within which to file the appellant's brief. The appellee's brief is due within thirty days of the date of service of the appellant's brief. A reply brief may be filed within twenty-one days of the date of service of the appellee's brief; it must be filed at least seven days before oral argument. D.C. App. R. 31(a). Counsel should carefully review D.C. App. R. 26, which governs the computation of time. Counsel must file an original and three copies of each brief with the Court, and serve a copy on each party to the appeal. D.C. App. R. 31(b).

Counsel may move for an extension of time within which to file briefs. D.C. App. R. 26(b). The United States Attorney (202) 514-7088 and the D.C. Attorney General (202) 727-9813 or (202)

727-6252 generally do not oppose reasonable requests for additional time. Prior to filing any procedural motion, counsel must attempt to secure the consent of each party. D.C. App. R. 27(b)(4). The movant must state the opponent's position at the beginning of the motion. *Id*. The court does not favor requests for extensions, and counsel should request only as much extra time as is needed, stating explicitly why it is needed.

The court is reluctant to grant multiple extensions. The order granting the first extension may state that no further extensions will be granted. If counsel has no choice but to seek a further extension, counsel must be prepared to make a specific and convincing showing of need. If a brief is filed beyond its assigned deadline, counsel must also file a motion for leave to late file. D.C. App. R. 27(b). If counsel fails to file a timely brief, the court may order counsel to show cause why the brief has not been filed, and may refer the attorney to Bar Counsel if the response is unsatisfactory.

2. Issues to be Raised

After consulting with the client, appellate counsel must make difficult decisions on what issues to raise. The most effective appeal generally focuses on a few key claims rather than outlining a number of weak issues along with two or three strong ones. Although failing to include all nonfrivolous issues pressed by the client is not ineffective assistance, *see Johnson v. United States*, 513 A.2d 798, 801 (D.C. 1986); *Jones v. Barnes*, 463 U.S. 745 (1983), counsel should strive to satisfy the client that all potentially successful claims have been raised. *See Head v. United States*, 489 A.2d 450 (D.C. 1985) (failure to raise issue on direct appeal ordinarily forecloses review of that issue); *see also Berg v. United States*, 631 A.2d 394, 396 n.8 (D.C. 1993) (points not urged in brief treated as abandoned).

3. Motions to Dismiss Appeals

On occasion, appellate counsel may believe that no non-frivolous issues exist in a particular case. If the defendant agrees with counsel's assessment, he may decide to waive his right to appeal and voluntarily dismiss the appeal. A motion for voluntary dismissal under these circumstances should include a statement by the appellant satisfying the requirements for a knowing and voluntary waiver of the right to appeal set out in *Johnson v. United States*, 513 A.2d at 803. This statement should reflect that the appellant "knows of the appeal right, has discussed with counsel the possible issues he can raise and the possible remedies, and notwithstanding that he has freely decided to dismiss the appeal he previously noted." *Id*. (footnote omitted).

In some circumstances, however, the client will disagree with counsel's conclusion that there are no nonfrivolous grounds for appeal. In these cases, counsel must file a motion to withdraw as counsel and file an *Anders* brief, as discussed below. Counsel should therefore not conclude that the appeal is not viable until carefully exploring both the facts and the law and consulting with the client, taking throughout the view of a zealous advocate. *See id*. at 801 (appellate counsel is vigorous advocate for client, not a friend of the court). Appointed counsel should not ask to withdraw unless counsel would also insist on withdrawal if retained in the same case. If there are any arguable issues, appointed counsel should remain in the case, even though counsel may be subjectively unimpressed with the merits. *See Johnson v. United States*, 360 F.2d 844 (D.C. Cir. 1966); *McCoy v. United States*, 370 F.2d 224 (D.C. Cir. 1966).

Counsel who decide to file an *Anders* brief, *Anders v. California*, 386 U.S. 738 (1967), must file in the Court of Appeals a motion to withdraw as counsel, stating that after careful examination of the record, counsel finds the case wholly frivolous. Counsel must accompany the motion with a brief, identifying the issues that the appellant seeks to assert and all other conceivable issues that counsel has considered as a possible basis for appeal. Counsel should send a copy of the pleading to the client, who may oppose the motion to withdraw; *counsel must not serve government counsel*. *Bell v. United States*, 457 A.2d 390 (D.C. 1983); *see Smith v. Robbins*, 528 U.S. 259, 265 (2000) (stating that courts are "free to adopt different procedures [from those in *Anders*], so long as those procedures adequately safeguard a defendant's right to appellate counsel").

The Court of Appeals will not grant a motion to withdraw as counsel without first reviewing the record on appeal, including the reporter's transcript. D.C. Ct. App. Internal Operating Procedures IV.D (1991). Sometimes, the court finds nonfrivolous issues exist and appoints new counsel to file an advocate's brief. *See Bell*, 457 A.2d at 391; *cf. Streater v. United States*, 478 A.2d 1055 (D.C. 1984). If the Court of Appeals agrees that no nonfrivolous issues exist, it will grant the motion to withdraw and may dismiss the appeal.

4. Preparation of the Brief

The form and service of briefs are governed by D.C. App. R. 28, 30, 31 and 32. Except by special order of the court, the brief may not exceed fifty pages, and the reply brief may not exceed twenty pages. D.C. App. R. 32(a)(6). Counsel should file the original and three copies with the Clerk unless the case is to be heard *en banc*, in which case an original and nine copies are necessary. D.C. App. R. 31(b). A copy must be served on counsel for each party separately represented, and the brief should contain a certificate of service. Counsel should send a copy of the brief to the client.

D.C. App. R. 30 governs the preparation and filing of an appendix to appellant's brief. No appendix is required in cases in which a party has been permitted to proceed *in forma pauperis* or counsel has been appointed to represent the party. In these cases, however, the appellant "must file with the brief 4 copies of any opinion, findings of fact, and conclusions of law, whether written or set forth orally in the transcript, that relate to the issues raised on appeal," and "may … file with the brief 4 copies of any additional portions of the record to be called to the court's attention." *Id*. This limited appendix must be served on all parties. *Id*.

All facts set forth in the brief should include citations to the record. Each page of the entire record of the case, including the transcript, will have been numbered for use by the court. Counsel may refer to the transcript by the page number as recorded by the reporter who prepared it. Page numbers for other portions of the record must be ascertained by checking the appellate record in the clerk's office of the Court of Appeals.

In a juvenile appeal, the record of the case, including the briefs, is sealed and only counsel of record may see it without a court order. D.C. App. R. 12(c). The case is identified by the respondent's initials and the case number in the trial court. *Id.*

When resolution of a dispositive issue is very clear, a party may move for summary reversal or affirmance. D.C. App. R. 27(c). The moving party has a heavy burden to show that "the merits of his claim so clearly warrant relief as to justify expedited action." *In re M.L. DeJ.*, 310 A.2d 834, 836 (D.C. 1973); *see United States v. Allen*, 408 F.2d 1287 (D.C. Cir. 1969).

5. Reply brief

A reply brief is not mandatory, D.C. App. R. 31(a)(1), but is an excellent opportunity to answer the appellee's arguments before oral argument. Counsel should not simply repeat the original arguments, but should use the reply brief to respond to the appellee's points and, if necessary, refocus the appellant's arguments. A reply brief should be filed within twenty-one days after service of the appellee's brief; it cannot be filed later than seven days before oral argument.

D. Oral Argument

1. Calendaring Cases for Hearing

Each month, the Clerk of the Court prepares and posts a calendar of cases scheduled for oral argument the following month, listing the cases, docket numbers, counsel, and dates for argument. The calendar is also posted on the DCCA's website, at www.dcappeals.gov. While a copy of the calendar or a letter containing the date of argument is generally mailed to each attorney with a case scheduled for argument that month, failure to receive the calendar, which is also published in the Daily Washington Law Reporter, does not excuse failure to appear when the case is called for hearing. D.C. App. R. 33(a). Counsel may apply to the court for a change of the scheduled date, but must show "good cause." D.C. App. R. 34(b).

All docketed cases, except original cases and those interlocutory appeals that must be decided within statutory guidelines, are screened and placed on either the regular or summary calendar of the court. When a case is on the regular calendar, counsel must appear for oral argument. On the consequences of failing to appear, *see* D.C. App. R. 34(e). The summary calendar includes any case that will not establish or alter a rule of law, involves no novel fact situation or legal issue of continuing public interest, and is unlikely to involve any error of law. *See* D.C. Ct. App. Internal Operating Procedures; D.C. App. R. 34(b). A case on the summary calendar will not be set for oral argument unless one of the parties moves, within the period provided in the calendaring notice, for leave to present oral argument. D.C. App. R. 33(c). If argument is allowed, it will be heard on the date specified in the summary calendar.

2. Conduct of Argument

Arguments in cases on the regular calendar are limited to thirty minutes per side, unless the Court *sua sponte* or on motion enlarges the time. D.C. App. R. 34(g)(1). Arguments in cases on the summary calendar are ordinarily limited to fifteen minutes per side. *Id*. Appellant's counsel is entitled to open and close the argument. D.C. App. R. 34(c). Where the cases of more than one appellant have been consolidated on appeal, the appellants are treated as one and must divide the allotted time for argument. D.C. App. R. 34(g)(2).

Except in a truly extraordinary case, the court will not rule from the bench; the case is taken under advisement following argument, and a written opinion is issued later.

E. Procedures Following the Court's Decision

Counsel should notify the client promptly of the court's decision and send the client a copy of the opinion. Counsel's obligation to the client does not end there. In the event of a reversal and remand for a new trial, counsel may file a motion to expedite the mandate so that the client can have release conditions promptly determined. If the conviction is affirmed, counsel should consider whether to seek rehearing, rehearing en banc, or a writ of certiorari from the Supreme Court, and must explain the court's decision to the client. If counsel decides not to pursue the case further, counsel must advise the client expeditiously of that decision and of the client's right to do so *pro se* or to request other counsel. Detailed procedures that counsel is required to follow are spelled out in *Qualls v. United States*, 718 A.2d 1039 (D.C. 1998) (per curiam); *see infra*. Counsel should explain the relevant time limitations and advise the client that a motion to recall the mandate based on ineffectiveness of appellate counsel must be filed within 180 days of issuance of the mandate. D.C. App. R. 41(f).

1. Petitions for Rehearing

If a petition for rehearing or rehearing en banc is warranted, counsel should prepare and file it. The Court of Appeals will not appoint new counsel to file a petition for rehearing en banc if appellate counsel has concluded that the petition would be frivolous, and if the appellant is unable to show that this assessment is wrong. *Wise v. United States*, 522 A.2d 898 (D.C. 1987).

The petition cannot exceed ten pages; it must be filed, or additional time requested, within fourteen days of entry of judgment. D.C. App. R. 40. Rehearing is granted by a vote of at least two of the judges who decided the case; rehearing en banc may be ordered by a majority of the active judges of the court. D.C. App. R. 35(a). Rehearing en banc "will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." D.C. App. R. 35(a). A petition for rehearing or rehearing en banc "must begin with a statement that either: (A) the decision of the division conflicts with controlling authority (with citation to the conflicting case or cases) and consideration by the full court is therefore necessary to secure and maintain uniformity of the court's decisions; or (B) the proceeding involves one or more questions of exceptional importance, each of which must be concisely stated. D.C. App. R. 35(b)(1). *See generally Kirk v. United States*, 510 A.2d 499 (D.C. 1986); *Angarano v. United States*, 329 A.2d 453 (D.C. 1974); *M.A.P. v. Ryan*, 285 A.2d 310 (D.C. 1971).

2. Petitions for Certiorari

Any petition for certiorari must be filed in the Supreme Court within ninety days of the entry of judgment, Sup. Ct. R. 13, or denial of a timely petition for rehearing in the Court of Appeals. *Id.* Issuance of the mandate is *not* a prerequisite to the filing of a petition of certiorari. *West v. United States*, 659 A.2d 1260, 1263 (D.C. 1995). A justice may provide a sixty-day extension "for good cause shown," but extensions are not favored. *Penry v. Texas*, 515 U.S. 1304 (1995).

The Supreme Court will not devote its limited resources to the claims of petitioners who have abused the certiorari process. *Attwood v. Singletary*, 516 U.S. 297 (1996).

An indigent appellant has the right to have counsel appointed for preparation of a petition for a writ of certiorari in the Supreme Court provided that there are nonfrivolous issues which can serve as grounds for the filing of the petition. *Qualls v. United States*, 718 A.2d 1039, 1040 (D.C. 1998) (per curiam). This right to appointed counsel does not require counsel to file frivolous petitions. *Id*. *Qualls* set forth detailed procedures which counsel must follow when counsel determines that there are no non-frivolous issues to present to the Supreme Court in a certiorari decision. It is imperative that counsel follow these procedures. As the Court makes clear, counsel's appointment will not terminate until the written notification required by *Qualls* is filed with the Court. The opinion states:

> [W]e direct that, upon final disposition of an appeal before this court, appointed appellate counsel shall notify his or her client of this court's decision, inform the client of the available options, including the right to file a petition for writ of certiorari, and then determine whether there is a non-frivolous basis for filing such a petition. By "a non-frivolous basis" we mean that, in counsel's professional judgment, there are reasonable grounds for seeking Supreme Court review. If counsel determines that there are no such grounds, counsel shall immediately notify the client in writing of his or her intent not to file a petition for certiorari and the reasons underlying that decision.
>
> The written notice shall include instructions on how the client can file a *pro se* petition for writ of certiorari and a motion to proceed *in forma pauperis*, notice of the deadlines for their filing, copies of the *pro se* forms provided by the Supreme Court, and information about how to file a request for extension of time to file a petition for certiorari. The notice shall also state that the client has the right to file a motion for appointment of new counsel for the purpose of filing a petition for certiorari. In addition, counsel shall file with this court a copy of the written notification to the client. Counsel's appointment will terminate upon the filing of that notification with this court.

718 A.2d at 1041 (footnotes omitted).

3. Issuance of the Mandate

The mandate is the order from the Court of Appeals directing the trial court to act in conformity with the Court of Appeals' decision in the case. *See Willis v. United States*, 692 A.2d 1380, 1382-83 (D.C. 1997). The mandate – which normally is sent only to the lower court, not to the parties – issues twenty-one days after the entry of judgment, unless the time is shortened or extended by order. D.C. App. R. 41(b). Issuance of the mandate is essentially a ministerial and procedural step. *West*, 659 A.2d at 1263. The timely filing of a petition for rehearing or rehearing *en banc* will stay the mandate; if the petition is denied, the mandate will issue seven days later unless otherwise ordered. D.C. App. R. 41(b).

A party may move the court to stay issuance of the mandate for up to ninety additional days pending application for a writ of certiorari in the United States Supreme Court. D.C. App. R. 41(d)(2). If counsel files the petition for certiorari and notice of the filing is provided to the Clerk of the Court of Appeals, the mandate will be stayed until disposition of the petition.

Appellate courts have the inherent power to recall a mandate for "good cause." This "good cause" requirement is a showing of a need to avoid injustice. *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 277-80 (D.C. Cir. 1971). Other instances of "good cause" include: (1) correction of clerical mistakes and clarification of the mandate and opinion; (2) fraud on the court or other misconduct affecting the integrity of the judicial process; (3) avoiding different results in cases pending at the same time; (4) the need to revise an unintended instruction to the trial court that produces an unjust result; and (5) other grounds of injustice rendering it "manifestly unconscionable" that a judgment be given effect. *Id.*; *see Calderon v. Thompson*, 523 U.S. 538 (1998) (recall of mandate in habeas case was abuse of discretion).

A motion for recall of the mandate should be addressed to the deciding division. *Derrington v. United States*, 509 A.2d 605, 605-06 (D.C. 1986) (per curiam). A motion to recall the mandate is the appropriate vehicle for raising claims of ineffectiveness of appellate counsel. *See Head v. United States*, 626 A.2d 1382, 1383-84 (D.C. 1993); *Watson v. United States*, 536 A.2d 1056 (D.C. 1987) (en banc). A motion to recall the mandate based on ineffective assistance of appellate counsel must be made within 180 days from issuance of the mandate. D.C. App. R. 41(f).

A party may also move to expedite issuance of the mandate if, for example, the mandate on an interlocutory appeal would otherwise issue after a scheduled trial date. *See In re J.D.C.*, 594 A.2d 70, 79 n.15 (D.C. 1991).

4. Publication of Opinions

An unpublished Memorandum Opinion and Judgment is used when a unanimous panel determines to affirm the judgment below, and agrees that the appellate decision does not (1) establish a new rule of law, (2) alter an existing rule, (3) involve a novel fact situation, (4) constitute the only recent precedent, (5) involve an issue of continuing public interest, or (6) find any error of law. Internal Operating Procedures. These opinions may not be cited as precedent except when relevant under the doctrines of law of the case, *res judicata* or collateral estoppel. A party may make a timely motion to have a memorandum opinion published, stating why publication is merited. *See* D.C. App. R. 36(c).

A "per curiam" opinion may be issued if the law is relatively clear but fuller explanation of the court's action is needed than in a memorandum decision. Per curiam opinions, like signed opinions, are published and may be cited as precedent.

5. Motions for Reduction of Sentence

A motion to reduce or modify the sentence, if not filed during the pendency of the appeal, *see Johnson v. United States*, 513 A.2d 798, 801 (D.C. 1986), may be filed within 120 days after receipt by the Superior Court of the mandate from the Court of Appeals or denial of review by the Supreme Court. Super. Ct. Crim. R. 35(b). *See Bell v. United States*, 676 A.2d 37 (D.C. 1996) (trial court had jurisdiction to grant motion to reduce sentence following appeal where the motion was timely filed after trial court belatedly received case-remand mandate). The trial court must then decide the motion "within a reasonable time." Super. Ct. Crim. R. 35(b).[4] Appellate counsel should communicate with trial counsel and agree on which one, if either, will assist the client with a Rule 35 motion. Whether or not counsel has agreed to assist the client in connection with any Rule 35 motion, counsel must compute the time period carefully and explain to the client that any such motion must be timely filed.

6. Steps Following Successful Appeals

If the decision on appeal is in the client's favor and further proceedings in the Superior Court are involved, appellate counsel is not obligated to continue to represent the client, but may enter an appearance on the client's behalf in the Superior Court if the original trial counsel is no longer in the case. In any event, appellate counsel should advise the client of the nature of the further proceedings in the Superior Court and the right to request appointed counsel, and should remain in the case until new counsel is appointed. Appellate counsel should notify the Defender Services Office, Room C-215, 500 Indiana Avenue, N.W., (202) 824-2830, of the outcome of the appeal and of appellant's need for new counsel.

If the conviction is reversed and the client is incarcerated under sentence, counsel should file a motion to expedite issuance of the mandate pursuant to D.C. App. R. 41(b). Counsel who will represent the defendant in further proceedings in the Superior Court should ensure that the defendant is returned to court for a determination of whether the government will continue to prosecute the case and, if so, what conditions of release should be set. If a conviction is reversed on the ground that the evidence was insufficient, the trial court must immediately vacate the conviction and sign a release order, if appropriate.

F. Compensation under the Criminal Justice Act

Appointed counsel for an indigent appellant is entitled to compensation, D.C. Code § 11-2601, paid at a rate of $90 per hour to a maximum of $5000.[5] *See* D.C. Code § 11-2604; 18 U.S.C., 2006A(d)(2). The court may not always approve counsel's voucher even if the voucher demonstrates that counsel spent enough time on the case to meet the maximum fee. Payment in excess of the maximum may be made for extended or complex representation when the judge

[4] Before its amendment in 1984, Rule 35 was interpreted as requiring the trial court to *act* on the motion within 120 days after the issuance of the appellate mandate or denial of review by the Supreme Court. *United States v. Nunzio*, 430 A.2d 1372 (D.C. 1981).

[5] Appellate counsel is entitled to compensation for work in pursuing post-conviction relief on the grounds of ineffective assistance of trial counsel. *See Doe*, 583 A.2d at 675.

who presided over the panel certifies that the amount is necessary to provide fair compensation and the Chief Judge of the Court of Appeals approves the payment. *Id*. § 11-2604(e).

Counsel's ability to be compensated depends in large part on whether counsel has kept accurate time records and can be specific in reporting how the time was used. The official voucher (EO Form 10) requires a detailed report of time spent, including itemization of: (a) interviews and conferences; (b) obtaining and reviewing records; (c) legal research and brief writing; and (d) other, with explanation. Time spent by associates or partners assisting assigned counsel is compensable, but must also be detailed. Counsel is entitled to reimbursement of expenses reasonably incurred in representing the client, such as travel, duplication, and long distance telephone expenses, which must be itemized on the voucher. The payment voucher provided by the Court of Appeals must be filed within sixty days after the conclusion of counsel's representation of the client.

CHAPTER 14

JUVENILE COURT

INTRODUCTION

This chapter provides an overview of the juvenile system in the District of Columbia. Juvenile court practice differs significantly from practice in criminal court. New practitioners in juvenile court must familiarize themselves with the law as it pertains to juvenile court, the Attorney Practice Standards[1], the professionals who work with delinquent youth, and the programs available for youth in the juvenile system.[2]

The history of juvenile court provides the practitioner with insight into the current philosophy of juvenile court. Prior to the statutory creation of juvenile courts in America, children, if competent, were generally prosecuted in the same manner as adults. In the late 19th century, reformers sought to change the system whereby children were commingled with adults in prison. The reformers believed that medical, social, and psychological factors should be examined when determining motivating factors for youthful offenders. Ultimately, the reform movement led to the creation of non-criminal juvenile courts. The first juvenile courts emphasized rehabilitation and acting in the best interest of the child. The courts relied on the doctrine of *parens patriae* with the judge in the role of the parental figure. "The problem for determination by the judge is not, has this boy committed a specific wrong, but what he is, how he has become what he is, and what had best be done in his interest and in the interest of the state to save him from a downward career." Mack, *The Juvenile Court*, 23 Harv. L. Rev. 104 (1909).

In its early years, juvenile court focused exclusively on rehabilitation and treatment. Children were committed to social services agencies or industrial schools based on hearsay evidence presented to the judge by a probation officer. Generally, lawyers were not present and juvenile proceedings were not recorded. The language of juvenile court reflected the non-criminal nature of the proceedings.[3] The informal practices in the early years of juvenile court relied on the benevolence of individuals in the system to assure fairness in the proceeding. The result was arbitrary treatment of juveniles and lengthy commitments to industrial schools that were, in essence, prisons.

In 1967, the Supreme Court recognized a liberty interest for children in the delinquency system:

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[1] Administrative Order 04-1, June 2004, *Attorney Practice Standards for Representing Juveniles Charges with Delinquency or as Persons in Need of Supervision*. http://www.dccourts.gov/dccourts/docs/0413a.pdf.

[2] The Public Defender Service conducts training sessions for new attorneys; contact the Deputy Trial Chief, Juvenile Section, for more information. For training information on abuse and neglect cases. Contact the CCAN (Center for Child Abuse and Neglect) office in D.C. Superior Court. Additional juvenile training manuals include *Trial Manual for Defense Attorneys in Juvenile Court*, Randy Hertz, Martin Guggenheim, & Anthony G. Amsterdam (Philadelphia, PA: ALI-ABA, 2008); *The District of Columbia Practice Manual* (annual) (District of Columbia Bar) (Juvenile Law and Practice chapter).

[3] Superior Court continues to use non-criminal terminology in juvenile court. *See* D.C. Code § 16-2301. The child is referred to as the respondent. A trial is an adjudicatory hearing or fact-finding hearing. A conviction is an adjudication. An adjudication of guilt or finding of involvement results in a disposition rather than a sentencing.

> [W]e confront the reality of . . . the Juvenile Court process . . . A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence – and of limited practical meaning – that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a "receiving home" or an "industrial school" for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. His world becomes "a building with whitewashed walls, regimented routine and institutional hours . . ." Instead of mother and father and sisters and brothers and friends and classmates, his world is peopled by guards, custodians, state employees, and "delinquents" confined with him for anything from waywardness to rape and homicide.

In re Gault, 387 U.S. 1, 27 (1967).

The Court in *Gault* held that juveniles in delinquency proceedings are entitled to Due Process protections in the fact-finding phase. These protections include notice of the charges, an opportunity to prepare a defense, representation by counsel, an opportunity to confront and cross-examine witnesses, and the privilege against self-incrimination. States revised their juvenile codes to reflect the holding in *Gault*. The Court in *Gault*, however, noted that unique aspects of juvenile court, such as individual treatment plans, a focus on rehabilitation, and the confidential nature of the proceedings, need not be affected by introducing Due Process protections in the fact-finding phase. In a later opinion, the Supreme Court held that juveniles do not have a right to a jury trial. *McKeiver v. Pennsylvania*, 403 U.S. 528, 533 (1971).[4] Thus, juvenile court developed as a civil proceeding with criminal aspects to it.[5]

In the District of Columbia, a delinquent child has a statutory right to rehabilitation. The goals of the juvenile justice system "are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment. The State is *parens patriae* rather than prosecuting attorney and judge." *Kent v. United States*, 383 U.S. 541, 554-55 (1966); *see In re D.H.*, 666 A.2d 462, 472 (D.C. 1995). The juvenile rules "embrace the principle that each child is an individual entitled, in his own right, to appropriate elements of due process of law, and also adopt the principle that, when a child is removed from

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[4] Juveniles are not entitled to bail, *Fulwood v. Stone*, 394 F.2d 939 (D.C. Cir. 1967), or to raise an insanity defense, *In re C.W.M.*, 407 A.2d 617 (D.C. 1979). Moreover, different dispositional treatment of juveniles and adults has been upheld in the face of repeated equal protection challenges. *See In re L.M.*, 432 A.2d 692 (D.C. 1981).

[5] *See In re Winship*, 397 U.S. 358 (1970) (proof of guilt beyond reasonable doubt); *In re D.H.*, 666 A.2d 462, 473 (D.C. 1995) (right to a speedy trial); *In re A.L.M.*, 631 A.2d 894, 898 (D.C. 1993) (right to counsel); *In re J.M.*, 596 A.2d 961, 972 (D.C. 1991) (privilege against self-incrimination); *Marrow v. United States*, 592 A.2d 1042, 1048 (D.C. 1991) (procedures for transfer to adult system must comport with due process); *In re W.A.F.*, 573 A.2d 1264, 1266 (D.C. 1990) (right not be tried while incompetent); *In re T.G.T.*, 515 A.2d 1086, 1089 (D.C. 1986) (right to notice and an opportunity to be heard before detention); *In re C.B.N.*, 499 A.2d 1215, 1218 (D.C. 1985) (right to confront and cross-examine witnesses); *District of Columbia v. I.P.*, 335 A.2d 224, 228 & n.7 (D.C. 1975) (dictum) (protection from double jeopardy); *Saunders v. District of Columbia*, 263 A.2d 58, 59 (D.C. 1970) (written notice of allegations and adequate opportunity to be heard); *In re McKelvin*, 258 A.2d 452, 454 (D.C. 1969) (fair identification procedures); s*ee also* D.C. Act 11-329, Juvenile Detention and Speedy Trial Act of 1996.

his own home, the Division will secure for him custody, care and discipline as nearly as possible equivalent to that which should have been provided for him by his parents." Super. Ct. Juv. R. 2.

The delinquency proceeding is a two-stage proceeding: (1) a determination of guilt or finding of involvement; and (2) a disposition or imposition of a treatment plan. In the first stage, a trial is held before a judge assigned to handle juvenile matters. The child has a right to challenge the government's case just as in adult court. In this stage of the proceeding, the lawyer's role is the same as that in adult court. Counsel must investigate the case, file motions, subpoena witnesses, and ensure all of the client's rights are protected. If there is a finding of involvement by the judge, then counsel must advocate for the youth at disposition. Juvenile delinquency cases are prosecuted by the Office of the Attorney General, formerly known as the Office of the Corporation Counsel. In the District of Columbia, the disposition options are prescribed by D.C. Code § 16-2320. The most common outcomes in delinquency cases are the judge placing a child on probation with conditions or committing the child to the Department of Youth Rehabilitative Services for an indeterminate period not to exceed the youth's 21st birthday.

I. THE JURISDICTION OF THE FAMILY COURT

The Family Court (formerly known as the Family Division of the Superior Court) has jurisdiction in neglect and abuse, delinquency, and status offense (PINS) matters. Delinquency cases are governed by D.C. Code §§ 16-2301 through 2340 and the Superior Court Juvenile Rules. A delinquent youth is defined as "a child who has committed a delinquent act *and* is in need of care or rehabilitation." D.C. Code § 16-2301(6) (emphasis added). A delinquent act is defined as an act designated as an offense under the law of the District of Columbia; traffic offenses are not deemed delinquent acts unless committed by an individual who is under the age of sixteen. The traffic cases of individuals over 16 are certified to Family Court when there is a "companion" delinquency case,[6] but this practice should be challenged in appropriate cases. Section 16-2301(8) defines a status offender, or a child in need of supervision. Section 16-2301(9) sets forth the criteria for a neglected child.

The judge presiding over a delinquency case also has jurisdiction over the parent for the purposes of enforcing the rehabilitation of the child. The court can hold the parent responsible for restitution to their child's victim, as provided in § 16-2320.01, or can order attendance at hearings or at treatment, as provided in § 16-2325.01.

II. THE ROLE OF THE DEFENSE ATTORNEY

The attorney's first role in representing juveniles is to successfully defend his or her client; the same role as that of the attorney representing an adult.[7] The attorney must focus on the government's allegations separate and apart from his or her client's need for treatment and rehabilitation. Counsel must remember that the client has a liberty interest at stake. Due to the

[6] Superior Court Administrative Order 06-03.

[7] *See The Role of Juvenile Defense Counsel in Delinquency Court*, The National Juvenile Defender Center (Spring 2009), www.njdc.info.

nature of juvenile sentencing, even cases involving minor offenses may result in lengthy incarceration at a secure detention facility such as New Beginnings Youth Development Center or the Youth Services Center.

Counsel has an ethical obligation to zealously represent his or her juvenile clients. Counsel must keep in mind that the parent is not the client. It is the youth who must make informed decisions about whether to contest the allegations or accept a plea bargain, waive certain constitutional rights, and testify on his or her own behalf. It is the attorney's role to carefully explain to the juvenile the legal issues and the proceedings so that the client can make informed decisions.

At the disposition phase, probation officers, judges, and juvenile prosecutors will attempt to determine what is in the "best interest" of the child. As in an adult case, counsel has an ethical obligation to explain the process to the client and to aid in developing options for the client. Counsel in a delinquency case is not a "guardian *ad litem*" (GAL). Counsel may advise the client as to what he or she believes is in the objective best interests of the child, but counsel cannot substitute his or her judgment, or that of parents, counselors, teachers, or anyone else, for that of the client. Counsel should try at every stage to avoid court intervention for the child or mitigate its impact.

The Family Court has the authority to commit a child to the Department of Youth Rehabilitative Services (DYRS) (formerly known as the Youth Services Administration, a division of the Department of Human Services) for an indeterminate period not to exceed his or her 21st birthday.[8] The defense attorney is obligated to represent the juvenile until the child is free of supervision. The attorney must remain in close contact with both the client and the institution(s) that have custody of the child.[9] Counsel should communicate frequently with juvenile clients; explanations about proceedings often must be repeated several times. Counsel should provide the client with copies of pleadings and always read documents to the youth.

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***In re M.H.*, 86 A.3d 553 (D.C. 2014).** Declining to determine constitutionality of DYRS's policy regarding shackling of juveniles.

[8] Legal custody is defined by D.C.Code § 2-1515.01(5); D.C.Code § 16-2301(21).

[9] An attorney who stays closely involved throughout all stages of a case, particularly post-disposition, when a child may be waiting for placement at a residential treatment facility, may be able to expedite placement and the provision of other services. Once a child is placed at a facility, counsel should contact the facility regularly to monitor the client's status and request reports be sent directly to counsel.

Role of Attorney:

- ✓ Counsel must remember that the youth, not the parent, is the client
- ✓ Counsel must thoroughly investigate case and focus on the allegations, ensuring that the client's rights are protected
- ✓ Counsel must serve as an advocate for youth at disposition
- ✓ Counsel must carefully explain legal issues so that the client can make informed decisions
- ✓ Counsel should remain in frequent communication with the client
- ✓ Counsel should provide the client with copies of pleadings and read documents with the client

III. THE CONFIDENTIAL NATURE OF THE PROCEEDINGS

Juvenile proceedings in the District of Columbia are confidential and closed to the public. Only persons necessary to the proceedings may be admitted to hearings, except that in delinquency cases, the victims, eyewitnesses, and the immediate family members and custodians of the victims and eyewitnesses shall have a right to attend several types of hearings. § 16-2316(e)(4); *see also* Sup. Ct. Juv. R. 53. The admission of victims and eyewitnesses and their families is subject to the rule on witnesses as well as Superior Court Juvenile Rule 53. *Id.* All others must apply for admission to the proceedings in accordance with procedures outlined in D.C. Code § 16-2316 and the rule.[10] The Omnibus Juvenile Justice Act of 2004 and Superior Court Juvenile Rule 55 broadened the categories of individuals with access to juvenile case records, social records, and law enforcement records. These records are confidential and not open to inspection except by authorized individuals. For juvenile case records, these authorized individuals are Family Court personnel, the respondent, the guardians, defense counsel, the prosecutor, any other court in which the respondent is charged, D.C. Public Schools, the Child and Family Services Agency (CFSA), the Children's Advocacy Center (CAC), law enforcement personnel, and certain other persons interested in the respondent's welfare and rehabilitation, if authorized by the court. D.C. Code § 16-2331.[11] Victims and eyewitnesses also have access to certain information from the case records, at the discretion of the Office of the Attorney General. *Id.* Access to social files and law enforcement records was also increased, though less broadly, in revisions to §§ 16-2332 and 2333. *See* Super. Ct. Juv. R. 55; *In re J.D.C.*, 594 A.2d 70 (D.C. 1991) (statute accords primacy to juvenile's right to anonymity; pretrial disclosure of respondent's name warrants closure to media of all further proceedings). Violation of the confidentiality provisions is a misdemeanor, punishable by ninety days imprisonment and a $250 fine. D.C. Code § 16-2336.

[10] Members of the bar are allowed into Family Court proceedings, as a general rule, *In Re Ti.B.* 762 A.2d 20 (D.C. 2000), but are limited in their ability to disclose information barred by Rule 55.

[11] Counsel may apply to the Family Court to inspect juvenile records. Applications are available in the Juvenile Clerk's office.

Presence of Media in Court: If the press is in court at an initial hearing, counsel should request that the court invoke Rule 53 to exclude all persons present, with specific reference to the media. Counsel should argue that the presence of the media forces counsel to choose between a full-blown hearing and protection of the child's privacy rights. In some cases, information available to the public has already compromised a child's anonymity, and counsel should therefore argue that any further details released could be attributed to the child, compromising his right to confidentiality. This would be the case, for example, if the child or his house has been shown on television, or if a family member or teacher has identified the child in the news. If the media representatives are allowed to remain, counsel should ask that the lawyers, Court Social Services representative (P.O.), and client approach the bench for a sealed discussion of any social factors relating to the pretrial placement decision. Because the P.O.'s position on placement, and the facts relating to it, are usually the first item discussed at the initial hearing, the motion to exclude the media and request for bench discussions must be made as soon as the case is called (or sooner, by contacting the chambers of the Presiding Judge of the Family Court). For a discussion of media presence and its impact later in the proceedings, see *In re J.D.C.*, 594 A.2d 70 (D.C. 1991).

IV. THE ASSIGNMENT OF JUVENILE CASES

The Public Defender Service (PDS) has a Juvenile Unit that handles juvenile cases. Matters that are not assigned to PDS are assigned to private panel attorneys under the Criminal Justice Act or to law students through clinical programs at Georgetown Law School and Law Students in Court, a clinical consortium of law schools. Attorneys who seek appointment to juvenile cases must apply to the Superior Court for admission to the Family Court Juvenile Panel. The application and information about deadlines can be located on the court's web site. Attorneys may contact the Defender Services Office (DSO) office at (202) 824-2830 for information about the current procedures for assignment of cases for juvenile court panel attorneys. The Public Defender Service provides training and resources to private attorneys.

Lawyers are appointed to cases the day the youth is scheduled for his or her first appearance in court at the initial hearing. Counsel may be appointed to a community case or a lock-up case. The case will come in as a community case if the child was released after arrest with a summons to return to court.[12] The DSO office will provide counsel with the child's name, date of birth, and social file number. Counsel should write down all available information and locate the child and his or her parents in the probation intake office or outside the New Referrals courtroom (JM-15).

If the child was held in detention pending an initial hearing, the case will be referred to as a lock-up case. The DSO office staff will provide counsel with a copy of the PD 379. The PD 379 is a police department arrest form completed in every juvenile case. It contains a minimal amount of

[12] The police may release a child from the police station before an initial hearing is conducted with a summons to return to the intake unit at Room 4206 of the D.C. Superior Court in two days for a preliminary investigation. A child who is not released at the police station will be taken to the Central Processing Facility at YSC. Children who are eligible for release but whose parents cannot be contacted, or who are not eligible for release and not brought to court by 3:00 p.m., are held overnight and brought to court the next morning for an initial hearing. CSS uses a Risk Assessment Instrument (RAI) to determine if a child is eligible for release pending an initial hearing.

information about the case and client. Detained children are held in the juvenile cellblock located on the JM level of the courthouse. Children younger than 13 with special needs, injuries, or other medical issues are held in the at-risk room next to the main cellblock. D.C. Code § 16-2310.01.

V. THE INITIAL INTERVIEW

Counsel must interview the client and his or her parent or guardian before the initial hearing. The first interview with the client will be a difficult one. The detained child will have spent the night at the Youth Services Center (YSC) and probably will have had little food or sleep. The purpose of the first interview is to begin to establish a rapport with the client, determine if the child has any immediate medical or other needs, obtain contact information for family members, and gather information to argue for the child's pretrial release. Counsel should explain to the child that the purpose of the initial hearing is to determine where he or she will stay until the trial. Counsel should explain to the child that they will have the opportunity to talk about the case in private after the hearing. Counsel should also explain to the child that anything he or she says to anyone except his or her lawyer, including parents, can be used at trial and counsel should instruct the client not to speak with anyone, including other children in the cellblock and co-respondents, about the case. Counsel should check with the marshals in the cellblock for interview times and procedures.

Counsel Should Carefully Explain the Following to her Client:

- ✓ The nature of the allegations; what the government must prove; and the likely and maximum potential consequences
- ✓ The role of counsel; the defense function; the attorney-client privilege, including the limits to privileges covering the client's communications with counsel, therapists, case workers, social workers, and other relevant individuals; and the consequences of the client discussing the facts of the case without first consulting with the attorney
- ✓ The procedures that will be followed in setting the conditions of pretrial release, if applicable to the particular client
- ✓ The type of information that will likely be requested in any other interview the client may have (e.g., with court social services personnel, detention staff, and forensic or mental health evaluators)
- ✓ A general procedural overview of the progression of the case, where possible
- ✓ Information regarding how counsel can be readily reached generally within one business day
- ✓ Schedule for the next client meeting
- ✓ Realistic answers, where possible, to the client's most urgent case-related questions
- ✓ Arrangements to address the client's most critical needs, e.g., medical or mental health attention, request for separation during detention, or contact with family or employers

Confidentiality at initial interview: Counsel should record a physical description of the child[13] and the child's clothing. Generally, counsel will not be able to have a confidential conversation with youth in the cellblock. Counsel must be careful not to ask the child about information relating to the facts of the case. However, counsel can ask basic questions to gather information for the probable cause hearing such as where and when the arrest took place, if the police said they recovered any items from the child, and whether or not there were any people who saw what the police say happened. Counsel should tell the child that if the judge is thinking of keeping the child locked up before trial, a police officer will testify about what the government said happened. Counsel should tell the child that he or she will have the opportunity to talk at the trial, but not at the first hearing.

Counsel should speak to the parent or guardian after speaking to the client. Counsel should explain the process and inquire about the child's school placement and behavior in the home. Counsel should also explain to the parents that the child has been told not to speak to anyone about the offense, including them. Counsel should ask the parents to sign a release of information so that counsel may obtain the educational, medical, and mental health records of the child, and obtain all insurance information.

Counsel should verify the client's age, address, telephone number(s), and parents' names as they appear on the PD 379. Counsel should also obtain the names of family members, along with their addresses and phone numbers, information concerning school and after school programs, and review the client's court record. Counsel can check the client's court record at the juvenile clerk's office.

A. Stand-In Cases

Counsel may be assigned some cases as a stand-in attorney for the initial hearing only. The Family Court has a "single representation" rule that means that if a child has a pending case, the attorney who already represents the child is assigned to any new case the youth picks up. Counsel will act as a stand-in for the child's previous counsel. Counsel should attempt to find the attorney of record in the courthouse and encourage that attorney to handle the initial hearing if possible. Otherwise, counsel must notify the attorney of record of the new charge, provide the attorney with information about the initial hearing, and transfer all paperwork, including the discovery packet, to the attorney of record. If there is a probable cause hearing, counsel should pass along notes of the hearing and sufficient information about the time of the hearing and the parties present so that the attorney of record can order a copy of the transcript of the proceedings.[14] Typically there are no court reporters at the probable cause hearing, so it is essential that counsel record the time of the hearing to facilitate obtaining a transcript of the proceeding.

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[13] If the child is injured, counsel must seek a court order to photograph the child to preserve evidence. Cameras are not permitted in the courthouse and are not allowed into detention facilities without a court order. Counsel must prepare an order for the signature of the judge conducting initial hearings to permit a photograph to be taken at the detention facility if the child is detained.

[14] CJA attorneys have folders in the filing cabinets in the DSO office, where counsel can place the paperwork. The DSO staff has a list of all CJA attorneys' phone numbers and addresses.

VI. THE INITIAL HEARING

Prior to the Initial Hearing Counsel Should be Familiar with:

- ✓ The elements of the offense and the potential punishment
- ✓ The legal criteria for determining pretrial release and the procedures that will be followed in making that determination
- ✓ The different pretrial release and detention options and conditions the court may set
- ✓ The procedures available for reviewing the trial judge's determination of level of detention and/or conditions of release

The initial hearing is the first court appearance for the juvenile subsequent to arrest. The initial appearance is a mechanism to provide the youth and his or her parent(s) notice of the charges. The judge will provide counsel with a copy of the petition and advise the child and parents of the contents of the petition or charging document and of the child's right to counsel. *See* D.C. Code § 16-2308. Typically, counsel will waive a formal reading of the petition, enter a plea of not guilty on behalf of the child, and set a date for the next hearing. In some cases, at the initial hearing stage, the client will be offered the opportunity to enter a diversion program or resolve the case by way of a consent decree. *See* D.C. Code § 16-2314. Upon the request of defense counsel, counsel will be provided with a discovery packet at the conclusion of the hearing (some judges believe that Rule 16 requires the prosecutor to turn over the discovery packet, upon request, before the hearing). If the judge decides to detain the child pretrial, either at a youth shelter house or in secure detention, a probable cause hearing will be held at the time of the initial hearing. A status date and trial date will be set in detention cases.

A. The Petition

Formal charges are brought against a juvenile by way of petition. D.C. Code § 16-2305 mandates that complaints alleging delinquency be referred to Court Social Services in the first instance. Court Social Services must make a recommendation as to whether petitioning is appropriate. The preliminary investigation occurs either at probation intake in the courthouse or by Court Social Services (CSS) intake staff at the Youth Services Center

An intake worker from Court Social Services (CSS) will interview the child and parents, and make a recommendation regarding petitioning based on the nature of the alleged act, prior police or court contact, and any mitigating circumstances. Super. Ct. Juv. R. 103. The report, called the Report of Preliminary Investigation, is forwarded to the Attorney General's office for final decision. If CSS does not recommend petitioning the case, the Attorney General, on request of the complainant, may review the facts and petition the case if the OAG believes such action is necessary to protect the community or the interests of the child. D.C. Code § 16-2305(c). A copy of the recommendation of Court Social Services should be in the child's social file and available for review by counsel.

The petition states the specific statute on which the charge is based. In a delinquency case, the petition must also allege that the child appears to be in need of care and rehabilitation. The petition must be filed within seven days after the complaint is referred to Court Social Services, except as provided by D.C. Code § 16-2312(g) (five-day holds). D.C. Code § 16-2305(d); *see In re T.G.T.*, 515 A.2d 1086, 1090 (D.C. 1986). A petition may be amended with permission of the court upon request by the prosecutor or respondent's counsel at any time prior to the conclusion of the fact-finding hearing, as long as no new offense is charged and if substantial rights of the respondent are not prejudiced. D.C. Code § 16-2305(e); Super. Ct. Juv. R. 7(e).

The nature of the charges to be brought will be determined by an Assistant Attorney General assigned to papering. The assistant will speak with the police officers and may talk to the complainant to determine what, if any, charges will be brought. Once the petition has been typed up in the Attorney General's office, the paperwork will go to the initial hearing courtroom and be placed in the court jacket. Counsel will be given a copy of the petition just prior to the initial hearing.

B. Five-Day Hold

In some cases, the petition will not be filed on the day of the initial hearing and the government will request a five-day hold. The government requests up to five days to determine what, if any, charges will be brought in the petition. The hold is on the filing of the petition, not on the placement or detention decision. For good cause, the court may grant the government's request to delay the filing of a petition. The court cannot, however, delay the detention decision. D.C. Code § 16-2312(g). The government must make "a clear showing that the continuance will serve a legitimate government objective," and give "reasonably specific notice of the nature of the charges." *T.G.T.*, 515 A.2d at 1090. Counsel should inquire through the court about the reason for the postponement. In some cases, a delay will result in the government deciding not to paper the case; thus, in many cases counsel will not vigorously oppose the petitioning delay. However, counsel should oppose detention if requested by CSS or the OAG, and the likelihood of detention should be a factor in deciding whether to oppose the 5-day hold request. As in any other case, a probable cause hearing and finding are required before detention can be ordered. *Id*. At the further initial hearing, if the case is petitioned, counsel must remind the court that the detention decision was made at the initial hearing and counsel must have notice and an opportunity to prepare if the government seeks to increase the level of detention.

In Preparation for the Initial Hearing, Counsel Should:

- ✓ Interview the child
- ✓ Interview parents and potential caregivers
- ✓ Consult with intake probation CSS staff
- ✓ Prepare probable cause questions
- ✓ View and obtain copies of relevant documents, including copies of charging documents, law enforcement reports and recommendations, and reports made by the court social service representatives concerning pretrial release

C. Community Cases

In a community case, the initial hearing itself is very brief. The child is formally advised of the charges and enters a plea of not guilty, and a status hearing date is set. Super. Ct. Juv. R. 10. Detention should not be an issue at the hearing. Pursuant to Super. Ct. Juv. R. 10(b), "[u]pon entry of a plea of not guilty in a case where the respondent was released prior to the filing of the petition, the judicial officer *shall* set conditions, if any, of release" (emphasis added). The Rule refers to § 16-2308. **Counsel should be prepared to argue against detention using the factors under Super. Ct. Juv. R. 106 and be ready for a probable cause hearing should the government request detention.**

D. Detention Cases

In lock-up cases, pursuant to D.C. Code § 16-2312(a)(2), when a child is held after arrest, "a detention hearing shall be commenced *not later than the next day* (excluding Sundays) after the child has been taken into custody or transferred from another court" (emphasis added).[15] "A child shall not be placed in detention prior to a *fact-finding hearing* or a *dispositional hearing unless* he is alleged to be delinquent or in need of supervision *and unless* it appears from available information that detention is required (1) to protect the person or property of others or of the child, or (2) to secure the child's presence at the next court hearing." D.C. Code § 16-2310(a). In addition, the court must have probable cause to believe that an offense was committed and that the respondent committed the offense. Juvenile Rule 106 enumerates factors relevant to this determination.

Relevant factors include the respondent's previous offenses and pending charges. The rule refers to offenses not arrests, thus the judge should not consider charges that did not result in adjudications. Moreover, the rule specifies offenses that relate to each theory of detention. *See In re I.C.B.*, No. 14019 (D.C. Oct. 20, 1978) (unpublished) (respondent may not be detained based on record of offenses against the person, where prior adjudications were for UUV and possession of marijuana).[16]

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[15] A judge may attempt to hold a child without an initial hearing for a variety of reasons (scheduling difficulties, an attempt to "teach a lesson" to a child, the unavailability of a police officer needed for a probable cause hearing, or pursuant to a custody order). *See infra* n.26. Counsel must object if the court attempts to hold a child in violation of the statute and should take an immediate appeal if this occurs.

[16] There is support for the argument that detention must be supported by factors that are proven to exist by "clear and convincing evidence." Detaining children is pretrial detention. *See Schall v. Martin*, 467 U.S. 253 (1984). But unlike the situation in *Schall*, children in D.C. are detained for significant periods of time, they may be mixed in with committed juveniles in the same facility, and there are no rehabilitative services for detained children. For these reasons, children are in the same position as adults who are detained pretrial. *United States v. Salerno*, 481 U.S. 739 (1987), upheld the Bail Reform Act because the statute required the court to find detention was necessary by "clear and convincing" evidence. Interpreting the adult detention statute, *Lynch v. United States*, 557 A.2d 580, 581 (D.C. 1989), held "[o]n authority of [*Salerno*], ... where pretrial detention is sought … the government must prove 'dangerousness' by clear and convincing evidence." Relying on *Lynch*, the court has further held, with regard to adult detention, "[I]n the absence of a standard of proof in the statute itself (or in its legislative history), we concluded that clear and convincing evidence was required to justify pretrial detention based on danger, in order to be sure the statute was constitutionally applied." *Kleinbart v. United States*, 604 A.2d 861, 869 (D.C. 1992). *Kleinbart* called the "clear and convincing" standard a constitutional precaution, if not a prerequisite. *Id*. at 870.

Under Rule 106(a)(5), "[i]f detention appears to be justified under the factors listed [in] . . . this Rule, the person making the detention decision may nevertheless consider whether the respondent's living arrangements and degree of supervision might justify release pending adjudication."[17] Most importantly, the child must be placed in the "least restrictive alternative." *In re Michael McK.*, 108 D.W.L.R. 1613, 1618 (July 16, 1980) (Schwelb, J.).

Initial hearings are held in the new referral courtroom, JM-15. Although juvenile cases are closed to the public, attorneys may sit in. Before picking up, counsel should observe the process in JM-15. At the initial hearing, the case is assigned to a calendar judge. Further proceedings will be held before that calendar judge.[18] Notice of the charges will be provided to counsel in the form of a petition. Counsel will enter his or her appearance on behalf of the client, waive a formal reading of the petition, enter a plea of not guilty, and request a speedy trial. The judge will ask the probation intake worker to make a recommendation regarding release pending trial. Counsel should speak with the probation intake worker before the hearing and address the concerns of the worker with the court. For example, the worker may be concerned about the child staying out late at night. Counsel can suggest the court impose a curfew. A worker will check on the child's curfew and report to the court any curfew violations

A parent's presence may be essential in obtaining release. If counsel cannot contact parents at home or work, counsel should look for them in the Court Social Service intake office (Room 4206)[19] or outside JM-15. When the parents arrive, counsel should explain the nature of the proceedings and determine if the parents are willing to take the child home. If necessary, counsel should make counseling referrals to help the parents maintain the child in the home. If the court orders that the child be released to his or her parent, or if social services recommends release and a parent is not present, the child still may be released to the parent. The typical procedure is that the child is held until the end of the day at the courthouse and is then brought to Central Processing to wait for a parent. If no parent arrives, the child is taken home or to a shelter house.

If the child has other matters pending in the neglect or delinquency systems, the intake worker will attempt to contact the workers in those cases for information about adjustment and compliance and a recommendation for the release status in the new case. Prior to the hearing, counsel should contact these workers to discuss the child's status.

The juvenile's prior contacts with the system will be very important to the judge in determining placement of the youth prior to trial. The intake probation officer will have a record of the child's court history. Counsel should check the client's record in the juvenile clerk's office so

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From these adult cases there is an argument that the courts in the juvenile division must find the factors in Super. Ct. Juv. R. 106 exist by clear and convincing evidence.

[17] *In re M.L. DeJ.*, 310 A.2d 834, 836 (D.C. 1973), limits the court's power to detain children pretrial, holding that an order citing the "nature and circumstances" of the offense charged is, without more, insufficient to justify pretrial detention of the respondent.

[18] Motions to reduce levels of detention are generally heard by the judge who presided over the initial hearing, *see* Super. Ct. Juv. R. 107(c), or by a designee of the presiding judge of the family court – frequently the calendar judge.

[19] Counsel can check the sign-in sheet in room 4206 to see if parents have arrived at the courthouse.

that counsel can be sure the information the probation officer relates to the judge is accurate.[20] Counsel should determine if the client has any open charges, is on probation, or is under commitment in another case. Counsel should get the names and phone numbers of all attorneys, probation, and DYRS case managers. This social information is crucial in both making effective arguments for pre-trial release and in formulating trial strategy and dispositional plans.

Familiarity with community based resources is as important at the initial hearing as it is at disposition.[21] Often, the most important aspect of counsel's presentation at an initial hearing is to provide the court with appropriate alternatives to detention. It is difficult to persuade the court to release a child on the basis of a legal argument alone. Legal arguments about the statute and rules must be made to remind the court of the constraints on its discretion and make a record where an appeal is indicated. However, release most often follows from practical suggestions that satisfy the court's concerns about the child.

Before the initial hearing, juveniles are tested for drug use and questioned about their health, including drug and alcohol abuse. The court is informed of the test results, and may use this information to order specific release conditions and placement. Drug test results and the results of physical and mental examinations cannot be used by the government at trial, but if the child is adjudicated delinquent, the court can use that information in fashioning a disposition. D.C. Code § 16-2315(d), (e).

E. Pre-trial Placement Options

The judge has several options for placement prior to trial. The court can release the child to a parent or any other appropriate adult. Straight release, although not commonly imposed, sets no conditions on the youth. The judge can also release the child with conditions of release such as regular school attendance, a nightly curfew, periodic drug-testing, electronic monitoring of curfew, and an order that the child stay away from complainants, co-respondents, and scenes of alleged offenses. Counsel should consult the child to identify activities such as evening school activities or employment and have these incorporated into the order as necessary. Counsel should be familiar with the current community placement options available for youth. In addition to the ORD juvenile resource manual, a licensed social worker, the duty day PDS ORD staff member, is available for phone consultations with counsel on placement options and resources for youth.[22]

If the parent or other responsible relative refuses to take the youth and the youth consents, counsel should explore whether or not the youth would more appropriately be in the neglect system and whether the parent's conduct falls within the definition of neglect. *See* D.C. Code § 16-2301(9).

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[20] On the day of pick-up, counsel will generally rely on a computer criminal history check. As soon as possible, counsel should check each court jacket for the outcome because the information in the computer may be inaccurate or incomplete. There are two juvenile clerk's offices; while case jackets are stored in the clerk's office on the fourth floor of the courthouse, filings and applications to inspect records are made at the clerk's office on the JM level.

[21] The juvenile and adult ORD resource manuals are available on the PDS website at www.pdsdc.org.

[22] Counsel should call the main number for PDS, (202) 628-1200, and ask for the ORD duty day staff member.

The judge may also place the youth in a third party supervision program or in a youth shelter house. The court may order detention in shelter care "to protect the person of the [child], or because the [child] has no suitable parent, guardian, custodian, or other person or agency able to provide supervision and care for [him] and the [child] appears unable to care for himself." Rule 106(b). Youth are placed in shelter houses according to the child's sex and age. Children attend school or work during the day and return to the shelter house in the evenings. Weekend home visits may be permitted. Rule 106(b) enunciates specific criteria relevant to whether shelter care is required.[23] Rule 106(b)(3) proscribes secure detention for a child who is in need of shelter care, unless detention would be justified under Rule 106(a). Space in shelter care is almost never available immediately and judges often order secure detention pending space, in violation of the rule. Counsel should be prepared to offer a safe alternative pending placement.[24] Counsel should request information from the probation intake workers about the available pretrial programs.

If the court orders secure detention, the youth will be held at the Youth Services Center (YSC) in DC. The Youth Services Center houses boys and girls detained pre-trial, as well as children detained overnight between arrest and the initial hearing. Youth who are detained and committed on previous cases may also be held at the YSC. New Beginnings houses committed boys. There is no committed secure facility for girls.

VII. THE PROBABLE CAUSE DETERMINATION

If the judge determines that detention is warranted, the court "shall then hear evidence presented by the Attorney General to determine whether there is probable cause to believe the allegations in the petition are true." D.C. Code § 16-2312(e). The Assistant Attorney General (AAG) will have a police officer present testimony. The hearing is the juvenile equivalent of a preliminary hearing in adult court. Counsel will have the opportunity to cross-examine the officer. **Counsel should never waive the probable cause hearing.** The hearing can provide counsel with basic information about the offense alleged, identification procedures, evidence obtained from the client, and information about the arrest. It affords an opportunity to demonstrate to the client counsel's commitment to zealous advocacy of the child's rights. Many of the considerations discussed in connection with preliminary hearings in adult cases apply with equal force in the juvenile context.[25]

A judge cannot detain a child pretrial without a probable cause determination. If, after the initial hearing, the calendar judge determines that a child presently released in the community is violating his or her conditions of release, the judge cannot detain the child unless there has

[23] Factors relevant to protecting the child are abusive or threatening conduct by someone in the family or household; dangerous conduct or threats by someone in the environment or neighborhood; whether the parents, guardian, or custodian cannot protect the child; and danger to the health or welfare of the child for which additional supervision is required short of secure custody. For a child without parental supervision, the court may find inability to care for self based on age, adequacy, length of and adjustment to current living arrangements, and any evidence or likelihood of serious harm resulting from current arrangements.

[24] Space availability can be determined from JM-15 personnel, or a DYRS representative. Counsel can check with the courtroom clerk or PDS ORD staff for current contact information.

[25] *See* Chapter 4, *The Preliminary Hearing*.

already been a probable cause determination on the substantive charge or the judge conducts a probable cause hearing and finds probable cause. *In re S.J.*, 686 A.2d 1024 (D.C. 1996).[26]

A. Custody Orders

If the child was arrested pursuant to a pre-petition custody order,[27] counsel must obtain a copy of the supporting affidavit from the court jacket. Typically, copies of the affidavit are in the court jacket by the time of petitioning, and counsel is given a copy with the petition before the hearing.[28] If the court holds a probable cause hearing, the officer may adopt the facts in the affidavit for his or her testimony. Counsel must read the affidavit before beginning cross-examination.

When a child fails to appear for a court date, a custody order will typically be issued. A custody order is the equivalent of a bench warrant in the adult system. In juvenile court, however, failure to appear is *not* a crime with which a child may be charged and for which a child may be detained. A child cannot be held on a custody order alone, because it is essentially only a showing that a child has violated a condition of release, i.e., not appearing for court. Moreover, a child may be detained only when probable cause has been found with respect to the charge in the underlying petition, not probable cause to believe that the child did not appear. *See* D.C. Code § 16-2312(e), (f).

If detention is requested when a child is returned on a custody order – based on the custody order alone – counsel should argue, as stated above, that a child can be detained only when probable cause has been found with respect to the charge in the underlying petition. *See* § 16-2312(e). Because failure to appear is not a crime in juvenile court, a child cannot be detained without a finding of probable cause on the charge in the petition. The child must appear in front of the judge who signed the custody order in order to have the custody order quashed. Unfortunately, if that judge is not sitting, the child is likely to be detained until he or she can appear in the front of the judge. If this is going to be longer than one night, counsel should argue that, given § 16-2312(e), this is an unconstitutional restraint on the child's liberty and that either (1) the child should be released pending appearance before the judge who signed the order or (2) another judge should quash the custody order for the issuing judge. If a child is committed and picked up

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[26] The Attorney General's office, relying on *dictum* from *S.J.*, has sought detention without live testimony where a child is returned on a custody order or where a child is violating a condition of release. Counsel should argue that any detention must be based upon evidence presented through testimony heard by the court. *See* D.C. Code § 16-2312(e); *see also In re R.D.S.*, 359 A.2d 136 (D.C. 1976). Moreover, counsel should also argue that *S.J.* does not provide authority to detain children with *Gerstein* affidavits. The Court of Appeals expressed "no view whether the court would be authorized to order the detention of a juvenile for a shorter period, or whether some substitute for a probable cause evidentiary hearing such as an affidavit…would suffice," *S.J.*, 686 A.2d at 1026. The Court specifically refrained from authorizing the government to detain juveniles with a *Gerstein* affidavit only. Moreover, in contrast to the juvenile court rules, Super. Ct. Crim. R. 5(c), the adult counterpart, explicitly allows for the court to make a probable cause determination at an initial appearance without conducting a hearing.

[27] A custody order, similar to an adult arrest warrant, may be issued when a judge has determined, on the basis of a sworn affidavit, that there is probable cause to believe a child has committed an offense. D.C.Code §16-2306; Super. Ct. Juv. R. 9(4).

[28] A copy of the Affidavit in Support of a Custody Order is usually provided with the petition before the initial hearing. If it is not provided, counsel should request it from the courtroom clerk in JM-10.

on a custody order based on absconding from a placement, the court will quash the custody order and return the child to the custody of DYRS. *See infra* Section XXIII F.

VIII. CONSENT DECREES

A consent decree is a court-approved agreement between a child alleged to be delinquent and the Attorney General's office through which the child is placed under court supervision for six months. The child enters the agreement without admitting guilt. If the supervision is successfully completed, the case is closed without an adjudication of delinquency.[29] D.C. Code § 16-2314; Super. Ct. Juv. R. 104. If the child does not comply with the conditions of the consent decree, or is rearrested on a new matter, the case will be reinstated and the child will be brought back to court. Counsel must explain the proceedings to the client and investigate the case so that potential witnesses are not lost in the event that the case is reinstated.

The Attorney General has discretion to offer a consent decree, and usually does so upon the recommendation of the probation intake worker. A consent decree should not be offered where the Attorney General knows that the offense charged is not supported by available evidence sufficient to establish a *prima facie* showing of guilt.

Counsel can request the current guidelines for eligibility for a Consent Decree from CSS and OAG intake staff. The OAG determines eligibility independent of Court Social Services, but will often approve a consent decree if approved by Court Social Services. If necessary, the prosecutor can re-petition the case to a lesser offense so that it fits within the guidelines.

If the child is petitioned on a new charge, or violates the consent decree, the petition can be reinstated. D.C. Code § 16-2314(c); *see In re C.Y.*, 466 A.2d 421 (D.C. 1983). The client should be fully informed of the consequences of failure to comply with all the conditions.

IX. DIVERSION

Diversion refers to any program that will ultimately divert the youth out of the juvenile justice system. The probation intake workers can familiarize counsel with the various diversion programs. Prior to petitioning the case, probation may offer the youth a chance to enter a program to avoid the case entering the system. To participate in pre-petition diversion, youth are required to waive their right to counsel.

Diversion also may be offered to certain youth as an option after the case has been petitioned. The probation intake worker screens for eligibility. Children who do not successfully complete program obligations are returned to the court system. If a child is rearrested while participating in the program, the charge is likely to be reinstated. Successful completion of the program, which averages six months, results in dismissal of the charges by the government.

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[29] A consent decree may contain any term or condition that could be imposed in an order of probation. Super. Ct. Juv. R. 104(a). The court may extend the term of supervision beyond six months. Counsel and the client should report to room 4206 (Probation Intake) after the hearing at which the consent decree is signed. The child will be assigned to a probation field unit close to home.

Counsel can also try to negotiate with the OAG to fashion creative dispositions that meet the needs of the child and the community. For example, the child might do volunteer work or pay restitution to the complainant in exchange for dismissal.

X. MENTAL HEALTH AND PHYSICAL EXAMINATIONS

On motion of the Assistant Attorney General, counsel for the child, or its own motion, the judge may order a child to be examined to aid in determining his physical or mental condition. D.C. Code § 16-2315(a). Whenever possible, a physical or mental examination is to be done on an outpatient basis. The judge may, if it deems necessary, order the child to be admitted as an inpatient to a suitable medical facility for the purpose of examination. The judge may, however, only order a child to a facility for a mental health examination after a psychiatrist or qualified psychologist examines the child and makes a written finding that an inpatient examination is necessary.[30] The court can order an inpatient evaluation for up to 21 days. That period may be extended for an additional 21 days if the psychiatrist or qualified psychologist certifies that a mental health examination has not been completed and cannot be effectively provided on an outpatient basis. § 16-2315(a), (b). Counsel should note that these procedures do not apply if the child is subject to the emergency hospitalization provisions of D.C. Code § 21-521.

A request for a mental health examination may be made for a number of reasons at the initial hearing stage. If the government or court believes the youth may not be competent to stand trial, a request for a forensic screening may be made. The initial hearing will be put off until the late afternoon and a psychiatrist will screen the child. If the psychiatrist finds the child is in need of a further evaluation on an inpatient basis, he or she will recommend the youth be held at a psychiatric hospital for further evaluation. There is no state psychiatric in-patient facility for children, thus the child would be placed at a private facility such as the Psychiatric Institute of Washington. Counsel should be familiar with the options currently available. If the child is detained, the court must conduct a probable cause hearing.

If, as a result of the competency evaluation, the judge finds that the child is incompetent to proceed and *unlikely* to attain competence in the reasonably foreseeable future, the judge must suspend further proceedings and the OAG must, if appropriate, initiate civil commitment proceedings under Chapter 5 or 11 of Title 21. § 16-2315(c)(1). If the judge finds that the child is presently incompetent to proceed, but is *likely* to attain competence in the reasonably foreseeable future, the judge must order that the child receive treatment to render him competent. § 16-2315(c)(2)(A). This treatment must be outpatient, unless a psychiatrist or qualified psychologist certifies (and a judge finds) that inpatient hospitalization is the least restrictive setting in which the treatment can be provided. *Id.* If hospitalization is unwarranted, the child may be released or ordered into shelter care or secure detention under § 16-2310. § 16-2315(c)(2)(B). If a child becomes competent or no longer requires hospitalization, the psychiatrist or qualified psychologist shall send a report stating so to the judge. § 16-2315(c)(4). Any child ordered into a hospital, detention, or shelter care while receiving treatment can be held only up to 180 days, with a possible extension of up to 180 days under certain circumstances.

[30] The court will call the forensic screening division within the courthouse and have a psychiatrist examine the child at the courthouse.

After 360 days, any further necessary treatment can only be on an outpatient basis. § 16-2315(c)(7)(A). If at any time the judge determines the child is unlikely to attain competence in the reasonably foreseeable future, the judge must suspend further proceedings and the OAG must, if appropriate, initiate civil commitment proceedings under Chapter 5 or 11 of Title 21. § 16-2315(c)(8).

In considering whether to raise the competence of a juvenile client to stand trial, counsel should use extreme caution and remember that the consequences of a competency hearing can often be worse than the consequences of a delinquency case. For example, a child with a shoplifting case who is a good candidate for probation might be through the system in a matter of a few months, but if her competency is put at issue, the case could be delayed for years.

The OAG may request forensic examinations for reasons other than competency purposes. If the request is made at the initial hearing stage and competency is not an issue, counsel should object and invoke his or her client's Fifth Amendment rights. If the issue is treatment considerations for the youth, the determination is not appropriately made until after a finding of guilt.

Juveniles are not entitled to raise an insanity defense. *In re C.W.M.*, 407 A.2d 617 (D.C. 1979). Moreover, the purpose of a pretrial mental examination is to determine not the mental state as it relates to criminal responsibility, but competence to participate in the proceedings. D.C. Code § 16-2315(c)(1).[31] At the initial hearing, counsel can ask the court to preclude the government from using any information derived or produced from the mental examination or forensic screening at any time, including disposition. It may be in the respondent's interest to undergo in-patient examination at PIW (Psychiatric Institute of Washington), particularly if the alternative is detention at YSC. Before requesting a pre-adjudication examination, counsel should consider the client's desires and competence to make such a decision. If the screening psychiatrist recommends in-patient evaluation, the respondent is transported to a hospital and a status hearing is set. If the client may have been abused, it may be more appropriate to request that the Child Protection Unit do the evaluation at Children's Hospital.

The Omnibus Juvenile Justice Act of 2004 also created a provision for the HIV/AIDS testing of a juvenile defendant. If a judge finds that there is probable cause to believe that a victim or eyewitness has been put at risk for the HIV/AIDS virus as a result of witnessing or being the victim of the delinquent act alleged to have been committed by the respondent, the judge must order the respondent to be tested. The results of that testing are provided to the OAG or a designee, who will then disclose the results to the respondent and the victim or witness. § 16-2315(f).

XI. RUNAWAYS AND THE INTERSTATE COMPACT ON JUVENILES

The Interstate Compact on Juveniles governs any transfer of juveniles between states. D.C. Code §§ 24-1101 *et seq*. This statute applies to children who are runaways from home or

[31] The competence standard set forth in *Dusky v. United States*, 362 U.S. 402 (1960), applies in juvenile delinquency proceedings. *W.A.F.*, 573 A.2d 1264 (D.C. 1990).

institutions in other states. It also covers youth who are sent out of state for placement and supervision.

As in adult court, the only challenge at an extradition hearing (sometimes called a "fugitive from justice" hearing or "fugitive from parent") is to the identity of the individual. Thus, an extradition hearing may merely delay the inevitable. If the runaway child wants to return home voluntarily, the prosecutor has a form for voluntary return and the court issues a standard order. Transportation arrangements should be made by counsel in conjunction with the Interstate Compact Office. If the child wishes to resist return, extradition proceedings under the Compact should be demanded. For more information, *see* Kimberly J. Winbush, *Validity, Construction, and Application of Juvenile Escape Statutes*, 46 A.L.R.5th 523 (1999); Phillip E. Hassman, *Extradition of Juveniles*, 73 A.L.R.3d 700 (1998).

XII. STATUS OFFENDERS OR PERSONS IN NEED OF SUPERVISION (PINS)

Counsel should determine if there is a diversion program available for a child charged with a status offense, or if the conduct of the parents would warrant a neglect matter rather than a PINS petition. An alleged PINS may not be securely detained unless detention is necessary to protect the child. Super. Ct. Juv. R. 106(a)(7); *see also* R. 106(a)(3). This limitation is consistent with the statutory provision that, even if adjudicated, a person in need of supervision may not be committed to secure detention facilities provided for delinquent youths, such as New Beginnings, unless the respondent has a prior PINS adjudication. D.C. Code § 16-2320(d). *But see In re W.L.*, 603 A.2d 839 (D.C. 1991) (not reversible error for child in need of services to be placed at receiving home because child was segregated from general population of detained youth).

XIII. DRUG COURT

Juveniles charged with non-violent offenses may be eligible for the Superior Court Juvenile Drug Court Program. Youth can be referred for a screening for eligibility at the initial hearing stage or at a probation revocation hearing. Counsel should contact a drug court treatment supervisor (202) 508-1788 for current eligibility requirements, programming information, and sanction guidelines. A preliminary screening indicating drug treatment is warranted will be followed by a referral for a more in-depth screening test. If the drug court supervisor determines that the child is appropriate for drug court, a referral is then made to the AAG assigned to drug court (202) 727-3500 to determine whether the charge makes the child ineligible. Participation in drug court requires youth to complete a rigorous program that includes many hours of court hearings, therapy sessions, and treatment-related activities. One juvenile calendar judge is assigned to drug court and that judge receives frequent reports on the progress of the youth in the program. Drug court reviews are held regularly, and sanctions are imposed for non-compliance. Sanctions can include periods of incarceration at YSC.

Counsel must be familiar with current drug court practice and procedures so that he or she can explain carefully to the youth the expectations of the drug court program and the sanctions for non-compliance. Counsel must carefully review the required written waivers and explain the non-confidential nature of the process to the youth and his or her parents.

XIV. PROSECUTION OF JUVENILES IN ADULT COURT

Two mechanisms allow for prosecution of juveniles in adult criminal court. First, the U.S. Attorney has discretion to charge anyone at least 16 years old who is charged with one of the statutorily-enumerated offenses.[32] *See United States v. Bland*, 472 F.2d 1329 (D.C. Cir. 1972) (upholding executive discretion against constitutional attack). Counsel's only recourse is to try to persuade the prosecutor not to assume jurisdiction over the client and refer the case back to the Family Court. *See Montgomery v. United States*, 521 A.2d 1150 (D.C. 1987).

The second method is judicial transfer, which is only available if the child was at least 15 at the time of the alleged offense and the offense is a felony; at least 16 and already committed as a delinquent; at least 18 and allegedly committed a delinquent act before becoming 18; or charged with having a firearm within 1,000 feet of a D.C. public school building, property, or event. D.C. Code § 16-2307(a). The Attorney General's Office has 21 days after the filing of the petition to move for transfer. The burden is on the government to show that the transfer is: (1) "in the interest of the public welfare and protection of the public security *and* (2) there are no reasonable prospects for rehabilitation." § 16-2307(d)(2) (emphasis added). There is a rebuttable presumption that transfer is in the interest of public welfare and the protection of public security for a child 15 through 18 who has been charged with murder, forcible rape, first-degree burglary, robbery while armed, or assault with intent to commit any such offense. This presumption applies only to the first prong of the test, namely whether the transfer is in the interest of the public welfare and protection of public security. The statute enumerates the factors the court shall consider in determining whether a child has reasonable prospects for rehabilitation. § 16-2307(e)(1)-(6).[33]

A juvenile contesting the transfer of a delinquency case is entitled to a hearing, counsel, access by counsel to the juvenile's social and other relevant records, and a statement of reasons for the ruling juvenile court's decision that is sufficient to permit meaningful scrutiny by a reviewing

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[32] The term "child," for the purposes of treatment in the juvenile justice system, excludes anyone who is at least 16 years old and charged by the U.S. Attorney with murder, forcible rape, first-degree burglary, armed robbery, or assault with intent to commit any of these offenses. D.C. Code § 16-2301(3); *see United States v. Hobbs*, 594 A.2d 66 (D.C. 1991). Other charges joinable with the enumerated offenses will also be brought in criminal court, as will any charges based on acts allegedly committed while the criminal charges were pending. Conviction on a lesser charge included within one of the enumerated charges does not return the person to "child" status. Acquittal on an enumerated charge, even if it is the charge that authorized the prosecution of a juvenile as an adult, does not terminate the jurisdiction of the Criminal Division. *Partlow v. United States*, 673 A.2d 642 (D.C. 1996). In *Partlow*, a juvenile was prosecuted as an adult on a charge of assault with intent to murder while armed [AWIMWA] and related charges. The jury acquitted the appellant of AWIMWA but was unable to reach verdict on the remaining charges. The court declared a mistrial and appellant moved to have his case transferred back to the Family Division, arguing that the acquittal removed him from the jurisdiction of the Criminal Division. The court denied appellant's motion. The Court of Appeals affirmed the denial, holding that the acquittal did not deprive the Criminal Division of jurisdiction. The court reasoned that just as a mistrial resulting from a hung jury would not terminate jeopardy, neither did it terminate the pendency of the "charge" within the meaning of the Title 16 transfer statute. Rather, the "charge" remains alive as long as any portion of it is not finally resolved.

[33] The law omits the nature of past treatment efforts, but requires the court to consider the child's response to past treatment efforts, including whether the child has absconded from custody. Counsel may argue that the quality and quantity of past treatment efforts remain an inherently relevant fact in determining the child's prospects for rehabilitation.

court. *In re W.T.L.*, 656 A.2d 1123, 1130 (D.C. 1995). A probable cause determination as a predicate to transfer is not required. *Id*. at 1132 (Due Process challenge based upon this issue denied). Once the OAG has moved to transfer the case, a hearing must be held within 30 days, with one 30-day extension possible if good cause is shown. § 16-2307(d)(1)(A).

Children transferred to adult court face all the penalties available under the criminal code and will receive none of the rehabilitative services available in the juvenile system. Thus, the transfer hearing is critical, and counsel must be thoroughly prepared. Counsel should copy the child's social file and previous court jackets (including PINS and neglect cases); subpoena all institutional records; retain at least one expert to testify to the child's amenability to treatment; and consult a social worker to thoroughly investigate the child's social background and assist in locating appropriate treatment placements in the juvenile system.[34] At least three days before the transfer hearing, counsel should submit a written opposition to the government's motion with a proposed treatment plan, explaining how and why the child can be rehabilitated in the juvenile system. *See* Super. Ct. Juv. R. 109.

Transfer under either mechanism terminates the jurisdiction of the Family Court over the child with respect to any subsequent acts unless two conditions are met:

> (1) the criminal prosecution is terminated other than by a plea of guilty, a verdict of guilty, or a verdict of not guilty by reason of insanity, and (2) at the time of the termination of the criminal prosecution no indictment or information has been filed for criminal prosecution for an offense alleged to have been committed by the child subsequent to transfer.

D.C. Code § 16-2307(h); *see In re C.S.*, 384 A.2d 407 (D.C. 1977). For the purpose of determining a "subsequent delinquent act," a person's status as a "child" is determined by reference to the date on which the charge is filed, not the date of the offense. *In re M.R.*, 525 A.2d 614 (D.C. 1987).

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***James v. United States*, 59 A.3d 1233 (D.C. 2013).** See, *supra*, Chapter 10.

[34] The Offender Rehabilitation Division (ORD) of PDS may be available to assist counsel (202) 628-1200.

Follow-up Client Interview:

Counsel should make every effort to arrange for a follow-up meeting with the client within 48 hours of appointment to a case.

Counsel should gather additional information relevant to preparation of the defense, including:

- ✓ The facts surrounding the allegations against or affecting the client;
- ✓ Any possible witnesses who should be located;
- ✓ Information about how the client was treated in the custody of police or other investigative agencies, juvenile or mental health departments or the prosecution;
- ✓ Information relevant to potential motions issues;
- ✓ Evidence that should be preserved;
- ✓ Evidence of the client's competence to stand trial or mental state at the time of the offense, where appropriate;
- ✓ The client's physical and mental health, and education records; and
- ✓ The client's past juvenile record, if any, including arrests in this and other jurisdictions; whether the client has any pending charges or is on probation; the history of the client's compliance with orders to appear in court; and the client's past or present performance under supervision.

XV. MOTIONS

In juvenile court, just as in adult court, counsel must carefully consider what motions should be filed in every case. The substantive law applicable in criminal court generally applies to delinquency cases. In addition, counsel must be familiar with motions unique to juvenile court, such as motions to dismiss pursuant to Super. Ct. Juv. R. 48 (b) and motions to reduce the level of detention pursuant to Super. Ct. Juv. R. 107.

Super. Ct. Juv. R. 12 and 47-I require that motions be filed within ten days of the status hearing; most judges set motions deadlines at the first status hearing. Counsel should check with the judge's law clerk to determine current practices. Motions are generally heard by the assigned judge on the day of trial. Because the judge is also the fact-finder, recusal may be appropriate if information learned or credibility determinations made during the hearing warrants a request for recusal.

Many family court judges will incorporate admissible testimony from a motion hearing into the trial so that a witness does not have to repeat the same facts twice. Counsel should be mindful of several issues when faced with incorporation: first, incorporation does not mean that there should not be a separate motions hearing, with a ruling on the motion before opening statements in the trial; second, hearsay objections must be made in order to preserve the issues for appellate review of the trial, despite the admissibility of hearsay at the motion; and finally, that incorporation may not be feasible in all cases, including for example a case in which the client is

excused during the identification portion of the motion hearing but wants to exercise his right to be present during all trial testimony.

The Jencks Act, 18 U.S.C. § 3500, requires that the government turn over to the defense any statement of a government witness that relates to the substance of the witness's testimony. This is an effective tool for defense counsel to obtain prior statements for cross-examination or, if not produced, for seeking sanctions against the government. Reverse-*Jencks*, the obligation of defense counsel to provide prior statements of defense witnesses, applies in juvenile court. See Super. Ct. Juv. R. 26.2. The government is entitled, upon request, to prior statements taken from defense witnesses called at a hearing or trial.[35]

A. Suppression of Evidence or Statements

Unreasonable search and seizure issues raised by the Fourth Amendment are complex. Counsel should refer to Chapters 20, 21, and 22 for the general principles of law relating to suppression claims, and for a comprehensive examination of the law as it relates to juvenile court practice, counsel should review Chapter 23, *Trial Manual for Defense Attorneys in Juvenile Court*, Randy Hertz, Martin Guggenheim, & Anthony G. Amsterdam (Philadelphia, PA: ALI-ABA, 2008).[36]

The totality of the circumstances standard is the same for juveniles as for adults; however, in reviewing the voluntariness of any statements or purported *Miranda* waivers by a juvenile, relevant issues include age-specific factors. In voluntariness determinations, "the burden is on the government to prove by a preponderance of the evidence that a defendant's statements were made 'freely, voluntarily, and without compulsion or inducement or any sort.'" *In re J.F.*, 987 A.2d 1168 (D.C. 2010) (*internal citations omitted*). The child's individual characteristics, which indicated susceptibility to coercion, required the court "to more carefully scrutinize the police interrogative tactics." *Id.* at 7. In *J.F.*, the court found the child's statement to be involuntary and took into consideration the child's prior experience with the criminal justice system, his vulnerable mental condition, the length of interrogation, and the fact that no adult was present at the interrogation. *Id.* at 8. An involuntary statement is inadmissible at trial for any purpose.

When the child challenges the admission of a statement on *Miranda* grounds, the government must prove by a preponderance of the evidence that the police complied with the warning requirements of *Miranda* if the child was in custody at the time of the interrogation.[37] "Custody for *Miranda* purposes, is present when there has been a formal arrest or restraint of movement of the degree associated with a formal arrest…Thus custody requires an inquiry into whether given [the] circumstances,[] a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." *Id.* at 5. (citation omitted). In *J.F.*, the court held that although the child was not in custody during the first part of the interrogation, the interview

[35] If investigators testify, statements may be producible under *United States v. Nobles*, 422 U.S. 225 (1975), discussed *supra* Chapter 2, n.1.

[36] *See also Defending Clients Who Have Been Searched And Interrogated at School, A Guide for Juvenile Defenders*, The National Juvenile Defender Center (2009), www.njdc.info.

[37] *See* Chapter 24, *Trial Manual for Defense Attorneys in Juvenile Court*, Randy Hertz, Martin Guggenheim, & Anthony G. Amsterdam (Philadelphia, PA: ALI-ABA, 2008).

became custodial during the course of the interrogation and *Miranda* warnings were required.[38] The court noted the change in the attitude and language of the police officer.

In order to use statements made during the course of custodial interrogation, the government must prove the child knowingly, voluntarily, and intelligently waived his or her *Miranda* rights. Counsel for juvenile respondents must carefully consider factors relating to the client's cognitive abilities and educational level when considering a basis for a motion to suppress statements. Counsel should obtain the child's school records, particularly the special education records, and carefully review the child's previous contacts with law enforcement officers. Counsel must consider in every case whether or not an expert in child development would assist counsel in determining the child's level of understanding.

B. Severance

If it appears that a respondent is prejudiced by a joinder of offenses or respondents, the Division may grant a severance of respondents or provide whatever relief justice requires. Super. Ct. Juv. R. 14. Although the prejudice from improper joinder may be somewhat less where a judge sits as the trier of fact, the juvenile provisions recognize the possibility of prejudice if inadmissible information comes to the attention of the court. *Cf.* D.C. Code § 16-2312(j) (judge who conducted detention or shelter care hearing cannot conduct fact-finding hearing on the same petition over the objection of the child or the parent).[39]

C. Motions to Reduce the Level of Detention

Court orders for secure detention, shelter care placement, or release on conditions may be modified upon application for reconsideration or modification, or may be appealed. A written motion to reconsider may be filed at any time with the judge who entered the order. A written decision and statement of reasons are to be rendered within five days of filing. Super. Ct. Juv. R. 107(c).[40]

A motion to modify or reduce the level of detention is appropriately filed in all cases where a youth is detained. Counsel should ask that the court hold a hearing on the motion in every case. A hearing allows the youth to participate in the proceedings and hear from the judge the requirements of release or the reasons for continued detention. Counsel should include information about conditions that have changed since the initial order was entered and information that counsel was not able to verify before the initial hearing that might have a

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[38] *See also In re I.J.* 906 A.2d 249 (D.C. 2006) (child in custody while interrogated by police in youth shelter house). *But see In re J.H.* 928 A.2d 643 (D.C. 2007) (court found that child was not in custody while interrogated in a school conference room).

[39] *See generally infra* Chapter 19; *Bruton v. United States*, 391 U.S. 123 (1968) (requires severance when the out-of-court statement of a non-testifying defendant is introduced and implicates a co-defendant, does not necessarily apply to non-jury trials); *In re L.J.W.*, 370 A.2d 1333 (D.C. 1977) (concluded that the judge could perform the necessary "mental gymnastics" although a jury could not). *But see Banks v. United States*, 516 A.2d 524 (D.C. 1986) (preferable procedure is for judge who rejected plea to certify case to another judge for trial).

[40] If the judge who entered the detention order is no longer in the family court, the New Referrals judge rules on the motion to reconsider. R. 107(c).

positive impact on the detention decision. If parents were not present at the initial hearing, counsel should indicate that the parents could not be reached in time for the initial hearing, but that they would be available for a hearing on the motion. Even if no new information is available since the initial detention decision, counsel may be able to report favorably on the child's progress in secure detention. Moreover, the judge may simply reconsider the original decision in light of the fact that the child has spent some time incarcerated since the arrest. Two or three days at a maximum-security facility with older adjudicated boys can have a significant impact on a detained youth. Counsel should also refer the youth to third party custody programs to offer an alternative to detention to the court.

D. An Increase in the Level of Detention

Counsel should be aware that occasionally the court may seek to enforce provisions of orders in other cases involving the same child by ordering detention at the initial hearing, on the theory that the new arrest violates probation or conditions of release. However, the initial hearing judge arguably lacks the legal authority to determine and respond to violations of other orders. There is no power to hold a child in contempt of court unless "the judge certifies that he saw or heard the conduct constituting the contempt and . . . it was committed in the actual presence of the Court." Super. Ct. Juv. R. 42(a). Due Process requires, at a minimum, notice of a hearing and of the alleged violations before deprivation of liberty may result from non-compliance with judicial orders. *See, e.g.*, *Gagnon v. Scarpelli*, 411 U.S. 778 (1973) (probation revocation); *Morrissey v. Brewer*, 408 U.S. 471 (1972) (parole revocation). Adult criminal defendants on release cannot be held in contempt for an arrest alone. *Parker v. United States*, 373 A.2d 906 (D.C. 1977).

The government may seek to increase the level of detention; however, the government is required to file a motion and state the reasons for the request. Super. Ct. Juv. R. 107(c). Counsel is entitled to notice and an opportunity to prepare for a hearing on the motion.

E. Review of Magistrate Judge's Detention Decisions

Rule 107(d) provides for a review of a magistrate judge's (formerly known as hearing commissioner) detention decision. Counsel must make the request for review to a judge designated by the presiding judge of the family court within twenty-four hours. The time taken for review may be extended for no more than an additional twenty-four hours (excluding Saturdays, Sundays, and legal holidays). An extension requires good cause and notice to all parties. No written motions or oppositions are required under R. 107(d).

F. Holiday and Temporary Release

Children who are detained may request temporary release for holidays, interviews with programs, funerals, or other community activities. The calendar judge is the recipient of motions for temporary release.[41] The presiding judge of the family court establishes deadlines and other procedures for holiday motions.[42]

[41] The motion may be heard by the presiding judge of the family court.

[42] DYRS staff at YSC may recommend youth for home visits. While inclusion on their list may increase the likelihood that the court will rule favorably on the motion, counsel should file holiday motions for all their detained

G. Expedited Appeal Process

An expedited appeal may be taken from a ruling on detention by filing a notice of appeal within two days after the order is entered. D.C. Code § 16-2328(a). The Court of Appeals must hear argument within three days (except Sundays) after the notice is filed and must render its decision by the day after argument. § 16-2328(b). Expedited appeal may also be taken from denial of a motion to reconsider. A non-expedited appeal may be taken from any order of pretrial detention or conditional release without complying with the two-day requirement. *In re M.L. DeJ.*, 310 A.2d 834, 835 (D.C. 1973).

Deciding whether to apply for reconsideration or to appeal requires a balancing of interests. On the one hand, an expedited appeal produces a decision within four days of filing the notice. On the other hand, the respondent bears the heavy burden of demonstrating that "the merits of his claim . . . clearly warrant relief." *Id*. at 836. The court has encouraged litigants to seek reconsideration before pursuing an appeal. *In re R.D.S.*, 359 A.2d 136, 138 (D.C. 1976). The decision may be assisted by knowledge of the practice of the particular judge. Some judges initially detain significant numbers of children and then frequently grant motions to reconsider. If the detention order was entered because certain information was unknown or unverifiable at the initial hearing, reconsideration is probably the appropriate route. On the other hand, if the order involved rejection of a legal argument, the question may appropriately be placed before the Court of Appeals.

H. Dismissal in the Interest of Justice: 48(b) motion

Super. Ct. Juv. R. 48(b) is unique to juvenile court. Motions made pursuant to this rule are sometimes referred to as motions to dismiss for social reasons or in the interest of justice. In every delinquency matter, the judge is obliged to consider whether the child is in need of care or rehabilitation. If not, the judge must discharge the child from the jurisdiction of the court. D.C. Code §§ 16-2301(6), 2317(d). The determination of whether a child is in need of care and rehabilitation may only be made at or after the dispositional hearing, unless the judge has found the respondent incompetent to proceed. § 16-2317(d)(2). The motion requires the court to decide, even if the juvenile committed an offense, whether it is in the interests of justice to continue the delinquency proceedings, *In re M.C.F.*, 293 A.2d 874 (D.C. 1972); however, there is a rebuttable presumption that a delinquency adjudication is sufficient to sustain a finding of need for care or rehabilitation. § 16-2317(c)(2). To overcome that presumption, the judge must find by clear and convincing evidence that the child is not in need of care or rehabilitation before terminating the proceedings. § 16-2317(d)(3). If possible, counsel should present the testimony of witnesses at a hearing on the motion. A motion that is denied at one stage of the proceedings may be reconsidered and granted at another stage.

A motion to dismiss may be filed in any case and for any client. The reasoning given to the court will depend upon the circumstances of each client. If the child is a first offender, has excellent social factors, and is receiving adequate support at home and in the community, he is

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clients regardless of the facility's position on the motion. Counsel should request a hearing on the motion and provide his or her client with a copy of the motion.

not in need of care and rehabilitation in the delinquency system. After arrest, a child may voluntarily enter a community program that provides care and rehabilitation. Thus, the child would not need care and rehabilitation in the system. If the child is already committed to DYRS in another delinquency case, he will receive care and rehabilitation in that case; another conviction simply to create a record is punitive. If the child is in the neglect system, the child is eligible for more appropriate and often better care and rehabilitative services under the neglect case than the delinquency case, and the delinquency case should be closed. *See* Super. Ct. Juv. R. 2. Be aware, however, that the fact that a child is receiving care and rehabilitation in another case cannot be the only grounds for dismissal. § 16-2317(d)(4). If the client's problem has been the school system's inability to meet his special education needs, counsel should obtain those services and then seek dismissal because the client is receiving the necessary educational services and is not in need of further care or rehabilitation. Finally, if the client has an adult case pending, or has been convicted in adult court or in another jurisdiction, further care and rehabilitation within the juvenile system may no longer be appropriate.[43] Judges must consider victim impact statements if submitted in making a determination. § 16-2317(d)(5).

XVI. INVESTIGATION AND DISCOVERY

Counsel must meet with the client the day after the initial hearing, or as soon thereafter as possible, to conduct a confidential, in depth interview. Counsel should explain to the child that the conversation is private and that counsel will not tell anyone what the child says. If the child is reluctant to talk, counsel should inquire about what the government says the child did and whom the government might bring to court to say the child was involved. Counsel must explain to the child that the government does not tell counsel who the witnesses are in the case and should explain that counsel will investigate the case and talk to the witnesses before the trial.

Counsel must promptly and thoroughly investigate juvenile cases, write *Rosser* letters, and file motions to compel discovery if the government does not disclose information in a timely manner.[44] In juvenile court, a discovery packet is prepared with copies of the police forms, statements by the client, a list of the physical evidence, and an indication of other discoverable material. The packet should be obtained from the Assistant Attorney General immediately after the initial hearing, before leaving court. The case may not be assigned to an AAG for up to two weeks after the initial hearing. If counsel does not obtain the discovery packet in court, counsel must ask that a supervisor in the Office of the Attorney General locate the packet. Super. Ct. Juv. R. 16 governs discovery in juvenile court and tracks the adult rule.

[43] Counsel should first seek to persuade the U.S. Attorney's Office to dismiss the adult case so that the child will remain in the juvenile system where services are available.

[44] *See generally supra* Chapter 2: Investigation; Chapter 5: Discovery.

Case Investigation:

Counsel has a duty to conduct a prompt and diligent independent case investigation regardless of the client's admissions or statements to defense counsel or others or of facts constituting guilt, or the client's stated desire to plead guilty.

Counsel should:

- ✓ View all evidence in the case, including visiting the scene(s) of the alleged offense(s), under circumstances similar to those existing at the time of the alleged incident (e.g., weather, time of day, and lighting conditions), and identify and hire experts if warranted
- ✓ Secure relevant information in the possession of the prosecution and law enforcement authorities, including: law enforcement notes (field notes); client, victim or witness records, such as school, mental health, drug and alcohol test results and criminal records, with appropriate releases and/or subpoenas; 911 tapes, inter-officer radio transmissions and dispatch reports; and civilian police officer complaints and internal affairs files, and other investigation records
- ✓ Interview potential witnesses
- ✓ Review client's records including educational, psychological, psychiatric, medical, substance abuse treatment, law enforcement, and court files; and execute necessary authorizations for releases of information

XVII. THE STATUS HEARING

The status date will be set at the initial hearing. Generally, status hearings will be scheduled within ten days of the initial hearing. Although practices vary, most judges will inquire as to the status of discovery. Some judges will set motion and opposition deadlines at the status hearing. The law clerk can advise counsel of the judge's practice. The judge generally will inquire of the government the anticipated length of a trial and set a date for the trial.

Counsel should inform the court at status whether or not discovery is complete. If the government is slow to turn over discoverable material in a timely manner, counsel will have a stronger argument for a motion to compel discovery, a motion to dismiss, or to have a continuance of the trial charged to the government if counsel raised the issues at status. Counsel should file discovery letters in the court jacket.

The government may offer a plea bargain that expires at status. In adult court, a quick plea often results in a substantial saving to the government in terms of time and effort spent in grand jury proceedings. In juvenile court, the government does not have similar considerations. Thus, the timing of the plea is generally of no consequence to the government. Counsel may not have had time to investigate the case thoroughly by the status date. Moreover, it takes several meetings with juvenile clients to establish a rapport and to advise them fully about their rights and trial proceedings. Children cannot process all of the issues involved in understanding the strength of the government's case and the rights they waive in a plea proceeding in one session with an attorney. Counsel should ask for more time for the client to consider the plea. Ultimately, and

perhaps just as importantly, because social factors are so important in juvenile court, it is often of no consequence whether or not the child pleads with respect to the disposition. **Counsel should avoid entering pleas in juvenile cases at the status hearing.**

XVIII. TRIAL AND PLEA PROCEEDINGS

Trial preparation must be undertaken in every juvenile case. Counsel cannot provide effective advice to a client until counsel has completed the investigation, discovery, and motion practice necessary for an accurate and complete assessment of the client's chances of a successful defense. Counsel should refer to *Trial Manual for Defense Attorneys in Juvenile Court*, Randy Hertz, Martin Guggenheim, & Anthony G. Amsterdam (Philadelphia, PA: ALI-ABA, 2008), and Chapters 25-33, for in depth discussions relating to trial preparation and practice.

Notices are usually sent by the clerk's office to counsel and to the client before each scheduled hearing. Counsel should, however, meet with the youth in advance of the hearing to explain the nature of the proceeding. In addition, counsel should contact the youth the day before to remind the youth of the date, time, and place for the hearing. Counsel should take particular care to make sure they have on-going communication with their clients in shelter houses and detention, and inform them of all proceedings and dates.

Counsel should contact the calendar judge's law clerk to determine the judge's courtroom procedures. Cases set for trial are generally called in the morning to determine whether or not the parties are ready to proceed to trial. Motions to continue the trial must be requested two days in advance of the trial date. Super. Ct. Gen. Fam. R. G. If the motion is unopposed, defense counsel and the AAG should sign a continuance form. The forms are available in the juvenile clerks' office. Should a last-minute continuance be necessary, counsel should seek the government's consent before the case is called. The government is also obligated to request continuances in advance of trial, and counsel should be prepared to object to a late request if the grounds were or should have been known earlier.

If the government is not ready for trial, counsel should move for dismissal for want of prosecution. If the respondent is detained and the case is continued on government request or because no judge is available, counsel should ask that the level of detention be reconsidered.[45]

A judge who presided at a detention or shelter care hearing shall be recused from a fact-finding hearing on the same charge on objection by the child, parent, guardian, or custodian. D.C. Code § 16-2312(j).[46] Similarly, § 16-2307(g) provides for recusal of the judge who presided at a transfer hearing. The statute does not provide for disqualification of a judge who granted a consent decree or heard a pretrial motion, though a similar argument can be made based upon the judge's knowledge of social information. *See supra* Section IV.

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[45] The length of detention is a primary factor the court should consider in a motion to reduce or reconsider the level of detention. *Schall v. Martin*, 467 U.S. 253, 269 (1984). Conditions of detention are also important. *Id*. at 270.

[46] The Court of Appeals has interpreted § 16-2312(j) to permit a judge to try a juvenile in an assault case even though he had held a detention hearing on a different assault charge involving the same youth three weeks earlier, admonishing, however, that the "better course" would have been recusal. *In re W.N.W.*, 343 A.2d 55, 58 (D.C. 1975).

The substantial differences between criminal and juvenile court sentencing possibilities affect considerations in determining whether the child should proceed to trial or consider a plea bargain.[47] First, unlike adult court where the possible penalty varies with the offense, the maximum sentence in juvenile court is potentially the same regardless of the charge – namely an indeterminate commitment until the child's 21st birthday. *See* D.C. Code §§ 16-2320, 2322. The sentence actually imposed is generally influenced more by the child's home environment, record and other social factors than by the adjudication itself. As a practical matter, then, it makes little difference, for example, whether in a burglary case the child is adjudicated guilty of second-degree burglary and theft I or pleads guilty to misdemeanor receiving stolen property. Counsel should carefully consider whether a plea to a lesser-included offense is beneficial.

Counsel must be familiar with, and apprise his or her client of, possible collateral consequences of a plea or adjudication at trial. The child's access to school placement options, future jobs, and military service may be limited as a result of involvement in a delinquency matter. If the child is found involved in a drug case, there may be an impact on her ability to obtain a driver's license. Moreover, juvenile adjudications can be used to increase adult sentencing guidelines. Counsel should also be aware of the future ramifications of being found involved in an offense involving a sexual assault. Counsel should contact a juvenile supervisor at PDS for more information about potential collateral consequences for specific offenses (202-628-1200).

Charging policies and the range of alternatives available in juvenile court are very different from their adult counterparts. Negotiations differ strikingly as a result. In adult court, the government will acknowledge the differences in criminal activities and sometimes exercise its discretion to bring charges according to the real seriousness of the offense. In juvenile court, because the same penalty applies to *all* charges brought, the Attorney General's Office rarely breaks down a charge. For example, the U.S. Attorney's Office will virtually never paper a case as "ADW shod foot" unless it involved stomping or serious injury; petitions in juvenile court routinely charge "ADW shod foot" based on allegations that the respondent was involved in a school-yard fight and, while wearing tennis shoes, kicked another teenager in the shins. Other assaults with relatively harmless objects, and involving no real injury, are routinely charged in criminal court as simple assault and possession of a prohibited weapon; the OAG routinely files ADW charges whether the weapon is a gun, a board, a stick, or a pencil. Even more serious charges such as robbery are sometimes broken down in criminal court based on the defendant's lack of any criminal record or relationship with the complainant; generally, the OAG will file the most serious charges available.

The charge filed at papering in a juvenile case thus sets the starting point for negotiations at a much different place. Because the charge is usually a felony rather than the misdemeanors that would be filed in adult court, the "ante" is automatically higher at the time of papering. Routine filing of felony charges against first offenders makes many children ineligible for a consent decree unless the prosecutor is willing to reduce the charge, forcing the respondent to plead guilty or go to trial.

[47] *See supra* Chapter 6 on plea-bargaining in criminal cases.

The rehabilitative goal of the juvenile system often means that the focus of plea-bargaining is not primarily on charge reduction, but instead on dispositional alternatives. To illustrate, a child who wants residential placement and is charged with armed robbery might be able to negotiate a plea to taking property without right because of potential weaknesses in the government's case. However, plea-bargaining should not end there. Counsel should attempt to secure an agreement that the government will not oppose residential placement in general or, if the child wishes, a short period of commitment, such as an indeterminate commitment not to exceed 2 years.

Even though respondents who plea bargain in juvenile court often end up with adjudications for much more serious offenses than their first-offender counterparts in the adult criminal system, important benefits may be gained through a plea that may make it preferable to a trial.[48] Other pending cases may be dismissed, thereby limiting for future reference the record of adjudications; the government may waive its rights to request detention pending disposition and to allocute at disposition, important concessions if there is a real risk of incarceration; the parties may bargain to have the case retained in juvenile court rather than referring it for prosecution in adult criminal court; the judge taking pleas may be more lenient than the possible trial judge;[49] the government may agree to limit its proffer as to what facts it would prove at trial; or the government may support a particular special placement, or at least agree not to oppose that placement.

On the other hand, pleading guilty to a felony charge in juvenile court may make a substantial difference in later adult cases because juvenile records may be considered in setting conditions of release and in sentencing in future adult cases. Counsel should review Chapter 35 regarding plea considerations in sex offense cases.

XIX. SOCIAL HISTORY

Counsel should discuss with the client and the client's parent as soon as possible after arrest the child's social history. Social factors are as important as the legal aspects of the case because the purported orientation of juvenile court is toward providing care and rehabilitation. With the client's permission, counsel may use various assessments to help determine any special needs.[50] The information may be helpful in finding appropriate services outside of the juvenile court system, in which case counsel should file a Motion to Dismiss for Social Reasons. *See* Super. Ct. Juv. R. 48(b). Also, psychiatric, psychological, and medical assessments or evaluations are relevant to the determination of whether a child is appropriate for placement in a residential program.

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[48] The written plea form used in juvenile court provides a space for recording the charge to which the plea is entered. Counsel should also write on that form all other details of the plea agreement, such as the government's agreement to waive allocution, so that disputes will not later arise concerning the exact contours of the plea agreement.

[49] After a trial, the trial judge must retain the case for disposition. Super. Ct. Juv. R. 25(b). Under family court policy, the judge who accepts a guilty plea usually retains the case for disposition.

[50] There are numerous assessments that can be requested on behalf of a client. Although the findings of these assessments sometimes overlap, the testing and evaluation that leads to the findings are quite different from each other.

The timing of the scheduling of the requisite evaluations is a strategic decision that counsel should make on a case-by-case basis. While it is often important to begin as early as possible to request evaluations to avoid a delay if the case goes to the disposition stage, counsel should be aware that the results of some evaluations done through the court system will be made available to the court and other relevant parties. If evaluations are done pretrial, counsel must make sure the client does not discuss the pending allegations. Post-adjudication evaluations are often more meaningful because they can take into account the adjudicated offense. For this reason, counsel may want to delay a request for certain evaluations. Counsel for an indigent respondent can apply to the court *ex parte* for expert services to be compensated from funds allocated to the CJA program.

Counsel should request school records for all clients soon after picking up the case. Counsel can obtain records by sending a subpoena to DCPS, Office of General Counsel, 825 North Capital Street, N.E., 9th Floor, Washington, DC 20002, (202) 442-5000, fax (202) 442-4298. Counsel should try to copy or review a client's educational file at the school with a "release of records" form. A parent's signature is required if the student is under the age of eighteen. Special education and disciplinary records are usually kept separate from the student's cumulative file.

A. Special Education

The Individuals with Disabilities Education Improvement Act (IDEIA)[51] is designed to ensure that students with a qualifying disability are provided a free appropriate public education (FAPE). The IDEIA was reauthorized in 2004 and changes took effect on July 1, 2005. The reauthorized IDEIA can be found at 20 U.S.C. 1400 *et. seq*. Implementing federal regulations can be found at 34 C.F.R. Parts 300 and 303. District of Columbia regulations can be found at 5 D.C.M.R. Chapter 30.[52]

Students are eligible for special education from age three through the end of the semester in which the student turns age twenty-two.[53] The eligible disabilities are mental retardation, hearing impairments, speech or language impairments, visual impairments, emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, specific learning disabilities, deaf-blindness, or multiple disabilities.[54]

There are a variety of school placement options in the District of Columbia including public schools and charter schools. In the District of Columbia, every student has the right to attend his or her District of Columbia Public Schools (DCPS) neighborhood school, which is assigned based on his or her address. The Office of Special Education is responsible for all special education services for students attending District of Columbia public schools. For more

[51] 20 U.S.C. § 1400 *et. seq*.

[52] Under the IDEIA, the right to receive special education services is a right of the parent, not the child. Therefore, counsel who represents the child in a juvenile matter and is pursuing special education services for the child at the same time must be wary of potential conflicts between what the parent and child want. Counsel may want to consider asking the court to appoint a special education attorney.

[53] 20 U.S.C. § 1412(a)(1)(A), 34 C.F.R. § 300.101(a), 5 D.C.M.R. § 3002.1(b).

[54] 20 U.S.C. § 1401(3)(A), 34 C.F.R. § 300.8, 5 D.C.M.R. § 3001.1.

information about special education at DCPS, counsel can contact the Office of Special Education at (202) 442-4800.

There are over fifty charter schools in the District of Columbia. A list of charter schools can be found at www.dcpubliccharter.com. Contact the school directly for application procedures. All charter schools are required to designate whether they elect to be their own Local Education Agency or DCPS Charters for special education purposes. By electing to be its own LEA Charter, the charter school assumes full legal responsibility for providing special education services as required by the IDEIA. Thus, for questions concerning special education at an LEA Charter, counsel should contact the individual charter school directly. If a charter school elects to be a DCPS charter, DCPS retains full legal responsibility for providing all special education related services to students at the charter schools. In this situation, counsel should contact DCPS Office of Special Education. Counsel may check with the charter school's principal or special education coordinator to determine if a charter school is its own LEA or is a DCPS charter.

The following are signs that a child may need to be referred for special education: difficulty with reading or understanding; poor grades or standardized tests scores; repeated retentions; severe behavioral problems at school; repeated suspensions or expulsion; poor coordination or motor control; and delayed or impaired speech. To start the special education process, the parent or guardian should send a written request for evaluations to the principal and special education coordinator at the school which the child is attending.[55] The request should include the reasons why the parent or guardian suspects the child has a disability that requires special education and related services. The parent or guardian must sign a consent form before the evaluation process can begin.[56]

Once a referral is made and before conducting evaluations, the school must hold a Multidisciplinary Team Meeting (MDT)[57] to review current and existing data about the child such as evaluations, assessments and observations and then develop a Student Evaluation Plan detailing the reasons for the referral and the evaluations to be conducted.

DC law requires the evaluations to be conducted within one hundred twenty days from the date the student was referred for an evaluation.[58] To expedite this process, counsel can request that the court order a psychological, neuropsychological or psychiatric evaluation from Youth Forensic Services and the Child Guidance Clinic. Counsel should ensure that requesting these evaluations is consistent with counsel's case strategy, and counsel should be mindful of the possible impact of these evaluations on the juvenile case. Before providing a copy of court-ordered or other outside evaluations to the school, counsel should redact any confidential, non-education-related information.

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[55] 20 U.S.C. § 1414(a)(1)(B), 34 C.F.R. §300.301(b), 5 D.C.M.R. § 3004.1(b).

[56] 20 U.S.C. §§ 1414(a) – 1414(c), 34 C.F.R. §§ 300.301-300.306, 5 D.C.M.R. § 3005.

[57] Members of the Multidisciplinary Team include the parents, teachers and qualified individuals who can interpret the results of the testing.

[58] D.C. Code § 38-2561.02.

Once the evaluations have been completed, the school district must convene a MDT meeting to review the tests and determine if the child has a disability that qualifies him or her for special education services.[59] If the child is found eligible, the team will determine the disability classification, discuss the necessary special education instruction and services the student requires and develop an Individualized Educational Program (IEP).[60]

After the initial IEP is developed, a team made up of parents, teachers and a DCPS representative knowledgeable about placement options must decide where the child will receive the services outlined in the IEP. The school placement must be the least restrictive environment that can serve the child's needs.[61]

Many of our juvenile clients will have been found eligible for special education before entering the delinquency system. The school system must evaluate these children at least once every three years and must update their IEPs at least annually.[62]

Children with disabilities who are detained either at Youth Services Center or New Beginnings Youth Development Center should still be receiving special education services while detained. Youth Services Center has a school run by District of Columbia Public Schools. The Maya Angelou Academy at New Beginnings, the school at New Beginnings, has been run by See Forever Foundations since 2007. The schools at Youth Services Center and at New Beginnings are responsible for evaluating children, convening MDT/IEP meetings and providing special education services to all eligible students at the facility. If counsel has questions regarding the school at Youth Services Center, counsel should call (202) 576-9073. To contact the Maya Angelou Academy at New Beginnings, counsel can call (202) 299-3227.

Many of the children in the delinquency system also deal with disciplinary issues while in the community. Often times the incident that leads to a suspension or expulsion from school also results in a delinquency charge. Counsel should make every attempt to attend disciplinary hearings, as they provide a good opportunity to obtain discovery. Counsel should also ensure that their clients are aware that disciplinary hearings are recorded, and thus clients should not say anything that can be used against them in another proceeding. The disciplinary regulations were updated in 2009 and can be found at 5 D.C.M.R. Chapter 25.

Special education students are entitled to further protections from disciplinary actions, including the right to a manifestation determination review after being suspended for more than ten days in a school year and the right to have expedited evaluations conducted during the period in which a child is subjected to disciplinary measures[63].

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[59] 20 U.S.C. § 1414(b)(4), 34 C.F.R. § 300.306, 5 D.C.M.R. § 3006.

[60] 20 U.S.C. § 1414(d), 34 C.F.R. § 300.302, 5 D.C.M.R. § 2009.

[61] 20 U.S.C. § 1414(e), 34 C.F.R. §§ 300.116, 300.327, 300.501(c), 300.503, 5 D.C.M.R. § 3013.

[62] 20 U.S.C. § 1414(a)(2), 34 C.F.R. § 300.303, 5 D.C.M.R. § 3005.7.

[63] 20 U.S.C. § 1415(k), 34 C.F.R. §§ 300.521-529, 5 D.C.M.R. § 2510.

XX. DUAL STATUS CHILDREN: NEGLECT AND DELINQUENCY

Many allegedly delinquent children are eligible to receive services as neglected children. If the need for a neglect investigation is indicated, and the client agrees, counsel can notify DHS Child and Family Services. Factors suggesting such a need include: (1) the child is 12 or younger; (2) the parents failed to take custody of the child after arrest, were unavailable, or failed to appear for an intake interview; (3) a troublesome home and social situation, indicated by a history of truancy, parental problems, or physical condition of the home; or (4) a history of family involvement with the delinquency or neglect system. Referrals are made based on the investigation report.

If the client has been adjudicated neglected, counsel should contact the GAL and social worker to ascertain whether the child needs the additional supervision and services of the delinquency system, and, if not, move to dismiss for social reasons. *See* Super. Ct. Juv. R. 48. It may be important to keep the neglect case open – even if the child is adjudicated delinquent – to allow continuation of services not available in the delinquency system, such as an independent living program. A delinquency adjudication may result in "expulsion" from the neglect system. Moreover, if the neglect case is closed, the delinquent will not have a viable home situation to transition to upon termination of the delinquency matter. While there are a number of independent living programs for neglected youth, only a limited number of programs take children with delinquency charges.

Counsel has an obligation to attend all neglect proceedings if her client is in the neglect system and the hearing will discuss matters relevant to the delinquency proceeding. Counsel must protect her client's 5th and 6th Amendment Rights and advocate for the client in the neglect proceeding in a manner than will further the client's objectives in the delinquency case. As noted earlier in Section III, counsel is allowed to be present at all Family Court proceedings. *See In Re Ti.B.*, 762 A.2d 20 (D.C. 2000)

XXI. THE DISPOSITION HEARING

Disposition is the term used in juvenile court for the sentencing proceeding. The date for the disposition hearing will be set after the child enters a plea or is found involved at the conclusion of his or her fact-finding hearing (trial). [64] The judge who accepted the plea or who finds the child involved during the fact finding phase will preside over the disposition hearing and all post-disposition matters.

[64] The disposition hearing may be held immediately if all parties consent and waive the preparation of a predisposition report. Super. Ct. Juv. R. 32. This consent of the parties is sometimes included as part of a plea agreement.

Social Factors:

- ✓ Counsel has an independent duty to investigate the client's circumstances, including such factors as previous history, family background and economic condition, and any other information relevant to disposition
- ✓ If helpful or necessary, counsel should seek to secure the assistance of psychiatric, psychological, medical or other expert personnel to evaluate, consult, or testify to aid the client at disposition

Super. Ct. Juv. R. 32 requires the court to schedule a disposition hearing within 15 days for a child detained at YSC or in a shelter house. However, in *In re J.B.*, 906 A.2d 866 (D.C. 2006), the court held that a disposition hearing of a detained juvenile can be continued beyond the 15 day period prescribed by the S. Ct. Juv. R. 32 to allow Court Social Services to prepare a disposition report. The court held that the language in Rule 32(a) which states that the court shall schedule a disposition hearing within 15 days of adjudication for a detained child is directory, not mandatory. However, the court noted that, "none of this is to say that the trial court may continue indefinitely the predisposition confinement of a juvenile to await the preparation of a predisposition report. Rule 32(a) serves as an important injunction to the court and the Director [Court Social Services] to avoid prolonged detention of juveniles pending disposition, especially when the end result may be a determination by the court that confinement for the offense-rather than probation- is unnecessary." Id. at 868.

The dispositional hearing is a hearing, after a finding of fact, to determine "whether the child in a delinquency or need of supervision case is in need of care or rehabilitation and, if so, what order of disposition should be made." D.C. Code § 16-2301(17)(A). The judge is required to terminate the proceedings and discharge the child from detention if the court finds that the child is not in need of care and rehabilitation. D.C. Code § 16-2317.[65] Moreover, the Family Court has authority under Super. Ct. Juv. R. 48(b) to dismiss a delinquency petition at a dispositional hearing if the court finds by clear and convincing evidence that a child who committed a delinquent act is nonetheless not in need of care and rehabilitation. The dispositional hearing is not intended to result in the imposition of any penal sanction on the child. Rather, the purpose is "to determine the treatment required to rehabilitate him." *In re C.W.M.*, 407 A.2d 617, 622 (D.C. 1979).[66]

The court's dispositional authority is set forth in D.C. Code § 16-2320. The court can permit the child to remain with a parent or guardian or other custodian subject to conditions and limitations prescribed by the court including outpatient medical or psychiatric treatment; place the child

[65] "There shall be a rebuttable presumption that a finding of the commission of an act which would constitute a criminal offense if committed by an adult is sufficient to sustain a finding of need for care or rehabilitation in delinquency and need of supervision cases." D.C. Code § 16-2317(c)(2).

[66] *In re L..J.*, 546 A.2d 429 (D.C. 1988) (while reaffirming that the District of Columbia is committed to a rehabilitative approach to juvenile justice, said that the protection of society is also a legitimate concern of the dispositional judge).

under protective supervision; transfer legal custody to a child placing agency . . . or relative or other individual qualified to receive and care for the child . . . ; commit the child for medical, psychiatric, or other treatment at an appropriate facility on an inpatient basis if confinement is necessary to the treatment of the child;[67] or terminate the parent child relationship for the purpose of seeking an adoptive placement for the child pursuant to Chapter III of Title 16. § 16-2320(c)(1).[68] The court can place the child on probation with conditions and limitations. § 16-2320(c)(3). The court can transfer legal custody of the child to a public agency for the care of delinquent children. *Id*. § 16-2320(c)(2).[69]

It is important to note that the authority of the court to order specific placements and services in delinquency cases is much narrower than in neglect cases. In 2003, the Court of Appeals curtailed longstanding practice by ruling that family court judges do not have the statutory authority to direct the placement or treatment of juveniles who have been committed to the legal custody of a public agency pursuant to § 16-2320(c)(2). *In re P.S.*, 821 A.2d 905 (D.C. 2003). Although the holding in *P.S.* is still accurate at the disposition phase of a delinquency case, the Omnibus Juvenile Justice Act of 2004 created the power to modify a commitment to DYRS after a finding that the child is not receiving the appropriate services or level of care. D.C. Code § 16-2323. This finding may be made only on the motion of the child or the child's parent or guardian, and such motion may be made only once every six months. *Id.* The same statute provides the only mechanism by which a judge may terminate a case prior to the expiration of the commitment without the consent of DYRS. *See In re K.A.*, 879 A.2d 1 (D.C. 2005).

A dispositional order of probation shall remain in force for a period not exceeding one year from the date entered. D.C. Code § 16-2322(a)(3). The Director of Social Services of the agency providing supervision may terminate the supervision at any time that it appears the purpose of the order has been achieved. *Id*.

"[A] dispositional order vesting legal custody of a child adjudicated delinquent or in need of supervision in a department, agency, or institution shall remain in force for an indeterminate period not to exceed the youth's twenty-first birthday." D.C. Code § 16-2322(a)(4). This statute prescribes the maximum period of commitment. Judges often impose indeterminate sentences of up to one year or up to two years.[70] Counsel must argue vigorously against the imposition of an indeterminate commitment not to exceed the youth's 21st birthday. Despite the theory of juvenile court as a rehabilitative process, the reality of the delinquency system is that it is punitive and children rarely receive appropriate, individualized treatment plans that would enable their early release from their commitment. *See* the court monitor reports in *Jerry M.* and the

[67] *See infra* Section XXIII E. Residential Placements.

[68] The court is authorized to enter any disposition authorized by § 16-2320(a) (dispositional alternatives for neglected children) other than paragraphs (3)(A) and (5) of that subsection.

[69] *See* D.C. Code § 16-2321 for the disposition of a child who is mentally ill or substantially retarded.

[70] Before the 1993 amendments to Title 16, the maximum period of commitment was an indeterminate period not to exceed two years that could be extended yearly. After the 1993 amendment, judges continued to impose the typical one or two year indeterminate commitments. There is no mandate that commitments must last until the youth's 21st birthday and counsel should argue for a shorter period of commitment whenever possible. *See In re C.L.M.*, 766 A.2d 992 (D.C. 2001). The court has no authority to extend a commitment.

consensus report on the *Jerry M.* panel recommending the closing of Oak Hill Youth Center; *see also A Call to Justice*, American Bar Association (1995).

Unless the commitment order sets a minimum period for commitment of the child, or specifies that release is permitted only by order of the Division, the department, agency, or institution may release the child at any time that it appears the dispositional order has been achieved. D.C. Code § 16-2322(a)(3).

Counsel Must Explain the Following to the Client:

- ✓ The nature of the disposition hearing and outcome
- ✓ The issues involved
- ✓ The alternatives available to the court
- ✓ The nature, obligations and consequences of any proposed disposition plan
- ✓ The meaning of conditions of probation
- ✓ The characteristics of any institution to which commitment is possible
- ✓ The probable duration of the client's responsibilities under the proposed disposition plan

If appeal from the decree is contemplated, the client should be advised of that possibility, but the attorney must counsel compliance with the court's decision during the interim.

Counsel's obligation to represent the client continues until the end of the probation period or the commitment order whether or not the court placed a restriction on the commitment. Counsel must continue to be an advocate for the child with the probation department or, if the child is committed, the DYRS case manager and treatment team at the institution.

The court retains jurisdiction over a child on probation. If the child violates the terms of probation, the OAG may file a petition to revoke probation. The court will notify counsel and schedule a probation revocation hearing. If the child is found by the court to have violated probation, the court may extend the period of probation, modify the terms and conditions of the probation order, or enter any other disposition specified in D.C. Code § 16-2320 for a delinquent child. *See* D.C. Code § 16-2327; Super. Ct. Juv. R. 32(h). By placing a child on probation, the court maintains control over the case and keeps open the option of being able to change the treatment program. A court could specify a treatment program as a condition of probation. If the child desires to participate in a treatment program as a condition of probation, counsel must work to secure a funding source outside the court system, such as DCPS, health insurance, or a scholarship. Probation has some purchase of services money for specific programs designated by the court such as family counseling or tutoring.

Upon commitment, the appropriate treatment plan is determined by DYRS. *See In re J.M.W.*, 411 A.2d 345 (D.C. 1980). If a child is placed on aftercare and supervised in the community, aftercare can be revoked and the child returned to the institution by a decision of a hearing officer after an administrative hearing. The statutory authority to file a motion with the court

after applying to the institution for a change in the commitment was dropped in the 1993 amendment to the Family Division Statute.[71]

Counsel's representation of the juvenile at the disposition phase can determine the course of the child's life during critical stages in the child's development. Counsel must thoroughly understand the commitment process and how DYRS interprets commitment orders. Counsel must review the disposition order carefully immediately following the hearing and make sure to follow the progress of the child closely.

At the conclusion of the fact-finding hearing if the client is found involved, or after entering a plea, the court will determine whether to detain the child pending disposition. Super. Ct. Juv. R. 106 explicitly applies to the detention decision at this phase of the proceedings.

One of the things the court must consider at the disposition phase of the case is any victim impact statement offered by the victim(s) or eyewitnesses, either personally or through the AAG. D.C. Code § 16-2340(b). Counsel should be given advance notice of such victim impact statements as part of the predisposition investigation. *See In re M.N.T.*, 776 A.2d 1201 (D.C. 2001).

A. Social Study

After adjudication, the child and family members will be required to meet with CSS probation staff prior to the disposition hearing. If the child is detained, the CSS staff will go to YSC interview the child. If the child is on probation or under commitment, the probation officer or DYRS case manager may prepare the report for the disposition. CSS will prepare a disposition report for the court called a social study. The social study report shall contain the child's prior record and such information about the child's "characteristics, family, environment and the circumstances affecting the respondent's behavior as may be helpful in determining the need for treatment and a proper disposition of the case." Super. Ct. Juv. R. 32(b)(2). The report will also include the results of physical or mental examinations if ordered by the court pursuant to D.C. Code § 16-2315. Counsel should provide the probation officer with pertinent social information and remain in contact with the worker throughout the diagnostic process.

Counsel must explain the diagnostic process to the child and his or her family. The child will be asked about the offense. The child should be advised to be as candid with the report writer as he or she was with the judge who accepted the plea. If the child was found involved in a fact-finding proceeding, counsel must call the diagnostic worker and advise the probation officer that the child will be asserting his or her Fifth Amendment privilege and will not discuss the case due to the possibility of a retrial after an appeal.

The social study and any other materials to be disclosed at disposition "shall be furnished to the judicial officer and copies thereof shall be furnished to counsel for the respondent and to the Corporation Counsel at least three business days prior to the dispositional hearing." Super. Ct. Juv. R. 32(a)(2). Counsel must obtain a copy of the report from the judge's chambers, review

[71] A *habeas* petition may be filed in the appropriate circumstances.

the report with his or her client, and submit a letter to the court in advance of the hearing addressing any inaccuracies in the report and setting forth a proposed treatment plan. Counsel must also review the child's social file in preparation for the disposition.[72]

At the disposition hearing, before entering a dispositional order, the judicial officer shall afford the respondent or the respondent's counsel an opportunity to comment on the predisposition report (social study) and, in the court's discretion, to introduce testimony or other information relating to any alleged factual inaccuracy in the report. The judicial officer shall afford counsel an opportunity to speak on behalf of the respondent, address the respondent personally, and permit the respondent's parents, guardian, or custodian to make a statement on the child's behalf or present any relevant information to the court. Super. Ct. Juv. R. 32(c)(1). The judge is not bound by the recommendation of the social study. Counsel may submit a proposed order to the court to sign. If the court adds language to the form disposition order, counsel must ensure that DYRS and the institution receive a legible copy of the order.

XXII. PROBATION

The court may impose probation for a period of up to one year. D.C. Code § 16-2320(c)(3). Special conditions may include a curfew, school attendance, participation in a vocational training program, psychological counseling, community service, and employment. If probation is ordered, the probation officer who was assigned to the case pretrial, and who completed the social study, will supervise the youth while on probation.

The Superior Court Social Services Division, which provides probation supervision, oversees a "purchase of services" program to provide diagnostic and treatment services. Participants must be residents or wards of D.C., under court supervision for long enough to receive the services, and able to benefit. Diagnostic services include educational assessments and psychiatric and medical evaluations. Treatment services include tutoring, school advocacy, and support; job readiness, placement, and outreach; limited in-home services; short-term psychiatric and psychological intervention; self-esteem building; parent support; and family counseling. Services should be discussed with the probation officer after adjudication but before disposition. However, funds are often in short supply.

A. Revocation of Probation

Super. Ct. Juv. R. 32(h) controls the procedure to be followed in revoking probation. If the respondent is rearrested or allegedly commits a technical violation, the Family Division's Director of Social Services may try to resolve the problem informally or refer it to the OAG for action. To initiate revocation, the Attorney General must file a petition setting forth the alleged violations. *See In re W.A.G.*, 104 Wash. D.L. Rptr. 591 (D.C. Super. Ct. April 6, 1976). The judge will schedule a hearing and send notices to the respondent and attorney. The standard of proof is preponderant evidence for technical violations and proof beyond a reasonable doubt for a new offense. Super. Ct. Juv. R. 32(h)(1). Generally a probation revocation hearing will trail

[72] The social file will contain all social information gathered on the child since the child first entered the system. Check with the probation officer for the location of the file pending disposition.

the rearrest matter. Other than the standard of proof, the procedures set forth in *United States v. Peters*, Crim. No. 9956 (D.C. Super. Ct. Dec. 12, 1975) (Greene, J.), apply to juvenile revocation proceedings. *See In re A.W.*, 353 A.2d 686 (D.C. 1976). No child can be detained prior to filing the revocation petition.

XXIII. COMMITMENT TO THE DEPARTMENT OF YOUTH REHABILITATION SERVICES (DYRS)

At the time a child is committed to DYRS, a case manager is assigned. The case manager is responsible for case management during placement of the child, including devising and implementing a treatment plan for the child as well as a release plan for aftercare. Case managers are assigned according to the level of treatment a child requires (e.g., residential, group home, etc.). This case manager has a profound effect on the nature and duration of the services the child will receive, and counsel should make every effort to stay in contact with the case manager, as well as with the child's parents and the child. If the child feels that he is not receiving appropriate services though his commitment, counsel should file a motion to modify the commitment under § 16-2323, keeping in mind that a judge in ruling on such a motion might order a more restrictive level of placement or a more intensive plan of services. The level of placements offered by DYRS changes fairly frequently, but can include some of the options below.

A. Foster Care

The waiting list may be long and placement may not occur for many months. Counsel should therefore try to place the client in an interim living arrangement, perhaps with a relative. DYRS may be able to designate a child's residence as an "abridged foster home," qualifying it for financial assistance. If a client might benefit from foster care, counsel should contact the probation officer and DYRS case manager. Counsel with PINS clients should also contact PDS ORD to determine the availability of other services for PINS children.

B. Group Homes

DYRS operates and contracts for group homes for adjudicated youth. The homes are located in various communities in the District of Columbia. The group homes generally house 8-10 children and are staffed 24 hours a day. Each group home provides counseling and organized recreational activities, and the children are required to attend school in the community, obtain employment, or be involved in job training or other programs. Specific services vary.

C. New Beginnings Youth Development Center

Committed children who are incarcerated are sent to New Beginnings Youth Development Center. New Beginnings is located twenty-five miles outside the District in Laurel, Maryland.[73]

[73] To reach New Beginnings, take the Baltimore-Washington Parkway north to Route 198 East, Fort Meade. Follow 198 East for approximately one half mile. At the first intersection on the left, marked by a green sign for New Beginnings, turn left.

Attorneys may visit or call their clients at the institution routinely from 7 a.m. to 9 p.m., seven days a week. *See Jerry M.*, C.A. No. 1519-85, § IX(E). If there is a legal emergency, counsel may visit or call at any time. *Id*. Counsel can call control at (202) 299-3200 to verify that the child is at the institution before visiting. To speak with the child on the telephone, counsel must have the child's Xref number from the court order.[74] Although the official policy is to the contrary, children are not always able to call their attorneys upon request. Counsel should call their clients regularly while they are incarcerated. When visiting youth, counsel must insist on a private office to interview his or her client. Counsel should talk to the superintendent if counsel is not afforded a place to have a confidential conversation with the client.[75]

Family members may visit the children on weekends.[76] Youth should be permitted to receive visits and make telephone calls to parents, guardians, primary caretakers, siblings, children, and co-parents of offspring. *See Jerry M.*, § IX(D). The child should get two ten-minute phone calls per week to call family members. *Id*. The child's unit manager can add other names to the list at his or her discretion.

Children who are committed to DYRS are usually sent to New Beginnings while a treatment plan is developed for the child. If counsel suspects a child will be committed at a dispositional hearing, counsel should contact DYRS in advance of that hearing to begin the placement planning process.

D. Girls

Girls who are committed are usually placed faster than boys. There is no secure DYRS facility for committed girls; pre-trial girls are detained at the Youth Services Center on Mt. Olivet Road.

E. Residential Placement

A residential placement is a facility that provides twenty-four hour care for children. There are one or two twenty-four hour facilities in the District, but they typically do not take delinquent children and there are long wait lists. The District of Columbia school system is obligated to place children in residential care if their IEP requires such placement. The school system places children with learning disabilities and severe emotional problems.

Residential placements range from psychiatric hospitals to boarding-school-type behavior modification programs. The family court judge may not order a specific level of treatment program at the time of the initial disposition, though some judges will make an unenforceable "recommendation" at the time of commitment. Once a child is committed, if DYRS believes

[74] Counsel can call social services to get the child's general schedule for the best time to visit or call. Attorneys should have no problem visiting during school hours, but it is better to call after school hours when the children are in the units. There is generally no movement between 2:30 p.m. and 3:30 p.m. because of shift change. Counsel should not visit at that time.

[75] Call the court monitor for the *Jerry M.* case if you have difficulty gaining access to your client on the phone or in person.

[76] The child's family can call control at New Beginnings for visiting times and policies at (202) 299-3200.

residential treatment is warranted, a caseworker will send application packets to several residential facilities. If the child is accepted, the interstate process will begin. Counsel can speed up this process significantly by determining what type of health insurance the child has (different programs accept different insurance) and by applying directly to programs without waiting for DYRS to act.

Residential placement should be the last alternative to incarceration at New Beginnings. Although it may offer a child with severe educational disabilities an appropriate school placement, many children become lost in the system when they are sent away and spend years at a facility. A *Jerry M.* expert panel found that, for the most part, the residential facilities utilized by the District did not provide the services they advertised.[77] The institutions have a financial incentive to keep children as long as possible. The District has little ability to oversee the children and DYRS workers have no incentive to bring children back and add more work to their already overloaded client list.

Once a child is placed at a facility, counsel should contact the facility and obtain the number of the child's social worker or therapist to provide information about the child, request that counsel be provided with monthly reports, monitor the child's progress, and ensure that the child has a mechanism to contact his or her attorney.[78]

F. Community Placement after Commitment

Community Release, formerly known as aftercare, refers to the status of a child whom DYRS has released to the community before expiration of the commitment. See 29 DCMR Chapter 1200, et seq. At the time of release, the caseworker and the child enter into a contract, which both sign. Counsel should make sure that the client understands his or her responsibilities. If the program is not feasible, counsel should advocate with the worker for modification.

Authority for revocation of a Community Release Agreement lies with DYRS, not with the court. *See In re J.M.W.*, 411 A.2d at 348. Community status review procedures are set out in the DCMR. The case manager initiates revocation. After notice to the respondent, the parents or guardian, and counsel, an administrative hearing is held. The child is entitled to be represented by counsel. The child may present a defense, but DYRS will not assist in securing attendance of witnesses for the child. DYRS rules require that the case manager be present at the hearing unless emergency prevents it.

J.M.W. likened the status of a child in Community Release status to that of an adult on parole. Counsel should look to the cases relating to parole revocation to determine what protections are necessary for revocation and the return of the child to a secure facility. *See*, *e.g.*, *Morrissey v. Brewer*, 408 U.S. 471 (1972) (due process requires written notice of claimed violations,

[77] Several facilities advertise 24-hour therapeutic intervention but provide only twice weekly contact with a therapist and minimal contact with a psychiatrist.

[78] *See In re D.W.G.*, 115 Wash. D.L. Rptr. 2097 (D.C. Super. Ct. Oct. 5, 1987) (von Kann, J.), finding the Brown School in Austin, Texas, to be "grossly incompetent, abusive, and life threatening" after a 17-year-old youth was injected with an antipsychotic drug when he refused to put on his pajamas, and then received daily dosages of other powerful drugs not to treat him "but rather to control him and to make him compliant."

disclosure of evidence against parolee, right to present witnesses and to cross-examine adverse witnesses, a neutral and detached hearing body, and a written statement by the fact-finder as to evidence relied on and reasons for revoking parole).

Counsel should request that the revocation hearing is transcribed and that any objections to the procedures are made on the record. If the child's placement in the community is changed, counsel may challenge the legality of incarceration through an administrative appeal or a petition for a writ of *habeas corpus* in Superior Court.

The only control a judge has over a child committed to DYRS (unless a motion has been filed pursuant to § 16-2323) is to retain a "restriction" on the commitment that operates as a veto over DYRS' decision to terminate the case prior to the end of the commitment period (and thereby close the case). In most cases, counsel should work to lift the restriction (or argue against it at the time of disposition). In some cases, however, the child may desire the housing or other services provided by the commitment and, therefore, desire the restriction, ensuring that DYRS will not divest itself of responsibility for the child without a judge's approval.

G. APPEAL

Counsel shall consider and discuss with the client the right to appeal and whether an appeal has merit. When discussing the possibility of an appeal, counsel should explain both positive and negative effects. Counsel should also discuss whether he or she will represent the client in an appeal or whether another attorney will be appointed.

If the client decides to appeal, trial counsel must file any necessary post-hearing motions and the notice of appeal, and he or she must order the transcript. If trial counsel does not serve as appellate counsel, he or she must transmit all documents relevant to the appeal to appellate counsel.

Trial counsel must protect his or her client's interests by responding in a thorough and timely manner to any post-trial motions, notice of appeal, and order for transcript filed by any adverse party. This obligation remains in effect until appellate counsel has been appointed for his or her client.

XXIV. THE JUVENILE SERVICES PROGRAM (JSP)

The Public Defender Service, pursuant to a mandate by City Council, created the Juvenile Services Program (JSP) to provide legal services to the District's incarcerated children. JSP has offices downtown and at YSC and New Beginnings. The program supervisor recruits and trains law students who work directly with the children. JSP activities include representing children at institutional disciplinary hearings, facilitating communication between attorneys and the children and providing assistance to attorneys with motions for release and to lift restrictions. Law clerks also provide orientation session for residents regarding their legal rights within the institution, the disciplinary rules, and the grievance process.

If counsel has concerns or questions regarding a client's safety, ability to access counsel, or other issues regarding the youth's confinement at the facility, counsel should contact JSP at the main PDS phone number (202) 628-1200.

XXV. JERRY M. v. DISTRICT OF COLUMBIA

In 1985, PDS and the ACLU National Prison Project filed a class action suit in Superior Court against the District of Columbia on behalf of children incarcerated in juvenile detention facilities, alleging that the facilities lacked appropriate education, special education, vocational training, medical, psychological, and psychiatric services, and that the number, quality, and training of staff was inadequate. *Jerry M. v. District of Columbia*, C.A. No. 1519-85. In 1986, the parties agreed to a settlement of all the issues. The *Jerry M.* consent decree governs virtually every area of operation of the YSA facilities, including population and overcrowding, safety of the youth, education, mental health and medical services, the environmental conditions of all of the facilities, and staffing, and is enforced by a Special Arbiter who reports to the court on the District's compliance. Counsel should become familiar with the services that DYRS institutions are required to provide pursuant to the *Jerry M.* consent decree and related workplans, as the institution's failure to provide the required services can become the basis for motions for release or alternative placements.

XXVI. SEALING OF RECORDS

Under D.C. Code § 16-2335, juvenile court and social records may be sealed if two years have passed since final discharge from custody or supervision and the child has not been subsequently convicted or adjudicated as a PINS or delinquent. The burden is on the child to file a motion to seal records. Super. Ct. Gen. Fam. R. P. Disposition orders include a notice to the child of eligibility to seal the record; notice should also be received when the child is discharged from supervision, treatment, or custody.

Two years after final discharge, counsel should submit the child's name, social file number, and jacket number(s) to the Juvenile Clerk's Office. If a search of Family Division and criminal records indicates eligibility, the Division will prepare the form and mail copies to the Attorney General, the authority that was responsible for supervision, the law enforcement agency having custody of the files and records as specified in § 16-2333, and the child's parents or legal guardians. These parties have 45 days to contest the motion. An Order Sealing Records will be entered if no opposition is received; if there is opposition, a Family Division judge will rule on the motion.

Once a record is sealed, the facts relating to the arrest and adjudication will no longer exist as a matter of law. Thus, anyone making further inquiry regarding the case will be informed that the case does not exist. However, the records will be unsealed if the child is subsequently adjudicated delinquent, in need of supervision, or is convicted of a felony. D.C. Code § 16-2335(e); Super. Ct. Gen. Fam. R. P(g). The Attorney General must file a Motion to Unseal, with copies to counsel, the child's parents or guardian, the law enforcement agency, and the authority granting the discharge, subject to the same rules for oppositions as the Motion to Seal.

CHAPTER 15

REPRESENTING PERSONS SUBJECT TO CIVIL COMMITMENT PROCEEDINGS

I. INTRODUCTION

A. Overview of the Civil Commitment Process

Civil commitment of persons in the District of Columbia is governed by the Hospitalization of the Mentally Ill Act, codified at D.C. Code §§ 21-501 to 592 (also known as the Ervin Act in honor of former United States Senator Sam Ervin). Approximately 1,300 Ervin Act cases are filed each year. Jurisdiction is vested exclusively in the Family Court of the District of Columbia Superior Court. Practice before the court and its Mental Health Commission is regulated by the Superior Court Mental Health Rules and certain enumerated Superior Court Rules of Civil Procedure that have been incorporated by reference in the Mental Health Rules. *See* Super. Ct. Ment. Health R. 12(d). The Mental Health Commission is a specially-created panel consisting of a magistrate judge of the court, who is the chairperson for the Commission, and eight qualified psychologists and psychiatrists who sit on the Commission in alternating pairs. D.C. Code § 21-502.

Four Stages for Commitment: The Ervin Act includes provisions to protect an individual's right to voluntary mental health treatment, as well as procedures for involuntary detention and mental health commitment. The processes for detention and mental health commitment set forth in the Ervin Act have four main stages. The first stage arises only if the respondent is detained at the commencement of the case. In that circumstance, he or she is entitled to a prompt hearing in Superior Court under § 21-525 to test the legality of the detention. This stage is discussed in section IV.D. The second stage consists of a hearing before the Mental Health Commission pursuant to §§ 21-542 and 21-544. *See infra* Section V. This hearing will result either in the dismissal of the petition for commitment or in a recommendation by the Commission for some form of commitment. If a petition is dismissed, the respondent is entitled to immediate release if he or she is being detained at the hospital. This stage is also discussed in section V.E.

The third stage is the review of the Commission's report pursuant to D.C. Code § 21-545, which permits the respondent to contest a recommendation of commitment by means of a court review or a *de novo* trial by judge or jury. This stage is discussed in section VI. The last stage is the disposition hearing. *See infra* Section VI. Commitment pursuant to § 21-545 is for a one-year period, which may be renewed pursuant to D.C. Code § 21-545.01 after a hearing before the Mental Health Commission. *See infra* Section VIII. The Ervin Act also includes sections that describe rights of respondents during the term of the commitment order. *See infra* Section VII.

Throughout these proceedings, the Act requires the court to ensure that a respondent has counsel. D.C. Code § 21-543 (2004). If the respondent is indigent, the court is authorized under the Criminal Justice Act, §§ 11-2601 to 2609, to appoint counsel. If a non-indigent respondent refuses or is unable to retain counsel, the court shall appoint counsel. *See* § 21-543 (2004).

B. Available Practice Materials

There are many treatises, journals, and web sites that provide information useful to representing individuals in civil commitment proceedings. For information on psychiatric diagnoses, counsel might want to refer to the Diagnostic and Statistical Manual (DSM) IV (IV-TR), *American Psychiatric Press Textbook of Neuropsychiatry* (Yudofsky & Hales), *Comprehensive Textbook of Psychiatry* (Kaplan & Sadock), and *www.medscape.com*. For information on medications, counsel might want to look at the Physician's Desk Reference (PDR), "The Medical Letter," *American Psychiatric Press Textbook of Psychopharmacology*, and *www.medscape.com/ druginfo*. In addition, counsel might find useful *Coping with Psychiatric and Psychological Testimony* by Faust & Ziskin (Law and Psychology Press) and *Psychological Evaluations for the Courts* by Petrila et al. (Guilford Press). The Mental Health Division (MHD) of the Public Defender Service (202-824-2860) maintains pleadings, files, and copies of Superior Court cases. In addition, MHD has a duty day attorney available to answer questions.

C. Voluntary and Nonprotesting Hospitalization Procedure

1. Statutes and Court Rules

D.C. Code §§ 21-511 through 514 (voluntary and nonprotesting hospitalization)

D.C. Code § 21-526 (extension of maximum periods of time)

Super. Ct. Ment. Health R. 13 (time)

2. Relevant Cases

In re Blair, 510 A.2d 1048 (D.C. 1986)

In re Clark, 700 A.2d 781 (D.C. 1997)

In re Curry, 470 F.2d 368 (D.C. Cir. 1972) (*Curry II*)

In re Robinson, 101 Wash. D.L. Rptr. 1501 (D.C. Super. Ct. May 30, 1973)

In re Peterson, 984 A.2d 192 (D.C. 2009)

3. Voluntary Treatment

Persons seeking psychiatric treatment at a hospital may do so on a voluntary basis. *See* D.C. Code § 21-511. Any person 18 years of age or older who requests care shall be admitted to a public hospital as a voluntary patient if an examination by a staff psychiatrist or psychologist reveals a need for hospital treatment; a private hospital may refuse to admit such a person even if

hospital treatment is indicated. *Id*. A person seeking voluntary treatment may not be admitted to the hospital as an emergency involuntary patient. *In re Blair*, 510 A.2d 1048 (D.C. 1986).[1]

Patients admitted involuntarily under § 21-522 can be – and often are – converted to voluntary status when the hospital doctor makes a judgment that they are not dangerous and can be responsible for their own treatment needs. Individuals who are converted to a voluntary status after initial detention have the same rights as individuals who are initially admitted in a voluntary status.

A voluntary psychiatric patient may terminate the hospitalization on his or her own request. D.C. Code § 21-512(a). Under the Ervin Act, a voluntary patient's right to leave is absolute. Although a voluntary patient may be held for up to 48 hours after making a written request for discharge, the hospital may not initiate involuntary proceedings to detain the patient. *See id*.; *In re Blair*, 510 A.2d 1048 (D.C. 1986); *In re Robinson*,101 Wash. D.L. Rptr. 1501 (D.C. Super. Ct. May 30, 1973); *In re Curry*, 470 F.2d 368 (D.C. Cir. 1972) (*Curry II*). *But see In re Peterson*, 984 A.2d 192 (patient's status could be changed from voluntary to involuntary). If the 48-hour period ends on a weekend or holiday, the patient may be detained until noon of the next day that is not a weekend or legal holiday. *See* D.C. Code § 21-526.

Two decisions by the D.C. Court of Appeals have suggested that a voluntary patient's right to discharge is not absolute. *See In re Clark*, 700 A.2d 781 (D.C. 1997); *In re Peterson*, 984 A.2d 192. In *Clark*, the court held that nothing in the Ervin Act precluded initiation of commitment proceedings under the narrow circumstances presented in the case. Clark had been a voluntary patient who was not compliant with treatment and who was arrested for assaulting a staff member on his ward at the hospital. He was placed in the hospital's forensic division under an order in the criminal case after a finding that he was incompetent to stand trial on the criminal charges, and unlikely to regain competence. In addition, the court found that he was "no longer … amenable to treatment as a voluntary inpatient." 700 A.2d at 786. The court rejected Clark's challenge to his involuntary inpatient commitment. In *Peterson*, the Court of Appeals extended *Clark* to hold that in extraordinary circumstances, a voluntary inpatient can also be the subject of an emergency detention petition. Peterson was a voluntary patient at Washington Hospital Center who requested discharge from inpatient treatment, and who was instead transferred involuntarily to St. Elizabeth's Hospital. The Court of Appeals held that involuntary detention procedures could be applied to allow involuntary detention of a voluntary patient "in truly urgent situations where imminent dangerousness requires detention of an individual who is no longer amenable to treatment. *Peterson*, 984 A.2d at 194. The Public Defender Service has filed a motion for *en banc* review of the *Peterson* decision.

Similar rules apply to voluntary admissions of minors (under 18), except that the person making application for hospitalization and requesting release is the minor's spouse, parent, or legal guardian. A minor cannot sign him or herself in or out of the hospital, absent unusual circumstances such as the emancipation of the minor. For more information regarding the rights of voluntarily and involuntarily hospitalized minors, *see infra* section IX.

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[1] An individual receiving voluntary treatment on an outpatient basis may be made the subject of an involuntary hospitalization proceeding under limited circumstances. *In re (Bernard) Johnson*, 691 A.2d 628 (D.C. 1997).

4. Nonprotesting Treatment

The Ervin Act provides for another noncompulsory hospitalization scheme, termed "nonprotesting" status. D.C. Code § 21-513 (1984). This status applies to a person who signs a statement that he or she does not object to hospitalization after being admitted when a friend or relative applies for the hospitalization. The Ervin Act explicitly provides that, unlike a voluntary patient, a nonprotesting patient can be detained if he or she is the subject of involuntary commitment proceedings. D.C. Code § 21-514. However, a nonprotesting patient must be released immediately upon written request unless involuntary commitment proceedings have already been initiated. D.C. Code § 21-514.

II. APPOINTMENT OF COUNSEL, PICKUP PROCESS AND REPRESENTATION IN MENTAL HEALTH CASES

A. Appointment of Counsel

In addition to the procedures necessary for obtaining appointments under the Criminal Justice Act (CJA), counsel must be approved to be on the panel of attorneys appointed to mental health cases. *See* Super. Ct. Administrative Order No. 03-20 (Oct. 10, 2003). For information on applying to the mental health panel of CJA attorneys, counsel should contact the Chairperson of the Mental Health Commission, Magistrate Judge Joan Goldfrank. Once on the list, counsel will be asked to provide notice of availability to receive appointments to the Mental Health Clerk's office (Room 4450) on a monthly basis. When an appointment is made, the clerk's office will notify counsel that the cases are ready to be picked up at the Mental Health Clerk's office. When counsel arrives at the office to pick up the cases, counsel will be asked to sign for the case documents, including legal documents and appointment vouchers relating to each newly assigned case. (Extra second, third, and continuation voucher sheets are available either from the Commission staff or at the CJA office.)

The bulk of counsel's newly assigned cases will be cases that were initiated as a result of the respondent's emergency involuntary admission to a hospital. *See infra* Section IV. Counsel is routinely appointed to a block of cases each rotation. Cases are also sometimes initiated as a result of a petition for judicial commitment filed under D.C. Code § 21-541, referred to as an "off the street" case because the respondent is not subject to detention pursuant to an emergency petition under § 21-522 and may remain at liberty during the pendency of the proceedings. *See infra* Section V.D.

On occasion, counsel may be asked to represent a family member in an off the street case who has filed a commitment petition pursuant to D.C. Code § 21-541. *See* Section V.D.2. Counsel may not be compensated for services rendered to a private petitioner. The Commission also occasionally appoints attorneys to be "guardians *ad litem*" (GAL) in certain situations in mental health cases. Sample reports to the court, required by the GAL in these cases, can be obtained from the Mental Health Division of the Public Defender Service.

Once counsel is appointed to represent a respondent in an emergency detention or commitment proceeding, the representation will continue until the court closes the case. *See* Section F.1,

supra. Nevertheless, the Commission will issue a new order appointing counsel when a petition for recommitment is filed, pursuant to D.C. Code § 21-545.01, and the Commission sets a hearing on the petition.

B. Papers in Emergency Detention Cases

When counsel is appointed to a new mental health case in which the respondent has been detained pursuant to the Ervin Act's emergency hospitalization provisions, counsel should receive the following documents:

1. Order Authorizing Continued Hospitalization for Emergency Observation

This order contains counsel's appointment, authorizes the respondent's continued hospitalization for exactly seven days from the time and date the order was docketed, and contains other useful information such as the case number.

2. Petition for Order Authorizing Continued Hospitalization of a Patient for Emergency Observation

This is usually a boilerplate pleading and should be signed by the hospital's administrator or the chief clinical officer of the Department of Mental Health, or their designee. The time and date of filing should be stamped on the front page by the case caption. The petition generally includes some information as to time of admission and the respondent's community contacts. The pleading should also indicate whether the respondent has been detained at St. Elizabeth's Hospital, the Department of Mental Health's Comprehensive Psychiatric Emergency Program (CPEP), or some other hospital or facility. United Medical Center ("UMC", formerly Greater Southeast Community Hospital) and the Psychiatric Institute of Washington ("PIW") have contracts with the Department of Mental Health to receive emergency involuntary admissions. PIW also maintains a number of its "emergency" beds at Providence Hospital.

There are a number of documents attached to the petition. Generally right below the petition is a copy of the Application for Emergency Hospitalization, often referred to as an "FD-12" form. This form will identify who initiated the respondent's hospitalization and should set forth the facts upon which the applicant based the detention. Below the application will be the "Certificate of Psychiatrist Under § 522." The psychiatrist or psychologist who made the decision to admit the respondent to the hospital or other facility should have completed this certificate. It will generally reflect the admitting doctor's tentative diagnosis and impressions, contain hearsay information about the circumstances surrounding the detention, and have information about relatives or other contacts and previous psychiatric care, etc. In most cases, reproductions of one or more handwritten sheets and copies of initial treatment records will be appended to the § 522 certificate. Often there are two § 522 certificates – one documenting admission at CPEP and another documenting admission at a hospital.

C. Papers in Off the Street Cases

If counsel is appointed to a proceeding initiated by the filing of a § 541 petition, then counsel will receive different documents than those provided in an emergency detention case:

1. Order Appointing Counsel and Setting Date for a Hearing

This order sets a date for a hearing before the Commission on Mental Health, appoints counsel to represent the respondent, indicates that the respondent will be subpoenaed to appear for an examination before the Commission on the date of the hearing, and states that the respondent "is to receive a certified copy of this order and petition for judicial hospitalization prior to the hearing."

2. Screening Findings

In off-the-street cases in which a family member or guardian files a petition for commitment, rather than the Department of Mental Health or a hospital, *see infra* Section V.D.2, the Commission conducts an *ex parte* preliminary screening hearing. Its findings are set forth in a document, signed by the members of the Commission on Mental Health after the hearing, and including the Commission's determination that the petition "is sufficient for the Court to require" the respondent to submit to an examination by the Commission's physician members.

3. Petition for Judicial Hospitalization

This is typically a form or boilerplate petition completed by the family member or other petitioner, available from the Commission on Mental Health, to which the petitioner adds identifying data about him or herself and information about the respondent.

4. Affidavit of Petitioner

The first page of this document allows the petitioner to describe the respondent's behavior by checking boxes. The second is a blank sheet on which the petitioner is directed to elaborate on the boilerplate allegations checked. This form should be notarized. When the Department of Mental Health or a hospital files the petition for commitment, a certificate of psychiatrist or qualified psychologist will be attached instead of an affidavit of petitioner.[2]

[2] In a small number of instances, the mental health case will begin with a § 541 petition filed by St. Elizabeth's Hospital against an individual who is detained at the hospital following a determination in a criminal case that the respondent is incompetent to stand trial and unlikely to regain competence in the foreseeable future (a so-called *Jackson* case, after the case *Jackson v. Indiana*, 406 U.S. 715 (1972)). *See supra* Chapter 3. In these cases, a certificate of a psychiatrist or qualified psychologist will be filed in lieu of an affidavit from the petitioner. *See* Section V.D.

D. Papers in Recommitment Cases

1. Order Appointing Counsel

This order appoints (or re-appoints) counsel to represent the respondent. Usually, the clerk's office will handwrite on the appointment order the date of the hearing before the Mental Health Commission.

2. Petition for Recommitment

This is typically a form or boilerplate document submitted by the Department of Mental Health's chief clinical officer or his designee. A certificate of physician should be attached to the petition. In the certificate, the respondent's treating doctor states findings of a current examination and certifies his or her opinion that the respondent is mentally ill and dangerous.

E. Locating the Respondent

Whether a respondent is detained in the hospital or is living in the community at the time counsel is appointed, counsel obviously must locate the client. The petition should indicate whether the respondent is detained at CPEP, St. Elizabeth's, or another hospital. If detained at St. Elizabeth's, the respondent's location there should appear in the petition for emergency detention. If detained at a different hospital, the easiest way to locate the respondent is by either calling the hospital's chief administrator or by contacting the petitioner. Many private hospitals will neither confirm nor deny that a person is a patient at the hospital if he or she is there for psychiatric treatment, due to restrictions on disclosure of information encoded in the Mental Health Information Act, D.C. Code §§ 7-1201.01, *et seq*. In contrast, the central switchboard at St. Elizabeth's (202) 562-4000 will tell counsel what ward a client is on and provide the telephone number for the ward.

If the respondent is the subject of an off the street case, the petitioner is supposed to provide the respondent's current address so that the court can notify the respondent of the filing. This information is often inaccurate, making it more difficult for counsel to find his or her client. If the information in the petition is inaccurate, counsel may be able to locate the respondent by determining whether the respondent was served with the petition and, if so, where.

F. Obligations of Counsel

1. Duty to Client

The Ervin Act mandates that persons involuntarily hospitalized "must be represented by counsel in all proceedings before the Commission or the court." D.C. Code § 21-543; *In re Holmes*, 422 A.2d 969, 972 (D.C. 1980);[3] *Dooling v. Overholser*, 243 F.2d 825 (D.C. Cir. 1957). This mandate extends from representation at a § 525 hearing to representation at any post-

[3] However, counsel does not have the right to be present at the examination conducted pursuant to D.C. Code § 21-542 by the physician-members of the Commission on Mental Health. *In re Holmes*, 422 A.2d at 973.

commitment proceedings that could have a bearing on the respondent's legal status. If a lawyer is unable for some reason to continue representing a client after a final commitment order is entered, he must communicate that clearly to the client, *see D.C. Rules of Professional Conduct*, comment to Rule 1.3 at [8], and, where appropriate, withdraw from the case so that successor counsel can be appointed. *See* D.C. R. Prof. Cond. 1.16(d) and comment; *see also* Michael L. Perlin, *Fatal Assumption: A Critical Evaluation of the Role of Counsel in Mental Disability Cases*, 16 Law & Human Behavior 39 (1992).

The *D.C. Rules of Professional Conduct* provide substantial guidance for counsel representing clients in Ervin Act proceedings. The rules that require a lawyer to represent a client zealously and diligently, within the bounds of the law, Rule 1.3, and that require counsel to provide competent representation, Rule 1.1, also apply in mental health cases. Rule 3.1 requires counsel in civil commitment cases to put the government to its proof, even where no defense theory seems to be available:

> A lawyer . . . for the respondent in a proceeding that could result in involuntary institutionalization, shall, if the client elects to go to trial or to a contested fact-finding hearing, nevertheless so defend the proceeding as to require that the government carry its burden of proof.

See also Comment to Rule 3.1 at [3].

The District of Columbia is not unique in holding lawyers in civil commitment cases to the same high degree of attention and zealous advocacy as in other areas of legal representation. The National Center for State Courts has published *Guidelines for Involuntary Civil Commitment* and the D.C. Court of Appeals has cited with approval the section on legal representation in the Guidelines. *See In re Melton*, 565 A.2d 635, 646 (D.C. 1989), *vacated on other grounds*, 597 A.2d 892 (D.C. 1991) (*en banc*). The *Guidelines* identify the obligations a lawyer owes a respondent in a mental health case, including a prompt and private meeting with the client soon after appointment in the case, during which counsel may learn the respondent's version of the facts and events leading to hospitalization, as well as background information from the client. In addition, the *Guidelines* state that counsel should explain to the client what is happening and why, explain what rights the client has during the commitment process, and determine what the client's preferences are. *Guidelines* at E.5, p. 473-74.

The American Bar Association's Commission on the Mentally Disabled has also promulgated standards for counsel in civil commitment proceedings. *Involuntary Civil Commitment: A Manual for Lawyers and Judges* (1988). The ABA Manual emphasizes that a prompt and thorough prehearing interview of the client, which includes advising the client of his or her rights, is one of the most important – if not *the* most important – points in the representation of a respondent in a mental health case. *See id.* at 19. Failure to meet with an Ervin Act client or attend scheduled hearings has been found to constitute negligent failure to pursue a client's case and conduct prejudicial to the administration of justice, warranting a 60-day suspension. *In re Zdravkovich*, 671 A.2d 937 (D.C. 1996).

2. Exercising and Waiving Rights of Clients

The Ervin Act, court rules, and case law provide respondents in civil commitment cases with important procedural protections. These rights, ranging from the very specific timetables in the emergency hospitalization process to a jury trial to contest one-year commitment, are personal to the client and any decision to exercise or to waive these rights must be made by the respondent. Respondents are presumed to be competent to make decisions and counsel is obligated to abide by the express wishes of the respondent; counsel may not substitute his or her own view of the client's best interests. Not only does counsel have an obligation to explain to the respondent what his or her rights are and to determine how the respondent wishes to proceed, counsel must also fully understand the client's decision and how it relates to waiver or exercise of those rights. For example, counsel should not presume from a client's willingness to receive outpatient treatment that the client necessarily agrees to treatment on a court-ordered basis; it is essential for counsel to make sure the respondent understands the difference between voluntary outpatient treatment and commitment as an outpatient for a one-year period. The respondent may choose to waive rights after the different options are explained and after a judge has inquired of the respondent to determine that the waiver is knowing and voluntary; it is otherwise improper for counsel to waive rights to contest commitment.

Some clients will reject all or part of counsel's assistance. For instance, a client may refuse to sign a record release, instruct counsel not to exercise various rights, or refuse to be represented by counsel at all. Counsel must determine how to handle such situations on a case-by-case basis at each step of the proceeding, taking care to fully advise the client of his or her rights while respecting the client's wishes. A client may explain that he or she wants to talk with a family member first or that he or she would prefer to work out a solution with the doctor without going to court. Counsel should respect this position. Counsel could attempt to facilitate such a discussion but should do nothing unless the client makes a request or otherwise authorizes him or her to take some action.

Under some circumstances, counsel may believe that the restrictions the client has placed on his representation will seriously impair counsel's ability to achieve the client's goals. In such a situation – e.g., the respondent has asked for a jury trial but refuses to sign a record release permitting counsel to review hospital records – counsel may have to consider taking action that appears to run counter to the client's wishes as to the manner of proceeding. If the refusal to cooperate with counsel reaches the point that the client has, in effect, rejected or fired the attorney, counsel may consider asking the court to relieve him of the appointment. *See* D.C. R. Prof. Cond. 1.16. If the client's refusal to cooperate is occasioned by a desire to waive the right to counsel and proceed *pro se*, this decision is presumptively competent. Counsel must raise the issue with the court to determine whether the client is able to proceed *pro se*. *See Faretta v. California*, 422 U.S. 806 (1975).

Occasionally, counsel will encounter ethical problems when representing a client who is unable to communicate with or assist counsel due to confusion, memory loss associated with advanced dementia, or serious physical problems. There is no clear solution to this problem. Because counsel is not a guardian who can decide what is best for the person and the community without reference to the respondent's wishes, counsel may wish in these rare circumstances to request

appointment of a guardian *ad litem*.[4] The need for a guardian *ad litem* arises almost exclusively at the final stage of the commitment process, after the Mental Health Commission has recommended commitment and the respondent is unable to communicate a decision regarding his or her trial rights. In requesting appointment of a guardian *ad litem*, counsel should ask the court to instruct the guardian *ad litem* to decide not necessarily what is in the respondent's best interests, but what decision the respondent would make for himself were he able to communicate a decision. This substituted judgment approach is strongly favored in the District of Columbia, which values dearly the sanctity of personal choice. *See, e.g.*, *In re A.C.*, 573 A.2d 1235 (D.C. 1990).

III. MENTAL ILLNESS AND LIKELIHOOD OF INJURY TO SELF OR OTHERS

A. Statutory Criteria for Involuntary Hospitalization

Throughout the Ervin Act, the criteria for involuntary hospitalization are mental illness and likelihood of injury to self or others as a result of mental illness. (The second criterion is commonly referred to as "dangerousness.") Before a person may be taken into custody for emergency treatment, there must be allegations that the person has a mental illness and is likely to injure self or others if not immediately detained. D.C. Code § 21-521. The doctor admitting the person to the hospital must also be of the opinion that the proposed patient is mentally ill and dangerous. D.C. Code § 21-522. The court, in authorizing hospitalization on an emergency basis, must determine whether there is probable cause to find the respondent mentally ill and dangerous. *See In re Barnard*, 455 F.2d 1370 (D.C. Cir. 1971). A petition for one-year commitment, which begins the second stage of the process, must similarly allege mental illness and dangerousness, D.C. Code § 21-541, and the Mental Health Commission must make findings regarding mental illness and dangerousness. D.C. Code § 21-544. In the third stage of a commitment proceeding, a judge or jury must make findings based on clear and convincing evidence that there is mental illness and dangerousness before one-year commitment may be ordered. D.C. Code § 21-545. Finally, a person who is committed is entitled to periodic reviews of the commitment at which doctors must determine whether the person remains mentally ill to the extent that he or she is likely to injure self or others if not committed. D.C. Code §§ 21-546, 548.

The statute contains a definition of mental illness, D.C. Code § 21-501, but does not define "likely to injure self or others." Both criteria have been considered by the courts, and a number of cases include language useful to understanding what mental illness and dangerousness mean in an Ervin Act proceeding. It is important to be familiar with the jurisprudence in this area, though most decisions are tightly tied to the particular facts of each case.

The parameters of mental illness and dangerousness do not vary from section to section of the Ervin Act. However, the quantum of evidence needed to prove these elements varies from section to section, ranging from a mere "reason to believe" in § 21-521 to clear and convincing evidence at a trial held pursuant to § 21-545. In addition, the statute has some variation on the

[4] Appointment of a guardian, as distinct from a guardian *ad litem*, is not an available procedure. Guardians are statutorily prohibited from accepting involuntary or voluntary civil commitment on behalf of their wards. D.C. Code § 21-2047(c)(4).

time frame for evaluating dangerousness: to support emergency detention, the dangerousness must be likely if the person is "not immediately detained," D.C. Code § 21-521, but for one-year commitment, the danger need not be imminent. *See* § 21-545.

B. Mental Illness

1. Cases

In re Ballay, 482 F.2d 648 (D.C. Cir. 1973)

In re Rosell, 547 A.2d 180 (D.C. 1988)

In re (Melvin) Alexander, 372 F.2d 925 (D.C. Cir. 1967)

In re Artis, 615 A.2d 1148 (D.C. 1992)

Addington v. Texas, 441 U.S. 418, 427 (1979)

2. Definition of "Mental Illness"

"Mental illness" is defined in D.C. Code § 21-501 as "a psychosis or other disease which substantially impairs the mental health of a person." However, "what may viscerally appear to be precise to the layman – the term 'psychosis' – is deceptively broad." *In re Ballay*, 482 F.2d 648, 665 n.57 (D.C. Cir. 1973). Accordingly, the statutory definition has been given an expansive reading. For example, a person who was diagnosed as having a non-psychotic personality disorder after attempting suicide could be found to be mentally ill at a probable cause hearing. *See In re Rosell*, 547 A.2d 180 (D.C. 1988).

All medical or psychiatric diagnoses do not come within the statutory definition. For example, mental retardation, drug addiction, epilepsy, or alcoholism, though mental disorders listed in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994) (DSM-IV), are not, standing alone, considered mental illnesses under § 21-501. *See, e.g.*, S. Rep. No. 925, 88th Cong., 2d Sess. 13 (1964); *In re (Melvin) Alexander*, 372 F.2d 925 (D.C. Cir. 1967). Conversely, to qualify as a § 21-501 mental illness, the condition need not be classified in the DSM-IV. *(Melvin) Alexander*, 372 F.2d at 927. Psychosis due to drug or alcohol intoxication may meet the statutory definition of mental illness; however, given that such states are generally temporary, it is possible that within a few days of a person's hospitalization the mental illness will have dissipated. Finally, some physical conditions, such as renal failure or diabetes, can in an acute phase cause temporary psychosis that would be resolved when the physical problem is treated.

"'[M]ental illness' is by no means a static concept but rather one of degree of deviation from the 'norm'," *Ballay*, 482 F.2d at 665, and because the origins of mental illness are uncertain, the "spotlight" at any hearing is on the respondent's current mental condition. *In re Artis*, 615 A.2d 1148, 1151 (D.C. 1992). The Supreme Court has cautioned that there is a risk that a fact-finder "might decide to commit an individual based solely on a few isolated instances of unusual

conduct." *Addington v. Texas*, 441 U.S. 418, 427 (1979). Accordingly, before an individual may be deprived of his or her liberty, there must be "a showing that the individual suffers from something more serious than is demonstrated by idiosyncratic behavior." *Id*.

C. Dangerousness: Likelihood of Injury to Self or Others

1. Cases

Addington v. Texas, 441 U.S. 418 (1979)

Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969)

Cross v. Harris, 418 F.2d 1095 (D.C. Cir. 1969)

De Veau v. United States, 483 A.2d 307 (D.C. 1984)

Fuller v. United States, 390 F.2d 468 (D.C. Cir. 1967)

In re (Magnolia) Alexander, 336 F. Supp. 1305 (D.D.C. 1972)

In re Artis, 615 A.2d 1148 (D.C. 1992)

In re Ballay, 482 F.2d 648 (D.C. Cir. 1973)

In re Barnard, 455 F.2d 1370 (D.C. Cir. 1971)

In re Bumper, 441 A.2d 975 (D.C. 1982)

In re Gahan, 531 A.2d 661 (D.C. 1987)

In re Katz, 638 A.2d 684 (D.C. 1994)

In re Melton, 597 A.2d 892 (D.C. 1991) (*en banc*)

In re Mendoza, 433 A.2d 1069 (D.C. 1981)

In re Nelson, 408 A.2d 1233 (D.C. 1979)

In re Perruso, 896 A.2d 255 (D.C. 2006)

In re Samuels, 507 A.2d 150 (D.C. 1986)

In re Snowden, 423 A.2d 188 (D.C. 1980)

Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966)

Millard v. Harris, 406 F.2d 964 (D.C. Cir. 1968)

Overholser v. Russell, 283 F.2d 195 (D.C. Cir. 1960)

United States v. Charnizon, 232 A.2d 586 (D.C. 1967)

2. Overview of Dangerousness

The meaning of the phrase "likelihood of injury to self or others" is not spelled out in the Ervin Act and has not yet been definitively established under case law interpreting the Ervin Act, though it has been deemed clear enough to meet constitutional standards. *See In re (Magnolia) Alexander*, 336 F. Supp. 1305 (D.D.C. 1972). Refinement of this criterion has been left to the courts, *id*. at 1307, on a case-by-case basis. *In re Mendoza*, 433 A.2d 1069, 1072 (D.C. 1981); *see also Cross v. Harris*, 418 F.2d 1095, 1099 (D.C. Cir. 1969) (regarding similar criterion in sexual psychopath commitment statute).

Given that courts make decisions regarding dangerousness that are closely tied to the specific facts of each case, it is difficult to say with certainty whether the allegations in a case, if proved, would support a finding of dangerousness at a probable cause hearing, a Mental Health Commission hearing, or a trial.[5] In a number of cases, the D.C. Court of Appeals has affirmed findings of dangerousness, and a few behavioral patterns have consistently been determined to be dangerous. One caveat should be noted: in most reported decisions affirming a trial court finding of dangerousness, the evidence has suggested that the respondent engaged in a variety of behaviors which, individually, may or may not have supported the finding, but which clearly support the finding when reviewed as a whole. For example, the court held that behavior that might not otherwise be considered dangerous or out of the ordinary could be, under certain circumstances, "sufficient to enable the court to find risk of injury" that satisfied the statutory requirements. *In re Perruso*, 896 A.2d 255 (D.C. 2006). In another case, the Court of Appeals stated that "wandering aimlessly and speaking incoherently in the midst of moving automobile traffic" is an example of "behavior [that] endangered both [respondent's] own well-being and the safety of others," and when coupled with other incidents such as threatening family members, ramming his head into a steel door, and destroying property, there was "an ample substantive basis from which the jury could conclude that, because of his mental illness, [respondent] is likely to injure himself or others if" allowed to be at liberty. *In re Samuels*, 507 A.2d 150, 154 (D.C. 1986).

A finding of likelihood of harm under the Ervin Act need not be based on a showing that the respondent committed a recent overt act that harmed himself or others, although the absence of

[5] The circuit court, in an early decision interpreting the Ervin Act, suggested some of the shortcomings with a case-by-case approach to dangerousness. "Remaining largely undefined, application of [dangerousness] concepts by judge and jury may unduly reflect clinical definitions and conclusions rather than the appropriate judicial exegetics and community values … Since most 'mental illness' is defined and measured in terms of behavioral deviance, to classify and label it as a basis for subsequent testimony predictive of future behavior presents somewhat of an anomaly in itself. It is at least questionable in many cases exactly how much this differs from a prediction that 80-90% of the individuals featuring specified socio-economic traits and backgrounds are destined to commit crimes, then using this profile to rehabilitatively incarcerate, presumably an unacceptable procedure both morally and constitutionally." *Ballay*, 482 F.2d at 665-66.

such an act may be argued. *In re Snowden*, 423 A.2d 188, 191-192 (D.C. 1980).[6] Conversely, a judge or jury may not base a finding of dangerousness on speculation. *In re Mendoza*, 433 A.2d at 1071-72. Nor may a finding be based on injury to a respondent's "reputation 'and the like'"; "the word 'injure' at least implies an element of dangerousness." *Id*. However, "the danger need not necessarily be physical nor involve violence. All that is required is that the subject be found likely, by reason of mental illness, to 'inadvertently place himself in a position of danger or . . . to suffer harm.'" *In re Gahan*, 531 A.2d 661, 665 (D.C. 1987) (citations omitted).

3. Dangerousness to Self

The phrase "dangerous to self" is ambiguous. *In re Ballay*, 482 F.2d at 660.

> Literally this encompasses injury of an active sort ranging from intentional acts such as suicide, to purely unintentional acts, such as ignorantly crossing the street against the light, to purely passive injury, such as disease which results from inability to . . . furnish the minimum nutritional and hygienic requirements of life.

Id. However, dangerousness to self is not so broad as to allow for commitment "of persons who, because of mental illness, lack sufficient capacity to make responsible decisions with respect to hospitalization." *Id*. at 661.

The decision in the *Gahan* case, in which the Court of Appeals concluded that there was ample evidence at trial of a likelihood of self-injury to justify commitment, 531 A.2d at 665, is frequently cited by the petitioner in mental health cases to support its argument that a respondent is dangerous to self. In *Gahan*, the court held that the evidence that the respondent "had a habit of standing outside for hours in cold or rainy weather inadequately clothed," "had not eaten for two weeks prior to her admission to" the hospital, and had a history of malnutrition and dehydration when off of antipsychotic medications, and "was likely to place herself in a position of danger" with "aggressive and hostile conduct [that] was likely [at] some point to incur retaliation," supported a finding that the respondent "was unable to care for herself, to a degree which put her in potential physical danger." *Id*. at 665, 666. The court emphasized that the question for the jury was whether the respondent "is likely to injure herself in the future." *Id*. at 666. Moreover, "[t]his prediction does not depend on the individual's having succeeded in causing injury to herself in the recent past." *Id*.

4. Dangerousness to Others

Case law affirming commitment is replete with descriptions of behavior that have been found to support findings of dangerousness to others, though there is no clear definition of what this means. Clearly, attacking another person or threatening another person with serious harm, especially if the threat involves a knife or some other kind of a weapon, fall within the scope of dangerousness to others. Numerous cases, for example, have involved threats to or attacks on family members by respondents, *see, e.g.*, *In re Melton*, 597 A.2d 892, 901 (D.C. 1991) (*en*

[6] Similarly, a requirement of "proof of *high* probability that *substantial* harm would result if respondent were at liberty … reflects neither the burden of proof nor the statutory elements accurately." *In re Bumper*, 441 A.2d 975, 978 (D.C. 1982).

banc); *In re Samuels*, 507 A.2d 150, 154 (D.C. 1986); *In re Snowden*, 423 A.2d 188, 189 (D.C. 1980); or threatening and assaultive behavior directed toward women who were not related to the male respondents. *See, e.g.*, *In re Katz*, 638 A.2d 684, 686 (D.C. 1994); *Samuels*, 507 A.2d at 154; *Snowden*, 423 A.2d at 189. However, injury to others need not be intentional. *Bumper*, 441 A.2d at 978. Nor must there have been any actual physical injury to others; potential injury or emotional injury may be enough. *See Samuels*, 507 A.2d at 154.

The D.C. Court of Appeals in *Mendoza*, 433 A.2d at 1071 n.6, suggested that courts look to the decision in *Cross v. Harris*, 418 F.2d 1095 (D.C. Cir. 1969), for help in understanding what is meant by dangerousness to others. The circuit court decisions in *Cross* and *Millard v. Harris*, 406 F.2d 964 (D.C. Cir. 1968), which arose from commitments under the Sexual Psychopath Act, provide an analysis germane to the judicial assessment of dangerousness in Ervin Act proceedings. *See also Fuller v. United States*, 390 F.2d 468, 471 n.3 (D.C. Cir. 1967) (Bazelon, C.J., concurring); *Barnard*, 455 F.2d at 1375 n.12. To be dangerous for purposes of the Sexual Psychopath Act, one must be "likely to attack or otherwise inflict injury" on others. D.C. Code § 22-3803(1). The circuit court, in *Cross*, observed that the focus of the statute is not on expected conduct, but on the harm that may result from the conduct. In determining whether the misconduct is likely to result in injury, factors such as the frequency of the misconduct, the availability of treatment, and the likelihood that the person in question will voluntarily accept a course of outpatient treatment should be considered. 418 F.2d at 1100. The court emphasized the importance that trial judges not allow the question of likelihood of harm "to devolve, by default, upon the expert [psychiatric] witnesses." *Id*. at 1100.

In at least one kind of commitment case, the assessment of dangerousness seems to omit the requirement of a likelihood of injury. In what are commonly referred to as "White House cases," a respondent need not demonstrate overtly threatening behavior in order to be deemed dangerous to others. In these cases, evidence that police or Secret Service perceived the respondent as threatening to a public official has been sufficient to support commitment. *See, e.g.*, *In re Nelson*, 408 A.2d 1233, 1235 (D.C. 1979); Ballay, 482 F.2d at 649. *But see* David Shore, M.D., et al., *White House Cases: Psychiatric Patients and the Secret Service*, 142 Am. J. Psych. 3 (March 1985) (Less than a quarter of delusional visitors to the White House or other government offices have threatened some prominent political figure, yet none had made an attempt on the life of any prominent political figure ten years after initial hospitalization as White House cases.)

The fact that a respondent could be charged with a crime often leads the petitioner in an Ervin Act case to argue that the respondent is dangerous because he or she has engaged in a criminal act, even if it would be a non-violent charge. In support of this argument, the petitioner generally will cite *In re Mendoza*, 433 A.2d at 1072, and *United States v. Charnizon*, 232 A.2d 586 (D.C. 1967). However, a closer analysis of these and related cases demonstrates that this is an impermissible interpretation of the Ervin Act.

The *Charnizon* decision, which is most frequently cited by the petitioner to support the argument that non-violent criminal acts are tantamount to dangerous behavior warranting commitment, is based on *Overholser v. Russell*, 283 F.2d 195 (D.C. Cir. 1960), an early case involving a release request for a person found not guilty by reason of insanity. The Court of Appeals relied on *Overholser v. Russell* in *Mendoza*, which stated that "[i]nvoluntary civil commitment is

appropriate when a fact-finder determines by clear and convincing evidence, that the subject is likely to cause injury to himself or others by criminal conduct or otherwise." 433 A.2d at 1072. However, the decisions in *Mendoza* and in *Overholser v. Russell* do not support the conclusion that any and all criminal behavior is tantamount to dangerous behavior warranting civil commitment. Non-violent or non-injurious criminal acts are not *per se* evidence of dangerousness in civil commitment cases given the holding in *Mendoza* that "a jury instruction [on dangerousness] must be sufficiently pure to protect against misleading the jury into speculation" and that the common meaning of injure[7] should be used. *Id*.

In *Overholser v. Russell*, the D.C. Circuit addressed whether an insanity acquittee, who was seeking release under D.C. Code § 24-501, is "'dangerous' if he may commit a non-violent crime, or only if he may commit an act of violence." 283 F.2d at 198. The court ruled, *per curiam*, that Russell, who had been acquitted by reason of insanity on a bad check charge, should not have been unconditionally released where, in part, the evidence showed that he might write bad checks if released. Russell himself had presented expert testimony that he remained mentally ill and was dangerous to "society because of his check-writing proclivity" and to himself because of his history of suicide attempts. The court, in *dicta*, stated:

> the danger to the public need not be possible physical violence or a crime of violence. It is enough if there is competent evidence that he may commit any criminal act, for any such act will injure others and will expose the person to arrest, trial and conviction. There is always the additional possible danger – not to be discounted even if remote – that a non-violent criminal act may expose the perpetrator to violent retaliatory acts by the victim of the crime.

Id. However, the trial court's order of unconditional release was reversed primarily because Russell had not proved that he had sufficiently recovered from his mental illness, as evidenced by his expert's opinion. This fact was essential for Judge Bazelon, who wrote a concurring opinion in which he agreed that the evidence supported the conclusion that Russell had not recovered from his mental illness to the extent that he would not be a danger to self or others in the reasonably foreseeable future. Judge Bazelon wrote separately to emphasize that there was "no basis for th[e] court's comments on the question whether a person who will probably commit non-violent crimes . . . may be unconditionally released." The question was not presented by the record in this case. *Id*. at 199.

Similarly, the question of whether a non-violent criminal act is *per se* evidence of dangerousness was not properly before the D.C. Court of Appeals in *United States v. Charnizon*, 232 A.2d 586 (D.C. 1967). Charnizon had been rehospitalized after running up a large hotel bill that he took care of with a bad check. In addition to this incident, there was evidence in the record from Charnizon's expert that he "had not recovered and would be a danger to himself and others if released." In spite of this expert testimony, the trial court *sua sponte* unconditionally released Charnizon, in part because of the disparity between the possible sentence and the length of commitment. The question presented to the Court of Appeals centered on the standard for return

[7] "Injure" is defined in Webster's New World Dictionary (3d College ed. 1988) as follows: "to do physical harm or damage to; hurt."

to inpatient status of this insanity acquittee who had been charged with writing bad checks after being conditionally released under D.C. Code § 24-501. The appeals court rejected the trial court's position, emphasizing that the criteria for release under § 24-501 is whether the patient has an abnormal mental condition that renders him potentially dangerous. Because of the expert testimony that Charnizon was still dangerous, not because he had engaged in possible criminal conduct, the court found that unconditional release was inappropriate. Then, in *dicta*, the court added that, under § 24-501, dangerousness "need not be possible physical violence or a crime of violence," 232 A.2d at 588, quoting with approval the language in *Overholser v. Russell*.

Subsequent cases seem to have discredited the idea that dangerousness can be proved by suggesting there is a possibility an insanity acquittee (or civilly committed person) might commit a nonviolent criminal act. In *Millard v. Harris*, 406 F.2d 964 (D.C. Cir. 1968), the court more fully addressed the question whether a person's non-violent criminal conduct might be dangerous to others. Judge Bazelon wrote on the question of dangerousness under the District's sexual psychopath law. Millard was found not dangerous in spite of testimony that he had a history of exhibitionism, voyeurism, and masturbating in public, all criminal acts. He had no history of violent sexual crimes, though he had history of other aggressive and assaultive acts. The court noted, however, that "[w]ere this a case involving civil commitment, such a rounded view of the individual's personality and past behavior would of course be essential both to a determination of whether he was mentally ill and, if so, whether his condition would cause him to be dangerous to himself or others." *Id*. at 975. Judge Bazelon rejected the implicit assumption of the trial court

> that the mere fact that some such women and children are among the 'potential viewers' of the appellant's expected exhibitionism if released is enough to justify the ultimate conclusion of likely dangerousness . . . [T]he requirement for commitment for dangerousness is not the mere possibility of serious harm, but its likelihood. The trial court made no effort to evaluate the probability, as opposed to the possibility, of such harm.

Id. at 977. Thus, the statutory requirement that a person must be "*likely* to inflict injury on others" is crucial to the analysis of dangerousness. *Id*. The court went on to find that the possibility of psychological harm to others, including children, who might witness Millard's act of exposure, was "too remote to justify commitment." *Id*. at 978.

Millard was the starting point for the circuit court's decision in *Cross v. Harris*, 418 F.2d 1095 (D.C. Cir. 1969), which further refined what goes into a dangerousness determination. (*Cross* is cited with approval in *Mendoza*, *supra*.) In *Cross*, Chief Judge Bazelon again focused on what the language "likely to . . . inflict injury" means. The court wanted to provide guidance to "lower courts in applying the conclusory term 'dangerous to others.'" *Id*. at 1099 (citation omitted).

> Without some such framework, 'dangerous' could readily become a term of art describing anyone whom we would, all things considered, prefer not to encounter on the streets. We did not suppose that Congress had used 'dangerous' in any such Pickwickian sense . . .

> The focus of the statute is not on expected conduct, but on the harm that may flow from that conduct. Commitment cannot be based simply on the determination that a person is likely to engage in particular acts. The court must also determine the harm, if any, that is likely to flow from these acts. A mere possibility of injury is not enough; the statute requires that the harm be *likely*. For no matter how certain one can be that a person will engage in particular acts, it cannot be said that he is 'likely to . . . inflict injury' unless it can also be said that the acts, if engaged in, are likely to result in injury.

Id. at 1099-1100 (citations omitted; emphasis in original). The court went on to emphasize that the magnitude of harm that would justify commitment must be substantial. It was clear that the commitment act in question did not "authorize indefinite preventive detention for those who have a propensity to behave in a way that is merely offensive or obnoxious to others." *Id*. at 1100. "Incarceration for a mere propensity is punishment not for acts, but for status, and punishment for status is hardly favored in our society." *Id*. at 1101-02.

More recent decisions by the D.C. Court of Appeals seem to have modified the *dicta* in *Charnizon* regarding non-criminal acts in evaluating dangerousness in § 24-501 release hearings. For example, the court's analysis in *De Veau v. United States*, 483 A.2d 307 (D.C. 1984), should lay to rest any argument, in any commitment context in D.C., that any non-violent criminal act, without more, is sufficient to support a finding of dangerousness. In *DeVeau*, the court addressed the factors that go into a current determination of dangerousness, given the presumption of mental illness and dangerousness following an insanity acquittal. First, "the hospital records, files, and psychiatric history of the acquittee are all relevant, and may be considered by the court." *Id*. at 314 (citations omitted). Second, "[t]he court may refer also to the acquittee's demonstrated behavior, including the act for which she was prosecuted as well as any other prior crimes or bad acts, if, in the particular case before the court, the behavior relates to the current determination of dangerousness." *Id*. at 315. Whether the offense leading to commitment was violent "may be relevant to the determination of whether the public's safety will be protected if the acquittee is released." *Id*. at 315 n.19. Although the court concluded that prior behavior could be considered, it emphasized that "there are relevancy limits to the use of prior antisocial acts in predicting future dangerousness. The mere commission of such an act or acts is not, without more, sufficient to establish dangerousness by a preponderance of the evidence." *De Veau*, 483 A.2d at 315 n.20. Third, given the "lack of certainty and fallibility of psychiatric diagnosis," *Addington v. Texas*, 441 U.S. 418, 429 (1979), quoted in *De Veau*, 483 A.2d at 315, the court must evaluate "these professional opinions [on future dangerousness], whether there is a consensus expressed, and whether the doctors have persuasively given reasons for their opinions." 483 A.2d at 316.

The court has reiterated that civilly committed individuals are distinct from individuals committed following an insanity acquittal "because [the latter] are 'an exceptional class of people' who have 'already unhappily manifested the reality of anti-social conduct.'" *Reese v. United States*, 614 A.2d 506, 515 (D.C. 1992) (citation omitted). Thus, prior criminal behavior may be a factor in determining current dangerousness for an insanity acquittee because that person has, in fact, committed a crime; a person found not guilty by reason of insanity is

presumed to be mentally ill and dangerous because of the nature of the commitment under D.C. Code § 24-501(d)(2). *Id.*

There are no decisions by the Court of Appeals after *Mendoza* that incorporate *DeVeau* or *Reese* into an analysis of dangerousness under the Ervin Act. Nor is there anything that directly addresses the question whether commission of non-violent or non-injurious criminal acts, without more, can support a finding of likelihood of injury to others under the Ervin Act. However, given the case law addressing this issue in a different, but similar, arena, and the oft-quoted admonition that the Ervin Act must be "narrowly, even grudgingly, construed," *Covington v. Harris*, 419 F.2d 617, 623 (D.C. Cir. 1969), it is difficult to see how commission of a non-violent criminal act by a respondent in a mental health case could be deemed likely to injure others, absent other compelling evidence of dangerousness.

5. Nexus Between Mental Illness and Dangerousness

The petitioner is required to establish a connection between the mental illness of the respondent and the dangerous behavior attributed to him. Counsel should be alert to any case in which the petitioner has failed to make this connection, and argue this point in court. For example, a person who is mentally ill may get involved in street fights, petty crimes, or family disputes that have nothing to do with the person's illness.

IV. INVOLUNTARY ADMISSION AND DETENTION UNDER D.C. Code §§ 21-521 TO 21-528

A. Application for Emergency Observation

1. Statutes and Court Rules

D.C. Code § 21-501 (definitions of mental illness, physician, private hospital, public hospital, and qualified psychologist)

D.C. Code § 21-501.01 (qualified psychologists)

D.C. Code § 21-521 (detention of persons believed to be mentally ill; transportation and application to hospital)

D.C. Code § 21-582 (conflicts for physicians and qualified psychologists)

D.C. Code § 21-583 (physicians and qualified psychologists as witnesses)

2. Cases

In re Barnard, 455 F.2d 1370 (D.C. Cir. 1971)

In re Blair, 510 A.2d 1048 (D.C. 1986)

In re Clark, 700 A.2d 781 (D.C. 1997)

In re Curry, 470 F.2d 368 (D.C. Cir. 1972) (*Curry II*)

In re Herman, 619 A.2d 958 (D.C. 1993) (*en banc*)

In re (Bernard) Johnson, 691 A.2d 628 (D.C. 1997)

In re Morris, 482 A.2d 369 (D.C. 1984)

In re Rosell, 547 A.2d 180 (D.C. 1988)

Magwood v. Giddings, 672 A.2d 1083 (D.C. 1996)

Williams v. Meredith, 407 A.2d 569 (D.C. 1979)

In re Peterson, 984 A.2d 192 (D.C. 2009)

3. Who May Initiate Emergency Hospitalization

The Ervin Act identifies three classes of persons qualified to take another person into custody and apply for the emergency hospitalization of that person in the District of Columbia: (1) an officer authorized to make arrests in D.C.; (2) an accredited officer or agent of the Department of Mental Health of the District of Columbia[8]; or (3) the physician or the qualified psychologist of the person in question. D.C. Code § 21-521 (2004).[9] A physician or psychologist who is employed by the government but is not an officer or agent of the District may not execute an application unless he or she is the physician or qualified psychologist of the person in question. *See Williams v. Meredith*, 407 A.2d 569 (D.C. 1979). The court in *Williams v. Meredith* emphasized that a § 521 applicant who is the "physician of the person in question" presupposes a voluntary and pre-existing doctor-patient relationship. *Id*. at 573. However, in *In re Rosell*, 547 A.2d 180 (D.C. 1988), where the physician applicant had no pre-existing relationship and only met the respondent in his hospital's emergency room, the court concluded that even if the application for hospitalization was defective because the doctor was not the "physician of the person in question," the statutory violation need not result in dismissal of the civil commitment action given the trial court's determination that involuntary hospitalization was supported by probable case. *Accord In re Herman*, 619 A.2d 958 (D.C. 1993) (*en banc*).

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[8] A list of accredited officer-agents can be obtained from the Department of Mental Health's Access Helpline at 671-3070. Certification of officer-agents is regulated by the Department of Mental Health in accordance with 22 D.C.M.R. 7600, *et seq*. (2008).

[9] This process of taking a person into custody and applying for the person's emergency hospitalization, while technically not an arrest, is a seizure within the meaning of the Fourth Amendment to the U.S. Constitution. *In re Barnard*, 455 F.2d 1370, 1373 (D.C. Cir. 1971). In *Magwood v. Giddings*, 672 A.2d 1083 (D.C. 1996), a woman involuntarily hospitalized as potentially suicidal unsuccessfully sued an officer-agent for false imprisonment, intentional infliction of emotional distress, negligence, and battery.

The class of psychiatrist or psychologist applicants is limited somewhat by § 21-582(a), which forbids a physician or qualified psychologist related to a person by blood or marriage to apply for that person's hospitalization under § 21-521 and prohibits a physician or psychologist who has a professional, financial, or official connection with a private hospital to apply for any person's admission to that particular hospital. In addition, § 21-582(b) states that a physician's or psychologist's application may not be considered unless it is based on personal observation and examination made by the physician or qualified psychologist within 72 hours of the execution of the application. *See In re Morris*, 482 A.2d 369 (D.C. 1984).

The requirement that the application be based on personal examination of the respondent may provide a basis for challenging the validity of the detention papers. An application that does not satisfy this requirement is not "cured" or "remedied" by a later judicial determination under §§ 21-524 and 21-525, *In re Herman*, 619 A.2d 958, 968 (D.C. 1993) (*en banc*), and although such a defect may not warrant dismissal of the action *per se*, the court should take such defects into account "insofar as they bear upon the reliability and integrity of the application and the information therein." *Id*.

4. Basis for Application

Section 21-521 requires the applicant to set forth in detail those facts that cause him or her to believe that the subject of the application is mentally ill and, as a result of mental illness, likely to injure self or others if not immediately detained.

5. Subject of an Emergency Application

Any person, adult or juvenile, may be the subject of an application for emergency hospitalization if the applicant has reason to believe that the person is mentally ill and, as a result of the illness, is likely to injure self or others if not immediately detained. However, if a person is seeking voluntary hospitalization under § 21-511, that person may not be made the subject of a § 21-521 application for emergency detention and observation. *See In re Blair*, 510 A.2d 1048, 1051 (D.C. 1986). *But see In re (Bernard) Johnson*, 691 A.2d 628 (D.C. 1997).

The D.C. Court of Appeals in *Blair* adopted the conclusion of the D.C. Circuit, which found that the Ervin Act's preference for voluntary treatment precluded the involuntary emergency hospitalization of a person who was actively seeking inpatient treatment under § 511. *In re Curry*, 470 F.2d 368 (D.C. Cir. 1972) (*Curry II*). In *Curry II*, the respondent voluntarily sought inpatient treatment at George Washington University Hospital, but was instead admitted to St. Elizabeths as an emergency involuntary patient. The circuit court dismissed his case after he had unsuccessfully raised the issue at a § 525 probable cause hearing, after a § 541 petition for judicial hospitalization had been filed, and after he had been discharged from the hospital. The court found that the issue was not moot and declared his involuntary hospitalization null and void. This result was reached in *Blair* also, though the respondent in that case came to the hospital under slightly different circumstances. In that case, the respondent was a voluntary outpatient for whom inpatient treatment was recommended. He agreed to his counselor's recommendation, but asked to wait a day to implement it so that he could take care of some personal matters. When he returned the next day seeking voluntary inpatient treatment, the

doctor believed he was "drunk" and his counselor thought he might sign himself out of the hospital prematurely, so the staff arranged for his admission to St. Elizabeths as an emergency involuntary patient. When Blair raised this issue at a § 525 hearing, the court rejected it and found probable cause to support his detention as an emergency patient. However, the Court of Appeals concluded that "the steps taken to have Blair hospitalized on an involuntary basis were improper, and the motion to dismiss the probable cause proceeding should have been granted." 510 A.2d at 1051; *cf. Zinermon v. Burch*, 494 U.S. 113 (1990) (incompetent respondent should not have been allowed to sign in as a voluntary patient where applicable statute required "express and informed consent" to voluntary admission).

There have been several cases decided after the *Blair* decision that have complicated the issue of voluntariness as a bar to commitment. In *In re Clark*, 700 A.2d 781 (D.C. 1997), the court held that a voluntary inpatient who was charged with a crime and found incompetent to stand trial on the charge, pursuant to *Jackson v. Indiana*, 406 U.S. 715 (1972), may be subject to involuntary commitment under D.C. Code §§ 21-541 through 21-545. Similarly, in *In re (Bernard) Johnson*, 691 A.2d 628 (D.C. 1997), the court concluded that Johnson's commitment as an outpatient, under D.C. Code § 21-545, was not precluded by the fact that, prior to the initiation of the commitment proceeding, he had been receiving outpatient treatment on a voluntary basis under § 21-511. Most recently, the court held that a voluntary inpatient status did not bar initiation of emergency detention proceedings after he requested his discharge. *In re Peterson*, 984 A.2d 192.

Individuals who are already subject to an involuntary outpatient commitment order under D.C. Code § 21-545 can be detained as the subject of an application for admission under D.C. Code § 21-521. However, the government is obligated under D.C. Code § 21-548 to notify the court of the person's inpatient status within 24 hours of hospitalization, and the government must release the person from detention if it has not filed a petition for revocation of outpatient status within 5 days of a detention order.

B. Examination and Admission for Observation for 48 Hours and Petition Requesting Continued Detention

1. Statutes and Court Rules

D.C. Code § 21-522 (examination and admission to hospital)

D.C. Code § 21-523 (court order required for detention beyond 48 hours)

D.C. Code § 21-526 (extension of maximum periods of time)

D.C. Code § 21-582(b) (admission certificate based on personal observation and examination)

Super. Ct. Ment. Health R. 2 (emergency detention proceedings)

2. Examination and Admission for Observation for 48 Hours

Once an application is received by a hospital,[10] a psychiatrist, qualified physician,[11] or qualified psychologist on the staff of the hospital must examine the individual in question and make an independent decision whether to admit the person. A person could also be presented for admission to the Department of Mental Health and would have to be evaluated by the Department's chief clinical officer or his designee. D.C. Code § 21-522(a). A psychiatrist, qualified physician, or psychologist who evaluates a person presented with an application for involuntary detention must complete a certificate stating that he or she: (1) has examined the person; (2) is of the opinion that the person is mentally ill and as a result dangerous; and (3) is of the opinion "that hospitalization is the least restrictive form of treatment available to prevent the person from injuring himself or others." D.C. Code § 21-522(a)(3).

If the psychiatrist, physician, or psychologist decides to admit the person and executes a certificate under D.C. Code § 21-522, the individual must be admitted to a public hospital, or may be admitted to a private hospital, for a period of up to 48 hours. In addition, a person admitted to the hospital as an emergency patient must be informed of his right to counsel. Super. Ct. Ment. Health R. 2(a).

If the doctor examining the person for admission is of the opinion that hospitalization is not the least restrictive form of treatment, but "that detention in a certified facility for observation and diagnosis is the least restrictive treatment alternative to prevent the person from injuring himself or others," then the person may be detained by the Department of Mental Health at a certified facility. D.C. Code § 21-522(b)(4). Currently, the only certified facility for emergency observation and diagnosis is the Department's Comprehensive Psychiatric Emergency Program (CPEP), located on the grounds of the former D.C. General Hospital. Typically, respondents remain at CPEP for at most a few days and are either discharged back to the community or placed in a hospital by the Department.

If the doctor examining the person for admission is of the opinion that detention at a hospital or a certified facility is not warranted, the doctor must "facilitate the person's treatment through the Department [of Mental Health] or a provider [of mental health services], as appropriate." D.C. Code § 21-522(c).

A psychiatrist or psychologist executing a certificate of admission must base the certificate "on personal observation and examination of the [alleged mentally ill] person." D.C. Code § 21-582(b). Also, "[t]he certificate shall set forth in detail the facts and reasons on which the physician or qualified psychologist based his opinions and conclusions." *Id.*

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[10] A hospital is defined as an institution, or part thereof, which is equipped and qualified to provide inpatient care and treatment for physical or mental illness. D.C. Code § 21-501.

[11] A "qualified physician" is one who is licensed to practice medicine in D.C. and "who is board-certified in emergency medicine and certified by the Department [of Mental Health] to examine persons and prepare admission certificates pursuant to section 21-522." D.C. Code § 21-501(9A).

3. Petition Requesting Continued Detention

A person admitted under § 21-522 must be released within 48 hours unless the hospital or Department of Mental Health has, within that period, filed a petition with the court for an order extending the hospitalization for further evaluation and diagnosis for a period not to exceed seven days. D.C. Code § 21-523. The application for the person's admission and the § 522 certificate for admission should be filed with the petition. *See* D.C. Code § 21-524(b).

Section 21-526(a) and (b) describes the method of computing the time limits set by D.C. Code §§ 21-522 to 524 and when these time limits may be extended beyond "clock" or "calendar" limits as set forth in these sections.

C. Ex Parte Consideration of Petition, Section 21-524 Order, and Assignment of Counsel Under Section 21-543

1. Statutes and Court Rules

D.C. Code § 21-524 (seven-day order)

D.C. Code § 21-543 (appointment of counsel)

Super. Ct. Ment. Health R. 2 (emergency detention proceedings)

Super. Ct. Ment. Health R. 12(a) (appointment of counsel)

2. Cases

In re Barnard, 455 F.2d 1370 (D.C. Cir. 1971)

In re Herman, 619 A.2d 958 (D.C. 1993) (*en banc*)

Williams v. Meredith, 407 A.2d 569 (D.C. 1979)

3. Review of § 523 Petition and Seven-Day Order

The court[12] will consider the § 21-523 petition on an *ex parte* basis and must act on it within 24 hours. D.C. Code § 21-524. As part of the petition, the court must consider the report of the person who made the admission application and the certificate of the admitting psychiatrist or psychologist as well as any other relevant information. *See* § 21-524(b); Super. Ct. Ment. Health R. 2(b).

The court may not grant the order extending the hospitalization unless it finds that the petition and accompanying documents contain "demonstrable facts" (and not "mere conclusory statements") establishing that probable cause exists to believe that the respondent is mentally ill

[12] One judge in the family court is assigned to the mental health calendar.

and, as a result of such illness, likely to injure self or others. *See In re Barnard*, 455 F.2d 1370, 1375 (D.C. Cir. 1971); *Williams*, 407 A.2d at 574.

Should the court decide to grant the § 523 petition, it will issue a detention order pursuant to D.C. Code § 21-524, which extends the period of hospitalization for up to seven days. The order, which is prepared by the clerk's office, also appoints counsel for the respondent and provides the respondent with notice of his right to a hearing under D.C. Code § 21-525. *See In re Barnard*, 455 F.2d at 1376. *See* D.C. Code § 21-543; D.C. Super. Ct. Ment. Health R. 2, 12(a).

In some cases, the court has concluded that the petition did not provide sufficient factual information that the respondent was mentally ill or likely to injure self or others as a result of mental illness.[13] *See, e.g.*, *In re Clinton*, M.H. No. 239-99 (D.C. Super. Ct. March 30, 1999) (Broderick, J.); *In re Britton*, M.H. No. 425-85 (D.C. Super. Ct. April 24, 1985) (Morrison, J.). In several more recent cases, the court has concluded that the petition was not filed within 48 hours of the respondent's admission to CPEP or the hospital, and has denied an order extending the detention. Because it is sometimes difficult to determine the exact time of admission, sometimes the court relies on supporting documents to determine when a person began receiving treatment, in order to start the 48-hour time period. In cases where the order to extend detention is denied, the respondent has the right to immediate release from detention. Often a respondent will chose to remain at the hospital as a voluntary patient. In cases where the petition is denied, the court usually assigns counsel to ensure that the person is not unlawfully detained.

D. Section 21-525 Hearing

1. Statutes and Court Rules

D.C. Code §§ 7-1201.01 *et seq.* (Mental Health Information Act)

D.C. Code § 21-501 (definition of mental illness)

D.C. Code § 21-525 (hearing by the court)

D.C. Code § 21-562 (medical records)

D.C. Code § 21-583 (physicians and psychologists as witnesses)

D.C. Code § 21-584 (witness fees)

D.C. Code § 21-585 (respondents may not be held in jail or cellblock)

Super. Ct. Ment. Health R. 2 (emergency detention proceedings)

[13] The court also may deny the request for a seven-day order if it is apparent that the documents before it are legally defective or violate the requirements of § 21-582. However, "[n]othing in § 524 suggests that the trial court should focus upon the processes whereby the person came to be admitted to the hospital to the exclusion of other considerations. *In re Herman*, 619 A.2d at 963.

Super. Ct. Ment. Health R. 12 (appointment of counsel)

Super. Ct. Ment. Health R. 13 (time)

2. Cases

In re Barlow, 634 A.2d 1246 (D.C. 1993)

In re Barnard, 455 F.2d 1370 (D.C. Cir. 1971)

In re Blair, 510 A.2d 1048 (D.C. 1986)

In re Curry, 470 F.2d 368 (D.C. Cir. 1972) (*Curry II*)

In re DeLoatch, 532 A.2d 1343 (D.C. 1987)

In re Herman, 619 A.2d 958 (D.C. 1993) (*en banc*)

Williams v. Robinson, 432 F.2d 637 (D.C. Cir. 1970)

In re Peterson, 984 A.2d 192 (D.C. 2009)

3. Nature and Scope of § 525 Hearing

To contest the legality of an emergency hospitalization, the respondent may request a hearing pursuant to D.C. Code § 21-525. At the hearing, the court will, after hearing the evidence and arguments of counsel, determine whether the petitioner has met its burden of showing probable cause to find the respondent is mentally ill and likely to injure self or others as a result of mental illness.

The respondent has an unqualified right to have the hearing held within 24 hours of requesting it. *In re DeLoatch*, 532 A.2d 1343 (D.C. 1987). The request is usually made through the Mental Health Clerk by respondent's counsel. A request can be made in writing, in person, or by telephone to the Mental Health and Mental Retardation Branch of the Family Court during normal business hours, or by filing a written request with the Family Court after normal business hours. D.C. Super. Ct. Ment. Health R. 2(d). In accordance with the requirement that the hearing be held within 24 hours of the request, the hearing will be scheduled before a Superior Court judge,[14] usually for the following day. If the court does not conduct the § 21-525 hearing within 24 hours, the respondent must be released. *Id*. at 1345; *see In re Barlow*, 634 A.2d 1246, 1250 (D.C. 1993) (hearing "*must* begin prior to the expiration of the deadline and . . . must *continue* to advance to conclusion without reasonable delay") (emphasis in original). The respondent may waive the 24-hour rule by filing a *praecipe* with the court before the hearing.

[14] Since the creation of the family court, there have been times when a judge is not available to preside over a probable cause hearing and a magistrate judge has been assigned to the mental health case for the § 525 hearing. While this is inconsistent with long-time practice and appears inconsistent with the court's rules, challenges to magistrate judges at probable cause hearings have been unsuccessful.

Any legal infirmity underlying the respondent's detention may be raised at the § 21-525 hearing. *See Curry II*, 470 F.2d 368 (D.C. Cir. 1972); *Barnard*, 455 F.2d 1370; *Morris*, 482 A.2d 369. *But see Herman*, 619 A.2d 958. The issues that frequently arise include: (1) whether the respondent was illegally converted to involuntary status while seeking admission on a voluntary basis, *see In re Blair, In re Curry*;[15] (2) whether the application was executed by a person authorized to make an application under § 21-521; (3) whether the application meets the requirements of D.C. Code § 21-582; and (4) whether all the time limits specified in §§ 21-521 to 525 have been met.

4. Legal Standard at a Probable Cause Hearing

Probable Cause: The probable cause determination itself involves consideration of two elements: (1) the presence of a mental illness; and (2) the likelihood of injury to self or others because of such illness. These elements are discussed in detail in Section III. The standard of proof at a § 21-525 hearing has been found to be analogous to that used to test affidavits supporting requests for search and arrest warrants. *Barnard*, 455 F.2d at 1375 n.13. The information before the court must be sufficiently detailed and supported by facts to allow the court to perform its function under § 21-525 of ruling on the credibility of the evidence and determining whether probable cause exists for continued detention. *Id*. at 1375.

5. Setting for Hearing

The § 21-525 hearings are held in Superior Court. Ordinarily, respondents are brought to court by hospital or ward staff and physical restraints are not used. Use of the jail or cellblock is prohibited by D.C. Code § 21-585.

In the case of a respondent who speaks English only as a second language or who is unable to hear, counsel should inform the court and petitioner's counsel as soon as possible after requesting the hearing. The court should arrange for an interpreter to be present at the hearing. See D.C. Code § 2-1901 *et seq.* (1993).

The court does not usually make a court reporter available for probable cause hearings, which are recorded by tape. If counsel wants a court reporter to transcribe a probable cause hearing, it is advisable to make the request in advance in order to avoid delay of the proceedings.

6. Hearing and Procedure

a. Presence of respondent

The respondent has a right to be present at the hearing, but may waive his or her presence. *See* Super. Ct. Ment. Health R. 2(f); *Barnard*, 455 F.2d 1370.

[15] *In re Peterson*, 984 A.2d 192 (D.C. 2009), altered the long-standing jurisprudence regarding an individual's absolute right to receive treatment on a voluntary basis, and to be discharged within 48 hours upon written request.

b. Preliminary matters

Counsel may and should ask the court to impose the Rule on Witnesses. Generally, such a request will be granted, though expert witnesses are usually allowed to remain in the courtroom while fact witnesses testify.

Generally, challenges to the legality of the detention procedure are raised as preliminary matters. The court may choose to resolve the legal challenge prior to commencement of any hearing on the merits of the probable cause determination, or may choose to proceed with arguments and evidence on the merits as well, and resolve the case in its entirety at the conclusion of the hearing.

c. Petitioner's case

At the § 21-525 hearing, the burden is on the hospital, as the petitioner, to establish that probable cause exists to justify the respondent's emergency hospitalization.[16] The hospital may do this either by relying on the same papers that were before the judge who authorized the original § 21-524 order, *Barnard*, 455 F.2d at 1375,[17] or by presenting witnesses. Hearsay is admissable.

Often the only witness for the petitioner will be the psychiatrist or psychologist treating the respondent at the hospital. Absent a stipulation as to the doctor's qualification as an expert in the treatment and diagnosis of mental illness, the prosecuting attorney first questions the doctor in a manner designed to establish the doctor's qualifications to testify as an expert witness. Respondent's counsel may conduct *voir dire* to challenge the doctor's qualifications. *See infra* Section VI.D.6. Once the doctor is qualified as an expert, he or she will typically be asked whether he or she: (1) is responsible for the respondent's care at the hospital; (2) is aware of the circumstances of the respondent's admission; (3) has reviewed the respondent's hospital records; (4) has conferred with hospital staff or family members about the respondent's condition and behavior; (5) has an opinion on whether the respondent has a mental illness and to explain the basis for that opinion, including a description of the respondent's diagnosis and symptoms the respondent is showing at the time of the hearing; and (6) has an opinion whether the respondent, as a result of mental illness, is likely to injure self or others if released, and the basis for that opinion. Other areas of examination may include the frequency of the doctor's contact with the respondent, the respondent's reported behavior in the community and on the ward, the respondent's history of prior hospitalizations and treatment, the medication the respondent is taking at the time of the hearing, and the doctor's opinion regarding the likelihood the respondent would continue taking medication or following through with other treatment if released from emergency detention. The petitioner's expert witness seldom has direct knowledge of the initial

[16] The Department of Mental Health (DMH), which operates St. Elizabeth's Hospital, is the petitioner in all but a handful of emergency mental health cases. DMH is represented by the Mental Health Section of the Office of the Attorney General for the District of Columbia, whose offices are located on the 2nd floor of the Smith Center on the grounds of St. Elizabeth's Hospital, 1100 Alabama Ave. SE. The main phone number for the office is (202) 645-5266. If the petitioning party is a private medical facility, its counsel will prosecute the case.

[17] In those rare cases where the hospital decides to rely on the papers, counsel's proffer of contrary proof of challenge to the accuracy of the facts or diagnoses in the papers can force the petitioner to put on live testimony. *See Barnard*, 455 F.2d at 1375.

detention and will rely primarily on the information in the § 521 application and § 522 certificate to establish the circumstances of admission. Similarly, the witness will typically rely on the notes by ward staff contained in the medical record to establish the respondent's behavior since admission.

Hearsay is admissible, but where the declarant is unknown or of uncertain reliability, or where the hearsay is second- or third-hand, the court may sustain an objection to its coming into evidence to establish the truth of the matters asserted.

Occasionally, the petitioner will call a family member, a police officer, an officer-agent, a case manager, or another member of the hospital staff to testify. Generally, if asked, the petitioner's counsel will inform the respondent's counsel who the witnesses are prior to the beginning of the hearing.

d. Respondent's case

The respondent is entitled to be represented by counsel, testify, present evidence, and examine witnesses at the § 21-525 hearing. *See* Super. Ct. Ment. Health R. 2(f). Counsel may subpoena witnesses, *id.*, or introduce affidavits. *See Barnard*, 455 F.2d at 1375. Under D.C. Code § 21-583, any psychiatrist, psychologist, or physician making application or conducting an examination pursuant to the Ervin Act can be compelled to give testimony.

Numerous avenues are available to the respondent to present favorable information to the court. As hearsay is usually accepted, the medical records may contain information supporting the respondent's position.[18] If the doctor testifies on the petitioner's behalf, favorable information contained in the records may be elicited through cross-examination. In addition to cross-examination of the petitioner's expert, the respondent may present witnesses such as relatives, eyewitnesses to events upon which the admission was based, community-based treatment providers, and so on.[19] A showing of alternative reasons for behavior, community ties, employment, residence or treatment alternatives to hospitalization may influence the court. Because the essential question in the hearing is how the respondent would act if left at liberty, i.e., released from emergency detention, evidence showing how the respondent would live and act in the community is relevant. If the respondent is willing to transfer to a different hospital and has the means to do so, a social worker can be called to testify to these facts, because willingness to seek help on a voluntary basis is a factor for the court to consider in making a judicial determination of dangerousness. *See Cross v. Harris*, 418 F.2d at 1101.

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[18] D.C. Code Section 21-562 requires the hospital to maintain "records detailing all medical and psychiatric care and treatment received by a person admitted for treatment as a voluntary, non-protesting, emergency or commited patient … and the records shall be made available [upon that person's written authorization] to the person's attorney …" *See also* D.C. Code §§ 7-1202.01, 1202.02, and 1202.06 (Mental Health Information Act); *see Williams v. Robinson*, 432 F.2d 637, 642-643 (D.C. Cir. 1970) ("[W]hen a patient at Saint Elizabeths seeks to challenge the legality of hospital decisions regarding the treatment accorded him or the manner of his confinement, the hospital may not rely upon information or explanations not in the patient's hospital record to justify its decision. . . .If the records are not adequate on their face, they may not be rehabilitated by a subsequent demonstration in court.")

[19] Because hearsay is admissible in this kind of hearing, a defense investigator may supply favorable information learned during the investigation from a source unable to testify.

Finally, the respondent may testify at the probable cause hearing. Whether the respondent takes the stand often depends upon his or her ability to make a credible showing. If the client insists on testifying against the advice of counsel, counsel must acquiesce. *See supra* Section II.F. Counsel should caution a client who has an open criminal case or a possible immigration problem that the client may risk self-incrimination or suffer other consequences if he or she testifies in the mental health case.

e. The hearing's conclusion

When the defense rests, most judges will allow summary argument by counsel before ruling. *Barnard*, 455 F.2d at 1375, suggests that the court state reasons for its finding on the record or in writing. If the court does not find probable cause, or if some other defect in the detention process requires the respondent's release, an entry on the court jacket will be sufficient to effect the client's release directly from the courtroom. The client, of course, may return to the hospital to seek admission on a voluntary basis without fear of commitment, *see Blair*, 510 A.2d at 1050-51, or to pick up his or her belongings, though doing so is not without risk of being subjected to a new emergency detention. *See In re Barlow*, 634 A.2d at 1250-51.

E. Continued Detention Under Section 21-526(c)

1. Statutes and Court Rules

D.C. Code § 21-526(c)

Super. Ct. Ment. Health R. 2(h)

2. Cases

In re Glymph, 102 Wash. D.L. Rptr. 2365 (D.C. Super. Ct. Nov. 1, 1974)

In re Reed, 571 A.2d 801 (D.C. 1990)

In re Strickland, 597 A.2d 869 (D.C. 1991)

3. Extension of Emergency Detention Beyond Seven Days

If the hospital files a timely petition for a respondent's judicial commitment pursuant to § 21-541, it may continue by operation of statute to detain a respondent who was involuntarily hospitalized pursuant to §§ 21-521 to 525. D.C. Code § 21-526(c). Absent such a timely filing, however, the respondent should be discharged immediately upon the expiration of the seven-day detention authorized by the § 21-524 order. *In re Strickland*, 597 A.2d 869 (D.C. 1991). In *Strickland*, the court made clear that the seven-day period covered by a § 524 order is measured "from the hour and minute" the order was signed, and the respondent is entitled to release at the end of seven 24-hour periods after entry of the § 524 order. 597 A.2d at 870; *In re Reed*, 571 A.2d 801 (D.C. 1990) (a § 21-541 petition filed more than 24 hours after the seven-day period had expired was untimely and respondent was entitled to be released; moreover, an intervening

finding of probable cause at a § 21-525 hearing did not cure this defect); *see also* Super. Ct. Ment. Health R. 2(g).

Extension of emergency detention under § 21-526(c), by the filing of a § 541 petition, is for a period of 21 days. The emergency detention may be extended beyond the 21-day period by the court for good cause. Generally, if both parties consent to continuation of proceedings before the Commission on Mental Health, the Commission will grant the extension and, accordingly, detention will be extended. The 21-day period may also be extended after a hearing before the Commission on Mental Health, pursuant to D.C. Code § 21-542, if the Commission has made findings that the respondent is mentally ill and dangerous. If the Commission finds that inpatient commitment is the least restrictive treatment alternative, the respondent's emergency detention will continue, pending conclusion of the commitment proceedings, until either the court discharges the respondent or the Department or hospital detaining the respondent determines that inpatient treatment is no longer the least restrictive treatment setting. D.C. Code § 21-526(d). If the Commission finds that outpatient commitment is the least restrictive treatment alternative, then the respondent's emergency detention must end no later than 14 days after the finding. The respondent must be released to outpatient treatment. D.C. Code § 21-526(e).

The filing of a § 21-541 petition does not negate a respondent's right to a § 21-525 hearing, *see In re Glymph*, 102 Wash. D.L. Rptr. 2365 (D.C. Super. Ct. Nov. 1, 1974), and the court may order that the respondent be discharged from the hospital at the end of a § 525 hearing, even if a § 21-541 petition has been filed in the case. (Customarily, the petitioner will not prosecute the § 21-541 petition if probable cause is not found at the § 21-525 hearing, though the petitioner is legally entitled to do so.)

V. ONE-YEAR CIVIL COMMITMENT: MENTAL HEALTH COMMISSION PHASE

A. Statutes and Court Rules

D.C. Code § 21-501 (definitions of mental illness, mentally ill person, physician, qualified psychologist)

D.C. Code § 21-502 (Commission on Mental Health organization)

D.C. Code § 21-503 (Commission on Mental Health exams and subpoenas)

D.C. Code § 21-514 (non-protesting patient subject to § 21-541 petition)

D.C. Code § 21-541 (petition for judicial commitment)

D.C. Code § 21-542 (Mental Health Commission hearing)

D.C. Code § 21-543 (right to counsel; continuances)

D.C. Code § 21-544 (Mental Health Commission findings and report; right to jury trial)

D.C. Code § 21-545 (court hearing on Mental Health Commission report)

D.C. Code § 21-545.01 (commitment renewal by Commission and court review)

D.C. Code § 21-562 (medical records)

D.C. Code § 21-582 (conflict of interest for physicians and psychologists; personal observation as basis for certificates and petitions)

D.C. Code § 21-583 (physicians and psychologists as witnesses)

D.C. Code § 21-586 (financial responsibility for hospitalization costs)

D.C. Code §§ 21-901 through 909 (Federal Reservation Act)

D.C. Code § 24-501 (commitment in criminal cases)

Super. Ct. Ment. Health R. 3 (proceedings before Commission on Mental Health)

Super. Ct. Ment. Health R. 4 (court hearing on Mental Health Commission report)

Super. Ct. Ment. Health R. 12 (appointment of counsel; confidentiality of Mental Health Commission hearing transcripts)

B. Cases

Addington v. Texas, 441 U.S. 418 (1979)

Anderson v. Block, No. 86-807 (D.C. June 23, 1986)

Anderson v. Hess, No. 87-380 (D.C. July 14, 1987)

Bension v. Meredith, 455 F. Supp. 662 (D.D.C. 1978)

Dobbs v. Duncan, 458 A.2d 719 (D.C. 1983)

In re Clark, 700 A.2d 781 (D.C. 1997)

In re Curry, 470 F.2d 368 (D.C. Cir. 1972) (*Curry II*)

In re Holmes, 422 A.2d 969 (D.C. 1980)

In re (Stanley) Johnson, 699 A.2d 362 (D.C. 1997)

In re Kossow, 393 A.2d 97 (D.C. 1978)

In re Lomax, 386 A.2d 1185 (D.C. 1978) (en banc)

Jackson v. Indiana, 406 U.S. 715 (1972)

Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966)

Medynski v. Margolis, 389 F. Supp. 743 (D.D.C. 1975)

Thomas v. United States, 418 A.2d 122 (D.C. 1980)

C. Nature and Function of Commission on Mental Health

Proceedings for the one-year commitment of individuals commence with the filing of a petition for commitment, pursuant to D.C. Code § 21-541, with the Commission on Mental Health. The Commission on Mental Health is composed of nine members: a magistrate judge of the Superior Court, who is the chairperson, and eight physicians or psychologists, who serve part-time. D.C. Code § 21-502(a), (c). The Commission hears cases in which a § 21-541 petition has been filed. D.C. Code § 21-542(a). The Commission sits in panels of three, consisting of the chairperson and two physician/psychologist members who serve in teams of two that change every three months. The Commission on Mental Health has an office in the District of Columbia Superior Courthouse, fourth floor, and all pleadings before the Commission are filed in the Mental Health/Mental Retardation Branch of the Family Court.

Section 21-502 describes the Commission's organization, its composition, and the appointment and terms of its members. Section 21-503 describes the Commission's general purposes, subpoena powers, and the location of its hearings. The purpose, mode, and scope of the hearings are governed by §§ 21-542 and 21-544 and Super. Ct. Ment. Health R. 3. The form, content, and filing of the Commission's report to the court are governed by § 21-544 and Super. Ct. Ment. Health R. 3(b).

D. Commencement of Mental Health Commission Phase

1. Who May Be the Subject of a Section 21-541 Petition

Proceedings for the commitment or court-ordered hospitalization of a person alleged to be mentally ill are commenced when an authorized person files an appropriate petition pursuant to D.C. Code § 21-541 with the D.C. Commission on Mental Health at Superior Court. A petition may be filed against a person who is temporarily hospitalized as an involuntary emergency patient pursuant to §§ 21-521 to 524, or against a person who is at liberty in the community. In addition, a person admitted to the hospital on a nonprotesting basis, pursuant to § 21-513, may be the subject of a § 21-541 petition before making a written request for release. D.C. Code § 21-514.

As a rule, a hospital may not file a § 21-541 petition on a person who is voluntarily receiving inpatient psychiatric care. *See* D.C. Code § 21-512; *Curry II*, 470 F.2d 368 (D.C. Cir. 1972).

But see In re Clark, 700 A.2d 781, 784 (D.C. 1997) (hospital may petition for commitment of "voluntary" patient who has been charged with a crime and found incompetent to stand trial).

A petition may also be filed against a defendant in a criminal case who has been found incompetent to proceed and unlikely to regain competence. D.C. Code § 24-531.06(c)(4). The Supreme Court in *Jackson v. Indiana*, 406 U.S. 715, 738 (1972), held that where a trial court finds the defendant not likely to regain competence, the defendant must be released unless the government institutes civil commitment proceedings. *Id*. In this jurisdiction, unless the government seeks civil commitment by filing a § 541 petition within 30 days of the *Jackson* finding, the defendant must be released. D.C. Code § 24-531.07(a)(1); *Thomas v. United States*, 418 A.2d 122, 126-27 (D.C. 1980).[20] The fact that the incompetent defendant had been a voluntary inpatient pursuant to D.C. Code § 21-511 at the time of the criminal charge is irrelevant when a § 21-541 petition is filed. *See In re Clark*, 700 A.2d 781, 786 (D.C. 1997).

The Federal Reservation Act, D.C. Code §§ 21-901-909, authorizes, under certain circumstances, the temporary detention of persons alleged to be mentally ill who have been found on federal reservations within Maryland and Virginia counties neighboring the District of Columbia. These reservations include Washington Dulles International Airport and Ronald Reagan Washington National Airport. The Act, as interpreted in *Bension v. Meredith*, 455 F. Supp. 662 (D.D.C. 1978), and *Medynski v. Margolis*, 389 F. Supp. 743 (D.D.C. 1975) (three-judge court), authorizes a magistrate in the U.S. District Court for the District of Columbia to commit such persons to St. Elizabeth's Hospital for a maximum of 30 days upon finding mental illness and likelihood of injury to self or others. Counsel assigned by the magistrate at the detention hearing represent these individuals. For more information on proceedings under the Federal Reservation Act, counsel should contact the Special Proceedings Section of the U.S. Attorney's Office, which prosecutes these cases. Once the temporary commitment, usually to St. Elizabeth's Hospital, is ordered, the hospital may initiate proceedings in Superior Court to have the detained person adjudicated mentally ill under the laws of the District of Columbia. *See* D.C. Code § 21-906(b). Thus, a § 21-541 petition may be filed against a patient held involuntarily under the Federal Reservation Act.

2. Who May File a Section 21-541 Petition

There are no court rules and only one Court of Appeals decision governing the filing of a § 21-541 petition. A § 21-541 petition may be filed by: (1) a person's spouse; (2) his or her parent or legal guardian; (3) a physician or qualified psychologist, *see Dobbs v. Duncan*, 458 A.2d 719 (D.C. 1983); (4) a duly accredited officer or agent of the D.C. Department of Mental Health; (5) the Director of the Department of Mental Health or the Director's designee; or (6) an officer authorized to make arrests in the District of Columbia. If a person is at liberty at the time of filing, i.e., an "off-the-street" case, the petitioner is usually the respondent's spouse, parent, or legal guardian. *See infra* section 6. If the respondent is hospitalized at the time of filing, the petitioner is usually the superintendent of the hospital, the respondent's treating physician from the hospital, or a designee of the Director of the Department of Mental Health.

[20] The District's law governing competence to proceed in criminal cases was substantially revised in 2004. The new law contains provisions regarding detention of an incompetent defendant pending civil commitment and the effect of civil commitment on pending criminal charges. *See supra* Chapter 3.

3. What Must Be Included in a Section 21-541 Petition

A § 21-541 petition must include a certificate of either a physician or a qualified psychologist stating that he or she has examined the respondent and is of the opinion that the respondent is mentally ill and, due to this illness, likely to injure self or others if allowed to remain at liberty. Alternatively, the petition may include a sworn, written statement that the petitioner has good reason to believe that the respondent is mentally ill and, because of this illness, is likely to injure self or others, and that the respondent has refused to submit to examination by a physician or qualified psychologist.[21] *See* D.C. Code § 21-541(a) (2004); *In re (Stanley) Johnson*, 699 A.2d 362, 364 (D.C. 1997).

Because the Ervin Act is concerned with the respondent's present mental status, *see In re Lomax*, 386 A.2d 1185 (D.C. 1978) (*en banc*), a petition based on facts that occurred substantially prior to the filing of the petition may be deemed stale. Furthermore, a petition should provide constitutionally adequate notice in order that the respondent may prepare a defense. A petition that is vague or conclusory and fails to describe precisely the facts upon which it is based may violate the respondent's right to due process of law. *See Addington v. Texas*, 441 U.S. 418 (1979).

If the petition is based upon a physician's or psychologist's certificate, the certificate "shall set forth in detail the facts and reasons on which the physician or qualified psychologist based his opinions and conclusions." D.C. Code § 21-582(b). The certificate "may not be considered unless it is based on personal observation and examination of the [alleged mentally ill] person made by the physician or qualified psychologist not more than 72 hours prior to the making of the . . . certificate." *Id*. *But see Dobbs v. Duncan*, 458 A.2d at 721 ("[Section] 582(b) does not require that a petition filed by the [hospital] superintendent and accompanied by a certificate of an examining physician also reflect that the superintendent personally examined the patient"). Furthermore, similar to the procedure for the filing of a petition for emergency detention, the physician or psychologist executing the certificate may not be related to the respondent, be financially interested in the hospital in which the respondent will be detained, or, except in the case of a physician or psychologist employed by the government, be professionally or officially connected to the hospital. D.C. Code § 21-582(a).

4. Notice

Section 21-541(b) provides that within three days after the Commission receives a § 21-541 petition, a copy of the petition shall be sent to the respondent by registered mail. It is important for counsel for a respondent to investigate whether the respondent has actually received a copy of the petition and the means by which the petition was served, and to note any objections to the case proceeding until service is sufficiently proved.

[21] Any allegation that the respondent refused to submit to an examination should be carefully investigated.

5. Motions to Dismiss

The only general rule governing motions practice in mental health cases is Super. Ct. Mental Health R. 14. In addition, Super. Ct. Ment. Health R. 12(d) incorporates into all proceedings before the Commission or the Court Rule 12-I (e) of the Superior Court Rules of Civil Procedure. As a matter of custom, motions to dismiss §21-541 petitions are generally filed with the Mental Health Clerk's office and heard by the Chair of the Commission, who is a magistrate judge for the Family Court. The Commission, if counsel requests, will usually continue the Commission hearing until after the motion is decided.

6. Procedures for "Off the Street" Petitions

When a § 21-541 petition is filed by a family member or guardian regarding a person who is at liberty, the petition and supporting affidavit are forwarded to the Mental Health Commission, which schedules a preliminary screening hearing. Notice of the hearing is required to be sent to the respondent. At the hearing, which is conducted on the record, the Commission will hear testimony and take other evidence from the petitioner and other witnesses about the allegations in the petition. If the Commission determines that there is sufficient evidence to support the petition, the Commission will report this to the Superior Court and ask the court to have notice of a preliminary examination and hearing before the Mental Health Commission sent to the respondent, ask that counsel be appointed to represent the respondent, and ask that a subpoena be issued directing the respondent to appear for the examination by the Commission. These procedures are the result of the decision in *In re (Stanley) Johnson*, 699 A.2d 362, 370 (D.C. 1997). The respondent is not represented by counsel at the preliminary screening hearing, but evidence presented at that hearing may have an impact on the decision of the Commission on Mental Health later. Accordingly, counsel may want to request a transcript of the preliminary screening hearing prior to the hearing on the § 541 petition. Unless a petitioner has retained counsel, the "private petitioner" (family member or guardian) is not usually represented by counsel in proceedings before the Mental Health Commission.

E. The Mental Health Commission Hearing

1. Nature, Form, and Scope of the Proceeding

After a § 21-541 petition has been filed, D.C. Code § 21-542 directs the Commission to examine the respondent promptly, hold a prompt hearing on the issue of the respondent's mental illness, and hold a hearing to determine who is liable under D.C. Code § 21-586 for the expense of the respondent's hospitalization if hospitalization[22] is ordered. The hearing on financial liability may be held separately from the hearing on mental health and, if it is conducted separately, may be conducted by the chairperson alone. D.C. Code § 21-542(b). In practice the hearing on liability will be held only if the Office of the Attorney General petitions for a determination of financial responsibility.[23]

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[22] Commitment may include inpatient treatment, outpatient treatment, and any range of treatment alternatives. *See Lake v. Cameron*, 364 F.2d 657, 659 (D.C. Cir. 1966).

[23] Section 21-586 instructs the Commission to ascertain the ability of the respondent and his parents, spouse, or adult children "to maintain or contribute toward the maintenance of the mentally ill person." In reality, the Commission

Typically, hearings before the Mental Health Commission are scheduled no more than three weeks after a petition for judicial commitment under § 21-541 has been filed. This should allow counsel and the respondent adequate time to prepare for the hearing. Respondents who are hospitalized pursuant to D.C. Code §§ 21-521 through 21-524 will continue to be detained pending the Commission hearing. Section 21-543 states that the court or the Commission may, at the request of respondent's counsel, grant a five-day recess of the hearing to give counsel time to prepare. The Commission may also grant continuances for up to 14 days if good cause is shown. D.C. Code § 21-543(b). The chairperson of the Commission will usually agree to a continuance for one two-week period if all the parties are notified and a written continuance request is presented before the day of the Commission hearing. In practice, the chairperson of the Commission will grant additional brief continuance requests for good cause shown, but after two or three requests will ask counsel to appear and put the request on the record.

All hearings before the Mental Health Commission must be conducted in a manner consistent with orderly procedure. D.C. Code § 21-542(a). The general public is excluded from the proceedings, though someone interested in the work of the Commission or a particular case may, upon application, be admitted to the hearing if respondent's counsel consents and the applicant agrees to maintain the confidentiality of the proceeding. Super. Ct. Ment. Health R. 3(a)(1).

Any person whose testimony may be relevant shall be heard and the Commission shall receive all relevant evidence offered. D.C. Code § 21-542(a). The Commission will impose the Rule on Witnesses upon request of counsel or upon its own initiative. Super. Ct. Ment. Health R. 3(a)(2).

Section 21-544 directs the Commission to make findings on two issues: whether the respondent is mentally ill and, if so, whether he or she is likely to injure self or others if not committed. *See supra* Section III. In addition, the court rules direct the Commission to consider dispositional alternatives less restrictive than hospital commitment. Super. Ct. Ment. Health R. 3(a)(2)(C).

2. Setting for Hearing

The Commission is authorized to conduct its examinations and hearings either at the courthouse or elsewhere at its discretion. *See* D.C. Code § 21-503(b). Most hearings are held at St. Elizabeth's Hospital, but whenever a respondent is detained or confined at another hospital or institution, the Commission will travel to the respondent. All proceedings before the Commission must be recorded. Super. Ct. Ment. Health R. 3(a)(2)(A).

3. Waiver of hearing

The respondent may choose to waive his right to a hearing on the § 541 petition and agree to accept the petitioner's recommendation of commitment. With rare exceptions, the respondent must appear before the Commission to state present a waiver on the record. The chair of the

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rarely addresses the respondent's ability to pay for treatment at its hearings and, if commitment is recommended, a proposed order will be attached to the Commission's final report to the court in which the final paragraph orders "[t]hat the expense for the Respondent's care and treatment provided by the Department of Mental Health shall be borne by the District of Columbia, without prejudice to the District of Columbia's right to claim reimbursement in full from the estate of the Respondent or others, as provided by law."

Commission will inquire of the respondent in order to determine whether the waiver is made knowingly and voluntarily. The respondent will be required to participate in a preliminary examination by the Commission doctors prior to appearing on the record to present a waiver. The decision to waive the right to a hearing before the Commission is a respondent's decision and counsel must abide by the respondent's choice, neither proceeding over the respondent's objection, nor waiving the right to a hearing absent the client's direction to do so. *See supra* Section II.F.

If the petitioner is seeking a commitment to outpatient treatment, the record should be made clear that the respondent understands the difference between outpatient commitment under D.C. Code § 21-545 and outpatient voluntary treatment under D.C. Code § 21-511.

Even if the respondent states that he or she has no objection to commitment, the commitment would not be final. The respondent, as discussed below, will still receive the Commission's final report and recommendation and have an opportunity to contest or agree to treatment under a court order.

4. Hearing and Procedure

a. Preliminary examination

Section 21-542(a) requires the Commission to examine the respondent after the filing of the § 21-541 petition. The Commission doctors usually conduct this examination on the same date of the hearing, just prior to the hearing. The Commission members typically have refused to permit counsel to be present during these examinations. They also have refused to conduct the examinations on the record, with or without counsel present, and to state on the record at the close of their deliberations any facts that they learned during the examination and upon which they relied in forming their conclusions. These examination procedures have been upheld in *In re Holmes*, 422 A.2d 969 (D.C. 1980).

The typical "preliminary examination" consists of an unrecorded conversation between the doctor members of the Commission and the respondent in a private room near the hearing room.[24] During this five to ten minute examination, the doctor members may ask the respondent fact questions – date, place, reason for hospitalization, names of presidents, etc. – aimed at determining the respondent's general mental condition. Occasionally, a Commission doctor may seek to test the respondent's capacity for abstract thinking by asking the respondent to interpret one or more proverbs or by asking the respondent what he or she would do in a given situation. *See* Myrl R. S. Manley, M.D., "Psychiatric Interview, History, and Mental Status Examination," in 1 *Kaplan & Sadock's Comprehensive Textbook of Psychiatry*, 652-665 (7th ed. 2000).

[24] The parameters of the Commission's examination of the respondent have not been clearly delineated. The legislative history of the Ervin Act suggests that this preliminary examination should be limited to an interview-style examination. Nonetheless, in one case, the Commission sought to compel a respondent to undergo neurological and psychological testing to determine an exact diagnosis and make recommendations as to appropriate treatment. The Court of Appeals rejected the Commission's request for a continuance and compulsory testing, however, because the Commission had already made findings that the respondent was mentally ill and dangerous. The lower court was directed to set the case for trial. *Anderson v. Hess*, No. 87-380 (D.C. July 14, 1987) (order denying writ of mandamus).

In addition to this interview, the Commission doctors may attempt to review the respondent's medical record, though the current Chair of the Commission generally sustains counsel's objections to this practice on the theory that the physician members may inquire of the hospital's witnesses on the record, in contrast to reviewing medical records during the preliminary examination, which is not on the record. If the doctor members of the Commission have reviewed a respondent's medical records before counsel had an opportunity to object, i.e., before the beginning of the hearing, then counsel should inquire of the doctor members during the hearing as to what documents were reviewed and what information is being relied on by the doctors in making a decision on the § 541 petition.

The preliminary examination is an important part of the Commission proceedings because the results will form part of the basis for the Commission's findings and recommendations to the court. Super. Ct. Ment. Health R. 3(b)(2). In addition, a doctor member of the Commission may be called as a witness at a trial or final hearing and may refer to facts learned during the preliminary examination as a basis for his or her opinion. D.C. Code 21-583; *See also In re Morrow*, 463 A.2d 689, 691 (D.C. 1983).

If the respondent wishes not to participate in the examination, the Commission will abide by the respondent's decision. Counsel should advise the Chair of the Commission of the client's decision in advance of the hearing to assure the examination is not attempted. If the respondent has no objection to the examination, but does not want to come to the hearing or examination room, the doctor members of the Commission may be willing, upon counsel's request, to examine the respondent on a hospital ward or another location. If the respondent chooses to participate in the examination, counsel should prepare him or her in advance and advise the respondent to invoke the privilege against self-incrimination if the doctors question him or her about privileged matters or pending criminal charges.

b. Presence of Respondent at Hearing

Once the examination is conducted, the respondent may, in his or her discretion, be present at the hearing to testify and to present and cross-examine witnesses. D.C. Code § 21-542(a). When a respondent who is at liberty in the community fails to attend a hearing of which he or she received notice and a subpoena, the chairperson historically has sought a court order by writ of attachment to the U.S. Marshal to bring the respondent to the next hearing to be examined under section 21-542(a). Prior to issuance of such an order, the respondent should have an opportunity to challenge the subpoena, in accordance with the decision in *In re (Stanley) Johnson*, 699 A.2d 362, 370-71 (D.C. 1997).

If the respondent elects to attend the hearing, the respondent may not be excluded unless he or she conducts him or herself in a manner that is so disorderly and disruptive of the hearing that it cannot be carried on in the respondent's presence. *See* Super. Ct. Ment. Health R. 3(a)(2)(D). If the respondent elects to waive his presence at the hearing, the Commission will hear arguments, receive testimony from witnesses and receive other evidence, deliberate, and announce its decision outside of the respondent's presence.

c. Rule on witnesses

Upon the request of counsel, or on its own initiative, the Commission may impose the Rule on Witnesses. *See* Super. Ct. Ment. Health R. 3(a)(2)(D).

d. Opening statement

Counsel has the right to make an opening statement at the hearing. *See* Super. Ct. Ment. Health R. 3(a)(2)(B).

e. Petitioner's case

The statute and the rules contain no reference to petitioner's counsel appearing at the Commission hearing. An attorney from the Attorney General's office represents the Department of Mental Health at Commission hearings. Occasionally, a private petitioner will appear with retained counsel. A private petitioner has no right to have his or her case prosecuted by a public prosecutor. *See In re Kossow*, 393 A.2d 97 (D.C. 1978).

In the majority of cases, where the petitioner is the Department of Mental Health and the respondent is hospitalized prior to the hearing, the primary witness against the respondent is the treating psychiatrist from the hospital. The petitioner will offer these witnesses as expert witnesses. Occasionally, the hospital will send either a new doctor whose credentials are not known to respondent's counsel, or a psychiatric resident, i.e., a doctor in training to become a psychiatrist, to testify at a Commission hearing. In those instances, counsel may want to explore the doctor's qualifications to testify as an expert, including questions regarding the doctor's licensure status in the District of Columbia. In a number of instances, psychiatric residents have not been licensed to practice medicine in D.C. and, therefore, may not be allowed to testify as experts. *See Joseph v. Board of Med.*, 587 A.2d 1085 (D.C. 1991).

The doctor's testimony may include information acquired from the admission papers, review of the medical record, and personal examinations and observations of the respondent. The doctor's testimony may be supplemented by that of family members, ward staff, and sometimes the officer who applied for the respondent's emergency admission, or staff from an outpatient clinic where the respondent had received treatment prior to hospitalization.

Respondent's counsel will have the opportunity to cross-examine any witnesses. The medical records may contain information that contradicts, undermines, or weakens the witnesses' testimony. Respondent's counsel should be familiar with the respondent's current hospitalization records and, to the extent possible, prior hospitalization and/or outpatient treatment records, and should be prepared to question the witness regarding content of the records.

When counsel have finished examining and cross-examining a witness, the physician/ psychologist members of the Commission are given an opportunity to ask questions. *See* D.C. Code § 21-542(a).

f. Respondent's case

The respondent is entitled to testify, but may also choose not to testify. *See* D.C. Code § 21-542(a). Counsel will be allowed to examine the respondent and petitioner's counsel will be allowed to cross-examine the respondent. Then the members of the Commission may ask the respondent questions.

The respondent is also entitled to present witnesses. *See id*.

At the close of the evidence, counsel for both sides may make closing arguments. *See* Super. Ct. Ment. Health R. 3(a)(2)(B).

g. Standard of proof

Neither the Ervin Act nor the Mental Health Rules explicitly set forth a standard of proof for the Mental Health Commission. Consequently, the Commission has refused to adopt a standard of proof on its own. *See In re Holmes*, 422 A.2d 969, 971 (D.C. 1980).

h. Commission findings and report

At the conclusion of the testimony and argument, the Commission determines by majority vote whether the respondent is mentally ill and, if so, whether the respondent is likely to injure self or others as a result of mental illness if not committed. *See* D.C. Code § 21-544; Super. Ct. Ment. Health R. 3(a)(2)(E). If the Commission decides that the respondent is not mentally ill or not dangerous as a result of mental illness, the respondent is entitled to immediate release. The fact of the respondent's release is later reported to the court. *See* D.C. Code § 21-544; Super. Ct. Ment. Health R. 3(a)(2).[25] If the Commission decides to recommend commitment, it must orally and in writing advise the respondent of his or her right to demand a jury trial. *See* D.C. Code § 21-544; Super. Ct. Ment. Health R. 3(a)(2). The Commission will usually also advise the respondent of its recommendation for inpatient commitment, outpatient commitment, or an alternative form of treatment.

Alternatively, the Commission may decide to continue the case if it cannot reach a conclusion about the respondent's mental illness or dangerousness. Super. Ct. Ment. Health R. 3(a)(2)(E). This may occur when there is a need for more evidence or when the doctor requests postponement in expectation that the respondent will be converted to voluntary status or placed in the community before the next hearing. Generally, a continuance will not be granted over the respondent's objection.[26]

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[25] A respondent may opt to remain at the hospital or in treatment on a voluntary basis, under D.C. Code § 21-511. If that is the respondent's plan, counsel should make that clear on the record before the respondent returns to the hospital ward or outpatient clinic to avoid having to physically leave the facility and seek voluntary admission.

[26] The Commission may not continue a case if it has found the respondent mentally ill and likely to injure self or others. Such findings trigger the respondent's right to trial. *See Anderson v. Hess*, No. 87-380 (M.H. No. 409-86) (D.C. Super. Ct. July 14, 1987) (order denying writ of *mandamus*). Super. Ct. Ment. Health R. 3(a)(2)(E) authorizes the Commission, at the close of its deliberations, to continue the hearing. This decision is committed to the Commissioner's discretion, though the Commission rarely continues a case over the respondent's objections. If the Commission recommends a continuance for further evaluation or treatment over the respondent's objection, it may

Within five days of the hearing, the Commission must report its findings of fact, conclusions of law, and recommendations to the court, and a copy of the report must be personally served on the respondent and respondent's counsel. *See* D.C. Code § 21-544; Super. Ct. Ment. Health R. 3(b).

Rule 3(b) sets out specific requirements regarding the contents of the Commission's report. For example, the report must specify which alternatives to hospitalization were considered by the Commission in making its commitment recommendation. In addition, each member of the Commission panel must sign the report and, if any member dissents from the findings and recommendation, that fact will be included in the report.

If counsel has objections to the contents of the report, an informal written request that the Commission amend the report to conform to the rules and to the record in the case should be sent to the chairperson. If this approach fails to settle the matter, counsel should request that the court order the Commission to amend the report. When the court is dissatisfied with a Commission report, it may require that the report be supplemented. *See* D.C. Code § 21-545(a); *Lake v. Cameron*, 364 F.2d at 662 n.18 (1966); *Kossow*, 393 A.2d at 107.

VI. JUDICIAL PHASE: TRIAL, TRIAL WAIVER AND DISPOSITION HEARING

A. Introduction

Once the Mental Health Commission has made its final report and recommendations, the Ervin Act provides a respondent with two options for judicial review of his or her legal status. The respondent may request a *de novo* trial by jury or the court to contest a recommendation of commitment. D.C. Code §§ 21-544 to 545. Alternatively, the respondent may agree to have the court review the Commission's report and enter a finding based on that report, a knowing and voluntary waiver of jury trial rights, and any other evidence that the court wishes to hear. § 21-545(a). When no trial is requested, the final hearing will be scheduled for the "open court" calendar.

B. Assertion or Waiver of Jury Trial Right

A trial must be requested within five days of the date on which the respondent is personally served with the Commission's final report and notice of final hearing. *See* D.C. Code § 21-545; Super. Ct. Ment. Health R. 4(d). The trial demand may be made by the respondent or by any other person on the respondent's behalf. Note that the five-day period is not counted from the day of the Commission hearing, but from the day of actual service of the Commission's report on the respondent. This date may be two or three weeks after the Commission hearing is held.

The request for trial is usually made by filing a *praecipe* with the court. However, if the circumstances require, the demand can also be made in open court. A jury demand is presumed

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be exceeding its authority. The continuance of a hearing for the purpose of further treatment and a possible change of status bear no relation to the statutory duties of the Commission. The question of what course of treatment is to be ordered is a decision committed to the court, not to the Commission. *See* D.C. Code § 21-545(b). Extended continuances act to deprive the respondent of a prompt trial, because a recommendation of a commitment, not a continuance, is needed to trigger the respondents' right to a jury trial. *See* § 21-545(a).

to be for a 12-person jury unless the parties stipulate to a smaller number. Super. Ct. Ment. Health R. 16(c).

There are no rules or cases governing a respondent's waiver of his or her right to trial. A trial waiver may consist of a written statement, preferably sworn, by the respondent, which counsel presents to the court. Alternatively, the respondent may waive his or her trial right on the record at the open-court hearing.[27]

Generally, those respondents who elect not to have a trial also agree to the disposition proposed in the Mental Health Commission report. In this case the disposition hearing will be held concurrently with the open court review and the court will sign the order of commitment reflecting the Mental Health Commission's recommendation.

C. Alternative Response to Section 21-544 Report

1. Section 21-545 Hearing

Section 21-545(a) requires that if no timely trial demand is made, the court must hold a hearing to make an independent determination of the respondent's mental condition. An order of commitment may be entered only if the court finds there is clear and convincing evidence that the respondent is both mentally ill and likely to injure self or others as a result of the mental illness. *See In re Holmes*, 422 A.2d at 972; *In re Walls*, 442 F.2d 749, 751 (D.C. Cir. 1971). A trial court has the authority at a § 21-545(a) hearing to evaluate the transcript of the Mental Health Commission hearing and to reject the Commission report. *Id*. at 750.[28] Super. Ct. Ment. Health R. 4 requires that this hearing be held as soon as practicable after the Mental Health Commission hearing.[29] Mental Health Rule 6 requires that a disposition hearing be held immediately after the final hearing.

2. Request for Disposition Hearing

A respondent who is not contesting the Mental Health Commission finding that he or she is mentally ill and dangerous may still wish to contest the type of commitment that has been recommended by asking for a formal disposition hearing pursuant to D.C. Code § 21-545(b) and

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[27] Most of the time, the judge presiding over mental health cases will conduct a fairly detailed inquiry of the respondent to determine if the respondent knowingly and voluntarily waives his or her right to a trial and agrees to a court order directing the respondent to receive treatment for a one-year period. The Mental Health Division of the Public Defender Service can provide sample trial waivers for both inpatient and outpatient commitment.

[28] Whenever the Commission determines that a respondent should be committed, a copy of the transcript of the Commission hearing must be furnished to counsel for indigent respondents upon request. Super. Ct. Ment. Health R. 3(a)(2)(F).

[29] If the Mental Health Commission recommended outpatient commitment, the respondent must be released from the hospital within 14 days of the Commission hearing. D.C. Code § 21-526(c). This often means that the respondent will have left the hospital prior to the status hearing in Superior Court at which counsel may have requested a trial or waived trial, on the respondent's behalf. The respondent has the right to be present at the status hearing in court if a trial date is being selected, and has the right not to be present if accepting commitment. However, most judges are reluctant to accept a trial waiver from counsel without the respondent being present.

Super. Ct. Ment. Health R. 6. The purpose of a disposition hearing is to determine the type of commitment, i.e., inpatient hospitalization, outpatient treatment, nursing home, etc. *See infra* Section VI.E.

D. The Trial

1. Introduction

A relatively small percentage of mental health cases go to trial. Most cases are resolved either by dismissal of the case when the respondent becomes a voluntary patient or is discharged, or by the respondent's waiving his or her right to trial and agreeing to commitment. In most cases in which there is a trial, the case is tried before a jury. However, some respondents elect to have their cases heard by the court sitting without a jury. In a trial by the court, the respondent has the same rights and the law is the same as in a jury trial. At a bench trial, the respondent is entitled to have the court make specific findings of fact instead of a general verdict. *See* Super. Ct. Ment. Health R. 5(c).

2. Statutes and Court Rules

D.C. Code § 11-2605(a) (*ex parte* request for investigator, expert witness)

D.C. Code § 21-543 (right to counsel)

D.C. Code § 21-544 (right to jury trial)

D.C. Code § 21-545 (court or jury determination regarding mental illness and dangerousness; court-ordered treatment to least restrictive alternative)

Super. Ct. Ment. Health R. 4 (specific civil rules apply; pre-trial motions; setting trial date)

Super. Ct. Ment. Health R. 5 (burden of proof; jury verdict; non-jury trial)

Super. Ct. Ment. Health R. 6 (disposition hearing)

Super. Ct. Ment. Health R. 7 (review of disposition implementation)

Super. Ct. Ment. Health R. 16 (trial by jury or the court)

Super. Ct. Ment. Health R. 17 (limited discovery in commitment trial)

3. Cases

Addington v. Texas, 441 U.S. 418 (1979)

Covington v. Harris, 419 F.2d 617 (D.C. Cir. 1969)

In re Artis, 615 A.2d 1148 (D.C. 1992)

In re Bumper, 441 A.2d 975 (D.C. 1982)

In re Gaither, 626 A.2d 920 (D.C. 1993)

In re Melton, 597 A.2d 892 (D.C. 1991) (*en banc*)

In re Morrow, 463 A.2d 689 (D.C. 1983)

In re Myrick, 624 A.2d 1222 (D.C. 1993)

In re Nelson, 408 A.2d 1233 (D.C. 1979)

In re Taylor, 112 Wash. D.L. Rptr. 1629 (D.C. Super. Ct. 1984) (Walton, J.)

Lake v. Cameron, 364 F.2d 657 (D.C. Cir. 1966)

4. Limited Discovery

The Mental Health Rules provide for an informal exchange of information between the parties in a commitment trial, to be provided on a schedule that is set by the court. *See* Super. Ct. Ment. Health R. 17. Each party must disclose the name and qualification of any expert witness whom the party intends to call at trial and a written summary of the witness's opinions and the bases for the opinions. In addition, the party must provide any report, record, or other document upon which the expert relied in forming the opinion. Upon request, a party must provide test data and test materials used in forming an opinion. Test data and materials are to be provided only to the opposing party's expert and to counsel, and must be returned at the conclusion of the trial to the party who produced the material.

The petitioner is obligated to provide written notification to the respondent of the incidents upon which it intends to rely at trial to establish likelihood of injury to self or others. The respondent must then notify the petitioner of any incidents that will be disputed at trial. Both parties are required to supplement or correct disclosures prior to trial.

A copy of the transcript of the Commission hearing must be furnished to counsel for indigent respondents upon request. Super. Ct. Ment. Health R. 3(a)(2)(F).

5. Burden and Standard of Proof

The burden of proof in all mental health trials is on the petitioner to show by clear and convincing evidence that the respondent is mentally ill and likely to injure self or others as a result of mental illness if not committed. *See* Super. Ct. Ment. Health R. 5(a); *Addington v. Texas*, 441 U.S. 418 (1979); *In re Nelson*, 408 A.2d 1233 (D.C. 1979).

6. Voir Dire

The Mental Health Rules do not cover *voir dire* of prospective jurors. However, Super. Ct. Ment. Health R. 12(d) incorporates Super. Ct. Civil R. 47 and 47-I, which govern *voir dire* and peremptory challenges. The respondent, through *voir dire*, may want to elicit the views of prospective jurors on the connections between mental illness and dangerousness, as well as the connection between mental illness and a need for treatment, regardless of dangerousness. Sample *voir dire* questions may be obtained from the Mental Health Division of the Public Defender Service and the Mental Health Division of the Office of the Attorney General, located at St. Elizabeth's Hospital.

Because of the broad range of behaviors that could be included in a definition of dangerousness in mental health proceedings, *voir dire* may need to include questions that cover specific areas unique to the case, which the petitioner will suggest supports a finding of dangerousness. For example, if the respondent was homeless prior to hospitalization, counsel may want to ask prospective jurors whether any of them believe that a person without a fixed address or who lives in a shelter is more likely to be mentally ill than the general population, or that a person who is described as a street person or homeless is more likely to injure himself or others or is placing himself in harm's way because of his lifestyle, or that a person who is described as homeless is unable to care for herself, or that a person who does not have a fixed address or who lives in a shelter should be hospitalized or housed in a mental institution. While the petitioner may object to such unique *voir dire*, the trial court frequently has overruled such objections when the respondent proffers the relevance of the issues raised in the questions. In addition, the respondent may object to the petitioner's *voir dire* where it misstates the law. *See In re Artis*, 615 A.2d at 1152.

7. Expert Testimony

a. Introduction

Counsel should be prepared to deal with psychiatric and psychological experts because their testimony will form the principal element in the petitioner's case and may well be an important part of the defense. Counsel for an indigent respondent can make an *ex parte* request for authorization of funds to hire an expert to examine his or her client in preparation for trial pursuant to D.C. Code § 11-2605(a). Super. Ct. Ment. Health R. 12(b); *In re Morrow*, 463 A.2d at 692.

The criteria for admitting expert testimony are set forth in *Dyas v. United States*, 376 A.2d 827, 832 (D.C. 1977). *But see Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993) (rejecting general acceptance portion of *Dyas* test). For general background information on psychiatric and psychological expert testimony, counsel should look at Ziskin & Faust, *Coping with Psychiatric and Psychological Testimony* (4th ed. 1988). This three-volume book includes examples of *voir dire* to qualify a witness as an expert, descriptions of psychological tests, and numerous samples of direct and cross-examination of an expert. In addition, counsel should be well-acquainted with the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (4th ed. Text Revision 2000) (DSM-IV-TR). Other references include Gary B. Melton

et al., *Psychological Evaluations for the Courts: A Handbook for Mental Health Professionals and Lawyers* (2nd ed. 1997).

b. Psychiatric testimony on dangerousness

Expert psychiatric testimony on dangerousness is probably one of the most important and difficult problems that arise during a mental health trial. In its *en banc* decision in *In re Melton*, 597 A.2d 892, 899-900 (D.C. 1991), the Court of Appeals ruled that a psychiatric witness who qualified as an expert in the treatment and diagnosis of mental illness was also qualified to give expert opinion testimony on whether a respondent would be dangerous to self or others in the future if the respondent failed to take prescribed psychiatric medications.[30] The court in *Melton* determined that psychiatrists are routinely called upon, under the Ervin Act, to make dangerousness assessments, and that they are capable of doing so because of their education and training in the treatment and diagnosis of mental illness. *Melton* identifies cross-examination as the means to undercut an expert's predictive ability, and any success will result in the jury assigning less weight to the testimony, rather than keeping it from being admitted before the jury.

c. Hearsay bases of expert testimony

The Court of Appeals, sitting *en banc*, in *Melton* also stated that a psychiatric expert may rely on, and testify concerning, otherwise inadmissible hearsay[31] as a basis for the expert's opinion if the trial judge determines that experts in the field commonly rely on that particular type of hearsay information in addressing the specific type of problem raised in the case before the court, but should exclude expert opinion, including the facts and data upon which it relies (even if of a type reasonably relied on most of the time), if admission into evidence would create a substantial danger of undue prejudice or would mislead the jury. 597 A.2d at 906. This analysis is consistent with the method of evaluating expert opinion testimony under Fed. R. Evid. 703, including the requirement that the trial court must determine as a threshold matter "that minimal standards of reliability have been met." *Id*.

However, a court need not make this explicit finding when the psychiatrist or psychologist is relying on information from family members or hospital records, which are "customarily relied on by" such experts. *In re Artis*, 615 A.2d at 1151-52. For example, the Court of Appeals recognized that not "everything a family member tells a psychiatrist is necessarily reliable or true"; thus, the trial court may be asked to determine whether the expert has "the necessary skill

[30] In *Melton*, the court noted that the expert's opinion on the respondent's likely dangerousness was so intertwined with allegations that the respondent would fail, "when not under the hospital's supervision, to take psychotropic medicine with the requisite regularity," that it defied "common sense to suggest that a lay juror knows as much as a qualified psychiatrist does about what is likely to happen if a schizophrenic patient does not receive" his medication. 597 A.2d at 898. The narrow basis for the court's holding, tied as it is to medication, may leave room to formulate questions in the qualification phase showing that the witness is not qualified to predict future dangerousness in a case where medication is not an issue. *But see In re Artis*, 615 A.2d at 1151.

[31] In some instances, the hearsay bases of an expert's opinion might be admissible under an exception to the hearsay rule. *See In re Samuels*, 507 A.2d at 154.

to evaluate any second-hand information" and whether the information meets the minimal standard of reliability for admissibility. *In re Melton*, 597 A.2d at 903.

In permitting psychiatric experts wide latitude in testifying about the bases for their opinions, the Court of Appeals in *Melton* acknowledged that the jury is being asked to do a difficult thing, to consider hearsay only to evaluate the opinion given by an expert witness and not to consider the hearsay as evidence in itself. *Id*. at 901. Accordingly, counsel should consider filing a pre-trial motion *in limine*. Motions *in limine* can and should be used to address the issue of prejudice that may result from an expert's reliance on otherwise inadmissible hearsay, and to clarify whether a particular hearsay basis is reasonably relied upon by an expert. *Id*. at 907 n.29. In addition, if a fact witness could be made available to testify about the hearsay basis of the expert's testimony, counsel should make a record on that issue and ask the court to "condition admission of the expert testimony . . . on the [petitioner's] also calling the [fact witness] to testify and on its making her available for cross-examination." *Id*. at 907.

d. Limiting instruction to jury and expert

Counsel may want to ask the court to instruct an expert witness in front of the jury right before the testimony is presented. Such instruction informs the jury and the witness of the special rules that govern expert testimony. *See infra* Chapter 29: Experts.

Counsel should ask the court to instruct the jury immediately before or after the psychiatric expert testifies. This instruction emphasizes for the jurors that much of the doctor's testimony may be hearsay and that it is not evidence for the jurors to rely upon in reaching a verdict, but merely information that the doctor relied upon in forming an opinion. *See Standardized Civil Jury Instructions for the District of Columbia* No. 3-3 (Rev. ed. 1998). Although a psychiatrist may testify as to his opinions on the respondent's mental condition and dangerousness, there is authority to support the argument that the petitioner also must present independent factual evidence to the fact-finder showing that the respondent is dangerous as a result of a mental illness. *See In re James*, 507 A.2d 155, 158 (D.C. 1986); *In re Mendoza*, 433 A.2d 1069, 1090-91 (D.C. 1981); *In re Snowden*, 423 A.2d 188, 192 (D.C. 1980); *In re Penn*, 443 F.2d 663, 666 (D.C. Cir. 1970).

The D.C. Court of Appeals has questioned the sufficiency of these limiting instructions in a mental health case. *See In re Melton*, 597 A.2d at 907; *In re Samuels*, 507 A.2d 150, 153 n.5 (D.C. 1986). A challenge to the effectiveness of these instructions might lie where the hearsay of an expert's testimony comes "to the jurors' attention in such a way that they might well have considered it for the truth of the out-of-court statement." *Melton*, 597 A.2d at 906.

8. Mental Health Commission Doctors as Witnesses

Counsel for the petitioner rarely calls Mental Health Commission doctors to testify at trial even though they are compellable witnesses at any mental health proceeding. *See* D.C. Code § 21-503. It is permissible, however, for a Commission doctor who expects to be called as a witness at a trial to reexamine the respondent before the trial without notice to respondent's counsel. *In re Morrow*, 463 A.2d at 692-93.

9. Jury Instructions

There are no standard jury instructions for civil commitment trials. The Mental Health Division of the Public Defender Service has sample jury instructions that it makes available to all mental health practitioners. Also, the Office of the Attorney General has a standard set of instructions it uses at trials that may be requested. The parties generally submit proposed instructions to the court prior to trial. *See* Super. Ct. Civ. R. 51. Prior to closing arguments, the judge will identify the instructions that he or she will give the jury. This is done on the record with the jury recessed to afford counsel an opportunity to object to any instructions he or she feels are inappropriate or misstate the law.[32] The language used in instructions is critical. Counsel should note objections to those instructions that misstate the law. At the very least, clearly stating objections to given instructions will preserve the issues should an appeal be necessary. Misstatement of the law in a jury instruction is clearly reversible error in civil commitment cases. *See In re Mendoza*, 433 A.2d at 1071-72. *Accord In re Bumper*, 441 A.2d 975, 978 (D.C. 1982).

Mental health cases are civil cases and many judges will use jury instructions from *Standardized Civil Jury Instructions for the District of Columbia* (Rev. ed. 1998); others will use standard criminal instructions. In addition to standard civil instructions 1-1 to 1-10, 2-1 to 2-10, and 3-1 to 3-3, the court will instruct the jury on the essential elements in a mental health case, the definitions of mental illness and dangerousness, and the standard of proof. The Mental Health Division of the Public Defender Service has copies of instructions used by the court in prior cases, although each judge tends to create his or her own set of instructions, and counsel may want to ask the judge for a set of instructions.

E. The Disposition Hearing

Super. Ct. Ment. Health R. 6 requires that the disposition hearing be held immediately after the civil commitment trial, though it may be continued for good cause. At the disposition hearing, the court must determine whether to order the respondent's hospitalization for a period of up to one year, or another alternative course of treatment that the court believes is in the best interests of the person or the public. D.C. Code § 21-545(b) (2004); *accord In re Artis*, 615 A.2d at 1153. This duty includes consideration of less restrictive intra-hospital dispositions, as well as exploration of dispositions less restrictive than hospitalization itself, such as outpatient clinics, day treatment programs, psychosocial and vocational rehabilitation programs, and various supportive long-term care environments such as community residential facilities and nursing homes. *See Lake v. Cameron*, 364 F.2d at 659-60. In fashioning an appropriate disposition, the court may resort to services or programs outside the District of Columbia. *See In re Myrick*, 624 A.2d 1222 (D.C. 1993); *In re H.J.B.*, 359 A.2d 285 (D.C. 1976). The court also may explore alternatives that might exist within the inpatient setting of St. Elizabeth's Hospital. *Covington v. Harris*, 419 F.2d 617, 623 (D.C. Cir. 1969). As a matter of practice, however, the government usually presents its witnesses first. Under Super. Ct. Ment. Health R. 5(c), the trial court must make specific findings at the disposition hearing "upon request of a party." *See In re Artis*, 615 A.2d at 1153.

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[32] In recent years, the judge presiding over most mental health trials has scheduled a pre-trial hearing several weeks before the trial is set to start. At that hearing, the jury instructions are discussed and refined, and objections should be noted.

Neither the Ervin Act nor the Mental Health Rules indicate who has the burden of proof or what that burden is at the disposition hearing. *See In re Gaither*, 626 A.2d 920, 925 (D.C. 1993).

F. Transfer of Civilly Committed Patients from John Howard Pavilion to the Civil Division of the Hospital

Individuals who are found incompetent for trial in a criminal case and are subsequently civilly committed have the right to be transferred from the forensic division to a civil division of St. Elizabeth's Hospital.[33] (The one possible exception to this rule is where the hospital can establish that a patient exhibits so much violent behavior that he or she can only be treated in a maximum security setting such as John Howard Pavilion.) The right to transfer is based not only on the right to receive treatment in the least restrictive setting, but also on St. Elizabeth's own regulations. *See Covington v. Harris*, 419 F.2d at 623; Commission on Mental Health Services Policy 50000.523.1A ("Transfer of Forensic Inpatient Services Bureau Patients to Other Clinical Bureaus") (Oct. 28, 1992).

VII. POST-COMMITMENT PROCEEDINGS

A. Statutes and Court Rules

D.C. Code § 21-545.01 (renewal of commitment status; review by the court)

D.C. Code § 21-546 (periodic review of commitment)

D.C. Code § 21-547 (judicial review of § 21-546 periodic review)

D.C. Code § 21-548 (revocation of outpatient commitment)

D.C. Code § 21-549 (*habeas corpus* challenge to commitment)

D.C. Code § 21-565 (notice of rights to patients)

D.C. Code § 21-589.01 (interim provisions for those committed before January 1, 2003)

D.C. Code § 21-592 (return to hospital of escaped mentally ill person)

Super. Ct. Ment. Health R. 9 (release proceedings under § 21-546)

B. Cases

In re Barlow, 634 A.2d 1246 (D.C. 1993)

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[33] Cases involving individuals who are subject to a § 21-541 petition for commitment after being found incompetent to stand trial in a criminal case, and not likely to regain competence, proceed in exactly the same manner as any other case that commences with the filing of a § 21-541 petition. However, the right to release from confinement in such cases may depend upon entry of a release order in the criminal case. *See supra* Chapter 3.

In re Dow, 663 A.2d 1214 (D.C. 1995)

In re Feenster, 561 A.2d 997 (D.C. 1989)

In re James, 507 A.2d 155 (D.C. 1986)

In re (Bernard) Johnson, 691 A.2d 628 (D.C. 1997)

In re Katz, 638 A.2d 684 (D.C. 1994)

In re Lomax, 386 A.2d 1185 (D.C. 1978) (*en banc*)

In re Mills, 467 A.2d 971 (D.C. 1983)

In re Plummer, 608 A.2d 741 (D.C. 1992)

In re Reynard, 616 A.2d 1262 (D.C. 1992)

In re Richardson, 481 A.2d 473 (D.C. 1984)

In re Smith, No. 03-FM-501, 2005 D.C. App. LEXIS 417 (Aug. 11, 2005)

In re Stokes, 546 A.2d 356 (D.C. 1988)

In re Walker, 856 A.2d 579 (D.C. 2004)

In re Perruso, 896 A.2d 255 (D.C. 2006)

C. Periodic Examinations and Court Review of Commitment

At the expiration of 90 days from the issuance of a § 21-545 order of commitment or the date on which the §21-545.01 order renewing the period of commitment begins, and every 90 days thereafter, a patient is entitled to a current examination of his or her mental condition. D.C. Code § 21-546(a). Within 180 days from the date of the commitment order, the patient may also make a written request to be examined by an independent physician. If the patient is indigent, the examination shall be provided at public expense. If the Department of Mental Health, after consideration of the physician's reports, determines that the patient no longer meets the statutory criteria for commitment, the patient must be converted to voluntary legal status or discharged from treatment. D.C. Code § 21-546(d).

If the Department of Mental Health decides that the patient should not be released, but one or more of the examining physicians disagree, the patient may petition the court for an order of release. *Id*.[34] This right to review applies to outpatients as well as inpatients. Super. Ct. Ment.

[34] It is not enough to trigger judicial review for a report under § 21-546 to state that the respondent is "not dangerous to herself or others *in a custodial setting*" because "this does not mean that [the respondent] would not be dangerous

Health R. 9 places the burden on the patient of proving, by a preponderance of the evidence, that he or she is no longer likely to injure self or others as a result of mental illness.

D. Revocation of Outpatient Commitment

In 2003, the Ervin Act was amended to include provisions regarding revocation of outpatient commitment. Prior to this amendment, the procedures were governed by Super. Ct. Ment. Health R. 16, which has since been repealed. The Ervin Act amendment sets forth procedures for transferring committed persons to inpatient hospitalization from outpatient committed status and is based on the decisions in *In re James*, 507 A.2d 155 (D.C. 1986); *In re Richardson*, 481 A.2d 473 (D.C. 1984); and *In re Mills*, 467 A.2d 971 (D.C. 1983).

1. Rehospitalization after Court Hearing

Section 21-548(a) authorizes the court to order a committed person's transfer from outpatient treatment to inpatient hospitalization after a hearing at which the petition has proved by clear and convincing evidence that the committed person (1) has failed to comply with a material condition of outpatient treatment and a more restrictive form of treatment is required to prevent the person from injuring self or others or (2) has had a significant change in his or her mental condition and a more restrictive form of treatment is required to prevent the person from injuring self or others. Occasionally, the government applies to the court for an order requiring that the U.S. Marshals Service or other law enforcement take a respondent into custody and transfer the person to an inpatient setting prior to any court hearing under § 21-548(a). The court has repeatedly found that it is not authorized to issue such an order. *See, e.g.*, Order, *In the Matter of Robert Freeman*, M.H. 1303-08 (December 28, 2009).

2. Rehospitalization before Court Hearing

Section 21-548(b) provides a detailed description of the process by which a treatment provider can take a committed person into custody and transfer the person from outpatient treatment to inpatient treatment for observation and evaluation, if the treatment provider determines that the patient is likely to injure self or others if not immediately detained. Within 24 hours of the detention, the Department of Mental Health or the hospital where the person is detained must file notice of rehospitalization along with a detailed affidavit in court reciting the circumstances of the transfer to a more restrictive treatment setting. D.C. Code § 21-548(b)(2). Also within 24 hours, a copy of the notice and affidavit must be provided to the committed person and counsel for the committed person. D.C. Code § 21-548(b)(3).

Within 24 hours of the filing of the notice of rehospitalization, the court must conduct an *ex parte* review and determine whether the change of treatment venue is supported by probable cause. D.C. Code § 21-548(b)(4). If the court determines it is not, the person is returned to outpatient status; if the court determines that it is, the hospital or Department may continue to hold the committed person for up to five days. *Id.* The Department or hospital may hold the

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in the event she were released" from the commitment. *In re Dow*, 663 A.2d 1214, 1215 (D.C. 1995) (emphasis in original).

person beyond the five-day period only if, during those five days, the hospital or Department has filed a petition to revoke outpatient treatment. D.C. Code § 21-548(b)(5). A hearing will be scheduled within 21 days of the filing of the outpatient revocation petition. *Id.* The decision in *In re Richardson*, 481 A.2d 473 (D.C. 1984), which formed the basis for the procedures set out in § 21-548, is helpful in understanding the outpatient revocation process.

Failure to file a timely notice of rehospitalization requires immediate release from inpatient custody and return to outpatient status. *In re Feenster*, 561 A.2d 997 (D.C. 1989). The untimely filing of a notice of rehospitalization is not "cured" by a subsequent judicial determination that outpatient status should be revoked. *Id*. at 999.

The statute does not distinguish between voluntary and involuntary transfers from outpatient to inpatient treatment. Section 21-548 appears to cover all transfers from outpatient to inpatient treatment.

3. The Revocation Hearing

In cases in which the hospital seeks revocation of outpatient status, either before or after the committed person has been transferred to more restrictive treatment, a revocation hearing will be scheduled before the judge who is assigned to the mental health calendar. When the respondent has been transferred to an inpatient setting prior to the hearing, the temporary detention will continue until the revocation hearing is held or the inpatient doctor determines that inpatient treatment is no longer the least restrictive setting for the respondent to receive treatment. Although the hearing will be scheduled within 21 days of the filing of an outpatient revocation petition, the court may, for good cause shown, continue the hearing. *See* D.C. Code 21-548(b)(5).

At a revocation hearing, the treatment provider or the Department of Mental Health has the burden of establishing by clear and convincing evidence that the transfer to inpatient treatment is warranted. D.C. Code § 21-548(a).[35] The court must find that up to one-year inpatient treatment is the least restrictive alternative and is supported by facts of increased dangerousness. *In re Stokes*, 546 A.2d 356, 361 (D.C. 1988). At the hearing, the court must inquire into treatment alternatives less restrictive than inpatient hospitalization. "[A] hearing on a petition to revoke an outpatient commitment involves more than a binary choice," between inpatient and outpatient commitment. *In re Smith*, 880 A.2d 269 (D.C. 2005).

Thus, at a revocation hearing, the court will consider any relevant evidence produced by either side as to whether the respondent's psychiatric condition has deteriorated such that inpatient psychiatric care is the only appropriate alternative and, therefore, is the least restrictive treatment feasible. *Richardson*, 481 A.2d at 479 n.4; *see James*, 507 A.2d 155 (court criticized hospital's presentation of unreliable hearsay). However, the court may not rely on "mere conclusionary statements" about dangerousness as a basis for revocation, but must present the testimony or affidavits of witnesses, such as family members, with direct knowledge of the respondent's

[35] Prior to enactment of the new § 548 in 2004, the standard of proof was a preponderance of the evidence that a conversion to inpatient status is required, *In re Mills*, 467 A.2d 971, 975-76 (D.C. 1983), and that it is the least restrictive alternative. *See In re James*, 507 A.2d 155 (D.C. 1986).

conduct. *James*, 507 A.2d at 159. The court will consider the entirety of a respondent's behavior, rather than individual incidents, including past history of compliance with and response to treatment. *See In re Perruso*, 896 A.2d 255 (D.C. 2006), (evidence that respondent was "inadvertently exposing herself to a significant risk of injury to herself when she acted on her delusions," was sufficient to support a conclusion that inpatient hospitalization was the least restrictive alternative until she "is optimally stable" at which point she would have "gained insight into her disease" and not "simply stop taking her medication the moment she was released from the hospital.").

The respondent's failure to take his or her medication should not be a basis in and of itself for revocation of outpatient status. *Richardson*, 481 A.2d at 479 n.5. A respondent's mental illness may go into remission or he or she may no longer need medication. If the respondent is doing fine without treatment, counsel may be able to persuade the court not to revoke outpatient commitment. *See James*, 507 A.2d at 158. Counsel for the respondent may call any witnesses who support the contention that the respondent should be returned to the community. Although the burden is on the petitioner to show that inpatient hospitalization is the least restrictive treatment alternative available, counsel for the respondent may consider proposing alternative placements within the community that are less restrictive than the hospital but better tailored to the client's needs. *Stokes*, 546 A.2d at 361.

If the court orders revocation, the respondent's legal status is changed to that of a committed inpatient. A committed inpatient may be placed on outpatient status by the hospital staff without the court's involvement. If a person on inpatient status is transferred to outpatient status, the procedures described in *Richardson* apply, even if the inpatient status came about through a revocation proceeding. *See In re Plummer*, 608 A.2d at 745.

E. Right to Appeal

If, after a trial, a respondent has been found likely to injure self or others as a result of mental illness, "the Court shall advise the respondent of his right to appeal within 30 days and of the right of a person who is unable to pay the cost of an appeal" to proceed *in forma pauperis*. Super. Ct. Ment. Health R. 6(c). The right to appeal attaches following any order that finalizes commitment, including a final order of disposition where the respondent has waived the right to a trial on the issues of mental illness and dangerousness, or an order revoking outpatient commitment.

A respondent may appeal adverse rulings on preliminary issues or motions raised at a probable cause hearing in addition to adverse rulings at disposition and revocation hearings.[36] *See, e.g., In*

[36] For several reasons, the release of a respondent from the hospital following an adverse decision at a probable cause hearing will rarely moot out an appeal. First, the release may be survived by "continuing collateral consequences which should be dispelled if the confinement was, in fact, unlawful." *In re Curry*, 470 F.2d at 371. *But see Hardesty v. Draper*, 687 A.2d 1368, 1372-73 (D.C. 1997) (*habeas* application mooted by juvenile patient's release from hospital and subsequent reaching of age of majority, even though the record of having been hospitalized could present future difficulties for the person). Second, the challenged action may be deemed 'capable of repetition yet evading review' if the effects were too short-lived to fully litigate and there is a reasonable expectation that the respondent may be subject to the same action again. *In re Morris*, 482 A.2d 369, 372 (D.C. 1984). In addition, the short duration of a case or the continuing collateral consequences alone may be sufficient to

re De Loatch, 532 A.2d 1343 (D.C. 1987). However, if the respondent willfully avoided the jurisdiction of the court, he or she may not seek appellate review of a trial court ruling that came after the respondent's flight. *In re Reynard*, 616 A.2d 1262 (D.C. 1992).

The petitioner may appeal a limited number of adverse rulings at a probable cause hearing. *In re Barlow*, 634 A.2d 1246, 1249 (D.C. 1993); *see also In re (Bernard) Johnson*, 691 A.2d 628 (D.C. 1997); *In re Katz*, 638 A.2d 684 (D.C. 1994). However, the petitioner may not appeal an adverse determination at trial. *In re Lomax*, 386 A.2d 1185 (D.C. 1978) (*en banc*).

VIII. RENEWAL OF COMMITMENT STATUS

In December 2004, the District's civil commitment law changed significantly in that commitment, which had previously been for an indeterminate period of time, became limited to a one-year term, which may be renewed following the procedures in D.C. Code § 21-545.01. There is no statutory limit on how many times the one-year commitment order may be renewed. If a renewal of a § 21-545 or § 21-545.01 commitment order is sought, a new petition for commitment must be filed at least 60 days prior to the expiration of the period of commitment. D.C. Code § 21-545.01. The petition can be filed within 60 days of the expiration of the commitment order only for good cause shown. The renewal term sought under § 21-545.01 shall not exceed one year. The respondent must be notified of this petition within three days of filing. D.C. Code § 21-545.01(b).

Petitions for recommitment will be heard by the Commission on Mental Health. D.C. Code § 21-545.01. The Commission must examine the respondent, and promptly hold a hearing on the issue of whether the respondent has a mental illness and if, as a result of that mental illness, the respondent is dangerous if not committed. D.C. Code §21-545.01 (c). If the Commission finds that the respondent remains mentally ill and dangerous, it will order renewal of commitment for a term no greater than one year and then notify the court and respondent in writing. The Commission can order renewal of commitment on an outpatient or an inpatient basis, and should consider and order the least restrictive treatment setting. If the Commission finds the respondent to be no longer mentally ill, or no longer a danger, the Commission shall order the termination of the respondent's commitment, and notify the court of the decision in writing. D.C. Code §545.01(d), (e).

A person for whom recommitment has been ordered by the Commission may appeal the decision to the Superior Court and shall be advised of this right orally and in writing. D.C. Code § 21-545.01(h). A respondent cannot appeal a recommitment order to the Court of Appeals until a judge of the Superior Court has first reviewed the order. D.C. Code § 21-545.01(h)(3).

IX. VOLUNTARY AND INVOLUNTARY COMMITMENT OF MINORS

Persons under 18 years of age may be hospitalized and discharged as voluntary patients only upon the signature of their parent or guardian. *See* D.C. Code §§ 21-511 and 512. The Supreme

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avoid mootness when the case involves "overarching issues important to the resolution of an entire class of future [cases]." *In re Barlow*, 634 A.2d 1246, 1249 (D.C. 1993) (citation omitted); *accord In re (Bernard) Johnson*, 691 A.2d 628 (D.C. 1997).

Court declared in *Parham v. J.R.*, 442 U.S. 584 (1979), that when a parent seeks to admit a child to a hospital for the treatment of a mental illness, the child's right to due process is satisfied by a determination by the admitting psychiatrist that hospitalization is warranted and that the statutory criteria are met. *Id*. at 606-14. Thus, assuming the hospital medical staff believes the admission is needed, a dispute between a juvenile and his or her parent or guardian regarding a decision to initiate or end a voluntary hospitalization will be resolved against the juvenile. The juvenile does have recourse to a petition for a writ of *habeas corpus* and, if it can be shown that the admission decision of the psychiatrist was incorrect, the juvenile may be able to contest his or her admission or continuing hospitalization. A juvenile who wishes to remain in treatment may be taken out of a hospital by a parent or guardian over the juvenile's objection. The Department of Mental Health no longer provides inpatient services to juveniles at St. Elizabeth's Hospital, though if it were to decide to do so again, then the rights of juveniles admitted as voluntary patients at Saint Elizabeth's would be controlled by an agreement filed in *Poe v. Harris*, No. 74-1800 (D.D.C. Feb. 25, 1980). The rights of juveniles admitted to private hospitals were raised but not resolved in *Hardesty v. Draper*, 687 A.2d 1368 (D.C. 1997).

Some minors hospitalized as emergency patients under D.C. Code § 21-521 *et seq.* are the subject of an open abuse or neglect case, a PINS case, or a juvenile delinquency case in family court. For children involved in these cases, it is common for the court to issue an order for observation and treatment, pursuant to D.C. Code § 16-2315. A "21-day order," the common name for an order under D.C. Code § 16-2315, will supercede any action in the mental health case and the mental health case will typically be dismissed at the time the 21-day order is entered.

Because Ervin Act court records, which often contain detailed medical reports, are not sealed or otherwise treated as confidential (unlike court records in juvenile and abuse or neglect cases), counsel should consider filing a motion to have the Ervin Act records sealed or rendered confidential. The motion is left to the discretion of the judge as there is neither a statute nor case law requiring the court to seal its records in mental health cases. *See In re L.W.*, No. 90-1291 (D.C. Nov. 6, 1991) (memorandum opinion and judgment affirming denial of motion to seal judicial records of a minor's hospitalization).

X. RIGHTS OF PATIENTS HOSPITALIZED IN MENTAL INSTITUTIONS IN THE DISTRICT OF COLUMBIA

A. Presumption of Competence

Commitment to a mental hospital in the District of Columbia does not render a person legally incompetent for any purpose. *See* D.C. Code § 21-564; *In re Boyd*, 403 A.2d 744, 747 n.5 (D.C. 1979); *District of Columbia v. Moxley*, 471 F. Supp. 777 (D.D.C. 1979); *Cameron v. Mullen*, 387 F.2d 193, 202 n.29 (D.C. Cir. 1967).

B. Right to Treatment

Persons hospitalized for a mental illness have a right to both medical and psychiatric treatment. *See* D.C. Code § 21-562. The right to treatment begins on the day of admission to the hospital

and cannot be ignored on the pretext that a person is being "observed" for diagnostic purposes. *See In re Curry*, 452 F.2d 1360 (D.C. Cir. 1971) (*Curry I*). Furthermore, the hospital may not justify a continuing failure to provide suitable treatment by a lack of staff or facilities. *See Rouse v. Cameron*, 373 F.2d 451 (D.C. Cir. 1966). Judicial review of treatment alternatives is limited to determining whether the administrator of the hospital has made a permissible and reasonable decision in view of relevant information and within a broad range of discretion. *See Covington v. Harris*, 419 F.2d 617 (D.C. Cir. 1969); *accord Tribby v. Cameron*, 379 F.2d 104, 105 (D.C. Cir. 1967).

C. Right to Consent to Treatment and to Refuse Medication or Other Treatment

With the creation of the Department of Mental Health in 2001, the District enacted a Mental Health Consumers' Rights Protection Act. D.C. Code § 7-1231.01 *et seq*. This Act guarantees a wide array of rights to voluntary and committed persons receiving mental health treatment, including the rights to consent to all treatments, to consent to or refuse medication, to be free from chemical restraints, to be free from seclusion or restraints, etc. Counsel should be familiar with this Act, and with rules adopted by the Department of Mental Health as a result of this Act. The Department's rules, which were promulgated pursuant to the D.C. Administrative Procedure Act, have the force of law and are located in Title 22A of the D.C. Municipal Regulations. *See also* D.C. Code § 21-563.

Section 7-1231.08 of the 2001 Act requires that informed consent be given before a person can be treated with medication. This means that the patient must be given "information about the proposed medication, including the purpose for its administration, possible side effects, and its potential risks and benefits, as well as information about feasible alternative treatments." D.C. Code § 7-1231.08(a). If, following the standards in the Health-Care Decisions Act, D.C. Code § 21-2204, a person has been deemed incapacitated to make a decision about treatment with medication, then the treatment provider may seek consent for treatment with medication from a substitute decision-maker if the patient so authorized the surrogate in an advance directive. D.C. Code § 7-1231.08(b). If a patient has not authorized a surrogate to consent to medication, or if an incapacitated patient does not have a surrogate, a treatment provider may administer medication after following certain procedures. D.C. Code § 7-1231.08(c). The procedures for administering medication to incapacitated patients of the Department of Mental Health can be found in Chapter 1 of Title 22A, D.C.M.R.

The involuntary administration of medication for defendants who are incompetent to proceed in criminal cases is controlled by D.C. Code § 24-531.09.

The Health-Care Decision Act bars a surrogate decision maker, absent a court order, from making any sort of decision regarding the administration of electro-convulsive therapy (ECT or shock treatment) or psychosurgery (lobotomies or the like). D.C. Code § 21-2211.

D. Right to Be Free From Unnecessary Restraint and Seclusion

Section 21-563 provides that mechanical restraints may not be used with a person hospitalized under the Ervin Act unless they are prescribed by a physician and the reasons for their use have

been documented in the person's medical record. The use of seclusion and restraints is addressed more fully in the Mental Health Consumers' Rights Protection Act of 2001. D.C. Code § 7-1231.09.

E. Other Rights

A person hospitalized under the Ervin Act continues to have the right, *inter alia*, to enter contracts, vote, and hold a driver's license, unless adjudicated incompetent in a separate proceeding. *See* D.C. Code § 21-564 (2003). Additionally, a hospitalized person has the right to receive mail, which may not be censored except in limited situations, to receive visitors, and to use the telephone. D.C. Code § 21-561. The Mental Health Consumers' Rights Protection Act of 2001 expands on the provisions of the Ervin Act regarding guarantees for individuals receiving mental health treatment, either voluntarily or involuntarily. Communication rights are addressed in D.C. Code § 7-1231.04, as are the rights, *inter alia*, to have access to mental health services without harassment or coercion, to be treated in the least restrictive setting, to wear one's own clothes and keep personal possessions, to have reasonable opportunities for social interaction with members of either sex, to have reasonable opportunities for regular physical exercise, and to have access to the outdoors.

CHAPTER 16

RECOVERY OF PROPERTY SEIZED BY POLICE: ASSET FORFEITURE, MOTIONS FOR RETURN OF PROPERTY, AND OTHER PROCEDURES

I. INTRODUCTION

Asset forfeiture – the process by which the government permanently takes property away from the owner, without compensation, as a penalty for offenses committed "by" the property or the owner – is one of the most controversial law enforcement weapons in the "war on drugs."[1] Traceable to Biblical times, forfeiture was used at early English law to divest convicts of property and to seize "guilty property," for example, a domesticated animal that killed a person. Eventually, the crown used forfeiture to enhance revenue, a practice that led to the statutory abolition of "deodand" in England in 1846. *Criminal Forfeiture: Attacking the Economic Dimension of Organized Narcotic Trafficking*, 32 Am. U. L. Rev. 227, 232-35 (1982).

Many of the anachronisms in forfeiture procedure and doctrine, such as the fiction that the property itself is the defendant, are remnants of this ancient history. Others – such as lowering the burden of proof to probable cause and requiring that the claimant post a bond in order to litigate the right to the property – are legislatively-created devices that make it easier for law enforcement to prevail. Because no liberty interest is implicated, the stringent proof requirements of the criminal courts do not restrict the "remedial" civil statutes. Some commentators believe that the legislatures have gone too far in easing the government's burden of proof and relaxing the normal civil due process safeguards.[2] Several of the controversial departures in procedure have been struck down as unconstitutional.[3] The law is rapidly changing in this area. Because the "war on drugs" has resulted in new law enforcement tactics that go far

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[1] *See* Steve V. Bernard, *Due Process for RICO and CCE Defendants: Requiring Post-Indictment Forfeiture Hearings*, 1991 Ann. Surv. Am. L. 1077 (March 1933); Alison Roberts Solomon, *Drugs and Money: How Successful Is the Seizure and Forfeiture Program at Raising Revenue and Distributing Proceeds?*, 42 Emory L.J. 1149 (Fall 1993); Amy L. Austin, *Narcotics Trafficking Statutes and the Effect of Violations upon the Right to Retain Private Counsel*, 20 Ohio N.U. L. Rev. 99 (1993); Anne-Marie Feeley, *Forfeiture of Marital Property Under 21 U.S.C. § 881(A)(7): Irreconcilable Differences*, 37 Vill. L. Rev. 1487 (1992); *Extending Constitutional Protection to Civil Forfeitures that Exceed Rough Remedial Compensation*, 60 Geo. Wash. L. Rev. 194 (1991); Robert G. Morvillo, *Forfeiture and its Constitutional Dimensions*, 209 N.Y.L.J. 3 (June 1993); Tamara R. Piety, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 U. Miami L. Rev. 911 (1991); *Symposium on Forfeiture Under State and Federal Statutes: Forfeiture of Attorney's Fees and the Question of the Interrelationship of Federal and State Law*, 11 U. Bridgeport L. Rev. 185 (1991); *United States v. Monsanto and Caplin & Drysdale, Chartered v. United States: Settling the Attorney's Fees Forfeiture Issue*, 28 Hous. L. Rev. 429 (1991); Jed S. Rakoff, *Will the Supreme Court Restrain Forfeiture?*, 210 N.Y.L.J. 3 (July 1993); Comment, *Scope of Real Property Forfeiture for Drug-Related Crimes Under the Comprehensive Forfeiture Act*, 137 U. Pa. L. Rev. 303 (1988); *Patterson v. District of Columbia*, 117 Wash. D.L. Rptr. 741 (D.C. Super. Ct. April 13, 1989) (King, J.); O. Smith, *Prosecution and Defense of Forfeiture Cases* (1991).

[2] Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 Hastings L.J. 889 (1987); Strafer, *End Running the Fourth Amendment: Forfeiture Seizures of Real Property Under Admiralty Process*, 25 Am. Crim. L. Rev. 59 (1987). For a useful treatise on this topic, *see* Steven L. Kessler, *Civil and Criminal Forfeiture, Federal and State Practice* (1993).

[3] Among these devices are cost bonds as a condition of obtaining judicial remedies, a shift in the burden of proof, and seizure warrants issued without a probable cause determination.

beyond previous practices and test the limits of the Constitution, virtually every forfeiture case is a case of first impression on some issue. Accordingly, counsel should be alert to the novelty of the issues presented.

The government often fails to follow current forfeiture standards and procedures. Studies by the General Accounting Office have cited numerous problems in the federal government's management of property seizure and forfeiture programs, including failures to preserve the condition of the property and to protect the interests of third parties. *See, e.g.*, "Real Property Seizure and Disposal Program Improvements Needed," Statement of Gene L. Dodaro, Associate Director, General Government Division, before the Subcommittee on Federal Spending, Budget and Accounting, U.S. Senate, GAO/T-GGD 87-28 (Sept. 25, 1987) (available from the GAO publications office).

A. Civil vs. Criminal Forfeiture

There are two types of forfeiture: *in personam* (i.e., criminal) or *in rem* (i.e., civil). The classic distinction was based upon whether the penalty was assessed against the thing or the person. Forfeiture against the person – criminal forfeiture – required a conviction before property could be taken. *United States v. Seifuddin*, 820 F.2d 1074, 1076 (9th Cir. 1987). *See also Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 682 (1974). Such forfeitures were regarded as criminal because they were penal. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965); *Seifuddin*, 820 F.2d at 1076.

"Criminal" forfeitures are subject to all the constitutional and statutory procedural safeguards available under criminal law.[4] Because the indictment must include the forfeiture counts, the grand jury must find a basis for forfeiture. The burden of proof in criminal forfeiture cases is "beyond a reasonable doubt." Examples of criminal forfeiture statutes in current use are the Racketeer-Influenced Corrupt Organization Act (RICO), 18 U.S.C. §§ 1961 *et seq.*, the Continuing Criminal Enterprise Act (CCE), 21 U.S.C. §§ 848 *et seq.*, and the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §§ 853, 881.

"Civil" forfeitures are *in rem* actions "based upon the unlawful use of the *res*, irrespective of its owner's culpability." *Seifuddin*, 820 F.2d at 1076-77. Traditionally, civil forfeiture has operated on the fiction that the *res* itself is the guilty party. The fact that forfeiture of the property affected someone's property rights was at first not considered. Civil forfeiture follows the rules of civil procedure and, in federal court, the Supplemental Rules for Certain Admiralty and Maritime cases. The burden of proof for seizure or arrest in the District of Columbia is probable cause. With regard to forfeiture, the government must show by a preponderance of the evidence that the moneys or items were used in violation of D.C. Code §§ 48-901.02 through -567. *$345.00 in United States Currency v. District of Columbia*, 544 A.2d 680, 682 (D.C. 1988). The standard for forfeiture actions under federal law, 21 U.S.C.A. § 801, is probable cause; the burden then shifts to the claimant to prove by a preponderance of the evidence that the "items or moneys were not so unlawfully used." *Id.* Because civil forfeiture is *in rem* instead of *in personam*, most civil forfeiture statutes relax the normal requirements for service of process,

[4] *Patterson*, 117 Wash. D. L. Rptr. 741. *But see Seifuddin*, 820 F.2d at 1077.

allowing the government to send notice by first-class mail coupled with publication. However, absent exigent circumstances, the Due Process Clause requires notice and a "meaningful" opportunity to be heard "before seizing real property subject to civil forfeiture." *United States v. James Daniels Good Real Property*, 510 U.S. 43 (1993).

Courts often distinguish between civil and criminal forfeitures in determining whether a particular constitutional provision applies. Analysis along these lines presents problems, however, because the distinction is arbitrary and constitutional rights are not so easily categorized.

Whether a forfeiture statute is civil or criminal turns on whether it is "punitive or remedial." *See United States v. Ward*, 448 U.S. 242, 248-49 (1980). The Supreme Court has announced seven considerations relevant to whether sanctions are so punitive as to override legislative intent to enact civil penalties:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as punishment, whether it comes into play only on a finding of *scienter*, whether its operation will promote the traditional aims of punishment – retribution and deterrence, whether the behavior to which it applies is already a crime, whether an alternative purpose to which it may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned.

Kennedy v. Mendoza-Martinez, 372 U.S. 144, 168-69 (1963) (citations omitted).

B. Constitutional Implications of the Quasi-Criminal Nature of Forfeiture

All forfeiture actions, whether denominated "civil" or "criminal," are "quasi-criminal" and require many of the constitutional procedural safeguards guaranteed to defendants in criminal cases. *One 1958 Plymouth Sedan*, 380 U.S. at 700. For example, the Due Process Clause secures the right of a citizen in an ordinary case to a hearing to contest the forfeiture of his property. *United States v. James Daniels Good Real Property*, 510 U.S. 43 (1993). This right to defend against forfeiture extends to an individual independent of his failure to appear in a related criminal prosecution. *Degen v. United States*, 517 U.S. 820 (1996).

Constitutional Rights Extended to Forfeiture Actions: In addition to the Search and Seizure Clause, the courts have extended to all forfeiture actions several other constitutional rights recognized in criminal cases. These include the Fifth Amendment privilege against self-incrimination, *United States v. United States Coin & Currency*, 401 U.S. 715, 717 (1971); the Sixth Amendment speedy trial guarantee, *United States v. $8,850*, 461 U.S. 555 (1983); the *Ex Post Facto* Clause, *United States v. MacDonald*, 607 F. Supp. 1183 (E.D.N.C. 1985); *but see United States v. $5,644,540*, 799 F.2d 1357 (9th Cir. 1986) (Ex Post Facto Clause applies only to criminal cases); and the Eighth Amendment's Cruel and Unusual Punishment Clause as a bar to disproportionality between the offense and penalty in criminal forfeiture cases, *Austin v. United States*, 509 U.S. 602 (1993); *Alexander v. United States*, 509 U.S. 544 (1993); *United States v. 92 Buena Vista Ave.*, 507 U.S. 111 (1993). The Confrontation Clause was held not to apply in

United States v. Zucker, 161 U.S. 475 (1896). Neither the Double Jeopardy Clause nor collateral estoppel prevents forfeiture after a criminal acquittal for the same offense. *United States v. One Assortment of 89 Firearms*, 465 U.S. 354 (1984). Claimants are not entitled to representation by counsel at the government's expense unless the judgment could result in loss of liberty. *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Scott v. Illinois*, 440 U.S. 367 (1979).

II. THE GOVERNMENT'S AUTHORITY TO TAKE

Although the Fifth Amendment precludes taking of private property for public use without just compensation, it does not entirely bar forfeitures. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 680 (1974), rejected the contention that the Puerto Rican forfeiture statute, which has no innocent owner defense, "unconstitutionally authorized the taking for government use of innocent parties' property without just compensation." The Court cited a long line of precedents establishing that innocence of the owner is not a defense to forfeiture. *Id*. at 683-90. *See* Note, *The Innocent Owner Defense to Real Property Forfeiture Under the Comprehensive Crime Control Act of 1984*, 58 Fordham L. Rev. 471 (1989). The Supreme Court held that judicial inquiry into the owner's guilt or innocence could be dispensed with because lawmakers are free to determine that certain uses of property are undesirable and to establish "a secondary defense against a forbidden use." *Calero-Toledo*, 416 U.S. at 686.

Until recently, many advocates relied on a passage in *Calero-Toledo* in support of the proposition that the Just Compensation Clause of the Fifth Amendment proscribes the taking of property when an owner proves "not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property." *Id*. at 688-89 (citations omitted).

Bennis v. Michigan, 516 U.S. 442 (1996), rejected the language in *Calero-Toledo* as *dicta*. Bennis' husband was arrested after the Michigan police observed him engaging in a sexual act with a prostitute while in an automobile. *Id*. at 445. Pursuant to a Michigan abatement scheme, the automobile was forfeited as a public nuisance, notwithstanding the fact that (1) the petitioner co-owned the car with her husband; and (2) the petitioner had no knowledge of her husband's use of the automobile in this matter. *Id*. In short, the *Bennis* court expressedly held that neither the Due Process Clause of the Fourteenth Amendment nor the Just Compensation Clause of the Fifth Amendment requires judicial recognition of the "innocent owner" defense. *Id*. at 448.

Although *Bennis* rejects the claims that the Constitution requires an innocent owner defense, and the Court views the language in *Calero-Toledo* as *obiter dictum*, *Bennis* was silent as to whether the Constitution would be offended if an owner affirmatively showed that he had "done all that reasonably could be expected to prevent the proscribed use of his property." *Calero-Toledo*, 416 U.S. at 688-89. Accordingly, advocates should consider making a showing, in addition to absence of knowledge, that the owner made efforts to prevent property from being used in an illegal manner.

The power of the government to "take" private property without implicating the Just Compensation Clause is limited to takings authorized by the police power. The police power is a function delegated to each state and local government to establish and enforce laws to preserve

public order and tranquility; promote the public health, safety and morals; and prevent, detect and punish crime. *See State ex rel. Walsh v. Hine*, 21 A. 1024 (Conn. 1890). It permits the taking of life, liberty and property, but only with due process. At a minimum, like statutes imposing criminal penalties, forfeiture statutes must be strictly construed in favor of the claimant, "in a manner favorable to the person whose property is to be seized as is consistent with the fair principles of interpretation." *District of Columbia v. One 1981 Datsun 200SX*, 115 Wash. D.L. Rptr. 645, 649 (D.C. Super. Ct. April 2, 1987) (Burgess, J.) (quoting *State v. 1979 Pontiac Trans Am*, 487 A.2d 722, 726 (N.J. 1985)).

Although the government is permitted to "take" one's property as long as the tenets of due process are met, forfeitures are subject to the principal of proportionality.[5] Consequently, the amount or the extent of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish. *See United States v. Bajakajian*, 524 U.S. 321 (1998).

III. STATUTES CONTROLLING FORFEITURES

A. DISTRICT OF COLUMBIA FORFEITURE STATUTES

Under District of Columbia law, there are five most commonly used statutes codifying asset forfeiture. Those statutes involve the offenses of controlled substances, firearms, illegal gambling, prostitution and pandering, and illegal dumping.

1. Controlled Substances – D.C. Code § 48-905.02

Asset forfeiture of property seized in connection with controlled substances is codified in D.C. Code § 48-905.02. The property that may be seized must be connected with the possession of items and/or containers used to hold, make or use drugs such as a crack pipe, baggies, and other drug paraphernalia. The statute permits the forfeiture of any U.S. Currency and "everything of value" that can be used or intended for use in drug sales and/or proceeds from drug sales. With this, vehicles or other conveyances used to carry drugs or drug paraphernalia, or are used to facilitate the sale or receipt of controlled substances, can be seized as well. In addition, any property, such as cash, that is used or intended for use to commit or facilitate a violation of the Controlled Substances Act can be seized, i.e., currency used to purchase drugs. Real property, such as a house, can also be forfeited if real property is used or intended for use to commit or facilitate a violation of the Controlled Substances Act, i.e., crack houses, shooting galleries, drug nests, and structures that are used or intended to be used for a violation of the Controlled Substances Act.

[5] Forfeiture verdict does not collaterally estop court from recalculating amount at sentencing because forfeiture and loss are independent concepts, i.e., forfeiture is value of proceeds possessed by defendant due to illegal activity and loss is harm that victim of those illegal activities suffered. *United States v. Hoover-Hankerson*, 511 F.3d 164 (D.C. Cir. 2007).

2. Firearms – D.C. Code § 7-2507.06a

The statute applies to transporting, possessing, or concealing any firearm in violation of D.C. Code § 7-2502.02, D.C. Code § 22-4503, and/or D.C. Code § 22-4504. Any vehicle or conveyance used to possess, transport, or conceal firearms can be seized and forfeited to the District of Columbia. Therefore, any vehicle containing a firearm can be forfeited under this provision. All property forfeited under this statute will follow the same procedures set forth in D.C. Code § 48-905.02 regarding forfeiture for controlled substances.

3. Illegal Gambling – D.C. Code § 22-1705

This statute codifies forfeiture of illegal gambling proceeds and property used to facilitate illegal gambling. Any premises can be seized under this statute if used for the purpose of illegal gambling.

Items that are used for legal, non-gambling purposes, such as a printer or recording device, can be seized as well if it is determined that those items were used to facilitate illegal gambling.

4. Prostitution and Pandering – D.C. Code § 22-2723

All vehicles and conveyances, including aircraft, can be seized if they were used to facilitate an act of prostitution. Under this forfeiture statute, owners are responsible for paying a civil administrative penalty of $150, plus booting, towing, and storage fees pursuant to D.C. Code § 22-2724. However, if the owner of the vehicle can establish the criminal case for prostitution was dismissed, that there was an acquittal, or that the vehicle was stolen at the time of the offense, then some or all of the fees will be refunded.

5. Illegal Dumping – D.C. Code § 8-905

Vehicles used to facilitate illegal dumping can be forfeited under this statute. This statute does not apply to a common carrier unless the owner consents to its use for illegal dumping.

Forfeiture can be mitigated or prevented if the owner can establish that the claimant committed the act negligently or without knowledge.

B. FEDERAL CASES

The most commonly used federal forfeiture provisions are subsections of remedial legislation intended to punish specific types of wrongdoers. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498-99 (1985). Racketeers and drug kingpins are the main focus of attention. "Commonly encountered statutes are the Racketeer Influenced and Corrupt Organizations Act ("RICO")," 18 U.S.C. §§ 1961 *et seq.*; the Continuing Criminal Enterprise Act ("CCE"), 21 U.S.C. §§ 848 *et seq.*; and the Comprehensive Drug Abuse Prevention and Control Act, 21 U.S.C. §§ 853, 881.

The RICO forfeiture provision is an *in personam* action applied to cover a broad number of illegal acts, including gambling, racketeering, extortion, murder, and drug dealing.

While CCE is to big-time drug dealers what RICO is to racketeers, CCE was broadly drafted to cover all imaginable types of drug offenders from the casual user to the mastermind behind major international drug cartels. Its forfeiture provision, § 853, is an *in personam* action integrated in a criminal proceeding. *See J.W. Goldsmith, Jr. - Grant Co. v. United States*, 254 U.S. 505 (1921) (*in rem* forfeiture valid even if person is innocent). CCE is Congress's most severe enforcement tool in its "war on drugs."

Section 881 forfeitures are the most frequently used. They are technically *in rem* proceedings, yet include a number of constitutional protections for claimants usually associated with criminal proceedings. Federal prosecutors prefer the § 881 action because it is available even if the defendant is acquitted of the underlying criminal charge. The government need only show probable cause, which shifts the burden to the person maintaining an ownership claim to prove by a preponderance of the evidence that the property is not connected with a proscribed activity.

Probable Cause: Federal circuits remain divided over the standard for determining probable cause in forfeiture actions. According to some, the government must make out a *prima facie* case, suggesting that probable cause depends on the government's ability to overcome a motion to dismiss. Other circuits hold that the government meets the probable cause standard by demonstrating that it is reasonable to believe that the property in question is connected with a proscribed activity. *United States v. Two Tracts of Real Property*, 665 F. Supp. 422 (M.D.N.C. 1987), *aff'd*, 856 F.2d 675 (4th Cir. 1988); *United States v. 3120 Banneker Drive*, 691 F. Supp. 497 (D.D.C. 1988). All federal circuits hold that the government must prove, by a preponderance of the evidence, that the property is connected to a proscribed activity. Once proved, the burden shifts to the defendant to prove beyond a reasonable doubt that there is no connection between the property and the proscribed activity.[6]

1. RICO Forfeiture Provision

RICO is the federal government's big gun in the war against crime. Among its chief characteristics are broad language and draconian measures. RICO was originally intended to stem the flow of organized crime money into legitimate businesses. *United States v. Turkette*, 452 U.S. 576 (1981) (expansive interpretation of RICO); *see also Russello v. United States*, 464 U.S. 16 (1983). Federal prosecutors have all but abandoned such intent, using RICO against criminal activities unconnected with organized crime. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 Colum. L. Rev. 661, 662-63 (1987).

The expansive language of RICO operates to:

- Prohibit the infiltration of dirty money, loan sharking, and extortion into legitimate businesses;

- Facilitate prosecution of a criminal's control and influence over the affairs of legitimate businesses;

[6] For a discussion of trial procedures in criminal forfeiture actions, see *United States v. Perholtz*, 842 F.2d 343 (D.C. Cir. 1988).

- Broadly define enterprises to include both legal and illegal groups of persons who are associated in fact;

- Expand the traditional definition of racketeer to include anyone who has committed two criminal acts; and

- Impose the most severe sanctions against prohibited activities.

Id. at 680-84; c*f. United States v. Lemm*, 680 F.2d 1193, 1198 (8th Cir. 1982) (limiting interpretation to traditional definition of racketeer and illegal enterprise).

18 U.S.C. § 1963, which provides for RICO criminal forfeitures, is intended to deprive a criminal of any property which is even remotely connected with a proscribed activity. The property itself need not be purchased with tainted proceeds or acquired by prohibited activity. *United States v. Ginsburg*, 773 F.2d 798 (7th Cir. 1985). This form of deprivation has survived constitutional challenges and is enforced to the fullest extent. For example, in *United States v. Anderson*, 782 F.2d 908 (11th Cir. 1986), the defendant's entire business dwelling was forfeited even though its basement was used only for legitimate purposes.

RICO imposes civil and criminal penalties upon "any person" who invests income derived from a "pattern of racketeering," § 1962(a); acquires or maintains control or influence over any legal or illegal enterprise through a "pattern of racketeering," § 1962(b); by way of hire or association with such enterprise, conducts or participates in its affairs, 18 U.S.C. § 1962(c); or conspires to violate any of the provisions of 18 U.S.C. § 1962(a)-(d).

a. Pattern of Racketeering

A "pattern of racketeering" includes any two acts of racketeering within ten years of each other, excluding terms of imprisonment. § 1961(5). There must be a continuity of proscribed activity, a threat of such continuity, and a relationship between the acts. *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985); *see also H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989) (pattern is established not upon a particular number, but upon an arrangement or relationship among predicate offenses).

b. Enterprise

"Enterprise" includes both legal and illegal entities associated for the purpose of engaging in a continuous common course of action. *Turkette*, 452 U.S. at 583. Legal entities include individuals, corporations, partnerships, and other unions and groups. 18 U.S.C. § 1961(4); *Turkette*, 452 U.S. at 582 n.4; *Perholtz*, 842 F.2d at 352.

A RICO indictment cannot be sustained against an unassociated entity. *See, e.g., Bennett v. United States Trust Co.*, 770 F.2d 308, 314-315 (2d Cir. 1985) (corporation cannot be defendant and entity because it cannot associate with itself). Some courts advance the position that RICO is predicated on a finding of "continuity of structure and among personnel within the entity."

Accordingly, a disjunctive structure or refusal of personnel to cooperate with one another "militates against a finding of continuity of personnel." *Perholtz*, 842 F.2d at 354.

Courts will infer the existence of an enterprise from a pattern of requisite offenses (racketeering). In a strict sense, proof of an enterprise can be satisfied when the prosecution demonstrates a common scheme among personnel or an organization, plus continuity. Accordingly, the relaxed test effectively treats two separate concepts as if they were the same. *See Turkette*, 452 U.S. at 583; *Perholtz*, 842 F.2d at 363.

C. Continuing Criminal Enterprise (CCE)

CCE, a chapter of the Comprehensive Crime Control Act of 1970, was enacted to augment enforcement tools by taking the profitability out of drug dealing. Like RICO, it is specifically aimed at a special class of offenders, described as "dangerous drug offenders" or "kingpins." Notwithstanding this intent, the scope of the statute and the wide latitude used in interpreting it enable CCE to reach even small-time users. *See Garrett v. United States*, 471 U.S. 773 (1985). Forfeiture is authorized under 21 U.S.C. § 853 and is mandatory upon conviction. Section 853 allows the court to restrain the disposal of potentially forfeitable property. If the subject property cannot be located, the court can forfeit any property, legal or illegal, owned by the defendant or transferred to a third party.

There is a rebuttable presumption against the "continuous" element of a criminal enterprise. When a crime does not require continuity, there is no presumption that it will continue. For example, a single drug transaction, no matter how large, cannot be a continuing criminal enterprise. *See* Torcia, *Wharton's Criminal Evidence*, § 64 (1985); *see also H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229 (1989); *Barticheck v. Fidelity Union Bank/First National*, 832 F.2d 36 (3d Cir. 1987). A rebuttable presumption exists that any property is subject to forfeiture if it was acquired by the defendant during the period in which the alleged violation occurred, and likely was not derived from another source. 21 U.S.C. § 853(d).

A conviction for a proscribed drug offense must precede forfeiture. The offense must involve at least five persons and large quantities of drugs, and must itself constitute an ongoing illegal drug scheme. Also, the defendant must manage, control, or direct the enterprise, and derive substantial profits from it. The subject property must be derived from or in part be used to facilitate the offense. 21 U.S.C. § 853(a); *see* 21 U.S.C. § 848.

Before a conviction is obtained, 21 U.S.C. § 853(e) provides for a protective order authorizing the government to restrain or enjoin, or require an execution or performance bond to preserve availability of the subject property. The protective orders are applied upon the filing of an indictment against the person.

Section 853(f) authorizes the government to request a warrant for seizure of subject property in the same manner as provided in a search warrant. Issuance of the warrant is based on probable cause that the subject property is "tainted."

1. Property

Property includes: "1) Real property, including things growing on, affixed to and found on land; and 2) Tangible and intangible personal property, including rights, privileges, interest, claims and securities." 21 U.S.C. § 853(b).

2. Predicate Offenses

Predicate offenses include:

- Manufacture, distribution, or dispensation of any controlled substance, or intent to do so;
- Creation, distribution, dispensation, or possession with intent to distribute any counterfeit substance;
- Use or revelation of any information about trade secrets used to process Schedule I or II drugs;
- Possession of a controlled substance (unless the record was expunged pursuant to 21 U.S.C. § 844(b));
- Distribution to persons under twenty-one years of age;
- Distribution or manufacture in or near a school or college;
- Employment of any person under eighteen years of age; or
- Attempt or conspiracy to commit any offense outlined in the chapter, *United States v. (Charles) Jones*, 763 F.2d 518 (2d Cir. 1985) (conspiracy suffices); *United States v. Sisca*, 503 F.2d 1337, 1343-45 (2d Cir. 1974) (conversation about prospective drug purchase).

See 21 U.S.C. §§ 844 *et seq.*

3. Series

A CCE "series" is roughly equivalent to a RICO "pattern." Its definitional scope includes three or more federal narcotics violations. *United States v. Ordonez*, 722 F.2d 530, 537 (9th Cir. 1983), *modified*, 737 F.2d 793 (1984); *see also United States v. Phillips*, 664 F.2d 971 (5th Cir. 1981). Any prior drug-related conviction can be an element in the series. *United States v. Black*, 605 F. Supp. 1027 (D.D.C.), *stay denied*, 759 F.2d 71 (D.C. Cir. 1985). The elements need not be distinct violations. For example, one commits a predicate offense by receiving a telephone call from a potential purchaser of a prohibited drug; if three related calls are received, the requisite number of offenses is met. *Cf. United States v. Estrada*, 757 F.2d 27 (2d Cir. 1985)

(defendant received a telephone call, prepared the drug, and delivered it to a prospective purchaser).

4. Kingpin

The kingpin provision is aimed at leaders of illegal drug associations. A leader need not be the head of a drug cartel; it is sufficient that one supervise, organize, or manage at least five persons in a drug-related activity and derive substantial income from such activity. 21 U.S.C. § 848 (c); *United States v. Zavala*, 839 F.2d 523 (9th Cir.1988); *see also United States v. (Michael) Jones*, 801 F.2d 304 (8th Cir. 1986).

5. Substantial Income

According to some circuits, "substantial income" is not limited to actual dollars received or promised. In fact, evidence that an alleged kingpin would have received money, but for government intervention, is sufficient to meet the test. Indeed, the defendant need not have received or even expected to receive money. In *United States v. Jeffers*, 532 F.2d 1101, 1117 (7th Cir. 1976), *modified*, 432 U.S. 137, 434 U.S. 880 (1977), the court held that substantial income could be inferred from the magnitude of an enterprise; gross receipts or income could therefore be the measure used to determine substantial income.

6. Third-Party Interest

The United States assumes full right and interest in a property upon the commission of a proscribed act. Therefore, no third party can claim an interest in "tainted" property, although there is an exception for *bona fide* purchasers for value. The doctrine of "relation back," 21 U.S.C. § 881(h), states that the government's title to property vests (i.e., relates back) to the date of the offense, not the date of seizure, thus avoiding any third-party claims arising between offense and seizure. However, this doctrine was seriously curtailed in *United States v. 92 Buena Vista Ave.*, 507 U.S. 111 (1993), holding that the interceding "innocent owner" was unjustly deprived of a home – given to her as a gift – purchased with the proceeds of drug transactions.

7. Enterprise

A CCE enterprise is the same as that defined under RICO. *See* Section B.2, *supra*. It includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact even though not a legal entity. 21 U.S.C. § 854(c).

C. CIVIL FORFEITURE UNDER 21 U.S.C. § 881

The broad language of 21 U.S.C. § 881 provides a dragnet for capturing virtually any asset, even if remotely connected to a proscribed activity. The forfeiture action can be maintained independent of a criminal proceeding, and may be brought against people who have been acquitted or who have not been criminally charged. *United States v. 3120 Banneker Drive*, 691 F. Supp. 497 (D.D.C. 1988); *United States v. One Clipper Bow Ketch Nisku*, 548 F.2d 8 (1st Cir. 1977). The statute has been consistently construed to extend to property loaned to a person who,

without the owner's knowledge or consent, uses the property in a manner proscribed by the act. *See United States v. One Mercedes Benz 380 SEL*, 604 F. Supp. 1307 (S.D.N.Y. 1984), *aff'd*, 762 F.2d 991 (2d Cir. 1985). Initially, the government must show probable cause that the property was used in violation of federal drug laws. The burden then shifts to the claimant, who must rebut that showing with preponderant evidence. *3120 Banneker Drive*, 691 F. Supp. at 499; *United States v. Brock*, 747 F.2d 761, 762 (D.C. Cir. 1984).

A *prima facie* forfeiture case is established when the evidence creates reasonable grounds for belief that the property is connected to a proscribed activity. This test is analogous to the probable cause standard in search and seizure cases, but is limited by the statutory language. Accordingly, the government may initiate a § 881 forfeiture action against an automobile by setting forth a claim that the "vehicle [was] used to facilitate the sale of a controlled substance." *See United States v. Fafowora*, 865 F.2d 360, 362 (D.C. Cir. 1989); *United States v. Pappas*, 613 F.2d 324 (1st Cir. 1980). *See generally Illinois v. Gates*, 462 U.S. 213, 230-31 (1983).[7]

The following are subject to forfeiture:

- Controlled substances made, distributed, dispensed, or acquired in violation of § 881;
- Conveyances, including aircraft, vehicles, or vessels that are used or intended for use to transport or in any manner facilitate the transportation, sale, receipt, possession, or concealment of controlled substances;
- Monies, negotiable instruments, securities, or other things of value, furnished by any person or exchanged for a controlled substance; and
- All real property, and rights, title, and interest thereof, used to facilitate the commission of an act proscribed under § 881.

See 21 U.S.C. § 881(a)(1)-(7). The statute reaches every physical object that is in any manner connected with the drug trade. *3120 Banneker Drive*, 691 F. Supp. at 503.

> [P]roperty is subject to civil forfeiture if it is used – even if tangentially used – in connection with a drug transaction . . . Congress did not envision a constricted scope for forfeitures; instead, in keeping with the statute's emphasis on deterring drug transactions by attacking the profitability of crime Congress intended the Act to provide for forfeitures of property used in connection with an illegal narcotics trade, regardless of whether the property was "substantially connected" to the deal or not.

Id. at 501 (footnotes and citations omitted).

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[7] The Federal Rules of Civil Procedure apply to relief from a § 881 action. *In Re Seizure Warrant of Cyril Onwuasoanya*, 830 F.2d 372 (D.C. Cir. 1987), *vacated*, 488 U.S. 920 (1988). The proper venue for the action is the federal circuit in which the property was seized. *United States v. One Cessna Model 310R Aircraft*, 432 F. Supp. 364 (D.S.C. 1977).

To maintain a forfeiture action, the government need only establish a reasonable belief that the property was intended for or facilitated a drug transaction. For example, in *United States v. Fleming*, 677 F.2d 602, 609-10 (7th Cir. 1982), the co-defendant's automobile and $10,000 in cash were forfeited because the car was used to transport the defendant to a place where a drug transaction was to take place. Similarly, *United States v. $33,000 U.S. Currency*, 640 F. Supp. 898, 900 (D. Md. 1986), held that proceeds from sales of coins, stock, and an Arabian horse were subject to forfeiture because it was reasonable to assume that the items sold were purchased with tainted money. For a comprehensive discussion of forfeiture involving drugs, see Annot., *Forfeiture of Personal Property Used in Illegal Manufacture, Processing, or Sale of Controlled Substances and 21 U.S.C. § 881*, 59 A.L.R. Fed. 765 (Supp. 1988).

IV. ATTORNEY'S FEES

Authority to forfeit attorneys' fees derives from the Comprehensive Forfeiture Act of 1984 (CFA), the same authority for other federal forfeiture cases. Depending on the underlying offense, the government may use a subchapter of the CFA that particularly applies to the facts of the case. The CCE forfeiture provision, 21 U.S.C. § 853, is most often used in large-scale drug cases. Prosecutors may also elect to use the RICO forfeiture provisions to seize attorney fees. *See* DuMouchel and Oberg, *Defense Attorney Fees: A New Tool for the Prosecution*, Det. C.L. Rev. 57 (1986).

Attorney fee forfeitures are distinguishable from most other cases involving real and intangible property rights because they involve substantive constitutional questions, namely the Sixth Amendment right to counsel of choice, as well as *bona fide* purchasers for value (who are usually exempt from forfeiture). The predominant issue is whether federal forfeiture statutes exempt assets a defendant wishes to use to retain and pay an attorney for legal representation. Federal courts labored over the question for years; in 1989 two five-to-four Supreme Court cases settled the debate.

United States v. Monsanto, 491 U.S. 600 (1989) (*Monsanto III*), and *Caplin & Drysdale Chartered v. United States*, 491 U.S. 617 (1989), rejected challenges on Sixth Amendment and due process grounds and found that money that the defendant intended to use to pay an attorney is not exempt from forfeiture. However, in a subsequent decision, the second circuit decided that assets needed for attorney's fees are forfeitable only after the government requests a post-indictment, pre-trial adversarial hearing, at which the government has the burden of demonstrating probable cause that the defendant violated the statute and that the assets are forfeitable. *United States v. Monsanto*, 924 F.2d 1186 (2d Cir. 1991) (*Monsanto IV*).

V. DISTRICT OF COLUMBIA FORFEITURES

Forfeiture under the District of Columbia code is a civil, *in rem* proceeding, authorized under D.C. Code § 48-905.02. It is remedial in purpose and effect. *$345.00 in United States Currency v. District of Columbia*, 544 A.2d 680 (D.C. 1988). Upon commission of specifically delineated activities, the law vests in the District of Columbia all titles, interests, and rights thereof in property connected to the activity. *See* D.C. Code §§ 48-901.02 *et seq.*

The action may be maintained even if the defendant was acquitted on the criminal charges to which the property was allegedly connected. In *District of Columbia v. Dunmore*, 749 A.2d 740 (D.C. 2000), the District of Columbia initiated proceedings for civil forfeiture of $821 seized from Mr. Dunmore at the time of his arrest. After Mr. Dunmore was acquitted of his possession with intent to distribute (PWID) charge, his attorney prevailed in his Super. Ct. Crim. R. 41(g) motion for return of Mr. Dunmore's property. The Court of Appeals reversed and remanded the case, holding that the trial court should have denied the Rule 41(g) motion and left the question of entitlement to the property to the civil forfeiture proceedings under D.C. Code § 48-905.02 (1998).

Forfeiture of property connected with or derived from a proscribed activity is authorized whenever one violates any of several local statutes, including:

- Controlled substances, including cocaine and its derivatives, LSD, PCP, and chemicals used to manufacture such, D.C. Code § 48-905.02;

- Contraband alcoholic beverages, and motor vehicles used in their transport, D.C. Code § 25-911;

- Drug paraphernalia, including syringes, pipes, roach clips, bongs, and cocaine spoons, D.C. Code § 48-1104;

- Proceeds from gambling, and the premises where gambling takes place, D.C. Code 22-1705;

- Interest derived from loan sharking (usury), D.C. Code § 28-3303;

- Firearms, and motor vehicle used in their transport, D.C. Code § 7-2507.06a;

- Any conveyance and/or U.S. currency used in any manner to facilitate a violation of a prostitution-related offense, D.C. Code § 22-2723; and

- Any conveyance used to facilitate illegal dumping, D.C. Code § 8-905.

D.C. Code § 48-905.02(a) applies to:

- Intrinsically illegal products, such as controlled substances;

- Cars, boats, aircraft, and other conveyances used to facilitate the transportation of controlled substances;

- Raw materials, including natural and synthetic elements and compounds used to make controlled substances, and containers;

- Books, records, or research property, including formulae intended to be used in violation of the law; and

- Anything of value, including cash and negotiable instruments exchanged for controlled substances.

PRACTICE TIP:

Parties involved with criminal cases can often be unsure as to whether or not property seized by the police is the subject of possible asset forfeiture proceedings. One way to ascertain whether or not the property in question may be held in asset forfeiture is to carefully read the narrative portion of the Metropolitan Police Department's Arrest Report, or the *Gerstein* portion of the PD 163. Often, the narrative will indicate if the property is being held for asset forfeiture.

VI. DEFENSES TO FORFEITURE

A. Affirmative Defenses

Affirmative defenses must be raised in the answer, but the answer may be amended even at the time of trial to conform to the evidence. *See* Super. Ct. Crim. R. 8(c), 15(b); Fed. R. Crim. P. 8(c), 15(b). It is wise to amend the answer as soon as there appears to be evidence to support an affirmative defense. In addition, claimants can defend forfeiture actions by attacking one or more of the elements of the government's case.

1. Innocent Owner

a. D.C. Statutes

The District of Columbia forfeiture statutes each have provisions for innocent owner defenses. The term "owner" was construed in *District of Columbia v. One 1981 Datsun 200SX*, 115 Wash. D.L. Rptr. 645, 650 (D.C. Super. Ct. April 2, 1987) (Burgess, J.):

> [T]he ultimate issue is who had the "power and the legal right to permit its use by another." . . . Federal courts, in determining who has standing to raise defenses under the federal forfeiture statute, 21 U.S.C. § 881(a), have first held that to challenge forfeitures, the challenger must own the *res*. They have then analyzed several factors in determining who is the owner, including, among others, who holds title, who exercises dominion and control, who has possession, and who has a financial stake in the property.

Id. at 649-50 (citation omitted).[8]

[8] Forfeiture statutes are construed liberally in favor of the claimant, and in such a manner "'as to give effect to the objects and purposes of the statute.'" *Id.* at 649 (quoting *Mason v. Automobile Finance Co.*, 121 F.2d 32, 34 (D.C. Cir. 1941)).

The District of Columbia controlled substances forfeiture statute has a liberal "innocent owner" defense with respect to cases involving controlled substances and/or firearms offenses. The statute provides that "[n]o conveyance is subject to forfeiture under this section by reason of any act or omission established by the owner thereof to have been committed or omitted without his or her knowledge or consent." D.C. Code § 48-905.02(a)(4)(B). "[A]ctual knowledge and consent is the proper standard to be applied."

The innocent owner defense for firearms forfeitures is enumerated in D.C. Code § 7-2507.06a (c)(1) & (2) for firearms offenses. This defense applies to situations in which the seized property is used and/or in the possession of another without the owner's knowledge and consent. Under the firearms statute, a claimant can establish a lack of knowledge of the presence of a firearm in the conveyance by a preponderance of the evidence. A claimant can also establish an innocent owner defense if he or she, upon receiving knowledge that a firearm was in his or her conveyance, took action to "terminate" the presence of the firearm or person with the firearm, from the conveyance. *See* D.C. Code § 7-2507.06a(c)(1)(B).

The innocent owner defense for illegal dumping provides that no motor vehicle will be subject to forfeiture if the owner establishes that a third party committed the illegal act of dumping without the owner's knowledge and consent. *See* D.C. Code § 8-905(a)(2). Further, the illegal dumping forfeiture statute provides that an owner may even regain possession of the vehicle if he or she did not know the dumping was illegal or did so negligently.

The innocent owner defense for prostitution and pandering applies only to vehicles that were used to facilitate an act of prostitution. *See* D.C. Code § 33-2723(a)(1)(C). There is no provision for currency seized under this statute. Common carriers are not applicable under this statute unless the owner had knowledge of and consented to acts of prostitution occurring in the vehicle on or on the premises.

The gambling forfeiture statute does not contain any innocent owner provisions.

PRACTICE TIP:

Innocent owners may be contacted by the Metropolitan Police Department to discuss the return of their vehicle. Defense counsel may also want to contact the Office of the Attorney General to facilitate the return of the property for innocent owners. By doing so, the claimant will avoid the long delays that can result when a civil forfeiture case is litigated in D.C. Superior Court.

Lien holders are considered innocent owners. Often, claimants may hold title to a vehicle jointly with a financing company, bank, credit union or car dealership. In such cases, lien holders can take possession of the vehicle before any proceedings, administrative or judicial, can occur. Claimants should carefully examine financing statement and loan agreements for their vehicle to ascertain whether or not those agreements contain a clause permitting the lien holder to take possession of the vehicle should it be held for asset forfeiture.

b. Federal statutes

The innocent owner defense in 21 U.S.C. § 881(a)(7), dealing with forfeiture of real estate for violations of drug laws, is identical in all significant respects to that used in the District of Columbia statute governing forfeiture of conveyances for drug violations: "[N]o property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner." Similarly, RICO protects the rights of innocent lienholders.

Most other federal statutes provide little or no protection for the interests of innocent owners and third parties. Furthermore, *Bennis v. Michigan*, 516 U.S. 442 (1996), held that the absence of an innocent owner defense in a forfeiture statute does not offend the Constitution: "a long and unbroken line of cases holds that an owner's interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use." *Id.* at 446; *see* Section II, *supra*.

2. Personal Use

That the drugs seized were intended for personal use and not for sale used to be a defense to forfeiture of a car under D.C. Code § 48-905.02(a)(4)(C). However, this provision was repealed in 1993, and apparently is no longer a defense. It was never a defense to forfeiture under 21 U.S.C. § 881.

3. Statute of Limitations

In the District of Columbia, the statute of limitations in forfeiture cases is one year. D.C. Code § 12-301(5). However, the statute of limitations is tolled during the pendency of criminal proceedings related to the property. *Ward v. District of Columbia*, 494 A.2d 666 (D.C. 1985). The federal statute of limitations is five years from the seizure. 19 U.S.C. § 1621. Even if the action is brought within the applicable statute of limitations, it may be time-barred by the Due Process Clause. *United States v. $8,850*, 461 U.S. 555 (1983) (applying four-factor test of *Barker v. Wingo*, 407 U.S. 514 (1972), in determining reasonableness of delay).

B. Constitutional Defenses

1. Suppression of Evidence

Although not technically a defense, winning a suppression motion may make it difficult or impossible for the government to prevail at trial. The Fourth Amendment applies to forfeiture in the same manner as in criminal cases. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965). Contraband, incriminating documents, and money seized as a result of an illegal seizure of the *res* must be suppressed as evidence in the forfeiture trial. However, illegal seizure of the

res does not by itself bar forfeiture, so long as the government presents other, untainted evidence to prove the illegal use.[9]

Because search and seizure issues may be raised at any time, entry of a guilty plea without the benefit of a suppression hearing should not preclude the claimant from litigating a suppression motion in the forfeiture case. *See District of Columbia v. One 1980 Blue Jaguar*, CA 3256-87 (Beaudin, J.) (illegality of search or seizure can be raised at any time, even during trial). The better practice is to enter a conditional plea under Super. Ct. Crim. R. 11(a)(2), and preserve the suppression issue.

Where there are parallel criminal and civil forfeiture proceedings involving the same parties and issues, resolution of a suppression issue in one case collaterally estops the issue in the other. Collateral estoppel "prohibits parties who have litigated one cause of action from relitigating in a second and different cause of action matters of fact which were, or necessarily must have been, determined in the first litigation." *Tutt v. Doby*, 459 F.2d 1195, 1197 (D.C. Cir. 1972).

2. Unreasonable Delay

Factors: *United States v. $8,850*, 461 U.S. 555 (1983), held that the four-factor balancing test of *Barker v. Wingo*, 407 U.S. 514 (1972), used to determine when delay of a criminal trial violates the accused's right to a speedy trial, is the test to be used in determining when delay in forfeiture cases violates the Due Process Clause. The factors are "length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *$8,850*, 461 U.S. at 564.

Although the delay challenged in *$8,850* came between the seizure and the filing of a forfeiture complaint, the same factors apply to delay between the filing of the action and the trial. Requiring prompt filing of a forfeiture action, but allowing indefinite postponement of the trial, would reduce the filing requirement to a nullity. Under the *Barker* test, there is a due process violation at some point. *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1162-63 (2d Cir. 1986).

> [T]here has been no uniformity in deciding what constitutes a reasonable length of time. Delays of five months, nine months, and fourteen months, have been deemed to be reasonable. Generally a majority of the circuits have held that a delay of more than one year is unreasonable in the absence of a compelling reason, such as a lengthy criminal investigation or substantial problems with collecting evidence.

Darmstadter & Mackoff, *Some Constitutional and Practical Considerations of Civil Forfeitures Under 21 U.S.C. § 881*, 9 Whittier L. Rev. 27, 40 (1987) (footnotes omitted).

Undue delay in instituting forfeiture proceedings after seizure may bar forfeiture. Although extenuating circumstances may lengthen the amount of time allowed for the government to file a

[9] An innocent owner may not have standing to challenge the stop and search of a car if the owner was not present at the time of the seizure. *United States v. One 1977 Mercedes Benz 450 SEL*, 708 F.2d 444, 448 (9th Cir. 1983) (owner relinquished expectation of privacy when she lent her automobile to third party).

complaint, delays of more than six months have generally been sufficient to trigger successful "deprivation of due process" defenses. In reviewing the merits of a defense of unreasonable delay, the determination of reasonableness is a finding of fact. The court will generally allow time for investigating and processing petitions for mitigation and remission. The courts are divided on whether the delay must cause harm before it can be found unconstitutional. A claimant's dependency on the property may strengthen the claim. Courts also look less favorably on delay when the property seized is a wasting asset, such as an automobile. Note, *An Analysis of Federal Drug-Related Civil Forfeiture*, 34 Maine L. Rev. 435 (1982).

3. Double Jeopardy

United States v. Ursery, 518 U.S. 267 (1996), held that *in rem* civil forfeitures are neither punishment nor criminal for purposes of the Double Jeopardy Clause. *Id*. at 278. Thus, after a person is convicted, the government may commence a separate, civil *in rem* proceeding against property used in the underlying offense without offending the Double Jeopardy Clause.

The mere denomination of a forfeiture statute as "*in rem*" does not end the analysis. Rather, the court employs a two-part analytical construct to determine whether "*in rem*" forfeiture statutes are in substance "*in personam*" criminal penalties, subject to the proscriptions of the Double Jeopardy Clause. *Id*. at 7. First, the courts must look to whether the legislature designed the forfeiture statute as a remedial civil sanction. *See id.*; *see also United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 363 (1984). Second, courts must look to "whether the statutory scheme was so punitive either in purpose or effect as to negate [the legislature's] intention to establish a civil remedial mechanism." *Ursery*, 518 U.S. at 278 (internal citations and quotations omitted).

VII. FORFEITURE PROCEDURES

A. Terminology

The following terms are commonly used in forfeiture statutes and are defined, interpreted, or distinguished in the cases cited:

"Intended for use": *United States v. Ader*, 520 F. Supp. 313, 325 (E.D.N.C. 1980) (in connection with 21 U.S.C. § 881).

"Proceeds traceable to a drug transaction": This language "has been interpreted to include a requirement that the property have a substantial connection to illegal drug trafficking." *United States v. A Single Family Residence*, 803 F.2d 625, 628 (11th Cir. 1986).

"Proximity to drugs": D.C. Code § 48-905.02(a)(7)(B), which creates a presumption that money found in close proximity to drugs was used or intended for use in violation of the drug laws, was found unconstitutional in *District of Columbia v. $987 (Purvis Williams)*, 115 Wash. D.L. Rptr. 1393 (D.C. Super. Ct. July 8, 1987) (von Kann, J.).

Quantity of drugs necessary to effect a forfeiture: Under the terms of federal and District of Columbia statutes, the amount of drugs involved is immaterial to the forfeiture case. *United States v. One 1976 Porsche 911S*, 670 F.2d 810, 812 (9th Cir. 1979); *United States v. One Clipper Bow Ketch Nisku*, 548 F.2d 8 (1st Cir. 1977); *United States v. One 1975 Chevrolet K-5 Blazer*, 495 F. Supp. 737, 740 (W.D. Mich. 1980); *United States v. One 1977 Chevrolet Pickup*, 503 F. Supp. 1027, 1030 (D. Colo. 1980); *United States v. One 1975 Mercury Monarch*, 423 F. Supp. 1026, 1029 (S.D.N.Y. 1976). These cases merely construed the statutes; they did not address the issue of whether the Eighth Amendment proportionality requirement is implicated.

Substantial connection requirement: *United States v. One 1994 Cadillac Eldorado Sedan*, 548 F.2d 421 (2nd Cir. 1977); *United States v. One 1972 Datsun*, 378 F. Supp. 1200 (D.N.H. 1974).

"To facilitate": *United States v. 1990 Toyota 4 Runner*, 9 F.3d 657 (7th Cir. 1993); *United States v. One 1972 Chevrolet Corvette*, 625 F.2d 1026 (1st Cir. 1980); *Platt v. United States*, 163 F.2d 165, 166-67 (10th Cir. 1947); *United States v. One Dodge Coupe*, 43 F. Supp. 60 (S.D.N.Y. 1942).

"Used in a gambling operation": *Vasille v. District of Columbia*, 296 A.2d 443 (D.C. 1972).

B. Seizure Warrants, Restraining Orders, and Warrantless Seizures

Property subject to forfeiture under this chapter may be seized by law enforcement officials, as designated by the Mayor, upon process issued by the Superior Court of the District of Columbia having jurisdiction over the property, or without process if authorized by other law.

D.C. Code § 48-905.02(b). Presumably, the "other law" referred to is the body of search and seizure law, developed in criminal cases, authorizing warrantless searches and seizures. *See* 21 U.S.C. § 881(b) for similar federal provisions.

1. Seizure Warrants

In federal cases, property subject to forfeiture may be seized with a warrant obtained pursuant to the procedures outlined in Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims of the Federal Rules of Civil Procedure, by filing a verified complaint meeting the specificity requirements of Rule E. Until 1985, Rule C required the clerk to issue the warrant; there was no provision for judicial determination of probable cause. This rule has been found unconstitutional by numerous courts.[10] The Supplemental Rules have preserved admiralty law's

[10] *United States v. $38,000*, 816 F.2d 1538 (11th Cir. 1987); *United States v. Device, Labeled Thermatic*, 641 F.2d 1289 (9th Cir. 1981); *Application of Kingsley*, 614 F. Supp. 219 (D. Mass. 1985), *appeal dismissed*, 802 F.2d 571 (1st Cir. 1986); *United States v. Life Insurance Co. of Virginia*, 647 F. Supp. 732 (W.D.N.C. 1986); *United States v. $128,035*, 628 F. Supp. 668 (S.D. Ohio), *appeal dismissed*, 806 F.2d 262 (6th Cir. 1986); *United States v. 4880 S.E. Dixie Highway*, 612 F. Supp. 1492 (S.D. Fla. 1985). *See also* Cupl, *Charting a New Course: Proposed Amendments to the Supplemental Rules for Admiralty Arrest and Attachment*, 103 F.R.D. 319 (1984); Batiza & Partridge, *The*

special procedures of arrest and attachment, but have been challenged as violating the principles of procedural due process enunciated in a line of decisions involving state attachment and provisional remedies statutes. *See North Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601 (1975); *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). The rule was amended in 1985 to require a determination of probable cause by a disinterested magistrate, except in forfeiture cases. The questions regarding the constitutionality of this procedure continue to occur in forfeiture cases. Many federal courts have solved this problem by local rule. In some federal jurisdictions, local rules also provide post-seizure probable cause hearings at which the claimant can put on evidence. Strafer, *Civil Forfeitures: Protecting the Innocent Owner*, 37 U. Fla. L. Rev. 841, 850-52 (1985).

2. Restraining Orders

Under the RICO and CCE criminal forfeiture statutes, once an indictment has been filed, the criminal court has jurisdiction to enter restraining orders, injunctions, or prohibitions; to require posting of performance bonds; or to take any other action it deems proper to prevent dissipation of forfeitable assets before the conclusion of the case. *See* 18 U.S.C. § 1963(e); 21 U.S.C. § 848(d).

Under RICO, a restraining order may be obtained before indictment if: (1) persons holding interests in the property are given notice and an opportunity for a hearing; (2) the court finds a substantial probability that the government will prevail, and that failure to enter a restraining order will result in dissipation of the property; and (3) the need to preserve the availability of the property outweighs the hardship on any party against whom the order is to be entered. 18 U.S.C. § 1963(d)(1).[11]

3. Warrantless Seizures

Both D.C. Code § 48-905.02(b) and 21 U.S.C. § 881(b)(4) provide exceptions to the warrant requirement in the seizure of assets for forfeiture. Generally, the power to seize is co-extensive with the power to search without a warrant, provided the search leads to probable cause to seize. The same exceptions to the warrant requirement apply to searches for evidence and seizures for forfeiture. Thus, if a search is proper under an exception to the warrant requirement and it turns up evidence leading to probable cause to support a forfeiture of the automobile, container, etc., the evidence may be seized. There are, however, a few qualifications to that general rule.

It has been held that seizure of the *res* must occur contemporaneously with the event giving rise to probable cause for seizure, and there must be a showing of exigent circumstances.

Constitutional Challenge to Maritime Seizures, 26 Loy. L. Rev. 203 (1980); Morse, *The Conflict Between the Supreme Court Admiralty Rules and Sniadach-Fuentes: A Collision Course?*, 3 Fla. St. U. L. Rev. 1 (1975).

[11] The constitutionality of these provisions has been the source of a great deal of controversy because, at least in post-indictment restraining order cases, they fail to provide a prompt post-seizure probable cause hearing. *See* Note, *RICO Post-Indictment Restraining Orders: The Process Due Defendants*, 60 N.Y.U. L. Rev. 1162, 1166 (1985). District of Columbia law has no similar provisions.

> Since § 881(b)(4) creates an exception that threatens to swallow § 881(b)'s warrant requirement, we would be reluctant to give it an absolutely literal reading. . . . We think it reasonable to read the "probable cause" exception as justifying the warrantless seizure of an automobile only when the seizure immediately follows the occurrence that gives the federal agents probable cause to believe that the automobile is subject to forfeiture under section 881(a) and the exigencies of the surrounding circumstances make the requirement of obtaining process unreasonable or unnecessary.

United States v. Pappas, 613 F.2d 324, 327, 329-30 (1st Cir. 1979). *United States v. One 1977 Lincoln Mark V Coupe*, 643 F.2d 154 (3d Cir. 1981), held that a short delay after the incident giving rise to probable cause does not invalidate a warrantless seizure. However, the ruling is undermined by the court's reliance on language from an older case indicating that the body of search and seizure law applicable to criminal cases does not apply to civil forfeiture, a contention clearly rejected in *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S. 693 (1965).[12]

C. The Period Between Seizure and Commencement of Proceedings

1. Suspension of Right to Replevin

The forfeiture statutes specifically prohibit a property owner from bringing a replevin action (a civil suit seeking return of the property) when the property is seized under a forfeiture statute.[13] The trade-off requirement that the government file the forfeiture action "promptly" is without teeth. The length of delay before filing the forfeiture complaint is limited only by the Due Process Clause and *$8,850*, 461 U.S. 555. However, *$8,850* motions cannot be filed until the government files the complaint or libel of information. Claimants can be rendered destitute by the seizure and indefinite detention of property.

2. Post-seizure Probable Cause Determination

The problem with allowing warrantless seizures of property for forfeiture is that, in most courts, there is no probable cause determination at any time prior to trial.[14] The *res* may be detained for years without any judicial finding of probable cause. When the *res* is the claimant's only car, or

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[12] Because real estate does not fit within the automobile exception, or any other exception relating to portable property (thus removing the exigency), a warrant is generally required for seizure of real estate for forfeiture. *United States v. $128,035*, 628 F. Supp. 668, 675 (S.D. Ohio), *appeal dismissed*, 806 F.2d 262 (6th Cir. 1986); *see also* Sinoway, *Seizures of Houses and Real Property Under Marijuana Forfeiture Laws*, 14 Search & Seizure L. Rpt. 113 (May 1987). Warrants are also generally obtained when the forfeitable property, such as a bank account, is held by another.

[13] Property taken or detained under this section shall not be repleviable, but shall be deemed to be in the custody of the Attorney General, subject only to the orders and decrees of the court or the official having jurisdiction thereof. 21 U.S.C. § 881(c); *see also* D.C. Code § 48-905.02(d)(2) ("Property, other than controlled substances, taken or detained under this section shall not be subject to replevin, but is deemed to be in the custody of the Mayor.")

[14] But see *Monsanto IV* for exception regarding requirement of probable cause hearing for assets needed to retain counsel of choice.

even virtually all of the claimant's assets – as RICO and CCE authorize – this deprivation is extremely severe. The amount of process "due" increases with the severity of the deprivation. Numerous articles have argued that the denial of a right to a post-seizure probable cause hearing is unconstitutional. *See* Strafer, *End-Running the Fourth Amendment: Forfeiture Seizures of Real Property Under Admiralty Process*, 25 Am. Crim. L. Rev. 59 (1987); Note, *Criminal Forfeiture and the Necessity for a Post-Seizure Hearing: Are CCE and RICO Rackets for the Government?*, 57 St. Johns L. Rev. 776 (1983); Kandaras, *Due Process and Federal Property Forfeiture Statutes: The Need for Immediate Post-Seizure Hearing*, 34 Sw. L.J. 925 (1980).

Patterson, 117 Wash. D.L. Rptr. 741, ruled that the Fourth Amendment prohibition against unreasonable seizures requires that a forfeiture claimant receive a prompt probable cause determination on demand. This determination appears to be something in the nature of a *Gerstein* proffer. *Id*. at 746.

No corresponding remedy exists in the federal courts, except for motions for return of property brought in the criminal case, or where the court provides such remedies by local rule. In both federal and local courts, motions for return of property, filed in the criminal case under Criminal Rule 41, sometimes provide a probable cause determination, although they are often ineffectual. *See infra* Section VIII.A.

D. Notice

Published notice is of negligible value to property owners, and is insufficient under the Due Process Clause when the names and addresses of owners of interests in property are readily ascertainable.[15]

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections . . . The notice must be of such a nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance . . .
>
> But when notice is a person's due, process which is a mere gesture is not due process . . .

[15] Names and addresses are "readily ascertainable" if they are available in the deed records and tax rolls. *Schroeder v. City of New York*, 371 U.S. 208, 210 (1962). *See also Vance v. United States*, 676 F.2d 183, 186 (5th Cir. 1982) (police and DEA agents knew claimant's name and address; published notice alone insufficient*); Jaekel v. United States*, 304 F. Supp. 993, 998-99 (S.D.N.Y. 1969) (same). If the claimant is incarcerated by the state that is attempting to forfeit the property, the government has knowledge of the person's whereabouts and must send notice to the person at the institution. *Robinson v. Hanrahan*, 409 U.S. 38, 40 (1972). However, this does not seem to be the government's general practice. To be on the safe side, a prisoner should have someone watching the mail at the prisoner's residence from the time the property is seized. It is also a good idea to notify the government in writing of a change of address, including place of incarceration.

> Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency.

Mullane v. Central Hanover Bank, 339 U.S. 306, 314-15, 318 (1950) (citations omitted).

In the District of Columbia cases, the first notice that the claimant's property is being seized for asset forfeiture is called a Notice of Intent to Administratively Forfeit Property or a Form PD 149 issued from the Metropolitan Police Department. Pursuant to D.C. Code § 48-905.02(d)(3)(A), this Notice must be sent by registered or certified mail to the registered owner of the property and to the person from whom the property was physically seized. Pursuant to SCR 71A-I, the Metropolitan Police Department must publish this Notice for two (2) successive weeks in a local newspaper. Most property is held at the Metropolitan Police Department's Evidence Control Branch located at 2235 Shannon Place, S.E. Vehicles are held at the Metropolitan Police Department's Blue Plains Impound Lot located at 5001 Shepherd Parkway, S.W.

1. District of Columbia

In District of Columbia cases, the first notice the claimant will receive is the "Libel of Information," the equivalent of a civil complaint. Claimants must file a claim and post a bond within 30 days of receiving notice. The Libel of Information must be sent by first-class mail to the last known address of:

> any lienholder of record . . . any person who has made written claim to the *res* to Office of the Attorney General, and . . . any other person who is known or in the exercise of reasonable diligence should be known to the Office of the Attorney General to have a right of claim to the *res*.

Failure to post a bond will result in an administrative forfeiture. The property will be retained by the Mayor of the District of Columbia. The property will be administratively forfeited to the District of Columbia if the interested party does not post a bond in a timely fashion. The Mayor will sell, retain for official use, or destroy the forfeited property. *See* D.C. Code § 48-905.01(d)(4).

Super. Ct. Civ. R. 71A-I. Libels of information are usually eight or nine pages, and include a large number of unrelated property seizures grouped together into one case. The claimant must file an answer with D.C. Superior Court Civil Clerk's Office (Room JM-220) by the "return date." The return date is listed on the page captioned "The President of the United States to the Marshal for Said District, Greetings," usually the last page of the Libel of Information. Pursuant to SCR 71A-I, the date of return shall be at least twenty (20) days from the date of publication of notice.

If the claimant does not file a timely answer, the Office of the Attorney General will obtain a default judgment and the property will automatically be forfeited and sold at auction or put into government use. This is known as a Default Decree of Condemnation and Forfeiture.

2. Federal Cases

The notice of seizure may be sent at any time. In most cases, it arrives six months or more after seizure. The claimant must respond by filing a claim. The notice is mailed to the claimant just before the first publication date, and specifies the publication in which notice will appear.

E. Claim and Cost Bond

In the District of Columbia cases, pursuant to D.C. Code § 48-905.02(d)(3)(B), claimants of seized property must post a bond in order to seek redress for the seizure of the property to be forfeited. The bond for the property can range from a minimum of $250 to a maximum of $2,500. For vehicles, the bond can range from $250 to ten (10) percent of the value of the vehicle. The value of the vehicle is assessed by the Metropolitan Police Department.

Under federal law, the Civil Asset Forfeiture Reform Act of 2000, 18 U.S.C. § 981, abolished the claimant's requirement of the posting of a bond in order to proceed with a federal civil forfeiture case. Previously, to obtain a judicial proceeding, a claimant had to file a written claim with the administrative agency and post a cost bond.

PRACTICE TIP:

Claimants who are indigent or are otherwise unable to pay the bond may file an application known as an Application for Waiver or Reduction Bond with the Metropolitan Police Department to have the bond reduced or waived. Applications are available at the MPD Evidence Control Branch.

F. Administrative Procedure

1. District of Columbia Cases

The Metropolitan Police Department conducts the administrative forfeiture of seized property for District of Columbia criminal cases. The Notice of Intent to Administratively Forfeit Property will also contain a cursory description of the property that the Metropolitan Police Department seeks to have forfeited. In order to prevent an administrative forfeiture, the claimant must post a bond with the MPD Evidence Control Branch for the property that is sought to be forfeited. Once the bond is posted, the Metropolitan Police Department will make a determination whether or not to release the property under the innocent owner statutes or to forward the case to the Office of the Attorney General for litigation in D.C. Superior Court.

2. Federal Cases

The notices sent out by the agency (DEA, FBI, or Customs) give only a cursory description of the possible remedies. They explain that one can avoid paying the cost bond by pursuing administrative remedies and waiving any judicial remedies. What they do not make clear is that

if the claimant files only a petition for remission, there will be no hearing and the agency's decision will be unreviewable. The only evidence that will be considered is what the claimant submits with the petition for remission. Also, there is no discovery of the government's case. The agencies deny many petitions for remission or mitigation without giving detailed reasons. Claimants may pursue this administrative route along with the judicial route if they post the cost bond or qualify for *in forma pauperis* treatment. Petitions for remission or mitigation must comply with the requirements of 21 CFR §§ 1316.79 through 1316.81 in DEA and FBI cases, or 19 CFR §§ 171.12 through 171.14 for customs seizures.

G. Judicial Procedure – Civil Forfeiture

1. The Complaint or Libel of Information

Forfeiture cases under District of Columbia law are commenced with the filing of a Libel of Information, which must:

> allege a description of the property seized, the date and place of the seizure, the person or persons from whom the property was seized, and that the property was used, or was to be used, in violation of the District of Columbia Code, specifying the applicable section(s).

Super. Ct. Civ. R. 71A-I(a).

The standard libel of information is not verified, but alleges "on information and belief." It does not clearly set out the procedures to be followed to contest the forfeiture. It directs the claimant to "duly intervene[16] and file an answer by the return date of such process," but does not specify the return date. The return is found in the Order for Issuance of Warrant and Advertising of Seizure, which is on the page entitled, "The President of the United States to the Marshal for Said District, Greetings." The return date is usually sixty (60) days after the case has been filed.

In federal cases, judicial forfeiture proceedings commence with the filing of a complaint, whose contents are governed by Supplemental Rules C and E.

> In actions *in rem* the complaint shall be verified on oath or solemn affirmation. It shall describe with reasonable particularity the property that is the subject of the action and state that it is within the district or will be during the pendency of the action. In actions for the enforcement of forfeitures for violation of any statute of the United States the complaint shall state the place of seizure and whether it was on land or on navigable waters, and shall contain such allegations as may be required by the statute pursuant to which the action is brought.

Supp. R. C(2).

[16] This language is misleading. A claimant who receives this notice is virtually always named as a party respondent, in which case there is no need to move to intervene. An unnamed claimant who wishes to intervene should follow the procedures of Super. Ct. Civ. R. 24.

> [T]he complaint shall state the circumstances from which the claim arises with such particularity that the defendant or claimant will be able, without moving for a more definite statement, to commence an investigation of the facts and to frame a responsive pleading.

Supp. R. E(2). Non-compliance with the requirements of verification and specificity subjects the complaint to dismissal, though courts disagree about the level of specificity required. *United States v. 1625 S. Delaware Ave.*, 661 F. Supp. 161, 163 (E.D. Pa. 1987); *United States v. $39,000 in Canadian Currency*, 801 F.2d 1210, 1222 (10th Cir. 1986); *United States v. One 1980 Ford Mustang*, 648 F. Supp. 1305, 1308 (N.D. Ind. 1986). The court may dismiss the complaint on these grounds *sua sponte* if it gives the government notice and an opportunity to amend the complaint. *Id*. However, if an amended complaint is filed, it will relate back to the date of the original filing and will not be necessary to release the property from seizure. *1625 S. Delaware Ave.*, 661 F. Supp. at 163.

2. Claim and Answer

Although Rule 71A-I(c) states that a default may be entered "if no answer or claim" is filed before the return date; the word "claim" does not appear elsewhere in the rule. In accepted practice, one document, commonly entitled "Claim and Answer to Libel" or "Answer," is filed in response to a libel of information.[17]

Under federal law, the claimant must file:

> a claim within 10 days after process has been executed, or within such additional time as may be allowed by the court, and shall serve an answer within 20 days after the filing of the claim. The claim shall be verified on oath or solemn affirmation, and shall state the interest in the property by virtue of which the claimant demands its restitution and the right to defend the action. If the claim is made on behalf of the person entitled to possession by an agent, bailee, or attorney, it shall state that the agent, bailee or attorney is duly authorized to make the claim.

Supp. R. C(6). Failure to file under Rule C deprives the claimant of standing to defend against the forfeiture. *One 1980 Ford Mustang*, 648 F. Supp. at 1307; *United States v. Fourteen Handguns*, 524 F. Supp. 395, 397 (S.D. Texas 1981). The claim required here should not be confused with the claim filed with the administrative agency along with the cost bond, which is insufficient to satisfy the Rule C(6) requirement because it was not submitted to the court. *One 1980 Ford Mustang*, 648 F. Supp. at 1306 (but late filing permitted because government had alleged no facts to show probable cause, *id*. at 1307, 1309).

[17] Neither the statute nor the rules specify how much time must be provided for filing an answer. The rule merely requires that the libel specify the return date, which is usually twenty (20) days after the warrant of seizure is issued by the court pursuant to SCR 71A-I. The form and contents of the answer are governed by the ordinary rules of civil procedure. *See* Super. Ct. Civ. R. 3-I, 8, 9, 10, 12, and 13.

3. Counterclaims

There is conflicting authority on whether claimants may counterclaim for loss of use and depreciation of the *res* during detention. When the forfeiture is later determined to be void, the government is liable for depreciation. *United States v. One 1965 Chevrolet Impala Convertible*, 475 F.2d 882 (6th Cir. 1973). However, the federal government and officials are immune from liability if the court issues a certificate of probable cause for the seizure. 28 U.S.C. § 2465. Detention without probable cause is a temporary taking for which just compensation must be paid. *See also* 28 U.S.C. § 2680(c) (exempting from Federal Tort Claims Act's waiver of sovereign immunity claims arising out of detention of goods or merchandise by customs, excise, or other law enforcement officers); *Kosak v. United States*, 465 U.S. 848 (1984).

The District of Columbia and its officers and employees are immune from liability for

> damage to any property resulting from the removal of such property from public space, or the transportation of such property into the custody of the Property Clerk, Metropolitan Police Department, or for damage to any such property while such property is in the custody of the Property Clerk . . . when such custody is maintained pursuant to the requirements of law, except that the government . . . or any such officer or employee may be liable for damage to such property as a result of gross negligence . . . "[G]ross negligence" means a willful intent to injure property, or a reckless or wanton disregard of the rights of another in his property.

D.C. Code § 5-119.11. This language deals only with damage, not depreciation. To the extent that it purports to immunize the government for temporary takings, it is probably unconstitutional. Even if it does provide a degree of immunity, it would not completely bar the counterclaim because the claimant might be able to prove gross negligence.

The Office of the Attorney General usually files a boilerplate motion to dismiss the counterclaim, arguing that because forfeitures are *in rem* actions, the defendant is the property and the claimant is not a party. The motion has been denied in a few Superior Court cases, *e.g.*, *District of Columbia v. One 1986 Mitsubishi*, CA 3435-87 (King, J.), and *District of Columbia v. One 1980 Blue Jaguar*, CA 3256-87 (King, J.), but written opinions were not issued.

4. Jury Demand

Claimants have a right to a jury trial.[18] However, when the government has impounded an automobile or another asset that depreciates rapidly or is vital to the claimant's livelihood, most claimants desire a trial as soon as possible. Demanding a jury trial puts the case on a slower track – the first trial date is often three or more years after the answer is filed, compared to less than two years on the non-jury calendar.

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[18] *Pernell v. Southall Realty*, 416 U.S. 363 (1974); *United States v. One 1976 Mercedes Benz 280S*, 618 F.2d 453 (7th Cir. 1980); *One Plymouth Automobile v. United States*, 165 F.2d 186 (5th Cir. 1947).

A jury trial is waived unless demanded in the answer or within ten days after filing the answer. If the demand does not specify a jury of twelve, a jury of six is provided. A fee of $75 must be paid when the demand is filed, unless the court has granted permission to proceed *in forma pauperis*. If the case does not go to trial, the $75 may be refunded.

5. Vacating Default Judgments

In District of Columbia cases, if the claimant does not file a timely answer, the Office of the Attorney General will obtain a "default decree of condemnation." Currently, the court does not require the government to put on *ex parte* proof in default cases. In fact, because Rule 71A-I allows service by first-class mail, without return receipt, the court does not even require the government to prove notice. Lack of notice, however, is grounds for vacating a default judgment.

A motion to vacate a default judgment must be accompanied by:

> a verified answer setting up a defense sufficient if proved to bar the claim in whole or in part . . . No answer need be filed if the movant accompanies the motion with a settlement agreement or a proposed consent judgment signed by both parties . . . [nor] when the movant asserts a lack of subject-matter or personal jurisdiction or when the default was entered after the movant had filed an answer.

Super. Ct. Civ. R. 55(c). Requiring a litigant who has not received notice to file a verified answer in order to vacate a default judgment is unconstitutional:

> Where a person has been deprived of property in a manner contrary to the most basic tenets of due process, "it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits."

Peralta v. Heights Medical Center, Inc., 485 U.S. 80, 86-87 (1988) (citation omitted).

Pro se claimants can pick up forms for vacating a default judgment in the Civil Actions Clerk's office on the John Marshall level. The clerks there are generally helpful in telling people how to fill them out, although the lines of people waiting for information and assistance limits the amount of attention they can give individual claimants.

6. Discovery

Discovery in civil forfeiture cases is governed by the civil rules, which are much broader than criminal discovery rules. The government often cites this ability to obtain discovery to which the claimant would not be entitled in the criminal case in arguing for a stay of forfeiture proceedings pending disposition of related criminal charges.

PRACTICE TIP:

Discovery includes depositions of witnesses, including police officers; requests for production of documents, including un-redacted police reports; and interrogatories. The discovery available in a civil case can prove highly beneficial to defense counsel in the criminal proceeding.

a. Discovery and the Fifth Amendment

The government's discovery from the defendant is also broader under the civil rules; however, the privilege against self-incrimination applies.

> "[P]roceedings instituted for the purpose of declaring the forfeiture of a man's property *by reason of offenses committed by him*, though they may be civil in form, are in their nature criminal" for Fifth Amendment purposes . . . In both instances, money liability is predicated upon a finding of the owner's wrongful conduct; in both cases, the Fifth Amendment applies with equal force.

United States v. United States Coin & Currency, 401 U.S. 715, 718 (1971) (citation omitted). While the privilege may be asserted in answer to interrogatories, this does not mean that the forfeiture action must be dismissed.

> "[G]overnment cannot penalize assertion of the constitutional privilege against self-incrimination by imposing sanctions to compel testimony which has not been immunized . . . [T]he touchstone of the Fifth Amendment is compulsion, and direct economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which the Amendment forbids . . . The Supreme Court has disapproved of procedures which require a party to surrender one constitutional right in order to assert another."

United States v. United States Currency, 626 F.2d 11, 14 (6th Cir. 1980) (citations omitted).

b. Failure to Cooperate

Many *pro se* forfeiture claimants fail to answer interrogatories or otherwise comply with discovery requests. The government then generally moves to compel discovery under Super. Ct. Civ. R. 37(a), requesting sanctions.

A party who prevails on a motion to compel discovery is entitled to attorneys' fees and costs. Super. Ct. Civ. R. 37(a)(4). However, the rule exempts the government (District of Columbia or federal) from having to pay fees or costs for abuse of discovery. Super. Ct. Civ. R. 37(f). The equivalent federal rule was repealed.

7. Motions

Motions practice is also governed by the civil rules. However, quasi-criminal issues, such as denial of speedy trial or suppression of evidence, do not fit tidily into any of the civil motions rules. Because there are issues of fact that must be resolved by an evidentiary hearing, a motion for summary judgment is not appropriate for these issues. The motions authorized by Super. Ct. Civ. R. 12 are also inappropriate. Claimants in several Superior Court cases have successfully argued that the criminal rules should be applied to quasi-criminal motions, and have captioned their motions as if the case were a criminal case, e.g., Motion to Suppress or Motion to Dismiss for Denial of Due Process. *See, e.g.*, *District of Columbia v. One Blue Jaguar*, CA 3256-87 (Beaudin, J.) (oral ruling made during trial).

In the Superior Court Civil Division, there is a filing fee of ten dollars for every motion unless the claimant has been granted leave to proceed *in forma pauperis*. The government does not have to pay filing fees.

8. Burden of Proof

In criminal forfeiture cases (e.g., RICO, CCE, and the criminal forfeiture provision of the federal drug laws), the government must prove beyond a reasonable doubt that the property is subject to forfeiture. Under the *civil* forfeiture statutes, the government's burden is to show "probable cause," as defined in connection with the Fourth Amendment. *Brinegar v. United States*, 338 U.S. 160, 175-76 (1949). The burden then shifts to the claimant to show by a preponderance of the evidence that the property is not subject to forfeiture. *United States v. $2500*, 689 F.2d 10, 12 (2d Cir. 1982), and *Bramble v. Richardson*, 498 F.2d 968 (10th Cir. 1974), held that proof beyond a reasonable doubt is not constitutionally required in civil forfeiture cases; neither specifically addressed the issue of whether probable cause was too low a burden of proof for the deprivation of such valuable property rights. *See McClendon v. Rosetti*, 460 F.2d 111, 116 (2d Cir. 1972) (shifting burden to claimant violated due process).

9. Stays During Pendency of Criminal Case

Because the broad discovery rules applicable in civil forfeiture cases can be used to obtain evidence that is not discoverable under the criminal rules, the government often requests a stay of the civil forfeiture proceeding pending disposition of the criminal case. A stay should not be automatically granted because undue delay in holding the forfeiture trial implicates the Due Process Clause. *United States v. Banco Cafetero Panama*, 797 F.2d 1154 (2d Cir. 1986). Rather, the court must:

> weigh competing interests and maintain an even balance. True, the suppliant for a stay must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to some one else. Only in rare circumstances will a litigant in one cause be compelled to stand aside while a litigant in another settles the rule of law that will define the rights of both. Considerations such as these, however, are counsels of moderation rather than limitations upon power . . . Impressed with the

> likelihood or danger of abuse, some courts have stated broadly that, irrespective of particular conditions, there is no power by a stay to compel an unwilling litigant to wait upon the outcome of a controversy to which he is a stranger. Such a formula . . . is too mechanical and narrow. All the cases advancing it could have been adequately disposed of on the ground that discretion was abused by a stay of indefinite duration in the absence of a pressing need.

Landis v. North American Co., 299 U.S. 248, 254-55 (1936) (citations omitted).

The calculus changes if the forfeiture case includes a third party not involved in the criminal action. When other means could be employed to protect the criminal prosecution from the risk of revealing undiscoverable information – protective orders, *in camera* discovery, sealed files, and other restrictions on dissemination of discovery materials – the government's need for the stay is outweighed by the claimant's due process rights under *$8,850*, 461 U.S. 555.

10. Expediting the Civil Forfeiture Process

While there is no formal procedure to expedite the trial date in either the federal or local system, things can be done to speed up the process. The "squeaky wheel" concept helps. Filing a motion for return of property or to dismiss for denial of speedy trial may bring immediate results. Even if the motion is denied, it makes a record that the claimant is asserting rights to speedy resolution of the case.

PRACTICE TIP:

In the event that the claimant is an innocent owner, defense counsel should take the affirmative step of contacting the Office of the Attorney General to set the process in motion for return of the property. Even with circumstances in which the claimant has plead guilty in the criminal matter, contacting the Office of the Attorney General to start settlement negotiations can prevent long delays in the return of some or all of the property.

11. Stays Pending Appeal

Stay pending appeal of orders of forfeiture, or denying forfeiture, are governed by Super. Ct. Civ. R. 62. Some courts have held that when a claimant loses a forfeiture trial and fails to obtain a stay, the resulting sale or disposal of the vehicle deprives the court of jurisdiction. *United States v. $57,480.05*, 722 F.2d 1457 (9th Cir. 1984); *Canal Steel Works v. One Drag Line Dredge*, 48 F.2d 212 (5th Cir. 1931). This rule is particularly harsh if the *res* is a depreciating asset, such as a car, and there is no mechanism by which a substitute *res* (such as a surety bond) can be posted to preserve the court's jurisdiction. An extension of this rule to situations where the claimant prevails at trial and the government appeals would produce absurd results. This is another area in which the court should tailor a remedy – such as a stipulation of jurisdiction, or a

substitute *res* – so that the value of the property is not dissipated during the pendency of the appeal.

The District of Columbia courts have not specifically adopted this doctrine.[19] However, to be on the safe side, claimants wishing to appeal a judgment of forfeiture should take immediate steps to stay the judgment, lest the rule later be applied to deprive the appellate court of jurisdiction.

VIII. COLLATERAL REMEDIES

A. Motions for Return of Property

The prosecutor assigned to the criminal case can file a PD 81c to have property released. However, if a prosecutor is unwilling to submit this form, then defense counsel can file a Motion for Return of Property under Super. Ct. Crim. R. 41. Some judges deny such motions without a hearing, requiring instead that the government file a forfeiture action within a specified period of time. However, a few favorable rulings have been obtained, giving claimants some remedy for prolonged detention of property seized without a determination of probable cause to believe it is forfeitable. *United States v. Golden*, 115 Wash. D.L. Rptr. 733 (D.C. Super. Ct. Apr. 13, 1987) (von Kann, J.), held, after a criminal defendant pled guilty to a misdemeanor, that an automobile owned by the defendant's father would be returned to him pending trial in the forfeiture case, upon the posting of a bond sufficient to cover the losses to the District in the event the government prevailed at trial.

> [T]he evidence . . . overwhelmingly established that the use of this automobile to facilitate the transportation of controlled substances was carried on wholly without the owner's knowledge or consent. Accordingly, absent additional evidence which might change this conclusion, the subject vehicle is indeed exempt from [forfeiture] under D.C. Code § 48-905.02 . . .
>
> [I]n view of the strong showing made by defendant at the hearing on this motion, it seems unfair to require that the vehicle remain parked on the District's impoundment lot for the months or years that may pass before the civil forfeiture proceeding is concluded. Doing so would deprive defendant and his family of the use of the vehicle for a long time while its value gradually declines. Even if they ultimately recover the vehicle after successfully prevailing in the libel action, there is no provision in § 48-905.02 to compensate them for the loss of the use of the vehicle during this time or its diminished value.

Id. at 738-39.

Even if the court denies a hearing on the motion, it will usually require the government to file a forfeiture action by a certain time, which expedites the case to some extent. Furthermore, filing

[19] The government argued it in one Superior Court case in opposition to a motion for reconsideration. The court ruled for the government, but did not specify which of several alternative grounds it relied upon. *District of Columbia v. One 1984 Toyota Cressida*, CA 6063-86 (Burnett, J.).

a motion for return of property is a way to assert a demand for a speedy trial for purposes of a later $8,850 motion.

PRACTICE TIP:

Ask the prosecutor in the criminal case to file a Property Release Form, PD 81c, before filing a Motion for Return of Property. However, the release of the property in the criminal matter will not authorize the release of the property in an asset forfeiture proceeding.

B. Collateral Attacks on Forfeitures

Because the forfeiture statutes themselves bar claimants from filing replevin actions (civil suits for the return of property, see note 12, *supra*, and accompanying text), the claimant generally has only two options to secure relief – through a motion for return of property in the criminal case or through the forfeiture action itself. A number of courts have held that claimants who receive notice of the forfeiture process cannot ignore those procedures and file a collateral suit.

1. Lack of Notice

The court must provide relief if property is forfeited without constitutionally adequate notice, by either vacating the default judgment or allowing a collateral suit. *Seguin v. Eide*, 720 F.2d 1046 (9th Cir. 1983); *Wiren*, 542 F.2d 757; *Glup v. United States*, 523 F.2d 557 (8th Cir. 1975); *Menkarell v. Bureau of Narcotics*, 463 F.2d 88 (3d Cir. 1972); *Jaekel*, 304 F. Supp. at 999. The complainant need not demonstrate a meritorious defense in order to get relief.

> [I]t is not denied by appellee that . . . a judgment entered without notice or service is constitutionally infirm . . .
>
> The Texas courts nevertheless held, as appellee urged them to do, that to have the judgment set aside, appellant was required to show that he had a meritorious defense, apparently on the ground that without a defense, the same judgment would again be entered on retrial and hence appellant had suffered no harm from the judgment entered without notice. But this reasoning is untenable. As appellant asserts, had he had notice of the suit, he might have impleaded the employee whose debt had been guaranteed, worked out a settlement, or paid the debt. He would also have preferred to sell his property himself in order to raise funds rather than suffer it sold at a constable's auction. . . .
>
> Where a person has been deprived of property in a manner contrary to the most basic tenets of due process, "it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." . . . [O]nly "wip[ing] the slate clean . . . would have restored the petitioner to the position he would have occupied had due process of

> law been accorded to him in the first place." The Due Process Clause demands no less in this case.

Peralta, 485 U.S. at 84-87 (citations omitted).

2. Void Forfeitures

When a forfeiture is void, the claimant may collaterally attack it and obtain return of the property or compensation for its value. *United States Coin & Currency*, 401 U.S. 715, declared unconstitutional a statute that required gamblers to register and pay a gambling tax and that provided for forfeiture of proceeds as an additional sanction. The Court relied on the criminal cases of *Marchetti v. United States*, 390 U.S. 39 (1968), and *Grosso v. United States*, 390 U.S. 62 (1968), in holding that penalizing the failure to register as a gambler unconstitutionally burdened the privilege against self-incrimination. Because the statute was unconstitutional, the forfeiture was void.

While a statute may be saved by reading into it the appropriate constitutional requirements, individual forfeitures may be vacated if the statute as applied violates the Constitution.

3. Statute of Limitations

Collateral suits should be entertained when the statute of limitations for initiating a forfeiture action has passed without the government having taken the necessary action. Forfeiture provisions that suspend the claimant's rights to replevin also require the government to institute proceedings "promptly."[20]

Collateral suits have been brought in a variety of other forms, including *Bivens*-type actions, *Seguin*, 720 F.2d 1046; actions under 42 U.S.C. § 1983, *Ford v. Turner*, 531 A.2d 233 (D.C. 1987); and inverse condemnation actions under the Just Compensation Clause of the Fifth Amendment and the Tucker Act, 28 U.S.C. § 1346(a)(2), *United States v. One 1965 Chevrolet Impala Convertible*, 475 F.2d 882 (6th Cir. 1973); *United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353 (5th Cir. 1972); *Jaekel*, 304 F. Supp. at 997.

IX. PROPERTY CLERK PROCEEDINGS

A. Administrative Forfeiture Statutes

There are a number of statutes, other than the drug, firearms, prostitution and gambling laws, under which the government can permanently deprive persons of property. Forfeiture statutes administered by the MPD Property Clerk include D.C. Code §§ 5-119.02 *et seq.* (lost,

[20] "In the event of seizure pursuant to subsection (b) of this section, proceedings under subsection (d) of this section shall be instituted promptly . . . Property, other than controlled substances, taken or detained under this section shall not be subject to replevin, but is deemed to be in the custody of the Mayor. " D.C. Code § 48-905.02(c), (d)(2).

abandoned, and stolen property); 22-1630 (hunting and fishing equipment); 22-4517 (dangerous articles); 25-803 (alcoholic beverages);[21] and 47-2320 (untaxed gasoline).[22]

These statutes differ drastically from the drug and gambling statutes in both substance and procedure. They are not governed by the procedures in Super. Ct. Civ. R. 71A-I, and generally never appear in Superior Court at all. Instead, the procedures terminating property interests are conducted entirely within an administrative agency.

Several other statutes, though not forfeiture statutes, authorize the police to take property into their possession. Once the property is in the custody of the Property Clerk, it is disposed of in accordance with D.C. Code §§ 5-119.02 *et seq.*, which means in most cases that the property is sold at auction, without any judicial proceedings. *See* D.C. Code §§ 22-3214 (dangerous weapons) and 23-525 (evidence seized pursuant to a search warrant).

As written, the administrative forfeiture statutes lack minimum due process safeguards. The Court of Appeals has read into them the requirements of notice, "reasonably calculated" to inform owners of interests in the property of the reasons for the seizure and ways in which to contest the forfeiture, and an opportunity to be heard. *Ford*, 531 A.2d at 237-38. It is unclear whether the government has instituted any major changes in notice practices and procedures in response to *Ford*. MPD General Order 601.1, "Recording, Handling and Disposition of Property Coming into the Custody of the Department," requires notice to the owner only in certain situations, and has not been revised since 1981. Special Order 88.27, effective July 26, 1988, added internal regulations, but applies only to drug and gambling forfeiture cases under D.C. Code §§ 48-905.02 and 22-1705(c).

Because these takings occur without judicial or any other scrutiny that might bring to light failures of notice or the opportunity to be heard, attorneys should be particularly wary when property fitting one of these categories is seized, and should warn potential claimants to take affirmative action to assert their claims in writing to the Property Clerk, the Office of the Attorney General, or both.

B. Office of the Property Clerk

D.C. Code §§ 5-119.01 *et seq.* created the Office of the Property Clerk and defines its powers and responsibilities. Section 5-119.05 empowers the Clerk to administer oaths and certify depositions that may be necessary to establish the ownership of any property or money lost,

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[21] Section 25-803 authorizes forfeiture of alcoholic beverages sold, consumed, or held for sale in violation of the ABC laws, as well as "other property designed for use in connection with the unlawful manufacture," etc., of alcoholic beverages. The property is to be returned upon acquittal or forfeited upon conviction of the underlying criminal offense. D.C. Code § 25-803(o).

[22] Section 47-2320 declares as contraband all motor vehicle fuels on which required taxes have not been paid; any vehicles used to transport such fuels are subject to forfeiture. The statute expressly negates any judicial remedies: "The Mayor shall not in any way be held responsible for the seizure or the confiscation . . . under this chapter." To the extent it purports to deprive claimants of notice and a hearing, it is unconstitutional. While the Mayor has discretion to return property if the failure to comply with the fuel tax requirements is excusable, D.C. Code § 47-2320(c), this provision may not be enough to save the statute from successful challenge on due process grounds.

abandoned, or returned to the clerk under the directions of the Mayor, including property that is alleged to have been feloniously obtained or to be the proceeds of crime.

The Clerk has the power to adjudicate the status of the property. If the property is owned by someone other than the person it was taken from, it is returned to its adjudicated owner; if the owner is unknown, it reverts to the District. Lost or abandoned property is summarily forfeited to the District unless someone comes forward with sufficient proof of ownership. Proceeds of crime are returned to the owner, if the owner is not the criminal defendant; if the owner does not come forward, the government retains the property. "Dangerous articles" may be transferred to a District or federal agency to be put to use, or destroyed if they have no value. D.C. Code § 22-4517; *see infra* Section C.1.b.

The Clerk is immune from liability for any official action performed in good faith under the Property Clerk statute. D.C. Code § 5-119.06(c). The Clerk and the District of Columbia are immune from liability for damages to the property while it is in the custody of the District, "when such custody is maintained pursuant to the requirements of law." D.C. Code § 5-119.11. However, the government and its officers are liable for damages from gross negligence ("a willful intent to injure property, or a reckless or wanton disregard of the rights of another in his property"). *Id*.

C. Procedures in the Property Clerk's Office

Sections 5-119.06 to 5-119.10 set out the procedures generally used by the Property Clerk. Some of the administrative forfeiture statutes have their own distinct procedures. Others dovetail with the Property Clerk statute procedures at some point – that is, usually the earlier proceedings are governed by the specific statute and, if the owner is not found, the property is treated as if abandoned, following the procedures of D.C. Code § 5-119.10.

1. Release to the Owner

In general, the Property Clerk must return property to its owner (or the owner's representative) "upon satisfactory evidence of ownership." D.C. Code § 5-119.06(a).

> [S]eizure or impoundment of property by the Metropolitan Police Department from an individual is *prima facie* evidence of that person's ownership of the property. The *prima facie* evidence shall constitute a presumption of ownership by possession and in the absence of other evidence or claims of others shall be satisfactory evidence of ownership.

D.C. Code § 5-119.06(a-1). When two or more persons claim ownership, the Clerk must give notice of a hearing to both by registered mail, receive evidence, and determine ownership. There are a number of exceptions depending on the type of property, who claims ownership, how the property is characterized, and other variations.

a. Property allegedly feloniously obtained or proceeds of crime

No property alleged to be feloniously obtained or the proceeds of crime may be released to an alleged victim of crime until the criminal trial is over, or one year after its seizure, unless the United States Attorney certifies in writing that it is no longer needed as evidence. D.C. Code §§ 5-119.08, 157(d). There are exceptions. A complainant can secure the release of property, other than money or perishable property, by presenting sufficient evidence that it is "necessary for the current use of the owner and not for sale," and posting a bond of twice the value of the property, conditioned on producing the property at trial. D.C. Code § 5-119.14. Perishable property and goods for sale with a value of over $50 are governed respectively by D.C. Code § 5-119.15, providing for return "on ample security being taken by the court for his appearance to prosecute the case," and D.C. Code § 5-119.16, providing for return "on ample security to prosecute the case."

If the property was taken from an accused and the judge is:

> satisfied from evidence that the person arrested is innocent of the offense alleged, and that the property rightfully belongs to him, the judge may, in writing, order such property or money to be returned, and the Property Clerk, if he has it, to deliver such property or money to the accused person himself, and not to any attorney, agent, or clerk of such accused person.

D.C. Code § 5-119.07.

If someone other than the accused claims ownership under oath before the court, the Property Clerk must retain custody until the conclusion of the case. D.C. Code § 5-119.08. The defendant should be notified before any intended release of the property to someone else. *See United States v. Averell*, 296 F. Supp. 1004, 1020-22 (E.D.N.Y. 1969).

Unless the defendant claims ownership of property held as proceeds within a year of its seizure, the property will be treated as abandoned and summarily forfeited. D.C. Code § 5-119.18.

b. Dangerous articles

"Dangerous articles" include silencers and "[a]ny weapon such as a pistol, machine gun, sawed-off shotgun, blackjack, slingshot, sandbag or mental knuckles." D.C. Code § 22-4517(a). Such articles are declared to be nuisances, which police may confiscate and deliver to the Property Clerk. D.C. Code § 22-4517(b), (c). The owner can file a written claim within thirty days. The Clerk must notify each claimant of the date and place of a hearing to determine entitlement to possession; the Clerk hears evidence within sixty days of the seizure, then renders a written decision and sends it to each claimant by registered mail. D.C. Code § 22-4517(d).

To prevail, the claimant must produce satisfactory evidence that: (1) the claimant is the lawful owner or owner's "accredited representative" (having a power of attorney); (2) at the time it was seized, the property was not illegally owned or illegally "possessed or carried by the claimant or

with his knowledge or consent;" and (3) receipt of the property by the claimant will not cause the property to be a nuisance. D.C. Code § 22-4517(e).

The claimant may file an appeal with the Superior Court within thirty days of when the decision is mailed, with notice to the Property Clerk. The Clerk may not dispose of the property pending appeal. D.C. Code § 22-4517(d)(3).

The notice requirements in D.C. Code § 22-4517(d)(1) are insufficient to satisfy the requirements of due process. *Ford*, 531 A.2d at 237. The statutory silence on notice is premised on a fallacious assumption that any possible claimant will somehow have constitutionally adequate notice of the seizure and be able to make a timely claim. "This failure . . . to inform [Ford] of the reasons why the Property Clerk held the guns and of the means by which Ford could challenge appellees' continued custody of them violated due process." *Id*. at 237-38.

c. Lost property

"Lost property" is "any personal property, tangible or intangible, except a motor vehicle, the owner of which is unknown and which has been casually or involuntarily parted with through negligence, carelessness, or inadvertence." D.C. Code § 5-119.01(b)(1). A "finder of lost property" may be anyone other than a police officer. D.C. Code § 5-119.01(b)(2).

When lost property comes into the hands of the police and is held over ninety days (sixty days for motor vehicles) without being claimed, the Property Clerk must publish notice once a week (in a newspaper of general circulation and by posting at the Police Department) for two consecutive weeks that the property must be claimed within forty-five days or it will be given to the finder, after deductions for expenses of storing, or will belong to the District government. D.C. Code § 5-119.10(a). This substituted service is not sufficient under the Due Process Clause and *Ford*, and counsel should be alert for instances where the government followed only the statutory procedures.

As described above, the owner may claim lost property by presenting the Property Clerk with "satisfactory evidence of ownership." D.C. Code § 5-119.06(a).

> If neither the rightful owner nor the finder appear[s] to claim the lost property, title to such property shall transfer to the District government and the property may be retained by the Mayor for official government use or may be sold at public auction . . . The Property Clerk need not offer any property for sale if, in the Property Clerk's opinion, the probable cost of sale exceeds the value of the property.

D.C. Code § 5-119.10(b).

d. Abandoned property

Abandoned property is disposed of under the same procedures as lost property, with notice by publication and posting. D.C. Code § 5-119.10(a). Property held as proceeds of crime that is not

claimed within one year and not called for as evidence may be treated as abandoned. D.C. Code § 5-119.18. A lot of property seized under other statutes, authorities, and pretexts ends up treated as abandoned after a certain period of time elapses without the owner asserting a claim. For example, under MPD General Order 601.1, Part III.B,

> 2. An "Abandoned Vehicle" is any motor vehicle in which the owner has relinquished all right, title, claim and possession.
>
>   a. Although time is not the only element that determines abandonment, a lapse of time may be considered as evidence of the owner's intent to abandon.
>
>   b. There must be factors other than mere non-use of the vehicle that indicate the owner's intent to disclaim the vehicle (e.g., stripped of parts, incapable of being operated, or the owner has intentionally removed the license plates, registration, or identification from the vehicle.)
>
> 3. A "Junk Vehicle" can be defined as a vehicle which has outlived its usefulness as originally manufactured or engineered, even though the vehicle's parts have salvage or scrap value, and such vehicle constitutes a nuisance to the health and welfare of the public.

Officers processing abandoned or junk vehicles must make a thorough investigation to determine ownership, including a canvass of the area in which it was parked and a check of the license number and vehicle identification number. General Order 601.1, Part III.B.5. Owners are warned to remove the property through PD Form 783. The order does not specify how long the owner has to claim the property before it may be towed away. "The Department of Environmental Services has been granted the authority to remove junk vehicles to a scrap processor and tow abandoned vehicles to the Blue Plains Impounding Lot." General Order 601.1, Part III.B.6.

e. Property set out during eviction

The police cannot remove property set on public space as a result of eviction unless it "creates a hazard to public travel and the owner cannot be located or refuses to have the property removed, or the property's significant value dictates that it should be safeguarded." General Order 601.1, Part III.C.1. The Watch Commander on duty at each organizational element determines whether or not to take property into custody. *Id*., Part III.C.3. Part III.C.4 sets out the procedures for safeguarding property.

f. Property of deceased persons

If property of a deceased person of a value less than $1000 comes into the hands of the Property Clerk and is not claimed within six months, it will be disposed of "as lost or abandoned property." D.C. Code § 5-119.09. If the property is valued at more than $1000 and remains in custody six months, the records must be referred to the Office of the Attorney General, which

institutes proceedings to have an administrator of the estate appointed. D.C. Code § 5-119.09(b)(2). If no one claims it within three years after the time for final settlement of the estate, it belongs to the District of Columbia. If there is pending in Superior Court a petition for appointment of a legal representative, the Clerk may not dispose of the property pending final action on the petition. (The same rule applies if the Clerk has actual notice of pendency of a similar petition in a court outside the jurisdiction.) D.C. Code § 5-119.09(b)(1).

g. Property of incompetent persons

When property belonging to an incompetent person comes into the hands of the Clerk, and a committee has been appointed but fails to take possession of the property within six months, the Clerk gives the committee sixty days notice by registered or certified mail. If the committee does not claim it within that time, the Clerk may sell the property at public auction; deduct expenses of sale, maintenance, and custody of the property, and any expenses due the District for the care of the incompetent person, and pay the remainder to the committee. If the property has no value, the Clerk may dispose of it in compliance with any regulations authorized by the Mayor. D.C. Code § 5-119.09(c).

2. Summary Forfeiture

Several provisions allow for summary forfeiture without a hearing. Property held as proceeds of crime which "shall not be called for as evidence by any proceeding in the courts of the District within 1 year from the date of such return, may, unless specially claimed by the owner within that time," be treated as abandoned and summarily forfeited. D.C. Code § 5-119.18.

If an owner is notified by registered or certified mail to pick up property within thirty days and fails to do so, the property will be disposed of or, if it has no resale value, destroyed. D.C. Code § 5-119.06(e).

Property other than "perishable property, animals, firearms and property of insane persons, not otherwise disposed of in accordance with D.C. Code § 5-119.09," remaining in the Clerk's custody for more than ninety days without being claimed and repossessed is summarily forfeited if forty-five days pass after publication of notice that the owner must pick up the property. D.C. Code § 5-119.10. The Constitution requires notice by mail when the owner's name and address is readily ascertainable from public records. *See supra* Section VII.D.

Property stored at a commercial warehouse pursuant to D.C. Code § 5-119.09(d)(2) & (3) may be sold at auction when the storage fees exceed 75% of its value, regardless of the amount of time that other sections require the Clerk to hold such property. D.C. Code § 5-119.09(2). Animals taken by the police and unclaimed after twenty days may be advertised and sold on ten days notice. D.C. Code § 5-119.12. Perishable property taken and unclaimed is sold at once. D.C. Code § 5-119.13.

3. Auctions and Other Final Dispositions

Property is auctioned monthly at the Blue Plains Impound Lot. Before the auction, the government must notify holders of any liens noted in the records of the Recorder of Deeds to claim the vehicle within forty-five days; if they fail to respond, their liens are deemed null and void, and the sale at auction is free and clear "from all claims of the rightful owner or the finder of the property and all persons claiming through and under the rightful owner or finder." D.C. Code § 5-119.10(c)(e).

Proceeds of the sale are distributed in this order: (1) the cost of storage and expenses for custody and sale, to the District; (2) the payments of liens declared null and void by the forfeiture; (3) the payment of the owner or finder, if such is determined under D.C. Code § 5-119.10(a); and (4) the remainder to the District. D.C. Code § 5-119.10(e).

D. Due Process in the Property Clerk's Office

The Property Clerk's office has responsibility for determining the disposition of a large volume of property. Despite the enormous volume of property that is subject to these provisions, hearings at the Clerk's office are rare. A probable explanation for the paucity of persons demanding hearings is lack of notice of the remedies. Several of the statutes administered by the Clerk include insufficient notice requirements; some do not require notice at all, while others require published notice alone, which is insufficient when the names and addresses of interest holders are readily ascertainable from public records. Under *Ford*, 531 A.2d at 238-39, the constitutional requirements for notice are read into the statute; if they are not followed, the procedures are ineffective in terminating property rights. However, if the person never learns of these rights, it is unlikely that the deprivation of due process will ever come to light.

CHAPTER 17

IMMIGRATION ISSUES FOR CRIMINAL DEFENSE ATTORNEYS

INTRODUCTION

In recent years, public policy in the United States has grown increasingly more stringent with respect to the enforcement of immigration law, and immigration consequences for criminal conduct have become ever harsher. As a direct result, collateral immigration consequences have increased in number and severity for non-citizens entangled in the criminal justice system. Once convicted, non-citizens may face any number of harsh consequences, including automatic deportation, permanent bars to returning to the United States, and indefinite detention by the Bureau of Citizenship and Immigration Services ("USCIS") (formerly the Immigration and Naturalization Service, or "INS"). Certain factors may trigger such severe consequences even when a non-citizen pleads guilty to a seemingly low-level misdemeanor offense.

The vast majority of non-citizen defendants convicted of a criminal offense do not have an immigration attorney to represent them in their immigration proceedings before the USCIS and the immigration courts. Moreover, the majority of non-citizens facing removal for crimes will be subject to mandatory detention during the duration of their immigration proceedings. *See* 8 U.S.C. 1223(c); INA § 236(c). Oftentimes, the criminal defense attorney provides the sole source of guidance to the non-citizen client as to what immigration consequences may lie ahead after he or she is convicted of a particular criminal offense. As such, it is imperative that criminal defense attorneys determine, from the outset of representation, their client's citizenship status and understand their obligations to include any possible immigration issues in their defense plans. In most cases, the criminal defense lawyer who is knowledgeable in constructing an immigration-safe record of conviction in a criminal case is the non-citizen's only hope of avoiding or mitigating these harsh immigration consequences.

The Supreme Court has recognized that defense counsel should competently advise his or her non-citizen clients of the potential immigration ramifications of a conviction. *See INS v. St. Cyr*, 533 U.S. 289, 323 n.50 (2001). In addition, many states, including California, Georgia, Indiana, and New Mexico, have recognized that defense counsel has a duty to provide non-citizen defendants with competent legal advice regarding immigration consequences in addition to advice regarding the pending criminal matter.[1] *See, e.g., United States v. Kwan*, 407 F.3d 1005 (9th Cir. 2005); *New Mexico v. Paredez*, 101 P.3d 799 (N.M. 2004); *Rollins v. State*, 591 S.E.2d 796 (Ga. 2004); *Crabbe v. State*, 546 S.E.2d 65 (Ga. 2001), *Williams v. State*, 641 N.E.2d 44 (Ind. 1995). Although some cases have not found ineffectiveness in a failure to advise a client of the deportation consequences of guilty pleas, *see, e.g.*, *Bermudez v. State*, 603 So. 2d 657 (Fla. 1992); *Commonwealth v. Frometa*, 555 A.2d 92 (Pa. 1989), the interest of any client who may be subject to deportation demands that the attorney be aware of and inform the client as to any possible consequences. *See also People v. Correa*, 485 N.E.2d 307, 310-11 (Ill. 1985); *Lyons v.*

[1] The following states have also passed laws to ensure that non-citizens are advised that certain consequences may result from a conviction: Connecticut, Florida, Hawaii, Massachusetts, Montana, North Carolina, Ohio, Oregon, Texas, Washington, and Wisconsin. *See also* Dan Kesselbrenner & Lory Rosenberg, *Immigration Law & Crimes* (West Group 2000), pp. 4.44-14 & 4.44-15.

Pearce, 694 P.2d 969, 977 (Or. 1985) (en banc). *But see United States v. Del Rosario*, 902 F.2d 55 (D.C. Cir. 1990); *Alpizar v. United States*, 595 A.2d 991 (D.C. 1991). Accordingly, the future of a non-citizen criminal defendant in the United States rests heavily on the quality and depth of defense counsel's representation. The Court of Appeals for the District of Columbia held in *Goodall v. United States*, 759 A.2d 1077 (D.C. 2000), that defense counsel's mis-advice regarding the consequences of collateral matters, such as immigration and parole, resulting from a guilty plea can be substantial grounds for a claim of ineffective assistance of counsel. For that reason, today more than ever before, criminal defense attorneys must remain abreast of collateral immigration consequences. An understanding of the fundamental principles of immigrant defense is crucial to the development of effective defense strategies to avoid adverse immigration consequences.

Immigration Status and Criminal Defense:

- ✓ The criminal defense attorney MUST be aware of the non-citizen client's status during criminal proceedings as this will impact her client's ability to remain in the U.S.
  - The client's immigration status will also inform counsel's defense strategies and options
- ✓ "Conviction" and "aggravated felony" in the immigration context do not necessarily mean the same thing as they do in the criminal context

I. REMOVAL PROCEEDINGS BASED ON CRIMES

The Immigration and Nationality Act ("INA") established the basic structure of immigration law in the United States and is enumerated in Title 8 of the United States Code. The INA governs every aspect of entitlements and benefits for all non-citizens living in the United States and its territories. Over the past five decades, Congress has legislated successive amendments to the INA targeted at limiting the rights of non-citizens and creating more penalties for non-citizens involved in the criminal justice system. It is important for criminal defense attorneys to be aware of the various statutes that government immigrant defense and the immigration consequences which flow from these statutes.

Passed by Congress in 1996 as an amendment to the Immigration and Naturalization Act, the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA") is often marked as one of the harshest statutes affecting immigration law in U.S. history. This legislation has been devastating to immigrant communities across the country by exponentially increasing the number of removable offenses in a very short period. Various provisions of this statute enhance the enforcement of immigration laws with more stringent provisions for exclusion while increasing the number of grounds for deportation. Moreover, it has reduced the number of available options for relief from removal from the United States.

The IIRIRA created substantial penalties for non-citizens who are "unlawfully present" in the United States, either because they overstayed their visas or entered the country illegally. If an individual is unlawfully present in the United States for a period of time from 180 and 365 days,

he or she is then barred from reentering, or from changing or adjusting his or her immigration status, for three years. Individuals unlawfully present for more than one year are barred for ten years. Non-citizens who enter without inspection are determined to be unlawfully present from the date of the illegal entry; however, no period of unlawful presence that occurred before the non-citizen's 18th birthday will be counted toward the three and ten year bars. As such, a person's immigration status is oftentimes the most significant factor in determining what immigration consequences he or she will face from a criminal conviction. The term "immigration status" refers to a non-citizen's classification under United States immigration laws. The immigration status of many non-citizens facing criminal prosecution is that of an undocumented person (illegal alien). Other possible classifications for non-citizens include the following: refugee; asylee; permanent resident who holds a "green card"; person with a work permit; person who has lost his or her citizenship through expatriation[2] or denaturalization[3]; and person with a nonimmigrant visa (includes visitors, students, and skilled and unskilled temporary workers).

For the non-citizen client charged with a criminal offense, removal from the United States will be the potential immigration consequence of greatest concern. Indeed, removal from the United States as a result of the commission or conviction of certain criminal offenses is an extreme measure and has been compared to banishment or exile, and the loss of "all that makes life worth living." *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922). *See also INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Jordan v. DeGeorge*, 341 U.S. 223 (1951). Depending on a client's immigration status and the nature of the criminal offense, removal proceedings may be initiated based on one of two separate grounds – "deportability" or "inadmissibility." In 1996, Congress significantly amended the Immigration and Nationality Act (INA) to strengthen the negative effects of criminal convictions and conduct for non-citizen defendants. The Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), which became effective April 1, 1997, dramatically changed the landscape of immigration law by adopting stricter measures to enhance the negative immigration consequences for the non-citizen. Prior to the IIRIRA, the grounds for deportability applied to non-citizens who had "entered" the United States, whether the entry was lawful or not. The new law has significantly revised the definition of deportation. Removal proceedings based on deportability grounds now apply only to the non-citizen who entered the United States lawfully, for example, as a legal permanent resident ("LPR").

Also under the new law, the term "inadmissibility" has been introduced, replacing the old term "excludability" which applied only to the non-citizen seeking lawful admission from outside the United States or at a port or entry. Removal based on inadmissibility grounds includes not only non-citizens falling under the old definition of excludability, but, more significantly, non-citizens who are unlawfully present in the United States, because they either entered the United States illegally or overstayed their visas.[4] Moreover, prior to the IIRIRA, the concept of "admission"

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[2] 8 U.S.C. § 1481; *see Kahane v. Sec'y of State*, 700 F. Supp. 1162 (D.D.C. 1988).

[3] 8 U.S.C. § 1451; *see Costello v. INS*, 365 U.S. 265 (1961) (loss of naturalization, due to conviction, rendered defendant Costello an alien).

[4] For practical purposes, a non-LPR, such as a valid visitor or student, who has been lawfully admitted to the United States, should be concerned with possible removal based on inadmissibility as his or her lawful status will likely expire or be terminated during or subsequent to criminal proceedings.

was a crucial factor in determining whether a non-citizen would be subject to deportation or exclusion proceedings. Generally, a non-citizen who had been placed in deportation proceedings was afforded more rights and relief than an individual subjected to exclusion proceedings. The IIRIRA destroys this differentiation and creates a process known as "removal proceedings" that covers the entire mechanism for dealing with non-citizens who are in violation of the INA.

The grounds of removal (deportation or inadmissibility) will be determined by the non-citizen's classification status. For example, a permanent resident will be subject to removal based on the grounds of deportability, which incorporates an aggravated felony definition, while an undocumented person will be subject to removal based on criminal grounds of inadmissibility and/or the aggravated felony definition. It is important to keep in mind the distinction between these grounds of removal because the grounds of deportability and the grounds of inadmissibility each trigger different immigration consequences for convictions.

A Non-citizen is a:

Refugee; asylee; permanent resident who holds a "green card"; person with a work permit; person who has lost his or her citizenship through expatriation or denaturalization; and person with a non-immigrant visa (including visitors, students, and skilled and unskilled temporary workers)

A. Grounds of Removal Relating to Crimes

Removal based on the grounds of deportability include the following: (1) an aggravated felony (*see infra* Section IV.A); (2) a crime involving moral turpitude ("CIMT") committed within five years of admission to the United States, for which sentence of one year or longer may be imposed; (3) two CIMTs committed at any time regardless of sentence, but not arising out of a single scheme of criminal conduct; (4) a controlled substance offense, other than a single offense of simple possession of 30 grams or less of marijuana; (5) a firearm or destructive device offense, whether a felony or misdemeanor; (6) a crime of domestic violence or stalking, whether a felony or misdemeanor; (7) a crime of child abuse, neglect, or abandonment, whether a felony or misdemeanor; or (8) violation of an order of protection, whether issued by a civil or criminal court. *See* INA § 237, 8 U.S.C. § 1227. Additionally, criminal convictions may be relevant to the grounds of deportability if the defendant is determined to be a drug abuser. *See* Section 237 of the INA, which governs the deportation of non-citizens from the United States.

Removal based on the grounds of inadmissibility include the following: (1) a conviction or admitted commission of any controlled substance offense, whether a felony or misdemeanor (waiver available for a single offense of simple possession of 30 grams or less of marijuana); (2) a conviction or admitted commission of a crime involving moral turpitude, whether a felony or misdemeanor (subject to (a) a petty offense exception where the possible sentence is not more than one year and the person did not receive more than six months; and (b) a juvenile exception for a juvenile offense committed more than five years before request for admission); (3) conviction of two or more offenses of any type with an aggregate sentence of imprisonment of

five years or more; or (4) engagement in prostitution or commercialized vice. *See* INA § 212(A)(2); 8 U.S.C. § 1182(a)(2). Additionally, criminal convictions may be relevant to the grounds of inadmissibility if the defendant is determined to: (1) have a physical or mental disorder that may pose or has posed a threat to the safety of the non-citizen or others; or (2) be a drug abuser. *See* INA § 212(a)(1). *See generally* Section 212 of the INA, which governs the inadmissibility of non-citizens from the United States.

Additionally, the IIRIRA expanded the list of offenses that count as "aggravated felonies" for immigration purposes. *See* 8 U.S.C. § 1101(a). It also broadened the scope of certain offenses for sentencing purposes. For example, the IIRIRA significantly amended the consequences of a conviction for a crime of violence by lowering the term of imprisonment from five years to one year. *See* INA § 101(a)(43)(F).

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***Fretes-Zarate v. United States*, 40 A.3d 374 (D.C. 2012).** Court did not plainly err in not providing jury trial to defendant where conviction for simple assault made her subject to deportation under federal immigration law.

B. Other Immigration Consequences

There are several other immigration consequences arising from criminal cases that are not as severe as the threat of removal. Nonetheless, these consequences can be equally devastating to a non-citizen who aspires to become an American citizen or wishes to sponsor family members to live in the United States. The Supreme Court has recognized that defense counsel should competently advise his or her non-citizen clients of the grounds of inadmissibility or deportability stemming from the outcome of a criminal case. *See INS v. St. Cyr*, 533 U.S. 289, 323 n.50 (2001). Consequences other than deportation include exclusion from or denial of admission to the United States, ineligibility to become a citizen, loss of legal permanent resident status, or loss of legal immigration status altogether. A criminal case may also result in a non-citizen's disqualification from political asylum from his or her country of origin or the denial of relief from deportation, among numerous other losses of benefits available to non-citizens legally present in the United States.

C. The Fifth Amendment Right to Remain Silent

While Congress continues to enact legislation that dramatically increases the number of criminal offenses and activities for which non-citizens can be removed, the Supreme Court has long recognized that the Fifth Amendment protects non-citizen defendants from being compelled to disclose their "alienage" or immigration status and manner of entry. *Ramon-Sepulveda v. INS*, 743 F.2d 1307 (9th Cir. 1984); *United States v. Alderete-Deras*, 743 F.2d 645 (9th Cir. 1984); *Kastigar v. United States*, 406 U.S. 441 (1972). The Court reasons that a non-citizen's right to remain silent is protected under the Fifth Amendment because answers to questions concerning alienage subjects non-citizens to criminal prosecution. For example, entry into the United States without inspection or admission is a criminal offense under 8 U.S.C. § 1325, and alienage is an element of the offense. In light of these concerns, the Supreme Court has expressly stated that

non-citizens may invoke the privilege "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." *Kastigar*, 406 U.S. at 444 (1972). As such, this right attaches to both removal proceedings, which are civil in nature, and criminal proceedings, though the scope of the privilege may vary.

On the other hand, where removal from the United States is a possible consequence, the need to negotiate a certain offense or sentence to avoid or mitigate harsh immigration consequences may only be accomplished during the course of criminal proceedings. During the course of criminal proceedings, defense counsel must be mindful of maintaining a "safe record" for the client. Further, given the nature of the criminal acts committed by the non-citizen defendant, it is possible that neither the court nor the government will desire to have removal proceedings initiated against the non-citizen defendant. Under these circumstances, both the court and the prosecutor may already be aware of possible immigration issues, and may wish to consider the immigration consequences during resolution of the criminal matter, even though it is "collateral" to the criminal proceeding.

D. Enforcement

In response to the terrorist attacks on the United States on September 11, 2001, Congress passed the Patriot Act, which substantially expanded the federal government's ability to enforce immigration laws by allowing criminal investigators and intelligence officials to share information for the stated purpose of deterring and punishing terrorist acts. *See* Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001). After September 11, 2001, Congress also created the Department of Homeland Security ("DHS"), which gave the federal government a wide range of authority in enforcing immigration law. The Department of Homeland Security absorbed and currently functions in part through two previously-established agencies: the Bureau of Immigration and Customs Enforcement ("ICE") and the Bureau of Citizenship and Immigration Services ("USCIS") (formerly the Immigration and Naturalization Service, or "INS").

1. Bureau of Immigration and Customs Enforcement ("ICE")

The Bureau of Immigration and Customs Enforcement, or ICE, is the agency responsible for the enforcement aspects of migration laws. Specifically, ICE is responsible for issuing "Notices to Appear," or summons for removal hearings. It also issues detainers on non-citizens detained in jails and prisons, thereby ensuring that criminally-detained non-citizens will be transferred into ICE custody at the conclusion of the criminal case. ICE is also responsible for the detention and removal of non-citizens.

2. Bureau of Citizenship and Immigration Service ("USCIS")

Any time that a non-citizen applies for and receives a change in immigration status, e.g., changing from a visa holder to a legal permanent resident, he or she receives what is known as "adjustment of status." The Bureau of Citizenship and Immigration Services, or USCIS, has jurisdiction over the approval of petitions for visas, naturalization, asylum, and all other types of status adjustment. USCIS works with the State Department in conducting consular interviews and reviewing petitions for adjustments of status.

II. LEVELS OF IMMIGRATION STATUS

Every non-citizen falls into a specific category or class under the Immigration and Nationality Act. *See* 8 U.S.C. § 1101(a)(15). Immigration consequences arising from a criminal conviction depend upon the non-citizen's immigration status. In addition, there are various forms of relief available that depend on immigration classification. Therefore, it is critical for a criminal defense attorney to be aware of the non-citizen client's status during criminal proceedings as it may mean the difference between removal and being able to remain in the United States. The levels of immigration status most relevant to the indigent non-citizen client are discussed below.

A. Undocumented Persons ("Illegal Aliens")

A person who does not have legal status under U.S. immigration laws is termed "undocumented person," or "illegal alien." The most common type of undocumented person is one who did not enter the United States at a designated port of entry, and thus entered without inspection.[5] An undocumented persons is immediately subject to automatic or "expedited" removal, but will often be afforded some due process if there are immigration charges pending other than unlawful presence. For purposes of removal from the United States, these persons are subject to the criminal grounds of inadmissibility and the aggravated felony definition.

The other category of undocumented person is the individual who entered the United States lawfully, but whose nonimmigrant visa has expired or been terminated. A non-citizen is considered "undocumented" when he or she "falls out of status." To fall out of status means that the non-citizen has failed to maintain his or her non-immigrant status and has thus become removable. *See* INA § 237. Falling out of status can happen in many ways. Examples of this include overstaying the time limit of a visa, failure to comply with the statutory conditions of one's immigration status, marriage fraud, or becoming a public charge. A public charge is a non-citizen who within five years of admission applies for and receives public benefits from a government agency and fails to repay the government for those services. *See Matter of L*, 6 I&N Dec. 349 (BIA 1954). However, the definition of public charge does not extend to non-citizens who have been hospitalized or institutionalized due to mental illness within five years of admission. *See Matter of Kowalski*, 10 I&N Dec. 159 (BIA 1963). For purposes of removal from the United States, these persons are subject to the criminal grounds of deportability, which incorporates the aggravated felony definition.

B. Permanent Resident ("Green Card Holder")

Permanent resident status is defined at INA § 101(a)(20) and 8 U.S.C. § 1101(a)(20) as "the status of having been lawfully accorded the privilege of residing permanently in the United States." *Id*. Any such non-citizen accorded this privilege is commonly known as a legal permanent resident ("LPR"), or green card holder. An I-551, known as a "green card," is the only evidence of the possessor's status as a legal permanent resident of the United States. LPRs are permitted to work and receive government benefits as part of their legal status. Each time an

[5] For non-citizen Spanish speaking clients who have an extremely limited English language vocabulary, a common term for a person without legal immigration documentation for admission to the U.S. is "sin papeles," which literally translates to "without papers."

LPR seeks admission into the United States at a port of entry, that LPR must prove his or her admissibility by showing his or her green card. *See* INA § 101(a)(13)(C); 8 U.S.C. § 1101(a)(13)(C). For purposes of removal from the United States, an LPR is subject to the criminal grounds of deportability, regardless of the length of time that the LPR has lived legally in the United States.

C. Visa Holders: Immigrants and Non-immigrants

There are two classes of non-citizens who hold visas: immigrants and non-immigrants. The conditions for these types of visa holders are enumerated in INA § 221. An immigrant is a non-citizen who intends to live permanently in the United States, while a non-immigrant is a non-citizen who is present in the U.S. for a specific, temporary purpose. Usually, visas are issued by a U.S. consulate or embassy in the non-citizen's country of origin. When applying for a non-immigrant visa, the applicant must state his or her purpose for a visit to the U.S. (i.e., business, tourist, student, etc.). The various classes of visas are listed in the INA and correspond to a letter in the alphabet from the letter "A" through the letter "V." Once in the United States, the visa holder generally cannot switch to another type of visa without a new visa application and another consular interview in his or her country of origin. For purposes of removal from the United States, nonimmigrant visa holders are subject to the criminal grounds of deportability.

D. Asylees and Refugees – INA §§ 207, 208; 8 U.S.C. §§ 1157, 1158

The United States has a lengthy history of providing protection to non-citizens seeking asylum and refuge from persecution in their countries of origin. For that reason, there are several federal statutes and governmental policies in place to assist non-citizens fleeing persecution. Non-citizens who are fleeing persecution from their countries of origin are known as asylees and refugees. A refugee is a non-citizen who applies for protection while being physically present outside of the United States. An asylee is a non-citizen who physically comes to the United States and subsequently applies for protection. Both asylees and refugees must establish a "well-founded fear of persecution." When applying for protection, both asylees and refugees must establish that they suffered persecution because of race, religion, membership in a social group, political opinion, or national origin at the hands of their country's government or an organization that cannot be controlled by their country's government. An immigration judge or officer can grant asylum. Asylum permits a non-citizen to live and work in the United States indefinitely under a grant of protection from persecution. For purposes of removal from the United States, refugees and asylees are subject to the criminal grounds of deportability.

III. IMMIGRATION COURT

A. Immigration Court

Immigration consequences stemming from a criminal conviction are often thought of as collateral criminal consequences. In fact, immigration law is a type of civil law with inadmissibility and removal as civil consequences arising from criminal convictions. Immigration court also involves administrative law because it is governed by the Department of Justice with an immigration judge adjudicating immigration hearings under the auspices of the

Executive Office of Immigration Review ("EOIR"). The procedures for removal proceedings are enumerated in INA § 240. *See* INA § 240; 8 U.S.C. § 1229(a). Appeals of an immigration judge's ruling are heard at the Board of Immigration Appeals, or the "BIA." The BIA is an appellate body within the EOIR that hears appeals from immigration judges. Appeals of BIA decisions based on a question of law are heard by federal courts of appeal on a case-by-case basis.[6] The Attorney General of the United States has the final decision in those cases from the BIA that do not merit appeal to the federal courts. *See* 8 C.F.R. §§1003.1 (h)(1)(i)-(iii); *see also Matter of D-J-*, 23 I&N Dec. 572, 575 (A.G. 2003).

The immigration hearing will commence only after the criminal case has been concluded by exhaustion of both the appellate and post-conviction processes. In many situations, a non-citizen client may complete a prison sentence and be released before the removal process begins. In other situations, ICE will issue a detainer to hold the non-citizen in his or her designated penal institution while he or she is serving a sentence. The removal process will begin once ICE takes the client into its custody. However, the ICE detainer allows ICE only 48 hours to take the non-citizen into custody after completion of the criminal case, and an additional 72 hours in emergency circumstances. *See* 8 C.F.R. § 287.3(d).

B. What is a Conviction for Immigration Purposes?

A conviction for immigration purposes is defined pursuant to INA § 101(a)(48)(A) and 8 U.S.C. § 1101(a)(48). The definition of a conviction in immigration law is quite distinguishable from a conviction for criminal law purposes. INA § 101(a)(48)(A) defines a conviction as follows:

> … with respect to [a non-citizen], a formal judgment of guilt of the [non-citizen] entered by a court or, if adjudication of guilt has been withheld, where –
> (i) a judge or jury has found the [non-citizen] guilty or the [non-citizen] has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and
> (ii) the judge has ordered some form of punishment, penalty, or restraint on the [non-citizen]'s liberty to be imposed.
>
> * * *
>
> Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.

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[6] *See Calcano-Martinez v. INS*, 533 U.S. 348 (2001) (under IIRIRA, two permanent legal residents who had been convicted of aggravated felonies could not seek direct review in a federal court of appeals, but could file *habeas* petitions in district court seeking release). *See also Zadvydas v. Davis*, 533 U.S. 678 (2001) (constitutional law requires that the INA contain an implicit reasonableness limitation on the period of post-removal detention for aliens who gained admission to the United States, but who were subsequently ordered removed after convictions for aggravated felonies). Federal courts have the authority to determine if a specific period of removal detention is reasonable, subject to a presumptive limit of six months. Federal *habeas* review is available to test the reasonableness of a post-removal order detention period. *Id.*

INA § 101(a)(48)(B).

There is a two-prong test to determine whether a conviction for immigration purposes has occurred. The first prong of the INA definition is when a court enters a finding of guilt against a non-citizen. A finding of guilt can be found where a client enters a plea of guilty or an *Alford* plea (*nolo contendre*), admits facts sufficient to warrant a finding of guilt by a judge, or has a finding of guilt entered against him or her after a trial by either judge or jury. The second prong of the INA definition is that the judge must order some form of punishment, penalty, or restraint to be imposed on a non-citizen's liberty. This form of punishment can range from a fine or probation to a suspended sentence or imposition of a prison term.

Case law used to determine what state dispositions were considered convictions for immigration purposes. This new statutory definition overrules the previous definition of conviction in the seminal case of *Matter of Ozkok*, 19 I&N Dec. 546 (BIA 1988). In *Ozkok*, the BIA excluded from the definition of conviction certain dispositions where the adjudication of guilt had been withheld based on fulfillment of certain conditions. The new statutory definition of conviction includes nearly any conviction, regardless of the type of sentence imposed. The prior requirement under *Ozkok* that the conviction be final – i.e., that appellate review be exhausted – may also be in doubt. The BIA in *In Re Punu*, 22 I&N Dec. 224 (BIA 1998), held that a conviction exists under Texas' deferred adjudication statute even where further appellate review remains possible.

The term of imprisonment an individual is sentenced to often determines if a conviction is an aggravated felony for immigration purposes. For example, a crime of violence with a term of imprisonment of one year or more is considered an aggravated felony. The new statutory definition of "criminal conviction" eliminates the distinction between imposition of sentence (ISS) and execution of sentence (ESS). Under this new provision, either sentence constitutes a conviction. What this means is that, under some circumstances, a client may be considered an aggravated felon and, thus, deportable without ever serving a day in jail. The length of the sentence and the maximum penalty for each offense determine whether or not a client is deportable and under which category or categories he or she can be deported.

C. Evidence of a Conviction for Immigration Court

INA § 240(c)(3)(B) and 8 U.S.C. §1229(c)(3)(B) set forth what evidence to establish a conviction may be admissible in an immigration hearing. The INA statute mandates that, "In any proceeding under this Act, any of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:

(i) An official record of judgment and conviction.
(ii) An official record of plea, verdict, and sentence.
(iii) A docket entry from court records that indicates the existence of the conviction.
(iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of a conviction.
(v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's

repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.

(vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.

(vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record."

INA § 240(c)(3)(B).

Taylor v. United States, 495 U.S. 575, 600 (1990), held that courts should focus on the statutory definitions of prior offenses – not the particular facts – when assessing the applicability of a penalty enhancement. The Court further clarified this position in *Shepard v. United States*, 544 U.S. 13 (2005), holding that documents used in collateral matters must be part of a judicial record; police documents do not qualify. Thus, for immigration court, the following judicial documents and records from the Superior Court of the District of Columbia would be applicable: the charging document, including an Information or Indictment; the signed plea agreement; jury instructions; a Sup. Ct. Crim. R. 11 plea colloquy, including admissions; the transcript of the plea or trial; and the judgment of the trial court, including the verdict form and the Judgment and Commitment Order.

According to *Shepard* and *Taylor*, documents such as police reports and pre-sentence reports may not be admissible in immigration court because they not part of the judicial record of conviction in the criminal court. *See Matter of Texeira*, 21 I&N Dec. 316 (BIA 1996).

D. What Types of D.C. Superior Court Criminal Dispositions Constitute Convictions for Immigration Purposes?

Various types of agreements are made in D.C. Superior Court between defendants, with the help of defense counsel, and the United States Attorney's Office ("USAO") with respect to criminal cases. While these various agreements often prove advantageous to defendants in their criminal cases, defense counsel should be aware that there may be imminent pitfalls for the client that may result from such agreements. Therefore, defense counsel must fully advise the non-citizen of the immigration consequences that may arise from these agreements.[7]

1. Agreements Constituting Convictions – "Win-Lose Situations"

There are several types of agreements between defendants and the USAO that may prove disastrous for a non-citizen client. Although an agreement may be advantageous for the criminal case, that same agreement may constitute a conviction for immigration purposes and result in removal. These agreements pose a "win-lose" situation for many non-citizen clients, and are thus not advisable for non-citizen clients to undertake.

[7] For more information on "safe haven" pleas for non-citizen clients, see *Safe Havens: How to Identify and Construct Non-Deportable Convictions*, by Norton Tooby and Joseph Justin Rollin, Law Offices of Norton Tooby, Norton Tooby, 2005.

a. Deferred adjudication

The Board of Immigration Appeals determined in *Matter of Roldan*, 22 I&N Dec. 512 (BIA 1999), that agreements such as deferred adjudications constitute convictions for immigration purposes. The BIA found that where a **deferred adjudication** statute requires admission of sufficient facts to warrant a finding of guilt and some form of punishment is ordered (i.e., the program itself), such an adjudication is considered a conviction for immigration purposes. *Id*. The United States Attorney's Office's Domestic Violence Intervention Program ("DVIP") requires the defendant to enter a plea before the court and imposes a form of punishment such as anger management classes, restitution, or drug testing. Therefore, defense counsel should be aware that a non-citizen client's participation in the DVIP will potentially pose a risk of removal because of the resulting conviction.

b. Expungements

Convictions that have been expunged may be considered convictions for immigration purposes. *Matter of Roldan*, 22 I&N Dec. 512, 520 (BIA 1999),[8] held that the BIA will not recognize any "state action, whether it is called setting aside, annulling, vacating, cancellation, expungement, dismissal, discharge, etc. of the conviction . . . that purports to erase the record of guilt of an offense pursuant to a state rehabilitative statute." *Id*. What this means is that, if an expungement has been granted because an individual has been "rehabilitated" or complied with certain rehabilitative requirements under a state statute or code, the resulting expungement will not work to avoid removal. However, if a conviction has been expunged because of constitutional or procedural infirmities with the conviction, then the expungement *will* avoid removal. In Superior Court, drug convictions with expungement provisions such as § 48-904.1(e) are still convictions for immigration purposes. *Id*.; *see also* INA § 101(a)(48).

2. Agreements not Constituting Convictions – "Win-Win Situations"

Some agreements in Superior Court are advantageous to the client in both criminal court and immigration court. These agreements are pre-trial agreements that do not require the client to enter a plea of guilty before the court, but set forth conditions with which the client must comply. Examples of these conditions include community service, a stay away order, drug treatment, counseling, or restitution. If the client complies with these conditions to the satisfaction of the USAO, then the USAO will dismiss the criminal case *nolle prosequi*. These agreements are a "win-win" for the non-citizen client in both criminal and immigration courts.

a. "Stet Docket" agreements

In some cases, the United States Attorney's Office will extend an offer known as a "Stet Docket" to certain defendants. The Stet Docket entails a pre-trial agreement between the client and the USAO under which the client agrees to certain conditions set forth by the USAO for a specified period of time. The trial court will approve the agreement and schedule a status hearing to take

[8] The Ninth Circuit has reversed *Roldan*, but this reversal applies only to those cases in the Ninth Circuit. There has been some recent activity by the BIA in published and unpublished decisions which appear to indicate a willingness on its part to reassess its position in *Roldan*. *See In Re Rodriguez-Ruiz*, 22 I&N Dec. 1378 (BIA 2000).

place at the end of the specified period of time. At that hearing, the USAO will determine whether or not to dismiss, or *nolle prosequi*, the criminal case based on the client's satisfactory compliance with the Stet Docket agreement. In this situation, there will be no conviction for either the criminal or immigration court.

b. Pre-Trial Diversion Program with the USAO

Pre-trial diversion is another means by which a non-citizen client can dispose of a criminal case without sustaining an immigration conviction. This program often requires the client to admit criminal wrongdoing in order to participate. Defense counsel should be aware that a non-citizen client's admissions are admissible against him or her in immigration court as an admission by a party-opponent. Defense counsel should make sure that the non-citizen client does not make any admissions to criminal wrongdoing as part of his or her participation in the Pre-Trial Diversion Program.

c. Juvenile adjudications & juvenile dispositions

Juvenile delinquency adjudications are not considered convictions for immigration purposes. *Matter of Ramirez-Rivero*, 18 I&N Dec. 135 (BIA 1981). *See also* 22 C.F.R. §§ 40.21(a)(2) and 40.22(a). Under some circumstances, sentences under the Youth Act do not constitute convictions for immigration purposes. The BIA in *Matter of Devison*, 22 I&N Dec. 1362 (BIA 2000), held that an adjudication of youthful offender status under New York law which corresponds to a determination of juvenile delinquency under the Federal Juvenile Delinquency Act does not constitute a judgment of conviction for immigration purposes.

E. Categories of Deportable Criminal Offenses Under INA § 237

Section 237 of the INA enumerates five distinct classifications of removable offenses. These classifications are: (1) aggravated felonies; (2) crimes of moral turpitude; (3) domestic violence offenses; (4) drug offenses; and (5) firearms offenses. *See infra* Section V. The most severe of the five categories is the first, aggravated felonies, a conviction for which will bar the client for life from re-entering the U.S. once deported. The statute for each offense must be analyzed to determine the immigration classification for each.

F. Analysis of Divisible and Ambiguous Criminal Statutes

A conviction for a criminal offense can fall under more than one category of offenses for immigration purposes and determining which category or categories can be a complicated matter. An immigration judge will generally not look behind the conviction to determine additional possible grounds for removal. *Matter of Short*, 20 I&N Dec. 136 (BIA 1989). The immigration court instead focuses on the criminal statute to ascertain whether or not a criminal conviction falls into one or more of the five categories of immigration offenses. Some criminal statutes have only one set of elements and are therefore "indivisible." However, many criminal statutes are ambiguous because they have more than one set of elements, one of which must be proven in order to sustain a conviction. These ambiguous statutes are known as "divisible" statutes for immigration purposes, meaning that they have more than one set of elements that will

constitute a particular offense. If a statute is divisible, then the immigration court will examine the record of conviction and ascertain the part of the statute under which the client was convicted.

Defense counsel should focus upon the elements of the statute to determine whether the conviction will trigger immigration consequences.

Example:

A simple assault conviction pursuant to D.C. Code § 22-504 is a divisible statute.

- ✓ It includes the elements of force, violence, or threat of such, or a non-sexual touching as indicated by subsections A, B, and C of the statute
- ✓ It is not punishable by one year or more
- ✓ It is not an aggravated felony, nor a crime involving moral turpitude
- ✓ It is not a domestic violence offense because the statute does not make reference to persons protected under domestic violence statutes
- ✓ Simple assault does not satisfy the elements for a firearms offense or a drug offense

Defense counsel must determine which set of elements is applicable to the conviction.

IV. CATEGORIES OF REMOVAL OFFENSES

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***Descamps v. United States*, 133 S. Ct. 2276 (2013).** Where statute of conviction has a single, indivisible set of elements, a court (and presumably also an immigration judge) may not apply the modified categorical approach by looking to the underlying court record, which approach is only used for divisible statutes, and only where it is necessary to look to the underlying court record to determine of which statutory offense or section the person was convicted and not to determine the facts or conduct of the offense.

A. Aggravated Felonies: Immigration Kiss of Death

The Anti-Drug Abuse Amendment Act of 1988[9] created a new category of removable criminal offenses known as aggravated felonies. *See* 8 U.S.C. § 1227(a)(2)(A)(iii). Subsequent provisions in the Immigration Act of 1990, the Immigration and Nationality Technical Corrections Act of 1994, and the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") have broadened the scope of crimes in this category. Aggravated felonies can and do include almost all possible criminal offenses. In fraud-related crimes, the definition of "aggravated felony" depends upon the sentence and the dollar amount involved. An LPR or any other non-citizen is removable if convicted of an aggravated felony at any time after admission or entry to the United States. The term "aggravated felony" applies to an offense described

[9] Pub. L. 100-690, 102 Stat. 4181 §§ 6001 *et seq*. (1988).

above whether in violation of state or federal law. *Matter of Ponce de Leon*, 21 I&N Dec. 154 (BIA 1996).

"Aggravated felony" is an immigration term of art, and does not necessarily conform to what would be classified as a felony under D.C. (or other state) law. Aggravated felonies for immigration purposes are defined and enumerated in 8 U.S.C. § 1101(a)(43), and include:

- Murder, rape, or sexual abuse of a minor;
- Illicit trafficking in a controlled substance;
- Illicit trafficking in firearms or destructive devices or in explosive materials;
- Certain offenses related to the laundering of monetary instruments or engaging in monetary transactions in property derived from specific unlawful activity IF THE AMOUNT OF THE FUNDS EXCEEDS $10,000;
- Certain offenses related to explosive materials or firearms;
- Crime of violence for WHICH THE TERM OF IMPRISONMENT IS AT LEAST ONE YEAR;
- Theft offense, including receipt of stolen property, or burglary offense FOR WHICH THE TERM OF IMPRISONMENT IS AT LEAST ONE YEAR;
- Certain offenses related to the demand for or receipt of ransom;
- Certain offenses related to child pornography;
- Certain offenses related to RICO, or certain gambling offenses, FOR WHICH A SENTENCE OF ONE YEAR IMPRISONMENT OR MORE MAY BE IMPOSED;
- Offense related to the owning, controlling, managing, or supervising of a prostitution business; certain offenses related to transportation for the purpose of prostitution or to peonage, slavery, and involuntary servitude, and trafficking in persons;
- Certain offenses related to gathering or transmitting national defense information or disclosure of classified information; sabotage or treason;
- Offense that involves fraud or deceit IN WHICH THE LOSS TO THE VICTIM OR VICTIMS EXCEEDS $10,000; offenses relating to tax evasion IN WHICH THE REVENUE LOSS TO THE GOVERNMENT EXCEEDS $10,000;
- Certain offenses relating to non-citizen smuggling, except in the case of a first offense for which the non-citizen has affirmatively shown that the non-citizen committed the offense for the purpose of assisting, abetting, or aiding only the non-citizen's spouse, child, or parent;

- Certain improper entry or illegal reentry offenses committed by a non-citizen who was previously deported on the basis of an aggravated felony conviction;

- Falsely making, forging, counterfeiting, mutilating, or altering a passport or instrument, or certain other offenses relating to document fraud, FOR WHICH THE TERM OF IMPRISONMENT IS AT LEAST 12 MONTHS, except in the case of a first offense for which the non-citizen has affirmatively shown that the non-citizen committed the offense for the purpose of assisting, abetting, or aiding only the non-citizen's spouse, child, or parent;

- Offense relating to the failure to appear by a defendant for service of sentence if the underlying offense is punishable by imprisonment for a term of five years or more;

- Commercial bribery, counterfeiting, forgery, trafficking in vehicles the identification numbers of which have been altered for which the term of imprisonment is at least one year;

- Obstruction of justice, perjury or subornation of perjury, or bribery of a witness, FOR WHICH THE TERM OF IMPRISONMENT IS AT LEAST ONE YEAR;

- Offense relating to failure to appear before a court pursuant to a court order to answer to or dispose of a felony charge for which a sentence of two years of imprisonment or more may be imposed;

- Attempt or conspiracy to commit any of the above offenses.

Id.

If arrested by agents of the Immigration and Customs Enforcement ("ICE"), persons considered aggravated felons are subject to mandatory detention without bond and to being placed in removal proceedings for expeditious removal. Aggravated felons may remain eligible for some very limited forms of relief under the immigration laws. Non-citizens convicted of aggravated felonies are barred from many forms of relief from removal, including the following:

- An "aggravated felon" is barred from applying for or receiving political asylum. 8 U.S.C. § 1158(b)(2)(B). However, aggravated felons may seek relief from removal under the Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment. U.N. Doc. No. 571 Leg/SER.E/13, IV.9 (1995).

- Aggravated felons are ineligible for cancellation of removal. 8 U.S.C. §§ 1229b(a)(3) & (b)(1)(C). However, non-citizens with convictions which pre-date AEDPA's effective date of April 24, 1996, may continue to be eligible for what was then called 212(c) Relief.

- Aggravated felons are ineligible for voluntary departure. 8 U.S.C. §§ 1229c(a)(1) & (b)(1)(C).

- Aggravated felons are not entitled to judicial review of removal orders that are based on such convictions. 8 U.S.C. § 1252(a)(2)(C). The issue of whether the federal courts have jurisdiction to review final orders of removal of aggravated felons has been and continues to be challenged in the federal courts. Although many courts of appeals have held that they may not have jurisdiction over criminal non-citizen cases, many district courts have held that they retain *habeas corpus* jurisdiction to review final orders of removal in criminal non-citizen cases.

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***Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013).** Illicit drug trafficking offense does not include a state criminal statute that extends to the social sharing of a small amount of marijuana and so noncitizen's conviction for marijuana-distribution offense that failed to establish that offense involved either remuneration or more than a small amount of marijuana held not to be aggravated felony making alien deportable under 8 U.S.C. § 1227(a)(2)(A)(iii).

1. Analysis of an Aggravated Felony – Divisible & Ambiguous Statutes

At times, an immigration court must review the record of conviction to determine whether a conviction can be qualified as an aggravated felony. *Matter of Sweetser*, 22 I&N Dec. 709 (BIA 1999). An offense becomes an aggravated felony when one of the elements involves a crime of violence against a person and when the sentence imposed is one year or more. *Id*. A crime of violence is defined as:

(a) an offense that has as an element the use, attempted us, or threatened use of physical force against the person or property of another, or
(b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16. *See also Matter of Martin*, 23 I&N Dec. 491 (BIA 2002). Defense counsel must also analyze whether the offense would be considered a felony under federal law. If a state offense is considered a felony under federal law, then that offense is an aggravated felony. A state felony offense may also qualify as an aggravated felony in certain circumstances, even if the offense is considered a misdemeanor under federal law. For example, if the sale of marijuana is a state felony (though not punished harshly) and also a drug-trafficking crime, then it is deemed an aggravated felony for immigration purposes.[10]

2. Analysis of a Divisible Statute for Aggravated Felonies

When the conviction is under a statute that is divisible, it is necessary to look to the record of conviction (not the facts), and to other documents admissible as evidence in proving a criminal

[10] *See Matter of Yanez*, 23 I&N Dec. 390, 396 (BIA 2002). State felony convictions are aggravated felony convictions for immigration purposes even though those felonies would be classified as misdemeanor offenses under federal law.

conviction to determine whether a specific offense constitutes an aggravated felony. *Id.* For example, where a criminal statute includes offenses that may, but do not necessarily include firearm offenses, the determination of whether a person was convicted of a firearms offense can only be done through the admission of the record of conviction or other documents admissible to prove a record of conviction under 8 C.F.R. § 3.41. A police report cannot be used to prove a conviction. *Matter of Teixeira*, 21 I&N Dec. 316 (BIA 1996). Whether or not a sentence is imposed or suspended is irrelevant for aggravated felonies – any time imposed may be considered in making an offense an aggravated felony. *See* INA § 101(a)(48)(B), 8 U.S.C. §1101(a)(48)(B). Straight probation does not create a sentence qualifying the offense as an aggravated felony.

PRACTICE TIP:

If your client is an LPR, he or she may be barred from cancellation of removal based on an aggravated felony conviction. However, if your client is not yet an LPR, it may be possible for him or her to have an aggravated felony conviction that is not a drug conviction, with the exception of 30 grams of marijuana or less. *See Matter of Kanga*, 22 I&N Dec. 1206 (BIA 2000); *see also In re Michel*, 21 I&N Dec. 1101 (BIA 1998). An aggravated felony offense is not an impediment to adjustment of status unless the offense forms some independent basis of inadmissibility. An aggravated felony is grounds for deportability, not for inadmissibility. Thus, a person cannot be barred from adjustment of status on the basis of an aggravated felony unless the offense is also a CIMT, a drug offense, or money laundering. *See Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001); *Matter of Kanga*, 22 I&N Dec. 1206 (BIA 2000); *Matter of Michel*, 21 I&N Dec. 1101 (BIA 1998). An adjustment of status can serve as a waiver to deportation for non-LPRs.

B. Crimes Involving Moral Turpitude

A crime involving moral turpitude, or "CIMT" or "CMT," "refers generally to conduct which is inherently base, vile, or depraved, and contrary to the accepted rules of [societal] morality." *Matter of Franklin*, 20 I&N Dec. 867, 868 (BIA 1994), *aff'd*, 72 F.3d 571 (8th Cir. 1995). A non-citizen is not subject to removal if the conviction is for a "petty offense," a conviction for which the maximum penalty possible does not exceed imprisonment for one year and the actual term of imprisonment does not exceed six months.[11] Although non-citizens with convictions of crimes of moral turpitude may be subject to removal, there are several remedies under the immigration laws to obtain relief from removal or seek waivers of the crimes to secure entry or re-entry into the United States.

[11] The Petty Offense Exception is enumerated in INA § 212(a)(2)(A)(ii)(II) and applies to certain crimes involving moral turpitude, thus allowing a non-citizen to remain admissible despite the conviction for offenses under this provision.

There is no statutory definition – CIMTs are defined by BIA caselaw. CIMTs may be felony or misdemeanor offenses. CIMTs all involve an element of moral depravity, bad character, or violence. A CIMT may involve an element of theft, an element in which great bodily harm is intended or threatened, "malice" as an element, sex offenses in which "lewdness" is an element, or crimes of domestic violence. The characteristic of a CIMT relevant for removal purposes is timing: a conviction for a CIMT that was committed within five (5) years of the non-citizen's last admission into the U.S., or 10 years if the citizen was admitted with an "S" visa, will likely lead to removal. The maximum possible sentence must be one (1) year or more in jail. Deportation for misdemeanors pursuant to 8 U.S.C. § 1227(a)(2)(A)(ii) must involve two or more CIMTs that are separate offenses, i.e., not arising from a single scheme of misconduct. In other words, the misdemeanor convictions must be two or more convictions that are not temporally related, or occur as separate acts of criminal wrongdoing. A non-citizen client may adjust his or her status with one CIMT conviction if the maximum sentence is not more than one year and the sentence imposed is not more than six months in jail.

In *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008), the Attorney General greatly modified the CIMT analysis used to determine whether a given conviction constitutes a crime involving moral turpitude for removal purposes. The new CIMT analysis provides that to determine whether a conviction is for a crime involving moral turpitude, immigration judges and the Board of Immigration Appeals should: (1) look to the statute of conviction under the categorical inquiry and determine whether there is a "realistic probability" that the criminal statute pursuant to which the alien was convicted would be applied to reach conduct that does not involve moral turpitude; (2) if the categorical inquiry does not resolve the question, engage in a modified categorical inquiry and examine the record of conviction, including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript; and (3) if the record of conviction is inconclusive, consider any additional evidence deemed necessary or appropriate to resolve accurately the moral turpitude question. *Id.* at 704.

The Attorney General specifically limited this new decision to CIMT cases: "This opinion does not, of course, extend beyond the moral turpitude issue—an issue that justifies a departure from the *Taylor/Shepard* framework because moral turpitude is a non-element aggravating factor. . . ." *Id.*

Removal may be based on a conviction of a CIMT committed[12] within five years after the date of entry and for which a sentence of one year or longer may be imposed. *See* 8 U.S.C. § 1227(a)(2)(A)(i). Removal may also be based on convictions of more than one crime involving moral turpitude occurring at any time after entry, not arising out of a single scheme of misconduct,[13] whether or not the convictions resulted from a single trial. *See* 8 U.S.C. § 1227(a)(2)(A)(ii).[14]

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[12] The operative date is the date the offense was committed, not the date of the conviction. *See also Matter of Sanchez*, 17 I&N Dec. 218 (BIA 1980); *Matter of Yanez-Jacquez*, 13 I&N Dec. 449 (BIA 1970), *rev'd on other grounds*, *Yanez-Jacquez v. INS*, 440 F.2d 701 (5th Cir. 1971); *Matter of M.S.*, 9 I&N Dec. 643 (BIA 1962); *Matter of C-P-*, 8 I&N Dec. 504 (BIA 1959).

[13] *See* Annot. 19 A.L.R. Fed. 598 (1974); *see also Nason v. INS*, 370 F.2d 865 (2d Cir.), *aff'd after remand*, 394 F.2d 223 (1967); *Matter of Vosganian*, 12 I&N Dec. 1 (BIA 1966) (single scheme of misconduct requires definite

C. Controlled Substances Offenses

Immigration consequences for controlled substances offenses, or drug offenses, are divided into two categories: (1) conviction-based grounds of removal; and (2) conduct-based grounds of removal. Persons convicted of a narcotics-related offense may be subject to removal under 8 U.S.C. § 1227(a)(2)(B)(i) or under 8 U.S.C. § 1101(a)(43)(B). Specifically, if the controlled substance conviction constitutes a drug trafficking offense as defined in 18 U.S.C. § 924(c)(2), a non-citizen will be subject to removal as an aggravated felon regardless of the date of conviction. *See* 8 U.S.C. § 1227(a)(2)(B)(i), (ii); 8 U.S.C. § 1101(a)(43). However, under this statutory provision, there is one exception – possession of 30 grams or less of marijuana – that does not subject a non-citizen to removal. This exception is often referred to as the "John Lennon" statute. In federal court, possession of cocaine is not considered an aggravated felony, but possession of crack cocaine *is* because of the length of sentence available for each offense. *See also Lopez v. Gonzalez,* 549 U.S. 47 (2007) (conduct made a felony under state law but a misdemeanor under the federal Controlled Substances Act is not a criminal offense removable under the INA); *Matter of Aruna*, 24 I & N Dec. 452 (BIA 2008) (state law misdemeanor offense of conspiracy to distribute marijuana qualifies as an "aggravated felony" under section INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B), where its elements correspond to the elements of the federal felony offense).

1. Conviction-based Grounds for Removal

Any conviction for a drug offense constitutes grounds for deportation. *See* INA § 237(b)(2)(B)(I); 8 U.S.C. § 1227(b)(2)(B)(I). Any conviction for a drug offense can render a non-citizen inadmissible at ports of entry; a drug conviction can also disqualify a non-citizen

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and limited purpose regarding, *inter alia*, time, place, and manner). Single schemes were found in *Gonzalez v. INS*, 910 F.2d 614 (9th Cir. 1990) (two bank robberies within two days of each other, at the same bank); *Sawkow v. INS*, 314 F.2d 34 (3d Cir. 1963) (two cars stolen within 24 hours); *In re Pataki*, 15 I&N Dec. 324 (BIA 1975) (voluntary manslaughter and assault with intent to do great bodily harm); *Matter of F.G. and C.D.*, 8 I&N Dec. 447 (BIA 1959) (false statements made one week apart to obtain unemployment compensation, resulting in two convictions under single statutory provision); and *Matter of G.*, 7 I&N Dec. 171 (BIA 1956) (convictions for statutory rape and incest based on same act). *But see Akindemowo v. INS*, 61 F.3d 282 (4th Cir. 1995) (rejecting *Gonzalez* and more expansive view of Second, Third, and Ninth Circuits, which require only a common plan or intent pursuant to which multiple crimes are committed). Separate schemes were found in *Nguyen v. INS*, 991 F.2d 621 (10th Cir. 1993) (possessing stolen car and assault with intent to kill); *Matter of Gutnick*, 13 I&N Dec. 412 (BIA 1969) (burglaries of different cars on different dates and in different cities); *Matter of McLean*, 12 I&N Dec. 551 (BIA 1967) (two convictions for issuing fraudulent checks, weeks apart, in different cities, against different complainants); *Matter of O'Gorman*, 11 I&N Dec. 6 (BIA 1965); and *Matter of C.*, 9 I&N Dec. 524 (BIA 1962) (filing fraudulent tax returns in different years), *rev'd on other grounds*, *Costello v. INS*, 376 U.S. 120 (1964). *See also Matter of B.*, 8 I&N Dec. 236 (BIA 1958); *Matter of M.*, 7 I&N Dec. 144 (BIA 1956). *But see Iredia v. INS*, 981 F.2d 847 (5th Cir. 1993); *Balogun v. INS*, 31 F.3d 8 (1st Cir. 1994); *In re Adetiba*, 20 I&N Dec. 506 (BIA 1992) ("a single scheme of criminal conduct … mean[s] that when an alien has performed an act, which, in and of itself constitutes a complete, individual, and distinct crime, he is deportable when he again commits such an act, even though one may closely follow the other, be similar in character, and even be part of an overall plan of criminal misconduct"). *See generally Patel's Immigration Law Digest*, Decisions from 1940 § 7.25 (1985).

[14] *See Matter of Ibarra-Obando*, 12 I&N Dec. 576 (AG 1967) (expungement of second conviction precludes deportation based upon conviction of two crimes after entry); *Matter of Mascorro-Perales*, 12 I&N Dec. 228 (BIA 1967); *Matter of P.*, 8 I&N Dec. 424 (BIA 1959) (no requirement of sentence or confinement where there have been two separate convictions); *Matter of H.*, 6 I&N Dec. 614 (BIA 1955).

from relief from deportation. However, there is one major exception to this provision of the INA – a conviction for a drug offense involving 30 grams or less of marijuana for personal use will not trigger deportation and inadmissibility. *See* 8 U.S.C. § 1227(a)(2)(B)(i), §§ 1182(a)(2)(A)(i)(II), (h). The BIA distinguishes between state misdemeanor convictions and felony convictions in determining whether the drug offense is also an aggravating felony for immigration purposes.

2. Conduct-based Grounds for Removal

Drug abuse and addiction can trigger grounds of deportability for non-citizen clients.[15] No conviction is necessary to deport a non-citizen for drug abuse and addiction. Deportability grounds for drug addiction and abuse are listed in 8 U.S.C. § 1227(a)(4)(A)(ii) and apply at any time after entry into the United States. Drug abuse is defined for immigration purposes as any non-medical use of a controlled substance, including marijuana. Drug addiction is defined as non-medical use resulting in physical or psychological dependence, or both. An admission of drug use in court or to a probation officer may be used to establish drug abuse and addiction. Non-medical use is more than experimentation – use must be casual or even sporadic. Drug abuse can also affect a non-citizen's ability to become a legal permanent resident and can affect admissibility if he or she leaves the U.S. Counsel should be sure to seal any proceeding in which his or her client makes an admission of drug abuse, thereby necessitating immigration investigators to seek to unseal the proceedings in order to use the in-court admission as evidence. Counsel should advise non-citizen clients that drug use, even casual or sporadic, could result in denial of admission into the U.S. Defense counsel should advise non-citizen clients of these consequences when such clients enter a program like the Superior Court's Drug Court.

PRACTICE TIP:

Counsel should assist their non-citizen clients in avoiding a drug conviction if at all possible. When possible, counsel should negotiate for a plea agreement in which the non-citizen enters a plea to a non-drug charge in exchange for the dismissal of the drug charge. A client will *not* be able to get cancellation of removal or adjustment of status if he or she is convicted of a drug offense involving trafficking or if there is a "reason to believe" that the client is involved in drug trafficking. *See* INA § 212(a)(2)(C). Even if a non-citizen has been acquitted of a drug offense(s) or if the drug offense(s) has been dismissed, the BIA may still deny that non-citizen admission into the United States if the BIA finds that there are facts sufficient to substantiate suspicion that the client has been involved in either drug trafficking or distribution of controlled substances, or both.

[15] An addict is "any person who habitually uses any habit-forming narcotic drug so as to endanger the public morals, health, safety, or welfare, or who is, or has been, so far addicted to the use of such habit-forming narcotic drugs as to have lost the power of self-control with reference to his addiction." 42 U.S.C. § 201(k).

D. Domestic Violence Offenses

Offenses charged in Domestic Violence court that do not reference household and family members or a minor as elements of the offenses are not domestic violence crimes for immigration purposes. Although there are very few offense statutes in the District of Columbia pertaining specifically to domestic violence offenses for immigration purposes, defense counsel should still be aware of any existing domestic violence offenses that could place a non-citizen client in danger of removal. Convictions for domestic violence, stalking, and child abuse render a non-citizen deportable. *See* INA § 237 (a)(2)(E), 8 U.S.C. § 1227(a)(2)(E). This new ground of removal was included in IIRIRA and applies to convictions or violations occurring after September 30, 1996.

1. Federal Law

INA § 237(a)(2)(E)(i) and 8 U.S.C. § 1127(a)(2)(E)(i) enumerate the domestic violence offenses triggering removal. This provision of the INA states that any non-citizen is deportable if he or she, "at any time after admission, is convicted of a crime of domestic violence, a crime of stalking, a crime of child abuse, a crime of child neglect, or a crime of child abandonment." *Id*. A crime of domestic violence is defined as follows:

> For purposes of this clause, the term "crime of domestic violence," means any crime of violence [as defined in 18 U.S.C. § 16] against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is a person cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family laws of the … United States or any State, Indian tribal government, or unit of local government."

Id.

To determine whether an offense charged can be classified as a domestic violence crime for immigration purposes, defense counsel must focus on the elements of the offense statute. For example, whether someone is removable on the basis of a conviction for a "crime of child abuse,"[16] is determined by the elements of the offense, as reflected in the statutory definition of the crime or admissible portions of the conviction record—the criminal statute, or at least the record of conviction, must specify the victim as a minor, i.e., under 18 years old. *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008). Counsel should check for specific language in the statute regarding acts committed against family or household members or children.

[16]*Matter of Velazquez-Herrera,* 24 I&N Dec. 503 (BIA 2008) ("For purposes of the ground of removal set forth in INA § 237(a)(2)(E)(i) and 8 U.S.C. § 1227(a)(2)(E)(i), the term 'crime of child abuse' means any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a person under 18 years old or that impairs such a person's physical or mental well-being, including sexual abuse or exploitation.").

Counsel should also be aware that the sentence is irrelevant in the classification of domestic violence crimes for immigration purposes.

2. Civil Protection Order ("CPO") Violations

INA § 237(a)(2)(E)(ii) and 8 U.S.C. § 1227(a)(2)(E)(ii) provide that a non-citizen is removable for violation of a civil protection order or stay away order issued by a trial court. The statute defines a protection order as "any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issues by civil or criminal courts." *Id.* This category of offenses includes violation of a protective order, regardless of whether a sentence of imprisonment is imposed. A court's factual finding that a non-citizen has violated a CPO will trigger removal proceedings. No conviction is necessary for a non-citizen client to become removable for such a violation; the immigration court needs only a finding of fact by a civil court to find a non-citizen removable. *See* INA § 237(a)(2)(E)(ii); 8 U.S.C. § 1227(a)(2)(e)(ii). This provision is effective for violations of CPOs occurring *after* October 1, 1996.

PRACTICE TIP:

Defense counsel should be sure to advise a non-citizen client to *strictly* abide by stay away orders as part of pre-trial release. Counsel should also be sure to advise the non-citizen client that *any* judicial finding – criminal or civil – of a violation of a protection order (i.e., a CPO or a stay away) may result in removal. A conviction for domestic violence may expose a non-citizen to three separate grounds for removal: first, he or she will be subject to the ground mentioned in this subsection; second, he or she may be subject to removal as a person convicted of a crime of moral turpitude; and third, if a term of imprisonment of one year or more is imposed, he or she may be charged by ICE as an aggravated felon. There are potential defenses to removal under the first two grounds, but few if any defenses to removal as an aggravated felon.

E. Firearms Offenses

There are two types of firearms offenses that may expose your client to removal. One is for illicit trafficking in firearms as defined in 18 U.S.C. § 921 and is considered an aggravated felony. The other is broader and defined under 8 U.S.C. § 1227(a)(2)(C) as "purchasing, selling, offering for sale, exchanging, using, owning, possessing or carrying, or of attempting or conspiring to purchase, sell, offer for sale, exchange, use, own, possess, or carry, any weapon, part, or accessory which is a firearm or destructive device [as defined in 18 U.S.C. § 921(a)] in violation of any law." *Id.* Convictions for attempt or conspiracy to commit firearms offenses are grounds for removal.[17]

[17] *Matter of St. John*, 21 I&N Dec. 593 (BIA 1996).

1. Possession-related Firearms Offenses

INA § 237(a)(2)(C) and 8 U.S.C. §§ 1227 (a)(2)(B) and (C) relate only to the possession of firearms. Use of a firearm must be an original element of the offense to qualify as a firearms offense for immigration purposes. Offenses must relate to the possession, carrying, purchasing, sale of, exchanging, using, ownership of, or attempting to do so involving a firearm. *Id*. Where use of a firearm is an essential element of the crime (i.e., where use of a firearm subjects the charge to more serious penalties), the conviction is a firearm offense.[18] A conviction for which the statute is divisible (e.g., possession of a dangerous weapon) is not considered a ground of removal unless the record of conviction establishes the crime involved a firearm.[19] Examples of deportable firearms offenses in the District of Columbia include carrying a pistol without a license in violation of D.C. Code § 22-4504, unlawful possession of a pistol in violation of D.C. Code § 22-4503, possession of an unregistered firearm in violation of D.C. Code § 7-2502.11, and possession of a firearm during a crime of violence in violation of D.C. Code § 22-4502. Defense counsel should be aware that firearms possessions as well as "while armed" penalty enhancements, will trigger removal. *Matter of Martinez-Zapata*, 24 I&N Dec. 424 (BIA 2007). In *Martinez-Zapata*, the court held that, "any fact (including a fact contained in a sentence enhancement) that serves to increase the maximum penalty for a crime . . . is to be treated as an element of the underlying offense, so that a conviction involving the application of such an enhancement is a conviction for the enhanced offense." *Id.*

PRACTICE TIP:

Defense counsel should try to avoid a firearms conviction if at all possible. Possession of ammunition is not classified as a firearms offense for immigration purposes and, thus, a plea offer including possession of ammunition instead of a firearm is more advantageous to the non-citizen client. Counsel should negotiate for a plea agreement on the non-firearms charge in exchange for dismissal of the firearms charge(s).

A firearms conviction does not trigger inadmissibility and, thus, does not bar a non-citizen client from adjusting his or her status. *See Matter of Rainford,* 20 I&N Dec. 598 (BIA 1992). A non-citizen convicted of a non-trafficking firearm offense may be eligible for relief from removal. Also, if the client has a United States citizen spouse or parent who can file a petition for a green card on the client's behalf, the immigration judge will have the discretion to waive the conviction and grant the client lawful permanent residence at the judge's discretion. Therefore, counsel should carefully examine the elements of the crime to avoid an aggravated felony charge.

[18] *Matter of P-F-*, 20 I&N Dec. 661 (BIA 1993).

[19] *Matter of Pichardo*, 21 I&N Dec. 330 (BIA 1996).

V. EFFECTIVE REPRESENTATION OF NON-CITIZEN CLIENTS

A. Effective Representation during the Pre-trial Phase of a Criminal Case

When defendants are not U.S. citizens, it is imperative that defense counsel be aware of the potential immigration consequences of a conviction. Even though there are cases in other jurisdictions holding that there is no ineffectiveness in defense counsel's failure to advise a client of the removal consequences of guilty pleas, counsel must be alert to the unique problems facing non-citizens accused of criminal offenses throughout appointment, arraignment, plea bargaining, entering a plea or going to trial, and sentencing. Subsequent to appointment, defense counsel should gather all the facts and circumstances surrounding the person's status in the United States. Appendix B of this chapter contains a sample interview sheet with instructions to guide the defense attorney through questioning a client about his or her immigration status. Defense counsel should, whenever possible, consult with immigration practitioners in order to carefully determine a client's status, if the crime with which he or she is charged will subject him or her to removal from the United States, and if there are any measures to avoid or ameliorate the harsh immigration consequences stemming from a possible conviction.

The following section includes tips on effective representation of non-citizen clients in the pre-trial stage of a criminal case.

1. Be Sure to Ask the Client about His or Her Immigration Status

One of the first things a criminal defense attorney should do is ascertain the non-citizen client's immigration status. Knowledge of the client's immigration status is essential to the assessment of the potential immigration consequences the non-citizen may face as a result of criminal charges. Specifically, the attorney should obtain legal documentation of the client's immigration status. For example, if a client state that he or she is an LPR, then counsel should request that the client produces his or her "green card."

Not all clients are aware of their immigration status. There are many situations in which non-citizen clients may have immigrated to the United States early in their lives, and thus have no memory or knowledge that they lived in another country or that the U.S. is not their country of origin. Consequently, they may falsely believe that they are citizens or legal permanent residents when, in reality, they have no documentation of legal immigration at all. This can have devastating immigration consequences for the non-citizen client. Therefore, investigation into a possible non-citizen client's immigration history is crucial. Investigation may mean speaking with members of the client's family about immigration status or requesting immigration documentation of the client's legal immigration status. Defense counsel should ask all clients about their immigration status, whether or not counsel believes the client is a citizen.

It is imperative that counsel does not advertise the client's immigration status to law enforcement or court personnel as this may lead to the involvement of immigration authorities. Non-citizen clients have a privilege against self-incrimination, which includes talking to officials from the ICE, MPD, the FBI, or any other law enforcement agency regarding immigration status.

2. Ascertain the Non-citizen Client's Criminal History

Acquiring all details of a client's criminal history is crucial to a defense attorney's ability to provide the client with effective assistance of counsel in a current criminal matter. This is doubly important to a non-citizen client. In some cases, the non-citizen client may already have a criminal history and, thus, may already be removable as a result of prior convictions. Obtaining the client's complete criminal history is essential to providing accurate advice to the client concerning potential immigration consequences that might stem from a subsequent criminal conviction. When advising the client, defense counsel should emphasize that not only can prior convictions render the client removable, but they can also prevent the client from being able to become a citizen or to gain admission into the U.S. at designated ports of entry. Investigation of criminal history is also important because the client may have to answer to a history of arrests and convictions in a removal hearing in immigration court.

3. Ascertain any Likely Dispositions of the Case

With any client, defense counsel should immediately begin to assess the strengths and weaknesses of the case to ensure the most favorable outcome for the client. This is very important with non-citizen clients because of the possible collateral immigration consequences that may arise as a result of the criminal case. In many cases, a conviction may be unavoidable; however, for a non-citizen client, formulating a defense strategy early in the case could mean the difference between deportation and being able to remain in the U.S. As part of formulating an effective defense strategy, defense counsel should research adverse immigration consequences and consult with an immigration attorney regarding such consequences as necessary.

4. Find out what is Important to the Client

Is the client concerned about the possible removal or exclusion consequences of the disposition? Is the client willing to do more time to prevent possible immigration consequences arising from a sentence? More time in custody could mean saving the client from adverse immigration consequences. Defense counsel should properly advise the client on the specific adverse consequences that can result from a criminal case. Counsel should not provide the client with general advice of immigration consequences such as "this might lead to deportation," "don't leave the country," or "this might prevent you from becoming a citizen."

The Court of Appeals for the District of Columbia held in *Goodall v. United States*, 759 A.2d 1077 (D.C. 2000), that defense counsel's mis-advice regarding the consequences of collateral matters, such as immigration and parole, resulting from a guilty plea can be substantial grounds for a claim of ineffective assistance of counsel. In keeping with the decision in *Goodall*, defense counsel should provide specific advice to the non-citizen client regarding the specific consequences that may result from a conviction, such as the various grounds of removability and inadmissibility as well as the denial of adjustments of status. Counsel should advise the client as to the actual consequences that will result from any possible disposition that may result from the case (from both a plea bargain and a trial). Counsel should also make sure that the non-citizen client understands his or her options in the case and how such a disposition will affect his or her immigration status.

5. Be Aware of Cultural Differences

If the client does not speak English or does not have a sufficient grasp of it, counsel will have to rely upon an interpreter in whom he or she has confidence. Counsel should make sure that he or she obtains the services of an interpreter with whom both counsel and the client feel comfortable. Counsel should also remember that shyness, non-aggressiveness, or a reluctance to defend oneself might be signs that the client comes from a culture that defers to authority. Such behavior may not mean indifference or disrespect. The client may not initially trust the attorney, particularly if the client has entered the U.S. without authorization, as he or she may see the attorney as part of the system that is seeking eventually to deport him or her or, at least, not protect his or her interests. Such suspicions and apprehensions may be heightened if the defense attorney is court-appointed: i.e., because the "government" is paying the attorney, the attorney is on the prosecutor's side.

Uneducated clients, particularly peasant farm workers, often have a literal interpretation of questions and answers. For example, on the witness stand, the client is asked if he is working. He answers no but counsel knows that he holds down two jobs. Why the answer? The client is not working now, at the time of the trial. Confronted with such clients, defense counsel will have to make extra efforts to ensure that effective communication is established.

Clients coming from war-torn societies or fleeing political persecution may have psychological baggage that could significantly impact criminal defense and immigration matters. Individuals from El Salvador, Guatemala, Ethiopia, and Somalia, among others, have often either witnessed or suffered terrible destruction and torture. The defense attorney should quiz the client and look for signs of post-traumatic stress disorder (PTSD) for a defense based on culture.[20]

6. Analyze the Elements of Current Charges

Defense counsel should complete the following checklist to determine if the client is subject to removal and why.

- Do the elements of the offense for which the client is charged constitute an **aggravated felony**?
- Do the elements of the offense for which the client is charged constitute a **crime involving moral turpitude**?
- Do the elements of the offense for which the client is charged constitute a **drug offense**?
- Do the elements of the offense for which the client is charged constitute a **domestic violence offense**?

[20] *See* Tarnao, Sharon M., *The Cultural Defense: Tradition or Formal?*, GEO. IMMIGR. L.J. (Winter, 1996).

- Do the elements of the offense for which the client is charged constitute a **firearms offense?**

- Is the conviction a conviction for immigration purposes?

Counsel should be sure to examine the potential sentence for each offense when determining if the client fits into any of the above categories.

7. Ensure that the Non-citizen Client understands what has happened

Counsel should explain to the client as thoroughly as possible what his or her obligations are if he or she is given probation or diversion, or if the case is dismissed. Counsel must ensure that the client understands that a conviction for DWI, battery, and other "minor" offenses represents a criminal conviction with possible immigration consequences. Counsel should explain that criminal records are often maintained indefinitely and that the USCIS has access to them. Non-citizens are frequently required to submit their fingerprints for criminal background checks when applying or reapplying for immigration papers. Material misrepresentations at ICE examinations and on immigration documents are grounds for denying immigration benefits. The client must be warned that if asked by immigration authorities, he or she must admit to arrests and criminal charges even if the case was dismissed.

B. Trial and Plea Negotiations

There are several issues that defense counsel should be aware of when advising a non-citizen client to enter a plea of guilty or to go to trial.

1. Going to Trial

A verdict of not guilty will not affect a person's immigration status in the United States. If the charges are very serious or the Assistant United States Attorney refuses to negotiate, counsel should consider going to trial. If the non-citizen client elects to go to trial, defense counsel should fully advise the client of the potential consequences that might result from any and all convictions in the case. Defense counsel should also advise the client that being found guilty at trial might foreclose the non-citizen client to certain forms of relief from removal stemming from the conviction.

2. Plea Negotiations

After counsel has determined the client's immigration status and carefully determined that he or she may be subject to removal, counsel should begin discussions with the Assistant United States Attorney (AUSA) in order to negotiate a plea to avoid or ameliorate possible harsh immigration consequences of a conviction. Defense counsel should primarily strive to avoid a conviction for a deportable offense by doing the following:

a. Negotiate a plea to a lesser-included offense that does not involve a crime of violence or other key element that renders it a deportable offense. For example, a burglary conviction

will not be a CIMT unless the record reflects that the breaking and entering was done to commit a CIMT, i.e., theft. *See Matter of G*, 1 I&N Dec. 403 (BIA 1943).

b. Negotiate for a sentence of just under one year if a one-year sentence is the "triggering effect" for an aggravated felony. Stack counts consecutively so that no one conviction carries a sentence of more than one year. If the non-citizen client has been detained pre-trial, waive credit for time served in order to obtain a lower jail sentence. Advise the client to spend more time in jail rather than pushing for a suspended sentence of over one year. Remember, the goals of saving a client from immigration consequences can be quite different from those in a criminal case. In many cases, serving more time can prevent adverse consequences in immigration court.

c. Negotiate for pleas that are binding upon the court pursuant to Super. Ct. Crim. R. 11(e)(1)(C). A binding plea can ensure that the court does not impose a sentence with potentially damaging immigration consequences for the client.

d. Include an immigration expert in the plea negotiations. In many situations, the AUSAs and judges do not understand or believe that many crimes now result in almost automatic removal. In attempting to negotiate a good plea with the AUSA, consider submitting an affidavit from an immigration expert explaining the consequences of a plea. Alternatively, ask an immigration attorney to participate in a meeting with the AUSA. Defense counsel should also consider calling an immigration expert as a witness during sentencing so that the judge will be better able to understand the consequences.

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***Chaidez v. United States*, 133 S. Ct. 1103 (2013).** See, *supra*, Chapter 11.III.B.

***Padilla v. Kentucky*, 559 U.S. 356 (2010).** See, *supra*, Chapter 11.III.B.

C. The Plea Colloquy and Sentencing

Defense counsel must be vigilant to protect the non-citizen's rights during this phase of a criminal case because it will make all the difference in immigration court.

1. Sanitize the Judicial Record during any Plea Colloquy

Counsel should ask the AUSA to issue a new charging document so that the contents of the new charging document do not trigger immigration consequences. Counsel should make sure that the plea colloquy does not contain any references to offenses that would result in immigration consequences and ask the AUSA to omit from the factual proffer all references to other charges to which the client is not pleading guilty. It is imperative to remember that the plea colloquy is admissible against the client in immigration court.

2. Make Sure that the Plea Colloquy Complies with the Alien Sentencing Act

D.C. Code § 16-713 requires every trial court to advise non-citizens of immigration consequences that may occur as the direct result of either a guilty plea or a plea of *nolo contendre*. *See* D.C. Law 4-202, March 10, 1983. The specific language regarding this advisement is as follows:

> If you are not a citizen of the United States, you are advised that conviction of the offense for which you have been charged may have the consequence of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States.

Id. This statute also permits a non-citizen defendant to withdraw his or guilty plea if the court fails to administer the advisement, based on a presumption that the non-citizen did not receive the advisement from any other source. The District of Columbia Court of Appeals has determined that the purpose of this statute is "to ensure notice to [non-citizens] of the consequences of a guilty plea." *Daramy v. United States*, 750 A.2d 552, 556 (D.C. 2000). The Court of Appeals requires that the trial court provide sufficient advisement, not legal advice, on immigration consequences. *Id*. at 557. In *Van Slytman v. United States*, 804 A.2d 1113, 1117-1118 (D.C. 2002), the Court of Appeals determined that a non-citizen defendant was entitled to withdraw his guilty plea because the trial court had failed to provide a complete advisement of immigration consequences pursuant to D.C. Code § 16-713.

Judges often misconstrue this statute to mean that the person pleading guilty must state whether he or she is a citizen. However, the sentencing judge *can* make reference to the non-citizen's immigration status when fashioning a sentence.[21] It is imperative that counsel object to the client being asked whether he or she is a United States citizen, as the client has a Fifth Amendment privilege against answering. All that is required of the court is to advise defendants that, if they are not citizens, then the conviction could have adverse immigration consequences.

3. Urge the Court to Impose a Sentence that will not Trigger Removal

If possible, defense counsel always should urge the court to impose straight probation, as probation is *not* a term of imprisonment of one year for immigration purposes. Counsel should remember to ask for a sentence in terms of days instead of months because twelve (12) months equals one year in immigration court.

[21] *See Yemson v. United States*, 764 A.2d 816 (D.C. 2001). No error, let alone plain error, for sentencing judge to comment on defendant's national origin and status as illegal alien where those comments bore a reasonable relationship to his pattern of misconduct and did not evince a clear intent to punish the defendant because of his status; that misconduct included twice fleeing abroad after guilty pleas and twice being deported. Also, no error for sentencing judge to remind the prosecutor to take steps to deport the defendant after his sentence was served or to make a notation on the judgment to that effect. The reminder and notation were not a part of the sentence.

VI. POST-CONVICTION RELIEF FROM REMOVAL

There are certain options available to non-citizens convicted of removable defenses in criminal court. Defense counsel should be aware of these options and should make the non-citizen client aware of them as well.

1. Look for flaws in the trial record as a basis to vacate the conviction. Make sure that the judge's order to vacate *does not* state immigration consequences as the *only* reason to vacate the conviction, i.e., that the language in the order implying social stigma or inability to find employment is beneficial. *See Matter of Pickering*, 23 I&N Dec. 621 (BIA 2003).

2. File an appeal if possible.

3. Seek modification of the original sentence. File a Rule 35 Motion if the triggering effect results from the length of the sentence. Make sure that the sentence is not modified solely for immigration purposes; however, the immigration court will still recognize the sentence reduction. *See Matter of Song*, 23 I&N Dec. 173 (BIA 2001).

VII. RELIEF FROM REMOVAL IN IMMIGRATION COURT

A. Cancellation of Removal

Cancellation of removal is a term of art for relief from deportation. Depending upon immigration status, there are different conditions that must be satisfied to be eligible for this relief. The immigration judge has wide discretion in deciding whether to grant relief and may look at a variety of different factors when accessing cancellation of relief for the deportable client. Defense counsel should be aware of the types of cancellation of relief that may be available to the non-citizen client when accessing the strengths and weaknesses of a potential plea offer or decision to go to trial.

1. For Legal Permanent Residents

The following conditions must all be met for an LPR to be eligible for cancellation of removal:

a. The LPR must have held this status for at least five (5) years and have resided continuously in the U.S. for seven (7) years in any legal status.
b. The LPR must not have been convicted of an aggravated felony and must have cancellation available in all removal grounds.
c. The LPR must not have received cancellation of removal on a prior occasion.

See INA § 240; 8 U.S.C. § 1229b(a); 8 C.F.R. §§ 1240.11, 1240.20.

2. Cancellation of Removal & Adjustment of Status for Non-Permanent Residents

Clients who are non-permanent residents are eligible if they meet all of the following conditions:

a. The non-LPR must have been present in the U.S. continuously for at least ten (10) years preceding the application for cancellation of removal.
b. The non-LPR must demonstrate good moral character for the past ten (10) years.
c. The non-LPR must not have been convicted of an offense rendering a non-citizen inadmissible or removable (deportable).
d. The non-LPR must establish that removal will result in exceptional and extremely unusual hardship to his or her spouse, parent, or child, who is either a U.S. citizen or an LPR.

See INA § 240; 8 U.S.C. § 1229b(a); 8 C.F.R. §§ 1240.11, 1240.20.

B. Relief for Asylees and Refugees, INA § 209(c), 8 U.S.C. § 1159(c)

There is a special waiver or adjustment of status for refugees and asylees seeking a waiver from removal. This provision does not require establishing hardship to a relative for approval and can be used by refugees and asylees convicted of certain offenses, such as simple possession of controlled substances. *See Matter of Jean*, 23 I&N Dec. 373 (A.G. 2002).

C. Violence Against Women Act of 1994 ("VAWA")

This provision was enacted as part of the Violent Crime Control and Law Enforcement Act of 1994. It was subsequently amended with the enactment of the Victims of Trafficking and Violence Protection Act of 2000. It provides relief to women and children subjected to battery and cruelty by a spouse or parent who is either a U.S. citizen or an LPR. *See* INA § 245. The complainant must apply for VAWA relief with allegations of abuse inflicted by the citizen or LPR spouse; the accused and defense counsel for the accused are not permitted knowledge of the application. Applying for VAWA relief enables women and juveniles to apply for waivers to removal proceedings. *See* INA §§ 212(g), (h), & (I); § 237(a)(7). To support the VAWA application, the applicant will often include police reports and other documents alleging instances of abuse.

D. Asylum Relief, INA § 208, 8 U.S.C. § 1158

Section 208 of the INA provides that any non-citizen physically present in the U.S. may apply for asylum if that individual fears persecution in his or her country of origin. There are certain convictions that will bar a non-citizen from applying for asylum, and a non-citizen may apply for asylum as a form of relief during removal proceedings.

E. Withholding of Removal, INA § 241(b)(3), 8 U.S.C. § 1231

"Withholding" means that the order of removal will be "withheld" if the deportable non-citizen can establish a credible fear of persecution if he or she were to be returned to a country of origin or a proposed country of removal. Persons with aggravated felony convictions are not barred from applying for this relief. A higher standard of proof is involved in establishing a credible fear of persecution under INA § 241(b)(3) than § 208.

F. Convention Against Torture ("CAT"), INA § 241(b)(3)(B), 8 U.S.C. § 241(B)(3)

The Convention Against Torture ("CAT") is a treaty governed by international law to which the United States is a signatory. CAT provides protection to persons who fear torture by their government or proposed country of removal. CAT's procedures are enumerated in 8 CFR § [1]208.16. CAT comes in two forms: (1) withholding of removal; and (2) deferral of removal. Withholding of removal was discussed previously in this chapter. Deferral of removal means that removal will be deferred until the United States government can locate a country to which the non-citizen can be removed without fear of torture and persecution.

G. Removal in Lieu of Incarceration or Voluntary Removal

The Anti-Terrorism Enforcement and Death Penalty Act of 1996 ("AEDPA"), Pub. L. 104-132, 110 Stat. 1214, provides for the removal of nonviolent offenders prior to the completion of a sentence of imprisonment. The provision reads as follows:

> (i) in the case of [a non-citizen] in the custody of the Attorney General, if the Attorney General determines that (I) the [non-citizen] is confined pursuant to a final conviction for a nonviolent offense [other than non-citizen smuggling] and (II) the removal of the [non-citizen] is appropriate and in the best interest of the United States; or (ii) in the case of [a non-citizen] in the custody of a State (or a political subdivision of a State), if the chief State official exercising authority with respect to the incarceration of the [non-citizen] determines that (I) the [non-citizen] is confined pursuant to a final conviction for a nonviolent offense [other than non-citizen smuggling], (II) the removal is appropriate and in the best interest of the State, and (III) submits a written request to the Attorney General that such [non-citizen] be removed.

8 U.S.C. § 1231(a)(4)(B).

H. Special Relief for Juveniles in Immigration Court and Special Immigrant Act for Children in Foster Care, 8 U.S.C. § 1101(a)(27)(J), 8 C.F.R. § 204.11(a)

The Immigration Act of 1990 and subsequent amendment created an option to help non-citizen juveniles in the neglect system. These juveniles qualify as "Special Immigrant Juveniles" pursuant to this legislation. Special Immigrant Juveniles are eligible to become LPRs and receive green cards. To qualify, the court must decide that family reunification is not in the juvenile's best interests, that the juvenile will remain in foster care, and that it would be inadvisable for the juvenile to return to his or her home country.

This act can be applied to juveniles in the criminal justice system who are committed to Department of Homeland Security ("DHS") custody. Counsel should advocate, under Superior Court's One Family-One Judge policy, that the delinquency proceeding be closed in favor of a neglect proceeding for the juvenile client. This act also acts as a waiver for drug abuse and dependency for deportation purposes. If there is a guardian *ad litem* (GAL), then he or she will be the party who applies for Special Immigrant status for counsel's juvenile client.

Defense counsel should take special care to ensure that special immigrant status is what the juvenile client wants. Commitment to DHS as an abused and neglected juvenile can result in termination of parental rights of the non-citizen parents and could expose the parents to negative immigration consequences as a result of the commitment.

VIII. BARS TO RELIEF FROM REMOVAL

Defense counsel should be aware that various criminal convictions render a non-citizen client ineligible for forms of relief from removal available in immigration court.

A. Bars to Naturalization

An applicant for citizenship cannot have any conviction for an aggravated felony or crime involving moral turpitude after November 29, 1990, and no murder conviction at any time. In addition, an applicant cannot have had any incidents preventing good moral character during the five (5) years immediately prior to the application, including:

a. aggravated felony convictions;
b. crimes involving moral turpitude convictions;
c. reason to believe a person is a drug trafficker;
d. a habitual drunkard;
e. an illegal gambler;
f. a person who gives false testimony for immigration benefits;
g. a person who engages in prostitution or non-citizen smuggling; or
h. a person who received confinement to a penal institution for an aggregate period of more than 180 days.

See 8 U.S.C. § 1101(f).

B. Bars to Relief for Persons with Temporary Protected Status ("TPS")

In certain circumstances, bars to relief from removal are applicable to persons who receive temporary protected status pursuant to the Nicaraguan Adjustment & Central American Relief Act ("NACARA"). Non-citizens with legal immigration status pursuant to this statute will be rendered ineligible for relief from removal under the following circumstances:

a. aggravated felony convictions;
b. crimes involving moral turpitude convictions;
c. reason to believe a person is a drug trafficker;
d. a habitual drunkard;
e. an illegal gambler;
f. a person who gives false testimony for immigration benefits;
g. a person who engages in prostitution or non-citizen smuggling; or
h. a person who received confinement to a penal institution for an aggregate period of more than 180 days.

See 8 C.F.R. § 240.61(b); 8 U.S.C. § 1101(f).

C. Bars to Asylum Relief

Bars to relief from deportation for persons seeking asylum as a form of relief from deportation include a conviction for an aggravated felony or a conviction for a "particularly serious crime," i.e., violence in the record of conviction. *See* 8 U.S.C. §§ 1158(b)(2)(A)(ii), (B)(i).

D. Bars to Withholding of Removal

A client seeking "withholding of removal" cannot have had a conviction for a "particularly serious crime," including:

a. An aggravated felony with a sentence of an aggregate period of at least five (5) years;
b. A drug trafficking conviction, *See Matter of Y-L-*, 23 I&N Dec. 270 (A.G. 2002); or
c. An act of violence in the record of conviction.

See 8 U.S.C. § 1231(b)(3)(B).

E. Bars to Voluntary Departure

A non-citizen client cannot receive voluntary departure if the client has an aggravated felony or a conviction that "suggests" terrorist activity. In addition, voluntary departure is not available to non-citizens who previously received voluntary departure, but failed to leave the United States.

IX. GROUNDS OF INADMISSIBILITY

A. INA Grounds of Inadmissibility

The Illegal Immigration Reform and Responsibility Act of 1996 ("IIRIRA") greatly expanded the grounds of exclusion, or "inadmissibility," listed in the INA. This section applies specifically to "on-citizens unlawfully present" in the United States. The following list includes some of the new grounds of inadmissibility that have been implemented by IIRIRA and incorporated into the Immigration Nationality Act (INA):

- A non-citizen present in the United States without being admitted or paroled, or who arrives in the U.S. at any time or place other than as designated by the Attorney General is inadmissible. *See* INA § 212(a)(6)(A)(i).

- A non-citizen who falsely represents him or herself to be a U.S. citizen for any purpose under the INA or any federal or state law is inadmissible for five years from the non-citizen's departure or removal. *See* INA § 212(a)(6)(C)(ii).

- A non-citizen admitted as a nonimmigrant who obtains benefits through fraud or misrepresentation under federal law for which the non-citizen is ineligible is

inadmissible for five years from the non-citizen's departure or removal. *See* INA § 212(a)(6)(C)(iii).

- A non-citizen subject to a final order for violation of section 274(C) is inadmissible. *See* INA § 212(a)(6)(F).

- A non-citizen who obtains the status of a student (F-1) and violates the terms or conditions of such status is inadmissible for five years from the date of the violation. *See* INA § 212(a)(6)(G).

- A non-citizen who votes in violation of any federal, state, or local statute or regulation is inadmissible. *See* INA § 212(a)(10)(D).

- A former citizen of the U.S. is inadmissible if he or she renounced U.S. citizenship for the purpose of avoiding U.S. taxation. *See* INA § 212(a)(10)(E).

B. Bars to Re-entry

Once a non-citizen is deported or voluntarily leaves the United States, he or she, depending upon the reason for the deportation, may either be barred from re-entering the U.S. for a statutorily specified period of time or receive a lifetime bar.

- A non-citizen ordered removed from the U.S. is inadmissible for five years and inadmissible for twenty years for any subsequent removal, or if removed due to a conviction of an aggravated felony defined by INA § 101(a)(43). *See* INA § 212(a)(9)(A)(i).

- A non-citizen not described above who has been ordered removed, or who has departed the U.S. while an order of removal was outstanding, is inadmissible for 10 years and 20 years for any subsequent removal, and permanently for non-citizens convicted of an aggravated felony. *See* INA § 212(a)(9)(A)(ii).

- A non-citizen who is unlawfully present in the U.S. for more than 180 days, but less than one year, who voluntarily departs from the U.S. prior to the commencement of removal proceedings is inadmissible for three years. *See* INA § 212(a)(9)(B)(i)(I). A non-citizen who is unlawfully present in the U.S. for more than one year, who voluntarily departs from the U.S. prior to the commencement of removal proceedings, is inadmissible for ten years under INA § 212(a)(9)(B)(i)(II). The time in unlawful status before April 1, 1997, is not counted.

PRACTICE TIP:

If the non-citizen is deported based on an aggravated felony, it will mean a lifetime bar (except perhaps to visit, but that would require a waiver of the criminal conviction). Although the non-citizen may not want to stay in jail or fight his or her case, if the non-citizen has the opportunity to argue against an aggravated felony charge, it might be worth fighting the immigration case if the client ever wants to return legally to the U.S.

X. NON-CITIZEN WITNESSES IN CRIMINAL CASES

The Immigration and Nationality Act has provisions to grant visas to non-citizens who cooperate with law enforcement officials or are the victims of crime. The purpose of these visas is to help the non-citizen and his or her family members to remain in the United States during the pendency of a criminal investigation and trial. These visas can benefit non-citizen witnesses who might otherwise be deportable.

A. S Visa: "Cooperator" Visa, INA § 101(a)(15)(S), 8 U.S.C. § 1101(a)(15)(S)

Pursuant to 8 CFR § 214.2(t), a non-citizen witness in a criminal proceeding can receive a visa with an S-5 status. Family members of a witness receiving S-5 status may receive visas with an S-7 status as derivative beneficiaries of the principle S visa holder. The application for this status must be completed by an agent from a state or federal law enforcement agency and prosecutors may sponsor these non-citizen witnesses for an S visa. The visa is approved by the Assistant Attorney General of the Criminal Division of the Department of Justice.

1. Conditions

The non-citizen S visa witness must report regularly to law enforcement agents and fulfill the terms of the cooperation agreement with law enforcement. The principal holder and derivative holders may not change the S status to another visa status. In addition, as a condition of receiving this visa, the witness and his or her family must waive their right to a removal hearing and to contest a removal action, other than on the basis of withholding of removal. The principal and his or her derivatives may apply for asylum if either party is ordered deported.

If the S non-immigrant is deportable because of a crime, only withholding is available.

2. Benefits

The S non-immigrant witness and his or her family are able to remain in the U.S. during the pendency of the investigation and prosecution. The witness and his or her family, while in S status, can adjust to LPR status as a reward for cooperation. The same sponsoring law enforcement agent can apply for LPR status for the witness and family. *See* INA § 245(j); 8 U.S.C. § 1255(j). The requirements and procedure for cooperating witnesses adjusting to LPR are found in 8 CFR § [1]245.11.

B. U Visas: Government Witnesses, INA § 101(a)(15)(U), 8 U.S.C. § 1101(a)(15)(U)

The U status is intended for the complainants in a wide array of crimes who are helpful or willing to be helpful to law enforcement. This provision was enacted as part of the Victims of Trafficking and Violence Protection Act of 2000.

An applicant for a U visa must have suffered substantial physical or mental abuse as a result of having been a victim of a specified criminal activity. The applicant (or where the witness is a child under the age of 16, the parent, guardian, or "next friend" of the witness) must possess

information concerning the specified criminal activity. The applicant must have been, be currently, or be likely to be helpful to a federal or state law enforcement official, prosecutor, or judge in investigating or prosecuting the criminal activity. The criminal activity described must be in violation of the law of the United States or its territories or possessions. Endorsement of the application by a law enforcement agency is the best form of primary evidence to support the application. U visa status for non-immigrant status lasts for three years and holders may adjust to LPR status after that time. In addition, government officials are encouraged not to institute removal proceedings against possible U visa applicants. *See* INS Memorandum "Victims of Trafficking and Violence Protection Act of 2000" (Aug. 30, 2001), *posted on AILA InfoNet at Doc. No. 02011734* (Jan. 17, 2002).

C. T Visas for Victims of Human Trafficking, INA § 101(a)(15)(T), 8 U.S.C. § 1101(a)(15)(T)

The Victims of Trafficking and Violence Protection Act of 2000 is available to assist victims of severe human trafficking offenses who are present in the U.S. as a result. The applicant must be either willing to cooperate with law enforcement and comply with investigations and prosecutions of human trafficking, or be under 15 years of age and likely to suffer extreme hardship if removed from the U.S. Procedures are found in 8 CFR § 214.11.

XI. CONCLUSION

Prior to the passage of IIRIRA and AEDPA, immigration attorneys stepped in post-conviction to represent the immigration interests of their clients before the immigration courts. At that time, persons with all types of convictions, including aggravated felonies, were able to request and receive relief from removal. Although some criminal practitioners consulted with immigration counsel prior to trial or plea negotiations, the majority rightly believed that immigration issues could be addressed and fixed post-trial. This no longer the case. Criminal defense attorneys must represent both their clients' due process rights and interests and their immigration interests during the criminal process. Criminal attorneys are now the first defense against potential removal. What defense counsel does in criminal court is gravely important and will have a serious, long-term impact on the non-citizen client. Therefore, it is essential that counsel review and address the issues enumerated in this chapter and consult with an immigration expert in all criminal cases involving non-citizens.

APPENDIX A

CRIMES HELD NOT TO INVOLVE MORAL TURPITUDE

1. Against the Person

Assault – simple assault and battery

United States ex rel. Griffo v. McCandless, 28 F.2d 287 (E.D. Pa. 1928); *In re B.*, 5 I&N Dec. 538 (BIA 1953); *United States ex rel. Zaffarano v. Corsi*, 63 F.2d 757 (2d Cir. 1933); *Ciambelli ex rel. Maranci v. Johnson*, 12 F.2d 465 (D. Mass. 1926).

Assault with an unknown weapon

Matter of B., 1 I&N Dec. 52 (A.G. 1941).

Homicide – by reckless conduct

Matter of Gantus-Bobadilla, 13 I&N Dec. 777 (BIA 1971); *Matter of Szegedi*, 10 I&N Dec. 28 (BIA 1962). *But see Matter of Wojtkow*, 18 I&N Dec. 111 (BIA 1981).

Homicide – involuntary manslaughter[22]

Tutrone v. Shaughnessy, 160 F. Supp 433 (S.D.N.Y. 1958); *United States ex rel. Mongiovi v. Karnuth*, 30 F.2d 825 (W.D.N.Y. 1929); *In re Lopez*, 13 I&N Dec. 725 (BIA 1971); *In re Szegedi*, 10 I&N Dec. 28 (BIA 1962); *Matter of N.*, 1 I&N Dec. 181 (BIA 1941).

Libel

United States ex rel. Mylius v. Uhl, 210 F. 860 (2d Cir. 1914).

2. Sex Offenses

Bastardy

In re D., 1 I&N Dec. 186 (BIA 1941).

Fornication or Mann Act violation (if compulsion was not inherent in crime)

In re R., 6 I&N Dec. 444 (BIA 1954).

Incest

In re B., 2 I&N Dec. 617 (BIA 1946) (no moral turpitude where alien married his niece, which was a *malum prohibitum* offense, not *malum in se*).

Indecent Exposure

In re H., 7 I&N Dec. 301 (BIA 1956).

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[22] If the statute does not distinguish between voluntary and involuntary manslaughter, an examination of the conviction will determine whether it involved moral turpitude. *Matter of S.*, 2 I&N Dec. 559 (AG 1947) (voluntary manslaughter involves moral turpitude); *Matter of D.*, 3 I&N Dec. 51 (BIA 1947); *Matter of B.*, 4 I&N Dec. 493 (BIA 1951); *Matter of Ghunaim*, 15 I&N Dec. 269 (BIA 1975); *Matter of Lopez*, 13 I&N Dec. 725 (BIA 1971).

Mailing an obscene letter
In re D., 1 I&N Dec. 190 (BIA 1942).

Maintaining a nuisance (if knowledge that premises are used for prostitution is not a necessary element)
In re A., 3 I&N Dec. 168 (BIA 1948).

Vagrancy (when charged in lieu of prostitution)
In re V.S., 2 I&N Dec. 703 (BIA 1946).

3. Crimes Against Property

Breaking and entering or unlawful entry (where intent to commit a crime involving moral turpitude is not implicit)
In re N., 8 I&N Dec. 466 (BIA 1959); *Matter of B.*, 2 I&N Dec. 867 (BIA 1947); *Matter of C.*, 2 I&N Dec. 716 (BIA 1947).

Depositing slug in coin box
In re G., 2 I&N Dec. 235 (BIA 1945).

Joy riding
Matter of M., 2 I&N Dec. 686 (BIA 1946); *Matter of D.*, 1 I&N Dec. 143 (BIA 1941).

Passing bad checks
Matter of Zangwill, 18 I&N Dec. 22 (BIA 1981) (where knowledge of insufficient funds is an element, but intent to defraud is not). *But see Matter of Khalik*, 17 I&N Dec. 518 BIA 1980) (involves moral turpitude where intent to defraud required); *Matter of Logan*, 17 I&N Dec. 367 (BIA 1980) (same); *In re B.*, 3 I&N Dec. 278 (BIA 1948).

Petty larceny
Tutrone v. Shaughnessy, 160 F. Supp. 433 (S.D.N.Y. 1958).

Possession of stolen property (where guilty knowledge is not essential)
In re K., 2 I&N Dec. 90 (BIA 1944).

Possession of burglary tools
Matter of S., 6 I&N Dec. 769 (BIA 1955) (absent an intent to use them to commit an offense involving moral turpitude); *United States ex rel. Guarino v. Uhl*, 107 F.2d 399 (2d Cir. 1939).

4. Crimes Against Government

Conspiracy to commit an offense against the United States (unless underlying offense involves moral turpitude)
Hirsch v. INS, 308 F.2d 562 (9th Cir. 1962); *but see Kabongo v. INS*, 837 F.2d 753 (6th Cir. 1988).

Desertion

Matter of S., 5 I&N Dec. 425 (BIA 1953); *In re S.B.*, 4 I&N Dec. 682 (BIA 1952). *But see Matter of R.*, 5 I&N Dec. 29 (BIA 1952).

Escape from prison

In re J., 4 I&N Dec. 512 (BIA 1951); *Matter of M.*, 2 I&N Dec. 871 (BIA 1947); *Matter of Z.*, 1 I&N Dec. 235 (BIA 1942).

Failure to report for induction

In re S., 5 I&N Dec. 425 (BIA 1953).

False statements not amounting to perjury

Matter of De M., 9 I&N Dec. 218 (BIA 1961); *In re S.*, 2 I&N Dec. 353 (BIA 1945); *Matter of J.*, 2 I&N Dec. 285 (BIA 1945).

Structuring financial transactions to avoid currency reports

Goldeshtein v. INS, 8 F.3d 645 (9th Cir. 1993).

5. Violations of Regulatory Laws

Gambling

In re S., 9 I&N Dec. 688 (BIA 1962).

Immigration law violations

In re Granados, 16 I&N Dec. 726 (BIA 1979).

Carrying a weapon without a license

Ex Parte Saraceno, 182 F. 955 (S.D.N.Y. 1910) (an act licensed by the state cannot involve moral turpitude). *Cf. United States ex rel. Andreacchi v. Curran*, 38 F.2d 498 (S.D.N.Y. 1926).

CRIMES HELD TO INVOLVE MORAL TURPITUDE

1. Against the Person

Assault

Atrocious assault and battery – *Matter of Medina*, 15 I&N Dec. 611 (BIA 1976) (aggravated assault); *Matter of Ptasi*, 12 I&N Dec. 790 (BIA 1968) (assault with intent to maim or wound); *Matter of P.*, 7 I&N Dec. 376 (BIA 1956) (same); *Matter of Z.*, 5 I&N Dec. 383 (BIA 1953) (assault with evil criminal intent).

Attempted murder – *In re Awaijane*, 14 I&N Dec. 117 (BIA 1972).

On police officer – *Matter of Logan*, 17 I&N Dec. 367 (BIA 1980); *Matter of Danesh*, 19 I&N Dec. 669 (BIA 1988).

With a deadly weapon with intent to do bodily harm – *Joseph v. INS*, 909 F.2d 605 (1st Cir. 1990); *Matter of O.*, 3 I&N Dec. 193 (BIA 1948); *Matter of P.*, 3 I&N Dec. 5 (BIA 1947); *Matter of G.R.*, 2 I&N Dec. 733 (BIA 1946); *Matter of R.*, 1 I&N Dec. 209 (BIA 1942); *Matter of R.*, 1 I&N Dec. 352 (BIA 1942) (glass milk bottle likely to produce bodily injury).

With intent to commit abortion – *In re M.*, 2 I&N Dec. 525 (BIA 1946).

With intent to kill – *Clark v. Orabona*, 59 F.2d 187 (1st Cir. 1932); *Matter of C.*, 5 I&N Dec. 370 (BIA 1953) (assault with intent to murder).

With intent to rape – *In re Beato*, 10 I&N Dec. 730 (1964).

With intent to rob – *United States ex rel. Rizzio v. Kenney*, 50 F.2d 418 (D. Conn. 1931); *Matter of Quadara*, 11 I&N Dec. 457 (BIA 1966).

With a weapon – *Matter of Goodalle*, 12 I&N Dec. 106 (BIA 1967) (knife); *Matter of S.*, 5 I&N Dec. 668 (BIA 1954) (revolver); *Matter of J.*, 4 I&N Dec. 512 (BIA 1951); *Matter of N.*, 2 I&N Dec. 201 (BIA 1944).

Corporal injury to a child (resulting in traumatic condition)

Matter of Nodahl, 12 I&N Dec. 338 (BIA 1967), *aff'd*, *Nodahl v. INS*, 407 F.2d 1405 (9th Cir. 1969).

Homicide – murder and voluntary manslaughter

Cabral v. INS, 15 F.3d 193 (1st Cir. 1994) (accessory after the fact); *Barber v. INS*, 968 F.2d 1220 (9th Cir. 1992) (unpublished disposition); *Saleh v. INS*, 962 F.2d 234 (2d Cir. 1992); *De Lucia v. Flagg*, 297 F.2d 58 (7th Cir. 1961), *United States ex rel. Allessio v. Day*, 42 F.2d 217 (2d Cir. 1930); *Matter of Rosario*, 15 I&N Dec. 416 (BIA 1975); *Matter of Ptasi*, 12 I&N Dec. 790 (BIA 1968); *Matter of Sanchez-Marin*, 11 I&N Dec. 264 (BIA 1965); *In re Abi Rached*, 10 I&N Dec. 551 (BIA 1964).

Kidnapping

In re C.M., 9 I&N Dec. 487 (BIA 1961); *Matter of Nakoi*, 14 I&N Dec. 208 (BIA 1972). *But see Matter of Farinas*, 12 I&N Dec. 467 (BIA 1967) (taking female under age of eighteen for purpose of marriage without her parents' consent not so depraved, base, or vile as to involve moral turpitude).

Mayhem

Matter of Santoro, 11 I&N Dec. 607 (BIA 1966).

Robbery

Taefu v. INS, 892 F.2d 84 (9th Cir. 1989); *United States ex rel. Meyer v. Day*, 54 F.2d 336 (2d Cir. 1931); *Matter of Martin*, 18 I&N Dec. 226 (BIA 1982); *Matter of Kim*, 17 I&N Dec. 144 (BIA 1979); *Matter of Medina-Lopez*, 10 I&N Dec. 7 (BIA 1962); *Matter of G.*, 7 I&N Dec. 114 (BIA 1956) (attempted robbery).

2. Sexual Offenses

Adultery

United States ex rel. Tourny v. Reimer, 8 F. Supp. 91 (S.D.N.Y. 1934); *Matter of H.*, 7 I&N Dec. 616 (BIA 1957); *Matter of Cienfuegos*, 17 I&N Dec. 184 (BIA 1979); *Matter of A.*, 3 I&N Dec. 168 (BIA 1948).

Bigamy

In re E., 2 I&N Dec. 328 (1945).

Carnal knowledge

Matter of R., 3 I&N Dec. 562 (BIA 1949).

Indecent assault

Matter of S., 5 I&N Dec. 686 (BIA 1954); *Matter of B.*, 3 I&N Dec. 1 (BIA 1947); *Matter of Z.*, 7 I&N Dec. 253 (BIA 1956); *Matter of Beato*, 10 I&N Dec. 730 (BIA 1964) (attempted assault with intent to commit carnal abuse and rape).

Indecent liberties with a minor

Castle v. INS, 541 F.2d 1064 (4th Cir. 1976); *Matter of Imber*, 16 I&N Dec. 256 (BIA 1977); *Matter of Garcia*, 11 I&N Dec. 521 (BIA 1966); *Matter of G.*, 6 I&N Dec. 461 (BIA 1954).

Lewd and lascivious conduct

Corneille v. INS, 947 F.2d 949 (9th Cir. 1991) (unpublished disposition); *Matter of P.*, 8 I&N Dec. 424 (BIA 1959); *In re M.*, 7 I&N Dec. 144 (BIA 1956); *Matter of C.*, 3 I&N Dec. 790 (BIA 1949); *Matter of A.*, 3 I&N Dec. 168 (BIA 1948); *Matter of J.*, 2 I&N Dec. 533 (BIA 1946); *Matter of M.*, 2 I&N Dec. 530 (BIA 1946).

Lewdness

Fitzgerald ex rel. Miceli v. Landon, 238 F.2d 864 (1st Cir. 1956).

Oral sex perversion

Matter of Leyva, 16 I&N Dec. 118 (BIA 1977).

Prostitution

Land ex rel. Cronin v. Tillinghast, 38 F.2d 231 (1st Cir. 1930); *Matter of K.*, 3 I&N Dec. 575 (BIA 1949) (solicitation to commit sodomy).

Rape – common law

Marciano v. INS, 450 F.2d 1022 (8th Cir. 1971); *Ng Sui Wing v. United States*, 46 F.2d 755 (7th Cir. 1931).

Rape – statutory

Pino v. Nicolls, 215 F.2d 237 (1st Cir. 1954), *rev'd on other grounds*, 349 U.S. 901 (1955); *Matter of Dingena*, 11 I&N Dec. 723 (BIA 1966); *Matter of S.*, 2 I&N Dec. 553 (BIA 1946).

3. Crimes Against Property

Arson

United States v. Hammad, 720 F. Supp. 240 (E.D.N.Y. 1989); *Matter of T.*, 6 I&N Dec. 835 (BIA 1955); *In re S.*, 3 I&N Dec. 617 (BIA 1949).

Blackmail

Lehmann v. United States ex rel. Carson, 353 U.S. 685 (1957).

Burglary

In re Garcia-Garrocho, 19 I&N Dec. 423 (BIA 1986); *Matter of De La Nues*, 18 I&N Dec. 140 (BIA 1981); *Matter of Frentescu*, 18 I&N Dec. 244 (BIA 1982); *Matter of C.*, 8 I&N Dec. 276 (BIA 1959) (breaking and entering with intent to commit offense involving moral turpitude); *Matter of W.*, 4 I&N Dec. 241 (BIA 1951) (same); *Matter of L.*, 6 I&N Dec. 666 (BIA 1955); *Matter of Farunas*, 12 I&N Dec. 467 (BIA 1967); *Matter of R.*, 5 I&N Dec. 612 (BIA 1954); *Matter of C-P-*, 8 I&N Dec. 504 (BIA 1959) (burglary of a locked automobile); *Matter of M.G.*, 5 I&N Dec. 531 (BIA 1953); *Matter of Z.*, 5 I&N Dec. 383 (BIA 1953); *Matter of E.*, 2 I&N Dec. 134 (BIA 1944); *Matter of V.T.*, 2 I&N Dec. 213 (BIA 1944); *In re R.*, 1 I&N Dec. 540 (BIA 1943).

Destruction of property (malicious)

In re M., 3 I&N Dec. 272 (BIA 1948).

Extortion

In re F., 3 I&N Dec. 361 (BIA 1949).

Forgery

United States ex rel. Robinson v. Day, 51 F.2d 1022 (2d Cir. 1931); *Matter of Jimenez*, 14 I&N Dec. 442 (BIA 1973) (possession of forgery devices with intent to use for purpose of forgery); *Matter of Acosta*, 14 I&N Dec. 338 (BIA 1973) (transportation of forged securities in interstate commerce); *Matter of Fernandez*, 14 I&N Dec. 24 (BIA 1972) (same); *Matter of H.*, 6 I&N Dec. 614 (BIA 1955); *Matter of O'B.*, 6 I&N Dec. 280 (BIA 1954) (forgery of narcotic prescription); *Matter of A.*, 5 I&N Dec. 52 (BIA 1953) (same).

Fraud

Mendoza v. INS, 16 F.3d 335 (9th Cir. 1994); *Matter of Correa Garcies*, 20 I&N Dec. 451 (BIA 1992); *Jordan v. DeGeorge*, 341 U.S. 223 (1951); *McNaughton v. INS*, 612 F.2d 457 (9th Cir. 1980); *In re Squires*, 17 I&N Dec. 561 (BIA 1980); *In re Khalik*, 17 I&N Dec. 518 (BIA 1980).

Larceny/theft

In re Grazley, 14 I&N Dec. 330 (BIA 1973); *Matter of De La Nues*, 18 I&N Dec. 140 (BIA 1981); *Matter of Westman*, 17 I&N Dec. 50 (BIA 1979) (attempted grand larceny by passing bad checks, requiring intent to defraud); *Matter of Vosganian*, 12 I&N Dec. 1 (BIA 1966); *Matter of Winter*, 12 I&N Dec. 638 (BIA 1967); *Matter of Chouinard*, 11 I&N Dec. 839 (BIA 1966); *Matter of F.*, 6 I&N Dec. 783 (BIA 1955); *Matter of L.*, 6 I&N Dec. 666 (BIA 1955); *Matter of H.*, 6 I&N Dec. 614 (BIA 1955); *Morasch v. INS*, 363 F.2d 30 (9th Cir. 1966); *Wyngaard v. Kennedy*, 295 F.2d 184 (D.C. Cir. 1961).

Passing bad checks

Matter of Balao, 20 I&N Dec. 440 (BIA 1992); *Matter of Bart*, 20 I&N Dec. 436 (BIA 1992) (issuing bad checks); *Matter of Khalik*, 17 I&N Dec. 518 (BIA 1980) (where intent to defraud required); *Matter of Logan*, 17 I&N Dec. 367 (BIA 1980) (same); *In re B.*, 3 I&N Dec. 278 (BIA 1948). *But see Matter of Zangwill*, 18 I&N Dec. 22 (BIA 1981) (no moral turpitude where knowledge of insufficient funds is an element but intent to defraud is not).

Receiving stolen property

Matter of Salvail, 17 I&N Dec. 19 (BIA 1979); *Matter of A.*, 7 I&N Dec. 626 (BIA 1957); *Matter of V-D-B-*, 8 I&N Dec. 608 (BIA 1960); *Matter of Z.*, 7 I&N Dec. 253 (BIA 1956); *Matter of G.*, 7 I&N Dec. 171 (BIA 1956); *In re R.*, 6 I&N Dec. 772 (BIA 1955).

Trespass (malicious)

In re Esfandiary, 16 I&N Dec. 659 (BIA 1979).

4. Crimes Against Government

Bribery

Okabe v. INS, 671 F.2d 863 (5th Cir. 1982); *United States ex rel. Sollazzo v. Esperdy*, 285 F.2d 341 (2d Cir. 1961); *In re H.*, 6 I&N Dec. 358 (BIA 1954).

Counterfeit currency

Matter of Lethbridge, 11 I&N Dec. 444 (BIA 1965); *Matter of A.*, 7 I&N Dec. 128 (BIA 1956); *Matter of P.*, 6 I&N Dec. 795 (BIA 1955).

Counterfeiting

United States ex rel. Volpe v. Smith, 289 U.S. 422 (1933).

Fraud

Iredia v. INS, 981 F.2d 847 (5th Cir. 1993) (unauthorized use of credit cards); *Jordan v. DeGeorge*, 341 U.S. 223 (1951) (conspiracy to defraud U.S. of taxes); *Kabongo v. INS*, 837 F.2d 753 (6th Cir. 1988); *Emmanuel v. INS*, 579 F. Supp. 1541 (D.V.I. 1984); *Matter of Squires*, 17 I&N Dec. 561 (BIA 1980) (obtaining money by false pretense with intent to defraud); *Matter of Bader*, 17 I&N Dec. 525 (BIA 1980) (same); *Matter of Khalik*, 17 I&N Dec. 518 (BIA 1980) (passing worthless check with intent to defraud); *Matter of*

Logan, 17 I&N Dec. 367 (BIA 1980) (same); *Matter of McLean*, 12 I&N Dec. 551 (BIA 1967) (same); *Matter of Haller*, 12 I&N Dec. 319 (BIA 1967) (same); *Matter of Chouinard*, 11 I&N Dec. 839 (BIA 1966) (same, involving illegal use of a credit card); *Matter of McNaughton*, 16 I&N Dec. 569 (BIA 1978); *Matter of Acosta*, 14 I&N Dec. 338 (BIA 1973) (making false statement to acquire firearm, in violation of 18 U.S.C. § 922(a)(6)); *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973).

Interference with trade

United States ex rel. Circella v. Neelly, 115 F. Supp. 615, 624-25 (N.D. Ill. 1953) ("conspiring to interfere with trade and commerce by violence, threats, and coercion"), *aff'd*, *United States ex rel. Circella v. Sahli*, 216 F.2d 33 (7th Cir. 1954).

Mail Fraud

United States v. Hammad, 720 F. Supp. 240 (E.D.N.Y. 1989); *Nason v. INS*, 394 F.2d 223 (2d Cir. 1968); *Ponzi v. Ward*, 7 F. Supp. 736 (D. Mass. 1934).

Perjury

Onadja v. INS, 974 F.2d 816 (9th Cir. 1989); *United States ex rel. Boraca v. Schlotfeldt*, 109 F.2d 106 (7th Cir. 1940); *Matter of P.*, 4 I&N Dec. 373 (BIA 1951).

Tax evasion

Chanan Din Khan v. Barber, 253 F.2d 547 (9th Cir. 1958).

5. Weapons Offenses

Carrying a concealed and deadly weapon with intent to use it against the person of another

Matter of S., 8 I&N Dec. 344 (BIA 1959).

Interference with law enforcement by threatening with a knife

In re Logan, 17 I&N Dec. 367 (BIA 1980).

Possessing or carrying an automatic weapon or sawed-off shotgun

8 U.S.C. § 1251(a)(14); *Matter of Rodriguez*, 14 I&N Dec. 706 (BIA 1974).

6. Narcotics Offences

Attempted possession

Abuda v. INS, 802 F.2d 1096 (9th Cir. 1986).

APPENDIX B

CLIENT QUESTIONNAIRE ON IMMIGRATION ISSUES

Instruction Sheet

To determine the immigration status of your client, including obtaining information that may be helpful to an immigration expert/attorney with whom you consult, you should ask the following questions:

- Full name, date of birth, place of birth: Place of birth information may be helpful in determining whether your client is eligible for certain forms of relief, including temporary protected status (TPS).

- Immigration Status: There are many different types of immigration status in the United States, one of which fits your client. The following are some types of immigration status: (1) legal permanent residents (green card holders); (2) nonimmigrant visa holders – persons in the United States on temporary visas, including students, tourists, and temporary workers; (3) asylum applicants; (4) NACARA applicants; (5) temporary protected status – many persons from conflicted countries have been granted what is called TPS; (6) undocumented – persons who entered the United States without inspection, the majority of whom crossed the southern border.

- Date(s) of entry into the United States: Be sure to ask your client when he or she first came to the United States, and how many times he or she has departed and reentered.

- Contact with Immigration: Has your client had any contact with the DHS? If your client is an LPR or has some other lawful immigration status, he or she has obviously had some contact with USCIS. However, this question may also apply to the undocumented person. Inquire if he or she has ever been detained or placed in immigration proceedings by USCIS. Ask for copies of any and all immigration papers, including a copy of his or her green card.

- Family in the U.S.: Get information regarding the immigration status of any immediate family members presently in the United States.

- Alien Registration Number or "A" Number: This number begins with an "A" and appears on your client's green card, his or her work authorization, and any other immigration documents.

- Prior criminal convictions or conduct: You should carefully question your client about past criminal conduct and convictions. This becomes important in determining whether or not he or she may be removable as a result of multiple convictions or having committed crimes of moral turpitude.

****

Full name, date of birth, place of birth: _____

_____

_____

Immigration Status (include information on any contact with the DHS): _____

_____

_____

_____

_____

Date of Entry: _____

Family in the United States: _____

_____

_____

_____

Alien Number: _____

Criminal History (list all criminal convictions, including date, criminal code section, and sentence where possible):

_____

_____

_____

_____

Pending Criminal Charges (include elements of offense and criminal code section):

_____

_____

_____

APPENDIX C

CONTACTS

Cecil C. Harrigan, Esquire
1638 R Street, N.W.
Suite 115
Washington, D.C. 20009
(202) 387-8866

Elliot Lichtman, Esquire
Lichtman, Trister, Singer & Ross
1666 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20009

Melanie Nezer, Esquire
Immigration and Refugee Services of America
1717 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 797-2105

Greg Nojeim, Esquire
American Civil Liberties Union
122 Maryland Avenue, N.E.
Washington, D.C. 20002
(202) 544-1681

Laura Kelsey Rhodes, Esquire
Law Offices of Albright and Rhodes, L.L.C.
200-A Monroe Street
Suite 305
Rockville, MD 20850
(301) 424-0094

Lory Diana Rosenberg, Esquire
Immigration Defense & Expert Assistance (IDEA)
200-A Monroe Street
Suite 305
Rockville, MD 20850
(301) 424-9048

Martha Saenz, Esquire
1629 K Street, N.W.
Suite 500
Washington, D.C. 20006
(202) 429-0925

Katie D'Adamo Guevara, Esquire
Immigration Staff Attorney
Public Defender Service for the
District of Columbia
633 Indiana Avenue, N.W.
Washington, D.C. 20004
(202) 628-1200

Washington Lawyer's Committee for
Civil Rights and Urban Affairs
11 Dupont Circle, N.W.
Suite 400
Washington, D.C. 20036
(202) 319-1000

Rex Wingerter, Esquire
7309 Baltimore Avenue
Suite 115
College Park, MD 20740
(301) 779-2111

APPENDIX D

ORGANIZATIONS

Ayuda, Inc.
1736 Columbia Road, N.W.
Washington, D.C. 20009
(202) 387-4848

Capital Area Immigrants Rights Coalition ("CAIR" Coalition)
(202) 331-3320
(202) 331-3341 (fax)
www.caircoalition.org

Catholic Charities Hogar Hispano
6201 Leesburg Pike
Suite 307
Falls Church, VA 22044
(703) 534-9732 or (703) 534-9805

Catholic Charities Immigration Legal Services
1815 H Street, N.W.
Suite 500
Washington, D.C. 20005
(202) 466-6611

Catholic Charities Immigration Legal Services
11160 Veirs Mill Road
Suite 700
Wheaton, MD 20902
(202) 628-4262 (D.C.)

Central American Resource Center ("CARECEN")
1460 Columbia Road, N.W.
Washington, D.C. 20009
(202) 328-9799

Center for Applied Legal Studies
Georgetown University Law Center
111 F Street, N.W.
Suite 332
Washington, D.C. 20017-1194

Ethiopian Community Development Council, Inc.
1038 South Highland Street
Arlington, VA 22204
(703) 685-0510

Institute for the Study of International Migration at Georgetown University
(202) 687-2258

Korean Community Service Center
7720 Alaska Avenue, N.W.
Washington, D.C. 20012
(202) 882-8270

Lawyers Committee for Human Rights
100 Maryland Avenue, N.E.
Suite 500
Washington, D.C. 20002-5625
(202) 547-5692 or (202) 543-5999

Lutheran Immigration and Refugee Service
122 C Street, N.W.
Washington, D.C. 20001
(202) 783-7509

Spanish Catholic Center
1618 Monroe Street, N.W.
Washington, D.C. 20008
(202) 234-7349

Spanish Catholic Center
1015 University Boulevard East
Silver Spring, MD 20903
(301) 431-3773

United States Catholic Conference
3211 4th Street, N.E.
Washington, D.C. 20001-2095
(202) 541-3256 or (202) 722-8750

World Organization Against Torture USA
1015 8th Street, N.W.
Suite 400
Washington, D.C. 20036
(202) 861-6495 or (202) 659-2724

CHAPTER 18

SPEEDY TRIAL

The Supreme Court announced the basic principles governing the law of speedy trial in *Barker v. Wingo*, 407 U.S. 514 (1972). Rejecting *per se* rules, the Court considered four factors in determining whether a speedy trial was denied: (1) length of the delay; (2) reasons for the delay; (3) whether and how the defendant asserted the right to a speedy trial; and (4) the prejudice to the defendant due to the delay. Subsequent decisions have refined the analysis through application to specific situations, but the fundamental principles of speedy trial law have remained the same. *Graves v. United States*, 490 A.2d 1086 (D.C. 1984) (en banc), adopted the *Barker* analysis.[1] The D.C. Court of Appeals conducts the four-factor inquiry required by *Barker* in evaluating speedy trial claims. *Parker v. United States*, 745 A.2d 933, 936 (D.C. 2000).

I. THE SIXTH AMENDMENT RIGHT TO A SPEEDY TRIAL

The Sixth Amendment right to a speedy trial is "triggered by arrest, indictment, or other official accusation." *Doggett v. United States*, 505 U.S. 647, 655 (1992). *Doggett* explicitly rejected the government's argument that the core concerns of the Sixth Amendment right to a speedy trial are implicated only after arrest or arraignment. *Id*. at 654-55;[2] *cf. United States v. Loud Hawk*, 474 U.S. 302, 312 (1986) ("when defendants are not incarcerated or subjected to other substantial restrictions on their liberty, a court should not weigh that time towards a claim under the Speedy Trial Clause"); *United States v. MacDonald*, 456 U.S. 1, 8 (1982) (time after dismissal of charges under military law and before indictment for similar charges under civilian criminal law does not count toward speedy trial claim); *United States v. Marion*, 404 U.S. 307 (1971) (time of delay between end of criminal activity and indictment does not count toward speedy trial claim); *United States v. (Norman) Day*, 697 A.2d 31 (D.C. 1997) (pre-indictment delay does not implicate Sixth Amendment speedy trial right). If a charge is dismissed and then re-brought, the period between dismissal and re-filing does not count for speedy trial purposes. *Loud Hawk*, 474 U.S. at 309-11; *MacDonald*, 456 U.S. at 8; *Dickerson v. United States*, 650 A.2d 680, 684 (D.C. 1994); *Givens v. United States*, 644 A.2d 1373 (D.C. 1994); *Townsend v. United States*, 512 A.2d 994 (D.C. 1986).

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[1] A different set of considerations governs the speedy trial right in federal courts under the Speedy Trial Act, 18 U.S. §§ 3161 *et seq.*, which does not apply to cases in Superior Court, *see Walker v. United States*, 481 A.2d 1308, 1309 n.2 (D.C. 1984); *United States v. Alston*, 412 A.2d 351, 356 n.10 (D.C. 1980), or to the pre-transfer period in cases originally filed in Superior Court and later transferred to federal court, *United States v. Mills*, 964 F.2d 1186 (D.C. Cir. 1992) (en banc). However, there is a statutory guarantee of indictment within 90 days and a trial within 100 days (subject to exceptions) for defendants preventively detained under D.C. Code § 23-1322(h)(1). *See also Graves*, 490 A.2d at 1109 (Ferren, J., dissenting). Yet another set of considerations governs respondents in juvenile cases. *See In re D.H.*, 666 A.2d 462, 473 (D.C. 1995) ("a child has a due process right to a fair trial, including a speedy one, consistent with the statutory purpose of the juvenile code, and consonant with the protection of the child and the community"). For a more detailed discussion of the due process analysis, *see infra* Section II.

[2] *Doggett* relaxed the requirement that the defendant furnish affirmative proof of prejudice. 505 U.S. at 655. Doggett's inability to demonstrate actual prejudice did not defeat his speedy trial claim because the excessive delay between indictment and arrest (8.5 years) presumptively compromised the trial's reliability in unidentifiable ways. *Id*. *See infra* Section I.D.

Violation of the right to a speedy trial requires dismissal of the charges with prejudice. *Strunk v. United States*, 412 U.S. 434, 439-40 (1973); *Turner v. United States*, 622 A.2d 667, 673 n.8 (D.C. 1993). Because this is the sole remedy, courts are reluctant to find a denial of the right to a speedy trial absent a strong showing of prejudice. *See Bowman v. United States*, 385 A.2d 28, 32 (D.C. 1978).[3] Dissenting in *Graves*, 490 A.2d at 1108-09, Judge Ferren noted that the reluctance to dismiss charges following a conviction has resulted in appellate decisions that compromise the Sixth Amendment right. He suggests that trial courts take intermediate steps when a defendant asserts the right to a speedy trial. The court could advance the case on the trial calendar; advance other pre-trial proceedings, such as motions to suppress, to reduce delays due to pre-trial government appeals; or release the defendant from custody if the delay continues. *See also Loud Hawk*, 474 U.S. at 314 (quoting *Barker*, 407 U.S. at 522) (calling dismissal an "unsatisfactorily severe remedy").

None of the *Barker* factors has "talismanic qualities"; they are interrelated and "must be considered together with such other circumstances as may be relevant" in the "difficult and sensitive balancing process" by which a court determines whether a defendant's speedy trial right has been denied. *Barker*, 407 U.S. at 533;[4] *see Moore v. United States*, 359 A.2d 299, 302 (D.C. 1976); *United States v. Brown*, 520 F.2d 1106, 1110 (D.C. Cir. 1975). The trial court's factual findings will be rejected only if they are plainly wrong or without evidence to support them. *Graves*, 490 A.2d at 1091; *see Jones v. United States*, 483 A.2d 1149, 1153 (D.C. 1984); *Reid v. United States*, 402 A.2d 835, 837 (D.C. 1979).

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[3] Local decisions containing a significant analysis of the issues include *Dickerson*, 650 A.2d 680; *Turner*, 622 A.2d 667; *Gayden v. United States*, 584 A.2d 578 (D.C. 1990); *Sanders v. United States*, 550 A.2d 343 (D.C. 1988); *Wynn v. United States*, 538 A.2d 1139 (D.C. 1988); *Townsend*, 512 A.2d 994; *Jackson v. United States*, 503 A.2d 1225 (D.C. 1986); *Graves*, 490 A.2d 1086; *Head v. United States*, 451 A.2d 615 (D.C. 1982); *Parks v. United States*, 451 A.2d 591 (D.C. 1982); *Tribble v. United States*, 447 A.2d 766 (D.C. 1982); *Turner v. United States*, 443 A.2d 542 (D.C. 1982); *United States v. Ellis*, 408 A.2d 971 (D.C. 1979); *Bethea v. United States*, 395 A.2d 787 (D.C. 1978); and *Branch v. United States*, 372 A.2d 998 (D.C. 1977). The defendants prevailed in *Ellis*, *Bethea*, and *Branch*. The critical factors in *Branch* were the government's failure to provide an adequate justification for the 16-month delay, incarceration during eight of the sixteen months, and assertion of the right while incarcerated. *Ellis* (22-month delay) and *Bethea* emphasized the uncomplicated nature of the cases and the anxiety of the defendants awaiting trial in misdemeanor cases for extraordinarily long periods.

[4] *United States v. Bolden*, 381 A.2d 624 (D.C. 1977), found reversible error when the trial court overemphasized the delay and largely ignored the other three factors. *But see Ellis*, 408 A.2d 971 (a superficial analysis of the other three factors was found adequate where the twenty-two month delay was exceptionally long for a simple misdemeanor).

Right to Speedy Trial:

- ✓ Triggered by arrest, indictment, or other official accusation
- ✓ Factors used in determining if right is violated:
  - Length of delay
  - Reason for delay
  - Whether and how defendant asserted right
  - Prejudice to the defendant
- ✓ Remedy: dismissal without prejudice
  - Requires strong showing of prejudice

A. Length of the Delay

Although there is "no constitutional basis for holding that the speedy trial right can be quantified into a specified number of days or months," *Barker*, 407 U.S. at 523, the "length of the delay [is] to some extent a triggering mechanism" and, "[u]ntil there is some delay which is presumptively prejudicial, there is no necessity for inquiry into the other factors that go into the balance." *Id*. at 530; *see also Doggett*, 505 U.S. at 652.

Benchmarks for Delays: Courts in the District of Columbia have developed benchmarks for evaluating the delay's significance. A delay of over six months warrants inquiry and justification. *Branch*, 372 A.2d at 1000 n.3 (citing *United States v. Ransom*, 465 F.2d 672 (D.C. Cir. 1972)); *United States v. Lara*, 520 F.2d 460, 464 (D.C. Cir. 1975). *But see United States v. Bolden*, 381 A.2d 624, 627 (D.C. 1977) (further inquiry not required unless delay is presumptively prejudicial). A claim based on delay of a year or more has *prima facie* merit. *See Doggett*, 505 U.S. at 652 n.1; *Gayden*, 584 A.2d at 583; *White v. United States*, 484 A.2d 553, 557 (D.C. 1984); *Head v. United States*, 451 A.2d 615, 620 (1982); *Glass v. United States*, 395 A.2d 796, 801 (D.C. 1978); *Bethea*, 395 A.2d at 790. Prejudice to the defendant is presumed and a heavy burden shifts to the government to justify the delay. *Bolden*, 381 A.2d at 627; *Branch*, 372 A.2d at 1000; *see also Miller v. United States*, 479 A.2d 862, 866 (D.C. 1984).[5] "A delay of [one year], of course, does not conclusively establish a speedy trial claim; rather it requires that the court analyze the three remaining *Barker* factors to determine if reversal is warranted." *Townsend*, 512 A.2d at 998. Where the delay is less than one year, no presumption attaches. *Towles v. United States*, 428 A.2d 836, 842 (D.C. 1981), *rev'd on other grounds*, 496 A.2d 560 (D.C. 1985); *see Reese v. United States*, 467 A.2d 152, 159 (D.C. 1983); *Hilton v. United States*, 435 A.2d 383, 391 (D.C. 1981).

[5] *But see Wright v. United States*, 513 A.2d 804, 810 n.8 (D.C. 1986) (one year plus two weeks "barely enough" for a presumptive violation); *Reed v. United States*, 383 A.2d 316, 319 (D.C. 1978) ("one-year delay period is a simple rule of thumb" that "simply triggers review" and attaches "no 'evidentiary' presumption to the delay"); *Bowman*, 385 A.2d 28, 30 n.3 (D.C. 1978). Indeed, *Bowman* took notice of the overwhelming volume of criminal cases in the Superior Court in concluding that "the passage of more than 365 days from arrest to trial (a period which certainly has no talismanic constitutional significance) may become the rule rather than the exception." *Id*.

The burden on the government to justify the delay varies according to the length of the delay and the seriousness of the offense; the longer the delay, the heavier the government's burden to justify it. *See Doggett*, 505 U.S. at 652; *(Tony) Turner*, 622 A.2d at 675; *Jackson*, 503 A.2d at 1228; *Graves*, 490 A.2d at 1091; *United States v. Rucker*, 464 F.2d 823, 825 (D.C. Cir. 1972); *Day v. United States*, 390 A.2d 957, 970 (D.C. 1978), *overruled in part* by *Graves*, 490 A.2d at 1095.

Conversely, the more serious and complicated the offense, the longer the allowable delay. "[T]he delay that can be tolerated for an ordinary street crime is considerably less than for a serious, complex conspiracy charge." *Barker*, 407 U.S. at 531; *Gayden*, 584 A.2d at 583; *Branch*, 372 A.2d at 1000; *see also Hartridge v. United States*, 896 A.2d 198 (D.C. 2006) (seriousness of premeditated murder charge one factor in finding no speedy trial right violation for 27 month delay); *Akins v. United States*, 679 A.2d 1017, 1024 (1996). Thus, in ordering dismissal in *Bethea*, the court relied heavily on the "uncomplicated nature of the case;" a nineteen-month delay in a simple misdemeanor "weigh[ed] heavily in favor of dismissal." 395 A.2d at 791; *see Ellis*, 408 A.2d 971 (D.C. 1979). Yet the court has frequently cautioned against placing undue weight on time alone without giving adequate consideration to the other factors. *See, e.g.*, *Akins*, 679 A.2d at 1024 (court found no delay where the defendant was tried on the second scheduled trial date); *Warren v. United States*, 436 A.2d 821 (D.C. 1981).

2014 Supplement

***Diggs v. United States*, 28 A.3d 585 (D.C. 2011).** Seven-year delay between homicide and commencement of trial did not violate defendant's right to speedy trial where defendant's claims of prejudice were too speculative to show actual prejudice to his defense and where no showing was made that police acted with improper motivation or recklessness in not arresting defendant in a timely manner.

B. Reasons for the Delay

1. Delay Attributable to the Government

"[C]losely related to length of delay is the reason the government assigns to justify the delay . . . [D]ifferent weights should be assigned to different reasons." *Barker*, 407 U.S. at 531. The party responsible for the delay and the party's motivations are key elements. "[W]henever the government's action at any stage of the proceedings indicates bad faith, neglect or a purpose to secure delay itself or some other procedural advantage, the resulting delay is not justified." *Lara*, 520 F.2d at 464 (quoting *United States v. Bishton*, 463 F.2d 887, 890 (D.C. Cir. 1972); *see also United States v. Perkins*, 374 A.2d 882, 883-84 (D.C. 1977).

Intentional Delays: In *Graves*, the *en banc* Court of Appeals "refined the analysis" by dividing delay attributable to the government into three categories: intentional, neutral, and "significant." *Id*. at 1092. Intentional delay on the part of the government to: (1) hamper the defense; (2) gain some tactical advantage; or (3) harass the defendant cannot be justified. *Barker*, 407 U.S. at 531 n.32.

Neutral Delays: In contrast, delays caused by crowded court dockets and other institutional delays are assessed against the government but weigh less heavily in the balance. *Id*. at 531; *see Sanders*, 550 A.2d at 346; *Warren*, 436 A.2d at 834; *Perkins*, 374 A.2d at 883-84. Although such delays are attributable to the government, they are "neutral" and "may be easily out-weighed by an inadequate assertion of the speedy trial right or a low threshold of prejudice." *Bethea*, 395 A.2d at 791; *see also Long v. United States*, 910 A.2d 298, 303 (D.C. 2006); *Akins*, 679 A.2d at 1023; *Gayden*, 584 A.2d at 584; *Head v. United States*, 451 A.2d 615, 620-21 (D.C. 1982). Some neutral delays are given slightly more or less weight, which *Graves* termed "neutral +" or "neutral -." 490 A.2d at 1097 n.12; *see also Turner*, 622 A.2d at 677.

Significant Delays: Between intentional and neutral delays are "significant" delays for actions less culpable than deliberate foot-dragging to gain tactical advantage, but more culpable than the neutral category exemplified by failure to advance trial dates due to court congestion. *Graves*, 490 A.2d at 1092 (citing examples of "significant" delay); *see also Hartridge*, 896 A.2d at 210 (delay caused by government's desire for joinder of all defendants in the same proceeding is not neutral but does not weigh heavily against the government); *Akins*, 679 A.2d at 1023-24; *Gayden*, 584 A.2d at 583-84.

Furthermore,

> the passing of a considerable length of time, especially after an accused has asserted his speedy trial right, should motivate the government to seek a prompt trial. If the government fails to take the necessary steps to effect an immediate trial, then the delay must be accorded substantial weight in the speedy trial calculus.

Bethea, 395 A.2d at 791-92 (citation omitted). These categories are not rigid rules but "rough benchmarks to guide analysis." *Graves*, 490 A.2d at 1092.

The weight to be assigned to the government's negligent delay is assessed in relationship to the prejudice to the defendant's ability to present a defense. "[T]he weight we assign to official negligence compounds over time as the presumption of evidentiary prejudice grows." *Doggett*, 505 U.S. at 657.

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***Ward v. United States*, 55 A.3d 840 (D.C. 2012).** In determining whether defendant was denied right to speedy trial, court employed a balancing test in which it did not weigh heavily against government the 33-month delay in bringing case to trial, even though shooting death seemed a simple offense, because government was investigating defendant's drug dealing and other possible RICO charges.

2. Delay Attributable to Defense

Delay caused by the defendant is excluded from the calculus. *See Long*, 910 A.2d at 303 (seeking new counsel and requesting continuance); *Turner*, 622 A.2d at 676; Sanders, 550 A.2d

at 346 (seeking new counsel and taking interlocutory appeal); *Wynn*, 538 A.2d at 1142-43 (delay required by appointing new counsel at defendant's request); *Cates v. United States*, 379 A.2d 968, 972 (D.C. 1977); *Chatman v. United States*, 377 A.2d 1155, 1157 n.3 (D.C. 1977) (defense request for continuance).[6] Delay caused by actions of appointed counsel is attributed to defendant, not to the state, with the exception of cases evincing a "systemic breakdown in the public defender system." *Vermont v. Brillon*, 129 S. Ct. 1283, 1292 (2009) (internal quotations omitted). Delays due to change in appointed counsel might in some cases be charged to government, but not where changes came at request of defendant. *Id*. Mutually agreed upon continuances may also be disregarded. *United States v. Calhoun*, 363 A.2d 277, 280 n.3 (D.C. 1976). Furthermore, acquiescence in delay generally, evidenced by failure to object to continuances or to demand a speedy trial on such occasions, will result in minimal weight being accorded to the delay. *Reed*, 383 A.2d at 319; *see also Head*, 451 A.2d at 621.

Assessing delay attributable to a co-defendant is more difficult. Because joinder is initially within the discretion of the prosecution and is a procedural device designed primarily to further the government's interest in "economy and efficiency," *Davis v. United States*, 367 A.2d 1254, 1263 (D.C. 1976), delays caused by a co-defendant are not properly chargeable to the defendant. However, where a co-defendant becomes unavailable for trial, and the government desires joinder, the delay by a co-defendant does not weigh heavily against the government. *See Hartridge*, 896 A.2d at 210; *Adams v. United States*, 466 A.2d 439 (D.C. 1983). If there is no objection or request to sever, the delays caused by a co-defendant will be charged to the defendant. *See (Jewel) Turner*, 443 A.2d at 546. To protect the record when the co-defendant requests the continuance, counsel should request a severance so that the trial against the defendant may begin immediately. In *Townsend*, the government's investigation of the case against a co-defendant, and its desire to try the defendants jointly, caused a ten-month delay between arrest and indictment. 512 A.2d 994. The court held that the "proffered reason does not excuse the delay [n]or render it neutral" but added that, because it was not intended to gain a strategic advantage over the defendant himself, the time did not weigh heavily against the government. *Id.* at 999.

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***Silver v. United States*, 73 A.3d 1022 (D.C. 2013).** No violation of right to speedy trial where 14 months of 22-month delay between indictment and trial were attributable to defendant who during that time requested three continuances, refused to comply with court orders to submit to writing exemplars pretrial, changed attorneys, and failed to appear for a trial date.

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[6] In *United States v. Calloway*, 505 F.2d 311 (D.C. Cir. 1974), appellant requested and the court ordered a pre-trial mental examination. Delay in completing the examination and filing the report caused the trial date to be postponed for more than three months. Because the trial court ordered the report completed at a specified date that would have required no delay in the trial, and the actual delay in completing the report was not appellant's fault, the court held that even though appellant requested the examination, the delay should not be attributed to him. *Id*. at 316. On the other hand, delays that mental examinations cause "are not normally taken into account for purposes of determining the question of a denial of speedy trial since a principal cause of postponement [is] the deliberate pace of the system of safeguards designed to protect the accused." *Shreeves v. United States*, 395 A.2d 774, 784 (D.C. 1978). In spite of *Shreeves*, the issue of excessive delay that a court-ordered mental examination causes has not been carefully examined, and it appears that under appropriate facts, *Calloway*'s rationale might be followed.

3. Pre-trial Appellate Delay

Loud Hawk, 474 U.S. at 314, specifically adopted the four-factor *Barker* analysis to determine "the extent to which appellate time consumed in the review of pre-trial motions should weigh towards a defendant's speedy trial claim." Delay from reasonable interlocutory appeals does not weigh heavily against the government. *Id*. at 315. In determining the reasonableness of an appeal, courts may look to the strength of the government's position and the importance of the issue, with the result that delay from a frivolous appeal will weigh heavily against the government. *Id*. at 315; *cf*. *Gayden*, 584 A.2d at 584 (delay not weighed heavily against government in part because of importance of issue appealed, even though government ultimately lost appeal). Additionally, the crime should be serious enough to justify the restraint imposed on defendant while awaiting the outcome of the appeal. *Loud Hawk*, 474 U.S at 316.

Because D.C. Code § 23-104(e) and Rule 4-III(a) require the government to expedite its interlocutory appeals, any unreasonable delay resulting from failure to expedite an appeal will be weighed "heavily" against the government. *Sell v. United States*, 525 A.2d 1017, 1023 (D.C. 1987). In *Sell*, fifty-one months elapsed between indictment and trial. The government failed to move to expedite either of its two interlocutory appeals or the remand from one of the appeals. The trial court found that each appeal should have taken six months rather than the one year each consumed. The Court of Appeals accepted that analysis and "heavily" charged the additional six months for each appeal to the government. *Sell*, 525 A.2d at 1022-23.

Delay resulting from a successful defense appeal from a conviction is not analyzed under the Sixth Amendment at all rather, the "proper evaluative frame-work is due process, not speedy trial." *Alston*, 412 A.2d at 354 (en banc). *But see Warren*, 436 A.2d 821. When Fifth Amendment due process analysis is applied, the outcome turns on a single factor: prejudice to the defendant. Specifically, the trial court must: "(1) evaluate the impact of the appeal period on the appellant;" then, if it determines that the "impact has been prejudicial, the court shall (2) decide whether the relationship between (a) the nature and severity of the prejudice and (b) the government's alleged responsibility for it by delaying the appeal, warrants dismissal of the information or indictment under the Fifth Amendment." *Alston*, 412 A.2d at 359 (ordering indictment reinstated).

Pre-trial Delay:

- ✓ Counsel should move for severance and immediate trial if a co-defendant requests a continuance (any delay caused by co-defendant's continuance may be counted against the client)
- ✓ Counsel should pay attention to docket entries
- ✓ Counsel should verify that the entries on the court jacket accurately reflect that the defense announced "ready" when a case was being continued and, where appropriate, that the defendant demanded a speedy trial or a severance from a co-defendant who had moved for a continuance (these should also be recorded in counsel's file so that the appropriate transcripts can be ordered in the event of appeal)

C. Assertion of the Right

The defendant must assert the right to a speedy trial. While failure to demand a speedy trial does not waive the right, early assertion carries "strong evidentiary weight" in subsequent litigation. *Barker*, 407 U.S. at 531; *Head*, 451 A.2d at 621. A delay in asserting the right, on the other hand, makes it "difficult for a defendant to prove that he was denied a speedy trial." 407 U.S. at 532. Delays in the absence of a speedy trial demand carry less weight than delays that follow assertion of the right. *See Glass*, 395 A.2d at 802; *see also Moore v. United States*, 675 A.2d 71, 75 (1996).

Counsel should demand a speedy trial early and often during the case. Courts will consider both the frequency and the force of the defendant's objections to delays, *Barker*, 407 U.S. at 528-29, giving tardy or less-than-explicit demands for a speedy trial less weight. *See Dickerson*, 650 A.2d at 685 (explicit speedy trial right assertion only upon appeal after 24-month delay); *Sanders*, 550 A.2d at 346 (demand made 21 months after arrest); *Jackson*, 503 A.2d at 1228 (no violation where motion to dismiss was filed 11 months after arrest); *Miller*, 479 A.2d at 866 (motion almost a year after arrest, and only a month before scheduled trial); *Ball v. United States*, 429 A.2d 1353, 1356-57 (D.C. 1981) (demand made 17 months after arrest and three days before trial).[7]

Counsel must make clear that the remedy sought is a speedy trial, not dismissal or release from detention. Although the judicial remedy for a completed violation of the speedy trial right is dismissal of charges, the constitutional guarantee is designed to protect defendants from unreasonable delays during prosecution, not from prosecution itself. Thus, courts will consider whether "a defendant has made merely *pro forma* objections or motions . . . or really seeks a prompt trial." *Graves*, 490 A.2d at 1098; *see also Akins*, 679 A.2d at 1024 (assertion of right to trial found explicit, not *pro forma*). Assertions that do not show a strong desire for a speedy trial receive less evidentiary weight. *See Lemon v. United States*, 564 A.2d 1368, 1378 (D.C. 1989) (demands made with more circumspection than zeal not as forceful as a direct request for a trial); *Bolden*, 381 A.2d at 628 (little indication of a strong desire for a speedy trial weakens speedy trial claim); *Graves*, 490 A.2d at 1101 (passivity during government's pre-trial appeal and failure to move for prompt trial as an alternative to dismissal weakened speedy trial claim).

Demands for a prompt trial must be explicit. The fact that a defendant is incarcerated, for example, does not weigh as heavily as an actual demand for a speedy trial. *Graves*, 490 A.2d at 1098-99.[8] Merely oral, indirect assertions of speedy trial right, or assertions prompted by judge rather than defendant, are accorded less weight than direct, written assertions of right. *See Hartridge*, 896 A.2d at 210-11. Motions for release, without further indication that a defendant

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[7] *See also Reed*, 383 A.2d at 318-19 (objections to continuances were not effective speedy trial demands and delays after objections thus received less weight than if a demand had been made); *Howard v. United States*, 473 A.2d 835, 840 (D.C. 1984) (defendant waited fourteen months after arrest to demand a speedy trial); *Taylor v. United States*, 471 A.2d 999, 1002 (D.C. 1983) (delay of 22 months between arrest and assertion of right diminished weight given to assertion).

[8] Incarceration does not put the government on notice that the defendant desires a speedy trial where the detention is due to parole revocation, *Jefferson v. United States*, 382 A.2d 1030 (D.C. 1978), or to the pendency of other criminal charges, *Bridgeford v. United States*, 411 A.2d 633, 635 n.3 (D.C. 1980).

wants a speedy trial, also receive minimal weight as assertions of the right. They manifest a desire for immediate release, but not for a prompt trial. *Graves*, 490 A.2d at 1099. Acquiescence to a motion for a continuance by prosecution or a co-defendant may weigh against a defendant's speedy trial claim. *Hartridge*, 896 A.2d at 211. However, mere objections to continuances, like motions for dismissal that are unaccompanied by a request for immediate trial, receive less weight than explicit speedy trial demands. *See Dickerson*, 650 A.2d at 685; *Turner*, 622 A.2d at 678; *Miller*, 479 A.2d at 866.[9]

Counsel must be particularly diligent when a client who is not incarcerated wants a speedy trial. The government is not charged with knowledge that a defendant on release seeks a prompt trial unless the defendant makes this interest known. *Day*, 390 A.2d at 970. Indeed, absent a demand, the prosecution may assume that the defendant is "satisfied with the pace of litigation and not concerned with possible prejudice to his defense." *Strickland v. United States*, 389 A.2d 1325, 1331 (D.C. 1978). Courts look with disfavor upon defendants at liberty who do not demand a speedy trial until it appears tactically that they might succeed on a motion to dismiss due to the age of the case. *See, e.g.*, *Campbell v. United States*, 391 A.2d 283, 286 (D.C. 1978).

Counsel must be careful not to undermine a client's ability to assert the right to a speedy trial, as the courts will look at the defendant's overall conduct. For example, perfunctory assertions carry less weight than demands showing concern with delays in the prosecution. *Bethea*, 395 A.2d at 792. Indisputably frivolous motions and petitions that contribute to delays will also undermine speedy trial claims. *Loud Hawk*, 474 U.S. at 314-15. Similarly, counsel must not appear to acquiesce to continuances where denial of a speedy trial is a concern.

[9] Indeed, an assertion of the right itself receives little weight when not made promptly. Courts consider delays unaccompanied by an assertion as probative of the defendant's lack of anxiety and concern with the case. *Smith v. United States*, 379 A.2d 1166, 1167 (D.C. 1977).

Assertion of the Right:

In arguing a motion to dismiss on speedy trial grounds and raising the issue on appeal, the record is of paramount importance. Counsel must take care to protect the record by asserting the right at the earliest opportunity and renewing the claim often throughout the litigation. A speedy trial demand should be made at arraignment and renewed at each status call or continued trial date. Counsel should not lightly acquiesce in continuances because such acquiescence may ultimately require discounting of the affected time in the computation of delay.

When objecting to a continuance, counsel should move for an immediate or prompt trial. Counsel must explicitly request a speedy trial rather than dismissal of the charges or release from incarceration.

- ✓ Counsel should demand a speedy trial early and often during the case
- ✓ Counsel must make clear that remedy sought is speedy trial, not dismissal or release
- ✓ Demands for a prompt trial should be explicit
- ✓ Absent a demand, prosecution may assume defendant is satisfied with the pace

D. Prejudice

Factors: Prejudice is assessed in terms of the interests that the speedy trial right is designed to protect: (1) preventing oppressive pre-trial incarceration; (2) minimizing the defendant's anxiety and concern with the outcome of the case; and (3) limiting the possibility that the defense will be impaired.[10] Of these interests, the last is characterized as the most serious. *Barker*, 407 U.S. at 532.

Pre-trial incarceration may be oppressive even where commitment results from an unrelated criminal conviction. Delays in bringing the new charge to trial "may ultimately result in as much oppression as is suffered by one who is jailed without bail upon an untried charge." *(Richard) Smith v. Hooey*, 393 U.S. 374, 378 (1969). Prejudice results from the reduced possibility of serving concurrent sentences, decreased likelihood of parole due to the untried charges, increased anxiety from the pending charges, and difficulties in presenting a defense while incarcerated. *Day*, 390 A.2d at 972. Prejudice may also exist where delays render a defendant ineligible for sentencing under the Youth Rehabilitation Act, D.C. Code § 24-901(b). *Dickerson*, 650 A.2d at 686; *Alston*, 412 A.2d 351. Similarly, loss of employment and disruption of family life due to pre-trial incarceration can constitute prejudice. *See Graves*, 490 A.2d at 1105 (25-month

[10] The prosecution may delay the trial of one defendant until another defendant is available to testify as a government witness. *Crowder v. United States*, 383 A.2d 336, 339-40 (D.C. 1978). Other results of a delay that expand or strengthen the prosecution do not present cognizable prejudice, unless a defendant presents some evidence that the government sought the delay for that purpose. *Perkins v. United States*, 473 A.2d 841, 844 n.3 (D.C. 1984).

incarceration not overwhelmingly prejudicial, though near the limit of constitutionality, where defendant was single and unemployed).[11]

Personal anxiety and concern with a pending case must have a specific impact on the defendant's "health or personal or business affairs." *Gayden*, 584 A.2d at 585 (quoting *Graves*, 490 A.2d at 1104). A mere assertion that one has been upset or concerned is not sufficient. *Reed*, 383 A.2d at 320; *see also Moore v. United States*, 675 A.2d at 75. A demand for a speedy trial adds weight to a claim of anxiety. *See Miller*, 479 A.2d at 867 (defendant's decision to go to trial without a defense witness shows he was suffering considerable anxiety from the delay). However, the individual circumstances ultimately determine whether or not anxiety is present. In *Akins*, 679 A.2d at 1017, for instance, the court attributed the defendant's anxiety to the fact that he was already incarcerated on another charge. *Id*. at 1024. In *Sell*, however, the defendant showed anxiety and prejudice where the charges were the only blemishes on a spotless employment record, the resulting stress required him to take sick leave, he was suspended from his job and could not find similar employment, began to drink heavily and use tranquilizers, started to see a psychiatrist, experienced marital problems, and was denied the opportunity to adopt a child as a result of the pending case.[12]

Impairment of the defense is the most serious type of prejudice because it "skews the fairness of the entire system." *Barker*, 407 U.S. at 532.

> [E]xcessive delay presumptively compromises the reliability of a trial in ways that neither party can prove or, for that matter, identify. While such presumptive prejudice cannot alone carry a Sixth Amendment claim without regard to the other *Barker* criteria, it is part of the mix of relevant facts, and its importance increases with the length of the delay.

Doggett, 505 U.S. at 655 (citation omitted).

A showing of actual prejudice is not required if the length of delay is presumptively prejudicial, in which case the burden shifts to the government to rebut the presumption of prejudice:

> When the government's negligence thus causes delay six times as long as that generally sufficient to trigger judicial review . . . and when the presumption of prejudice, albeit unspecified, is neither extenuated, as by the defendant's acquiescence, . . . nor persuasively rebutted, the defendant is entitled to relief.

Id. at 658.[13]

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[11] A parole detainer also diminished the prejudice from pre-trial incarceration. *Graves*, 490 A.2d at 1104. Nor can prejudice be presumed where the defendant is incarcerated as a result of parole revocation, not the pending case. *Jefferson*, 382 A.2d at 1033.

[12] *See also Bolden*, 381 A.2d at 629 (defendant suffered little additional apprehension, anxiety, or community suspicion from a pending misdemeanor charge where he was also pending trial on a felony); *United States v. Clark*, 376 A.2d 434, 436 (D.C. 1977) (defendant must assert or show specific instances that the delay weighed heavily on him if prejudice is based on strain of being under indictment and facing a lengthy prison term).

[13] *But see United States v. Taylor*, 497 F.3d 673, 677-78 (D.C. Cir. 2007) (denying speedy trial claim where actual prejudice not shown and delay barely exceeds one year presumptive prejudice threshold); *Hartridge*, 896 A.2d at

In *Doggett*, the defendant left the country unaware that he was being indicted. The government made no effort to find him for more than eight years, though he had lived in the United States for six of those years. Pointing to the inverse relationship between protracted government negligence "and its consequent threat to the fairness of the accused's trial," the Supreme Court dismissed the charges. *Id*. at 657-58.

While "consideration of prejudice is not limited to the specifically demonstrable, and . . . affirmative proof of particularized prejudice is not essential to every speedy trial claim," *id*. at 655, counsel should be prepared to show as specifically as possible that the injuries are substantial and not mere speculation. *See, e.g.*, *Ferguson v. United States*, 977 A.2d 993 (2009); *Lemon*, 564 A.2d at 1379; *Asbell v. United States*, 436 A.2d 804, 814 (D.C. 1981); *Glass*, 395 A.2d at 802; *Head*, 451 A.2d at 622. Counsel must make concrete proffers about the existence of missing witnesses and their testimony. *Taylor*, 471 A.2d at 1003; *Reese*, 467 A.2d at 160; *Akins*, 679 A.2d at 1024.[14] Failure to alert court pre-trial regarding defense's intention to call a particular witness at trial may weigh against a finding of prejudice to defense if witness is later unavailable due to delay. *See Hill v. U.S.*, 959 A.2d 702, 712 (D.C. 2008). In *Parker*, the Court of Appeals found that "the government's unreadiness for trial on two occasions in a fairly uncomplicated case spanning twenty-one months between arrest and trial [gave them] substantial pause, at least enough to require careful attention to appellant's claim of prejudice from the delay." *Parker*, 745 A.2d at 937. The defendant argued that the unavailability of two defense witnesses was the result of the government's previous voluntary dismissals, and the court stated that "[i]f that assertion were true, there would be real substance to his speedy trial claim." *Id*. The court, however, found that the witnesses' unavailability was ultimately of the defendant's own making and held that, "[a]fter balancing the *Barker* factors, . . . appellant was not denied his right to a speedy trial. The delay of twenty-one months, even taxing the government significantly with eleven months of it, is not sizeable enough to warrant dismissal without evidence of prejudice not apparent on this record." *Id*.

Counsel must show that the delay in bringing the case to trial, not the failure to preserve previously available evidence, prejudiced the defense. *See Gayden*, 584 A.2d at 585 (no relevant prejudice from destruction of policeman's notes five and one half months after arrest where trial was 45 months after arrest); *Wynn v. United States*, 386 A.2d 695, 697 n.8 (D.C. 1978). Thus, to substantiate claims of prejudice from the delay, counsel must maintain contact with witnesses during the pendency of a case, *Sell*, 525 A.2d at 1026, and make a detailed record of the witnesses' recollection shortly after the incident. *(Charles) Smith*, 379 A.2d at 1167.[15]

211-13 (distinguishing *Doggett* based on lack of "serious fault" by government and requiring affirmative showing of prejudice even though 27-month delay presumptively prejudicial); *Turner*, 622 A.2d at 679 (distinguishing *Doggett* and denying a speedy trial claim based in part on appellant's inability to show prejudice).

[14] It is frequently difficult to assess how delay affects the ability to present a defense. The impact on the witnesses' recollection is often unknown until they testify at trial. Thus, counsel should renew the speedy trial motion after trial if prejudice to the defense becomes evident. *See United States v. MacDonald*, 435 U.S. 850 (1978).

[15] These requirements put defense counsel in a bind. No prejudice would result from the passage of time if a witness's memory is preserved. However, a speedy trial claim will also fail if counsel does not take reasonable steps to record a witness's recollection. Nonetheless, preservation is the safest route because only then can the issue be argued. Furthermore, counsel can argue that past recollection recorded in a written statement is not as effective as testimony based on current recollection. Counsel should be mindful of potential reverse-*Jencks* considerations.

Prejudice:

- ✓ Counsel must show that delay in bringing case to trial prejudiced the defendant
- ✓ To substantiate claims of prejudice counsel should maintain contact with witnesses during pendency of the case and keep detailed records of witnesses' recollection shortly after incident, and maintain
- ✓ A showing of prejudice is essential, and counsel's proffers of prejudice must be concrete and specific. This showing may include the personal anxiety inflicted on the client, but must include a specific impact on the defendant's health or personal affairs. Even more importantly, counsel should proffer specific ways in which the delay has prejudiced the defense (e.g., unavailability of witnesses, etc.)

PRACTICE TIP:

If the trial court grants a speedy trial motion, counsel should request that the court make complete findings of fact on each of the *Barker* factors. The Court of Appeals will not review *de novo* speedy trial claims where the trial court makes proper findings that have support in the record, *Reid*, 402 A.2d at 837; *see* D.C. Code § 17-305(a), even if the record in support of the trial court's decision is rather thin, *see, e.g.*, *Ellis*, 408 A.2d 971 (D.C. 1979).

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***Diggs v. United States*, 28 A.3d 585 (D.C. 2011).** See, *supra*, Chapter 18.I.A.

II. THE DUE PROCESS CLAUSE

Although the Sixth Amendment right to a speedy trial does not apply to delay prior to official accusation through indictment or arrest, the defendant may still "invoke due process to challenge the delay both before and after official accusation." *Doggett*, 505 U.S. at 655 n.2. References to "speedy trial" in this section are thus descriptive only and do not refer to the Sixth Amendment.

The Due Process Clause requires a showing of "actual prejudice." *Marion*, 404 U.S. 307. Actual prejudice makes the due process claim "concrete and ripe for adjudication, not . . . automatically valid." *United States v. Lovasco*, 431 U.S. 783, 789 (1977). Pre-indictment delay due to the prosecution's further investigation of the case "does not deprive [the defendant] of due process, even if his defense might have been somewhat prejudiced by the lapse of time." *Id*. at 796. The Court reasoned that investigative delay is unlike delay undertaken "to gain tactical advantage over the accused" because it is not as one-sided. *Id*. at 795. Full investigation serves the interests of justice and often those of the putative defendant, and thus fulfills rather than

violates the requirements of the Due Process Clause. *Id*. at 795-96; *see Johnson v. United States*, 434 A.2d 415 (D.C. 1981); *(Albert B.) Smith v. United States*, 414 A.2d 1189 (D.C. 1980).

If the prosecution can provide a legitimate "investigative" justification for pre-indictment delay, *Lovasco* eviscerates the due process claim. *See Day*, 697 A.2d at 34. Further, if the prosecution has an investigative justification for dismissing initial charges for lack of evidence and later indicts the defendant on the same charges, the intervening period of delay will not be held against the government in a speedy trial analysis. But where such "neutral" reasons are not proffered and supported by the record, the Due Process Clause protects the defendant from prejudicial delay. *See, e.g., United States v. Morrison*, 518 F. Supp. 917 (S.D.N.Y. 1981).

"To prevail on his claim that he was denied a fair trial, appellant must show at a minimum that he was actually prejudiced and that the government's reasons for the delay were unjustified." *Robinson v. United States*, 478 A.2d 1065, 1066 (D.C. 1984) (citations omitted). *See United States v. Donaldson*, 451 A.2d 51, 56 (D.C. 1982) (accused must show substantial prejudice to the right to a fair trial and that delay was an intentional device to gain tactical advantage). Even where the government offers no neutral reason for pre-indictment delay, a court may decline to find the delay unjustified where it cannot ascribe to the government any "unseemly motives." *Asbell*, 436 A.2d at 812.

The issue of pre-arrest delay often arises in the context of arrests following the "surfacing" of an undercover narcotics agent, sometimes many months after the alleged sale that forms the basis of the charges. *Ross v. United States*, 349 F.2d 210 (D.C. Cir. 1965), held that a seven-month delay between a defendant's alleged sale of narcotics to an undercover officer and his arrest mandated reversal of the conviction. The only evidence against the defendant was the testimony of the undercover officer, based upon his notes rather than present recollection, and the defendant's proffered mistaken identification defense could not be bolstered with an alibi because he had no recollection of his activities on the date of the offense. Under these circumstances, prejudice to the defendant mandated dismissal of the indictment on due process grounds, even though the government brought the case well within the statute of limitations. *See also Woody v. United States*, 370 F.2d 214 (D.C. Cir. 1966).

The principle of *Ross*, however, has been closely circumscribed in subsequent cases, and retains little precedential value. *See Harrison v. United States*, 528 A.2d 1238, 1240-41 (D.C. 1987) ("to the extent that Ross is inconsistent with *Lovasco* and *Marion*, it can no longer be reliably cited as authority"). In cases decided since Ross, the District of Columbia Circuit has emphasized the necessity of balancing the reasonableness of the delay against prejudice to the accused. *See, e.g., United States v. Rippy*, 606 F.2d 1150 (D.C. Cir. 1979); *United States v. Jones*, 524 F.2d 834 (D.C. Cir. 1975). The court in recent cases has been much more willing to find a pre-arrest delay "reasonable" in the context of delayed prosecution of undercover narcotics buys.

Robinson, 478 A.2d at 1067 n.1, distinguished *Ross* on the facts and also questioned its precedential value in light of the Supreme Court's pronouncement "that prosecution following investigative delay is not a denial of due process even if the defense has been 'somewhat prejudiced by the lapse of time'" (quoting *Lovasco*, 431 U.S. at 796). *Robinson* noted that in *Ross*, the delay was found to be "purposeful" and the defendant was "continually available for

arrest." 478 A.2d at 1067 n.1. In *Robinson*, such factors as the undercover officers' desire to purchase a greater quantity of narcotics from the suspect in an effort to identify suppliers in the distributive chain, and their inability to identify and locate the suspect despite their continuing efforts to do so, indicated that the delay was not intentional, reckless, or negligent. In *Day*, 697 A.2d at 31, the Court of Appeals clarified its holding in *Robinson* in which it found that, in the absence of severe prejudice, a defendant cannot prevail on a due process claim for post-arrest delay when the government conduct is "'negligent, but not reckless or intentional.'" *Id*. at 34 (quoting *Robinson*, 478 A.2d at 1066) (internal quotations omitted). The court held that "[u]nder *Robinson*, the legal equivalent of intentional delay would have to be recklessness." *Id*. at 34. Inability to recall one's whereabouts on the date in question is not likely to provide a sufficient basis for dismissal. *See, e.g.*, *Rippy*, 606 F.2d at 1153; *Robinson*, 478 A.2d at 1067 (defendant's "general assertion that he cannot remember where he was on the day of the heroin transaction is not a definite enough showing of prejudice to warrant reversal"). The court in *Robinson*, however, noted that the defendant did not testify, whereas the defendant in *Ross* actually testified that he was unable to remember where he was on the day of the offense charged. 478 A.2d at 1067 n.1. *But cf. Harrison*, 528 A.2d at 1240 (no prejudice even though defendant testified, denied participation in drug transactions, but maintained no recollection of activities on the dates when the transactions occurred).

The "rough rule of thumb" giving *prima facie* merit to a claim of prejudice where the delay exceeds four months, *see Jones*, 524 F.2d at 840-41, also seems to have been abandoned. To prevail, the defendant must make a strong showing of a likelihood of prejudicial misidentification resulting from the delay. *See Robinson*, 478 A.2d at 1067 (no indication that delay posed a significant danger of misidentification where identification was based on three daylight encounters and procedure was not suggestive); *Harrison*, 528 A.2d at 1240 ("risk of misidentification was negligible" where undercover officer made purchases from defendant on three separate occasions and saw defendant on the street almost every day after final purchase, and defendant had an unusual scar on his chest).

Due Process Clause:

- ✓ Can challenge delays both before and after official accusation
- ✓ Requires a showing of actual prejudice

III. INTERSTATE AGREEMENT ON DETAINERS

The Interstate Agreement on Detainers (IAD),[16] D.C. Code §§ 24-801 to 805, was enacted to secure speedy trials for prisoners in one party state who have charges pending in another member jurisdiction. D.C. Code § 24-801, Art. I. Expeditious disposition of these cases seeks to eliminate uncertainties that interfere with prisoner rehabilitation programs. *Kleinbart v. United*

[16] Almost every state has adopted the IAD. The agreement benefits all defendants in the District of Columbia, whether prosecuted by the Corporation Counsel or the United States Attorney. *United States v. Bailey*, 495 A.2d 756, 764 (D.C. 1985).

States, 426 A.2d 343, 356 n.12 (D.C. 1981), *rev'd on other grounds*, 553 A.2d 1236 (1989). Defendants waive speedy trial rights under IAD by voluntarily pleading guilty, *Moore v. United States*, 724 A.2d 1198, 1199 (D.C. 1999). Defendants benefit from the IAD's speedy trial rights only after the jurisdiction where the charges are pending (receiving state) lodges a detainer (e.g., an arrest warrant) based on those charges with the jurisdiction where the defendant is incarcerated (sending state). *See Felix v. United States*, 508 A.2d 101, 107 (D.C. 1986); *(Albert F.) Smith v. United States*, 470 A.2d 315, 318-19 (D.C. 1983); *Bean v. United States*, 409 A.2d 1064, 1065 (D.C. 1979). A defendant's rights under IAD are implicated only if she is "serving a term of imprisonment." *See* D.C. Code § 24-801; *see also Moore*, 724 A.2d at 1199 (IAD not applicable to defendant who was pre-trial detainee in Maryland, and transferred between jurisdictions prior to sentencing in Maryland).[17]

The IAD does not apply when the defendant's presence is secured solely by issuance of a writ of *habeas corpus ad prosequendum*. *See United States v. Mauro*, 436 U.S. 340 (1978). Articles III and IV of the IAD impose different time limitations, depending on whether or not a defendant demands a speedy trial. Failure to meet these restrictions results in dismissal of pending cases with prejudice. D.C. Code § 24-801, Art. III(d), Art. IV(e). These time requirements toll whenever the court with jurisdiction over the case finds that the prisoner is unable to stand trial. Art. VI(A).

Article III(a) applies if the prisoner requests transfer. The receiving state must bring the prisoner to trial within 180 days of receipt of notice by the demanding jurisdiction of the request for disposition, absent a continuance for good cause shown. Art. III(a); *see also Fields v. United States*, 698 A.2d 485 (D.C. 1997) (finding 180-day requirement not triggered if request gets lost in mail or is never delivered to 'receiving' state). The burden is on the defendant, however, to submit the request in writing to the warden of the facility where the defendant is confined. The warden must then forward the request to the authorities responsible for prosecuting the case in the District. D.C. Code § 24-801, Art. III(b); *see Bailey*, 495 A.2d at 759.

Article IV applies when transfer is made at the government's request. The receiving state must then take the prisoner to trial within 120 days after the transfer. D.C. Code § 24-801, Art. IV(a), (c). The defendant, however, must assert before trial that a speedy trial violation has occurred. *Haigler v. United States*, 531 A.2d 1236, 1238 (D.C. 1987).

Counsel should review the IAD carefully because violation of the provisions may result in dismissal of the charges. *See Haigler*, 531 A.2d 1236 (case dismissed with prejudice). Other cases exploring issues that arise under the IAD include *Alabama v. Bozeman*, 533 U.S. 146 (2001) (provision prohibiting return of prisoner to sending state before trial completed is absolute and cannot be disregarded even if deemed harmless or *de minimus*); *Carchman v. Nash*, 473 U.S. 716 (1985); *Cuyler v. Adams*, 449 U.S. 433 (1981) (right to pre-transfer hearing where transfer at the request of the government); *Baylor v. United States*, 500 A.2d 1012 (D.C. 1985); *Hill v. United States*, 434 A.2d 422 (D.C. 1981); *Christian v. United States*, 394 A.2d 1 (D.C. 1978); *McBride v. United States*, 393 A.2d 123 (D.C. 1978); *United States v. Palmer*, 393 A.2d

[17] Mere notice of a pending criminal charge is insufficient to invoke the provision of the IAD. For example, a warrant given to police in the sending state, not to corrections authorities, and at the request of officials in the sending state, rather than the receiving state, is not a detainer within the meaning of the IAD. *Tucker v. United States*, 569 A.2d 162, 166 (D.C. 1990).

143 (D.C. 1978); *Gale v. United States*, 391 A.2d 230 (D.C. 1978); *and United States v. Cogdell*, 585 F.2d 1130 (D.C. Cir. 1978), *rev'd on other grounds sub nom* by *United States v. Bailey*, 444 U.S. 394 (1980).

Counsel should review IAD because violation of the provisions may result in dismissal.

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***Cooper v. United States*, 28 A.3d 1132 (D.C. 2011).** 180-day time frame in which defendant must be brought to trial under Interstate Agreement on Detainers begins to run upon *delivery* to prosecuting authority.

CHAPTER 19

JOINDER AND SEVERANCE

When a client is charged with two or more crimes, or when there are co-defendants, counsel should consider a motion for relief from improper joinder and/or severance. Counsel should first consider whether the offenses or defendants are properly joined for trial under Super. Ct. Crim. R. 8. Even if joinder is proper, it may still unduly prejudice the client, thereby supporting a motion for severance under Super. Ct. Crim. R. 14.[1]

I. JOINDER UNDER RULE 8

Joinder of offenses and defendants is governed by Super. Ct. Crim. R. 8:

> (a) Joinder of Offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors, or both, are of the same or similar character or are based on the same act or transaction or on 2 or more acts or transactions connected together or constituting parts of a common scheme or plan.
>
> (b) Joinder of Defendants.[2] Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in 1 or more counts together or separately and all of the defendants need not be charged in each count.

Rule 8(a) governs joinder of offenses *only* when a single defendant is charged. This is the case even where a single defendant was originally charged as a co-defendant. *Loukas v. United States*, 702 A.2d 681 (D.C. 1997). In co-defendant cases, the more stringent Rule 8(b) standards govern joinder of defendants *and* offenses. *See Loukas* at 682; *(Marvin) Taylor v. United States*, 603 A.2d 451, 455 (D.C. 1992), *cert. denied* by *Jones v. United States*, 506 U.S. 852 (1992); *Settles v. United States*, 522 A.2d 348, 352 (D.C. 1987) *(Settles I)*; *Ray v. United States*, 472 A.2d 854, 857 (D.C. 1984). Rule 8(a) permits joinder of similar offenses, offenses committed in a single act or transaction, or a series of offenses that are sufficiently connected to each other. Rule 8(b) permits joinder of transactionally related offenses only; similarity is insufficient. *See, e.g., Byrd v. United States*, 551 A.2d 96, 99 (D.C. 1988), *cert. denied*, 493 U.S. 968 (1989), *Morris v. United States*, 548 A.2d 1383, 1387 (D.C. 1988); *Davis v. United States*, 367 A.2d 1254, 1261 (D.C. 1976), *cert. denied*, 434 U.S. 847 (1977).

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[1] Cases construing Fed. R. Crim. Proc. 8 and 14 are persuasive authority because the rules are identical in all material respects to the Superior Court rules. *Joyner v. United States*, 540 A.2d 457, 459 n.1 (D.C. 1988). If D.C. Code charges are joined with U.S. Code charges in a District Court indictment, severance will result in the D.C. Code charges being tried in Superior Court. *United States v. Jackson*, 562 F.2d 789, 800 (D.C. Cir. 1977).

[2] Super. Ct. Juv. R. 8(b) allows joint trial of co-respondents upon request by Corporation Counsel.

In determining whether counts are properly joined, the court looks to the allegations in the indictment and the facts to be adduced at trial. *Roper v. United States*, 564 A.2d 726, 730 & n.7 (D.C. 1989) ("as in most cases, the indictment alleges only skeletal facts about the charged crimes"); *see also (Ronald) West v. United States*, 599 A.2d 788, 791 (D.C. 1991) (although ordinarily court determines misjoinder motion on basis of indictment alone, "it is not impermissible to consider other facts in determining the joinder issue") (quoting *Winestock v. United States*, 429 A.2d 519, 524 (D.C. 1981).

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***Medley v. United States*, Nos. 11-CF-1670, 11-CF-1671 & 12-CF-7, 2014 WL 7202060 (D.C. Dec. 18, 2014).** Application of "separate and distinct" test may apply only to cases joined pursuant to Super. Ct. Crim. R. 8(a) and not R. 8(b).

A. "Same or Similar" Offenses – Single Defendant Cases Only

Under Rule 8(a), charges against a single defendant may be joined if they involve similar but unrelated crimes – that is, if they "allege the same general kinds of crimes." *(Ronald) West*, 599 A.2d at 791 (quoting *Winestock*, 429 A.2d at 524); *Sweet v. United States*, 756 A.2d 366, 374 (D.C. 2000). This principle was addressed in *Roper*, which found error in the joint trial of an armed robbery and an unrelated weapon possession charge. The courts "have largely relied on common-sense definitions of the term 'same or similar,'" and "permit[] the joinder of offenses under the 'same or similar' provision only where there is a substantial degree of similarity among the crimes charged." *Roper*, 564 A.2d at 729. Looking to the offenses' "gravamen," "basic natures" and elements, the court found them dissimilar. *Id*. at 729-30 (collecting cases).

In cases where defendants have been joined under Rule 8(b) but where only one defendant remains by the time of trial, the less restrictive standard of Rule 8(a) will be applied to the issue of joinder of charges. *Loukas*, 702 A.2d 681.

B. Connected-Offense Joinder – Single and Multiple Defendant Cases

Both Rules 8(a) and 8(b) permit joinder of transactionally related offenses – those committed in a single transaction or in connected transactions. The "single act or transaction" test is relatively simple. For example, charges of burglary and assault arising from a break-in are joinable, no matter how many defendants are involved. Furthermore, "[w]hen two or more persons are charged with jointly committing a criminal offense, a strong presumption arises that they will be tried together." *Johnson v. United States*, 596 A.2d 980, 987 (D.C. 1991), *cert. denied* by *Bullock v. United States*, 504 U.S. 927 (1992) (citing *Tillman v. United States*, 519 A.2d 166, 169 (D.C. 1986)).

Joinable Series: Whether acts or transactions are sufficiently connected to constitute a joinable "series," on the other hand, has been extensively litigated. A joinable series exists if: (1) each offense was "committed to achieve a specific common end," or directed toward some shared common goal; (2) one caused or "le[d] logically" to the other(s); or (3) all were "part of a common scheme and are so closely connected in time and place that necessarily proof of the two

crimes overlaps substantially." *Ray*, 472 A.2d at 858; *accord (Marvin) Taylor*, 603 A.2d at 455; *Settles*, 522 A.2d at 352; *Davis*, 367 A.2d at 1261. Joinder may also be proper when the indictment alleges a conspiracy linking the offenses. *Ray*, 472 A.2d at 858 n.7; *see Coleman v. United States*, 619 A.2d 40, 46-47 (D.C. 1993) (charge of carrying dangerous weapon sufficiently connected to charges relating to four previous robberies involving said weapon because proof of robberies tended to prove purpose in carrying weapon).

Improper Joinder: The definitions of transactionally related offenses are not the same under 8(a) and 8(b). Transactional relationship under 8(a) "is interpreted more liberally in favor of initial joinder," and "focus[es] on whether there is a substantial overlap of proof relevant to the offenses." *Id*. *Davis* found improper joinder of two defendants and charges arising out of seven rapes. Davis and Warren were jointly charged with four rapes; Davis alone was charged with three other rapes, allegedly committed with an unidentified assailant. *Davis*, 367 A.2d at 1260. The counts charging Davis alone were misjoined with those also charging Warren because they were not part of the "same series of acts or transactions." *Id*. at 1263. The court reasoned that Warren was unfairly prejudiced because the jury almost inevitably would conclude that he was the unidentified accomplice in two of the rapes for which he was not charged. *Id*. at 1263-64; *accord Jackson v. United States*, 623 A.2d 571, 579-81 (D.C. 1993), *cert. denied*, 510 U.S. 1030 (1993) (joinder of three robberies improper where "common goal" of obtaining property from others too broad, and robberies occurred at different stores on different dates with different victims, despite overlap of proof); *(Michael) Smith v. United States*, 561 A.2d 468, 473 (D.C. 1989) (joinder of three robberies involving two co-defendants improper; common goal of "obtaining property from others" is too broad, "each offense was not a logical or necessary continuation of the other," and, although robberies occurred within one hour and several blocks of each other, no substantial overlap of proof); *Byrd*, 551 A.2d at 98-99 (joinder of two shootings on one night, involving same automobile, improper because neither depended for its success or furtherance on the other and no overlapping testimony by government witness); *Morris*, 548 A.2d at 1386 (impropriety of joinder of two armed robberies conceded by government on appeal); *Settles*, 522 A.2d at 352-54 (improper joinder of two rapes occurring ten days apart).

Proper Joinder: However, joinder has been upheld where the second offense, committed by only one of the defendants, was a "sequel" to the first. *See Crutchfield v. United States*, 779 A.2d 307, 321-22 (D.C. 2001) (obstruction of justice arising from murder in Maryland properly joined with triple murder case in District of Columbia because D.C. murders provided motivation for Maryland murder/obstruction of justice); *Sams v. United States*, 721 A.2d 945, 954 (D.C. 1998), *cert. denied*, 528 U.S. 1135 (2000) (joinder of obstruction of justice charge of codefendant Reid with Sams under charge was proper where indictment alleged that Sams and Reid both participated in attack on complainant and Reid subsequently attempted to keep his girlfriend from talking to police); *(Marvin) Taylor*, 603 A.2d at 456 (joinder of initial assault offenses with perjury at grand jury by co-defendant who failed to implicate defendant in grand jury testimony). Similarly, in *Sweet v. United States*, 756 A.2d 366 (D.C. 2000), co-defendants were charged with two separate homicides and related offenses. The first homicide concerned the killing of a correctional officer who was a government witness, while the other involved a single gunman in a known drug area. The court held that the "circumstances demonstrate that the offenses are connected together within the meaning of [Rule 8(a)] because of the overlapping of proof." *Id*. at 375. The court also found a "further connection in that the indictment alleges that Sweet's motive for shooting and killing [the second victim] was to prevent her from

providing information to law enforcement authorities concerning the [correctional officer's] murder." *Id*.

Other cases upholding joinder of transactionally related charges include *(Charles) Johnson v. United States*, 671 A.2d 428, 436 (D.C. 1995) (joinder of attempted robbery counts with other charges proper as "common scheme or plan" due to the "exceptionally close temporal and spatial relationship of these offenses and the necessary overlap of proof among them"); *Joyner*, 540 A.2d at 459 (drug and gun charges, based on contraband seized at one time and place); *Washington v. United States*, 434 A.2d 394, 395 (D.C. 1980) (en banc) (Bail Reform Act violation with underlying charges), and *Grant v. United States*, 402 A.2d 405, 407 (D.C. 1979) (same).

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***Ball v. United States*, 26 A.3d 764 (D.C. 2011).** Joinder appropriate because all crimes of two co-defendants logically related where crimes stemmed from single series of events beginning with one co-defendant's reckless driving which led to high-speed chase then armed bailout of second co-defendant and subsequent resisting of arrest while armed.

***Fadero v. United States*, 59 A.3d 1239 (D.C. 2013).** Offenses that occurred on separate dates nearly two weeks apart properly joined because of "substantial overlap" in evidence where vehicle description from both dates matched and photo array from second date allowed victim to confirm earlier identification of assailant, and where items found on defendant provided motive for earlier offenses.

***Vines v. United States*, 70 A.3d 1170 (D.C. 2013) (amended).** Charges arising from two logically distinct sets of events were sufficiently 'connected together' to justify joinder as there was substantial overlap of evidence between the two sets of charges.

***Ward v. United States*, 55 A.3d 840 (D.C. 2012).** Trial court did not err in joining trials where it reasonably found that an initial murder by one defendant had led directly to charged conspiracy between co-defendants to commit another murder, an attempted murder, and an assault.

C. Raising Claims of Misjoinder

A motion for relief from misjoinder is an attack on the charging document, and must be filed within the time limits set out in Superior Court Criminal Rule. 47-I. Super. Ct. Crim. R. 12(b)(2); *cf. (Marvin) Taylor*, 603 A.2d at 455. Misjoinder is an error of law, subject to *de novo* review on appeal. *Ray*, 472 A.2d at 857. The trial court *must* grant a timely motion for relief from misjoinder when defendants or charges are improperly joined. *Ward v. United States*, 289 F.2d 877, 878 (D.C. Cir. 1961).

Misjoinder may, however, be harmless. *United States v. Lane*, 474 U.S. 438, 449 (1986); *Settles*, 522 A.2d at 354. While misjoinder creates a presumption of prejudice, *Morris*, 548 A.2d at 1387 (citations omitted), it may be "harmless when it does not result in actual prejudice, which is to say only if it has no substantial and injurious effect or influence in determining the jury's

verdict" – i.e., when: (1) "substantially all of the evidence of one offense would be admissible in a separate trial of the other," or (2) "the evidence of guilt . . . is overwhelming." *Byrd*, 551 A.2d at 99 & n.8 (citations and quotation marks omitted); *see Jackson*, 623 A.2d at 582 (finding misjoinder harmless due to both mutual admissibility and overwhelming evidence of guilt). In the mutual admissibility context, discussed *infra* Section II.A.1, the government must prove the defendant's connection to each crime by clear and convincing evidence. Thus, misjoinder cannot be deemed harmless if the defendant is acquitted of one misjoined charge and convicted of another. *Roper*, 564 A.2d at 731-32.

Claims of Misjoinder:

Although it is generally more difficult to show misjoinder under Rule 8 than severance under Rule 14, if there is a colorable argument for misjoinder it should be raised in a pretrial motion so as to ensure that the issue is not deemed waived.

II. SEVERANCE UNDER RULE 14

Severance of offenses and defendants properly joined under Rule 8 is governed by Rule 14:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the Court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the Court may order the prosecutor to deliver to the Court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

Under Superior Court Criminal Rule 14 the court may grant severance if it appears that a defendant or the government is prejudiced by joinder. *Moore v. United States*, 927 A.2d 1040, 1056 (D.C. 2007). There is a "strong presumption" when two or more defendants are charged with jointly committing a criminal offense that they will be tried together. *King v. United States*, 550 A.2d 348, 352 (D.C. 1988). However, severance must be granted if prejudice to the defendant "outweighs the judicial economy to be denied from a joint trial," *Jones v. United States*, 483 A.2d 1149, 1157 (D.C. 1984), *cert. denied* by *Britt v. United States*, 471 U.S. 1118 (1985). The decision to sever is discretionary, though, and will be reversed "only upon a showing of the 'most compelling prejudice.'" *Void v. United States*, 631 A.2d 374, 379 (D.C. 1993); *accord Dancy v. United States*, 745 A.2d 259, 266 (D.C. 2000); *Feaster v. United States*, 631 A.2d 400, 412 (D.C. 1993).

Because this weighing process is discretionary, appellate reversals for failure to sever tell the court when it *must* sever, not when it *should*. Moreover, prejudice to the defendant may outweigh the presumption favoring joinder. *See, e.g.*, *McFerguson v. United States*, 870 A.2d

1199 (D.C. 2005) (finding prejudicial error in denial of defense motion to sever sexual assault offenses based on assertion that they were not mutually admissible even though they were presented separately and distinctly at trial); *Harper v. United States*, 582 A.2d 485, 488 n.3 (D.C. 1990) (risk of prejudice from joinder of similar offenses is particularly substantial in cases involving rape); *Foster v. United States*, 548 A.2d 1370, 1378 (D.C. 1988) (severance required when government seeks to admit co-defendant's statement and there is a substantial risk that jury will consider statement in assessing defendant's guilt: "when the Confrontation Clause and the desire for judicial economy collide, it is the Confrontation Clause which must prevail"); *Carpenter v. United States*, 430 A.2d 496, 502-03 (D.C. 1981) (en banc) (1981), *cert. denied*, 454 U.S. 852 (1981) (some types of evidence are inherently prejudicial, including other crimes evidence and co-defendant's statements implicating defendant). *But see (Ronald) West*, 599 A.2d 788 (severance not required where evidence of three incidents of rape and one of murder presented separately).

Although a motion to sever must be made before trial,[3] "the trial judge has a continuing duty at all stages of the trial to grant a severance if prejudice [appears]." *Schaffer v. United States*, 362 U.S. 511, 516 (1960); *accord Carpenter*, 430 A.2d at 501; *see also Parker v. United States*, 751 A.2d 943, 949 (D.C. 2000); *Mitchell v. United States*, 569 A.2d 177, 182 (D.C. 1990). Where the prejudice was not foreseeable, severance may be sought at any time during trial. *Grant*, 402 A.2d at 407. Counsel should therefore move for severance before trial and again at every point thereafter when prejudice materializes or becomes more apparent. *Mitchell*, 569 A.2d at 181 n.3; *Parker*, 751 A.2d at 949 ("counsel for appellant appropriately renewed her motion for severance at the conclusion of the government's case after the court had the opportunity to assess the quality of the government's evidence against appellant").

Failure to move for severance results in appellate review for plain error only because failure to raise a timely objection is often an indication that prejudice was speculative. *Cf. (Marvin) Taylor*, 603 A.2d at 455 (applying plain error standard to misjoinder claim); *(Michael) Smith*, 561 A.2d at 472.[4]

Motion for Severance:

Counsel should move for severance before trial and again at every point thereafter when prejudice materializes or becomes apparent.

A. Severance of Offenses

Joinder of offenses creates a substantial risk of prejudice. *Evans v. United States*, 392 A.2d 1015

[3] Super. Ct. Crim. R. 12(b)(5), 47-I(c); *Carpenter*, 430 A.2d at 501.

[4] In *Wheeler v. United States*, 470 A.2d 761 (D.C. 1983), counsel moved for severance of twenty-nine counts into separate trials; instead, the trial court divided the charges into two groupings and two trials. *Id*. at 763 & n.1. Because the motion was not renewed at the first trial, the court applied a plain error standard. *Id*. at 765.

(D.C. 1978).

> (1) [The defendant] may become embarrassed or confounded in presenting separate defenses; (2) the jury may use the evidence of one of the crimes charged to infer a criminal disposition on the part of the defendant from which is found his guilt of the other crime or crimes charged; or (3) the jury may cumulate the evidence of the various crimes charged and find guilt where, if considered separately, it would not so find. A less tangible, but perhaps equally persuasive element of prejudice may reside in a latent feeling of hostility engendered by the charging of several crimes as distinct from only one.

Drew v. United States, 331 F.2d 85, 88 (D.C. Cir. 1964). Because of these risks, the appellate courts have consistently reiterated that severance *should be granted*:

> (1) unless the evidence of each offense would be admissible in a separate trial of the other, for some "substantial" and "legitimate" purpose – i.e., the evidence is "mutually admissible;"
>
> (2) unless the evidence will be and in fact is kept separate and distinct so that the jury is unlikely to cumulate the evidence of the crimes charged and find guilt where, if considered separately, it would not, *(Ronald) West*, 599 A.2d at 792; *Arnold v. United States*, 443 A.2d 1318, 1323 (D.C. 1982); *Bridges v. United States*, 381 A.2d 1073, 1074-75 (D.C. 1977), *cert. denied*, 439 U.S. 842 (1978); *see Mitchell v. United States*, 985 A.2d 1125, 1137 (D.C. 2009) (no abuse of discretion in denying motion to sever where trial court instructed jury both during trial and before deliberations began that inculpatory statements and actions made by co-defendant were admissible against co-defendant only); or
>
> 3) if the defendant will be "embarrassed or confounded" in defending two or more charges in a single trial, *Roper*, 564 A.2d at 731 n.9; *Cross v. United States*, 335 F.2d 987, 989 (D.C. Cir. 1964); *Drew*, 331 F.2d at 88; *but see Garcia v. United States*, 897 A.2d 796 (D.C. 2006) (no abuse of discretion in failing to sever a drug distribution count from a Bail Reform Act violation charge because the defendant did not proffer sufficient evidence to show why he could not testify on the distribution charge but could testify on the BRA charge).

See generally, *Void*, 631 A.2d at 379; *Feaster*, 631 A.2d at 412.[5]

[5] Even when the other crimes evidence falls within one of the *Drew* exceptions, the court must make a separate determination that its probative value outweighs its prejudicial effect. *Harper*, 582 A.2d at 488; s*ee also Parker v. United States*, 751 A.2d 943, 949 n.14; s*ee, e.g., United States v. Henry*, 940 F. Supp. 342 (D.D.C. 1996) (though both gun and drugs were found on defendant at same time, court severed unlawful possession of a firearm by a convicted felon charge from possession of a controlled substance charge because of prejudice arising from proof of convicted felon status).

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***Williams v. United States*, 75 A.3d 217 (D.C. 2013).** Trial court did not err in denying motion to sever for defendant facing charges of felon-in-possession as well as unlawful possession of ammunition and possession of an unregistered firearm where trial judge's cautionary instructions were sufficient to mitigate any prejudice suffered.

1. Mutual Admissibility

Mutual admissibility is determined under the standard generally applied to "other crimes" evidence. The question is whether evidence of each crime would be admissible in a separate trial of every other crime. The government must show: (1) by clear and convincing evidence that the defendant committed each charged offense; (2) that the evidence of each crime would be "directed to a genuine, material and contested issue" in a separate trial of every other charge; (3) that "the evidence [is] logically relevant to prove this issue for a reason other than its power to demonstrate criminal propensity;" and (4) that the evidence is "more probative than prejudicial" to the defendant. *Roper*, 564 A.2d at 731.[6] *But see Johnson v. United States*, 683 A.2d 1087, 1099 (D.C. 1996), *cert. denied*, 520 U.S. 1148 (1997) (danger of unfair prejudice must substantially outweigh probative value).

As the D.C. Court of Appeals has recognized, the standards are different under D.C. case law and the Federal Rules of Evidence. Whereas Rule 404(b) of the Federal Rules of Evidence is viewed as an "inclusionary rule," the District of Columbia follows an exclusionary rule under which the prosecution bears the burden of showing that the evidence falls within one or more of the recognized exceptions and of proving the alleged prior misconduct by clear and convincing evidence. *Thompson v. United States*, 546 A.2d 414, 424 n.18 (D.C. 1988); *see also Johnson v. United States*, 683 A.2d 1087, 1101 (D.C. 1996) (en banc). The District of Columbia Court of Appeals has expressly noted that D.C.'s "rule is more restrictive than the comparatively permissive federal rule, in which such evidence is held to be admissible unless it bears solely on criminal predisposition." *Holmes v. United States*, 580 A.2d 1259, 1267 (D.C. 1990). Indeed, the court "ha[s] emphasized that our rule should not be applied in a parsimonious spirit, and courts must view with a jaundiced eye evidence purportedly offered as relevant to some other issue but in reality bearing wholly or primarily on the defendant's predisposition to commit another similar crime. Courts must be vigilant to ensure that poisonous predisposition evidence is not brought before the jury in more attractive wrapping and under a more enticing sobriquet." *Id.* at 1267 (internal quotation marks and citations omitted).

To determine mutual admissibility, the question is whether evidence of each crime would be admissible in a separate trial of every other crime. Sometimes the danger of unfair prejudice can substantially outweigh the probative value if evidence of one offense were introduced in a trial for the other even though the contrary would not be true. For example, in *Bright v. United States*, 698 A.2d 450 (D.C. 1997), the defendant was charged with two murders in which .38 caliber ammunition was used and with unlawful possession of ammunition relating to a .38

[6] Not every item of evidence must fall within a *Drew* exception. The criteria are to be applied in a "broader sense." *Bradley v. United States*, 433 F.2d 1113, 1118 (D.C. Cir. 1969); *see also Hackney v. United States*, 389 A.2d 1336, 1345 (D.C. 1978), *cert. denied*, 439 U.S. 1132 (1979); *Bridges*, 381 A.2d at 1078.

caliber round of ammunition found in his apartment five days later. The court held that while evidence of the ammunition would have been admissible in a trial on the murder charges, evidence of the murders would not have been admissible in a trial on possession of ammunition because it would be substantially more prejudicial than probative; the possession of ammunition was reversed, but the murder was affirmed.

Mutual Admissibility:

Be careful that offenses are truly *mutually* admissible. Oftentimes in the quest for efficiency, there may be pressure to go forward with a joint trial where, in reality, only one of the offenses would be admissible in a trial for the other and not vice versa.

The major issues to which independent other crimes evidence may legitimately be directed are the so-called "*Drew* exceptions":

> (1) motive, (2) intent, (3) the absence of mistake or accident, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of the one tends to establish the other, and (5) the identity of the person charged with the commission of the crime on trial.

331 F.2d at 90.

Joinder has often been upheld under the identity exception. The Court of Appeals seems to have been much more accepting of joinder under the identity exception in the instance of robberies than in other types of cases such as burglaries. For instance, in *Ifelowo v. United States*, 778 A.2d 285 (D.C. 2001), the court held that the trial court did not abuse its discretion in denying the defendant's motion to sever three robbery counts. The Court of Appeals held that, based on the totality of circumstances, and despite the differences among the robberies, the combination of the consistent features of each of the three joined robberies created a reasonable probability that the same persons committed all three and thus outweighed the variations between the three. *Id*. at 295.[7] The robberies all involved the threat of force, occurred around the same time of day, took place in reasonable geographic proximity, and involved a similarly described car in which the perpetrators drove up and drove away. *Id*. at 294; *see also Shotikare v. United States*, 779 A.2d 335, 339 (D.C. 2001) (holding no abuse of discretion in denying severance from case of co-defendant Ifelowo); *Coleman*, 619 A.2d at 44-46 (holding no abuse of discretion in refusing to sever four robberies); *Bond v. United States*, 614 A.2d 892, 896-97 (D.C. 1992) (holding no abuse of discretion in refusing to sever five robberies where evidence of other charged armed robberies committed within a four-day period would have been admissible to prove identity in separate prosecutions); *Cantizano v. United States*, 614 A.2d 870, 874 (D.C. 1992) (four assaults that were classic signature crimes with unusual *modus operandi*).

[7] The court also found that any "striking differences" among the three robberies were cured by the rebuttal testimony of the other robber, who implicated Ifelowo in all three robberies. *Id*.

Where the offenses are insufficiently similar, however, the court has reversed. In *Wright v. United States*, 570 A.2d 731 (D.C. 1990), the court found an abuse of discretion in refusal to sever two burglary charges where, although the burglaries were of the same video store, on holidays, within thirty days of each other, and accomplished by similar methods, they did not show a sufficiently distinctive *modus operandi*. *Id*. at 733-36.

Similarly, the indictment in *Evans* charged two burglaries and related crimes. Each burglary was a night-time entry of an occupied dwelling by two black youths who demanded money and expressed an interest in drugs; each was facilitated by a ruse involving a third party; the victims were either threatened or assaulted; and one of the burglars was referred to as "Papa." None of those factors, alone or in combination, was "sufficiently distinctive . . . to warrant the introduction of evidence under the identity exception." 392 A.2d at 1021. In *United States v. Carter*, 475 F.2d 349 (D.C. Cir. 1973), the indictment charged armed robbery and assault on January 11, assault on January 16, and armed robbery and assault on January 17. The court found prejudicial error in denial of severance where the only evidence common to all the charges was that the assailant wore a fur coat and hat: "[T]he jury must have viewed the evidence cumulatively . . . [A]s a practical matter the jury must have been influenced by the sum total of the evidence, without segregating, in insulated compartments, the proof under each group of counts." *Id*. at 351; *see also United States v. Bussey*, 432 F.2d 1330, 1334-35 (D.C. Cir. 1970) (evidence of uncharged robbery committed twenty minutes before charged robbery inadmissible because no strong evidence that defendant committed both).

PRACTICE TIP:

The Court of Appeals has at times used loose language to refer to evidence coming in to show identity. Beware of use of this language to inappropriately support an argument for admission under the *Drew* paradigm where that is not what the Court of Appeals was addressing. An example previously relied upon by the United States is *Dockery v. United States*, 853 A.2d 687 (D.C. 2004). The *Dockery* court's reference to proving identity, however, had nothing to do with the *Drew* analysis, but rather was merely saying that evidence of a prior crime helped "identify" the defendant; the *Dockery* court was really just saying that the evidence showed that the defendant had the motive and means to commit the later shooting. *See id*. at 698.

In the domestic violence context, the Court of Appeals has held that prior instances of misconduct toward the complainant are admissible, as are acts against third parties if there is a sufficient nexus. *Gezmu v. United States*, 375 A.2d 520 (D.C. 1977) (earlier domestic violence toward complainant admissible to show malice and motive.); *see McCloud v. United States*, 781 A.2d 744 (D.C. 2001) (no abuse of discretion in denying severance of counts alleging abuse against defendant's five different children or step-children).

Even if the government has met the burden of demonstrating mutual admissibility, the court may sever the counts due to undue prejudice towards the defendant. *See Roper*, 564 A.2d at 731

(stating that "there may be circumstances in which two offenses would be mutually admissible, but where the error still cannot be considered harmless"). *Harper*, involving offenses stemming from two sexual assaults, noted the need for particular vigilance in analyzing probative value versus prejudicial impact, because the danger of undue prejudice from joinder is "particularly substantial" in sex offenses. 582 A.2d at 488 n.3. The court upheld one set of convictions based on other crimes evidence under the identity exception, but reversed and remanded the conviction in which other crimes evidence was admitted under the intent exception. *See also Ali v. United States*, 520 A.2d 306, 310-12 (D.C. 1987) (holding that evidence that defendant in child sex abuse case previously touched complainant's younger sister on three to five occasions separate from the alleged incidents with complainant was not admissible under "common scheme or plan" theory; the court explicitly stated "[a] pattern or systematic course of conduct is insufficient to establish a plan," regardless of the similarity of the offenses "[t]here must be a permissive inference that both crimes were related to an overall goal in the defendant's mind"). *See generally McFerguson*, 870 A.2d at 1202 (government conceding on appeal that distinct instances of alleged sexual assaults not admissible under common scheme or plan theory).

Cases upholding joinder under other *Drew* exceptions include *Leasure v. United States*, 458 A.2d 726, 729 (D.C. 1983) (two murders mutually admissible to show "intent or . . . the absence of innocent presence"); *Fowler v. United States*, 374 A.2d 856, 857-58 (D.C. 1977) (evidence relating to four "flim-flam" schemes, under common scheme exception); *Calhoun v. United States*, 369 A.2d 605, 607-08 (D.C. 1977) (robbery counts mutually admissible to show "motive, intent, the absence of accident, and a common scheme or plan to rob," and evidence of each was "simple and distinct"); *Goins v. United States*, 353 A.2d 298, 300 (D.C. 1976) (two armed robberies and one weapons charge mutually admissible as "common scheme or plan"); and *United States v. Burkley*, 591 F.2d 903, 920-22 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 966 (1979) (narcotics transactions joined to show common scheme and predisposition where defense claimed entrapment).

The *Drew* analysis does not apply where the evidence is direct proof of the crime charged. *See Crutchfield*, 779 A.2d at 322-23 & n.5. "*Drew* does not apply where such evidence (1) is direct and substantial proof of the charged crime, (2) is closely intertwined with the evidence of the charged crime, or (3) is necessary to place the charged crime in an understandable context." *Id.* at 322 n.5 (quoting *(William) Johnson v. United States*, 683 A.2d 1087, 1098 (D.C. 1996) (en banc)). *But see Sweet v. United States*, 756 A.2d 366, 373 (D.C. 2000) (holding that evidence that defendant had killed before on behalf of co-defendant was not direct proof that he killed or conspired to kill decedent in present case at co-defendant's behest and thus not admissible under *Johnson*). The Court of Appeals has consistently held that obstruction of justice charges are properly joined with original charges as the obstruction charges are evidence of a consciousness of guilt. *Crutchfield*, 779 A.2d at 323; *Byrd v. United States*, 502 A.2d 451, 452 (D.C. 1985).

When evidence of joined offenses is "mutually admissible," it need not be presented in a "separate and distinct" manner. Indeed, a proper finding of mutual admissibility necessarily implies some relevant overlap of proof. *Watson v. United States*, 536 A.2d 1056, 1071-72 & n.30 (D.C. 1987) (en banc), *cert. denied*, 486 U.S. 1010 (1988). This does not mean, however, that the court must permit the government free rein to commingle its evidence however it pleases. *Cf. Harper*, 582 A.2d at 489 (reversing where government made predisposition

argument). Rule 14 imposes a continuing obligation to prevent unnecessary prejudice. If a more limited overlap in proof will minimize the prejudice, the court should impose reasonable restrictions on the order of the government's presentation of its evidence.

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***Bailey v. United States*, 10 A.3d 637 (D.C. 2010).** Trial court did not abuse its discretion in denying motion to sever sexual abuse claims of two victims – men recently released from prison and on probation or parole – where defendant's use in both cases of a forged document and the threat of re-incarceration to coerce their compliance with certain sexual acts made the evidence "closely intertwined" and thus mutually admissible and where evidence of defendant's guilt was strong.

***Haney v. United States*, 41 A.3d 1227 (D.C. 2012).** Evidence of threats made against detective at detention hearing properly joined with underlying assault and weapons offenses where gun-mimicking gesture and mouthing of words "I'm going to fuck you up" were directed at detective, detective was going to testify against defendant on assault and weapons charges, detective was not a fungible witness in that he had conducted a significant part of the investigation and was the only witness to victim selecting defendant from photo array, and threats and obstruction charges were unlikely to have affected jury's consideration of the charge of AWIK by shooting victim nine times at point-blank range.

***Workman v. United States*, 15 A.3d 264 (D.C. 2011).** Trial court did not err in denying defense motion to sever murder, PFCV and CPWL counts from CPWL count of alleged murder weapon on later date after finding that evidence in two trials would be mutually admissible and that defendant's non-specific argument that he might wish to testify regarding charges stemming from one day and not the other was insufficient to show prejudice.

2. Separate and Distinct

If the evidence is not mutually admissible, the charges must be severed unless they can be and are kept "separate and distinct" so that the jury is unlikely to cumulate the evidence in deciding guilt. *See Bright*, 698 A.2d 450; *Dunaway v. United States*, 205 F.2d 23, 27 (D.C. Cir. 1953). Theoretical distinctness is not enough; the government's presentation and the court's instructions must keep the evidence "separate and distinct." This requires of "court and counsel . . . a 'vigilant precision in speech and action far beyond that required in the ordinary trial.'" *Cox v. United States*, 498 A.2d 231, 235 (D.C. 1985) (quoting *Drew*, 331 F.2d at 94).

In *Parks v. United States*, 656 A.2d 1137 (D.C. 1995), the defendant moved pretrial to sever a simple assault count from other more serious charges where the same individual was the complainant in both confrontations, and the confrontations occurred within a week of each other in the same neighborhood. Moreover, the government's theory as to both incidents was that the defendant acted out of jealous anger and an unwillingness to let the complainant leave him. Although the judge twice instructed the jury to consider the evidence of the two incidents separately, the simple assault conviction was reversed because the government presented evidence of both incidents throughout the trial and failed to keep the incidents separate. In light

of this "confused presentation of evidence," the court was not convinced that the jury was able to consider the charges separately. *Id*. at 1139-40.

On the other hand, *Jaggers v. United States*, 482 A.2d 786, 795 (D.C. 1984), *overruled on other grounds* by *Carter v. United States*, 684 A.2d 331 (D.C. 1996), found no error in the refusal to sever various robbery, burglary, and felony murder counts against four victims because, although the evidence of the charges was similar, it was separate and distinct; acquittal on all counts as to one victim demonstrated the jury's ability to keep the evidence separate. Similarly, in *Parker*, appellant was charged with two counts of child sexual abuse on two different complainants and was acquitted of one count and convicted of the other. The court, finding that any error on the trial judge's part in not conducting a full "other crimes" *Drew* inquiry was harmless given the strength of the government's case, noted that "appellant was convicted of the charge on which the government had strong evidence and acquitted of the charge on which the evidence was weaker." 751 A.2d at 949. This indicated that evidence from one charge had not "tainted" the other charge. Likewise, *Reyes v. United States*, 933 A.2d 785 (D.C. 2007), held that the trial court did not abuse its discretion for failure to sever a UUV count from unrelated kidnapping and robbery counts where the evidence regarding the UUV offense was separate from other evidence presented at trial, and where the trial judge instructed the jury to give each count separate consideration.[8] *But see Ray*, 472 A.2d at 859 n.8 (rejecting government's argument that evidence was sufficiently separate and distinct).

That two crimes are insufficiently related to fall within a *Drew* exception does not mean that they are "separate and distinct" and therefore joinable under *Dunaway*. To the contrary, other crimes that are similar enough for the government to argue that a *Drew* exception should apply, but do not in fact meet one of the *Drew* exceptions, rarely should be found sufficiently separate and distinct. It is in those cases that the jury is most likely to be confused or misuse the evidence:

> Once the "identity exception" to the "other crimes" rule has been rejected the points of potential similarity cut the other way. Every suggestion at trial that the two crimes were in some way similar increased the likelihood that the jury became confused or misused the evidence.

Tinsley v. United States, 368 A.2d 531, 536-37 (D.C. 1976); *accord Settles*, 522 A.2d at 355.

Goodall v. United States, 686 A.2d 178 (D.C. 1996), addressed the joint trial of an "ex-felon" count with other charges. Goodall moved to sever the ex-felon count on the ground that "evidence of his prior felony conviction – implying propensity to commit crime – would not have otherwise been admissible" in a trial on the remaining weapons counts. *Id*. at 181. The

[8] *See also (Ronald) West*, 599 A.2d at 792 (joint trial of three separate incidents of rape and one of murder was permissible where court instructed jury to keep charges separate and evidence was presented separately, even though prosecution spoke of "signature or mark" and "creature of habit" in closing argument); *Thorne v. United States*, 582 A.2d 964, 965-66 (D.C. 1990) (no manifest injustice in failure to sever incidents of distribution of preludin and heroin where defendant failed to preserve issue at trial, government presented evidence separately and distinctly, and court instructed jury to consider each offense separately); *(James) Arnold v. United States*, 511 A.2d 399, 404-07 (D.C. 1986) (no error where government careful to keep evidence separate and distinct and jury twice instructed to consider each offense separately); *Fields v. United States*, 484 A.2d 570, 573 (D.C. 1984) (failure to sever *sua sponte* not plain error where evidence was kept separate and distinct).

court concluded that given the efforts to minimize prejudice – (1) stipulating to the prior felony conviction, without revealing the nature of the offense, instead of proving it through live testimony; and (2) twice cautioning the jury of the limited relevance of the felony conviction – the trial court did not abuse its discretion in denying severance. *Id*. at 180. The *Goodall* court did not, however, foreclose other alternatives. For instance, although finding no abuse of discretion in proceeding as described above, the court recognized that it would also be permissible to bifurcate the jury's deliberations by submitting the other counts to jury first, awaiting a verdict on those counts, and then submitting the ex-felon count. *Id*. at 184 n.4. Further, it is questionable whether *Goodall* remains good law on the point that a single element of an offense cannot be submitted to the trial judge alone to determine. In *Shepard v. United States*, 544 U.S. 13 (2005), the majority opinion addressed the dissent's concern that requiring proof of prior convictions could work to prejudice a defendant by saying: "if the dissent turns out to be right that *Apprendi* will reach further, any defendant who feels that the risk of prejudice is too high can waive the right to have a jury decide questions about his prior convictions." *Id*. at 26 n.5; *cf. United States v. Dockery*, 955 F.2d 50 (D.C. Cir. 1992) (denial of severance an abuse of discretion where government refused to stipulate to prior conviction, government repeatedly referred to conviction, and trial court failed to instruct jury that it could not use the conviction to infer propensity to commit the other charged crimes).

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***Fadero v. United States*, 59 A.3d 1239 (D.C. 2013).** Trial court did not err in refusing to grant motion to sever when, upon the jury's request for clarification, the court resolved any confusion about dates by directing the jurors to the verdict form, which clearly indicated which offenses allegedly occurred on which dates.

***Thomas v. United States*, 50 A.3d 458 (D.C. 2012).** Trial court did not abuse its discretion in trying in same trial two counts of sexual abuse against different women in two different years where government was careful to present evidence of two different crimes separately, including emphasizing in opening that offenses were to be considered separately, presenting entirety of case for first count before moving to second, calling two separate DNA experts, one for each assault, summarizing evidence separately in closing, and reemphasizing in rebuttal that evidence with respect to each count should be considered separately; and trial court explicitly instructed jury to consider crimes separately and noted that it could find defendant guilty of neither crime, just one, or both.

3. Prejudice from Presenting Separate Defenses

Severance is also required if the defendant would be "embarrassed and confounded" in trying to defend against multiple charges, as, for example, when the defendant wishes to testify with respect to some charges but not others.[9]

[9] To obtain severance, a single defendant who is tried for multiple offenses must make "a convincing showing that he [had] both important testimony to give concerning one count [or pair of counts] and a strong need to refrain from testifying on the other [counts]." *Allen v. United States*, 622 A.2d 1103, 1105 (D.C. 1993) (per curiam) (citation omitted).

> Prejudice may develop when an accused wishes to testify on one but not the other of two joined offenses which are clearly distinct in time, place and evidence. His decision whether to testify will reflect a balancing of several factors with respect to each count: the evidence against him, the availability of defense evidence other than his testimony, the plausibility and substantiality of his testimony, the possible effects of demeanor, impeachment, and cross-examination. But if the two charges are joined for trial, it is not possible for him to weigh these factors separately as to each count. If he testifies on one count, he runs the risk that any adverse effects will influence the jury's consideration of the other count. Thus, he bears the risk on both counts, although he may benefit on only one. Moreover, a defendant's silence on one count would be damaging in the face of his express denial of the other. Thus he may be coerced into testifying on the count upon which he wished to remain silent.

Cross v. United States, 335 F.2d at 989. Cross was indicted for robberies of a church rectory and a tourist home, several months apart. He was acquitted on the latter count, as to which he testified that he was a victim rather than an accomplice; he was convicted of the church robbery, his denial of which "was plainly evasive and unconvincing." *Id*. at 990. Moreover, the prosecutor sharply cross-examined him on "his generally tawdry way of life and his prior convictions." *Id*. Denial of severance was reversible error. *Id*. at 991.

If a defendant wishes to testify on only some of the charges, severance should be granted if counsel makes "a convincing showing that [the defendant] has both important testimony to give concerning the count and a strong need to refrain from testifying on the other." *Baker v. United States*, 401 F.2d 958, 976-77 (D.C. Cir. 1968), *cert. denied*, 400 U.S. 965 (1970); *accord (James) Arnold*, 511 A.2d at 406; *Strickland v. United States*, 389 A.2d 1325, 1332 (D.C. 1978), *cert. denied*, 400 U.S. 926 (1979); *see also Roy v. United States*, 652 A.2d 1098, 1108 (D.C. 1995) (no abuse of discretion in refusing to sever obstruction of justice from armed robbery, PFCV, and CPWL because defendant's proposed testimony on obstruction charge was not exculpatory and judge would have restricted government's cross-examination of the defendant regarding the armed robbery offense).

If a defendant does not request severance when he wishes to testify in one but not all joined cases, the cases will be reviewed only for plain error. *Fields v. United States*, 698 A.2d 485, 490 (D.C. 1997), *cert. denied*, 523 U.S. 1012 (1998) (holding that trial court's failure to order *sua sponte* severance was not plain error when evidence of each offense was "separate and distinct and thus unlikely to be amalgamated in the jury's mind into a single inculpatory mass").

Horton v. United States, 377 A.2d 390, 393 (D.C. 1977), appeared to conclude that the *Cross* rationale is inapposite if evidence of two crimes would be mutually admissible because "appellant would have been questioned on all offenses had he taken the stand." *Roper*, however, rejected this analysis because, if the defendant intends to testify on one charge and not the other, he would not be testifying at all at one of the trials.

> While it has been said that where offenses are mutually admissible, "there can be no harm in trying the offenses together rather than successively, because in either

> event the jury will hear all about both crimes," this may, in fact, not be true in all cases. One situation where this might not be so, for instance, would be in a case where the defendant wishes to testify as to one offense, but does not wish to testify as to another. If the charges are tried separately, he could choose to testify in the first trial without doing so in the second. If, on the other hand, the two charges were tried together, the defendant, desiring to testify as to the first offense, "may be coerced into testifying on the count upon which he wished to remain silent." The potential prejudice the defendant may thus suffer for having the charges tried together rather than apart exists regardless of whether the evidence of each crime would have been admissible in a trial of the other.

Roper, 564 A.2d at 731 n.9 (citations omitted).

Counsel should make the proffer *ex parte* about the defendant's wish to testify. Just as the defense is not entitled to disclosure of the government's case for purposes of severance litigation, *United States v. Jones*, 438 A.2d 444, 446-47 (D.C. 1981), neither is the government entitled to disclosures of defense theories that, but for the severance motion, it would not otherwise obtain. *Cf. Bowman v. United States*, 412 A.2d 10, 12 (D.C. 1980) (judge has no power to condition presentation of defense upon pretrial disclosure of its nature).

B. Severance of Defendants

Several types of prejudice may require severance of defendants: (1) use of a statement by one that inculpates another; (2) irreconcilable defenses from which the jury will unjustifiably infer that the conflict alone demonstrates that both are guilty; or (3) testimony by one that urges the jury to draw an adverse inference from the other's silence.[10] *Rhone v. United States*, 365 F.2d 980, 981 (D.C. Cir. 1966). Additional grounds include disparate evidence such as the evidence against the co-defendant being far more damaging, a desire to call the co-defendant as an exculpatory witness, or the co-defendant's alignment with the government. *See Jackson v. United States*, 650 A.2d 659, 662 (D.C. 1994); *United States v. Ford*, 870 F.2d 729, 731 (D.C. Cir. 1989); *United States v. Mardian*, 546 F.2d 973, 979-81 (D.C. Cir. 1976). *But see Riley v. United States*, 923 A.2d 868 (D.C. 2007) (trial court properly exercised its discretion in denying request for severance of co-defendant based on "conflicting defenses" and a disparity of evidence because the defenses were not irreconcilable and a jury instruction was given to limit the disparity.).

Severance:

If the co-defendant's presence will be beneficial, severance, of course, should not be sought. For example, the co-defendant may have an unusually strong defense that might "spill over" to the client. If the defendants do not know each other but are accused of a joint crime, this fact alone may create a reasonable doubt. A testifying co-defendant may exculpate the other. The benefits and detriments should be thoroughly evaluated, after full investigation and complete discovery, before severance is requested.

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***Castillo-Campos v. United States*, 987 A.2d 476 (D.C. 2010).** Trial court did not err in denying co-defendants' motions for severance, despite fact that defendants were charged with a number of non-overlapping crimes and trial lasted almost two months, because due to conspiracy charges much of same evidence would have been introduced during separate trials, no indication that amount of evidence hindered jury's ability to make individual determinations as to guilt or innocence, jury was instructed to consider each offense and its supporting evidence separately, and the jury deliberated at length and returned both convictions and acquittals for each defendant.

***Diggs v. United States*, 28 A.3d 585 (D.C. 2011).** Trial court did not abuse its discretion in denying defendant's severance motion based upon redaction of statement by defendant in which he inculpated co-defendant because defendant would not have been entitled to invoke rule of completeness had he been tried alone where excluded portion of statement was not necessary to explain admitted portion, place it in context, or avoid misleading jury.

***Hargraves v. United States*, 62 A.3d 107 (D.C. 2013) (amended).** Not abuse of discretion to deny motions for severance where arguably inconsistent testimony was at most cumulative of other evidence and where jury clearly was able to differentiate co-defendants in that it acquitted defendants of most serious charges against them.

***Harrison v. United States*, 76 A.3d 826 (D.C. 2013).** Trial court did not err in denying motion to sever where court instructed jury where appropriate that certain evidence applied only to one defendant and was not to be considered in evaluating government's case against other defendant.

***Robinson v. United States*, 100 A.3d 95 (D.C. 2014).**

***King v. United States*, 51 A.3d 512 (D.C. 2012).** Trial court did not abuse its discretion in denying motion for severance, even though charges against other defendant were more numerous and more serious, because threats offense occurred on different days and involved different crimes, court instructed jury to consider evidence and charges against each defendant separately, and there was no danger that jury misused evidence to infer a criminal propensity on defendant's part.

1. Introduction of a Co-Defendant's Statement

The Confrontation Clause requires severance when the government uses a statement by a non-testifying co-defendant that implicates the defendant. The trial court in *Bruton v. United States*, 391 U.S. 123 (1968), admitted the co-defendant's out-of-court confession implicating both himself and Bruton in an armed robbery. The Supreme Court held that Bruton's right to cross-examine was violated, despite the trial court's instruction that the jury could not use the statement against him. *Id*. at 125-26. "[I]n the context of a joint trial we cannot accept limiting instructions as an adequate substitute for [Bruton's] constitutional right of cross-examination."

Id. at 137; *see also Dumas v. United States*, 483 A.2d 301, 303 (D.C. 1984); *Carpenter*, 430 A.2d at 500.[11]

The Supreme Court made clear in *Crawford v. Washington*, 541 U.S. 36 (2004), that a "testimonial" statement of a non-testifying co-defendant is inadmissible, even if it meets some other hearsay exception and even if it "interlocks" with a statement by the defendant. *Crawford*, 541 at 58-59 (distinguishing *Lee v. Illinois*, 476 U.S. 530 (1986)); *see also Morten v. United States*, 856 A.2d 595 (2004) (reversing where statements of non-testifying co-defendants were admitted against defendants as declarations against penal interest). Accordingly, *Bruton* error requires reversal unless it is harmless beyond a reasonable doubt. *Schneble v. Florida*, 405 U.S. 427, 430 (1972); *Harrington v. California*, 395 U.S. 250, 254 (1969). In *Johnson v. United States*, 883 A.2d 135 (D.C. 2005), a *Bruton* violation was deemed harmless where the trial court provided an extensive curative instruction when a co-defendant's hearsay statement implicating Johnson was unanticipated, and other evidence implicating his involvement was significant.

Bruton is inapplicable if the co-defendant's statement would be admissible against the defendant in a separate trial. *See Tennessee v. Street*, 471 U.S. 409, 417 (1985) (used to impeach defendant's testimony that his own confession was coerced copy of co-defendant's statement); *Dutton v. Evans*, 400 U.S. 74, 81 (1970) (admissible as co-conspirator's statement); *Byrd v. United States*, 364 A.2d 1215, 1219-20 & n.8 (D.C. 1976) (relevant to defendant's intent); *United States v. Leonard*, 494 F.2d 955, 970 (D.C. Cir. 1974) (contemporaneous declaration or excited utterance); *cf. (Michael) Smith*, 561 A.2d at 472 n.2 (inadmissible hearsay as to defendant); *Dumas*, 483 A.2d at 303 (same).

Severance is not required on Sixth Amendment grounds when the co-defendant testifies and is therefore subject to cross-examination about the statement. *Nelson v. O'Neil*, 402 U.S. 622, 629-30 (1971); *Lemon*, 564 A.2d at 1371-72 (confession of testifying co-defendant hearsay as to defendant, but negligible possibility of substantial prejudice given opportunity to cross-examine); *Ellsworth v. United States*, 300 A.2d 456, 457-58 (D.C. 1973) (testifying co-defendant affirmed statement and was cross-examined by defendant's counsel); *Jackson v. United States*, 439 F.2d 529, 530 (D.C. Cir. 1970) (*per curiam*) (testifying co-defendants repudiated prior confessions; defendant's counsel chose not to cross-examine).

Satisfaction of the Confrontation Clause does not terminate the court's continuing duty to reduce or eliminate prejudice caused by joinder. *Carpenter*, 430 A.2d at 503. A co-defendant's out-of-court statement remains, of course, inadmissible hearsay as to any other defendant. *Id*. at 500. When the severance motion is based on the proposed use at trial of a co-defendant's confession, Rule 14 permits a number of alternatives: severance, exclusion of the statement, redaction, *id*. at

[11] Severance on this ground is not required in every bench trial because judges are presumed able to compartmentalize evidence against each co-defendant. *See Thompson v. United States*, 745 A.2d 308, 316 n.9 (D.C. 2000) (in bench trial, "[t]he trial judge is presumed to know the law and to refrain from relying on inadmissible evidence") (citation omitted); *In re L.J.W.*, 370 A.2d 1333, 1336-37 (D.C. 1977) (presumption may be rebutted only by showing judge improperly considered statement against defendant). Super. Ct. Juv. R. 14, like the criminal rule, requires the judge to review the statements *in camera* and to grant severance or provide other necessary relief whenever the respondent is prejudiced by joinder. *Cf.* D.C. Code § 16-2312(j) (statutory right to recuse initial hearing judge from fact-finding role).

504, or "whatever other relief justice requires," *Elliott v. United States*, 633 A.2d 27, 35 (D.C. 1993).

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***Dowtin v. United States*, 999 A.2d 903 (D.C. 2010).** Trial court did not abuse its discretion in denying motion to sever where one co-defendant introduced unredacted statement that may have inculpated second co-defendant because testimony by two witnesses established second co-defendant's involvement in offense, co-defendant did not deny his involvement when it was discussed in his presence, and co-defendant's fingerprints were found on car used in commission of crime.

***Ingram v. United States*, 40 A.3d 887 (D.C. 2012).** Although trial court "clearly erred" in admitting co-defendant's unredacted confession, error harmless where limiting instructions were given on three separate occasions, other evidence against the defendants was "overwhelming," and the jury's verdict suggested that the jury had followed the court's limiting instructions.

***Mobley v. United States*, 101 A.3d 406 (D.C. 2014).** Trial court did not abuse discretion in denying defendant's motion for severance where co-defendant's use of pronoun "they" during non-testimonial admission did not incriminate any particular person and trial judge gave timely cautionary instructions to jury that co-defendant's statement could only be used against him and not other co-defendants.

a. Redaction of confessions

Richardson v. Marsh, 481 U.S. 200, 211 (1987), held that an out-of-court statement by a non-testifying co-defendant may be admitted at a joint trial, if it is redacted to eliminate any reference to the defendant's existence. *Accord Brown v. United States*, 934 A.2d 930 (D.C. 2007) (not an abuse of discretion to admit redacted version of co-defendant's out-of-court statement rather than severing trials where admission was changed to "I punished them" rather than "we punished them"); *Perry v. United States*, 571 A.2d 1156, 1159 (D.C. 1990) (not error to refuse to sever defendants where confession was redacted to eliminate any reference to co-defendant by name and limiting instruction was given). *Richardson* and *Cruz v. New York*, 481 U.S. 186 (1987), stand for the proposition that the Confrontation Clause does not permit use of a non-testifying co-defendant's redacted statement that "interlocks" with, but is not substantially corroborated by, the defendant's own confession.[12] *But see Dowing v. United States*, 929 A.2d 848 (D.C. 2007) (no violation of Confrontation Clause to admit redacted videotaped statement of co-defendant where co-defendant ultimately testified and was subjected to cross-examination).

While *Richardson* declined to address the issue, *Gray v. Maryland*, 523 U.S. 185 (1998), applied *Bruton*'s protective rule to redacted confessions in which blank spaces and words such as 'delete' or 'deletions' are used in place of references to a non-testifying co-defendant. In *Gray*, the prosecution was allowed to introduce a co-defendant's redacted confession into evidence.

[12] The *dictum* in *Carpenter*, 430 A.2d at 505, that instructions may suffice to cure prejudice "where the references to the non-confessing defendant are so intertwined with the confessing" co-defendant's statement that redaction is impracticable, "and the references are not significantly incriminating," should not survive *Cruz* and *Richardson*.

Unlike the confession in *Richardson*, the redacted confession in *Gray* clearly referred to the existence of a co-conspirator; references to *Gray* were replaced with 'deleted' or 'deletion.' The Court distinguished *Richardson*:

> We concede that *Richardson* placed outside the scope of *Bruton*'s rule those statements that incriminate inferentially. We also concede that the jury must use inference to connect the statement in this redacted confession with the defendant. But the inference pure and simple cannot make the critical difference, for if it did, then *Richardson* would also place outside *Bruton*'s scope confessions that use shortened first names, nicknames, descriptions as unique as the "red-haired, bearded, one-eyed man-with-a-limp," and perhaps even full names of defendants who are always known by a nickname.

523 U.S. at 195 (citations omitted).

Before *Gray*, the Court of Appeals addressed this issue in *Foster v. United States*, 548 A.2d 1370, 1378 (D.C. 1988). *Foster*, however, ruled that a co-defendant's statement substituting neutral references for the defendant's name or description cannot be used if there is a "substantial risk" that the jury will consider it in deciding the defendant's guilt, adopting the doctrine of "contextual analysis:"

> [T]he trial court must consider the degree of inference the jury must make to connect the defendant to the statement and the degree of risk that the jury will make that linkage despite a limiting instruction. Such an assessment will require consideration of other evidence to determine whether the redaction is effective, when taken in context, to avoid linkage with the defendant.

Id. at 1379;[13] *see also Plater v. United States*, 745 A.2d 953 (D.C. 2000) (harmless error to allow introduction at trial statements of non-testifying co-defendant in which key word "we" was plural, neutral pronoun that comported with the proposed redaction "me and a few other friends" and did not directly implicate defendant). *Carpenter*, without specifically adopting a "contextual analysis," noted that severance is required unless redaction "effectively eliminate[s] from the out-of-court statement all references to the non-declarant co-defendant," including "references which, when placed in conjunction with the redacted statement, make it clear the deleted portions or names refer to the codefendant." 430 A.2d at 505 n.15; *cf. West v. United States*, 499 A.2d 860, 868-70 (D.C. 1985) (no *Bruton* violation when "the jury [could not] likely discern from the neutral references [in the redacted statement] a suggestion of any one of the codefendants in particular"). Foster moved for severance on the grounds that use of co-defendant Washington's statements to police, incriminating Foster, would violate Foster's Confrontation Clause rights if

[13] *Foster* surveyed federal decisions and relied on the approach of the D.C. and Sixth Circuits, which have found constitutionally deficient such substitutions as "blank," *Hodges v. Rose*, 570 F.2d 643, 647 (6th Cir.), *cert. denied* by *Lewis v. Rose*, 436 U.S. 909 (1978); "other man," *Serio v. United States*, 401 F.2d 989, 990 (D.C. Cir. 1968) (per curiam); and "named person," *Greenwell v. United States*, 336 F.2d 962, 969 (D.C. Cir. 1964). *See also Lyle v. Koehler*, 720 F.2d 426, 435 (6th Cir. 1983) (admission of co-defendant's letters referring to defendant as "Rock" constitutes error because of substantial risk, in context of other evidence, that jury would consider them in deciding defendant's guilt).

Washington did not testify. *Foster*, 548 A.2d at 1372. The trial court admitted the statement, with substitutions of "two other men" and "the other man" for Foster's nickname "Rock," because the statement "standing alone" did not incriminate Foster. *Id*. Five witnesses testified that the victim was killed when he violated Foster's order (during an armed robbery) not to mention the name Rock, and "[t]he government presented other evidence that Foster's nickname was Rock." *Id*. at 1379. Analyzing the statement in this evidentiary context, the court found a substantial risk that the jury would conclude that "Rock" was the name referred to in the redacted statement; no "substantial inference" was necessary. *Id*.

Since *Foster*, contextual analysis was applied in *(Michael) Smith*, 561 A.2d at 473-74 (admission of co-defendant's two-page confession, redacted by "whiting out" defendant's name in fourteen places and penciling around each space, was plain and reversible error); *Dew v. United States*, 558 A.2d 1112, 1119 (D.C. 1989) (deletion of references to defendant's involvement in crime, except for one substitution of "other person" in sentence that could not have been excised without distorting co-defendant's explanation, sufficient because statement contained no details of incident and did not corroborate testimony of government witnesses); *Morriss v. United States*, 554 A.2d 784, 786-87 (D.C. 1989) (reversal required where references to two co-defendants and victim were replaced with "person," "friend," and "guy," because jury would "readily be able to infer" from other evidence that statement referred to co-defendants). *But see Garris v. United States*, 559 A.2d 323, 330-31 (D.C. 1989) (reversal not required because two references in statement of *testifying* co-defendant were redacted to exclude any mention of defendant, and third was harmless in light of independent evidence of guilt and proper limiting instruction).[14]

Erroneous use of a co-defendant's statement is reversible unless proven harmless beyond a reasonable doubt. *Foster*, 548 A.2d at 1379*; see also Geter v. United States*, 929 A.2d 428 (D.C. 2007) (holding reversible error for trial court to allow prosecutor to cross-examine co-defendant about parts of his police statement that inculpated defendant by name, when the statement had previously been redacted in lieu of granting defendant's motion for severance.)

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***Medley v. United States*, 104 A.3d 115 (D.C. 2014).** Requirements of *Carpenter v. United States*, 430 A.2d 496 (D.C. 1981), do not apply to statements that fall within a hearsay exception.

[14] *Catlett v. United States*, 545 A.2d 1202, 1210 (D.C. 1988), *cert. denied* by *Smith v. United States*, 488 U.S. 1017 (1989), decided before *Foster*, upheld admission of a co-defendant's videotaped confession. All names were removed by erasing the relevant audio portions and masking the co-defendant's mouth so the jury could not read his lips. A transcript of the tape, with blanks for references to names, was provided to the jury only while the tape was played at trial. The court concluded that severance was properly denied because of the large number of participants in the crime, there was "other powerful evidence" against one defendant, and the jury was twice instructed to consider the statement only against the declarant and not to assume that the deletions referred to any other defendant. *Id*. at 1212.

2. Conflicting and Irreconcilable Defenses

Rule 14 requires severance when there is a:

> "clear and substantial contradiction between [co-defendants'] defenses," causing inherent irreconcilability between them, and . . . the irreconcilability creates a danger or risk that the jury will draw an improper conclusion from the existence of the conflicting defenses alone that both defendants are guilty.

Garris, 559 A.2d at 329 (citation omitted); *see also Rhone*, 365 F.2d at 981. The prejudice arises because "at least one defendant is assuredly lying and, for that reason, there is a danger that the jury will believe both are lying." *Ready v. United States*, 445 A.2d 982, 986 (D.C. 1982), *cert. denied*, 460 U.S. 1025 (1983).

> If the defenses are irreconcilable, the trial court must determine whether there would be available at trial enough independent evidence of [the defendant's] guilt – *beyond that required for the government to survive a motion for judgment of acquittal* – so that the court reasonably could find, with substantial certainty, that the conflict in defenses alone would not sway the jury to find [the defendant] guilty.

Ready, 445 A.2d at 987 (emphasis added); *see also Sams*, 721 A.2d at 954; *Walker v. United States*, 630 A.2d 658, 663 (D.C. 1993); *Tillman v. United States*, 519 A.2d 166, 171 (D.C. 1986). Once irreconcilability is shown, the government should proffer whatever evidence it has of the defendant's guilt so that the court can make an informed ruling.

In the classic case of irreconcilability, one co-defendant points an accusing finger directly at the other. In *Mitchell*, 569 A.2d 177 (D.C. 1990), the defendant was accused of raping and stabbing the decedent, and then, along with co-defendant Hair, moving the body. In cross-examination and argument, Hair's counsel became a second prosecutor, accusing Mitchell of completing the crime himself, and of figuratively stabbing Hair in the back by failing to exonerate him. On appeal, the government conceded irreconcilability, and the court agreed that the defenses were conflicting. However, because of strong independent evidence of Mitchell's guilt, the court concluded that the jury was not likely to convict based on the conflict alone. *Id*. at 179-82. Likewise, cases finding irreconcilability but sufficient independent evidence of guilt are: *Ingram v. United States*, 592 A.2d 992, 997 (D.C. 1991), *cert. denied*, 502 U.S. 1017 (1991) (alibi and misidentification); *Lemon*, 564 A.2d at 1372 (defendant claimed duress by co-defendant, who claimed absence from scene); *Ready*, 445 A.2d at 987 (one co-defendant testified that he shot into air while the other shot victim; the latter claimed alibi); *Sweet v. United States*, 438 A.2d 447, 450-51 (D.C. 1981) (coercion and alibi); *Ellis v. United States*, 395 A.2d 404, 409 (D.C. 1978), *cert. denied* by *Barnes v. United States*, 442 U.S. 913 (1979) (co-defendant's assertion that defendant masterminded crime "essentially contradictory" to claim of alibi).

Depending on the testimony of a defendant who claims innocent presence, that defense may be irreconcilable with alibi or misidentification. *See, e.g., Taylor v. United States*, 601 A.2d 1060, 1064 (D.C. 1991) (conflict, but sufficient independent evidence of guilt, though it must be carefully examined); *Dew*, 558 A.2d at 1119-20 (same). Conflicting defenses alone, however, do not automatically equal irreconcilable defenses. *Garris*, 559 A.2d at 330 (claims had some

degree of irreconcilability, but sufficient independent evidence of guilt); *United States v. Wilson*, 434 F.2d 494, 500 (D.C. Cir. 1970) (co-defendants' testimony that each was at billiard parlor prior to night of robbery, but that neither claimed to see other there, did not conflict and in fact corroborated their claim that they had not met before their arrest); *see also Johnson v. United States*, 980 A.2d 1174 (D.C. 2009) (co-defendants' claims that decedent died from fall after being punched by third party rather than from co-defendants' subsequent kicks not irreconcilable because which defendant struck fatal blow could not be defense to culpability for second-degree murder under theory of aiding and abetting); *Jennings v. United States*, 431 A.2d 552, 556 (D.C. 1981), *cert. denied*, 457 U.S. 1135 (1982) (no conflict).

At least one case has held that the defenses of general denial and alibi do not conflict. *Payne v. United States*, 516 A.2d 484, 492 n.15 (D.C. 1986) (per curiam). The circuit court has also found that insanity and duress do not always conflict. *United States v. Wright*, 783 F.2d 1091, 1094 (D.C. Cir. 1986).

Mutually antagonistic defenses are not prejudicial *per se*, and severance is not required if curative instructions were sufficient to cure any possibility of prejudice. *Zafiro v. United States*, 506 U.S. 534, 539-41 (1993); *see also United States v. Finotti*, 701 F. Supp. 830, 834 n.13 (D.D.C. 1988), *rev'd on other grounds sub nom*, *United States v. White*, 887 F.2d 267 (D.C. Cir. 1989) (severance denied where one co-defendant opened door to evidence other defendants wished to exclude).

Where counsel for co-defendants merely argued that their clients did not participate in the crimes charged, and neither defendant called any witnesses, *Dancy v. United States*, 745 A.2d at 266, (held that there were no irreconcilable defenses and, even if the defenses were conflicting, Dancy was not prejudiced by the conflict. "The trial court specifically noted that there was enough evidence of Dancy's guilt so that it could reasonably find with substantial certainty that the conflict in defenses alone would not sway the jury to find Dancy guilty." *Id*.

Conflicting goals in impeaching a witness may require severance. *See Mercer v. United States*, 724 A.2d 1176, 1193-94 (D.C. 1999) (severance granted where one murder defendant wanted to impeach witness by asserting that she entered witness protection program to get money from government, but co-defendant wanted to keep out all evidence regarding intimidation of witnesses); *cf. Boone v. United States*, 769 A.2d 811 (D.C. 2001) (finding no abuse of discretion in denying severance under Rule 14 where one defendant wished to cross-examine cooperator to show that cooperator had pleaded guilty and testified against co-defendant in an earlier burglary case; defendant was able to cross-examine with regard to cooperation agreement and was only precluded from identifying the co-defendant as the person against whom the cooperator previously testified).

3. Disparate Evidence

Severance may be required if it becomes apparent that the evidence against one co-defendant is "far more damaging" than the evidence against another, raising the specter of guilt by association. *United States v. Mardian*, 546 F.2d 973, 979-81 (D.C. Cir. 1976), a case arising out of the Watergate prosecution, held that Mardian's case should have been severed, in part, when it

became clear, during trial, that the weight of evidence against the co-defendants was disproportionate.

In *United States v. Sampol*, 636 F.2d 621 (D.C. Cir. 1980) (per curiam), a prosecution for the murder of Chilean Ambassador Orlando Letelier and Ronni Moffitt, Sampol was charged with false statement and misprison of a felony. His co-defendants were accused of murder and conspiracy to commit murder. The court reversed Sampol's conviction, identifying several factors that together created impermissible prejudice from the joint trial: (1) confusion of the charges and the evidence, which left the false impression that Sampol was a co-conspirator in the murders; (2) great disparity in the evidence; and (3) Sampol's inability to present exculpatory testimony and limited opportunity to cross-examine an important government witness. *Id*. at 642-51. The court stressed that the co-defendants were charged with particularly heinous murders, while Sampol was charged with lesser crimes. Although the evidence against Sampol was no less substantial than that against his co-defendants, "the quantity and type of evidence adduced against the co-defendants [was] a vital consideration in evaluating the necessity for severance." *Id*. at 646. The court found it unreasonable to expect the jury to successfully compartmentalize the evidence, most of which concerned an extremely violent assassination scheme for which Sampol was not on trial. It also noted, as in *Mardian*, that separate proceedings against the less culpable defendant would have required only a short trial with a small number of witnesses. *Id*. at 647.

Manifest prejudice occurs only if "the evidence of a defendant's complicity in the overall criminal venture is *de minimis* when compared to the evidence against his co-defendants." *Hawthorne v. United States*, 504 A.2d 580, 585 (D.C. 1986), *cert. denied* by *Myrick v. United States*, 479 U.S. 992 (1986). "Severance is not required merely because evidence … against one defendant is more damaging than the evidence against the other." *Johnson*, 596 A.2d at 987; *see also Sams*, 721 A.2d at 955; *Russell v. United States*, 586 A.2d 695, 698-99 (D.C. 1991); *Lumpkin v. United States*, 586 A.2d 701, 708 (D.C. 1991), *cert. denied* by *Austin v. United States*, 502 U.S. 849 (1991); *Perry*, 571 A.2d at 1159; *Garris*, 559 A.2d at 330; *Catlett*, 545 A.2d at 1209; *Sweet*, 438 A.2d at 452; *Hilton v. United States*, 435 A.2d 383, 389-90 (D.C. 1981); *United States v. Bruner*, 657 F.2d 1278, 1291 (D.C. Cir. 1981).

United States v. Day, 591 F.2d 861, 879 (D.C. Cir. 1978), held that severance was required because "other crimes" evidence was admissible against Day and not against the co-defendant, but tended to incriminate both. However, severance is not required simply because certain evidence would be admissible against only one co-defendant. *McCullough v. United States*, 827 A.2d 48 (D.C. 2003) (holding that trial court did not commit plain error in failing to sever where evidence was introduced that one co-defendant was previously seen with a gun and jury was instructed to consider trial as two separate trials, one for each defendant); *Russell*, 586 A.2d at 698; *Smith v. United States*, 315 A.2d 163, 168 (D.C. 1974), *cert. denied* by *Jeffries v. United States*, 419 U.S. 896 (1974).

4. Desire to Call Co-defendant as a Witness

If a defendant asserts prejudice because the co-defendant cannot be called as a witness, the court must weigh: (1) the exculpatory nature of the desired testimony, regardless of the court's view of

the co-defendant's credibility as a witness, *Martin v. United States*, 606 A.2d 120, 129 (D.C. 1991); (2) the movant's desire to present it; (3) the co-defendant's willingness to testify;[15] and (4) the demands of effective judicial administration. *Lumpkin*, 586 A.2d at 707.[16] In *Tucker v. United States*, 571 A.2d 797 (D.C. 1990), the Court of Appeals reversed a conviction where the trial court denied a continuance until after the co-defendant was sentenced and thus lost his Fifth Amendment privilege. *Id*. at 799. *King v. United States*, 550 A.2d 348, 352 (D.C. 1988), ruled that the trial judge had no duty *sua sponte* to determine whether potential testimony by King's co-defendant would provide grounds for severance. "Ms. King's failure to make an adequate proffer [of prejudice] could reasonably be viewed as her counsel's tactical decision to avoid revealing the defense case, a decision which the trial judge was bound to respect." *Id*. Because the co-defendant "faced serious criminal charges and was represented by an attorney whose function it was to protect his client from incriminating himself," the judge properly exercised his discretion in declining to question the co-defendant and denying the motion for severance. *Id*. at 352-53*; see also Moore*, 927 A.2d at 1056 (no error to deny pretrial motion for severance based on exculpatory testimony of co-defendant where the trial court was not satisfied that co-defendant would actually testify if severance was granted and where granting severance might unduly contribute to delay of trial for other co-defendants); *Lumpkin*, 586 A.2d at 707-08 (would have been within court's discretion to deny defendant's motion for severance based on vague proffer of "potentially exculpatory testimony" by co-defendant); *Perry*, 571 A.2d at 1159 (proffer of what third person said co-defendant had said insufficient to show how co-defendant would actually testify); *Jackson v. United States*, 329 A.2d 782, 788 (D.C. 1974), *cert. denied*, 423 U.S. 851 (1975) (because co-defendant could have testified only on premeditation, and defendant denied any conversations relating to that issue, co-defendant's testimony would go only to credibility and its exclusion did not deny defendant a fair trial); *United States v. Washington*, 969 F.2d 1073, 1080 (D.C. Cir. 1992), *cert. denied*, 507 U.S. 922 (1993) (because co-defendant's testimony was dependent on co-defendant being tried first, defendant failed to show "reasonable probability" that desired testimony would follow severance); *cf. Martin*, 606 A.2d at 129 (exculpatory nature of co-defendant's proffered testimony to defendant's lack of motive warranted separate trial, even though the "inference for which the [testimony] is offered 'does not necessarily follow'") (citation omitted).

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[15] A witness properly under subpoena is considered "willing" to testify for purposes of this analysis. *See Martin*, 606 A.2d at 131 ("To put it in the vernacular, a subpoena does not say please . . . [The defendant's] constitutionally based right to present testimony cannot reasonably be made to depend on whether [the co-defendant] is eager or reluctant to tell his tale.").

[16] *Cf. United States v. Ford*, 870 F.2d 729, 731 (D.C. Cir. 1989):

> To establish a *prima facie* case for severance on [this ground], the movant must demonstrate: (1) a bona fide need for the testimony; (2) the substance of the testimony; (3) the exculpatory nature and effect of the testimony; and (4) the likelihood that the co-defendant will testify if the cases are severed. Once the movant makes that threshold showing, the trial court must then: (1) examine the significance of the testimony in relation to the defendant's theory of the case; (2) assess the extent of prejudice caused by the absence of the testimony; (3) consider the effects on judicial administration and economy; and (4) give weight to the timeliness of the motion.

5. Co-defendant's Comment on Defendant's Failure to Testify

In order to establish the requisite prejudice if one defendant emphasizes the other's failure to testify, the movant must demonstrate that the testifying co-defendant actually urged the jury to draw an adverse inference from the movant's silence. *Rhone*, 365 F.2d at 981; s*ee also Garris*, 559 A.2d at 329 n.6 (testifying co-defendant did not urge jury to draw adverse inference from defendant's silence); *Catlett*, 545 A.2d at 1210 (requisite prejudice not demonstrated); *United States v. Hines*, 455 F.2d 1317, 1334-35 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 975 (1972) (no abuse of discretion in ruling that, absent direct request to jury to draw adverse inference from co-defendant's refusal to testify, any prejudice resulting from mere mention of that refusal could be cured by cautionary instruction; request to draw favorable inference on behalf of testifying co-defendant amounted to mere incidental reference to non-testifying co-defendant's silence); *cf. De Luna v. United States*, 308 F.2d 140 (5th Cir. 1962).

6. Jury Instructions

Instructions may sometimes cure the prejudice of a joint trial. For example, the jury may be instructed to consider a prior inconsistent statement by a defendant as impeachment only against the declarant and not substantively for its implication of the co-defendant. *See Garris*, 559 A.2d at 331; *Washington v. United States*, 470 A.2d 729, 731 (D.C. 1983), *cert. denied*, 481 U.S. 1030 (1987); *Borrero v. United States*, 332 A.2d 363, 366 (D.C. 1975). When the jury is instructed to consider the evidence against each defendant separately and not to infer the guilt of one from evidence against the other, severance may not be required. *Wesley v. United States*, 547 A.2d 1022, 1027-28 (D.C. 1988); *Catlett*, 545 A.2d at 1210.

But instructions can have the opposite effect. Counsel must therefore remain vigilant to ensure that the instructions properly direct the jury as to how it may use evidence that is admitted against one defendant only. In *Russell*, where one co-defendant disappeared mid-trial and the trial continued in his absence, the trial court gave a very confusing instruction regarding flight. Counsel for the remaining co-defendant failed to object, however, so although the Court of Appeals found the instruction "perplexing," "imprecise at best," and "confusing," it found no plain error. 586 A.2d at 699.

An instruction that substantially weakens or casts doubt on a codefendant's defense can create sufficient prejudice to mandate separate trials. *United States v. Gambrill*, 449 F.2d 1148, 1163 (D.C. Cir. 1971), reversed for other reasons, but also concluded that severance should be granted on remand. Defendant Hunter had called alibi witnesses who placed him and Gambrill in Hyattsville on the night of the crime. Gambrill claimed he was not with Hunter, and asserted prejudice from Hunter's use of the alibi. At Gambrill's request, the jury was instructed that the alibi was introduced only on behalf of Hunter. Gambrill did not testify. The court found prejudice to Hunter because the instruction amounted to an untested assertion that Hunter's witnesses were lying. *Id*. at 1160-62; *see also Sims v. United States*, 405 F.2d 1381, 1382-83 (D.C. Cir. 1968) (repeated instructions to disregard co-defendant's extrajudicial statements rendered failure to sever harmful).

Several of the *Criminal Jury Instructions for the District of Columbia* (5th ed. 2009) may be appropriate: No. 1.203, Where Charges are Dismissed in Mid-Trial; No. 2.321, Other Crimes

Evidence; No. 2.403, Multiple Defendants – One Count; No. 2.404, Multiple Defendants – Multiple Counts; and No. 2.308, Evidence Admitted Against One Defendant Only.

Jury Instructions:

Counsel should remain vigilant to ensure that the instructions properly direct the jury as to how it may use evidence that is admitted against one defendant only.

CHAPTER 20

MOTIONS TO SUPPRESS STATEMENTS

I. KEEPING THE CAT IN THE BAG

The most effective way to avoid litigation over admissibility of statements is, of course, to prevent them from being made. Counsel should advise the client at the outset of the representation, and repeat frequently thereafter, not to speak with police, probation officers, or other government agents about the offense or related matters without the presence of counsel. The client should also be advised not to speak or write to any other person – including family members, friends, or co-defendants – about the offense, as any of these people may be subpoenaed to the grand jury or trial and required to testify about the defendant's statements.

Counsel should carefully explain the significance of remaining silent, and how to assert the rights to silence and counsel. Upon arrest, police should advise the person of the rights to silence and counsel, and then ask four questions: "(1) Have you read or had read to you the warning as to your rights, (2) Do you understand these rights, (3) Do you wish to answer any questions, and (4) Are you willing to answer questions without having an attorney present?" These questions are on the PD 47, which the defendant may have signed after arrest. The answers that avoid waiver are (1) Yes, (2) Yes, (3) No, and (4) No. (Note that other police departments, such as the United States Park Police, may use a different form.)

If counsel knows that the client will be coming into contact with a government agent, as when a defendant surrenders himself or herself to the police, counsel should accompany the client to prevent any potentially incriminating statements from being made. This is the only effective method for guarding against statements because the police are adept at obtaining statements even from a person who was advised to remain silent.

Counsel should call the arresting agent in advance and obtain an agreement that the defendant will not be questioned in the absence of counsel. However, reliance on such an agreement is extremely risky in light of *Moran v. Burbine*, 475 U.S. 412 (1986). In *Moran* the defendant was arrested for burglary, and the police suspected that he was involved in an unrelated murder. The same evening, the defendant's sister called a public defender, who called the police and told them that she represented the defendant. The police told her they would not question the defendant that night and did not tell her that he was a suspect in a murder. Within an hour, the police interrogated the defendant and he confessed to murder. The Court held that the failure to inform the defendant of the attorney's efforts to reach him did not deprive him of his right to counsel or vitiate the waiver of *Miranda* rights. *Id*. at 421-424. For this reason, and because defendants will feel pressure to talk when surrounded by police, counsel should make every effort to be present during questioning. *See also Brewer v. Williams*, 430 U.S. 387 (1977) (agreement between counsel and government agent does not preclude waiver of right to counsel and use of resulting statement).

At presentment or arraignment, counsel should assert the client's Fifth and Sixth Amendment rights to silence and to counsel and should review with the client the need to remain silent before

compliance with any court order. Even after the arrest and counsel's appointment, there are situations where the police may come into contact with the client outside the presence of counsel—for example, during compliance with line-up and blood-and-hair orders. Police sometimes attempt to initiate discussions during these encounters.

Handwriting exemplars present a similar problem. Although the exemplar should consist of the client writing down information provided by the police, the police routinely direct the client to provide information. Counsel should accompany the client, insist that the police not require the client to answer any questions and, if necessary, return to court before complying with the order.

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***Watson v. United States*, 66 A.3d 542 (D.C. 2013).** No Sixth Amendment violation where defendant made incriminating statements to government informant because informant was not acting as the government's covert agent but rather "on his own initiative" when he spoke to the defendant.

Advising the Client:

- ✓ Carefully explain the significance of remaining silent and how to assert the right to counsel and silence
- ✓ Make every effort to be present during questioning, to prevent your client from making any incriminating statements

II. PROCEDURAL ASPECTS OF FIFTH AMENDMENT LITIGATION

A. Discovery of Defendant's Statements

Counsel is entitled to discovery of: (1) all *written* statements made by the defendant to anyone, which the government has in its possession; and (2) the substance and any written reflection of all *oral* statements made by the defendant to any government agent that the government intends to offer in evidence at trial. Super. Ct. Crim. R. 16. Even if the government intends to use only part of a statement, it should disclose the entire statement, as the defense may be entitled to introduce other portions, either on cross-examination or in the defense case. *Henderson v. United States*, 632 A.2d 419, 426-31 (D.C. 1993); *Andrews v. United States*, 922 A.2d 449 (D.C. 2007).

B. Pre-trial Motions

All motions must be filed within twenty (20) days of the status hearing or, for non-jury misdemeanors, within ten (10) days of arraignment or entry of counsel's appearance. Super. Ct. Crim. R. 47-I. Most judges set their own motions schedules at arraignment or status. If a motion cannot be timely filed due to insufficient discovery or investigation, counsel should file either a

request for extension of time or a preliminary motion with request for leave to supplement as additional information comes to light. *Duddles v. United States*, 399 A.2d 59, 62 (D.C. 1979).

Practitioners should know, however, that there is a standing order from Judge Burgess, then-Presiding Judge of the Criminal Division, that states that "motions governed by Rule 47-I(c) will be deemed timely filed, without prior approval by the Court, if filed thirty (30) days prior to the date initially set for trial." Order of May 28, 1996 (Burgess, J.).

C. Burdens of Proof and of Going Forward

When a statement to government agents is challenged on voluntariness grounds, the court must conduct an evidentiary hearing[1] and make a clear factual finding. *See Staton v. United States*, 466 A.2d 1245, 1252-53 (D.C. 1983); *Wells v. United States*, 407 A.2d 1081, 1085-86 (D.C. 1979).[2] The trial court must conduct a "*voir dire* to determine whether the statement was obtained legally." *Jackson v. United States*, 589 A.2d 1270, 1271 (D.C. 1991). The hearing must be held outside the presence of the jury. *See Jackson v. Denno*, 378 U.S. 368, 414 (1964).[3] Generally, it is held immediately before jury selection. Some judges may agree to schedule the hearing in advance of trial if the hearing will be lengthy or the ruling on the motion is likely to be dispositive (i.e., will result in dismissal if it is granted or a plea if it is denied).

At the hearing, the government must prove by a preponderance of the evidence that: (1) any statement made by the defendant was voluntary;[4] (2) any statement made in response to custodial interrogation was preceded by advice of *Miranda* rights and a knowing, voluntary, and intelligent waiver of those rights;[5] (3) any statement made following an illegal arrest or detention or as a consequence of an inadmissible prior statement was free of the taint of that illegality;[6] and (4) any physical evidence procured as a result of an unlawfully obtained statement would inevitably have been discovered.[7]

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[1] In some circumstances, the court may have an obligation to hold a hearing even if the defense does not raise voluntariness. *See United States v. Powe*, 591 F.2d 833, 842-48 (D.C. Cir. 1978).

[2] If the trial court failed to conduct an evidentiary hearing or to make a clear-cut finding on the voluntariness issue, the Court of Appeals may remand for a full evidentiary hearing or further findings. *See Staton*, 466 A.2d at 1253; *Wells*, 407 A.2d at 1090. *But see Miller v. Fenton*, 474 U.S. 104, 110-11 (1985) (state court determination on ultimate question of voluntariness is a legal question requiring independent federal determination and therefore not binding in federal *habeas corpus* proceeding).

[3] The District of Columbia follows the 'New York' Rule whereby, if there is a factual conflict in the evidence as to voluntariness over which reasonable men could differ, the judge leaves the question of voluntariness to the jury.

[4] *See Lego v. Twomey*, 404 U.S. 477, 484 (1972); *Garris v. United States*, 559 A.2d 323, 328 (D.C. 1989) (citing *Wells*, 407 A.2d at 1089).

[5] *See Colorado v. Connelly*, 479 U.S. 157, 169-70 (1986); *North Carolina v. Butler*, 441 U.S. 369, 374-75 (1979) (waiver is necessary but need not be explicit); *Miranda v. Arizona*, 384 U.S. 436, 475-79 (1966); *Catlett v. United States*, 545 A.2d 1202, 1208 (D.C. 1988).

[6] *See Brown v. Illinois*, 422 U.S. 590, 602-04 (1975); *Patton v. United States*, 633 A.2d 800, 816-18 (D.C. 1993).

[7] *See Nix v. Williams*, 467 U.S. 431, 444 (1984); *United States v. Lewis*, 486 A.2d 729, 735-36 (D.C. 1985).

As the proponent of the evidence and the party with the burden of proof, the government should also have the burden of going forward with witnesses. Regardless of which party calls a police witness, the defense is entitled to any *Jencks* statements he or she has made. Super. Ct. Crim. R. 12(e); *United States v. Dockery*, 294 A.2d 158, 161 (D.C. 1972) (disclosure provisions of the Jencks Act apply to pre-trial hearings). The rule implicitly acknowledges that police witnesses are actually adverse to the defense regardless of which party calls them; hence, counsel may be entitled to ask questions as if on cross-examination.

D. Defendant's Testimony at the Hearing

Whether the defendant should testify at the pre-trial hearing is a critical strategic decision that should not be finalized until after all other witnesses have testified.

In assessing the importance of the client's testimony, counsel must gauge: (a) the likelihood of winning the motion without the client's testimony; (b) the extent to which the client's testimony, if believed, will increase the likelihood of winning the motion; and (c) the risk that the judge will disbelieve the client. The client's testimony may be critical if the motion is based on involuntariness or the client's subjective beliefs about freedom to leave or inability to understand the *Miranda* warnings that are at issue. *See Ruffin v. United States*, 524 A.2d 685, 694-98 (D.C. 1987) (determination of whether defendant voluntarily accompanied police). On the other hand, if the motion is based on the failure to give *Miranda* warnings or the illegality of a seizure, it may be possible to establish the necessary facts through the testimony of police or other witnesses.

Counsel must also assess the risk that the client's testimony will reveal additional details of the offense, which the government may then use to its advantage at trial. And while the accuracy of details included in the statement is irrelevant to voluntariness, the court may find it difficult to find involuntary a statement that matches the client's testimony about the offense. If the client intends to testify at the hearing only about the arrest and interrogation, counsel should seek a ruling limiting the government's cross-examination so that the client is not forced to testify about the offense as well.

If the client is likely to testify at trial, counsel must weigh the benefits of observing the client's demeanor and giving the client practice at testifying against the risk of impeachment at trial with the client's testimony from the hearing, discussed *infra* Section IV.D.

E. The Corroboration Requirement

The prosecution may not obtain a conviction based solely on the defendant's statements, but must introduce "substantial independent evidence which would tend to establish the trustworthiness of the statement." *Opper v. United States*, 348 U.S. 84, 93 (1954); *see also McCoy v. United States*, 890 A.2d 204 (D.C. 2009) (reversing co-defendant's convictions where his erroneously admitted confession was the only evidence that he was involved in the planning of a drive-by shooting and that he instructed his co-defendant to "get at them"); *In re J.H.*, 928 A.2d 643 (D.C 2007) (12-year-old juvenile's confession to sexually abusing his 3-year-old sister was adequate corroboration); *Adams v. United States*, 502 A.2d 1011, 1022-23 (D.C. 1986). If

there is no evidence that a crime was actually committed, a conviction based on the defendant's confession cannot stand. *See United States v. Khandjian*, 489 F.2d 133, 138 n.6 (5th Cir. 1974). There need be no evidence outside the confession, however, to link the defendant with the crime. *See Hicks v. United States*, 382 F.2d 158, 163 n.6 (D.C. Cir. 1967). A comprehensive review of the corroboration requirement is set forth in *United States v. Johnson*, 589 F.2d 716 (D.C. Cir. 1978). *See also* Super. Ct. Juv. R. 111 (uncorroborated confession is insufficient to support finding of involvement); *In re R.A.B.*, 399 A.2d 81, 83 (D.C. 1979).

F. Appellate Review and Harmless Error

On appeal, the trial court's factual findings are entitled to deference, and are reviewed under the "clearly erroneous" standard. They will not be disturbed if they have substantial support in the record. *Arizona v. Fulminante*, 499 U.S. 279, 287-88 (1991); *McIntyre v. United States*, 634 A.2d 940, 943 (D.C. 1993); *Gomez v. United States*, 597 A.2d 884, 892 (D.C. 1991). The ultimate legal issues – whether a statement was voluntarily made and whether there was custodial interrogation – are subject to *de novo* review. *Fulminante*, 499 U.S. at 287 (voluntariness); *Reid v. United States*, 581 A.2d 359, 363 (D.C. 1990) (custodial interrogation); *see also United States v. Little*, 851 A.2d 1280 (D.C. 2004).

Use of statements obtained in violation of *Miranda* rights requires reversal unless the error is found harmless beyond a reasonable doubt. *Dancy v. United States*, 745 A.2d 259, 273 (D.C. 2000); *Hammill v. United States*, 498 A.2d 551, 559-60 (D.C. 1985); *Derrington v. United States*, 488 A.2d 1314, 1329-35 (D.C. 1985); *Lewis v. United States*, 483 A.2d 1125, 1131-35 (D.C. 1984); *Miley v. United States*, 477 A.2d 720, 724 (D.C. 1984); *Montgomery v. United States*, 268 A.2d 271, 272-73 (D.C. 1970). Statements taken in violation of the Sixth Amendment right to counsel are also subject to constitutional harmless error analysis. *Henry v. United States*, 590 F.2d 544, 547 (4th Cir. 1978), *aff'd*, 447 U.S. 264, 274-75 n.13 (1980).

To save an appellate *Miranda* argument from a harmless error defeat, counsel might consider a conditional guilty plea preserving the *Miranda* issue, *see* Super. Ct. Crim. R. 11; a stipulated trial; a specific proffer that the defendant is testifying to meet the force of the government's unlawfully obtained evidence, *see Lewis*, 483 A.2d at 1133 (citing cases); and other tactics designed to limit or shape the trial record.

Despite a long line of cases holding that use of *involuntary* statements can never be harmless,[8] a five-justice majority in *Fulminante* held that the *Chapman* harmless error rule applies. *See Chapman v. California*, 386 U.S. 18 (1967). Despite this ruling, the Court has yet to find harmless error in the context of a coerced confession. Even in *Fulminante* itself, a majority held that use of a murder defendant's confession to a jailhouse informant was reversible error. The harmless error test is to be strictly applied in cases of an involuntary confession:

> In the case of a coerced confession . . . the risk that the confession is unreliable, coupled with the profound impact that the confession has upon the jury, requires a

[8] *Mincey v. Arizona*, 437 U.S. 385, 398-99 (1978); *Jackson v. Denno*, 378 U.S. 368, 376 (1964); *Malinski v. New York*, 324 U.S. 401, 404 (1945).

> reviewing court to exercise extreme caution before determining that the admission of the confession at trial was harmless.

Fulminante, 499 U.S. at 296.

III. GROUNDS FOR EXCLUDING STATEMENTS

Each of the grounds discussed below is a separate and independent basis for suppression. For example, even if the police comply with all the requirements of *Miranda*, a statement is inadmissible if it was involuntary or obtained following an illegal arrest. *United States v. Bernett*, 495 F.2d 943, 948-50 (D.C. Cir. 1974). Each applicable ground should be raised.

The principles governing suppression of statements apply to any declaration by the defendant that tends to implicate the defendant, including an accusation of another person, a false exculpatory statement, or a refusal to confess. *See Rhode Island v. Innis*, 446 U.S. 291, 301 n.5 (1980) (quoting *Miranda*); *Botts v. United States*, 310 A.2d 237, 241 & n.2 (D.C. 1973); *United States v. Robinson*, 439 F.2d 553, 559 (D.C. Cir. 1970). They also apply to non-verbal but incriminatory conduct. *United States v. Jackson*, 627 F.2d 1198, 1210-12 (D.C. Cir. 1980) (turning over to government money allegedly obtained through heroin sale). The conduct, however, must be "testimonial" – that is, communicative. *Pennsylvania v. Muniz*, 496 U.S. 582, 597-600 (1990) (videotape of slurred speech and lack of muscular coordination was not "testimonial;" statement that defendant did not know date of his sixth birthday was testimonial because response was prompted by question requiring "express or implied assertion of fact or belief"). Certain conduct has been found to be non-testimonial. *See, e.g.*, *Doe v. United States*, 487 U.S. 201, 207, 209-11 (1988) (compelled signing of directive to produce defendant's bank records); *United States v. Dionisio*, 410 U.S. 1, 5-6 (1973) (voice exemplar); *Gilbert v. California*, 388 U.S. 263, 266-67 (1967) (handwriting exemplar); *United States v. Wade*, 388 U.S. 218, 221 (1967) (standing in line-up); *Schmerber v. California*, 384 U.S. 757, 760-61 (1966) (furnishing blood sample); *Karamychev v. United States*, 772 A.2d 806, 810 (D.C. 2001) (performance on roadside sobriety tests).[9]

A. Involuntariness

The Supreme Court has formulated the test for voluntariness in various ways. *See Fulminante*, 499 U.S. at 288 (court must consider whether defendant's will was "overborne in such a way as to render his confession the product of coercion"); *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961) (plurality opinion) (statement must be "the product of an essentially free and unconstrained choice by its maker"), approved in *Schneckloth v. Bustamonte*, 412 U.S. 218, 225 (1973) (question is whether person's "will has been overborne and his capacity for self-determination critically impaired"); *United States v. Thomas*, 595 A.2d 980, 981 (D.C. 1991).

Even if the statement is ruled admissible, the defendant may raise voluntariness as a jury question. Evidence about the way a statement was obtained, in addition to bearing on its

[9] While a co-defendant's statement is not subject to a Fifth Amendment challenge by the defendant, the Confrontation Clause may require either redaction to eliminate all references to the defendant or severance of the defendants. *See Richardson v. Marsh*, 481 U.S. 200 (1987); *Bruton v. United States*, 391 U.S. 123 (1968).

voluntariness, often bears on its credibility. Moreover, the physical and psychological environment that yields a statement is relevant not only to the legal issue of voluntariness, but also to the ultimate factual issue of guilt or innocence. The jury should be instructed to view with caution any oral statements, due to the grave potential for inaccurate or biased recollection and the pressure on an accused when making admissions, and should further be instructed to disregard the statement if it finds the statement involuntary.[10]

Crane v. Kentucky, 476 U.S. 683 (1986), held that when the defendant unsuccessfully challenges his statement on voluntariness grounds before trial, he can still challenge the voluntariness of the statement. The defendant, who was sixteen years old when he was arrested, sought to introduce testimony describing the length of the interrogation and the manner in which it was conducted, in order to show that the statement was unworthy of belief. Exclusion of that evidence violated the fundamental constitutional right to a fair opportunity to present a defense, under the Due Process, Compulsory Process, or Confrontation Clause. *Id*. at 690-91.

In determining voluntariness, the court may not consider the probable trustworthiness of the statement. *Jackson*, 378 U.S. at 376-77, 383-86; *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961). While each case is litigated on the totality of the circumstances, counsel should be particularly alert throughout the case to the presence of the factors discussed below. *See Beasley v. United States*, 512 A.2d 1007, 1013 (D.C. 1986) (enumerating factors).[11]

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***Dorsey v. United States*, 60 A.3d 1171 (D.C. 2013) (en banc).** Trial court erred in admitting defendant's videotaped confession in government's case-in-chief after his invocation of right to counsel because initiation and waiver were invalid.

***Napper v. United States*, 22 A.3d 758 (D.C. 2011).** Trial court did not err in denying defendant's motion to suppress statements he made during cell phone calls placed while left alone in police interview room where defendant told by detective that cell phones should not be used in room, tried to hide and cover his face while making calls, and did not alert detective that any recording device should be turned off while calls were made, and where conversation with detective regarding "equipment" in room focused on polygraph machine and not any recording equipment or cameras.

***Jennings v. United States*, 989 A.2d 1106 (D.C. 2010).** Trial court erred in finding defendant failed to invoke Miranda rights by determining that his "sarcasm" belied his request for his attorney; however, motion to suppress upheld because defendant reinitiated his discussion with the police officers ("Can I talk to you please?") immediately after the invocation.

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[10] *See* 18 U.S.C. § 3501(a); *Jackson*, 378 U.S. at 380-86; *Wells*, 407 A.2d at 1089-90; *Hall v. District of Columbia*, 353 A.2d 296 (D.C. 1976); *Hutcherson v. United States*, 351 F.2d 748, 754 (D.C. Cir. 1965); *Naples v. United States*, 344 F.2d 508, 512 (D.C. Cir. 1964); *Obery v. United States*, 217 F.2d 860, 862 (D.C. Cir. 1954); *Jackson v. United States*, 198 F.2d 497 (D.C. Cir. 1952); *Criminal Jury Instructions for the District of Columbia*, No. 2.305 (5th ed. 2009).

[11] The same factors are relevant to the voluntariness of waiver of the rights to silence and counsel. *See infra* Section III.B.3.

1. Coercion

Some kind of police coercion is necessary for a finding of involuntariness. *Colorado v. Connelly*, 479 U.S. 157, 164-67 (1986); *United States v. Baird*, 851 F.2d 376, 382 (D.C. Cir. 1988) (citing cases).[12] Involuntariness may be shown not only by physical coercion, *see Stein v. New York*, 346 U.S. 156, 182 (1953); *Brown v. Mississippi*, 297 U.S. 278, 286 (1936), but by a variety of other more or less subtle types of psychological coercion, *see, e.g.*, *Mincey v. Arizona*, 437 U.S. 385 (1978) (inculpatory statements obtained during hospital interview of seriously wounded, barely conscious homicide suspect after police ignored requests to see attorney, held involuntary). *Cf. Thomas*, 595 A.2d at 983 (no involuntariness in statement of postal employee based on pressure of being told consequences of non-cooperation with postal inspectors; citing examples of coercion, including a four-hour interrogation while defendant was sedated in intensive-care unit, an eight-hour interrogation of mentally disturbed suspect in small, crowded room, and questioning after administering truth serum).

2. Circumstances of Detention and Interrogation

The likelihood of a statement being involuntary increases with the length of the period of interrogation.[13] Psychological or other coercion may be exacerbated by other factors – questioning at night; deprivation of food, sleep, or medication; isolation from friends or relatives, especially after a request to see them; the number of officers present; and the physical setting (at home or at the police station). Statements were found involuntary on the basis of one or more of these factors in *Greenwald v. Wisconsin*, 390 U.S. 519 (1968) (defendant was aware of constitutional rights, but was questioned for four hours during a thirteen-hour detention, requested counsel, and was given neither food nor medication for high blood pressure); *Gallegos v. Colorado*, 370 U.S. 49 (1962) (notwithstanding oral statements given by 14-year-old immediately after arrest, written statement obtained after five days of being held incommunicado was involuntary); *Haley v. Ohio*, 332 U.S. 596 (1948) (statement of 15-year-old without

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[12] Statements made to persons other than law enforcement personnel can be involuntary. *See Robinson*, 439 F.2d at 561 n.8 (statements made to psychologists), and cases cited therein. Conversely, statements made in response to police questioning during a "consensual" encounter may be voluntary. *See, e.g.*, *Lewis v. United States*, 767 A.2d 219 (D.C. 2001) (statements made in response to questioning by police officer after defendant attempted to enter a federal building). While *In re C.P.D.*, 367 A.2d 133, 135 (D.C. 1976), held that statements made by a juvenile in response to questioning by his step-father, even though in the presence of police, were voluntarily made, it did not make clear whether there may *never* be compulsion absent direct police interrogation or merely whether no evidence of compulsion was presented in that case. *Cf. In re Raymond W.*, 377 N.E.2d 471 (N.Y. 1978). Grand jury testimony given under grant of immunity is involuntary and may not be admitted in a subsequent criminal trial. *New Jersey v. Portash*, 440 U.S. 450, 459 (1979).

[13] D.C. Code § 5-115.01(b) provides that any statement made within three hours of arrest shall not be excluded from evidence because of unnecessary delay in bringing the defendant before a magistrate for a determination of probable cause. *See also* 18 U.S.C. § 3501(c), applicable to prosecutions in Superior Court, providing the same for statements made within six hours of arrest; D.C. Code § 16-2311(a)(2), requiring that juvenile arrestees be brought before the Director of Social Services "with all reasonable speed"; *In re F.D.P.*, 352 A.2d 378, 382 (D.C. 1976). At the least, these statutes provide a benchmark to gauge the permissible duration of interrogation. They may also create a presumption that any statement obtained during interrogation beyond the applicable period is involuntary. *But see Riley v. United States*, 923 A.2d 868 (D.C. 2007) (delay of several hours between arrest and interrogation was insufficient to demonstrate that murder confession was coerced); *Byrd v. United States*, 618 A.2d 596, 599 (D.C. 1992) (length of delay between arrest and confession without more is insufficient to establish coercion).

presence of counsel or parent, after questioning from midnight to 5 a.m.); *United States ex rel. B. v. Shelly*, 305 F. Supp. 55 (E.D.N.Y. 1969), *modified*, 430 F.2d 215 (2d Cir. 1970) (statement of tired, frightened 16-year-old immediately following arrest in absence of parents). Local cases *not* finding involuntariness include *Graham v. United States*, 950 A.2d 717 (D.C. 2008) (defendant was 19-years-old, literate, had previous experience with criminal justice system, was adequately advised of his *Miranda* rights, and was well treated throughout his interrogation); *Bliss v. United States*, 445 A.2d 625, 631-32, *amended*, 452 A.2d 172 (D.C. 1982) (defendant had been shot but it was a flesh wound and he was able to answer questions); and *United States v. Yunis*, 859 F.2d 953, 961 (D.C. Cir. 1988) (despite seasickness, uncomfortably hot room, and unfamiliarity with American legal culture).

The courts distinguish between compulsion to be present and compulsion to make statements. *See, e.g.*, *Minnesota v. Murphy*, 465 U.S. 420, 429-35 (1984) (witness compelled to appear before probation officer but freely chose to answer questions); *Baird*, 851 F.2d at 383 (while employee might have felt compelled to attend meeting on supervisor's order, compulsion to answer questions did not follow, especially after superior told employee he was free to leave).

3. Promises and Threats

Promises of leniency or threats of additional prosecution may constitute psychological "coercion." *See In re D.L.*, 486 A.2d 1180, 1182 (D.C. 1985); *United States v. Powe*, 627 F.2d 1251 (D.C. Cir. 1980) (remanded for further findings on whether statement was voluntary); *Hicks*, 705 A.2d at 641-42 (police offer of lenience in exchange for statement not coercive, nor was statement involuntary); *United States v. Blocker*, 354 F. Supp. 1195, 1201 n.31 (D.D.C. 1973), *aff'd*, 509 F.2d 538 (D.C. Cir. 1975). The Second Circuit has found involuntary statements induced by false promises to prosecute defendant for charges that were far less serious than those the police knew would be brought. *United States ex rel. Everett v. Murphy*, 329 F.2d 68 (2d Cir. 1964); *see also United States v. Copeland*, 105 Wash. D.L. Rptr. 2053 (D.C. Super. Ct. Oct. 13, 1977) (Scott, J.) (statement obtained from parolee in exchange for promise not to bring new crime to attention of parole officer was involuntary). *But see Lindsey v. United States*, 911 A.2d 824 (D.C. 2006) (prison statement not involuntary where officers, prior to defendant's confession, told him that he was not required to cooperate with them, and where totality of circumstances demonstrated that defendant could not have believed that his previous plea agreement in another case would protect him from prosecution for the murder about which he was being questioned); *Thomas*, 595 A.2d 980, 982 (informing defendant that cooperation could lead to more lenient treatment was not sufficiently coercive); *Hill v. United States*, 434 A.2d 422, 431 (D.C. 1981) (direct or implied promises did not constitute compulsion where government agent was investigating someone other than defendant, and meeting was result of defendant's willingness to explore extra-judicial resolutions to other charges); *United States v. Davis*, 617 F.2d 677, 696 (D.C. Cir. 1979) (implication that property might be damaged in thorough search of defendant's apartment did not give rise to sufficiently coercive atmosphere).

Promises do not have to be false or misleading. In fact, the defendant's belief that the promises will be fulfilled may render a statement involuntary. Indeed, a statement has been found involuntary where the defendant reasonably believed that the police had made a promise of

leniency, even when no promise was actually made. *United States v. Harris*, 301 F. Supp. 996, 999 (E.D. Wis. 1969). **Counsel should be alert to any promises made or reasonably believed by the defendant to have been made in the course of interrogation – for example, promises to drop (or not to bring) other charges, to obtain low bail, to release the defendant after a confession, or not to bring charges against friends or relatives.** *Butler v. United States*, 614 A.2d 875, 881 (D.C. 1992) (no coercion where defendant was told he could go home after he gave a statement because there was no evidence that defendant believed he would be held if he failed to give a statement). *See also Moran*, 475 U.S. 412. Inaccuracies in representations about consequences must actually cause the defendant's will to be overborne. *See Bliss*, 445 A.2d at 631-32 (defendant did not say he talked because of promises of leniency).

On the other hand, "accurate" representations of the possible consequences of cooperating or not cooperating do not render a statement involuntary. *See Fare v. Michael C.*, 442 U.S. 707, 727 (1979) (police told 16-year-old that a cooperative attitude would be to his benefit); *Beasley v. United States*, 512 A.2d 1007, 1016 (D.C. 1986) (urging that defendant should "help himself" by telling the truth and promise to tell prosecutor about cooperation not sufficiently critical to overbear ability to make free and voluntary choice); *United States v. Robinson*, 698 F.2d 448, 455 (D.C. Cir. 1983).

4. Tricks and Artifice

Use of artifice may not by itself render a statement involuntary "as long as the means employed are not calculated to produce an untrue statement." *Beasley*, 512 A.2d at 1015-16 (one factor to be considered is that police led suspect to believe that evidence was stronger than it really was). *See also Davis v. United States*, 724 A.2d 1163, 1168 (D.C. 1998). Involuntariness may exist when the deception, by making the situation appear hopeless, combines with other circumstances to create coercion. *See United States ex rel. Caminito v. Murphy*, 222 F.2d 698 (2d Cir. 1955); *United States v. Morales*, 233 F. Supp. 160 (D. Mont. 1964). One of the reasons *Miranda* cites for requiring advisement of rights was prevention of tactics such as falsely telling a defendant that he or she has been identified by a witness, or that co-defendants have already implicated the defendant. *Miranda*, 384 U.S. at 453; *Brewer*, 430 U.S. 387; *see also Oregon v. Mathiason*, 429 U.S. 492, 495-96 (1977) (finding false claim that defendant's fingerprints were found not relevant to whether defendant was in custody, but leaving open question whether it might be relevant to involuntariness); *Hairston v. United States*, 905 A.2d 765 (D.C. 2006) (detective's playing of silent videotape of defendant's accomplice speaking to police as proof that accomplice confessed—and perhaps implicated the defendant—did not have a coercive impact on the defendant's decision to say he wanted to tell his side of the story); *Contee v. United States*, 667 A.2d 103 (D.C. 1995) (false statement that voice stress analyzer test indicated suspect was lying did not render subsequent confession involuntary); *Rosser v. United States*, 313 A.2d 876, 878 (D.C. 1974).

In *Brisbon v. United States*, 957 A.2d 931 (D.C. 2008), the court was "troubled by the deception used by the police officers and its coercive potential." *Id.* at 942. In *Brisbon*, a murder case, the officers who interrogated Brisbon at the police station told him that they had searched the house where Brisbon lived with his mother and grandmother and recovered a shotgun and drugs from the house. That much was true. They also told him, falsely, that his grandmother got upset and

was rushed to the hospital and that his mother was arrested after they found a shotgun and some drugs in the house. *Id.* at 938. The court cautioned "that the kind of deception employed here, involving supposed harm to vulnerable family members, could well cross the line beyond the type of tactics *vel non* that a court will tolerate because they 'are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause.'" *Id.* at 945 (citing *Miller v. Fenton*, 474 U.S. 104, 109 (1985)); *see also id.* at 946 (stating that "the use of deception to exert psychological pressure that exploits vulnerabilities extraneous to the offense charged, such as the threat of adverse consequences to family members if the suspect does not confess or cooperate with the investigation, is in a different category that has been singled out for condemnation"). After reviewing the many factors supporting a finding of involuntariness, and considering a number that arguably weighed in favor of a finding of voluntariness – such as Brisbon's familiarity with the criminal justice system and the fact that he twice waived his *Miranda* rights during the interrogation – the court ultimately declined to rule on the question of voluntariness, which it described as "a close one," because it determined that the admission of the confession in that case was harmless beyond a reasonable doubt. *Id.* at 947-49.

5. Defendant's Age and Experience

"[A]dmissions and confessions of juveniles require special caution." *In re Gault*, 387 U.S. 1, 45 (1967). In addition to traditional notions of involuntariness, the courts must be sure that a confession is not "the product of ignorance of rights or of adolescent fantasy, fright or despair." *Id*. at 55. In reversing a murder conviction, the Court observed:

> [W]hen, as here, a mere child – an easy victim of the law – is before us, special care in scrutinizing the record must be used. Age 15 is a tender and difficult age for a boy of any race. He cannot be judged by the more exacting standards of maturity. That which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens.

Haley v. Ohio, 332 U.S. 596, 599 (1948).

The defense bears the burden of presenting relevant information. *See also Catlett*, 545 A.2d at 1208 n.9, 1209 n.10; *In re T.T.T.*, 365 A.2d 366, 369 (D.C. 1976); *In re J.F.T.*, 320 A.2d 322, 324-25 (D.C. 1974).

The absence of a juvenile's parent during questioning does not alone render a statement invalid, *see T.T.T.*, 365 A.2d at 370 n.5, although the result may be different if questioning continues after the juvenile specifically requests the presence of a parent. *See In re W.B.W.*, 397 A.2d 143, 146 (D.C. 1979).[14] The client's prior experience with the criminal justice system may also bear on voluntariness. *See Beasley*, 512 A.2d at 1015.

[14] *Fare v. Michael C.* refused to adopt a *per se* rule of exclusion based on denial of a juvenile's request for the presence of his probation officer, although an unfulfilled request for a lawyer would require exclusion. 442 U.S. at 724.

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***J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011).** A child's age properly informs the Miranda custody analysis.

6. Intellectual Capacity and Education

Ignorance of the full consequences of the decision to speak does not vitiate voluntariness. *Connecticut v. Barrett*, 479 U.S. 523, 530 (1987); *Moran*, 475 U.S. at 422; *Oregon v. Elstad*, 470 U.S. 298, 316 (1985). However, the defendant's limited intellectual capacity and lack of education, including difficulty in reading, discussed most frequently in determining whether a waiver of *Miranda* rights was knowing and intelligent, may also be relevant to whether the statement is the product of a "free and unconstrained choice." **Counsel should consider introducing evidence from psychologists, teachers, or others of the defendant's IQ and educational difficulties.** *See United States v. Holmes*, 104 Wash. D.L. Rptr. 1025 (D.C. Super. Ct. May 17, 1976) (Bacon, J.), *aff'd on other grounds*, 380 A.2d 598 (D.C. 1977).

7. Mental Illness

Although a defendant's mental illness may be a significant factor in the voluntariness determination, absent police coercion it does not render a statement involuntary. *Colorado v. Connelly*, 479 U.S. 157, 165 (1986) (defendant who suffered from chronic paranoid schizophrenia walked up to officer on street and confessed to murder; although he was initially found incompetent to stand trial based on auditory hallucinations that prevented him from making free and rational choices, there was no coercion and statement was voluntary).[15] *See also Martin v. United States*, 567 A.2d 896 (D.C. 1989) (applying *Connelly*). Mental condition is especially relevant if police conduct takes the form of subtle psychological persuasion.

8. Intoxication

Intoxication may also affect the defendant's ability to make a statement voluntarily. *See, e.g.*, *Beecher v. Alabama*, 389 U.S. 35, 38 (1967); *Townsend v. Sain*, 372 U.S. 293, 307-09 (1963), *overruled on other grounds* by *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992); *Jaggers v. United States*, 482 A.2d 786, 790, 795 (D.C. 1984), *overruled on other grounds* by *Carter v. United States*, 684 A.2d 331 (1996). While the fact of addiction does not negate voluntariness, evidence of withdrawal symptoms may. *Compare United States v. Poole*, 495 F.2d 115, 122 (D.C. Cir. 1974) (no evidence of withdrawal; statement voluntary), *with United States v. Monroe*, 397 F. Supp. 726 (D.D.C. 1975) (evidence of withdrawal; statement suppressed).[16]

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[15] *Connelly* noted that doubts about a defendant's ability to make rational decisions may call the reliability of a confession into question, but said that issue was best addressed by state rules of evidence. *Connelly*, 479 U.S. at 166-67. This comports with the sharp distinction between voluntariness and reliability drawn in *Lego v. Twomey*, 404 U.S. 477 (1972), and *Jackson v. Denno*, 378 U.S. 368 (1964).

[16] *Connelly* probably overruled older cases holding statements while intoxicated involuntary, absent coercive state action. *See Martin*, 567 A.2d 896, 907 (D.C. 1989) (no involuntariness without evidence of coercion, despite defendant's mental condition); *United States v. Bradshaw*, 935 F.2d 295, 298 (D.C. Cir. 1991) (trial court properly

9. Pre-existing Grant of Immunity

United States v. Friedrick, 842 F.2d 382 (D.C. Cir. 1988), upheld a finding that statements made by a previously immunized FBI agent in the course of "interviews" conducted by Justice Department lawyers were inadmissible against him in a prosecution for making false statements in previous interviews because they were compelled and involuntary. In the preceding months, Friedrick had been given use immunity as part of an internal investigation, and informal transactional immunity as a potential grand jury witness in the prosecution of two other FBI agents.

The government argued that, by the time the statements at issue were obtained, Friedrick's status had changed and he no longer had either form of immunity. However, the trial court found that the lawyers interviewing Friedrick never adequately advised him of his change in status or of his *Miranda* rights. The court was particularly moved by the fact that Friedrick had made several attempts to clarify his status and had been met with equivocating answers. His testimony was deemed 'compelled' as a result of his reasonable belief in his continuing immunized status.

B. The Miranda Principle

Before interrogating a person who is in custody "or otherwise deprived of his freedom of action in any significant way," the police must expressly advise the person that: (1) he or she has a right to remain silent; (2) any statement may be used as evidence against him or her; (3) he or she is entitled "to consult with a lawyer and to have the lawyer with him during interrogation;" (4) an attorney will be appointed to represent him or her if he or she cannot afford to retain one; and (5) he or she may exercise any of these rights at any point during the interrogation. *Miranda*, 384 U.S. at 444, 471. A statement made in police custody, in response to questions, is inadmissible unless the record clearly shows that the entire series of warnings was provided and that the defendant knowingly and intelligently waived these rights. *See also (Dennis) Smith v. United States*, 529 A.2d 312 (D.C. 1987) (failure to cease questioning immediately after defendant unequivocally invoked right to counsel); *Lewis v. United States*, 483 A.2d 1125, 1128 (D.C. 1984) (failure to inform accused of entire litany of *Miranda* rights); *Friedrick*, 842 F.2d 382 (failure of grand jury prosecutor to adequately inform previously immunized witness of both change in status and *Miranda* rights rendered subsequent statements compelled and inadmissible). *But see Fisher v. United States*, 779 A.2d 348 (D.C. 2001) (statements obtained by Canadian police admissible despite failure to comply with *Miranda* because officers were not acting as agents of the MPD); *McIntyre v. United States*, 634 A.2d 940 (D.C. 1993) (no error where defendant refused to allow police to give *Miranda* warnings and initiated conversation

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treated intoxication as irrelevant to voluntariness, although it may have been relevant to whether *Miranda* waiver was knowing and intelligent). *See also United States v. Bernett*, 495 F.2d 943 (D.C. Cir. 1974) (spontaneous statement by intoxicated person not involuntary); *cf. id*. at 948-60 (Robinson, J., dissenting); *Dean v. United States*, 938 A.2d 751 (D.C. 2007) (not error to deny defendant's motion to suppress confession based on invalid waiver of *Miranda* rights due to intoxication where defendant admitted drinking heavily on daily basis, displayed no clear signs of intoxication to arresting officers, appeared "alert" and "coherent" to questioning officers several hours later, had prior experience with legal system, and discarded weapon and placed blame for killing on another immediately after the incident took place).

about charges); *Hammill v. United States*, 498 A.2d 551 (D.C. 1985) (failure to advise defendant of right to appointed counsel harmless error).

During the 1999-2000 term of the U.S. Supreme Court, the *Miranda* principle came under attack. In *Dickerson v. United States*, 530 U.S. 428 (2000), the Court was faced with two issues: (1) clarifying the constitutionality of *Miranda*; and (2) addressing whether Congress has constitutional authority to supercede *Miranda*. After Dickerson's motion to suppress a statement he had made at an FBI field office without having received "Miranda warnings" had been granted, the government appealed and the Court of Appeals for the Fourth Circuit reversed the District Court's suppression order, holding that the interrogation had satisfied 18 U.S.C. § 3501, the statute Congress enacted in the wake of the Supreme Court's decision in *Miranda* making the admissibility of statements made during custodial interrogation turn only on the statement's voluntariness.[17] It then concluded that the *Miranda* decision was not a constitutional holding and that, therefore, Congress could by statute have the final say on the questions of admissibility. *Dickerson*, 530 U.S. at 432. The Supreme Court, recognizing that the Fifth Amendment right against self-incrimination and the Due Process Clause of the Fourteenth Amendment form the constitutional bases for requiring that confessions must be voluntary in order to be admitted into evidence, clarified the constitutionality of *Miranda* and thereby declined to overrule it. Thus, the Court held that *Miranda*, being a constitutional decision, may not be in effect overruled by an Act of Congress, and further held that, under the doctrine of *stare decisis*, *Miranda* and its progeny govern the admissibility of statements made during custodial interrogation in both state and federal courts. *Id*.

With respect to what makes a statement incriminating, *Miranda* itself unambiguously pronounced that "no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory'" and that "[i]f a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution." *Miranda*, 384 U.S. at 476. The Supreme Court also noted in *Rhode Island v. Innis* that "statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication" and are "incriminating in any meaningful sense of the word." 446 U.S. 291, 301 n.5 (1980) (quoting *Miranda*, 384 U.S. at 477). *But cf. Hairston*, 905 A.2d at 780 (defendant's statement to detectives while in custody – "yes," he wanted to tell his side of the story – even if considered a response to a functional equivalent of interrogation, was not an incriminating statement and thus was not in violation of *Miranda*).

A testifying officer should not be asked whether the defendant was "informed of the *Miranda* rights," which is a legal conclusion, but should instead be asked to explain precisely what the defendant was told, so that the court may determine whether all the *Miranda* requirements were met. The extent of the information conveyed should be fully explored on cross-examination. *California v. Prysock*, 453 U.S. 355, 358 (1981) (per curiam) (U.S. Constitution does not require a "talismanic incantation" of the language of the *Miranda* rule, but it is indisputable that it requires that an accused be adequately informed of his right to have counsel appointed prior to

[17] The statute clearly omitted any warning requirement and included instruction for trial courts to consider a nonexclusive list of factors relevant to the circumstances surrounding the statement, thus demonstrating Congress' intent to overrule *Miranda.*

any police questioning); *Clark v. Smith*, 403 U.S. 946 (1971) (summarily reversing conviction for use of statement made after only three of the warnings were given; facts at 164 S.E.2d 790 (Ga. 1968)); *see also Lewis*, 483 A.2d at 1127; *Moore v. United States*, 457 A.2d 406 (D.C. 1983); *Botts v. United States*, 310 A.2d 237 (D.C. 1973). *But see Duckworth v. Eagan*, 492 U.S. 195, 203 (1989) (warnings adequate although police added that attorney would be appointed "if and when you go to court;" warnings need not conform specifically to words used in *Miranda*, but must "reasonably convey" right both to consult with lawyer before questioning and to have lawyer present during questioning); *Prysock*, 453 U.S. at 361 (warnings adequate where defendant was not specifically told of right to a free attorney before and during interrogation, but was told of right to have attorney before and during interrogation and was subsequently told of right to appointed counsel); *Henson v. United States*, 563 A.2d 1096, 1097 (D.C. 1989) (citation omitted) (police "touched all of the bases required by *Miranda*").

Proof that the defendant was actually aware of the rights does not excuse a failure to warn. *Greenwald v. Wisconsin*, 390 U.S. 519 (1968) (statement involuntary even though defendant was aware of constitutional rights); *Miranda*, 384 U.S. 436 (1966). And, while a showing that the defendant had previously been advised of *and* understood the *Miranda* rights may have some evidentiary value, a mere showing of the number of times a defendant has been arrested is irrelevant.

In addition, the government must prove that any waiver of rights was knowing, voluntary, and intelligent. Failure to hold a hearing on this issue will result in remand on appeal. *United States v. Bradshaw*, 935 F.2d 295 (D.C. Cir. 1991).

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***Bobby v. Dixon*, 132 S. Ct. 26 (2011) (per curiam).** See, *supra*, Chapter 20.III.A.1.

***Dowtin v. United States*, 999 A.2d 903 (D.C. 2010).** Admission of videotaped statement in which defendant described kidnapping and killing of decedent harmless beyond reasonable doubt where numerous witnesses testified firsthand about events leading up to killing and about defendant's multiple admissions to having killed decedent.

***Florida v. Powell*, 559 U.S. 50 (2010).** Police satisfy *Miranda* when they warn suspect that he has "the right to talk to a lawyer *before* answering any questions" and that he can invoke this right "at any time," even if they do not say that he has the right to have a lawyer with him *during* questioning.

1. Custodial interrogation

The *Miranda* protections apply only to "custodial interrogation." *See Rhode Island v. Innis*, 446 U.S. 291, 297 (1980). The threshold issues are: (1) whether the defendant was in custody; and (2) whether the defendant was being questioned at the time the statement was made.

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***J.D.B. v. North Carolina*, 131 S. Ct. 2394 (2011).** A child's age properly informs the *Miranda* custody analysis.

***Maryland v. Shatzer*, 559 U.S. 98 (2010).** Two-week break in "custody" (here, return to general prison population counting as break in "custody") after invocation of right to counsel ends Edwards ban on questioning absent suspect's re-initiation.

***White v. United States*, 68 A.3d 271 (D.C. 2013).** Defendant in Miranda custody after traffic stop during which he was removed from car, immediately handcuffed, and separated from his nine-year-old son who was also an occupant, without being asked for his license or registration and without being told why he had been stopped, and trial court erred in denying motion to suppress incriminating statements made during that custody.

***Bates v. United States*, 51 A.3d 501 (D.C. 2012).** Trial court did not err in denying motion to suppress statements made by defendant during encounter with police officers who were watching car suspected of being involved in multiple robberies where defendant was cooperative with officers after approaching car, was never told he was under arrest, agreed to wait while one officer left the scene to confirm his story, and made statements before being made to sit on curb, and therefore wouldn't have thought he was under arrest.

a. Custody

The *Miranda* requirements apply if a person is in custody "or otherwise deprived of his freedom of action in any significant way." 384 U.S. at 444. Custody is clear if the defendant is under arrest. Whether a suspect who has not been formally arrested is in "custody" depends on the circumstances of the particular encounter.[18] Before being informed that one is under arrest, the test is whether "the investigating officer physically deprives the suspect of his freedom of action in any significant way *or*, under the circumstances, leads him to believe, as a reasonable person, that he is so deprived." *Miley v. United States*, 477 A.2d 720, 722 (D.C. 1984) (emphasis added); *accord Patton v. United States*, 633 A.2d 800, 815-16 (D.C. 1993); *In re E.G.*, 482 A.2d 1243, 1247-48 (D.C. 1984); *United States v. Ward*, 438 A.2d 201, 204 (D.C. 1981); *Calaway v. United States*, 408 A.2d 1220, 1224 (D.C. 1979).[19] Note, however, that a person is not in custody for *Miranda* purposes unless there is "restraint on freedom of movement *of the degree associated with a formal arrest*." *In re E.A.H.*, 612 A.2d 836, 838 (D.C. 1992) (quoting *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam) (emphasis in original)).

[18] "[T]here is substantial authority holding that an inmate is not 'in custody' for *Miranda* purposes merely because of his status as a prisoner." *Smith v. United States*, 586 A.2d 684, 685 (D.C. 1991).

[19] The "only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984); *accord Miley*, 477 A.2d at 722; *Calaway*, 408 A.2d at 1225. Subjective intent to arrest, or lack thereof, is irrelevant, except to the extent it bears on the officer's observable conduct. *Stansbury v. California*, 511 U.S. 318, 324-25 (1994); *Berkemer*, 468 U.S. at 442-45; *Miley*, 477 A.2d at 722. Neither does the suspect's subjective belief control, although it is probative on the "reasonable person" inquiry. *United States v. Warren*, 578 F.2d 1058, 1070-71 (5th Cir. 1978), *modified in part* by *United States v. Warren*, 612 F.2d 887 (1980) (substantive holding not modified).

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***Howes v. Fields*, 132 S. Ct. 1181 (2012).** A prisoner is not always deemed to be "in custody" for Miranda purposes, and court will consider totality of circumstances, taking into account "the ordinary restrictions of prison life," in determining whether a prisoner was subject to "inherently compelling pressures" akin to custody.

(1) The level of intrusion

Neither a suspect who has been briefly stopped and questioned pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), nor a person briefly questioned as a material witness at the scene of a crime, is in "custody."[20] Similarly, "the roadside questioning of a motorist detained pursuant to a routine traffic stop" need not be preceded by *Miranda* warnings because "detention of a motorist pursuant to a traffic stop is presumptively temporary and brief" and "circumstances associated with the typical traffic stop are not such that the motorist feels completely at the mercy of the police." *Berkemer v. McCarty*, 468 U.S. 420, 435, 437-38 (1984) (motorist suspected of driving under influence was stopped, asked to perform "balancing test," and asked whether he had been using intoxicants).[21]

"Seizure and custody are not synonymous." *Morris v. United States*, 728 A.2d 1210, 1216 (D.C. 1999). However, an encounter even without arrest may be, or may quickly become, "custodial." *See Miley*, 477 A.2d at 722-23 (suspect stopped at gunpoint was in "custody" from inception of encounter); *Owens v. United States*, 340 A.2d 821 (D.C. 1975) (same). If "a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him 'in custody' for practical purposes, he is entitled to the full panoply of protections prescribed by *Miranda*." *Berkemer*, 468 U.S. at 440 (excluding statements made after defendant was placed in police car for transportation to police station, which transformed encounter from "routine traffic stop" into arrest); *see also Edwards v. United States*, 619 A.2d 33, 35 (D.C. 1993) (defendant in custody and *Miranda* warnings required where officer grabbed defendant's arm, re-holstered gun, and asked "where's the gun" and "where's the rifle"). *But see Savoy v. United States*, 981

[20] *See also Patton v. United States*, 633 A.2d 800 (D.C. 1993) (defendant covered with blood who sought out police was justifiably detained and questioned); *McIlwain v. United States*, 568 A.2d 470 (D.C. 1989) (questioning of defendant in his room); *Hairston v. United States*, 500 A.2d 994 (D.C. 1985) (pre-arrest statements at crime scene after being asked what happened); *Hammill v. United*, 498 A.2d 551 (D.C. 1985); *United States v. Calhoun*, 363 A.2d 277 (D.C. 1976) (defendant questioned at scene by police investigating "unexplained death" of woman lying on bed in defendant's apartment); *District of Columbia v. M.E.H.*, 312 A.2d 561, 565-66 (D.C. 1973) ("material witness" questioned at scene); *Tyler v. United States*, 298 A.2d 224 (D.C. 1972) (police asked person who entered house during execution of search warrant whether he owned narcotics found in house); *United States v. Gale*, 952 F.2d 1412 (D.C. Cir. 1992) (questions asked during *Terry* stop); *see also Carr v. United States*, 585 A.2d 158 (D.C. 1991) (statements to Humane Society officers).

[21] *See also Pennsylvania v. Bruder*, 488 U.S. 9 (1988) (per curiam) (summarily reaffirming *Berkemer*); *Karamychev v. United States*, 772 A.2d 806, 809 (D.C. 2001); *Ford v. United States*, 376 A.2d 439 (D.C. 1977) (known narcotics user who was stopped for traffic violation was asked whether he was still using drugs); *McMillan v. United States*, 373 A.2d 912 (D.C. 1977) (officer who stopped car resembling one used in robbery asked defendant about bag lying on floor of car); *Montgomery v. United States*, 268 A.2d 271 (D.C. 1970) (driver of car stopped for drag racing was asked if he had stolen the car). *Berkemer* rested on the nature of the detention and of the police-citizen contact in traffic stops and not on the less serious nature of what initially appears to an officer to be the offense warranting the stop, explicitly rejecting a proposal to limit *Miranda* to felonies. 468 U.S. at 428-33.

A.2d 1208, 1216 (D.C. 2009) (defendant not in custody where, during traffic stop, officers asked him to sit on curb while car was searched).

While the contours of custody and a "detention requiring probable cause" are not coterminous, *see Miley*, 477 A.2d at 722, Fourth Amendment jurisprudence is instructive on the "custody" issue.[22] *See id*. (citing Fourth Amendment cases to support finding of custody); *Moore v. Ballone*, 658 F.2d 218 (4th Cir. 1981). Accordingly, police conduct that is typically considered in determining whether an encounter was so intrusive as to require probable cause – i.e., the use of physical force, handcuffs, or brandishing of weapons; whether the police said the suspect was under arrest; the length of detention; the site of interrogation; the degree of questioning; and the suspect's subjective beliefs – should be analyzed. *See Ruffin v. United States*, 524 A.2d 685, 694-98 (D.C. 1987).

Even if a suspect is not formally under arrest, the existence of probable cause to arrest at the time of interrogation will support a finding of custody "to the extent that it makes it more likely that investigators will 'bear down in interrogation and [] create the kind of atmosphere of significant restraint that triggers *Miranda*.'" *Calaway*, 408 A.2d at 1225 (citation omitted); *see also Miley*, 477 A.2d at 722. Thus, a government argument that there was probable cause to detain the defendant supports an assertion that the defendant was in custody and should have been afforded *Miranda* warnings.

Execution of a search warrant by the police supports a finding of custody. In *United States v. Turner*, 761 A.2d 845 (D.C. 2000), the defendant voluntarily accompanied police officers to the F.B.I. field office for questioning. *Id*. at 852. After an initial period of questioning, the police informed the defendant that they had a search warrant for his blood, saliva, and head and pubic hair. *Id*. The court found that a search warrant of this kind was "the type of formality that a layperson might reasonably view as having all the indicia of a formal arrest regardless of police pronouncements to the contrary." *Id*. By contrast, *In re E.A.H.*, 612 A.2d 836, 839 (D.C. 1992), held that a juvenile was not in custody where police, while executing a search warrant for his home, questioned him alone in a separate room of his home; the door was open, no weapons were drawn and the respondent was not handcuffed. That the police had probable cause to arrest respondent after he made incriminating statements was not conclusive in determining custody

[22] The "free to leave" language has been integral to *both* the Fifth and Fourth Amendment standards. *See Thompson v. Keohane*, 516 U.S. 99, 112-13 (1995) (describing the "two discrete inquiries" that are essential to the custody determination: "first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave"); *In re I.J.* 906 A.2d 249, 256 (D.C. 2006) (reaffirming this custody standard and collecting cases). The custody standard is *not* more stringent in the typical stationhouse case, and the reality is that unless the detention is akin to a *Terry* stop, the distinction does not matter, and a suspect will invariably be in custody for *Miranda* purposes where a court finds, in a stationhouse interrogation case, that a reasonable person would have felt he was not free to terminate the interrogation and leave. In *I.J.*, the court's statement that "for purposes of the Fifth Amendment, 'custody is clearly more than seizure alone,'" referred to custody situations that arise in the context of *Terry*-type stops, and not just any *Terry* stop, but "the brief investigative 'stop and frisk' detention in *Terry*," rather than "the lengthier and more intrusive police detentions for investigation of more recent vintage that have been given Fourth Amendment sanction[.]" *I.J.*, 906 A.2d at 259 n.11. When the court in *I.J.* "reject[ed] the view that the two issues are the same," its point was that *Miranda* warnings are sometimes required even for a *Terry*-type detention. 906 A.2d at 261 (facts justifying a *Terry* stop "will not necessarily dispose of the related – but different – question of whether there is custody within the meaning of *Miranda* under the Fifth Amendment").

where the police left without making an arrest. *Id*.;[23] *see also Chavez-Quintanilla v. United States*, 788 A.2d 564, 569 (D.C. 2002) (holding that convenience store employee questioned while police executed warrant to search store for drugs was not in custody).

(2) The site of interrogation

The coercive environment of police-dominated settings, such as lock-ups, police stations, and police vehicles, was of principal concern to the Supreme Court when it fashioned the prophylactic *Miranda* rules. *See Miranda*, 384 U.S. at 467; *see also Mathis v. United States*, 391 U.S. 1 (1968) (interrogation of suspect in lock-up for other charges custodial). *Compare Turner*, 761 A.2d at 852 (suspect in custody after being informed of a search warrant for bodily fluids while being questioned in the "unfamiliar police dominated environment" of the F.B.I. field office), *with E.A.H.*, 612 A.2d at 839 (suspect not in custody when questioned during a search warrant of his home). However, interrogations in those environments are not automatically deemed custodial; there must be either an arrest or a reasonable basis for believing that the suspect has been significantly deprived of freedom. *See California v. Beheler*, 463 U.S. 1121, 1125 (1983) (per curiam); *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (per curiam) (questioning of parolee who appeared at police station was not custodial); *Graham*, 950 A.2d 717 (no custody where defendant went to police station voluntarily, left interview room on his own to use bathroom, was questioned in room with door propped open and was not formally arrested when he first made incriminating statements); *McFadden v. United States*, 945 A.2d 1203 (D.C. 2008); *Lindsey*, 911 A.2d 824 (prison statement admissible where no greater restriction was placed on defendant's movement due to interview with officers than was normal under the circumstances of his incarceration); *Calaway*, 408 A.2d at 1224-25 (station-house interrogations non-custodial where suspects voluntarily attended at police request).

As a practical matter, police conduct or statements often may communicate that the suspect is not free to refuse "requests" to accompany officers or remain in a police setting. *See United States v. Gayden*, 492 A.2d 868 (D.C. 1985) (defendant under arrest for Fourth Amendment purposes although he voluntarily accompanied police to station, where he was subjected to seven hours of incommunicado, accusatory questioning in small room). *But see McFadden*, 945 A.2d at 1207; *Resper v. United States*, 793 A.2d 450, 457 (D.C. 2002) (defendant not in custody when questioned at police station after police forced him from a car at gunpoint and frisked him for weapons, but did not place him in handcuffs and told him he was not under arrest). Relevant factors include the events preceding the trip to the police station, the failure to inform a suspect of the ability to refuse to go or to leave, the existence of probable cause to arrest, the number of officers involved, and the nature of the questions asked.

Questioning at a neutral location, such as a crime scene, a public place, or the suspect's workplace, home, or vehicle, is often deemed non-custodial because it is inherently less coercive than police-dominated settings. *See Berkemer v. McCarty*, 468 U.S. 420 (1984) (suspect's car); *Beckwith v. United States*, 425 U.S. 341 (1976) (home); *In re J.H.*, 928 A.2d 643 (D.C. 2007) (juvenile not in custody when police questioned him at school); *Moore v. United States*, 927

[23] In *E.A.H.*, the court left open the question of whether the "objective reasonable person test" for determining custody should include "subjective elements" where juveniles are concerned. *Id*.

A.2d 1040 (D.C. 2007) (no custody and thus no *Miranda* violation, where police stopped defendant's vehicle after it left the scene where a search warrant was being executed and made no "show of authority" that would have conveyed a message to defendant that he was being taken into custody as opposed to being stopped temporarily); *Hairston v. United States*, 500 A.2d 994 (D.C. 1985) (crime scene); *Hammill*, 498 A.2d 551 (crime scene); *United States v. Ward*, 438 A.2d 201 (D.C. 1981) (though police gave *Miranda* warnings prior to questioning in home, defendants were not in police custody at the time of the interview); *Reid v. United States*, 402 A.2d 835 (D.C. 1979) (home); *Ford v. United States*, 376 A.2d 439, 441 (D.C. 1977) (suspect's car); *District of Columbia v. M.E.H.*, 312 A.2d 561, 566 (D.C. 1973) (crime scene).

Again, however, a neutral locus is not determinative. The defendant in *Orozco v. Texas*, 394 U.S. 324 (1969), was surrounded in his own home at 4 a.m. by four officers who later testified at a suppression hearing that he was not free to go. The officers questioned the defendant about his involvement in the offense, without giving *Miranda* warnings, and then formally arrested him. The Court had no trouble finding the defendant in custody and declined to limit *Miranda* to stationhouse interrogations. 394 U.S. at 326-27. And in *In re I.J.*, 906 A.2d 249 (D.C. 2006), the court affirmed the suppression of the 16-year-old respondent's statements, holding that the youth was impermissibly interrogated in a custodial setting without *Miranda* warnings because: (1) he was confined to a room; (2) at the youth center, which was likely more coercive than being summoned to a private office; (3) neither the officer nor the presence of a protective adult mitigated the coercive environment; (4) he was questioned away from public view; and (5) he was confronted with evidence of his guilt. Similarly, the defendant in *United States v. Beraun-Panez*, 812 F.2d 578 (9th Cir. 1987), *modified*, 830 F.2d 127 (1987) (en banc) (substantive holding not modified), an undocumented alien, was in custody when law enforcement officers called him over to their vehicle and questioned him for thirty to ninety minutes, during which they separated him from his co-workers, confronted him with false witness statements, accused him of lying, and told him he could avoid deportation by confessing.

The Court of Appeals has required *Miranda* warnings where a suspect is detained at a crime scene in a manner approaching a formal arrest. *See Miley*, 477 A.2d 720; *see also United States v. Baird*, 851 F.2d 376 (D.C. Cir. 1988) (Coast Guard officer was not "in custody" when he was ordered by superior officer to cooperate with Department of Transportation investigator because investigator later told him, outside superior officer's presence, that he was free to leave when he chose); *United States v. Robinson*, 439 F.2d 553, 560 (D.C. Cir. 1970) (questioning of patient at St. Elizabeth's Hospital, where the defendant was institutionalized and where the crime occurred, was custodial).

b. Interrogation

> [T]he term "interrogation" under *Miranda* refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.

Innis, 446 U.S. at 301 (footnote omitted). "Express questioning" is usually apparent. *See, e.g.*, *In re I.J.*, 906 A.2d 249 (finding interrogation where officer entered a small office where

respondent had been taken after being confronted with marijuana found under his bed and asked respondent, "What happened?"). It should be noted, however, that after the Court of Appeals' decision in *Jones v. United States*, 779 A.2d 277 (D.C. 2001) (en banc), even express questions must be reasonably likely to elicit incriminating information in order to constitute interrogation. *Id.* at 283. The more difficult issue is whether police conduct is a "functional equivalent" of such questioning – i.e., words or actions that the police know or should know are "reasonably likely to elicit an incriminating response." *Id*. The test "focuses primarily upon the perceptions of the suspect, rather than the intent of the police," reflecting the design of the *Miranda* safeguards to vest a suspect in custody with an added measure of protection against coercive practices. *Id*. The test is objective, rather than subjective:

> [S]ince the police surely cannot be held accountable for the unforeseeable results of their words or actions, the definition of interrogation can extend only to words or actions on the part of police officers that they *should have known* were reasonably likely to elicit an incriminating response.

Id. at 301-02.

Remarks may constitute interrogation if "the police carried on a lengthy harangue in the presence of the suspect," versus merely making "a few offhand remarks," or, "under the circumstances, the officers' comments were particularly 'evocative.'" *Id*. at 303; *see also Pennsylvania v. Muniz*, 496 U.S. 582, 603 (1990) (routine recitation of instructions for sobriety and breath tests are not "likely to be perceived as calling for any verbal response"); *Thomas v. United States*, 731 A.2d 415 (D.C 1999) (although recognizing "routine booking question exception" to *Miranda*, extensive questioning regarding defendant's identity constituted custodial interrogation and defendant's use of aliases during interrogation should have been suppressed). Police awareness that the suspect is "unusually disoriented or upset at the time of his arrest" or "peculiarly susceptible" to a particular type of police appeal or ploy, *Innis*, 446 U.S. at 302-03, is also relevant. Moreover, "intent of the police . . . may well have a bearing on whether the police should have known that their words or actions were reasonably likely to elicit an incriminating response." *Id*. at 301-02 n.7.[24]

In *Arizona v. Mauro*, 481 U.S. 520 (1987), a five-to-four Court concluded that a meeting between the defendant and his wife was not the "functional equivalent of interrogation." Mauro and his wife were questioned separately about the death of their son. Mr. Mauro asserted his rights. After Mrs. Mauro was questioned, she asked to speak with her husband. The police agreed on the condition that an officer and a tape-recorder be present. Mrs. Mauro's initiation of the meeting kept the police conduct from amounting to a psychological ploy. "There is no evidence that the officers sent Mrs. Mauro in to see her husband for the purpose of eliciting incriminating statements. As the trial court found, the officers tried to discourage her from

[24] *Innis* held that an officer's comment to his partner in Innis's presence that handicapped children might find Innis's hidden gun and injure themselves was not the functional equivalent of express questioning because the officer's comments were merely "a few off-hand remarks" and were not particularly evocative in the circumstances. There was nothing in the record to suggest that the police knew Innis was unusually disoriented, upset, or susceptible to an appeal to his conscience concerning the safety of handicapped children, and the record did not suggest that the remarks were designed to elicit a response. 446 U.S. at 302-03.

talking to her husband, but finally 'yielded to her insistent demands.'" *Id*. at 528. That the police hoped Mauro would incriminate himself was not significant. "Officers do not interrogate a suspect simply by hoping that he will incriminate himself." *Id*. at 529. Neither did the majority find it significant that Mauro would not have freely chosen to meet with his wife and, in the midst of their conversation, told her not to talk anymore and to consult with a lawyer. *See id*. at 522. As noted by the dissent, "[t]he regrettable irony . . . is that respondent endured the functional equivalent of interrogation while in the very process of advising his wife to exercise her own Fifth Amendment right to remain silent." *Id*. at 535 n.5; *see also Graham*, 950 A.2d 717 (permitting defendant's mother to question him after he asked for attorney did not violate Fifth Amendment right to counsel because mother was not a "state actor" and because defendant never objected to her presence).

The danger of coercion arises not from the mere fact of custody, but from the "interaction of custody and official interrogation," and conversations with undercover officers do not implicate concerns with a police-dominated atmosphere and compulsion. *Illinois v. Perkins*, 496 U.S. 292, 297 (1990). *Miranda* warnings are therefore not required when the suspect is unaware that he or she is speaking to a law enforcement officer and gives a voluntary statement, even if the suspect is in custody on an unrelated matter. *See id*. (cellmate was a government agent).

District of Columbia decisions interpreting *Innis* have acknowledged the often subtle methods of interrogation. *Derrington v. United States*, 488 A.2d 1314 (D.C. 1985), found the "functional equivalent" of interrogation where a detective told the defendant that "he was arrested for homicide, that we had [] what we felt to be a very strong case," summarized the evidence against him, and "told him that if he wanted [to] . . . tell me his involvement, if any, in the case, that he could do so." *Id*. at 1326-27 (summarizing *Innis* factors). Also, in *Stewart v. United States*, 668 A.2d 857 (D.C. 1995), a detective's words of "inspiration" constituted interrogation because the remarks "were likely to elicit an incriminating response." The officer had known the defendant since the defendant was a small child, both belonged to the same church, and the officer knew the defendant from that church. The detective "minimized the moral seriousness of Stewart's alleged crime by saying that Stewart would not be judged regarding it. He also told Stewart that 'we all make mistakes.'" *Id*. at 866. Finally, in *Hill v. United States*, 858 A.2d 435 (D.C. 2004), a detective told a suspect that he was being charged with second-degree murder and that one of the suspect's close friends had told the police what had happened. *Id*. at 440. The court found the combination of those statements to be the "functional equivalent" of express questioning. *Id*. at 443; *see also United States v. Alexander*, 428 A.2d 42, 51 (D.C. 1981) (statement during arrest processing that police knew accused did stabbing was interrogation). *But see Spann v. United States*, 551 A.2d 1347 (D.C. 1988) (complainant's identification of defendant on scene was not interrogation because it was not a psychological ploy); *Hawkins v. United States*, 461 A.2d 1025, 1031 (D.C. 1983) (statement during arrest processing that investigation 'revealed that accused was responsible' was not interrogation).

The courts do not automatically accept at face value a stated intent not to elicit information. *In re E.G.*, 482 A.2d 1243, 1248 n.6 (D.C. 1984), rejected the officer's explanation that he was making a "rhetorical remark" when he stated upon arresting the defendant and seizing evidence, "Here is the sunglasses and the hat. I wonder where the gun and money is." *Id*. at 1245. The court continued:

> Unlike *Innis*, there was no understandable explanation for Lieutenant Wells' rhetorical question other than to elicit a response from appellant. It is precisely this type of tactic, following on the heels of a statement confronting the suspect with purported tangible evidence of a crime, which is prohibited by *Miranda*.

Id. (footnote omitted). Similarly, *Miley*, 477 A.2d at 723, found the "functional equivalent" of interrogation where an officer detained the defendant at gunpoint in a stairwell and asked him whether a nearby gun was registered in the District of Columbia. "It is generally true that probing, accusatory questions going to the heart of the offense under investigation are more likely to elicit incriminating responses than routine inquiries into an individual's background." *Id*.[25]

In *Smith v. United States*, 586 A.2d 684 (D.C. 1991), a halfway house counselor asked Smith, "What the hell are you doing with a gun in here?"

> Assuming the question even rose to the level of an initial "on-the-scene investigation," which *Miranda* does not reach, this case remains quite unlike *Miley* in which the police officer "asserted his authority over appellant and gave a clear indication that the confrontation had escalated beyond a general investigation." . . . [A]ppellant's "instantaneous response" . . . [seems] more akin to a volunteered statement which *Miranda* deems admissible than an incriminatory statement wrung from an accused [whose will] is overborne."

Id. at 686 (citations omitted) (alterations in original). The question, "asked reflexively in a context of wonderment," did not implicate the typical *Miranda* concerns in part because the questioning was by a counselor, rather than by a person "charged with investigating crime." *Id*. at 685. It was neither "probing" nor "accusatory," nor aimed at eliciting a confession, but was a "reflex reaction," "more in the nature of an exclamation than a question." *Id*.; *see also Otts v. United States*, 952 A.2d 156, 166 (D.C. 2008) (defendant's statement "there's nothing in there" after spitting out a green ziplock bag while in police custody was "more likely a spontaneous boast rather than an answer to a question posed by arresting officers" and *Miranda* was therefore not at issue).

An officer in *Reid v. United States*, 581 A.2d 359, 363 (D.C. 1990), asked Reid what he was "doing with a knife" as a way of discerning what was happening in a "dangerous and ambiguous street situation." That questioning was not concerned with an ongoing investigation of a previous crime and, as in *Owens*, an incriminating response was no more likely than some other explanation that would not be inculpatory. The question reflected concern with the officer's own safety, rather than an attempt to elicit a confession, and was closer to questioning in a *Terry* stop than the custodial interrogation about a preexisting crime with which *Miranda* is concerned. *Id*. at 363-64.

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[25] *Miley* took pains to qualify this statement by noting that "in certain circumstances, even routine background questions will be reasonably likely to elicit an incriminating response." *Id*. at 723 n.6. Thus, if police are aware that a suspect is peculiarly susceptible to questioning, they should know that even routine questions might elicit an incriminating response.

In *Jones v. United States*, 779 A.2d 277 (D.C. 2001) (en banc), the police stopped the defendant after observing him drop two ziplock bags to the ground. *Id*. at 279. When the officers asked the defendant to identify himself, he stated that "all he does is drink" and that "he was holding for those two guys." *Id*. at 279-80. Affirming the conviction, the en banc court limited the definition of "interrogation" to include "only questions that are reasonably likely to elicit incriminating information in the specific circumstances of the case." 779 A.2d at 283 (quoting *United States v. Bogle*, 114 F.3d 1271, 1275 (D.C. Cir.), *cert. denied*, 522 U.S. 938 (1997)). Asking the defendant his name and other identifying information did not constitute interrogation under that test. *Id*. at 283.

Of course, if there is sufficient evidence of intent to elicit an incriminating response, interrogation should be found. *See Innis*, 446 U.S. at 301-2 n.7, 303 n.9; *Derrington*, 488 A.2d at 1329; *Wilson v. United States*, 444 A.2d 25 (D.C. 1982); *cf. Mauro*, 481 U.S. 520 (defendant, who had asserted right to counsel, was not subjected to interrogation when police allowed wife to speak to him in presence of officer who taped conversation); *Morris v. United States*, 469 A.2d 432, 438 (D.C. 1983) (after "a brief exchange of commonplace greetings," suspect "spontaneously confessed to killing"; detective could not have foreseen that greeting would evoke confession); *Robertson v. United States*, 429 A.2d 192, 194-95 (D.C. 1981) ("Do you know why I'm here?," taken in context, would not normally elicit an incriminating response).

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***Johnson v. United States*, 40 A.3d 1 (D.C. 2012).** No Fifth Amendment violation to admit "spontaneous" statement made by defendant while being asked "routine booking questions" where statement was made in response to detective's explanation as to why defendant had been arrested and not in response to any questions.

***Watson v. United States*, 43 A.3d 276 (D.C. 2012).** Trial court did not err in finding defendant's statement spontaneous and not the product of custodial interrogation where statement was given freely and voluntarily in response to officer's questions about "strictly biographical information."

2. Public safety exception

In *New York v. Quarles*, 467 U.S. 649 (1984), a five-justice majority held that *Miranda*'s prophylactic rule does not apply when "police officers ask questions reasonably prompted by a concern for the public safety." *Id*. at 656. Availability of this exception does not turn on the officers' actual motivation, but requires an objective consideration of whether, in the circumstances, the benefits to public safety from forgoing the provision of *Miranda* warnings before interrogation outweigh the advantages of the warnings in providing "practical reinforcement" for the Fifth Amendment right against compulsory self-incrimination. *Id*. at 654;[26] s*ee also Dickerson*, 530 U.S. at 441 (stating that the public safety exception to *Miranda* is "as much a normal part of constitutional law as the original decision").

[26] Dissenting, Justice O'Connor predicted,

The scope of the exception may be quite limited. *Quarles* itself emphasized that it is intended to be "narrow." *See id*. The facts presented a fast-moving "kaleidoscopic" situation in which immediate questioning without *Miranda* warnings was reasonably aimed at alleviating an imminent public danger. An officer chased Quarles inside a grocery store shortly after a woman reported that she had been raped at gunpoint by two assailants and that at least one of the men had fled into the store. The officer detained Quarles at gunpoint and, upon frisking him, discovered that he was wearing an empty shoulder holster. Immediately after handcuffing Quarles, the officer asked him where the gun was. Quarles pointed to some nearby cardboard boxes and said, "the gun is over there." *Id*. at 651-52.[27] Thus, the "police . . . were confronted with the immediate necessity of ascertaining the whereabouts of a gun which they had every reason to believe the suspect had just removed from his empty holster and discarded in the supermarket," which was open to the public and might have held an accomplice. *Id*. at 657. Moreover, the officer "asked only the question necessary to locate the missing gun before advising respondent of his rights." *Id*. at 659.

In *Edwards v. United States*, 619 A.2d 33 (D.C. 1993), a citizen flagged down an officer and said that a man had just threatened several people with a rifle. Police pursued the defendant, followed him into the apartment building where he lived, confronted him, and asked, "Where's the gun?" The defendant answered, "I ain't got a gun." *Id.* at 35. The officers then asked, "Where's the rifle?" In response, the defendant said, "It ain't a rifle, it's a machete." *Id.* Citing *Quarles*, the court held that the questions were proper under the public safety exception, rejecting the notion that the public safety exception did not apply because the questioning occurred on private property. *Edwards*, 619 A.2d at 37. It noted that the building was somewhat occupied, had been broken into several times by vagrants, and was generally accessible to the public. *Id*.; *see also Green v. United States*, 974 A.2d 248, 261 (D.C. 2009) (public safety exception applied where officers reasonably suspected the suspect had a gun, had an objectively reasonable need to protect themselves from a legitimate and immediate danger, and reasonably asked spontaneously, "Where is the gun?"); *Dyson v. United States*, 815 A.2d 363, 369 (D.C. 2003) (post-arrest questioning about the location of a gun fell within the public safety exception where officer observed fleeing suspect tugging at his waistband); *Crook v. United States*, 771 A.2d 355, 359 (D.C. 2001) (questioning of bleeding suspect about who shot him and why following the suspect's arrest at the scene of a shooting for possession of a pistol fell within public safety

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> The end result [of the rule] will be a finespun new doctrine on public safety exigencies incident to custodial interrogation, complete with the hair-splitting distinctions that currently plague our Fourth Amendment jurisprudence.
>
> . . . The justification the Court provides for upsetting the equilibrium that has finally been achieved . . . really misses the critical question to be decided . . . *Miranda* has never been read to prohibit the police from asking questions to secure the public safety. Rather the critical question *Miranda* addresses is who shall bear the cost of securing the public safety when such questions are asked and answered: the defendant or the State. *Miranda*, for better or worse, found the resolution of that question implicit in the prohibition against compulsory self-incrimination and placed the burden on the State.

Quarles, 467 U.S. at 663-64 (O'Connor, J., dissenting) (citation omitted).

[27] Quarles was then advised of and waived his rights, and admitted to owning the gun. The trial court excluded the initial statement, and the gun and later statement as fruits. *See id*. at 652-53.

exception); *United States v. Jones*, 567 F.3d 712, 715 (D.C. Cir. 2009) (suspect's response to question whether he had "anything on" him admissible under public safety exception where officers entered a known drug market in search of a murder suspect, that suspect led an officer on a chase during which a gunshot was fired, the officer apprehended the suspect in a dimly lit stairwell where children where children had just been present, and the suspect was wearing a bulky jacket and known to have possessed two guns).

Quarles' treatment of *Orozco v. Texas*, 394 U.S. 324 (1969), also supports the view that the "public safety" exception applies only where police ask questions reasonably designed to alleviate substantial and exigent danger to themselves or to the public. In *Orozco*, statements of a suspect, in response to custodial interrogation without *Miranda* warnings, four hours after a murder, led police to a loaded pistol hidden in a public place. *Quarles* distinguished *Orozco* because the questioning there had continued without *Miranda* warnings for a substantial period after Orozco was seized, and the questioning had not focused solely on the location of the gun. 467 U.S. at 659 n.8. Most important, from the circumstances apparent to the police in *Orozco*, "there was no *exigency* requiring *immediate* action by the officers beyond the normal need expeditiously to solve a serious crime." *Id*. (emphasis added).

The *Quarles* exception, based on a balance of public safety concerns against the need for a prophylactic rule requiring warnings,[28] applies only to a failure to provide *Miranda* warnings before "public safety" questioning.[29] The Court also suggested that where police action amounts to "actual coercion" there is a "constitutional imperative" requiring exclusion of resulting evidence. 467 U.S. at 658 n.7. Thus, it appears that the "public safety" exception would not legitimize otherwise impermissible conduct.

Trice v. United States, 662 A.2d 891 (D.C. 1995), concluded that "public safety" questioning is justified even *after* a suspect has invoked his *Miranda* rights. Trice was arrested at his home four days after a shooting and robbery attempt. At the time of the arrest, police noticed several small children in the home. At the police station more than an hour after the arrest, police questioned the defendant about the location of the gun and remarked that small children were in the house and that police did not want anyone to get hurt. The defendant's response to the officer's question about the gun was admitted into evidence at trial under the public safety exception.[30]

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[28] Quarles emphasized that the warnings requirement is not itself a constitutional right but only a "practical reinforcement" for the right against compulsory self-incrimination. 467 U.S. at 654 (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)). *But see Dickerson*, 530 U.S. 428 (holding that *Miranda* was a constitutional decision that may not be overruled by an act of Congress).

[29] "We conclude that the need for answers to questions in a situation posing a threat to the public safety outweighs the need for the prophylactic rule protecting the Fifth Amendment's privilege against self-incrimination." *Quarles*, 467 U.S. at 657. "We hold that on these facts there is a 'public safety' exception to the requirement that *Miranda* warnings be given before a suspect's answers may be admitted into evidence." *Id*. at 655.

[30] The public safety exception would not apply where the passage of time was so great that it would be unreasonable to believe, objectively, that focus of interrogation was public safety and not factual investigation. See *id*. at 896-97.

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***Watson v. United States*, 43 A.3d 276 (D.C. 2012).** Trial court did not abuse its discretion in admitting defendant's response to officer's question "What's that?" while in custody for *Miranda* purposes, where question was asked in reference to a bulge in the defendant's sock discovered during search incident to arrest and where officer did not follow up with more questions.

3. Waiver of *Miranda* rights

A waiver is effective only if it is the knowing, intelligent, voluntary, and intentional relinquishment of a known right or privilege. *Miranda*, 384 U.S. at 475-79; *see also Brewer v. Williams*, 430 U.S. 387, 404-06 (1977); *Schneckloth v. Bustamonte*, 412 U.S. 218, 237-42 (1973). Waiver cannot be presumed merely because a person makes a statement after hearing advice of rights.

> If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.

Miranda, 384 U.S. at 475. "Lengthy interrogation or incommunicado incarceration" is inconsistent with a finding of waiver. *Id*. at 476. However, a waiver may be valid even if the suspect was not told of all the possible subjects of questioning in advance. *See Colorado v. Spring*, 479 U.S. 564 (1987). Similarly, a suspect can validly waive the *Miranda* rights without being told by police that an attorney is nearby, ready to assist the suspect. *See Moran v. Burbine*, 475 U.S. 412 (1986). A finding of waiver depends on the totality of the circumstances and may be inferred from the circumstances. *See North Carolina v. Butler*, 441 U.S. 369 (1979).

The Court of Appeals has identified four primary factors to be considered: (1) the defendant's prior experience with the legal system; (2) the circumstances of the questioning; (3) any allegation of coercion or trickery; and (4) any delay between arrest and the statement. *Rosser v. United States*, 313 A.2d 876, 878 (D.C. 1974). "In addition, it is appropriate for a court to consider the intellectual capacity and education of the accused." *Di Giovanni v. United States*, 810 A.2d 887, 892 (D.C. 2002) (citing *Sims v. Georgia*, 389 U.S. 404 (1967)); *see also Robinson v. United States*, 928 A.2d 717 (D.C. 2007) (no error in admitting defendant's inculpatory videotaped statement where, despite possible learning disabilities and evidence of possible mental retardation, statement showed a level of cognitive ability sufficient to make a knowing and intelligent waiver and there was no evidences that the *Miranda* warnings were distorted) These factors are discussed *supra* Section A, relative to voluntariness.

With respect to the first factor, courts have usually concluded that prior experience with the criminal justice system makes a knowing waiver more likely. But if, for example, the client's refusal to confess resulted in prolonged detention or interrogation on prior occasions, the purported waiver is arguably *less* likely to have been voluntary because it may have been compelled by fear of similar adverse consequences.

Valid waivers were found in *In re C.L.W.*, 467 A.2d 706, 709 (D.C. 1983) (15-year-old with I.Q. of 74 and reading difficulties was read his rights, executed the waiver in writing, and was read his rights again during the statement; respondent had "numerous" prior arrests, did not request an attorney or an adult, and said he wanted to talk in an effort to "beat my charge"); *In re C.P.*, 411 A.2d 643 (D.C. 1980) (13-year-old with no prior record was read his rights twice; incriminating statement was made during a conversation with his mother during which officer was present), *vacated on other grounds* by *C.P. v. District of Columbia*, 449 U.S. 945 (1980); *In re W.B.W.*, 397 A.2d 143 (D.C. 1979) (15-year-old with no previous arrests twice gave written waiver and asked that his mother be told where he was, but did not request her presence); *In re F.D.P.*, 352 A.2d 378 (D.C. 1976) (15-year-old who had been arrested two or three times before, voluntarily came to police station and twice waived rights); *In re M.D.J.*, 346 A.2d 733 (D.C. 1975) (respondent had five prior arrests and police read rights twice orally); *United States v. Rawls*, 322 A.2d 903 (D.C. 1974) (officer's statement that defendant would not be able to obtain lawyer until following day did not render waiver invalid as a matter of law); *In re J.F.T.*, 320 A.2d 322 (D.C. 1974) (15-year-old respondent had nine prior arrests said he knew his rights and was willing to answer some questions, and had refused to answer certain other questions following previous arrests).

The defendant in *United States v. Yunis*, 859 F.2d 953 (D.C. Cir. 1988), was accused of hijacking, arrested abroad, and transported by boat to the United States. The court found an in-transit waiver valid although Yunis suffered from untreated fractures to both wrists and from seasickness, his quarters were uncomfortably hot and poorly ventilated, he did not understand English and the warnings were translated into Arabic with a few mistakes in the written version, and he was unfamiliar with the concept of *Miranda* rights and American legal culture in general. *See Yunis*, 859 F.2d at 961-66. Although *Yunis* is an extremely unusual fact situation, the opinion marshals many of the arguments for a valid waiver and should be examined with care for the cases it cites and those it distinguishes.

In *Di Giovanni v. United States*, 810 A.2d 887 (D.C. 2002), the defendant was read *Miranda* warnings and then asked if he understood them. *Id*. at 890. The defendant replied that he did not fully understand them. *Id*. After the detective went back over the warnings "line by line" and confirmed that the defendant understood them, the detective asked the questions on the back of the PD 47 card. *Id*. When the detective reached the fourth question, which asks whether the person wants to answer questions without an attorney present, the defendant asked the detective whether he needed a lawyer. *Id*. The detective responded "that he would need one later, but that at that time he did not think Di Giovanni needed one, and that it would not be feasible to bring a lawyer into the police station." *Id*. Finally, the detective told the defendant that if he requested a lawyer the interview would stop and that it would be "best if [Di Giovanni] told [his] side of the story." *Id*. The Court of Appeals held that the subsequent waiver did not meet the knowing and intelligent standard because the defendant had been initially misinformed and confused as to his rights. *Id*. at 892. The detective's "embellishments and directives that Di Giovanni didn't need a lawyer vitiated the validity of his waiver." *Id*. at 894.

Purported waivers were also found invalid in *Cooper v. Griffin*, 455 F.2d 1142 (5th Cir. 1972) (confessions obtained from 15- and 16-year-old defendants, who were mentally retarded with at most a second-grade reading level, had IQs of 67-68, and had no prior arrests); *United States v.*

Blocker, 354 F. Supp. 1195 (D.D.C. 1973), *aff'd*, 509 F.2d 538 (D.C. Cir. 1975) (defendant unable to read; strip searched; police informed him of maximum penalty for offense and said he would likely be released on low bail if he cooperated); *People v. Honeycutt*, 570 P.2d 1050, 1055 (Cal. 1977) ("when the waiver results from a clever softening-up of a defendant through disparagement of the victim and ingratiating conversation, the subsequent decision to waive . . . must be deemed to be involuntary"); and *United States v. Charlton*, 565 F.2d 86 (6th Cir. 1977). *See also Brewer*, 430 U.S. 387 (1977) (although defendant confessed after being informed of right to counsel and understood that right, his consistent prior reliance on counsel indicated lack of intent to "relinquish" Sixth Amendment right to counsel).

Juveniles' statements with regard to waiver must be scrutinized with special care.[31] *See C.P.*, 411 A.2d 643; *In re F.D.P.*, 352 A.2d 378 (D.C. 1976); *In re Gault*, 387 U.S. 1 (1967). *But see Fare v. Michael C.*, 442 U.S. 707 (1979) (juvenile's request to speak with his probation officer was not *per se* an invocation of *Miranda* rights). The totality of the circumstances test applies, as it does with regard to an adult. *J.F.T.*, 320 A.2d 322. Relevant factors relating to the child include "age, education," *F.D.P.*, 352 A.2d at 380; previous experience with the legal system, *W.B.W.*, 397 A.2d at 144; sophistication in matters of a criminal nature, *id*.; emotional state at the time of the waiver, *Taylor*, 380 A.2d at 992 n.6; and low IQ and reading difficulties, *C.L.W.*, 467 A.2d 706. *See supra* Section III.A.5.

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***Berghuis v. Thompkins*, 560 U.S. 370 (2010).** Suspect can implicitly waive right to silence by answering questions, even after long period of silence.

4. Waiver after assertion of rights

Once an accused asserts the right to silence or to counsel, the standard governing waiver changes and depends on which right has been asserted.

a. What constitutes an assertion?

Effective assertion does not require an affirmative request that questioning cease or that an attorney be present. For example, a negative response to the third or fourth question on the back of a PD 47 "rights" card is sufficient to invoke the right to silence and/or counsel. *See, e.g., (Dennis) Smith v. United States*, 529 A.2d 312 (D.C. 1987); *Hawkins v. United States*, 461 A.2d 1025 (D.C. 1983); *McKeamer v. United States*, 452 A.2d 348, 350 n.5 (D.C. 1982).

Doubt cannot be cast on a clear assertion of rights by answers to subsequent questions ostensibly designed to "clarify" the assertion. Thus, a response, "Yeah, I'd like to do that," when informed of the right to have an attorney present invokes the right to counsel, notwithstanding later ambiguous answers to questions about whether the accused wants to assert rights. *Smith v. Illinois*, 469 U.S. 91 (1984) (per curiam). "[U]nder the clear logical force of settled precedent,

[31] A "juvenile" in this context is a person not yet eighteen years old, whether prosecuted in family or criminal court. *See Taylor v. United States*, 380 A.2d 989, 992 n.6 (D.C. 1977).

an accused's *postrequest* responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself." *Id*. at 100.

(Dennis) Smith relied on *Smith*, 469 U.S. at 98, to reverse a second-degree murder conviction based on admission of a videotaped statement. *See* 529 A.2d at 316. Detective Corboy testified that Smith had answered "yes" to the first three questions on the "rights card," but "no" to the fourth: "Are you willing to answer questions without having an attorney present?" The detective was "surprised" because of Smith's response to the third question and because Smith had volunteered statements before and during the explanation of rights and nodded his head while being explained his rights. *See id*. at 314. The detective repeated the question and received a positive response. The Court made clear that only ambiguities that precede or are part of the assertion of rights may warrant further clarifying questions. Moreover, a desire to talk before being informed of the right not to talk cannot be used to cast doubt on a later assertion of rights, which in this case was clear and unambiguous. *See id*. at 316-18.

If the alleged assertion itself is equivocal, police are not obligated to clarify an ambiguous response before proceeding with the interrogation. *Davis v. United States*, 512 U.S. 452 (1994); *Riley v. United States*, 923 A.2d 868, 882 (D.C. 2007) (applying *Davis* to ambiguous invocation of right to counsel). *See also Mitchell v. United States*, 985 A.2d 1125, 1132-33 (D.C. 2009) (discussing *Davis*). In *Burno v. United States*, 953 A.2d 1095 (D.C. 2008), the Court of Appeals held that the defendant did not unambiguously assert his general right to remain silent when he said that he would "rather not say" in response to some questions but continued to answer others. *Id.*; *cf. Patton*, 633 A.2d at 818 (ambiguous assertion irrelevant if defendant is not in custody).

The request for counsel must be granted a "broad, rather than a narrow, interpretation." *Michigan v. Jackson*, 475 U.S. 625, 633 (1986). Hence, pronouncements that the accused "want[s] an attorney before this goes very much further" or "before making a deal," though arguably ambiguous, have been held to be all-inclusive invocations of the right to counsel. *See Oregon v. Bradshaw*, 462 U.S. 1039, 1041 (1983) (Marshall, J., dissenting); *Edwards v. Arizona*, 451 U.S. 477, 479 (1981). Mere silence for a short period in the face of police questioning, however, is not an assertion of the right to silence. *See McClinnahan v. United States*, 454 A.2d 1340, 1345-47 (D.C. 1982); *Bliss v. United States*, 445 A.2d 625 (D.C.), *amended*, 452 A.2d 172 (1982).

An assertion that contains specific unambiguous conditions will not be construed as an unconditional invocation of rights. The defendant in *Connecticut v. Barrett*, 479 U.S. 523 (1987), said he would talk to the police but would not supply a written statement without an attorney present and made an oral statement. The Court held that the "broad interpretation" of an assertion of rights applies only if there is unresolved ambiguity. Because Barrett clearly asserted his rights only as to a written statement, the oral statement was properly admitted. "To conclude that respondent invoked his right to counsel for all purposes requires not a broad interpretation of an ambiguous statement, but a disregard of the ordinary meaning of respondent's statement." *Id*. at 529-30.

b. Assertion of the right to silence

Once an accused asserts the right to silence, the police must "scrupulously honor" the decision to cut off questioning. *See Michigan v. Mosley*, 423 U.S. 96 (1975). A number of factors must be considered in determining whether the assertion was scrupulously honored: "1) whether [the defendant] was advised of and orally acknowledged his rights, 2) whether questioning immediately ceased, 3) the length of time between interrogations, and 4) whether *Miranda* warnings were again given." *Rogers v. United States*, 483 A.2d 277, 285-86 (D.C. 1984); *see also Stewart v. United States*, 668 A.2d 857, 866 (D.C. 1995) (cellblock interrogation improper where suspect did not initiate interrogation, "short" time between assertion of right to remain silent and interrogation, questions concerned the same crime, suspect not readvised of his rights, and suspect did not waive rights); *Derrington*, 488 A.2d at 1329 n.18. Concerns governing the validity of any waiver of *Miranda* rights – the defendant's age, education and prior experience with the legal system, the circumstances and manner of questioning, coercion, trickery, and delay – should also be considered. *See also Rogers*, 483 A.2d at 286; *Wilson*, 444 A.2d at 29; *Alexander*, 428 A.2d at 49.

The Court of Appeals has found numerous failures to "scrupulously honor" the assertion of rights where police conduct falls short of direct questioning. The defendant in *Derrington*, for example, orally asserted the rights to silence and to counsel at the site of the arrest and again on a PD 47 at the homicide office. Homicide detectives then "explained . . . that he was arrested for homicide, that [the police] had . . . what [they] felt to be a very strong case," summarized that evidence, and said "that it was unfortunate that the officer advised him of his rights prior to us getting there, that he knew nothing about the case; and . . . that if he wanted, in fact, now to tell me what happened, and tell me his involvement, if any, in the case, that he could do so." 488 A.2d at 1327. Despite reiteration of the *Miranda* rights and the absence of any questioning during this monologue, the detective's comments were the "functional equivalent" of interrogation and did not scrupulously honor the assertion of rights. *See id*. at 1328 n.11. Accordingly, the resulting waiver was invalid under *Mosley*.

Indeed, readvisement of rights can itself be a failure to scrupulously honor an assertion. The defendant in *McKeamer* asserted her rights to silence and to counsel on a PD 47, and was then taken to the homicide office. The arresting officers did not inform the homicide detectives of the assertion, and the defendant was placed in an interview room where a homicide detective readvised her of her *Miranda* rights. The defendant said she was "willing to talk" and the detective asked her "what happened tonight;" the defendant gave a written statement and later executed a written waiver. Considering all the circumstances, including the defendant's lack of experience with the criminal justice system and her IQ (59), the court found that the police had not "scrupulously honored" her assertion of rights, and the waiver was invalid. *See McKeamer*, 452 A.2d at 351.

Accusations and discussions of the evidence do not constitute the kind of "scrupulous honoring" of rights contemplated by *Mosley*. For example, the defendant in *Alexander*, who had no experience with the criminal justice system and had just stabbed a woman with whom she lived, was taken to the homicide office, placed in an interrogation room, and advised of her rights, which she asserted. 428 A.2d at 45 n.8. The detective then began to fill out the arrest report, but stopped and told Alexander that the police knew she had done the stabbing. This conduct

suggested continued interrogation, albeit by subtle methods, and required exclusion of the statement.[32] *Id*. at 51. Similarly, the defendant in *Wilson* was arrested in Virginia for a District of Columbia offense. The arresting officers read him his rights but did not question him. Two District of Columbia detectives picked him up the next morning and read him his rights, which he asserted. Nevertheless, the detectives almost immediately began to discuss the evidence with him as they proceeded to the courthouse. Finding that the conversation constituted interrogation and that the change in location increased, rather than reduced, the coercive effect of the questioning, the court concluded that Wilson's right to cut off questioning had not been "scrupulously honored." 444 A.2d at 29.

Statements may be admitted, however, if the defendant initiates a conversation about the offense with the police. After asserting rights, the defendant in *Rogers* later said, spontaneously, "I had to sacrifice him." A detective asked, "Sacrifice who?" The defendant responded with incriminating statements, and later led the police to the murder weapon and the body. Relying principally on the defendant's initiation of the conversation, the court found that the police had "scrupulously honored" the initial assertion. 483 A.2d at 284-86; *see also McIntyre*, 634 A.2d 940 (because defendant initiated conversation, statement allowed despite failure to give *Miranda* warnings); *In re D.L.*, 486 A.2d 1180 (D.C. 1985) (after asserting rights, juvenile advised police, through sister of another suspect, that he wished to discuss case; police readvised him and obtained waiver on PD 47); *Calaway v. United States*, 408 A.2d 1220 (D.C. 1979) (statement made almost immediately after request for counsel admissible where first remark was spontaneous and later statement preceded by repeated warnings); *Peoples v. United States*, 395 A.2d 41 (D.C. 1978) (statement made six hours after previous interrogation admissible, where accused asked to speak with officer and was twice advised of rights); *Taylor*, 380 A.2d 989 (statement admissible after defendant was advised four times of rights in presence of mother by officer whom mother knew, even though defendant indicated to another officer at one point during statement that he did not wish to answer questions and desired the presence of an attorney); *Brown v. United States*, 359 A.2d 600 (D.C. 1976) (statement obtained after request for counsel, made to different officer); *United States v. Hackley*, 636 F.2d 493 (D.C. Cir. 1980) (defendant expressed desire to remain silent, police ceased interrogation, and statement was made spontaneously an hour later to different officer, in course of conversation). The holdings in *Calaway*, *Taylor*, and *Brown* are of little precedential value in light of the current requirement that counsel be present during any interrogation after the right to counsel is invoked, discussed *infra* Section c.

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***Berghuis v. Thompkins*, 560 U.S. 370 (2010).** Suspect must "unambiguously" invoke right to silence to cease police questioning; refusing to sign waiver form or simply remaining silent is not enough.

[32] The right asserted was the right to counsel; the stricter analysis discussed in the next section would apply if the same facts arose today.

c. Assertion of the right to counsel

A stricter standard applies if the accused invokes the right to counsel, in which case "the interrogation must cease until an attorney is present." *Miranda*, 384 U.S. at 474. Under the current state of the law, after invocation of the Fifth Amendment right to counsel further interrogation may not be conducted unless the accused initiates further dialogue or counsel is actually present.

The day after the defendant in *Edwards v. Arizona* was arrested and asked for counsel, detectives went to the jail, and obtained a waiver and a statement. A unanimous Court found this procedure constitutionally offensive. The plurality explained:

> We further hold that an accused . . . having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

451 U.S. at 484-85.

Further interrogation, or its functional equivalent, undertaken for whatever purpose, is improper unless counsel is present. *See id*. at 484.

Once an accused has answered "no" to the fourth question on the PD 47, or otherwise asserted the right to counsel's presence, any statements elicited without an attorney present, even if preceded by readvice and a purported waiver, must be suppressed, unless the accused, *sua sponte*, "reopen[s] the dialogue with the authorities," and the government establishes separately the existence of a knowing and intelligent waiver. *Id*. at 486 n.9; *see also Morris v. United States*, 728 A.2d 1210, 1213-22 (D.C. 1999); *Thomas v. United States*, 731 A.2d 415 (D.C. 1999).

In *Tindle v. United States*, 778 A.2d 1077 (D.C. 2001), the court found a violation of the *Edwards* rule when the defendant initially checked "no" beside the question whether he wanted to answer questions without a lawyer present. *Id*. at 1080. The detective "told him if you answer that no, I can't talk to you any more" and then "said[,] take some time to think about whether you want to answer, think about that question." *Id*. The defendant then changed his response to "yes." *Id*. The court held that the detective had reinitiated interrogation in violation of *Edwards*. *Id*. at 1084-85.

An opportunity to consult with counsel before reinterrogation is irrelevant. *See Minnick v. Mississippi*, 498 U.S. 146, 153-54 (1990).[33] "A single consultation with an attorney does not remove the suspect from persistent attempts by officials to persuade him to waive his rights, or from the coercive pressures that accompany custody and that may increase as custody is

[33] Two FBI agents came to talk to Minnick the day after he was charged with murder. Minnick said he would make a more complete statement after consulting with counsel. After that interview, appointed counsel spoke to Minnick on two or three occasions. Three days after the arrest, a local sheriff initiated a conversation with Minnick, who confessed to the crimes. *See Minnick*, 498 U.S. at 148-49.

prolonged." *Id*. at 153. The Court "decline[d] to remove protection from police-initiated questioning based on isolated consultations with counsel who is absent when the interrogation resumes"; rather, "*Edwards*' purpose [is] to protect the suspect's right to have counsel present at custodial interrogation." *Id*. at 154.

> [E]ven preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Thus the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

Id. (quoting *Miranda*, 384 U.S. at 470).

However, the right asserted must be specifically the *Fifth Amendment* right to counsel, which is not invoked by appointment of a lawyer at a judicial proceeding in an unrelated case. *McNeil v. Wisconsin*, 501 U.S. 171 (1991).[34] In *McNeil*, the defendant was arrested, charged with armed robbery, and assisted at a bail hearing by appointed counsel. While he was still in jail, the police secured a waiver of his *Miranda* rights and questioned him twice about an unrelated murder. The Court reasoned that "[t]he [*Edwards* rule] applies only when the suspect 'has *expressed*' his wish for the particular sort of lawyerly assistance that is the subject of *Miranda*." *Id*. at 178 (quoting *Edwards*, 451 U.S. at 484) (emphasis added in *McNeil*). Invocation of the Fifth Amendment right to counsel "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police*. Requesting the assistance of an attorney at a bail hearing does not bear that construction." *Id*.; *see also Texas v. Cobb*, 532 U.S. 162 (2001) (holding that Sixth Amendment right to counsel encompasses only charged offenses, not those that are merely "factually related").

***McNeil* makes it imperative that counsel invoke the client's Fifth Amendment rights at the first court appearance, in open court, and on the record.** As the *McNeil* dissent points out,

> If petitioner . . . had made such a statement indicating that he was invoking his Fifth Amendment right to counsel as well as his Sixth Amendment right to counsel, the entire offense-specific house of cards that the Court has erected today would collapse . . .
> In future preliminary hearings, competent counsel can be expected to make sure that they, or their clients, make a statement on the record that will obviate the consequences of today's holding.

Id. at 184 (Stevens, J., dissenting).

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[34] The Court retreated from its prior position in *Michigan v. Jackson*, 475 U.S. 625 (1986), broadly construing a defendant's request for counsel at arraignment. *Michigan v. Jackson* was subsequently overruled in *Montejo v. Louisiana*, 129 S. Ct. 2079, 2091 (2009).

The importance of that invocation was underscored in *United States v. Green*, 592 A.2d 985 (D.C. 1991).[35] Green was arrested on a drug case and invoked his Fifth Amendment right to counsel on the PD 47. After he pled guilty on the drug case, and while he was still in custody, the police obtained a waiver and a statement about an unrelated murder. The court affirmed the trial court's ruling that Green's statement was taken in violation of *Edwards* and its progeny: "*Edwards*, *Roberson* and *Minnick* together teach . . . the need for great caution in finding distinctions among cases all involving the paradigmatic original request by the accused for counsel, reflecting 'his own view that he is not competent to deal with the authorities without legal advice.'" *Green*, 592 A.2d at 988 (citing *Arizona v. Roberson*, 486 U.S. 675, 681 (1988)).

Edwards requires that the accused do two things after asserting the right to counsel: initiate conversation and validly waive the *Miranda* rights. The defendant in *Bradshaw*, after asserting his right to counsel and while en route to jail, asked an officer, "Well, what is going to happen to me now?" Four justices concluded that he had "initiated" a conversation within the meaning of *Edwards*; four dissented.[36]

> [E]ight Justices manifestly agree that *Edwards* did create a *per se* rule . . . The rule is simply stated: unless the accused himself initiates further communication with the police, a valid waiver of the right to counsel [once asserted] cannot be established. If an accused has himself initiated further communication with the police, it is still necessary to establish as a separate matter the existence of a knowing and intelligent waiver . . .

Edwards, 462 U.S. at 1054 n.2 (Marshall, J., dissenting).

Smith v. Illinois, 469 U.S. 91 (1984), reiterated the importance of the two-step inquiry. Police continued to question Smith after he asked for a lawyer, ostensibly to clarify an ambiguity in his original request. The Court held that all questioning should have stopped after the accused made his request and that his responses to later interrogation could not be used to cast doubt on the original assertion or to establish a waiver.

> The importance of keeping the two inquiries distinct is manifest. *Edwards* set forth a "bright-line rule" that all questioning must cease after an accused requests counsel. In the absence of such a bright-line prohibition, the authorities through "[badgering]" or "overreaching" – explicit or subtle, deliberate or unintentional – might otherwise wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance. With respect to the waiver inquiry, we accordingly have emphasized that a valid waiver "cannot be established by showing only that [the accused] responded to further police-initiated custodial interrogation."

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[35] *See also In re A.L.M.*, 631 A.2d 894 (D.C. 1993) (appointment of counsel in prior traffic offense did not preclude police-initiated interrogation in unrelated murder, even though murder weapon had been recovered from vehicle in which defendant was driving on night of traffic offense).

[36] Justice Powell concurred in the result, rejecting the *Edwards* two-step rule in favor of the traditional test of whether the purported waiver was knowing and intelligent in light of all the circumstances. *See Bradshaw*, 462 U.S. at 1047-51.

Id. at 98 (citations omitted). *See also Rogers*, 483 A.2d at 284.

Morris v. United States, 728 A.2d 1210 (D.C. 1999), found that the *Edwards* two-step inquiry was satisfied. After Morris asserted his right to counsel, police discontinued the interrogation and left the room where they were interviewing him. Later, a detective went into the interview room to "obtain non-substantive processing information from Morris." *Id*. at 1213. At that time, Morris asked the detective to speak to the officer who had previously conducted the interrogation. When the interrogating officer returned to the interview room, Morris told her he wanted to talk to her; the officer responded that she could not talk to him about the case because he had asserted his right to counsel. *Id*. "Morris said 'O.K.'" *Id*. The officer stayed believing that Morris wanted to talk about his life. *Id*. at 1213-14. Morris then began to talk about his childhood and his relationship with the decedent. Morris then said "I might as well tell you what happened with [the decedent]." *Id*. at 1214. The police then told Morris that to talk about the case with them, he would have to fill out another rights card agreeing to be interrogated without an attorney present. Morris did this and subsequently made a videotaped statement. *Id*. Looking at Morris's demeanor in the videotape, the trial judge found that Morris wanted to get the facts "off his chest and talk about [the case]." *Id*. at 1220. The appellate court found this case to be a close call and declared that another trial court, in looking at the facts, may have decided the question differently. *Id*. at 1220-21. Therefore, the court affirmed the decision of the trier of fact that the videotaped statement was admissible. *See also Thomas v. United States*, 731 A.2d 415 (D.C. 1999) (questioning of suspect, who had initially asserted his right to counsel through a rights card, after he said that he wanted to talk about the case without an attorney present and changed his original rights card to reflect the same satisfies *Edwards*).

The question of what police-initiated conversation might violate *Edwards* is unclear. *Edwards*, *Bradshaw*, and *Smith* imply that the police can "initiate" a "conversation" and thus trigger the rule against waiver without engaging in "interrogation" or its "functional equivalent." At the same time, statements are admissible unless they are elicited through interrogation. "Absent . . . interrogation, there would have been no infringement of the right that [appellant] invoked and there would be no occasion to determine whether there had been a valid waiver." *Edwards*, 451 U.S. at 486. Cases have tended to require "interrogation" or its functional equivalent rather than mere police-initiated "conversation" in order to establish an *Edwards* violation. *See, e.g.*, *Derrington*, 488 A.2d at 1328-29; *Howard v. United States*, 452 A.2d 966 (D.C. 1982). *But see United States v. Hinckley*, 672 F.2d 115, 124 (D.C. Cir. 1982) ("background" questioning of mentally ill suspect violated *Edwards*). However, police "conversation" with an accused after a prior assertion of the right to counsel favors finding the functional equivalent of interrogation. *See Derrington*, 488 A.2d at 1328.

Idle chatter by the accused does not initiate a conversation. The suspect must evince "a desire to discuss the investigation." *Rogers*, 483 A.2d at 284; *see also Hawkins*, 461 A.2d at 1031 (suspect's comment that he "wanted to get it off his chest" initiated conversation); *Wyrick v. Fields*, 459 U.S. 42 (1982) (request for a polygraph test met the initiation test).

C. The Sixth Amendment Right to Counsel

The Sixth Amendment right to counsel prohibits use of statements "deliberately elicited" from a defendant once the Sixth Amendment right attaches, absent a valid waiver. The central questions in this context are whether the incriminating statement was made after the Sixth Amendment right to counsel attached, whether the statement was "deliberately elicited," and whether the defendant waived the right to counsel.

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***Dorsey v. United States*, 60 A.3d 1171 (D.C. 2013) (en banc).** See, *supra*, Chapter 20.III.B.4.b

1. Attachment of the Right

The Sixth Amendment right to counsel is offense-specific. *See Cobb*, 532 U.S. at 167-68; *McNeil*, 501 U.S. at 175. It does not cover future prosecutions because it attaches only "at or after the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *United States v. Gouveia*, 467 U.S. 180, 188 (1984) (citation omitted); *Crawford v. United States*, 932 A.2d 1147 (D.C. 2007) (counsel's invocation at probation revocation hearing of defendant's Sixth Amendment right to counsel in uncharged murder case unrelated to probation matter was insufficient to preserve that right during future questioning on murder charge). Thus, it does not prohibit police contact with the defendant about cases other than the one for which the defendant is in custody. Indeed, the police may even question the defendant about crimes that are intimately related to the charged offenses. *See Cobb*, 532 U.S. at 173 (holding that Sixth Amendment did not bar police from questioning defendant, who had been appointed counsel in connection with a burglary indictment, about capital murders that occurred during the course of the same burglary). Counsel should invoke the client's Fifth Amendment right to counsel at presentment or arraignment to protect against such contacts. *See McNeil*, 501 U.S. at 184 (Stevens, J., dissenting); *see also Yunis*, 859 F.2d at 967; *cf. Riley*, 923 A.2d 868 (the filing of a complaint containing a criminal charge in order to obtain an arrest warrant does not trigger Sixth Amendment right to counsel); *Brown v. United States*, 518 A.2d 415, 420-21 (D.C. 1986) (Sixth Amendment rights do not attach at issuance of grand jury line-up directive because government has not yet committed itself to prosecute). After criminal charges in a particular case have been dropped, a defendant's Sixth Amendment right to counsel no longer adheres and must be reasserted in the absence of bad faith on the part of the government. *Lindsey v. United States*, 911 A.2d 824 (D.C. 2006).

When addressing issues arising under the Sixth Amendment right to counsel, counsel should be mindful of the fundamental change in the legal landscape worked by the Supreme Court in *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009), which overruled the Court's prior decision in *Michigan v. Jackson*, 475 U.S. 625 (1986). In *Michigan v. Jackson*, the Court imported into the Sixth Amendment context the bright-line rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), from the Fifth Amendment context. That is, the Court held that a defendant who has been formally charged with a crime and who has requested appointment of his counsel at arraignment cannot be subject to uncounseled interrogation unless he initiates exchanges or conversations with police. 475 U.S. at 626. In other words, "if police initiate interrogation after a defendant's assertion, at

an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid." *Id.* at 636.

Montejo rejected the notion that courts "must *presume* that such a waiver is invalid under certain circumstances," 129 S. Ct. at 2085, further stating that "even if it is reasonable to presume from a defendant's *request* for counsel that any subsequent waiver of the right was coerced, no such presumption can seriously be entertained when a lawyer was merely 'secured' on the defendant's behalf, by the state itself, as a matter of course." *Id.* at 2087. Thus, after *Montejo,* officers may attempt to obtain a waiver and a statement from a defendant without running afoul of the Sixth Amendment even after he has been appointed counsel and asserted his rights at arraignment. Where under *Jackson,* police could not initiate interrogation in the absence of counsel after the invocation of the Sixth Amendment right to counsel at the initial court hearing, *Montejo* establishes that the Sixth Amendment does not preclude law enforcement from initiating contact with a defendant in an effort to obtain a statement following a court's appointment of counsel or a defendant's request for counsel. *Id.*

2. Statements "Deliberately Elicited"

After *Montejo,* clients must be carefully counseled to specifically request counsel at the time of any attempted interrogation, even though counsel has been requested or appointed at arraignment. Once a defendant has so invoked his Sixth Amendment right to counsel, law enforcement is precluded from deliberately eliciting statements.

Massiah v. United States, 377 U.S. 201 (1964), reversed a conviction based on the defendant's statements to his co-defendant, who was acting as a government agent. The accused was denied "the basic protections of [the Sixth Amendment] when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him." *Id.* at 206. Similarly, *United States v. Henry*, 447 U.S. 264 (1980), found that an incriminating statement had been "deliberately elicited" where the defendant's cell mate, a paid informant, "deliberately used his position to secure incriminating information" from the defendant, and that this conduct was directly attributable to the government even though the government had expressly instructed the informant not to question the defendant:

> Nichols had been a paid Government informant for more than a year; moreover, the FBI agent was aware that Nichols had access to Henry and would be able to engage him in conversations without arousing Henry's suspicion. The arrangement between Nichols and the agent was on a contingent-fee basis; Nichols was to be paid only if he produced useful information . . . Even if the agent's statement that he did not intend that Nichols would take affirmative steps to secure incriminating information is accepted, he must have known that such propinquity likely would lead to that result.

Id. at 270-71 (footnote omitted).

Maine v. Moulton, 474 U.S. 159 (1985), found another violation of the Sixth Amendment right to counsel when the government arranged to record a conversation between the defendant and his

co-defendant, who had agreed to cooperate with the government and wear a wire during a meeting to plan defense strategy. *See also Watson v. United States*, 940 A.2d 182 (D.C. 2008) (remanding for hearing on question whether informant was acting as a government agent where he testified at trial the he spoke to the defendant about the crime on his own initiative, but where the government disclosed in its appellate brief that one of its agents had spoken to informant about defendant prior to the conversation in which the defendant made incriminating statements); *Simpson v. United States*, 632 A.2d 374 (D.C. 1993) (statements taken intentionally from defendant in absence of knowing and voluntary waiver of Sixth Amendment right to counsel constituted a core violation and must be excluded for all purposes). *Compare United States v. Sampol*, 636 F.2d 621 (D.C. Cir. 1980) (*Massiah* applies where informant elicits incriminating statements in exchange for anticipated leniency in his own sentencing), *with Hill v. United States*, 434 A.2d 422, 431 (D.C. 1981) (government agent's effort to secure accused's unknowing participation in unrelated criminal investigation, resulting in accused volunteering statements about his own case, did not violate Sixth Amendment). *But see Kuhlmann v. Wilson*, 477 U.S. 436 (1986) (Sixth Amendment does not forbid use of defendant's statements to jailhouse informant who was placed in close proximity but made no effort to initiate conversation about defendant's pending charge); *Davis v. United States*, 623 A.2d 601 (D.C. 1993) (*Massiah* does not apply to interviews with parole officer before and after arrest, and no assertion of right to counsel).

The police conduct in obtaining the accused's statements need not be "overbearing" or "deceptive." "[W]hether the incriminating statements were elicited in a surreptitious manner is 'constitutionally irrelevant.' The significant focus for a reviewing court is the presence of 'interrogation' – in the sense of deliberate elicitation of an incriminating statement…." *Woodson v. United States*, 488 A.2d 910, 912-13 (1985) (citations omitted).

3. Waiver

The right to counsel can be waived without first consulting counsel. *See Michigan v. Harvey*, 494 U.S. 344, 352-53 (1990); *Brewer v. Williams*, 430 U.S. 387 (1977); *Shreeves v. United States*, 395 A.2d 774 (D.C. 1978). And after *Montejo*, the request for counsel or the appointment of counsel at arraignment creates no presumption that a defendant's subsequent waiver to police-initiated interrogation is invalid. *Montejo*, 129 S. Ct. at 2085-87. In determining whether a defendant waived his Sixth Amendment right, the government "bears a heavy burden to show: (a) that the defendant understood that in fact he had a right to the presence of counsel during an interrogation and (b) that the defendant intentionally relinquished or abandoned that 'known right.'" *Shreeves*, 395 A.2d at 781 (citations omitted).[37] As the Supreme Court reaffirmed in *Montejo*, "when a defendant is read his *Miranda* rights (which included the right to have counsel present during interrogation) and agrees to waive those rights, that typically does the trick, even though the *Miranda* rights purportedly have their source in the Fifth Amendment." 129 S. Ct. at

[37] If the defendant wishes to waive the right to counsel altogether and proceed *pro se*, the court itself must conduct a "penetrating and comprehensive examination of all the circumstances" to determine whether that decision is knowing and voluntary. *Ali v. United States*, 581 A.2d 368, 372 (D.C. 1990); *see also McClinton v. United States*, 817 A.2d 844 (D.C. 2003); *Mendes v. United States*, 595 A.2d 972 (D.C. 1991) (right waived where defendant, an experienced attorney, discharged counsel on baseless grounds in order to delay trial).

2085 (citing *Patterson v. Illinois*, 487 U.S. 285, 296 (1988). Retention or a request for an attorney may alter the analysis "markedly," however. *Patterson*, 487 U.S. at 290 n.3.

In *Riley v. United States*, 923 A.2d 868, the defendant waived his right to remain silent by changing from "yes" to "no" his answer to the question on the waiver form whether he was willing to make a statement without a lawyer. *Id.*, at 876. The defendant, who never asked for a lawyer during questioning, stated that he wanted to talk but not give a written statement, and the officer told him that his "no" response was not concerned with written statements. *Id.* at 876, 884-85. *Compare McNeil v. Wisconsin*, 501 U.S. 171 (1991) (invocation of Sixth Amendment right to counsel does not invoke Fifth Amendment right).

It is clear that an accused can waive the right to counsel after it has attached by initiating contact with the police. For example, in *United States v. Rorie*, 518 A.2d 409 (D.C. 1986), several days after the defendant was appointed counsel, he called the police and said he wanted to "point us [the police] in the right direction," and that he wanted to "take care of things himself and not to worry about his lawyer." Another detective returned his call, and the resulting statements were introduced against him at trial. Rorie's initiation of the contact was extremely significant to the court's finding of a valid waiver.[38] *See also Martinez v. United States*, 566 A.2d 1049, 1053-54 (D.C. 1989).

D. Unnecessary Delay Following Arrest

1. *McNabb-Mallory* and Relevant Statutes

McNabb v. United States, 318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957), held that a statement obtained during a period of unnecessary delay in taking the defendant before a judicial officer for a determination of probable cause following arrest should be excluded. The *Mallory* holding is based on Fed. R. Crim. P. 5(a), which mandates that an arrestee be taken before a judicial officer without unnecessary delay. Superior Court Criminal Rule 5(a) contains a similar provision.[39] *Mallory* ruled a statement suppressible because the

[38] Counsel should be particularly attuned to the possibility of Sixth Amendment violations when a defendant is arrested in another jurisdiction and transported to the District for questioning. A person who is arrested on a District of Columbia warrant in another jurisdiction shall be taken before a judge, commissioner, or magistrate, and held to answer in Superior Court pursuant to the Federal Rules of Criminal Procedure. *See* D.C. Code § 23-563(c); *Hagans v. United States*, 408 A.2d 965, 966 (D.C. 1979); Super. Ct. Crim. R. 5-I; Fed. R. Crim. P. 40. The defendant is entitled to counsel at that hearing and may be removed to the District of Columbia, may seek to have a preliminary hearing in the other district, or may even enter a guilty plea in the other district. *See* Fed. R. Crim. P. 40. Because of the substantive rights at stake in a Rule 40 proceeding, "the decision is inescapable" that such a proceeding is a "judicial proceeding" that triggers the Sixth Amendment right to counsel. *United States v. Abrahams*, 604 F.2d 386, 393 (5th Cir. 1979). Accordingly, subsequent statements made in response to interrogation violate the Sixth Amendment.

[39] Superior Court Criminal Rule 5(a) contains additional language not found in the federal rule (emphasis added):

> An officer within the District of Columbia making an arrest under a warrant issued by the Superior Court upon a complaint, making an arrest without a warrant, or receiving a person arrested by a special policeman or other unauthorized person shall take the arrested person without unnecessary delay before the Court. *Before taking an arrested person before the Court, an officer may perform any recording, fingerprinting, photographing, or other preliminary police duties required in the*

government delayed the defendant's appearance before an available magistrate for over seven hours:

> The next step [after arrest] is to arraign the arrested person before a judicial officer as quickly as possible so that he may be advised of his rights and so that the issue of probable cause may be promptly determined. The arrested person may, of course, be "booked" by the police. But *he is not to be taken to police headquarters in order to carry out a process of inquiry that lends itself, even if not so designed, to eliciting damaging statements* to support the arrest and ultimately his guilt. . . .
>
> Circumstances may justify a brief delay between arrest and arraignment, as for instance, where the story volunteered by the accused is susceptible of quick verification through third parties. But *the delay must not be of a nature to give opportunity for the extraction of a confession*.

354 U.S. at 454-55 (emphasis added).

The *McNabb-Mallory* rule was stringently enforced in the 1960s, leading to suppression of evidence based on delays as short as three hours.[40] It is not, however, a constitutional doctrine, *Mallory*, 354 U.S. at 453, and subsequent legislation and judicial decisions have modified its force.[41] Nevertheless, the rule retains vitality and should be relied upon when a delay between arrest and confession occurs. Title 18 of the United States Code Section 3501(c), which applies to prosecutions in Superior Court, provides (emphasis added):

> In any criminal prosecution by the United States or by the District of Columbia, *a confession* made or given by a person who is a defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, *shall not be inadmissible solely because of delay in bringing such person before a [judicial officer]* if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and *if such confession was made or given by such person within six hours immediately following his arrest or other detention*: Provided, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available [judicial] officer.

> *particular case, and if such duties are performed with reasonable promptness, the period of time required therefor shall not constitute delay within the meaning of this Rule.*

[40] *See, e.g.*, *Adams v. United States*, 399 F.2d 574 (D.C. Cir. 1968); *Greenwell v. United States*, 336 F.2d 962 (D.C. Cir. 1964); *Spriggs v. United States*, 335 F.2d 283 (D.C. Cir. 1964); *Seals v. United States*, 325 F.2d 1006 (D.C. Cir. 1963); *Naples v. United States*, 307 F.2d 618 (D.C. Cir. 1962) (en banc).

[41] *See, e.g.*, *United States v. Alvarez-Sanchez*, 511 U.S. 350 (1994) (18 U.S.C. § 3501 does not apply to defendants arrested and held solely on state charges).

Thus, a confession made later than six hours after arrest may be suppressed under the *McNabb-Mallory* rule if the delay before presentment is unreasonable. *See United States v. Perez*, 733 F.2d 1026, 1031 (2d Cir. 1984); *United States v. Erving*, 388 F. Supp. 1011, 1016 (W.D. Wis. 1975); 3 Wigmore, *Evidence* § 862(a) (Chadbourn rev. 1970). In *Corley v. United States*, 129 S. Ct. 1558 (2009), the Supreme Court interpreted the statutory exception 18 U.S.C. § 3501(c) that statements made six hours or more after arrest, even if voluntarily given, are inadmissible and must be suppressed in Superior Court. It is unclear from *Corley* how the statutory exception applies to arrests made after the statutory cut-off, or *Miranda* waivers during the six hours, and confessions that take longer.

"*Corley* Rule":

Argue that any statement made six or more hours after arrest be suppressed.

Reasonableness of the delay is measured by a number of factors. The statute itself calls for consideration of only two – "the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer." *See Yunis*, 859 F.2d at 967-69. Superior Court Criminal Rule 5(a) and some decisions have considered the time necessary for routine processing of the accused by police. *See, e.g.*, *United States v. Johnson*, 467 F.2d 630 (2d Cir. 1972). Some courts have also considered whether a judicial officer was available at the relevant time. *See, e.g., United States v. Rubio*, 709 F.2d 146 (2d Cir. 1983).

Valid waiver of *Miranda* rights and giving a statement also waives the right to prompt presentment, at least for the period it takes to give the statement. *See Crawford v. United States*, 932 A.2d 1147 (D.C. 2007) (no *Mallory-McNabb* violation where defendant was presented morning after his statement, which was the first available time, and where he had waived his *Miranda* rights and thus his rights under *Mallory* and *McNabb*); *Brown v. United States*, 979 A.2d 630, 635-36 (D.C. 2009) (defendant's waiver of *Miranda* rights also waived right to presentment without unnecessary delay; rule excluding statement made during delay "is a 'supervisory' rather than constitutional principle"); *Everetts v. United States*, 627 A.2d 981, 985 (D.C. 1993) (because voluntariness of confession and of waiver are touchstone of § 3501 analysis, valid *Miranda* waiver can waive prior period of unnecessary delay); *Byrd v. United States*, 618 A.2d 596, 598 (D.C. 1992); *Bond v. United States*, 614 A.2d 892, 899 (D.C. 1992).

D.C. Code § 5-115.01 also addresses delay before presentment:

> (a) Any person arrested in the District of Columbia may be questioned with respect to any matter for a period not to exceed 3 hours immediately following his arrest. Such person shall be advised of and accorded his rights under applicable law respecting any such interrogation . . .

> (b) Any statement, admission, or confession made by an arrested person within 3 hours immediately following his arrest shall not be excluded from evidence in the courts of the District of Columbia solely because of delay in presentment.

Section 5-115.01, enacted before 18 U.S.C. § 3501(c), arguably provides even greater protection than § 3501(c) by virtue of the three-hour limit for interrogation following arrest. *But see Brisbon v. United States*, 957 A.2d 931, 942 (D.C. 2008) (seven-hour delay did not render confession involuntary where it was caused primarily by out-of-District arrest and where there was no evidence that the delay, the conditions in custody, or the length of questioning were unreasonable or had a coercive effect); *Outlaw v. United States*, 806 A.2d 1192, 1199-1200 (D.C. 2002). As to juveniles, D.C. Code § 16-2311(a) provides that "[a] person taking a child into custody *shall with all reasonable speed*" release the child to a parent, guardian, or custodian, or bring the child before the Director of Social Services or other designated agency. *Id.* (emphasis added.) Section 16-2311(a) must be interpreted by referring to cases interpreting the *McNabb-Mallory* rule. *See F.D.P.*, 352 A.2d at 381-82.

2. The Fourth Amendment requirement of prompt presentment

Since 1978, the Metropolitan Police Department has been under a federal court order, grounded in the Fourth Amendment, to bring arrestees to the courthouse within four hours of arrest. *Lively v. Cullinane*, 451 F. Supp. 1000 (D.D.C. 1978), concluded that "the right to a prompt presentment is a fundamental constitutional right, rooted in the Fourth and Fifth Amendments." *Id.* at 1005 (citations omitted). The court relied on the analysis in *Gerstein v. Pugh*, 420 U.S. 103 (1975), of the importance under the Fourth Amendment of promptly taking a person in custody before a neutral magistrate. "Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate." *Gerstein*, 420 U.S. at 114. *Lively* found MPD practices unconstitutional, 451 F. Supp. at 1009, and, in 1978, the court entered an order directing MPD to, *inter alia*:

> institute measures necessary so that . . . persons arrested between . . . 5:00 a.m. and 2:00 p.m. on Mondays through Fridays (except holidays) and between . . . 6:30 a.m. and 10:00 a.m. on Saturdays and holidays are released or arrive at the courthouse within no more than 4 hours of their arrest and so that persons arrested at any other time are ready for delivery to court within no more than 4 hours of their arrest and arrive at the courthouse by 8:00 a.m. of the next day the court is in session.

Lively v. Cullinane, Civ. No. 75-0315, Interim Order (D.D.C. July 31, 1978). Noncompliance with this provision resulting in statements by the defendant may form the basis for suppression due to excessive delay violative of the Fourth Amendment.

Riverside v. McLaughlin, 500 U.S. 44 (1991), articulated more clearly the promptness requirement, holding that a jurisdiction "must [provide a probable cause determination] as soon as is reasonably feasible, but in no event later than 48 hours after arrest." *Id.* at 57. Failure to provide the determination in 48 hours "shifts to the government [the burden] to demonstrate the existence of a bona fide emergency or other extraordinary circumstance. The fact that in a

particular case it may take longer than 48 hours to consolidate pre-trial proceedings does not qualify as an extraordinary circumstance." *Id.*

Although "a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein*," "simply because it is provided within 48 hours" does not, standing alone, make it constitutional. *Id*. at 56. Rather, a hearing within forty-eight hours "may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably." *Id*. Unreasonable delays include "delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake." *Id*. Violations of the *Lively* order may constitute unreasonable delay within the meaning of the Fourth Amendment even if presentment is conducted within the forty-eight hour window established by *McLaughlin*.

E. Statements Obtained through Violation of Fourth Amendment Rights

Statements obtained following an illegal arrest are inadmissible, unless the prosecution meets its burden of establishing that they were not obtained by exploitation of the illegality – that is, that they are "sufficiently an act of free will to purge the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 486 (1963). *Compare Patton v. United States*, 633 A.2d 800, 817 (D.C. 1993) ("the actions of the detectives at the homicide office, and especially the repeated reminder that appellant was not under arrest and that he was free to leave . . . constitute sufficient attenuation" (internal citations omitted)), *and United States v. McMillian*, 898 A.2d 922 (D.C. 2006) (initial unlawful detention of defendant did not render defendant's subsequent stationhouse confession inadmissible under the Fourth Amendment where police legally obtained probable cause prior to the confession, and the illegal detention was very short and sufficiently attenuated because some hours had passed between the illegal detention and the stationhouse confession) *with Keeter v. United States*, 635 A.2d 903 (D.C. 1993) (no attenuation where less than two hours separated the defendant's first statement from illegal arrest and no significant intervening event). *Brown v. Illinois*, 422 U.S. 590 (1975), held that *Miranda* warnings alone could not attenuate the taint of an unconstitutional arrest. Brown was illegally arrested, taken to the station, informed of his *Miranda* rights, and made an inculpatory statement two hours after arrest.

> The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct are all relevant.

Id. at 603-04 (citation and footnote omitted). The Court held that a statement obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the arrest and the statement. *Id*. at 603-05. Because there were no significant intervening events, Brown's statements should have been suppressed.

In *Dunaway v. New York*, 442 U.S. 200, 203 (1979), the defendant was unlawfully arrested, transported to the police station, and questioned after *Miranda* warnings. The defendant made

statements at that time, and the next day made statements and drew sketches of the crime scene. Applying *Brown*, the Court suppressed all the statements and the sketches as tainted by the unlawful arrest:

> No intervening events broke the connection between petitioner's illegal detention and his confession. To admit petitioner's confession in such a case would allow "law enforcement officers to violate the Fourth Amendment with impunity, safe in the knowledge that they could wash their hands in the 'procedural safeguards' of the Fifth."

Id. at 219 (footnote omitted). Similarly, *Taylor v. Alabama*, 457 U.S. 687 (1982), suppressed statements made six hours after the unlawful arrest, where *Miranda* warnings were given, an arrest warrant had issued during the detention, and the defendant was permitted to consult a friend before making the statements. *Accord United States v. Gayden*, 492 A.2d 868 (D.C. 1985); *United States v. Allen*, 436 A.2d 1303, 1309 (D.C. 1981); s*ee also Martin v. United States*, 567 A.2d 896, 906 (D.C. 1989); *Ruffin v. United States*, 524 A.2d 685 (D.C. 1987). *But see Rawlings v. Kentucky*, 448 U.S. 98, 107-10 (1980).

The "intervening event" that will ordinarily break the causal link between an illegal arrest and a subsequent statement is an actual break in custody. For example, in *Wong Sun* the defendant was released following his illegal arrest on his own recognizance at arraignment. He returned to the police station several days later and made a statement. The Court held that "the connection between the arrest and the statement had 'become so attenuated as to dissipate the taint.'" 371 U.S. at 491. And in *Wilkerson v. United States*, 432 A.2d 730 (D.C. 1981), the police illegally stopped Wilkerson and seized several articles from his shopping cart. Eight days later, Wilkerson came to the police station to reclaim the articles. During the interim, the articles were reported stolen. The police therefore arrested Wilkerson when he arrived at the police station. His subsequent statements were held admissible because he was out of custody for the eight days between the stop and his statements and because he voluntarily came to the police station. *See also United States v. Davis*, 617 F.2d 677 (D.C. Cir. 1979) (grand jury testimony of defendant free on personal bond was not fruit of illegal arrest); *United States v. Weisman*, 624 F.2d 1118, 1126 (2d Cir. 1980) (though defendant "was never entirely free of the shadow of the illegal arrest," coercive impact dissipated as defendant was released on his own recognizance). *But see Rawlings*, 448 U.S. 98.

Similarly, a statement may be excluded if it was made in response to being confronted with illegally obtained evidence or with police knowledge of such evidence. *See Fahy v. Connecticut*, 375 U.S. 85, 90-91 (1963); *United States ex rel. Hardy v. Brierley*, 326 F. Supp. 364, 368 (E.D. Pa. 1971), *aff'd*, 458 F.2d 38 (3d Cir. 1972).

Finally, *New York v. Harris*, 495 U.S. 14 (1990), announced a narrow exception to application of the fruits doctrine. The defendant was arrested in his home without a warrant but with probable cause, and contended that his subsequent statement should be suppressed as a fruit of that illegal arrest. In a 5-4 decision, the Court rejected this claim "because the statement, while the product of an arrest and being in custody, was not the fruit of the fact that the arrest was made in the house rather than someplace else." *Id*. at 20. The need to deter warrantless entries into

residences was, the Court concluded, sufficiently served by exclusion of any tangible evidence seized in the home during the arrest. However, the Court limited its holding to cases where the police have probable cause to arrest, and explicitly reaffirmed the validity of *Brown v. Illinois*, 422 U.S. 590 (1975), *Dunaway v. New York*, 442 U.S. 200 (1979), and *Taylor v. Alabama*, 457 U.S. 687 (1982).

F. Statements during Pre-trial Mental Examination

As established by case law as well as statutes and rules designed to secure the Fifth Amendment privilege against self-incrimination, no statement made by a defendant during a court-ordered psychiatric examination may be admitted in evidence against the defendant on the issue of guilt. *See* Super. Ct. Crim. R. 12.2(c); *Clifford v. United States*, 532 A.2d 628, 636 (D.C. 1987); *White v. United States*, 451 A.2d 848 (D.C. 1982). Likewise, absent appropriate warnings or notice to counsel before a court-ordered psychiatric examination, testimony based on the defendant's statement at the examination cannot be used in the determination of punishment. *See Estelle v. Smith*, 451 U.S. 454 (1981); *Clifford*, 532 A.2d at 636.

The government may, however, use statements made in a court-ordered psychiatric examination to rebut a claim of insanity. *Accord United States v. Byers*, 740 F.2d 1104 (D.C. Cir. 1984); *United States v. Whitlock*, 663 F.2d 1094, 1106-07 (D.C. Cir. 1980);[42] *see Clifford*, 532 A.2d at 635-36; *White*, 451 A.2d at 853 ("where the defendant puts his sanity in issue, he is constructively deemed to have waived his privilege with respect to the sanity determination"). An accused does retain a Sixth Amendment right to assistance of counsel in deciding whether to submit to a psychiatric examination. However, most federal courts have ruled that the Sixth Amendment does not confer a right to have counsel present during the examination, but only a right to have counsel informed of its purpose before the examination so that appropriate advice may be given. *See White*, 451 A.2d at 854-55, and authorities cited therein; *Byers*, 740 F.2d at 1115-18; *United States v. Hinckley*, 525 F. Supp. 1342 (D.D.C. 1981), *clarified*, 529 F. Supp. 520 (D.D.C. 1982), *aff'd*, 672 F.2d 115 (D.C. Cir. 1982).

2014 Supplement

***Kansas v. Cheever*, 134 S. Ct. 596 (2014).** Privilege against self-incrimination does not bar government from introducing defendant's statements during court-ordered mental evaluation to rebut defense expert testimony that defendant lacked mental state to commit the crime. *Cf. Estelle v. Smith*, 451 U.S. 454 (1981) (holding that court-ordered psychiatric exam violated defendant's Fifth Amendment rights when defendant neither initiated exam nor put his mental capacity in dispute at trial).

G. Statements Made in Connection with Plea Bargains

Statements made in connection with and relevant to an offer to plead guilty are not admissible in any criminal proceeding – other than perjury or making false statements – against the maker of

[42] The statutorily created physician-patient privilege, D.C. Code § 14-307(b)(2), is also unavailable if sanity is in issue. *See White*, 451 A.2d at 852 n.7.

the statements. *See* Super. Ct. Crim. R. 11(e)(4); *Banks v. United States*, 516 A.2d 524, 528 (D.C. 1986); *Johnson v. United States*, 420 A.2d 1214, 1215 (D.C. 1980). Fed. R. Evid. 410(4) provides that the following is not admissible against the defendant:

> any statement made in the course of plea discussions with an attorney for the [government] which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. However, such a statement is admissible (i) in any proceeding wherein another statement made in the course of the same plea or plea discussion has been introduced and the statement ought in fairness be considered contemporaneously with it, or (ii) in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.[43]

Protected statements may not be used for any purpose, including impeachment. *See Johnson*, 420 A.2d at 1215 n.3. **Counsel must take special care to object to erroneous use of an incriminatory statement made in connection with a plea bargain because a Rule 11(e)(4) or (e)(6) violation is generally not plain error**. *See id*. at 1215 (defense failed to object and court gave a cautionary instruction). However, *United States v. Davis*, 617 F.2d 677, 684-87 (D.C. Cir. 1979), held that where a defendant sought to withdraw from a plea bargain, Fed. R. Crim. P. 11(e)(6) did not mandate suppression of his grand jury testimony given after formalization of the plea agreement but before entry of the plea.

H. Statements Made During Preparation of Presentence Report

A presentence report "shall not be submitted to the Court or its contents disclosed to anyone unless the defendant has pleaded guilty, or *nolo contendere*, or has been found guilty." Super. Ct. Crim. R. 32(b)(1). The defendant in *Warren v. United States*, 436 A.2d 821 (D.C. 1981), made incriminatory remarks to the probation officer preparing a presentence report. The conviction was reversed on appeal and the prosecution introduced the inculpatory remarks at the second trial. Citing Rule 32(b)(1), the court found "error of the clearest kind" because the reversal of the first conviction meant that the defendant had not yet been found guilty at the time the information was placed in evidence. *Id*. at 840-41.

I. Interception and Recording of Wire and Oral Communications

Interception and recording of wire and oral communications by government agents (bugging, wiretapping, and wiring) are governed by detailed federal and local statutory provisions. 18 U.S.C. §§ 2510-2520, D.C. Code §§ 23-541 *et seq*. Issues relating to these provisions rarely arise in Superior Court; when they do, a motion may be filed to suppress any statements obtained or recorded in violation of the statutory provisions. *See, e.g.*, *United States v. Sell*, 487 A.2d 225 (D.C. 1985) (construing § 23-542(b)(2) (1981), authorizing interception of communications where one party gives prior consent), *rev'd on other grounds*, 525 A.2d 1017 (D.C. 1987);

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[43] *See also* Note to Subsection (e)(2), 1979 Amendment, Fed. R. Crim. P. 11; *United States v. Davis*, 617 F.2d 677 (D.C. Cir. 1979) (discussing pre-amendment legislative history).

Khaalis v. United States, 408 A.2d 313, 338-41 (D.C. 1979) (construing District of Columbia wiretap statute's standing provisions).

J. Statements Made By Communication-Impaired Persons after Arrest

> Whenever a communication-impaired person is arrested and taken into custody for an alleged violation of a criminal law, the arresting officer shall procure a qualified interpreter for any custodial interrogation, warning, notification of rights, or taking of a statement . . . No answer, statement, or admission, written or oral, made by a communication-impaired person in reply to a question of a law-enforcement officer in any criminal or delinquency proceeding may be used against that . . . person unless either the answer, statement, or admission was made or elicited through a qualified interpreter and was made knowingly, voluntarily, and intelligently or, in the case of a waiver, unless the court makes a special finding upon proof by a preponderance of the evidence that the answer, statement, or admission . . . was made knowingly, voluntarily, and intelligently.

D.C. Code § 2-1902(e) (2004). A "communication-impaired person" is a "person whose hearing is impaired or who does not speak English." § 2-1901. The definition of "custody" for purposes of determining whether the Interpreter Act applies is the same as that for purposes of *Miranda*. *Castellon v. United States*, 864 A.2d 141 (D.C. 2004). However, the waiver referred to in the statute appears to be a waiver of the right to a qualified interpreter, not of the *Miranda* rights themselves.

In *Barrera v. United States*, 599 A.2d 1119 (D.C. 1991), the government impeached a Spanish-speaking defendant with alleged oral statements that were made before and after assertion of rights, and without the interpreter required by § 31-2702 (recodified at D.C. Code § 2-1902). "[Section 2-1902] creates a statutory presumption that any statement the police obtain in violation of the [statute] is untrustworthy [and] [t]hat presumption is irrebuttable as applied to the government's case-in-chief." 599 A.2d at 1132. The violation "does not preclude the government from rebutting that presumption – solely for impeachment purposes – if it can show, by a preponderance of the evidence, that the statements at issue are reliable and trustworthy despite the [violation]." *Id.* at 1132-33; *cf., e.g., Torres v. United States*, 929 A.2d 880 (D.C. 2007) (no error in denial of suppression motion where officer testified that defendant spoke to him in English during two prior interactions, where he did not appear confused, and where his responses were straightforward and understandable).

K. Other Rules of Evidence

Even though a statement has been determined to be admissible, introduction of some parts of it may violate some other rule of evidence, and should be excised. *See, e.g., United States v. Wiggins*, 509 F.2d 454 (D.C. Cir. 1975) (failure to excise references to three prior murders in defendant's confession was prejudicial error). Counsel should carefully examine any statement for hearsay, irrelevant, or overly prejudicial matters. Unreliability of the statement may also warrant exclusion. *See, e.g., Barrera v. United States*, 599 A.2d 1119 (D.C. 1991). In addition, if the government succeeds in admitting a damaging statement, counsel should seek to admit

under the "rule of completeness" any remaining portions of that statement that provide the whole context or cure any distortions. *See Andrews v. United States*, 922 A.2d 449 (D.C. 2007) (where trial court admitted defendant's statement that the had possessed the murder weapon, it was reversible error to exclude portion of the same statement indicating that he had acquired the gun approximately 10 days after the murder).

IV. IMPEACHMENT WITH DEFENDANT'S STATEMENTS

A. Use of Suppressed Statement

The government's ability to impeach a testifying defendant with a previously suppressed statement depends upon the substantive ground upon which the statement was suppressed. A statement that was involuntary, or produced by some other compulsion – such as a grant of immunity – cannot be used for any purpose, including impeachment. *See New Jersey v. Portash*, 440 U.S. 450 (1979); *Mincey v. Arizona*, 437 U.S. 385 (1978). A statement that was obtained in violation of *Miranda*, but that is otherwise voluntary, is admissible for impeachment, so long as there are sufficient indicia of reliability. *See United States v. Turner*, 761 A.2d 845, 853 (D.C. 2000); *Michigan v. Harvey*, 494 U.S. 344 (1990); *Oregon v. Hass*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222 (1971);[44] *see also Davis v. United States*, 623 A.2d 601 (D.C. 1993) (statement excluded for discovery violation is admissible for impeachment); *Barrera v. United States*, 599 A.2d 1119 (D.C. 1991) (remanding for findings on accuracy, trustworthiness, and reliability of statements obtained in violation of *Miranda* and statute requiring interpreter for Spanish-speaking defendant).

A statement that is the fruit of a Fourth Amendment violation probably can be used to impeach the defendant's trial testimony. *Cf. United States v. Havens*, 446 U.S. 620 (1980) (physical evidence seized in violation of Fourth Amendment can be used to impeach testifying defendant). Statements made in connection with a plea bargain cannot be used for impeachment. *See Johnson v. United States*, 420 A.2d 1214, 1215-16 n.3 (D.C. 1980).

Whether statements taken in violation of the Sixth Amendment right to counsel may be used for impeachment is unclear. *Cf. Martinez v. United States*, 566 A.2d 1049 (D.C. 1989) (statement may be used to impeach); *Harvey*, 494 U.S. 344. The defendant in *Harvey* was impeached with a statement given after the police wrongfully initiated a discussion with him, but also after he waived the right to counsel. The Court distinguished between violations of prophylactic measures "designed to ensure that constitutional rights are protected" – i.e., the rule against police initiation – and direct violations of "'rights protected by the Constitution.'" *Id.* at 351 (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)). It left open the question presented in *Martinez*: "[W]e need not consider the admissibility for impeachment purposes of a voluntary statement obtained in the absence of a knowing and voluntary waiver of the right to counsel." *Harvey*, 494 U.S. at 354. However, the Court remanded to the Michigan court to determine if there had been such a waiver, suggesting that statements obtained in direct violation of the Sixth Amendment right to counsel may not be used for impeachment. *Id.*

[44] The statement may be used only to impeach the defendant's own inconsistent testimony, not to impeach a defense put on by the defendant through other witnesses. *See James v. Illinois*, 493 U.S. 307 (1990); *cf. Jackson v. United States*, 589 A.2d 1270 (D.C. 1991).

In contrast, *Simpson v. United States*, 632 A.2d 374 (D.C. 1993), held that a statement taken *intentionally* from a defendant whom the police knew was represented by a lawyer was a "core" violation of the Sixth Amendment, and thus could not be used for any purpose, including impeachment. Simpson was hospitalized and had a lawyer appointed to represent him in a double homicide case. Detective Schwartz was aware of this, but nonetheless went to the hospital, initiated a conversation with Simpson and commenced an interrogation without giving *Miranda* warnings. Schwartz also knew at the time of the interrogation that the information he received would not be admissible in the government's case-in-chief. The trial court found a Sixth Amendment violation but allowed the statement to be used to impeach Simpson. In reversing, the Court of Appeals distinguished *Martinez*, 566 A.2d 1049, and *Harvey*, 494 U.S. 344, in that Simpson did not effectuate a waiver.

B. Using Silence to Impeach

Whether silence in response to police questioning may be used to impeach the defendant's testimony depends on whether it occurs after arrest and after *Miranda* warnings are given.

Post-arrest, post-Miranda silence may *not* be used to impeach a defendant.

> [I]t does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony.

Doyle v. Ohio, 426 U.S. 610, 619 (1976) (citation omitted); *accord Baggett v. United States*, 528 A.2d 444 (D.C. 1987); *Singleton v. United States*, 488 A.2d 1365, 1369 (D.C. 1985); *see also Mack v. United States*, 570 A.2d 777, 778 n.1 (D.C. 1990). Similarly, the defendant in *Wainwright v. Greenfield*, 474 U.S. 284 (1986), pled not guilty by reason of insanity; the prosecutor argued in closing that his silence, after *Miranda* warnings, was evidence of sanity. The Supreme Court held that breaching the implied assurance of *Miranda* warnings was an affront to the fundamental fairness required by the Due Process Clause. *Id*. at 291; *see also McNeil v. United States*, 933 A.2d 354 (D.C. 2007) (reversing murder conviction where government used defendant's post-*Miranda* silence to show she was not insane).

Use of silence *post-arrest* but *pre-Miranda* warning, on the other hand, does not violate due process. *See Fletcher v. Weir*, 455 U.S. 603 (1982). However, as a matter of federal evidentiary law, this type of silence cannot be used for impeachment. "In light of the many alternative explanations for his pre-trial silence, we do not think it sufficiently probative of an inconsistency with his in-court testimony to warrant admission of evidence thereof." *United States v. Hale*, 422 U.S. 171, 180 (1975). The Court of Appeals has assumed that *Hale* is binding. *See, e.g.*, *Ford v. United States*, 487 A.2d 580, 585 (D.C. 1984); *Hill v. United States*, 404 A.2d 525, 530 (D.C. 1979). The defendant may, however, open the door to impeaching use of silence. Thus, in *United States v. Butler*, 924 F.2d 1124 (D.C. Cir. 1991), the defendant testified that when he was arrested he wanted to explain that his possession of drugs was innocent, but had no opportunity to do so. The court found no plain error in cross-examination revealing that the defendant had in

fact had such opportunities and had made statements to the police that did not include the exculpatory claim. *Id*. at 1128-30.

Impeachment use of pre-arrest and pre-*Miranda* warning silence does not violate due process. *See Jenkins v. Anderson*, 447 U.S. 231 (1980); *Butler*, 924 F.2d at 1128. As a matter of local evidentiary law, however, there is a compelling argument that under *Hale* and the cases on impeachment by omission, mere silence cannot be used for impeachment. *See infra* Section C. *Jenkins* acknowledged that impeachment with pre-arrest silence can be prohibited under "state evidentiary law," 447 U.S. at 239 n.5, and *Hale* speaks broadly of the inherent lack of probative value of a defendant's silence, 422 U.S. at 180. The Court of Appeals has often relied on *Hale*'s references to the ambiguity of silence, *see, e.g.*, *Ford*, 487 A.2d at 585-86; *Hill*, 404 A.2d at 530-31, and silence can rarely, if ever, be sufficiently "inconsistent" with trial testimony to permit impeachment. *See Beale v. United States*, 465 A.2d 796, 804-05 (D.C. 1983).

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***Salinas v. Texas*, 133 S. Ct. 2174 (2013).** Defendant had not yet been placed in custody or received *Miranda* warnings and, therefore, after having voluntarily responded to questions by police about a murder, his subsequent silence in response to further questioning did not constitute an invocation of his Fifth Amendment privilege so that his silence could be used as evidence of his guilt at trial.

C. Impeachment by Omission

Failure to mention certain facts to the police may not be used to impeach unless, after waiving rights, the accused gives a statement that fails to mention a "material circumstance" – later testified to at trial – that "it would have been natural to mention in the prior statement." *Sampson v. United States*, 407 A.2d 574, 576 (D.C. 1979) (denial of participation not inconsistent with alibi defense). The defendant in *Walker v. United States*, 402 A.2d 424 (D.C. 1979), fled from the police and explained at trial that he fled because he knew of an outstanding parole warrant for his arrest. He had not mentioned that fact in a conversation with his parole officer. The court held that the omission was not so material as to be an inconsistency for impeachment purposes, with the record revealing insufficient facts about the content of the conversation to support an inference that it would have been natural for him to explain why he ran. *Id*. at 426-27; *accord Beale*, 465 A.2d 796 (not natural for defendant to have explained whereabouts at time of crime absent indication that defendant knew when crime occurred); *see also Dixon v. United States*, 565 A.2d 72 (D.C. 1989); *Butler*, 924 F.2d at 1129-30. *Compare Ford*, 487 A.2d at 585-88 (failure to mention in long statement that defendant had been with decedent on day of murder was sufficiently inconsistent with testimony), *with Hill*, 404 A.2d at 531 (impeachment with exculpatory statement that omitted material details later testified to at trial).

Obviously, statements made voluntarily after arrest, inconsistent with the defendant's testimony at trial, may be used to impeach the defendant. *Anderson v. Charles*, 447 U.S. 404 (1980); *Hill*, 404 A.2d at 530.

D. Defendant's Testimony at Pre-trial Hearing

The defendant's testimony at a suppression hearing may not be used in the government's case-in-chief at trial because such use would impermissibly force a choice between the right to testify at the pre-trial hearing and the privilege against self-incrimination. *Simmons v. United States*, 390 U.S. 377, 389-94 (1968). However, with few limitations, it may be used to impeach the defendant's trial testimony. *United States v. Havens*, 446 U.S. 620 (1980); *Bourn v. United States*, 567 A.2d 1312, 1314-17 (D.C. 1989).

E. Defendant's Testimony at Previous Trial

If a mistrial is declared after a defendant testifies, that testimony may be used to impeach the defendant at a subsequent trial. *See Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979) (trial aborted due to ineffective assistance of counsel; jury must be informed, at defense request, of circumstances of mistrial); *cf. Harvey*, 494 U.S. 344 (1990). A defendant's first trial testimony will not be held inadmissible, however, merely because that testimony was impelled by erroneous admissions of hearsay evidence at the previous trial. *Patton v. United States*, 688 A.2d 408, 411-12 (D.C. 1997).

V. "FRUITS" OF UNLAWFULLY OBTAINED STATEMENTS

As in other contexts, the exclusionary rule with respect to statements includes not only illegally obtained evidence but also its "tainted fruits."[45] Whether a piece of evidence is a "fruit," however, is a clouded and complex issue. *See Oregon v. Elstad*, 470 U.S. 298 (1985). Courts must consider: (1) the nature and magnitude of the illegality (e.g., Fifth Amendment involuntariness, *Miranda* violations, or something in between); and (2) the variety of "fruit" (statements, testimony, or physical evidence).

A. Subsequent Statements

Elstad held that the failure to give *Miranda* warnings, without additional coercive circumstances, requires suppression only of the immediately resulting statements and not of voluntary statements made following a later, valid waiver of *Miranda* rights. Elstad was arrested for burglary pursuant to a warrant. Without advising him of his rights, an officer sat down with him in the living room and asked him a few brief questions. Elstad said he had heard of the burglary. The officer said he thought Elstad was involved, and Elstad replied, "Yes, I was there." An hour later, at the police station, Elstad was advised of his rights, said he understood them and wanted to waive them, and gave a signed statement. The police made no threats or promises during either conversation. 470 U.S. at 301-03. Because the police obtained the initial admission "absent [the use of] deliberately coercive or improper tactics . . . the mere fact that a suspect has

[45] The "tainted fruits" doctrine had its genesis in Fourth Amendment cases. *See Wong Sun*, 371 U.S. 471 (1963) (arrestee's conduct and statements made after illegal arrest and narcotics seized from second person based on arrestee's statements should have been suppressed); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920) (government could not use information obtained during illegal search to subpoena the very documents illegally viewed).

made an unwarned admission does not warrant a presumption" that the subsequent waiver of rights is ineffective. *Id*. at 314.

> It is an unwarranted extension of *Miranda* to hold that a simple failure to administer the warnings, *unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will*, so taints the investigatory process that a subsequent voluntary and informed waiver is ineffective for some indeterminate period.

Id. at 309 (emphasis added).

> There is a vast difference between the direct consequences flowing from coercion of a confession by physical violence or other deliberate means calculated to break the suspect's will and the uncertain consequences of disclosure of a "guilty secret" freely given in response to an unwarned but noncoercive question.

Id. at 312.

> We hold today that a suspect who has once responded to unwarned yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings.

Id. at 318 (emphasis added; citations omitted).[46]

Elstad's rule is limited to "a narrow category of cases in which the initial questioning of the suspect was made in a totally uncoercive setting." *Id*. at 364 (Stevens, J., dissenting). The Court distinguished its fact-specific holding from cases in which the "initial unwarned statement [is] obtained through overtly or inherently coercive methods which raise serious Fifth Amendment and due process concerns." *Id*. at 312 n.3. Thus, *Elstad* leaves intact the presumptive ineffectiveness of a subsequent waiver, where the initial statement is the involuntary product of an interrogation that is so coercive that due process is violated[47] or, although the coercion may not rise to the level required to constitute a due process violation, the initial statement is obtained through methods "calculated to break the suspect's will."[48] *Id*. at 312. *See* cases cited in *Nix v. Williams*, 467 U.S. 431, 440-41 (1984).

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[46] Before *Elstad*, many courts suppressed as tainted "fruits" any statements made following an unlawfully obtained statement, even if the later statements were made voluntarily and after receipt of full *Miranda* warnings, on the theory that "after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first." *United States v. Bayer*, 331 U.S. 532, 540 (1947).

[47] *See, e.g., Darwin v. Connecticut*, 391 U.S. 346 (1968); *Beecher v. Alabama*, 389 U.S. 35 (1967); *Clewis v. Texas*, 386 U.S. 707 (1967); *Reck v. Pate*, 367 U.S. 433 (1961); *Ruffin*, 293 A.2d 477; *Hamilton v. Nix*, 781 F.2d 619, 624-25 n.7 (8th Cir. 1985).

[48] Neither did *Elstad* alter the rules requiring suppression of statements that are the fruits of earlier involuntary statements, *Bayer*, 331 U.S. at 540; Fourth Amendment violations, *see supra* Section III.E; or earlier compelled testimony, *Kastigar v. United States*, 406 U.S. 441, 460-61 (1972); *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1964); *In re Sealed Case*, 791 F.2d 179, 181 (D.C. Cir. 1986). Nor, by analogy, should statements that are the

Similarly, the police may not employ tactics that render *Miranda* warnings ineffective. In *Missouri v. Seibert*, 542 U.S. 600 (2004), the Supreme Court considered a confession obtained using a "question-first" tactic, in which the police deliberately withhold *Miranda* warnings during initial questioning. *Id*. at 651. *Seibert* involved interrogation of an arson suspect. The detective employed an "interrogation technique he had been taught: question first, then give the warnings, and then repeat the question 'until I get the answer that she's already provided once.'" *Id*. The trial court, citing *Elstad*, had suppressed the pre-*Miranda* statements but admitted the confession that followed. *Id*. Distinguishing *Elstad*, the Supreme Court held that this technique rendered the warnings ineffective. *Id*. at 658. The Court reasoned:

> Upon hearing warnings only in the aftermath of interrogation and just after making a confession, a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground again. A more likely reaction on a suspect's part would be perplexity about the reason for discussing rights at that point, bewilderment being an unpromising frame of mind for knowledgeable decision. What is worse, telling a suspect that "anything you say can and will be used against you," without expressly excepting the statement just given, could lead to an entirely reasonable inference that what he has just said will be used, with subsequent silence being of no avail. Thus, when *Miranda* warnings are inserted in the midst of coordinated and continuing interrogation, they are likely to mislead and "depriv[e] a defendant of knowledge essential to his ability to understand the nature of his rights and the consequences of abandoning them." *Moran v. Burbine*, 475 U.S. 412, 424 (1986). By the same token, it would ordinarily be unrealistic to treat two spates of integrated and proximately conducted questioning as independent interrogations subject to independent evaluation simply because *Miranda* warnings formally punctuate them in the middle.

Id. at 2611 (footnote omitted). *See also Edwards v. United States*, 923 A.2d 840 (D.C. 2007) (error to admit defendant's statement that he was the shooter but acted in self-defense where statement was obtained by two-step interrogation process and was related to the substance of the pre-warning statement, even though the pre-warning statement was ostensibly exculpatory); *Ford v. United States*, 931 A.2d 1045 (D.C. 2007) (defendant's videotaped statements made after he had been advised of, and waived, his *Miranda* rights were admissible despite earlier, unwarned interrogation because police had not deliberately withheld *Miranda* warnings and did not engage in strategy to get defendant to confess); *Hairston v. United States*, 905 A.2d 765 (D.C. 2006) (police tactic of withholding warnings while defendant listened to the evidence against him was not akin to "question first" tactic declared unconstitutional in *Siebert*); *McCoy v. United States*, 890 A.2d 204 (D.C. 2006) (police questioning of suspects to elicit confession before reading *Miranda* warnings and eliciting second admissible confession violated defendant's Fifth Amendment right to remain silent); *Hill v. United States*, 858 A.2d 435, 447 (D.C. 2004) (holding that confession obtained after waiver of *Miranda* rights was inadmissible

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"fruits" of Sixth Amendment *Massiah* violations be admissible. *See Nix*, 467 U.S. 431 (physical evidence flowing from Sixth Amendment violation); *Hamilton*, 781 F.2d at 624-25 n.7.

where police purposefully withheld *Miranda* warnings during initial questioning).

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***Bobby v. Dixon*, 132 S. Ct. 26 (2011).** See, *supra*, See, *supra*, Chapter 20.III.A.1.

B. Physical Evidence

Physical evidence garnered as a result of statements obtained in violation of the Fourth, Fifth, or Sixth Amendment generally must be suppressed. *See Nix*, 467 U.S. at 442 (Sixth Amendment); *Murphy*, 378 U.S. at 79 (Fifth Amendment, compelled testimony); *Wong Sun*, 371 U.S. 471 (Fourth Amendment); *Counselman v. Hitchcock*, 142 U.S. 547, 586 (1892) (Fifth Amendment, involuntary statement).

However, the courts have left open the question whether physical evidence obtained solely as a result of a *Miranda* violation must be suppressed. *See Patterson v. United States*, 485 U.S. 922 (1988) (White. J., dissenting from denial of certiorari); *New York v. Quarles*, 467 U.S. 649, 660 (1984). Justice Brennan's dissent in *Elstad* noted that the majority's analysis did not extend to physical evidence obtained as a result of *Miranda* violations, due to its heavy reliance on intervening individual volition as an insulating factor in successive statement cases, and cited as still reliable authority numerous cases applying the exclusionary rule to physical fruits of *Miranda* violations. *See Elstad*, 470 U.S. at 347 n.29.

For example, *United States v. Downing*, 665 F.2d 404, 407-09 (1st Cir. 1981), held that physical evidence seized from the defendant's airplane must be suppressed when the existence and location of the plane were discovered through interrogation after Downing invoked his right to counsel. The court relied heavily on the Supreme Court's "view that the primary justification for the exclusionary rule is to deter unconstitutional police misconduct." *Id*. at 409. To deter improper police questioning designed to locate physical evidence, the "fruits" doctrine must be applied to *Miranda* violations resulting in discovery of physical evidence. *Id*. The protections of *Miranda* would be toothless without suppression of physical fruits of unlawfully obtained statements: "'The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all.'" *Wong Sun*, 371 U.S. at 485 (citation omitted).

C. Identity and Testimony of Witnesses

The identity and testimony of witnesses discovered via a *Miranda* violation are not suppressible "fruits" of the violation. *See Elstad*, 470 U.S. at 308-09; *Michigan v. Tucker*, 417 U.S. 433 (1974); *cf. Wood v. United States*, 498 A.2d 1140, 1145 n.7 (D.C. 1985); *United States v. Ceccolini*, 435 U.S. 268 (1978) (testimony obtained in violation of defendant's Fourth Amendment rights is not suppressible fruit). The witness's volition distinguishes live testimony from other evidentiary fruits: "[T]he living witness is an individual human personality whose attributes of will, perception, memory, and *volition* interact to determine what testimony he will give." *Elstad*, 470 U.S. at 308-09 (quoting *Ceccolini*, 435 U.S. at 277) (alteration in original). However, based on the broad "fruits" language of cases involving compelled statements obtained

in violation of Fifth Amendment rights, *see, e.g.*, *Murphy*, 378 U.S. 52, a witness's testimony that is the product of the *accused's* statements compelled under a grant of immunity or coerced in violation of the Fifth Amendment may be the suppressible fruit of that illegality. *See Elstad*, 470 U.S. at 307-09 (distinguishing fruits of Fifth Amendment violation from fruits of "prophylactic rule" of *Miranda*); *Tucker*, 417 U.S. at 445 (same).

D. The Independent Source Doctrine

Evidence is admissible despite a constitutional violation if it was discovered through a means wholly independent of the violation. The doctrine has been applied in Fourth, Fifth, and Sixth Amendment contexts. *See Murray v. United States*, 487 U.S. 533, 537 (1988); *Bynum v. United States*, 262 F.2d 465 (D.C. Cir. 1958) (fingerprint identification, based on information already in FBI's possession, not tainted by use of prints obtained in subsequent illegal arrest of defendant); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920) ("If knowledge of [facts] is gained from an independent source[,] they may be proved like any others"). It is premised on the judgment that the public interests in deterring unlawful police conduct and in placing probative evidence of crime before juries are properly balanced by putting the government in the same position in which it would have been but for the police misconduct. *See Kastigar*, 406 U.S. at 457, 458-59; *Murphy*, 378 U.S. at 79. As a result, the principle applies whether the police misconduct was simply negligent or in bad faith. *Nix*, 467 U.S. 431.

The prosecution must prove that it had a legitimate source for the disputed evidence, completely independent of the unlawfully obtained statement. *See Murphy*, 378 U.S. at 79 n.18. The quantum of proof required is a preponderance of the evidence. *Cf. Nix*, 467 U.S. 431 (inevitable discovery must be established by a preponderance of the evidence). *But see United States v. Wade*, 388 U.S. 218 (1967) (requiring clear and convincing evidence of independent source for in-court identification).

The relative timing of the illegality and discovery of the "independent" source can be critical.

> When the independent source exists, and is known prior to the police illegality, then a stronger case for admission is presented. If the independent source is found to exist, or in fact comes into existence after the initial illegality, then it must be carefully examined in order to prevent the independent source requirement from becoming an illusory source requirement.

Pitler, *"The Fruit of the Poisonous Tree" Revisited and Shepardized*, 56 Calif. L. Rev. 579, 586 (1968); *see also Murray*, 487 U.S. at 540; *Segura v. United States*, 468 U.S. 796 (1984) (evidence discovered after illegal entry admissible where other officers already had information establishing probable cause and were seeking warrant); *United States v. Romero*, 585 F.2d 391 (9th Cir. 1978) (documents obtained by federal warrant not suppressible fruit of earlier illegal state warrant because federal warrant was based on information obtained before execution of state warrant); *State v. Marshall*, 359 So.2d 78 (La. 1978) (victim can testify to defendant's use of knife in robbery based on observation made before illegal search uncovering knife).

E. Inevitable Discovery

The "inevitable discovery" doctrine permits use of evidence that the government would inevitably have discovered through a completely legitimate, independent line of investigation, even if the evidence was actually discovered through police misconduct. The difference from the "independent source" doctrine is that under the "inevitable discovery" doctrine, the evidence has not actually been legitimately obtained.

Nix v. Williams, 467 U.S. 431 (1984), adopted the inevitable discovery exception to the exclusionary rule. The defendant had a second trial after the Supreme Court reversed his conviction based on statements that violated his Sixth Amendment right to counsel. *Id*. at 437; *see also Brewer v. Williams*, 430 U.S. 387 (1977). At the second trial, the government did not use the inculpatory statements that disclosed the location of the decedent's body, but presented evidence of the location and the condition of the body when it was found. *Nix*, 467 U.S. at 437. When the defendant led the police to the body, the government called off an extensive search in freezing temperatures that would have preserved the body. *Id*. at 438. The evidence was admissible because its inevitable discovery eliminated a sufficient "nexus" to the police misconduct "to provide a taint." *Id*. at 448.

The government must prove by preponderant evidence that the discovery was inevitable. *See id*. at 444 n.5.[49] When this burden is met, "the State has gained no advantage at trial and the defendant has suffered no prejudice." *Id*. at 447. The prosecution does not have to show absence of police bad faith for the doctrine to apply. *Id*. at 445; *see also United States v. Gale*, 952 F.2d 1412, 1416 (D.C. Cir. 1992) (drugs removed from appellant and automobile trunk would have been discovered in search incident to arrest, regardless of *Miranda* violation); *Spinner v. United States*, 618 A.2d 176 (D.C. 1992); *United States v. Lewis*, 486 A.2d 729, 734-35 (D.C. 1985); *United States v. Allen*, 436 A.2d 1303, 1310 (D.C. 1981) (in case involving inventory search of car, "only if the court is persuaded 'with certainty' that the evidence would have been discovered lawfully may the exclusionary rule be waived") (citation omitted).

49 In dissent, two justices called for the clear and convincing evidence standard to apply. *Id*. at 459 (Brennan and Marshall, JJ., dissenting).

CHAPTER 21

MOTIONS TO SUPPRESS EYEWITNESS IDENTIFICATION TESTIMONY

Identification of the defendant as the perpetrator of the crime is an element of every criminal case. Most often, identifications are made when a witness testifies that the person seated next to defense counsel is the one who committed the crime. Frequently, in addition to this in-court identification, the witness will testify to an out-of-court identification of the defendant through a photographic array, line-up, or police-arranged one-on-one "show-up."

The lay public generally perceives eyewitness identifications to be reliable, and the witness's identification of the defendant will often prove to be the primary factor resulting in a conviction. Yet, as studies have repeatedly shown, eyewitness identifications are fraught with errors of perception and memory. *See* Elizabeth F. Loftus and James M. Doyle, *Eyewitness Testimony: Civil and Criminal* (2d Ed. 1992); *see also Benn v. United States*, 978 A.2d 1257, 1266-68 (D.C. 2009) (noting improvements in the scientific methodology of eyewitness identification over the past few decades). *See generally* Elizabeth Loftus, *Eyewitness Testimony* (1979). Interracial eyewitness identifications are particularly problematic. "The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials." *See* Felix Frankfurther, The Case of Sacco and Vanzetti (1927) *quoted* in *United States v. Wade*, 388 U.S. 218, 228 (1967). Indeed, "positive identification of a person not previously known to the witness is perhaps the most fearful testimony known to the law of evidence." *Wehrle v. Brooks*, 269 F. Supp. 785, 792 (W.D.N.C. 1966), *aff'd*, 379 F.2d 288 (4th Cir. 1967). Even if the witness professes certainty, "it is well recognized that the most positive eyewitness is not necessarily the most reliable." *See* Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 Cornell L. Rev. 934 (1984). Indeed, the Supreme Court decisions establishing constitutional restrictions on the use of eyewitness testimony arose from "the Court's concern with the problems of eyewitness identification," and in particular, the Court's recognition that a "witness' recollection of the stranger can be distorted easily by the circumstances or by later actions of the police." *Manson v. Brathwaite*, 432 U.S. 98, 112 (1977); *see also United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Stovall v. Denno*, 388 U.S 293 (1967). These problems of identification may be combated by presenting an eyewitness identification expert, who may testify regarding the various problems with eyewitness identification. *See generally Benn v. United States*, *supra*. The key to gaining admission of such expert testimony is the use of a detailed proffer that provides the trial court with specific information regarding the substance of the eyewitness testimony: both the questions that the expert intends to address and the reasons that the expert's testimony is beyond the ken of a lay juror. *Id.* The importance of challenging eyewitness identifications can be gleaned from case law in the District of Columbia in which misidentifications may have resulted in the incarceration of innocent individuals. *See United States v. Greer*, 538 F.2d 437 (D.C. Cir. 1976); *see also In re As. H*, 851 A.2d 456 (D.C. 2004) (court overturned a pure eyewitness identification case because the ID was legally insufficient. The complaining witness expressed her certainty about the ID as a "seven or eight on a scale of one to 10.") *Id.*; *see also* "Nightmare: Indicted for Crimes They Didn't Commit," *Washington Post*, November 27, 1981, at A1-A2.

There are two types of identification evidence: testimony regarding out-of-court identifications and in-court identification. Out-of-court identification evidence may be, for example, testimony from an eyewitness that he or she saw the crime charged and identified the client in a line-up, photo array, or show-up. In-court identification evidence is generally testimony that a witness recognizes the client, as he or she sits in court, as the person who he or she saw commit the crime. Frequently, the government attempts to introduce an eyewitness's out-of-court identification as well as an in-court identification.

2014 Supplement

***In re A.W.*, 92 A.3d 1094 (D.C. 2014).** Evidence insufficient as a matter of law to prove defendant's guilt beyond a reasonable doubt in light of victim's own unequivocal testimony that person shown in a photograph taken of defendant less than three hours after his offense occurred was not person who attacked him.

***Simmons v. United States*, 999 A.2d 898 (D.C. 2010).** Mid-trial motion to suppress identification properly denied where defendant knew of basis for motion in advance of trial but failed without reason to file an appropriate pretrial motion.

Eyewitness Identifications:

✓ Generally fraught with errors of perception and memory

Two Types of Identification Evidence:

1. Out-of-court: testimony from an eyewitness who was a witness to the crime and identified your client in a line-up, photo array, or show-up
2. In-court: testimony from a witness who recognizes your client in court, as the person who committed the crime

I. CONSTITUTIONAL AND EVIDENTIARY GROUNDS FOR EXCLUSION

There are three basic legal arguments that counsel can assert in an attempt to suppress or exclude out-of-court and in-court identifications. Each argument shares one common theme: the out-of court identification was so unreliable that any testimony regarding it, as well as any subsequent in-court identification, should be suppressed. The first argument is based on the Due Process Clause. In making the argument, counsel asserts that undue suggestivity surrounding an out-of court identification procedure led to an impermissibly unreliable identification. The due process violation lies in illegal state action, i.e., suggestivity by the police or prosecutor. The second argument is also based on the Due Process Clause, but does not require state action. Counsel asserts that the identification was unreliable as a matter of due process, regardless of any conduct by the police or government. Finally, the third argument states that the identification may be so insufficiently reliable as an evidentiary matter that it should be excluded.

A. The Basic Due Process Claim – Police Suggestivity

Government use of an impermissibly suggestive out-of-court identification procedure triggers due process protection. *Stovall v. Denno*, 388 U.S 293, 302 (1967) (recognizing that an identification procedure may violate due process if it is "unnecessarily suggestive and conducive to irreparable mistaken identification"). The test is whether "the identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of misidentification." *Turner v. United States*, 622 A.2d 667, 672 n.4 (D.C. 1993) (quoting *Neil v. Biggers*, 409 U.S. 188, 198-99 (1972)). Consequently, a defendant may assert a due process challenge to testimony regarding an out-of-court identification where the identification procedures used were unduly suggestive.

Unduly suggestive out-of-court identification procedures might also affect the admissibility of in-court identifications. In *Simmons v. United States*, 390 U.S. 377 (1968), the Court analyzed the circumstances in which a suggestive out-of-court identification procedure also requires suppression of an in-court identification by the same witness. *Simmons* held that an in-court identification is inadmissible "if the [out-of-court] identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of *irreparable* misidentification." *Id*. at 384 (emphasis added).

An unnecessarily suggestive identification procedure, however, does not always require a court to exclude subsequent testimony regarding the identification. "It is the reliability of identification evidence that primarily determines its admissibility." *Watkins v. Sowders*, 449 U.S. 341, 347 (1981) (citing *Brathwaite*, 432 U.S. at 113-14). Even where there was an impermissibly suggestive identification, a trial court might find it admissible if the government can establish sufficient reliability. *See In re L.G.T.*, 735 A.2d 957 (D.C. 1999).

Two-Part Inquiry: Thus, the issue of suppression involves a two-part inquiry. *Lyons v. United States*, 833 A.2d 481, 486 (D.C. 2003). Once some suggestivity is shown, the reliability of the identification is determined by weighing "the corrupting effect of the suggestive identification" against factors relating to its reliability. *Brathwaite*, 432 U.S. at 114. These factors include the witness's opportunity to observe the perpetrator and degree of attention paid at the time of the offense, accuracy of prior descriptions, level of certainty at the time of the confrontation, and the time between the crime and the identification. *See id*.

Furthermore, the Supreme Court rejected the argument that a *per se* rule of exclusion is required to deter use of unnecessarily suggestive identification procedures. *Brathwaite*, 432 U.S. at 112. The Court concluded that the "totality of the circumstances" approach of *Biggers* would sufficiently protect the defendant's interest to exclude testimony that is unreliable and of limited "evidentiary interest," while effectively deterring improper police conduct that might fatally taint the government's case:

> We . . . conclude that reliability is the linchpin in determining the admissibility of identification testimony. . . . The factors to be considered . . . include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal,

> the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.

432 U.S. at 114 (citing *Biggers*, 409 U.S. at 199-200); *see also L.G.T.*, 735 A.2d at 959. These are essentially the same factors applied in *Simmons*, 390 U.S. at 385.

Therefore, under *Biggers* and *Brathwaite*, suppression appears to be virtually an all-or-nothing proposition. Either the out-of-court identification is suggestive and unreliable and consequently, in almost all cases, the subsequent identification is inadmissible; or it is reliable and "testimony as to it and any identification in its wake is admissible." *Brathwaite*, 432 U.S. at 110 n.10.

"Independent Source": Even where an out-of-court identification was unnecessarily suggestive and thus suppressed, the government may still be permitted to elicit an in-court identification. Under the *Stovall* and *Simmons* "independent source" test, the defense can sometimes obtain suppression of an out-of court identification but not of the in-court identification by the same witness. The defense is then entitled, should it choose to do so, "to bring out the pre-trial confrontation itself, hoping that it can thus detract from the weight the jury might otherwise accord the in-court identification." *Clemons v. United States*, 408 F.2d 1230, 1237 (D.C. Cir. 1968); *see also In re W.A.F.*, 407 A.2d 1062, 1066 (D.C. 1979) (trial court erred in not permitting questions on prior out-of-court identification after witness made an in-court identification); *Hampton v. United States*, 318 A.2d 598, 600-01 (D.C. 1974) (even absent due process violation, accused has right at trial to show suggestive police conduct to impeach identification). Moreover, the defense may attempt to call an expert to testify about the unreliability of eyewitness identification, but such testimony is admissible at the trial court's discretion. *See Green v. United States*, 718 A.2d 1042, 1051 (D.C. 1998). Should defense counsel elicit testimony regarding a suppressed out-of-court identification, the prosecution would then be entitled to bring out the full circumstances of that prior identification. *See Clemons*, 408 F.2d at 1246; *see also United States v. Holiday*, 482 F.2d 729, 734 (D.C. Cir. 1973) (applying same principles to violations of Sixth Amendment right to counsel at line-ups).

Two-Step Analysis in D.C.: Although *Brathwaite* balances suggestivity against reliability, *see* 432 U.S. at 114, cases in the District of Columbia have hinted at a different approach. *Wilkerson v. United States*, 427 A.2d 926 (D.C. 1981), and *Patterson v. United States*, 384 A.2d 663 (D.C. 1978), seem to treat the inquiry as a two-stage process, focusing first on suggestivity and then ultimately on reliability. *See also Greenwood v. United States*, 659 A.2d 825, 828 (D.C. 1995) ("[I]f the identification procedures are not unduly suggestive, the details of those procedures are admissible and no reliability finding is necessary."); *Henderson v. United States*, 527 A.2d 1262 (D.C. 1987). More recent cases have clearly delineated the two prongs of suggestivity and reliability. *See United States v. Hunter*, 692 A.2d 1370, 1376 (D.C. 1997) ("If the trial court finds undue suggestivity, it must then determine whether the identification was nonetheless reliable."); *Williams v. United States*, 696 A.2d 1085, 1086 (D.C. 1997) (proposing that trial court should rule on the reliability of an identification even when it does not find undue suggestivity). *United States v. Brown*, 700 A.2d 760, 761 (D.C. 1997), confirmed that trial courts must apply a two-part test to determine suggestivity and reliability. On the other hand, the Court of Appeals has previously treated the inquiry as a one-step balancing test. *See United*

States v. Walton, 411 A.2d 333 (D.C. 1979); *Middleton v. United States*, 401 A.2d 109 (D.C. 1979); *Cureton v. United States*, 386 A.2d 278 (D.C. 1978). Nevertheless, it is in the best interest of all parties for a trial court to rule on reliability even where the court finds no suggestivity. *See Williams v. United States*, 696 A.2d 1085 (D.C. 1997). In *McCoy v. United States*, 781 A.2d 765 (D.C. 2001), the court affirmed convictions for assault with a dangerous weapon and possession of a prohibited weapon, and held that it was not error to deny motion to suppress photo identification where the trial court properly found the photo array was not suggestive, but if suggestive, the identification was reliable.

B. Due Process Reliability[1] – Sheffield Motions

An identification may be "so unduly suggestive as to deprive that identification of probative value" even without police suggestivity.[2] *Sheffield v. United States*, 397 A.2d 963, 967 n.4 (D.C. 1979). Identification testimony lacking probative value may be inadmissible on purely evidentiary grounds.[3] *Sheffield* makes clear that the evidentiary violation can, in certain circumstances, rise to the level of constitutional error. The due process principle of *Sheffield* is the same as that which the Supreme Court has invoked in other contexts: an error, although technically only a violation of the rules of evidence, can be so prejudicial to the defendant's ability to have a fair trial as to violate due process. *Cf. Green v. Georgia*, 442 U.S. 95 (1979) (evidentiary ruling on hearsay). It is also a logical corollary of the Supreme Court's repeated observation that "reliability is the linchpin in determining the admissibility of identification testimony." *Brathwaite*, 432 U.S. at 114; *accord Watkins*, 449 U.S. at 347 ("It is the reliability of identification evidence that primarily determines its admissibility.").

The issue is appropriately raised in a pre-trial motion. *See Sheffield*, 397 A.2d at 967 (stating that defense can raise due process issue in pre-trial hearing and, if it fails, raise the purely evidentiary issue at trial). *Sheffield*'s direction that a judicial determination of admissibility be made outside the hearing of the jury is consistent with procedural requirements for other types of evidence whose potential for prejudicing the jury is profound. *Cf., e.g., Jefferson v. United States*, 463 A.2d 681, 685 (D.C. 1983) (asserting that jury cannot hear evidence of defendant's other crimes until judge has ruled it admissible).

Although *Sheffield* specifically refers to a constitutional challenge to pre-trial identifications, such as second sightings, its rationale applies equally to in-court identification evidence lacking in probative value.

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[1] Defense counsel might consider calling an expert witness to testify about the unreliability of eyewitness identification. Counsel must note, however, that where the trial court finds that the expert's proposed testimony is not beyond the ken of the average juror, the court may properly exclude such testimony. *See Green v. United States*, 718 A.2d 1042 (D.C. 1998); *see also Steele v. D.C. Tiger Market*, 854 A.2d 175 (D.C. 2004) (expert testimony is admissible to help the jury to do its work and not to do the jury's work for it.)

[2] *See infra* Section I.D for the principles used to determine whether an identification is the result of government action or merely accidental.

[3] *See infra* Section I.C for discussion of evidentiary challenges to admission of identification evidence.

C. Evidentiary Inadmissibility Based on Unreliability

Separate and apart from the due process analysis, the rules of evidence may preclude identification testimony where, in the totality of the circumstances, the identification is not sufficiently reliable. This challenge is essentially one of simple relevance – an inherently weak or unreliable identification lacks probative value. *See Sheffield*, 397 A.2d at 967 ("A defendant may challenge the admission of [identification] testimony by raising a timely objection to its admissibility at trial on the ground that under the law of evidence testimony is so inherently weak or unreliable as to lack probative value."). Since all evidence must be relevant, both out-of-court and in-court identifications are subject to this evidentiary challenge. *See also Reavis v. United States*, 395 A.2d 75, 78-79 (D.C. 1978) (holding that in-court identification must be relevant and probative in order to be admissible).

Out-of-court identification evidence is also subject to an additional, albeit similar, evidentiary requirement of reliability. To be admissible under the prior identification exception to the hearsay rule, two criteria must be met: the declarant must be available at trial for cross-examination, and the out-of-court identification must be reliable. *See Beatty v. United States*, 544 A.2d 699, 701-02 (D.C. 1988); *In re L.D.O.*, 400 A.2d 1055, 1057 (D.C. 1979). Thus, *Beatty* made clear that reliability is a separate evidentiary requirement for admissibility, based on all the surrounding circumstances. 544 A.2d at 702-03. In *L.D.O.*, the prior identification was rendered unreliable, and thus inadmissible, because the identifying witness testified that he was not certain of his prior identification either at the time it was made or at trial. *See* 400 A.2d at 1056-58; *see also United States v. Bamiduro*, 718 A.2d 547 (D.C. 1998) (ruling that witness's failure to identify defendant in photo array, but ability to identify defendant at second sighting 19 days later, admissible); *cf. Scales v. United States*, 687 A.2d 927, 931-32 (D.C. 1996) (ruling that out-of-court identification of defendant admissible as substantive evidence where witness recants prior identification during redirect examination, after making in-court identification and affirming prior identification during direct examination).

Beatty is a powerful tool for excluding testimony that might be admissible under the *Brathwaite* due process analysis. On judicial economy grounds, *Beatty* urges pre-trial determination of the evidentiary issue, suggesting two methods to resolve the question of admissibility. If there is a motion to suppress on due process grounds, the court may allow additional testimony as necessary to determine admissibility on an evidentiary basis. If no motion is pending, the court may entertain a motion *in limine* to exclude the testimony. *See Beatty*, 544 A.2d at 703 n.6. For example, *Jackson v. United States*, 623 A.2d 571, 588-90 (D.C. 1993), examined a purely evidentiary challenge to out-of-court and in-court identification evidence. Although finding no plain error in admitting any of the identifications, the court made clear the separate evidentiary basis for challenging admission of identification evidence.

Grounds for Exclusion of Identification Testimony:

BASIC THEME: Out-of-court identification was so unreliable that any testimony or in-court identification should be suppressed

1. Due process: undue suggestivity during an out-of-court identification procedure led to an unreliable identification
    a. Due process violation lies in illegal state action (i.e., suggestivity by prosecutor or police officer)
    b. Two-part inquiry
        i. Suggestivity: out-of-court identification procedure "was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification"
        ii. Reliability: determined by weighing "the corrupting effect of the suggestive identification" against factors relating to its reliability"; based on a totality of the circumstances

Note: If the out-of-court identification is suppressed, the government may be able to elicit an in-court identification under the "independent source" test. In this instance, counsel should bring out the pre-trial confrontation so as to detract from the weight the jury might give the in-court identification.

Note: D.C. cases seem to treat it as a two-step inquiry, focusing first on suggestivity, and then reliability.

2. Due process: identification was "unduly suggestive as to deprive that identification of probative value"
    a. Error may be a technical violation of the rules of evidence, but can be prejudicial to the defendant's ability to have a fair trial
        i. Can apply to second sightings and in-court identifications lacking in probative value

3. Unreliability: where based on the totality of the circumstances, the identification is not sufficiently reliable (i.e., testimony is weak or unreliable)
    a. Admissibility under prior identification exception to hearsay:
        i. The declarant must be available at trial for cross-examination and
        ii. The out-of-court identification must be reliable

These issues are properly raised pre-trial.

D. Case Law on Suggestivity

Totality of Circumstances: Suggestivity is evaluated in light of the totality of the circumstances. *See, e.g., Harley v. United States*, 373 A.2d 898, 901 (D.C. 1977). Each identification procedure carries its own dangers, discussed below. Suggestivity may also result

when more than one witness views a suspect simultaneously, because each may influence the others and thereby "shore up" the degree of "certainty," making it unclear whether any witness would have made an identification separately. *See United States v. McBride*, 499 F.2d 525 (D.C. Cir. 1974) (photo array); *Clemons v. United States*, 408 F.2d 1230, 1241 (D.C. Cir. 1968) (show-up); *cf. Sheffield*, 397 A.2d at 963. For a useful analysis of other factors that may cause undue suggestivity, *see United States v. O'Connor*, 282 F. Supp. 963 (D.C. Cir. 1968).

Examples of Police Suggestivity: The police should not tell the witness that a suspect is in the show-up, array or line-up. *See Byrd v. United States*, 502 A.2d 451 (D.C. 1985); *Hampton v. United States*, 318 A.2d 598, 601 (D.C. 1974); *United States v. Gambrill*, 449 F.2d 1148, 1151 n.3 (D.C. Cir. 1971). However, use of surveillance tapes, which may carry the implication that the suspect is in the tape, has been allowed. *Curtis v. United States*, 886 A.2d 92 (D.C. 2005) (holding that it was not unduly suggestive for police to use a surveillance videotape, which depicted witness and suspect, for purposes of identification and then also to subsequently use a photo array including the suspect's photo). The court in Curtis noted that "so long as detectives do not suggest to an eyewitness which person shown on the tape committed the offense, but rather, as here, elicit the information from the witness, there is no suggestivity." *Id.* at 95.

It is also suggestive for the police to tell the witness that the suspect has a special characteristic. *See Anderson v. United States*, 364 A.2d 143 (D.C. 1976) (finding that police told witness the suspect was tall, but line-up not impermissibly suggestive where review of photo revealed nothing unduly suggestive); *Holt v. United States*, 675 A.2d 474, 482 (D.C. 1996) (finding no suggestivity where before the show-up police did not inform witness that physical appearance and clothing of the suspect he was about to see matched the witness's earlier description). Suggestive remarks by the police after an identification may taint an in-court identification. *See Scott v. United States*, 619 A.2d 917, 929-30 (D.C. 1993) ("somewhat suggestive" for police to advise witness that she selected wrong person in line-up); *In re W.A.F.*, 407 A.2d 1062, 1066 (D.C. 1979). *But see Jackson v. United States*, 420 A.2d 1202 (D.C. 1979) (en banc) (finding that, after witness identified defendant in a photo array, police officer's remarks that witness selected the man arrested, "although inadvisable and better left unsaid, were not so impermissibly suggestive as to give rise to a substantial likelihood of irreparable misidentification.")

1. Show-ups

A "show-up" is a one-on-one confrontation between a witness and a suspect. These confrontations most frequently occur when the police, responding to a radio run for a recent incident, apprehend a suspect "matching" the description broadcast, and take the suspect to the witness for an identification. "[C]onfrontations in which a single suspect is viewed in the custody of the police are highly suggestive." *Russell v. United States*, 408 F.2d 1280, 1284 (D.C. Cir. 1969); *see also Hollingsworth v. United States*, 531 A.2d 973, 977 (D.C. 1987). Yet show-ups are not *per se* inadmissible, *see, e.g. Turner v. United States*, 622 A.2d 667, 672 (D.C. 1993), *Forte v. United States*, 856 A.2d 567 (D.C. 2004), and the results may be admitted into evidence on the rationale that necessity justifies their suggestivity, that a prompt show-up enhances the reliability of an identification, and that a show-up may quickly exonerate an innocent person who has been mistakenly apprehended.

These justifications suggest their own limitations. First, "[a]t some point the nexus of time and place between offense and identification must become too attenuated to outweigh the admitted dangers of presenting suspects singly to witnesses." *United States v. Perry*, 449 F.2d 1026, 1036-37 (D.C. Cir. 1971) (quoting *McRae v. United States*, 420 F.2d 1283, 1290 (D.C. Cir. 1969)); *see also Garris v. United States*, 559 A.2d 323, 327 (D.C. 1989). Second, even confrontations "manageable freshly after criminal episodes" must be limited to situations where the need to promptly resolve doubts as to the identification outweighs the inherent suggestivity of the show-up. *Perry*, 449 F.2d at 1037.

As to the temporal and spatial nexus, the courts eschew any hard and fast rules. *See Garris*, 559 A.2d at 327. *Holt* approved a show-up held "a little over a half hour" after the crime. *See* 675 A.2d at 483. *Perry* approved a show-up held ninety minutes after the crime. *See* 449 F.2d at 1028-29. *McRae*, 420 F.2d at 1290, found excludable a show-up conducted some four hours after the offense. MPD General Order 304.7 authorizes show-ups only within sixty minutes after either a crime or second sighting, except that if the complainant or the suspect has been admitted to the hospital in critical condition, the show-up is authorized at any time. However, in *Zanders v. United States*, 678 A.2d 556, 567 (D.C. 1996), the court deemed reliable a show-up procedure where five or six suspects were presented one at a time to two separate witnesses two-and a-half hours after commission of the crime. Counsel may argue that police misconduct in violating the General Order requires suppression of the identification. *But see United States v. Caceres*, 440 U.S. 741 (1979) (finding evidence obtained in violation of IRS rule on electronic surveillance, not mandated by constitution or statute, not subject to suppression).

Indicia of custody may heighten suggestivity. *But see, e.g., Holt*, 675 A.2d at 482 (ruling no suggestivity where identification included suspect lying on hospital gurney without restraint); *Fields v. United States*, 484 A.2d 570, 574 (D.C. 1984) (finding that a show-up of a suspect in handcuffs did not create a substantial likelihood of misidentification); *Jones v. United States*, 277 A.2d 95, 97-98 (D.C. 1971) (ruling that although suspect in handcuffs and seated in police car, promptness of identification outweighed suggestivity). Indicia of custody accompanied by "special elements of unfairness" may establish a due process violation. *See Turner*, 622 A.2d at 672 (quoting *Russell*, 408 F.2d at 1284). *But see Diggs v. United States*, 906 A.2d 290, 300-01 (D.C. 2006) (summarizing cases involving police officer presence or remarks that did not constitute undue suggestivity); *Gregg v. United States*, 754 A.2d 265, 267 (D.C. 2000) ("neither the custodial appearance nor officers' statement that the [suspects] 'matched the descriptions' given by the witnesses rendered the identifications unduly suggestive"); *Singletary v. United States*, 383 A.2d 1064, 1068-69 (D.C.1978) (officer's statement to a witness that "we got two guys in the car similar to the ones you told us about" does not render a show-up identification unduly suggestive).

2014 Supplement

***Kaliku v. United States*, 994 A.2d 765 (D.C. 2010).** No abuse of discretion to deny motion to suppress show-up identifications where defendant failed to adequately articulate argument as to suggestivity of identifications and where complaining witnesses were placed in separate police cars to avoid tainting their identifications, procedure took place within 30 minutes of robbery and sexual assault, and location of show-ups was well-illuminated.

***Oxner v. United States*, 995 A.2d 205 (D.C. 2010).** No Fourth Amendment violation for police to make warrantless, nonconsensual entry into defendant's home in order to effectuate arrest for distribution of cocaine where police had probable cause prior to the unlawful entry and where correspondence of description, time and location provided at least reasonable suspicion to justify investigative detention of defendant for purposes of show-up identification.

***Perry v. New Hampshire*, 132 S. Ct. 716 (2012).** Absent unduly suggestive procedures created by police action, trial court need not screen identification testimony due to any alleged inherent unreliability of eyewitness identifications.

2. Accidental Encounters

The government may not purposefully arrange an "accidental" confrontation, e.g., having the witness present when the defendant is arraigned on other charges. *See United States v. York*, 426 F.2d 1191 (D.C. Cir. 1969). However, truly accidental encounters even while the suspect is in custody do not generally give rise to impermissible suggestivity under the Due Process Clause. For example, *Cureton v. United States*, 386 A.2d 278, 288 (D.C. 1978), found no due process violation in a spontaneous identification when the witness encountered the defendant in the police station after a presumably untainted line-up. *Cureton* established the following criteria for admissibility: (1) the confrontation is inadvertent, accidental or unplanned; (2) the identification is spontaneous and positive; (3) the police and prosecution did not intend that an identification be attempted; (4) no one pointed out the accused to the witness; and (5) the witness is subject to full cross-examination at trial concerning the basis of the identification. *Harvey v. United States*, 395 A.2d 92 (D.C. 1978), applied the *Cureton* analysis where no identification had occurred before the inadvertent, arguably suggestive encounter. *McCall v. United States*, 596 A.2d 948, 952 n.9 (D.C. 1991), upheld an in-court identification resulting from a witness seeing the defendant in the courthouse before the witness testified.[4] Even if an encounter is purely accidental under *Cureton*, it may still be so unduly suggestive as to lack probative value and violate due process and evidentiary rules under *Sheffield* and *Beatty*. *See supra* Sections B, C.

[4] *Cf. United States v. Greene*, 429 F.2d 193 (D.C. Cir. 1970) (finding that police arranged encounter between witnesses and suspect by use of summons to appear at same location; resulting identification violated defendant's right to have counsel present at post-arrest confrontations); *Mason v. United States*, 414 F.2d 1176 (D.C. Cir. 1969) (police told witness to observe preliminary hearings when suspect was to appear; right to counsel violated); *Gregory v. United States*, 410 F.2d 1016, 1020-24 (D.C. Cir. 1969) (testimony regarding unnecessarily suggestive encounter in detective's office did not require reversal); *Miles v. United States*, 483 A.2d 649 (D.C. 1984) (complainant, who had been unable to identify defendant, recognized him at counsel during *voir dire*; prosecutor had told complainant to be alert to see if she recognized anyone and had oriented her to defense counsel's table; not "intentionally suggestive"); *United States v. Neverson*, 463 F.2d 1224 (D.C. Cir. 1972) (complainant observed defendant being taken from jail to courthouse for a line-up; no violation); *United States v. Conner*, 462 F.2d 296 (D.C. Cir. 1972) (complainant waiting to speak to officer at police station saw defendant being taken into another room; no violation).

3. Photographic Identifications

There is no right to the presence of counsel at a photographic display. *See United States v. Ash*, 413 U.S. 300 (1973) (array of photographs of individual suspects); *Turner v. United States*, 443 A.2d 542 (D.C. 1982) (array of mug shots and photograph of line-up); *Williams v. United States*, 379 A.2d 698 (D.C. 1977) (photograph of line-up).

Showing a single photograph is highly suggestive and the suggestivity is unnecessary absent compelling circumstances. *See Manson v. Brathwaite*, 432 U.S. 98 (1977); *Mason v. United States*, 414 F.2d 1176 (D.C. Cir. 1969). *But see Green v. United States*, 580 A.2d 1325 (D.C. 1990) (not unduly suggestive or untrustworthy to display single photo to witness who had lived with suspect for six months and had already identified suspect by name); *Patterson v. United States*, 384 A.2d 663 (D.C. 1978) (showing single photo to witness just before trial to "refresh" witness's memory, while unnecessarily suggestive, not conducive to irreparable misidentification where there had been a previous, unequivocal, unsuggestive and otherwise constitutionally permissible identification); *United States v. Washington*, 12 F.3d 1128, 1134 (D.C. Cir. 1994) (totality of circumstances established that the reliability of the single photo identification outweighed its suggestivity); *United States v. Brannon*, 404 A.2d 926, 928-29 (D.C. 1979).

An array in which the suspect's picture is the only one matching the description given by the complainant is unnecessarily suggestive.[5] *See United States v. Sanders*, 479 F.2d 1193 (D.C. Cir. 1973) (only defendant had facial hair similar to witness's description); *cf. Simmons v. United States*, 390 U.S. 377, 383 (1968). *But see Banton v. United States*, 411 A.2d 975, 979 (D.C. 1980) (not suggestive where picture of defendant, who was three quarters white and one quarter Cherokee, was placed in album of black males, the court finding "[a]t least three other pictures in the album. . . similar to appellant in complexion and hairstyle"); *Dang v. United States*, 741 A.2d 1039 (D.C. 1999) (photo array not unduly suggestive even if there were no other photos of people, like defendant, of African-American and Asian descent, included in arrays). A six picture photo array was not unduly suggestive even though only one other person had similar features of the defendant. Since no suggestiveness was found, there is no need to proceed to the reliability test, *United States v. Lawson*, 410 F.3d 735 (D.C. 2005) (also finding it was not unduly suggestive that array included a photo of defendant's brother who resembled defendant); *Harley v. United States*, 373 A.2d 898 (D.C. 1977) (defendant alone was wearing coat similar to that described by complainant; admissible because witness recognized defendant's face, not coat); *Davis v. United States*, 367 A.2d 1254, 1265 (D.C. 1976) (not unnecessarily suggestive even though defendant was only person wearing dashiki, which complainant had stated was worn by her attacker; she was positive of her identification and at trial was unable to recall whether man in photograph was wearing dashiki); *Herbert v. United States*, 340 A.2d 802, 803 (D.C. 1975) (not impermissibly suggestive although defendant's clothing in photo resembled that which witness had said robber was wearing, "in view of the total number of pictures observed (150) and the number of men of comparable age and appearance in the array").[6]

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[5] On the suggestivity of the array itself, the appellate court's own examination of that array is decisive. *See United States v. Smallwood*, 473 F.2d 98, 100 (D.C. Cir. 1972).

[6] *Harley*, *Davis*, and *Banton* indicate that suggestivity will not be found unless the witness at least admits having noticed the aspect of the photographs which the defense argues is suggestive. *See also Stewart v. United States*, 490 A.2d 619, 623 (D.C. 1985).

The prior familiarity of an eyewitness with a suspect may be relevant to whether identification procedures are unduly suggestive. *See Adams v. United States*, 883 A.2d 76, 81 (D.C. 2005). In Adams, the police constructed a photo array composed of arrest photos of persons named Glenn after eyewitnesses described the shooter in detail and said they knew his name was Glenn. *Id.* at 79. The court found that photo array was not unduly suggestive because the witnesses knew defendant for several years, and because each witness was able to give a detailed description of the shooter. *Id.* at 81.

The distinctive format or nature of a defendant's photograph can contribute to suggestivity. *See, e.g.*, *Henderson v. United States*, 527 A.2d 1262, 1268 (1987) (poor quality of photo taken together with fact that defendant's picture had newest date and he was the only bald, bearded person depicted rendered array unduly suggestive); *Parks v. United States*, 451 A.2d 591, 605-06 (D.C. 1982) (faded quality of defendant's photograph contributed to showing of suggestivity). The key question is "whether something 'in the [photo] array would have directed [the] witness' attention to any particular individual.'" *Henderson*, 527 A.2d at 1268 (quoting *McClain v. United States*, 460 A.2d 562, 566 (D.C.1983)); *see also Hartridge v. United States*, 896 A.2d 198 (D.C. 2006) (finding photo array not unduly suggestive and emphasizing that defendant did not assert that his photo "'st[ood] out dramatically' from the other photos in the array" (quoting *Henderson*)). Yet distinctive format alone has often not been sufficient to achieve suppression. *See United States v. Sherry*, 318 A.2d 903 (D.C. 1974) (array not so suggestive as to violate due process even though defendant's was the only full face photograph); *Harley*, 373 A.2d at 898 (identification admissible although defendant was pictured in Polaroid snapshot while the other photos were mug shots).

The picture of one suspect should not be repeated in multiple arrays. *See Simmons*, 390 U.S. at 383 (danger of misidentification increases if witness sees "pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized").[7] *See infra* Section 5. "The chance of misidentification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime." *Id.* at 383. But unless the police say more than the suspect is in the array, the procedure generally will not be found impermissibly suggestive. *See Jackson v. United States*, 420 A.2d 1202 (D.C. 1979) (en banc); *Harley*, 373 A.2d at 900-01; *Crawley v. United States*, 328 A.2d 777 (D.C. 1974) (array not impermissibly suggestive although police told complainant that suspect was included; suggestivity, if any, did not require suppression because procedure was largely ineffective, as witness was only able to pick two pictures as resembling robber and was unable to make line-up identification). One rationale for this result is that showing a witness an array or line-up (as opposed to a mug book) implicitly suggests that the police suspect someone in the array or line-up. *Gambrill*, 449 F.2d at 1151 n.3.[8]

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[7] A similar procedure was criticized in *Ellis v. United States*, 395 A.2d 404 (D.C. 1978). Police first showed the witness an array containing nine photographs of men named Michael Barnes; she selected one. Two weeks later she was shown the same array, with a new suspect's picture replacing the one she had picked earlier. The court held that this procedure did not require suppression of the identification of the newly included suspect, but criticized the procedure, noting that the use of "an essentially identified photo array" might be unduly suggestive in some instances. *Id*. at 411 n.10; *see Harris v. United States*, 375 A.2d 505, 509 (D.C. 1977).

[8] It is, of course, impermissibly suggestive to direct the witness's attention to a particular photograph. *See United States v. Trivette*, 284 F. Supp. 720 (D.D.C. 1968) (detective asked, "Is that the man?"). *But see Taylor v. United States*, 451 A.2d 859, 862-63 (D.C. 1982) (witness viewed photo array which included appellant's photograph three

Providing information from which the witness can "proceed backward" to deduce who "should" be identified is suggestive.[9] For example, if the photos reveal dates, a witness might be able to figure out who is no longer in the relevant age group. *See also United States v. McBride*, 499 F.2d 525 (D.C. Cir. 1974) (witness knew perpetrator's name and, having tentatively identified picture, located name in index to mug book; but independent source found). MPD General Order 304.7 now directs that the index not be available to the witness.

Given the number of photographs in police files, the police should be able to formulate a fair array. Thus, except where quick action is required, as where photos are used in a rapidly unfolding criminal investigation, *see Simmons*, 390 U.S. at 384-85, less suggestivity should be permitted in an array than in any other type of identification procedure. *See United States v. Logan*, 104 Wash. D.L. Rptr. 1817, n.1 (D.C. Super. Ct. Oct. 19, 1976) (Murphy, J.).

The police have a duty to preserve, and the defense has a right to discover, all arrays from which an identification is made. *Washington v. United States*, 377 A.2d 1348, 1351 (D.C. 1977); *United States v. Bryant*, 439 F.2d 642 (D.C. Cir.), *aff'd after remand*, 448 F.2d 1182 (1971); *see also* MPD General Order 304.7. The government need not preserve arrays from which no identification was made. *Washington*, 377 A.2d at 1351. *But see Fields v. United States*, 698 A.2d 485, 489 (D.C. 1997) (holding that defendant's right to fair trial not violated by loss of photo array after jury started deliberating). If the witness identifies someone other than the defendant or provides other exculpatory information during the array, the government has an obligation to disclose that information and to preserve the array pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). *See, e.g., Grant v. Alldredge*, 498 F.2d 376, 382 (2nd Cir. 1974) (due process violation where government failed to disclose until the middle of trial information that witness selected another person's photograph, notwithstanding pre-trial disclosure of witness failure to select defendant's photograph).

The factors used in determining appropriate sanctions for failure to comply with the Jencks Act may also apply to failure to preserve discoverable arrays: the degree of negligence or bad faith involved, the importance of the evidence lost, and the evidence of guilt adduced at trial. *See Cotton v. United States*, 388 A.2d 865, 869 (D.C. 1978). In affirming the trial court's decision not to impose sanctions and assessing the element of prejudice, *Cotton* noted that inability to regroup the array does not preclude a finding that the procedure was not suggestive. *Id*. at 870; *see also Sheffield*, 397 A.2d at 968 (failure to impose sanctions *sua sponte* will be reversed only if plain error).

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or four times, and each time settled on two photographs including appellant's photo; detective pointed at appellant's photograph and asked "what about this photograph?").

[9] *See Johnson v. United States*, 585 A.2d 766, 768 n.2 (D.C. 1991) (array not unduly suggestive without evidence that witness saw initials on backs of photographs); *McBride v. United States*, 393 A.2d 123 (D.C. 1978) (no inherent suggestivity in showing appellant's picture last in a series of 100 where there was no evidence witness knew the photo he identified was to be the last shown).

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***Graure v. United States*, 18 A.3d 743 (D.C. 2011).** Court did not err in determining nine-man photo array not impermissibly suggestive and admitting out-of-court identifications based on array where majority of men shared defendant's physical characteristics and looked as though they could be of European descent, like defendant.

4. Line-ups

Line-ups are conducted at MPD Headquarters, 300 Indiana Avenue, N.W. They are videotaped and photographed. Counsel can interpose objections before the line-up begins. Sometimes the line-up detectives will make changes, such as altering the clothing or positions of those in the line, based on such objections. The police usually will not proceed with a line-up with fewer than eight persons in the line, although the courts have occasionally permitted smaller line-ups. *United States v. Hines*, 455 F.2d 1317 (D.C. Cir. 1971) (six-person line); *Patton v. United States*, 403 F.2d 923 (D.C. Cir. 1968) (five-person line). Counsel should make sure that the client wears appropriate clothes (*i.e.*, not jail suits or clothes matching the description given by government witnesses).[10]

As with photographic identifications, the primary source of suggestivity in line-ups is uniqueness, especially if it corresponds with a feature of a prior identification or description. *But see United States v. Jackson*, 509 F.2d 499 (D.C. Cir. 1974) (identification admissible, although only suspect wore "bush" haircut, because complainant had good opportunity to observe culprit and had given detailed description). As with photographic identifications, the suggestivity of the actual line-up is determined primarily by the court's examination of the photograph of that line, *see supra* note 5; *see also McClain v. United States*, 460 A.2d 562 (D.C. 1983) (prison garb in line-up may be suggestive, but identification admissible as reliable).

In re L.W., 390 A.2d 435 (D.C. 1978), disapproved MPD's practice of making it appear that all persons in the line are the same height by having some participants stand on boxes. The line-up was found to be unnecessarily suggestive when appellant's physical frame and apparent lack of maturity were compared with that of others in the line who appeared substantially older and larger. *Id*. at 438; *see also Herbert v. United States*, 340 A.2d 802 (D.C. 1975).[11]

[10] Magistrate judges in courtrooms C-10 and 115 routinely grant oral motions to allow an incarcerated client to change into clothing provided by counsel, and will sign an order prepared by counsel. Counsel must present the order and clothing at the line-up room one hour before the line-up is to be held. The line-up detectives do provide clothing and try to match all the people in the line, so counsel may wish to wait to see the line before providing clothing to the client.

[11] One study found that false identifications in line-ups could be reduced by as much as fifty percent if witnesses viewed the suspects one at a time instead of as a group. Participants viewed a videotape depicting a staged robbery, and were then asked to identify the robber from a videotaped line-up. Of those who viewed a standard six-person line-up, 39 percent identified an innocent person as the perpetrator; for those who viewed the suspects one by one, the rate of mistaken identification was 19 percent. Cutler and Penrod, Improving the Reliability of Eyewitness Identification: Line-up Construction and Presentation, 73 J. Applied Psychol. 281 (1988).

Violation of the right to counsel at a line-up requires automatic suppression of the identification.[12] Erroneous admission of the identification must result in reversal unless it can be found harmless beyond a reasonable doubt. *See Gilbert v. California*, 388 U.S. 263 (1967); *cf. Washington*, 377 A.2d at 1350 (identification was made after counsel left based on erroneous information that neither defendant nor any witnesses were present; harmless based on reliability of identification, appearance of line-up photo, and fact that counsel argued suggestivity to jury); *Graham v. United States*, 377 A.2d 1138 (D.C. 1977) (no right to counsel during post-line-up interview in which witness who had selected no one told police that line-up included perpetrator).

Although a line-up is generally considered more reliable than a photographic display, the government may choose a pictorial presentation instead. *See United States v. Jackson*, 509 F.2d 499 (D.C. Cir. 1974); *see also United States v. Hamilton*, 420 F.2d 1292, 1294-95 n.11 (D.C. Cir. 1969). The defense may, however, request a line-up, *see infra* Section III.B.

5. Multiple Procedures

Witnesses may be asked to make more than one identification – for example, at a show-up and again at a line-up, or in multiple photo arrays. Repetition itself may be suggestive, leading the witness to recognize the person from the previous viewings rather than from the crime scene. *See Foster v. California*, 394 U.S. 440 (1969) (procedure unduly suggestive where suspect was presented at a show-up, and was the only person who participated in two different line-ups); *Jennings v. United States*, 431 A.2d 552 (D.C. 1981) (procedures suggestive where police showed line-up photo with defendant as shield number four and then showed line-up with defendant's brother, who looked similar, in the same position); *Towles v. United States*, 428 A.2d 836, 845-46 (D.C. 1981) ("[t]here is, of course, a degree of suggestivity in such a progression of pre-trial events," and "the combined circumstances may give rise to a degree of impermissible suggestivity which is violative of due process"); *United States v. Walton*, 411 A.2d 333, 338 (D.C. 1979) (suggestive for police to pressure witness who cannot make an identification by showing repeated arrays and suggesting that witness, rather than defendant, is prime suspect and ought to take polygraph test); *United States v. Sanders*, 479 F.2d 1193 (D.C. Cir. 1973). *But see Christian v. United States*, 394 A.2d 1, 27-28 (D.C. 1978) (court held exhibition of appellant to witness a total of five times—once in a line-up, three times in photograph of line-up combined with his presence in courtroom—did not cumulatively result in an unnecessarily suggestive identification procedure).

A related threat to the independent integrity of the second procedure arises where the witness is told beforehand that a previous selection of the suspect was "correct." However, that fact alone may not require suppression of the second procedure. *See Harley*, 373 A.2d at 900-01; *Marshall v. United States*, 340 A.2d 805 (D.C. 1975); *Allen v. United States*, 697 A.2d 1 (D.C. 1997) (finding witness's failure to identify defendant in array did not render previous show-up identification unduly suggestive). Similarly, telling a witness that an identification was *incorrect* injects suggestivity into a subsequent procedure. That suggestivity may not taint a subsequent in-court identification, however, if the witness *initially* identified the defendant during a

[12] Use of substitute counsel is permissible. *See Shelton v. United States*, 388 A.2d 859 (D.C. 1978).

constitutionally acceptable procedure. *See Scott v. United States*, 619 A.2d 917, 929-30 (D.C. 1993) (where initial positive identification occurred during constitutionally acceptable photo array, suggestivity of police telling witness that she identified wrong person in subsequent line-up did not require suppression of in-court identification).

6. In-court Identifications

Admissibility of an in-court identification does not hinge on the existence of a previous out-of-court identification. *See Middleton v. United States*, 401 A.2d 109 (D.C. 1979). While acknowledging the inherent suggestivity of an in-court identification, the court held that "the mere exposure of the accused to a witness in the suggestive setting of a criminal trial does not implicate the Due Process Clause." *Id*. at 132. Indeed, the in-court identification is admissible in part because its suggestivity is obvious. *See In re W.K.*, 323 A.2d 442, 444 (D.C. 1974) ("juries are inclined to be skeptical of courtroom identifications"); *see also Brown v. United States*, 327 A.2d 539 (D.C. 1974). Nevertheless, the defense may challenge such identifications on purely evidentiary grounds, *see supra* Sections I.B and C.

The constitutional and evidentiary concerns involved in a "surprise" in-court identification by a witness who had previously been unable to identify the defendant are discussed in *Reavis v. United States*, 395 A.2d 75 (D.C. 1978).

Counsel should be alert to potentially prejudicial information being included in any in-court identification. In *Gordon v. United States*, 582 A.2d 944, 947 (D.C. 1990), a police officer repeatedly identified Gordon by referring to her jail arm band. While a defendant cannot be compelled to wear prison clothing in front of a jury, because that appearance would erode the presumption of innocence, e.g. *Estelle v. Williams*, 425 U.S. 501 (1976), the arm band created little incremental danger of prejudice because Gordon had worn prison clothing before the jury the previous day, without objection. *See Gordon*, 582 A.2d at 947.

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***Graure v. United States*, 18 A.3d 743 (D.C. 2011).** Court did not err in admitting in-court identification of defendant by witness who had made an uncertain and tentative out-of-court identification where reliability of identification was left to jury to determine.

***Jones v. United States*, 99 A.3d 679 (D.C. 2014).** Complainant's out-of-court identification was sufficiently reliable to put before the jury, notwithstanding the fact that the complainant initially claimed to have identified defendant because of his neck tattoos but at trial conceded that defendant had no such tattoos.

***Williams v. United States*, 52 A.3d 25 (D.C. 2012).** Trial court did not violate defendant's constitutional right to due process by failing to order removal of his leg shackles during trial where shackles remained because defendant was not "compliant" with marshals, though not violent, and where skirts around tables in courtroom hid fact from jury that defendant was shackled.

Be Wary of ANY Suggestivity in Identification Procedures:

Always raise challenges to any suggestive identification procedures
- A primary source of suggestivity is uniqueness, e.g., where the client is the only person that shares a trait of a prior identification

- ✓ **Show-ups**: Where possible, argue that police misconduct in violating the General Order requires suppression of the identification:
  MPD General Order 304.7 authorizes show-ups only within sixty minutes after either a crime or second sighting, except that if the complainant or the suspect has been admitted to the hospital in critical condition, the show-up is authorized at any time
- ✓ **Accidental encounters**: Even if purely accidental, may still be unduly suggestive so as to lack probative value and violate due process
- ✓ **Photographic identification**: Request all arrays from which an identification has been made to ensure that the procedure was not unduly suggestive
- ✓ **Line-ups**: Counsel should be present at the line-up identification procedure; a violation of the right to counsel requires automatic suppression of the identification
- ✓ **Multiple identification procedures**: Repetition may be unduly suggestive, so raise appropriate challenges
- ✓ **In-court**: Be alert to any potentially prejudicial information being included in any in-court identification

E. Litigating Admissibility of the Identification

1. The Contours of the Hearing

The scope of the constitutional right to a pre-trial hearing outside the presence of the jury is not fully resolved. While there is no "*per se* rule compelling such a procedure in every case . . . [i]n some circumstances . . . a determination [outside the presence of the jury] may be constitutionally necessary." *Watkins v. Sowders*, 449 U.S. 341, 349 (1981). *Watkins* did not indicate what types of cases might come within this requirement.

Regardless of the constitutional law, long-established local case law confers a right to a pre-trial hearing. *See Clemons*, 408 F.2d at 1237. *Watkins* approvingly cited *Clemons* and similar decisions from other federal circuits, commenting that apart from the question of a constitutional right, it is both "prudent" and "advisable" to require pre-trial hearings as a matter of local procedure. *Watkins*, 449 U.S. at 349.

The Court of Appeals has invoked its supervisory powers to "hold that every defendant is entitled to an evidentiary hearing on a motion to suppress a show-up identification unless it clearly appears from informal discovery that the defendant is seeking a hearing in bad faith." *In re F.G.*, 576 A.2d 724, 725 (D.C. 1990) (en banc). Since counsel is never present at a show-up identification, the defendant usually cannot discern what is happening during a show-up, and since specific information regarding the show-up is not available unless the prosecutor provides

it informally, the defense is unlikely to have enough information about the show-up procedure to allege specific facts that would justify a hearing under the standard used for other types of suppression motions. *See id*. at 726-27 (distinguishing *Jackson v. United States*, 420 A.2d 1202 (D.C. 1979) (en banc) (no hearing required unless motion to suppress line-up states facts that if proven would warrant relief); *Duddles v. United States*, 399 A.2d 59 (D.C. 1979) (same, regarding Fourth Amendment motions).

The defense motion should, to the extent possible, allege specific facts that, if true, constitute suggestivity or unreliability creating a substantial likelihood of misidentification. Accordingly, counsel should attempt to discover from the government as much detail as possible about the identification procedures used. "[T]he defense is entitled to know, through disclosure by the prosecution or by evidentiary hearing outside the presence of the jury," the circumstances of any pre-trial identification. *Clemons*, 408 F.2d at 1237; *see also Cantizano v. United States*, 614 A.2d 870, 873-74 (D.C. 1992) (failure to disclose identification did not mandate mistrial where court immediately instructed jury to disregard it, identification was not intentionally elicited but was volunteered during cross-examination, and jury was also presented with evidence of witness's failure to identify appellant during a line-up); *Arnold v. United States*, 511 A.2d 399 (D.C. 1986) (finding prosecutorial misconduct in failing to disclose identification testimony on request). If the court refuses to hold a hearing, counsel should place the efforts to obtain information through discovery on the record.

The hearing is generally held immediately before trial. If the government is ready on the day of trial only with witnesses for the motions and not its trial witnesses, or the judge has time only for the motion and not the entire trial, the hearing may be held days or even weeks before trial.

From the defense perspective, the goal of the hearing may be either: (1) to suppress the unconstitutional identification; or (2) to preview the government's case on identification. Each goal requires a somewhat different strategy. Where the primary goal is suppression, and there has been adequate discovery, cross-examination should be carefully framed to elicit only the testimony desired. Where the primary purpose is to preview the government's case, counsel may, as in preliminary hearings, ask open-ended questions that allow the witness to discourse at will, reverting to narrow leading questions to pin the witness down on specific helpful testimony. The purposes and questions must be adapted to the specific case and developments in the hearing.

Counsel may encounter judicial resistance to calling the identifying witness[13] and to an inquiry into reliability,[14] based on the assumption that other witnesses can testify about suggestivity and

[13] In *Minor v. United States*, 647 A.2d 770 (D.C. 1994), the Court of Appeals upheld the trial court's decision to bar the defense from calling the identification witness at the pre-trial identification suppression hearing on the issue of suggestivity. The court reasoned that there was no error because the identifying witness's testimony at trial was consistent with the testimony of the arresting officer who saw the show-up and who was the only government witness at the pre-trial hearing.

[14] In *Greenwood v. United States*, 659 A.2d 825 (D.C. 1995), the appellant was convicted of first degree burglary, two counts of sodomy and assault with intent to rape. The motions judge rejected appellant's claim that a photo array and subsequent line-up were unduly suggestive. The government requested that the reliability finding be made after the complaining witness' trial testimony to "spare her the ordeal of having to testify twice about the unpleasant

that reliability need not be shown absent a preliminary showing of suggestivity. That assumption is flawed in a number of ways. First, the witness's testimony is material to both suggestivity and reliability. The suggestivity inquiry is not whether the police *intended* to suggest an identification, but whether the *effect* of the procedures was suggestive, a question the identifying witness alone can answer. Some judges may require that counsel subpoena the identifying witness, call them to the stand, and question them through direct examination.

Second (and regardless of whether the identifying witness testifies), appellate resolution of all issues is facilitated by a full record on both suggestivity and reliability. The Court of Appeals has "frequently encouraged trial judges, even when finding there was no suggestivity, to make explicit reliability findings." *Greenwood*, 659 A.2d at 828 (citing *Henderson v. United States*, 527 A.2d 1262, 1269 (D.C. 1987)); *Johnson v. United States*, 470 A.2d 756, 759 n.1 (D.C. 1983);[15] *see also* the pre-*Brathwaite* cases, e.g., *United States v. Holiday*, 482 F.2d 729, 734 (D.C. Cir. 1973); *Clemons*, 408 F.2d at 1237. The doctrine of judicial economy is even more compelling under current law, where suggestivity must be examined for all purposes in the context of reliability and the effect of suggestivity can be gauged only in relation to the strength of the factors supporting the identification. Thus, given a minimal showing of suggestivity—a determination which itself under *United States v. Sanders*, 479 F.2d 1193 (D.C. Cir. 1973), and *United States v. Perry*, 449 F.2d 1026 (D.C. Cir. 1971), requires knowledge of the circumstances of the initial crime scene sighting—the appellate court will be unable, without full exploration of the "independent source" issue, to make the requisite analysis.

Third, reliability is relevant regardless of suggestivity, if the motion asserts *Sheffield* or *Beatty* as well as *Brathwaite-Biggers* grounds. And the Supreme Court's recognition of the factors critical to reliability strongly support the right of the defense to explore fully the witness's ability to observe (eyesight, influence of alcohol or drugs, emotional state, etc.) as well as the conditions under which the observations took place (lighting, distance, duration of incident, etc.).

Finally, the circumstances of the crime scene are inextricably intertwined with the issue of suggestivity. *See Sanders*, 479 F.2d 1193 (witness's description of perpetrator is critical to issue of suggestivity because it may reveal that some aspect of suspect's appearance at later identification uniquely or unfairly corresponded with some feature noticed by witness); *Perry*, 449 F.2d at 1037 ("the ability of the witness to observe the offender in the first instance" should be considered "in determining the fairness of the confrontation").

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events she would have to relate." *Id.* at 828. The court held that in granting this request the motions judge did not abuse his discretion because there is no requirement that, absent suggestivity, a trial court make a reliability finding.

[15] *See also Patterson v. United States*, 384 A.2d 663, 668 n.7 (D.C. 1978) (usual two-step inquiry encouraged where "there is some evidence that initial identification may have been equivocal or suggested"); *Jackson v. United States*, 623 A.2d 571, 589 n.13 (D.C. 1993) ("We reiterate, as we have so many times, that it is important for the trial court to make the second inquiry, i.e., if unduly suggestive whether the resulting identification is reliable"); *Johnson*, 470 A.2d at 759 n.1:

> Even where the trial court finds that a pre-trial identification procedure was not unduly suggestive and consequently could not taint a subsequent identification, it is helpful to this court for the trial judge to go on to make findings regarding independent sources that support the reliability of the subsequent identification.

The defense is also entitled to cross-examine on any discrepancy between prior descriptions and the defendant's actual appearance. *See Thomas v. United States*, 382 A.2d 24, 28 (D.C. 1978). *Biggers* makes previous identifications "at any . . . show-ups, line-ups or photographic showings" similarly relevant. 409 U.S. at 201; *see also Redmond v. United States*, 829 A.2d 229 (D.C. 2003) (despite inconsistencies between out-of-court and in-court identifications due to changes in defendant's appearance, victim's positive identification of defendant upheld due to length of time she had known him and validity of out-of-court identification).

2. Waiving the Defendant's Presence

It is important that identifying witnesses not see the defendant during the motions hearing. Thus, the defendant generally should waive the right to be present during those witnesses' testimony.[16] "[T]he defendant does have a right to waive his presence at a pre-trial suppression hearing . . . in which no legitimate interests of the government or of the defendant would [be] prejudiced by the defendant's absence." *Singletary v. United States*, 383 A.2d 1064, 1070 (D.C. 1978). The defendant should execute a written waiver, acknowledging a knowing, voluntary and intelligent waiver of the right to be present. If identification is seriously contested, and especially if the defendant waives his presence at the hearing, counsel must take care to avoid chance encounters between the defendant and the witnesses, discussed *supra* Section I.D.2.

Motions to Suppress at Pre-trial Hearing:

- ✓ The Motion to Suppress should, to the extent possible, allege specific facts that, if true, constitute suggestivity or unreliability creating a substantial likelihood of misidentification
- ✓ Counsel should cross-examine any discrepancies between prior descriptions and the defendant's actual appearance
- ✓ Defendant should generally waive the right to be present during witnesses' testimony

II. OTHER CONSTITUTIONAL ISSUES

A. Sixth Amendment Issues: Right to Counsel at Line-up

The Sixth Amendment right to counsel applies to any line-up that occurs "at or after the initiation of adversary judicial criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972); *see also United States v. Wade*, 388 U.S. 218, 237 (1967); *Poole v. United States*, 630 A.2d 1109, 1125 (D.C. 1993). Evidence of a line-up held without counsel must be suppressed. *See Moore v. Illinois*, 434 U.S. 220 (1977); *Wade*, 388 U.S. at 218; *Gilbert v. California*, 388 U.S. 263 (1967). Where a line-up is held without counsel present, an in-court identification by the

[16] The witness need not identify the defendant at the hearing before making an in-court identification before the jury. *See Allen v United States*, 580 A.2d 653, 657 (D.C. 1990).

same witness can be received into evidence only if the government shows by clear and convincing evidence that the in-court identification is based on observations of the defendant independent of the tainted confrontation—that is, has an "independent source." *Wade*, 388 U.S. at 239-40.[17]

There is no right to counsel at identification procedures other than line-ups. *See, e.g., United States v. Ash*, 413 U.S. 300, 312 (1973). Furthermore, identifications made from a photograph of a line-up have been admitted, notwithstanding counsel's absence at the actual line-up. *See Poole*, 630 A.2d at 1126.

B. Fourth Amendment Issues: Identification Resulting from Illegal Seizure

An out-of-court identification can be suppressed as the fruit of an illegal seizure. *See, e.g., Ellis v. United States*, 941 A.2d 1042 (D.C. 2008) (reversible error for trial judge to admit over defendant's objection hearsay testimony of a show-up identification where the government had not proved the police had a reasonable, articulable suspicion or probable cause to stop the defendant for purposes of the show-up); *Bryant v. United States*, 599 A.2d 1107 (D.C. 1991) (unlawful entry led to evidence of defendant's presence that contributed to identification being suppressed); *Gatlin v. United States*, 326 F.2d. 666, 672 (D.C. Cir. 1963); *see also Cantizano*, 614 A.2d at 872-73 (recognizing identification as potential fruit of Fourth Amendment violation, but finding seizure lawful); *cf. United States v. Crews*, 445 U.S. 463, 474, 477 (1980) (leaving question open and declining to suppress in-court identification because police knowledge of defendant's identity and complainant's "independent recollections" of defendant antedated unlawful arrest). The police only need to establish that they had a reasonable, articulable suspicion to stop a suspect before conducting a show-up identification. *See In re T.L.L.*, 729 A.2.d 334 (D.C. 1999).

III. GROUNDS FOR REQUESTING AN IDENTIFICATION PROCEDURE

A. Line-ups at Government Request

The client may be ordered to stand in a line-up by any of three procedures. The first is an "*Adams-Anderson*" order. *See United States v. Anderson*, 490 F.2d 785 (D.C. Cir. 1974); *Adams v. United States*, 399 F.2d 574 (D.C. Cir. 1968); *see also United States v. Eley*, 287 A.2d 830 (D.C. 1972). These cases authorize the court to order a lawfully detained defendant to stand in a line-up to be viewed by witnesses to the charged crime and other crimes. There is some ambiguity in the circumstances under which a defendant may be included in a line-up for "other crimes."[18] *See United States v. Perry*, 504 F.2d 180, 182-84 (D.C. Cir. 1974) (separate statement of McGowan, J.).

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[17] An appellate court may still, of course, apply a harmless error test. *See Gilbert*, 388 U.S. at 274 (conviction might be affirmed if error could be found harmless beyond a reasonable doubt).

[18] *United States v. Allen*, 408 F.2d 1287, 1288 (D.C. Cir. 1969), expressed the view that the government could bring witnesses of other crimes to a line-up if the unrelated charges "involved a similar *modus operandi*." *See also Adams*, 399 F.2d at 578. *But cf. Eley*, 287 A.2d at 831 n.2 (dictum disapproving limitation with *Dublin v. United States*, 388 A.2d 461, 465 (D.C. 1978) (citing *Adams* with apparent disapproval)).

The second procedure is to obtain a line-up order issued by the Superior Court upon a showing of reasonable suspicion that a person has committed an offense. *See Wise v. Murphy*, 275 A.2d 205 (D.C. 1971) (en banc). This procedure applies only to serious felonies involving grave personal injuries or threats thereof, and requires a showing of "reasonableness." The line-up is to be as minimally intrusive on the defendant's liberty and "as antiseptic as possible," *i.e.*, the other participants may not be suspects or convicted criminals, "security safeguards and devices" are not to be employed, no other use is to be made of the line-up or photographs of it,[19] and the total time for conducting the proceeding must be minimized. *Id*. at 208. A person ordered to stand in such a line-up may challenge the order on the Fourth Amendment ground that the government lacks sufficient information to warrant the intrusion on liberty.

Finally, the grand jury may issue a directive to stand in a line-up. The directive alone is not sufficient to compel attendance, but if it relates to an on-going investigation the court may issue an order enforcing it. The Court of Appeals has held under its supervisory powers that to secure such an order the prosecutor must "make a minimal factual showing sufficient to permit the judge to conclude that there is a reason for the line-up which is consistent with the legitimate function of the grand jury" – *i.e.*, "a minimal showing of a legitimate basis for requiring the particular line-up." *In re Kelley*, 433 A.2d 704, 707, 710 (D.C. 1981) (en banc). That showing can be made "by affidavit of a law enforcement officer or a formal representation of an Assistant United States Attorney," and the defense is not entitled to an adversary hearing on the issue. *Id*. at 707-08, 710.

Kelley Rights: *Brown v. United States*, 518 A.2d 415 (D.C. 1986), held that no one may be subpoenaed to the grand jury to receive a line-up directive without being informed of the *Kelley* rights. The court directed the government to develop an "advice of rights" form covering the following points:

a) The grand jury is conducting an investigation of possible violation of specific criminal laws;

b) Under appropriate circumstances the grand jury may issue a directive ordering a person to appear in a line-up;

c) The results of a line-up may be used in a subsequent legal proceeding, for or against anyone who appears in the line-up; and

d) Anyone who receives a subpoena to appear before the grand jury to receive a line-up directive has a right to consult with a lawyer before complying with the directive, and to challenge the directive in court.

[19] *Dublin* rejected appellant's argument that language in the line-up order – "[counsel] has approved this order because it is for this offense only" – barred the government from showing a photo of the line-up to a witness in an unrelated case, where before the line-up the government had probable cause linking the defendant to that crime and therefore could have obtained a line-up order in connection with it as well. 388 A.2d at 461.

The form must be appended to the subpoena, and the prosecutor must repeat the statement of rights to the suspect on the record before the grand jury and ask the suspect to affirm that he or she understands them. *Id*. at 420.

Despite this advice, the suspect, if indigent, is not entitled to appointment of counsel to challenge the line-up directive. *Kelley* rights can be enforced by contesting the directive in court before the line-up, or by a suppression motion if the suspect is ultimately charged. *See Brown*, 518 A.2d at 421. Availability of the second alternative, the court concluded, obviates the need for counsel when the subpoena is issued. Of course, this holding does not undermine the *Wade* requirement of counsel at the line-up.

B. Identification Procedures at Defense Request

The Court of Appeals has consistently affirmed the right of the defense to conduct a show-up before the jury at which a witness is asked to make an identification. *Hollingsworth v. United States*, 531 A.2d 973 (D.C. 1987), found that the defendant should have been permitted to conduct an in-court show-up identification, by a defense witness, of the complainant as the person who had threatened to "get" the defendant one day before the alleged robbery. Due process concerns regarding suggestivity did not apply because the subject to be identified was not the defendant. Noting that the entire defense case rested on a theory of the complainant's fabrication, the court reversed the conviction. *Id*. at 977-79; *see also Wilson v. United States*, 558 A.2d 1135 (D.C. 1989) (trial court allowed defense, over government objection, to conduct in-court show-up at which two witnesses present under subpoena were shown to government witnesses during cross-examination).

The trial court has authority to order a line-up at defense request. *See United States v. Smith*, 473 F.2d 1148 (D.C. Cir. 1972); *United States v. Caldwell*, 465 F.2d 669 (D.C. Cir. 1972); *United States v. Ash*, 461 F.2d 92 (D.C. Cir. 1972), *rev'd on other grounds*, 413 U.S. 300 (1973). Indeed, in some cases the identification procedures may be irreparably tainted absent such a line-up. *See United States v. Caldwell*, 481 F.2d 487 (D.C. Cir. 1973).

> Generally, such a line-up may be appropriate where the defendant, on timely motion, makes a showing that eyewitness identification is materially at issue, and there exists, in the particular case, a reasonable likelihood of mistaken identification which a line-up would tend to resolve.

Berryman v. United States, 378 A.2d 1317, 1320 (D.C. 1977);[20] *see also Hollingsworth*, 531 A.2d at 973.

Berryman observed that the same principles would govern motions for an in-court line-up, but suggested that in view of the superiority of police department facilities, in-court line-ups should be rare. The trial court may consider failure to seek an out-of-court line-up, absent exigent

[20] While *Jackson v. United States*, 395 A.2d 99, 104-05 (D.C. 1978), did not find an abuse of discretion in denying a defense request for a line-up, it did point out that where the government intends to have a witness make an in-court identification, without having conducted a prior non-suggestive identification procedure, denial of a defense request for a line-up is questionable even when the request is not made until near the trial date.

circumstances, in denying a defense request for the disfavored in-court procedure. *See* 378 A.2d at 1320 n.6.

Of course, defense counsel should be extremely cautious in requesting a line-up. If the witness identifies the defendant, the line-up will strengthen the government's case. Since it is such a high-risk venture, it must be an especially informed one.

CHAPTER 22

MOTIONS TO SUPPRESS ON FOURTH AMENDMENT GROUNDS

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

Fourth Amendment issues are a critical aspect of criminal defense practice.[1] Suppression motions can be won, especially where the police act without a warrant. Without the excluded evidence, the government may be unable to prosecute, particularly for such crimes as drug or weapons possession. Furthermore, the existence of a substantial Fourth Amendment claim may result in a more favorable plea offer than the government would otherwise extend. Counsel must therefore be prepared to recognize Fourth Amendment issues, file appropriate pleadings, and present the claim effectively[2] at evidentiary hearings.

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***Maryland v. King*, 133 S. Ct. 1958 (2013).** When officers make an arrest supported by probable cause and bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure.

I. PROCEDURAL ASPECTS OF FOURTH AMENDMENT LITIGATION

Counsel must raise suppression issues before trial. D.C. Code § 23-104(a)(2). Super. Ct. Crim. R. 12, 41(g), and 47-I detail the procedures.[3] Absent good cause, failure to raise suppression issues by motion before trial constitutes a waiver. Super. Ct. Crim. R. 12(b)(3), (d); *Streater v. United States*, 478 A.2d 1055, 1058 (D.C. 1984). The motion must be in writing,

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[1] For a thoughtful and comprehensive treatment of Fourth Amendment law, see Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* (4th ed. 2004).

[2] The failure to file a motion to suppress where there exists a legal basis to do so constitutes ineffective assistance of counsel. *See, e.g., Watley v. United States*, 918 A.2d 1198 (D.C. 2007).

[3] Wiretapping raises special issues, both procedural and substantive. *See* D.C. Code §§ 23-541 to 556; Super. Ct. Crim. R. 47-I; 18 U.S.C. §§ 2510-2520; *United States v. Sell*, 487 A.2d 225 (D.C. 1985) (interpreting one-party consent provision of D.C. Code § 23-542(b)(2)), *rev'd on other grounds*, 525 A.2d 1017 (D.C. 1987); *United States v. (Gerald) Johnson*, 696 F.2d 115 (D.C. Cir. 1982); *United States v. (John) Robinson*, 698 F.2d 448, 450-51 (D.C. Cir. 1983); *United States v. Belfield*, 692 F.2d 141 (D.C. Cir. 1982); *United States v. (Carroll) Ford*, 414 F. Supp. 879 (D.D.C. 1976, *aff'd*, 553 F.2d 146 (D.C. Cir. 1977) ("bugging" of private premises is to be limited to the narrowest possible point necessary to accomplish law enforcement purposes; each entry into private premises requires separate determination of probable cause). Claims of illegal wiretapping are rare in superior court practice and are not treated here.

with a memorandum of points and authorities, and a copy must be served on the government. Super. Ct. Crim. R. 47-I. The motion is due twenty days after the status hearing in felony cases[4] and in misdemeanor cases in which a jury trial has been demanded, and within ten days after arraignment in misdemeanor cases scheduled for bench trial. Super. Ct. Crim. R. 47-I(c). The court may grant additional time for filing. Super. Ct. Crim. R. 45(b), 47-I(c). *See, e.g.*, D.C. Superior Court Order, May 28, 1996, by Criminal Division Presiding Judge Burgess: "on misdemeanor calendars presided over by judges [,] motions governed by Rule 47-1(c) will be deemed timely filed, without prior approval by the Court, if filed thirty (30) days prior to the date initially set for trial." Additional time may be sought when, for example, the government has failed to provide adequate discovery.[5]

Motions should be filed in the appropriate clerk's office. Hearings are ordinarily scheduled for the day of trial. The Jencks Act, 18 U.S.C. § 3500, applies at suppression hearings to the same extent as at trial. *United States v. (Mary) Dockery*, 294 A.2d 158 (D.C. 1972); Super. Ct. Crim. R. 12(e).[6]

Degree of Factual Detail: One important tactical issue involves the degree of factual detail that the pleadings should allege. Rule 47-I(b) requires that a motion include "a statement of grounds" for the relief requested and that the memorandum state "the specific points of law and authorities to support the motion." Especially when the motion involves a novel or complicated legal issue, very general pleadings will probably fail to persuade the court. Moreover, conclusory and non-factual allegations of a Fourth Amendment violation will not entitle the defendant to an evidentiary hearing. *Duddles v. United States*, 399 A.2d 59, 63 (D.C. 1979). The defendant must "make factual allegations which, if established, would warrant relief (based on evidence discovered of the government and, if necessary, proffered from defendant's own view of the case)." *Id.*; *cf. In re F.G.*, 576 A.2d 724, 726 (D.C. 1990) (en banc) (because "*Duddles* expressly premised its test on the availability to the defendant of evidence about the government's actions," a motion to suppress show-up identification need not allege facts because the defendant has little access to the evidence); *Best v. United States*, 582 A.2d 966, 968-69 (D.C. 1990) (*F.G.* applies only to motion to suppress show-up identification; *Duddles* rule still applies to motions to suppress tangible evidence). On the other hand, a motion that provides a great amount of detail

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[4] As a practical matter, many judges will set a motions schedule at the status conference that may conflict with the rule. The judge's schedule controls, and counsel should always familiarize herself with judges' procedures.

[5] Decided when the rules required that motions be filed within ten days of arraignment in all cases, *Duddles v. United States*, 399 A.2d 59, 62 (D.C. 1979), suggested:

> Counsel, during the 10 days, can file a motion for extension of time within which to file a motion to suppress; e.g., an extension until 10 days after completion of timely discovery. Alternatively, counsel can file a motion to suppress based on currently available information, requesting deferral of a hearing or ruling until completion of discovery and amendment of the motion with further particulars. If counsel has asserted valid reasons for such an extension or deferral, it would be an abuse of discretion for the trial court to compromise a defendant's rights by denying such a motion.

[6] If the defense calls a law enforcement officer as a witness at a pretrial motions hearing, both the government and the defendant are required to produce the "Jencks" statements of that witness, pursuant to Super. Ct. Crim. R. 26.2 and Super. Ct. Crim. R. 12(e).

may disclose too much about the defendant's position, giving the government's witnesses an opportunity to plan their testimony so as to foreclose the line of attack suggested in the motion. Thus, the amount of detail that should be included in a particular motion requires careful consideration.

II. SEIZURES: ON-THE-STREET ENCOUNTERS BETWEEN CITIZENS AND POLICE

A. Introduction

The Fourth Amendment protects against unreasonable searches and seizures. Every time a citizen's liberty is restrained by the police,[7] there is an opportunity for a Fourth Amendment challenge to the seizure of the person.[8] One always has standing to challenge one's own seizure. *Cousart v. United States*, 618 A.2d 96, 99 n.4 (D.C. 1992) (en banc).

Encounters between citizens and police have been described as "incredibly rich in diversity," ranging "from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life." *Terry v. Ohio*, 392 U.S. 1, 13 (1968). Yet *Dunaway v. New York*, 442 U.S. 200, 213 (1979), rejected the notion that seizures should be analyzed using a general balancing test of "reasonable police conduct under the circumstances" to cover all seizures that do not technically amount to an arrest.

> For all but those narrowly defined intrusions [that fall within the rubric of Terry], the requisite "balancing" has been performed in centuries of precedent and is embodied in the principle that seizures are "reasonable" only if supported by probable cause.

Id. at 214.

Since *Dunaway*, there have been a few carefully delineated situations in which courts have applied a general reasonableness standard to seizures that did not rise to the level of arrests, but did not fit comfortably within the *Terry* mold. The Supreme Court in *Michigan v. Summers*, 452 U.S. 692, 704 (1981), upheld the right of the police to detain a suspect while they searched his house.[9] The Court found the detention reasonable, both so that Summers would be available for arrest if the search produced a basis, and so that he could assist in the search and thereby prevent unnecessary damage to his property. *Id*. at 702-03. The controlling facts making the detention reasonable, in the absence of probable cause, appear to be that the police had a warrant, even if only to search; the warrant was for contraband; Summers was a resident of the premises to be

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[7] In order to implicate the Fourth Amendment, the seizure must involve state action. *Akins v. United States*, 679 A.2d 1017, 1027 (D.C. 1996) (bounty hunter not a state actor). Challenges may be brought to police seizures conducted out of the officer's jurisdiction. *See Cole v. United States*, 678 A.2d 554 (D.C. 1996) (discussing "fresh pursuit" doctrine).

[8] The same principles apply to seizures of property. *Soldal v. Cook County*, 506 U.S. 56, 62 (1992).

[9] The police saw Summers leaving as they were descending on his home to execute a search warrant. They "requested his assistance in gaining entry" and detained him for the duration of the search, but did not search Summers himself until the results of the house search yielded probable cause to arrest him. *Id*. at 693.

searched; and he was merely detained and not searched until the police had probable cause for his arrest. *Id*. at 701-02.

The District of Columbia Court of Appeals held in *Williamson v. United States*, 607 A.2d 471 (D.C. 1992), that a brief detention of an eyewitness to a violent crime also comports with the Fourth Amendment if exigent circumstances exist. In *Williamson*, an officer heard gunshots, saw one car speed away, and then saw defendant Williamson and two others quickly get into a car and start to drive away. The officer told the driver to stop and eventually ordered Williamson out. The court upheld the seizure as reasonable, but explicitly limited its holding to the unique facts of that case,[10] noting that the "authority to detain witnesses must be 'much more narrowly circumscribed' than the authority to stop suspects." *Id*. at 477 n.16; *see also Hawkins v. United States*, 663 A.2d 1221, 1226-27 (D.C. 1995) (no "exigent circumstances" justifying stop of eyewitness where no fast-moving scenario, no just-completed crime, no flight, and no attempt by police of investigative methods short of seizure); *Patton v. United States*, 633 A.2d 800, 814-15 (D.C. 1993) (per curiam) (on-scene *Terry* stop warranted where crucial eyewitness to double homicide was covered with blood and had sought out police).

Despite cases applying a general reasonableness standard,[11] *Dunaway* remains authority for the general point that there is no sliding scale of reasonableness on which police action will be judged. *See also Whren v. United States*, 517 U.S. 806 (1996) (refusing to perform general "balancing" analysis). Consequently, for the majority of cases, a police-citizen encounter can be classified as one of four types of intrusions, each of which requires its own level of justification: (1) a contact that involves minimal restriction on liberty, does not implicate the Fourth Amendment, and requires no justification; (2) a stop that constitutes a seizure under the Fourth Amendment and is justified only if the police have a reasonable, articulable suspicion to believe that the person has been or is engaged in criminal activity; (3) a frisk that must be preceded by a lawful stop and is justified only if the police have reason to believe the person is armed and dangerous; and (4) an arrest that is justifiable only if the police have probable cause to believe the person has committed or is committing a crime.

Each suppression motion arising out of a police-citizen encounter will therefore turn on an identification of the degree of police intrusion and an analysis of whether there was adequate justification for it.

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[10] We have no occasion to decide here whether a potential eyewitness may be stopped when other, less violent forms of crime are involved or circumstances are less demanding of immediate police action than those presented here. Nor need we explore the proper scope of the detention of such a witness as regards either its length or the intensity of the intrusion.

Id. at 477.

[11] These may represent the cases of "extraordinary private or public interests" mentioned by Justice White in his concurrence in *Dunaway*, 442 U.S. at 220.

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***Crossland v. United States*, 32 A.3d 1005 (D.C. 2011)** (APO statute 'prohibits forceful resistance even if the officer's conduct is unlawful,' citing Dolson v. United States, 948 A.2d 1193, 1202 (D.C. 2008).

***United States v. Brodie*, 742 F.3d 1058 (D.C. Cir. 2014).** Seizure was not incidental to execution of a search warrant where the encounter was in anticipation of the search warrant execution and no safety concerns were present.

B. The Warrant Requirement

The initial issue involved in the seizure of a person is whether or not the police had a warrant for the seizure, i.e., an arrest warrant. If the police did, then the burden is on the defense to establish how the police violated the defendant's rights. If such a showing is established, the burden of establishing an exception to the exclusionary rule will rest with the government. *Duddles*, 399 A.2d at 63 n.9. The Fourth Amendment and Superior Court Criminal Rule 4(c)(1) require that an arrest warrant include a description that is sufficient to identify the person to be seized. Warrants that fail to describe a person by name can be attacked on this basis. *Cf. United States v. John Doe*, 703 F.2d 745, 749 (3rd Cir. 1983) (warrant also lacked description). Counsel should also be familiar with D.C. Code §§ 23-561 to 563, governing the issuance and execution of arrest warrants. *See infra* Section III.B (challenging police misconduct in obtaining or executing warrants).

If the police acted without a warrant, the burden is on the government to present evidence sufficient to justify the challenged police conduct. *Malcolm v. United States*, 332 A.2d 917, 918 (D.C. 1975); *see also West v. United States*, 604 A.2d 422, 426 (D.C. 1992) (motion to suppress should have been granted when government failed to introduce any evidence regarding arrest or search). Particularly when the police act without a warrant, the probable cause requirement must be "strictly enforced." *Henry v. United States*, 361 U.S. 98, 102 (1959); *see also Ornelas v. United States*, 517 U.S. 690 (1996) (when arrest or search is warrantless, appellate court should review reasonable suspicion and probable cause *de novo*); *United States v. Watson*, 423 U.S. 411, 432 n.6 (1976) (Powell, J., concurring) (emphasizing Court's "longstanding position that [a warrantless] arrest should receive careful judicial scrutiny if challenged");

Warrants are not constitutionally required for felony arrests in public places.[12] *Watson*, 423 U.S. at 415-16; D.C. Code § 23-581(a)(1)(A); *(Brenda) Gatlin v. United States*, 833 A.2d 995 (D.C. 2003) (police's warrantless entry into common area of school did not implicate Fourth Amendment); *(Paul) Gatlin v. United States*, 326 F.2d 666, 668 n.6 (D.C. Cir. 1963). To effect a warrantless arrest for a misdemeanor, the officer must have probable cause to believe that the suspect is committing a misdemeanor in the officer's presence,[13] § 23-581(a)(1)(B); *Schram v.*

[12] Similarly, the Fourth Amendment does not require the police to obtain a warrant to seize an automobile from a public place if the police have probable cause to believe that the automobile to be seized contains contraband. *See Florida v. (Tyvessel) White*, 526 U.S. 559 (1999).

[13] In *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001), the Supreme Court held that police may arrest for a crime that is punishable only by fine. In that case, police stopped a Texas mother who was driving two young children

District of Columbia, 485 A.2d 623, 624-25 (D.C. 1984), or has committed or is about to commit one of certain enumerated misdemeanors if such person, "unless immediately arrested, may not be apprehended, may cause injury to others, or may tamper with, dispose of, or destroy evidence," § 23-581(a)(1)(C), (2).[14] Otherwise, § 23-581 is a codification of the common law of arrest. *United States v. Hamilton*, 390 A.2d 449, 452 (D.C. 1978); *see also United States v. (Everett) Williams*, 754 F.2d 1001 (D.C. Cir. 1985) (adopting *Schram* test). Finally, a warrant is not required for a "stop" within the meaning of *Terry v. Ohio*, 392 U.S. 1 (1968).[15]

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***Missouri v. McNeely*, 133 S. Ct. 1552 (2013).** No per se rule that state may do blood test without a warrant.

C. The Level of Intrusion: Contacts, Stops, Frisks, and Arrests

1. Contacts and Stops

"[N]ot all personal intercourse between policemen and citizens involve[] 'seizures' of persons" which implicate the Fourth Amendment. *Terry*, 392 U.S. at 19 n.16. For example,

> law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions.

Florida v. Royer, 460 U.S. 491, 497 (1983) (plurality opinion); *see also Ohio v. Robinette*, 519 U.S. 33 (1996) (request by police to search car during traffic stop does not constitute a seizure); *Florida v. Bostick*, 501 U.S. 429, 434 (1991) ("mere police questioning does not constitute a seizure"); *INS v. Delgado*, 466 U.S. 210, 216 (1984) ("police questioning, by itself, is unlikely to result in a Fourth Amendment violation"); These "non-seizures" are often referred to as "contacts" and require no justification: "[P]olice-citizen communications which take place under circumstances in which the citizen's 'freedom to walk away' is not limited by anything other than his desire to cooperate do not amount to 'seizures' of the person." *United States v. Wylie*, 569 F.2d 62, 67 (D.C. Cir. 1977); *see Patton*, 633 A.2d at 815 (no seizure where suspect asked police to investigate and never asked to leave police station); *Coates v. United States*, 413 F.2d

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who were not wearing seat belts, arrested her, handcuffed her, and took her to the police station. *See also Virginia v. Moore*, 553 U.S. 169 (2008) (holding that where police officers have probable cause to believe an individual has committed a crime in their presence, the Fourth Amendment permits them to make an arrest and search the suspect, regardless of state law to the contrary).

[14] Those offenses presently are assault, unlawful entry, attempted burglary, theft II, receiving stolen property, shoplifting, attempted theft I, attempted unauthorized use of a vehicle, and illegal dumping.

[15] A delay of longer than 48 hours after a warrantless arrest, before a judicial probable cause determination, violates the Fourth Amendment. *Riverside v. McLaughlin*, 500 U.S. 44 (1991).

371, 374 (D.C. Cir. 1969) (no restraint on liberty in mere conversation).[16] *But see Hawkins v. United States*, 663 A.2d 1221, 1228 (D.C. 1995) (officer's repeated questioning turned consensual encounter into seizure). Whether a citizen is free to walk away is judged by "what a reasonable man, innocent of any crime, would have thought had he been in the defendant's shoes." *United States v. McKethan*, 247 F. Supp. 324, 328 (D.D.C. 1965); *see also (Lawrence) Ware v. United States*, 672 A.2d 557 (D.C. 1996). The test for whether a person has been seized involves an objective standard. *Michigan v. Chesternut*, 486 U.S. 567, 573 (1988); *In re J.M.*, 619 A.2d 497, 501 (D.C. 1992) (en banc); *(Ezzard) Lawrence v. United States*, 566 A.2d 57, 60 (D.C. 1989); *(Johnny) Harris v. United States*, 738 A.2d 269, 274 (D.C. 1999).

Before 1968, any type of seizure was considered an arrest, and without probable cause it was illegal. In *Terry*, the Court gave its sanction to limited seizures of a person based on a "reasonable, articulable suspicion" that the person is committing a crime. A *Terry* "stop," in contrast to a "contact," is any encounter, short of an arrest, in which an individual has been restrained: "It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." 392 U.S. at 16.[17] *Brown v. Texas*, 443 U.S. 47 (1979), held that a brief detention of a suspect in an alley for the purpose of asking him to identify himself was a *Terry* stop and unjustifiable. *Royer*, 460 U.S. at 498 (plurality opinion), flatly stated that a suspect "may not be detained even momentarily without reasonable, objective grounds for doing so." *Accord (Taylor) Mayes v. United States*, 653 A.2d 856, 866 n.17 (D.C. 1995) (citing *Royer*). "[A] person has been 'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (plurality opinion). For example, the Court of Appeals found that when a police officer ordered an individual to "come here" in a stern and commanding tone, twice, that individual was seized within the meaning of the Fourth Amendment. *In re D.T.B.*, 726 A.2d 1233 (D.C. 1999); *accord Michigan v. Chesternut*, 486 U.S. 567, 573 (adopting *Mendenhall* test); *In re J.M.*, 619 A.2d at 499-500. *But see California v. Hodari D.*, 499 U.S. 621, 627 (1991) (meeting *Mendenhall* test is necessary but not sufficient condition for seizure). *Mendenhall* also stated that a stop can be the result of either "physical force or show of authority" on the part of the police, listing kinds of police conduct that could give rise to a *Terry* stop:

> Examples of circumstances that might indicate a seizure, even where the person did not attempt to leave, would be the threatening presence of several officers, the

[16] The court of appeals has often referred to the relevant MPD order as a standard for reasonableness of police conduct: "Conduct by an officer which places the sworn member in face-to-face communication with an individual citizen under circumstances in which the citizen is free not to respond, and to leave, is considered a 'contact.'" MPD General Order, Series 304, No. 10 (Police-Citizen Contacts, Stops, Frisks, July 1, 1973) (emphasis added); *see Crawford v. United States*, 369 A.2d 595 (D.C. 1977); *Wylie*, 569 F.2d at 67. Counsel may obtain the order from MPD by subpoena. The order may be revised or updated, so counsel should obtain the official version current at the time of the client's arrest. While the order does not have the force of law, effective cross-examination can be based on an officer's failure to adhere to it.

[17] MPD General Order, Series 304, No. 10, conforms generally to *Terry*: A stop occurs whenever an officer uses his or her authority to compel a person to halt, remain in a certain place, or to perform some act (such as walking to a nearby location where the officer can use a radio or telephone). If a person is under a reasonable impression that he or she is not free to leave the officer's presence, a "stop" has occurred.

> display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled.

446 U.S. at 554; *accord (Louis) Jackson v. United States*, 805 A.2d 979 (D.C. 2002) (consensual encounter became seizure where suspect complied with officer's request that he lift his jacket and turn around in order to be patted down); *Reyes v. United States*, 758 A.2d 35 (D.C. 2000) (defendant seized where officer told him several times to remove his hands from his pockets after observing an apparent drug transaction); *(Lawrence) Ware v. United States*, 672 A.2d 557, 561 (D.C. 1996); *Kelly v. United States*, 580 A.2d 1282, 1286 (D.C. 1990). *But see Hodari D.*, 499 U.S. at 626 (no seizure when suspect fails to comply with show of authority).

Applying this standard, *Mendenhall* concluded that no *Terry* detention had occurred when DEA agents observed Mendenhall in an airport, approached her as she was walking through the concourse, identified themselves as federal agents, asked to see her ticket and identification, and posed questions concerning some apparent discrepancies. 446 U.S. at 547-48. The agents' subjective intent to detain the woman was irrelevant, except to the extent that it might have been communicated to her. *Id*. at 554 n.6. Three other members of the Court expressed general approval of this standard and conclusion, although they preferred to base their decision on another ground. *Id*. at 560 n.1 (Powell, J., concurring); *see Reid v. Georgia*, 448 U.S. 438, 443 (1980) (per curiam) (Powell, J., concurring).

While there is no "litmus-paper test for distinguishing a consensual encounter from a seizure," *Florida v. Royer* identified several factors persuading the Court to label the encounter a seizure: the officers identified themselves as narcotics agents, told the defendant that he was suspected of transporting drugs, asked him to accompany them to the police room while retaining his airplane ticket and driver's license, and in no way indicated that he was free to leave. 460 U.S. at 506. Although there were adequate grounds for the detention, the detention lasted longer than necessary to effectuate its purpose. Finally, the Court reaffirmed what was previously an implicit limitation on police conduct, that "the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." *Id*. at 500. *But see Vernonia School District 47J v. Acton*, 515 U.S. 646, 663 (1995) (refusing "to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment").

Hodari D. refined the *Mendenhall* standard by stating that a seizure occurs if physical force (which can include a mere touching) is used, or if a person submits to a show of authority, but that if a person ignores a show of authority and flees from the police, there is no seizure until the individual is captured. 499 U.S. at 626-27; *see also Cook v. United States*, 620 A.2d 256 (D.C. 1993) (applying *Hodari D.*). Court of Appeals cases decided both before and after *Hodari D.* make it clear, however, that as long as the individual submits to the show of authority, the restraint need not be complete in order to amount to a *Terry* stop:

> [A] Fourth Amendment "seizure" does not turn on whether a suspect is totally restrained, i.e., prevented from . . . reaching for a weapon or contraband. Indeed, many suspects who are "seized," within the meaning of the Fourth Amendment

> "show of authority" criterion, retain significant freedom of action. Evidence of such residual liberty cannot cancel the fact that an official restraint has been imposed amounting to constitutional encroachment.

In re J.G.J., 388 A.2d 472, 474 n.3 (D.C. 1978) (per curiam); *see also Albright v. (Roger) Oliver*, 510 U.S. 266, 276-77 (1994) (Ginsburg, J., concurring) (surrender to show of authority of arrest warrant is a seizure, which continues even after release on bond); *(Lawrence) Ware*, 672 A.2d at 561 (although bicyclist initiated conversation with officer, compliance with officer's direction to get off bicycle, put purse down, and keep hands out in open, constituted seizure); *(Jose) Mitchell v. United States*, 609 A.2d 1099, 1107 n.16 (D.C. 1992) (throwing gun and putting hands in air is submission to show of authority); *Williamson v. United States*, 607 A.2d 471, 473 (D.C. 1992) (seizure occurred when driver complied with order to stop car, despite appellant's subsequent failure to comply with order to raise his hands). *But see United States v. (Robert) Johnson*, 212 F.3d 1313, 1316 (D.C. Cir. 2000) (no seizure occurred while suspect in automobile continued to make furtive gestures after officer ordered him to raise his hands at gunpoint).

The Court of Appeals has also held that a seizure occurs when the police touch a person. *(John H.) Smith v. United States*, 558 A.2d 312 (D.C. 1989) (en banc), held that a stop occurred when an officer put his hand on the defendant's shoulder after the defendant refused to halt in response to a verbal request. *See also Upshur v. United States*, 716 A.2d 981 (D.C. 1998) (officers exceeded the scope of *Terry* stop when they grabbed suspect's arm and forced open suspect's clenched fist); *Duhart v. United States*, 589 A.2d 895, 898 (D.C. 1991) (stop occurred when officer approached defendant, "asked him to take his hand out of his pocket, and when he reluctantly complied, grabbed his wrist").

Numerous cases have found seizures based on a show of authority short of physical contact. *J.G.J.* upheld a finding that a stop occurred when a police car stopped behind two youths who were walking down a sidewalk. One officer "identified himself as a police officer by displaying his badge and his identification card." 388 A.2d at 473. One of the youths subsequently pulled out a syringe and dropped it to the ground. Although the youth was clearly "free" to reach for a weapon or contraband, this was a stop, for "official restraint ha[d] been imposed amounting to constitutional encroachment." *Id*. at 474 n.3. *J.G.J.* was reaffirmed in *United States v. (Harvey) Johnson*, 496 A.2d 592, 594 (D.C. 1985), holding that a uniformed officer's command to the driver of a car – "come here, police officer" – was a Fourth Amendment seizure because the driver could not have believed that he was free to leave. *See also United States v. McMillan*, 898 A.2d 922 (D.C. 2006) (defendant impermissibly seized when told by an officer to "come back" twice, in a firm voice, and defendant complied both times); *Carr v. United States*, 758 A.2d 944 (D.C. 2000) (seizure occurred when member of a large police "jump-out" team pulled suspect from a door frame of car into which the suspect was leaning); *In re D.T.B.*, 726 A.2d 1233 (D.C. 1999) (youth ordered twice to "come here" constituted a seizure); *Hawkins v. United States*, 663 A.2d 1221, 1228 (D.C. 1995) (after agreeing to talk with officer, eyewitness seized when questioned three times if he was carrying gun); *(Marvin) Brown v. United States*, 590 A.2d 1008, 1024 n.24 (D.C. 1991) (officer "frustrat[ed] defendant's efforts to depart"); *In re T.T.C.*, 583 A.2d 986, 988 (D.C. 1990) (officer approached vehicle "with his gun at his side"); *Hemsley v. United States*, 547 A.2d 132, 133 (D.C. 1988) (officer ordered suspect to keep car parked and roll down window); *United States v. Brown*, 104 Wash. D.L. Rptr. 1669 (D.C. Super. Ct. 1976)

(Mencher, J.) (two officers called suspect to their scout car and questioned him about his activities). *But see Brown v. United States*, 983 A.2d 1023 (D.C. 2009) (no seizure where officer on routine patrol approached defendant on sidewalk and stood two to three feet away while speaking in a normal tone, all without placing hand on gun or making any threatening gesture); *Plummer v. United States*, 983 A.2d 323 (D.C. 2009) (defendant not seized when the police approached him with their guns drawn and ordered him to put up his hands because he did not comply with that show of authority); *United States v. Goddard*, 491 F.3d 457 (D.C. Cir. 2007) (finding no seizure when police officers pulled into entrance of gas station in unmarked car and jumped out with their guns, handcuffs, and MPD logos visible; Fourth Amendment stop occurred only when officers yelled "gun," and ordered defendant's companion back to the scene); *(Ezzard) Lawrence v. United States*, 566 A.2d 57, 62-63 (D.C. 1989) (no seizure where officer stopped in front of defendant in walkway and asked defendant what was in his clenched fist, defendant could have walked around officer, and officer used conversational tone and did not draw gun); *Richardson v. United States*, 520 A.2d 692, 697 (D.C. 1987) (absent evidence of threatening language or commanding tone, no seizure when officer said, "Police, wait a second, we want to talk to you"); *United States v. Barnes*, 496 A.2d 1040, 1045 (D.C. 1985) (no stop when officer approached man loitering outside store, asked him to remove hands from pockets, and asked several questions in nonintimidating manner); *Purce v. United States*, 482 A.2d 772, 777 (D.C. 1984) (no stop when officer tapped on window of car, awakened suspect, and asked for identification).

In some circumstances, pursuit can be a show of authority sufficient to constitute a seizure. *Chesternut* found that following and then overtaking the defendant was not a seizure when the police followed "to see where he was going," but did not activate the cruiser's siren or flashers, command that he halt, display any weapons, operate the cruiser in an "aggressive manner to block respondent's course," or get out of the cruiser to give chase on foot. 486 U.S. at 575. *In re D.J.*, 532 A.2d 138, 140-41 (D.C. 1987), by contrast, found a seizure when the police stalked D.J. with one car, blocked his path with another, and then chased him on foot.

All pursuit cases must now be viewed in light of the holding in *Hodari D.*, 499 U.S. at 626-27, that there is no seizure until an individual submits to the show of authority. *See (Antonio) Green v. United States*, 662 A.2d 1388, 1390 (D.C. 1995); *Allison v. United States*, 623 A.2d 590, 592 (D.C. 1993) (*D.J.* must be modified in light of *Hodari D.*). If, however, the police begin to pursue a suspect and the person immediately stops or submits, the circumstances of the pursuit may still constitute a seizure.

The question whether there is a sufficient show of authority to constitute a seizure has arisen frequently in cases involving drug interdiction teams in transportation terminals. There is no magic formula for interdiction cases; the standards are the same and each case must be judged on its facts. *Guadalupe v. United States*, 585 A.2d 1348 (D.C. 1991), found a seizure even though the police did not touch Guadalupe or display a weapon. The court found that a reasonable person would not have felt free to leave when, during a thirty-minute period, the police confronted Guadalupe twice, asked to search his bag and his body, and searched his companion; the officers' continuing interest in Guadalupe communicated to him that the police suspected him of carrying narcotics, which made the encounter "inherently coercive." *Id*. at 1360. In *Bostick*, 501 U.S. 429, officers boarded a bus, approached Bostick, asked to inspect his

identification and ticket, and asked if they could search his luggage. Although remanding on the issue of seizure, the Court suggested that there was none, noting that the police advised Bostick that he had a right to refuse consent and did not threaten him with a gun. *Id*. at 436; *see also Kelly v. United States*, 580 A.2d 1282, 1286 (D.C. 1990) (no seizure when police use no physical force and display no weapons, but merely question defendant in conversational tone while dressed in plain clothes);[18] *Burton v. United States*, 657 A.2d 741, 744 (D.C. 1994) (on bus); *Symes v. United States*, 633 A.2d 51, 53 (D.C. 1993) (in train compartment); *In re J.M.*, 619 A.2d 497, 501 (D.C. 1992) (en banc) (on bus). *But cf. Hawkins*, 663 A.2d at 1228 (during initial consensual encounter, eyewitness seized when questioned three times if he was carrying gun); *(Michael) Taylor v. United States*, 662 A.2d 1368, 1371 n.6 (D.C. 1995) (questioning driver of parked car about driver's license requires articulable suspicion).

The issue whether the police advised a suspect that he had the right to refuse consent is not dispositive. In *Ohio v. Robinette*, 519 U.S. 33 (1996), the Supreme Court held that it is not necessary to advise a suspect of his right to refuse consent. Therefore, the fact that the police did not advise a suspect that he has the right to refuse consent will not automatically result in a Fourth Amendment violation. Other factors must be explored and argued.

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***In re D.M.*, 94 A.3d 760 (D.C. 2014).** Mere fact that police knew defendant's name and where he attended school and therefore could have located him again at a later time did not make their seizure of him for a show-up per se unconstitutional.

***Ramsey v. United States*, 73 A.3d 138 (D.C. 2013).** Weapon found on defendant was fruit of illegal search, and thus defendant's motion to suppress should have been granted, where police officer conducting warrant check on defendant who had consented to interaction turned encounter into seizure.

***Henson v. United States*, 55 A.3d 859 (D.C. 2012).** Defendant not seized for Fourth Amendment purposes when officer grabbed his arm and asked him where he was going because defendant then ran away from officer's control.

***In re J.F.*, 19 A.3d 304 (D.C. 2011).** Unlawful seizure where defendant was confronted with authority of police on a deserted street as evidenced by officers with weapons, police vests and badges, and by multiple questions by an officer as well as a direct order to remove his hands

[18] In other interdiction cases, the circuit court has held that "an encounter between a police officer and a citizen, involving no more than approach, questioning, and official identification, does not constitute a seizure and does not require probable cause, articulable suspicion, or any other 'kind of objective justification.'" *United States v. (Milton) Smith*, 901 F.2d 1116, 1118 (D.C. Cir. 1990) (citation omitted); *see Casey v. United States*, 788 A.2d 155 (D.C. 2002); *United States v. Samuels*, 938 F.2d 210, 213 (D.C. Cir. 1991); *United States v. Springs*, 936 F.2d 1330, 1333 (D.C. Cir. 1991); *United States v. (Dennis) Lewis*, 921 F.2d 1294 (D.C. Cir. 1990); *United States v. Nurse*, 916 F.2d 20, 23 (D.C. Cir. 1990); *United States v. Tavolacci*, 895 F.2d 1423, 1425 (D.C. Cir. 1990); *United States v. Maragh*, 894 F.2d 415, 419 (D.C. Cir. 1990); *United States v. Winston*, 892 F.2d 112, 117 (D.C. Cir. 1989); *United States v. Joseph*, 892 F.2d 118, 121 (D.C. Cir. 1989); *United States v. Lloyd*, 868 F.2d 447, 450 (D.C. Cir. 1989). *But see United States v. Jordan*, 958 F.2d 1085, 1087-88 (D.C. Cir. 1992) (typical interdiction scenario became seizure when officer retained passenger's ticket).

from his pockets while seeing the police continuing to hold another suspect (for a warrant check) after they had found no contraband on his person.

***United States v. Brodie*, 742 F.3d 1058 (D.C. Cir. 2014).** Putting one's hands on a car when ordered to do so, no matter how briefly, constitutes a Fourth Amendment seizure.

2. Vehicle Stops

"[S]topping an automobile and detaining its occupants constitutes a 'seizure' within the meaning of [the Fourth] Amendment[], even though the purpose of the stop is limited and the resulting detention quite brief." *Delaware v. Prouse*, 440 U.S. 648, 653 (1979); *see also Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 450 (1990) ("a Fourth Amendment 'seizure' occurs when a vehicle is stopped at a [sobriety] checkpoint"); *Brower v. Inyo*, 489 U.S. 593, 599 (1989) (roadblock crossing both sides of highway was a seizure); *Berkemer v. McCarty*, 468 U.S. 420, 436 (1984) ("traffic stop significantly curtails the 'freedom of action' of the driver and the passengers"); *Galberth v. United States*, 590 A.2d 990, 995 (D.C. 1991) (seizure occurs when car is stopped at a roadblock). *But see Jones v. United States*, 972 A.2d 821 (D.C. 2009) (holding that traffic checkpoint that forced motorists to reduce their speed as they passed police was not a Fourth Amendment seizure).

All occupants of the car are equally stopped; hence, passengers have standing to challenge the stop. *See, e.g., Brendlin v. California*, 551 U.S. 249 (2007); *Cousart v. United States*, 618 A.2d 96, 105 n.4 (D.C. 1992) (en banc) (Rogers, C.J., dissenting) (citing numerous cases); *Prouse*, 440 U.S. at 650 n.1; *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). A passenger may not, however, challenge the search of a vehicle unless he or she has an expectation of privacy in the area searched. *Rakas v. Illinois*, 439 U.S. 128, 148-50 (1978); *see also Varner v. United States*, 685 A.2d 396 (D.C. 1996) (driver who was not owner must establish reasonable expectation of privacy to challenge search).

As with individuals on the street, the level of seizure of a person in a car is determined by reference to objective circumstances and the subjective feelings those circumstances evoke. *United States v. (Orson) White*, 648 F.2d 29, 33-34 (D.C. Cir. 1981); *Bailey v. United States*, 389 F.2d 305, 308-09 (1967). Relevant factors include the officer's intent in stopping the car; the impression conveyed to the occupants as to whether they were in custody or only briefly detained for questioning; the length of the stop; the questions asked, if any; and the extent of the search, if any was made. *(Orson) White*, 648 F.2d at 34; *see also Jacobs v. United States*, 981 A.2d 579 (D.C. 2009) (combination of the activation of emergency lights on a police vehicle and a request for defendant, who was in a car at the location of a reported fight, to roll down his window did not constitute an investigatory stop; the activation of the emergency lights in itself did not constitute a stop, and asking defendant to roll down the window was the only way that officers could speak to him).

In *(Carlton) Mitchell v. United States*, 746 A.2d 877, 886 (D.C. 2000), a seizure occurred when the officer approached the suspect seated in his parked vehicle, asked him to produce his license and registration, and then ordered him out of the car. The suspect was considered seized when the police officer approached him in the car even though his car was already parked. *Id*. at 885.

The intrusion must be "reasonably related in scope to the justification for [its] initiation." *Terry*, 392 U.S. at 29. Thus, when the police stop a car based on a traffic violation, they may not, by virtue of that traffic violation alone, frisk the driver, *Powell v. United States*, 649 A.2d 1082, 1091 (D.C. 1994), or the passengers, *(Taylor) Mayes v. United States*, 653 A.2d 856, 862-63 (D.C. 1995); *United States v. Page*, 298 A.2d 233 (D.C. 1972).[19] During a traffic stop, the police may detain the car's occupants only for the time required to issue a ticket and check the driver's license and registration. *See Carr v. United States*, 758 A.2d 944 (D.C. 2000) (there is no automatic right for police to order occupants out of a car for a parking violation) (citing *Pennsylvania v. Mimms*, 434 U.S. 106, 111, n.6 (1977)). However, without further articulable suspicion, the police may order the driver and any passengers out of the car based on the hazards inherent whenever an officer approaches a stopped car. *Mimms*, 434 U.S. at 111; *Maryland v. (Jerry) Wilson*, 519 U.S. 408 (1997). *See also Goines v. United States*, 964 A.2d 141 (D.C. 2009) (police had reasonable articulable suspicion that driver was in violation of motor vehicle laws in order to conduct a permissible Fourth Amendment seizure where, before police approached the car, they observed the driver slumped over the wheel of his parked car with its engine running); *Hawkins v. United States*, 902 A.2d 99 (D.C. 2006) (holding that for safety reasons police can order a driver to return to his car after initially telling him to get out of the car without violating the Fourth Amendment). *But cf. United States v. Bullock*, 510 F.3d 342 (D.C. Cir. 2007) (leaving open the question of whether an officer may order the driver out of a car when speaking to the driver without a basis to detain due to a traffic stop). Any further intrusions must be based on objective circumstances apart from the mere traffic violation. *See, e.g.*, *Mimms*, 434 U.S. at 112 (bulge in driver's clothing justified frisk); *In re D.E.W.*, 612 A.2d 194 (D.C. 1992) (passenger's furtive movement evincing unambiguous effort to conceal weapon justified frisk).

The stop of a moving vehicle is clearly a seizure. A seizure may also occur when the police approach a parked car and ask for a driver's license. *(Michael) Taylor v. United States*, 662 A.2d 1368, 1371 n.6 (D.C. 1995) (questioning parked car occupant about driver's license requires articulable suspicion); *Little v. United States*, 393 A.2d 94, 97 (D.C. 1978) (police may do so in absence of whim); *see also (Larry) White v. United States*, 763 A.2d 715, 721-22 (D.C. 2000) (police had reasonable suspicion to order occupants from parked car and temporarily handcuff driver to luggage rack). *But see Purce v. United States*, 482 A.2d 772 (D.C. 1984) (requesting identification from parked car occupant not seizure). The police clearly may not, however, order an occupant from a parked car without articulable suspicion. *Hood v. United States*, 661 A.2d 1081 (D.C. 1995); *(Donald) Jones v. United States*, 391 A.2d 1188, 1190-91 (D.C. 1978).

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***Navarette v. California*, 134 S. Ct. 1683 (2014).** Under totality of circumstances, motorist's tip that pickup truck had run her off the road provided reasonable suspicion for officer to execute traffic stop.

[19] Likewise, where a car is stopped based on reasonable suspicion that its occupants are undocumented persons, the officer may ask occupants "about their citizenship and immigration status, and . . . to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause." *United States v. Brignoni-Ponce*, 422 U.S. 873, 881-82 (1975); *accord Martinez-Fuerte*, 428 U.S. at 567.

***Watson v. United States*, 43 A.3d 276 (D.C. 2012).**

3. Frisks

Terry v. Ohio, 392 U.S. 1 (1968), approved not only certain seizures of the person in the absence of probable cause, but also a limited kind of search dubbed a "frisk." The Court sanctioned, under some limited circumstances, an officer's "carefully limited search of the outer clothing . . . in an attempt to discover weapons which might be used to assault him." *Id*. at 30. Before conducting a frisk, however, the police must have adequate justification for a *Terry* stop. *In re D.A.D.*, 763 A.2d 1152, 1157 (D.C. 2000) (limited pat-down for officer's safety warranted during valid stop in response to report of gun activity); *(Taylor) Mayes*, 653 A.2d at 864; *Gomez v. United States*, 597 A.2d 884, 891 (D.C. 1991) ("no matter how appealing the cart may be, the horse must precede it"); *Adams v. Williams*, 407 U.S. 143, 146 (1972). The frisk must be independently justified; the sole justification for a frisk is protection. *(Taylor) Mayes*, 653 A.2d at 861; *see also Germany v. United States*, 984 A.2d 1217 (D.C. 2009) (police officers were justified in conducting a pat down search for weapons of the non-resident appellant while executing a warrant for weapons and drugs in the residence). *But see United States v. Spinner*, 475 F.3d 356 (D.C. Cir. 2007) (holding that a defendant's nervousness in not enough to create a reasonable suspicion that he is armed and dangerous justifying a search). Furthermore, the scope of the intrusion is significantly limited. *Id*. The Court determined in *Florida v. J.L.*, 529 U.S. 266, 274 (2000), that an anonymous tip, such as that regarding a suspect unlawfully carrying a firearm which entails only a physical description of the suspect without more, cannot justify an officer's *Terry* frisk. An officer who has grounds to conduct a frisk may pat down the suspect's outer clothing. If, and only if, the officer then feels an object that may be a weapon may the officer reach inside the clothing to retrieve it. *Terry*, 392 U.S. at 23-27. Objects that cannot reasonably be mistaken for weapons may not be seized. *See Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979) (*Terry* provides no support for "any search whatever for anything but weapons"); *United States v. Short*, 570 F.2d 1051, 1055 (D.C. Cir. 1978). Thus, where an officer during a lawful pat-down feels an object that is obviously not a weapon, further "patting" of the object is not permissible. For example, in *Minnesota v. (Timothy) Dickerson*, 508 U.S. 366, 378 (1993), the officer overstepped the limited scope of a frisk for weapons by "squeezing, sliding and otherwise manipulating" the small lump in Dickerson's pocket, thereby concluding that the lump was crack cocaine. *Id.*; *see also United States v. Holmes*, 505 F.3d 1288 (D.C. Cir. 2007) (officer's removal of car keys from defendant's pocket during a legal *Terry* frisk violated the Fourth Amendment because the seized item could not have been weapons or contraband, and but for the illegal seizure of the keys the officers likely would not have discovered the gun and ammunition in defendant's car). Only where the initial pat down of the object, without further touching, combined with other suspicious circumstances, establishes probable cause that an object felt is contraband may the officer seize it. *See also United States v. Askew*, 529 F.3d 1119 (D.C. Cir. 2008) (en banc) (holding police violated defendant's Fourth Amendment rights by partially unzipping his outer jacket during a show-up identification procedure, so that a robbery victim could see whether defendant's sweatshirt matched that of a robbery perpetrator; unzipping a defendant's jacket constitutes a greater violation of privacy than manipulating the exterior of a pocket in a search for contraband and exceeds the scope of a proper *Terry* frisk). *Compare (Kenneth) Dickerson v. United States*, 677 A.2d 509, 513 (D.C. 1996) (finding probable cause)

with United States v. Adell, 676 A.2d 446, 448 (D.C. 1996) (no probable cause) *and Speight v. United States*, 671 A.2d 442, 449 (D.C. 1996).

In *Adams v. Williams*, the officer reached directly into the waistband of a suspect sitting in a car and retrieved a gun, with no preliminary pat-down. The Court found this conduct consistent with the standards for a *Terry* frisk, based on the fact that the officer not only had a general reason to believe the individual was armed and dangerous, but had specific information about the location of the weapon. 407 U.S. at 147-48.[20] *See also Sibron v. New York*, 392 U.S. 40, 65 (1968) (proper scope of frisk exceeded where officer made "no attempt at an initial limited exploration for arms" but instead "thrust his hand into Sibron's pocket"); *(Samuel) Moore v. United States*, 468 A.2d 1342, 1346 (D.C. 1983) (no pat-down necessary where tip received that man had gun in trouser pocket, and officer saw heavy bulge and man's hand in coat pocket); *cf. Adell*, 676 A.2d at 447 (refusing to decide whether pat-down necessary where, despite police orders, Adell put hand in pocket three times). In *Florida v. J.L.*, 529 U.S. at 274, the officer was not justified in conducting a frisk of a suspect simply because the suspect's physical appearance fit the description of that contained in an anonymous tip. *See also Watley v. United States*, 918 A.2d 1198 (D.C. 2007) (frisk not justified where officer saw defendant and two other men engage in a "hand-to-hand transaction," and then observed one of the men light what the officer believed was a crack pipe). *But see United States v. Abdus-Price*, 518 F.3d 926 (D.C. Cir. 2008) (finding no Fourth Amendment violation in conducting a protective frisk of defendant because police officers believed they had just stopped a vehicle used in an armed robbery and because defendant added to that suspicion by attempting to escape).

The rationale of the *Terry* frisk has been applied to protective searches of items carried by a suspect. *See District of Columbia v. M.M.*, 407 A.2d 698, 701-02 (D.C. 1979) (pat-down of paper bag); *United States v. Mason*, 450 A.2d 464, 467 (D.C. 1982) (per curiam) (where police stopped suspect based on anonymous tip that he was carrying gun in tote bag, officer had no suitable or safe alternative but to secure and open bag that suspect had placed on ground by his feet); *United States v. McClinnhan*, 660 F.2d 500, 503 (D.C. Cir. 1981); *Gamble v. United States*, 901 A.2d 159 (D.C. 2006). The search of an item beyond the immediate reach of the suspect, however, exceeds a frisk's strictly limited scope to protect the officer. In *Holston v. United States*, 633 A.2d 378, 380 (D.C. 1993), the police, responding to a tip for a man with a gun standing behind a car, saw Holston lean into the car's trunk, "as if putting something in," and walk away. Although the court held proper the officer's fruitless frisk of Holston, protection of the officer and the public failed to justify the subsequent search of the trunk:

> [No] exigent circumstances of protecting the police from whatever was in the trunk existed where [Holston] had already walked away from the vehicle and the police when he was stopped. . . . [T]hat [Holston] might gain access to the locked trunk or drive the car away once the police left does not present exigent circumstances similar to those in Mason and McClinnhan.

Id. at 384.

[20] The Metropolitan Police Department has instructed its officers not to dispense with a pat down unless the officer in question "reasonably believes he [or] she knows the location of the weapon." MPD General Order, Series 304, No. 10.

Michigan v. Long, 463 U.S. 1032 (1983), permits the police to search, on *Terry* grounds, areas of the passenger compartment where a weapon may be hidden only if, after a valid stop, they have reason to believe the occupant may be armed and dangerous.[21] *Accord Hood*, 661 A.2d at 1084-86 (assuming valid stop because no reasonable belief that car occupant was armed and dangerous, squeezing leather pouch between bucket seats not justified); *see also Reyes v. United States*, 758 A.2d 35 (D.C. 2000) (protective search of area was permissible when officer observed defendant handing objects wrapped in plastic to a known drug user in an open air drug market and when officer observed suspect clutching something in his hand); *(Chauncy) Turner v. United States*, 623 A.2d 1170, 1174-76 (D.C. 1993) (passenger compartment encompasses rear quarter panel of hatchback); *(Tony) Thomas v. United States*, 553 A.2d 1206, 1207-08 (D.C. 1989) (search of cloth bag in plain view on floor of car stopped for traffic violations allowed because officers had reasonable suspicion that occupants might be armed); *(Wilbur) Johnson v. United States*, 350 A.2d 738, 741-42 (D.C. 1976) (protective search of paper bag in which defendant, who had been stopped at night in high narcotics area for traffic violation, tried to put hand); *United States v. (James) Thomas*, 314 A.2d 464, 467-68 (D.C. 1974) (protective search of area under and behind glove compartment, where police had reason to suspect that car's occupants had been attempting a robbery and high-speed chase preceded stop). *Compare (Troy) Lewis v. United States*, 632 A.2d 383 (D.C. 1993) (search of glove box invalid where arrestee had parked, locked, and walked away from car before arrest for traffic offense).

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***Henson v. United States*, 55 A.3d 859 (D.C. 2012).** Officers had reasonable suspicion for *Terry* frisk based on defendant's unprovoked flight, at night, in a high crime area, after officers had stated they were investigating recent robberies in the area.

***United States v. Taylor*, 49 A.3d 818 (D.C. 2012).** In DUI case, evidence of handgun and ammunition found in car properly excluded where police did not have "reason to believe" or provide any articulable facts that indicated that evidence related to the arresting offense would be discovered in the vehicle.

***Stanley v. United States*, 6 A.3d 270 (D.C. 2010).** Frisk reasonable in absence of individualized suspicion where officers were executing search warrant of private *residence* in which defendant was present, and officers made reasonable inference that defendant might be armed and dangerous based on his association with drug activity.

"Shaking" belt of individual while conducting frisk for weapons "reasonable" where officer's experience informed him that belts can sometimes be used to hide weapons and officer neither manipulated the belt nor removed any of defendant's clothing to reveal any more than what was already exposed.

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[21] *But see Arizona v. Gant*, 129 S. Ct. 1710 (2009). Under *Gant*, "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies."

4. Arrests

A common question is whether a seizure should be treated as an arrest requiring probable cause, or a *Terry* stop requiring articulable suspicion. Of course, the defense ordinarily will want to argue that the encounter is an arrest, saddling the government with a heavier burden of justification.

Dunaway v. New York, 442 U.S. 200 (1979), held that a forcible trip from the suspect's house to a police station for custodial interrogation is improper absent probable cause, forcefully and repeatedly stressing the very limited nature of the detention permissible under *Terry*. To explain the bounds of this "special category," the Court referred to *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), holding that United States Border Patrol officers could conduct limited stops of cars to investigate suspected immigration violations, provided that the requisite articulable suspicion existed. But, as *Dunaway* reemphasized, such stops are indeed quite limited: "The investigative stops usually consumed less than a minute and involved 'a brief question or two'" and "'any *further detention or search must be based on consent or probable cause*.'" 442 U.S. at 210-12 (quoting *Brignoni-Ponce*, 422 U.S. at 880-82) (emphasis added). *But see Resper v. United States*, 793 A.2d 450 (D.C. 2002) (no Fourth Amendment violation where suspect went to police station voluntarily after police staked out and stopped his vehicle with weapons drawn).

Hayes v. Florida, 470 U.S. 811 (1985), held that a forcible trip to the police station for fingerprinting is an "arrest" requiring probable cause. Similarly, *Taylor v. Alabama*, 457 U.S. 687 (1982), suppressed a confession made six hours after a suspect was both transported to the police station without probable cause and placed in a line-up where he was not identified. *But cf. McFadden v. United States*, 945 A.2d 1203 (D.C. 2008) (*Miranda* warnings are required only where there has been such a restriction on a person's freedom of the degree associated with a formal arrest as to render him in custody and thus requires much more than a finding that a Fourth Amendment seizure has occurred).

Local case law provides a basis for arguing that a specific detention should be classified as an arrest rather than a *Terry* stop. While there is no litmus test, certain factors have been identified as relevant.

a. Physical force or brandishing of weapons

Whether a show of armed force will transform a stop into an arrest may turn on whether the level of force was a reasonable response to the situation. Thus, *In re T.T.C.*, 583 A.2d 986, 988 (D.C. 1990), found that "at least a *Terry* stop" occurred when the officer approached the vehicle "with his gun at his side." In reviewing the cases involving use of weapons, the court noted that armed suspects were involved in every case in which it had concluded that use of weapons did not convert a seizure into an arrest. *Id*. at 988 n.2.[22] Thus, *(Aubrey) Dockery v. United States*, 385

[22] See also MPD General Order, Series 304, No. 10:

> The amount of force shall not be such that it could cause death or serious bodily harm to the person stopped. This means that an officer may not use his [or] her service revolver or other service weapons to effect a stop and detention; this does not preclude a member from holding a

A.2d 767, 771 (D.C. 1978), assumed that an arrest occurred the moment that police officers drew their weapons on two suspects because the suspects were no longer free to leave. Similarly, *Irby v. United States*, 342 A.2d 33, 37 (D.C. 1975), found that an arrest was effected when a car was stopped and suspects were ordered out at gunpoint. *See also Keeter v. United States*, 635 A.2d 903, 907 n.10 (D.C. 1993) (arrest occurred when police, with guns drawn, awakened defendant in his bedroom).

Conversely, several cases involving armed suspects have found only a *Terry* stop despite the fact that police drew weapons. *See Perry v. United States*, 571 A.2d 1156, 1157-58 (D.C. 1990) (*Terry* stop where defendant was stopped at gunpoint); *Offutt v. United States*, 534 A.2d 936, 938 (D.C. 1987) (display of weapon reasonable when confronting suspected armed drug dealer alone in early morning hours, and did not transform *Terry* stop into arrest); *Groves v. United States*, 504 A.2d 602, 603 n.4 (D.C. 1986) (stopping car and ordering defendant out at gunpoint was *Terry* stop); *Franklin v. United States*, 382 A.2d 20, 22 n.5 (D.C. 1978) (detention at gunpoint of car and occupants was *Terry* stop); *Cousart v. United States*, 618 A.2d 96, 101 (D.C. 1992) (en banc) (not unreasonable for officer to be holding shotgun, which was not pointed at suspects).

Similarly, although the use of handcuffs is a familiar feature of arrests and can thus elevate a stop to an arrest, *see Prophet v. United States*, 602 A.2d 1087, 1091 (D.C. 1992) (adopting trial court's finding that "the handcuffing . . . did result in a degree of detention so as to make the encounter an arrest"), it does not conclusively establish arrest, *Womack v. United States*, 673 A.2d 603, 608-09 (D.C. 1996) (citing *In re M.E.B.*, 638 A.2d 1123, 1128 (D.C. 1993)). Nor does a police officer's physical movement of the suspect. *Flores v. United States*, 769 A.2d 126, 129-30 (D.C. 2000) (officer's backing the suspect up and removing the suspect's foot from atop a ChapStick container did not turn *Terry* stop into arrest).

b. Whether police told suspect it was an arrest

While an announcement of arrest may be compelling if not decisive evidence of an arrest, an arrest may occur even without such an announcement. Indeed, arrests have been found in part because the police failed to tell suspects they were free to go. *See, e.g.*, *Keeter*, 635 A.2d at 906-07; *(Ernest) Robinson v. United States*, 278 A.2d 458, 459 (D.C. 1971). An express disclaimer of an intention to arrest is not controlling. *United States v. Gayden*, 492 A.2d 868, 872 (D.C. 1985); *Giles v. United States*, 400 A.2d 1051, 1053-54 (D.C. 1979). Thus, *Keeter*, 635 A.2d at 906-07, found an arrest even though the officer repeatedly told the suspect he was not under arrest. *Seals v. United States*, 325 F.2d 1006 (D.C. Cir. 1963), a pre-*Terry* case involving the issue of whether a given detention was forcible at all, held that an arrest occurred even though the suspect was told that he was free to leave. FBI agents stopped a nineteen-year-old robbery suspect on the street; he ultimately accompanied them to FBI headquarters for questioning.

> The fact that Seals was told that he was free to leave and that he was not under arrest would hardly in the circumstances in which he found himself – never left

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service weapon at the time of the detention when circumstances dictate a need for such safety precautions.

> alone and constantly in the company of FBI agents in their offices (observed by him to be difficult of access and presumably thought to be difficult of exit) – suggest to him, a 19-year-old high school student, that he was in fact free.

Id. at 1008-09.

c. Length of detention

There is language from the Supreme Court suggesting that *Terry* permits only a very brief detention. MPD General Order, Series 304, No. 10, limits the permissible duration of a *Terry* stop to ten minutes. Stressing that the police needed the time to conduct a limited investigation in the immediate vicinity of the stop, the Court of Appeals has approved detentions lasting as long as fifteen minutes. *Franklin*, 382 A.2d at 23. *United States v. Sharpe*, 470 U.S. 675 (1985), held that a twenty-minute investigative detention was not an arrest requiring probable cause, where the police diligently pursued a means of investigation that was likely to quickly confirm or dispel their suspicions, it was necessary to detain the suspect during this time, and the police were acting in a swiftly developing situation. Counsel should, of course, challenge any stop that lasts longer than necessary for the legitimate investigative purpose that prompted the stop. The twenty minutes in Sharpe may be close to the maximum time that the police may detain a suspect in the absence of probable cause.

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***In re D.M.*, 94 A.3d 760 (D.C. 2014).** Order denying defendant's motion to suppress show-up identification reversed, and adjudication of delinquency reversed, because trial court did not have sufficient evidence, as a matter of law, to find that length of detention was necessary and that police acted diligently in pursuing purpose of stop where witness had to return from work to identify defendant in show-up, but record allowed for speculation only on the nature and timing of what occurred between time witness left for work and returned for show-up.

Length of seventy-five minute detention alone does not compel finding that such detention is beyond bounds permitted by *Terry*.

***West v. United States*, 100 A.3d 1076 (D.C. 2014).** Trial court did not err in denying motion to suppress evidence (a glass vial containing liquid PCP that was recovered from defendant's vehicle) observed "in plain view" where defendant's detention was not "unreasonably" prolonged by patdown, question about whether there were guns or drugs in vehicle, and request for consent to search vehicle; officer was entitled to look into vehicle while it remained lawfully stopped; and "totality of circumstances"—defendant "sweating and shaking profusely" and breathing heavily as officer approached vehicle, combined with observation of a "one-ounce vial with an amber liquid in it"—gave officer probable cause to search vehicle without a warrant.

d. Transporting the suspect from the place of the stop

One frequently litigated issue is whether the police exceeded their authority under *Terry* by transporting a suspect some distance from the initial stop. *Dunaway*, *Brignoni-Ponce*, and *Royer*

suggest that such ambulatory *Terry* detentions are improper, at least when more than minimal distances are involved; a forced trip in the back of a police transport vehicle is a quantum leap beyond the brief on-the-scene stop for questioning described in *Terry*. *Hayes v. Florida*, 470 U.S. 811 (1985), reaffirmed these cases, holding that a forced trip to the police station for investigative purposes so intrudes upon the suspect's freedom of movement and privacy interests that probable cause is required. *See also Keeter*, 635 A.2d at 907 (suspect taken from home to police station was arrested).

The Court of Appeals has approved transporting *Terry* detainees shorter distances for legitimate investigative purposes. *See King v. United States*, 550 A.2d 348, 357 (D.C. 1988) (suspects required to walk short distance for ride-by identification); *District of Columbia v. M.M.*, 407 A.2d 698, 701 (D.C. 1979) (suspects transported a mile to be viewed by witnesses to robbery); *(William) Harris v. United States*, 382 A.2d 1016, 1019 (D.C. 1978) (trip in police car to check out suspect's story concerning property police thought was stolen); *Cooper v. United States*, 368 A.2d 554, 557 (D.C. 1977) (suspect returned to apartment building as part of burglary investigation).

Yet the Court of Appeals has found arrests in factual situations that are not readily distinguishable. *See Bridges v. United States*, 392 A.2d 1053 (D.C. 1978) (arrest occurred when officers called for transport vehicle to take suspects from site of stop to police station); *(Ernest) Robinson v. United States*, 278 A.2d 458, 459 (D.C. 1971) (transport of a block and a half not the "momentary contact" sanctioned by *Terry*). In any event, as *Bridges* suggests, a trip to the stationhouse almost surely will be classified as an arrest. *See Dunaway*, 442 U.S. at 212-16 (stationhouse custodial interrogation requires probable cause); *Keeter*, 635 A.2d at 906-07 (detention and removal to homicide office for questioning was arrest).

e. <u>The degree of questioning</u>

MPD General Order, Series 304, No. 10, permits only limited questioning of the *Terry* detainee: "The officer may direct questions to the detained person for the purpose of obtaining their name, address, and an explanation concerning their presence and conduct." More persistent questioning may be custodial interrogation, marking the detention as an arrest. *Gayden*, 492 A.2d at 872-73, held that a suspect was under "arrest" as soon as questioning to which he had submitted voluntarily at the police station became "sharply accusatory in character," notwithstanding the fact that the interrogating officers repeatedly told the suspect that he was free to leave. "At this point, Gayden's detention in the police station 'was in important respects indistinguishable from a traditional arrest.'" *Id*. at 873 (quoting *Dunaway*, 442 U.S. at 212). The fact that the detentions at issue in *Dunaway* and *Taylor v. Alabama*, 457 U.S. 687 (1982), were for the purpose of custodial interrogation was one of the reasons the Supreme Court cited for its decision to label what occurred an arrest. *See also Brignoni-Ponce*, 422 U.S. at 881-82 (describing limited nature of questioning conducted during INS stop of car); *Keeter*, 635 A.2d at 907. Likewise, the nature of questioning can elevate a consensual encounter into a stop. *See Hawkins v. United States*, 663 A.2d 1221, 1228 (D.C. 1995) (initial consensual encounter became seizure when Hawkins was asked three times if he was carrying gun); *(Michael) Taylor v. United States*, 662 A.2d 1368, 1371 n.6 (D.C. 1995) (questioning driver of parked car about driver's license requires articulable suspicion); *Guadalupe v. United States*, 585 A.2d 1348, 1360

(D.C. 1991) (*Terry* stop occurred because repeated "questions, concluding in a request to conduct a body search, became accusatory in effect"). *But see Symes v. United States*, 633 A.2d 51, 53 (D.C. 1993) (approach, questioning, and request to search was not a seizure).

f. Suspect's belief about the strength of the evidence

If a detained suspect believes that the police have "the goods" on him or her, it is reasonable to think that the suspect is under arrest. At that point, the purely investigatory phase of the case is closed. The Court of Appeals looked to such facts to find that an arrest had occurred in *Campbell v. United States*, 273 A.2d 252 (D.C. 1971). Two suspects were detained as they were carrying a television down the street and their explanation was quickly disproved. *Id*. at 253. At this point, they were under arrest, for "particularly after their story had been discredited, it is clear that they could not have felt free to leave the precinct." *Id*. at 254.

D. The Degree of Justification: Articulable Suspicion for a Stop or Frisk, Probable Cause for Arrest

Once an encounter has been defined as a *Terry* stop, a *Terry* frisk, or an arrest, the Fourth Amendment is implicated and the remaining inquiry is whether the intrusion was justified.[23] A *Terry* stop must be justified by the officer's reasonable, articulable suspicion that a crime has been, or is being, committed by the suspect. A frisk can be performed only if a valid *Terry* stop has been executed and the officer has a reasonable belief that a suspect is armed and dangerous. An arrest can be made only upon probable cause.

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***Singleton v. United States*, 998 A.2d 295 (D.C. 2010).** Officer had reasonable articulable suspicion to conduct Terry stop and frisk for firearm where officer noticed "bulge" in defendant's pants pocket "consistent" with a firearm, defendant acted nervous and repeatedly looked over shoulder at officer, and defendant's awkward gait and hand movements appeared to officer to indicate presence of firearm.

1. Definitions

a. Articulable suspicion for a stop

In the beginning, there was probable cause. In 1968, when the Supreme Court carved out a "narrowly drawn" exception to the probable cause requirement, it fashioned a new standard by

[23] It is axiomatic that the facts upon which a seizure is based must be in the officer's possession prior to the seizure. *Powell v. United States*, 649 A.2d 1082, 1087 (D.C. 1994); *see also Bailey v. United States*, 389 F.2d 305, 308 (D.C. Cir. 1967) ("a search is not to be made legal by what it turns up . . . It is good or bad when it starts and does not change character from its success") (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)); *Smith v. Ohio*, 494 U.S. 541, 543 (1990) ("'justify[ing] the arrest by the search and at the same time . . . the search by the arrest,' just 'will not do'") (citations omitted); *Henry v. United States*, 361 U.S. 98, 104 (1959) ("an arrest is not justified by what the subsequent search discloses").

which to judge police conduct. *Terry*, 392 U.S. at 27. To justify a *Terry* stop, the police must have "reasonable grounds to believe" that "criminal activity may be afoot." *Id*. at 30.

> [I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. . . . And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate?

Id. at 21-22 (citations omitted); *see also id*. at 22 ("inarticulable hunches" cannot justify Fourth Amendment intrusions).

An "articulable suspicion" must be based on "[b]ehavior unusual enough to plant the seeds of suspicion in the mind of a trained police observer." *Kenion v. United States*, 302 A.2d 723, 726 (D.C. 1973) (Reilly, C.J., dissenting). "[A]wareness of the unusual, and a proper resolve to keep a sharp eye, is not the same as an articulated suspicion of criminal conduct." *United States v. Montgomery*, 561 F.2d 875, 879 (D.C. Cir. 1977); *see also In re A.S.*, 827 A.2d 46 (D.C. 2003) (behavior with multiple innocent explanations does not establish articulable suspicion). It is not enough that an officer concludes that a citizen "looked suspicious" unless the officer can support that conclusion with facts. *Brown v. Texas*, 443 U.S. 47, 52 (1979).

Concrete facts – not inchoate suspicion – must underlie a *Terry* stop. *United States v. Cortez*, 449 U.S. 411, 417 (1981). "[T]he totality of the circumstances – the whole picture – must be taken into account." *Id*.

> The analysis proceeds with various objective observations, information from police reports, if such are available, and consideration of the modes or patterns of operation of certain kinds of lawbreakers. From these data, a trained officer draws inferences and deductions – inferences and deductions that might well elude an untrained person.

Id. at 418. Further, "[this] process . . . must raise a suspicion that the particular individual being stopped is engaged in wrongdoing." *Id*. *See, e.g.*, *Sibron v. New York*, 392 U.S. 40, 73 (1968) (Harlan, J., concurring) ("There must be something at least in the activities of the person being observed or in his surroundings that affirmatively suggests particular criminal activity, completed, current, or intended"); *(Donald) Jones v. United States*, 391 A.2d 1188 (D.C. 1978); *(George) Coleman v. United States*, 337 A.2d 767 (D.C. 1975).

The general categories of sources of relevant information include:

> (1) the particular activity of the person stopped for questioning which the investigating officer has observed, (2) that officer's knowledge about (a) the activity and the person observed and/or (b) the area in which the activity is taking place, and (3) the immediate reaction or response of the person approached and questioned by the officer.

Stephenson v. United States, 296 A.2d 606, 609 (D.C. 1972).

For example, in *Hemsley v. United States*, 547 A.2d 132 (D.C. 1988), observations of a car lawfully parked in a high narcotics area, with three occupants, windows rolled up, and excessive smoke inside were held not to support more than mere suspicion, and a *Terry* stop was ruled invalid. In *(John H.) Smith v. United States*, 558 A.2d 312, 314 (D.C. 1989), the *en banc* court held that experienced officers did not have reasonable articulable suspicion where they saw Smith talking to suspected drug dealers in a high narcotics trafficking area. Neither did Smith's walking from the scene at a fast pace upon the arrival of plainclothes officers in an unmarked car provide grounds for suspicion, absent evidence that he knew the police had arrived. *Id*. at 317; *see also (Kenneth) Anderson v. United States*, 658 A.2d 1036, 1040 (D.C. 1995) (no reasonable suspicion to frisk where man in alley at midnight in high crime area walks away from police, puts hands back in his pocket after police ordered him to take them out, and acts nervously); *United States v. Bellamy*, 619 A.2d 515, 520 (D.C. 1993) (no reasonable suspicion when man in car pointed finger at undercover officer and mouthed "pow"); *Duhart v. United States*, 589 A.2d 895, 898-99 (D.C. 1991) (no reasonable suspicion where officer saw defendant and other individual examining object, and defendant shoved item in pocket when police approached, would not answer questions, and reluctantly removed hand from pocket when twice asked to do so); *In re T.T.C.*, 583 A.2d 986, 990 (D.C. 1990) (no reasonable suspicion where officer "saw one man pass another man a small white object on a corner known for drug trafficking" because object may have been a number of things besides drugs); *United States v. McMillan*, 898 A.2d 922 (D.C. 2006) (no reasonable suspicion to detain defendant who had just disembarked from a bus containing 30 people where information police possessed – that a shooter in a recent shooting incident was on the bus – lacked particularity as to any person on the bus). *But see Black v. United States*, 810 A.2d 410 (D.C. 2002) (police had reasonable suspicion to stop where officer's arrival interrupted an imminent transaction in a high drug trafficking area and where the other man in the transaction fled); *Howard v. United States*, 929 A.2d 839 (D.C. 2007) (holding that sufficient probable cause existed for warrantless arrest of defendant suspected of drug activity; defendant was seen flagging down cars in an area known for illegal drug transactions, defendant quickly walked away when he saw officer, who wearing his tactical uniform, and officer discovered bags containing marijuana on the ground where defendant had been standing).

The facts of each case must be weighed carefully to determine whether the police possessed reasonable articulable suspicion at the time of the seizure. Relevant factors are discussed *infra* Section 2 (Specific Factors Relevant to Articulable Suspicion or Probable Cause).

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***Brown v. United States*, 97 A.3d 92 (D.C. 2014).** Officers had reasonable articulable suspicion to stop defendant where seizure occurred in high crime area, officers were "there to investigate a man with a gun," defendant "had been with the suspect who matched the lookout for the man with a gun to a 'T,'" defendant "made some hesitant or indecisive motions" that "could be interpreted as nervous and evasive behavior," and defendant "tried to flee after the police or just before the police were about to pat him down."

***Hampleton v. United States*, 10 A.3d 137 (D.C. 2010).** Officer possessed reasonable suspicion to stop defendant under totality of circumstances test where, even though lookout description was vague, defendant was only individual in immediate area that fit description (and was in fact only individual that officer saw in area at all) and was stopped soon after car chase that led to bailout and resulting lookout.

***Robinson v. United States*, 76 A.3d 329 (D.C. 2013).** Error for judge to deny motion to suppress handgun and defendant's subsequent statements about gun where defendant's drunken, silent hand gestures around his chest in response to question "do you have a gun?" did not give rise to reasonable and articulable suspicion required for *Terry* stop.

***Pleasant-Bey v. United States*, 988 A.2d 496 (D.C. 2010).** Officer had reasonable suspicion to conduct Terry stop of vehicle that may have had expired temporary tags, may have attempted to evade him, and drove at an unreasonable speed through a parking lot "fairly full" of pedestrians.

b. Roadblocks

The courts tend to apply a more general reasonableness standard to seizures resulting from roadblocks or checkpoints, which are not necessarily initiated based upon individualized suspicion. The courts must apply a balancing test that examines three factors: (1) the gravity of the public concerns served by the seizure; (2) the degree to which the seizure advances the public interest; and (3) the severity of the interference with individual liberty." *Galberth v. United States*, 590 A.2d 990, 997 (D.C. 1991) (quoting *Brown v. Texas*, 443 U.S. 47, 50-51 (1979)).

Using the balancing test, the Supreme Court has found two types of roadblock seizures to be constitutional: (1) immigration checkpoints located permanently near the United States borders, *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); and (2) sobriety checkpoints, *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444 (1990). In contrast, for roadblocks designed only to advance general law enforcement purposes, such as those used to obtain evidence of drug crimes, individual suspicion is required before the police may seize someone. *City of Indianapolis v. Edmond*, 531 U.S. 32 (2000) (city checkpoint program permitting stops without individualized suspicion violated Fourth Amendment where purpose was general crime control); *Galberth*, 590 A.2d at 998 (citing *Delaware v. Prouse*, 440 U.S. 648, 659 n.18 (1979) (the governmental interest in controlling automobile thefts "is not distinguishable from the general interest in crime control" and is therefore insufficient to justify suspicionless stops). Thus, the D.C. Court of Appeals concluded in *Galberth* that a roadblock designed to address the problem of traffic congestion associated with open air drug markets was unconstitutional because the purpose was not fulfilled. *Id*. at 998; *see also (Jay) Taylor v. United States*, 595 A.2d 1007 (D.C. 1991). *But see Jones v. United States*, 972 A.2d 821 (D.C. 2009) (holding that traffic checkpoint that forced motorists to reduce their speed as they passed police was not a Fourth Amendment seizure). The court in *Jones* wrote:

> In this case the police slowed the flow of traffic by constricting three lanes into one, thus enabling the observing officers to get a good look at each vehicle and its occupants at reduced speed and under intensified artificial lighting. The motorists, however, were neither stopped nor significantly delayed. They suffered merely

> the inconvenience of momentary congestion and heightened police scrutiny. On the record before us, we are satisfied that in the moments before Officer Truong saw that Jones' van lacked a rear-view mirror, while he was slowly merging into one lane of traffic to pass through the checkpoint, neither Jones nor the van was "seized" in a Fourth Amendment sense. The police had set up no barrier and had given motorists no indication that they were required to stop for inspection; rather, they were expected to continue through the checkpoint, albeit at a reduced speed. Instead of routinely stopping the vehicles passing through the checkpoint and questioning their occupants-the hallmark of a true roadblock-the police stopped only those cars presenting noticeable traffic violations. Most of the cars proceeded through the checkpoint unimpeded. Unless an officer instructed a driver to pull over (as Officer Truong did to Jones), no reasonable motorist driving through the area would have believed that he was not free to leave. On the contrary, a reasonable driver would have considered himself free to continue driving and proceed on his way. The minor delay and inconvenience that a motorist would experience from a compliance checkpoint like the one at issue here are really no different from the permissible "incidental restrictions" on vehicles delayed by a traffic stop on a busy highway, or those accompanying normal traffic congestion. Courts routinely decline to characterize as a "seizure" police activity designed to heighten the ability of officers to observe passing vehicles.

972 A.2d at 826. *But see Mills v. District of Columbia*, 571 F.3d 1304 (D.C. Cir. 2009) (holding that individuals stopped by police at "Neighborhood Safety Zones" checkpoints in the Trinidad section of the city had demonstrated irreparable harm, in action against city, alleging that the stopping and questioning of motorists and passengers at the checkpoints violated the Fourth Amendment prohibition against unreasonable seizures, supporting issuance of preliminary injunction to enjoin further implementation of checkpoint program; it was likely that individuals' Fourth Amendment rights were being violated by the program, and the loss of their Fourth Amendment rights, even for a minimal period, would constitute irreparable harm).

c. Articulable suspicion for a frisk

An individual may only be frisked after a valid stop; however, a valid stop alone does not justify a frisk. A frisk must be supported by an independent justification. *(Taylor) Mayes v. United States*, 653 A.2d 856, 861 (D.C. 1995); *In re R.M.C.*, 719 A.2d 491 (D.C. 1998). A frisk is forbidden absent specific and articulable facts indicating not only that "criminal activity may be afoot," but also "that the persons with whom [the officer] is dealing may be armed and presently dangerous." *Terry*, 392 U.S. at 30.[24] "[T]he issue is whether a reasonably prudent man in the

[24] "Armed" and "dangerous" are two separate aspects of the requisite justification. Conceivably, an individual may be armed but not dangerous if there is insufficient reason to think that the individual will use the weapon. *See Adams v. Williams*, 407 U.S. 143, 159-60 & n.8 (1972) (Marshall, J., dissenting). Nonetheless, the court of appeals generally has permitted frisks when all that is shown is that a suspect may be armed. *See, e.g., (Eugene) Lewis v. United States*, 399 A.2d 559 (D.C. 1979); *United States v. Walker*, 294 A.2d 376 (D.C. 1972); *see also Michigan v. Long*, 463 U.S. 1032, 1057 (1983) (police may search passenger compartment of automobile if they believe "suspect is dangerous and . . . may gain immediate control of weapons").

circumstances would be warranted in the belief that his safety or that of others was in danger." *Id*. at 27.[25]

The frisk cannot be sustained if the evidence establishes that the true purpose behind it was something other than protection. Thus, Terry provided no support for a search of a shoplifting suspect's coat when the officer's conceded purpose was to see if the coat concealed any stolen goods:

> [W]hen an officer has stopped a citizen whom he has an articulable reason to suspect is presently engaged or has just engaged in criminal activity, the officer is authorized to lay hands on the citizen to discover what he may have concealed on his person only when the officer has a reasonable belief the citizen may be armed and dangerous; the justification for such frisk by the officer is solely in order to protect himself. The government does not urge on this appeal that Officer Harrison believed appellant might be armed and the record does not reflect that the officer's lifting of appellant's raincoat to uncover the leather jacket was justified as a protective frisk.

Whitten v. United States, 396 A.2d 208, 210 (D.C. 1978). Similarly, *(George) Coleman*, 337 A.2d at 771, approved the stop of a citizen but held that when a detention of several minutes did not produce incriminating facts, it was unreasonable for the officers to conduct a frisk. *See also In re R.M.C.*, 719 A.2d 491 (D.C. 1998) (stop of juvenile for curfew violation was permissible, but there were not enough facts alleged to justify suspicion that the juvenile was "armed and dangerous," thereby making the subsequent frisk unreasonable). *United States v. Brown*, 104 Wash. D.L. Rptr. 1669, 1675 (D.C. Super. Ct. 1976) (Mencher, J.), held that an examination of a suspect's handbag was improper under *Terry* because the officer's purpose was to search for evidence. "*Terry* does not allow an exploratory search even if it is limited to a frisk of outer clothing or handbag for any other reason except to discover weapons." *Id*. (citation omitted); *see also Watley v. United States*, 918 A.2d 1198 (D.C. 2007) (*Terry* frisk not justified where officer saw defendant and two other men engage in a "hand-to-hand transaction," and then observed one of the men light what the officer believed was a crack pipe); *Minnesota v. (Timothy) Dickerson*, 508 U.S. 366 (1993) (where during lawful pat down of outer clothing officer feels object obviously not weapon, further "patting" of object impermissible); *United States v. Boswell*, 347 A.2d 270 (D.C. 1975) (*Terry* doctrine did not support limited search of television covered with a blanket on suspicion that it was stolen).

The standard is no different for *Terry* frisks conducted during the stop of a car. *United States v. Page*, 298 A.2d 233 (D.C. 1972), held that the police lacked grounds to frisk a passenger where the car had been stopped because of a traffic violation and the police saw the passenger make certain "furtive gestures." *See also (Taylor) Mayes*, 653 A.2d at 862-63 (driver's traffic infraction standing alone cannot justify passenger's frisk); *Powell v. United States*, 649 A.2d 1082, 1091 (D.C. 1994) (frisk of driver unjustified where officers saw driver bend or duck

[25] In determining whether an officer was reasonably apprehensive of danger, the court will consider the officer's vulnerability. Thus, *Gilchrist v. United States*, 300 A.2d 453, 455 (D.C. 1973), held that an officer could consider the fact that the citizen was about to be transported in the officer's car, thereby increasing the officer's vulnerability, although this fact alone would not justify a frisk.

toward passenger side of car before traffic stop); *(Jesse) Tyler v. United States*, 302 A.2d 748 (D.C. 1973) (furtive gestures by sole occupant of car insufficient to justify protective search). *But see In re D.E.W.*, 612 A.2d 194 (D.C. 1992) (frisk justified when movement is not ambiguous, but is identified as attempt to conceal weapon); *United States v. (Robert) Johnson*, 212 F.3d 1313, 1316-17 (D.C. Cir. 2000) (frisk justified where continued shoving down motion in response to police confrontation suspicious enough to suggest criminal activity).

If, however, the police have particularized suspicion that an occupant is armed and dangerous, they may frisk both the person and search the areas of the passenger compartment where a weapon may be hidden. *See Michigan v. Long*, 463 U.S. 1032, 1050 (1983) (officers reasonably believed that defendant would pose danger if he were permitted to reenter car without protective search of it for weapons); *(Tony) Thomas v. United States*, 553 A.2d 1206 (D.C. 1989) (police legitimately stopped rental car on hot July day and saw ski mask sticking out of cloth bag; permissible *Terry* frisk of bag took place when, upon officer picking up ski mask, bag fell over and metal objects clanked inside). *But see Hood v. United States*, 661 A.2d 1081, 1084-85 (D.C. 1995) (squeezing leather pouch between bucket seats not justified by reasonable belief car occupant armed and dangerous where at 2 a.m. occupant waited outside home of ex-girlfriend to whom he made unspecified threats day before, hesitated in exiting car, and smelled of alcohol).

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***Stanley v. United States*, 6 A.3d 270 (D.C. 2010).** No Fourth Amendment violation for officers acting under drug warrant to frisk all occupants of residence because "drugs and guns go together" and frisks were reasonably necessary given the uncertainty of each occupant's status and the risk of harm potentially posed by each.

d. Probable cause for arrest

Whether there was probable cause to make an arrest is viewed from the perspective of "'a reasonable, cautious and prudent peace officer' and must be judged in light of his experience and training." *Munn v. United States*, 283 A.2d 28, 30 (D.C. 1971). The question is whether officers in the particular circumstances, conditioned by their observation and information, and guided by their experience, reasonably could have believed that a crime had been committed by the person to be arrested. *Id*.

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***United States v. Washington*, 670 F.3d 1321 (D.C. Cir. 2012).** Police had probable cause to believe defendant was driving in possession of open container of alcohol where they could identify odor of alcohol coming from car, clear plastic cup in backseat cup holder, and puddle of liquid on floorboard near driver's seat.

2. Specific Facts Relevant to Articulable Suspicion or Probable Cause

The general definitions of reasonable, articulable suspicion and probable cause are of limited use without reference to the factual patterns in which these issues arise. *See Ornelas v. United*

States, 517 U.S. 690, 695-96 (1996) (referring to these terms as "fluid concepts that take their substantive content from the particular contents in which the standards are being assessed"). What follows is a discussion of factors that the courts have found relevant to the question of whether a particular seizure is justified. Although the courts may look to the same factors in considering whether the police had reasonable, articulable suspicion or probable cause, the government will need significantly more evidence to meet the probable cause standard than to justify the intrusion of a *Terry* stop. Thus, each case in this section should be considered in light of the particular standard at issue.

Each case must be decided on its own facts, viewed as a whole. *See, e.g., (James) Lucas v. United States*, 256 A.2d 574, 575 (D.C. 1969). The Court of Appeals has therefore cautioned against "color matching" cases as a technique for determining whether a new fact pattern does or does not add up to probable cause. *See Tobias v. United States*, 375 A.2d 491, 493 (D.C. 1977); *Arrington v. United States*, 311 A.2d 838, 839-40 (D.C. 1973). Yet comparisons among cases are inevitable. Often the only way to persuade a trial court that the police lacked probable cause is to analogize the facts to those in an appellate decision where no probable cause was found.

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***Florida v. Harris*, 133 S. Ct. 1050 (2013).** Dog sniff can establish probable cause when government proffers evidence that dog performed adequately in controlled setting and defense does not dispute facts.

***Butler v. United States*, 102 A.3d 736 (D.C. 2014).** Unpersuaded by government's argument that identifiable aroma of drug by itself provides probable cause to arrest and search an individual, Court of Appeals concludes that arrest and subsequent search here was not unconstitutional because defendant was sole occupant of vehicle stopped during traffic stop and because aroma was of "fresh" marijuana, thus making it more likely that defendant was presently in possession of marijuana.

***Brown v. United States*, 97 A.3d 92 (D.C. 2014).** See, supra, Chapter 22.II.D.1.

***Tuckson v. United States*, 77 A.3d 357 (D.C. 2013).** Trial court erred in finding probable cause that defendant was about to commit crime of impersonating an officer where defendant was observed driving a car decked out in police gear but was not otherwise acting as a police officer.

Trial court erred in finding lawful arrest of defendant for possessing a baton without probable cause that he planned to use it as a dangerous weapon.

***Henson v. United States*, 55 A.3d 859 (D.C. 2012).** See, supra, Chapter 22.II.C.3.

***United States v. Bailey*, 622 F.3d 1 (D.C. Cir. 2010).** Trial court did not err in denying motion to suppress, finding that police had reasonable articulable suspicion that defendant was involved in drug transaction, thus providing grounds to stop defendant's car after it left alley, where court found that based on prior purchase from same drug dealer, undercover officer could reasonably infer that defendant, after speaking with drug dealer, had been waiting for arrival of drugs he

wanted to purchase when he drove into alley after another car entered alley, briefly stopped next to that car, and then quickly drove out of alley.

***United States v. Vinton*, 594 F.3d 14 (D.C. Cir. 2010).** Probable cause to arrest defendant for PPW (a "butterfly knife") where circumstances – design of knife, defendant's denial of its existence and its concealment under floor mat – reasonably suggested to officer that defendant intended to use it for "malicious purposes" and thus provided probable cause to believe defendant was carrying a "deadly or dangerous weapon."

a. Report of crime

Half of the probable cause determination is a finding that the police had reasonable grounds to believe that a crime had been or was being committed prior to the seizure. An officer can be faced with extraordinarily suspicious circumstances, yet lack probable cause to believe that a crime had been committed. Innumerable cases have turned on the government's inability to establish police awareness of the commission of a crime. *See, e.g., (Donald) Jones v. United States*, 391 A.2d 1188 (D.C. 1978); *United States v. (Major) Pannell*, 383 A.2d 1078 (D.C. 1978); *(Ernest) Robinson v. United States*, 278 A.2d 458 (D.C. 1971); *Campbell v. United States*, 273 A.2d 252 (D.C. 1971); *Daugherty v. United States*, 272 A.2d 675 (D.C. 1971).

While probable cause may exist without knowledge of the commission of a specific crime, *see, e.g., Bates v. United States*, 327 A.2d 542 (D.C. 1974); *Wray v. United States*, 315 A.2d 843 (D.C. 1974), "it is usually easier to understand police conduct and find it reasonable where they have actual knowledge of a crime and the only probability is whether the suspect is the criminal." *Campbell v. United States*, 273 A.2d at 254. Thus, knowledge that a crime was recently committed is an enormously potent ingredient in the "totality of circumstances" that comprise probable cause. *Umanzor v. United States*, 803 A.2d 983, 994 (D.C. 2002) (that the stop was made in response to a report of criminal activity supported reasonable suspicion); *see also United States v. Abdus-Price*, 518 F.3d 926 (D.C. Cir. 2008); *In re D.A.D.*, 763 A.2d 1152, 1156 (D.C. 2000). Lack of such knowledge, while not necessarily dispositive, will make it harder for the government to show probable cause or even articulable suspicion. *See (Donald) Jones v. United States*, 391 A.2d 1188; *(Ernest) Robinson v. United States*, 278 A.2d 458 (D.C. 1971).

Even if a crime has been committed, its connection with the suspect may be too weak.[26] For example, *(Major) Pannell* involved extremely suspicious circumstances: two suspects were seen at about midnight in an area where at least one burglary had occurred that day. One was carrying a television set, the other a clock radio and a portable radio in a paper bag. Inquiry revealed a story of highly questionable truth. Yet the court found no probable cause.

[26] Information about police knowledge regarding commission of a crime may become available through discovery, the preliminary hearing, or a tape of the radio run. If the offense occurred several days before the arrest, and the officer indicates that this information came from a roll call, a copy of the bulletin read to the officer should be obtained. An effective cross-examination can be built on the vagueness of the reported crime or on distinctions between the report and the defendant's activities. *(Antonio) Green v. United States*, 662 A.2d 1388, 1390 (D.C. 1995) (roll call report of gunfire in general area at unspecified time "is of little or no weight"). If the officer did not possess any information regarding the occurrence of a crime, this point should of course be emphasized.

> Although Officer Vincent knew that a burglary had taken place in the area, it had occurred more than eighteen hours before and he was not aware of what, if anything, had been taken. The knowledge that a burglary has occurred in a particular area is hardly a basis for seizing property carried by citizens.

383 A.2d at 1080.

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***Bean v. United States*, 17 A.3d 635 (D.C. 2011).** Probable cause existed to believe that defendant had violated POCA statute where officer saw in plain view unsealed and partially consumed, but closed, bottle of alcohol on floor of vehicle inches from where defendant had been sitting.

b. Proximity to crime scene

Bryant v. United States, 599 A.2d 1107, 1112 (D.C. 1991), found proximity to the crime scene to be the decisive factor in determining that there was adequate justification for a *Terry* stop. If the probable cause determination is a "practical and factual matter" and not a "philosophical concept existing in a vacuum," it is obviously relevant that an individual was stopped near the scene of a crime and shortly after its commission. *Bell v. United States*, 254 F.2d 82 (D.C. Cir. 1958). *See, e.g.*, *McFerguson v. United States*, 770 A.2d 66 (D.C. 2001); *In re D.A.D.*, 763 A.2d at 1156; *(Lamont) Hill v. United States*, 627 A.2d 975 (D.C. 1993); *Gomez v. United States*, 597 A.2d 884 (D.C. 1991); *Perry v. United States*, 571 A.2d 1156, 1158 (D.C. 1990); *King v. United States*, 550 A.2d 348, 357 (D.C. 1988). *But see In re T.L.L.*, 729 A.2d 334 (D.C. 1999) (suspect found on scene fifty-five minutes after robbery too long to contribute to probable cause calculation).

As the amount of time between the crime and the stop increases, the significance of proximity diminishes. Thus, *(Major) Pannell* found little significance in the fact that a burglary was committed in the neighborhood eighteen hours before the stop. 383 A.2d at 1080; *see Cauthen v. United States*, 592 A.2d 1021, 1023 (D.C. 1991) (15-minute delay between receipt of tip that persons were selling drugs and police arrival at location "key factor" in finding no reasonable suspicion); *(Marvin) Brown v. United States*, 590 A.2d 1008, 1017 (D.C. 1991) (government failed to show that suspect probably still would have been in area because no evidence of when informant called police).

Counsel must scrutinize the tapes of the radio run 911 calls and police reporting forms to understand the chain of events that resulted in a client's arrest. For example, while the client may have been seized immediately after a lookout was broadcast, the radio run may indicate that the underlying offense occurred hours earlier. The PD 251 will also indicate when the offense occurred. The time of arrest can be gleaned from radio runs or other police reporting forms (e.g., PD 379 for juvenile arrests and PD 163 for adult arrests).

c. Time of day

The presence of an individual on the street at an unlikely hour can add slightly to an officer's suspicion. *See, e.g., Umanzor v. United States*, 803 A.2d at 994; *Adams v. Williams*, 407 U.S. 143 (1972); *Crowder v. United States*, 379 A.2d 1183 (D.C. 1977); *In re E.F.B.*, 320 A.2d 95 (D.C. 1974); *Wray v. United States*, 315 A.2d 843; *Jeffreys v. United States*, 312 A.2d 308 (D.C. 1973).[27]

However, mere presence on the street at a late hour is not criminal conduct, and contributes only marginally to suspicion. *See Powell v. United States*, 649 A.2d 1082, 1087 (D.C. 1994) ("fact that police officers encountered an individual in the early morning hours does not provide a basis for a seizure"); *(Donald) Jones v. United States*, 391 A.2d 1188, 1191 (D.C. 1978) ("The fact that the officer encountered the two men during the early morning hours in an area where there had been robberies and drug trafficking certainly did not provide a basis for the 'seizure'"). *But see In re D.A.D.*, 763 A.2d 1152, 1156-57 (D.C. 2000) (that suspect was encountered "at night" – at 11 p.m. – supported reasonable suspicion).

If walking on the street at an unusual hour contributes marginally to suspicion, presence on the streets at a usual hour ought to detract. *See, e.g., Curtis v. United States*, 349 A.2d 469, 471-72 (D.C. 1975) (7:20 p.m.); *Kenion v. United States*, 302 A.2d 723, 725 (D.C. 1973) (3:30 p.m.).

d. Presence in a high crime area

Police routinely cite the high crime rate of a neighborhood to justify a stop or arrest. While relevant,[28] the significance of this factor is slight.

> The flaw in the State's case is that none of the circumstances preceding the officers' detention of appellant justified a reasonable suspicion that he was involved in criminal conduct. . . . The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct.

Brown v. Texas, 443 U.S. 47, 51-52 (1979); *see also Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). The *en banc* Court of Appeals displayed its skepticism of this factor in *(John H.) Smith v. United States*, 558 A.2d 312, 316 (D.C. 1989), stating that "where the suspected criminal activity is drug dealing, based on a purchase by an undercover police officer, to give significant weight to the character of the neighborhood as an additional factor seems of doubtful validity." Referring to the government's characterization of the area as a "high narcotics activity" area, the court cautioned:

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[27] A variation on the theme is reflected in *(Tony) Thomas*, 553 A.2d at 1208, where the presence of a ski mask in a rental car in July was sufficient to arouse reasonable suspicion, and *(Eugene) Lewis*, 399 A.2d at 561, in which police were properly suspicious of a person carrying a sweater that appeared to be wrapped around a gun-shaped object in the warm month of June.

[28] *See, e.g., (Dexter) Davis v. United States*, 781 A.2d 729, 735 (D.C. 2001); *Nixon v. United States*, 402 A.2d 816 (D.C. 1979); *United States v. Childs*, 379 A.2d 1188 (D.C. 1977); *(Thomas) Robinson v. United States*, 355 A.2d 567 (1976); *United States v. (Charles) White*, 655 F.2d 1302 (D.C. Cir. 1981).

> "[t]his familiar talismanic litany, without a great deal more, cannot support an inference that appellant was engaged in criminal conduct.' For "it is necessary to remind again that thousands of citizens live and go about their legitimate day-to-day activities in areas which surface . . . in court testimony, as being high crime neighborhoods. The fact that the events here at issue took place at or near an allegedly 'high narcotics activity' area does not objectively lend any sinister connotation to facts that are innocent on their face."

Id. (citations omitted); *see (Marvin) Brown v. United States*, 590 A.2d 1008, 1020 n.17 (D.C. 1991); *Duhart v. United States*, 589 A.2d 895, 899-900 (D.C. 1991); *Haywood v. United States*, 584 A.2d 552, 555 (D.C. 1990) ("the parroting of phrases, such as 'high crime area,' that conjure up inferences of proper police conduct without regard to the reasonableness of police actions given the circumstances of an individual case, may do violence to the rationale of *Smith*"); *In re T.T.C.*, 583 A.2d 986, 990 (D.C. 1990); *see also Shelton v. United States*, 929 A.2d 420 (D.C. 2007) (evidence that parking lot in which transaction occurred was a "high drug area" not enough to support a finding of probable cause); *Hemsley v. United States*, 547 A.2d 132, 134 (D.C. 1988) (presence with two others in parked car with smoke inside is not sufficiently suspicious, even in high crime area, to warrant stop); *United States v. (Harvey) Johnson*, 496 A.2d 592, 598 (D.C. 1985) (persons unfamiliar to police seated in parked car late at night in high crime area insufficient to justify *Terry* stop); *(Donald) Jones*, 391 A.2d at 1191.

The Court of Appeals has given more weight to the "high crime" factor when the location described is more precise than the "neighborhood." Thus, in *Peay v. United States*, 597 A.2d 1318, 1320-21 (D.C. 1991) (en banc), the court considered the fact that the encounter took place in "not some generalized neighborhood or even public street where drug activity was rife but rather a specified, identified, and isolated private locale, known for such trafficking and regularly patrolled by the police." *See also Funchess v. United States*, 677 A.2d 1019, 1022 (D.C. 1996) (particular carry-out); *(Taylor) Mayes v. United States*, 653 A.2d 856, 859 & n.12 (D.C. 1995) (impact of "high crime" factor appreciably reduced where building described as crack house was high-rent luxury apartment building).

The criminal reputation of the neighborhood must be related to the particular conduct of the citizen. *United States v. Bellamy*, 619 A.2d 515, 522 (D.C. 1993) ("high crime area" known for prostitution, not drugs or violence); *(Patrick) James v. United States*, 829 A.2d 963, 968 (D.C. 2003) (that area was known for gun possession, the crime of which police suspected the defendant, contributed to reasonable suspicion). Similarly, if the officer cannot say what kind of crimes were committed in a neighborhood, this factor should be worth little or nothing. Finally, for the neighborhood's reputation to be of any relevance, the police have to have had it in mind when deciding to make a stop. *United States v. Brown*, 104 Wash. D.L. Rptr. 1669, 1672 n.2 (D.C. Super. Ct. 1976) (Mencher, J.).

2014 Supplement

***Johnson v. United States*, 40 A.3d 1 (D.C. 2012).** Probable cause to arrest in context of a controlled delivery where officers knew that the package contained drugs and where defendant acknowledged he was the intended recipient, received the package at an address that was not his home, and subsequently exercised control over the package by leaving the house with it and placing it in his car.

e. Prior knowledge of citizen

Police knowledge of a person's prior criminal record may have some slight probative value, *see, e.g., (Harold) Ford v. United States*, 376 A.2d 439, 441 (D.C. 1977), but cannot itself justify a stop. *Beck v. Ohio*, 379 U.S. 89, 93-94 (1964).

> All that remains . . . to justify the police action is the officer's belief that appellant was possessed of a criminal record. The Government has cited no case and we have found none which countenances an invasion of a person's fourth amendment rights upon a showing, without more, of a police officer's good faith belief that such person had a criminal record.

Kenion v. United States, 302 A.2d 723, 725 (D.C. 1973). Conversely, the defense may benefit from the officer's lack of prior knowledge of the suspect. *See (Donald) Jones v. United States*, 391 A.2d 1188 (D.C. 1978); *United States v. (Major) Pannell*, 383 A.2d 1078 (D.C. 1978); *(Ernest) Robinson v. United States*, 278 A.2d 458 (D.C. 1971).

f. Guilt by association

One's associations alone cannot support a reasonable suspicion of involvement in criminal activity. *In re K.P.*, 951 A.2d 793 (D.C. 2008) (report of armed threats with generalized description of a group of juveniles insufficient to justify *Terry* stop of a defendant merely because he was with a group of juveniles). *Sibron v. New York*, 392 U.S. 40, 62 (1968), a companion case to *Terry*, rejected as unreasonable the inference that persons who talk to narcotics addicts are engaged in narcotics trafficking, finding no basis in that case even for a stop or frisk. *See also Ybarra v. Illinois*, 444 U.S. 85 (1979) (search of a bar patron based on a warrant for premises insupportable). The defendant in *(John H.) Smith v. United States*, 558 A.2d 312 (D.C. 1989) (en banc), was seen talking to two persons whose descriptions had recently been broadcast in regard to an undercover drug purchase. The court held that the subsequent *Terry* stop was unjustified, referring to this proffered basis as "guilt by association." *Id*. at 315; *see also Haywood*, 584 A.2d 552 (no reasonable suspicion where defendant was seen handing money to person described in informant's tip). *Haywood* also "rejected the notion of locational taint 'whereby an individual's behavior is explained by reference to what others in that area or neighborhood may know about the arrest procedures of the police department.'" *Id*. at 555 (citation omitted). *(Troy) Thompson v. United States*, 745 A.2d 308, 315 (D.C. 2000), held that mere association with the co-defendant was insufficient to infer that the co-defendant was engaged in criminal activity. *But see Funchess v. United States*, 677 A.2d 1019, 1021 (D.C. 1996) (finding more than mere association where, immediately after exchange of money for

cocaine ziplock, seller gave defendant, the suspected holder, the money received in exchange); *Bsharah v. United States*, 646 A.2d 993, 997 (D.C. 1994) (where officer saw Bsharah's companion with gun on crowded Metro train stopped at station for short while, reasonable to remove Bsharah and companion from train to platform to control situation and reduce risk to passengers).

2014 Supplement

***Bennett v. United States*, 26 A.3d 745 (D.C. 2011).** Police detention of defendant for a show-up identification on the sole basis that he was standing next to a person who was reasonably suspected of committing a robbery was not justified by either of the narrow exceptions to *Terry* allowing for a brief stop under exigent circumstances.

g. Response to questioning

"A refusal to listen, answer, or cooperate with the police does not furnish grounds for an investigatory stop." *Duhart v. United States*, 589 A.2d 859, 900-01 (D.C. 1991). The defendant in *Duhart* "initially cooperat[ed] when the officer asked to speak to him, [but] did not thereafter respond to the officer's questions and only 'reluctantly' took his hand out of his pocket," after twice being asked to do so; his failure to cooperate was not a "legitimate ground to conduct an investigatory stop"; otherwise, the "[r]ecognition that citizens have no legal duty to speak to the police would be rendered meaningless." *Id.* at 901; *see also (Kenneth) Anderson v. United States*, 658 A.2d 1036, 1040 (D.C. 1995) (frisk unjustified where defendant reluctantly complies with order to remove hands from pockets, then places hands in pockets again).

Refusing to provide identification is neither a crime nor, "in most circumstances, even a ground for suspecting criminal activity." *United States v. Wylie*, 569 F.2d 62, 69 (D.C. Cir. 1977).[29] It is simply "too bland a circumstance to connote criminality objectively." *Id.* at 254, 569 F.2d at 85 (Robinson, J., dissenting); *see also Powell*, 649 A.2d at 1087 (that driver stopped for traffic violation asked officer why he was being stopped and nervously hesitated before providing driver's license and car registration did not provide basis for frisk). The ability and willingness to produce facially valid identification, however, is at least a slight indication that the individual may not be engaged in criminal conduct. The Supreme Court determined in *Florida v. Bostick*, 501 U.S. 429, 437 (1991), that refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.

Factors that can be considered in determining whether a seizure is justified include inconsistent answers, *Lee v. United States*, 242 A.2d 212 (D.C. 1968); improbable explanations, *In re E.F.B.*, 320 A.2d 95 (D.C. 1974); exculpatory explanations confirmed to be false, *(Lisa) Oliver v. United States*, 656 A.2d 1159, 1170 (D.C. 1995); and nervousness, *(Eugene) Lewis v. United States*, 399 A.2d 559, 561 (D.C. 1979). *See also United States v. Barnes*, 496 A.2d 1040, 1043-45 (D.C. 1985) (defendant's loitering outside store at closing time while companion twice entered and

[29] *Kolender v. Lawson*, 461 U.S. 352 (1983), struck down as unconstitutionally vague a California statute requiring persons who loiter or wander the streets to provide "credible and reliable" identification and to account for their presence when asked by police conducting a legitimate *Terry* stop, because the statute gave police unbridled discretion to determine whether the suspect had satisfied it.

exited store did not create grounds for *Terry* stop, but when defendant could not give valid reason for being in front of store and admitted a prior robbery conviction, grounds for frisk existed); *(William) Harris v. United States*, 382 A.2d 1016, 1019 (D.C. 1978) (inconsistent answers warranted further detention). *But see (Kenneth) Anderson v. United States*, 658 A.2d 1036, 1037 (D.C. 1995) (no reasonable suspicion despite defendant's false answers and nervousness); *United States v. Spinner*, 475 F.3d 356 (D.C. Cir. 2007) (holding that a defendant's nervousness in not enough to create a reasonable suspicion justifying a frisk). A failure to answer truthfully and completely, however, cannot create probable cause where the police only observe innocent behavior like carrying a television. *See, e.g., (Major) Pannell*, 383 A.2d 1078 (false information); *Daugherty*, 272 A.2d 675 (D.C. 1971) (defendant's "explanation for possession of the [TV] set heightened suspicions already aroused"); *Campbell*, 273 A.2d 252, 255 (D.C. 1971) (bogus explanation for possession of television set).[30]

2014 Supplement

***Smith v. United States*, 987 A.2d 432 (D.C. 2010).** Trial court erred in relying on defendant's ambiguous body language to find that arresting officer reasonably and objectively understood as an admission of guilt defendant's reply of "yeah" in response to officer's inquiry "You're telling me that's not marijuana?"

h. Possession of goods believed to be stolen

The police should not assume criminality from the sight of persons carrying expensive property on the street, even when other circumstances add somewhat to their suspicions. *See (Major) Pannell*, 383 A.2d 1078; *United States v. Boswell*, 347 A.2d 270 (D.C. 1975). "Our often criticized society has not yet deteriorated to the point where we can say that a man who carries openly, on the street, a large household appliance is probably a thief." *Campbell*, 273 A.2d at 255.

Similarly, *Henry v. United States*, 361 U.S. 98 (1959), held that the FBI lacked probable cause to believe that Henry was in possession of stolen liquor, even though an agent knew that thefts of liquor were common and had seen Henry in possession of packages under somewhat suspicious circumstances.

> The fact that packages have been stolen does not make every man who carries a package subject to arrest nor the packages subject to seizure. The police must have reasonable grounds to believe that the particular package carried by the citizen is contraband. Its shape and design might at times be adequate. The weight of it and the manner in which it is carried might at times be enough. But

[30] MPD General Order, Series 304, No. 10 provides:

> Neither refusal to answer questions nor to produce identification by itself establishes probable cause to arrest. However, such refusal may be considered, along with other factors, as an element contributing to probable cause if, under the circumstances, an innocent person could reasonably be expected not to refuse.

> there was nothing to indicate that the cartons here in issue probably contained liquor.

Id. at 104.

Nonetheless, probable cause or reasonable suspicion has been found when additional incriminating facts are present. *See In re C.A.P.*, 633 A.2d 787, 816 (D.C. 1993) (car stolen with uncovered broken window in December); *(Glenn) Edwards v. United States*, 379 A.2d 976, 978 (D.C. 1977) (flight and distinctive markings on property).

i. Flight

> [F]light cannot imply consciousness of guilt in all cases. Leaving a scene hastily may be inspired by innocent fear, or by a legitimate desire to avoid contact with the police. A citizen has as much prerogative to avoid the police as he does to avoid any other person, and his efforts to do so, without more, may not justify his detention . . .
>
> To provide grounds for suspicion . . . "the circumstances of the suspect's efforts to avoid the police must be such as 'permit[ ] a rational conclusion that flight indicated a consciousness of guilt.'"

(John H.) Smith, 558 A.2d at 316 (en banc) (citations omitted). *Smith* characterized cases in which the court has found that flight indicated a consciousness of guilt as those in which "the accused clearly knew that the police were present and reacted by immediately running from the scene of the alleged crime." *Id*. at 316-17 (citing *United States v. Bennett*, 514 A.2d 414 (D.C. 1986); *Umanzor*, 803 A.2d at 994 (reasonableness of stop supported by fact that vehicle was one block from the Maryland line); *Tobias v. United States*, 375 A.2d 491, 492 (D.C. 1977); *Hinton v. United States*, 424 F.2d 876, 879 (D.C. Cir. 1969)); *see also Powell v. United States*, 649 A.2d 1082, 1085 & n.5 (D.C. 1994) (no flight where driver stopped car several blocks from where police first activated emergency signals); *Hemsley v. United States*, 547 A.2d 132, 135 (D.C. 1988) (more than minimal movement is required to call it flight). The defendant in *Smith* neither "ran" nor "bolted." 558 A.2d at 317. Neither was there any basis, despite the government's argument that most people in that neighborhood would recognize a "jump-out" team, for the officer to draw a "rational and reasonable belief" that Smith himself believed they were police officers. *Id*. Thus, Smith's "flight" had no "impact in the Fourth Amendment equation." *Id*.
Several decisions have applied *Smith* to find no consciousness of guilt where the defendant either did not know that the police were present or did not run upon recognizing the police. *See Cauthen*, 592 A.2d at 1024 (defendant knew that police were present and quickly walked away); *(Marvin) Brown*, 590 A.2d at 1019 (defendant merely walked away); *Duhart*, 589 A.2d at 900 (same); *Haywood*, 584 A.2d at 555 (no evidence that defendant saw unmarked police car; even if he did, no inference that he "recognized it as a police cruiser"). *But see (Patrick) James v. United States*, 829 A.2d 963, 969 (D.C. 2003) (though defendant's failure to pull over promptly did not demonstrate an attempt to flee, it contributed to reasonableness of officer's fear); *Di Giovanni v. United States*, 810 A.2d 887, 895 (D.C. 2002) (sufficient evidence of flight where defendant ran away, swam across a creek, and tried to mislead police by saying "[t]here's a man

with a gun up there"); (*In re R.E.G.*, 602 A.2d 146, 150 (D.C. 1992) ("flooring" accelerator and attempting to jump out of truck in response to police contact evidences guilty conscience); *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (officers justified in stopping suspect when suspect's flight was unprovoked); *(Ernest) Wilson v. United States*, 802 A.2d 367 (D.C. 2002) (rejecting argument that only "headlong flight" meets test of *Wardlow;* accelerated walk as if "in a rush," but not running, might support a finding of unprovoked flight)

Flight alone is not sufficient to justify a *Terry* stop. *See Williamson v. United States*, 607 A.2d 471, 479 (D.C. 1992) (Schwelb, J., concurring) (attempt to leave scene of shooting is a "slim reed indeed on which to predicate a finding of articulable suspicion"); *In re D.J.*, 532 A.2d 138, 141 (D.C. 1987) (no adverse inference from behavior manifesting only a desire not to talk to police)[31] *cf. Holston v. United States*, 633 A.2d 378, 382-86 (D.C. 1993) (reasonable suspicion, but not probable cause, where tip was corroborated and suspect reacted to police by looking startled, slamming car trunk, and walking away). Moreover, because "a person has a right to walk away to avoid contact with the police, he also has a right to attempt to observe an area to learn whether the police have left." *(Antonio) Green v. United States*, 662 A.2d 1388, 1391 (D.C. 1995) (retreating and "peeping around the corner" did not evince consciousness of guilt).

j. Furtive gestures

The government frequently points to a "furtive gesture" as a reason for a stop. *See, e.g., (Percy) Lawson v. United States*, 360 A.2d 38 (D.C. 1976); *United States v. (James) Thomas*, 314 A.2d 464, 467 (D.C. 1974); *Jeffreys v. United States*, 312 A.2d 308, 310 (D.C. 1973). But "furtive gestures" are even more ambiguous than other supposed indicia of guilt, such as flight. For example, a stop was unjustified in *Curtis v. United States*, 349 A.2d 469, 472 (D.C. 1975), where the defendant walked through a neighborhood known for serious weapons problems, and moved his right arm to the left side of his coat when someone shouted "police officers." *See also Reid v. Georgia*, 448 U.S. 438 (1980) (per curiam) (furtive behavior, even with other arguable evidence of criminality, did not justify *Terry* stop); *(Antonio) Green*, 662 A.2d at 1391 (no articulable suspicion when defendant pocketed small dark object upon seeing police); *(Kenneth) Anderson*, 658 A.2d at 1040 (putting hands back into coat pockets after having removed them upon officer's request did not justify frisk where no bulge or object being concealed that officer could identify as potential weapon); *Powell*, 649 A.2d at 1091 (ambiguous movement of driver ducking or bending toward passenger side of car before stopping car did not justify driver's frisk); *Duhart*, 589 A.2d at 900 (no articulable suspicion when defendant shoved something into his pocket upon seeing police); *United States v. Page*, 298 A.2d 233 (D.C. 1972) (furtive movements of passenger during traffic stop did not provide grounds to frisk). In *In re D.T.B.*, 726 A.2d 1233, 1236 (D.C. 1999), there was no reasonable, articulable suspicion to frisk after police observed a person inside a laundromat fidgeting in his waist area. *But see In re D.E.W.*, 612 A.2d 194, 196 (D.C. 1992) (unambiguous effort to conceal a weapon justifies a frisk); *(Patrick) James v. United States*, 829 A.2d at 967-68 (D.C. 2003) (search justified by officer's observation of suspect first sitting upright and then leaning all the way forward); *In re D.A.D.*, 763 A.2d at 1156 (that defendant was tiptoeing in a suspicious semi-crouched position was a

[31] Although *California v. Hodari D.*, 499 U.S. 621 (1991), modified *D.J.*'s holding regarding when a seizure occurs, the holding on lack of justification for a *Terry* stop remains in force.

factor supporting limited pat-down and frisk for weapons). In *United States v. (Robert) Johnson*, 212 F.3d 1313, 1316-17 (D.C. Cir. 2000), a *Terry* frisk was permissible when the suspect made "shoving down" furtive gestures after the officer drew his weapon and ordered the suspect to raise his hands.

k. Plain view of suspected drugs or container

An officer who immediately recognizes an item as contraband has probable cause to arrest. The more difficult cases involve containers that may or may not hold illegal substances. *Waters v. United States*, 311 A.2d 835 (D.C. 1973), held that the officer lacked probable cause even though five times before, at the same school, he had seen similar manila envelopes used to hold narcotics. *See also (Carlton) Mitchell v. United States*, 746 A.2d 877, 886 (D.C. 2000) (officer did not have probable cause to arrest the defendant or to search incident to arrest an illegally parked car after the officer observed a closed container of partially consumed alcohol and cigar blunts); *Christmas v. United States*, 314 A.2d 473, 476-77 (D.C. 1974) (no probable cause for seizure of vial when all officer knew was that prescription label looked old and worn, and officer claimed no special expertise in recognizing narcotics); *United States v. Wright*, 113 Wash. D.L. Rptr. 729 (D.C. Super. Ct. 1985) (Richter, J.) (no probable cause to seize manila envelope on front seat of car, despite officer's testimony that such envelopes are frequently used to carry marijuana). *But see In re J.D.R.*, 637 A.2d 849, 850 (D.C. 1994) (probable cause where officer had personal experience with small plastic ziplock as drug container); *(Ezzard) Lawrence v. United States*, 566 A.2d 57, 58 (D.C. 1989) (probable cause to seize single clear plastic packet of white powder that officer recognized as heroin); *Munn v. United States*, 283 A.2d 28, 30 (D.C. 1971) (relying heavily on officer's experience to find that observation of tinfoil packets gave him probable cause); *United States v. (Reginald) Brown*, 463 F.2d 949, 950 (D.C. Cir. 1972) (per curiam) (observation of same type of envelope in which officer had previously found narcotics supported probable cause finding). *Price v. United States*, 429 A.2d 514, 516-17 (D.C. 1981), found probable cause when an experienced officer saw a passenger in a car parked in a high narcotics area make a furtive gesture, and saw a manila envelope precisely where the gesture suggested that an object had been placed; the appearance of the envelope alone would not have been enough, but the totality of the circumstances provided sufficient grounds to believe that it contained contraband.[32] *See also United States v. Bolden*, 429 A.2d 185 (D.C. 1981) (experienced narcotics officer justifiably concluded that tinfoil package on floor of car contained drugs because aroma of marijuana emanated from car and officer had just seen passenger quickly extinguish hand-rolled cigarette).

2014 Supplement

***United States v. Nash*, 100 A.3d 157 (D.C. 2014).** In consolidated interlocutory appeal of suppression rulings in two cases, Court of Appeals found no reasonable, articulable suspicion in first case justifying further search of defendant's car after arrest for POCA based on police seizure of single can of Four Loko because beverage not packaged or sold in way that would suggest that additional evidence of POCA would be found in car. Grant of suppression motion

[32] The officer's expertise is often a determining factor: "An officer experienced in the narcotics traffic may find probable cause in the smell of drugs and appearance of paraphernalia which to the lay eye is without significance. His action is not measured by what might be probable cause to an untrained civilian passerby." *Bell*, 254 F.2d at 86.

overturned in second case because type of open container found—a half-full bottle of tequila—is usually drunk via cups, and therefore it was reasonable to believe that further evidence of POCA could be found in car.

l. Exchange of items

A one-way transfer of an item not identified as contraband cannot justify a Fourth Amendment seizure. *In re T.T.C.*, 583 A.2d 986, 990 (D.C. 1990) (experienced officer saw one man passing another a small white object; *Terry* stop not justified); *see also (Troy) Thompson v. United States*, 745 A.2d 308, 313 (D.C. 2000); *Duhart*, 589 A.2d 895 (officer saw two men examining "something"); *Haywood*, 584 A.2d 552 (one-way money transfer in high drug area, even when combined with tip that other man was a drug dealer, insufficient); *Waters v. United States*, 311 A.2d 835 (D.C. 1973) (evidence insufficient where officer saw high school student trying to stuff money into an envelope like those used to hold narcotics and saw a known narcotics user approach student but turn away at sight of officer); *Vicks v. United States*, 310 A.2d 247 (D.C. 1973) (police saw appellant receive money, but did not see him pass anything to companion); *Gray v. United States*, 292 A.2d 153 (D.C. 1972) (one-way transfer). *But see Flores v. United States*, 769 A.2d 126, 129 (D.C. 2000) (the transfer of a ChapStick container, "a personal item not normally subject to sharing," was a factor supporting reasonable suspicion that the defendants were engaged in a drug transaction).

While a two-way exchange does not always support probable cause to arrest, "[t]he exchange of small objects for currency is an important and sometimes decisive factor in determining the existence of probable cause." *Tobias v. United States*, 375 A.2d 491, 494 (D.C. 1977) (probable cause based on two-way exchange, combined with furtive activity, flight, and presence in high narcotics area); *see also Prince v. United States*, 825 A.2d 928, 932-33 (D.C. 2003) (quoting *Tobias*) (exchange of money for a small object supported probable cause). Police in *United States v. Green*, 670 F.2d 1148, 1151-53 (D.C. Cir. 1981), saw a transfer of money to Green from a customer via a "runner," in return for an unidentified object. All three individuals made efforts to conceal the object of the transaction, and Green subsequently fled at the approach of the police. No one of these factors alone would have sufficed to establish probable cause for Green's arrest, but the totality of the circumstances and, more critically, the sequence in which the events occurred, did. *See also Coles v. United States*, 682 A.2d 167, 168 (D.C. 1996) (exchange of ziplock plastic bag for currency, coupled with extensive officer expertise, constituted probable cause); *Peterkin v. United States*, 281 A.2d 567 (D.C. 1971) (in combination with officer's expertise and high level of narcotics use in neighborhood, exchange of something from vial for money supported probable cause). In *(Troy) Thompson*, 745 A.2d 308, 314 (D.C. 2000), officers had reasonable, articulable suspicion to conduct an investigatory stop after observing the retrieval of something (an object) from an alley and a subsequent two-way exchange of currency for the small object in a high drug-activity area. The D.C. Court of Appeals has rejected a bright-line rule that anything short of a completed two-way transaction is insufficient to establish probable cause, holding instead that probable cause can be supported by evidence of an ongoing, but interrupted, two-way transaction – "the middle situation" between a one-way exchange and a completed two-way transaction. *(Dexter) Davis v. United States*, 781 A.2d 729, 736 (D.C. 2001); *see also Jefferson v. United States*, 906 A.2d 885, 888 (D.C. 2006) (per curiam) ("Typically, when all that has been observed is a one-way transfer of an

unidentified object, that will not provide probable cause to arrest or search . . . sometimes not even reasonable suspicion for a stop under *Terry v. Ohio*. But we have been careful to explain that a two-way exchange of apparent drugs for money is not a precondition to a finding of probable cause. Rather, the real key is these case is how the observed transaction fits into the totality of the circumstances."). *But see Shelton v. United States*, 929 A.2d 420, 425 (D.C. 2007) (reversing denial of suppression motion noting "the instant case involves a two-way transaction on a record otherwise devoid of suspicious circumstances and where the observed transaction is capable of numerous innocent explanations").

m. Descriptions

If a seizure is based on a broadcast "lookout" relating to a recent crime,[33] two inquiries must be made: (1) whether the information about what occurred supports probable cause or a reasonable suspicion that a crime occurred and (2) whether the lookout description supports probable cause or a reasonable suspicion that the person stopped was the person who committed the offense. If there is a sufficient match, a lookout may justify a stop or even an arrest. *See, e.g., (Maurice) Thompson v. United States*, 571 A.2d 192, 193 n.1 (D.C. 1990); *(Michael) Smith v. United States*, 561 A.2d 468, 471 (D.C. 1989). Police can also make seizures based on matching descriptions of vehicles. *See, e.g., Holston v. United States*, 633 A.2d 378, 382 (D. C. 1993).

For a broadcast description to justify a seizure, it must be sufficiently detailed and tailored to the particular individual. Thus, *In re A.S.*, 614 A.2d 534, 538-39 (D.C. 1992), held that a general description that matched at least five individuals in the area could not justify a *Terry* stop. *See also In re K.P.*, 951 A.2d 793 (D.C. 2008) (report of armed threats with generalized description of a group of juveniles was not enough information to justify a *Terry* stop of defendant who was with the group of juveniles); *McFerguson v. United States*, 770 A.2d 66, 73-74 (D.C. 2001) (police lacked probable cause to arrest and search bag where neither suspect was wearing red pants, the only distinctive feature of the lookout description); *In re T.L.L.*, 729 A.2d 334 (D.C. 1999) (description of black male – 14-18 years old, medium complexion, and wearing dark clothes – insufficient to support finding of probable cause); *Junior v. United States*, 634 A.2d 411, 420 (D.C. 1993) (description of older black male, gray and black facial hair, and detailed clothing description insufficient to support probable cause); *Bryant v. United States*, 599 A.2d 1107, 1112 (D.C. 1991) (description of black male wearing brown suede-like jacket and gray khaki pants too general to support *Terry* stop); *Cauthen v. United States*, 592 A.2d 1021, 1023-24 (D.C. 1991) (no reasonable suspicion; scanty description and 15-minute delay in arrival of police); *(Marvin) Brown v. United States*, 590 A.2d 1008, 1017 (D.C. 1991) ("descriptions applicable to large numbers of people will not support a finding of probable cause"); *United States v. (Gerald) Lewis*, 486 A.2d 729, 733-34 (D.C. 1985) (no probable cause; variations in height, weight, and facial hair). *But see (Lamont) Hill v. United States*, 627 A.2d 975 (D.C. 1993) (probable cause based on broadcast giving particularized clothing description and exact location); *(Herbert) Lawrence v. United States*, 509 A.2d 614 (D.C. 1986) (reasonable suspicion, although defendant only partially matched lookout for robbery suspect broadcast forty minutes earlier, based on suspicious actions in "casing" store and flight when police approached). Even

[33] Counsel should not rely on the description in the PD 251, which is often recorded after the arrest. One indication that the PD 251 was completed after the arrest is if the "closed" box is checked at the bottom of the form. The radio run should reflect the description actually given.

when a description is detailed, substantial differences in height, weight, age, facial characteristics, or clothes weaken the justification for a seizure. *See (Marvin) Brown v. United States*, 590 A.2d 1008, 1018 (D.C. 1991). *But see Umanzor v. United States*, 803 A.2d at 989, 994 (D.C. 2002) **(**similarities between the lookout description of a gray two-door Honda with one or two occupants and appellant's Honda with three occupants that was dark blue but that an officer at first thought was gray supported the reasonableness of the *Terry* stop); *In re J.G.J.*, 388 A.2d 472, 474 (D.C. 1978) ("precise correlation" not necessary).

n. Drug courier profile

Whether reasonable suspicion exists must be determined with regard to the totality of circumstances; police agents must be able to articulate factors that lead to that suspicion. The fact that these factors may be set forth in a "profile" should neither add to nor detract from their evidentiary significance. *United States v. Sokolow*, 490 U.S. 1, 10 (1989). *Reid v. Georgia*, 448 U.S. 438, 441 (1980) (per curiam), found that DEA agents lacked sufficient basis to stop two disembarking airline passengers, despite their similarity to a DEA "drug courier profile" and their arguably furtive behavior, because the information the agents possessed could just as well "describe a very large category of presumably innocent travelers, who would be subject to virtually random seizures were the Court to conclude that as little foundation as there was in this case could justify a seizure." *But see Symes v. United States*, 633 A.2d 51, 53 (D.C. 1993) (dicta) (reasonable suspicion where train passenger had paid cash for one-way ticket for double slumber coach from "known narcotic source city," made reservation day before departure, and picked up ticket minutes before departure, and call to telephone number listed on registration revealed information inconsistent with passenger's travel plans).

o. Experience of the police officer

While few officers have the 39 years of experience on which the Supreme Court relied in upholding the frisk in *Terry*, the courts have been generous in crediting police officers with special expertise.[34] *See, e.g., (Patrick) James v. United States*, 829 A.2d at 968 ("experience in dealing with similar furtive gestures"); *Flores v. United States*, 769 A.2d at 129 (expertise in recognizing distinctive drug packaging); *Funchess v. United States*, 677 A.2d 1019, 1022 (D.C. 1996) (roles in sale of drugs); *(Kenneth) Dickerson v. United States*, 677 A.2d 509, 512 (D.C. 1996) ("plain feel" of narcotics package); *United States v. Bennett*, 514 A.2d 414, 416 (D.C. 1986) (defendant's gesture of sticking hand in waistband consistent with reaching for secreted drugs); *United States v. Purry*, 545 F.2d 217, 220 (D.C. Cir. 1976) (during four and one-half years experience, officer "had arrested five other armed robbery suspects without a mistake"); *(Eugene) Lewis v. United States*, 399 A.2d 559, 561 (D.C. 1979) (seven years experience). Just as an officer's experience may augment the basis for a seizure, an officer's lack of experience may diminish it. *Powell*, 649 A.2d at 1089 (holding that trial court did not give due weight to officer's lack of experience).

[34] If the officer is a rookie or lacks experience with a particular kind of crime, cross-examination on prior experience may be fruitful. For example, an officer who usually investigates robberies and burglaries may do no better in recognizing the smell of drugs or appearance of paraphernalia than an untrained civilian. *See generally Bell*, 254 F.2d at 86.

The court's deference to police expertise, however, has its limits. *See (Marvin) Brown v. United States*, 590 A.2d 1008, 1020 n.17 (D.C. 1991) ("we fail to see how [the officer's] claimed expertise could have measurably assisted him in determining whether [defendant] matched the broadcast description of the seller"); *Duhart v. United States*, 589 A.2d 895, 899 (D.C. 1991) ("there are limits to the inference that an experienced reasonable police officer can rationally draw"); *T.T.C.*, 583 A.2d at 990 (where "all that [the officer] saw was one man pass another man a small white object on a corner known for drug trafficking . . . the officer's experience could, at best, only provide a basis for possible suspicion . . . not . . . articulable suspicion"); *(John H.) Smith v. United States*, 558 A.2d 312, 315 (D.C. 1989) (en banc) (knowledge of trained investigators that drug sales are often conducted in teams is not without limitations); *Duckett v. United States*, 886 A.2d 548 (D.C. 2005). *But see Flores v. United States*, 769 A.2d at 129-30.

p. Pretext

Until recently, the Supreme Court had not directly addressed the pretextual use of a valid basis of police action to investigate a hunch-based suspicion of an unrelated serious crime, such as when a stop for a minor traffic violation is used to investigate a hunch of drug possession. The "standard of objective reasonableness without regard to the [officer's] underlying intent or motivation" propounded by *Scott v. United States*, 436 U.S. 128, 138 (1978), had produced two lower court definitions for this objective standard as applied to assertedly pretextual police actions. One inquired whether a reasonable officer would have made the stop, absent the illegitimate motivation, considering such factors as local standard police procedures. The other inquired whether a reasonable officer could have made the seizure regardless of the motivation. *See Minnick v. United States*, 607 A.2d 519, 523-24 (D.C. 1992) (refusing to choose between "could" or "would" because no violation under either). In *Whren v. United States*, 517 U.S. 806, 814-15 (1996), the Supreme Court rejected the "would have" standard, upholding a drug seizure following a stop based on probable cause for minor traffic violations, without regard to the subjective intent of the officer or whether a reasonable officer would have made the stop. *See also Arkansas v. Sullivan*, 532 U.S. 769 (2001) (reaffirming *Whren*); *Varner v. United States*, 685 A.2d 396, 397 n.3 (D.C. 1996).[35]

q. Shoplifting

In any shoplifting prosecution, counsel must determine the legal status of the store employee who conducted the stop or search in order to determine whether the employee should be deemed an agent of the state. If so, the Fourth Amendment and its exclusionary rule may be invoked; if not, the fruits of the employee's conduct, even if the conduct was tortious, are admissible in court. *Burdeau v. McDowell*, 256 U.S. 465 (1921). A privately employed special police officer, commissioned under D.C. Code § 5-101.03, may be a state agent. "Although such officers are for some purposes considered to be private employees, 'when they are performing their police functions, they are acting as public officers and assume all the liabilities attaching thereto.'"

[35] It is also important to note that *Whren* flags the Equal Protection Clause as the constitutional weapon for attacking racially motivated searches and seizures. *Id.* at 1774. *See generally* Charles J. Ogletree, *Does Race Matter In Criminal Prosecutions?*, The Champion, July 1991 at 10 (noting that "[i]t is appropriate to challenge discriminatory stops of people of color under . . . the Fourteenth Amendment[ ]" and that "[p]olice are seldom made to answer to the equal protection clause for [such] stops").

(Deborah) Lucas v. United States, 411 A.2d 360, 362 (D.C. 1980) (citations omitted); *see also Woodward & Lothrop v. Hillary*, 598 A.2d 1142 (D.C. 1991). *But United States v. Lima*, 424 A.2d 113, 119 (D.C. 1980) (en banc), declined to extend this rule to store security guards who are not special police officers, are granted no broader law enforcement powers than are ordinary citizens, and are, in principle, no different from other licensed professionals whose conduct is not treated as state action. *See also Alston v. United States*, 518 A.2d 439, 443 (D.C. 1986) (actions of special police officer, but not licensed security officer, are subject to Fourth Amendment strictures).

The most difficult question in shoplifting cases is how far along an apparent shoplifting effort may go before probable cause arises. This difficulty stems from the fact that the act of shoplifting requires taking "dominion" over the property. A seizure before that intent is sufficiently manifested may lack probable cause. The case law is inconsistent in setting the point at which a suspect passes beyond innocence and arrives at criminality. Is it when the suspect goes past the first available cash register, or the last one? Or when a suspect places clothing in a shopping bag, or meat in a purse? *See, e.g., (Deborah) Lucas*, 411 A.2d at 364 n.6; *May Dept. Stores Co. v. Devercelli*, 314 A.2d 767, 771-72 (D.C. 1973); *Durphy v. United States*, 235 A.2d 326 (D.C. 1967). Ambiguity is compounded because every "customer in a self service store [has] the implied permission of the store management to pick up, move, and either replace or pay for any product offered for sale." *Id*. at 327. Counsel must ascertain precisely where the seized merchandise came from and where the arrest took place. How many cash registers lie in between? How close to the exit was the client at the time of arrest? Did the client change floors? Were there signs warning shoppers not to leave a particular store section without paying for merchandise? Was the client heading toward or away from the exit? It is equally important to know how the client achieved "dominion" over the goods; there is a significant difference between placing goods in an open shopping bag and placing them in a closed and clasped purse.

E. The Source of the Information

1. Information Communicated by Other Officers

Police action may be based on facts known to officers other than those who effectuate the seizure, if the seizing officer is informed of the conclusion that an arrest or detention is to be made. Thus, *Whiteley v. Warden*, 401 U.S. 560, 568 (1971), held that an officer may act upon an official communication that an arrest is to be made, even if that officer is personally unaware of the facts and circumstances underlying the direction. There must, however, be probable cause at the source of the communication. *Id*.[36] The same is true for a *Terry* stop. In *United States v. Hensley*, 469 U.S. 221, 232-33 (1985), an investigatory stop made in reliance upon another police department's "wanted" flyer was upheld, so long as the government established that (1) the department that issued the flyer did so on the basis of articulable facts supporting a reasonable suspicion that the suspect had committed an offense, and (2) the detention was no

[36] *But see In re R.E.G.*, 602 A.2d 146 (D.C. 1992), where an arrest was based on a computer printout indicating that a car was stolen; the defense proffered testimony that, by the time of the seizure, the car had already been reported recovered. The court held that a three-day administrative delay (including a weekend) in updating the computer was reasonable and that the computer information, together with the driver's attempt to evade the police and the arresting officer's personal knowledge of the theft of the car, supported probable cause. *Id*. at 149-50.

more intrusive than was justified by an objective reading of the flyer. Moreover, the government must set forth some evidence establishing the basis of knowledge and reliability of the information's ultimate source. *(Taylor) Mayes v. United States*, 653 A.2d 856, 863-64 (D.C. 1995) (lookout did not establish reasonable suspicion absent evidence regarding its ultimate source); *see also Umanzor v. United States*, 803 A.2d at 997 (identity of the source may be proved inferentially in the absence of direct proof; distinguishing *Whiteley*).

In order for facts known to other officers to be considered, there must be some evidence of communication to the seizing officer. In *Haywood v. United States*, 584 A.2d 552, 556-57 (D.C. 1990), the government did not present the arresting officer's testimony; therefore, because there was no evidence that any information was communicated to that officer, facts known to other officers could not be considered. If some information is communicated to the seizing officer, however, the court must consider the collective knowledge of the police in determining whether the seizure was justified. *In re M.E.B.*, 638 A.2d 1123 (D.C. 1993) (information acquired after radio broadcast but before seizure may be considered, even if it was never communicated to seizing officers); *McFerguson v. United States*, 770 A.2d 66, 72-73 (D.C. 2001). This doctrine of "collective information" applies equally to information augmenting or diminishing the justification for conducting a seizure. *(Chauncy) Turner v. United States*, 623 A.2d 1170, 1172 n.2 (D.C. 1993).[37]

2. Informant Tip

The police make arrests based on a range of information from a variety of civilian sources. The source of the tip may be an ordinary citizen, a regular informant, or a person whose identity is not easily determined. The question then arises whether reliance on the tip was justified. The factors that are deemed relevant affect the focus of investigation, discovery requests, search for relevant records, talks with the client, and preparation of pleadings. At the motions hearing, counsel will have to decide whether to cross-examine the police in an attempt to undermine their basis for the seizure or to forgo questioning because the government has failed to meet its burden of showing probable cause.

In the context of searches, a tip may be relied upon in obtaining a search warrant. If evidence is seized pursuant to the warrant, the court must decide if the issuing court had sufficient facts to make out a showing of probable cause, *see, e.g., Illinois v. Gates*, 462 U.S. 213 (1983), and, if not, whether the police acted in reasonable reliance on the warrant, *United States v. Leon*, 468 U.S. 897 (1984). If a warrantless search is based in part upon information obtained from an informant, the government must justify not only the officer's conduct in acting without a warrant, but also their reliance on the tip; the courts assess reliance upon the informant with the same standards used to examine a search warrant based upon information obtained from an informant. *See Spinelli v. United States*, 393 U.S. 410, 417 n.5 (1969); *McCray v. Illinois*, 386 U.S. 300, 304 (1967); *United States v. (Betty) Davis*, 387 A.2d 1091, 1092 n.2 (D.C. 1978).

[37] Counsel should therefore explore at the suppression hearing all information in the collective knowledge of the police department that might diminish the justification for a seizure, including conflicting versions or differing descriptions given by other witnesses.

a. The general standard[38]

Until 1983, tips were reviewed under the two-pronged "*Aguilar-Spinelli* test,"[39] examining the informant's (1) "veracity" – facts indicating that the informant was "reliable" and telling the truth; and (2) "basis of knowledge" – facts indicating that the informant came across the information in a reliable manner, such as personal observation. In *Illinois v. Gates*, the Supreme Court abandoned this rigid two part test in favor of a "totality of circumstances" evaluation.

> The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Gates, 462 U.S. at 238.

In *Gates*, the police had received an anonymous letter stating that Mr. and Mrs. Gates were drug dealers, that Mr. Gates would fly to Florida to meet his wife, that they would drive back to Illinois with a trunkload of drugs, and that there was a substantial quantity of drugs in the Gates' house. Investigation corroborated that Mr. Gates flew to Florida, stayed overnight in a motel room registered to Mrs. Gates, and the next day drove north with a woman in his car. *Id*. at 225. The Illinois Supreme Court invalidated a warrant obtained on these facts because it did not satisfy the *Aguilar-Spinelli* test. *Id*. at 216-17. The Supreme Court abandoned that test as unduly rigid, and upheld the search because the totality of the circumstances – in particular, corroboration of substantial parts of the tip involving future actions of third parties, which are not easily predicted – provided an adequate basis for probable cause that drugs were present in the house and automobile. *Id*. at 238, 246. An anonymous tip must bear sufficient corroboration and indicia of reliability in order to justify a *Terry* stop and frisk of the alleged suspect. *Florida v. J.L.*, 529 U.S. 266, 274 (2000) (quoting *Alabama v. (Vanessa) White*, 496 U.S. 325, 329 (1990)). In *Florida v. J.L.*, the Supreme Court found that an anonymous tip entailing only a description of the suspect's clothing and allegations that the suspect was carrying a gun lacked sufficient indicia of reliability and corroboration to justify a stop and frisk of the suspect. *Id*. at 1379. The Court explained that it would not extend an automatic firearm exception to the indicia of reliability standard for anonymous tips regarding a suspect's carrying of firearms. *Id*. at 1380.[40]

The mutually supportive network of basis of knowledge, veracity, and police corroboration has been referred to as "the probable cause mix." *United States v. Laws*, 808 F.2d 92, 102 (D.C. Cir.

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[38] *Alabama v. White*, 496 U.S. 325, 330-31 (1990), applied the *Gates* analysis to a tip resulting in a *Terry* stop, "the only difference being the level of suspicion that must be established."

[39] *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969).

[40] The Supreme Court in *Florida v. J.L.* reasoned that creating such an automatic firearm exception to the indicia of reliability standard would "enable persons to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun." *See id*.

1986); *see also Holston v. United States*, 633 A.2d 378 (D.C. 1993) (anonymous tip for black man with gun standing behind bronze BMW with certain license plate number on certain block sufficiently corroborated to support *Terry* stop when, fifteen seconds after broadcast, police saw black man behind bronze BMW with that license plate number on that block); *Goldston v. United States*, 562 A.2d 96 (D.C. 1989) (police verified details of car registration and observed defendant travel from address to which car was registered to corner where informant said he sold drugs and where several persons were standing); *United States v. (Morris) Johnson*, 540 A.2d 1090 (D.C. 1988) (anonymous tip for subject selling gun out of orange Volkswagen at particular corner supported *Terry* stop after police verified all details of tip that reasonably could be verified upon arrival on scene a few seconds later); *United States v. (Larry) Lucas*, 778 F.2d 885 (D.C. Cir. 1985) (tip from anonymous caller, corroborated by police observations of apparent narcotics transaction, provided probable cause).

Counsel should be alert to any deterioration of the "probable cause mix" into a mush in which otherwise incredible and unreliable information, supported only by corroboration of innocent details, is deemed a sufficient basis for an arrest or search. While "a fair indication of the informant's basis of knowledge may compensate for a less than conclusive demonstration of his credibility," *Laws*, 808 F.2d at 102, *Gates* does not in any way vitiate the prior case law's definitions of "veracity" and "basis of knowledge." Indeed, these remain essential factors even under the "totality of the circumstances" test. *Goldston*, 562 A.2d at 98. Thus, where the government fails to present any evidence whatsoever regarding the identity, reliability, or basis of knowledge of a tip's source, even the modest standard of articulable suspicion cannot be met. *(Taylor) Mayes*, 653 A.2d at 863-64; *see (Kirby) Sanders v. United States*, 751 A.2d 952, 955-56 (D.C. 2000) (tipster's information did not provide police with probable cause to search suspect's car due to insufficient indicia of reliability of tipster). *But see Chavez-Quintanilla v. United States*, 788 A.2d 564, 568 (D.C. 2002) (totality of circumstances satisfied probable cause standard despite affidavit's failure to establish informant's reliability).

2014 Supplement

***Parsons v. United States*, 15 A.3d 276 (D.C. 2011).** Reversible error to deny defendant's motion to suppress evidence obtained during a search based on an informant's tip where no evidence to judge informant's credibility even when applying the collective knowledge doctrine.

b. Veracity[41]

The government's burden to demonstrate veracity depends in part upon the type of informant involved. If the source was a paid informant or otherwise closely associated with the "underworld," veracity is highly suspect, and the government must show why the police were nonetheless entitled to trust the informant.

> The typical paid or protected police informant – drawn from the criminal milieu – is almost universally viewed with a jaundiced eye. He is inherently suspect. He hides behind a cloak of anonymity. His information – just as the testimony of an

[41] See Appendix A for some suggested lines of cross-examination on veracity.

> accomplice – is looked upon with a healthy skepticism and is examined with great scrutiny.

Nance v. United States, 377 A.2d 384, 389 (D.C. 1977) (quoting Moylan, *Hearsay and Probable Cause: An* Aguilar *and* Spinelli *Primer*, 25 Mercer L. Rev. 741, 769 (1974)); *overruled* by *(Elaine) Jefferson v. United States*, 476 A.2d 685, 686 (D.C. 1984) (overruling *Nance*'s decision in that "corroboration of innocent details of a tip from a paid informant, by itself, does not establish veracity," stating that the analysis in *Gates* controls).

If the police have sufficient reason to believe that the source was an ordinary citizen simply doing a civic duty by reporting criminal activity, the veracity prong is satisfied absent a showing to the contrary by the defense.

> The presumption in favor of the credibility of citizen informants is based upon an assumed absence of ulterior motives. The skepticism with respect to police informants is based partly on the fact that they are generally remunerated in some way, which is thought to taint their motives (although the fact that the informant is remunerated would, presumably, also serve to assure reliability). It also appears that police informants are generally drawn from the criminal milieu, which in itself is an impeaching circumstance.

Rushing v. United States, 381 A.2d 252, 255 n.3 (D.C. 1977). *See Groves v. United States*, 504 A.2d 602, 605 (D.C. 1986) (informant's willingness to identify himself buttressed veracity of tip).

Somewhere on the veracity scale between the ordinary good citizen and the informant from the "criminal milieu" are the citizen who prefers to remain anonymous when making the tip, *see, e.g.*, *Rushing*, 381 A.2d at 255, and informants who initiate the relationship with the police or provide information for the first time, *see, e.g.*, *Rutledge v. United States*, 392 A.2d 1062, 1066 (D.C. 1978).[42] The Court of Appeals has not formulated a precise test for differentiating among these categories, but some rough guidance may be derived from the case law. Relevant considerations include job history, ability to make accurate observations and reports, reputation, relationship with the suspect, motive to lie or lack thereof, and association with known criminals. *Id*. at 1066 n.7; *see also Barrie v. United States*, 887 A.2d 29 (D.C. 2005) (holding confidential informant's tip sufficient for probable cause to stop and search defendant where informant had long and reliable history of providing accurate information, did not use drugs and alcohol, was employed, not involved in the criminal justice system and actually witnessed the alleged drug sale). *But see Laws*, 808 F.2d at 100 (self-serving label "responsible individual" does not substitute for facts upon which determination of reliability can be made; assertion that informant "'has been gainfully employed for more than three (3) years' . . . does not give any real

[42] *United States v. Walker*, 294 A.2d 376 (D.C. 1972), emphasized the importance of efforts to obtain names of citizen informants: where "'it is at all practicable' [the police should] secure the name and address of a 'citizen giving information on the street,' and thus 'go far to remove from subsequent prosecutions the troublesome factors of the unknown and uncorroborated informant.'" *Id*. at 377 (quoting *United States v. Frye*, 271 A.2d 788, 791 (D.C. 1970)). However, the court added, "we did not hold [in *Frye*] that police should ignore information from an unknown and unidentified citizen." *Id*.

indication regarding honesty or accuracy"). Other considerations include whether the informant is a narcotics addict, *United States v. (Betty) Davis*, 387 A.2d 1091, 1093 (D.C. 1978), whether the informant is being paid,[43] and whether the police have reached any agreement to help the informant with his or her own pending criminal charges.[44]

A tip was found sufficient to establish probable cause in *(Theresa) Allen v. United States*, 496 A.2d 1046 (D.C. 1985), where the tip was anonymous but came from a person who had previously called the police with useful information, was not a paid informant, and explained that she was active in her community's campaign against drugs, and the police acquired partial corroboration of the tip.[45] In *(Arnold) Jefferson v. United States*, 776 A.2d 576, 580 (D.C. 2001), an anonymous tip to 911 that a particular gas station was about to be robbed, plus the observations of the police who responded to the gas station and saw the defendant emerging through the gate of a fenced area reasonably perceived to be off limits to the public and housing the entrance to the cashier's office, gave police reasonable suspicion to stop and frisk the defendant.[46] *See also Green v. United States*, 974 A.2d 248 (D.C. 2009) (holding that an anonymous tip, was suitably corroborated, and thus exhibited sufficient indicia of reliability to provide reasonable suspicion to make investigatory stop where officer's corroboration of the tip with respect to the physical and clothing description given by the tipster, the officer's interpretation (based on his training and experience) of defendant's motion to his waist or furtive gesture of concealment, and defendant's retreat into the van upon seeing the police).

In *(Marvin) Brown v. United States*, 590 A.2d 1008 (D.C. 1991), however, a partially corroborated anonymous tip was not sufficient to establish even a reasonable suspicion; veracity of the tip could not be determined without more information about its source, and police observations could not cure the defects because both the tip and the officer's description lacked specificity and, in fact, differed significantly. *See also (Taylor) Mayes*, 653 A.2d at 863-64 (tip did not establish reasonable suspicion because no evidence presented regarding its ultimate

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[43] [T]he expectation of reward for services is an ambiguous variable which very well could furnish reason to be honest and accurate – in the hope of being utilized again – or, conversely, reason to distort or fabricate, in order to earn at least one payment. . . . [W]e perceive that the first-time, volunteer, paid informer is much closer to the typical paid police informant than to the ordinary, unrewarded citizen.

Rutledge, 392 A.2d at 1066.

[44] In *Nance*, the police had promised to "talk to the U.S. Attorney" about a pending charge, apparently in return for his tip. This fact "could be given weight by the judicial officer in evaluating the reliability of the tip," because it "would seem to provide an incentive for the informant to tell the truth." 377 A.2d at 389. Nonetheless, the court expressed some doubt about using the informant's status as a criminal defendant to enhance his reliability "when that very status also renders him inherently suspect." *Id.* While hope for assistance could discourage the informant from manufacturing a tip out of whole cloth, it could also encourage the informant to be reckless and to try to pass off a mere street rumor as personal observation in the hope that it would prove correct when the police acted on it.

[45] *See also Bates v. United States*, 327 A.2d 542, 546 (D.C. 1974) (evidence supporting probable cause can come from "an unidentified victim of an undisclosed robbery and assault").

[46] The fact that police may have intended to stop and question everyone at the gas station did not invalidate the seizure of the defendant where police had an objective basis to seize defendant based on the tip and their observations. *Id.* at 580.

source). *Compare Gomez v. United States*, 597 A.2d 884, 889 (D.C. 1991) (anonymous tip provided reasonable suspicion for stop of individuals suspected of drug activity in alley).

Reliability is enhanced when there is a basis for an inference that an anonymous informant is a witness to, or a victim of, a crime. *Compare Rushing*, 381 A.2d at 254-56 (with no direct evidence that officers knew whether informant was on police payroll on the one hand, or was simply a concerned neighborhood resident on the other, anonymity presented "significant dangers of untrustworthiness"), *with (Lawrence) Ware v. United States*, 672 A.2d 557, 563 (D.C. 1996) (credibility enhanced where anonymous tip is from "citizen-eyewitness" and was given in person rather than over telephone); and *Carey v. United States*, 377 A.2d 40, 45 (D.C. 1977) (veracity prong satisfied based on sufficiently strong inference that broadcast description had come from a victim). A citizen informant tip received in person in combination with the officer's observations could yield a probable cause to search. *(John) Davis v. United States*, 759 A.2d 665, 676 (D.C. 2000) (citizen informant's tip that a man on the block in a wheelchair was selling cocaine from his shoe gave police probable cause to search the man where the tip came from a person who flagged down the police officer but refused to tell the officer his name).

The most common means of rebutting the presumption of the underworld tipster's unreliability is through a showing that the tipster has proven reliable in the past.[47] *See, e.g.*, *Fleming v. United States*, 923 A.2d 830 (D.C. 2007) (informant tip reliable because informant was known to officer and on two prior occasions had provided information that resulted in arrests, informant based his information on personal knowledge and direct observation of the defendant, informant was unpaid, and informant understood that providing misinformation would impact his own sentencing in pending criminal matter); *Barrie v. United States*, 887 A.2d 29 (D.C. 2005); *Jones v. United States*, 362 U.S. 257, 268-71 (1960), *overruled on other grounds* by *United States v. Salvucci*, 448 U.S. 83 (1980). This showing must be based on specific information. *See (James) Mitchell v. United States*, 368 A.2d 514, 516 n.3 & 519 (D.C. 1977) (Kern, J., concurring) (officer's conclusory testimony that informant "had proved reliable in five cases previously" insufficient to satisfy veracity prong). Similarly, in *Nance*, 377 A.2d at 388, an officer testified that he had received tips from the informant five times and that none of this information had been unreliable. Without deciding the point, because the tip in any event failed to satisfy the "basis of knowledge" prong of the *Aguilar-Spinelli* test, the Court strongly suggested that this testimony was too conclusory:

> If the phrase "reliable informant" is too conclusory, as it is, then the clause "an informant who has been found by me to be reliable in the past" is no less conclusory, but simply wordier. If "reliable" is switched to "credible" or "prudent," the use of any adjective is still the lawman's characterization and not the facts from which the magistrate can do his own characterizing.

[47] The government may also attempt to establish veracity by showing that the tip was a statement against the informant's penal interest, at least in the absence of other factors casting doubt on its trustworthiness. *See, e.g.*, *United States v. Harris*, 403 U.S. 573, 583-84 (1971) (plurality opinion); *see also United States v. (Robert) Davis*, 617 F.2d 677, 693 (D.C. Cir. 1979) ("When one makes an admission against his own penal interest, he tends to be telling the truth . . . . We thus are satisfied that an admission against penal interest may form the basis for a magistrate's conclusion that an informant is reliable").

Id. (quoting Moylan, 25 Mercer L. Rev. at 758). Finally, the informant in *United States v. (Betty) Davis*, 387 A.2d 1091 (D.C. 1978), had previously given the officer two tips; one had led to an arrest that was then pending grand jury action, while the other had been used in an affidavit in support of an application for a search warrant. The court found this testimony insufficient, noting that the officer "nowhere asserted that the information given by the informant on either of the two prior occasions turned out to have been true." *Id*. at 1094. Thus, the government is not required to show that the informant's prior tips led to actual convictions, *id*., but it does have to show that the tips were verified. *See Goldston v. United States*, 562 A.2d 96 (D.C. 1989) (officer had worked with informant more than eighteen months; previous tips had led to eleven arrests, seizures of drugs and weapons, and an unknown number of convictions, and informant had never supplied inaccurate information; informant was employed, not motivated by monetary remuneration, and not a drug addict; and informant joined surveillance team to await and follow the suspect).

The particular officers who relied on the tip must themselves be aware of the fact that the informant has been reliable, even though they may be unfamiliar with the details. *(Alphonso) Waldron v. United States*, 370 A.2d 1372, 1373 (D.C. 1977). As in cases not involving informants, an arresting officer does not need personal knowledge of all the factors that create probable cause, so long as the officer is acting on the basis of facts "known" to the police department generally, as discussed *supra* Section II.E.1.

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***Navarette v. California*, 134 S. Ct. 1683 (2014).** Assuming anonymity, motorist's 911 emergency call reporting that pickup truck had run her off the road was sufficiently reliable.

***Porter v. United States*, 7 A.3d 1021 (D.C. 2010).** Informant tip sufficiently reliable, and thus no error in denying motion to suppress drug evidence, where informant had never provided false information over 10-year period, his tips had resulted in approximately 100 arrests, and he provided accurate "innocent" details regarding defendant's appearance and actions.

c. Basis of knowledge

The basis of knowledge prong inquires into how the informant knew what he or she was reporting, even if the informant was not lying. Basis of knowledge is obviously met if the tip included an express statement that the informant had seen what he or she then reported. *See Goldston*, 562 A.2d at 97 (informant said he had purchased cocaine from defendant within previous seventy-two hours); *(Betty) Davis*, 387 A.2d at 1093 (informant indicated "he had seen the [defendant] sell pills from her purse 'shortly before' he called"); *District of Columbia v. M.E.K.*, 407 A.2d 655 (D.C. 1979) (informant said he saw the person making sales);[48] *Rutledge v. United States*, 392 A.2d 1062, 1065 (D.C. 1978) (tip based on "first-hand observation").

[48] *M.E.K.* implied that it might be possible to discredit "first hand" knowledge if the facts confronting the officer at the scene differ dramatically from the facts given by the informant. *Id*. at 658. At a minimum, such information would be relevant to probable cause.

The more difficult issue is whether police are justified, without an express claim, in inferring from the tip itself that the information was based on first-hand observation. A general description will not support that inference:

> The tip's only details were contained in a description of appellant . . . While such details would permit an inference that the informant had observed what appellant was wearing, it is not sufficient to support the further inference that the informant's allegation of criminal conduct on the part of appellant was based on something "more substantial than a casual rumor . . . or an individual's general reputation."

Nance, 377 A.2d at 387-88; *see also (John) Davis v. United States*, 759 A.2d 665 (D.C. 2000) (citizen's tip describing man in wheelchair selling cocaine from his right shoe was sufficient); *(Taylor) Mayes v. United States*, 653 A.2d 856, 863-64 (D.C. 1995) (where no evidence about source's basis of knowledge presented, reliance on tip unjustified); *(Marvin) Brown v. United States*, 590 A.2d 1008, 1023 (D.C. 1991) ("Anyone could have observed the corner of 17th and Euclid, N.W., and phoned in appellant's description"); *Cauthen v. United States*, 592 A.2d 1021 (D.C. 1991) (no reasonable suspicion where caller said three or four persons were at a certain corner selling drugs, and police drove through the relatively busy intersection 15 or 20 minutes later and saw three to five people disperse and begin walking briskly upon seeing them); *Rushing*, 381 A.2d at 257 (similar tip, insufficiently detailed); *United States v. Myers*, 538 F.2d 424, 426 (D.C. Cir. 1976) ("basis of knowledge" prong not satisfied by tip that defendant was at girlfriend's residence, would leave within the hour with six "spoons" of heroin, and would drive to identified destination to have heroin cut and packaged, describing in detail both defendant and his car, relaying only what could well be common knowledge). *But see United States v. Boxley*, 985 A.2d 1108 (D.C. 2009) (police had probable cause to arrest based on an informant's tip that "he saw the drugs" and his corroborating identification, satisfying the "basis of knowledge" prong); *Joseph v. United States*, 926 A.2d 1156 (D.C. 2007) (finding that identified informant's telephone tip and responding officer's immediate corroboration of defendant's location and clothing were sufficient to establish a reasonable articulable suspicion to justify *Terry* stop and frisk); *(James) Mitchell v. United States*, 368 A.2d 514 (D.C. 1977) (tip sufficiently detailed that described two men's physical characteristics, dress, location, activity, and location of contraband).

On the other hand, a corroborated tip predicting details of a person's "future behavior" may justify an investigatory stop if "it demonstrate[s] inside information – a special familiarity with [the person's] affairs." *Alabama v. (Vanessa) White*, 496 U.S. 325, 332 (1990) (tip, which detailed when White would leave designated building, where he would go, and what kind of car he would drive, once corroborated, justified investigatory stop of car); *see also (Charles) Parker v. United States*, 601 A.2d 45, 49 (D.C. 1991) (predictive quality of tip, by identified informant, sufficient for probable cause). In *Groves v. United States*, 504 A.2d 602, 605 (D.C. 1986), the informant's second telephone call, minutes after the first, to say that the suspect's car was at that moment passing a police cruiser made obvious that the informant was personally witnessing the events. *See also (Clarence) Turner v. United States*, 588 A.2d 280, 282 (D.C. 1991) (informer called again to report that suspect had removed his jacket); *(Percy) Lawson v. United States*, 360 A.2d 38 (D.C. 1976) (per curiam) (citizen said police had better hurry to phone booth if they still

wanted to find individual with gun); *United States v. Walker*, 294 A.2d 376 (D.C. 1972) (first-hand knowledge inferred from details provided). Prediction of future activity is not, however, an absolute precondition to reliance on anonymous tips. *Speight v. United States*, 671 A.2d 442, 447 (D.C. 1996) (corroboration, two minutes after call, of extremely detailed information about present circumstances involving man with gun; although "close call," reliance on tip justified).

Finally, even if both the informant's veracity and basis of knowledge seem insufficient, when taken together with other circumstances, probable cause may be found. Counsel should therefore attack all factors on which the government is relying to establish probable cause.

3. Observation Posts

In drug cases, information offered to justify an arrest often originates from an officer located in a hidden "observation post." District of Columbia courts have recognized a qualified "surveillance post" privilege, which the government may invoke to block cross-examination about the site from which the observations were made. When the government seeks to raise this privilege at a motions hearing, the judge "must balance the public interest in legitimate criminal surveillance against the defendant's right to cross-examine government witnesses." *Hicks v. United States*, 431 A.2d 18, 21-22 (D.C. 1981). If the issue is whether the police had probable cause, "the Court should consider, among other pertinent concerns, whether the defense has established that the location . . . is a material and relevant issue; whether the evidence supports a finding of probable cause; and whether the evidence creates a substantial doubt about the credibility of the observer." *Id*. at 22-23 (footnotes omitted); *see also United States v. Green*, 670 F.2d 1148, 1156 n.11 (D.C. Cir. 1981) (adopting privilege and citing *Hicks* factors with approval).

Hicks suggests a method for partially lifting the privilege. The trial court may require the government to reveal the location of the post to the court *in camera*. 431 A.2d at 22 n.2; *see also (Robert) Carter v. United States*, 614 A.2d 913, 917 (D.C. 1992) ("*in camera* review is a useful and relatively risk-free tool which should be used liberally"). The government may also be required to disclose the location subject to a protective order that counsel not reveal the information to the client. *Green*, 670 F.2d at 1156. In any event, counsel should file a motion requiring the government to disclose the location of the observation post prior to trial, on the grounds that the factors listed in *Hicks* require disclosure. Even if that motion is denied, counsel can explore the issue further at the suppression hearing.

If the observation post's location is not previously disclosed at trial, the qualified privilege does apply, but because the defendant's interest in avoiding wrongful conviction is at stake, the balancing process is different than at a motions hearing.[49] *(Ronald) Thompson v. United States*, 472 A.2d 899, 900 (D.C. 1984). *(Richard) Anderson v. United States*, 607 A.2d 490, 496 (D.C. 1992), set forth the showing that must be made in order to justify disclosure of the observation post at trial. Upon the government's invocation of the privilege, the defense must make a threshold showing of need for the information. This is satisfied if the defendant can show that there are locations in the area from which the view is impaired or obstructed, and that there is

[49] *United States v. Fos*ter, 986 F.2d 541, 543-44 (D.C. Cir. 1993), noting that different standards apply at motions hearings and at trial, found that the trial court erred in upholding an observation post privilege at trial when the officer's identification testimony played a crucial role in the prosecution.

reason to believe that the officer was in such a location. In order to do this, the defense must be accorded some leeway on cross-examination. Counsel may inquire whether the officer was in a specific location. "If the officer declines to provide an informative response, then the defendant's showing of need is significantly enhanced, and the judge will ordinarily have to proceed to the balancing stage." *Id*. at 497. In the balancing stage, the court must weigh the defendant's need for the evidence in order to conduct the defense against the specifics of the government's countervailing interest (e.g., the observation post is still in use, cooperating civilians remain in jeopardy, etc.). *Id*.; *see also (Robert) Carter*, 614 A.2d at 915-17 (applying *Anderson* test).

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***Valentin v. United States*, 15 A.3d 270 (D.C. 2011).** Trial court properly denied defense request that observation post location be disclosed where defendant failed to establish both that such evidence was needed when officer had already testified as to many details of observation, including side of block, distance, presence of objects on street and elevation of post, and that disclosure required despite potential danger to law enforcement and civilians in doing so, as evidenced by details of corroboration of officer observations.

III. CHALLENGING THE USE OF EVIDENCE SEIZED

A. The Threshold Issue: A Legitimate Expectation of Privacy

"'Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.'" *Rakas v. Illinois*, 439 U.S. 128, 133-34 (1978) (quoting *Brown v. United States*, 411 U.S. 223, 230 (1973)). Only those whose "Fourth Amendment rights have been violated [may] benefit from the [exclusionary] rule's protections." *United States v. Salvucci*, 448 U.S. 83, 87 (1980); *(Taylor) Mayes v. United States*, 653 A.2d 856, 865-66 (D.C. 1995); *(Thomas) Brown v. United States*, 627 A.2d 499, 502 (D.C. 1993). Thus, in order to challenge the seizure of evidence, the client's own Fourth Amendment rights must have been violated by virtue of the fact that he or she had a "legitimate expectation of privacy in the invaded place [or object]." *Rakas*, 439 U.S. at 143.[50] An expectation of privacy is "legitimate," hence constitutionally protected, if the person claiming the right has a subjective expectation of privacy in the thing or area searched or seized, and the expectation is one that society is prepared to recognize as "reasonable." *Rakas*, 439 U.S. at 143-44 n.12; *see Smith v. Maryland*, 442 U.S. 735, 740 (1979).[51] Although tending to focus on the latter prong, the Supreme Court, as well as

[50] Rakas "discarded reliance on concepts of 'standing' in determining whether a defendant is entitled to claim the protections of the exclusionary rule" in favor of simply determining whether the defendant's rights were violated by the alleged search or seizure. *Salvucci*, 448 U.S. at 87 n.4. As a practical matter, the existence or nonexistence of a "legitimate expectation of privacy" is still frequently referred to as an issue of "standing." *See, e.g., (Jose) Mitchell v. United States*, 609 A.2d 1099, 1107 (D.C. 1992); *(Gregory) Lewis v. United States*, 594 A.2d 542, 544 (D.C. 1991); *Martin v. United States*, 567 A.2d 896, 902-03 (D.C. 1989). Counsel should be prepared to argue that a charge that a defendant has no "standing" can be resolved only through litigation of the Fourth Amendment motion.

[51] That one has a "legitimate expectation of privacy" in one's own person is generally accepted without analysis. *See, e.g., Ybarra v. Illinois*, 444 U.S. 85, 91 (1979); *Gomez v. United States*, 597 A.2d 884, 888 (D.C. 1991) (seizure of person); *(Samuel) Moore v. United States*, 468 A.2d 1342, 1345 (D.C. 1983) (seizure and search of person); *Berry v. District of Columbia*, 833 F.2d 1031, 1034 (D.C. Cir. 1987) (mandatory urinalysis).

the Court of Appeals, generally explicitly addresses both the subjective and objective provisions. *See, e.g., Bond v. United States*, 529 U.S. 334, 338-39 (2000); *Speight v. United States*, 671 A.2d 442, 453 (D.C. 1996); *Minnesota v. Olson*, 495 U.S. 91, 95-96 (1990); *California v. Greenwood*, 486 U.S. 35, 39-41 (1988); *O'Connor v. Ortega*, 480 U.S. 709, 715 (1987); *California v. Ciraolo*, 476 U.S. 207, 211 (1986); *see also Tri-State Steel v. Occupational Safety & Health*, 26 F.3d 173, 176 (D.C. Cir. 1994). *But see (Thomas) Brown*, 627 A.2d at 502 n.3 (citation omitted) (arguing that *Olson* collapsed these inquiries "no doubt because [the court] had come to realize that they necessarily overlap . . . [and thus] it is not possible to entirely divorce inquiry under one prong of the test from inquiry under the other"). Consequently, counsel should argue facts to support a finding that the client's expectation of privacy was both real and reasonable.[52]

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***Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012).** Not unreasonable for jail officials to strip search arrestees who may be placed in general jail population.

***Florida v. Jardines*, 133 S. Ct. 1409 (2013).** Bringing a drug sniffing dog onto the curtilage of a person's home is a search and, therefore, subject to warrant requirement.

***Riley v. California*, 134 S. Ct. 2473 (2014).** The police generally may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested.

***United States v. Scott*, 987 A.2d 1180 (D.C. 2010).** Where no evidence linked car to on-the-street drug sale, police had no probable cause to search car after recovering keys from seller who denied ownership of car but acknowledged car belonged to cousin, and defendant's denial of ownership did not constitute abandonment.

1. The Subjective Expectation of Privacy

It is a basic premise of Fourth Amendment law that "[w]hat a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection." *Katz v. United States*, 389 U.S. 347, 351 (1967). This concept underlies the subjective portion of the two-pronged analysis.

In determining whether an individual has a subjective expectation of privacy in a particular place or thing outside the immediate confines of the home, the inquiry has often been cast in terms of

[52] An interesting question is the extent to which *Rakas* and its progeny affect traditional burdens of pleading and proof. Because the government has the burden of proving that warrantless searches fall within an exception to the warrant requirement, *see, e.g., Arkansas v. Sanders*, 442 U.S. 753, 760 (1979), and because, pursuant to *Rakas*, reliance on the concept of standing has been discarded in favor of simply determining whether the client's Fourth Amendment rights were violated, *Salvucci*, 448 U.S. at 87 n.4, a strong argument may be made that, absent a warrant, the burden is on the government to prove that the defendant had no legitimate expectation of privacy in the person, place, or thing searched. *But see Varner v. United States*, 685 A.2d 396, 397 (D.C. 1996) (stating that claimant has burden of establishing standing). When a warrant is issued, it is less clear where the burden lies. *Compare Florida v. Riley*, 488 U.S. 445, 455 (1989) (burden should lie with defendant) (O'Connor, J., concurring); *id*. at 465-66 (burden is properly placed on government) (Brennan, J., dissenting); *and id*. at 467 (no prior decision demonstrates who has burden) (Blackmun, J., dissenting).

the individual's behavior[53] – whether the person did anything to demonstrate an intent to keep the evidence or place private, or acted in a way that exposed the evidence or place to the public. *See, e.g., Holt v. United States*, 675 A.2d 474, 480 (D.C. 1996) (no expectation of privacy in the appearance of clothing publicly worn; therefore, officer's visual inspection of Holt's clothing placed by hospital personnel under Holt's gurney, after Holt's voluntary emergency hospital admission, was permissible); *(Thomas) Brown*, 627 A.2d at 503-04 (appellant's failure to shut door to public stairwell was factor suggesting that he had no legitimate expectation of privacy in that area).[54]

Applying this principal to invasions of the quasi-public or common areas of a multiple residence building in which the claimant lives, the cases – while being less than explicit in distinguishing between subjective and objective expectations – give weight to the claimant's efforts to control the use of the common areas. *See Bryant v. United States*, 599 A.2d 1107, 1110 (D.C. 1991) (court could not infer from fact that front door to rooming house was sometimes left unlocked that residents took no reasonable precautions to maintain privacy in common hallway and kitchen); *United States v. Booth*, 455 A.2d 1351, 1353-54 (D.C. 1983) (residents' regular use of rooming house corridor, combined with ability and efforts to exclude members of general public, deemed important in finding Fourth Amendment privacy interest). *But see Penny v. United States*, 694 A.2d 872, 876 (D.C. 1997) (the common areas of multi-tenant apartment buildings "are not within an individual tenant's zone of privacy even though they are guarded by locked doors") (citing *United States v. Holland*, 755 F.2d 253, 255 (2d Cir. 1985)).

When the claimed interest is in property outside of, but in some manner attached to, a home, erecting a fence that shields that property from the public sidewalks demonstrates a subjective expectation of privacy in the area. *Ciraolo*, 476 U.S. 207 at 211; *see also Florida v. Riley*, 488 U.S. 445, 450-51 (1989) (backyard greenhouse partially surrounded by fence and shrubs).

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[53] *Rawlings v. Kentucky*, 448 U.S. 98, 104-05 (1980), appears to be the only case in which the Supreme Court has relied on the person's verbal assertion to assess the validity of a subjective expectation of privacy, basing its determination that the petitioner had no subjective expectation of privacy largely on his "frank admission" during the motions hearing "that he had no subjective expectation that [the item] would remain free from governmental intrusion." Now that the importance of the subjective expectation of privacy is firmly established, it is unlikely that a proponent of a Fourth Amendment motion would testify in such a manner, and equally unlikely that a court would rely on a proponent's bare claim of a personal expectation of privacy.

[54] The groundwork for this approach was laid before the articulation of the two-prong test. The petitioner in *Katz* challenged the use of tapes that the government had obtained by tapping a public telephone booth. The Court rejected the parties' attempts to resolve the issue by reference to the character of a public telephone booth. "[T]his effort to decide whether or not a given 'area,' viewed in the abstract, is 'constitutionally protected' deflects attention from the problem presented by this case. For the Fourth Amendment protects people, not places." 389 U.S. at 351 (footnote and citation omitted). The Court proceeded to analyze the petitioner's acts and found that in entering a phone booth, shutting the door behind him, and paying the toll, he acted to exclude the "uninvited ear." *Id.* at 352. Because he sought protection for the content of his conversation, it was of no import that he could be seen from the street as he talked. *Id*. What was significant was that he did something to protect his words from being "broadcast to the world." *Id*.; *cf. Smith v. Maryland*, 442 U.S. 735, 742-43 (1979) (Fourth Amendment interest in phone number dialed rejected because claimant, though making call from his home phone, did not exhibit subjective expectation of privacy in the number in that "[t]elephone users . . . typically know that they must convey numerical information to the phone company; that the phone company has facilities for recording this information; and that the phone company does in fact record this information for a variety of legitimate business purposes"); *Khaalis v. United States*, 408 A.2d 313, 339 (D.C. 1979) (defendant demonstrated no subjective expectation of privacy when he held telephone conversation in presence of hostage, knew phone was tapped, and made calls to attract media attention).

In the case of premises in which the proponent has no residential, ownership, or possessory interest, a showing of more than legitimate presence is required. The circumstances must show that the person had a subjective expectation of privacy in the host's home. An overnight guest will generally be found to have demonstrated this expectation because "[f]rom the overnight guest's perspective, he seeks shelter in another's home precisely because it provides him with privacy, a place where he and his possessions will not be disturbed by anyone but his host and those his host allows inside." *Olson*, 495 U.S. at 99. *Compare (Gregory) Lewis v. United States*, 594 A.2d 542, 545-46 (D.C. 1991) (party-goer who napped while other guests came and went from room demonstrated no subjective expectation of privacy in host's premises). However, the Court of Appeals does not interpret *Olson* to mean that "overnight guest status . . . is a *sine qua non* of standing. . . . [B]eing an overnight guest is not the sole means by which a guest may satisfy" the burden of proving a legitimate expectation of privacy. *Rose v. United States*, 629 A.2d 526, 530-31 (D.C. 1993) (defendant had legitimate expectation of privacy in house he regularly visited, to which he had key, and with respect to which he was in position to admit and exclude others). *Compare (Reginald) Hill v. United States*, 664 A.2d 347, 352-53 (D.C. 1995) (no standing where defendants not overnight guests at time of arrest, only sometimes stayed at apartment, had no key, and were not permitted to enter at will or exclude others); *Minnesota v. (Wayne) Carter*, 525 U.S. 83, (1998) (no standing where defendants were only on premises a short time and had no previous connection with the householder); *United States v. McCarson*, 527 F.3d 170 (D.C. Cir. 2008); *Brown v. United States*, 932 A.2d 521 (D.C. 2007).

Similarly, to assert a Fourth Amendment interest in the interior of a car, a passenger must be able to "offer . . . evidence [other than his status as a passenger] regarding his legal expectation of privacy in the car." *(Jose) Mitchell v. United States*, 609 A.2d 1099, 1107 (D.C. 1992); *see Rakas*, 439 U.S. at 140 (suggesting that owner, renter, or driver would have such an interest);[55] *Varner v. United States*, 685 A.2d 396, 399 (D.C. 1996) (non-owner driver's presence behind wheel of car, without more, insufficient to give driver standing, where owner's presence in car diminished driver's apparent control of car). In *Varner*, the court listed some factors that could give standing to a non-owner driver: exclusive control of the car, open-ended permission from the owner to use the car, a possessory interest in the car, and the presence of the non-owner driver's personal effects in the car. *Id*. at 398.

Finally, placing an object in a container that protects it from view evidences a subjective expectation of privacy. *See Greenwood*, 486 U.S. at 39 (trash placed in opaque garbage bag, on street, for pick-up at specified time); *Godfrey v. United States*, 408 A.2d 1244, 1247 (D.C. 1979), *amended*, 414 A.2d 214 (1980) (per curiam) (objects placed in opaque plastic bag hanging from cleaning cart in hallway of hotel where appellant worked); *In re B.K.C.*, 413 A.2d 894, 900 (D.C. 1980) (placing personal papers in unlocked briefcase manifested intent to keep remainder of contents from public view). Similarly, covering an object while carrying it on public streets demonstrates an expectation of privacy. *United States v. Boswell*, 347 A.2d 270, 274 (D.C. 1975).

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[55] *Rakas* pointed out that, while the passenger could not challenge a search of the car's interior, there was never a claim that the evidence seized was a fruit of the initial stop of his person. Such a seizure should give rise to a cognizable Fourth Amendment claim. *Id*. at 131-32. *See Nixon v. United States*, 402 A.2d 816 (D.C. 1979) (taxicab passenger challenged stop of cab); *see also infra* Section IV discussing fruits.

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***United States v. Peyton*, 745 F.3d 546 (D.C. Cir. 2014).** In light of co-tenant's clear statement to police that defendant kept his "personal property" in area around bed in common living room, not reasonable for police to believe that she had necessary authority to consent to search of closed shoebox found therein, and thus evidence recovered from the shoebox should have been suppressed.

2. The Reasonableness of the Expectation

"An expectation of privacy does not give rise to Fourth Amendment protection . . . unless society is prepared to accept that expectation as objectively reasonable." *Greenwood*, 486 U.S. at 39-40. This "[l]egitimation of expectations of privacy . . . must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas*, 439 U.S. at 143-44 n.12. However, legal entitlements alone do not necessarily determine the reasonableness of an expectation of privacy. "It has long been recognized that rights defined by positive law, though they sometimes figure in the constitutional calculus, do not control it." *United States v. Lyons*, 706 F.2d 321, 327 (D.C. Cir. 1983) (citing *Salvucci*, 448 U.S. at 91). Thus, while one can have no legal property right in contraband, one may nevertheless have a right to object to its seizure. *United States v. Jeffers*, 342 U.S. 48, 52-54 (1951).[56] Though one may have no legally enforceable contract interest in a place or legal authority to exclude others from it, one may have a reasonable expectation of privacy in it. The crucial factor is whether one's expectations are founded on understandings of privacy that are recognized and permitted by society. *See Olson*, 495 U.S. at 98 ("to hold that an overnight guest has a legitimate expectation of privacy in his host's home merely recognizes the everyday expectations of privacy that we all share");[57] *Junior*, 634 A.2d at 419 (remanded on whether legitimate expectation existed where appellant visited premises every day to care for occupant's son); *Lyons*, 706 F.2d at 327 (legitimate expectation in hotel room tendered for defendant's sole use, though his name not registered and government paid for room).

Nevertheless, in determining what is reasonable, many cases give significant weight to traditional notions of property law. Thus, "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of [the] right to exclude." *Rakas*, 439 U.S. at 143-44 n.12. That right need not be exclusive or absolute. For

[56] Godfrey dealt with a very different, value-laden approach to the determination of reasonableness, suggesting that Fourth Amendment protections extend only to "socially acceptable" expectations of privacy and that whatever subjective expectation a hotel houseman might have had in secreting stolen goods in a trash bag on his cart, it was not "legitimate" because the property was not his. 408 A.2d at 1246. Ultimately, however, the court did not base its decision on this ground. *Id*. at 1247 n.3. The Supreme Court has subsequently reiterated that it is objective reasonableness that must govern: *Ciraolo*'s discussion of the public's ability to fly over a back yard, 476 U.S. at 211, would have been superfluous had it held that society simply does not recognize any expectation of privacy in the cultivation of marijuana; *Greenwood* focused not on the social acceptability of the defendant's activities, but on whether the defendant reasonably could expect that his garbage would be secure from inspection by third parties, 486 U.S. at 40-41. *See McFerguson v. United States*, 770 A.2d 66, 71 (D.C. 2001) (citing *Godfrey).*

[57] *But see Prophet v. United States*, 602 A.2d 1087, 1091 (D.C. 1992) (party guest does not have expectation of privacy in premises equal to that of overnight guest); *(Gregory) Lewis*, 594 A.2d 546.

example, the subjective expectation of privacy of a roomer in the hallway and common rooms of a rooming house is reasonable if the lodgers together have the right to control who uses those areas. *Bryant*, 599 A.2d at 1109-10; *Booth*, 455 A.2d at 1353-54. An occupant may admit some and exclude others, *Lyons*, 706 F.2d at 327 (hotel lodger may contest search of room into which the lodger has invited guests), and may even be legally obligated to allow certain individuals access to a space without losing the right to secure it against others, *Stoner v. California*, 376 U.S. 483, 489-90 (1964) (distinguishing lawful access to hotel room by maids or repairmen from unlawful access by hotel clerk for police investigation). *Penny v. United States*, 694 A.2d 872, 876 (D.C. 1997), however, held that a third floor tenant in a multi-tenant apartment building had no reasonable expectation of privacy in a basement common area because there was no evidence (such as language in a lease) that the tenant had any authority to exclude others from that common area.

The legitimacy of one's expectation of privacy in one's residence is so strong that it will be recognized even though the claimant is absent at the time of a search. *Cf. Bumper v. North Carolina*, 391 U.S. 543, 548-49 (1968). The resident need not have any independent interest in the thing seized. *See Alderman v. United States*, 394 U.S. 165 (1969) (homeowner may contest electronic surveillance of conversations in his home though he was not a party to them).

On the other hand, private property consisting of open fields surrounding a dwelling, but not within the "curtilage," is not protected by the Fourth Amendment. *See United States v. Dunn*, 480 U.S. 294, 301 (1987) (curtilage does not include barn 60 yards from house and outside fence). *But see (Willie) Horton v. United States*, 541 A.2d 604, 609 (D.C. 1988) (remanding for hearing on whether property seized on defendant's land, but outside fence surrounding his home, was within curtilage).

Reasonable expectations of privacy deriving from property interests are not limited to one's residence. "[A] person can have a legally sufficient interest in a place other than his home to warrant Fourth Amendment protection from unreasonable government intrusion." *United States v. (John) Robinson*, 698 F.2d 448, 454 (D.C. Cir. 1983). An expectation of privacy in the work place is reasonable based on the employees' right to exclude the general public. Thus, an employee may contest a search of a shared office, including personal effects and work-related papers, despite accessibility to other employees. *See O'Connor v. Ortega*, 480 U.S. at 716-17; *Mancusi v. DeForte*, 392 U.S. 364, 369 (1968). An expectation of privacy will also be recognized in personal property if the movant can show ownership or a similarly strong interest in securing the object. *B.K.C.*, 413 A.2d at 900-01 (reasonable expectation of privacy in contents of briefcase not lost by temporarily relinquishing briefcase to friend); *United States v. Hinckley*, 672 F.2d 115, 130-32 (D.C. Cir. 1982) (prisoner preserved confidentiality of papers by folding them and placing them in envelope with personal letters and attorney-client information). *But see Hudson v. Palmer*, 468 U.S. 51, 526 (1984) (no reasonable expectation of privacy in prison cell).

However, if an owner or possessor acts in a way that, in the normal course of events, exposes property to the public, any subjective expectation of privacy is unreasonable. *See, e.g., Riley*, 488 U.S. at 450-51 (plants in backyard greenhouse could be seen through open roof from aircraft in routine flight through legally navigable airspace); *Greenwood*, 486 U.S. at 39-40 (opaque

garbage bags placed at curbside are readily accessible to animals, children, scavengers, and snoops); *Ciraolo*, 476 U.S. at 211 (despite fence, contents of yard could be seen by anyone flying through legally navigable airspace); *Holt v. United States*, 675 A.2d 474, 479-80 (D.C. 1996) (no reasonable expectation of privacy in outward appearance of clothing that defendant wore publicly just prior to entering hospital and over which he had not attempted to exert any control once taken from him by hospital staff; search limited to visual inspection conducted within short time of defendant's entry into hospital).

3. Relinquishment of the Expectation

One may lose the Fourth Amendment rights attendant to a legitimate privacy interest when a possession or area is abandoned or voluntarily exposed to some limited official or private intrusion. The focus of abandonment analysis is the individual's intent. *Spriggs v. United States*, 618 A.2d 701, 703 n.3 (D.C. 1992).

> [I]ntent may be inferred from words spoken, acts done, and other objective facts . . . All relevant circumstances existing at the time of the alleged abandonment should be considered . . . The issue is not abandonment in the strict property-right sense, but whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search.

Id. An intention to abandon will not be presumed, but must be shown by "clear, unequivocal, and decisive evidence." *Peyton v. United States*, 275 A.2d 229, 230 (D.C. 1971). Abandonment is thus most easily shown when the defendant verbally disclaims any interest. *See United States v. (Dennis) Lewis*, 921 F.2d 1294, 1302 (D.C. Cir. 1990) ("A voluntary denial of ownership demonstrates sufficient intent of disassociation to prove abandonment"). In other situations, the government shoulders a heavy burden. For example, in *United States v. Boswell*, 347 A.2d 270 (D.C. 1975), an officer saw Boswell put a large object, wrapped in a blanket, in the hallway of a building and go next door; the officer lifted the blanket, observed a television set, and jotted down its serial number. *Id*. The set was later reported stolen and Boswell was arrested. *Id*. The court rejected the government's argument that Boswell had abandoned the television, finding instead that his actions evidenced an intent to secrete it. *Id*. at 274.

Shreeves v. United States, 395 A.2d 774 (D.C. 1978), reached a similar conclusion where the defendant's car had been left parked on private land behind an open-air market for several hours. The police, seeking the defendant in connection with several robberies and a homicide, learned of the car's location and had it towed to a private garage where it was fingerprinted and searched. *Id*. at 777. The court found that, because the defendant had left a substantial number of personal belongings in the car, it was his intent to secrete the car, not abandon it. *Id*. at 784-85.

Even where one relinquishes possession of an object in anticipation of arrest or interrogation, no abandonment occurs if one also acts to protect the property from police inspection. *Smith v. Ohio*, 494 U.S. 541, 543-44 (1990). *Smith* held that no abandonment occurred when the defendant, in response to a police inquiry, threw the grocery bag he was carrying on the hood of

a parked car and attempted to protect it with his hands. *Id*.[58] If, however, the relinquishment is a result of illegal police conduct, abandonment will not be recognized, nor a legitimate expectation of privacy lost, even in the absence of an effort to protect the property. *United States v. Brady*, 842 F.2d 1313, 1315 n.7 (D.C. Cir. 1988). For a discussion of the effect of an unlawful search or seizure on the characterization of particular evidence as abandoned property or as suppressible "fruits," *see infra* Section IV.

One may, however, relinquish a legitimate expectation of privacy by exposing possessions to some limited governmental intrusion such as a customs inspection. *Illinois v. Andreas*, 463 U.S. 765, 769 (1983). Customs officers lawfully opened a container and, upon finding marijuana, resealed it and delivered it to the addressee; the defendant brought the container into his apartment, and was arrested a short time later as he left the apartment with the container. *Id*. at 767. Reopening the container at the station was not a "search" because the defendant had no legitimate expectation of privacy in the already lawfully opened container, absent a "substantial likelihood" that the contents may have been changed. *Id*. at 773.

Exposure of certain information or possessions to private individuals who subsequently share that information with government officials may also render a subsequent government search a non-search. *United States v. Jacobsen*, 466 U.S. 109 (1984). Employees of a private freight carrier opened a damaged package and discovered plastic bags containing a white powdery substance and notified a DEA agent, who field-tested the substance and determined it was cocaine. *Id*. at 111-12. The Court held that the initial search by the freight carrier did not violate the Constitution because the Fourth Amendment proscribes only governmental intrusion. *Id*. at 113-15. Stating that any additional invasion of privacy must be tested by the degree to which it exceeded the scope of the private search, the Court held the agent's viewing and handling of what the freight carrier made available "infringed no legitimate expectation of privacy and, hence, was not a 'search' within the meaning of the Fourth Amendment." *Id*. at 119-20. The subsequent field test of the powder was reasonable in that it had, at most, a *de minimis* impact on any protected property interest. *Id*. at 125.

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***Brown v. United States*, 97 A.3d 92 (D.C. 2014).** Defendant's abandonment of jacket—by wiggling out of it, running away, and leaving it behind with "no indication that he was going to come back to get it because he was trying to make his escape"—relinquished any reasonable expectation of privacy protected by the Fourth Amendment.

[58] *Compare (James) Harris v. United States*, 614 A.2d 1277, 1279 & n.5 (D.C. 1992) (finding of abandonment not clearly erroneous where, upon approach of police, defendant threw object to ground and walked away); *Spriggs*, 618 A.2d at 703 (finding of abandonment not clearly erroneous where "appellant discarded the key case on a public sidewalk, exposing it to public view, [where] any passerby could have picked it up"); *(Wilbert) Parker v. United States*, 704 A.2d 299, 301 (D.C. 1997) (finding of abandonment not clearly erroneous where defendant "dropped to the ground a ziplock bag which contained 'a white rock' substance").

B. Challenging Searches and Seizures Based on Warrants

Warrant procedures ensure "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the [people] and the police." *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963). Consequently, "except in certain carefully defined classes of cases," *see infra* Section C "a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967).

D.C. Code §§ 23-521, 23-522, and 48-921.02, and Super. Ct. Crim. R. 41 prescribe the procedures for obtaining search warrants and the particularity with which the person, place, or thing sought to be searched and seized must be described. *See Stanford v. Texas*, 379 U.S. 476, 485 (1965) (requirement that warrants particularly describe things to be seized makes general searches impossible). Execution of search warrants is governed by §§ 23-523, 23-524, and 48-921.02, and Rule 41(e).[59]

Whenever the police obtain evidence under color of a warrant, counsel must carefully compare these provisions to the factual situation to determine whether a motion to suppress can be made on the grounds that the warrant was improperly obtained or executed or that the scope of the search conducted pursuant to it was overbroad. *See, e.g.*, *Miller v. United States*, 357 U.S. 301 (1958).

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***United States v. Brodie*, 742 F.3d 1058 (D.C. Cir. 2014).** See, supra, Chapter 22.II.

1. Obtaining the Warrant

Search warrants may be issued only upon a judicial finding that probable cause exists to believe that "stolen or embezzled" property, "contraband or otherwise illegally possessed" property, property "possessed for the purpose of being used to commit or conceal the commission of a criminal offense[,] or . . . evidence . . . tend[ing] to demonstrate the commission of [] an offense or the identity of a person participating in the commission of an offense," D.C. Code § 23-521(d), "is likely to be found in a designated premise, in a designated vehicle or object, or upon a designated person," D.C. Code § 23-522(b)(2). *See also* D.C. Code § 48-921.02(a)-(d); Rule 41(b), (c).

The applicant must present a written affidavit setting forth the facts in support of probable cause. D.C. Code §§ 23-522(a), (b)(2)-(3), 48-921.02(c); Rule 41(c). The Controlled Substances Act requires that the judicial officer examine the applicant under oath. D.C. Code § 48-921.02(c). A search warrant must include "a designation of the premises, vehicles, objects or persons to be searched, sufficient for certainty of identity," D.C. Code § 23-521(f)(3), Rule 41(d)(3); "a

[59] A number of other D.C. Code provisions contain their own special warrant provisions. *See, e.g.*, § 4-145 (gaming or bawdy houses); § 4-149 (examination of pawned or pledged property). The most commonly used special provision is D.C. Code § 48-921.02 (Controlled Substances Act). Superior court judges also have authority to issue federal search warrants. *United States v. Edelen*, 529 A.2d 774, 777 (D.C. 1987).

description of the property whose seizure is the object of the warrant," D.C. Code § 23-521(f)(4), Rule 41(d)(4); and the "name of the issuing court, the name and signature of the issuing judge, and the date of issuance," § 23-521(f)(1), Rule 41(d)(1). The statutes also prescribe who the warrant may be made out to, and whether and when nighttime searches will be allowed. D.C. Code §§ 23-522(c), 48-921.02(a), (h); *see also* Rule 41(c).

A warrant may be challenged when it does not meet the requirements of these provisions or the underlying constitutional mandates. *United States v. Edelen*, 529 A.2d 774, 786 (D.C. 1987).[60] Evidence obtained pursuant to an improperly issued warrant will be excluded if the executing officer's reliance on that warrant was not "objectively reasonable." *United States v. Leon*, 468 U.S. 897, 919-20 n.20 (1984); *Massachusetts v. Sheppard*, 468 U.S. 981, 990 (1984).

> Objective reasonableness in this context implies a more stringent standard than subjective good faith. Of course, if the constitutional or statutory violation is intentional, knowing, or consciously indifferent to (or in reckless disregard of) compliance with the constitutional or statutory mandate, the "objective reasonableness" standard is clearly not met. In addition, however, the objective standard "requires officers to have a reasonable knowledge of what the law prohibits," and to conform their action to an objective standard.

Edelen, 529 A.2d at 786 (citing *Leon*, 468 U.S. at 919 n.20) (emphasis added). The burden is on the government to establish objective good faith. *Leon*, 468 U.S. at 924.

The requirement that an officer have a "reasonable knowledge of what the law prohibits" means that certain statutory and constitutional violations on the part of the issuing judicial officer may require suppression on the grounds that the executing officer's reliance on the illegal warrant was not objectively reasonable.[61] The Supreme Court has delineated at least five possible scenarios in which suppression is appropriate for this reason, *see Edelen*, 529 A.2d at 785 (citations omitted):

> the warrant is "facially deficient" . . . in failing to particularize the place to be searched or the things to be seized[;] . . . the warrant is based on an affidavit "so

[60] *See, e.g., Irving v. United States*, 673 A.2d 1284, 1287 (D.C. 1996) (warrant allowing search of one suspect's apartment for purpose of locating communications and other documents showing a connection between that suspect and another supported by probable cause and not impermissibly vague where underlying affidavit described offense as conspiracy between the two and alleged that a witness said suspects were close associates who maintained communications via telephone and written documents).

[61] Before *Leon*, a defendant could obtain suppression of evidence through a direct challenge to the finding of probable cause or on the grounds that the judicial officer committed a technical or clerical error when issuing the warrant. Reasoning that deterrence of police misconduct is the primary purpose for the exclusionary rule, *Leon* held that exclusion is generally inappropriate when an officer reasonably relied on the decision of a neutral third party. 468 U.S. at 920. *See also Illinois v. Krull*, 480 U.S. 340, 349-50 (1987) (evidence not suppressed because police reasonably relied on statutory authority to search though statute was ultimately found unconstitutional). However, because limits on the exclusionary rule should not preclude review of "the constitutionality of the search or seizure, deny needed guidance from the courts, or freeze Fourth Amendment law," courts should not adopt an "inflexible practice of always deciding whether [police] conduct manifested objective good faith before turning to the question [of] whether the Fourth Amendment has been violated." *Leon*, 468 U.S. at 924.

> lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable[;] . . .a magistrate abandons his neutral and detached role[;] . . . "the magistrate or judge . . . was misled by information in an affidavit that the affiant knew was false except for his reckless disregard of the truth[;] . . ." [or] "a magistrate or judge had no business issuing a warrant."

In addition, an executing officer's reliance on a warrant is not objectively reasonable if the officers who obtained the warrant either lacked the authority to do so or knew that their authority was questionable, but failed to bring this information to the attention of the judicial officer. *Id*. at 786-87.[62]

Warrant deficiencies involving problems on the face of the warrant are the most readily spotted. If a facial challenge involves an incorrect description of the place to be searched, the government must show that "the [incorrect] description was such that the officer with [the] search warrant [could], with a reasonable effort, ascertain and identify the place intended." *Buckner v. United States*, 615 A.2d 1154, 1155 (D.C. 1992).[63] Facial deficiencies involving omissions in the warrant should also be challenged, but are likely to survive the challenge if the missing information is found in an attached affidavit. *See, e.g.*, *Criales v. United States*, 621 A.2d 374, 376 (D.C. 1993) (omission of date of issuance not fatal where attached affidavit was dated and there was no dispute that warrant was issued the same day or next day); *cf. United States v. (Sidney) Moore*, 263 A.2d 652, 653 (D.C. 1970) (warrant valid where it incorporated affidavit's description of place to be searched).

Challenges based on allegations that the affiant knew or should have known were false require extensive investigation. The proponent of a "*Franks* motion" must indicate the specific portion of the affidavit that is allegedly false or misleading, and attach to the motion an offer of proof. *Dailey v. United States*, 611 A.2d 963, 965 (D.C. 1992). "Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained." *Franks v. Delaware*, 438 U.S. 154, 171 (1978). Counsel's affidavit ordinarily should suffice. A hearing is required if the pleadings make an initial showing that the affiant engaged in "deliberate falsehood or . . . reckless disregard for the truth" and that the affidavit would have been insufficient without the misrepresented portions. *Id*. at 171-72; *Poole v. United States*, 630

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[62] Because the various warrant provisions differ on who may execute warrants and when they may be executed (and the overlapping but not identical jurisdictions of the local and federal police forces), counsel should carefully check cited warrant provisions to ensure that they authorize the executing police force to execute the warrant in the manner and at the time that it was executed.

[63] *Buckner* upheld the search on the grounds that the warrant's description, although incorrectly stating that the apartment to be searched was "behind the second door on the left," was otherwise specific enough that it was reasonable for the police to search what turned out to be the only apartment on the left. *Id*. at 1155. The defendant in *Buckner* also moved to suppress evidence because the police relied on descriptive information not contained in the warrant or its supporting affidavit. Relying on its determination that the warrant description satisfied the particularity requirement of the Fourth Amendment, the court rejected this argument. *Id*. at 1156. However, it cautioned that this action should not be construed as a "blanket endorsement" of "the use of post-warrant information" or "a bellwether of [its] intent to dilute the particularity requirement of the written warrant and affidavit." *Id*. But see *Los Angeles County v. Rettele*, 550 U.S. 609 (2007) (per curiam).

A.2d 1109, 1115 (D.C. 1993); *In re Y.G.*, 399 A.2d 65, 68 (D.C. 1979) (per curiam);[64] *see also (Stacy) Jones v. United States*, 828 A.2d 169, 178-79 (D.C. 2003) (not reaching question whether affidavit was false or reckless because affidavit was sufficient to support probable cause even without the challenged statements).

At an evidentiary hearing, the defendant must prove, by a preponderance of the evidence, that the affiant "intentionally tried to deceive the [judicial officer] or acted with reckless disregard for the truth by including or omitting information from the affidavit." *Dailey*, 611 A.2d at 968. Although the *Leon* good faith exception requires the motions judge to determine "whether the officer's conduct [was] reasonable under the circumstances," *id*. at 967, *Leon* does not apply if the officer was reckless, *id*. at 968 n.7. "A 'blatantly false affidavit' cannot survive a challenge on a mere claim of 'good faith.'" *Id*.

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***United States v. Cardoza*, 713 F.3d 656 (D.C. Cir. 2013).**Despite false statements by officer in affidavit in support of search warrant, probable cause to support warrant established by officer's observation of apparent drug transaction involving defendant, defendant's possession of $3,000 in cash, defendant's possession of three disposable cell phones, false address provided by defendant, defendant's record of prior arrests for drug activity, and officer's training and experience that persons involved in drug trafficking frequently store drugs in residence.

***United States v. Matthews*, 753 F.3d 1321 (D.C. Cir. 2014).** No error in denying *Franks* hearing where officer informed issuing judge as to informant's legal difficulties and involvement with drugs.

***United States v. Washington*, 775 F.3d 405 (D.C. 2014).**Affidavit provided grounds for officers' objectively reasonable reliance on warrant where purportedly reliable informant relied on statements of "unwitting informant," unwitting informant's prediction of traveling to address to purchase drugs from named individual came true, "commonsense" reading of warrant did not render information stale, and informant personally observed "unwitting informant" accompany occupant from residence to car, after which time "unwitting informant" showed drugs to informant.

***Smith v. United States*, Nos. 12-CM-1742 & 12-CM-1743, 2014 WL _____ (D.C. Dec. 4, 2014).** Where an officer's mistake of law leads to a warrant premised on tainted evidence, exclusionary rule applies to derivative evidence obtained pursuant to that warrant, unless there is an independent source for the evidence or sufficient attenuation to "purge the taint."

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[64] *Franks* did not define precisely what it meant by "deliberate disregard for the truth." Outright fabrication is clearly included. An allegation and offer of proof that exculpatory information was omitted will require an evidentiary hearing "if the affidavit supplemented with the omitted information would have defeated probable cause." *Dailey*, 611 A.2d at 967. If "witnesses" discussed in the affidavit turn out to be co-defendants, informers, or anonymous tipsters, their characterization as mere witnesses may be subject to challenge. If an affidavit says the complainant "identified" the defendant, a *Franks* motion may lie if the "identification" was substantially less positive than that word implies. *See Metts v. United States*, 388 A.2d 47, 51-52 (D.C. 1978). Counsel should also be skeptical of unelaborated assertions that the defendant "confessed," which may well mask the fact that the defendant merely admitted, for example, innocent presence.

2. Execution of the Warrant

a. The knock and announce rule

As a general rule, officers executing a search warrant must give notice of their authority and purpose prior to acting, whether the warrant is for the search of a person, a vehicle, or a premises. D.C. Code §§ 23-524(a), 48-921.02(g).

The law on notice has been most fully developed with respect to execution of warrants for "premises." In such circumstances, "the common-law knock and announce principle forms a part of the Fourth Amendment reasonableness inquiry." *(Sharlene) Wilson v. Arkansas*, 514 U.S. 927, 930 (1995). In this jurisdiction, the "knock and announce" principle is also contained in a statute providing that officers may not "break and enter" into premises to execute a search warrant unless they have announced their identity and purpose and been denied entry. 18 U.S.C. § 3109, made applicable to D.C. by D.C. Code §§ 23-524, 48-921.02(g); *United States v. Goddard*, 113 Wash. D.L. Rptr. 537 (D.C. Super. Ct. March 19, 1985) (Walton, J.).[65] Known as the "knock and announce" rule, this requirement ensures the privacy and safety of individuals in their homes and the safety of officers who might otherwise be mistaken for unauthorized intruders, guards against the needless destruction of private property, and "symbolizes the respect for individual privacy summarized in the adage that a man's (or woman's) house is his (or her) castle." *Poole v. United States*, 630 A.2d 1109, 1116 (D.C. 1993); *see also Sabbath v. United States*, 391 U.S. 585, 589 (1968). Residents who are in eyeshot or earshot of their home at the time the police execute a search warrant have standing to complain that the police failed to comply with the knock and announce requirement. *District of Columbia v. Mancouso*, 778 A.2d 270, 271-74 (D.C. 2001) (rejecting government's argument that defendants had no standing to challenge knock-and-announce violation where one was washing his car near the house and one was directly across the street). Because the purpose of the rule is to protect privacy and safety, courts presented with claims of statutory violations must carefully scrutinize the circumstances of the entry. *Culp v. United States*, 624 A.2d 460, 466 (D.C. 1993) (Rogers, C.J., concurring). The Supreme Court has twice held that a knock and announce violation requires exclusion of the evidence found inside the home following the violation, and thus counsel should carefully examine the facts whenever a search warrant is executed to determine whether a "breaking" occurred and, if it did, whether the police knocked, announced their purpose, and waited until they had been denied entry before entering.[66] *Miller v. United States*, 357 U.S. 301, 314 (1958); *Sabbath v. United States*, 391 U.S. 585 (1968); *see also (Bill) Griffin v. United States*, 618 A.2d 114, 125 (D.C. 1992). However, counsel should also be aware that violation of the "knock-and-announce" rule does not necessitate exclusion of evidence gathered during the search of a defendant's home after the Supreme Court's ruling in *Hudson v. Michigan*, 547 U.S. 586 (2006). A "breaking," as prohibited by the Constitution, is a term of art that refers to a broad range of behavior. A breaking may occur even if no actual force or violence is used. *Sabbath*, 391 U.S.

[65] 18 U.S.C. § 3109, by its own terms, applies only to "houses." D.C. Code § 23-524(a) explicitly makes the § 3109 knock and announce requirements applicable to the execution of a search warrant for "a dwelling house or other building or a vehicle." D.C. Code § 48-921.02(g), the warrant provision of the Controlled Substances Act, refers only to "houses."

[66] The protections of these requirements extend individually to each unit in a multi-unit building. *Cf. Keiningham v. United States*, 287 F.2d 126 (D.C. Cir. 1960).

at 589. There is a breaking when "officers break down a door, force open a chain lock on a partially opened door, open a locked door by use of a pass key, [or] open a closed but unlocked door." *Id*. at 590. Even entry through an open door will be characterized as a "breaking" if the occupants of the premises are not first made aware of the officer's presence. *(Frances) Belton v. United States*, 647 A.2d 66, 69 (1994); *see also Goddard*, 113 Wash. D.L. Rptr. at 540 (applying *Hair v. United States*, 289 F.2d 894, 897 (D.C. Cir. 1961)). With the exception of an entry by ruse,[67] whenever the police enter a premises not otherwise open to the public[68] without knocking and announcing their authority and purpose, the entry is a breaking and a violation of the Fourth Amendment and the statutory requirements unless justified by limited exigent circumstances. *See also (John) Jones v. United States*, 336 A.2d 535, 538 (D.C. 1975) ("resistance (or lack thereof) is neither the sole nor a necessary criterion for determining whether a breaking has taken place").

Even when the police properly knock and announce, they are nevertheless prohibited from breaking and entering a premises until "they reasonably believe they have been refused admittance." *United States v. Covington*, 385 A.2d 164, 168 (D.C. 1978). Although the police need not wait until admittance is affirmatively refused, they must be able to infer a constructive refusal from the occupants' actions or inactions. *(Craig) Williams v. United States*, 576 A.2d 700, 703 (D.C. 1990); D.C. Code § 48-921.02(g). The test is an objective one, requiring the motions judge to decide "whether the circumstances were such as would convince a reasonable person that permission to enter had been refused." *(Bill) Griffin*, 618 A.2d at 118 n.7. When no actions can be detected within a premises, some cases suggest that a lapse of at least a minute is required to find a denial of admittance. *See id*. at 122 (when police knock and announce at 1:40 a.m. at dark residence from which no sound can be heard, "considerably longer" than thirty seconds required to demonstrate constructive denial of entry); *Poole*, 630 A.2d at 1117 (police could not reasonably have concluded that occupants of apartment constructively refused admittance when it was early Saturday morning, there was no evidence that police heard or saw signs of activity from within apartment, and police waited only ten seconds between announcement and entry); *Covington*, 385 A.2d at 168. *But see United States v. Owens*, 788 A.2d 570, 575-76 (D.C. 2002) (distinguishing *Griffin*) (where police entered 15 seconds after announcing their authority, no knock and announce violation based on the timing of the late afternoon search, the small size of the one- or two-bedroom apartment to be searched, and the fact that police had reason to believe guns and drugs were in the home); *see also Atchison v. United States*, 982 A.2d 1138, 1144 (D.C. 2009) (no knock and announce violation when police entered 15 seconds after announcing their presence where warrant was executed at a one-bedroom residence in the middle of the afternoon and in connection with a murder investigation, and where officers had reason to believe suspect was inside with access to a firearm). Somewhat less time may be required if there is evidence of an affirmative denial such as footsteps going in the opposite direction from the door. *Covington*, 385 A.2d at 168.

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[67] *See (Ronald) Coleman v. United States*, 728 A.2d 1230 (D.C. 1999) (use of ruse to effect entry into house pursuant to search warrant was reasonable and did not violate the knock-and-announce rule). *See also (John) Jones*, 336 A.2d at 538 (no breaking where police knocked but did not announce, defendant opened door, and "on seeing the police there, permitted rather than contested the entry").

[68] The police need not knock and announce before entering a business that keeps its "doors . . . open to the public," but "once the entry is accomplished . . . the officers [must] announce their authority and purpose in order to actually conduct the search." *Criales v. United States*, 621 A.2d 374, 377 (D.C. 1993) (quoting trial court).

The knock and announce rule must be complied with except under the special and limited circumstances delineated in *Richards v. Wisconsin*, 520 U.S. 385, 392-96 (1997). *Richards* invalidated a *per se* exception to the rule for felony drug cases, holding that trial courts must instead evaluate, case-by-case, whether the police have "reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing destruction of evidence." *Id*. Accordingly, "exigent circumstances" involving concerns for police safety based on the possible presence of weapons have been found to excuse compliance with the knock and announce rule. *Poole*, 630 A.2d at 1118.[69] To justify a forced entry on this ground,

> the government must show that the police had concrete, particularized evidence that reasonably led them to believe that (1) there were weapons on the premises and (2) there was a realistic possibility that the occupant or occupants would use the weapons against them. [E]vidence that the suspect merely possesses a weapon is insufficient to justify a forced entry. An unjustified but sincere fear by an officer cannot excuse noncompliance, or the protection of the occupants' privacy interest would depend on no more than an officer's anxiety.

Id. at 1118-19 (emphasis added; footnote, citations and internal quotation marks omitted). If the warrant is related to a violent crime, a lesser degree of exigency will justify a forced entry. *See id*. at 1120-21 (ten-second delay justified when no weapon had been recovered from crime scene, police knew appellant was suspect in robberies in which he had brandished weapons, and appellant had been charged with assault on police officer); *Culp*, 624 A.2d at 463 (five-second delay after knock and announce, at residence from which voices could be heard, justified where residence was of suspect linked by identification evidence to twelve armed robberies involving an Uzi which had been used to take a hostage, suspect had previously "racked the action" in threatening manner, Uzi had been seen on premises within preceding twenty-four hours, suspect had within that time talked about committing another robbery, suspect had a record for violence and PCP use and was using drugs at the time, and police knew all this at time of entry); *(Craig) Williams*, 576 A.2d at 702 (three- to five-second delay justified where police knew there were guns in house, front door was guarded by someone armed with automatic weapon, and occupants had been alerted to their arrival). In assessing a claim that exigent circumstances justified less than complete compliance with the knock and announce rule, the judge must apply an "'objective test . . . which calls for a . . . judicial evaluation'" of "how a reasonable and experienced officer would respond under [the] circumstances." *Culp*, 624 A.2d at 463 (citations omitted).

[69] The court has specifically declined to find that the presence of drugs is an exigent circumstance justifying entry prior to denial of admittance on the grounds that the requisite "delay will enable persons in the premises to destroy potential evidence." *(Bill) Griffin*, 618 A.2d at 124; *see also Richards v. Wisconsin*, 520 U.S. 385, 393 (1997) (rejecting *per se* exception to knock and announce rule for felony drug cases).

b. Inventory and return requirements

Pursuant to Super. Ct. Crim. R. 41(e)(4), the officers must provide to the owner of the premises a copy of the warrant and an inventory of the seized property.[70] Violation of this requirement can result in suppression of the evidence seized if "(1) there was 'prejudice' in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or (2) there is evidence of intentional and deliberate disregard of a provision in the Rule." *Criales*, 621 A.2d at 378 (citations omitted) (fact that warrant and return were left on business premises rather than provided to occupants, all of whom were arrested, was not egregious enough to require suppression where police let one defendant telephone "associates of the business" to inform them of the search).

c. Anticipatory Warrants

In *United States v. Grubbs*, 547 U.S. 90 (2006), Grubbs bought a tape of child-pornography from an undercover agent. The officers submitted an affidavit in support of their request for a search warrant. The affidavit stated that the search warrant would not be executed until the videotape was delivered (the triggering condition). The affidavit also included two attachments which described the residence and the items to be seized. The attachments were included in the body of the warrant, but not the triggering condition. The videotape was delivered, at which point Grubbs was arrested and the search warrant executed. Grubbs moved to suppress on the theory that anticipatory warrants are unconstitutional and that, because the warrant failed to list the triggering condition, it had run afoul of the particularity requirement of the Fourth Amendment. The Supreme Court rejected his argument.

The Court first stated that anticipatory warrants (those based on probable cause that at some *future* time evidence of crime will be in a specific location) are not categorically unconstitutional. "We reject [the defendant's contention], as has every Court of Appeals to confront the issue." Officers must merely show probable cause that the evidence of a crime will be present *when the search is conducted*.

As to the particularity challenge, the Court notes that the Fourth Amendment sets forth only two requirements that must be particularly described in the warrant: 'the place to be searched' and 'the persons or things to be seized.' "Nothing in the language of the Constitution or in this Court's decisions interpreting that language suggests that, in addition to the [requirements set forth in the text], search warrants also must include a specification of the precise manner in which they are to be executed." (internal citations omitted).

3. Search Exceeding Authorized Scope

Any part of a search extending beyond the limits prescribed in the warrant is a warrantless search "conducted outside the judicial process, without the prior approval by judge or magistrate, [and is] *per se* unreasonable under the Fourth Amendment." *Katz*, 389 U.S. at 357. Upon a motion to

[70] Rule 41(f) describes the documentation that must be filed with the court, and how seized property is to be treated. *See also* D.C. Code § 23-521(f)(6).

suppress fruits of a warrantless search, the burden is on the government to demonstrate that the search falls within one of the specifically delineated exceptions to the warrant requirement. *Cf. Malcolm v. United States*, 332 A.2d 917, 918 (D.C. 1975); *infra* Section III.C.

Counsel should be prepared to argue that the "good-faith" exception, discussed *supra* Section III.B.1, does not apply to "beyond-the-scope" searches. The Supreme Court has not directly addressed this issue. However, *Illinois v. Krull*, 480 U.S. 340, 342 (1987), made clear that the rule of *Leon* applies only when the constitutional error is committed by some neutral party, i.e., a judicial officer or a legislature. It declined to extend the rationale of *Leon* to good-faith errors by police, noting that unlike judges and legislators, police are "engaged in the often competitive enterprise of ferreting out crime," and must remain subject to the exclusionary rule so that its deterrent effect tempers their competitive impulses. *Id*. at 360 n.17. It follows that a good-faith mistake by police in interpreting the scope of the authorized search remains subject to the exclusionary rule.[71]

2014 Supplement

***Bailey v. United States*, 133 S. Ct. 1031 (2013).** The *Summers* rule—that officers executing a search warrant may detain the occupants during search without suspicion—is limited to the geographical area in which an occupant poses a real threat to the execution of the search, and stopping respondent a mile from search was not justified by concerns underlying the rule.

C. Evidence Obtained Without a Warrant

Warrantless searches and seizures are presumptively unlawful, *Katz*, 389 U.S. at 357, even if there is probable cause. *Agnello v. United States*, 269 U.S. 20, 33 (1925); *see also Burton v. United States*, 657 A.2d 741, 745 (D.C. 1994). Thus, the government's proposed use of evidence obtained without a warrant should always be challenged. Once challenged, the government has the burden of proving that the evidence was obtained through one of the limited exceptions to the warrant requirement. *Arkansas v. Sanders*, 442 U.S. 753, 760 (1979). These "exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.'" *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) (citations omitted).

2014 Supplement

***Missouri v. McNeely*, 133 S. Ct. 1552 (2013).** When officers in drunk driving investigations can reasonably obtain a warrant before having a blood sample drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.

***Silver v. United States*, 73 A.3d 1022 (D.C. 2013).** Trial court did not err in allowing testimony regarding evidence found during an illegal search in prosecution for obstruction of justice charge

[71] *Cf. Maryland v. Garrison*, 480 U.S. 79, 85-86 (1987) (where warrant authorized search of entire third floor of building and officers reasonably believed there was only one apartment on that floor, entry into second apartment on that floor did not require suppression because the warrant, on its face, covered that apartment).

because suppression of that evidence in connection with PWID charge provided adequate deterrent to police misconduct.

1. Exceptions Based on Consent

Consent obviates the need for Fourth Amendment protection; with valid consent, the police may search a person's body, home, or possessions without a warrant or probable cause. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973). Claims of consent are therefore subject to strict judicial scrutiny, and the burden is on the government to prove that (1) the consent was voluntary, (2) the person who consented had the authority to do so, and (3) the actual search did not exceed the scope of the consent given. *See (James) Oliver v. United States*, 618 A.2d 705, 709 (D.C. 1993); *Villine v. United States*, 297 A.2d 785, 786 (D.C. 1972); *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).

2014 Supplement

***United States v. Delaney*, 651 F.3d 15 (D.C. Cir. 2011).** Testimony of officers on question of who had requested search that tended to describe actions in plural "we" and used terms "rear" and "back" window interchangeably not so "inconsistent" as to render officers' version of events incredible such that defendant's consent to search of vehicle that led to discovery of firearm and drugs in rear passenger compartment should have been deemed invalid.

a. Voluntariness of the consent

The right to be free from unreasonable searches is a fundamental constitutional right. Thus, the courts must "indulge every reasonable presumption against waiver" by consent. *United States v. Abbott*, 546 F.2d 883, 885 (10th Cir. 1977). The government must prove "by clear and positive testimony," *Judd v. United States*, 190 F.2d 649, 651 (D.C. Cir. 1951), that consent was "voluntarily given, and not the result of duress and coercion, express or implied." *Schneckloth*, 412 U.S. at 248. "[T]o establish consent [the government] must show more than the mere 'acquiescence to a claim of lawful authority.'" *(Lisa) Oliver v. United States*, 656 A.2d 1159, 1179 (D.C. 1995) (Ferren, J., dissenting) (quoting *Bumper v. North Carolina*). Rather, the government must convince the court, by a preponderance of the evidence following "careful scrutiny of all circumstances surrounding" the consent, *(James) Oliver*, 618 A.2d at 709, that it has "clearly establish[ed] the absence of intimidation and duress." *(Lisa) Oliver*, 656 A.2d at 1179 (Ferren, J., dissenting) (citing *Schneckloth*);[72] *see also United States v. Lindsay*, 506 F.2d 166, 173 (D.C. Cir. 1974); *United States v. (Theodore) Mayes*, 552 F.2d 729, 732-33 (6th Cir. 1977) (consent invalid where person initially refused but relented after twenty to thirty minutes of police persuasion); *United States v. Rogers*, 436 F. Supp. 1, 7-8 (E.D. Mich. 1976) (equivocation and hesitation invalidate consent).

[72] The requirement that the court assess all of the circumstances surrounding the consent justifies defense counsel undertaking a searching cross-examination of all of the circumstances surrounding the alleged consent regardless of whether the defense calls witnesses of its own. *United States v. Hodge*, 19 F.3d 51 (D.C. Cir. 1994) (remanded because trial court cut off cross-examination of officer designed to demonstrate that appellant must have witnessed what police did with two other individuals being arrested and patted down sometime before, during, or after appellant allegedly consented to a search of his belongings).

"[A]ccount must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents." *(James) Oliver*, 618 A.2d at 709 (quoting *Schneckloth*, 412 U.S. at 229). The court must undertake a "careful sifting of the unique facts and circumstances of each case." *In re J.M.*, 619 A.2d 497, 503 (D.C. 1992) (en banc) (citing *Schneckloth*, 412 U.S. at 233). Among the relevant circumstances are the length of the detention, the nature of the questioning, the use of physical punishment, the intelligence and education of the individual, and the lack of any advice by the police regarding his or her rights. *Schneckloth*, 412 U.S. at 226.

The government will have the greatest difficulty carrying its burden if there is evidence of physical abuse or overt duress. However, even in their absence, courts should view "with caution and misgivings any search based upon a consent given after arrest, and under circumstances indicating intimidation or coercion of any kind." *Wion v. United States*, 325 F.2d 420, 423 (10th Cir. 1963) (en banc) (emphasis added); *accord Judd*, 190 F.2d at 651. Thus, special scrutiny should be given to any "consent" allegedly obtained after a client is arrested, restrained, and questioned by police. *See, e.g., United States v. Rothman*, 492 F.2d 1260, 1264-65 (9th Cir. 1974) (consent involuntary despite giving of *Miranda* warnings where defendant was arrested, handcuffed, and questioned by three officers for two hours); *United States v. Whitlock*, 418 F. Supp. 138, 145 (E.D. Mich. 1976), *aff'd*, 556 F.2d 583 (6th Cir. 1977) (fact that defendant was arrested at gunpoint, handcuffed, made to sit in chair, and subjected to rough and loud behavior by a number of officers supported finding of involuntary consent despite *Miranda* warnings and fact that defendant was in his own apartment with his wife). *Cf. United States v. Watson*, 423 U.S. 411, 424 (1976) (custody did not vitiate consent where defendant was held on public street, given *Miranda* warnings, and cautioned that result of search would be used against him); *United States v. Battista*, 876 F.2d 201, 207 (D.C. Cir. 1989) (consent after seizure was valid where tone between defendant and officer was conversational and defendant was informed mid-search that he did not have to consent but told officer to proceed). "The psychological atmosphere in which the consent is obtained is a critical factor in the determination of voluntariness." *Rothman*, 492 F.2d at 1265.[73]

In non-arrest situations, courts have long been skeptical of the voluntariness of "consent" obtained by armed, uniformed officers:

> "[I]nvitations" to enter one's house, extended to armed officers of the law who demand entrance, are usually to be considered as invitations secured by force. A like view has been taken where an officer displays his badge and declares that he has come to make a search, even where the householder replies "All right." A finding of consent in such circumstances has been held to be "unfounded in

[73] Fourth, Fifth, and Sixth Amendment rights occasionally overlap in post-arrest consent cases. Thus, if a defendant asks to consult with counsel, government agents may not attempt to obtain consent until after that opportunity has been provided. *See, e.g., United States ex rel. Daley v. Yeager*, 415 F.2d 779, 783-84 (3d Cir. 1969) (violation of Fourth, Fifth, and Sixth Amendments when police sought defendant's consent after he made an in-court request for an attorney and was granted a continuance to obtain one). Similarly, if a suspect cuts off police questioning and requests counsel and a telephone, subsequent efforts to obtain written consent to search may violate the *Miranda* rule. *See United States v. Fisher*, 329 F. Supp. 630, 634 (D. Minn. 1971). Finally, and perhaps most basically, evidence obtained as a result of an apparently valid consent will be suppressed if the consent is the fruit of a seizure found to be invalid under the Fourth Amendment. *See Florida v. Royer*, 460 U.S. 491, 502-03 (1983).

> reason." Intimidation and duress are almost necessarily implicit in such situations.

Judd, 190 F.2d at 651 (citations omitted); *accord (Paul) Gatlin v. United States*, 326 F.2d 666, 673 (D.C. Cir. 1963). Further, while opening a door and stepping back may be construed as a voluntary consent to enter a home, such acts should be so interpreted only "where the person opening the door already knew that police officers were outside [and in] opening the door and stepping back clearly showed an intent to admit (as opposed to merely a desire to see) the person on the other side." *(Lisa) Oliver*, 656 A.2d at 1183 (Ferren, J., dissenting). A person who opens his or her door, not knowing that police are there, and then steps back, is as likely to be retreating as inviting the officers in. Absent a specific request to enter, a "resident's unequivocal, voluntary consent to enter cannot be inferred merely from failure to object to the entry, at least where no body language indicates an invitation to enter." *Id.*; *cf. Martin v. United States*, 605 A.2d 934, 938 (D.C. 1992) (consent voluntary where homeowner knew before officers arrived that they were there to pick up grandson and upon their arrival knocked down a relative who tried to impede their entry).

An ultimatum may also vitiate consent. Thus, "consent" was involuntary where a defendant's wife allowed the police to search only after they told her that they would not be responsible for "what happened to what was in the apartment" if they had to obtain a warrant, but that "they would put everything back" if she consented. *(Robert) Waldron v. United States*, 219 F.2d 37, 39 (D.C. Cir. 1955); *see also United States v. Kampbell*, 574 F.2d 962, 963-64 (8th Cir. 1978) (coerced by threat to ransack house).

Consent may also be coerced if obtained by deceit. *See Bumper*, 391 U.S. at 548-50. "[T]rickery, fraud or misrepresentation on the part of the police to gain entry naturally undermines the voluntariness of any consent." *United States v. (Calvin) Griffin*, 530 F.2d 739, 743 (7th Cir. 1976). Coercion may be found if one is led to believe that consent will secure another person's freedom. *United States v. Bolin*, 514 F.2d 554, 560 (7th Cir. 1975) (defendant, during custodial interrogation, was told that his girlfriend would not be arrested if he signed search warrant waiver).

When coercion is subtle, careful attention must be given to the subjective state of the person to whom it is directed. This point was emphasized in *(James) Oliver*, a drug-interdiction case finding a consent to search involuntary though the objective circumstances of the defendant's public encounter with plainclothes police were nearly identical to those of other cases in which the consent was found to have been voluntarily given.[74] In *Oliver*, the finding of involuntariness was based on the defendant's reasonable belief that he had recently encountered the same officers in the same setting and had at that time consented to a search only as a result of their implied threat to take his bags. 618 A.2d at 708-10. Finding that "the message conveyed to [the defendant] on the previous occasion would bear importantly on 'the nature of [his] subjective

[74] *Kelly v. United States*, 580 A.2d 1282, 1286 (D.C. 1990) (individual was confronted in public place by plainclothes officers who spoke in conversational tone, did not display weapons, identified themselves, and requested permission to speak to individual before asking for consent to search); *United States v. Maragh*, 894 F.2d 415, 420 (D.C. Cir.), *on remand*, 756 F. Supp. 18 (D.D.C. 1991) (same); *United States v. Lloyd*, 868 F.2d 447, 451-52 (D.C. Cir. 1989) (same).

understanding' of his rights," the court found nothing to offset the effect of the previous coercive search. *Id*. at 710 (citations omitted).

Although the Supreme Court has declined to impose a prophylactic rule requiring advice of the right to withhold consent, absence of such advice may prove "highly relevant." *United States v. Mendenhall*, 446 U.S. 544, 559 (1980). This is particularly true in cases involving alleged consent by a juvenile. Judges upholding such searches must "make explicit findings on the record concerning the effect of age and relative immaturity on the voluntariness of the defendant's consent." *J.M.*, 619 A.2d at 503. "These findings . . . are particularly necessary when it is conceded . . . that the youth was not told he could withhold consent." *Id*.

b. Authority to consent

When the government alleges that consent to enter or search was given by someone other than the defendant, its burden on validity is "especially weighty." *Villine*, 297 A.2d at 786.[75] In addition to showing that the consent was voluntary, the government must demonstrate that the officer reasonably believed that the person had authority to consent. *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990). Pursuant to this standard, police are assumed to know the significant body of well-established law defining "authority to consent." Thus, an officer's mistaken determination that an individual had the requisite authority can potentially be reasonable if it is based on a misapprehension of the facts, but not if it is based on a misunderstanding of the law. *United States v. (Maurice) Whitfield*, 939 F.2d 1071, 1073-74 (D.C. Cir. 1991); *cf. United States v. Edelen*, 529 A.2d 774, 787 (D.C. 1987).

Consent to enter or search may be granted only by a person with "common authority over or other sufficient relationship to the premises or effects sought to be inspected." *United States v. Matlock*, 415 U.S. 164, 171 (1974). Authority may not be inferred from a mere property or proprietary interest. *Stoner v. California*, 376 U.S. 483, 488 (1964) (night clerk cannot consent to search of hotel guest's room); *Chapman v. United States*, 365 U.S. 610, 616-17 (1961) (landlord cannot validly consent to search of house he has rented to another). Because privacy interests are at stake, consent may come only from those who enjoy "mutual use of the property," such that "any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched." *Matlock*, 415 U.S. at 171 n.7. Simple access and use are not enough. The important factors are mutuality of use and control by the authorizing party "for most purposes." *Id*. Thus, in *Rodriguez*, where a woman had a key to her boyfriend's apartment; lived with him until a month before the search; kept clothing, household effects, and furniture in the apartment; and sometimes spent the night there when he was at home, but did not have her name on the lease and did not contribute to the rent, the Supreme Court declined to find that she had authority to give consent because she did not have "joint access or control for most purposes." 497 U.S. at 181-82.

[75] As a procedural matter, while proof of authority to consent may be supported with hearsay, *United States v. Matlock*, 415 U.S. 164, 173 (1974), hearsay alone may fail to carry the government's heavy burden. *See, e.g., Moffett v. Wainwright*, 512 F.2d 496, 499-501 (5th Cir. 1975) (authority not made out by officer recounting woman's assertion that she lived with defendant in searched apartment, even though her clothes were found there).

In *Georgia v. Randolph*, 547 U.S. 103 (2006), officers responded to a call for a domestic disturbance. Randolph and his estranged wife both met the officers at the door and the wife told them that Randolph had cocaine in the house. The officers asked for permission to search the house and Randolph explicitly refused while the wife consented. A search revealed cocaine paraphernalia and ultimately led to an arrest and conviction for possession of cocaine. The question is whether the wife's consent to the search overrode Randolph's refusal, rendering the search 'reasonable'. The Supreme Court held that it did not. The Court distinguished *United States v. Matlock*, which held that the consent of a person who possess common authority is valid against an absent, non-consenting person who shares a similar common authority. *Matlock* was based on the reasoning that a tenant assumes that co-tenant has the right to admit anyone into the common areas of the premises when they are not present. This reasoning does not apply when the non-consenting tenant is not present (even when the non-consenting tenant is asleep inside the premises or being held in a police car right by the premises). The Court stated that it was unreasonable to think that, if someone showed up at a house and one tenant invited them in while the other tenant explicitly told the visitor to stay out, that they would enter and disregard the lack of consent. "[I]t is fair to say that that a caller standing at the door of shared premises would have no confidence that one occupant's invitation to enter was a sufficiently good reason to enter when a fellow tenant stood there saying "stay out" . . . no sensible person would go inside under those conditions."

Even if the area sought to be searched is within a common premises to which the consenting third party has control for most purposes, consent is not valid if the searched area is under the defendant's exclusive control. *See (Janice) Washington v. United States*, 585 A.2d 167, 168 n.1 (D.C. 1991) (resident of apartment could not validly consent to search of bedroom used by her sister); *United States v. Heisman*, 503 F.2d 1284, 1287-88 (8th Cir. 1974) (co-lessor of commercial premises cannot validly consent to search of unlocked room set aside for defendant's personal use); *cf. Welch v. United States*, 466 A.2d 829, 845 (D.C. 1983) (wife could consent to search of husband's basement office because she had free access to office, kept her personal property there, and occasionally used it for typing). This limit is recognized even if the consenting party is the defendant's parent. *(Maurice) Whitfield*, 939 F.2d at 1074-75 (mother's "ability or . . . legal right to enter [son's room] simply qualified her as a person who, under *Matlock*, could give consent to a search of property subject to her 'mutual use' . . . whether she had 'mutual use' . . . could not be determined from anything the agents asked"); *Reeves v. Warden*, 346 F.2d 915, 924-25 (4th Cir. 1965) (mother cannot consent to search of room set aside for son's exclusive use); *see also In re Scott K.*, 595 P.2d 105 (Cal. 1979) (rejecting contention that parents have greater authority to consent to search of minor child's effects than of those of adult child). *But see (Cleveland) Wright v. United States*, 717 A.2d 304 (D.C. 1998) (police acted reasonably in relying on father's consent to search son's room, in which others had occasionally slept while defendant slept in basement).

Neither may consent to search a common area imply consent to search the personal effects of another found within that area, if the owner has demonstrated an intent to assert an exclusive right of control over the property. *See Frazier v. Cupp*, 394 U.S. 731, 740 (1969) (user of part of duffel bag may validly consent to search of entire bag); *Derrington v. United States*, 488 A.2d 1314, 1325 (D.C. 1985) (mother's consent to search defendant's gym bag valid because bag was unzipped in open area of apartment to which all household members had access and defendant

had done "nothing to assert an exclusive right of control over [it]"); *Welch*, 466 A.2d at 845 (wife may consent to search of husband's unlocked bag found in trunk of car owned by and registered to her); *United States v. Harrison*, 679 F.2d 942, 947 (D.C. Cir. 1982) (wife may consent to search of unsealed boxes in basement storage area where wife kept personal items, and husband never asserted boxes were exclusively in his control or contained his personal effects).

2014 Supplement

***Fernandez v. California*, 134 S. Ct. 1126 (2014).** *Georgia v. Randolph*, 547 U.S. 103 (2006) (one occupant's consent insufficient to justify search when another physically present occupant objects), does not apply when objecting occupant is absent at time of fellow occupant's consent, even when that absence is because of lawful detention or arrest.

***United States v. Peyton*, 745 F.3d 546 (D.C. Cir. 2014).** See, *supra*, Chapter 22.III.A.1.

***In re K.H.*, 14 A.3d 1087 (D.C. 2011).** Reversible error to deny motion to suppress the evidentiary fruits of a warrantless, nonconsensual intrusion by police into an apartment in which defendant had a reasonable expectation of privacy as an overnight guest.

c. The scope of consent

The legality of a consent search is limited by the scope of the consent given. "It is clear that a person may limit the consent which he gives to authorities to search his premises. And 'a consent search is reasonable only if kept within the bounds of the actual consent.'" *United States v. (Calvin) Griffin*, 530 F.2d 739, 744 (7th Cir. 1976) (citations omitted). In other words, if evidence was obtained as a result of what, in essence, was a warrantless search, it will not be admitted unless the government can demonstrate that it comes within some other exception to the warrant requirement.

In a dwelling, one may permit entry to certain rooms and not others, or permit certain officers to enter without thereby opening the door to the rest of the police force. *United States v. Glasby*, 576 F.2d 734, 737 (7th Cir. 1978). One may also explicitly limit the extent of a search. Permission to search an automobile may exclude containers and packages in the auto, *see Florida v. Jimeno*, 500 U.S. 248 (1991), and consent to search a bag or luggage need not include all the packages and containers contained therein. *See Kelly v. United States*, 580 A.2d 1282, 1289 (D.C. 1990) (by implication); *United States v. (Milton) Smith*, 901 F.2d 1116 (D.C. Cir. 1990); *United States v. Battista*, 876 F.2d 201, 207 (D.C. Cir. 1989). *But see (Lawrence) Ware v. United States*, 672 A.2d 557, 564-66 (D.C. 1996) (failure to express object of search did not render consent invalid where defendant first said he would not give permission to officers to search purse but would help them out, and then removed containers from purse and placed on wall next to police; Court appears to rely on contrast between manner in which defendant handled containers in purse and purse itself (which he held closely and refused to let go of) in finding it objectively reasonable for officers to believe they had permission to search containers).

If one does not define the exact parameters of the search to which consent is given, the standard for measuring the scope of consent is "objective" reasonableness – what a reasonable person would understand from the exchange between officer and subject. *Jimeno*, 500 U.S. at 251; Kelly, 580 A.2d at 1289. Thus, *Jimeno* found no Fourth Amendment violation when an officer opened a closed paper bag taken from inside a car, having received permission to search the car for narcotics, finding it "objectively reasonable" to conclude that the consent would necessarily include containers in which narcotics could be stored,[76] but suggesting that a general consent to search a car when no objective had been specified could not be read as a consent to search all containers in the car. 500 U.S. at 251-52; *see also Kelly*, 580 A.2d at 1289 (consent found to search bag and any container in it that could hold drugs, where officer asked defendant if he was carrying drugs in shopping bag and then asked if defendant would have a problem if he searched the bag, to which defendant said no).

In contrast, when an unrestricted consent extends to the search of one's person, even when the searching officer has made it clear that he or she is looking for narcotics, the "police do not have free reign to perform the most intimate and intrusive search of a suspect's private areas" though such areas could contain drugs. *United States v. Ashley*, 37 F.3d 678, 680 (D.C. Cir. 1994). Thus, the D.C. Circuit has found that a general consent to a body search is limited by the "objective reasonableness" test to a traditional *Terry* frisk excluding "direct frontal touching" of the genital area, *United States v. Rodney*, 956 F.2d 295, 298 (D.C. Cir. 1992), and, presumably, the breasts, *id*. at 300-02 (Wald, J., dissenting). If the searching officer and the person being searched are not of the same sex, a general consent to search likely allows even less. *Id*. at 298. *But see id*. at 299-302 (arguing that general consent to body search in public place cannot reasonably be understood to include more than emptying of pockets and patting down of sides, shoulders, and back).

2. The Plain View and Plain Feel Doctrine

The warrantless seizure of evidence in the plain view of an officer may be upheld if (1) the officer was lawfully present at the *situs* and (2) the item seized was immediately recognizable as evidence. *(Terry) Horton v. California*, 496 U.S. 128, 136-37 (1990); *(Richard) Jackson v. United States*, 404 A.2d 911, 918 (D.C. 1979); *see also Texas v. Brown*, 460 U.S. 730, 737 (1983); *Washington v. Chrisman*, 455 U.S. 1, 8-9 (1982); *Coolidge v. New Hampshire*, 403 U.S 443, 468 (1971) (plurality opinion).[77] This test eliminated the "inadvertent discovery" requirement set out in *Coolidge*: "though inadvertence is a characteristic of most legitimate 'plain view' seizures, it is not a necessary condition." *Horton*, 496 U.S. at 130.[78]

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[76] But *Jimeno* also suggests that a general consent to search a car when no objective had been specified could not be read as consent to search all containers in the car. 500 U.S. at 251-52.

[77] "If . . . the police lack probable cause to believe that an object in plain view is contraband without some further search of the object . . . the plain-view doctrine cannot justify its seizure." *Minnesota v. (Timothy) Dickerson*, 508 U.S. 366, 378, (1993).

[78] In *Horton*, while searching the defendant's home with a warrant for proceeds of an armed robbery, the police discovered weapons; the officer testified that while searching for the proceeds, "he also was interested in finding other evidence connecting petitioner to the robbery. Thus, the seized evidence was not discovered 'inadvertently.'" *Id*. at 131. However, the weapons "were discovered during a lawful search . . . [and w]hen they were discovered, it was immediately apparent . . . that they constituted incriminating evidence." *Id*. at 142. The court upheld the

For presence to be lawful, the officer must have a valid reason for being in a position to see the evidence seized. This requirement "has both temporal and spatial dimensions." *Brooks v. United States*, 367 A.2d 1297, 1305 (D.C. 1976). Presence as a result of warrantless entry to effect an arrest justified by exigent circumstances, *see infra* Section III.C.4, will ordinarily cease to be lawful upon the removal of the defendant, *id*. at 1304-05 n.6; a subsequent discovery of evidence cannot be justified under the plain view doctrine. *But see Chrisman*, 455 U.S. at 5 (officer who accompanied arrestee to his dormitory room to procure identification and saw what appeared to be marijuana was justified in entering and seizing marijuana, on grounds that police may stay at arrestee's elbow). Similarly, where presence is based on a search warrant, the search must cease as soon as the specified items are found; any later discovery of items in plain view is not justified. *See Horton*, 496 U.S. at 141. Neither will the plain view doctrine justify discovery of evidence in areas too small to accommodate items described in a warrant. *Id*. at 140-41 (discussing automobile cases in which scope of permissible search is defined by its object).

With respect to the second prong of the test, if the article is not clearly contraband, the police must have probable cause to believe that it is incriminating evidence. *Brown*, 460 U.S. at 742 (officer seized balloon from defendant's hand which, based on his experience, he had probable cause to believe contained narcotics).[79] *See Gant v. United States*, 518 A.2d 103, 109 (D.C. 1986) (police who lawfully entered defendant's dwelling to effect arrest improperly seized clothing whose character as evidence "was not obvious"); *Bynum v. United Sta*tes, 386 A.2d 684, 687-88 (D.C. 1978) (not "immediately apparent" that tape recorder, bearing name different from possessor's and address of dwelling that had recently been burglarized, was evidence or proceeds of crime); *see also Christmas v. United States*, 314 A.2d 473, 476 (D.C. 1974) (contents of medicine vial not in plain view of officers who had no reason to believe vial contained contraband). In contrast, in *(Terry) Horton*, police reports attached to the search warrant justifying the entry provided clear evidence that the police had probable cause to believe that the weapons they discovered were instrumentalities of the very robbery that prompted them to obtain the warrant. 496 U.S. at 131, 142.

Minnesota v. (Timothy) Dickerson, 508 U.S. 366 (1993), extended the plain view doctrine to cases in which an officer discovers weapons or contraband through the sense of touch. If, while patting down a suspect's outer clothing pursuant to a lawful *Terry* frisk,[80] an officer "feels an object whose contour or mass makes its identity immediately apparent," the warrantless seizure of the object is valid on the same rationale justifying seizure when weapons or contraband are in plain view. *Id*. at 378 (emphasis added); *see Ball v. United States*, 803 A.2d 971 (D.C. 2002) (though officer's tactile identification of pill bottle did not independently satisfy probable cause, the combination of that plain feel, the officer's experience with narcotics packaging, and

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seizure, reasoning that "[i]f the interest in privacy has been invaded, the violation must have occurred before the object came into plain view and there is no need for an inadvertence limitation on seizures to condemn it." *Id*. at 141.

[79] Before *Brown*, there was some question as to whether more certainty than probable cause was necessary; *Brown* laid this issue to rest and declined to address the question of whether in some circumstances a lesser degree of suspicion would be sufficient. *Id*. at 742 n.7.

[80] *See supra* Section II.D.1.c on the justification needed for a *Terry* frisk.

defendant's attempts to access that pocket authorized the bottle's seizure); *Speight v. United States*, 671 A.2d 442, 449 (D.C. 1996) (removal of keys from pocket exceeded the scope of permissible *Terry* frisk). The officer must have been acting within the "strictly circumscribed" bounds of the search for weapons permitted by *Terry v. Ohio*, 392 U.S. 1 (1968). *Dickerson*, 508 U.S. at 378. Thus, if, as in *Dickerson*, an officer is able to determine that the item in question was contraband only by "squeezing, sliding and otherwise manipulating" a piece of clothing that the officer already knew contained no weapon, the search is not authorized by Terry and the seizure is unlawful. *Id*.; *see also United States v. Adell*, 676 A.2d, 446, 447 (D.C. 1996) (even if officer was justified in reaching into pocket on grounds that he believed weapon was located there, on feeling object and realizing it was not a weapon, the officer should not have removed it).

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***Beachum v. United States*, 19 A.3d 311 (D.C. 2011).** Motion to suppress properly denied under plain view exception where officer stood on public street responding to complaint of loud music coming from particular vehicle, shone his flashlight into vehicle and noticed what he immediately recognized as clip of handgun sticking out of bag in rear passenger area, and then seized weapon.

***Butler v. United States*, 102 A.3d 736 (D.C. 2014).** Unpersuaded by government's argument that identifiable aroma of drug by itself provides probable cause to arrest and search an individual, Court of Appeals concludes that arrest and subsequent search here was not unconstitutional because defendant was sole occupant of vehicle stopped during traffic stop and because aroma was of "fresh" marijuana, thus making it more likely that defendant was presently in possession of marijuana.

***Gilliam v. United States*, 46 A.3d 360 (D.C. 2012).** Officer had probable cause under plain smell doctrine to search ice cream truck parked in driveway of house subject to search warrant because he smelled burning marijuana and saw smoke coming from the truck, despite the fact that no evidence indicating that any marijuana had been burned in the truck was found during the search.

***Zanders v. United States*, 75 A.3d 244 (D.C. 2013).** Trial court did not err in denying defendant's motion to suppress evidence seized following traffic stop where investigation was still ongoing when officer asked driver and passengers to get out of car and then saw ammunition clip of gun protruding from under front passenger seat which provided probable cause to search rest of car for additional weapons.

3. Searches of People

The presumptive warrant requirement applies with maximum force to searches of individuals, which are lawful only with a valid search warrant, or incident to a valid arrest. *Gustafson v. Florida*, 414 U.S. 260, 264 (1973); *United States v. Robinson*, 414 U.S. 218, 235 (1973). *But see Samson v. California*, 547 U.S. 843 (2006) (suspicionless search of California parolee did not violate the Fourth Amendment).

"'It is axiomatic that an incident search may not precede an arrest and serve as part of its justification.'" *Smith v. Ohio*, 494 U.S. 541, 543 (1990) (per curiam) (citation omitted); *see also United States v. Di Re*, 332 U.S. 581, 595 (1948) ("a search is not to be made legal by what it turns up . . . [I]t is good or bad when it starts and does not change character from its success"); *(Lamont) Hill v. United States*, 627 A.2d 975, 978-79 (D.C. 1993) (though suspect was not formally under arrest, search of person justified because formal arrest made immediately after search, and probable cause to arrest existed at time of search); a*ccord Millet v. United States*, 977 A.2d 932, 935 (D.C. 2009) ("A search incident to arrest may precede the actual arrest if probable cause exists, independent of the search, to justify the arrest, and if the arrest follows 'quickly on the heels' of the search.").

It is less clear how long after an arrest a search may still be "incident" to the arrest. Once an accused is in custody, certain warrantless searches and seizures that could have been made at the time of arrest may be conducted at the place of detention. *See United States v. Edwards*, 415 U.S. 800, 803 (1974); *cf. Cupp v. Murphy*, 412 U.S. 291, 296 (1973). However, there is a strong argument for limiting such post-custody warrantless searches to instances involving evidence that could be lost during the delay necessary to obtain a warrant. *Whalen v. United States*, 379 A.2d 1152, 1163 (D.C. 1977), *rev'd in part on other grounds*, 445 U.S. 684 (1980). *United States v. Chadwick*, 433 U.S. 1 (1977), concluded that it was not prepared to hold that non-evanescent items, such as samples of the suspect's own hair, could be seized absent a warrant. Drug testing without consent is permissible when special needs, other than a normal need for law enforcement, provide sufficient justification, such as testing railway employees involved in train accidents, *Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602 (1989); customs employees seeking promotion to sensitive positions, *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989); and high school students participating in interscholastic sports, *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995). A state hospital violated the Fourth Amendment, however, when medical staff performed urine tests on obstetrics patients – the results of which would be turned over to law enforcement agents without the knowledge or consent of the patients – in an effort to get pregnant women off drugs. *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). The Supreme Court concluded that "[g]iven the primary purpose of the [drug testing] program, which was to use the threat of arrest and prosecution in order to force women into treatment, and given the extensive involvement of law enforcement officials at every stage of the policy, this case simply does not fit within the closely guarded category of "special needs." *Id.* at 84.

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***Florence v. Bd. of Chosen Freeholders*, 132 S. Ct. 1510 (2012).** See, *supra*, Chapter 22.III.A.

***United States v. Scott*, 987 A.2d 1180 (D.C. 2010).** Despite its intrusiveness, a strip search for contraband (or a weapon) is permissible as part of a search incident to a lawful arrest if the search is supported by reasonable suspicion and conducted in a reasonable manner.

4. Searches of Dwellings

"[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton v. New York*, 445 U.S. 573, 585 (1980). Freedom from such

intrusion "is the archetype of the privacy protection secured by the Fourth Amendment." *Dorman v. United States*, 435 F.2d 385, 389 (D.C. Cir. 1970) (en banc). "In general a home may not be searched without a warrant notwithstanding probable cause." *Id*. Absent exigent circumstances, the police need a warrant for arrest before forcibly entering a home to make an arrest. *Payton*, 445 U.S. at 590; *see also New York v. Harris*, 495 U.S. 14, 20 (1990) (evidence found or statements taken inside house after warrantless, non-consensual entry to arrest must be suppressed).[81] A search warrant is presumptively necessary before the police may enter a third party's home to effect an arrest; an arrest warrant in the name of the suspect will not suffice. *Steagald v. United States*, 451 U.S. 204, 215-16 (1981). In addition, law enforcement agents' warrantless use of sense-enhancing technology to gather information about the interior of a private home – namely, a thermal imaging device to determine if the amount of heat emanating from the home suggested the use of high-intensity lamps used for growing marijuana – constituted an unlawful search. *Kyllo v. United States,* 533 U.S. 27, 33, 40 (2001) ("[w]here, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant"). When litigating motions to suppress evidence obtained from a dwelling, counsel should emphasize the special deference the courts have accorded the privacy associated with the home. *See Michigan v. Clifford*, 464 U.S. 287, 292-93 (1984) (reaffirming reasonable expectation of privacy in fire-damaged premises). "[P]rivate residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant." *United States v. Karo*, 468 U.S. 705, 714 (1984).

The requirement of a warrant applies to each step of the intrusion. Thus, even if the police had a warrant that justified entry into a home, evidence seized from inside will be suppressed unless that seizure was also authorized by the warrant (*see supra* Section III.B), the police obtained proper consent (*see supra* Section III.C.1), the evidence was in plain view (*see supra* Section III.C.2), or one of the exceptions to the Warrant Clause discussed below applies (*see infra* Section III.C.4.b).

a. Justifying the warrantless entry

Exceptions to the warrant requirement when a dwelling is entered include emergencies characterized as "hot pursuit," "exigent circumstances," or an "emergency requiring preventive action." "Courts have recognized emergencies excusing failure to procure a warrant very sparingly." *United States v. Dawkins*, 17 F.3d 399, 405 (D.C. Cir. 1994). Whatever other specific requirements must be met to justify a warrantless entry under a particular exception, a search of a home based on one of these exceptions will be upheld only if supported by probable cause. "This requirement stems from the fact that an exception to the warrant preference rule excuses the government only from the necessity of going before a magistrate; it does not alter the underlying level of cause necessary to support entry." *Id*. at 403. Additionally, assuming all prerequisites are satisfied, entry pursuant to these exceptions is justified only when necessary to "protect officers, bystanders, and identified evidence, and to secure suspects." *(Janice)*

[81] A warrantless arrest in a home may be lawful with valid consent (discussed *supra* in Section 1) to the entry. *See Robertson v. United States*, 429 A.2d 192, 194 (D.C. 1981).

Washington v. United States, 585 A.2d 167, 170 (D.C. 1991). These exceptions can never be relied on to "facilitate exploration, or obtain[] of evidence to verify mere suspicions." *Id.*

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***Oxner v. United States*, 995 A.2d 205 (D.C. 2010).** See, *supra*, Chapter 21.I.D.1.

(1) Hot pursuit

Warden v. Hayden, 387 U.S. 294, 298 (1967), approved a warrantless entry and search by officers who had probable cause to believe that an armed robber had entered a house less than five minutes earlier. *Accord United States v. Santana*, 427 U.S. 38, 42-43 (1976). Commonly referred to as the "hot pursuit" exception,[82] this type of warrantless entry is permissible only when (1) the police have probable cause to arrest a fleeing felon; (2) speedy apprehension is imperative to prevent completion of the crime, destruction of evidence, or the suspect's escape; and (3) the police have continuous knowledge of the accused's whereabouts. *See id.*

The "true[st]" hot pursuit cases are those in which a suspect attempts to "defeat an arrest which has been set in motion in a public place . . . by the expedient of escaping to a private place." *Id.*; *see also Hilliard v. United States*, 638 A.2d 698, 706 (D.C. 1994) (pursuit justified where experienced officers had seen what they believed to be drug transaction and appellant fled into apartment known to be used as a "shooting gallery"); *(Glenn) Edwards v. United States*, 379 A.2d 976, 979 (D.C. 1977) (en banc) (officer who had probable cause to arrest defendant before he ran into building could pursue him). Situations most clearly falling outside the scope of this exception involve a break in the chase, lack of continuous knowledge of the suspect's whereabouts, or a delay in which a warrant could have been procured.[83] *See, e.g.*, *United States v. Lindsay*, 506 F.2d 166, 173 (D.C. Cir. 1974) (where police caught one of two suspected armed felons as he was about to enter motel room but the other fled, and half an hour later, after returning arrestee to scene for show-up, police used pass-key to enter motel room, entry was not in "hot pursuit" because police were not chasing anyone and had no knowledge of fleeing suspect's whereabouts for half an hour); *United States v. (Lamont) Carter*, 522 F.2d 666, 676 (D.C. Cir. 1975) (hot pursuit did not justify entry of arrestee's home where government did not establish why it failed to do obtain an arrest warrant, when it had the opportunity to do so); *see also Dawkins*, 17 F.3d at 407 (hot pursuit did not justify entry into second apartment when individual matching description of suspect had been located in another apartment). When a hot pursuit argument cannot succeed, the defense should be sensitive to the possibility that the government will argue that other exigent circumstances justified the warrantless entry.

[82] "Hot pursuit" actually involves two Fourth Amendment exceptions, one justifying a warrantless entry and the other justifying a limited "protective search"; the latter is discussed *infra* in Section III.C.4.b(2).

[83] Police from another jurisdiction do not fall outside of the "hot pursuit" exception. If police from another jurisdiction enter D.C. in "fresh pursuit" of a suspect, they become a "police force operating in the District of Columbia." *Watkins v. United States*, 724 A.2d 1200, 1204 (D.C. 1999).

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***Magruder v. United States*, 62 A.3d 720 (D.C. 2013).** Under "hot pursuit" exception to warrant requirement, police justified in pursuing defendant into apartment after watching him sell drugs and then flee, despite fact that police observed conduct potentially amounting to a misdemeanor and not a felony.

(2) Exigent circumstances

Although the Supreme Court has not expressly held that exigent circumstances can justify a warrantless entry into a dwelling absent "hot pursuit,"[84] the D.C. Court of Appeals, along with numerous other jurisdictions, has upheld such entries in certain limited circumstances. The analysis adopted by the Court of Appeals is based on criteria initially articulated in *Dorman*, 435 F.2d 385. *Dorman* approved a warrantless, night-time entry of a home for the purpose of arresting a suspect in a recent armed robbery. *Id*. at 391. Though there was no trail leading the police in "hot pursuit" from the crime to the suspect's home, the police knew which house to search because the suspect had left a probation report notice with his name and an address at the scene of the crime. *Id*. at 387. The exigencies identified in *Warden v. Hayden*, 387 U.S. 294, 298 (1967), were present in general. *Dorman,* 435 F.2d at 392-94. The court also noted that the police made a good-faith effort to obtain a warrant, but were unsuccessful due to the unavailability of a judicial officer. *Id*. at 394-96.

In concluding that the entry was justified, *Dorman* identified seven considerations material to the government's "heavy burden" of "show[ing] that there was a need that could not brook the delay incident to obtaining a warrant," *id*. at 392: whether

> (1) a grave offense was involved, particularly a crime of violence; (2) the suspect was reasonably believed to be armed; (3) there was a clear showing of probable cause; (4) there was strong reason to believe that the suspect was in the dwelling; (5) there was a likelihood of escape if the suspect was not swiftly apprehended; (6) the police effectuated a peaceful entry as opposed to a breaking; and (7) the entry occurred during night.

(Janice) Washington, 585 A.2d at 169.[85] In cases in which a "substantial period of time has elapsed between the commission of the crime and the warrantless entry" the Court of Appeals asks four questions that supplement and incorporate the *Dorman* criteria:

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[84] The Supreme Court has, however, held that exigent circumstances justified a police officer's refusal to permit the defendant to enter his residence unescorted by an officer until police obtained a search warrant. *Illinois v. McArthur*, 531 U.S. 326, 331-332 (2001). The restraint was reasonable, in the Court's view, because the police "had probable cause to believe that a home contained contraband, which was evidence of a crime," because "they reasonably believed that the home's resident, if left free of any restraint, would destroy that evidence," and because "they imposed a restraint that was both limited and tailored reasonably to secure law enforcement needs while protecting privacy interests." *Id.* at 337.

[85] The *Dorman* criteria are consistent with those approved in *Minnesota v. Olson*, 495 U.S. 91 (1990). The *Olson* court held that, absent hot pursuit, there must be at least probable cause to believe that one or more of the following factors were present: the imminent destruction of evidence, the need to prevent a suspect's escape, or the risk of danger to the police or to other persons inside or outside the dwelling; in assessing danger, the gravity of the crime

> (1) At what time did the police decide they had sufficient cause to pursue [the suspect]? (2) Did the police act reasonably in waiting that long to do so? (3) By the time the police were ready to move against [the suspect], were there exigent circumstances justifying a warrantless entry under Dorman []? (4) If so, did the police enter the premises without unreasonable delay?

United States v. (Mark) Harris, 629 A.2d 481, 488 (D.C. 1993) (citing *Minick v. United States*, 455 A.2d 874, 876 (D.C. 1983) (en banc)); *Derrington*, 488 A.2d at 1323-24.

Applying these criteria, *Minick* upheld a warrantless night-time entry that occurred four hours after the offense. The offense was grave; there was strong reason to believe the defendant was at home; the entry was peaceful; there was a clear showing of probable cause; and there was a substantial likelihood that critical evidence was on the premises and would be lost absent immediate entry. 455 A.2d at 878-81. *Minick* also found that the entry was made without unreasonable delay, and that the police could not have been expected to obtain a warrant during the twenty minutes between the time they reasonably concluded that they had probable cause to arrest and the entry. *Id*. at 881-82.

The *Dorman* criteria were also met in *Dunston v. United States*, 315 A.2d 563, 565 (D.C. 1974), and *Brooks v. United States*, 367 A.2d 1297 (D.C. 1976). The entry in *Dunston* occurred within thirty minutes, 315 A.2d at 565; in *Brooks*, two hours elapsed between the offense and entry, 367 A.2d at 1302. Each case emphasized the strength of the probable cause and the strong reason to believe that the suspect was on the premises. Similarly, *Derrington* held that it was not clearly erroneous for the trial court to find no unreasonable delay where the police entered the defendant's home one hour and fifteen minutes after the defendant was identified as the prime suspect in a shotgun murder. 488 A.2d at 1324.

In contrast, the entry in *Washington* was improper under *Dorman*. The police responded to an apartment after receiving a radio run for a "woman with a gun;" the woman who answered the officers' knock appeared upset and said, "my sister has a gun, and I want it out of the house." 585 A.2d at 167-68. She pointed the officers to the bedroom where she said her sister was. Receiving no reply to their knock, the officers forced their way into the room and found the defendant sitting on her bed with her three-year-old son. She denied having a gun. The police searched the room and found a semi-automatic. *Id*. Applying the seven-prong test, the court found the entry into the defendant's room invalid. *Id*. at 169. It concluded that the fact that an individual possessed a gun in a private home, without more, did not provide probable cause to conclude that any criminal activities had occurred, let alone the commission of a grave offense. *Id*.; *see also Dawkins*, 17 F.3d at 406 (although firearms present unique dangers to police and law-abiding citizens and may heighten an existing exigency, court has "never found exigency

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and the likelihood that the suspect is armed should also be considered. *Id*. at 100. *Olson* upheld the state court's application of this test and its finding that there were no exigent circumstances justifying a warrantless entry. *Id*. at 100-01. This is also in keeping with the reasoning in *Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978), which, in rejecting a *per se* exception to the warrant requirement for searches of homicide scenes absent a more particularized showing of exigent circumstances, declared that "the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment."

solely on basis that police have information that firearms are located in a private home") (emphasis in original); *cf. Gaulmon v. United States*, 465 A.2d 847, 851-53 (D.C. 1983) (police justified in entering room in transient hotel upon call from management reporting presence of gun, because occupant was in all likelihood not District resident and probably had and would carry gun in streets, thus posing real and present danger to public).

The entry in *United States v. Lindsay*, 506 F.2d 166 (D.C. Cir. 1974), was also improper under *Dorman* (as well as on a "hot pursuit" theory). A crime of violence had been committed; the suspect was armed and likely to escape unless swiftly apprehended; and the entry, within four hours of the offense, was peaceable. But the reasons for thinking that the suspect was inside were too speculative. *Id*. at 171-72. That the officers did not arrest the accused immediately upon entry, but instead searched for additional incriminating evidence, "undercut[] the Government's assertion that they clearly had probable cause to arrest . . . at the time of the entry." *Id*. at 171.

No fixed combination of factors is always necessary or sufficient to sustain an entry based on exigent circumstances. Further, the enumerated factors are to be considered in light of the totality of the circumstances. *United States v. (Mark) Harris*, 629 A.2d at 487; *see also Lindsay*, 506 F.2d at 172. Yet, whatever flexibility this allows the government is countered by the "heavy burden" that it shoulders when it seeks to "justify a warrantless intrusion into a residence to arrest a suspect." *Dunston*, 315 A.2d at 565.

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***Kentucky v. King*, 131 S. Ct. 1849 (2011).** When police do not create exigency by engaging or threatening to engage in conduct that violates Fourth Amendment, warrantless entry to prevent destruction of evidence permissible.

(3) Emergencies requiring preventive action

A third exception permits warrantless entry where no crime has been committed, but the officer reasonably believes that a person inside the premises needs emergency assistance.[86] *See Brigham City v. Stuart*, 547 U.S. 398 (2006) (holding that police officers, regardless of subjective reasons, may enter a residence without a warrant if there is an objective basis for belief that an emergency exists within the residence). *See also Michigan v. Fisher*, 130 S. Ct. 546 (2009) (per curiam) (citing *Brigham City*).

When police in *United States v. Booth*, 455 A.2d 1351 (D.C. 1983), responded to a radio run for an assault, the defendant appeared at the door with dried blood on his face and did not respond to questions. The court held that under these circumstances, the police could enter the living room to see if anyone was hurt. *Id*. at 1356. It established three requirements:

[86] This exception may include animals as well. *Tuck v. United States*, 477 A.2d 1115, 1120 (D.C. 1984) (warrantless entry permitted where small animals' dire condition due to heat was visible from street through pet store window).

> First, the police officer must have probable cause, based on specific, articulable facts, to believe that immediate entry is necessary to assist someone in danger of bodily harm inside the premises. Second, the entry must be tailored carefully to achieve that objective; the officer can do no more than is reasonably necessary to ascertain whether someone is in need of assistance, and then to provide that assistance. Finally, the entry must not be motivated primarily by the intent to arrest or to search, but by an intent to investigate a genuine emergency and to render assistance.

Id. at 1355-56 (footnotes and citation omitted); *see also (Lisa) Oliver*, 656 A.2d at 1164-71 (behavior of appellant, who had been identified as a possible kidnapper of a newborn, including repeated lying about where, when, and how her child had been born, provided probable cause justifying warrantless entry into home for the limited purpose of removing the infant to a hospital where it could be identified; relies heavily on the fact that an infant's inability to speak and identify itself makes identification through other means necessary). *But see id*., at 1174-77 (Ferren, J., dissenting) (because there was no indication that infant at issue was in danger of bodily harm, the only basis for finding the requisite danger was the presumption that victims are necessarily in danger, thus police not justified in entering her home without a warrant); *Earle v. United States*, 612 A.2d 1258, 1263-64 (D.C. 1992) (*Booth* probable cause test met where police, upon being summoned to home because gunshots were fired in or at rear of house, were greeted by someone who resembled suspect in earlier homicide, behaved nervously, looked repeatedly back behind door, refused to show his hands, and attempted to shut out police with possible victims inside).

Entries under the *Booth* emergency exception are "strictly circumscrib[ed]." *(Janice) Washington v. United States*, 585 A.2d 167, 172 (D.C. 1991). *Washington*, applying the *Booth* test to the facts described in section (2) above, concluded that while the officers may have surmised that entry was necessary to assist someone in danger, they acted beyond the scope of what is permitted under the second and third prongs of *Booth*. *Id*. "Once the officers saw that appellant's sister was . . . out of harm's way, they should have ceased their search immediately, or inquired into the nature of the weapon and the reason that she called the police before proceeding;" "the entry into the bedroom was motivated by an intent to arrest and search," an impermissible purpose under *Booth*. *Id*.

b. Search or seizure subsequent to lawful entry

Even with a valid warrantless entry, the government must also show that any subsequent warrantless search or seizure also falls within a recognized exception to the warrant requirement. In addition to the consent and plain view doctrines, discussed *supra* Sections III.C.1 and 2, a warrantless search and seizure after a valid entry may be justified as: (1) incident to a valid arrest; (2) a protective search; or (3) a result of crime scene processing.

(1) Search incident to arrest

A warrantless search incident to arrest serves to protect the officers and preserve evidence from the arrestee's possibly destructive reactions. *Chimel v. California*, 395 U.S. 752, 763 (1969). A search incident to arrest is therefore not limited by the grounds for the arrest, as "custodial

seizures on any ground inherently pose a danger." *In re J.O.R.*, 820 A.2d 546, 548 (D.C. 2003) (upholding search incident to arrest on a neglect custody order). These rationale limit the scope of the permissible search. Thus, an officer may search only "the arrestee's person and the area within his immediate control – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Young v. United States*, 670 A.2d 903, 906 (D.C. 1996).

Accordingly, in a dwelling, a search is not "incident" if it occurs in "any room other than that in which an arrest occurs." *Id*.;[87] *see Vale v. Louisiana*, 399 U.S. 30 (1970) (arrest on front steps of house does not justify search of house). Even a search within the room where the arrest occurs may not extend to "all the desk drawers or other closed or concealed areas." *Chimel*, 395 U.S. at 763. It is limited to the area from which an arrestee can actually seize an object. *See Young*, 670 A.2d 907-08 (search of area behind stereo upheld as stereo only "a few feet" from arrestee and thus within his reach); *see United States v. Simpson*, 330 A.2d 756 (D.C. 1975) (search of oven upheld when individuals arrested were five and twelve feet away and officer had heard door open).

Because a key is the defendant's ability to reach an object, the degree to which the defendant is restricted by the police at the time of the search is an important factor in determining the area that falls within the defendant's "immediate control." *Young*, 670 A.2d at 908. In this regard, the court has adopted a two-part test: "a court must first put itself in the officers' position and determine[] whether the [seized object] was within the arrestee's immediate control when he was arrested. The court must then consider whether events occurring after the arrest but before the search made the search unreasonable." *Young*, 670 A.2d at 907 (citations omitted). Thus "the precautions of immobilizing and handcuffing defendants before searching the area do not spoil a valid search incident to arrest" where the area searched was "few feet" from the defendant, the search occurred contemporaneously with arrest, the police had "strong reason . . . to believe that guns were nearby, and the defendant had shown his determination to avoid arrest by retreating into the dwelling and struggling with the officer. *Id*. at 907-08. Noting that arrestees have been known to slip handcuffs and that the police still had to stand the defendant up and transport him, the court found the search reasonable saying "[b]ecause custodial arrests are often dangerous, the police must act decisively and cannot be expected to make punctilious judgments regarding what is within and what is just beyond the arrestee's grasp." *Id*. at 908. *But see United States v. Scios*, 590 F.2d 956, 963-94 n.15 (D.C. Cir. 1978) (en banc) (significant that FBI agent stationed himself between arrestee and area searched); *United States v. Lyons*, 706 F.2d 321, 330-31 (D.C. Cir. 1983) (disapproved of search of closet in defendant's hotel room when defendant sitting handcuffed several yards away and neither attempted to reach closet nor requested access to it); *Brooks v. United States*, 367 A.2d 1297 (D.C. 1976) (lengthy search could not be justified as incident to arrest because defendant under nearly complete control of police during search). *Compare Haltiwanger v. United States*, 377 A.2d 1142, 1143 (D.C. 1977) (approved precautionary search under mattress as incident to suspect's arrest because he was about to sit on mattress).

[87] The police, who had a warrant for Chimel's arrest, were admitted into his home by his wife. After Chimel was arrested, he denied them permission to "look around"; the police nevertheless searched the three-bedroom house. The Court rejected the "incident to arrest" rationale. *Id*. at 768.

(2) Protective searches

There are three types of warrantless "protective searches" that may be found reasonable under the Fourth Amendment. The first two, described in *Maryland v. Buie*, 494 U.S. 325 (1990), are often referred to as "protective sweeps." The police in *Buie* obtained an arrest warrant for two suspects in an armed robbery. Arriving at the house of one of the suspects, one officer yelled into the basement ordering anyone in there to come out; the defendant emerged and was arrested. Another officer then entered the basement "'in case there was someone else' down there," *id*. at 328, and saw in plain view evidence that was subsequently admitted by the trial court. The Court upheld the search: "as an incident to [an] arrest the officers could, as a precautionary matter and without probable cause or reasonable articulable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched." *Id*. at 334. This first type of protective sweep is "very circumscribed" and does not allow the police to search in drawers, under mattresses, behind window shades, or anywhere else where it would be impossible for a person to hide. *United States v. (Mark) Ford*, 56 F.3d 265, 269 (D.C. Cir. 1995); *see also (Mark) Harris*, 629 A.2d at 493-95 (upholding protective sweep of room immediately adjacent to hallway in which appellant was arrested, where search was "narrowly confined to a cursory visual inspection of those places where a person might be hiding").

Buie also authorized a broader search of areas beyond those immediately adjoining the area of arrest if, and only if, the police have reasonable articulable suspicion that another area of the dwelling "harbors an individual posing a danger to those on the arrest scene." 494 U.S. at 334. This search, too, must be limited "to a cursory inspection of those spaces where a person may be found," *id*. at 335, and can last "no longer than necessary to dispel the reasonable suspicion." *(Mark) Ford*, 56 F.3d at 269.

Pursuant to *Buie*, *Earle v. United States*, 612 A.2d 1258, 1264-65 (D.C. 1992), sustained both a "cursory sweep" of areas immediately adjoining the first-floor site of the arrest, as well as a basement from which the officers heard footsteps despite the defendant's representation that he was the only one home. Key to the court's conclusion that the limited protective sweep was justified was the arrestee's lie and the fact that the police had arrived on the scene in response to a report of gunshots. *Id*.; *see also United States v. (Ronald) Henry*, 48 F.3d 1282 (D.C. Cir. 1995) (defendant arrested in hallway immediately in front of open door to apartment announced to a co-defendant standing outside of building that he'd been arrested; cursory protective sweep of apartment permissible because reliable informant had advised that defendant had weapons in apartment, defendant might have confederates in apartment, arrest in front of open door and defendant's announcement meant that anyone inside would have been aware that defendant had been arrested, and officers could not get defendant to police cars without exposing themselves to potential assault from anyone still inside); *(Marcus) Young v. United States*, 982 A.2d 672, 681 (D.C. 2009) (reasonable for officers to conduct a protective sweep of basement when investigating serious charges, i.e., murder and weapons, even when detained individual is not yet identified as suspect).

A third type of protective search, not specifically authorized in *Buie*, may be justified under an exigent circumstances rationale that is an outgrowth of *Warden v. Hayden*, 387 U.S. 294 (1967).

Hayden sanctioned a hot pursuit entry and a warrantless search for a robbery suspect and his weapon, emphasizing that the "'exigencies of the situation made that course imperative.'" *Id*. at 298 (citation omitted).

> The police were informed that an armed robbery had taken place, and that the suspect had entered [the house] less than five minutes before they reached it. They acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them. The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others . . .
>
> Here, the seizures occurred prior to or immediately contemporaneous with Hayden's arrest, as part of an effort to find a suspected felon, armed, within the house into which he had run only minutes before the police arrived. The permissible scope of search must, therefore, at the least, be as broad as may reasonably be necessary to prevent the dangers that the suspect at large in the house may resist or escape.

Id. at 298-99. Key factors in this and other cases in which this type of search has been upheld are a reasonable belief on the part of the searching officers that weapons are present and that there are individuals at large who could obtain and use those weapons against the officers. *See id*. at 299-300 (officer who did not know that defendant had been arrested elsewhere in house acted properly in seizing what was clearly evidence (gun and clothing matching description of that worn by suspect) located during weapons search; declining to apply search incident to arrest rationale, as search took place before or simultaneous to arrest); *Vance v. United States*, 399 A.2d 52, 56-59 (D.C. 1979) (reasonable for police to believe after two armed robbery suspects were arrested in front room, that a third may have escaped to bedroom; upholding admission of weapon and proceeds found in plain view during protective search of bedroom); *Ruth v. United States*, 438 A.2d 1256, 1258-60 (D.C. 1981) (armed suspects arrested after hot pursuit; police, having not yet found all the suspects' weapons, were justified in searching bedroom where they had seen a suspect hiding something in presence of another individual who had not yet been located); *Hilliard v. United States*, 638 A.2d 698, 706 (D.C. 1994) (while officers frisked a suspect based on a justified "hot pursuit" entry, reasonable to conduct a limited search of area towards which another person twice reached despite warnings); *cf. (Mark) Ford*, 56 F.3d at 271-72 (presence of gun clip found in plain view during protective sweep of area immediately adjoining place of arrest was not an exigent circumstance creating threat to safety of officers where arrest made pursuant to warrant and crime giving rise to warrant occurred months, not minutes, before arrest; the search occurred after, not prior to or contemporaneous with, the defendant's arrest; and, at time of search, police had secured all people in apartment).

Only if it is clear that a seized individual has left a weapon where it might endanger others, the police may undertake a limited search aimed at locating the weapon in the area where the police reasonably believe it will be found. *See (Johnnie) Edwards v. United States*, 619 A.2d 33, 36 (D.C. 1993) (police knew rifle, used in recent crime, was unattended in building). The time during which such a search will be permitted is not unlimited. *See Sturdivant v. United States*,

551 A.2d 1338, 1343 (D.C. 1988) (citing *Mincey v. Arizona*, 437 U.S. 385 (1978) (warrantless reentry to conduct general search for evidence unconstitutional)). It must be incident to a "hot pursuit" and based on a true exigency.

The importance of these requirements is demonstrated in two related cases, *United States v. Peterson*, 522 F.2d 661 (D.C. Cir. 1975), and *United States v. (Lamont) Carter*, 522 F.2d 666 (D.C. Cir. 1975), which grew out of the theft of numerous rifles and shotguns from a military arsenal. Some six months later, police spotted two armed men and attempted to approach them. The men opened fire and fled toward a house; one was arrested outside, but the second ran into the house. Through an upstairs window, the police could see someone with a rifle; they rushed in and arrested the man they had seen on the street. A search of the house was proper because "circumstances . . . combined to justify the exercise of reasonable and proper precautions by the police for their own protection. The officers at that time could not have known of the existence or the whereabouts of . . . possible allies." *Peterson*, 522 F.2d at 665.

The police in *Carter*, armed with an arrest warrant and aware of the earlier gun battle, went to the residence of another suspect in the arsenal burglary. They found the suspect in front of the house, and an FBI agent, purportedly fearing that a sniper might be lurking, entered the house and discovered more weapons and ammunition. This search violated the Fourth Amendment principally because there had been no hot pursuit and because, having obtained an arrest warrant, the police could just as easily have obtained a search warrant for the house. In short, no exigencies justified the absence of a warrant. To hold otherwise would eviscerate *Chimel* because

> a rule that permitted a warrantless residence-wide search in any instance where an arresting officer hypothesized the presence of armed felons and noticed a potential vantage for a sniper might very well abolish the *Chimel* doctrine for all but plate glass houses.

522 F.2d at 675.

(3) Crime scene processing

Though mobile crime units routinely arrive at the scene of serious offenses and begin their work without obtaining a warrant, evidence seized in this manner can be successfully challenged. *Thompson v. Louisiana*, 469 U.S. 17 (1984) (per curiam), reaffirmed the holding in *Mincey v. Arizona*, 437 U.S. 385 (1978), that there is no "murder scene exception" to the warrant requirement. Acknowledging that the homicide investigators "may well have had" probable cause to search, the Court found that their failure to obtain a warrant rendered their entry and search unlawful in the absence of a valid exception to the warrant requirement. *Id*. at 20-21. *Douglas-Bey v. United States*, 490 A.2d 1137, 1139 (D.C. 1985), following *Thompson* and *Mincey*, held that a warrantless entry and search by a crime scene search officer was unlawful though it followed a limited warrantless search of the premises by another officer that was lawful pursuant to the emergency assistance exception. In brief, unless a recognized Warrant Clause exception exists, the Fourth Amendment does not allow searches under the rubric of "crime scene processing." *Accord Settles v. United States*, 615 A.2d 1105, 1111-12 (D.C. 1992); *see also Gant v. United States*, 518 A.2d 103, 108 (D.C. 1986) (warrantless crime scene processing of dwelling where rape suspect was arrested); *Michigan v. Tyler*, 436 U.S. 499, 511 (1978)

(repeated warrantless searches days after fire made in search of evidence of arson); *Brooks v. United States*, 367 A.2d 1297, 1306 (D.C. 1976) (processing of rape scene, hours after suspect arrested in and removed from his apartment). *But see Clark v. United States*, 593 A.2d 186, 196-98 (D.C. 1991) (upholding warrantless entry and seizure of evidence in plain view by crime scene search officers who, in contrast to those in *Douglas-Bey*, arrived while officers who had first responded to 911 call made legal emergency entry, had seen evidence in plain view, and were still present).

5. Automobile Searches

Automobiles, because of their inherent mobility, are virtually exempt from the warrant requirement. *See Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (automobile exception based on "ready mobility" of car); *see also Maryland v. Dyson*, 527 U.S. 465 (1999) (because the police had probable cause to search defendant's car, police were not required to obtain a search warrant, despite having plenty of time to do so). However, citizens do not surrender all Fourth Amendment rights when they get behind the wheel or place their possessions in a car. Evidence seized from a car pursuant to a warrantless search must be suppressed if the government cannot show that the seizure was justified by the plain view or consent doctrines; that the seizure was the result of a search incident to arrest, a limited *Terry* search for weapons, or a regulated inventory search; or that, before the police began the search, they had in their possession objective facts that would have justified issuance of a warrant (the true automobile exception). That an automobile is involved does not vitiate the Fourth Amendment requirements of probable cause and reasonable suspicion.[88]

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***United States v. Jones*, 132 S. Ct. 945 (2012).** Attaching GPS device to motor vehicle and using that device to monitor vehicle's movements constitutes a physical invasion or trespass of property, i.e., a "search" requiring probable cause.

***United States v. Scott*, 987 A.2d 1180 (D.C. 2010).** See, *supra*, Chapter 22.III.A.

***United States v. Vinton*, 594 F.3d 14 (D.C. Cir. 2010).** Police officer had reasonable belief that defendant was armed and dangerous such that protective search of vehicle was proper where officer observed in plain view a knife with five-and-a-half inch sheath that defendant claimed was used only for fishing, even though no other fishing equipment present in vehicle, defendant had "thin blue line" sticker "suggesting a connection with law enforcement" and there had been double-stabbing homicide in same vicinity 20 hours earlier.

***Zanders v. United States*, 75 A.3d 244 (D.C. 2013).** See, *supra*, Chapter 22.III.C.2.

a. Incident to arrest

New York v. Belton, 453 U.S. 454 (1981), adopted a bright-line rule allowing an officer making a lawful custodial arrest of an occupant of a car to search the passenger compartment (but not the

[88] Issues relating to the initial stop and seizure of cars and occupants are discussed *supra* in Section II.C.1, 2.

trunk) of the car and any containers found therein. Neither a warrant nor probable cause is required if the search is a "contemporaneous incident" of a lawful arrest. Citing *Chimel v. California*, 395 U.S. 752 (1969), the Court reasoned that this exception is necessitated by "exigencies" of the arrest setting. *Belton*, 453 U.S. at 457. "Such searches have long been considered valid because of the need 'to remove any weapons that (the arrestee) might seek to use in order to resist arrest or effect his escape' and the need to prevent the concealment or destruction of evidence." *Id*. at 457 (citation omitted).

Thornton v. United States, 541 U.S. 615, 620-21 (2004), made clear that the *Belton* rule extends to circumstances in which the officer did not make contact with the vehicle's occupant until after that person had left the vehicle: "In all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle." 541 U.S. at 621. *Thornton* therefore supplants the contrary holding of *(Troy) Lewis v. United States*, 632 A.2d 383 (D.C. 1993), where the D.C. Court of Appeals refused to extend *Belton* to cases in which the occupant got out of and walked away from the car before being arrested and confined the *Belton* rule to cases in which the police confronted, or at least signaled confrontation, while the person was an occupant of the car. *Id*. at 385-86, 388.

The Supreme Court has declined, however, to extend the *Belton* rule to searches incident to a traffic citation, even if an arrest could have been made but was not. *Knowles v. Iowa*, 525 U.S. 113 (1998). *See also (Chauncy) Turner v. United States*, 623 A.2d 1170 (D.C. 1993) (officers followed then stopped driver of car); *United States v. (Kevin) Harris*, 617 A.2d 189 (D.C. 1992) (officer signaled car in which appellant was passenger to stop after it had failed to stop at red light); *Staten v. United States*, 562 A.2d 90 (D.C. 1989) (officer stopped car in which appellant was passenger after it made illegal U-turn); *(John H.) Smith v. United States*, 435 A.2d 1066 (D.C. 1981) (per curiam) (police flashed lights and then stopped car appellant was driving). In *Lewis*, the Court stated that "cases that fall outside the scope of *Belton* are subject to the case-by-case analysis inherent in *Chimel*'s test of 'the area within [an arrestee's] immediate control.'" *(Troy) Lewis*, 632 A.2d at 386 (quoting *Chimel*, 395 U.S. at 763). The Supreme Court in *Thornton* explicitly declined to reach the issue of whether *Belton* should be limited to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. 541 U.S. at 622-23.

The requirement that the search be a "contemporaneous incident" of a lawful arrest means that *Belton* will not justify a search after a suspect is removed from a car and taken to a police station. *See Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 220-22 (1968); *Preston v. United States*, 376 U.S. 364 (1964). Nevertheless, a search of a car "occurring shortly after the driver, or an occupant, has been placed under arrest and restrained" in handcuffs or in the back of a squad car, "is contemporaneous." *(Kevin) Harris*, 617 A.2d at 193.[89]

[89] The court of appeals has twice upheld the search of a locked glove compartment of a car as a valid search incident to arrest. Relying on *Belton*, *Smith*, 435 A.2d at 1068-69, held that a search of the glove compartment conducted immediately following the lawful arrest of a driver and his passenger was contemporaneous and incident. *Staten* involved the passenger/owner of a car, who was arrested on gun charges after a search incident to the arrest of the driver for driving under the influence revealed a pistol in the glove compartment. The court held that the need to search for possible weapons was "no less acute simply because a person other than the arrestee owns the 'container'

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***Dawkins v. United States*, 987 A.2d 470 (D.C. 2010).** Vehicle search incident to arrest valid for defendant arrested for marijuana possession even though defendant seized outside locked car and was handcuffed during vehicle search because defendant was "recent occupant" of vehicle and because officers could reasonably believe evidence relevant to crime of arrest might be found in vehicle.

***Johnson v. United States*, 7 A.3d 1030 (D.C. 2010).** Search of backseat passenger's large purse permissible incident to lawful arrest of another passenger for possession of handgun in plain view where purse was large enough to hold a handgun or other type of weapon and it was "reasonable to believe" that vehicle and the containers therein, including defendant's purse, might contain additional weapons or ammunition.

***United States v. Taylor*, 49 A.3d 818 (D.C. 2012).** In DUI case, evidence of handgun and ammunition found in car properly excluded where police did not have "reason to believe" or provide any articulable facts that indicated that evidence related to the arresting offense would be discovered in the vehicle.

b. *Terry* searches[90]

When police lawfully stop a car, they are entitled, on *Terry* grounds, to search the passenger compartment[91] if, and only if, they have a reasonable belief based on specific and articulable facts that an occupant whom they have detained is dangerous and may gain immediate control of weapons from the car. *Michigan v. Long*, 463 U.S. 1032, 1049-50 (1983).[92] The search must be limited to those areas that could contain a weapon. *Id.*

Officers in *Long* saw a car traveling erratically and speeding. It swerved into a ditch and the driver alighted and met the officers at the rear of the car. *Id*. at 1035. Appearing intoxicated, he did not respond to questions and instead walked back toward the open car door. The police

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in which those items might be located," and that "the arrest justifies the reasonable infringement on any privacy interest that another passenger in the automobile may have in that container." 562 A.2d at 92.

[90] The scope of and justification necessary for a *Terry* frisk of the driver or occupants of a car are discussed *supra* in Sections II.C.2 and 3.

[91] *(Chauncy) Turner v. United States*, 623 A.2d 1170 (D.C. 1993), ruled that the passenger compartment includes any area within a hatchback that can be readily reached without exiting the car. It explicitly declined to adopt a "general 'hatchback' rule applicable to other cars nominally of the hatchback variety but which may contain a trunk enclosure inaccessible except by lifting the hatchback from the outside, or which have a large enough hatchback compartment that the area at issue, although visible to the occupants, is not 'reachable without exiting the vehicle.'" *Id*. at 1176 n.10 (citations omitted).

[92] Even before *Long*, local case law recognized a right of the police, on *Terry* grounds, to conduct limited "protective searches" or *Terry* frisks of the interior of cars when, during a traffic stop, they have sufficient reason to fear for their safety. *See United States v. (James) Thomas*, 314 A.2d 464 (D.C. 1974) (upholding protective search of area under and behind glove compartment during traffic stop, where police had reason to suspect that car's occupants had been attempting robbery, and high-speed chase preceded stop); *(Wilbur) Johnson v. United States*, 350 A.2d 738 (D.C. 1976) (protective search of paper bag upheld after defendant, who had been stopped at night in high narcotics area for traffic violation, attempted to put hand in bag).

followed and saw on the floorboard a hunting knife that was apparently legal to carry. A frisk of the defendant produced no additional weapons. However, the officers, shining a flashlight into the car, saw something protruding from under the armrest, lifted it up, and seized an open pouch containing marijuana. *Id*. at 1036. The Court found the officers had a reasonable belief that the defendant would have posed a danger if he had been allowed to reenter his car before it was searched for weapons. *Id*. at 1051-52.

Applying the *Long* rationale, *Hood v. United States*, 661 A.2d 1081, 1086 (D.C. 1995), declined to find that the police had "specific and articulable facts from which it could be inferred reasonably that the defendant was armed and presently dangerous." The defendant's girlfriend had sought a police escort to her home because the defendant had threatened her the day before. When police arrived at the girlfriend's house in the early morning hours, they found the defendant sitting in a car. Although he smelled of alcohol and hesitated when the police commanded him to roll down his window or get out, the court found that there was no information that the defendant had a weapon, was involved in criminal activity, or was behaving in a criminal manner at that time. Consequently, the search of the passenger compartment of the defendant's car was not justified. *Id*. at 1084-86.

Holston v. United States, 633 A.2d 378, 384 (D.C. 1993), found that a search of a trunk exceeded the limits allowed by *Long* because the subject of the *Terry* stop had walked away from the car before the police stopped him. The officers had received a tip for a man holding a woman at gunpoint behind a car; the tip included the location, make, color, and license plate of the car, and may have included the fact that the suspect was a black male. *Id*. at 380. Fifteen seconds after receiving the tip, an officer saw appellant leaning in the trunk of a car that matched the description; when appellant saw the police, he shut the trunk and walked away. *Id*. The Court found that "the exigent circumstances of protecting the police officers from whatever was in the trunk" did not exist after the appellant had walked away from the car. *Id*. at 384.

In contrast, the court has upheld, under *Long*, a search of a cloth bag in plain view on the floor of a car that had been stopped for traffic violations on a hot day in July. Officers noticed a ski mask protruding from a bag on the floor of the passenger area. An officer picked up the mask to examine it and heard noises consistent with guns, looked inside the bag, and discovered three handguns. A majority of the panel held that the officer had reasonable suspicion that the occupants of the vehicle might have been armed given the use of ski masks in robberies, the presence of the ski mask on a hot day, and the fact that the car was a rental and the driver looked unusually young. *(Tony) Thomas v. United States*, 553 A.2d 1206 (D.C. 1989).

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***Jackson v. United States*, 56 A.3d 1206 (D.C. 2012).** Police did not have reasonable suspicion to believe that occupants of a traffic stop were dangerous, and thus the subsequent search of the driver's van violated the Fourth Amendment.

***Pleasant-Bey v. United States*, 988 A.2d 496 (D.C. 2010).** Officer had reasonable suspicion to conduct *Terry* stop of vehicle that may have had expired temporary tags, may have attempted to evade him, and drove at an unreasonable speed through a parking lot "fairly full" of pedestrians.

c. Inventory searches

The purpose of an inventory search is to secure a car and its contents from harm and to protect the police from civil suits based on claims of damaged, stolen, or lost property. While permissible in certain circumstances, inventory searches are nonetheless subject to Fourth Amendment scrutiny.

Inventory searches are constitutional. *South Dakota v. Opperman*, 428 U.S. 364 (1976). After towing a car from the street where it had been illegally parked, pursuant to established procedure, police inventoried the contents for the purpose of protecting the owner's property and themselves from civil liability and found marijuana. *Id*. at 365-66. The Court noted that the car was lawfully in police possession, stressed the routine nature of the search, and emphasized the fact that the inventory itself conformed to "standard procedures in the local police department, a factor tending to ensure that the intrusion [is] limited in scope to the extent necessary to carry out the caretaking function." *Id*. at 375 (citations omitted). "There is no suggestion whatever that this standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigatory police motive." *Id*. at 376.

Colorado v. Bertine, 479 U.S. 367, 372-73 (1987), sanctioned the search of a closed backpack found during an inventory of an impounded vehicle conducted under state impoundment law and detailed local procedures, citing the government interest in "protect[ing] an owner's property while it is in the custody of the police . . . insur[ing] against claims of lost, stolen, or vandalized property, and . . . guard[ing] the police from danger," and emphasizing that the police were not acting in bad faith or for the sole purpose of investigation. *See also (Kevin) Hill v. United States*, 512 A.2d 269 (D.C. 1986) (upholding taking and search of key case).

The central importance of preexisting regulations was reiterated in *Florida v. Wells*, 495 U.S. 1 (1990). An officer stopped the defendant for speeding, arrested him, informed him that his car would be impounded, obtained permission to inventory it, and found marijuana in the ashtray and a locked suitcase in the trunk. *Id*. at 2. Forcing open the suitcase was unconstitutional because there were no regulations governing the opening of containers during inventory searches. *Id*. at 4-5.

Regulations governing vehicle impoundment and inventory searches are set out in MPD General Order Series 602, No. 1, "Automobile Searches and Inventories" (May 26, 1972), and 601, No. 1, "Recording, Handling and Disposition of Property Coming into the Custody of the MPD" (Dec. 1, 1971).[93] These procedures govern transportation of a car to the police station, as well as the circumstances pursuant to which it may be inventoried and the procedures to be followed. *See United States v. Proctor*, 489 F.3d 1348 (D.C. Cir. 2007) (If a standard impoundment procedure exists, a police officer's failure to adhere thereto is unreasonable and a violation of the Fourth Amendment.). "Lawful possession is a prerequisite to an inventory search." *McMillan v. United States*, 527 A.2d 739, 740 (D.C. 1987) (citing *Opperman*, 428 U.S. at 369). MPD General Order 602.1 provides that when "an officer has probable cause to believe that a vehicle is a fruit, instrumentality, or evidence of a crime, he shall take the vehicle into custody." *See McMillan*, 527 A.2d at 740-41 (probable cause to impound where arrested motorcycle rider

[93] The MPD general counsel's office will make these orders available upon request.

could not produce driver's license or registration); *(Kevin) Hill*, 512 A.2d at 274 (probable cause to impound car as evidence of crime where no valid registration or license tags).

Where there is no basis for seizure as a fruit, instrumentality, or evidence of crime, the police ordinarily lack authority to take possession of a car driven by someone they have arrested unless that person asks them to. Under MPD General Order 602.1, Part I(B)(3), a car in these circumstances "shall be disposed of in any lawful manner which the person arrested directs. In any case where a prisoner requests that his vehicle be lawfully parked on a public street, he shall be required to indicate his request in writing." Exceptions may arise when exigent circumstances affect the safety of the officers or the public. *See (George) Jones v. United States*, 330 A.2d 248 (D.C. 1974) (police could move arrestee's car, without permission, where it was blocking traffic and there was risk of violence by a hostile crowd).

Even if the police act properly in transporting a car to the station, they cannot impound and inventory it unless they obtain consent or the driver is unable to make other arrangements for the car. *See Arrington v. United States*, 382 A.2d 14, 18 (D.C. 1978); *Mayfield v. United States*, 276 A.2d 123 (D.C. 1971); *United States v. (Norman) Pannell*, 256 A.2d 925 (D.C. 1969); *(David) Williams v. United States*, 170 A.2d 233 (D.C. Mun. 1961); *see also Dyke*, 391 U.S. at 220-21; *Schwasta v. United States*, 392 A.2d 1071 (D.C. 1978). An inventory search may be invalid if the police did not give the arrestee an adequate opportunity to locate someone to take care of the car, or to secure release on stationhouse bond, collateral, or citation.[94]

MPD General Order 602.1 requires a two-stage process. After the vehicle is brought to the station, property in the passenger compartment should be removed, but only if it "can easily be seen from outside the vehicle" and its value is more than twenty-five dollars. At this point, officers are to lock and secure the car, but to make no further search. A more thorough inventory is allowed only if no one claims the vehicle within twenty-four hours. Certain written records must be made, including a PD Form 82, listing property taken from the car.

Whenever evidence was obtained through an inventory search, counsel should examine the situation carefully to determine whether a challenge may be based on the unlawfulness of the initial seizure of the vehicle or the failure of the police to follow their own regulations during the search. Unlawful possession will result in suppression. *See Arrington*, 382 A.2d at 18, and cases cited therein. While a trivial violation of regulations may not always result in suppression, the Supreme Court's emphasis on regularized procedures fettering police discretion supports the argument that departures from those procedures evidence an invalid sham search.[95] Further,

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[94] In an analogous situation, *United States v. Mills*, 472 F.2d 1231 (D.C. Cir. 1972) (en banc), held that the police improperly searched a person arrested on a collateral offense before advising him of his right to secure release by posting fifty dollars, which he happened to have in his pockets. Whatever the continuing validity of *Mills* in light of subsequent Supreme Court decisions validating searches incident to arrest, *see supra* Section III.C.3, it seems unreasonable for the police to undertake a non-consensual search of an arrestee's car for "safe keeping," if the arrestee has the wherewithal to secure release and take care of the car.

[95] *United States v. (Clarence) Whitfield*, 629 F.2d 136, 139 n.5 (D.C. Cir. 1980), held that an alleged inventory search was indeed a pretext, based on findings that the officer searching the car was unaware of standard police procedures, the search did not conform to the requirements of MPD General Orders, and the police had an ulterior purpose to search for evidence. But a majority of the court went on to uphold the search on other grounds. *See also*

while *Opperman* did not clearly state that a substantial violation of regulations would render an inventory search *per se* improper if it was otherwise reasonable and not pretextual, there is room to infer such a prophylactic rule.

d. Evidentiary searches based on probable cause

Pursuant to the "automobile exception," police need not obtain a warrant if, before they begin to search, they are in possession of objective facts that would justify issuance of a warrant. *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (police may search car if it "is readily mobile and probable cause exists to believe it contains contraband"); *Speight v. United States*, 671 A.2d 442, 453 (D.C. 1996) (apparently operable automobile parked on public street creates exigency justifying warrantless search provided police have probable cause to believe auto contains evidence of crime); *(Charles) Parker v. United States*, 601 A.2d 45, 49 (D.C. 1991). This exception had its genesis in *Carroll v. United States*, 267 U.S. 132 (1925), in which police stopped a car on the open road, with probable cause to believe that they would find contraband liquor inside, and conducted a warrantless but fruitful search. The Supreme Court relied on the inherent mobility of the automobile to uphold the search. *Id*. at 153. In *Maryland v. Dyson*, 527 U.S. 465 (1999), the Supreme Court held that the automobile exception does not require the police to justify warrantless automobile searches on exigency grounds. Therefore, even if the police have time to obtain a warrant to search a vehicle, it is not necessary under the automobile exception. *Id*.

United States v. Ross, 456 U.S. 798 (1982), further expanded the "automobile" exception to the warrant requirement. Overruling *Robbins v. California*, 453 U.S. 420 (1981), *Ross* held that the police may search any part of a car, including the trunk and any closed containers, if they have probable cause to believe that the items they are seeking are in the car, and the items reasonably could be in the trunk or the containers. 456 U.S. at 821, 824; *see also United States v. (Leonard) Watson*, 697 A.2d 36, 38 (D.C. 1997) (per *Ross*, search of trunk justified because officers had already lawfully found marijuana and heroin in the passenger compartment); *Minnick v. United States*, 607 A.2d 519, 524-25 (D.C. 1992) (per *Ross*, search of driver's purse upheld where officers smelled strong odor of PCP during routine traffic stop); *(Charles) Parker*, 601 A.2d at 48-50 (per *Ross*, search of bag on front seat upheld because officer had probable cause to believe it contained narcotics based on information supplied by informant). Warrantless searches of containers otherwise justified under *Ross* need not always be conducted immediately as part of the vehicle inspection. *United States v. Johns*, 469 U.S. 478 (1985).

California v. Carney, 471 U.S. 386, 390 (1985), applied the *Carroll* rationale to a mobile home having mobility similar to that of an automobile, and held that the subsequent search of the mobile home at the station was justified under *Chambers*. The Court noted that, as a result of the "pervasive regulation of vehicles capable of traveling on the public highways," there is a reduced expectation of privacy in a motor-home, as opposed to other types of homes.[96] 471 U.S. at 392.

United States v. Lyons, 706 F.2d 321 (D.C. Cir. 1983) (rejecting theory that police had legitimate interest in inventorying and impounding contents of defendant's hotel room in which he was arrested).

[96] Noting the similarity of circumstances (created by the possibility of quick flight) between an automobile and other moving vehicles, *United States v. Tartaglia*, 864 F.2d 837, 841 (D.C. Cir. 1989), upheld a warrantless search of a train roomette. Having probable cause to believe that a roomette contained narcotics, police did not seek a warrant

California v. Acevedo, 500 U.S. 565 (1991), used the *Carroll* rationale to sanction the warrantless search of containers that police have probable cause to believe contain contraband or evidence, when those containers are located in a car.[97] Before *Acevedo*, police were required to obtain a warrant before searching closed luggage placed in a car. *See United States v. Chadwick*, 433 U.S. 1 (1977); *Arkansas v. Sanders*, 442 U.S. 753 (1979). *Acevedo* found this rule unworkable in light of the *Ross* holding that a warrantless search of an automobile can include all containers that could hold the sought-after contraband. 500 U.S. at 579-80. In keeping with the "cardinal principle that searches conducted outside the judicial process . . . are *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions," the Court emphasized that "[p]robable cause to believe that a container placed in [a car] contains contraband or evidence does not justify a search of the entire [car]." *Id*. at 580 (citations and internal quotations omitted). The police had probable cause to believe Acevedo had marijuana in the car's trunk, but no probable cause as to any other part of the automobile; thus a search of the entire vehicle would have been without probable cause and unreasonable under the Fourth Amendment. *Id*. at 572-73, 580. *See Symes v. United States*, 633 A.2d 51 (D.C. 1993) (upholding search of luggage in train roomette based on probable cause to believe roomette contained narcotics which can be stored in luggage); *United States v. Tartaglia*, 864 F.2d 837, 841 (D.C. Cir. 1989) (same).

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***West v. United States*, 100 A.3d 1076 (D.C. 2014).** See, *supra*, Chapter 22.II.C.4.c.

6. Container Searches

The Fourth Amendment guarantees "[t]he right of the people to be secure in their . . . papers, and effects." Thus, searches of containers raise Fourth Amendment issues independent of the legality of the search in which the container was seized. Unless the search of a container occurs incident to a valid arrest, the police will generally need both probable cause and a search warrant. If the search is extremely limited in scope and analogous to a *Terry* detention of a person, the warrant requirement may be dispensed with and the search is justified if the police are in possession of specific articulable facts supporting a belief that the container contains evidence or contraband. If the search is part of a validly regulated inventory search, conducted not for investigative purposes but only to protect property from theft and the police from civil suits based on claims of loss, neither a warrant nor probable cause is required. Finally, pursuant to *Acevedo*, the warrant, but not the probable cause requirement, may be dispensed with if the container is seized from a car; if the container is not in a car, a warrant is required.[98] Thus, the

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to search it during the train's twenty-five minute layover in Washington, D.C. *Id*. at 839-40. The court applied the exigent circumstances rationale, noting the difficulty of securing even a telephone search warrant during the layover period, and the limited jurisdiction of the warrant if the train moved out of the District before it was executed. *Id*. at 841-43. *See also Symes v. United States*, 633 A.2d 51 (D.C. 1993).

[97] The Supreme Court has expanded warrantless searches of containers in a car to include those containers possessed by passengers that might be capable of concealing the object of the search. *Wyoming v. Houghton*, 526 U.S. 295 (1999) (upheld warrantless search of car passenger's purse for drug evidence capable of being concealed therein).

[98] *Acevedo* overruled *Chadwick* to the degree that *Chadwick* required a warrant before a search of luggage in a car, but did nothing to weaken the reasoning pursuant to which *Chadwick* declined to extend the rationale of the

Acevedo exception, which is more a car exception than a container exception, is discussed *supra* in Section III.C.5.c, as is the inventory exception. What follows is a review of the exception incident to arrest and the purpose of a limited *Terry* detention.

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***Johnson v. United States,* 7 A.3d 1030 (D.C. 2010).** See, *supra*, Chapter 22.III.C.5.a.

***United States v. Vinton*, 594 F.3d 14 (D.C. Cir. 2010).** Reasonable for officer during protective search to pry open locked briefcase on backseat of vehicle under *Gant*'s evidentiary rationale because officer reasonably expected there might be additional weapons in car in which he had already found two knives, one of which was hidden, and two cans of mace.

a. Incident to arrest

Pursuant to *Chimel v. California*, 395 U.S. 752 (1969), and *New York v. Belton*, 453 U.S. 454 (1981), the Court of Appeals has held that warrantless container searches performed incident to valid arrests are reasonable. *Alston v. United States*, 518 A.2d 439 (D.C. 1986).[99] The rationale is that police should be allowed, without delay, to discover any weapons or evidence in the arrestee's immediate control that the arrestee might be able to use against the police or to destroy. Given that rationale, the question is whether the search was close enough in time to be valid and incident given the underlying rationale. The more time that passes between the arrest and the search, the more likely it is that the "incident to arrest" rationale will be rejected. Thus, the search in *Chadwick* "more than an hour after the federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody" could not "be viewed as incidental to the arrest or as justified by any other exigency." 433 U.S. at 15.

Time is not the only relevant issue. In *Alston*, a woman suspected of shoplifting was followed from a store. She began to run and fell, injuring herself. When the pursuing special police officers reached her, they took her bag, helped her up, and took her back to the security office in the store where they searched her and the tote bag. 518 A.2d at 441.

> [A] common-sense view of the events that transpired compels a holding that the search of the tote bag was made incident to the process of a lawful arrest. To move the injured appellant from the public park to the privacy of the security office across the street for further processing was entirely reasonable and sensible.

"automobile exception" to permit a warrantless search of any movable container found in a public place. In *Chadwick*, during an arrest, a locked footlocker was seized from the open trunk of a car in which one of the defendants was seated and by which the other two were standing. An hour and a half later, federal agents opened the locker and seized marijuana from inside it. Although they had probable cause to believe that the locker contained contraband, they had not applied for a warrant. The Court rejected an argument that the mobility of the locker rendered it analogous to a car and that consequently no warrant was required. 433 U.S. at 11-13. *Acevedo*, in keeping with the *Chadwick* rationale, did not uphold the warrantless search of the container at issue because the container itself was inherently mobile, but found that because the container was located in a car, the exigencies of the car's mobility justified suspension of the warrant requirement.

[99] *Chimel* validated warrantless limited searches of the area in the immediate control of defendants arrested in their homes. *See supra* Section III.C.4.b(1). *Belton* held that incident to the arrest of a person in a car, the police may undertake a warrantless search of the passenger compartment. *See supra* Section III.C.5.a.

> There the search took place without any indication of undue delay and as part of an uninterrupted immediate custodial process. The item searched was an open tote bag. The search was directly related to the cause of the arrest.

Id. at 446. Any delay in the search of a container that has been taken from an arrestee should be necessitated by similar exigency in order to be incident to arrest.[100]

b. *Terry* detention of containers

In *United States v. Place*, 462 U.S. 696 (1983), the Supreme Court for the first time addressed the validity of a warrantless temporary seizure of personal luggage analogous to a *Terry* stop. (*See supra* Sections II.C and D on *Terry* stops.) The Court reasoned that brief investigative seizures of containers implicate the same balancing of individual and government interests implicated in the exception to the probable cause requirement for limited seizures of the person. Citing *Terry* and its progeny, it held that brief, minimally intrusive detentions of personal effects are permissible if based on specific articulable facts that the property contained contraband or evidence of a crime. *Id*. at 706.

Applying this standard, the Court held that FBI agents had seized Place's luggage when, after he refused to consent to a search, they told him they were taking his luggage to a judge to secure a warrant. *Id*. at 708. It implicitly concluded that the agents had a "reasonable suspicion" that Place was carrying narcotics in his luggage, and explicitly stated that the luggage was seized in order to arrange its exposure to narcotics detection dogs. *Id*. at 706. It concluded that the limitations applicable to investigative detention of the person define the permissible scope of an investigative search of luggage. *Id*. at 709. On the length of the detention alone (90 minutes), the seizure was unreasonable. *Id*. at 709-10.[101]

IV. FRUITS OF ILLEGAL SEARCHES AND SEIZURES

All fruits of an unlawful search or seizure must be suppressed. The fruits can include tangible evidence, identification evidence, statements, and anything else tainted by the illegality. *See*, *e.g.*, *United States v. Crews*, 445 U.S. 463 (1980) (identification procedures); *United States v. (Harvey) Johnson*, 496 A.2d 592 (D.C. 1985) (evidence of flight). Even the testimony of a witness whom the government has discovered because of a Fourth Amendment violation can be

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[100] If the container was on the defendant's person from the time of arrest until the search, and the defendant was at the place of detention when the search took place, there is little question that the search would be valid. *See United States v. Edwards*, 415 U.S. 800 (1974) (search of defendant's clothes taken from him at jail ten hours after arrest held valid); *Dunham v. United States*, 442 A.2d 121, 127 (D.C. 1982) (when defendant was arrested, her purse was taken from her, searched, and returned, and searched again three hours later at jail). Since *Illinois v. Lafayette*, 462 U.S 640 (1983), searches of the type described in *Dunham* are generally excepted from the warrant requirement as inventory searches. *See supra* Section III.C.5.c.

[101] *United States v. Colyer*, 878 F.2d 469 (D.C. Cir. 1989), relying on *Place*, held that a canine sniff of a train roomette was not a search for Fourth Amendment purposes. The court strongly suggested that it would decline to follow *United States v. (Kenneth) Thomas*, 757 F.2d 1359 (2d Cir. 1985), holding that a warrantless canine sniff violated the Fourth Amendment, reasoning that canine sniffs which detect only illegal drugs do not interfere with any legitimate privacy interest. (It also distinguished *Thomas* in that the search there was of an apartment, and the expectation of privacy was consequently greater.)

suppressed as a fruit. *Compare United States v. Ceccolini*, 435 U.S. 268 (1978) (no suppression where degree of attenuation between search and witness testimony was sufficient to dissipate taint, and witness was completely willing to testify), *with United States v. Scios*, 590 F.2d 956 (D.C. Cir. 1978) (en banc) (taint not dissipated where witness testified only to avoid contempt).

When the question is whether evidence is the fruit of an unlawful seizure, the timing of the seizure can be critical, particularly if evidence was discarded upon approach by the police. If the seizure preceded the dropping of the evidence, the evidence is the fruit of the seizure rather than abandoned property: "abandonment will not be recognized when it is the result of illegal police conduct." *United States v. Brady*, 842 F.2d 1313, 1315 n.7 (D.C. Cir. 1988). *Compare (Jose) Mitchell v. United States*, 609 A.2d 1099, 1107 (D.C. 1992) (appellant has standing to challenge admission of weapon tossed after seizure); *and In re J.G.J.*, 388 A.2d 472 (D.C. 1978) (suspect's dropping of syringe on approach of officer who yelled, "Drop it!" is not abandonment); *with California v. Hodari D.*, 499 U.S. 621 (1991) (contraband abandoned when discarded prior to seizure by police); *Allison v. United States*, 623 A.2d 590, 592 (D.C. 1993) (same); *(Carlton) Smith v. United States*, 292 A.2d 150 (D.C. 1972) (same); and *United States v. Speed*, 388 A.2d 892 (D.C. 1978) (same).

Evidence is suppressible if it was obtained by "exploitation" of the initial illegality, but not if it was discovered through "means sufficiently distinguishable to be purged of the primary taint." *Wong Sun v. United States*, 371 U.S. 471, 488 (1963). *Wong Sun* suppressed a statement made during the course of an illegal arrest, but held admissible a statement made at a police station some days after the defendant was released by a magistrate; while the illegal arrest was surely a cause, in the "but for" sense, of the later statement, the connection between the two was too attenuated. *Id*. at 491.

Taylor v. Alabama, 457 U.S. 687 (1982), *Dunaway v. New York*, 442 U.S. 200 (1979), and *Brown v. Illinois*, 422 U.S. 590 (1975), formulated a more precise standard for determining when a derivative fruit will be subject to suppression. In these cases, suspects made incriminating statements in response to custodial interrogation during the course of illegal arrests. Each case held that the statements should be suppressed, despite advice of rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966).

> *Brown* identified several factors to be considered "in determining whether the confession is obtained by exploitation of an illegal arrest[:] [t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct . . . And the burden of showing admissibility rests, of course, on the prosecution."

Dunaway, 442 U.S. at 218 (quoting *Brown*, 422 U.S. at 603-04).[102]

[102] The application of even such an apparently simple test may be difficult. Justice Stevens, concurring in *Dunaway*, observed that temporal proximity "may be an ambiguous factor," for "a prolonged detention may well be a more serious exploitation of an illegal arrest than a short one," and "even an immediate confession may have been motivated by a pre-arrest event such as a visit with a minister." *Id*. at 220. He also raised interesting questions concerning the relevance of the flagrancy of the official misconduct. *Id*. at 220-21.

After being illegally seized and interrogated for an hour, the suspect in *United States v. (Charles) Allen*, 436 A.2d 1303 (D.C. 1981), consented to a search of his car and confessed. The Court found "'no intervening event of significance whatsoever'" between the illegality and the consent and confession, and suppressed tangible evidence and the statement. *Id*. at 1309 (quoting *Dunaway*, 442 U.S. at 218); *see also Fahy v. Connecticut*, 375 U.S. 85 (1963) (suppressing statement made when police confronted suspect with illegally seized tangible evidence).

Wilkerson v. United States, 432 A.2d 730, 732 (D.C), found that the passing of eight days since the illegal seizure, combined with Wilkerson's voluntary decision to return to the station, dissipated the taint. Had there been a stronger showing that the police secured a confession by confronting the suspect with illegally seized property, the case may well have been decided differently. Other courts have recognized that a confrontation like that is itself the exploitation of the illegal seizure and, in this context, such factors as temporal proximity are unimportant. *See* 4 W. LaFave, *Search and Seizure* 11.4(c) (4th ed. 2004). *(Lisa) Oliver v. United States*, 656 A.2d 1159, 1172-73 (D.C. 1995), found that the following intervening circumstances purged the taint of an earlier illegal arrest: the police lawfully obtained probable cause through independent means, the defendant was allowed to speak in private with her brother and boyfriend, and the defendant was advised of and waived her *Miranda* rights three times.

Insufficient taint is demonstrated by *New York v. Harris*, 495 U.S. 14 (1990), in which although the police had probable cause to arrest Harris, the actual arrest was illegal because it was made pursuant to a warrantless entry into Harris' home. The Supreme Court held that a subsequent statement was not a fruit of the illegality – that is, it was not the fruit of the fact that the arrest was made in the home rather than someplace else. *Id*. at 19; *see also Martin v. United States*, 605 A.2d 934, 937-38 (D.C. 1992) (applying *Harris*).

Bryant v. United States, 599 A.2d 1107, 1109 (D.C. 1991), on the other hand, ruled that a show-up identification performed after the police illegally entered Bryant's home and brought him outside should have been suppressed. The case was distinguishable from *Harris* because through the illegal entry, the police obtained evidence that Bryant was located in the area of the drug sale – without which there would have been no grounds for a seizure. *Id*. at 1112-13.[103]

Evidence that was illegally seized may be used at trial if the government can show either that an "independent source" for the evidence was known prior to the illegality, or that the evidence would "inevitably" have been discovered through legal means. "[T]he exclusionary rule has no application" when the government "learned of evidence 'from an independent source.'" *Wong Sun*, 371 U.S. at 487. Thus, *Segura v. United States*, 468 U.S. 796 (1984), held lawful a search conducted pursuant to a warrant one day after an unlawful search because the information on which the warrant was based was entirely independent of the unlawful search and its fruits. Similarly, in *Murray v. United States*, 487 U.S. 533 (1988), federal agents watched the defendants drive two vehicles out of a warehouse. The agents seized the vehicles lawfully, found marijuana, then illegally broke into the warehouse without a warrant and observed a number of bales of what appeared to be marijuana. They left, obtained a search warrant, and

[103] If an out-of-court identification is suppressed as unlawfully obtained, any in-court identification must likewise be suppressed if it was tainted by the illegal identification procedure. *See United States v. Crews*, 445 U.S. 463 (1980) (finding an independent source for the identification); *cf. Gilbert v. California*, 388 U.S. 263 (1967).

seized the marijuana bales. The Supreme Court determined that the search pursuant to the warrant was valid if, but only if, both the information used to obtain the warrant and the decision to seek a warrant were not based on information obtained by breaking into the warehouse. *Id*. at 542 (remanding for hearing on whether valid seizure of trucks provided an "independent source").

Even fruits of unlawful police activity can ordinarily be used to impeach the defendant's testimony at trial.[104] *See Michigan v. Harvey*, 494 U.S. 344 (1990) (statement obtained in violation of Sixth Amendment right to counsel); *United States v. Havens*, 446 U.S. 620 (1980) (fruits of unlawful search); *Harris v. New York*, 401 U.S. 222 (1971) (statement obtained in violation of *Miranda*). Illegally obtained evidence cannot, however, be used to impeach any other defense witness. *James v. Illinois*, 493 U.S. 307 (1990).

Havens swept aside the restriction that only the defendant's answers on direct could warrant such impeachment, permitting impeachment of the defendant's answers to any questions on cross-examination that are reasonably suggested by the direct testimony. 446 U.S. at 626-28; *see also (Theodore) Ware v. United States*, 579 A.2d 701, 703-04 (D.C. 1990) (defendant's broad denial of drug sales to undercover officer or anyone else on day of arrest "reasonably suggested" cross-examination about Dilaudid seized from his car). In addition to cross-examination, the evidence itself may also be introduced in the government's rebuttal case.

If a suppression motion is granted, counsel should therefore carefully consider whether the client should testify, risking a loss of the benefits gained by suppression. It may be possible to limit the direct examination sufficiently to preclude impeachment. An advance ruling may be sought on whether, based upon counsel's proffer of the client's testimony, cross-examination concerning the suppressed evidence will be allowed. *See (Allen) Wright v. United States*, 418 A.2d 146, 149 (D.C. 1980) (commending trial judge for making such a ruling before defendant testified, though noting practical difficulties that may be involved because precise contours of defendant's testimony cannot always be predicted).

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***Davis v. United States*, 131 S. Ct. 2419 (2011).** Exclusionary rule does not apply when police search is conducted "in objectively reasonable reliance on binding appellate precedent."

***Ramsey v. United States*, 73 A.3d 138 (D.C. 2013).** See, *supra*, Chapter 22.II.C.1.

***Silver v. United States*, 73 A.3d 1022 (D.C. 2013).** Trial court did not err in allowing testimony regarding evidence found during an illegal search in prosecution for obstruction of justice charge because suppression of that evidence in connection with PWID charge provided adequate deterrent to police misconduct.

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[104] Evidence suppressed for trial use may also be admissible at other proceedings. *See (Kimberly) Thompson v. United States*, 444 A.2d 972 (D.C. 1982) (probation revocation); *United States v. McCrory*, 930 F.2d 63 (D.C. Cir. 1991) (sentencing) (1992). Parole boards are not required to exclude illegally obtained evidence. *Pennsylvania Board of Probation and Parole v. (Keith) Scott*, 524 U.S. 357 (1998). It is not admissible, however, in civil forfeiture proceedings. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965).

***Wilson v. United States*, 102 A.3d 751 (D.C. 2014).** Absent unforeseen exceptional circumstances, where a defendant commits a separate and distinct crime while unlawfully in police custody, evidence uncovered by a search incident to the later, lawful arrest is not suppressible as the fruit of the poisonous tree.

APPENDIX A

CROSS-EXAMINATION ON INFORMANT'S VERACITY

When an officer has said enough on direct for the source to be classified as a citizen-informant, counsel should try to generate evidence casting doubt on this characterization or to develop impeaching evidence:

How, in detail, did the informant communicate the tip? Was it by telephone, in writing, through a third party, or in person?[105]

Did the informant leave a name or address or other identifying information such as a code name or number?

Did the informant offer to provide information in the future? Did the police suggest this?

What was the nature of the relationship between the informant and the person accused?

Did the police check to determine whether the informant might have had a motive to lie?

Did the police know about the informant's job history, criminal record, mental health history, community standing?

Is the informant an alcoholic or addict?

Was the informant under the influence of drugs or alcohol when giving the tip?

When did the informant learn the information that was ultimately passed to the police?

Has the tipster ever provided information before? How many times? Over how long a period of time?

Under similar circumstances to those of the present case, or not? If different, how so?

Were the police able to determine the accuracy of any earlier tips? How and with what results?

Did the tipster or the police, either on this occasion or earlier, speak about the tipster receiving money or other favors for information?

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[105] Tips are often communicated through telephone calls on the "911" emergency line, which are routinely taped. A citizen reporting a crime is likely to use this number and the police sometimes make arrangements with paid informants to call in tips on that line. Accordingly, before the suppression hearing, counsel should request a copy of the tape from the United States Attorney's Office under Rule 16. Requests should be made expeditiously. *(Percy) Lawson v. United States*, 360 A.2d 38 (D.C. 1976), illustrates the importance of obtaining such documentary evidence. However, in *Lawson*, such evidence – consisting of an informant's unfamiliarity with the defendant and his insistence on police action – was used to justify a finding that the 911 caller was a citizen-informant.

Did the informant associate with the people the informant was accusing or with other criminals?

Was the informant in custody, on probation, parole, or under any other form of supervision when the information was supplied to the police?

When the officer, on direct, makes an adequate record to justify a finding of veracity from the informant's past reliability, cross-examination might develop the kinds of impeaching evidence discussed above (e.g., drug use or addiction, criminal record, association with criminals). The witness should also be examined in an effort to show that this tip was somehow different from prior tips, so that their reliability is not a fair index to the informant's present veracity.

How did the informant communicate the tip on each prior occasion and on this occasion?

If the police and informant did not meet face to face, how did the informant identify himself or herself?

Has the informant ever used his or her own name or nickname or code name before when passing on a tip?

Did the informant use any name at this time?

What kind of information did the informant pass on before and what was the asserted basis of knowledge on earlier occasions?

Was either of these different this time?

The officer should be questioned in detail about the assertions that earlier tips proved accurate.

How many earlier tips, precisely, were there? Over what period of time?

With respect to each specific earlier tip, how was the accuracy of the information assessed?

Did any criminal prosecutions result?

What were the names of the cases and what is their present status?

Was any information received from the tipster shown to be false?

What were the precise arrangements made with the informant?

Was the informant paid before the tip was checked out?

Was there reason to think the informant had some pressing need for money when the tip was given (for example, to buy drugs to avoid withdrawal)?

If the informant was "working off" a charge, what kind of help did the police promise?

How pressing was the informant's need for this help?

Had the police been pressing the informant for information?

Had the informant been threatened with criminal prosecution?

Were the arrangements made in this case any different from arrangements used previously?

CHAPTER 23

VOIR DIRE

Voir dire is a critical tool in effective trial advocacy because it is the only opportunity to unearth the conscious or subconscious concerns that affect jurors' ability to remain impartial.[1] Some jurors are biased due to race, their interactions with law enforcement, prior experience with crime, media scrutiny of a particular incident, or even of crime in general. Uncovering these predispositions through *voir dire* is crucial to establishing a basis for cause challenges and for deciding on peremptory challenges.

"*Voir dire* examination serves the dual purposes of enabling the court to select an impartial jury and assisting counsel in exercising peremptory challenges."[2] *Mu'Min v. Virginia*, 500 U.S. 415, 431 (1991). "*Voir dire* serves to ensure an accused, as far as possible, of an impartial jury by exposing any juror biases that might affect the verdict." *Boertje v. United States*, 569 A.2d 586, 592 (D.C. 1989). Skillful questioning can help elicit attitudes or biases that jurors may not be inclined to express openly. *Voir dire* also provides an opportunity to develop a positive relationship with the jurors, and to prepare them for some of the legal and factual aspects of the case that they would not ordinarily hear until later in the trial.

It is, of course, unethical to present inadmissible factual information to the venire. *See ABA Standards for Criminal Justice* 3-5.3(c), 4-7.2(c) (1980). However, *Brown v. United States*, 383 A.2d 1082 (D.C. 1978), upheld the prosecutor's actions in introducing the complainant's daughter to the venire, announcing that she would not be called as a witness, and asking whether panelists knew her. This case stands as useful authority for introducing the defendant's family, and providing some social information about the defendant, such as addresses or neighborhoods, schools and churches, to ensure that the jurors do not know the defendant or the family.[3]

PRACTICE TIP:

- ✓ When introducing yourself and your client to the jury during the initial stages of *voir dire* consider having your client stand up and introduce himself: "Good morning ladies and gentleman, my name is Mr. John Client." With the appropriate client this can start to humanize your client to the jury. Of course if you go this route, prepare your client for standing and speaking, and have him practice a few times to see if it works well for him.

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[1] The National Jury Project, *Jurywork: Systematic Techniques* (2d ed. 1986), describes various social science techniques used in jury selection. It is available at local libraries.

[2] *See generally United States v. Peterson*, 483 F.2d 1222, 1226-27 (D.C. Cir. 1973) ("without knowledge bearing on the qualifications of the venire[], neither function can be performed intelligently").

[3] *See also Powell v. United States*, 485 A.2d 596 (D.C. 1984) (permitting prosecutor to briefly describe decedent during *voir dire* to see if anyone knew her).

The Sixth Amendment right to an impartial jury sets the minimum standards for *voir dire* and "the essential demands of fairness." *Aldridge v. United States*, 283 U.S. 308, 310 (1931). While the trial court has broad discretion, it must afford "a full and fair opportunity to expose bias or prejudice on the part of the veniremen." *United States v. Robinson*, 475 F.2d 376, 380-81 (D.C. Cir. 1973); *see also Dennis v. United States*, 339 U.S. 162, 171-72 (1950) ("[p]reservation of the opportunity to prove actual bias is a guarantee of a defendant's [constitutional] right to an impartial jury"). The court's rulings will be affirmed on appeal unless the record reveals an abuse of discretion coupled with substantial prejudice to the defendant. *Boertje*, 569 A.2d at 592.[4] "Although the trial court has broad discretion in the conduct of *voir dire*, an abuse of discretion with resulting reversible error will occur where the court's restriction hindered the defendant's opportunity to make reasonable use of his challenges." *United States v. Brown*, 799 F.2d 134, 136 (4th Cir. 1986).

Another stick in the defendant's bundle of Sixth Amendment rights is the right to a jury comprised of a "fair cross-section" of his community. *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975). Jury pools that display "systematic exclusion" in the selection process violates this rule, *Id*. at 522. To establish a prima facie violation of this requirement, the defendant must show three elements: (1) the group must be distinctive; (2) the group represented in the pool is not fair and reasonable in relation to the number of such persons in the community; and (3) the underrepresentation is due to a systematic exclusion in the selection process. *Diggs v. United States*, 906 A.2d 290, 296 (D.C. 2006).[5]

To make such a *prima facie* showing of a Sixth Amendment violation, the defense needs to show more than just a discrepancy in the panel sent to the courtroom; a larger system disparity must be shown. In 2007-2008, the Public Defender Service (PDS) litigated this issue in *United States v. Powell*, in Superior Court. The court granted the defense extensive discovery in order to investigate the potential disparity of African American jurors. The court ultimately ruled that based on the information provided and because of some changes made by the jury office, the defense had not made out a prima facie case. Going forward, this is an area ripe for litigation, both for African Americans and other distinct groups, as the practices of the jury office and software they use change. At the time of press for this CPI, the Court of Appeals had heard, *en banc*¸ the question of what showing, if any, the defense needed to make to receive discovery (from the court's jury office) to prepare a Sixth Amendment challenge. *See United States v. Gause*, 959 A.2d 671 (D.C. 2008) (defendant must make a particularize showing supporting a reasonable belief of an underrepresentation in the jury pool in order to obtain discovery), *opinion vacated in part on rehearing en banc by United States v. Gause*, 968 A.2d 1032 (2009).

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[4] *Musgrove v. United States*, 441 A.2d 980 (D.C. 1982), illustrates appellate reluctance to reverse rulings on the content and scope of *voir dire*. Musgrove was a police officer charged with assault. The Court concluded that the trial court's questions on attitudes toward police brutality were "minimally sufficient" but "adequate," and affirmed. *Id*. at 983, n.3.

[5] In *Diggs*, the Court of Appeals ruled that the trial court did not improperly deny defendants' claim that they were deprived of their Sixth Amendment right to a jury drawn from a fair cross-section of the community simply because of hardship deferrals and the Monday composition of the jury pool, although the court acknowledged it was "troubling." *Id.* at 299.

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***Gause v. United States*, 6 A.3d 1247 (D.C. 2010) (en banc).** The District of Columbia Jury System Act (DCJSA), which includes a statutory right to inspect court records used in conjunction with the jury selection process, does not impose a threshold showing that the requested materials will ultimately yield evidence of a "substantial failure to comply with" the DCJSA.

I. METHOD OF EXAMINATION

A. Questioning by the Court or Counsel

The court may conduct the entire examination itself, allow counsel to conduct it, or share the questioning. Super. Ct. Crim. R. 24(a). A ruling on the method and manner of conducting *voir dire* will be overturned only for "an abuse of discretion prejudicing a party's rights." *McCowan v. United States*, 458 A.2d 1191 (D.C. 1983) (upholding refusal to allow individual *voir dire* on religious views). There are only a few general rules in this area. For example, the court "is not obliged to ask the question exactly as proposed; instead, the court may alter the wording and make it more general." *Boertje*, 569 A.2d at 593. However, if inquiry in a given area is appropriate, the court cannot prohibit it altogether based solely on the form of suggested questions. *Aldridge*, 283 U.S. at 311.

Counsel must determine the judge's practice before trial. If the judge normally conducts the *voir dire*, counsel must prepare and submit proposed questions. Counsel may also submit a questionnaire for distribution to the panel before *voir dire* begins, as jurors tend to be more candid about their attitudes in questionnaires than in questions posed in open court. Jones, *Judge Versus Attorney Conducted Voir Dire: An Empirical Investigation of Juror Candor*, 11 L. & Hum. Beh. 131, 144 (1987). Questionnaires are particularly necessary where the case is highly publicized, an unusual defense may be asserted (*e.g.*, battered women's syndrome), or very sensitive issues are involved (*e.g.*, serial rape charges). The questionnaires must be tailored to the facts of the case, using as many specific questions as possible. Counsel should examine returned questionnaires carefully. On appeal, counsel will be held responsible for knowing jurors' written responses, even if they did not respond accurately to oral questions. *United States v. Brown*, 26 F.3d 1124 (D.C. Cir. 1994) (issue not preserved for appeal where counsel failed to question juror about bias based on questionnaire response). *See Khaalis v. United States*, 408 A.2d 313 (D.C. 1979) (example of a case using *voir dire* questionnaires).

As to the *voir dire* questions themselves, a question that is clearly proper and necessary in one case may be equally improper in another, for the "demands of fairness" can be determined only by reference to the particular facts and circumstances of the case at hand. Questions designed to expose potential biases should be supported with fact-specific argument that such bias or prejudice is especially dangerous or likely to exist in a particular case. Thoroughness in *voir dire* is essential to making a record for appeal. As a prerequisite to challenging a verdict on the ground of juror partiality, D.C. Code § 23-105(d) requires that the defense have conducted or requested examination on that subject. Unless a specific objection is made at the time, *voir dire*

issues will not be reviewed on appeal. *United States v. Bryant*, 471 F.2d 1040, 1044 (D.C. Cir. 1972).

PRACTICE TIP:

Counsel should submit written requests for case-specific questions or questionnaires significantly in advance of the trial date. In a few recent cases, Superior Court judges have allowed lengthy questionnaires, usually when both the government and defense request one. No matter the form, counsel should try to identify what likely prejudices a juror might have in a particular case (crime of violence, domestic abuse, drug distribution, etc.) and request that the court/attorney ask about that area.

If the court's practice is to conduct *voir dire*, counsel may attempt to persuade the court to permit the lawyers to ask at least some questions of the panel. Studies have shown that attorneys are more likely than judges to discover information about panelists' attitudes. Candor may be diminished when questions are posed by the judge, the ultimate figure of authority. Jones, *supra*, 11 L. & Hum. Beh. at 144. "Subjects changed their answers [from attitudes expressed out of court] almost twice as much when questioned by a judge as when interviewed by an attorney." *Id*. at 143. Other studies have shown that *voir dire* by counsel is more likely to minimize the effect of publicity on decision-making, to eliminate jurors who are easily swayed, to sensitize others against group pressure, and to impress upon jurors the importance of legal procedures and admissible evidence. Padawer-Singer, *Voir Dire by Two Lawyers: An Essential Safeguard*, 57 Judicature 386 (1974). These benefits may be linked to the attorneys' more approachable status in the courtroom. *Id*. *See generally United States v. Ledee*, 549 F.2d 990, 993 (5th Cir. 1977) (lawyers' superior understanding of issues of the case may contribute greatly to *voir dire* process); *Griffin v. State*, 389 S.W.2d 900 (Ark. 1965) (despite statute putting attorney *voir dire* at discretion of court, prohibiting attorney questioning on issues relevant to case is not justified). Developing information for the exercise of challenges should take the same time whether conducted by the court or counsel. If the court is concerned about the content of questions, counsel may proffer proposed inquiries for the court's review.

If the court conducts the *voir dire*, counsel should use any available opportunity to ask follow-up questions, particularly at the bench, to elicit information pertinent to the exercise of challenges and to develop rapport with the jurors. *But see Gibson v. United States*, 700 A.2d 776 (D.C. 1997) (error in not allowing follow-up questions may be found harmless given juror's answer to court questioning). In the District of Columbia, private, individual questioning is almost uniformly conducted in at least three areas—juror experiences as witnesses, victims, or suspects of crimes (which usually includes a substantial number of jurors); exposure to publicity; and admitted inability to be fair. Counsel should request individual *voir dire* in any other sensitive area that creates concern that a disqualifying state of mind may exist. In all these situations, it is critical that the panelists be examined at the bench, to avoid introducing extraneous, contaminating information into the panel. *See United States v. Ridley*, 412 F.2d 1126 (D.C. Cir. 1969) (defendant could not complain that venire members' recitals of past victimization tainted whole venire panel where defense counsel elicited such information, did not request that it be

given in private, and made no objection at the time). Most important, individual *voir dire* enables counsel to better evaluate jurors through customized follow-up questions.

Form of Questions: Although the purpose of *voir dire* is to expose prejudices and biases, the typical form of questioning may hinder this process. Studies have shown that jurors often are not truthful in their responses. Broeder, *Voir Dire Examination: An Empirical Study*, 38 S. Cal. L. Rev. 503, 528 (1965). "[J]urors often distort their replies to questions posed during *voir dire*." Jones, *supra*, 11 L. & Hum. Beh. at 145. Part of this situation may stem from reliance on jurors' self-evaluation of their own prejudices, which are notoriously unreliable. *Id*. at 144. Numerous studies have shown that collective questioning does not effectively expose the attitudes of greatest concern in criminal cases. Collective *voir dire* "makes it difficult for people who are not accustomed to speaking in front of others to respond to questions, and it also makes it easier for jurors who have an answer to some question to fail to respond." Babcock, *Voir dire: Preserving "Its Wonderful Power"*, 27 Stan. L. Rev. 545, 547 (1975).

This problem is aggravated by the use of compound questions, where potential jurors are asked several two-part questions that instruct them to listen to both parts before answering. The first part of the question asks whether jurors have a certain background characteristic or experience, such as being "currently or previously employed by any law enforcement agency." The second part of the question asks the juror to self-evaluate his or her own impartiality in light of the characteristic or experience from the first question. An example of this second question is "As a result of your experience, do you believe that you personally would be unable to be fair and impartial to both sides if selected as a juror in this case?" *United States v. Mouling*, 557 F.3d 658, 662 (D.C. Cir. 2009).

Courts have expressed "deep reservations" about the use of compound questions. *United States v. Littlejohn*, 489 F.3d 1335, 1342 (D.C. Cir. 2007). These reservations stem from the belief that these questions deny defendants "a full and fair opportunity to expose bias or prejudice on the part of the veniremen." *Id*. at 1346. *Littlejohn* notes that it is especially important to accurately apprehend a juror's views where the court rejected the defense counsel's objections to the compound questions, the defense never received a "present occupation" listing of the jurors, and the effect of any potential bias involved the "heart of the case." *Id*. at 1346-47. In *Mouling*, where the credibility of a police officer was "crucial" to the conviction, whether the compound questions affected defendant's substantial rights "present[ed] a close question." 557 F.3d at 664. By contrast, in *United States v. West*, 458 F.3d 1 (D.C. Cir. 2006), none of these factors were in play, and subsequent non-compound questions regarding the same subject as the compound questions were asked of the jurors.

Optimally, questions should be open-ended and invite informative responses, such as, "When you think about the police department in this city, what's the first thing that comes into your mind?" Cathy E. Bennett, et al., *How to Conduct a Meaningful & Effective Voir Dire in Criminal Cases*, 465 Marq. L. Rev. 659, 670 (1993). The use of formal, leading questions tends to impede inquiry into potential prejudice. "A yes-no answer format often results in the development of automatic patterns of response. Particularly if the socially appropriate answers are obvious, such responses tell us little about respondents' attitudes." Hans, *The Conduct of Voir Dire: A Psychological Analysis*, 11 Just. Sys. J. 40, 55 (1986). Trained psychologists use

indirect questions to probe attitudes, *id*. at 45, and counsel should phrase questions in an open-ended fashion that elicits responses, unlike the more typically phrased questions that may be answered "correctly" by silence. *Id*. at 51.[6] Disclosure of information by the questioner also tends to increase the candor of responses.

Types of Questions:

- ✓ Use open-ended questions that invite informative responses
- ✓ Avoid using compound questions
- ✓ Avoid using leading questions

PRACTICE TIP:

In follow-up questioning of a potential juror about an area of bias, an attorney may want to take a two step approach. First, ask a few open-ended questions about the area: "I know this is hard, but can you tell us how being the victim of an armed robbery affected you?" This can establish the depth of the juror's bias. The second step would involve asking if that incident or bias would be something the juror might be thinking about or might be in his or her mind while hearing the evidence in this case. With additional follow-up based on the answers, such a process may be able to ferret out a juror's true bias.

B. Defendant's Presence during *Voir Dire*

The defendant is entitled to be present during questioning at the bench. The defendant in *Robinson v. United States*, 448 A.2d 853 (D.C. 1982), asked permission to be present, pursuant to Super. Ct. Crim. R. 43. That request was denied, and a substantial number of prospective jurors were questioned out of her presence. On appeal, her conviction was reversed because *Robinson* had not had

> an opportunity beyond the minimum requirements of fair selection to express an arbitrary preference" which the peremptory challenge is designed to ensure, and was "[un]able to assist [] counsel in the selection of the jurors.

Id. at 856 (citations omitted). *Boone v. United States*, 483 A.2d 1135 (D.C. 1984) (*en banc*), observed that the benefits of the defendant's presence at *voir dire* "cannot be over-emphasized," and noted the constitutional underpinnings of the right to be present during all stages of *voir dire*. *Id*. at 1137, 1139-40; *see Kleinbart v. United States*, 553 A.2d 1236 (D.C. 1989) (violation is of constitutional magnitude), *vacated and remanded on other grounds*, 604 A.2d 861 (1992); *United States v. Gordon*, 829 F.2d 119 (D.C. Cir. 1987) (waiver must be personal, knowing and intelligent). The defendant in *Beard v. United States*, 535 A.2d 1373 (D.C. 1988), asked to be present at the bench during individual *voir dire*, and the judge told counsel that he could go back at any time and tell his client what had transpired at the bench. The Court of Appeals found that

[6] Interestingly, at least one study has shown that judges prefer questions that bear directly on legal issues and are posed in a closed-ended manner. Jones, *supra*, 11 L. & Hum. Beh. at 154.

the defendant unequivocally asserted his right to be present and that the judge's response was reversible error.

> [I]f the trial judge was not denying the motion, it was his responsibility to determine whether appellant mistakenly interpreted his comment as a denial or was intentionally relinquishing the right he had clearly asserted only seconds before.

Id. at 1376; *see also, United States v. Hoover-Hankerson*, 511 F.3d 164 (D.C. Cir. 2007) (attorney can waive defendant's right without defendant's oral confirmation); *Lay v. United States*, 831 A.2d 1015 (D.C. 2003) (request to be present made after *voir dire* has already begun is not timely and constitutes a waiver); *Robinson v. United States*, 756 A.2d 448, 456 (D.C. 2000) (failure to assert right constitutes waiver on appeal); *Williams v. United States*, 665 A.2d 928 (D.C. 1995) (waiver is valid notwithstanding subsequent claim of "mistake" as long as it was "knowing" and "intentional"); *Young v. United States*, 478 A.2d 287 (D.C. 1984) (exclusion from *voir dire* at bench from which two jurors were selected was harmless error); *Welch v. United States*, 466 A.2d 829 (D.C. 1983) (failure to assert right, or acquiescence in exclusion from individual *voir dire*, constitutes waiver on appeal).

There are also other issues that arise regarding a defendant's physical presence in the courtroom during *voir dire*. For example, when the defendant represents an "unusual security problem," such as where "evidence of [defendant's] mental illness gave rise to a reasonable concern that [defendant] would act out and intimidate jurors, threaten their safety, or cause them to be prejudiced against him," *Briggs v. United States*, 525 A.2d 583, 590 (D.C. 1987). In *Briggs*, as in *Robinson*, the defendant asserted the right to be present at *voir dire* after the prospective jurors had been sworn, after questioning had commenced, and after two prospective jurors had already approached the bench without the defendant being present. Due to the aforementioned security concerns, this untimeliness made alternate arrangements to protect potential jurors impractical. *Id*. at 589-90. Even so, if the defendant "had made a timely request to assert his right to hear and observe jurors' responses at bench *voir dire*, the court would have had to arrange special procedures to accommodate him." *Id*. at 590. If counsel believes that prospective jurors might be intimidated and develop biases as a result of being in close proximity to the defendant, counsel should request that individual *voir dire* be conducted in the jury room, with the defendant present. This procedure should alleviate any juror discomfort from close contact with the defendant and should take no longer than individual *voir dire* at the bench. It will also encourage greater openness on the part of potential jurors, who will be less concerned about other venire members overhearing their responses.

Other alternatives to being present at the bench for individual questioning include: conducting *voir dire* on closed circuit television, *see United States v. Washington*, 705 F.2d 489, 497 (D.C. Cir. 1983), cited with approval in *Boone*, 483 A.2d at 1141-42; conducting individual *voir dire* in open court, but excluding all other members of the panel; conducting part of the *voir dire* in the judge's chambers; or conducting *voir dire* while the defendant can participate fully from afar through a headset, *see Hoover-Hankerson*, 511 F.3d at 169.

PRACTICE TIP:

The day before trial, counsel may want to contact chambers or the courtroom clerk to request a listening device be made available for a client so that he or she can listen in to the questioning of jurors at the bench. Alternatively, counsel may request individual *voir dire* be conducted "in the back," i.e., in the jury room where all parties can listen to the questions and answers. This mode of *voir dire* is often done in multiple co-defendant cases where it is hard for all parties to hear answers to individual questioning at the bench.

C. Public Access to *Voir Dire*

The public has a presumptive entitlement to access to jury selection. *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501, 510 (1984). While jurors may have a "compelling interest" in privacy "when interrogation touches on deeply personal matters," *id*. at 511, the court must attempt to accommodate these competing interests and consider alternatives to closure of the proceedings. *Id*. at 512. Thus, it must make specific findings that a fair trial or a juror's privacy would be damaged by disclosure of particular information, consider jurors' expressed desires for *in camera* examination where answers could be embarrassing, and consider delayed release of the transcript or deletion of the juror's identity. *Id*.; *see also Cable News Network, Inc. v. United States*, 824 F.2d 1046 (D.C. Cir. 1987) (trial court failed to make specific evidence-based finding that compelling privacy interests outweighed public's interest in disclosure). In Superior Court, *voir dire* is recorded and a transcript is generally available to interested parties upon request. Jury panels usually take up all seats in the courtroom, so clerks clear the courtroom when a jury panel is about to enter.

Circumstances may arise, however, where the jury must be anonymous to protect their safety. The trial court in *United States v. Edmond*, 52 F.3d 1080 (D.C. Cir. 1995), found that withholding the identities and addresses of potential jurors was warranted because "'a realistic threat of violence is present as all defendants are allegedly members of a drug conspiracy that resorted to violence in order to achieve the conspiracy's end.'" *Id*. at 1090 (citation omitted). *But see United States v. Mohammed*, 538 F. Supp.3d 281 (D.C. Cir. 2008) (finding an Afghan drug manufacturer operating in DC did not constitute a threat to jurors). Noting that an anonymous jury implicates the defendant's rights to a presumption of innocence and to execute peremptory challenges, the circuit court concluded that the trial court's *voir dire* "was more than adequate to compensate for the information denied by juror anonymity." *Edmond*, at 1092.

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***Williams v. United States*, 51 A.3d 1273 (D.C. 2012).** Partial closure of voir dire proceedings substantially prejudiced the defendant, but did not amount to plain error where nothing in the record suggested that the judge deliberately enforced secrecy to be free of the safeguard of public scrutiny, and where the defendant, defense counsel, prosecutor, trial judge and court reporter were all present for the voir dire process.

II. SPECIFIC AREAS OF INQUIRY

The court must allow inquiry into areas that are well-recognized sources of bias or are reasonably calculated to discover sources of bias. *Robinson*, 475 F.2d at 380-81. Some forms of bias are common, such as the tendency to attach disproportionate weight to testimony of police officers. *See infra* Section F. Others vary widely with the facts of the case. Counsel should be prepared to demonstrate that certain "controversial factors" require careful inquiry because they are "inextricably linked to the trial." *Cordero v. United States*, 456 A.2d 837, 842 (D.C. 1983). These factors may include race, religion, abortion, nationality or alienage, insanity, sexual preference, drug-related crimes, political attitudes and so on. *Id*.

PRACTICE TIP:

When asking about a certain incident that might cause bias, counsel should cover a number of areas including how long ago the incident happened, how deeply the juror was affected, if the juror still feels affected by it, if the juror still thinks or talks with others about the incident regularly, what assistance the juror received to help her with the incident, and so forth. Counsel should, of course, be very sensitive and empathetic when inquiring into these areas.

A. Attitudinal Bias or Prejudice

The "essential demands of fairness" require, at a minimum, that on request the court inquire into matters where there is a "'significant likelihood' of juror prejudice." *Id.* at 841; *see Jackson v. United States*, 940 A.2d 981 (D.C. 2008) (discovery of a John Grisham book in the deliberating room did not "pose a substantial risk of improper jury influence"). A significant likelihood of prejudice exists if matters about which the community is commonly known to harbor strong feelings are "'inextricably bound' up with the conduct of the trial." *Cordero* 456 A.2d at 842 (citation omitted). Because of "the reluctance of a person to admit bias," the trial judge should permit follow-up questions if jurors make ambiguous claims that they can be impartial. *Lewis v. Voss*, 770 A.2d 996 (D.C. 2001) (reversing the denial of a new trial on damages where trial court refused to pose specific *voir dire* questions to the jury panel relating to tort reform). The list of possible biases will vary depending on the nature of the case. Courts have permitted inquiry into biases based on religion,[7] political beliefs,[8] and sexual preference,[9] among others.

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[7] *See, e.g., McCowan v. United States*, 458 A.2d 1191, 1195 (D.C. 1983) (witness asserted that prayer before lineup guaranteed accuracy of identification). Factors that may cause jurors to give special credence to a particular witness are also appropriate subjects for examination. For example, *Coleman v. United States*, 379 A.2d 951 (D.C. 1977), concluded that questions directed at religious beliefs were proper where the complainant was a Roman Catholic priest, but held that all members of that faith need not be automatically excluded.

[8] *See, e.g., Cordero*, 456 A.2d 837 (abuse of discretion in refusing to inquire into potential prejudice based on defendant's membership in two radical organizations).

[9] *See, e.g., Maine v. Lovely*, 451 A.2d 900 (Me. 1982) (reversing where defendant was accused of arson of gay bar of which he was patron, and *voir dire* on anti-homosexual bias was denied).

In cases with racial overtones, questions on racial prejudice must be permitted. *Ham v. South Carolina*, 409 U.S. 524 (1973) (defense to drug charge was that police framed defendant because of his civil rights work; reversible error not to allow *voir dire* on racial prejudice); *Aldridge v. United States*, 283 U.S. 308 (1931) (same, in case resulting in death penalty for black man charged with murdering white police officer). While in federal cases the mere fact that the defendant and the victim are of different races does not require inquiry, *Ristaino v. Ross*, 424 U.S. 589 (1976), if the case also involves a violent crime, the federal courts must inquire, *Rosales-Lopez v. United States*, 451 U.S. 182, 191 (1981) (plurality opinion). The D.C. Superior Court is not held to this strict rule; such inquiry is constitutionally required in some circumstances. *See Turner v. Murray*, 476 U.S. 28 (1986) (capital sentencing proceeding involving interracial crime).

If the case will involve translators, bilingual jurors should be asked whether they will be willing to abide by the translator's version of the testimony even if they had a different opinion of he meaning. In *Hernandez v. New York*, 500 U.S. 352 (1991), both the plurality and the dissent suggested that hesitation on the part of such a juror could constitute grounds for excusal for cause. *Id*. at 362-63, 379.

B. Pretrial Publicity

Possible exposure to prejudicial publicity must be explored. *See ABA Standards for Criminal Justice*, 8-3.5 (Relating to a Fair Trial and Free Press) (1980). Jurors who have been prejudiced by media coverage must be excused. *See Morris v. United States*, 564 A.2d 746, 748-49 (D.C. 1989). In determining whether each juror "can lay aside his impression or opinion and render a verdict based on the evidence presented in court," a pro forma statement of impartiality should not satisfy the court. *See Irvin v. Dowd*, 366 U.S. 717, 723 (1961) (reversed and remanded where, because eight jurors had formed some opinion of defendant's guilt prior to trial, their statements that they would be fair and impartial were of little weight); *see also Johnson v. United States*, 701 A.2d 1085, 1091 (D.C. 1997) (juror's response, "I think I can," to question whether she could fairly judge case on evidence, where juror knew decedent's close friend, "was too slim a reed upon which to base a determination that the juror was not partial"). The court should inquire sufficiently to decide "at the end of questioning: is this juror to be believed when he says he has not formed an opinion about the case?" *Mu'Min v. Virginia*, 500 U.S. at 425.

In some situations, "adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed." *Patton v. Yount*, 467 U.S. 1025, 1031 (1984). However, this presumption is often reserved for the most extreme circumstances. For example, the Court in *Mu'Min* found that the case had not created a "wave of public passion," even though it was discussed in at least 45 articles. The trial court asked four questions about the effect of publicity, and conducted further *voir dire* in panels of four. No jurors who knew about the case from outside sources said they had formed an opinion about the defendant's guilt. In those circumstances, refusal to inquire about the specific content of the publicity to which jurors were exposed was not manifest error. 500 U.S. at 428-29. Similarly, *Patton* concluded that publicity before the defendant's first trial had abated before the retrial and that the intervening four years had "softened" community sentiment. 467 U.S. at

1032. Courts also may be less likely to find that minimal *voir dire* is reversible error when the defendant sought the publicity. *Welch*, 466 A.2d at 837; *Khaalis*, 408 A.2d at 335.

Courts have provided some guidelines for how to inquire and decide if improper influence from pretrial publicity exists for a certain juror. Questioning each panelist privately avoids "contamination" of the entire venire. *Silverthorne v. United States*, 400 F.2d 627, 639 (9th Cir. 1968).[10] Some combination of general and private questioning may be used. For example, a series of general questions may expose blatant biases that would result in some potential jurors being struck for cause. Then, with the number of potential jurors reduced, the court and counsel can engage in a more efficient individualized *voir dire*. *See, e.g.*, *United States v. Haldeman*, 559 F.2d 31, 65 (D.C. Cir. 1976).

Questions should focus on the nature, extent and source of the jurors' knowledge, whether they have learned information that will not be admitted at trial, whether they have discussed what they have read or heard, whether they have heard, formed or expressed opinions on guilt or innocence, and whether they can set such knowledge and opinions aside. *See, e.g.*, *Welch*, 466 A.2d at 836-37 (individual *voir dire* on precise content of pre-trial publicity was sufficient, change of venue not required); *Silverthorne*, 400 F.2d at 638 (*voir dire* on effect of pretrial publicity was inadequate because it was too general and relied on jurors' subjective evaluations of impartiality). Where the publicity is of a more general nature and does not discuss specific facts of the case, courts are less likely to require *voir dire*. *See Finley v. United States*, 632 A.2d 102 (D.C. 1993) (defendant failed to show that fictional television program involving issues similar to trial was potentially prejudicial); *Morris v. United States*, 564 A.2d 746 (D.C. 1989) (in rape and sodomy prosecution, exposure to television feature on "date rape" did not require mistrial, where program was even-handed and trial court, following post-verdict inquiry, concluded that no significant prejudice had resulted from exposure).

PRACTICE TIP:

Where a juror has indicated some knowledge of pre-trial publicity, counsel's inquiry should begin by asking the juror to try and recall everything the juror has learned about the incident. If the juror is seated for the trial, the juror should also be instructed to notify the court if and when he or she recalls anything else the juror learned through publicity, as the evidence may jog his or her memory as to the pre-trial information.

[10] *See United States v. Brooks*, 567 F.2d 134 (D.C. Cir. 1977) (approving individual *voir dire* on publicity); *United States v. Liddy*, 509 F.2d 428 (D.C. Cir. 1974) (where individualized questioning revealed nothing more than *en masse* questioning, court had discretion to individually *voir dire* only those indicating opinions or knowledge of case details); *Coppedge v. United States*, 272 F.2d 504 (D.C. Cir. 1959) (where pre-trial publicity was voluminous, *voir dire* should be done individually).

C. The Nature of the Offense

Upon hearing the nature of the charge or a brief description of the allegations, jurors may discover that they have strong feelings that would impair their ability to be fair. Jurors tend to have strong opinions in cases involving sex, drugs, weapons, or violence. If the offense involves a subject about which people harbor strong prejudices, at least some inquiry into the general area is required.[11] For example, *Hamling v. United States*, 418 U.S. 87 (1974), upheld a refusal in an obscenity trial to ask specifically about whether educational, political, and religious beliefs might affect the jurors' views of the offense only because the judge had inquired generally about views on obscenity. Similarly, the trial court in *Matthews v. United States*, 599 A.2d 1389 (D.C. 1991), a drug case, refused to inquire into drug use by friends or family members or feelings about drugs in general. The Court of Appeals found the *voir dire* "sufficient to bring to light any potential biases," but was "troubled" because it has "specifically recognized drug-related crime as one of several 'controversial matters requiring careful inquiry' during *voir dire*." *Id*. at 1390.

D. Juror Experience Similar to Evidence in the Case

Jurors must be excused for cause if their experience, or that of their close relatives, indicates a probability of partiality. *See Sims v. United States*, 405 F.2d 1381 (D.C. Cir. 1968) (taxicab drivers and their relatives should have been excused for cause from case involving murder of taxicab driver); *Jackson v. United States*, 395 F.2d 615 (D.C. Cir. 1968) (reversing where juror was in triangle love affair similar to that involved in murder case); *Burton v. Johnson*, 948 F.2d 1150 (10th Cir. 1991) (reversing where defense was "battered women's syndrome" and juror did not reveal that she was victim of abuse); *United States ex rel. De Vita v. McCorkle*, 248 F.2d 1 (3d Cir. 1957) (reversing where juror had been victim of similar robbery).

E. Experience as a Crime Victim, Witness, or Defendant

All Superior Court judges permit questioning about whether the juror or any close relatives or friends have been victims of, witnesses to, or charged with a crime. The goal is to expose jurors who have developed biases based on experiences with the criminal justice system. *See United States v. Ridley*, 412 F.2d 1126 (D.C. Cir. 1969).[12] The details of these experiences are discussed with the juror at the bench, to avoid contamination of other panelists and creation of "a climate prejudicial to one accused of crime." *Id*. at 1128 (but review of alleged taint by

[11] *See Morford v. United States*, 339 U.S. 258 (1950) (per curiam) (reversing conviction of criminal contempt against House Un-American Activities Committee because trial court did not allow questioning on impact of Loyalty Oath on potential jurors); *United States v. Dellinger*, 472 F.2d 340 (7th Cir. 1972) (where defendants were accused of protesting Vietnam War in violation of Anti-Riot Act, *voir dire* on attitudes towards anti-war protesters, hippies, and law enforcement officials was required); *United States v. Clancy*, 276 F.2d 617 (7th Cir. 1960), *rev'd on other grounds*, 365 U.S. 312 (1961) (where trial court asked two questions on prejudice or religious scruples against gambling, further inquiry would be cumulative and argumentative).

[12] Several judges limit such questions to crimes similar to the offense at issue, or to some specified number of recent years. Counsel should request that the *Ridley* questions not be limited. However, *Tate v. United States*, 610 A.2d 237, 239-40 (D.C. 1992), found that the trial court did not abuse its discretion by only inquiring about experiences with robberies and not with similar crimes or lesser included offenses. *See also Williams v. United States*, 521 A.2d 663 (D.C. 1987) (no abuse of discretion in assault case when trial court narrowed scope of question to "any kind of assaultive crime").

revelation of details waived when counsel failed to request private inquiry or to object to public discussion of past victimization).

Questions tailored to the specific facts of the case are vital to exposing possible biases. For example, if a defendant charged with rape knows the complainant, counsel should ask whether any potential jurors, their close friends, or relatives have been victims of "acquaintance rape." However, the trial court is not required to ask about any crime without limitation. The questions should relate to potential jurors' experience with crime similar to the crime charged or with crime that would interfere with the jurors' ability to be fair and impartial. *Mills v. United States*, 796 A.2d 26 (D.C. 2002) (finding no error in posing two separate *Ridley* questions regarding jurors' experience with the crime of escape, despite defense counsel's specific request to ask about other crimes). While similar experiences are not in and of themselves grounds for excusal, further questioning may indicate hidden concerns or prejudices. Again, open-ended questions to determine the nature and extent of such experiences are crucial.

F. Testimony of Police Officer

The court must allow inquiry into whether jurors would be inclined to give greater weight to the testimony of police officers than to that of other witnesses. *Jenkins v. United States*, 541 A.2d 1269 (D.C. 1988). The question should

> probe[ ] the relative weight a juror might tend to give such testimony solely because of its source. That accords with this jurisdiction's standard end-of-trial jury instruction . . . which states that "[i]n no event should you give either greater or lesser weight to the testimony of any witness merely because s/he is a police officer."

Jolly v. United States, 704 A.2d 855, 862 (D.C. 1997). Whether deficient *voir dire* on this point is reversible error depends on the extent of the deficiency and the role of police testimony in the government's case. *Id*. at 863 (inadequate question harmless because jurors' responses "provide[d] reassurance that the rest of the panel were not lulled into thinking some bias in favor of police testimony required no response," and non-police testimony, "if believed, virtually dictated a conclusion that" appellant was guilty); *Doret v. United States*, 765 A.2d 47 (D.C. 2000) (finding harmless error in trial court's refusal to allow follow-up questions of jurors who responded that they or close family or friends were connected to law enforcement); *Gibson*, 700 A.2d 776 (*voir dire* may have been inadequate, as it failed to reveal that juror's daughter who worked with MPD actually worked with same office as lead government witness, but harmless, since this juror sat only as alternate); *Jenkins*, 541 A.2d at 1274; *Harvin v. United States*, 297 A.2d 774, 777-78 (D.C. 1972) (reversing where police testimony was almost entire government's case); *Brown v. United States*, 338 F.2d 543, 544-45 (D.C. Cir. 1964) (reversing where complainant did not testify but police witnesses did); *Sellers v. United States*, 271 F.2d 475, 476-77 (D.C. Cir. 1959) (per curiam) (reversing where drug conviction was almost completely dependent on officer's testimony).

In the related area of whether jurors (or relatives or close friends) have worked in a law enforcement or prosecutor's office, the trial court has broad discretion, but the questions should

at least be sufficient to unearth any relationship to a participant in the case. *See Gibson*, 700 A.2d 776 (failure to permit follow-up questioning resulted in juror's revelation during trial that daughter worked with primary government witness); *Murray v. United States*, 532 A.2d 120 (D.C. 1987) (although better to delve further into relationship with law-enforcement officials, minimally sufficient to ask about work and whether it would affect impartiality); *Cordero*, 456 A.2d 837 (deeming sufficient a general question about whether any panelists had done "law enforcement work," absent an objection).

Extensive *voir dire* into the jurors' relationship to, and beliefs about, law enforcement is especially important if the defense will attribute improper actions or false statements to a police officer. If that *voir dire* is curtailed, counsel should precisely state its importance to the projected defense to preserve the record for appeal. *But see Gibson*, 700 A.2d 776 (error in not allowing follow-up questions about unfair bias was harmless, although seven of eight government witnesses were police officers, where juror with connection to police sat only as alternate).

G. Acquaintance with Witnesses, Counsel, Defendant, or Location

The conviction in *Wilburn v. United States*, 340 A.2d 810 (D.C. 1975), was reversed because the trial court refused to strike a juror who was acquainted with an important government witness, even though the juror said she could be impartial. However, not all acquaintances between jurors and witnesses are grounds for reversal. *Allison v. United States*, 451 A.2d 877 (D.C. 1982), held that it was not error to refuse to excuse two jurors who had been members of a panel at an earlier trial involving a witness. The court affirmed because "'the juror[s]' partiality [was not] manifest." *Id*. at 879;[13] *see also Williams v. Taylor*, 529 U.S. 420, 440-43 (2000) (holding that petitioner is entitled to evidentiary hearing on juror bias where the juror failed to disclose that she had been married to the government's lead witness for seventeen years and the prosecutor had represented her during the divorce); *Graham v. United States*, 703 A.2d 825, 828-30 (D.C. 1997) (no reversal required where juror recognized witness during trial, but insignificant relationship was not sufficient to establish bias); *Johnson*, 701 A.2d at 1088-92 (reversing where court did not excuse juror who discovered during trial that her friend was very close to decedent); *Young v. United States*, 694 A.2d 891 (D.C. 1997) (affirming because juror did not know until after trial that appellant's prosecutor was also prosecuting juror's son); *Carpenter v. United States*, 100 F.2d 716 (D.C. Cir. 1938) (where juror did not initially remember that he had met counsel in context of another case, court can refuse to grant new trial).

If counsel learns during trial that a juror knows the defendant or a witness, counsel must notify the court so that it can make the necessary inquiry. *Cowden v. Washington Metro Area Transit Auth.*, 423 A.2d 936, 938 (D.C. 1980). The court must then investigate whether actual bias

[13] The juror and witness in *Wilburn* were "more than mere acquaintances," whereas in *Allison* the relationship was "far more attenuated." *Allison*, 451 A.2d at 879. Neither member of the earlier panel in *Allison* had been chosen for the jury, and the witness (then defendant) had been acquitted. *But see United States v. Patterson*, 648 F.2d 625 (9th Cir. 1981) (reversing because judge failed to *voir dire* panelists in detail about being in panel for defendant's other trial the day before.) It was also significant in *Allison* that at trial the defense agreed to the court's procedure, which was informing the panel of the circumstances of the earlier trial and asking if any juror would be unable to render an impartial verdict. *Allison*, 451 A.2d at 878 n. 2.

exists. *Artisst v. United States*, 554 A.2d 327, 331 (D.C. 1989) (court should have conducted "more than a perfunctory poll" when defendant indicated he might know juror through her brother). If there is actual bias, the court should replace the biased juror with an alternate. *Id*. Where a verdict has already been reached, a post-trial hearing should be held. *See Mozelle v. United States*, 612 A.2d 221, 222-23 (D.C. 1992) (no abuse of discretion where judge at post trial hearing found that juror's nondisclosure of fact that witness had once tried out for juror's gospel singing group was inadvertent and did not prejudice defendant).

Acquaintance with the site of the incident may also implicate juror infirmity during *voir dire*. *Tolbert v. United States*, 905 A.2d 186 (D.C. 2006). Failing to disclose familiarity with the site of the incident could require a new trial if the failure to disclose was material and withheld purposefully or truthfully. *Artisst*, 554 A.2d at 330-31. In *Tolbert*, the court found that failing to disclose the juror's familiarity with the nightclub in question was not material because she had not been to the club in a long while and did not recognize the defendant. 905 A.2d at 190.

H. Attitudes toward Defenses

Questioning on attitudes toward a specific defense theory is important, but resistance may be encountered on the ground that this is a proposition of law to be governed by instructions. *See, e.g.*, *Davis v. United States*, 315 A.2d 157, 160 (D.C. 1974) (question about attitude toward crime charged was objectionable because it invaded function of judge). The touchstone appears to be counsel's ability to demonstrate (from preliminary *voir dire* or empirical data developed by surveys or community analyses) possible animosity toward the theory. Counsel should attempt to show that the "community or population at large is commonly known to harbor strong feelings" about this type of defense that "may stop short of presumptive bias" but may nonetheless skew deliberations. *United States v. Orenuga*, 430 F.3d1158 (D.C. 2005) (holding that the defense of entrapment does not constitutionally compel the trial court to conduct further voir dire).[14] *United States v. Cockerham*, 476 F.2d 542, 544 n.2 (D.C. Cir. 1973), suggested that, because of recognized animosity to the insanity defense, examination in this area should be permitted where there is some indication of such bias.[15] However, the court found that the *voir dire* was extensive enough to bring out any indication of bias, and none emerged. *Id*. at 544; *see Robinson*, 475 F.2d at 381 n.10 (absent evidence showing general prejudice against self-defense and given social science research indicating jurors were in fact likely to be sympathetic, lack of *voir dire* on self-defense did not prejudice defendant).

I. Principles of Law

The court has discretion to permit questions on general principles of law. *Cockerham*, 476 F.2d at 544 n.2. In *Cordero*, 456 A.2d at 841, the trial court's refusal to ask whether jurors would be able to apply the law on the presumption of innocence, reasonable doubt, and the burden of proof

[14] The National Jury Project's studies of jurors' reactions to various defenses, *supra* note 1, should be consulted in order to make the requisite showing.

[15] It is error to conduct *voir dire* about the insanity defense before the guilt phase in a bifurcated trial. *Jackson v. United States*, 404 A.2d 911, 925-26 (D.C. 1979). A separate *voir dire* is required immediately before the insanity phase.

was upheld. However, such questions—especially on fundamental principles like reasonable doubt, burden of proof, and presumption of innocence—are usually permitted in Superior Court. Where there is some indication that a certain legal principle is not favored by the population in general, or is peculiarly based on specific facts of the case, some inquiry should be permitted. *See supra* Section H.

J. Prior Experience as Juror

Superior Court judges generally permit inquiry into whether jurors have previously served on a grand jury and, if so, whether they can apply the very different standard of proof that applies in a trial. Prior experiences in petit juries may also result in partiality—if, for example, the previous jury was scolded for an acquittal, or the juror learned prejudicial information after acquitting the defendant, such as evidence that had been suppressed. *See Grady v. United States*, 376 A.2d 437 (D.C. 1977) (no new trial required because of prior judge's remarks after acquittal where judge held two hearings and determined that jurors were not prejudiced, and trials were dissimilar); *United States v. Kyle*, 469 F.2d 547 (D.C. Cir. 1972) (even though judge in previous trial reprimanded jurors for acquittal, not reversible error because court asked jurors if they could be impartial and trials were dissimilar); *United States v. Harvey*, 392 A.2d 1049 (D.C. 1978) (judge declared mistrial because prosecutor did not inform court that police confronted jurors about prior acquittal; misconduct not severe enough to bar retrial).

III. EXCUSALS FOR CAUSE

Prospective jurors should be challenged for cause if they are uncertain whether they can judge the case exclusively on the evidence presented, without reference to any extraneous factors. *See United States v. Caldwell*, 543 F.2d 1333, 1345 n.47 (D.C. Cir. 1974) ("The law in this jurisdiction is that jurors must be excused for cause if their experience or that of their close relatives is such as to indicate probability of partiality."). This challenge requires a *voir dire* that is in depth enough to discover any possibility of prejudice or bias. *Medrano-Quiroz v. United States*, 705 A.2d 642, 653 (D.C. 1997). All the forms of bias and prejudice discussed *supra* in Section II may be grounds for disqualification. A statement that a juror will be able to set prejudice aside and judge the case fairly is not dispositive. *Irvin v. Dowd*, *supra*, 366 U.S. at 728. However, with some limitation, the trial court has discretion to determine which assertions to accept. *See, e.g.*, *Harris v. United States*, 606 A.2d 763 (D.C. 1992) (upholding decision not to strike for cause a juror who said her partiality was "hard to call"); *Rease v. United States*, 403 A.2d 322 (D.C. 1979) (juror's opinion that defendant was high on narcotics was not sufficient indication of partiality where juror said she had no opinion on defendant's guilt).

The trial court's conclusion on impartiality is a "finding of fact" entitled to great deference on appeal. *Patton*, 467 U.S. at 1036-38; *see Medrano-Quiroz*, 705 A.2d at 650 ("when a wise and experienced judge…comes to the conclusion that the defendant was not prejudiced…it is not for us to upset it") (internal quotations omitted). Proof of actual bias is usually required. In *Smith v. Phillips*, 455 U.S. 209 (1982), for example, the prosecutor intentionally concealed information about a juror's application for employment as a major felony investigator with the prosecutor's office. The Supreme Court was unwilling to deviate from the requirement of proof of actual bias, and rejected the district court's imputation of bias. Neither did the Court agree that the

prosecutor's failure to disclose this information denied the defendant due process, as it was not shown to have impaired the juror's ability to render an impartial verdict. *Id*. at 220-21. To preserve the record for appeal, counsel must allege the juror's actual bias against the defendant, and request *voir dire* to establish such bias. *See Brown*, 26 F.3d at 1126-27.

A knowing misrepresentation by a prospective juror raises a strong indication of prejudice. *Medrano-Quiroz*, 705 A.2d at 653-54; *United States v. Boney*, 977 F.2d 624, 634 (D.C. Cir. 1992). *But see United States v. Boney*, 97 F.Supp. 2d 1 (D.D.C. 2000) (denying motion for new trial where juror failed to disclose grand larceny conviction because, on remand, the district court found no actual bias). An omission or misstatement first discovered after trial may be raised in a motion for a new trial. *Turner v. United States*, 416 F.2d 815 (D.C. Cir. 1969) (if juror purposefully withheld information, new trial is dependent on whether court can infer significant bias or prejudice). "If [a juror] conceals a material fact which, if disclosed, would probably have induced counsel to strike him from the jury, a new trial should ordinarily be ordered." *Carpenter v. United States*, 100 F.2d 716, 717 (D.C. Cir. 1938); *see Jackson*, 395 F.2d 615 (new trial ordered where juror denied he had affair similar to trial situation, but substantial evidence showed otherwise); *Daniels v. United States*, 357 F.2d 587, 591 (D.C. Cir. 1966) (no new trial even though juror failed to disclose relevant information that was available to counsel on jury list). Undisclosed information is "material" if the judge, acting cautiously, would have excused the juror for cause or if counsel would (and could) have peremptorily challenged the juror. *Harris*, 606 A.2d at 765; *cf. Tolbert*, 905 A.2d 186 (failure to disclose familiarity with site of alleged crime was not material).

The standard for excusal for cause outlined in *Medrano-Quiroz* also applies when moving juror(s) to an alternate position. In *Perez v. United States*, 968 A.2d 39, 83-84 (D.C. 2009), an investigator for a party overheard two impaneled jurors making racial comments in the restroom such as "Spanish people love stabbing each other." The trial judge immediately *voir dired* the jurors, who denied the allegations, but were ultimately made alternates.

A new trial is required if the trial court does not dismiss a juror who "failed to answer honestly a material question," and if "a correct response would have provided a valid basis for a challenge for cause." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 556 (1984) (Blackmun, J., concurring), quoted in *Medrano-Quiroz*, 705 A.2d at 653. Five justices in two opinions emphasized that *McDonough* "does not foreclose the normal avenue of relief available to a party who is asserting that he did not have the benefit of an impartial jury." *Id*. [R]egardless of whether a juror's answer is honest or dishonest, it remains within a trial court's option, in determining whether a jury was biased, to order a post-trial hearing at which the movant has the opportunity to demonstrate actual bias or, in exceptional circumstances, that the facts are such that bias is to be inferred. *Id*. at 556-57.

Counsel's primary responsibility to the client is to ensure an unbiased jury. There is no limit to the number of jurors who counsel may challenge for cause. D.C. Code § 23-105(c). If the court erroneously denies an excusal for cause, counsel should consider using a peremptory challenge to remove the juror, even though it may moot a later appellate issue.

PRACTICE TIP:

Cause challenges should be made immediately after individual questioning of a juror is finished and before the next juror is interviewed. Often a juror will give different answers at different times to similar questions (such as agreeing with the judge that an issue would not prevent him or her from being fair, but also expressing grave concern that the same issue might affect his or her view of the evidence). In such cases, the cause challenge should be based both on the impartial answers given as well as the fact that the juror provided conflicting answers.

In general, a juror can be eliminated at any point during trial, including during deliberations, if it is shown that the juror failed to honestly answer "material questions arising during *voir dire* and…a correct answer would have yielded a valid basis for a challenge for cause." *United States v. Carson*, 455 F.3d 336, 352-53 (D.C. Cir. 2006) (quoting *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548, 556 (1984)).

In *Carson*, a juror complained of chest pains and was excused for the day to go to the hospital. It was later discovered, however, that the juror had instead checked into a mental hospital and dishonestly answered several questions during *voir dire*. These included his abuse of alcohol, mental illness, use of prescription drugs, and ownership of a firearm. The trial court did not err in dismissing the juror because it "relied on a combination of factors-including that [the juror] had lied about his symptoms before visiting the hospital, provided inaccurate *voir dire* responses about mental health treatment and was, according to [other jurors] distracted and unfocused (and even threatening) during deliberations." *Id*. at 352. Relying on the *McDonough* standard enumerated above, these factors proved enough to dismiss the juror even during deliberations.

IV. PEREMPTORY CHALLENGES

A. The Right to Peremptory Challenges

Each side is entitled to ten peremptory challenges in a felony trial and three in a misdemeanor trial.[16] The court may allow further challenges if there are co-defendants or the case is prosecuted by both the United States and the District of Columbia, but must still give each side the same number. Challenges are usually made on a strike sheet provided by the clerk, with the prosecutor proceeding first and each side then proceeding in turn. D.C. Code § 23-105(a); Super. Ct. Crim. R. 24(b), (c). Trial judges have considerable flexibility in governing the exercise of peremptory challenges during the jury selection process. *Shields v. United States*, 916 A.2d 903, 908 (D.C. 2007). While many judges permit strikes into the panel as well as the box, some do not. Peremptory challenges are "one of the most important of the rights secured to the accused." *Pointer v. United States*, 151 U.S. 396, 408 (1894).[17] They enhance both the

[16] If alternates are impaneled, each side is entitled to additional challenges: one more of one or two alternates, two more if three or four, three more if five or six. D.C. Code § 23-105(b).

[17] *See generally Swain v. Alabama*, 380 U.S. 202, 219 (1965) ("peremptory challenge is a necessary part of trial by jury"), *overruled in part on other grounds*, *Batson v. Kentucky*, 476 U.S. 79 (1986) (reversed and remanded to

appearance and the reality of an impartial trial. If a defendant establishes a violation of the right to exclude any prospective juror through the exercise of a peremptory challenge, the Court of Appeals must examine whether the "system for the empanelling of a jury . . . prevents or embarrasses the full, unrestricted exercise by the accused of that right." *Id*. at 408. Counsel should make an effort to involve clients in jury selection decisions. Defendants have a right to participate and "express an arbitrary preference" through peremptory challenges. *Robinson*, 448 A.2d at 856.

Peremptory challenge procedures may vary, so long as they do not impair any statutory or other rights, and are fair to both sides. *See, e.g.*, *Lee v. United States*, 699 A.2d 373, 380-89 (D.C. 1997) (no error where first panel was exhausted and trial court called supplemental panel, and both sides had equal ability to view panelists before exercising strikes); *Johnson v. United States*, 804 A.2d 297 (D.C. 2002) (no abuse of discretion to allow each side two additional peremptory strikes upon request of defense counsel). The trial court in *Butler v. United States*, 377 A.2d 54 (D.C. 1977), counted passes as strikes, did not permit strikes into the panel, and did not replace stricken jurors until the end of each round. On the final round, the defense was prevented from striking the juror who replaced the one last struck by the prosecution because he would not be seated until the defense had exercised all of its challenges. The court held that the defendant was improperly denied the exercise of her final challenge.[18] *But cf. Burgess v. United States*, 786 A.2d 561 (D.C. 2001) (trial court properly acted without supplementing the panel even though too few jurors remained after strikes for cause to allow each side to exercise all of its peremptory challenges). On the other hand, the court approved the pass-is-not-a-strike alternating jury box method used in *Taylor v. United States*, 471 A.2d 999 (D.C. 1983), even though under this system each side must accept at least one juror without opportunity to challenge. *See United States v. Anderson*, 39 F.3d 331, 344-45 (D.C. Cir. 1995) (discussing federal court treatment of this issue).

An abridgement of the defendant's right of peremptory challenge is not reversible error unless a party can demonstrate that the procedure actually affected the composition or verdict of the jury. *See Shields*, 916 A.2d at 907-08; *Lyons v. United States*, 683 A.2d 1066, 1071 (D.C. 1996) (en banc) (abridgment of right occurred when prosecutor failed to identify potential witness during *voir dire* who was known to juror, but actual bias not shown). In *Shields*, the court found no reversible error when the judge ordered preemptory challenges to begin in the hallway and that the challenges be exercised two at a time. Although both of these processes violated standard procedures, the court found no reversible error because the ultimate result did not manifest an actual bias in the selected jury or the verdict. 916 A.2d at 909-10. Although the ABA requires that peremptory challenges be made "at the bench," the court ruled that this meant only that challenges must be made concealed from the prospective jurors. *Id.* at 908.

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evaluate case for purposeful discrimination in the government's use of peremptory challenges in jury selection); *Kleinbart*, 553 A.2d 1236 (D.C. 1989) (prohibiting defendant from hearing *voir dire* at bench and thereby having enough knowledge to make informed peremptory challenges violated right to due process).

[18] The problem can be obviated by allowing the defense to strike "into the panel" the replacement of the government's last strike.

Courts also have discretion in the logistics of the peremptory strikes process. In *Taylor v. United States*, 372 A.2d 1009 (D.C. 1977), the court rejected a challenge to the practice of not placing the first twelve jurors who had passed challenges for cause in the jury box so that the defendant and counsel could better see the jurors when exercising strikes. The trial court did ask the panelists to rise as their names were called to be sworn, and offered to have any panel member stand again if counsel desired. The court concluded that this provided "ample opportunity to inspect the panel." *Id*. at 1011.

Although important, peremptory challenges are a "creature of statute," *Ross v. Oklahoma*, 487 U.S. 81, 89 (1988), that have no freestanding basis in Sixth Amendment rights or in the right to an "impartial jury." *See, e.g., United States v. Martinez-Salazar*, 528 U.S. 304, 311 (2000). In fact, a State can decline to offer preemptory challenges altogether. *See Georgia v. McCollum*, 505 U.S. 42, 57 (1992). In *Rivera v. Illinois*, respondent attempted to remove a female juror with a preemptory strike but the judge denied the strike with a *sua sponte Batson* concern, which was held to transgress Illinois law concerning preemptory strikes. The Supreme Court deemed that, "because peremptory challenges are within the States' province to grant or withhold, the mistaken denial…does not…violate the Federal Constitution." 129 S. Ct. 1446, 1454 (2009).

B. Discriminatory Use of Peremptory Challenges

The Equal Protection Clause prohibits peremptory strikes by either party based on race, *Georgia v. McCollum*, 505 U.S. 42 (1992); *Batson v. Kentucky*, 476 U.S. 79 (1986), or gender, *J.E.B. v. Alabama ex. rel. T.B.*, 511 U.S. 127 (1994).[19] To launch a challenge on the basis of race – a *Batson* challenge - the defendant must first make a *prima facie* showing that the prosecutor has exercised peremptory challenges on the basis of race. This may be done by showing that a member of a cognizable racial group has been stricken, and that the facts and circumstances raise an inference that strike was based on race. *Batson*, 476 U.S. at 96-97. Courts should look at all relevant circumstances, including the pattern of strikes against one race, the make-up of the parties, and the attorney's statements or questions during *voir dire*. *Id*. at 97; *see also Miller-El v. Dretke*, 545 U.S. 231 (2005) (cumulative evidence of prosecution tactics raised the inference that the strikes were discriminatory, as chance was unlikely to produce the disparity shown by the percentage of black jurors who were struck). Statistical analysis can be a significant factor in establishing a *prima facie* showing of discrimination. *Capitol Hill Hospital v. Baucom*, 697 A.2d 760, 760 (D.C. 1997) (per curiam) (remanding for hearing at which "the trial judge shall accord

[19] *Baxter v. United States*, 640 A.2d 714, 718 n.5 (D.C. 1994), held that peremptory challenges on the basis of age are constitutionally permissible, an issue on which the Supreme Court has not ruled. *See also Evans*, 682 A.2d at 649 (D.C. 1996) (D.C. Human Rights Act, which protects right to public service, does not prohibit peremptory challenges based on age). *Baxter* deferred to the trial court on whether venire replacements negated the *prima facie* case. 640 A.2d at 716-17. If other groups (e.g., religion, ethnicity) are discriminated against, counsel should urge the court to apply *Batson* principles, and make a parallel *prima facie* case. *See Nelson*, 649 A.2d at 309 (D.C. 1994); *cf. Carle v. United States*, 705 A.2d 682, 685 (D.C. 1998) (distinctive group for fair cross-section purposes is one that "possess[es] a unique perspective on human events or [has] an outlook, a viewpoint, or an experience not shared by other segments of society" (citation and internal quotation marks omitted); *id*. at 686 (convicted felons are not distinctive group, and states has valid interest in excluding convicted felons based on their "presumptively 'shared attitudes' … as they relate to the goal of juror impartiality"); Disabled persons are not a suspect class and peremptory strikes of disabled people are therefore not subject to heightened scrutiny. *United States v. Watson*, 483 F.3d 828 (D.C. Cir. 2007).

appropriate weight to statistical evidence, and shall apply a more rigorous standard of scrutiny to counsel's explanations for his strikes"); *Id*. at 765 (Ruiz, J., concurring); *Id*. at 768-74 (Schwelb, J., concurring).

PRACTICE TIP:

When the jury panel first enters the courtroom, counsel should approach and make a record about how many people of a particular race (and/or gender) are present in the panel. Counsel should make a similar record after cause challenges are finished. The percentages of different groups from these calculations will establish the baseline number for the first stage of *Batson* challenges. For example, if the panel after cause challenges and other excusals is 30% African American and the government strikes five African Americans out of ten strikes (50%), the defense can make a *Batson* challenge based on the disparity of those percentages (30% vs. 50%). Making a clear record based on the numbers in the room is vital both at trial and on appeal.

The prosecutor in *Little v. United States*, 613 A.2d 880 (D.C. 1992), used six of seven peremptory strikes against black jurors, a number of whom had not been questioned, resulting in a panel consisting of eight black and four white jurors, a higher ratio of whites than the venire. The judge denied a motion for a mistrial, finding that the defense had failed to make out a *prima facie* case of discriminatory challenges. The Court of Appeals upheld the ruling but noted that the case was close, and expressed concern about the trial court's reasoning. The trial court had asserted that the government's strike of one white juror precluded the constitutional challenge. This conclusion was erroneous as a matter of law, "for the exclusion of even one black member of the venire for racial reasons violates the equal protection clause regardless of how many white jurors are struck." *Id*. at 886.

The second step of the *Batson* framework shifts the burden to the prosecution to give a race-neutral reason for each challenge. *Batson*, 476 U.S. at 97-98. If no *prima facie* showing has been made by the objecting party and the opposing party nonetheless defends the allegation as though a *prima facie* showing has been made, the question whether such a showing was made is moot. *Epps v. United States*, 683 A.2d 749, 753 (D.C. 1996). Trial courts are given great deference in accepting or rejecting *Batson* challenges when jurors are struck for demeanor or conduct that cannot be decided on transcripts alone. *See Smith v. United States*, 966 A.2d 367, 382-83 (D.C. 2008). In *Smith*, the prosecutor struck a disproportionate number of black jurors and provided explanations such as a juror "gave the defense good eye contact" or "was coming across as hostile." *Id*. at 370. The court ruled that, although these explanations were imperfect, deference was still due to the trial court's finding that the prosecutor's actions were not suspect.

If the prosecution offers sufficiently neutral reasons, the third step of a *Batson* challenge is triggered and the burden returns to the defendant to show, by relevant circumstances raising an inference of discriminatory purpose, "that the proffered neutral reasons are pretextual." *Nelson v. United States*, 649 A.2d 301, 311 (D.C. 1994). Proffered neutral reasons "must be legitimate, clear and reasonably specific." *Id*. at 311-12. Unpersuasive explanations include those that

would apply equally to similarly situated jurors who were not stricken, and should be greeted with greater skepticism where the *prima facie* case of discrimination is strong. *See Capitol Hill Hospital v. Baucom*, 697 A.2d at 766 (Ruiz, J., concurring); *id*. at 771-73 (Schwelb, J., concurring). In other circumstances, the trial court may accept "silly or superstitious" reasons that are unpersuasive or implausible if they do "not deny equal protection," facially or by inherent intent. *Purkett v. Elem*, 514 U.S. 765 (1995). Ultimately, the question is whether the trial court believes, with reason, any strike was racially motivated. If so, the Equal Protection Clause has been violated. *Batson*, 476 U.S. at 98.

The courts have provided some guidance in determining if reasons offered for strikes are neutral. In *Tursio v. United States*, 634 A.2d 1205 (D.C. 1993), the court stated that "'explanations which focus upon a person's body language must be closely scrutinized because they are subjective and can be easily used by the prosecutor as a pretext for excluding persons on the basis of race." *Id*. at 1213 n.7 (citation omitted). Explanations can also be tested by comparing them to characteristics of jurors who were not challenged. "The presence of black jurors who possess the same characteristics as the eliminated white jurors indicates, at least in the absence of other material differences, that the prosecutor's explanations were pretextual." *Id*. at 1212. When, in *Snyder v. Louisiana*, a prosecutor struck a black juror because of a demanding work schedule, which was shown to be minimal in comparison to the work schedule of white jurors, the trial court committed clear error in overruling a *Batson* violation. *Snyder*, 128 S. Ct. 1203 (2008). In a racially charged case, especially if each party is presenting witnesses of a different group from the other party's witnesses, "the government ha[s] a heavier burden to overcome the defendant's *prima facie* case." *Evans v. United States*, 682 A.2d 644, 650 (D.C. 1996), *citing Tursio*, 634 A.2d at 1210.

If the court finds a *Batson* violation, re-empanelling the wrongly stricken juror is a permissible remedy. *Epps*, 683 A.2d 749 at 754.[20] The trial court's findings are entitled to great deference and will be overturned only if clearly erroneous. *Nelson*, 649 A.2d at 312; *see also Hernandez v. New York*, 500 U.S. 352, 364-65 (1991).[21]

The courts also delve into the murky area of heterogeneous reasoning for striking jurors, such as in *Robinson v. United States*, 878 A.2d 1273 (D.C. 2005). In that case, the prosecutor exercised his peremptories based on race *and* gender. The trial court ruled that the defendant did not make out a *prima facie* case because race and gender *combinations* were not "suspect categories." The Court of Appeals reversed Mr. Robinson's conviction, stating that the "critical question is

[20] In *Epps*, the appellant (who had committed the *Batson* violation) made no showing that the two wrongly stricken jurors were aware that they had been struck from the panel and harbored any animus toward the defense as a consequence of having been victims of discrimination. The court did not decide on the remedy to be used when potential jurors victimized by discrimination are aware that their rights have been violated.

[21] The defendant in *Hernandez* challenged peremptory strikes of Spanish-speaking jurors. The trial court credited the prosecutor's explanation that he struck the jurors because their specific responses and demeanor cause him to doubt their ability to defer to the official translator, and found that the strikes were exercised in a "race-neutral" manner. The Supreme Court found no clear error, but cautioned that that the trial court should give appropriate weight to the disparate impact of the prosecutor's criteria in determining whether the prosecutor acted with forbidden intent. "[A] policy of striking all people who speak a given language, without regard to the particular circumstances of the trial and or the individual responses of the jurors, may be found by the trial judge to be a pretext for racial discrimination." 500 U.S. at 371-72.

whether the purposeful use of peremptory strikes to exclude black females (or other groups defined in terms of race plus gender) involves racial and/ or gender discrimination. If it does, then it offends the basic principles of equal protection and is prohibited under *Batson* and *J.E.B." Id.* Strikes based on a mixture of race and other factors were also held unconstitutional by (the completely unrelated) *Robinson v. United States*, 890 A.2d 674 (D.C. 2006). There, although the court found the defense had not made out a prima facie case for other reasons, it did hold that there is a *Batson* violation when a strike was "*partially* motivated by the juror's race or gender." *Id*. at 681 (emphasis in original).

The defendant may object to race-based exclusion of jurors through peremptory challenges, whether or not the defendant and the excluded jurors are of the same race. *Powers v. Ohio*, 499 U.S. 400, 415 (1991) (white defendant has standing to object to exclusion of black jurors); *see also Edmondson v. Leesville Concrete Co.*, 500 U.S. 614 (1991) (racially based strikes in civil case violate Equal Protection Clause).

A *Batson* challenge should be made before the jury is sworn and the venire dismissed. *Durphy v. Kaiser Foundation Health Plan*, 698 A.2d 459, 469-71 (D.C. 1997); *Owens-Corning Fiberglas Corp. v. Henkel*, 689 A.2d 1224, 1227-28 (D.C. 1997); Brown v. United States, 627 A.2d 499 (D.C. 1993). The court must conduct a full hearing when the challenge is first raised, rather than waiting until a motion for a new trial. *Tursio*, 634 A.2d at 1211. This practice makes it possible to reconstruct the details of the jury selection process and ensures that justifications are fresher and more candid. To preserve the *Batson* issue for appeal, counsel should establish all relevant information, including the racial makeup of the jury and of the venire after strikes for cause, races of people struck by opposing counsel, and any other facts suggesting no reason other than race for the challenges. *Jefferson v. United States*, 631 A.2d 13 (D.C. 1993).

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***United States v. Gooch*, 665 F.3d 1318 (D.C. Cir. 2012).** No *Batson* violation to strike juror who "had some opposition to the death penalty," worked as a youth minister, and had counseled drug addicts, where strike was based on fact that juror's experience would make her more sympathetic to the defendant than the government would prefer.

Court did not clearly err in rejecting defendant's challenge to prosecutor's strike of juror who had made comments on questionnaire about racial profiling and "bad cops" because she laughed during voir dire and government could have reasonably inferred from her inappropriate laughter that she would not be a serious trier of fact.

***Mungo v. United States*, 987 A.2d 1145 (D.C. 2010).** Trial court did not err in not requiring government to explain why it used eight of its ten peremptory challenges to strike African-American jurors because the strikes were "consistent with the panel" that was 75 to 80% African-American and about 20% white.

Trial court did not err in re-seating white juror who lived in Georgetown struck by defense after finding that race played a significant role in the decision to strike.

V. *VOIR DIRE* AFTER THE JURY HAS BEEN IMPANELED

Events or information coming to light after the jury is impaneled may require further *voir dire*. As in this area generally, the court has broad discretion in determining whether to conduct *voir dire* and whether to address it to the entire panel, individually to each member, or to specific jurors. *Voir dire* should be requested whenever potentially prejudicial events occur or when the court finds that jurors are exposed to publicity during trial, jurors have had conversations with counsel or court officials,[22] jurors learn inadmissible evidence,[23] jurors responded incorrectly during *voir dire*,[24] or jurors otherwise violate the court's instructions.[25] *See Jackson v. United States*, 940 A.2d 981, 994 (D.C. 2008) (no *voir dire* required after a copy of John Grisham's *A Time to Kill* was found in jury room because there was no "substantial risk of improper jury influence.") If the verdict has already been rendered, the court should hold a post-trial hearing and examine jurors on their impartiality.[26]

A higher court's review of the trial court's decision whether or not to even conduct a *voir dire* will be reviewed under the deferential plain error review.

For example, the defendant in *Wilson v. United States*, 380 A.2d 1001 (D.C. 1977), was arrested on unrelated charges at the end of the first day of trial. The trial court denied a request for *voir dire* to determine whether any juror had witnessed the arrest and, if so, what effect it had, because counsel could not proffer that any juror had seen or heard of the arrest. After conviction, counsel moved for a new trial, accompanying the motion with an affidavit that several jurors had learned of the arrest. The Court of Appeals, concluding that such knowledge "may . . . be prejudicial to [the defendant's] right of a fair trial," remanded for a hearing to determine whether jurors witnessed the event and whether the defendant was thereby prejudiced. *Id*. at 1004; *see also Johnson v. United States*, 389 A.2d 1353 (D.C. 1978) (upholding refusal to *voir dire* where witness was arrested mid-trial but arresting officers testified that jury could not have known of arrest); *Evans v. United States*, 392 A.2d 1015, 1025 (D.C. 1978) (upholding offer to *voir dire* entire panel where bomb scare required evacuation of jury; refusal to examine each juror individually was within court's discretion).

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[22] The judge in *Etheredge v. District of Columbia*, 635 A.2d 908 (D.C. 1993), a civil police brutality case, suggested *ex parte* to the jurors that they might want to participate in the Rodney King verdict protest. This was held to be reversible error because parties have a right to be present at all stages of the trial. *Id*. at 923.

[23] *Compare Hill v. United States*, 622 A.2d 680 (D.C. 1993) (upholding mistrial where juror visited crime scene and observed lighting, a material issue in case), *with United States v. Williams-Davis*, 821 F. Supp. 727 (D.D.C. 1993) (no mistrial where jurors merely drove through crime scene and did not make any material investigations).

[24] *See Graham*, 703 A.2d at 828-30 (juror recognized witness during trial); *Johnson*, 701 A.2d at 1088-92 (reversible error not to remove juror who discovered during trial that she decedent's close friend; juror's response, "I think I can," to question whether she could fairly judge case "was too slim a reed upon which to base a determination that the juror was not partial"; *Young*, 694 A.2d 891 (D.C. 1997) (while failure to disclose felon and parole status can indicate desire to serve on jury for improper purpose, trial court after inquiry found nondisclosure was not purposeful but rather resulted from inattentiveness).

[25] *See Medrano-Quiroz*, 705 A.2d 642 (D.C. 1997) (juror's discussion of case prompted trial court to question juror and other participant in conversation mid-trial, but no actual bias revealed).

[26] A verdict cannot be impeached based on intra-jury dynamics. In federal courts, only evidence about exposure to extraneous information or outside influences is relevant. *See, e.g.*, *Williams-Davis*, 821 F. Supp. at 733.

In all such situations, counsel should be diligent and creative in framing questions that not only probe the particular issue, but also avoid further infecting the jury's impartiality. For example, in the *Wilson* situation, a question like, "Did any of you see or hear about any incident yesterday possibly involving any participant in this trial?" is preferable to, "Did any of you see or hear that Mr. Wilson was arrested yesterday on a new felony charge involving the fencing of stolen goods?"

If jurors are exposed to media discussion of issues they are considering, the court must determine whether the information was potentially prejudicial and, if so, *voir dire* the jurors to determine whether they were prejudiced by the exposure. *Morris v. United States*, 564 A.2d 746, 748 (D.C. 1989). Although it is preferable to interview jurors individually, the specific procedures used are discretionary. *Id*. at 748. If potential prejudice exists, the court may give curative instructions, seat alternate jurors, declare a mistrial, or take other corrective measures. *Id*. at 749.

Counsel must be timely and specific in his claims of juror partiality. The jury in *Calaway v. United States*, 408 A.2d 1220 (D.C. 1979), returned "not guilty" verdicts on three homicide charges and continued deliberations on the remaining charges. Those verdicts along with some information about Calaway's prior record were reported in the newspapers the next morning; two jurors acknowledged having been exposed to some publicity. They were questioned individually, but in the presence of the other jurors. In finding no error, the court relied heavily upon counsel's failure to present specific information about the publicity, to allege and specify prejudice, and to request either individual *voir dire* or a mistrial. *Id*. at 1228-29; *see Coppedge v. United States*, 272 F.2d 504, 508 (D.C. Cir. 1959) (recommending "a careful, individual examination of each of the jurors involved, out of the presence of the remaining jurors, as to the possible effect of the articles").

If a juror must be removed mid-trial due to extraordinary circumstances, the trial court has discretion to proceed to a verdict with the remaining eleven jurors. D.C. Code § 16-705(c); *Salmon v. United States*, 719 A.2d 949 (D.C. 1997) (no abuse of discretion in following this procedure where juror's *de facto* parent died, and juror had to fly to California for funeral).

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***Garrett v. United States*, 20 A.3d 745 (D.C. 2011).** Reversible error for trial judge not to inquire whether the jury had considered as evidence utterance by a witness while on the stand, but not in response to a question, which thus had not been tested by adversarial process.

VI. SAMPLE *VOIR DIRE*

The following questions are intended as a helpful guide in forming a *voir dire* inquiry. Several basic principles should be kept firmly in mind. Questions should be carefully tailored to the facts of the case. Any question that the court may be inclined to reject should be precisely drafted and presented in writing, so as to eliminate a sustainable objection based on "form" rather than "content."

If the court permits counsel to conduct *voir dire*, it is often effective to preface the questions with an explanation of the purpose of *voir dire* in a way that communicates the importance of the jurors' task and counsel's sincere interest in the client:

> I have no doubt, ladies and gentlemen, that everyone in this courtroom wants to make sure that Mr. Jones, and every citizen who comes before a court, receives a fair trial. That is why we are now asking you these questions. Everyone, because of their upbringing, their experiences, their learning, has feelings about things, preconceptions, and predispositions. This is true for all of us. The reason for these questions is so that you can make sure, if you are selected to sit on this case, and to decide the important question of guilt or innocence concerning [defendant's name], that you can take your seat in that jury box confident that whatever strong feelings you may harbor will not make it difficult or impossible for you to be a fair judge, or to weigh the evidence impartially. So really, ladies and gentlemen, I ask these questions at least partly for your benefit, and ask you to ask them to yourselves, carefully and thoughtfully. I know you would not want to find that, in the middle of such an important matter, you realize that some experience was making it difficult for you to carry out your duty. [Defendant's name] wants a fair jury, and an impartial jury. That is all s/he asks. So please listen carefully to these questions, and assist the court and counsel and Mr. Jones by considering your answers carefully.

A. Standard Questions[27]

Introduction of client and witnesses. (The client and witnesses should be personalized as early as possible. The panel may be informed of the person's name, address, occupation, age, and schools, churches, or organizations attended. Counsel should then ask whether, based on this information, any member of the panel knows this person.)

One of the fundamental principles of our legal system is that when a person is brought to court charged with a crime, that person is presumed innocent unless the government proves guilt beyond a reasonable doubt. If you are selected as a juror in this case, would you have difficulty in accepting and applying the rule of law that Mr. Jones is presumed innocent?

Even though Mr. Jones has been arrested in this case, he is presumed innocent unless the government proves guilt beyond a reasonable doubt. Does the fact that he has been arrested make it difficult for you to presume now that he is innocent?

There has been an indictment in this case. That is just a formal way of presenting the charges. Does the fact that there is an indictment affect your ability to presume that Mr. Jones is innocent?

The government has the burden of proving Mr. Jones guilty. Because he is presumed innocent, he remains innocent unless the government is able to prove guilt beyond a reasonable doubt.

[27] Answers to questions marked with an asterisk should be taken at the bench. Jurors should be asked just to state their number, which counsel should note. Most judges will call all these jurors to the bench for individual questioning after the general *voir dire*.

This burden of proof never shifts to the defendant. Is there anyone who is uncomfortable with this rule?

Does anyone here think the defendant should be required to prove his innocence?

Consequently, ladies and gentlemen, the defendant need not testify, need not offer any evidence, and may, in fact, stand mute, because he is presumed innocent. Does anyone here feel that Mr. Jones should testify or present evidence on his behalf before you could find him not guilty?[28] If the defense does not present any witnesses of its own, but relies solely on cross-examination of government witnesses, would that cause you to conclude that Mr. Jones is guilty? Does anyone think that Mr. Jones has to prove his innocence once he testifies or presents evidence? If Mr. Jones were to testify, would you give him the same credence that you would give to any other witnesses?[29]

[Where a witness, who will definitely testify, has a record.] The law says, ladies and gentlemen, that if a witness has a prior conviction, the prosecution can bring it into evidence. But its use is very limited. You can consider it only in deciding whether the witness is a credible witness. You will hear that Mr. Jones has been convicted of _____. Is each of you confident that you will consider his prior record only in assessing her credibility?[30] NOTE: Obviously, the jury now knows that Mr. Jones has convictions, whether or not he ultimately testifies. Omit this line of questioning unless the defense absolutely requires Mr. Jones' testimony.

Perhaps the most important principle of all in this regard, ladies and gentlemen, is that before the presumption of innocence can be overcome, the government must prove that the defendant is

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[28] Or:

> Do you disagree with the proposition of law that the burden of proving guilt beyond a reasonable doubt rests with the prosecution and that Mr. Jones need not introduce any evidence whatsoever?
>
> Knowing that, do you realize that Mr. Jones is not bound to explain his side of the case – because the burden of proof does, in fact, rest with the prosecution? So would you consider Mr. Jones' failure to testify as an indication that he is guilty?
>
> Now in a criminal case, a defendant has the right to testify, not to take the witness stand. Do you believe that a defendant who does not testify must be guilty – or is more likely to be guilty than a defendant who does testify?

[29] Do you have any difficulty with the rule of law that says that any person who takes the witness stand has equal dignity with any other person who takes the witness stand? Will you consider and judge Mr. Jones' testimony by the same rules and standards you would use in judging the testimony of other witnesses in this case?

[30] Would the fact that Mr. Jones was convicted of a crime prejudice you or cause you to disregard any of his testimony?

Would anyone assume, regardless of what his testimony is, that he is not telling the truth?

> If the witness is the defendant:
> You will also be told that you can consider the prior conviction only in evaluating his credibility. Would anyone assume that Mr. Jones is guilty simply because he made a mistake and committed a crime in the past?

guilty beyond a reasonable doubt. And the court's instructions will define reasonable doubt. Is there anyone here who might not be able to apply this principle in weighing the evidence?

Are any of you lawyers or law students, or has anyone here studied law in the past? Do you have relatives, neighbors or personal friends who are lawyers or are studying law?

Have you ever worked for a law enforcement agency, such as the MPD (FBI, CIA, IRS, GSA guards or police or D.C. building police), or worked as a special police officer or military police? Have any of your relatives or close friends?

Other than while serving in the armed forces, have you ever held a job that required you to carry a gun?

Have you ever worked in the courts or in a prosecutor's office? Have any of your relatives, close friends, or neighbors worked for a prosecutor's office?

Have you regularly watched programs on TV like Perry Mason? Are there any among you, based on your viewing of these programs, who expect witnesses to confess on the stand? Or the defense to prove who really committed the crime?

Do you regularly read magazines like True Detective or Police Gazette?

[If law enforcement officials will testify.] A police officer will be a witness. Would you be more or less likely to believe this officer than other witnesses because s/he is a police officer?

*Have you or any relative or close friend ever been the victim of, or a witness to, or accused of a criminal offense?

Have you ever served on a grand jury in the District of Columbia or elsewhere? The standard of proof in a trial is very different from the one used by the grand jury; do you think you might have any difficulty in requiring the government to prove its case beyond a reasonable doubt?

[If misdemeanor.] Do you understand that because this is a misdemeanor case, the prosecution was able to charge Mr. Jones without presenting any evidence to a grand jury?

Have you previously served on a jury in a criminal case?

*Have you ever had _____ as a prosecutor in previous cases on which you have served as a juror?

*After the trial, did you speak with the prosecutor, a court reporter, a U.S. Marshal, or other court official about the case?

*Have you heard or seen anything in previous jury service that would make it difficult for you to sit in this case?

*Have you formed any opinions about defense attorneys, prosecutors, or accused persons?

The incident in this case took place at [location]. Are you familiar with that area, because you have lived or worked near there, or for some other reason?

The complainant in this case works as a [profession]. Have you, or a close relative or friend, ever worked as a [profession]?

Mr. Jones is charged with _____. This crime has a specific legal definition about which the court will instruct you. Sometimes legal definitions are different from common lay understandings of the word. Would you have difficulty following the judge's instructions where they differ from your own personal definition?

The law states [defense theory]. Does anyone here disagree with this proposition of law?

Would the nature of the charge itself make it difficult for you to render a fair and impartial verdict in this case?

*We expect this trial to last about _____ days. Are there any among you with responsibilities at home or elsewhere who could not sit until 5 o'clock, if necessary?

Are you suffering from a sight problem uncorrected by glasses? A hearing problem? A health problem?

Are you taking medication that you must receive at particular times of the day, or that might affect your ability to listen to the evidence? Do you have a standing appointment with a physician to receive medication?

We have all heard about the reported crime situation in D.C. Would your own fears or feelings make it difficult for you to consider the evidence surrounding a criminal charge?

Are you an active member of, or participant in, any crime prevention committee or Neighborhood Watch Group?

Are you in a sufficiently impartial state of mind that you would be satisfied to have jurors possessing such a state of mind judge the evidence if you [or your loved one] were on trial here?

Is there any reason why you could not fully and impartially weigh the evidence in this case and render a verdict on that evidence, and only on that evidence?

If you came to the conclusion that the prosecution had not proven Mr. Jones' guilt beyond a reasonable doubt, and you found that a majority of the jurors believed he was guilty, would you change your verdict only because you were in the minority? Would you give Mr. Jones the benefit of your own individual judgment in arriving at a verdict?

[If defendant's relatives will testify.] You may hear from Mr. Jones' relatives when the defense has an opportunity to present evidence. Would you think that because a witness is related to Mr. Jones, the witness's testimony is entitled to less belief than that of someone who is not related to him?

Number of counts: As you have been told, Mr. Jones is charged by indictment with several counts. As you know, the indictment is not evidence. It is merely the formal manner of informing the accused of the charges against him. Does the mere number of charges cause you to believe that Mr. Jones is probably guilty of one, or some, of them?

Co-defendants: As you know, there are X persons on trial here, and each of them must be given separate consideration.

Would you tend to evaluate the evidence concerning these people together?

Would you assume that evidence admitted only against one should also be used against the other, just because they are being tried together?

If the evidence convinces you of guilt beyond a reasonable doubt of one but not the other, would you have any difficulty finding the other not guilty?

PRACTICE TIP:

When requesting *voir dire* about certain areas or associations, counsel should request that the court phrase questions broadly to include the juror, her family, and her close friends in order to ferret out any bias and to gain information for peremptory strikes.

B. Sensitive Matters

Gang affiliation:

You will hear evidence that Mr. Jones was/is a gang member. Do you have feelings about gang affiliation that would make it difficult for you to render a fair and impartial verdict in this case?

Do you live in a neighborhood where gangs are a problem? Do you feel that may affect your judgment in this case where gang membership is alleged?

Homosexuality:

Mr. Jones is a homosexual. Might that fact interfere with your ability to decide his case solely on the evidence presented?

Do you feel that a homosexual is more likely to commit a crime than a person who is not a homosexual?

Do you believe that because a person is a homosexual, he is less likely to be telling the truth?

Has anyone here never met a homosexual? Never talked to a homosexual?

Do you believe that there are certain sensitive government jobs for which homosexuals should not be hired?

Would you prefer not to sit on a case, or feel that you could not be fair in a case, that involves a homosexual or a homosexual lifestyle?

Cross-dressing:

Mr. Jones dresses differently from most men. Would you hold the fact that Mr. Jones dresses unusually against him when you are evaluating his testimony?

Weapons:

The government will present evidence concerning a gun that was allegedly used in the offense. The question of gun control has been very prominent in recent years. Do you have feelings about possession of weapons that would make it difficult for you to render a fair and impartial verdict in this case?

Do you actively participate in the political issue of gun control?

Are you a member of any organization that either supports or discourages gun control?

Would you be prejudiced against someone merely because he had been shown to have owned or carried firearms?

Do you feel that the sale of handguns should be prohibited?

Do you object to anybody keeping a firearm in his home for self-protection?

Do you have such a fear of guns that it would be difficult for you to weigh the evidence in this case impartially?

Religion:

Do you have any religious or moral beliefs that make it impossible for you to judge another?

[If clergy will testify.] In this case, a [priest/minister/rabbi] will be a witness. Would you be more or less likely to believe this person than other witnesses, simply because he or she is a member of the clergy?

Do your religious beliefs make it difficult for you to question the word of a clergy member?

[If defendant's religion will become apparent or case involves religious issues, devise questions that test attitudes toward those beliefs.]

Cursing:

You may hear some profanity or swear words in this trial. Would you be so uncomfortable after hearing these words in this courtroom that you would have difficulty weighing the evidence impartially?

Narcotics:

The evidence will show that Mr. Jones [voluntarily participated in a methadone maintenance program / was an addict]. Would knowing that affect your ability to render a fair and impartial verdict?

*Have you had a personal or family experience involving narcotics that might make it difficult for you to sit on the case and fairly judge the testimony of witnesses who may be narcotics users?

Have you formed special opinions about the use of drugs? Do you feel that just because someone is in an area known to be a high narcotic area, he must be guilty of using or selling drugs?

Do you feel that a person found in an area described to have high narcotic use must explain why he is there?

Do you live in an area where drug [use is/sales are] a problem? Do you feel that may affect your judgment in this case where drug [use is/sales are] alleged?

*Do you have any special relationship with police in the detection of drug sales?

Do you have any opinion about the truthfulness of people who have used drugs before?

Alcohol:

Do you make it a point never to allow alcoholic beverages in your home?

Do you feel that it is morally wrong for a person to drink intoxicating beverages?

There may be testimony in this case concerning drinking and the effects of alcohol. Would hearing evidence of this type cloud your rational view of all the evidence, and make it difficult for you to render a fair and impartial verdict?

Would anyone here prefer not to sit on a case involving evidence of alcohol use?
Do you have religious or moral scruples against drinking alcohol?

There will be evidence that Mr. Jones is a chronic alcoholic. Is there any reason why you could not fairly judge the case of a man who is an alcoholic?

*Publicity: (Any questions that may elicit information about the case should be asked at the bench.)

Do you know anything about the facts of this case other than what you have heard in court today?

Have you read about the case in the newspapers or heard about it over the radio or television?

Have you read about this case on the internet?

Have you heard anybody discussing the case?

Have you discussed the case with someone who claimed to know something about the facts of the case?

If yes:
What [newspapers have you read] [did you hear] [did you discuss]?

What did the article say?

Have you formed some opinion about the guilt or innocence of Mr. Jones from what you [heard, discussed, read in the newspapers]? When did you first form an opinion about the defendant's guilt? Have you carried that opinion from then until now? So it would require evidence to remove or change your opinion?

Knowing what you know about this case from the newspapers and television, would you be satisfied to be tried by jurors having your frame of mind?

Would what you have read or heard affect your ability to judge this case only on what you hear in testimony and evidence in this courtroom, and not be influenced by anything that you read or heard?

Homelessness:

In [dates], Mr. Jones was sometimes staying with his parents, and sometimes living in shelters. Have any of you had an experience with someone who is homeless or living in a shelter that affected your opinion about homeless persons? Do any of you have strong opinions about homeless people, or issues of homelessness?

Has anyone here been active in establishing or preventing laws and regulations relating to homelessness, including whether or not shelters will be established in your neighborhood?
Racial or ethnic bias:

Do you believe that people of certain races are more apt to commit crimes of violence than people of other races?

The defendant who, is [color or ethnicity], is accused of raping a woman who is [color or ethnicity]. Would you find it harder to believe that a woman consented to sexual relations with a man of a different race than with a man of her own race?

Evidence may show that the defendant [a witness] is in this country illegally. Would you be less likely to believe his/her testimony because of his/her illegal status?

Some of the witnesses who will testify in this trial speak Spanish and do not speak English. Therefore, an interpreter will be used to translate questions to them from English to Spanish and their answers from Spanish to English.

Have you ever lived in or visited a country where Spanish is spoken?

Do you understand any Spanish? (If yes:) How well do you understand spoken Spanish? Would you be able to accept the official translation of Spanish testimony, even if you think it should be translated in a different way?

Do you have strong feelings about people living in this country who do not speak English?

Do you have any feelings about whether English should be made the official language of our country?

Do you have any strong feelings about whether a person who is a native Spanish speaker is more likely or less likely to tell the truth than a person who is a native English speaker?

You will hear evidence that Mr. Jones is a native of _____ and that English is not his native language. Would that in any way interfere with your ability to decide his case on the evidence alone?

Do you feel that a person of Spanish origin is more likely to commit a crime or a certain kind of crime than a person who is not of Spanish origin?

Is there anyone who would prefer not to sit on a case involving a Spanish speaking person?

Do you feel that you could be as fair to Mr. Jones as you could to someone who was a native English speaker?

<u>DNA</u>:

You will hear from a witness who will be called as an expert witness. An expert witness, unlike regular witnesses, is allowed to state their opinion about a particular subject matter. However, you are not obligated to accept the expert's opinion. Are there any of you who believe that

because a person is qualified as an expert, his or her opinion is more credible than any other witness?

This case will involve expert testimony about hair analysis and DNA. Have any of you received any training in these fields?

If you have received training in this field, would you be able to set aside your own expertise in the field and rely only on the witnesses and evidence presented to render your verdict?

With regard to the expert testimony about hair analysis and DNA previously asked of you, if you are not specially trained in these areas, have you been exposed to any information about the sciences of hair analysis and DNA?

If so, do you have any opinions or beliefs that might affect your assessment of the evidence and testimony in this case?

If so, would you be able to set aside your opinions or beliefs and rely only on the witnesses and evidence presented to render your verdict?

Any expert testimony:

Do any of you or your family or close friends have any training, education, or experience in the fields of (select as appropriate) DNA, serology, statistics, ballistics, toolmarks, fingerprints, etc.

C. Defenses

Mistaken identification:

The defense in this case is one of mistaken identity—that is, that the witnesses are wrong when they say that Mr. Jones was the person responsible for the offense. Do you have any preconceived ideas that might make it difficult for you to consider a defense of mistaken identification?

Do you agree that the identity of the person who commits a crime must be shown with such certainty as to eliminate any reasonable possibility of error? Do you agree that it is not enough for the government to prove beyond a reasonable doubt that the offense was committed as alleged in the indictment—but the government must also prove beyond a reasonable doubt that Mr. Jones was the person who committed it?

Innocent presence:

Mr. Jones has pled not guilty in this case. Would the fact that Mr. Jones was at the scene of the alleged crime create in your mind a presumption that he must be guilty?

Self-defense:

The defense in this case will be self-defense. Judge X will instruct you that if evidence of self-defense is present, the defendant does not have to prove that he acted in self-defense, but the government must prove beyond a reasonable doubt that he did not act in self-defense. Would you have any difficulty returning a verdict of "not guilty" if the government fails to prove beyond a reasonable doubt that Mr. Jones did not act in self-defense?

Do you disagree with the principle of law that says that a person is justified in killing another human being if he believes that he is in actual danger of being seriously injured or killed by his attacker?

Do you feel that self-defense can never justify the willful taking of a human life?

Do you feel that you would be unable to follow the court's instructions on self-defense because of your personal views on the subject?

Judge X will instruct you that a person has a right to use a [weapon] in certain circumstances. Would the fact that Mr. Jones used a [weapon] in self-defense make it difficult for you to return a verdict of not guilty?

Do you have any strong feelings about using a [weapon] to protect oneself or one's family?

Do you have feelings or beliefs about possession of weapons that would make it difficult for you to consider self-defense in this case?

Insanity defense:

Are you aware that the law does not hold a person responsible for his act, if he was insane at the time he committed the crime?

Do you disagree with that proposition of law?

If you find that Mr. Jones was legally insane when he committed the crime, would you have any difficulty following the court's instruction and rendering a verdict of not guilty?

*Have you ever served on a jury in a criminal case in which the defense of insanity was raised?

Do you feel that anyone who is physically able to commit a crime must be responsible for that crime?

Do you feel that legal insanity is, or should be, limited to conditions that totally destroy a person's ability to thrive or function?

Do you feel that anyone who knows what he is doing must necessarily be responsible for his act?

*Have you had any experience with mental illness in your immediate family or among your close personal friends?

Do you hold religious or philosophical views that might interfere with or cause you difficulty in following the judge's instructions on the defense of insanity?
Do you belong to any religious or philosophical groups that emphasize the individual's free will or lack of free will (for instance, the Catholic Church, the John Birch Society, etc.)?

Have you ever studied psychology? Medicine? Sociology? Psychiatry?
Have you, or your relatives, ever worked at a mental hospital or for a psychiatrist or psychologist?
At any hospital?

Have you been a medical corpsman in the military?

Have you ever visited Saint Elizabeth's Hospital?

Do you regularly read magazines such as Psychology Today?

Do you have friends who are psychiatrists or psychologists? Do you believe that your relationship with them or conversations you have had with them would cause you to be partial one way or another to an insanity defense?

Have you formed any views about the validity of psychiatry or psychology?

Do you feel that psychiatrists are no more qualified or competent to judge the mental condition of an individual than is a lay person?

Do you have any reservations or feelings that would prevent you from fairly considering the evidence of insanity in this case?

Do you, for any reason, prefer not to sit on an insanity case?

Domestic violence:

In this case there will be allegations of violent physical abuse resulting in injuries. Would any of you be so disturbed by this evidence that it would make you incapable of fairly and impartially deciding this case?

Battered women's syndrome:[31]

Evidence will be presented that Mrs. Smith had been battered by her husband, the decedent.

[31] New evidence has shown that men can be victims of abusive relationships also; genders should be reversed in these questions when appropriate.

*Have you or a family member or close personal friend ever been verbally, psychologically, or physically abused or assaulted by a spouse, family member, or significant other?

Have any of you seen or read any books, articles, movies or TV shows on domestic violence? As a result of this exposure, do any of you have such strong feelings about domestic violence that you feel you cannot be fair and impartial in this case?

There will be evidence of violent physical abuse resulting in injuries. Would any of you be so disturbed by this evidence that it would make you incapable of fairly and impartially deciding this case?

Do any of you feel that there can be no legal justification for a wife killing her husband?

Do any of you believe that a wife's actions can justify her husband's physical abuse?

Do any of you believe that if a woman in a physically abusive relationship does not leave, she is acquiescing to future abuse?
Are there any among you who would find the testimony of a woman who was being battered less believable because she did not leave the relationship?

You will hear testimony that in the past Mrs. Smith refused to press charges against her husband and allowed him to return to live with the family. Are there any among you who believe that therefore she could not have been a battered woman?

[If defendant has children.] There may be testimony that children lived in the home during some period(s) of domestic violence. Does the fact that children may have witnessed physical abuse between their parents have an adverse effect upon your ability to be fair and impartial in this case?

You will hear expert testimony regarding battered women's syndrome. This testimony will include incidents of past physical violence committed by the decedent against Mrs. Smith. Are there any of you who would have difficulty deciding this case where the main issue is Mrs. Smith's perception of life-threatening danger, based upon her past experiences of physical abuse?

D. Specific Offenses

Tailor questions to the specific facts of the case, in as much detail as possible. For example, if a rape case also involves allegations of sodomy, include specific questions to elicit attitudes toward sodomy as well as rape.

Murder:

Did you know or have close friends who knew the deceased, Mr. Smith?

Knowing that the charge against Mr. Jones is murder, could you give him the same fair trial that you would give him if he were charged with a lesser crime?

*Have you sat as a juror in a murder case before?

Have any of your close family or friends died as a result of foul play or under suspicious circumstances?

If the widow or other close relative of the deceased were to testify, would that person's appearance or demeanor so upset or influence you that you could not give Mr. Jones a fair trial?

Rape:

The government will attempt to show that Mr. Jones had sexual intercourse with the complainant against her will. And there may be some medical evidence presented about the female anatomy. Given the nature of this case, would you prefer not to serve as jurors because you might find it uncomfortable to hear such testimony or discuss it with your fellow jurors, or for some other reason?
During the past several months there has been considerable publicity on both radio and in newspapers concerning the law of rape and rape cases in the District. Do you feel that you could not sit as a juror on a rape case in view of the publicity you have heard?

You will hear evidence that DNA testing was conducted in this case. Are there any of you who believe that these scientific tests are infallible?

Do you believe that the law is unfair to the woman who claims she was raped?

Judge X will instruct you that there was no rape if there was consent, and if you find that Ms. Smith consented to having sexual intercourse, you must find Mr. Jones not guilty. Would you be reluctant to apply that principle of law?

Do you belong to the National Organization of Women, or a similar organization?

Have you worked or volunteered with a rape crisis center, domestic violence advocacy group or other organization that helps rape or domestic violence victims or lobbies for changes in rape or domestic violence laws?

Do you have any apprehensions about seeing explicit pictures of the human body that might be used for instructional purposes in this case?

Child sexual assault:

The complainant in this case is _____ years old. Do you think you will have difficulty sitting in this case because of her age?

Do you feel that when a young child says that she has been sexually assaulted, she must be telling the truth?

Because you have children of your own or because of your particular feelings about children, are there any of you that would prefer not to sit on this case?

Final questions:

Finally, ladies and gentlemen, is there anything you have heard so far that would make you, feel uncomfortable sitting on this case or is there any other reason at all that you would prefer to be excused?

Is there any reason that Mr. Jones should not want you serving as a juror in this case?

If you were sitting as the defendant in a case like this would you want to have yourself as a juror?

Does anyone have any questions?

CHAPTER 24

OPENING STATEMENTS

I. OPENING STATEMENT OF THE GOVERNMENT

The government must make an opening statement in a jury trial to "ensure the jurors' comprehension of what is about to transpire at trial." *Jackson v. United States*, 515 A.2d 1133, 1134 & n.1 (D.C. 1986); *see also Best v. District of Columbia*, 291 U.S. 411, 415 (1934); *Criminal Jury Instructions for the District of Columbia*, No. 1.102 (5th ed. 2009). However, the government is not required to make an opening statement in a non-jury case. *Jackson*, 515 A.2d at 1135; *Baldwin v. United States*, 521 A.2d 650, 651 (D.C. 1987).[1]

The content of the government's opening statement is circumscribed. "The purpose of an opening is to give the broad outlines of the case to enable the jury to comprehend it. It is not to poison the jury's mind against the defendant, and it is certainly not to recite items of highly questionable evidence." *Government of the Virgin Islands v. Turner*, 409 F.2d 102, 103 (3d Cir. 1968); *cf. United States v. Dinitz*, 424 U.S. 600, 612 (1976) (Burger, C.J., concurring).

Counsel must listen carefully for improper comments. The most frequent include references to prejudicial material or other matters of questionable admissibility and assertions of fact that the government will not be able to prove. Counsel should keep close account of what is proffered, including any failure to state facts sufficient to prove all the elements of the offense charged. Variances between the opening statement and the evidence, or highly prejudicial statements, may necessitate a mistrial, a cautionary instruction, or prove to be a fruitful ground for closing argument.

On review for improper comments by a prosecutor, an appellate court will consider: (1) the gravity of the impropriety; (2) its relationship to the issue of guilt; (3) the effect of any corrective action by the trial judge; and (4) the strength of the government's case. *McGrier v. United States*, 597 A.2d 36, 41 (D.C. 1991); *see also United States v. Brown*, 508 F.3d 1066 (D.C. Cir. 2007)(no reversal where prosecutor's remarks as to defendant's decision not to testify occurred during opening and before jury knew defendant would not testify and where judge mitigated effect by instructing on burden shifting; prosecutor's introduction of conspirators' guilty pleas as substantive evidence of defendant's knowledge and intent to participate in conspiracy, where judge gave final instructions that sufficiently addressed government's burden of proof and limited the significance of the plea agreements; and prosecutor's comments regarding credibility of government witnesses, where judge mitigated effect by giving instruction on assessing witness credibility, weight of evidence against defendant was strong, and judge gave instructions making clear that prosecutor's personal beliefs were irrelevant). Counsel's good faith, or lack thereof, and the likelihood that the opening statement was unfairly prejudicial are the controlling questions in deciding whether to grant a mistrial. *Ginyard v. United States*, 816 A.2d 21 (D.C.

[1] In non-jury trials, counsel should argue that the government, since it shoulders the burden of proof, must make an opening statement to inform the fact-finder – whether judge or jury – of the course and conduct of the trial. This argument is especially persuasive if the trial will be long or complicated. *Cf. Jackson*, 515 A.2d at 1135 (no opening required because trial was brief and government's first witness provided substantial detail).

2003) (no prejudice where court instructed jury to disregard government summary of testimony in opening about a witness who later asserted Fifth Amendment privilege); *Walker v. United States*, 630 A.2d 658, 667 (D.C. 1993) (statement that there would be testimony that defendant confessed was not in bad faith and not prejudicial where government's case was otherwise strong); *Spears v. United States*, 281 A.2d 287, 289 (D.C. 1971).

Government's Opening Statement:

Counsel must pay close attention to the content of the government's opening statement, looking for references to:

- ✓ Any prejudicial material
- ✓ Matters of questionable admissibility
- ✓ Assertions of facts that the government will not be able to prove
- ✓ Failure to state facts sufficient to prove all elements of the offense charged

Factors considered on appellate review for improper prosecutorial remarks

- ✓ Gravity of the impropriety
- ✓ Relationship to the issue of guilt
- ✓ Effect on any corrective action by the trial judge
- ✓ Strength of the government's case

Note: Counsel's good faith, or lack thereof, and likelihood that remarks were unfairly prejudicial are controlling in deciding whether to grant a mistrial.

A. Motion for Judgment of Acquittal after the Government's Opening Statement

In civil cases, the court may direct a verdict for the defendant after the plaintiff's opening statement. *Best*, 291 U.S. at 415. However, "it is an open question whether the trial court may grant a dismissal after the prosecutor's opening statement based upon a failure to set forth a *prima facie* case." *District of Columbia v. Whitley*, 640 A.2d 710, 711-12 (D.C. 1994). As *Whitley* noted, Super. Ct. Crim. R. 29(a) states that a judgment of acquittal can be entered "after the evidence on either side is closed if the evidence is insufficient to sustain a conviction." *But see Jackson*, 515 A.2d at 1136 ("[d]ismissal may be appropriate where the prosecutor's opening statement is flawed and it is clear that the prosecution will be to no avail"); *Amos v. District of Columbia*, 309 A.2d 305 (D.C. 1973); *District of Columbia v. Huffman*, 42 A.2d 502, 503 (D.C. 1945); *Phillip E. Hassman*, Annot., *Power of Trial Court to Dismiss Prosecution or Direct Acquittal on Basis of Prosecutor's Opening Statement*, 75 A.L.R.3d 649 (1977).

When the government's opening statement omits an essential element, the government may be given an opportunity to cure the deficiency by supplementing the statement. If it cannot do so, a motion for judgment of acquittal may be granted. *See Rose v. United States*, 149 F.2d 755, 758 (9th Cir. 1945); *cf. Brooks v. United States*, 396 A.2d 200, 206 (D.C. 1978) ("There exists little case law from which to determine the standard for dismissal of an indictment at the completion of the government's opening statement.").

As a tactical matter, counsel should move for judgment of acquittal after an opening statement only in unusual circumstances. Such motions are granted only in rare cases. *Webb v. United States*, 191 F.2d 512, 515 (10th Cir. 1951); *see Dobbins v. United States*, 157 F.2d 257 (D.C. Cir. 1946). The motion may only alert the government to potential deficiencies in its case-in-chief that may be corrected. Thus, it should be made only where it is impossible for the government to correct the defect, *see, e.g.*, *Proctor v. United States*, 381 A.2d 249 (D.C. 1977) (defendant charged with obstruction of justice at a time when no criminal charges were pending in the case he allegedly obstructed), or where the government clearly has no evidence on the charged offenses.

Motions for Judgment of Acquittal:

- ✓ Move for a judgment of acquittal in the rare instance when the government omits an essential element and it is impossible for the government to correct the defect
  - Caution: The motion may only alert the government of potential deficiencies, so counsel must be extremely careful in deciding whether or not to pursue such a motion

B. Improper Statements

To avoid references to inadmissible and prejudicial matters, counsel should obtain *in limine* rulings on questionable evidence such as statements of the defendant, the defendant's record, *Drew* evidence and tangible evidence. *See United States v. Bailey*, 675 F.2d 1292 (D.C. Cir. 1982). Courts have found the following types of comments improper:[2]

Arousing Undue Sympathy: In *Hill v. United States*, 367 A.2d 110, 113-14 (D.C. 1976), the Court of Appeals was troubled, but found no error under the facts of the case, when the government told the jury that the robbery victim suffered from multiple sclerosis, which was irrelevant. *See also Clarke v. United States*, 256 A.2d 782 (D.C. 1969).

Appeal to Passions and Prejudices: *United States v. Somers*, 496 F.2d 723, 737-39 (3d Cir. 1974), found improper (but harmless) overly dramatic and unnecessary characterizations of the evidence that served only to prejudice the jurors. *See also Washington v. United States*, 760 A.2d 187 (D.C. 2000) (holding that prosecutor's comments in opening statement asking jurors to put themselves in the victim's shoes ("Have you ever been followed? Have you ever looked back and felt that someone was watching you?…") were improper, but no error in denying motion for mistrial where government's case was strong); *Settles v. United States*, 615 A.2d 1105, 1113 (D.C. 1992); *cf. Criminal Jury Instruction* No. 2.102; *Perez v. United States*, 968 A.2d 39, 82-84 (D.C. 2009) (prosecutor's one-time reference to the defendants' gang membership in opening

[2] Variants of many of the same prohibitions apply to defense opening statements. For example, defense counsel may not arouse undue sympathy or appeal to jury prejudices. Cases holding various comments improper during closing arguments generally apply to opening statements as well.

was not improper given that the court placed appropriate and clear restrictions on such evidence").

Evidence of Other Crimes: Other crimes evidence may not be mentioned unless and until the court has ruled it admissible. *Day v. United States*, 360 A.2d 483, 485 n.5 (D.C. 1976); *see United States v. Bailey*, 505 F.2d 417 (D.C. Cir. 1974); *Leonard v. United States*, 277 F.2d 834 (9th Cir. 1960).

Inadmissible Material: Counsel cannot refer to evidence that will not be offered, available, and admissible at trial. *Void v. United States*, 631 A.2d 374, 383-85 (D.C. 1993) (holding that prosecutor's indirect reference to evidence previously ruled inadmissible violated spirit of pre-trial ruling, but not prejudicial to defendant). In questionable situations, counsel should get advance approval from the court. *See also Bailey v. United States*, 831 A.2d 973 (D.C. 2003) (holding that it was error for a prosecutor to make statements lacking evidential foundation in opening statement, combined together with leading questions during the trial and statements violating juror anonymity during closing, but that they were not prejudicial enough to affect the outcome of the case). *See generally ABA Standards for Criminal Justice*, 5.5 (The Prosecution Function) and 7.4 (The Defense Function) (1980) ("[i]t is unprofessional conduct to allude to any evidence unless there is a good faith and reasonable basis for believing such evidence will be tendered and admitted in evidence").

Defendant's Prior Record: Ordinarily the prosecution cannot mention a defendant's record in an opening statement. In the limited cases where it is permitted, counsel should make sure it is stated correctly. For example, in *Bailey*, 675 F.2d 1292, the prosecutor incorrectly stated that the defendant had a prior armed bank robbery conviction rather than simple robbery. The appellate court found error, but no prejudice in light of a curative instruction.

Lengthy Recitation of Evidence: In *United States v. DeRosa*, 548 F.2d 464 (3d Cir. 1977), the prosecutor improperly read to the jury lengthy transcripts of the defendants' conversations, obtained through wiretaps. *But see Perez*, 968 A.2d at 81 (prosecutor's one-time graphic description of the decedent's injuries and comment regarding witness intimidation in opening were supported by the evidence and "within bounds")

Personal Evaluation of the Case: Counsel must avoid any personal assessment of the case or expected evidence. *See United States v. Davis*, 548 F.2d 840, 845 (9th Cir. 1977). *But see Parker v. United States*, 757 A.2d 1280 (D.C. 2000) (holding that prosecutor's opening statement and closing argument that a human life is worth nothing to the defendant was not improper).

Arguing the Case or Pertinent Law: The opening statement should only outline the evidence each side believes will be presented. It should not be argumentative and should avoid characterization of the evidence. *See Somers*, 496 F.2d at 737-38. *But see Outlaw v. United States*, 632 A.2d 408, 409 n.1 (D.C. 1993) (not improper to list each element of charged offense and anticipated evidence to fulfill each element).

Defendant's Failure to Testify or Present Evidence: In *United States v. Maccini*, 721 F.2d 840, 843 (1st Cir. 1983), the prosecutor said that the government "will present the testimony and the

documents and of course [the defendant] will have an opportunity to present any evidence." The court found error, but held that a curative instruction given after prompt objection was sufficient to avoid any Fifth Amendment violation. *See also Perez*, 968 A.2d at 79 (prosecutor's reference in opening to a testifying accomplice's acceptance of responsibility "unlike all of these other [defendants]," was improper but not substantially prejudicial).

Counsel must determine when to object to opening remarks. Much depends on the procedures of the particular judge, but counsel should not permit clearly improper statements without objection. In deciding whether a mistrial is warranted, the court should consider whether an improper statement was made inadvertently or purposefully, whether it was repeated, and its possible impact on the jury given the length of the trial and the amount of other evidence.

Objecting to Government's Opening Remarks:

- ✓ Obtain *in limine* rulings on any questionable evidence such as statements of defendant, record, *Drew* evidence or tangible evidence
- ✓ Determine when to object to opening remarks, which depends on the particular procedures of each judge

C. Variance from the Evidence

When a prosecutor opens on evidence that is admissible but is ultimately not offered, the defendant may be entitled to a mistrial. The danger is that "the jury in its deliberations might consider, as if it had been given, the testimony it was told to expect from a witness even though that witness did not testify." *United States v. West*, 486 F.2d 468, 472 (6th Cir. 1973). When there is a significant possibility that the prosecutor's remarks will improperly influence or prejudice the jury, the defense should move for a mistrial.

In a weak government case, misrepresentation of anticipated testimony may constitute grounds for reversal even absent any bad faith. For example, *Jones v. United States*, 338 F.2d 553 (D.C. Cir. 1964), reversed a conviction where the prosecutor's opening statement contained facts not proved at trial. *See also Augburn v. United States*, 514 A.2d 452 (D.C. 1986); *Burkley v. United States*, 373 A.2d 878, 879-80 (D.C. 1977); *Robinson v. United States*, 361 A.2d 199, 200 (D.C. 1976); *Jackson v. United States*, 329 A.2d 782, 790 (D.C. 1974); *United States v. Vargas-Rios*, 607 F.2d 831 (9th Cir. 1979); *United States v. Brown*, 540 F.2d 364 (8th Cir. 1976).

However, where the prosecutor reasonably believes that a witness will present certain testimony but then does not, the trial court may properly deny a request for a mistrial. Thus, in *Frazier v. Cupp*, 394 U.S. 731, 733-37 (1969), the trial court properly denied a motion for a mistrial where the prosecutor's opening statement summarized testimony expected from a co-conspirator, who asserted his Fifth Amendment privilege and refused to testify. The prosecutor had actually and reasonably believed that the witness intended to waive his privilege, a curative instruction was given, the government's case was strong, and the expected testimony was only briefly mentioned in the opening statement.

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***Evans v. United States*, 12 A.3d 1 (D.C. 2011).** Trial court did not abuse its discretion in denying request for mistrial or curative instruction to address government's comment in opening statement regarding defendant's story of how he sustained injuries, on which defense counsel relied in his opening statement, and later decision not to introduce that evidence where misstatement confined to opening and not touted to jury as critical, and where general instruction that opening statements are not evidence was given three times.

Motion for Mistrial:

- ✓ Move for a mistrial when prosecutor's remarks will improperly influence or prejudice the jury

II. OPENING STATEMENT OF THE DEFENSE

The defense is entitled to make an opening statement, whether or not it puts on evidence. *Wright v. United States*, 508 A.2d 915, 919 (D.C. 1986). The purpose of the defense opening is to provide a persuasive interpretation of the evidence and persuade the jury of the defendant's innocence. Opening statements are, without question, a critical moment of the trial. They provide an opportunity for the defense to attack the government's theory and climb out of the hole created by the government's opening statement. It is an opportunity to put the government on the defensive, and to take an early lead in the case by removing the sting and casting the evidence in a more favorable light.

The "opening statement" actually begins when the jury panel enters the courtroom. Potential jurors are likely to form lasting impressions of the defendant, counsel and the case from such matters as clothing, and whether counsel appears to like the client or spends most of the time chatting with the prosecutor or courtroom staff. Similarly, *voir dire* can serve many of the same functions as the opening statement. If the court allows, counsel should have the client introduce himself or herself in person to the jury after the government and defense counsel have done so. Counsel can alert the jurors to the defense theory and its legitimacy, highlight the presumption of innocence, the burden of proof, and the requirement of proof beyond a reasonable doubt. Creative use of *voir dire* can foreshadow crucial, complex, expert, detrimental, or inflammatory evidence, and emphasize the need for impartiality notwithstanding the nature of the offense charged. Effective *voir dire* will lay much of the ground work for the opening statement.

Although the defense can reserve opening until just before its case, or waive opening altogether, *see Hampton v. United States*, 269 A.2d 441, 443 (D.C. 1970); *Karikas v. United States*, 296 F.2d 434 (D.C. Cir. 1961), an opening statement is most effective when it comes immediately after the government's opening. Studies have shown that jurors tend to make up their minds concerning guilt or innocence right after opening statements. If they have only heard the government's version, they will very likely return a verdict of guilty. A defense opening

immediately offsets the impact of the prosecutor's opening remarks and assures the jurors that there will be a persuasive defense.

In most cases, the prosecutor's opening is a lengthy chronicle of the devastating facts of the offense. The more detailed and passionate it is, the more likely it is that counsel's initial reaction will be to faint. It is precisely in the difficult cases that one must jump to one's feet, forcefully challenge the prosecutor's statement, and make every effort to refocus the jury's sympathy or outrage. An effective opening can create immediate skepticism about the testimony of the government's witnesses, thus allowing the jury to listen critically to the government's case and to begin questioning its strength early in the proceedings.
Opening before the government's case also assists the jurors in understanding the thrust of cross-examination. Without having heard the defense version, the jury will begin the case assuming that the government's version of the facts is the only credible one. A defense opening that precedes the government's case can accomplish several goals:

- Create immediate skepticism about the direct testimony of government witnesses and make the purpose of counsel's cross-examination more understandable.

- Explain the evidence the defense will present to minimize prejudice from the government case.

- Point out facts that are favorable to the defense that the government omitted in its opening.

- Provide alternative inferences from circumstantial evidence arising from either the government's case or evidence the defense will present.

- Present explanations for government witnesses' testimony, i.e. bias, lack of ability to observe, intoxication and *Giglio evidence*.[3]

In short, in all but the most unusual case, the defense should make an opening, and should do so at the outset.

The content of the opening may range from a general statement of principles and emphasis on one or two essential pieces of evidence to a relatively detailed recitation of every witness's testimony. The opening may include references to anticipated weaknesses in the government's proof, such as intended impeachment, as well as evidence that the defense intends to offer in its own case. The choice of format depends on the circumstances of the case and counsel's strategy. If the evidence that the defense might present depends on evidence to be introduced in the government's case, counsel should avoid making promises of what evidence it will present because counsel may decide not to present that evidence depending on how the government's case plays out.

[3] Defense counsel should move to get all *Giglio* evidence as to the government's witnesses prior to opening so counsel can make use of the information in openings. *See Giglio v. United States*, 450 U.S. 150 (1972).

Counsel should always request *Brady*, *Giglio*, and *Lewis* information the government has prior to making an opening so that counsel can utilize the impeaching and bias information to discredit the government's witnesses. *See supra* Chapter 5 Section II.

The length of opening statements varies with the nature, length and complexity of the case. Most attorneys prefer a short, simple presentation of a few basic points that will offset the government's opening and pique the jury's curiosity.

A. Possible Format – Substantial Defense Case

1. Begin with a five to ten sentence impact statement, quickly summarizing the defense theory and theme.
2. Alert the jurors to the key legal principles of the defense (e.g., self-defense, mistaken identification, consent). A discussion of reasonable doubt and presumption of innocence should *not* be included in the opening in a strong defense case.
3. Focus attention on defects in the government's evidence and contrast the government's theory with "what really happened" (the defense evidence and theory).
4. Suggest that the government witnesses will not be as reliable or as credible as the government asserts.
5. Conclude with passion, communicating counsel's fear that an innocent person might be unjustly convicted.

B. Possible Format – No Defense Case

1. Begin with a denial of the offense, assertion of the client's innocence, and a discussion of the theme of the case.
2. Alert the jurors to the key legal principles of the defense with particular emphasis on the principle that charges are not evidence.
3. Indicate that although the government charges that specific facts occurred, the *evidence* will establish that they did not.
4. Conclude with even more passion because counsel's sincerity will be the key in persuading the jury to acquit the defendant

Naturally, before the opening statement, counsel must be familiar with the names of all witnesses and the crucial dates, times and places, and must have mastered each witness's testimony so that favorable portions can be highlighted. If the complainant and defendant know each other, counsel should discuss their relationship and previous activities to create a context for the alleged offense. Counsel may wish to disclose defense witnesses' impeachable convictions, only *if*

counsel is certain that the witnesses will testify.[4] Finally, where evidence is of questionable admissibility, counsel should refer to it only after obtaining a ruling from the court.

Every opening statement should tell a story – a picture painted with words – so that the listener will find it easier to understand and remember. Speak like a normal person, eschew "legalese," and, through your expressions, convey the true tone of the case (*e.g.*, the terrifying experience this has been for your client, outrage at the police, etc.). The opening statement should neither be read nor sound like rehearsed speech. Comfortable and conversational language will be more persuasive and will communicate more successfully. Avoid too much detail and specificity, and do not promise too much.[5] Instead, tantalize and pique the jury's curiosity with hints about the surprises to come.

Finally, use the opening statement to humanize the client and to present the client in a sympathetic light. Never use depersonalizing, demeaning or distancing language. Refer to the client as "Mr. Smith" or "my client," never as "the defendant;" use the first person plural rather than singular.

Defense's Opening Statements:

- ✓ Counsel should always make an opening statement after the government's opening
- ✓ Counsel should tell a story, using comfortable and conversational language
- ✓ Opening should never be read or sound like a rehearsed speech
- ✓ Humanize your client
- ✓ Provides opportunity to attack government's theory and to alert jurors to defense theory, presumption of innocence, burden of proof, and requirement of beyond a reasonable doubt, etc.
- ✓ Effective *voir dire* can lay the groundwork for the opening by foreshadowing crucial, complex, expert, detrimental, or inflammatory evidence
- ✓ Emphasize the need for impartiality notwithstanding the nature of the offense
- ✓ Do not make promises of what evidence will be presented because counsel may decide not to present certain evidence depending on how the government's case plays out

[4] This is especially critical if the potential witness is the client. Counsel cannot put the cat back in the bag if the witness (or client) does not ultimately testify.

[5] Either side may comment in closing argument on evidence that was promised in opening but not delivered (unless only a non-testifying defendant could have given the promised testimony); the government may also comment on failure to present evidence in support of alternative theories suggested by the defense. *See Boyd v. United States*, 473 A.2d 828, 832-34 (D.C. 1984) (comment permitted on lack of evidence supporting defense theory, to which persons other than defendant could have testified).

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***Hopkins v. United States*, 84 A.3d 62 (D.C. 2014).** See, *supra*, Chapter 11.III.B.

***Evans v. United States*, 12 A.3d 1 (D.C. 2011).** Defendant not substantially prejudiced in relying on prosecutor's comments in opening in deciding to include in his own opening statement a summary of defendant's statement to police regarding events surrounding a stabbing where defendant not "entitled to rely" on contents of government's opening in promising evidence of its own and where defendant made numerous other "promises" in opening that failed to materialize.

III. CO-DEFENDANT'S OPENING STATEMENT

Every defendant in a joint trial has the right to present an opening statement consistent with that defendant's theory of defense. If one defendant's lawyer opens and another does not, the silent defendant will be placed at a distinct disadvantage early in the trial.

Counsel should be alert to the possible prejudice that can result from the comments or actions of co-defendants or their lawyers.[6] Severance motions should be made or renewed, or curative instructions proposed. Mistrial motions may also be appropriate.

[6] In *United States v. Rhodes*, 713 F.2d 463 (9th Cir.1983), one attorney said that his client would be out on bail if he was involved in the charged conspiracy, implying that co-defendants had used proceeds from their criminal involvement to make bond. This counsel also sought to distinguish his client on the basis of race. The court, however, found that under the facts of the case, curative instructions were sufficient to remedy the prejudice. *See United States v. Praetorius*, 622 F.2d 1054 (2d Cir. 1979).

CHAPTER 25

THE JENCKS ACT

I. INTRODUCTION: JENCKS AND "REVERSE-JENCKS"

The Jencks Act, 18 U.S.C. § 3500,[1] requires the United States government to turn over to the defense any "statement" of a witness called by the prosecution that relates to the subject matter of the witness's direct testimony. Properly used, the Act can be an extremely effective tool. It enables counsel to obtain prior statements to use in cross-examining adverse witnesses. If statements are not produced, the defense may seek sanctions against the government. There is also a "reverse-Jencks" rule, which entitles the government to defense witnesses' prior statements after each witness's direct testimony. Superior Court Criminal Rule 26.2 and Superior Court Juvenile Rule 26.2 track the requirements of the Jencks Act for Superior Court criminal and juvenile proceedings.

The Jencks Act applies at criminal and juvenile trials, as well as at suppression hearings. Super. Ct. Crim. R. 12(e) and 26.2(g); Super. Ct. Juv. R. 26.2(g) and 12(e). It also applies at detention hearings under D.C. Code §§ 23-1322, 1323, 1325(a), and 1329; *see also* Super. Ct. Crim. R. 46(f), 26.2(g)(3). At a suppression hearing, even if the *defense* calls a law enforcement officer as a witness, the government is still required to produce his or her Jencks Act material.[2] Super. Ct. Crim. R. 12(e); Super. Ct. Juv. R. 12(e). Rule 26.2 also applies at sentencing, hearings to revoke or modify probation, and juvenile dispositions or probation revocation hearings. *See* Super. Ct. Crim. R. 26.2(g)(1), (2); Super. Ct. Juv. R. 26.2(g).

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***Snell v. United States*, 68 A.3d 689 (D.C. 2013).** Defendant was not prejudiced by government's failure to produce one officer's notes because substance of those notes had been incorporated into second officer's notes that had been turned over to the defense prior to trial.

***Lazo v. United States*, 54 A.3d 1221 (D.C. 2012)** (discussing the trial court's affirmative duty to order production of witness statements).

II. AN OVERVIEW OF JENCKS REQUIREMENTS

Prerequisites: There are four prerequisites to the production of material under the Jencks Act: (1) the material must be in the possession of the party presenting the witness; (2) the opposing party must request the material; (3) the material must be a "statement" as defined in 18 U.S.C. § 3500(e); and (4) the statement must relate to the subject matter of the witness's testimony on direct examination. *See, e.g., Wheeler v. United States*, 977 A.2d 973, 988 (D.C. 2009).

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[1] The Jencks Act was passed within three months of, and codifies the holding of, *Jencks v. United States*, 353 U.S. 657 (1957). *See Palermo v. United States*, 360 U.S. 343, 345-46 (1959).

[2] At a detention hearing, a judge may deviate from the Act's requirements "for good cause shown." Super. Ct. Crim. R. 46(f).

If these conditions are fulfilled, the party from whom the statement is sought *must* furnish the material to the moving party. 18 U.S.C. § 3500(b). The sole circumstance in which the trial court can decline to order production of a Jencks statement – or excise portions of it – is where the material does not relate to the subject of the witness's testimony. *Id*. The document in question need not be admissible. *Jencks v. United States*, 353 U.S. 657, 669 (1957); *Campbell v. United States*, 373 U.S. 487, 493 n.7 (1963) (*Campbell II*). Nor is the moving party required at any point to show an inconsistency between the statement and the witness's testimony. *Jencks*, 353 U.S. at 666. Furthermore, a party is not relieved of its obligation to disclose a statement under Jencks merely because the opposing party could have subpoenaed the statement. *Matthews v. United States*, 322 A.2d 908, 911 (D.C. 1974).[3]

Notably, disclosure under the timeframe set forth by the Jencks Act does *not* necessarily satisfy the prosecutor's duty of reasonable, timely disclosure under *Brady v. Maryland*, 373 U.S. 83 (1963). *Perez v. United States*, 968 A.2d 39, 66 (D.C. 2009) ("this court has rejected any notion that disclosure in accordance with the Jencks Act satisfies the prosecutor's duty of seasonable disclosure under *Brady*") (citation omitted); *Boone v. United States*, 769 A.2d 811, 821 (D.C. 2001) (where *Brady* and Jencks Act overlap, *Brady* controls and compels pre-trial disclosure).

Possession: The prosecutors at the United States Attorney's Office or the Office of the Attorney General need not ever have had the material in their possession. Possession by a government or investigative agency satisfies the requirements. *See, e.g.*, *Robinson v. United States*, 825 A.2d 318 (D.C. 2003) (defendant's conviction for threatening an individual over the phone from a correctional facility reversed due to government's failure to produce tape of conversation where the police knew or should have known the tape existed and could have obtained the recording); *Cook v. United States*, 828 A.2d 194 (D.C. 2003) (case vacated and remanded regarding Jencks Act issue where neither the investigating officers nor their notes were present at trial in spite of defense request for production); *Slye v. United States*, 602 A.2d 135, 138 (D.C. 1992) (recognizing an affirmative duty to preserve Jencks material on government as a whole, including Metropolitan Police Department); *Wilson v. United States*, 568 A.2d 817, 821 (D.C. 1990) (finding that statement by Metro bus driver to Washington Metropolitan Area Transit Authority was Jencks material, and stating that "WMATA, or more specifically the METRO police, was the investigative arm for the prosecution . . . and to that extent WMATA was a governmental agency"), *vacated as moot*, 592 A.2d 480 (D.C. 1991); *Butler v. United States*, 481 A.2d 431, 445-47 (D.C. 1984) (finding violation of the Jencks Act where government failed to disclose witness's testimony before grand jury in a different federal district in a separate matter); *United States v. Bryant*, 439 F.2d 642, 650 (D.C. Cir. 1971) (*Bryant I*), *aff'd after remand*, 448 F.2d 1182 (D.C. Cir. 1971) (*Bryant II*) (tape recordings in possession of Bureau of Narcotics and Dangerous Drugs are Jencks material); *cf. Nelson v. United States*, 649 A.2d 301, 307-08 (D.C. 1994) (medical and psychiatric records relating follow-up treatment to child sexual abuse were not producible under Jencks because not in possession of the government). However, the prosecution may not be required to disclose documents in the physical possession of law enforcement officers in another jurisdiction. *See In re T.H.*, 905 A.2d 195 (D.C. 2006) (finding that the "District" was not in possession of any Jencks material produced by officers in

[3] Material must be produced even if it contains confidential FBI information, *Ogden v. United States*, 303 F.2d 724, 739-40 (9th Cir. 1962), or might affect internal security, *West v. United States*, 274 F.2d 885, 890 (6th Cir. 1960).

Maryland, at least where only Maryland law enforcement officers testified at trial and none of the officers referenced statements that had been turned over to District police officers or prosecutors). Possession of a statement by a defense investigator satisfies the requirement as it pertains to Superior Court Criminal Rule 26.2.

Untranscribed prior testimony is in the possession of the courts and is, therefore, not "in the possession of the United States." *Frye v. United States*, 600 A.2d 808, 810-12 (D.C. 1991) (untranscribed testimony in related juvenile proceeding is not Jencks material); *McClain v. United States*, 460 A.2d 562, 570 (D.C. 1983) (testimony at pre-trial hearing is not Jencks material). Consequently, counsel must obtain the transcripts by other means.[4]

The fourth element is satisfied if the statement "relates generally to the events and activities testified to. Moreover, the witness need not have testified on direct to the specific conversation or document." *Rosser v. United States*, 381 A.2d 598, 606 (D.C. 1977) (citations and internal quotations omitted). Further, if a witness testifies both in the government's case in chief and on rebuttal, the material may be irrelevant to the initial testimony, but producible before cross-examination on rebuttal. *See United States v. Rippy*, 606 F.2d 1150, 1153 (D.C. Cir. 1979).

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***Valentin v. United States,* 15 A.3d 270 (D.C. 2011).** Disclosure of all transcripts of testimony of government's drug expert from previous cases unwarranted where transcripts did not involve activities in which defendant allegedly participated on date in question and would most likely be irrelevant to case.

III. THE DEFINITION OF A "STATEMENT"

Three categories of "statements" are subject to production.

A. Signed, Adopted or Approved

A writing is a "statement" under 18 U.S.C. § 3500(e)(1) if it is signed or otherwise adopted or approved by the testifying witness. The witness need not have written or signed the document. *Campbell II*, 373 U.S. at 492 n.6. Nor is it necessary that the statement be made contemporaneously with the events to which it relates. Adoption or approval of the writing occurs when the document or notes are read to the witness for the witness's oral affirmation, *id*. at 494-95 n.9, or examined by the witness to determine accuracy. *See id.*; *Goldberg v. United States*, 425 U.S. 94, 98 (1976); *Campbell v. United States*, 365 U.S. 85, 93 (1961) *(Campbell I)*. Notes or memoranda of conversations with other persons may be disclosable statements of both the interviewer or the interviewee. *Clancy v. United States*, 365 U.S. 312, 314-15 (1961). For example, PD forms 251, 202, 163, et al., are almost always producible as Jencks material of the

[4] Counsel for indigent defendants must submit vouchers to obtain transcripts of those proceedings. For a discussion of the right of an indigent defendant to be provided with a transcript, see *United States v. Brown*, 443 F.2d 659, 660 (D.C. Cir. 1970). Under the Criminal Justice Act, counsel may petition the court *ex parte* for preparation of the transcripts at public expense. *See* D.C. Code § 11-2605(a), (b). Prior court approval is also required when seeking transcripts from juvenile proceedings. *See Frye*, 600 A.2d at 809.

reporting officer and of the interviewed witness if they were "signed or otherwise adopted or approved."

A statement under 18 U.S.C. § 3500(e)(1) also includes notes prepared by a witness to preserve or refresh recollection, if the party has possession of the notes. It also includes signed statements given by a party's witness to its investigators. Police or other government reports and reports by defense investigators are producible if they incorporate interview notes that the witness adopted or approved. *See Campbell II*, 373 U.S. at 494-97.

B. Contemporaneous and Substantially Verbatim

A writing is producible under 18 U.S.C. § 3500(e)(2) if it is (1) "a substantially verbatim recital of an oral statement made by [the] witness" and (2) "recorded contemporaneously with the making of such oral statement." Whether a writing is a "substantially verbatim recital" is a factual question that turns on whether the "statement can be fairly said to be the witness's own so that it would not be unfair to allow the defense to use it to impeach the witness." *(Isaac) Williams v. United States*, 338 F.2d 286, 288 (D.C. Cir. 1964) (*(Isaac) Williams II*) (citing *Palermo*, 360 U.S. at 350).

Standard for substantially verbatim: The words used in the writing need not be identical to those spoken by the witness. The standard is flexible, turning on a combination of factors such as: (1) the extent to which the writing conforms to the witness's language; (2) the relative length of the statement and of the interview; (3) the lapse of time between the interview and the recording; (4) the appearance of the substance of the witness's remarks;[5] (5) the use of quotation marks; (6) the presence of the interviewer's comments or ideas; and (7) the purpose for which the statement was taken. *Id.* at 288-89. The requirement that the notes be "contemporaneously recorded" is interpreted flexibly; the recording need not be simultaneous. *United States v. McKeever*, 271 F.2d 669, 674-75 (2d Cir. 1959).[6]

C. Grand Jury Testimony

A statement or testimony given by a witness before a grand jury is producible under section (e)(3). *Butler*, 481 A.2d at 445-46.[7] In a juvenile case in which there is an adult co-defendant, the government must disclose grand jury testimony given in connection with the adult's case. *See In re S.W.B.*, 321 A.2d 564, 567 (D.C. 1974).

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[5] As a general rule, "[t]he transcription must be a continuous, narrative recording rather than mere selective notations or excerpts from the oral statements." *(Calvin) Moore v. United States*, 353 A.2d 16, 18 (D.C. 1976) (citing *Palermo*, 360 U.S. at 351-52).

[6] Both *(Isaac) Williams II* and *Palermo* considered the lapse of time between the interview and the transcription, factors that would be irrelevant if the requirement of contemporaneous recording were intended to be strictly construed.

[7] A summary prepared by clerks prior to grand jury testimony is likewise producible if it is substantially verbatim. *(Isaac) Williams v. United States*, 338 F.2d 286 (D.C. Cir. 1964).

D. Recurring Issues

1. Attorney's Notes

Notes taken by an attorney while interviewing a witness may be producible under either 18 U.S.C. § 3500(e)(1) or (e)(2). *See Goldberg*, 425 U.S. at 98; *Middleton v. United States*, 401 A.2d 109, 123 n.30 (D.C. 1979); *Saunders v. United States*, 316 F.2d 346, 349-50 (D.C. Cir. 1963). The duty to produce is not obviated by a claim that the attorney could not be called to complete the impeachment if the statement is inconsistent. Production and admissibility are separate issues. *Jencks*, 353 U.S. at 669; *Campbell II*, 373 U.S. at 493 n.7. If the attorney's notes contain personal impressions, comments that are not part of the "statement," or other information that does not relate to the subject matter of the witness's testimony, the court must excise the non-producible portions upon request. 18 U.S.C. § 3500(c).

2. Rough Notes

A police officer's or defense investigator's handwritten notes of an interview with a witness may be producible under section (e)(1) or, more likely, (e)(2). *See United States v. Bundy*, 472 F.2d 1266, 1267 (D.C. Cir. 1972). The fact that notes are handwritten is irrelevant if the material indeed meets the other standards for a "statement" under the Act. *Compare (Calvin) Moore*, 353 A.2d at 19-20 (handwritten notes of the description of suspects ruled producible), *with Matthews v. U.S.*, 322 A.2d 908, 910 (D.C. 1974) (handwritten notes not producible if they were not substantially verbatim).

The argument most frequently advanced to avoid production of rough notes is that the notes are too sketchy or hastily written to be substantially verbatim. However, police notes are often Jencks Act statements. *See (Carlton) Moore v. United States*, 657 A.2d 1148, 1151-52 (D.C. 1995); *Edwards v. United States*, 483 A.2d 682, 684 (D.C. 1984); *United States v. (Carroll) Montgomery*, 478 A.2d 1088, 1089-90 (D.C. 1984); *(Calvin) Moore*, 353 A.2d at 19. Indeed, if rough notes were not potentially producible, the repeated emphasis on the need for compliance with MPD General Order Series 601, No. 2, requiring preservation of notes of descriptions taken by an officer at a crime scene, would be unnecessary. *See (Calvin) Moore*, 353 A.2d at 18 n.7; *Savage v. United States*, 313 A.2d 880, 883-84 (D.C. 1974). Moreover, notes that contain a description of the perpetrator or phrases relating to height, weight, clothing, etc., while not narrative in form, are by definition verbatim, and thus producible under 18 U.S.C. § 3500(e)(2). *See (Calvin) Moore*, 353 A.2d at 19.

Additionally, incorporation of notes into a police report does not relieve the government of its obligation to produce the original notes.[8] *Bundy*, 472 F.2d at 1267. Particularly when identification is an issue in the case, the notes of a description are critical:

> The initial description of an assailant by the victim or other eyewitness is crucial evidence, and the notes taken of that description should be kept and produced.

[8] Incorporation into another document may affect the sanctions imposed for non-production of the notes, as discussed *infra* Section V.

> The formal written police report of the crime does, of course, contain a description of the offender, but that report is often prepared after a suspect is arrested and the danger that the description in the formal report may be subconsciously influenced by the viewing of the suspect by the author of the report is very great.

Id. (footnote omitted).

3. Police Forms, Reports, 911 Calls and Radio Runs

If the officer who prepared a document testifies, the document is producible as the officer's section (e)(1) statement. *Clancy v. United States*, 365 U.S. 312, 314-15 (1961); *(Kenneth) Montgomery v. United States*, 384 A.2d 655, 662 (D.C. 1978). The report may also be the section (e)(1) or (e)(2) statement of the witness who provided the officer with the information recorded in the report.[9] *See also Williams v. United States*, 757 A.2d 100 (D.C. 2000) (statement of anonymous officer to grand jury not Jencks without evidence, or at least proffer, that the anonymous witness testified). *But see Hilliard v. United States*, 638 A.2d 698, 704 (D.C. 1994) (a PD 76 stop and frisk card is not Jencks where it contained only background information for individuals not called as witnesses); *Gibson v. United States*, 536 A.2d 78, 84-85 (D.C. 1987) (radio run made following receipt of 911 call not Jencks statement of 911 caller). Defense counsel should argue that tapes and recordings must be produced notwithstanding testimony that the tapes are unintelligible. *See Bryant II*, 448 F.2d at 1184 n.1.

4. Diagrams

A crime scene diagram prepared by the arresting officer is not a Jencks statement. *Tansimore v. United States*, 355 A.2d 799, 801-02 (D.C. 1976). However, it may be discoverable under Superior Court Criminal Rule 16.

IV. PROCEDURE FOR LITIGATING JENCKS ACT QUESTIONS

A. Raising the Issue

The party calling the witness is not automatically required to produce the witness's prior statements. A request for the statements is required. *See* 18 U.S.C. § 3500(b); *(Edward S.) Williams v. United States*, 252 A.2d 893, 894 (D.C. 1969). To raise the issue,

> "[n]o ritual of words" is required, but the defendant must plainly tender to the Court the question of the producibility of the document at a time when it is possible for the Court to order it produced, or to make an appropriate inquiry. If he fails to do so he may not assert, on appeal, that failure to order production or undertake further inquiry was error. . . The responsibility for fairly directing the

[9] Counsel should request sanctions in reference to both the author of the rough notes and the witnesses who provided the information. In *(Lorenzo) Moore v. United States*, 508 A.2d 924, 926 (D.C. 1986), the court commented in *dictum* that where a police officer's notes of an interview with an eyewitness are lost or destroyed, sanctions are appropriately directed at the testimony of the eyewitness, not the officer.

> attention of the Court to the precise demand submitted for the Court's determination is appropriately placed upon the Defendant, who seeks the statute's benefits.

Ogden v. United States, 303 F.2d 724, 733 (9th Cir. 1962) (footnote omitted).

At the end of the direct examination of each government witness, counsel should move for production of any and all statements that are or should be in the opposing party's possession. The moving party is not bound by the opposing party's representations that it has no Jencks statements or that all producible statements have been turned over. Counsel is entitled to, and in most cases should, cross-examine the witness in an effort to probe for additional Jencks material. Cross-examination of the witness is important because "[t]he prosecutor may have had no knowledge of a witness's statements to police or other authorities, or he may have mistakenly believed that relevant materials were not 'statements' under the Act." *Young v. United States*, 346 F.2d 793, 794 (D.C. Cir. 1965). Moreover, the trial court should not rely on the representations of the prosecutor, once a foundation has been laid, that the statements are not Jencks material. *Matthews*, 322 A.2d at 910. *In camera* review for the possible existence of Jencks material is required. *Id*.; *see also Johnson v. United States*, 800 A.2d 696 (D.C. 2002) (trial court "put the cart before the horse" by ruling that notes were not producible Jencks Act statements without first inspecting them). *See infra* Appendix A for a sample Jencks inquiry. It is not necessary to first show that the statement is in the government's possession or even that the statement definitely exists, information "the defendant often does not and cannot know." *Saunders*, 316 F.2d at 349.

Foundation Required for Requesting Production of a Statement: The required foundation for requesting production is a showing that a statement, as defined in 18 U.S.C. § 3500(e), was made and that it relates to the subject matter of the witness's direct testimony. *Hilliard*, 638 A.2d at 704-05. The moving party must only establish that there is some reason to believe that a Jencks statement may exist. *Goldberg*, 425 U.S. at 109. *Prima facie* entitlement to section (e)(1) statements is established when the witness admits to having made a report or signed a statement, or having been interviewed by a government or defense agent who took notes and secured the witness's approval of the notes or a report prepared from the notes. *See id*. For a section (e)(2) demand, counsel need elicit only, for example, that the witness was interviewed by a government agent who took notes. *See (Carroll) Montgomery*, 478 A.2d at 1089-90; *Saunders*, 316 F.2d at 349; *Ogden*, 303 F.2d at 737. *But see Wilburn v. United States*, 340 A.2d 810, 813 (D.C. 1975) (no foundation was laid for Jencks hearing outside presence of jury because there was no indication that the officer wrote anything other than the complainant's name and address). The demanding party "has no duty to explain why such documents fall within the categories defined in the Act as producible. This is a determination to be made by the trial court." *Colbert v. United States*, 471 A.2d 258, 262 (D.C. 1984);[10] s*ee also Johnson v. United States*, 800 A.2d 696 (D.C. 2002) (abuse of discretion and violation of express command of Jencks Act to deny

[10] The witness in *Colbert* testified that he had given descriptions of his assailant to four police officers. The prosecution declined to turn over the officers' notes, and the trial court refused to order production, stating that only substantially verbatim statements and those adopted by the witness were producible under Section (e)(1). The Court of Appeals held that Colbert had no means of knowing whether the statements were substantially verbatim and that the trial court had a duty to conduct an *in camera* inspection to determine producibility. *Id.* at 261-62.

counsel's request for Jencks material after government witness testified, and to require defense counsel to first "set a Jencks foundation").

Once reasonable belief of the existence of a Jencks statement is established, all Jencks procedures, including motions for production, witness testimony, arguments and rulings, and actual delivery of materials, must take place outside of the jury's presence. *See Campbell I*, 365 U.S at 93.[11] Counsel may also request of, and be granted by, the trial court sufficient time to study the documents outside of the jury's presence. 18 U.S.C. § 3500(c).[12]

2014 Supplement

***Medina v. United States*, 61 A.3d 637 (D.C. 2013).** Trial court's failure to investigate whether officer's notes contained Jencks statements was not harmless where second officer testified that first officer had taken notes during their meetings and defense counsel requested "full evidentiary hearing" on issue during trial.

B. The Jencks Hearing

If the government resists a Jencks demand, the court must conduct an inquiry outside the presence of the jury:

> [W]hen a defendant seeks the production of a statement, as defined in the Act, the district court has an affirmative duty to determine whether any such statement exists and is in the possession of the Government and, if so, to order the production of the statement. . . A trial judge is to conduct such inquiry as may be necessary to determine whether or not the conditions of the statute have been satisfied. His inquiry may involve an interrogation of witnesses, or he may make an in camera examination of the statement, or the circumstances may call for both such in camera examination and interrogation of witnesses. This is clear from the decisions of the Supreme Court in [*Campbell II* and] *Palermo* . . . In the latter case, the Court said: It is also the function of the trial judge to decide, in light of the circumstances of each case, what, if any, evidence extrinsic to the statement itself may or must be offered to prove the nature of the statement. In most cases

[11] *(Samuel) Washington v. United States*, 397 A.2d 946, 951 (D.C. 1979), held that it was error, though not reversible error, for the prosecutor to announce in front of the jury that he was presenting Jencks material to defense counsel. *See also United States v. Guglielmini*, 384 F.2d 602, 605 (2d Cir. 1967) (discussion of Jencks issue, particularly when request is denied before jury, may discredit defense); *Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966) (Jencks requests and production in front of the jury may lead the jury to inappropriately infer that the witness's previous statements were all consistent); *(George) Johnson v. United States*, 347 F.2d 803, 805-06 (D.C. Cir. 1965) (prohibiting prosecutor from commenting on counsel's receiving and failing to use materials). *But see Jordan v. United States*, 633 A.2d 373, 376 (D.C. 1993) (finding no abuse of discretion in not informing jury that court had determined outside jury's presence that witnesses were mistaken when they testified about officer taking notes and stating that "[s]uch a step would risk injecting the trial court into a sphere that is the exclusive province of the jury; namely, the credibility of witnesses").

[12] The length of time counsel should receive to review the *Jencks* material will depend on "the nature, quantity, and content of the [Jencks] material provided." *(Timothy) Washington v. United States*, 499 A.2d 95, 99 (D.C. 1985).

> the answer will be plain from the statement itself. In others further information might be deemed relevant to assist the court's determination.

(Isaac) Williams v. United States, 328 F.2d 178, 180 (D.C. Cir. 1963) (*(Isaac) Williams I*) (citations and internal quotations omitted), *quoted with approval in Matthews*, 322 A.2d at 910; *see also Campbell I*, 365 U.S. 85, 92-93; *Saunders*, 316 F.2d at 350; *Ogden*, 303 F.2d at 737.[13] If the court cannot determine producibility from the hearing alone, it is an abuse of discretion to make a ruling without an *in camera* examination. *See Bayer v. United States*, 651 A.2d 308, 311 (D.C. 1994) (trial court erred in failing to investigate whether the police officer's notes qualified as a "statement" under 18 U.S.C. § 3500(e)); *United States v. (Jacqueline) Jackson*, 430 A.2d 1380, 1385 (D.C. 1981). The focus of the hearing, however, will depend upon the asserted reason for resisting production.[14]

2014 Supplement

***Dalton v. United States*, 58 A.3d 1005 (D.C. 2013).** Trial court erred in failing to conduct requisite Jencks Act inquiry upon defendant's renewed request for statements by testifying police officers related to use of force investigation when government represented that use of force investigation against all four testifying officers had been completed, but asserted that no related statements by officers existed.

1. "No Documents Exist"

Once a party makes a *prima facie* showing that a statement exists, the court must inquire into the matter. *Flores v. United States*, 698 A.2d 474, 481 (D.C. 1997). The inquiry should not end merely because the government asserts that the document does not exist. "The fact that the prosecutor does not admit the existence of a statement does not relieve the court of the affirmative duty to determine whether any such statement exists." *Leach v. United States*, 320 F.2d 670, 671 (D.C. Cir. 1963) (internal quotation omitted).

2. "The Material Is Not a Statement"

If the party in possession of possible Jencks material claims that a document or report is not a statement, the court must examine the document *in camera* or hear extrinsic evidence, including testimony by the witness or the agent to whom the statement was given, to decide whether the document is producible. *Campbell I*, 365 U.S. at 92-93; *Palermo*, 360 U.S. at 354-55; *Bayer*, 651 A.2d at 311; *Hilliard*, 638 A.2d at 703; *(Isaac) Williams I*, 328 F.2d at 180-81. This is an affirmative duty upon the judge to inspect relevant documents or question relevant witnesses.[15] *Campbell I*, 365 U.S. at 95; *Matthews*, 322 A.2d at 910; *(Isaac) Williams I*, 328 F.2d at 180-81.

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[13] The right to a hearing may be waived by assenting to production of material to the court for *in camera* inspection without requesting a hearing. *See United States v. Fowler*, 608 F.2d 2, 5-6 (D.C. Cir. 1979).

[14] On appeal, the adequacy of the hearing is reviewed for an "abuse of discretion." *In re K.L.H.*, 372 A.2d 1003, 1005 (D.C. 1977).

[15] Appellate counsel is not entitled to inspect a document that was found non-producible. *(Michael) Reed v. United States*, 379 A.2d 1181, 1182-83 (D.C. 1977).

It must be made with the parties' assistance, but "without reliance on artificial burdens of persuasion." *(Jacqueline) Jackson*, 430 A.2d at 1386. *Campbell I*, for example, held that the trial court erred in imposing on the defense the burden of subpoenaing and calling an FBI agent:

> The circumstances of this case clearly required that the judge call [the agent] of his own motion or require the Government to produce him. Not only did the Government have the advantage over the defense of knowing the contents of the Interview Report but it also had the advantage of having [the agent] in its employ and presumably knew, or could readily ascertain from him, the facts about the interview. . . . [T]he ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary.

365 U.S. at 96 (citations omitted); *see also (Carlton) Moore*, 657 A.2d at 1151 ("The trial judge could not determine whether the notes were substantially verbatim . . . unless they were produced in court for the judge to examine. . . . [T]he burden was on the prosecutor to produce them so that the judge could make that determination.") (citations omitted).

3. "The Statement Was Not Relevant"

In response to a claim that all or part of a statement does not relate to the subject matter of the witness's testimony, "the court shall order the United States to deliver such statement for the inspection of the court *in camera*. Upon such delivery, the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness." 18 U.S.C. § 3500(c).[16] The issue is not legal relevance or admissibility, but logical relevance. The statement must relate "generally to the events and activities testified to. Moreover, the witness need not have testified on direct to the specific conversation or document to warrant its production." *Rosser*, 381 A.2d at 606 (citations and internal quotations omitted); *Ogden*, 303 F.2d at 740; *see Rosenberg v. United States*, 360 U.S. 367, 370 (1959); *Jencks*, 353 U.S. at 668-69; *cf. United States v. Malcolm*, 331 A.2d 329, 334 (D.C. 1975) (holding that warrants completed by police officer in prior cases based upon tips from same informant were not Jencks material because they did not relate to activities testified to). Defense counsel must anticipate government claims that the material has improperly been sought for discovery purposes. *See, e.g.*, *Wheeler*, 977 A.2d at 989 ("As we have said, the Jencks Act is not a tool for discovery; rather, '[o]ne purpose of the Jencks Act was to restrict defendant's right to any general exploration of the government's files.'") (citing *Hilliard*, 638 A.2d at 704).

4. "The Statement Is Lost or Destroyed"

"[B]efore a request for discovery has been made, the duty of disclosure is operative as a duty of preservation." *Bryant I*, 439 F.2d at 651; *see also Slye*, 602 A.2d at 138; *(Carroll) Montgomery*, 478 A.2d at 1091; *Hardy v. United States*, 316 A.2d 867, 870 (D.C. 1974); MPD Gen. Order Series 601, No. 2, effective May 26, 1972. The burden of explaining and justifying any failure to

[16] If any portion of the statement is withheld on the ground that it is not relevant, 18 U.S.C. § 3500(c) requires the party in possession to preserve and make available for appellate review the entire text of the statement.

preserve potentially discoverable evidence falls on the party calling the witness; "the burden of explanation . . . must be a heavy one." *Bryant I*, 439 F.2d at 651.

If a statement has been lost or destroyed, the court must conduct an evidentiary hearing. *See Johnson v. United States*, 298 A.2d 516, 519 (D.C. 1972) (*(Henry) Johnson I*), *appeal after remand*, 336 A.2d 545 (1975) (*(Henry) Johnson II*). The hearing should include testimony on (1) who is responsible for the loss or destruction;[17] (2) whether the loss or destruction was deliberate, done for an improper purpose, negligent, or inadvertent;[18] (3) the extent to which the party has promulgated and generally followed procedures designed to preserve evidence;[19] (4) whether the applicable procedures were followed in the particular case;[20] and (5) what steps were taken to locate or reconstruct the missing evidence when its loss was discovered.[21] *See Slye*, 602 A.2d at 139; *United States v. (Michael) Jackson*, 450 A.2d 419, 426 (D.C. 1982).

V. SANCTIONS FOR FAILURE TO PRODUCE JENCKS MATERIAL

A. Election Not To Produce Material

When the government has Jencks material but refuses to produce it, the court must strike the witness's testimony, and may declare a mistrial:

> If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, *the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared*.

18 U.S.C. § 3500(d) (emphasis added).

B. Loss or Destruction of Material

A stern warning has been issued that the government must preserve all Jencks material:

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[17] *See e.g., Johnson v. United States*, 298 A.2d 516, 519-20 (D.C. 1972) (remanding for hearing on the events leading to loss of Jencks material); *United States v. Maynard*, 476 F.2d 1170, 1177 (D.C. Cir. 1973) (whether higher duty applies when loss is attributable to prosecutor's loss of police notes transferred to her).

[18] *See e.g., Fields v. United States*, 368 A.2d 537, 541 (D.C. 1977); *(Earl) Jones v. United States*, 343 A.2d 346, 350-52 (D.C. 1975); *see also United States v. Augenblick*, 393 U.S. 348, 355-56 (1969).

[19] *See e.g., Bryant I*, 439 F.2d at 652; *(Daniel) Washington v. United States*, 343 A.2d 560, 562 (D.C. 1975); *cf. Augenblick*, 393 U.S. at 355-56.

[20] *See Bryant I*, 439 F.2d at 652. *But see Slye*, 602 A.2d 135, 138-39 (holding that failure to sanction government for failing to preserve tapes was not abuse of discretion when erasing of tapes was merely negligent and was part of existing procedure).

[21] *See (Henry) Johnson I*, 298 A.2d at 519 (remanding for determination whether prosecutor's loss was negligent; sanctions must be imposed if it was).

> [S]anctions . . . based on loss of evidence will be invoked in the future unless the Government can show that it has promulgated, enforced and attempted in good faith to follow rigorous and systematic procedures designed to preserve *all* discoverable evidence gathered in the course of a criminal investigation. The burden, of course, is on the Government to make this showing. Negligent failure to comply with the required procedures will provide no excuse.

Bryant I, 439 F.2d at 652 (footnote omitted) (emphasis in original); *see Slye*, 602 A.2d at 140 ("Although the *Bryant* rule may be inconvenient or annoying, it is still the law, and prosecutors and police alike are bound by it . . . Although [the government's] breach of that duty in this case was not fatal, a similar breach in another case may well lead to reversal.").[22]

Additionally, as stated previously, the government's duty to disclose Jencks material necessarily encompasses the antecedent duty to preserve it:

> Along with the duty to disclose, the government has the duty to preserve statements of witnesses covered by the Jencks Act. Otherwise, disclosure might be avoided by destroying vital evidence, before prosecution begins or before defendants hear of its existence. This duty extends not only to the prosecutor, but to the government as a whole, including its investigative agencies.

(Kenneth) Montgomery, 384 A.2d at 661-62 (citations and internal quotations omitted).[23]
A range of sanctions, including the exclusion of testimony and a missing evidence instruction, is available. However, a violation of the duty of preservation that results in the loss of producible statements does not automatically require the imposition of sanctions. *Lee v. United States*, 699 A.2d 373, 389 (D.C. 1997).[24] As the Court of Appeals has stated:

> [T]he circuit court never intended its directive in the *Bryant* case to constitute an inflexible rule of exclusion which would bar a trial judge from exercising his considered judgment in determining on an ad hoc basis whether sanctions under the Jencks Act should be imposed.

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[22] *Bryant* is binding, pursuant to *M.A.P. v. Ryan*, 285 A.2d 310 (D.C. 1971).

[23] Although *(Kenneth) Montgomery* and *Bryant* involved police or other investigative agencies, other cases have held the doctrine "instructive" to non-investigating agencies. In other words, while *Bryant* cannot be applied "unqualifiedly" to such agencies, the general obligation to preserve evidence remains. *United States v. Butler*, 499 F.2d 1006, 1008 (D.C. Cir. 1974). "The relationship of the evidence to the offense would control the right of the defense to have it preserved, not which agency of the government [was involved]." *Id*. at 1007. Thus, for example, *(Henry) Johnson I*, 298 A.2d at 519, involving an alleged assault on a Lorton correctional officer, held that *Bryant* required a full hearing regarding the loss of an institutional disciplinary report. *See (Henry) Johnson II*, 336 A.2d at 547-48 (upholding trial court's discretionary decision not to impose sanctions because loss was not result of bad faith or gross negligence).

[24] Likewise, testimony is not automatically stricken where there is a delay in production of materials. In *United States v. Rippy*, 606 F.2d 1150 (D.C. Cir. 1979), notes were not turned over after the witness testified in the government's case-in-chief, but were produced after his rebuttal testimony. The appellate court, finding no bad faith on the part of the government, and no prejudice to the defendant, upheld the trial court's refusal to impose sanctions. *Id*. at 1154.

(Earl) Jones, 343 A.2d at 352; *see also United States v. Perry*, 471 F.2d 1057, 1062 (D.C. Cir. 1972) (recognizing that a loss of evidence that was not in bad faith does not necessarily preclude sanctions).

Given this approach, the trial court has considerable discretion to weigh the relevant circumstances and determine both whether to impose sanctions at all and which sanctions to impose. *See Hardy*, 316 A.2d at 870 (stating that the penalty of striking testimony "is not to be invoked automatically" and that, when testimony is struck, "there should be a showing of either negligence or purposeful destruction accompanied by either bad motive or bad judgment"). As the Court of Appeals has stated:

> Once a violation of the rule of preservation is found, the totality of circumstances must be considered in determining what sanction to apply. In fashioning the appropriate sanction, the court should weigh the degree of negligence or bad faith involved, the importance of the evidence lost, and the evidence of guilt adduced at trial in order to come to a determination that will serve the ends of justice. The decision as to the appropriate sanction, however, is left to the discretion of the trial judge and that decision will be reversed only if shown to be an abuse of discretion.

(Kenneth) Montgomery, 384 A.2d at 662 (citations and internal quotations omitted); *see also (Carroll) Montgomery*, 478 A.2d at 1090-91; *(Isaac L.) Williams v. United States*, 385 A.2d 760, 763 (D.C. 1978).

If the loss is a result of bad faith or gross negligence, the court *must* exclude the witness's testimony. *(Henry) Johnson I*, 298 A.2d at 520; *(David) Jones v. United States*, 535 A.2d 409, 411 n.10 (D.C. 1987); *see also Edwards*, 483 A.2d at 684-85 (alleged error in failure to exclude testimony could not be raised on appeal where defense did not request such a sanction at trial). Courts consider gross negligence as the functional equivalent of a party's election not to produce, triggering exclusion of the testimony under 18 U.S.C. § 3500(d). *See (Carroll) Montgomery*, 478 A.2d at 1091. Even if the negligence could be classified as "simple" rather than "gross," a consideration of the "totality of circumstances," *(Kenneth) Montgomery*, 384 A.2d at 662, may lead to exclusion of the testimony. Defense counsel should request all applicable sanctions for the record on appeal.

In *(Michael) Jackson*, 450 A.2d 419, a witness testified at a suppression hearing that he was shown a photo array a month after a homicide and made a tentative identification of the defendant. The detectives testified that they did not recall showing the witness any photographs, that they would have made notes of the witness's selection if they had, and that they had no such notes. Finding that the detectives showed a photo array to the witness, took notes, and negligently lost the notes, the court suppressed the witness's testimony regarding the photo identification. The Court of Appeals affirmed. *Id*. at 427.

MPD General Order Series 601, No. 2, promulgated in response to *Bryant*, specifies policies and procedures for the preservation of all discoverable evidence and establishes a standard by which

to measure the degree of negligence.[25] The Court of Appeals has commended the promulgation of the order, *see Banks v. United States*, 305 A.2d 256, 258 n.3 (D.C. 1973), and has repeatedly stressed the importance of police familiarity and compliance with the order. *See Marshall v. United States*, 340 A.2d 805, 809 (D.C. 1975); *Hardy*, 316 A.2d at 870 (Gallagher, J., concurring); *Savage*, 313 A.2d at 883; *see also (Kenneth) Montgomery*, 384 A.2d at 662 n.6. Counsel should ask police witnesses questions based on the order. *See infra* Appendix B.

For negligent loss, the court has the discretion to fashion a remedy less extreme than striking the testimony, *(Earl) Jones*, 343 A.2d at 352, or to impose no sanction at all, *Groves v. United States*, 564 A.2d 372, 378 (D.C. 1989) (*Groves I*). In certain cases, the lesser sanction of a "missing evidence" instruction may be in order:

> In some circumstances, and particularly in the face of a general routine of preservation, such as the D.C. police have established, the absence of notes may be the kind of mishap best handled by instructing the jury with an adaptation of the kind of instruction used in case of a missing witness, that the jury is free to infer that the missing original notes would have been different from the testimony at trial and would have been helpful to defendant.

Bundy, 472 F.2d at 1269 (Leventhal, J., concurring); *see also (David) Jones*, 535 A.2d at 411-12; *Maynard*, 476 F.2d at 1177-78. The instruction would permit counsel to argue inferences favorable to the defense to the jury; *cf. United States v. Patterson*, 495 F.2d 107, 112-13 n.7 (D.C. Cir. 1974) (defense counsel properly allowed to make missing evidence argument when government attempted to take fingerprints and lost physical evidence of the attempt).[26]

Another possible sanction is partial exclusion of testimony. For example, the court could exclude any testimony by a complaining witness concerning just his initial description of an assailant due to the loss of rough notes or other Jencks statements containing the original description. *See Fields*, 368 A.2d at 539-40.[27] In some cases, defense counsel may also wish to seek a continuance.

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[25] The court noted in *Bryant II* that the destruction of evidence, although not in bad faith, contravened existing agency policies: "The fact that [the agent] acted in direct violation of a Bureau rule makes his conduct extremely negligent and, in the future, would surely result in imposition of full sanctions." 448 F.2d at 1184.

[26] Such an instruction must be specifically requested. *Slye*, 602 A.2d at 140 & n.9; *(Kenneth) Montgomery*, 384 A.2d at 662 n.7. For a sample instruction, see *United States v. Peters*, 587 F.2d 1267, 1276 (D.C. Cir. 1978).

[27] In *Fields*, several officers took rough notes at a show-up procedure. One of the officers was not at trial, and his notes were lost. The trial court excluded testimony about the show-up, but permitted testimony regarding a subsequent line-up identification and an in-court identification. The Court of Appeals held that the absence of the notes was harmless, and, therefore, that the trial court's decision was not reversible error, noting that there was an "independent source" for the other identifications. *Id*. at 539. This approach was criticized in the dissent as an unwarranted judicial modification of the Act: "'[T]aint' and 'independent source' are irrelevant to the Jencks issue . . . The remedy for a Jencks Act violation rests not in a constitutional 'exclusionary rule' as modified by the 'independent source doctrine,' but in the Jencks Act itself." *Id*. at 545 (Mack, J., dissenting).

The imposition of sanctions does not require a showing of prejudice caused by non-production.[28] *(Michael) Jackson*, 450 A.2d at 427 n.5; *Jencks*, 353 U.S. at 674 (J. Burton, concurring) (no inconsistency shown between testimony and statement); *(Michael) Reed*, 379 A.2d at 1182 (government interests should not be weighed against prejudice to defendant to determine if a Jencks violation has occurred). Lack of prejudice may be considered, however, in determining what sanction to apply. *See Woodall v. United States*, 684 A.2d 1258, 1265-66 (D.C. 1996) (court may decline to impose sanctions where loss of police contact card constitutes simple, not gross, negligence and results in no significant prejudice); *Groves I*, 564 A.2d at 378 (court found no evidence of bad faith and prejudice to defendant was slight, given four substitute documents); *Gibson v. United States*, 536 A.2d 78, 84 (D.C. 1987) (tapes were erased pursuant to established policy, no indications of bad faith existed, one call contained no descriptions or other material of consequence, and computer print-out pertinent to second call served as "adequate source" of its substance); *Bartley v. United States*, 530 A.2d 692, 697 (D.C. 1987) (erasure was not result of bad faith, tape had minimal impeachment value, and other materials enabled defense to engage in effective cross-examination).

An important variant of the prejudice argument is the contention that a report incorporating the information in a Jencks statement renders the loss of the original statement harmless. "Documents which substantially incorporate notes or records of oral statements of a witness may satisfy the production requirements of the Act depending on the reliability of the reporting process and the absence of prejudice to the defendant." *(Calvin) Moore*, 353 A.2d at 18; *accord Banks*, 305 A.2d at 258-59. The problem is that, while a document incorporating the content of lost material may have some value for impeachment purposes, there is generally no assurance that the original material is incorporated verbatim.[29] The witness's actual words are especially critical in certain cases, such as those involving identification issues. *See supra* Section IV.B. Furthermore, without knowing the exact words of the original statement, the court cannot accurately assess whether the defendant will be prejudiced by the loss. Of course, the same considerations apply where the defense has lost Jencks material sought by the government.

VI. SUGGESTIONS FOR DEFENSE ATTORNEYS

A. Before Trial

Counsel should attempt to learn of the existence of Jencks material as early as possible, both through interviews with government witnesses and from the prosecutor. For example, defense counsel should ask questions such as: "When you spoke to the police, did they take notes?" Defense counsel should specifically request that the prosecutor ask officers and witnesses, at the earliest possible date, about what statements and reports exist. Defense counsel should further

[28] *(Earl) Jones*, 343 A.2d at 352, approved balancing "the degree of negligence involved in the loss of producible material and the possible prejudice to the defendant resulting from the failure to produce such material." *See also Woodall*, 684 A.2d at 1265; *(Kenneth) Montgomery*, 384 A.2d at 662; *United States v. Anderson*, 366 A.2d 1098, 1100-01 (D.C. 1976).

[29] One potentially effective line of questioning of an officer who claims that the original notes were fully incorporated in a subsequent report includes challenging the officer's ability to recall exactly what the original notes included, focusing, for example, on the time lapse between the date of the original statement and the day of trial, as well as the number of intervening descriptions recorded.

request that the prosecutor preserve any and all potential Jencks material. Counsel should also be familiar with the special reports used by various divisions of the police department in particular types of cases, and advise the prosecutor in advance that counsel intends to seek production of any and all such reports.

As discussed below, production of Jencks material during the trial requires counsel to read and incorporate that material while the trial is in progress, and may necessitate recesses to give counsel an adequate opportunity to review documents. To avoid this problem, especially where there is likely to be a large amount of Jencks material, counsel should ask the prosecutor to produce the material in advance. Pre-trial production, while not mandated by the statute, is not precluded and will obviate the need for repeated recesses. Having asked for Jencks material ahead of time, even when the government refuses to produce the material, can give defense counsel leverage in requesting sanctions.

The ABA *Standards for Criminal Justice*, § 11-2.2 (The Prosecution Function) (1980), admonishes prosecutors to disclose Jencks Act material "as soon as practicable following the defense request for disclosure." *See also United States v. Sebastian*, 497 F.2d 1267, 1270 (2d Cir. 1974). The United States Court of Appeals for the District of Columbia Circuit, citing the ABA *Standards*, has criticized the government for withholding Jencks material until the onset of a suppression hearing held on the morning before trial. Recognizing that the government had no legal obligation to turn over the materials earlier, it found the government's delay "particularly troubling" in light of the 60 pages of material. *United States v. Hinton*, 631 F.2d 769, 779-80 (D.C. Cir. 1980).

Before Trial:

- ✓ Learn of the existence of Jencks as early as possible
- ✓ Request that prosecutor produce material in advance of trial

B. During Trial

If the government declines to provide Jencks material before trial, or if counsel becomes aware of additional Jencks statements, counsel should request all Jencks material at the outset of the trial. If the government insists on providing the documents only as required by statute, counsel should request that the jury be excused at the conclusion of the direct examination of each government witness so that production of materials and any additional procedures can take place outside its presence.

The court may recess proceedings for a time "reasonably required for the examination of such statement . . . and [counsel's] preparation for its use in the trial." 18 U.S.C. § 3500(c). Counsel should insist on sufficient time not only to read the documents, but also to integrate them with other material so that they may be used effectively in cross-examination. *Hinton* held that defense counsel provided ineffective assistance by not requesting a recess and taking sufficient time to review materials carefully before proceeding with cross-examination. 631 F.2d at 781-

82. Refusal by the trial court to allow sufficient time for review constitutes an abuse of discretion. *Id.* at 781. *Hinton* is useful authority if the trial court seeks to encourage counsel to proceed with examination after only a few moments of delay. If pre-trial production was sought and denied, counsel should remind the court that it was the government's refusal that necessitated the recess, and that *Hinton* makes clear the importance of thorough review before cross-examination. *But see (Timothy) Washington v. United States*, 499 A.2d 95, 99 (D.C. 1985) (the court's awarding counsel five minutes to examine the material was a reasonable opportunity where the material was only twelve pages and did not contain many inconsistencies).

Unless the prosecutor produces all materials on request and counsel is satisfied that the prosecutor is aware of all Jencks materials, each witness should be examined as to the existence of any additional statements or reports. Counsel should avoid phrasing questions in only conclusory language (e.g., "Did you give any statements?"), but should question the witness in detail to ensure that any and all potential statements are revealed. When a civilian witness cannot say whether law enforcement officers took notes, counsel is entitled to examine the interviewing officers as well.

At the conclusion of the Jencks hearing, counsel should demand production of each statement, identifying each one if possible (e.g., "the notes on yellow paper taken by the uniformed officer who arrived on the scooter").

Once satisfied with the material thus produced, counsel should so announce and inform the court of the time required to examine the materials and integrate them into counsel's planned cross-examination. If a Jencks statement has been identified but is not immediately available for production (e.g., an officer left it at home), counsel cannot be required to proceed with cross-examination until the statement is produced. *See Leach*, 320 F.2d at 671-72.

If the court refuses to order production, counsel should request that the disputed material be incorporated into the record, under seal if necessary, so that it will be available for appellate review. To preserve the objection, counsel should also move to strike the witness's testimony.

Counsel should seek a full evidentiary hearing into the circumstances of any loss or destruction. *See infra* Appendix B. Because prejudice may be relevant to sanctions and to appellate review, counsel should show how the lack of the materials prejudices the defense. Thus, it is necessary to investigate what the missing material contained and, if there is a claim that the material was incorporated into a subsequent document, establish that the officer cannot state with certainty that everything that was in the missing document is contained verbatim in the subsequent document.

The preferable sanction in most cases will be striking the witness's testimony. If the court declines to strike testimony, counsel should be prepared to suggest alternatives (e.g., a missing evidence instruction), while making it clear that the defense is not waiving its request for a more severe sanction. If the court agrees to give only a missing evidence instruction, counsel should offer evidence that will make the instruction meaningful to the jury and establish the evidentiary foundation for closing argument – for example, the regulations requiring that evidence be

preserved, the nature of the evidence lost, and the officer's inability to explain satisfactorily the loss or destruction. *See supra* Section V.B.

Finally, counsel should be alert during Jencks litigation to related legal issues. For example, Jencks material produced at trial may contain exculpatory information that should have been disclosed under *Brady* and its progeny. *See Smith v. United States*, 666 A.2d 1216, 1224-25 (D.C. 1995) (distinguishing a *Brady* violation from a Jencks violation); *see also Boone v. United States*, 769 A.2d 811 (D.C. 2001). Sanctions may be appropriate notwithstanding compliance with the Jencks Act. Similarly, the loss or destruction of material may trigger sanctions not only under the Jencks Act and *Brady*, but also under Superior Court Criminal Rule 16(d)(2). Counsel should therefore explore as fully as possible the nature and contents of lost or destroyed Jencks material.

During Trial:

- ✓ Request all Jencks material at the outset of the trial
  - If the government insists on providing the documents only as required by statute, request that the production of materials and any additional procedures take place outside the presence of the jury
- ✓ Request time to review materials and incorporate them into the cross-examination
- ✓ If the court refuses to order production, request that disputed material be incorporated into the record, for appellate review
- ✓ Seek a full evidentiary hearing for lost or destroyed material
- ✓ Defense counsel should request all applicable sanctions for the record on appeal

APPENDIX A

SAMPLE JENCKS INQUIRY

Civilian Witness

Have you spoken with the police about [subject matter of direct testimony]?

How many times?

When?

For each officer/occasion:

Do you know the name(s) of the officer(s) you spoke with?

Can you describe the officer(s) you spoke with?

Did the officer(s) ask you questions?

You were answering those questions?

The officer(s) had a pad/notebook/paper while you were talking?

The officer(s) had a pen/pencil while you were talking?

The officer(s) was (were) writing as you were talking?

As you were talking, did the officer(s) ask you to repeat anything?

The officer(s) asked you to slow down as the officer(s) was (were) writing?

Did the officer ask you to spell anything?

The officer(s) repeated back part of what you had said, while you were talking? After you had finished, the officer(s) asked if what was repeated was correct?

You were given an opportunity to review what the officer(s) wrote?

You were given an opportunity to make corrections, additions, or deletions in what the officer(s) wrote?

You signed or initialed what the officer(s) wrote?

Was any part of your conversation tape recorded/videotaped?

The officer(s) prepared a typed statement from your discussion?

Other statements:

Have you written, typed or recorded any other information relating to [subject matter of direct testimony]?

Did you provide a copy of that statement/recording to the police or the prosecutor?

You testified before the grand jury or in another hearing or trial about [subject matter of direct testimony]?

Have you spoken with any other assistant United States attorney / assistant attorney general / government lawyer about [subject matter of direct testimony]? [If yes, see above.]

Have you spoken with ambulance personnel / members of the fire department / special police officers about [subject matter of direct testimony]? [If yes, see above.]

Police Officer

You took notes concerning [subject matter of direct testimony]?

You prepared reports concerning [subject matter of direct testimony]? Which ones?

Did you broadcast any information over the radio concerning [subject matter of direct testimony]?

Did you prepare an affidavit in support of an arrest or search warrant?

You testified before a grand jury or in another hearing or trial about [subject matter of direct testimony]?

You papered this case? [If yes, see above.]

How many times have you met with a prosecutor concerning this case? When?

Which prosecutors did you meet with? [If yes, see above.]

Have you discussed the subject matter of your direct testimony with any other police officer/detective? With whom? How many times? When?

Did any other police officer prepare any notes or reports from information you provided?

APPENDIX B

SAMPLE QUESTIONS WITH REGARD TO MPD GENERAL ORDER 601 CONCERNING LOST DOCUMENTS

[Have MPD Order marked for identification.]

Do you recognize this document marked Defense Exhibit 1 for identification? [General Order Series 601, Number 2, "Preservation of Potentially Discoverable Material."]

What is that document?

This Order applies to all members of the Metropolitan Police Department? That includes detectives like yourself assigned to the [Robbery Squad]?

This Order is presently in effect?

And it was in effect on the date you spoke to [Mr. Jones]?

In fact, you previously have received a personal copy of this Order?

You are required to keep it in your personal MPDC manual?

You have a copy of that Order in your manual today? And it was there on the date you spoke to [Mr. Jones]?

Isn't it also true that you are specifically required to be familiar with all general orders of the Metropolitan Police Department? That is a specific duty spelled out in the MPDC manual, is it not?

Let me direct your attention to the first part of this order. The Order imposes on you a "duty to preserve *all* material which constitutes, or might constitute, evidence, or might otherwise be pertinent in a subsequent criminal judicial proceeding?"

Directing your attention to the top of page 2, the phrase in parentheses, the Order specifically includes "an officer's rough notes of the description of the perpetrator of the crime given by the victim or witness prior to the arrest of the suspect," does it not?

Is there anything in the Order that authorizes you to destroy notes?

When you spoke to [Mr. Jones], you knew [he had just been robbed], didn't you? And you realized that it was important to determine what [Mr. Jones] could tell you about [the description of the robber, the time of the offense, the nature of the argument, etc.]?

And you knew that the information you obtained from [Mr. Jones] would be important for any criminal case against [the robber], isn't that right?

And you knew that [Mr. Jones] would likely be called to testify at trial? And asked to describe [the robber]? And that you might be called to testify about what [Mr. Jones] had said?

You were in charge of this investigation, weren't you?

How long did you say you have been on the force? And how long have you been assigned to the [Robbery Squad]?

You know from experience that trials are often delayed, isn't that right?

When you began investigating this case, you knew that it involved a serious crime in which [a citizen had been robbed]?

You handle many cases at one time?

You were handling many cases at the particular time when you interviewed [Mr. Jones]?

And [Mr. Jones'] precise words are important, are they not?

And notes of your interview of [Mr. Jones] would help you remember exactly what [he] said to you, right?

What did you do with the notes immediately after you took them?

And when did you return to your office after that? [What are your usual procedures for preserving evidence?]

Isn't it a fact that you have a locker at the [Robbery Squad] where evidence may be safely preserved?

Isn't it a fact that you could have simply placed those notes in that locker and they would be here today?

Don't you also keep a case jacket on each investigation you are conducting?

That jacket remains in your custody at the [Robbery Squad] until the case is completed in court?

You could have put the notes in that jacket also?

You decided for yourself to destroy these notes? Despite the Department's order? And without authorization from your supervisors? And without consulting the prosecutor? Without consulting anyone?

CHAPTER 26

OBJECTIONS, CROSS-EXAMINATION, AND IMPEACHMENT

I. THE USE OF OBJECTIONS

Objections must be viewed from two perspectives – **technical** (what is objectionable) and **tactical** (when to make or forgo technically proper objections). Technical knowledge is crucial because even a proper objection may be overruled if counsel cannot support it with case law. Tactical considerations are vital because objections will inevitably affect how the jurors view the parties.

A. The Law of Objecting

Counsel must be prepared to state and explain the basis of each objection. The basis need not be lengthy – a single word often suffices – but it must be clear. A basic distinction to keep in mind is the difference between objections to the form of the question and to the substance of the answer sought.

The basic rule is that a party objecting to evidence "must make known to the court and opposing party the specific portion of the testimony that is objectionable and the precise ground on which the party is basing his objection. Grounds not raised in trial court will not require reversal on appeal, absent 'plain error.'" *Williamson v. United States,* 445 A.2d 975, 980 n.5 (D.C. 1982).[1]

1. Objections to form of question

Objections to the form of the question control the way opposing counsel examines a witness. If sustained, they do not preclude inquiry into a given area, but merely require rephrasing of the question. The most common grounds for such objections are:

- Leading – suggests the answer
- Confusing, ambiguous, or misleading – the witness or the jury may misunderstand the question or the answer
- Argumentative – argues with witness's prior testimony or uses the examination to preview closing argument

[1] Persuasive authority from the D.C. Circuit indicates that: (1) when a party seeks to exclude evidence by making a general objection, the court's ruling against the party will be upheld if the appellate court finds any ground for excluding the evidence because the appellate court will assume that the trial court's ruling was made for the right reason; and (2) it is error for the trial court not to clarify its decision when a party seeking to exclude evidence explicitly requests that the court clarify its decision not to exclude the evidence. *United States v. Ashton*, 555 F.3d 1015, 1019 (D.C. Cir. 2009) (quoting 1 MCCORMICK ON EVIDENCE 260 (6th ed. 2006). Based on *Ashton*, it would appear in most contexts that the best strategy for a party seeking to exclude evidence is to state the specific ground or grounds for exclusion and request the court spell out its decision not to exclude the evidence. Thereby, the party precludes plain error review on appeal and also avoids an appellate decision that affirms the trial court by using different reasoning from that of the trial court.

- Repetitious or asked and answered – has been answered adequately in response to a previous question by that attorney

- Compound – asks two or more questions at once

- Assumes facts not in evidence

- Interrupts the witness

2. Objections to Substance of Answer Sought

Objections to the substance of the answer called for by a question attempt to exclude evidence from trial. If sustained, they preclude questioning in the objectionable area. The most common grounds for objections to the substance of the answer sought are that the answer would be:

- Irrelevant – will not render any fact in dispute more or less probable

- Hearsay – will contain or rely upon and imply the truth of an out-of-court statement

- Speculative – will not be based on a witness's first-hand knowledge

- Lacking foundation – will be inadmissible until other facts have been elicited, such as expert qualification, exhaustion of memory, or authenticity of document

- Opinion – will contain an opinion or be based on hypothetical facts where the witness is not qualified as an expert on that subject

B. Method of Objecting

Before trial, counsel should ascertain the particular judge's procedures for objections. Some judges insist that counsel not state the grounds for the objection in the jury's presence, while others require a brief statement from the well of the court. If the reasons for the objection require explanation or risk prejudicing the jury, counsel should request permission to approach the bench.

If it appears before trial that the propriety of a particular line of questioning will raise complex or difficult issues, or that a witness's entire testimony may be subject to objection, counsel should raise the issue as a preliminary matter. If the court allows the testimony, counsel should declare a continuing objection. The objection is not waived by presenting evidence to rebut the evidence to which counsel has objected. *See (Charles) Jones v. United States*, 385 A.2d 750, 752 (D.C. 1978).

C. Objecting to Examination by Court

The court may put questions to witnesses called by any party. *Womack v. United States*, 350 A.2d 381, 383 (D.C. 1976) (intervention proper when necessary to development of facts). *See*

also Fed. R. Evid. 614(b). It may not, however, abandon the neutral judicial role and assume the role of advocate. This concern is greatest in jury trials; however, even during motions or other proceedings without a jury, there are limits to a court's intervention.

> [I]n judge-tried cases in all jurisdictions restrictions on leading questions and impeaching questions are relaxed. Nevertheless, even then, the judge, though he has a wide power to examine witnesses, must avoid extreme exercises of the power to question, just as he must avoid extreme exercises of the power to comment. He must not assume the role of an advocate or of a prosecutor. If his questions are too partisan or even if they are too extensive, he faces the risk that the appellate court will find that he has crossed the line between judging and advocacy.

McCormick on Evidence § 8 at 16 (3d ed. 1984) (footnote omitted). Counsel may object when the court exceeds its judicial role. The Court of Appeals has reversed convictions on this basis alone. "One obvious general rule is that, since the judge is something more than a moderator, but always a neutral umpire, the interrogation of witnesses is ordinarily best left to counsel, who presumably have an intimate familiarity with the case." *Petway v. United States*, 391 A.2d 798, 799 (D.C. 1978) (citing *Jackson v. United States*, 329 F.2d 893, 894 (D.C. Cir. 1964)). Indeed, *Haughton v. Byers*, 398 A.2d 18 (D.C. 1979), held that due process *requires* judicial restraint in propounding questions. Although *Haughton* involved a personal injury suit, the constitutional principle applies to criminal cases as well.

D. The Tactics of Objections

Objections can create the impression that counsel fears particular testimony or desires to keep relevant evidence from the jury. Therefore, there may be times to forgo even meritorious objections, as well as occasions when an objection to an answer already blurted out would only draw the jury's attention to the answer. If the response is fairly short and isolated in the context of the entire examination, silence may be the lesser evil.

On the other hand, some objections must be made in order to prevent or ameliorate harm, or to preserve error for appellate review. The manner of objecting should convey to the jury that it is counsel's duty to object. *See Criminal Jury Instructions for the District of Columbia*, No. 1.102 (5th ed. 2009). If a sense of unfairness is conveyed, the unfairness should be clearly attributable to opposing counsel. As outlined below, counsel must object to anything that is both improper and damaging. Objections can also be used to protect witnesses; a proper objection can give a confused or flustered witness time to collect his or her thoughts.

As a general rule, there is no reason to object if the answer will do no harm. One must know the direction in which opposing counsel is headed and have an idea of the likely responses to a particular line of questioning. Failure to object to a line of inquiry that at first does not harm the defense but later becomes damaging may cause the court to rule that the belated objection has been waived.

A difficult decision must be made when the court examines a witness. Most jurors respect the court and pay particular attention to the court's questions. Thus, objections are likely to make counsel appear defiant and suspiciously eager to keep out what the jury may infer to be important evidence. One way to deal with the situation is to request permission to approach the bench without stating the objection.

Failure to object, for any reason, will relegate any resulting error to the category of "plain error" on appeal. Few cases are reversed under that stringent standard of review.

Should the court make what counsel believes to be an erroneous ruling, and counsel believes fuller explanation might persuade the court to reverse itself, counsel should approach the bench to rectify the situation. Getting to the bench can be difficult, but a statement such as "Your Honor, may we approach the bench because there are other factors that might have a bearing on the court's approach to the issue," may solve the problem.

Counsel should not be afraid to make necessary objections during opening statements and closing arguments. Counsel should ascertain beforehand the court's preference for the timing of objections – whether objections should be made contemporaneously or later at the bench.

Making Objections:

- ✓ Ascertain the judge's procedure for objections
- ✓ Be prepared to state and explain the basis of each objection, i.e., the specific portion that is objectionable and the precise ground on which to base the objection
- ✓ Request to approach the bench if reasons for the objection risk prejudicing the jury
- ✓ Declare a continuing objection when objection raised is overruled
- ✓ Object when court exceeds its judicial role
- ✓ Object to anything that is improper or damaging
- ✓ Do not make objections when answer will not be harmful
- ✓ Determine the direction of the testimony in order to be able to object to a particular line of inquiry
- ✓ Request to approach the bench should the court make what counsel believes is an erroneous ruling

II. CROSS-EXAMINATION

A. The Right to Cross-Examination and Its Limitations

The defendant has a constitutional right to cross-examine prosecution witnesses.

> The right of cross-examination is more than a desirable rule of trial procedure. It is implicit in the constitutional right of confrontation, and helps assure the "accuracy of the truth-determining process." It is, indeed, "an essential and

> fundamental requirement for the kind of fair trial which is this country's constitutional goal."

Chambers v. Mississippi, 410 U.S. 284, 295 (1973) (citations omitted). *Davis v. Alaska*, 415 U.S. 308, 316 (1974), emphasized the importance of cross-examination, calling it "the principal means by which the believability of a witness and the truth of his testimony are tested." Indeed, cross-examination is so essential that its denial without waiver is "constitutional error of the first magnitude and no amount of showing of want of prejudice [can] cure it." *Brookhart v. Janis*, 384 U.S. 1, 3 (1966). *See Davis*, 415 U.S. at 318; *Smith v. Illinois*, 390 U.S. 129, 131 (1968); *Goldman v. United States*, 473 A.2d 852 (D.C. 1984).

The court may limit cross-examination that is repetitive and unduly harassing, unnecessarily degrading or humiliating to the witness, unnecessarily confusing to the jury, or irrelevant to the issues raised at trial. *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986); *Barnes v. United States*, 614 A.2d 902, 904 (D.C. 1992); *Roundtree v. United States*, 581 A.2d 315, 323 (D.C. 1990). In determining whether a restriction was proper, the appellate court will evaluate the scope of any cross-examination actually permitted against the importance of cross-examination on the particular subject. *Springer v. United States*, 388 A.2d 846, 857 (D.C. 1978) (cross-examination on witness's bias or ulterior motive for testifying found particularly important); *see also (James A.) Brown v. United States*, 409 A.2d 1093, 1100 (D.C. 1979).

The court's discretion is circumscribed by constitutional principles and will be subjected to careful scrutiny on appeal:

> Central to the fundamental right of confrontation and to the conduct of an effective defense is the opportunity to cross-examine government witnesses against the defendant . . . "[T]he extent of cross-examination [of a witness] . . . is within the sound discretion of the trial court" . . .
>
> However, the permissible scope of cross-examination "must be limited with the utmost caution and solicitude for the defendant's Sixth Amendment rights" . . . The trial court's "wide latitude in the control of cross-examination . . . 'cannot . . . justify a curtailment which keeps from the jury relevant and important facts bearing on the trustworthiness of crucial testimony.'"

Springer, 388 A.2d at 854-55 (citations omitted); *see also Tyler v. United States*, 705 A.2d 270, 277-78 (D.C. 1997). Accordingly, erroneous curtailment of cross-examination will require reversal unless it is harmless beyond a reasonable doubt. *Van Arsdall*, 475 U.S. at 679; *United States v. (Gregory) Thomas*, 114 F.3d 228 (D.C. Cir. 1997) (limiting cross-examination amounts to abuse of trial court discretion if the result is prejudicial to the substantial rights of the defendant); *see also Blunt v. United States*, 863 A.2d 828 (D.C. 2004) (violation of confrontation clause to preclude defense from cross-examining key government witness about case on Maryland's "stet" docket in order to show a bias to curry favor with the government.); Isler *v. United States*, 731 A.2d 837 (D.C. 1999) (reversal where cross-examination on bias was improperly curtailed); *In re S.H.*, 570 A.2d 814, 818 (D.C. 1990); *Brooks v. United States*, 516 A.2d 913 (D.C. 1986). *Compare Goldman*, 473 A.2d 852 (reversal where cross-examination on

bias was curtailed *in limine*), *Lawrence v. United States*, 482 A.2d 374, 376-77 (D.C. 1984) (reversible error to prevent exploration of similar and false accusations by key government witness), *and In re W.A.F.*, 407 A.2d 1062 (D.C. 1979) (reversible error to prevent cross-examination on uncertainty of complainant's identification), *with Matthews v. United States*, 892 A.2d 1100 (D.C. 2006) (court stated that the government "arguably should have been precluded from impeaching" witness with her failure to tell authorities about the alibi, but concluded that it did not need to decide the issue because the error was harmless – government's case was strong, and the impeachment did not seriously damage witness's credibility), *Adams v. United States*, 883 A.2d 76 (D.C. 2005) (defendant argued that the trial court erred in limiting his cross-examination of two witnesses about their drug use at the time of the shooting, without deciding error, the court held that such error would be harmless because defendant was permitted to ask the witnesses whether they were using drugs at the time of the shooting; he was only restricted in his questions regarding whether the witnesses saw other witnesses using drugs), *Moreno v. United States*, 482 A.2d 1233, 1238 (D.C. 1984) (harmless error to restrict examination into complainant's bias against members of defendant's race), *McNeil v. United States*, 465 A.2d 807, 811-12 (D.C. 1983) (trial court's improper limitation of impeachment of accomplice found harmless where sufficient facts were brought forth for the jury to infer that the accomplice "was motivated to testify against appellant by a belief that if she did so things might go better for her in her own criminal cases"), *and Rhodes v. United States*, 354 A.2d 863, 866 (D.C. 1976) (despite constitutionally erroneous denial of the right to cross-examine on possible bias of government witness, "the facts . . . establish lack of prejudice beyond a reasonable doubt").[2] *But see Scott v. United States*, 953 A.2d 1082 (D.C. 2008) (trial judge did not abuse discretion in foreclosing cross-examination into complainant's motivation for changing her version of events after conducting a comprehensive *voir dire* of witness where she testified that she did not disavow her recantation out of fear of losing her children, and thus her motive was not to falsely accuse defendant); *Riley v. United States*, 923 A.2d 868 (D.C. 2007) (no error for trial court to limit cross-examination by defense counsel into witness's possible knowledge of whether individuals from one gang were being prosecuted for shooting members of defendant's gang where inference would have been that reason for murders was "justice," which could not justify the homicide, and where there was substantial evidence of defendant's guilt); *Fleming v. United States*, 923 A.2d 830 (D.C. 2007) (not abuse of discretion for trial court to limit defendant's cross-examination of officer on grounds of relevancy where defense counsel's questions related to field test for marijuana, but defendant was tried on charge of unlawful possession with intent to distribute PCP, and where responses to questions about general procedure for handling evidence, or why person who conducted field test for marijuana was not identified, would not make it less probable that defendant possessed PCP with intent to distribute it); *Woodall v. United States*, 842 A.2d 690 (D.C. 2004) (court did not err in subsequently correcting false testimony admitted at trial, by permitting cross-examination of police detective that unequivocally contradicted the witness's testimony on the fabricated points).

The court should permit exploration during cross-examination of all matters that contradict, modify, or explain the witness's testimony during direct examination, including matters brought out on direct examination or directly relevant to them, to inferences from them, or to the

[2] Furthermore, a judge's asking questions on behalf of (or even offering to serve as a conduit for questions from) a party is an inadequate substitute for the right to adversarial cross-examination. *Tyree v. Evans*, 728 A.2d 101, 105-06 (D.C. 1999).

witness's credibility or veracity.[3] *See Kinard v. United States*, 635 A.2d 1297, 1306 (D.C. 1993); *Brooks v. United States*, 536 A.2d 1091, 1093 (D.C. 1988); *Goldman*, 473 A.2d at 856; *Morris v. United States*, 389 A.2d 1346, 1352 (D.C. 1978); *Springer*, 388 A.2d at 855; *(Curtis) Smith v. United States*, 330 A.2d 519, 520 (D.C. 1974);[4] *cf.* Fed. R. Evid. 611(b). Where a witness is unable to recall relevant events, the Sixth Amendment right to confrontation is not violated as long as the party has a full and fair opportunity to cross-examine the witness. *United States v. Owens*, 484 U.S. 554, 557 (1988); *Carey v. United States*, 647 A.2d 56, 59 (D.C. 1994); *(Samuel) Wright v. United States*, 637 A.2d 95, 102 (D.C. 1994).

The court also has discretion to terminate cross-examination after the defense has exercised the right "substantially and fairly." *See Rhodes*, 354 A.2d at 866; *United States v. Pugh*, 436 F.2d 222, 225 (D.C. Cir. 1970). It may cut off cross-examination that is protracted, *Davenport v. District of Columbia*, 61 A.2d 486, 489 (D.C. 1948); repetitive, *Wright v. United States*, 183 F.2d 821, 822 (D.C. Cir. 1950); unfairly besmirches the witness or the defendant, *Welch v. United States*, 689 A.2d 1 (1996) (trial court did not abuse discretion in denying a continuance to prepare for cross-examination of a witness when counsel thoroughly crossed the witness without the benefit of a continuance); for which the proponent of the question clearly has no good faith basis, *(James D.) Brown v. United States*, 726 A.2d 149 (D.C. 1999); *Rogers v. United States*, 419 A.2d 977, 981 (D.C. 1980) (cross-examination on witness's drug habit properly disallowed absent foundation that witness was using drugs at time of incident); *United States v. Wooden*, 420 F.2d 251, 253 (D.C. Cir. 1969) (cross-examination of a witness concerning defendant's convictions for drunkenness deemed irrelevant to his reputation for honesty and integrity); *Howard v. United States*, 389 F.2d 287, 292 (D.C. Cir. 1967); or is of little probative value, *Brooks v. United States*, 396 A.2d 200, 207 (D.C. 1978); *(Willie) Smith v. United States*, 389 A.2d 1364, 1370 (D.C. 1978). *See also (Nathaniel) Jones v. United States*, 548 A.2d 35, 39 (D.C. 1988) (cross-examination on defendant's cocaine use appropriate where defendant put his sophistication with respect to drugs at issue); *Wesley v. United States*, 547 A.2d 1022, 1025 (D.C. 1988) (no abuse of discretion in allowing cross-examination about defendant's drug dealings where direct examination "opened the door"). *But see (Milton) Price v. United States*, 697 A.2d 808, 815 (D.C. 1997) (defendant's testimony on direct examination in narcotics case that he did not appear for pretrial status conference because he believed his case would be dismissed did not permit government to impeach defendant with his plea bargain discussions on

[3] During cross-examination of an adverse witness, one must be extremely careful not to elicit damaging information because, upon appellate review, counsel may be viewed as having created the situation about which they are complaining. *Gonzalez v. United States*, 697 A.2d 819, 826 (D.C. 1997).

[4] *See also Irving v. United States*, 673 A.2d 1284 (D.C. 1996) (properly limited cross-examination of police informant concerning informant's psychiatric history); *Van Ness v. United States*, 568 A.2d 1079, 1082 (D.C. 1990) (no reversible error in restriction of bias cross-examination after allowing inquiry into bias inherent in police officer's role as member of special drug interdiction team); *Deneal v. United States*, 551 A.2d 1312, 1315 (D.C. 1988) (no abuse of discretion in curtailing cross-examination on police officer's bias or incentive to misrepresent circumstances justifying an arrest); *Hart v. United States*, 538 A.2d 1146, 1148 (D.C. 1988) (cross-examination on type of credit cards used by complainant, to show familiarity between complainant and defendant, not inappropriately curtailed when subject was not raised by complainant's direct testimony and defense could have called complainant in its case); *Waller v. United States*, 389 A.2d 801, 810 (D.C. 1978) (not improper to cut off cross-examination about prior description of co-defendant whom witness did not identify in court). *But see United States v. Raper*, 676 F.2d 841, 846 (D.C. Cir. 1982) (defendant could not testify for limited purpose of introducing trench coat he claimed to have been wearing during his arrest without opening door to broad cross-examination).

cross-examination). *Flores v. United States*, 698 A.2d 474 (D.C. 1997), held that although trial courts "have a measure of discretion to manage their trials by placing limits on cross-examination as a way to deal with the realities of crowded court schedules . . . any fixed pre-set limit must be subject to review and modification in order to accommodate a defendant's Sixth Amendment right to confront witnesses against him." *Flores*, 698 A.2d at 479-80 (citing *Springer*, 388 A.2d at 855). Thus, the court found reversible error where the trial court "held trial counsel to a pre-set time limitation, refusing to hear defense counsel's proffers concerning . . . additional questions." *Id*. at 480. The court noted that the trial court "had no basis, in the face of unanticipated difficulties with interpretation, to adhere to a unilaterally-imposed predetermined plan without first allowing defense counsel to at least proffer the questions she had not had an opportunity to ask." *Id*.

Counsel may not "allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence." D.C. R. Prof. Cond. 3.4(e); *see also ABA Standards for Criminal Justice*, 4-7.6(d) ("It is unprofessional conduct for a lawyer to ask a question which implies the existence of a factual predicate for which a good faith belief is lacking"); Code of Professional Responsibility, DR 7-106(C)(2) & EC 7-25 ("a lawyer should not ask a witness a question solely for the purpose of harassing or embarrassing him").[5]

However, in many cases counsel may have "only a well reasoned suspicion that a circumstance might be true" and, in such cases, cross-examination is to be permitted. *Pugh*, 436 F.2d at 225 (extensive questioning on theory of mistaken identification should have been permitted, even though counsel admitted having no factual foundation for the questions); *see Ray v. United States*, 620 A.2d 860, 863 (D.C. 1993) (court may limit inquiry where factual basis is founded on "an improbable flight of fancy" rather than "well reasoned suspicion"). The trial judge in *Hazel v. United States*, 319 A.2d 136, 139 (D.C. 1974), threatened disciplinary measures if counsel asked a question based on information supplied by the defendant which counsel did not know to be true, when the defendant did not intend to testify. The Court of Appeals disagreed: "the assumed factual predicate for the question was neither known by counsel to be false, nor inherently incredible, thus . . . amount[ing] to unprofessional conduct." *Id*. at 139.

If the government objects to a line of questioning on this ground, a proffer of relevance and materiality should be made, but the court may not require an exhaustive proffer:

> Counsel often cannot know in advance what pertinent facts may be elicited on cross-examination. For that reason it is necessarily exploratory; and the rule that the examiner must indicate the purpose of his inquiry does not, in general, apply. It is the essence of a fair trial that reasonable latitude be given the cross-examiner,

[5] In cross-examining the defendant in *Bliss v. United States*, 445 A.2d 625, 634 (D.C. 1982), *modified*, 452 A.2d 172 (1982), the prosecutor implied that the defendant had referred to certain evidence in his statement to the police. In fact, the statement did not refer to the evidence. Moreover, the implication undermined the defense theory that the defendant had not participated in the offense. On appeal, the government conceded that the cross-examination was improper. Although the court held that the error did not entitle the defendant to a mistrial, then Chief Judge Newman stated: "The conduct of the Assistant United States Attorney … was unprofessional and unseemly. Equal justice under law demands more than the government's advocate gave on this occasion." *Id*. at 634 (concurring opinion).

> even though he [or she] is unable to state to the court what facts a reasonable cross-examination might develop . . . To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial.

Alford v. United States, 282 U.S. 687, 692 (1931), quoted in *Moss v. United States*, 368 A.2d 1131, 1135 n.2 (D.C. 1977); *see also Scull v. United States*, 564 A.2d 1161, 1164 (D.C. 1989). Moreover, in the interest of due process, the court may not restrict cross-examination without allowing counsel to make a proffer. *See Holmes v. United States*, 277 A.2d 93, 95 (D.C. 1971).

If counsel intends to cross-examine a witness in a manner designed to suggest or establish that the witness or someone else other than the defendant committed the crime charged, counsel should be prepared to proffer evidence that "tend[s] to indicate some reasonable possibility that a person other than the defendant committed the charged offense." *Winfield v. United States*, 676 A.2d 1, 4 (D.C. 1996) (en banc);[6] *see also Freeland v. United States*, 631 A.2d 1186, 1188-89 (D.C. 1993) (reversing murder conviction where trial court erroneously failed to allow the defendant to admit evidence tending to suggest that someone else had murdered his wife); *(Woredell) Johnson v. United States*, 552 A.2d 513, 516 (D.C. 1989).

Comments on Another Witness's Veracity: Counsel may not ask one witness to comment on another witness's veracity either directly or indirectly. *See Gardner v. United States*, 698 A.2d 990 (D.C. 1997) (trial court's regulation of cross-examination of rape victim as to motive to embellish was not abuse of discretion; defense counsel's questions, though relevant, were posed in manner that required victim to speculate on state of mind of her friends); *McLeod v. United States*, 568 A.2d 1094, 1097 (D.C. 1990); *Poteat v. United States*, 559 A.2d 334, 336 (D.C. 1989) (prosecutor asked defendant whether police had made a mistake in identifying him as the person who had sold drugs); *Freeman v. United States*, 495 A.2d 1183, 1187 (D.C. 1985) (prosecutor summarized government witnesses' testimony and asked defendant why they would lie).

Suggestion of Missing Witness: A suggestion through cross-examination that a person who has not been called as a witness would give testimony that contradicts the testifying witness is tantamount to a missing witness argument. Any such suggestion is forbidden without advance approval by the court based on a determination that the necessary preconditions exist. *See (Andrew) Price v. United States*, 531 A.2d 984, 993 (D.C. 1987) (reversing in part because cross-examination of defendant revealed that he had failed to call his mother, sister, and niece as alibi witnesses). Such error is especially dangerous when indulged in by the government, as it "might improperly imply that the burden of proof has shifted or that a defendant has been saddled with the responsibility to produce witnesses." *Id*. at 994.

In contrast, counsel enjoys latitude in cross-examination of witnesses on issues for jury determination. *See, e.g., Samuels v. United States*, 605 A.2d 596, 598 (D.C. 1992) (direct

[6] In an 8 to 1 decision, the *en banc* court discarded the *Brown/Beale* "clear link" principle in favor of the "reasonable possibility" test of *(Woredell) Johnson v. United States*, 552 A.2d 513 (D.C. 1989).

examination establishing that a witness would have no motive to help defendant "opened the door" to cross-examination based on witness having received PCP from, and used PCP with, defendant); *Mathews v. United States*, 539 A.2d 1092, 1093 (D.C. 1988) (in self-defense case where defendant likely could have raised insanity defense, trial court properly allowed cross-examination on reasonableness of defendant's apprehension of need for self-defense, including his fear of a conspiracy against him); *Wesley*, 547 A.2d at 1025 (questions regarding defendant's drug use proper when defendant testified on direct that he had been selling drugs on the date of the offense and used the site of the robbery to hide his drugs).

Fifth Amendment Privilege: Finally, problems may arise where a witness asserts a privilege against self-incrimination and refuses to answer questions on cross-examination. "[W]hen a conflict arises between a witness's proper exercise of his Fifth Amendment privilege against self-incrimination and the defendant's right to confront witnesses, a proper balance must be struck." *McClellan v. United States*, 706 A.2d 542 (D.C. 1997) (citing *(Irving) Johnson v. United States*, 418 A.2d 136, 140 (D.C. 1980) (quoting *United States v. Gould*, 536 F.2d 216, 222 (8th Cir. 1976)). If the witness's answers are protected by the Fifth Amendment, the court should strike the witness's direct testimony.

> The crucial consideration . . . is whether a witness' claim of Fifth Amendment privilege precludes cross-examination of that witness concerning his or her testimony bearing upon the substantive offense or offenses, as distinguished from subsidiary or subordinate matters. If cross-examination is so precluded, the testimony must be stricken in relevant part. Furthermore, since "the line between 'direct' and 'collateral' is not clear, . . . the question in each case must finally be whether [the] defendant's inability to make the inquiry created a *substantial degree of prejudice* by depriving him of the ability to test the truth of the witness' direct testimony."

(Irving) Johnson v. United States, 418 A.2d 136, 140 (D.C. 1980) (citations omitted). Johnson was charged with the armed robbery of Martha Ellis. In cross-examining Ellis, counsel sought to establish that Johnson had received a large quantity of marijuana from Ellis and her boyfriend and had failed to pay for it. Counsel would then have sought to convince the jury that Ellis simply fabricated the armed robbery in retaliation. Ellis invoked her Fifth Amendment privilege and refused to answer. Because the cross-examination went to the critical part of the witness's possible bias, the trial court's refusal to strike the witness's testimony on direct examination was reversible error. *See also Isler*, 731 A.2d 837; *United States v. Sampol*, 636 F.2d 621, 670 (D.C. Cir. 1980). *But see Ginyard v. United States*, 816 A.2d 21 (D.C. 2003) (Sixth Amendment right to cross-examine not implicated when government failed to call a witness it mentioned in opening statement); *Velasquez v. United States*, 801 A.2d 72 (D.C. 2002) (no violation of Sixth Amendment rights to confront the complainant with respect to her mental breakdown three years after the offense; the witness's competency was not at issue and the records were neither relevant to her perception of the event nor to alleged "false claims"); *Crutchfield v. United States*, 779 A.2d 307 (D.C. 2001) (no improper restriction on cross-examination with respect to prior bad acts of a witness that were remote in time from the events on trial, or to alleged bias that was too speculative, or to matters that were outside the scope of direct or not relevant); *Guzman v. United States*, 769 A.2d 785 (D.C. 2001) (limitations on cross-examination did not violate Sixth

Amendment); *Shorter v. United States*, 792 A.2d 228 (D.C. 2001) (improper restriction on cross-examination of recantation of a previous accusation of sexual abuse against the defendant, and refusing to allow *voir dire* of the complainant and the complainant's mother to establish that the recanted accusation was false); *Bueno v. United States*, 761 A.2d 856 (D.C. 2000) (affirming trial court's denial of motion to disclose observation post where police officer was sole eyewitness to alleged drug transactions); *(Maurice) Martin v. United States*, 756 A.2d 901 (D.C. 2000) (defendant was not denied his Sixth Amendment right to be confronted with witnesses against him when the court held a hearing outside the presence of defendant's jury at which the victim of the aggravated assault refused to testify at defendant's trial and was held in contempt); *(David) Washington v. United States*, 760 A.2d 187 (D.C. 2000) (stalking conviction affirmed with holding, *inter alia*, that defendant was not entitled to cross-examine complainant to elicit that her previous criminal complaint against him had been dismissed for want of prosecution where there was no showing that prior complaint had been false); *McClellan v. United States*, 706 A.2d 542 (D.C. 1997) (no abuse of discretion to limit cross-examination of witness in way that honored witness's Fifth Amendment privilege where defense had "a completely adequate opportunity to bring to the jury's attention his bases for contending that [the witness] was biased against him").

2014 Supplement

***Andrade v. United States*, 88 A.3d 134 (D.C. 2014).** Defendant not prejudiced by prosecutor's negative comments about his use of an interpreter where trial court "properly handled" questions and comments by prosecutor that appeared to express her personal opinion about defendant's veracity and that tended to denigrate and disrespect his right to and use of an interpreter to understand the proceedings against him.

***Austin v. United States*, 64 A.3d 413 (D.C. 2013).** Trial court did not abuse its discretion in limiting defendant's cross-examination of government witness for bias regarding a CFSA complaint that was temporally and factually unrelated to issues raised at trial.

***Daniels v. United States*, 33 A.3d 324 (D.C. 2011).** Not abuse of discretion to deny recall of an officer for cross-examination on photograph showing police officers and civilians on scene after arrest had taken place where photograph was deemed irrelevant because it was taken "well" after the criminal conduct had transpired.

***Diggs v. United States*, 28 A.3d 585 (D.C. 2011).** Trial court did not err in limiting defendant's cross-examination of witness as to supposed steroid use and psychiatric treatment where witness denied using steroids or other drugs, being under their effect, or being treated for mental health problems when he spoke with police about defendant's confession to him about murder.

***Garibay v. United States*, 72 A.3d 133 (D.C. 2013).** Court infringed on defendant's Sixth Amendment right of confrontation by precluding him from questioning complainant about previous allegation of sexual assault where defendant proffered "good faith basis" to question veracity of prior allegation as demonstrated by defendant's informing court that official investigation had concluded with determination that prior allegation of assault was unsubstantiated and where issue of minor's veracity was not settled by voir dire of her mother.

***Gay v. United States*, 12 A.3d 643 (D.C. 2011).** Reversible error to preclude witness from testifying on grounds that it was cumulative where proffered testimony of unnamed witness was markedly similar to instant case.

***Graure v. United States*, 18 A.3d 743 (D.C. 2011).** No abuse of discretion in limiting cross-examination of club manager regarding defendant's level of intoxication where not a "shred of evidence" to support defendant's theory that manager was fabricating testimony to implicate defendant and protect himself from liability in club fire.

***Jordan v. United States*, 18 A.3d 703 (D.C. 2011).** Trial court did not err in restricting cross-examination of accomplice regarding statement made in an earlier, unrelated Maryland prosecution that nearly mirrored one of three false statements made in present case where witness admitted on direct to having given three false statements, including the one at issue, and where witness acknowledged that he had received a reduced sentence in the Maryland case, he was testifying in the present case pursuant to a plea agreement, and the government had dropped some of the charges against him.

Trial court did not err in rejecting defense request to quote detective's statements in which he "suggested" to accomplice what had happened where defendant was able to elicit information sought by asking about the statements generally.

***Lloyd v. United States*, 64 A.3d 405 (D.C. 2013).** Trial court erred in allowing prosecutor to question defendant about whether two other witnesses had fabricated their testimony against him, *see McLeod v. United States*, 568 A.2d 1094 (D.C. 1990), though not plainly, where court instructed jury that attorney statements did not constitute evidence, and where matters to which disputed questioning pertained were brief deviations over course of trial and relatively tangential in nature.

***Longus v. United States*, 52 A.3d 836 (D.C. 2012).** Sixth Amendment violation for court to curtail bias cross-examination regarding detective's involvement in witness coaching.

***Melendez v. United States*, 10 A.3d 147 (D.C. 2010).** No Sixth Amendment violation to limit bias cross-examination of witness that defendant alleged was true perpetrator and from whom defendant wanted to elicit testimony about a desire to curry favor with the government in exchange for leniency as to his violation of a New York stay-away order where trial counsel laid insufficient foundation for request by failing to provide court with any detail regarding alleged violation, including time and place of its occurrence.

***McClary v. United States*, 3 A.3d 346 (D.C. 2010).** Amended on reh'g, 28 A.3d 502 (2010), clarified, 30 A.3d 808 (2011). Constitutional error to limit any bias cross-examination of complaining witness into independent area of witness's pre-trial arrest, the no-papering of one of those charges, and the pending status of the other cases. However, the error was harmless because the complainant's testimony was corroborated by multiple eyewitnesses. N.B.: Original opinion found no error.

***Mungo v. United States*, 987 A.2d 1145 (D.C. 2010).** No abuse of discretion to allow testimony of individual that defendant asked to murder government witness where testimony came in only on cross-examination to bolster individual's credibility that defendant would ask enemy to kill government witness for him.

***Kaliku v. United States*, 994 A.2d 765 (D.C. 2010).** Multiple interjections by trial judge during cross-examination by defense counsel proper and did not evidence judicial bias where most often made when line of questioning was inappropriate or repetitive, sufficient cordiality existed between defense counsel and the court, and jury instructions were sufficient to avoid appearance of potential judicial bias to jury.

***Kaliku v. United States*, 994 A.2d 765 (D.C. 2010).** No Sixth Amendment violation to limit defense cross-examination into complaining witness's "common practices" as a prostitute where defendants failed to proffer their expanded rationale for such cross-examination to trial court and where such testimony would have been unduly prejudicial.

B. The Decision to Cross-Examine

Goals of Cross-Examination: Cross-examination may be designed to: (1) support or corroborate the defense theory by establishing additional evidence or facts that corroborate evidence to be introduced through defense witnesses; (2) contradict evidence introduced through another government witness; or (3) discredit the testimony of the witness being examined. Of course, counsel may cross-examine for several different purposes, and may wish to argue that some but not all of the witness's testimony should be believed.

Cross-examination should be conducted only if it is likely to further at least one of these three goals. For example, suppose a ballistics expert testifies to connect a bullet found near the body to a gun found in the defendant's apartment. The defense theory is self-defense; the defense does not contest that the defendant shot the victim. There is no purpose in discrediting this witness. However, the witness may be able to testify that examination of the clothing showed that the shot was fired from less than two feet away, supporting the defense theory. Likewise, if the medical examiner testifies that death was caused by a bullet puncturing the decedent's lung, counsel may be able to use the expert to establish that the bullet entered at an angle that would tend to support the theory of self-defense.

Counsel must weigh the expected benefits against the risk of losses, even where cross-examination may be useful. Almost all cross-examination entails risks. For example, it may strengthen the witness's testimony by emphasizing the facts to which he or she testified, bring out new adverse facts, or arouse sympathy for the witness and hostility toward the defense. *See generally* L. Pozner & R. Dodd, *Cross Examination: Science and Techniques* Ch. 1 (1993). It may open the door to damaging and otherwise improper redirect examination. *See Beale v. United States*, 465 A.2d 796, 800 (D.C. 1983) (where defense sought to discredit police officer by suggesting that officer had not investigated the case fully and had not talked to several defense witnesses, government could establish on redirect that one of those witnesses had been a fugitive). Often these risks must be taken because the witness has hurt the defense case and must

be discredited, or because important evidence can be brought out only through that witness. In other cases, careful questions can minimize the risks.

> That lawsuits are sometimes lost in cross-examination is reason enough to beware of any unyielding rule that you cross-examine every witness. It is possible, however, that failure to cross-examine a witness may lead the jury to conclude that you concede that [the] testimony is correct, or that you have no way of disputing it though you might wish that you could do so. In rare instances the testimony of your adversary's witness is so favorable or so sound and undisputed that you are willing to adopt it, and you may even smile warmly as you say, "We have no questions."

R. Keeton, *Trial Tactics and Methods* 98 (3d ed. 1973). However, if adopting the witness's testimony will hurt the client's defense, then cross-examination of the witness is necessary. *See (Nathaniel) Thomas v. United States*, 824 A.2d 26 (D.C. 2003) (per curiam) (harmless error to preclude cross-examination of witness's fitness as a parent to explain motive to lie); *(Garfield) Gordon v. United States*, 783 A.2d 575 (D.C. 2001) (although trial court properly allowed some redirect on the reason for the witness's reluctance to testify after defense counsel opened the door, it failed to properly weigh the prejudicial effect of the witness's extensive, highly emotional testimony of fear); *Moore v. United States*, 757 A.2d 78 (D.C. 2000) (no abuse of discretion in curtailing defendant's direct examination of MPD officer regarding his failure to list defendant's personal medical records on the PD 163 when counsel had a full opportunity to cross-examine the same police officer and either by decision or by inadvertence had failed to use the opportunity to examine on the issue).

Counsel should weigh the benefits against the risk of losses, even where cross might be useful.

C. Establishing Facts to Support the Defense Case

If one objective is to establish facts to support the defense theory or to contradict facts given by another government witness, the technique must be consistent with that objective. Accordingly, counsel should not try to undermine the witness's credibility as to evidence helpful to the defense case. Counsel is free to establish any facts relating to a subject inquired into on direct examination. *C.f., e.g., United States v. Stamp*, 458 F.2d 759, 763 (D.C. Cir. 1971) (trial court correct in not allowing defense to cross-examine on matters relating only to an affirmative defense and not brought out on direct); *Baker v. United States*, 401 F.2d 958, 987 (D.C. Cir. 1968). Examples of specific objectives in cross-examinations appear below:

Supporting an alibi defense: An eyewitness has identified the defendant as the perpetrator of the robbery. Counsel intends to show that the witness lacked a good opportunity to observe, but also knows that the witness can establish that the event occurred at 3:00, when the defense evidence

places the client elsewhere. These objectives are not inconsistent and may complement each other; the witness's view was obstructed, but his perception and memory of the time are accurate.

Undermining the government's theory of motive: The defendant allegedly shot and killed his wife. The victim's sister testifies to hearing a violent argument between the two a week earlier, in which the defendant vented his jealousy over his wife seeing another man. While the defendant does not contest this, he will testify that the argument was resolved amicably the next day when the wife promised not to see the man again, and that the relationship had been good since then. The objective is to bring out the witness's observations of the relationship in the week after the argument.

Support for a motion to suppress statements: The defendant purported to waive his Fifth and Sixth Amendment rights by signing a PD-47 "waiver of rights" card. Counsel wants to suppress a later statement on grounds that the waiver of rights was involuntary. Cross-examination of the police officer who secured the signature on the card should be leading and should include the facts necessary to the legal argument:

Q. Mr. Smith was handcuffed to a chair, right?
A. Yes.

Q. He was not allowed to leave the room, right?
A. That's right

Q. You and Officer Jones were with him alone, right?
A. Yes.

Q. You both questioned him for three hours?
A. Right.

Q. Without interruption, isn't that correct?
A. Yes.

D. Discrediting the Witness

The objective of discrediting the witness is to show that the witness is either lying or honestly mistaken. "[T]here is far less intentional perjury in the courts than the inexperienced would believe . . . [O]n the other hand, evidence itself is far less trustworthy than the public usually realizes." F. Wellman, *The Art of Cross-Examination* 27 (4th ed. 1986).

United States v. Kearney, 420 F.2d 170, 174-75 (D.C. Cir. 1969), recommended that before impeaching a witness on an inflammatory or otherwise questionable subject matter, counsel should approach the bench and make a general proffer so that the basis for the proposed cross-examination may be explored out of the jury's presence. It is good practice to prepare a memorandum of law on the propriety of any questionable line of impeachment.

Prepare a memorandum of law on the propriety of any questionable line of impeachment.

1. Assumption that witness is not lying – attacking perception and memory

A witness who is honestly mistaken may have a faulty perception of the event, an unreliable memory of the event, or a perception or memory of the event that is warped by bias.

One of the most common subjects of cross-examination is the reliability of the witness's perception of the event, e.g., the circumstances under which an eyewitness identification is made. Counsel will want to consider inquiring into, among other things, the following:

- **The witness's innate physical ability to perceive** – Does the witness wear eyeglasses? Were the glasses worn at the time of the event? Was the witness under the influence of alcohol or other drugs that might have impaired his or her ability to observe and recall accurately?

- **External impediments to the witness's perception** – obstructions, bad lighting, a short span of time in which to observe.

- **Psychological hindrances to accurate perception** – the degree of the witness's attention and distractions such as fear for the witness's own safety.

See J. Jeans, *Trial Advocacy* 13.12 (1975).

Faulty Memory: A faulty memory may be exposed by establishing: (1) that a long time has elapsed between the event and the testimony; (2) that there was nothing particularly unusual or striking about what the witness observed to keep the event in the witness's memory; (3) that the witness did nothing, such as making notes of the event, to help preserve recollection of the event; (4) discrepancies within the witness's testimony; or (5) discrepancies with other evidence.

Avenues to Act Faulty Perception and Memory: In testing perception and memory, counsel has several avenues of attack. One is to explore fully the details of the event and bring out the relevant factors. Another is to test the witness's perception and memory collaterally to see whether the witness has perceived or can remember similar details involved in the same incident or details in other incidents. Counsel would like to argue that the failure to perceive or remember such collateral details casts doubt on the accuracy of the witness's claimed perception or memory. *See, e.g.*, McCormick, *Evidence* 64 (3d ed. 1984). Although the collateral matter is unconnected with the case, this line of inquiry is permitted and commonly used. *See* 3A

Wigmore, *Evidence* 995 (Chadbourn rev. 1970). For example, when an eyewitness has given a detailed description of the defendant's clothing, counsel may want to ask the witness to describe the clothing of other people present at the scene (e.g., the complainant). Suppose a taxi cab driver is testifying to details of a conversation with the defendant just before an alleged murder. Counsel might ask:

> Q. Mr. Glass, you transported a lot of people that day, didn't you?
> A. Yes.
>
> Q. You had conversations with several of these passengers, right?
> A. Yes.
>
> Q. Tell us the substance of some of your other conversations that day.
> A. I can't remember any.

These questions will backfire if the witness in fact has a good memory of other similar details or events. As with all cross-examination where one does not know what the answer will be, the great risks may outweigh the gains. A statement obtained through pretrial investigation may reveal whether this line of cross-examination will be fruitful.

Inconsistencies within the witness's story should be developed and exploited. A witness may say one thing on direct and another on cross-examination. Details within the direct examination may be contradictory or confusing. The task of the cross-examiner is to bring out such inconsistencies to show that the witness's perception and memory are not reliable.

Cross-examination may also explore the witness's drug use, either at the time of the events in dispute or at the time of testifying, which may influence ability to observe, ability to relate, or veracity. *See (Antonio) Williams v. United States*, 642 A.2d 1317, 1320 (D.C. 1994) (but not proper to impeach witness's denial of drug use at the time of the event with proof of drug use at times "remote from the night in question"); *Robinson v. United States*, 642 A.2d 1306, 1310-11 (D.C. 1994) (rejecting claim that evidence of complainant's use of alcohol years before the incident was "probative of her diminished sensory capacity"); *see also (Sherman) Durant v. United States*, 551 A.2d 1318, 1326-27 (D.C. 1988).

Mental problems may also influence a witness's capacity to observe and relate events. The right to cross-examine a witness about mental problems or psychiatric treatment is discussed at length in *Collins v. United States*, 491 A.2d 480, 484 (D.C. 1985). *See also Hammond v. United States*, 695 A.2d 97 (D.C. 1997).

Exploiting Inconsistencies:

- ✓ When attempting to attack a witness's memory, use caution as he or she may, in fact, have a good memory
  - Obtaining statements through pre-trial investigation may reveal if a certain line of cross-examination will be fruitful
- ✓ Remember the task of the cross-examiner is to bring out inconsistencies that indicate that the witness's perception and memory are unreliable. Develop and exploit inconsistencies with the witness's story

2. Assumption that Witness is Lying

It has been said that there are two basic explanations for fabrications, exaggerations, or suppressions on the witness stand: (1) a lack of credibility; or (2) a background of bias. *See* Jeans, *Trial Advocacy* 13.17. Impeachment is the principal method for showing both.

Even if counsel is attempting to persuade the jury that a witness is lying, counsel may still try to discredit the witness by exposing weaknesses in perception and memory, as with a witness who is honestly mistaken. However, such efforts may be forsaken altogether. A lying witness may have manufactured a coherent story the details of which cannot be shaken, or may have an accurate perception and memory of the event except that the defendant has replaced the witness or someone else as the perpetrator. For example, a paid informant or a person who has made a deal with the government in exchange for testimony may lie by saying that the defendant approached the witness to make a drug sale rather than the other way around. Such a witness's perception and memory are probably unshakable because the testimony is true except for one crucial detail.

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***Coles v. United States*, 36 A.3d 352 (D.C. 2012).** Reversible error to preclude defendant from cross-examining officer about whether he had substantially copied his internal police report about the shooting from other officer's report.

a. General lack of credibility

Prior False Allegations: One way to attack credibility is to suggest that the witness is a liar generally. The court must allow inquiry into prior false allegations of criminal conduct made by government witnesses. *See Lawrence v. United States*, 482 A.2d 374, 377 (D.C. 1984) (reversible error to prevent exploration of prior false accusations of sexual misconduct against family members). However, the Confrontation Clause mandates the cross-examination only if counsel can "show convincingly" that the witness made a false claim under similar circumstances. *Roundtree*, 581 A.2d at 321 (trial court did not err in barring examination about prior reports of sexual assault absent evidence they were false). *See Riddick v. United States*, 806 A.2d 631 (D.C. 2002) (trial court did not violate appellant's constitutional right to confront witnesses against him when it limited his trial counsel's cross-examination of the victim about

prior bad acts of shoplifting that did not result in conviction because bad acts did not bear directly on her veracity with respect to the issues involved at trial); *(David) Washington v. United States*, 760 A.2d 187 (D.C. 2000) (defendant not entitled to cross-examine complainant to elicit that her previous criminal complaint against him had been dismissed for want of prosecution where there was no showing that prior complaint had been false). Absent such a showing, the court retains broad discretion to control the scope and extent of this type of cross-examination. *Roundtree*, 581 A.2d at 323.

Prior Bad Acts: "A well recognized means of discrediting a witness is inquiry into that witness's bad acts." *Lawrence*, 482 A.2d at 377. A witness may be cross-examined about a prior bad act that has not resulted in a criminal conviction where: (1) the examiner has a factual basis for the question; and (2) the bad act bears directly on the witness's veracity with respect to issues involved in the trial. *(James D.) Brown v. United States*, 726 A.2d 149, 153 (D.C. 1999); *Murphy v. Bonamo*, 663 A.2d 505, 508-11 (D.C. 1995) (trial court erred in concluding that plaintiff's prior false claims were irrelevant); *Sherer v. United States*, 470 A.2d 732, 738 (D.C. 1983); *Kitchen v. United States*, 221 F.2d 832 (D.C. Cir. 1955). Applying that standard, *Lawrence* found reversible error in a ruling that the witness could not even be *questioned* about prior false accusations. "An examination of the record reflects a curtailment of an appropriate line of cross-examination which prevented the jury from receiving information essential to an assessment of [the witness's] credibility." *Lawrence*, 482 A.2d at 377.[7] Cross-examining a witness on his or her employment when that employment involves bad acts is permissible. *Johnson v. United States*, 960 A.2d 281, 302-04 (D.C. 2008) (court's preclusion of questioning on witness's employment at a "gentlemen's place" was error but harmless).

Reluctance to Testify: Reluctance to testify may bear on credibility if it results from fear that the testimony will not be true. *Cf. Ramirez v. United States*, 499 A.2d 451, 453 (D.C. 1985). However, before pursuing this line of cross-examination, counsel should determine whether it opens the door to otherwise inadmissible evidence and, after cross-examining on reluctance to testify, should pay close attention to the questions and answers on redirect. For example, in *Carpenter v. United States*, 635 A.2d 1289, 1291-92 (D.C. 1993), defense counsel cross-examined a witness on her delay in contacting the police. The witness explained on re-direct that people in her neighborhood killed "snitches" and recounted a confrontation with the defendants' families after attending a line-up. *Id*. at 1293. The prosecutor went on to examine the witness about an assault she suffered to which the defendants were not linked. *Id*. at 1294. The court found the first two explanations relevant and admissible, but ruled that the testimony about the assault unconnected to the defendants was improper. *Id*. at 1296. *See Bennett v. United States*, 763 A.2d 1117 (D.C. 2000) (reversible error to exclude impeachment of key corroborative government witness on his efforts to bribe or kidnap a witness against him in his murder case); *(Latasha) Brown v. United States*, 763 A.2d 1137 (D.C. 2000) (no abuse of discretion in

[7] The court did not decide whether the defense could have presented extrinsic evidence if the witness denied making the prior accusations or admitted them but asserted that they were true. While the court noted that extrinsic evidence generally may not be offered in such a case, *see McLean v. United States*, 377 A.2d 74 (D.C. 1977), it appeared to leave the question open on the facts alleged in *Lawrence*. *See also In re C.B.N.*, 499 A.2d 1215 (D.C. 1985) (trial court erred in excluding extrinsic evidence that would discredit a government witness). Of course, constitutional principles may come into play. *See Chambers v. Mississippi*, 410 U.S. 284 (1973).

precluding defendant from cross-examining police officer regarding his lack of compliance with police general order to interview all potential witnesses to an assault on a police officer).

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***McCorkle v. United States*, 100 A.3d 116 (D.C. 2014).** Not reversible error to erroneously allow questioning improperly suggesting assault of particular complainant, despite lack of evidence to support that particular assault, where weeks of testimony had established other assaults and shootings.

***Worthy v. United States*, 100 A.3d 1095 (D.C. 2014).** Prior witness statement admissible to rehabilitate witness when fact and circumstances of statement were relevant in refuting theory of impeachment that had been advanced.

b. Bias

> Bias is a term used in the "common law of evidence" to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest.

United States v. Abel, 469 U.S. 45, 52 (1984). Bias of a witness is "always relevant." *Hollingsworth v. United States*, 531 A.2d 973, 979 (D.C. 1987); *see also Martinez v. United States*, 982 A.2d 789 (D.C. 2009); *Clayborne v. United States*, 751 A.2d 956 (D.C. 2000); *In re C.B.N.*, 499 A.2d 1215, 1218 (D.C. 1985); *Benjamin v. United States*, 453 A.2d 810, 811 (D.C. 1982); *Springer*, 388 A.2d 846; *(Willie) Smith*, 389 A.2d at 1367; *Simmons v. United States*, 364 A.2d 813 (D.C. 1976); *Villaroman v. United States*, 184 F.2d 261, 262 (D.C. Cir. 1950) (pendency of civil action by a prosecuting witness held to be proper subject of bias inquiry).

> The Supreme Court has established that the refusal to allow *any* questioning about facts indicative of bias from which the jury could reasonably draw adverse inferences of reliability is an error of constitutional dimension, violating the defendant's rights secured by the Confrontation Clause.

Ford v. United States, 549 A.2d 1124, 1126 (D.C. 1988)[8] (citing *Delaware v. Van Arsdall*, 475 U.S. at 678-79 (1986); *accord Brown v. United States*, 952 A.2d 942 (D.C. 2008) (reversible error to curtail cross-examination of a key government witness about possible bias where a friend of the victim present in courtroom allegedly disturbed her by making threats against her both inside and outside of the courtroom); *Isler*, 731 A.2d 837 (reversible error to preclude

[8] The trial court in *Ford* had denied inquiry into an essential government witness's motive to lie or implicate the defendant – to prevent retaliation against himself by drug dealers to whom he owed money. Although the court allowed some questioning on the witness's personal drug use and whether he was lying when he said the defendant committed the offense, it precluded any questions about indebtedness or specific threats against him and his family by drug dealers. The Court of Appeals held these limitations effectively disallowed any questioning relating to the witness's motive to lie.

questioning on witness's bias stemming from motive to avoid scrutiny as actual killer); *In re S.H.*, 570 A.2d 814, 817 (D.C. 1990) (reversible error to prevent further questioning after witness denied initial inquiry into whether witness was protecting someone). *But see Beatty v. United States*, No. 04-CF-1489 (D.C. Sept. 11, 2008) (trial court did not err in refusing to conduct an *in camera* inspection of witness's immigration documents denying him citizenship that may have revealed bias against defendant where witness's sworn testimony provided a different reason for the denial of the application, and was confirmed by the prosecutor as an officer of the court). "The foundational requirement necessary to support a line of questioning into bias is a 'fairly lenient' one, particularly in criminal cases where cross-examination is typically exploratory rather than accusatory." *Obiazor v. United States*, 964 A.2d 147, 152 (D.C. 2009) (reversible error in child sexual assault case to exclude questioning complainant about prior false allegations of molestation on grounds of dissimilarity and temporal remoteness); *see also Howard v. United States*, 978 A.2d 1202 (D.C. 2009) (reversible error to preclude cross-examination of police officers concerning the defendant's pending lawsuit against police officers for excessive force in previous interaction with the defendant); *McDonald v. United States*, 904 A.2d 377 (D.C. 2006) (evidence of police brutality is relevant to show officer's bias against defendant where theory of defense is that the charge is a fabrication, and defense counsel need not proffer specific facts). Counsel is entitled "'to make a record from which to argue *why* [the witness] might have been biased.'" *S.H.*, 570 A.2d at 818 (citation omitted).

Because bias is a subjective question, inquiry must be permitted into the witness's state of mind. Thus, counsel may inquire whether government witnesses subjectively fear prosecution, regardless of the "real" danger of prosecution. *Scull*, 564 A.2d 1161, 1165 (refusal to allow examination of two key government witnesses on motive to escape prosecution for selling drugs violated Sixth Amendment); *United States v. Anderson*, 881 F.2d 1128, 1140 (D.C. Cir. 1989) (reversible error to cut off cross-examination regarding indictment that had been dismissed because possible reinstatement gave witness a motive to favor government). *See also Davis v. Alaska*, 415 U.S. 308; *(Joseph) Washington v. United States*, 461 A.2d 1037, 1038 (D.C. 1983) (reversible error in refusal to allow counsel to establish possible bias based on existence of pending case, even though arrangement for testimony did not exist); *(Irving) Johnson*, 418 A.2d 136; *Best v. United States*, 328 A.2d 378 (D.C. 1974).

However, the court may curtail questions about bias when its existence is speculative. *Elliott v. United States*, 633 A.2d 27, 32 (D.C. 1993). *But see Jolly v. United States*, 704 A.2d 855 (D.C. 1997) (trial court's numerous instructions to jury that there was no evidence to permit inference that someone other than defendant was co-defendant's actual accomplice to felony murder did not impermissibly impair defendant's ability to present bias defense). Nonetheless, the court may not apply unduly restrictive legal standards in curtailing defense bias cross-examination. *(Rocky) Brown v. United States*, 683 A.2d 118, 127 (D.C. 1996); (*Emmett) Jones v. United States*, 853 A.2d 146 (D.C. 2004) (pursuant to *Brown*, the trial judge may curtail cross-examination as long as the judge does not prohibit inquiry about an event that may reasonably test bias.) *But see McClellan v. United States*, 706 A.2d 542, 546 (D.C. 1997) (defendant's Confrontation Clause rights not violated by court's allowing witness to testify for government while denying defendant opportunity to cross-examine witness for bias).

Other restrictions have been held to be error, but harmless. *See McGriff v. United States*, 705 A.2d 282 (D.C. 1997) (harmless error under *Chapman* standard, where trial court precluded cross-examination of police officer regarding his alleged threat against defendant and trial counsel); *Jenkins v. United States*, 617 A.2d 529, 533 (D.C. 1992) (harmless error where cross-examination as to the nature of the crime for which witness was pending sentencing was limited); *United States v. Gambler*, 662 F.2d 834, 839-40 (D.C. Cir. 1981) (harmless error where trial court prevented inquiry into witness's previous civil litigation against defendant); *Moreno*, 482 A.2d at 1238 (limitation of cross-examination into witness's alleged racial bias held to be harmless error where jury had sufficient evidence to judge whether such bias existed and whether it impacted the accuracy of her testimony); *Sullivan v. United States*, 404 A.2d 153, 161 (D.C. 1979) (harmless error where trial court limited cross-examination as to witness's contemplated litigation, but did allow sufficient questioning to establish bias against defendant).

The scope of bias examination is not limitless, however; irrelevant or non-probative questions may be disallowed. *See (Anthony) Williams v. United States*, 696 A.2d 1085, 1086 (D.C. 1997) (robbery defendant not entitled to cross-examine complainant, who was visiting United States from country where person accused of crime is allegedly guilty until proven innocent, regarding her attitudes as to presumption of innocence – such attitudes irrelevant to reliability of her identification of defendant as robber, because defendant was not an "accused" when witness first identified him); *Barnes v. United States*, 614 A.2d 902, 904-05 (D.C. 1992) (cross-examination of police officer on theory that defendant's arrest and officer's subsequent testimony were motivated by desire for overtime pay was properly excluded as too speculative to be probative of bias); *Parker v. United States*, 586 A.2d 720, 723 (D.C. 1991) (trial court found inquiry went beyond witness's bias). The government's power to cross-examine regarding bias is also limited by the basic evidentiary rule that the probative value of the evidence not be substantially outweighed by the prejudice it generates. *Mercer v. United States*, 724 A.2d 1176, 1184 (D.C. 1999).

Notably, the scope of bias cross is limited when the government seeks to explain its own witness's reluctance to testify and the witness's courtroom demeanor by eliciting that the witness is afraid to testify and the basis for that fear. In *Blunt v. United States*, 959 A.2d 721, 724-27 (D.C. 2008), the trial court allowed a government witness to testify on direct that she was afraid because she had been stabbed nine times and a bullet had been fired through the floor of her house when she was present. The trial court gave an immediate limiting instruction about the testimony. Even so, the appellate court found error because the testimony impliedly linked the defendant to the bad acts against the witness. The appellate court held that the witness's testimony "should have been limited . . . to a general statement that [the witness] feared retaliation." *Id*. at 726; *see also Clayborne v. United States*, 751 A.2d 956, 964 (D.C. 2000) (a witness may mention general fear of retaliation for snitching when not linked in any way to the defendant).

"'[T]he trial court may not require counsel to ask questions in conclusory form of a witness whom he is questioning in order to demonstrate bias.'" *Petway*, 391 A.2d at 801 (citation omitted). However, the questioning party must proffer facts to support a genuine belief that the witness is biased in the manner asserted. *(Irving) Jones v. United States*, 516 A.2d 513, 517 (D.C. 1986). The trial court "did not abuse its discretion by precluding cross-examination of a

key government witness where it was established that the witness did not know the underlying facts which arguably would create bias." *Cunningham v. United States*, 974 A.2d 240, 246 (D.C. 2009 (citing *Ifelowo v. United States*, 778 A.2d 285, 295 n.13 (D.C. 2001)). "[A] well reasoned suspicion," *Scull v. United States*, 564 A.2d 1161, 1164 (D.C. 1989), is enough to meet this "fairly lenient" standard, *(Rocky) Brown v. United States*, 683 A.2d 118, 125 (D.C. 1996) (*Brown I*). In *Porter v. United States*, 561 A.2d 994, 996 (D.C. 1989), counsel failed to proffer an officer's knowledge of defendant's pending suit against the police department or the underlying assault; the court upheld a refusal to allow cross-examination on that alleged source of bias. *See also Burgess v. United States*, 608 A.2d 733, 736 (D.C. 1992) (counsel sought to cross-examine witness about hostility between his son and decedent, on theory that witness had inculpated defendant in order to exculpate his son, but failed to proffer that when witness reported the murder he knew about altercation or had reason to believe his son might be implicated).

Counsel Must Lay The Foundation For Extrinsic Evidence: If the bias is indicated in statements made by the witness, counsel must lay the foundation for extrinsic evidence of those statements by confronting the witness with them.

> [A] foundation is required for the admission of extrinsic proof of a witness' statements indicating bias for or against a party . . .
>
> We express no opinion on the necessity of a foundation when the corrupt statements consist entirely of conduct rather than statements or statements plus conduct.

C.B.N., 499 A.2d at 1220 & n.5. In *(Timothy) Washington v. United States*, 499 A.2d 95, 102 (D.C. 1985), the complainant had told her former boyfriend before trial that she had gone to Potomac Gardens to buy "lovely." After her testimony, she approached the former boyfriend in the witness room and told him, "Don't say anything about the lovely." Defense counsel sought to have the boyfriend testify to this conversation. The trial court's refusal to allow extrinsic evidence of the complainant's bias was upheld because counsel had not confronted the complainant with the conversation on cross-examination.

Once a foundation has been laid, a party may always introduce extrinsic evidence of bias. *See Newman v. United States*, 705 A.2d 246 (D.C. 1997) (remanded for hearing on admissibility of extrinsic evidence purporting to show bias on part of the government witness); *C.B.N.*, 499 A.2d 1215, 1221 (trial court's ruling that cross-examination on bias was irrelevant, and restriction of extrinsic evidence, was reversible error; counsel's failure to lay a foundation was not dispositive because the trial court had ruled that the cross-examination would not be allowed). The trial court may not attempt to evaluate the reliability of the witness providing the foundation for such "runs too close to usurping the jury's function." *(Rocky) Brown v. United States*, 740 A.2d 533 (D.C. 1999) (*Brown II*). The defense must be allowed to reopen its case if mid-trial events lead to new evidence of bias, as in *Washington*. "While the trial court has some discretion to regulate the manner in which, and the extent to which, bias may be proven, it may not exclude such proof entirely." *Hollingsworth*, 531 A.2d at 979 (trial court abused its discretion in not permitting

defense to reopen its case to present evidence that complainant threatened a defense witness during the trial).

Denial of bias cross-examination violates the Sixth Amendment right to confront witnesses. The trial court in *Van Arsdall*, 475 U.S. 673, had prohibited inquiry into the possibility that a government witness in a homicide trial was biased as a result of the state's dismissal of his pending public drunkenness charge. The Court rejected the government's suggestion that the defense must show "outcome determinative" prejudice, i.e., that the limitation on cross-examination created a reasonable possibility that the jury returned an inaccurate guilty verdict. Instead, "the focus of the prejudice inquiry in determining whether the confrontation right has been violated must be on the particular witness, not on the outcome of the entire trial." *Id*. at 679.

Bias theories of impeachment include:

- **Witness and defendant are enemies or have antagonistic relationship** – *Keene v. United States*, 661 A.2d 1073, 1078-79 (D.C. 1995) (rape complainant had motive to fabricate charges against group home counselor because counselor had earlier disciplined him for sexual misbehavior); *Petway*, 391 A.2d 798; *Flecher v. United States*, 358 A.2d 322 (D.C. 1976); *White v. United States*, 297 A.2d 766 (D.C. 1972) (jealousy); *Austin v. United States*, 418 F.2d 456 (D.C. Cir. 1969); *Wynn v. United States*, 397 F.2d 621 (D.C. Cir. 1967).

- **Witness had previously provided alibis for defendant** – *(Phillip) Johnson v. United States*, 701 A.2d 1085, 1093 (D.C. 1997) (not abuse of discretion for government's cross-examination of defense witness, for limited purpose of demonstrating bias, to reveal defendant's prior bad acts).

- **Bias against members of defendant's race** – *Moreno*, 482 A.2d 1233.

- **Common membership in an organization with another witness** – *United States v. Abel*, 469 U.S. 45 (1984).

- **Unfounded belief in defendant's guilt** – *Miles v. United States*, 374 A.2d 278 (D.C. 1977) (proper to cross-examine police regarding previous arrests of defendant, but trial court may exclude evidence that defendant was acquitted); *Simmons v. United States*, 364 A.2d 813 (D.C. 1976); *Ewing v. United States*, 135 F.2d 633 (D.C. Cir. 1942); *but see McClain v. United States*, 460 A.2d 562, 569 (D.C. 1983) (reluctance to cooperate with defense investigation is not, alone, relevant to bias).

- **Defendant refused witness's advances, or there is a history of sexual relations between the witness and the victim or other witnesses** – *United States v. (Anthony) Wright*, 489 F.2d 1181 (D.C. Cir. 1973); *Tinker v. United States*, 417 F.2d 542 (D.C. Cir. 1969); *Thompkins v. United States*, 236 A.2d 443 (D.C. 1967). *But see Brown v. United States*, 338 F.2d 543 (D.C. Cir. 1964).

- **Witness seeks retaliation against defendant for other reasons** – *Porter*, 561 A.2d 994 (defendant had pending civil suit against police); *Staton v. United States*, 466 A.2d 1245 (D.C. 1983) (government entitled to demonstrate that police officer who testified for defense was the subject of an internal police investigation); *(Irving) Johnson*, 418 A.2d 136 (defendant failed to pay for marijuana previously taken from complainant).

- **Witness has a pending civil suit against defendant or other pecuniary interest in the trial** – *Beynum v. United States*, 480 A.2d 698 (D.C. 1984); *Sullivan*, 404 A.2d 153 (contemplation of civil litigation); *Webb v. United States*, 388 A.2d 857 (D.C. 1978); *Gambler*, 662 F.2d 834; *Villaroman*, 184 F.2d 261.

- **Witness seeks to avoid a civil suit for false arrest** – *Hyman v. United States*, 342 A.2d 43 (D.C. 1975).

- **Witness has (or had during the pendency of the case) a promise or hope of leniency in some other matter** – *Alford*, 282 U.S. 687; *Artis v. United States*, 505 A.2d 52 (D.C. 1986); *Ramirez v. United States*, 499 A.2d 451 (D.C. 1985); *(Joseph) Washington*, 461 A.2d 1037 at 1038 ("It is the jury, not the judge, witness, and prosecutor, which must assess whether a pending charge had colored an individual's testimony. Despite the stated lack of a testimony arrangement, it was for the jury to decide whether [the witness] might still harbor a hope of better treatment if he testified as he did."); *McNeil*, 465 A.2d 807; *Benjamin*, 453 A.2d 810; *Coligan v. United States*, 434 A.2d 483 (D.C. 1981); *(Willie) Smith*, 389 A.2d 1364; *United States v. Leonard*, 494 F.2d 955 (D.C. Cir. 1974); *United States v. Lee*, 506 F.2d 111 (D.C. Cir. 1974); *McCoy v. United States*, 301 A.2d 218 (D.C. 1973).

- **Witness committed the alleged crime and is trying to blame another** – *Davis*, 415 U.S. 308; *(Woredell) Johnson v. United States*, 552 A.2d 513 (D.C. 1989); *Gillespie v. United States*, 368 A.2d 1136, 1137-38 (D.C. 1977).

- **Witness has been guilty of police brutality, has used false names, has committed perjury** – *Beynum*, 480 A.2d at 706-07; *Best*, 328 A.2d 378; *Blair v. United States*, 401 F.2d 387, 390 (D.C. Cir. 1968); *Lyda v. United States*, 321 F.2d 788, 792 (9th Cir. 1963).

- **Witness has sought to corrupt integrity of the proceedings** – *(Timothy) Washington*, 499 A.2d at 101-02 (complainant told witness not to say anything about the PCP); *C.B.N.*, 499 A.2d at 1217-20 (key government witness said he wanted money from defendants or he would testify against them).

- **Trial court's *ex parte* ruling that the government need not disclose to defense counsel that witness's own sons were under investigation for sexually abusing the child victims was not a *Brady* violation, but rather a violation of appellant's Sixth Amendment right to confront a witness with evidence highly relevant to her bias** – *McCloud v. United States*, 781 A.2d 744 (D.C. 2001).

- **First-degree murder and related convictions reversed because cumulative effect of several evidentiary errors was unduly prejudicial. The improperly admitted evidence included evidence that a defense witness had stabbed the defendant, who had not pressed charges, a fact that was completely unnecessary to show the witness's bias to curry favor from the defendant where she was amply impeached with other evidence of bias** – *Foreman v. United States*, 792 A.2d 1043 (D.C. 2002).

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***Blades v. United States*, 25 A.3d 39 (D.C. 2011).** See, *supra*, Chapte 26.II.A.

***Coles v. United States*, 36 A.3d 352 (D.C. 2012).** Reversible error to preclude defendant from cross-examining officer about whether he had substantially copied his internal police report about the shooting from other officer's report.

***Dawkins v. United States*, 41 A.3d 1265 (D.C. 2012).** Trial court abused its discretion in excluding, without hearing a proffer from defendant, evidence of a civil lawsuit for false arrest pending against officer

***Gaines v. United States*, 994 A.2d 391 (D.C. 2010).** No Sixth Amendment violation in limiting bias cross-examination of police officers concerning alleged pretextual motive in stopping defendant for violation of hands-free law where court permitted questioning sufficient to expose inconsistent enforcement of hands-free law and where single reference in opening statement to race or racial bias was insufficient to support conclusion that court precluded proper bias cross aimed at establishing officers' racial bias.

***Harrison v. United States*, 76 A.3d 826 (D.C. 2013).** Not error to preclude defense counsel from inquiring into informant witness's prior act of attempting to smuggle marijuana into prison where there was adequate opportunity to explore informant's bias.

***King v. United States*, 75 A.3d 113 (D.C. 2013).** Court did not err in admitting evidence defendant claimed falsely implicated him in threatening a witness where witness's suggestion to two other witnesses that they should not testify against defendant went to bias, and did not suggest that witness threatened to do them harm if they did not do as he suggested.

***Longus v. United States*, 52 A.3d 836 (D.C. 2012).** See, *supra*, Chapter 26.II.A.

***Mason v. United States*, 53 A.3d 1084 (D.C. 2012).** Error to curtail cross-examination for anti-homosexual bias in which evidence that witness called defendant "Faggy Dre" could have indicated anti-gay bias against defendant, but harmless where defendant was able to impeach witness on several other grounds.

***McClary v. United States*, 3 A.3d 346 (D.C. 2010), *amended on reh'g*, 28 A.3d 502 (2010), *clarified*, 30 A.3d 808 (2011).** Constitutional error to limit any bias cross-examination of complaining witness into independent area of witness's pre-trial arrest, the no-papering of one of those charges, and the pending status of the other cases. However, the error was harmless because the

complainant's testimony was corroborated by multiple eyewitnesses. **N.B.: Original opinion found no error.**

***Woods v. United States*, 987 A.2d 451 (D.C. 2010).** Government may introduce evidence of plea agreement with government witness on direct examination even where defense has stipulated that it will refrain from any cross-examination regarding bias relating to that plea agreement because mitigating anticipated impeachment by defendant is not sole purpose for admitting plea agreement on direct; evidence of plea agreement prevents jury from speculating as to why witness implicated in offense has not been charged, and existence of plea agreement has potential to either bolster or undermine witness's credibility in eyes of jury.

c. Accomplices and informants

Although the uncorroborated testimony of an accomplice, *see Lee*, 506 F.2d at 118-20, or an informant, *see Hoffa v. United States*, 385 U.S. 293, 296 (1966), is sufficient to survive a motion for judgment of acquittal, accomplices and informants are often the weakest government witnesses. A "snitch" (also known as a "cooperating witness") is likely to be defensive and evasive about the full extent of his or her participation in the crime. Because courts regard the testimony of informants and accomplices with suspicion, counsel has unusually wide latitude in cross-examination and argument, and is usually entitled to a special instruction on credibility. Given the rich opportunities for effective cross-examination, careful preparation for informant or accomplice testimony is particularly important.

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***Mason v. United States*, 53 A.3d 1084 (D.C. 2012).** Trial court did not err in denying defendant's *Roviaro* request that the government reveal the identity of a confidential informant where defendant failed to renew motion at trial and made a tactical choice that completely obviated any need for the informant's identity when he did not elicit any evidence about the informant during trial.

(1) Preparation

The prosecution must disclose any formal or informal immunity agreement with its witnesses. *See Giglio v. United States*, 405 U.S. 150, 153-55 (1972) (informal promise of non-prosecution). Frequently, accomplices and informants have extensive criminal histories. Counsel should specifically demand full information regarding the agreements and criminal records. *See Lewis v. United States*, 408 A.2d 303, 309-11 (D.C. 1979) (*Lewis II*) (defense entitled to production of witness's FBI rap sheet). Court records (status hearings, trials, pleas, and sentencings) must be reviewed carefully and any relevant transcripts should be obtained.[9] Investigation must include

[9] The hazards of incomplete preparation are illustrated by *McNeil*, 465 A.2d at 810-11. An accomplice falsely denied that as part of a plea agreement that included testifying against the defendant, the government had promised to argue at her sentencing that she be permitted to remain in a drug treatment program. The trial court refused to permit counsel to have the transcript of the plea hearing prepared to complete the impeachment. Relying on its own recollection of the statements made at the plea proceedings, it denied a separate request to have the reporter read the jury the terms of the plea agreement from her notes. The impeachment was never completed and the defendant was

efforts to obtain as much information as possible about every source of potential bias against the defendant.

(2) Scope of cross-examination

Because accomplices and informants have a unique interest in the outcome of the case, counsel has wide latitude in cross-examining them.

Accomplices must be cross-examined carefully and extensively about their motives for testifying. If the defense cannot give an explanation for it, the accomplice's incriminating testimony is almost as compelling as the defendant's own confession. Standard techniques are to show: (1) personal bias against the defendant; (2) the consideration or deal received from the government;[10] and (3) an inconsistent story when first taken into custody, including denying any complicity in the crimes. *See McNeil*, 465 A.2d at 811-12.

Cross-examination should emphasize the accomplice's understanding of the agreement and explore the charges that have been dismissed or reduced, the potential for sentence reduction, and other expectations of assistance including allocution at sentencing, representations to the parole authorities, or government support for a motion to reduce sentence. The accomplice may also have obtained other benefits such as an agreement not to oppose release pending trial or sentencing, relocation of family members, reduction of charges in other cases, or favorable government representations to prosecuting or correctional authorities in other jurisdictions. Counsel must explore the *witness's* understanding of the possible benefits, regardless of the actual "deal," because it is the witness's credibility that is at issue. "It is the jury, not the judge, witness, and prosecutor, which must assess whether a pending charge has colored an individual's testimony. Despite the stated lack of a testimony arrangement, it was for the jury to decide whether [the witness] might still harbor a hope of better treatment if he testified as he did." *(Joseph) Washington*, 461 A.2d at 1037-38. For example, the government often presents testimony that no deal had been struck when the witness first provided the police with information incriminating the defendant. Cross-examination may nevertheless demonstrate that the witness knew he or she was in trouble and expected to improve the situation by blaming the defendant.[11]

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convicted. Although the trial court was found to have erred, and the government to have acted improperly in failing to correct the false testimony, a divided appellate court found the error harmless.

[10] Of course, witnesses other than accomplices and informants also may be impeached if they have a relationship with the criminal justice system that motivates them to curry favor with the government. In *Benjamin*, 453 A.2d 810, a conviction was reversed because the trial court had refused to permit cross-examination that would have revealed that charges against the complainant were dismissed or reduced during the defendant's prosecution. The trial court based its ruling on the fact that the witness was the complainant and "not an informant or a witness for the government." *Id*. at 811. *See also (Joseph) Washington*, 461 A.2d at 1037-38.

[11] However, *(David) Reed v. United States*, 452 A.2d 1173 (D.C. 1982), upheld a ruling precluding cross-examination of a witness concerning three recent arrests that were dismissed – the first due to lack of probable cause, the second when the victim refused to prosecute, and third after the medical examiner ruled that the victim's death was accidental. In ruling that the curtailment of cross-examination was neither a Sixth Amendment violation nor an abuse of discretion, the court relied upon a "complete absence of any showing either that the charges were dismissed because of any initiative on the part of the government, or that [the witness] had reason to believe that such was the case." *Id*.

In many cases, the accomplice has already pled guilty and will be scheduled for sentencing before the judge who is presiding over the trial. Thus, the witness has every reason to minimize his or her own culpability.

Cross-examination of the accomplice should also include the more routine subjects. For example, an accomplice will at least purport to know the defendant. Evidence of ill will, envy, resentment, or other bias can underscore the fundamental theory of the cross-examination – that the accomplice has to help the government convict someone and that the defendant is the target because of an underlying animosity. Exploring the relationship between the accomplice and the defendant to show personal bias can be dangerous. For instance, an accomplice may state that he has known the defendant since they were in prison or robbed banks together. To avoid these pitfalls it may be sufficient to phrase questions carefully, and to instruct the witness to answer questions with "yes" or "no." However, it may be necessary to seek the judge's assistance, outside the jury's presence, to ensure no improper answers will be given to properly phrased questions. For example, the witness should be instructed to answer the question, "You have known Mr. Smith since 1994," with a simple, "Yes," not the damaging, "Yes, back when we controlled the crack trade on Quesada Street."

As with all witnesses, there may be inconsistencies between the accomplice's testimony and other witnesses' testimony or the accomplice's own prior statements. Intensive examination regarding the accomplice's role in the offense may also produce very significant results.

Informants are encountered less frequently. Generally, they have either played a major role in setting up the crime, e.g., a sale of narcotics or weapons, or allegedly overheard admissions by the defendant. In the former case, the informant is very much like an accomplice and is subject to similar techniques of cross-examination. Participation in the crime may also provide the basis for an entrapment defense. If the informant did not play an active role in the offense, several possible avenues of cross-examination remain to be explored. Most informants are recruited through prior arrests. Is the informant supplying information in return for help in unrelated offenses? Is payment being made or expected? The nature, extent, character, and duration of the informant's previous dealings with the police should be explored. *See Springer*, 388 A.2d at 854-56. Extrinsic evidence of the informant's unreliability, such as evidence of narcotics addiction, may also be relevant and admissible to undermine credibility. *See United States v. Kinnard*, 465 F.2d 566, 570-73 (D.C. Cir. 1972). However, cross-examination on the informant's status as a complainant in an unrelated matter may be limited. *See (Willie) Smith*, 389 A.2d 1364.

(3) Instructions

When an informant, immunized witness, or accomplice testifies, counsel should request an instruction cautioning the jury to scrutinize such testimony. *See Criminal Jury Instructions for the District of Columbia*, Nos. 2.202 (Accomplice's Testimony), 2.204 (Testimony of Immunized Witness), 2.205 (Informer's Testimony) (5th ed. 2009). The defense is almost always entitled to such an instruction. *See United States v. Sarvis*, 523 F.2d 1177, 1180-81 (D.C. Cir. 1975); *United States v. Leonard*, 494 F.2d 955, 959-62 (D.C. Cir. 1974); *Kinnard*, 465 F.2d at 569-70. If the witness is both an informant and an accomplice, the defense should ask for an

instruction relating to each role.[12] "When a witness has a strong motivation to lie, the trial court's failure to give a cautioning instruction when requested is reversible error." *Fields v. United States*, 396 A.2d 522, 526 (D.C. 1978). It is better practice for the court to give such an instruction even absent a request, but it is not plain error not to do so if other evidence corroborates the testimony. *Id.*[13] Even if an informant is not produced, the government may be bound by statements reported in a warrant affidavit, which the defense may introduce as statements adopted by the opposing party. *United States v. Morgan*, 581 F.2d 933, 937-38 (D.C. Cir. 1978) (government has manifested adoption or belief of hearsay statements in affidavit in support of a search warrant) (*cited with approval* in *Freeland v. United States*, 631 A.2d 1186, 1192-93 (D.C. 1993) (applying rule to statement contained in government pleading)); *see also* Fed. R. Evid. 801(d)(2)(B). Evidence of the informant-witness's addiction should also be the subject of an instruction. *See Kinnard*, 465 F.2d at 572-73.

d. Prior convictions

Witnesses may be impeached[14] with a conviction[15] for any crime that is a felony or involves dishonesty or false statements. D.C. Code § 14-305. *See generally Dorman v. United States*,

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[12] If evidence is properly admitted for a specific purpose and the defense does not request a limiting instruction, failure to give one *sua sponte* is reviewable only for plain error. *Gilliam v. United States*, 707 A.2d 784 (D.C. 1998); *(Andrew) Price*, 531 A.2d 984, 987 (D.C. 1987) (rejecting argument that court should have instructed *sua sponte* on evaluation of testimony from accomplice whom defense claimed was also an "immunized" witness, where court did read, with counsel's consent, modified instruction on accomplice testimony). *See Criminal Jury Instruction* No. 2.204.

[13] The defense is entitled to present testimony by an accomplice who exculpates the defendant. *See Washington v. Texas*, 388 U.S. 14, 22-23 (1967); *Cool v. United States*, 409 U.S. 100, 104 (1972). If the witness is unavailable, the defense may be able to introduce prior testimony given at a proceeding in which the government had the right to examine the witness, *Feaster v. United States*, 631 A.2d 400, 405-12 (D.C. 1993) (grand jury), or other statement against interest. Calling an informant whom the government does not intend to call as a witness is more difficult. Under *Roviaro v. United States*, 353 U.S. 53,61-62 (1957), the court may permit the government to withhold the informant's identity after balancing the defendant's need for the witness against the government's need to protect the informant. The need to protect the informant is measured by potential danger to the informant, *United States v. Ferguson*, 498 F.2d 1001, 1004-05 (D.C. Cir. 1974), and the informant's current utility to law enforcement efforts, *United States v. Bell*, 506 F.2d 207, 216-20 (D.C. Cir. 1974). *See also Hamilton v. United States*, 395 A.2d 24, 26-27 (D.C. 1978); *Savage v. United States*, 313 A.2d 880, 884 (D.C. 1974). An informant who is a "mere tipster," who supplies information but did not participate in nor witness the crime charged, may not be producible. *See McCray v. Illinois*, 386 U.S. 300, 310-14 (1967); *Hamilton*, 395 A.2d at 27; *Hooker v. United States*, 372 A.2d 996, 997 (D.C. 1977); *United States v. Skeens*, 449 F.2d 1066, 1069-71 (D.C. Cir. 1971). A similar balancing test governs disclosure of secret observation posts used to detect narcotics trafficking or other crimes.

[14] Counsel may elicit convictions on direct in order to lessen the impact of the impeachment. *See Wright*, 637 A.2d at 100; *Kitt v. United States*, 379 A.2d 973, 975 (D.C. 1977). This does not foreclose impeachment on cross-examination. *See Beale v. United States*, 465 A.2d 796, 800 (D.C. 1983).

[15] A guilty plea without imposition of sentence is not an impeachable conviction. *Godfrey v. United States*, 454 A.2d 293, 305 (D.C. 1982); *Langley v. United States*, 515 A.2d 729, 734 (D.C. 1986) ("a defendant (or any other witness) may not be impeached with a prior guilty verdict unless and until there is a judgment of conviction premised on a sentence"). The underlying conviction is available for impeachment, however, upon a commitment for a Youth Act study under 18 U.S.C. § 5010(e) (repealed). *Stewart v. United States*, 490 A.2d 619, 625-26 (D.C. 1985). Similarly, a summary court martial may not be used to impeach a witness. *Zellers v. United States*, 682 A.2d 1118, 1125 (D.C. 1996).

491 A.2d 455, 458 (D.C. 1984) (en banc).[16] The fact-finder determines the weight to accord a prior conviction, but "the fact that one has been previously convicted of a crime is not an absolute justification for totally discrediting one's testimony." *Hawkins v. United States*, 663 A.2d 1221, 1228 (D.C. 1995). Fewer than ten years must have elapsed since the witness was released from confinement or since the expiration of the period of parole, probation, or sentence imposed with regard to the most recent conviction. § 14-305(b)(2)(B).[17] "[W]hen a party establishing a conviction by means of cross-examination is met with a denial, the party posing the question must be prepared to prove the conviction." *(Elliott) Reed v. United States*, 485 A.2d 613, 618 (D.C. 1984). Accordingly, counsel

> may not cross-examine a defendant about a prior conviction unless the prosecutor has a certificate under seal as provided by § 14-305(c) or the trial judge has ruled in advance of the cross-examination or offer of proof *aliunde* that the government has presented sufficiently reliable proof of a prior conviction by a defendant to permit cross-examination or proof *aliunde*.

Id. at 619. The same rule applies to cross-examination of any witness. *Id*. at 618 n.6. A defendant may not be impeached by prior convictions that are not disclosed to the defense following a pretrial request by defense counsel or the court. *Wilson v. United States*, 606 A.2d 1017, 1020-23 (D.C. 1992). Failure to insist on the government's proving the existence of a conviction limits a defendant to plain error review on appeal. *Allen v. United States*, 622 A.2d 1103, 1104 (D.C. 1993); *Haley v. United States*, 799 A.2d 1201 (D.C. 2002).

The government may not suggest through the manner of impeachment that the defendant has a propensity to commit crimes. Both *Fields*, 396 A.2d at 527, and *Bailey v. United States*, 447 A.2d 779, 781-81 (D.C. 1982), reversed convictions because the manner of impeachment suggested that, because of his prior convictions, the defendant was guilty of the crime charged. In each case, the prosecutor elicited from the defendant a denial of the offense charged, then immediately impeached the defendant with a prior conviction for a similar offense.

> Questions concerning appellant's prior conviction for unregistered possession of a firearm, asked by the prosecutor immediately after appellant had denied possessing a gun on the occasion of the offense charged, likely gave the jury the impression that evidence of appellant's prior conviction was being offered to rebut appellant's denial that he possessed a gun at the time in question. We will not countenance such a highly suggestive and prejudicial sequence of questions, which appeared designed to suggest to the jury that because appellant carried a gun before, he was probably guilty of the crime charged.

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[16] If the defendant claims that a conviction was obtained in violation of the Sixth Amendment right to counsel, the government must demonstrate a valid waiver of that right. *Oliver v. United States*, 384 A.2d 642, 645 (D.C. 1978) (although error to use uncounseled conviction for impeachment, conviction upheld because error was harmless).

[17] Any conviction within the ten-year time period makes available any conviction within ten years before that, and so on. *Glass v. United States*, 395 A.2d 796, 807-08 (D.C. 1978).

Fields, 396 A.2d at 527-28; *see also Dorman*, 491 A.2d at 458-59; *Baptist v. United States*, 466 A.2d 452 (D.C. 1983). A cautionary instruction that the prior conviction could be considered only for purposes of impeachment does not cure the error.[18] *See Fields*, 396 A.2d at 528; *Bailey*, 447 A.2d at 783. *But see Dorman*, 491 A.2d at 462 n.9. There are two general prohibitions on the government's manner of impeachment: (1) the government may not pair questions about the defendant's previous convictions for offenses similar to those charged with questions that elicit general denial of the charged crime; and (2) the government may not pair questions about similar previous convictions with questions that elicit the defendant's denial of a key element of the charged offense. *Dorman*, 491 A.2d at 459; *Baptist*, 466 A.2d at 458. The rule is based on the same principles that prohibit a prosecutor from suggesting in closing argument that the jury should infer criminal disposition from any evidence of prior crimes. *See Ford v. United States*, 487 A.2d 580, 591 (D.C. 1984); *see also (Howard) Jones v. United States*, 512 A.2d 253 (D.C. 1986) (prosecutor's remark juxtaposing defendant's prior conviction with his testimony on key factual dispute in instant case was improper but not plain error).

Impeachable offenses include almost any misdemeanor except simple assault or threats. *See Thompson v. United States*, 571 A.2d 192, 194 (D.C. 1990) (criminal contempt for violation of express condition of pretrial release); *Bates v. United States*, 403 A.2d 1159, 1161-62 (D.C. 1979) (unlawful entry); *(Clinton) Williams v. United States*, 337 A.2d 772, 775-76 (D.C. 1975) (carrying a pistol without a license); *(Horace) Durant v. United States*, 292 A.2d 157, 160-61 (D.C. 1972) (possession of narcotics). Non-jury-eligible offenses such as vagrancy and disorderly conduct are not impeachable. *Pinkney v. United States*, 363 F.2d 696, 699 (D.C. Cir. 1966). *But see (Cheri) Brown v. United States*, 518 A.2d 446, 447 (D.C. 1986) (soliciting prostitution is an impeachable offense).

Juvenile Adjudications: Juvenile adjudications are not impeachable convictions. *See Walls v. United States*, 773 A.2d 424 (D.C. 2001); *Sherer*, 470 A.2d at 739 n.7; *(Reginald) Smith v. United States*, 392 A.2d 990, 993 (D.C. 1978); *see also (Ronald) Brown*, 338 F.2d at 546-48; *cf.* D.C. Code § 16-2318.[19] Neither can knowledge of the defendant's juvenile adjudications be used to impeach a character witness. *McAdoo v. United States*, 515 A.2d 412 (D.C. 1986). However, in some circumstances a character witness may be cross-examined about knowledge of juvenile arrests or wrongful acts committed by the defendant as a juvenile. "[I]t seems reasonably likely . . . that community members in general will have heard of a juvenile's commission of wrongful acts, independently of any arrest or adjudication." *Devore v. United States*, 530 A.2d 1173, 1175 (D.C. 1987). *Rogers v. United States*, 566 A.2d 69 (D.C. 1989) (en banc), attempted to reconcile the tension between *McAdoo* and *Devore*, pointing out that while

[18] *See also Watkins v. United States*, 379 A.2d 703 (D.C. 1977) (while immediate instruction might have been preferable, it was not error to refuse defense request for immediate limiting instruction regarding impeachment by prior convictions of defense witnesses).

[19] A conviction of a juvenile prosecuted as an adult may be admissible for impeachment. *See United States v. Edmonds*, 524 F.2d 62, 67-68 (D.C. Cir. 1975). Unless they have been set aside, Youth Act convictions are available for impeachment. *See Williams v. United States*, 421 A.2d 19, 24-25 n.8 (D.C. 1980) (dictum); *Weaver v. United States*, 408 F.2d 1269, 1271-72 n.2 (D.C. Cir. 1969); *cf. Tuten v. United States*, 440 A.2d 1008 (D.C. 1982), *aff'd*, 460 U.S. 660 (1983). The set-aside of a Youth Act conviction does not preclude otherwise proper cross-examination of a character witness concerning the underlying arrest. *Askew v. United States*, 540 A.2d 760, 763 (D.C. 1988).

juvenile adjudications are confidential, juvenile arrests may be public knowledge and "the witness reasonably can be expected to have learned of the incident through means other than access to confidential court records." 566 A.2d at 78. The court determined to follow the same policies with regard to cross-examination of both opinion and reputation witnesses: (1) cross-examination regarding juvenile adjudications is forbidden due to policy interest in maintaining confidentiality of closed proceedings, but (2) cross-examination on juvenile arrests is permitted because these are public events that the witness may learn of informally. *Id*. To prevent abuse of juvenile arrest cross-examination, counsel should request a hearing outside the presence of the jury to demonstrate circumstances that might have precluded community knowledge of the arrest.

Juvenile adjudications may also be used to show bias by suggesting, for example, that a witness on probation has a motive to curry favor with the government. *See Davis v. Alaska*, 415 U.S. 308, 319-20 (1974); *Tabron v. United States*, 410 A.2d 209, 212-13 (D.C. 1979), *app. after remand*, 444 A.2d 942, 943-44 (1982) (*Tabron II*); Gillespie, 368 A.2d 1136 (trial court erred in not allowing defense to cross-examine concerning witness's juvenile probationary status). The Court of Appeals has suggested that juvenile adjudications may sometimes be used for impeachment even where they do not bear on possible bias. *See Lewis*, 408 A.2d at 312 (*Lewis II*).[20]

A conviction that is pending appeal is available for impeachment, but becomes unavailable once an appellate reversal has been entered. *See Hale v. United States*, 361 A.2d 212, 215 (D.C. 1976). Likewise, a conviction is unavailable if

> (i) the conviction has been the subject of a pardon, annulment, or other equivalent procedure granted or issued on the basis of innocence, or (ii) the conviction has been the subject of a certificate of rehabilitation or its equivalent and such witness has not been convicted of a subsequent criminal offense.

D.C. Code § 14-305(b)(2)(A). Although the Court of Appeals has not decided what procedures qualify as a "certificate of rehabilitation or its equivalent," it has strongly hinted that unconditional discharge under the Federal Youth Corrections Act or unconditional discharge by

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[20] The court explored these principles at length in *Tabron II*, sustaining a ruling that the government's failure to disclose juvenile adjudications did not require a new trial. Without deciding whether the records should have been disclosed, the court held that: (1) as to bias, cross-examination about adjudications would not have weakened the impact of testimony by witnesses who had a relationship with the court during the investigation, prosecution, and trial of the case, and (2) as to general credibility, cross-examination about adjudications would not have affected the outcome of the trial. The decision was based largely on counsel's extensive cross-examination on the witnesses' active involvement in crimes with which the defendant was charged, highlighting their motive to curry favor with the government. *Tabron*, 444 A.2d at 943. Similarly, *(Dwayne) Johnson v. United States*, 537 A.2d 555, 559 (D.C. 1988), held that non-disclosure of juvenile records was not reversible when both the jury and counsel were aware of circumstances implying witness bias and questionable credibility. *Johnson* cited *United States v. Bagley*, 473 U.S. 667 (1985), and *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), for the proposition that the Sixth Amendment Confrontation Clause is a "trial right" that does not compel pretrial discovery of specific material with which to question witnesses. *(Dwayne) Johnson*, 537 A.2d at 558. The court concluded that under the test set out in *Brady v. Maryland*, 373 U.S. 83, 87 (1963), as interpreted by the *Bagley* court, the prosecutor's failure to disclose the witness's juvenile record in this case was not a violation of due process because there was no "reasonable probability" that production of the records would have affected the outcome of the trial. *(Dwayne) Johnson*, 537 A.2d at 558-59.

the District of Columbia Parole Board pursuant to D.C. Code § 24-404(b) prior to expiration of the maximum term of the sentence qualify. *(Charles) Williams v. United States*, 421 A.2d 19, 24-25 n.8 (D.C. 1987) (but reduction of minimum sentence at Parole Board's request pursuant to D.C. Code § 24-401(c) (repealed) is not equivalent to a certificate of rehabilitation). The conviction need not have been expunged or set aside to trigger the provisions of the statute so long as rehabilitation has been demonstrated. *Id.*[21]

Character witnesses aside, impeachment with a prior arrest is generally prohibited unless a witness opens the door with a sweeping denial of the specific type of conduct that was the basis for the prior arrest.[22] Counsel may not "set up" the impeachment by eliciting a denial from the witness in order to impeach. *See also Collins v. United States*, 491 A.2d 480, 488 (D.C. 1985) (where on direct examination defendant denies ever owning a gun, it is improper to allow questions regarding previous arrest on gun charges on cross-examination when prosecutor has only the arresting officer's affidavit and no more concrete evidence); *(David) Reed*, 452 A.2d at 1178 ("[t]he use of prior arrests for the purpose of impeachment is limited to those situations in which the arrests are relevant to issues apart from general credibility, e.g., reputation and bias"); *Coles v. United States*, 452 A.2d 1190, 1193 (D.C. 1982) (impeachment by charges dismissed in exchange for a guilty plea prohibited; however, error not "plain"). *Compare Walder v. United States*, 347 U.S. 62, 64-65 (1954) (impeachment with prior arrest for narcotics possession, dismissed after suppression of the evidence, was not error where defendant on direct examination volunteered general denial possessing narcotics), *with Jackson v. United States*, 377 A.2d 1151, 1154-55 (D.C. 1977) (trial court erred in permitting cross-examination of defendant on prior arrest for carrying a pistol without a license after prosecutor elicited denial of any prior possession of a pistol on cross-examination). Character witnesses may be examined on the defendant's prior arrests to test their knowledge of information consistent with a reputation for truthfulness. *Maura v. United States*, 555 A.2d 1015 (D.C. 1989).

Finally, "the facts of the [previous] crime are not admissible unless, and to the extent that, those facts are independently relevant to the issues at trial. [They] are not admissible to prove a general disposition to commit crime or a specific crime." *Ward v. United States*, 386 A.2d 1180, 1182 (D.C. 1978) (citation omitted). If, however, the defendant suggests that a plea of guilty was entered to a prior offense only because the defendant was guilty of that offense (implying that the "not guilty" plea in this case supports innocence), the door may be opened to cross-examination about the facts of the case, to show the plea was entered to avoid more serious charges. *See (Nathaniel) Thomas v. United States*, 824 A.2d 26 (D.C. 2003) (per curiam)

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[21] For cases construing the analogous provisions of Fed. R. Evid. 609(c), *see United States v. Wiggins*, 566 F.2d 944, 946 (5th Cir. 1978) (release from halfway house alone, without certification of rehabilitation, does not establish rehabilitation); *United States v. Di Napoli*, 557 F.2d 962, 965-66 (2d Cir. 1977) (certificate of relief from disabilities issued pursuant to statute by state trial court does not render conviction inadmissible for impeachment); *United States v. Thorne*, 547 F.2d 56, 58 (8th Cir. 1976) (finding of rehabilitation not limited to certificate of rehabilitation and may be established through questioning by trial court).

[22] The existence of a pending case may be introduced to establish a government witness's bias even if the government has not made testimonial arrangement. *See Washington*, 461 A.2d at 1038. *But see (Antonio) Williams*, 642 A.2d at 1322 (improper for prosecutor to question defense witness about pending case because it is too implausible "to assume categorically that a witness awaiting criminal trial on charges unrelated to the present case is fired by anti-government hostility").

(harmless error to allow cross-examination of defendant about past drug use and violent behavior where counsel failed to object); *(Charles) Thomas v. United States*, 772 A.2d 818 (D.C. 2001) (no plain error in impeachment and argument regarding defendant's prior convictions); *Middleton v. United States*, 401 A.2d 109, 125-28 (D.C. 1979).

III. IMPEACHMENT: USE OF PRIOR STATEMENTS

A. Prior Inconsistent Statements: Impeachment of Other Party's Witness

1. General Considerations

Impeachment with prior inconsistent statements is often the most dramatic and effective means of attacking credibility.[23] Written or oral statements (including prior testimony) may be used.[24] The defendant may be impeached with a prior inconsistent statement taken in violation of Fourth and Sixth Amendment rights, if the statement was voluntary. *Martinez v. United States*, 566 A.2d 1049, 1059 (D.C. 1989). *But see Simpson v. United States*, 632 A.2d 374, 379-81 (D.C. 1993) (statements taken in violation of the "core" Sixth Amendment right to counsel may not be used even for impeachment, though statements which merely violate the 'prophylactic rule' may be used for impeachment purposes).[25] Prior statements may include statements made jointly by the witness and another person. *See United States v. Broadus*, 450 F.2d 1312, 1316 (D.C. Cir. 1971) (burden is on government to show that nothing in joint statement could be attributed to witness being impeached).

Under D.C. Code § 14-102, as amended by the Public Safety and Law Enforcement Act of 1994, a prior inconsistent statement of a witness is admissible for the truth of the matter asserted if the prior statement is: (1) inconsistent with the witness's in-court testimony; and (2) given under oath, subject to the penalty of perjury, at a prior proceeding. Thus, sworn prior inconsistent statements are no longer considered hearsay and may be admitted as affirmative proof of their contents. *See also Mercer v. United States*, 724 A.2d 1195 (D.C. 1999) (videotaped statement given to police admissible under § 14-102(b) when adopted by witness in sworn grand jury testimony); *(Sean) Williams v. United States*, 686 A.2d 552, 558 (D.C. 1996). Further, retroactive application of § 14-104, allowing the admission of a witness's prior inconsistent

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[23] As with prior convictions, counsel may elicit prior inconsistent statements on direct examination in order to lessen the impact of impeachment. "[T]he rule against impeachment of one's own witness forbids an attack on the credibility of the witness; the rule is not violated by the eliciting of evidence adverse to the witness's credibility as a matter of strategy." *(David) Reed*, 452 A.2d at 1179. The general prohibition on bolstering an unimpeached witness's credibility forbids using a prior consistent statement to "rehabilitate" one's own witness on direct examination. *Id*. Likewise, counsel may not recall a government witness for direct examination to impeach that person with an inconsistent statement, though such impeachment is perfectly proper on cross-examination. *Woodward v. United States*, 626 A.2d 911, 913 (D.C. 1993). Failure to impeach with a prior inconsistent statement may, under certain circumstances give rise to an ineffective assistance of counsel claim. *(Bradford) Williams v. United States*, 725 A.2d 455, 458 (D.C. 1999).

[24] Prior statements given to the Pretrial Services Agency may also be used for impeachment. *See Herbert v. United States*, 340 A.2d 802, 804-05 (D.C. 1975).

[25] *See also Barrera v. United States*, 599 A.2d 1119, 1132-33 (D.C. 1991) (voluntary statements by non-English speaking arrestee are admissible for impeachment, even if no interpreter was present, provided that the government can show by preponderance of evidence that statements are reliable and trustworthy).

statement given under oath, is permissible. *(Darryl) Jones v. United States*, 719 A.2d 92 (D.C. 1998); *see also Tyer v. United States*, 912 A.2d 1150 (D.C. 2006) (harmless error to admit second statement of government witness taken after four hours of questioning where initial statement, taken immediately after incident and before questioning, did not implicate defendant; where initial statement was inconsistent with grand jury testimony; and where witness changed his mind during direct and cross-examination as to which was the correct statement).

Prior unsworn inconsistent statements remain inadmissible as substantive proof and come in only to raise doubt about the truth of a witness's testimony.[26] The theory is not that the prior unsworn statement is true, but that the inconsistency creates doubt regarding the witness's credibility. A complete contradiction of the witness's testimony is not necessary:

> The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.

Jencks v. United States, 353 U.S. 657, 667 (1957). *But see Perritt v. United States*, 640 A.2d 702, 706 (D.C. 1994) (complete contradiction is not required, but at a minimum there must be a prior assertion of fact inconsistent with the assertion made on the stand); *Beale v. United States*, 465 A.2d 796, 804 (D.C. 1983) (government failed to show "threshold inconsistency" necessary to use prior statement for impeachment).

One witness may not express an opinion on the ultimate credibility of another witness. *See (Wayne) Carter v. United States*, 475 A.2d 1118, 1126 (D.C. 1984); *Allen v. United States*, 837 A.2d 917 (D.C. 2003) (prejudicial error for prosecutor to cross-examine witness on the credibility of another witness, namely a police officer); *McFerguson v. Untied* States, 870 A.2d 1199 (D.C. 2005) (character witness's opinion or reputation evidence of a character trait may not be tested by posing a hypothetical question to the witness which assumes that the defendant committed the acts as the purpose to test the witness's basis of knowledge and credibility for holding the opinion.) Hence, a witness may not be confronted with another's inconsistent testimony and asked to comment on the latter's credibility. *Freeman v. United States*, 495 A.2d 1183, 1187 (D.C. 1985) (prosecutor summarized government witnesses' testimony and asked defendant why they would lie). Furthermore, one cannot impeach with the hearsay statements of a third person. *Patton v. United States*, 633 A.2d 800, 808-09 (D.C. 1993) (error to impeach defendant with his mother's declarations).

While the legal definition of inconsistency may be broad, there are tactical limitations. Impeachment with a relatively inconsequential inconsistency may create sympathy for the witness. "Never launch an attack which implies that the witness has lied deliberately unless you

[26] Unsworn prior inconsistent statements may not be admitted for the truth of the matter asserted. *(Thomas) Johnson v. United States*, 820 A.2d 551 (D.C. 2003). *See (Jeffrey) Carter v. United States*, 614 A.2d 542, 545 (D.C. 1992) ("the impeachment value of the statement depended on its truth, and that fact made it hearsay"). But when a witness admits the truth of her prior statement and adopts it as part of her in-court testimony, subject to cross-examination, the earlier statement may be considered not only for credibility but also as affirmative evidence of the truth of the matter asserted. *See Watts v. United States*, 362 A.2d 706, 711-12 n.11 (D.C. 1976).

are convinced that the attack is justifiable and essential to your case." *McCormick On Evidence* § 33, at 73 (3d ed. 1984). Objective evaluation of the relative significance of the inconsistency and any reasonable explanations for it will assist counsel in deciding how to handle the witness. The standard instruction on prior inconsistent statements, *Criminal Jury Instruction* No. 2.216, is a useful guide in evaluating the potential impact of the prior statement.

The rule that extrinsic evidence may not be introduced to prove collateral matters limits the scope of impeachment. *See infra* Section III.C. Bias and defects in ability to observe are never collateral, and are always provable by extrinsic evidence. *See, e.g.*, *C.B.N.*, 499 A.2d at 1217-20; *(Irving) Johnson*, 418 A.2d at 140; *Ewing v. United States*, 135 F.2d 633 (D.C. Cir. 1942). Prior inconsistent statements may be proved by extrinsic evidence only if they relate to non-collateral facts – facts that could be introduced "for any purpose independently of the self-contradiction." *Ewing*, 135 F.2d at 641. Statements concerning the offense itself or describing the perpetrator are clearly not collateral. *See Moss v. United States*, 368 A.2d 1131, 1135 (D.C. 1977) (description of where defendant was stopped not collateral); *Hampton v. United States*, 318 A.2d 598, 600 (D.C. 1974) (inconsistent statement relating to witness's photographic identification not collateral).

This rule does not restrict the line of questioning. Impeachment, unlike extrinsic evidence, is proper with respect to any matters as to which the witness has testified on direct or cross-examination. *Moss*, 368 A.2d at 1135 n.3. Counsel may confront the witness with a prior inconsistent statement concerning collateral matters. If the witness admits making the statement, the impeachment is completed. If the witness denies making the statement, counsel may not introduce extrinsic proof to complete the impeachment.

If the witness denies making the statement and counsel does not complete the impeachment – or if counsel lacks a good faith basis for the purported impeachment – the court may issue an instruction that counsel is "'bound by the answer,' i.e., that no such statement was made." *Leon v. United States*, 136 A.2d 588, 590 (D.C. 1957); *see also Coles*, 452 A.2d at 1194. Failure to grant a request for a cautionary instruction when opposing counsel has asked a question that raises an inference of bias may be grounds for reversal. (*Lee Won Sing v. United States*, 215 F.2d 680, 681 (D.C. Cir. 1954) ("[t]he damaging character of the question, considered with the inconclusiveness of the evidence of appellant's guilt, called for a more direct and positive elimination of its influence upon the jury").[27]

[27] The prosecutor in *Lee Won Sing* asserted in a question that a defense witness had been paid to take responsibility for the offense charged, but neither attempted to prove nor demonstrated a good-faith basis for believing that the assertion was true. 215 F.2d at 680-81. The problem in *Leon* and in *Coles* was the prosecutor's failure to complete impeachment. The statement in *Coles* purportedly had been made to the prosecutor personally. *Compare* D.C. R. Prof. Cond. 3.7(a) ("A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: (1) [t]he testimony relates to an uncontested issue; (2) [t]he testimony relates to the nature and value of legal services rendered in the case; or (3) [d]isqualification of the lawyer would work substantial hardship on the client").

2. Requirement of a Proper Foundation

Counsel must lay a foundation for impeachment by directing the witness's attention to the time, place, and circumstances of the prior statement and by asking the witness whether the statement was made. The witness must also be given the opportunity to explain the inconsistency. *See Scott v. United States*, 619 A.2d 917, 921 (D.C. 1993); *Beale*, 465 A.2d 796, 801 (D.C. 1983); *(Anthony) Wright*, 489 F.2d 1181; *Gordon v. United States*, 289 F. 552, 554-55 (D.C. Cir. 1923); *Queen Caroline's case*, 129 Eng. Rep. 976, 2 Brod. & Bing. 284, 313 (H.L. 1820). *But see Parker v. United States*, 757 A.2d 1280 (D.C. 2000) (no error to restrict questioning of police officer regarding witness's prior inconsistent statements when witness had not been confronted with the prior statement). Failure to lay a foundation precludes later cross-examination on, or admission of, the prior statement.[28]

It is improper to question a witness about prior testimony without introducing a specific inconsistent statement. In *Frederick v. United States*, 472 A.2d 888, 889-90 (D.C. 1984), the prosecutor challenged a defense witness by asking him whether he had previously testified in an inconsistent manner. The prosecutor did not refer to a specific inconsistent statement and, in fact, mischaracterized the witness's earlier testimony. The court ruled that the interrogation should have identified the specific statement alleged to be inconsistent and that it was improper to summarize or paraphrase prior testimony. *See also*, 1 McCormick on Evidence § 37 at 120 (4th ed. 1992).

Before a defendant can be impeached with an *omission* from a prior statement or by silence prior to being given Miranda warnings, the court must determine that "the defendant's pretrial statement omitted a material circumstance which the defendant mentions later but which also would have been natural for the defendant to have mentioned in the prior statement." *Henderson v. United States*, 632 A.2d 419, 434 (D.C. 1993). The prosecutor must alert the court in advance so that the court may decide if its omission is material. *(Melvin) Martin v. United States*, 452 A.2d 360, 363 (D.C. 1982); *Hill v. United States*, 404 A.2d 525, 531 (D.C. 1979). If the omission does not involve such a material inconsistency that would have been natural to mention, the necessary threshold inconsistency is lacking and impeachment closing arguments are improper. *Beale*, 465 A.2d at 804-05. *Outlaw v. United States*, 604 A.2d 873 (D.C. 1992) (failure to exculpate co-defendant at plea proceeding did not constitute implied adoption of government proffer necessary to impeach witness at co-defendant's trial).[29]

[28] Failure to object to lack of a foundation eliminates the possibility of appellate relief except upon finding of plain error affecting substantial rights. *See Beale*, 465 A.2d at 802.

[29] The government may not use the defendant's exercise of the constitutional right to remain silent after advice of rights for impeachment purposes. *Doyle v. Ohio*, 426 U.S. 610, 619 (1976). Similarly, the government may not use the defendant's decision, after consultation with counsel, not to speak about a case with family and friends as impeachment through omission. *Henderson*, 632 A.2d at 434. *But see Greer v. Miller*, 483 U.S. 756, 764-67 (1987) (no reversible error where court sustained objection to question, "Why didn't you tell this story to anybody when you were arrested?" because jury was immediately instructed to ignore question and prosecutor did not pursue the matter further). However, the government can question defendant regarding pre-arrest silence. *Bedney v. United States*, 684 A.2d 759, 767 (D.C. 1996).

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***Smith v. United States*, 26 A.3d 248 (D.C. 2011).** Error to prohibit defendant from impeaching the lead detective with information that she was the subject of an investigation for coaching witnesses in another case and refusing to let him argue to the jury that the testimony of the government's key witness had been coached.

***Koonce v. United States*, 993 A.2d 544 (D.C. 2010).** Complaining witness's adoption of contents of Child Advocacy Center tape in sexual assault case as sworn testimony during her grand jury testimony became admissible as substantive evidence where used to impeach her testimony at trial.

3. Admissibility of Impeaching Document

The inconsistent portion of a prior statement is admissible for purposes of impeachment after identification by the witness or the person who took the statement. *See Gordon v. United States*, 344 U.S. 414, 420-21 (1953) (witness's admission of contradiction does not bar admissibility of document itself); *(Michael) Reed v. United States*, 403 A.2d 725 (D.C. 1979); *Jefferson v. United States*, 328 A.2d 85 (D.C. 1974) (although prior inconsistent statement successfully used to persuade witness to change testimony should have been admitted, error was harmless); *United States v. (Joseph) Smith*, 521 F.2d 957 (D.C. Cir. 1975). If the witness adopts the prior inconsistent statement, even if unsworn, it becomes part of the testimony and can be considered as substantive evidence. *See Bell v. United States*, 790 A.2d 523 (D.C. 2002) (prior inconsistent statement of a trial witness can be used as substantive evidence where the statement was a written factual proffer prepared by the government but agreed to under oath by the witness at his guilty plea proceeding); *Watts*, 362 A.2d at 711-12 n.11; *(Abraham) Williams v. United States*, 403 F.2d 176, 178-79 (D.C. Cir. 1968).

4. Cautionary Instruction

The jury may not treat a prior unsworn inconsistent statement as substantive evidence. Where, at the conclusion of argument, "there has been a request for a limiting instruction following the impeachment of a witness . . . and the use of impeachment testimony as substantive evidence is potentially prejudicial, it is error for a trial court to refuse to give such an instruction." *Brooks v. United States*, 448 A.2d 253, 259 (D.C. 1982). However, it may not be plain error for the court to fail to give an immediate cautionary instruction *sua sponte* if a witness has been impeached by an opposing party. This is because the jury is then less likely to view the statement as substantive evidence than if a party impeaches its own witness. *(Linwood) Johnson v. United States*, 387 A.2d 1084, 1087 (D.C. 1978) (en banc); *see also Forbes v. United States*, 390 A.2d 453, 457-58 (D.C. 1978). Thus, counsel must request an immediate instruction[30] or the issue is effectively waived on appeal.

[30] If the prior statement is favorable, *see, e.g.*, *Marksman v. United States*, 275 A.2d 241, 243 (D.C. 1971), counsel may choose not to request the instruction. The court may, however, give the instruction *sua sponte*.

If an unsworn impeaching statement is offered by the party who called the witness (*see infra* Section III.B.1), the court must *sua sponte* give an immediate limiting instruction. Failure to do so may be plain error. *See Gordon v. United States*, 466 A.2d 1226, 1231 (D.C. 1983). *But see Beale*, 465 A.2d at 802-03 (failure of trial court to instruct jury on limited purposes of the statement not plain error even though prosecutor impeached his own witness because impeachment related to collateral rather than initial issue); *(Linwood) Johnson*, 387 A.2d at 1086-87.

5. Specific Techniques and Examples

"Lock" the witness: When intending to impeach with an inconsistent statement, counsel should first "lock" the witness into the story by repeating the statements made on direct examination that conflict with the prior statement. To avoid telegraphing impeachment intentions, use a low-key, casual manner. Too direct an approach will alert the witness to the trap that lies ahead and supply an opportunity to formulate a ready response.

Lay foundation: A foundation must be laid by directing the witness's attention to the time, place, circumstances, and substance of the prior statement. ("You were interviewed by Detective John Doe of the Homicide Squad at your home on January 19, 1993, were you not? And that interview was about this alleged robbery?") This requirement applies to both oral and written statements. A written statement should be marked as an exhibit. If the witness signed it, counsel should have the witness identify the handwriting and signature or initials and acknowledge that there have been no changes made to the statement and that it was true when given.

Explore Inconsistency: If the witness admits making the prior statement, counsel is free to explore the basis for the inconsistency and to argue that the witness's memory was better at the time of the prior statement than at trial. If the witness denies making the prior statement or professes not to recall making it, counsel may introduce extrinsic proof to establish its existence. *Gray v. United States*, 589 A.2d 912, 915 (D.C. 1991). If the witness denies making a prior oral statement, counsel should produce another witness who heard the statement. If the statement was written and signed, the cross-examiner may, upon proper foundation, introduce it as an exhibit. *See supra* Section III.3.

Impeachment by Omission: Counsel should be alert to the possibility of impeachment by omission if the testimony includes a significant fact that was not included in a prior statement. Counsel should then argue that the additional fact is not true because, if it were, the witness would have included it in the prior statement.

a. Sworn statement (grand jury testimony)

Q. You testified on direct examination that you got a very good look at the man's face and recognized him immediately as the man who came into your store the day before?
A. Yes.

Q. And that he did not have anything covering his face?
A. Yes.

Q. You testified before a Grand Jury on May 17, 1993, concerning the circumstances surrounding the robbery, did you not?
A. Yes.

Q. You gave that testimony just three weeks after the robbery?
A. Yes.

Q. And it was sworn testimony, just as is your testimony here in court today, some eight months after the robbery?
A. Yes.

Q. Naturally, you were trying to be as truthful and accurate then as you are trying to be here in court today?
A. Yes.

Q. And the prosecutor asked you at that time whether you were able to get a good look at the man's face, isn't that right?
A. Yes.

Q. And you gave this response [reading from transcript]: "No, he was wearing a mask."
A. Yes.

[If witness denies, call court reporter who took Grand Jury testimony as your witness with original notes, have reporter authenticate transcript, and move for admission and publication of pertinent parts.]

Q. Well, is your memory here in the courtroom today better than it was just three weeks after the robbery?
A. I don't know.

Q. Well, did the man who robbed you have a mask on his face or not?
A. He did not have a mask on.

Q. Sir, are you as sure of the rest of your testimony as you are of this fact?

b. <u>Oral statement</u>

Q. You testified on direct examination that the man who robbed you had blue eyes like my client's, is that correct?
A. Yes.

Q. Now, when you saw the person who robbed you, did you get a good look at his eyes?
A. Yes, excellent.

Q. So excellent that you were positive immediately after the robbery and now of the color of the man's eyes, is that correct?

A. Yes.

Q. Is it fair to say that the color of his eyes made an impression that stayed in your mind from the time of the robbery until now?
A. Yes.

Q. You spoke with Detective Dick Tracy the day after the robbery, did you not?
A. Yes.

Q. And that interview was about this robbery, was it not?
A. Yes.

Q. And you were trying to describe the robber accurately, were you not?
A. Yes.

Q. And you told Detective Tracy that you were not sure what color the man's eyes were, did you not?
A. Yes.

[If no, call Detective Tracy and, after having him identify his police report, move the pertinent portions of the document into evidence.]

Q. Well, is your recollection here today better that it was on the day after the robbery?

[If "No" or "I don't know"]

Q. Well, which is it, are you positive or is it what you said right after the robbery that you are not sure what color the man's eyes were?

[If "Yes"]

Q. So, it was sometime after the police talked with you when you began to believe that the man's eyes were blue?

c. <u>Signed statement</u>

Q. You testified on direct examination that the man who robbed you is my client, who is 18 years old, isn't that right?
A. Yes.

Q. A defense investigator, Mr. Paul Drake, visited you at your store on April 5, 1993, and obtained a written statement from you about this robbery, isn't that right?
A. Yes.

Q. That was only two weeks after the robbery, was it not?

A. Yes.
Q. And your memory was at least as good then as it is now, was it not?
A. Yes.

Q. And you told Mr. Drake that the man who robbed you was about 30 years old, right?
A. I don't recall. I don't think I said that.

Q. Directing your attention to Defense Exhibit 1, will you look at the bottom of the page? Is that your signature?
A. It looks like mine.

Q. Well, is it your signature or not?
A. Yes, it is mine.

[If witness denies signature, call investigator who witnessed the signature on the statement.]

Q. You read this statement, sir, before you placed your signature there, did you not?
A. Yes.

Q. And you had the opportunity to make any changes or corrections, didn't you.
A. Yes.

Q. And this is the same statement that you read over and signed as true, isn't it?
A. Yes.

Q. And in fact this statement was true and accurate at the time that you gave it to Mr. Drake, was it not?
A. Yes.

Q. And you said in this statement that the man who robbed you appeared to be about 30 years old?
A. Yes, I guess I did.

[If witness still denies making the age description, and the statement is signed, it may be introduced into evidence.]

Q. Now, how old was the man who robbed you? Was he 30 years old or was he a mere lad of 18, like my client?
A. [Doesn't matter.]

d. <u>Impeachment by omission</u>

Q. You have testified here today that you can identify my client as the man who robbed you because of his very distinctive Caribbean accent, is that correct?
A. Yes.

Q. The police came to your store right after the robbery, did they not, and asked you questions about the robbery?
A. Yes.

Q. And Detective John Jones asked you for a description of the man who robbed you?
A. Yes.

Q. And the detective asked you to come down to his office two days later to look over a written report he had prepared, which included your detailed description of the robber?
A. Yes.

Q. And you read the report and signed it in the detective's presence, right?
A. Yes, I did.

Q. And the report was truthful and correct when you looked it over and signed it?
A. Yes.

Q. And you were trying to be helpful and cooperative with the police when you looked over that report and signed it, weren't you?
A. Yes.

Q. In other words, you wanted to give them all the information you possibly could to help them catch the robber, did you not?
A. Yes.

Q. But isn't it true that you failed to include in your description of the man who robbed you any mention of the fact that he had a Caribbean accent or an accent of any kind?
A. Yes.

B. Use by a Party of Its Own Witness's Prior Statements

1. To impeach credibility

D.C. Code § 14-102, as a result of the Public Safety and Law Enforcement Support Amendment Act of 1994, now permits a party to attack the credibility of its own witnesses, whether or not the party can claim surprise. D.C. Code § 14-102(a), now identical to Fed. R. Evid. 607, provides that "[t]he credibility of a witness may be attacked by any party, including the party calling the witness." However, § 14-102(b) permits introduction of only sworn prior inconsistent statements as substantive evidence, *see supra* Section III.A.1; any unsworn prior inconsistent statement can be admitted only for the purpose of attacking credibility. Unless the witness adopts it, an unsworn statement cannot be used as substantive evidence. Using an unsworn impeaching statement in closing argument as substantive evidence is improper. *See Wheeler v. United States*, 211 F.2d 19, 26 (D.C. Cir. 1953) (although prosecutor should not have attempted to refer

to prior inconsistent statement as substantive evidence in closing argument, trial court did not commit reversible error in failure to raise issue *sua sponte*).[31]

Immediately after a party has impeached its own witness with a prior unsworn statement, the court should advise the jury that the prior statement is admissible only for impeachment and not as substantive evidence. *See Beale*, 465 A.2d at 802, 803; *Stewart*, 490 A.2d at 625; *Lucas v. United States*, 436 A.2d 1282, 1284-85 (D.C. 1981); *Towles v. United States*, 428 A.2d 836, 842-43 (D.C. 1981), *aff'd*, 496 A.2d 560 (1981), *vacated on reh'g*, 497 A.2d 793 (en banc), *aff'd*, 521 A.2d 651 (1987); *(Linwood) Johnson*, 387 A.2d at 1086-87. Failure to give a limiting instruction may constitute plain error. An instruction is not required where the government refreshes the witness's recollection without actual impeachment. *(Amos) Jones v. United States*, 579 A.2d 250, 253-54 (D.C. 1990).

2. Preemptive introduction of inconsistent statements

A party may elicit its own witness's prior inconsistent statement "'to take the sting out' of anticipated impeachment" by the opposing party, *(David) Reed*, 452 A.2d at 1179, because any party is entitled "to bring out on direct examination damaging information about . . . his witness."

> [Eliciting] a witness' prior convictions on direct examination does not constitute impeachment of the witness, but rather is an effort to enhance the witness' credibility. The same reasoning is applicable to a party's eliciting its own witness' prior inconsistent statements. The rule against impeachment of one's own witness forbids an attack on the credibility of the witness; the rule is not violated by the eliciting of evidence adverse to the witness' credibility as a matter of strategy.

Id. (citations omitted). A party may not, however, follow up preemptive use of inconsistent statements with introduction of consistent statements. "The prohibition against bolstering one's own witness with his prior consistent statements cannot be circumvented by first eliciting the witness's inconsistent statement and then 'rehabilitating' the witness with a prior consistent statement." *Id*.

3. Use of consistent statements to bolster credibility

A party may not in general bolster the credibility of its witness by eliciting or introducing prior consistent statements. This prohibition is based "on the theory that 'mere repetition does not imply veracity.'" *See also Hill v. United States*, 664 A.2d 347, 350-51 (D.C. 1995) (trial court did not err in declining to admit witness's grand jury testimony when it did not rebut charge of motive to fabricate but only demonstrated that witness had previously testified in consistent matter. *(David) Reed*, 452 A.2d at 1180 (citations omitted); *Coltrane v. United States*, 418 F.2d 1131, 1140 (D.C. Cir. 1969). *Daye v. United States*, 733 A.2d 321, 325 (D.C. 1999) (trial court

[31] The portion of the prior statement that may be introduced is within the discretion of the court. *Wheeler*, 211 F.2d at 25-26; *Coleman v. United States*, 371 F.2d 343, 345 (D.C. Cir. 1966).

in error when it admitted prior consistent statements from government witnesses that were given after motive to fabricate arose, but were ostensibly offered and admitted to explain the story each witness originally gave to the police); *Sherrod v. United States*, 478 A.2d 644, 660 (D.C. 1984); *Musgrove v. United States*, 441 A.2d 980, 985 (D.C. 1982); *Scott v. United States*, 412 A.2d 364, 373 (D.C. 1980).[32] *But see Ventura v. United States*, 927 A.2d 1090 (D.C. 2007) (not plain error for trial court to fail to intervene *sua sponte* when prosecutor elicited prior consistent statements of complainant after defense counsel waived objection to the testimony; as long as those statements were made directly to testifying police witness and not through an interpreter, defense counsel elicited prior consistent statements from same witness, and evidence of defendant's guilt was not "marginal").

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***Mason v. United States*, 53 A.3d 1084 (D.C. 2012).** Prior consistent statement made to police shortly after shooting admissible to rebut charge that witness had current reason to curry favor with government where prior *inconsistent* statement had been made for other, unrelated reasons.

4. Use of consistent statements contained within statements used to impeach

While a party may never use its own witness's prior consistent statements on direct examination to bolster credibility, if the opposing party impeaches a witness with a portion of a statement, counsel may introduce on redirect any other portion of the same statement that meets the force of the impeachment. *See Mitchell v. United States*, 569 A.2d 177, 185 (D.C.1990); *(David) Reed*, 452 A.2d at 1180; *Musgrove*, 441 A.2d at 985-87. The requirement that the rehabilitation meet the force of the impeachment is a strict one. "'[T]he proposed evidence must be directed only at the particular impeachment that occurred,' and must include a statement by the declarant that will support particular testimony that has been impeached." *Musgrove*, 441 A.2d at 985 (citation omitted). A statement that meets the force of the impeachment must be redacted or edited to excise irrelevant prejudicial sections before the jury sees it. *Id*. at 987.

Counsel must be careful not to open the door to introduction of prior consistent statements through impeachment on minor points. The defense in *Sherer v. United States*, 470 A.2d 732, 739-41 (D.C. 1983), brought out several minor discrepancies between what a key government witness said at trial and what he had told the police. On redirect, the government was permitted to question the witness fully concerning his full statement. After noting that it was the defense, not the prosecution, that first alerted the jury to the witness's earlier statement implicating the defendant, the court concluded:

> The rule [barring prior consistent statements] is not designed to bar the introduction of cumulative evidence of a statement that already is properly before

[32] Counsel must be alert to use of "disguised" prior consistent statements on direct examination. In *(Ulysses) Jones v. United States*, 483 A.2d 1149, 1157 (D.C. 1984), a prosecutor asked an unimpeached government witness whether he had taken notes of his conversation with the defendant at the jail. The court held that such questions are improper because the jury may infer from any subsequent failure of the defense to impeach with the notes that they are consistent with the witness's testimony.

> the jury. Thus, appellant could not invoke the rule to bar the jury's hearing on redirect . . . that [the witness] had previously implicated appellant.

Id. at 740. To rebut the implication that the witness had fabricated the story and raise instead an inference that the witness simply had forgotten certain details, the prosecutor was entitled to question the witness regarding his earlier narrative. "The government was entitled to press this more natural inference on the jury by trying to show that the discrepancies were trivial when measured against the message of the statement as a whole." *Id*. at 741.

The court reaffirmed the permissible breadth of questioning in response to impeachment in *Sweat v. United States*, 540 A.2d 460, 464 (D.C. 1988). In questioning the complainant, who alleged that he had been assaulted by a disappointed loan applicant, defense counsel raised the inference that the complainant had phoned his supervisor before he notified the police because he was concerned that his conduct during the incident would cost him his job. The court held that the government was allowed during redirect of the complainant to elicit the full circumstances surrounding the call, as well as the conversation itself. *Id*. at 464.

5. Use of consistent statements to rebut charge of recent fabrication

If a witness's credibility is undermined by a suggestion of motive to lie, the witness may be rehabilitated with a previous statement, made when the witness had no motive to fabricate, that is directed at the impeachment and supports the particular testimony that was impeached. *See Brooks v. United States*, 536 A.2d 1091, 1093 (D.C. 1988); *(Ronald) Williams v. United States*, 483 A.2d 292, 296 (D.C. 1984); *(David) Reed*, 452 A.2d at 1180; *Musgrove*, 441 A.2d at 985; *(Maurice) Johnson v. United States*, 434 A.2d 415, 420-21 (D.C. 1981); *Rease v. United States*, 403 A.2d 322, 328 n.7 (D.C. 1979); *Daye v. United States*, 733 A.2d at 325.

At issue in *(Ronald) Williams* was the rehabilitation of government witnesses who were arrested in connection with the offense at issue. Counsel cross-examined each one extensively about the terms of plea agreements used to secure their testimony. In response, the government was permitted to introduce consistent statements made by each witness to the police *after* arrest. The court agreed that defense counsel had suggested that the witnesses had a motive to lie at the time of trial. Nevertheless, the prior consistent statements were *not* admissible because they were made at a time when the witnesses also had a motive to fabricate:

> The prior statements, however, were made to law enforcement officials at a time when the witnesses were under arrest and knew they could be tried for first-degree murder. While each of the witnesses' statements was made before a plea agreement was struck, it cannot be questioned that each declarant had a motive to lie to the detective who took the statement. Thus, the trial court erred in admitting the previous statements . . . since they were made at a time when the declarants were motivated to misstate the truth.

(Ronald) Williams, 483 A.2d at 296-97 (citations omitted); *see also Tome v. United States*, 513 U.S. 150, 165 (1995) (FRE 801(d)(1)(B) permits introduction of declarant's consistent out-of-

court statements to rebut charge of motive to lie *only* when statements were made *before* alleged motive arose).

Generally, counsel should use the earliest impeaching statement available. For example, if counsel has an inconsistent statement obtained just after the crime and one from just before the trial, the former is preferable. If the latter were used, all prior consistent statements might be admissible to rebut the charge of recent fabrication.

C. Collateral Matters

Extrinsic evidence may not be introduced to impeach on collateral issues. *(Timothy) Washington v. United States*, 499 A.2d 95, 101 (D.C. 1985). However, the court has discretion to admit evidence which is technically collateral when it "has sufficient bearing on the issues which the trier of fact must resolve." *Patterson v. United States*, 580 A.2d 1319, 1322-23 (D.C. 1990). For example, in *(Nathaniel) Jones*, 548 A.2d at 39, the defendant denied on cross-examination that he had used cocaine on or before the day of his arrest. The court found impeachment with positive drug tests the day after his arrest to be proper, as it was relevant to two issues raised by the defendant himself: "his sophistication with respect to drugs and his general credibility." *Id*. at 39.

Doctrine of Specific Contradiction: Another, related exception to the collateral issue rule is the "doctrine of specific contradiction." *(Antonio) Williams v. United States*, 642 A.2d 1317, 1321 (D.C. 1994). This exception allows extrinsic evidence to be introduced to complete an impeachment where the witness has gratuitously offered a false assertion regarding a specific fact. *Id*. at 1321; *Patterson*, 580 A.2d at 1323-24. *(Antonio) Williams* found that the doctrine did not apply where on cross-examination a defense witness, when pressed by the prosecutor regarding past drug use, falsely asserted that he had never used drugs in his life. The court found the doctrine of specific contradiction inapplicable because "[the witness] can scarcely be said to have volunteered such a denial." 642 A.2d at 1321; *see also Robinson*, 642 A.2d at 1309-10 (no error to disallow extrinsic evidence to impeach the complainant's claim that she stopped drinking in 1985 where claim made only under cross-examination and where trial court otherwise gave the defense a great deal of latitude in cross-examining complainant about her alleged drinking).

CHAPTER 27

OTHER CRIMES EVIDENCE

I. INTRODUCTION

Generally, "evidence of another crime is inadmissible to prove a defendant's disposition to commit the crime charged. *Johnson v. United States*, 683 A.2d 1087, 1090 (D.C. 1996) (en banc). *Johnson* "reaffirm[ed] the long-standing principle set forth in *Drew v. United States*, 331 F.2d 85 (D.C. Cir. 1964), that evidence of another crime is inadmissible to prove a defendant's disposition to commit the crime charged." 683 A.2d at 1090.[1] However, it may be admissible if it is offered on and determined to be a material issue in the case and falls into one of several enumerated exceptions to the general presumption of inadmissibility." *Id*. *Johnson* reiterated that other crimes evidence will most often come in to show "(1) motive; (2) intent; (3) absence of mistake or accident; (4) common scheme or plan; or (5) identity." *Id*. at 1092. It is the government's burden to show that the evidence falls within one of these exceptions. *See id*. at 1101.[2]

Clear and Convincing Standard: First the government must establish by clear and convincing evidence that the accused committed the other offense. *Johnson* at 1101; *see also Anderson v. United States*, 857 A.2d 451, 456 (D.C. 2004). If the government is able to do that, the trial court's decision about whether to admit the evidence requires it to weigh the probative value of the evidence against the danger of unfair prejudice. *See id*. *Johnson* announced that in balancing the probative value and prejudice of such evidence, the trial court must follow the standard set

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[1]As for "reverse *Drew*" – the defendant's use of other crimes to show that someone else committed the offense – *Newman v. United States*, 705 A.2d 246, 255 (D.C. 1997), held that the defendant may introduce other crimes evidence against a third person if that evidence "'tend[s] to indicate some reasonable possibility that a person other than the defendant committed the charged offenses'" (citation omitted). The Court of Appeals has since reaffirmed its holding in *Newman*, making clear that because defensive use of *Drew* evidence does not present a risk that the defendant will be convicted based on propensity, reverse *Drew* evidence is subject only to a relevance inquiry. *Battle v. United States*, 754 A.2d 312, 316-17 (D.C. 2000). *Battle* further reiterates the proposition that when the defendant seeks to use reverse *Drew* evidence, the trial court should resolve close questions of admissibility in favor of inclusion, not exclusion. *Id*. *See also Hunter v. United States*, 980 A.2d 1158, 1164 (D.C. 2009) (error, though harmless, to deny admission of third party's convictions for drug trafficking while armed and possession of a pistol on ground that they had no probative value because they had "any tendency" to show that defendant did not know about or have ready access to gun he allegedly used to shoot at victim); *Burgess v. United States*, 786 A.2d 561, 577-79 (D.C. 2001), *cert. denied*, 537 U.S. 854 (2002) (error, albeit harmless, for trial court to have excluded photograph of government witness who had immunity holding a gun closely linked to homicide where it could have lead jury to conclude that witness, rather than accused was one of the shooters; "[t]he cloak of 'undue prejudice' does not protect witnesses acknowledged to be present and participating in the crime from reasonable inferences that they may have committed the crime"). *But see Bruce v. United States*, 820 A.2d 540, 545 (D.C. 2003) (excluding "reverse *Drew*" because the "probative value of the evidence was substantially outweighed by the prejudice to the government" where there was no distinct *modus operandi* between robbery with a gun of a fast-food restaurant and a purse snatching).

[2] No prejudice is presumed when the sole defense is insanity; the government may cross-examine defense experts about prior crimes because there is little risk of prejudice when the defense is not factual innocence, and the evidence is relevant to the reliability of the experts' opinions. *See Rogers v. United States*, 483 A.2d 277, 288 (D.C. 1984).

forth in Federal Rule of Evidence 403: "that the danger of unfair prejudice must *substantially* outweigh probative value before relevant evidence may be excluded." *Id*. at 1099.

Prejudice v. Probative: In deciding whether the danger of unfair prejudice substantially outweighs probative value the trial court must weigh "(1) the strength of the evidence as to the commission of the other crime, (2) the similarities between the crimes, (3) the interval of time that has elapsed between the crimes, (4) the need for the evidence, (5) the efficacy of alternative proof, and (6) the degree to which the evidence probably will rouse the jury to overmastering hostility." *Id*. at 1095 n.8, citing John Strong, *I McCormick on Evidence* § 190 (4th ed. 1992).

The remainder of this chapter addresses the threshold question of whether the evidence is "*Drew*" evidence, the procedures for admitting other crimes evidence, and case law pertaining to the common "*Drew*" exceptions.

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***Dowtin v. United States*, 999 A.2d 903 (D.C. 2010).** No abuse of discretion to deny motion for mistrial based on witness's comment regarding defendant's prior murder indictment where trial court immediately and twice instructed jury to disregard statement.

Other Crimes Evidence:

- ✓ Generally inadmissible to show one's propensity to commit crime
- ✓ Counsel should argue that the danger of prejudice "substantially" outweighs any probative value
- ✓ Counsel should challenge relevance
- ✓ Counsel should be careful not to open the door to other crimes evidence when presenting his/her case
- ✓ Admissible if it is offered and determined to be a material issue in the case and falls under the following exceptions to show:
  - Motive, intent, absence of mistake or accident, identity, or common scheme or plan
  - Government must show by "clear and convincing standard" that accused committed other offense

II. THRESHOLD ISSUE: IS IT "DREW"?

Drew issues are potentially present whenever the government joins multiple offenses for trial or whenever the government seeks to introduce evidence of any prior bad act in a criminal trial. However, evidence of a prior bad act is not other crimes evidence requiring *Drew* analysis if the activity is not sufficiently criminal, if the crime is direct and substantial proof of the charged crime, closely intertwined with the evidence of the charged crime, or necessary to place the charged crime in an understandable context. *See Johnson*, 683 A.2d at 1098. *Johnson* clarified essentially two categories of "non *Drew*" evidence, both involving prior acts directly related or connected to the charged offense. The first, commonly referred to as *Toliver* evidence, involves

evidence that is "admissible to complete the story of the crime on trial by proving its immediate context." *Toliver v. United States*, 468 A.2d 958, 960 (D.C. 1983) (citations omitted). The second type of "non *Drew*" evidence is evidence that is "not independent of the crime charged." *Johnson*, 683 A.2d at 1096. Such evidence is "admissible as direct proof of guilt." *Id.*

Additionally, the Court of Appeals has held that "in prosecutions for sexual offenses, evidence of a history of sexual abuse of the complainant by the defendant may be admissible on the theory of predisposition to gratify special desires with that particular victim." *Pounds v. United States*, 529 A.2d 791, 794 (D.C. 1987). In *Pounds*, a case involving a "history of incest" between the complainant and the accused, the Court of Appeals specifically noted that it was not deciding "[w]hether the theory that evidence of a defendant's past sexual conduct with persons other than the complainant may be admissible if it shows an unusual sexual taste or preference" would "survive [a] *Drew* [analysis]" and "caution[ed] against embracing an expansion of the exception." *Id.*, at n. 3. Subsequently, however, in *Howard v. United States*, 663 A.2d 524 (D.C. 1995), the court held that it was not error for the trial court to have admitted evidence of a past sexual offense involving a different complainant under the "unusual sexual preference" other crimes exception. In *Howard*, the court stated that "the 'lustful disposition' exception [was relevant] to . . . absence of mistake or to the presence of 'criminal intent.'" 663 A.2d at 529.

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***United States v. Morton*, 50 A.3d 476 (D.C. 2012).** Not an abuse of discretion for trial judge to exclude drug addiction evidence when offered to prove a coherent story of the evidence under Johnson and Tolliver.

***Harrison v. United States*, 30 A.3d 169 (D.C. 2011).** Trial court abused its discretion in admitting testimony by three other female high school students that defendant had made sexually suggestive comments to them prior to his alleged sexual assault on complaining witness as the inappropriate remarks to the other students were relevant only as propensity evidence from which the jury could infer, improperly, that defendant acted toward the complaining witness in conformity with the bad character revealed by those remarks.

A. Non-Criminal Activity

The *Drew* analysis applies to "acts that have not been formally adjudicated as crimes," as long as those acts are "'minimally in the nature of a criminal offense,'" *Bigelow v. United States*, 498 A.2d 210, 212 (D.C. 1985) (citation omitted), and purportedly committed by the defendant. *See Freeman v. United States*, 689 A.2d 575, 580-81 (D.C. 1996). Evidence of non-criminal activity must not be viewed in isolation, because context may make otherwise innocuous behavior sufficiently suggestive of criminal conduct to require a *Drew* analysis. *See e.g.*, *United States v. Shelton*, 628 F.2d 54, 57 (D.C. Cir. 1980) (reversing conviction for assault on a federal officer because the prosecutor, through evidence of various non-criminal circumstances, painted a picture of the accused and one of his witnesses as "members of the drug underworld involved in all sorts of skullduggery.") In *Shelton* the court of appeals rejected the argument that the evidence was not *Drew* merely because the evidence was "less focused and more subtly adduced than traditional "other crimes" evidence." 628 F.2d at 57. The court explained that "[w]here the

'other crime' alleged is not specified, it is more difficult for the defendant to refute the charge or to demonstrate its insignificance. *Id.* Where the evidence is presented by innuendo, it is less likely that the jury will guard against manipulation. *Id*.

Examples of Other Crimes Evidence: For example, where the accused is charged with carrying a pistol without a license, and the jury is aware that the defendant did not have a license, evidence of prior firearm possession is other crimes evidence. *See Scull v. United States*, 564 A.2d 1161, 1162 n.1 (D.C. 1989); *see also (Abdus-Shahid) Ali v. United States*, 581 A.2d 368, 375 (D.C. 1990) (possession of sawed-off shotgun is inherently criminal); *(Adrian) Williams*, 549 A.2d 328, 332-34 (D.C. 1988) (in prosecution for three break-ins at American University dormitories, evidence of different incident in which defendant surreptitiously entered American University dormitory and was arrested was other crimes evidence).

Conduct that is not "other crimes" Evidence: Cases finding that suspicious conduct does not fall within the category of "other crimes" evidence include: Ferguson v. United States, 977 A.2d 993 (D.C. 2009) (defendant's failure to retrieve his car, mail, and other documents from complaining witness's home, after he allegedly assaulted complaining witness, admissible for consciousness of guilt); *Jackson v. United States*, 945 A.2d 621 (D.C. 2008) (teardrop-shaped tattoo beneath his left eye was not *Drew* or "other crimes" and where tattoo was relevant for identification purposes at trial); *Rodriguez v. United States*, 915 A.2d 380 (D.C. 2007) (evidence of defendant's prior contacts with police was relevant to manner in which investigation was conducted and mention of contacts not other crimes evidence); *Hammond v. United States***,** 880 A.2d 1066 (D.C. 2005) (threats to kill witness deemed "consciousness of guilt or admissions of [accused's] involvement in the crime charged"), *citing Burgess v. United States*, 786 A.2d 561, 569 (D.C. 2001); *Burgess v. United States*, 786 A.2d 561 (D.C. 2001) (evidence that co-defendants agreed to coordinate their stories after one participant spoke to police was not *Drew*, but rather was direct evidence of commission of the offense because it demonstrated consciousness of guilt), *cert. denied*, 537 U.S. 854 (2002); *Butler v. United States*, 688 A.2d 381, 389 (D.C. 1996) (evidence of contacts with police not necessarily other crimes evidence); *(Darryl) Smith v. United States*, 665 A.2d 962, 996 n.8, 967 (D.C. 1995) (wearing bullet-proof vest not a crime and telling juvenile to "watch the strip" while he was gone not *Drew*); *Blakeney v. United States*, 653 A.2d 365, 368-69 (D.C. 1995) (possession of pager in drug distribution case not inherently criminal); *Perritt v. United States*, 640 A.2d 702, 704-05 (D.C. 1994) (MPD detective's testimony explaining investigative procedures, including fact that defendant's attorney sent him a letter saying she represented defendant, not *Drew* evidence because no explicit reference made to defendant's prior criminal history); *Kinard v. United States*, 635 A.2d 1297, 1303-05 (D.C. 1993) (possession of handgun without more not evidence of other crimes and evidence in murder/armed robbery trial that two hours earlier defendant was seen with a gun and with co-defendant, had approached three groups of strangers, spoke to them briefly and left at a quick pace not *Drew*); *Carter v. United States*, 614 A.2d 913, 918 (D.C. 1992) (even if no sufficient factual basis for prosecutor's questions suggesting that defense witness had been intimidated, accused was not prejudiced, where questions did not state or imply that it was accused who had been involved in intimidation); *Catlett v. United States*, 545 A.2d 1202, 1217 (D.C. 1988) (*Drew* analysis not applied to evidence that accused obstructed justice as he stood across street while police interviewed witness); *Wheeler v. United States*, 470 A.2d 761, 770 (D.C. 1983) (peering into windows, posing as salesman and workman, wandering between

houses and bushes, giving false name to police, ringing doorbells, and following a woman, in neighborhood where several charged sexual assaults had occurred, "albeit strange, is not sufficiently 'criminal' to fall within *Drew*'s scope"); *Evans v. United States*, 417 A.2d 963, 966 (D.C. 1980) ("there is no compelling inference that the use of a credit card bearing another's name is a criminal act"). Further, evidence that a defendant is on parole is not "other crimes" evidence. *See Hall v. United States*, 540 A.2d 442, 447 (D.C. 1998). Likewise cross-examination of defense witness regarding her receipt of PCP from accused and her use of PCP with him was not "other crimes" evidence because it was "only admitted for the limited purpose of demonstrating [the witness's] bias." *Samuels v. United States*, 605 A.2d 596, 597 (D.C. 1992).

Relevance: It is important to always raise issue of relevance. Even when not strictly *Drew*, evidence introducing other bad acts is inadmissible unless the government demonstrates its relevance to an issue in the case. *See, e.g.*, *(Timothy) Robinson*, 623 A.2d 1234, 1242-43 (D.C. 1993) (reversing conviction for admission of evidence that two nights after decedent's stabbing, accused stood for several minutes near woman parking her car, looking at her and holding object with handle covered by paper bag, deeming that evidence more prejudicial than probative, particularly where government presented it as evidence of another crime); *(James) Hawkins v. United States*, 482 A.2d 1230, 1232 (D.C. 1984); *Wheeler*, 470 A.2d at 769.

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***Daniels v. United States*, 2 A.3d 250 (D.C. 2010).** Trial court did not abuse its discretion in refusing to strike witness testimony that he had seen defendant with "numerous guns" where defense counsel elicited the statement and then used statement to challenge witness's description of weapon used in homicide.

***Mungo v. United States*, 987 A.2d 1145 (D.C. 2010).** Trial court did not err in allowing evidence that defendants regularly carried particular firearms on their persons around the time of the murders where evidence came in through witness who described earlier gun incidents as related to motive defendants had to shoot victims and where evidence would show that defendants had access to weapons similar to those used in murders.

B. Direct and Substantial Proof of the Crime Charged

Johnson made clear that the *Drew* analysis is unnecessary if the government can demonstrate that the other crimes evidence: "(1) is direct and substantial proof of the charged crime, (2) is closely intertwined with the evidence of the charged crime, or (3) is necessary to place the charged crime in an understandable context." 683 A.2d at 1098. *See also Jackson v. United States*, 856 A.2d 1111, 1116-17 (D.C. 2004) (holding that "other crimes or bad act evidence may be offered for the purpose of demonstrating 'knowledge' and, absent a finding that the prejudicial effect of the evidence substantially outweighs its probative value evidence offered for such purpose will overcome *Drew's* presumption of inadmissibility").

In *Johnson*, the defendant and a severed co-defendant were charged with killing the decedent with a .45 caliber weapon. The decedent's keys to his apartment in Maryland were also taken.

Less than one hour later, someone arrived at the decedent's Maryland apartment and stole the decedent's nine millimeter handgun and killed two boys in the apartment with the same .45 caliber handgun used to kill the decedent. When the defendant was arrested a week later, he was in possession of the decedent's stolen nine-millimeter weapon.

On appeal, the court held that "[t]he Maryland murders were independent evidence of the underlying crime because "the same evidentiary stream ran through [the Maryland murders] and the charged crime." *Johnson*, 856 A.2d at 1098. Specifically, the same gun was used in the commission of both crimes; both crimes occurred close to one another in time (less than one hour apart); the Maryland murders arguably occurred as a consequence of the D.C. murder; and the perpetrators appeared to be known to the victims of each crime. *See id*. This set of facts, with both a temporal and causal nexus, was deemed direct and substantial proof of Johnson's guilt of the D.C. murder. *See id.*; *Jackson*, 856 A.2d at 1111 (evidence that accused had been warned, when he had been previously arrested at same location for selling compact discs without a license that he was selling counterfeit compact discs, was admissible to show accused's knowledge that compact discs he was selling in charged offense were counterfeit); *Bonhardt v. United States*, 691 A.2d 160, 164 (D.C. 1997) (evidence that defendant sold drugs to victims for years, supplied victims two days before fire with drugs and threatened to burn the building if a drug debt was not paid was "intertwined with the arson, and put it in context . . . [and] was also direct and substantial proof of the crimes charged").

A frequently encountered scenario involves the government attempting to introduce evidence of prior occasions where defendant possessed the same weapon used in the charged offense. *See, e.g.*, *Gamble v. United States*, 901 A.2d 159 (D.C. 2006) (testimony that a witness had seen the defendant two weeks earlier with the gun allegedly used in the killing admitted as evidence was relevant in the extent to which it showed the defendant's physical means of committing the crime); *Hartridge v. United States*, 896 A.2d 198 (D.C. 2006) (probative value of focusing on the presence of defendants and their access to guns prior to the murder in dispute was not substantially outweighed by danger of unfair prejudice where the evidence established at least a reasonable probability that defendants either were seen with, or had reasonable access to, the guns probably used in the murder, and helped to explain one of the murders and established the other murder); *Adams v. United States*, 883 A.2d 76 (D.C. 2005) (no plain error in admission of witness's testimony that he previously saw defendant with the "same gun" that was used to shoot the decedent); *Marshall v. United States*, 623 A.2d 551, 554 (D.C. 1992) (evidence of possession of a weapon on an earlier occasion by one later charged with using a similar weapon is probative, relevant evidence).

Although *Johnson* remains a seminal case, the court has made clear that trial courts must remain vigilant when examining the government's contention that other crimes evidence is admissible as "direct proof of the charged crime." In *Sweet v. United States*, 756 A.2d 366, 373-74 (D.C. 2000), the Court of Appeals reversed a murder conviction where the trial court had admitted evidence that the defendant had killed previously. In *Sweet* the government's theory was that Sweet had killed a corrections officer at the request of co-defendant Hammond. To link Sweet to the charged offense the government introduced evidence of Sweet's admission that he had killed previously for Hammond. This connection alone was held insufficient to make the evidence admissible:

> Evidence that Sweet had killed other people in the past on behalf of Hammond was not direct proof that he killed or conspired to kill the corrections officer at Hammond's behest. Nor was the evidence of past murders closely intertwined with evidence of the current conspiracy to murder [the corrections officer]. The prior murders about which Sweet boasted did not purport to be related to, or connected with, the murder of the corrections officer.

Id.

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***Jones v. United States*, 27 A.3d 1130 (D.C. 2011).** Not abuse of discretion to admit in homicide case weapon and DNA evidence related to a North Carolina robbery that went to identity of perpetrators in homicide and corroborated defendant's confession to government witness that he had committed both crimes.

***Castillo-Campos v. United States*, 987 A.2d 476 (D.C. 2010).** No error to permit introduction of evidence of defendant's participation in crimes with which he was not charged because evidence in question was direct proof of the charged crime of conspiracy.

C. Evidence Intertwined with Government's Proof or Necessary to Place the Charged Offense in Context

"A related situation not governed by *Drew* arises when evidence is offered 'to explain the immediate circumstances surrounding the offense charged.' . . . In those instances, we are dealing with 'events so closely related to the charged offense in time and place that they are necessary to complete the story of the crime' . . . 'by placing it in the context of nearby and nearly contemporaneous happenings.'" *Johnson*, 683 A.2d at 1098 (citations omitted); *see also Brown v. United States*, 840 A.2d 82, 93-95 (D.C. 2004) (complainant's testimony that accused had beaten her was "closely intertwined with [her] report of sexual abuse" and "served to place the charged crimes in context . . . because it aided the jury in understanding what finally prompted [the complainant] to come forward with her serious allegations"). This second category of bad acts evidence that is not subject to the "*Drew*" analysis is commonly known as "*Toliver* evidence." It is still highly prejudicial, however, and the court should weigh carefully the government's need for the evidence against the prejudice it will cause the defendant. *See (John) Smith v. United States*, 312 A.2d 781, 784-85 (D.C. 1973).

Whether the evidence is sufficiently "intertwined" to be relieved of *Drew* requirements may arise in two contexts: when it is offered "to explain the immediate circumstances surrounding the offense charged," *Toliver*, 468 A.2d at 960, or when evidence offered to prove the charged offense incidentally reveals other criminal activity. In the latter case, the evidence is offered not to prove the "surrounding circumstances," but to prove an element of the offense itself. "[T]he fact that its use results in the revelation of other criminal activity is merely incidental." *(John) Smith*, 312 A.2d at 785; *see also McGriff v. United States*, 705 A.2d 282 (D.C. 1997) (evidence

of traffic infractions admissible in CPWL case to explain why police stopped the car defendant was driving).

1. Surrounding circumstances

The "surrounding circumstance" rationale permits use of evidence that is necessary "[t]o complete the story of the crime on trial by placing it in the context of nearby and nearly contemporaneous happenings." E. Cleary, *McCormick on Evidence*, 190 (3d ed. 1984).

> Evidence of a defendant's other criminal activity "is admissible when relevant to explain the *immediate circumstances* surrounding the offense charged and when its probative value outweighs its prejudicial effect." The rationale behind this exception is that the government should not be denied the opportunity to introduce evidence of events that are "intimately entangled with the charged criminal conduct."

German v. United States, 525 A.2d 596, 607 (D.C. 1987) (citations omitted). In *Toliver*, evidence that the defendant was arrested because he was seen making six exchanges of small white packets for money, and was carrying $1,293, was properly introduced in his trial for possession of heroin to explain the immediate circumstances surrounding the offense charged. *See Toliver*, 468 A.2d at 959. The court emphasized, however, that the rule reaches only events that are "intimately entangled with the charged criminal conduct." *Id*. at 960; *see also McFarland v. United States*, 821 A.2d 348 (D.C. 2003) (no abuse of discretion for court to have admitted evidence of suspected drug money in drug distribution case where money was found on accused moments after drug transaction and accused could have requested a limiting instruction because money was circumstantial evidence of the offense, intertwined with it, and admissible to place the charged offense in context; moreover, there is nothing inherently criminal about currency); *McGriff*, 705 A.2d at 286-87 (evidence that vehicle in which defendant was a passenger was speeding and ran several red lights properly admitted to show why police chased and stopped car).

The Court of Appeals has cautioned against expanding the *Toliver* exception beyond events *immediately* surrounding the offense charged: "Because this type of *res gestae* evidence is highly prejudicial, its use should be narrowly circumscribed." *German*, 525 A.2d at 608 n.24 (evidence suggesting illegal purchase of food stamps not admissible as circumstances surrounding trafficking in other stolen property); *see also Sweet*, 756 A.2d at 373-74; *Parker v. United States*, 586 A.2d 720, 724-25 (D.C. 1991) (prior acts of violence against complainant lacked a "close temporal relationship" to the charged offense); *(Adrian) Williams*, 549 A.2d at 332-33 (prior arrests not admissible under *Toliver*); *(Eugene) Robinson v. United States*, 486 A.2d 727, 729 (D.C. 1989); *Lemon v. United States*, 564 A.2d 1368, 1373 (D.C. 1989) (co-defendant testified that she used cocaine with defendant after charged robbery; court had "difficulty in appreciating why the cocaine use was 'intertwined' with the robbery or why any supposed intertwining was 'inextricable,'" but held testimony harmless).

If the government seeks to use evidence of crimes immediately preceding the charged offense to show how the latter was discovered, it must clearly connect the defendant with the "surrounding

circumstances." *See Light v. United States*, 360 A.2d 479 (D.C. 1976). The trial court should require a proffer of the purpose for which the evidence is offered, *see United States v. Day*, 360 A.2d 483, 485 n.5 (D.C. 1976), and weigh its asserted probativity against its potential for prejudice. *See United States v. Childs*, 598 F.2d 169, 173 (D.C. Cir. 1979).[3]

Examples of "surrounding circumstances:" Cases in which evidence of uncharged criminal conduct has been introduced under the "surrounding circumstances" rationale include: *Brown v. United States*, 934 A.2d 930 (D.C. 2007) (not error to allow jury to hear evidence of defendant's drug possession prior to shooting where possession took place immediately prior to shooting and helped explain why defendants would shoot two strangers in the back as part of a turf war over drugs); *Bonhardt v. United States*, 691 A.2d 160, 164 (D.C. 1997) (evidence that accused sold drugs to victims for years, supplied victim two days before fire and threatened to burn building, admissible to put arson charge in context); *Thomas v. United States*, 685 A.2d 745 (D.C. 1996) (evidence that accused had given handgun to victim, which latter had failed to return to accused, was properly admitted under *Toliver* because it was directly related to and demonstrated the circumstances surrounding the charged offense); *Holiday v. United States*, 683 A.2d 61, 83-84 (D.C. 1996) (drug evidence admissible in gun case and gun evidence admissible in drug case where police officer allegedly observed accused selling drugs and then found gun in accused's possession an hour later while making arrest on drug charges); *Bell v. United States*, 677 A.2d 1044 (D.C. 1996) (evidence of apparent drug sales shortly before accused arrested admissible to place the accused's possession of cocaine in context and explain his stop and search); *In re T.H.B.*, 670 A.2d 895, 902-03 (D.C. 1996) (assault on unknown passerby after defendants agreed to attack any would-be drug buyers but before the attack on the complainant admissible under *Toliver*); *Hilliard v. United States*, 638 A.2d 698, 707-08 (D.C. 1994) (syringes admissible to show circumstances surrounding drug distribution and to help establish that apartment was a "shooting gallery" and not accused's residence); *Derrington v. United States*, 488 A.2d 1314, 1337-38 (D.C. 1985) (plans for two other robberies admitted to explain events leading to murder and robbery); *(James) Hawkins v. United States*, 482 A.2d 1230, 1233 (D.C. 1984) (in cocaine possession trial, gun found with cocaine was relevant to accused's knowledge that cocaine was there, because accused admitted moving gun shortly before search); *Head v. United States*, 451 A.2d 615, 626-27 (D.C. 1982) (kidnapping shortly before murder admissible to show motive, intent or plan, and surrounding circumstances); *(Edward) Green v. United States*, 440 A.2d 1005, 1007 (D.C. 1982) (two marijuana sales, shortly before arrest for marijuana possession, placed in context and made comprehensible police approach, arrest, and search of defendant); *Tabron v. United States*, 410 A.2d 209, 214 (D.C. 1979) (evidence of plan to rob store where shooting occurred held admissible to explain immediate setting of murder; other robbery plan only marginally relevant, but introduction was harmless); *Lewis v. United States*, 379 A.2d 1168 (D.C. 1977) (possession of paraphernalia admissible in trial for heroin possession; not prejudicial in light of ample independent evidence of heroin possession and fact that paraphernalia is a known concomitant of heroin use); *(Daniel) Williams v. United States*, 379 A.2d 698, 700 (D.C. 1977) (that accused's arrest was based on look-out relating to a different robbery admissible to explain circumstances of arrest, and not highly prejudicial); *Day*, 360 A.2d 483 at 484 (robbery immediately preceding arrest admissible to explain why accused was arrested).

[3] "*Toliver* evidence" does not require a *Drew*-type limiting instruction, *Bell v. United States*, 677 A.2d 1044, 1047 (D.C. 1996), but in particular cases the defense may request an instruction cautioning the jury to limit this evidence also to its proper use.

Reference to a warrant for an unspecified earlier offense may be part of the circumstances surrounding an arrest. *See (Charles) Ford v. United States*, 396 A.2d 191, 193-94 (D.C. 1978). Unless the circumstances of the arrest are connected to the prior offense, however, or are placed in issue by the accused, reference to the earlier offense and warrant should be excluded as irrelevant. *See United States v. Lewis*, 701 F.2d 972, 974 (D.C. Cir. 1983).

Toliver evidence may also be introduced by one defendant against another. The court in *Skyers v. United States*, 619 A.2d 931, 932 n.3 (D.C. 1993), found no error in allowing the co-defendant's counsel to impeach a kidnap victim with her grand jury testimony that the other defendant had supplied her with drugs during the kidnapping. The court reasoned that the government could have presented this evidence in its case-in-chief to explain the circumstances immediately surrounding the charged offense, and the grand jury testimony was used only for impeachment and the jury was instructed accordingly. *See id*.

2. Other crimes incidentally revealed

Evidence of other criminal activity may be "inextricably intertwined" with the government's proof when the same evidence refers to both the charged offense and another offense. For example, evidence that the accused possessed a weapon that was used in the charged offense either before or after the offense is not "other crimes evidence" as long as it can be reasonably inferred that the weapon is related to the charged offense. *See e.g.*, *Busey v. United States*, 747 A.2d 1153, 1165 (D.C. 2000) (two days before homicide accused seen with revolver, and ammunition of same caliber as that used in shooting found in accused's apartment); *Thomas*, 685 A.2d at 750 (weeks before homicide accused had been in possession of and had access to .45 caliber pistol); *Johnson v. United States*, 596 A.2d 980, 986-87 (D.C. 1991) (possession of what appeared to be murder weapon a few days after murder); *(Abdus-Shahid) Ali*, 581 A.2d at 376-77 (several weeks before homicide, accused had carried sawed-off shotgun and shotgun shells in bag similar to one he was seen with on night of murder, where decedent was killed with sawed-off shotgun); *Lee v. United States*, 471 A.2d 683 (D.C. 1984) (knife recovered from accused sixteen hours after armed rape). However, before a weapon is admissible, the government is required to show that it is linked not only to the accused but to the charged offense. *See King v. United States*, 618 A.2d 727, 728-29 (D.C. 1993).

The Court of Appeals has applied the "inextricably linked" rationale in a number of contexts. *See, e.g., Bolanos v. United States*, 718 A.2d 532, 539 (D.C. 1998) (trial court properly admitted evidence of defendants' prior beating of complainant to show state of mind of complainant with respect to issue of consent and to explain recantation); *Bonhart*, 691 A.2d at 164 (evidence that accused sold drugs to complainants for years, supplied complainants two days before fire and threatened to burn building, admissible both as direct and substantial proof of the arson charge and as evidence intertwined with the arson and putting the arson in context); *Wilson v. United States*, 690 A.2d 468, 469 (D.C. 1997) (accused's threats to kill decedent made days before murder were direct evidence of murder); *Byers v. United States*, 649 A.2d 279, 286 n.3 (D.C. 1994) (evidence that defendant threatened witnesses proof of consciousness of guilt rather than evidence of other crimes); *Wages v. United States*, 594 A.2d 1053, 1055 (D.C. 1991) (attempt to bribe complainant not to testify was evidence of consciousness of guilt of charged offense); *(John) Smith*, 312 A.2d at 785 (threats against witness inextricably intertwined with implied

admissions of charged offense); *see also United States v. Perholtz*, 842 F.2d 343, 356-60 (D.C. Cir. 1988) (no error in admitting "script" written by accused for use by unindicted co-conspirator in providing innocent explanation for criminal acts).[4]

If references to other crimes can be eliminated without substantially impairing the government's proof, they must be. *See Harris v. United States*, 366 A.2d 461, 463-64 (D.C. 1976) (allowing evidence that witness had seen accused in past without reference to circumstances of earlier offense); *United States v. Wiggins*, 509 F.2d 454, 462 (D.C. Cir. 1975) (statement including admission to unrelated offense should be redacted).

The defense should be careful not to open the door to other crimes evidence when presenting defense evidence. For example, *Neku v. United States*, 620 A.2d 259, 265 (D.C. 1993), held that once the accused was allowed to present testimony that he had tested drug-free following his arrest for distributing cocaine, it was not plain error to allow the government to adduce evidence of his previous drug use. *See also Kinard*, 635 A.2d 1297, 1306 (D.C. 1993); *United States v. Hoover-Hankerson*, 511 F.3d 164 (D.C. Cir. 2007) (Harmless error to permit government to cross-examine defense witness about that witness's prior uncharged participation in fraudulent acts with the defendant in light amount of other overwhelming evidence of defendant's participation.) *Goines v. United States*, 905 A.2d 795 (D.C. 2006) (Apart from *Drew*, evidence of prior bad acts may come in under the separate doctrine of curative admissibility. However, it was error to allow the government, under a theory of curative admissibility, to question the complainant on re-direct about the defendant's prior acts of violence against the complainant where defendant had alleged fabrication. Under doctrine of curative admissibility the court still must determine whether the probative value of the evidence substantially outweighs the danger of unfair prejudice.).

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***Lewis v. United States*, 996 A.2d 824 (D.C. 2010).** No abuse of discretion to admit evidence of Maryland arrest and weapon recovered during arrest that looked like weapon used during prior robbery where witness had told police that gun looked "just like the one used" in robbery and court carefully weighed factors for and against its admission.

III. PROCEDURES FOR ADMISSION OF OTHER CRIMES EVIDENCE

A. Pre-trial Notification and Hearing

Before attempting to introduce evidence of other crimes, the government must make a fair-minded assessment of its admissibility. *See United States v. Foskey*, 636 F.2d 517, 525-26 (D.C. Cir. 1980). It may not refer to *Drew* evidence before proffering it to the court, out of the jury's presence, so that the court can rule on admissibility. *See Day v. United States*, 360 A.2d 483, 485 n.5 (D.C. 1976); *see also (Warren) Jefferson v. United States*, 463 A.2d 681, 685 (D.C.

[4] Other cases involving incidental revelation of other crimes include *Beynum v. United States*, 480 A.2d 698, 702-03 (D.C. 1984) (accused's statement that he had shot someone was implicit confession to charged offense); *Sweet v. United States*, 449 A.2d 315, 319 (D.C. 1982) (evidence that assailant told rape complainant he had killed another woman and beaten his girlfriend admissible to show complainant's reasonable fear, an element of the offense).

1983); *United States v. Bailey*, 505 F.2d 417, 420 (D.C. Cir. 1974). This proffer is usually made at a pre-trial hearing.[5] *See, e.g.*, *Anderson v. United States*, 857 A.2d 451 at 456-58. If the government introduces evidence of other crimes without any notice or ruling by the court, the defense should move for a mistrial.

There is no specific rule requiring that the government provide advance notice of its intent to introduce other crimes evidence. *See Burgess v. United States*, 786 A.2d at 569. In stopping short of adopting the notice requirement of FRE 404(b), *Johnson*, 683 A.2d at 1000 n.17, encouraged prior notice and noted that even without a uniform rule the trial court has discretion to require notice. *Id*. The United States Attorney's Office often files a pre-trial notice of intent to introduce *Drew* evidence, and many Superior Court judges require it. As Judge Farrell indicated in his separate opinion in *(Edward) Ford v. United States*, 647 A.2d 1181, 1186 (D.C. 1994):

> Our opinion today does not . . . call into question, the practice of some Superior Court judges of requiring advance notice to the defense of the prosecution's intent to offer other crimes evidence. Also, prudence should counsel the government to comply voluntarily with Fed. R. Evid. 404(b) in Superior Court, as it does mandatorily in the United States District Court. Were a succession of cases like this one and *Lewis v. United States*, 567 A.2d 1326 (D.C. 1989), to persuade this court to adopt a formal notice requirement, there is little question that among the sanctions available to the trial judge for noncompliance would be *exclusion* of the other crimes evidence – a prospect the government can hardly welcome.

Id. at 1186. Moreover, even those judges who do not *sua sponte* require that the government provide notice often routinely do so upon defense motion. Finally, even in the absence of a notice requirement, should the defense request notice and the government purport to provide it, the defense may be entitled to rely on the government's representations in its notice. *See Freeland v. United States*, 631 A.2d 1186, 1191-94 (D.C. 1993) (government bound by its pleadings).

A day-of-trial announcement may prejudice the defense if it is surprised and unable to counter the evidence. If the defense is surprised with evidence of other crimes, counsel should be prepared to make these proffers, and argue that an opportunity to investigate is essential to counsel's ability to show that the evidence does not meet the clear and convincing standard. *See Groves v. United States*, 564 A.2d 372 (D.C. 1989), *modified*, 574 A.2d 265 (D.C. 1990) (notice permitted counsel to present substantial evidence impeaching witness credibility). Counsel should note the prejudice inherent in being forced to litigate the complex legal issues involved without preparation. If the defense seeks a continuance to respond to late notice of *Drew* evidence, the defense should make this request as soon as the government informs the defense of the evidence, and should make clear on the record that a continuance is sought. *See (Edward)*

[5] The government cannot appeal an advisory pre-trial ruling on inadmissibility, *United States v. Shields*, 366 A.2d 454 (D.C. 1976), but may appeal a final pre-trial order, *United States v. Williams*, 697 A.2d 1244 (D.C. 1997) (pursuant to D.C. Code § 23-104(2)(1)). As discussed *infra* Section II.A, although a pre-trial hearing should be held, the defense may want to ask the court to reserve ruling on admissibility until hearing the defense at trial to determine whether the evidence is relevant to a contested issue.

Ford, 647 A.2d 1181, 1185-86 (D.C. 1994) (affirming trial court's refusal to grant a continuance where the defense request for a continuance was belated and ambiguous).

Lewis v. United States, 567 A.2d 1326 (D.C. 1989), found that there was no prejudice to the defense in the government's waiting until after the jury was sworn to make known its intention to introduce evidence of a prior altercation between the accused and the complainant because, in a hearing five months before the trial, the witness to the other offense "had 'laid out in considerable detail exactly what the Government [sought] to offer." 567 A.2d at 1329-1330. The Court of Appeals distinguished the circumstances in *Lewis* from those "where the government pulled something out of the closet by surprise and drop[ped] it on the defendant's table after the jury is sworn.'" 567 A.2d at 1330. The court observed that "[w]hile counsel noted prejudice in that two potential witnesses to the prior incident were unavailable at trial, "[c]ounsel did not detail the efforts made to locate these witnesses, nor specify what efforts could have been undertaken had he had more time. Nor did he seek a continuance." *Lewis*, 567 A.2d at 1330 n.8. *See also Simmons v. United States*, 940 A.2d 1014 (D.C. 2008) (government violated a pre-trial discovery promise not to introduce so-called *Toliver* evidence of uncharged contemporaneous drug sales, but no basis for reversal because use of the evidence was unintentional, the defendant suffered no prejudice as a result of its introduction, and the jury did not rely on it).

When Other Crime Evidence is Introduced without Notice:

- ✓ Move for a mistrial if the government introduces evidence of other crimes without any notice or ruling by the court by arguing:
  - Opportunity to investigate is essential to refute clear and convincing standard
  - Prejudice inherent in litigating a complex legal issue without preparation
- ✓ Request a continuance (if needed) as soon as government informs defense of evidence

B. Government's Burden in Obtaining Admission of Other Crimes Evidence

Other crimes evidence may not be admitted unless the government has met four specific requirements: (1) that there is clear and convincing evidence that the defendant committed the offense;[6] (2) that the other crimes evidence is directed to a genuine, material, and contested issue in the case; (3) that the evidence is logically relevant to prove this issue for a reason other than its power to demonstrate criminal propensity, *see Roper v. United States*, 564 A.2d 726, 731 (D.C. 1989) (citing numerous cases);[7] and (4) that the probative value is not substantially outweighed by the danger of unfair prejudice. *See Johnson*, 683 A.2d at 1099.

[6] *Compare* Fed. R. Evid. 404(b), under which the court must determine only that the jury reasonably could find that the accused committed the other offense. *See Huddleston v. United States*, 485 U.S. 681, 689-91 (1988), *cited in Anderson*, *supra*, 857 A.2d at 457 n.4.

[7] "[R]eferences to uncharged crimes in a confession, such as drug possession and use, are subject to the same types of restrictions on admissibility as would apply if the uncharged crimes evidence came from another source," unless

However, despite the clear and convincing evidence requirement, the trial court

> may act within its discretion to conduct its pre-trial inquiry on the admissibility of the other crimes evidence by means of a detailed proffer from the government instead of holding, in effect, a bench trial of the other crime, which presumably will be fully replicated before the jury if admitted.

Daniels v. United States, 613 A.2d 342, 347 (D.C. 1992) (citing *Groves*, 564 A.2d at 375), *quoted in Crutchfield v. United States*, 779 A.2d 307, 330 (D.C. 2001). The proffer "must show the trial court that the evidence that it proposes to present during the trial would, if believed, clearly and convincingly establish that the uncharged crime occurred and the defendants were connected to it." *Daniels*, 613 A.2d at 347. *But see (Timothy) Robinson*, 623 A.2d 1234, 1241 (D.C. 1993) (error to admit testimony regarding another crime that "was far too ambiguous to support a finding of clear and convincing evidence"). If the evidence at trial does not live up to what the government had proffered, the defense should object and move for an appropriate remedy. *Anderson, supra*, 857 A.2d at 458 n. 6, *quoting Daniels*, 613 A.2d at 347. "The trial court, in its discretion, may, for example, restrict the government's closing argument, give limiting instructions to the jury, or, where it deems there is a probability of 'a miscarriage of justice,' declare a mistrial." *Id*. (citing *Bundy v. United States*, 422 A.2d 765, 768 (D.C. 1980)).

1. Clear and Convincing Evidence

The reason for requiring clear and convincing evidence that the defendant committed the offense is obvious: if someone else committed the uncharged offense, or no offense was committed, evidence of the other offense would not only be irrelevant, but would seriously prejudice the accused. *See Roper*, 564 A.2d at 731; *see also Bieder v. United States*, 662 A.2d 185, 189 (D.C. 1995) (emphasis omitted) ("the creation of an erroneous impression that the accused previously violated the law . . . has no probative value whatsoever"). Where clear and convincing evidence is lacking, "the admissibility inquiry comes to a halt." *Groves*, 564 A.2d at 375.

Although the court may in some cases find clear and convincing evidence of unadjudicated other crimes based on a proffer of evidence from the government, *see, e.g., Anderson, supra*, where the defense disputes the proffer, the court should resolve the factual dispute by conducting a *voir dire* of the proffered witnesses, and assessing the witnesses' credibility and the strength of the evidence. "The Court of Appeals has held that if the trial judge has determined that [the sole government witness's] credibility is completely suspect, then it is logically impossible for the judge to find clear and convincing evidence based solely on the proffered testimony." *Groves*, 564 A.2d at 375; *see also Lewis*, 567 A.2d at 1330-31 (review only for plain error if no objection on specific ground that proof of the other crime is not clear and convincing; if found credible, single witness's testimony as to other crime would suffice); *United States v. Rhodes*, 886 F.2d

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they are so intimately entangled with the charged criminal conduct that there can be no separation of the relevant and irrelevant parts, or the charged and other crimes are so connected as to be part of a general scheme. *(John) Settles v. United States*, 615 A.2d 1105, 1109 (D.C. 1992); *see also (Timothy) Robinson v. United States*, 623 A.2d 1234, 1238-41 (D.C. 1993) (defendant's admission that he occasionally shared drugs with women, followed by sex, constituted inadmissible other crimes evidence); *supra* Section II.C on events that are inextricably intertwined with the charged offense.

375 (D.C. Cir. 1989) (plain error to admit evidence of fraudulent checks that were not proven to be connected to accused).

If the accused has been acquitted of a criminal charge, it would be "fundamentally unfair" to use evidence of the same charge in a subsequent trial as evidence of other crimes. *See Roper*, 564 A.2d at 732. Conversely, if the accused already has been convicted of the other offense, the clear and convincing evidence requirement is satisfied. *See Thompson v. United States*, 546 A.2d 414, 421 n.11 (D.C. 1988).

2. Evidence Directed to a Genuine, Material and Contested Issue

The issue to which the evidence is directed must be not only legitimate, but also genuine, material, and contested by the defense. *See Clark v. United States*, 593 A.2d 186 (D.C. 1991) (hearsay testimony to decedent's alleged statements describing past abuse by defendant should not have been admitted, as decedent's state of mind was not a controverted issue). The requirement that the issue be contested is illustrated most readily in cases addressing admission to show intent. Although some kind of criminal intent is an element of virtually every criminal offense, other crimes evidence may be used to show intent only if the defense meaningfully controverts that issue. *See Thompson*, 546 A.2d at 422-23. "[T]he intent exception has the capacity to emasculate the other crimes rule because it is often impossible to distinguish intent from predisposition, and intent is an element of virtually every crime." *Harper v. United States*, 582 A.2d 485, 489 (D.C. 1990); *see also Landrum v. United States*, 559 A.2d 1323, 1326 (D.C. 1989); *Graves v. United States*, 515 A.2d 1136, 1140 (D.C. 1986); *Willcher v. United States*, 408 A.2d 67, 76 (D.C. 1979) ("as several courts have recognized, the intent exception has a capacity to emasculate the other crimes rule since intent is generally an element of the offense charged. Thus . . . intent must be a material or genuine issue in the case, not merely a formal issue in the sense of an entitlement to an instruction").

To ensure that intent is actually contested, "in the absence of exceptional circumstances, the government may not be permitted to introduce other crimes evidence in its case in chief to prove intent." *Thompson*, 546 A.2d at 423-24 (footnote omitted); *see also Murphy v. United States*, 572 A.2d 435, 438-39 (D.C. 1990); *Graves*, 515 A.2d at 1142-43.

3. Logical Relevance Apart from Showing Criminal Propensity

Counsel must be alert to arguments by the government that suggest disposition. In *Sweet*, 756 A.2d at 374, a contract killing case, the government introduced the defendant's statement that he had committed previous contract killings. After rejecting the government's arguments for admission of this evidence under *Drew* or *Johnson*, in reversing the conviction the Court of Appeals stated:

> [I]t is difficult to conclude that the evidence was not offered to prove predisposition to commit the charged offense. Indeed, that is the way the government used the evidence of Sweet's admissions to prior contract killings in opening statement and closing argument. The prosecutor identified Sweet as a 'self-proclaimed hit man' . . . 'who used to do this all the time' until his arrest.

Id.

Counsel also must be alert to predisposition arguments in cases where the government seeks admission under the intent exception.

> Where evidence of prior crimes can become probative with respect to intent only after an inference of predisposition has been drawn, the argument for admission is at its weakest, for the distinction between intent and predisposition then becomes ephemeral.

Thompson, 546 A.2d at 421. The defendant in *Thompson*, a passenger in a car, was charged with possession with intent to distribute phencyclidine (PCP). The government used evidence that he had previously sold marijuana and PCP to show his intent to distribute the twenty-seven packets of PCP-laced marijuana found under his seat. The court reversed the conviction, ruling that the other crimes evidence proved only the defendant's predisposition to sell drugs:

> There is no real connection between the two offenses other than the allegation that they both spring from the defendant's predisposition to sell marijuana and PCP. Indeed, one cannot logically draw a connection between the two incidents without first assuming that, because Thompson was predisposed to sell in November 1985, he remained so predisposed in April 1986. Here, intent piggy-backs on predisposition.

Id. at 427 (citation omitted); *see also Roper*, 564 A.2d at 732-33 (Mack, J., concurring) (in trial for carrying a pistol without a license, evidence of armed robbery on previous day is not relevant beyond its power to generate inference of criminal propensity).

On the other hand, evidence of the accused's use or involvement with illegal drugs may be admissible if it is relevant to a testifying defendant's recollection or perception, *Durant v. United States*, 551 A.2d 1318, 1326-27 (D.C. 1988), or it is directly linked to the accused's behavior or state of mind relevant to an element of the offense charged, or meets an "other crimes" exception under *Drew*. *See also United States v. Leonard*, 494 F.2d 955, 970 (D.C. Cir. 1974).

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***United States v. Morton*, 50 A.3d 476 (D.C. 2012).** Trial judge did not err in excluding evidence of defendant's commission of prior burglaries to support his drug habit where the prosecutor's description of the evidence was probative of identity, a legitimate non-propensity purpose.

4. Prejudice vs. Probative Value

Johnson held that "[t]his jurisdiction will hence forth follow the policy set forth in accordance with Federal Rule of Evidence 403" which states that:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the

> issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation or cumulative evidence.
> 683 A.2d at 1099.[8]

Factors to consider when determining whether the danger of unfair prejudice substantially outweighs probative value include: "(1) the strength of the evidence as to the commission of the other crime, (2) the similarities between the crimes, (3) the interval of time that has elapsed between the crimes, (4) the need for the evidence, (5) the efficacy of alternative proof, and (6) the degree to which the evidence probably will rouse the jury, to overmastering hostility." *Id*. at 1095 n.8, citing John Strong, *I McCormack on Evidence* § 190 (4th ed. 1992); *see also Old Chief v. United States*, 519 U.S. 172, 184 (1997) ("what counts as the Rule 403 'probative value' of an item of evidence . . . may be calculated by comparing evidentiary alternatives").

Bright v. United States, 698 A.2d 450, 456 (D.C. 1997), held that the introduction of evidence of the accused's murder charge would have been too prejudicial to be admissible in a separate trial where the accused was charged with possession of ammunition found in his apartment but not related to the murder.

> [T]he introduction of the evidence of the murders in a separate trial on the ammunition offense would have heated an extreme risk of prejudice no matter what instructions the judge gave regarding the limited use of the evidence.

Id. (citations omitted).

Accordingly, even applying the new, stricter standard as set forth in *Johnson*, the *Bright* court ruled that the probative value of the evidence of the murders was substantially outweighed by the danger of unfair prejudice and that the joinder of these two charges was reversible error.[9] 698 A.2d at 456; *see also Sweet*, 756 A.2d at 374 (danger of unfair prejudice substantially outweighed probative value when government introduced evidence that defendant confessed to having killed before).

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***United States v. Morton*, 50 A.3d 476 (D.C. 2012).** Whether drug addiction evidence is admissible as corroborating the defendant's identity depends on trial court re-weighing the prejudicial effect of the evidence against its probative value.

[8] *Johnson* did not apply 403(b) to the facts at issue, as the facts satisfied the prior standard that the evidence be more probative than prejudicial.

[9] The court held, however, that evidence of the possession of ammunition would have been admissible in the murder trial because it was "direct and substantial proof of the murder," and thus only reversed the possession of ammunition conviction. *See Bright*, 698 A.2d at 456.

C. Safeguards against Prejudice

1. Opening statements

Even if the trial court permits the government to introduce evidence of other crimes at trial, counsel should argue that evidence of other crimes should not be mentioned in the government's opening statement. *See Day v. United States*, 360 A.2d 483, 485 n.5 (D.C. 1976).

> [T]he government should not have mentioned appellant's prior offenses in its opening statement. Such mention irretrievably puts before a jury the fact that a defendant has been involved in prior criminal activity. If later government efforts to introduce evidence of the prior offenses prove unavailing, the jury is still left aware of these offenses and, even with a cautionary instruction, the chances of prejudice are still significant. On the other hand, the government loses little by delaying its mention of the previous offenses until at least the presentation of its case-in-chief.

Bailey, 505 F.2d at 420 (footnotes omitted). Even if a pre-trial hearing is held, the court may reserve final decision on admissibility until the defense case to determine whether the issue for which the evidence is being offered is actually contested. Thus, under those circumstances as well, the government should not mention the prior bad act evidence in its opening statement.

Of course, after obtaining a preliminary ruling excluding certain evidence, counsel must be careful not to open the door to such evidence through cross-examination or argument. *See Busey*, 747 A.2d at 1165-66 (not error to allow government on re-direct to elicit previously excluded details of assault where defense counsel on cross suggested that assault had not occurred because witness could not remember details).

2. Cautionary instructions

If and when evidence of other crimes is used, the accused is entitled to an immediate cautionary instruction and any other prophylactic measures necessary to ensure that the jury does not confuse the incidents and to make sure that the jury does not use the evidence of other crimes for an improper purpose. *See Coleman v. United States*, 779 A.2d 297 (D.C. 2001) (reversal required where instead of an immediate cautionary instruction trial judge waited until following day, after completion of government's case, to instruct jury to disregard highly prejudicial testimony; an immediate instruction may be required when highly prejudicial and inadmissible testimony regarding accused comes before the jury, even if accidentally); *Easton v. United States*, 533 A.2d 904, 906-07 (D.C. 1987) (proper to instruct jury before opening statements, after testimony was presented, and in final jury instructions at the close of trial); *Jones v. United States*, 477 A.2d 231, 242 (D.C. 1984); *Sweet v. United States*, 449 A.2d 315, 319 (D.C. 1982); *(Edward) Green v. United States*, 440 A.2d 1005, 1007-08 (D.C. 1982). *See generally Criminal Jury Instructions for the District of Columbia*, No. 2.321 (5th ed. 2009). Failure to instruct *sua sponte*, however, will be reversed only for plain error. *See Jones*, 477 A.2d at 242. Whether an instruction is in the accused's interest depends on a number of factors, including the extent to which the government emphasizes the evidence. *See Bartley v. United States*, 530 A.2d 692, 708

(D.C. 1987) (Mack, J., dissenting). If the prior crime is mentioned only briefly, an instruction may only exaggerate its importance. A tactical decision to waive a limiting instruction should be honored, but waives the right on appeal to challenge the absence of an instruction. *See Tabron*, 410 A.2d at 214 n.6.

In *Coleman* the Court of Appeals reversed the conviction where, upon request, the trial judge failed to give an immediate cautionary instruction after testimony from the accused's sister that the accused had set fires in the very same house on two previous occasions. Instead the trial court waited until the following day and after the completion of the government's case to instruct the jury to disregard the testimony. In reversing the conviction the Court of Appeals ruled that even if the highly prejudicial and inadmissible testimony came before the jury accidentally the failure to give an immediate instruction required reversal. *Coleman*, 779 A.2d 297.

Reversal may be required if properly admitted other crimes evidence is used for an impermissible purpose. *Compare (Adrian) Williams v. United States*, 549 A.2d 328, 333-34 (D.C. 1988) (conviction reversed due to improper use in closing argument), *with Hazel v. United States*, 599 A.2d 38, 44-45 (D.C. 1991) (instruction allowing jury to consider other crimes evidence to establish intent was not reversible error because evidence was in fact admissible on motive and common scheme or plan). A limiting instruction, however, may render harmless any improper use of *Drew* evidence by the government. *See Cooper v. United States*, 680 A.2d 1370, 1372 (D.C. 1996); *see also Higgenbottom v. United States*, 923 A.2d 891 (D.C. 2007) (failure of court to grant mistrial *sua sponte* not unreasonable where trial judge intervened *sua sponte* and delivered a curative instruction immediately after prosecutor asked and answered questions about prior conviction of beating a man with a pipe, and where question was virtually innocuous when viewed in light of surrounding circumstances).

When Other Crime Evidence is Admitted:

- ✓ Argue that other crime evidence should not be introduced in opening statement
- ✓ Request cautionary instructions and any other prophylactic measures to ensure that the jury does not confuse the incidents and use the evidence of other crimes for an improper purpose
- ✓ Counsel has a continuing duty to object to evidence even after it is admissible

IV. THE "DREW" EXCEPTIONS

A. Intent, Motive, and Absence of Mistake[10]

The three exceptions for intent, motive, and absence of mistake, which all relate to the defendant's mental state, generate the greatest risk of introduction of evidence that is not "directed to 'a genuine and material issue in the case.'" *Bigelow*, 498 A.2d at 213. Moreover, use of uncharged criminal acts under these exceptions leads easily to misuse. For instance, the accused in *Harper v. United States*, 582 A.2d 485, 489 (D.C. 1990), was charged with a rape and burglary in April, and a burglary and assault in July. The trial court permitted use of both incidents to show the identity of the perpetrator of the other, and use of the earlier incident to prove the intent in the second entry. Although the incidents were sufficiently similar to support admissibility to prove identity (*see infra* Section IV.C.), the Court of Appeals held that evidence of the April incident was not admissible on the issue of the accused's intent in the July incident.

> [T]he prosecutor argued to the jury that, because the defendant had done something in the past, that is what he intended to do this time. Essentially, what this is showing is predisposition rather than intent. Under *Drew*, as explained by *Graves* and *Thompson*, this is a misuse of the [April] evidence in the trial of the [July] incident.

Harper, 582 A.2d at 489.

Recurrence of conduct does not necessarily render evidence admissible; the trial court must ensure that there is a sufficient logical connection between the other crime and the purpose for which it is used. Mere association with criminal activity on two occasions does not make criminal intent on the second occasion more likely. *See, e.g.*, *Wright v. United States*, 570 A.2d 731, 734 (D.C. 1990) (similarities between two video store burglaries arose from "circumstances inherent in the nature of the premises," and did not make incidents mutually admissible).[11] In *United States v. Foskey*, 636 F.2d 517, 525-26 (D.C. Cir. 1980), the United States Court of

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[10] *Drew* analysis also applies if the government seeks to introduce evidence of acts after the offense to show mental state at the time of the offense. *See Jefferson*, 463 A.2d at 684-85 (felony-murder reversed where court admitted evidence of subsequent assault, ostensibly to show knowledge of plan to commit charged robbery); *Johnson v. United States*, 387 A.2d 1108, 1111 (D.C. 1978) (later attempts to sell goods, offered as stolen, probative of accused's knowledge that property was stolen); *United States v. Mitchell*, 49 F.3d 769, 776 (D.C. Cir. 1995) (although subsequent acts may be relevant to intent underlying an earlier act, two-year gap exceeds bounds of relevance); *United States v. Brown*, 16 F.3d 423, 434-35 (D.C. Cir. 1994) (Edwards, J., dissenting).

[11] Other cases upholding use of *Drew* evidence under a mental state exception include *Bruce v. United States*, 471 A.2d 1005, 1006-07 (D.C. 1984) (per curiam) (evidence of each shooting admissible to negate theory of self-defense in the other); *Calaway v. United States*, 408 A.2d 1220, 1226-27 (D.C. 1979) (assault and robbery admissible to show intent in trial for murder, assault and burglary; eight-year interval since earlier incident did not limit probative value because defendant was incarcerated for seven of those years); *Chambers v. United States*, 383 A.2d 343 (D.C. 1978) (fact that defendant had a third party's watch in his bag, which he accused complainant of stealing, probative of defendant's motive for confronting complainant and relevant to refute claim of self-defense by undermining contention that complainant was initial aggressor); *United States v. Bobbitt*, 450 F.2d 685, 688-89 (D.C. Cir. 1971) (threat to victim twelve years earlier admissible to show motive, where accused claimed accidental shooting and evidence showed "bad blood" over a period of years).

Appeals for the District of Columbia Circuit reversed a conviction for possession with intent to distribute narcotics secreted in a car. The trial court had admitted evidence that Foskey and a co-defendant had been arrested together two and a half years earlier for possession of the same type of drugs, but the co-defendant had asserted possession of the drugs on the prior occasion. The court ruled that those facts did not support an inference of Foskey's previous intent, and therefore could not show intent in the current case because Foskey had not even been charged with the drugs the co-defendant admitted possessing and thus, inferentially, did not even have knowledge of those drugs nor the intent to possess them. 636 F.2d at 523-24; *see also (Robert) Hawkins v. United States*, 395 A.2d 45, 47 (D.C. 1978) (evidence of lack of operator's permit at time of accident that resulted in manslaughter charge provided no basis for inference of recklessness or gross negligence); *United States v. Linares*, 367 F.3d 941 (D.C. Cir. 2004) (error to admit evidence of prior possession of a handgun where prior gun possession in no way proved possession of a gun for which defendant was on trial); *United States v. Hernandez*, 780 F.2d 113, 118 n.7 (D.C. Cir. 1986) (in firearm possession trial, evidence of earlier fight at which accused was merely present was not probative of motive for possessing a gun). *But see Riley v. United States*, 790 A.2d 538 (D.C. 2002) (where intent to aid and abet in commission of robbery raised as an issue by defense counsel in opening statement there was no error in armed robbery case to permit government to introduce evidence that one month earlier, accused drove getaway car after armed robbery of another store involving the same co-defendant); *Howard*, 663 A.2d 524 (no error to admit evidence of past sexual offense involving a *different* complainant under the "unusual sexual preference" other crimes exception); *Pounds*, 529 A.2d at 794 ("in prosecutions for sexual offenses, evidence of history of sexual abuse of same complainant by defendant may be admissible on theory of predisposition to gratify special desires with that particular victim"); *Page v. United States*, 438 A.2d 195, 197 (D.C. 1981) (prior uncharged pickpocketing probative of intent in trial for assault with intent to rob); *United States v. McCarson*, 527 F.3d 170 (D.C. Cir. 2008) (not abuse of discretion to allow evidence of defendant's prior convictions for possessing firearms and selling crack cocaine where defendant was charged with constructive possession of the same types of contraband because his prior offenses were relevant to prove his knowledge of possession and his intent to distribute).

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***Steward v. United States*, 6 A.3d 1268 (D.C. 2010).** Not abuse of discretion to admit evidence of alleged prior incidents of sexual contact between defendant and minor victim where evidence met four prongs of *Koonce* and where prosecutor established crimes by clear and convincing evidence through testimony of victim and others with whom the victim had discussed the prior incidents.

***Legette v. United States*, 69 A.3d 373 (D.C. 2013).** Trial court did not err in permitting prior-sexual-assault testimony as "intent" evidence— specifically, as evidence tending to prove defendant had intent to engage in charged sexual acts by force—where defense opened with a consent defense.

***Thomas v. United States*, 59 A.3d 1252 (D.C. 2013).** Trial court erred in admitting evidence of defendant's prior sexual assault in Virginia to show identity and motive in sexual assault case

where the only similarity between crimes over a 17month period was the 'sexual assault[] of young white male victims late at night.'

***Robles v. United States*, 50 A.3d 490 (D.C. 2012).** Judge's refusal to sever two sexual assault cases relating to separate complainants on grounds that the offenses were mutually admissible in separate trials to show intent was error as defendant's intent was not a 'material or genuine issue' at trial.

1. Intent

To be probative of intent, the other criminal conduct must involve an offense: (a) similar in kind; and (b) reasonably close in time to the charge at trial. *See, e.g., (Adrian) Williams*, 549 A.2d 328, 333 (D.C. 1988) (unlawful entry inadmissible to show intent requisite to burglary, because unlawful entry, unlike burglary, does not require an intent to commit a particular crime); *Page*, 438 A.2d 195, 198 (D.C. 1981); *Willcher*, 408 A.2d at 76; *Mitchell v. United States*, 49 F.3d 769, 775 (D.C. Cir. 1995); *United States v. Brown*, 16 F.3d 423, 434 (D.C. Cir. 1994) (Edwards, J., dissenting).[12] A prior act that was not illegal may be probative of illegal intent on the theory that the recurrence of certain conduct decreases the possibility that it was innocent. *See Willcher*, 408 A.2d at 76 n.11. If the proffered relevance is a "theory of probabilities," similarity between the incidents is critical. *Id.*; *see also Curry v. United States*, 793 A.2d 479 (D.C. 2002) (in case where accused convicted of manslaughter when dump truck he was driving failed to stop and collided with another car, killing its occupant, trial court did not abuse its discretion in allowing government to admit accused's prior convictions for excessive speed and signal violations and his earlier collision involving operation of same dump truck to prove accused's "depraved heart" malice); *United States v. Pettiford*, 517 F.3d 584 (D.C. Cir. 2008) (court did not err, under Rules 404(b) and 403, in admitting evidence, with limiting instruction, of defendant's prior drug trafficking offense as evidence of his state of mind that he had intent to sell the drugs that were found in the console of car in which he was sole occupant. *But see Linares*, 367 F.3d 941 (error to admit evidence of prior possession of a handgun where prior gun possession in no way proved possession of a gun for which defendant was on trial).

In many cases, other crimes evidence demonstrates intent only by showing a criminal predisposition. *See Thompson*, 546 A.2d at 421 (reversing conviction for possession with intent to distribute drugs, for erroneous admission of evidence regarding prior sales to show intent but only to the extent that they demonstrated a propensity to sell drugs). For that reason, and because intent is at least formally in issue in almost every case, the court in *Thompson* acknowledged that the intent exception has the potential to "emasculate" the other crimes rule. *See id*. at 420. The court therefore set out particular procedural and substantive requirements for the intent exception.

First, intent must be a genuinely controverted issue, not just an element of the offense charged. *See Thompson*, 546 A.2d at 422-23. "When a defendant denies participation in the conduct which is alleged to constitute the crime, intent is ordinarily not a material issue for purposes of

[12] By contrast the relevance requirements to admit other crimes evidence to prove identity are such that earlier offenses are probative only if they are "nearly identical in method." *Bridges v. United States*, 381 A.2d 1073, 1075 (D.C. 1977). *See infra* Section IV.C.

admitting other crimes evidence." *Id*. at 422; *see also (Azam) Ali v. United States*, 520 A.2d 306, 310 (D.C. 1987); *Graves*, 515 A.2d at 1140; *Campbell v. United States*, 450 A.2d 428, 430-31 (D.C. 1982) (because accused denied threatening complainant at all, evidence of prior abusive conduct toward complainant should not have been admitted).[13]

Second, the government should not introduce other crimes evidence to prove intent in its case-in-chief. *Graves*, 515 A.2d at 1141-42. In *Graves* the court held that in a prosecution for inviting for purposes of prostitution no evidence of prior invitations should have been admitted in the government's case-in-chief to prove the specific intent element. In discussing the general concerns raised by proving intent through other crimes, the court noted that "[w]hile this court has not expressly adopted an absolute rule precluding other crimes evidence in the government's case-in-chief, we have certainly embraced that approach." *Id*. at 1142 (citing *Willcher*, 408 A.2d at 76) (prosecutor "properly waited until cross-examination," after defendant "opened the door," to elicit prior crimes evidence).

> We therefore have come very close to announcing a rule (and perhaps implicitly we did) precluding the government from introducing other crimes evidence in its case-in-chief to prove intent. This, of course, is essentially an impeachment approach, the difference being that the previous crimes used to refute the defense come in as substantive evidence of intent accompanied by an appropriate limiting instruction. But this approach has the virtues of faithfulness to *Drew*'s basic message and of assuring that other crimes evidence is not admitted until the court is in a position to weigh probative value against prejudice by reference to the defense case.

Graves, 515 A.2d at 1142-43. *Thompson* furthered the analysis of the timing of admissibility. In light of the requirement that the accused meaningfully controvert an issue for other crimes evidence to be admissible, the court in *Thompson* made "explicit what was at least implicit in th[e] court's prior decisions, and . . . [held] that the decision whether other crimes evidence is admissible under the intent exception should ordinarily be deferred until the trial judge has sufficient knowledge of the government's need for the evidence, and of the defendant's defense, to make an informed judgment.." 546 A.2d at 423. In *Thompson* the court further explained, "in the absence of exceptional circumstances, the government may not be permitted to introduce other crimes evidence in its case-in-chief to prove intent (including specific intent where the evidence of such intent is sufficient to go to the jury when the prosecution rests, and the defendant so acknowledges)." *Id.* at 424 (footnotes omitted).

For purposes of the admissibility of other crimes evidence on the issue of intent the defense may be considered to have controvert intent not only through direct evidence, but also through the "opening statement, relevant cross-examination, and the representations of defense counsel." *Landrum*, 559 A.2d at 1328 (reversing conviction for erroneous admission of other crimes

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[13] The "absence of mistake or accident" exception is closely related to intent. *See Clark*, 593 A.2d at 195 (where accused asserted defense of accident, evidence that accused had been drinking on the night of the murder and had been violent in past when abusing alcohol was admissible to show "absence of mistake"); *(Kenneth) Robinson v. United States*, 317 A.2d 508, 513 n.10 (D.C. 1974) (accused claimed that injury to child was accidental; had he simply denied offense, intent likely would not have been a proper issue).

evidence in government's case in chief where defense neither confirmed nor denied whether it would controvert intent). In *Murphy v. United States*, 572 A.2d 435, 437-39 (D.C. 1990), a prosecution for distribution and possession with intent to distribute Dilaudid, at the close of the government's case the trial court inquired whether Murphy would testify. Defense counsel said that Mr. Murphy might testify only if evidence of a prior sale of Dilaudid were admitted, and declined to reveal whether the defense would challenge intent. The trial court then "prognosticated," in light of the government's evidence, that the defense would argue failure to prove intent, and ruled the other crimes evidence admissible. 572 A.2d at 437. Only then did defense counsel make an opening statement. The accused later testified that he possessed the Dilaudid for his own use. Over a dissent concerned with "ambushes" of the prosecution, the majority held that "[t]he trial court erred in admitting [the other crimes evidence] because, at the time of the court's ruling Murphy's specific intent was in issue only because of the nature of the charge itself, not because it was genuinely or meaningfully controverted by the defense." 572 A.2d at 438; *see also Lewis*, 567 A.2d at 1329 (in prosecution for carrying a dangerous weapon that requires that object was carried as a dangerous weapon, prior brandishing of knife properly admitted to rebut testimony that purpose for which accused carried the knife was to use in his work at a florist's shop).[14]

In *(Charles) Jefferson v. United States*, 587 A.2d 1075, 1078-79 (D.C. 1991), the trial court precluded admission of other crimes evidence in the government's case because the defense had not contested intent, but ruled that if the defense argued in closing that the government had failed to prove specific intent to kill, or requested instruction on the lesser offense of simple assault that did not include specific intent to kill, the government would be allowed to reopen its case to introduce other crimes evidence – even though both sides had rested. The Court of Appeals affirmed holding that the defense can "meaningfully controvert intent" without adducing any evidence. 587 A.2d at 1079.

Finally, an entrapment defense may open the door to *Drew* evidence to rebut the defense by establishing predisposition. *See German v. United States*, 525 A.2d 596, 607-08 (D.C. 1987). The court must still rule that the probative value of the evidence is not substantially outweighed by its prejudicial effect, but the government need not prove the prior conduct by clear and convincing evidence, because "'reasonable suspicion is all that is required to establish predisposition sufficiently to defeat a claim of entrapment.'" *Id*. at 608 (citation omitted).

2. Motive

If the accused denies any involvement in the offense whatsoever, identity is at issue. Motive may then be one means of proving the accused's identity as the perpetrator, and other crimes may be admissible to show motive. *See Hill v. United States*, 600 A.2d 58, 61 (D.C. 1991) ("if the accused denies that he committed the act . . . the prosecutor is permitted, as part of his effort to prove that the particular accused did commit the act, to prove that the accused had a motive for killing the deceased"); *Hazel*, 599 A.2d at 41-42; *see also Dockery v. United States*, 853 A.2d

[14] Tactical concerns may prompt counsel to seek early determination of whether the trial court will allow the government to introduce other crimes evidence after the defense has put intent in issue. For example, if the intended theory is self-defense, evidence relating to motive or premeditation may be less damaging in the government's case-in-chief than in rebuttal.

687, 697-98 (D.C. 2004) (testimony regarding earlier shooting of members of rival drug organization and evidence regarding accused's drug dealing were relevant to establish motive and identity of accused as shooter); *Boone v. United States*, 769 A.2d 811 (D.C. 2001) (no abuse of discretion to admit other crimes evidence that defendants were involved in drug distribution and acted as enforcers to prove motive where the government's theory was that defendants volunteered to kill decedent to prove their loyalty to drug ring leader).

> [N]o affirmative defense need be pleaded nor must motive constitute an element of the offense charged to permit admission of motive evidence where the defendant generally denies committing the offense and the evidence helps to establish the identity of the defendant as the offender. . . . Moreover, there is no requirement that the facts of the charged and uncharged crimes bear substantial similarity, because the motive exception where identity is at stake is broader than the independent identity exception to *Drew*, and permits "evidence of past hostility between the defendant and the victim to be admitted as proof of a motive to commit the particular hostile act against the same victim."

Johnson, 596 A.2d at 985 (citations omitted). The motive must be specific enough to connect the accused to the charged offense. Usually, "the key to admissibility under the motive exception . . . is the fact that the defendant's prior criminal conduct was directed toward the same victim." *Hill*, 600 A.2d at 62.[15] In *Hazel*, evidence that the accused and complainant had sold drugs together, and that the accused had stolen drug proceeds from the complainant and had a number of violent but uncharged confrontations with the complainant, was held admissible as evidence of motive in an assault case in which identity was at issue. 599 A.2d at 39-42; see *also Yelverton v. United States*, 606 A.2d 181, 182 (D.C. 1992) (existence of debt from prior drug transactions could support motive for murder, thereby helping to establish identity).

When motive evidence is proffered to prove identity, the trial court should carefully determine whether the evidence is specific enough to differentiate the accused from other possible suspects. *See (Timothy) Robinson*, 623 A.2d 1234, 1239 (D.C. 1993). In *Robinson* the accused was convicted of second-degree murder and carrying a dangerous weapon (knife). Under the motive exception the trial court had admitted evidence that the accused said he had occasionally shared drugs with women followed by sex, and had told his nephew on the morning of the murder (while displaying a knife that did not appear to have blood on it) that he had stabbed someone up the street "because she didn't do what she was suppose to do." *Id*. at 1236-37. The court reversed the convictions because the government had failed "to bridge the considerable gap between appellant's admission of drug use and his alleged remark to [his nephew]." *Id*. at 1240. There was no evidence that the decedent knew the accused, used illegal drugs before her death, or had obtained any drugs from the accused in exchange for sex and then reneged. *Id*. Moreover, the government's motive theory was highly speculative since there was no evidence that the defendant had ever threatened any woman for refusing to have sex with him after he had

[15] Other crimes evidence is often offered in domestic violence cases involving the same defendant and complainant. *See Flores v. United States*, 698 A.2d 474, 482-83 (D.C. 1997); *Garibay v. United States*, 634 A.2d 946 (D.C. 1993); *United States v. Mitchell*, 629 A.2d 10 (D.C. 1993); *Hill v. United States*, 600 A.2d 58 (D.C. 1991); *(John) Green v. United States*, 580 A.2d 1325, 1328 (D.C. 1990); *Gezmu v. United States*, 375 A.2d 520, 522 (D.C. 1977). *Frye v. United States*, 926 A.2d 1085 (D.C. 2005); *Bacchus v. United States* 970 A.2d 269 (D.C. 2009).

shared his drugs with her. *Id.* "[A]ppellant's admission that he had shared drugs for sex did nothing to distinguish him from any other person in the neighborhood who had done the same." *Id.*

> When motive evidence is offered to show identity, its probative value decreases insofar as the motive attributed to the defendant is either (a) so common that it embraces a large class of other possible suspects or (b) so generalized that it embraces a large class of potential victims.

Id. at 1239. Thus, the Court of Appeals held that the trial court committed reversible error by admitting the overly broad and unconnected motive evidence.

Moreover, as with any other exception, for other crimes evidence to be admissible on the issue of motive, motive must be a relevant issue in the case. *See Graves*, 515 A.2d at 1140 ("appellants' . . . motives – the reasons why either may have intended to invite for prostitution – were not an element of the offense charged. Therefore the motive exception could not properly serve as a basis for admissibility").

If the evidence falls within the motive exception, its admissibility turns on whether its prejudicial effect substantially outweighs its probative value. In *Hill*, for example, the court agreed that "the lengthy parade of witnesses to prove the earlier incident was far more than necessary to establish that Hill had a motive to kill his former girlfriend, indeed, it took up almost half of the trial." 600 A.2d at 63 (but no plain error, where accused did not object to quantity of evidence). Counsel should also be wary of the use of hearsay testimony to bring in evidence of motive. *See Clark*, 593 A.2d at 190-92.

B. Common Scheme or Plan

The common scheme or plan exception to the prohibition on other crimes evidence embraces "the commission of two or more crimes so related to each other that proof of the one tends to establish the other." *Drew*, 331 F.2d at 90.[16] This exception permits evidence that the accused planned the offense or possessed instruments for committing the offense as circumstantial evidence of a contested element. *Payne v. United States*, 294 F.2d 723, 725-26 (D.C. Cir. 1961) (flim-flam materials seized from accused during arrest, six months after larceny-by-trick, admissible to show that accused was equipped to commit the kind of "elaborate fraud" charged).

Proving the existence of a common scheme or plan is not an end in itself; the evidence remains inadmissible unless it proves a contested element of the charged offense. *(Azam) Ali*, 520 A.2d at 311. In *Ali* the court rejected the argument that evidence of prior similar sexual offenses was properly admitted as part of a common scheme. Because the accused had not interposed a defense of misidentification or lack of intent, the sole issue was whether the charged sexual acts had occurred. Under the government's theory,

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[16] Joinder cases on "common scheme or plan" are also useful on this issue. *See, e.g., (Charles) Settles v. United States*, 522 A.2d 348, 355 (D.C. 1987) (same standards apply).

> [t]he common scheme or plan, rather than the particular acts charged in the indictment, became the ultimate inference. While this perhaps created the illusion of compliance with the "common scheme or plan" exception, the ultimate inference generated by other crimes evidence must always be the defendant's greater likelihood of guilt on a contested issue in the case.

(Azam) Ali, 520 A.2d at 311. Evidence that the accused unlawfully touched one person is relevant to charges that he engaged in sexual intercourse and sodomy with another person only by means of one inference: because he did so with the first, he did so with the second. "That is precisely the 'propensity' inference forbidden by *Drew*." *Id.*[17]

In *Ali* the court of made clear that introduction of evidence under a common scheme or plan theory requires compliance with precise guidelines. It explained that a pattern or systematic course of conduct is insufficient to establish a plan:

> Standing alone, a series of similar acts does not establish the existence of a true plan. A series of similar robberies could be the result of separate decisions to rob. There must be a permissive inference that both crimes were related to an overall goal in the defendant's mind.
>
> The distinguishing characteristic of the common scheme or plan exception to inadmissibility is the existence of a true plan in the defendant's mind which includes the charged and uncharged crimes as stages in the plan's execution: the series of crimes must be mutually dependent.

Id. at 311-12 (citations omitted). The court in *(Azam) Ali* described two theories under which common scheme or plan evidence might be admissible: "Under the 'chain' theory, a series of crimes of roughly equivalent magnitude are seen as necessary steps in the accomplishment of specified goal such as covering-up a murder or eliminating rival heirs to an inheritance." 520 A.2d at 312 n.6. Admissibility might also be "based upon an inference of a sequence of interconnected crimes, in which earlier crimes lay the foundation for the charged crime, illustrated by the classic example of the defendant who steals the gun which is subsequently used to carry out the primary crime." *Id*.

In *Hazel v. United States*, which involved a series of assaults against the complainant, evidence that the accused and the complainant had sold drugs together, and that the accused had stolen drug proceeds from the complainant and had previously attacked him, was properly admitted as evidence of a common scheme or plan:

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[17] *(Azam) Ali* rejected the suggestion that the evidence was admissible to show the accused's disposition to commit an unusual sexual offense. Although the holding was based on the government's failure to argue the theory at trial, the court indicated disapproval of the theory, pointing out that it had last approved the introduction of evidence "to show the intent and lustful disposition of the defendant" before the *Drew* decision. 520 A.2d at 312 n.7 (citation omitted). *Johnson v. United States*, 610 A.2d 729 (D.C. 1992), however, over the dissent of Senior Judge Mack, who authored *(Azam) Ali*, said that such evidence is admissible to show the accused's disposition to commit an unusual sexual offense. *See also Riley v. United States*, 790 A.2d 538 (D.C. 2002); *Pounds*, 529 A.2d 791.

> [A]ll of the evidence of the uncharged crimes, including the drug operation and burglary, was connected historically; each crime was a piece of the puzzle of appreciating appellant's plan to engage in the charged acts. Thus, each of the other crimes comprised an organic link in the story of the charged crimes, such that without the predecessor crime, each successor crime would probably not have taken place.

599 A.2d at 43.

The common scheme or plan exception is frequently confused with the identity exception, in which other crimes are relevant because they are so similar to the charged crime that they show the "signature" of the perpetrator. *See Page v. United States*, 438 A.2d 195, 199 n.2 (D.C. 1981) (Ferren, J., dissenting). Counsel should be alert to this potential for confusion, which can lead to erroneous admission of prejudicial evidence. *Cf. Groves*, 564 A.2d at 376-77 (government conceded impropriety of other crimes evidence to show common scheme, but use to show identity upheld). Unlike other crimes evidence admitted to establish a common scheme or plan, when other crimes evidence is admitted under the identity exception, the other offense can be completely unrelated to the charged offense in time, place or conception, if it has the requisite degree of similarity.

C. Identity

The identity exception to the prohibition on other crimes evidence allows use of other criminal acts, "if the facts surrounding the two or more crimes . . . show that there is a reasonable probability that the same person committed both crimes due to the concurrence of unusual and distinctive facts relating to the manner in which the crimes were committed." *Drew*, 331 F.2d at 90. The crimes must be "so nearly identical in method that it is likely that the present offense has been committed by [the defendant]," suggesting a "trademark" or "signature." *Bridges v. United States*, 381 A.2d 1073, 1075-76 (D.C. 1977); *see also Settles v. United States*, 522 A.2d 348, 355 (D.C. 1987) (there must be a "logical basis . . . to assume that whoever did one [offense] did the other").[18]

There need not be one characteristic in common that is so unique that, alone, it supports admissibility, as long as the common characteristics together create a composite indicating that the offenses were committed by the same person. *See Bridges*, 381 A.2d at 1078. The *Bridges* court held that the trial court did not abuse its discretion in denying severance of four different rapes because they were all sufficiently similar to one another, *see infra* Section 2, but cautioned that when sex offenses are joined the risk of prejudice is substantial and should be carefully weighed. *Id.*

[18] The identity exception is inapplicable if the evidence is offered simply to bolster the testimony of a witness who proffers an identification. *See Harris v. United States*, 366 A.2d 461 (D.C. 1976) (testimony that witness knew the robber "[f]rom two previous robberies where he had robbed us before" inadmissible, and more prejudicial than probative). However, as discussed in Section IV.A.2, *supra*, if the evidence shows a motive it may be probative of identity.

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***Haye v. United States*, 67 A.3d 1025 (D.C. 2013).** Testimony that defendant had been previously barred from property was admissible under Drew in order to prove identity insofar as to show how property manager would recognize defendant when he came onto property again.

***Jones v. United States*, 27 A.3d 1130 (D.C. 2011).** See, supra, Chapter 27.II.B.

***Nellson v. United States*, 989 A.2d 1122 (D.C. 2010).** No error in permitting introduction of evidence of defendant's involvement in prior, similar crime under signature crime exception where entry into dwelling in both cases was made stealthily and unconventionally; both crimes occurred in the middle of the night, involved similar levels of violence and were perpetrated with use of accomplices; and victims in both crimes were immediately incapacitated, bound with same type of cable and duct tape, beaten until they had disclosed their credit card PINs, and robbed of computers and credit cards.

1. Insufficiently similar

Wright v. United States, 570 A.2d 731, 735 (D.C. 1990): The court reversed convictions of, *inter alia*, two counts of second-degree burglary for the trial court's failure to sever from one another two burglaries of the same video store. The similarities, no more than one would find in any two burglaries of a store, did not suggest that one person was responsible for both. Two robberies of (1) a Video Place store; (2) one month apart; (3) at times when it was unlikely that anyone would be at work; (4) during which alarm siren was disabled by being ripped from the ceiling; (5) where intruders entered the office by crawling over the door through the ceiling; and (6) took money, video tapes, and personal stereos.

Easton v. United States, 533 A.2d 906, 908 (D.C. 1987): In two cab-driver robberies: (1) both drivers were middle-aged; (2) the robbers initially approached in an ingratiating manner; (3) both robbers claimed a connection with the place of business where they were picked up; (4) both robbers had sharp instruments; (5) both robbers used or threatened substantial force; (6) both robberies occurred at the same time of day; and (7) both robberies involved a similar *modus operandi*. However, there were striking differences: (1) the cabs were summoned in a different manner; (2) one victim knew the sharp object was a knife, while the other was not certain; (3) in one case the robber threatened to use a gun; (4) one case involved only one robber, in the other there were two; (5) one driver was robbed at the original destination, while the other was directed to various other points; and (6) in one case the robber fled after obtaining a small amount of cash, in the other the robbers ransacked the cab because they were not satisfied with the small amount of cash they obtained.

Evans v. United States, 392 A.2d 1015, 1020-21 (D.C. 1978): Each burglary involved a nighttime entry of an occupied dwelling by two young black males who demanded money and drugs, facilitated by a ruse involving a third person; the complainants were either threatened or physically assaulted.

Tinsley v. United States, 368 A.2d 531, 534-36 (D.C. 1976): Similarities were: (1) the assailant had been drinking with both victims hours before their deaths; (2) both decedents were relatively

old (52 and 64), of similar weight, and close in height; and (3) both victims had similar chest fractures revealing pressure in the chest area, perhaps reflecting a larger assailant, such as the defendant. Differences were: (1) one strangulation was manual, the other by ligature; (2) the offenses were almost six months apart; (3) they were in locations distant from one another; and (4) no motive was shown in either case.

United States v. Bussey, 432 F.2d 1330 (D.C. Cir. 1970): (1) Two robberies occurred twenty minutes apart; (2) both culprits entered a store and asked a question of an employee; (3) both ordered those present to lie on the floor; (4) both only took money from the cash register; and (5) both locked the victims in a back room and fled. The court did not note any dissimilarities.

Drew v. United States, 331 F.2d 85, 92-93 (D.C. Cir. 1964): A black man wearing sunglasses robbed clerks in High's convenience stores on summer afternoons when no customers were in the store. These circumstances fit into an obvious pattern that would suggest itself to anyone disposed to commit robberies, and therefore did not indicate a reasonable probability that one person perpetrated both.

Bruce v. United States, 820 A.2d 540 (D.C. 2003): No distinct *modus operandi* between robbery with a gun at a fast-food restaurant and a purse-snatching.

2. Sufficiently similar[19]

Harper v. United States, 582 A.2d 485, 490-91 (D.C. 1990): In two burglaries, the intruder: (1) a slim black male, 5'9" to 5'11" tall, 25 to 35 years old; (2) entered residences six to eight blocks apart; (3) through a bedroom window; (4) around midnight; (5) armed with 10- to 12-inch knife; (6) wearing a stocking mask. However, (1) one window was on the second floor, the other on the first; (2) one victim was 56, the other 14; (3) in one but not the other the intruder carried out a plan to rape and steal; (4) one bedroom was being used for storage, the other as a sleeping room; and (5) the two incidents were three and a half months apart.

Groves v. United States, 564 A.2d 372, 376-77 (D.C. 1989): (1) At times when traffic was light, within (2) three days and (3) a three-mile radius, there were two (4) senseless shootings, (5) from one vehicle to another, (6) without provocation or apparent motivation, in which (7) a lone assailant drove next to (8) a vehicle standing at an intersection for a red light, stopped, (9) fired a gun twice, (10) at an unsuspecting victim, and (11) drove away; (12) the license tags reported by a witness to one shooting belonged to a car owned by the accused. "[T]he degree of geographical proximity necessary to establish similarity between crimes is a function of the

[19] *See also Cox v. United States*, 498 A.2d 231, 238 (D.C. 1985) (two armed robbery-rapes sufficiently similar); *Brooks v. United States*, 448 A.2d 253, 257 (D.C. 1982) (two rapes sufficiently similar); *Samuels v. United States*, 385 A.2d 16, 18 (D.C. 1978) (two cab-driver robberies, seven hours apart, with virtually identical *modus operandi*); *Horton v. United States*, 377 A.2d 390, 392-93 (D.C. 1977) (two incidents of armed rape and robbery mutually admissible to show "motive, intent and identity"); *Roldan v. United States*, 353 A.2d 292 (D.C. 1976) (burglary charges sufficiently similar); *United States v. Levi*, 45 F.3d 453, 455 (D.C. Cir. 1995) (bank robber used similar notes, made similar statements and gestures, wore similar clothing, and robbed banks in the same general area of the city); *United States v. Adams*, 481 F.2d 1099 (D.C. Cir. 1973) (similarities "remarkable").

nature of the crimes. Thus, random shootings from one vehicle could well encompass a larger geographic area than where offenses are committed by perpetrators on foot." *Id*. at 377 n.13.

Bartley v. United States, 530 A.2d 692, 695-96 (D.C. 1987): Maryland robbery admitted in D.C. robbery trial, where (1) the stores had similar floor plans, knowledge of which was crucial to the robbery; (2) the same *modus operandi* was used; and (3) they occurred within a week of each other. (There is a strong dissent to the majority opinion with an extensive analysis of this and other "Drew" exceptions).

Artis v. United States, 505 A.2d 52, 56-57 (D.C. 1985): Prior burglary had a "'clear, definite kind of earmark similarity to'" the charged burglary: the accused (1) knew and associated with both complainants; (2) determined that the complainants would not be present; (3) recruited juveniles to assist him; (4) falsely told the juveniles he had a right to the property; (5) supervised the juveniles from nearby; and (6) encouraged the juveniles by feigning a willingness to obtain the property himself.

Gates v. United States, 481 A.2d 120, 123-24 (D.C. 1984): "[A]dmitting the closeness of the question," the Court found no error in admission of prior armed robbery, to which accused had pled guilty, in an armed rape/murder trial. The trial court found the evidence more probative than prejudicial, and several similarities established a sufficient basis for either the identity or common scheme or plan exception. The similarities included: (1) two assaults occurred within a few hundred yards of one another; (2) 19 days apart; (3) both victims were white females in their twenties; (4) both incidents began as robberies and turned into assaults; and (5) both occurred near heavily traveled area.

Warren v. United States, 436 A.2d 821, 832-33 (D.C. 1981): Three rapes were properly tried together: All three complainants, (1) approximately 20 years old, were (2) waiting for transportation on a public street; (3) were transported in a green car with black interior described by two as a Vega and one as a Pinto to (4) deserted locations where they were threatened with a weapon and then raped; (5) the abductions all occurred after sunset but before midnight; and (6) the driver was the actual rapist, while one or more accomplices held a weapon. Rapes A and B occurred the same night, five hours apart, in apartment buildings; in both, revolvers were used. In rapes B and C, both complainants were offered rides by a man alone who later stopped to pick up the accused, and both rapes occurred the same time of night.

Bowyer v. United States, 422 A.2d 973, 977 (D.C. 1980): (1) Complainants were all prostitutes in the 14th Street corridor; (2) each was abducted or induced into getting into a car (3) in the very early morning; (4) the car was a dark blue Thunderbird; (5) the assailant had a poor complexion; (6) a gun was used to make commands; (7) the complainants were driven to a parking lot or secluded area where they were robbed and/or sexually assaulted; and (8) all but one incident took place within four to six weeks.

Calaway v. United States, 408 A.2d 1220, 1226-27 (D.C. 1979): (1) Attackers used a ruse of seeking a place to stay as a scheme to commit rape; (2) complainants were young, (3) white women; (4) complainants were either ordered to remove their clothes or their clothes were forcibly removed; (5) assailants subdued complainants with a severe blow to the jaw; and (6) attackers climbed on complainants and manually strangled them.

Crisafi v. United States, 383 A.2d 1, 4-5 (D.C. 1977): Extreme similarities between two sexual assaults included: (1) the assailant posed as a foreigner; (2) approached single women in their twenties who were alone in public; (3) gave the name "Simone"; (4) was denied a date but obtained the woman's name and telephone number; and (5) then obtained a date through "George," a purportedly English-speaking roommate, who was in fact the assailant. The attacks were also similar in method, timing and location.

Bridges v. United States, 381 A.2d 1073, 1078 (D.C. 1977): Four rapes were sufficiently similar based on (1) the time of day (between 1:00 and 4:45 a.m.); (2) that all four occurred within a six-month period; (3) in a similar location (same general area of Southeast D.C.); and (4) method (breaking into the rear of the complainant's dwellings, threats with a weapon, followed by a single sex act).

Arnold v. United States, 358 A.2d 335, 338-39 (D.C. 1976): (1) Each rapist drove a light blue Volkswagen, and (2) invited the complainants into the car as an act of friendly concern and for an innocent purpose, but (3) suddenly became angry and life-threatening because of (4) some alleged injury perpetrated on him or his relatives by the complainant or her relatives, (5) abandoned the death threat and replaced it by a demand for sexual intercourse, and (6) after the rape, treated the complainants kindly and took them to their destinations.

Goins v. United States, 353 A.2d 298, 300 (D.C. 1976): (1) Each robbery was committed with a sawed-off rifle, an uncommon weapon; (2) both complainants were delivery truck drivers who collected money after each delivery; (3) each driver was approached just after making a delivery, forced into the truck, transported to another location where the money was taken; and (4) the offenses occurred within a five-day period.

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***Bates v. United States*, 51 A.3d 501 (D.C. 2012).** Trial court did not abuse its discretion in denying motion to sever purse snatchings that occurred in two consecutive years where similarities among robberies—including type of victim targeted, manner of robbery and getaway, and the same license plate number of the getaway car—outweighed the differences enough to support a reasonable probability that if defendant had committed later robbery, he had also been involved in earlier crimes.

***Tornero v. United States*, 94 A.3d 1 (D.C. 2014).** Evidence mutually admissible under *Drew*'s "signature crime exception" where incidents comprised a series of late-night attacks against out-of-state cab drivers by an assailant driving a D.C. cab in a similar geographic area at a similar time and were accompanied by an act of vandalism and a high-speed flight, notwithstanding differences in witness identifications.

V. SHOWING RELATIONSHIP WITH A CONFEDERATE

The use of other crimes to show the accused's connection to or relationship with an alleged confederate is expressly prohibited. *See Holmes v. United States*, 580 A.2d 1259, 1267-69 (D.C.

1990); *Rindgo v. United States*, 411 A.2d 373, 376-77 (D.C. 1980).[20] The trial court in *Holmes* admitted evidence that Hood and Holmes had previously planned a robbery together, which suggested a relationship such that Holmes would participate in the charged shooting and robbery of a witness against Hood in a criminal case, to show the surrounding circumstances of the charged offense and "corroborate the nature of their relationship." *Holmes*, 580 A.2d at 1266. The court found error on both grounds.

Noting that this jurisdiction follows an "exclusionary" rule making other crimes evidence presumptively inadmissible, the court emphasized that this rule:

> should not be applied in a parsimonious spirit, and courts must view with a jaundiced eye evidence purportedly offered as relevant to some other issue but in reality bearing wholly or primarily on the defendant's predisposition to commit another similar crime.

Id. at 1267 (quoting *Thompson*, 546 A.2d at 420). The court recognized that evidence designed to show a criminally oriented relationship between individuals "is not so very different from proof that the two of them were predisposed to commit crimes together." *Holmes*, 580 A.2d at 1268. It declined, in the absence of a formal conspiracy charge, "to carve out a *Drew* exception which would allow other crimes evidence to be brought before the jury to show the relationship between the accused and an alleged accomplice," and held that the evidence should have been excluded as a matter of law. *Id*. at 1269.

In *Rindgo* the accused was charged with murder and rape. Government witness Burke testified that he and Rindgo were "casing" the area when he saw Rindgo assault the decedent, and that he and Rindgo had committed other robberies together. The prosecution argued that evidence of the other crimes was admissible to show Burke's relationship with Rindgo, and therefore that it was probable that Rindgo was with Burke the night of the murder. The court rejected this argument:

> By informing the jury here about appellant's other criminal activities, numerous robberies and attempts to commit crimes, Burke's testimony permitted the jury the easy inference that [Rindgo] had a general disposition to commit crime, more particularly this robbery-murder.

Rindgo, 411 A.2d at 376.

VI. CONTINUING DUTY TO OBJECT

The *Hill* court held that evidence of other crimes was properly admitted to prove motive, but that the "lengthy parade of witnesses to prove the earlier incident was far more than necessary to establish that Hill had a motive to kill his former girlfriend; indeed it took up almost half the trial." 600 A.2d at 63. However, because the accused had not objected to excessiveness (as

[20] *But see United States v. Mathis*, 216 F.3d 18, 26 (D.C. Cir. 2000) ("In a conspiracy prosecution, the government is usually allowed considerable leeway in offering evidence of other offenses 'to inform the jury of the background of the conspiracy charged, to complete the story of the crimes charged, and to help explain to the jury how the illegal relationship between the participants in the crime developed.'")

opposed to admissibility) of the evidence, the court applied a plain error standard, and found none. *But see Landrum*, 559 A.2d at 1327 (plain error standard not applied where counsel objected to admissibility: "where the effect of admission of other crimes evidence was to parade before the jury four witnesses to a previous robbery before the jurors heard or saw a single piece of evidence concerning the crime for which appellant was actually on trial, we cannot help but be concerned that appellant's right to this fundamental presumption [of innocence] was substantially undermined"); *Scott v. United States*, 953 A.2d 1082 (D.C. 2008).

CHAPTER 28

WITNESS ISSUES

I. COMPETENCE OF WITNESSES

A. Proceedings to Determine Competence

The determination of witness competence involves inquiry into whether the witness: (1) had the capacity "to observe intelligently" the events in question; (2) has the capacity to recollect the events at trial; (3) has the capacity to understand questions, and to form and communicate intelligent answers; and (4) has a sense of moral responsibility to speak the truth. 2 Wigmore, *Evidence*, § 478 (Chadbourn rev. 1979). Although there is no clear rule on what circumstances require a trial court to conduct a competence hearing, inquiry must be made whenever the court confronts a "red flag" about a witness's competence. *United States v. Crosby*, 462 F.2d 1201, 1203 (D.C. Cir. 1972). In those situations, the trial court should not allow the competence determination to become a question of credibility for the jury. *United States v. (Wilbur) Jones*, 482 F.2d 747, 751-52 (D.C. Cir. 1973). However, the standard used to determine competence "may vary depending on the importance of the witness to the case. Where . . . the witness is the *key* witness for the prosecution, justice demands a strict standard of competency." *Crosby*, 462 F.2d at 1203 (emphasis in original).

Constitutional concerns limit discretion in selecting the procedure to determine the competence of a witness. Due process gives defendants the right to be present during all stages of a trial. *See, e.g., Robinson v. United States*, 448 A.2d 853 (D.C. 1982), *reh'g denied*, 456 A.2d 848 (1983) (right to be present at bench during pre-trial jury selection). The right to confront witnesses extends to competence hearings because the hearing "retains a direct relationship with the trial." *Kentucky v. Stincer*, 482 U.S. 730, 740 (1987). However, due process does not include an absolute right to be present at all portions of every competence hearing, so long as the scope of the hearing is limited and defense counsel has an opportunity to cross-examine at the hearing and at trial. *Stincer*, 482 U.S. at 744-46. The defendant should be present whenever the defendant's relationship with the witness, knowledge of the witness's background, or any other information the defendant possesses could assist either counsel or the court in asking questions and making a reliable competence determination. *Id*. at 747.

Counsel should raise the question of competence before trial whenever possible, and request the opportunity to *voir dire* the witness out of the jury's presence before testimony is taken.[1] This may be the only fair way to examine the witness's ability to observe and recall events, to testify coherently at trial, and to appreciate the duty to tell the truth. To this end, counsel may seek to examine the witness's medical records or request a court order for the witness to undergo psychiatric or physical examinations concerning matters relevant to competence. *Vereen v. United States*, 587 A.2d 456, 458 (D.C. 1991).

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[1] Due process requires that defense counsel receive an opportunity to question any witness that the prosecution has *voir dire*'d. *Smith v. United States*, 414 A.2d 1189, 1198-99 (D.C. 1980). An opportunity to cross-examine the witness at trial does not cure this constitutional error. *Id*. at 1199.

For its part, the court has broad discretion in obtaining extrinsic evidence for use at a competence hearing, provided it balances the witness's privacy right with the defendant's right to a full and fair determination of the witness's competence. *Hammon v. United States*, 695 A.2d 97 (D.C. 1997) (granting defendant's request for *in camera* inspection of eyewitness's juvenile records in the District of Columbia, but denying review of witness's records from juvenile treatment center in Florida); *(James) Rogers v. United States*, 419 A.2d 977, 980 (D.C. 1980); *Ledbetter v. United States*, 350 A.2d 379, 380 (D.C. 1976); *Crosby*, 462 F.2d at 1203 (abuse of discretion to deny request for locally available hospital records of key government witness who had been hospitalized twice for drug addiction and used drugs on day of trial).

The evidentiary standard for competence of a witness is not enunciated as a "preponderance of the evidence" standard by D.C. case law, although just such a standard appears to predominate. *See generally Galindo v. United States*, 630 A.2d 202, 206 (D.C. 1993); *Whitaker v. United States*, 616 A.2d 843, 853-54 (D.C. 1992); *Vereen v. United States*, 587 A.2d 456, 457 (D.C. 1991).[2]

Nevertheless, there is a presumption against ordering mental examinations of witnesses. *See Dorsey v. United States*, 935 A.2d 288, 294-95 (D.C. 2007) (no abuse of discretion in finding prosecution witness diagnosed with paranoid schizophrenia competent without conducting independent medical examination where witness was examined under oath at competency hearing and did not exhibit distorted perceptions, and where the trial court and parties relied on witness's medical records); *(James) Collins v. United States*, 491 A.2d 480, 484 (D.C. 1985); *Hilton v. United States*, 435 A.2d 383, 386 (D.C. 1981); *(James) Rogers*, 419 A.2d at 980. When requesting such an order, counsel should make a particularized showing of the reasons to believe the witness is not competent to testify. *See, e.g., (James) Collins*, 491 A.2d at 484 (alleged admission by sole government witness that he suffered from mental illness was unsupported by the evidence); *United States v. Heinlein*, 490 F.2d 725, 731-32 (D.C. Cir. 1973) (confusing testimony and hospital records showing chronic alcoholism insufficient proffer).

The presumption against ordering a mental examination is heavier where the witness has undergone prior examinations. For example, the defense in *Whitaker v. United States*, 616 A.2d 843 (D.C. 1992), moved to compel a medical examination of the complainant before trial. The complainant had sustained head injuries that led to confabulation, a "usually unintentional fabrication by a person who has suffered an injury to fill in memory gaps." *Id*. at 846. The day before trial, the government disclosed evidence substantiating the defense theory that the complainant had confabulated and mistakenly identified the defendant as her assailant. *Id*. at 847. The defense moved to reopen the hearing to compel an examination and, after conviction, moved for a new trial based on the untimely government disclosures. The Court of Appeals

[2] A "clear and convincing" standard of proof for incompetence of a *defendant* has been soundly rejected by the Supreme Court in *Cooper v. Oklahoma*, 517 U.S. 348 (1996), which held the Oklahoma "clear and convincing" evidentiary standard violative of due process. Moreover, the Court noted that

> [b]oth early English and American cases suggest that the common-law standard of proof was preponderance of the evidence . . . this same standard is currently used by 46 states and the federal courts …

Id.

affirmed the denial of these defense requests, but noted that "[h]ad the complainant not previously been subjected to two prior neurological examinations, our conclusion . . . might well be different." Id. at 850. However, the court is not bound by the ultimate conclusions of prior examinations and prior proceedings in making its competence determination before a criminal trial. The Court of Appeals has held that a court is not estopped from ruling on a *defendant's* mental competence due to a ruling by another court, as the issue of competence is subject to a court's independent determination. *Merle v. United States*, 683 A.2d 755 (D.C. 1996).

> When reviewing a party's mental competency to participate in judicial proceedings, a court must focus on that party's *present* mental condition, not his condition at an earlier date . . . a finding of mental competency (or incompetency) made after a hearing cannot be regarded as a final ruling …

Id. at 762 (emphasis in original).

If a government witness is ruled competent, counsel should renew the objection when the witness testifies – particularly if the witness manifests confusion, inconsistencies, or vagueness on the stand – and move to strike the challenged testimony. *See (Wilbur) Jones*, 482 F.2d at 752 (absence of objection to confused and contradictory testimony crucial in upholding conviction); *Chappell v. United States*, 519 A.2d 1257, 1258 n.1 (D.C. 1987) (no plain error where defense did not *voir dire* witness or object to testimony). Finally, keeping in mind jury sensibilities, counsel should cross-examine the witness about the disability, argue that the testimony is unreliable in closing argument, and request a cautionary instruction. The determination of whether a witness is competent to testify is discretionary and will not be overturned absent clear error.[3] *See, e.g.*, *Howard v. United States*, 663 A.2d 524, 530 (D.C. 1995); *Carey v. United States*, 647 A.2d 56, 59 (D.C. 1994); *In re A.H.B.*, 491 A.2d 490, 492 (D.C. 1985); *Hilton*, 435 at 388; *In re B.D.T.*, 435 A.2d 378, 379 (D.C. 1981).

Competency Determination:

- ✓ Raise issue of competence before trial, whenever possible, and request the opportunity to *voir dire* the witness out of the jury's presence before testimony is taken
- ✓ Examine medical records or request a court order for the witness to undergo psychiatric or physical examination concerning matters relevant to competence
  - When requesting an order, make a particularized showing of the reasons to believe the witness is not competent to testify
- ✓ If government witness is ruled competent, renew the objection when the witness testifies and move to strike the challenged testimony
- ✓ Request a pre-trial taint hearing in addition to the competence hearing when a child witness is involved

[3] Competence and privileges are "governed, except when an act of Congress or these Rules otherwise provide, by the principles of the common law as they may be interpreted by the courts in the light of reason and experience." Super. Ct. Crim. R. 26. D.C. Code § 14-305(a) abolished the common-law rule rendering persons with prior convictions incompetent to testify.

B. Frequently Encountered Competence Issues

1. Age – Chronological and Developmental

The presence of a child witness raises difficult questions for the adversarial process.

> Not only does it pose problems in terms of the child's appreciation of the need to tell the truth with precision and accuracy, but the trauma attendant upon testifying in open court – subject to examination and cross-examination – before the unfamiliar faces of jurors, lawyers and judges may be peculiarly terrifying to a young child.

United States v. Comer, 421 F.2d 1149, 1152 n.3 (D.C. Cir. 1970).

Even with a child witness, the trial court has wide discretion in determining competence and selecting the method for making that determination. *United States v. Schoefield*, 465 F.2d 560, 562 (D.C. Cir. 1972); *A.H.B.*, 491 A.2d at 492. The court may *voir dire* the witness in or out of the jury's presence – with or without counsel's participation – or forgo *voir dire* altogether. *Smith v. United States*, 414 A.2d 1189, 1198 (D.C. 1980).

There is no precise age that determines competence to testify. *Galindo*, 630 A.2d at 206-07 (D.C. 1993) (three-year-old found competent); *Wheeler v. United States*, 159 U.S. 523, 524 (1895) (five-year-old held competent). Competence "depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former." *Id*. To permit the testimony, the court must find that the child: (1) has the intellectual capacity to understand the difference between truth and falsehood; (2) appreciates the duty to tell the truth: and (3) can recall the events in question. *Owens v. United States*, 688 A.2d 399, 404 (D.C. 1996) (8 year old not able to remember relevant events); *Howard*, 663 A.2d at 530; *A.H.B.*, 491 A.2d at 492; *Smith*, 414 A.2d at 1198; *(Dexter) Brown v. United States*, 388 A.2d 451, 458 (D.C. 1978); *(Oliver) Johnson v. United States*, 364 A.2d 1198, 1202 (D.C. 1976). Appreciation of the duty to tell the truth is satisfied where the witness fears being punished for not telling the truth. *A.H.B.*, 491 A.2d at 494.

The inquiry must be thorough, particularly where the child is an important witness and the charges are serious. *Schoefield*, 465 F.2d at 562. Counsel must request an opportunity to question the witness outside the jury's presence, making as extensive a record as possible of relevant factors: immaturity, lack of understanding, inconsistent testimony, etc. *See A.H.B.*, 491 A.2d at 492; *(Dexter) Brown*, 388 A.2d at 458; *Edmondson v. United States*, 346 A.2d 515, 516 (D.C. 1975).

The determination of competence as to a witness who is intellectually limited or learning disabled should proceed in the same manner as with child witnesses. Expert testimony may be required. *See United States v. Benn*, 476 F.2d 1127, 1130-31 (D.C. Cir. 1972). However, attendance in a school for slow learners does not by itself establish incompetence. *B.D.T.*, 435 A.2d 378.

The age and intellectual capacity of a witness will also influence determinations to close the courtroom during the witness's testimony. A party seeking to close the courtroom must show an "overriding interest that is likely to be prejudiced" and demonstrate that the closure is "no broader than necessary to protect that interest." *Waller v.* Georgia, 467 U.S. 39, 48. The trial court must "consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure." *Id.* The District of Columbia Court of Appeals found that it is a violation of the defendant's Sixth Amendment right to a public trial to close the courtroom during the testimony of a twelve-year-old complainant on the grounds that she suffered severe social disorders and mental retardation where the trial court failed to adequately consider alternatives to closure in light of defense counsel's objection (albeit scant) and where the trial court's general reference to the child's vulnerability was not a sufficient finding to support closure of the courtroom. *McIntosh v. United States*, 933 A.2d 370 (D.C. 2007). *But see In re K.S.*, 966 A.2d 871, 878-79 (D.C. 2009) (trial court was within its discretion to have the mother in neglect proceeding watch and listen to child complainant's testimony via closed-circuit television given that core evidence related to testimony about defendant's fear-inducing threats, extreme disciplinary measures, and trauma suffered by complainant as a result, and that defendant offered no reason to question expert's evaluating techniques in determining how the child would be impacted by testifying in open court).

2. Taint of Witness's Ability to Recall Events by External Factors Such as Suggestion

Closely related to the concerns about a witness's young age is the concern about a witness's susceptibility to suggestion. In assessing whether the witness is able to accurately recall the events alleged, the court must determine whether the witness may have a mistaken or false recollection of material facts caused by the suggestivity of multiple investigatory interviews by family, law enforcement, and hospital personnel. In other jurisdictions, courts have explored this issue through pre-trial "taint" hearings and by considering expert testimony at trial on the suggestivity of pre-trial forensic interviews and investigation. *See, e.g.*, *State v. Sloan*, 912 S.W.2d 592 (Mo. Ct. App. 1995); *People v. Michael M.*, 618 N.Y.S.2d 171, 176-79 (Kings Sup. Ct. 1994); *State v. Michaels*, 642 A.2d 1372 (N.J. 1994); *see also United States v. Rouse*, 100 F.3d 560 (8th Cir. 1996) (finding abuse of discretion in exclusion of expert testimony about suggestivity of small children to practices during investigatory interviews).

"[R]eliability [is] the linchpin in determining admissibility" of evidence under the standard of fairness dictated by the Due Process Clause. *See Michaels*, 642 A.2d at 1380, quoting *Manson v. Braithwaite*, 432 U.S. 98, 114 (1977). As the New Jersey Supreme Court noted in *Michaels*, the basic issue to be addressed at a pre-trial taint hearing is "whether the pre-trial events, the investigatory interviews and interrogations, were so suggestive that they give rise to a substantial likelihood of irreparably mistaken or false recollection of material facts bearing on [the] defendant's guilt." 642 A.2d at 1382-83, citing *Simmons v. United States*, 390 U.S. 377, 384 (1968). The defendant has the initial burden of producing "some evidence" that the witness's statements are the product of coercion or suggestion. *Id*. at 1383, citing *Watkins v. Sowders*, 449 U.S. 341, 350 (1981). The burden then shifts to the government to prove the reliability of the proffered evidence by clear and convincing evidence. *Id*. In assessing whether the defendant has met his burden, however, the court should bear in mind that it may be unreasonable to expect precise factual allegations when the defendant does not have access to information about the

witness interviews. *See id*. at 1382-84; *cf. In re F.G.*, 576 A.2d 724 (D.C. 1990) (en banc). *But see O'Brien v. United States*, 962 A.2d 282, 302-03 (D.C. 2008) (no error in trial court's denial of taint hearing when defendant had ample opportunities to challenge the children's testimonies via cross-examination of the children and the testimony of the expert on suggestive interviewing of children and the trial judge reviewed the interview tapes of each child and determined that competency hearings were not necessary in murder trial of young child).

In child sex cases, the investigative interview is a critical, "perhaps determinative," stage in the proceedings. *Id*. at 1377; *In re Dependency of A.E.P. and W.M.P.*, 956 P.2d 297, 306-07 (Wash. 1998). Children are vulnerable, immature, and impressionable. As a result, children are susceptible to suggestion. *Id*. Thus, when a child witness is involved, counsel should specifically request a pre-trial taint hearing in addition to the competence hearing. An inquiry into the reliability of statements by child witnesses in sex abuse cases must be comprehensive and touch "all relevant circumstances." *Michaels*, 642 A.2d at 1381; *Michael M.*, 618 N.Y.S.2d at 178-79.

Coercive and Suggestive Interviews: In ordering a pre-trial hearing in *Michaels*, the New Jersey Supreme Court acknowledged that the growing body of psychological literature recognizes that the manner in which a child is interviewed may influence the reliability of the child's testimony. *See, e.g.*, *John E.B. Meyers*, et al., *Psychological Research on Children as Witnesses: Practical Implications for Forensic Interviews and Courtroom Testimony*, 28 Pac. L.J.3 (1996); Stephen J. Cece & Maggi Bruck, *Jeopardy in the Courtroom: A Scientific Analysis of Children's Testimony* (Am. Psychol. Ass'n 1st ed. 1995); *see also Maryland v. Craig*, 497 U.S. 836, 860-70 (1990) (Scalia, J., dissenting) (highlighting the problems associated with improper and suggestive investigatory techniques). Many factors may render an investigative interview coercive and suggestive. The most frequently noted factors are (1) the interviewer's lack of investigatory independence; (2) the interviewer's preconceived notions about the events and presumption of guilt on the accused; (3) the interviewer's failure to control for outside influences on the child's answers; (4) the interviewer's use of leading questions; (5) the interviewer's status as a trusted authority figure in relation to the interviewee; (6) the interviewer's incessant repetition of questions, particularly where the questions suggest information to the child; (7) the interviewer's or others' criticism of the accused; (8) the interviewer's use of bribes, threats, rewards, peer pressure, and the like to get the child to answer; (9) the absence of spontaneous recall by the child; and (10) the use of multiple anatomically correct dolls diagnostically, rather than demonstratively. *See, e.g.*, *Michael M.*, 618 N.Y.S.2d at 177-79; *Michaels*, 642 A.2d at 1377-79. Any one or more of these factors may result in a coercive or suggestive interview, distort the child's memory of events, and render the child's testimony unreliable. *Michael M.*, 618 N.Y.S.2d at 177; *Michaels*, 642 A.2d at 1377.

3. Mental Disability Due to Drug or Alcohol Abuse

When a witness is a known drug or alcohol abuser, the court must consider whether the witness: (1) was under the influence at the time of the events about which the witness will testify; (2) is under the influence at the time of testifying; or (3) is mentally disabled as a result of chronic substance abuse.

Inquiry into these areas must be thorough. *Crosby*, 462 F.2d at 1203. Competence hearings may include examination of medical records, testimony of witnesses to the alleged conduct, expert testimony, and results of mental and physical examinations. *See generally Galindo*, 630 A.2d at 207; *Vereen*, 587 A.2d at 458; *Ledbetter*, 350 A.2d at 380; *Heinlein*, 490 F.2d at 730; *United States v. Butler*, 481 F.2d 531, 533 (D.C. Cir. 1973). However, given the highly inflammatory nature of drug abuse allegations, the court has discretion to limit the inquiry. As a result, counsel must establish that the witness was using drugs at the time of the disputed events or is under the influence while testifying. *United States v. Sampol*, 636 F.2d 621, 667 (D.C. Cir. 1980).

Furthermore, a witness under the influence of drugs on the day he testifies may nevertheless be reliable. In *Carey v. United States*, 647 A.2d 56 (D.C. 1994), a witness tested positive for PCP after the first day of testimony. The trial judge denied a motion to strike the witness's earlier out-of-court statement, which was otherwise admissible as past-recollection recorded, because he "'didn't observe anything about her testimony or manner that led [him] to believe that she was incompetent to testify.'" *Id*. at 58. The appellate court found that the fact that the witness may have been "under the influence of drugs at the time of her testimony at appellant's trial does not render her prior police statement unreliable." *Id*. at 59.

4. Mental Illness

A mentally ill person may be a competent witness. *In re Penn*, 443 F.2d 663, 666 (D.C. Cir. 1970). The court should conduct the usual inquiry, including examination of medical records, results of mental evaluations, and testimony from witnesses. *See, e.g., Vereen*, 587 A.2d 456 (denial of access to medical records and exclusion of expert testimony was abuse of discretion where witness acknowledged having premonition and seeing "vapors" on the morning of trial); *(James) Collins*, 491 A.2d at 484 (*in camera* inspection of records failed to show that witness had suffered or been treated for mental illness); *cf. Benn*, 476 F.2d at 1131 (court relied on testimony of witness's father instead of expert testimony, noting that a psychiatric examination impinged on privacy rights and could be used to harass witness). *But see Tyer v. United States*, 912 A.2d 1150, 1157-58 (D.C. 2006) (no abuse of discretion for trial court to deny request for school records relating to mental health of government witness where defense counsel withdrew an initial request for a competency examination, and the records were nearly 20 years old and likely did not contain evidence sufficient to establish that witness was incompetent to testify).

The Supreme Court has held that under certain circumstances, a defendant may be compelled to involuntarily undergo antipsychotic medication if the process will render the defendant competent for trial. *Sell v. United States*, 539 U.S. 166, 169 (2003). However, it is only permitted if the following conditions are met: 1) important government interests are at stake; 2) involuntary medication will significantly further those interests; 3) the medication is necessary to further the government interests; and 4) it is medically appropriate to administer the drugs. *Id.* at 180-81. In *United States v. Austin*, 606 F.Supp.2d 149, 152-53 (D.D.C. 2009), the court denied the government's request to involuntarily medicate the defendant because while the government demonstrated important governmental interests, that interest was firmly outweighed by the unlikelihood of the medication resulting in the defendant gaining competency.

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***Myerson v. United States*, 98 A.3d 192 (D.C. 2014).** No violation of defendant's right to call witness where defendant could not show that missing witness would have been "favorable."

***Bryant v. United States*, 93 A.3d 210 (D.C. 2014).**

***Marshall v. United States*, 15 A.3d 699 (D.C. 2011).** No violation of rule on witnesses where rule had not been invoked before or during hearing at issue, witnesses present at hearing exposed to minimal testimony and nothing in record established that presence of witnesses was part of "coordinated" effort to affect proceeding.

II. PRIVILEGE AGAINST SELF-INCRIMINATION

A. Availability and Scope

1. General Principles

The Fifth Amendment privilege against self-incrimination

> not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.

Lefkowitz v. Turley, 414 U.S. 70, 77 (1973). The privilege applies whether the potentially incriminating answer refers to past, present, or prospective conduct, provided the hazards of incrimination are not "trifling or imaginary." *Marchetti v. United States*, 390 U.S. 39, 54 (1968). The privilege is available in juvenile cases, *In re Gault*, 387 U.S. 1, 55 (1967), administrative proceedings, *Garrity v. New Jersey*, 385 U.S. 493 (1967), and civil cases, *McCarthy v. Arndstein*, 266 U.S. 34 (1924).

The privilege protects a person against self-incrimination in any jurisdiction, under state or federal law. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 77-78 (1964). However, the privilege is personal, *Couch v. United States*, 409 U.S. 322, 327 (1973), and may not be asserted on behalf of a corporation, *United States v. Sherpix, Inc.*, 512 F.2d 1361, 1370 n.16 (D.C. Cir. 1975); a group or an organization, *Bellis v. United States*, 417 U.S. 85 (1974); *Rogers v. United States*, 340 U.S. 367 (1951); or some other witness, *Bright v. United States*, 698 A.2d 450 (D.C. 1997); *Long v. United States*, 360 F.2d 829, 834 (D.C. Cir. 1966).

The privilege applies only to compelled statements. The content of voluntarily prepared documents is not privileged; however, compelled oral or written testimony that restates the contents of those documents would be privileged and, therefore, may not be compelled. *United States v. John Doe*, 465 U.S. 605, 610-12 (1984). The privilege is not implicated by requiring production of physical evidence such as blood or hair samples, *Schmerber v. California*, 384

U.S. 757, 765 (1966); *United States v. Poole*, 495 F.2d 115, 122 (D.C. Cir. 1974); voice and handwriting exemplars, *United States v. Dionisio*, 410 U.S. 1, 7 (1973); *United States v. Mara*, 410 U.S. 19 (1973); the display of physical characteristics, *Hill v. United States*, 367 A.2d 110, 115-16 (D.C. 1976); or even production of a child, *Baltimore Soc. Services v. Bouknight*, 493 U.S. 549 (1990). However, where producing physical evidence in compliance with a court order involves testimonial self-incrimination, a valid Fifth Amendment claim exists. *John Doe*, 465 U.S. at 612-14 (act of producing documents would involve testimonial self-incrimination because it would compel defendant to admit that records exist, are in his possession, and are authentic).

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***Maryland v. King*, 133 S. Ct. 1958 (2013).** See, *supra*, Chapter 22.

***Dowtin v. United States*, 999 A.2d 903 (D.C. 2010).** A co-defendant lacks standing to challenge an asserted violation of his co-defendant's Fifth Amendment right against compulsory self-incrimination.

***Kaliku v. United States*, 994 A.2d 765 (D.C. 2010).** Motion to dismiss results of penile swabs obtained after arrest and without warrant or court order properly denied under exigent circumstances exception in sexual abuse case where defendants could have contaminated DNA evidence or washed it away.

2. Type of Harm Protected Against

The privilege affords protection against exposure to criminal prosecution.[4] An answer exposing a witness to civil liability is not privileged. *See* 8 Wigmore, *Evidence*, § 2254 (McNaughton rev. 1979). Because the Fifth Amendment only bars use of compelled testimony in criminal prosecutions, answers that might compromise a witness's probationary status at a probation revocation hearing are not privileged. *Short v. United States*, 366 A.2d 781, 784-85 (D.C. 1976). In contrast, statements of a parolee or probationer in revocation proceedings, given without a valid Fifth Amendment waiver, cannot be used against the person in a subsequent criminal prosecution. *See, e.g.*, *Melson v. Sard*, 402 F.2d 653 (D.C. Cir. 1968); *People v. Rocha*, 312 N.W.2d 657 (Mich. Ct. App. 1981); *People v. Coleman*, 533 P.2d 1024 (Cal. 1975) (barring use except for impeachment).

3. Proceedings Where Privilege Applies

The privilege against self-incrimination may extend beyond the guilt phase of a case. For example, in *Estelle v. Smith*, 451 U.S. 454, 462 (1981), the Supreme Court rejected the notion that "incrimination is complete once guilt has been adjudicated" and held the privilege applicable in capital sentencing hearings.

[4] Answers of a witness who is denied the privilege and forced to answer questions are not admissible against the person in subsequent criminal proceedings. *Lefkowitz*, 414 U.S. at 78.

The privilege is also available in sentence enhancement proceedings involving a substantial risk of increased penalties. *Boswell v. United States*, 511 A.2d 29, 33 (D.C. 1986). In *Boswell*, the court imposed an enhanced sentence based in part on the defendant's refusal to testify at an enhancement hearing. The Court of Appeals vacated the sentence, holding that the "exercise of the privilege cannot be the foundation of enhanced penalties." *Id*. *But see Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272, 284-85 (1998) (voluntary clemency interview does not violate Fifth Amendment privilege against self-incrimination because testimony is not compelled even if adverse inference will be drawn from refusal to speak); *Baxter v. Palmigiano*, 425 U.S. 308, 316-20 (1976) (privilege does not forbid drawing adverse inferences from refusal to testify at prison disciplinary hearing that does not amount to criminal prosecution).

Finally, while a defendant may claim the privilege during a pre-trial mental health examination to answers that might be used in future criminal prosecutions, raising a "mental status" defense may waive the privilege. *Powell v. Texas*, 492 U.S. 680, 684 (1989) (per curiam); *Buchanan v. Kentucky*, 483 U.S. 402, 422-23 (1987).

4. "Tending to Incriminate"

Whether a witness can claim a Fifth Amendment privilege at trial depends on the relationship between the testimony sought and the harm that might result from it. The connection between an answer and a criminal prosecution is evident where the answer sought is an admission to a crime. The privilege also applies, however, if the testimony might "furnish a link in the chain of evidence" needed to prosecute. *Hoffman v. United States*, 341 U.S. 479, 486 (1951); *see also United States v. (Thomas) Reese*, 561 F.2d 894, 900-01 (D.C. Cir. 1977):

> It is enough (1) that the trial court be shown by argument how conceivably a prosecutor, building on the seemingly harmless answer, might proceed step by step to link the witness with some crime … and (2) that this suggested course and scheme of linkage not seem incredible in the circumstances of the particular case.

United States v. Coffey, 198 F.2d 438, 440 (3d Cir. 1952), *cited with approval* in *Emspak v. United States*, 349 U.S. 190, 198-99 n.18 (1955).

It is not the practical likelihood, but rather the legal possibility, of a subsequent prosecution that determines the existence of the privilege, provided this possibility is real and not trifling. Thus, in *(Roscoe) Jackson v. United States*, 490 A.2d 192, 196 (D.C. 1985), two co-defendants who pled guilty and testified for the government were allowed to exercise the privilege where the defense contended they had forced the defendant to join them in a robbery. If the scope of cross-examination subjected the co-defendants to a potential admission that they coerced the defendant to drive a getaway car, the danger of a kidnapping prosecution was real enough to warrant assertion of a Fifth Amendment privilege.

5. Where the Witness Has Been Prosecuted

Whether a witness can claim a Fifth Amendment privilege at trial depends on the relationship between the testimony sought and the harm that might result from it. The admission of a crime obviously implicates the privilege – assuming that the admission is necessary to the witness'

testimony. The privilege also applies if the testimony "might furnish a link in the chain of evidence" needed to prosecute. *United States v. Reese*, 561 F.2d 894, 900-01 (D.C. Cir. 1977); *Hoffman v. United States*, 341 U.S. 479, 486 (1951).

The privilege is unavailable if conviction or acquittal has eliminated the danger of self-incrimination, *United States v. Heldt*, 668 F.2d 1238, 1253 (D.C. Cir. 1981); the statute of limitations has expired, *Hale v. Henkel*, 201 U.S. 43, 67 (1906); *United States v. Miranti*, 253 F.2d 135, 138 (2d Cir. 1958); an official statutory grant of immunity protects the witness, *Reina v. United States*, 364 U.S. 507, 513 (1960); charges are dismissed as part of a plea agreement, *United States v. Pardo*, 636 F.2d 535, 543 (D.C. Cir. 1980); or an appellate court has affirmed a conviction, *Ramos v. United States*, 569 A.2d 158, 162 n.5 (D.C. 1990). However, the witness continues to be protected by the Fifth Amendment if he or she is pending sentencing on the matter about which he or she is being asked to testify, *see Tucker v. United States*, 571 A.2d 797, 799 (D.C. 1990), or pending appeal, *see Ellison v. State*, 528 A.2d 1271, 1277-78 (Ma. 1987); *Mills v. United States*, 281 F.2d 736, 741 (4th Cir. 1960).

In fact, despite a final conviction, the privilege is available if the testimony might implicate the witness in an offense not included in the conviction. *(Tony) Alston v. United States*, 383 A.2d 307, 311-12 (D.C. 1978) (witness pled guilty to less than all counts in indictment); *Pardo*, 636 F.2d at 544 (conspiracy charge still possible despite conviction of substantive offenses).

Finally, the possibility of a criminal prosecution in another jurisdiction, based on the same conduct, should result in continued availability of the privilege. *Murphy v. Waterfront Comm'n*, 378 U.S. 52 (1964).

B. Whether to Invoke the Privilege

Counsel for the witness must advise the client on whether a privilege exists and whether to invoke the privilege. Counsel should learn as much as possible from the parties about the facts of the case or investigation for which testimony is sought. It is important to know the questions each party intends to ask, the existence of any evidence that suggests the witness was or is involved in any criminal conduct, what the witness knows about the case, the answers the witness will give, and the witness's legal status (e.g., on probation or parole, or pending criminal or appellate matters).

Counsel should fully explain the client's rights, the meaning of the privilege, and the consequences of testifying or not testifying. Furthermore, counsel must be aware of all criminal conduct for which the witness is a suspect, or with which the witness might have been involved, to determine the possibility of perjury charges. Ultimately, the witness decides whether or not to testify. *See ABA Standards for Criminal Justice*, 4-5.2 (2d ed. 1982).

Privilege Against Self-incrimination:

- ✓ Advise the client on whether a privilege exists and whether to invoke it
- ✓ Learn as much as possible from the parties about the facts of the case or investigation for which testimony is sought
- ✓ Fully explain the client's rights, meaning of the privilege, and consequences of testifying and not testifying
- ✓ Be aware of all criminal conduct for which the witness is a suspect, or with which the witness might have been involved, to determine the possibility of perjury charges

C. How to Invoke the Privilege

1. At the Grand Jury

The prosecutor should allow a witness to leave the room and consult with counsel at any time while testifying before a grand jury, *see United States v. George*, 444 F.2d 310, 315 (6th Cir. 1971); *United States v. Capaldo*, 402 F.2d 821, 824 (2d Cir. 1968); *United States v. De Sapio*, 299 F. Supp. 436, 440 (S.D.N.Y. 1969), unless frequent departures from the grand jury room are frivolous or intended to frustrate the proceedings. *In re Tierney*, 465 F.2d 806, 810-11 (5th Cir. 1972).

Counsel should ask the government what questions it intends to ask the witness. The witness and counsel should discuss these in advance, and decide which questions are problematic. Counsel should ask that the government allow the witness to write down each question asked and, if permission to consult with counsel between questions is denied, instruct the witness to invoke the Fifth Amendment for all questions asked. To contest the validity of the assertion, the government must seek a court ruling that the privilege is not available. *Cf. Tierney*, 465 F.2d at 806 (court held witnesses in contempt after they refused to testify at grand jury despite grant of immunity).

Counsel must strongly emphasize to the witness the importance of following this advice. Once the witness is inside the grand jury room, the prosecutor or grand jurors may attempt to elicit answers that incriminate the witness or waive the privilege. Despite the advice of counsel, a witness might surrender to tension, pressure, or anxiety, and provide damaging answers. Counsel should provide a written form invoking the privilege and instruct the witness to read the form out loud whenever the witness has problems with the questions. This advice is crucial because testimony before a grand jury may waive a Fifth Amendment privilege at a subsequent trial. *Ellis v. United States*, 416 F.2d 791, 800 (D.C. Cir. 1969).

2. At Trial

The court "has the opportunity to pass on the availability of the privilege only when the witness is sworn and invokes the privilege in response to specific questions." *Vaughn v. United States*,

364 A.2d 1187, 1189 (D.C. 1976). Counsel should request permission to stand next to the witness while the client testifies. If this request is denied, counsel should work out a method for communicating to the client when the privilege should be invoked (e.g., standing when an incriminating question is asked). If confusion occurs, or the witness is about to answer an incriminating question, counsel should intervene and request an opportunity to speak with the client.

The witness is not required to state a "special combination of words" to invoke the privilege, but may simply state, "I refuse to testify on the ground of the Fifth Amendment," or words to that effect. *Quinn v. United States*, 349 U.S. 155, 162-63 (1955). Lengthy statements may confuse the witness and should be avoided.

Counsel should inform the court of the Fifth Amendment privilege as soon as possible. This practice will allow the court to determine whether the privilege applies outside the presence of the jury. *See, e.g., (Gene) Reese v. United States*, 467 A.2d 152, 157 (D.C. 1983).

Invoking the Privilege:

Grand jury:

- ✓ Ask the government what questions it intends to ask the witness
- ✓ Discuss these in advance and determine which questions are problematic
- ✓ Request permission to allow witness to consult with counsel between questions. If this request is denied, instruct the witness to invoke the Fifth Amendment for all questions asked
- ✓ Strongly emphasize to the witness the importance of following this advice
- ✓ Provide a written form invoking the privilege and instruct the witness to read the form out loud whenever the witness has problems with the questions

Trial:

- ✓ Request permission to stand next to the witness while the client testifies
  - If request is denied, counsel should work out a method for communicating to the client when the privilege should be invoked (e.g., standing when an incriminating question is asked). If confusion occurs, or the witness is about to answer an incriminating question, counsel should intervene and request an opportunity to speak with the client

Counsel should remember to:

- ✓ Inform the court of the Fifth Amendment privilege as soon as possible
- ✓ Raise issues of potential self-incrimination of a government witness to the judge as a preliminary matter
- ✓ If the witness decides to assert the privilege, and the government does not have a strong case without the witness, this may result in dismissal

D. Judicial Evaluation of an Assertion of Privilege

Although defendants have an absolute right not to testify, witnesses may invoke the privilege only as to specific questions that might provoke incriminating answers. *Vaughn*, 364 A.2d at 1189. The judge, not the witness, must determine whether the privilege is available. *Hoffman v. United States*, 341 U.S. 479, 486 (1951). When the privilege is invoked, the court must determine if there is the possibility of subsequent prosecution, and not speculate as to the likelihood of such prosecution. *Carter v. United States*, 684 A.2d 331, 334 (D.C. 1996) (en banc). Older case law required that the threat of prosecution be "substantial and real and not merely fanciful." *Jaggers v. United States*, 482 A.2d 786, 793 (D.C. 1984) (per curiam). The question under *Carter* is whether prosecution is possible, not whether it is probable. 684 A.2d at 337.

A defendant has standing to challenge impermissible grants of immunity to government witnesses, *United States v. Leonard*, 494 F.2d 955, 972 (D.C. Cir. 1974); *Ellis v. United States*, 416 F.2d 791, 799 (D.C. Cir. 1969); and invocation of the privilege by prospective defense witnesses, *Vaughn*, 364 A.2d at 1189-90.

Sometimes problems arise when a witness's Fifth Amendment rights conflict with a defendant's Sixth Amendment right to call witnesses in his own behalf.[5] When these rights come into conflict, the court must attempt to preserve them both. *Littlejohn v. United States*, 705 A.2d 1077, 1083 (D.C. 1997); *Carter*, 684 A.2d at 336. The need to avoid the granting of a blanket privilege is essential when a question-by-question analysis would better protect a defendant's Sixth Amendment rights. A blanket privilege is appropriate only when it is clear that nothing less will adequately protect the witness. *Littlejohn*, 705 A.2d at 1083. However, when there is no resolution that will adequately accommodate both interests, "[n]o man may vindicate his constitutional rights by requiring another to forego his own." *Id*. at 1082. Thus, the Fifth Amendment will prevail where there is an irreconcilable conflict between the right of a witness against self-incrimination and the right of a defendant to call a witness and present a defense. *Id*. at 793 n.3; *(Harvey) Johnson v. United States*, 746 A.2d 349 (D.C. 2000); *Carter*, 684 A.2d at 338; *Wilson v. United States*, 558 A.2d 1135, 1140 (D.C. 1989); *(Tony) Alston*, 383 A.2d at 310. *But see Bell v. United States*, 950 A.2d 56, 63 (D.C. 2006) (no error in allowing driver of getaway car to invoke blanket Fifth Amendment privilege because reasonable to conclude that he would refuse to answer essentially all questions posed to him because of pending appeal in companion case); *Butler v. United States*, 890 A.2d 181, 186-90 (D.C. 2006) (affirming unauthorized use of vehicle and receiving stolen property convictions where trial court's failure to examine witness to determine extent of Fifth Amendment right (and instead granting blanket privilege without inquiry) was harmless error because there was no way witness's testimony would not have incriminated him or at least subjected him to charge of unauthorized use of a vehicle as a passenger).

Situations also arise wherein a defense witness asserts a privilege against self-incrimination that can only be overcome by a grant of immunity, a grant that is an express executive (prosecutorial) power not available to the courts or to the defense. *Carter* deals with this issue explicitly and creates a new method for judicial control of prosecutorial misconduct (that of providing

[5] *See Washington v. Texas*, 388 U.S. 14, 19 (1967), on the defendant's right to compel witnesses to testify.

immunity to government witnesses while denying immunity to defense witnesses) by providing a method for quasi-judicially imposed immunity for a defense witness capable of providing testimony that is "material, exculpatory, and not cumulative and is not obtainable from any other source." 684 A.2d at 340 (citations omitted). The judge, while not given the authority to impose immunity, can limit the choices available to the prosecution to either providing immunity to a defense witness capable of providing material and exculpatory testimony or face court directives that ensure a defendant's right to due process of law. 684 A.2d at 343. *Carter* suggests the dismissal of the indictment as an appropriate remedy:

> If, after a hearing, the trial court were to conclude that, all circumstances considered, the defense will not receive a fair trial without the testimony of a crucial defense witness . . . [and] the government does not submit to the court a reasonable basis for not affording use immunity to the crucial witness . . . the trial court would be justified in informing the government that it must make the choice between dismissal of the indictment or some other *commensurate remedy* which the court may fashion.

Id.; see also id. at 345 n.20 for additional suggested remedies. *Carter*, in furtherance of the scheme, advised the trial courts to permit a debriefing procedure, whereby the government can assess the content of the defense witness's testimony in deciding to grant or deny use immunity. *Id*. at 345. The government should grant limited immunity for the purposes of the debriefing process. *Id*. at 343. *But see Butler*¸ 890 A.2d at 189-90 (holding that trial court did not abuse discretion in determining that government acted reasonably by denying immunity for testimony and debriefing of defense witness, also charged in relation to auto theft incident and proffered as being able to provide exculpatory testimony, where witness refused to speak to government or to even be debriefed, and noting that neither *Carter* or any other case *requires* a grant of limited immunity for debriefing process, but rather offers it as a suggestion).

If the court determines that the privilege does not exist, the witness has two options. First, the witness may answer the incriminatory questions, and challenge the use of the testimony at any subsequent trial. Second, the witness may refuse to respond and face being found in contempt of court. *See, e.g.*, *Murphy*, 378 U.S. at 79-80; *Ellis*, 416 F.2d at 805-06.

Finally, in some circumstances, defense counsel may know that some area of cross-examination may expose a government witness to self-incrimination. Counsel may want to raise this issue with the judge as a preliminary matter. The judge may then appoint counsel to consult with the witness so that the witness can make an educated decision about whether to testify against the defendant and expose himself to the risk of self-incrimination or whether to assert a privilege. Such a strategy may result in the dismissal of a case if the witness decides to assert the privilege and the government does not have a strong case without the witness. However, if the witness or court decides that the Fifth Amendment is not applicable, the defendant has no standing to assert a Fifth Amendment privilege on behalf of a witness. *Bright v. United States*, 698 A.2d 450 (D.C. 1997); *Ellis*, 416 F.2d at 799.

E. Waiver

The privilege against self-incrimination is available when legal compulsion is used to extract testimony. The general principles regarding waivers of constitutional rights apply to waiver of the right against self-incrimination:

> A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver . . . must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.

Johnson v. Zerbst, 304 U.S. 458, 464 (1938). The waiver must be "knowingly and voluntarily made." *Gardner v. Broderick*, 392 U.S. 273, 276 (1968).
Defendants waive the privilege by taking the stand, while a witness waives by answering a question related to the subject matter as to which privilege is claimed.

1. By the Defendant

If the defendant testifies at one trial but declines to testify at a retrial, the government can introduce otherwise admissible statements made at the first trial. *See, e.g.*, *Edmonds v. United States*, 273 F.2d 108, 112-13 (D.C. Cir. 1959). The right against self-incrimination is not "implicated when a defendant feels pressured to take the stand in order to rebut the evidence accumulated against him." *United States v. Wright*, 783 F.2d 1091, 1096 (D.C. Cir. 1986).

However, if the defendant testifies at a first trial to rebut an illegally procured confession, that testimony is the inadmissible product of the illegal confession. *Harrison v. United States*, 392 U.S. 219 (1968). Similarly, testimony at a suppression hearing or other pre-trial proceeding does not waive the privilege (but it may be used to impeach the defendant at trial). *See Harris v. New York*, 401 U.S. 222 (1971); *Simmons v. United States*, 390 U.S. 377, 389 (1968); *Bailey v. United States*, 389 F.2d 305, 311 (D.C. Cir. 1967).

2. By a Witness

The Fifth Amendment privilege available to witnesses is narrower than the privilege extended to defendants. It extends to specific questions and does not encompass a refusal to take the stand. *(Eric) Collins v. United States*, 596 A.2d 489, 491 (D.C. 1991). A witness may not assert a blanket privilege against self-incrimination where a narrower assertion suffices to protect his or her rights. *Littlejohn*, 705 A.2d 1077; *(Roscoe) Jackson v. United States*, 490 A.2d 192, 196 (D.C. 1985); *Wilson*, 558 A.2d at 1141. In fact, a blanket privilege is available only where a witness could properly decline to answer all questions that may be asked. *See, e.g., Holbert v. United States*, 513 A.2d 825, 828 (D.C. 1986) (defense witness arrested during defendant's trial based on same incident could properly invoke blanket privilege where he would have been cross-examined concerning his participation in the robbery to establish motive to lie); *Jackson*, 490 A.2d at 196 (defense witnesses could invoke blanket privilege where all questions could have incriminated them in armed kidnapping); *(Gene) Reese v. United States*, 467 A.2d 152, 157

(D.C. 1983) (blanket privilege upheld where government was entitled to ask questions on cross-examination regarding bias and general credibility that would necessarily explore witness's role in related homicide).

Once a witness has answered incriminating questions, there is no claim of privilege as to additional questions not involving a real danger of further incrimination. *Rogers*, 340 U.S. at 373; *Singer v. United States*, 244 F.2d 349 (D.C. Cir), *rev'd on other grounds*, 247 F.2d 535 (D.C. Cir. 1957); *Bart v. United States*, 203 F. 2d 45, 51-52 (D.C. Cir. 1952), *rev'd on other grounds*, 349 U.S. 219 (1955). The witness in *Rogers* testified without objection before a grand jury that she had been treasurer of the communist party and possessed party records, but invoked the Fifth Amendment when asked to disclose the identity of the person to whom she had turned over these records. The court found that admission of communist party membership, a crime under the Smith Act, forfeited her privilege to refuse answering questions related to her membership, and that the privilege against self-incrimination is not available to protect anyone other than the testifying witness. 340 U.S. at 371-73.

The general rule is that a witness who voluntarily testifies in one proceeding does not waive a Fifth Amendment privilege for another proceeding. *Salim v. United States*, 480 A.2d 710, 713-14 (D.C. 1984). However, *Ellis*, 416 F.2d at 800, held that

> [a] witness who voluntarily testifies before a grand jury without invoking the privilege against self-incrimination, of which he has been advised, waives the privilege and may not thereafter claim it when he is called to testify as a witness at the trial on the indictment returned by the grand jury, where the witness is not the defendant, or under indictment.

In *Tomlin v. United States*, 680 A.2d 1020, 1022 (D.C. 1996), the court extended the holding in *Ellis* to an indicted witness, stating that a defendant who waives his right to avoid self-incrimination at trial cannot subsequently invoke the Fifth Amendment if compelled to testify in the trial of a co-defendant. *Cf. Croom v. United States*, 546 A.2d 1006 (D.C. 1988) (marital privilege waived where witness signed criminal complaint against husband and voluntarily testified against him at grand jury). Similarly, a witness who voluntarily testifies for the defense at a suppression hearing and provides potentially incriminating testimony cannot assert the privilege at trial. *Harris v. United States*, 614 A.2d 1277 (D.C. 1992). Moreover, a waiver by a witness in testimony before the grand jury extends to trial, but only to testimony regarding the same facts; any attempt to go beyond the scope of the grand jury testimony that requires the disclosure of new substantive matters is prohibited. *(Phillip) Johnson v. United States*, 686 A.2d 200, 202-03 (D.C. 1996).

Despite the presence of grand jury testimony, the court must determine whether the privilege has been waived. *Salim*, 480 A.2d at 714. It must examine the grand jury testimony, *voir dire* the witness outside the jury's presence, and compare the answers with the grand jury testimony on a question-by-question basis. *Id*. at 715.

It is not clear whether a witness who testifies at a trial waives the privilege for subsequent proceedings in the same case. McCormick writes that

> [w]aiver of the privilege by one not an accused, as the waiver of the privilege of an accused, is effective throughout but not beyond the "proceeding" in which it is made. Thus it applies to additional appearances during the same proceeding but not to appearances in separate and independent proceedings.

Evidence, § 140 at 347 (3d ed. 1984). Similarly, a witness in *United States v. Wilcox*, 450 F.2d 1131, 1141-42 (5th Cir. 1971), was allowed to assert the privilege at a second trial despite his previous testimony where "taking the stand would expose him to perils when new or different words came out."

F. Immunity

A grant of immunity is viewed as a rational accommodation between the imperative of the privilege and the legitimate demands of the government to compel citizens to testify. Because the privilege applies only when a possibility of prosecution exists, it can terminate with a grant of immunity from such prosecution.

Prior to enactment of 18 U.S.C. § 6002, it was argued that the witness had to be immunized from any prosecution arising from the *transaction* about which the witness testified, even if the prosecution is based on evidence unrelated to the testimony. *Counselman v. Hitchcock*, 142 U.S. 547 (1892). Section 6002 rejected this broad view:

> [N]o testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

This provision for "use" (as opposed to "transactional") immunity was held constitutional in *Kastigar v. United States*, 406 U.S. 441 (1972) (immunity statute must be equal in scope with privilege it replaces). *New Jersey v. Portash*, 440 U.S. 450 (1979), held that testimony extracted under a grant of use immunity may not be used for impeachment at a criminal trial under the rationale of *Harris*, 401 U.S. 222.[6]

Obtaining Formal Immunity: Formal immunity is obtained only through compliance with the procedures of 18 U.S.C. §§ 6001-6005 (applicable to the Superior Court through § 6001). *See John Doe*, 465 U.S. 605; *Ellis*, 416 F.2d 791; *Earl v. United States*, 361 F.2d 531 (D.C. Cir. 1966). The United States Attorney's Office must obtain from "the Attorney General, the Deputy Attorney General, the Associate Attorney General or any designated Assistant Attorney General" a request for immunity, and present it to the federal court in the district where the refusal to

[6] One may also invoke the Fifth Amendment privilege in a civil deposition, even after testifying at a grand jury under a grant of immunity under 18 U.S.C. § 6002. *Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983) (deposition testimony, even though it would have closely followed grand jury testimony, was not immunized and therefore could not be compelled).

testify occurs.[7] The prosecutor must certify that: (1) the testimony is "necessary to the public interest;" and (2) the witness has refused or will refuse to testify by invoking the right against self-incrimination. 18 U.S.C. § 6003. Once this referral is made, it appears that the judge's duties are purely ministerial and that the court is bound by the United States Attorney's subjective determination of these issues.[8] The district court then issues an order compelling the witness to testify and granting immunity from use of the testimony in any subsequent prosecution. Immunity under 18 U.S.C. § 6003 may be obtained in anticipation, if an individual "may be called" and is "likely to refuse" to testify by asserting the privilege against self-incrimination.[9]

In most cases, the United States Attorney does not seek formal immunity, but confers informal immunity with a statement on the record that the testimony will not be used against the witness. However, a witness with only informal immunity cannot be compelled to testify; only a court order granting *formal* immunity can compel the testimony.

Although there may be no reason to insist on a formal grant of immunity, counsel must be careful when securing informal immunity. It is important that the terms be clearly specified on the record and put in writing. Counsel should generally insist that informal immunity be equal to formal immunity. For example, formal immunity cannot be "revoked" on the grounds that the testimony given was inaccurate or false. Formal immunity is unqualified. Counsel should not generally acquiesce in agreements that testimony or statements will not be used against the client so long as the information provided is truthful and accurate.

An informal promise of immunity is binding against the government, to the extent of the agreement, so long as the witness fulfills his or her part of the bargain. *See Santobello v. New York*, 404 U.S. 257 (1971) (government promise about sentencing recommendation after guilty plea is binding); *United States v. Warren*, 373 A.2d 874 (D.C. 1977) (promise of immunity binding). The defendant in *Warren* had been convicted of a series of rapes that were believed to be connected to several unsolved homicides. The government agreed not to use "truthful, complete, and accurate" information provided by *Warren* about the murders, with respect to the murders or any "incidental offenses," and to let him plead to lesser offenses. *Warren* provided inaccurate and misleading information about the homicides, but accurate information implicating himself in a previously uncharged rape. Upon *Warren*'s motion to dismiss an indictment for that rape, the trial court found that, by giving false information, *Warren* had not kept his part of the bargain with respect to the homicides, but found a severable and binding promise not to use information about incidental offenses. Interpreting the promise as the equivalent of use

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[7] If a child asserts the privilege, Corporation Counsel may seek an order compelling a child to testify in a delinquency proceeding or in a proceeding ancillary to a delinquency proceeding from the judge presiding over the proceeding. D.C. Code § 16-2339. There is no provision for Corporation Counsel to seek immunity for an adult witness or a child called to testify at an adult proceeding.

[8] *See Application of United States Senate Select Committee on Presidential Campaign Activities (Young)*, 361 F. Supp. 1270 (D.D.C. 1973); *accord In re Daley*, 549 F.2d 469 (7th Cir. 1977); *In re Baldinger*, 356 F. Supp. 153 (C.D. Cal. 1973) (court declining to grant immunity order where proposed order violated Constitutional rights).

[9] This reverses earlier law requiring actual invocation of the privilege before immunity could be granted. *In re McElrath*, 248 F.2d 612 (D.C. Cir. 1957).

immunity, the court dismissed the indictment because the government did not prove that it had not used *Warren*'s information in securing it.

The Court of Appeals upheld that interpretation, agreeing that the false information did not vitiate the entire agreement and that the "incidental offenses" language was severable. The court also agreed that the government had the burden of proving that the evidence used to secure the indictment was derived from independent sources. *Warren*, 373 A.2d at 877.

Because the government may later claim that prosecution of the witness is based solely on independently-derived evidence, the record should show the precise information provided by the witness. Should the government subsequently prosecute, counsel should ask that the government submit for *in camera* inspection any evidence it had before granting immunity. *See, e.g.*, *Goldberg v. United States*, 472 F.2d 513, 516 n.5 (2d Cir. 1973); *see also* Note, *Standards for Exclusion in Immunity Cases after Kastigar and Zicarelli*, 82 Yale L.J. 171, 182 (1972); Gerald Gunther, Comment, *Forward: In Search of an Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 187-89 (1973). If a challenge is raised, the court should make specific factual findings as to the source. *See Aiken v. United States*, 956 A.2d 33, 48 (D.C. 2008) (defendant was entitled to *Kastigar* hearing for government to meet its burden of proving that its evidence at trial was not tainted by defendant's immunized testimony at a civil protection order hearing); *United States v. Rinaldi*, 808 F.2d 1579, 1583 (D.C. Cir. 1987) (per curiam) (government bears burden of proving that testimony was "free of taint and independently derived").

Finally, if documentary evidence is involved, counsel should request that the witness receive immunity for the *act* of producing information, as well as the substance of the information. See *In re Sealed Case*, 791 F.2d 179 (D.C. Cir. 1986). *See generally John Doe*, 465 U.S. at 616-17.

Immunity:

- ✓ Be careful when securing informal immunity
  Make sure the terms are clearly specified on the record and put in writing
- ✓ Counsel should generally insist that informal immunity be equal to formal immunity
- ✓ Counsel should not generally acquiesce in agreements that testimony or statements will not be used against the client so long as the information provided is truthful and accurate
- ✓ Because the government may later claim that prosecution of the witness is based solely on independently-derived evidence, the record should show the precise information provided by the witness
- ✓ Should the government subsequently prosecute, counsel should ask that the government submit for *in camera* inspection any evidence it had before granting immunity

G. The Problem of Inconsistent Statements

A witness whom the government seeks to call before the grand jury has probably spoken to a prosecutor or police officer about the expected testimony, and may have given a signed statement. A witness the government plans to call at trial may already have testified before the grand jury. Special attention should be given to situations where the testimony the witness will give, while not otherwise incriminating, is inconsistent with the earlier statements or testimony. *See* D.C. Code § 22-2405 and 18 U.S.C. § 1001 (false statements); D.C. Code § 22-2402 and 18 U.S.C. § 1621 (perjury); 18 U.S.C. § 1623 (false declarations before a court or grand jury).

Counsel must tread carefully when confronted with any "inconsistent statement" problems. The privilege should probably be invoked if there is any possible exposure to prosecution and the witness does not wish to testify.

1. False Statements to Government Agencies

Compelled testimony may be used in prosecuting an immunized witness for "perjury, giving a false statement, or otherwise failing to comply with the order." 18 U.S.C. § 6002. An extensive discussion of this language appears in *In re Baldinger*, 356 F. Supp. 153 (C.D. Cal. 1973), in which the witness asserted her privilege against self-incrimination and the government obtained an immunity order compelling her to testify, but the witness refused to comply on the ground that the immunity would not protect her from prosecution under 18 U.S.C. § 1001[10] for false statements given earlier to the FBI. The court agreed, holding § 6002 unconstitutional as applied in this context.

Several courts have concluded that immunized testimony can only be used in prosecuting false statements made *after* the compelled testimony. *United States v. Alter*, 482 F.2d 1016 (9th Cir. 1973); *Application of U.S. Senate Committee*, 361 F. Supp. 1282 (D.D.C. 1973); *United States v. Doe/In re Subpoena of Daniel Cahalane*, 361 F. Supp. 226 (E.D. Pa.), *aff'd*, 485 F.2d 678 (3d Cir. 1973). *Alter* concluded that in order to prosecute a false statement made before immunity was granted, the government's evidence must stem from an independent source.

> Immunity "prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness." Accordingly, in the event of a prosecution for making a false statement to the F.B.I., none of Government's proof could be based upon direct or indirect evidence gained by virtue of Alter's immunized grand jury testimony.

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[10] 18 U.S.C. § 1001:

> [W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully – (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years … or both.

482 F.2d at 1028 (citation omitted). Thus, without immunity, the witness may refuse to testify if the testimony would form a link in the chain of evidence proving an earlier violation of 18 U.S.C. § 1001.

The District's "false statements" law is much narrower. It provides criminal penalties only for *written* material misstatements to District of Columbia government agencies, in documents that note that criminal penalties attach for false statements. D.C. Code § 22-2405.[11]

2. Perjury

The Fifth Amendment is not implicated if the only potential incrimination is that the witness will give perjurious testimony,[12] proscribed by 18 U.S.C. § 1621[13] and D.C. Code § 22-2402.[14] The immunity statute specifically excludes perjury prosecution from the protection granted. "Immunity under these statutes need extend only to prosecution for past crimes – not to prosecution for future crimes or for perjury or contempt in connection with the very process of making the disclosure itself." 8 Wigmore, *Evidence* § 2282, at 511.[15]

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[11] D.C. Code § 22-2405(a):

> A person commits the offense of making false statements if that person willfully makes a false statement that is in fact material, in writing, directly or indirectly, to any instrumentality of the District of Columbia government, under circumstances in which the statement could reasonably be expected to be relied upon as true: provided, that the writing indicates that the making of a false statement is punishable by criminal penalties.

[12] *See Brogan v. United States*, 522 U.S. 398 (1998) (Fifth Amendment allows witness to remain silent, but not to swear falsely); *United States v. Wong*, 431 U.S. 174 (1977); *United States v. Orta*, 253 F.2d 312 (5th Cir. 1958); *see also* 8 Wigmore, *Evidence* § 2260, at 370 n.5 (McNaughton rev. 1961) ("The privilege of course does not apply to permit silence where the fear is of prosecution for perjury in the very testimony sought") (emphasis omitted).

[13] 18 U.S.C. § 1621:

> "Whoever – (1) having taken an oath before a competent tribunal … willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true … is guilty of perjury …"

[14] D.C. Code § 22-2402:

> (a) A person commits the offense of perjury if: (1) Having taken an oath or affirmation before a competent tribunal, officer, or person, in a case in which the law authorized such oath or affirmation to be administered, that he or she will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by that person subscribed is true, willfully and contrary to an oath or affirmation states or subscribes any material matter which he or she does not believe to be true and which in fact is not true … (b) Any person convicted of perjury shall be fined not more than $5,000 or imprisoned for more than 10 years, or both.

[15] *See also United States v. Bryan*, 339 U.S. 323, 340-42 (1950); *Glickstein v. United States*, 222 U.S. 139 (1911); *United States v. Moss*, 562 F.2d 155 (2d Cir. 1977); *United States v. Anzalone*, 555 F.2d 317 (2d Cir.) *on reh'g*, 560 F.2d 492 (2d Cir. 1977); *United States v, Tramunti*, 500 F.2d 1334 (2d Cir. 1974); *United States v. Hockenberry*, 474 F.2d 247 (3d Cir. 1973).

The Fifth Amendment does protect against use of compelled testimony to prove perjury based on *previous* testimony, if the present testimony would "form a link in the chain of evidence" that the prior testimony was perjurious.

> [W]hen a witness is asked a question that could show that he had already committed a crime, i.e., perjury at a prior trial, his refusal to answer is permissible almost by the definition of self-incrimination . . . Thus the aphorism that one cannot take the Fifth Amendment on the ground that if he testifies he will perjure himself applies only as an excuse for not testifying initially. It does not mean that having once testified, the Fifth Amendment is not available to avoid giving further testimony which might expose the witness to substantial risk of prosecutions growing out of the prior testimony.

United States v. Wilcox, 450 F.2d 1131, 1141 (5th Cir. 1971). Nevertheless, in *United States v. Irving*, 593 F.Supp.2d 140, 143-44 (D.D.C. 2009), the court denied the government's request for an upward adjustment in a income tax charges and fraud case when it found that the defendant's direct testimony could not amount to perjury by a preponderance of the evidence. The court noted that the seven excerpts from the defendant's testimony did not show that he clearly intended to give false testimony. *Id.* at 143.

3. False Declarations under Oath

The offense of false declaration before a grand jury or court, 18 U.S.C. 1623,[16] is established by proving that the defendant made two materially inconsistent statements under oath; the government need not show which one was false. It seems, however, that a witness who testifies falsely and then is granted immunity under 18 U.S.C. § 6002 cannot be prosecuted under § 1623(c)[17] if the immunized testimony is truthful. *See United States v. Patrick*, 542 F.2d 381 (7th Cir. 1976). Thus, although under § 1623(c) the government normally would not have to show which of the two inconsistent declarations was false, that showing is necessary to prosecute an

[16] 18 U.S.C. § 1623:

> (a) Whoever under oath … in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information … knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

There is no D.C. equivalent to this offense.

[17] 18 U.S.C. § 1623:

> (c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if –
>
> (1) each declaration was material to the point in question, and
>
> (2) each declaration was made within the period of the statute of limitations for the offense charged under this section…

immunized witness.[18] *See United States v. Hockenberry*, 474 F.2d 247 (3d Cir. 1973). *See generally United States v. Apfelbaum*, 445 U.S. 115 (1980).

Section 1623(d)[19] extends limited immunity to a witness who retracts the false statement in the same proceeding. Although it involves stringent requirements, it may furnish an escape hatch to a witness who has lied under oath. The defendant must express the desire to recant before it becomes "manifest" that the falsity of the prior statement will be exposed, and the burden is on the accused to prove that the statements warrant the protection of § 1623(d). *See United States v. Moore*, 613 F.2d 1029 (D.C. Cir. 1979); *United States v. Krogh*, 366 F. Supp. 1255 (D.D.C. 1973).

H. Penalties

Unjustified refusal to testify can be met with civil contempt (aimed at coercing the witness to comply with the court's order) or criminal contempt (aimed at punishing the witness for failure to comply), or both.[20] If the contempt is civil, the witness is imprisoned until he or she testifies or the proceedings at which the witness refuses to testify conclude. The punishment for criminal contempt has no fixed limits; the penalty imposed is usually less than six months because a jury trial is required if the court intends to impose a harsher penalty.[21]

The usual method of dealing with an immunized witness's refusal to answer is civil contempt pursuant to the recalcitrant witness statute, 28 U.S.C. § 1826:

> Whenever a witness in any proceeding before or ancillary to any court or grand jury of the United States refuses without just cause shown to comply with an order of the court to testify or provide other information . . . the court, upon such refusal, or when such refusal is duly brought to its attention, may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information. No period of such confinement shall

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[18] *United States v. Dunn*, 577 F.2d 119 (10th Cir. 1978), *rev'd on other grounds*, 442 U.S. 100 (1979), however, held that immunity testimony could be used to establish the *corpus delicti* for an inconsistent declaration prosecution under 18 U.S.C. § 1623(a) without proving that it was the statement made pursuant to the grant of immunity which was false. The defendant's statement under oath that his prior inconsistent immunized statement was false seems to have been a factor in the court's reasoning. *See also Moss*, 562 F.2d 155.

[19] 18 U.S.C. § 1623(d):

> Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

[20] *See Yates v. United States*, 355 U.S. 66, 71 (1957); *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418 (1911); *In re Grand Jury Investigation (Hartzell)*, 542 F.2d 166 (3d Cir. 1976); *In re Grand Jury Proceedings (Raper)*, 491 F.2d 42 (D.C. Cir. 1974); *In re Grand Jury Proceedings (Liddy)*, 506 F.2d 1293 (D.C. Cir. 1974); *Anglin v. Johnston*, 504 F.2d 1165 (7th Cir. 1974).

[21] *United States v. Liddy*, 510 F.2d 669 (D.C. Cir. 1974) (upheld order that, for witness under sentence when he refused to testify, prior sentence be suspended while he served time for contempt conviction).

> exceed the life of – (1) the court proceeding, or (2) the term of the grand jury, including extensions, before which such refusal to comply with the court order occurred, but in no event shall such confinement exceed 18 months.

"Just cause" may exist if a self-incrimination claim is erroneously denied, but would end once the witness receives immunity.

Fed. R. Crim. P. 6(g) and Super. Ct. Crim. R. 6(g) provide that grand juries may be empaneled for 18-month periods. Ordinary criminal grand juries in both Superior Court and district court sit for several months; investigative grand juries utilized by the U.S. Attorney's Fraud and Major Crimes Sections customarily sit much longer. While there is no bar to recalling the witness to testify before a successor grand jury and confining the witness for the life of the second grand jury upon another refusal to testify, *Shillitani v. United States*, 384 U.S. 364, 371 n.8 (1966), the U.S. Attorney's Office here has apparently never taken this route.

III. OTHER TESTIMONIAL PRIVILEGES

The District of Columbia recognizes three statutory privileges: spousal, doctor-patient, and clergy. Other common-law privileges that may disqualify a witness include work-product[22] and the attorney-client privilege.[23]

A. The Spousal Privilege

The marital privilege exists in two situations, depending on whether the subject matter involves a confidential communication. Under D.C. Code § 14-306(a),[24] a spouse *may – but cannot be compelled to* – testify to matters that are not confidential communications. The right to exercise this privilege rests with the spouse who is the potential witness. *Bowler v. United States*, 480 A.2d 678, 685 (D.C. 1984);[25] *see also (Joseph) Smith v. United States*, 947 A.2d 1131, 1135 (D.C. 2008) (no violation of marital privilege statute D.C. Code § 14-306(a) to admit recording of 911 call made by defendant's wife, the complaining witness, because spousal testimony privilege belongs solely to the witness spouse and cannot be invoked by defendant, and because defendant failed to make a marital testimony privilege argument at trial). The spouse/witness may waive or assert the privilege both before the grand jury and at trial, and may invoke the privilege at the grand jury but waive it at trial. When the privilege is waived at the grand jury and invoked at trial, the court must determine whether the waiver in the grand jury was voluntary

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[22] *See United States v. Nobles*, 422 U.S. 225 (1975); *Hickman v. Taylor*, 329 U.S. 495 (1947).

[23] Attorney-client privilege protects confidential communications between an attorney and client for the purpose of securing professional legal advice. *See generally* 8 Wigmore, *Evidence* § 2292 (McNaughton rev. 1961). However, a defendant waives this privilege, at least to some extent, by challenging a conviction based on alleged ineffectiveness of counsel. *Eldridge v. United States*, 618 A.2d 690, 693 n.3 (D.C. 1992). A distinct but overlapping concern is the attorney's ethical obligation to preserve the confidences and secrets of a client. *See* D.C. R. Prof. Cond. 1.6: *ABA Code of Professional Responsibility*, Canon 4.

[24] D.C. Code § 14-306 applies to common-law marriages. *See also Kleinbart v. United States*, 426 A.2d 343, 351 & n.7 (D.C. 1981); *Morgan v. United States*, 363 A.2d 999 (D.C. 1976).

[25] The defendant could not compel the spouse to testify any more than the government could. Thus, it is improper for the government to argue *anything* about the absence of a spouse as a witness. *Kleinbart*, 426 A.2d 343.

and whether it extended to testimony at trial. *Croom v. United States*, 546 A.2d 1006, 1008 (D.C. 1988). To assure an opportunity to exercise the privilege, the court should tell the potential spouse/witness, outside the presence of the jury, that the witness's testimony cannot be compelled but may be received if volunteered. *See Egbuka v. United States*, 968 A.2d 511, 521-22 (D.C. 2009) (trial court's refusal to inform complaining witness of her spousal privilege not to testify was not harmless error, but rather, had a substantial influence on the case); *(Dennis) Jackson v. United States*, 623 A.2d 571, 584 (D.C. 1993); *Postom v. United States*, 322 F.2d 432, 433 (D.C. Cir. 1963); *see also United States v. Lewis*, 433 F.2d 1146, 1149-50 (D.C. Cir. 1970) (per curiam). The same process applies in the grand jury, but is not generally practiced.

Under D.C. Code § 14-306(b), a spouse *cannot testify* to a confidential communication from the other spouse. Testimony covered by § 306(b) is not actually "privileged" in the strict sense. When the evidence fits within this provision, the witness is not competent to testify at all. If the government attempts to elicit such evidence, counsel should file a motion *in limine* to prevent its admission.

Section 14-306(b) covers both verbal statements and conduct used to communicate to and confide in the other spouse. *Lewis*, 433 F.2d at 1150-51. The disqualification survives dissolution of the marriage, *see id*. at 1149 n.10, and may even survive the death of a spouse, *United States v. Burks*, 470 F.2d 432 (D.C. Cir. 1972).

Statements made in the presence of third parties are not "confidential." *Morgan v. United States*, 363 A.2d 999, 1004 (D.C. 1976); *accord Beard v. United States*, 535 A.2d 1373, 1381 (D.C. 1988). An assault by one spouse on another is neither a "communication" nor confidential. *(Cecil) Alston v. United States*, 462 A.2d 1122, 1126 n.3 (D.C. 1983); *Morgan*, 363 A.2d at 1004. This exception to the privilege includes crimes done to a child of either spouse. *(Michael) Johnson v. United States*, 616 A.2d 1216, 1224-25 (D.C. 1992). Thus, the spouse may – but cannot be compelled to – testify about such statements and actions.

Persons in a common-law-marriage may invoke the spousal privilege. "The elements of common law marriage in this jurisdiction are cohabitation as husband and wife, following an express mutual agreement, which must be in words of the present tense." *Coates v. Watts*, 622 A.2d 25, 27 (D.C. 1993). "The existence of an agreement may be inferred from the character and duration of cohabitation, or from other circumstantial evidence such as testimony by relatives and acquaintances as to the general reputation regarding the parties' relationship." *Marcus v. Director*, 548 F.2d 1044, 1048 n. 9 (1976). *But see Coleman v. United States*, 948 A.2d 534, 544 (D.C. 2008) (holding that trial court did not abuse its discretion in failing to exclude, *sua sponte*, testimony on the basis of the spousal privilege where no common law marriage existed prior to the engagement because the defendant and his girlfriend did not consider themselves spouses or cohabit, and no common law marriage existed after they were engaged because defendant was incarcerated and so they did not live together).

B. The Doctor-Patient Privilege

> [A] physician or surgeon or mental health professional as defined by [D.C. Code § 7-1201.01(11)] *may not be permitted, without the consent of the person afflicted*, or of his legal representative, to disclose any information, confidential in

> its nature, that he has acquired in attending a client in a professional capacity and that was necessary to enable him to act in that capacity, whether the information was obtained from the client or from his family or from the person or persons in charge of him.

D.C. Code § 14-307(a) (emphasis added).[26] The privilege rests with the patient; the doctor does not have the right to determine whether or not to assert it.[27] The privilege does not apply to:

> (1) evidence in criminal cases where the accused is charged with causing the death of, or inflicting injuries upon, a human being, and the disclosure is required in the interests of public justice;[28]
> (2) evidence relating to the mental competency or sanity of an accused in criminal trials where the accused raises the defense of insanity or where the court is required under prevailing law to raise the defense *sua sponte*, or in the pre-trial or post-trial proceedings involving a criminal case where a question arises concerning the mental condition of an accused or convicted person;
>
> (3) evidence relating to the mental competency or sanity of a child alleged to be delinquent, neglected, or in need of supervision in any proceeding before the Family Division of the Superior Court; or
>
> (4) evidence in criminal or civil cases where a person is alleged to have defrauded the District of Columbia or federal government in relation to receiving or providing services …

§ 14-307(b); *see also White v. United States*, 451 A.2d 848 (D.C. 1982); *United States v. Carr*, 437 F.2d 662 (D.C. Cir. 1970).

The exception created by § 307(b)(1) requires that disclosure be in the interests of justice. Because the privilege belongs to the patient,

> the patient has an interest in the determination of the interest-of-public-justice exception.
>
> . . . When D.C. Code § 14-307 applies and the exception relied upon is that contained in § 307(b), *prior* leave of the court is required before any subpoenas may be served by anyone for the production of material covered by that statute for use in preparing for, or otherwise in connection with, a trial . . . .In determining the interest-of-public-justice exception, it will often, if not always, be appropriate

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[26] Social workers serving as psychotherapists are also covered by the physician-client privilege. *Jaffee v. Redmond*, 518 U.S. 1, 15 (1996).

[27] A valid release of records waives the privilege, at least to some extent.

[28] See *Graham v. United States*, 746 A.2d 289 (D.C. 2000) (balancing test used when applying the "interest of public justice" exception).

> to give the person whose records are being sought notice and an opportunity to be heard.

(Anthony) Brown v. United States, 567 A.2d 426, 427-28 (D.C. 1989).[29]

(Anthony) Brown created some confusion over what procedures must be followed to obtain and utilize information regarding medical care. Clearly, an *ex parte* motion for issuance of a subpoena for medical records is appropriate.[30] If the court determines that notice to the patient is necessary, either the court or counsel may give such notice. The court may appoint counsel for the patient, and an *ex parte* hearing should be held with the record placed under seal. Counsel should strenuously resist any involvement by the United States Attorney's Office in these proceedings, which may reveal much of the defense investigation and preparation for trial. *Cf. Williams v. United States*, 310 A.2d 244, 246 (D.C. 1973) (*ex parte* proceedings for appointment of expert are designed to ensure that defendant will not have to make "premature disclosure of his case"). Nor can the United States Attorney represent the complainant, given the clear conflict of interest. *See also Nelson v. United States*, 649 A.2d 301 (D.C. 1994) (discussing failure of defense to meet "interest of public justice" standard in order to gain medical records of a girl who fell victim to the perpetrator in a case involving carnal knowledge of a child and taking indecent liberties with a minor child).

In *Nelson*, the Court of Appeals settled the issue of whether a waiver by parents of the doctor-client privilege to release their child's medical records to the government constituted an implied waiver for other interested parties. *Nelson*, 649 A.2d at 308-09. The case involved an appeal by a defendant convicted of carnal knowledge of a child and taking indecent liberties with a minor child. While the court held that a patient waives his privilege as to relevant evidence by filing a lawsuit, which places in issue the patient's medical condition, *id*. at 308, the court refused to recognize a "general waiver by implication of any medical information . . ." *Id*. at 309. The court stated that "[w]hether an implied waiver has occurred depends upon the facts and circumstances of the particular case . . ." [and that] "[w]aiver determinations are to be carefully scrutinized." *Id*.

Finally, the statutory privilege cannot bar disclosure of records if the defendant's due process or confrontation rights would be violated. *See United States v. Wright*, 114 Wash. D.L. Rptr. 1205 (D.C. Super. Ct. June 13, 1986).

C. The Clergy Privilege

> A . . . clergyman . . . may not be examined in any civil or criminal proceedings in the Federal courts in the District of Columbia and District of Columbia courts with respect to any –

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[29] *Brown* found "no rational basis on which to distinguish subpoenas issued at the behest of a grand jury from our holding in this case." *Id*. at 429. Thus counsel should be alert to potential abuses of the physician-client privilege at the grand jury.

[30] Since *Brown*, the Superior Court has created a special subpoena to be used, indicating the trial court's approval of the subpoena under *Brown*.

> (1) confession, or communication, made to him, in his professional capacity . . . without the consent of the person making the confession or communication; or
>
> (2) communication made to him, in his professional capacity in the course of giving religious or spiritual advice, without the consent of the person seeking the advice …

D.C. Code § 14-309. Again, waiver must come from the person whose conversations are at issue, not from the clergy-witness.

IV. ATTORNEY TESTIMONY ISSUES

In some cases, defense counsel or the prosecution will find it beneficial to take the stand and offer testimony. However, attorney testimony will be subject to the court's approval and limitation. *Gatlin v. United States*, 925 A.2d 594, 604 (D.C. 2007), held that the trial court did not abuse its discretion in rejecting defense counsel's request to testify and the defense's motion for mistrial after a government witness, on cross-examination during a murder trial, accused defense counsel of asking him to commit perjury. The court based its decision on several points, namely that the government had no indication that the witness would make such an accusation in open court; defense counsel's immediate response was one of disbelief; and defense counsel was allowed to cross-examine the witness to elicit testimony that he had never acted upon nor complained about the alleged request to commit perjury and the alleged conversation between defense counsel and the witness could not have taken place where the witness alleged that it had. *Gatlin*, 925 A.2d at 603-04. The court believed that a reasonable juror would infer from these circumstances that the witness's accusation was false. *Id.* at 604. Moreover, the court noted that the witness, though key, was not the only government witness, and defense counsel refused the option to have the jurors instructed to disregard the witness's accusation and to have the parties stipulate that defense counsel did not instruct the witness to commit perjury. *Id*. Alternatively, defense counsel should consider requesting a curative instruction to alleviate undue prejudice injected into the trial by a government witness. *But see Owens v. United States*, 982 A.2d 310, 315-16 (D.C. 2009) (failure to issue corrective instruction after government witness testified that defense counsel had identified him as such to other inmates during visit to jail not plain error where defense counsel invited much of testimony, it was clear that defense counsel disagreed with witness's characterization of events, and there was other independent evidence of defendant's guilt).

In *Coleman*, 948 A.2d at 549, the Court of Appeals found that the trial court did not abuse its discretion in denying a motion for retrial after the prosecution improperly vouched for the credibility of the government witnesses in the case, including an AUSA, who testified on the facts of the case, a detective, and the prosecutor herself. While the statements were improper, the court held that they were harmless since the government evidence was overwhelming (e.g. defendant had acknowledged during direct examination that he had confessed to the AUSA) and curative jury instructions were issued both immediately after the motion and during final instructions. *Id.* at 548-49. Nevertheless, the court noted that courts "have repeatedly admonished prosecutors against commenting on the veracity of government witnesses during rebuttal argument." *Id.* at 549. (*citing Powell v. United States*, 455 A.2d 405, 408 (D.C.1982)).

Additionally, the court acknowledged that in cases where the determination of guilt rests on an assessment of the witnesses' credibility, improperly vouching for the credibility of witnesses is of "cardinal importance." *Id.* (*quoting* Powell, 455 A.2d at 408).

CHAPTER 29

EXPERT TESTIMONY

As science plays an ever more prominent role in the administration of justice, it is crucial for counsel to be comfortable working with experts and to understand the law governing their testimony. Experts can contribute at every stage of a trial: pre-trial preparation, admissibility and suppression hearings, the guilt/innocence phase, and sentencing. Experts can testify as witnesses, help form cross examinations, or simply assist counsel in crafting and understanding her case. This section discusses the legal standards and professional skills relevant to working with experts.

2014 Supplement

***Harrison v. United States*, 76 A.3d 826 (D.C. 2013).** Trial court did not err in admitting testimony of police officer without trappings of an expert witness where officer merely based his testimony regarding barrel length on his familiarity with the outward appearances of the specific types of pistols he was asked to describe.

***King v. United States*, 74 A.3d 678 (D.C. 2013).** Trial court did not err in allowing police officers to offer lay opinion testimony on meaning of certain street lingo because knowledge was based on their personal experiences and observations and because reasoning process officers used to interpret street language was "everyday process of language acquisition."

I. THE RIGHT TO EXPERT ASSISTANCE

A. D.C. Law

D.C. law provides a right to expert assistance:

> (a) Counsel for a person who is financially unable to obtain . . . expert . . . services necessary for an adequate defense may request them in an ex parte application. Upon finding, after appropriate inquiry in an ex parte proceeding, that the services are necessary and that the person is financially unable to obtain them, the court shall authorize counsel to obtain the services.
>
> (b) Subject to the applicable limits described in subsections (c) and (d) of this section, an individual providing services under this section shall be compensated at a fixed rate of $25 per hour, and shall be reimbursed for expenses reasonably incurred.
>
> (c) Counsel appointed under this section may obtain, subject to later review, investigative, expert, or other services, excluding the preparation of reporter's transcript, without prior authorization if necessary for an adequate defense. The total cost of services obtained without prior authorization may not exceed $375 or

> the rate provided by [18 U.S.C. § 3006(A)(e)(2)], whichever is higher, and expenses reasonably incurred.
>
> (d) Compensation to be paid to a person for services rendered by such person to a person under this subsection shall not exceed $750, or the rate provided by [18 U.S.C. § 3006(A)(e)(3)], whichever is higher, exclusive of reimbursement for expenses reasonably incurred, unless payment in excess of that limit is certified by the court, as necessary to provide fair compensation for services of an unusual character or duration, and the amount of the excess payment is approved by the presiding judge in the case.
>
> (e)

D.C. Code § 11-2605 (2005).[1]

B. U.S. Constitution

The Supreme Court has recognized a due process right to expert psychiatric assistance. *Ake v. Oklahoma*, 470 U.S. 68 (1985) (holding that when indigent defendant has made preliminary showing that his sanity at time of offense will likely be significant factor at trial, due process requires that government provide access to psychiatrist's assistance). This right derives from the principle of fundamental fairness – "to assure that the defendant has a fair opportunity to present his defense . . . justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake." *Id*. at 76. The Supreme Court recognized "the pivotal role that psychiatry has come to play in criminal proceedings" and noted that "when the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense." *Id.* at 79-80.

Subsequently, in *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985), the Court reserved the "equally important questions of whether and when an indigent defendant is entitled to non-psychiatric expert assistance." *Johnson v. Oklahoma*, 484 U.S. 878, 880 (1987) (Marshall, J., dissenting from denial of petition for writ of certiorari). Lower courts have differed in their interpretation of *Caldwell*; some have viewed *Caldwell* as holding explicitly that *Ake* does not cover other types of expert witnesses. *See, e.g., Jackson v. Ylst*, 921 F.2d 882, 885–87 (9th Cir. 1990) ("[n]o issue was presented to the Supreme Court in *Ake* concerning the right of an indigent to the appointment of an expert on eyewitness identification"); *Kordenbrock v. Scroggy*, 919 F.2d 1091, 1119 (6th Cir. 1990) (Kennedy, J., dissenting) (limiting *Ake*'s holding to provision of psychiatric expert witnesses in cases where defendant exhibits that his or her sanity is significant issue at trial); *Siebert v. State*, 562 So. 2d 586, 590 (Ala. Crim. App. 1989) ("[t]here is nothing contained in the *Ake* decision to suggest that the United States Supreme Court was addressing anything other than psychiatrists and the insanity defense"). On the other hand, a number of lower courts have extended *Ake*'s command beyond those instances in which a defendant's mental condition is at issue in a capital case. *See, e.g., Powell v. Collins*, 332 F.3d 376, 390 n.5

[1] Counsel may find that the fee caps in the statute are unrealistically low and based upon an outdated understanding of such expenses, and should apply to the court for leave to exceed the caps. *See infra* Part II.D.

(6th Cir. 2003) (noting generally that Sixth Circuit, as well as a number of other circuits, "have extended *Ake*'s command of expert assistance to instances beyond those where a defendant's mental condition is at issue at trial, and beyond those of capital cases"); *Little v. Armontrout*, 835 F.2d 1240, 1243 (8th Cir. 1987) (holding that state's refusal to provide defendant with assistance of expert on hypnosis rendered trial fundamentally unfair and required conviction to be set aside, explaining that "[t]here is no principled way to distinguish between psychiatric and nonpsychiatric experts").

This constitutional issue remains an open question in D.C., where the Court of Appeals has observed that statutory law provides a right to non-psychiatric expert assistance. *See Brown v. Dist. of Columbia*, 727 A.2d 865, 869 n.6 (D.C. 1999) ("during oral argument, Corporation Counsel conceded that D.C. Code § 11-2605(a) grants an indigent defendant more rights than required by *Ake v. Oklahoma*"; trial court abused its discretion in denying defendant charged under Compulsory School Attendance Act authorization to secure services of expert psychologist to examine child and defendant herself and testify regarding school phobia).

II. PROCEDURES RELATING TO EXPERT WITNESSES

A. Appointment of Expert Under D.C. Code § 11-2605

1. *Ex parte* Procedures

Section 2605 provides for *ex parte* application for appointment of the expert and an *ex parte* proceeding to determine whether the assistance is necessary for an adequate defense. The *ex parte* application and proceedings are designed to ensure that the defendant will not have to make "a premature disclosure of his case in order to obtain access to expert services." *Williams v. United States*, 310 A.2d 244, 246 (D.C. 1973). An *ex parte* application should be made to the presiding judge or judge-in-chambers. Some judges will authorize the expenditure upon oral application; others require a written application. If a written application is made and the court requests that it be filed in the record, counsel should be sure that it is filed under seal. Indeed, if counsel ultimately decides not to call the expert witness to testify, counsel need not disclose the expert's findings.[2] Counsel should avail himself as fully as possible of the *ex parte* procedures to avoid revealing his trial strategy in open court.

2014 Supplement

***In re L.C.*, 92 A.3d 290 (D.C. 2014).** Reversible error not to conduct during bench trial a particularized inquiry, pursuant to Dyas and Benn II, into whether proffered expert testimony regarding reliability of eyewitness identifications was "beyond the ken" of the average layperson, despite the fact-finder being "an experienced trial judge."

[2] Super. Ct. R. Crim. P. 16(b)(1)(B) provides for defense disclosure only of test results or reports that "the defendant intends to introduce as evidence in chief at trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony."

2. Indigence Standard

A defendant must qualify as indigent to receive the assistance of an expert appointed by the court. Under D.C. law, "[t]he determination whether a person is financially unable to obtain adequate representation shall be based on information provided by the person to be represented and such other persons or agencies as the court in its discretion shall require." D.C. Code § 2-1602(d) (2005).

3. Reasonableness Standard

The purpose of appointing an expert under section 2605 is to assist counsel, not to serve the court. *Dobson v. United States*, 426 A.2d 361, 368 (D.C. 1981); *United States v. Chavis*, 476 F.2d 1137, 1142 (D.C. Cir. 1973). Thus, for a defendant to invoke his right to expert assistance successfully, the court must first determine whether the services are "necessary to an adequate defense." *Chavis*, 476 F.2d at 1141. This judicial determination is not an automatic one. "[A] trial court need not authorize an expenditure . . . for a mere 'fishing expedition.'" *Gaither v. United States*, 391 A.2d 1364, 1368 (D.C. 1978); *see Berry v. United States*, 528 A.2d 1209 (D.C. 1987) (no abuse of discretion in denying request for independent chemist to analyze substances found in defendant's house absent showing that DEA chemist's analysis would be unreliable). The court may also consider counsel's ability independently to accomplish the task for which expert assistance is sought. *Compare United States v. Obregon*, 107 Wash. D.L. Rptr. 57, 61 (D.C. Super. Ct. 1979) (statistical concepts required to analyze composition of master grand jury pool are beyond general knowledge of attorney), *with Neku v. United States*, 620 A.2d 259, 265 n.8 (D.C. 1993) (denial of request for fingerprint expert not abuse of discretion where defense was able to inform jury that government performed no fingerprint analysis.

However, courts should grant reasonable requests for expert assistance "when underlying facts reasonably suggest that further exploration may prove beneficial to the accused in the development of a defense to the charge . . . the application of the accused's counsel for such services must be evaluated on a standard of reasonableness. In making this determination, the trial court should tend to rely on the judgment of defense counsel who has the primary duty of providing an adequate defense." *Gaither*, 391 A.2d at 1368 (citation omitted).

4. Limit on Expenditures

Section 11-2605(d) places a $750 limit on expenditures unless the services provided are of an "unusual character or duration." When seeking greater expenditures, counsel should emphasize the character of the services rendered, the prevailing market rates for similar services in the private sector, and the courts' own admonitions that experts be thorough in their preparation.[3]

[3] *See, e.g.*, *In re Morrow*, 463 A.2d 689, 692 (D.C. 1983) (trial court initially declined to authorize payment for second psychiatric expert whose fee would exceed statutory minimum when counsel could not provide compelling justification for expenditure); *Rollerson v. United States*, 343 F.2d 269, 274 (D.C. Cir. 1964) ("[t]he basic tool of psychiatric study remains the personal interview, which requires rapport between the interviewer and the subject . . . More than three or four hours are necessary to assemble a picture of a man. A person sometimes refuses for the first several interviews to reveal his delusional thinking …"); *People v. Dove*, 287 A.D.2d 806 (N.Y. App. Div. 2001) (no abuse of discretion when trial court did not authorize expenditure for expert witness, where counsel's oral

Section 2605(c) provides for expenditures for defense services, excluding transcript preparation, in amounts up to $375 without prior authorization by the court, although subject to later review. This subsection does not set forth any standards by which to judge the reasonableness of the expenditure, but the standards set forth in section 2605(a) likely apply. To be safe, counsel should obtain prior authorization when possible. *See Plan for Furnishing Representation to Indigents under the District of Columbia Criminal Justice Act* § VI.B (1974), concerning the ratification procedure.

B. Rule 16 Notice

D.C. Superior Court rules require the government to provide expert notice to the defendant at the defendant's request.

> (E) Expert Witness. At the defendant's request, the government shall disclose to the defendant a written summary of the testimony of any expert witness that the government intends to use during its case-in-chief at trial. If the government requests discovery under subdivision (b)(1)(C)(ii) of this Rule and the defendant complies, the government shall, at the defendant's request, disclose to the defendant a written summary of testimony of any expert witness the government intends to use as evidence at trial on the issue of the defendant's mental condition. The summary provided under this subparagraph shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications.

Super. Ct. R. Crim. P. 16(a)(1)(E).

Counsel should ensure that the government's expert notice is not merely a "list of topics" or a summary of expected testimony, but a detailed account of "the expert's *actual* opinions" as well as "the bases for those opinions." *Murphy-Bey v. United States*, 982 A.2d 682, 688 (D.C. 2009) (emphasis added). If this level of detail is not received, counsel should consider filing a motion to compel this information, or in the alternative to exclude the proffered expert's testimony.

Similarly, when the government complies with a Rule 16(a)(1)(E) notice request or the defendant has given notice of intent to present an insanity defense, a defendant must disclose certain information pertaining to the use of expert testimony in his case at the government's request.

> (C) Expert Witnesses. Under the following circumstances, the defendant shall, at the government's request, disclose to the government a written summary of testimony of any expert witness that the defendant intends to use as evidence at trial: (i) if the defendant requests disclosure under subparagraph (a)(1)(E) of this Rule and the government complies, or (ii) if the defendant has given notice under Rule 12.2(b) of an intent to present expert testimony on the defendant's mental

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application failed to address details concerning necessity for the expert, time to be expended by expert, precise services to be rendered by expert, or extraordinary circumstances that would warrant expenditure).

> condition. This summary shall describe the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications.

Super. Ct. R. Crim. P. 16(b)(1)(C).

The expert notice requirement is not a light one. The party calling the expert should provide a current copy of the expert's *curriculum vitae*, the specific opinions that the government expects the expert to offer, and the specific bases and reasons for those opinions. *See Murphy-Bey*, 982 A.2d at 688; *Ferguson v. United States*, 866 A.2d 54, 64 (D.C. 2005) (government's letter to defense counsel did not comply with Rule 16(a)(1)(E) because it could not be interpreted, even remotely, as "written summary" of testimony medical expert would give at trial, nor did letter describe expert's opinions or bases for his opinions). *But see Bellamy v. United States*, 810 A.2d 401, 404 (D.C. 2002) (holding that even where government expert's testimony differed from summary provided in Rule 16 letter, there was no reversible error because defendant was not prejudiced); *United States v. Tinoco*, 304 F.3d 1088 (11th Cir. 2002) (defendant must show prejudice before reversal is warranted for government's failure to comply with Rule 16 disclosure requirements). Appropriate sanctions for the failure to provide adequate Rule 16 notice include ordering the party to permit the discovery or inspection, granting a continuance, and even "bar[ring] the inadequately-disclosed testimony's admission." *See Murphy-Bey*, 982 A.2d at 689; Super. Ct. R. Crim. P 16(d)(2).

While complying with the strictures of Rule 16, defense counsel should endeavor to disclose no more information than is required;[4] one strategy is simply to match the specificity of the disclosure provided by opposing counsel. An unduly specific Rule 16 disclosure of the expert's testimony will hamper one's case by artificially limiting what the expert may discuss. A Rule 16 disclosure should be accurate but leave room for the expert's testimony to be developed further.[5]

2014 Supplement

***Austin v. United States*, 64 A.3d 413 (D.C. 2013).** Trial court did not abuse its discretion in precluding defense from introducing testimony about what had caused child's injuries and ultimate death where testimony sought had not been disclosed in compliance with Rule 16.

***Robinson v. United States*, 50 A.3d 508 (D.C. 2012).** Trial court erred in excluding on notice grounds relevant expert testimony on effects of PCP because of how late parties became aware of witness's use of PCP despite efforts prior to trial to obtain evidence of any recent drug use and given importance of defendants' right to present defense and meaningfully confront witness about PCP, but error was harmless because witness's ability to perceive the events was not particularly susceptible to mistakes where she knew two of three assailants well and had met the

[4] Recent case law provides some guidance for the appropriate proffer in the eyewitness identification expert context. *See infra* Part V.B.2.

[5] Given judicial resistance in some forums to the admission of many types of experts, counsel may consider supplementing Rule 16 notice by submitting a motion *in limine* to admit expert testimony. Alternatively, counsel may elect to take the more aggressive position that no motion is required because admissibility is clear as a matter of law.

third assailant previously, and where her testimony was corroborated by third assailant's own police interview about night of the offense.

III. ADMISSIBILITY OF EXPERT TESTIMONY

A jury will naturally accord a certain level of credibility to a witness who has been presented as an expert. To ensure the integrity and probative value of expert testimony, various doctrines govern its admissibility.

In *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979) (*Ibn-Tamas I*), *appeal after remand*, 455 A.2d 893 (D.C. 1983) (*Ibn-Tamas II*), the Court of Appeals outlined a two-tiered analysis for admission of expert testimony. "First, there is the question of admissibility . . . Second, the probative value of the testimony must outweigh its prejudicial impact." 407 A.2d at 632.

As to the first question, the D.C. Court of Appeals has set forth three requirements, or "prongs," for the admission of expert testimony on a given subject:

> (1) [T]he subject matter 'must be so distinctively related to some science, profession, business, or occupation *as to be beyond the ken of the average layman*';
>
> (2) 'the witness must have sufficient skill, knowledge, or experience in that field . . . as to . . . *aid the trier in [the] search for truth*'; and
>
> (3) expert testimony is inadmissible if 'the state of the pertinent art or scientific knowledge does not permit a reasonable opinion to be asserted even by an expert.'

Dyas v. United States, 376 A.2d 827, 832 (D.C. 1977) (citations omitted) (emphasis in original).

Within this framework, trial courts have broad discretion to determine whether expert evidence should be admitted, and the Court of Appeals will not overturn decisions unless they are manifestly erroneous or abuses of discretion. *See, e.g.*, *Bennett v. United States*, 876 A.2d 623, 635 (D.C. 2005); *Blakeney v. United States*, 653 A.2d 365, 369 (D.C. 1995); *Battle v. Thornton*, 646 A.2d 315, 324 (D.C. 1994); *In re Melton*, 597 A.2d 892, 901 (D.C. 1991) (en banc); *Coates v. United States*, 558 A.2d 1148, 1152 (D.C. 1989).

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***Girardot v. United States*, 92 A.3d 1107 (D.C. 2014).** Trial court did not abuse discretion in excluding expert testimony under *Dyas* test because expert's opinion was not beyond ken of average juror and expert was inadequately experienced and did not have sufficient knowledge to render an opinion that would have been likely to assist with search for truth.

***Minor v. United States*, 57 A.3d 406 (D.C. 2012).** Trial court's finding that expert's "equivocal" conclusions were inadmissible under *Dyas* was error and an abuse of discretion as the nature of the evidence only affected the weight of the expert's testimony.

***Robinson v. United States*, 50 A.3d 508 (D.C. 2012).** See, *supra*, Chapter 29.II.B.

***United States v. Morton*, 50 A.3d 476 (D.C. 2012).** Trial court properly excluded narcotics expert testimony concerning the need for narcotics users to commit burglaries and other criminal acts as a means of supporting their habit.

***Patterson v. United States*, 37 A.3d 230 (D.C. 2012), amended, reh'g en banc denied (Oct. 11, 2012) (per curiam).** Any assumed error in refusing to allow defendant to present expert witness testimony on subject of cross-racial identification harmless where witness had no opportunity to view defendant other than during crime, declined to identify a suspect as the perpetrator in a show-up immediately after crime, and identified defendant only in photo array and during trial, and where individual who defendant asserted committed crime looked almost nothing like defendant.

***Pettus v. United States*, 37 A.3d 213 (D.C. 2012).** Forensic handwriting comparison and expert opinions based thereon satisfy the bedrock admissibility standard of Frye and Ibn-Tamas and may be put before a jury, where remaining issues of reliability may be argued, after cross-examination and any counter-expert testimony, as affecting the weight of the opinions.

***Jones v. United States*, 27 A.3d 1130 (D.C. 2011).** Assuming, without holding, that firearms examiners should not be allowed to testify that they are 100% certain of match, to exclusion of all other firearms, any such error harmless where defense counsel thoroughly cross-examined experts on level of certainty, subjective nature of conclusions, and lack of demonstrative evidence, and then used expressions of certainty to his advantage during closing.

***Heath v. United States*, 26 A.3d 266 (D.C. 2011).** Trial court erred in excluding proffered expert testimony on eyewitness identification without conducting particularized inquiry required by Dyas and Benn II, but error harmless where expert's testimony that reliability of identifications can be reduced by stress, weapon focus and deficient police procedures and that misidentification can occur because of "unconscious transference" would have been "of scant relevance" to testimony of two witnesses who already knew defendant at time of shooting and independently identified him as one of shooters and defense proffer failed to provide details regarding "unconscious transference" and how it may have occurred with third eyewitness to shooting, and where defense conducted "ample crossexamination" of witnesses and emphasized possibility of misidentification in closing argument.

***Girardot v. United States*, 996 A.2d 341 (D.C. 2010).** Trial court abused its discretion in not applying the existing standard for the first Dyas prong and not considering the second and third prongs.

***Jones v. United States*, 990 A.2d 970 (D.C. 2010).** Not error to admit testimony of expert explaining how child sex offenders operate and how their victims react where testimony helped

dispel stereotype that child molesters use violence to commit crimes, expert had obtained expertise through more than 20 years of experience with FBI studying sexual victimization of children rather than through academic training and his testimony was non-controversial and modest in scope, and expert testified that he knew nothing about facts of particular case and never opined on whether defendant fit profile of child molester.

A. Prong One: Subject Matter

1. "Beyond the Ken"

> [D]espite the fact that jurors may be familiar from their own experience with factors relevant to the reliability of eyewitness observation and identification, . . . it cannot be said that psychological studies regarding the accuracy of an identification are within the ken of the typical juror.

Benn v. United States, 978 A.2d 1257, 1277 (D.C. 2009) (*quoting Hager v. United States*, 856 A.2d 1143, 1147 (D.C. 2004)).

Expert testimony must be helpful, that is, the expert must play a significant role in explaining an issue to the court. This means, among other things, that an expert may testify only to matters that the jury cannot understand adequately on its own. Therefore, the expert may not speak to matters in which "the jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions." *Lampkins v. United States*, 401 A.2d 966, 969 (D.C. 1979). At very least, an expert's helpfulness to a jury must outweigh the potential for distracting the jury or supplanting the jury's role in credibility determinations. *See Green v. United States*, 718 A.2d 1042, 1051 (D.C. 1998).

Whether the subject matter is "beyond the ken of the average layman" is difficult to define. The subject matter need not be *completely* incomprehensible to the average layperson. *Adams v. United States*, 502 A.2d 1011, 1021-22 (D.C. 1986).[6] Recent cases in D.C. have arguably opened the door to admission of many types of "soft science" expert testimony; the court in *Ibn-Tamas*, for example, found that testimony of a clinical psychologist on battered woman syndrome met the first test of admissibility because it "would have supplied an interpretation of the facts which differed from the ordinary lay perception . . . advocated by the government." *Ibn-Tamas I*, 407 A.2d at 634-35; *see also Nixon v. United States*, 728 A.2d 582 (D.C. 1999) ("certain repeated patterns of battered women's behavior" may be beyond the ken of the jury). In *Mindombe v. United States*, 795 A.2d 39 (D.C. 2002), the court referenced expert testimony on battered woman syndrome and found that "testimony discussing the patterns and behavior of molested children by experts who have researched and worked with victims in this area serves

[6] In *Adams*, the Court of Appeals held that the testimony of a psycholinguistics expert on the meaning of a "sunburst symbol" was necessary to avoid improper speculation by the jury, because even "the most diligent and persevering of juries" would be incapable of deciphering the meaning of the symbol. 502 A.2d at 1021. Similarly, a government expert could testify about the use of pagers in connection with unlawful drug distribution to show that pagers are "a common tool of drug sellers – a fact not commonly known," *Blakeney*, 653 A.2d at 369, though it is questionable whether, with the passage of time and spread of technology, such testimony would now be permitted.

the same useful purpose." 795 A.2d at 43.[7] *But see Ahmed v. United States*, 856 A.2d 560 (D.C. 2004) (finding no manifest error in trial court's exclusion of expert testimony concerning how children remember and relate events, because such testimony was not outside understanding of average juror and cross-examination of complainant by defense counsel adequately highlighted inconsistencies in testimony).

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***Smith v. United States*, 27 A.3d 1189 (D.C. 2011).** Trial court abused its discretion by excluding testimony of fingerprint expert as the proffered testimony was relevant and defense that police failed to gather available fingerprint evidence was beyond the ken of the average layperson.

2. Ultimate Issue

The second important subject matter limitation relates to the relative functions of the expert and the jury. The expert's role is to assist the jury without preempting the jury's function: determining whether the government has proven the defendant's guilt beyond a reasonable doubt. Therefore, the expert should not speak too directly to this "ultimate issue." *United States v. Spaulding*, 293 U.S. 498, 506 (1935). However, this traditional prohibition has been relaxed by the adoption of Federal Rule of Evidence 704(a), which states that, except when an expert is testifying as to the defendant's mental state, "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." "[T]he ultimate issue rule has, over time, been reduced to a prohibition only against questions to an expert 'which, in effect, submit the whole case to an expert witness for decision.'" *Ibn-Tamas I*, 407 A.2d at 632 (citation omitted). *See also Gant v. United States*, 518 A.2d 103, 110 (D.C. 1986) ("The 'ultimate facts' rule has been somewhat relaxed in this jurisdiction, and an expert may state a conclusion on such facts so long as the conclusion is one that laypersons could not draw"). "'The real test is not that the expert opinion testimony would go to the very issue to be decided by the trier of fact, but whether the special knowledge or experience of the expert would aid the court or jury in determining the questions in issue.'" *Lampkins*, 401 A.2d at 970 (citation omitted).[8] Thus, an expert arguably may testify on questions of guilt or innocence so long as the testimony is helpful and so long as the practical effect is not to deprive the jury of independent consideration of the issues.

[7] The testimony in *Mindombe* included discussion of the ability of sexually abused children to remember events in sequential order, the range of children's reactions to abuse, and their tendency not to report abuse.

[8] In *Lampkins*, the Court of Appeals found error when the prosecution's expert, who testified to the *modus operandi* of pickpocket teams, also testified to whether the defendant's activities were consistent with the *modus operandi*. *Compare Irick v. United States*, 565 A.2d 26 (D.C. 1989) (*modus operandi* of drug dealers not within ken of average lay person; expert testimony admissible), *and Hinnant v. United States*, 520 A.2d 292, 294 n.2 (D.C. 1987) (no error where detective testified that he would infer from facts in hypothetical question that person arrested under those circumstances was selling drugs), *with Gant*, 518 A.2d at 112 ("had the doctor testified on direct examination that this was a case of rape, she would have impermissibly preempted the jury's role").

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***Blaize v. United States*, 21 A.3d 78 (D.C. 2011).** Trial court did not err in permitting medical examiner to testify that "ultimate cause" of death of individual struck by car had been defendant's firing a gun where medical examiner did not express an opinion about defendant's state of mind, but rather that of hypothetical decedent, explained that her definition of "homicide" did not equate to legal definition, and admitted on cross-examination that her opinion was based on what police told her and not her medical review alone.

***Gaines v. United States*, 994 A.2d 391 (D.C. 2010).** District of Columbia evidence law does not prohibit expert witnesses from stating opinions on ultimate facts or issues to be resolved by the jury.

B. Prong Two: Qualification of Expert

> The expert has something different to contribute. This is a power to draw inferences from the facts which a jury would not be competent to draw. To warrant the use of expert testimony . . . the witness must have such skill, knowledge or experience in that field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth.

(Vincent) Jenkins v. United States, 307 F.2d 637, 643 (D.C. Cir. 1962) (quoting McCormick, *Evidence* § 13 (1954)).

A court must certify an individual as an expert before she is allowed to present expert testimony. Therefore, the party offering the expert must sufficiently demonstrate that expert's qualifications. The proponent must also offer the witness as an expert in a *specific* area, e.g., forensic psychiatry, ballistics, etc. Sometimes the opponent may argue against certification of the expert in one area but not another. Absent a stipulation, certification is up to the court. The expert cannot give testimony exceeding the scope of her qualifications. *Gant*, 518 A.2d at 110.
However, an individual may be qualified to offer expert testimony about a particular area, even if he is not a specialist in that area. "The determination of … competence to render an expert opinion . . . must depend upon the nature and extent of [the expert's] knowledge. It does not depend upon his claim to [a] title." *(Vincent) Jenkins*, 307 F.2d at 645. In *(Vincent) Jenkins*, the court ruled that three defense psychologists were qualified to testify on the presence or absence of mental disease in the defendant, even though none were qualified to *treat* the defendant's impairment. Similarly, an attorney could testify as an expert witness in a legal malpractice action as to an attorney's requisite standard of care in litigating a Medicaid fraud case for a plaintiff, even though he was neither a Medicaid fraud specialist nor had he ever handled a Medicaid fraud case himself; rather, "his legal training and his intensive experience as a criminal lawyer" were sufficient to qualify him. *Battle*, 646 A.2d at 323. "[H]e had participated in other types of criminal fraud cases . . . [and] was familiar with the standard of care required of an attorney performing services for a client charged with criminal fraud." *Id.* at 324. *See also Karamychev v. District of Columbia*, 772 A.2d 806 (D.C. 2001) (police officer properly qualified as expert regarding results of particular sobriety test); *Gonzales v. United States*, 697 A.2d 819 (D.C. 1997) (detective qualifies as expert on methods of drug distribution and police procedures

for handling and safeguarding narcotics); *Harris v. United States*, 489 A.2d 464 (D.C. 1985) (detective could testify to habits of narcotics users and dealers); *United States v. (Orville) Jackson*, 425 F.2d 574 (D.C. Cir. 1970) (officer assigned for three years to pickpocket squad and who had investigated fifty to seventy-five pickpocket cases qualified to testify to pickpockets' *modus operandi*). *But see (Howard) Jones v. United States*, 512 A.2d 253, 260 (D.C. 1986) (police officer not qualified as expert may not express opinion that defendant was "acting as an apparent lookout"; jury equally capable of drawing conclusion about defendant's role); *High v. United States*, 972 A.2d 829, 831 n. 2 (D.C. 2009) (summarily finding (in a footnote) no abuse of discretion where trial court excluded professor/exhumation expert who had no experience with firearms, no publications related to firearms and toolmarks, and had never testified regarding a specialized form of toolmark called a "bunter mark" from testifying about bunter mark comparisons).[9]

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***Austin v. United States*, 64 A.3d 413 (D.C. 2013).** Trial court did not abuse its discretion in allowing Chief Medical Examiner to testify as expert, even though she did not meet statutory qualifications as a board-certified forensic pathologist, based on her training, experience, and a waiver granted by the Mayor.

C. Prong Three: State of the Art

The "state of the art" refers to the field about which the expert will testify. Even if the subject matter is beyond the ken of the jury and the expert is qualified, is the field reputable enough to produce meaningful, helpful testimony? In short, the "state of the art" must be sufficient to permit an expert opinion.

1. *Frye* Standard

In D.C. Superior Court, the proponent of expert testimony must fulfill this prong by meeting the standard set forth in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923): demonstration by a preponderance of the evidence that the technique has been generally accepted as reliable in the relevant scientific community. *Frye*, 293 F. at 1014. *See United States v. Porter*, 618 A.2d 629, 633-35 (D.C. 1992) (holding that extant FBI procedures to determine whether defendant's DNA matched DNA taken from crime scene were generally accepted as reliable in scientific community, but remanding to consider scientific consensus regarding statistical assessment of probability of coincidental match).

> ***Strengthening Forensic Science in the United States: A Path Forward***, National Research Council, National Academy of Sciences [hereinafter NRC Forensic Science Report] (Feb. 2009). The most up-to-date views of the scientific community were recently collected and presented in this peer-reviewed report produced by a committee of "members of the forensic science community, legal

[9] This footnote from *High*, a panel opinion, does not address what qualifies as the "relevant scientific community" as defined in *United States v. Porter*, 618 A.2d 629 (D.C. 1992), an *en banc* decision that specifically addressed this issue. *See infra* Part III.C.1(a), for further discussion of the relevant scientific community for any given discipline.

community, and a diverse group of scientists" who were selected by the National Academy of Sciences to assess the state of forensic science. This report – which levels thorough and harsh critiques at the lack of scientific support for various forensic disciplines (including fingerprint, firearm/toolmark, hair, fiber, handwriting, and bitemark) and particularly stresses that forensic practitioners are unable to reliably connect a piece of evidence to a specific source – is an essential tool for every member of the criminal defense bar. For further discussion of this watershed report, *see infra* Part IV.C.

a. Relevant Scientific Community

Under *Frye*, the "relevant scientific community" is not limited to the narrowest possible scientific area. For example, in *Porter*, the Court of Appeals made clear in the context of nuclear DNA evidence that the "relevant scientific community" in determining whether a technique has been generally accepted is *not* merely the insulated community of forensic scientists, but the larger community of individuals "whose scientific background and training are sufficient to allow them to comprehend and understand the process and form a judgment about it." *Id.* at 634 (citation omitted). The court noted that forensic scientists likely "accept – no qualifier is necessary – forensic DNA evidence and believe that the time has come for its use as powerful evidence in criminal trials." *Id.* Thus, the "relevant scientific community" for the purposes of nuclear DNA techniques would also include statisticians, mathematicians, molecular biologists, geneticists, bioethicists, and molecular anthropologists. Counsel should therefore take an expansive view in thinking which types of experts can render an opinion about the scientific questions in the case.

b. General Acceptance

When determining whether scientific evidence is generally accepted, "'the issue is consensus versus controversy over a particular technique . . . . If scientists significant either in number or expertise publicly oppose [a new technique] as unreliable, then that technique does not pass muster under *Frye*.'" *Nixon v. United States*, 728 A.2d 582, 588 (D.C. 1999) (quoting *Porter*, 618 A.2d at 633-34). Therefore, under *Frye*, the court's role is not to determine whether a particular scientific conclusion is valid; such a determination would usurp the jury's function of weighing conflicting expert opinions. Rather, the court considers whether there is significant dispute surrounding the technique.[10] "The court may not resolve a scientific dispute between opponents and proponents of the technique, [and] the very existence of the dispute precludes admission of the testimony." *Porter*, 618 A.2d at 634 (citation omitted) (alteration in original).

[10] *Compare Moore v. United States*, 374 A.2d 299 (D.C. 1977) (Duquenois-Levine and thin layer chromatography tests for marijuana admissible), *and United States v. Stifel*, 433 F.2d 431 (6th Cir. 1970) (neutron activation analysis of bomb fragments admissible), *with Frye*, 293 F. 1013 (polygraph results inadmissible), *and United States v. Hearst*, 412 F. Supp. 893 (N.D. Cal. 1976) (stylistic comparison of defendant's known writings and utterances with later writings and tape recordings inadmissible). The state of scientific knowledge on a particular issue may be so meager that courts will exclude expert testimony relating to it. *See, e.g.*, *Douglas v. United States*, 386 A.2d 289 (D.C. 1978) (psychologist not permitted to testify that based on presence of some characteristics and absence of certain symptoms, defendant was incapable of committing certain sexual offenses); *Tonkovich v. Dep't of Labor & Indus.*, 195 P.2d 638 (Wash. 1948) (cause of cancer unknown; expert testimony that plaintiff's cancer resulted from job-related injury excluded).

Although disagreement in the scientific community generally precludes admission of scientific evidence, some degree of disagreement over a particular issue may go to the weight, not admissibility, of the testimony, particularly where the defendant is the proponent of the evidence. *See Rock v. Arkansas*, 483 U.S. 44, 59 (1987) (vacating judgment that excluded hypnotically refreshed recollection and noting that, although "the use of hypnosis in criminal investigations . . . is controversial, and the current medical and legal view of its appropriate role is unsettled," any inaccuracies in process could be reduced through procedural safeguards and traditional methods of assessing accuracy of testimony);[11] *Coates*, 558 A.2d at 1152 (acknowledging constitutional constraints on judicial discretion to exclude defense-proffered expert testimony). Thus, if there are reasonable means by which the jury can assess its reliability, counsel can argue that scientific evidence critical to the defense should not be excluded solely because it is controversial.

A proponent of expert testimony may establish general acceptance of a field by using expert testimony and affidavits, as well as by citing scientific literature. A court may also consider "not only expert evidence of record, but also judicial opinions in other jurisdictions, as well as pertinent legal and scientific commentaries." *Porter*, 618 A.2d at 635 (citing *(Nathaniel) Jones v. United States*, 548 A.2d 35, 41 (D.C. 1988)). In *(Nathaniel) Jones*, the Court of Appeals held that, in all future cases, drug test results based on the EMIT (enzyme multiplied immunoassay technique) system would be presumptively reliable and admissible. 548 A.2d at 46. The court relied in its holding on *United States v. Roy*, 113 Wash. D.L. Rptr. 2317 (D.C. Super. Ct. 1985); in *Roy*, the trial court had conducted a full evidentiary hearing and surveyed the relevant literature regarding the EMIT, as well as considering numerous judicial opinions from other jurisdictions. The *(Nathaniel) Jones* court left open the possibility that this presumption of admissibility could be overcome with evidence suggesting a change of attitude in the scientific community. *(Nathaniel) Jones*, 548 A.2d at 46 n.9; *see also Benn v. United States*, 978 A.2d 1257, 1276-78 (D.C. 2009) (in determining the admission of expert testimony, "automatic reliance on *Dyas* or on other past cases" is not appropriate "except in clear-cut cases," instead court "must consider . . . the *current* state of generally-accepted scientific research") (emphasis added). Courts may also look to the existence or absence of validation studies and peer review of the technology or technique to establish or negate "general acceptance." *Porter*, 618 A.2d at 638 n.13. For example, in *United States v. Clifton Crawford*, F-2103-05 (D.C. Super. Ct. Sept. 6, 2006), the methodology employed by the Metropolitan Police Department's fingerprint examination section was excluded under *Frye* for its undocumented, ill-defined and invalidated protocols and ad hoc peer review process.

2. *Daubert* Standard

The "general acceptance" standard that governs the third admissibility prong in D.C. is not universal. Federal courts (including the D.C. District Court) and many state courts instead follow the standard set out in *Daubert v. Merrell Dow Pharm.*, 509 U.S. 579 (1993), which states that the scientific evidence must be relevant and reliable. *Daubert*, 509 U.S. at 589; *see Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (*Daubert* standard applies not only to "scientific"

[11] "Certain information recalled as a result of hypnosis may be verified as highly accurate by corroborating evidence. Cross-examination, even in the face of a confident defendant, is an effective tool for revealing inconsistencies. Moreover, a jury can be educated to the risks of hypnosis through expert testimony and cautionary instructions. Indeed, it is probably to a defendant's advantage to establish carefully the extent of his memory prior to hypnosis, in order to minimize the decrease in credibility the procedure might introduce." *Rock*, 483 U.S. at 61.

testimony, but to all expert testimony). "General acceptance is not a necessary precondition to the admissibility of scientific evidence under the Federal Rules of Evidence." *Daubert*, 509 U.S. at 597; *see also Gen. Elec. Co. v. Joiner*, 522 U.S 136, 146 (1997) (finding no error where trial court excluded expert testimony that did not pass *Daubert* test; "[a] court may conclude that there is simply too great an analytical gap between the data and the opinion proffered.").

Under the *Daubert* approach, when faced with a proffer of expert scientific testimony, the trial judge acts as a "gatekeeper" and must:

> determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.

Daubert, 509 U.S. at 592-93. Factors that the trial court should consider include whether the theory or technique can be and has been tested, whether the theory or technique has been subjected to peer review and publication, the known or potential rate of error and, as under the *Frye* standard, the general acceptance of the theory or technique. *Id.* at 593-94. The inquiry envisioned is "flexible." *Id.*

While the *Daubert* standard does not presently control the admissibility of new scientific evidence in this jurisdiction, *Taylor v. United States*, 661 A.2d 636, 652 (D.C. 1995) (Newman, J., dissenting), it has been adopted in many other jurisdictions[12] and it is possible that D.C., too, may shift standards. Additionally, counsel can turn to the *Daubert* reliability factors in considering whether a particular scientific methodology is generally accepted. Counsel should therefore be familiar with both standards.

D. Probative Value vs. Prejudicial Impact

Once the admissibility of expert testimony has been established, the trial court must, as with all relevant evidence, balance the probative value of the proffered testimony against its potential for prejudicial impact on the jury.[13] *Compare Ford v. United States*, 533 A.2d 617, 627 (D.C. 1987) (testimony regarding prostitutes' *modus operandi* erroneously admitted because it "was not probative of any material fact that had not already been established by other evidence"), *with Harris*, 489 A.2d at 470 (expert testimony on ways narcotics are used is potentially inflammatory, but was probative and not so prejudicial that its admission was abuse of discretion), *and Hawkins v. United States*, 482 A.2d 1230, 1232 (D.C. 1984) (testimony that substances found in defendant's home were "cutting reagents" was not unduly prejudicial and

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[12] *See, e.g.*, Tex. Evid. R. 702, essentially adopting the *Daubert* test.

[13] On appeal, the scales are tipped in favor of the proponent of the evidence: "[W]e follow the 'better approach' recommended . . . [in] Weinstein's Evidence para. 403[03], at 18. We have attempted to tip the scales in favor of the proponent of the evidence by seeking to maximize its legitimate bearing upon the issues while minimizing its potentially abusive overtones." *Ibn-Tamas I*, 407 A.2d at 639 n.27 (citation omitted).

was probative of defendant's knowledge that drugs were present). In *Ibn-Tamas I*, testimony regarding battered women was highly probative because it had a substantial bearing on the defendant's perceptions at the time of the killing. In contrast, any prejudicial effect was incremental because the court had already admitted "a substantial amount of evidence relating to the decedent's earlier attacks on the appellant." 407 A.2d at 639.

IV. OTHER EVIDENTIARY ISSUES RELATING TO EXPERT TESTIMONY

A. Intersection of Expert Testimony and the Confrontation Clause

In *Melendez-Diaz v. Massachusetts***,** 129 S. Ct. 2527 (2009), the Supreme Court held that affidavits reporting the results of forensic analysis are "testimonial" in nature, and thus their admission without the opportunity to cross examine the analyst who created them violates the Sixth Amendment's Confrontation Clause. As the Court noted, its holding is in accord with the law, in D.C. and other states, which was adopted in the wake of the *Crawford* opinion. *See Id.* at 2540 n.11 (*citing Thomas v. United States*, 914 A.2d 1, 12-13 (D.C. 2006) (holding that forensic reports may be admitted at trial only if record contains a valid waiver by defendant of his confrontation right)). The decision reaches all manner of reports prepared for use at trial, including traditional forensic reports (e.g. fingerprint, firearm and DNA comparisons), autopsy reports, and even a "clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record [such as firearm registration] and failed to find it." *Id.* at 2538-39.

Whether a supervising analyst who relies upon the testimonial conclusions of other analysts may testify in their absence without violating a defendant's Confrontation Clause rights remains an open question in D.C. *See Roberts v. United States*, 916 A.2d 922 (D.C. 2007) (although defendant was "erroneously denied the right to cross-examine witnesses whose conclusions formed part of the DNA evidence against him" where supervising analyst offered those conclusions as substantive evidence, reversal was not warranted due to defendant's failure to object at trial); *Veney v. United States*, 929 A.2d 448 (D.C. 2007), *amended*, 936 A.2d 809 (D.C. 2007) (per curiam) (amending ruling specifically for the purpose of leaving this issue an open question). The Court of Appeals has not readdressed the issue since *Melendez-Diaz* was handed down. However, other courts applying *Melendez-Diaz* have held that making a supervising analyst available for cross examination does not satisfy a defendant's right of confrontation. *See People v. Dungo*, 98 Cal. Rptr. 3d 702 (Cal. Ct. App. 2009).

Melendez-Diaz and related cases also provide a basis for counsel to object to testimony that a supervisor or other analyst "verified" a testifying analyst's work, as this too is an out-of-court, testimonial conclusion. This particularly comes into play with the pattern matching disciplines, such as fingerprints and firearm/toolmarks.

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***Williams v. Illinois*, 132 S. Ct. 2221 (2012).** State rule of evidence allowing expert to testify about results of DNA testing performed by different, non-testifying expert did not violate Confrontation Clause.

***Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011).** Forensic lab report certifying blood alcohol level was testimonial, and its admission through an expert who did not perform the lab test violated the Confrontation Clause.

B. The Bases of Expert Testimony and Rule 16

Melendez-Diaz and associated caselaw should not alter the general principle that the basis on which the expert relies in reaching an opinion need not be entered into evidence.[14] *Edwards v. United States*, 483 A.2d 682, 685 (D.C. 1984) (standard charts used by drug chemist are customarily relied upon by experts and can form the foundation of expert's opinion without being entered into evidence). Indeed, the basis upon which the expert relies need not even be admissible. Although the facts or data relied upon by the expert in rendering her opinion must be sufficiently reliable to be "reasonably relied upon" by the expert, *Melton*, 597 A.2d at 901, 903, the expert may rely, for instance, on hearsay and extrajudicial information. *Id.*

However, pursuant to Rule 16 disclosure requirements, the court may order a party proffering expert testimony to turn over for inspection by the opponent any report or document on which the expert relied in forming the opinion and may exclude the testimony for non-compliance. *Clifford v. United States*, 532 A.2d 628 (D.C. 1987); *see also* Fed. R. Evid. 705 ("The expert may testify in terms of opinion or inference and give reasons therefore without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination").

C. Motions *in Limine* and the NRC Forensic Science Report

In its analysis, the *Melendez-Diaz* Court relied in part upon a recent report issued by the prestigious National Academy of Sciences' National Research Council, for its discussion of "problems of subjectivity, bias, and unreliability of common forensic tests such as latent fingerprint analysis, pattern/impression analysis, and toolmark and firearms analysis." *Melendez-Diaz*, 129 S. Ct. at 2538. This comprehensive report – *Strengthening Forensic Science in the United States: A Path Forward* (2009) – is a useful tool in exposing the weaknesses in forensic evidence, testing, and analysis. The report is particularly critical of the pattern-based disciplines (including those referenced in *Melendez-Diaz*), noting – after considerable research into the issue – that none of them "ha[ve] been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual or source." NRC Forensic Science Report at 7. Not only does the report represent the consensus opinion of the scientific community for purposes of outright exclusion of unreliable forensic evidence and testimony, it also can be used to limit an expert's testimony. For example, fingerprint experts will often testify that a latent print matches an inked print to the exclusion of all others, and to a reasonable degree of scientific or practical certainty. The NRC Forensic Science Report is useful in limiting the expert to testifying that the latent is "consistent with" the known print, or that the source of the known print "cannot be excluded" as the source of the latent print. *See, e.g., U.S. v. Mouzone*, No.WDQ-08-086, slip op. (D. Md. Oct.

[14] That is, so long as the expert does not offer testimonial out-of-court statements as a basis for his opinion. *See Dungo*, 176 Cal. App. 4th at 1402-04.

29, 2009) (recommending limitations on firearm and toolmark examiner's testimony based largely upon NRC Forensic Science Report).

V. USING AN EXPERT IN THE DEFENSE CASE

An expert witness can contribute immensely to the defense case. Expert testimony may be introduced for such diverse purposes as refuting the reliability of drug analyses by government chemists, establishing a medical reason for an intervening cause of death as a defense to a homicide charge, challenging a claim that latent fingerprints from the crime scene match the defendant's, explaining the effects of mind-altering substances, or establishing the client's susceptibility to coercion. Additionally, experts can provide valuable services other than courtroom testimony. Counsel should think creatively about how experts can clarify the facts and concepts in a case, shape the theory of the case, and strengthen the case in the courtroom.

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***Young v. United States*, 56 A.3d 1184 (D.C. 2012) (amended).** See, supra, Chapter 11.III.B.

A. When to Use an Expert

Experts should not be relegated solely to the courtroom or the guilt/innocence phase of a trial; they can also be used during pre-trial preparation, at hearings, and at sentencing. For example, given the importance of the cross-examination of a medical expert, counsel may wish expert assistance in preparing that cross-examination, or in understanding records. *See Curry v. United States*, 498 A.2d 534 (D.C. 1985) (calling trial counsel deficient for failing to have a physician or other expert examine medical record and interpret it for him, and for being unprepared to cross-examine government's medical expert); *United States v. (Anthony) Jenkins*, No. F-320-00 (D.C. Super. Ct. Apr. 5, 2005) (admissibility hearing at which numerous experts on both sides testified as to various statistical methods of calculating significance of "cold hit" database search); *United States v. Chase*, No. F-7330-99 (D.C. Super. Ct. Jan. 10, 2005) (admissibility hearing involving expert testimony about FBI database used for mitochondrial DNA analyses).

At sentencing, experts can humanize convicted defendants with scientific testimony regarding psychology, neurology, modern culture, and sociology, among other fields. Prison and job training experts can testify to a prisoner's level of rehabilitation and potential for reintroduction into society. *See, e.g.*, *State v. Pittman*, 109 P.3d 237, 240 (Mont. 2005) (at sentencing, two experts testified about defendant's mental health – one for defense, one for prosecution); *Hodges v. State*, 885 So. 2d 338, 346 (Fla. 2004) (sociologist presented testimony during post-conviction proceeding that defendant's hometown "constituted a classic example of social disorganization characterized, in part, by a distrust of outsiders"); *People v. Fierro*, No. D041515, slip op. (Cal. Ct. App. Dec. 29, 2004) (neurologist opined at sentencing that, because of defendant's brain damage, defendant was unable to control his sexual urges).

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***Kigozi v. United States*, 55 A.3d 643 (D.C. 2012).** See, *supra*, Chapter 11.III.B.

B. Types of Experts

Counsel should be resourceful and broad-minded in seeking out experts for both testimony and consultation. Experts in fields related to the scientific area in question can provide valuable perspectives and insights. Today's juries tend to expect expert testimony as a matter of course; several articles have been written discussing the increasing importance of presenting experts in criminal trials, due in part to the prevalence of crime-related television shows. These shows have given rise to a so-called "*CSI* effect": jury members have seen forensic science and investigation techniques, whether good or bad, real or imagined, depicted on their television screens, creating a certain expectation for the kind of evidence they will see in a real criminal trial.[15]

The following types of experts are among the most common and important in modern-day criminal trials.[16] DNA, eyewitness identification, and false confession experts receive more extended treatment because those fields are increasingly prevalent yet somewhat less understood.

1. DNA Expert

The increasing use of DNA evidence has been one of the most important developments in criminal justice in recent years. The ability to analyze a DNA sample left at the scene of a crime is now a key law enforcement tool, both in matching a suspect to the sample ("confirmatory ID") and in locating a suspect simply by running a sample through a DNA database ("cold hit"). On the other side, attorneys involved in innocence work have embraced DNA evidence as a means of exonerating their clients. Because the technologies and methodologies associated with DNA analysis are extremely complex, parties seeking to adopt or challenge DNA evidence should make ample use of expert advice and testimony. *See also Roberts v. United States*, 916 A.2d 922, 936 (D.C. 2007) (it was error not to allow defense to argue a different interpretation of the DNA evidence than the government's expert, even though the defense did not put on its own expert, because "interpretation of electropherogram[s] or other test results always involves an element of subjectivity"). This advice does not substitute for counsel's own engagement in the science of DNA evidence, but experts can be invaluable not only in explaining the evidence but also in helping to develop the theory of the case.

Counsel may wish to retain two different types of DNA experts. A consultant is an individual who can independently review the DNA evidence, advise the attorney, and testify in court. An independent tester will most often be a laboratory unaffiliated with law enforcement, which will

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[15] *See, e.g.*, Jamie Stockwell, *Defense, Prosecution Play to New "CSI" Savvy*, Wash. Post, May 22, 2005, at A1; Simon Cole & Rachel Dioso, *Law and the Lab*, Wall St. J. Online, May 13, 2005, at W13; Kit R. Roane & Dan Morrison, *The CSI Effect*, US News & World Rep., Apr. 25, 2005, at 48; Richard Willing, *"CSI Effect" Has Juries Wanting More Evidence*, USA Today, Aug. 8, 2004, at 1A. *But see* Dr. Kimberlianne Podlas, *The CSI Effect, Exposing the Media Myth*, 16 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 429 (2006) (conducting a study showing that watching CSI has no anti-prosecution effect).

[16] Defense counsel may wish to explore the resources available at the National Legal Aid & Defender Association website: http://www.nlada.org/Defender. The "Forensic Library" tab is particularly helpful for cases involving forensic evidence. The following online resources are also available: http://www.corpusdelicti.com/forensic_fraud.html; http://www.bioforensics.com/kruglaw/; http://www.scientific.org/; http://www.ncstl.org/.

perform a separate set of tests on the DNA evidence. The consultant and the independent tester generally bring different skills to bear and should not be associated with one another.

Consultant. One of the most important functions of a DNA expert consultant is to serve as another interpreter of the evidence. Contrary to popular belief, DNA analysis is subjective, not objective; it involves significant amounts of interpretation, and is more an art than a science. *See, e.g., Roberts*, 916 A.2d at 936. Different experts will often view the same analysis in different ways, and bias is always relevant. For example, forensic scientists working in law enforcement laboratories may favor the prosecution, consciously or unconsciously, in interpreting a DNA profile.[17] Furthermore, there are various (and, in some cases, competing) methodologies associated with DNA analysis, which often produce different conclusions. *See, e.g., (Anthony) Jenkins*, No. F-320-00 (involving four different statistical methods for calculating significance of "cold hit," each producing different result). In selecting a DNA consultant with whom to work, counsel should be as broad-minded and creative as possible in looking beyond the field of straight forensic science.[18]

Independent tester. Under the Innocence Protection Act and the Rules of Criminal Procedure, a criminal defendant in the District of Columbia has the right independently to test biological material involved in a case against him.[19] However, the existence of this right does not mean

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[17] *See also* William C. Thompson, *Subjective Interpretation, Laboratory Error and the Value of DNA Evidence: Three Case Studies*, 96 Genetica 153 (1995); William C. Thompson, *Examiner Bias in Forensic RFLP Analysis*, Scientific Testimony: An Online Journal, *available at* http://www.scientific.org; *Melendez-Diaz*, 129 S. Ct. at 2536 ("The majority of [laboratories producing forensic evidence] are administered by law enforcement agencies, such as police departments, where the laboratory administrator reports to the head of the agency.") (quoting Prepublication NRC Forensic Science Report).

[18] "In our experience, the best [DNA] experts . . . are academic scientists in the fields of molecular biology, biochemistry, bioinformatics, molecular evolution, genetics (particularly human and population genetics), and related fields. It is not essential that the expert have had experience analyzing forensic samples. In fact, we find that forensic scientists often (but not always) make poor defense experts because they tend to accept too readily the goal-directed subjective judgments and circular reasoning of their crime lab colleagues." William C. Thompson et al., *Evaluating Forensic DNA Evidence Part 2: Essential Elements of a Competent Defense Review*, The Champion 26-27 (May 2003).

[19] The Innocence Protection Act, codified at D.C. Code §§ 22-4131 to 4135, states:

> (b) A defendant charged with a crime of violence shall be informed in open court:
> (1) That he or she may request or waive independent DNA testing prior to trial or the entry of a plea if:
> (A)(i) DNA testing has resulted in the inclusion of the defendant as a source of the biological material; or (ii) under circumstances that are probative of the perpetrator's identity, DNA testing has resulted in the inclusion of the victim as a source of the biological material; and
> (B) There is sufficient biological material to conduct another DNA test;
> (2) That he or she may request or waive DNA testing of biological material prior to trial or the entry of a plea if the biological material has not been subjected to DNA testing.

D.C. Code § 22-4132(b)(1)-(2) (2005).

Rule 16 states, in relevant part, that "[u]pon request of the defendant the prosecutor shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which are within the possession, custody or control of the government, and which are

that a defendant should in all cases seek independent testing. Counsel should ask how independent testing could affect the government's case: Will counsel be able to secure *ex parte* access to the evidence and protective orders so that the government does not learn what is being tested and which laboratory is doing the testing? Would the government undertake additional testing if counsel requested analysis of previously untested material? Would the government suggest at trial that the defense did test, or could have tested? *See, e.g., Teoume-Lessane v. United States*, 931 A.2d 478 (D.C. 2007) (not an abuse of discretion to allow one question on redirect regarding defense's right to test because "the defense's questions had attempted to create the impression that the FBI's testing had been selectively performed to skew the results"). Once the decision has been made to test, counsel must consider what to test: only material that was already analyzed by the government, or previously unanalyzed material? What additional testing could be exculpatory or contradictory to the government's theory of the case?

Finally, counsel must decide which laboratory to use for the independent testing. Each facility has strengths and weaknesses; factors to consider include ability to perform the test counsel wants, cost, processing time, testimonial ability, and reputation. Note that the laboratory must be willing to sign a confidentiality agreement, which should include every step of the delivery process (who picks up the evidence, how customs will be handled, etc.). The client's profile must be protected, and the laboratory should be prohibited from using the results of any testing in their research or database development. The laboratory must agree not to consume any evidence sample without written authorization from counsel. Counsel should also ask for a copy of the laboratory's protocols.

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***Gee v. United States*, 54 A.3d 1249 (D.C. 2012).** Trial court's decision to allow jury to learn that defense had right to test shirt for DNA evidence was not abuse of discretion and did not shift burden of proof to defense where not disclosing that shirt was available for testing would have created impression that government had deliberately ignored and then withheld from defense evidence that could have called into question government's DNA-based case.

2. Eyewitness Expert

Eyewitness testimony is the most frequent way of identifying criminal suspects – over 75,000 people a year become criminal defendants on the basis of eyewitness identifications.[20] However, eyewitness identifications have also been shown to be the leading cause of wrongful convictions.[21] Over the last twenty years, social scientists have conducted extensive research into what makes an eyewitness identification reliable (or not), and their findings are often

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material to the preparation of the defendant's defense, or are intended for use by the government as evidence in chief at the trial, or were obtained from or belong to the defendant." Super. Ct. R. Crim. P. 16(a)(1)(C).

[20] National Science Foundation, *False Identification: New Research Seeks to Inoculate Eyewitnesses Against Errors* (Jan. 3, 1997), *available at* http://www.nsf.gov/pubs/stis1997/pr971/pr971.txt.

[21] For more information, see http://www.innocenceproject.org/causes/mistakenid.php.

counter-intuitive.[22] Until recently, many court rulings regarding the admissibility or suppression of eyewitness testimony, both nationally and in D.C., were outdated and did not take recent science into account.[23] For example, in 1977, the Court of Appeals in *Dyas* did not find abuse of discretion in the trial court's exclusion of a psychology professor's proffered testimony regarding eyewitness identification. 376 A.2d at 832.

An increasing number of judges, however, are using their discretion to admit eyewitness identification testimony. In *Green v. United States*, 718 A.2d 1042 (D.C. 1998), the Court of Appeals clarified that *Dyas* does not *per se* exclude eyewitness identification experts, but rather left to the trial court's discretion admission of such testimony where it was deemed helpful to jurors. However, the *Green* court decided to uphold the ruling excluding testimony about unconscious transference and photo-biased identifications. Subsequently, in *Benn v. United States*, 801 A.2d 132 (D.C. 2002), the court, in finding error in the trial court's refusal to allow the defendant's alibi witness to testify a second time, expressed serious concern about the eyewitness identifications that comprised the entirety of the prosecution's case.[24]

When the *Benn* case went to trial a second time, the trial court excluded the defendant's proffered eyewitness identification expert testimony. The case was appealed for a second time. In *Benn II*, the Court of Appeals stated that "[t]he defense should be permitted to present expert testimony on the unreliability of eyewitness testimony in appropriate cases." *Benn v. United States*, 978 A.2d 1257, 1270 (D.C. 2009) ("*Benn II*"). The court remanded the case once again, finding that the trial court did not conduct the necessary thorough analysis of the proffer under the three-part analysis from *Dyas*. This opinion makes clear that trial courts must carefully evaluate proffered expert testimony in light of the appropriate legal standard and may not automatically rely on *Dyas* or any other past cases. *Id*. at 1277. Furthermore, the court "emphasize[d its] disagreement with the prosecutor's statement that expert testimony on eyewitness identification is 'never ... appropriate because it would usurp' the jury's function." *Id*. at 1274.

In other fairly recent cases, the Court of Appeals suggested that, while trial judges continue to have broad discretion over the admission of eyewitness identification experts, it may be error to exclude such experts when an identification is uncorroborated. In *In re As. H.*, 851 A.2d 456 (D.C. 2004), the court overturned a conviction based solely on an uncorroborated eyewitness identification after considering factors such as stress and the cross-racial nature of the identification, and other factors about which eyewitness identification experts often testify. In *Hager v. United States*, 856 A.2d 1143, 1149 n.16 (D.C. 2004), the court upheld exclusion of an expert where all of the identifications made were non-stranger, and there was substantial

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[22] *See, e.g.*, Gary Wells & Elizabeth Olson, *Eyewitness Testimony*, 54 Ann. Rev. Psychol. 277–95 (2003) (overview of variables affecting eyewitness identification and some research findings), *available at* http://www.psychology.iastate.edu/faculty/gwells/annual_review_2003.pdf; Saul M. Kassin et al., *On the "General Acceptance" of Eyewitness Testimony Research: A New Survey of the Experts*, 56 Am. Psychol. 405 (2001).

[23] *See supra* Chapter 21: Motions to Suppress Eyewitness Identification Testimony.

[24] The court was troubled by the fact that: (1) defendant was a stranger; (2) all the eyewitnesses said that defendant "looked like" the culprit; and (3) all the eyewitnesses said that they were "95% certain" of their identification, a coincidence indicating police suggestion. The implication was that stranger identifications were to be carefully scrutinized. *Benn*, 801 A.2d at 145.

corroboration of the identification, but noted the "case-specific nature of any determination of whether proffered expert testimony will assist the jury." The *Hager* court also noted that expert testimony on the correlation between eyewitness confidence and accuracy "may well be beyond the ken of the average layperson." 856 A.2d at 1148; *see also Benn II*, 978 A.2d at 1277 ("[d]espite the fact that jurors may be familiar from their own experience with factors relevant to the reliability of eyewitness observation and identification . . . it cannot be said that psychological studies regarding the accuracy of an identification are within the ken of the typical juror")(*quoting Hager*, 856 A.2d at 1147).

Post-*Benn II*¸ defense attorneys should prepare a specific and detailed proffer for their eyewitness identification experts. *Benn II* requires that the trial judge give individualized consideration to the proffer in light of *Dyas*; therefore the defense proffer should specifically address the three prongs of *Dyas*.[25] The proffer should clearly communicate to the judge what the expert's proffered opinions will be and how these opinions are relevant to the specific facts of the current case, along with how this testimony will aid the fact-finders.

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***Russell v. United States*, 17 A.3d 581 (D.C. 2011).** More recent developments in the scientific community concerning the reliability and accuracy of eyewitness testimony require more in-depth consideration of the factors affecting admissibility.

3. False Confessions Expert

False confessions have similarly emerged as a hot area of judicial interest in recent years. The Cardozo Innocence Project has reported that twenty-five percent of wrongful convictions in DNA exoneration cases involved false confessions or admissions.[26] Experts in this field can help judges and juries overcome the layperson's assumption that people do not falsely confess; psychologists can demonstrate a defendant's suggestibility and compliance, while social scientists can testify as to the coercive dynamics of police interrogations. *See, e.g.*, *United States v. Roark*, 753 F.2d 991 (11th Cir. 1985) (holding that exclusion of testimony that inculpatory statements and confessions were given involuntarily was reversible error because it could not be said that such testimony was of such scant or cumulative probative force that it had to be kept from jury); Gisli Gudjonsson, *The Psychology of Interrogations, Confessions, and Testimony* (2004) (leading treatise on law and science of false confessions).

4. Other Experts

The following types of experts should be familiar to counsel practicing in the criminal justice system.

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[25] The *Benn II* court did not specifically analyze the proffer, but rather remanded to the trial court to conduct this task. However, the *Benn II* opinion contains helpful observations on the development of social science research related to eyewitness identifications in recent years. *See Benn II*, 978 A.2d at 1278.

[26] For more information, see http://www.innocenceproject.org/causes/falseconfessions.php.

Forensic experts. Fingerprints, blood spatter, and ballistics are among the traditional areas in which a forensic expert could be useful. *See, e.g.*, *Williams v. United States*, 881 F.2d 557, 566 (D.C. 2005) (both government and defendant used ballistics experts to examine bullet core and fragments); (*Joseph) Jackson v. United States*, 768 A.2d 580, 590 (D.C. 2001) (finding no abuse of discretion in denying appointment of fingerprint expert where his testimony would have added nothing, but holding that trial court erred in precluding defense expert from testifying regarding police failure to fingerprint); *Eason v. United States*, 687 A.2d 922 (D.C. 1996), *aff'd in part on rehearing*, 704 A.2d 284 (D.C. 1997) (affirming trial court's holding that detective and forensic pathologist could both give expert testimony regarding blood spatter); *Wright v. United States*, 570 A.2d 731 (D.C. 1990) (fingerprint expert testified that print taken from scene matched defendant).

Narcotics experts. Narcotics experts in criminal trials testify predominantly, but not exclusively, for the government and are usually current or former law enforcement officers, though drug treatment providers who are familiar with drug use and the drug trade are also possible expert witnesses. *See, e.g.*, *Bates v. United States*, 766 A.2d 500 (D.C. 2000) (police narcotics expert testified at trial about street value, quantity, and packaging of crack cocaine and marijuana involved in case); *Owens v. United States*, 688 A.2d 399 (D.C. 1996) (detective explained how police test and handle seized drugs); *Derrington v. United States*, 681 A.2d 1125 (D.C. 1996) (detective who was qualified as narcotics expert testified as to purity of cocaine found at scene); *Blakeney v. United States*, 653 A.2d 365, 369 (D.C.1995) (permitting expert testimony on habits of drug traffickers); *United States v. Lackey*, No. 01-515 (E.D. Pa. June 7, 2002) (*defendant's* narcotics expert testified that defendant's crack possession was consistent with both distribution and personal use, and that, without more evidence, he could not rule out either one as a possibility); *State v. Smith*, 610 P.2d 869 (Wash. 1980) (both former drug addict and police officer testified as to physiological and psychological effects of marijuana).

Medical experts. Although medical experts are not as common in criminal trials as in civil trials, they still offer testimony and expertise on a wide variety of issues. *See, e.g.*, *Brown v. United States*, 840 A.2d 82 (D.C. 2004) (medical expert testified as to various aspects of complainant's records and physical condition); *Gethers v. United States*, 684 A.2d 1266 (D.C. 1996) (finding no abuse of discretion in admission of testimony by medical expert describing complainant's injuries and treatment he received at hospital); *Pansing v. United States*, 669 A.2d 1297 (D.C. 1995) (finding that medical expert testimony regarding narcotic addiction is helpful to trier of fact, but expert testimony as to primary purpose for which defendant sold drugs is not); *Walker v. United States*, 630 A.2d 658 (D.C. 1993) (medical expert testified as to entry of wounds in relation to positions of perpetrator and complainant).

Psychiatry/psychology experts. Psychiatrists and psychologists are often used at the sentencing phase to offer testimony in mitigation. However, these types of experts also testify at other stages of trial. *See, e.g.*, *O'Brien v. U.S.*, 962 A.2d 282, 288 (D.C. 2008) (expert testimony on the suggestiveness of particular interviewing techniques on children); *In re Ty. B.*, 878 A.2d 1255 (D.C. 2005) (clinical psychologist testified about post-traumatic stress disorder at evidentiary hearing in abuse and neglect case); *Malede v. United States*, 767 A.2d 267 (D.C. 2001) (defendant presented testimony of expert in psychology and forensic psychology to bolster insanity defense); *Nixon*, 728 A.2d 582 (finding no reversible error in admission of

psychologist's expert testimony regarding battered woman syndrome); *Ahmed*, 856 A.2d 560 (no manifest error in admission of expert testimony about how children remember and relate incidents); *Mindombe*, 795 A.2d 39 (upholding admission of expert testimony regarding behavior of subjects of child abuse).

C. Selecting Your Witness

No matter what type of expert is needed, counsel should take care in selecting the individual whom she will present to the court as an authority. To find potential expert witnesses, consult colleagues, university faculties, professional associations, other experts, and the authors of publications in the relevant field.[27] In assessing potential candidates, it is important to consider the following points:

- **Qualifications** – Does the expert have the highest qualifications in his field? How long has the expert been practicing? How do the expert's qualifications compare to the opposing side's experts? How do they compare to other experts you may use? What value would this expert add? Will using this expert only add to juror boredom?

- **Appropriateness** – Does the expert practice in the field most relevant to the case? For example, in a juvenile case, does the witness have experience not only in psychology, but also in child or adolescent psychology?

- **Vulnerability** – What will opposing counsel use to attack the expert on the stand? Is the expert's *curriculum vitae* ("C.V.") accurate and truthful? (Counsel should independently verify all C.V.'s submitted by potential expert witnesses.)

- **Personality** – Is the expert likable? Does the expert project an air of credibility? How will the jury weigh the expert's testimony?

- **Ability to explain** – Can the expert break down complex science into simple steps? Can the expert use layperson's terms to illustrate difficult concepts? How willing is the expert to spend time discussing his testimony with counsel before appearing on the witness stand?

- **Courtroom experience** – Does the individual often testify as an expert? How many times? For the prosecution or for the defense? What is her fee? Will the jury see her as a hired gun?

It is recommended that counsel search Westlaw or Lexis for the expert's prior testimony, as well as contact the last few attorneys for whom the expert testified to obtain both transcripts and the attorneys' views on the expert's effectiveness.

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[27] Counsel is also encouraged to contact the Public Defender Service and ask for assistance in identifying and consulting with experts. As of the printing of this edition of the Criminal Practice Institute Manual, such inquiries should be directed to Jason Tulley, Special Counsel to the Director, at jtulley@pdsdc.org or (202) 824-2434.

D. Preparing the Expert Witness

Counsel should devote significant time to preparing the expert witness. First, counsel and the witness should together review the facts of the case and all arguments from both sides, making sure to discuss potential areas of ambiguity. If possible, provide the witness with materials relating to the opposing side's expert witness – indeed, the witness should watch the opposing expert testify. Make sure that the witness familiarizes herself with all of the relevant literature. At this stage, the witness will be able to assist counsel not only in understanding the science involved, but also in shaping and refining the theory of the case.

In discussing the expert's testimony, counsel should ask: What questions would the jury want to ask the expert? The lawyer and the expert should review the expert's proposed direct examination enough times to ensure that the expert is able to explain effectively and accurately his opinion and the basis therefor in a manner consistent with the trial theory. The expert should advise counsel as to appropriate and helpful visual aids and analogies that would assist the jury in understanding the testimony. Counsel should also prepare the witness for cross-examination on the subject matter of his testimony and on any and all items in his *curriculum vitae*. Make sure the witness understands leading versus direct questions, and how to respond when objections are raised.

The expert must also be ready to discuss fully the basis for each opinion that will be offered, so that the jury can determine whether to credit the opinion. "Quite obviously, an expert witness who cannot recall the basis for his opinion invites the jury to find that his opinion is as unreliable as his memory." *Delaware v. Fensterer*, 474 U.S. 15, 19 (1985).[28] The expert should also refrain from stating lay opinions as if they were based upon special expertise.[29] These principles were incorporated into a (recently deleted) instruction on expert witnesses in cases where an insanity defense is presented, *Criminal Jury Instruction* 1.18 (4th ed. 1993, removed 2009),[30] and apply to experts testifying in any other context.

E. Direct Examination

The party seeking to introduce expert testimony must first elicit the expert's qualifications in terms of training, background, and experience in a stated field. Questions should cover, among other things, the following:

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[28] The Court in *Fensterer* also held that the fact that the expert witness could not remember and therefore could not be cross-examined about the basis for his opinion did not violate the defendant's rights under the Confrontation Clause. 434 at 21-22.

[29] When a party seeks to elicit from one witness both lay and expert testimony, the trial court must determine whether the danger of jury confusion can be neutralized by means other than outright exclusion of the dual testimony. *Eason*, 704 A.2d at 284.

[30] The relevant portions of the deleted instruction read: "[Y]ou may not state conclusions or opinions as an expert unless you also tell the jury what investigations, observations, reasoning and medical theory led to your opinion . . . If the answer [to a question] depends upon knowledge and experience generally possessed by ordinary citizens . . . you should not answer. You should try to separate expert medical judgments from what we may call 'lay judgments.'"

- Educational institutions attended
- Degrees achieved
- Board certifications and other qualifications
- Professional memberships
- Length of practice in the field
- Specific activities involved in expert's practice (e.g., interviews, examinations, fieldwork)
- Awards or commendations
- Publications
- Teaching experience

Counsel should avoid stipulating to the expert's qualifications, instead taking the opportunity to impress the jury with the witness's expertise. The adverse party may *voir dire* the witness about training and background in order to challenge the witness's qualification in the proffered area. Depending on a close review of the C.V.'s of the opposing party's experts, counsel may consider offering to stipulate to the qualifications of those experts.

When moving to the substance of the testimony, counsel should present the expert as a teacher, but always maintain control over the witness by asking short questions that break up the testimony into comprehensible pieces. Avoid using jargon; if the witness uses a technical term on the stand, counsel should ask the witness to explain the meaning of the term in plain language. It is also helpful to bring out differences between your witness's expertise and the expertise of the opposing side's witness, and explain why that matters. The direct should be focused, lasting no longer than necessary and accounting for the jury's level of interest and patience. Counsel should always be prepared to redirect.

VI. CROSS-EXAMINING THE EXPERT

A. General Considerations

Cross-examination of an expert involves both special hazards and special opportunities. Because the expert is knowledgeable in the subject and is often experienced in testifying, trying to match wits may only expose counsel's own ignorance and enhance the expert's reliability. On the other hand, counsel will usually know the content of the testimony prior to trial[31] and can study the subject matter and prepare the cross-examination carefully and thoroughly. With sufficient preparation and hard work, counsel can feel confident in approaching the cross-examination.

B. Excluding or Limiting the Expert's Testimony

Cross-examination can be avoided entirely if counsel successfully moves for exclusion of an expert's testimony. It is important to know the relevant admissibility standard; as noted above, while many jurisdictions have moved toward the *Daubert* standard, D.C. is governed by the *Frye* standard of general acceptance in the relevant scientific community. *See supra* Part III.C.1. In

[31] See Super. Ct. R. Crim. P. 16(b)(1)(C) and 16(a)(1)(E), making discoverable reports of examinations and tests discussed, as well as summaries thereof.

moving to exclude expert testimony, counsel may also make a Fifth Amendment due process argument, as well as an argument based on the Sixth Amendment jury trial right. *See, e.g.*, *Proctor v. United States*, 728 A.2d 1246, 1249 (D.C. 1999) (rejecting expert testimony about lie detector tests while noting that, "[b]ecause of the authoritative quality which surrounds expert opinion, courts must reject testimony which might be given undue deference by jurors and which could thereby usurp the truthseeking function of the jury").

Even if an expert's opinion is not excluded in its entirety, it may be appropriately limited using arguments and authority similar to those used to exclude. *See supra* Part IV.C (discussing the potential use of the NRC Forensic Science Report to appropriately limit expert's testimony).

C. Whether to Cross-Examine

Of course, a motion to exclude expert testimony will not always be strategically appropriate or successful, leaving counsel with the decision whether or not to cross-examine. As with all witnesses, deciding whether to cross an expert involves balancing the potential gains and risks. If the testimony has not hurt the defense, the only reason to cross-examine is to secure additional opinions favorable to the defense. If the expert's testimony is damaging, in all likelihood the expert should be cross-examined, unless counsel feels so mismatched that cross-examination will only make the situation worse. If counsel has prepared thoroughly enough, however, she will not face that particular dilemma.

D. How to Prepare

Preparation for cross-examination begins with mastery of the subject matter. Counsel should know as much as the expert, or more, about the topic at hand; treatises, articles, and consultations with colleagues and other experts are all indispensable tools in this process. Counsel should also know the evidence inside and out (e.g., visit the scene, view the evidence, and speak to the relevant government experts). Counsel should also avoid relying solely on the Rule 16 disclosures made by opposing counsel, but instead engage in thorough and aggressive discovery. Obtain all notes, recordings, photographs, and computer files related to the expert's work on the case, including correspondence between the expert and opposing counsel. In a DNA case, obtain not only the laboratory report but also the underlying laboratory data used to prepare the report, as well as the laboratory protocols. Counsel should serve discovery letters, subpoenas, FOIA requests, and motions to compel discovery. This level of preparation will help counsel control the witness and increase his credibility in front of the jury, thus decreasing the overall impact of the opposing expert.

Counsel should investigate the opposing party's expert witness just as thoroughly. Study the expert's writings, check every item on his *curriculum vitae*, and read transcripts of testimony that the expert has given in other cases. Run criminal checks and search for the expert's name in Westlaw, Lexis, other databases, and the internet (e.g., via Google). Investigate the expert's sources of funding and his attendance at conferences. Counsel should also make every effort to speak personally with the opposing expert. Most experts are available for interviews before trial and encourage counsel to bring questions to them. Interviews provide invaluable opportunities to learn about the witness's personality and expertise, thus enabling counsel to assess how the jury will see the witness. This interview should not be treated as a mock cross-examination;

counsel will be better served by being friendly and engaging, and by encouraging a wide-ranging conversation. Note, however, that some experts will share these conversations with opposing counsel; care must be taken to avoid revealing the defense theory prematurely.

While some cross-examinations can be drafted at the last minute, crosses of expert witnesses most certainly cannot be. Beginning to draft an expert cross-examination early on will help counsel organize her research and thinking, while allowing for expansion and reorganization of the cross as counsel learns more and refines her theory of the case. It is crucial to confront an expert with a well-researched, well-organized cross.

E. Method

In general, counsel should keep a cross-examination short and focused. Counsel must ask leading questions, each building upon the last. Avoid sparring with the expert; the jury should see counsel as a co-equal interpreter of scientific evidence, not as a hostile adversary. Have the jury learn with you why the expert is biased or mistaken, and why the jury should not credit her opinion. Substantively, there are several lines of attack that counsel can employ while cross-examining an expert witness; the following are some of the most common.

1. Obtaining Opinions that Support the Defense

Expert testimony is subject to limitations and qualifications. Especially where the opinion is simply an expression of judgment on probabilities based on certain facts, experts are often willing to recognize that another expert, including in some instances your expert, might reasonably come to a different conclusion.

Q: Dr. Smith, you're familiar with the work of Dr. Jones, correct?
A: Yes.

Q: You respect him as a knowledgeable and qualified colleague in your field?
A: Yes, I do.

Q: Dr. Jones carefully and thoroughly examined the evidence in this case, correct?
A: He did.

Q: Based on the work Dr. Jones did in this case, it was reasonable for him to come to the conclusion that he did, wasn't it?
A: Yes.

Q: In fact, you could say that you and Dr. Jones simply have different professional opinions, couldn't you?
A: Yes, you could.

In addition, counsel sometimes can secure favorable opinions by asking questions that assume the truth of facts that counsel will try to prove, or the falsity of facts that counsel will try to disprove. For example:

Q. Ma'am, you testified that the gun would have had to be four feet away from the victim for the bullet to make the size hole it did, right?
A. Yes.

Q. But that wouldn't necessarily be true if the bullet ricocheted off the stone wall before it entered the body, right?
A. That's right.

2. Discrediting the Expert's Qualifications

The validity of an expert's conclusion is subject to impeachment as is the testimony of any other witness. *See Criminal Jury Instruction* 2.215.[32] At the outset of the examination, the proponent will bring out the witness's background, education, and experience, and move to qualify the witness as an expert in a particular field. Before the witness is permitted to testify to any opinion, the opponent can ask *voir dire* questions designed to show that the witness has insufficient education, training, or experience to qualify as an expert. The trial court will then rule on whether the witness in fact qualifies.

Even if the witness is qualified as an expert, counsel may wish to ask further questions on cross-examination to show that the qualifications are so weak as to undermine the reliability of the opinion. For example:

Q. Doctor, you stated that you did your residency training in psychiatry?
A. Yes.

Q. Did you obtain board certification in psychiatry?
A. No.

Q. Did you do any post-graduate training in psychiatry?
A. No.

Q. Doctor, there is a recognized medical field called neuropsychology, is there not?
A. Yes, there is.

Q. And in lay terms, it is correct to say that neuropsychology deals particularly with the relationship between organic brain diseases or defects and personality disorders?
A. Yes.

Q. Now, you aren't board certified in that field, are you?

[32] The instruction reads, in part: "You are not bound by an expert's opinion. If you find that the opinion is not based on sufficient education or experience, that the reasons supporting the opinion are not sound, or that the opinion is outweighed by other evidence, you may completely or partially disregard the opinion." Instruction 2.215 should be read immediately after the court qualifies the witness as an expert. If there is a stipulation to the expert's qualifications, the court should delete from the standard instruction the language allowing the jury to decide that the expert's opinion "is not based upon sufficient education and experience."

A. That's correct.

The cross-examiner may also want to show that the expert's field of expertise is not the one to which the expert's testimony pertains, thus highlighting the narrow scope of the witness's expertise:

Q. Professor, you've taught psychiatry for ten years, isn't that correct?
A. Yes.

Q. But you've never taught a course in paranoid schizophrenia, right?
A. That's right.

Q. You've never published anything about paranoid schizophrenia, have you?
A. No.

Q. In fact, you've never done any work specifically focusing on paranoid schizophrenia?
A. No, I haven't.

Counsel may point out the expert's lack of practical experience in the area about which she has testified:

Q: Professor, I noticed on your C.V. that you've written an article about developing techniques in blood spatter analysis.
A: That's right.

Q: Isn't it true, Professor, that you've never been employed as a forensic scientist?
A: Yes, that's true.

Q: You've never worked a single day in a crime lab?
A: No, I haven't.

Q: You've never even been to a crime scene, have you?
A: No.

A cross-examiner should be also ready and willing to point out any exaggeration, or "puffing," on the witness's *curriculum vitae*.

Q: Sir, under academic background, you list study at the University of Virginia, correct?
A: Yes.

Q: You were not a matriculated student at UVA, correct?
A: That's right.

Q: You signed up for one class, correct?

A: Correct.

Q: Pass/Fail?
A: Yes.

Q: No grades at all?
A: Yes.

Q: No papers?
A: Right.

Q: No final examination?
A: Right.

Q: All you had to do was show up?
A: Correct.

Q: And this class was only for one afternoon, right?
A: Right.

3. Discrediting the Expert's Impartiality

As with any other witness, bias is always relevant when cross-examining an expert witness. For example:

Q. Mr. Smith, you're being paid by the government to appear here today as a handwriting expert, aren't you?
A. Yes.

Q. How much has the government paid you for your testimony in this case?
A. $3500.

Q. And you've testified for the government in how many cases?
A. About fifty.

Q. How many times have you testified for the defense?
A. None.

Consider also the following scenario involving a forensic scientist employed by a law enforcement agency, demonstrating possible bias when a scientist does not "blind" herself before analyzing evidence:

Q. Dr. Jones, you are employed as a forensic DNA scientist by the FBI, aren't you?
A. Yes.

Q. When you performed your DNA analysis, you were aware of the facts of this case, isn't that correct?
A. Yes, I was.

Q. And you were aware of the prosecution's theory that my client committed the crime?
A. Yes.

Q. In fact, you wrote in your notes that Detective Davis specifically wanted to connect our client to the scene with DNA evidence, didn't you?
A. Yes.

4. Discrediting the Expert's Opinion and the Basis Thereof

Counsel may try to demonstrate that the expert has an insufficient or flawed basis for providing expert testimony about specific issues in a case. For example, when questioning a psychiatrist, counsel might want to ask when the expert examined the patient, for how long, what other health care personnel were relied on to provide information, what their qualifications were, and what studies or other experts were consulted or relied upon. Counsel can also attack an expert's reliance on hearsay reports and the expert's failure independently to corroborate the hearsay reports. For example:

Q: Doctor, you based your diagnosis of the defendant partially on statements that his mother made to you, correct?
A: Yes, I did.

Q: For example, you noted in your report Mrs. Doe's statement that the defendant had exhibited "oppositional behavior" in high school, didn't you?
A: Yes.

Q: Did you ever ask any of the defendant's high school teachers about his behavior?
A: No.

Q: How about his guidance counselor?
A: No.

Q: Did you look through his high school record for reports of problem behavior?
A: No, I didn't.

Q: Did you in any way try to corroborate Mrs. Doe's statement?
A: No.

Counsel may also ask questions that bring out flaws in the tools that the expert used. For example, the cross of a DNA expert might include questions about the flaws in the database on which the expert relied, or disagreements in the scientific community over a statistical method that the expert used.

Q: Sir, the FBI compared my client's profile to profiles in an FBI database, right?
A: Right.

Q: The FBI did that to estimate how common my client's DNA sequence appears in the "relevant population"?
A: Yes.

Q: So when the government says that my client's mitochondrial DNA sequence appears in only one percent of the population, that estimate is based entirely on the comparison with the FBI database, right?
A: That's right.

Q: The database that the FBI used isn't really representative of my client's frequency in the relevant population, is it?
A: I think it is.

Q: Scientists have shown that mtDNA profiles are not distributed at random throughout the population, correct?
A: Correct.

Q: DNA profiles tend to cluster regionally?
A: Yes, you can say that.

Q: DNA profiles tend to cluster regionally because people tend to migrate in groups?
A: Some scientists have produced evidence of that phenomenon.

Q: The FBI databases don't take migration patterns into account, do they?
A: No, they don't.

Q: They don't take the regional clustering of mtDNA profiles into account, do they?
A: No, they don't.

Q: For example, none of the profiles in the FBI mtDNA database are from people living in the DC metropolitan area, are they?
A: I don't think so.

Q: The profiles in the database are primarily from Texas and California?
A: Yes.

Q: In fact, the FBI itself admitted in 1999 that reliable frequency estimates for most mtDNA sequences are impossible, didn't it?
A: Yes, that's true.

Q: And the FBI also admitted that its mtDNA databases are simply too small to provide estimates of the frequency of most mtDNA sequences in the relevant populations?
A: Yes.

The expert will also be vulnerable on cross-examination if he did not follow documented protocols or perform standard tests.

Q: Doctor, it's standard medical practice to order an MRI when a patient presents these symptoms, isn't it?
A: In most cases, yes.

Q: The emergency room protocol that your hospital uses calls for an MRI when a patient has these symptoms, doesn't it?
A: Yes, it does.

Q: You didn't order an MRI in this case, did you?
A: No.

It is also proper to impeach an expert with facts that were available to the expert, but which the expert did not mention when testifying as to the basis for the ultimate conclusion. *Doepel v. United States*, 434 A.2d 449, 455 (D.C. 1981) (prosecution could impeach expert with what expert believed to be defendant's criminal record, even though that information was false, to demonstrate that expert ignored what he believed to be facts pointing to different conclusion).

Q: Doctor, you concluded that the patient's symptoms were consistent with tonsillitis?
A: Yes.
Q: Testified about these symptoms on direct examination?
A: Yes.

Q: Symptoms included fever?
A: Yes.

Q: Swelling in the neck?
A: Yes.

Q: Pain in swallowing?
A: Yes.

Q: Testified that those were the only symptoms you considered for your diagnosis?
A: Yes.

Q: Patient also presented with vomiting, right?
A: I don't recall that.

Q: Refresh your recollection with the treatment notes.

A: Okay.

Q: Patient presented with vomiting as well, right?
A: Yes.

Q: Vomiting is inconsistent with tonsillitis?
A: Uh, yes, it is.

Finally, counsel may attack the witness's opinion directly. This is very dangerous ground for inadequately prepared counsel because the expert will have a great natural advantage – superior knowledge of the field. On the other hand, prepared counsel can find this very fertile and effective ground. Counsel may attempt to push the expert to an extreme adversarial position; demonstrate the expert's disagreement with other authoritative voices in the field, including learned treatises;[33] or show that the expert has made prior statements inconsistent with the ones the expert is now expressing, including testimony in prior cases.

Q: Doctor, are you familiar with the DSM-IV?
A: Yes, I am.

Q: The DSM-IV is the standard treatise used by clinical psychiatrists, isn't it?
A: Yes, it is.

Q: It's the most respected treatise in the field, correct?
A: Yes.

Q: The DSM-IV lists four criteria for a diagnosis of antisocial personality disorder, doesn't it?
A: Yes, it does.

Q: The defendant only exhibited two of the four criteria that the DSM-IV discusses, isn't that true?
A: Yes, that's true.

[33] Opinions expressed in scientific authorities are admissible. *Garfield Mem'l Hosp. v. Marshall*, 204 F.2d 721, 728-29 (D.C. Cir. 1953).

CHAPTER 30

REAL AND DEMONSTRATIVE EVIDENCE

Physical evidence is introduced at trial in a variety of forms, including weapons, drugs, clothing, photographs, tape recordings, diagrams, models, and written documents. Such evidence is particularly powerful because, unlike testimony, it allows the trier of fact to draw first-hand inferences about contested issues. *2 McCormick on Evidence* § 212, at 3 (4th ed. 1992).

Real evidence consists of all items directly related to the alleged commission of the offense that is the subject of the prosecution. *3 Wharton's Criminal Evidence* § 16:1 at 1. (15th ed. 2008). Demonstrative evidence is quite different from real evidence, which is often what one normally thinks of as evidence. While real evidence is some article or object, often from the crime scene, or tangible evidence that plays some part in the events leading up to the current trial, demonstrative evidence is representational or exemplary evidence. *Anderson v. Anderson*, 514 S.E.2d 369 (Va. App.1999) (demonstrative evidence is distinguished from real evidence in that it has no probative value in itself, but serves merely as a visual aid to the jury in comprehending the verbal testimony of a witness). Demonstrative evidence is usually some sort of chart, graph, or illustration used to assist the jury (or judge) in better understanding a particular event, series of events, or proposition. *3 Wharton's Criminal Evidence* § 16:23 at 1.

The critical issue is not the type of object, but rather its relationship to the case. For example, the actual bank surveillance videotape on which robbers appear would be real evidence in a prosecution for that bank robbery. Alternatively, a videotape showing a re-creation of the robbery based on testimony of eyewitnesses would be demonstrative evidence. *Id.*

As discussed in detail below, real and demonstrative evidence have different foundational requirements. Further, both are admissible only if they are relevant to the offense and if their probative value outweighs their prejudicial impact. Therefore, counsel must carefully scrutinize any government proffer of physical evidence and request a ruling on its admissibility outside the presence of the jury. *See Barnes v. United States*, 365 F.2d 509, 511 n.5 (D.C. Cir. 1966).

2014 Supplement

***McKnight v. United States*, 102 A.3d 284 (D.C. 2014).** Trial court did not abuse its discretion in admitting witness's testimony that she was "scared" and had been threatened because testimony was brief and accompanied by a limiting instruction and because government had presented stronger evidence—calls made by defendant to family members while he was in pretrial detention that included a request to "use a knife" on a woman reasonably understood to be the witness—to prove charges.

***Austin v. United States*, 64 A.3d 413 (D.C. 2013).** No prejudicial error occurred when a photo of the minor victim after his death not previously moved into evidence was inadvertently sent back to the jury because it was virtually identical to other photographs of the victim that had been admitted and properly provided to the jury during deliberations.

Physical Evidence:

- ✓ Carefully scrutinize any government proffer of physical evidence
- ✓ Request a ruling on its admissibility outside the presence of the jury

I. REAL EVIDENCE

A. Foundational Requirements

Absent a stipulation by the parties, objects that allegedly have played a direct role in the alleged offense require a foundation establishing that what is proffered as evidence is in fact the object involved in the events, and that the item is in substantially the same condition as it was at the time of the crime. *3 Wharton's Criminal Evidence* § 16:2 at 1.

For all practical purposes, authenticity is a subset of relevancy in that if the proffered object is not what the proponent claims it is, it is usually not relevant to the case. *3 Wharton's Criminal Evidence* § 14:1 at 1. Real evidence falls into two categories – items that are uniquely identifiable and those that are not.

2014 Supplement

***McCorkle v. United States*, 100 A.3d 116 (D.C. 2014).** No error in denying withdrawal instruction where defendant made no showing at trial that there was a conflict from which to withdraw when he walked away.

1. Identification

If something about an object makes it unique, a witness can authenticate it merely by examining it and testifying that it is in essentially the same condition as it was at the relevant time. Anything about the exhibit that makes it unique is sufficient. *U.S. v. Mills*, 194 F.3d 1108 (10th Cir. 1999) (videotape admissible where officer responsible for filming testified as to authenticity of tape and confirmed that, except for deleted portion, videotape accurately depicted episode of former corrections officer violating inmate's constitutional rights); *Ali v. United States*, 581 A.2d 368, 374 (D.C. 1990) (upholding admission of photographs of a sawed-off shotgun and shotgun shells, identified by witness as similar to those she saw in defendant's possession).

On the other hand, the identification may be insufficient if the witness testifies that the object is only similar to the article involved, or is not positive about the item's identity. *See Burleson v. United States*, 306 A.2d 659, 661 (D.C. 1973) (revolver inadmissible, in part, because complainant only described it as "similar" to one allegedly used in assault).

Test results and analysis acquired from physical evidence that is not identified at trial should be excluded. *See Novak v. District of Columbia*, 160 F.2d 588 (D.C. Cir. 1947) (alcohol level test

results improperly admitted where witness did not identify bottle from which analysis was conducted as containing defendant's urine sample). Even if a witness identifies an object, the court "must be satisfied that 'in reasonable probability the article has not been changed in important aspects.'" *Ford v. United States*, 396 A.2d 191, 194 (D.C. 1978) (citation omitted).

2014 Supplement

***Grissom v. United States*, 102 A.3d 1163 (D.C. 2014).** Conviction for second-degree theft reversed where only evidence that defendant stole jewelry from particular store was testimony of loss prevention officer that UPCs matched product sold at store but were not unique to that particular store or location and where officer did not see theft occur.

2. Chain of Custody

The quantum of proof needed to establish chain of custody varies with the susceptibility of the evidence to alteration or mishandling. The government need not establish chain of custody if a witness can identify the object as the actual object about which the witness has testified and the article is not susceptible to alteration. *United States v. Blue*, 440 F.2d 300, 303 (7th Cir. 1971).

Some real evidence, such as a drug, is not uniquely identifiable. In that case, if the substance has passed through several hands before being tested and produced in court, it is necessary to establish a chain of custody, tracing the possession of the substance to the final custodian for authentication. *U.S. v. Washington*, 11 F.3d 1510 (10th Cir. 1993) (in challenge to cocaine base, proponent of evidence that is not readily identifiable and susceptible to alteration by tampering or contamination must lay foundation establishing chain of custody sufficient to render it improbable that original item has either been exchanged with another or been contaminated or tampered with); *United States v. Collado*, 957 F.2d 38, 39 (1st Cir. 1992) ("*Fed. R. Evid.* 901 requires it be reasonably probable there was not material alteration of evidence."). *But see Fleming v. United States*, 924 A.2d 830 (D.C. 2007) (no plain error to admit drug evidence where differences in officers' testimony about whether a field test was done and whether there was a break in the chain of custody would affect only the weight of the evidence, not its admissibility).

The government also must establish that the original acquisition and subsequent custody of the evidence links it to the accused or the offense. *Gass v. United States*, 416 F.2d 767, 770 n.8 (D.C. Cir. 1969). This requirement "demands that the possibilities of misidentification and adulteration be eliminated, not absolutely, but as a matter of reasonable probability." *Id.* at 770; *see also Garcia v. United States*, 897 A.2d 796 (D.C. 2006). (mis-numbering of paperwork associated with cocaine recovered in defendant's alleged undercover drug transaction did not affect chain of custody because defendant did not present any evidence suggesting that either the foil wrapper or its contents had been altered). The court must consider the "nature of the article, the circumstances surrounding the preservation and custody of it, and the likelihood of intermeddlers tampering with it." *Ford v. United States*, 396 A.2d 191, 194.

Absent evidence of tampering, there is a presumption that persons charged with keeping the evidence properly perform their duties. *Id.* For example, police procedures for handling

narcotics and drug paraphernalia in locked and sealed envelopes have been found adequate. *Tompkins v. United States*, 272 A.2d 100, 102-03 (D.C. 1970) (officer's inability to identify a particular syringe as one taken from defendant did not render it inadmissible where officer placed syringe in a locked and sealed envelope and initialed it before delivery to chemist).

This presumption also applies to medical personnel and laboratory technicians. *See Gass*, 416 F.2d at 770 (chain of custody established where lab slides taken by a doctor were handled briefly outside doctor's presence by a nurse who did not testify, because it is presumed that persons working in serious matters handle objects with care); s*ee also Turney v. United States*, 626 A.2d 872, 874 (D.C. 1993) (chain of custody for cocaine upheld where three officers testified that drugs in police envelope were the "same or similar" to drugs seized even though better practice would have been for prosecutor to have police identify their initials on envelope).

Another departure from the ordinary chain of custody requirement exists under the business record exception to the hearsay rule, Super. Ct. Civ. R. 43-I; Fed. R. Evid. 803(6). To introduce such evidence, the proponent must satisfy precise requirements. For example, a foundation has not been laid when a witness asserts that a transaction recorded in a given document is "standard protocol." The proponent must properly authenticate the document by showing both the routineness of the transaction and the reliability of the document. *Smith v. United States*, 337 A.2d 219 (D.C. 1975) (although results of medical tests showing presence of sperm in victim's vagina were admissible even though government did not meet requirements of the now-repealed Federal Shopbook Rule, 28 U.S.C. § 1732, such evidence would in future be inadmissible under similar circumstances).

2014 Supplement

***Plummer v. United States*, 43 A.3d 260 (D.C. 2012).** Trial court did not abuse its discretion in admitting into evidence unsealed bag containing DVDs and CDs seized from defendant that were not individually inventoried by the police where no evidence that police failed to maintain continuous custody over the DVDs and CDs and no evidence of tampering or other mishandling.

B. Admissibility

To introduce weapons, clothing, drugs, and other items directly related to an alleged offense, the government must prove both that such is relevant to a material issue and that it is connected in some way to the defendant *and* the crime. *King v. United States*, 618 A.2d 727, 728 (D.C. 1993).[1] The evidence should be excluded if its connection is too remote or conjectural. *Burleson v. United States*, 306 A.2d 659 (D.C. 1973) (admission of pistol constituted reversible error – even though it was found five hours after alleged assault in a car owned and driven by

[1]*King* found that a pistol, discovered in the apartment of a friend of the appellant, was admissible where it had "some connection" with both the charged crime and the defendant. 618 A.2d at 729. Despite language in prior decisions that evidence to be introduced must simply bear "some connection with the defendant or the crime with which he is charged," *see, e.g.*, *Ali v. United States*, 581 A.2d 368, 375 (D.C. 1990) (quoting *Burleson v. United States*, 306 A.2d 659, 661 (D.C. 1973)), *King* found that "we have always required that the evidence be connected to both." 618 A.2d at 728. "[W]e view our authorities to require, as government counsel conceded at oral argument, that the weapon be linked to both the defendant and the crime in order to be admissible." *Id*. at 729.

appellant's brother in which appellant had been a passenger a short time before – because complainant could not identify the pistol).

Whether real evidence is sufficiently connected to an offense depends on the circumstances surrounding its seizure and the facts of the particular case. Thus, admission of evidence has been upheld in, for example, *Stewart v. United States*, 881 A.2d 1100 (D.C. 2005) (affirming defendant's convictions for assault with a dangerous weapon despite defendant's claim that the pistol was inadmissible due to the attenuated connection between himself and the pistol because it was found two months after the shooting in another person's car trunk); *Taylor v. United States*, 759 A.2d 604 (D.C. 2000) (government's use of tape recording of armed robbery did not offend the rule of parity because it was used only to corroborate that the robbery had occurred and not to identify the defendant); *King*, 618 A.2d at 729 (D.C. 1993) (pistol recovered from defendant's friend's home, several hours after defendant left a pistol there, where defendant asked police for his property shortly after officer had recovered the pistol, and pistol matched complainant's description); *Ali*, 581 A.2d at 374-75 (D.C. 1990) (photograph of shotgun properly admitted into evidence, where witness testified that defendant killed decedent with shotgun, and witness testified that she saw defendant two weeks before the murder with a shotgun that looked like the one shown in the photo); *Swinson v. United States*, 483 A.2d 1160, 1163-64 (D.C. 1984) (hatchet recovered from defendant's vehicle shortly after offense was admissible, based on locksmith's testimony that an axe, chisel, or hatchet had been used to break into vending machine); *Lee v. United States*, 471 A.2d 683, 685 (D.C. 1984) (knife recovered from defendant's car on day of offense, where complainant's description of knife held to her throat varied only slightly from its actual appearance); *Oesby v. United States*, 398 A.2d 1, 10 (D.C. 1979) (gun found shortly after assault and within one block of where defendants abandoned car); *(Earl) Coleman v. United States*, 379 A.2d 710, 712 (D.C. 1977) (in murder case involving .45 caliber weapon, photograph of defendant holding .45 caliber pistol taken five months before murder); *Punch v. United States*, 377 A.2d at 1358 (in carrying a dangerous weapon case, four sets of masks and hats, found along with four guns, inside car occupied by defendants); *United States v. Blackwell*, 694 F.2d 1325, 1329-33 (D.C. Cir. 1982) (in gun possession case, four photographs showing defendant holding a gun that resembled weapon seized, in what appeared to be hotel room where gun was found).

On the other hand, the alleged connection was too tenuous for admissibility in *Butts v. United States*, 822 A.2d 407 (D.C. 2003) (repair document properly excluded in light of defense failure to lay proper foundation); *Burgess v. United States*, 786 A.2d 561 (D.C. 2001) (error to exclude photograph showing government witness present at murder holding gun similar to murder weapon by concluding that photograph was more prejudicial than probative when it was not "undue prejudice" to corroborate defense theory that witness was one of the shooters); *Davis v. United States*, 700 A.2d 229, 231-32 (D.C. 1997) (assuming that plastic pistol found in defendant's possession at time of arrest was irrelevant in trial for armed robbery and kidnapping that had occurred seven weeks prior to arrest, but finding that admission of gun was not prejudicial); *(Charles) Coleman v. United States*, 295 A.2d 896, 897-98 (D.C. 1972) (prejudicial error to admit pellet pistols found in car in addition to admitting pistol found under seat where defendant had been sitting); *Macklin v. United States*, 410 F.2d 1046, 1048 (D.C. Cir. 1969) (error to admit guns seized from defendant's companions in addition to weapon allegedly seized from defendant in prosecution for carrying a dangerous weapon); *United States v. Williams*, 561 F.2d at 861-62 (D.C. Cir. 1977) (error to admit evidence concerning the location where stolen

money had been found when government did not establish defendant's access to apartment and jury was not told that another occupant had pled to the crime).

Improperly admitted evidence is not always considered "inherently and incurably prejudicial," the appellate standard for evaluating a claim of prejudicial error being "whether the judgment of the jury was substantially swayed." *See Moore v. United States*, 927 A.2d 1040 (D.C. 2007). In *Moore*, after retiring to the jury room, the jury discovered three Ziploc bags in a small denim coin purse that had been admitted in evidence. One Ziploc bag contained an unidentified white powder (presumably, cocaine). An immediate and lengthy curative instruction by the trial court that there was "absolutely no evidence" connecting the purse or its contents with either appellant (defendants) was then followed by an equally immediate conviction by the jury. The Court of Appeals found that, "[J]uries are presumed to have followed unambiguous instructions given by the trial court, and we will not upset the verdict by assuming that the jury declined to do so. All things considered, we are satisfied that the unauthorized evidence did not 'substantially sway' the jury. . . ." *Id.* at 1063 (internal citations omitted).

Finally, a finding of relevance does not require admission of the evidence. Once relevance is established, the judge must then weigh the probative value of the evidence against any unduly prejudicial impact that it might have on the defendant. *Fed. R. Evid.* 403. *See Punch*, 377 A.2d at 1358.

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***Tornero v. United States*, 94 A.3d 1 (D.C. 2014).** Reversible error to admit BB gun as evidence, where no evidence was recovered to link the BB gun to the destruction of property charge.

***Mason v. United States*, 53 A.3d 1084 (D.C. 2012).** Trial court did not abuse its discretion in admitting jail records indicating that defendant had been transported to court on two consecutive days, despite witness's testimony that his conversation with defendant about "snitching" and changing his story during transport had only occurred on second day, because test for relevance is "a minimal one," witness could have been mistaken about the exact day conversation had occurred, judge thought it would be "misleading" to withhold evidence from jury and thus ask it to conclude that conversation had never taken place, and whether defendant had ever confronted witness about "snitching" and asking him to change his story was a contested fact.

***Riddick v. United States*, 995 A.2d 212 (D.C. 2010).** Harmless to exclude from evidence handwritten note found in decedent's bedroom that would have supported defense that shooting was accidental where no indication of when note had been written, thus making it potentially irrelevant to dynamic of relationship shortly before shooting, and admission would have required jury to speculate on meaning of note.

C. Examples

1. Photographs

A photograph is admissible in evidence if the proponent shows that it is illustrative of a material fact and that it fairly and accurately portrays what it is being offered to show. *3 Wharton's Criminal Evidence* § 16:6 at 1 (15th ed. 2008). The requisite authentication of photographs, a specialized aspect of relevance, *Blackwell*, 694 F.2d at 1329-30, may be accomplished in any of three ways.

First, a sponsoring witness with personal knowledge of the scene depicted may testify that the photographs "fairly and accurately" portray that scene. *United States v. Rembert*, 863 F.2d 1023, 1026 (D.C. Cir. 1988). The jury must be cautioned about any differences in the portrayal of the scene. *March v. United States*, 362 A.2d 691, 703 (D.C. 1976) (no abuse of discretion in admitting photographs that showed lighting conditions somewhat different from conditions at time of offense where jury was cautioned about variance); *see also Hammond v. United States*, 501 A.2d 796 (D.C. 1985) (harmless error to admit photographs of defendant's car portraying gun as protruding from underneath armrest, where gun had actually been completely hidden, because jury was sufficiently cautioned about the variance between photos and reality). *But see, Nelson v. U.S.*, 378 A.2d 657 (D.C. 1977) (photographs of scene of burglary were properly excluded from evidence where there was no showing that conditions at time of burglary were the same as those shown in photographs).

The second method of authentication is based on the reliability of the process through which the photograph is made, a method often associated with the introduction of x-rays. *Rembert*, 863 F.2d at 1026.

Finally, even absent direct testimony to lay a foundation, the contents of the photograph may combine with other evidence "'to explain and authenticate a photograph sufficiently to justify its admission into evidence.'" *Id.* at 1027 (citation omitted) (sufficient authentication for admissibility of bank surveillance photographs when witnesses described events, bank employees testified to loading and security of film, and film depicted events in question).

Properly authenticated photographs are not automatically admissible. Photographs may be excluded if they are unnecessarily cumulative. *See Johnson v. United States*, 613 A.2d 888, 895 (D.C. 1992) (trial court properly admitted photographs of victim's burn taken 5 days after incident and photographs of scar taken right before trial, but excluded photos taken a month after the incident as unnecessarily cumulative); *Russell v. United States*, 586 A.2d 695, 700 (D.C. 1991). Similarly, authenticated photographs may be excluded if their prejudicial effect outweighs their probative value. *Gonzalez v. United States*, 697 A.2d 819, 827 (D.C. 1997).

PRACTICE TIP:

A defendant's willingness to stipulate to certain facts may be relevant when the court balances the probative value of a photograph with the likelihood of unfair prejudice. A stipulation, however, will not automatically exclude such photographs. Indeed, courts often still admit such photographs despite a stipulation from the defense. *See Rivers v. United States*, 270 F.2d 435 (9th Cir. 1959) (photographs of dismembered body of victim admitted although dismemberment was conceded).

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***Strozier v. United States*, 991 A.2d 778 (D.C. 2010).** Not abuse of discretion to allow into evidence two autopsy photos of decedent's "ruptured eye" and "sawed-off skull and exposed brain" to argue that blow in "one punch case" was excessive where photos were not "gory" and were relevant to show severity of injuries, oral testimony had already been presented that prepared jury for extent of injuries, and no indication that use of photos was intended to or did inflame jury.

2. Mug shots

Mug shots of the defendant are usually inadmissible. They strongly imply past criminal conduct and are thus overwhelmingly prejudicial. This inference of prior criminal activity "is violative of an accused's right to have his guilt or innocence . . . determined strictly on the basis of the evidence regarding the crime charged." *United States v. Torres-Flores*, 827 F.2d 1031, 1036 (5th Cir. 1987) (jury view of mug shot array of defendant and others was prejudicial error, where police markings were crudely and inadequately covered). It is error for the prosecutor to refer to such "photographs" in an opening statement or during direct examination absent a showing that the probative value outweighs the prejudice to the defendant. *Brown v. United States*, 387 A.2d 728, 730 (D.C. 1978). *See also, Bishop v. United States*, 983 A.2d 1029 (D.C. 2009) (manner in which mug shot was introduced into evidence with reference to a PDID number, coupled with curative jury instruction referencing the defendant's arrest, was reversible error).

The criteria for admissibility of mug shots are detailed in *Williams v. United States*, 382 A.2d 1, 5 (D.C. 1978) (evidence of defendant's mug shot photograph, which had numbers printed across defendant's chest blacked out and conveyed inherent implication of criminal activity, constituted reversible error where government had no need to introduce photograph for purpose of identification). First, the government must show that identity is a critical issue, that pre-trial identification procedures were fair, and that no other evidence can achieve those ends. Second, the photographs, in and of themselves, must not imply that the defendant had a criminal record. Finally, the mug shots must be introduced in a way that does not draw attention to their identity as police records. *See also, Gonzalez v. United States*, 697 A.2d 819, 826 (D.C. 1997) (arrest photograph for instant offense unlike a mug shot in that it implies only that defendant was arrested for crime for which he is on trial, so admission not prejudicial).

Mere disguise or blocking out of serial numbers will not satisfy the last two requirements. The prosecutor must make "suitable arrangements, by separation and copying, avoiding the incriminatory prejudice." *Barnes v. United States*, 365 F.2d 509, 512 (D.C. Cir. 1966). Finally, the court must give a cautionary instruction. *See Criminal Jury Instructions for the District of Columbia*, No. 2.101 (5th ed. 2009).

3. Audio and Video Recordings

To establish the proper foundation for admission of any tape recording, the proponent of the recording must show that the conversation on the recording was "fairly reproduced" on the tape. *Butler v. United States*, 649 A.2d 563, 566-68 (D.C. 1994). The proponent of the recording can

satisfy this foundational requirement through the testimony of a participant to the conversation or someone who overheard it. *Id*. at 568. The proponent must also establish a proper chain of custody for the recording. *Id*.

The parties should verify the audibility and accuracy of tapes and transcripts and attempt before trial to stipulate to these points. If they are unable to reach an agreement, the court may make these factual findings or submit each party's transcript and let the jury determine which version is accurate. *Slade*, 627 F.2d at 302-03. The court should listen to the tapes (preferably before trial) out of the jury's presence to verify audibility, and should not give transcripts to the jury before verifying their accuracy. *Springer*, 388 A.2d at 853-54.

Tape recordings must be shown by clear and convincing evidence to be authentic, accurate, and trustworthy. *Springer v. United States*, 388 A.2d 846, 852-53 (D.C. 1978), *overruled in part on other grounds*, *Bassil v. United States*, 517 A.2d 714 (D.C. 1986); *see also Akins v. United States*, 679 A.2d 1017, 1035 (D.C. 1996); *Harrison v. United States*, 526 A.2d 1377, 1379 (D.C. 1987). The tapes must be "audible and comprehensible enough for the jury to consider the contents." *United States v. Slade*, 627 F.2d 293, 301 (D.C. Cir. 1980). These determinations of fact lie within the discretion of the trial court. *Springer*, 388 A.2d at 852.

If part of the conversation or recorded statement is unintelligible or inaudible, this does not render the entire sound recording inadmissible. *United States v. Sweeney*, 44 F.3d 1032 (D.C. Cir. 1994) (despite fact that several areas of tape recording of inculpatory statements were inaudible, no error in admission of the recording). Nonetheless, inaudibility requires exclusion if "'the unintelligible portions are so substantial as to render the recording as a whole untrustworthy.'" *Slade*, 627 F.2d at 301 (citation omitted). If a party attempts to introduce recordings that have been "enhanced" to reduce background noise and improve comprehension using a sound suppression device, the court must determine whether the enhanced tape accurately reflects the original. *Beard v. United States*, 535 A.2d 1373, 1382 (D.C. 1988).

The tapes – not the transcripts – are the evidence. The jurors should have access to the transcripts only when the tapes are being played. The court should instruct the jury that "the transcripts are provided merely to facilitate their comprehension," and that if there are differences between the tapes and the transcripts, the contents of the tapes control. This instruction should be repeated when the case is submitted to the jury. During deliberations, the jury may use the transcripts only when the court allows it to listen to the tapes in open court after giving the appropriate cautionary instruction. *Springer*, 388 A.2d at 854; *see Criminal Jury Instruction* No. 2.310. If both parties consent, the transcripts may be taken into the jury room.

Videotapes are admissible in evidence on substantially the same grounds as still photographs. *Fed. R. Evid*. 1001(2). The proponent must show they are relevant and accurate representations of the subjects in question. *See* Photos, *supra*, I.C.1. If videotapes are shot from places or angles that could be misleading, courts may exclude them. *Robinson v. United States*, 756 A.2d 448 (D.C. 2000) (videotape of the street scene where events surrounding the drug transaction took place was inadmissible in prosecution for distribution of heroin; videotape was not taken from same angles or position from which officer made his observations, and thus probative value of

videotape would be substantially outweighed by its prejudice because the videotape would be misleading to the jury).

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***Gray v. United States*, 100 A.3d 129 (D.C. 2014.)** Trial court did not err in basing factual findings on store surveillance videos not formally authenticated and admitted into evidence where defendant had an opportunity to view the videos and did not object to court's ruling that prosecution could introduce them, videos were played in court, defense counsel cross-examined witnesses about store's camera systems and particular videos, both parties referred to videos in closing, and defense counsel did not object to trial court's reliance on videos in announcing verdict.

4. Documents the Defendant has Authored

The government must show the relevance and authenticity of documents that it attempts to introduce as having been authored by the defendant. Authenticity of writing must be shown independently of the document itself before it is admissible. *United States v. Sutton*, 426 F.2d 1202, 1206-10 (D.C. Cir. 1969) (notes found next to decedent were admissible to show premeditation and deliberation where contents and circumstances surrounding their discovery identified defendant as author).

The standard for authenticity is whether the evidence of genuineness, if uncontradicted, might lead a reasonable mind to conclude that the alleged author wrote the document. Authenticity may be shown through circumstantial evidence which permits a logical conclusion of the author's identity, including the location where the document was found, and whether the information contained would have been peculiarly within the alleged writer's knowledge. *Id*. at 1207-08.

Counsel should seek redaction of any writing that contains prejudicial information, and request a cautionary instruction defining the purpose for which the jury may consider the contents. *See Adams v. United States*, 502 A.2d 1011, 1018-20 (D.C. 1986) (voluminous diary, introduced to show premeditation and deliberation, contained highly prejudicial entries irrelevant to murder prosecution).

PRACTICE TIP:

Handwriting analysis poses a variety of evidentiary problems of which counsel need be aware. Courts have upheld challenges to handwriting examiners' ability to reliably individualize, or, in other words, to identify a particular individual as the author of a document to the exclusion of any other person. Thus, where counsel has a handwriting case, counsel should consider and explore different challenges to admissibility, including challenges pursuant to *Frye* and *Dyas*. As with most expert testimony, counsel should also consider consulting a defense expert to identify areas of challenge regarding both admissibility and trial cross-examination. Lastly, many of the issues relating to admissibility are also proper and fruitful fodder for cross-examination at trial.

5. DNA[2]

Once a witness has been qualified as a DNA expert (*See* Chapter 29, *supra*), counsel should focus on the summary report of the DNA tests performed and the components of those tests from an evidentiary standpoint. Relevant laboratory techniques should be explored with the expert witness.[3] Quality control and other measures of accreditation should be determined. Counsel also may want to probe chain of custody, if that has become a relevant issue. With respect to the actual contents of the DNA report itself, counsel may inquire into every aspect of the testing, especially if there is reason to believe that a weakness can be exposed--especially to the jury. Training of technicians, why certain types of tests were conducted as opposed to others, quality control of testing agents, the handling of discrepancies in testing outcomes, are all areas that may prove fruitful in challenging the probative value of the DNA summary, itself, to which the expert is testifying, especially if counsel has prepared their own DNA expert to refute the government's expert witness and any DNA evidence.

While initially some courts questioned the results of DNA testing, s*ee People v. Castro*, 545 N.Y.S.2d 985 (N.Y. Sup. Ct. 1989), today DNA is now widely admitted by U.S. courts. *See United States v. Porter*, 618 A.2d 629 (D.C. 1992) ("no basis in the law of this jurisdiction for holding hostage new scientific evidence which is 'generally' accepted because of the absence of [generally accepted] standards.")

However, according to the recent National Research Council study on the state of forensic sciences in the United States, "this does not mean that DNA evidence is always unassailable in

[2] The increasing use of DNA evidence has been one of the most important developments in criminal justice in recent years. The ability to analyze a DNA sample left at the scene of a crime is now a key law enforcement tool, both in matching a suspect to the sample ("confirmatory ID") and in locating a suspect simply by running a sample through a DNA database ("cold hit"). *See supra CPI Manual*, Section 29.13.

[3] Under the Innocence Protection Act and the D.C. Rules of Criminal Procedure, a criminal defendant in the District of Columbia has the right independently to test biological material involved in a case against him. *See supra CPI Manual*, Section 29.14.

the courtroom."[4] Problems also may arise when there are mixed samples, limited amounts of DNA, or biases over statistical interpretation of data from partial profiles." *See, e.g., Coy v. Renico*, 414 F. Supp. 2d 744 (E.D. Mich. 2006).

Finally, the Supreme Court recently has ruled that the Constitution's Confrontation Clause requires the prosecution, if it plans to present a laboratory report as evidence in a criminal trial, to make the analyst who prepared it available for on-demand cross-examination by defense counsel. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009) ("[T]he text of the Amendment contemplates two classes of witnesses – those against the defendant and those in his favor. The prosecution *must* produce the former; the defendant *may* call the latter. . . [T]here is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation."); *Tabaka v. District of Columbia*, 976 A.2d 173, 175-76 (D.C. 2009) (holding that certificates of no record are inadmissible pursuant to *Melendez-Diaz*); *Howard v. United States*, 929 A.2d 839 (D.C. 2007) (holding that DEA-7 is testimonial hearsay under *Crawford*); *Thomas v. United States*, 914 A.2d 1 (D.C.2006) (same).

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***Kaliku v. United States*, 994 A.2d 765 (D.C. 2010).** No due process violation for FBI laboratory supervisor to allow use of entire DNA sample without consulting prosecutor where defendants failed to show either bad faith in using entire sample or that substantial prejudice would occur due to the absence of samples for retesting.

II. DEMONSTRATIVE EVIDENCE

A. Foundational Requirements

More and more often in trials, counsel incorporate demonstrative evidence into the presentation of testimony. Unlike real evidence consisting of the objects and documents that were actually involved in the incident, demonstrative evidence serves as a visual aid to assist the fact finder in understanding the testimony of a witness. *3 Wharton's Criminal Evidence* § 16:1 (15th ed. 2008).

Demonstrative evidence "'when validly and carefully used' has a particularly powerful effect on the finder of fact." *Taylor v. United States*, 661 A.2d 636, 643 (D.C. 1995) (citations omitted). In addition to using demonstrative aids during a witness's testimony, counsel may also use them during their opening statement and closing argument to summarize or organize certain evidence. See, e.g., *U.S. v. Young*, 955 F.2d 99 (1st Cir. 1992) (in embezzlement prosecution, government's use of chart summarizing transactions during closing was proper, where chart was based on information already in evidence).

The "persuasive power" of demonstrative evidence obligates courts "to make a thorough foundational inquiry into its reliability before allowing its admission." *Taylor*, 661 A.2d 636, 643 (D.C. 1995). Additionally, the court must be satisfied that the evidence is "sufficiently

[4] National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* 99-100 (2009).

explanatory or illustrative of relevant testimony in the case to be of potential help to the trier of fact." *Brown v. United States*, 464 A.2d 120, 122 (D.C. 1983) (quoting *McCormick* § 212).

The foundation counsel must lay to use demonstrative evidence is somewhat different than that required when counsel seeks to introduce real evidence. *3 Wharton's Criminal Evidence* § 16:23 at 1. For most demonstrative evidence, it is sufficient to show that the demonstrative aid, whatever it is, fairly and accurately shows something that is relevant in the case and that it would be helpful to the witness to be able to refer to the exhibit while testifying. *Id.*

B. Admissibility

How much testimony is needed to lay an adequate foundation usually depends on the nature of the exhibit and its importance in the case. How much of a foundation will be required generally depends on the court and the particular demonstrative aid. *See, e.g., U.S. v. Taylor*, 210 F.3d 311 (5th Cir. 2000) (admitting organizational chart of participants in alleged drug conspiracy into evidence was not harmless). *But see Stallings v. State*, 235 N.E.2d 488 (1968) (diagram of apartment, in which defendant shot and killed victim during altercation, purporting to show location of three bullet holes was immaterial and irrelevant in absence of proof that holes were in any way related to shooting of victim or that holes were in fact bullet holes or that if holes were bullet holes that bullets were fired by defendant, and admitting diagram into evidence after proper objection was prejudicial error).

C. Examples

1. Illustrative Evidence

A party seeking to introduce diagrams must show, through testimony, that the diagram fairly and accurately portrays what the witness has seen and attempted to describe in testimony. *Brown*, 464 A.2d at 123. However, the proponent does not have to show that the illustrative evidence "perfectly mirror[s] the facts or conditions to be presented," provided that the jury is cautioned about the variance. *District of Columbia v. Chessin*, 61 F.2d 523, 525-26 (D.C. Cir. 1932) (diagram not drawn to scale properly admitted where witness explained discrepancies). The opponent of the evidence should *voir dire* the witness where the exhibit appears distorted or misleading, and offer evidence showing that the exhibit is inaccurate. *United States v. Hobbs*, 403 F.2d 977, 978 (6th Cir. 1968). If the diagram will be shown to more than one witness, all markings and alterations should be made on transparent overlays to avoid leading subsequent witnesses.

Courts permit demonstrative summaries usually in chart form to help a jury visualize complex facts, *see United States. v. Smyth*, 556 F.2d 1179, (5th Cir. 1977) (trial court did not err admitting FBI summaries of computer printouts of fraudulently billed time where court admitted the underlying documents and instructed jury that summaries were not evidence); *McDaniel v. U.S.*, 343 F.2d 785 (5th Cir. 1965) (chart admitted which summarized various computations to which a witness had testified), or to see relationships. *See, e.g., United States v. DeSimone*, 488 F.3d 561 (1st Cir. 2007) (summary chart prepared by FBI agent itemizing the defendant's receipt of payments and net profits relative to the sale of certain paintings was admissible as an aid to the

IRS agent's expert testimony; all the listed information had already been admitted into evidence); *United States v. King*, 616 F.2d 1034 (8th Cir. 1980) (in prosecution for willful tax evasion, trial court allowed in evidence and use by government's expert witness of organizational charts prepared by witness to illustrate various housing projects with which defendant was associated and which paid him consulting fees he allegedly failed to report on his income tax returns).

2. Demonstrations

The proponent of demonstrations and experiments to be conducted before the jury must show that the circumstances under which they will be performed are substantially similar to conditions existing at the time of the original occurrence. *See Taylor v. United States*, 661 A.2d at 643-44 (D.C. 1995) (citation omitted). Proffers should take place outside the presence of the jury. The opponent may request that the experiment itself be conducted as part of the proffer. *See Fed. R. Evid.* 103(c); *Williams v. United States*, 641 A.2d 479, 483 (D.C. 1994) (no abuse of discretion in allowing white prosecutor to place stocking over his face while crossing co-defendant to demonstrate possibility of recognizing one's face under stocking, even though co-defendant testified that stocking worn by prosecutor was lighter than the one worn by robber, where alleged robber was black, and government rebuttal witness testified that stocking prosecutor wore was similar to the one robber wore); *see also U.S. v. Birch*, 39 F.3d 1089 (10th Cir. 1994) (in prosecution for assault on federal officer and possession of firearm during violent crime, trial court properly permitted prosecution to conduct re-enactment of shooting in courtroom, using two courtroom chairs placed side by side to simulate front seat of car and asking defendant to show position of gun when it was fired; purpose of demonstration was to illustrate and clarify testimony already given by defendant on direct examination, defendant himself participated in demonstration, defense could have conducted redirect examination to correct any part of demonstration was potentially misleading to jury, and prosecution met its burden of demonstrating substantial similarity between courtroom demonstration and seating in defendant's car).

The requirement of substantially similar conditions also applies to jury viewings of a scene. Trial courts have broad discretion when ruling on requests for scene visits. It is reversible error, however, to deny a request when "to do so deprive[s] the jury of the means of better understanding and interpreting the evidence." *Washington Coca-Cola Bottling Works v. Kelly*, 40 A.2d 85, 87 (D.C. 1944). The court should consider the relevance of the viewing to contested issues, the feasibility of providing the information through other forms of evidence, and the extent to which the scene has changed since the alleged offense. *Minor v. United States*, 294 A.2d 171, 173 (D.C. 1972). The defendant must be present at any scene viewings. Super. Ct. Crim. R. 43.

3. Computer-generated Animations

An increasingly common form of demonstrative evidence is computer-generated evidence, usually consisting of animations or simulations. Computer animations usually consist of three types: models, demonstrations, and reconstructions. Models show how an object looks. For example, a computer animation can be used to re-create the home in which the crime occurred. A

demonstration shows how some physical principle works. For example, a ballistics expert may need to explain how a gun works. A reconstruction shows how an event occurred. For example, it might depict the sequence of events leading up to a shooting. *3 Wharton's Criminal Evidence* § 16:30 at 1.

The foundation required for any computer animation is highly specific to the exhibit. The foundation for an animation model could be supplied by any lay witness who is familiar with what is being re-created. The foundation for a demonstration could be supplied by an expert who can testify that it accurately reproduces the relevant laws of physics, chemistry, or biology that the jury needs to understand. The foundation for a reconstruction may require both the substantive expert and the producer of the animation. *Robinson v. Missouri Pacific R. Co.*, 16 F.3d 1083 (10th Cir. 1994) (admitting video animation illustrating expert's theory of how accident occurred not abuse of discretion).

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***Lloyd v. United States*, 64 A.3d 405 (D.C. 2013).** Error, though harmless, to permit jury to see without a cautionary instruction illustration of fist punching child's liver to show type of blunt force trauma where child had significantly more serious injuries to head and where expert testified that punch was "just an example" of something that could cause that type of injury to liver and that injury could have been caused by some other type of mishap.

III. MITIGATING THE PREJUDICE

There are various ways to mitigate the prejudicial impact of physical evidence. The defense may attempt to stipulate to facts that the government seeks to establish through the prejudicial evidence. However, the government is not required to stipulate. *See Wilkerson v. United States*, 427 A.2d 923, 927 (D.C. 1981) (photographs of complainant's body relevant and necessary to show forcible rape); *United States v. Sampol*, 636 F.2d 621 (D.C. Cir. 1980) (death scene evidence and autopsy reports admissible to show deliberation and premeditation); *United States v. Cockerham*, 476 F.2d 542, 545 n.4 (D.C. Cir. 1973) (description of murder wound admissible to show elements of offense and circumstances inconsistent with insanity defense). Irrelevant and unduly prejudicial information should be redacted from documents, recordings and transcripts.

The defense may also ask the court to exclude part of the proposed evidence as unnecessarily cumulative. *Johnson v. United States*, 613 A.2d 888, 895 (D.C. 1992) (trial court admitted two sets of photos of victim's burn, but excluded one set as unnecessarily cumulative). However, photographs may be admissible, even if cumulative, if their "probative value outweighs any prejudice from their use." *Hammond v. United States*, 501 A.2d 796, 798 (D.C. 1985) (citing *Pittman v. United States*, 375 A.2d 16, 19 (D.C. 1977)).

When prejudicial evidence is admitted, counsel should attempt to offset its prejudicial impact. Counsel may remind the jurors that they should not allow the nature of the offense or the evidence to influence their deliberations. *See Criminal Jury Instruction* No. 2.14. Counsel may also argue in closing that the evidence was not relevant to the issues and the jury should not let it prevent fair and dispassionate consideration of the disputed facts. These arguments should be used with caution, however, since they may highlight damaging evidence and intensify its prejudicial effect.

Mitigating Prejudice:

- ✓ Stipulate facts the government seeks to establish
- ✓ Irrelevant and unduly prejudicial information should be redacted from documents, recordings, and transcripts
- ✓ Exclude evidence that might be unnecessarily cumulative
- ✓ Take steps to offset the impact of any prejudicial evidence
  - Challenge relevance
  - Remind jurors to be fair and dispassionate
  - Be cautious not to highlight damaging evidence

IV. PRESERVING THE RECORD FOR APPEAL

An inadequate trial record will severely damage appellate challenge to admission or exclusion of evidence. Counsel should insist on adequate methods for recording such evidence. For example, diagrams should be drawn on paper instead of blackboards, and demonstrations not amenable to verbal descriptions should be videotaped. Requests for preservation of exhibits or diagrams must be made in a timely manner. *See Byrd v. United States*, 485 A.2d 947, 950 (D.C. 1984) (government did not destroy evidence when it removed photographs taped to diagram where defense had requested that diagram be redrawn for another witness and did not object to dismantling of exhibit). Counsel should make sure that all references to exhibits contain the exhibit number. Finally, after any conviction, counsel should request on the record that the clerk keep "the original papers and exhibits filed in the Superior Court." D.C. App. R. 10(a)(1). Although the rule is clear, some clerks return exhibits to counsel.

CHAPTER 31

HEARSAY

I. THE DEFINITION OF HEARSAY

Hearsay is [1] a statement [2] other than one made by the declarant while testifying at the trial or hearing, [3] offered in evidence to prove the truth of the matter asserted. Fed. R. Evid. 801(c); *Carter v. United States*, 614 A.2d 542, 545 n.9 (D.C. 1992) (Federal Rule 801(c) is consistent with well-settled law in the District of Columbia).[1]

A. Is It a Statement?

For purposes of hearsay analysis, a statement is an oral or written assertion or nonverbal conduct that is intended as an assertion. *Burgess v. United States*, 608 A.2d 733, 739-740 (D.C. 1992). The focus is on the declarant's intent.

In *Burgess*, the declarant was a passenger in a car that the defendant approached. The declarant called the defendant "Tony." The court held this statement non-hearsay on the grounds that when the declarant called the defendant "Tony," the declarant was not trying to introduce or otherwise identify "Tony" to anyone. Instead "the word Tony appears to have been no more than a salutation or the typical reference made in conversation." *See also Little v. United States*, 613 A.2d 880, 882 (D.C. 1992) ("no Marvin" not a statement because no evidence that declarant was intending to introduce or otherwise identify "Marvin" to anyone"). Of course, under *Burgess*, the same statement "Tony" would be hearsay if the declarant had been trying to warn others that "Tony" was present or otherwise convey that he was talking to an individual named Tony. *See Burgess*, 608 A.2d at 740.

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***Holmes v. United States*, 92 A.3d 328 (D.C. 2014).** Fact that witness observed actions about which he testified through video surveillance system rather than with his naked eyes is immaterial to operation of rule against hearsay.

***Kozlovska v. United States*, 30 A.3d 799 (D.C. 2011).** Error for trial court in bench trial to admit hearsay statements of maintenance workers through property manager that they had not given defendant permission to enter apartment building, which was only contested issue at trial, but harmless where trial court did not rely on hearsay statement in rendering verdict, instead finding defendant's testimony inconsistent and not credible.

[1] For a comprehensive annotation of the Federal Rules of Evidence to relevant Supreme Court and District of Columbia case law, please see the new edition of *The Law of Evidence in the District of Columbia*, originally authored by the late Judge Steffen Graae and Brian T. FitzPatrick, Esq., and with Judge Henry Greene as the new co-author, which is expected to be published in 2010.

***Diggs v. United States*, 28 A.3d 585 (D.C. 2011).** Grand jury testimony of witness who had reported defendants to police and testified against them before grand jury, but who later claimed to suffer from memory loss resulting from brain injury, properly admitted as prior inconsistent statement.

***Smith v. United States*, 26 A.3d 248 (D.C. 2011).** See, supra, Chapter 26.III.

***Jones v. United States*, 17 A.3d 628 (D.C. 2011).** Reversible error to admit hearsay statement made by an officer-witness to testifying officer that the officer-witness observed defendant drop a cigarette to the ground as they approached the defendant and two other men in an alley.

***Daniels v. United States*, 2 A.3d 250 (D.C. 2010).** Harmless error to admit hearsay testimony about robbery and retaliation to support government theory of ongoing feud as motive for other shooting where several witnesses provided motive testimony, hearsay witness's credibility seriously questioned on cross and additional evidence against defendant was "strong and compelling" and included threats, inculpatory statements and eyewitnesses to shooting.

***Wilson v. United States*, 995 A.2d 174 (D.C. 2010).** Any error in allowing detective to answer "no" to question regarding whether neighbors had seen defendant and deceased wife return home on night of wife's murder harmless where seeing their return would have been weak proof that defendant's account was untrue and where other evidence showed that defendant was neither at or near his home at the time in question.

B. Is the Statement Offered for Its Truth?

The last criterion – the purpose for which the statement is offered – is generally the most important in determining whether an out-of-court declaration is subject to the hearsay rule. A declaration that is not offered to prove the truth of its contents is not hearsay. Such declarations may be offered as circumstantial evidence of the declarant's state of mind, where state of mind is at issue (discussed *infra* Section II.E); as "legally operative facts," where the statements have legal significance regardless of their truth (as in a threats case); or to show their *effect* on the hearer, reader, or observer, in order to illuminate the person's motive or the reasonableness of the person's subsequent actions.[2] Counsel should beware of claims that a statement is being offered

[2] *See, e.g., Gamble v. United States*, 901 A.2d 159, 170 (D.C. 2006) (declarant's out-of-court statements identifying defendant as perpetrator of shooting were admissible through officer's testimony at suppression hearing; the statements were not hearsay because they were not offered for their truth, but rather "to demonstrate to the court why the police had reasonable suspicion to stop appellant and frisk him"); *Cox v. United States*, 898 A.2d 376, 380-82 (D.C. 2006) (trial court erred by precluding defense from cross-examining officer regarding defendant's statements to officer at the time of his arrest; statements were admissible as non-hearsay to prove that defendant had made such statements, and should have been admitted under rule of completeness, as they impeached another officer's testimony on the same subject); *Ko v. United States*, 722 A.2d 830, 836 n.17 (D.C. 1998) (en banc) (complainant's testimony that his daughter asked him to deliver a check to the defendant's sister was not hearsay); *Perritt v. United States*, 640 A.2d 702, 704-05 (D.C. 1994) (testimony that certain police paperwork listed defendant's nickname as same name witnesses gave for suspect; that defendant's mother told police she didn't have picture of him; and that defendant's attorney had sent letter asserting Fifth Amendment rights not to answer questions about case, admissible to explain investigative process that led to identification and arrest of defendant); *Freeland v. United States*, 631 A.2d 1186, 1190-91 (D.C. 1993) (threats made to defendant's family were offered for non-hearsay purpose of showing reason for defendant's flight on day his wife's dead body was discovered); *Jenkins*

for a purpose other than to prove its truth, where the effect of admitting the statement will be to suggest the truth of a matter it asserts. *See, e.g.*, *Patton v. United States*, 633 A.2d 800, 808 (D.C. 1993) (reversible error in admission of out-of-court statements by decedent's mother where it was clear that government was relying on their truth); *Battle v. United States*, 630 A.2d 211, 214-15 (D.C. 1993) (complainant's descriptions to police of sexual assault were not admissible to explain background of government's investigation); *Carter*, 614 A.2d at 545 (statement valuable as impeachment only if matter asserted therein was believed to be true).

Similarly, alternative means to make a point through non-hearsay testimony, such as by testimony about what was done without describing what was said, should be raised in objecting to admission of hearsay. *See, e.g., United States v. Deloach*, 654 F.2d 763, 770-71 (D.C. Cir. 1980) (error in prosecution for falsifying application for labor certification to admit testimony from Department of Labor employee that witnesses told him they never heard of address defendant gave in application, where employee could have testified that he sought but could not find place matching that address). Moreover, counsel should always be alert to the fact that even if the testimony is ruled non-hearsay, the evidence may still be objected to as unduly prejudicial. *Cf. Perritt v. United States*, 640 A.2d 702, 705-06.

When a party seeks to introduce hearsay and opposing counsel properly objects, the party seeking admission must identify an exception to the hearsay rule under which it is admissible. If counsel fails to object, the trier of fact may properly rely on the hearsay. *See, e.g., Rose v. United States*, 629 A.2d 526, 531 (D.C. 1993). Upon objection, the court must examine the testimony to determine whether the proper foundation has been laid. *See In re M.L.H.*, 399 A.2d 556, 558 (D.C. 1979). If an objection is raised to admission of a statement that is arguably admissible for a proper purpose, the proponent and the court must clarify the exception under which the statement is being admitted. *Patton v. United States*, 633 A.2d 800, 809-10 (D.C. 1993).

Rules of Evidence: Since there are no codified rules of evidence in the Superior Court of the District of Columbia, counsel must look to case law for governing principles. The Court of Appeals has expressly adopted some federal rules.[3] However, counsel cannot assume that decisions interpreting the federal rules will correspond exactly with the law applicable in Superior Court. A helpful source, annotating District of Columbia cases to the Federal Rules of Evidence, is Graae and Fitzpatrick, *The Law of Evidence in the District of Columbia*, Bar Association of the District of Columbia (4th ed. 2002).

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v. United States, 415 A.2d 545, 547 (D.C. 1980) (in prosecution for Bail Reform Act violation, error to exclude defendant's testimony that courthouse clerk told him his case was dismissed; statement offered to show basis for his good faith belief that he was not required to come to court). *But see United States v. Evans*, 216 F.3d 80, 87 (D.C. Cir 2000) (hearsay statements allegedly offered to show why police "did what they did" ruled inadmissible as irrelevant).

[3] *See, e.g., Smith v. United States*, 583 A.2d 975, 983 (D.C. 1990) (applying Fed. R. Evid. 406, habit evidence); *Butler v. United States*, 481 A.2d 431 (D.C. 1984) (adopting Fed. R. Evid. 801 (d)(2)(E), co-conspirator exception to hearsay rule); *Laumer v. United States*, 409 A.2d 190 (D.C. 1979) (en banc) (adopting Fed. R. Evid. 804(b)(3), statements against penal interest).

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***Garibay v. United States*, 72 A.3d 133 (D.C. 2013).** Trial court did not improperly rely on detective's testimony regarding complainant's demeanor during his interview with her because relevance of demeanor when discussing sexual assault did not depend on truthfulness of her report, but rather constituted independent evidence that she was victim of assault.

Hearsay:

- ✓ An out of court statement made by the declarant offered to prove the truth of the matter asserted

Non-hearsay:

- ✓ Declaration not offered to prove the truth of the matter asserted
- ✓ Circumstantial evidence as to state of mind
- ✓ Legally operative facts
- ✓ Effect on hearer, reader, observer, to illuminate motive, reasonableness

PRACTICE TIPS:

- ✓ Be aware of claims that statement is being offered for other purposes, but also suggest the truth of the matter asserted
- ✓ Even if determined that statement is not hearsay, the statement could be unduly prejudicial
- ✓ Make objections to hearsay statement as failure to do so will allow the statement to be entered into evidence and relied on
- ✓ When seeking to introduce hearsay and opposing counsel properly objects, identify an exception to the hearsay rule under which it is admissible

II. COMMON EXCEPTIONS TO THE RULE AGAINST HEARSAY[4]

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***Gee v. United States*, 54 A.3d 1249 (D.C. 2012).** Trial court did not err in precluding use and admission of 2009 NAS report as a learned treatise where court found many portions of it "common sense and understandable" and confirmed that no other court had accepted the relevant portions of the report as a learned treatise, court observed that it disagreed with "a couple of parts" of the report, no witness testified that report was "government publication" and defense counsel did not provide sufficient answer to government counsel's proffer and demonstration that statements in section at issue did not represent views of relevant scientific community.

***Mason v. United States*, 53 A.3d 1084 (D.C. 2012).** See, supra, Chapter 26.III.B.3.

[4] For a list of exceptions, *see* Fed. R. Evid. 803 and 804; *see also McCormick on Evidence*, § 253 (6th ed. 2006).

***Brooks v. United States*, 39 A.3d 873 (D.C. 2012).** Error to admit at defendant's retrial the prior recorded testimony of key prosecution witness who failed to appear at second trial after jury selection where government's efforts to secure her attendance at trial were not reasonably diligent, and thus inadequate to demonstrate witness's "unavailability."

A. Dying Declaration

1. Elements

(a) The declarant is dead at the time the statement is offered;

(b) At the time the statement was made, the declarant was aware that death was near and certain, and had abandoned all hope of living;

(c) The statement relates to the circumstances of the killing or events immediately preceding it;

(d) The defendant is on trial for killing the declarant.

2. Cases

"To make out a dying declaration, the declarant must have spoken without hope of recovery and in the shadow of impending death." *Shepard v. United States*, 290 U.S. 96, 99 (1933); *see also Bell v. United States*, 801 A.2d 117, 126-27 (D.C. 2002) (holding that trial court had erred in admitting shooting victim's dying declarations when the defendant knew he was in "critical condition" and "could die" as opposed to "without hope of recovery"). The requisite state of mind may be proven by the declarant's explicit words. *See, e.g.*, *United States v. Barnes*, 464 F.2d 828, 831 (D.C. Cir. 1972) (in hospital on day before she died, badly burned victim said, "I feel like I am going to die because I am too much in pain"). More often, the court is asked to "infer the victim's sense of impending death from the circumstances – from the nature and extent of his wounds." *McFadden v. United States*, 395 A.2d 14, 16 (D.C. 1978) (victim had been burned over seventy percent of his body, was unlikely to survive, was told that his condition was very serious, and acted fearful and panicky in presence of nurse); *see also Jenkins v. United States*, 617 A.2d 529, 530 (D.C. 1992) (victim had been stabbed ten times in limbs and major organs, was bleeding profusely, staggering and complaining of pain); *Butler v. United States*, 614 A.2d 875, 885-86 (D.C. 1992), (victim had been shot, was lying on back, gravely wounded, and unable to get up); *Lyons v. United States*, 645 A.2d 574, 581-82 (D.C. 1994), *vacated on other grounds*; *Lyons v. United States*, 683 A.2d 1066 (D.C. 1996) (decedent was lying on ground ten minutes after being shot, two weeks before dying from those injuries, groaning in pain and asking not to be moved because he had been shot too many times); *cf. Gayden v. United States*, 584 A.2d 578, 585 (D.C. 1990) (trial court denied admission of statement as dying declaration because victim believed he would survive; however, statement was admitted as a spontaneous utterance, discussed *infra* Section B).

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***Johnson v. United States*, 17 A.3d 621 (D.C. 2011).** No error to admit as dying declarations statements made to police officer by victim who suffered six gunshot wounds to chest and rib cage, lapsed in and out of consciousness during series of questions to which statements were responsive, and died a few hours later.

B. Spontaneous or Excited Utterance

1. Elements

(a) A serious occurrence causing a state of nervous excitement or physical shock in the declarant;

(b) A declaration made within a reasonably short period of time after the occurrence, so as to assure that the declarant did not reflect upon, premeditate, or construct the statement;

(c) Circumstances which in their totality suggest the spontaneity and sincerity of the remark.

2. Cases

When determining whether a statement qualifies as an excited utterance or spontaneous declaration, a court usually considers "the impetus for the statement, the length of time that passed between the serious occurrence and the statement, and whether the totality of circumstances suggests that the statement was made without prior reflection." *See In re L.L.*, 974 A.2d 859, 863 (D.C. 2009).

Usually, the statement at issue is, according to the proponent, directly caused by the event about which the statement is made. *See, e.g.*, *Simmons v. United States*, 945 A.2d 1183, 1187-89 (D.C. 2008) (testimony regarding anonymous bystander's out-of-court identification of someone other than appellant as shooter was admissible as an excited utterance, where declarant was elderly man who was obviously "scared and upset," and was mumbling to himself while pacing back-and-forth near the crime scene less than 15 minutes after shooting occurred); *Lazo v. United States*, 930 A.2d 183, 186 (D.C. 2007) (statement made while victim was fleeing from assailants were admissible as excited utterances, as they "met the requirements of shock or nervous excitement and spontaneity."); *Lyons v. United States*, 683 A.2d 1080, 1082-83 (D.C. 1996) (statement made ten minutes after victim was shot, as he was lying on the ground groaning in pain with a visible hole in his chest); *Gayden v. United States*, 584 A.2d 578, 585 (D.C. 1990) (trial court did not clearly err by admitting shooting victim's statement as spontaneous utterance, where statement was made shortly after declarant was shot six times and while he was rolling on doorstep in extreme pain).

Evidence that the declarant was highly distraught and in shock satisfies the first element. *See, e.g., Reyes v. United States*, 933 A.2d 785, 789-91 (D.C. 2007) (robbery victim's out-of-court

statements to police were admissible as excited utterances, where declarant was bleeding and in pain from a significant knife wound and was "very upset, highly agitated, scared and talking rapidly" when he made the statements to police, just minutes after the robbery); *United States v. Woodfolk*, 656 A.2d 1145, 1151 n.16 (D.C. 1995) (trial court entitled to consider tone and tenor of declarant's voice in 911 call in determining whether statement was an excited utterance); *Smith v. United States*, 666 A.2d 1216, 1221-22 (D.C. 1995) (recording of robbery victim's 911 call, made 15 minutes after the event and at the prompting of his mother, was admissible as an excited utterance where declarant's tone evidenced that he was in "a state of nervous excitement and shock"); *Price v. United States*, 545 A.2d 1219, 1125-27 (D.C. 1988) (declarant's statements regarding shooting she had witnessed three hours earlier were admissible as excited utterances, where statements were made during telephone call in which declarant became upset and began crying upon learning that victim actually had been hit and severely wounded); *Wheeler v. United States*, 211 F.2d 19, 23-24 (D.C. Cir. 1953) (10-year-old girl's out-of-court identification of defendant as sexual abuser was admissible as spontaneous declaration, where child was crying and "highly distraught" and made statement less than hour after being assaulted). *But see Walker v. United States*, 630 A.2d 658, 666 (D.C. 1993) (statement by defendant that he was not present during event was not an excited utterance because there was no evidence that the defendant was in a state of nervous excitement or physical shock at the time of the statement and because the circumstances indicated lack of spontaneity and sincerity of the statement).

Passage of Time: When evaluating whether a statement was the result of reflective thought or a spontaneous reaction to the exciting event, the amount of time that elapsed between the exciting event and the making of the statement is a factor "of great significance." *Fitzgerald v. United States*, 443 A.2d 1295, 1304 (D.C. 1982) (en banc) (child's reports made one day and ten days after alleged sexual assault not admissible). The shorter the interval of time between the exciting event and the statement, the more likely a court is to find that the statement qualifies as an excited utterance. *See, e.g., Simmons*, 945 A.2d at 1187-89 (statement made less than fifteen minutes after shooting admissible); *Lyons*, 683 A.2d at 1083 (statement made ten minutes after stabbing admissible); *Welch v. United States*, 689 A.2d 1, 4 (D.C. 1996) (rape victim's account of incident immediately afterwards to investigating police admissible); *Robinson v. United States*, 565 A.2d 964, 970 (D.C. 1989) (statement to police shortly after a rape was admissible); *Young v. United States*, 391 A.2d 248 (D.C. 1978) (statement made to phone shortly after stabbing admissible as excited utterance even though statement was made in response to an inquiry); *Harris v. United States*, 373 A.2d 590, 593 (D.C. 1977) (statement to police two hours after being shot admissible; interval was brief, and decedent was in the hospital suffering pain and trauma); *Nicholson v. United States*, 368 A.2d 561, 564 (D.C. 1977) (concluding that declarant's response to "what in the world happened," asked no more than thirty minutes after the declarant was stabbed and shortly before declarant died, was admissible as spontaneous utterance); *United States v. Kearney*, 420 F.2d 170, 175 n.11 (D.C. Cir. 1969) (statement made by decedent in response to questioning admissible even though twelve hours had elapsed between the shooting and the making of the statement because decedent/declarant was either in surgery or recovery during the twelve hour period); *Bandoni v. United States*, 171 A.2d 748, 750 (D.C. 1961) (18-year-old woman's statements regarding assault admissible as excited utterance or spontaneous declaration, where declarant was "highly distraught" and made statements an hour after assault).

In contrast, if a significant amount of time has passed between the shocking event and the statement, a court is likely to find that the statement is inadmissible as an excited utterance. *In re L.L.*, 974 A.2d 859, 862-65 (D.C. 2009) (trial court reversibly erred by admitting five-year-old girl's description of sexual assault, made six months after assault occurred, as spontaneous utterance; while declarant began to shake and cry when recounting the assault in response to questioning, she "clearly had not been in the throes of the traumatic episode…for the entire six months between the" assault and her statement); *Battle v. United States*, 630 A.2d 211, 214 n.2 (D.C. 1993) (fourteen-year-old complainant's statements to her aunt describing sexual assault six weeks earlier not admissible as excited utterance, although complainant was crying and distraught, because she had sufficient time given her age to reflect).

That the statement was made in response to questioning is relevant but not conclusive, as it is not automatically proof that the declarant reflected before speaking. *See Odemns v. United States*, 901 A.2d 770, 776-81 (D.C. 2006) (trial court committed reversible error by admitting testimony regarding out-of-court statements made by victim of a different armed robbery committed by defendant nine days after charged offense; where victim's statements were made in response to police questioning one hour after robbery occurred, detective's testimony that victim was "upset," "excited," "shaken," and "afraid" was insufficient to establish "element of spontaneity on which [the excited utterance/spontaneous exclamation] hearsay exception is based."). The questions police ask are pertinent. *See Reyes v. United States*, 933 A.2d 785, 791 (D.C. 2007) (declarant's response to police officer's inquiry "what happened," was admissible, where declarant had been robbed minutes earlier and was bleeding from knife wound).

Tenor and Tone of Voice: The tenor and tone of the declarant's voice is also relevant. *See Malloy v. United States*, 797 A.2d 687, 690-91 (D.C. 2002) (trial court corrected admitted 911 call based on caller's tone of voice, the promptness of the report, and the physical evidence consistent with the account); *Woodfolk*, 656 A.2d at 1151 n.16 (defense contention that complainants statements were not excited utterance because they were made in response to questioning deemed meritless: "[t]he trial court was entitled to consider the declarant's tone and tenor of voice on the tape recording in determining the issue of excited utterance"); *cf. Portillo v. United States*, 710 A.2d 883, 885 (D.C. 1998) (trial court erred in admitting complainant's statements as excited utterances where assault occurred the day before the interview with the police, complainant was "pretty calm" at the time of her statements, and statements were made in response to questions by the police through an interpreter); *Alston v. United States*, 462 A.2d 1122, 1128 (D.C. 1983) (statements inadmissible where child was acting normally and did not appear emotionally upset, and statements occurred several hours after offense and one hour after child awoke).

Whether a statement qualifies as a spontaneous utterance depends as much on the manner in which it is recounted at trial as on the circumstances under which it was made. For example, whether the statement contains a misrepresentation is relevant to determining whether it is an excited utterance. *Smith v. United States*, 666 A.2d 1216 (D.C. 1995). The misrepresentation may suggest that the statement is not a spontaneous reaction to the event but the result of conscious reflection by the declarant. *Id*. at 1225. *But see Malloy*, 797 A.2d at 690-91 (caller's subsequent statements to police concerning her observation of the events were not part of "core evaluation" whether the statements made during 911 call were excited utterances; rather, those

statements went to "the jury's overall assessment of the substance of what the caller said during the call"). Similarly, a police officer's chronological narrative of his 685-word report of a witness's lengthy statement was not a mere in-court repeating of a spontaneous remark. Accordingly, its admission was clearly erroneous. *Lyons v. United States*, 622 A.2d 34, 47 (D.C. 1993), *vacated on other grounds*, 650 A.2d 183 (D.C. 1994) "[T]he ultimate question . . . is whether the statement, *as reported at trial*, was 'a spontaneous reaction to the exciting event' rather than 'the results of reflective thought.'" *Lyons*, 622 A.2d at 47 (internal citation omitted) (emphasis added).

The trial court may not preclude a witness from testifying to another person's spontaneous utterance simply because it deems the testifying witness unreliable—such assessments of credibility should be "left to the jury," and go only to the weight of the evidence, not its admissibility. *Brisbon v. United States*, 894 A.2d 1121 (D.C. 2006) (error to preclude defendant's longtime friend from testifying about defendant's out-of-court statement, made shortly after shooting when defendant was shaking and hysterical).

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***Best v. United States*, 66 A.3d 1013 (D.C. 2013).** Court of Appeals reversed defendant's convictions for assault and attempted PPW, finding trial record insufficient to evaluate testimonial nature of individual statements made by complaining witness where trial court stated that "ongoing emergency" existed, but did not make any factual findings as to duration of that emergency.

***Brown v. United States*, 27 A.3d 127 (D.C. 2011).** Statements of beating victim who later died from his injuries, that included identification of defendant as assailant, properly admitted as excited utterances where they were made to first people who saw victim after beating that eventually proved fatal and were made as soon as he was "startled" into consciousness, despite uncertainty as to how much time may have passed between beating and subsequent statements.

***Castillo v. United States*, 75 A.3d 157 (D.C. 2013).** Reversible error to admit as "excited utterances" hearsay statements of witnesses to alleged "relatively minor" sexual assault because record could not support determination that statements had been made spontaneously and without reflection where up to two hours or more may have passed between incident and report.

***Graure v. United States*, 18 A.3d 743 (D.C. 2011).** Witness statements properly admitted as spontaneous utterances where they were made to a "shocked" crowd "within moments" of his emerging "completely burned" with smoke rising from his body from the back door of a club and where witness's physical condition, demeanor and tone of voice indicated worsening shock rather than calmness.

***Goodwine v. United States*, 990 A.2d 965 (D.C. 2010).** Tape of assault victim's 911 call and statements made to police upon arrival at scene properly admitted under both excited utterance and present sense impression exceptions to hearsay rule where call was made during course of assault and statements were made two to three minutes after assault ended while victim was still in "a state of nervous excitement."

***Melendez v. United States*, 26 A.3d 234 (D.C. 2011).** Trial court did not abuse its discretion in admitting as excited utterance statements of four-year-old child made at least an hour and forty-five minutes after murder where child witnessed murder and was thereafter driven straight home by the murderer who he feared might kill him if he said anything.

***Smith v. United States*, 26 A.3d 248 (D.C. 2011).** Excited utterance based on statement that the defendant "cut him" made shortly after stabbing insufficient to support admissibility of excited utterance where government presented no evidence of the declarant's demeanor that the statement was uttered while in a state of shock or nervous excitement.

C. Present Sense Impression

A separate and distinct yet closely related exception to excited utterance is the present sense impression – an out-of-court statement that describes or explains an event or condition made while the declarant was perceiving the event or condition or immediately thereafter. A present sense impression differs from an excited utterance because a shocking or startling event need not cause it, and the statement must describe what is perceived rather than reacting to it. *See Walker*, 630 A.2d at 666; *Burgess v. United States*, 608 A.2d 733, 739 (D.C. 1992).

In *Hallums v. United States*, 841 A.2d 1270 (D.C. 2004), the Court of Appeals formally recognized the exception for present sense impression. The court defined the exception to include "statements describing or explaining events which the declarant is observing at the time he or she makes the declaration or immediately thereafter." *Id.* at 1276. It distinguished between excited utterances and present sense impressions by explaining that "[t]he time within which an excited utterance may be made is measured by the duration of the stress, while present sense impressions may be made only while the declarant is actually perceiving the event, or immediately thereafter – a more circumscribed time period than that permitted for excited utterances."

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***Goodwine v. United States*, 990 A.2d 965 (D.C. 2010).** See, *supra*, Chapter 31.II.B.2.

D. Complaint of Rape or Sexual Assault

Historically, because corroboration was required in sex offenses, a report of rape made to the third person shortly after the crime could be admitted. *See Fitzgerald*, 443 A.2d 1295 (D. C. 1982). The corroboration requirement has been abolished in all sex offense cases, regardless of the sex or age of the victim or the perpetrator. *See* D.C. Code § 23-114; *Gary v. United States*, 499 A.2d 815, 833-34 (D.C. 1985).

Nevertheless, *Battle*, 630 A.2d at 217, held that abolition of the corroboration requirement does not preclude introduction of a complainant's reports to others of a sexual assault. *Battle* upheld the complaint of rape exception as necessary to negate jurors' assumptions that if there is no evidence of a complaint, no complaint was made. *Id*. at 217-21; *accord Galindo v. United States*, 630 A.2d 202, 209 (D.C. 1993). "Under the report-of-rape rule, testimony that the complainant reported that she was the victim of a sexual assault was admissible 'not for the truth

of the matter asserted, but merely for the fact that the statement was made.'" *Battle*, 630 A.2d 216-17 (quoting *Fitzgerald v. United States*, 443 A.2d 1295, 1304 (D.C. 1982) (en banc)). The court also reasoned that the exception was necessary to negate prejudices held by some jurors by showing that the victim behaved as society traditionally has expected sexual assault victims to act, i.e., by promptly telling someone of the crime. Additionally, the court found that such evidence rebuts an implied charge of recent fabrication, which comes from some jurors' assumption that a victim's failure to report a crime promptly is inconsistent with the victim's in-court statement that the assault occurred. This exception also has been found to cover prior reports of a consensual sexual relationship with a minor in the context of a child sexual abuse prosecution. *Williams v. United States*, 756 A.2d 380, 386 (D.C. 2000).

This exception permits use of the fact, but not the details, of the complaint. *Galindo*, 630 A.2d at 209 (under the rule, "a witness may testify that the complainant stated that a sexual crime occurred and may relate the detail necessary to identify the crime."). A complaint by a sex crime victim may also qualify as a spontaneous utterance, in which case the details of the declaration may also be admitted as substantive evidence. *See, e.g.*, *White v. Illinois*, 502 U.S. 346 (1992), discussed *supra* Section B; *Baber v. United States*, 324 F.2d 390 (D.C. Cir. 1963); *United States v. Nick*, 604 F.2d 1199 (9th Cir. 1979).

E. Prior Recorded Testimony

1. Elements

(a) The declarant is unavailable at trial (discussed in detail *infra* Section III.B.1);

(b) The former testimony was given under oath or affirmation in a legal proceeding;

(c) The issues in the two proceedings were substantially the same;

(d) The party against whom the testimony is now offered had the same opportunity and motivation to cross-examine the declarant at the former proceeding.

Bedney v. United States, 684 A.2d 759, 763 (D.C. 1996); *Feaster v. United States*, 631 A.2d 400, 405 (D.C. 1993); *Skyers v. United States*, 619 A.2d 931, 933-34 (D.C. 1993); *see also* D.C. Code § 14-303 (testimony of deceased or incapable person admissible). Even when these elements exist, the judge has discretion to exclude prior recorded testimony if its prejudicial effect outweighs its probative value. *See Feaster*, 631 A.2d at 405.

a. Issues substantially the same

The trial court in *Skyers* permitted use of the complainant's testimony about a previous kidnapping, elicited at appellant's bail hearing. The Court of Appeals agreed that the "testimony at the bail hearing [went] directly to the heart of an issue at trial – whether appellant's conduct constituted a kidnapping." *Skyers*, 619 A.2d at 935. Cross-examination at the hearing had been "essentially unlimited," and the defense had been able to explore lack of coercion and to impeach the witness's credibility. *Id.* Thus, the defense "did in fact explore the issue ultimately to be

resolved at trial – appellant's asserted guilt of the kidnapping charges." *Id*. at 934. By contrast, *Dudley v. United States*, 715 A.2d 866 (D.C. 1998), upheld a refusal to allow the defendant to introduce exculpatory statements made at a co-defendant's aborted plea proceeding, holding that because the plea broke down, the issues that were raised in the defendant's trial never had the opportunity to arise during the plea proceeding. *Epstein v. United States*, 359 A.2d 274, 278 (D.C. 1976), in contrast, upheld a refusal to admit into evidence a transcript of a police officer's testimony from an earlier proceeding, because the cross-examination at the earlier proceeding had been directed at the officer's credibility, while the issue at the later hearing was the validity of the warrant.

b. Opportunity and motivation to cross-examine

Prior recorded testimony is admissible only if the party against whom the testimony is offered had an opportunity and the same or a similar motive in questioning the witness at the former proceeding as in the later proceeding. *Dudley v. United States*, 715 A.2d 866 (D.C. 1998) (co-defendant's prior testimony inadmissible because plea broke down, therefore, prosecutor did not cross-examine co-defendant); *Bedney v. United States*, 684 A.2d 759, 765 (D.C. 1996) (co-defendant's prior plea testimony inadmissible because government was not permitted to explore subject thoroughly in prior cross-examination); *Akins v. United States*, 679 A.2d 1017, 1030 (D.C. 1996) (government should not have been allowed to introduce prior grand jury and trial testimony of witness because appellant was not able to cross-examine witness at either proceeding); *Feaster*, 631 A.2d at 407 (defendant was entitled to introduce grand jury testimony of witness because government had same motive and opportunity to cross-examine at grand jury as at trial); *Jones v. United States*, 483 A.2d 1149, 1155-56 (D.C. 1984) (co-defendant Britt sought to introduce the grand jury testimony of a deceased who had testified in the grand jury about his identification of co-defendant Jones but did not testify about his non-identification of Britt; trial court's exclusion of the grand jury testimony proffered by Britt upheld because the witness had been called for limited purposes in the grand jury and "the opportunity for cross-examination at the grand jury was no substitute for the opportunity to cross-examine the witness at trial"); *cf. Alston v. United States*, 383 A.2d 307 (D.C. 1978) (defendant should have been permitted to introduce prior recorded testimony of former co-defendant who asserted Fifth Amendment privilege at Alston's trial and had pled guilty at hearing at which he had been sworn and examined by prosecutor about nature and extent of Alston's involvement).

Counsel's assistance during a prior proceeding may have been ineffective, rendering the cross-examination so incompetent that the "opportunity to cross-examine" requirement is not met. *See United States v. Hsu*, 439 A.2d 469, 472-73 (D.C. 1981) (the effectiveness of the prior cross-examination must be explored where unusual circumstances exist at the time of the previous cross-examination, such as the defendant proceeding *pro se*; however, cross-examination by *pro se* defendant Hsu deemed effective).

F. State of Mind

The purpose of the state-of-mind exception is "allowing into evidence out-of-court statements of the declarant to prove his or her state of mind when that is directly called into issue." *Clark v. United States*, 412 A.2d 21, 28-29 (D.C. 1980). For example, in *Hairston v. United States*, 500

A.2d 994 (D.C. 1985), the defendant claimed self-defense in a homicide case. The court ruled that evidence showing that the decedent complained about not getting respect from the defendant and said "either I am going to kill him or he is going to kill me" was admissible under the state-of-mind exception. *Id*. at 997-98.

Situations such as the one in *Hairston* must be carefully distinguished from situations in which the proffered state-of-mind evidence is not hearsay – that is, not intended to prove the truth of its contents. In *Freeland v. United States*, 631 A.2d 1186 (D.C. 1993), the appellant, on trial for the murder of his wife, had left town the day his wife's body was discovered. Threatening statements made by acquaintances of the appellant to him and his family were ruled admissible, but not through the state-of-mind exception. The evidence that threats had been made were not offered for their truth, i.e., that confederates really would kill appellant if he testified. Rather, they were offered solely to demonstrate the impact that they had on appellant so he could argue to the jury that the threats had prompted him to leave town. *Id*. at 1190-91.

Admissibility of statements under the state-of-mind exception to the hearsay rule is discretionary, and probative value must be weighed against any potential to cause prejudice, confusion or delay. *Nelson v. United States*, 601 A.2d 582, 596 (D.C. 1991).

The mental state of a defendant, complainant or witness may be directly in issue or relevant because declarations of intentions provide circumstantial proof of subsequent acts. Relevant states of mind may include intention, purpose, design, motive, assent, belief, affection, desire, malice, fear, and submission. The evidentiary context can make a state of mind relevant. In *Nelson*, 601 A.2d 582, for example, the court upheld admission on redirect examination of a tape recording of a government witness's reaction upon learning of the decedent's death, where cross-examination accusing the witness of having murdered the decedent himself put the witness's state of mind in issue. *Id*. at 596-97. *But see Blackson v. United States*, 979 A.2d 1 (D.C. 2009) (trial court properly excluded statements by driver of car in which defendant was a passenger, as driver's state-of-mind was not at issue in case); *Bowman v. United States*, 652 A.2d 64, 68 (D.C. 1994) (defendant's state of mind before he went to witness's house irrelevant in burglary case; defendant's state of mind when he entered house several hours later was relevant); *Walker v. United States*, 630 A.2d 658, 666 (D.C. 1993) (excluding defendant's alleged reaction to news of decedent's death because defendant's state of mind was not an issue in view of defense being presented).

The state of mind exception has been analyzed extensively in homicide cases where the government offers statements the decedent allegedly made. The declarant's "state of mind must be relevant to some material issue in the case as, for example, where an issue of self-defense, suicide, or accidental death is raised by defendant." *United States v. Brown*, 490 F.2d 758, 774 (D.C. Cir. 1973). Brown, charged with murder, asserted alibi; the government introduced evidence that the decedent had been afraid Brown was going to kill him. The circuit court reversed.

> [A] victim's extrajudicial declarations of fear of the defendant are admissible under the state of mind exception to the hearsay rule with a limiting instruction only if there is a manifest need for such evidence, i.e., if it is relevant to a material

> issue in the case. Where there is a substantial likelihood of prejudice to the defendant's case in the admission of such testimony, it is inadmissible if it bears only a remote or artificial relationship to the legal or factual issues raised in the case. Even where there is substantial relevance, the additional factual matters in the statements may simply be too explosive to be contained by the limiting instruction, in which case exclusion of the testimony is also necessitated.

Id. at 773-74. Even if the evidence is technically admissible, the trial court must weigh its actual probative value against its potential for prejudice.

> [T]he proximity of the statement to the central issues is a key factor in determining the degree of prejudice. For example, the simple statement "I am afraid" contains no extraneous factual matters; and if the declarant's state of mind is at all relevant, there is very little conceivable prejudice to the defendant. However, the statement "I am afraid of D" is more dangerous. It gives rise to the natural inference that there has been some past conduct on the part of defendant to justify such a fear, e.g., past beatings or threats, or even that the statement accurately reflects on defendant's state of mind and intentions. For example, where the trial is for murder by stabbing, the statement, and "I am afraid that D is going to knife me" is much further along on the spectrum of possible prejudice. If descriptions of past conduct are also added in, the prejudicial dangers are even greater, e.g., "I am afraid that D will knife me – he has attacked me with a butcher knife twice last week."

Id. at 776 (footnotes omitted). The court specifically recognized that such evidence is inadmissible to show the *defendant's* state of mind:

> The principal danger is that the jury will consider the victim's statement of fear as somehow reflecting on *defendant's* state of mind rather than the victim's – i.e., as a true indication of defendant's intentions, actions or culpability. Such inferences are highly improper and where there is a strong likelihood that they will be drawn by the jury the danger of injurious prejudice is particularly evident.

Id. at 766; *see also Bennet v. United States*, 375 A.2d 499 (D.C. 1977).

In *Gezmu v. United States*, 375 A.2d 520 (D.C. 1977), numerous witnesses testified to what the decedent had told them about her troubled marriage to the defendant. One testified about two previous altercations between the defendant and the decedent a few weeks before the fatal shooting. The Court of Appeals found such testimony particularly relevant and admissible in marital homicide cases. *Id*. at 522. Relying in part on *Brown,* it found the testimony properly admitted not only to show the decedent's state of mind, which the defense had placed in issue, but also to establish the defendant's malice and motive. *Id.*[5]

[5] *Hill v. United States*, 600 A.2d 58 (D.C. 1991), found that evidence of prior instances of hostility, including an assault, was admissible to show the motive and identity of the assailant in a marital homicide case. While some of the evidence consisted of hearsay accounts of what the decedent told police, the prosecutor, and family members about the incident, the court analyzed its admissibility on *Drew* rather than hearsay grounds.

Counsel should be alert to the problem identified in *Brown* concerning specific prior incidents. *See Campbell v. United States*, 391 A.2d 283 (D.C. 1978). Campbell claimed that his fatal shooting of his girlfriend was an accident caused by her assault on him. Some hearsay testimony reflecting the decedent's state of mind was probative on the defense of accidental death, and properly admitted. But certain statements, which were "essentially . . . hearsay accounts of appellant's past conduct rather than depictions of the decedent's state of mind," *id*. at 287, were unduly prejudicial. Especially damaging were the decedent's reported statements that the defendant had once held a gun to her head all night until she assured him that she had not slept with another man, and that whenever she received a telephone call the defendant beat her because he thought "it was somebody calling her for a date or something." *Id*. at 288. The court reversed the conviction.

A similar problem arose in *Giles v. United States*, 432 A.2d 739 (D.C. 1981). In this self-defense case, a witness testified that some months before the death the decedent said that the defendant, his common-law wife, had stabbed him. The trial court committed a double error; first, the statement was inadmissible as to the deceased's state of mind because it was a statement of a prior specific act of the accused. *Id*. at 745. Second, the judge erroneously instructed the jury that it could consider the evidence on the issue of the *defendant's* state of mind. *Id*.; *see also Rink v. United States*, 388 A.2d 52 (D.C. 1978); *Smith v. United States*, 381 A.2d 258 (D.C. 1977).

(David) Clark v. United States, 412 A.2d 21 (D.C. 1980), strictly limited *Gezmu* to those situations in which the declarant's state of mind is at issue. The trial court had admitted testimony about the decedent's statements regarding her fear of the defendant, threats and assaults by the defendant, and her intention to see the defendant on the day of the murder at the place where she was killed. The Court of Appeals held that there was no relevant issue as to the decedent's state of mind at the time of or before the murder.

> [T]he defendant failed to raise any of the three defenses – accident, self-defense, or suicide by the decedent – which traditionally have been understood to call into question the state of mind of the deceased declarant. . . . What is at issue in this case is the identity of the decedent's murderer.

Id. at 28. The court held that the decedent's state of mind was irrelevant to the real issues – whether the defendant had a motive to commit the murder, was capable of committing the murder, and was at the scene of the crime the day it was committed. "This being the case, there can be no question that the traditional function of the state-of-mind exception, as a means of allowing into evidence out-of-court statements of the declarant to prove his or her state of mind when that is directly called into issue, is not implicated in the present case." *Id*. at 28-29; *see also (Oliver) Clark*, 593 A.2d 186 (D.C. 1991) (reversible error to admit decedent's statements about defendant's prior violent acts where decedent's state of mind not an issue); *Fox v. United States*, 421 A.2d 9, 12 (D.C. 1980) (error to admit hearsay testimony regarding victim's fear of the defendant where only issue presented in the case was the identity of the murderer, not state of mind of the victim).

Clark further made clear that while the declarant's statements may be admissible to show his own state of mind, the declarant's statements regarding the defendant's (or anyone else's) state of mind are not admissible. Under *Clark*, the state of mind exception "permits the introduction of a person's out of court declarations of future intent to perform an act, to show that the act actually was performed." *(David) Clark*, 412 A.2d 21, 29 (D.C. 1980). In other words, the declarant's statement "I am going to the movies tomorrow" would be admissible; the declarant's statement that "I am going to the movies tomorrow with Jim," however, would not be admissible to show that Jim went to the movies.

Self-defense and State of Mind: The defense will most often seek to introduce hearsay evidence of state of mind in self defense cases such as evidence of the decedent's prior threats against the defendant. As discussed above, the trial court in *Hairston v. United States*, 500 A.2d 994 (D.C. 1985), excluded evidence that the decedent (Hairston's girlfriend) had complained about not getting respect from the defendant and said, "Well, either I am going to kill him or he is going to kill me." The Court of Appeals found that the threat fell within the state of mind exception to the hearsay rule:

> In self-defense cases, "the victim's mind is of particular concern to the jury." Thus when this defense is raised, it is generally recognized that hearsay evidence of prior threats is probative of whether the defendant was likely to be the aggressor in the altercation and whether the defendant reasonably apprehended imminent, serious bodily harm from the decedent.

Id. at 997-98 (citation omitted).

The declarant's state of mind was found relevant to whether her death was accidental in *Jones v. United States*, 398 A.2d 11 (D.C. 1979). A witness testified that the decedent had said she intended to leave Jones, with whom she had been living. Jones was seen standing at the top of a flight of stairs, at the bottom of which was the decedent's body, after a noise that sounded like something falling down the stairs. The issue was whether the fall was accidental or deliberate, and the court found the hearsay admissible. *Id*. at 12-13.

The complainant's state of mind was also found to be relevant in a case where the defendant offered a defense of fabrication to a charge of sodomy on a minor. *See Keene v. United States*, 661 A.2d 1073 (D.C. 1995). The evidence was a tape recording the complainant made in which he evinces a fantasy of being forced into oral sex by one of his counselors. The court ruled that the probative value of the tape to the defense of fabrication was not outweighed by its possible prejudicial effect, since the defendant was one of the complainant's counselors, and the charge was one of forced oral sex. *See id*. at 1079.

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***Mason v. United States*, 53 A.3d 1084 (D.C. 2012).** Trial court did not abuse its discretion in admitting recorded jail calls made by defendant where parties disagreed as to what phone calls meant, but where jury could have interpreted calls to show defendant's consciousness of guilt.

G. Physical Condition

A declaration about a then-existing physical condition is admissible as substantive evidence where the declarant's physical condition at the time of the out-of-court statement is relevant to a material issue, on the theory that such statements are spontaneous and therefore trustworthy. See *Mitchell v. United States*, 569 A.2d 177, 186 (D.C. 1990) (the decedent's statement to her neighbor, on the day she was killed, that she was in pain from menstrual cramps was admissible to show that she would not have consented to have sex with the defendant); *Guthrie v. United States*, 207 F.2d 19, 23 (D.C. Cir. 1953) (upholding admission of testimony that a witness heard the decedent say, "Whatever you are doing please don't do this to me," on the grounds that the statement indicated something physically painful or unpleasant was being done to the decedent and showed her revulsion or alarm). Descriptions of past pain or injuries do not qualify (although they may be admissible as statements made for the purpose of medical diagnosis or treatment, discussed *infra* Section M). The Federal Rules of Evidence combine this exception with the state of mind exception. *See* Fed. R. Evid. 803(3).

H. Prior Identification or Description

D.C. Code § 14-102 (b)(3) provides that "[a] statement is not hearsay if the declarant testifies at trial or hearing and is subject to cross examination concerning the statement and the statement is . . . an identification of a person made after perceiving the person." In other words, evidence that a witness made an out-of-court identification (at a show-up, line-up, "second sighting," or from a photograph) is admissible to prove identity, provided the identifying witness is available for cross-examination at trial.[6] *Edelen v. United States*, 627 A.2d 968, 972-73 (D.C. 1993) (error for prosecutor to elicit testimony about an out-of-court identification made by a witness who was unavailable for cross-examination). *But see Lewis v. United States*, 930 A.2d 1003 (D.C. 2007) (harmless error where defense elicited and made full use of testimony concerning declarant's out-of-court identification of defendant, where declarant did not testify at trial). The rationale for this exception is the belief that:

> [T]he earlier identification has greater probative value than an identification made in the courtroom after the suggestions of others and the circumstances of the trial may have intervened to create a fancied recognition in the witness' mind. . . . The failure of the witness to repeat the extrajudicial identification in court does not destroy its probative value, for such failure may be explained by loss of memory or other circumstances.

Gilbert v. California, 388 U.S. 263, 272-73 n.3 (1967). *See also Edelen v. United States*, 627 A.2d 968, 972-73 (D.C. 1993); *Clemons v. United States*, 408 F.2d 1230, 1243 (D.C. Cir. 1968).

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[6] Defense use of an out-of-court identification was addressed in *Gates v. United States*, 481 A.2d 120 (D.C. 1984), a trial for rape and robbery, in which the government introduced *Drew* evidence of a prior similar incident. The defense attempted to introduce "reverse-*Drew*" evidence regarding another incident in which a different complainant had wrongly identified Gates as the aggressor in a rape. At trial, the defense could not locate the complainant for the misidentification theory, and proffered the officer who had witnessed the misidentification. The court affirmed exclusion of the testimony as inadmissible hearsay because the identifying witness was unavailable for cross-examination.

But see Simmons v. United States, 945 A.2d 1183 (D.C. 2008) (out-of-court identification by an unavailable declarant admissible under the excited utterance exception).

The exception also permits introduction of prior descriptions. *Morris v. United States*, 389 A.2d 1346 (D.C. 1978); *see also Brown v. United States*, 881 A.2d 586 (D.C. 2005) (detective's notes and transcript of detective's prior sworn testimony containing descriptions of drug dealer's apparel were admissible as a "prior identification"); *Battle*, 630 A.2d at 215 (evidence that complainant had stated appellant sexually assaulted her was admissible under prior identification or description exception, but statements recounting details of offense were not); *Scott v. United States*, 619 A.2d 917, 923 (D.C. 1993) (defense could have sought admission of police reports containing description of robber under prior identification exception); *Harrison v. United States*, 526 A.2d 1377, 1379 (D.C. 1987) (complainant's out of court identification of handgun admissible); *Harley v. United States*, 471 A.2d 1013 (D.C. 1984) (extending the *Morris* rationale to descriptions of physical objects); *United States v. Coleman*, 631 F.2d 908, 913 (D.C. Cir. 1980) (officer's notes recording description of defendant, properly admitted as statement of identification).

Counsel should object when the government seeks to introduce a prejudicial out-of-court identification that lacks sufficient indicia of reliability. *In re L.D.O.*, 400 A.2d 1055, 1057 (D.C. 1979), reversed because the complainant's testimony "dissipated the predicate of an arguably reliable extra-judicial identification necessary to admit hearsay corroboration." Because the prior identification was unreliable, the "justification for admitting this hearsay evidence vanished." *Id*. The complainant had selected the respondent's photograph from an array. At trial the complainant testified that he had selected the photograph "that kind of favored the fellow that had the gun" but that he "couldn't be positive," he had been under medication at the time of the identification and had blurred vision, and he had told the detective that he could not be even forty percent sure of the identification. *Id*. at 1056. He was not asked to make an in-court identification. The detective who was present at the identification then testified that the complainant had chosen the respondent's photograph and had said "he was fairly certain about his choice because he had seen [the respondent] in the neighborhood before." *Id*. at 1057. *L.D.O.* also ruled that the witness's recantation of the prior identification rendered him "in essence, unavailable for cross-examination since an attempt to examine the witness about an event he denies or cannot remember is an exercise in futility." *Id*. at 1058. *Fletcher v. United States*, 524 A.2d 40 (D.C. 1987), reversed for similar reasons. The complainant testified that Fletcher was not the robber and that he did not get a good look at the person who robbed him. The government then elicited a detective's testimony that the complainant had previously identified Fletcher. The complainant's repudiation at trial rendered the extra-judicial identification unreliable, and his testimony that he did not get a good look at the robber left no effective basis for cross-examination attacking the identification. *Id*. at 43.

Fatal unreliability might also have existed in *Beatty v. United States*, 544 A.2d 699 (D.C. 1988), where the robbers were viewed for only 45 to 50 seconds, the witness's attention was focused on the gunman, not the bagman (alleged to be Beatty), none of the other witnesses identified appellant, the description of the person who was the bagman varied significantly from appellant's appearance, and the witness was not asked to make an in-court identification and admitted on cross-examination that he was not sure that appellant was the bagman. These

circumstances created such concerns about the reliability of the identification that had the issue been presented to the trial court, a serious question regarding the admissibility of the identification would have existed. (It was not, and the court reversed based on insufficient evidence.)

Although the Court of Appeals has apparently held in numerous cases that a witness's repudiation at trial "rendered the earlier statement inadmissible hearsay," *Fletcher*, 524 A.2d at 43, several decisions have also upheld admission even in the face of a repudiation. In *Scales v. United States*, 687 A.2d 927 (D.C. 1996), for example, the court upheld admission of a prior identification that was repudiated by the witness on redirect. The court in *Scales* concluded that "the trial court may accept as credible, for purposes of determining whether the hearsay rule applies, the witness's original testimony [on direct]." *Id*. at 932. In fact, in *Sparks v. United States*, 755 A.2d 394 (D.C. 2000), the court seemed to distance itself somewhat from the *Fletcher* and *L.D.O.* opinions in the context of a repudiation, noting that those cases were both "decided before the Supreme Court's opinion in *Owens*." *Id*. at 400 n.5. *United States v. Owens*, 484 U.S. 554 (1988), was a case wherein the Supreme Court noted that "given adequate safeguards against suggestiveness, out-of-court identifications [are] generally preferable to courtroom identifications." *Id.* at 562 (see further discussion below). The court in Sparks found that "even if [the government witness's] testimony were to be regarded as a clear denial that Elias and Jesse Sparks assaulted him," evidence of his prior identification of Mr. Sparks was nonetheless properly admitted where the witness was available for cross-examination and the identification was "trustworthy and reliable," in light of the fact that the witness had known Mr. Sparks all his life. *Sparks v. United States*, 755 A.2d at 400.

Likewise, the fact of a witness's memory loss may not necessarily render testimony regarding a prior identification inadmissible. In *United States v. Owens*, 484 U.S. 554 (1988), the complainant named the defendant and identified him from photographs. At trial, the complainant testified that he could not remember seeing his assailant nor could he recall whether someone had suggested the defendant's name to him. The Supreme Court held that neither the defendant's Sixth Amendment right to confront witnesses nor Fed. R. Evid. 801(d)(1)(c) was violated by the complainant's loss of memory; the defendant had an opportunity for effective cross-examination by impeaching the complainant with his loss of memory, and such testimony would tend to discredit the prior out-of-court identification testified to by the FBI agent. *Id*. at 557-64.

Williams v. United States, 478 A.2d 1101 (D.C. 1984), discussed what police could and could not testify about the statements of identifying witnesses in three different fact situations. First, the court found error in allowing police testimony about an on-scene identification by a witness who did not testify at trial. Second, it approved admission of testimony by an officer who could not recall the name of the identifying witness who "just made a remark and that led me to believe that this was one of the persons that perpetrated the crime." *Id*. at 1104. The tentative nature of the testimony did not render it inadmissible because all three witnesses who participated in the show-up testified about identifying the defendant. Finally, the court approved admission of an officer's testimony that a witness did not identify the defendant by name but by the stripes in his shirt and his height relative to the other robber. At trial, the identifying witness reiterated that description. Since her failure to name the defendant was not a disavowal of her on-the-scene identification, the officer's testimony regarding her identification was admissible.

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***Diggs v. United States*, 28 A.3d 585 (D.C. 2011).** Witness's call to police in which he identified defendants as persons who confessed commission of murder directly to witness himself admissible under prior identification exception.

***Graham v. United States*, 12 A.3d 1159 (D.C. 2011).** Statement "Kamau's [Walker's] friend, Dave [Graham]" in response to question "And who did you tell them did it [i.e., the shooting]?" properly admitted as prior statement of identification because statement identified defendant as shooter and declarant was available for cross-examination.

***King v. United States*, 51 A.3d 512 (D.C. 2012).** Trial court did not err in admitting as prior identifications statements made by gunshot victim while lying on ground in which he named defendant as shooter and when asked how he knew him, stated, "He tried to rob my brother," where robbery statement was not offered to prove that defendant had actually tried to rob victim's brother.

***Lewis v. United States*, 996 A.2d 824 (D.C. 2010).** No abuse of discretion to admit evidence that defendants had previously been identified by robbery victim where witness identified defendants both under oath at grand jury and in statements made to police and prosecutor and where witness testified at trial and was available for cross-examination.

***Melendez v. United States*, 26 A.3d 234 (D.C. 2011).** Trial court did not plainly err in admitting police officer's testimony that eyewitness identified defendant as murderer to him where eyewitness identified defendant at trial as murderer and made in-court and photographic identifications of defendant.

Trial court did not err in admitting four-year-old witness's out-of-court photographic identification of defendant where prior to identification witness had given police defendant's name, witness had opportunity to focus on defendant before, during and after murder, and witness's testimony that he had never seen defendant before murder was contradicted by adult witness's assertion that "of course" he had met defendant before day of murder.

I. Declaration against Interest

1. Elements

(a) The declarant is unavailable (discussed *infra* Section III.B.1);

(b) "[C]orroborating circumstances clearly indicate the trustworthiness of the statement;

(c) The declarant knew when making the statement that it was against his or her interest; and

(d) The statement was against the declarant's proprietary, pecuniary, or penal interest.

See Laumer v. United States, 409 A.2d 190, 196 (D.C. 1979) (en banc).[7]

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***McCorkle v. United States*, 100 A.3d 116 (D.C. 2014).** Notwithstanding revisions to commentary on Federal Rule of Evidence 804(b)(3), trial judge did not err in making judicial determination regarding credibility of witness to establish admissibility of statement against penal interest implicating third party because defendant failed to cite en banc D.C. Court of Appeals or Supreme Court authority to the contrary.

2. Cases

The proponent must prove that the witness is unavailable – for example, refusing to testify on the basis of a valid privilege. *Laumer*, 409 A.2d at 199-200. In deciding whether the declarant made the proffered statement, the focus is on the veracity of the witness who testifies that the statement was made. *Id*. at 199. As to trustworthiness, relevant considerations are (1) the time of the declaration and the party to whom it was made; (2) the existence of corroborating evidence; and (3) the extent to which the declaration is really against the declarant's penal interest.[8] *Id*. at 200; *see Ingram v. United States*, 976 A.2d 180 (D.C. 2009) (insufficient indicia of trustworthiness where defendant's friend confessed to shooting eight months after incident, made statement to defendant's attorney, gave contradictory accounts to defense counsel and the grand jury, and said he would testify to statement only if he would not go to jail); *Gilchrist v. United States*, 954 A.2d 1006 (D.C. 2008) (insufficient indicia of trustworthiness where declaration was made five years after murder, the closeness of the relationship between the declarant and the witness was unclear, and the witness's testimony incorrectly specified where murder took place); *Brown v. United States*, 542 A.2d 1231, 1235-36 (D.C. 1988) (excluding statement made to counsel three months after events); *United States v. Edelin*, 996 F.2d 1238, 1242 (D.C. Cir. 1993) (insufficient indicia of trustworthiness, where defense investigator obtained statement from defendant's relative on day of trial and no other witnesses corroborated it). The declarant must be aware of the deserving quality of the statement. *Laumer*, 409 A.2d at 201 n.15. A reviewing court will not disturb the trial court's finding on admissibility unless it is clearly erroneous. *Id*. at 203; *see Henson v. United States*, 399 A.2d 16 (D.C. 1979) (trial court properly excluded statements of co-defendant, who testified at Henson's parole hearing that certain guns recovered by police belonged to co-defendant and not to Henson; proffered testimony lacked indicia of trustworthiness and appeared to have been fabricated to protect Henson).

Laumer involved the standard for admitting declarations that *exculpate* the accused;[9] the *Laumer* standard has also been applied to statements *inculpating* the accused. In *Lyons v. United States*,

[7] While traditionally this exception included only statements against proprietary or pecuniary interest, Fed. R. Evid. 804(b)(3) and *Laumer* expanded it to include declarations against penal interest. *See also Harris v. United States*, 668 A.2d 839, 843 (D.C. 1995) (recognizing the admissibility of statements against penal interest).

[8] *See Void v. United States*, 631 A.2d 374, 386 n.27 (D.C. 1993) (upholding refusal to admit co-defendant's out-of-court statement that he had been at scene but had not killed decedent because it was not against his penal interest).

[9] *See, e.g., Ford v. United States*, 616 A.2d 1245, 1251 (D.C. 1992) (harmless error, in exclusion of testimony to third party's admission to offense; statement was a declaration against penal interest that exculpated defendant).

514 A.2d 423 (D.C. 1986), the trial court permitted police testimony that an unindicted accomplice had admitted involvement with the defendant in the robbery. Although the Court of Appeals extended the reach of *Laumer* to include statements against penal interest which inculpate, rather than exculpate, the defendant, it held that admission of the statement in that case was error (albeit harmless) because the trial court failed to ascertain whether the witness was unavailable.

The trial court in *Irby v. United States*, 585 A.2d 759 (D.C. 1991), *overruled on other grounds by Carter v. United States*, 684 A.2d 331 (D.C. 1996), precluded the defense from offering a sworn affidavit of a witness in which he exculpated the defendant and inculpated himself in the weapons charges. The Court of Appeals upheld the finding that the defense had not shown that the witness had been subpoenaed, could not be found, had fled the jurisdiction, or was beyond the subpoena power of the court. *Irby*, 585 A.2d at 765. Moreover, the statement "did not have the usual indicia of trustworthiness." *Id*. The affidavit was executed three months after the incident; it was not made to a relative or person with whom the declarant had a relationship indicating trust; and it was not significantly against his penal interest because he was already facing three weapons-related charges and thus was unlikely to face significantly greater liability for charges related to an additional gun. *Id.*; *see also Harris v. United States*, 668 A.2d 839, 843 (D.C. 1995) (holding self-inculpatory affidavit executed 8 months after the crime by defendant's cellmate inadmissible due to lack of corroborating evidence).

While the *confession of a co-defendant* may be a declaration against interest and the co-defendant's refusal to testify may render the co-defendant unavailable, the use of such evidence raises confrontation issues and in a joint trial may be proscribed by *Bruton v. United States*, 391 U.S. 123 (1968); *see Smith v. United States*, 312 A.2d 781, 786 (D.C. 1973); *United States v. Coachman*, 727 F.2d 1293, 1292 (D.C. Cir. 1984). *But see Bedney v. United States*, 684 A.2d 759, 765 (D.C. 1996) (co-defendant's statement that appellant not involved in drug sale not against penal interest because it did not expose him to any greater criminal liability than that to which he had already exposed himself by pleading guilty).

Williamson v. United States, 512 U.S. 594, 600-01 (1994), held that Federal Rule of Evidence 804(b)(3) does not allow admission of statements that are "non-self-inculpatory, even if they are made within a broader narrative that is generally self-inculpatory." In *Williamson*, the government attempted to introduce the police statement of a witness, who later refused to testify at trial. The police statement contained assertions that inculpated the witness as well as statements which implicated the defendant. The government argued that the aggregate effect of the statement was inculpatory and therefore sufficiently trustworthy, even those parts of the statement that implicated the defendant but not the witness. The court held that "the [trial] court may not just assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else." *Id*.

However, *United States v. Hammond*, 681 A.2d 1140, 1145 (D.C. 1996), held that "*Williamson* did not announce a categorical rule that incriminating references to a person other than the declarant can never be self-inculpatory." The court did recognize that "such references are suspect at best," and are not self-inculpatory "if they are 'merely attempts to shift blame or curry favor.'" *Id*. (*citing Williamson*, 512 U.S. at 603). Thus, trial courts must engage in a "fact-

intensive inquiry . . . to determine whether the inculpatory references to other individuals were also "sufficiently against the declarant's penal interest." *Hammond*, 681 A.2d at 1146. *See (Keith) Thomas v. United States*, 978 A.2d 1211, 1227-33 (D.C. 2009) (trial court erred by admitting defendant's statement that "him and [co-defendant] was going to finish that shit with [their deceased friend]" as statement against penal interest, where statement was ambiguous and made prior to charged killing, and did not clearly expose declarant to criminal liability *at the time he made it.*")

The court applied these principles in *Doret v. United States*, 765 A.2d 47 (D.C. 2000). There, at issue was whether a dead confederate's statements inculpating himself in drug-dealing were admissible. The court held that they were not properly admitted as statements against penal interest because they would not have exposed the declarant to "criminal liability based on his own explicit admission," *id.* at 65, and because the statements did not bear "particularized guarantees of trustworthiness." *Id.*:[10] *cf. (Keith) Thomas* 978 A.2d at 1227-33) (defendant's non-testimonial statement that "I killed him, [co-defendant's] gun jammed," made to a family member in private shortly after the charged murder, was properly admitted as substantive evidence against defendant and co-defendant as statement against penal interest).

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***Hagans v. United States,* 96 A.3d 1 (D.C. 2014).** Constitutional error to admit redacted plea offers of rival gang members into evidence as statements against penal interest, but reversal not required because not shown beyond a reasonable doubt that error contributed to verdict where extrajudicial statements were made by rival gang members, not co-conspirators, and statements did not directly implicate defendants or prove any charges against them.

J. Past Recollection Recorded

1. Elements

(a) the witness must have had first-hand knowledge of the event;

(b) the written statement must be an original memorandum made at the time of the event and while the witness had a clear and accurate memory of it;

(c) the witness must lack a present recollection of the event; and

(d) the witness must vouch for the accuracy of the written memorandum.

Carey v. United States, 647 A.2d 56, 58 (D.C. 1994) (citing *Mitchell v. United States*, 368 A.2d 514, 517-18 (D.C. 1977) (per curiam)).

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[10] The court in *Doret* excluded the statements both under evidentiary rules and under the Sixth Amendment's Confrontation Clause. *See* 765 A.2d at 68. The Court's Confrontation Clause analysis inquiring into whether the statements contained "particularized guarantees of trustworthiness" is no longer applicable in light of *Crawford v. Washington*, 124 S. Ct. 1354 (2004). *See infra* III.B.

2. Cases

Carey, 647 A.2d 56, held that the witness's statement to the police the night of the shooting identifying the defendant as the shooter was admissible as a past recollection recorded. Despite the witness's lack of memory at the trial about the shooting and the statement to the police, the court found no violation of the Sixth Amendment right to confrontation. The court found that the witness was available for cross-examination and was, in fact, cross-examined by defense counsel on her failure to remember the events on the night of the shooting.[11]

In *Pickett v. United States*, 822 A.2d 404 (D.C. 2003), the court held that it was not error for the trial court to have admitted a 10-year-old's videotaped interview at the Children's Advocacy Center concerning the alleged sexual abuse and a undelivered letter containing similar statements. At issue was whether the child witness had vouched for the accuracy of the earlier statements. The court stated that "we adhere to the rule that the witness must confirm the accuracy of the recorded statement, but we also agree that unless the witness has expressly repudiated it on the stand the trial judge may consider all of the circumstances in finding the requisite confirmation, including the demeanor of the witness in court-evincing, for example, hostility or reluctance to testify-as well as the conditions under which the out-of-court statement was made." *Id.* at 406. Applying that rule, the court held that the child witness had vouched for the accuracy of the prior statements despite her equivocal statements about their truthfulness. *See id.* at 407.

See also Isler v. United States, 824 A.2d 957 (D.C. 2003), in which the court held that grand jury testimony of two witnesses allowed at trial because they had seen the crime take place and neither witness repudiated their testimony at trial, though they claimed that they could neither recall the events nor their grand jury testimony.

K. Admission of a Party Opponent

1. Elements

Words or conduct[12] of a party may be offered in evidence against the party.[13] Unlike other exceptions to the rule against hearsay, the rationale for this exception rests on the adversary theory of litigation, and not on any notion of special reliability concerning the circumstances of the out-of-court statement. *See Akins v. United States*, 679 A.2d 1017, 1030 (D.C. 1996); *Johns v. Cottom*, 284 A.2d 50, 53 (D.C. 1971) ("The basis for allowing an admission into evidence is the ability of the party to rebut the testimony thereby avoiding the danger of the hearsay rule, that

[11] The police statement had been read to the grand jury because the witness also had no memory before the grand jury. The court recognized that the grand jury testimony could be characterized as containing hearsay within hearsay. *Carey*, 647 A.2d at 59 n.4. The government conceded at oral argument that the grand jury testimony should not have been read into evidence at the trial because, unlike the police statement, it was not the past recollection recorded. *Id.* at 58 n.3.

[12] *See Gale v. United States*, 391 A.2d 230, 235 (D.C. 1978) (voluntary "restitution" to burglary victims may be regarded as "admission by conduct").

[13] Although the government's ability to introduce a defendant's words as conduct may be limited by other principles. *See, e.g., United States v. Alexander*, 718 A.2d 137 (D.C. 1998) (post-Miranda silence).

is, the inability to cross-examine an out-of-court assertion.") (citation omitted). If a party said something earlier that is inconsistent with what that party asserts at trial, the prior statement may be admitted as substantive evidence of the truth of the matter asserted. The statement is offered against the party, but need not have been against the party's interest when it was made. It may consist of an opinion, and need not have been based on the declarant's personal knowledge. Typically, statements, admissions or confessions of defendants may be admitted under this exception. *See United States v. Williams*, 697 A.2d 1244, 1249 (D.C. 1997) (citing *Chaabi v. United States*, 544 A.2d 1247, 1248 (D.C. 1988)).

The relevant parties in a criminal case are the defendant and the United States; the complainant's statement is not admissible under this exception. However, out-of-court statements by the government, particularly statements contained in pleadings which have been filed, may be admitted against the government under this exception. *See, e.g.*, *Freeland v. United States*, 631 A.2d 1186, 1191-95 (D.C. 1993) (pleading filed by the United States Attorney for the Eastern District of Virginia admissible as admission of party opponent in D.C. trial); s*ee also Harris v. United States*, 834 A.2d 106, 121-22 (D.C. 2003) (police affidavit in support of a search warrant signed by Assistant United States Attorney was a party admission admissible against government); *United States v. Morgan*, 581 F.2d 933, 937-38 & n.10 (D.C. Cir. 1978) (sworn affidavit submitted in support of search warrant represented position of the government; admissible as admission of party opponent).

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***Matthews v. United States*, 13 A.3d 1181 (D.C. 2011).** Trial court did not err in admitting co-defendant statement that did not implicate defendant in that statement did not reference defendant by name or any nickname and trial court instructed jury twice that statement could be used only in assessing co-defendant's guilt or innocence.

2. Defendant's Admission

Unlike with a prior inconsistent statement used to impeach, the party offering an admission need not confront the declaring party before introducing it. *Powell v. United States*, 414 A.2d 530, 533 (D.C. 1980). However, the party against whom an admission is offered must be given an opportunity to explain it. The trial court in *Chaabi v. United States*, 544 A.2d 1247 (D.C. 1988), allowed the government to introduce Chaabi's extra-judicial admission for the first time on rebuttal, and denied him any opportunity to explain or deny it in sur-rebuttal. The Court of Appeals reversed, holding that the justification for allowing admissions into evidence – *i.e.*, that as a party to the action, the declarant has a full opportunity to explain or deny any out-of-court assertion either on the witness stand or through other evidence – is undermined if the party is not given an opportunity to explain "the specific circumstances and nature of the admission itself, including a flat denial that such an admission was ever made." *Id*. at 1249.

Nevertheless, the defendant need not testify to personally contradict a prior statement before it can be introduced against him. *Powell*, 414 A.2d at 533 (upholding testimony on rebuttal that defendant, who did not testify, had said at time of arrest that he was somewhere other than where his four alibi witnesses testified to); *accord Davis v. United States*, 623 A.2d 601, 604 (D.C.

1993) (upholding admission of testimony by defendant's parole officer in government's rebuttal case that address which defendant was required to and did give him matched residence in which drugs were found and contradicted testimony of defendant's mother and sister that defendant lived elsewhere); *Harris v. United States*, 612 A.2d 198, 202-03 (D.C. 1992) (at probation revocation hearing in which defendant did not testify but in which defendant's attorney challenged validity of positive drug test results, trial court could treat defendant's prior statements requesting continuance of revocation hearing to enroll in drug treatment program as admission of illegal drug use); *see also Smith*, 312 A.2d at 785 (police officer testified to overhearing defendant threaten a witness); *United States v. Robinson*, 530 F.2d 1076, 1079-83 (D.C. Cir. 1976) (proper to allow admission that defendant and alibi witness were involved in a "joint venture" buying and selling drugs). *See generally* IV Wigmore, *Evidence*, §§ 1048-1067 (Chadbourn rev. 1972); *McCormick on Evidence*, §§ 254-258 (6th ed. 2006).

3. Vicarious Admissions

While "admissions" are usually the statements of the defendant, they may be made *vicariously* – that is, by someone other than the party against whom the statement is offered.

a. Co-conspirator statements

Vicarious admissions are frequently encountered when the government moves to admit statements of the defendant's co-conspirators against the defendant. *Butler v. United States*, 481 A.2d 431 (D.C. 1984), adopted Fed. R. Evid. 801(d)(2) as controlling in D.C.:

> [A] coconspirator's out-of-court assertions may be admitted as non-hearsay evidence . . . only if the prosecution proves that (1) a conspiracy existed, (2) the defendant had a connection with the conspiracy, and (3) the coconspirator made the statement during the course of and in furtherance of the conspiracy.

Id. at 439; *accord Chavarria v. United States*, 505 A.2d 59, 62 (D.C. 1986). "To be admissible, the statements must satisfy both the 'in the course of' and the 'in furtherance of' requirements." *Williams v. United States*, 655 A.2d 310, 313 (D.C. 1995) (as modified); *see also Fiswick v. United States*, 329 U.S. 211, 217 (1946) ("confession or admission by one co-conspirator after he has been apprehended is not in any sense a furtherance of the criminal enterprise" and thus post-arrest admissions inadmissible against co-conspirators); *McCoy v. United States*, 760 A.2d 164,181-82 (D.C. 2000) (statements and letters by one defendant made two weeks to two years after the murder in which he sought through intimidation to conceal the crime were inadmissible hearsay as to the other co-defendants); *Akins v. United States*, 679 A.2d 1017, 1028 (D.C. 1996) (statements made after the conspiracy not within co-conspirator exception to the hearsay rule).[14] *But see Walker v. United States*, 982 A.2d 723 (D.C. 2009) (testimony referring to directions given by alleged co-conspirators to prove charge of conspiracy not considered out-of-court hearsay assertion and thus application of *Butler* rule not triggered). In *United States v. Brockenborrugh*, 575 F.3d 726 (D.C. Cir. 2009), the Court of Appeals for the D.C. Circuit observed that "despite its use of the word 'conspiracy,' Rule 801(d)(2)(E) allows for admission

[14] *Akins* held that in a joint conspiracy trial where the government relies on a theory of vicarious liability, statements may not be introduced under any hearsay exception that is not reliability based unless they are admissible as co-conspirator statements in furtherance of the conspiracy under *Butler*. *Akins*, 679 A.2d at 1028.

of statements by individuals acting in furtherance of a lawful joint enterprise." 575 F.3d at 735 (affirming admission of co-defendant's statement to third-party at defendant's trial, where the record contained "ample evidence" that defendant and co-defendant were "engaged in a lawful joint enterprise" at the time the statement was made).

Before an alleged co-conspirator's statements can be admitted against the defendant, the government must present "independent non-hearsay evidence" that it is "more likely than not" that a conspiracy existed, and that the defendant participated in it. *Butler*, 481 A.2d at 439-41. Except in "very unusual circumstances," the court should make the requisite determinations during the prosecution's case-in-chief, and should not conditionally admit the evidence subject to eventual establishment of the conspiracy. *Id*. In *Butler*, the court concluded that the co-conspirator's statements should not have been admitted because the government failed to establish the existence of a conspiracy. *Id*. at 442. In contrast, the *Williams* court found that dividing the spoils of the crime was "in furtherance of the conspiracy" and thus the co-conspirator's statements were properly admitted. *Williams*, 655 A.2d at 314. A substantive crime of conspiracy need not be charged as long as there is evidence that "'two or more defendants were joint participants in the commission of substantive offenses.'" *Butler*, 481 A.2d at 439-41 (quoting *United States v. Jackson*, 627 F.2d 1198, 1216 (D.C. Cir. 1980)). *See generally* IV Wigmore, *Evidence*, § 1079 (Chadbourn rev. 1972); *McCormick on Evidence*, § 259 (6th ed. 2006).

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***Harrison v. United States*, 76 A.3d 826 (D.C. 2013).** Not error to admit statements under co-conspirator exception to the hearsay rule where court did not explicitly rule that predicate conspiracy existed at the time statements were made because adequate evidence was presented and the statements were otherwise admissible under alternative hearsay exceptions.

***Jenkins v. United States*, 80 A.3d 978 (D.C. 2013).** Statements made between co-defendants during recorded jail phone calls were admissible for non-hearsay purpose as verbal acts probative of conspiracy and members' identity, but should not have been admitted against each other under the co-conspirator hearsay exception as truth of what the hearsay declarant asserted.

b. Adoptive admissions

The statement of another, when it "clearly appears that the accused understood and unambiguously assented to" the statement, is properly admitted as an adoptive admission. *Holmes v. United States*, 580 A.2d 1259, 1263 (D.C. 1990) (quoting *Skiskowski v. United States*, 158 F.2d 177, 181-82 (D.C. Cir. 1946)) (footnote omitted); *see also Naples v. United States*, 344 F.2d 508, 511 (D.C. Cir. 1964), *overruled on other grounds by Fuller v. United States*, 407 F.2d 1199, 1230 (D.C. Cir. 1967). "[E]vidence of 'tacit' or 'adoptive' admissions is replete with possibilities for misunderstanding, and '[t]he cases repeatedly emphasize the need for careful control of this otherwise hearsay testimony.'" *Holmes*, 580 A.2d at 1263 (citation omitted). Where, as in *Holmes*, an adoptive admission was allegedly made to someone who was trying to elicit an admission, the potential for misapprehension is enhanced. *Holmes* cautioned that the adoptive admission doctrine may provide "'an open invitation to manufacture evidence' or to

make something out of nothing or very much out of very little." *Id*. (citation omitted). The test is whether a "reasonable jury could properly conclude that the defendant *unambiguously* assented to" the statement. *Id*. at 1264; *see also Brown v. United States*, 464 A.2d 120, 123-25 (D.C. 1983); *Morgan*, 581 F.2d at 937-38 (government adopted informant's statements that appeared in affidavit submitted to magistrate).

A party's silence in the face of another person's statement, which the party would naturally have been expected to deny if untrue, may be admitted as circumstantial evidence of the party's belief in the truth of the statement. *See United States v. Hale*, 422 U.S. 171, 176 (1975); *Comford v. United States*, 947 A.2d 1181 (D.C. 2008) (admission of drunken defendant's silence when confronted by witness regarding presence of gun in car did not constitute plain error). Failure to object to another person's assertion is especially probative of acquiescence if the statement was made in the presence of a third party who was not an accomplice. *See Blackson v. United States*, 979 A.2d 1, 6-8 (D.C. 2009) (defendant's silence properly admitted as adoptive admission where witness placed defendant at conversation and established that defendant did not dispute version of crime, despite presence of non-accomplice third party); *Robinson v. United States*, 606 A.2d 1368, 1371 (D.C. 1992); *Brown*, 464 A.2d at 124; *see also Graves v. United States*, 490 A.2d 1086, 1106 (D.C. 1984) (en banc), *overruled on other grounds by Sell v. United States*, 525 A.2d 1017 (D.C. 1997) (defendant did not object to statement accusing him of murder but instead told declarant to "shut up"). *But see Foreman v. United States*, 792 A.2d 1043, 1052 (D.C. 2002) (defendant's silence in the face of a false identification given to police by girlfriend was not an unambiguous assent to the falsehood to constitute an adoptive admission where defendant was "barely clad, and in the presence of multiple police officers who had a valid warrant for his arrest"). The Fifth Amendment, however, makes the theory of adoptive admissions by silence inapplicable to a defendant who is in police custody. *Doyle v. Ohio*, 426 U.S. 610, 617-18 (1976); *Hale*, 422 U.S. at 176-77. *See generally* IV Wigmore, *Evidence*, § 1071 (Chadbourn rev. 1972); *McCormick on Evidence*, §§ 261-64 (6th ed. 2006); Fed. R. Evid. 801(d)(2) (classifying admissions by a party opponent as non-hearsay); Saltzburg and Redden, § 801(d) (2).

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***Dowtin v. United States*, 999 A.2d 903 (D.C. 2010).** See, *supra*, Chapter 19.II.B.1.

***Wilson v. United States*, 995 A.2d 174 (D.C. 2010).** No Confrontation Clause violation to admit videotape of defendant's conversation with friend that included statements asserting or implying that defendant had killed wife and that provided sole evidence that friend had supplied defendant with gun one week before murder because apparent to jury that statements made to elicit confession, not to act as evidence themselves, and constituted adoptive admissions where defendant failed to deny truth of statements even when made in presence of third party.

L. Business Records

1. Elements

The business records exception is codified in Fed. R. Evid. 803(6) and Super. Ct. Civ. R. 43-I, which applies in criminal cases under Super. Ct. Crim. R. 57(a). As the court summarized in *Meaders v. United States*, 519 A.2d 1248 (D.C. 1986):

> The party seeking admission of a document under the business records exception must demonstrate, through a competent witness, (1) that the record was made in the regular course of business, (2) that it was the regular course of business to make such a record, and (3) that the record was made at, or within a reasonable time after, the act, transaction, occurrence, or event which it reports.

Id. at 1255. In addition to these requirements,

> the party must also prove that the maker of the records had personal knowledge of the facts set forth in that record or, if not, that the facts were communicated to the maker, directly or indirectly, by one who was acting in the regular course of business and who had such personal knowledge.

In re D.M.C., 503 A.2d 1280, 1282-83 (D.C. 1986) (citation omitted); *see also Clayburn v. District of Columbia*, 741 A.2d 395, 398 (D.C. 1999).

Other circumstances surrounding the manner in which the writing or record was made, including the maker's lack of personal knowledge, may affect the weight given to the writing, but not its admissibility. The term "business" includes "business, profession, occupation, and calling of every kind." Super. Ct. Civ. R. 43-I(a).

Critically, even where a document may be properly admitted as a business record, counsel should be alert to the presence of any objectionable hearsay within the document itself. The D.C. Court of Appeals has observed that "[i]t is imperative to keep in mind that two inquiries must be made about business records: whether the record itself qualifies under the exception, and whether any statement in the record is itself hearsay that is not covered by an exception to the hearsay rule." *Evans-Reid v. District of Columbia*, 930 A.2d 930, 943-44 (D.C. 2007) (FRE 803(6) does not permit admission of a document as a business record when the document "contain[] hearsay or conjecture or conclusions"); *see also United States v. Smith*, 521 F.2d 957, 964-65 (D.C. Cir. 1975) ("while [FRE 803(6), as codified by federal statute] exempts the maker of the record from the requirement of personal knowledge, it allows admission of the hearsay only if it was reported to the maker, directly or through others, by one who is himself acting in the regular course of business, and who has personal knowledge").

2. Cases

Among the many different types of records to which this exception applies, those of particular significance to defendants in criminal cases include:

Probation/parole reports chronicling the extent of compliance with conditions of release are admissible as business records. *Harris v. United States*, 612 A.2d 198, 202 (D.C. 1992) (records contained in probation file); *Patterson v. United States*, 570 A.2d 1198, 1199-1201 (D.C. 1990) (probation violation reports are official records kept in ordinary course of Probation Department business and bear "'recognized indicia of reliability'") (citation omitted); *Wright v. United States*, 570 A.2d 731 (D.C. 1990) (halfway house records).

Medical/hospital records are admissible if "composed solely of '[r]egularly recorded factors as to the patient's condition or treatment on which the observations of competent physicians would not differ.'" *Adkins v. Morton*, 494 A.2d 652, 662 (D.C. 1985) (citation omitted). Medical entries describing the patient's appearance, physical signs and diagnosis are admissible because they are made routinely in the course of admitting and treating patients. *Clements v. United States*, 669 A.2d 1271 (D.C. 1995); *Sullivan v. United States*, 404 A.2d 153, 158-59 (D.C. 1979). The business records exception does not apply to statements in medical records regarding the complainant's version of the cause of the injuries, which the complainant has no duty to relate, and which are not objective medical data that the hospital has a duty to record. *Id*. at 158. *But see infra* Section M (statements made for purpose of medical diagnosis). Nor does the exception include diagnoses involving subjective judgment about which physicians would differ in the absence of quantitative analysis, such as a diagnosis of PCP intoxication, which is not admissible. *Durant v. United States*, 551 A.2d 1318, 1324-25 (D.C. 1988) (but diagnosis of alcohol intoxication is a matter about which competent physicians are not likely to differ, and possesses sufficient indicia of reliability to be admissible).

Police reports are generally not admissible when offered by the prosecution, either as substantive evidence or for impeachment, because the business records exception does not apply to documents prepared with an eye toward litigation. *See generally United States v. Smith*, 521 F.2d 957, 965-66 (D.C. Cir. 1975). However, police reports may be admissible when offered by the government when the documents are not prepared solely with an eye toward litigation. *See Montgomery v. United States*, 517 A.2d 313, 316 (D.C. 1986) (police reports regarding the conditions and contents of police vehicles are admissible because preparing such reports is part of "routine police procedures designed to serve several internal administrative purposes, not to aid a prosecution"); *United States v. Coleman*, 631 F.2d 908, 912 (D.C. Cir. 1980). (DEA forms and lock-sealed envelopes are admissible because they contain only skeletal information and are prepared to preserve a record of the chain of custody of the evidence).

In contrast to restrictions on the government's attempt to introduce police reports under this exception, the defense may admit reports as substantive evidence so long as the author of the information contained in the report had a duty to complete the document. *See Smith*, 521 F.2d at 962-63. Statements of third parties with no such duty may still be admissible if they fall within another exception to the hearsay rule. *Id*.; *see also Leiken v. United States*, 445 A.2d 993, 996 n.1 (D.C. 1982); *Sellman v. United States*, 386 A.2d 303, 306 (D.C. 1978).[15]

[15] Of course, the foundation requirements still must be met prior to the document's admission. *See Meaders*, 519 A.2d at 1255 (MPD Medical Examination Form properly excluded when defense failed to establish that the portion of the form filled out by the examining physician met the requirements of a business record). *See infra* Section II.K.4.

Report of results of drug tests: The Pre-trial Services Agency and the APRA (formerly ADASA) drug treatment program administer drug tests which have been held admissible, without the testimony of a chemist having personal knowledge of the accuracy and reliability of the specific tests at issue.[16] *Harris*, 612 A.2d at 201-02 (upholding admission of ADASA drug test results in probation revocation hearing because they had sufficient regularity and reliability to permit reliance on them, particularly in revocation hearing, which is not subject to same procedural formalities as a trial); *Jones v. United States*, 548 A.2d 35, 39 n.3 (D.C. 1988) (upholding admission of Pre-trial Services Agency EMIT drug test results because records contained objective facts rather than expressions of opinion and bore sufficient indicia of reliability); *United States v. Roy*, 113 Wash. D.L. Rptr. 2317, 2322-23 (D.C. Super. Ct., Nov. 15, 1985) and 114 Wash. D.C. Rptr. 2481 (D.C. Super. Ct., Dec. 1, 1986) (positive results of EMIT test sufficient to withstand MJOA in contempt proceeding for violation of conditions of pre-trial release).

PSA reports: These reports contain some information that is admissible if it is standard practice for the PSA workers to record the information and there are no additional hearsay problems. *See United States v. Cicero*, 22 F.3d 1156, 1163-64 (D.C. Cir. 1994) (phone numbers given by defendant and recorded in PSA reports held admissible).

Business appointment calendars: In *Pryor v. United States*, 503 A.2d 678 (D.C. 1986), the defendant claimed that at the time of the robbery, he was at a gathering where a distributor of Amway products dropped in and discussed the prospect of becoming commissioned sales representatives. In the government's rebuttal case, the Amway distributor testified that the gathering took place nine days after the robbery. To confirm the date, the government offered the witness's appointment calendar and an "Amway prospect" book. The defendant argued that the documents were not admissible because the records were incomplete and were maintained for tax purposes. The Court of Appeals upheld admission of the documents: "The fact that the records may have been incomplete bears only on the weight to be accorded this material by the jury. . . .As to the second objection, [the witness] testified that she also kept the records for business reasons, such as the scheduling of appointments." *Id*. at 681.

Documents not admissible as business records: Forms on which intended payees of government checks certified that they had not received the checks were held not to be business records because the payees had no business duty to complete them. *United States v. Baker*, 693 F.2d 183, 188 (D.C. Cir. 1982).

Similarly, in *United States v. Kim*, 595 F.2d 755 (D.C. Cir. 1979), the defendant, charged with using money from the Korean Central Intelligence Agency to bribe members of Congress, was not permitted to introduce a telex from his bank in Korea showing his deposits of the money at issue into his bank account. The court reasoned that the proffered evidence "contain[ed] two hearsay links[:] [t]he bank's record of deposits made by the defendant . . . [and] the telex itself, which contain[ed] another bank employee's statement as to what the bank records show[ed]." *Id*. at 759 (footnotes omitted). The telex was inadmissible for several reasons. First, the record was not made "at or near the time" of the event it reported, but two years later. *Id*. at 760-61.

[16] However, a proper foundation must be laid through testimony of a custodian of the records. *See infra* Section II.K.4.

Second, the telex was neither made for a regular business purpose nor relied on by the bank, but was prepared in response to a subpoena, negating the presumption of reliability on which the hearsay exception is based. Although the information was retrieved through a method that the bank commonly used, the transaction giving rise to the telex was highly unusual and served no business purpose. *Id*. at 761-62. Finally, the trial court has discretion to refuse to admit proffered business records because "the circumstances of preparation indicate lack of trustworthiness." *Id*. at 762-63 (quoting Fed. R. Evid. 803(6)).

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***Dutch v. United States*, 997 A.2d 685 (D.C. 2010).** No error to admit under business record exception to hearsay rule two documents derived from information stored on computers where the information was collected by a third party financial transaction processing company for joint use by its merchant clients and where the records for joint use and the records at issue – i.e., the electronic data stored by the processing company – were created at the time of the transaction in this case (cashing a forged check).

3. Summary of Records

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

Fed. R. Evid. 1006.

> The party offering the summary must introduce the underlying data into evidence, or at least make that data available for inspection by opposing parties. . . . When the underlying documents are not subject to examination by the opposing parties, the summary should not be admitted into evidence.

Kim, 595 F.2d at 764 (citations omitted).

4. Foundation

In *In re D.M.C.*, 503 A.2d 1280 (D.C. 1986), the government introduced into evidence a document captioned "D.C. Public Schools Absence Investigation Request," and produced no witnesses. Admission of the document was error:

> [T]he party must . . . prove that the maker of the record had personal knowledge of the facts set forth in that record or, if not, that the facts were communicated to the maker, directly or indirectly, by one who was acting in the regular course of business and who had such personal knowledge.

Id. at 1282-83. The government failed to call the custodian of the school's records or any other witness to lay the proper foundation for the admission of the document as a business record.

A proper foundation was not laid in *Meaders v. United States*, 519 A.2d 1248 (D.C. 1986), a case which involved an MPD Medical Examination Form (PD 124). The form contained information that a physician recorded regarding the examination of a sexual assault victim as well as information that the police recorded. The defendant called only the police officer, thus failing to establish the necessary foundation through a witness capable of testifying about the hospital's record-keeping practices. While it was not essential to call the particular doctor, someone "'sufficiently familiar with the practices of the business involved to testify that the records were made in the regular course of business, and thus to verify their authenticity'" must lay the foundation. *Id*. at 1256 (citation omitted); *see also Brown*, 627 A.2d at 506 (although DEA-7 is admissible without chemist's testimony, government must lay proper foundation through testimony of custodian or other person in position to know that report was made in regular course of business and within a reasonable time after analysis of the substance). *See generally McCormick on Evidence*, §§ 284-294 (6th ed. 2006); V Wigmore *Evidence*, §§ 1517-1561 (Chadbourn rev. 1972); Saltzburg and Redden, § 803(b).

M. Public Records

A public record is admissible as an exception to the hearsay rule when:

(a) The facts stated in the document are within the personal knowledge and observation of the recording official; and

(b) The document is prepared pursuant to a duty imposed by law or implied by the nature of the office.

See D.M.C., 503 A.2d at 1283-84. Super. Ct. Crim. R. 27 sets forth the manner in which proof of the existence or lack of a public record may be made. Authentication of an official record kept within the United States may be evidenced by an official publication or copy attested to by the officer having legal custody of the record, or that officer's deputy, and accompanied by a certificate that such person has legal custody.

> The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of office.

Super. Ct. Crim. R. 27(a)(1).

Hunter v. United States, 590 A.2d 1048 (D.C. 1991), held that a certificate of no record of a license to carry a pistol satisfied both the authentication and foundation requirements. The statement was accompanied by the required certification and seal, was signed by the one who conducted the search indicating personal knowledge of the facts stated, and contained the

statutory language indicating that the records searched were established and maintained pursuant to a legal duty. *See also McCormick on Evidence*, §§ 295-300 (6th ed. 2006); V Wigmore, *Evidence*, §§ 1630-1637; Saltzburg and Redden, § 803(8).

N. Statements Made for Medical Diagnosis

> Statements of a presently existing bodily condition made by a patient to a doctor consulted for treatment have almost universally been admitted as evidence of the facts stated. . . . Although statements to physicians are not likely to be spontaneous, since they are usually made in response to questions, their reliability is assured by the likelihood that the patient believes that the effectiveness of the treatment he receives may depend largely upon the accuracy of the information he provides the physician.

McCormick on Evidence, § 277 (6th ed. 2006); *accord White*, 502 U.S. 346, 351 (1992); *Sullivan v. United States*, 404 A.2d 153, 158 (D.C. 1979); *see also* VI Wigmore, *Evidence*, §§ 1718-1723; Fed. R. Evid. 803(4); Saltzburg and Redden, § 803(4).

The declarant need not have been the patient. In *Galindo v. United States*, 630 A.2d 202, 208-10 (D.C. 1993), statements made to a physician by the mother of a three-year-old sex offense complainant were held admissible. Although the mother was not the patient, her statements to the doctor were deemed sufficiently trustworthy because her interest in obtaining appropriate medical care created the same incentive for her to be truthful as if she herself was injured. Admission of an identifying portion of the statement was upheld because it described the assailant as a member of the family who had been taking care of the complainant, a fact pertinent to treat the psychological and emotional consequences of the incident. *Id*. at 210.

Many courts distinguish between statements made to physicians consulted by the declarant for purposes of treatment and those made to physicians consulted solely with the anticipation that the physician will testify in court on the declarant's behalf. *McCormick on Evidence*, § 278. The latter are generally excluded. *See Sullivan*, 404 A.2d at 158-59.

That said, statements attributing cause and fault are often admitted under the exception. For example, in *Jones v. United States*, 813 A.2d 220,226 (D.C. 2002), the Court of Appeals held that the complainant's statement that his "father tied [his] arms behind his back with duct tape and ⋯ hit him with a wire brush all over his body, stomach, buttocks, arms . . . [and that] [h]e hit him in the past" was admissible as a statement of medical diagnosis and treatment. The court relied on *Galindo* in which "'recognized that statements [made to a doctor] about the cause of injuries fall within the medical diagnosis exception to the hearsay rule because explaining the cause of injuries may facilitate treatment.'" *Id. (*quoting *Galindo*, 630 A.2d at 210). "Similarly, 'statements in a complainant's hospital records about the injured party's explanation of the cause of the injury' fall within the exception." *Id.* (quoting *Galindo*, 630 A.2d at 210.)

The medical diagnosis exception applies to statements made to hospital attendants, ambulance drivers, and other medical personnel. *See Sullivan*, 404 A.2d at 159; *see* Fed. R. Evid. 803(4). It may include descriptions of past as well as present sensations, as both may be relevant to

treatment. *See* Fed. R. Evid. 803(4); *Meaney v. United States*, 112 F.2d 538, 539 (2d Cir. 1940). In *Sullivan*, records indicating "complaint of assault" and "[n]o injury by accident, but after accident in fight," were admissible because they were made for purposes of treatment, there was no evidence of a deliberate attempt to lay a foundation for expert testimony in future litigation, and there was no assignment of blame. 404 A.2d at 158-59.

O. The Residual Exception and the Penumbra Rule

Even if a statement does not fall under one of the specific exceptions to the hearsay rule, Fed. R. Evid. 807 provides that hearsay statements can be admitted if they "have equivalent circumstantial guarantees of trustworthiness" to those offered under the various specific exceptions to the hearsay rule. Under the federal rules, the trial court must determine that:

(a) The statement is offered as evidence of a material fact;

(b) The statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and

(c) The general purpose of the rules of evidence and the interests of justice will best be served by its admission.

The party seeking admission of the statement must give the adverse party sufficient notice in advance of trial of the party's intention to offer the statement so that the adverse party may prepare to meet it. The party must give the particulars of the statement and the name and address of the declarant. Fed. R. Evid. 807.

United States v. Kim, 595 F.2d 755 (D.C. Cir. 1979), found no abuse of discretion in the trial court's refusal to admit a telex from the defendant's bank in Korea under the residual exception.

> It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. . . . The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule. . . . It is intended that . . . the trial judge will exercise no less care, reflection and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.

Id. at 380, 595 F.2d at 765 (citation omitted). However, *S.E.C. v. First City Financial Corporation, Ltd.*, 890 F.2d 1215 (D.C. Cir. 1989), considered whether it was error to admit a chronology of events prepared at the request of the S.E.C. The court concluded that in light of the guarantees of trustworthiness, the admission of the chronology was not error under the residual hearsay exception. *Id*. at 1225.

While the Court of Appeals has never explicitly approved a residual exception, *Jackson v. United States*, 424 A.2d 40, 41-42 (D.C. 1980), discussed such an exception in detail. The defendant in that murder case sought to use an unavailable witness's out-of-court statement that someone else committed the murder. The court found, however, that the statement had none of the traditional

indicia of reliability or "circumstantial guarantees of trustworthiness," *i.e.*, it was not made under oath, it was not made in the presence of the trier of fact, and the declarant was not subject to cross-examination. *Id*. at 42.

The "penumbra rule" is closely related to the residual exception, in that it permits admission of statements that closely resemble, but fail to meet all the criteria of, the specific hearsay exceptions, provided such statements possess equivalent indicia of reliability. In *United States v. Kearney*, 420 F.2d 170 (D.C. Cir. 1969), the court upheld admission of a statement the victim made the day after he was shot and one day before he died of the wounds, as within the "penumbra of both the spontaneous utterance and dying declaration exceptions to the hearsay rule," although it did not exactly qualify as either, because it was sufficiently reliable. *Id*. at 174-75.

III. HEARSAY AND THE CONSTITUTION

A. The Due Process Clause

Even if evidentiary rules preclude admission of certain hearsay statements, fundamental fairness and the Due Process Clause may require their admission.[17] *Keene v. United States*, 661 A.2d 1073 (D.C. 1995) "[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) (denial of due process where state rules had precluded defendant from introducing persuasive and trustworthy confessions by third party). *Green v. Georgia*, 442 U.S. 95 (1979), reaffirmed the *Chambers* doctrine. At a capital sentencing hearing following his conviction of rape and murder, Green attempted to introduce his co-defendant's statement that the co-defendant had shot the decedent while Green was off on an errand. The testimony was excluded under state evidentiary rules, and the death penalty was imposed. The Supreme Court vacated the sentence.

> Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause of the Fourteenth Amendment. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial . . . and substantial reasons existed to assure its reliability.

Id. at 97. The statement had been made spontaneously to a close friend, it had been considered sufficiently reliable to use at trial against the co-defendant, and there was no reason to presume that the declarant had an ulterior motive in making the statement.

The *Chambers* doctrine is a narrow one and is of uncertain constitutional dimension. However, counsel should always consider whether the exclusion of evidence under the hearsay rules violates due process, especially when the evidence is testimony that another individual confessed to the charged offense. Although in certain circumstances such testimony may fall under the

[17] This is in contrast to the right of confrontation, which in certain circumstances may result in the *exclusion* of evidence which is non-hearsay or falls under an exception to the hearsay rule. *See infra* Section III.B.

declaration against penal interest exception, *see supra* Section II.H, that exception requires that the declarant be "unavailable." However, *Chambers*, stands for the proposition that due process may require the admission of such testimony even when the declarant is available. *Cf. United States v. MacDonald*, 688 F.2d 224, 232 n.13 (4th Cir. 1982). Moreover, the standard of review on appeal if it is found that evidence was excluded contrary to the *Chambers* decision would require reversal unless the error was harmless beyond a reasonable doubt. *See infra* Section III.B. Finally, although the disputed evidence in *Chambers* and *Green* were confessions of uncharged individuals, the doctrine applies to other evidence that may go to the heart of the defense case.[18]

Cases rejecting arguments based on *Chambers* emphasize that the out-of-court statements either did not go the heart of the charged offense and thus did not have a direct impact on the question of guilt or innocence,[19] or lacked circumstantial guarantees of trustworthiness.[20]

B. The Confrontation Clause

1. *Crawford v. Washington* and Its Progeny

The Supreme Court's decision in *Crawford v. Washington*, 541 U.S. 36 (2004), marked a sea change in Confrontation Clause jurisprudence. Prior to *Crawford*, the Supreme Court held that the admission of out-of-court statements in a criminal trial did not violate a defendant's Sixth Amendment right to confront "the witnesses against him" if the hearsay statement fell within a "firmly-rooted exception" or if it bore "particularized guarantees of trustworthiness." *Ohio v. Roberts*, 448 U.S. 56, 66 (1980). The Court rejected the *Roberts* paradigm in *Crawford* because it conflated the Confrontation Clause with the rules of evidence, pegging the constitutional inquiry to a judicially made "reliability" determination. "Admitting statements deemed reliable by a judge," the Court wrote, "is fundamentally at odds with the right of confrontation. . . . [The Confrontation Clause] commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Crawford*, 541 U.S. at 61.

The proper threshold constitutional inquiry, the Court held, was whether the hearsay statement was "testimonial evidence." *Id.* at 51. If it was testimonial, then the Confrontation Clause

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[18] In *Trussell v. Estelle*, 699 F.2d 256 (5th Cir. 1983), the defense argued for the admission of a police report that an eyewitness had failed to identify the defendant at a pre-trial line-up. The trial court denied this request, although several individuals present at the line-up were made available to the defense as potential witnesses. The defense elected not to call these individuals because it appeared that the witness had in fact identified the defendant and the report was erroneous. The Fifth Circuit rejected the defendant's argument that *Chambers* required the admission of the police report but noted that "if there was evidence that [the witness] could not identify [the defendant] at the pre-trial line-up and if the state evidentiary rules prevented the defense from presenting that evidence to the jury, a due process issue of significant dimension would be presented." *Id*. at 262.

[19] *Jones v. United States*, 483 A.2d 1149 (D.C. 1984), upheld the exclusion of a witness's failure to select one of the co-defendants in pre-trial identification procedures. The court reasoned that "the inability of a witness to identify appellant Britt from a photo array and his tentative misidentification at the line-up are not so exculpatory that their exclusion violated appellant's right to due process." *Id*. at 1156.

[20] *Grochulski v. Henderson*, 637 F.2d 50 (2nd Cir. 1980), found no denial of due process where the trial court refused to allow an individual with a "mixed record as an informant" to testify that another individual confessed to the crime. The alleged declarant denied making the confession and the purported confession contradicted the testimony of eyewitnesses to the murder and the medical evidence. *Id*. at 55-56.

barred its admission unless the declarant was unavailable *and* the defendant had a prior opportunity to cross-examine the declarant. *See id.*

Crawford's concept of "testimonial" arises from the text of the Confrontation Clause, which secures for the accused the right to be confronted with "the witnesses against him." *See id.* at 51. The Court answered the question what it means to be a "witness against" by reference to the history of the Clause and ordinary usage of its words. The Court concluded that the point of the Confrontation Clause was to abolish the condemned civil-law practice of permitting *ex parte* affidavits to substitute for live testimony at trial subject to confrontation. *See id.* at 50 ("[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused."). Civil-law practice permitted justices of the peace to examine witnesses in private and to read their examinations into evidence against the accused in lieu of live testimony.
With that focus in mind, the Court concluded that the reach of the Clause was not limited merely to those witnesses who appeared in court against an accused, but to witnesses who made "testimonial" statements out of court that the government sought to use at trial. *See id.* at 50-51. The Clause's use of the words "witnesses against" encompassed those who "bear testimony." *Id.* at 51. "Testimony," in turn, meant "[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact." *Id.* (quoting 1 N. Webster, An American Dictionary of the English Language (1828)). The Court drew a sharp distinction between "testimonial" statements, against which the Clause was directed, and casual, off-hand remarks, to which the Clause did not extend.

> An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rule, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted. . . . . [On the other hand,] [a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not.

Id. at 51.

Although the Court declined "to spell out a comprehensive definition of 'testimonial'" in *Crawford*, 541 U.S. at 68, it made clear that testimonial statements include "pretrial statements that declarants would reasonably expect to be used prosecutorially," and "statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.* at 51-52. Such statements include, at a minimum, "testimony at a preliminary hearing, before a grand jury, or at a former trial" and "[s]tatements taken by police officers in the course of interrogations." *Id.* at 68. In *Crawford* itself, the hearsay statement introduced at trial was an audiotaped stationhouse confession to police by the defendant's wife, Sylvia Crawford, which implicated her husband, Michael Crawford, in a stabbing. *See id.* at 38-39. The Court concluded that, whatever the precise definition of "testimonial," Sylvia Crawford's audiotaped, stationhouse confession fell squarely within the meaning of "testimonial." *See id.* at 53.

Crawford did provide some guidance as to what statements are *not* testimonial. The Court contrasted formal statements to a government officer with a "casual remark to an acquaintance." *Id.* at 51. The Court also identified two types of hearsay statements "that by their nature were

not testimonial" – the common-law exceptions existing in 1791 admitting business records and statements in furtherance of a conspiracy. *Id.* at 56.

The Supreme Court provided additional guidance regarding *Crawford's* "testimonial" requirement in *Davis v. Washington*, 547 U.S. 813 (2006) and *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (D.C. 2009).

In *Davis v. Washington*, 547 U.S. 813 (2006), the Court considered whether statements by alleged domestic battery victims' to law enforcement personnel during a 911 call and at a crime scene were "testimonial" within the meaning of the Confrontation Clause. The *Davis* Court held that

> "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."

547 U.S. at 822. In keeping with this general formulation, the Court held that an alleged victim's responses to a 911 operator's questions were not "testimonial," where the declarant was describing events as they occurred and the 911 operator's questions were directed at resolving an on-going emergency situation, namely, the defendant's alleged presence inside the declarant's home in violation of a no-contact order. *Id.* at 827-28. In contrast, the Court held that an alleged victim's written statements in a "battery affidavit," which she completed at the request of the police officer who responded to her domestic disturbance call, were "testimonial": there was no emergency in progress when declarant made the written statements, as the alleged battery had happened before police arrived, and the primary purpose of the officer's interrogation was to investigate a possible past crime. *Id.* at 829-30.

In *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, the Court considered whether a state forensic analyst's laboratory report prepared for use in a criminal prosecution is "testimonial" evidence subject to the demands of the Confrontation Clause as set forth in *Crawford.* In a 5-4 decision, the Court held that a state chemist's drug-analysis affidavit falls "within the core class of testimonial statements" identified by *Crawford*, because it was "functionally identical to live, in-court testimony, doing precisely what a witness does on direct examination." *Id.* at 2531-32. In so holding, a majority of the Court rejected the contention that scientific analysts are exempt from confrontation because they are not "conventional witnesses." *Id.* at 2535. The Court found it was irrelevant that the analyst "observe[d] neither the crime nor any human action related to it," or that the affidavit was not provided in response to interrogation. *Id.* The Court also declined to draw a distinction between "testimony recounting historical events" and statements that are the "result of neutral, scientific testing," finding that to do so would be a "return to our overruled decision in *[Ohio v.] Roberts*, 448 U.S. 56 [(1980)]." *Id.* at 2536. Noting that drug-analysis affidavits are "create[d] for the sole purpose of providing evidence against a defendant," the Court found that such affidavits "do not qualify as traditional official or business records, and even if they did, their authors would be subject to confrontation nonetheless." *Id.* at 2537.

Finally, the Court found that a defendant's ability to subpoena the authoring analyst "is no substitute for the right of confrontation." *Id.* at 2540.

Four Justices (Kennedy, Breyer, Alito, JJ. and Roberts, C.J.) joined in a strongly-worded dissent in *Melendez-Diaz*, stating that the majority's holding would result in "a distortion of the criminal justice system." 129 S. Ct. at 2548 (Kennedy, J. dissenting). With Justice Souter's departure from the Court, there is a possibility that the dissenters could pick up a fifth vote favoring reconsideration or narrowing of the decision in *Melendex-Diaz.* On June 29, 2009, the Court granted review in *Briscoe, et al., v. Virginia* (07-11191), which presents a question that *Melendez-Diaz* appears to have resolved in the negative, namely: "If a state allows a prosecutor to introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, does the state avoid violating the Confrontation Clause of the Sixth Amendment by providing that the accused has a right to call the analyst as his own witness?"

Note that *Crawford* is not applied retroactively to cases already final on direct review. *See, e.g.*, *Whorton v. Bockting*, 549 U.S. 406; *Gathers v. United States*, 977 A.2d 969 (D.C. 2009).

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***Williams v. Illinois,* 132 S. Ct. 2221 (2012).** See, *supra*, Chapter 29.IV.A.

***Bullcoming v. New Mexico,* 131 S. Ct. 2705 (2011).** See, *supra*, Chapter 29.IV.A.

***Michigan v. Bryant,* 131 S. Ct. 1143 (2011).** Gunshot victim's statements to police on scene 25 minutes after shooting were not "testimonial" because their "primary purpose" was not to create "an out-of-court substitute for live testimony" but to enable police to meet "ongoing emergency."

***Gilliam v. United States,* 80 A.3d 192 (D.C. 2013).** Reversible error to deny brief continuance to allow defendants to call cell phone provider employee to testify that witness's cell phone number had not been active morning of murder
where no other witness identified defendants as perpetrators of murder and that witness claimed that he and defendants had met up to arm themselves before finding victim and killing him.

***Garibay v. United States,* 72 A.3d 133 (D.C. 2013).** See, supra, Chapter 26.II.A.

***Best v. United States,* 66 A.3d 1013 (D.C. 2013).** See, supra, Chapter 31.II.B.2.

***Diggs v. United States,* 28 A.3d 585 (D.C. 2011).** Witness who reported defendants to police and testified against them before grand jury was not unavailable for cross-examination within meaning of Confrontation Clause based on his assertion that he had suffered brain damage and subsequent memory loss where witness took stand and was subjected to cross-examination allowing jury to evaluate his credibility and prior statements.

Not plain error to allow prosecution to introduce victim's autopsy report without calling medical examiner who wrote it.

***Graure v. United States*, 18 A.3d 743 (D.C. 2011).** Witness's out-of-court statements not testimonial, and thus no Confrontation Clause violation to admit them over defense objection, where made in response to co-workers' questions regarding fire that had just occurred within a club, questions centered on whether threat of harm was still imminent and witness's answers to questions were likely "simply reflexive" because of the injuries he had sustained in fire.

***Johnson v. United States*, 17 A.3d 621 (D.C. 2011).** Statements made by victim of six gunshot wounds to chest and rib cage in response to police officer's questioning not testimonial and thus no Confrontation Clause violation where questions were asked by police officer first on scene after 911 call and posed to meet ongoing emergency.

***Johnson v. United States*, 17 A.3d 621 (D.C. 2011).** No violation of Sixth Amendment right of confrontation to admit witness's videotaped statements to police in which she relayed statements that co-defendant had made regarding murder because co-defendant's statements were not testimonial and because trial court ensured witness's statement had been redacted to defendant's satisfaction before playing videotape for jury.

***Zanders v. United States*, 999 A.2d 149 (D.C. 2010).** A certificate of no record (CNR) is inadmissible in the absence of testimony from the person who performed the search of the records.

***Gardner v. United States*, 999 A.2d 55 (D.C. 2010).** Absent a limiting Melton instruction, admissibility of DNA and serology reports in absence of testimony from expert who conducted the testing violated defendant's Sixth Amendment rights under the Confrontation Clause.

***Kaliku v. United States*, 994 A.2d 765 (D.C. 2010).** Not error to allow supervisor of biologist team to testify in lieu of individual who did actual DNA testing where defendants conceded that they had engaged in sexual acts with complaining witness and where other evidence clearly tied defendants to sexual abuse.

***Brooks v. United States*, 993 A.2d 1090 (D.C. 2010).** No abuse of discretion to deny defendant's mid-trial request to withdraw his express waiver of right to confront government chemist where a "slight drag of the pen" creating question as to number on ziplock bag and thus chain of custody went towards weight, not admissibility, of evidence.

***Goodwine v. United States*, 990 A.2d 965 (D.C. 2010).** Confrontation Clause not violated where declarant testifies at trial and is available for crossexamination by defense counsel.

***United States v. Smith*, 640 F.3d 358 (D.C. Cir. 2011).** Violation of Confrontation Clause to admit into evidence to prove felon-in-possession charge certified copies of clerk letters without providing opportunity for defendant to cross-examine clerk who had produced them.

***Young v. United States*, 63 A.3d 1033 (D.C. 2013)** (questioning precedential value of Supreme Court's "fractured decision" in Williams v. Illinois because "not one of the three proffered tests for determining whether an extrajudicial statement is testimonial [] attracted the support of a majority of the Justices").

***Ward v. United States*, 55 A.3d 840 (D.C. 2012).** Statements made by accuser to her friends were not testimonial because they were not made to government officials and were therefore not subject to strictures of Crawford v. Washington.

2. Application of *Crawford* by the D.C. Court of Appeals

Despite the Supreme Court's decisions in *Davis* and *Melendez-Diaz*, significant uncertainty about *Crawford's* parameters remains. Accordingly, counsel should be vigilant in keeping abreast of the latest *Crawford* developments, which are unfolding almost daily.

It is critical for defense counsel to make a Confrontation Clause objection — in addition to any appropriate evidentiary objection — when testimonial hearsay is admitted absent a showing that (1) the declarant is unavailable; and (2) the defendant had a prior opportunity to cross-examine the declarant. *See Ferguson v. United States*, 948 A.2d 513 (D.C. 2008) (admission of DEA-7 without authoring chemist's testimony at trial was error under *Crawford*, but unpreserved error did not require reversal, as it did not seriously affect the fairness, integrity or public reputation of defendant's trial.); *Otts v. United States*, 936 A.2d 782 (D.C. 2007), *vacated and reissued at* 952 A.2d 156 (D.C. 2008) (same); *Thomas v. United States*, 914 A.2d 1 (D.C. 2006) (same). The D.C Court of Appeals has stated repeatedly that "a Confrontation Clause objection will not suffice to preserve a hearsay claim [on appeal], nor will a hearsay objection preserve a Confrontation Clause claim." *Comford v. United States*, 947 A.2d 1181, 1188 (D.C. 2008). *See also Marquez v. United States*, 903 A.2d 815 (D.C. 2006) (assuming that testimonial hearsay was admitted in violation of defendant's confrontation rights, unpreserved error did not require reversal, as defendant could not demonstrate that it affected his substantial rights).

Make a Confrontation Clause Objection:

- ✓ When testimonial hearsay is admitted absent a showing that
  - the declarant is unavailable and
  - the defendant had a prior opportunity to cross-examine the declarant

911 Calls and on-the-scene statements to police: In *Smith v. United States*, 947 A.2d 1131 (D.C. 2008), a domestic violence victim did not know if the incident was over when she called 911 to request police assistance and spoke with an ambulance dispatcher. The court held that portions of a 911 recording that included complainant's request for police assistance and a conversation with an ambulance dispatcher were nontestimonial because their main purpose was to summon help during an ongoing emergency. *Id.* at 1134-35; *see also Tyler v. United States*, 975 A.2d 848, 854-56 (D.C. 2009) (911 recording of an anonymous caller's statements did not violate defendant's right to confrontation; statements were nontestimonial as they "pertained to on-going emergency" and "the primary purpose of the operator's questioning and the declarants' responses was to enable the operator to send the appropriate police and medical assistance"); *Long v. United States*, 940 A.2d 87 (D.C. 2007) (witness's on-the-scene statements to police, which

enabled police to respond to an ongoing emergency and were not made in the context of a formal investigation, were non-testimonial and qualified as excited utterances).

In *Stancil v. United States*, 866 A.2d 799 (D.C. 2005), *reh'g granted*, 878 A.2d 1186 (D.C. 2005), at issue was whether the on-the-scene statements of the complainant and her daughter to responding police officers admitted as excited utterances were testimonial statements.[21] A panel of the court observed that the police interrogations cited in *Crawford* "involve[d] a declarant's knowing responses to structured questioning in an investigative environment." *Id.* at 812. Relying on the analysis of a California court in *People v. Kilday*, 20 Cal. Rptr. 3d 161 (Cal. Ct. App. 2004), the panel distinguished between two stages of police questioning: questioning conducted while "securing the scene" and questioning conducted after the officers' attentions have turned to "investigation and fact-gathering." *Stancil*, 866 A.2d at 812-13. In the former situation, police are not acting in their investigative capacity to produce evidence, the panel reasoned, and therefore the statements elicited in that stage were not testimonial. On the other hand, statements elicited once the scene was secure, "and once the officers' attention has turned to investigation and fact-gathering, statements made by those on the scene, in response to police questioning, tend in greater measure to take on a testimonial character." *Id.* On the facts of *Stancil*, the panel remanded the statements for the trial court to determine whether they fell within the first or second stage of interrogation.

In *Drayton v. United States*, 877 A.2d 145 (D.C. 2005), the court applied *Stancil*'s two-stage paradigm and concluded that the complainant's statements made to officers at the scene and admitted as excited utterances were testimonial. The statements at issue were made after the police had handcuffed the defendant and had placed her in a patrol car and after the police had started interviewing witnesses at the scene. The officer admitted that he had spoken to the complainant to get "his account of the story." *See* 877 A.2d at 150-51. The complainant told the police that his mother had pulled a knife on him and had threatened him. The complainant, however, did not testify at trial, with no explanation offered as to his unavailability. His on-the-scene statements were admitted as excited utterances, and the defendant was convicted on the basis of those statements. The Court of Appeals reversed the conviction on the ground that the on-scene-statements were admitted in violation of the defendant's right to confrontation under *Crawford*.

Accomplice's Confession: In *Davis v. United States*, 848 A.2d 596 (D.C. 2004), the Court of Appeals held that an accomplice's confession admitted as a statement against penal interest at the defendant's perjury trial was testimonial. *See id.* at 599. The confession was given to police in a stationhouse setting, similar to Sylvia Crawford's statement in *Crawford*. The court held that because the statement was testimonial and because the defendant did not have a prior opportunity to cross-examine the declarant, his confrontation rights were violated by its admission. *See also Morten v. United States*, 856 A.2d 595, 600 (D.C. 2004) (non-testifying co-defendant's

[21] At the time of press, the future of *Stancil*'s "two-stage" interrogation paradigm is uncertain. An *en banc* panel of the court granted rehearing, *see Stancil*, 878 A.2d at 1186-87, and its decision is pending, with oral argument scheduled for November 1, 2005. That same panel will hear a case addressing whether a 911 call is testimonial. *See Greene v. United States*, 03-CM-605 (2005). However, *Stancil's* analysis is largely consistent with the Supreme Court's analysis in *Davis v. Washington*, which was decided *after* rehearing was granted in *Stancil*.

videotaped confession admitted as statements against penal interest were testimonial); *cf. (Keith) Thomas v. United States*, 978 A.2d 1211 (D.C. 2009) (codefendants' inculpatory out-of-court statements to friends and family were not "testimonial" under *Crawford* because the statements were "casual remarks to acquaintances in which the speaker . . . confidentially admitted having committed or intending to commit a crime"); *Perez v. United States*, 968 A.2d 39, 73-75 (use of transcripts of co-defendant's statements to police to refresh recollection of and impeach co-defendant did not violate other defendants' confrontation rights, as co-defendant testified at trial and was available for cross-examination).

Plea Allocutions: In *Morten*, the government conceded, and the court agreed, that the admission of two co-defendants' plea allocutions against the defendant to prove conspiracy violated his right of confrontation. *See* 856 A.2d at 600; *see also Williams v. United States*, 858 A.2d 978, 981 (same).

Forensic Reports (DEA-7 reports & DNA/Serology Analysis): Even before *Melendez-Diaz* was decided, the D.C. Court of Appeals concluded that a government chemist's report is testimonial within the meaning of *Crawford*. In *Thomas v. United States*, 914 A.2d 1 (D.C. 2006), the court held that the "DEA-7" report of a Drug Enforcement Administration (DEA) chemist, which sets forth the chemist's observations and conclusions about "the identity and quantity of the controlled substance seized from appellant as revealed by her testing, chain of custody, . . . the reliability of her testing methods and procedures, their general acceptance in 'the forensic science community,' and the purity of the chemical reagents and the operability of the analytical instruments that she used in conducting her tests," is a "'core' testimonial statement subject to the requirements of the Confrontation Clause" because it is "created primarily for the government to use it as a substitute for live testimony in a criminal prosecution." *Id.* at 12-14 (internal citations omitted); *see also Digsby v. United States*, 981 A.2d 598 (D.C. 2009) (admission of two DEA-7 reports over defense objection, without providing defendant opportunity to cross-examine authoring chemist, violated defendant's Sixth Amendment right of confrontation; error was not harmless as to possession of heroin with intent to distribute conviction, given absence of other overwhelming evidence of that offense, but was harmless as to possession of marijuana with intend to distribute, as the government presented "ample, strong and compelling evidence" regarding that offense); *Duvall v. United States*, 975 A.2d 839 (D.C. 2009) (reversing conviction for possession of a controlled substance, finding that admission of DEA-7 over defense objection, without providing defendant opportunity to cross-examine authoring chemist, and in absence of other overwhelming evidence, was not harmless error); *Fields v. United States*, 952 A.2d 859 (D.C. 2008) (same, even as to lesser-included offense of attempted possession); *Callaham v. United States*, 937 A.2d 141 (D.C. 2007) (same); *Howard v. United States*, 929 A.2d 839 (D.C. 2007) (same). The court has also found that the conclusions of other forensic scientists—such as serologists and DNA Analysts—are testimonial under *Crawford*. *See also Roberts v. United States*, 916 A.2d 922 (D.C. 2007) (finding that "the conclusions" of forensic laboratory scientists who conduct DNA and serology tests that "provid[e] the basis for 'critical expert witness testimony . . . against [the defendant] at his criminal trial" are testimonial hearsay," but the introduction of such evidence did not require reversal on plain error standard of review).

Certificates of No-Record ("CNR"): In *Tabaka v. District of Columbia*, 976 A.2d 173, 175-76 (D.C. 2009), the court held that a "clerk's certificate attesting to the fact that the clerk had searched for a particular relevant record and failed to find it" was inadmissible over defense counsel's objection without corresponding testimony by the Department of Motor Vehicles clerk who performed the search.

Other Statements Held To Be Non-Testimonial: In *Roy v. United States*, 871 A.2d 498 (D.C. 2005), the Court observed that the admission of a co-defendant's statements to fellow passengers as present sense impressions did not pose a confrontation problem under *Crawford*. The statements were not "'testimonial' within the meaning of *Crawford* because [they were] not made to the police for purposes of accusation or prosecution." *Id.* at 505; *see also Clarke v. United States*, 943 A.2d 555 (D.C. 2008) (out-of-court statement was non-testimonial because it was not intentionally made in anticipation of litigation); *Jackson v. United States*, 924 A.2d 1016 (D.C. 2007) (certified copies of court docket entries and notice to return to court were not "testimonial" and their admission without testimony from the court clerk who created them was not error because their primary purpose was administrative).

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***Diggs v. United States*, 28 A.3d 585 (D.C. 2011).** Not plain error to allow prosecution to introduce victim's autopsy report without calling medical examiner who wrote it.

Confrontation Clause violated by admission of certificate of no license without testimony from its preparer, and corresponding CPWL conviction reversed.

***Fox v. United States*, 11 A.3d 1282 (D.C. 2011).** Admission of Certificates of No Record (CNRs) without providing defendant opportunity to cross-examine official who created them violated Sixth Amendment and thus CPWL, UF and UA counts stemming therefrom vacated.
***Frye v. United States*, 86 A.3d 568 (D.C. 2014).** Complaining witness's answers to lone question "what happened," posed by officer in attempting to assess volatile situation police met upon entering house, not testimonial where heated argument still "in progress" when police arrived, complaining witness was "shaken and crying" during exchange with officer, and situation was "fluid…and confused."

***Jenkins v. United States*, 75 A.3d 174 (D.C. 2013).** Supreme Court decision in *Williams v. Illinois* did not change holding in *Robert v. United States*, 916 A.2d 922 (D.C. 2007), which held that statements of DNA findings and analysis are testimonial if admitted for an evidentiary purpose, and violate the Confrontation Clause, as here, without the in-court testimony of the personnel who actually performed the laboratory analysis, and such admission constituted reversible error beyond a reasonable doubt.

***Lester v. United States*, 25 A.3d 867 (D.C. 2011).** No Confrontation Clause violation for trial court to allow into evidence Certificate of No Record (CNR) without testimony of clerk who signed it where police officer who requested search testified that he had provided clerk with necessary information about defendant, waited while clerk typed information into computer, personally saw search result on computer and been present while clerk prepared CNR form on typewriter after running search.

***Little v. United States*, 989 A.2d 1096 (D.C. 2010).** Error to admit two testimonial "certificates of no record" of firearms registration or license to carry pistol without providing opportunity to cross-examine preparer of documents, but harmless where defendant failed to object to introduction at trial and provided no proof that error was plain.

***Mungo v. United States*, 987 A.2d 1145 (D.C. 2010).** Allowing a medical examiner other than the one who actually performed the autopsies and prepared the reports to testify about the cause of death did not violate defendants' rights under Confrontation Clause where cause of death was not in dispute, the testimony was largely based on non-testimonial photographs, and the defense could have subpoenaed the attending medical examiner if they had wanted to challenge his findings.

***Timms v. United States*, 25 A.3d 29 (D.C. 2011).** Admitting two CNRs into evidence over objection without providing defendant opportunity to confront author(s) violated Confrontation Clause and thus convictions for CPWL, UF and UA – all requiring proof that defendant did not have license to carry firearm in question – reversed.

***Young v. United States*, 63 A.3d 1033 (D.C. 2013)** FBI examiner testimony at trial that defendant's DNA profile matched DNA profile of rapist violated Confrontation Clause because technician lacked personal and significant involvement in critical parts of testing process. (questioning precedential value of Supreme Court's "fractured decision" in *Williams v. Illinois* because "not one of the three proffered tests for determining whether an extrajudicial statement is testimonial [] attracted the support of a majority of the Justices")**.**

3. Unavailability

Under *Crawford*, a testimonial statement, even if previously subject to cross-examination, may be admitted consistent with the Confrontation Clause only if the declarant is unavailable. *See Crawford*, 541 U.S. 36.

Because the *Crawford* court did not expound on the concept of unavailability, pre-*Crawford* law arguably will control that inquiry. When unavailability is a prerequisite, "[a] witness is not 'unavailable' . . . unless the prosecutorial authorities have made a *good faith effort* to obtain his presence at trial." *Barber v. Page*, 390 U.S. 719, 724-25 (1968) (emphasis added). How far the prosecution must go "is a question of reasonableness." *Roberts*, 448 U.S. at 74. Circumstances that can render a witness unavailable to testify include:

- Despite all efforts, counsel cannot physically locate the witness. *See*, *e.g.*, *Feaster v. United States*, 631 A.2d 400, 407, 411 (D.C. 1993) (finding abuse of discretion in exclusion of grand jury testimony of defense witness, and remanding for finding on whether efforts to locate witness had been sufficient to prove unavailability); *Kimes v. United States*, 569 A.2d 104, 114 (D.C. 1989) (neither counsel nor marshals were able to locate witness); *Ready v. United States*, 445 A.2d 982 (D.C. 1982) (eleventh-hour efforts to subpoena witness were insufficient).
- A lack of memory about the events to which the person is a witness, *see Thomas v. United States*, 530 A.2d 217, 223 (D.C. 1987), *vacated on other grounds*, 557 A.2d

599 (1989) (en banc) (per curiam), even if the claim of no present memory is feigned, *Hsu*, 439 A.2d at 470-71 (claimed loss of memory was not result of wrongdoing by party seeking to introduce prior testimony); *cf. United States v. Owens*, 484 U.S. 554, 557-60 (1988) ("neither the Confrontation Clause nor Fed. Rule Evid. 802 is violated by admission of an identification statement of a witness who is unable, because of memory loss, to testify concerning the basis for the identification").

- Refusal to testify. *See Kimes*, 569 A.2d 104, 114 (witness returned the subpoena, airline ticket, check for witness fees and travel information that defense counsel had mailed him, and neither defendant nor United States marshals had been able to locate him); *Jones v. United States*, 441 A.2d 1004, 1006-07 (D.C. 1982).

- Invocation of a testimonial privilege. *See Alston v. United States*, 383 A.2d 307, 315 (D.C. 1978) (former co-defendant who invoked Fifth Amendment privilege).

- "Extreme circumstances" where the court finds a "grave risk to a witness's psychological health." *See Warren v. United States*, 436 A.2d 821, 829 (D.C. 1981) (powerful expert testimony that rape victim would be temporarily and perhaps permanently psychologically injured if she testified.)

- The witness is dead. *See Leasure v. United States*, 458 A.2d 726, 730 (D.C. 1983) (spontaneous declaration by dying complainant was admissible).

- The witness is unreachable by subpoena. *See Mancusi v. Stubbs*, 408 U.S. 204 (1972) (witness in Sweden); *cf. Irby v. United States*, 585 A.2d 759 (D.C. 1991), *overruled on other grounds*; *Carter v. United States*, 684 A.2d 331 (1996) (party had not shown that witness had been subpoenaed, could not be found, had fled jurisdiction, or was beyond subpoena power of the court).

- If a witness is merely absent, the offering party must place on the record what efforts it has made to use "procedures . . . whereby the witness could be brought to the trial." Roberts, 448 U.S. at 77. The party should be required "to relate carefully and comprehensively for the record at trial its efforts to make the witness available and the reasons such efforts have proved unavailing." *Harrison*, 435 A.2d at 736 n.5 (but affirming, despite sparse showing of unavailability, due to lack of objection on that basis).

Depositions may be taken "[w]henever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for trial." Super. Ct. Crim. R. 15. Thus, while a witness may be dead by the time of trial, if the government was on notice that the witness might die because of old age or ill health it should have used Rule 15 to secure a deposition before trial. Likewise, if ill health prevents a witness from attending a trial, it may not prevent the parties from going to the witness for a deposition.[22]

[22] *Cf. Harrison*, in which the prosecutor claimed he had heard from the witness's daughter that the witness was unable to come to Washington "because he was undergoing treatment for a nervous condition." 435 A.2d at 736. Defense counsel not only did not require verification of the daughter's allegation, but did not request a deposition

Moreover, in the courts of the District of Columbia, not only is there nationwide subpoena power in felony cases, D.C. Code § 23-106, but 28 U.S.C. § 1783(a), applying to "courts of the United States," appears to empower the court to issue subpoenas to American citizens abroad.

Forfeiture-by-wrongdoing: Under the "forfeiture-by-wrongdoing" doctrine, when a defendant procures a witness's unavailability for trial with the purpose of preventing the witness from testifying, the defendant waives his rights under the Confrontation Clause to object to the admission of the absent witness's hearsay statements. *Sweet v. United States*, 756 A.2d 366, 379 (D.C. 2000); *Devonshire v. United States*, 691 A.2d 165, 168-69 (D.C. 1997). In *Giles v. California*, the Supreme Court held that "forfeiture-by-wrongdoing" is not an exception to the Confrontation Clause where the defendant procured the decedent's unavailability by killing him or her, but was not shown to have done so for the *purpose* of preventing the decedent from testifying. 128 S. Ct. 2678, 2683-85 (2008) (where defendant was on trial for murdering his ex-girlfriend, decedent's unconfronted report of domestic violence was not admissible against defendant absent evidence that defendant killed decedent for purpose of preventing her from testifying against him). The defendant's misconduct in procuring the witness's absence must be established by a preponderance of the evidence before confrontation clause rights will be deemed waived. *Id*; *see Roberson v. United States*, 961 A.2d 1092 (D.C. 2008) (affirming admission of deceased witness's grand jury testimony and statements to police, where government's proffer that defendant conspired to kill witness to prevent witness from testifying was supported by preponderance of the evidence); *Gatlin v. United States*, 925 A.2d 594, 597-98 (D.C. 2007) (affirming admission of deceased witness's grand jury testimony, where defendant participated in conspiracy to silence witnesses and witness's death was natural and foreseeable consequence of that conspiracy).

4. Prior Opportunity for Cross-Examination

In addition to unavailability, *Crawford* established a second requirement for admission of a testimonial statement consistent with the Confrontation Clause: a prior opportunity for cross-examination. The Court observed that "[w]e do not read the historical sources to say that a prior opportunity to cross-examine was merely a sufficient, rather than a necessary, condition for admissibility of testimonial statements." 541 U.S at 54-65. Again, the *Crawford* Court did not address what constituted a prior opportunity for cross-examination. Accordingly, pre-*Crawford* case law will guide that inquiry.

In *Dudley v. United States*, 715 A.2d 866 (D.C. 1998), the court in the context of discussing the elements for the admissibility of a prior recorded statement stated observed that "'[a]n adequate opportunity to cross-examine exists if the parties and the issues in both proceedings are substantially the same.'" *Id.* at 867 (quoting *Epstein v. United States*, 359 A.2d 274, 277 (D.C. 1976)). "Unless the issues where then [substantially] the same as they are when the former statement is offered, the cross-examination would not have been directed to the same material points of investigation, and therefore could not have been an adequate test for exposing inaccuracies and falsehoods." *Id.* (quoting *Epstein*, 359 A.2d at 277-78).

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under Rule 15. Of course, when for tactical reasons the defense prefers the hearsay over live or recorded testimony, a request for a deposition should not be made.

CHAPTER 32

THE DEFENSE CASE

I. THE RIGHT TO PRESENT A DEFENSE

The Constitution embodies a fundamental "right to present a defense, the right to present the defendant's version of the facts." *Washington v. Texas*, 388 U.S. 14, 19 (1967). Moreover, neither the government nor the court, with few exceptions, may compel disclosure of the nature of the defense. *Bowman v. United States*, 412 A.2d 10, 11 (D.C. 1980).[1] The specific constitutional components of this fundamental right are discussed below.

A. The Right to be Present

The Constitution guarantees the right of every person accused of a crime to be present at every stage of the trial, at least where the defendant's presence "bears, or may fairly be assumed to bear a relation, reasonably substantial, to his opportunity to defend." *Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934). This right is grounded in both the Sixth Amendment right to confrontation and the Fifth Amendment right to due process. *Singletary v. United States*, 383 A.2d 1064, 1070 (D.C. 1978); *see Illinois v. Allen*, 397 U.S. 337, 338 (1970); Westen, *Confrontation and Compulsory Process: A Unified Theory of Evidence in Criminal Cases*, 91 Harv. L. Rev. 567, 591 (1978) (Sixth Amendment right to compulsory process generates right to presence during presentation of defense case). Super. Ct. Crim. R. 43(a) also guarantees that: "[t]he defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule."[2] Nevertheless, in cases involving child complainants the government will often seek to close the courtroom during the child's testimony. For guidance on issues surrounding child complainants, *see supra* Chapter 28.

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[1] Unless the defense is insanity, D.C. Code § 24-501(j) (1996), or otherwise relies on mental health testimony, Super. Ct. Crim. R. 12.2, or the government has made an alibi demand, Super. Ct. Crim. R. 12.1, counsel has no obligation to specify the nature of the defense. If the trial court inquires, it is suggested that counsel respond "general denial" and not elaborate further. *See also McKoy v. United States*, 518 A.2d 1013, 1018 (D.C. 1986) (alibi-disclosure rule is an "exception to the general concept that a defendant need not commit his or her defense to a particular course until the government has presented its entire case, so that the defense in no way aids the prosecution in its presentation").

[2] The right to be present during impaneling of the jury includes the right to be present at bench conferences during *voir dire*. *Beard v. United States*, 535 A.2d 1373, 1375-77 (D.C. 1988); *Robinson v. United States*, 448 A.2d 853, 855-56 (D.C. 1982). A defendant's right to participate in *voir dire* is preserved by the use of a headset when defendant is not permitted to be present at the bench, the headset is functional, and defendant engages in conversation with her attorney which indicates that she is not prejudiced by the use of the headset. *United States v. Hoover-Hankerson*, 511 F.3d 164, 169 (D.C. Cir. 2007). The U.S. Court of Appeals for the District of Columbia has held that when a defendant is in court during *voir dire*, defense counsel may effectively waive her right to be present without the defendant orally seconding the statement. *Id.* at 170. Rule 43(c) does not require the presence of the accused: (1) if the accused is a corporation; (2) if the accused waives presence in writing in a prosecution for an offense punishable only by fine or imprisonment for not more than one year; (3) at a conference or argument upon a question of law; or (4) at a reduction of sentence under Super. Ct. Crim. R. 35.

In limited circumstances, the defendant may forfeit his right to be present or the defendant's presence may not be essential if counsel is present to protect the defendant's interests. *See Allen*, 397 U.S. at 343 (no abuse of discretion in having defendant removed after repeated warnings, where defendant "continued to conduct himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial could not be carried on with him in the courtroom"); *Tatum v. United States*, 703 A.2d 1218, 1223 (D.C. 1997) (defendant's behavior was *not* sufficiently disruptive to warrant his removal from the courtroom); *Harris v. United States*, 489 A.2d 464, 467-70 (D.C 1985) (no error where defendant was not present when portions of transcript were read back to jury); *Heiligh v. United States*, 379 A.2d 689, 694 (D.C. 1977) (no error where defendant was absent during part of discussion of proposed jury instructions).

Rule 43(b)(1) precludes the trial from progressing without the defendant unless the defendant is voluntarily absent. Absence cannot be construed as voluntary unless the court finds an "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Absent such a finding, the absence must be deemed involuntary and further presentation of testimony is constitutional error. *See Black v. United States*, 529 A.2d 323, 325 (D.C. 1987) (reversible error when defendant did not waive right to presence and evidence was introduced in his absence). In *Kimes v. United States*, 569 A.2d 104, 109-10 (D.C. 1989), the court set forth this two-part analysis: (1) whether the defendant voluntarily waived the right to be present; and (2) even if he has, whether the trial court abused its discretion in proceeding without the defendant, based on

> the reasonableness of the trial court's efforts to ascertain the defendant's whereabouts, the likelihood that the trial could occur with the defendant present, the burden on the government, witnesses, and jurors if the trial were delayed, and the appellant's interest in being present at the trial proceedings that remained.

See Frost v. United States, 618 A.2d 653, 657 (D.C. 1992) (no abuse of discretion where judge waited a reasonable period and conducted thorough inquiry into reasons for defendant's absence before proceeding with trial).

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***Euceda v. United States*, 66 A.3d 994 (D.C. 2013).** Because a clerk received and responded to a jury note (posing two detailed questions about an element of attempted armed robbery) without alerting defendant or his counsel, defendant was deprived of his constitutional right to "the presence of defense counsel and the accused at all critical stages of the prosecution."

***Jones v. United States*, 99 A.3d 679 (D.C. 2014).** Motions judge did not err in restricting defendant's access to co-defendant's plea colloquy or decision to keep plea colloquy transcripts sealed where defendant failed to demonstrate prejudice as a result of the closure of the plea proceeding.

***Lucas v. United States*, 20 A.3d 737 (D.C. 2011).** Sidebar discussion among trial judge, cooperator's attorney and prosecutor, outside presence of defendants and their attorneys, regarding safety of cooperator did not violate Sixth Amendment rights or right to be present at

trial where defendants did not demonstrate how fear for his safety would have motivated cooperator to give additional testimony *against* defendants, cross-examination by defendants about threats may have bolstered witness's credibility, government did not mention threats during its questioning or closing arguments, and no indication that court considered information in sentencing.

B. The Right to Present Evidence

The defendant has an absolute right to testify, guaranteed by the U.S. Constitution. Under the due process clause of the Fourteenth Amendment, the right to testify is essential to due process of law in an adversary system. The opportunity to testify stems also from the Fifth Amendment's guarantee against compelled testimony, as every criminal defendant has the opportunity either to refuse to testify in his defense, or do so. *Brooks v. Tennessee*, 406 U.S. 605, 612 (1972). That right is personal and can be waived only by the defendant. *Johnson v. United States*, 613 A.2d 888, 894 (D.C. 1992); *accord Hunter v. United States*, 588 A.2d 680, 681-82 (D.C. 1991); *see also Boyd v. United States*, 586 A.2d 670, 675 (D.C. 1991) (stressing fundamental and personal importance of right to testify, the court instructed trial judges to conduct "on the record colloquy" in order to ensure valid waiver); *cf. Ferguson v. Georgia*, 365 U.S. 570, 601 (1961) (Clark, J., concurring) (statute rendering accused incompetent to testify is unconstitutional). Trial judges should take care during so-called "*Boyd* inquiries" not to unduly influence a defendant's decision regarding his right to testify. *See Arthur v. United States*, 986 A.2d 398, 419 (D.C. 2009) (reversible error for judge to make comments to defendant during *Boyd* inquiry regarding impact of his testimony on jury such that a reasonable person would be persuaded not to testify). The defendant can also revoke or withdraw his waiver of the right to testify. *State v. Christian*, 967 P.2d 239, 252-53 (Haw. 1998). *But see Moctar v. United States*, 718 A.2d 1063, 1068 (D.C. 1998) (trial court does not have to conduct a full evidentiary hearing with a non-testifying defendant when it finds a possible waiver of right to testify).

The Sixth Amendment also guarantees the accused "compulsory process for obtaining witnesses in his favor." This right, "fundamental and essential to a fair trial," applies in state as well as federal courts. *Washington*, 388 U.S. at 17-18. The right to present a defense combines with the Sixth Amendment right to confront adverse witnesses, thus constitutionalizing "the right to a defense as we know it." *California v. Green*, 399 U.S. 149, 176 (1970) (Harlan, J., concurring).

> 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 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. The right is a fundamental element of due process of law.

Washington, 388 U.S. at 19. In *Obiazor v. United* States, 964 A.2d 147, 154 (D.C. 2009), the court reversed the defendant's two counts of misdemeanor sex abuse convictions and remanded his case for a new trial after finding that the trial court erred in preventing the defense from cross-examining the twelve-year-old complainant about the similarity between her allegations

against the defendant and previous allegations she made against her grandmother's boyfriend to argue that she sought the same affection she received from her mother following the first incident, and the trial court erred in prohibiting the defense from arguing that the unusual similarity between the two incidents should cast doubt on the complainant's veracity. Because the child complainant's credibility could have been undermined, the defense argument could have lessened the impact of her testimony, and she was the government's key witness, without whom the defendant would not have been convicted, the error was not harmless. *Id.* Additionally, in *Bassil v. United States*, 517 A.2d 714, 716 (D.C. 1986), the court found constitutional error in prohibiting a defendant from introducing evidence of a government witness's bad reputation in the community for truth and veracity.[3] *See also Bynum v. United States*, 799 A.2d 1188 (D.C. 2002), (reversible error when court precluded the defense from admitting surrebuttal testimony ultimately denying Bynum the personal use defense); *Flores v. United States*, 698 A.2d 474, 480 (D.C. 1997) (reversible error found where court adhered strictly to pre-set time limitations for cross-examination); *cf. Johnson v. United States*, 960 A.2d 281, 296-300 (D.C. 2008) (no violation of defendant's constitutional right to present a complete defense by limiting defendant's testimony when limitation did not deprive him of opportunity to testify to his state of mind, the trial court recognized its ability to use this discretion and purported to do so, the trial court based its determination on firm factual record, and the court's actions were within a permitted range of alternatives); *Roundtree v. United States*, 581 A.2d 315, 320-26 (D.C. 1990) (confrontation clause not violated when defendant, who failed to show that prior accusations were false, was denied opportunity to cross-examine government witness about prior allegations of sexual assaults); *Van Ness v. United States*, 568 A.2d 1079, 1080-82 (D.C. 1990) (no error in restricting cross-examination of police officer on ethical aspects of undercover investigation including how officers are evaluated); *United States v. Ashton*, 555 F.3d 1015, 1020-21 (D.C. Cir. 2009) (the district court acted within its discretion in denying defendant's request for a continuance to secure the testimony of detective who had pneumonia during trial and was thus unavailable to testify where defense counsel proffered the testimony would refute that defendant claimed ownership of drugs recovered at arrest; but counsel failed to make "diligent efforts" to secure the detective's testimony prior to trial, counsel made no projection as to the length of the delay, and the detective's testimony was of "little importance" to "a just determination of the cause"). *But see Cannon v. United States*, 838 A.2d 293 (D.C. 2003) (court did not err in denying defendant the opportunity to present surrebuttal testimony to repair damaged creditability because the rebuttal witness's testimony was stricken from the record). In *Gamble v. United States*, 901 A.2d 159, 171-72 (D.C. 2006), the Court of Appeals found no error in the trial court precluding defense counsel from questioning a defense witness about his belief that a government witness was a paid government informant, where counsel never characterized such testimony as relevant to that witness's bias, where on cross-examination the witness denied being an informant, and where counsel never responded to the court's invitation to make a specific proffer on the matter.

[3] "Community" may include work and school. *Rogers v. United States*, 566 A.2d 69, 74 (D.C. 1989) (en banc). Specific acts of lying must be shown by clear and convincing evidence. *Id.*

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***Gilliam v. United States*, 80 A.3d 192 (D.C. 2013).** Reversible error to deny brief continuance to allow defendants to call cell phone provider employee to testify that witness's cell phone number had not been active morning of murder where no other witness identified defendants as perpetrators of murder and that witness claimed that he and defendants had met up to arm themselves before finding victim and killing him.

***Richardson v. United States*, 98 A.3d 178 (D.C. 2014).** Reversible error for trial court to exclude "snitch" evidence—(1) evidence that defendant had obtained drugs from decedent's brother morning of stabbing, (2) evidence that, months before stabbing, defendant had spoken with police about drug sales from decedent's family's apartment and police had executed search warrant there, and (3) testimony by defendant that he believed decedent knew he had actually talked to police—that would have supported defendant's self-defense claim where evidence would have shown that defendant had an objectively reasonable belief that he had been in imminent danger of serious bodily harm or death at time he stabbed decedent and that use of lethal force had been necessary to save himself from that harm.

***Austin v. United States*, 64 A.3d 413 (D.C. 2013).** See, supra, Chapter 29.II.B.

***Patterson v. United States*, 37 A.3d 230 (D.C. 2012),** amended, reh'g en banc denied (Oct. 11, 2012) (per curiam).

See, supra, Chapter 29.III.

***Timms v. United States*, 25 A.3d 29 (D.C. 2011).** Trial court did not violate defendant's Sixth Amendment right of confrontation in denying defense request for leave to ask additional questions after cross-examination had concluded and court asked witness question in response to juror inquiry regarding presence of other individuals where counsel had sufficient opportunity to confront witness on issue during cross and where evidence was "extensive" that defendant had been shooter.

***Gay v. United States*, 12 A.3d 643 (D.C. 2011).** See, supra, Chapter 26.II.A.

***Woods v. United States*, 987 A.2d 451 (D.C. 2010).** Harmless error for trial court to limit defense line of questioning during direct examination of defendant to the fact that he lied to the police and why when first questioned and not content of lies, later elicited during cross-examination, because jury present to observe exchange that revealed defendant wanted to explain himself on direct examination but was precluded from doing so.

C. Limitations on Defense Evidence

As with any other witness, various hearsay and privilege issues may arise in the testimony of a defense witness. The Sixth Amendment right to present a defense, however, changes the analysis of the evidentiary issues. Evidentiary rules which exclude important exculpatory evidence must give way to the defendant's Sixth Amendment rights. *Chambers v. Mississippi*,

410 U.S. 284, 302 (1973). Erroneous exclusion of defense evidence violates the defendant's Sixth Amendment rights. *See Feaster v. United States*, 631 A.2d 400, 411 (D.C. 1993) (improper exclusion of grand jury testimony of unavailable witness not harmless); *see also Vereen v. United States*, 587 A.2d 456, 457-58 (D.C. 1991) (trial court's failure to disclose mental health records of government witness deprived defense of opportunity to adequately challenge witness's testimony through an expert). Courts will examine the prejudice deemed to result from evidentiary decisions and the surrounding context of those decisions. *See Lazo v. United States*, 930 A.2d 183, 186 (D.C. 2007) (any resulting prejudice was too slight to warrant reversal where trial judge suggested to defense counsel, in the presence of the jury, that he would have to pare down the number of witnesses he intended to call).

1. Evidence that another committed the offense

Implicit in almost any denial of participation by the defendant in an offense is a claim that someone else actually committed the crime. Occasionally the defense will seek to introduce evidence that a third party has actually confessed. Usually, the declarant is not available at trial and the defense wishes to present the confession through a witness who heard it, or the declarant is available to testify but denies making the confession. If the declarant cannot be found despite counsel's diligent efforts or has a Fifth Amendment privilege, and is thus "unavailable," the confession may be admissible as a "declaration against penal interest," if the court finds that: (a) the declarant in fact made the statement; (b) the declarant is unavailable; and (c) corroborating circumstances clearly indicate the trustworthiness of the statement. *See Laumer v. United States*, 409 A.2d 190, 199 (D.C. 1979) (en banc).

If the declarant is "available," counsel cannot rely on *Laumer*, but should instead cite *Chambers*. In *Chambers* the Supreme Court reversed a murder conviction because the trial court had excluded, on hearsay grounds, proffered testimony of crucial defense witnesses. *Chambers*, 410 U.S. at 302. Chambers had called McDonald, who had previously given Chambers's attorney a sworn confession of guilt, as a witness. On the stand, McDonald repudiated his confession and asserted an alibi. The trial court refused to allow counsel to treat him as a hostile witness, and excluded as hearsay three witnesses' proffered testimony to his confession. *Id*. at 291-93. In reversing, the Supreme Court began with the premise that "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Id*. at 302. Acknowledging that Mississippi had refused to adopt an exception to the hearsay rule for an admission against penal interest, *id*. at 300 n.20, the Court made clear that state evidentiary rules must give way where they operate to prevent a defendant from presenting a defense: "[The proffered testimony] 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 mechanistically to defeat the ends of justice." *Id*. at 302.[4] Courts have applied the principles set forth in *Chambers* and *Washington* to set aside convictions in a variety of situations where the testimony of defense witnesses was restricted.[5]

[4] The Court reversed because the combined exclusion of testimony and denial of cross-examination of McDonald denied Chambers a trial "in accord with the traditional and fundamental standards of due process." *Chambers*, 410 U.S. at 302.

[5] *See, e.g., Brown v. United States*, 584 A.2d 537, 543-44 (D.C. 1990) (reversible error to deny defendant opportunity to present full evidence of provocation); *United States v. Armstrong*, 621 F.2d 951, 952 (9th Cir. 1980)

When seeking to introduce evidence that another person committed the offense, counsel should emphasize any available indicia of reliability of the proffered testimony. In *Jackson v. United States*, 424 A.2d 40, 42 (D.C. 1980), the court rejected appellant's claim that *Chambers* required admission of certain exculpatory hearsay because, unlike the admission against penal interest in *Chambers*, it lacked indicia of reliability.

The Supreme Court recognizes some limitation on the allowable inferences one can make about third-party guilt even given strong government evidence of the defendant's guilt in *Holmes v. South Carolina*, 547 U.S. 319 (2006). The Court notes that "[j]ust because the prosecution's evidence, if credited, would provide strong support for a guilty verdict, it does not follow that evidence of third-party guilt has only a weak logical connection to the central issues in the case." *Holmes*, 547 U.S. at 330. A criminal defendant's constitutional rights are violated by an evidence rule under which a defendant many not introduce evidence of third-party guilt when the prosecution has introduced forensic evidence that strongly supports a guilty verdict. *Id.* at 330-31. The strength of one party's evidence does not dictate the strength of another party's rebuttal evidence. *Id.* at 331.

In *Winfield v. United States*, the court examined the *Brown-Beale* principle that "before evidence of the guilt of another can be deemed relevant and thereby admissible, the evidence must clearly link that other person to the commission of the crime." *Winfield*, 676 A.2d 1, 2 (D.C. 1996) (en banc) (quoting *Beale v. United States*, 465 A.2d 796, 803 (D.C. 1983)). The court concluded that "the phrase 'clearly linked' is unhelpful and should be discarded from our lexicon of terms governing the admissibility of third-party perpetrator evidence." *Id*. at 3. The test is one of simple relevance. Defense proffers of evidence that persons other than the defendant committed the charged offense need only provide a "link, connection or nexus between the proffered evidence and the crime at issue," *id*. at 5 (quoting *Johnson v. United States*, 552 A.2d 513, 516 (D.C. 1989).[6] The court noted that a "requirement that evidence 'tend to indicate some *reasonable possibility* that a person other than the defendant committed the charged offense.' . . . sufficiently accommodates the concern . . . that surmise as to third-party responsibility for a

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(reversible error to exclude testimony that another man, matching description of robber, had made purchases with marked money); *Ronson v. Commissioner*, 604 F.2d 176, 179 (2d Cir. 1979) (habeas relief granted where state court refused to allow accused to call a psychiatrist because defense failed to file formal notice of intention to raise insanity defense); *Pettijohn v. Hall*, 599 F.2d 476, 482-83 (1st Cir. 1979) (habeas relief granted where state court precluded accused from calling eyewitness concerning misidentification after witness's subsequent identification of accused was suppressed); *United States v. Torres*, 477 F.2d 922, 923 (9th Cir. 1973) (reversible error to preclude defense impeachment of own witness with prior narcotics conviction, though no claim of surprise); *Curry v. Estelle*, 412 F. Supp. 198, 201 (S.D. Tex. 1975), *aff'd on related ground*, 531 F.2d 1260 (5th Cir. 1976) (habeas relief granted where state refused to disclose identities of two material, non-informant witnesses alluded to, but not called by government at trial).

[6] In *Winfield v. United States*, 652 A.2d 608 (D.C. 1994), *vacated*, 661 A.2d 1094 (1995) (*Winfield I*), the defense proffered that a third party had kidnapped, stabbed and shot the decedent one month before the murder because the third party suspected her of being a witness in another case. On the day the decedent was killed, she testified before the grand jury in that case against the third party, and then called her mother to say "they" were after her. Furthermore, witnesses heard her killer say, "you won't tell this." In *Winfield I*, the court found that the coincidence of a strong motive and prior assaults on the decedent by the third party were, without more, insufficient to establish the required link or nexus between those events and the crime charged. *See e.g.*, *Jordan v. United States*, 722 A.2d 1257, 1258 (D.C. 1998) (applying *Winfield I*, the court unduly limited third party perpetrator evidence, but the error was harmless); *accord Thomas v. United States*, 715 A.2d 121 (D.C. 1998).

crime risks misleading the jury by distracting it from the issue of whether *this* defendant is guilty or not." *Winfield*, 676 A.2d at 5 (citation omitted) (emphasis in original); *accord Wilson v. United States*, 711 A.2d 75, 77 (D.C. 1998). *See Battle v. United States*, 794 A.2d 53 (D.C. 2001) (the court found that there was proof which "tended to indicate some reasonable possibility that someone other than defendant shot the decedent"); *see also Newman v. United States*, 824 A.2d 40 (D.C. 2003) (the court holds that the risk of jury confusion can never be a basis for excluding otherwise admissible *Winfield* evidence and that evidence of a prior robbery two weeks before involving some of the same people but not the defendant was admissible even though it did not meet a "signature crime" standard).

However, "[s]imple proof of motivation of others to commit the crime ordinarily does not create a 'real possibility' that any of them was the perpetrator." *Winfield*, 676 A.2d at 5. Thus, a trial court "may exclude evidence of third-party motivation unattended by proof that the party had the practical opportunity to commit the crime, including at least inferential knowledge of the victim's whereabouts." *Id.* (citations omitted); *see Bruce v. United States***,** 820 A.2d 540 (D.C. 2003) (third-party perpetrator defense was speculation and thus did not satisfy *Winfield*); *Resper v. United States*, 793 A.2d 450 (D.C. 2002) (court properly excluded evidence of "widespread ill will against the victim" is not enough to compel admissibility under *Winfield*); *Hager v. United States***,** 791 A.2d 911 (D.C. 2002) (court holds that the trial court did not abuse its discretion in refusing to allow defense counsel to argue that the murder was committed by one of two brothers because the evidence was too speculative to show a third party's culpability even under *Winfield*); *see also Brown v. United States*, 932 A.2d 521 (D.C. 2007) (no abuse of discretion where trial court excludes as irrelevant certain evidence and arguments that someone other than defendant had sold cocaine to undercover police officer because defendant failed to make sufficient proffer that person other than defendant was seller and because additional evidence of such person being a drug dealer would not have made it less likely that defendant, too, was a drug dealer); *Freeland v. United States*, 631 A.2d 1186, 1189 (D.C. 1993) (given other evidence, failure to proffer direct evidence placing the other person at the scene is not dispositive).

Similarly, "although *Winfield* relaxed somewhat the test for connecting the charged offense to an allegedly culpable third party, neither *Winfield* nor any of our prior decisions suggested that the third party could be a hypothetical person, *i.e.*, an unidentified, unknown person with only generic reasons for committing crime." *Gethers v. United States*, 684 A.2d 1266, 1271 (D.C. 1996);[7] *see Jolly v. United States*, 704 A.2d 855, 860 (D.C. 1997) (the trial court did not impair the defendant's ability to present the bias defense by instructing the jury that the third person is "not connected to the offense").

[7] *Gethers* involved a defense proffer that a "dissatisfied customer" might have shot the decedent in retaliation for receiving a "burn bag." 684 A.2d at 1270. The court agreed with the trial judge that counsel was "merely trying to throw something out there for the jury to speculate about." *Id.*at 1272.

Evidence that Other Person Committed Offense:

- ✓ If declarant is available, counsel should rely on *Chambers*, not *Laumer* Emphasize any available indicia of reliability when introducing evidence that another committed the crime

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***Melendez v. United States*, 26 A.3d 234 (D.C. 2011).** No abuse of discretion to allow defendant to present third-party perpetrator defense only after government had rested its case-in-chief where pretrial proffer had contained insufficient evidence that particular third party had opportunity to harm victim on date of murder, trial court allowed defendant to argue in opening that evidence would show that unnamed "person" other than defendant had committed offense, and trial court required only that any bias cross-examination as to third party be raised first with court, and where trial court intervened immediately and offered to provide limiting instruction when prosecutor argued in rebuttal as to the "lateness" of defendant's identification of third-party perpetrator.

***Williamson v. United States*, 993 A.2d 599 (D.C. 2010).** Not abuse of discretion to refuse to permit defense counsel to testify to "admission" of third party who refused to testify or sign affidavit and whose testimony would have been uncorroborated, failed to provide motive and contradicted defendant's own trial testimony.

2. Fifth Amendment privilege[8]

Co-defendants: There are several common situations in which a defense witness may have a Fifth Amendment privilege – for example, a co-defendant whose case has been severed for trial or has pled guilty but not yet been sentenced, a juvenile charged with the same offense, a person who was present during the crime but was never arrested or whose case was no-papered. **If counsel becomes aware of a witness with a potential privilege, counsel should alert the court to appoint counsel for the witness.** The court cannot simply accept an assertion by the witness or the witness's attorney on the validity of the purported privilege; only through a full hearing can the issues be resolved. *See Davis v. United States*, 482 A.2d 783 (D.C. 1984); *Jaggers v. United States*, 482 A.2d 786 (D.C. 1984); *Salim v. United States*, 480 A.2d 710 (D.C. 1984). The court must determine whether the testimony would be incriminating and thus create

[8] While this discussion focuses on assertion of the Fifth Amendment privilege, non-constitutional privileges may also be asserted. Where reasonable accommodation of these privileges and the accused's right to present a defense is not possible, the Sixth Amendment guarantee must prevail. *See United States v. Nixon*, 418 U.S. 683 (1974) (subpoena in criminal case prevails over generalized assertion of absolute executive privilege); *Branzburg v. Hayes*, 408 U.S. 665, 692 (1972) (reporter's privilege pierced in criminal investigation); *Roviaro v. United States*, 353 U.S. 53, 60-62 (1957) (informant's privilege overcome).

the *possibility* of further prosecution. *Carter v. United States*, 684 A.2d 331, 338 (D.C. 1996) (en banc).[9]

Since the privilege of a mere witness is narrow, and may be invoked only in response to specific questions that would incriminate, the court must conduct a hearing in order to rule on the claim of privilege. *See Harris v. United States*, 614 A.2d 1277, 1282 (D.C. 1992); *see also Vaughn v. United States*, 364 A.2d 1187, 1189 (D.C. 1976). The court should permit questioning of the witness outside the jury's presence, ruling on the validity of the privilege as each question is asked. *Id.*; *Davis*, 482 A.2d at 785; *Salim*, 480 A.2d at 715. If the court determines that the witness will assert a valid privilege to virtually all questions asked, it may bar the witness from taking the stand and asserting the privilege in front of the jury. *Brown v. United States*, 589 A.2d 434, 436 (D.C. 1991); *Reese v. United States*, 467 A.2d 152, 157 (D.C. 1983); *Alston v. United States*, 383 A.2d 307, 313 (D.C. 1978).

Even a witness who appears to have a privilege may have waived it in the grand jury, at the time of a guilty plea, or in some other court proceeding. *See Salim*, 480 A.2d at 714-15; *Ellis v. United States*, 416 F.2d 791, 800 (D.C. Cir. 1969);[10] *cf. Croom v. United States*, 546 A.2d 1006, 1009 (D.C. 1988) (waiver of marital privilege at grand jury precludes its assertion at trial). The witness may also have made sworn statements admissible as prior testimony. *See Boone v. United States*, 769 A.2d 811 (D.C. 2001) (defendant waived issue of accommodating potential defense witness's Fifth Amendment privilege and defendant's Sixth Amendment right to present a defense when he decided not to call the witness); *see also* Fed. R. Evid. 804(b)(1); *Alston*, 383 A.2d 307 (reversible error where trial court did not admit accomplice's statements made under oath during entry of guilty plea). *But see Smith v. United States*, 809 A.2d 1216 (D.C. 2002) (defendant was denied his Fifth and Sixth Amendment rights to due process and to present a defense when the trial judge precluded him from calling his former co-defendant as a witness).

When the prospective witness is a co-defendant who has pleaded guilty, the issue may be avoided by continuing the defendant's trial until after the witness is sentenced because the privilege will no longer exist. *Jones v. United States*, 386 A.2d 308, 315 (D.C. 1978). In *Tucker v. United States*, 571 A.2d 797, 800 (D.C. 1990), the court reversed a conviction because the trial court failed to grant a two-week continuance for that purpose. *Tucker* also recognized that when a continuance is requested under such circumstances, the defense may not be in a position to proffer the precise testimony that it expects to elicit from the co-defendant. *Id.* at 800. In *Martin v. United States*, 606 A.2d 120, 132 (D.C. 1991), the court reversed a murder conviction for failure to grant a mistrial when the co-defendant pleaded guilty in the middle of trial and the defendant sought a continuance until after the co-defendant's sentencing so he could present the co-defendant's exculpatory testimony.

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[9] *Carter* specifically overruled *Jaggers v. United States*, 482 A.2d 786 (D.C. 1984), and its progeny "insofar as these cases require the trial judge, in evaluating a defense witness's invocation of the privilege against self-incrimination, to predict or assess the practical likelihood that the witness will be prosecuted." *Carter*, 684 A.2d at 334.

[10] A witness does not necessarily waive the Fifth Amendment privilege by testifying before the grand jury. The privilege is waived only if the waiver is explicit or the witness makes an *incriminating* statement to the grand jury, so that the testimony at trial cannot further incriminate the witness. *See Rogers v. United States*, 340 U.S. 367, 372-75 (1951); *see also Harris*, 614 A.2d at 1282 (testimony at suppression hearing constituted voluntary waiver and was thus admissible at trial); *United States v. Honesty*, 115 Wash. D.L. Rptr. 25 (D.C. Super. Ct. Jan. 7, 1987).

If an answer could incriminate the witness, the Fifth Amendment privilege outweighs the defendant's Sixth Amendment right to compulsory process, and the defendant must proceed without the evidence that the witness could provide. *See, e.g., Carter*, 684 A.2d at 336; *Harris*, 614 A.2d at 1281-82; *Jaggers*, 482 A.2d at 793 n.3; *accord Isler v. United States*, 731 A.2d 837 (D.C. 1999). Yet the courts can and have conferred use immunity on witnesses and fashioned other remedies for the defendant.[11]

Immunity of Defense Witness: The historic reluctance on the part of the executive and judiciary to confer immunity at a defendant's request was rooted in a concern that allowed the accused "to give his confederates an immunity bath." *In re Kilgo*, 484 F.2d 1215, 1222 (4th Cir. 1973); *see also Earl v. United States*, 361 F.2d 531 (D.C. Cir. 1966). This concern was minimized in *Kastigar v. United States*, where the Court held that immunity from subsequent *use* of compelled testimony is sufficient to satisfy the privilege against self-incrimination. 406 U.S. 441, 462 (1972). The witness could still be prosecuted in connection with the transaction about which he or she had testified, but the witness's own testimony could not be used. *Id*. at 453.

There is growing judicial recognition that the government's refusal to grant "use" immunity to a witness capable of providing clearly exculpatory information absent a compelling state interest, intrudes deeply upon the Fifth and Sixth Amendment right to present a defense.[12] Some courts have suggested that if the government grants immunity to its own witnesses, it may also have to grant immunity to defense witnesses if their testimony would be needed to ensure a fair trial.[13] *See, e.g.*, *Earl*, 361 F.2d at 534 n.1; *United States v. Alessio*, 528 F.2d 1079 (9th Cir. 1976); *United States v. Ramsey*, 503 F.2d 524 (7th Cir. 1974).

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[11] This discussion concerns situations in which the potential witness may assert the privilege against self-incrimination *on direct examination*. When the privilege may apply only to questions and answers during cross-examination:

> it is necessary to balance the defendant's need to present evidence against the Government's ability to cross-examine the witness effectively to guarantee truthfulness and accuracy. Certainly the defendant does not have a blanket right to produce testimony that the Government is completely foreclosed from challenging on cross-examination. But where the rights of the defendant and the Government can be reconciled, the defendant's constitutional right to procure testimony in his favor must prevail.

United States v. Pardo, 636 F.2d 535, 544-45 (D.C. Cir. 1980). When the government proffers testimony of a witness who claims the privilege during defense cross-examination, the result may be exactly the opposite. *See Johnson v. United States*, 418 A.2d 136, 140 (D.C. 1980) (Confrontation Clause required reversal of conviction where cross-examination on bias and motive was precluded by government witness's assertion of privilege).

[12] *See Carter*, 684 A.2d at 338-44 (discussing whether defense witness immunity should be judicially imposed or prosecutor should be required to grant immunity or risk dismissal if testimony is material and exculpatory); *Jaggers*, 482 A.2d at 795 n.7. *But see In re J.W.Y.*, 363 A.2d 674 (D.C. 1976); *Terrell v. United States*, 294 A.2d 860 (D.C. 1972).

[13] Nevertheless, obstacles to admitting defense witness testimony still remain. In *Brown v. United States*, 934 A.2d 930, 937-38 (D.C. 2007), the court of appeals found that the trial court did not violate the defendant's Sixth Amendment right to present a defense in granting blanket Fifth Amendment privilege to a defense witness facing ongoing federal drug investigation where the court found there was no relevant non-inculpatory testimony that the witness could provide on defendants' behalf and where defense counsel did not make a pre-trial request for witness immunity as required by *Carter*.

Carter held that "[i]f immunity of a defense witness is . . . sought, the defendant must first establish to the trial court's satisfaction that the proposed testimony is (a) material, (b) clearly exculpatory, (c) non-cumulative, and (d) unobtainable from any other source." *Carter*, 684 A.2d at 344. The defense may, in the trial court's discretion, make this initial proffer *ex parte*. *Id.* If the judge concludes preliminarily that "the process should continue" the "next step might be to institute a debriefing process . . . to determine whether the government will accede to a grant of use immunity." *Id.* at 345. Finally, if after a "debriefing procedure and investigation" the government declines to grant "use" immunity, the trial court should "explore the basis of the government's refusal and decide whether there will be a distortion of the fact-finding process and the indictment should be dismissed." *Carter*, 684 A.2d at 345.

In *Government of the Virgin Islands v. Smith*, 615 F.2d 964, 974 (3d Cir. 1980), the court remanded for an evidentiary hearing to determine whether the government's refusal to grant immunity was intended merely to keep highly relevant and possibly exculpatory evidence from the jury. The United States Attorney had refused to consent to a grant of immunity by juvenile authorities to a juvenile witness who had provided exculpatory information. The court found that the refusal strongly suggested that the government was merely barring from trial important evidence to save its case.[14] *See Wilson v. United States*, 558 A.2d 1135, 1140 (D.C. 1989) (noting tendency for executive branch to exercise discretion regarding immunity in ways that make it more likely that defendants will be convicted). *Smith* indicates that the right to compel testimony where the witness invokes a privilege should not turn on whether the prosecution has granted immunity to its own witnesses or has dealt heavy-handedly with prospective defense witnesses. *Smith*, 615 F.2d at 972-73. Rather, it should depend solely on whether the government can show that there is a legitimate, overriding reason not to grant immunity.[15] To obtain immunity under *Smith*, the defense must apply to the trial court, naming the proposed witness and specifying the particulars of the testimony; the witness must be available to testify; the defendant must show convincingly that the testimony will be clearly exculpatory and essential; and the government must lack any strong countervailing interest. *See Smith*, 615 F.2d at 972.

Judicial Grant of Immunity: If it becomes apparent that some judicial action is necessary to vindicate the accused's constitutional rights, and there is no legitimate government interest in refusing to provide immunity, there is precedent for a judicial grant of immunity. For example, a defendant who wishes to testify at a pre-trial suppression hearing is granted immunity from use of the pre-trial testimony as substantive evidence at trial. *Simmons v. United States*, 390 U.S. 377, 394 (1968). Similarly, the Third Circuit has twice found the need for judicial grants of immunity. *See In re Grand Jury Investigation*, 587 F.2d 589, 597 (3d Cir. 1978) (testimony

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[14] Some cases have used the *Smith* analysis but have reached a different conclusion regarding denial of the defense request for immunity. *See, e.g., United States v. Davis*, 623 F.2d 188, 192-93 (1st Cir. 1980); *United States v. McMichael*, 492 F. Supp. 205, 206-08 (D. Colo. 1980); *see also United States v. Turkish*, 623 F.2d 769, 776-77 (2d Cir. 1980) (considering *Smith* analysis, but disagreeing with the standards it outlines).

[15] Where, as in *Smith*, the prosecutor, explicitly or implicitly, has previously indicated a lack of interest in prosecuting the witness in the face of known potential liability (as by not seeking an indictment, or dismissing a complaint), a strong inference may be drawn against governmental refusals to confer immunity for trial. If the government was not previously aware of the potential liability, *see, e.g.*, *In re J.W.Y.*, 363 A.2d 674, 684 (D.C. 1976), the propriety of a refusal to grant immunity requires balancing the accused's need for the testimony against the prejudice to the government of conferring "use" immunity.

predicate to Speech and Debate Clause defense); *United States v. Inmon*, 568 F.2d 326, 332-33 (3d Cir. 1977) (testimony predicate to double jeopardy defense). Just as local rules of evidence give way when they operate to prevent an accused from introducing exculpatory and reliable testimony, *Chambers v. Mississippi*, 410 U.S. 284, 295-98 (1973), courts have interpreted witness privileges flexibly enough to permit an accused to present the testimony of witnesses necessary for the defense. *Roviaro v. United States*, 353 U.S. 53, 60-62 (1957) (abrogation of informant's privilege); *see Tucker v. United States*, 799-800 (D.C. 1990) (reversible error to deny two-week continuance until after sentencing of witness who would invoke privilege).

Other Remedial Actions: Courts have taken other remedial actions as well. In *United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976), the court reversed the conviction because the prosecutor had confronted a prospective defense witness outside the courtroom and threatened to prosecute if her testimony incriminated her. On remand, the trial court was instructed to enter a judgment of acquittal unless the government offered the witness "use" immunity. *See United States v. Herman*, 589 F.2d 1191, 1204 (3d Cir. 1978), (where government denied "use" immunity to defense witnesses with the "deliberate intention of distorting the judicial fact finding process," the trial court has remedial power to order dismissal unless government grants immunity).

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***Aiken v. United States*, 30 A.3d 127 (D.C. 2011).** See, *supra*, Chapter 11.III.B.

***Mason v. United States*, 53 A.3d 1084 (D.C. 2012).** See, *supra*, Chapter 26.II.D.2.C.

D. Where the Government Discourages Testimony

Occasionally the police, prosecutor or judge may try to discourage a defense witness from testifying, for example, with "reminders" as to the penalty for perjury. A long line of cases forbids these practices. *See Webb v. Texas*, 409 U.S. 95, 98 (1972) (violation of right to compulsory process where sole defense witness refused to testify after judicial admonition concerning potential perjury prosecution); *see also United States v. Smith*, 478 F.2d 976 (D.C. Cir. 1973) (reversible error for prosecutor to warn defense witness that he might be prosecuted if he testified). *But see Holbert v. United States*, 513 A.2d 825, 826-28 (D.C. 1986) (no prosecutorial misconduct in causing mid-trial arrest of potential defense witness, based on information developed during trial, with resulting invocation of Fifth Amendment privilege by witness); *Reese*, 467 A.2d at 156 (prosecutor's remarks to attorney for defendant's alibi witness, moments before witness was to testify that testimony could lead to accessory charges were improper, but did not substantially prejudice defendant); *United States v. Simmons*, 699 F.2d 1250 (D.C. Cir. 1983) (warning by prosecutor to defense witness about possible prosecution for perjury if witness testified falsely not improper); *United States v. Blackwell*, 694 F.2d 1325 (D.C. Cir. 1982) (no judicial or prosecutorial misconduct or violation of defendant's right to call witnesses when both prosecutor and judge warned defense witness of consequences of perjury).

Pointed reminders from the trial court about the duty to testify truthfully and the penalties for perjury may have the practical effect of keeping a potential defense witness off the witness stand. In *Yates v. United States*, 513 A.2d 818, 820 (D.C. 1986), the trial court made numerous remarks

to a potential defense witness concerning the necessity for telling the truth and the consequences of perjury. The potential witness, a co-defendant, had made a post-arrest statement inculpating the defendant, but later gave the defendant's attorney a statement exculpating the defendant. The court's remarks were made at a hearing on the defendant's severance motion. *Id*. at 821-22. After questioning by the court, which included references to perjury, the co-defendant told the court that he could not give exculpatory testimony for the defendant. He then pleaded guilty, and testified for the government. *Id*. at 822. The Court of Appeals characterized the case as a close one, but held that the court's repeated remarks did not violate the Sixth Amendment right to present witnesses because of the need to inquire into the nature of the co-defendant's testimony in order to rule on the severance motion, the inconsistent statements, and the fact that some of the court's strongest remarks were made after the co-defendant had changed his position. Id. at 824.

Courts will reflect on whether a defendant's substantial rights have actually been violated as addressed under D.C. Code § 11-721 (e) (2001) in inquiries about government intimidation. In *Scott v. United States*, 898 A.2d 899 (D.C. 2006), a destruction of property case, a defense witness alleged that a detective told her that if she testified to a certain version of the facts, he would have her locked up and would falsely testify that she had given him a more inculpatory version previously. The trial judge's potential error in failing to question the detective before concluding that he had done nothing "illegal" did not affect the defendant's substantial rights because the defense did not assert that the witness would have testified but for the alleged intimidation, and the court found the defendant guilty based on the testimony of an eyewitness whose testimony the defense did not suggest would have been impeached by the intimidated witness. *Id.* at 901.

Whenever the police, the prosecutor, or the court has sought to discourage a potential defense witness from testifying, **counsel should object on Sixth Amendment grounds, and ensure that the record reflects the precise remarks made**.

E. The Notice of Alibi Rule

The prosecution is entitled to demand the names of witnesses who would furnish an alibi. If the defendant does not comply, the trial court may exclude the testimony of the undisclosed alibi witness, absent "good cause." Super. Ct. Crim. R. 12.1(d).[16]

Even assuming there is no "good cause" for non-compliance, **counsel should argue that preclusion of the testimony of non-disclosed alibi witnesses is unconstitutional**. The Supreme Court thus far has refrained from deciding this issue. *See Wardius v. Oregon*, 412 U.S. 470, 472 n.4 (1973); *Williams v. Florida*, 399 U.S. 78, 83 n.14 (1970). The District of Columbia Court of Appeals also has never ruled on this precise issue, but has recognized the constitutional

[16] Rule 12.1 is "an exception to the general concept that a defendant need not commit his or her defense to a particular course until the government has presented its entire case, so that the defense in no way aids the prosecution in its presentation." *McKoy v. United States*, 518 A.2d 1013, 1018 (D.C. 1986).

concerns. *See Clark v. United States*, 396 A.2d 997, 999-1000 & n.6 (D.C. 1979); *see also United States v. Smith*, 524 F.2d 1288 (D.C. Cir. 1975).[17]

F. Ethical Considerations

Counsel cannot knowingly present the perjured testimony of any witness. D.C. R. Prof. Cond. 3.3(a)(4). Special rules apply if the witness is the client.

> When the witness who intends to give evidence that the lawyer knows to be false is the lawyer's client and is the accused in a criminal case, the lawyer shall first make a good-faith effort to dissuade the client from presenting the false evidence; if the lawyer is unable to dissuade the client, the lawyer shall seek leave of the tribunal to withdraw. If the lawyer is unable to dissuade the client or to withdraw without seriously harming the client, the lawyer may put the client on the stand to testify in a narrative fashion, but the lawyer shall not examine the client in such manner as to elicit testimony which the lawyer knows to be false, and shall not argue the probative value of the client's testimony in closing argument.

D.C. R. Prof. Cond. 3.3(b); *see also ABA Code of Professional Responsibility*, DR 7-102(A)(4); *ABA Standards for Criminal Justice* (The Defense Function) (1980).[18]

With proper and tactful advice from the attorney to the client, it is highly unlikely that counsel will face a real ethical dilemma. Counsel must make every effort to avoid concluding that the client intends to commit perjury. "The protection of a client's confidence is so basic a tenet of professional responsibility that it yields only in the rarest of real ethical dilemmas." *Butler v. United States*, 414 A.2d 844, 849 (D.C. 1980) (en banc). A client's suggestion of two or more inconsistent defenses does not raise an ethical dilemma. *See Johnson v. United States*, 404 A.2d 162, 164 (D.C. 1979). For example, in *Butler*, no ethical dilemma was demonstrated where the accused first admitted and then denied possession of the pistol. "[T]he record does not support an inference that defense counsel knew that this client was going to commit perjury. . . . [C]ounsel knew only that his client had made inconsistent representations to him about the possession of the gun." *Butler*, 414 A.2d at 850.

In the unlikely event that counsel is forced to conclude that the client will commit perjury, the client's confidences must be preserved above all. D.C. R. Prof. Cond. 1.6(a)(1) and 3.3, comment 6. Counsel may not disclose the client's intent to commit perjury, either expressly or impliedly. *Id*. at comment 8. *See generally United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 n.13 (3d Cir. 1977) (citing Callan and David, *Professional Responsibility and the Duty*

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[17] In *United States v. Davis*, 639 F.2d 239, 243 (5th Cir. 1981), the court held that the Compulsory Process Clause forbids exclusion of otherwise admissible evidence solely as a sanction to enforce discovery rules or orders against criminal defendants. The trial court excluded proffered testimony that the chief government witness's reputation for truth and veracity was poor because the witnesses were not on a list provided to the government pursuant to a pre-trial discovery order. The Fifth Circuit reversed, finding the error to be of constitutional proportion.

[18] Disciplinary Rule 7-102(A)(4) applies to all witnesses, not just the accused. The issues are essentially the same, although representations by other witnesses to counsel are not *per se* within the attorney-client privilege.

of Confidentiality: Disclosure of Client Misconduct in an Adversary System, 29 Rutgers L. Rev. 332 (1976)).

Withdrawal: Counsel must seek to withdraw if the problem is discovered and cannot be resolved before trial. D.C. R. Prof. Cond. 3.3(b). In doing so, however, counsel cannot inform the court of the ethical dilemma that gave rise to the withdrawal. More general representations concerning "irreconcilable personal and tactical differences" between attorney and client will usually suffice to procure the court's leave to withdraw where the client consents. *See* Super. Ct. Crim. R. 57(a). If the basis for counsel's request is communicated to the court, counsel should ask that the court recuse itself.[19] *Cf. Butler*, 414 A.2d 844; *Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978). *But see Garrett v. United States*, 642 A.2d 1312, 1315-16 (D.C. 1994) (trial court not required to recuse itself *sua sponte* because counsel's statements did not constitute unequivocal declaration that client would perjure himself). Nor should counsel do or say anything that would place successor counsel in the same dilemma.

Passive Representation: The "passive representation" mode required by Rule 3.3(b) should be employed only if counsel tries and is not allowed to withdraw, even if the dilemma first arises during trial. If the case is tried to a judge who would recognize passive representation, use of that mode of examination would deny the accused a fair trial and due process of law. *Lowery*, 575 F.2d at 731. Alternatively, if counsel informs a judge of the ethical dilemma, litigation on the merits before that judge as fact-finder is fundamentally unfair and denies the accused due process of law. *Butler*, 414 A.2d at 852. Although the danger is less certain in a jury trial, there is a substantial risk that even a jury will sense that something is wrong if counsel employs passive representation, using a unique examination technique during the defendant's testimony. Furthermore, without counsel's assistance, the accused's testimony – content and verity aside – may do more harm than good. *Cf. Ferguson v. Georgia*, 365 U.S. 570, 596 (1961) (statute forbidding elicitation of accused's statement by direct examination unconstitutional). Nor is it likely that counsel's failure to argue the client's testimony during closing argument would escape the jury's attention.

Again, it is very difficult for a lawyer – who, after all, was not there during the relevant events – to "know" that a client intends to commit perjury, and counsel should avoid reaching that conclusion whenever possible.

G. Standard of Review on Appeal

Whenever an issue involving possible denial of the right to present a defense is raised, it is absolutely critical, for appellate purposes, that counsel identify the constitutional basis of the objection to exclusion of evidence.

In 1967, the Supreme Court separated constitutional errors in criminal cases into two classes – those requiring automatic reversal and those that may be found harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18, 23-26 (1967). Among those rights "so basic to

[19] Counsel must make the recusal request because advising successor counsel of the grounds would place the successor in the same ethical dilemma.

a fair trial that their infraction can never be treated as harmless error" is the Sixth Amendment right to counsel. *Id*. at 23 & n.8; *see also Jackson v. United States*, 420 A.2d 1202, 1204-05 (D.C. 1979) (en banc) (reversal is automatic and no showing of prejudice is necessary where judge ordered accused not to confer with counsel over luncheon recess). *But see Bell v. United States*, 950 A.2d 56, 72-73 (D.C. 2008) (no Sixth Amendment violation in accepting defendant's decision to represent himself where trial judge's lengthy discussion with defendant concerning sentencing process, combined with extensive *Hsu* inquiry[20] conducted before trial, adequately appraised defendant of benefits of counsel and risks of proceeding without counsel). However, in most situations where defense evidence is erroneously excluded, the Court of Appeals will subject the error to harm analysis. *See generally Arizona v. Fulminante*, 499 U.S. 279 (1991). If the error is deemed serious enough to be constitutional error, the conviction must be reversed unless the government can demonstrate that the error is harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 24. If the error is deemed mere evidentiary error, the *Kotteakos v. United States*, 328 U.S. 750, 775-77 (1946), standard for non-constitutional error will apply, a standard that is easier for the government to meet. *See also Rowland v. United States*, 840 A.2d 664 (D.C. 2004) (court admitted evidence was found to be harmless and conviction affirmed). The Court of Appeals will decide whether to apply a constitutional or nonconstitutional standard of review depending on the importance of the evidence to the defense theory. *See United States v. Valenzuela-Bernal*, 458 U.S. 858, 873 (1982) (violates Compulsory Process Clause, without justification, to exclude "the testimony of a witness that would have been material and favorable to [the] defense"); *Benn v. United States*, 801 A.2d 132 (D.C. 2002) (constitutional error when court denied defense the opportunity to recall a witness due to the violation of the rules on witnesses); *Battle v. United States*, 754 A.2d 312, 318 (D.C. 2000) (error of constitutional dimension when excluded evidence went "to the heart of the defense theory").

Thus, when a dispute arises about the admissibility of defense evidence, it is the duty of trial counsel, both in attempting to persuade the trial court and for making a good appeal record, to proffer what the evidence would be, explain its importance in advancing the defense theory or rebutting the government theory and point out that the evidence is so material that its exclusion amounts to a constitutional violation. *See supra* Chapter 13.

Objecting to Exclusion of Evidence:

- ✓ Identify the constitutional basis for any objection to the exclusion of evidence
- ✓ Proffer what the evidence would be
- ✓ Explain its importance in advancing the defense theory or rebutting the government theory
- ✓ Point out that the evidence is so material that its exclusion amounts to a constitutional violation

[20] A "Hsu inquiry" requires the trial court to conduct a probe into whether the defendant's decision to waive his right to counsel is knowing, intelligent, and ultimately valid. *Bell*, 950 A.2d at 69.

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***Tillman v. United States*, 68 A.3d 742 (D.C. 2013).** Conviction for escape reversed where trial judge did not hold required *Hsu* inquiry, instead relying on outcome of *Hsu* inquiry made in defendant's unrelated case involving different charges several months earlier.

II. PREPARING DEFENSE WITNESSES

Except for the most experienced of witnesses, testifying can be a confusing experience. Counsel must spend ample time preparing the direct testimony of each witness on direct examination and anticipating lines of inquiry that may be developed during cross-examination. The extent of this preparation will vary depending on the witness and the expected testimony, but every witness requires at least some preparation.

If the witness has never testified and is totally unfamiliar with trials and courtrooms, counsel should explain how a trial works, the order of the proceedings, and the set-up of the courtroom. Counsel should explain the role of the judge, the jury, the prosecutor, and the defense attorney, and where each will physically be located in the courtroom. If possible, the witness should be shown the inside of the courtroom before testifying. Counsel should make sure the witness understands objections to questions and what it means when an objection is sustained or overruled.

In all likelihood each witness will testify as to only one aspect of the case. It is useful to explain to the witness what the trial is about, why his or her testimony is important, and how it fits in with other anticipated evidence. These explanations will help the witness understand why he or she is being asked to sacrifice time during the inevitable court delays (and increase the likelihood that the witness will continue to appear), and to understand the purpose of counsel's questions.

While counsel should remain in contact with prospective witnesses throughout the pre-trial period, it is vital that counsel have a thorough pre-trial conference with the witnesses at least a week before trial. In the event that a witness becomes unavailable, counsel will then have sufficient time to seek a continuance. *See* Super. Ct. Crim. R. 111 (requests for continuance must be filed at least two days prior to scheduled court proceeding).

At this conference, counsel should first inform the witness of how much of the witness's time the trial will consume. If the witness is working, the witness can be placed "on call" to the extent possible.[21] This will not only help to ensure the witness's appearance, but will also alleviate the anxiety and frustration caused by hours of waiting in the witness room. Counsel should also inform the witness of the amount and manner of payment of the witness fee. If at all possible, counsel should request that the witness wait until after the trial before seeking payment, thus encouraging the witness to remain available, and saving valuable time that would otherwise be spent filling out vouchers during the trial itself. Above all, *the witness must be subpoenaed*, no matter how reliable, friendly, or eager to testify he or she may seem. Otherwise, if the witness

[21] Placing a witness "on call" puts the risk on the defense if the witness does not appear and the court refuses to grant a brief continuance to obtain the witness. Therefore, counsel must be certain that the witness will appear in the requested time period before placing the witness on call.

does not appear, counsel will not be able to obtain a continuance and, of course, will not be able to request a bench warrant for the witness's arrest. If the witness questions the need for a subpoena, counsel should explain that the subpoena is being given for technical, legal reasons and not because counsel has doubts about the witness's timely appearance.

Counsel should go through each witness's testimony at the pre-trial conference, including a mock cross-examination (preferably conducted by a colleague of counsel).[22] Hopefully, through this "dress rehearsal," the witness will be prepared for all questions and, at trial, will be able to respond effectively. While the content of the testimony is an obvious focus of preparation, demeanor and appearance on the witness stand are equally important. In this crucial but often ignored area, clothing is critical. While it is generally true that witnesses should "be themselves," some need to be instructed not to wear gold chains, tight jeans, short skirts, or any other mode of dress that might offend some jurors (or the court) or convey the wrong impression. A good rule of thumb is to ask that the witness wear church clothes, or what one would wear to a job interview.

A. General Principles

- The witness should review any possible impeachment material, and be prepared to be confronted with any inconsistencies with his or her own prior statements or the testimony of other witnesses.

- The witness should be familiar with any pertinent government or defense exhibits such as charts, photos, or diagrams.

- The witness should understand that it is appropriate to ask that questions be repeated or rephrased, to answer "I don't know" or "I don't recall," or to give approximations instead of precise answers, if necessary.

- The witness should not ramble, and should answer only the questions asked.

- The witness should speak in a loud, clear voice and appear confident in his or her answers.

- The witness should treat all court personnel with courtesy. It is not helpful, for example, if the witness seems very cooperative toward defense counsel, but treats the prosecutor with disdain.

- The witness should appear interested in his or her testimony, not indifferent.

- A witness with prior convictions that will be used in impeachment should be told to acknowledge them forthrightly and not to try to explain them.

[22] Counsel should never go through the witnesses' testimony in a group setting, but should speak to each witness individually and privately. Counsel should avoid "contemporaneous and substantially verbatim" note-taking during such conferences to avoid court-ordered production of the notes pursuant to Super. Ct. Crim. R. 26.2.

- To the question, "Did you talk to defense counsel?" the witness should be prepared to answer, "Yes, and the lawyer told me to tell the truth."

B. Defense Witness Checklist

- ✓ Subpoena the witness for the trial date.
- ✓ Check the witness's criminal record.
- ✓ Find out whether the witness testified in the grand jury or made statements to the police.
- ✓ Do a "dry run" with the witness of the testimony, including cross-examination. Prepare the witness for all impeachment.
- ✓ Advise the witness on proper attire.
- ✓ If the witness has a Fifth Amendment privilege against self-incrimination, alert the court so that independent counsel may be appointed.

C. Preparing the Defendant to Testify

Among the factors to consider in determining whether the defendant should testify are: (1) the defendant's demeanor and ability to testify clearly and coherently; (2) any prior statements by the defendant to the police or other potential government witness; (3) the existence of other witnesses who are available to present the defense; and (4) whether the defendant has any impeachable convictions. Counsel should advise the client based on these factors, but the client must make the ultimate decision on whether to testify. *Boyd v. United States*, 586 A.2d 670, 673 (D.C. 1991) (attorney must abide by defendant's decision to testify). In certain types of cases – e.g. consent defense to rape and self-defense – it may be difficult to convey the client's mental state, which is crucial to such defenses, without his or her testimony. There is no *sua sponte* duty on the part of the court, however, to inquire directly of the defendant whether he knowingly and intelligently waives his or her right to testify. *See United States v. Ortiz*, 82 F.3d 1066 (D.C. Cir. 1966) (defendant's claim of no knowledge of his right to testify after refusing to take the witness stand not sufficient grounds for retrial). However, in *Boyd*, the court recommended that the trial court engage a non-testifying defendant in an on-the-record inquiry to establish that his or her waiver of the right to testify is knowing and voluntary in order to avoid issues on appeal or collateral attack. 586 A.2d at 678. "*Boyd* inquiries" are now fairly routine in Superior Court.

Preparation: The final decision whether to testify must be made by the client and should not, absent rare circumstances, be finally determined before trial. Therefore, the client must be prepared to testify. The client should be prepared thoroughly for both direct and cross-examination.[23] Counsel should familiarize the client with all prior statements and exhibits, and

[23] Practice of both direct and cross-examination is imperative, and it is often useful to go through this procedure before trial. Many times a defendant will come up with new witnesses or new information that will require further

review appropriate demeanor for taking the stand. Whether or not the client will testify, counsel should review appropriate attire and conduct, both in and around the courthouse. The jurors are watching the client not only on the stand but also at counsel table, in the hallway, and walking to and from the courthouse. The client must be on his or her best behavior at all times during the trial, inside and outside the courtroom. The client should not make faces while witnesses are testifying, react to testimony, look disinterested, or fall asleep in the proceedings. The impression the client makes on the jury is as important as his or her testimony.

When the client takes the stand, counsel should take ample time to develop the defendant's personal background. Jurors are curious about the type of person the defendant is, and will be wondering whether he or she is capable of committing the alleged acts. It is important to personalize the client by bringing out positive background information before the client testifies about the events in question. The examination should develop as much favorable information as possible on the client's family, community ties, membership in community or religious organizations, employment, and educational background. Of course, counsel should begin to bring this information to the jury's attention when the client is introduced to the jury during *voir dire*, as well as, where appropriate, during earlier examinations.

Any impeachable convictions should be brought out at a point in the direct examination where they will make the client seem forthright without giving the convictions undue emphasis, perhaps after the questions on personal background. The questions should emphasize, for example, remoteness in time: "Mr. Jones, I must ask you this. Were you convicted of robbery almost ten years ago here in the District of Columbia?"

Counsel must also vigilantly ensure that the prosecutor follows all rules governing the use of impeachable convictions generally, as well as the special requirements when it is the defendant who is impeached. Specifically, there can be no impeachment of a defendant with convictions that the government failed to disclose following a pre-trial request. *See Wilson v. United States*, 606 A.2d 1017, 1023 (D.C. 1992) (defendant entitled to new trial after government used convictions to impeach defendant after pre-trial assurances that it would not do so). Nor may the prosecutor, through the manner of impeachment, suggest that the defendant has a propensity to commit crimes. The prosecutors in both *Bailey v. United States*, 447 A.2d 779, 781-82 (D.C. 1982), and *Fields v. United States*, 396 A.2d 522, 524-25 (D.C. 1978), elicited from the defendants a denial of the offense charged, then immediately impeached the defendants with a prior conviction for a similar offense.

> Questions concerning appellant's prior conviction for unregistered possession of a firearm, asked by the prosecutor immediately after appellant had denied possessing a gun on the occasion of the offense charged, likely gave the jury the impression that evidence of appellant's prior conviction was being offered to rebut appellant's denial that he possessed a gun at the time in question. We will not countenance such a highly suggestive and prejudicial sequence of questions, which appeared designed to suggest to the jury that because appellant carried a gun before, he was probably guilty of the crime charged.

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investigation. In contrast to witness preparation conferences, counsel need not avoid "contemporaneous and substantially verbatim" note-taking while preparing the defendant's testimony, because Super. Ct. Crim. R. 26.2 does not apply to statements of the defendant.

Fields, 396 A.2d at 527-28. "The test is whether the prosecutor's reference to a defendant's previous conviction is such that, under the circumstances, reasonable jurors would naturally and necessarily regard the manner in which the impeachment is accomplished as implying that the defendant is guilty of the crime charged because he was guilty of past crimes." *Dorman v. United States*, 491 A.2d 455, 460 (D.C. 1985) (en banc); *Baptist v. United States*, 466 A.2d 452, 458 (D.C. 1983). In most recent cases, the court has held that prior convictions and present charges are not impermissibly "paired" where there is a "buffer" inquiry separating the defendant's general denial of the offense with which they are presently charged and questioning about a prior conviction. *See Augburn v. United States*, 514 A.2d 452, 455 (D.C. 1986) (valid impeachment where prosecution asked a single question between general denial and prior conviction). This is particularly true where the offenses are of a different nature. *Id*. at 455. In *Franklin v. United States*, 555 A.2d 1010, 1013 (D.C. 1989), the court also emphasized that a "conviction" for the purpose of impeachment does not include a guilty verdict where a sentence has not been imposed (improper to impeach defendant with prior adjudication absent judgment *and* sentence). Finally, the proscription against pairing questions about defendant's prior convictions for offenses similar to those on trial with a general denial does not pertain solely to circumstances surrounding the commission of the offense. *See Harris v. United States*, 618 A.2d 140, 145-46 (D.C. 1992) (government improperly implied that because defendant had not been calm during prior offense he was not calm during the current offense).

In both *Fields* and *Bailey*, the court held that a cautionary instruction that the prior conviction could be considered only for purposes of impeachment could not cure the error. *But see Dorman*, 491 A.2d at 462 n.9 (instruction can cure error). If direct examination of the defendant ends with a general denial, it may be improper for the prosecutor to begin cross-examination with impeachment with a prior conviction if the defense objects. *See Reed v. United States*, 485 A.2d 613, 617 (D.C. 1984) (where defendant ends direct with a general denial, and defendant does not object, prosecution not precluded from impeaching defendant by prior convictions during cross-examination).

The prosecution is absolutely precluded from using a defendant's silence after receiving *Miranda* warnings to impeach the defendant. *Doyle v. Ohio*, 426 U.S. 610, 619-20 (1976); *Bedney v. United States*, 684 A.2d 759, 765-66 (D.C. 1996). A prosecutor's use of post-*Miranda* silence in cross-examination is a violation of due process. *Id*. at 619; *Bedney*, 684 A.2d at 766; *Alexander v. United States*, 718 A.2d 137, 142 (D.C. 1998). Note, however, that when a defendant chooses to remain silent before being placed under arrest, and therefore before receiving *Miranda* warnings, there is no constitutional bar to the use of the defendant's pre-arrest silence for the purpose of impeachment. *Brecht v. Abrahamson*, 507 U.S. 619, 627-28 (1993); *Jenkins v. Anderson*, 447 U.S. 231, 239 (1980); *Bedney*, 684 A.2d at 767. However, even pre-*Miranda* silence cannot be used to impeach a testifying defendant unless the prosecution establishes a material inconsistency between the silence and the testimony. The prosecution is required to first seek a ruling from the trial court that such a material inconsistency exists. *Hill v. United States*, 404 A.2d 525, 531 (D.C. 1979); *Sampson v. United States*, 407 A.2d 574 (D.C. 1979).

Preparing Defendant Testimony:

- ✓ Defendant should be thoroughly prepared to testify on both direct and cross-examinations, even if it is unlikely that defendant will actually testify
- ✓ Bring out any impeachment evidence on direct
- ✓ Humanize the client

III. CHARACTER EVIDENCE

The defendant may introduce evidence of good character to show that it is unlikely that he or she either committed the offense or would testify falsely. *United States v. Lewis*, 482 F.2d 632, 638 (D.C. Cir. 1973); *United States v. Fox*, 473 F.2d 131, 134 (D.C. Cir. 1972); McCormick, *Evidence*, § 191 (3d ed. 1984); 1A Wigmore, *Evidence*, §§ 55-56 (1983 ed.). The defense may also attempt to discredit the credibility of a government witness through evidence of a bad reputation for truth and veracity. *See Bassil v. United States*, 517 A.2d 714, 715-16 (D.C. 1986) (evidence of a bad reputation for truth and veracity admissible on issue of witness credibility); *see also Keene v. United States*, 661 A.2d 1073, 1079 (D.C. 1995) (tape recording of complainant's sexual fantasy was admissible to attack his veracity), and cases cited therein. *Rogers v. United States*, 566 A.2d 69, 73 (D.C. 1989) (en banc), allows "opinion" as well as "reputation" evidence on that point. Evidence is limited to general character. Specific acts of good character are not admissible on direct examination. *See infra* Section B. However, once the defense presents such evidence, the government may attempt to refute it with evidence of specific acts of proven or alleged misconduct.

The government may not, however, introduce evidence of the defendant's bad character or reputation to establish that he or she is likely to have committed a criminal offense. *Di Giovanni v. United States*, 810 A.2d 887 (D.C. 2002), the trial court did not err in ruling that defendant's character witness could be cross-examined regarding defendant's prior AWIK arrest. *See also Michelson v. United States*, 335 U.S. 469, 475-76 (1948); *Anderson v. United States*, 857 A.2d 451 (D.C. 2004); *Josey v. United States*, 135 F.2d 809 (D.C. Cir. 1943); McCormick, *Evidence*, § 190; 1 Wigmore, *Evidence*, § 890 (3d ed. 1940).[24]

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character, but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The

[24] However, evidence of other crimes may be admissible in the government's case-in-chief where relevant to: (1) motive; (2) intent; (3) the absence of mistake or accident; (4) a common scheme or plan embracing the commission of two or more crimes so related that proof of one tends to establish the commission of the other; or (5) identity. *Drew v. United States*, 331 F.2d 85, 90 (D.C. Cir. 1964); Fed. R. Evid. 404(b).

> inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.

Michelson, 335 U.S. at 475-76 (footnotes and citation omitted).

A. Type of Character Evidence

1. Truthfulness and Honesty

Honesty and veracity, although distinct, are frequently linked. *Cooper v. United States*, 353 A.2d 696, 704 n.16 (D.C. 1975) (stating that honesty and veracity represent different character traits). If the defendant testifies, his or her credibility is at issue and the defense may introduce evidence of character for veracity, or truthfulness, even when the charges involve violent behavior. *Id.*[25] If the charge involves dishonesty (e.g., petit larceny, embezzlement, false pretenses), the defense can introduce evidence of the defendant's character for honesty, regardless of whether or not the defendant testifies. *Michelson v. United States*, 335 U.S. 469 (1948). As the trait of veracity bears on the defendant's credibility as a witness, the relevant time period is the time of trial. Thus, if the trait is honesty, the focal point is the defendant's character at the time of the offense.

There is some authority that evidence may be presented of the defendant's character for truthfulness and honesty even if the defendant does not testify. *See United States v. Lechoco*, 542 F.2d 84, 88-89 (D.C. Cir. 1976) (reversible error where psychiatrist's testimony about defendant's reputation for truthfulness in insanity defense was excluded); *Pendergrast v. United States*, 332 A.2d 919, 921 n.1 (D.C. 1975) (defendant may introduce evidence of reputation for truth or veracity regardless of whether defendant takes the stand); *Shimon v. United States*, 352 F.2d 449, 453 (D.C. Cir. 1965) ("a defendant may try, whether or not he takes the stand, to cast doubt on the probability of guilt by showing that some in his community believe him to be truthful and honest"); *cf. Cooper*, 353 A.2d at 703 n.14.

2. Peacefulness and Non-Combativeness

In *Lewis*, 482 F.2d at 637, the court found that for charges involving violence (homicide, assault, robbery, rape), the defense may introduce evidence of the accused's character for peacefulness and non-combativeness at the time of the offense. *Cf. Burrell v. United States*, 455 A.2d 1373, 1378 (D.C. 1983) (government improperly introduced character evidence by comparing defendant and decedent in a manner that highlighted their patterns of behavior far more than it described defendant's threats against decedent). The defense does not open the door to a government attack on the client's character for peacefulness and non-combativeness by

[25] The defendant's good character is not in issue merely because the defendant testifies; good character evidence must be introduced. *See Johns v. United States*, 434 A.2d 463, 468 (D.C. 1981).

introducing evidence of the decedent's violent character. *Johns v. United States*, 434 A.2d 463 (D.C. 1981).

3. Peace and Good Order

Evidence of the defendant's good character for "peace and good order" implies that the defendant not only is nonviolent, but also has no law violations. *See Darden v. United States*, 342 A.2d 24, 26 (D.C. 1975) (reasoning that past convictions reflect on the "good order" trait that defendant tries to show by using a character witness). If counsel seeks to show nonviolence, it is important to limit the evidence to "peacefulness and non-combativeness," as "peace and good order" would permit cross-examination of the character witness about any prior arrests of the accused, for any type of offense, which might be irrelevant to the former.

B. Proving the Defendant's Character

Three types of evidence conceivably may be offered as evidence of the defendant's character – testimony relating to specific instances of conduct that show the particular trait, a witness's opinion on whether the defendant possesses the trait, and testimony to the defendant's "reputation" on that trait. *Michelson v. United States*, 335 U.S. 469 (1948). Before *Rogers v. United States*, 566 A.2d 69 (D.C. 1989) (en banc), only testimony as to reputation was permitted in the Superior Court. Rogers expanded the scope of permissible character evidence by holding that witnesses may offer their opinion as well, adopting the principles embodied in Fed. R. Evid. 405(a). *Rogers*, 566 A.2d at 71, 75. In most cases opinion, rather than reputation, will be the preferable form of character evidence, as it avoids cross-examination designed to show that the witness has seldom, if ever, heard the defendant's character discussed and therefore has no basis for testifying about the defendant's reputation. On the other hand, reputation evidence introduces testimony that the community agrees with the opinion that the defendant is a person of good character. Therefore, if the witness can testify to reputation as well as his or her own opinion, such testimony should be considered. If reputation testimony is elicited, it is not necessary that the trait actually have been discussed in the witness's presence. Indeed, the witness need not have heard discussions concerning the defendant's character. It is sufficient that the witness had been in a position that were anything negative said about the accused the witness would have heard it, that the witness has heard nothing of that sort, and that the witness therefore concludes that everyone believes the accused's character for that particular trait to be good.

> [A]bsence of utterances unfavorable to a person is a sufficient basis for predicating that the general opinion of him is favorable. A witness to good reputation may therefore testify by saying that he has never heard anything said against the person.

5 Wigmore, *Evidence*, 1614 (3d ed. 1948); *accord Fletcher v. United States*, 42 D.C. App. 53, 66-67 (D.C. Cir. 1914) (witnesses to defendant's general character must be able to testify as to what is generally said about defendant in the community, and with whom the witness has spoken to reach his or her conclusion); *Deschenes v. United States*, 224 F.2d 688, 691 (10th Cir. 1955)

(if a witness has never heard of defendant's reputation, silence speaks in favor of a defendant's good reputation).

Testimony as to particular aspects of reputation – work, school, or neighborhood – may be introduced through a representative of that community who is sufficiently familiar with it. *See Robinson v. United States*, 156 F.2d 574 (D.C. Cir. 1946) (defendant was entitled to use evidence that he had a reputation for careful driving among co-workers); McCormick, *Evidence*, § 191; 5 Wigmore, *Evidence*, § 1616. In such cases, however, the prosecutor probably can comment on the fact that the jury had only heard about a small part of the accused's life.

The character traits that are admissible are *abstract* qualities that reflect a person's general moral character. Thus, in *Hack v. United States*, 445 A.2d 634, 642-43 (D.C. 1982), the Court affirmed the lower court's refusal to admit testimony of the accused's reputation for not using or selling drugs because it did not reveal a characteristic quality but rather community knowledge that he had not committed certain acts in the past. *Rogers* adhered to the prevailing principle that a character witness is not allowed to testify about the defendant's specific acts as affirmative proof of character. 566 A.2d at 73; *accord Ali v. United States*, 581 A.2d 368, 382 n.29 (D.C. 1990) (government inquiries of a character witness as to fact, rather than opinion, are impermissible under *Rogers*). "A defendant's specific acts, however, remain a proper subject for the cross-examination of character witnesses for purposes of testing the foundation of the testimony or the credibility of the witness." *Rogers*, 566 A.2d at 73.

C. The Government's Response to Character Evidence

1. General considerations

Prosecutors may not ask questions that are "totally groundless." *McGrier v. United States*, 597 A.2d 36, 44 (D.C. 1991) (citations omitted). But, defense evidence on a particular character trait opens the door for cross-examination and rebuttal evidence about arrests, convictions, or bad acts that are inconsistent with that trait. This evidence, however, is strictly limited to the particular trait asserted by the accused, and the probative value of the impeaching evidence must outweigh its potential for prejudice. *See Cooper*, 353 A.2d at 702-03 (government is confined to defendant's specific traits placed at issue by defense, to avoid prejudice and the possibility of conviction on bad character alone); *Lewis I*, 482 F.2d at 637; *Awkard v. United States*, 352 F.2d 641, 643-44 (D.C. Cir. 1965) (cross-examination of a character witness by prosecution can only test the foundation and reliability of the witness's testimony, not establish defendant's bad character). For example, a witness who testifies to peacefulness may be cross-examined about the defendant's arrests for rape, but not for embezzlement.

Rogers expanded the permissible scope of cross-examination of a character witness. When reputation was the only valid form of character evidence, cross-examination was limited to whether the witness had *heard* of specific acts contrary to the character trait. *See Michelson*, 335 U.S. at 482. (This is to be distinguished from the principle that proponents of character evidence cannot bring out specific acts to establish a character trait). A witness who offers an opinion of defendant's character may be asked whether the witness *knows* about specific acts. *Rogers*, 566 A.2d at 73; *accord Ali*, 581 A.2d at 382 n.29 (not prejudicial when government questions

character witness with regard to knowledge of facts, rather than community opinion). However, before cross-examination about specific acts is permitted, the court must assure itself that those acts actually occurred. *See Rogers*, 566 A.2d at 74. Consequently, the government must be prepared to establish, outside the jury's presence, the factual basis for the question. *See Lewis*, 482 F.2d at 639 (matters to be asked by prosecution must first be established as actual events to the judge's satisfaction). Before calling a character witness, counsel should ask for a proffer of what, if anything, the government intends to use in cross-examination. If the government intends to use prior bad acts or arrests that the defendant wishes to dispute, a hearing should be requested, at which the government bears the burden of proving that those incidents occurred. *See Johnson v. United States*, 373 A.2d 596, 598 (D.C. 1977) (prosecution could ask defense's character witness if an act occurred and present evidence that it occurred, provided the defense presents evidence to the contrary during questioning). Even if there is a factual and legal basis for the cross-examination, the court may preclude mention of old arrests or bad acts if the subject matter is too prejudicial. *See United States v. Fox*, 473 F.2d 131, 135 (D.C. Cir. 1972) (prosecution cannot question character witness about defendant's alleged arrest for rape; there is no relationship between rape and "truth and veracity"). *But see Veney v. United States*, 929, A.2d 488, 464-66 (D.C. 2007), *amended*, 936 A. 2d 809 (D.C. 2007) (per curiam) (trial court did not err in denying mistrial on alleged improper admission of testimony concerning bad acts committed by defendant against complainant where prosecutor had not intended to elicit the prior bad acts evidence, judge gave a limiting instruction to which defense counsel agreed, and evidence was not mentioned again by any witness nor in closing arguments by either party).

2. Scope of the cross-examination

a. Arrests and convictions

The court has a "heavy responsibility" to decide when evidence of an arrest, not resulting in conviction, may be elicited on cross-examination, and must be careful to ensure that the evidence is not misused. *See Crews v. United States*, 514 A.2d 432, 435 (D.C. 1986) (trial court properly allowed use of recent arrests directly involving truth or veracity) (quoting *Michelson*, 335 U.S. at 480); *cf. Lewis*, 482 F.2d at 639-40 (evidence of arrest without more may not be introduced to test credibility of defendant). *But see Terrell v. United States*, 721 A.2d 957, 960 (D.C. 1998) (prosecutor can impeach defendant with reference to his prior convictions). If the asserted trait is "peace and good order," the witness may be asked whether he or she has heard (or knows) about prior arrests and convictions that are relevant to the particular character trait. *Michelson*, 335 U.S. at 482; *Lewis*, 482 F.2d at 639-40.

Improper references to a defendant's prior convictions, nevertheless, do not guarantee that the court will grant a mistrial. *See e.g., Goins v. United States*¸ 617 A.2d 956, 959-60 (D.C. 1992) (affirming robbery and possession of firearms conviction where trial court did not abuse its discretion in denying mistrial motion after police officer revealed that defendant had previous record and where evidence during trial was sufficient to support a conviction). The mistrial analysis will include analysis of the "strength of the government's case, the centrality of the issue affected, and the corrective measures taken by the trial court to mitigate the prejudice." *Dorsey v.*

United States, 935 A.2d 288, 293 (D.C. 2007) (referencing *Coleman v. United States*, 779 A.2d 297, 302 (D.C. 2001)).[26]

As to juvenile arrests, while the court has discretion to allow inquiry, it must first hold a hearing outside the jury's presence to determine whether the circumstances "might preclude community knowledge or discussion about the arrest," and permit cross-examination only "where the witness reasonably can be expected to have learned of the incidents through means other than access to confidential court records." *Rogers*, 566 A.2d at 75-79.

> Confidentiality of juvenile proceedings is sufficient reason to preclude cross-examination of an opinion witness with a juvenile *arrest* of the defendant where the facts demonstrate that the juvenile arrest was substantially nonpublic or confidential, and the witness could not reasonably be expected to have learned of its occurrence by means other than confidential records.

Id. at 78.

Juvenile Adjudications: Most significantly, juvenile adjudications may not be the subject of cross-examination. *Id*. at 77-81; *McAdoo v. United States*, 515 A.2d 412, 419 (D.C. 1986); *cf. Askew v. United States*, 540 A.2d 760, 762-63 (D.C. 1988) (witness may be cross-examined on arrest that culminated in a conviction later set aside under Youth Act); *Devore v. United States*, 530 A.2d 1173, 1174 (D.C. 1987) (witness may be cross-examined about acts underlying juvenile adjudication).

b. Date of arrest or conviction

If the defendant uses character evidence to suggest that it is unlikely that he or she committed the offense, the relevant time period is that of the alleged offense, not the trial. Accordingly, cross-examination is limited to arrests that occurred before the offense. *See Lewis*, 482 F.2d at 639-40 (evidence of reputation subsequent to public notice of charge is not admissible). On the other hand, testimony about the defendant's truthfulness and veracity at the time of trial can lead to inquiry about any relevant arrest that is not unduly remote.

c. Prior bad acts

Character witnesses may be questioned about acts of the defendant relevant to the trait in question that were not the subject of a criminal charge. *Lewis*, 482 F.2d at 638. Evidence of prior crimes is admissible to show the immediate circumstances surrounding the offense at issue. *Toliver v. United States*, 468 A.2d 958, 960 (D.C. 1983); *see e.g., Muschette v. United States*, 936 A. 2d 791, 798 (D.C. 2007) (trial court did not abuse discretion in admitting evidence of defendant's prior bad acts where evidence was probative in proving government's case by

[26] The court of appeals found that it was not error to deny defendant's mistrial request where defendant's prior convictions were referenced only in the court's reading of the indictment and prosecutor's opening statement; where the court instructed the jury that convictions in indictment were not evidence; where references were brief and non-specific; and where the government's proof of defendant's identification, the central issue at trial, was strong and unrefuted. *Dorsey*, 935 A.2d at 293.

negating defendant's claim of self-defense and placing shooting in context and where defendant did not identify any reason why the evidence would be unduly prejudicial). The rules for admissibility are the same as for arrests and convictions. *See Rogers*, 566 A.2d at 78-79 (recognizing that there is a strong argument for treating juvenile convictions in same manner as juvenile arrest).

3. Jury Instructions

After cross-examination on arrests, bad acts or convictions, the defendant is entitled to an immediate cautionary instruction on the limited purpose for which the evidence is admitted. *See Criminal Jury Instructions for the District of Columbia*, No. 2.214 (5th ed. 2009); *see also Lewis*, 482 F.2d at 638 (jury must be instructed to limit consideration of witness's testimony to an assessment of its worth); *Coleman v. United States*, 420 F.2d 616, 622 (D.C. Cir. 1969) (no error where judge gave limiting and explanatory instructions following the prosecution's impeaching questions).

D. Preparing Character Witnesses

Counsel should explore the possibility of character evidence long before trial. In fact, counsel should ask the client about the existence of possible character witnesses during one of the initial interviews, especially when it appears likely that the case will go to trial. Early contact with potential witnesses is necessary given the nature of character evidence and the precise types of questions the witness must be asked. In order for reputation testimony to be effective, it is important to know whether the witness has discussed the relevant reputation with others in the community. A witness who is not contacted until a day or two before trial will have had neither the opportunity nor a reason to have had such discussions.

The tactical purpose of presenting character evidence is to show that respectable members of the community are willing to appear and testify on behalf of the accused. It therefore makes little sense to use family members or close friends who can be easily discredited. The client's neighbors, teacher, employer, or religious leaders are all potentially good character witnesses.

In deciding whether to introduce testimony about a particular character trait, counsel should weigh the value of the evidence against possible cross-examination on otherwise inadmissible arrests. Of course, a testifying defendant may be impeached with any felony convictions and most misdemeanor convictions. *See* D.C. Code § 14-305.

Character witnesses must be thoroughly interviewed, and carefully prepared with respect to the basis for the witness's knowledge of the defendant's character for the pertinent time frame. If there are arrests or bad acts by the defendant about which the prosecutor may ask on cross-examination, counsel should inform the witnesses of these facts and then ask whether knowledge of the facts changes his or her ability to testify to the defendant's character. Counsel should also consider bringing out the arrests or acts on direct examination, just as prior convictions may be brought out on direct examination.

Character Witnesses:

- ✓ Seek out community members to testify
- ✓ Weigh value of the evidence against possible cross-examination on otherwise inadmissible arrests

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***Barnes v. District of Columbia*, 102 A.3d 1152 (D.C. 2014).**

***Myerson v. United States*, 98 A.3d 192 (D.C. 2014).** APO statute does not exceed D.C. Council's lawmaking authority under Home Rule Act.

***Myerson v. United States*, 98 A.3d 192 (D.C. 2014).** Park Police officers making arrest for APO on federal property did not violate Home Rule Act because they were effectuating local traffic laws at time of incident.

***King v. United States*, 75 A.3d 113 (D.C. 2013).** Although court failed to conduct complete Myers inquiry before determining that evidence of defendant's flight was admissible, error harmless where defense counsel essentially admitted during opening statement that defendant was absent from his mother's home, though for a different reason than government argued, and there was evidence of different flight to which defendant did not object.

***Nero v. United States*, 73 A.3d 153 (D.C. 2013).** Trial court did not abuse its discretion in allowing to be read to jury stipulation regarding defendant's prior felony conviction where stipulation concerned essential element of charge of unlawful possession of a firearm by a convicted felon.

***Smith v. United States*, 68 A.3d 729 (D.C. 2013).** Contraband message statute not unconstitutionally vague.

***Fortune v. United States*, 59 A.3d 949 (D.C. 2013).** Trial court committed plain error in failing to obtain a valid written waiver of defendant's jury trial right with respect to felon-in-possession charge where judge found possession at same time that jury found government had failed to prove beyond a reasonable doubt that defendant possessed weapon during commission of other offenses.

***Williams v. United States*, 52 A.3d 25 (D.C. 2012).** In case where victim of murder was in process of divorcing the accused and members of her family had made clear their belief that he had committed murder, trial court did not abuse its discretion in admitting prejudicial evidence, including defendant's absence from his wife's funeral, to show consciousness of guilt because eyewitness identifications of clothing and hairstyle of shooter were remarkably similar, defendant's brother testified that he had seen defendant leave house half hour before shooter with "a gun on him," harm from funeral evidence itself was mitigated through cross-examination and

defendant declined trial court's invitation to request instruction limiting use jury could make of funeral evidence.

***Thomas v. United States*, 50 A.3d 458 (D.C. 2012).** Defendant not deprived of constitutional rights under Ex Post Facto Clause when he was tried in 2008 for a sexual assault that had occurred in 2000 because the "Felony Sexual Assault Act" extended the statute of limitations period to 15 years for sexual assault in 2005, before the original limitation period of six years had expired.

***Martin v. United States*, 991 A.2d 791 (D.C. 2010).** Sixth Amendment violation and plain error requiring reversal for trial court to order defendant not to speak to his attorney about his testimony over weekend recess that interrupted his crossexamination.

1. Suggested examination of character witness

- What is your name?
- Where do you live? How long have you lived there?
- Where are you employed? How long have you worked there?
- Do you know [defendant]?
- How long have you known him/her?
- How do you know him/her?
- How often do you see him/her? Under what circumstances?
- How well do you know him/her?
- Do you know other people who know him/her?
- Based on your knowledge of [defendant], do you have an opinion about whether s/he is a [truthful; honest; peaceful] person?
- What is your opinion?
- Do you know what his/her reputation is among others who know him/her for [truthfulness, honesty, peacefulness, etc)?
- What is his/her reputation among others in [relevant community]?
- Counsel should try to elicit positive background information about the character witnesses, as counsel would on the defendant's direct examination.

CHAPTER 33

COMMON DEFENSES

I. THE MISIDENTIFICATION DEFENSE

In cases where the complainant or other eyewitnesses do not know the perpetrator, the accuracy of the identification of the defendant is often *the* central issue. As the trial court will instruct the jury: "The burden is on the government to prove beyond a reasonable doubt, not only that the offense was committed as alleged in the indictment, but that the defendant was the person who committed it." *Criminal Jury Instructions for the District of Columbia*, No. 9.210 (5th ed. 2009).

Eyewitness identifications are notoriously unreliable.

> The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification. Mr. Justice Frankfurter once said: "What is the worth of identification testimony even when uncontradicted? The identification of strangers is proverbially untrustworthy. The hazards of such testimony are established by a formidable number of instances in the records of English and American trials. These instances are recent – not due to the brutalities of ancient criminal procedure." *The Case of Sacco and Vanzetti* 30 (1927).

United States v. Wade, 388 U.S. 218, 228 (1967) (footnote omitted). Nevertheless, many witnesses – even those who have previously expressed uncertainty in their identifications – will, by the time they come to court, honestly believe that they are certain it was the defendant who committed the crime. Counsel must convince the jury that the witnesses are mistaken and that the client is the innocent victim of a misidentification.[1]

A. Investigation: Gathering Necessary Information and Documents

Interviewing Each Witness: The defense should interview each witness to the offense. Interviews should focus on the details of the incident; the witnesses' opportunity and ability to observe; descriptions given of the offender; conversations with the police and prosecutors; the identification procedures employed and identifications made by the witnesses; the basis for the identifications; the witnesses' degree of certainty about the accuracy of the identification; and whether the witnesses have seen the offender either before or after the incident. Police officers, especially those to whom the incident was reported and those who participated in out-of-court identification procedures, as well as civilians with whom the witnesses have spoken about the offense, should also be interviewed; they may have information that can be used to impeach the eyewitness testimony at trial.

MPD Identification Procedures: A general understanding of Metropolitan Police Department identification procedures is necessary to a thorough investigation. Typically, a witness will

[1] Establishing an alibi may bolster the assertions of misidentification. *See infra* Section II.

telephone the police on "911" to report the incident. This report, which is audio-recorded, may contain the first description of the assailant. The police dispatcher will then broadcast to patrol cars the location and time of the offense and the description of the assailant, if one was given. This broadcast, which is also tape-recorded, is known as the "radio run" or "lookout." If the police stop a person in the area fitting the assailant's description, either as broadcast or as the police determine from speaking with the complainant or other witnesses, they may bring that person to the suspect's location for a show-up identification. A positive show-up identification usually results in an immediate arrest.

The police may also show the witness photographs. This viewing may take a number of forms. Most frequently, the police will assemble a series of photographs from police files – typically nine "mug shots" or color arrest photos – and show this array to the witness.[2] Over a period of weeks, the witness may be shown a number of different arrays. Usually, the police fill out a Photo Viewing Sheet when they show a witness an array. This sheet, turned over to the defense under either Rule 16 or Jencks, contains the witness's name and identifying information, the questions the witness was asked, and their words of identification. Occasionally, the witness will be shown a larger number of photos assembled in a police album. An identification from a photo array or from an album may form the basis for an arrest warrant.

Following the arrest and the initial court appearance, the government may obtain an order directing the client to stand in a line-up at police headquarters, where one or more witnesses may view the defendant. It may be videotaped and a photograph is taken of the suspects standing in the line. Witnesses who were unable to attend the line-up, or who were not located until after the line-up was conducted, may be shown the photograph or videotape and asked whether they can identify anyone standing in the line.[3]

Each witness may meet on several occasions with the Assistant United States Attorney to whom the case is assigned to prepare for trial. At that time, the prosecutor may review the various photographs with the witness and elicit more complete descriptions of the assailant. Even absent probable cause to arrest a person, the government may obtain a court order directing a person not under arrest to appear in a line-up upon a showing of reasonable grounds to believe that the person is linked with the offense under investigation. *See Wise v. Murphy*, 275 A.2d 205 (D.C. 1971) (en banc); *see also Brown v. United States*, 518 A.2d 415 (D.C. 1986). This procedure is rarely used.

Counsel should attend all line-ups, with an investigator if possible. Although the use of substitute counsel at a line-up does not violate the defendant's right to counsel,[4] a substitute is

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[2] Historically, the array that the Metropolitan Police Department ("MPD") showed witnesses was a single page containing nine photographs. In the last two years, MPD initiated a policy of showing photographs to witnesses sequentially: nine photos shown one at a time.

[3] Counsel should consider obtaining a court order at presentment prohibiting the government from using and photographing the defendant in a line-up if no witnesses are present. In addition, counsel should object to any such photographs being made and to the photographs being shown to witnesses who do not attend the line-up, as violative of the client's Sixth Amendment right to the presence of counsel at a line-up.

[4] *See Shelton v. United States*, 388 A.2d 859, 862 (D.C. 1978); *cf. Poole v. United States*, 630 A.2d 1109, 1127 n.25 (D.C. 1993).

unlikely to be sufficiently familiar with the facts of the case to make meaningful objections to the defendant's appearance in the line.[5] Counsel should object to any aspect of the client's appearance that is dissimilar to others in the line or that matches the initial clothing description; indeed, failure to do so may waive any later claim of suggestivity. The line-up is often counsel's first opportunity to obtain a preliminary impression of the witnesses, and perhaps even to learn their identities.[6] If counsel will be unable to attend the line-up, counsel should attempt to reschedule it or ask a colleague to substitute, briefing the colleague in sufficient detail so that he or she can make appropriate objections. Afterwards, counsel should promptly obtain a report of the line-up results. In every case, counsel should review before trial both the still photograph[7] and the videotape of the line-up.[8]

The client may have been subpoenaed to the grand jury to receive a line-up directive, and thus have stood in a line-up before counsel's appointment to the case. *Brown*, 518 A.2d at 419-20, held that the government must inform the defendant of the right to test the legitimacy of the line-up directive.[9] While counsel need not be appointed when the directive is served, counsel appointed after the line-up and indictment can assert the absence of a legitimate basis for the line-up through a pre-trial motion to suppress the identification. *Id*. at 421.

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[5] The police department staff who operate the line-up will give each lawyer an opportunity to make any objections to the client's appearance before any witness views the line-up. Whether a particular line-up is suggestive depends upon a variety of factors, including the description of the assailant given by the witnesses and the appearance of the suspects in the line.

[6] The witnesses are not identified at the line-up. However, counsel may take the opportunity to speak with the witnesses upon leaving police headquarters. Of course, it is usually better to interview witnesses at home, but where it appears that counsel will otherwise be unable to learn the identity or address of a witness, the line-up may afford the only opportunity to obtain that information.

[7] Counsel is entitled to a copy of the photograph of the line-up pursuant to Super. Ct. Crim. R. 16(c). The photograph can also be obtained through a subpoena *duces tecum* stating the date and time of the line-up, which should be served on the line-up unit at MPD headquarters, 300 Indiana Avenue, N.W.

[8] Counsel should subpoena the videotape of the line-up in advance of trial or arrange informally with the prosecutor for an appropriate time to view the videotape on government equipment available for this purpose. The videotape is also subject to production at trial or at a pre-trial motions hearing as a Jencks Act statement of the identifying witness. 18 U.S.C. § 3500(e)(2). *See United States v. Bryant*, 448 F.2d 1182, 1183 (D.C. Cir. 1971).

[9] *In re Kelley*, 433 A.2d 704, 707 (D.C. 1981) (en banc), held, based on the court's supervisory power over the grand jury, that a prosecutor who seeks judicial enforcement of a line-up directive must "by affidavit of [a] law enforcement officer or a formal representation of an Assistant United States Attorney, make a minimal factual showing sufficient to permit the judge to conclude that there is a reason for the line-up which is consistent with the legitimate function of the grand jury." In essence, *Brown* holds that anyone subpoenaed to the grand jury to receive a line-up directive must be advised of the *Kelley* rights.

Line-ups:

- ✓ Counsel should attend all line-ups and with an investigator if possible
- ✓ Object to any aspect of the client's appearance that is dissimilar to others in the line or that matches the initial clothing description; failure to do so may waive any later claim of suggestivity
- ✓ Counsel appointed after the line-up and indictment can assert the absence of a legitimate basis for the line-up through a pre-trial motion to suppress the identification.

Police Department Reports: This description of police identification procedures suggests several avenues for investigation. Initially, police department reports provide invaluable information and investigative leads. The PD 251 (incident report) is a public document, available for 30 days in the district where the incident occurred and thereafter at 300 Indiana Avenue, N.W. This form lists the time and date of the incident, the description of the suspect, the complainant's name and address, and the names and badge numbers of the reporting officers. In addition, the PD 251 will indicate if and when there was a radio run. Other documents, while not public, may contain descriptions of the assailant and be subject to production by subpoena *duces tecum*, in discovery or as the Jencks Act statement of the officer who prepared the document. Any document containing a description that differs in significant detail from the defendant's characteristics should be disclosed as exculpatory evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). The relevant documents may include the PD 163 (prosecution report, containing a more detailed narrative); PD 252 (event report continuation, listing the names of witnesses); PD 379 (prosecution report in juvenile cases, containing witnesses' names and a more detailed narrative); PD 123 (report of investigation); PD 106 (flash lookout, containing descriptions); PD 258 (run card, a computerized printout prepared whenever a radio run is broadcast, often containing descriptions); and the PD 76 or 725 (stop card, filled out following the stop of any person, whether or not arrested, and usually containing descriptions).[10] In addition, in undercover drug cases, the "buy report" will usually contain a description of the alleged seller. Counsel should subpoena the black and white photograph and full-length color photograph taken of the client at the time of arrest, which may document discrepancies between the description of the perpetrator and the client's appearance. Counsel or an investigator should also record, through notes and photographs, the client's appearance in the cellblock or courtroom C-10, and may wish to keep the client's clothing as evidence.[11]

Counsel should request recorded radio communications by the investigating or arresting officers as well as any "911" calls, whether or not police reports indicate that a "radio run" was broadcast. This request should be made promptly upon counsel's entry into the case because the

[10] Where the police stopped other persons either in connection with the charged offense or for unrelated reasons, the description of each person stopped, contained in the PD 76, may be used to show that other persons meeting the description of the assailant were in the vicinity around the time of the offense.

[11] The United States Marshal Service and Superior Court security require an order, signed by a judge or magistrate judge, allowing the defense to bring a camera into the courthouse to take photos. Counsel should have proposed orders ready at presentment for cases that present identification issues.

police department routinely erases tapes of 911 calls after approximately one year, unless the recording has been requested during that period.[12] If a suspect is stopped for a show-up identification, the tape recording often includes the police broadcasts regarding the stop. Identities of witnesses may also be learned from the tapes.[13]

Counsel and investigators should also be familiar with MPD General Order No. 304.7 on out-of-court identification procedures. Interviews with witnesses may reveal violations of this order, providing a fruitful area for examination at an identification suppression hearing or at trial, and may perhaps provide an independent ground to suppress an identification.

Investigation:

- ✓ Request recorded radio communications by the investigating or arresting officers
- ✓ Request any "911" calls, whether or not police reports indicate that a "radio run" was broadcast
- ✓ Requests should be made promptly upon counsel's entry into the case because the police department routinely erases tapes of 911 calls

B. Preliminary Hearing, Discovery, and Plea Bargaining

Preliminary Hearing: The preliminary hearing provides an opportunity to learn about the government's case. Through skillful cross-examination, counsel may learn a good deal about the strength or weakness of the identification evidence, yet remain within the bounds of Super. Ct. Crim. R. 5(d) (purpose of preliminary hearing is not discovery). Because an unreliable identification can, of course, negate probable cause, counsel is entitled to question thoroughly the reliability of the identification of the defendant, including information about witnesses' observations, descriptions and identifications. How much counsel is able to learn in informal discovery depends in part on the practice of the Assistant United States Attorney assigned to the case; some disclose more information than others. Apart from Super. Ct. Crim. R. 16 discovery and whatever other information the assistant may be willing to provide, *Clemons v. United States*, 408 F.2d 1230, 1237 (D.C. Cir. 1968) (en banc), requires the government to disclose the circumstances of any pre-trial identification. *See Arnold v. United States*, 511 A.2d 399 (D.C.

[12] The tape of the 911 call is often critical because it contains the first description given by the complainant. The former policy of routine destruction of the tape recording after sixty days was unwritten, and appeared to violate MPD's own written regulations requiring the preservation of all evidence for three years. *See* MPD General Order No. 601.2. If the police have destroyed the tape in a pending case, counsel may seek sanctions for the deliberate destruction of relevant evidence. The cases discussing the propriety of sanctions for loss of *Jencks* materials may serve as useful authority by analogy. *See also Arizona v. Youngblood*, 488 U.S. 51 (1988); *Cotton v. United States*, 388 A.2d 865, 869 (D.C. 1978); *Brown v. United States*, 372 A.2d 557, 560 (D.C. 1977); *Marshall v. United States*, 340 A.2d 805, 809 (D.C. 1975); *United States v. Bryant*, 439 F.2d 642, 647 (D.C. Cir. 1971).

[13] Even if there is no radio run, there may still be relevant broadcasts. For example, if the complainant flagged down a police cruiser to report a recent crime, the cruiser likely would have broadcast a description of the suspect.

1986) (failure to reveal possibility of additional identification testimony to court and defense counsel despite pre-trial order to do so was prosecutorial misconduct).

Discovery Conference: At the discovery conference, counsel must thoroughly explore all identification procedures used. Counsel should view line-up photographs and the photographic array from which an identification was made, and arrange to view the videotape of the line-up. *See* Super. Ct. Crim. R. 16(a)(1)(C). The government has no obligation, however, to preserve arrays from which no identification was made, at least where it is speculative that the defendant's picture was included in the array. *Washington v. United States*, 377 A.2d 1348, 1351 (D.C. 1977).

The doctrine of *Brady v. Maryland*, 373 U.S. 83 (1963), is an important discovery tool. Counsel should make specific *Brady* requests for any information regarding each witness's ability and opportunity to observe that might detract from the witness's credibility or certainty. *Cf. Giglio v. United States*, 405 U.S. 150 (1972); *Giles v. Maryland*, 386 U.S. 66 (1967); *Lewis v. United States*, 408 A.2d 303 (D.C. 1979) (on rehearing). A *Brady* request should also be made for information, including physical evidence such as photographs, regarding any "misidentifications" or "nonidentifications" of the defendant by any witness. This information would include any instances in which a witness had an opportunity to identify the defendant, but identified either someone else or no one at all. *See Jackson v. Wainwright*, 390 F.2d 288 (5th Cir. 1968); *United States ex rel. Meers v. Wilkins*, 326 F.2d 135 (2d Cir. 1964); *cf. Jones v. Jago*, 575 F.2d 1164 (6th Cir. 1978) (potential co-defendant's confession to crime without identifying or implicating defendant was *Brady*). The government generally honors these requests, but counsel should not hesitate to file a motion to compel production if it refuses to comply. Misidentifications and non-identifications are ordinarily exculpatory evidence, which counsel cannot present to the jury without knowing which witnesses to call. *See Meers*, 326 F.2d 135.

The plea-bargaining calculus in a possible misidentification case must be especially sensitive because of the vagaries of identification evidence. When there is only one eyewitness against the defendant, the defense is in a more advantageous bargaining posture than usual. Counsel may be able to exploit that weakness, learned by investigation, to negotiate a dismissal or a favorable plea offer.

Discovery Conference:

- ✓ Explore all identification methods used
- ✓ Make a *Brady* request for any physical evidence and any "misidentifications" or "nonidentifications" by any witness
- ✓ Make specific *Brady* requests for any information regarding each witness's ability and opportunity to observe that might detract from the witness's credibility or certainty

C. Pre-trial Motions

A motion to suppress evidence of out-of-court identifications and prospective in-court identifications should be filed in every misidentification case. So long as the pleading meets the test of *In re F.G.*, 576 A.2d 724 (D.C. 1990) (en banc) (hearing necessary where information concerning details of show-up was not made available to defense), the defense is entitled to a hearing at which the suggestivity and reliability of the identification evidence may be probed.

Suppression Hearing: The primary purpose of the suppression hearing may be either to suppress an unconstitutional identification or to test the government's identification case. The two purposes require somewhat different strategies in conducting the hearing. If the purpose is to suppress the identification, cross-examination (assuming there has been adequate discovery and investigation) is conducted as it would be at trial with questions carefully framed to elicit only the testimony desired. To suppress an identification, counsel must show it is the product of an unduly suggestive procedure and that it is unreliable. *See United States v. Hunter*, 692 A.2d 1370, 1376 (D.C. 1997) (quoting *Greenwood v. United States*, 659 A.2d 825, 828 (D.C. 1995)). If the primary purpose is to evaluate the government's case, open-ended questions are used to allow the witness to discourse at will and possibly to provide useful information. If the purpose is to pin the witness down on the record with specific testimony helpful to the defense, counsel may revert to narrow and specific leading questions. Counsel will have to adapt the purposes and questions to each hearing and even to different stages of and developments in a particular hearing.

Identification suppression tends to be an all-or-nothing proposition. An out-of-court identification produced by undue suggestivity must be suppressed if it is also unreliable; if that identification is unreliable, an in-court identification will usually be unreliable as well, since it lacks an "independent source." *See Manson v. Brathwaite*, 432 U.S. 98, 110 n.10, 122 (1977). If, however, the defense succeeds in suppressing only the out-of-court identification, counsel at trial must choose either to keep out the prior identification, pursuant to the pre-trial ruling, or to introduce evidence of the out-of-court identification to suggest to the jury that the in-court identification is also unreliable. *See Clemons*, 408 F.2d at 1237.

Counsel may also move to exclude an extrajudicial identification on the grounds that it is unreliable and therefore inadmissible as an evidentiary matter. *See Beatty v. United States*, 544 A.2d 699, 701 (D.C. 1988); *United States v. Brannon*, 404 A.2d 926, 930 (D.C. 1979); *Sheffield v. United States*, 397 A.2d 963, 967 (D.C. 1979). If this motion is made before trial, it will be joined for hearing with the motion to suppress on constitutional grounds, and will substantially broaden the scope of permissible questioning on issues pertaining to reliability. *See Beatty*, 544 A.2d at 702-03. The predicate of unnecessary suggestivity need not be met to justify an inquiry into reliability. A mid-trial motion to strike the identification may be appropriate if doubt is cast on the identification through testimony at trial. *See id*. at 702.

Client's Presence at Preliminary Hearing: An important concern in the hearing is the potential for creating another identification or bolstering the previous identification by allowing the witness to see the defendant at counsel table during the hearing.[14] Thus, counsel should consider

[14] Counsel should also be wary of out-of-court encounters between witnesses and the client.

carefully whether to waive the client's presence at the hearing. Defendants may waive presence provided there is a knowing and voluntary waiver on the record and no legitimate interests of either party are prejudiced by the defendant's absence. *Singletary v. United States*, 383 A.2d 1064, 1070-72 (D.C. 1978).

Expert Witness: Finally, counsel may wish to retain an expert on the nature of human memory and perception to testify at trial on the vagaries of eyewitness identification. There is a substantial body of psychological research material dealing with the mental processes involved in eyewitness identification. *See* E. Loftus, *Eyewitness Testimony* (1979). If permitted to testify, the expert can educate the jury generally on significant mental processes, debunk popular misconceptions about eyewitness identifications, and comment on factors influencing the accuracy of the identification.

If the trial court decides that the "testimony is not beyond the ken of the average layman,"[15] it may be amenable to instructing the jury on such "common sense" matters regarding the possibilities of misidentification. *Cf. State v. Helterbridle*, 301 N.W.2d 545, 547 (Minn. 1980). A proposed instruction is set out in the next section. *See also Criminal Jury Instruction* No. 9.210.

D. Trial

The reliability of eyewitness identifications has long been questioned. Well meaning people have been known to be honestly mistaken about identifications, and popular reports of innocent people who have been wrongly identified and convicted are legion. Despite such potential unreliability, empirical evidence has shown that identification evidence has a powerful impact on juries, regardless of its reliability.[16]

> Eyewitness testimony is likely to be believed by jurors especially when it is offered with a high level of confidence, even though the accuracy of an eyewitness and the confidence of that witness may not be related to one another at all. All the evidence points rather strikingly to the conclusion that there is almost nothing more convincing than a live human being who takes the stand, points a finger at the defendant and says, "That's the one!"[17]

Presentation of the misidentification defense necessarily involves attacking the reliability of each government eyewitness. In most cases, the defense will have no reason to argue that the witnesses are lying, but will instead stress that the witnesses are mistaken, and seek to provide

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[15] *Green v. United States*, 718 A.2d 1042, 1050 (D.C. 1998); *Taylor v. United States*, 451 A.2d 859, 867 (D.C. 1982); *Brooks v. United States*, 448 A.2d 253, 258 (D.C. 1982); *Dyas v. United States*, 376 A.2d 827, 832 (D.C. 1977).

[16] *See, e.g., Watkins v. Sowders*, 449 U.S. 341, 349 (1981) (Brennan, J., dissenting); *Crawley v. United States*, 320 A.2d 309, 312 (D.C. 1974) (recognizing that the most certain eyewitness is not necessarily the most reliable); *United States v. Butler*, 636 F.2d 727, 732 (D.C. Cir. 1980) (Bazelon, J., dissenting); *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972); *McKenzie v. United States*, 126 F.2d 533, 535 (D.C. Cir. 1942).

[17] Loftus, *supra*, at 19. Loftus also remarks, "Jurors have been known to accept eyewitness testimony pointing to guilt even when it is far outweighed by evidence of innocence." *Id*. at 9.

explanations for their mistakes. To the extent possible, counsel should begin during *voir dire* to educate the jury about the theory of the defense. Counsel should ask (or request that the judge ask) whether any prospective jurors have ever been mistakenly identified, as, for example, where someone mistakenly greets them on the street, or if they have ever been mistaken in their identification of someone. Certainly, counsel should follow up on the answers to the *Ridley* question[18] with questions about the jurors' own experiences as identification witnesses or as victims of misidentification. If jurors truly represent a cross-section of the community, then they share commonly held misconceptions about eyewitness identifications.[19] Although it is admittedly difficult to do so, *voir dire* can be used to disabuse jurors of their mistaken faith in eyewitness identification.

Doubts on Reliability: The opening statement, cross-examination, and closing argument must highlight the points that cast doubt on the reliability of identification testimony. Human memory is a three-stage process: acquisition, retention, and retrieval. *See* Loftus, *supra*, at 21. At each stage, various factors will affect the reliability of the identification. Through her own work and exhaustive review of the professional literature, Loftus has identified a number of factors; some are based on common sense, while others are more subtle. Factors inherent in the event itself affect the witness's ability to perceive: how much time the incident took; the number of opportunities the witness had to observe particular details; whether certain details were more salient, or memorable, than others; whether the relevant detail is the type of fact capable of being accurately remembered (time, speed, height, weight, shapes, colors, and distance are often inaccurately remembered); and the violence of the event. Factors inherent in the witness – the amount of stress or fear (including extra stress from the presence of a weapon), the witness's prior knowledge and expectations, and what the witness is doing during the event (e.g., trying to remember details or thinking of ways to escape) – also influence perception. So, too, the witness's general anxiety, sex, age, and training affect perception. *See id*. at 20-51.

However accurate information may be when it is perceived and remembered, it will be influenced as it is stored or retained. *See id*. at 52-87. "It is by now a well-established fact that people are less accurate and complete in their eyewitness accounts after a long retention interval than after a short one." *Id*. at 53. What happens during the "retention interval" also affects how accurately data will be stored. Further information provided to the witness about the incident, as well as the witness's intervening thoughts, can cause alterations in memory.

The process of communication of memory, or "retrieval," subtly affects the accuracy and completeness of the witness's account. *Id*. at 88-109. The circumstances of the telling, the manner of recounting, the wording of questions, the identity of the interrogator, and the witness's confidence in his or her recollections will all affect the validity of the eyewitness account.

Finally, Loftus has isolated several particular factors that influence the recognition of people. *See id*. at 134-52. With respect to cross-racial identifications, "people are better at recognizing faces of persons of their own race than a different race." *Id*. at 136-37. Psychologists refer to the

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[18] *United States v. Ridley*, 412 F.2d 1126, 1128 (D.C. Cir. 1969).

[19] *See* Loftus, *supra*, at 171-77. For example, 33% of the subjects of a controlled experiment mistakenly believed that extreme stress would not interfere with an eyewitness's ability to make a reliable identification.

process of "unconscious transference" to describe the phenomenon in which a person seen in one situation (e.g., in the neighborhood) is confused with or recalled as a person seen in a second situation (e.g., as the perpetrator of a crime). Unconscious transference may occur when a witness makes a line-up identification after seeing a spread of photographs or after the police make a composite sketch of a suspect. Photographic and line-up identification procedures therefore may also contribute to mistaken identification.

Most identification issues focus on the differences in physical appearance between the perpetrator and the client. The client's testimony is not mandatory, as the jury is able to see the client and evaluate those differences. Counsel may also present additional evidence of the client's appearance and clothing at the time of the offense through witnesses and introduction of the arrest photograph and police documents.

Counsel should also consider presenting testimony of an expert witness about the reliability of eyewitness identifications, particularly when the witness and suspect are of different races. *See Green v. United States*, 718 A.2d 1042, 1051 (D.C. 1998) (trial court has discretion to admit testimony of expert regarding identification issues); *State v. Cromedy*, 727 A.2d 457 (N.J. 1999) (trial court's failure to submit defendant's requested charge on cross-racial identification was error). In cases involving evidence of the perpetrator's voice, counsel may present evidence of the client's voice to rebut identity through either a tape-recording or testimony. If either the client or the perpetrator has an unusual voice or speech pattern, counsel may hire an expert to obtain and analyze an exemplar of the client's voice, comparing it to any recording of the perpetrator. If the client does not testify, counsel may expose the jury to the client's voice by presenting a voice exemplar as demonstrative evidence. *See Taylor v. United States*, 601 A.2d 1060, 1065-67 (D.C. 1991) (where perpetrator's voice was taped, having defendant repeat same words in open court was non-testimonial evidence that did not waive Fifth Amendment protections or open door to cross-examination), *op. after remand*, 661 A.2d 636 (1995).

Expanded Instructions for Eyewitness Identifications: Finally, counsel should request a full instruction on the vagaries of eyewitness identifications. Counsel may also request the court to expand the standard jury instruction as follows:

> One of the most important issues in this case is the identification of the defendant as the perpetrator of the crime. The burden is on the government to prove beyond a reasonable doubt not only that the offense was committed as alleged in the indictment, but that the defendant was the person who committed it.
>
> You must judge the credibility of a witness who gives identification testimony the same way you do any other witness. In reaching a conclusion as to the credibility of an identification witness and in weighing the testimony of such a witness, you may consider any matter that may have a bearing on the subject; however, you should evaluate identification testimony with care and caution. It's not enough to be satisfied that the witness is sincere and certain of his or her identification; you must be convinced beyond a reasonable doubt of the accuracy of the identification.

> Eyewitness testimony is not infallible. It may be affected by the violence of the event, the attention given by the witness to the weapon, the amount of time that elapsed between the event and identification, by social pressures, or by the personality of the witness. It may be affected by many influences.
>
> You should consider the emotion and excitement of the moment and the duration of the stress that the witness may have been under, in conjunction with all the other evidence in this case and consider the extent, if any, to which these factors interfered with the witness's ability to observe and recollect.

But see Wilkerson v. United States, 427 A.2d 923, 926 (D.C. 1981).

E. Motion for Judgment of Acquittal

Counsel should argue that a prosecution relying exclusively upon eyewitness identifications, especially upon the testimony of one eyewitness, should not be permitted to survive a motion for a judgment of acquittal.

> The general test for directing a judgment of acquittal must be applied in the special context where . . . the finding of guilt rests solely upon the positive identification testimony of a single witness . . . Necessarily, the sole issue in this special context is whether the circumstances surrounding the identification could be found convincing beyond a reasonable doubt . . .
>
> In deciding whether to permit a criminal case to go to the jury, where identification rests upon the testimony of one witness, the [trial] judge ought to consider . . . the lapse of time between the occurrence of the crime and the first confrontation, the opportunity during the crime to identify . . . the reasons, if any, for failure to conduct a line-up or use similar techniques short of line-up, and the [trial] judge's own appraisal of the capacity of the identifying witness to observe and remember facial and other features. In short, the [trial] judge should concern himself as to whether the totality of circumstances "[gives] rise to a very substantial likelihood of irreparable misidentification."
>
> . . . [T]he trial court and this court must of course view the evidence in the light most favorable to the government . . . In addition, while we are mindful that the record on review is "cold," we think it proper – and indeed necessary – for us to draw upon our own experience, value judgments, and common sense in determining whether the verdict reached was in keeping with the facts.
>
> . . . [T]he complainant testified that he was able to identify appellant at the show-up because the image of appellant's face was implanted on his mind. Although the complainant may have been a credible and convincing witness, it is well recognized that the most positive eyewitness is not necessarily the most reliable . . . Thus, the complainant's emphatic statements about his ability to identify

> appellant are not controlling; rather, they are only one factor to consider in determining the reliability of the identification.

Crawley v. United States, 320 A.2d 309, 311-12 (D.C. 1974) (footnote and citations omitted). While Crawley was positively identified by the complainant fifteen minutes after an alleged burglary, he fit none of the characteristics listed in the broadcast description except that he was a black man wearing wine-colored pants. In addition, the complainant was unable to make an in-court identification. The D.C. Court of Appeals reversed the conviction.

Beatty v. United States, 544 A.2d 699, 701 (D.C. 1988), applied *Crawley* to find that the identification evidence was not reliable enough to sustain the conviction. The sole evidence connecting Beatty to a shoe store burglary was two pre-trial out-of-court identifications by the manager of the shoe store, Smothers. Smothers was shown a photo array and identified Beatty's photograph saying: "This guy looks like him. His face rings a bell and he is the one without the gun." *Id*. at 700. Later, upon viewing a videotape of a line-up, Smothers said Beatty "looks like him" and "this looks like the guy." *Id*. At trial, Smothers testified that after seeing Beatty at a pre-trial suppression hearing, he had told a police detective that Beatty did not look like the bagman. He specified significant physical differences between Beatty and the bagman. Moreover, the descriptions of the bagman given by the other two witnesses differed significantly from Beatty's appearance.

> All the trial testimony of Smothers and Attaway about the identity of the bagman was inconsistent with Beatty. On the other hand, we have the hearsay pre-trial identifications where Smothers said Beatty "looked like" the bagman, "his face rings a bell," "he is the one without the gun." Viewing the evidence under the standard mandated by *Hill* and *Crawley*, we hold that the identification of Beatty by Smothers as the bagman, standing alone as the only probative evidence, lacks the degree of reliability necessary to sustain the conviction, i.e., convincing beyond a reasonable doubt.

Id. at 703.

An in-court identification, however, leaves the court much more reluctant to find the evidence insufficient. For example, the conviction in *In re B.E.W.*, 537 A.2d 206 (D.C. 1988), was sustained based on the testimony of a single eyewitness, who had described the driver of a stolen car as a "young black male in a T-shirt," and identified him in a show-up and in court. See also *United States v. Bamiduro*, 718 A.2d 547 (D.C. 1998) (overturning trial court's grant of MJOA where single witness made in-court identification and identification was supported by corroborating evidence); *Cf. Brooks v. United States*, 717 A.2d 323 (D.C. 1998) (in-court identification is not always necessary to establish identity of defendant as person who committed charged crime, as identification may be inferred from all facts and circumstances in evidence).

The existence of more than one identification will significantly bolster an otherwise weak government case. *See Williams v. United States*, 355 A.2d 784 (D.C. 1976) (discrepancy of 41.2 inches between original description of assailant's height and defendant's height held sufficient because complainant made three positive identifications of defendant, robbery lasted fifteen

minutes at close range, and incident occurred on brightly lit street); *Russell v. United States*, 348 A.2d 299 (D.C. 1975) (one-witness identification sufficient when witness described assailant's attire in detail and identified defendant in a photographic array, in a line-up, and at trial); *In re W.K.*, 323 A.2d 442, 445 (D.C. 1974) (positive identification by one witness and tentative identifications by two other witnesses were sufficient); *see also Hill v. United States*, 541 A.2d 1285, 1287-88 (D.C. 1988) (one-witness identification sufficient although initial broadcast description omitted certain of the defendant's characteristics).

II. THE ALIBI DEFENSE

The alibi defense – proof that the accused was elsewhere at the time the offense was committed – is the most popular defense asserted in fictional trials. However, in reality, for several reasons, it may be the most difficult defense to present successfully. First, an alibi typically depends on the testimony of relatives and close friends, who are easily challenged on grounds of bias. Second, alibi witnesses frequently testify about remote and mundane events that people ordinarily have no particular reason to remember. These inherent weaknesses create a great danger that the jury's focus will shift from the government case to the defense case, in effect shifting the burden of proof; thus it is crucial for an alibi defense to be promptly investigated[20] and thoroughly prepared.[21]

The alibi defense is well exemplified by *Gethers v. United States*, 556 A.2d 201 (D.C. 1989). There, Gethers allegedly sold cocaine to an undercover police officer in a "cut" after obtaining the drugs from a brown paper bag, containing an additional thirteen packages, which was stashed in some bushes on O Street. Gethers called two witnesses who testified that they had been talking and drinking with Gethers on O Street for 2 hours and did not see him leave O Street or go to the "cut" or possess or distribute cocaine. The court found that error in refusing to instruct on alibi required reversal of the distribution conviction only, and affirmed the possession with intent to distribute (PWID) conviction. Even though the government claimed that the same person who sold the one packet possessed the other thirteen, the alibi "simply [did] not reach the PWID offense, which occurred in large measure on O Street, the very location where Gethers claimed to have been during the entire period in question." Additionally, there was no prejudicial "spillover" from the distribution count because the two offenses were "logically separable." *Gethers*, 556 A.2d at 205.

Although people traditionally believe that only other people can establish an alibi defense, one

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[20] An unexplained failure to present a potential alibi defense may constitute ineffective assistance of counsel. *Gillis v. United States*, 586 A.2d 726, 728-29 (D.C. 1991) (motion for new trial improperly denied without a hearing where appellant alleged ineffective assistance based upon counsel's failure to present alibi witnesses, and record reflected only counsel's statement at sentencing that "[t]here are reasons why the defense chose not to present any evidence at all").

[21] An alibi instruction is available if there is "any evidence, however weak," that the defendant was not at the precise scene of the crime. *Gethers v. United States*, 556 A.2d 201, 204 (D.C. 1989) (citation omitted). For an alibi to be effective, it must cover the entire time during which the crime was allegedly committed. *See Bright v. United States*, 698 A.2d 450, 459 (D.C. 1997) (alibi instruction appropriate only when alibi shows that defendant was elsewhere during time period he was allegedly engaged in criminal conduct); *Greenhow v. United States*, 490 A.2d 1130, 1134 (D.C. 1985).

can also come in the form of a client's statement or testimony. In *Reams v. United States*, 895 A.2d 914 (D.C. 2006), it was error not to admit a defendant's statement of alibi under the rule of completeness where the government introduced a portion of the statement in which the defendant implicitly denied being present at the scene of the crime thus suggesting that he did *not* account for his whereabouts but, rather, offered the police only a blanket denial. Therefore, even without a witness to indicate that a client was elsewhere at the time of the crime, the client's testimony will be sufficient to establish an alibi defense.

2014 Supplement

***Smith v. United States*, 68 A.3d 729 (D.C. 2013).** Evidence sufficient to satisfy two-witness perjury rule where government used testimony of two witnesses at trial as well as grand jury testimony of third witness to support falsity of co-defendant's alibi statement.

A. Preparation of the Alibi Defense

Alibi Witnesses: Counsel should attempt to contact potential alibi witnesses as soon as possible, before memories begin to fade. Early contact also provides the witness with a natural and proximate milestone from which to begin the recollection process. Counsel should also be aware whether the witness has provided the client an alibi for previous charges. *See Johnson v. United States*, 701 A.2d 1085, 1093 (D.C. 1997) (government allowed to cross alibi witness regarding two previous occasions on which witness testified to alibi for same defendant even though it revealed defendant's prior bad acts).

Witness Preparation: Alibi witnesses must be prepared to face perhaps the most probing, aggressive, and hostile cross-examination the prosecutor is capable of executing. It is common for witnesses to think it sufficient to say, "He was at home at 9:00 p.m. watching television," or "he is always at home on Saturday night." Typically, several pre-trial witness conferences will be necessary to impress effectively upon an alibi witness the need to try to corroborate the accused's presence with other persons or events. At a minimum, the witness must be thoroughly examined in the following areas:

- The defendant's actions: What was the defendant doing? Did he or she say or do anything unusual? When did the defendant arrive and depart? Did the defendant ever leave the witness's sight during that period of time? If so, for how long and for what purpose? How was the defendant dressed? (Compare with the description of the alleged offender). Did the defendant have any weapons or proceeds that might connect him or her with the alleged offense? Did the defendant say anything that could connect him or her with the alleged offense?

- The witness's relationship to the defendant: An alibi dependent on the testimony of persons having a special relationship with the defendant (e.g., spouse or relative) is more difficult to establish than one corroborated by disinterested testimony and objective evidence, but should not be rejected solely for that reason. Preparation of such persons will have to take into account their relationship with the defendant.

- The identities and actions of all other persons who were present with the alibi witness and the defendant.

- Any prior criminal convictions that could be used to impeach the witness's testimony.

- The nature and extent of any statements made by the witness to the police or others, including the grand jury. Friendly witnesses should be warned against communications with the complainant that could be brought out at trial to show bias.

- When and by whom was the witness first contacted about the case? How is the witness able to remember the date of the incident? Did something unusual occur, e.g., a birthday or serious illness? Was it near a payday?[22] Or did hearing about the incident or the arrest soon afterward make the witness realize that the defendant was with the witness when it happened?

Alibi witnesses must be interviewed and prepared by counsel personally, not by an investigator. Early personal contact with the witnesses will permit counsel to determine the strengths and weaknesses of the defense before deciding whether it should be presented. Counsel should keep in mind Super. Ct. Crim. R. 26.2, requiring production at trial, upon demand, of all "statements" of defense witnesses (who testify) that are in the possession of the defense.

Counsel should also independently investigate the witness's account, both to corroborate the witness's testimony, if possible, and to discover evidence that might be offered by the government to impeach or contradict that testimony. Counsel should obtain, for example, any employment, school, medical, or institutional records relating to the alibi witness and his or her prospective testimony. For example, should employment records indicate that the witness was at work at the time the witness remembers being elsewhere with the defendant, the apparent discrepancy must be explored in advance of trial.

After the initial interview but well before trial, counsel should prepare the witnesses for the often traumatic, always unnatural, task of testifying. All too often, alibi witnesses appear flustered and are unable to explain on cross-examination how they can remember the particular date and time about which they have testified. Sometimes the witnesses may not even understand the meaning of the inquiry. Their credibility is thus destroyed by minimal cross-examination. Pre-trial preparation is the key to successful presentation of an alibi. Cross-examination of the witnesses by another attorney before trial can expose a defense that is weak and shore up one that is only adequate.

A common line of cross-examination is for the prosecutor to ask the alibi witness if he or she can remember some other, irrelevant date several months before the trial; if not, the witness may be

[22] Counsel must be prepared to meet any hearsay objections with a proffer of why a witness's explanation for remembering certain events is not offered for the truth of what may have been said at the time. *Payne v. United States*, 516 A.2d 484 (D.C. 1986), held that the trial court did not err in rejecting as inadmissible hearsay proposed testimony that a witness recalled what she did on the night of the robbery because of something that a third person told her; "[b]ased on the nature of the defense proffer, [the court could not] say that the trial court abused its discretion in rendering this evidentiary ruling." *Id*. at 498 n.27.

unable to explain why one date is memorable and the other is not. Witnesses should be warned about this question in advance, so that they can explain, for example, that if they had some time and it was important they might well be able to work back and figure out what happened on the date suggested by the prosecutor. With an articulate and well-prepared alibi witness, the tactic of not asking the alibi witness to explain a seemingly remarkable memory in the direct testimony, in hopes that the prosecutor will elicit the crushing explanation on cross-examination, can be very effective. For example: "How do you know it was 10 o'clock when [defendant] entered the house?" "Because that was the time he was invited to arrive for the surprise party in his honor, and I turned off the television set just as the 10 o'clock news started."[23] If the explanation does not emerge during cross-examination, it should be brought out in redirect.

Alibi witnesses with a special relationship to the defendant – such as spouses, parents, boyfriends, or girlfriends – should be prepared for cross-examination on bias: "You love [defendant], don't you? You wouldn't want to see him hurt? You'd say anything for him, wouldn't you? You'd lie if it were necessary to save him from being hurt, wouldn't you?" These questions must be answered truthfully, and the witness should be prepared to assert forcefully that he or she is not lying and would not lie under oath for the defendant, regardless of their relationship.

If there are several alibi witnesses, the government will exploit any inconsistencies in the details of their testimony. Through pre-trial preparation, the witnesses will be aware of inconsistencies and may be able to explain them. Of course, some discrepancies are to be expected whenever several people recount the same event. Moreover, if the inconsistencies are not of major proportions, counsel may argue to the jury that they demonstrate only that the witnesses have not conspired to fabricate an alibi.[24] Counsel should also be familiar with, and argue to the jury, *Criminal Jury Instruction* No. 2.200 (Credibility of Witnesses).

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[23] *Ali v. United States*, 520 A.2d 306 (D.C. 1987), found no sufficient factual predicate and hence no good faith belief for cross-examination of alibi witnesses that suggested the defendant had suborned perjury or influenced witnesses. A detective had heard the defendant say "Now remember this" to witnesses in the cafeteria, but had not heard what appellant was asking witnesses to remember. "This bit of evidence [was] hardly a sufficient foundation for the prosecutor's questioning of appellant as to whether this was appellant's 'normal' behavior, nor for his argument in closing that appellant was 'orchestrating witnesses' and 'making up testimony.'" *Id.* at 315. The prosecutor's questions constituted prejudicial misconduct. *Id.* at 316.

[24] It is improper for the prosecutor to cross-examine on the witness's failure to report the substance of exculpatory testimony to the police:

> When a person is approached by the police for questioning, our cases have "commented on the duty of every person to cooperate . . ." But no inference can be drawn from the fact that a witness did not go to the police when he learns they have made an arrest of a defendant for a crime committed at a time for which he can provide alibi testimony. He might reasonably presume that it was sufficient for him to relate his knowledge to the attorney retained or appointed to represent defendant.

United States v. Young, 463 F.2d 934, 938 (D.C. Cir. 1972) (citations omitted). *See Alexander v. United States*, 718 A.2d 137, 143 (D.C. 1998) (cross-examination of defense witness regarding failure to come forward with alibi testimony is permissible only where witness's normal and natural conduct would have been to go to authorities with exculpatory information); *cf. Mitchell v. United States*, 408 A.2d 1213 (D.C. 1979) (no error in precluding defense from cross-examining complainant on refusal to speak to defense investigator).

Counsel should consider whether the alibi will be inconsistent with a co-defendant's defense and may require a severance. The Court of Appeals has found an alibi defense irreconcilable with the defense of a co-defendant claiming innocent presence and implicating the alibi defendant. *See Ready v. United States*, 445 A.2d 982, 987 (D.C. 1982). *But see Ellis v. United States*, 395 A.2d 404, 409 (D.C. 1978) (testimonial conflict between defendants is not alone sufficient ground for separate trials).

If the defenses are inherently irreconcilable, the court must

> determine whether there would be available at trial enough independent evidence of appellant's guilt – beyond that required for the government to survive a motion for judgment of acquittal – so that the court reasonably could find, with substantial certainty, that the conflict in defenses alone would not sway the jury to find appellant guilty.

Ready, 445 A.2d at 987. The defendants in *Tillman v. United States*, 519 A.2d 166, 169-72 (D.C. 1986), contended that their defenses were irreconcilable because the co-defendant's testimony placed Tillman on the scene while Tillman argued alibi. The court found enough independent evidence of both defendants' guilt, presented through the complainant's testimony, that the conflict in defenses alone would not sway the jury. *Id*. at 172.

An alibi defense, like any other, must not be accepted uncritically. Merely because the client has "nice" people who will swear that he or she was elsewhere does not mean they should be called. Counsel should present the defense only after careful preparation and consultation with the client. Counsel must appraise its strengths and weaknesses realistically, and advise the client accordingly. How good are the witnesses? Are their explanations for remembering the time and date persuasive? Are their memories of the occasion either overly vague or incredibly precise (bearing in mind that some haziness is to be expected)? Do the witnesses contradict each other, or the client, on important points? Do they corroborate the government's case in any respect, such as by placing the client in the vicinity of the crime scene? Will a co-defendant's testimony put the client on the scene but establish his or her innocent presence? Will the prosecutor be able to impeach the alibi witnesses with prior convictions? Will the witnesses manifest strong bias for the accused?

Alibi Defense:

- ✓ Contact and interview alibi witnesses as soon as possible
- ✓ Counsel should personally interview and prepare the witness for trial
- ✓ Present alibi defense after careful preparation and consultation with the client

B. Alibi-Demand Rule

The alibi-demand rule, Super. Ct. Crim. R. 12.1, is triggered by a written demand by the prosecutor. Within ten days of the written demand, unless the court directs otherwise, the

defendant must serve on the prosecutor a written notice of intention to offer an alibi. The notice "shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names and addresses of the witness[es] upon whom the defendant intends to rely to establish such alibi." Super. Ct. Crim. R. 12.1(a). Within ten days, the prosecutor must respond with a written notice "stating the names and addresses of the witnesses upon whom the government intends to rely to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut testimony of any of the defendant's alibi witnesses." Super. Ct. Crim. R. 12.1(b). Both parties are under a continuing duty to disclose additional witnesses of whom they become aware. *See* Super. Ct. Crim. R. 12.1(c).

The court has discretion to exclude the testimony of an undisclosed witness (but not of the defendant). *See* Super. Ct. Crim. R. 12.1(d); *Hall v. United States*, 540 A.2d 442 (D.C. 1988). In Hall, the government did not make its alibi demand until eleven days before trial. The defense complied immediately and the government turned over its list of "anti-alibi" witnesses. On the morning of trial, the government informed defense counsel of three additional witnesses whose existence had just been discovered and whom it intended to call in rebuttal. The defense objected to admission of their testimony, based on the eleventh-hour disclosure. Finding no violation of Rule 12.1(a) or (b) in the late demand, the court looked to Rule 12.1(c): "If prior to or during trial, a party learns of an additional witness whose identity, if known, should have been [previously disclosed] the party shall promptly notify the other party or the other party's attorney of the existence and identity of such additional witness." The court found compliance with 12.1(c), but that even if there had not been compliance, the broad discretion granted by 12.1(d) authorized the trial court to admit the rebuttal witnesses' testimony. *Hall*, 540 A.2d at 446-47. *See also Clark v. United States*, 396 A.2d 997, 999-1000 (D.C. 1979) (court has discretion to permit defendant to call alibi witness if defendant can show good cause for failure to comply with rule), and *Brown v. United States*, 763 A.2d 1137 (D.C. 2000) (court did not abuse its discretion in precluding defendant from cross-examining police officer regarding his lack of compliance with police general order to interview all potential witnesses to assault on a police officer on the theory that his failure to do so reflected on his credibility and was evidence that the assault never took place).

Preclusion as a sanction against a defendant who fails to comply with the alibi notice requirement can implicate the Sixth Amendment. *See Michigan v. Lucas*, 500 U.S. 145 (1991); *Taylor v. Illinois*, 484 U.S. 400 (1988). It is justified only in extreme circumstances. *See Lucas*, 500 U.S. at 152 (alternative sanctions are "adequate and appropriate in most cases"); *Escalera v. Coombe*, 852 F.2d 45, 48 (2d Cir. 1988) (remanding for determination, in light of *Taylor*, of whether defense failure to comply with alibi notice was "willful and motivated by a desire to obtain a tactical advantage"). Even if counsel is uncertain whether an alibi will actually be presented, compliance with the alibi-demand rule must be attempted. Evidence relating to an alibi notice that has been withdrawn is inadmissible. *See* Super. Ct. Crim. R. 12.1(f); *Bundy v. United States*, 422 A.2d 765, 767 (D.C. 1980) (error to cross-examine defendant about initial alibi later recanted).

Before names and addresses are disclosed in response to an alibi demand, counsel should contact all alibi witnesses and advise them that they may soon be contacted by the government. While it

is improper to instruct any witness (other than the client) not to talk to the police or prosecutor, it is appropriate to discuss the witnesses' options and to inform them that there is no obligation to discuss their testimony with any person in advance of trial.

C. Sample Examination of Alibi Witnesses

1. Direct

Do you know Mr. X [defendant]?

How long have you known him?

What is the nature of your relationship?

Did you have occasion to see Mr. X during [month]?

How often?

Generally, how did you happen to see him during that month?

Directing your attention to the [day] of [month], did you happen to see Mr. X on that day?

Did anything unusual happen on that day?[25]

[Number] days later, did you have occasion to see him again?

What was that date?

What day of the week was that?

Did anything unusual happen that day?

Where did you see him?

About what time?

Please tell the ladies and gentlemen of the jury what transpired at that time.

How long did you [activity]?

What happened then?

Was [other witness] there?[26] What was he doing?

[25] It is a useful technique to direct the witness's attention to a date on which something unusual occurred that would fix the date in the witness's memory. The testimony then builds toward the date in question as part of a sequence of events that seems natural for the witness to remember.

Who else was with you?

At what time did you last see Mr. X?

Did you notice the exact time? Why?[27]

During the [length of time] you were with Mr. X, was he wearing a [garment]?[28]

At any time from [time] to [time] on that day, did Mr. X leave from [place]?

At any time did you see him with [weapon used in crime, if any]?

At any time did you see him with [proceeds of crime, if other than money]?

At [time], [date], was Mr. X with you?

2. Cross Examination

On cross-examination, the prosecutor likely will pursue the following line of questioning:

You love the defendant and don't want to see him in trouble, do you?

In fact, you would do almost anything to help him win his case?

Have you discussed your testimony with the defendant's attorney? With the other witnesses? How many times?

When did you first tell defense counsel about where the defendant was?

What was the defendant doing the day before [date in question]? The day after? The month before?[29]

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[26] If other witnesses are going to testify, the presence of those witnesses should be woven into the testimony. This can be done only with careful preparation of each witness so that counsel is familiar with the details of their testimony.

[27] The examiner should use time references: e.g., television programs, amount of daylight, changes in weather conditions, regular working hours, or delivery hours.

[28] Reference is made here to the clothing described by the government witness as being worn by the offender. Notice that the question is not asked as "What was he wearing?" Such information is seldom remembered unless the witness's attention is specifically directed to it.

[29] Counsel should object to any questions about whether the witness contacted the police or prosecutor, *Alexander v. United States*, 718 A.2d 137, 143 (D.C. 1998); *United States v. Young*, 463 F.2d 934, 938 (D.C. Cir. 1972), or questions that put the witness in the position of calling government witnesses liars, *Carter v. United States*, 475 A.2d 1118, 1126 (D.C. 1984).

3. Redirect

How certain are you that you were with Mr. X on [date in question]?

Even considering your close relationship to Mr. X, would you testify untruthfully merely to help him?

III. SELF-DEFENSE

In homicide, assault, and some weapons offenses,[30] counsel must explore the possibility that the client acted in self-defense. One who reasonably believes that he or she is in imminent danger of bodily harm is entitled to use a reasonable amount of force to protect himself or herself against that harm.[31] The touchstones of the analysis are the reasonableness of the belief of danger and the reasonableness of the response to that danger under the circumstances as they appeared at the time the force was used. A belief or response that may seem unreasonable or unnecessary in retrospect may nonetheless have been reasonable in the heat of the moment.[32] "Detached reflection cannot be demanded in the presence of an uplifted knife." Indeed, a person in no real danger at all may reasonably believe otherwise, and lawfully act in self-defense.[33] Where evidence of self-defense is present, the government must prove beyond a reasonable doubt that the defendant did not act in self-defense.[34]

To demonstrate that the defendant acted reasonably under the circumstances, counsel must strive to recreate for the jury the imminent danger, the fear and desperation the client's circumstances engendered, and the lack of less drastic alternatives to the defensive measures taken.[35] In

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[30] Self-defense is a defense to possession of a prohibited weapon if it negates the element of intent to use the weapon unlawfully. *See Potter v. United States*, 534 A.2d 943, 946 (D.C. 1987); *see also Williams v. United States*, 877 A.2d 125 (D.C. 2005). In more limited circumstances, self-defense is a defense to carrying a pistol without a license, possession of an unregistered firearm, and possession of unregistered ammunition. *See, e.g., Yoon v. United States*, 594 A.2d 1056, 1065 n.16 (D.C. 1991), *modified in part*, 610 A.2d 1388 (D.C. 1992); *McBride v. United States*, 441 A.2d 644, 650 n.11 (D.C. 1982).

[31] *See Criminal Jury Instruction* No. 9.500; *Gezmu v. United States*, 375 A.2d 520, 523 (D.C. 1977); *United States v. Peterson*, 483 F.2d 1222, 1229 (D.C. Cir. 1973).

[32] *See Fersner v. United States*, 482 A.2d 387, 391 (D.C. 1984); *Inge v. United States*, 356 F.2d 345, 348 (D.C. Cir. 1966); *Criminal Jury Instruction* No. 9.501.

[33] *See Ibn-Tamas v. United States*, 407 A.2d 626, 634 (D.C. 1979) (*Ibn-Tamas I*); *Williams v. United States*, 403 F.2d 176, 179 n.2 (D.C. Cir. 1968); *Criminal Jury Instruction* No. 9.502.

[34] *See Criminal Jury Instruction* No. 9.500; *Harris v. United States*, 618 A.2d 140, 148 (D.C. 1992); *Speed v. United States*, 562 A.2d 124, 129 (D.C. 1989). An instruction shifting the burden to the defense is erroneous. *See Clark v. United States*, 593 A.2d 186, 194 (D.C. 1991) (burden of proof was impermissibly shifted where statement of defense theory was followed by, "[i]f you are satisfied that this is what happened, you must find that the defendant is not [guilty]").

[35] Counsel's arguments to the jury, however, should be reasonable. *See, e.g., Broadie v. United States*, 925 A.2d 605 (D.C. 2007) (Court of Appeals agreed that defendant's self-defense argument was unpersuasive given that defendant admitted he had stabbed decedent in chest and where jury had only two options with regard to chest wound: (1) to find defendant acted in self-defense, and was therefore not criminally culpable for chest wound; or (2) to find that defendant committed an armed offense). Additionally, a client cannot testify about his or her state of mind if that state of mind is irrelevant or if its probative value does not outweigh its prejudicial effect. *See Johnson*

preparation, counsel will have to investigate thoroughly and probingly, beginning with the initial client interview. The client may not even realize that there is a potential self-defense claim.[36]

2014 Supplement

***Ewell v. United States*, 72 A.3d 127 (D.C. 2013) (amended).** Insufficient evidence to show defendant did not act in self-defense.

***Richardson v. United States*, 98 A.3d 178 (D.C. 2014).** See, supra, Chapter 32.I.B.

***Kittle v. United States*, 65 A.3d 1144 (D.C. 2013).** Trial judge did not err in denying defendant's request for self-defense instruction where he was restrained by friend for fourteen minutes because he announced to room just before restraint began that he had a gun, friend thought he was acting "out of character," restraint was merely to hold and not to harm, and evidence showed that restraint made defendant "mad" but not frightened or fearful that he was in imminent harm.

***Hargraves v. United States*, 62 A.3d 107 (D.C. 2013) (amended).** Trial judge did not abuse discretionary authority over order of proof by requiring defendant to present some evidence that he had acted in self-defense before he could introduce evidence of decedent's propensity for violence.

***Tyson v. United States*, 30 A.3d 804 (D.C. 2011).** Trial court did not plainly err in not making specific finding as to APO defense of "justifiable or excusable cause" where record showed that court considered question in expressly disbelieving testimony of defendant and friend that officers used force against him and that he did not resist, instead crediting police officer testimony that he struggled against and kicked them when they attempted to arrest him.

***Wooden v. United States*, 6 A.3d 833 (D.C. 2010).** Heller does not "clearly" extend Second Amendment protection to knives or to carrying them for exclusive purpose of self-defense outside home.

***Jones v. United States*, 999 A.2d 917 (D.C. 2010).** Trial court did not err in denying defense request for self-defense instruction in case where defendant used a box cutter to stab decedent during fight at club because reasonable jury could not without speculation have found from evidence presented – whether decedent had bumped into defendant on overcrowded dance floor

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v. United States, 960 A.2d 281, 295-96 (D.C. 2008) (trial court properly excluded defendant's testimony that he killed decedent because decedent tried to rape him, which made him think about how his mother had been raped).

[36] Self-defense is obviously not the only defense to an assault. Where a person is charged with assault a child, they may be able to assert that they were exercising reasonable parental discipline. *See, e.g.*, *Longus v. United States*, 935 A.2d 1108 (D.C. 2007) (simple assault conviction reversed because government's evidence insufficient to rebut defense of parental discipline privilege where defendant's slapping daughter on back of head and grabbing her clothing near her neck did not meet severity of disciplinary force required by statute and where no evidence was introduced of resulting psychological trauma or physical injury). Note, however, that there is no *de minimis* defense to assault: in short, "an assault conviction will be upheld when the assaultive act is merely offensive, even though it causes or threatens no physical harm to the victim." *Dunn v. United States*, 976 A.2d 217, 222 (D.C. 2009) (internal quotations and citation omitted).

or had thrown first punch in fistfight – that defendant reasonably believed he was in imminent danger of death or serious injury such that use of the box cutter was necessary to protect himself.

A. General Legal Principles

Criminal Jury Instructions 9.500 to 9.510 set out the principles relating to self-defense. One is entitled to use a reasonable amount of force in self-defense if one actually believes that bodily harm is imminent and there are reasonable grounds for that belief. In evaluating the reasonableness of the defendant's actions and beliefs, the jury is to consider the circumstances as they appeared to the defendant at the time of the incident. Entitlement to the use of self-defense may vary depending on whether the defendant was the initial aggressor or provoked the conflict, *Criminal Jury Instruction* No. 9.504; whether the force used by the defendant was deadly or nondeadly, No. 9.501; the nature and degree of force used in relation to the apparent harm defended against, Nos. 9.501 and 9.502; and the imminence of the actual or apparent danger, No. 9.502.

As with any theory of defense instruction, the defendant is entitled to a self-defense instruction if there is any evidence to support it. In making that determination, the court must view the evidence in the light most favorable to the defendant. *See Adams v. United States*, 558 A.2d 348, 349 (D.C. 1989). The instruction must be given whenever an evidentiary basis exists, because "[a] defendant's decision . . . to establish different or even contradictory defenses does not jeopardize the availability of a self-defense jury instruction as long as self-defense is reasonably raised by the evidence." *Wilson v. United States*, 673 A.2d 670, 673 (D.C. 1996); *see also Guillard v. United States*, 596 A.2d 60, 62 (D.C. 1991). *But see Dorsey v. United States*, 935 A.2d 288 (D.C. 2007) (request for instructions on self-defense and defense of a third person properly denied because evidence did not show that either defendant or his brother were in immediate peril of death or serious bodily harm such that defendant could reasonably think that deadly force was needed where decedent was unarmed, uttered no threats, and did not inflict any serious injury on defendant's brother). When the right to self-defense is relevant to the theory of defense, an appropriately tailored instruction should be given, even though the defendant is not presenting an exclusive claim of self-defense. *See Clark*, 593 A.2d 186, 194-95 (error in denying detailed theory of defense instruction explaining defense of accident in the context of the right to self-defense; error not cured by offer to give standard self-defense instruction).

The jury must be clearly instructed as to which substantive offenses the self-defense claim applies. To accomplish this goal, the court may instruct on self-defense immediately after each substantive offense instruction, or clearly specify the substantive offenses to which self-defense applies. *Swanson v. United States*, 602 A.2d 1102, 1106-07 (D.C. 1992). When the jury is reinstructed on a substantive offense to which self-defense applies, it should also be reinstructed on self-defense. *See id*. at 1107 n.11. *See also*, *Robinson v. United States*, 642 A.2d 1306, 1311-12 (D.C. 1994).

1. Initial Aggressor and Provocation

Being the initial aggressor in an altercation, or deliberately provoking a conflict, may defeat the claim of self-defense.[37] Initial aggressors may not invoke the privilege of self-defense unless they have first withdrawn from the conflict in good faith, and effectively (by word or deed) communicated that withdrawal to the opponent. The burden, however, remains with the government to prove beyond a reasonable doubt that the accused was the initial aggressor and thus not entitled to a claim of self-defense.

If the initial aggressor withdraws from the conflict and the opponent then takes up the attack, the initial aggressor can properly use reasonable force in self-defense.[38] Hence, where the defendant may have been the initial aggressor, counsel must investigate the possibility that the defendant attempted to withdraw at some point during the altercation. *See, e.g., Murphy-Bey v. United States*, 982 A.2d 682, 691 (D.C. 2009) (error to deny instruction on the law of "initial aggressor" where the defendant started the fight but then took a few steps backward in order to avoid being stabbed). This may require a precise, moment-by-moment recapitulation of a fast-moving encounter. Therefore, witnesses should be interviewed as promptly as possible. Also,

> [a] nondeadly aggressor (i.e., one who begins an encounter, using only his fists or some nondeadly weapon) who is met with deadly force in defense may justifiably defend himself against the deadly attack. This is because the aggressor's victim, by using deadly force against nondeadly aggression, uses unlawful force.[39]

In *Mitchell v. United States*, 399 A.2d 866 (D.C. 1979), the accused followed the complainant into a public street after their fight in an apartment, thereby placing "himself in a position reasonably calculated to provoke trouble" and losing a claim of self-defense. *Id*. at 869. The court did not find it significant that this place of provocation was a public street open to the general public.[40] *Id*. (no self-defense instruction when accused shot driver who yelled out to accused, followed accused for 5-15 minutes, and pulled object out of glove compartment that later turned out to be pistol); *see also Tyler v. United States*, 975 A.2d 848 (D.C. 2009).

One may not assert self-defense where no imminent threat of harm exists, even if the alleged victim engaged in aggressive and threatening behavior before the assault. *See v. United States*, 619 A.2d 1180, 1181 (D.C. 1992); *Frost v. United States*, 618 A.2d 653, 661 (D.C. 1992) (no "defense of third person" instruction where complainant threatened another patron inside bar, but no evidence that he presented a danger once he had been escorted outside and denied reentry);

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[37] *Martin v. United States*, 452 A.2d 360, 363 (D.C. 1982); *see also Criminal Jury Instruction* No. 9.504 (mere words, without more, do not constitute aggression or provocation).

[38] *See Criminal Jury Instruction* No. 9.504; *see also Rowe v. United States*, 164 U.S. 546, 555-57 (1896); *United States v. Grover*, 485 F.2d 1039, 1042 (D.C. Cir. 1973); *Peterson*, 483 F.2d at 1231; *Harris v. United States*, 364 F.2d 701 (D.C. Cir. 1966).

[39] LaFave and Scott, *Criminal Law*, § 53, p. 395 (1972).

[40] *See also Howard v. United States*, 656 A.2d 1106, 1111 (D.C. 1995), *appeal after remand*, 692 A.2d 1380 (D.C. 1997); *Peterson*, 483 F.2d at 1233; *Rowe v. United States*, 370 F.2d 240, 241 (D.C. Cir. 1966); *Parker v. United States*, 158 F.2d 185 (D.C. Cir. 1946); *Laney v. United States*, 294 F. 412, 415 (D.C. Cir. 1923).

Harper v. United States, 608 A.2d 152, 154-55 (D.C. 1992) (no self-defense instruction where accused shot alleged robber whom she had followed out of store and up the street).

The difference between deliberate, unjustifiable provocation and innocent behavior that others see as provocative can be hard to discern. In close cases, counsel must take pains to establish the lawfulness and reasonableness of the client's behavior in the circumstances of the moment.

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***Bryant v. United States*, 93 A.3d 210 (D.C. 2014).**Defendant's return to complainant's apartment with gun in his hand after clear that occupants objected to his presence precipitated physical confrontation, and precluded claim of self-defense.

2. Nature and Amount of Force Used

To justify the use of deadly force, the accused must actually and reasonably believe that there was imminent peril of death or serious bodily harm.[41] An accused who uses nondeadly force must reasonably believe merely that harm was imminent. *See McPhaul v. United States*, 452 A.2d 371, 373 (D.C. 1982). If there is a factual dispute as to whether the accused used deadly or nondeadly force, the defendant's testimony alone is sufficient to require an instruction on *nondeadly* force. *See id*. at 373-74 (all witnesses said accused used iron pipe; defendant testified he was armed only with a stick).

One may use the amount of force that one reasonably believes to be necessary under the circumstances to avoid the threatened harm. In evaluating the reasonableness of the defendant's belief that he or she was in imminent danger of death or serious bodily injury, the jury is to take into account the defendant's individual character, beliefs, and experiences, provided that these beliefs are ones that an ordinary person could reasonably hold in the circumstances. *See Mathews v. United States*, 539 A.2d 1092, 1093 (D.C. 1988).[42] The same rules govern when the accused claims to have acted in defense of a third person. *See Taylor v. United States*, 380 A.2d 989, 994 (D.C. 1977). Here too, the touchstone is reasonableness; the accused is "entitled to use the degree of force reasonably necessary to protect the other person on the basis of the facts as

[41] *See Swann v. United States*, 648 A.2d 928, 929-30 (D.C. 1994); *Fersner v. United States*, 482 A.2d 387, 390 (D.C. 1984); *Sellars v. United States*, 401 A.2d 974, 982 (D.C. 1979); *Peterson*, 483 F.2d at 1229-30 ("deadly force" means force that is likely to cause death or serious bodily harm), and cases cited therein; *Inge v. United States*, 356 F.2d 345, 348 (D.C. Cir. 1966); *Criminal Jury Instruction* No. 9.501.

[42] In *Mathews*, the government elicited through cross-examination of the defendant that he believed that the complainant was part of a conspiracy against him. The critical issue for the jury became whether the defendant's perceptions were reasonable under the circumstances. The jury sent out a note during deliberations asking whether they were to consider the defendant's background and experiences or that of an ordinary person in evaluating the reasonableness of his belief that he was in danger. The trial court responded that the standard was that of an ordinary person under the circumstances. The court found that the trial court's reinstruction should have addressed the materiality of the defendant's life experiences and background, but, in light of the other instructions as a whole, found the error harmless. *See also United States v. Williams*, 697 A.2d 1244, 1249 (D.C. 1997) (defendant's statement to police that marijuana use makes her paranoid of men is relevant to reasonableness of self-defense claim where defendant under such influence kills man). *Perry v. United States*, 422 F.2d 697, 699 (D.C. Cir. 1969).

the intervenor, not the victim, reasonably perceives them." *Fersner v. United States*, 482 A.2d 387, 391 (D.C. 1984). *See Criminal Jury Instruction* No. 9.510.

The problem of seemingly over-reacting in self-defense can arise in several ways. For example, the defendant may have struck more blows or fired more shots than were, at least in retrospect, necessary. Under such circumstances, a "false appearances" instruction may be appropriate. *See Criminal Jury Instruction* No. 9.502. The false appearances instruction may also be warranted where there is conflicting evidence of danger to the defendant. *See Jackson v. United States*, 645 A.2d 1099, 1101-03 (D.C. 1994); *Sloan v. United States*, 527 A.2d 1277, 1282 (D.C. 1987) (instruction redundant because jury was instructed that it did not matter whether they believed in retrospect that use of force was necessary, so long as defendant actually believed he was in danger, and that belief was reasonable under the circumstances as they appeared to him at the time); *see also Criminal Jury Instruction* No. 9.500.

For example, the complainant/decedent may have been armed only with a knife while the accused used a gun in response. Counsel must dramatize for the jury the gravity of the danger, the absence of advance warning, and the stress of the moment:

> [T]he claim of self-defense is not necessarily defeated if, for example, more knife blows than would have seemed necessary in cold blood are struck in the heat of passion generated by the unsought altercation. A belief which may be unreasonable in cold blood may be actually and reasonably entertained in the heat of passion. "If the last shot was intentional and may seem to have been unnecessary when considered in cold blood, the defendant would not necessarily lose his immunity if it followed close upon the others while the heat of the conflict was on, and if the defendant believed that he was fighting for his life."

Inge v. United States, 356 F.2d 345, 348 (D.C. Cir. 1966), *quoting Brown v. United States*, 256 U.S. 335, 344 (1921).[43]

Another common "excessive force" problem occurs when the accused claims, either incorrectly or without substantial evidence, that the adversary was armed: "He reached into his pocket, I figured he had a gun, so I shot him." Obviously counsel will want to learn, through investigation and discovery, whether the adversary was in fact armed. If no weapon was retrieved by the police, could it have been removed by others with a motive to do so? Counsel also must show the reasonableness of the defendant's fear in the circumstances. Had the defendant seen the adversary with a gun on earlier occasions? Had the adversary ever threatened the client? Are there corroborating witnesses? What had the client previously heard or known about the adversary's reputation for violence?

In homicide cases, the decedent's past acts of violence, even though unknown to the defendant, as well as uncommunicated threats, are admissible on the issue of who was the aggressor. *Johns v. United States*, 434 A.2d 463, 468-69 (D.C. 1981); *Griffin v. United States*, 183 F.2d 990, 991 (D.C. Cir. 1950). In non-homicide cases, the law is less clear; a full discussion follows in

[43] In *Inge*, 356 F.2d at 348, the trial court erroneously instructed the jury to return a manslaughter verdict if they found that the accused had struck excessive blows in a sudden heat of passion.

Section H. Admissibility of evidence of the adversary's reputation for violence and of specific prior violent acts is also discussed *infra* Section III.G.

If the client was armed, counsel must thoroughly explore the reasons why. Is there an innocent explanation? For example, is the weapon actually a tool used in employment? Did the defendant pick up the weapon only after the attack had begun, because it was handy? "One may deliberately arm himself for purposes of self-defense against a pernicious assault which he has good reason to expect . . . [T]he true significance of the fact of arming can be determined only in the context of the surrounding circumstances." *Peterson*, 483 F.2d at 1232 n.61 (citations omitted). The jury may well find that the arming reflected premeditation and deliberation, specific intent to kill, or an aggressive intent inconsistent with the claim of self-defense.[44] A precautionary arming is so suggestive of non-defensive intentions that counsel must make every effort to explain it to the jury fully and persuasively, at every available opportunity, including opening, cross-examination, and the client's testimony.

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***Henry v. United States*, 94 A.3d 752 (D.C. 2014).** Trial court did not err in declining to give requested self-defense instruction where evidence presented—that defendant had fired in the direction of decedent standing with group of which defendant "reasonably was afraid"—would not have permitted jury to find that defendant reasonably believed that decedent was about to shoot him and that he needed to shoot decedent to protect himself from danger.

3. Imperfect Self-Defense and Mitigated Malice

In a homicide case, counsel should explore the possibility of self-defense even if the facts do not support a full self-defense claim. If the self-protective conduct was excessive or unreasonable, the defendant may be found guilty of manslaughter instead of murder. This is commonly referred to as "imperfect self-defense."

> Appellant's jury may have recognized an obstacle to finding self-defense simply from the amount of force used to repel the deceased's attack. And if the jury rejected self-defense just because appellant imprudently misjudged the response necessary in the situation, his offense might well have been manslaughter, arising from the unreasonableness of the judgment he made.

Sellars v. United States, 401 A.2d 974, 977 (D.C. 1979). Counsel should carefully review the standards and instructions relating to manslaughter set forth in *Swann v. United States*, 648 A.2d 928, 930 (D.C. 1994), and *Comber v. United States*, 584 A.2d 26, 31 (D.C. 1990) (en banc). *Comber* reiterated that, while a full self-defense claim excuses a homicide resulting in no criminal liability,[45] an imperfect self-defense claim mitigates the malice element, thus reducing

[44] Self-defense is a defense to a charge of possession of a prohibited weapon because it negates intent to use the weapon unlawfully, and the defense is entitled to an instruction to that effect. *See Potter v. United States*, 534 A.2d 943, 946 (D.C. 1987).

[45] Killings committed under other legally recognized excuses and justifications, such as accidental and nonnegligent killings, or killings commanded or authorized by law, also result in no criminal liability. *See Comber*, 584 A.2d at 40-41 n.16.

the liability from murder to manslaughter. Imperfect self-defense includes killings committed in self-defense or defense of others, but with excessive force or under an honest, but unreasonable, belief of the mortal danger involved. Other recognized mitigating circumstances include killings committed after adequate provocation and those committed in the heat of passion (such as fear, resentment, terror, rage, and anger). *See id*. at 40-42.

Counsel should request appropriate instructions in all homicide cases[46] involving some evidence of self-defense, provocation, or heat of passion. From a tactical standpoint, counsel should be aware that evidence showing the accused was aware of an "imminent peril" could be used to deny an instruction on *involuntary* manslaughter. *Brown*, 619 A.2d at 1183.

Where evidence of mitigating circumstances is present, the court must give complete instructions defining them, explaining their effect on liability, and explaining the government's burden of disproving them beyond a reasonable doubt. *See Jackson v. United States*, 653 A.2d 843, 846-47 (D.C. 1995); *Bostick v. United States*, 605 A.2d 916, 918 (D.C. 1992) (reversible error in refusing to give specific instructions where sufficient evidence of provocation was presented).[47] These instructions should be given even if the evidence is presented exclusively through the government's witnesses and even if the jury is not instructed on the lesser-included offense of voluntary manslaughter. *See Bostick*, 605 A.2d at 919-20.

4. Avoiding the Harm – Duty to Retreat

Common law imposed a duty to retreat, if it could be done safely, as a precondition to the use of deadly force in self-defense. While some jurisdictions have retained this "retreat to the wall" doctrine, the majority have rejected it. The majority position, referred to as the American rule, imposes no duty to retreat and permits one to stand one's ground and defend oneself. *See Gillis v. United States*, 400 A.2d 311 (D.C. 1979), (adopting a "middle ground" approach that neither imposes a duty to retreat nor precludes a jury from considering a failure to retreat in determining whether the defendant acted in self-defense).

> This middle ground imposes no duty to retreat, as it recognizes that, when faced with a real or apparent threat of serious bodily harm or death itself, the average person lacks the ability to reason in a restrained manner how best to save himself and whether it is safe to retreat . . . But this middle ground does permit the jury to consider whether a defendant, if he safely could have avoided further encounter by stepping back or walking away, was actually or apparently in imminent danger of bodily harm. In short, this rule permits the jury to determine if the defendant acted too hastily, was too quick to pull the trigger. A due regard for the value of human life calls for some degree of restraint before inflicting serious or mortal injury upon another.

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[46] The principles discussed in this section apply to any offense that requires proof of malice. *See, e.g., Howard v. United States*, 656 A.2d 1106 (D.C. 1995) (evidence of provocation admissible on issue of mitigation of malice in prosecution for assault with intent to murder).

[47] *See also Kinard v. United States*, 96 F.2d 522, 525 (D.C. Cir. 1938); *cf. Price v. United States*, 602 A.2d 641, 644-45 (D.C. 1992) (no error in refusing to instruct on lesser-included offense of manslaughter where no evidence of legally recognized mitigating circumstances).

Id. at 313; *see Criminal Jury Instruction* No. 9.503; *see also Carter v. United States*, 475 A.2d 1118, 1124 n.1 (D.C. 1984) (citation omitted):

> [W]hen an individual is faced with a real or apparent threat of serious bodily harm or even death itself, there is no mandatory duty to retreat. This standard allows a jury to consider whether a defendant could have safely avoided further encounter by stepping back or walking away and thereby to determine whether he was actually in imminent danger of bodily harm.

Once it is clear that the danger appeared imminent, the defendant need not retreat. "[A]n individual in this jurisdiction, when faced with a life threatening situation, may stand upon his rights and resist the attack to the extent apparently necessary to avoid death or serious bodily harm." *Carter*, 475 A.2d at 1124; *see Edwards v. United States*, 619 A.2d 33, 38 (D.C. 1993) (no evidence to support appellant's claim that he reasonably believed himself to be in danger from a fleeing man when defendant himself testified that he had locked himself inside his apartment). Under the appropriate facts, counsel should request *Criminal Jury Instruction* No. 9.503, which educates the jury about a client having no duty to retreat. *See, e.g.*, *Broadie v. United States*, 925 A.2d 605 (D.C. 2007) (not abuse of discretion for trial court to give jury "no duty to retreat" instruction where there was a "truly relevant question" as to whether defendant could have safely retreated as evidenced by defendant's admission that he did not know where third party was that he was allegedly trying to defend, he did not shout any warnings, and he could have remained where he was instead of electing to give chase to decedent, leading to their alleged struggle over a knife and her subsequent death from two stab wounds). However, self-defense is unavailable to a defendant who deliberately puts himself in a position where he has reason to believe his presence will provoke trouble. *Sams v. United States*, 721 A.2d 945, 953 (D.C. 1998); *see also In re Robertson*, 940 A.2d 1050 (D.C. 2008) (self-defense argument properly denied where defendant had clear opportunity to withdraw between end of fight in which complainant was on floor and "bleeding badly" and when defendant threw lye on complainant, causing burns requiring intensive care treatment).

The "castle doctrine" involves the issue of retreat when the incident occurs in the defendant's home: It is well-settled that "one who through no fault of his own is attacked in his own home is under no duty to retreat therefrom." *Gillis*, 400 A.2d at 312 n.4. *Cooper v. United States*, 512 A.2d 1002 (D.C. 1986), discussed the castle doctrine, assuming its applicability in D.C. and noting its virtually universal adoption by other jurisdictions. The issue in *Cooper* was whether one is entitled to a castle doctrine instruction when assaulted by a co-occupant of the home; the Court of Appeals adopted the minority position: "evidence that the defendant was attacked in his home by a co-occupant did not entitle him to [a castle doctrine] instruction that he had no duty whatsoever to retreat." *Id*. at 1006.[48]

In Superior Court, the law of self-defense is that those who have not provoked an altercation and have a right to be where they are have no duty to retreat, or to consider retreat, before using

[48] For a background discussion of the duty to retreat and castle doctrines, see *Peterson*, 483 F.2d 1222; *Laney v. United States*, 294 F. 412 (D.C. Cir. 1923). *See also Beard v. United States*, 158 U.S. 550 (1895); *United States v. Taylor*, 510 F.2d 1283, 1287 (D.C. Cir. 1975); *Josey v. United States*, 135 F.2d 809 (D.C. Cir. 1943); *Marshall v. United States*, 45 App. D.C. 373 (1916); *Sacrini v. United States*, 38 App. D.C. 371 (1912); *Gant v. United States*, 83 A.2d 439 (D.C. 1951).

whatever force is reasonably necessary to protect themselves. However, their failure to retreat if they could safely have done so may be relevant to whether the danger truly and reasonably appeared imminent. The failure to retreat instruction is not appropriate where there is no evidence that the defendant could have retreated *safely* prior to the use of force against the complainant. The prosecutor may cross-examine on the failure to retreat, and may argue that the danger faced was not imminent if retreat was possible.

Gillis probably does not apply in cases involving non-deadly force. The rationale of *Gillis* was that a jury should be permitted to consider failure to retreat because "[a] due regard for the value of human life calls for some degree of restraint before inflicting *serious or mortal* injury upon another." *Gillis*, 400 A.2d at 313 (emphasis added). The cases addressing the duty to retreat, and those on which they relied, all involved deadly force.

Counsel must attempt to show that any failure to retreat was not unreasonable under the circumstances. Clients should explain why they did not feel they could safely flee. Perhaps retreat would have exposed them or others (e.g., their families) to greater dangers. Perhaps an attack was so sudden and so threatening that there was no time to consider alternatives. Perhaps the safe retreat apparent in retrospect was not so evident at the time. Clients must be prepared for cross-examination on this vital point.

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***In re Robertson*, 19 A.3d 751 (D.C. 2011), *vacating In re Robertson*, 940 A.2d 1050 (D.C. 2008).** Self-defense argument properly denied where defendant had clear opportunity to withdraw between end of fight in which complainant was on floor and "bleeding badly" and when defendant threw lye on complainant, causing burns requiring intensive care treatment.

B. Testimony by the Defendant

Ordinarily, the defendant will testify in a self-defense case, because in most circumstances only the defendant can supply evidence of actual – that is, subjective – fear of death or serious bodily injury. The client must be prepared for cross-examination designed to elicit and emphasize such things as the client's own aggressive and provocative behavior, actions inconsistent with the self-defense claim, or a failure to retreat or otherwise pursue less drastic alternatives. Ideally, it would be best for the client to explain such apparently damaging facts in direct testimony, and blunt the effect of the cross-examination. If, however, the client is subject to impeachment with a record of violent crimes,[49] and the self-defense case can be presented through other witnesses, counsel should consider advising the client not to take the stand. The risk if the defendant does not testify is that a self-defense instruction may be refused. *See, e.g.*, *Scott v. United States*, 536 A.2d 1040 (D.C. 1987), *rev'd on other grounds*, 559 A.2d 745 (D.C. 1989). However, the client

[49] *See* D.C. Code § 14-305(b). Simple assault is not an "impeachable offense." *Ross v. United States*, 520 A.2d 1064, 1065 (D.C. 1987). In theory, the prior crimes are not admissible to show the defendant's propensity for violence or aggression, but only to impeach credibility. In practice, such distinctions are nearly impossible for juries to make, and the effect of convictions for violent crimes may be devastating.

is by no means the only source of the testimony needed to guarantee a self-defense instruction.[50] Counsel must simply ensure that, by the end of the case, a picture has been painted of an altercation in which an ordinary person in the client's shoes reasonably would have felt in danger of death or serious bodily injury – and therefore justified in the use of deadly force – or in reasonable fear of any injury, such that the amount of force used was only that needed to repel the attack.

C. Expert Testimony: Battered Women

If the jury may have difficulty understanding the reasonableness of the defendant's actions, counsel should consider presenting expert testimony. For example, homicides by battered women frequently do not conform to traditional notions of what constitutes self-defense. It is not uncommon for a woman to resort to deadly force even though she withstood more serious beatings without resistance in the past, or to use deadly force several hours after she was beaten or when the man's back was turned.

Social myths about battered women compound the difficulty of seeing the "reasonableness" of this conduct. Many people believe that battered women voluntarily participate in and enjoy battering relationships or that their behavior justifies the beatings. Also, it is very difficult for many people to understand why a "reasonable" woman would not simply leave. *See generally* Schneider, *Equal Rights for Women: Sex Bias in the Law of Self-Defense*, 15 Harv. C.R.-C.L. L. Rev. 623 (1980).

It is crucial that the jury understand the complex psychological state of the battered woman, why she may feel helpless to leave, and why she may reasonably perceive that she is in imminent danger when an outside observer might not. In addition to the defendant's testimony, an expert may be able to provide a basis from which the jury can understand the defendant's actions.

The defense in *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979), proffered psychological testimony to explain that there is an identifiable class of "battered women," and why the mentality and behavior of such women are at variance with the ordinary lay perception of how someone would be likely to react to a battering spouse. On appeal, the court found that this testimony would have supplied an interpretation of facts that differed from the ordinary lay perception that the government advocated ("she could have gotten out, you know"), and therefore met the first criterion for admissibility of expert testimony. *Id*. at 634.

On remand, the trial court concluded that the appellant had failed to establish a "general acceptance" for the expert's methodology in studying battered women. *Id*. Citing its "narrow" scope of review, the Court of Appeals affirmed the decision not to admit the evidence, explaining that the trial judge "had discretion whether to admit [the testimony] and 'this court should not substitute its judgment in [such] a discretionary ruling.'" *Ibn-Tamas v. United States*, 455 A.2d 893, 894 (D.C. 1983); *see Nixon v. United States*, 728 A.2d 582 (D.C. 1999) (upholding trial court's decision to admit, over defense objection, testimony of government

[50] Indeed, where there is evidence of self-defense in the government's case-in-chief, the defendant may be entitled to a judgment of acquittal before the defense case is ever presented. *See United States v. Bush*, 416 F.2d 823 (D.C. Cir. 1969).

expert regarding battered women's syndrome); *Earl v. United States*, 932 A.2d 1122 (D.C. 2007) (trial court did not abuse its discretion in admitting expert testimony on battered woman's syndrome where testimony assisted jury in understanding why complainant did not immediately identify defendant as her assailant and in assessing complainant's credibility after her misrepresentations to police, and where judge instructed jury that testimony was not evidence that defendant was predisposed to violence or that he committed any particular act of violence).

D. Pre-trial Silence

Often a defendant asserting a self-defense claim at trial will not have surrendered voluntarily to the police after the incident. At trial, the government may try to impeach the credibility of the defendant's testimony by using this pre-trial silence as a prior inconsistent "statement."[51] In most self-defense cases, however, counsel will be in a good position to exclude both testimony and argument on pre-trial silence on evidentiary grounds,[52] because its probative value will not outweigh its prejudice. *See Henderson v. United States*, 632 A.2d 419, 432-34 (D.C. 1993).

A defendant's failure to tell his or her version of an incident to authorities before trial often has virtually no probative value on the issue of self-defense. There are many reasons why people who act in self-defense would not go to the police and volunteer their account. The law of self-defense – what constitutes a legal justification for an admitted assault – defies easy comprehension. People justified in assaulting others in the legal sense might very well be unaware of their legal innocence, just as people guilty in the eyes of the law might feel innocent under a lay conception of the defense. The relative willingness of persons who have assaulted others to come forward and assert this legal defense thus bears no meaningful relationship to the veracity of their descriptions of their conduct in the incident. Moreover, even people who believe themselves to be innocent by reason of self-defense may rationally choose not to assert this belief.

> [Pre-trial silence] may simply be attributable to [the accused's] awareness that he is under no obligation to speak or to the natural caution that arises from his knowledge that anything he says might later be used against him at trial. Alternatively, the individual may refrain from speaking because he believes that efforts to exonerate himself under the circumstances would be futile. Finally, it is a lamentable but undeniable fact of modern society that some of our citizens harbor a mistrust for law enforcement authority which leads them to shun contact

[51] See *Doyle v. Ohio*, 426 U.S. 610, 616-17 (1976), and *Hill v. United States*, 404 A.2d 525 (D.C. 1979), on impeachment by silence. Silence is never admissible to show consciousness of guilt, nor can post-*Miranda* silence be used to impeach subsequent trial testimony by defendant. Indeed, use of pre-trial silence as substantive evidence of guilt is the very prejudice that leads courts to limit the use of silence to rare cases where the inconsistency is complete.

[52] In *Jenkins v. Anderson*, 447 U.S. 231, 239 (1980), the Supreme Court invoked its supervisory power "to hold that prior silence cannot be used [in federal courts] for impeachment where silence is not probative of a defendant's credibility and where prejudice to the defendant might result." While finding no constitutional bar to cross-examination of the accused concerning pre-arrest silence for purposes of testing testimonial credibility, the Court stressed that it was not approving automatic admission of such evidence: "Each jurisdiction remains free to formulate evidentiary rules defining the situations in which silence is viewed as more probative than prejudicial." *Id*. at 240.

> with the police even when the avoidance of contact is not in their own best interest. Such individuals may refrain from speaking to law enforcement officials not because they are guilty of some crime, but rather because they are simply fearful of coming into contact with those whom they regard as antagonists.

People v. Conyers, 420 N.E.2d 933, 935 (N.Y. 1981) (citations omitted). Not only is the accused's pre-trial silence usually devoid of probative value, but "it also has a significant potential for prejudice." *United States v. Hale*, 422 U.S. 171, 180 (1975); *accord Walker v. United States*, 402 A.2d 424, 427 (D.C. 1979). The risk is that the jury will treat silence as tantamount to an admission of guilt. Instead of considering the impact of prior inconsistent silence upon the defendant's testimonial credibility, the danger is that the jury simply will take the shortcut to an improper inference of guilt for failure to assert innocence prior to trial.

As a matter of evidentiary law, courts have generally barred cross-examination and comment on pre-trial silence, because of its minimal probative value and the inherent, serious risk of prejudice.[53] Moreover, to assure that use of pre-trial silence is made only in the rare, appropriate case, the Court of Appeals has held that the prosecutor may not cross-examine the accused on this subject without a *prior* judicial finding that the purported inconsistency is sufficient. *See Martin v. United States*, 452 A.2d 360, 363 (D.C. 1982).

Of course, defendants can be impeached with statements made to the police. Should they testify inconsistently, or if the government can show conduct inconsistent with the statement, the impeachment can have devastating results. For example, in *Fornah v. United States*, 460 A.2d 556 (D.C. 1983), the government was permitted to introduce evidence that the defendant had been seen carrying a gun before the murder with which he was charged, where in his statement to the police and his trial testimony he denied ever possessing a pistol. Similarly, *Allen v. United States*, 603 A.2d 1219, 1221-25 (D.C. 1992) (en banc), held that the government was properly permitted to cross-examine and argue regarding the defendant's failures to report the death, to preserve evidence, and to tell friends about the incident, along with his flight and assumption of an alias.

E. Character Witnesses

Counsel must ascertain the availability of character witnesses who can testify to the defendant's peacefulness and non-combativeness at the time of the alleged offense. *See Rogers v. United States*, 566 A.2d 69 (D.C. 1989) (en banc). The prosecutor, of course, will be allowed to cross-examine these witnesses about their knowledge of convictions, arrests, and other alleged misconduct on the part of the accused. If the alleged misconduct is highly prejudicial, and

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[53] *See, e.g.*, *Sampson v. United States*, 407 A.2d 574 (D.C. 1979) (post-arrest assertion of general denial not totally inconsistent with assertion of alibi at trial); *Walker*, 402 A.2d at 427 (failure to tell exculpatory story to parole officer after arrest but prior to trial insufficiently inconsistent); *United States v. Henderson*, 565 F.2d 900 (5th Cir. 1978) (pre-arrest failure to volunteer story); *Weiss v. State*, 341 So. 2d 528 (Fla. Dist. Ct. App. 1977) (pre-arrest failure to make exculpatory explanation in administrative proceeding); *People v. Sheperd*, 551 P.2d 210 (Colo. Ct. App. 1976) (pre-arrest failure to turn self in and tell police rape complainant had consented); *see also Coates v. United States*, 705 A.2d 1100, 1104-05 (D.C 1998) (not plain error for trial court to admit defendant's pre-arrest silence as substantive evidence).

especially if it did not result in a conviction, counsel may ask the court to exercise its discretion to forbid cross-examination about it. *See Rogers*, 566 A.2d at 71-72. This request should be made out of the jury's presence, either before trial or before the character witness takes the stand. A character witness may be cross-examined on a defendant's juvenile arrests, *id*. at 75-79; wrongful acts underlying a juvenile adjudication, *Devore v. United States*, 530 A.2d 1173, 1175-76 (D.C. 1987); and arrests that result in convictions later set aside under the Federal Youth Corrections Act, *Askew v. United States*, 540 A.2d 760 (D.C. 1988).

F. The Complainant/Decedent

In self-defense cases, counsel should focus considerable investigation, discovery, and argument at trial on the complainant. One starting point might be the complainant's aggressive behavior leading up to the defendant's use of force. Another might be the complainant's capacity for aggression at the time of the incident. Any physical superiority (such as weight, height, or age) of the complainant over the defendant should be highlighted. Counsel must also learn, through investigation and discovery, whether the complainant might have been armed[54] and the extent of any injuries suffered by the complainant and defendant, respectively.

Counsel should locate and interview anyone who knew or may have known the complainant, and who may be able to provide valuable information concerning the complainant's reputation for violence or prior violent acts. The complainant's criminal history and court files often contain information about prior violent acts and may lead to witnesses to such acts.

G. The Complainant's Reputation, Prior Violent Acts, and Prior Relationship to the Defendant

Evidence of the complainant's prior hostility toward the defendant, general reputation for violence at the time of the altercation, and, with qualifications to be noted, specific prior acts of violence (even though not involving the accused) are all relevant and admissible in support of a claim of self-defense. Such evidence is admissible, with possible qualifications, to prove that the complainant was in fact the aggressor and, if known to the accused at the time of the altercation, that the defendant's fear of the complainant was reasonable. By presenting this kind of evidence, the defendant does not "open the door" to evidence of the defendant's bad character. *Johns v. United States*, 434 A.2d 463, 469 (D.C. 1981).[55] However, the government may be permitted to introduce evidence of the defendant's prior acts of violence toward the complainant. *See Garibay v. United States*, 634 A.2d 946, 947 (D.C. 1993); *Rink v. United States*, 388 A.2d 52, 56 (D.C. 1978).

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[54] In *Griffin v. United States*, 183 F.2d 990 (D.C. Cir. 1950), the defendant was charged with first-degree murder and claimed self-defense. The court ordered a new trial because the prosecution knew at the time of trial, but did not disclose to the defense, that an open penknife was found in the decedent's pocket where his hand was when the defendant shot him.

[55] Of course, if the defendant expressly puts his or her own character in issue, the prosecution can present evidence to the contrary. *Johns*, 434 A.2d at 471. When the defense presents evidence of the complainant's violent character, the government may answer with evidence of the complainant's peaceable character, good deeds and good reputation. *See id*. at 469.

Evidence of the complainant's prior acts of violence against the defendant is relevant both to the reasonableness of the defendant's fear and to whether the complainant was the initial aggressor. The defense may also introduce lay witness testimony regarding any changes in the defendant's behavior following the prior acts of violence that show fear of the complainant. *Cf. Street v. United States*, 602 A.2d 141, 143-46 (D.C. 1992) (lay evidence of complainant's behavioral changes following rape was properly introduced to rebut defendant's claim of consent). If these behavioral changes are remote in time or do not clearly demonstrate fear of the complainant, counsel should consider presenting expert testimony to establish that the changes were caused by the violent acts and motivated by fear. *See id*. at 144.

The complainant's general reputation for violence or belligerence is relevant to who was the aggressor in the encounter, whether or not the accused knew of that reputation.[56] If the accused knew at the time of the incident of the complainant's reputation, it is also relevant to the reasonableness of the defendant's fear.[57] Extrinsic proof of the complainant's reputation is admissible to corroborate the defendant's testimony about what the defendant had heard.[58] This principle applies in both assault and homicide cases. *See Cooper v. United States*, 353 A.2d 696, 700 n.8 (D.C. 1975).

Specific prior acts of violence by the complainant against people other than the defendant, including prior convictions for violent crimes,[59] may also be proved in support of self-defense claims. As with general reputation, specific acts aimed at or known to the defendant show the reasonableness of the defendant's fear,[60] and are admissible to prove both the reasonableness of that fear and the likelihood that the complainant was the first aggressor. Evidence of prior violent acts that are unknown to the defendant is admissible in homicide cases to prove that the decedent was the first aggressor. *Harris v. United States*, 618 A.2d 140, 144 (D.C. 1992).

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[56] *See Evans v. United States*, 277 F.2d 354, 356 (D.C. Cir. 1960); *see also Cooper v. United States*, 353 A.2d 696, 700 n.8 (D.C. 1975); *United States v. Burks*, 470 F.2d 432, 434-35 (D.C. Cir. 1972); *Preston v. United States*, 80 F.2d 702 (D.C. Cir. 1935).

[57] *See King v. United States*, 177 A.2d 912, 913 (D.C. 1962); *Marshall v. United States*, 45 App. D.C. 373 (1916).

[58] *See Burks*, 470 F.2d at 435 n.5.

[59] Although proof that the complainant habitually carries weapons is admissible, *Preston*, 80 F.2d at 703, proof of a conviction for CPWL has been held not admissible as a prior act of violence. *Carmichael v. United States*, 363 A.2d 302 (D.C. 1976).

[60] *See, e.g., United States v. Akers*, 374 A.2d 874, 877 (D.C. 1977) (defendant's knowledge of complainant's violent conduct is prerequisite to admissibility of prior acts of violence, except in homicide cases when defendant claims self-defense against decedent); *Cooper*, 353 A.2d at 700 n.8 (evidence of specific prior acts of violence by complainant known to defendant may be used to support self-defense claim); *Hurt v. United States*, 337 A.2d 215, 217 (D.C. 1975) (evidence of decedent's violent character admissible when self-defense raised); *King*, 177 A.2d at 913 (error to exclude decedent's prior acts of violence communicated to, but not personally observed by, defendant claiming self-defense); *Burks*, 470 F.2d at 434-35 (evidence of decedent's bad acts admissible in self-defense case). Testimony about what the accused had heard is not objectionable on hearsay grounds, because it is relevant to the defendant's state of mind regardless of its truth. *See, e.g., Robinson v. United States*, 448 A.2d 853, 855 n.4 (D.C. 1982) (decedent's boast of violent acts told to defendant and repeated on stand admissible as to reasonableness of defendant's state of mind and physical responses); *McBride v. United States*, 441 A.2d 644, 651 (D.C. 1982) (threats by decedent to defendant are admissible as to state of mind).

Johnson v. United States, 452 A.2d 959 (D.C. 1982), reaffirmed the holdings of *Johns* – that prior violent acts by the deceased, even if unknown to the accused, are admissible to prove that the deceased was a likely aggressor, and that the offering of such evidence does not open the accused's character to attack. *Id*. at 961 (while trial court may regulate "the form and quantity" of evidence pertaining to deceased's character, total preclusion of evidence that deceased was charged with rape three months before his death and had violent reputation was reversible error). *But see Hawkins v. United States*, 461 A.2d 1025, 1033-34 (D.C. 1983) (trial court did not err by refusing to admit evidence of decedent's violent acts when they were too remote and occurred only in context of his marriage).

While limiting the admissibility of most prior violent acts not known to the defendant to homicide cases, the court has approved admission in all cases of threats by the complainant against the defendant, whether or not those threats were communicated to the defendant.[61] *See McBride v. United States*, 441 A.2d 644, 650-54 (D.C. 1982). Threats communicated to the defendant, like other violent acts by the complainant that are known to the defendant, are admissible to show who was the aggressor and the reasonableness of the defendant's fear. Uncommunicated threats against the accused are admissible, even in a non-homicide case, to show that the complainant was the likely aggressor. Threats by persons other than the complainant, whether communicated or not, are admissible if the defendant can show that the third persons were acting in concert with the complainant. Logically, this rule should also apply to acts of violence against the defendant by third persons acting in concert with the complainant.

Where there is a claim of self-defense, the government is entitled to produce evidence that the complainant/decedent had not abused the defendant in the past, to establish the identity of the initial aggressor and whether the defendant was in reasonable fear of imminent bodily harm. *Rawls v. United States*, 539 A.2d 1087 (D.C. 1988).

H. Resisting Arrest

> It is neither justifiable nor excusable cause for a person to use force to resist an arrest when such arrest is made by an individual he has reason to believe is a law enforcement officer, whether or not such arrest is lawful.

D.C. Code § 22-405(a); *see McDonald v. United States*, 496 A.2d 274 (D.C. 1985). Section 22-405(a) applies not only to charges of assault on a police officer (APO), but also to charges of simple assault where the complainant is a law enforcement officer *acting in an official capacity*. *See Speed v. United States*, 562 A.2d 124, 127 (D.C. 1989); *McDonald*, 496 A.2d at 276. Accordingly, one has no right to resist an unlawful arrest, unless the officer uses excessive force, regardless of whether the charge is APO or simple assault. The effect of this upon a self-defense case involving a police officer complainant depends upon the facts of the case and the charges presented to the jury. *See Robinson v. United States*, 649 A.2d 584, 587-88 (D.C. 1994).

Where the defendant is charged with APO and the jury is *not* presented with a lesser-included count of simple assault, self-defense based upon resisting arrest can be raised only if the officer

[61] Threats are a form of violent act. *See Griffin v. United States*, 183 F.2d 990, 992 (D.C. Cir. 1950).

used excessive force and the defendant responded with force that was "reasonably necessary under the circumstances." *Nelson v. United States*, 580 A.2d 114, 117 (D.C. 1990) (quoting *Criminal Jury Instruction* No. 4.15 (3d ed. 1978; now No. 4.114), and citing *Jones v. United States*, 512 A.2d 253, 259 n.8 (D.C. 1986)).

In holding that in a simple assault case the government was entitled to jury instructions setting forth the elements of APO, *Speed* emphasized that the trial court must also instruct the jury on all the requisite elements and the burden of proof. The jury must be instructed that if the government does not meet its burden on any one of those elements, the remaining instructions relating to APO are inapplicable. The jury must also be instructed on the general right of self-defense and that the government bears the burden of proving beyond a reasonable doubt that the defendant was not acting in self-defense. *See Speed*, 562 A.2d at 129-30.

Speed expressly did not hold that the government would be entitled to APO instructions in every simple assault case where the complainant is a police officer. *Id*. at 128 n.7. Accordingly, counsel should carefully examine each case to determine whether there is an evidentiary basis for an APO instruction.

I. Defense of a Third Person

One has a right to use a reasonable amount of force in defense of another if one *actually and reasonably believes that*: (1) the other person is in imminent danger of bodily harm; (2) the other person would have been justified in using a reasonable amount of force in the person's own self defense; and (3) one's own intervention is necessary for the protection of the other person. *See Jones v. United States*, 555 A.2d 1024 (D.C. 1989); *Graves v. United States*, 554 A.2d 1145 (D.C. 1989); *Criminal Jury Instruction* No. 9.510; *see also Fisher v. United States*, 779 A.2d 348 (D.C. 2001) (evidence sufficient to disprove defendant's claim that he was attempting to defend a third party who was under attack).

The defendant's belief and perception are critical – not the belief and perception of the third person. *Graves*, 554 A.2d at 1149 (in determining degree of force reasonably necessary to defend third person under attack, focus ultimately must be on reasonable perceptions of intervenor, not victim) (citing *Fersner v. United States*, 482 A.2d 387, 392 (D.C. 1984)). The proper inquiry in determining entitlement to instruction on "defense of a third person" is "whether there was any evidence, 'however weak,' from which the jury could reasonably infer that, from [the defendant's] reasonable perception of the situation, the use of force to protect the [third person] was justified." *Jones*, 555 A.2d at 1027. Much of the discussion regarding self-defense applies to defense of a third person. Counsel's aim must be to demonstrate that the defendant acted reasonably under the circumstances.

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***Lee v. United States*, 61 A.3d 655 (D.C. 2013).** Trial judge erred in instructing jury that defendant's justification in acting in defense of third person required proof that third person must also have had right to defend himself.

J. Defense of Property

When police are investigating complaints of alleged criminal conduct, defendants who could have requested the assistance of the police in ejecting any person who was unlawfully on the premises are not entitled to a property defense. *Gatlin v. United States*, 833 A.2d 995 (D.C. 2003). In addition, the amount force used must be reasonable. *Id*.

CHAPTER 34

THE INSANITY DEFENSE

I. PREPARATION AND TRIAL OF AN INSANITY DEFENSE

Cases involving the insanity defense are uncommon and challenging. Because of the complexity of both the applicable law and the evidence that must be presented when an insanity defense is raised, counsel must become immersed in the area. The substantive fields of psychiatry and psychology are beyond the scope of this section, which addresses general legal and tactical considerations. Counsel should seek assistance from other attorneys experienced in this area and should consult pertinent medical and legal materials.

Trying an insanity defense to a jury is rare and usually unsuccessful. District of Columbia law governing the insanity defense requires the defendant[1] to meet an exacting standard of proof in order to prevail. Juries often show hostility to the insanity defense, characterizing it as an "excuse" used by defendants to avoid the consequences of their actions. Indeed, the few insanity claims that succeed are almost always the product of an agreement worked out between the defense and the prosecution – following extensive case investigation and psychiatric examination of the defendant – that the defendant committed an offense, but that he or she meets the legal standard for an insanity acquittal. In addition, a verdict or plea resulting in a not guilty by reason of insanity ("NGI" or "NGBRI") judgment usually leads to several decades of restrictive commitment for the defendant. Therefore, in most cases, counsel's efforts are best directed toward exploring other defenses; as a general rule, NGI constitutes the best theory of defense when the defendant faces the most serious charges (such as murder or a series of sex offenses) and no other viable defenses exist.

A. Factors to Consider in Evaluating Whether to Raise the Insanity Defense

Many considerations go into deciding whether to raise the insanity defense. To begin with, counsel and the client must consider whether such a defense can be successful under the stringent standard established by District of Columbia statutory and case law. In Superior Court:

> A person is not responsible for criminal conduct if at the time of such conduct as a result of a mental disease or defect he lacked substantial capacity either to recognize the wrongfulness of his conduct or to conform his conduct to the requirements of the law.

Bethea v. United States, 365 A.2d 64, 78-79 (D.C. 1976).[2] The underlying "mental disease or defect" must be manifested by something more than repeated criminal or antisocial conduct.[3] It

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[1] The insanity defense is not available in juvenile adjudications. *In re C.W.M.*, 407 A.2d 617 (D.C. 1979).

[2] The doctrine of diminished capacity is not recognized in Superior Court. *Bethea*, 365 A.2d at 85. Consequently, expert testimony concerning the defendant's lack of capacity to form the requisite mental state for the offense will not be admitted. *See, e.g., O'Brien v. United States*, 962 A.2d 282, 300-01 (D.C. 2008) (precluding introduction of evidence concerning defendant's mental retardation to negate *mens rea*). However, it is important to understand that *Bethea* merely precludes the introduction of evidence concerning the defendant's *capacity* to form the requisite *mens*

must rise to the level of an abnormal mental condition which "substantially affects mental or emotional processes and substantially impairs behavioral controls." *Id*. at 83. The defendant has the burden of proving insanity by a preponderance of the evidence. D.C. Code § 24-501(j).

Carefully Weigh Consequences of NGI Defense: In addition, as noted above, the defendant and defense counsel must carefully weigh whether the consequences of a successful NGI defense would actually be worse than the consequences of criminal convictions. In many cases, an insanity defense "win" will deprive the defendant of his or her liberty for a longer period than would convictions on all of the charged offenses. Commitment following a verdict of not guilty by reason of insanity, where the defendant voluntarily raised the insanity defense, is immediate, automatic, and indeterminate. D.C. Code § 24-501(d)(1). Even if the underlying offense is trivial, the defendant could be hospitalized for life. In *Jones v. United States*, 463 U.S. 354 (1983) (approving indeterminate commitment for person acquitted by reason of insanity on shoplifting charge), the Supreme Court held that "[t]he length of the acquittee's hypothetical criminal sentence . . . is irrelevant to the purposes of his commitment." *Id*. at 369. In concluding that confinement for a greater period than the maximum sentence an acquittee could have received if convicted does not violate due process, the Court commented that:

> The purpose of commitment following an insanity acquittal, like that of civil commitment, is to treat the individual's mental illness and protect him and society from his potential dangerousness. The committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous. And because it is impossible to predict how long it will take for any given individual to recover – or indeed whether he ever will recover – Congress has chosen, as it has with respect to civil commitment, to leave the length of commitment indeterminate, subject to periodic review of the patient's suitability for release.

Id. at 368-69 (footnote and citations omitted).

For most acquittees, the commitment is life-long and involves lengthy periods of inpatient confinement. As discussed in detail in Section II of this chapter, acquittees are not allowed to step foot outside the hospital unless they can first persuade the court that they have recovered sufficiently such that there are conditions under which they could be released without posing a

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rea, as distinct from evidence of *actual* mental state at the time of the offense. In *Arizona v. Clark*, 548 U.S. 735 (2006), the Supreme Court shed light on what this distinction means in practical terms. In upholding Arizona's rule precluding expert testimony about a defendant's diminished capacity, the Court noted that its holding was not authority for barring "observation evidence indicating state of mind at the time of a criminal offense (conventional *mens rea* evidence) as distinct from professional mental-disease or capacity evidence going to ability to form a certain state of mind during a period that includes the time of the offense charged." *Id*. at 765 n. 34. According to the Court, "observation evidence" includes "in the every day sense, testimony from those who observed what [the defendant] did and what he said; this category would also include testimony that an expert witness might give about [the defendant's] tendency to think in a certain way and his behavioral characteristics." *Id*. at 2724.

[3]Aberrant mental states induced by the voluntary ingestion of drugs such as PCP will cloud the determination of whether the accused's conduct meets the *Bethea* insanity test. *See McNeil v. United States*, 933 A.2d 354, 363-69 (D.C. 2007), for a thorough discussion of where the partial defense of voluntary intoxication ends and the complete defense of "settled insanity" – i.e., permanent mental impairment brought on by chronic use of intoxicating substances – begins.

danger to themselves or others, or that their unconditional release would not endanger themselves or the public. Consequently, the insanity defense merits consideration only if the likelihood and potential length of incarceration are substantial.[4]

Decision to Raise Insanity Defense is Reserved to the Acquittee: However, as discussed in the next section, the decision whether to raise an available insanity defense is a personal one reserved to the acquittee, provided there is no question of his or her competence to make the decision. To some acquittees, the prospect of incarceration is sufficiently unpleasant that they may insist on raising insanity despite the indeterminate nature of the NGRI commitment, even where the sentence they would likely receive would be relatively short. Though counsel ultimately must respect the client's choice, counsel should take pains to make sure the client has a realistic appraisal of the likely course of an NGRI commitment and is fully informed regarding other alternatives.

For instance, where the charges are relatively minor, the client may be eligible for certification to the Mental Health Diversion Court, where he or she could enter into a deferred prosecution agreement and obtain a dismissal with prejudice after a period of sustained participation in mental health treatment. Alternatively, counsel may be able to negotiate an agreement with the prosecution involving a sentence of probation conditioned on the client participating in psychiatric treatment provided through the District of Columbia's Department of Mental Health and monitored by CSOSA. Probation offers the advantages of a definite endpoint to compulsory treatment and the opportunity to remain in the community, compared to the indefinite treatment beginning with protracted inpatient confinement that comes with an NGRI commitment. In any event, factors stemming from a defendant's mental illness can, under the Superior Court's sentencing guidelines, constitute a mitigating factor at sentencing.

B. Notice and Consent Issues

In order to preserve the insanity defense, counsel must file a notice of intent to rely on the defense. The notice must be filed within fifteen days of arraignment. D.C. Code § 24-301(j). Super. Ct. Crim. R. 12.2(a), (d). Also, if the defense intends to introduce expert testimony to support the insanity defense at trial, it must file a notice to that effect "within the time provided for the filing of pre-trial motions or at such later time as the Court may direct." The court also may allow a late filing for cause shown. Super. Ct. Crim. R. 12.2(b).

Though a notice can be withdrawn later without consequence,[5] counsel should not file the notice in the first instance without first discussing the issue with the client and obtaining the client's consent. Once the notice is filed, the client will likely be ordered to submit to psychiatric examination by DMH doctors, and may be ordered into St. Elizabeth's Hospital for that purpose. *See* Super. Ct. Crim. R. 12.2(c). The defense should also expect the court to grant a request

[4] This requires a careful analysis of which charges are likely to result in conviction and which are not. *See Goudy v. United States*, 495 A.2d 744 (D.C. 1985), *amended by* 505 A.2d 461 (D.C. 1986) (acquittee not permitted to withdraw insanity defense after underlying rape charge dropped out on appeal, leaving only a misdemeanor charge).

[5] If the defense ultimately decides not to pursue the insanity defense, the fact that it filed a notice of intent cannot be admitted against the client in any civil or criminal proceeding. Super. Ct. Crim. R. 12.2(e).

from the prosecution for examination of the defendant by its retained experts. The examining doctors will question the client about every aspect of his or her life, including the most intimate details. In addition, they will question the client in detail about the offense itself.[6] Although Super. Ct. Crim. R. 12.2(c) bars both the direct and derivative use of the client's statements against him in the guilt phase of the trial, enforcement of this protection may be difficult in light of the fact that the prosecution has access to the examining doctors and the institutional records created during the examination process.

Counsel should apprise the client of all the potential consequences of, and alternatives to, raising an insanity defense and obtaining an insanity acquittal. In addition to the considerations discussed above, others may be important to the client. For instance, a client may decline to assert an available insanity defense because he or she wishes to avoid the stigma associated with mental illness, or prefers prison conditions to hospital conditions, or fears that the acquittal will lead to collateral legal disabilities. The client's reasons for refusing an insanity defense may appear irrational and self-destructive. Counsel should not substitute his or her judgment for the client's or force the client into raising the defense. If it appears that the client has a viable insanity defense and the consequences of not raising it would be dire, counsel may suggest that the court initiate an inquiry into the client's competence to waive the defense under *Frendak v. United States*, 408 A.2d 364 (D.C. 1979).[7]

[6] Because the examination involves questioning the defendant regarding the circumstances of the offense, the court cannot order the examination unless: (1) the defense has affirmatively raised the insanity defense; (2) the court has concluded that the defendant lacks the capacity to waive an available insanity defense; or (3) the court has determined that such questioning is necessary to determine the defendant's capacity to waive the defense. *See Briggs v. United States*, 525 A.2d 583, 594 (D.C. 1987); *Anderson v. Sorrell*, 481 A.2d 766, 767 (D.C. 1984). In the latter two scenarios the court should implement safeguards to protect the defendant's Fifth Amendment rights such as ordering that the examination report be submitted *in camera*. *Briggs*, 525 A.2d at 594; *Anderson*, 481 A.2d at 770-71.

[7] The insanity defense constitutes a distinct plea of not guilty by reason of insanity. Thus counsel's belief that the client's interests dictate the assertion of an insanity defense that the client does not want puts counsel squarely in conflict with the duty to abide by a defendant's decision "as to a plea to be entered" (*see* Rule of Professional Conduct 1.2(a)), and the duty to zealously pursue a client's lawful stated objectives (*see* Rule 1.3(b)). Though counsel may take protective action under narrowly-prescribed circumstances, counsel must (a) maintain a typical client-lawyer relationship as far as reasonably possible, (b) take only such action as is reasonably necessary, and (c) make only those disclosures concerning the client that are reasonably necessary to protect the client's interests. *See* Rule 1.14 – Client with Diminished Capacity and Comment 7 to the rule. The Professional Rules recognize that "[t]he lawyer's position in such cases is an unavoidably difficult one." Rule 1.14, Comment 8. In order to maintain the client's trust as much as possible and, at the same time, protect the client's interests, the most prudent course is for counsel to ask that the court appoint *amicus* counsel, who would be free of ethical constraints in developing the evidence concerning the insanity defense and the defendant's competence to waive the defense. The Court of Appeals has recognized the wisdom of appointing *amicus* counsel when "counsel is conflicted between loyalty to [his] client's objective and counsel's own, contrary advice." *Phenis*, 909 A.2d at 159.

Notice and Consent:

- ✓ Counsel should apprise the client of all the potential consequences of, and alternatives to, raising an insanity defense and obtaining an insanity acquittal
- ✓ Counsel should not substitute his or her judgment for the client's or force the client into raising the defense

In *Frendak*, the Court of Appeals held that the trial court has discretion to impose the insanity defense if the defendant is incapable of making an intelligent and voluntary decision about whether to raise the defense. The court outlined procedures for determining whether the defendant has the requisite capability:

> In some instances . . . it may be sufficient for a trial judge to advise the defendant of the possible consequences of the insanity plea, become assured that the defendant understands those consequences by questioning the defendant about his or her reasons for rejecting the defense, and make a decision on the basis of the reasons given, the manner in which they are expressed, and any evidence of the defendant's mental capacity already in the record. In other cases, the judge still may have doubts after such an inquiry and may desire additional information. In those situations the judge may order psychiatric examinations to determine whether the defendant's mental condition has impaired his or her ability to decide whether to raise the defense. At this point, the judge may choose to appoint *amicus* counsel to present evidence concerning the defendant's mental capacity.

Frendak, 408 A.2d at 380 (footnote omitted).

Whenever there is a potential insanity defense, the court makes up to three separate determinations in the following order:

> (1) whether the defendant is presently competent to stand trial; (2) if so, whether he or she, based on present mental capacity, can intelligently and voluntarily waive the insanity defense and has done so; (3) if not, whether the court *sua sponte* should impose the insanity defense based on evidence of the defendant's mental condition at the time of the alleged crime.

Anderson, 481 A.2d 766, 769 (D.C. 1984).

The scope of the *Frendak* inquiry will necessarily "vary according to the circumstances present in each case, and especially in relation to the background and condition of the defendant." *Frendak*, 408 A.2d at 380. (citation omitted). For instance, counsel may not necessarily need to proffer an expert's opinion that an insanity defense exists in order to trigger the court's responsibility to initiate a *Frendak* inquiry. In *Briggs*, the Court of Appeals concluded that the absence of such an opinion was not dispositive. It was enough that the defendant had behaved bizarrely pre-trial, that the record contained expert testimony regarding the long-standing nature

of Briggs' bizarre behavior, and that he had steadfastly resisted the defense. 525 A.2d at 593-94. Even a doctor's report recommending that the defendant be held criminally responsible is not dispositive. *Compare Phenis v. United States*, 909 A.2d 138, 157 (D.C. 2006) (inquiry necessary despite report finding the defendant responsible, given conclusory nature of report, which did not indicate how much time the doctor spent evaluating the defendant, what records the doctor reviewed, and what the doctor based his conclusion on) *with Robinson v. United States*, 565 A.2d 964, 967-68 (D.C. 1989) (given thorough report finding defendant responsible, court's duty to conduct a *Frendak* hearing not triggered despite some evidence in record pointing to insanity at the time of the crime). In *Patton v. United States*, 782 A.2d 305 (D.C. 2001), the Court of Appeals ruled that the trial judge was obliged *sua sponte* to conduct a full inquiry to determine if the defendant was fully informed of the alternative of an insanity defense based merely on representations made by defense counsel and a social worker at the sentencing hearing.

The consequences of an insanity acquittal following imposition of the defense by the court are much less onerous than when the defendant affirmatively raises the defense. Automatic, indeterminate, court-supervised commitment pursuant to D.C. Code § 24-501(d) is not available. *Lynch v. Overholser*, 369 U.S. 705 (1962); *United States v. Wright*, 511 F.2d 1311 (D.C. Cir. 1975). Rather the acquittee must be released or given the benefit of a civil commitment proceeding. Even if the acquittee becomes civilly committed, the commitment will expire after twelve months, absent a recommitment petition and hearing. Moreover, the acquittee can be discharged from commitment at any time by a doctor without having to go back before the committing court.

C. Fact Investigation

Thoroughly Examine the Client's Entire History: Though the ultimate focus is the defendant's condition at the time of the crime, an insanity defense is unlikely to be successful unless the defense can convincingly show a history of mental illness pre-dating the offense. Thus, it is imperative that the client's entire history be examined thoroughly for evidence of any kind of mental abnormality. The most important source of information about a client's mental problems is often the client. An in-depth interview focusing on the client's entire social history will provide counsel with a sense of the client's mental condition as well as ideas for further investigation. Relatives, friends, employers, teachers, counselors and other associates should be interviewed at length.

The investigation should also seek to unearth any records of the client's prior mental condition. With authorization from the client, records can be obtained from the military, correctional institutions, schools, hospitals, mental institutions, and juvenile social files. The records may reveal the names of nurses, social workers, doctors, supervisors, or colleagues who remember the client and may provide a wealth of information relating to past behavior.

Valuable information about the client's condition can also be gathered from victims of, or witnesses to, the crime. For example, evidence that the defendant was yelling incoherently, looking dazed, or generally acting in a bizarre manner at the time of the offense may contribute significantly to a successful defense.

The foregoing is but a general sketch of some of the considerations in investigating the client's background. Each case has its own particular facts, and counsel should consult with other attorneys and with the defense experts to obtain further ideas about proper investigation.

D. Experts

Once the insanity defense is raised, the court will likely order the defendant to undergo a "productivity"[8] or "criminal responsibility" examination by doctors on staff with the Forensic Services Division of the District of Columbia's Department of Mental Health. *See* Super. Ct. Crim. R. 12.2(c). The examination will be conducted either at the D.C. Jail, CTF, or St. Elizabeth's Hospital, if the defendant is detained in one of those facilities. A released defendant will be seen at the Forensic Division's Field Office, Room C-255, at the courthouse. The court may also order the defendant into St. Elizabeth's for the examination.[9] Usually, the court will also order the defendant to submit to examination by experts retained by the prosecution.

Counsel should move the court *ex parte* for authorization to retain a defense expert at the court's expense as early as possible. Ideally, this should be done as close in time to the offense as possible so that the expert may assess the defendant's mental condition before the defendant receives psychiatric treatment designed to ameliorate his or her symptoms. The defense is entitled to expert services if the accused is financially unable to obtain the services and they are "necessary to an adequate defense." D.C. Code § 11-2605(a). "Necessary to an adequate defense" does not require a showing that the defendant was insane at the time of the offense, but that there is sufficient evidence of mental disorder that a reasonable attorney would pursue an insanity defense. *Gaither v. United States*, 391 A.2d 1364, 1367-68 (D.C. 1978). The court should approve requests for expert services whenever "the underlying facts reasonably suggest that further exploration may prove beneficial to the accused in the development of a defense to the charge. . . . In making this determination, the trial court should tend to rely on the judgment of defense counsel who has the primary duty of providing an adequate defense." *Id*. At 1368 (citations omitted).

The fact that the defendant may have been examined by DMH doctors does not defeat a request for a defense expert. Unlike the role of a DMH doctor, the role of an expert appointed under D.C. Code § 11-2605 is to aid the defense, not the court.[10] The expert's role is to give partisan

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[8] "Productivity" is an anachronistic and inaccurate, but still commonly used, reference in the Superior Court to legal insanity or criminal non-responsibility, the test for which is set forth in *Bethea*, 365 A.2d 64.

[9] In *Horton v. United States*, 591 A.2d 1280 (D.C. 1991), the trial court's authority to order inpatient commitment for a criminal responsibility exam was challenged by direct appeal from the order. The Court of Appeals deemed the order non-reviewable, likening it to one in aid of discovery, but implied that it might be reviewed if the defendant were sentenced for contempt of the order or convicted following a trial in which the court prohibited the defendant from putting on the defense because of disobedience to the order. *Id*. at 1282-83.

[10] One court has cautioned that, until the DMH doctor reaches a conclusion, "he is a neutral expert [and] *ex parte* communication between him and either side would seem to be out of place." *United States v. Morgan*, 567 F.2d 479, 495 (D.C. Cir. 1977) (reversing guilty plea due to *ex parte* contact during examination phase between prosecutor and St. Elizabeth's doctor who ultimately wrote report indicating that no foundation for insanity defense existed). At the very least, prudence would dictate that counsel keep a careful record of any contacts with the examining staff.

advice and assistance to the defense in developing and presenting the insanity defense. *Gaither*, 391 A.2d at 1368; *see also Ake v. Oklahoma*, 470 U.S. 68 (1985) (due process requires that, upon a preliminary showing by an indigent defendant that sanity is likely to be a significant factor at trial, the court must assure the defense access to one competent expert to assist in the evaluation, preparation and presentation of the defense.)

The correct choice of a mental health expert is essential to a successful insanity defense. Whether a psychiatrist, a neurologist, a psychologist, a neuropsychologist, another type of specialist, or a combination of specialists is the appropriate choice depends on the nature of the defendant's problems. Further, the full extent of the defendant's impairments and the diagnostic measures that must be employed may not be apparent until some preliminary examination is completed. Consultation with a variety of experts and with counsel experienced in such cases is an important step in determining what sort of experts to engage.

In meeting with the expert, counsel should explain the basic defense theory and the applicable legal standards. Counsel should also furnish the expert with the fruits of his or her investigation into the offense and the defendant's history, being mindful that any written material will likely have to be disclosed to the government if the witness ultimately testifies at trial. The court has the authority to order a party proffering expert testimony to turn over to the opponent any report or document on which the expert relied in forming the opinion to which he or she will testify. *See Clifford v. United States*, 532 A.2d 628, 632-35 (D.C. 1987) (not an abuse of discretion to exclude testimony of defense expert due to defense's refusal to produce written notes made during psychological testing of defendant and relied upon by proffered expert).

Expert's Evaluation: Counsel should direct the expert to conduct the evaluation in a confidential manner and refrain from writing a report. A report will likely have to turned over to the prosecution and become fodder for cross-examination. The expert's time is better spent on interviewing the defendant and collaterals, reviewing records and other written materials, interpreting test results, and the like. Counsel can be apprised of the experts' findings and reasoning through interview. Counsel should maintain regular contact with the expert to monitor the expert's progress, furnish the expert with additional information uncovered by counsel's investigation, and learn what additional information the expert would deem helpful. Once counsel decides to call the expert as a witness at trial, a summary statement of the expert's opinions, reasons, and qualifications will have to be prepared in anticipation of a government request for production under Super. Ct. Crim. R. 16(b)(1)(C).

E. Trial Considerations

1. Bifurcation

Simultaneous trial of an insanity defense and a defense on the merits may prejudice the defendant. "[T]estimony that the crime charged was the product of the accused's mental illness. . . . will tend to make the jury believe that he did the act. Also, evidence of past anti-social behavior and present anti-social propensities, which tend to support a defense of insanity, is highly prejudicial with respect to other defenses. Moreover, evidence that the defendant has a dangerous mental illness invites the jury to resolve doubts concerning commission of the act by

finding him not guilty by reason of insanity, instead of acquitting him, so as to assure his confinement in a mental hospital." *Holmes v. United States*, 363 F.2d 281, 282 (D.C. Cir. 1966) (footnotes omitted).

Bifurcation, i.e., trial of the guilt phase and the insanity phase separately, and possibly before separate juries, serves to mitigate this prejudice. However, the decision whether to bifurcate rests within the broad discretion of the trial court and the defense has the burden of making a "substantial proffer both on the merits and the issue of responsibility." *Kleinbart v. United States*, 426 A.2d 343, 354 (D.C. 1981). However, a proffer of affirmative evidence is not necessarily required. *Lucas v. United States*, 497 A.2d 1070, 1075 (D.C. 1985). A serious challenge to the government's evidence may constitute a substantial defense on the merits. *Jackson v. United States*, 404 A.2d 911, 925 (D.C. 1979). When the defense on the merits is insubstantial or nonexistent, a unitary trial does not prejudice the defendant, but, where the government's case is weak, a failure to bifurcate may amount to an abuse of discretion. *See United States v. Ashe*, 427 F.2d 626, 630 (D.C. Cir. 1970) (unitary trial an abuse of discretion where requisite corroboration evidence was very thin and court imposed insanity defense on defendant).

In practical terms, the defense must show what prejudice a unitary trial would cause. For example, statements of the defendant, introduced to demonstrate an impaired mental state at the time of the offense, may contain incriminating remarks that would undermine a defense on the merits.[11] A self-defense claim, which requires the defendant to justify a conceded assault, will certainly conflict with an insanity defense, which requires proof that the defendant could not conform his conduct to the law or did not know the wrongfulness of his conduct. *Kleinbart*, 426 A.2d at 353-55.

When Two Separate Juries Are Not Impaneled: If the court grants bifurcation, but does not agree to empanel two separate juries, counsel will be confronted by a "Catch 22:"

> probe the jurors about their attitudes toward insanity prior to trial on the merits and incur virtually certain severe prejudice to [the] client's defense on the merits by indicating to the jurors that an additional, inconsistent defense [is] yet to come; or . . . forego *voir dire* on this issue entirely and be unable to assure that impaneled jurors [are] not biased with respect to the insanity defense

Jackson, 404 A.2d at 926.[12] A potential solution to this dilemma would be to impanel a large number of alternate jurors and then permit a second *voir dire* of the first jury and alternates prior to the insanity phase.

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[11] Though incriminating statements made during the course of a court-ordered mental evaluation can be elicited from the prosecution's expert witnesses at trial only for the purpose of rebutting the insanity defense, *see* Super. Ct. Crim. R. 12.2(c), it is asking a lot of jurors in a unitary trial to ignore the defendant's statements in making the initial determination whether the defendant in fact committed an offense.

[12] Counsel should be permitted to *voir dire* on attitudes about the insanity defense:

> The suggestions that a number of citizens condemn those suffering from mental illness and that some jurors may resist the insanity defense, particularly given vengeful attitudes likely to prevail concerning the serious offenses for which insanity is commonly raised as a defense, or because

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***Jackson v. United States*, 76 A.3d 920 (D.C. 2013).** No abuse of discretion in denying bifurcated trial before separate juries or in instructing juors at voir dire that trial would proceed to insanity phase if jury found that defendant committed criminal acts where trial court thoroughly considered issue of potential prejudice, defense counsel did not unambiguously object during trial, and merits and insanity defenses not inconsistent.

2. Witness Preparation

Extensive care and planning should go into preparation for direct examination of the defense expert(s) and for cross-examination of any experts who will be testifying for the government. Exhaustive treatment of the issue is beyond the scope of this manual. Counsel should consult pertinent treatises and colleagues with experience in litigating mental health issues. A good reference for getting started is David Faust & Jay Ziskin, *Coping with Psychiatric and Psychological Testimony* (5th ed. 1995).

At a minimum, counsel will need to obtain any and all written documentation relevant to the psychiatric examinations of his or her client. Counsel should seek to obtain reports of the prosecution experts' findings, as well as copies of any documents or reports they relied upon in formulating their opinions. *See Clifford*, 532 A.2d at 635; Super. Ct. Crim. R. 16(a)(1)(D) & (E).[13] Counsel should also obtain the complete inpatient record generated at St. Elizabeth's Hospital. These records will include the detailed findings underlying the DMH doctor's conclusions, as well as other data useful for cross-examination of any prosecution witness. Principally, counsel will be looking for statements by the testifying doctor that conflict with his or her in-court testimony, or statements of others that tend to undercut the doctor's opinions. Because sound clinical practice would require any evaluator to have reviewed these records, they are fair game for cross-examination of any expert witness, including defense doctors. To the extent DMH or prosecution doctors have conducted psychological testing of the defendant, counsel should seek to obtain the raw data underlying the test scoring and interpretation. *See Clifford*, *supra*. With the aid of the defense experts, counsel can identify any errors or deficiencies in the test administration or interpretation.

In addition to gaining a command of the underlying documentation, counsel should investigate the qualifications of the opposing experts. Counsel can learn a great deal about a doctor's background, practices, and predilections, by consulting with other attorneys and perhaps other doctors. For instance, if counsel learns through investigation that the doctor is a full-time expert witness and does not treat patients, this would be worth bringing out at trial. Likewise, if the doctor testifies exclusively for the prosecution, this too should be elicited.

> they fear inadequate confinement might result from an acquittal by reason of insanity, combine to reveal the possible existence of attitudes which the *voir dire* is designed to disclose.

United States v. Cockerham, 476 F.2d 542, 544 n.2 (D.C. Cir. 1973) (citations omitted).

[13] Super. Ct. Crim. R. 16(b)(1) imposes reciprocal disclosure obligations on the defense.

Finally, counsel should interview any DMH doctor who will be testifying for the government and should seek clearance from the prosecution to interview any retained doctor it intends to call as a witness. Such interviews will afford counsel the opportunity to clarify any matters left ambiguous or confusing in the written records and explore other matters not covered in the records. For instance, counsel may learn that the doctor spent very little time in the face-to-face interview with the defendant, or the doctor is relying heavily on a source of information counsel knows to be unreliable. A tension between wishing to probe for more information and wishing to avoid "tipping off" the doctor to defense theories and tactics often inheres in this type of interview.

Lay witnesses can prove especially valuable at trial. They can testify to their own observations and opinions of the defendant's mental condition. *Carter v. United States*, 252 F.2d 608, 618 (D.C. Cir. 1957). Jurors may have some difficulty with an expert's technical evaluation, but be able to identify with and comprehend the testimony of a good lay witness. Of course, some latitude is permitted in cross-examination designed to test the foundation for their testimony. *See Rogers v. United States*, 483 A.2d 277, 289 (D.C. 1984) (impeachment of defendant's sister with evidence of defendant's prior arrests permissible because witness claimed she was close enough to her brother to make an informed judgment about his mental state).

3. Use of Defendant's Conduct Following Arrest

Because the insanity determination involves an inquiry into one's ability to control one's conduct or to appreciate its wrongfulness, the defendant's conduct immediately following arrest may become relevant. Thus, the prosecution may attempt to introduce evidence of the defendant's actions or statements to show that the defendant appreciated the wrongfulness of the conduct. *See Wilkes v. United States*, 631 A.2d 880, 889 (D.C. 1993). However, it violates due process to argue, as evidence of sanity, that the defendant invoked the rights to remain silent and to counsel, following advice pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966). *Wainwright v. Greenfield*, 474 U.S. 284 (1986); *McNeil v. United States*, 933 A.2d 354 (D.C. 2007) (reversible error to allow admission of rights card and additional references to defendant's invocation of *Miranda* rights to demonstrate defendant's state of mind shortly after offense where government used evidence to undermine defendant's primary theory of defense (insanity)).

4. Jury Instructions

Counsel should carefully review relevant portions of the standard jury instructions. For example, *Criminal Jury Instructions for the District of Columbia*, No. 9.403, Effect of Finding of Not Guilty by Reason of Insanity, is potentially prejudicial to the defense because it informs the jury that there will be a hearing within 50 days of the verdict regarding the defendant's fitness for release. While technically accurate, it is misleading because it implies that the defendant has a realistic opportunity to be released in 50 days, a highly implausible prospect in a case involving any sort of serious offense. In other words, the instruction carries with it a substantial risk of fanning jurors' fears that a dangerous person will be prematurely released and deterring them from returning a verdict of insanity. It is important to understand that no appellate decision mandates the precise wording of Instruction 9.403. The wording was merely suggested in dicta by the D.C. Circuit in *United States v. Brawner*, 471 F.2d 969, 996-98 (1972). Counsel must

carefully weigh whether to request the standard instruction, oppose any instruction, or seek a modified version, perhaps one omitting the reference to the 50-day hearing. For a thoughtful discussion of the relative merits of instructing the jury regarding the consequences of an insanity verdict, s*ee Shannon v. United States,* 512 U.S. 573 (1994) (ruling instruction not required as a matter of general federal practice, but may be necessary depending on the circumstances of individual case).

F. Uncontested Cases

If the defendant decides to rely on the insanity defense, and reaches agreement with the government not to contest the facts of the case in exchange for the government not contesting insanity, a proceeding much resembling a plea proceeding takes place. Such a proceeding involves the introduction of a signed stipulation as to the facts constituting the offense(s), as well as a signed waiver of jury trial. The court must conduct a Rule 11-type colloquy with the defendant to ensure that he understands the consequences of waiving trial on the merits and relying on the insanity defense. *See, e.g., Walls v. United States*, 601 A.2d 54 (D.C. 1991). Based on the defendant's waiver and stipulation, the court makes a determination concerning the defendant's factual guilt. Then the defense introduces the uncontested evidence of insanity, usually in the form of a report rather than live testimony, and the court adjudicates the defendant not guilty by reason of insanity.

II. PROCEEDINGS FOLLOWING ACQUITTAL BY REASON OF INSANITY

A. Introduction

St. Elizabeth's Hospital is the place of confinement for several hundred NGBRI acquittees, persons who have been committed to the hospital's custody after having been found not guilty by reason of insanity (NGBRI) in criminal cases. A defendant who relies on the insanity defense at trial and obtains an acquittal solely by reason of insanity must be committed immediately to a hospital for the mentally ill and remain confined until he or she has recovered sufficiently to be eligible for release. *See United States v. Mendelsohn*, 443 A.2d 1311 (D.C. 1982). This section is designed to aid attorneys in representing acquittees who seek release from their commitment in D.C. Superior Court.[14] Attorney and ancillary services rendered in representing acquittees are compensable under the Criminal Justice Act, D.C. Code §§ 11-2601 to -2609. All attorneys are invited to consult with the Public Defender Service, Mental Health Division at (202) 824-2860 in the event that questions or difficulties arise in the course of advocating for acquittees.

B. Nature of the NGBRI Commitment

The first step in effectively representing an acquittee is to understand the nature of the post-acquittal commitment. Once a defendant is acquitted by reason of insanity, the defendant is automatically committed to St. Elizabeth's Hospital. D.C. Code § 24-501(d)(1). The NGBRI

[14] This section also is relevant to representing individuals who were found not guilty by reason of insanity in the U.S. District Court for the District of Columbia prior to the passage of the Insanity Defense Reform Act of 1984 (IDRA). For information regarding commitment following an insanity defense in federal court after (IDRA), counsel should contact the D.C. Federal Public Defender at (202) 208-7500.

commitment is indefinite, potentially lifelong in duration. The purpose of the commitment is treatment, not punishment, and the length of the prison term the acquittee may have received had the acquittee been convicted of the underlying offense is therefore irrelevant. *Jones v. United States*, 463 U.S. 354 (1983). The acquittee can be released only at the discretion of the committing court.

Unlike persons facing civil commitment, acquittees are not entitled to a hearing prior to their commitment. Although an acquittee is entitled to periodic post-commitment hearings, the acquittee will always bear the burden of persuasion regarding his or her fitness for release.

The term "Bolton hearing" is commonly used to refer to hearings that are mandated to take place within a prescribed time period following the initial acquittal (50 days) under D.C. Code § 24-501(d)(2)(A). With rare exceptions, Bolton hearings are handled by the same judge, prosecutor, and defense counsel who handled the trial phase of the criminal case. Counsel newly appointed at the Bolton stage should approach the hearing in the same manner as described below for acquittee-initiated release requests.

C. Seeking Release Based on Present Mental Condition

Acquittees can obtain judicial review of conditional or unconditional release requests in two ways: (1) the hospital can petition the committing court for the acquittee's release based on his or her progress in recovering from the illness that produced the original offense, D.C. Code § 24-501(e); or (2) the acquittee can petition the court for release based on the same theory. D.C. Code § 24-501(k).

1. Unconditional Release

For an acquittee committed under D.C. Code § 24-501, i.e., all Superior Court acquittees, as well as those acquitted in district court prior to the passage of the Insanity Defense Reform Act in 1984, *see United States v. Crutchfield*, 893 F.2d 376, 379 (D.C. Cir. 1990), unconditional release is mandated when the acquittee can demonstrate he or she is no longer mentally ill or, if still mentally ill, will not pose a danger to self or others as a result of mental illness in the reasonable future if released. *Dixon v. Jacobs*, 427 F.2d 589 (D.C. Cir. 1970); *Overholser v. O'Beirne*, 302 F.2d 854, 857 (D.C. Cir. 1961). Regardless of the committing statute, due process compels the release of an acquittee who is no longer mentally ill, even if the acquittee may pose a danger upon release. *Foucha v. Louisiana*, 504 U.S. 71 (1992).

Upon unconditional release, the acquittee is no longer an acquittee. Like any other citizen, he or she has no further obligation to the hospital or the court. By the same token, he or she is free to seek psychiatric care as a voluntary patient. In fact, an acquittee may hasten the day of his or her unconditional release if he or she can demonstrate to the court's satisfaction that he or she will continue to obtain psychiatric care voluntarily.

2. Conditional Release

The acquittee is entitled to conditional release if the acquittee has sufficiently recovered from his or her mental illness such that there are conditions under which the acquittee could be released without presenting a danger to self or others. *United States v. Ecker*, 543 F.2d 178 (D.C. Cir. 1976); *Hough v. United States*, 271 F.2d 458 (D.C. Cir. 1959); *DeVeau v. United States*, 483 A.2d 307 (D.C. 1984).

What constitutes conditional release is less obvious than unconditional release. Essentially, conditional release refers to any time the acquittee leaves the hospital grounds without being in the company of hospital staff or law enforcement officers. Many patients at John Howard are permitted to go on outings into the city in the company of hospital staff to do their banking or shopping, or to look for a job or an apartment. Traditionally, those visits have not been viewed as releases that require advance approval of the court because the supervision provided by the staff is viewed essentially as an extension of the hospital walls. *See Hough*, 271 F.2d at 460; *Ecker* (II), 543 F.2d at 182, *discussed in Hinckley v. United States*, 163 F.3d 647, 651-56 (D.C. Cir. 1999).

The term "conditional release" is intimately related to another concept: treatment in the least restrictive setting. Acquittees are entitled to receive treatment in the least restrictive setting consistent with their needs and the safety of the community. *See, e.g.*, *Reese v. United States*, 614 A.2d 506, 510-511 (D.C. 1992); *Ashe v. Robinson*, 450 F.2d 681, 683 (D.C. Cir. 1971); *Covington v. Harris*, 419 F.2d 617, 623 (D.C. Cir. 1969); *Rouse v. Cameron*, 373 F.2d 451, 454, 456 (D.C. Cir. 1966). The purpose of commitment is not punishment, but treatment. Indeed, the conditional release itself is a form of treatment that will help the acquittee gradually re-assimilate into stable independent community living. *Hough*, 271 F.2d at 462; *Rouse*, 373 F.2d at 452.

3. Hospital-initiated Release Requests

The hospital may initiate release proceedings by filing a certificate with the committing court pursuant to D.C. Code § 24-501(e). Those certificates (often referred to as "e" letters) are filed only by the hospital's Forensic Review Board, which reviews recommendations made by the acquittee's treatment team and decides what will be recommended to the court.

In Superior Court, hearings on hospital certificates are held on Tuesdays before a judge assigned to the Mental Observation (M.O.) calendar. The Special Proceedings Section of the U.S. Attorney's Office, (202) 514-7280, is the opposing party. In district court, the certificates are scheduled to be heard by the same judge who presided over the original trial phase of the case.

Counsel's duty to his or her acquittee-client is the same as it is in any other case: to advocate zealously for the client's stated objectives rather than the client's best interests. Therefore, counsel should seek to secure the U.S. Attorney's consent to release terms that will satisfy the client. If agreeable terms cannot be negotiated, counsel should thoroughly prepare in advance for a contested hearing. That preparation will include, at a minimum, interviewing his or her client; reviewing and obtaining photocopies of the medical records; interviewing and preparing the hospital physician for testimony; and interviewing and preparing other prospective witnesses.

Most judges will rule from the bench at the conclusion of the hearing and ask counsel to draft an order for the judge's signature after allowing the other side an opportunity to approve the form of the order. Sometimes, especially in complex cases, the judge will take the case under advisement and invite both parties to submit written proposed findings. If release is denied in whole or in part, the acquittee is entitled to findings of fact. *United States v. McNeil*, 434 F.2d 502, 503 (D.C. Cir. 1970). Upon receiving an adverse decision, counsel should consider and discuss with his or her client whether to pursue an appeal or other post-hearing relief.

4. Acquittee-initiated Release Requests

Acquittees may initiate release proceedings themselves, though the court is not obligated to entertain repetitious motions filed by the acquittee within a six-month period. *See* D.C. Code § 24-501(k)(5).

Counsel should not assume that the hospital is opposed to release merely because the impetus comes initially from his or her client rather than the hospital. Counsel should endeavor to ascertain what support there might be among the hospital staff and mobilize it, with the goal being a hospital certificate or at least informal hospital endorsement of the acquittee's request. Either of those elements will enhance the prospects for obtaining the release.

Prevailing at the Hearing: In order to prevail at a hearing on an acquittee-initiated release request, and perhaps to persuade the acquittee's treatment team to support the request, counsel will need to retain an expert to evaluate the acquittee independently and form an opinion regarding the acquittee's fitness for release. To protect the client's interests, this evaluation should be done confidentially. Thus, court-appointed counsel will have to make an *ex parte* application for the services of a defense expert. *See* D.C. Code §§ 11-2601, 11-2605, 21-546; *Bolton v. Harris*, 395 F.2d 642 (D.C. Cir. 1968).

5. Substantive Standard at a § 501 Release Hearing

At a § 501 release hearing, whether initiated by the acquittee or the hospital, the court must address whether the acquittee continues to have a mental illness or has recovered sufficiently that he or she will not be dangerous if released unconditionally or conditionally. The definition of "mental illness" in the context of release hearings is broad. An acquittee continues to be mentally ill if he or she continues to suffer "from an abnormal mental condition of the mind that substantially affects mental and emotional processes, and substantially impairs behavioral controls." *Dixon*, 427 F.2d at 595 n.17. This may be the precise mental condition that constituted the basis for the insanity acquittal, or a residual condition remaining in a person who has improved. *Overholser v. O'Beirne*, 302 F.2d at 855. It may be a condition that would not relieve the person of criminal responsibility again if a criminal act were committed upon release. *Jackson v. United States*, 641 A.2d 454, 457-58 (D.C. 1994). It also may include such disorders as personality disorders, which are not considered by psychiatrists to be major mental illness, e.g., a disorder characterized by substantial disturbances in thought or mood. *Id*. at 457-58; *Overholser*, 302 F.2d at 857.

Though the mental illness standard is broad, the determination is a legal one, not medical. "The presence of an abnormal mental condition, and the extent to which it impairs [mental and emotional] processes and [behavioral] controls, are questions of fact; how 'substantial' such an impairment must be to be considered a mental illness is a matter of law." *Dixon*, 427 F.2d at 595 n.17. Therefore, the diagnostic label given to a particular disorder is only a small part of the inquiry. Similarly, whether a doctor concludes that a condition constitutes an abnormal mental condition or a mental illness does not end the inquiry.

Even if the court is not persuaded that the acquittee is free of mental illness, the inquiry does not end. As noted above, the acquittee is entitled to unconditional release if the court concludes that, though he or she still suffers from a mental illness, the acquittee will not be dangerous to self or others as a result of that illness in the reasonable future if released. *DeVeau*, 483 A.2d at 311 n.8; *Ecker* (II), 543 F.2d at 187. What constitutes dangerous behavior has been the subject of much litigation and is discussed more fully in the civil commitment chapter in this manual. However, in order to grant conditional release, the court need not find that the acquittee's release will pose absolutely no risk. Instead, the law requires that acquittees be given controlled opportunities to re-assimilate into the community. *Covington v. Harris*, 419 F.2d at 625-26, and charges the court with balancing that interest against whatever risk the patient's release might engender. *DeVeau*, 483 A.2d at 312.

Accordingly, the determination of dangerousness embodies a legal conclusion to be made by the court:

> The likelihood of future misconduct, the type of misconduct to be expected, and its probably frequency are questions of fact; whether the expected harm, and its apparent likelihood, are sufficiently great to warrant coercive intervention under our statutes, are questions of law.

Dixon v. Jacobs, 427 F.2d at 595 n.17 (emphasis and citations omitted). In other words, the court must first determine, as a factual matter, what risk the acquittee's release to the community will pose, then it must decide whether the risk is so great that the acquittee must remain confined to the hospital indefinitely. In discharging this duty, the court must exercise independent judgment and not allow the ultimate decision to devolve to doctors. *DeVeau*, 483 A.2d at 312, 315-16. Similarly, the court is not bound by what may be characterized as the hospital's or its review board's opposition.

The court's decision is a *de novo* determination whether the acquittee will be dangerous if released. *Id.* at 313. In *DeVeau*, the D.C. Court of Appeals elucidated the role of the trial court in a § 501 release hearing. For example, the court is not bound by the testimony of the acquittee's expert witnesses, though it may not arbitrarily disregard their testimony:

> The Court must take into account these professional opinions, whether there is a consensus expressed, and whether the doctors have persuasively given reasons for their opinions. If the trial court has reason to reject the opinions of the experts on the issue of dangerousness, it may do so even though they are unanimous.

483 A.2d at 316 (citations omitted).

In addition to expert and lay witness testimony, the *DeVeau* court enumerated other factors and evidence that the trial court may properly consider. These include "hospital records, files and psychiatric history of the acquittee," "previous diagnoses and prognoses, attempts to release the acquittee, the success or failure of any attempts, and whether these past occurrences are similar to or distinguishable from the present situation," "the acquittee's demonstrated behavior, including the act for which she was prosecuted as well as any other prior crimes or bad acts, if, in the particular case before the court, the behavior relates to the current determination of dangerousness," and "the period of time that has elapsed since the acquittee was adjudged unsuitable for conditional or unconditional release." 483 A.2d at 314-15 (citations and footnote omitted).

If the court determines that the acquittee is no longer mentally ill but is dangerous, the commitment must end. In *Foucha*, 504 U.S. at 77, the Supreme Court held that a state may not continue to confine an insanity acquittee who is no longer mentally ill because of concern that he or she may be dangerous. It would violate due process to continue to hospitalize an insanity acquittee who does not suffer from any mental illness. Citing *Jones v. United States*, 463 U.S. at 368, the Court held that "the committed acquittee is entitled to release when he has recovered his sanity or is no longer dangerous."

6. Burden of Proof

In acquittee-initiated hearings, the acquittee bears the burden of proof on all issues raised in his or her motion. D.C. Code § 24-501(k)(3). Though the statute does not assign the burden to either party in hospital-initiated hearings, the burden of proof rests with the acquittee as a practical matter. *DeVeau* makes clear that the court must be convinced by a preponderance of the evidence that release is warranted. 483 A.2d at 314 n. 16. *DeVeau* also stated that the § 501(e) certificate itself does not establish a presumption in favor of release. *Id*. at 313 n.12.

D. Seeking Release Based on Defects in the Initial Trial Phase

If the client desires unconditional release, counsel should review the events that transpired during the initial trial phase for procedural defects that may have rendered the ensuing commitment illegal. For instance, if the insanity defense is imposed upon a defendant against the defendant's wishes, automatic commitment following acquittal would be unlawful. D.C. Code § 24-501(d)(1) (1981); *Lynch v. Overholser*, 369 U.S. 708 (1962); *United States v. Sanderlin*, 794 F.2d 727 (D.C. Cir. 1986); *United States v. Henry*, 600 F.2d 924 (D.C. Cir. 1979); *United States v. Wright*, 511 F.2d 1311 (D.C. Cir. 1975). Another example would be when ineffective assistance of defense counsel or other procedural defects have rendered a defendant's insanity plea involuntary or unintelligent. *See, e.g., Walls v. United States*, 601 A.2d 54 (D.C. 1991).

E. Revocation of Conditional Release

Conditionally released acquittees have a constitutionally protected liberty interest, *Reese v. United States*, 614 A.2d at 510, although the process that is due upon revocation of release may be minimal. *See Brown v. United States*, 682 A.2d 1131, 1140 (D.C. 1996). If an acquittee violates the conditions of his or her release, or if the acquittee's mental condition deteriorates, he or she may become the subject of proceedings to revoke the release. *See generally Friend v. United States*, 388 F.2d 579 (D.C. Cir. 1967); *Darnell v. Cameron*, 348 F.2d 64 (D.C. Cir. 1965); *Reese v. United States*, *supra*.

Conditionally release acquittees have a liberty interest in continued enjoyment of their conditional release status protected by Fifth Amendment due process. *Reese v. United States*, 614 A.2d at 510. However, the Court of Appeals has held that informal procedures used by the hospital in detaining a conditionally released acquittee, together with the acquittee's ability to request a hearing under D.C. Code § 24-501(k), satisfy due process. *Brown v. United States*, 682 A.2d at 1140. Under ad hoc procedures followed by the hospital, notice of rehospitalization or denial of the right to leave the hospital pursuant to a conditional release order is typically sent to the court within a week or so of the action. Usually a copy of the letter is sent to counsel. The hospital does not seek revocation of the conditional release order and there is no judicial review of the notice of re-hospitalization. Nonetheless, the Court of Appeals approved these procedures because they include:

> a preliminary determination by mental health professionals that circumstances involving the patient's condition warrant at least temporary inpatient examination and care of the patient . . . [and] [t]he Hospital's procedure of providing notice to the court and the patient's counsel, generally within five days of the patient's return which set forth the reason therefore.

682 A.2d at 1139-40. In other words, an acquittee can be detained indefinitely as an inpatient without the government having to show cause or the court having to conduct any review. Although the acquittee may seek review of the revocation by motion under D.C. Code § 24-501(k), he or she will have the burden of persuading the court once again that release is warranted. For this reason, counsel may wish to argue against including in the original order of conditional release any provision that would authorize the hospital to withhold conditional release *prior* to a revocation hearing. *But see Brown*, 682 A.2d at 1140, affirming court's authority to include such a provision under certain circumstances.

An acquittee's failure to comply with the conditions of release is not in and of itself an adequate basis for denying the acquittee release. The court must consider whether the acquittee will be dangerous in the reasonable future under the previously imposed conditions or under any other conditions that the court may see fit to impose. *Friend v. United States*, 388 F.2d at 581-82. Also the acquittee is entitled to be released under the least restrictive conditions necessary to serve the purpose of commitment. *Ashe v. Robinson*, 450 F.2d 681, 683 (D.C. Cir. 1971).

F. Sex Offender Registration Act of 1999 and Insanity Acquittees

Individuals who have been found not guilty by reason of insanity of a crime identified as a "registration offense" in the Sex Offender Registration Act of 1999, D.C. Code §§22-4001 through 22-4017, are required to register with the Court Services and Offender Supervision Agency for the District of Columbia (CSOSA), as are individuals who were convicted of registration offenses. Registration offenses are identified in D.C. Code § 22-4001. The time period for registration is spelled out in D.C. Code § 22-4002, and duties of sex offenders (which includes insanity acquittees) are identified in D.C. Code § 24-1134. The registration period begins when an insanity acquittee is placed on "conditional release, or convalescent leave, or 10 years after . . . [being] placed on . . . conditional release, or convalescent leave, or is unconditionally released from a . . . hospital or other place of confinement." D.C. Code § 22-4002(a). The registration period may continue throughout the lifetime of the acquittee, depending on the type of offense, so that certain acquittees may be required to register even though more than 10 years have elapsed since unconditional release. *See* D.C. Code § 22-4002(b).

In addition to the obligations placed on an insanity acquittee under this new law, DMH is obligated to provide information about insanity acquittees who meet the statutory definition of sex offenders to CSOSA. D.C. Code § 22-4006. CSOSA has the authority to notify DMH about sex offenders in the custody or under the supervision of DMH. After this notice, the Sex Offender Registration Act requires DMH to notify CSOSA whenever an insanity acquittee in DMH custody or under DMH supervision, who meets the Act's definition of sex offender,

> (1) is first granted unaccompanied access to the hospital grounds or is placed on convalescent leave;
>
> (2) is first conditionally or unconditionally released; or
>
> (3) is on unauthorized leave.

D.C. Code § 22-4006(b). The notice must include the name and other identifying information about the acquittee, "including a physical description and photograph," the nature of the leave or privileges and the date they began, an address where the acquittee lives, works or attends school, and any other relevant administrative information. § 22-4006(c).

CHAPTER 35

PARTICULAR TYPES OF CASES

I. SEX OFFENSE CASES

The defense of sex offense cases requires special knowledge of both developing areas of law and certain types of scientific evidence. Moreover, public sentiment concerning such offenses must be countered from *voir dire* through closing argument. This section is not a complete manual for the trial of sex offenses. Instead, it focuses on some of the special legal, factual, and tactical considerations counsel may encounter while defending such cases in D.C. Superior Court.

Most of the statutes relevant to sex offenses appear in Chapter 30 of Title 12 of the D.C. Code, at D.C. Code § 22-3001 through D.C. Code § 22-3104. Several other sex-related offenses, however, appear elsewhere in the Code. *See, e.g.*, D.C. Code § 22-1312 (indecent exposure); D.C. Code § 22-2201 (obscenity).[1]

A. Credibility Factors

A judge or jury's finding of guilty or not guilty in sex cases quite often comes down to the credibility of the complaining witness. Counsel must be aware of the unique factual and legal issues regarding credibility in sex cases.

The legislature has abolished the old common-law requirement of corroboration of a sex-offense complainant. *See* D.C. Code § 22-3023; *Moore v. United States*, 609 A.2d 1133, 1135 (D.C. 1992); *Barrera v. United States*, 599 A.2d 1119, 1125 (D.C. 1991). Under the now-discredited rule, physical evidence or the testimony of another person must have corroborated the complainant's allegations of sexual abuse. *See Battle v. United States*, 630 A.2d 211, 216 (D.C. 1993) ("Historically . . . the law has treated sex crimes somewhat differently from other crimes. Corroboration has been required as an element of the government's burden of proof."). The law no longer requires such corroboration. *See id.*

Even, however, with the abolishment of the corroboration rule the trial court retains discretion to determine whether unique circumstances would warrant a cautionary instruction regarding the complainant's testimony in a particular case. *See Gary v. United States*, 499 A.2d 815, 834 (D.C. 1985) (en banc).[2] *But see Hicks v. United States*, 658 A.2d 200 (D.C. 1995) (finding that

[1] The Court of Appeals has upheld the indecent exposure statute, D.C. Code § 22-1312, against a challenge that it is unconstitutionally vague. *Parnigoni v. Dist. of Columbia*, 933 A.2d 823 (D.C. 2007).

[2] *Gary* gave a sample instruction emphasizing factors to be considered in such a unique circumstance:

> The nature of the crime of (crime charged) is such that the substantive evidence presented often consists of the conflicting testimonies of the defendant and the complainant. Because of this fact, you must examine the evidence presented with care and caution.
>
> In addition to proving the credibility of the witnesses, you should consider a number of relevant factors in reaching your decision. These factors may include:

the court was not obligated to give an instruction on a child complainant's testimony where the complainant was not impressionable because of her youth).

Report of Rape exception to Hearsay: The report-of-rape exception to the hearsay rule, whose rationale at one time depended in part on the corroboration requirement, still exists. *See Battle*, 630 A.2d at 214. Under that exception, an out-of-court report of the abuse or attack made by the complainant is admissible at trial. *See id.* at 221. The Court of Appeals has held that such out-of-court reports are admissible on the theory that such evidence will "confront jurors' assumptions . . . that if a victim did not report a sexual assault to someone else, the victim is probably lying about the occurrence of the offense." *See id.* Only the fact that the complaint exists, not its details, is admissible, however, and it is *not* admissible for its truth, but only to "dispel[] the inference that the victim was silent." *Id.* at 224 n.21; *see also Fitzgerald v. United States*, 443 A.2d 1295, 1304 (D.C. 1982) (en banc) ("[U]nder the 'complaint of rape' doctrine, [out-of-court reports of sexual assault are admissible] not for the truth of the matter asserted, but merely for the fact that the statement was made."). *But see In re J.H.*, 928 A.2d 643, 652 (D.C. 2007) (finding that a *Battle* report could be used to corroborate the respondent's confession for purposes of the doctrine that the accused's confession alone is insufficient for conviction). If the complainant does not testify, the *Battle* report should be inadmissible, as there would be no in-court report to corroborate.

PRACTICE TIP:

Whether the *Battle* rule applies in bench trials is an open question. The basis for the exception is that the admission of such reports will counteract assumptions jurors might make about the import of timing of a complaint of rape. Because judges are presumed not to make such assumptions, the exception logically is inapplicable in bench trials. Counsel should object to the admission of *Battle* reports in bench trials.

A young or socially immature complainant may be an appropriate candidate for a psychological and/or psychiatric evaluation. The trial court has discretion to order such examinations where the results would assist the court in determining the witness's competence to testify or assist the jury in assessing the witness's credibility. *See, e.g.*, *United States v. Benn*, 476 F.2d 1127 (D.C. Cir. 1973); *Ledbetter v. United States*, 350 A.2d 379 (D.C. 1976); *State v. Butler*, 143 A.2d 530, 533 (N.J. 1958). Also, an examination may be necessary to determine whether the complainant's

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(1) whether there was any delay by the complainant in reporting the incident;
(2) whether the complainant had a motive to falsify charges;
(3) inconsistent or improbable testimony by the witnesses;
(4) evidence of facts and/or inconsistencies which support the complainant's testimony.

You should not consider any one of these factors as decisive, but rather your decision should be based on the evidence presented. These factors, considered as a whole, should assist you in weighing the evidence before you.

499 A.2d at 834.

testimony meets minimum evidentiary requirements when such complainant's reliability is questionable. *See State v. Michaels*, 642 A.2d 1372 (N.J. 1994).

The complainant's testimony alone generally gets the government past a motion for judgment of acquittal. *See, e.g., R.W. v. United States*, 958 A.2d 259 (D.C. 2008) (holding that the testimony of a transgender inmate who claimed that the defendant, a correctional officer, had forced his penis into the inmate's mouth and ejaculated was not inherently incredible even though DNA analysis did not find evidence of the defendant's sperm cells in the inmate's mouth);*Ortiz v. United States*, 942 A.2d 1127 (D.C. 2008) (finding the evidence sufficient to support conviction for second degree child sexual abuse where the complainant testified that the defendant rubbed "his private part" across her "bottom" and that she could tell it was his genitals and not the zipper on his pants); *Mattete v. United States*, 902 A.2d 113 (D.C. 2006) (finding evidence sufficient to support a sexual abuse conviction where the complainant testified that the defendant touched her inner thigh and where she demonstrated the way he had touched her); *Barrera v. United States*, 599 A.2d 1119, 1124 (D.C. 1991) ("[The complainant] testified that [the defendant] placed his penis in [the complainant's] mouth and anus and had fondled [the complainant's] penis. That testimony alone is sufficient for convictions on all three charges."). *But see Farrar v. United States*, 275 F.2d 868, 869 (D.C. Cir. 1959) (finding that rape complainant was not credible enough for proof beyond a reasonable doubt).[3]

Credibility: That said, the government still needs to prove credibility; the fact-finder must believe the complainant in order to convict the defendant. In challenging the government's case through cross-examination and attacks on witness credibility and competence (where appropriate), counsel should be familiar with elements previously considered corroborative and prepared to argue that the *absence* of circumstances supporting the complainant's allegations bears on the complainant's credibility. These factors include: (1) adequacy of the complainant's opportunity to observe; (2) promptness or lack of any report to the police; (3) the complainant's emotional condition at the time of the report; (4) the consistency of the complainant's testimony with prior statements; (5) the defendant's opportunity to commit the crime; (6) the defendant's conduct at the time of arrest; (7) medical evidence, bruises, and scratches, or lack thereof; (8) the condition of the complainant's clothing; and (9) the presence of biological material (e.g., DNA, blood, or semen) on the complainant's clothes or body, or on the accused's clothes or body. *See Douglas v. United States*, 386 A.2d 289, 294 (D.C. 1978); *Davis v. United States*, 367 A.2d 1254, 1270 (D.C. 1976); *In re W.E.P.*, 318 A.2d 286 (D.C. 1974).

[3] Counsel should be attentive to arguments at the motion for judgment of acquittal stage that the evidence, even construed in the government's favor, does not support the charged crime. *See, e.g.*, *In re L.L.*, 974 A.2d 859 (D.C. 2009) (finding insufficient evidence to support a finding of penetration and hence reversing the first degree child sexual abuse adjudication where evidence showed that the defendant was lying on his back, the complainant was sitting on his groin area with her legs on either side of his body, and the defendant was holding complainant by her hips and moving her "up and down"); *In re E.H.*, 967 A.2d 1270 (D.C. 2009) (reversing adjudication for first degree child sexual abuse for lack of evidence as to penetration where the complainant testified that the defendant "humped" her and where the trial judge found that the defendant pushed his unclothed penis against the complainant's unclothed buttocks causing a laceration).

PRACTICE TIP:

In cases where the complainant and the defendant are strangers and misidentification is a viable defense, counsel should consider presenting the testimony of an expert on eyewitness reliability. Although its older decisions on the topic were not favorable, the Court of Appeals has been more accepting of the validity and necessity of such expert testimony in recent years. *See, e.g.*, *Benn v. United States*, 978 A.2d 1257 (D.C. 2009); *Burgess v. United States*, 953 A.2d 1055, 1063 n.12 (D.C. 2008); *Hager v. United States*, 856 A.2d 1143, 1148 (D.C. 2004).

B. Common Defenses

1. Consent

One of the most frequently raised defenses in rape cases involving an adult complainant is that the complainant and the defendant engaged in consensual sexual relations.

D.C. Act 18-181, the Omnibus Public Safety and Justice Emergency Amendment Act of 2009, effective August 6, 2009, modified the law of consent in the District. Prior to the 2009 Act, consent was an affirmative defense that the defendant needed to establish by a preponderance of the evidence. *See generally Russell v. United States*, 698 A.2d 1007, 1009 (D.C. 1997). After the 2009 Act, consent is no longer an affirmative defense. The government, therefore, must prove lack of consent as an element in sex cases where consent is a legal defense.[4] The changes to the law of consent are codified at D.C. Code § 22-3007.

It is error for a trial judge to fail to inform a jury that it can consider defense-adduced evidence of consent with respect to the question of whether the government proved beyond a reasonable doubt that the act was accomplished by force. *See Russell*, 698 A.2d at 1013; *see also Mozee v. United States*, 963 A.2d 151, 159 (D.C. 2009) (holding that trial court's instruction to the jury that it should "not to get 'to this business of consent' until after it had considered all the other evidence" was in error).

[4] Consent is not a defense to first degree child sexual abuse, second degree child sexual abuse, first degree sexual abuse of a minor, second degree sexual abuse of a minor, enticing a child or minor, or misdemeanor sexual abuse of a child or minor. *See* D.C. Code § 22-3011; *see generally Parnigoni v. Dist. of Columbia*, 933 A.2d 823, 828 (D.C. 2007). However, consent is not precluded as a defense to misdemeanor sexual abuse under § 22-3006 even where the complainant is a minor. *See* D.C. Code § 22-3007. *But see Davis v. United States*, 873 A.2d 1101, 1105 (D.C. 2005) (holding that consent is not a defense to misdemeanor sexual abuse where victim is a "child," i.e., under 16). Note also that, pursuant to D.C. Code § 22-3017, consent is not a defense to sexual abuse of a ward, patient, or prisoner under D.C. Code § 22-3013 and § 22-3014, or to sexual abuse of a patient or client under D.C. Code § 22-3015 and § 22-3016. Finally, consent is not a defense to indecent exposure when the complaining witness is a child. *See Parnigoni*, 933 A.2d at 828 ("[W]e conclude that Parnigoni's claim that O.J. consented to the game of naked ping pong, thus consenting to Parnigoni's indecent exposure, must fail.").

The defense must prepare the jury for the consent theory from the earliest possible stage of the proceedings. The jury should learn in *voir dire* that the government bears the burden of proving both that sexual relations between the complainant and the defendant occurred and that those relations were forced. Similarly, the opening statement should assert the consensual nature of the relations and explain why the complainant is making the allegations.

The defense should bring out any pre-existing relationship with the defendant in cross-examining the complainant. A prior close relationship might help to persuade the jury that interactions on the day in question were merely a continuation of an ongoing relationship. Counsel should explore fully the absence of physical injuries. However, even physical injuries do not necessarily show lack of consent. Counsel should investigate the possibility that the injuries were sustained in an argument before or after the consensual act. Indeed, subsequent injuries inflicted by the client or attributable to a third person might provide the complainant with a motive to fabricate the sexual abuse complaint.

PRACTICE TIP:

Be aware that a consent theory may open the door to evidence of past abuse by the defendant of the complainant. For instance, in *Bolanos v. United States*, 718 A.2d 532 (D.C. 1998), the Court of Appeals, in a plurality opinion, held that where the defense was consent, the government could introduce evidence that the defendants had beaten the complainant one week before the alleged rape to rebut the claim of consent and to explain the complainant's subsequent recantation.

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***Hatch v. United States*, 35 A.3d 1115 (D.C. 2011).** Error for trial court to instruct the jury that the defendant had the burden of proving consent by a preponderance of the evidence when the defendant had *not* raised consent as an affirmative defense, but rather simply denied any use of force in the sexual activity at issue.

2. Fabrication

Fabrication is another sensitive theory that counsel should explore thoroughly in *voir dire*, especially in cases involving a child. Counsel should propose questions designed to expose commonly held beliefs, such as the notion that children will not lie about sexual assaults.

If the jury is to believe that the complainant is lying, there must be a reason for the lie – a motive to fabricate – that counsel must expose. Sometimes fabrication grows from a personal bias, animosity, or motive against the defendant.

For example, the court in *Keene v. United States*, 661 A.2d 1073 (D.C. 1995), held that it was error to exclude evidence that the defendant had disciplined the complainant for sexual misbehavior on prior occasions. Similarly, evidence of explicit or unique fantasies linking a

minor complainant to the accused may be introduced as evidence of motive to fabricate. *Id*. at 1076 (holding that the trial court erred in excluding tape-recording where complainant fantasized about sexual conduct that he accused appellant of committing).

In *Obiazor v. United States*, 964 A.2d 147 (D.C. 2009), the defense wished to present evidence in support of a defense of fabrication that the child complainant had made a prior allegation of sexual abuse against another person in the past and that her mother had reacted with an unusual amount of care and concern. The trial court precluded the defense from adducing such evidence; however, the Court of Appeals reversed. It stated that "evidence and argument that since a child had received special attention and affection from her mother upon reporting identical mistreatment in the past, she had an incentive to falsify events on the present occasion to receive a similar gratifying response" was a valid theory of fabrication. 964 A.2d at 152. In fact, the Court of Appeals held that the trial court's preclusion of such evidence and cross-examination violated the defendant's rights under the Confrontation Clause of the Sixth Amendment to the United States Constitution.

Counsel should explore evidence of any emotional or psychological problems affecting the complainant's credibility.[5] Even in the absence of a documented psychological or psychiatric infirmity, counsel may question the complainant on mental incapacity for purposes of challenging credibility if there is a "well-reasoned suspicion" for the questions. *See Collins v. United States*, 491 A.2d 480, 487 (D.C. 1985).[6] The court may permit counsel to introduce extrinsic evidence concerning the complainant's mental condition.[7]

C. The Parameters of and Limitations on the Cross-Examination and Introduction of Evidence Regarding a Complainant's Prior Sexual Activity and Prior Reports of Sexual Abuse

Under D.C. Code § 22-3021 and § 22-3022, the so-called "Rape Shield Law," the defendant may not introduce evidence about a complainant's past sexual acts generally or reputation for chastity. *See generally Watts v. United States*, 971 A.2d 921, 926 (D.C. 2009). However, the complainant's past sexual acts with the defendant may be admissible if the defense theory is consent. *See* D.C. Code § 22-3022(a)(2)(B). Other past sexual acts by the complainant are admissible if they tend to rebut the inculpatory effect of physical or scientific evidence. *See* D.C. Code § 22-3022(a)(2)(A). Finally, past sexual acts by the complainant are admissible when such evidence "is constitutionally required to be admitted." *See* D.C. Code § 22-3022(a)(1).

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[5] The victim's emotional reaction upon identifying the defendant may be deemed relevant to the victim's credibility even where identification and consent are not at issue. *Bragdon v. United States*, 668 A.2d 403, 404 (D.C. 1995).

[6] In *Collins*, though *in camera* inspection of psychological reports concerning the witness revealed no mental illness, statements the witness made to the defense during the investigation provided a sufficient basis for cross-examination. 491 A.2d at 487. The witness's assertion that he had received treatment for mental illness was a proper area for cross-examination, especially in light of the defense theory that the allegations against the accused had been fabricated. *Id*.

[7] Extrinsic evidence concerning a witness's mental condition obtained from prior history or as the result of a court-ordered examination, may be admissible on the witness's competence and credibility. *See United States v. Benn*, 476 F.2d 1127 (D.C. Cir. 1973); *Hilton v. United States*, 435 A.2d 383, 387 (D.C. 1981); *Ledbetter v. United States*, 350 A.2d 379 (D.C. 1976). Due to the witness's right to privacy, there is a presumption against court-ordered mental examinations. *Collins*, 491 A.2d at 484; *Rogers v. United States*, 419 A.2d 977, 980 (D.C. 1980).

The defense must file written notice, not later than 15 days before trial, of any intent to introduce evidence of a complainant's past sexual behavior unless the evidence is newly discovered and could not have been obtained earlier. *See* D.C. Code § 22-3022(b)(1). Counsel must file this notice under seal with a written offer of proof, and must serve all other parties and the alleged complainant. *See id.*

If the court determines that such offer of proof sets forth potentially admissible evidence, it must hold an *in camera* hearing. *See* D.C. Code § 22-3022(b)(2). Defense counsel's burden at this hearing is to "precisely demonstrate" the probative value of the evidence she seeks to present. *Watts*, 971 A.2d at 926. The defendant must explain how the proffered sexual-history evidence would "undercut" the government's case. *Id.* As the Court of Appeals stated: "This evidentiary foundational requirement is the bedrock of the protection of victims of sexual assault, because it ensures that accounts of a complainant's prior sexual history are not admitted on tenuous or unjustified claims of relevance." *Id.* (citations, quotations, and alterations omitted). If the defense succeeds in crossing the "threshold" relevance hurdle, the trial court still must consider whether the probative value of the past-sexual-behavior evidence outweighs its prejudicial impact. *See id.*; *see also Brown v. United States*, 840 A.2d 82, 93 (D.C. 2004).

In *Watts* the Court of Appeals held that the trial court did not abuse its discretion by excluding evidence of the complainant's unprotected, consensual sexual encounter occurring two days before the defendant allegedly raped her. While the court found that the evidence may have been exculpatory, it concluded that the defense had failed to meet its burden: the defense did not precisely demonstrate the probative value of the evidence in order to admit it under the Rape Shield Law's exception and it failed to lay the factual foundation for the relevance of the complainant's past sexual encounter. 971 A.2d at 926.

At the *in camera* hearing, counsel should be aware that any statements made by the defendant to corroborate the proffer may be used against the defendant at trial. In *Bobb v. United States*, 758 A.2d 958 (D.C. 2000), the defendant, charged with rape, filed a motion for a hearing based on allegations that he and the complainant had consensual sex on that and prior occasions. At a closed hearing on the offer of proof, defense counsel called the complainant who denied the proffer. Counsel then called the defendant who testified and was subjected to extensive cross-examination. At the subsequent trial, the prosecutor used a transcript of the hearing to impeach the defendant's trial testimony. The Court of Appeals held that the trial court did not "compel" the defendant to testify at the pre-trial hearing, nor abuse its discretion in allowing extensive cross-examination, and that, at least under plain error review, allowing the prosecutor to use the transcript to impeach the defendant's credibility at trial did not violate the Fifth Amendment or the Rape Shield Law.

The defense in *McLean v. United States*, 377 A.2d 74 (D.C. 1977), sought to show that the complainant had engaged in sex with men other than the defendant and had a reputation for unchaste conduct to support a defense of consent and to impeach the complainant's credibility. The Court of Appeals upheld exclusion of the evidence of sexual acts as relevant to neither consent nor credibility, holding that "counsel may not ask [the] complainant about her sexual relations with others nor attempt to impeach her credibility by examining other witnesses concerning their knowledge of specific instances in which [the] complainant engaged in sexual intercourse in the past." 377 A.2d at 78. The Court of Appeals similarly rejected evidence of

reputation for unchaste behavior, deeming it to be of "very slight" probative value. "Reputation testimony should not be admitted except in the most unusual cases where the probative value is precisely demonstrated and outweighs the prejudicial effect of the testimony." *Id*. at 79.

McLean does not altogether preclude evidence of the complainant's sexual activity or unchaste character. Where the defense is consent or fabrication, counsel may present evidence of previous sexual relations between the complainant and the defendant. 377 A.2d at 78. In addition, counsel may cross-examine the complainant and introduce evidence regarding specific instances of sexual conduct with men other than the defendant where such evidence "'directly refutes physical or scientific evidence, such as the victims [sic] alleged loss of virginity, the origin of semen, disease or pregnancy.'" *McLean*, 377 A.2d at 78 n.6 (citation omitted). *But see Scott v. United States*, 953 A.2d 1082 (D.C. 2008) (finding that defendant failed to establish evidentiary foundational requirement for cross-examination of the complainant's prior sexual history of engaging in "rough" sex where there was no evidence that the complainant's injuries could have resulted from her prior consensual sexual acts).

Evidence that the complainant has a general reputation as a prostitute or engaged in specific acts of prostitution may be admissible if there is evidence that she offered such services to the defendant. *See Brewer v. United States*, 559 A.2d 317, 320 (D.C. 1989). Likewise, if the defendant offers evidence that he met the complainant at a bar and she invited or accompanied him home and engaged in consensual sex with him, evidence that the complainant had regularly frequented bars and engaged in identical behavior with other men should be admissible. *See People v. McClure*, 356 N.E.2d 899 (Ill. App. Ct. 1976); *cf. Drew v. United States*, 331 F.2d 85, 90 (D.C. Cir. 1964). *See generally* Vivian Berger, *Man's Trial, Woman's Tribulation: Rape Cases in the Courtroom*, 77 Colum. L. Rev. 1, 15 (1977).

Under *McLean*, testimony regarding the complainant's reputation for unchaste conduct may be admitted if the defendant alleges that the complainant consented to an act of prostitution or the prosecution offers evidence of the complainant's chastity. 377 A.2d at 79 n.9. In addition, when the charge is attempted rape, which requires specific intent to rape, reputation for unchaste character may be relevant to the defendant's state of mind. *See Brewer*, 559 A.2d at 320-22; *State v. Geer*, 533 P.2d 389, 391 n.1 (Wash. Ct. App. 1975); *cf. In re J.W.Y.*, 363 A.2d 674 (D.C. 1976). Evidence of prostitution *after* the alleged sexual assault, however, likely will be deemed overly prejudicial. *See Bryant v. United States*, 859 A.2d 1093, 1105 (D.C. 2004); *cf. Sothern v. United States*, 756 A.2d 934 (D.C. 2000) (holding that the trial court did not abuse its discretion in refusing to allow counsel to cross-examine the complainant on the nature of her arrest – for sexual solicitation – during the pendency of defendant's case).

Substantial case law recognizes the right to adduce evidence of the complainant's prior false reports of sex crimes.[8] In *Lawrence v. United States*, 482 A.2d 374 (D.C. 1984), the defendant

[8] *See, e.g.*, *People v. Hurlburt*, 333 P.2d 82 (Cal. Ct. App. 1958) (reports of indecent acts); *People v. Fremont*, 117 P.2d 891, 894 (Cal. Ct. App. 1941) (by implication; accusation against complainant's father); *People v. Sheperd*, 551 P.2d 210, 212 (Colo. Ct. App. 1976) (report thirteen months prior); *McClure*, 356 N.E.2d at 901 (report seven years before present charge); *People v. Evans*, 40 N.W. 473 (Mich. 1888); *State v. Nab*, 421 P.2d 388 (Or. 1966) (the sexual activity reported was with the father and grandfather of the complainant, as well as with the son of the accused); *see also Giles v. Maryland*, 386 U.S. 66, 70-74 (1967) (suggesting prior false report subject to disclosure under *Brady v. Maryland*, 373 U.S. 83 (1963)); *cf. Hall v. State*, 374 N.E.2d 62 (Ind. Ct. App. 1978) (prior threats to

was accused of sexual assault of a child. The key government witness was an adult who provided corroboration for the complainant's testimony and testified to an essential element of the offense (penetration) that was not firmly established through the complainant or the medical evidence. The Court of Appeals found that it was error for the trial court to prohibit the defense from impeaching the witness with two prior false reports of sexual misconduct against her family members and further held that the error implicated the Confrontation Clause of the Sixth Amendment. *Id*. at 376-77.

However, under *Roundtree v. United States*, 581 A.2d 315 (D.C. 1990), unless the defense shows "convincingly" that the prior report was false, a prior allegation of the complainant is not probative of the complainant's credibility and, therefore, is not relevant. *See Roundtree*, 581 A.2d at 321 (distinguishing *Lawrence* by noting that, in *Lawrence*, the court understood that the prior allegations were false).

In *Shorter v. United States*, 792 A.2d 228 (D.C. 2001), the Court of Appeals discussed *Lawrence* and *Roundtree* at length and explained the different treatment of prior allegations that are false and prior allegations whose falsity are unclear or unknown. There, the trial court had precluded the defense from questioning the child complainant or her mother with respect to a past allegation of the child. Shortly after the child made this earlier allegation to her mother, she recanted it. The defense wanted to cross-examine the complainant and her mother with respect to this past and recanted allegation. The Court of Appeals remanded the case to the trial court and ordered it to conduct a *voir dire* of the complainant and her mother concerning the truth or falsity of the alleged prior assault. It further ordered that if the trial court concluded that the prior allegation indeed had been false, a new trial was required. *Shorter*, 792 A.2d at 236.

If, however, the truth or falsity of the past complaint is not germane to the defense's theory of relevancy with respect to the complainant's past allegations, the *Roundtree* rule is inapplicable. *See Obiazor v. United States*, 964 A.2d 147, 151 (D.C. 2009) ("The facts of this case are squarely outside the realm of *Roundtree*. In the case before us, the significance of the prior allegation does not rise and fall on the truth or falsity of the allegation. Rather, its arguable significance lies in the improbability of the same kind of injury having been inflicted on the child's body at the same location by two different men.").

The prior false complaint need not be factually similar to the complaint at issue at trial. In *Obiazor* the Court of Appeals stated that there was "nothing in [its] case law to suggest that prior allegations must be factually similar to the issue on trial to be admissible." 964 A.2d at 153. Rather, the "use of false prior allegations is intended to call the witness's veracity into question by showing that they have lied in the past – not to show what they lied about." *Id.* The court noted, however, that "lying about a similar matter would bolster the point." *Id.*

Finally, a trial court may decide not to permit counsel to impeach a complainant with extrinsic evidence of prior false reports, *McLean* 377 A.2d at 77 n.4, although many courts have admitted extrinsic evidence when the complainant denies the falsity of the prior reports. Some have concluded that such evidence is akin to bias or motive and, hence, not collateral. *See, e.g.*,

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falsely accuse others of rape); *State v. Izzi*, 348 A.2d 371 (R.I. 1975) (evidence of false reports of assault, made against others subsequent to alleged assault by accused).

McClure, 356 N.E.2d at 901; *People v. Evans*, 40 N.W. 473 (Mich. 1888); *State v. Izzi*, 348 A.2d 371 (R.I. 1975). Thus, if counsel can tie the false reports to a bias theory, extrinsic evidence would be admissible. *See generally Johnson v. United States*, 418 A.2d 136, 140 (D.C. 1980) ("[E]xtrinsic evidence may always be introduced to show bias and motive."). Other courts have admitted extrinsic evidence on a superrelevance, specific credibility rationale. *See, e.g.*, *People v. Hurlburt*, 333 P.2d 82 (Cal. Ct. App. 1958); *People v. Simbolo*, 532 P.2d 962 (Colo. 1975) (en banc); *People v. Sheperd*, 551 P.2d 210, 212 (Colo. Ct. App. 1976).

D. Medical and Scientific Evidence

Effective representation in any sex offense case requires thorough familiarity with the medical and scientific evidence. *See generally Johnson v. United States*, 413 A.2d 499 (D.C. 1980). Familiarization with these matters should begin early in the case so that, if necessary, an independent expert can be retained to analyze findings of critical evidentiary value. In addition, counsel should be aware that the Innocence Protection Act of 2001 provides a mechanism for counsel and her client to obtain independent testing of biological evidence. *See* D.C. Code § 22-4132.

1. Medical Examinations and Reports

When an allegation of a sexual assault is made, typically a detective assigned to the Metropolitan Police Department's Sex Squad takes the complainant to a hospital for a medical evaluation and gives a medical examination form to the examining physician. This form, which the doctor fills out and signs, requests detailed information about the complainant's subjective complaints and behavior, observable signs of trauma, gynecological observations, and medical conclusions as to the cause of the conditions.

Moreover, in most sexual assault cases, the complainant will meet with a Sexual Assault Nurse Examiner, commonly known as a "S.A.N.E. nurse." S.A.N.E. nurses are trained forensic nurses who examine complainants who have reported sexual assault. Although the S.A.N.E. nurse ostensibly provides medical and psychological treatment to complainants, the nurse's primary role is to collect forensic evidence such as hairs, clothes, swabs, and smears. The S.A.N.E. nurse will record his or her observations and findings, frequently on a document called the "medical/legal form."

In addition, the S.A.N.E. nurse typically will prepare slides by taking swab samples from the vagina and cervix. Where the complainant has alleged sodomy, the S.A.N.E. nurse may also prepare oral or rectal slides. The slides are then "fixed" and sent to a laboratory for later evaluation.

The S.A.N.E. nurse may also take colposcopy photographs. A colposcopic camera produces photographs that magnify the photographed area – typically the anal or genital region – thereby revealing abnormalities or injuries that are imperceptible or invisible to the naked eye. The S.A.N.E. nurse often applies toluidine dye to the area photographed. This dye is supposed to attach to any tears, injuries, or other abnormalities, making them more apparent in the photograph.

PRACTICE TIP:

Typically, the S.A.N.E. nurse collects evidence in a sexual-assault kit. During discovery, counsel should demand the opportunity to view and photograph the sexual-assault kit and, where appropriate, should use the Innocence Protection Act to obtain independent testing of the swabs, smears, and other biological materials that the S.A.N.E. nurse collected.

Counsel should obtain all the photographs, reports, forms, and documents prepared by the police, the doctors, the S.A.N.E. nurse, and any other medical or putatively medical personnel during discovery. With a proper foundation, the defense may have such records admitted at trial, either under the business record or statement for purposes of medical diagnosis or treatment exceptions to the rule against hearsay. *See United States v. Smith*, 521 F.2d 957 (D.C. Cir. 1975).[9]

The information contained in medical reports may be useful to impeach the complainant's testimony at trial. Similarly, such reports may undermine the complainant's allegations or provide an alternative explanation for any injuries.

Creative counsel may determine that such evidence also may be relevant for other reasons. In *Roundtree v. United States*, 581 A.2d 315 (D.C. 1990), for example, the defense sought to present evidence that the complainant had a venereal disease. While the court found that evidence irrelevant to prove that the defendant's fear of contracting a disease would have dissuaded him from sexually assaulting the complainant, it did comment that the physical appearance of the complainant's genitalia would have been relevant to the complainant's credibility concerning the offense if it would have made oral intercourse unpleasant and, therefore, less likely. 581 A.2d at 327.

On the other side of the coin, counsel also must be aware of the relevant legal challenges available should the government seek to introduce records that are damaging to the defendant's position.[10] Medical forms and documents often will contain the hearsay statements of the complainant; in seeking the admission of such hearsay statements the government typically relies on the business record and/or the statement for purposes of medical diagnosis or treatment exceptions to the rule against hearsay. But, the "business records exception does not

[9] Admitted as business records, the documents may be considered for the *truth* of the matters contained therein. *See Smith v. United States*, 337 A.2d 219 (D.C. 1975). Similarly, if a complainant's statements to medical personnel are made for the purpose of medical diagnosis, they may be admitted for the truth of the matters asserted. *See Sullivan v. United States*, 404 A.2d 153, 158 (D.C. 1979).

[10] In *United States v. Smith*, 521 F.2d 957 (D.C. Cir. 1975), the court held that representations attributed to a witness on a police report were admissible to complete impeachment of the witness, but observed that the government could not use representations attributed to the witness for its own litigative benefit because, *vis-à-vis* the government, the police report was prepared in anticipation of litigation. *Id.* at 956-66 (citing *Palmer v. Hoffman*, 318 U.S. 109 (1943)).

apply to records that have been prepared with an eye toward litigation." *Montgomery v. United States*, 517 A.2d 313, 316 (D.C. 1986). *See generally Meaders v. United States*, 519 A.2d 1248 (D.C. 1986). Likewise, the statements for medical diagnosis or treatment exception is inapplicable when the statements were made merely to elicit evidence for use in a trial. *See Sullivan v. United States*, 404 A.2d 153, 158 (D.C. 1979).

Counsel thus should argue that the maker of the report spoke with the complainant not for the purpose of diagnosis or treatment, but rather to elicit and collect evidence for use in a trial and, therefore, that neither the business record nor the statement for medical diagnosis or treatment exceptions to the hearsay rule is applicable. This argument is quite strong with respect to S.A.N.E. nurse reports when, as often happens, the complainant only meets with the S.A.N.E. nurse after being treated by a conventional doctor or other medical services provider.

Counsel also should be aware that the statement for medical diagnosis or treatment exception to the rule against hearsay generally does not permit the introduction of statements that ascribe blame or fault, as such statements typically are not relevant to diagnosis or treatment. Stated otherwise, while the complainant's statement to a medical provider that "I was raped" would be admissible under the exception, the statement "Joe raped me" would not, as the identity of the rapist is irrelevant to the medical provider's diagnosis or treatment. *See In re Kya. B.*, 857 A.2d 465, 472 (D.C. 2004) (stating that "attributions of fault made to medical workers are generally excluded from the medical diagnosis exception").

The Court of Appeals, however, has held that attributions of blame may be admissible in sexual abuse cases where a child allegedly was abused by someone in the child's household, as such information may be relevant to the diagnosis and treatment of the psychological ramifications of such abuse. *See Galindo v. United States*, 630 A.2d 202, 210 (D.C. 1993) ("[A] statement by a child or her parent that the child has been sexually assaulted by someone who is effectively a member of the child's immediate household is admissible when 'reasonably pertinent to treatment,' because the injury involves more than mere physical injury, but has psychological and emotional consequences as well.").

PRACTICE TIP:

If the complainant is not testifying at trial, counsel *must* object to the introduction of the complainant's statements to the S.A.N.E. nurse or other medical personnel under the Confrontation Clause of the Sixth Amendment and *Crawford v. Washington*, 541 U.S. 36 (2004).

In addition to the medical examination form and any S.A.N.E. report, counsel should obtain copies of any ambulance records and of the hospital's records of the complainant's admission, both of which often contain statements and observations that are inconsistent with the complainant's testimony. Neither party may subpoena medical records without *prior* court approval or a release signed by the complainant. *Brown v. United States*, 567 A.2d 426 (D.C.

1989). Obtaining these records early and having them reviewed by an expert is usually essential to advising a client about whether to accept or reject a plea offer.

Finally, if the government seeks to introduce a laboratory or medical report *in lieu* of the testimony of the maker of the report, counsel should consider seeking to exclude the report pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004). *Crawford* holds that the government may not introduce "testimonial" hearsay statements against a defendant unless the declarant is unavailable *and* the defendant had a previous opportunity to cross-examine the declarant. *Id*. at 68. *See generally Tabaka v. Dist. of Columbia*, 976 A.2d 173 (D.C. 2009) (holding that the trial judge violated the defendant's confrontation rights by admitting into evidence a document from a Department of Motor Vehicles official certifying that DMV records revealed no evidence of an operator's permit having been issued to the defendant); *Otts v. United States*, 952 A.2d 156, 161 (D.C. 2008) (holding that a certificate prepared by a drug analyst from the Drug Enforcement Agency was "testimonial" under *Crawford*).

In *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), the Court held that a report completed by a drug analyst, in which the analyst concluded that the at-issue substance was cocaine, was a document within the "core class" of testimonial statements covered by the Confrontation Clause. *Accord Thomas v. United States*, 914 A.2d 1 (D.C. 2006). In so holding, the Court rejected the argument that the testimony of such analysts does not implicate the Confrontation Clause because (as argued the government) such testimony relates to "neutral, scientific" testing. Thus, if the government desires to introduce the results of scientific testing, it needs to call the scientist or individual who actually conducted it: introducing the reports of such a scientist without calling the scientist violates the Confrontation Clause. Although *Melendez-Diaz* arose out of a narcotics prosecution, the case's holding should apply four-square to many of the reports and tests typically at issue in sex cases. *See generally Veney v. United States*, 936 A.2d 811, 831 (D.C. 2007) (assuming a Confrontation Clause violation, but finding no "plain error because the government's failure to call the serologist and/or the [DNA] technician did not seriously affect the fairness, integrity, or public reputation of [the] judicial proceedings") (citations, quotations, and alterations omitted); *Roberts v. United States*, 916 A.2d 922, 939 (D.C. 2007) ("[A]ppellant was erroneously denied the right to cross-examine witnesses whose conclusions formed part of the DNA evidence against him.").

2. DNA Typing

DNA typing, sometimes called "DNA fingerprinting," involves comparing fragments of deoxyribonucleic acid, or DNA, from a known source (often the defendant or the complainant) with unknown fragments associated with a crime scene – most often, semen from a rape victim, blood on the scene of a violent crime, or bloodstains on a suspect's clothing or belongings. If a DNA analyst determines that the known and the unknown sources "match," such analyst then must determine the statistical significance of the match; this latter step involves determining the likelihood that an unrelated individual selected randomly from the relevant population would match the profile observed in the sample.

The Court of Appeals took its first in-depth look at the admissibility of DNA evidence in *United States v. Porter*, 618 A.2d 629 (D.C. 1992). At that time, the Federal Bureau of Investigation, which processed the DNA evidence presented by the government in Superior Court, used a

process called "restriction fragment length polymorphism," or "RFLP," which measured the "variable number of tandem repeats," or "VNTRs," at a particular genetic location to determine a DNA match, as well as a method called "fixed bin analysis" to calculate the probability of a coincidental match. *Porter*, 618 A.2d at 632. The *Porter* court held that although the FBI's procedures for determining a match passed muster under *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923),[11] there was no consensus within the relevant scientific community in support of the FBI's methods for calculating the probability of a coincidental match. The *Porter* court reached this holding because, according to leading population geneticists, the FBI's method failed to account for population substructure within racial groups. The *Porter* court thus remanded the case to the trial court to determine whether a more conservative statistic could be calculated using a scientifically accepted method. On remand, the trial court found that the government had generated such a statistic and therefore admitted the DNA evidence. *See United States v. Porter*, No. F-06277-89, 1994 WL 742297 (D.C. Super. Ct. 1994).

In the late 1990s, the FBI laboratory replaced the RFLP-VNTR method with the PCR-STR method – standing, respectively, for "polymerase chain reaction" and "short tandem repeats." The PCR-STR process works as follows: An evidence technician collects pieces of evidence from a crime scene, a suspect, or a complaining witness that may have biological material on them. A serologist then examines the collected evidence for the presence of semen, blood, skin flakes, saliva, hair, or other biological material that may contain DNA. If the serologist finds such material, a biologist then makes sub-sample "cuttings" to remove the portion of the evidence that contains the potential DNA. If the serologist detected the presence of semen, the sub-sample then will be subjected to a process known as differential extraction, a process meant to separate the sperm from the non-sperm portion of a forensic sample.

Next, through a heating and cooling process called polymerase chain reaction, or PCR, a biologist amplifies the tiny amounts of DNA extracted from the sub-samples into millions of copies at distinct genetic locations, or loci, containing short tandem repeats, or STRs. STRs are short stretches of "junk" DNA – DNA with no known function – composed of repeated sequences of four chemical base pairs.[12] At any particular STR location (or locus) all individuals share the same sequence of four base pairs; however, the number of times that the sequence repeats itself varies among individuals. The number of repeats present at a particular STR location represents the individual's genetic type, or allele, for that locus. *See generally Trala v. United States*, 162 F. Supp. 2d 336 (D. Del. 2001).

An individual has two alleles, one inherited from each parent, at each locus tested in the PCR-STR process. Scientists denote a particular allele numerically, that is, by the number of times that the base pair repeats at a particular locus. Thus, an individual typically is ascribed two numbers for each locus. The combination of alleles at the multiple loci tested in the PCR-STR process represents an individual's DNA profile. In addition to analyzing the questioned samples collected at the crime scene, the laboratory also must analyze known samples from the suspect

[11] Under *Frye*, expert testimony is admissible only if the technique the expert used to generate her expert opinion is generally accepted as reliable in the relevant scientific community. *See Ibn-Tamas v. United States*, 407 A.2d 626, 638 (D.C. 1979).

[12] The four bases are known as "A," "T," "G," and "C" – letters denoting adenine, thymine, guanine, and cytosine, respectively.

and the complainant. Once the laboratory has obtained DNA profiles from both these known and questioned samples, it can exclude or match the profiles obtained from the known contributors to those obtained from the questioned samples.

The fact that a known profile "matches" a questioned sample does not necessarily mean that the owner of the known profile was the source of the DNA detected in the unknown sample. Alternatively, another person with a matching profile could have contributed to the sample. To account for this possibility, the DNA analyst calculates a random match probability, or RMP, representing the likelihood that an unrelated individual selected randomly from the relevant population would match the profile observed in the sample.

In a pair of cases involving sexual offenses – *Roberts v. United States*, 916 A.2d 922 (D.C. 2007), and *Veney v. United States*, 936 A.2d 811 (D.C. 2007) – the Court of Appeals rejected several *Frye* challenges to the PCR-STR process. In both the *Veney* and the *Roberts* cases, the defendants argued that the FBI's method of determining the statistical significance of a match by calculating a RMP without reference to the chances of a false positive caused by laboratory error or contamination was misleading and not generally accepted, and that the FBI laboratory's quality assurance protocols were inadequate and not generally accepted in the relevant scientific community. The defendant in *Roberts* further argued that the FBI's method of interpreting mixed samples of DNA (that is, samples containing DNA from more than one source contributor) was not generally accepted. The Court of Appeals rejected these contentions, noting that "unanimity among scientists is not required" under *Frye*, *see Roberts*, 916 A.2d at 929, and that "*Frye* does not require that a scientific method be infallible," *see Veney*, 936 A.2d 830.

In *United States v. Jenkins*, 887 A.2d 1013 (D.C. 2005), the Court of Appeals addressed so-called "cold hit," or database search, DNA cases.[13] In *Jenkins*, the government compared the DNA profile obtained from blood found at the crime scene to the hundreds of thousands of DNA profiles contained in a government-maintained DNA database.[14] The search revealed that the DNA profile of the questioned sample "matched" that of Raymond Jenkins – whose DNA profile had been entered into the database due to previous charges in Virginia. The defense argued, and the trial court agreed, that there was no general acceptance within the scientific community over the appropriate method of calculating the statistical significance of a "match" produced by a database search. On the government's interlocutory appeal, however, the Court of Appeals reversed the trial court's ruling. *See Jenkins*, 887 A.2d at 1016 ("[T]he evidence in the record indicates that there is no debate in the relevant scientific community as to the methodology, mechanics, or mathematics underlying the various statistical formulas used to calculate significance, or in the results produced under the various formulas.").

Counsel must become familiar with the science of DNA evidence. The opinions in *Porter*, *Jenkins*, *Roberts*, and *Veney* provide a useful starting point and counsel should consult these cases. Additionally, counsel should endeavor to keep abreast of the latest scientific

[13] The *Jenkins* case involved charges of murder, not sex offenses. The *Jenkins* court's holding regarding cold-hit matches nonetheless would apply to database searches in sex cases as well.

[14] DNA evidence is collected from offenders in the District for inclusion in DNA databases pursuant to the terms of D.C. Code § 22-4151. *See generally Johnson v. Quander*, 440 F.3d 489 (D.C. Cir. 2006) (upholding the seizure and inclusion of a probationer's blood in a DNA database against a constitutional challenge).

developments in this field. Counsel may also want to hire an independent expert to assist with this very technical evidence.

Regardless of what defense theory counsel originally believes he or she will use at trial, counsel should consider filing motions to exclude the DNA evidence and match statistics pursuant to *Frye*. This is especially true if the case involves mixed DNA samples, which are more easily misinterpreted by government analysts.

PRACTICE TIP:

Much of the DNA evidence at issue in Superior Court now is processed by the MPD itself in conjunction with private analysts from the Bode Technology Group, Inc., at Bode's laboratory in Lorton, Virginia. Several of the *Frye* challenges rejected in *Roberts* and *Veney* were specific to the FBI laboratory. Counsel should seek discovery and litigate motions to compel in order to obtain information about the new laboratory with an eye towards developing evidence in support of *Frye* challenges specific to the new laboratory's practices and methods.

Finally, counsel also should demand, in *every* DNA case, the CD-ROM that contains the raw data underlying the conclusory reports generated by the analyst and typically given to defense counsel in discovery. This raw data obviously is important for evaluating the strength of the government's case. Moreover, any DNA expert who works with the defense is going to need to review and assess this data.

In addition, the data itself may provide knowledgeable counsel with the basis for arguments supporting reasonable doubt. For instance, in *Roberts* defense counsel sought to argue in closing argument that an electropherogram (a graph that a DNA analyst interprets to determine a sample's DNA profile) produced by the FBI laboratory in processing the government's DNA evidence showed the existence of additional genetic material in a questioned sample that either indicated an unexplained third contributor or excluded the defendant as a potential contributor to the questioned sample. The government's expert had testified that it was his conclusion that the at-issue portion of the electropherogram simply was an artifact of the testing process, as opposed to an indication of real genetic material. The Court of Appeals held that the trial court erred in precluding defense counsel from arguing that the government's electropherogram showed the presence of unexplained genetic material in the questioned source, despite the fact that the defense had not called an expert to offer an interpretation of the electropherogram different than that of the government. Rather, the court found that counsel's proffered argument regarding the electropherogram was a reasonable interpretation of the evidence adduced in the case, and that the trial court's ruling erroneously impeded the defendant's right to make reasonable comments on the evidence and to urge such inferences from the evidence as may support his defense. 916 A.2d at 936. As the decision in *Roberts* makes clear, counsel must not only obtain the raw data, but further must understand it sufficiently to make counterarguments to the conclusions of the government's DNA experts.

An excellent resource for an introduction to DNA typing, DNA litigation, model pleadings, model discovery requests, transcripts, and other DNA resources is open to the defense bar and available at http://www.nlada.org/Defender/forensics. The Public Defender Service also has a Forensic Practice Group that specializes in DNA litigation and that is available to the defense bar for consultation on such cases.

3. The Innocence Protection Act

The Innocence Protection Act of 2001, often referred to as the IPA, codified at D.C. Code §§ 22-4131 *et seq.*, allows a defendant accused of a "crime of violence" to obtain independent testing of biological material relevant to his or her case.[15] The IPA provides that a defendant charged with a crime of violence shall be informed in open court:

> (1) That he or she may request or waive independent DNA testing prior to trial or the entry of a plea if:
>
> (A) (i) DNA testing has resulted in the inclusion of the defendant as a source of the biological material; or
>
> (ii) Under circumstances that are probative of the perpetrator's identity, DNA testing has resulted in the inclusion of the victim as a source of the biological material; and
>
> (B) There is sufficient biological material to conduct another DNA test;
>
> (2) That he or she may request or waive DNA testing of biological material prior to trial or the entry of a plea if the biological material has not been subjected to DNA testing; and
>
> (3) Of the potential evidentiary value of DNA evidence in the defendant's case and the consequences of requesting or waiving DNA testing.

D.C. Code § 22-4132(b). With respect to indigent defendants who seek to exercise their right to independent testing, the practice in the Superior Court has been to pay for such testing out of public funds.

In *Veney v. United States*, the Court of Appeals stated that the preferred practice for informing a defendant of his rights under the IPA, as well as for ascertaining whether a defendant wishes to waive or invoke his IPA rights, is for the trial judge to engage the defendant in a colloquy in open court. 936 A.2d at 823 (stating that the trial judge "is ultimately responsible for seeing to it that the required information is given to a defendant in open court"); *see also Teoume-Lessane v. United States*, 931 A.2d 478, 487 (D.C. 2007) ("The statute unambiguously states that the notifications 'shall' be made before trial in open court; the trial court thus does not have discretion to alter or ignore these requirements."). Nonetheless, counsel must: (1) discuss the

[15] Crimes of violence are defined at D.C. Code § 23-1331(4).

defendant's IPA rights with the defendant; (2) advise the defendant as to the potential benefits of independent DNA testing; and (3) prepare the defendant for the IPA colloquy with the court. Simply put, the colloquy with the court should not be the first time that a defendant charged with a crime of violence learns of the IPA; rather, counsel should educate and advise her client with respect to DNA evidence and the IPA from the inception of the representation.

In *Ventura v. United States*, 927 A.2d 1090 (D.C. 2007), the Court of Appeals held that the trial court did not err in refusing a defendant's request for independent testing under the IPA because the defendant was unable to point to any potential relevance for the results of such testing. It therefore is apparent that the right to independent testing under the IPA is not automatic. Rather, when a defendant seeks independent testing under the IPA, counsel must be prepared to proffer – on an *ex parte* basis if necessary – why the results of such testing would be relevant to the defense in the particular case.

4. Hairs and Fibers

The Metropolitan Police Department's DNA lab also inspects items of evidence taken from the scene, the complaining witness, and/or the defendant for hairs and fibers. For hairs, the laboratory's analyst will then compare the questioned hairs taken from the evidence against head and pubic hairs taken from the complainant and the defendant to see if any of the questioned hairs match those from the known sources. The analyst also will look to see if any textile fibers (from clothing, carpets, or similar) from one item of evidence matches another item of evidence. This analyst will write a written report and also take extensive notes.

Counsel should request all of these documents under Super. Ct. Crim. R. 16. Counsel *must* also speak with the MPD analyst who conducted the examinations because the analysts frequently make findings that are not covered completely in their written materials. For example, the analyst often will look to match hairs and fibers, but will not note when such items do *not* match – information that can support a variety of defense theories.

If the analyst does declare a match that the government intends to use as evidence at trial, counsel must be aware that in February of 2009, the National Academy of Sciences presented a report to Congress questioning the claims made by forensic hair and fiber analysts. This report, known as the NAS Report, supports raising a *Frye*[16] challenge to hair and fiber analysis. There is more information on the NSA report in the CPI chapter regarding expert witnesses.

Often the analyst will make an "inconclusive" finding as to the hairs – meaning that the analyst cannot say if the defendant's hair matches or does not match a hair found at the scene or on the complainant. In such cases the government (or the defense) may want to test the hairs for mitochondrial DNA to try and determine if they came from the same person or at least the same maternal line of a family.[17] Mitochondrial DNA testing is more limited than nuclear DNA

[16] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

[17] Mitochondrial DNA, or mtDNA, is contained in the cytoplasm of the cell, rather than in the nucleus. Mitochondrial DNA is passed by a mother to her children without any mixing, so a child's mtDNA is the same as his mother's mtDNA, which is the same as her mother's mtDNA, and so on back through the generations.

testing (such as the PCR-STR process discussed above) and has issues that make it ripe for *Frye* challenges.

5. Seizure of Blood, Hair, and Saliva from Defendants

In sex cases, the government routinely requests a blood, hair, pubic hair, and saliva order at presentment. This order compels defendants to produce samples of each for comparison to evidence found on the complainant or the scene. These orders are not automatic.

A compelled intrusion into the body to seize a blood sample implicates the Fourth Amendment to the United States Constitution. *Schmerber v. California*, 384 U.S. 757 (1966). To obtain a warrant or court order for a blood sample, the government must show that there exists probable cause to believe that the blood sample will produce evidence of the defendant's involvement in the crime charged. *Schmerber*, 384 U.S. at 770; *see also Winston v. Lee*, 470 U.S. 753, 761-62 (1985). In particular, the government is required to establish a "nexus . . . between the item to be seized and criminal behavior." *In re Lavigne*, 641 N.E.2d 1328, 1331 (Mass. 1994); *see also Warden Md. Penitentiary v. Hayden*, 387 U.S. 294, 307 (1967).

Winston v. Lee, 470 U.S. 753 (1985), outlined the four factors to be considered when determining the reasonableness of bodily intrusions: (1) the effect on the safety or health of the individual being searched; (2) the impact on the person's dignity, personal privacy, and bodily integrity; (3) the community's interest in fairly and accurately determining the guilt or innocence of a criminal defendant; and (4) a clear indication that desired evidence will be found if the test is undertaken. *Id*. at 761-62.

In *In re Lavigne*, 641 N.E.2d 1328 (Mass. 1994), the Supreme Court of Massachusetts considered the following question: whether the defendant, charged with murder, could be compelled to produce a blood sample when the government did not offer any evidence that it had relevant samples to which the defendant's blood would be compared. The *Lavigne* court held that the defendant was entitled to a hearing at which the judge was required to "make findings as to the degree of intrusion and the need for the evidence of the blood sample." *Id*. at 1331. The *Lavigne* court further held that the government was required to establish a "nexus … between the item seized and criminal behavior." *Id*.[18] The court held that an order compelling the defendant to provide a blood sample was unreasonable without the government establishing such a nexus and ordered the return of the blood sample that had already been taken from the defendant.

In *State v. Acquin*, 416 A.2d 1209 (Conn. 1979), the government sought to seize the blood of a defendant in a murder case where the government proffered that it was in possession of multiple items believed to be the murder weapons, both of which bore "reddish sticky" substances that could have been blood. The court, relying in part on *Schmerber* and *Warden*, held that "[i]n the absence of facts establishing, *at the very least*, that the 'substance' found on the alleged murder weapons was in fact blood, the [trial] court had [in]sufficient facts before it" to determine that

[18] *See also Pittman v. United States*, 375 A.2d 16, 19 (D.C. 1977) (holding that tangible objects sought by the government must be relevant in some way "either independently or as corroborative of other evidence").

there was probable cause to believe the blood seized from the defendant would have a nexus to the crime charged. *Id*. at 1211 (emphasis added).

Even if the government can establish that it has relevant evidence to which a defendant's blood and hair would be compared, the government must establish that the intrusion and impact on the defendant's bodily integrity and personal dignity are reasonably necessary to justify the blood order if the government were to prevail in its motion to obtain hair and/or saliva samples. *See State v. Williams*, 815 P.2d 569 (Kan. Ct. App. 1991) (trial court's order compelling defendant to produce semen sample violated Fourth Amendment where government already had hair, saliva, and blood samples, and where government did not articulate compelling need for seminal fluid).

In the context of government-sponsored bodily intrusions, the protection of the Fourth Amendment does not cease with the initial collection of the sample from the defendant's body. Rather, "[t]he ensuing chemical analysis of the sample to obtain physiological data is a further invasion of . . . privacy interests" that constitutes a Fourth Amendment search. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989); *cf. Arizona v. Hicks*, 480 U.S. 321, 324-25 (1987) (holding that a new invasion of privacy occurs when the government acts beyond the scope of the authorized intrusion to reveal new information about the item being searched or seized). Thus, even if the government has lawfully seized a defendant's blood, the government's access to the information about the defendant contained in the blood sample would be the subject of another Fourth Amendment search and, therefore, is subject to motions to destroy samples and to suppress results of tests.

Defendants have a reasonable expectation of privacy in their blood and the intimate information contained therein. Blood is not knowingly exposed to the public, unlike a person's fingerprints,[19] voice,[20] or handwriting,[21] which do not receive Fourth Amendment protection. Blood contains highly personal information that could reveal genetic disorders, predisposition to disease, family relationships, and other private characteristics otherwise beyond the reach of the government. *See* Floralynn Einesman, *Vampires Among Us: Does a Grand Jury Subpoena for Blood Violate the Fourth Amendment?*, 22 Am. J. Crim. L. 327, 373 (1995).

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***Kaliku v. United States*, 994 A.2d 765 (D.C. 2010).** See, *supra*, Chapter 28.II.A.1.

E. Special Voir Dire Issues

Defense counsel's primary concern in conducting *voir dire* in sex offense cases is to eliminate or neutralize the fear and hostility aroused by crimes such as rape and child sexual assault. Merely inquiring about the "nature of the charges" is inadequate. The community's consciousness of violent crime is extremely high, fueled by newspaper reports of specific offenses and general criminal activity. Television programs and movies also devote considerable attention to urban

[19] *Davis v. Mississippi*, 394 U.S. 721 (1969).

[20] *United States v. Dionisio*, 410 U.S. 1 (1973).

[21] *United States v. Mara*, 410 U.S. 19 (1973).

crime, and rape and child sexual assault are topics frequently addressed. Heightened public attention to the political and legal aspects of sex offenses has led to an increasingly well-informed jury pool.

Counsel should carefully monitor the local media, and may seek to continue a trial that is scheduled near especially inflammatory articles or programs. *See generally Groppi v. Wisconsin*, 400 U.S. 505 (1971); *Sheppard v. Maxwell*, 384 U.S. 333 (1966). In general, reports, movies, or programs about the specific case or similar sex crimes have a significant impact on jurors if they are broadcast close to the trial date. *See Morris v. United States*, 564 A.2d 746, 748 (D.C. 1989). Moreover, with the rise of Internet, potential jurors now have virtually unlimited sources for information (or misinformation). The lawyer who fails to consider such sources in preparing for and conducting *voir dire* does so at her client's peril. *See generally* Erika Patrick, *Protecting the Defendant's Right to a Fair Trial in the Information Age*, 15 Cap. Def. J. 71 (2002). When conducting *voir dire* in sex offense cases, counsel must strive to inquire with sufficient specificity to uncover latent prejudices, while being careful not to spread prejudicial information among previously untainted jurors.

1. General Crime, Specific Case, Nature of Offense

One way to start the *voir dire* is to acknowledge that all citizens are concerned about the problem of crime in general. But, as a juror, one must set aside these more general concerns and focus only on the one case on trial, which must be resolved on its facts alone. The juror's job is to do justice in this one case. Counsel or the court may then allude to the nature of the crime charged, e.g., rape of a sixteen-year-old girl, followed by such questions as:

> Do you have such strong feelings about crime in general or rape in particular, that you would rather not sit on a jury in this case?
>
> Have you worked in a political or community organization in an effort to improve law enforcement, reduce crime, or change the laws pertaining to rape?
>
> Have you worked with or on behalf of victims of sex offenses, such as at a rape crisis center or hot-line?
>
> If selected to sit on this jury, will you be able to listen fairly to the evidence and rest your verdict *solely* upon that evidence?

2. Publicity

If there has been recent media coverage, the panel should be asked who among them has recently seen an article, television program, Internet source, or movie about rape. Answers to this question should be taken at the bench and should be followed up with questions about how any such coverage has affected the potential juror's feelings about the issues in general and specifically.

3. Cross-Examination of the Complainant

One of the primary messages the media has succeeded in spreading about rape is that complainants are victimized twice – first in the initial assault and again in cross-examination. If the defense is misidentification, cross-examination of the complainant may well be sympathetic and low-key. In a case of consent or fabrication, however, counsel may need to use an aggressive, emotional approach. It is essential that counsel preempt any undue sympathy that might otherwise arise in cross-examination. The following approach may prove effective:

> Part of the way I will defend my client, Mr. D, is by cross-examining the government's witnesses. The main witness is Ms. C; she is the one who has made these allegations against Mr. D. I will be cross-examining her at some length. To get at the truth, I will ask her hard questions. I will ask her intimate questions. It is the only way to show you that her charges just aren't true.
>
> Do any of you think that you might feel sympathy for Ms. C because I will be asking her hard, intimate questions?
>
> Do any of you think you might feel uncomfortable listening to such questions?

If the complainant is a child, counsel must attempt to detect any biases toward children or against persons accused of sex offenses involving children:

> The complainant is a ___-year-old child, who is accusing my client of engaging in sexual activity with her. The defense completely denies these accusations and contends that she is making these false/mistaken accusations because _____.
>
> Have you or your relatives, your friends or friends of any of your children, ever been the victim of, a witness to, or accused of any criminal offense involving children or mistreatment or neglect of children?
>
> The court will instruct you about the manner in which you should evaluate testimony by a child witness.
>
> Do you believe that a child is more likely than an adult to tell the truth?
>
> Do you believe that a child could not or would not make false accusations about sexual activity?
>
> The court will instruct you that Mr. D is presumed innocent and that you may not convict him of any of these offenses unless the government proves each element of the charges beyond a reasonable doubt.
>
> Do you think that when the case involves an accusation of sexual abuse of a small child, the defendant should have to prove his innocence?

Do you believe that less proof should be required in cases like this?

Are there any of you right now who for any reason cannot say that you do, in fact, presume Mr. D to be innocent of these charges?

4. Law Applicable to the Case

During *voir dire*, counsel or the court should explain the general legal principles applicable to the case, such as consent and the age of consent, and inquire whether any members of the panel hold views contrary to the law, e.g., that the defendant should prove that any sex was not forced.

F. Child Complainants

Under certain limited circumstances, the court can permit a child complainant to testify via closed-circuit television, out of the presence of the defendant. *See Hicks-Bey v. United States*, 649 A.2d 569 (D.C. 1994); *see also Maryland v. Craig*, 497 U.S. 836 (1990); *Coy v. Iowa*, 487 U.S. 1012 (1988). The judge must hold an evidentiary hearing to determine whether the television set-up is necessary to protect the welfare of the particular child who will testify. The court must also find that the child witness would be traumatized by the presence of the defendant, and that the emotional distress suffered by the child in the presence of the defendant would be more than "*de minimis*, i.e., more than 'mere nervousness or excitement or some reluctance to testify.'" *Craig*, 497 U.S. at 856.

G. Sexual Psychopath Treatment

Commitment for sex offender treatment may be available under the Sexual Psychopath Act ("SPA"), D.C. Code § 22-3802 to § 22-3811. Congress enacted the SPA in 1948 in order to provide "'a humane and practical approach to the problem of persons unable to control their sexual emotions.'" *Millard v. Harris*, 406 F.2d 964, 966 (1968) (quoting S.Rep. No. 80-1377, at 5 (1948)). The SPA is designed to afford a defendant charged with a sex offense[22] the opportunity to receive treatment in a secure setting other than a prison and proceed with the criminal case upon recovering to the extent that his release would not endanger the public. Implied, but by no means promised, is the notion that a defendant who has done well in treatment will receive favorable consideration from the prosecution or the sentencing judge, perhaps avoiding incarceration altogether.

The government may initiate SPA commitment proceedings by filing a statement setting forth facts tending to show that the defendant meets the definition of a sexual psychopath. *See* D.C. Code § 22-3804(b).[23] The statement may be filed anytime before trial, after conviction or plea of guilty (but before sentencing), or before the completion of probation. *See* D.C. Code § 22-

[22] The Act cannot be invoked with respect to a defendant charged with first or second degree sexual abuse or assault with intent to commit such abuse. *See* D.C. Code § 22-3804(e).

[23] The Act defines a sexual psychopath as "a person, not insane, who by a course of repeated misconduct in sexual matters has evidenced such lack of power to control his or her sexual impulses as to be dangerous to other persons because he or she is likely to attack or otherwise inflict injury, loss, pain, or other evil on the objects of his or her desire." D.C. Code § 22-3803(1).

3804(d). Alternatively, the trial court may *sua sponte* direct the government to file a statement. *See* D.C. Code § 22-3804(c). Though the statute does not explicitly authorize the defense to file a statement, defendants have successfully moved Superior Court judges to direct the government to file.

Counsel only should consider seeking SPA commitment for defendants who would be unlikely to receive probation, would be amenable to inpatient treatment in a psychiatric hospital, and would be especially vulnerable if incarcerated. Persons committed under the SPA are housed at St. Elizabeth's Hospital, an institution for the treatment of persons with serious psychiatric disturbances. SPA committees by definition do not have such afflictions, yet they are not housed separately or managed any differently from the rest of the inpatient population at St. Elizabeth's.

In addition, SPA commitments tend to be protracted. In recent decades, St. Elizabeth's has lacked a comprehensive treatment program for sex offenders and has had no specialized program for management of sex offenders in the community. Consequently, an SPA committee may encounter substantial obstacles to obtaining effective treatment and persuading the institution that he has recovered sufficiently such that his release would no longer endanger the public. This is critical because the criminal case remains in suspended status until the Hospital administration certify that the defendant has sufficiently recovered that his release will not pose a danger to the community. *See* D.C. Code § 22-3809; *id.* at § 22-3810. A defendant may challenge his continued confinement at St. Elizabeth's by means of a petition for a writ of habeas corpus, but he will need to sustain the burden of proving his fitness for release, notwithstanding the Hospital's opposition.

Though a defendant who proceeds to sentencing after his discharge from St. Elizabeth's will get credit for time spent confined at the Hospital, *see Shelton v. United States*, 721 A.2d 603 (D.C. 1998), he cannot proceed to sentencing without first satisfying the Hospital administration or the committing court that he has recovered sufficiently that his release would not endanger the community.[24] In other words, the SPA commitment is indeterminate in duration as a matter of law. As a practical matter, the commitment will exceed the maximum possible sentence in many cases and may span the defendant's lifetime.

Counsel advising clients about SPA commitment are invited to consult with the Mental Health Division of the Public Defender Service at (202) 824-2860.

H. AIDS Testing of Defendant

D.C. Code §§ 22-3901 *et seq.* governs the testing of individuals for the human immunodeficiency virus, or HIV, the virus that causes acquired immunodeficiency syndrome, or AIDS, who have been convicted of sexual crimes that involved the "contact between the penis and the vulva or the penis and the anus, however slight, or contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus." D.C. Code § 22-3901(4). In a nutshell, "[u]pon the request of a victim, the court shall order any individual convicted of an

[24] In *Shelton*, the defendant was permitted to proceed to sentencing on the unopposed alternative ground that he had achieved maximum benefit from what the Hospital had to offer. 721 A.2d at 604 n.3.

offense . . . to furnish a blood sample to be tested for the presence of HIV." D.C. Code § 22-3902(a).

As to pretrial testing, in *United States v. Garmon*, 50 Crim. L. Rep. 1378 (D.C. Super. Ct. Jan. 6, 1992), the government moved to test a rape defendant for presence of the HIV virus, arguing that the test might produce evidence of assault with a dangerous weapon (HIV-laced semen) and would enable the complainant to seek medical care if it were positive or ease her worries if it were not. The trial court found the first argument insufficient under *Schmerber v. California*, 384 U.S. 757 (1966), because the government failed to demonstrate a likelihood that the test would be positive. It agreed with the logic of the second argument, but denied the motion for lack of any authority to grant it.

D.C. Code § 16-2315(f) allows for pretrial testing of juvenile respondents for the HIV/AIDS virus. Before the court can order the respondent to submit to such testing, it must find "probable cause to believe that a victim or eyewitness to a delinquent act alleged to have been committed by the respondent may have been put at risk for the HIV/AIDS virus." D.C. Code § 16-2315(f).

I. Megan's Law

1. Sex Offender Registration

In 1994, Congress enacted the Jacob Wetterling Crimes Against Children And Sexually Violent Offender Registration Act, 42 U.S.C. § 14071, *et seq*. The District incorporated the requirements of the Wetterling Act into the Sex Offender Registration Act of 1999 ("SORA"), D.C. Code § 22-4001, *et seq*. As a result, the District's registration scheme changed from an offender-based system of registration, where an individual's risk is assessed based on factors specific to him or her, to an offense-based system, where offenders are classified based on the crimes of which they have been convicted.[25]

In 2006, Congress replaced the Wetterling Act with more stringent requirements for the treatment of sex offenders. Title I, the Sex Offender Registration and Notification Act ("SORNA") of the Adam Walsh Child Protection and Safety Act of 2006 ("Walsh Act") created "a new comprehensive set of minimum standards for sex offender registration and notification in the United States." The National Guidelines for Sex Offender Registration and Notification, 73 Fed. Reg. 38030 at 38041 (2008) (the "Final Guidelines"). SORNA requires jurisdictions, including the District, to develop registration laws that either "substantially implement" the Walsh Act's minimum requirements or impose harsher restrictions on sex offenders than mandated by the Act. *See* Final Guidelines at 38046 (the Walsh Act "sets a floor, not a ceiling, for jurisdictions' programs"). If a jurisdiction fails to comply by the July 27, 2010 deadline, the federal government may reduce annual Byrne Justice Assistance Grant funds by ten percent.[26]

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[25] The D.C. Court of Appeals upheld the retroactive application of the District's offense-based system against Ex Post Facto, Double Jeopardy and Due Process clause challenges. *In re W.M.*, 851 A.2d 431 (D.C. 2004); *see Smith v. Doe*, 538 U.S. 84 (2003); *Conn. Dep't of Pub. Safety v. Doe*, 538 U.S. 1 (2003).

[26] The original deadline was July 27, 2009. However, Attorney General Eric Holder issued Order No. 3081-2009, extending the deadline by one year. The Attorney General has the authority to order an additional year-long extension. *See* 42 U.S.C.A. § 16924.

42 U.S.C.A. § 16925. As this manual went to printing, the Department of Justice had found only the State of Ohio and two Tribes to be in compliance, with many states opting not to attempt compliance. The District has not formally taken up the issue of whether it will attempt to substantially implement SORNA; it is likely to request another year-long extension, which would extend the deadline to July 27, 2011. If the District does choose to comply, it will have to develop new registration laws

Even if the District adopts only the minimum requirements of the Walsh Act, there will be significant changes to the current SORA. The Walsh Act requires registration and internet notification for certain juvenile adjudications, broadens the category of offenses requiring registration to include misdemeanor sex offenses involving adults, increases the minimum registration period, imposes more stringent reporting requirements and increases the possible penalties for failure to register. Moreover, the provisions of the Walsh Act are retroactive.

Given the significant changes that may be on the horizon, defense attorneys should be aware of the Walsh Act's minimum requirements at every stage of representation – even when your client is not charged with committing a sex offense. The Walsh Act makes it incumbent on defense attorneys to diligently search their clients' juvenile and adult criminal histories for past sex offenses. It is critical to have this information before advising clients about potential penalties or accepting or rejecting plea offers.

This section begins with an overview of the current SORA and concludes with a discussion of some of the potential changes to the law if the District adopts the minimum requirements of the Walsh Act.

2. Who is required to register?

D.C. Code § 22-4001(9) currently defines a sex offender as a person who lives, resides, works or attends school in the District and who:

- committed a registration offense on or after July 11, 2000 (the effective date of the legislation);
- committed a registration offense at any time and is in custody or under supervision on or after the effective date of the legislation;[27]
- was required to register under the law of the District of Columbia on the day before the effective date of the legislation;
- committed a registration offense at any time in another jurisdiction and, within the registration period, enters the District to live, reside, work, or attend school.

Work is defined as any paid or unpaid, full or part-time employment exceeding 14 calendar days or 30 aggregate days in any calendar year. D.C. Code § 22-4001(13).

[27] This means that a person who is placed on probation even for a minor, non-sex-related offense, but who thirty years ago committed what would have been a registration offense, incurs registration obligations.

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***Sullivan v. United States*, 990 A.2d 477 (D.C. 2010).** District of Columbia Sex Offender Registration Act of 1999 (SORA) intended to have broad application to offenses under D.C. Code and therefore defendant who had previously committed registration offense of assault with intent to rape subject to provisions of SORA when he was convicted of driving without a permit while on probation for the assault with intent to rape.

3. How long is the registration period?

Under the current SORA, there are two categories of registration offenses – offenses requiring lifetime registration and those requiring a ten-year period of registration.

4. Lifetime Registration Offenses

D.C. Code §§ 22-4001(6) and 24-4002 currently mandate that individuals convicted of the following offenses are required to register for life:

- First-Degree Sexual Abuse § 22-3002
- Second-Degree Sexual Abuse § 22-3003
- First-Degree Child Sexual Abuse § 22-3008
  (where victim is under age of 12)
- Murder or Manslaughter § 22-2101 *et seq*.

(when committed before, during, or after engaging in or attempting to engage in a sexual act or sexual contact or rape as it was defined by 22-4801)

- Forcible Rape As proscribed until 5/23/95 by § 22-2801
- Forcible Sodomy As proscribed until 5/23/95 by § 22-3502(a)
- Sodomy As proscribed until 5/23/95 by § 22-3502(a)
  (where victim was under age of 12)
- Carnal Knowledge As proscribed until 5/23/95 by § 22-2801
  (where victim was under age of 12)
- Statutory Rape As proscribed until 5/23/95 by § 22-2801
  (where victim was under age of 12)
- Attempt or conspiracy to commit any of the above crimes. § 22-4001(6)(D)
- Assault with intent to commit rape, carnal knowledge, statutory rape, first degree sexual abuse, second degree sexual abuse, or child sexual abuse. *Id.*

An offense under the law of any state, federal law, or the law of any other jurisdiction which involved conduct that would constitute an offense described above if it had been committed in the District and prosecuted under the D.C. Code, or conduct which is substantially similar to that described by the offenses detailed above. § 22-4001(6)(E).

Under the current law, some other individuals are required to register from the date of conviction for life. *See* D.C. Code § 22-4002(b). That set of individuals is defined as:

1. Those determined to be sexual psychopaths.

2. Those who have committed at least two registration offenses where at least one registration offense was a felony or involved a minor. Minor is defined as anyone under the age of 18.[28] D.C. Code § 22-4001(7).
3. Those who have committed at least two registration offenses relating to different victims or involving minors.

5. Ten-Year Registration Offenses

Other individuals covered by the current law are required to register for ten years. D.C. Code § 22-4002; § 22-4001(8). A ten year period of registration is required following a conviction for one of the following crimes:
All offenses under the Anti-Sexual Abuse Act of 1994 (D.C. Code § 22-3002 *et seq*.) which are not listed as Lifetime Registration Offenses, and any of the following offenses where the victim is a minor:

- Lewd or Indecent Acts § 22-1312
- Obscenity § 22-2201
- Sexual Performances Using Minors § 22-3102
- Incest § 22-1901
- Kidnapping § 22-2001
- Prostitution/Pandering § 22-2701 *et seq*.

Any offense under the D.C. Code that involved a sexual act or sexual contact without consent or with a minor, except misdemeanors committed against adults.[29] *See* § 22-4001(8)(D); § 22-4016.

Assaulting or threatening another with the intent to engage in a sexual act or sexual contact, or with the intent to commit rape. § 22-4001(8)(D).

Causing the death of another in the course of, before, or after engaging in or attempting to engage in a sexual act or sexual contact or rape. *Id.*

Kidnapping, burglary, or assault with intent to commit any of the above crimes where there was intent, attempt, or conspiracy to commit any of the above crimes. *See* § 22-4001(8)(E).

An offense under the law of any state, federal law, or the law of any other jurisdiction which involved conduct that would constitute an offense described above if it had been committed in the District and prosecuted under the D.C. Code, or conduct which is substantially similar to that described by the offenses detailed above. § 22-4001(8)(G).

[28] Note that this is different from the definition of a "child" (under 16) in the sexual abuse subchapter.

[29] The D.C. Court of Appeals has determined that, "because registration with SORA is an administrative requirement and not penal in nature," a defendant facing a ten-year registration requirement for misdemeanor child sexual abuse is not entitled to a jury trial. *Thomas v. United States*, 942 A.2d 1180, 1186 (D.C. 2008).

Any other offense where the individual agrees pursuant to a plea agreement to be subject to sex offender registration requirements. § 22-4001(8)(H).

It is important to note that D.C. Code § 22-4016 is the "exemption section," which excludes from registration, among other crimes, misdemeanor convictions where the complaining witness is an adult.

6. What Defines the Registration Period?

Pursuant to D.C. Code § 22-4002, the registration period begins upon conviction or determination of status as a sexual psychopath and continues until the expiration of time being served on probation, parole, supervised release, conditional release, or convalescent leave, or ten years after unconditional release from a correctional facility, prison, hospital, or other place of confinement – whichever is later.

There are three exceptions to this general rule for those who fall under the ten year registration requirement:

First, CSOSA has the discretion to grant credit for time a person was registered as a sex offender in another jurisdiction. § 22-4002(a)(1).

Second, CSOSA has the discretion to deny credit for any time during which a person was detained, incarcerated, confined, civilly committed, or hospitalized. Moreover, CSOSA can deny credit for any time during which an individual was registered as a sex offender prior to a revocation of parole, probation, supervised release, conditional release, or convalescent leave. § 22-4002(a)(2). This provision heightens the significance of probation and parole revocation for offenders.

Third, the registration period is tolled for any time the individual fails to register or otherwise fails to comply with his obligations under this law. § 22-4002(a)(3).

7. What is the Process for Registering Offenders?

Once a person is convicted of a registration offense, the judge presiding over the case must enter an order certifying the person as a sex offender and establishing his status as either a "ten-year" or "lifetime" registrant. § 22-4003(a). The judge is charged with notifying the defendant of his duties under the law and his obligation to report to CSOSA. *Id.* The defendant must read and sign the order, a copy of which will be provided to CSOSA by the Court. § 22-4003(b).

The Department of Corrections must notify CSOSA before a sex offender in its custody is about to be released to a halfway house or the community. § 22-4005. The DOC must also advise the individual, orally and in writing, of his obligation to report to CSOSA upon his release. *Id*. Where an individual is in the custody of or under supervision of St. Elizabeth's and the Commission on Mental Health Services, similar rules apply. D.C. Code § 22-4006.

Once the individual is referred to CSOSA, CSOSA takes over. CSOSA has the authority to develop procedures to implement its duties and powers under the law. § 22-4007. CSOSA's current procedures and requirements relating to sex offender registration are published at 28 C.F.R. § 811.1, *et seq*.

CSOSA has broad powers under the law, including, but not limited to, the power to obtain a detailed description of the registration offense(s) and all identifying information from the registrant, including social security number and current or expected locations of employment or school attendance. D.C. Code § 22-4007(a). CSOSA may also photograph and fingerprint the individual and require him to sign a form agreeing that he understands his duties under the law. *Id.* The individual must meet with a CSOSA officer at any reasonable time to ensure compliance with the law's requirements. D.C. Code §§ 22-4007 to 4008.

CSOSA is also charged with maintaining and updating the sex offender registry, including prompt removal of all outdated names and information. §§ 22-4008 to 4010. CSOSA's registry is now on the National Sex Offender Registry and available to the FBI.

8. Notification and Publicity Regarding Sex Offenders

Pursuant to D.C. Code § 22-4011, MPD is charged with community notification regarding sex offenders. While CSOSA maintains the full registry, MPD disseminates information from the registry as required and permitted by law. For all intents and purposes, the law permits MPD to distribute or make publicly available all information that is collected by CSOSA.

For notification purposes, offenders are divided into three groups: Class A, Class B, and Class C. § 22-4011.

- **Class A** offenders are lifetime registrants.

- **Class B** offenders are those other than Class A registrants who committed a registration offense against a minor or a ward, patient or client.

- **Class C** offenders are all other ten-year registrants.

Notification is defined in two ways: Active and Passive.

- **Active** notification means affirmatively informing people and groups about sex offenders via community meetings, flyers, telephone calls, door-to-door contacts, e-mail, direct mail, media releases, and other means.

  Class A offenders are exposed to unlimited active notification. Class B & C offenders, on the other hand, are exposed to active notification only where information is being provided to law enforcement agencies, to organizations that serve "vulnerable" populations such as schools, day care centers, and senior citizen services centers, victims of and witnesses to a sex offender's crimes and their family members, and to any other person MPD has reason to believe is at specific risk of harm by the sex offender.

- **Passive** notification refers to making information available for public inspection via Internet postings, maintaining publicly available registries at police stations and other public places, and responding to inquiries from the public. Passive notification may be made regarding all offenders with one exception: under the current law, public inspection via the Internet is not allowed for Class C offenders.

9. Duties of the Registered Sex Offender

During the registration period, a sex offender must, in the time and manner specified by CSOSA, do the following: register, provide all information necessary for registration, cooperate in photographing and fingerprinting, and report any changes in residence or other registration information. D.C. Code § 22-4014. Individuals must periodically verify registration information and meet with CSOSA as reasonably required. *Id.* The registered sex offender must also report if moving to another state or working in another state, and register as a sex offender in that state if required to do so by law there. *Id.*

Under the current SORA, CSOSA requires lifetime registrants to verify information quarterly and ten year registrants to verify information annually. 28 C.F.R. § 811.9. CSOSA permits registrants to update information by completing and mailing a verification form, but verification must take place in person if ordered by CSOSA. *Id.*

As noted above, offenders with qualifying convictions in other jurisdictions who live, work, or attend school in the District will be required to register as well. Presumably, those on probation, parole, or supervised release in other jurisdictions will be advised by their supervising officers of their duty to register in the District. For new clients who fall into this category, defense attorneys will need to evaluate the elements of their offenses in those other jurisdictions and to determine whether the elements of the crime or crimes provide a basis to challenge the client's registration obligations.

All requirements of this law, and those lawfully imposed by CSOSA, automatically become conditions of probation, parole, supervised release, and conditional release. § 22-4015(b). Under the District's sentencing scheme, sex offenders are subject to extended periods of supervised release. For example, a person convicted of burglary with intent to commit a nonsexual felony would face a maximum of five years supervised release. If the burglary was with intent to commit a sex offense, however, the defendant would face a maximum of ten years supervised release. Moreover, convictions set aside pursuant to the Youth Rehabilitation Act, D.C. Code § 24-901 *et seq.*, are still subject to registration requirements if the set-aside occurred after August 5, 2000. *See* § 24-906(f)(6).

Knowing violation of any requirement of this law – including any requirement imposed by CSOSA through a proper exercise of its power – is punishable by a misdemeanor carrying a fine of up to $1,000 and 180 days in jail. D.C. Code § 22-4015. For second and subsequent violations of registration duties, the individual is subject to felony prosecution carrying a fine of up to $25,000 and five years in jail. *Id.*

10. Challenges to the Current Law

Pursuant to D.C. Code § 22-4004, individuals have limited power to challenge their registration obligations. An individual only has a statutory right to challenge registration if ordered to register by CSOSA. The statute does not create a mechanism to challenge a judge's registration order.[30]

The person may only seek review of CSOSA's determination if the decision "depends on a finding or findings which are not apparent from the disposition." *Id.* D.C. Code § 22-4004 provides four examples of findings which may not be apparent from the disposition:

1. Whether the complainant was a minor or under the age of 12 at the time of the offense;

2. Whether sexual acts or contacts were forcible;

3. Whether the exemptions listed in § 22-4016(b) apply; and

4. Whether an act, conduct, or offense committed in another jurisdiction is sufficiently similar to what would constitute a registration or lifetime registration offense if it had been conducted in D.C.

The statute suggests that this is not an exclusive list. *See* § 22-4004 (possible grounds for challenge "include, but [are] not limited to" the four cited grounds).

Once a person is referred to CSOSA for registration (or once informed of the obligation to register for life), the individual has 30 days to notify CSOSA of an intent to challenge the registration obligation. After notifying CSOSA, the person has 30 days to file a motion in Superior Court detailing the challenge. Unless it is clear from the motion that the individual is not entitled to relief, the court must notify the government of the motion and give the government time to respond.

In such a challenge, the government bears the burden of proving by a preponderance of the evidence that the offense is a registration offense under § 22-4001. *See In re W.M.*, 851 A.2d 431, 455-56 (D.C. 2004). Counsel should also know that the DCCA has held that the federal offense of interstate travel with intent to commit a sexual act with a minor, in a case stemming from an internet sting operation with a federal agent rather than an actual minor, is "substantially similar" to the D.C. offense of attempted enticing of a child for purposes of SORA. *In re Stanley Doe ("S.D.")*, 855 A.2d 1100 (D.C. 2004).

If the court determines a hearing is necessary or if the interests of justice otherwise require, the Court must appoint counsel. The court must rule on the motion within 60 days.

[30] A judge's registration order cannot be the sole basis for habeas relief. The D.C. Court of Appeals held that the registration "obligations under SORA do not render [a person] 'in custody' within the meaning of § 23-110." *Mitchell v. United States*, 977 A.2d 959, 969 (D.C. 2009).

11. The Walsh Act's SORNA

This section does not provide an exhaustive list of the potential changes to the current SORA. Rather, it covers the changes that will result in the greatest departure from the current law and that will have the most significant impact on our clients and our practice if the District adopts the *minimum* requirements of the Walsh Act's SORNA.

a. Registration Required for Certain Juvenile Adjudications

Under the current SORA, a juvenile adjudicated delinquent for committing a sex offense is not required to register as a sex offender "because a juvenile adjudication or disposition 'is not a conviction of a crime.'" *Cannon v. Igborzurkie*, 779 A.2d 887, 890-91 (D.C. 2001) (*citing* D.C. Code § 16-2318 (2001)).

SORNA broadens the definition of "conviction" to include delinquency adjudications "if the offender is 14 years of age or older at the time of the offense and the offense adjudicated was comparable or more severe than aggravated sexual abuse (as described in section 2241 of title 18, United States Code), or was an attempt or conspiracy to commit such as offense." 42 U.S.C. § 16911(8). The relevant provision of the U.S. Code "proscribes engaging in a sexual act with another by means of force or the threat of serious violence, or by rendering unconscious or involuntarily drugging the victim." Final Guidelines, 73 Fed. Reg. 38030 at 38041. The Department of Justice has explained that "it is sufficient . . . to require registration for (roughly speaking) juveniles at least age 14 who are adjudicated delinquent for offenses equivalent to rape or attempted rape, but not for those adjudicated delinquent for lesser sexual assaults or non-violent sexual conduct." Final Guidelines at 38030.

Importantly, the relevant provision of the U.S. Code proscribes sexual acts with victims below the age of 12, even where no overt violence or coercion is involved. *See* 18 U.S.C. 2241(c). However, the Department of Justice has recognized that offenses involving "consensual sex play" where "the delinquent may himself be a child who is not far removed in age from the victim" do not implicate SORNA's public safety objectives. Final Guidelines at 38040-41. Accordingly, jurisdictions are not required to register "juveniles adjudicated delinquent on the basis of offenses that are within the definitional scope of 18 U.S.C. 2241 only because of the age of the victim."[31] *Id.*

Nevertheless, if adopted, SORNA mandates drastic changes in the current law. Not only does the Act require a person to register as a sex offender as a result of certain juvenile offenses, but it also mandates that the person continue to register for the rest of his life based on that single juvenile offense.[32] An individual who is required to register for life based on a juvenile adjudication may only have his registration period reduced if he maintains a "clean record" for

[31] However, SORNA "sets a floor, not a ceiling, for jurisdictions' programs." Final Guidelines at 38046. Accordingly, the District has the discretion to mandate the registration of juveniles adjudicated delinquent for engaging in consensual sex play with a complaining witness similar in age.

[32] As explained in the next section, registerable juvenile offenses qualify as "Tier III" offenses which require lifetime registration.

twenty-five years.[33] 42 U.S.C. § 16915(b). Moreover, juveniles are not exempt from SORNA's requirement that registration information be posted on the internet. *See* 42 U.S.C.A. § 16918.

b. Registration required for misdemeanor sex offenses and increased period of registration for felony sex offenses

Under the D.C. Code, felony sex offenses currently require either ten-year or lifetime registration. SORNA increases the minimum period of registration to fifteen years – for all misdemeanor sex offenses – and divides the duration of registration into three categories: fifteen-year ("Tier I"), twenty-five year ("Tier II"), and lifetime ("Tier III").

Tier III and Tier II are both limited to cases in which the offense for which the sex offender is required to register "is punishable by imprisonment for more than 1 year." 42 U.S.C. §§ 16911(3) and (4). Tier III includes any offense that is comparable or more severe than aggravated sexual abuse as described in 18 U.S.C. § 2241, abusive sexual contact against someone under 13 years of age as described in 18 U.S.C. §2244, or an attempt or conspiracy to commit such an offense. 42 U.S.C. § 16911(4). The elements of the federal offenses cited in SORNA include the following:

1. Engaging in a sexual act with another by force or threat;
2. Engaging in a sexual act with another who has been rendered unconscious or involuntarily drugged, or who is otherwise incapable of appraising the nature of the conduct or declining to participate;
3. Engaging in a sexual act with a child under the age of 12;
4. Sexual touching of or contact with the intimate parts of the body, either directly or through the clothing, where the victim is under 13; or
5. Kidnapping of a minor (unless committed by a parent or guardian).

Final Guidelines at 38054. Any individual convicted of one of the above offenses will be required to register for life.[34] 42 U.S.C. § 16915(a)(3).

Tier II generally covers "most sexual abuse or exploitation offenses against minors." Final Guidelines at 38053. "Minor" means a person under the age of 18. 42 U.S.C. § 16911(14). The federal offenses cited in SORNA include four types of offenses:

1. Offenses involving the use of minors in prostitution, and inchoate or preparatory offenses (including attempts, conspiracies, and solicitations);
2. Offenses against minors involving sexual contact, including attempts, conspiracies, and solicitations;
3. Offenses involving use of a minor in a sexual performance; and

[33] In order to have a clean record, an individual may not be convicted of *any* felony offense or any misdemeanor sex offense and must have successfully completed any period of supervision and an appropriate sex offender treatment program. *Id.*

[34] There is one exception – the Walsh Act does not require the registration of an individual based on a juvenile sex offense simply because the complaining witness was a person under 12, without more.

4. Offenses involving the production or distribution of child pornography.

Final Guidelines at 38053-54. Any person who has been convicted of a Tier II offense at anytime and is subsequently convicted of a felony sex offense automatically becomes a lifetime (Tier III) registrant. *Id.*

Tier I is a residual class that dictates the registration requirements for an individual who was convicted of any sex offense, but does not satisfy the criteria for Tier II or Tier III. 42 U.S.C. § 16911(2). The Walsh Act's SORNA expands the definition of "sex offense" to include any "criminal offense that has an element involving a sexual act or sexual contact with another." 42 U.S.C.A. § 16911(5)(A)(i). Accordingly, under SORNA, a misdemeanor sex offense involving an adult qualifies as a registerable Tier I sex offense. *Compare* Final Guidelines at 38053 ("[T]ier I includes a sex offender whose registration offense is not punishable by imprisonment for more than one year . . . .") *with* DC Code 22-4016(b)(3) ("Any misdemeanor offense committed against an adult" is not a registration offense "except where the offender agrees in a plea agreement to be subject to sex offender registration requirements."). As registration eligibility is based on the legal elements of the offense of conviction and not on the underlying factual conduct, when possible, defense counsel should seek pleas to offenses that do not have an element involving a sexual act or sexual contact.[35] For example, an offense originally charged as a misdemeanor sex offense involving an adult might meet the criteria for simple assault.

SORNA permits a five year reduction in the 15-year period of registration for Tier I registrants after the individual maintains a clean record for ten years. 42 U.S.C. § 16915. Jurisdictions have the discretion to exempt Tier I sex offenders from having their registration information posted on the internet, but only if the individual was "convicted of an offense other than a specified offense against a minor." *See* 42 U.S.C.A. § 16918(c)(1).

J. Broadened definition of "sexual act"

The federal and D.C. Code definitions of *sexual act*, 18 U.S.C. § 2246(2) and D.C. Code § 22-3001(8) respectively, differ in one important respect. Under the U.S. Code, a sexual act includes "the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, degrade, or arouse or gratify the sexual desire of any person." 18 U.S.C. § 2246(2)(D). Under the D.C. Code, this would only qualify as the lesser act of sexual contact. *See* D.C. Code § 22-3001(9). Accordingly, if the District adopts the minimum requirements of SORNA, the touching of the genitalia of a 15 year old (under the clothing) with the requisite intent, but without penetration, will qualify as a lifetime registration offense if committed by an adult. There is an exception for juvenile sex offenders. "Sexual act" for the purpose of juvenile registration only includes genital or anal penetration and any oral-genital or oral-anal contact. *See* Juvenile Offenders Required to Register Under SORNA: A Fact Sheet.[36]

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[35] Final Guidelines at 38031 ("[J]urisdictions are not required by SORNA to look beyond the elements of the offense of conviction in determining registration requirements, except with respect to victim age.").

[36] Available at http://www.ojp.usdoj.gov/smart/pdfs/factsheet_sorna_juvenile.pdf.

K. Retroactivity

Like the current SORA, the provisions of the Walsh Act's SORNA are retroactive. SORNA does not require the District to actively seek out all District residents who have ever been adjudicated delinquent or convicted of a sex offense. However, an individual will be subject to the new law's registration requirements if: (1) the individual is incarcerated or under supervision for some other crime, even if the other crime is not a registerable offense; (2) the individual reenters the District's criminal justice system for a new offense, even if the new offense is not a registerable offense; or (3) the individual is already registering as a sex offender. Final Guidelines at 38046. SORNA does afford jurisdictions the discretion to grant individuals credit towards the registration period for time spent in the community following release from the prison term imposed as a result of the past sex offense (or for time since sentencing for a non-incarcerative sentence). Final Guidelines at 38047.

The retroactivity of SORNA is critical to our practice because it substantially increases the importance of clients' juvenile and adult criminal histories. For example, if a person was adjudicated delinquent for a registration-eligible offense as a juvenile and reenters the District's criminal justice system based on a conviction for *any* offense, SORNA mandates that he be required to register as sex offender for life even if the juvenile offense predates SORNA's enactment by decades.[37] As noted in the earlier overview of the Tier system, SORNA expands the definition of "sex offense" to include any "criminal offense that has an element involving a sexual act or sexual contact with another." 42 U.S.C.A. § 16911(5)(A)(i). Accordingly, an adult who was convicted of a misdemeanor sex offense at any time will be required to register as a sex offender for fifteen years if he is charged with a new non-sex related offense. If a client is facing registration based on a past offense, counsel should be prepared to seek credit for any time the client spent in the community in order to shorten the registration period.

L. Increased penalties for failure to register

Under the current law, a sex offender's first failure to register can only be prosecuted as a misdemeanor offense and a subsequent failure to register may be prosecuted as a felony. SORNA requires jurisdictions to provide a criminal penalty that includes a maximum term of imprisonment greater than one year for the failure of a sex offender to comply with the registration requirements. 42 U.S.C. § 16913(e). Accordingly, an individual can be charged with a felony for the first failure to register.

In addition, SORNA creates a new *federal* crime, codified at 18 U.S.C. § 2250, with penalties of up to ten years of imprisonment. If the District adopts SORNA, 18 U.S.C. § 2250 will apply to any District sex offender required to register under SORNA who knowingly fails to register or update registration.[38] Final Guidelines at 38069.

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[37] However, as noted earlier, the individual may escape registration if he has had a "clean record" for twenty-five years and the District exercises its discretion to grant credit for time spent in the community.

[38] For other jurisdictions that adopt SORNA, 18 U.S.C. § 2250 will only apply "where circumstances supporting federal jurisdiction exist, such as interstate or international travel or travel on or off an Indian reservation by a sex offender, or conviction of a federal sex offense for which registration is required." Final Guidelines at 38069. However, 18 U.S.C. § 2250, by its terms, automatically applies to any person who is required to register as a sex

M. Mandatory In-Person reporting

CSOSA's regulations currently permit individuals to update registration information by mailing a completed verification form unless CSOSA orders an in-person visit. 28 C.F.R. § 811.9(d). Under the Walsh Act's SORNA, in-person reporting is mandatory for all registrants. 42 U.S.C. § 16916. Lifetime registrants must verify registration information in-person every three months. Persons registering based on a juvenile adjudication are not exempt from this requirement. SORNA increases the reporting requirement for Tier II registrants to every six months and requires Tier I registrants (misdemeanants) to appear in person annually. *Id.*

II. DRUG CASES

A. Uniform Controlled Substances Act

The Uniform Controlled Substances Act, or UCSA, D.C. Code §§ 48-901.02 *et seq.*, governs the prosecution of drug cases in the Superior Court. D.C. Code § 48-902.03 through D.C. Code § 902.12 enumerates "controlled substances" in five schedules set out in descending order of seriousness based on accepted use in medical treatment, potential for abuse, and psychological and physical effects of abuse. The act further classifies schedule I and II drugs into "narcotic" and "abusive" drugs.[39]

1. Possession and Probation without Judgment

The two elements of the offense of possession of a controlled substance are: (1) that the defendant possessed a measurable amount of a controlled substance; and (2) that the defendant did so knowingly and intentionally, rather than by mistake or accident. *See Callaham v. United States*, 937 A.2d 141, 147 (D.C. 2007). "[I]n order to prove the completed crime of possession of a controlled substance, the government must prove 'that the substance possessed was, in fact, the controlled substance in question.'" *Fields v. United States*, 952 A.2d 859, 864 (D.C. 2008) (quoting *Seeney v. United States*, 563 A.2d 1081, 1083 (D.C. 1989)).

Simple possession of a controlled substance, except pursuant to a prescription or as otherwise authorized by the statute, is a misdemeanor. The only lesser-included offense to which a plea may be entered is "attempted possession," which carries the same possible penalty as possession. Sentences for attempted possession without proof that the substance is controlled are valid. *See Seeney*, 563 A.2d at 1083 ("With respect to the offense of *attempted* possession . . . we hold it is not necessary to establish that the substance a defendant attempted to possess was the proscribed substance. The government must establish conduct by the defendant that is reasonably adapted to the accomplishment of the crime of possession of the proscribed substance, and the requisite

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offender under SORNA "by reason of a conviction under Federal law . . . [or] the law of the District of Columbia." 18 U.S.C. § 2250(2)(A).

[39] A challenge to the UCSA on the ground that it is invalid because of the failure of the Mayor to republish the schedules, as required by D.C. Code § 48-902.13, has been rejected on the grounds that the intent of the legislature was to require republication only when changes are made to the schedules. *See Arrington v. United States*, 585 A.2d 1342 (D.C. 1991). Furthermore, "medical necessity" is not a defense to a charge of possession where there is a reasonable legal alternative to violating the law. *See Emry v. United States*, 829 A.2d 970 (D.C. 2003).

criminal intent."); *see also Fields*, 952 A.2d at 864 ("[T]o prove [attempted possession the government] need not establish that the substance a defendant attempted to possess was the proscribed substance.") (citations and quotations omitted).

Anyone convicted of possession or attempted possession under D.C. Code § 48-904.01(d) who has no previous drug convictions in any jurisdiction is eligible for probation under § 48-904.01(e).[40] If the court finds this option appropriate, it places the defendant on probation for up to one year without entering a judgment of guilty. D.C. Code § 48-904.01(e)(1). The case is dismissed upon successful completion of probation, and the defendant then may move for expungement of the record under § 48-904.01(e)(2). Once the judge grants the motion, only the Clerk of the Criminal Division maintains a nonpublic record of the case to be used solely to determine subsequent qualification for § 48-904.01(e) treatment.

2014 Supplement

***Ramirez v. United States*, 49 A.3d 1246 (D.C. 2012).** Evidence sufficient to establish that defendant exercised dominion and control over drugs and drug paraphernalia found in apartment in which defendant admitted to residing and where a ziplock bag with cocaine was found in a pants pocket near his bed.

2. Distribution and Possession with Intent to Distribute

To prove distribution of a controlled substance, the government must show that the defendant knowingly and intentionally transferred a controlled substance to another person. To prove possession with the intent to distribute, the government must prove that the defendant knowingly and intentionally possessed a controlled substance with the specific intent to distribute it. *See Taylor v. United States*, 662 A.2d 1368, 1371 (D.C. 1995).

Intent to distribute is proven most frequently by quantity and/or method of packaging. *See, e.g.*, *Taylor*, 662 A.2d at 1371 (finding that expert testimony that eighteen rocks of crack cocaine in a medicine vial is consistent with distribution along with absence of any paraphernalia for personal use was sufficient to show intent to distribute); *Davis v. United States*, 623 A.2d 601, 603 (D.C. 1993) (stating that over one-hundred individual packages is strong evidence of intent to distribute).

Even without an exchange of money, giving drugs to or sharing drugs with another is distribution, *Wright v. United States*, 588 A.2d 260, 262 (D.C. 1991), as is holding or transporting drugs to give back to a dealer, *Malloy v. United States*, 605 A.2d 59 (D.C. 1992). Likewise, handing back drugs to a seller is considered distribution. *See Durham v. United States*, 743 A.2d 196 (D.C. 1999). The defendant cannot claim as a defense to distribution that he acted as an agent of the buyer, rather than of the seller. *See Minor v. United States*, 623 A.2d 1182, 1185 (D.C. 1993).

[40] One may be eligible for § 48-904.01(e) probation even if one is convicted after trial, was originally charged with distribution, or has a lengthy non-drug related record. The UCSA specifically permits the government to reduce more serious charges to possession in "the interests of justice." D.C. Code § 48-904.01(f).

In *Garcia v. United States*, 897 A.2d 796 (D.C. 2006), the court considered whether the defendant's conduct of directing an undercover police officer's attention to a rolled-up piece of foil containing cocaine constituted a "transfer" under the drug distribution statute. The court held that it did, even though the defendant did not hand the foil with cocaine to the officer – the act of directing the officer's attention to it, with the obvious expectation that she would pick it up, was a "transfer" under the statute, which bars any act effectuating a transfer of drugs.

In *Steward v. United States*, 927 A.2d 1081 (D.C. 2007), the court found the evidence sufficient to convict on distribution of heroin where the officer testified that he saw the defendant hand the co-defendant two zips containing heroin, even though the police found neither additional drugs nor money on the defendant when he was arrested.

Evidence that a defendant assisted in the sale of some of the drugs possessed by a co-defendant may be sufficient to prove that the defendant intended to assist the co-defendant in future sales, thereby supporting the defendant's conviction for possession with intent to distribute the remaining drugs under an aiding and abetting theory. *See Owens v. United States*, 688 A.2d 399, 403 (D.C. 1996) (finding that evidence of prior assisted sale, plus expert testimony on the role of the "runner," was sufficient to prove possession with intent to distribute drugs found on co-defendant).

The government's proof at trial about the type of controlled substance at issue must match the allegation in the indictment, information, or petition. For example, if the charging document alleged that the controlled substance was heroin and the court allowed the government to proceed at trial on proof that the substance was cocaine, the charging document would be constructively amended, thereby violating the defendant's rights under the Fifth Amendment to the United States Constitution. *See Wooley v. United States*, 697 A.2d 777, 784 (D.C. 1997); *Robinson v. United States*, 697 A.2d 787 (D.C. 1997).

3. Attempt Cases and Cases Where the Government Does Not Call the Drug Chemist

The Court of Appeals' decision in *Thomas v. United States*, 914 A.2d 1 (2006), requires the government to call the drug chemist – a mandate with which the government often cannot comply.[41] Counsel thus must be aware of issues that often arise in cases where the government goes forward absent the testimony of a chemist. *Thomas* also has made an in-depth understanding of the law of attempt critically important to counsel's ability to defend successfully a drug case, because when the government cannot obtain the in-court testimony of the chemist who tested the drugs it often will proceed on a theory of attempted possession.

In order to prove attempted possession of a controlled substance, "the government must establish conduct by the defendant that is reasonably adapted to the accomplishment of the crime of possession of the proscribed substance" and that the defendant intended to possess the substance. *See Seeney v. United States*, 563 A.2d 1081, 1082 (D.C. 1989). In order to prove attempted

[41] In *Thomas v. United States*, 914 A.2d 1 (2006), the Court of Appeals concluded that "DEA-7 reports," reports that Drug Enforcement Agency chemists prepare to show that the at-issue material is a controlled substance, are "testimonial" evidence under *Crawford v. Washington*, 541 U.S. 36 (2004), and that admission of a DEA-7 report without the testimony of the chemist who prepared it violates the Confrontation Clause of the Sixth Amendment.

possession with the intent to distribute a controlled substance, the government must additionally prove that the defendant had the intent to distribute the substance. *See Thompson v. United States*, 678 A.2d 24, 27 (D.C. 1996). However, the government need not prove that the material the defendant possessed *actually* was a controlled substance. *See Fields v. United States*, 952 A.2d 859, 864 (D.C. 2008); *see also Seeney*, 563 A.2d at 1083 ("[I]n order to prove the *completed* crime of illegal possession of a specified controlled substance, the government must prove that the substance possessed was, in fact, the controlled substance in question. . . . However, there is no such requirement when the charge is an attempt.").

Nonetheless, the government needs to prove that the defendant intended to possess the controlled substance alleged in the indictment, information, or petition.[42] For example, it is not a defense to a charge of attempted possession of marijuana that the substance at issue actually is oregano. But, the government must prove that the defendant had the actual intent to possess marijuana. A showing of intent to possess oregano, or for that matter some controlled substance other than marijuana, would not support a conviction for attempted possession of marijuana. *See Washington v. United States*, 965 A.2d 35, 44 (D.C. 2009) ("The *mens rea* element of the attempt offenses required the government to prove that appellant intended to possess and distribute a controlled substance; in other words, that appellant *believed* he was selling drugs rather than something else.").

Thus, in *Fields* the Court of Appeals reasoned that the unconstitutional admission of a chemist's report was not harmless error as to attempted possession because the report eliminated the possibility that the green leafy material was a "different illegal substance." *Fields*, 952 A.2d at 868. The court also explicitly referred to the intent element of attempted possession of marijuana as the intent to possess marijuana: "In this case, the necessary element is the *intent to possess marijuana*." *Id*. at 867 (emphasis added).

Furthermore, if the court allowed a conviction in an attempted possession of marijuana case where the government alleged marijuana, but where the government showed that the defendant intended to possess some other controlled substance, such as PCP-laced oregano, it would work a constructive amendment of the charging document in derogation of the Fifth Amendment to the United States Constitution. *See Wooley v. United States*, 697 A.2d 777 (D.C. 1997).[43]

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[42] In *Digsby v. United States*, __ A.2d __, No. 06-CF-1585 (D.C. Oct. 1, 2009), the court stated that it is "unclear whether the [UCSA] . . . permits the government to charge an offense without specifying the identity of the controlled substance in question." The *Digsby* court did not answer the question. Judge Farrell's concurring opinion in *Wooley v. United States*, 697 A.2d 777 (D.C. 1997), provides excellent fodder for the argument that the UCSA does not permit an indictment, information, or petition that charges the defendant simply with possessing a "controlled substance."

[43] Judge Farrell also noted in his concurrence in *Wooley* the distinct legal significance of charging a defendant with possession of a particular controlled substance:

> When a grand jury indicting for possession or distribution specifies one form of controlled substance rather than another, that specification has distinct legal significance, both conceptually and often practically. Controlled substances are classified by Schedule (I through V) based upon judgments the Executive Branch has made as to their relevant potential for abuse and physical or psychological dependence, and their accepted medical use (if any) in treatment. So when a grand jury charges, as in this case, possession of "heroin, a Schedule I narcotic controlled substance," it is saying something very different about the seriousness of the behavior than if it had charged

In cases where the government cannot produce the chemist it often will seek to introduce evidence of any field tests conducted on the at-issue substance. A positive field test alone does not support a beyond a reasonable doubt finding that the material is a controlled substance. *See Callaham v. United States*, 937 A.2d 141, 147 (D.C. 2007). **Counsel also should consider filing *Frye*[44] challenges to the science underlying field tests and thereby require the government to prove that the science is generally accepted in the relevant scientific community.**

PRACTICE TIP:

Absent expert qualification and notice under Super. Ct. Crim. R. 16, counsel should object to the government seeking to adduce the results of a field test through the testimony of a police officer. The results and interpretation of a field test involves complex issues of chemistry and botany, areas on which a court should not permit a lay witness to offer an opinion.

Finally, counsel should argue in summation that the absence of scientific proof as to the nature of the at-issue substance is a reason to doubt the government's case in cases where the chemist does not testify. *See generally Wheeler v. United States*, 930 A.2d 232, 238 (D.C. 2007) ("[T]he defense is always free to comment on the absence of evidence in arguing to the jury that the government has not met its burden to prove guilt beyond a reasonable doubt.") (citing *Greer v. United States*, 697 A.2d 1207 (D.C. 1997)). As the Court of Appeals noted in *Washington*:

> [A]ppellant's counsel could have argued forcefully that the government had not met its high burden of proof as to appellant's intent to possess and distribute a controlled substance when it had not even shown what the ziplock bags contained. This might have been a difficult argument to counter, for the prosecutor would have been unable . . . to explain the conspicuous gap in the government's proof. The unanswered questions might have loomed large in the jury's deliberations.

Washington, 965 A.2d at 44; *see also Doreus v. United States*, 964 A.2d 154, 162 (D.C. 2009) (Glickman, J., concurring).[45]

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possession of, say, a Schedule III or V controlled substance, the latter each having (among other things) "a low potential for abuse relative to" substances in higher schedules.

697 A.2d at 786-87 (Farrell, J., concurring) (citations omitted).

[44] *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

[45] This is *not* a missing evidence argument. A missing evidence/witness argument is one in which counsel explicitly asks the fact-finder to infer that the evidence or testimony that the opposing party failed to present would have been unfavorable to that party. *See Harris v. United States*, 602 A.2d 154, 160 (D.C. 1992) (en banc). A missing witness argument would consist of arguing that the fact-finder should infer that because the government failed to call the chemist the fact-finder should infer that the chemist would have testified that the substance at issue was not a controlled substance. Before making a missing evidence/witness argument counsel must show that the evidence or witness "is peculiarly available" to the opposing party and that the evidence or witness "would have elucidated" a matter relevant to a disputed issue in the case. *See Lawson v. United States*, 514 A.2d 787, 789 (D.C. 1986).

B. Defense Strategy

1. Police Reports

Successful preparation and defense of any drug case often depends on careful scrutiny of all police reports. Inconsistencies among these reports can provide a reasonable doubt in cases where the police are the only witnesses.

The PD 251 (INCIDENT REPORT). Historically, the Metropolitan Police Department prepared a PD 251, which is available as a public record, in every MPD case. Recently, the MPD has been using the "Incident-Based Event Report" in place of the PD 251. In either event, such preliminary documents give very little information in most drug cases but will, on rare occasions, record the name of an undercover officer, a physical description of the "suspect" (based on observation of either the perpetrator of the crime or the defendant at arrest), or a brief account of the transaction. The defense may exploit the MPD's failure to note the description of "suspects" whom the MPD did not arrest. Because all this information in drug cases comes from the police, who have a business duty to provide it, the defense can introduce the form as a business record. *See United States v. Smith*, 521 F.2d 957 (D.C. Cir. 1975).

The **PD 163 (ARREST REPORT)** is used in all MPD arrests of adults; the juvenile equivalent is the PD 379. The front and top portion of the back contain certain biographical information on witnesses and the defendant respectively. The lower portion of the back contains a narrative about the offense and the arrest; it often is copied on a blank piece of paper, sworn to, and used as the *Gerstein* proffer. Counsel should get both the report and the *Gerstein* where it exists, for they are often signed by different officers and thus can both be used for impeachment. The PD 163 usually has the most complete account of the transaction. The chain of custody for drugs and money seized is often recorded here, allowing counsel to reconstruct the roles of the officers involved. According to MPD General Order Series 601, No.1, the property control number and the laboratory control number(s) *must* be included in the narrative section of the PD 163 as well.

The **PD 81 (PROPERTY REPORT)** records the location from and manner in which the police recover any physical evidence. A separate report is generally prepared for each type of property recovered, e.g., drugs, money or weapons. According to MPD General Order Series 601, No.1, the laboratory control number shall be listed in item number 7 on the original PD 81; failure to do so may assist counsel in calling the chain of custody into question.

The **PD 95** is attached to the heat-seal envelope in which drugs are kept after the police seized them. Among other things, it specifies the exact location where the police seized the alleged drugs. The PD 95, as well as the seized drugs and their packaging, are available for inspection. During discovery in every drug case, counsel should request a "viewing letter" giving counsel and/or a defense investigator permission to view this evidence.

Counsel need not make such a showing before simply pointing out the absence of corroborating evidence in arguing the burden of proof.

The **UNDERCOVER OFFICER'S REPORT ("BUY REPORT")** is used by officers in observation posts and officers making purchases. It is designed and *appears* to be used to record the descriptions of those involved immediately after the transaction; this appearance is deceptive, however, because it is often completed after an arrest. Thus, part of the description may be written during the observation, while other features are filled in by the arresting officer hours later.

The **PD 127 (CONFIDENTIAL EXPENDITURE SHEET)** lists the time, place, and amounts expended for narcotics. Some of the same information can be found in the PD 129, PD 152, and the expenditure log. Counsel also should consult MPD General Order Series 304, No. 5, relating to the confidential fund.

The **PD 58 (PRISONER PROPERTY RECEIPT)** records the property found on the defendant, usually other than that which is seized. This information is useful when counsel is trying to prove that the defendant had little or no money on his person at the time of the arrest.

2. The Drug Analysis

In order to prove any drug charge other than "attempt," the government must demonstrate, beyond a reasonable doubt, that the substance seized from the defendant is a controlled substance. Historically, the government typically proved that the material was a controlled substance through the introduction of a chemist's report, although sometimes the government did so through the testimony of a chemist in its case-in-chief.

Perhaps because few attorneys have an extensive background in the sciences, this element of the prosecution's case is seldom challenged. Attacking the drug analysis, however, has been a successful strategy for many defense attorneys who have prevailed by doing basic research and conducting adequate discovery. Defense counsel never should concede the adequacy of the government's drug analysis as a matter of course.

D.C. Code § 48-905.06 states that the government may introduce an official report of the chain of custody and a chemist's analysis of the controlled substance (the DEA-7 form) *in lieu* of the chemist testifying at trial. In *Thomas v. United States*, 914 A.2d 1 (2006), the Court of Appeals concluded that a DEA-7 report is "testimonial" evidence under *Crawford v. Washington*, 541 U.S. 36 (2004), and that admission of a DEA-7 report into evidence without the testimony of the chemist who prepared it violates the Confrontation Clause of the Sixth Amendment. *Thomas*, 914 A.2d at 19. In *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009), the Supreme Court affirmed the holding of *Thomas*. *See Melendez-Diaz*, 129 S. Ct. at 2532 ("[T]he analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment."). As a result, the chemist herself *must* testify at trial unless the government can both show that the chemist is unavailable and that the defendant had the prior opportunity to cross-examine her. *See Melendez-Diaz*, 129 S. Ct. at 2532 ("Absent a showing that the analysts were unavailable to testify at trial *and* that petitioner had a prior opportunity to cross-examine them, petitioner was entitled to 'be confronted with' the analysts at trial."); *Thomas*, 914 A.2d at 15 ("[T]he Confrontation Clause barred the prosecution from introducing the report at

appellant's trial without calling the chemist to testify in person, unless the chemist was unavailable and appellant had a prior opportunity to cross-examine the chemist.").[46]

In *Thomas*, the court held that a defendant may waive his confrontation right with respect to a chemist. "For the waiver to be valid, however, it must be 'an intentional relinquishment or abandonment of a known right or privilege.'" 914 A.2d at 19 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). The court stated that if the government provided a defendant represented by counsel with the chemist's report and advised her that a failure to request the chemist's presence for purposes of confrontation will be understood as a waiver of the right, "a trial court would be justified in inferring a valid waiver from an unexplained or unexcused failure by the defendant to respond." 914 A.2d at 19. With a valid waiver, D.C. Code § 48-905.06 "authorizes the government to introduce the chemist's report in evidence without calling the chemist to testify." 914 A.2d at 20. In contrast, where the government does not advise the defendant as to the consequences of not requesting the live testimony of the chemist, or where the defendant expressly demands the chemist's presence, the government must present the chemist in its case-in-chief.

PRACTICE TIP:

Counsel should invoke her client's right to confrontation from the inception of the case. In her initial discovery requests and letters under *Rosser v. United States*, 381 A.2d 598 (D.C. 1977), counsel should invoke the defendant's rights under *Melendez-Diaz* and *Thomas* and expressly assert the defendant's right to confront the chemist. If after investigation and considered reflection counsel ultimately concludes that the in-court testimony of the chemist would harm her client's case, counsel then can inform the government that she wishes to waive her client's right to confront the chemist. However, counsel should approach a drug case with the assumption that the defense will invoke the right of confrontation with respect to the chemist.

Counsel should make the decision to waive the presence of the chemist at trial only after careful deliberation. At a bare minimum, counsel should subpoena and examine the *curriculum vitae* of the chemist, as well as all notes, memoranda, records and reports relating to the chain of custody, testing, storage and handling of the material in question. In addition, counsel should require

[46] *See also Duvall v. United States*, 975 A.2d 839, 843 (D.C. 2009) ("[A]dmitting the DEA-7 in the present case without the in-court testimony of the preparing chemist violated Duvall's rights under the Confrontation Clause of the Sixth Amendment."); *Smith v. United States*, 966 A.2d 367, 390 (D.C. 2009) ("We held in *Thomas v. United States*, 914 A.2d 1 (D.C. 2006), that a DEA-7 report constitutes 'testimonial' evidence, and that under *Crawford*, the government may use it against a criminal defendant only if the defendant either: (1) has the opportunity to cross examine the chemist who authored the report; or (2) has waived his Confrontation Clause right as to the chemist."); *Fields v. United States*, 952 A.2d 859, 861 (D.C. 2008) ("[A]dmission of the report into evidence without the presence of the chemist who prepared it violates the defendant's constitutional right to confrontation unless the defendant validly waives the chemist's presence at trial."); *Callaham v. United States*, 937 A.2d 141, 145 (D.C. 2007) ("[W]e conclude that the trial court erred in admitting the chemist's report without providing Callaham an opportunity to cross-examine the chemist.").

production of specific documents relating to the chain of custody and testing of the suspected controlled substance, such as the DEA-86, DEA-307 and DEA-12 forms, as well as the relevant portions of the Bound Ledger kept by the evidence custodian.[47]

Counsel may consider challenging the chemist's educational background, training, and experience. Many DEA chemists do not have college degrees in chemistry or biology and have no formal training beyond on-the-job training at the DEA. Counsel should, of course, be familiar with the particular chemist's background beforehand.

Counsel also should conduct discovery concerning the practices of the Drug Enforcement Agency's Mid-Atlantic Field Laboratory as they relate to the evidence in the defendant's case. Attached to every DEA-7 form is a "Report of Chain of Custody and Certification of Compliance," which affirms that the evidence was "properly analyzed" by "reliable analytical methods," and that the chain of custody was safeguarded while the substance was being analyzed. The defense should carefully scrutinize these claims, like any others the prosecution makes in its case-in-chief. DEA documents that either support or refute these assertions are "material to the preparation of the defense," and therefore should be subject to discovery under Super. Ct. Crim. R. 16.

Documents which relate to the "bases and reasons" for the government assertion that the suspected controlled substance was "properly analyzed" by "reliable analytical methods," and that the chain of custody was safeguarded, are relevant to the preparation of the defense and should be sought in the discovery process.[48] The DEA materials requested by the defendant

[47] According to the limited portions of the DEA memoranda and manuals which have been examined by defense attorneys to date, the DEA-86 is the chemist's worksheet, and contains a great deal of information which is not transferred to the DEA-7, such as the type of tests conducted and the time the evidence bag was opened. Other records and/or charts should be generated by the specific machines in use: the DEA-307 and the DEA-12 forms detail transfers of the evidence. Similarly, the Bound Ledger kept by the evidence custodian is supposed to contain an entry noting each time the evidence is moved within the laboratory.

[48] Discovery requests should include: (1) all reports, memoranda, and manuals on the maintenance, repair, and use of machines and instruments which were, or may have been, used to test the items seized in the defendant's case, that were generated or in use from the time the DEA Mid-Atlantic Field Laboratory received the evidence in the case to the time when the analysis was completed; (2) all reports, logs, and memoranda on the accuracy of machines and instruments which were, or may have been, used to test items seized in the defendant's case, that were generated or in use from the time the DEA Mid-Atlantic Field Laboratory received the evidence to the time when the analysis was completed; (3) all memoranda, notes, and reports relating to the handling, storage, chain of custody, and testing of items seized in the defendant's case; (4) all written protocols and procedures followed by DEA Mid-Atlantic chemists when handling and testing controlled substances, that were generated or in use from the time the DEA Mid-Atlantic Field Laboratory received the evidence in the defendant's case to the time when the analysis was completed; (5) all written protocols and procedures followed by DEA Mid-Atlantic chemists when handling and testing items seized in the defendant's case, that were generated or in use from the time the DEA Mid-Atlantic Field Laboratory received the evidence to the time when the analysis was completed; (6) all training manuals, training memoranda, and training reports relating to the chain of custody, handling, and storage of suspected controlled substances, that were generated or in use from the time the DEA Mid-Atlantic Field Laboratory received the evidence in the defendant's case to the time when the analysis was completed; (7) all training manuals, training memoranda, and training reports relating to the testing of items seized in the defendant's case issued to DEA chemists and personnel, that were generated or in use from the time the DEA Mid-Atlantic Field Laboratory received the evidence to the time when the analysis was completed; and (8) the *curriculum vitae* of all DEA chemists who handled and/or tested items seized in the defendant's case. *But see United States v. Curtis*, 755 A.2d 1011 (D.C. 2000) (case remanded for trial court to determine materiality of requested information to preparation of

effectively constitute the "basis and reasons" for the opinions of the expert witness the government must introduce through the DEA-7 form or the testimony of the chemist who performed the analysis.[49] Furthermore, any chemist may be hesitant to discuss a procedure she knows she has neglected to follow or one she believes is faulted. Only an informed defense counsel can guard against this risk. Overall, it would be difficult, if not impossible, to adequately cross-examine the chemist without adequate pre-trial discovery.

Finally, any assessment of the DEA's ability to analyze properly suspected controlled substances would be incomplete without knowledge of the DEA laboratory's physical plant. Therefore, in addition to DEA documents related to testing and chain of custody, counsel should consider requesting an opportunity to inspect the DEA Mid-Atlantic Laboratory. *See* Super. Ct. Crim. R. 16(a)(1)(C) ("Upon request of the defendant the prosecutor shall permit the defendant to inspect . . . buildings or places . . . which are within the possession, custody or control of the government, and which are material to the preparation of the defendant's defense.").

The government may contend that discovery requests relating to the DEA analysis are barred by Super. Ct. Crim. R. 16(a)(2), which prohibits disclosure of "reports, memoranda, or other internal documents made by the prosecutor or other government agent in connection with the investigation or prosecution of the case." However, the documents that the defense typically requests in drug cases concerning the analysis are not prepared "in connection with" the prosecution of a particular case and, in fact, often pre-date the prosecution of the case against the defendant. Rule 16(a)(2) was designed to protect "work product" produced in a given case; DEA laboratory documents are not likely to have been prepared by any attorney and, therefore, would not reveal trial strategy, legal research, or investigative work.

The government sometimes argues that DEA internal policy prohibits disclosure of material requested by the defense in discovery, due to the so-called *Touhy*[50] regulations. *See* 28 C.F.R. § 16.21 *et. seq*. However, *Touhy* does not extend to prosecutions brought by the United States, *id*. at 467, and the subpart of the Code of Federal Regulation which the government regularly cites does not mandate nondisclosure, but instead is "intended only to provide guidance." 28 C.F.R. § 16.21(d). Counsel should argue that the government has no legitimate interest in refusing to disclose discoverable material where no criminal investigation is impaired and no state secrets or names of confidential informants are revealed. *See* 28 C.F.R. § 16.26(b). In a criminal case where liberty interests are at stake, the court should prevent the government from introducing any evidence relating to material that it elects to withhold. *See United States v. Andolschek*, 142

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defense under Rule 16 (a)(1)(C); and materials sought not discoverable under either Rule 16 (a)(1)(D) or Rule 16 (a)(1)(E)).

[49] The "bases" and "reasons" for the government assertion that the analysis of a suspected controlled substance is accurate will include results of tests conducted with extremely sophisticated, delicate machinery. Without reference to documents relating to the accuracy and maintenance of the machines used to conduct the analysis, counsel cannot effectively prepare to challenge the DEA analysis, or assist his or her client in making an informed decision *not* to challenge the analysis. Another underlying basis for the chemist's opinion that the substance seized from the defendant is a controlled substance is that the substance tested is the same as the substance seized from the defendant. Absent a reliable chain-of-custody by the DEA laboratory, the test results are irrelevant; documents relating to chain-of-custody procedures are therefore relevant to the preparation of the defense.

[50] *United States ex rel. Touhy v. Ragen*, 340 U.S. 462 (1951).

F.2d 503, 506 (2d Cir. 1944) (cited in *United States ex rel. Touhy v. Ragen*, 340 U.S. 462, 467 n.6 (1951)).

If the government argues that production of the material would be unduly burdensome, counsel should note that it is not difficult to retrieve documents that any competent laboratory should keep in the regular course of business, and which are available to inspectors, laboratory chemists, and quality control personnel. Nor are the defense requests a "fishing expedition," *see Cooper v. United States*, 353 A.2d 696, 701 (D.C. 1975), because the requests are as specific as possible given the reluctance of the laboratory to allow scrutiny of its procedures and relate to an element of the case that the government must prove. *See Clifford v. United States*, 532 A.2d 628, 635 (D.C. 1987) (stating that where parties do not enjoy the benefit of broad discovery, as here, "the courts should readily exercise the power to compel disclosure of the basis" of an expert opinion).

Finally, counsel should insist on strict compliance with the notice provisions of D.C. Code § 48-905.06. If the government does not provide the chemist's certificate at least five days before trial, counsel should object to its use. The defense should oppose any government request for a continuance based on late delivery of the certificate because the statute provides no exceptions to the timing requirements.[51]

In *Washington v. United States*, 965 A.2d 35 (D.C. 2009), the Court of Appeals reversed the defendant's conviction because the government failed to comply with the time requirements of D.C. Code § 48-905.06. The court reasoned that, in order to "enable the defendant to make an informed decision whether to waive the personal appearance of the chemist for cross examination, the statute requires the government to 'furnish[]' a copy of the reports to the defense 'no later than 5 days prior to trial.'" 965 A.2d at 39 (quoting D.C. Code § 48-905.06). It noted that the five-day notice period is subject to the time computation requirements of Super. Ct. Crim. R. 45, under which intermediate Saturdays, Sundays, and legal holidays are excluded. It concluded: "As appellant's trial began on February 10, 2005, the government therefore was obliged to mail the DEA-7 reports to his counsel no later than ten calendar days earlier, i.e., January 31, 2005." 965 A.2d at 39. The prosecution, however, had not provided the defense with the reports on or before that date. The court therefore held that the trial court erred in admitting the reports over the defendant's objection and reversed his convictions. *Id.* at 45.

3. The Drug Expert

In virtually every drug case heard before a jury, the government calls a "drug expert" – commonly a police officer who purports to be an expert in the methods of use and distribution of drugs. The testimony of these "experts" can be very damaging and is often filled with

[51] Weekends and holidays are excluded from computation of any time period of less than eleven days, and three days must be added where service is by mail. Super. Ct. Crim. R. 45(a), (e). In *Belton v. United States*, 580 A.2d 1289 (D.C. 1990), the government mailed the certificate eight days before trial, which was insufficient time because a weekend intervened; the court affirmed because the defendant failed to show prejudice from the untimely service. In *Johnson v. United States*, 596 A.2d 511 (D.C. 1991), the government sent the certificate to an attorney who no longer represented the defendant, and new counsel's request for additional time to review the certificate was denied; the conviction was reversed because the defendant was denied an opportunity to determine whether to call the DEA chemist.

prejudicial, nonprobative material. *See Jones v. United States*, 548 A.2d 35 (D.C. 1988). Counsel also should be watchful for the expert invading the province of the jury. *See, e.g.*, *Ford v. United States*, 533 A.2d 617 (D.C. 1987) (en banc); *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979). Counsel should explore ways of limiting the testimony, such as filing a motion *in limine* to block irrelevant evidence.

The defense also should request a written summary of the expert's opinions, the bases for those opinions, and the qualifications of the witness, pursuant to Super. Ct. Crim. R. 16(a)(1)(E).[52] Unfortunately, the written notice that the government serves on the defense is often extremely vague, noting general areas of possible inquiry instead of actual opinions, giving no bases for the expert opinion beyond the qualifications of the witness, and providing a list of several possible witnesses with background sketches instead of a particular expert with a full *curriculum vitae*. If the written notice that the defense receives in response to a Super. Ct. Crim. R. 16(a)(1)(E) request is not tailored to the expert testimony that the government actually intends to elicit, counsel should file a motion to compel proper notice and move to exclude the expert's testimony if that notice is not provided.

The Court of Appeals held in *Reed v. United States*, 828 A.2d 159 (D.C. 2003), that the government gave sufficient notice about a drug expert's qualifications by giving the defense a copy of the expert's *curriculum vitae*. In part because counsel had a copy of the *curriculum vitae* before *voir dire*, the court concluded that counsel could effectively prepare for the *voir dire* of the expert. *Id*. at 163. The defense apparently did not raise, and the Court of Appeals did not address, the sufficiency of pre-trial notice as to the substance of the expert's actual testimony, the bases for his opinions, or the expert's qualifications in terms of training.[53]

A common topic of expert testimony is the way the drug in question is used. In the past, the government has offered this highly graphic and often irrelevant testimony under the guise that the drug seized is a "usable amount" of the illegal substance. Because the government no longer needs to prove "usable amount," *Thomas v. United States*, 650 A.2d 183, 197 (D.C. 1994) (en banc), such testimony should be irrelevant or, if somehow relevant in a particular case, should be more prejudicial than probative.

The government also may call an expert to testify on the roles of "runners" and "holders," often to explain why one co-defendant may have possessed no physical evidence of sales, such as money or drugs. *See Owens v. United States*, 688 A.2d 399, 403 n.1 (D.C. 1996) (finding expert testimony that defendant was a "runner" aided jury's reasonable inference that both defendants worked together to sell drugs); *Thompson v. United States*, 678 A.2d 24, 28 (D.C. 1996) (holding

[52] "At the defendant's request, the government shall disclose to the defendant a written summary of the testimony of any expert witness that the government intends to use," including "the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications." Super. Ct. Crim. R. 16(a)(1)(E).

[53] In the typical boilerplate paragraph in discovery letters giving drug expert notice, the government gives no indication of how extensive any of the experts' training was (e.g., whether it was one lecture or an entire course), when it was undertaken, or whether the putative experts actually completed any degree or certification program of any sort. Similarly, though the government generally asserts that the experts "have trained and instructed others," the government typically provides no specifics as to when or to whom they provided this training.

that expert testimony that defendant acted as "runner" helped establish sufficiency of evidence of distribution).

The government's expert can sometimes be turned to the advantage of the defense. For example, if the defendant is found with a large sum of money but no drugs, the expert will testify that dealers hide their drugs in "stashes." Counsel can elicit that one reason for use of stashes is fear of robbery and that dealers also hide their money in stashes instead of carrying it. Much can be gained by watching "drug experts" testify in similar cases and consulting with other attorneys familiar with the particular expert or similar fact patterns.

Non-expert police officers may not testify to the "general practices" of narcotic traffickers and police officers in drug cases if the testimony is opinion evidence given by a witness who has not been qualified as an expert. *See Hill v. United States*, 541 A.2d 1285 (D.C. 1988). Judges have discretion to allow an officer who is a potential "fact" witness to give expert testimony. *Eason v. United States*, 704 A.2d 284 (D.C. 1997) (en banc) (overruling *Beach v. United States*, 466 A.2d 862 (D.C. 1983)). Counsel should argue that dual testimony of this type should not be permitted, however, as there is a very real danger that jurors will give the opinion of such an expert greater weight due to her credibility as a lay witness.

4. Measurable Amount

For all drug offenses committed after November 9, 1994, the government must establish beyond a reasonable doubt that the quantity of the alleged controlled substance was a "measurable amount." *Thomas v. United States*, 650 A.2d 183, 197 (D.C. 1994) (en banc) (overruling, with prospective application from the date of the opinion, cases that required proof of a "usable amount").[54] "[T]he term measurable is defined as capable of being measured or quantified." *Id.* at 197 n.48. The government no longer must prove the presence of a "usable" amount of the controlled substance, i.e., "an amount which can be used as a narcotic," *Edelin v. United States*, 227 A.2d 395, 397 (D.C. 1967), though if the government does establish such usability it will have met its burden, since "if a substance is usable it is also measurable." *Thomas*, 650 A.2d at 197 n.46.

The government typically establishes the presence of a measurable amount of a controlled substance through direct evidence, namely by presenting a chemist or a chemist's report to attest to the weight of the substance in question.[55] *See Price v. United States*, 746 A.2d 896, 899 (D.C. 2000). Nonetheless, the government also can prove measurability through circumstantial

[54] If an "attempt" is charged pursuant to D.C. Code § 48-904.09, the government need not prove that a measureable amount of an actual controlled substance is involved. *See Seeney v. United States*, 563 A.2d 1081 (D.C. 1989). The government in an attempt case does need to prove that the defendant intended to possess or distribute – depending on the allegations – the particular controlled substance at issue. *See Thompson v. United States*, 678 A.2d 24, 26-28 (D.C. 1996).

[55] To offer expert testimony the government must first comply with Super. Ct. Crim. R. 16. Under *Thomas v. United States*, 914 A.2d 1 (2006), the government cannot introduce the chemist's report without the in-court testimony of the preparing chemist unless the defendant has made a valid waiver of her rights under the Confrontation Clause of the Sixth Amendment.

evidence. *See Vest v. United States*, 905 A.2d 263, 268 (D.C. 2006). Regardless of whether it is direct or circumstantial, if the evidence merely establishes a *trace* of the controlled substance it is insufficient to sustain a conviction. *See Price*, 746 A.2d at 899.

Otts v. United States, 952 A.2d 156 (D.C. 2008), provides an example of the government proving a measurable amount through circumstantial evidence. There, the Court of Appeals concluded that there was sufficient evidence of a "measureable" amount of heroin to support the defendant's conviction for possession with the intent to distribute heroin despite the fact that the chemist's report indicated that the baggie at issue contained only a "trace" amount of heroin. Police officers testified at trial that, as they approached the defendant after observing him exchange another object for money with his co-defendant, they observed the defendant put a baggie in his mouth and "move his [A]dam's apple as if trying to swallow." 952 A.2d at 160. The police made the defendant spit out the baggie; when the defendant did so he stated "'there's nothing in there.'" *Id.* at 167. And, the defendant's observation was correct: the chemist's report indicated only a trace amount of heroin. The Court of Appeals nonetheless found sufficient circumstantial evidence of measurability. Specifically, it found: (1) that it was a reasonable assumption that a person under the circumstances would not have a baggie that did not contain a quantifiable amount of a controlled substance; (2) that because the baggie recovered from the co-defendant contained a measurable amount of heroin it was reasonable to assume that the at-issue baggie similarly contained a measurable amount prior to the defendant putting it in his mouth; and (3) that the defendant's statement "there's nothing in there" could lead a jury reasonably to conclude that immediately before the defendant placed the bag into his mouth and began to chew there had existed a measurable amount of heroin.

In *Hicks v. United States*, 697 A.2d 805 (D.C. 1997), the Court of Appeals held that it is sufficient for the government to prove a measurable amount of a *mixture* containing cocaine. Because a mixture of cocaine and a cutting agent is statutorily defined in D.C. Code § 48-902.06(1)(B) as a controlled substance in its own right, the government need not prove that the amount of cocaine in the mixture itself is measurable. With respect to other drugs, such as heroin, the government needs to prove a measurable amount of the controlled substance itself; merely proving a measurable amount of a *mixture* containing heroin and some uncontrolled substance is insufficient. *See Price*, 746 A.2d at 900 n.3 ("It is immaterial that the total amount of the quinine-heroin powder mixture was measurable. . . . Unlike mixtures containing cocaine, the combination of heroin and cutting agent is not itself a controlled substance.").

5. Entrapment

The entrapment defense requires sufficient evidence of government inducement of a crime and the defendant's lack of predisposition to commit the offense. *See Minor v. United States*, 623 A.2d 1182, 1187 (D.C. 1993) (finding the evidence insufficient to require entrapment instruction where government's evidence established that defendant initiated contact with undercover officer, sought out two different sellers, negotiated sales terms, received money from seller, and later approached officer regarding paraphernalia, and defense presented no evidence); *see also Jefferson v. United States*, 631 A.2d 13, 18-19 (D.C. 1993) (sufficient evidence of predisposition supporting jury's rejection of entrapment defense where defendant referred undercover officer to men selling drugs, offered to bring them to officer, and immediately did so).

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***Daniels v. United States*, 33 A.3d 324 (D.C. 2011).** No error in refusing to provide a jury instruction on entrapment after finding negligible inducement evidence and that the defendant was predisposed to engage in the conduct at issue.

C. Drug Court

Drug Court in D.C. Superior Court encompasses three separate programs all of which have different eligibility requirements, procedures, benefits, and downsides: (1) The Superior Court Drug Intervention Program (SCDIP); (2) New Directions; and (3) the Sanction-based Treatment Track (SBTT).

1. The Superior Court Drug Intervention Program (SCDIP)

The Superior Court Drug Intervention Program (SCDIP) was developed to provide drug treatment to defendants charged with non-violent misdemeanor and felony cases, or others deemed eligible by the United States Attorney's Office and the Drug Court judge.[56] Defendants can be referred to SCDIP by their defense attorney,[57] certified from C-10 after pre-trial screening or by a Superior Court judge. All drug court participants and their counsel are required to execute a drug court contract and attend orientation before they can be admitted into the program.[58]

In SCDIP, participants receive individual case management, drug testing, group therapy sessions, drug treatment (including outpatient, or residential as determined by assessment), educational and other social service referrals. The program is a four-phase program involving both treatment and sanctions. The four phases are: (1) Orientation and Assessment; (2) Stabilization and Cognitive Restructuring; (3) Transition; and (4) Maintenance. The program may be completed in a minimum of four months for misdemeanors and five months for felonies. Participants are required to drug test two times a week in the beginning of the program. If a participant tests

[56] Unless specifically allowed by the USAO and drug court judge, to be eligible for SCDIP defendants must:

- Not be currently charged with a violent misdemeanor or violent felony or any weapons offense;
- Have no more than one additional pending criminal case;
- Have no prior convictions for a violent offense for which the defendant was serving a sentence, or on probation, parole, or supervised release within the last 5 years;
- Not be charged with or have a pending charge that involves a victim;
- Have no prior convictions for a victim-involved crime for which the defendant was serving a sentence or on probation, parole, or supervised release within the last 5 years.

In addition, to be eligible, defendants must have an assessment or "ASI" done that indicates a need for treatment, in a combination with a positive drug test result on the day of arrest, or at their initial appearance, or after a random spot test, or have a history of three positive drug tests or substance abuse treatment in the past twelve months.

[57] A Superior Court Drug Intervention Program Attorney Referral Form is attached as Exhibit A at the end of this chapter.

[58] A sample drug court contract has been attached at the end of this chapter as Exhibit B, and a sample SCDIP release form which also details the program requirements is attached as Exhibit C.

positive for drugs, misses a drug test, misses a group meeting or meeting with his or her case worker, does not attend a sanction hearing,[59] does not submit a sample, or submits an insufficient or "bogus" sample,[60] the participant may be "sanctioned" or punished. Sanctions are graduated and are imposed as follows:

- 1st Sanction: Reorientation Session (the drug court participant has to report to 633 Indiana Avenue to have their case manager or another drug court representative explain to the program requirements again).

- 2nd Sanction: 2 Redirection Groups and Phase Freeze (the drug court participant has to attend two group therapy sessions from 5 to 7 pm at 633 Indiana Avenue and is not allowed to advance to the next Phase of the program.)

- 3rd Sanction: 2 Redirection Groups, 2 Days in the Jury Box (which requires the drug court participant to actually sit in the jury box of the drug court judge's court room between 9:30 am and 5 pm on two consecutive business days; individuals are required to sign notice to come to court on those days and risk being arrested and further sanctions if they do not appear), and Phase Freeze

- 4th Sanction: 3 nights in jail

- Additional Sanctions: 3 nights in jail

- Program Discharge (after repeated interventions and level 4 sanctions).

The program rewards participants after 16 consecutive negative drug tests by reducing drug testing to once a week, and after 20 consecutive negative tests reducing drug testing to random testing only. Monthly progression ceremonies are held every month in the drug court courtroom to recognize the participants that have progressed to the next treatment phase, and upon program completion a large commencement ceremony is held honoring successful participants.

Both felony and misdemeanor defendants can be in SCDIP, but they are treated somewhat differently. After successful completion of SCDIP, the charges against a misdemeanor defendant will be dismissed by the government whereas after successful completion of SCDIP, a defendant with a felony charge may be eligible for probation. A defendant charged with a felony is eligible both pre- and post-adjudication of his or her case. Pre-arraignment, the only felony cases eligible are distribution and possession with intent to distribute a controlled substance. Pre-trial and post-adjudication, drug court is available to defendants charged with possession with intent

[59] The drug court judge has the discretion to impose an additional 0 to 3 day jail sanction when a drug court client is brought to court on a bench warrant for failing to appear at a drug court sanction hearing. The severity of the ultimate sanction imposed will depend on the nature of the client's reason for not appearing.

[60] Drug court participants should be advised that a drug court representative will follow them into the restroom when they submit their urine sample and that the restrooms have mirrors that are strategically placed to prevent defendants from trying to tamper with their samples.

to distribute, distribution, theft, BRA, UUV, uttering, forgery, receiving stolen property, fraud, and escape/prison breach.

2. New Directions

Drug-involved defendants with felony and misdemeanor charges who do not otherwise qualify for drug court may be eligible[61] for placement in New Directions.[62] Placement into New Directions is accomplished by the pre-trials services officer with notice to the court or recommendation to the court to amend the defendant's release order. Like SCDIP, participants then receive individual case management, drug testing, group therapy sessions, drug treatment (including outpatient, or residential as determined by assessment), educational and other social service referrals. New Directions also rewards participants after 16 consecutive negative drug tests by reducing drug testing to once a week, and after 20 consecutive negative tests reducing drug testing to random testing only. Monthly progression ceremonies are held every month in the drug court courtroom to recognize the participants that have progressed to the next treatment phase, and upon program completion a large commencement ceremony is held honoring successful participants.

Graduated sanctions are also imposed in New Directions like SCDIP but they are a bit different and notably do not include incarceration:

- 1st Sanction: Reorientation session;
- 2nd Sanction: 2 Redirection Groups;
- 3rd Sanction: Phase Freeze;
- 4th Sanction: Program Discharge.

3. The Sanction-based Treatment Track (SBTT)

Drug-involved defendants who are ineligible for SCDIP or New Directions, or cannot be treated by either program for various reasons, may be placed in SBTT. Services and supervision, as well as program sanctions and certain incentives are commensurate with those of SCDIP except there are no exclusionary criteria. SBTT is like a catch-all program which attempts to provide the opportunity for drug treatment for ordinarily ineligible defendants. The specialized nature of this program and its case by case approach to different defendants precludes any more extended

[61] The eligibility criteria for placement in New Directions is: A current substance abuse assessment indicating a need for treatment; and Positive drug test at lockup; initial appearance, or after a random spot test; or at least 3 positive drug tests within 12 months; or verified history of drug treatment within 12 months; and no outstanding or extraditable warrants or detainers; and not currently participating in a methadone maintenance program; and must be placed prior to conviction.

[62] Generally, SCDIP is considered by judges in Superior Court as the first option for defendants who are eligible.

description here. Counsel should contact the drug court representatives to see if SBTT is an option for clients that are ineligible for SCDIP or New Directions.

4. Drug Court Practice Pointers (SCDIP, New Directions, and SBTT)

Lawyers practicing in drug court must advocate as zealously as they would for a client in a normal criminal case by familiarizing themselves with the different drug court programs rules, procedures, sanctions, and particularities, and by effectively and persuasively arguing for each individual drug court defendant's right to a fair hearing, the least punitive sanction, and a result consistent with each client's expressed interests.[63]

When responding to an alleged drug court violation and in arguing for the least punitive sanction consistent with each respective client's wishes, a drug court lawyer should quickly ascertain how each individual client wants to respond to the alleged violation (the drug court judge will commonly allow drug court counsel enough time to talk with the client and ascertain how the client wants to respond to the alleged violation and requested sanction). Counsel must effectively assist each client with formulating and articulating the best possible response (e.g., outright denial, request for a challenge hearing,[64] concession with an excuse, and concession with no excuse, etc.) to an alleged drug court violation and request for sanction under the given circumstances.

[63] PDS has an attorney assigned the drug court room each day to stand-in for other PDS attorneys and CJA attorneys whose clients have been picked up on drug court bench warrants and/or placed on the drug court sanctions list the day before due to a positive drug test or other violation of the program rules. A summary of what occurs at the hearing is documented by the PDS drug court attorney on a form letter and left in each respective defense lawyer's file in the Defender Services' Office, on the C-level of the courthouse. *See* Exhibit D attached.

[64] Defendants who test positive for drugs can "challenge" the result by requesting the drug court judge to order that a more sophisticated test can be done on a particular defendant's urine sample.

CHAPTER 36

MOTION FOR JUDGMENT OF ACQUITTAL

Super. Ct. Crim. R. 29(a) authorizes a motion for judgment of acquittal (MJOA) "after the evidence on either side is closed."[1] In practice, the motion should be made at the end of the government's case and renewed after the close of all evidence. Counsel may also move for judgment of acquittal in a new trial motion filed within seven days after the verdict. Rule 29(c).[2]

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***Conley v. United States*, 79 A.3d 270 (D.C. 2013).** See, supra, Chapter 33.

I. THE LEGAL STANDARD

If the evidence would only permit the jury to speculate as to the defendant's guilt, the court must not allow the jury to act.

> [A] trial judge, in passing upon a motion for [judgment of] acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond reasonable doubt. . . . [I]f there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted.

Curley v. United States, 160 F.2d 229, 232-33 (D.C. Cir. 1947), *cert. denied*, 331 U.S. 837 (1947) (footnote omitted). *See Cooper v. United States*, 680 A.2d 1370, 1371 (D.C. 1996);

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[1] If the opening statement omits an element of the offense, counsel may move for a judgment of acquittal after the government's opening statement. In *Brooks v. United States*, 396 A.2d 200, 206 (D.C. 1978), the court stated that the standard is whether the omission in the government's opening "'prejudice[s] the defendant in making his defense'" (citation omitted). Although this is a difficult standard, it may be met if the opening omits an essential element. However, in *District of Columbia v. Whitley*, 640 A.2d 710 (D.C. 1994), the Court of Appeals raised – without deciding – the issue of whether a trial court has authority to enter an MJOA at the close of the government's opening statement. Stating that the parties had assumed that the trial court possessed this authority, the appellate court noted that Rule 29(a) provides for entry of judgment of acquittal "after the evidence on either side is closed." *Id*. at 712. Although recognizing that it had also assumed that an MJOA could be granted after the government's opening, *see Jackson v. United States*, 515 A.2d 1133, 1136 (D.C. 1986), the *Whitley* court observed that an "opening statement is not evidence." *Whitley*, 640 A.2d at 712 (citation omitted). The court further stated that "it is an open question whether the trial court, in either a jury or non-jury criminal trial, may grant a dismissal after the prosecutor's opening statement based on a failure to establish a *prima facie* case." *Id*. at 711-12.

[2] If the trial court should have granted a motion for judgment of acquittal, retrial is barred just as it would have been had the motion been granted. *Burks v. United States*, 437 U.S. 1 (1978). Judgments of acquittal are acquittals in substance and form, and for purposes of double jeopardy there is no distinction between subsections (a), (b), and (c) of Rule 29. *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977) (MJOA granted after deadlocked jury was discharged). The government may seek appellate review of a successful MJOA only if the motion is granted *after* a jury returns a guilty verdict, because reinstatement would not require retrial and thus would not run afoul of double jeopardy. *See also*, *Evans v. Michigan*, 133 S.Ct. 1069 (2013), *supra* Chapter 9.I.C.

Williams v. United States, 357 A.2d 865, 867 (D.C. 1976).[3] Thus, the MJOA "must be granted when the evidence, viewed in the light most favorable to the Government, is such that a reasonable juror must have a reasonable doubt as to the existence of any of the essential elements of the crime," *Austin v. United States*, 382 F.2d 129, 138 (D.C. Cir. 1967), *overruled in part*, *United States v. Foster*, 783 F.2d 1082 (D.C. Cir. 1986) (en banc), or as to the identification of the perpetrator, *see Peterson v. United States*, 657 A.2d 756, 760 (D.C. 1995), or where the government presents no evidence of an essential element, *see Bolan v. United States*, 587 A.2d 458, 459 (D.C. 1991) (conviction for attempted breaking and entering of parking meter reversed because "the government presented no evidence that appellant lacked authority to open the meter"); *Macklin v. United States*, 733 A.2d 962 (D.C. 1999) (BRA conviction reversed where government presented no evidence that appellant failed to appear for court date); *United States v. Applewhite*, 72 F.3d 140, 144 (D.C. Cir. 1995) (evidence that distance between the appellant's "address" and nearest school was 920.2 feet along the most direct pedestrian route was not enough to uphold conviction for possession with intent to distribute in school zone; reasonable jury could not infer point of possession was within 1000 feet of a school); *see also Perry v. United States*, 571 A.2d 1156, 1160 (D.C. 1990) (evidence must be "sufficient to enable reasonable jurors to reasonably infer [guilt]"); *United States v. Lumpkin*, 448 F.2d 1085, 1091 (D.C. Cir. 1971) (judge may only take case from jury when there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt); *Crawford v. United States*, 375 F.2d 332, 334 (D.C. Cir. 1967) (court must consider whether "the evidence was such that a reasonable mind might fairly have a reasonable doubt *or might not* have such doubt").[4]

When assessing a motion for judgment of acquittal, the court must assume the truth of the government's evidence and give the government the benefit of all legitimate inferences to be drawn from the evidence. *See Carter v. United States*, 591 A.2d 233, 234 (D.C. 1991); *Curry v. United States*, 520 A.2d 255, 263 (D.C. 1987); *Shelton v. United States*, 505 A.2d 767, 769 (D.C. 1986); *Franey v. United States*, 382 A.2d 1019, 1022 (D.C. 1978).[5] These inferences must be valid, however, and a guilty verdict cannot be based on mere speculation:

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[3] A conviction cannot be based on evidence so incredible or inconsistent that no reasonable mind could find guilt beyond a reasonable doubt. For example, proof of the rape charged in *Farrar v. United States*, 275 F.2d 868, 870 (D.C. Cir. 1959), depended primarily on the complainant's testimony. The complainant asserted that she submitted out of fear because the defendant continually held a knife to the back of her neck over a three-hour period which included the drinking of whiskey, both parties dressing and undressing, and two rounds of intercourse 45 minutes apart, but also testified that she never saw the knife. The appellate court found that evidence so incredible, inconsistent and speculative, that the government had not made out a case as a matter of law. *Id.*

[4] Although evidence that is so inconsistent that no reasonable mind could find guilt cannot be the basis of a guilty verdict, verdicts will not be disturbed "'merely because they are inconsistent.'" *Ransom v. United States*, 630 A.2d 170, 172 (D.C. 1993) (citation omitted). Ransom was convicted of possessing a firearm during a crime of violence (PFCV), but acquitted of assault with a dangerous weapon – the offense indicted as the predicate for PFCV. The Court held that it is "'without authority'" to set aside the inconsistent verdict "so long as there is evidence in the record to support a conviction of the compound offense." *Id.* Inconsistencies in a verdict without any clear basis to show that the jury was confused will not warrant a motion for judgment of acquittal. *See Smith v. United States*, 684 A.2d 307, 312 (D.C. 1996) (assault with a dangerous weapon and PFCV); *United States v. Dobyns*, 679 A.2d 487, 490 (D.C. 1996), *cert. denied*, 520 U.S. 1247 (1997) (kidnapping and PFCV).

[5] No distinction is drawn between circumstantial and direct evidence. *See, e.g., Shelton*, 505 A.2d at 769-71; *Wheeler v. United States*, 470 A.2d 761, 764-65 (D.C. 1983); *In re E.G.C.*, 373 A.2d 903 (D.C. 1977); *Chaconas v. United States*, 326 A.2d 792, 797 (D.C. 1974); *United States v. Harris*, 435 F.2d 74, 88-89 (D.C. Cir. 1970).

> [W]hile '[a] jury is entitled to draw a vast range of reasonable inferences from evidence, [it] may not base a verdict on mere speculation.' [*United States v. Long*, 905 F.2d 1572, 1576 (D.C. Cir. 1990).] '[T]he evidence is insufficient if, in order to convict, the jury is required to cross the bounds of permissible inference and enter the forbidden territory of conjecture and speculation.' [*Curry v. United States*, 520 A.2d 255, 263 (D.C. 1987).]

Rivas v. United States, 783 A.2d 125, 134 (D.C. 2001) (en banc).[6]

II. PRACTICE AND PROCEDURE

Motion for Judgment of Acquittal:

- ✓ Move for a judgment of acquittal at the close of the government's case in every trial.
- ✓ Broadly stated MJOA's are deemed sufficient to preserve the full range of challenges to sufficiency of evidence
- ✓ MJOA arguments and proof must be anticipated well before trial
  - Be thoroughly familiar with the statutes, jury instructions, and case law relating to each charge
  - Know the elements of each crime and what proof amounts to sufficient evidence for each element
- ✓ In a close or complicated case, consider submitting a written memorandum at the time of the MJOA (an overnight continuance should be requested to amend the memorandum as needed)

Superior Court Rule of Criminal Procedure 29 governs the practice of motions for judgment of acquittal in Superior Court. In every trial defense counsel should move for judgment of acquittal at the close of the government's case, and, if defense evidence is submitted, after the close of all evidence. To prevent prejudice to the defendant, counsel should not make the MJOA in the presence of the jury. It is standard practice for the judge to excuse the jury at the close of the government's case before the defense moves for judgment of acquittal; some judges call counsel to the bench to permit defense counsel to make the motion, but will generally excuse the jury if more lengthy discussion is required.

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[6] When considering an MJOA at the close of the government's case the court may not speculate on an anticipated affirmative defense. However, there is some support for the proposition that the court should consider an affirmative defense established in the government's own case, unless it is satisfactorily rebutted. For example, the defendant in *United States v. Bush*, 416 F.2d 823, 825-26 (D.C. Cir. 1969), *overruled on other grounds*, *United States v. Hinkle*, 487 F.2d 1205 (D.C. Cir. 1973), was charged with manslaughter based on a shooting in a bar. The government's own evidence showed that after a verbal altercation, the decedent advanced on the defendant, threatening him with a heavy bar stool. When the decedent got close, the defendant fired two shots into the floor. The decedent came toward the defendant faster, and the defendant shot him. *Id*. at 825. The government proffered no evidence to rebut the inference of self-defense. The court found that the first count should not have gone to the jury. *Id*. at 825-26.

Preserving challenges to the sufficiency of the evidence for appellate purposes is accomplished with a general MJOA. As the Court of Appeals noted in *Newby v. United States*, 797 A.2d 1233 (D.C. 2002), "the grounds for a motion pursuant to Rule 29 need not be stated with specificity, unless the prosecutor so requests." *Id.* at 1237 (quotations omitted). If defense counsel's MJOA is "broadly stated, without specific grounds, it is deemed sufficient to preserve the full range of challenges to the sufficiency of the evidence." *Id*. at 1238 (quotations omitted). In other words, if counsel simply says "I move for judgment of acquittal" or words to that effect, that is sufficient to preserve any claim on appeal regarding the sufficiency of evidence. If, however, counsel seeks to draw the trial court's attention to a deficiency in the government's proof with respect to a particular element or charge, counsel should indicate that the MJOA also goes to all elements of all the charges against the defendant. It is unclear whether the District of Columbia Court of Appeals would review for plain error a sufficiency claim on appeal when an MJOA was made on specific, and different, grounds at the trial level. *Id*. at 1238 n.3. *But see Davis v. United States*, 367 A.2d 1254, 1268-69 (D.C. 1976) (a claim regarding venue is reviewed for plain error where it was not included in the specific grounds raised in the defendant's motion for judgment of acquittal at the trial level, even though such an objection is preserved by a general MJOA).

In general, if the MJOA at the close of the government's case is denied, presentation of defense evidence waives appellate review of sufficiency based solely on the evidence in the government's case in chief. *See Zanders v. United States*, 678 A.2d 556, 563 (D.C. 1996); *In re A.B.H.*, 343 A.2d 573, 575 (D.C. 1975); *Wesley v. United States*, 233 A.2d 514, 516 (D.C. 1967); *Dickson v. United States*, 226 A.2d 364, 365-66 (D.C. 1967). Instead, the trial and appellate courts evaluate all the evidence presented by both sides. *See Hawthorne v. United States*, 476 A.2d 164, 168 n.10 (D.C. 1984); *Bedney v. United States*, 471 A.2d 1022, 1024 n.3 (D.C. 1984); *Clark v. United States*, 418 A.2d 1059, 1060 n.2 (D.C. 1980); *Franey v. United States*, 382 A.2d 1019, 1021-22 (D.C. 1978) (discussing waiver rule and its exceptions). It is important to note that putting on a defense case does not result in a waiver of sufficiency claims: the trial court and appellate court will simply consider all of evidence presented at trial rather than just evidence adduced in the government's case.[7]

There appear to be at least two exceptions to this general rule. The first is in multi-defendant cases where one defendant is forced to put on evidence in response to damaging evidence offered by a co-defendant. *Cephus v. United States*, 324 F.2d 893, 897 (D.C. Cir. 1963). Although *United States v. Foster*, 783 F.2d 1082, 1085 (D.C. Cir. 1986) (en banc), rejected *dictum* in *Cephus* criticizing the general waiver rule, the *Cephus* exception survives. Also, if one defendant does not introduce any evidence, evidence presented by a co-defendant may not be considered in determining sufficiency of the evidence against the first defendant. *Wesley v. United States*, 547 A.2d 1022, 1026 (D.C. 1988). *See, e.g., Guishard v. United States*, 669 A.2d 1306, 1312 (D.C. 1995) (noting that a defendant's introduction of evidence in response to a co-defendant's damaging testimony does not waive review of a MJOA made at the close of the government's case).

[7] Similarly, if the defense submits evidence during the government's case-in-chief, that evidence is considered by the court when it evaluates the MJOA.

Another exception to the waiver rule arguably may exist in first-degree murder cases. *See Austin v. United States*, 382 F.2d 129, 138 n.20 (D.C. Cir. 1967). This exception was rejected by the D.C. Circuit in *Foster*, but was acknowledged in *Franey v. United States*, 382 A.2d 1019, 1022 n.5 (D.C. 1977); as noted in *Frendak v. United States*, 408 A.2d 364, 370 n.7 (D.C. 1979), Austin remains binding under *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971). *Compare Watson v. United States*, 501 A.2d 791, 792 n.1 (D.C. 1985) ("Because this is a first-degree murder case, we consider only the evidence presented during the government's case-in-chief."), *with Hairston v. United States*, 497 A.2d 1097, 1104 n.12 (D.C. 1985) (ignoring *Austin* rule and considering all evidence adduced in first-degree murder case).

The possible waiver of a right to appeal denial of an MJOA based on the evidence presented in the government's case-in-chief alone becomes significant only if defense evidence or government rebuttal evidence fills in gaps in the government's case. For example, the respondent's testimony in *In re A.B.H.*, 343 A.2d 573 (D.C. 1975), put him in the co-respondent's company, and established that the co-respondent could not have snatched the purse without A.B.H.'s knowledge. In these situations, the defense must make a strategic decision as to whether the possibility of appellate reversal on the first MJOA is good enough to justify not presenting evidence.

If the defense evidence in no way contributes to the government's case, as, for example, with most alibi defenses, presenting it creates no potential waiver problems. However, counsel should renew the MJOA at the close of all the evidence to insure that sufficiency of the evidence issue is fully preserved for appellate purposes. *Compare Washington v. United States*, 475 A.2d 1127 (D.C. 1984) (court reviewed sufficiency of the evidence although MJOA not renewed), *with Foster*, 783 F.2d at 1086 (noting split of authority among circuit courts).

Ordinarily, the trial court decides an MJOA at the close of the government's case before the defense begins to present its case. If the court reserves ruling on the motion until jury deliberations have begun or until after return of a guilty verdict, the court must decide the motion on the basis of the evidence at the time the ruling was reserved. Super. Ct. Crim. R. 29(b). An MJOA may be made or renewed within seven days after a jury is discharged or has reached a verdict (or within any other period authorized by the court during the seven-day period) even if it was not made before submission of the case to the jury. Super. Ct. Crim. R. 29 (c).[8]

The court may permit the government to reopen its case to cure a defect raised in the MJOA, unless the defense can claim surprise, a lack of opportunity to defend against the new evidence, or prejudice due to the order in which evidence was introduced. *See In re E.R.E.*, 523 A.2d 998, 999-1000 (D.C. 1987) (government allowed to reopen case to prove date alleged in petition, where all its previous evidence had pertained to incorrect date; rejecting double jeopardy claim, because no final judgment had yet occurred); *see also United States v. Webb*, 533 F.2d 391, 395 (8th Cir. 1976) (government allowed to reopen to prove operability of weapon); *United States v. Robinson*, 698 F.2d 448, 455-56 (D.C. Cir. 1983) (government allowed to reopen to prove value of stolen goods). These cases reached the appellate courts because the trial courts exercised their

[8] *Carlisle v. United States*, 517 U.S. 416 (1996), held that a federal district court lacks the jurisdiction to enter a judgment of acquittal *sua sponte* after the case has been submitted to the jury or upon an untimely post-verdict motion.

discretion in the government's favor; obviously, the many cases in which trial courts are persuaded not to do so are not reported.

MJOA arguments and proof must be anticipated well before trial. Counsel must be thoroughly familiar with the statutes, jury instructions, and case law relating to each charge. It is essential that counsel know the elements of each crime, and what proof amounts to sufficient evidence for each element. For a quick reference, the comments to the standard jury instructions usually refer to the major cases, from which it is relatively easy to find more recent decisions.

In a close or complicated case, counsel should consider submitting a written memorandum at the time of the MJOA. If revision is necessary in light of the evidence presented, an overnight continuance should be requested to amend the memorandum as needed.

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***Evans v. Michigan*, 133 S. Ct. 1069 (2013).** See, supra, Chapter 9.I.C.

III. COMMON MJOA ISSUES

The following is a collection of common MJOA issues. It is not an exhaustive list of such issues and, in any given case, counsel will have sufficiency arguments that are not listed here. As noted above, preparation for MJOA should begin before trial with a thorough review of the relevant statutes, jury instructions, and case law. The following discussion of some common issues may be used as a brief overview, but should never be the only source consulted.

A. Theories of Liability

1. Aiding and Abetting

To establish that a defendant is guilty of a crime under an aiding and abetting theory of liability, the government must prove that he knowingly associated himself in some way with the commission of the crime, he participated in the crime as something he wished to bring about, there was some affirmative conduct by the defendant in either planning or carrying out the crime, and the defendant had the *mens rea* required for the charged offense. *See Criminal Jury Instructions for the District of Columbia*, No. 3.200 (5th ed. 2009).

Intent

The District of Columbia Court of Appeals opinion in *Wilson-Bey v. United States*, 903 A.2d 818, 822 (D.C. 2006) (en banc), concluded that the government must show that an aider and abettor possessed the mental state necessary to convict a principal of the ultimate crime, and not just that the aider and abettor intended to aid in the commission of *some* offense that might foreseeably lead to the ultimate crime. 903 A.2d at 838-39. Rather, where a specific *mens rea* is an element of a criminal offense, a defendant must have had that *mens rea* himself to be guilty of that offense, regardless of whether he is charged as a principal or aider and abettor. *Id.* at 839. While the appellants in *Wilson-Bey* were charged with first-degree murder, the Court of Appeals

subsequently recognized that the rationale of *Wilson-Bey* applies to all crimes requiring proof of a "specific *mens rea*":

> [*Wilson-Bey*'s] reasoning and holding apply to other aiding and abetting situations in which an accomplice is charged with an offense requiring proof of a specific intent. In all such situations, the rule is exactly the same: where a specific *mens rea* is an element of a criminal offense, a defendant must have had that *mens rea* himself to be guilty of that offense, whether he is charged as the principal or as an aider and abettor.

Kitt v. United States, 904 A.2d 348, 356 (D.C. 2006); *see also Coleman v. United States*, 948 A.2d 534, 553 (D.C. 2008) ("Although conviction for second-degree murder does not necessarily require proof of an 'intent to kill,' and may be based on proof of a 'conscious disregard of an extreme risk of death or serious bodily injury,' … a conviction for second-degree murder cannot stand on the basis that the defendant was merely negligent. As we made clear in *Wilson-Bey*, 'a natural and probable consequences rule imposes liability on an accomplice for the crime committed by the principal on the basis of the accomplice's negligence.'") *Wilson-Bey*, *Kitt*, and *Coleman* make clear that the government must prove that the aider and abettor had the *mens rea* required for the charged offense, and not anything less.

Affirmative Conduct

Affirmative conduct by the aider and abettor is required. *See Criminal Jury Instruction* No. 3.200 ("Some affirmative conduct by the defendant in planning or carrying out the crime is necessary. Mere physical presence by the defendant that the place and time the crime is committed is not by itself sufficient to establish her/his guilt. [H]owever, mere physical presence is enough if it is intended to help in the commission of the crime.").

In *Bailey v. United States*, 416 F.2d 1110, 1113-14 (D.C. Cir. 1969), the government's evidence showed the accused's presence at the scene of the robbery, slight prior association with the actual perpetrator, and flight from the vicinity of the robbery. The appellate court found the evidence insufficient to sustain a guilty verdict under an aiding and abetting theory of liability. *See also Jones v. United States*, 625 A.2d 281, 289 (D.C. 1993) (fact that defendant talked with principal, then brushed by victim several minutes before attack, was not sufficient basis for inference that defendant distracted victim in order to facilitate assault).

Relying on *Bailey*, the court held in *Quarles v. United States*, 308 A.2d 773, 774-75 (D.C. 1973), that evidence that Quarles pushed a pickpocket victim back against the actual pickpocket, was insufficient even in light of expert testimony on the *modus operandi* of pickpockets working in pairs. In *In re R.A.B.*, 399 A.2d 81, 83 (D.C. 1979), the respondent was seen 100 to 150 feet from a department store that was being burglarized, fled the area with four or five others, admitted that he went to the store with other persons; and was present on the first floor just before the announced closing time. The court held this evidence insufficient because the government was unable to show that his presence facilitated the crime or that his flight was related to the burglary.

Likewise *In re L.A.V.*, 578 A.2d 708, 710 (D.C. 1990), found mere presence insufficient, although the respondent knew of the criminal activity. Police observed Dunn and L.A.V. in a jeep. When the officers followed the jeep, L.A.V. pulled over, and the two youths began to walk away, turning to look at the officers and then speaking to one another. Dunn placed an object on the ground as L.A.V. watched. The young men then walked away, picked up their pace when summoned by the officers, but stopped when again ordered to do so. The officers retrieved the object -- a pistol -- from the ground. Despite his obvious knowledge of the pistol, "there was insufficient evidence for the fact finder to infer that L.A.V. was in a position or had the right to exercise dominion and control over the gun." *Id*. The court also found insufficient evidence in *Acker v. United States*, 618 A.2d 688, 690 (D.C. 1992), in which the conviction was based on mere presence at the scene of a robbery of a gold chain, taken by someone else. Although the defendant witnessed the robbery and knew the complainant from high school, he had no obligation to rescue the complainant. *Id*. *But see Carter v. United States*, 957 A.2d 9 (D.C. 2008) (totality of evidence sufficient to support co-defendant's conviction for aiding and abetting assault with intent to rob while armed where evidence demonstrated that he had been waiting near site of attempted robbery, drove getaway car with gun in plain view, tried to elude police when being chased both by car and on foot, and owned gun used in assault.); *Bolanos v. United States*, 938 A.2d 672 (D.C. 2007) (evidence sufficient to convict defendant on assault with a dangerous weapon as an aider and abettor where defendant was present when victim was attacked in stabbing incident, and where defendant initiated confrontation leading to stabbing, was first to draw his knife, and failed to withdraw from conflict prior to assault taking place).

In *Lancaster v. United States*, 975 A.2d 168 (D.C. 2009), the court found insufficient evidence to sustain a conviction for possession of a firearm during a crime of violence under an aiding and abetting theory where the defendant had aided and abetted a robbery by luring the victim into the apartment, and left when the robbers told her to, but there was no evidence that she had done "anything at all to aid in the possession of a firearm by any of the robbers."

The Principal

The government must also prove, of course, that someone – the principal – committed all the elements of the substantive offense. *See Jefferson v. United States*, 558 A.2d 298, 303-04 (D.C. 1989) (where government failed to introduce evidence that the only co-defendant with operable gun did not have license, trial court should have granted an MJOA as to CPWL).[9] The government is not required to prove the identity of the principal, except to the extent that the principal is someone other than the defendant. *Johnson v. United States*, 980 A.2d 1174, 1181 (D.C. 2009); s*ee also Russell v. United States*, 701 A.2d 1093, 1099-100 (D.C. 1997) (conviction of aiding and abetting reversed where there was insufficient evidence as to existence of a principal). Co-defendants need not be convicted of identical offenses. One may be convicted as an aider and abettor for a lesser-included offense even if the principal is convicted of a greater offense. *See Mayfield v. United States*, 659 A.2d 1249, 1254-55 (D.C. 1995); *Branch v. United States*, 382 A.2d 1033 (D.C. 1978).

[9] If the principal is acquitted in a separate trial, the government can still proceed against an accomplice. *See Standefer v. United States*, 447 U.S. 10 (1980). The principal actor need not be identified. *See Felder v. United States*, 595 A.2d 974 (D.C. 1991); *Gayden v. United States*, 584 A.2d 578, 582 (D.C. 1990); *Wright v. United States*, 508 A.2d 915, 918 (D.C. 1986); *see also United States v. Staten*, 581 F.2d 878, 887 (D.C. Cir. 1978).

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***Castillo-Campos v. United States*, 987 A.2d 476 (D.C. 2010).** Evidence sufficient to convict defendant of second-degree murder either as aider and abettor or as co-conspirator where, even though weapon defendant carried malfunctioned and would not fire, defendant "encouraged and facilitated" commission of murder by a fellow gang member by joining in the attempt to shoot.

***English v. United States*, 25 A.3d 46 (D.C. 2011).** Evidence insufficient to support conviction of motor vehicle passenger for reckless flight from law enforcement officer under aiding and abetting theory where evidence that operator of motor vehicle sped at 95 miles per hour and that passenger fled on foot once car had stopped did not provide proof that passenger took any concrete action in assisting operator to escape from police.

***Fox v. United States*, 11 A.3d 1282 (D.C. 2011).** Evidence sufficient to support conviction for armed robbery under aiding and abetting theory where defendant had actual knowledge that crime would be committed while armed even though defendant himself did not carry firearm during commission of offense.

Evidence insufficient to establish aiding and abetting PFCV where defendant himself did not carry firearm during commission of crime of violence (armed robbery) and took no affirmative steps to aid co-defendants in *their* possession of firearms in that he did not provide the weapons, prevent victims from seizing the weapons or do anything to assist in the use of the weapons.

Wilson-Bey did not overrule principle that individual is guilty of aiding and abetting an armed robbery if he aids and abets robbery and knows or has reason to know that principal will be armed.

***Kaliku v. United States*, 994 A.2d 765 (D.C. 2010).** Evidence sufficient to sustain conviction for aiding and abetting kidnapping of sexual assault victim where defendant brandished weapon used to intimidate victim and made announcement that he "wanted to have sex" with victim that encouraged her detention by co-defendant.

***Lucas v. United States*, 20 A.3d 737 (D.C. 2011).** Evidence sufficient to convict defendant of CPWL, UF and UA on aiding and abetting theory where government showed that co-defendant, who carried gun into jewelry store, did not have license to carry gun.

***Rosemond v. United States*, 134 S. Ct. 1240 (2014).** Defendant aids and abets the offense of carrying a firearm during a drug crime (18 U.S.C. § 924(c)) if he participates in a drug crime with the knowledge (but without specific intent) that his accomplice will carry a firearm. Aider and abettor need not participate in every element (or even most "significant" element) of the crime.

***Rosemond v. United States*, 134 S. Ct. 1240 (2014).** Aider and abettor need not participate in every element (or even most "significant" element) of the crime.

***Robinson v. United States*, 100 A.3d 95 (D.C. 2014).** In order to be subject to the "while armed" enhancement of D.C. Code § 22-4502, an unarmed aider and abettor must have known that the principal offender—or another accomplice, if appropriate—was armed.

***Gray v. United States*, 79 A.3d 326 (D.C. 2013).** Trial court abused its discretion in responding to juror note about aiding and abetting liability by doing no more than re-reading in their entirety the aiding and abetting instructions jury had already heard when such instructions failed to explain to jury that aiding and abetting liability cannot be based on defendant's conduct after a completed crime, where juror note explicitly asked whether guilt for aiding and abetting required defendant's participation at time of crime or whether defendant could have participated after crime had occurred.

***Spriggs v. United States*, 52 A.3d 878 (D.C. 2012).** As a matter of law, a person may be convicted of aiding and abetting in the burglary of the home where he dwells when the crime intended to be committed in the home infringes upon the peaceful use and occupancy of a co-dweller of that home.

***Ewing v. United States*, 36 A.3d 839 (D.C. 2012).** No "reasonable likelihood" that jury unconstitutionally misapplied "general" aiding and abetting instruction when premeditated murder instruction stated that jury must find that defendants murdered the decedent "with a specific intent to kill" and the prosecutor never implied that either defendant could be guilty as an accomplice to first-degree premeditated murder without finding first that the defendant had the necessary mens rea to commit the offense.

2. Accessory After the Fact

In the District of Columbia, accessory after the fact liability remains distinct from actual commission of a crime. An MJOA is appropriate where one charged with being an accessory after the fact is actually shown at trial to be a principal, *Williams v. United States*, 478 A.2d 1101, 1105-06 (D.C. 1984), or an aider and abettor, *Stevenson v. United States*, 522 A.2d 1280, 1282-83 (D.C. 1987) (no accessory conviction where appellant drove get-away car because robbery was still in progress).

To convict a defendant of accessory after the fact, the government must prove: (1) that an offense was committed; (2) that the defendant knew that the offense was committed; (3) that, knowing that the offense was committed, the defendant provided assistance to the person who committed it; and (4) that the defendant did so with the specific intent to hinder or prevent that person's arrest, trial or punishment. *See Criminal Jury Instruction* No. 7.100.

In *Butler v. United States*, 481 A.2d 431 (D.C. 1984), the D.C. Court of Appeals overturned a conviction for accessory after the fact to murder where the only competent evidence linking the particular defendant to the murder failed to establish that he either knew of the principal's participation in the murder or assisted the principal with specific intent to help him evade apprehension or punishment. *See also Outlaw v. United States*, 632 A.2d 408, 412-13 (D.C. 1993) (evidence insufficient where appellant reprimanded principal for not killing victim with first shot, walked toward injured victim with murder weapon in his pocket, returned weapon to

principal with instruction that he go to relative's house, and remained on scene while police investigated); *Clark v. United States*, 418 A.2d 1059, 1061 (D.C. 1980) (appellant was with the robber on the night of the robbery, waited for him to return to the car while the robbery was in progress, then drove the car with the robber in it, and denied knowing the robber when questioned upon arrest; despite reasonable inference from the false denial that Clark wanted to avoid association because he knew of the robber's guilt, the inference was too attenuated to support his conviction as an accessory after the fact). *Id.*

3. Attempt

Proving attempt requires: (1) the intent to commit the specified crime; and (2) an act reasonably adapted to accomplishing the crime. The act must be more than preparation and the defendant must have come "dangerously close to completing the crime." *Criminal Jury Instruction* No. 7.101. Proof of a completed crime is sufficient to prove an attempt. *United States v. Fleming*, 215 A.2d 839, 840-42 (D.C. 1966). *But see Brawner v. United States*, 979 A.2d 1199 (D.C. 2009) (the government failed to prove intent as an element of attempted escape where defendant engaged in unauthorized movement in jail while wearing civilian clothing contraband).

Attempted Drug Crimes

When a drug charge is dropped to an attempt – e.g., attempted possession of marijuana, attempted possession with intent to distribute marijuana, etc. – the government does not have to prove the actual identity of the controlled substance. The government does have to prove, however, that the defendant *intended to possess the particular substance charged in the information or indictment*. *See Fields v. United States*, 952 A.2d 859, 867-68 (D.C. 2008) (finding the erroneous admission of a drug analysis harmful with respect to attempted possession of marijuana because it dispelled the possibility that the defendant was concealing a different illegal substance: "In this case, the necessary element is the *intent to possess marijuana*.") (emphasis added). For example, where a defendant is charged with attempted possession of cocaine, it is not sufficient for the government to show that he intended to possess any illegal substance; rather, the government must show that he intended to possess cocaine in particular. *See Wooley v. United States*, 697 A.2d 777, 779, 784 (D.C. 1997) (where a defendant is charged by indictment with possession with intent to distribute heroin, permitting the jury to convict that defendant of possession with intent to distribute cocaine is a "constructive amendment of the indictment" that violates the defendant's Fifth Amendment right to be tried for an "infamous crime" only "on a presentment or an indictment of a grand jury"). If the government's evidence in an attempted drug crime does not include chemical analysis, and there is not any other proof that the defendant intended to possess – or distribute – the particular drug charged in the indictment, counsel should move for a judgment of acquittal.

Threats and Assault

In *Evans v. United States*, 779 A.2d 891 (D.C. 2001), the court held that attempted threats is a crime in the District of Columbia, rejecting arguments that: (1) it is not possible to attempt to orally threaten another (since in theory once one makes the "attempt" the crime is completed); (2) because threats was not a crime when the general attempt statute became law, attempted

threats was not a crime; and (3) the government was not permitted to charge attempted threats to deprive the accused of his right to a jury trial. The same is not true, however, for the crime of assault. Assault is an inchoate crime, just like attempt. *Owens v. United States*, 688 A.2d 399, 403 (D.C. 1996).[10] Both assault and attempt "can occur without completion of the objective." *Id*. In other words, assault is an attempt, which is why "attempted assault" does not exist. *See, e.g., Wilson v. State*, 53 Ga. 205, 206 (1874). In the words of the Georgia Supreme Court:

> As an assault is itself an attempt to commit a crime, an attempt to make an assault can only be an attempt to attempt to do it, or to state the matter still more definitely, it is to do any act towards doing an act towards the commission of the offense. This is simply absurd . . . The refinement and metaphysical acumen that can see a tangible idea in the words an attempt to attempt to act is too great for practical use. It is like conceiving of the beginning of eternity or the starting place of infinity.

Id. Defense counsel should move to dismiss any charge of attempted assault.

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***Gee v. United States*, 54 A.3d 1249 (D.C. 2012).** Evidence sufficient to support conviction for attempted first-degree sexual assault where complainant's testimony that she heard attacker unzip his pants, saw his torso exposed, felt him pull down her underwear and felt him pull her body from behind toward his own body, while on her hands and knees trying to escape, enabled jury to reasonably infer that attacker had committed overt acts with intent to commit first-degree sexual assault and that he came "dangerously close" to forcing complainant to submit to sexual act.

***Lewis v. United States*, 95 A.3d 1289 (D.C. 2014).** Conviction for misdemeanor attempted threats reversed because threatening statement was made after defendant was searched and placed in handcuffs and therefore could not have induced fear of bodily injury.

***Newman v. United States*, 49 A.3d 321 (D.C. 2012).** Evidence sufficient to sustain conviction for attempted possession of controlled substance (marijuana) of defendant who moved away at "a very fast pace" after making eye contact with undercover officers where reasonable to infer that defendant suspected they were police and where "white paper" that defendant had held in hands was soon after discarded but located close to defendant and found to contain marijuana.

4. Conspiracy

To prove conspiracy, the government must prove that: (1) two or more persons formed an agreement to commit an offense; (2) the defendant knowingly participated in the conspiracy with the intent to commit the offense; and (3) at least one overt act was committed in furtherance of

[10] Black's Law Dictionary defines "Inchoate" as: "Imperfect; partial; unfinished; begun, but not completed; as a contract not executed by all the parties." BLACK'S LAW DICTIONARY 523 (Abridged 6th ed. 1998). An "inchoate crime" is defined as: "An incipient crime which generally leads to another crime. An assault has been referred to as an inchoate battery, though the assault is a crime in and of itself." *Id*.

the common scheme. *United States v. Treadwell*, 760 F.2d 327, 333 (D.C. Cir. 1985). In *Irving v. United States*, 673 A.2d 1284, 1288 (D.C. 1996), the court rejected appellant's argument that he did not knowingly participate in a conspiracy because he had never been sure with whom he conspired. Intentional association with the plot and affirmative steps to locate the intended murder victim were sufficient to uphold a conspiracy conviction. In *McCullough v. United States*, 827 A.2d 48 (D.C. 2003), the court found sufficient evidence of conspiracy based on the defendant's conversations with co-defendants about murder and the actions he and others took in implementing murder. *See also Mitchell v. United States*, 985 A.2d 1125, 1135 (D.C. 2009) (evidence sufficient to support conviction for conspiracy where testimony revealed that co-defendants together had come from behind trash dumpsters wielding guns, opened fire on group of individuals, and fled scene of shooting and jumped into waiting SUV).

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***Brown v. United States*, 89 A.3d 98 (D.C. 2014).**Evidence sufficient to prove specific intent required to support conviction for obstruction of justice where defendant expressed frustration that witness "went in there and told the truth", confronted witness about "being the motherfuckin witness in that situation," and told co-defendant that he (defendant) told witness to "do the right thing," meaning not tell officers the truth.

***Castillo-Campos v. United States*, 987 A.2d 476 (D.C. 2010).** Evidence sufficient to establish criminal conspiracy where defendants were present at gathering of gang members at which agreement was made to "get" members of rival gang and where there was evidence of concerted attacks targeted only against rival gang members.

***Collins v. United States*, 73 A.3d 974 (D.C. 2013)** (finding evidence sufficient to support *Pinkerton* instruction).

***Gilliam v. United States*, 80 A.3d 192 (D.C. 2013).** When prosecution for conspiracy is predicated on an agreement made in another jurisdiction, government must prove that an overt act pursuant to conspiracy was committed within District in order to prove offense.

***Harrison v. United States*, 60 A.3d 1155 (D.C. 2012).** Insufficient evidence to support specific intent elements of obstruction of justice and conspiracy convictions where jury could draw no reasonable inference that the defendant was the actual source of the "stay away" messages conveyed by his relatives to third parties associated with the witness to influence and prevent his testimony.

***Lucas v. United States*, 20 A.3d 737 (D.C. 2011).** Evidence sufficient to establish that defendant involved in conspiracy to rob jewelry store where government showed that defendant was in car when plan finalized, defendant received gun from co-defendant which he carried into store, and defendant helped subdue store employees and shot store's owner while co-defendants stole jewelry and money from store.

***Smith v. United States*, 133 S. Ct. 714 (2013).** Because Congress did not place on the government the burden of proving a withdrawal defense, the common law rule applies, requiring the defendant to affirmatively prove that he withdrew from the conspiracy.

***Snowden v. United States*, 52 A.3d 858 (D.C. 2012).** Evidence sufficient to convict for AAWA on conspiracy theory when second gunman shot victim, despite hesitation, after defendant had fled scene where defendant fled with money taken from victim who had struggled with him and defendant himself had used weapon to confront victim and take his money.

***United States v. Jones*, 744 F.3d 1362 (D.C. Cir. 2014).** Evidence sufficient to establish that drug defendants engaged in single conspiracy for purposes of sentencing, where evidence cited by district court at sentencing established all three attributes of a single conspiracy: a common goal of selling crack for profit in certain area during a specified period of time; interdependence in the forms of shared sales proceeds and the protection of turf against encroachment by outsiders; and overlap in membership both across time and among the different cliques.

***Jones v. United States*, 99 A.3d 679 (D.C. 2014).** Co-conspirator statements admissible because in-court testimony regarding other, non-hearsay statement made by alleged co-conspirator was sufficient to establish the conspiracy.

5. Constructive Possession

Issues relating to constructive possession are encountered most frequently in cases involving drugs, weapons, ammunition, or drug paraphernalia. To establish constructive possession, the government must prove: (1) that the accused knew of the presence of the contraband; (2) had the power to exercise dominion and control over it; and (3) intended to exercise dominion and control over it. *In re L.A.V.*, 578 A.2d 708, 710 (D.C. 1990); *In re T.M.*, 577 A.2d 1149, 1151 (D.C. 1990) ("[P]rosecution was required to prove that each appellant knowingly had both the power and the intention at a given time to exercise dominion and control over the cocaine."); *Bernard v. United States*, 575 A.2d 1191, 1195 (D.C. 1990) (same). Dominion or control over an object requires "some appreciable ability to guide [its] destiny." *United States v. Staten*, 581 F.2d 878, 883 (D.C. Cir. 1978); *see also Greer v. United States*, 600 A.2d 1086, 1087 (D.C. 1991).

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***West v. United States*, 100 A.3d 1076 (D.C. 2014).** Evidence sufficient to establish that defendant constructively possessed PCP where vial containing drug found on uncluttered backseat floorboard of vehicle, in plain view, officers detected smell of PCP emanating from vial as soon as they stuck their heads inside vehicle, stipulation established that defendant owned the vehicle, and uncontested evidence that defendant was sole occupant of vehicle when stopped by officers.

***In re D.R.*, 96 A.3d 45 (D.C. 2014).** Insufficient evidence to support finding of CDW where government did not proffer any evidence to prove that weapon was concealable "on or about the person at the time it [was] carried" by the defendant.

***Schools v. United States*, 84 A.3d 503 (D.C. 2013).** Notwithstanding that defendant was engaged in a drug operation, evidence was insufficient to show that defendant constructively

possessed firearm and ammunition found hidden beneath clothing in dresser drawer in back bedroom he occupied with others.

***Smith v. United States*, 55 A.3d 884 (D.C. 2012).** Evidence sufficient to show that defendant had constructive possession of firearm and ammunition because items were found in a conspicuous backpack in defendant's bedroom, a room of which she had been the sole occupant for the week prior to the search.

***Rose v. United States*, 49 A.3d 1252 (D.C. 2012).** Evidence sufficient to convict for possession of PCP where defendant was seen giving codefendant money and then drawing in on cigarette consistent with cigarette dipped in PCP, where defendant was seen smoking cigarette as he returned to car, and where wet, partiallyburned PCP-laced cigarette was found on ground outside passenger door of car when it was stopped.

***Newman v. United States*, 49 A.3d 321 (D.C. 2012).** See, supra, Chapter 36.III.A.3.

a. Proximity and Knowledge

Proximity to contraband, presence at the scene where it is found, or association with one in possession, without more, is insufficient to establish dominion and control. *Speight v. United States*, 599 A.2d 794, 796-97 (D.C. 1991); *Hack v. United States*, 445 A.2d 634, 639 (D.C. 1982); *see also L.A.V.*, 578 A.2d at 710 (insufficient proof of constructive possession and aiding and abetting, although respondent knew his companion had a gun and had accompanied co-defendant when co-defendant tried to stash the weapon).

Proximity and knowledge alone are also not sufficient when the defendant is a passenger in a vehicle – unless the defendant is charged with "presence in a motor vehicle containing a firearm." In *Rivas v. United States*, 783 A.2d 125 (D.C. 2001) (en banc), the court held that the evidence was insufficient for constructive possession (with intent to distribute) cocaine where the defendant was the front-seat passenger in the vehicle and the cocaine was found in plain view in the center console between the driver's and passenger's seats. *Id.* at 128. The court held that there is no automobile exception to the settled rule that knowledge and proximity alone are insufficient to prove constructive possession beyond a reasonable doubt. *Id.* As in all constructive possession there must be something more in the totality of the circumstances – a word or deed, a relationship or other probative factor – in conjunction with evidence of proximity and knowledge to prove beyond a reasonable doubt that the passenger *intended* to exercise dominion and control. The court concluded in *Rivas* that the evidence that Rivas was a passenger in a car where cocaine was in plain view in a console between Rivas and the driver was insufficient to prove beyond a reasonable doubt Rivas's intent to exercise dominion and control over the contraband.

In the Summer of 2009, the D.C. Council passed, and the mayor signed, a law creating a new crime entitled "presence in a motor vehicle containing a firearm." *See* Summary of Omnibus Public Safety and Justice Amendment Act of 2009 By Code Number, available at http://www.dcacdl.org/legaldocs/2009%20Crime%20Bill%20PDS%20Summary%20-%20_code%20order.doc (last visited October 13, 2009). As of the writing of this CPI chapter, the law has not yet been codified. The law makes it a felony – punishable by up to 5 years in

prison – for any "person to be in a motor vehicle if that person knows that a firearm is in the vehicle, unless the firearm is being lawfully carried or transported." It is an affirmative defense, that the defendant must establish by a preponderance of the evidence, "that the defendant, upon learning that a firearm was in the vehicle, had the specific intent to immediately leave the vehicle, but did not have a reasonable opportunity under the circumstances to do so." The holding of *Rivas* and the other cases finding insufficient evidence for constructive possession based solely on proximity and knowledge, will not apply to this new law – presence in a car and knowledge of a gun in the car will be sufficient. *Rivas* and the other cases will, however, continue to apply to all other cases involving constructive possession.

Cases in which the government unsuccessfully tried to show constructive possession through proximity and knowledge, or proximity alone, include *Burnette v. United States*, 600 A.2d 1082 (D.C. 1991) (gun recovered from under the car floor-mat where appellant was seated made it reasonable to infer appellant lifted the floor-mat and saw the gun); *In re M.I. W.*, 667 A.2d 573 (D.C. 1995) (appellant was backseat passenger in car where machine gun was protruding from underneath front seats into the rear of the car); *In re T.M.*, 577 A.2d 1149 (D.C. 1990) (guns found in house appellants had rented earlier in the day, including one on the couch where one of the appellants had slept); *Hutchinson v. United States*, 944 A.2d 491 (D.C. 2008) (insufficient evidence of constructive possession of cocaine where defendant was sole passenger in back seat of a car that he neither owned nor was observed driving, where contraband was found next to his foot that – while blocking the officer's view of it – did not without more show an effort to conceal or control the drugs); *In re R.G.*, 917 A.2d 643 (D.C. 2007) (Insufficient evidence of constructive possession where contraband was found on a windowsill in defendant's bedroom during execution of a search warrant where defendant's boyfriend had spent the night two hours before police arrived); *In re T.H.*, 898 A.2d 908 (D.C. 2006) (The police lacked probable cause to arrest T.H. for constructive possession of fireworks stored in the trunk of an SUV in which he occupied the rear passenger seat. The court held that T.H.'s proximity to the fireworks and his awareness of their presence were insufficient to constitute probable cause to believe that he constructively possessed the fireworks, especially because many fireworks are legal in the District, it was within days of the 4th of July, and the passengers identified the driver as the owner of the fireworks.); *Mitchell v. United States*, 683 A.2d 111, 115-16 (D.C. 1996) (insufficient evidence when heroin on floor behind seat in vehicle used to transport defendant to police station where officers searched defendant, defendant was handcuffed and vehicle unlocked and unattended for forty-five minutes before it was searched); *Taylor v. United States*, 662 A.2d 1368, 1370-74 (D.C. 1995) (insufficient evidence to establish constructive possession where the government could not show that the appellant owned or regularly used the car where gun was found under the rear seat); *Johnson v. United States*, 503 A.2d 686, 687-88 (D.C. 1986) (no proof of knowledge that drugs were present); *Easley v. United States*, 482 A.2d 779, 781-82 (D.C. 1984) (insufficient evidence to prove constructive possession of gun under passenger seat of car because no evidence that gun was used in prior larceny); *Outzs v. United States*, 306 A.2d 664 (D.C. 1973) (insufficient evidence to prove constructive possession when defendant standing by car and gun found partially concealed beneath right rear tire); *United States v. Whitfield*, 629 F.2d 136 (D.C. Cir. 1980) (insufficient evidence of constructive possession when defendant was passenger for five or ten minutes in friend's car and gun was hidden under his seat).

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***James v. United States*, 39 A.3d 1262 (D.C. 2012).** Evidence of defendant's ownership of unoccupied car riddled with bullets and found to contain drugs hidden in armrest insufficient to show constructive possession even where defendant's wallet with identification was also found inside.

***Zanders v. United States*, 75 A.3d 244 (D.C. 2013).** Evidence sufficient to support convictions for possession of PWID cocaine while armed and three firearms-related offenses where defendant's act of dropping jacket to floor of car so as to conceal gun satisfied "something more" requirement of *Rivas* and established that defendant knew of gun's presence and had ability and intent to exercise dominion and control over it.

b. Association with Others

Association with others is insufficient to prove constructive possession. *United States v. Pardo*, 636 F.2d 535, 549 (D.C. Cir. 1980) ("[M]ere presence at the scene of a drug transaction or mere proximity to drugs seized is not sufficient to establish guilt."); *accord Staten v. United States*, 581 F.2d 878, 884 (D.C. Cir. 1978). The defendant in *Pardo* was present in a small, confined area "where a drug transaction was obviously taking place." 636 F.2d at 549. In reversing the conviction, the court noted: "It may be foolish to stand by when others are acting illegally, or to associate with those who have committed a crime. Such conduct or association, however, *without more*, does not establish the offenses here charged." *Id*.

c. Involvement in a Criminal Operation

Although proximity or association is by itself insufficient, when coupled with evidence linking the accused to an ongoing criminal operation involving possession, the requisite knowledge and dominion and control may be established. In *Bullock v. United States*, 709 A.2d 87, 93 (D.C. 1998), the appellant was acting only as a "runner" by simply referring pedestrians to his partner, who would then sell drugs from a stash. The Court of Appeals upheld the conviction, stating that the appellant was part of an ongoing criminal operation and that "the jury could infer that he knew the location of the stash and that he shared both the ability and the intent to exercise dominion and control over [it]." *Id*; *see Fields v. United States*, 698 A.2d 485, 490-91 (D.C. 1997) (constructive possession found where appellant stole witness's car at gun point and was later stopped by police, who found gun hidden under passenger seat); *Guishard v. United States*, 669 A.2d 1306, 1313 (D.C. 1995) (sufficient evidence to prove constructive possession of gun and drugs where there was testimony that defendants had operated a drug business out of the apartment); *United States v. Hubbard*, 429 A.2d 1334, 1337-39 (D.C. 1981); *Gordon v. United States*, 783 A.2d 575 (D.C. 2001) (there was enough evidence that the appellant possessed the drugs found at his feet because of the substantial evidence that the drugs were in plain view and that he had a consciousness of guilt).

d. Joint Possession

Possession may be joint, with more than one individual sharing control over a single object. The co-defendants in *Bernard* were seen selling drugs for an hour or more, during which each periodically walked to a ledge to replenish their supply. From this, "[the jurors] could reasonably conclude . . . that Bernard and Redmond had joint dominion over all the drugs hidden in that one location." *Bernard v. United States*, 575 A.2d 1191, 1196 (D.C. 1991); *see also Parker v. United States*, 601 A.2d 45, 51-52 (D.C. 1991) (bag of drugs recovered from front seat of car in which appellants were sitting); *Covington v. United States*, 459 A.2d 1067, 1071 (D.C. 1983) (same).

If one person has actual possession of an object, and another's access to it requires that person's independent decision to relinquish it, the one without actual possession may not have the ability to exercise control over the object. *See Jefferson v. United States*, 558 A.2d 298, 304 (D.C. 1989) (co-defendants did not have dominion and control over gun third man held during holdup absent evidence that he would have relinquished control if asked).

In *Wheeler v. United States*, 494 A.2d 170, 173 (D.C. 1985), the court affirmed a conviction where drugs were found under a pillow on a bed used by appellant in a hotel room she occupied with three other women; Wheeler failed to respond to the knock on the door when police sought entry and was found in the bathroom with two other occupants while the toilet was flushed, giving rise to an inference that she was helping to discard evidence. *Compare United States v. Raper*, 676 F.2d 841, 848 (D.C. Cir. 1982) (sufficient evidence that defendant controlled heroin in co-defendant's possession where defendant spoke with co-defendant and buyer and received paper money); *with United States v. Johnson*, 952 F.2d 1407, 1411-12 (D.C. Cir. 1992) (rejecting argument that $127 recovered from appellant provided logical link between appellant and drug distribution scheme, although he was found in co-defendant's apartment, which contained drugs and a gun).

In *Roy v. United States*, 652 A.2d 1098 (D.C. 1994), the court affirmed the defendant as a principal of CPWL under a constructive possession theory where he had helped to engineer the sale of a gun, although he had never touched the gun. The court concluded that the appellant had intended to exercise dominion and control over the destiny of the gun. *Id*. at 1107; *see also Moore v. United States*, 927 A.2d 1040 (D.C. 2007) (evidence sufficient to establish constructive possession of 91 ziploc bags of crack cocaine and a semi-automatic handgun found in apartment accessible by both defendants where defendants each had a key to apartment, had been photographed there, and were in the immediate vicinity of the apartment when contraband was discovered by police, and where evidence showed close personal and business relationship between defendants); *White v. United States*, 647 A.2d 766, 767-68 (D.C. 1994) (constructive possession of weapon where defendant participated in planning robbery, acted with others to dispose of the gun, and had the ability to retrieve the gun).[11]

[11] Aiding and abetting a possessory offense may be proven without showing constructive possession by the accomplice. *See Lowman v. United States*, 632 A.2d 88, 90-92 (D.C. 1993) (evidence that appellant brought undercover officer to seller, asked whether seller had what buyer wanted, and waited with buyer during sale, was sufficient to uphold conviction for aiding and abetting distribution); *Greer v. United States*, 600 A.2d 1086, 1088 (D.C. 1991) (appellant made apartment available to others for distribution of drugs); *Selby v. United States*, 501

e. Carrying Weapons – Convenient of Access

If the defendant is charged with "carrying" a weapon, rather than mere possession, the government must show that the weapon "was in such proximity to [the accused] as to be convenient of access and within reach." *Porter v. United States*, 282 A.2d 559, 560 (D.C. 1971). The statute makes it a crime to "carry [the weapon] either openly or concealed on or about [one's person]." D.C. Code § 22-3204. "Because 'possession' is a broader concept than to 'carry on or about the person,' the government's evidence must go beyond mere proof of constructive possession and must show that the pistol was in such proximity to the person as to be convenient of access and within reach." *White v. United States*, 714 A.2d 115, 119 (D.C. 1998) (quotations omitted). "That statute was intended to prevent a person's having a pistol or dangerous weapon so near him or her that he or she could promptly use it, if prompted to do so by any violent motive." *Id.* at 119-20 (quotations omitted). Therefore, the sufficiency analysis for "carrying" focuses "on whether the location of the [weapon presents] an obstacle such as to deny [the defendant] convenient access to the weapon or place it beyond his reach." *Id*. (sufficient evidence for CPWL found where gun in the back of an ice cream truck, which court found accessible because ice cream trucks are "specifically designed to allow the driver to walk easily to the rear section, just a few steps away from the driver's seat," and the police had observed White moving about the inside of the truck while it was stopped) (quotations omitted); *Henderson v. United States*, 687 A.2d 918, 921-22 (D.C. 1996) (handgun locked in trunk of defendant's car effectively denied defendant convenient access to the weapon).

f. Owner, Occupant or Manager of Property / Owner or Operator of Vehicle

Evidence that one is the owner, occupant or manager of property in which contraband is found is highly relevant. *See, e.g.*, *United States v. Whitfield*, 629 F.2d 136, 143 (D.C. Cir. 1980) (owner of car); *United States v. Smith*, 520 F.2d 74, 76 (D.C. Cir. 1975) (lessee/occupant of premises). *United States v. Herron*, 567 F.2d 510, 513 (D.C. Cir. 1977), sustained a conviction based on evidence that Herron's "special relationship to [the apartment] was of a permanent character sufficient to indicate a possessive interest in its contents": his name was called out as a warning by two women visitors when DEA agents approached; he was alone inside the apartment, dressed in a robe and slippers, holding a dog on a leash; he produced a key to the locked bedroom closet; and his personal belongings were found in another closet. *See also United States v. Lawson*, 682 F.2d 1012, 1017 (D.C. Cir. 1982) (drugs seized from coffee table in plain view in living room of defendant's and co-defendant's apartment while defendant was in bathtub); *Carter v. United States*, Nos. 06-CF-458 & 06-CF-476 (D.C. Sept. 18, 2008) (evidence sufficient to support firearms conviction of robbery getaway car driver on constructive possession theory where gun found in plain view next to driver's seat); *Burwell v. United States*, 901 A.2d 763 (D.C. 2006) (evidence sufficient to show defendant in constructive possession of marijuana where he was the driver of a car in which controlled substance was found in the glove compartment, car smelled of marijuana, and emptied cigar shell and tobacco shavings were in the rear seat); *White v. United States*, 763 A.2d 715 (D.C. 2000) (evidence was sufficient to prove that driver, who was also the owner of the car, constructively possessed the gun in plain view on

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A.2d 800, 801-02 (D.C. 1985) (defendant properly convicted of aiding and abetting possession of heroin when actively participated in obtaining heroin for buyer).

the floor); *Hooker v. United States*, 372 A.2d 996, 997 (D.C. 1977) (drugs found in defendant's bedroom in nightstand among his clothes and papers, in home in which he and his mother lived alone).

Proof that the defendant is the owner or occupant, however, is not always sufficient. Where there is more than one person present near an item of contraband – or more than one person has access to the location of the contraband – the prosecution's case for constructive possession is weaker than if the contraband is in a location where the defendant is the sole person nearby or the sole person with access (again, with the exception of "presence in a motor vehicle containing a firearm"). "[A]ny legitimate inference which can be drawn from such presence, proximity, or association is considerably weakened where the accused is one of several people gathered in the place where the contraband is found." *Curry v. United States*, 520 A.2d 255, 264 (D.C. 1987). If more than one person is present on premises in which contraband is found, the government must show that the accused is more than a mere visitor. *Id*. Even where the accused is a resident, the courts "will not normally impute possession of an illegal item without proof that the accused is actually involved in some criminal enterprise of which the contraband is a part." *Id*.; *see also In re R.G.*, 917 A.2d at 643, 649-50 (insufficient evidence for possession of a gun, although the gun was found within feet of R.G. on a windowsill in her bedroom, and she admitted to possessing marijuana in the bedroom, because her adult boyfriend had been in the room just a few hours before the police found the gun).

In *Curry*, police found large quantities of heroin and cocaine in an apartment - some of it in plain view, large bags of cutting agents, a radio scanner, a "Seal-a-Meal," large amounts of cash, and papers showing a narcotics price list, customer names and telephone orders. 520 A.2d at 259-62. Curry's two co-defendants, James Jones and Wayne Washington, were in the apartment when it was raided and were linked to it by keys and personal papers. Washington made furtive hand movements in an area from which heroin was retrieved. *Id*. at 259. Jones had heroin in his wallet, and his handwriting appeared on the price list and on a money order for payment of rent on the apartment. *Id*. at 260. None of this evidence was sufficient to sustain any of the convictions for possession of a pistol seized from a nightstand in Curry's bedroom. Curry herself did not have exclusive access to the apartment, arrived after the raid was already in progress, and used the bedroom temporarily and intermittently. *Id*. at 261-62. There was no evidence that she had stayed there the night before the raid.

> Even if Curry had been the sole, full-time resident of the apartment, her absence at the time the loaded pistol was seized, at which point many others were present, compels a reasonable doubt that Curry knew of the presence of a loaded pistol in her bedroom nightstand . . . Although the loaded pistol was found in the bedroom nightstand amongst her clothes, a reasonable mind must concede the reasonable possibility that Jones, Washington, or any of the three others found in the midst of a drug distribution operation could have placed the weapon in the bedroom unbeknownst to its occupant.

520 A.2d at 265. And although both Jones and Washington were more than mere visitors, neither lived in the apartment nor had exclusive access, and the gun was not in plain view and was found among women's clothing in Curry's bedroom.

> A reasonable mind must have a reasonable doubt [as to their guilt] because Curry, amongst whose personal belongings the weapon was apparently found, or any of the three others present during the raid could have placed the loaded pistol in the bedroom nightstand unbeknownst to the two male appellants. Having failed to present sufficient evidence as to knowledge, the government necessarily failed also to present sufficient evidence that Jones and Washington exercised a right to dominion or control over the loaded pistol.

Id. at 265-66.

g. Employment at the Scene

Employment at the scene where the contraband was recovered is insufficient – by itself – to establish constructive possession. In *United States v. Foster*, 783 F.2d 1087 (D.C. Cir. 1986), police executing a warrant entered a variety store, ordered Foster away from the counter, and seized a shotgun from a shelf under the counter. The butt of the gun was visible to an officer only when he knelt down behind the counter; the rest of the gun was concealed by a towel. Foster worked in the store at least once a week, and was generally seen working behind the counter where the shotgun was found. His status as an employee was not sufficient to permit an inference that he exercised "a substantial voice in regard to the weapon," absent any other evidence that he was aware of its presence. *Id*. at 1089-90.

h. Evasive Action / Furtive Gestures

Evasive action, gestures toward an area in which contraband is found, and evidence of motive or purpose in using contraband are all relevant. In *United States v. Hernandez*, 780 F.2d 113 (D.C. Cir. 1986), a car made a sharp turn upon encountering a marked police car and during a subsequent chase, Lopez-Leyva, the front seat passenger, bent over and made a motion toward the front of his seat; a machine gun was found on the floorboard in the same area, partly concealed in a shirt bearing the driver's name. The combination of the car's evasive turn with Lopez-Leyva's proximity and gesture were sufficient to establish constructive possession. *Id*. at 120. The conviction of Hernandez, a rear-seat passenger, was also affirmed, based on proximity to the weapon and evidence of his motive for using it. *Id*. at 120-21. *See also McGriff v. United States*, 705 A.2d 282, 290 (D.C. 1997) (evidence sufficient to support constructive possession where driver's maneuvers to evade police made him participant in trying to dispose of passenger's gun, and thus driver was in position to exercise dominion and control of weapon); *Thompson v. United States*, 567 A.2d 907 (D.C. 1989) (drugs, gun and large sums of money lying in plain view in apartment within appellant's ready access, and appellant tried to hide from police was sufficient); *Wright v. United States*, 926 A.2d 1151 (D.C. 2007) (evidence sufficient to support defendant's possession of sawed-off shotgun where he was seen pulling object from waistband of pants and setting object down on nearby fence, officers heard sound of "something metal" hit chain link fence, and shotgun was subsequently recovered from behind place on fence where defendant was seen setting object down).

B. Specific Offenses

1. Aggravated Assault

To prove aggravated assault, the government must prove that the assault caused "serious bodily injury" and that the defendant intended to cause serious bodily injury, knew serious bodily injury would result, or knowingly engaged in conducted that created a grave risk of serious bodily injury. D.C. Code § 22-404.01. In aggravated assault cases, the defense will often have a strong argument at MJOA that the government has not produced sufficient evidence of "serious bodily injury." "The term 'serious bodily injury' has a restrictive meaning," and includes only "'bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty.'" *Swinton v. United States*, 902 A.2d 772, 774-75 (D.C. 2006) (quoting *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999)). The Court of Appeals has repeatedly "emphasized 'the high threshold of injury' that 'the legislature intended in fashioning a crime that increases twenty-fold the maximum prison term for simple assault." *Id.* at 775; *see also In re P.F.*, 954 A.2d 949, 952 (D.C. 2008); *(David) Jackson v. United States*, 940 A.2d 981, 986 (D.C. 2008); *Bolanos v. United States*, 938 A.2d 672, 677-78 (D.C. 2007); *Earl v. United States*, 932 A.2d 1122, 1131-32 (D.C. 2007). The court has construed the serious bodily injury requirement as an "exacting standard" that confines the application of the aggravated assault statute to a "narrow category of truly horrific assaults." *(David) Jackson*, 940 A.2d at 988, 993; *see also Swinton*, 902 A.2d at 775.

Disputes regarding whether the government has produced sufficient evidence for aggravated assault often center on two types of serious bodily injury: "extreme physical pain" and "protracted and obvious disfigurement." To establish "extreme physical pain," it is well-established that "the level of pain necessary to constitute serious bodily injury 'must be exceptionally severe if not unbearable,'" and "may have to be so severe as to be 'immobilizing' to satisfy the serious bodily injury requirement of the aggravated assault statute." *(David) Jackson*, 940 A.2d at 987-88 (quoting *Swinton*, 902 A.2d at 777, and citing *Nixon*, 730 A.2d at 150, and *Bolanos*, 938 A.2d at 681-82); s*ee also In re P.F.*, 954 A.2d at 952; *Earl*, 932 A.2d at 1132. The court looks to the nature and extent of a complainant's injuries as the key factor in determining whether the evidence supports an inference of "exceptionally severe if not unbearable" or "immobilizing" pain. *See In re P.F.*, 954 A.2d at 952-53 (insufficient evidence where an assault with aluminum baseball bats sent the complainant to the hospital with "bad bruises" on her chest and back, a cut on her finger, and a swollen wrist; and the complainant was discharged from the hospital with a splint and a supply of painkillers that she took for a week); *(David) Jackson*, 940 A.2d at 988-89 (insufficient evidence of extreme pain where, after being beaten for hours with a hammer, a metal fan, and fists, complainant was bleeding from her ear, nose, head, and legs, had a gash on her right ear that went through skin and cartilage, lacerations on her head and shins, and bruising on her face and body, testified that she felt "regular shock" and "sharp pains" during the attack, and was prescribed pain medication upon discharge from the hospital); *Bolanos*, 938 A.2d at 681-82 (insufficient evidence where the victims were stabbed multiple times and prescribed Percocet); *Earl*, 932 A.2d at 1132 (insufficient evidence where the complainant sustained a bruised kidney and sprained wrist and testified at trial that she experienced "severe" pain in her arm as a result of an assault where the defendant hit her with his

fists on her stomach, face, body, and back, and kicked her in the stomach); *Swinton*, 902 A.2d at 777 (insufficient evidence where a victim suffered bruising after the defendant punched her and forced her to have sex, and testified that she was "hurt bad" and had "screamed in pain" during the attack); *Alfaro*, 859 A.2d at 153 (insufficient evidence of serious bodily injury where the defendant subjected naked children to "vicious whippings" with a telephone cord, leaving "loop-shaped markings, 'reddish pink' in color," that remained visible for two weeks); *Nixon*, 730 A.2d at 148 (insufficient evidence where one gunshot victim had "a hole … behind his ear with blood coming out," and another was seen grabbing the back of his bloody shoulder). In contrast with these examples of "merely significant" pain, the court in *(David) Jackson* observed that the "particularly egregious cases in which the evidence presented at trial supported findings of extreme physical pain," shared certain characteristics: "substantial and well-documented evidence of pain and related medical treatment (often including emergency surgery and lengthy hospital stays), arising from some combination of life-threatening gunshot wounds, deep and penetrating stab wounds, broken bones, extensive internal or external blood loss, perforated organs or other serious internal injuries, loss or near loss of consciousness, and severed muscles, tendons, or nerves." *(David) Jackson*, 940 A.2d at 989.

Where injuries are not "grievous," "horrific" or "particularly egregious," a complainant's unsubstantiated and subjective testimony that he experienced severe pain will not overcome that deficiency to satisfy the demanding "extreme physical pain" standard. *See In re P.F.*, 954 A.2d at 952 ("[A] victim's statements regarding pain are not alone sufficient to support a finding of serious bodily injury."); *Earl*, 932 A.2d at 1132 (insufficient although complainant characterized her pain as "severe"); *Swinton*, 902 A.2d at 777-78 (insufficient although complainant said she "hurt bad" and "screamed in pain").

As in the context of the "extreme physical pain" requirement, the District of Columbia Court of Appeals has "insisted on [a] rigorous standard" for "protracted and obvious disfigurement" "to avoid trivializing the 'high threshold of injury' erected by the aggravated assault standard." *(David) Jackson*, 940 A.2d at 991. Scars do not meet this "rigorous standard" *per se*. Rather, to support a finding of "serious bodily injury" based on "protracted and obvious disfigurement," the government must prove that a particular scar amounts to "*serious* physical disfigurement" that carries "'a degree of genuine prominence' sufficient to make it 'obvious.'"[12] *Id.* (quoting *Swinton*, 902 A.2d at 776-77). As the court noted in *Swinton*, the dictionary defines "obvious" as "'so placed as to be easily or inevitably perceived or noticed; . . . capable of easy perception.'" 902 A.2d at 777 n.8 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1559 (1993)); *see also Stroman v. United States*, 878 A.2d 1241, 1246 (D.C. 2005) (cut to the complainant's forehead requiring fifteen stitches "cannot reasonably be characterized as falling within the definition of great bodily injury," without evidence of "visible or permanent scarring . . . that . . . would fit the 'protracted and obvious disfigurement' component of the definition of great bodily injury."); *(David) Jackson*, 940 A.2d 981 (conviction for aggravated assault while armed vacated because there was insufficient evidence of serious bodily injury, where the only evidence of physical injury was moderate bleeding and the presence of superficial wounds, and

[12] The court has observed that, "'[t]o be permanently disfigured' for the cognate crime of malicious disfigurement 'means that the person is appreciably less attractive or that a part of his [or her] body is to some appreciable degree less useful or functional than it was before the injury.'" *Swinton*, 902 A.2d at 776 (quoting *Perkins v. United States*, 446 A.2d 19, 26 (D.C. 1982)); *see also (David) Jackson*, 940 A.2d at 991.

because there was insufficient evidence of protracted and obvious disfigurement, where only moderately-sized bandages were used, physician stated that injuries would leave "cosmetic" scars that would heal fine, and no testimony was presented as to size, shape, color, and noticeability of scars); *(Marcel) Jackson v. United States*, 970 A.2d 277 (D.C. 2009) (lacerations and puncture wounds that required staples and forced the victim to miss a week of work, where photographs at the hospital showed seven scars on the body, insufficient to establish protracted and obvious physical disfigurement). *But see Payne v. United States*, 932 A.2d 1095 (D.C. 2007) (sufficient evidence where complainant was stabbed sixteen times with scissors, hitting bone, two bones in his hand were broken, he was unable to move and losing consciousness when he arrived at hospital, he missed eleven months of work due to injuries, wore a cast for four months, attended physical therapy for three months, and continued to suffer arthritis); *Gathy v. United States*, 754 A.2d 912, 918 (D.C. 2000) (sufficient evidence of protracted and obvious disfigurement where defendant broke a bottle over the complainant's head, slicing two "deep cuts" in his face, "one over his left eyebrow and the other extending from the bridge of his nose across his left cheek;" the cuts required forty-eight "layered" stitches, and doctors had to shave a chipped piece of bone from his nose because "scars in the center of one's face are more visible and prominent—and thus more disfiguring—than they might be elsewhere").

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***Castillo-Campos v. United States*, 987 A.2d 476 (D.C. 2010).** Convictions for AAWA vacated because evidence did not show that victim sustained serious bodily injury where victim stood in place for a period of time after being shot, did not need surgery due to his injury and was able to travel abroad five days after being shot.

***Medley v. United States*, 104 A.3d 115 (D.C. 2014).**Evidence sufficient to satisfy serious bodily injury element of aggravated assault where complainant was stabbed two times, required 18 staples to close head wound, and described his pain as "terrible," and where doctor testified complainant's wounds were "very painful".

***Snowden v. United States*, 52 A.3d 858 (D.C. 2012).** See, *supra*, Chapter 36.III.A.4.

2. Burglary

In burglary cases, the government must prove that the defendant had the intent to commit a specific offense at the time of entry. For example, the complainant in *North v. United States*, 530 A.2d 1161 (D.C. 1987), heard glass breaking and voices in her basement, locked the basement door and went next door to call the police. Neighbors saw the two co-defendants enter the complainant's back yard, look around, walk down her basement steps, and then leave. A glass pane was broken on the basement door. This evidence was sufficient to show unlawful entry, but where there was no property on the premises small and valuable enough to steal, and the court concluded that surreptitious behavior coupled with an unexplained forced entry could not support an inference of intent to steal. *Id*. at 1162-63. A motion for judgment of acquittal should be made even if the evidence establishes that an intent to commit a crime was formed *after* the time of entry. In *Parker v. United States*, 449 A.2d 1076, 1077 (D.C. 1982), the court found sufficient evidence of burglary where two window washers, who had the authority to be in

the two hotel rooms from which items were taken, constituted sufficient proof of intent to steal when the defendants entered at least one of the rooms. The court noted if only a single entry and theft had occurred the court "very likely" would have concluded that the evidence of an intent to steal at the time of entry was insufficient. *Id*.

Evidence of unlawful entry "cannot on its own constitute sufficient evidence of an intention to steal." *Shelton v. United States*, 505 A.2d 767, 770-71 (D.C. 1986). Shelton entered a well-lit house through an unlocked kitchen door. The complainants discovered him standing in the middle of their dining room; when they asked what he was doing, he said he was "looking for Jimmy." *Id*. at 768. No property was missing. The complainants never saw Shelton touch anything, and he did not behave violently. No burglary tools were found and there was no evidence of stealth or concealment. The court found no evidence of intent to steal, vacated the conviction of attempted burglary, and remanded for entry of a judgment of conviction of unlawful entry. *Id*. at 770-71.

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***Spriggs v. United States*, 52 A.3d 878 (D.C. 2012).** As a matter of law, a person may be convicted of aiding and abetting in the burglary of the home where he dwells when the crime intended to be committed in the home infringes upon the peaceful use and occupancy of a co-dweller of that home.

***Castillo-Campos v. United States*, 987 A.2d 476 (D.C. 2010).** Evidence sufficient to conclude that defendants undertook burglary with specific intent to commit assault where one defendant stopped to get his bat on the way and another defendant had a gun in his waistband.

3. Dangerous Weapons: CDW; PPW(b); ADW; and "While Armed" Offenses

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***Thompson v. United States*, 59 A.3d 961 (D.C. 2013).** D.C. Code § 22-4501, prohibiting the possession of "knuckles," is not unconstitutionally vague in that possessor of trench knife with handle with knuckles on it would not be on notice that possessing such a weapon was prohibited.

a. What is a Dangerous Weapon?

CDW, PPW(b), ADW and "while armed" offenses must involve "dangerous weapons." Certain objects, such as guns and particular knives, have been defined by statute to be dangerous weapons. However, allegations that other objects qualify as "dangerous weapons" may give rise to serious issues on a motion for judgment of acquittal. "A dangerous . . . weapon is one which is *likely* to produce death or great bodily injury by the use made of it." *Scott v. United States*, 243 A.2d 54, 56 (D.C. 1968) (emphasis original). Thus any object can become a dangerous weapon, depending on "the manner it is used, intended to be used, or threatened to be used." *Harper v. United States*, 811 A.2d 808, 810 (D.C. 2002). However, as noted, it must at a minimum be *likely* to produce "great bodily injury," which the court has concluded is the

equivalent of "serious bodily injury" as defined by *Nixon v. United States*, 730 A.2d 145, 150 (D.C. 1999). *Alfaro v. United States*, 859 A.2d 149, 161 (D.C. 2004). In other words, for the government to prove that an object is a dangerous weapon, it must prove that it is *likely* to cause "bodily injury that involves a substantial risk of death, unconsciousness, extreme physical pain, protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental facility." *Id*. (quoting D.C. Code § 22-4101 (2001)). Thus, in *Alfaro*, the court reversed three convictions for attempted PPW(b) where the defendant whipped her three pre-teen children with a wet telephone cord, while they were naked, because the evidence was not sufficient to establish that telephone cord was a dangerous weapon in the manner it was used. *Id*. at 153, 161-62. Similarly, in *Harper*, the court concluded that a plastic flowerpot, thrown at the complainant's car while the complainant was inside did not constitute a dangerous weapon and therefore reversed the defendant's attempted PPW(b) conviction. *Id*.; *Harper*, 811 A.2d at 809-11. *But see Savage-El v. United States*, 902 A.2d 120 (D.C. 2006) (defendant's threatened use of her small spray bottle containing gasoline, under the particular circumstances presented, was sufficient to support conviction for carrying a dangerous weapon because her actions were intended to cause an explosion likely to result in death or serious bodily injury); *Arthur v. United States*, 602 A.2d 174, 178-79 (D.C. 1992) (reasonable juror could find that a tennis shoe is a dangerous weapon where defendant stomped complainant in the face repeatedly resulting in serious bodily injury); *Moore v. United States*, 599 A.2d 1381, 1383 n.1 (D.C. 1991) (defendant kicked complainant in eye with boot, causing permanent eye damage); *(Carl) Jones v. United States*, 401 A.2d 473, 476 (D.C. 1979) (furniture leg used to inflict beating is dangerous weapon); *United States v. Brooks*, 330 A.2d 245, 246-47 (D.C. 1974) (wooden table leg thrown at victim is dangerous weapon). *See also Savoy v. United States*, 981 A.2d 1208, 1213-14 (D.C. 2009) ("slapjack" and "blackjack" are the same instrument or weapon for the purpose of prohibition under D.C. Code § 22-4514(a)). Permanent fixtures, such as sinks, toilets, or bathtubs, are not objects with which one can arm oneself, and therefore are not weapons, although they may be used to inflict serious injury. *Edwards v. United States*, 583 A.2d 661, 667-68 (D.C. 1990). In other words, if the object is not something that a person can arm herself with, it cannot be a dangerous weapon.

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***Jones v. United States*, 67 A.3d 547 (D.C. 2013).** Insufficient evidence to show that "pepper spray" was an "other dangerous weapon," as it could not inflict "great bodily injury," at least under the circumstances here.

b. The Intent Required for PPW(a), PPW(b), and CDW

To prove PPW(a), the government need only prove that the person knowingly and intentionally possessed certain weapons listed in the statute (machine gun, sawed off shotgun, switchblade, etc.). D.C. Code § 22-4514(a) (formerly § 22-3214(a)); *Criminal Jury Instruction* No. 6.503.

To prove PPW(b), however, where the weapon is not included in the (a) list, the government must establish that the defendant had a specific intent to use the weapon unlawfully. D.C. Code § 22-4514(b) (formerly § 22-3214(b)). Using a weapon in self-defense is not an unlawful purpose. *Reid v. United States*, 581 A.2d 359, 366 (D.C. 1990). In *Reid*, a police officer

observed appellant facing four or five other people while holding a knife in a threatening manner. When the officer asked about the knife, Reid responded, "I'm going to show these motherfuckers they don't be fucking with me. I'll fuck them up." *Id*. at 361. Although the court stated it was a close case, it found the evidence sufficient to sustain a conviction of possession of a prohibited weapon. *Id*. at 363.

To prove CDW, however, the government needs only to establish that the defendant's purpose in carrying the object was its use as a weapon. *Reed v. United States*, 828 A.2d 159, 162 (D.C. 2003) (defendant was carrying a three-inch dagger with no utilitarian purpose while in possession of marijuana and alcohol). In *Monroe v. United States*, 598 A.2d 439, 441-42 (D.C. 1991), the court concluded that the evidence was sufficient to sustain conviction for carrying a dangerous weapon; the defendant had made statements that he used knife for personal protection and in his employment as a bodyguard. In *Lewis v. United States*, 767 A.2d 219 (D.C. 2001), the court also found sufficient evidence of the defendant's intent to carry a knife as a weapon necessary for CDW and noted the different intent requirement for PPW(b). In that case the defendant attempted to enter an ATF building, claiming he had been the director of the ATF in the 1970s (when he would have been a teenager) and wanted to retrieve his credentials from the current director. An officer asked him to step outside and produce identification and inquired whether he had any weapons. The defendant replied that he had a knife. A search produced a folding knife with a blade slightly less than four inches long. The court found that under the circumstances, given the size and shape of the knife, and the defendant's failure to offer an innocent purpose for having the knife when asked if he had a weapon, there was sufficient circumstantial evidence of his intent to carry the knife as a weapon.[13]

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***Williams v. United States*, 90 A.3d 1124 (D.C. 2014).**

***In re M.L.*, 24 A.3d 63 (D.C. 2011).** Evidence sufficient to prove "intent" and "purpose" elements of CDW and PPW offenses, respectively, where defendant carried folding knife with nearly three-inch blade in his pocket in open position, was seen hiding behind car in the dark, wore gloves on evening that was not cold and ran from police officer, and where accepting either of defendant's two alternative explanations as to why he had been crouching behind car would have required illogical inferences from evidence presented: a brief pause for a lawful purpose (illogical to presume that defendant would have crouched behind car rather than standing upright if pausing for lawful purpose) or an intent to commit a property offense (illogical based on defendant's delay in committing offense and fact that no evidence was presented that any was in progress).

[13] With respect to CDW, counsel should consider raising a Second Amendment claim if the defendant's purpose for carrying the weapon was self-defense. In June 2008, the Supreme Court decided *District of Columbia v. Heller*, 128 S. Ct. 2783, which held that the Second Amendment to the Constitution "guarantee[s] the individual right to possess and carry weapons in case of confrontation." *Id.* at 2797. Individual self-defense, the Court explained, is "the *central component*" of the right "to keep and bear Arms," *id.* at 2801, a "fundamental," "*pre-existing* right" tethered to the "natural right of resistance and self-preservation," *id.* at 2797-98. For example, it is clear – after *Heller* – that an individual cannot be criminally prosecuted for carrying a pocket knife solely for purposes of self-defense.

c. While Armed Offenses

The underlying offense in a "while armed" conviction must fit within the definition of a "dangerous crime" or a "crime of violence" in D.C. Code § 22-4501 (formerly § 22-3201). Furthermore, conviction of a "while armed" offense appears to require that the accused, at minimum, had constructive possession of the weapon. *Guishard v. United States*, 669 A.2d 1306, 1314 (D.C. 1995). In *Guishard*, the appellants were convicted of possession of cocaine with intent to distribute "while armed" with an operable pistol in a dresser drawer a few feet away from the drug transaction. *Id*. In rejecting appellants' MJOA regarding the "while armed" portion of the offense, the court found that although the meaning of "readily armed" had not been defined, precedent required a denial of the motion. *Id*.; *see Morton v. United States*, 620 A.2d 1338, 1340 (D.C. 1993) (an operable pistol on top of a television set within the accused's reach satisfied the "readily available" element). However, the court reserved ruling on the distinction between constructive possession and "readily available," as well as the definition of "readily available," for a later date. *Guishard*, 669 A.2d at 1314. In *Johnson v. United States*, 613 A.2d 888, 897-98 (D.C. 1992), the court held that placing a hot iron on the victim's breast and chest area before the rape was sufficient to support a conviction for rape "while armed," because it was part of what led the complainant to fear that she would be hurt if she did not submit, and because the iron was within the defendant's reach at the time of the rape. In *Smith v. United States*, 777 A.2d 801 (D.C. 2001), the court found sufficient evidence that the defendant was armed with a firearm or imitation thereof for an armed robbery conviction. The court held that the defendant's threats to shoot and gestures with his hand in his pocket as if he had a gun were circumstantial proof that he did have a gun. Judge Farrell, concurring, noted that it was not enough that the defendant appeared to be armed, he must actually be armed, and that had he been arrested on the scene without a gun, the proof would have failed.

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***Brown v. United States*, 27 A.3d 127 (D.C. 2011).** Evidence sufficient for jury to find that defendant was armed with a dangerous weapon, i.e., a detached object rather than an attached fixture, even though object itself was not recovered, where witnesses testified that victim appeared to have been hit with something and there was blood spatter on scene.

***Clyburn v. United States*, 48 A.3d 147 (D.C. 2012).** Evidence insufficient to prove "while armed" element of PWID offense where no evidence of defendant's close proximity or easy access to assault rifle located in the bedroom beyond the living room where drug money was located.

***Snowden v. United States*, 52 A.3d 858 (D.C. 2012).** Evidence sufficient to convict on multiple charges of AWIRWA under intent-to-frighten theory where defendant approached group with gun drawn and second gunman pointed his weapon at different people in the group and moved it around, despite fact that defendant only robbed single individual in group.

4. First Degree Sexual Abuse and First Degree Child Sexual Abuse

In cases where the defendant is charged with first degree sexual abuse or first degree child sexual abuse there are often sufficiency issues regarding whether the government has proven that the defendant committed a "sexual act." A sexual act is defined by statute as "(A) The penetration, however slight, of the anus or vulva of another by a penis; (B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or (C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object with an intent to abuse, humiliate, harass, degrade or arouse or gratify the sexual desire of any person." D.C. Code § 22-3001(8). For (A) and (C), although "any penetration, however slight" is sufficient, evidence of contact alone is insufficient. The Court of Appeals in *In re E.H.*, 967 A.2d 1270 (D.C. 2009), found insufficient evidence of penetration although there was testimony that the respondent had touched and "humped" the complainant's "butt," and the complainant had a "laceration of the anus," because there was no evidence of penetration. *Id*. at 1274-75. Similarly, in *In re L.L.*, 974A.2d 859 (D.C. 2009), the court found insufficient evidence of penetration although evidence established that the complainant "was sitting on [L.L.'s] groin area, with her legs on either side of his body, … that their groin areas were touching," that both children were naked, and that L.L. was holding the complainant "by her hips and was moving her 'up and down.'" *Id*. at 867.

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***Gee v. United States*, 54 A.3d 1249 (D.C. 2012).** See, *supra*, Chapter 36.III.A.3.

5. Theft and Related Offenses

a. Value

In all theft cases, the government must prove the goods had *some* value. *Jones v. United States*, 345 A.2d 144, 145-46 (D.C. 1975), for example, held that valid car license tags had a use value to their owner for the balance of the license year, and there was no need to show actual market value. *Accord Leftridge v. United States*, 410 A.2d 1388, 1391 n.6 (D.C. 1980) (intact tire had obvious value to car owner). *But see In re P.A.S.*, 434 A.2d 461, 463 (D.C. 1981) (government failed to prove license tags were current and hence had value).

An essential element of first-degree theft and similar felonies is that the property involved had at least a certain monetary value. Absent sufficient evidence on that element, an MJOA as to the felony is appropriate, and the charge is reduced to a misdemeanor. D.C. Code § 22-3212 (formerly § 22-3812). Cases arising before the effective date of the Theft and White Collar Crime Act of 1982 discuss larceny rather than theft and a requisite value of $100 rather than $250. D.C. Code § 22-3212 (formerly § 22-3812).

Because the consequences of a felony conviction are much more severe than that of a misdemeanor, the court "has been careful to require substantial probative evidence of value at the time of the theft." *Williams v. United States*, 376 A.2d 442, 444 n.3 (D.C. 1977). *But see Curtis v. United States*, 611 A.2d 51, 52 (D.C. 1992) (although government failed to put on specific evidence of value of four-door Taurus sedan, which was fully operable and in good

condition when it was stolen, as revealed by photographs, jury could reasonably find that fair market value exceeded $250).

The owner's testimony, even when coupled with introduction of the items for the jury's inspection, may not be enough to ensure that the jury's assessment of present value is based on anything more than speculation. *See Malloy v. United States*, 483 A.2d 678, 680-81 (D.C. 1984); *Salim v. United States*, 480 A.2d 710, 716 (D.C. 1984); *Terrell v. United States*, 361 A.2d 207, 211 (D.C. 1976); *Wilson v. United States*, 358 A.2d 324, 325 (D.C. 1976); *Boone v. United States*, 296 A.2d 449 (D.C. 1972).

The government's evidence of market value must reflect the value at the time of the offense, *i.e.*, the price at which a willing seller and a willing buyer would trade. The defendant in *Williams v. United States*, 376 A.2d 442 (D.C. 1977), was convicted of grand larceny based on theft of a watch that needed repair, a leather coat and a television. The complainant testified that the total purchase price of the items was $755. Shortly after the theft, one of Williams's friends sold the TV for $50 to $60. Williams repurchased the set for $100 when he heard that the complainant would not press charges if the set was returned to her. In reversing the conviction, the court held that the price Williams paid for the television did not show its fair market value because he was not a "willing buyer." *Id*. at 444.

The value of new items taken from a commercial establishment can be shown by evidence of retail price, which can be established by the testimony of a management employee. "The market value of a chattel, of course, may be established by the testimony of its non-expert owner." *Saunders v. United States*, 317 A.2d 867, 868 (D.C. 1974). *Saunders* should apply only to the situation in which new items were taken from a store with value established by the testimony of a witness engaged in the commercial distribution of such items. *But see Moore v. United States*, 388 A.2d 889, 891 n.2 (D.C. 1978) ("Whether an owner's testimony as to current market value provides enough information to get to the jury on that issue will depend on the circumstances of each case.").

The owner's estimate and introduction of the items into evidence may be sufficient if the stolen property was: (1) recently purchased at a price well in excess of the statutory limit; (2) in "mint" condition when stolen; and (3) not subject to prompt depreciation or obsolescence. *See Wilson v. United States*, 358 A.2d 324, 325 (D.C. 1976) (owner's testimony that stolen coat had been purchased for $150 but had two buttons missing at time of trial and snag on one sleeve was insufficient); *In re J.F.T.*, 320 A.2d 322, 325 (D.C. 1974). In *Moore*, 388 A.2d at 891, the complainant's testimony that a fifteen-month-old color television, purchased for $300 to $400, and in "almost mint condition" at the time of the offense, was insufficient to meet "any, let alone all, of the three conditions" of *J.F.T.* and *Wilson*. In *Comber v. United States*, 398 A.2d 25, 26 (D.C. 1979), evidence of the purchase prices and dates of a television, two radios, and two men's suits was insufficient, without any evidence of value at the time of the offense. *See also Johnson v. United States*, 387 A.2d 1108, 1112 (D.C. 1978). *But see United States v. Robinson*, 698 F.2d 448, 455-56 (D.C. Cir. 1983) (although owner's testimony on subjective value of jewelry would not be permitted, testimony on objective market value was relevant; jeweler's written appraisal was also introduced); *Capers v. United States*, 403 A.2d 1155, 1156 (D.C. 1979) (owner's testimony that four-year-old gold watch with diamonds and two-year-old necklace with diamond

and rubies had total value of $1150 sufficient; jewelry with precious stones not subject to prompt depreciation or obsolescence).

In some cases where the items greatly exceeded the requisite value, the court appears to have accepted the owner's estimate. *See Roldan v. United States*, 353 A.2d 292, 295 (D.C. 1976) (challenge to proof of value "baseless" where stolen items included $300 in travelers checks, $55 in cash, and cameras and binoculars assessed by owner at $600; pawn shop employee also gave expert testimony to retail value of cameras and binoculars); *In re R.D.J.*, 348 A.2d 301, 304 (D.C. 1975) (tenant's $560 estimate of present value of stolen television, tape deck, and radio and stereo components).

In *United States v. Whetzel*, 589 F.2d 707, 710-11 (D.C. Cir. 1978), the government's proof of value, while innovative, was insufficient to convict appellant of two counts of transporting stolen property in excess of $5,000. Whetzel was charged with transporting nearly 3000 pirated 8-track tapes from the District and selling them to an FBI agent in Maryland. The prosecution offered evidence of the value of a license to produce and distribute tapes and records of the copyrighted recordings appellant sold, arguing that the intangible "aggregation of sounds" was transported and that its value should be measured by the value of the license to produce them. The court disagreed, holding that the value of the tapes would be reflected in whatever market price they could command. *Id.*

The government is bound by strict rules in proving value. *See Zellers v. United States*, 682 A.2d 1118, 1120-22 (D.C. 1996) (government failed to prove value of stolen property was over $250 where pawnbroker paid $130 for property, and where original purchase prices did not necessarily reflect current market value); *Eldridge v. United States*, 492 A.2d 879, 881-82 (D.C. 1985) (discussing value and its relationship to the charges of first-degree theft); *Criminal Jury Instruction* No. 3.105. Under § 22-3202 (formerly § 22-3802), if the government can prove that a series of thefts are part of a single scheme or a systematic course of conduct, it can aggregate the amounts received to raise the crime to first-degree theft (theft I). For example, if a person is charged with taking $50 from a cash register, the charge is second-degree theft (theft II); if the person allegedly did this every day for two weeks as part of a single scheme or systematic course of conduct, the government may charge either a series of misdemeanors or one felony. A successful challenge to aggregation may reduce the charge from a felony to a misdemeanor. The maximum penalties for theft I and theft II are 10 years and/or a $5000 fine, and 180 days and/or a $1000 fine, respectively. D.C. Code § 22-3212 (formerly § 22-3812). Thus, in some cases the best defense may be a challenge to the value of the property.

In *Phillips v. United States*, 778 A.2d 281 (D.C. 2001), the court held that the evidence was sufficient to prove theft over $250 and destruction of property over $250 where the evidence showed that the defendant was in possession of the recently stolen car, the car had not been damaged before it was taken, and the insurance company reimbursed the owner $2800 for the loss of the car. Similarly, the evidence in *Williams v. United States*, 805 A.2d 919 (D.C. 2002), was held sufficient for first-degree theft where the complainant testified about the value, age and quantity of the stolen jewelry. The court noted that unlike electrical goods, jewelry is not subject to "prompt depreciation or obsolescence." However, in *Hebron v. United States*, 804 A.2d 270 (D.C. 2002) (per curiam), the evidence was held insufficient for first-degree theft where the government elicited testimony as to the purchase price of the items, but did not offer evidence as

to the condition at the time of the theft. The court held that there must be evidence of the value at the time of the theft sufficient to eliminate the possibility of the jury surmising about the value of the property. *But see Hebron v. United States*, 837 A.2d 910 (D.C. 2003) (en banc) (court held that victim gave ample evidence to support a conviction including quality, age, and original purchase price).

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***Foreman v. United States*, 988 A.2d 505 (D.C. 2010).** Evidence insufficient to permit conviction for first-degree theft where government presented no evidence from which rational jury could infer that combined value of stolen iPod and its contents exceeded $250.

b. Possession

The government must prove that the complainant had possession of the goods at issue. *Robinson v. United States*, 270 A.2d 144, 145-46 (D.C. 1970), reversed a larceny conviction for stealing boxes of cold tablets from a drugstore, where Robinson had been in the store shortly before his arrest holding a bag full of boxes of cold tablets similar to those formerly on a largely depleted display counter. Absent evidence that the display had been depleted by criminal means (for there was no evidence that it had been recently stocked or was full just before the incident, and some of the boxes were of a different size from those found in the display) or that the tablets in appellant's possession had come from the display, the prosecution had not established an "unlawful taking." Similarly, in *McGilton v. United States*, 140 A.2d 190, 191 (D.C. 1958), a jacket found on McGilton was of a type sold at a particular store, but the same kind of jacket was sold at other stores in the city and there was no evidence that the jacket, or any similar jacket, was missing from the store; the court reversed McGilton's conviction.

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***Hawkins v. United States*, 103 A.3d 199 (D.C. 2014).** Conviction for second-degree theft of bicycle remanded where judge did not resolve unambiguously the issue of defendant's mistaken but genuine belief that bicycle belonged to no one because of her misunderstanding that defendant's actual belief is insufficient to make out abandonment as defense to theft, and thus record evidence could not preclude finding either that defendant lacked genuinely held belief that he could claim ownership of property or that his testimony negated an actual belief that bicycle had been abandoned.

6. Receiving Stolen Property (RSP)

The intent required for RSP is knowledge or reason to know that the property is stolen. It is a defense to RSP, but not to attempted RSP, that the property was not actually stolen. *See In re P.A.S.*, 434 A.2d 461, 462 (D.C. 1981). "Intent to defraud" is not an element. *DiGiovanni v. United States*, 580 A.2d 123 (D.C. 1990). *See Criminal Jury Instruction* No. 5.301. Although not technically a lesser included offense of theft, RSP is the "functional equivalent" of a lesser included of theft. *Byrd v. United States*, 598 A.2d 386, 392 n.13 (D.C. 1991) (en banc).

Therefore, a defendant should not receive consecutive sentences for RSP and UUV convictions. *Id.* at 393.

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***Lihlakha v. United States*, 89 A.3d 479 (D.C. 2014).** A defendant may establish a return-for-reward defense that negates requisite intent for RSP if evidence shows that: (1) reward had been announced, or was believed to have been announced, before property was possessed or agreed to be possessed; (2) person claiming reward had nothing to do with theft; (3) possessor returned property without unreasonable delay to rightful owner or to a law enforcement officer; and (4) possessor implied no condition on return of property.

7. Unauthorized Use of a Vehicle (UUV)

To establish UUV the government must prove that the defendant operated a vehicle knowing that she did not have the consent of the owner (or some other person empowered on the owner's behalf). D.C. Code § 22-3215 (formerly § 22-3815); *Criminal Jury Instruction* No. 5.302. In *Agnew v. United States*, 813 A.2d 192 (D.C. 2002), the court held that the government had failed to produce sufficient evidence that the defendant knowingly used the vehicle without the consent of the owner: there was no evidence as to who was authorized to give consent since the identity of the owner was never conclusively established; circumstantial evidence consisted of a missing vent window covered in plastic, a "hardly obvious" discrepancy in the VIN number, and insubstantial evidence of flight; there was also no evidence that the car had been "recently" stolen.

The passenger in a stolen car is often charged with aiding and abetting UUV, D.C. Code § 22-3215 (formerly § 22-3815). To sustain a conviction, the government must prove beyond a reasonable doubt that the passenger had actual knowledge that the car was operated without the owner's permission – *i.e.*, guilty knowledge of the criminal act being committed. *See In re D.M.L.*, 293 A.2d 277, 278 (D.C. 1972); *In re Davis*, 264 A.2d 297, 298 (D.C. 1970); *see also Stevens v. United States*, 319 F.2d 733, 735 (D.C. Cir. 1963).

8. Malicious Destruction of Property

In order to prove destruction of property, the government must prove that the defendant acted with malice. *Gonzalez v. United States*, 859 A.2d 1065, 1067 (D.C. 2004) (evidence insufficient where defendant's car negligently hit police officer on bicycle and then fled the scene). Malice is: "(1) the absence of all elements of justification, excuse or recognized mitigation, and (2) the presence of either (a) an actual intent to cause the particular harm which is produced or harm of the same general nature, or (b) the wanton and willful doing of an act with awareness of a plain and strong likelihood that such harm may result." *Id.* at 1068 (quotations omitted). Furthermore, "the requisite intent for malicious destruction of property is an intent to injury or destroy the property, for a bad or evil purpose, and not merely negligently or accidentally." *Id.* (quotations omitted); *see also Guzman v. United States*, 821 A.2d 895 (D.C. 2003) (insufficient evidence of malice where defendant was drunk, went to his brother's apartment, hit his brother, and in the ensuing melee his brother's fish tank was knocked off a table and broken).

In destruction of property cases the government must also prove that the property destroyed, injured, or broken was "not his or her own." D.C. Code § 22-303; *Thomas v. United States*, 985 A.2d 409 (D.C. 2009) (sufficient evidence for destruction of government property). However, a defendant may be convicted of destroying property that she co-owns with another person. *Jackson v. United States*, 819 A.2d 963 (D.C. 2003) (defendant broke door lock of house he co-owned with the complainant, his wife).

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***Best v. United States*, 66 A.3d 1013 (D.C. 2013).** Evidence of damage to door lock and jamb, police officer's observations, and defendant's admission that he broke door were sufficient to support conviction of destruction of property.

9. Taking Property without Right (TPWR)

The elements of taking property without right (TPWR) are "that the defendant (1) took and (2) carried away (3) the property of another." *Tibbs v. United States*, 507 A.2d 141, 144 (D.C. 1986), *on reh'g en banc*, *Scarborough v. United States*, 522 A.2d 869 (D.C. 1987). The property need not have been in "the possession of another." *Id*. (rejecting claim of insufficient evidence even though complainant had never received check that defendant convicted of taking); *see also* D.C. Code § 22-3816 (formerly § 22-3816). *Craig v. United States*, 490 A.2d 1173, 1178 (D.C. 1985), reversed a conviction of taking property without right where the appellant was charged with taking coins from parking meters, but the government failed to prove that he did not have legitimate access to the meters. Similarly, in *Schafer v. United States*, 656 A.2d 1185, 1189 (D.C. 1995), the government failed to prove that the defendant took property of another when he removed from his former girlfriend's apartment a TV set that he had bought while living with her.

10. Shoplifting

The government need not prove exactly who owns the stolen merchandise; as long as it proves that the owner is someone other than the defendant. *Douglas v. United States*, 570 A.2d 772, 775 (D.C. 1990); *Carmon v. United States*, 498 A.2d 580, 582-83 (D.C. 1985). The owner is the person or entity entitled to exercise dominion and control over the property. *Carmon*, 498 A.2d at 582-83. In *Carmon*, the government failed to prove both the corporate status of the department store from which the property had been taken, and that the store was the owner of the merchandise. Carmon removed sweaters from a store rack, concealed them under his coat, and left the store. When he realized he was about to be stopped, he ran back into the store and dropped the sweaters with the store's price tags on them. From this evidence, the trier of fact could find that the proprietor of the store – not Carmon – owned the sweaters. In *Douglas*, the court concluded that evidence of behavior inconsistent with ownership was sufficient to survive an MJOA; the appellants cased a store, tried to loosen the front security gate, cut telephone wires, broke a window, and walked quickly away from the sound of an alarm. *Douglas*, 570 A.2d at 776-77; *see also Alston v. United States*, 509 A.2d 1129, 1131 (D.C. 1986) (defendant triggered alarm when he exited store, the concealed goods had store's price tags on them, and security guard testified that defendant "stole some gloves").

The government must also prove specific intent to appropriate the property without complete payment. In *Carmon*, evidence of concealing merchandise and leaving a store without paying for it was sufficient to show the requisite intent. Concealment of merchandise without leaving the store may also suffice. *Baldwin v. United States*, 521 A.2d 650, 651 (D.C. 1987); *Singletary v. United States*, 519 A.2d 701, 702 (D.C. 1987); *Wormsley v. United States*, 526 A.2d 1373, 1375 (D.C. 1987). *See* D.C. Code § 22-3213 (formerly § 22-3813(a)(1)) (concealment with intent to appropriate without complete payment or with intent to defraud is shoplifting).

11. Trafficking in Stolen Property (TSP)

This provision, aimed at professional "fencing" operations, distinguishes between those who are in the business of dealing in stolen property and those who buy or receive stolen property for their own use on a limited basis. The statute defines an *act* of trafficking in stolen property, and provides that a person must have committed *two* or more such *acts* to be guilty of the *offense* of TSP. An act of trafficking may be committed either by disposing of property "as consideration for something of value," or by obtaining control of property with the intent of so disposing of it. D.C. Code § 22-3231(a) (1) and (2).

The distinction between an act of trafficking and the offense of TSP must be made clear to the jury. First, the evidence of each act of trafficking must be analyzed separately, and the unanimous jury must agree on what acts were committed. The jury must then find that two or more such individual acts were committed, on separate and distinct occasions. The statute is intended to address transactions "committed at different times and involving different items of property." *Extension of Comments on Bill No. 4-133* (July 20, 1982) at 49. If the jury finds only one such action, it may find the defendant guilty only of receiving stolen property under § 22-3832. *See Criminal Jury Instruction* No. 5.305.

The property involved need not actually have been stolen if the defendant had reason to believe that it had been. This provision was intended to allow police "sting" operations to function. D.C. Code § 22-3231(c).

D.C. Code § 22-3231 was challenged in *German v. United States*, 525 A.2d 596 (D.C. 1987), on grounds of overbreadth and vagueness. The court rejected these challenges. *Id*. at 606. It also rejected a substantive due process challenge to the statute, and an issue of whether the provision "deprived [the defendant] of the defense of impossibility," because that defense was not "constitutionally protected." *Id*. at 606-07.

12. Fraud

The elements of fraud are: 1) the defendant engages in a scheme or systematic course of conduct; 2) with the intent to defraud or obtain property of another by means of a false or fraudulent pretense, representation or promise; 3) that the property lost or obtained was of a particular value (punishments vary based on the value); first degree fraud has the additional element 4) that as a result of the scheme or systematic course of conduct, the defendant obtained property of another or caused another to lose property. D.C. Code § 22-3221(a) and (b). The fraud statute also states: "Fraud may be committed by means of false promise as to future performance which the

accused does not intend to perform or knows will not be performed. An intent or knowledge shall not be established by the fact alone that one such promise was not performed." D.C. Code § 22-3221(c).

The definitions of "scheme" and "false promise" are derived from the federal mail fraud statute, 18 U.S.C. §§ 22-1341 to 1345. The definition of "systematic course of conduct" is derived from N.Y. Penal Law 190.50 and 190.60 (McKinney 1983) and *People v. Block & Kleaver, Inc.*, 427 N.Y.S.2d 133 (1980).

The prior definitions of "false pretense [or] representation" may be applicable to the fraud statute. *Blackledge v. United States*, 447 A.2d 46, 50-51 (D.C. 1982).

Arguably, the federal requirement that "overt acts" be proven should apply (*i.e.*, that a person's actions must have progressed from the thought and planning stages of a scheme to actually "engaging" in the scheme). Proof of the overt acts themselves would form the basis of a jury finding a "scheme or systematic course of conduct."

A single incident or proof of only one overt act may not amount to the requisite scheme or systematic course of conduct. Fraud may be more closely analogous to a "continuing criminal enterprise" than to a "conspiracy," in that it may require proof of at least two overt acts instead of just one. The overt acts need not, however, be criminal in and of themselves, but may include such acts as meetings with victims or among co-schemers. A single overt act in the District of Columbia is sufficient for jurisdictional purposes; the government can then plead acts occurring outside the District as part of the scheme and course of conduct.
Reference to the federal mail fraud statute may be helpful in resolving the myriad questions that will arise regarding aiders and abettors and instances where an individual joins a scheme in progress and leaves it or it terminates before any overt acts occur.

Potential jury unanimity issues exist. The jury may be asked to find a scheme or systematic course of conduct based on proof of several different actions; the jury should be required to agree on which acts occurred before being allowed to consider whether the acts constitute a scheme or systematic course of conduct.

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***Cooper v. United States*, 28 A.3d 1132 (D.C. 2011).** Evidence sufficient to convict defendant of charges stemming from transaction designed to obtain hardwood flooring by tendering fraudulent checks where defense conceded that government had sufficient proof that he was involved in second transaction and where cell phone records and similarities between transactions would allow reasonable jury to find defendant participated in both transactions.

13. Cruelty to Children / Parent-Child Assaults

Reasonable parental discipline is a defense to cruelty to children charges and in assault cases where a parent, or a person acting *in loco parentis*, is accused of assaulting a child. *Simms v. United States*, 867 A.2d 200, 204-05 (D.C. 2005). When there is some evidence, however slight,

that the defendant's actions were reasonable parental discipline, the burden is on the government to refute the defense by establishing that the purpose of the treatment was not for the purpose of discipline or that the discipline was not reasonable under the circumstances. *Simms*, 867 A.2d at 204; *Lee v. United States*, 831 A.2d 378 (D.C. 2003); *Newby v. United States*, 797 A.2d 1233 (D.C. 2002). The government can fail to meet this burden even when the amount of discipline employed is significant and there is evidence that the parent acted in anger. *Florence v. United States*, 906 A.2d 889 (D.C. 2006) (government did not prove beyond a reasonable doubt that parent's use of a curling iron - not hot - to discipline belligerent child was sufficient to support conviction for assault and attempted second-degree cruelty to children; the court held that evidence of a parent's anger does not necessarily bar the defense of parental discipline); *see also Longus v. United States*, 935 A.2d 1108 (D.C. 2007) (simple assault conviction reversed because government's evidence was insufficient to rebut defense of parental discipline privilege where defendant slapped daughter on back of head and grabbed her clothing near her neck); *Powell v. United States*, 916 A.2d 890 (D.C. 2006) (insufficient evidence to disprove defendant's parental discipline defense where defendant restrained his daughter from leaving the house by grabbing her arm and pulling her back, thereby causing her to fall against a staircase; the court noted that parental discipline may be reasonable even when it is not applied in reaction to imminent danger, or where there is evidence that the parent was angry when imposing the discipline). *But see Dorsey v. United States*, 902 A.2d 107 (D.C. 2006) (evidence supporting conviction for second-degree cruelty to children was sufficient to show that defendant's actions were not a reasonable exercise of parental discipline, and were, in fact, reckless where use of a belt had left visible marks on the child's face, including under his eye, and created a substantial risk of a fractured eye socket or ruptured eye); *Lee*, 831 A.2d at 381 (where defendant struck the complainant in the shoulders and legs with a wooden dowel, the court held that this level of corporal punishment was unreasonable under the circumstances).

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***Mitchell v. United States*, 64 A.3d 154 (D.C. 2013).** Operative language of cruelty to children statute effectively treats reckless disregard of a grave risk of bodily injury to a child as substantial equivalent of cruelty, and thus jury reasonably found that exposure of children to presence of loaded weapons five feet from where they watched television constituted very kind of reckless disregard of a grave risk of bodily harm needed to sustain conviction for second-degree cruelty to children.

14. Kidnapping

To commit a kidnapping, the defendant must have: "[1] seized, confined, abducted or carried away the complainant against his/her will . . . with [2] the specific intent to hold or detain[] the complainant for ransom, reward, or [some other purpose]." *Criminal Jury Instruction* No. 4.303; see D.C. Code § 22-2001 (formerly § 22-2101). Addressing the second element, *Walker v. United States*, 617 A.2d 525, 527 (D.C. 1992), held that the statutory language "for ransom or reward or otherwise" requires some proof of intent to benefit from the kidnapping, but that Walker's motive for revenge was sufficient. *See also Butler v. United States*, 614 A.2d 875 (D.C. 1992) (transportation is not an element of kidnapping). In *Persall v. United States*, 812 A.2d 953 (D.C. 2002), the court held that the evidence was sufficient to establish that the

complainant was carried away against his will where the defendant was armed and threatened violence if the complainant did not go with the defendant.

15. Prostitution

The essential elements of solicitation of prostitution, D.C. Code § 22-2701(a), are that a defendant: "(1)invited, enticed or persuaded . . . (2) a person age 16 or over (3) for the purpose of engaging, agreeing to engage, or offering to engage in sexual acts or contacts with that person (4) in return for a fee." *See Blyther v. United States*, 577 A.2d 1154, 1154-55 (D.C. 1990) (§ 22-2701 applies to commercial solicitation in private residence); *Graves v. United States*, 515 A.2d 1136, 1145 (D.C. 1986) (evidence insufficient for solicitation of prostitution where police saw suspects waving to men in cars in high-prostitution area but heard no mention of a fee). As for the "fee" element, the government need not prove that the solicitee had the ability to pay, *Nche v. United States*, 526 A.2d 23, 27 (D.C. 1987), or that the fee involved money, *Muse v. United States*, 522 A.2d 888, 890 (D.C. 1987) (offer to exchange gold chain for sex). In *Ford v. United States*, 533 A.2d 617, 625 (D.C. 1987) (en banc) Rose *v. United States*, 535 A.2d 849, 852-55 (D.C. 1987), the court reviewed a 1981 amendment which defined the "invited, enticed or persuaded" element as encompassing several enumerated acts, including repeated beckoning, stopping and attempting to engage passers-by in conversation. The appellants were seen engaging in such acts, but no evidence of any commercial transactions for sexual relations was presented. The court held that the 1981 amendment could not be used to reduce the prosecution's burden of proof, and that without some evidence of sex for a fee there was insufficient evidence to support the charge.

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***Moten v. United States*, 81 A.3d 1274 (D.C. 2013).** See, supra, Chapter 10.

***Moten v. United States*, 81 A.3d 1274 (D.C. 2013).** Evidence sufficient to support defendant's conviction of solicitation where defendant informed stranger in response to her statement that she was "looking for dates" that he was "horny" and offered her marijuana and "a warm place to stay."

16. Obstruction of Justice

This statute proscribes any attempt to obstruct justice by means of bribery or misrepresentation, in addition to force or threats. It includes "prosecuting attorneys" in the definition of "investigators" or persons to whom the complainant is attempting to communicate information about a criminal offense. Finally, it prohibits attempts at retaliation against witnesses, jurors, or court officers for carrying out their duties. *See Irving v. United States*, 673 A.2d 1284, 1289 (D.C. 1996) (an endeavor to impede a witness need not be successfully completed, nor need the threat be communicated to the witness, in order to establish obstruction of justice).

The statute includes investigations as "official proceedings," even absent a pending case. It also includes proceedings conducted by the Council for the District of Columbia. Specific methods of impeding a witness are enumerated, and the statute proscribes "harassing" a witness.

> [T]he harassment provision is intended to prohibit only conduct intended to obstruct justice. It is not intended, nor should it be construed to apply to acts by an attorney or an investigator who are legitimately interviewing a witness for preparation of the defense. The plain meaning of this provision is limited to conduct that is corrupt, threatening or intimidating with the purpose of impeding the criminal justice process.

Report to the Council of the District of Columbia from the Committee on the Judiciary, Wilhelmina J. Rolark, Chairperson, regarding Bill 9-385 (May 20, 1992). As yet, no cases have interpreted the broad language of the statute.

In *Crutchfield v. United States*, 779 A.2d 307 (D.C. 2001), in affirming an obstruction of justice conviction, the court held that for the purpose of that offense, a *witness* is a person who knows or is supposed to know material facts about a pending case and who may be called to testify and an *official proceeding* may be an ongoing investigation. In *McCullough v. United States*, 827 A.2d 48 (D.C. 2003), the court found sufficient evidence for obstruction where the evidence showed defendant knew victim to be witness to earlier murder, confirmed her identity to co-defendants, and obstructed her testimony by participating in her murder.

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***Brown v. United States*, 89 A.3d 98 (D.C. 2014).**See, *supra*, Chapter 36.III.A.4.

***Castillo-Campos v. United States*, 987 A.2d 476 (D.C. 2010).** Testimony that one defendant stated that he "was not going to let" government witness cooperate with government sufficient to sustain obstruction conviction where statement made in context of discussion amongst co-conspirators that a bullet would be put in the head of anyone who snitched.

***Harrison v. United States*, 60 A.3d 1155 (D.C. 2012).** See, *supra*, Chapter 36.III.A.4.

***Jones v. United States*, 999 A.2d 917 (D.C. 2010).** Evidence sufficient to support obstruction of justice charge where defendant's request to friend that she lie about being present at club when fatal fight occurred when she hadn't been there made her a witness with information about case and where defendant's conditional request – "if I was to ask you…" – was an "endeavor to influence" that brought behavior within the obstruction statute.

***Jones v. United States*, 99 A.3d 679 (D.C. 2014).** Evidence that defendant warned complainant not to "snitch" was sufficient to sustain conviction for obstruction of justice.

***Silver v. United States*, 73 A.3d 1022 (D.C. 2013).** Evidence sufficient to support conviction for obstruction of justice where government presented evidence that defendant wrote to witness one month after arrest for PWID, asking him to claim responsibility for drugs, and then again, threatening to fight witness when witness had failed to come forward.

***Smith v. United States*, 68 A.3d 729 (D.C. 2013).** Conviction for obstruction of justice upheld where evidence was sufficient for jury to infer that defendant had used cell phone found in his prison cell to contact witness to persuade him to change his testimony.

***Wynn v. United States*, 48 A.3d 181 (D.C. 2012).** Statutory definition of "the due administration of justice in any official proceeding" does not include an initial police response to the scene of a crime and therefore defendants' convictions are reversed.

***Wynn v. United States*, 80 A.3d 211 (D.C. 2013).** Insufficient evidence to support "harassment" form of obstruction of justice where conduct was a single request to report a false alibi made in a non-threatening manner.

17. Homicide and Related Offenses

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***Blaize v. United States*, 21 A.3d 78 (D.C. 2011).** Evidence sufficient to support conviction for voluntary manslaughter where jury could reasonably conclude that defendant's firing of gun in decedent's direction was substantial factor in decedent's fleeing into street and in driver of car that fatally struck decedent taking off at high speed when gunfire began.

***Castillo-Campos v. United States*, 987 A.2d 476 (D.C. 2010).**
Evidence sufficient for jury to find requisite premeditation and deliberation for first-degree premeditated murder where evidence showed that defendant had pursued victim and then shot him eight times in head and neck at close range.

Evidence sufficient for jury to find requisite premeditation and deliberation for first-degree premeditated murder where evidence showed a deliberate selection of victim, an initial shot from a distance into the victim's head, and a subsequent resumption of shooting at close range by multiple shooters.

Evidence sufficient to find that murder took place during course of burglary, to support conviction for felony murder while armed (burglary), where defendants forced decedent outside at gunpoint during course of burglary, then ran after decedent and shot him when decedent broke free and ran.

***Ewing v. United States*, 36 A.3d 839 (D.C. 2012).** Jury could permissibly infer premeditation and deliberation in first-degree premeditated murder without an eyewitness where there was preexisting hostility between parties, defendants walked away with decedent into a private setting, one of defendants took deadly weapon with her, decedent suffered brutal and prolonged beating, and defendants searched for money and valuables after decedent's death.

***Graham v. United States*, 12 A.3d 1159 (D.C. 2011).** Evidence sufficient to sustain convictions for first-degree murder while armed, PFCV and CPWL where contradictions between testimony from various witnesses were "unremarkable," and credibility of only eyewitness to shooting was

not "inherently incredible" simply because he changed his account and was influenced by plea agreement with government.

***McKnight v. United States*, 102 A.3d 284 (D.C. 2014).** Evidence insufficient evidence to infer that defendant acted with requisite malice aforethought required for conviction of second-degree murder where witness testified to seeing only short portion of argument not involving defendant, no evidence that defendant had interest or involvement in argument, witness did not know of any relationship between defendant and decedent, witness provided no evidence that defendant present for any reason other than driving car in which co-defendant was passenger, defendant used words expressing possibility that decedent was or would be armed, and witness did not testify to defendant's demeanor after shooting.

***Napper v. United States*, 22 A.3d 758 (D.C. 2011).** Evidence sufficient to convict defendant of first-degree murder while armed despite numerous contradictions in evidence where jury heard and weighed evidence that eyewitnesses identified both defendant and gun, defendant fled scene after shooting, and defendant made incriminating statements in taped telephone calls.

***Walden v. United States*, 19 A.3d 346 (D.C. 2011).** Evidence sufficient to establish premeditation in first-degree premeditated murder case in which victim bled to death after being shot one time in jaw and neck where defendant armed himself with shotgun hours before murder, told witness "he was going to kill" whomever had raped an acquaintance, ambushed decedent, and then shot decedent at close range after accusing him of the rape.

***Williams v. United States*, 52 A.3d 25 (D.C. 2012).** Evidence sufficient to convict on murder and weapons offenses where eyewitness descriptions of the shooter showed "remarkable" consistency, and included a description by a witness who knew defendant well and had seen him in area of shooting within seconds after shooting took place.

***Wilson v. United States*, 995 A.2d 174 (D.C. 2010).** Evidence sufficient for jury to infer that defendant murdered wife where defendant falsely told girlfriend week before death that wife had been in car accident and suffered serious injuries, applied for insurance policy on wife's life, with defendant as beneficiary, less than one week before wife's death, obtained a gun from a friend one week before wife was killed, and gave inconsistent accounts of what occurred the night of the murder.

18. Assault

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***Ewell v. United States*, 72 A.3d 127 (D.C. 2013) (amended).** See, supra, Chapter 33.III.

***Buchanan v. United States*, 32 A.3d 990 (D.C. 2011)** (see concurring opinion for an in-depth discussion of the mens rea requirement for simple assault)**.**

***Castillo-Campos v. United States*, 987 A.2d 476 (D.C. 2010).** Evidence sufficient to support specific intent to kill required for conviction of AWIKWA where evidence of conspiracy to "get"

members of rival gang, evidence that multiple gang members pointed guns at one victim and shot at him six times, and evidence that two cars carrying gang members made U-turn to follow and shoot at rival gang member's car eight or nine times.

***Flores v. United States*, 37 A.3d 866 (D.C. 2011).** Trial judge did not plainly err in giving jury supplemental instruction that recklessness required for assault with significant injury need not be specifically directed at injured party.

***Graure v. United States*, 18 A.3d 743 (D.C. 2011).** Evidence sufficient to establish specific intent to kill element of AWIKWA where defendant poured enough gasoline over burn victim that fire inspector identified victim as an "area of origin" of fire and where defendant ignited his lighter when gasoline-soaked victim was in close range, and where other victims were seated within eight feet of where defendant poured gasoline and ignited lighter.

***Lopez v. United States*, 30 A.3d 190 (D.C. 2011) (per curiam).** Failure to prove identity of victim in prosecution for simple assault – D.C. Code § 22-404(a) – does not violate due process.

***Medina v. United States*, 61 A.3d 637 (D.C. 2013).** Audio recording of physical altercation that corroborated testimony of MPD witness was sufficient to support assault conviction.

***Nero v. United States*, 73 A.3d 153 (D.C. 2013).** Bullet wounds not *per se* significant bodily injuries for purposes of felony assault – D.C. Code § 22-404(a)(2).

***Quintanilla v. United States*, 62 A.3d 1261 (D.C. 2013).** Evidence insufficient to sustain conviction for felony assault under D.C. Code § 22-404(a)(2) because victim's injuries to head and hand did not constitute "significant bodily injury" where victim received no medical attention, as properly defined, and suffered no long-term consequences.

19. Arson

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***Lewis v. United States*, 10 A.3d 646 (D.C. 2010).** Evidence insufficient to support conviction for arson under theory of "conscious disregard of known and substantial risk that actions would endanger human life" where defendant set fire to vacant home next to, but not attached to, other homes, and no evidence of defendant's subjective state of mind because risk must involve danger to human life.

20. Robbery

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***Lewis v. United States*, 996 A.2d 824 (D.C. 2010).** Evidence sufficient to sustain conviction for robbery where complainant knew defendants from past acquaintances, identified each defendant by name, and in photo array, made in-court identifications of defendants, and where two defendants acted in concert with each other during offense.

***Lucas v. United States*, 20 A.3d 737 (D.C. 2011).** Inconsistent testimony of cooperating witnesses as to when defendant first met cooperating witnesses was matter for jury to weigh, and evidence thus sufficient to sustain convictions for robbery.

***Matthews v. United States*, 13 A.3d 1181 (D.C. 2011).** Evidence sufficient to support conviction for attempted robbery while armed where defendant knew from presence at tattoo party that tattoo artist had nearly $1000 cash on him when party ended, defendant complained that tattoo artist's prices were too high, and defendant stated that intent had been only to commit robbery when informed that the victim had been killed.

***Pleasant-Bey v. United States*, 988 A.2d 496 (D.C. 2010).** "Felonious taking" element of robbery established where defendant did not have "complete and exclusive control" of stolen car until he killed its owner.

***Snowden v. United States*, 52 A.3d 858 (D.C. 2012).** Despite numerous inconsistencies in testimony of two witnesses, witness identification evidence sufficient to support finding that defendant was gunman who robbed complainant, where inconsistencies not so great that jury could not have resolved them, and where witness knew defendant well enough to know defendant's nickname, recognized defendant before defendant covered face with a black ski mask, and could see defendant clearly right before incident occurred.

***Sutton v. United States*, 988 A.2d 478 (D.C. 2010).** "Force and violence" and "immediate actual possession" elements of armed robbery satisfied where victim began to flee after keys were taken, but before his car was driven away, because as victim began to flee, co-defendants stopped their own car, and threatened to shoot at victim, and victim was 45 to 50 feet away at the time his car was taken, but was within a distance that he could have retained physical custody over the car if not deterred by violence or fear.

21. Assault on a Police Officer

***Ball v. United States*, 26 A.3d 764 (D.C. 2011).** Evidence sufficient for conviction of felony APO where defendant pointed loaded gun at police officer, thereby creating grave risk of significant bodily injury, even where gun was jammed when recovered by police, because gun still in "normal operating condition," and would have fired, even while jammed, if round had been in chamber.

***Cave v. United States*, 75 A.3d 145 (D.C. 2013).** Conviction for APO vacated where trial court "reluctantly" found defendant guilty, despite factual dispute about who had struck whom, and in what order, and where court's refusal to resolve factual dispute meant judge had reasonable doubt about what had occurred.

***Cheek v. United States*, 103 A.3d 1019 (D.C. 2014).** Evidence sufficient to sustain conviction for APO where defendant's conduct was "active and oppositional," as he repeatedly and aggressively came at officer, who was attempting to conduct investigation and protect himself and those around him, from behind in midst of angry mob despite repeated orders not to do so.

Trial court did not plainly err in failing to, *sua sponte*, consider first Amendment defense to APO because defendant's conduct went beyond speech into active confrontation interfering with officer's investigation.

***Crossland v. United States*, 32 A.3d 1005 (D.C. 2011).** Evidence sufficient for to support misdemeanor APO conviction under D.C. Code § 22-405(b) where trial court credited testimony that defendant elbowed and attempted to hit officer while "in fighting stance," that defendant did so before officers used any force against defendant, that defendant resisted officers' efforts to handcuff him, and defendant did not establish that trial court's factual findings were plainly wrong.

***Dickens v. United States*, 19 A.3d 321 (D.C. 2011).** Defendant's yelling "get them" or "get him" to his unleashed pit bull without corresponding physical action as officers were attempting to handcuff him were not "mere words," instead constituting "intimidation" sufficient to convict defendant of APO under intimidation theory.

***Fadero v. United States*, 59 A.3d 1239 (D.C. 2013).** Evidence sufficient for conviction of APOWA (assault on a police officer while armed) where police officer was in uniform and drove a police car, and where defendant's backing into officer with car, even slowly, created a "grave risk of significant bodily injury."

***In re J.S.*, 19 A.3d 328 (D.C. 2011).** Evidence sufficient to sustain adjudication for APO based on "resisting" officers rather than "assaulting" them where defendant's repeated pulling away of arm while being handcuffed demonstrated "active and oppositional" conduct that he ceased once being threatened with mace.

APO does not require proof of specific intent, regardless of manner in which offense committed

***Mattis v. United States*, 995 A.2d 223 (D.C. 2010).** Off-duty police officer protected by APO statute when engaged in outside employment because officer must comply with all applicable D.C. Code provisions pertaining to his duties when engaged in police-related outside employment, and required by both statute and regulation to take police action when crimes are committed in his presence regardless of whether "on duty."

***Mobley v. United States*, 101 A.3d 406 (D.C. 2014).** Court plainly erred in omitting "significant bodily injury" element that distinguishes felony from misdemeanor from APOWA instruction, but error harmless where government introduced "compelling" evidence that defendant was identified as one of men who fired twenty to thirty shots in direction of officers, and trial court instructed that a weapon is dangerous if "used in a manner likely to produce death or great bodily injury."

***Ruffin v. United States*, 76 A.3d 845 (D.C. 2013).** Insufficient evidence to support APO conviction where defendant's "ephemeral" elbow jerk in response to police officer reaching towards his shoulder did not amount to "resisting" police officer.

***Wilson v. United States*, 102 A.3d 751 (D.C. 2014).** APO statute prohibits forcible resistance to lawful and unlawful police action.

22. Second Amendment

***McDonald v. Chicago*, 561 U.S. 742 (2010)** (incorporating Second Amendment to states through Due Process Clause of Fourteenth Amendment).

***Snell v. United States*, 68 A.3d 689 (D.C. 2013).** See, supra, Chapter 33.

***Thompson v. United States*, 59 A.3d 961 (D.C. 2013).** No Second Amendment right to carry a concealed weapon. See Gamble v. United States, 30 A.3d 161, 164-66 (D.C. 2011).

***Gamble v. United States*, 30 A.3d 161 (D.C. 2011).** Carrying a concealed weapon is not protected by the Second Amendment.

***Herrington v. United States*, 6 A.3d 1237 (D.C. 2010).** Holding in Heller also applies to simple possession of ammunition in the home.

***Mack v. United States*, 6 A.3d 1224 (D.C. 2010).** Second Amendment does not "clearly" secure right of people "to keep and bear" ice picks generally or outside the home or in a concealed manner.

***Wooden v. United States*, 6 A.3d 833 (D.C. 2010).** See, supra, Chapter 33.III.

***Lowery v. United States*, 3 A.3d 1169 (D.C. 2010).** Conviction for attempted possession of unregistered firearm found in apartment in which defendant was staying upheld under plain error review because defendant did not preserve constitutional issue at trial and record was insufficient to demonstrate that he could have successfully registered that weapon.

***Heller v. District of Columbia*, 670 F.3d 1244 (D.C. 2011)** (holding that basic registration requirements are constitutional with respect to handguns, but leaving open question of whether requirements constitutional with respect to long guns).

23. Weapons

2014 Supplement

***Brown v. United States*, 89 A.3d 98 (D.C. 2014).**Evidence sufficient to support CPWL conviction under D.C. Code § 22-4504(a) where defendant grabbed gun from complainant, fired gun twice, and did not have license to possess gun because actual possession required for CPWL includes direct physical control over gun at a given moment, satisfied here by defendant's firing of gun.

***Lucas v. United States*, 20 A.3d 737 (D.C. 2011).** Evidence sufficient to sustain conviction for PFCV where defendant facilitated co-defendant's firearm offenses by giving him the gun and acting as look-out while robbery took place.

***Graham v. United States*, 12 A.3d 1159 (D.C. 2011).** See, *supra*, Chapter 36.III.B.17.

24. Felon-in-Possession

2014 Supplement

***Fox v. United States*, 11 A.3d 1282 (D.C. 2011).** Evidence sufficient to support conviction for felon in possession of a firearm where defendant held gun for brief period during ride to liquor store but did not carry firearm during robbery of liquor store.

***Williams v. United States*, 75 A.3d 217 (D.C. 2013).** Trial court did not abuse its discretion in permitting government to read stipulation of defendant's prior felony robbery conviction during summation in felon-in-possession case where conviction was mentioned at no other time during trial and was read in order to establish a necessary element of the offense.

***Nero v. United States*, 73 A.3d 153 (D.C. 2013).** See, supra, Chapter 32.

25. Operating Under the Influence

2014 Supplement

***Everton v. District of Columbia*, 993 A.2d 595 (D.C. 2010).** A bicycle is considered a "vehicle" under the statutory prohibition against operating a vehicle under the influence of alcohol.

26. Criminal Neglect of a Vulnerable Adult

2014 Supplement

***Jackson v. United States*, 996 A.2d 796 (D.C. 2010).** Evidence sufficient to support conviction for criminal neglect of a vulnerable adult where defendant engaged in physical altercation with severely mentally retarded complainant, knew that complainant had noticeable bruises and scratches resulting from that altercation that required medical attention but failed to provide it, and failed to report the matter as administratively required.

***Tarpeh v. United States*, 62 A.3d 1266 (D.C. 2013).** Insufficient evidence of "reckless indifference" to support conviction for criminal neglect of a vulnerable adult where government failed to introduce evidence "far beyond" mere fact that caregiver did not act with degree of care that someone of ordinary prudence would have exercised in same situation.

27. Misdemeanor Sexual Abuse

2014 Supplement

***Hailstock v. United States*, 85 A.3d 1277 (D.C. 2014).** Specific intent required for misdemeanor sexual abuse—i.e., intent to commit sexual act or sexual contact in order to gratify defendant's sexual desire, when defendant either knew or should have known that he did not have complainant's permission to engage in sexual act or sexual conduct—established by defendant's closing and locking door to bedroom in which complaining witness lay resting, and continuing in his efforts by pulling on her robe and touching her breast in the process, even after she said "no" to his expressed intent to "get down" with her and pushed him away.

***Hooker v. United States*, 70 A.3d 1197 (D.C. 2013).** See, *supra*, Chapter 8.II.B.

***Steward v. United States*, 6 A.3d 1268 (D.C. 2010).** Trial court did not err in denying motion for judgment of acquittal because evidence sufficient to establish misdemeanor sexual abuse where victim testified that she was "tired" of defendant's inappropriate sexual behavior, and that defendant for years had been engaging her in activities that seemed to sexually arouse him.

28. Drugs and Drug Paraphernalia

2014 Supplement

***Fatumabahirtu v. United States*, 26 A.3d 322 (D.C. 2011).** D.C. Code § 48-2203(b) (District of Columbia Drug Paraphernalia Act of 1982) requires government to prove that owner or clerk of commercial retail store (1) had specific intent to deliver or sell drug paraphernalia and (2) knew, or reasonably should have known, that buyer of items would use them illegally to inject, ingest or inhale a controlled substance.

Evidence sufficient to sustain convictions of clerk and owner of retail store for attempted sale of drug paraphernalia where clerk gave undercover officer both "an ink pen" and a metal scouring pad, which can be used together to smoke crack cocaine, when he asked only for pen, and where owner ordered and stored in back storeroom and in cabinet underneath cash register items obviously used with illegal drugs.

***Jackson v. United States*, 61 A.3d 1218 (D.C. 2013).** Evidence insufficient to sustain conviction for PWID marijuana where defendant was briefly observed "just sitting" in backseat of car on passenger side in which drugs were found in closed cooler on floorboard behind driver's seat.

***Johnson v. United States*, 40 A.3d 1 (D.C. 2012).** Evidence sufficient to sustain conviction for PWID marijuana where possession element established by defendant's acceptance and acknowledgement of package delivery and its contents, including placing package in his car shortly after delivery, and making statements to officers regarding its contents, and where jury could infer intent from quantity of marijuana and manner of packaging and shipping.

***Ruffin v. United States*, 25 A.3d 1 (D.C. 2011).** See, supra, Chapter 10.

29. Leaving the Scene of an Accident

2014 Supplement

***Sandwick v. District of Columbia,* 21 A.3d 997 (D.C. 2011).** Evidence sufficient to sustain conviction for leaving scene of accident involving personal injuries where testimony established that defendant's truck struck victim, that victim was thrown three feet into air and landed in roadway, and that defendant's truck slowed down or stopped immediately after impact but then drove away.

Knowledge of both collision and resulting physical injuries, as required under statutory provision for leaving scene of accident involving personal injuries, established where impact of collision threw victim into air three feet and vehicle slowed down after impact had occurred.

30. Disorderly Conduct

2014 Supplement

***Martinez v. District of Columbia,* 987 A.2d 1199 (D.C. 2010).** Evidence insufficient to support conviction for disorderly conduct where defendant's conduct; verbal outburst towards only a police officer that did not create a "likelihood or probability" that any onlookers would react with violence; did not constitute a breach of the peace.

31. Unlawful Entry

2014 Supplement

***Cartledge v. United States,* 100 A.3d 147 (D.C. 2014).** Trial court did not plainly err in finding that "Bar Notice" based on "articulable and reasonable" suspicion that defendant's involvement in activity was "dangerous to the health or safety of the residents" of DCHA housing complex was valid, and thus supported conviction for unlawful entry, where police received report of individual carrying gun at complex, found gun hidden in vacant apartment, and defendant was on premises and matched suspect's description.

***Haye v. United States,* 67 A.3d 1025 (D.C. 2013).** A physical copy of a barring notice is not required to be provided to defendant for barring notice to take effect provided there is evidence of notice to prove unlawful entry, and authorized person attempted to deliver such barring notice to defendant.

***Ortberg v. United States,* 81 A.3d 303 (D.C. 2013).** Evidence sufficient to prove that entry was against will of occupant where evidence showed that defendant 'knew or should have known' that his entry into a hotel private function was unwanted.

32. Threats

***Gray v. United States*, 100 A.3d 129 (D.C. 2014.)** Despite testimony of complainant that defendant's behavior—saying "I'm going to kill you" and making "a gun motion" with his hand—did not "necessarily" seem threatening, conviction for threats upheld based on complainant's testimony that defendant seemed "serious," complainant avoided defendant to avoid "further confrontation," and complainant testified that "maybe" defendant would act on threat, and fact that other witnesses testified to defendant's behavior that day, satisfying the "ordinary hearer" standard.

***Ruffin v. United States*, 76 A.3d 845 (D.C. 2013).** Evidence insufficient to support felony threats conviction where defendant threated to damange police vehicle because felony threats does not apply to threats to property owned by District of Columbia. Statute's use of "person" is limited to natural persons, and statute does not protect victims with interests in, but not ownership of, threatened property.

33. Attempted Cruelty to Animals

***Dauphine v. United States*, 73 A.3d 1029 (D.C. 2013).** Evidence legally sufficient to sustain conviction for attempted cruelty to animals where government was able to demonstrate that defendant possessed intent to commit offense by showing that she "acted without justification or excuse" in putting poison in neighborhood cats' food bowl.

34. Threats to do Bodily Harm

***Carrell v. United States*, 80 A.3d 163 (D.C. 2013).** Evidence sufficient to support conviction for attempted threats to do bodily harm where defendant choked victim with two hands around her neck while saying "I could kill you, I could fucking kill you right now."

Trial judge need not make explicit finding on intent to threaten element of attempted threats to do bodily harm because offense is general intent, not specific intent.

35. Perjury

2014 Supplement

***Brown v. United States*, 89 A.3d 98 (D.C. 2014).**Evidence sufficient to support perjury conviction where phone call in which defendant admitted committing perjury admitted as evidence, high volume of phone calls between co-defendants in months following shooting suggested that acquaintance predated shooting, witness testified that defendant had been like family to witness for nearly entire life, witness and co-defendant saw one another regularly, and defendant denied knowing co-defendant's name at time of shooting.

36. POCA

2014 Supplement

***Workman v. United States,* 96 A.3d 678 (D.C. 2014).** Conviction for POCA reversed where evidence that police observed open container bearing tequila label in back seat of his car was insufficient to demonstrate beyond reasonable doubt that bottle contained at least one half of one percent alcohol by volume, as required under POCA statute's definition of "alcoholic beverage."

37. Traffic

***Whitfield v. United States,* 99 A.3d 650 (D.C. 2014).** No traffic violation under 18 DCMR §§ 422.5 and 422.6 if attached license plate frame does not obscure any part of license plate's identifying information, which does not include state motto or nickname located at bottom of plate.

38. Possession of Implements of Crime

***In re J.W.,* 100 A.3d 1091 (D.C. 2014).** Adjudication for possessing implements of crime under D.C. Code § 22-2501 (2012 Repl.) (prohibiting the possession of "any instrument, tool, or implement for picking locks or pockets, with the intent to use such instrument, tool, or implement to commit a crime") vacated because bolt cutters do not constitute "lock-picking tools" within the adopted definition of the statute, regardless of the statute's title.

39. Tampering

***Mobley v. United States,* 101 A.3d 406 (D.C. 2014).** Evidence sufficient to sustain tampering conviction where testimony of co-defendant's cellmate regarding gun was corroborated by testimony of witness who saw gun thrown from vehicle, and later recovered it, and was confronted by other defendant who angrily told him, "You didn't see nobody throw a gun. Don't show up to court," and where reasonable jurors could infer that defendant took "substantial step" in completing crime by going to spot where gun had been tossed and searching for it, with the intent of preventing it from being used by law enforcement officers in prosecuting co-defendant.

C. Other Sufficiency Issues

1. Jurisdiction

It is fundamental that a court cannot act without jurisdiction over the parties and the subject matter. *Colbert v. United States*, 601 A.2d 603, 606-07 (D.C. 1992). In every Superior Court case, the government must prove that the crime was committed inside the District of Columbia. Failure to do so mandates the granting of an MJOA. *See James v. United States*, 478 A.2d 1083, 1086 (D.C. 1984). The issue of jurisdiction should be determined by the trial court – it is not an issue of fact for the jury. *Dyson v. United States*, 848 A.2d 603, 609 (D.C. 2004); *Adair v. United States*, 391 A.2d 288, 290 (D.C. 1978). There is a presumption that an offense charged was committed within the jurisdiction of the court in which the charge is filed unless the

evidence affirmatively shows otherwise. *Dyson*, 848 A.2d at 609. In *Dyson*, the Court of Appeals affirmed the trial court's finding of jurisdiction where there was "an ongoing crime or series of crimes which [began in the District and] ended in Maryland." *Id.*; *see also Crutchfield*, 779 A.2d 307.

2014 Supplement

***Dobyns v. United States*, 30 A.3d 155 (D.C. 2011).** Superior Court had subject matter jurisdiction over defendant's second-degree theft conviction where defendant was stopped and arrested while intentionally driving car without permission within District of Columbia regardless of fact that he originally had permission to drive car and had initially obtained possession of car in Maryland.

2. Second Amendment

***Snell v. United States*, 68 A.3d 689 (D.C. 2013).** See, supra, Chapter 33.

***Riddick v. United States*, 995 A.2d 212 (D.C. 2010).** CPWL conviction did not violate defendant's Second Amendment rights where record showed that defendant had previously pled guilty to and was convicted of CPWL and thus would likely not have qualified for a license to carry pistol had he applied for one.

***Little v. United States*, 989 A.2d 1096 (D.C. 2010).** Convictions for CPWL, UF and UA do not violate Second Amendment where gun used outside confines of defendant's home.

3. Eyewitness Identification

The vagaries and hazards of eyewitness identification, as a matter of law, have long been recognized in the District of Columbia. *See United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972). A case involving a single identifying witness should therefore receive special scrutiny from the trial court:

> [A] judge has the power to refuse to permit a . . . case to go to the jury even though the single eyewitness testifies in positive terms as to identity. . . . [W]here identification rests upon the testimony of one witness, the judge ought to consider with respect to identification testimony the lapse of time between the occurrence of the crime and the first confrontation, the opportunity during the crime to identify [the perpetrator], the reasons . . . for failure to conduct a line-up or use similar techniques . . . and the judge's own appraisal of the capacity of the identifying witness to observe and remember facial and other features. In short, the judge should concern himself as to whether the totality of circumstances "give[s] rise to a very substantial likelihood of irreparable misidentification."

* * *

> In the instant case the complainant testified that he was able to identify appellant at the show-up because the image of appellant's face was implanted on his mind. Although the complainant may have been a credible and convincing witness, it is well recognized that the most positive eyewitness is not necessarily the most reliable . . . . Thus, the complainant's emphatic statements about his ability to identify appellant are not controlling; rather, they are only one factor to consider in determining the reliability of the identification.

Crawley v. United States, 320 A.2d 309, 311-12 (D.C. 1974) (footnote and citations omitted). Despite a very prompt and positive identification, Crawley fit none of the characteristics listed in the broadcast description except that he was a black man wearing wine-colored pants, and the complainant was unable to identify him in court; his conviction was reversed. *But see Nelson v. United States*, 601 A.2d 582, 593 (D.C. 1991) (identification of clothing and other apparel was sufficient for an identification).

Reliance by the government on a single eyewitness "does not by itself render the evidence insufficient." *Peterson v. United States*, 657 A.2d 756, 760 (D.C. 1995) ("Even identification testimony of a single eyewitness will be sufficient so long as a 'reasonable person could find the identification convincing beyond a reasonable doubt, given the surrounding circumstances.'"); *In re B.E.W.*, 537 A.2d 206, 207 (D.C. 1988) (affirming although suspect was viewed at a distance, in mist, through a partially rolled up window, and identifying officer broadcast a lookout for a black male wearing a T-shirt).

If the government's single eyewitness fails to make an in-court identification, the identity of the defendant may be inferred from all the evidence before the jury. *Brooks v. United States*, 717 A.2d 323, 328 (D.C. 1998). The narcotics officer in *Brooks* failed to identify the defendant in court, but the court ruled that an in-court identification is not always necessary where "the record is replete with evidence sufficient to allow the jury to find that the defendant who appeared at trial was the person who committed the acts charged." *Id*. at 327. *But see In re R.H.M.*, 630 A.2d 705, 708 (D.C. 1993) (identification testimony insufficient where witness was unable to make in-court identification and, prior to trial, identified appellant from a photo array as one of three people who "looked familiar").

4. Fingerprints

Fingerprints at the scene of a crime can convict a defendant only if there is evidence that they "could only have been impressed at the time when the crime was perpetrated." *Townsley v. United States*, 236 A.2d 63, 65 (D.C. 1967) (citation omitted) (fingerprints found on outside of window of burglarized store were insufficient to convict). The "[g]overnment must negate at least the most reasonable explanations for the prints consistent with innocence." *Patten v. United States*, 248 A.2d 182, 183 (D.C. 1968). The seminal case of *Borum v. United States*, 380 F.2d 595 (D.C. Cir. 1967), reversed a housebreaking conviction based on evidence that Borum had touched objects in the house at some time, where the government presented no evidence that the objects were inaccessible to him at any time other than during the robbery.

> Of course, the jury may have thought that Borum could not have touched the jars at any other time or in any other place. The jury may have thought that Borum never had any opportunity to touch the jars outside the house either before or after complainant bought them. But that conclusion would have been based on speculation alone. . . . The case should not have been submitted to the jury, for the Government produced no evidence, *either direct or circumstantial*, which could support an inference that the fingerprints were placed on the jars during the commission of the crime.

Id. at 597 (footnotes omitted) (emphasis added).

Immobility of the object combined with lack of access generally supports a reasonable inference that the prints were made at the time of the offense. *See In re M.M.J.*, 341 A.2d 421, 423 (D.C. 1975) (prints on broken transom over door inside burglarized house) *Hawkins v. United States*, 329 A.2d 781, 782 (D.C. 1974) (prints on dresser drawer, in bedroom usually locked by complainant); *Stevenson v. United States*, 380 F.2d 590, 591 (D.C. Cir. 1967) (prints on objects in house, which complainant had never given defendants permission to enter). *But see Rhyne v. United States*, 492 A.2d 596, 597 (D.C. 1985) (fingerprint in home to which appellant routinely had access was not enough to sustain burglary and grand larceny convictions).

Generally, when prints are found in a place accessible to the public, and could have been impressed at any time, the government's proof is insufficient. *See Townsley v. United States*, 236 A.2d 63, 65 (D.C. 1967) (defendant's prints on outside surface of piece of broken glass from front door of drugstore insufficient to show attempted housebreaking); *Hiet v. United States*, 365 F.2d 504, 505 (D.C. Cir. 1966) (prints on side of open vent window of automobile in larceny prosecution; insufficient evidence).

The circumstances may, however, eliminate any possibility that the accused could have touched the object at any time other than during the crime. *See United States v. Cary*, 470 F.2d 469, 471-72 (D.C. Cir. 1972) (defendant's prints on both sides of window pane installed three months earlier, not by defendant, which complainant frequently washed; submitted case to jury).

CHAPTER 37

CLOSING ARGUMENT

The defendant's right to closing argument is guaranteed by the Sixth Amendment. *Herring v. New York*, 422 U.S. 853 (1975); *United States v. DeLoach*, 504 F.2d 185, 190 (D.C. Cir. 1974). The right applies in full force even to relatively uncomplicated cases. *Kearney v. United States*, 708 A.2d 262, 264 (D.C. 1998). While the right is waivable, *Id*. at 264, it should never be waived. Closing argument "serves to sharpen and clarify the issues for resolution by the trier of fact. . . . [I]t is only after all the evidence is in that counsel for the parties are in a position to present their respective versions of the case . . . and point out the weaknesses of their adversaries' positions." *Id*. at 264. More importantly, "for the defense, closing argument is the last clear chance to persuade the trier of fact that there may be reasonable doubt of the defendant's guilt." *Id*.

I. PREPARATION AND PRELIMINARY MATTERS

Preparation: Well before trial, counsel should plan the themes, content, and organization of the summation, using a separate file for pertinent notes and ideas. Key pieces of evidence, negative and positive, should be discussed. Counsel should also incorporate the relevant jury instructions into any closing plan, which counsel should copy and place into the closing file well in advance of trial. The government's case should be anticipated and an effective rejoinder integrated into the argument. The basic argument should be formulated before the first juror is sworn, with accurate notes taken throughout the trial to permit incorporation of developments at trial.

Preliminary Matters: Before closing arguments, counsel should also resolve certain preliminary matters with the judge. If counsel needs more time to modify or finalize the argument after presentation of the evidence, a brief continuance should be requested, based upon the Sixth Amendment. *See Herring*, 422 U.S. 853. If asked, counsel should advise the court of the time needed to present full closing argument, so that the argument will not be curtailed unexpectedly. The court has discretion to control closing arguments, but it abuses its power if it prevents counsel from making essential points. *See United States v. Sawyer*, 443 F.2d 712 (D.C. Cir. 1971). If counsel is cut short or the time requested is disallowed, counsel should object and enumerate the issues not reached because of the limitation. Counsel may want to request that the court specify the permitted length of the prosecutor's closing and rebuttal arguments; most judges will limit the government's rebuttal to one third of its total time, to avoid abuse of rebuttal. Counsel should also find out whether objections to improper arguments are to be made during or after arguments.[1]

Emphasizing and explaining the guiding principles of law is often essential as well as effective. The jury instructions provide the framework from which counsel may argue the law as it relates to the facts of the case. The trial court may exclude only those statements that misstate the law or the evidence. *See Johnson v. United States*, 671 A.2d 428, 438 (D.C. 1995); *Thomas v.*

[1] Permission is also required if counsel wants to read from the trial transcript during closing argument. *Sherrod v. United States*, 478 A.2d 644, 663-64 (D.C. 1984).

United States, 557 A.2d 1296 (D.C. 1989) (reversing due to prosecutor's misstatement of law where trial court failed to take corrective action); *Sawyer*, 443 F.2d at 713-14. Counsel must consider early in the case the possible instructions, and submit proposed modifications of any important instructions that can be properly worded in a way more positive to the defense. In every case, counsel should submit a proposed instruction on the defendant's theory, consistent with the theory to be argued in closing. Before closing arguments, the court must advise counsel of the instructions it intends to give. Super. Ct. Crim. R. 30. The purpose of this rule is to allow counsel to fashion their arguments according to the specific charges to the jury. The court must fully consider and rule on instructions prior to closing arguments. *See Ballard v. United States*, 430 A.2d 483, 487-88 (D.C. 1981).

Preparation for Closing Statement:

- ✓ Keep a file for pertinent notes and ideas
- ✓ Plan the basic argument before first juror is sworn in
- ✓ Plan themes, content and organization well before trial
- ✓ Discuss key pieces of evidence, both negative and positive
- ✓ Incorporate relevant jury instructions
- ✓ Take accurate notes throughout trial
- ✓ Anticipate the government's case

Preliminary Matters:

- ✓ Request a brief continuance if needed
- ✓ Advise court of time required, if needed, so argument will not be curtailed
- ✓ Object and enumerate issues not reached, if argument is curtailed unexpectedly
- ✓ Inform court of any proposed instructions or modifications

II. FREQUENTLY DISCUSSED AREAS

The following three areas of law, missing witness inference[2], arguing the absence of evidence as a reason to doubt the government's case, and arguing flight as evidence of guilt, frequently arise in the context of closing arguments and merit specific discussion.

A. Missing Witness Inference

"[I]f a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transaction, the fact that he does not do it creates [an inference] that the testimony, if produced, would be unfavorable." *Graves v. United States*, 150 U.S. 118, 121 (1893). Before the court can permit the inference to be argued or give an instruction on it, the court must

[2] The terms "missing witness inference" or "missing witness argument" are more accurately labeled "missing witness/evidence inference" or "missing witness/evidence argument" because the evidence at issue is not always testimony from a witness but also can be other forms of evidence. The "missing witness" formulation is used here as a matter of custom.

determine: (1) that the witness is able to "elucidate the transaction" such that he might be expected to be called; and (2) that he is "peculiarly available" to the party against whom the inference is made. *Reyes-Contreras v. United States*, 719 A.2d 503, 508 (D.C. 1998) (quoting *Arnold v. United States*, 511 A.2d 399, 415 (D.C. 1986)); *see also Lemon v. United States*, 564 A.2d 1368, 1375 (D.C. 1989); *Lawson v. United States*, 514 A.2d 787, 789 (D.C. 1986); *Parks v. United States*, 451 A.2d 591, 614 (D.C. 1982); *Thomas v. United States*, 447 A.2d 52, 57 (D.C. 1982); *Dent v. United States*, 404 A.2d 165, 169-171 (D.C. 1979). A witness's anticipated testimony would elucidate the transaction if it would be "relevant, material, noncumulative, and 'an important part' of the case of the party against whom the inference is drawn." *Strong v. United States*, 665 A.2d 194, 197 (D.C. 1995) (citation omitted). A witness is peculiarly available to a party if "the party [has] the physical ability to locate and produce the witness, and there was such a relationship, in legal status or on the facts as claimed by the party as to make it natural to expect the party to have called the witness." *Id*. (citation omitted). Thus, a finding of peculiar availability may be made where the witness could be expected to be biased against or hostile to the party seeking the benefit of the inference, even if the witness is physically available to both parties. *Id*. at 197 (fact that complainant and witness were "friends" justified missing witness inference based on prosecution's failure to call the witness).[3] *But see Jenkins v. United States*, 902 A.2d 79 (D.C. 2006) (defendant did not lay sufficient foundation for a missing witness argument because she failed to show that the witness was peculiarly available to the prosecution and made no attempt to call the witness or even request an opportunity to interview the witness).

The two part test is designed to eliminate the risk that a missing witness argument "may add a fictitious weight to one side or another of the case [because] in a sense [it] creates evidence from the absence of evidence." *Burgess v. United States*, 440 F.2d 226, 234 (D.C. Cir. 1970). Even if the conditions are met, the court may disallow argument if an adverse inference is not warranted under the circumstances. *See Reyes-Contreras*, 719 A.2d at 508 (quoting *Thomas v. United States*, 447 A.2d at 58); *Cooper v. United States*, 415 A.2d 528, 533 (D.C. 1980).

In a partial missing witness argument, counsel comments upon the witness's absence, but does not ask the jury to infer that the testimony would have been adverse to the other party. An incomplete or partial missing witness argument also requires advance permission from the court, which must make the same factual determination before permitting the argument. *See Lawson*, 514 A.2d at 790; *Arnold*, 511 A.2d at 399; *see also Price v. United States*, 531 A.2d 984, 994 (D.C. 1987) (error to suggest, through cross-examination of defendant, that missing witness would have provided unfavorable testimony).

B. Arguing the Absence of Evidence as a Reason to Doubt the Government's Case

While counsel is prohibited from making a missing witness argument, fundamental to virtually every defense closing will be an argument pointing to evidence that the government has not introduced as a reason to doubt the government's case. The persuasive force of such an argument is apparent to competent defense counsel, and the legal support to make such an

[3] Sufficient likelihood of bias has been found where the relationship between the party and the witness was one of "girlfriend," "government informer," "employer-employee," and "relative." *Strong*, 665 A.2d at 199 (citing cases).

argument is recognized in *Greer v. United States*, 697 A.2d 1207, 1209 (D.C. 1997). In *Greer*, the defense attorney in a drug case attempted to open on the fact that, among other things, no money was found on the defendant, no videotape was made of the transaction, and no fingerprints were lifted from the drugs. The defense attorney attempted to cross-examine and close on the same themes. *Id.* The prosecutor objected to these arguments on missing witness grounds, and the court sustained the objections. The Court of Appeals reversed, holding that "a defendant is entitled to have the jury consider the lack of corroborating evidence in the government's case . . . ." *Id.* at 1211. "Indeed, it is the absence of evidence upon [material] matters that may provide the reasonable doubt that moves a jury to acquit." *Id.* at 1210 (citation omitted). "Thus, in assessing whether the government has met its burden of proving guilt beyond a reasonable doubt, the jury may properly consider not only the evidence presented but also the lack of any evidence that the government, in the particular circumstances of the case, might reasonably be expected to present." *Id.* For this reason, after laying the appropriate foundation in cross-examination, defense counsel may appropriately comment on the absence of evidence. *Id. But see Brown v. United States*, 881 A.2d 586 (D.C. 2005) (harmless error where trial judge erroneously gave the "no duty" instruction because trial counsel was allowed to argue to the jury that the government's case lacked corroborating evidence, and that the government is "required to lay an evidentiary foundation entitling it" to the "no duty" instruction where the defense challenges the lack of evidence).

It is important to note, however, that the government can make a similar argument provided a proper foundation has been laid. *See Lazo v. United States*, 930 A.2d 183 (D.C. 2007) (where only one eyewitness testified that defendant wore a mask during stabbing attack, prosecutor did not shift burden of proof by acknowledging discrepancy in government's own evidence and then telling jurors not to "speculate" about what had become of mask that was not recovered from defendant and not introduced into evidence); *Allen v. United States*, 603 A.2d 1219 (D.C. 1992) (prosecutor not making impermissible missing evidence argument by commenting that defendant's failure to preserve corroborative evidence undermined his theory of self-defense).

As *Greer* makes clear, arguing the absence of evidence is different from arguing missing evidence. A missing evidence instruction allows the jury to infer that "corroborative evidence, if obtained, would have been favorable to the defendant." *Greer*, 697 A.2d at 1211. In a typical absence of evidence argument, the defense is not arguing that the absent evidence, if obtained, would have proven favorable to the defense. Rather, the defense is arguing only that the failure to produce such evidence (e.g., a handgun in a homicide case, fingerprints in a drug case, and physical findings in a sexual assault case), weakens the government's case and provides a reason to doubt the defendant's guilt.

The Supreme Court has recognized the enormous prejudice a defendant suffers if he is precluded from commenting on the absence of evidence to support the government's case. In *Kyles v. Whitley*, the Court acknowledged that defense counsel must be permitted to attack "the reliability of the investigation" that led to the defendant being placed on trial. 514 U.S. 419, 446 (1995). The Supreme Court held that it was permissible for counsel to cross-examine police officers regarding their failure to even consider that a key witness may not be telling the truth, or that incriminating evidence might be planted. *Id.* Quoting *Bowen v. Maynard*, 799 F.2d 593, 613 (10th Cir. 1986), the *Kyles* Court noted that, "[a] common trial tactic of defense lawyers is to

discredit the caliber of the investigation or the decision to charge the defendant. . . ." Thus it is permissible to attack the government's case by commenting on the absence of evidence.

It is critical for defense counsel to keep in mind the distinctions between missing witness arguments, partial missing witness arguments, and *Greer*-type reasonable doubt arguments. The former require certain predicates including the requirement that counsel obtain permission from the court before making such an argument. The *Greer*-type reasonable doubt argument points to missing evidence in the government's case not to imply that such evidence, if presented, would have been favorable to the defense; rather, this type of argument suggests that the absence of a certain type or item of evidence shows that the government has not met its burden of proof. Counsel need not obtain permission in advance in order to make such an argument. *Haywood v. United States*, 965 A.2d 26 (D.C. 2009), reaffirmed the viability of this type of argument even in contexts where missing witness/evidence arguments are not viable. *See United States v. Lawson*, 494 F.3d 1046 (D.C. Cir. 2007) (very clear exposition of when a *Greer*-type argument is proper even when missing witness/evidence arguments are not).

C. Flight as Evidence of Guilt

Government counsel must seek permission to argue an inference of guilt from the defendant's flight. That inference is not favored in this jurisdiction, and "should be used sparsely." *Logan v. United States*, 489 A.2d 485, 489 (D.C. 1985). Because of the inherent danger of prejudice, there must be some "meaningful evidence" of actual flight. *See Scott v. United States*, 412 A.2d 364, 371-72 (D.C. 1980); *United States v. Vereen*, 429 F.2d 713, 715 (D.C. Cir. 1970); *see also Smith v. United States*, 777 A.2d 801 (D.C. 2001) (evidence that defendant attempted to flee from the preliminary courtroom was properly admitted to show consciousness of guilt). Any instruction must tell the jury that a variety of factors may cause both the guilty and the innocent to flee, and to consider all those factors cautiously before inferring guilt from flight. *Logan*, 489 A.2d at 489; *Austin v. United States*, 414 F.2d 1155, 1157 (D.C. Cir. 1969); *see also Criminal Jury Instructions for the District of Columbia* (5th ed. 2009), No. 2.301, Flight or Concealment by Defendant. Because flight is powerful evidence, counsel should be prepared to address it in closing.

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***Gaines v. United States*, 994 A.2d 391 (D.C. 2010).** Error to omit from instruction on flight language stating that flight may be motivated by factors fully consistent with innocence, but harmless where defendant established on cross that he was driving without a license when stopped and argued in closing that it was this lack of driver's license, and not the drugs in his possession, that caused him to run from police.

***Graham v. United States*, 12 A.3d 1159 (D.C. 2011).** Flight instruction proper that instructed jury that it must first find evidence of flight before considering it where pertinent language included in body of instruction even though it was not prefatory.

Flight instruction not unduly prejudicial where evidence showed that defendant changed clothes soon after murder, quickly left area and wasn't seen in neighborhood because it was "hot," and had friend come to another neighborhood to bring him clothes from his apartment.

***Headspeth v. United States*, 86 A.3d 559 (D.C. 2014).** Trial court erred in giving jury consciousness-of-guilt instruction that permitted jurors to infer, from evidence that defendant tried to escape restraint by arresting officer, that defendant was conscious of his guilt of charged offense where instruction was given without jury having learned of "history" between defendant and arresting officer that might have explained defendant's conduct, and without considering whether instruction would be prejudicial in light of jury's lack of information about that history.

III. PROSECUTORIAL MISCONDUCT[4]

If an improper argument is anticipated, counsel should object before arguments begin. Throughout opposing argument, counsel must be alert for prejudicial conduct and object to it promptly. Timely, specific objections are crucial for purposes of appeal.[5] The standard for reversal is significantly higher if counsel does not object.[6] Counsel should request a mistrial and, alternatively, a special curative instruction.[7] An improper closing argument to which counsel did not object because the judge's policy forbade objections during closing argument may be considered in a mistrial motion where "other directly related improprieties [in opposing counsel's] closing" exist. *Carpenter v. United States*, 635 A.2d 1289, 1295 (D.C. 1993); *cf. Simmons v. United States*, 940 A.2d 1014 (D.C. 2008) (defense counsel's failure to object timely to prosecutor's misstatement during closing argument challenging a defense witness's testimony that she was with defendant when he purchased drugs, and thus knew how many bags he had purchased, together with counsel's failure to object to the judge's 'jury recollection controls' instruction, was error but not reversible).

Counsel should avoid explanations or hypotheticals that may permit the prosecutor to reply with otherwise impermissible argument.[8] However, defense misconduct should be met with a

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[4] While most of the decisions discussed in this section involve allegations of prosecutorial misconduct, the parameters are generally applicable to the conduct of defense counsel as well.

[5] "The applicable test [on appeal] in determining whether prosecutorial misconduct infects a verdict is to balance, on the one hand, the gravity of the misconduct, its direct relationship to the issue of innocence or guilt, and the effect of specific corrective instructions by the trial court, if any, against the weight of the evidence of appellant's guilt." *Villacres v. United States*, 357 A.2d 423, 428 (D.C. 1976); *see also Diaz v. United States*, 716 A.2d 173, 181-82 (D.C. 1998); *Lee v. United States*, 668 A.2d 822, 831 (D.C. 1995); *Bowman v. United States*, 652 A.2d 64, 70-71 (D.C. 1994); *Byers v. United States*, 649 A.2d 279, 288-89 (D.C. 1994); *Bouknight v. United States*, 641 A.2d 857, 863 (D.C. 1994); *Peoples v. United States*, 640 A.2d 1047, 1056 (D.C. 1994); *Carpenter v. United States*, 635 A.2d 1289, 1295-96 (D.C. 1993) (expansive prosecutorial misconduct analysis).

[6] Failure to object results in review for plain error. *Gilmore v. United States*, 648 A.2d 944, 945 (D.C. 1994); *Foreman v. United States*, 633 A.2d 792, 795 (D.C. 1993) (plain error analysis outlined); *Poole v. United States*, 630 A.2d 1109, 1129 (D.C. 1993) (counsel must object and request further instruction); *Matthews v. United States*, 629 A.2d 1185, 1198 (D.C. 1993).

[7] An instruction may, however, only highlight the improper argument and exacerbate its prejudicial impact. Counsel should emphasize this point in moving for a mistrial. *See, e.g., Van Ness v. United States*, 568 A.2d 1079, 1083 (D.C. 1990) (curative instruction would accentuate any improper inferences drawn from prosecutor's argument); *United States v. Miranda*, 593 F.2d 590, 596 n.7 (5th Cir. 1979) (curative instruction in response to improper prosecutorial argument might only enhance prejudicial impact and thus might in certain cases be inappropriate). A curative instruction should be given immediately, *i.e.*, before resuming arguments, state that the prosecutor's previous statement was wrong, correct the error specifically, and be repeated in final instructions.

[8] *See Ibn-Tamas v. United States*, 407 A.2d 626, 646 (D.C. 1979) (comment on defendant's consultation with counsel while giving police statement containing inconsistencies proper where defense attempted to argue that inconsistencies were due to defendant's anxiety and confusion at the time of arrest); *Byrd v. United States*, 364 A.2d

prosecution objection, not prosecutorial misconduct. *United States v. Young*, 470 U.S. 1, 11-14, 17-18 (1985), made clear that it was misconduct for the prosecutor to express his opinion that the defendant was guilty, even though an improper defense argument "invited" it. *See also Irick v. United States*, 565 A.2d 26, 40-52 (D.C. 1989) (Newman, J., dissenting). That defense counsel's misconduct "invited" the prosecutor's misconduct is not an appropriate government or judicial response to a defense objection to such misconduct at trial, although it may be a successful government argument on appeal that the misconduct did not amount to reversible error. *See*, *e.g.*, *United States v. Childress*, 58 F.3d 693, 717 (D.C. Cir. 1995).

Improper Argument: Some of the basic areas of improper argument are outlined in the *ABA Standards for Criminal Justice* (1980) (The Prosecution Function), 3-5.8, 3-5.9: It is improper for the prosecutor "to intentionally misstate the evidence or mislead the jury as to the inferences it may draw," express a "personal belief or opinion as to the truth or falsity of any testimony or evidence of the guilt of the defendant," "use arguments calculated to inflame the passions or prejudices of the jury," "divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict," or "intentionally to refer to or argue on the basis of facts outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice." *Id*.; *see also Coleman v. United States*, 948 A.2d 534 (D.C. 2008) (improper for prosecutor to elicit testimony from witness that he had taken polygraph as part of plea agreement and to vouch in rebuttal for credibility of government witnesses, but not abuse of discretion to deny motion for mistrial where trial judge gave immediate curative instruction in each instance and where case against defendant was strong); *Lindsey v. United States*, 911 A.2d 824 (D.C. 2006) (not plain error for trial judge to fail to intervene *sua sponte* where prosecutor's passing remark, arguably linking co-defendants in absence of any other evidence presented at trial, though troubling to the court, did not affect substantial rights or undermine the integrity of the trial); *Simpson v. United States*, 877 A.2d 1045 (D.C. 2005) (prosecutor's "fear-based" arguments during closing, while determined to be prosecutorial error, did not amount to harmful, reversible error).

Prosecutorial misconduct in the rebuttal argument is especially serious because the defense has no opportunity to respond or clarify the point. *Diaz v. United States*, 716 A.2d 173, 180 (D.C. 1998); *Coreas v. United States*, 565 A.2d 594, 600 n.8 (D.C. 1989); *Mathis v. United States*, 513 A.2d 1344, 1349 (D.C. 1986); *Powell v. United States*, 455 A.2d 405, 411 (D.C. 1983). *But see Edwards v. United States*, 767 A.2d 241 (D.C. 2001) (government's rebuttal argument that defendant can appeal and get a new trial if a mistake is made, so don't be afraid to make a decision, may have been improper, but was not plain error given overwhelming evidence).

1215, 1218-19 (D.C. 1976) (comment concerning defendant's ability to have testified proper in light of hypothetical in defense closing); *see also Jefferson v. United States*, 587 A.2d 1075, 1079 (D.C. 1991) (defense argument that government had failed to prove specific intent permitted government to reopen its case and introduce otherwise inadmissible other crimes evidence); *Diaz v. United States*, 716 A.2d 173, 181 (D.C. 1998) (improper argument by prosecutor "tempered" by defense counsel's suggestion that government witness changed her story after talking with prosecutor).

Five types of improper argument that prosecutors often make are discussed below. Counsel should also be alert to abuse of rebuttal argument, which occurs when points that were or should have been made in the initial closing are repeated or introduced in rebuttal. *See Coreas*, 565 A.2d at 600-01; *Lewis v. United States*, 541 A.2d 145, 146-48 (D.C. 1988); *Curry v. United States*, 520 A.2d 255, 267 (D.C. 1987). One clue that an abuse is taking place is if the rebuttal is longer than the initial closing argument.

Raising Objections:

- ✓ Object to any prejudicial conduct
- ✓ Object to any anticipated improper arguments before they begin
- ✓ Request a mistrial where appropriate or curative instructions
- ✓ Be weary of abuse of rebuttal arguments

Timely and specific objections are crucial for appeal.

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***Andrade v. United States*, 88 A.3d 134 (D.C. 2014).** See, supra, Chapter 26.II.A.

***Woodard v. United States*, 56 A.3d 125 (D.C. 2012).** Prosecutor's closing argument improperly urged the jury to draw inference that witness failed to identify the shooter face-to-face at the first trial because he was afraid when witness in fact had identified defendant as one of the shooters in that proceeding.

***Robinson v. United States*, 50 A.3d 508 (D.C. 2012).** Prosecutor's statement during rebuttal of defendants' closing arguments that there was no evidence that witness's use of PCP morning of offense had affected her recollection of events was improper where trial court had excluded defense-proffered expert testimony on that very issue, but trial court's overruling objection and denying curative instruction was not error under Kotteakos standard where thorough expert testimony on subject would have been unlikely to vitiate witness's story of what had happened.

***Gilliam v. United States*, 46 A.3d 360 (D.C. 2012).** Regardless of whether prosecutor's description of reasonable doubt standard in rebuttal closing argument was improper, and regardless of whether court's response to defense's objection was forceful enough, any resulting error was harmless where court gave correct reasonable doubt instruction only fifteen minutes after prosecutor's rebuttal, making clear that jurors "must accept" and "not ignore" the court's instructions, and where defendant had been found surrounded by contraband during two separate searches of his home and ice cream truck.

***Patterson v. United States*, 37 A.3d 230 (D.C. 2012), amended, reh'g en banc denied (Oct. 11, 2012) (per curiam).** Trial court did not plainly err in failing to correct government's closing argument that defendant's defense was "malarkey" and "garbage," sua sponte, because government was attempting to discredit defendant's misidentification defense and reinforce

victim's identification by showing that defendant and other individual were physically distinguishable.

***Ball v. United States*, 26 A.3d 764 (D.C. 2011).** Trial court did not err in failing to intervene sua sponte when prosecutor commented in closing that defendant knew, when pointing gun at police officer, that he was "in a lot of trouble and [had] little to lose" because reasonable inference to draw from evidence that defendant participated in high-speed police chase after which he bailed out from car and fled from police while visibly carrying gun.

***Turner v. United States*, 26 A.3d 738 (D.C. 2011).** Standard jury instruction that jurors' recollection of the testimony controlled was inadequate to neutralize prejudice reinforced by the repeated emphasis the prosecutor placed on unsupported arguments regarding the defendant's motive to attack the complaining witness.

***Jordan v. United States*, 18 A.3d 703 (D.C. 2011).** No shift in burden, and thus no error in trial court's refusal to grant mistrial, where government used rhetorical questions "So, what's the explanation? What's he doing here?" that did not highlight defendant's failure to testify, but rather emphasized that the government's evidence was uncontradicted.

***Johnson v. United States*, 17 A.3d 621 (D.C. 2011).** Not abuse of discretion to allow prosecutor to comment in closing and rebuttal on witness's possible fear of defendant where witness adopted at grand jury her earlier videotaped interview with police in which she inculpated defendant, but then testified at trial that "everything" had been lies, and where redacted video of her police interview included her statement that she had come to police because she didn't feel "safe" and because defendant had beaten her up and threatened to kill her.

***Matthews v. United States*, 13 A.3d 1181 (D.C. 2011).** Prosecutorial statements during closing argument that first victim identified defendant by his facial features and that second victim may have rolled over after being shot permissible where first victim had spent 20 minutes in good lighting giving defendant a tattoo before the attack and was at arms-length in a well-lit hallway during attack, and where evidence showed that second victim would have had three to five minutes of consciousness after fatal shot.

***Fox v. United States*, 11 A.3d 1282 (D.C. 2011).** Defendant did not suffer substantial prejudice by prosecutor's inaccurate characterization of "other police paperwork" not entered into evidence that may or may not have existed where case against defendant was strong and outcome did not turn on credibility of police witnesses that testified as to completion of paperwork.

***Daniels v. United States*, 2 A.3d 250 (D.C. 2010).** Prosecutorial comments regarding presumption of innocence and vouching for credibility of detective, though likely improper, did not substantially prejudice defendant where defendant declined a curative instruction and court instructed jury three times that attorney arguments were not evidence.

***Lewis v. United States*, 996 A.2d 824 (D.C. 2010).** No grounds for reversal based on prejudicial comment by prosecutor where court sustained defense objection to prosecutor's statement that

robbery victim was "too scared" to testify and then instructed jury not to consider statement during deliberations.

***Spencer v. United States*, 991 A.2d 1185 (D.C. 2010).** No abuse of discretion to deny defendant's request for additional argument in response to government's "natural consequences" aiding and abetting argument made for first time during rebuttal where aiding and abetting theory offered as fallback to government's principal argument that defendant had been shooter and prosecutor stated that finding defendant guilty would require finding that he "carried the gun knowingly."

A. Comment on Constitutional Rights

The prosecutor cannot comment, expressly or by implication, on the defendant's failure to testify. Misconduct is found if "'the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be comment on the failure to testify.'" *Brewer v. United States*, 559 A.2d 317, 322 (D.C. 1989) (citation omitted); *see also (Brian K.) Williams v. United States*, 655 A.2d 310, 312 n.1 (D.C. 1995).[9] Nor may the prosecutor comment on the defendant's decision to testify last, or suggest that the defendant's presence during the trial facilitated fabrication of testimony. *See Mitchell v. United States*, 569 A.2d 177, 183 (D.C. 1990); *Coreas*, 565 A.2d at 604; *Sherrod v. United States*, 478 A.2d 644, 656 (D.C. 1984); *Fornah v. United States*, 460 A.2d 556, 560-61 (D.C. 1983); *Dyson v. United States*, 418 A.2d 127, 131 (D.C. 1980); *Jenkins v. United States*, 374 A.2d 581, 584 (D.C. 1977).

Also improper is any implication that the defendant shares any of the burden of proof or should not be presumed innocent.[10] *See Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Parks v. United States*, 451 A.2d 591 (D.C. 1982); *Evans v. United States*, 232 F.2d 379 (D.C. Cir. 1956); *United States v. Segna*, 555 F.2d 226 (9th Cir. 1977); *Graham v. United States*, 257 F.2d 724 (6th Cir. 1958); *see also Golsun v. United States*, 592 A.2d 1054, 1059 (D.C. 1991) (improper to state that presumption of innocence had "slipped away," but no plain error since prosecutor made corrective statements in closing and jury was instructed on presumption of innocence); *Logan v. United States*, 489 A.2d 485, 488 (D.C. 1985) (misconduct to argue that defendant is trying to "hide behind" government's burden of proving guilt beyond a reasonable doubt).

Other areas protected by the Constitution, as to which the prosecutor may not argue, comment, or suggest adverse inferences include:

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[9] While it is proper for the prosecutor to tell the jury that the government's evidence is uncontradicted (if it is), this argument is improper when only the accused could have offered contradictory testimony. *See Owens v. United States*, 688 A.2d 399, 404 (D.C. 1996); *Johnson v. United States*, 613 A.2d 888, 896 (D.C. 1992) (not improper to tell jury in self-defense case that defense put on no evidence of injuries to defendant because such evidence could have come from a variety of other sources).

[10] Where, however, the prosecutor simply misstates a burden actually resting with the defense at one point in closing, no plain error will be found if the closing in its entirety does not do so. *(Brian K.) Williams v. United States*, 655 A.2d 310, 312-13 n.1 (D.C. 1995). Note that no objection was raised at the time of the misstatement, hence the analysis for plain error only. *See, e.g., Gilmore v. United States*, 648 A.2d 944, 945 (D.C. 1994).

- **Consultation with counsel, before or after arrest**. *See Diaz*, 716 A.2d at 179-80; *Ibn-Tamas v. United States*, 407 A.2d 626 (D.C. 1979); *United States ex rel. Macon v. Yeager*, 476 F.2d 613 (3d Cir. 1973).

- **Exercise of the constitutional right to confront witnesses**. *See Mitchell*, 569 A.2d 177 (D.C. 1990).

- **Failure of the defendant and/or counsel to give the authorities the defense version of the incident post-indictment.** *Hunter v. United States*, 606 A.2d 139 (D.C. 1992).

- **Failure of the defendant and/or counsel to ask witnesses to contact the police or prosecutor to provide exculpatory information post-arrest.** *Morris v. United States*, 622 A.2d 1116 (D.C. 1993).

- **Commenting on post-arrest silence.** *See United States v. Moore*, 104 F.3d 377, 384 (D.C. Cir. 1997). *But see Coates v. United States*, 705 A.2d 1100, 1103-05 (D.C. 1998) (comment on pre-arrest silence, no plain error); *Jenkins v. Anderson*, 447 U.S. 231, 240-41 (1980) (impeachment with pre-arrest silence is not unconstitutional).

By contrast, in *Portuondo v. Agard*, 529 U.S. 61 (2000), the Supreme Court held that it was permissible for a prosecutor to comment in rebuttal closing that the defendant had tailored his testimony after hearing the testimony of the other witnesses. In light of *Portuondo*, defense counsel should be alert to possible responses to such an argument, including the possibility of putting on evidence that the defendant had made similar statements *before* trial and before hearing the witnesses. At a minimum, defense counsel may wish to inquire before closings whether the government is considering making such an argument so that the defense counsel can address it in the defense closing. A prosecutor is also permitted to comment in closing on the failure of the defense to prove up evidence defense counsel promised in opening statement. *See Brisbon v. United States*, 957 A.2d 931 (D.C. 2008).

The prosecutor is prohibited from deriding a defense – such as insanity, alibi, or plant – on the ground that it has been presented in other cases. For example, the prosecutor in a drug trial overstepped the bounds of acceptable advocacy with the sweeping assertion that "[w]hen a lawyer argues plant, there is nothing left." *Curry v. United States*, 520 A.2d 255, 267 (D.C. 1987). That the evidence does not support the defense theory does not entitle the prosecutor to suggest that it is commonly recognized as a dubious defense. *See United States v. Hawkins*, 480 F.2d 1151 (D.C. Cir. 1973); *United States v. Brawner*, 471 F.2d 969 (D.C. Cir. 1972) (en banc). It is also improper for the prosecutor to suggest or imply that defense counsel does not believe the defendant's testimony. *See Powell*, 455 A.2d 405; *Bates v. United States*, 403 A.2d 1159 (D.C. 1979).

B. Arguing Personal Beliefs and Opinions

Whether reviewing the evidence or commenting on its implications, counsel should neither express a personal opinion nor use such expressions as "I believe" or "we know." *United States*

v. Young, 470 U.S. 1 (1985) (misconduct for prosecutor to express opinion that defendant was guilty).[11] The prosecutor may not vouch for the credibility of witnesses. *Daye v. United States*, 733 A.2d 321, 327 (D.C. 1999); *Diaz*, 716 A.2d at 180 (improper for prosecutor to argue that "'there is absolutely no reason not to believe [the complainant],' and that the only motive that [the complainant] had for coming into the courtroom was to 'tell you . . . the truth.'") *Scott v. United States*, 619 A.2d 917, 927 (D.C. 1993) (error for prosecutor to say that witness "'was open and up front and honest when he testified in this case to those things that had been transgressions in his life'"); *Mitchell v. United States*, 569 A.2d 177, 184 (D.C. 1990) (reference to witness as "truthtelling individual"); *Mathis v. United States*, 513 A.2d 1344, 1347 (D.C. 1986) ("All we are telling you . . . is that their . . . testimony was accurate"); *Beynum v. United States*, 480 A.2d 698, 710 (D.C. 1984); *Sherrod v. United States*, 478 A.2d 644, 656-57 (D.C. 1984) (prosecutor may not express personal belief about a witness's state of mind, veracity or demeanor).

Nor may counsel refer to certain testimony as a lie or to a witness as a liar. *See, e.g.*, *Coreas*, 565 A.2d 594; *Jones v. United States*, 512 A.2d 253 (D.C. 1986); *Miller v. United States*, 444 A.2d 13 (D.C. 1982); *Dyson v. United States*, 418 A.2d 127 (D.C. 1980); *Washington v. United States*, 397 A.2d 946, 951 (D.C. 1979); *Hyman v. United States*, 342 A.2d 43 (D.C. 1975); *United States v. Jones*, 482 F.2d 747, 754 (D.C. Cir. 1973); *United States v. Dews*, 417 F.2d 753 (D.C. Cir. 1969); *King v. United States*, 372 F.2d 383 (D.C. Cir. 1966) (repeated misstatement implying belief in or knowledge of a certain fact); *Berger v. United States*, 295 U.S. 78 (1935); *see also Powell*, 455 A.2d 405. *But see United States v. Brown*, 508 F.3d 1066 (D.C. Cir. 2007) (no reversal under plain error standard based on prosecutor's remarks as to defendant's decision not to testify, where such remarks occurred during opening and before jury knew defendant would not testify and where judge mitigated effect by instructing on burden shifting; prosecutor's introduction of conspirators' guilty pleas as substantive evidence of defendant's knowledge and intent to participate in conspiracy, where judge gave final instructions that sufficiently addressed government's burden of proof and limited the significance of the plea agreements; and prosecutor's comments regarding credibility of government witnesses, where judge mitigated effect by giving instruction on assessing witness credibility, weight of evidence against defendant was strong, and judge gave instructions making clear that prosecutor's personal beliefs were irrelevant); *Robinson v. United States*, 928 A.2d 717 (D.C. 2007)(trial court did not plainly err by failing to intervene *sua sponte* during prosecutor's closing argument when prosecutor argued that defendant's contention that he had struck decedent with baseball bat in self-defense was too farfetched to believe); *Freeman v. United States*, 689 A.2d 575, 585 (D.C. 1997) (prosecutor's statement that witness was afraid to testify and that jury should consider this fear when assessing witness's credibility not improper because of curative instructions to jury.) *Scott*, 619 A.2d at 928 (prosecutor's statement that defense theory was "ludicrous" permissible where it is logical inference from the evidence); *Mills v. United States*, 599 A.2d 775 (D.C. 1991) (misconduct to state that defendant lied about victims' whereabouts, but not reversible where ample evidence supported that inference and prosecutor did not allege that defendant had lied on witness stand); *Irick v. United States*, 565 A.2d 26, 35 (D.C. 1989) (not improper to refer to defendant sarcastically as "the truthteller"); *Kleinbart v. United States*,

[11] *See Hart v. United States*, 538 A.2d 1146, 1149-50 (D.C. 1988); *Gass v. United States*, 416 F.2d 767, 774-75 n.42 (D.C. Cir. 1969); *Stewart v. United States*, 247 F.2d 42, 46-47 (D.C. Cir. 1957).

426 A.2d 343, 352 (D.C. 1981) (since statement "that is perjured testimony" had basis in evidence it was not a personal opinion). Similarly, a prosecutor may not comment on answers to improper examination. *Poteat v. United States*, 559 A.2d 334, 336 (D.C. 1989) (cross of defendant on witnesses' credibility).

While it is proper for a prosecutor to contrast the testimony of government and defense witnesses, it is improper to argue that police officers are entitled to greater credence than other witnesses. *See Bouknight v. United States*, 641 A.2d 857, 862-63 (D.C. 1994); *Hinkel v. United States*, 544 A.2d 283, 285 (D.C. 1988); *see also Criminal Jury Instructions for the District of Columbia* (5th ed. 2009), No. 2.207, Police Officer's Testimony.

C. Inflaming the Passions and Prejudices of the Jury

Appeals for sympathy or for help in maintaining law and order and analogies or references to highly inflammatory cases or unrelated incidents are impermissible. *See, e.g. Brown v. United States*, 766 A.2d 530 (D.C. 2001) (depiction of complainant as poor and oppressed and doctor-defendants as rich, powerful, and arrogant was impermissible as it was an "undisguised appeal to class prejudice"); *Battle v. United States*, 754 A.2d 312, 321 (D.C. 2000) (improper to tell jury that because government witnesses had testified in fear, jury had to do justice for witnesses by delivering a guilty verdict); *McGriff v. United States*, 705 A.2d 282, 288-89 (D.C. 1997) (improper for prosecutor to request jury to send a message through its verdict); *Freeman v. United States*, 689 A.2d 575, 585 (D.C. 1997) (counsel's remark to jury that "this is your opportunity to make a difference" improper); *Buergas v. United States*, 686 A.2d 556, 559 (D.C. 1996) (counsel asked the jury to send message "that drug dealing is a business that this community will not and cannot tolerate"); *Johnson v. United States*, 671 A.2d 428, 438 (D.C. 1995) (prosecutor's description of felony murder statute as "blanket of protection" thrown over "our community" improper); *Settles v. United States*, 615 A.2d 1105, 1113 (D.C. 1992) (12-year-old decedent had a promising future); *Mills*, 599 A.2d at 787 (imagine rape victims' pain and suffering); *Coreas*, 565 A.2d at 604-05 ("send a message" to defendant; "in this country the jury decides"); *Dixon v. United States*, 565 A.2d 72, 76 (D.C. 1989) (decedent's children would grow up without their father); *Hart v. United States*, 538 A.2d 1146, 1150 (D.C. 1988) (base verdict on policy or fears of being victimized); *Hawthorne v. United States*, 476 A.2d 164 (D.C. 1984) (closing in first person as the decedent); *Powell*, 455 A.2d at 410 (send a message to the streets); *Miller*, 444 A.2d 13 (references to type of crime that occurs in a city); *Turner v. United States*, 443 A.2d 542, 546 (D.C. 1982) (think of deceased as your son, your husband, your brother); *Hill v. United States*, 434 A.2d 422, 432 (D.C. 1981) (government witness more credible because he was convinced he would face certain death if he testified improperly); *Obregon v. United States*, 423 A.2d 200 (D.C. 1980) (there is no death penalty in the District of Columbia); *Fernandez v. United States*, 375 A.2d 484, 486 (D.C. 1977) (would be really sad day for city and young children if not guilty verdict returned, jury's duty to return guilty verdict); *Miles v. United States*, 374 A.2d 278, 283-84 (D.C. 1977) (references to Benedict Arnold and Judas Iscariot); *Villacres v. United States*, 357 A.2d 423, 428 (D.C. 1976) (analogy between "execution" of victim and crucifixion of Jesus Christ); *Clarke v. United States*, 256 A.2d 782, 787 (D.C. 1969) (appeal to jurors to imagine themselves in victim's position); *United States v. Hawkins*, 480 F.2d 1151, 1143 (D.C. Cir. 1973) (references to insanity defenses raised by famous defendants); *United States v. Phillips*, 476 F.2d 538, 539 (D.C. Cir. 1973) (analogies to Sirhan Sirhan, James Earl

Ray, Richard Speck and Jack Ruby); *Turner v. United States*, 416 F.2d 815, 819 (D.C. Cir. 1969) (reference to Truman Capote novel, In Cold Blood); *Jackson v. United States*, 412 F.2d 149, 155 (D.C. Cir. 1969) (references to President Kennedy's inaugural address and Fourth of July fireworks as analogous to gunplay); *Brown v. United States*, 370 F.2d 242, 246 (D.C. Cir. 1966) (acquittal would leave police powerless short of resort to martial law). *But see Ventura v. United States*, 927 A.2d 1090 (D.C. 2007) (not plain error for trial court not to intervene *sua sponte* when prosecutor discussed how armed robbery complainant did not want to be a victim, how complainant worked for the money, and the fear complainant experienced at the time of the assault where complainant's fear had particular relevance in this case; defense counsel integrated both sets of challenged comments into closing argument, trial court instructed jury that statements and arguments of lawyers were not evidence, and evidence of defendant's guilt was substantial); *Long v. United States*, 910 A.2d 298 (D.C. 2006) (where prosecutor's closing rhetoric attempted to draw a contrast with the witness, any misinterpretation of that rhetoric as an invitation to "send a message" was mitigated by the judge's prompt and emphatic corrective instruction to the jury to decide the case on a purely objective view of the evidence); *Plummer v. United States*, 813 A.2d 182 (D.C. 2002) (prosecutor's improper appeals to emotions by highlighting in closing argument that the witness was "scared to death" and by appealing to the "community conscious" as well as his reiteration of gang violence evidence did not warrant reversal); *Parker v. United States*, 757 A.2d 1280 (D.C. 2000) (comment in prosecutor's opening statement and closing argument that a human life is worth nothing to defendant was not improper).

Inflammatory descriptions should also be avoided. *See Settles*, 615 A.2d at 1113 (attack on testifying defendant as a "self-centered coward" whose explanations so contradicted each other that he "reminds you [the jury] of an octopus because . . . when an octopus is scared in water, [he] lets out a black ink"); *Bates v. United States*, 766 A.2d 500 (D.C. 2000) (improper to call defense counsel racist, or to highlight race of defense counsel); *United States v. Bell*, 506 F.2d 207, 225 (D.C. Cir. 1974) (defendant in narcotics case described as profiting from sale of "filth" to poor people); *United States v. DeLoach*, 504 F.2d 185, 193 (D.C. Cir. 1974) (described murders as "executions or assassinations" and referred to victims as having been "shot down like a dog in the street"); *see also Mathis*, 513 A.2d at 1348 (described defendant as "the Godfather"); *Williams v. United States*, 483 A.2d 292, 297 (D.C. 1984) (reference to death penalty); *Harris v. United States*, 430 A.2d 536, 540-41 (D.C. 1981) (defendant compared to Mafia godfather and referred to as a "thief" in drug prosecution); *Sellars v. United States*, 401 A.2d 974, 977 (D.C. 1979) (described shooting as "execution" and "coup de grace"); *Maxwell v. United States*, 297 A.2d 771, 773 (D.C. 1972) (defendant called a "burglar, thief, robber"); *Jones*, 482 F.2d at 753 (defendant described as executioner); *United States v. Jenkins*, 436 F.2d 140, 145 (D.C. Cir. 1970) (prosecutor's statement that if there was evidence against complainant's credibility, defense would have presented it).

Nor may counsel address the issues of possible punishment. *Brown v. United States*, 554 A.2d 1157, 1160 (D.C. 1989) (reversible error to argue that judge has "broad latitude" in sentencing, especially in case where mandatory sentence required); *Powell v. United States*, 485 A.2d 596 (D.C. 1984).

Finally, statements that violate the anonymity of individual jurors are improper. *Bailey v. United States*, 831 A.2d 973, 985 (D.C. 2003) (prosecutor's recitation of the various ages of the jurors,

employment, areas of residence, and genders found to be improper, but not sufficient to affect the outcome of the case). In *Bailey*, even though the defense's closing was highly rhetorical, the prosecutor's attempt to rebut this rhetoric by referring to the ages of the jurors, employment, areas of residence, and gender was impermissible (although not so prejudicial as to warrant reversal). *Id.*

D. Arguing Facts Not in Evidence

Counsel may of course comment on and suggest reasonable extrapolations and inferences from the evidence. *See Price v. United States*, 697 A.2d 808, 817 (D.C. 1997); *Greer*, 697 A.2d at 1210-12; *Goodall v. United States*, 686 A.2d 178, 186 (D.C. 1996); *Van Ness v. United States*, 568 A.2d 1079 (D.C. 1990); *Irick v. United States*, 565 A.2d 26 (D.C. 1989); *Brewer v. United States*, 559 A.2d 317, 322 (D.C. 1989); *Jefferson v. United States*, 558 A.2d 298 (D.C. 1989), *opinion corrected*, 571 A.2d 178 (D.C. 1989).[12]

Counsel may not engage in impermissible speculation. *Gardner v. United States*, 698 A.2d 990, 1001 (D.C. 1997); *see e.g.*, *Anthony v. United States*, 935 A.2d 275 (D.C. 2007) (instruction that jury's recollection controls is insufficient to cure possible misstatement by the prosecutor made during rebuttal argument, and then repeated after defense objection in weapons case where defense had no opportunity to respond to the claim that the defendant's sole defense witness actually saw the defendant with a gun); *Najafi v. United States*, 886 A.2d 103 (D.C. 2005) (error for trial court to allow, over defense objection, the government to make repeated references in closing argument that the defendant was "running a business" of selling drugs where the only evidence was of a single sale); *Daye v. United States*, 733 A.2d 321, 328 n.6 (D.C. 1999) (argument that "[i]f we had other evidence that [government witness] committed this murder, we would have prosecuted him for that" improper as no facts introduced as to evidence or lack thereof implicating witness); *Diaz v. United States*, 716 A.2d at 180 (ruling that prosecutor's implication that Diaz lied when he said he didn't understand a statement made in English was a misstatement of the record and was improper); *McClellan v. United States*, 706 A.2d 542, 553 (D.C. 1997) (prosecutor's remark in closing that victim had seen defendant's face and was threatened by defendant was improper when no evidence of that was presented); *Russell v. United States*, 701 A.2d 1093, 1099 (D.C. 1997) (comment that defendant aided and abetted third party in setting fires when no evidence was presented on this fact was plain error); *Lee v. United States*, 668 A.2d 822, 830-33 (D.C. 1995) (error to give rebuttal that three witnesses had seen defendant shoot decedent, when evidence showed they had not); *Coreas*, 565 A.2d 594 (reversing where prosecutor argued in rebuttal, for the first time, that defendant lay in wait for decedent, of which there was no evidence); *Lewis v. United States*, 541 A.2d 145 (D.C. 1988) (prosecutor misstated evidence of witness's testimony, implied facts not in evidence, and suggested jury should assume guilt from arrest); *Ali v. United States*, 520 A.2d 306 (D.C. 1987) (error to imply defendant sought to suborn perjury based on innocuous statement); *see also Donnelly v. DeChristoforo*, 416 U.S. 637 (1974); *Morris v. United States*, 564 A.2d 746 (D.C.

[12] Sections 3-5.8(a) of the *ABA Standards for Criminal Justice* (The Prosecution Function) and 4-7.8(a) (The Defense Function) provide that suggested inferences must be reasonable. Wigmore, however, suggests with respect to the defense that "in this domain of logic, it is conceded, the counsel is free from restraint during argument. His desired inferences may be forced, unnatural, and un-tenable." VI Wigmore, *Evidence*, § 1807(3) (Chadbourn rev. 1976).

1989) (inviting jurors to imagine conversations between co-defendants planning to gang rape complainant); *Jones*, 512 A.2d 253 (arguing what defendant said at scene of crime where there was no evidence that anyone heard him say anything); *Hawthorne v. United States*, 476 A.2d 164 (D.C. 1984) (reversible error to pretend to speak as decedent in describing events before and after death); *Hawkins*, 480 F.2d 1151; *Villacres v. United States*, 357 A.2d 423 (D.C. 1976) (commenting on defendant's demeanor when not testifying); *Fuller v. District of Columbia*, 204 A.2d 812 (D.C. 1964) (arguing prosecutor's own knowledge of case); *United States v. Cummings*, 468 F.2d 274 (9th Cir. 1972) (reversible error to describe how case develops from arrest through grand jury to trial); *United States v. Hayward*, 420 F.2d 142 (D.C. Cir. 1969) (implying that paucity of witnesses resulted from intimidation by defendant); *King*, 372 F.2d 383, 393-94 ("distortion by selective omission" when reviewing witness's testimony); *Corley v. United States*, 365 F.2d 884 (D.C. Cir. 1966) (erroneous account of alibi testimony); *Reichert v. United States*, 359 F.2d 278 (D.C. Cir. 1966) (reversible error to imply that government witnesses' prior statements, not in evidence, were consistent with trial testimony); *cf. Lazo*, 930 A.2d 183 (D.C. 2007) (no error for trial court to permit prosecutor to remark upon defendant's change in appearance as evidence of consciousness of guilt where there was independent evidence that defendant had changed his appearance and where trial judge immediately cautioned jury to judge case only on evidence presented).[13]

The prosecutor may neither suggest improper conduct by defense counsel in such a way that the suggestion undermines the proceedings, nor impute thoughts and bad judgment to defense counsel. *Johnson v. United States*, 671 A.2d 428, 437 (D.C. 1995) (prosecutor's comment "shame on you both of you" directed at defense counsel who had argued that government witnesses had lied was improper); *Poole v. United States*, 630 A.2d 1109, 1129 (D.C. 1993) (statement that defense lawyers "were trying to intimidate these witnesses" would be improper if, in context, it seriously affected proceedings); *Mathis*, 513 A.2d at 1347 (defense attorney characterized as "leading the pack in this trial"); *Hammill v. United States*, 498 A.2d 551, 558 n.8 (D.C. 1985) (described defense counsel's judgment in calling appellant's child to testify as "a terrible thing – I wouldn't even cross-examine him," and imputed to defense counsel the opinion that an aspect of defense case was not worth arguing). Similarly, it is improper to argue that proper cross-examination was unfair, or attempt to create a credibility contest between the testimony of the government's expert witness and the proper argument of defense counsel. *Jaggers v. United States*, 482 A.2d 786, 796 (D.C. 1984), *overruled on other grounds by Carter v. United States*, 684 A.2d 331 (D.C. 1996). It is proper, however, to point out that the other side did not prove what it said it would prove in opening statement. *Brewer*, 559 A.2d at 323 n.11; *Reed v. United States*, 828 A.2d 159 (D.C. 2003).

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***Brown v. United States*, 89 A.3d 98 (D.C. 2014).** Statement by prosecutor that 1500 *hours* of phone calls rather than 1500 calls had been made between defendants did not constitute plain error.

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[13] *But see McKenzie v. United States*, 659 A.2d 838, 841 (D.C. 1995) (where fact of existence of witness's prior statement in evidence, but not context, not plain error for prosecutor to argue that defense counsel would have brought out inconsistencies had they existed).

***McKnight v. United States*, 102 A.3d 284 (D.C. 2014).** Prosecutor's argument in closing that co-defendants controlled neighborhood block and commanded that community "obey" them was "only tenuously" based on evidence presented, but no plain error where other evidence, i.e., testimony of eyewitness, responding police officers, and medical examiner, amply established defendant's guilt of first-degree murder while armed.

***Robinson v. United States*, 50 A.3d 508 (D.C. 2012).** Prosecutor's statement during rebuttal of defendants' closing arguments that there was no evidence that witness's use of PCP morning of offense had affected her recollection of events was improper where trial court had excluded defense-proffered expert testimony on that very issue, but trial court's overruling objection and denying curative instruction was not error under *Kotteakos* standard where thorough expert testimony on subject would have been unlikely to vitiate witness's story of what had happened.

***Woodard v. United States*, 56 A.3d 125 (D.C. 2012).** Prosecutor's closing argument improperly urged the jury to draw inference that witness failed to identify the shooter face-to-face at the first trial because he was afraid when witness in fact had identified defendant as one of the shooters in that proceeding.

***Woodard v. United States*, 1 A.3d 371 (D.C. 2010).** Error to allow prosecutor to suggest in rebuttal argument that witness changed testimony because of fear of defendant, but harmless where witness's testimony at second trial that she told a different story at first trial because she "felt threatened for [her] life" provided sufficient factual basis for prosecutor's argument.

E. Arguing the Defendant's Prior Convictions

Although the government may introduce evidence of a testifying defendant's prior convictions to impeach credibility, D.C. Code § 14-305, it may not adduce or argue from them in a way that implies general criminal predisposition or guilt of a charge at issue. *See Fields v. United States*, 396 A.2d 522 (D.C. 1978); *United States v. Coats*, 652 F.2d 1002 (D.C. Cir. 1981); *United States v. Henry*, 528 F.2d 661, 666-68 (D.C. Cir. 1976); *United States v. Carter*, 482 F.2d 738 (D.C. Cir. 1973). Such misuse of convictions may not be cured with immediate instruction and may constitute plain error. *See Fields*, 396 A.2d at 527-28; *cf. Coats*, 652 F.2d at 1004-05 (harmless because of overwhelming evidence of guilt). *But see Dorman v. United States*, 491 A.2d 455, 461-462 (D.C. 1985). It is also improper to link arguments about the convictions with an argument that the defendant committed a key, contested element of the charged offense. *Jones*, 512 A.2d at 261.[14] So sensitive is this area that it is normally impermissible for a prosecutor to characterize a defendant's prior convictions in a pejorative way, even when ostensibly directing the argument to credibility. *See Lee v. United States*, 562 A.2d 1202, 1203 (D.C. 1989) (prosecutor's comment that defendant is "a more likely person to not tell the truth if he's the kind of person that would steal from somebody else" is improper); *Harris v. United States*, 430 A.2d 536, 541 (D.C. 1981) (characterization of defendant as "thief" unworthy of belief serves "only to

[14] "[W]hat is a key element of an offense will vary with the facts of a particular case. . . . [I]t could be said that any time an element becomes the focus of a factual dispute, the defendant's denial of the facts relating to that element constitutes denial of a key element. . . . However, some elements do not relate directly to the actual commission of the criminal act itself, and [therefore linking of arguments] may not create the sort of prejudice that [is proscribed]." *Dorman v. United States*, 491 A.2d 455, 459 n.2 (D.C. 1985) (en banc).

blur the already murky distinction which the jury must draw between the use of evidence of prior crimes as a reflection of credibility and the use of such evidence as a denotation of criminal character"). It is proper, however, to argue that the convictions demonstrate lack of general credibility, and even to contrast the defendant's credibility with that of a police officer by reference to the officer's lack of a prior conviction. *See Jones v. United States*, 579 A.2d 250, 254 (D.C. 1990).

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***Lucas v. United States*, 102 A.3d 270 (D.C. 2014).** Prosecutor's comment during rebuttal that defendant "had [gun] on his person just like he had that prior conviction on his record" was improper propensity argument and defense counsel's objection thereto should have been sustained, but error harmless despite lack of limiting or curative instruction because, among other factors, jury had been made aware from beginning that defendant's conviction of unrelated crime was not to be used against him and prosecutor's comment was a "single, brief, non-emphasized statement" in midst of an hour of closing argument.

IV. STRUCTURE AND CONTENT OF FINAL ARGUMENT

The closing argument should be logical, clear, and compelling. It should be the product of careful rehearsal, but should never be read or recited by rote. Counsel should consciously strive to maintain a rapport with the jurors and to obtain their trust and respect. Counsel's manner should be earnest and straightforward, using a conversational tone and avoiding legalese and phrases such as "we submit." Everything the attorney says and does must convince the jury of counsel's absolute and unreserved belief in the client's innocence.

Style, presence, and creativity are personal and must be developed by the individual attorney. Likewise, the structural design of every argument will be patterned on the available issues. There are, however, certain techniques and strategies that have proven effective and which, if properly utilized, should enhance any final argument.

The argument should begin on a strong and powerful note. Whether this note is a factual point, the government's burden of proof, or some other point will depend upon the particular case. Often the argument will commence immediately with an important substantive point or with a rejoinder to some particularly weak point in the prosecutor's argument. However, merely answering the government's points throughout one's own argument is a trap to avoid. Just as counsel must control the courtroom during the trial, closing argument must focus on the defense themes, not merely on the government's argument.

The substance of the defense argument often begins by attacking the government's case, reviewing, probing, questioning, explaining, and attempting to minimize the significance of the testimony of every important government witness and item of demonstrative evidence. It is effective sometimes to ask a series of unanswerable questions highlighting the weaknesses in the government's case. It is proper to suggest that the absence of certain types of evidence (such as fingerprint evidence) indicates that the defendant is innocent or that the government has not proven its case. *Greer*, 697 A.2d at 1210 (D.C. 1997).

When credibility is in issue, it is often effective to point out that the court will instruct the jurors on the factors they may consider in determining credibility,[15] and then to address the evidence relating to each factor separately. For example:

> The only issue in this case is whether Mr. Smith is telling the truth. So how do you, as jurors, go about deciding whether or not he is telling the truth? As the judge will instruct you, the law provides a great deal of guidance on this point. And the law says that in determining whether or not to believe a witness, you may consider his demeanor and his behavior on the witness stand; his manner of testifying; whether he impresses you as a truthful individual; whether he impresses you as having an accurate memory and recollection; whether he has any motive for not telling the truth; whether he had a full opportunity to observe the matters concerning which he has testified; whether he has any interest in the outcome of this case, or friendship or animosity toward other persons concerned with this case. Now let's take these factors one by one and look at them very carefully. First of all, what about Mr. Smith's demeanor and behavior on the witness stand. . . .

Of course, there is nothing to be gained by reciting irrelevant factors, for example, bias, when counsel will not suggest that Mr. Smith is biased. Counsel must also anticipate how the prosecutor will use the various factors in rebuttal.

In other cases, the "honest mistake" theory is appropriate, as are properly phrased expressions of sympathy for the victim. The latter may often be used effectively to underscore any of a number of the basic principles governing the trial (*e.g.*, reasonable doubt, burden of proof, jury's duty to decide the case solely on the evidence). For example, the closing remarks in a homicide case involving the death of a child might include something like the following:

> The case will soon be in your hands. I thank you for your attention to this very important case. The prosecutor will no doubt emphasize the terrible sadness of Barbara's death. The grief and the tragedy in this case are overwhelming. Everyone in this courtroom would give anything for us not to be here today, for Barbara still to be alive. But we are here. And you, ladies and gentlemen, are the jury. You must rationally and dispassionately – without fear and without emotion – consider the evidence in this case, and only the evidence.

It is more effective to weave the defense evidence into an interesting, even dramatic, narrative rather than to restate the testimony of each witness seriatim.[16] Counsel should emphasize that, notwithstanding the burden of proof on the government and the government's failure to resolve all reasonable doubts, a "full defense" has been presented. Words such as "alibi" and "story"

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[15] *See Criminal Jury Instructions for the District of Columbia* (5th ed. 2009), Nos. 2.200; 2.202, Accomplice's Testimony; 2.204, Testimony of Immunized Witness; 2.205, Informer's Testimony; and 2.206, Perjurer's Testimony.

[16] Of course, much of the defense evidence may also be used earlier in demonstrating defects in the government's case.

should be eschewed. If counsel was unable to adduce much evidence before the jury, inferences should be argued. The entire event may be construed inferentially as long as there is some evidentiary basis. *See United States v. DeLoach*, 504 F.2d 185 (D.C. Cir. 1974).

If the defendant has testified, the jury should be reminded that there was no legal obligation to do so. It may be effective to point out the unequal contest between the well-educated prosecutor and the underprivileged defendant, and how well, given the circumstances, the defendant fared. Any character testimony should be recounted and its importance underscored; reference to the very favorable instruction on character evidence, *Criminal Jury Instruction* No. 2.213, is usually in order. Sympathetic factors, such as the defendant's family or community situation, health, and employment may prove effective if properly argued, and the defendant should be personalized. It is improper, however, to refer to the possible sentence or to conditions in prisons. *See Sparf v. United States*, 156 U.S. 51 (1895); *Criminal Jury Instruction* No. 2.505, Possible Punishment Not Relevant.

If the defense has presented no evidence, the government's burden of proof must be emphasized, together with inroads made on cross-examination. Remember that in cases involving violence, the jury may feel the need to hold someone accountable. It is important to remind the jury that this is not their role. Nor is it the jury's role to "solve" the case the way that a police officer would; rather, the jury is charged with determining whether the government has proven the facts it alleged beyond a reasonable doubt. The jury must be made to feel the weight of that burden and should understand that the burden never shifts to the defense. Counsel should argue the lack of evidence or the weaknesses in the government's case, stressing that the jurors should look to the government if they have any unanswered questions or concerns. Counsel should also argue that the law establishes this heavy burden and does not require that the defense present any evidence, and explain why this is so. For example:

> The law requires that if the government is going to bring this young man in this courtroom, point a finger at him, and try to label him a rapist, it had better have something to back up these claims. And not just anything, ladies and gentlemen, but proof – proof beyond a reasonable doubt.
>
> As the judge will instruct you, Mr. Smith was presumed innocent at the beginning of the trial, he is presumed innocent at this very moment, and he is presumed innocent while you are deliberating and deciding this case in the jury room. That presumption never changes, it never shifts.
>
> The judge will also instruct you that, because of that presumption, the government has the burden of proof. This, too, never shifts. The government always has the burden – the task, the very difficult job – of trying, if it can, to prove its charges beyond a reasonable doubt.

> The law requires that you look to the government, not to Mr. Smith, and require them to sustain this heavy burden. If they don't, the law requires that you find Mr. Smith not guilty of these charges.[17]

Obviously, these fundamental principles – the presumption of innocence, the burden of proof, and reasonable doubt – should be discussed in every case. The focus will vary depending on the relative strengths of the government and defense evidence. This argument might be highlighted and stressed at the beginning of the closing argument in a difficult case or one in which no defense evidence is presented. In a stronger defense case the burden of proof may be left until later in the summation, which would begin on a strong factual note or with a rejoinder to a weak government argument. Counsel should cite and dramatize examples to explain the meaning of proof beyond a reasonable doubt. Here again, the jury instruction, *Criminal Jury Instruction* No. 2.108, provides an excellent basis for practical explanation and can be used effectively. Before the defense rests, all twelve jurors should be made to appreciate the rigorous standard they are bound to apply to the government's case.

The rhetorical question is an effective device that avoids use of the first person pronoun and has been deemed proper during closing argument. *Butts v. United States*, 822 A.2d 407 (D.C. 2003). Documents and tangible evidence can be used effectively, and the jury should be urged to keep such evidence with them throughout their deliberations. Experiments and demonstrations can and should be used with the court's permission. In short, consider using anything that is effective, interesting, dramatic, or charged with impact. Closing argument is counsel's last opportunity to speak to the jurors and one of the last statements jurors will hear before they deliberate. It must convey the most favorable impression possible on behalf of the client.

Closing Statement:

- ✓ Closing should be logical, clear and compelling – a product of careful rehearsal not read or recited by rote
- ✓ Maintain rapport and obtain trust and respect of the jurors
- ✓ Avoid legalese
- ✓ Consider using anything that is effective, interesting, dramatic, or charged with impact

Remember: Closing argument is counsel's last opportunity to speak to the jurors and one of the last statements the jurors will hear before they deliberate.

[17] At some point, counsel might wish to explain that the defense will be unable to respond to the prosecutor's rebuttal and caution the jury to keep in mind critical, key points in the defense or shortcomings in the prosecution, for example:

> This is my first and only opportunity here at the end of the case to speak with you on behalf of my client, Mr. Smith. The prosecutor has already presented his argument to you, and when I finish he will speak to you again. He is permitted to do that because the government has the burden of proving to you beyond a reasonable doubt that Mr. Smith is guilty of each element of each offense charged. But when the prosecutor gets up again, please keep in mind some of what I said, and please ask yourself, how would Mr. Smith's lawyer respond?

37.22

CHAPTER 38

JURY ISSUES: INSTRUCTIONS, DELIBERATIONS, AND IMPEACHING THE VERDICT

I. INSTRUCTIONS: GENERAL RIGHTS AND REQUIREMENTS

Jury instructions contain the principles of law that the jurors swear to apply in their deliberations, and thus comprise the very backbone of the trial. Instructions should be considered very early in preparing the case, as they will affect investigation, direct and cross-examination, opening statement, and closing argument.

A. Requesting Instructions

> At the close of the evidence or at such earlier time during the trial as the Court reasonably directs, any party may file written requests that the Court instruct the jury on the law as set forth in the requests. At the same time, copies of such requests shall be furnished to all parties. The Court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The Court may instruct the jury before or after the arguments are completed or at both times. No party may assign as error any portion of the charge or omission therefrom unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which that party objects and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury.

Super. Ct. Crim. R. 30. Careful thought should be given to requesting and objecting to instructions because many appellate reversals are based on the court giving improper instructions or denying requested instructions on behalf of the defense. *See Ferawell v. United States*, 886 A.2d 95 (D.C. 2005). Failure to request or object to an instruction in accordance with Rule 30 limits appellate review to plain error. *See Green v. United States*, 718 A.2d 1042 (D.C. 1998); *Russell v. United States*, 698 A.2d 1007 (D.C. 1997) (objections must be specific enough to direct judge's attention to the correct rule of law; a party's request for jury instructions must be made with sufficient precision to indicate distinctly the party's thesis); *see also Zeledon v. United States*, 770 A.2d 972, 974 (D.C. 2001) (quoting *Russell*); *Ali v. United States*, 581 A.2d 368, 377-78 (D.C. 1990); *Maura v. United States*, 555 A.2d 1015, 1017 (D.C. 1989); *Watts v. United States*, 362 A.2d 706, 709 (D.C. 1976) (en banc); *Deneal v. United States*, 551 A.2d 1312, 1316-17 (D.C. 1988) (plain error review where counsel objected to instruction but did not follow up as promised with supporting case law). Plain error is that which is "so clearly prejudicial to substantial rights as to jeopardize the very fairness and integrity of the trial." *Watts*, 362 A.2d at 709; *see also McClam v. United States*, 775 A.2d 1100 (D.C. 2001) (plain error where trial court refused to allow the defendant to present a duress defense and refused duress instruction on the grounds that the defendant denied any involvement in the offense at a pre-trial hearing, when there exists sufficient evidence for a reasonable jury to find in defendant's favor); *Coleman v. United States*, 779 A.2d 297 (D.C. 2001) (plain error where trial judge failed to give, upon request, an immediate cautionary instruction after highly prejudicial

and inadmissible testimony regarding defendant came before jury); *Cash v. United States*, 648 A.2d 964 (D.C. 1994) (plain error where trial court instructed jury only on simple possession when defendant charged with possession with intent to distribute). *See also Brawner v. United States,* 979 A.2d 1199 (D.C. 2009) (Reversible error to deny defendant's request for a more specific jury instruction on intent to complete the offense of escape when theory of defense was lack of intent to complete the offense). *But see Wilson v. United States*, 785 A.2d 321 (D.C. 2001) (instructional error can rarely amount to plain error even if the trial court fails to instruct jury on definition of a term appearing in an element of a statutory crime as omission of a term is not the equivalent of omission of an essential element of the crime). This stringent standard can rarely be met. *See*, *e.g.*, *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977); *Cowan v. United States*, 629 A.2d 496, 502 (D.C. 1993) (plain error contemplates clear showing of miscarriage of justice); *Morgan v. United States*, 402 A.2d 598 (D.C. 1979); *Devone v. United States*, 401 A.2d 971 (D.C. 1979).[1] Therefore, the importance of the requirement that counsel object to or request instructions cannot be overemphasized. *York v. United States*, 803 A.2d 1009 (D.C. 2002) (no abuse of discretion when trial court, *sua sponte*, did not submit a lesser included offense to the jury). Indeed, the Court of Appeals has held that even failure to instruct on an element of the crime is not *per se* reversible error absent an objection. *See White v. United States*, 613 A.2d 869 (D.C. 1992) (en banc).

Oral requests for the standard instructions contained in the *Criminal Jury Instructions for the District of Columbia* (5th ed. 2009) (the "Red Book") will generally suffice to preserve the record.[2] Counsel should obtain a ruling on each requested instruction prior to final arguments.

The standard instructions may be modified to fit the facts of the particular case. The "Defenses" instructions, Nos. 9.100 through 9.700, are particularly appropriate for refinement and modification. Modifications must, of course, reflect the law or be based on "a good-faith argument for an extension, modification, or reversal of existing law." D.C. R. Prof. Cond. 3.1. Cases often contain language that can be used to enhance the standard instructions. However, the court is not obliged to accept language suggested by counsel, provided that the appropriate substance is covered.

Any special instruction should be submitted in writing along with supporting points and authorities, with a copy served on the prosecutor. *But see Russell*, 698 A.2d at 1012 (where issue is one of first impression concerning radical departure from statute and where there was considerable discussion on the issue throughout trial, the failure to submit written instruction did

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[1] *But see Comber v. United States*, 584 A.2d 26, 52 n.42 & 53 n.47 (D.C. 1990) (en banc) (while counsel did not object to specific wording of voluntary manslaughter instruction, plain error review inappropriate where counsel vigorously requested involuntary manslaughter instruction, which trial court erroneously denied).

[2] The fifth edition of the standard instructions was published in 2009. The instructions are available through the Bar Association of the District of Columbia, 1250 H Street, N.W., Sixth Floor, Washington, DC 20005. The standard instructions are promulgated by the Young Lawyers Section of the Bar Association of the District of Columbia, and are not immune to challenge. *See, e.g.*, *Thurston v. United States*, 779 A.2d 260 (D.C. 2001) (rejecting a standard Red Book jury instruction on escape and a duress defense where the language "intent to avoid further confinement" was inconsistent with the Supreme Court's decision in *United States v. Bailey*); *Tibbs v. United States*, 507 A.2d 141, 144 (D.C. 1986) (No. 4.68 in 3d edition incorrectly stated elements of taking property without right); *Kinard v. United States*, 416 A.2d 1232, 1235 (D.C. 1980) (rejecting *falsus in uno* instruction).

not compel plain error review). Rule 30 provides for submission of requests at the close of evidence unless the judge "reasonably" directs an earlier submission. Although there is little authority for deciding when a request for advance submission is reasonable,[3] it is obviously important to submit requests as early as possible so that the court can consider them carefully. Some judges require special instructions to be submitted a specified number of days before trial, and counsel should inquire as to whether the judge has such a policy.

Requesting Instructions:

- ✓ Request and object to jury instructions, as appropriate
- ✓ Obtain a ruling on each requested instruction prior to final arguments.
- ✓ Modify standard instructions to fit the facts of the case
- ✓ Any special instruction should be submitted in writing along with supporting points and authorities, with a copy served on the prosecutor
- ✓ Inquire about judge's policy as to when to submit special instructions

B. Instructions Before and During Trial

The court will ordinarily give preliminary instructions to advise the jury about the trial process. *See Criminal Jury Instruction* Nos. 1.100-1.112. In every trial, there are other times during the proceedings when the court will explain a relevant legal concept to the jury, e.g., how to evaluate a particular type of evidence. Counsel should be alert to these situations and request necessary instructions. If there are any inadequacies in the instructions given, counsel must object and attempt to persuade the court to give the desired instruction.

It is essential that the jury be able to understand instructions. *Thompson v. United States*, 546 A.2d 414 (D.C. 1988). Although *Thompson* concerned an instruction on the use of "other crimes" evidence, it applies to every other limiting instruction as well. The court pointed out that evaluation of probative value against prejudicial effect requires an inquiry into whether the risk of prejudice has been or can be meaningfully reduced by limiting instructions. That, in turn, requires consideration of both whether the concept of law propounded in the instruction "can make any sense to a jury of lay people," *id*. at 426, and whether the jury is likely to understand the language actually used. The court reversed the conviction, holding that the "other crimes" evidence was incorrectly admitted, and the limiting instruction was so complicated as to be incomprehensible to the average juror and, hence, did not cure the error. *See also Carpenter v. United States*, 635 A.2d 1289 (D.C. 1993) (cautionary instruction insufficient to cure prejudicial statement because it neither specifically addressed nor provided competent guidance regarding statement).

[3] *Bruno v. United States*, 259 F.2d 8 (9th Cir. 1958), holds that the defense should be permitted to present requests at the close of the evidence because only then is it clear what theories of defense will be supported by the evidence. *Cf. United States v. Tourine*, 428 F.2d 865 (2d Cir. 1970) (court did not err in refusing to delay its charge to the jury so that it could consider requests not presented until after closing argument).

Failure to instruct the jury on how to evaluate certain evidence can be reversible error. Although the court need not provide specific instructions on how to evaluate each fact or legal standard, the instructions taken as a whole must give the jury adequate guidelines. *Victor v. Nebraska*, 511 U.S. 1, 5 (1994) (discussing reasonable doubt instruction). For example, where the government has impeached its own witness with prior grand jury testimony, the Court of Appeals has found reversible error in failure to give an immediate cautionary instruction on use of the prior statements. *Lucas v. United States*, 436 A.2d 1282 (D.C. 1981); *see also Wilkins v. United States*, 582 A.2d 939 (D.C. 1990) (government improperly "refreshed" witness's recollection by reading her grand jury testimony to jury); *Weeda v. District of Columbia*, 521 A.2d 1156, 1168 (D.C. 1987) (Terry, J., dissenting) (where there is repeated emphasis on inadmissible evidence, and there is evidence that jury disregarded another instruction, no instruction can cure the prejudice); *Gordon v. United States*, 466 A.2d 1226 (D.C. 1983) (court's failure *sua sponte* to give immediate cautionary instruction after government impeached its own witness was error, but harmless). However, it remains important for counsel to actually request such instruction. *See Gilliam v. United States*, 707 A.2d 784 (D.C. 1998) (en banc) (no error when court did not *sua sponte* give limiting instruction for evidence properly admitted for a specific purpose); *Johnson v. United States*, 820 A.2d 551 (D.C. 2003) (no error when trial court, *sua sponte*, did not instruct jury that witness's statement should be viewed with "special suspicion" because witness was an accomplice to the crime).

Standard instruction No. 2.305 provides specific guidance on evaluation of a confession. It embodies the procedure contained in 18 U.S.C. § 3501(a),[4] which provides that a confession is admissible if voluntarily given and that, where voluntariness has been challenged, "the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances." *See Wells v. United States*, 407 A.2d 1081, 1089-90 (D.C. 1979). However, "where there is little if any evidence that a defendant's admission is involuntary, the trial court has discretion whether to give, upon request, an instruction on the weight to be accorded the admission." *Hairston v. United States*, 497 A.2d 1097, 1101 (D.C. 1985) (defendant never challenged voluntariness).

Instructions Before and During Trial:

- ✓ Be alert to any instructions given before and during trial
- ✓ Object to any inadequacies in the instructions given, and attempt to persuade the court to give the desired instruction

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***Lloyd v. United States*, 64 A.3d 405 (D.C. 2013).** See, *supra*, Chapter 30.II.C.3.

[4] This statute applies to prosecutions brought in Superior Court. *See, e.g., Hall v. District of Columbia*, 353 A.2d 296, 298 n.8 (D.C. 1976); *Thomas v. United States*, 351 A.2d 499, 500-01 n.4 (D.C. 1976).

***McCorkle v. United States*, 100 A.3d 116 (D.C. 2014).** Instruction that limited jury from considering defendants as involved in death of one figure in trial was harmless where circumstances of death were unrelated to crimes charged, defendants agreed to the instruction, and jury would not have speculated in the prejudicial manner instruction was designed to prevent.

***Williams v. United States*, 75 A.3d 217 (D.C. 2013).**See, *supra*, Chapter 19.II.A.

C. Final Instructions

The trial court has the important role of keeping the jury focused on determining the facts. The court must refrain from making conclusions of law where there are facts to be determined, which would invade the province of the jury.[5] *See Helm v. United States*, 555 A.2d 465 (D.C. 1989); *Shelton v. United States*, 983 A.2d 979, 985 (D.C. 2009) (error to instruct jury that there is no mandatory minimum sentence, thus impermissibly focusing jury's consideration on punishment, but harmless because jury was also instructed not to consider possible punishment in its deliberations); *Headspeath v. United States,* 910 A.2d 311, 324 (D.C. 2006) (court reversed conviction where trial court not clear that it was not bound by the jury's opinion on sentencing of the defendant). Moreover, an attempt by either party to prejudice the jury or misstate the law should be condemned by the trial court *sua sponte*, in the jury's presence. *(William) Thomas v. United States*, 557 A.2d 1296 (D.C. 1989).

The instructions must accurately define the offenses and defenses. *See Zeledon v. United States*, 770 A.2d 972 (D.C. 2001) (trial court's failure to define "serious bodily injury" not harmless error as jury, in face of conflicting medical evidence, would not necessarily have found serious bodily injury if it were correctly instructed); *Bolanos v. United States*, 938 A.2d 672, 682 (D.C. 2007) (remanded to trial court due to failure to accurately instruct on the elements of "serious bodily injury"). However, "an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence" and is thus subject to harmless error review. *Neder v. United States*, 527 U.S. 1, 9 (1999) (emphasis in original); *see also Savoy v. United States*, 981 A.2d 1208, 1213 (D.C. 2009) (error in reading instruction that allowed jury to convict defendant for impersonating a police officer even if he lacked the intent to gain an advantage); *Green v. United States,* 948 A.2d 554, 561 (D.C. 2008) (trial court's error in omitting the intent element in a child sexual abuse case was not plain error); *Savage-El v. United States,* 902 A.2d 120,126 (D.C. 2006) (trial court's refusal to define a term that was not an element of the offense was not error). For example, the old standard instruction stated that self-defense is a defense to a charge of assault when the complainant is a police officer only if the officer used "excessive force"; it erroneously omitted the essential requirement that the police officer-complainant be "engaged in official duties" before the "excessive force" requirement came into play. *Speed v. United States*, 562 A.2d 124 (D.C. 1989); *Criminal Jury Instruction* No. 4.114; *see also Hicks v. United States*, 707 A.2d 1301 (D.C. 1998) (trial court's burden of proof instruction unconstitutionally shifted burden by not informing jury it could consider consent in a rape case); *Nelson v. United States*,

[5] The Court of Appeals has eliminated an indication in former Instruction 2.71 that the judge has "wide latitude" in sentencing a defendant, which undermined the jury's fundamental role of determining guilt or innocence by encouraging it to speculate on sentencing. *Brown v. United States*, 554 A.2d 1157, 1158 (D.C. 1989).

580 A.2d 114 (D.C. 1990); *Reid v. United States*, 581 A.2d 359 (D.C. 1990). *But see Burton v. United States*, 818 A.2d 198 (D.C. 2003) (no error to substitute Red Book instruction on "malice" element of malicious disfigurement for undifferentiated "malice" when all required elements that government had to prove were embraced by the instruction); *Hammon v. United States*, 695 A.2d 97 (D.C. 1997) (no error in refusing to follow Red Book when court's instruction accurately reflected law). *See generally Coghill v. United States*, 982 A.2d 802 (D.C. 2009).

Counsel is entitled to know in advance what closing arguments will be supported by the instructions: "The Court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury." Super. Ct. Crim. R. 30; *see Shreeves v. United States*, 395 A.2d 774, 786-87 (D.C. 1978).

When a court initially denies a requested instruction and then decides after the argument to give the instruction after closings, counsel may request that argument be reopened. Reopening of argument is discretionary and will be permitted only if counsel can specify ways in which the client has been prejudiced in the closing argument by the court's subsequent decision. *See Loveless v. United States*, 260 F.2d 487 (D.C. Cir. 1958) (reversing conviction because trial court refused to allow further argument, when before closing arguments it denied a request for a manslaughter instruction, but decided after hearing arguments to give the instruction); *cf. Ballard v. United States*, 430 A.2d 483 (D.C. 1981) (harmless error to give *sua sponte* carnal knowledge instruction in rape case, but trial courts admonished to rule on instructions prior to closing arguments); *Walker v. United States*, 418 F.2d 1116 (D.C. Cir. 1969) (conviction affirmed where counsel did not request additional argument or identify the prejudice).

Objections should be made to any instruction that might provide a basis for future challenge; while the point may not succeed on appeal if counsel objects, it will almost surely fail if counsel does not. The purpose of the rigid requirement that counsel object to instructions is to give the trial court an opportunity to correct its error. While this rationale may have some validity where there has been a slip of the tongue or an inadvertent omission, it would seem to lose its force where the court has already considered and rejected a request or objection. Nevertheless, failure to comply with Rule 30, even in the latter instance, may be fatal to an appeal. *See*, *e.g.*, *Fleming v. United States*, 310 A.2d 214 (D.C. 1973). It is therefore crucial for counsel to approach the bench after the judge has instructed the jury and object to omission of instructions already requested and denied; inclusion of instructions to which objections have been made; and/or any other errors or omissions in the instructions. Counsel should carefully follow along in the Red Book or in the text of additional instructions while instructions are read to the jury, noting any possibly prejudicial variations from the standard or agreed upon instructions. In some instances, counsel may decide not to object to a judge's slip of the tongue or omission because counsel does not want the judge to correct or elaborate on the instruction, thereby highlighting the issue for the jury. Such error can still be raised on appeal, but the nearly insurmountable plain error standard will apply. *See*, *e.g.*, *Owens v. United States*, 982 A.2d 310, 313 (D.C. 2009); *Mitchell v. District of Columbia*, 741 A.2d 1049, 1052 (D.C. 1999); *Lee v. United States*, 699 A.2d 373, 386 (D.C. 1997); *Headen v. United States*, 373 A.2d 599, 602 (D.C. 1977).[6]

[6] *See* Vol. I, Chapter 13 (discussion of plain error review). *See also United States v. Breedlove*, 204 F.3d 267 (D.C. Cir. 2000).

The objection by counsel to the court's instruction must specifically inform the judge of *what* counsel is objecting to and *why* (i.e., why the instruction is legally incorrect and prejudicial). Lack of specificity can be fatal. *See e.g.*, *Cowan*, 629 A.2d at 503 (denial of instruction proper when position is not stated distinctly, with reasonable specificity, or with sufficient precision); *Charles v. United States*, 371 A.2d 404, 408 (D.C. 1977) (general objection to instruction on inference from possession of recently stolen property insufficient); *United States v. Howard*, 433 F.2d 505 (D.C. Cir. 1970). The requirement that the objection be renewed before the jury retires provides an opportunity to polish and particularize the basis. If the court clearly states on the record that the objections and arguments previously made are incorporated by reference, however, it is unnecessary to insist upon making them once again. *See Cohen v. Franchard Corp.*, 478 F.2d 115 (2d Cir. 1973). *But see* Blackmar, *Problems of Court and Counsel in Requests and Exceptions: How to Avoid Them*, 62 F.R.D. 251, 266-67 (1974). Of course, if the initial discussion of instructions was not conducted on the record, counsel should be sure that the record accurately reflects the initial objections and arguments. *See Government of the Virgin Islands v. Cruz*, 478 F.2d 712 (3d Cir. 1973).

While most judges call counsel to the bench following instructions so that they can register their objections, some do not. When in doubt, prior to the giving of instructions, counsel should ask what the court plans to do. If the judge sends the jury out to deliberate before it is possible to get to the bench, counsel should make that clear on the record. Rule 30 requires that opportunity be given to object "out of the hearing of the jury" (i.e., at the bench). Requiring counsel to object in the jury's hearing is manifest error. *See United States v. Schartner*, 426 F.2d 470, 478-79 (3d Cir. 1970). Moreover, if the discussion is expected to be a long one, counsel has the right under Rule 30 to have the jury excused; the jury should be instructed not to commence its deliberations before hearing further from the court.

Final Instructions:

- ✓ Object to any instruction that might provide a basis for future challenge
- ✓ Request that the argument regarding a jury instruction that was initially denied, be reopened, if after closing argument the judge decides to issue the instruction
  - Counsel must show how client is prejudiced in closing argument
- ✓ Carefully follow along while instructions are read to the jury, noting any prejudicial variations from the agreed upon instructions
  - Objections to instructions should include why it is legally incorrect and how its is prejudicial

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***Bryant v. United States*, 93 A.3d 210 (D.C. 2014).** In case where evidence at trial revealed two different incidents separated by time, each of which could have been factual predicate for attempted burglary and ADW charges, trial court erred in failing to give special unanimity instruction that called jury's attention to requirement that they must also be in unanimous agreement with respect to underlying acts upon which their verdict was based, though error not plain where jury had ample evidence to convict on actions during both first and second incidents.

***Headspeth v. United States*, 86 A.3d 559 (D.C. 2014).** See, supra, Chapter 37.II.C.

***Gray v. United States*, 79 A.3d 326 (D.C. 2013).** See, supra, Chapter 36.III.A.1.

***Williams v. United States*, 75 A.3d 217 (D.C. 2013).** See, supra, Chapter 19.II.A.

***Collins v. United States*, 73 A.3d 974 (D.C. 2013).** See, supra, Chapter 8.II.B.

***Collins v. United States*, 73 A.3d 974 (D.C. 2013).** See, supra, Chapter 36.III.A.4.

***Legette v. United States*, 69 A.3d 373 (D.C. 2013).** Error to allow jurors to consider prior sexual assault evidence as "motive" evidence, though harmless as same evidence had been introduced as probative of intent.

***Smith v. United States*, 68 A.3d 729 (D.C. 2013).** Trial court did not err in defining "contraband message" as "a message conveyed by any means not authorized by the D.C. Department of Corrections" because such definition was construed according to term's ordinary meaning or common use and because purpose of law is to maintain prison security.

***Kittle v. United States*, 65 A.3d 1144 (D.C. 2013).** See, supra, Chapter 33.III.

***Fadero v. United States*, 59 A.3d 1239 (D.C. 2013).** Trial court did not err in giving jury instruction defining "significant bodily injury" under APO statute as "an injury that requires hospitalization or immediate medical attention."

***Nelson v. United States*, 55 A.3d 389 (D.C. 2012).** Plain error to instruct jury on the offense of CPWL, in which the term "firearm" was defined as "a weapon regardless of operability, which will expel a bullet by the action of an explosive."

***Spriggs v. United States*, 52 A.3d 878 (D.C. 2012).** Any error occurring as a result of the allegedly erroneous definition of "dwelling of another" element of burglary was harmless where, even if jury convicted defendant of burglary based upon principal liability and not aiding and abetting, jury by its verdict necessarily found that it had rejected defendant's claim of innocent presence and determined that defendant had requisite intent for aiding and abetting burglary.

***Williams v. United States*, 51 A.3d 1273 (D.C. 2012).** No plain error in failing to provide a unanimity instruction for contempt and obstruction of justice convictions where defendant was found guilty of theft and destruction of property in a location for which he stipulated he had a stay away order, and where it was irrelevant as to whether jurors had focused on telephone call or letter to establish obstruction because defendant conceded that he had asked witness "not to come to court" and could provide no legally viable innocent explanation for either telephone call or letter to witness.

***Eady v. United States*, 44 A.3d 257 (D.C. 2012).** See, supra, Chapter 8.

***Ewing v. United States*, 36 A.3d 839 (D.C. 2012).** See, supra, Chapter 36.III.A.1.

***Perry v. United States*, 36 A.3d 799 (D.C. 2011)** (applying Wilson-Bey to aggravated assault).

***Hatch v. United States*, 35 A.3d 1115 (D.C. 2011).** See, supra, Chapter 33.

***Daniels v. United States*, 33 A.3d 324 (D.C. 2011).** See, supra, Chapter 35.II.B.5.

***Fowler v. United States*, 31 A.3d 88 (D.C. 2011).** Trial court did not abuse its discretion in not giving instruction directing jury not to consider statements allegedly made by defendant unless jury found "substantial independent evidence" establishing reliability of those statements because preliminary determination on adequacy of corroboration necessarily and properly made by trial judge when evaluating admissibility of statements.

***Youssef v. United States*, 27 A.3d 1202 (D.C. 2011).** Error for trial court not to give special unanimity instruction with respect to defendant's one theft charge that encompassed series of alleged thefts, but not plain where "exhaustive" evidence, including bank records, video recordings, photographs and witness testimony, supporting each incident of theft was presented at trial, and where issuance of general unanimity instruction and short deliberation made risk of non-unanimous verdict "extremely remote."

Trial court did not err in failing to give special unanimity instruction with respect to defendant's one fraud charge that included series of incidents in which defendant wrote and cashed checks against accounts with insufficient funds where jury needed only to find that at least two acts had created "a scheme or systematic course of conduct" calculated to deceive, cheat or falsely obtain property, and defendant's acts merely constituted the "brute facts" underlying that statutory element.

***Turner v. United States*, 26 A.3d 738 (D.C. 2011).** See, supra, Chapter 37.III.

***Paige v. United States*, 25 A.3d 74 (D.C. 2011).** Trial court did not plainly err in failing to expressly instruct jury that aider and abettor must possess same mens rea as principal where jury properly instructed on elements of second-degree murder and intent.

Timms v. United States, 25 A.3d 29 (D.C. 2011). Use of pre-modification "serious bodily injury" instruction that listed "substantial risk of death" as first enumerated consequence rather than last not reversible error because instruction never objected to, jurors never expressed confusion over phraseology, and trial court did not otherwise invite misapplication.
Error, though not plain, to give "attitude and conduct" instruction that implied to jurors that they would fail "test" of responsible service if they could not overcome their opinions and reach agreement on verdict.

***Blaize v. United States*, 21 A.3d 78 (D.C. 2011).** Trial court did not plainly err in failing to instruct on intervening cause and proximate causation because more general instruction was adequate to instruct jury on foreseeability where defendant convicted of voluntary manslaughter while armed of decedent at whom defendant had been shooting who was fatally struck by car fleeing scene.

***Lucas v. United States*, 20 A.3d 737 (D.C. 2011).** Not plain error to instruct jury to disregard witness's testimony about defendant's failure to respond when told of reason for arrest where not "obvious" or "clear" that government not permitted to elicit testimony about defendant's post-arrest, pre-Mirandized silence.

***Walden v. United States*, 19 A.3d 346 (D.C. 2011).** Trial court did not err in instructing on intent to kill element of first-degree murder that jury could, but was not required to, conclude that defendant had specific intent to kill if it found that defendant had used a weapon and that use of that weapon under circumstances would naturally and probably have resulted in death because allowed inference not cast in mandatory or presumptive terms and instruction did not "isolate" any fact (here, whether defendant had used a weapon) for consideration by jury.

***Workman v. United States*, 15 A.3d 264 (D.C. 2011).** Trial court did not abuse its discretion or tell jury to disregard absence of motive in issuing instruction informing jury that it could consider the presence or absence of motive in determining whether government had met its burden of proof rather than defense requested language that absence of motive could be considered as support for defendant's innocence.

***Graham v. United States*, 12 A.3d 1159 (D.C. 2011).** Flight instruction not unduly prejudicial where evidence showed that defendant changed clothes soon after murder, quickly left area and wasn't seen in neighborhood because it was "hot," and had friend come to another neighborhood to bring him clothes from his apartment.

Flight instruction proper that instructed jury that it must first find evidence of flight before considering it where pertinent language included in body of instruction even though it was not prefatory.

***Fox v. United States*, 11 A.3d 1282 (D.C. 2011).** See, supra, Chapter 36.III.A.1.

***Mack v. United States*, 6 A.3d 1224 (D.C. 2010).** Trial court did not err in denying addition to defense's proposed instruction on CDW that would have negated guilt for carrying the deadly weapon – here, an ice pick – if the carrier used it only during exercise of actual self-defense because carrying a deadly or dangerous weapon is a general intent crime and invocation of legitimate self-defense claim requires that defendant's response was necessary to save himself from danger, not present where defendant carried ice pick with him in anticipation of needing it for self-defense.

***McClary v. United States*, 3 A.3d 346 (D.C. 2010), amended on reh'g, 28 A.3d 502 (2010), clarified, 30 A.3d 808 (2011).** "Attitude and conduct of the jury" pre-deliberation instruction not "coercive" that did not direct jurors to disregard personal opinions in favor of judicial efficiency and reaching a verdict and warned jurors against announcing their commitment to a particular verdict in advance of deliberations.

***Cox v. United States*, 999 A.2d 63 (D.C. 2010).** Trial court erred in telling the jury in response to a note to give "ordinary meaning…in everyday conversation" to the words "readily available" when considering the term in the "while armed" instruction because although a pistol may be

within reach, the defendant may be unaware of its presence or lack the intent to exercise dominion or control over it.

***Gaines v. United States*, 994 A.2d 391 (D.C. 2010).** Error to omit from instruction on flight language stating that flight may be motivated by factors fully consistent with innocence, but harmless where defendant established on cross that he was driving without a license when stopped and argued in closing that it was this lack of driver's license, and not the drugs in his possession, that caused him to run from police.

***Williamson v. United States*, 993 A.2d 599 (D.C. 2010).** No error to give "natural and probable consequences" aiding and abetting instruction because sufficient evidence of defendant's mens rea where government presented evidence of grudge between defendant and decedent and where guilty verdict meant that jury had rejected defendant's alibi and misidentification theories of defense.

***Spencer v. United States*, 991 A.2d 1185 (D.C. 2010).** Assuming error to give "natural and probable consequences" aiding and abetting instruction with respect to ADW charge, trial court properly determined that any error was harmless where defendant could not show that but for error outcome would have been different.

***Little v. United States*, 989 A.2d 1096 (D.C. 2010).** Harmless to give "natural and probable consequences" aiding and abetting instruction where evidence demonstrated that defendant had been active participant in robbery, assault and weapons offenses, as evidenced by binding one victim's hands, taking his personal belongings and cutting his throat, and struggling with second victim over weapon and striking victim on head with weapon before fleeing scene, such that specific intent to steal, assault and possess a weapon could be inferred.

***Sutton v. United States*, 988 A.2d 478 (D.C. 2010).** No plain error in giving "natural and probable consequences" aiding and abetting instruction because jury could not reasonably have perceived defendant's actions as those of a mere aider and abettor where defendant held gun to victim's head to facilitate encounter that led to armed carjacking.

***Mungo v. United States*, 987 A.2d 1145 (D.C. 2010).** No plain error in giving "natural and probable consequences" aiding and abetting instruction where jury could reasonably have concluded that defendant acted as a principal when he had been "beefing" with victims, brought weapon to scene and was identified by each eyewitness as the shooter.

1. Defenses with Special Factual Predicates

Despite the general rule (discussed *infra* Section I.C.3) that a requested defense theory instruction should be given if there is any evidence to support it – no matter how weak – certain defense theories require a special and detailed factual predicate before the refusal to instruct on them will be held to be error.

a. Intoxication

The intoxication defense applies only to specific intent crimes. *Carter v. United States*, 531 A.2d 956 (D.C. 1987). Furthermore, denial of an instruction on intoxication is proper unless the evidence demonstrates "such a degree of complete drunkenness that a person is incapable of forming the necessary intent essential to the commission of the crime charged." *Smith v. United States*, 309 A.2d 58, 59 (D.C. 1973); *see also Bell v. United States*, 950 A.2d 56 (D.C. 2008). Thus, consumption of substantial amounts of alcohol is not a sufficient factual predicate. *Nicholson v. United States*, 368 A.2d 561 (D.C. 1977). The Court of Appeals has even held that a defendant's testimony that he was intoxicated at the time of the offense is insufficient; apparently there must be some additional evidence concerning the type and quantity of the substance consumed, the length of time over which it was taken, and, perhaps, the manner in which the ingestion prevented formation of the requisite intent. *See Powell v. United States*, 455 A.2d 405 (D.C. 1982); *Williams v. United States*, 331 A.2d 341 (D.C. 1975); *Criminal Jury Instruction* No. 9.404; *see also Womack v. United States*, 336 F.2d 959 (D.C. Cir. 1964) (evidence of drunkenness supported intoxication instruction, even though intoxication was not primary theory of defense).

b. Other extraordinary defenses requiring a factual predicate

- Abandonment: *Williams v. United States*, 337 A.2d 772 (D.C. 1975)

- Assaults ("attempted-battery" and "intent-to-frighten"): *Peterson v. United States*, 657 A.2d 756 (D.C. 1995); *Smith v. United States*, 593 A.2d 205 (D.C. 1991); *McGee v. United States*, 533 A.2d 1268 (D.C. 1987)

- Defense of a third person: *Muschette v. United States*, 936 A.2d 791 (D.C. 2007); *Dorsey v. United States*, 935 A.2d 288 (D.C. 2007); *Jones v. United States*, 555 A.2d 1024 (D.C. 1989)

- Duress: *Dixon v. United States,* 548 U.S. 1 (2006); *McClam v. United States*, 775 A.2d 1100 (D.C. 2001); *Stewart v. United States*, 370 A.2d 1374 (D.C. 1977)

- Entrapment: *Mathews v. United States*, 485 U.S. 58 (1988)

- "Innocent possession" of a pistol: *Bieder v. United States*, 662 A.2d 185 (D.C. 1995); *Carey v. United States*, 377 A.2d 40 (D.C. 1977)

- Insanity: *Patton v. United States,* 782 A.2d 305, 311-12 (D.C. 2001); *Bethea v. United States,* 365 A.2d 64, 72 (D.C. 1976);

- Insanity (drug induced): *McNeil v. United States.* 933 A.2d 354 (D.C. 2007)

- Intervening gross negligence in medical treatment (homicide case): *Baylor v. United States*, 407 A.2d 664 (D.C. 1979)

- Multiple conspiracy: *Khaalis v. United States*, 408 A.2d 313 (D.C. 1979)

- Parent defense to kidnapping: *Byrd v. United States*, 705 A.2d 629 (D.C. 1997)

- Possession of a pistol by a special police officer: *Shivers v. United States*, 533 A.2d 258 (D.C. 1987)

- Possession of a weapon for defensive purposes: *Reid v. United States*, 581 A.2d 359 (D.C. 1990)

- Provocation: *Lee v. United States,* 959 A.2d 1141 (D.C. 2008) (defendant is entitled to instruction on provocation as mitigation in a second degree murder case even without a lesser included offense instruction); *Brown v. United States*, 584 A.2d 537 (D.C. 1990) (applying law of provocation to non-homicide case)

- Transferred intent: *In re E.D.P.*, 573 A.2d 1307 (D.C. 1990)

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***Robinson v. United States*, 100 A.3d 95 (D.C. 2014).** Trial court erred by instructing jury, in response to its inquiries, that defendant could be convicted of second-degree burglary while armed as an aider and abettor if defendant had reason to know original perpetrator of that crime was armed.

***Lee v. United States,* 61 A.3d 655 (D.C. 2013).** See, supra, Chapter 33.III.I.

2. Instructions in Co-Defendant Trials

The trial court must be especially careful to use instructions during trial and at the end of the evidence to neutralize the inherent prejudice of a joint trial. For example, the court must instruct the jury to consider a prior inconsistent statement by a defendant as impeachment only against the defendant who made the statement and not substantively for its assertion that a co-defendant was implicated in the crime. *See Hordge v. United States*, 545 A.2d 1249, 1257-58 (D.C. 1988); *Carpenter v. United States*, 430 A.2d 496, 501 (D.C. 1981) (en banc); *Borrero v. United States*, 332 A.2d 363 (D.C. 1975). *But see Sims v. United States*, 405 F.2d 1381 (D.C. Cir. 1968) (severance should have been granted). Also, the court must instruct the jury that evidence or instructions on behalf of one defendant relate to that defendant only, not to the co-defendant as well. *See*, *e.g.*, *Lowman v. United States*, 632 A.2d 88 (D.C. 1993) (error, though harmless, not to instruct jury that prior criminal conviction instruction applied only to one defendant). Other instructions that may be apt include No. 1.203, Where Charges are Dismissed in Mid-Trial; No. 2.321, Other Crimes Evidence; No. 2.402, Multiple Counts – One Defendant; No. 2.403, Multiple Defendants – One Count; No. 2.404, Multiple Defendants – Multiple Counts; and No. 2.308, Evidence Admitted Against One Defendant Only.

Nonetheless, instructions in a co-defendant case can damage a defendant's case. Indeed, an instruction that substantially weakens or casts doubt on a co-defendant's defense can amount to sufficient prejudice to mandate separate trials. For example, the convictions in *United States v. Gambrill*, 449 F.2d 1148 (D.C. Cir. 1971), were reversed for other reasons, but the court also

ordered that the defendants should receive separate trials on remand. At the first trial, defendant Hunter had called alibi witnesses who placed him and Gambrill in Hyattsville on the night of the crime. Gambrill claimed that he was not with Hunter that night, and asserted prejudice from Hunter's use of the alibi; at his request, the court instructed the jury that the alibi was introduced only on behalf of Hunter. The court of appeals held that the effect of the instruction prejudiced Hunter because it amounted to an untested assertion by Gambrill (who did not testify) that Hunter's witnesses were lying.

Listen carefully for any error when the trial judge is instructing the jury on aiding and abetting with respect to the issue of intent. In *Wilson-Bey v. United States,* 903 A.2d 818 (D.C. 2006) (en banc), the court held that the government must always prove that the aider and abettor has the same *mens rea* as required in the charged offense. The instruction using "natural and probable consequences" as the standard "could not be reconciled with the requirement that 'each participant's responsibility in a criminal homicide must turn on his or her individual intent....'" *Coleman v. United States,* 948 A.2d 534, 552 (D.C. 2008), *citing Wilson-Bey*, 903 A.2d at 836. "[T]he government must prove all of the elements of the offense" in order for a defendant to be found guilty under an aiding and abetting theory. *Wilson-Bey,* 903 A.2d at 822. *See Martinez v. United States*, 982 A.2d 789 (D.C. 2009) (trial court erred in giving the "natural and probable consequences" instruction, which may not be used to convict a defendant of the specific intent crime of first-degree murder). The court has since held that this error in instructing the jury incorrectly requires reversal. *See Coleman,* 948 A.2d at 553. *But see Johnson v. United States*, 980 A.2d 1174, 1181 (D.C. 2009) (reversal not required if error not harmless beyond a reasonable doubt). This rule applies to both general and specific intent crimes. *See Perez v. United States*, 968 A.2d 39, 102 (D.C. 2009) (applying it to second-degree murder); *Wheeler v. United States,* 977 A.2d 973, 986 n.4 (D.C. 2009) (explicitly stating that *Wilson-Bey* applied to general intent crimes); *Coleman*, 948 A.2d at 552-53 (applying it to second-degree murder).

Careful attention must also be paid in cases where the defendant is charged with conspiracy. Counsel should proffer specific instructions tailored to the facts of his case emphasizing that the defendant's own statements and actions must be the evidentiary basis upon which a jury can find that the defendant knowingly became a member of a conspiracy. *United States v. Treadwell,* 760 F.2d 327 (D.C. 1985).

Counsel should also ask for an instruction cautioning that evidence concerning prior bad acts that establish an overt act of the conspiracy should only be considered as to the overt act and not be treated as bad character evidence.

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***Ingram v. United States,* 40 A.3d 887 (D.C. 2012).** Trial court did not plainly err in giving "natural and probable consequences" aiding and abetting instruction where defendants participated throughout the beating that led to the victim's death and the jury's verdict made clear that defendants were convicted on their own acts.

3. The Theory of Defense Instruction[7]

"[A] defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." *Jackson v. United States*, 645 A.2d 1099, 1101 (D.C. 1994) (citations omitted); *Bostick v. United States*, 605 A.2d 916, 917 (D.C. 1992). A defense theory instruction is warranted even if the supporting testimony seems "implausible, unreliable or incredible" to the court. *Murphy-Bey v. United States*, 982 A.2d 682, 691 (D.C. 2009) (error to deny instruction on the law of the "initial aggressor" where the defendant started the fight but then took a few steps backward in order to avoid being stabbed); *Young v. United States*, 309 F.2d 662, 663 (D.C. Cir. 1962); *McClam*, 775 A.2d at 1104 (defendant entitled to present a duress defense even after denying any involvement in the offense at pre-trial hearing); *Adams v. United States*, 558 A.2d 348, 349 (D.C. 1989) (defendant entitled to self-defense instruction even though he stated that there were no weapons at the scene); *Pendergrast v. United States*, 332 A.2d 919, 926 (D.C. 1975) (improper denial of manslaughter instruction where there was conflicting evidence on appellant's state of mind). *But see Brown v. United States*, 619 A.2d 1180 (D.C. 1992) (no evidence to support self-defense instruction). This standard, however, limits the defendant's right to a theory of defense instruction in two fundamental ways. First, the defense must be recognized as valid. *See Dolson v. United States,* 948 A.2d 1193 (D.C. 2008) (trial judge appropriately rejected defense request to instruct the jury that the defendant had the right to resist an unlawful entry onto his property). In addition, sufficient evidence supporting the defense must be presented to the jury. *Minor v. United States*, 623 A.2d 1182 (D.C. 1993). *See Cowan v. United States*, 629 A.2d 496 (D.C. 1993) (defense not entitled to instruction that has no conceivable relevance to pending charges); *Cosby v. United States*, 614 A.2d 1291 (D.C. 1992) (refusal to give "Narcotics Addiction Not a Crime" instruction not error where defendant admitted possession and thus "addiction" was a legal defense). In reviewing the denial of a requested defense instruction, the evidence must be viewed in the light most favorable to the defendant. *Simms v. United States*, 867 A.2d 200, 204 (D.C. 2005). An instruction is not required, however, if the jury would have to engage in "bizarre reconstructions of the evidence" in order to accept the proposed defense. *Id.*

Counsel should, in every case, submit at the close of evidence a proposed instruction on the theory of the defense. It is reversible error for a trial court to refuse to instruct on a "'theory of the case that negates [the defendant's] guilt of the crime charged' if the instruction is supported by 'any evidence, no matter how weak.'" *Graves v. United States*, 554 A.2d 1145, 1147 (D.C. 1989) (quoting *Gray v. United States*, 549 A.2d 347, 349 (D.C. 1988)); *see Clark v. United States*, 593 A.2d 186 (D.C. 1991). The request must be made in a timely manner. *See Tyree v. United States,* 942 A.2d 629, 642 (D.C. 2008) (trial court did not abuse its discretion when it denied request for a summary defense theory instruction after the closings and after the jury had been instructed). A defendant may put on different or contradictory defenses, and the right to an instruction is based on all the evidence in the case, not just on the defense evidence. *McClam v. United States*, 775 A.2d 1100 (D.C. 2001). "[M]ere inconsistency between defenses does not constitute a proper basis for the denial of a defense instruction … 'regardless of whether it is

[7] A defense theory may give rise to a request to modify the standard instruction on the elements of the offense in addition to or in place of a separate defense theory instruction. *See Jackson v. United States,* 600 A.2d 90 (D.C. 1991) (reversible error for trial court not to modify standard UUV instruction when requested to incorporate theory that defendant thought he had a third party's consent to drive the car on behalf of the owner).

consistent with the defense theory of the case or the defendant's testimony.'" *Adams v. United States*, 558 A.2d 348, 349-50 (D.C. 1989) (citations omitted); *see also Goddard v. United States*, 557 A.2d 1315, 1316 (D.C. 1989) (request cannot be denied unless there is no rational inference supporting the theory); *Jones v. United States*, 555 A.2d 1024, 1028 (D.C. 1989) (appellate courts do not readily find harmless a refusal to instruct on defense theory); *Doby v. United States*, 550 A.2d 919, 920 (D.C. 1988) (defense theory instruction must be given unless no factual or legal basis for it).

The court's role is to inform the jury about the law governing a case. When the trial court refuses to instruct on an issue because it believes that the evidence supporting the request is incredible or too weak, it improperly assumes the jury's role as fact-finder. *Stevenson v. United States*, 162 U.S. 313, 315-16 (1896); *see Jordan v. United States*, 633 A.2d 373 (D.C. 1993); *Jones*, 555 A.2d at 1027; *Montgomery v. United States*, 384 A.2d 655, 660 (D.C. 1978); *Belton v. United States*, 382 F.2d 150, 155 (D.C. Cir. 1967). If necessary, counsel should cite the specific testimony that supports the requested instruction. *See Young v. United States*, 309 F.2d 662 (D.C. Cir. 1962). The instruction can be supported by the defendant's testimony alone. *See McPhaul v. United States*, 452 A.2d 371 (D.C. 1982); *Tatum v. United States*, 190 F.2d 612 (D.C. Cir. 1951). It may also be based upon parts of testimony from various witnesses, both prosecution and defense, for the jury is free to "pick and choose" from the evidence offered. *Pendergrast v. United States*, 332 A.2d 919, 925 n.2 (D.C. 1975); *Brooke v. United States*, 385 F.2d 279, 282-83 (D.C. Cir. 1967); *United States v. Grady*, 481 F.2d 1106, 1107-08 (D.C. Cir. 1973). "[W]here the issue [of whether to give an instruction] is close, the request of defense counsel may properly be given the benefit of the doubt." *Belton*, 382 F.2d at 156.

The Court of Appeals has repeatedly found error when the trial court refused to give the requested defense instruction in alibi cases. *See e.g.*, *Henderson v. United States*, 619 A.2d 16 (D.C. 1992) (alibi instructions should be granted liberally); *Gethers v. United States*, 556 A.2d 201, 204 (D.C. 1989) (alibi instruction must be given even when defendant is sole alibi witness and government's case refuting alibi is compelling); *Dublin v. United States*, 388 A.2d 461, 464 n.6 (D.C. 1978) (if alibi is presented, defendant may still be entitled to instructions on lesser-included offenses, self-defense, or intoxication, if supported by other evidence). *But see Greenhow v. United States*, 490 A.2d 1130, 1134-35 (D.C. 1985) (no alibi instruction where evidence established only partial alibi). The court has also found error when the trial court has denied a request for a self-defense instruction. *Jones v. United States,* 893 A.2d 564 (D.C. 2006) (error for trial court to fail to instruct jury that self-defense is a defense to all counts in the indictment); *Swann v. United States*, 648 A.2d 928 (D.C. 1994) (error not to give instruction on imperfect self-defense instruction); *Jackson v. United States*, 645 A.2d 1099 (D.C. 1994) (error not to give false appearances instruction in a self-defense case where evidence supported instruction); *Guillard v. United States*, 596 A.2d 60, 62 (D.C. 1991) (error not to give self-defense instruction even if defendant establishes different or contradictory defense, "as long as self-defense is reasonably raised by the evidence"); *Gray v. United States*, 589 A.2d 912, 917 (D.C. 1991) (defendant is not required to testify to get a self-defense instruction so long as "a defendant's subjective belief of danger can be determined from the objective circumstances of the killing").

The court has also found error where the trial court refuses to give a "special circumstances" instruction separate and apart from the defense theory instruction. *See Fearwell v. United States,* 886 A.2d 95, 101 (D.C. 2005). In *Fearwell*, the defendant was charged with a Bail Reform Act violation for the failure to appear for a status hearing. *Fearwell,* 886 A.2d at 97. The defendant testified at trial that he was "incapacitated" due to the advanced stages of HIV and unable to come to court. *Id.* at 98. The trial court denied the defense request for a "special circumstances" instruction separate from the defense theory explaining that the jury could consider the defendant's condition in determining whether the "government had proved beyond a reasonable doubt that the defendant's failure to appear was willful" *Id*. The Court of Appeals held that there is a distinction between giving an instruction about an affirmative defense – "however weak" the evidence to support it, and giving the defense theory instruction. *Id.* at 100-1. This error, combined with prosecutorial misconduct in misstating the evidence in closing, required reversal of the defendant's conviction. *Id.* at 102; *See also Tyer v. United States*, 912 A.2d 1150 (D.C. 2006); *Bonilla v. United States*, 894 A.2d 412 (D.C. 2006).

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***Holloway v. United States*, 25 A.3d 898 (D.C. 2011).** Trial court did not violate arson defendant's due process rights in declining to include language in theory-of-defense instruction regarding government's burden to prove beyond a reasonable doubt that fire was set intentionally and not by accident where basic arson instruction stated same principle and where any ambiguity created by judge's explanation after prosecutor mentioned "mitigation" during initial closing argument that question was whether setting of fire had been intentional or accidental was removed by subsequent instructions regarding arson and burden of proof.

***Jones v. United States*, 999 A.2d 917 (D.C. 2010).** Trial court did not err in denying defense request for self-defense instruction in case where defendant used a box cutter to stab decedent during fight at club because reasonable jury could not without speculation have found from evidence presented – whether decedent had bumped into defendant on overcrowded dance floor or had thrown first punch in fistfight – that defendant reasonably believed he was in imminent danger of death or serious injury such that use of the box cutter was necessary to protect himself.

***Williams v. United States*, 6 A.3d 843 (D.C. 2010).** No error to reject defense requested instruction regarding theory of innocence that included declarative sentences regarding witnesses' credibility and defendant's innocence that were the equivalent of a judgment of acquittal where court rephrased language to include reference to defendant's "theory" and provided ample instructions regarding the assessment of witness credibility.

***Woods v. United States*, 65 A.3d 667 (D.C. 2013).** Consent is not a defense to a charge of assault with significant bodily injury arising out of a street fight.

4. Defendant as Witness

Clifford v. United States, 532 A.2d 628 (D.C. 1987), disapproved of the standard "Defendant as Witness" instruction (No. 2.209), which singles out the testifying defendant from other witnesses and instructs the jury that in considering the defendant's credibility, it may consider the defendant's vital interest in the outcome of the trial. On the facts of that case, the court found

that the instruction did not constitute reversible error, but suggested that the better practice is to include the defendant in the general instruction on evaluating credibility. Alternatively, the court suggested that an instruction referring to the defendant's interest in the trial can be given more appropriately if there are vital interests of other witnesses that can be included in the same instruction, so that the defendant is not singled out. In the Comment Section of the 2009 edition of the Criminal Jury Instructions, the Committee recommends that the instruction not be given over defense objection.

II. PARTICULAR SUBJECTS: REASONABLE DOUBT, MISSING WITNESSES AND EVIDENCE AND LESSER INCLUDED OFFENSES

A. Reasonable Doubt

Smith v. United States, 709 A.2d 78 (D.C. 1998) (en banc), modified the Red Book jury instruction on reasonable doubt, No. 2.108. The new instruction reads, *id*. at 82:

> The government has the burden of proving [name of the defendant] guilty beyond a reasonable doubt. In civil cases, it is only necessary to prove that a fact is more likely true than not, or, in some cases, that its truth is highly probable. In criminal cases such as this one, the government's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> Reasonable doubt, as the name implies, is a doubt based upon reason – a doubt for which you have a reason based upon the evidence or lack of evidence in the case. If, after careful, honest, and impartial consideration of all the evidence, you cannot say that you are firmly convinced of the defendant's guilt then you have a reasonable doubt.
>
> Reasonable doubt is the kind of doubt that would cause a reasonable person, after careful and thoughtful reflection, to hesitate to act in the graver or more important matters in life. However, it is not an imaginary doubt, nor a doubt based on speculation or guesswork; it is a doubt based upon reason. The government is not required to prove guilt beyond all doubt, or to a mathematical or scientific certainly. Its burden is to prove guilt beyond a reasonable doubt.

According to *Smith*, the new instruction "maintains the essential concepts required for defining proof beyond a reasonable doubt, but it eliminates expressions from earlier versions of the Redbook instruction which may be viewed as outdated in favor of simpler ones." *Id*. at 82. The impetus behind fashioning a "simpler" instruction was the increasing number of appeals challenging trial courts' deviation from the Red Book instruction. Despite the modification, the court strongly admonishes the trial court against straying from or strongly embellishing upon the instruction. *Id*. at 83.

Counsel should pay careful attention to the instructions on reasonable doubt and the burden of proof. If the trial court does not correctly define reasonable doubt and the government's burden of proof, the appellate court could find *per se* reversible error. *Sullivan v. Louisiana*, 508 U.S.

275 (1993). *But see Payne v United States*, 932 A.2d 1095, 1102 (D.C. 2007) (not error for the court to say the government does not have to prove guilt "beyond a shadow of a doubt"); *Green v. United States*, 718 A.2d 1042 (D.C. 1998) (deviation from instruction was error, but not plain error). The court will reverse a conviction if it appears that "taking the jury instructions as a whole," it is "reasonably likely that the jury applied the instruction in an unconstitutional manner." *Minor v. United States*, 647 A.2d 770, 773 (D.C. 1994) (*quoting Victor v. Nebraska*, 511 U.S. 1, 5 (1994)).

Lack of evidence: It is in the jury's exclusive province to weigh the evidence and a jury may consider the lack of evidence when making such determinations. In *Wheeler v. United States*, 930 A.2d 232 (D.C. 2007), the court found it was plain error when the trial court instructed as a matter of law that the jury could not consider the lack of fingerprint evidence. *See also Greer v. United States*, 697 A.2d 1207 (D.C. 1997).

B. Missing Witnesses and Missing Evidence

The failure of a party to call a witness or to produce evidence, when the party might naturally be expected to do so, may create an inference that the missing testimony or evidence would have been unfavorable. This adverse inference may then be the subject of closing argument by the opposing party, an instruction by the court, or both.[8] Known as the "missing witness" and "missing evidence" doctrines, the treatment accorded all missing evidence, whether testimonial or tangible, is the same.[9]

The instruction or comment requires two prerequisites. *Harris v. United States*, 602 A.2d 154 (D.C. 1992). First, it must be shown that the testimony or evidence would have "elucidate[d] the transaction." *Id*. at 160; *see Graves v. United States*, 150 U.S. 118, 121 (1893); *Garris v. United States*, 465 A.2d 817, 822 (D.C. 1983). Second, the missing witness or evidence must be "peculiarly available" to the non-producing party. *Graves*, 150 U.S. at 121; *Harris*, 602 A.2d at 160-61; *Lawson v. United States*, 514 A.2d 787, 789 (D.C. 1986); *Garris*, 465 A.2d at 822; *Wynn v. United States*, 397 F.2d 621, 625 (D.C. Cir. 1967). Instructions and arguments regarding inferences to be drawn as to an absent witness are prohibited if either condition is not met. *Kleinbart v. United States*, 426 A.2d 343, 351 (D.C. 1981).

Even if both conditions are satisfied, the trial court has discretion to refuse to give a missing witness instruction, and has been encouraged by the Court of Appeals to exercise that discretion.

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[8] *See Criminal Jury Instruction* No. 2.300:

> If [evidence relevant to an issue] [a witness who could have given relevant testimony on an issue] in this case was only within the power of one party to [produce] [call], was not [produced] [called] by that party, and [its] [his/her] absence has not been sufficiently explained, then you may, if you deem it appropriate, infer that the [evidence] [witness's testimony] would have been unfavorable to the party who failed to [produce it] [call him/her]. However, you should not draw such an inference from [evidence that] [a witness who] in your judgment was equally available to both parties or [which] [whose testimony] would have [duplicated other evidence] [repeated other testimony] or that you think was unimportant.

[9] *See Jones v. United States*, 535 A.2d 409 (D.C. 1987); *Harvey v. United States*, 395 A.2d 92 (D.C. 1978).

Lawson, 514 A.2d at 787; *Miles v. United States*, 483 A.2d 649, 658 (D.C. 1984); *Thomas v. United States*, 447 A.2d 52, 57 (D.C. 1982); *see Williams v. United States*, 641 A.2d 479, 483-84 (D.C. 1994) (trial court did not commit error by refusing to give "missing notes" instruction when the court found that the police officer's lost notes had not been "purposefully" or "maliciously" destroyed and the substance of the notes had been broadcast in a radio run and disclosed to the defense). *But see Davis v. United States*, 641 A.2d 484, 493-95 (D.C. 1994) (missing evidence instruction may be given as a sanction when court found that the police officer negligently destroyed the sex kit prepared in a rape case). Indeed, in seeking to discourage the use of the instruction, the Court of Appeals has noted that it is far more likely to find an abuse of discretion and resulting error in the trial court's decision to give a missing witness instruction than in its refusal to give the instruction. *See Lawson*, 514 A.2d at 787. The court has even threatened to forbid use of the instruction entirely unless its persistent misuse and overuse abates. *Id*. at 793.

The court recently found that giving the "opposite" of the missing witness instruction can be reversible error. *See Wheeler v. United States*, 930 A.2d 232 (D.C. 2007). In *Wheeler,* the trial judge gave an instruction that MPD was under no obligation to conduct fingerprint tests to counter any argument by the defense that the government's failure to provide such evidence should undermine the government's case. *See Wheeler*, 930 A.2d at 238. The Court of Appeals found that the government is only entitled to this instruction where it is relevant to the specific facts of the case. *Id.* Further, the instruction to the jury that the "absence of fingerprint evidence, standing alone, does not constitute reasonable doubt," infringed upon the province of the jury to consider any particular piece of evidence, or lack thereof, in making a determination of whether the government has met its burden of proof. *Id.* at 249.

1. <u>"Elucidating the Transaction"</u>

To "elucidate the transaction," the testimony or evidence must be not only relevant, but also material to a disputed issue. *Thomas*, 447 A.2d at 57; *Cooper v. United States*, 415 A.2d 528 (D.C. 1980); *Dent v. United States*, 404 A.2d 165, 169-70 (D.C. 1979); *United States v. Young*, 463 F.2d 934, 940-41 (D.C. Cir. 1972). Non-cumulative eyewitness testimony will always meet this test. *See*, *e.g.*, *Haynes v. United States*, 318 A.2d 901 (D.C. 1974). Conversely, a witness need not be called to testify if the testimony would be cumulative, *Ray v. United States*, 616 A.2d 333 (D.C. 1992); *Anderson v. United States*, 352 A.2d 392 (D.C. 1976); unimportant, *Dyson v. United States*, 418 A.2d 127, 131 (D.C. 1980); *Brown v. United States*, 414 F.2d 1165 (D.C. Cir. 1969); or inferior, *Cote v. Palmer*, 16 A.2d 595, 600 (Conn. 1940).

> In evaluating a request for a missing witness instruction, the trial court should consider – from the viewpoint of trial preparation – whether a particular witness would provide testimony which would be superior to that which counsel anticipates from other witnesses as well as testimony which would be noncumulative and nonduplicative. Unless it can be established that the witness in question would provide new or additional evidence or would be manifestly more credible, we risk considerable unfairness by using the missing witness instruction to create adverse evidence from a party's decision not to call that witness.

Cooper, 415 A.2d at 534 (footnote omitted). It is not the purpose of the missing witness rule to force counsel to call "individuals who they suspect for one reason or another would be unfavorable, even though they could contribute nothing relevant or material to the issues in dispute." *Id*.

Several cases have indicated that the witness's credibility should be considered in deciding whether the testimony is cumulative. For example, *Shelton v. United States*, 388 A.2d 859 (D.C. 1978), held that it was not error to give a missing witness instruction when the defendant failed to call a woman who could supposedly corroborate his alibi. Both the defendant and his girlfriend had testified to an alibi, but the court concluded that the testimony of the absent woman would have been non-cumulative because, unlike the defendant and his girlfriend, she was likely to be unbiased and thus more likely to be believed by the jury. *Id*. at 864. The court reached the opposite conclusion, however, in *Nowlin v. United States*, 382 A.2d 9, 12 (D.C. 1978), and *Cooper*, 415 A.2d 528. In *Cooper*, the defendant called his girlfriend but not his aunt to support an alibi defense where the defense asserted that both were with him. The court held that the missing witness instruction given was reversible error because the aunt did not have a vantage point superior to that of the girlfriend and would not have been manifestly more credible. *Nowlin* similarly suggested that the testimony of an eyewitness not called by the government would have been cumulative, even though the only other eyewitnesses were the complainant and his son, and the absent eyewitness was unrelated to both men.

If the testimony would not elucidate the transaction, giving the missing witness instruction or allowing adverse comment may be reversible error. *Lawson*, 514 A.2d 787; *Miles*, 483 A.2d at 658; *Thomas*, 447 A.2d 52; *Dyson*, 418 A.2d 127; *Dent*, 404 A.2d 165. Conversely, failure to give a requested instruction is not error "in the absence of a showing that evidence material to [the] defense was suppressed." *Brown v. United States*, 388 A.2d 451, 460 (D.C. 1978) (citation omitted).

2. "Peculiarly Available"

To satisfy the "peculiar availability" requirement, it must be shown that the witness is both *physically* unavailable and *practically* unavailable to the non-producing party. *Strong v. United States*, 665 A.2d 194 (D.C. 1995). "Physical unavailability" occurs when a witness cannot be located or is beyond the subpoena power of the court. *Id*. at 197. *See also* Comment to Instruction No. 2.300 (witness is ill); *Ray*, 616 A.2d 333 (witness's testimony would be privileged under the Fifth Amendment); *Alston v. United States*, 552 A.2d 526 (D.C. 1989); *Bowles v. United States*, 439 F.2d 536 (D.C. Cir. 1970); *Pennewell v. United States*, 353 F.2d 870 (D.C. Cir. 1965) (witness identified by defendant as real perpetrator); *see also Nixon v. United States*, 730 A.2d 145 (D.C. 1999) (no missing witness instruction where government witness is in the room and government decided not to call witness); *Reyes-Contreras v. United States*, 719 A.2d 503 (D.C. 1998) (no abuse of discretion in denying missing witness instruction where witness not peculiarly available); *Kleinbart*, 426 A.2d at 351-52; *United States v. Debango*, 780 F.2d 81 (D.C. Cir. 1986) (defense failed to lay foundation by showing that missing informant was peculiarly available to government); *cf. McClanahan v. United States*, 230 F.2d 919, 926 (5th Cir. 1956).

Under practical unavailability, "if a party has a special relationship with a witness, that witness becomes unavailable in a practical sense to the opposing party because his testimony is expected to be hostile." *Strong*, 665 A.2d at 198 (quoting *Dent*, 404 A.2d at 170). The court has found "practical unavailability" if there is a "special relationship," such as a girlfriend, government informer, employer-employee, or relative. *Id*. at 199. However, in *Strong*, the court held that there was no "special relationship" between a government witness and a mere acquaintance of that witness which "reveal[ed] a 'potential bias in favor of one party.'" *Id*. (quoting *Thomas*, 447 A.2d at 58).

Even a belated but good-faith and unsuccessful effort to locate the witness renders comment or an instruction improper. S*ee also Stewart v. United States*, 418 F.2d 1110 (D.C. Cir. 1969). *Compare Harris v. United States*, 430 A.2d 536, 542-43 (D.C. 1981) (defendant's assertions, *inter alia*, that he had "been past" missing reverend's church but had never knocked on door and that he knew reverend's phone number but not his name, were not sufficient to constitute *bona fide* effort to locate witness), *with Nowlin*, 382 A.2d at 13 (government effort to locate witness one day before trial sufficient, even though existence of witness was known when case was before grand jury). The defendant cannot obtain the instruction when a witness invokes the Fifth Amendment privilege not to testify and the government refuses to grant the witness immunity. *Bowles*, 439 F.2d at 542; *Morrison v. United States*, 365 F.2d 521 (D.C. Cir. 1966).

When a party seeking the instruction first learns the absent witness's identity during trial, the party is not required to subpoena the witness or forgo the instruction. *Brown v. United States*, 555 A.2d 1034, 1036 (D.C. 1989); *Brown*, 388 A.2d 451; *United States v. Stevenson*, 424 F.2d 923, 926 (D.C. Cir. 1970). However, alibi witnesses whose identities are learned by the government at trial are not "peculiarly available" to the defendant if the government did not avail itself of Super. Ct. Crim. R. 12.1, requiring the defendant to disclose the names and addresses of alibi witnesses upon request. *Coombs v. United States*, 399 A.2d 1313, 1316-17 (D.C. 1979).

A witness who is amenable to subpoena by both parties may nevertheless be "peculiarly available" to one party if there is a likelihood of bias in favor of that party or a special relationship with the party. *Compare Hale v. United States*, 361 A.2d 212, 216 (D.C. 1976) (defendant's girlfriend); *and Burgess v. United States*, 440 F.2d 226, 232 (D.C. Cir. 1970) (government informant); *with Milton v. United States*, 110 F.2d 556 (D.C. Cir. 1940).

3. Factual Findings

When the issue is raised, the court must make factual findings on both elucidation and availability. *Brown*, 555 A.2d at 1036; *Leftwitch v. United States*, 460 A.2d 993 (D.C. 1983); *Dent*, 404 A.2d at 171; *Givens v. United States*, 385 A.2d 24 (D.C. 1978); *Conyers v. United States*, 309 A.2d 309, 312-13 (D.C. 1973); *United States v. Scott*, 464 F.2d 832 (D.C. Cir. 1972). It must conduct a factual inquiry as to the existence of both foundation conditions, and give the opposing party an opportunity to contest the factual basis. *Simmons v. United States*, 444 A.2d 962, 964 (D.C. 1982). The court has considerable latitude to decide "whether from all circumstances an inference of unfavorable testimony from an absent witness is a natural and reasonable one." *United States v. Craven*, 458 F.2d 802, 805 (D.C. Cir. 1972); *accord Leftwitch*, 460 A.2d at 995. Thus, even where both elements have been satisfied, the court may refuse to

give the instruction. *Thomas*, 447 A.2d at 58; *Simmons*, 444 A.2d at 964; *Kleinbart*, 426 A.2d at 351 & n.6; *Smith v. United States*, 343 A.2d 40 (D.C. 1975). In addition, the trial court may not suggest that counsel seek an instruction regarding the missing witness or evidence, *Brown*, 414 F.2d 1165, and may not give the instruction *sua sponte*. *Simmons*, 444 A.2d at 964; *Egan v. United States*, 287 F. 958 (D.C. Cir. 1923).

4. Arguing the Inference

When the court has concluded that no adverse inference can be drawn, counsel may not argue the inference to the jury. *Conyers*, 309 A.2d at 313; *see*, *e.g.*, *Hughes v. United States*, 633 A.2d 851 (D.C. 1993) (defense may remark on government's failure to introduce fingerprint evidence, but may not use this as springboard for arguing facts not in evidence, such as fact that fingerprint evidence if introduced would have been favorable to defense). Indeed, counsel must obtain permission from the court before even commenting on the absence of a witness. *Lemon v. United States*, 564 A.2d 1368, 1375 (D.C. 1989); *Alston*, 552 A.2d at 528 (argument that "witness" did not exist was reasonably inferred from evidence); *Price v. United States*, 531 A.2d 984, 993-94 (D.C. 1987); *Arnold v. United States*, 511 A.2d 399, 416 (D.C. 1986) (even if argument "goes no further than to note the absence of the witness, [counsel] should first obtain permission from the court to do so"); *Harvey v. United States*, 395 A.2d 92 (D.C. 1978); *Conyers*, 309 A.2d at 313. Government counsel's failure to do so may constitute reversible error. *Lawson*, 514 A.2d 787 (missing witness remarks caused substantial prejudice to defendant and constituted reversible error where prosecutor failed to seek permission and comments bore directly on defendant's guilt); *Dyson*, 418 A.2d at 131; *Givens*, 385 A.2d at 26-27. *But see Morris v. United States*, 622 A.2d 1116 (D.C. 1993) (cross-examination on defendant's failure to contact acquaintances present at shooting did not refer to their failure to testify, and accordingly did not implicate missing witness rule); *Allen v. United States*, 603 A.2d 1219, 1223 (D.C. 1992) (en banc) (cross-examination of defendant on his failure to preserve crime scene and report decedent's death, along with references to these failures in closing argument, did not violate missing evidence doctrine; defendant's inaction at time of incident is different than inaction at trial).

C. Lesser Included Offenses

Super. Ct. Crim. R. 31(c) permits conviction for any offense necessarily included in the offense charged in the indictment. This principle, known as the lesser-included offense (LIO) doctrine, originally developed as an aid to prosecutors whose proof failed to establish some element of the offense charged. It is now equally available to defendants and is said to enable juries to temper justice with mercy. *See Kelly v. United States*, 370 F.2d 227 (D.C. Cir. 1966).

The jury must determine guilt or innocence of all lesser-included offenses of each count going to the jury.[10] *Simmons v. United States*, 554 A.2d 1167 (D.C. 1989). "A lesser-included offense instruction is proper where (1) the lesser included offense consists of 'some, but not every

[10] A trial court may decide a lesser-included non-jury offense without submitting it to a jury if the court removes the greater jury-demandable charged offense from the jury's consideration. *Berroa v. United States*, 763 A.2d 93 (D.C. 2000) (court granting MJOA on PWID could decide the lesser-included non-jury offense and did not need to submit the lesser-included non-jury demandable offense of simple possession to the jury.)

element of the greater offense'"; and "(2) the evidence is sufficient 'to support the lesser charge.'" *Tucker v. United States*, 871 A.2d 453, 461 (D.C. 2005) (quoting *Woodward v. United States*, 738 A.2d 254, 261 (D.C. 1999)); *Plater v. United States*, 745 A.2d 953, 957 (D.C. 2000); *Simmons v. United States*, 554 A.2d at 1170; *Rease v. United States*, 403 A.2d 322, 328 (D.C. 1979); *see Stevenson v. United States*, 162 U.S. 313 (1896) (defendant entitled to instruction when jury rationally could find him not guilty of greater offense but guilty of lesser). This requirement generally is met when there is some evidence tending to create a dispute on the factual element differentiating the two crimes and "the lesser-included offense is fairly inferable from the evidence." *Plater*, 745 A.2d at 957. In *Plater*, the court reasoned that the defendant's actions in an unarmed voluntary manslaughter offense were part of "a continuing course of assaultive conduct, rather than a succession of detached incidents." *Id*. at 958 (citations omitted). The defendants were, therefore, not entitled to lesser-included offense instructions on assault and aggravated assault because "an assault that results in a death is a homicide." *Id*.

One offense is necessarily included in another if it is impossible to commit the greater without also having committed the lesser. *See Sansone v. United States*, 380 U.S. 343, 349-50 (1965). In other words, to be an LIO, all elements of the lesser must be included in the greater. *Schmuck v. United States*, 489 U.S. 705 (1989); *Gathy v. United States*, 754 A.2d 912, 919 (D.C. 2000). *See Lee v. United States*, 668 A.2d 822 (D.C. 1995) (voluntary manslaughter while armed is LIO of second degree murder while armed even though it carried greater penalty).

The instruction must be given for any LIO – even one to which the defendant would not be entitled to a jury trial – if there is an evidentiary basis, no matter how weak. *See*, *e.g.*, *Brockington v. United States*, 699 A.2d 1117 (D.C. 1997) (reversible error in distribution case to refuse to instruct on possession); *Simmons*, 554 A.2d at 1170 (reversible error in robbery case to refuse to instruct on taking property without right); *Wright v. United States*, 505 A.2d 470, 472 (D.C. 1986), *modified*, 510 A.2d 223 (D.C. 1986) (reversible error in distribution case to refuse to instruct on possession); *Petway v. United States*, 420 A.2d 1211 (D.C. 1980) (reversible error in case of assault on police officer to refuse to instruct on simple assault, where defendant testified he did not know complainant was police officer); *Day v. United States*, 390 A.2d 957, 962 (D.C. 1978); *see also Bragdon v. United States*, 668 A.2d 403 (D.C. 1995) (assault with intent to rape is LIO of armed rape where there was evidence of sexual assault without penetration); *Anderson v. United States*, 490 A.2d 1127 (D.C. 1985) (instruction appropriate where existence of LIO could be inferred by crediting parts of various witnesses' testimony); *Glymph v. United States*, 490 A.2d 1157 (D.C. 1985). *But see Owens v. United States*, 982 A.2d 310 (D.C. 2009) (though improper to instruct on voluntary manslaughter where no evidence of mitigating circumstances was before the jury, no plain error because aggravated assault instruction provided requisite intermediate option between conviction for second-degree murder and acquittal); *Bright v. United States*, 698 A.2d 450 (D.C. 1977) (no error in refusing to instruct on second-degree murder when defense theory was misidentification); *Leak v. United States*, 757 A.2d 739 (D.C. 2000) (trial court properly denied defendant's LIO request which required a bizarre reconstruction of the facts in order to qualify under the jurisdictional definition of theft); *Minor v. United States*, 623 A.2d 1182, 1185 (D.C. 1993) (no error in distribution case to refuse

to instruct on possession when such instruction would require jury to engage in "bizarre reconstruction of the facts").[11]

In close cases, out of deference to the jury's role as fact-finder, the court generally should instruct on LIOs if requested. *Rodriguez v. United States*, 915 A.2d 380 (D.C. 2007); *Banks v. United States*, 902 A.2d 817 (D.C. 2006); *Wright*, 505 A.2d at 472 (instruction should be "freely given" upon request); *United States v. Comer*, 421 F.2d 1149, 1154 (D.C. Cir. 1970). The trial court may also, *sua sponte*, initiate consideration of a lesser-included offense. *Hawthorne v. United States*, 829 A.2d 948 (D.C. 2003); *Mungo v. United States*, 772 A.2d 240 (D.C. 2001). But when there is no evidence tending to create a factual dispute, *see*, *e.g.*, *Bell*, 950 A.2d 56; *Dublin v. United States*, 388 A.2d 461 (D.C. 1978); *Robinson v. United States*, 388 A.2d 1210, 1213 (D.C. 1978), or the evidence is wholly incredible, such an instruction is not required. *See Minor v. United States*, 623 A.2d 1182 (D.C. 1993) (evidence that defendant was agent of buyer rather than seller was not defense to charge of distribution and did not entitle defendant to instruction on LIO of possession); *Brown v. United States*, 619 A.2d 1180 (D.C. 1992) (defendant not entitled to involuntary manslaughter instruction where no evidence defendant unaware of risk of harm in providing Uzi to co-defendant); *Walker v. United States*, 617 A.2d 525 (D.C. 1992) (defendant not entitled to assault with intent to kidnap as LIO of kidnapping unless all elements of lesser offense are included within offense charged); *Price v. United States*, 602 A.2d 641 (D.C. 1992) (where no evidence of mitigation in second-degree murder case, instruction on manslaughter should be denied); *Anderson*, 490 A.2d 1127; *Wood v. United States*, 472 A.2d 408 (D.C. 1984). Nor is an instruction on an LIO required when it is unclear that the lesser offense exists in the jurisdiction. *Everetts v. United States*, 627 A.2d 981 (D.C. 1993) (second-degree felony murder).

The instruction should also not be given if the factual issues to be resolved are the same as to both the lesser and greater offenses. *Berra v. United States*, 351 U.S. 131 (1956) (court properly refused to instruct on offense that had identical elements to charged offense but carried less severe maximum sentence); *Johnson v. United States*, 756 A.2d 458 (D.C. 2000) (reasoning that the purpose of a lesser-included offense instruction is to provide the jury with the means to convict of the offense properly proven by the evidence, not to give the jury a choice between two offenses for both of which there is sufficient evidence). *See Rease*, 403 A.2d 322 (court properly denied requested instruction for disorderly conduct (attempted pickpocketing) as LIO of attempted robbery because proof of acts necessary to establish lesser also established greater offense); *Rouse v. United States*, 402 A.2d 1218 (D.C. 1979) (not entitled to larceny instruction in armed robbery prosecution where defense was alibi); *Hawkins v. United States*, 399 A.2d 1306 (D.C. 1979) (larceny instruction properly denied where defense to armed robbery was duress).

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[11] Second-degree murder is an LIO of felony murder. *Towles v. United States*, 521 A.2d 651, 656-58 (D.C. 1987) (en banc). The court in *West v. United States*, 499 A.2d 860, 864 (D.C. 1985) expressly failed to reach the issue of whether felony murder includes voluntary manslaughter because there was insufficient evidentiary basis in that case. Both voluntary and involuntary manslaughter are LIOs of second-degree murder; involuntary manslaughter is not an LIO of voluntary manslaughter. *Comber v. United States*, 584 A.2d 26, 53 n.46 (D.C. 1990) (en banc). The jury should be instructed on both forms of manslaughter for which there is a sufficient evidentiary basis. *United States v. Bradford*, 344 A.2d 208, 218 (D.C. 1975); *see also Reed v. United States*, 584 A.2d 585, 590 (D.C. 1990). Note that the defendant is entitled to an instruction on provocation as a defense to second degree murder even where there is no lesser included offense instruction given. *See Lee v. United States*, 959 A.2d 1141, 1145 (D.C. 2008).

Whether to seek instruction on a lesser offense, or acquiesce to a government LIO request, is a tactical question requiring careful consultation with the client. Giving the jury an opportunity to compromise may be in the client's interest, especially if the lesser offense carries a much lighter sentence. On the other hand, the client may wish to "go for broke" by eliminating the possibility of compromise. The decision should be based on the strength of the government's evidence and the likelihood that the jury, without an LIO alternative, will return a verdict of acquittal.

Lesser Included Offense:

- ✓ Consult with your client on whether to seek instruction on a lesser offense, or acquiesce to a government LIO request.
- ✓ Base decision on the strength of the government's evidence and likelihood that the jury, without an LIO alternative, will return a verdict of acquittal
  - Giving the jury an opportunity to compromise may be in the client's interest, especially if LIO carries a much lighter sentence; or the client may wish to eliminate the possibility of compromise

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***Shuler v. United States,* 98 A.3d 200 (D.C. 2014).** Trial court did not commit reversible error when, in response to jury question, it instructed on lesser-included offense not requested by either party prior to closing arguments where instruction was given in response to question asked early on during deliberation process and included a reminder to jury that it must first consider guilt of first-degree premeditated murder while armed, defendant's theory did not depend on difference between elements of first-degree and second-degree murder and in fact "just as effectively" addressed both charges, and evidence supported instruction on second-degree murder despite court acting *sua sponte* over defendant's objection.

***Rose v. United States*, 49 A.3d 1252 (D.C. 2012).** Without deciding whether possession is lesser-included offense of distribution, court holds that no plain error committed by trial judge in instructing jury that it could find defendant guilty of possession of PCP if it first found him not guilty of distribution of PCP.

***Davidson v. United States*, 48 A.3d 194 (D.C. 2012).** See, supra, Chapter 9.I.F.

***Jennings v. United States*, 993 A.2d 1077 (D.C. 2010).** No error to instruct on lesser-included offense of second-degree murder where theory of charge was based on severe risk presented by defendant's conduct in firing numerous shots into street in which group of individuals had congregated and where jury instructed not to consider lesserincluded unless it had first ruled out first-degree murder charge.

1. "Acquittal First" Versus "Reasonable Efforts"

One very important issue is whether the jury can begin deliberating on the LIO without first unanimously voting to acquit on the greater offense. The jury may be told either that it must first

acquit on the greater before considering the lesser – the "acquittal first" instruction – or that it can consider the lesser after making "reasonable efforts" to reach a verdict on the greater. The defendant is entitled to choose which of these instructions is given in the initial charge to the jury. If the jury deadlocks and was initially given the "acquittal first" instruction, the defendant is entitled on request to have the jury given the "reasonable efforts" instruction at that point. *See Taylor v. United States*, 866 A.2d 817 (D.C. 2005) ("reasonable efforts" reinstruction proper after three notes from jury informing court of its inability to reach unanimity); *Jones v. United States*, 620 A.2d 249, 251-52 (D.C. 1993); *Cosby v. United States*, 614 A.2d 1291, 1294 n.4 (D.C. 1992); *Parker v. United States*, 601 A.2d 45 (D.C. 1991); *Wright v. United States*, 588 A.2d 260, 262 (D.C. 1991); *Jones v. United States*, 544 A.2d 1250 (D.C. 1988); *Criminal Jury Instruction* No. 2.401, and comment thereto. *But see Jackson v. United States*, 683 A.2d 1379, 1382 (D.C. 1996) (trial court required to accept verdict on lesser charge and discharge jury only where jury has truly exhausted all reasonable efforts; determination is not for jury alone to make). The decision whether to request the "acquittal first" or "reasonable efforts" instruction is also a tactical one and depends on very much the same analysis determining whether LIOs are requested. This is true especially in light of the Court of Appeals' ruling in *United States v. (Darrian) Allen*, 755 A.2d 402 (D.C. 2000). In *Allen*, the court found that the Constitution's double jeopardy clause does not bar retrial on the greater offense where the jury hung on the greater offense after being given a reasonable efforts instruction, but returned a guilty verdict on the lesser-included offense. *See also Holt v. United States*, 805 A.2d 949, 955 (D.C. 2002). Counsel should be careful when, after requesting an acquittal first instruction, the jury comes back with a verdict on a lesser included offense. *See Wilson v. United States,* 922 A.2d 1192 (D.C. 2007). In *Wilson*, defense counsel requested the acquittal first instruction, but when the jury came back with a verdict on the lesser included offense, counsel did not establish that the jury had acquitted on the greater count before taking the verdict on the lesser included offense, thereby essentially shifting to a "reasonable efforts" regime and allowing the greater to stand for possible retrial. *Wilson.* 922 A.2d at 1196.

III. UNANIMITY OF VERDICT

A criminal defendant is entitled to a unanimous jury verdict.[12] All jurors must agree on the defendant's act or acts – that is, on "'what a defendant did' as a predicate to determining whether the defendant is guilty of the crime charged." *Barkley v. United States*, 455 A.2d 412, 415 (D.C. 1983) (citation omitted). If there is evidence that factually or legally separate incidents are encompassed in a single count, the instructions should require the jury to reach unanimity on a specific incident before convicting.[13] Incidents are legally separate if they are met by different defenses, "or when the court's instructions . . . tend to shift the legal theory from a single incident to two separate incidents." *Simms v. United States*, 634 A.2d 442, 445 (D.C. 1993) (quoting *Gray v. United States*, 544 A.2d 1255, 1257 (D.C. 1988)). Incidents are factually separate if they occur at different times, or when the later act is motivated by a "fresh impulse."

[12] The Sixth Amendment requires a unanimous jury verdict in criminal trials. *See also* Super. Ct. Crim. R. 31(a). However, Super. Ct. Crim. R. 23(b) provides that, at any time before the verdict, the parties may stipulate in writing, with the approval of the court, that a valid verdict may be returned by a jury of less than twelve should the court find it necessary to excuse a juror for just cause. Rule 23(b) also allows the court in its discretion and "due to extraordinary circumstances" to have a verdict returned with only eleven jurors even if the parties do not agree.

[13] *See* Vol. I, Chapter 8, Section II.D. for a discussion of duplicitous and multiplicitous charging.

Id.; *see Byers v. United States*, 649 A.2d 279, 290 (D.C. 1994) (no separate and distinct offenses and no special unanimity instruction required where a single count indictment charged murder by shooting or beating during a single episode of conduct and defendant found guilty of first-degree murder while armed); *see also Thomas v. United States*, 748 A.2d 931, 938 (D.C. 2000) (defendant not entitled to unanimity instruction where only one incident involved and "jury is not required to agree on a theory of liability").[14] *See also Williams v. United States*, 981 A.2d 1224 (D.C. 2009) (the court holds that where a single count in an indictment is based on separate incidents on which the conviction could be based, the jury must be unanimous on which law violation the defendant committed).

Troublesome issues may arise in a myriad of situations. For instance, the defendant in *Davis v. United States*, 590 A.2d 1036 (D.C. 1991), was charged with possession of cocaine, but the evidence showed that there were two "rocks" that he might have possessed – one in his pocket and the other near his feet. At issue was the sufficiency of proof that each rock contained a "usable amount" of narcotic. The Court of Appeals affirmed over a dissent by Chief Judge Rogers, finding that Davis' possession of both rocks "constituted a single legally cognizable act of possession," and the defense did not offer different defenses to the possession of the separate rocks. *Davis* suggests that even a case with simple facts can present unanimity problems to which counsel must be alert. *See*, *e.g.*, *Simms*, 634 A.2d 442; *Brown v. United States*, 542 A.2d 1231 (D.C. 1988); *Shivers v. United States*, 533 A.2d 258 (D.C. 1987); *Scarborough v. United States*, 522 A.2d 869 (D.C. 1987) (en banc); *Henry v. United States*, 754 A.2d 926 (D.C. 2000).

The potential for non-unanimity is most pervasive when a single count charges an offense, but there is evidence of two different incidents that might constitute that offense. *See*, *e.g.*, *Davis*, 590 A.2d 1036. In *Scarborough*, the en banc court held that the unanimity question with respect to a single count turns not only on whether separate criminal acts occurred at separate times, but, more fundamentally, on whether each act alleged under a single count was a separately cognizable incident – by reference to separate allegations or separate defenses – whenever it occurred. (The portion of the opinion to the contrary in *Barkley*, 455 A.2d at 415-16, was overruled.) *See*, *e.g.*, *Smith v. United States*, 549 A.2d 1119 (D.C. 1988) (failure to instruct that certain evidence applied to only two of four charges unconstitutionally infringed on right to unanimity); *Davis v. United States*, 448 A.2d 242 (D.C. 1982) (given evidence that defendant sold one packet of drugs and hid another in police car, failure to instruct that jury must agree that defendant possessed a particular packet was plain error); *Hack v. United States*, 445 A.2d 634, 641 (D.C. 1982) (two bags of marijuana in different locations, but one was mixed with PCP and one was not; failure to instruct on need for unanimity not plain error because of jurors' resolution of PCP possession charge); *Hawkins v. United States*, 434 A.2d 446 (D.C. 1981) (plain error where evidence of two separate assaults on complainant occurring moments apart was elicited with only one relevant count charged, and ambiguous instruction did not tell jurors they must all agree on a particular incident); *Johnson*, 398 A.2d at 368-70 (error in failing to tell jury it had to

[14] The concern with non-unanimity also arises if an indictment includes a "duplicitous" count, charging more than one criminal offense. In part because of this concern, duplicitous indictments are improper. *See, e.g., Derrington v. United States*, 488 A.2d 1314 (D.C. 1985); *Johnson v. United States*, 398 A.2d 354, 369 (D.C. 1979). When faced with a duplicitous indictment, counsel should move for dismissal or a requirement that the government elect between the offenses. *See, e.g., United States v. Starks*, 515 F.2d 112 (3d Cir. 1975), *rev'd in part*, 431 U.S. 651 (1977).

agree unanimously on which of two incidents constituted assault with intent to kill; reversing on other grounds). *But see Green v. United States*, 544 A.2d 714 (D.C. 1988) (no plain error in general unanimity instruction when defendant had appeared on complainant's balcony twice, but both sides focused entirely on later incident); *Derrington*, 488 A.2d 1314 (no error in general unanimity instruction where robberies and murder formed single incident and defense did not object to instruction or request more particularized unanimity charge); *Murchison v. United States*, 486 A.2d 77 (D.C. 1984) (single incident of assault); *Gordon v. United States*, 466 A.2d 1226, 1233-34 (D.C. 1983) (single incident of armed robbery); *see also Owens v. United States*, 497 A.2d 1086 (D.C. 1985) (no plain error in general unanimity instruction where assault with intent to rob and with intent to kill were charged in separate counts); *Chapman v. United States*, 493 A.2d 1026 (D.C. 1985) (no plain error in giving unanimity instruction where three-count information included two gun charges and judge told jury twice to consider each gun separately);[15] *Burrell v. United States*, 455 A.2d 1373, 1380 (D.C. 1983) (no error in failing to instruct jurors that they must agree on which of different factual theories led to single stabbing).

When a single count is charged, and the facts show a continuing course of conduct, rather than a succession of clearly detached incidents, a special unanimity instruction is unnecessary unless some factor differentiates the facts on legal grounds. *Gray*, 544 A.2d 1255; *Washington v. United States*, 760 A.2d 187 (D.C. 2000) (unanimity instruction not required with respect to stalking offenses which embrace a continuing course of conduct); *see also Simms*, 634 A.2d 442; *Parks v. United States*, 627 A.2d 1 (D.C. 1993); *Bourn v. United States*, 567 A.2d 1312 (D.C. 1989). But where there is no single, consistent scenario from which the jury may find guilt, a special unanimity instruction is required. *Horton v. United States*, 541 A.2d 604 (D.C. 1988).

The potential for non-unanimity due to insufficient or improper instructions may also arise in other situations, such as where multiple identical offenses involving the same complainant and occurring at approximately the same time are charged in a single indictment. Counsel must be alert to potential non-unanimity problems and be prepared to propose appropriate remedial instructions. Despite the constitutional dimensions of the claim, if counsel fails to object to an insufficient or improper charge, the stringent "plain error" standard will apply on appeal. *See Owens*, 497 A.2d at 1092-93; *Derrington*, 488 A.2d at 1335; *Murchison*, 486 A.2d at 77; *Gordon*, 466 A.2d at 1235; *Burrell*, 455 A.2d at 1379 n.10; *Hack*, 445 A.2d at 641; *Hawkins*, 399 A.2d 1306.

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***Bryant v. United States*, 93 A.3d 210 (D.C. 2014).** In case where evidence at trial revealed two different incidents separated by time, each of which could have been factual predicate for attempted burglary and ADW charges, trial court erred in failing to give special unanimity instruction that called jury's attention to requirement that they must also be in unanimous agreement with respect to underlying acts upon which their verdict was based, though error not plain where jury had ample evidence to convict on actions during both first and second incidents.

[15] *But see id*. (Mack, J., dissenting) (general instruction insufficient to insure against a non-unanimous verdict).

***Williams v. United States*, 51 A.3d 1273 (D.C. 2012).** No plain error in failing to provide a unanimity instruction for contempt and obstruction of justice convictions where defendant was found guilty of theft and destruction of property in a location for which he stipulated he had a stay away order, and where it was irrelevant as to whether jurors had focused on telephone call or letter to establish obstruction because defendant conceded that he had asked witness "not to come to court" and could provide no legally viable innocent explanation for either telephone call or letter to witness.

***Wynn v. United States*, 48 A.3d 181 (D.C. 2012).** Failure to give a "special" unanimity instruction, cautioning jurors that they must unanimously agree which, if any, of three different firearms the defendant possessed at different times and in different locations, was error but not reversible because defendant failed to preserve claim at trial and trial judge issued a "general" unanimity instruction.

IV. THE DELIBERATING JURY

Some of the most difficult and important tactical decisions that counsel must make involve instructions when the jury appears to be confused or deadlocked. The choice will depend in large part on whether, based upon the evidence and the communications received from the jury, the jury appears to be leaning in favor of conviction or acquittal.

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***Spencer v. United States*, 991 A.2d 1185 (D.C. 2010).** Error to withhold grand jury testimony from jury that was used to impeach important government witness, but harmless where multiple inconsistencies between witness's testimony at trial and before grand jury were made sufficiently clear to jury during cross-examination and jury's decision as to credibility of witness was made clear in its acquittal of defendant of seconddegree murder.

A. Substitution of Jurors during Deliberations

Once the jury has begun to deliberate, the court may substitute an alternate for one of the deliberating jurors so long as the court instructs the jury, once the alternate becomes a sitting juror, that deliberations must start "anew." Super. Ct Crim. R. 24(c)(3); *see also McCallum v. United States,* 808 A.2d 1242 (D.C. 2002). *See Hinton v. United States*, 979 A.2d 663 (D.C. 2009) (en banc) (government has burden to prove that judge's error was not harmless where juror who asked "strange and bizarre" questions was replaced pursuant to Rule 24(c)), reversing conviction upheld by *Hinton v. United States*, 951 A.2d 773 (D.C. 2008). *But see United States v. Donato*, 99 F.3d 426 (D.C. Cir. 1996) (abuse of discretion to replace juror with alternate before deliberations began because judge did not explain why juror could be excused or develop record).

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***Harrison v. United States*, 76 A.3d 826 (D.C. 2013).** Trial court did not err in excusing an ailing juror and reseating a previously-excused juror in order to go forward with 12 jurors instead of 11

where ailing juror remained hospitalized after two-week recess and reseated juror had previously been excused to accommodate international travel plans and, although he had discussed case after excusal, maintained that he had not been influenced in any way and asserted that he would be fair and deliberate with jury.

***Hobbs v. United States*, 18 A.3d 796 (D.C. 2011).** Abuse of discretion and reversible error for trial court to replace juror with an alternate juror after the close of evidence without a finding that the juror was unable or disqualified to perform her juror duties, as required by Rule 24(c) of the Superior Court Rules of Criminal Procedure.

***Johnson v. United States*, 50 A.3d 1050 (D.C. 2012).** Trial court's replacement of regular juror with alternate without finding her "unable or disqualified from performing jury duties" was an abuse of discretion.

B. Excusing Jurors during Deliberations

Since March 25, 1995, the trial court has had discretion to permit an 11-member jury to proceed to a verdict, "even absent [the parties'] agreement, if, due to extraordinary circumstances, the court finds it necessary to excuse a juror for just cause after the jury has retired to consider its verdict." D.C. Code § 16-705(c); *see Brown v. United States*, 818 A.2d 179 (D.C. 2003) (no error for trial judge to dismiss a juror during deliberations and proceed with a jury of eleven when judge concluded, after careful inquiry, that juror failed to follow the law by refusing to deliberate with fellow jurors); *Salmon v. United States*, 719 A.2d 949 (D.C. 1997) (judge did not abuse discretion in excusing juror whose "de facto" parent died during deliberations); *Duvall v. United States*, 676 A.2d 448, 452 (D.C. 1996) (juror properly excused when wife died during deliberations; resulting 11-juror verdict was permissible); *see also* Super. Ct. Crim. R. 23(b). A jury of less than twelve is also permissible if the trial court approves the parties' written stipulation to that effect. *Id*.; *Johnson v. United States*, 619 A.2d 1183 (D.C. 1993) (no due process violation where government did not agree to excuse juror whose father died where juror in question was inclined to acquit).

The court cannot discharge a deliberating juror "when the record evidence discloses a possibility that the juror believes that the government has failed to present sufficient evidence to support a conviction." *United States v. Brown*, 823 F.2d 591, 597 (D.C. Cir. 1987). The nine defendants in *Brown* were tried on a sixty-nine count RICO indictment. The evidentiary part of the trial took three months, and the jury deliberated for eight weeks. Five weeks after deliberations began, one juror asked to be excused, explaining that he disagreed with the way the RICO Act "is written and the way the evidence has been presented." *Id*. at 594. The trial court discharged that juror and permitted deliberations to continue with the remaining eleven jurors. On appeal, the court ruled that the colloquy between the juror and the court, while unclear, indicated a possibility that the juror asked to be discharged because he believed that the government's evidence was insufficient to sustain a conviction; the court accordingly determined that the juror's discharge violated the defendants' constitutional right to a unanimous verdict.

C. Providing Exhibits and the Charging Document to the Jury

Exhibits that have been admitted into evidence may be given to the jury when it begins its deliberations, *see Robinson v. United States*, 210 F.2d 29 (D.C. Cir. 1954), or submitted on an individual basis upon request from the jury. The defendant or counsel need not be present during transmission of exhibits, which is merely a ministerial function. *See Quarles v. United States*, 349 A.2d 690 (D.C. 1975). *But see United States v. Fulcher*, 626 F.2d 985 (D.C. Cir. 1980) (where jury requested specific documents, counsel entitled to be notified so as to verify that only the requested documents were provided).

"A jury view is proper when 'an object in question cannot be produced in court because it is immovable or inconvenient' and, therefore, it is necessary for the fact-finder 'to go to the object in its place and there observe it.'" *Barron v. United States*, 818 A.2d 987, 990 (D.C. 2003) (quoting *Dailey v. District of Columbia*, 554 A.2d 339, 340-41 (D.C. 1989) (quoting *Wigmore*). Jury views constitute evidence. *See Barron*, 818 A.2d at 991-92 (rejecting traditional argument that jury views are merely a tool to evaluate evidence, and do not constitute evidence themselves). As such, where a view is granted during deliberations, the court must reopen the case and permit counsel the opportunity to argue about the significance of the jury view. *Id.* at 992. *But see Washington v. United States,* 881 A.2d 575, 582 (D.C. 2005) (trial court's granting of jury's request to view the defendant's profile up close during deliberations in a case where defense was misidentification was not evidence since the jury had seen his profile throughout the trial).

It is error to permit into the jury room materials that were not admitted into evidence, even where the transmittal is inadvertent. *See Dallago v. United States*, 427 F.2d 546 (D.C. Cir. 1969). *But see Evans v. United States,* 883 A.2d 146, 152 (D.C. 2005) (not error to provide jury with magnifying glasses to study fingerprints, and, even if there was error, it was harmless given that the jury was still deadlocked after the glasses were provided).

The standard to be applied is whether the judgment of the jury was "substantially swayed" by the presence of the unauthorized evidence. *Barron*, 818 A.2d at 993-94 (not harmless error to allow deliberating jury to view car, from which alleged crime took place, that had not been introduced into evidence); *Vaughn v. United States*, 367 A.2d 1291 (D.C. 1977); *see also United States v. Treadwell*, 760 F.2d 327 (D.C. Cir. 1985) (inadvertent submission of document harmless error where document was merely cumulative of other testimony and jurors apparently did not consider it in their deliberations).

In contrast, in *Williams v. United States*, 665 A.2d 928 (D.C. 1995), the Court of Appeals held that the trial court's failure to submit all physical evidence admitted during trial will not result in reversible error without showing of prejudice. Similarly, in *Fields v. United States*, 698 A.2d 485, 489 (D.C. 1997), the court found no due process violation where properly admitted and submitted evidence was lost after deliberations began because the court determined that it was not *reasonably possible* that the jury would have reached a different verdict had the evidence not been lost. The court considered two slightly different analyses in determining whether a due process violation existed, referencing both the standard developed in *Arizona v. Youngblood*, 488 U.S. 51 (1988), which dealt with the pre-trial loss or destruction evidence, and *People v. Ford*,

736 P.2d 1249 (Colo. Ct. App. 1974), which provided a four-prong test to determine whether a due process violation exists when evidence is lost during trial. However, the court did not decide which analysis would control in this jurisdiction. It opined that, under either rationale, there was no due process violation in Field's case.

The court may provide the jury with a copy of the charges that have been submitted. *See Dallago*, 427 F.2d 546; *ABA Standards for Criminal Justice*, 15-4.1 (Trial by Jury) (1980). When this is done, counsel may want to ask that the court re-read Instruction 2.106 (indictment is not evidence). *See Scott v. United States*, 412 A.2d 364, 371 (D.C. 1980) (improper and misleading for court to instruct jury that indictment is not evidence "in and of itself").

The court may also provide the jury with a tape-recorded, transcribed, or typed copy of its instructions. *Smith v. United States*, 454 A.2d 822 (D.C. 1983); *Carrado v. United States*, 210 F.2d 712 (D.C. Cir. 1953); *Copeland v. United States*, 152 F.2d 769 (D.C. Cir. 1945). However, because "instructions which he reads and hands over to the jury may make a stronger impression than other instructions which are not reduced to writing," the judge should avoid highlighting one instruction over another via the manner in which the instruction is transmitted. *Id*. at 770.

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***Austin v. United States*, 64 A.3d 413 (D.C. 2013).** See, *supra*, Chapter 30.I.C.1.

***Jackson v. United States*, 97 A.3d 80 (D.C. 2014).** Not abuse of discretion for court to deny motion for mistrial and instead give limiting instruction where jury managed to activate cell phone with previously dead battery and peruse its contents where court proceeded "prudently and carefully" in confirming what had been accessed and to what extent it might be prejudicial and then giving instruction that specified that phone had been introduced for only two purposes: (1) its location where it had been found and (2) the telephone number associated with it.

D. Communications from the Deliberating Jury

The court must take care to preserve secrecy of deliberations when communicating with the jury. *See Brown v. United States*, 818 A.2d 179, 185 (D.C. 2003); *United States v. Shotikare*, 779 A.2d 335, 345 (D.C. 2001). *Criminal Jury Instruction* No. 2.509 directs the jury to communicate with the court only through the foreperson and only in writing. *See also* E. Devitt and C. Blackmar, *Federal Jury Practice and Instructions*, 5.21 (3d ed. 1977). Failure to follow these instructions may therefore warrant the trial court declining to respond directly to the substance of an apparent communication and instead re-instructing the jury on the proper procedures for communicating with the court. *See Lewis v. United States*, 466 A.2d 1234 (D.C. 1983).

However, it is not always improper for the court to respond to oral questions from individual jurors in open court. Nonetheless, "trial courts should be cognizant of the potential risks presented by individual colloquy and by responding to questions other than those formally propounded in writing through the foreperson, such as the risk that permitting and responding to individual jurors could lead to the disclosure of a numerical jury division and later allegations of a coerced verdict." *Barnes v. United States*, 822 A.2d 1090, 1092 n.5 (D.C. 2003); *see also United States v. United States Gypsum Co.*, 438 U.S. 422, 460 (1978) (disapproving of oral

communications between the court and jurors because "[u]nexpected questions or comments can generate unintended and misleading impressions of the judge's subjective personal views which have no place in his instruction to the jury").

Instruction 2.509 also directs the jury never to reveal to anyone outside the jury, including the court, the numerical split of the deliberating jury. The Court of Appeals has emphasized the importance of that instruction, and has recommended that it be given in every trial. *(Charles) Smith v. United States*, 542 A.2d 823, 824 (D.C. 1988).

The defendant and counsel have a right to be informed of all communications from the jury and to offer their reactions before the judge responds. *See*, *e.g.*, *Etheredge v. District of Columbia*, 635 A.2d 908 (D.C. 1993); *(Charles) Smith*, 542 A.2d 823; *(Michael) Smith v. United States*, 389 A.2d 1356 (D.C. 1978). The trial court's refusal to permit counsel to read notes from the jury may be reversible error. *Etheredge*, 635 A.2d 908; *see also Lewis v. United States*, 567 A.2d 1326 (D.C. 1989) (issue of court's *ex parte* communication with juror was not preserved for appeal where counsel expressly agreed to procedure; had issue been preserved, error would have been harmless where communication was brief and substance repeated verbatim in presence of both parties).

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***Grant v. United States*, 85 A.3d 90 (D.C. 2014).** Court's violation of Rule 36-I(a) by entering jury room with counsel for both parties, but without court reporter, reading juror's note about hostility in deliberations to jury as a whole, and dismissing jurors for evening held non-prejudicial where unrecorded specific error was "highly improbable" based on court's discussion with counsel before entering jury room and from court's summary the following morning regarding what had happened in the jury room.
Court erred in telling jury its "purpose" was to reach "fair and impartial, and a justified verdict" and in omitting language reminding jurors they should not surrender their honest convictions to secure agreement from a "civility" instruction given after jury had returned two notes reflecting its inability to make a decision and one note reflecting a difficult environment in the jury room.

***Euceda v. United States*, 66 A.3d 994 (D.C. 2013).** See, supra, Chapter 32.I.A.

1. The Defendant's Right to be Present

Super. Ct. Crim. R. 43(a) guarantees the defendant the right to be present "at every stage of the trial including the impaneling of the jury and the return of the verdict." Communications with the jury are a "stage of the trial." For example, in *Rogers v. United States*, 422 U.S. 35 (1975), the foreperson inquired whether the court would accept a verdict of "guilty as charged with extreme mercy of the Court." Without notifying the defense, the court instructed the marshal who had delivered the note that the court had responded affirmatively. The Supreme Court reversed the conviction:

> Cases interpreting the Rule make it clear, if our decisions prior to the promulgation of the Rule left any doubt, that the jury's message should have been

> answered in open court and that petitioner's counsel should have been given an opportunity to be heard before the trial judge responded.

Id. at 39. The federal and Superior Court rules are identical to the holding in *Rogers*. Similarly, in *Shields v. United States*, 273 U.S. 583 (1927), counsel had agreed that the jurors were to be held until they reached a verdict. After counsel departed, the jurors sent a note to the judge stating that they had agreed as to some defendants but could not agree as to Shields and two others. The judge replied by note that the "jury will have to find also whether Shields (and the two others) are guilty or not guilty." The Supreme Court reversed the ensuing convictions because counsel was not present. *See also Kleinbart v. United States*, 426 A.2d 343 (D.C. 1981); *Roberts v. United States*, 402 A.2d 441 (D.C. 1979); *Smith*, 389 A.2d at 1361; *Wade v. United States*, 441 F.2d 1046 (D.C. Cir. 1971) (counsel's presence not sufficient; right applies to defendant unless knowingly waived). *But see Johnson v. United States,* 804 A.2d 297 (D.C. 2002) (no error in denying appellant's motions for new trial when court clerk responded directly to a jury note without notifying the judge or counsel because the contents of the first unseen note and the rewritten second note, seen by the judge and counsel, were substantially similar, indicating a lack of prejudice emanating from the clerk's actions); *Hallmon v. United States*, 722 A.2d 26 (D.C. 1998) (improper for court clerk to answer jury note about instructions without court or counsel present; error harmless); *Heiligh v. United States*, 379 A.2d 689, 692-94 (D.C. 1977) (no error to discuss proposed instructions in defendant's absence after defendant failed to appear and counsel waived his presence). *See also Allen v. United States*, 649 A.2d 548, 556 (D.C. 1994) (harmless error found where trial judge read jury note and read court's written response to the note in open court and sent note to jury without defense counsel present).

A defendant's right to be present and to be heard are not absolute. For example, a defendant may not have a right to presence either under Rule 43 or under the Due Process Clause for the mere transmittal of evidence or a readback of testimony to the jury. *See, e.g., McConnaughey v. United States,* 804 A.2d 334, 341 (D.C. 2002) (mere transmittal of evidence to jury, without more, not a communication; thus no right to be present). A violation of the defendant's right to be present at all stages of the trial may also be found to be harmless error. *See Rogers*, 422 U.S. at 40; *Boone v. United States*, 483 A.2d 1135, 1140 (D.C. 1984) (en banc); *Calaway v. United States*, 408 A.2d 1220 (D.C. 1979); *Smith*, 389 A.2d at 1364. Thus, counsel must immediately object to any communications in counsel's or the defendant's absence and move for a mistrial, explaining how the communication prejudiced the defense.

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***Van Dyke v. United States,* 27 A.3d 1114 (D.C. 2011).** Combination of trial court's ex parte communication with jury, its decision to address "as it became relevant" individual juror's note that she was unable to serve beyond the end of the day, and its giving of reasonable efforts instruction did not create substantial risk of coerced verdict where reaching unanimous agreement on voluntary manslaughter would not have required extensive deliberation after several days of deliberation on second-degree murder, and where judge had informed jurors that he could not "guarantee" that they would be through deliberating on particular day, told them not to rush deliberations because of a change to schedule, and assured individual juror that she would not miss her "important event out-of-town."

2. Reinstructions

The court has broad discretion as to whether and how to respond to requests for reinstruction. *Davis v. United States*, 510 A.2d 1051 (D.C. 1986); *see United States v. Jackson*, 482 F.2d 1167 (10th Cir. 1973); *ABA Standards for Criminal Justice*, 15-4.3 (Trial by Jury) (1980); Devitt and Blackmar, *Federal Jury Practice and Instructions*, 5.21. Of course, counsel must be given notice of the jury's request and the proposed response, as well as an opportunity to object. *(Charles) Smith*, 542 A.2d 823. The court also has discretion *sua sponte* to recall the jury to give supplemental instructions. *See Bouknight v. United States,* 641 A.2d 857, 860 (D.C. 1994); *Allis v. United States*, 155 U.S. 117 (1894); *Coupe v. United States*, 113 F.2d 145 (D.C. Cir. 1940).

The court's discretion is not unlimited. If the jury has difficulty understanding the initial charge on a material issue, it is error to refuse to give a clarifying reinstruction. *Zeledon v. United States*, 770 A.2d 972 (D.C. 2001) (reversible error where the court refused to give the jury a legal definition of the key element of a crime charged); *Whitaker v. United States*, 617 A.2d 499 (D.C. 1992) (refusal to respond where it appeared that jury was confused is reversible even though request for reinstruction is inartfully worded); *Wright v. United States*, 250 F.2d 4, 10 (D.C. Cir. 1957) (reversible error to refuse to respond to inquiry as to whether mental illness other than schizophrenia was appropriate for jury to consider); *cf. Graham v. United States*, 703 A.2d 825 (D.C. 1997) (refusal to instruct proper where juror had a question about an instruction but did not request reinstruction); *Ransom v. United States*, 630 A.2d 170 (D.C. 1993) (refusal to reinstruct proper despite inconsistent verdicts, because there was no evidence of confusion). The jury in *Roberts v. United States*, 402 A.2d 441 (D.C. 1979) sent a note to the court requesting instruction on self-defense. The court, without consulting with counsel, responded with a handwritten note suggesting that the jurors replay the taped instruction "as to the offenses." The Court of Appeals found that this instruction was so vague as to engender confusion, and reversed the conviction. *See Bollenbach v. United States*, 326 U.S. 607, 612-13 (1946); *Bedney v. United States*, 471 A.2d 1022 (D.C. 1984); *Price v. Glosson Motor Lines*, 509 F.2d 1033 (4th Cir. 1975). The court should be careful when instructing the jury that it balance its instructions so as not to leave a misimpression with them. *See Headspeth v. United States*, 910 A.2d 311 (D.C. 2006).

Reinstruction may be required to prevent the jury from rendering a verdict that is inconsistent with the court's instructions and the law. *See Alcindore v. United States*, 818 A.2d 152, 159 n.11 (D.C. 2003) (error for court to accept a verdict where jury indicated its confusion in a note and also stated that it had reached a verdict; court should have reinstructed jury and sent it back to deliberate). The fact that initial instruction was clear does not obviate duty to re-instruct where jury demonstrates confusion. *Alcindore*, 818 A.2d at 157-58 (D.C. 2003). The reinstruction must respond to the jury's request, without unduly emphasizing an aspect of the case in favor of one party. *See Yelverton v. United States,* 904 A.2d 383, 389 (D.C. 2006) (error for trial judge to answer jury's question about whether they could consider defense evidence with a pro-government reinstruction); *see also Davis*, 510 A.2d at 1053. The court's response to a jury note accordingly must be neutral and balanced. *See Bates v. United States*, 834 A.2d 85, 92 (D.C. 2003) (in responding to jury note, court should "strive to achieve the ideal of a neutral, balanced instruction") (internal quotations and citation omitted). If the jury requests reinstruction on the elements, one way to counteract the prominence given to the government's side of the case is to

reinstruct on the defenses as well. One federal appellate court has consistently held that the trial court, in some cases, must go beyond the jury's request so as not to give undue prominence to the government's version of events. *See Perez v. United States*, 297 F.2d 12 (5th Cir. 1961) (where jury requested reinstruction on inference from unexplained possession of narcotics, it was error to deny defense request to instruct that defendants need not explain possession, but rather that it might be explained by other evidence or inferences therefrom); *United States v. Carter*, 491 F.2d 625 (5th Cir. 1974) (court should repeat instructions favorable to defense where requested instruction alone might leave erroneous impression). *But see Robinson v. United States*, 642 A.2d 1306, 1311 (D.C. 1994) (no abuse of discretion where trial court, in response to a note from jurors, reinstructed jury on elements of simple assault but refused to reinstruct on self-defense). In any case, it is certainly not error to repeat more than is requested. This principle may benefit the government as well as the defense. *See Williams v. United States*, 403 F.2d 176 (D.C. Cir. 1968). "[T]he better practice is for the trial judge to remind the jury during reinstruction that what they are hearing is but part of the total charge." *Davis*, 510 A.2d at 1053. The trial judge also has the duty to re-instruct the jury *sua sponte*, even during deliberations, where there was an error made during final instructions, as long as further argument by both parties is allowed. *See Blocker v. United States,* 940 A.2d 1042, 1046 (D.C. 2008).

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***Blaine v. United States,* 18 A.3d 766 (D.C. 2011).** Two instructions on reasonable doubt conveyed different meanings when the trial judge, for purposes of reinstruction, not only reworked critical language but also told the jurors to see the instructions in the new light of "some change."

***Brocksmith v. United States*, 99 A.3d 690 (D.C. 2014).** Trial court's reinstruction in response to juror's note asking whether, in determining witness credibility, he or she could take into account belief that complainant had "overwhelming incentive not to report" crime for fear of discrimination and exposing herself as transgender did not have effect of encouraging jury to engage in improper speculation because there was evidence to support inference that juror's note sought to make as evidenced by complainant's initial uncertainty as to whether she would report crime because of her transgender status and by her demeanor on stand and testimony about being "afraid," coupled with jury's "common-sense knowledge" about discrimination that transgendered people face in our society.

***Ewing v. United States*, 36 A.3d 839 (D.C. 2012).** In case where jury requested clarification on "premeditation," court did not err in declining to tell jury explicitly that "there must be evidence" of premeditation and deliberation where court's prior instructions had made clear to jury the necessity for proof beyond a reasonable doubt for each element of the offense.

Gray v. United States, 79 A.3d 326 (D.C. 2013). See, supra, Chapter 36.III.A.1.

Shuler v. United States, 98 A.3d 200 (D.C. 2014). Trial court did not abuse its discretion in reinstructing on premeditation and deliberation, transferred intent, and obligation of jury to acquit defendant of first-degree murder before considering second-degree murder—and declining to "balance" the reinstruction with reinstruction on reasonable doubt and credibility of

witnesses, over defense objection—where court's reinstructions were limited to addressing jury's areas of confusion

***Jordan v. United States*, 18 A.3d 703 (D.C. 2011).** Trial court did not err in declining to answer deliberating jury's question whether word "cause" in first-degree murder instruction meant "physically striking" victim where answering "yes" would have approximated a directed verdict in case where strike to victim's head with hard, plastic pipe during robbery caused blood clot that led to victim's death.

3. Supplemental Instructions

The trial court may, in its discretion, give supplemental instructions on new areas of law after the jury has begun deliberations if the facts presented at trial support the additional instruction and the instruction will not create jury confusion. *See Thomas v. United States*, 806 A.2d 626 (D.C. 2002) (reversible error where, in response to jury note, court instructed jury that it could find defendant guilty on a theory unsupported by legally-sufficient evidence); *see also Bouknight v. United States*, 641 A.2d 857, 860 (D.C. 1994). In *Bouknight*, the government charged the defendant as a principal with burglary I while armed. After deliberations began, the jury sent a note asking whether the defendant had to be armed when he entered the apartment in order to be convicted of the "while armed" element of the offense. When the judge responded in the affirmative, the government requested a supplemental aiding and abetting instruction, which the trial judge gave over defense objection. The court found that the supplemental instruction was within the discretion of the trial judge and the defendant, who put on an alibi defense, was not prejudiced by the supplemental instruction.

The trial judge also has a responsibility to define elements of the original instructions if they jury indicates that they need further clarification. *See Preacher v. United States*, 934 A.2d 363, 371 (D.C. 2007). In *Preacher*, the court found reversible error where the jury sent a note requesting the definition of an "assault" with respect to the decedent's behavior in a self-defense case. *Preacher,* 934 A.2d at 366-67. The court had not instructed the jury as to what characterized an assault, and did not do so after the note, despite a defense request to do so. *Id.* The court found that given the clear question and the centrality of the issue to the case, the trial judge committed error that required reversal. *Id.* at 371.

Finally, if the trial court gives a supplemental instruction, counsel may have the right, if asserted timely, to limited additional argument. *Id*. at 860-61. *See Loveless v. United States*, 260 F.2d 487 (D.C. Cir. 1958). However, if the judge allows supplemental argument, the scope of the argument is left to the discretion of the judge. *Bouknight*, 641 A.2d at 860-61. *But see Tyler v. United States*, 495 A.2d 1180 (D.C. 1985) (upholding decision to further instruct without granting further argument because appellant failed to demonstrate prejudice and trial court expressly noted that appellant's closing argument would not have been different).

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***Flores v. United States*, 37 A.3d 866 (D.C. 2011).** See, *supra,* Chapter 36.III.B.18.

***Jackson v. United States*, 97 A.3d 80 (D.C. 2014).** See, *supra*, Chapter 38.IV.C.

***Owens v. United States*, 90 A.3d 1118 (D.C. 2014).** Trial court's supplemental instruction to jury, referring to "what a reasonable person would have believed," on third element of receiving stolen property ("knowing or having reason to believe that the property was stolen"), in response to specific question was error as it improperly focused on what a reasonable person would have believed without emphasizing jury's duty to determine defendant's subjective knowledge, but error not plain.

***Robinson v. United States*, 100 A.3d 95 (D.C. 2014).** See, *supra*, Chapter 38.I.C.2.

***Shuler v. United States*, 98 A.3d 200 (D.C. 2014).** See, *supra*, Chapter 38.II.C.

4. Requests for Portions of Testimony

Requests by the jury to have portions of testimony read to them raise many of the same issues as requests for reinstruction, and the court's response is similarly discretionary. *See Salzman v. United States*, 405 F.2d 358 (D.C. Cir. 1968); *Peckham v. United States*, 210 F.2d 693 (D.C. Cir. 1953). In some circumstances, however, it may be error to refuse the request. *See*, *e.g.*, *United States v. Rabb*, 453 F.2d 1012, 1013-14 (3d Cir. 1971) (testimony short and crucial). The court has also found that it is not error to provide transcripts of the requested testimony. *See Gardner v. United States,* 898 A.2d 367 (D.C. 2006); *Fuller v. United States*, 873 A.2d 1108 (D.C. 2005). The court should instruct the jury that it should not give "undue emphasis" to the witness's testimony simply because the jury had the transcript. *Gardner,* 898 A.2d at 372 (citations omitted). On the other hand, testimony should not be repeated or provided if the effect is to emphasize unduly prejudicial evidence. *See Corley v. United States*, 365 F.2d 884, 887 (D.C. Cir. 1966) (Burger, J., dissenting); *Henry v. United States*, 204 F.2d 817 (6th Cir. 1953) (trial court had castigated witness).

E. Unauthorized Communications and Juror Misconduct

1. Unauthorized Communications

Any private communication, contact, or tampering – directly or indirectly – with a juror during a trial about a matter pending before the jury is presumptively prejudicial to the defendant. The court in *Tolbert v. United States*, 905 A.2d 186, 191 (D.C. 2006) adopted the standard in *United States v. Williams,* 822 F.2d 1174, 1190 (D.C. 1987), that, "where, following a hearing, the defendant has established a substantial likelihood of actual prejudice from the unauthorized conduct, … all reasonable doubts [about the juror's ability to render an impartial verdict must] be resolved in favor of the accused" (citations omitted). The government bears a heavy burden to establish that the contact was harmless. If the presumption of prejudice is not rebutted, the court must declare a mistrial. *See Waller v. United States*, 389 A.2d 801 (D.C. 1978). However, the court's determination will be reversed only for an abuse of discretion. *Al-Mahdi v. United States*, 867 A.2d 1011 (D.C. 2005); *Medrano-Quiroz v. United States*, 705 A.2d 642 (D.C. 1997); *Darab v. United States*, 623 A.2d 127 (D.C. 1993); *Waller*, 389 A.2d 801.

In examining the soundness of that decision, appellate courts focus on the trial court's inquiry into the question of prejudice. The nature and extent of the *voir dire* required depends upon the facts of the case and also upon whether the inquiry is held before or after the verdict is rendered. *See Bellamy v. United States,* 810 A.2d 401 (D.C. 2002) (no abuse of discretion in holding a limited post-verdict hearing to question juror about his silence during *voir dire* when asked about prior contacts with a specific area, given the great caution judges are to exercise in allowing jurors to impeach their own verdict); *see also (Woodrow) Wilson v. United States*, 663 A.2d 558 (D.C. 1995) (defendant not prejudiced by one juror's negative comments about defense counsel during deliberations); *Letsinger v. United States*, 402 A.2d 411 (D.C. 1979) (affirming where two jurors who heard decedent's brother warn them that he would "get them" and "kill them all," presumably unless they convicted, stated unequivocally that incident would have no impact on their ability to render impartial verdict). *See generally Medrano-Quiroz*, 705 A.2d 642 (improper comments by one juror about his impressions of case before deliberations began; improper communication with unrelated defense attorney concerning case); *Darab*, 623 A.2d 127 (improper behavior by courtroom clerk in front of jury); *Waller*, 389 A.2d 801 (unauthorized communication to juror; juror threatened not to find defendant guilty); *Branch v. United States*, 382 A.2d 1033 (D.C. 1978) (pre-verdict *voir dire*); *Wilson v. United States*, 380 A.2d 1001 (D.C. 1977) (post-verdict *voir dire*).

The jury in *Calaway v. United States*, 408 A.2d 1220 (D.C. 1979), acquitted on three homicide charges and continued deliberating on the remaining charges. Those verdicts, along with some information concerning the defendant's prior record, were repeated in the newspapers the next morning, and two of the jurors acknowledged having been exposed to some of the publicity. They were not interrogated individually, but in the presence of the other jurors. On appeal, the court found no error in the failure to conduct an individual *voir dire*. However, the court relied heavily upon defense counsel's failure to present specific information concerning the publicity, to allege and specify prejudice, and to request either individual *voir dire* or a mistrial. *But see Coppedge v. United States*, 272 F.2d 504, 508 (D.C. Cir. 1959) (recommending "a careful, individual examination . . . out of the presence of the remaining jurors" as to the impact of publicity).

2. Juror Misconduct

Juror misconduct may also form the basis for a mistrial or a new trial, if it results in substantial prejudice to the defendant. The dereliction must be such as to deprive the defendant of the continued, objective, and disinterested judgment of the juror, thereby foreclosing a fair trial. *See Lee v. United States*, 454 A.2d 770 (D.C. 1982) (no prejudice shown despite foreperson's apparent insobriety); *Nelson v. United States*, 378 A.2d 657 (D.C. 1977).

The defendant in *Wilson*, 380 A.2d 1001, was arrested on unrelated charges during his trial. Counsel requested a *voir dire* to determine whether any juror had witnessed the arrest and, if so, what affect it had on the juror. The trial court denied the request because counsel had no personal knowledge that any juror had seen or heard of the arrest. After conviction, counsel filed a motion for a new trial, with an attached affidavit that several jurors had in fact learned of the arrest. The Court of Appeals, concluding that such knowledge "may . . . be prejudicial to [defendant's] right of a fair trial," remanded for a hearing, including a *voir dire* of the jurors who

had learned of the arrest. *Id*. at 1004. *Compare Leeper v. United States*, 579 A.2d 695 (D.C. 1990) (approving *voir dire* of two alternates who discussed case, one of whom eventually sat on jury); *Lewis v. United States*, 567 A.2d 1326 (D.C. 1989) (juror, during recess in trial for carrying a knife, produced pocket knife and remarked that she carried one; no abuse of discretion in failure to *voir dire* entire jury *sua sponte* after counsel asked that nothing be done to highlight incident); *Evans v. United States*, 392 A.2d 1015 (D.C. 1978) (upholding offer to *voir dire* entire panel after bomb scare required evacuation; refusal to examine each juror individually was within court's discretion); *Johnson v. United States*, 389 A.2d 1353 (D.C. 1978) (upholding refusal to conduct *voir dire* where arresting officers testified that jury could not have known of mid-trial arrest of defense witness).

The court has a duty to inquire into problems with deliberations that are revealed in jury notes. *See e.g., Brown v. United States*, 818 A.2d 179, 185-87 (D.C. 2003) (inquiry warranted where court learned that juror was refusing to deliberate and was using trial as a forum to protest the treatment of the District of Columbia at the hands of the federal government); *Shotikare v. United States*, 779 A.2d 335, 344-45 (D.C. 2001) (inquiry required where court learned that a juror had threatened to assault another juror, and had paralyzed deliberations because the other jurors were afraid of her). If such an inquiry reveals that a juror is refusing to follow the applicable law, the court has both the "authority and responsibility" to dismiss that juror. *Brown*, 818 A.2d at 185.

In investigating juror misconduct during deliberations, the court must make every effort not to disturb the secrecy of deliberations, which is the "corner-stone" of our jury system. *Brown*, 818 A.2d at 185; *see also Shotikare*, 779 A.2d at 344 (the court must respect the presumptive secrecy of jury deliberations when investigating alleged juror misconduct). Specifically, the "jurors' views of the case, the back and forth among them concerning the evidence or the application of the law to the facts, their numerical division on the merits – all such things are off limits." *Shotikare*, 779 A.2d at 345. Moreover, the court must ensure that its inquiry does not itself "foment discord among the jurors or subtly influence the work of the jury." *Id.* (internal citations and quotations omitted).

The "distinction between juror misconduct and a juror merely defending her position can be elusive"; accordingly, a court should *not* dismiss a juror if "the record evidence discloses any *reasonable possibility* that the impetus for a juror's dismissal stems from the juror's views on the merits of the case." *Brown*, 818 A.2d at 186 & n.3 (emphasis in original; internal citation and quotations omitted). Excusing a juror for the purpose of breaking a deadlock or because of her views on the merits violates both a defendant's right to a unanimous verdict and his right to have his guilt or innocence determined by the jury, not the court. *See Tolbert v. United States*, 905 A.2d 186 (D.C. 2006); *Shotikare,* 779 A.2d at 344 ("[i]f consensus is not achievable and the jury hangs, that is a price that must be paid in order to keep the judicial thumb off the scales of a judgment that is constitutionally entrusted to the jury to make"); *Williams v. United States*, 338 F.2d 530, 533 (D.C. Cir. 1964) ("a mistrial is as much a part of the jury system as a unanimous verdict").

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***Lester v. United States*, 25 A.3d 867 (D.C. 2011).** Trial court did not err in keeping juror on jury where it determined, on remand, that juror had not been sleeping during trial, but rather listened to testimony and closing arguments with her head bowed and eyes shut.

F. Deadlocked Juries

When, because of a jury note or the excessive length of deliberations, *Paschen v. United States*, 70 F.2d 491 (7th Cir. 1934) (40 hours), it appears that a jury may be deadlocked, the trial court has limited discretion to instruct the jury on the desirability of reaching a verdict. *Shotikare*, 779 A.2d at 343 ("When a jury reports that it is deadlocked, the trial judge must decide whether to instruct the jurors to make further efforts to reach a verdict (and if so, how to instruct them), or to declare a mistrial"). Caution must be exercised so that the instruction neither coerces the jury into arriving at a verdict nor otherwise interferes with its province. Jurors may not be told that they should "surrender their honestly held convictions, even if that prevent[s] agreement." *Jones v. United States,* 946 A.2d 970, 974 (D.C. 2008). "The possibility of a hung jury is as much a part of our jury unanimity scheme as are verdicts of guilty or not guilty." *United States v. Fioravanti*, 412 F.2d 407, 416 (3d Cir. 1969); *see also Williams v. United States*, 338 F.2d 530, 533 (D.C. Cir. 1964) ("a mistrial is as much a part of the jury system as a unanimous verdict").

In this jurisdiction, if the jury is deadlocked, the trial court may give the "*Winters* Instruction" approved by the court in *Winters v. United States*, 317 A.2d 530 (D.C. 1979) (en banc). The *Winters* anti-deadlock instruction is as follows:

> It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without sacrificing your individual judgment. Each of you must decide this case for yourself. As I have told you earlier, you should do so only after impartial consideration of the evidence with your fellow jurors.
>
> In the course of your deliberations, you should not hesitate to reexamine your own views and the reasons for your views and to change your opinion if you become convinced that it's wrong. But don't surrender your honest conviction as to the weight or the effect of the evidence only because of the opinion of your fellow jurors only for the purpose of returning a verdict.
> Now, remember that you are you [sic] not advocates for either side of this case, as I have already told you. You are judges, you are judges of the facts. And your sole interest in this case is to find the truth from the evidence in the case.

Winters warned, however, that use of this instruction

> should be confined to instances where deadlock is apparent . . . We are only setting the high-water mark for an anti-deadlock charge. Use of a less emphatic charge such as the one contained in the ABA Standards [i.e., Alternative A] may be deemed appropriate.

Id. at 533-34; *see also Thompson v. United States*, 354 A.2d 848, 851 n.8 (D.C. 1976) ("The *Winters* instruction . . . is not a course to be taken precipitously and automatically when a jury announces an inability to reach a verdict . . . [It] should be in the nature of an ultimate judicial attempt, not a preliminary attempt, to secure a verdict"). Thus, the *Winters* charge represents the *maximum* pressure that a court can exert on a deadlocked jury. The more balanced charge, set out in the concurring opinion, less coercively reminds the jurors not to surrender their conscientious convictions. *Winters*, 317 A.2d at 539 (Gallagher, J., concurring); *see also Davis v. United States*, 700 A.2d 229 (D.C. 1997) (court can fashion its own instruction so long as it does not exceed pressures of *Winters*).[16]

A *Winters* instruction given over defense objection under circumstances already creating a potential for coercion may be reversible error. For example, on the third day of deliberations in *Morton v. United States*, 415 A.2d 800 (D.C. 1980), a juror said that his brother had died the previous night and asked to be relieved to make funeral arrangements. Later that day the jury announced that it could not reach a verdict. The court did not excuse the juror but gave a *Winters* instruction the next day. The Court of Appeals held that, although the *Winters* instruction was otherwise appropriate, giving that instruction after the juror asked to be excused created a substantial risk of a coerced verdict and reversed the first-degree murder conviction. *Compare Nixon v. United States*, 730 A.2d 145 (D.C. 1999) (no coercion in giving *Winters* instruction after jury sent two deadlock notes) *and Chavarria v. United States*, 505 A.2d 59 (D.C. 1986) (giving *Winters* charge was not abuse of discretion, where jury's difficulty in reaching decision was not due to any extraneous factors), *with Smith v. United States*, 542 A.2d 823 (D.C. 1988) (*Winters* instruction after jury twice revealed its numerical division, nine-to-three and then eleven-to-one for conviction, was reversible error because of its potential for coercion).

It is error to give a second *Winters* instruction; once the instruction is given, the jury must be discharged if it again announces a deadlock. *But see Carey v. United States*, 647 A.2d 56, 60-61 (D.C. 1994) (jury not given two anti-deadlock instructions when trial judge first instructed the jury, after 5 hours of deliberation, to "deliberate further" and give case their "best efforts" and later gave a *Winters* instruction); *Trapps v. United States*, 887 A.2d 484 (D.C. 2005) (anti-deadlock instruction was not repeatedly given to a hung jury where first instruction in response to a deadlock jury note began with complimenting the jury so that it was not deemed to have a coercive effect); *Epperson v. United States*, 471 A.2d 1016 (D.C. 1984), *on reh'g*, 495 A.2d 1170 (D.C. 1985). *But see Davis*, 700 A.2d 229 (giving copy of *Winters* instruction after jury has already been Winterized does not constitute second instruction when juror requested copy and all jurors agreed to request). Implying that the jury "must" or "ought to be able to" reach a verdict is also reversible error. *See Jenkins v. United States*, 380 U.S. 445 (1965). "Statements of this sort reflect the judge's assessment that the factual issues bear relatively easy resolution, and pressure jurors, who in their own endeavors have not found it so, to come to some result at all costs." *United States v. Thomas*, 449 F.2d 1177, 1183 (D.C. Cir. 1971).

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[16] Alternative B of Instruction 2.91 may not be given in federal court because *United States v. Strothers*, 77 F.3d 1389 (D.C. Cir. 1996), holds that Alternative A of the *Winters* instruction is less coercive than Alternative B. The court found that Alternative B was more coercive because it did not include the admonition that jurors should not surrender their "honest convictions as to the weight or effect of the evidence solely because of the opinion of his fellow jurors."

Instructions emphasizing the desirability of reaching a verdict in order to avoid a retrial are not only improper but may also be factually inaccurate, because mistried cases often are not retried. *See id*. at 1184; *United States v. Johnson*, 432 F.2d 626, 632 n.7 (D.C. Cir. 1970). Similarly, jurors must not be asked to sacrifice their beliefs because of the time and expense involved in the trial, *see United States v. Harris*, 391 F.2d 348 (6th Cir. 1968); *United States v. Smith*, 303 F.2d 341 (4th Cir. 1962), or because of the court's backlog, *Thomas*, 449 F.2d at 1183.

Although the court may require the jury to deliberate for a reasonable time even after a deadlock is announced, it may not expressly or implicitly threaten to keep the jury indefinitely until a verdict is reached. *See United States v. Amaya*, 509 F.2d 8 (5th Cir. 1975) (judge's statement that jury under similar circumstances deliberated for over nine days). Notes sent to a deadlocked jury instructing them to "please keep trying" do not have such a coercive effect. *See Calaway v. United States*, 408 A.2d 1220 (D.C. 1979); *Ford v. United States*, 759 A.2d 643 (D.C. 2000), *petition for rehearing denied*, 856 A.2d 591 (2004) (instructing jury, after several notes including one of deadlock and another alleging juror misconduct, to decide the case "without other extraneous, irrelevant issues coming into play" was not inherently coercive because no *Winters* instruction was given and because it reiterated the jury's sworn duty). However, a court may not require an unreasonably long period of deliberation. *See Jones v. United States*, 946 A.2d 970 (D.C. 2008) (error to imply that jurors have failed test of responsible service if deadlocked); *Thompson*, 354 A.2d at 850.

Disclosure of the jury's numerical division may be grounds for a mistrial, particularly where the court itself solicits the disclosure, *see Brasfield v. United States*, 272 U.S. 448 (1926), or takes action that might be construed as coercing the minority after the jury accidentally reveals its split. *See Jackson v. United States*, 368 A.2d 1140 (D.C. 1977); *Williams v. United States*, 338 F.2d 530 (D.C. Cir. 1964). *But see Downing v. United States,* 929 A.2d 848, 861 (D.C. 2007) (not error to fail to declare a mistrial where numerical split on some counts revealed where no evidence of coercion was found). *In Davis v. United States*, 669 A.2d 680 (D.C. 1995), the jury announced that it was deadlocked, and then informed the court that it reached a unanimous verdict before the court could give further instructions. After the jury foreperson announced a guilty verdict, the jury was polled and one juror stated "not guilty." Thereafter, the jury resumed deliberations and again announced that it was deadlocked. Over defense objection, the trial court gave a *Winters* instruction. The Court of Appeals held that it was error to give the instruction because the disclosure of the numerical minority to the court produced an "inherent potential risk of a coerced verdict." *Id*. at 684.

However, the jury's inadvertent revelation of its division, without further inquiry from the court, is not automatic grounds for a mistrial, and subsequent verdicts have been upheld where the court simply advised the jury to keep deliberating. *Chavarria*, 505 A.2d 59; *see also Wilson v. United States*, 419 A.2d 353 (D.C. 1980); *Lewis v. United States*, 393 A.2d 109, 113 (D.C. 1978); *Smith*, 389 A.2d at 1360; *United States v. Diggs*, 522 F.2d 1310, 1322 (D.C. Cir. 1975).

A deadlocked jury may indicate that a few jurors are disagreeing with a larger number and the dynamics are such that the smaller number will ultimately yield if given sufficient time.[17] Where

[17] For an interesting mathematical and psychological analysis of jury dynamics, see Comment, *On Instructing Deadlocked Juries*, 78 Yale L.J. 100 (1968).

counsel believes, based on the strength of the evidence and the communications from the jury, that the jury is leaning toward conviction, counsel should object to any action that creates a risk that the minority of jurors will perceive that the court is pressuring them to surrender their views. For the defendant, there is little to be gained by assisting the court in breaking a deadlock, and little to lose by objecting. If the jury remains deadlocked and was inclined toward acquittal, the prosecutor may be persuaded to forego a retrial; if the jury favored conviction, retrial will afford a second and often more favorable chance of obtaining an acquittal.

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***Barbett v. United States*, 54 A.3d 1241 (D.C. 2012).** An anti-deadlock instruction is a decision committed to the discretion of the trial judge, but reversible error to give instruction as a matter of routine and not after careful consideration.

***Douglas v. United States*, 97 A.3d 1045 (D.C. 2014).** In a case in which jury twice stated it could not reach unanimous verdict on PWID after determining guilt on possession, PWID conviction reversed where trial judge sent jury back for
additional deliberation after the two notes without first determining whether jury had made "reasonable efforts" to reach a verdict on the PWID.

***Grant v. United States*, 85 A.3d 90 (D.C. 2014).** See, *supra*, Chapter 38.IV.D.2.

***Hankins v. United States*, 3 A.3d 356 (D.C. 2010).** Giving *Gallagher* instruction to deadlocked jury after learning from courtroom clerk's conversations with two jurors that one juror had first stopped participating in deliberations and then, though again participating, was convinced that defendant was not guilty was not unduly coercive where trial court emphasized that it had "absolutely no idea" as to the numerical split or the direction in which the jury was leaning, and reminded the jury to always communicate in writing and never to reveal its split if it remained deadlocked.

***Jones v. United States*, 999 A.2d 917 (D.C. 2010).** Trial court did not coerce verdict by giving anti-deadlock instructions, even where jury sent several notes regarding an "obstructionist" juror and was given both a *Winters*/Gallagher amalgamated instruction and a *Brown* instruction during deliberations, because trial court took care not to pressure any particular juror(s), did nothing to isolate "obstructionist" juror and offered jury multiple opportunities to declare itself deadlocked after giving *Winters*/Gallagher instruction.

***Van Dyke v. United States*, 27 A.3d 1114 (D.C. 2011).** Trial court did not abuse its discretion by including partial sentence "I would expect it to take some time to" within its initial encouraging instruction, in response to jury's initial note stating that it was deadlocked, where jury remained deadlocked two hours after reinstruction and instruction itself amount to "a temperate prod" to non-unanimous jury.

***Williams v. United States*, 52 A.3d 25 (D.C. 2012).** Trial court did not err in instructing jury with combination anti-deadlock/"reasonable efforts" instruction after receiving second note indicating that jury could not reach unanimous verdict on first-degree murder charge where jury

made clear in its notes that it had not yet considered lesser-included second-degree murder charge and where *Thomas*/Gallagher language included softened impact of *Winters* anti-deadlock language.

G. Polling the Jury and Partial Verdicts

Both sides are entitled to a poll of the jurors after the foreperson announces the verdict. Super. Ct. Crim. R. 31(d). In a multi-count indictment, defense counsel normally should request a poll as to each count on which the jury has convicted.[18] Counsel must be sure to make the request immediately after the verdict is announced; because once the jury has been excused it cannot be reconvened for a poll. *Speaks v. United States*, 617 A.2d 942 (D.C. 1992). When a foreperson announces a verdict of guilty on some counts and not guilty on others, defense counsel should request a poll only as to the guilty counts. *See generally Thomas v. United States*, 544 A.2d 1260 (D.C. 1988).

There appear to be no standard questions to be asked on the poll, and the practice varies slightly with each judge. The prevalent practice is to inquire of each juror: "How do you find the Defendant _____ as to Count ____ of the indictment, charging him with _____, guilty or not guilty?"

Rule 31(d) provides that if there is not unanimous concurrence, the jury may be directed to retire for further deliberation or may be discharged. It is therefore appropriate to request a mistrial when the poll reveals lack of unanimity. *See e.g. Headspeath v. United States,* 910 A.2d 311, 324 (D.C. 2006). The trial judge has "considerable" and "appreciable" discretion in how it responds to a non-unanimous jury poll because "it is best able to assess the impact of the dissenting vote and whether that juror ultimately gave its free consent to a subsequent verdict." *Green v. United States*, 740 A.2d 21, 26 (D.C. 1999) (citations omitted).

When a juror indicates disagreement[19] with the announced verdict, it is error to continue the poll absent a specific request by the defense. *Dorn v. United States*, 797 A.2d 1226 (D.C. 2002) (plain error in continuing to poll the jury after the fifth juror indicated disagreement with the announced verdict). Such error prejudices a defendant's substantial rights by creating a real possibility of a coerced verdict. *See Ellis v. United States*, 395 A.2d 404 (D.C. 1978); *Kendall v.*

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[18] "The jury poll is the primary device for uncovering the doubt or confusion of individual jurors. Its purpose is to determine with certainty that every juror approves of the verdict as returned, and that no juror has been coerced or induced to agree to a verdict with which he dissents. Thus, the jury poll has long been regarded as a useful and necessary device for preserving the defendant's right to unanimous verdict." *Crowder v. United States*, 383 A.2d 336, 340 (D.C. 1978) (citations omitted); *Gibson v. United States,* 792 A.2d 1059 (D.C. 2002) (trial court did not err in denying, without an evidentiary hearing, a motion to set aside the verdict on the ground that one juror was improperly intimidated during the jury poll, as the juror's post-trial written statement that he was intimidated was not sufficient as a matter of law to require anything more than a summary denial).

[19] The disagreement may take the form of outright dissent from the announced verdict or uncertainty about it. *See Matthews v. United States*, 252 A.2d 505 (D.C. 1969) (error to require juror who states during poll that his verdict is "conditional" to respond either guilty or not guilty). However, where the "dissent" is ambiguous, it is not plain error to continue to poll. *See Johnson v. United States*, 470 A.2d 756 (D.C. 1983) ("guilty, I guess"). Also, if there are multiple counts, it is not error to continue the poll on the counts where no disagreement has been announced. *Perkins v. United States*, 473 A.2d 841 (D.C. 1984).

United States, 349 A.2d 464 (D.C. 1975); *In re Pearson*, 262 A.2d 337 (D.C. 1970). Continued polling serves no useful purpose and discloses in open court the jury's numerical division and thus subjects the dissenter(s) to unnecessary coercion. *See Ellis*, 395 A.2d 404.

Appellate courts are sensitive to the danger of coercion, *see id*; *Green*, 740 A.2d at 29-30, especially the danger of coercion inherent in requiring further post-poll deliberation where the dissenter is the twelfth juror polled, because that juror's position as the lone holdout is highlighted. *See Crowder*, 383 A.2d at 342-43. Generally, the court will not find coercion if further deliberations are ordered after the first juror registers dissent, as that juror will not believe the judge is focusing on his or her vote alone. *See Elliott v. United States*, 633 A.2d 27 (D.C. 1993); *Lumpkin v. United States*, 586 A.2d 701 (D.C. 1991); *Artis v. United States*, 505 A.2d 52 (D.C. 1986) (no error in continuing poll on *other* counts, and ordering further deliberation on count as to which first juror changed verdict to not guilty); *cf. Harris v. United States*, 622 A.2d 697 (D.C. 1993) (verdict given freely and fairly, even after jury tried three times to tell court it could not reach verdict, where trial judge interpreted note to say that they may be able to reach a verdict and said nothing that could be interpreted as coercive when he sent them back to continue deliberating).

The court must carefully limit its comments and avoid probing too deeply when confronted with apparent dissent, lest its actions be construed as coercive. *See id*. However, it is proper for the court to determine whether the juror's dissent is intentional or merely the result of a momentary misunderstanding of the polling procedure or the question. *See Headspeth*, 910 A.2d 311; *Jackson v. United States*, 386 F.2d 641 (D.C. Cir. 1967). If the court decides, when confronted with dissent during a poll, to have the jury retire and continue deliberating, a special supplemental instruction such as No. 2.603 (Return of the Jury After Polling) may be appropriate. *See Harris*, 622 A.2d 697; Crowder, 383 A.2d at 342 n.11. *But see Abdus-Price v. United States*, 873 A.2d 326, 330 (D.C. 2005) (trial court has no general duty to instruct the jury post-poll *sua sponte*). On appeal, the standard of review is whether the court can "'say with assurance that the jury freely and fairly arrived at a unanimous verdict.'" *Harris*, 622 A.2d at 701 (quoting *Smith v. United States*, 542 A.2d 823, 827 (D.C. 1988)). Appellate review of a judge's decision to require further deliberations is for abuse of discretion. *Id*. In *Green*, the court found that the trial judge did not abuse her discretion in failing to read an anti-deadlock instruction to the jurors in addition to Instruction 2.603, where the eighth juror indicated disagreement with the guilty verdict during a poll. The court held that there was "no reason to conclude that [juror] was 'coerced into conforming to the majority's vote' or that [the jury] did not 'freely and fairly arrive[ ] at a unanimous verdict.'" 740 A.2d at 32.

If a poll reveals confusion or disagreement on one count but agreement on a not guilty verdict as to another, counsel must immediately move to record a partial verdict of not guilty on that count. In *Thomas v. United States*, 544 A.2d 1260 (D.C. 1988), the foreperson announced findings of not guilty on three counts and guilty on one. Counsel requested a poll on all counts. During the poll, the responses of the first two jurors revealed confusion. The jury was sent back to continue deliberations. When the jury returned after further deliberations, it found the defendant guilty on one count as to which the foreperson had previously announced a verdict of not guilty. The Court of Appeals found no double jeopardy violation, ruling that the original verdicts of not guilty were not "final" because they were not recorded on the court docket.

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***Brown v. United States*, 59 A.3d 967 (D.C. 2013).** Court erred in failing to give requested bracketed language of jury instruction 2.603 to dispel coercive potential of "poll breakdown" where position of eleventh juror polled was disclosed in open court.

***Leake v. United States*, 77 A.3d 971 (D.C. 2013) (amended).** Trial court did not abuse its discretion by failing to recognize potential for jury coercion following juror's dissent in open court where judge ended first jury poll immediately after Juror Three indicated disagreement with verdict and had instructed jury to answer only "yes" or "no" and not to provide any basis for dissent in open court, poll was on verdict rather than each of four charges, and judge gave jury neutral instruction about resumption of deliberations, charging jury with either trying to reach verdict *or* coming back to court with questions.

V. IMPEACHING THE VERDICT

Occasionally, after the verdict has been entered, counsel learns of matters that may have affected or influenced the verdict. Whether the court will look behind the verdict to determine the effect of these matters on the verdict depends upon whether the matter involves an "extraneous influence" on the jury or relates solely to events occurring within the jury room. *See generally ABA Standards for Criminal Justice*, 15-4.7 (Trial by Jury) (1980), and commentary thereto. Where only the latter is involved, courts will not inquire into the nature of the deliberations. Although there are cases where an extraneous intrusion should be presumed prejudicial, the ultimate inquiry involves an assessment of whether the intrusion actually affected the deliberations and, thereby, the verdict. *United States v. Olano*, 507 U.S. 725 (1993) (presence of alternates in jury room was not plain error absent specific showing that alternates either participated in deliberations or "chilled" deliberations by regular jurors); *see also Jenkins v. United States*, 870 A.2d 27 (D.C. 2005) (error for trial court to base its post-trial ruling exclusively on an unsworn letter from the court reporter's office when correcting the trial transcript to show that the jury had, in fact, been unanimous); *Ransom v. United States*, 630 A.2d 170 (D.C. 1993) (ambiguous markings on verdict form were properly disallowed as evidence of confusion to impeach verdict).

When a defendant attempts to impeach a verdict based on alleged juror taint or bias, the court must consider a number of factors, including the nature of the communication, the length of contact, the possibility of removing juror taint by a limiting instruction, and the impact of the communication on both the juror involved and the rest of the jury, *Al-Mahdi v. United States*, 867 A.2d 1011 (D.C. 2005), and failure to inquire into the possibility of juror bias may constitute an abuse of discretion. *Bates v. United States*, 834 A.2d 85 (D.C. 2003) (abuse of discretion for court to deny motion for a new trial without further inquiry into the possibility of juror bias when juror and defense witness had a prior relationship).

Jurors cannot impeach their own verdict. *See McDonald v. Pless*, 238 U.S. 264, 267 (1915); *Boykins v. United States*, 702 A.2d 1242, 1247 (D.C. 1997); *Sellars v. United States*, 401 A.2d 974, 981-82 (D.C. 1979); *King v. United States*, 576 F.2d 432, 438 (2d Cir. 1978); *United States v. Dioguardi*, 492 F.2d 70 (2d Cir. 1974); *see also Speaks v. United States*, 617 A.2d 942 (D.C.

1992) (jury cannot impeach its deadlock any more than its verdict). Federal Rule of Evidence 606(b) precludes juror testimony to impeach a verdict except on the question of whether extraneous prejudicial information was improperly brought to the jury's attention. *Tanner v. United States*, 483 U.S. 107 (1987). The reasons for this rule are many: discouraging harassment of jurors by losing parties eager to have the verdict set aside; encouraging free and open discussion among jurors; reducing incentives for jury tampering; promoting verdict finality; and maintaining the viability of the jury as a decision-making body. *See Government of the Virgin Islands v. Gereau*, 523 F.2d 140, 148 (3d Cir. 1975), *quoted in United States v. Wilson*, 534 F.2d 375, 378 (D.C. Cir. 1976).

Two cases illustrate this principle. In *Khaalis v. United States*, 408 A.2d 313 (D.C. 1979), the defendants moved for a new trial, claiming that one juror exhibited bizarre and irrational behavior during deliberations and was later treated for mental illness. The Court of Appeals affirmed denial of the motion without a hearing, holding that there must be clear and convincing evidence of incompetence shortly before or after jury service to permit inquiry into a juror's mental competence, and that defendant's unverified, conclusory allegations were insufficient to meet this strict test.

The defendant in *Sellars* was convicted of manslaughter. Each juror was polled before the jury was discharged. Several days later, the trial court received a letter from the foreperson informing the court that the jurors had misunderstood the instructions, believing their verdict of manslaughter would reflect that the defendant had acted in self-defense. Although *voir dire* of the jurors revealed that several had in fact misunderstood the instructions, the trial court denied relief. The Court of Appeals affirmed, holding that jurors may not impeach their verdict even on a claim of misunderstanding. 401 A.2d 974, 982. *Sellars* reviews in detail numerous cases involving claims to impeach the jury verdict, making it a useful starting point in researching such issues.

PRACTICE TIPS

- ✓ Client has the right to be informed of the substance of all communications with the jury and the right to be heard before a response to any substantive communication. Sup. Ct. Rule 43.
- ✓ The court has the duty to read all jury notes. *Foster v. George Washington Univ. Med. Ctr.*, 738 A.2d 791, 797 (D.C. 1999).
- ✓ Counsel must be specific when preserving error as to the court's proposed reinstruction. *Zeledon v. United States*, 770 A.2d 972, 974 (D.C. 2001).
- ✓ Court should not deviate from the standard Reasonable Doubt Instruction. *Smith v. United States*, 709 A.2d 78, 82 (D.C. 1998).
- ✓ **Unanimity:** Court should clarify any confusion about the factual basis for the crime charged with a special unanimity instruction. *Simms v. United States*, 634 A.2d 442, 446 (D.C. 1993); *Murchison v. United States*, 486 A.2d 77, 83 (D.C. 1984).
- ✓ **Inconsistency**: Courts should take reasonable measures to avoid inconsistent verdicts.
  - Logical inconsistency. *Whitaker v. United States*, 617 A.2d 499, 502 (D.C. 1992).
  - Factual inconsistency. *Alcindore v. United States*, 818 A.2d 152, 158 (D.C. 2003).
  - Legal inconsistency. *Thomas v. United States*, 806 A.2d 626, 629-30 (D.C. 2002).
- ✓ **Lack of Evidence**: Jury can consider lack of evidence when determining guilt. *Greer v. United States*, 697 A.2d 1207, 1212 (D.C. 1997).

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***Kittle v. United States*, 65 A.3d 1144 (D.C. 2013).** Trial judge has discretion to admit juror testimony in rare and exceptional circumstances, where allegations of racial bias may have jeopardized defendant's constitutionally-protected rights to an impartial jury. Here, however, trial judge did not err in declining to hold hearing to address juror's post-verdict allegation that several of her fellow jurors made racist remarks during deliberations where defendant was acquitted on three counts and granted mistrial on six others, juror's letter did not call verdict into question by suggesting that it should be reconsidered, none of thirteen jury notes during deliberations indicated a concern with racial bias, and no jurors mentioned to either counsel during post-verdict meeting to discuss trial that prejudice had affected verdict.

CHAPTER 39

CONTEMPT

Both defendants and lawyers can be held in contempt. A court may hold clients in contempt for violating a court order (e.g., release conditions, line-up order, stay-away order, order to testify before a grand jury, etc.) and counsel in contempt for conduct in or relating to a court proceeding.

The law recognizes two kinds of contempt: civil and criminal. Civil contempt is remedial. It is designed to enforce compliance with a court order or to compensate a party for losses or damages caused by the noncompliance. *See Bolden v. Bolden*, 376 A.2d 430, 433 (D.C. 1977). Civil contempt may be imposed for any prohibited act or omission, regardless of whether or not the conduct was willful. *Link v. District of Columbia*, 650 A.2d 929, 931 (D.C. 1994). For example, civil rather than criminal contempt is an appropriate sanction when a defendant refuses to give a handwriting exemplar. *Jennings v. United States*, 354 A.2d 855 (D.C. 1976). Furthermore, once noncompliance with a judicial order has been factually established, the burden of establishing justification for noncompliance shifts to the alleged contemnor. *Bolden*, 376 A.2d at 433.

Because civil contempt is remedial, it may result in detention until one "purges" oneself of the contempt and agrees to obey the court order. Even a prison sentence can be remedial if "the defendant stands committed unless and until he performs the affirmative act required by the court's order." *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 632 (1988) (citation omitted). A fine can also be remedial when paid to the complainant, as opposed to a criminal fine paid to the court. *Id.*

In contrast, criminal contempt is punitive. It involves a determinate punishment that cannot be purged by complying with the court order. For a finding of criminal contempt, there must be both "a contemptuous act and a wrongful state of mind." *In re Gorfkle*, 444 A.2d 934, 939 (D.C. 1982). And, as with all criminal offenses, each element of criminal contempt must be proven beyond a reasonable doubt. *In re Kraut*, 580 A.2d 1305, 1312 (D.C. 1990).

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***Salvattera v. Ramirez*, No. 14-FM-1006, 2014 WL 7202072 (D.C. Dec. 15, 2014).** Court erred in ordering respondent to vacate his apartment as part of a CPO because petitioner had no ownership or possessory interest in the dwelling unit even though a victim of sexual assault under D.C. Code § 16-1001.

Types of Contempt:

Civil: a remedial measure used to enforce compliance with a court order

Criminal: a punitive measure that cannot be purged by compliance
- ✓ Requires a contemptuous act and a wrongful state of mind
- ✓ Each element must be proven beyond a reasonable doubt

I. STATUTORY AUTHORITY

A superior court judge's authority to hold a person in contempt is conferred by 18 U.S.C. § 402 and D.C. Code § 11-944. *See Kraut*, 580 A.2d at 1310. "A judge of the Superior Court 'may punish for disobedience of an order or for contempt committed in the presence of the court.'"[1] *In re L.G.*, 639 A.2d 603, 605 (D.C. 1994) (quoting D.C. Code § 11-944).[2] This general contempt statute has been applied primarily to behavior that the court otherwise could not address. For example, the contempt process should not be used to address probation violations for which the court has authority to revoke the probation. *See Jones v. United States*, 560 A.2d 513, 516-17 (D.C. 1989).

Several other District of Columbia statutes establish contempt powers in specific situations. *See, e.g.*, D.C. Code §§ 16-1005(f) (violation of a CPO); 16-2325 (disobedience of a Family Division order to pay support for a committed child); 23-1329(c) (intentional violations of conditions of pretrial release); 11-741 (authority to cite for contempt). With the exception of § 23-1329(c) and § 16-1005(f), which limit the maximum punishment for contempt prosecuted under those statutes to six months imprisonment and a $1,000 fine, there is no authority apart from the Constitution of the United States which limits the sentence a court may impose for criminal contempt. However, the U.S. Constitution and the applicable D.C. statutes provide for jury trials in

[1] 18 U.S.C. §§ 402 and 3691 provide for jury trials in a narrow class of contempt involving an order of a U.S. District Court or any D.C. court issued pursuant to litigation prosecuted by a private party, where the disobedient act constitutes a crime regardless of the existence of the order. Section 402 does not apply to contempt committed in the presence of the court or in disobedience of an order issued in any action prosecuted in the name of the United States, including criminal cases.

[2] In the federal courts, the contempt power derives from 18 U.S.C. § 401, which is somewhat more detailed than the D.C. provision:

> A court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as –
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
> (2) Misbehavior of any of its officers in their official transactions;
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

See, e.g., In re Holloway, 995 F.2d 1080 (D.C. Cir. 1993). It is unclear whether a District of Columbia court is a "court of the United States" within the meaning of this section. However, D.C. Code § 11-944 is as broad in scope as is § 401.

situations where a defendant faces a sentence for criminal contempt which exceeds six months. *See infra* Section III.D.

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***In re Shirley*, 28 A.3d 506 (D.C. 2011).** Jurisdictional requirements of CPO statute apply only to filing of petition for CPO, not enforcement of it.

II. ELEMENTS OF THE OFFENSE OF CRIMINAL CONTEMPT

Criminal contempt requires "a contemptuous act and a wrongful state of mind." *Gorfkle*, 444 A.2d at 939. "To prove criminal contempt of court, the government must prove: '(1) conduct committed in the presence of the court that disrupts the orderly administration of justice; or (2) willful disobedience of a court order, committed outside the presence of the court.'" *Payne v. United States*, 932 A.2d 1095, 1099 (D.C. 2007) (quoting *Baker v. United States*, 891 A.2d 208, 215 (D.C. 2006)). As with all criminal offenses, each element must be proven beyond a reasonable doubt. *Kraut*, 580 A.2d at 1312.

For conduct occurring in the presence of the court that evinces a "willful attempt [by the contemnor] to show disrespect for the court or to disrupt the proceedings," the court may conduct a summary contempt proceeding. *Gorfkle*, 444 A.2d at 939-40; *see also L.G.*, 639 A.2d at 605. However, "in summary proceedings based on failure to appear in court, the accused is entitled, at least, to notice that he is being charged with criminal contempt, to the meaningful assistance of counsel . . . and to a reasonable opportunity to present a defense." *Swisher v. United States*, 572 A.2d 85, 92 (D.C. 1990).

However, in criminal contempt proceedings arising from conduct that occurs outside the presence of the court or is not seen or heard by the judge, including proceedings arising from statutory provisions for criminal contempt, a full (non-summary) trial is required. *See, e.g., Vaas v. United States*, 852 A.2d 44 (D.C. 2004).

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***Clark v. United States*, 28 A.3d 514 (D.C. 2011).** Consent of petitioner is not defense to criminal contempt for violation of CPO.

***In re Shirley*, 28 A.3d 506 (D.C. 2011).** "Consent" is not a defense to a charge of criminal contempt for violation of a CPO.

A. Willful Disobedience

Because it is punitive, rather than remedial, criminal contempt requires willfulness where civil contempt does not. *Bolden v. Bolden*, 376 A.2d 430, 432-33 (D.C. 1977). To convict an individual for criminal contempt, "it is necessary to find beyond a reasonable doubt that an individual committed a volitional act that constitutes contempt." *Vaas*, 852 A.2d at 46 (quoting *In re Ryan*, 822 A.2d 509, 511 (D.C. 2003)); *see, e.g., Parker v. United States*, 373 A.2d 906

(D.C. 1977) (reversing contempt conviction, where only underlying behavior was re-arrest while on conditional release, because "being arrested . . . is not a volitional act"). Reckless conduct may also subject one to prosecution for contempt, but a defendant is reckless only if "he intentionally does an act with a willful disregard of its potential consequences." *Thompson v. United States*, 690 A.2d 479, 483 (D.C. 1997).

"To prove willfulness, the government must first show that the defendant had knowledge of the court order," including knowledge of its terms. *Hooks v. United States*, 977 A.2d 938, 940 (D.C. 2009); *see also Hector v. United States*, 883 A.2d 129, 132 (D.C. 2005). "Often such knowledge is demonstrated by proof that the defendant was present in open court when the order was issued and explained." *Hooks*, 977 A.2d at 940.

With respect to contempt in the presence of the court, "[a] mere finding of improper conduct is not sufficient, rather we must find a 'willful attempt [by the contemnor] to show disrespect for the court or to disrupt the proceedings.'" *Bethard v. District of Columbia*, 650 A.2d 651, 653 (D.C. 1994) (citation omitted).

Willfulness: A court may in some cases infer willfulness from the circumstances of a contemptuous act. For example, failure to pay a fine may be considered willful if the court has made a preliminary finding that the defendant had the capacity to pay. *See, e.g.*, *Bell v. United States*, 806 A.2d 228 (D.C. 2002) (defendant's sentence for failure to pay fine arising from theft conviction not unconstitutional because the failure to pay fine was willful). Where a court appearance involving both parties to a stay-away order makes literal compliance with the order impossible and the respondent has not received notice as to what is expected of him, a finding of willful violation of the order is not appropriate. *In re Jones*, 898 A.2d 916, 922 (D.C. 2006). However, where the respondent has been instructed about the requirements of the stay-away order and the interaction is avoidable, willful violation may be inferred. *Thomas v. United States*, 934 A.2d 389, 392 (D.C. 2007); *see also Payne v. United States*, 932 A.2d 1095, 1100 n.1 (D.C. 2007). The Court of Appeals has specifically held that narcotics addiction is not a defense in a contempt case charging the failure to comply with release conditions mandating drug testing and abstinence from drug use. *Grant*, 734 A.2d at 177-78.

Attorney Conduct: In proceedings involving an attorney's conduct, the court must exercise special caution before inferring willfulness where the alleged contumacious behavior is the product of counsel's vigorous efforts to represent a client. *See In re Schwartz*, 391 A.2d 278, 281 (D.C. 1978); *cf. In re Nesbitt*, 345 A.2d 154 (D.C. 1975). But willfulness may be inferred where the conduct demonstrates a "reckless disregard for professional duty," *Sykes v. United States*, 444 F.2d 928, 930 (D.C. Cir. 1971), or deliberate noncompliance with an order or the authority of a court, *In re Hunt*, 367 A.2d 155 (D.C. 1976), or repeatedly disregarding the same order, *see In re Holloway*, 995 F.2d 1080, 1087 (D.C. Cir. 1993). Although a wide variety of willful actions may constitute criminally contumacious behavior, *see Gorkfle*, 444 A.2d at 939-40 (collecting cases), the most common situation involves willful disobedience of a lawful court order.

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***Williams v. United States*, 51 A.3d 1273 (D.C. 2012).** Court's definition of "willful" ("does not mean that he knew he was breaking the law"), though an incorrect statement of law, did not rise to plain error requiring reversal where it was established that defendant had understood the court order and had proceeded to intentionally commit an act that violated it.

B. Court Order

Violation of a court order cannot support a contempt conviction unless the order was so clear and unambiguous that it would leave no doubt in the mind of the alleged contemnor of the actions required to comply with the order. *See Smith v. United States*, 677 A.2d 1022, 1029 (D.C. 1996); *In re Benton*, 228 A.2d 324, 326 (D.C. 1967); *Pincus v. Pincus*, 197 A.2d 854, 856 (D.C. 1964); *cf. In re Holloway*, 995 F.2d 1080, 1082 (D.C. Cir. 1993); *O'Connor v. United States*, 240 F.2d 404, 405 (D.C. Cir. 1956).

Even where a written order is clear, a person cannot be convicted of criminal contempt where "he or she is not put on notice of the specific conditions of the… order." *Vaas*, 852 A.2d at 46 (citing *Smith*, 677 A.2d at 1031). In *Vaas*, a written order required the defendant to stay away from a "one block radius" of a particular address, while the court's verbal order was to stay away from a "one block area" of that address. *Vaas*, 852 A.2d at 47. In reversing the conviction, the reviewing court found that:

> The court's written order and its oral pronouncement created an ambiguity regarding the exact area from which Vaas was barred. Thus, we cannot say that the order set forth "all the conditions to which the release [was] subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct." D.C. Code § 23-1322(f) (2001). Because we find that the order as explained by the court fails to meet the specificity standard of § 23-1322(f), the trial court could not find beyond a reasonable doubt that Vass' conduct in this case was willful.

Id.

Similarly, in *Hector*, the court reversed a criminal contempt conviction for violation of a CPO that prohibited, *inter alia*, written communication with the petitioner. *Hector*, 883 A.2d at 131-32. The government could not show that the defendant had willfully violated the order where the defendant did not receive a written copy of the CPO and the record did not show that the issuing judge explained to the defendant that written communication was prohibited. *Id.* And in *Hooks*, the court held that there was insufficient evidence of willfulness to sustain a criminal contempt conviction for violation of a CPO where the appellant was not present when the order was issued, and "[t]he government made no effort to prove that appellant had been served with the CPO or otherwise had been notified of its prohibitions." *Hooks*, 977 A.2d at 940. "In order to prove willfulness, [the government] . . . had to establish that appellant knew the order had been issued and knew that it prohibited him from coming within 100 feet of the victim, her residence, and her automobile." *Id.*

Appealing Court Orders: In most cases, even when a court order is based on an erroneous interpretation of law, compliance with the order is required until the order is reversed on appeal or later modified. *Thomas v. United States*, 934 A.2d 389 (D.C. 2007). Also in most cases, failure to challenge the order at trial or on appeal precludes reversal of the contempt conviction, even when the underlying order may have been invalid. *Baker*, 891 A.2d at 212. However, a person may not be held in contempt for refusing to comply with an order that the court is "patently unauthorized" to issue, such as when a court lacks jurisdiction over a matter. *Id*. at 213 (citing and distinguishing this exception as articulated in *In re Banks*, 306 A.2d 270, 273 (D.C. 1973)). Moreover, a contempt conviction arising from violation of an order the court lacked authority or jurisdiction to issue may be challenged in a collateral appeal (or habeas petition, where conviction has resulted in imprisonment), without first challenging the order itself on direct appeal. *Banks*, 306 A.2d at 273; *see also Ex parte Hudgings*, 249 U.S. 378 (1919). However, it should be noted that the unauthorized order in *Banks* involved "special circumstances," including the imposition of a significant burden on the purported contemnor. *Baker*, 891 A.2d at 213. Where such hardship is not imposed, and special circumstances are thus absent, one who defies a court order risks a criminal contempt conviction in most circumstances. *Id*.; *see also*, *e.g.*, *Murphy v. Okeke*, 951 A.2d 783, 793 n.10 (D.C. 2008); *Shewarega v. Yegzaw*, 947 A.2d 47, 51-52 (D.C. 2008).

Challenging Contempt Orders:

- ✓ Compliance of court order is required until the order is reversed on appeal, even if the attorney believes it was in error
- ✓ Failure to challenge a court order at trial or appeal precludes reversal of contempt conviction
- ✓ Court orders must strictly adhere to the specificity requirement in D.C. Code § 23-1332(f)
  - Any possible ambiguities in a court order, or any reason why a person might misunderstand an order, may well be grounds for reasonable doubt about a defendant's guilt

C. Obstruction of the Administration of Justice

A criminal contempt conviction for actions taken in the superior court can only stand where there is "conduct committed in the presence of the court that disrupts the orderly administration of justice." *Payne*, 932 A.2d at 1099; *see*, *e.g.*, *Thompson*, 454 A.2d at 1327; *Schwartz*, 391 A.2d at 281; *Nesbitt*, 345 A.2d at 155.[3]

Defendant Conduct: Defendants have been found to have interfered with the administration of justice for changing their physical appearance before a line-up when ordered not to do so, *see*, *e.g.*, *In re Carter*, 373 A.2d 907 (D.C. 1977); *In re Jackson*, 328 A.2d 377 (D.C. 1974); for refusing to heed the admonitions of the court, *see*, *e.g.*, *Irby v. United States*, 342 A.2d 33, 41

[3] In federal court, 18 U.S.C. § 401, *see supra* n.2, similarly provides that a person can be held in contempt for "misbehavior in the court's presence that obstructs the administration of justice."

(D.C. 1975); for refusing to comply with a court order to testify before a grand jury, *see, e.g.*, *United States v. Coachman*, 752 F.2d 685 (D.C. Cir. 1985); and for failing to appear for trial, *cf. Campbell v. United States*, 295 A.2d 498, 500 n.8 (D.C. 1972). Similarly, a witness under subpoena who fails to appear when directed may be found in contempt. *See Budoo v. United States*, 677 A.2d 51 (D.C. 1996) (criminal contempt conviction affirmed where witness to murder refused to testify despite offer of complete immunity and entrance into a witness protection program).

Attorney Conduct: Attorneys' conduct can also be found contemptuous where it interferes with the administration of justice. For example, attorneys have been convicted of criminal contempt for tardiness or non-appearance. *See, e.g., In re Gratehouse*, 415 A.2d 1388 (D.C. 1980); *In re Schaeffer*, 370 A.2d 1362 (D.C. 1977); *In re Hunt*, 367 A.2d 155 (D.C. 1976). Such conviction cannot stand, however, where circumstances do not support the requisite finding that the tardiness or absence was willful. *See, e.g., In re Brown*, 320 A.2d 92 (D.C. 1974).[4] The unauthorized practice of law has similarly been found contumacious, *J.H. Marshall & Associates, Inc. v. Burleson*, 313 A.2d 587, 592 (D.C. 1973), as has repeated questioning or argument along lines a judge has forbidden, *see Pounders v. Watson*, 521 U.S. 982 (1997). *But see In re McConnell*, 370 U.S. 230 (1962) (reversing the conviction of a lawyer for contempt of court and holding that his behavior in asserting the right to ask questions had not obstructed the administration of justice).

When the contumacious behavior at issue in a summary proceeding for criminal contempt is witness testimony the judge believes to be perjured, such testimony may not alone constitute the requisite element of obstruction of justice "unless the perjury is part of some greater design to interfere with judicial proceedings." *United States v. Dunnigan*, 507 U.S. 87, 93 (1993) (citing *In re Michael*, 326 U.S. 224 (1945) and *Ex Parte Hudgings*, 249 U.S. 378 (1919)). For example, in *Clark v. United States*, 289 U.S. 1 (1933), the Supreme Court affirmed the conviction of petitioner for criminal contempt not because of her concealment or false swearing, though those elements were proven, but because "she made use of false swearing and concealment as the means whereby to accomplish her acceptance as a juror, and under cover of that relation to obstruct the course of justice." *Id.* at 11. The Court, in both *Hudgings*, 249 U.S. at 384, and *Michael*, 326 U.S. at 227, reasoned that failing to require a separate showing of intent to obstruct when a summary criminal contempt proceeding is based on perjury would create too great a potential to violate a witness's constitutional rights.

III. CONTEMPT PROCEDURES

A. Non-Summary Contempt

The procedure for adjudicating acts contemptible of court is set forth in Superior Court Criminal Rule 42(b). The rule provides as follows:

[4] The Court of Appeals has taken a dim view of counsel's reliance on scheduling conflicts as an excuse for tardiness or failure to appear. *See In re Thompson*, 419 A.2d 993 (D.C. 1980); *Gratehouse*, 415 A.2d 1388. Counsel may not be held in contempt, however, for failure to appear for a court appearance of which counsel had no actual knowledge. *See Thompson*, 419 A.2d at 996.

> *Disposition upon notice and hearing*. A criminal contempt except as provided in paragraph (a) of this Rule [the summary contempt rule] shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the United States Attorney, of the Corporation Counsel, or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. The defendant is entitled to be released on conditions or detained as provided in these Rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the Court shall enter an order fixing the punishment.[5]

Non-Summary Proceedings: Non-summary contempt proceedings are usually initiated by the issuance of a judicial order, directing the respondent to show cause why he or she should not be held in contempt. However, Rule 42(b) contemplates an application by a prosecutor for an order to show cause or an order to arrest. In 2001, the D.C. Council amended D.C. Code § 23-1329(c) to allow prosecutors, as well as judges, to initiate contempt prosecutions under that section. D.C. Law 13-310 §2(d). In addition, under D.C. Code § 16-1005(f) and Rule 12(d) of the Rules Governing Proceedings in the Domestic Violence Unit, a criminal contempt prosecution may be initiated by the attorney general or by the private beneficiary of a CPO. *See In re Robertson*, 940 A.2d 1050, 1056-57 (D.C. 2008) ("[T]he Council intended that considerations supporting a private right of action to seek a CPO apply equally to a private right of action to enforce the CPO through an intra-family contempt proceeding." (quoting *Green v. Green*, 642 A.2d 1275, 1279-80 n. 7 (D.C. 1994))). As the facts of *Robertson* demonstrate, such a private right of action has potential to complicate the plea bargaining process for individuals subject to prosecution for multiple charges that include criminal contempt for violation of a CPO.

Criminal Contempt Proceedings: Criminal contempt proceedings are typically prosecuted by the United States Attorney, though that office may decline to do so. If it should decline prosecution, or is barred by ethical considerations from prosecuting (e.g., where the respondent is a member of the United States Attorney's Office), the court may appoint a disinterested private lawyer to pursue the case. *See* Super. Ct. Crim. R. 42(b); *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987); *In re Peak*, 759 A.2d 612 (D.C. 2000) (adopting *Young*).

Independent of the question of who may initiate a contempt proceeding is the question of the right to a grand jury indictment. Since criminal contempt is not an "infamous crime" under the Fifth Amendment, there is no constitutional right to grand jury indictment. *Green v. United*

[5] Superior Court Juvenile Rule 42(b) differs substantially from Superior Court Criminal Rule 42(b) in that a juvenile may not be prosecuted for contempt not committed in the presence of the court. This restriction arguably applies in the criminal court as well as in the juvenile court, although the criminal rule does not specifically so provide. A juvenile who is held in contempt for behavior in the presence of a criminal court need not be transferred to the Family Division for a hearing and possible punishment. *See L.G.*, 639 A.2d at 606 n.4; *In re Williams*, 306 F. Supp. 617 (D.D.C. 1969).

States, 356 U.S. 165, 183-87 (1958). However, *Green* largely relied on the Supreme Court's consistent refusal to hold that a criminal contempt defendant is entitled to a jury trial, a right which *Bloom v. Illinois*, 391 U.S. 194 (1968), explicitly applied to criminal contempt proceedings 10 years after the decision in *Green*. (*See infra* Section C.) Nevertheless, the court in *Smith v. United States*, 677 A.2d 1022, 1029 (D.C. 1996), held that Rule 42(b) does not require that contempt charges be set forth in an information, indictment, or show cause order. The court held that "simple notice" of the charges against the defendant—in the form of the government's documented motion for a contempt hearing—was sufficient. *See id.*

Respondent's Rights: Although Rule 42(b) by its terms provides very few procedural protections, numerous judicial decisions have expanded a respondent's rights. For example, criminal contempt is considered to be a "crime in every fundamental respect… to which the jury trial provisions of the Constitution apply." *Bloom*, 391 U.S. at 201-02. The defendant is entitled to notice and counsel, and to call witnesses both in defense of charges and mitigation at sentencing. *See Cooke v. United States*, 267 U.S. 517, 537 (1925); *McCormick v. United States*, 635 A.2d 347, 350-51 (D.C. 1993); *Williams v. United States*, 551 A.2d 1353 (D.C. 1989); *Offutt v. United States*, 232 F.2d 69 (D.C. Cir. 1956). A defendant is entitled to a public trial, *see In re Oliver*, 333 U.S. 257 (1948), before an impartial tribunal, *see Offutt*, 232 F.2d 69.
Also, a defendant in a criminal contempt proceeding is presumed innocent, must be proven guilty beyond a reasonable doubt, and has a privilege against self-incrimination. *See Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 444 (1911); *cf. Davis v. United States*, 834 A.2d 861 (D.C. 2003) (no violation of civil protection order where evidence insufficient to show a "willful" violation). The burden of proving guilt rests with the prosecuting authority, and no burden may shift to the defendant. *Feiock*, 485 U.S. at 637-38 (1988). (In a civil contempt proceeding, however, a burden-shifting statute would not offend the Due Process Clause. *Id*. at 638.) Double Jeopardy protections apply to non-summary criminal contempt prosecutions. *United States v. Dixon*, 509 U.S. 688, 696 (1993). But a contempt conviction incurred after a summary proceeding probably does not bar subsequent prosecution for the independent offense. *See United States v. Rollerson*, 449 F.2d 1000 (D.C. Cir. 1971). *Dixon* specifically declined to rule on the issue: "[w]e have not held, and do not mean . . . to decide, that the double jeopardy guarantee applies to [summary] proceedings." 509 U.S. at 697 n.1.

Violations of Civil Protection Orders: Criminal contempt cases that result from violations of civil protection orders in the intra-family context fall under the Intra-family Offense Act and Domestic Violence Unit Rules. *See Green v. Green*, 642 A.2d 1275 (D.C. 1994). In privately prosecuted intra-family contempt proceedings there is no entitlement to discovery of "Jencks" statements pursuant to Super. Ct. Crim. R. 26.2. *Id*. at 1278-79. Nor does discovery under Superior Court Criminal Rule 16 apply to such proceedings. *Mabry v. Demery*, 707 A.2d 49, 52 (D.C. 1998); *see also Peak*, 759 A.2d 612, 619-20 (limiting private prosecutor-related exceptions to the "special context" of intra-family proceedings at issue in *Green*).

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***In re Robertson*, 19 A.3d 751 (D.C. 2011), *vacating In re Robertson*, 940 A.2d 1050 (D.C. 2008).** A criminal contempt proceeding brought under the District of Columbia's intrafamily offense statute must be brought in the name of the United States as sovereign. *See also*

***Robertson v. United States ex rel. Watson*, 130 S. Ct. 2184, 2185 (2010) (Roberts, C.J.)** (dissenting from dismissal of certiorari as improvidently granted in 940 A.2d 1050, and stating: "Our entire criminal justice system is premised on the notion that a criminal prosecution pits the government against the governed, not one private citizen against another."). But on plain error review, the court would not reverse defendant's criminal contempt convictions despite existence of plea agreement between defendant and the USAO in which the USAO agreed not to prosecute defendant with respect to the same events at issue in the criminal contempt case, a criminal contempt case that the private civil protection order holder had prosecuted with the assistance of the OAG.

B. Summary Contempt

The authority of a court to punish summarily for contempt is reserved only for "exceptional circumstances." *McCormick*, 635 A.2d at 350 (citing *Harris v. United States*, 382 U.S. 162, 164 (1965)). Restrictions on the trial court's authority to adjudicate contempt proceedings summarily are grounded in the fear that summary contempt proceedings are subject to misuse. *Bloom v. Illinois*, 391 U.S. 194, 202 (1968); *see also Pounders v. Watson*, 521 U.S. 982, 988 (1997). To guard against the misuse of the summary contempt authority, "only the least possible power adequate to the end proposed should be used in contempt cases." *United States v. Wilson*, 421 U.S. 309, 319 (1975) (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 231 (1821)) (internal quotations omitted). Thus, the appellate court has consistently admonished trial courts that its use should be limited to those situations in which it is absolutely necessary. *See McCormick*, 635 A.2d at 350 (conviction reversed because no "exceptional circumstances" present requiring use of summary action). The Court of Appeals has also urged that the summary contempt power be used especially sparingly against attorneys. *In re Thompson*, 454 A.2d 1324, 1327 (D.C. 1982).

Rule 42(a) of the Superior Court Rules of Criminal Procedure governs the prosecution of summary contempt, and provides as follows:

> *Summary disposition.* A criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the Court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

Requirements: While Rule 42(a) outlines only two express requirements, namely that "the judge saw or heard the conduct" and that the conduct "was committed in the actual presence of the Court," the third requirement the courts emphasize is the "exceptional circumstances" requirement, where "the conduct must have been so outrageous and disruptive that the 'necessities of the administration of justice' required immediate action." *McCormick*, 635 A.2d at 350 (quoting *Offutt v. United States*, 348 U.S. 11, 14 (1954)). If those "exceptional circumstances" are not present, the conviction will not be upheld. *See, e.g., Bethard*, 650 A.2d at 654-55 (D.C. 1994); *see also McCormick*, 635 A.2d at 350.

The rule additionally requires that once the judge has made a finding of summary contempt, the judge must prepare an order reciting the contumacious acts. The order must include specific findings of fact and conclusions of law based on the testimony offered, regardless of whether a request for findings is made. *See Williams v. United States*, 576 A.2d 1339, 1345 (D.C. 1990). The written order is critical because it is the definitive statement as to the trial court's view of the allegedly contemptuous behavior. *In re Kraut*, 580 A.2d at 1312 n.7. The facts recited in the order of contempt define "the critical mass of contumacious behavior," all of which must be established beyond a reasonable doubt if a conviction is to be sustained. *Id*. at 1314 n.9. Upon review, the Court of Appeals presumes that the trial judge cumulated the separate grounds for the finding of contempt absent an explicit finding by the judge that each separate ground stands alone as a single contumacious act. *In re L.G.*, 639 A.2d 603, 607 (D.C. 1994). If any individual ground making up the critical mass is unsupported by the record, the conviction is reversed for insufficient evidence. *Id*. at 607; *In re Kraut*, 580 A.2d at 1312-14; *Bethard*, 650 A.2d at 658-59 (King, J., concurring).

The requirement that the conduct take place in the presence of the court and be observed by the judge must be literally applied. *Pounders*, 521 U.S. at 988. Thus, disrespectful and insulting comments by an attorney who is addressing the court fall within the summary contempt power. *In re Gates*, 248 A.2d 671 (D.C. 1968). However, a judge cannot use a positive urine test as a basis for a summary contempt conviction because it is evidence which is not within the court's own observation. *Bethard*, 650 A.2d at 655 n.11.

Previously, tardiness of an attorney or failure to appear could be punished summarily under Rule 42(a). *See also In re Gratehouse*, 415 A.2d 1388. *See generally In re Rosen*, 315 A.2d 151 (D.C. 1974). The court in *Swisher*, 572 A.2d 85, 92 (D.C. 1990), imposed additional requirements on this process, holding that in summary contempt proceedings based on failure to appear, the accused is entitled to notice of the contempt charge, meaningful assistance of counsel, and a reasonable opportunity to present a defense. Thus, a hearing similar to that described in Rule 42(b) may be required. *See also McCormick*, 635 A.2d at 350 (notice and hearing required because there was no emergency requiring summary power and there was a factual dispute as to what had actually occurred); *Fields v. United States*, 793 A.2d 1260 (D.C. 2002) (although evidence was sufficient to establish criminal contempt, defendant's behavior was not an immediate threat to proceedings, thereby making a Rule 42(b) proceeding more appropriate than a Rule 42(a) proceeding). Further, if the circumstances raise a substantial issue as to the mental capacity of the alleged contemnor, summary contempt proceedings are inappropriate and an evidentiary hearing on the person's capacity to formulate the requisite intent for contempt is required. *See Panico v. United States*, 375 U.S. 29 (1963); *United States v. Flynt*, 756 F.2d 1352 (9th Cir. 1985).

Due Process: Due process protections are significantly curtailed in summary contempt proceedings. *See generally In re Terry*, 128 U.S. 289, 306-307 (1888). There is no right to formal notice or to counsel. *Id*; *see also In re Ellis*, 264 A.2d 300, 305 (D.C. 1970). However, the invocation of summary contempt does not deprive a contemnor of all due process rights. *McCormick*, 635 A.2d at 349. Instead,

> [a]lthough due process rights are significantly compromised by summary contempt proceedings, some traditional rights are never surrendered; for example . . . "reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are 'basic in our system of jurisprudence,'" especially when one's liberty is at stake.

Id. (quoting *Taylor v. Hayes*, 418 U.S. 488, 498 (1974)).

PRACTICE TIPS:

- ✓ File Motion to Dismiss if show-cause order does not state all elements of the offense.
  - Rule 42(b) requires that a criminal contempt notice state the essential facts constituting the contempt charge. Thus, the show-cause order may be treated as an information and is subject to a motion to dismiss. *See United States v. Meyer*, 346 F. Supp. 973, 977 (D.D.C. 1972).
- ✓ Conduct subject to summary criminal contempt must be committed in the actual presence of the court and must be seen or heard by the court.
  - This requirement has been narrowly construed. Accordingly, acts that occur in court, but are not heard by the judge, such as a witness or defense lawyer uttering an obscenity to the prosecutor, cannot be prosecuted as summary contempt. *See In re L.G.*, 639 A.2d at 606 n.4.
- ✓ If a client is charged with repeatedly violating a particular order, counsel should try to limit criminal liability to a single charge.
  - "[A] trial court has the authority to reduce a series of contemptuous actions to a single instance of contempt, so long as each episode is supported by substantial evidence." *In re (James) Dixon*, 853 A.2d 708, 711 (D.C. 2004). However, the court can consider each contemptuous act separately, and thus expose a defendant to additional criminal punishment. *Id*.

C. Right to a Jury Trial and Related Sentencing Issues

The Sixth Amendment requires a jury trial for non-petty offenses, which have been defined as those for which a sentence of longer than six months is imposed in a unitary proceeding. *Baldwin v. New York*, 399 U.S. 66, 69 (1970); *In re Carter*, 373 A.2d 907, 908 (D.C. 1977). And in *Bloom v. Illinois*, 391 U.S. 194 (1968), the Court determined that the jury trial right applies to proceedings for non-petty criminal contempt just as it does as to proceedings for other crimes, because "criminal contempt is a crime in the ordinary sense." *Id*. at 201. For example, in *Codispoti v. Pennsylvania*, 418 U.S. 506 (1974), the defendant was cited for seven contumacious acts during a trial in which he had represented himself. The court held a single non-jury trial, convicted him of all seven acts, and imposed consecutive sentences totaling thirty-three months. The Supreme Court reversed – in spite of the fact that no individual count resulted in a sentence greater than six months – because the contemnor had been tried "for what was equivalent to a serious offense . . . in a single proceeding." *Id*. at 517. *But cf. Taylor v. Hayes*, 418 U.S. 488 (1974) (holding that Sixth Amendment does not require a jury trial for multiple contempt

convictions in the same proceeding where the maximum authorized penalty for each individual count does not exceed six months and the court actually imposes a sentence of no more than six months imprisonment, in this case by amending judgment so that all sentences run concurrently).

D.C. Code § 16-705(b) codifies the constitutional principles:

> In any case where the defendant is not under the Constitution of the United States entitled to a trial by jury, the trial shall be by a single judge without a jury, except that if:
>
> (1) (A) The defendant is charged with an offense which is punishable by a fine or penalty of more than $1,000 or by imprisonment for more than 180 days (or for more than six months in the case of the offense of contempt of court); or
>
> (B) The defendant is charged with 2 or more offenses which are punishable by a cumulative fine or penalty of more than $4,000 or a cumulative term of imprisonment of more than 2 years; and
>
> (2) The defendant demands a trial by jury, the trial shall be by jury, unless the defendant in open court expressly waives trial by jury and requests trial by the court, and the court and the prosecuting officer consent thereto. In the case of a trial by the court, the judge's verdict shall have the same force and effect as that of a jury.

The Supreme Court has limited the amount of a fine that can be imposed in a non-jury trial. *Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821 (1994) (contempt fines of 52 million dollars require a jury trial). In the District of Columbia, however, the maximum fine in a non-jury setting is $1,000. D.C. Code § 16-705(b).[6]

In sum, any contempt proceeding, summary or otherwise, in which the court contemplates imposition of a sentence longer than six months or a fine of more than $1,000, the court must either conduct a jury trial or ascertain that the respondent understands the right to a jury trial and knowingly and voluntarily waives it.

D. Sentencing Limitations

D.C. Code § 11-944 does not place any sentencing restriction on the court's general contempt power, but there are limits on the sentence that may be imposed for contempt under certain code provisions. Sentences for contempt related to child custody proceedings may not exceed twelve months. D.C. Code § 11-944(b)(1). And for a violation of pre-trial release conditions prosecuted under D.C. Code § 23-1329(c), or a violation of a CPO prosecuted under D.C. Code § 16-1005(f)-(g), there is a maximum penalty of six months imprisonment and a $1000 fine.

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[6] A person may not aggregate fines, after being sentenced to pay more than one fine, to arrive at the requisite amount for a jury demand. *See Thompson*, 454 A.2d at 1328.

However, in *Caldwell v. United States*, 595 A.2d 961 (D.C. 1991), the court observed that "[w]hen two statutes allow different penalties for the same act, the prosecutor has discretion in selecting which of the two statutes to apply." *Id*. at 965. Therefore, violations of pretrial release prosecuted under the general contempt power in § 11-944 rather than the specific power in § 23-1329(c) are not subject to the latter provision's sentencing limitations. *Id.* at 965-66.

Courts may also review sentences for criminal contempt on other than statutory grounds. For example, in *Caldwell* the court found that a seven to twenty-one year sentence for violating a pretrial stay-away order violated the principle of proportionality and remanded the case for sentencing. *Caldwell*, 595 A.2d at 968-70. "[T]he question before the judge was the appropriate sanction to be imposed . . . for disobedience of the order, not for the underlying offense," and the authority of the court could have been adequately vindicated by "[a] substantially less severe sentence." *Id*. at 969, 971. The sentence exceeded not only sentences imposed in other stay-away contempt cases, but also the sentence for the underlying act, an assault with a dangerous weapon. *Id*. at 969-71.

E. Contempt as an Impeachable Offense

Whether a conviction can be used for impeachment under D.C. Code § 14-305 is based on the behavior underlying the criminal contempt conviction, and whether that behavior involves dishonesty or false statement. *Thompson v. United States*, 571 A.2d 192, 195 (D.C. 1990) (contempt conviction entered after hearing and with notice for violating condition of pretrial release not to use drugs did involve dishonesty and could be used for impeachment). *Cf. In re DeNeueville*, 286 A.2d 225, 227 (D.C. 1972) (contempt conviction of spectator for failure to rise when judge entered courtroom did not involve dishonesty); *Williams v. United States*, 552 A.2d 1255, 1256 n.1 (D.C. 1988) (contempt conviction for unspecified reasons, resulting in a fine of $25 or one day in jail, was not impeachable offense).

F. Right to Appeal and Appellate Review of Sentence

Standard of Review: The standard of review of a contempt conviction is abuse of discretion.[7] *See United States v. Wilson*, 421 U.S. 309, 319 (1975). A conviction may be set aside only if there is an error of law or if the judgment is plainly wrong or without evidence to support it. *Williams v. United States*, 576 A.2d 1339, 1342 (D.C. 1990). However, the court scrutinizes criminal contempt cases closely. *See, e.g., Bethard*, 650 A.2d 651; *In re L.G.*, 639 A.2d 603 (D.C. 1994); *McCormick*, 635 A.2d 347; *In re Kraut*, 580 A.2d 1305 (D.C. 1990).

Filing an Appeal: A criminal contempt *citation* is appealable only after sentence has been imposed. *In re Cys*, 362 A.2d 726, 728-29 (D.C. 1976); *West v. United States*, 346 A.2d 504, 505 (D.C. 1975). The time period for filing a notice of appeal begins to run when the sentence is imposed. *See In re Alexander*, 428 A.2d 812, 813 (D.C. 1981). Notice of appeal must be filed within thirty days of the appealable order. D.C. App. R. 4(b)(1). For summary contempt, the thirty days runs from the written ruling required by Rule 42(a). *In re Kraut*, 580 A.2d at 1311-

[7] Where the fine imposed for summary contempt is less than $50, D.C. Code § 11-721(c) provides that review shall be only upon application for appeal, filed in the Court of Appeals within three days from the date of judgment. *See In re Kane*, 422 A.2d 995 (D.C. 1980).

12. The government can appeal the dismissal of a charging document, as it can in any criminal case, but it may not appeal a judge's refusal to issue an order to show cause. *United States v. Maye*, 675 A.2d 57 (D.C. 1996).

Generally, completion of a term of imprisonment or payment of a fine does not render a contempt appeal moot. *See Green v. Green*, 642 A.2d 1275, 1278 n.4 (D.C. 1994); *In re Evans*, 450 A.2d 443, 445 (D.C. 1982). *But see In re DeNeueville*, 286 A.2d 225 (D.C. 1972) (dismissing appeal of contempt conviction when fine had been paid and there were no collateral consequences). In an appeal from a summary contempt conviction where the defendant has already served the sentence and the Court of Appeals finds that summary disposition was inappropriate, the court may order dismissal rather than remand as "just in the circumstances." *Bethard*, 650 A.2d at 655; *McCormick*, 635 A.2d at 351. *See generally* D.C. Code § 17-306 (2001). In any event, counsel should request a stay of execution of the sentence pending appeal in order to avoid the possibility that the Court of Appeals will find the appeal moot, and to avoid the client serving an unjustified sentence.

The ultimate objective in punishing criminal contempt is to employ "the least possible power adequate to the end proposed." *Harris v. United States*, 382 U.S. 162, 165 (1965); *see also supra* III.D (sentences for criminal contempt reviewed under principle of proportionality). Consequently, appellate courts in criminal contempt cases have the power to consider the appropriateness of the sentence imposed and to vacate any excessive portion. *See, e.g., United States v. Flynt*, 756 F.2d 1352, 1367 (9th Cir. 1985) (where trial court's refusal to grant continuance to obtain psychiatric evaluation and testimony required reversal, and five months and five days of incarceration which appellant had already served was excessive punishment for abusive and obscene language to the judge, appellate court declined to remand, and instead reversed and vacated remainder of fifteen-month sentence); *United States v. Gracia*, 755 F.2d 984, 990 (2nd Cir. 1985) (defendant convicted of criminal contempt for refusing to testify before grand jury after being granted immunity, and sentenced to nine years incarceration; appeals court affirmed conviction but reduced sentence to four years); *United States v. Abascal*, 509 F.2d 752, 757 (9th Cir. 1975) (contemnor's conduct did not warrant exercise of summary contempt power, in that objective of securing compliance with court order concerning courtroom demeanor had been achieved by two weeks of incarceration already served by contemnor; remanding for vacation of remainder of ninety-day sentence); *United States v. Camil*, 497 F.2d 225, 229-30 (5th Cir. 1974) (where trial judge failed to prepare certificate of contempt and the primary purpose of punishment was to preserve order during trial, termination of trial rendered remand futile and reversal was appropriate); *United States ex rel. Robson v. Malone*, 412 F.2d 848, 850-51 (7th Cir. 1969) (per curiam) (although appellants' failure to rise upon court's instruction was contumacious, exclusion from courtroom and retention in custody for several hours adequately served purpose of summary punishment and vacation of sentence was appropriate). The propriety of appellate review of sentences in contempt cases has been expressly recognized by both appellate courts in the District of Columbia. *See, e.g., Caldwell*, 595 A.2d at 970; *In re Gates*, 478 F.2d 998, 1000 (D.C. Cir. 1973).

CHAPTER 40

DOMESTIC VIOLENCE

The Domestic Violence Unit of the Superior Court of the District of Columbia was established "to the greatest extent possible, consistent with due process of law, to bring all cases in the Superior Court in which domestic violence is a significant issue before one designated team of judicial officers." *Superior Court of the District of Columbia Administrative Order 96-25* (October 31, 1996). Pursuant to the Order, the Unit is charged with handling all petitions for civil protection orders, all misdemeanors where the defendant and the complainant have an intra-family relationship as defined by the D.C. Intra-family Offenses Act, D.C. Code § 16-1001 *et seq.*,[1] and all divorce, custody, and paternity and support cases involving parties to either a petition for a civil protection order or an intra-family misdemeanor. The Unit does not handle any criminal felony, juvenile delinquency, or abuse and neglect cases.[2]

This chapter is meant to introduce practitioners to the Domestic Violence Unit. Defense attorneys representing clients charged in domestic violence cases may find themselves embroiled in litigation they did not expect. In addition to representing a client in a criminal case stemming from an intra-family offense, the attorney may need to represent that client in civil protection order litigation involving any number of family law issues, or in a criminal contempt trial. Following the structure of the Domestic Violence Unit, each of these three areas will be discussed below.

I. THE DOMESTIC VIOLENCE UNIT[3]

The Unit is comprised of five calendars: the Master Calendar; the Civil Track; two Criminal Track calendars; and the Commissioner Track. The Domestic Violence Intake Center is where a party must go to initiate a civil case involving an intra-family offense, as defined in D.C. Code § 16-1001(5). The Domestic Violence Clerk's Office, Room 4242, is where all court jackets

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[1] The Act defines "intra-family" relationships as those based on blood; legal custody; marriage; having a child in common; sharing or having shared a residence at any time; having or having had a romantic relationship (not necessarily a sexual relationship). D.C. Code § 16-001(5)(A)(B); *see, e.g.*, *McKnight v. Scott*, 665 A.2d 973 (D.C. 1995) (intra-family relationship where parties are engaged to be married); *Sandoval v. Mendez*, 521 A.2d 1168 (D.C. 1987) (no intra-family relationship where two couples cohabitating and one partner from each couple involved in incident) (But note that holding in *Sandoval* rests on an interpretation of the "intimacy" requirement which was deleted from the Intra-family Offenses Act in 1995); *Robinson v. United States*, 317 A.2d 508 (D.C. 1974) (intra-family relationship between woman, her child, and man who lived with woman for several years); *United States v. Harrison*, 461 F.2d 1209 (D.C. Cir. 1972) (no intra-family relationship between aunt and niece where no mutual residence).

[2] There are specific prosecutors at the Office of the United States Attorney that handle domestic violence felony cases, which are assigned to calendar judges based on the nature.

[3] In *Robinson v. United States*, the court rejects defense challenges to the creation of the Domestic Violence Unit and to the prosecution of domestic violence cases, holding that: (1) the Chief Judge of the Superior Court had the authority to create the unit; (2) the Unit had jurisdiction over criminal cases which it conducted according to the criminal rules; (3) the potential that judges presiding over related intra-family cases might learn of matters that would be inadmissible in the criminal cases over which they would also preside did not state a due process violation; and (4) the defendant did not meet his burden of showing an equal protection violation in the prosecution of domestic violence cases based on gender. *Robinson v. United States*, 769 A.2d 747 (D.C. 2001).

relating to matters in the Domestic Violence Unit are maintained; the clerk may be reached at (202) 879-0164.

A. Calendar I: The Master Calendar

The Master Calendar, also known as Calendar I, or Calendar Control, is the calendar to which all Domestic Violence Unit cases (except for criminal cases with no related civil matters that are assigned directly to a criminal calendar) are assigned initially. The Master Calendar is currently located in Courtroom 113. The Master Calendar judge's primary responsibility is "to ascertain the status of the cases, hear uncontested matters, and certify contested or uncontested cases to other calendars in the Unit." *See* Administrative Order. The secondary responsibility of the Master Calendar judge is to preside over civil and criminal trails within the Unit. *Id.* Finally, the Master Calendar judge may certify any domestic violence case to another division for trial if no Unit judge is available. *Id.*

B. Calendar II: The Civil Track

The Civil Track, also known as Calendar II, is currently located in Courtroom 114. The primary responsibility of the Civil Track judge is to preside over contested civil matters within the Unit. The Civil Track judge may hear other cases in the Unit, which are certified from the Master Calendar judge. *Id*.

C. Calendars III and IV: The Criminal Track

While the Administrative Order provides for a single criminal calendar, known as Calendar III, due to a heavy criminal caseload the Unit added a Calendar IV as a second criminal calendar. Calendar III is currently located in Courtroom 118 and Calendar IV is currently located in Courtroom 117. The primary responsibility of the Criminal Track judges is to preside over contested criminal matters within the Unit. A Criminal Track judge may hear other cases in the Unit, which are certified from the Master Calendar judge. *Id*.

D. Calendar V: The Commissioner Track

The Commissioner Track, also known as Calendar V, is currently located in Courtroom 108. "The Commissioner assigned to this calendar will hear matters certified from the Master Calendar [Calendar I]. The certified cases may include: paternity and support cases and, with the consent of the parties, any contested or uncontested request for a civil protection order ("CPO"), divorce, custody, or visitation." *Id*.

The Commissioner assigned to Calendar V will also handle the hearing of a misdemeanant with a case in the Domestic Violence Unit who is held pursuant to D.C. Code § 23-1322(a)(1)(A)(B)(C) or (b)(1)(C)(D) at arraignment (3 and 5 day holds). The Commissioner may handle deferred sentencing pleas and reviews, arraignments for criminal cases that are re-instituted after having been dismissed, and arraignments for new criminal informations filed for violating a CPO.

E. The Domestic Violence Intake Center

The Domestic Violence Intake Center ("DVIC") is located in Room 4235 in the Superior Court of the District of Columbia. The telephone number is (202) 879-0152. The DVIC is the first stop for petitioners who wish to obtain a CPO. The DVIC is staffed with intake counselors who help petitioners prepare petitions for CPOs and Temporary Protection Orders ("TPO"). The counselors also will assist in opening a permanent paternity and support case for the petitioner who has children in common with the respondent.

F. The Domestic Violence Clerk's Office

The Domestic Violence Clerk's Office is located next door to the DVIC in Room 4242. This office maintains pending files for both criminal misdemeanor and Family Division cases (where the complainant and defendant share an intra-family relationship) in which domestic violence is a significant issue. In addition, this office maintains all closed CPO cases dating back to 1992. However, closed misdemeanor, child support, and domestic relations files are maintained by their respective divisions.

II. HANDLING CRIMINAL CASES[4] IN DOMESTIC VIOLENCE COURT

To date, only intra-family misdemeanors are referred to the Domestic Violence Unit for prosecution. A felony in which the defendant and the complainant share an intra-family relationship, as defined in D.C. Code § 16-1005(5), will be assigned to a felony calendar and proceed through the court in the same manner as all other felonies on that calendar. However, clients charged with felonies involving an intra-family offense may also be party to civil cases in the Domestic Violence Unit. The complainant may still seek a petition for a CPO based on the underlying criminal offense, even if it is a felony. In that case, the client in the felony case would have a civil trial scheduled in the Domestic Violence Unit. An attorney representing a client in this situation must be intimately familiar with what is happening in the intra-family case and should represent the client in that matter as well. *See infra* Section III. Additionally, where the case involves a parent and child there may be a neglect case in family court. The attorney should be in constant contact with the attorneys in the neglect case and attend neglect hearings as well. *See In re Ti. B.*, 762 A.2d 20, 30 (D.C. 2000).

[4] This section deals with representing clients charged by the United States Attorney's Office intra-family misdemeanors. Subsection IV will address representation of clients charged with criminal contempt in the Domestic Violence Unit.

Criminal Cases in Domestic Violence Court:

- ✓ When representing clients charged with a felony involving an intra-family offense, counsel should be intimately familiar with what is happening or even represent the client in the civil case in the Domestic Violence Unit
- ✓ Counsel should thoroughly investigate: the complainant; the relationship with the defendant; criminal backgrounds; prior complaints/relationships; family members; and school records (if children are involved)

A. Mandatory Arrest Law

In 1990, the Council of the District of Columbia passed legislation providing that:

> A law enforcement officer shall arrest a person if the law enforcement officer has probable cause to believe that the person: (1) Committed an intra-family offense that resulted in physical injury, including physical pain or illness, regardless of whether or not the intra-family offense was committed in the presence of the law enforcement officer; or (2) Committed an intra-family offense that caused, or was intended to cause reasonable fear of imminent serious physical injury or death.

D.C. Code § 16-1031(a).

B. Arraignment

A domestic violence misdemeanor case is assigned to the Domestic Violence Unit at arraignment in Courtroom 119 (not C-10). Similar to a non-domestic violence misdemeanor, the next court date following the arraignment and initial appearance in Courtroom 119, is a status hearing. The status hearing will be scheduled within two weeks of the arraignment and will be held in either Courtroom 117 or 118.

Stay Away Orders: In domestic violence cases, it is the government's practice to *automatically* request a stay away from the complainant and the scene of the alleged incident as a condition of pre-trial release, and the practice of many judicial officers to routinely grant such requests. However, counsel may effectively argue against such conditions by demonstrating that the location is a place to which the defendant must have access and to which the complainant neither needs, nor should desire, access absent his or her involvement with the defendant. Such examples are a home where the defendant lives and the complainant does not or the defendant's worksite or chosen place of worship or interference with other familial relationships, like care-taking responsibilities for children or elderly relatives.

With an order to stay away from the complainant, keep in mind that oftentimes the government has not consulted with the complainant concerning his or her wishes for such an order. In the case where the attorney has talked to the complainant and he or she does not want a stay away, the attorney may make such representations to the judicial officer. In the situation where the complainant is present in court, the attorney may either request that the judicial officer hear from

the complainant with respect to the stay away order, or attempt to put the complainant in touch with the prosecutor in Courtroom 119 before the case is called.

In cases where the complainant is the child of the client, counsel should argue strongly that the stay away should be worded to allow for visitation (whether supervised or not) consistent with the best interests of the child as determined by the family court judge.

If an attorney is unsuccessful in arguing against a stay away order in Courtroom C-10 despite compelling reasons against issuing such an order, the attorney should consider filing a motion to modify the conditions with the judge assigned to the Master Calendar. *See* Sup. Ct. Crim. R. 117. The attorney might consider attaching an affidavit from the complainant in the case where he or she does not desire such an order.

Service: Also note that the defendant in a domestic violence case (misdemeanor or felony) may be served with documents relating to a civil case in the Domestic Violence Unit by the courtroom clerk in 119. It is important that the attorney review and copy that documentation in order to advise and/or represent the client in those matters. *See infra* Section III. Service upon the client may also occur in the cellblock prior to the criminal case being called. If the criminal case involves an intra-family offense, attorneys should be sure to ask the client during the cellblock interview if they have been served with any documentation. In the event the client is not served with paperwork relating to a civil case in the Domestic Violence Unit on the day of the arraignment, attorneys should be sure to inform the client that such a case might be initiated by the complainant. Attorneys should advise the client to contact them immediately if and when they are served with such paperwork. One may also check to determine if a companion intra-family civil case (IF case) exists by going to the Domestic Violence Clerk's Office and providing the clerk with the names of the parties involved.

Discovery: Upon arraignment, the Assistant United States Attorney ("AUSA") will give counsel a letter indicating that no discovery will be provided until a formal, written request is made. A letter requesting discovery should be handed to the assistant in Courtroom C-10 making general Rule 16 discovery requests. In the event that an initial discovery packet is not available at arraignment, the attorney should call the Domestic Violence Unit of the Office of the United States Attorney's Office ("USAO") at (202) 305-3693 to find out which assistant has been assigned to his or her client's case. A discovery conference should be scheduled prior to the status hearing so that any discovery issues may be raised at the status hearing and so that the client may make an informed decision regarding any plea offer that may expire on the date of the status hearing.

Arraignment:

Challenge **Stay Away Orders**
- ✓ Demonstrate that the location is a place your client must have access to
- ✓ If complainant does not want order, use this to challenge the order
- ✓ Request visitation rights in cases where complainant is a child
- ✓ If needed, file a motion to modify conditions after it is assigned to a Master Calendar judge

Discovery conference should be scheduled prior to the status hearing
- ✓ Client can make an informed decision on plea offer that may expire on the date of the status hearing
- ✓ A formal written request must be made to the AUSA
- ✓ Any discovery issues that result can be then raised at the status hearing
- ✓ Discovery concerns can be raised at the status hearing

Remember to tell your client to contact you when he or she is served.
Counsel should carefully review and copy any documents her client's received.

C. The Status Hearing

In misdemeanor cases assigned to the Domestic Violence Unit, the next court date scheduled following the client's arraignment will be a status hearing.[5] The status hearing is scheduled within two weeks of the arraignment. Criminal cases with no related civil matters are assigned directly to one of the criminal calendars. The cases are assigned to Courtroom 117 or Courtroom 118. All other criminal cases are assigned to Courtroom 113 for status hearings.[6] Courtroom 113 is the busiest of the domestic violence courtrooms first thing in the morning. It is not uncommon for there to be standing room only. It is therefore particularly important that attorneys check in with the courtroom clerk upon arrival. It is also customary for the attorneys to sit in the jury box so that the clerk may more easily identify those who are present.

At the status hearing, the judge assigned to the Master Calendar will inquire whether a plea offer has been made and, if so, whether the client wishes to enter a guilty plea or schedule a trial date.[7]

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[5] If a client charged with a domestic violence misdemeanor is held pursuant to D.C. Code § 23-1322(a)(1)(A), (B), or (C), or (b)(1)(C) or (D), *see supra* Chapter 1, on the day of his or her arraignment, the client will have his or her subsequent hearing on the hold within the time period specified by statute. Nevertheless, regardless of the outcome of that hearing, the client will still have a status hearing scheduled within two weeks of his or her arraignment. Again, if the client is charged with a domestic violence felony, the case will proceed in the criminal division as any other felony. A person charged with a felony will not have an appearance in his or her criminal case in the Domestic Violence Unit.

[6] The purpose of scheduling the status hearing within two weeks of the arraignment is so that it will coincide with the next court date in any companion civil case. The next court date in a CPO case is held within two weeks because, pursuant to Superior Court Rule of Intra-family Proceedings 7A(b), a TPO may not exceed fourteen (14) days. *See* Section III of this chapter.

[7] It is the policy of the USAO that plea offers in domestic violence cases expire on the date of the status hearing. Absent unusual circumstances, this policy is strictly enforced. Although the government can be somewhat flexible

If the client wishes to enter a guilty plea, the plea likely will be taken that morning by the judge assigned to the Master Calendar. If the client elects to set a trial date, the trial date will be scheduled and the client will sign notice to appear in Courtroom 103 (the Criminal Track). Attorneys should request that a motions schedule be set and raise any discovery concerns at the status hearing.

D. Deferred Sentencing

Defendants charged in domestic violence cases are ineligible for the pre-trial diversion program of the USAO. Instead, certain clients are eligible for "deferred sentencing," the domestic violence alternative to diversion. Eligibility for deferred sentencing is left to the discretion of the USAO. Generally, it is only offered to first offenders in cases where the circumstances surrounding the offense are less serious. The initial discovery packet received in Courtroom C-10 should indicate whether or not a client is eligible for deferred sentencing. If the discovery packet does not so indicate, the attorney should contact the AUSA assigned to the case. If the client is deemed ineligible for deferred sentencing by the USAO, but the attorney is aware of circumstances that may potentially change this decision, the attorney should contact the assistant assigned to the case. The guidelines are not so rigid that negotiation is out of the question.[8]

A deferred sentencing agreement is an agreement between the United States of America and the client whereby the client enters a plea of guilty to a charge or charges and agrees to abide by certain conditions over a specified period of time (usually nine months). The parties agree that sentencing will be deferred until after the nine-month period. In return, the government agrees that if the client successfully abides by the agreed upon conditions, at the time of sentencing the government will not oppose a motion by the defendant to withdraw his guilty plea and will enter a *nolle prosequi* in the case thereafter.

Conditions: While the conditions are negotiable, they usually consist of some combination of the following: that the defendant stay away from the complainant and specified locations such as the complainant's home and workplace; that the defendant pay restitution if damages resulted; that the defendant participate in the Domestic Violence Intervention Program (a treatment program for abusers organized through the probation office); that the defendant maintain employment, and participate in community service; or that the defendant participate in substance abuse counseling. It is critical to explain to a client who is contemplating entering such an agreement that the determination of whether the defendant has violated any conditions of the agreement rests exclusively with the government. Therefore, if the government wishes to terminate the agreement because it determines that the client has not complied with some condition, the defendant is not entitled to a hearing before a judicial officer on the matter. In such a situation the defendant will go directly to sentencing having already entered a plea of guilty.

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with this policy in any given case, it is much more rigid with respect to a deferred sentencing plea offer (discussed more fully in subsection D below).

[8] The USAO will not offer any deferred sentencing in cases that involve a child.

Following the entering of a guilty plea the court will schedule a review hearing approximately ninety days thereafter. Attorneys should accompany his or her clients to the review hearing and present proof of compliance with the agreement conditions.

It is also imperative that attorneys representing clients who are not United States citizens be aware of the immigration consequences of participating in a deferred sentencing agreement. *See supra* Chapter 17.

For eligible clients, participation in deferred sentencing is usually an option, which expires on the day of the status hearing. This is a policy of the USAO from which the government rarely deviates. It is therefore important that discovery be completed, and this option be fully discussed with the client within the first two weeks of the case. The client must understand that if he or she is unable to successfully complete the agreed upon conditions, he or she will not later have the option of going to trial. Therefore, while deferred sentencing can be a positive option for some clients, for those who are not certain that they can comply with the agreed upon conditions, it may not be the right choice. The client must understand all of the implications of entering a deferred sentencing agreement before the status hearing.

Deferred Sentencing:

- ✓ Determine client's eligibility for deferred sentencing (left to the discretion of the USAO)
- ✓ Complete discovery so as to allow the client to make an informed decision
- ✓ Discuss implications of non-compliance with your client – there is no option to go to trial after agreeing to the terms
- ✓ Notify the AUSA if you know of circumstances that would make client eligible (generally for first offenders where circumstances are less serious)
- ✓ Compliance of conditions is determined by the government
- ✓ Accompany client at the review hearing and present proof of compliance

Counsel should be aware of any immigration consequences by participating in deferred sentencing. *See supra* Volume I, Chapter 17.

E. Trial

In theory, a criminal trial in the Domestic Violence Unit should resemble any other misdemeanor trial. With respect to all aspects of the case, the Superior Court Rules of Criminal Procedure govern. However, the defense attorney should expect to see more aggressive prosecution than one would expect in a criminal division misdemeanor case. The USAO has a "No-drop Policy" regarding domestic violence cases. This means that once a case has been papered the USAO will not dismiss it simply because the complainant either no longer wishes to go forward or recants. Because of its commitment to prosecute intra-family offenders, the USAO will regularly employ tactics in domestic violence cases to which it is unlikely to resort in a criminal division misdemeanor.

Complaining witness does not testify: It is not unusual for a complaining witness in a domestic violence case to refuse to appear for trial or recant on the stand. As a result, prosecutors with the Domestic Violence Section of the USAO are trained to think about putting together cases under these circumstances. Thus, it is not safe to assume that a case will be dismissed for want of prosecution should the complainant fail to appear. The government will often attempt to make a case with hearsay evidence, arguing one of the exceptions to the rule against hearsay. *See supra* Chapter 31. Probably the most often used exception is the spontaneous or excited utterance. The vehicles through which the government may attempt to bring in such evidence are varied. Common sources of hearsay evidence include 911 calls or other recorded communications and the testimony of an officer or other witness who has talked to the complainant.[9] It is therefore critical that the defense attorney know the facts of the case, anticipate the types of evidence the government may seek to admit, and be prepared to deal with that evidence at trial. Counsel should be prepared to raise objections based on *Crawford*. Counsel should be prepared to argue *Hammond*/*Davis* issues regarding the admissibility of any alleged excited utterances.

Witness Privileges: Another issue that is likely to arise in a domestic violence misdemeanor case is the issue of witness privileges. Because of the nature of domestic violence case, it is not unusual for a complainant to have a testimonial privilege. In domestic violence cases it is often the case that violence between a defendant and complainant is mutual. Therefore, if the complainant testifies he or she may be exposed to cross examination about his or her assaultive conduct against the defendant (either during the incident at issue or at some previous time). In this situation the complainant will have a Fifth Amendment privilege. *See supra* Chapter 32. It may also be the case that the complainant has a spousal privilege. *See supra* Chapter 32. It is therefore important that an attorney who represents a complainant in a domestic violence case be familiar with the law on testimonial privileges so that the client may be well informed before deciding whether to waive his or her privilege.

Motivation to Fabricate: It is also important, as with any criminal case, that the defense attorney representing a client in a domestic violence case be familiar with possible motives for a complainant to fabricate an allegation. It is always helpful to think of the possible benefits a complainant may receive as a result of a guilty verdict against your client. Along those lines, the defense attorney should always find out whether any pending civil litigation involving the defendant and the complainant exists. The most obvious type of civil matter is an intra-family case ("IF" case discussed below, *see infra* Section III). If such an intra-family jacket exists, the

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[9] As with any criminal case, certain materials are not provided to the defense attorney pre-trial, despite a request under Rule 16, because the government views the materials as "statements made by government witnesses or prospective government witnesses," and therefore only producible pursuant to 18 U.S.C. § 3500 (The Jencks Act). *See* Super. Ct. R. 16(a)(2); *see also supra* Chapter 25. However, keep in mind that Rule 16(c) places upon the government a continuing duty to disclose requested information. Pursuant to this Rule, if materials, which were not discoverable when requested, become discoverable the government must provide the defense with that information. It follows that if, at any point, the government realizes that a witness is not available for trial, any statements of that witness which were previously undisclosed under Rule 16(a)(2) must be provided to the defense. This will most likely arise in the context of a complainant who made a 911 call. At the point the government realizes the complainant is unavailable, the 911 call becomes producible under Rule 16. Defense attorneys may want to consider requesting that the government ascertain the availability of their witnesses well in advance of trial so that the defense will not be in the position of having to request a continuance because the discoverable material discussed above is not produced until the day of trial.

defense attorney should be certain to obtain a copy as well as transcripts of hearings particularly where testimony is given. The petition will set forth the type of relief the complainant/petitioner sought from the defendant which, in turn, can help establish a theory for motive. Property and monetary relief are the most common, but there may be others. (In addition, statements made on the petition, or in a hearing on a request for a TPO, are potentially useful impeachment.) Other civil matters that may exist in domestic relationships include divorce cases and paternity and support cases. An attempt to gain an advantage in a pending civil matter is an obvious potential motive to allege criminal conduct.

Along these lines, the defense attorney should be aware that if custody of a child is an issue, a finding by a judicial officer that an intra-family offense has occurred creates a rebuttable presumption against the offender having custody of, or visitation with, the child, D.C. Code § 16-1005(c-1) (discussed below), making an intra-family offense allegation a potential weapon in a custody dispute.

Domestic violence cases require intensive investigation. In addition to being aware of any related cases (particularly family court cases) thorough investigation should be done into the complainant and the relationship between the complainant and the client. For example, among other investigation, family members should be spoken to, criminal background checks should be done, prior complaints by the complainant and prior relationships should be investigated, in the case of a child complainant school records.

At Trial:

- ✓ Counsel should review law on testimonial privilege. *See supra* Chapter 32.
- ✓ Raise objections based on *Crawford*, where appropriate, if complainant does not testify
- ✓ Explore ANY motivations to fabricate

III. CIVIL PROTECTION ORDERS AND RELATED ISSUES

In 1970, Congress created a civil remedy for victims of domestic violence. That remedy, codified as the D.C. Intra-family Offenses Act, D.C. Code § 16-1001 *et seq.*, authorizes the Superior Court's Family Division to issue injunctions and other civil remedies in cases where a person commits, or threatens to commit, a criminal offense against someone with whom he or she has an intra-family relationship.[10] *See also Murphy v. Okeke*, 951 A.2d 783 (D.C. 2008)(unlawful entry may serve as a basis for a CPO because statute is designed to protect person as well as property; however, it was reversible error when the court issued a TPO under the rationale that the respondent was "triggering" violence in the petitioner). The remedy, a Civil Protection Order (CPO), may last up to one year, and may be extended or modified upon a showing of good cause. D.C. Code § 16-1005(d).

[10] *See supra* note 2 (D.C. Code § 16-1005(A)(B)).

2014 Supplement

***J.O. v. O.E.*, 100 A.3d 478 (D.C. 2014).** Because trial judge's reasons for denying petition for CPO were "too cryptic and opaque" to understand, and may have included an improper reliance on appellee's testimony regarding his sexual orientation, decision vacated and case remanded for judge to make determination "without reliance on a flawed rationale" (here, an assumption that a self-described heterosexual man will not make sexual advances against another man).

A. Initiating the Process

1. Intake

An individual seeking a CPO is referred to as a petitioner. The person against whom the CPO is sought is referred to as a respondent. When a petitioner decides to initiate CPO proceedings he or she is referred to the Domestic Violence Intake Center (DVIC), located in Room 4235 of Superior Court of the District of Columbia. If an alleged intra-family offense results in the police being called, the police are required to instruct complainants in domestic violence cases to report to the DVIC no later than 8:30 a.m., the morning after an assault complaint is reported. MPD General Order 304.11(I)(A)(6)(f).

Once at the DVIC, the petitioner is interviewed by a DVIC intake worker. DVIC personnel do not function as attorneys for the petitioner. They will, however, explain the applicable criminal and civil procedures and make referrals to service providers. DVIC personnel will also assist the petitioner in drafting pleadings for a CPO. The basic pleadings include a petition for a CPO and an affidavit in support thereof (normally these are combined into one document completed on a pre-printed form). The petition and the affidavit must be sworn to by the petitioner. Intra-family Rule 2. The petition and affidavit detail the relationship between the parties, the allegations of illegal conduct, and the requested remedies.

This process begins an intra-family case. The case is given an "IF" number. The documentation associated with the case is filed in the IF jacket. All open (and select closed) IF jackets are housed in the Domestic Violence Clerk's Office.

2. Temporary Protection Order ("TPO")

When the petitioner believes himself or herself to be in immediate danger, he or she may seek a Temporary Protection Order (TPO).[11] A TPO is an emergency order usually enjoining the respondent from having contact with the petitioner until a hearing on the CPO, although a TPO may contain the full range of civil remedies that a CPO may include.[12] Domestic Violence Unit Rule 7(a)(2). A TPO lasts up to fourteen days from the date it is issued, *id*.; D.C. Code § 16-1004(d), unless extended by court order. A hearing on the request for the CPO must be scheduled to take place within this two-week period. D.C. Code § 16-1004(d). The potential consequences for violating a TPO mirror those for violating a CPO. *See infra* Subsection H.

[11] D.C. Code § 16-1004(d) and Domestic Violence Unit Rule 7 establish TPO standards and procedures.

[12] Those remedies are set forth in D.C. Code § 16-1005(c).

To obtain a TPO, the petitioner need only make an oral motion to the clerk upon filing a petition for a CPO. The petitioner will automatically be granted an *ex parte* hearing before a judge. At that hearing, the petitioner must show that "the safety or welfare of a family member is immediately endangered." D.C. Code § 16-1004. Although the respondent does not have a right to be present at this hearing, it will be recorded. Counsel should order the transcript in preparation for the CPO hearing and/or the criminal trial.

3. Service

After an application for a CPO is completed, it must be served on the respondent. Dom. Violence Unit R.3. If the CPO motion is filed after the respondent has been arrested on a domestic violence criminal charge, the CPO petition and affidavit usually will be served on the respondent in Courtroom C-10 at the arraignment or presentment on the criminal charge. If a TPO has been granted, it likely will be served at the same time. If the respondent has not been arrested prior to the filing of a petition for a CPO, the respondent must be served personally pursuant to Dom.Violence Unit R. 3. Proof of service, as set forth in Domestic Violence Unit R. 3(c), must be returned to the Clerk's office and will be filed in the IF court jacket.

B. Discovery

The respondent is entitled to make an application to the court requesting discovery pursuant to Domestic Violence Unit R. 8. The rule states in part:

> For good cause shown and with due regard to the summary nature of the proceedings, the court may authorize a party to proceed with discovery from the other party by requests for written interrogatories or production of documents. Other Superior Court Civil Rules of discovery available against non-parties may be utilized if approved by the court. Requests for reports from the Metropolitan Police Department may be made directly to the Department. . . . Every application for discovery must state whether there is a criminal proceeding pending involving the facts alleged in the petition.

Scope: Unless the court directs otherwise, "discovery is limited to matters directly relating to the incident or incidents of abuse alleged in the petition or answer, and to medical treatment obtained as a result of those incidents." Dom. Violence Unit R. 8(a)(1). Note, however, that the rule does grant the court broad discretion to limit or expand the scope of discovery.

Procedures: Because the CPO hearing will be set within two weeks of the petition's filing, all procedures are on a fast track. Applications for discovery must be made within *five calendar days* of service. The rules generally do not permit enlargement of time for discovery where such enlargement will delay the scheduled hearing on the CPO motion. Responses to authorized discovery requests must be filed with the opposing party *and* with the Domestic Violence Clerk's Office no later than two days before the hearing.

See Appendix A for a sample Application For Authorization to Proceed With Discovery.

C. The Hearing

Throughout the process, a respondent must be mindful of the fact that, if not already charged with a crime, he or she potentially may be criminally charged. This fact should be relayed to the respondent because it will affect his or her decisions at every stage of the proceedings.

On the day of the scheduled hearing, a domestic violence court mediator will approach the parties to discuss a consent CPO. A consent CPO is an agreement between the parties that a CPO will issue with neither side objecting to a set of remedies. The court will inquire of both parties to insure that there is voluntary consent and that the terms and conditions of the CPO are understood. Dom. Violence Unit R. 11(b). If the consent CPO is adopted by the court, no evidentiary hearing will occur.

An attorney representing a respondent must keep in mind that any communications between the respondent and the mediator are not confidential. Such communications must therefore be appropriately limited. Under no circumstances should the respondent discuss the underlying facts of the case. If the respondent is represented by counsel, all communications should be conducted through the attorney.

If no consent order is reached, the court will hold an evidentiary hearing. Both parties may be represented by counsel, but neither party has the right to a court-appointed attorney. *See Cloutterbuck v. Cloutterbuck*, 556 A.2d 1082 (D.C. 1989). In some cases, the petition for a CPO will be filed by the Office of the Attorney General. Where the Office of the Attorney General has filed the petition or a motion related thereto, the Office of the Attorney General will represent the petitioner at the hearing. Dom. Violence Unit R. 9.

Neither party has the right to a jury for a CPO hearing; all findings are made by the presiding judge. Dom. Violence Unit R. 9(b)(2). Each party has the right to introduce testimonial and physical evidence, with the provisos that all testimony be given under oath and that all evidence meet basic standards of relevance, competence, and materiality. Dom. Violence Unit R. 9(b)(3)(A) and (b)(4)(A). The spousal privilege codified at D.C. Code § 14-306 is inapplicable in CPO hearings, although all testimony compelled over a claim of that privilege is inadmissible in a criminal trial if the objection is maintained at the criminal trial. D.C. Code § 16-1005; Dom. Violence Unit R. 9(b)(4)(B). In addition, if the respondent testifies, his or her testimony, and the fruits of that testimony, is inadmissible in a criminal trial except in a prosecution for perjury or false statement. D.C. Code § 16-1002(c); Dom.Violence Unit R. 9(b)(5).[13]

[13] While § 16-1002(c) provides limited protection to a respondent who chooses to testify at a CPO hearing, it does not provide protection sufficient to supplant the respondent's Fifth Amendment privilege against self-incrimination. *Cf.* 18 U.S.C. § 6002 (Federal immunity statute protects immunized witness not only at a subsequent criminal trial but in "any criminal case"). In order for a statute to supplant a person's Fifth Amendment privilege it must provide protection commensurate to that afforded by the Constitution of the United States. *See Kastigar v. United States*, 406 U.S. 441 (1972). The Fifth Amendment protects a person from being compelled to provide testimony that may be used against him "in any criminal case." *See* U.S. Const. Amend. 5; *Mitchell v. United States*, 526 U.S. 314, 327 (1999). This protection clearly extends beyond merely protecting the witness at a future trial, but ensures that a witness can't be compelled to provide testimony that may be used against him or her at other proceedings in a criminal case. *See Mitchell* (sentencing); *United States v. Oliver North*, 920 F.2d 940 (D.C. Cir. 1990) (grand jury).

The burden of proof rests with the petitioner but is quite low. If the court finds there is "good cause" to believe the allegations in the petition and that those allegations constitute an intra-family offense, the court, while not required to do so, may issue the CPO. D.C. Code § 16-1005(c); Dom. Violence Unit R. 9(b)(6). The "good cause" language has been held to mean a preponderance of the evidence standard. *Cruz-Foster v. Foster*, 597 A.2d 927, 930 (D.C. 1991).

The court must articulate factual findings sufficient for an appellate court to review its rulings on whether good cause exists. *Thomas v. Thomas*, 477 A.2d 728 (D.C. 1984).

D. Remedies

If the court issues the CPO, it has a broad range of remedies available. These remedies are detailed in D.C. Code § 16-1005(c) and include: stay away orders; compulsory psychiatric, psychological, and medical treatment; directing the respondent to refrain from entering a dwelling when the petitioner has some ownership or leasehold interest in the dwelling; compelling relinquishment of use of personal property in which the petitioner has some ownership interest; awarding temporary custody of a minor child of the parties and determining visitation rights; awarding litigation costs, attorney fees, and other monetary relief; directing the parties to participate in or refrain from other activities appropriate to the effective resolution of the matter; and directing MPD to take such action as the court deems necessary to enforce its orders. D.C. Code § 16-1005(c); Dom. Violence Unit R. 11(e); *see also Powell v. Powell*, 547 A.2d 973 (D.C. 1988). The court's authority to grant monetary awards is not explicitly detailed in the Code or rules. In *Powell v. Powell*, 547 A.2d 973 (D.C. 1988), the Court of Appeals read the catchall provision of D.C. Code § 16-100(c)(10), permitting the trial court to compel "physical actions," as implicitly authorizing an order to provide monetary relief. Such an order, may not, however, be for the purpose of punishment. The trial court is still guided by the principle that remedies must be designed to "accomplish an effective resolution of the matter of family violence before the [trial] court." *Id*. at 975; *see also Mabry v. Demery*, 707 A.2d 49 (D.C. 1998).

E. Custody

If the court finds good cause that an intra-family offense occurred, the court must make additional findings when it addresses the questions of visitation and custody of a minor child. If the court finds by a preponderance of the evidence that a party has committed an intra-family offense, that party then bears the burden of "proving that visitation will not endanger the child or significantly impair the child's emotional development." D.C. Code § 16-1005(c-1). For the court to grant custody or visitation to a parent found to be abusive, the court must issue a written order stating the factors supporting that parent's having such rights. Practitioners should have available witnesses and other evidence that help prove the respondent's fitness as a parent in all cases where minor children are involved.

Because § 16-1002(c) does not protect a respondent from having his or her testimony used against him or her in other, non-trial, criminal proceedings, it is insufficient to supplant the Fifth Amendment privilege.

F. Paternity and Support

The court has the authority to award monetary relief, such as child support, pursuant to D.C. Code § 16-1005(c)(10) if it determines that such an award is "appropriate to the effective resolution of the matter." *Powell*, 547 A.2d at 974 (quoting D.C. Code § 16-1005(c)(10)). However, such an award expires when the CPO expires. Alternatively, a representative from the Office of Paternity and Support Enforcement is available in the DVIC to assist petitioners in filing permanent child support actions if they choose. In such a case, there will be a separate paternity and support (P&S) case housed in the Domestic Violence Clerk's Office, and sent to court, along with the IF case as long as the IF case is open.

1. Paternity Determination

Paternity must be established by a preponderance of the evidence before a child support award may be entered. Under certain circumstances there is a rebuttable presumption that the respondent is the father. *See* D.C. Code § 16-909.

In other situations, paternity must be established. Paternity may be established by voluntary acknowledgment by the respondent or through paternity testing. *See* D.C. Code § 16-909.1. Paternity may be established by the respondent acknowledging paternity under oath. If the respondent wishes to contest paternity, the respondent may ask the judge or hearing commissioner to order a paternity test. Alternatively, if paternity is contested, the judge or hearing commissioner may choose to order a paternity test.

The test is conducted in the courthouse. It will give a probability that the respondent is the father. Following the test, the respondent will again be asked to admit or deny paternity. If the respondent denies paternity he is entitled to a trial on the issue. However, the blood test will be used as evidence against the respondent. If a blood test is ordered and the respondent is found to be the father, he will be required to pay for the testing. *See generally* D.C. Code § 16-908-909.2, and § 16-2342.1-2343.1.

2. Support

Once paternity is established, an award of child support will be ordered to be paid based on the Child Support Guideline. The Guideline is found at D.C. Code 16-916.1. Although presumptively applicable, the Guideline amounts are not fixed, but rather provide a framework for the judicial officer to use in making an award determination.

G. Motions to Modify or Extend CPO

"Upon written motion of any party to the original proceeding, the court may extend, rescind, or modify a CPO for good cause shown." Intra-family Rule 11(f). If one of the parties to a CPO wishes to move the court to modify any condition contained within, he or she must file a written motion with the court. Form motions are available in the DVIC.

CPOs may not be modified without the court's approval. Unless the parties return to court to modify the CPO, they cannot eliminate the danger of arrest and/or contempt adjudication for violation of its terms. If a petitioner wishes to extend the CPO he or she must demonstrate good cause as to why he or she is still in need of protection. The court may not, *sua sponte*, extend a CPO. *Adams v. Ferrcira*, 741 A. 2d 1046, 1047-48 (D.C. 1999).

H. Penalties for Violation

Violating either a TPO or CPO is a criminal offense. There are two ways in which criminal charges may be brought against a respondent if he or she is alleged to have violated any condition of either a TPO or CPO. The first way is for the USAO to charge an alleged violator with a misdemeanor, pursuant to D.C. Code § 16-1005(g). If convicted, the maximum punishment for each count is 180 days and/or a fine of $1,000. If a defendant is charged under § 16-1005(g), the Superior Court Rules of Criminal Procedure apply.

Alternatively, a respondent who is alleged to have violated either a TPO or CPO, or who fails to appear at an intra-family hearing after receiving notice to do so, may be charged with criminal contempt. The next section discusses criminal contempt in the context of the Domestic Violence Unit.

Civil Protection Orders:

- ✓ Order transcripts from *ex parte* TPO hearings in preparation for CPO hearing or criminal trial
- ✓ Discovery must be made within five calendar days of service of CPO motion
- ✓ Counsel should be mindful that even if the client has not been charged with a crime, he or she MAY later be charged
  - Communication should always be conducted in the presence of the attorney to avoid issues of self-incrimination
- ✓ If court finds good cause that an intra-family offense occurred, counsel should have witnesses available to prove that respondent is fit to be a parent if custody is at issue

IV. CONTEMPT

The court has available to it the threat of criminal or civil contempt. *See supra* Chapter 39.

D.C. Code § 16-1005(f) provides that [v]iolation of any temporary or permanent protection order issued under this subchapter and failure to appear as provided in subsection (a) shall be punishable as contempt. Where the court finds that a respondent has not complied with a TPO or CPO, and the court wishes to bring the respondent into compliance (for example, where the respondent has failed to make required payments to the petitioner), the appropriate action is for the court to use its civil contempt powers. However, when the court seeks to punish the respondent for failure to abide by the conditions set forth in the TPO or CPO – or for failure to appear at a hearing for which the respondent had notice – the court may use its criminal

contempt powers. Criminal contempt proceedings brought under District of Columbia's intra-family offense statute is prosecuted in name of beneficiary of court order, not in name of United States or District of Columbia. *In re Robertson*, 940 A.2d 1050 (D.C. 2008) Therefore, contempt proceeding brought under intra-family offense statute are not barred by plea agreement with USAO where neither District of Columbia nor beneficiary of court order named anywhere on plea agreement form. *Id*. Criminal contempt proceedings are procedurally different in the Domestic Violence Unit than in other contexts. The discussion in Chapter 39 is generally applicable to criminal contempt proceedings in the Domestic Violence Unit. However, there are some important differences in Domestic Violence Unit criminal contempt cases. The focus of this subsection is to address those differences.

Constitutional Rights and Criminal Contempt: The practitioner must keep in mind that constitutional principles, applicable in all criminal proceedings, also hold true in criminal contempt cases in domestic violence court. The principles which must be kept in mind with respect to these proceedings are: (1) that the criminal contempt proceeding is unquestionably a criminal case; (2) that this proceeding is separate from the underlying civil matter; (3) that because the contempt proceeding is a criminal case, the defendant must be afforded all constitutional protections required of criminal proceedings; (4) that only the court may initiate criminal contempt proceedings (unless initiated by the grand jury at the behest of the executive branch by way of indictment); and (5) that the petitioner is not herself a party to this criminal proceeding.

There are two phenomena that help explain why the application of the above-mentioned principles to these proceedings is often overlooked. The first is the role the petitioner to the underlying CPO plays in initiating and litigating the contempt. The petitioner's role makes the contempt proceeding appear to be an extension of the civil matter. The second is the decision in *Green v. Green*, 642 A.2d 1275 (D.C. 1994). Each of these factors is discussed in detail below.

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***In re Robertson*, 19 A.3d 751 (D.C. 2011), *vacating In re Robertson*, 940 A.2d 1050 (D.C. 2008).** See, *supra*, Chapter 39.III.A.

***Williams v. United States*, 51 A.3d 1273 (D.C. 2012).** Although no direct evidence to show that a stay-away order was in effect during specific dates, evidence sufficient for jury to conclude there was a valid court order in place and that defendant had intentionally violated it.

A. The Role of the Petitioner

The petitioner may file a motion to adjudicate criminal contempt if he or she believes a TPO or CPO has been violated. By filing the motion, the petitioner initiates the criminal contempt process. The motion to adjudicate criminal contempt has the same caption as the underlying CPO case, which adds to the confusion over whether the contempt is a separate matter. The petitioner himself or herself, or his or her attorney, often will prosecute the criminal contempt, thereby further reinforcing the erroneous notion that he or she is a party to the criminal contempt proceeding. *See Green*, 642 A.2d 1275 (holding that it is not error to allow a private prosecution

in a criminal contempt arising out of a CPO violation). The unique role of the petitioner in the contempt proceedings increases the risk that not everyone will realize that the contempt is in fact a criminal proceeding and that all constitutional protections applicable to any criminal defendant apply.

The Supreme Court has made clear that "'[c]riminal contempt is a crime in the ordinary sense,' and 'criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings.'" *International Union, United Mineworkers of America v. Bagwell*, 512 U.S. 821, 826 (1994); *see also United States v. Dixon*, 509 U.S. 688, 696 (1993) (holding that nonsummary criminal contempt is a "crime in the ordinary sense" and that "constitutional protections for criminal defendants . . . apply in nonsummary criminal contempts as they do in other criminal prosecutions."); *Bloom v. State of Illinois*, 391 U.S. 194, 201 (1968) (holding that "criminal contempt is a crime in every fundamental respect").

It is equally true that the petitioner is not a party to the criminal contempt, as "criminal contempt proceedings arising out of civil litigation 'are between the public and the defendant, and are not part of the original cause.'" *Young v. United States ex rel. Vuitton et fils*, 481 U.S. 787, 804 (1978) (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 445 (1911)).

Criminal contempt is, by definition, an offense against the dignity and authority of the court. The sole purpose of a criminal contempt proceeding is to vindicate the authority of the court. *See Young*, 481 U.S. at 796 (the purpose of contempt proceedings is to "'vindicate the jurisdiction and authority of courts to enforce orders and to punish acts of disobedience'") (citations omitted). "Indeed, the role of criminal contempt and that of many ordinary criminal laws seem identical – protection of the institutions of our government and enforcement of their mandates." *Bloom*, 391 U.S. at 201.

Because the purpose of the criminal contempt proceeding is to redress an injury to the court, and thereby the public, it is for the court – and only the court – to determine whether to initiate such proceedings. The beneficiary of a CPO cannot compel a court to punish a violation of its order. Such a decision is left to the discretion of the court. *See N.L.R.B. v. A-Plus Roofing, Inc.*, 39 F.3d 1410 (9th Cir. 1994) (holding that the prosecutorial decision in a criminal contempt may not be delegated to any party other than the court and the grand jury); *Department of Health v. Roselle*, 169 A.2d 153, 159 (N.J. 1961) (holding that the decision to bring contempt charges must be the court's and only the court's).

While the contemptuous conduct may be an act directed at the petitioner in the civil matter, making him or her a complainant in the contempt case, the petitioner is not a party to the criminal contempt. "The litigant's role is to acquaint the court, rather than to level the charge." *Roselle*, 169 A.2d at 159. Indeed, the role of the petitioner from the original case should be extremely limited:

> [A] private person, as informant, is not a proper party to a criminal contempt proceeding. His only office in such a proceeding is served when he calls to the court's attention facts which may constitute criminal contempt. Having done so,

> the matter is out of his hands, and further proceedings are conducted through the office of the court or the United States as the representative of the public, in vindication of the court's dignity and authority . . . Whether such a proceeding should be instituted is a matter concerning [the alleged contemnor] and the public, in which [a party's] interest is no greater than that of every member of the general public.

Ramos Colon v. U.S. Att'y, 576 F.2d 1, 5 (1st Cir. 1978) (quoting *Kienle v. Jewel Tea Co.*, 222 F.2d 98, 100 (7th Cir. 1955)).

Therefore, regardless of one's interpretation of the Court of Appeals' holding in *Green* (discussed below), it is clear that the contempt proceeding is a criminal case between the defendant and the public. It is equally true that even though the petitioner may have an active role in the prosecution of that case, he or she is not a party to it.

Violating TPO or CPO:

- ✓ Violation may be punishable as contempt
- ✓ For criminal contempt, constitutional principles apply, as it is a criminal case
- ✓ Counsel should be present at the hearing
- ✓ Discovery is made under Dom. Violence Unit R. 8 (not Super. Ct. Crim. R. 16 or 26.2)

B. The *Green* Decision

While it is undoubtedly true that the principles discussed above apply to domestic violence criminal contempt proceedings, the *Green* decision was issued in response to a challenge to a different practice, which is common in domestic violence contempt cases. In *Green*, the petitioner prosecuted the defendant with advice from her own attorney. The appellant in *Green* argued that he was entitled to a disinterested public prosecutor. The appellant relied heavily on *Young*, 481 U.S. 787. In *Young*, the Supreme Court held that "counsel for a party that is the beneficiary of a court order may not be appointed to undertake contempt prosecutions for alleged violations." In that case, the petitioners (Young and Klayminc) consented to a court ordered injunction prohibiting them from infringing on the trademark of respondent (Vuitton). The court subsequently found probable cause to believe that petitioners violated the court order. The court, therefore, granted the request of respondent's attorneys to prosecute a criminal contempt against petitioners. The criminal contempt was prosecuted pursuant to Fed. R. Crim. P. 42(b). The petitioners argued on appeal that the district court erred in appointing respondent's attorneys, rather than a disinterested attorney, to prosecute the criminal contempt. The Supreme Court reversed the convictions exercising its supervisory authority to hold that, in criminal contempt prosecutions pursuant to Fed. R. Crim. P. 42(b), the court must appoint a *disinterested* prosecutor. Rejecting respondent's request that it undertake a harmless error analysis, the Court further held that appointment of an interested prosecutor in a criminal contempt prosecution is an

"error [which] '[is] so fundamental and pervasive that [it] requires reversal without regard to the facts or circumstances of the particular case.'" *Young* at 809-10.[14]

Distinguishing the *Green* case from *Young*, the District of Columbia Court of Appeals held that it was not error for the trial court to allow the petitioner to prosecute a criminal contempt arising from a CPO of which she was the beneficiary. Because the contempt in *Green* was brought pursuant to § 16-1005(g) and not Federal Rule of Criminal Procedure 42(b), the court held that *Young* was inapplicable and, therefore, it was not error for the trial court in *Green* to fail to appoint a disinterested prosecutor. In so ruling, the court concluded that the legislature intended to allow a petitioner to act as a private prosecutor in the case where a disinterested prosecutor was not available, recognizing the importance of having criminal contempts prosecuted in situations where vindicating the court's authority was necessary to protect victims of domestic violence.

The *Young* Court did not find a constitutional violation because it did not reach the question of whether any prosecutorial impropriety occurred. Instead, it used its supervisory authority to forbid the appointment of an interested prosecutor in criminal contempts brought under Fed. R. 42, holding that the "potential for private interest to influence the discharge of public duty" is enough to forbid such a practice. *See Young* at 2136-7. The court in *Green* declined to reach such a blanket conclusion, holding that the importance of enforcing CPOs outweighs the concern about potential prosecutorial impropriety. Nevertheless, the potential for such prosecutorial impropriety certainly exists when the petitioner, or his or her attorney, serves as prosecutor. It is certainly the obligation of the court to strive to ensure that "a private attorney appointed to prosecute a criminal contempt . . . ought to be as disinterested as a public prosecutor who undertakes such a prosecution." *Young* at 2136.

However, while *Green* is somewhat vague, it certainly does not – and indeed, constitutionally, could not – stand for the proposition that criminal contempts in domestic violence court are between the petitioner, as opposed to the sovereign, and the defendant. Furthermore, *Green* cannot disturb the unambiguous precedent that the constitutional protections afforded criminal defendants are equally afforded defendants in criminal contempt. It is unarguable that the alleged contemnor is afforded constitutional protections including the presumption of innocence, a reasonable doubt standard, the guarantee against self-incrimination, notice of charges, assistance of counsel, and the right to present a defense – all constitutional protections explicitly afforded the defendant in criminal contempt. *See Dixon*, 509 U.S. at 696; *see also Hicks v. Feiock*, 485 U.S. 624, 632 (1988) (distinguishing criminal from civil contempt, the Court held that "[it is a] fundamental proposition that criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal proceedings").

Just as it is undoubtedly true that constitutional protections apply to defendants in criminal contempt cases, it is equally, and necessarily true that the matter is between the public and the contemnor. Once the matter is referred to the court for consideration, the court must exercise discretion in determining whether the contempt should be prosecuted. "[Such] power should be

[14] The District of Columbia Court of Appeals recently adopted this holding in *Young* but made an exception for the "specified circumstances presented in *Green*." *In re Francine Peak*, 759 A.2d 612 (D.C. 2000).

used sparingly." *Roselle*, 169 A.2d at 159. By filing a motion to adjudicate criminal contempt, the petitioner is requesting that the court initiate contempt proceedings. The defense attorney must not lose sight of the fact that the prosecution is the court's, not the petitioner's. Therefore, even if the petitioner is acting as the prosecutor, all constitutional protections must apply.

Because it will be difficult for a layperson to understand and honor his or her obligations as a prosecutor, the defense attorney should consider requesting a public prosecutor to facilitate the litigation. In addition, should the court deny a request for a public prosecutor, *Young* leaves open the question of whether a showing that the private prosecutor is not disinterested may be the basis for a Due Process violation, as that question was not reached.

C. Discovery

The court in *Green* held that the Rules of Criminal Procedure are not applicable to criminal contempt proceedings brought for an alleged violation of a CPO. Therefore, the court went on to find that neither Superior Court Criminal Rule 16 nor 26.2 applies to these contempt cases. As a result, counsel for a defendant in a criminal contempt proceeding in the Domestic Violence Unit must proceed with discovery pursuant to Dom. Violence Unit R. 8. The most recent Domestic Violence Unit Rules set forth discovery methods for criminal contempt, which closely mirror Superior Court Criminal Rule 16. *See* Dom. Violence Unit R. 8(b). In the comment to Dom. Violence Unit R. 8, the Board of Judges makes clear the preference for publicly prosecuted criminal contempt changes. In publicly prosecuted contempt cases, the defendant may make discovery requests directly upon the prosecutor. In situations where the court has appointed a private prosecutor, discovery requests must be approved by the court.

D. Right to a Jury

The Rules governing proceedings in the Domestic Violence Unit omitted the six-month limitation on the sentence a judge may impose in a contempt case that was explicit in the former Intra-family Rules. *See* Rule 12. Therefore, the only limitation upon a judge's discretion at sentencing in this context is the rule of proportionality set forth in *Caldwell v. United States*, 595 A.2d 961 (D.C. 1991). Unless the judge is willing to commit to limiting the defendant's exposure to six months or less, the defendant is entitled to a jury trial. *See Codispoti v. Pennsylvania*, 418 U.S. 595 (1974); D.C. Code § 16-705(b)(1); *see also In re Robertson*, 940 A.2d 1050 (demand for jury trial properly rejected because maximum statutory penalty for violation of civil protection order is $1,000 or incarceration up to 180 days, regardless of restitution amount ordered (here, $10,000).

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***In re Robertson*, 19 A.3d 751 (D.C. 2011), *vacating In re Robertson*, 940 A.2d 1050 (D.C. 2008).** Demand for jury trial properly rejected despite amount of restitution ordered ($10,000) because maximum statutory penalty for violation of civil protection order is $1,000 or incarceration up to 180 days.

APPENDIX A

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Domestic Violence Unit

_____, Petitioner,	**:**	
	:	**Docket No. IF _____**
v.	**:**	**Judge _____**
	:	**Hearing: _____**
_____, Respondent.	**:**	

APPLICATION FOR AUTHORIZATION TO PROCEED WITH DISCOVERY

Respondent _____, through undersigned counsel, respectfully moves this honorable Court, pursuant to Superior Court Rule of Intra-Family Proceedings 8, for authorization to proceed with discovery from petitioner, _____, by requests for written interrogatories and production of documents.

In support of this Motion counsel states:

1. On _____, A Petition and Affidavit For a Civil Protection Order ("Petition") and accompanying Notice of Hearing and Order to Appear was served upon respondent. The Petition alleges that: _____
_____
_____
_____
_____

2. In her Petition, petitioner requests the following relief from this honorable Court: _____
_____
_____
_____
_____

3. Superior Court Intra-Family Rule 8(a) governs discovery in intra-family proceedings. Pursuant to Rule 8(a), the Court may authorize a party to proceed with discovery from the other party by requests for written interrogatories or production of documents.

4. In order that he/she may adequately defend against the allegations in the Petition, respondent respectfully requests that this honorable Court, through issuance of the attached

proposed order, authorize his proposed request for production of documents and his proposed interrogatories.[15]

5. Respondent further requests that responses to his discovery requests be served on his attorney, _____, at the following address: _____
_____
_____

6. Pursuant to Superior Court Intra-Family Rule 8(a), counsel submits that there is/is not a criminal proceeding involving the facts alleged in the petition.

WHEREFORE, for the foregoing reasons, and for any such reasons as may appear at a hearing on this Application, respondent respectfully requests that this Application be granted.

Respectfully submitted,

_____
Respondent / Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion, Memorandum of Points and Authorities, and attached Request for Production of Documents and Interrogatories have been served by mail to _____
_____,
this ____ day of _____, _____.

[15] Copies of respondent's proposed Request For Production of Documents and proposed Interrogatories are attached. The format utilized for the Request For Production of Documents is taken from the Superior Court Rules of Civil Procedure, Appendix of Forms, CA Form 24. See Superior Court Rule of Civil Procedure 84.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Domestic Violence Unit

_____, Petitioner,	**:**	
	:	**Docket No. IF _____**
v.	**:**	**Judge _____**
	:	**Hearing: _____**
_____, Respondent.	**:**	

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF APPLICATION FOR
AUTHORIZATION TO PROCEED WITH DISCOVERY

Respondent is before the Court by a Petition For a Civil Protection Order initiated by petitioner in the above-captioned matter. If the Court finds good cause that the allegations in the Petition are true, respondent faces substantial liberty loss and/or a financial loss and a potential term of incarceration should petitioner allege future non-compliance.

Currently, respondent has no more than petitioner's Petition to inform him/her as to the dates and times of the alleged infractions underlying the Petition and the nature of the behavior underlying each alleged infraction. The substance of the allegations alleged in the Petition are limited to the allegations set forth in paragraph 1 of the instant Application for Authorization to Proceed with Discovery.

It is important that respondent be provided information necessary to meet the allegations against him/her. In order to defend against the charges levied in the Petition, respondent must be given notice regarding the exact date, time, and location of each alleged offense, as well as the details of the exact behavior in which he allegedly engaged. Superior Court Intra-Family Rule 8 provides the means through which a respondent may obtain discovery in an Intra-Family proceeding. It was designed to be utilized in the exact scenario presented in the instant case, i.e., to obtain discovery in response to a Petition For a Civil Protection Order. *See generally,* Rule 8 (refers to the "petition" as the document giving rise to discovery requests under the Rule). Rule 8 gives the Court broad discretion to authorize parties to make use of a variety of methods of discovery in general. However, Rule 8(a) specifically allows for the Court to authorize "a party to proceed with discovery from the other party by requests for written interrogatories or production of documents."

Furthermore, Rule 8(f) requires a party to request discovery by written motion, with notice that objections must be filed within three days of service, for all discovery requests by methods other than written interrogatories or requests for production of documents. It is notable that no such requirement exists for these latter two methods of discovery.

The language of Rule 8 suggests that the rulemakers envisioned requests for written interrogatories and production of documents, along with requests for reports from the

Metropolitan Police Department, which are made directly to MPD, as the primary methods to be used to obtain discovery in intra-family proceedings.

Given the vital liberty interest and/or the financial interest at stake with respect to respondent in the above-captioned matter, counsel submits that there has clearly been a showing of good cause to justify the Court's authorization to allow respondent to proceed with discovery as requested in the instant Motion.

WHEREFORE, these reasons, and any others which may appear to the court, respondent respectfully requests that the Court grant his Application for Authorization to Proceed With Discovery.

Respectfully submitted,

_____

Respondent/Attorney for Respondent

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Domestic Violence Unit

_____, Petitioner,	**:**	
	:	**Docket No. IF _____**
v.	**:**	**Judge _____**
	:	**Hearing: _____**
_____, Respondent.	**:**	

ORDER

The Court having considered respondent's Application for Authorization to Proceed With Discovery and [accompanying] Memorandum of Points and Authorities in Support Thereof ("Application"), it is this _____ day of _____, _____, hereby

ORDERED, that counsel for respondent be, and hereby is, authorized to file and serve upon petitioner the Request for Documents attached to the Application, and it is

FURTHER ORDERED, that counsel for respondent be, and hereby is, authorized to file and serve upon petitioner the written interrogatories attached to the Application, and it is

FURTHER ORDERED, that petitioner shall respond to the Request for Documents either by providing copies of the requested documents to counsel for respondent, or by making the requested documents available to counsel for respondent for inspection and copying, and it is

FURTHER ORDERED, that petitioner shall respond in writing to the written interrogatories, and it is

FURTHER ORDERED, that the responses to the Request for Documents and to the written interrogatories be provided to counsel for respondent by the close of business on _____, _____.

_____
Associate Judge
(Signed in Chambers)

Copies to:

[Respondent or Respondent's attorney's address]

[Petitioner or Petitioner's attorney's address]

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Domestic Violence Unit

_____, Petitioner,	**:**	
	:	**Docket No. IF _____**
v.	**:**	**Judge _____**
	:	**Hearing: _____**
_____, Respondent.	**:**	

REQUEST FOR PRODUCTION OF DOCUMENTS

Respondent, _____, requests petitioner, _____, to respond no later than the date to be determined by the Court to the following request:

That petitioner, provide respondent, through counsel, with copies, or in the alternative, permit respondent, through his attorney, to inspect and to copy any documentation, including, but not limited to, taped recordings, photographs, diagrams, letters, medical records and reports, which may be introduced as evidence at, or is in any other way relevant to the subject matter involved in, a hearing on petitioner's Petition For a Civil Protection Order. This request also includes any notes, logs, or diary in which information pertaining to the alleged violations have been recorded.

Signed: _____
Respondent/Attorney for Respondent

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Domestic Violence Unit

_____, Petitioner,	**:**	
	:	**Docket No. IF _____**
v.	**:**	**Judge _____**
	:	**Hearing: _____**
_____, Respondent.	**:**	

INTERROGATORIES

To: _____, petitioner
From: _____, respondent

Pursuant to Rule 8 of the Superior Court Rules of Intra-Family Proceedings, the respondent submits these interrogatories, to be answered by you by a date to be determined by the Court.

[LIST QUESTIONS]

Respectfully submitted,

_____
Respondent/Attorney for Respondent