

TRIAL MANUAL 6

FOR THE DEFENSE OF CRIMINAL CASES

Anthony G. Amsterdam and Randy Hertz

VOLUME ONE

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by Anthony G. Amsterdam and Randy Hertz

The *Trial Manual 6 for the Defense of Criminal Cases* is a guidebook for criminal defense lawyers at the trial level. It covers the information a defense attorney has to know, and the strategic factors s/he should consider, at each of the stages of the criminal trial process. It is organized for easy access by practitioners who need ideas and information quickly in order to jump-start their work at any given stage.

Volume One opens with a general sketch of criminal procedure and an outline of the first things to think about and do in the four common situations in which a defense attorney enters a criminal proceeding. The Volume then proceeds chronologically to cover pretrial proceedings, including bail and other forms of pretrial release; the initial client interview; dealings with police and prosecutors; defense investigation; preliminary hearing; grand jury practice; challenges to indictments and informations; pleas and plea bargaining; diversion; and the wide array of motions that should be considered in any criminal case. Because of the importance of federal (and often state) constitutional law in pretrial motions practice, the chapters on suppression motions and other pretrial motions contain substantial doctrinal analysis presented in a form that permits it to be easily converted into defense briefing.

Volume Two deals with the immediate run-up to trial, the trial itself, sentencing proceedings, and other trial-court proceedings after a guilty verdict or finding. The Volume begins with discussions of the timing of pretrial and trial proceedings; interlocutory review of pretrial rulings; and the concrete steps that counsel will need to take to prepare for trial. The Volume then addresses all aspects of the trial, including the decision to elect or waive jury trial; jury selection procedures and challenges before and at trial; evidentiary issues and objections; techniques and tactics for handling prosecution and defense witnesses; trial motions; opening and closing arguments; requests for jury instructions and objections to them; and jury deliberation. Issues, procedures, and strategies unique to bench trials are discussed in tandem with the parallel aspects of jury-trial practice. The Volume covers posttrial motions and sentencing, and concludes with a short summary of appellate and postconviction procedures and a *précis* of the first steps to be taken in connection with them.

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PART ONE: INTRODUCTION AND OVERVIEW

Chapter 1

Introduction

1.1. *The Nature and Purpose of the Manual*

This *Trial Manual* is a how-to-do-it guidebook for handling criminal cases from beginning to end. It provides a compact guide through the stages of an ordinary criminal case, from arrest and investigation to appeal. Its focus is upon the key points at which defense counsel must make decisions and take actions. Options and factors to be considered in each decision, and steps that can be taken to assert a client's rights and protect the client's interests at each stage, are laid out.

Of course, no criminal case is "ordinary" in any but a highly artificial sense. Every criminal charge is intensely personal to the accused. Every accused person is a complex and unique individual. Every prosecution of an accused is unique in facts and in law, and makes unique demands on the skills of the defense attorney. Every defense attorney has his or her own style. There is no such thing as conducting a criminal defense generally. What is right or advisable in one case or situation is wrong in another. The most important attribute of the good criminal defense lawyer is perceptive selectivity – the ability to determine the precise requirements of each case and to respond to them in a highly specific manner best suited to the particular circumstances.

No book can capture or instill that quality. All that is attempted here is a listing of available options for the lawyer; an identification of the major strategic considerations that may affect choice among the options; an introductory description of the prevailing legal principles and potential legal arguments, procedures, and practical techniques that defense counsel may encounter or may wish to employ; some warnings about common problems; and some suggestions of ways to avoid them or to cope with them. Counsel will have to cull all these things according to his or her own lights and the needs of the particular case and client in making the ultimate decisions what to do, when, and how.

The *Manual* should communicate enough information to dispel the edge of uneasiness that a lawyer without much criminal experience naturally feels when s/he is retained or appointed in a criminal matter. Having at least a general notion of what is coming and what can be done about it rightly inspires some confidence, and confidence is no less important in dealing with a criminal defendant than with any other client. Confidence should not get out of hand, however. Criminal practice is a specialty, and the lawyer with relatively little specialized experience must be careful not to bite off more than s/he can chew. In difficult matters s/he should consider the practicability of consulting (formally or informally, and on a limited or extended basis), associating with, or withdrawing in favor of, a more experienced criminal practitioner.

1.2. *The Structure of the Manual*

The *Manual* proceeds more or less chronologically, moving step-by-step through the process of handling an individual criminal case. It begins with the earliest stages at which defense counsel may enter a case, then advances through the pretrial stages, trial, sentencing and post-trial proceedings.

To make this *Manual* easy to use during court proceedings, we have abandoned various conventions of manual-writing. We take up topics in the order in which they become relevant at each particular stage of a typical prosecution, even when this format requires dispersing substantively related material among different chapters. For example, the topic of suppression of illegally obtained evidence is covered in five different chapters. A section on drafting suppression motions is found in the chapter on motions that need to be filed shortly after arraignment; a later chapter spells out techniques for handling suppression hearings; then come three substantive chapters covering, respectively, motions to suppress tangible evidence, incriminating statements, and identification testimony. The latter chapters summarize the voluminous federal and state law on their respective subjects.

Where judicial opinions are cited to illustrate basic propositions accepted in a majority of state and federal jurisdictions, we have not multiplied citations but have chosen a case or two reported with headnotes that target the proposition in point. By using these headnotes to access the national data bases, attorneys in all jurisdictions can zero in efficiently on the relevant local caselaw.

Citation form in the *Manual* has also been adapted to the realities of trial practice. Thus, for example, a short-form (“*supra*”) citation to a case will only refer back to cases cited within a page or two before the *supra*, so that attorneys consulting the text when arguing a point in a trial or hearing will not need to search far afield for the full citation.

1.3. *The Attorney-Client Relationship*

“The primary duties that defense counsel owe to their clients, to the administration of justice, and as officers of the court, are to serve as their clients’ counselor and advocate with courage and devotion; to ensure that constitutional and other legal rights of their clients are protected; and to render effective, high-quality legal representation with integrity.” AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Standard 4-1.2(b) (4th ed. 2015). The duties of a defense attorney, which “run throughout the period of representation, and even beyond,” include: “(a) a duty of confidentiality regarding information relevant to the client’s representation which duty continues after the representation ends; (b) a duty of loyalty toward the client; (c) a duty of candor toward the court and others, tempered by the duties of confidentiality and loyalty; (d) a duty to communicate and keep the client informed and advised of significant developments and potential options and outcomes; (e) a duty to be well-informed regarding the legal options and developments that can affect a client’s interests during a criminal representation; (f) a duty to continually evaluate the impact that each decision or action may

have at later stages, including trial, sentencing, and post-conviction review; (g) a duty to be open to possible negotiated dispositions of the matter, including the possible benefits and disadvantages of cooperating with the prosecution; (h) a duty to consider the collateral consequences of decisions and actions, including but not limited to the collateral consequences of conviction.” *Id.*, Standard 4-1.3. *See also* AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Rules 1.1 (competence), 1.2 (scope of representation and allocation of authority between client and lawyer), 1.3 (diligence), 1.4 (communication), 1.6 (confidentiality of information) (2015); AMERICAN BAR ASSOCIATION, CODE OF PROFESSIONAL RESPONSIBILITY, Canons 4 (preservation of client confidences and secrets), 6 (competent representation), 7 (zealous representation) (1980).

“Certain decisions relating to the conduct of the case are for the accused; others are for defense counsel. Determining whether a decision is ultimately to be made by the client or by counsel is highly contextual, and counsel should give great weight to strongly held views of a competent client regarding decisions of all kinds.” ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 4-5.2(a). “The decisions ultimately to be made by a competent client, after full consultation with defense counsel, include: (i) whether to proceed without counsel; (ii) what pleas to enter; (iii) whether to accept a plea offer; (iv) whether to cooperate with or provide substantial assistance to the government; (v) whether to waive jury trial; (vi) whether to testify in his or her own behalf; (vii) whether to speak at sentencing; (viii) whether to appeal; and (ix) any other decision that has been determined in the jurisdiction to belong to the client.” *Id.*, Standard 4-5.2(b). *See also Jones v. Barnes*, 463 U.S. 745, 751 (1983) (“[i]t is . . . recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal”); *Florida v. Nixon*, 543 U.S. 175, 187 (2004); *Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000); *Cooke v. State*, 977 A.2d 803, 809, 843 (Del. 2009) (“Here, defense counsel pursued a ‘guilty but mentally ill’ verdict over Cooke’s vociferous and repeated protestations that he was completely innocent and not mentally ill. This strategy deprived Cooke of his constitutional right to make the fundamental decisions regarding his case.”); “We conclude that defense counsel’s strategy infringed upon the defendant’s personal and fundamental constitutional rights to plead not guilty, to testify in his own defense, and to have the contested issue of guilt beyond a reasonable doubt decided by an impartial jury.”); *State v. Humphries*, 181 Wash. 2d 708, 714, 336 P.3d 1121, 1124 (2014) (a defense attorney may not “stipulate an element of the crime [at trial] . . . over the defendant’s known and express objection”). Counsel should advise the client regarding each of these issues and – in addition to informing the client about all relevant information, options, and potential consequences of alternative decisions – counsel may forcefully urge the client to make choices that counsel believes to be in the client’s best interests. However, particularly when it comes to defining those interests – determining the ultimate goals that should be pursued in the litigation – the client has the last word.

In other matters (designing and implementing strategy, formulating the client’s legal contentions, selecting evidence and shaping its presentation, and so forth), the bottom-line judgments are for counsel to make. “An attorney

undoubtedly has a duty to consult with the client regarding ‘important decisions,’ including questions of overarching defense strategy. . . . That obligation, however, does not require counsel to obtain the defendant’s consent to ‘every tactical decision.’ *Taylor v. Illinois*, 484 U.S. 400, 417-418 . . . (1988) (an attorney has authority to manage most aspects of the defense without obtaining his client’s approval).” *Florida v. Nixon*, *supra*, 543 U.S. at 187. *See also Nix v. Whiteside*, 475 U.S. 157, 166 (1986): “[C]ounsel must take all reasonable lawful means to attain the objectives of the client” while remaining obedient to the applicable rules of professional conduct, such as the prohibition against knowingly presenting perjurious testimony.

“Immediately upon appointment or retention, defense counsel should work to establish a relationship of trust and confidence with each client.” ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 4-3.1(a). “Defense counsel should actively work to maintain an effective and regular relationship with all clients,” and this “obligation . . . is not diminished by the fact that the client is in custody” (*id.*, Standard 4-3.1(f)). Even if a “client appears to have a mental impairment or other disability that could adversely affect the representation,” “this does not diminish defense counsel’s obligations to the client, including maintaining a normal attorney-client relationship in so far as possible” (*id.*, Standard 4-3.1(c)). The same is true if the client is a minor or elderly; these cases and cases involving clients with a mental impairment or other disability often require that defense counsel pay “special attention” to “us[ing] language and means that the client is able to understand” (*id.*, Standard 4-3.1(d)). *See also* ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.14(a) (“When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.”).

If counsel reasonably believes that factors such as mental illness or developmental disability so severely “diminish” the client’s “capacity to make adequately considered decisions in connection with the representation . . . [that] a normal client-lawyer relationship with the client” cannot be maintained, and if counsel furthermore “reasonably believes” that the client “is at risk of substantial physical, financial or other harm unless action is taken and [that the client] cannot adequately act in the client’s own interest,” then counsel may take “reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.” *Id.*, Rule 1.14(a), (b).

The preceding principles, honed by scholars and practitioners familiar with the intricacies of criminal defense work, provide an indispensable compass for defense attorneys as they try to navigate the complex world of criminal practice. Yet, even the most experienced, committed defense attorneys will admit to sometimes feeling baffled and frustrated by difficulties in dealing with particular clients. These include, for example, the client who seems hell-bent on doing something that is tactically dangerous; the client who is antagonistic to counsel for no apparent reason (or at least not one that is evident

to counsel); and perhaps even a client whom counsel personally dislikes. In such situations, it is useful for attorneys to remind themselves that criminal defendants usually are under extreme stress, not only because of the criminal charge that hangs over their heads but also because of a variety of difficult life circumstances that comprise the background for the charge. *See generally* STEPHEN ELLMANN, ROBERT D. DINERSTEIN, ISABELLE R. GUNNING, KATHERINE R. KRUSE & ANN C. SHALLECK, *LAWYERS AND CLIENTS: CRITICAL ISSUES IN INTERVIEWING AND COUNSELING* 34-47 (2009); *see also id.* at 6-7 (explaining the ideal of client-centeredness). Also, counsel needs to keep in mind that a client's decisions about the case, including decisions regarding such fundamental matters as whether or not to take a guilty plea, may be influenced by a host of complicated feelings about family and self that the client may not feel comfortable sharing with a stranger like counsel, however well-meaning counsel may be. *See, e.g.*, Binny Miller, *Give Them Back Their Lives: Recognizing Client Narrative in Case Theory*, 93 MICH. L. REV. 485, 570-75 (1994). Defense attorneys should approach this work with a humble recognition of the limits of their ability to understand the circumstances of their clients' lives and relationships, and should reconcile themselves to the sometimes painful reality that faithful adherence to the ethos of defense work requires providing the best possible defense even (and perhaps especially) to the most difficult clients.

Chapter 2

Outline and Flow-Chart of a Criminal Case

2.1. *Different Procedures for Offenses of Differing Seriousness*

Most jurisdictions have two or more distinct sets of criminal procedures to govern charges of differing degrees of gravity. The jurisdictions vary regarding the number of sets of procedures employed (usually two or three), the charges governed by each set, and the particular courts, stages, and practices involved in each set. Local statutes, rules, and customs must be consulted. (In federal practice, for example, criminal prosecutions in the United States District Courts are governed by Rules 1-57 and 59-61 of the Federal Rules of Criminal Procedure; Rule 58 provides a somewhat different set of rules for proceedings in petty-offense and misdemeanor cases.)

The following sections of this chapter provide a brief description of the typical stages in each set of procedures in a three-set jurisdiction. In such a jurisdiction, *summary procedure* is used for petty state charges and for most municipal ordinance violations when ordinance violations are conceived as being criminal rather than civil matters. *Misdemeanor procedure* is used for charges of middling seriousness, and *felony procedure* for serious charges. (The terms *summary procedure*, *misdemeanor procedure*, and *felony procedure* are used as generic artifices here; the boundary between the second and third categories in some jurisdictions corresponds only roughly to the technical felony-misdemeanor line.) From *summary* through *misdemeanor* to *felony procedure*, the process becomes increasingly elaborate and increasingly protracted. A summary defendant may be tried, convicted, and sentenced within hours of arrest. A felony defendant is often not formally charged in the court having jurisdiction to try the charge (that is, s/he is not indicted) for months after arrest.

It is meaningless to generalize about the duration of “ordinary” cases of the three types; the variations within each type are extreme. Counsel principally familiar with civil litigation will notice, however, that the pace of criminal litigation is generally far more rapid. The early stages (through bind-over) are usually completed within days or weeks, and (except when the defendant is serving a sentence on another conviction) there is nothing like the years of pretrial delay common in civil cases.

2.2. *Summary Procedure*

2.2.1. *Complaint and Warrant or Summons*

Summary cases ordinarily begin with the filing of a complaint against the defendant before a member of the minor judiciary [hereafter called, generically, a magistrate]. The complainant, who may be a private citizen or a police officer, appears before the magistrate and signs and swears to a written (often printed-form) document, called the complaint, which describes what the defendant did (often in the conclusory language of the criminal statute) and characterizes it as an offense. If the magistrate is satisfied that an offense

is legally stated, s/he issues a warrant authorizing the arrest of the defendant, or in many jurisdictions s/he may issue a summons or notice ordering the defendant to appear before the magistrate on a designated date. This procedure, in the jargon, is called the swearing out of a warrant by the complainant.

It should be noted that the complaint ordinarily has two discrete functions in summary procedure: (1) It constitutes the charging paper or initial pleading against the defendant in the court having jurisdiction to try the charge, and (2) it serves as the basis for the issuance of an arrest warrant. In the former aspect its technical sufficiency is governed by state law, but in the latter aspect it must also satisfy the Fourth Amendment to the Constitution of the United States (see § 25.2 *infra*), which requires that arrest warrants be supported by a sworn statement of facts in sufficient detail to permit the issuing magistrate to make an independent determination whether there is probable cause to believe that the defendant has committed the offense charged (see §§ 25.7.2, 25.7.4 *infra*). Conclusory forms of complaint that are commonly used may be sufficient as pleadings under state law, but they are assailable under the Fourth Amendment insofar as the validity of an arrest or detention subsequently comes into issue (*cf. In re Walters*, 15 Cal. 3d 738, 751, 543 P.2d 607, 616-17, 126 Cal. Rptr. 239, 248-49 (1975)) – for example, in connection with a motion to suppress illegally obtained evidence (see § 25.39 *infra*) or in connection with a motion to dismiss the prosecution in those few jurisdictions in which the magistrate’s jurisdiction depends upon a valid arrest (*e.g., City of St. Paul v. Webb*, 256 Minn. 210, 97 N.W.2d 638 (1959); *State v. Duren*, 266 Minn. 335, 123 N.W.2d 624 (1963)) or when state law makes a valid arrest the precondition for some other exercise of authority (such as a police demand that an individual submit to a blood test (*e.g., State v. Christon*, 160 Wis. 2d 50, 468 N.W.2d 33 (Table) (1990))).

2.2.2. Arrest

In a limited number of cases (principally involving offenses that constitute breaches of the peace), police are authorized to make arrests for summary offenses without a warrant. When a defendant is arrested without a warrant, the officer brings him or her before a magistrate and immediately files the complaint or has a private complainant file it. Practice varies on whether in these cases the magistrate then issues a *pro forma* warrant. Even when they are authorized by law to arrest without a warrant, police will often refuse to do so in summary cases but will require the private complainant to swear out a warrant.

2.2.3. Stationhouse Bail

Police who have made an arrest for a summary offense with or without a warrant are ordinarily authorized to release the defendant on bail for his or her appearance before the magistrate on a designated date. The amount of this “stationhouse” bail is sometimes subject to police discretion and sometimes regulated by a bail schedule prescribed by a statute or court rule, setting the bail for specified offenses. When the amount is determined solely by the police, they often have their own more or less inflexible bail schedule.

2.2.4. *Trial*

When the defendant is brought before the magistrate or appears pursuant to a summons or a bail obligation, trial is often had on the spot. If a recently arrested defendant requests a continuance to obtain a lawyer, a continuance is usually granted for a few days. Brief continuances may also be granted the prosecution or the defense because of the unavailability of witnesses or the requirements of adequate preparation.

The complaint (or, in some jurisdictions, the warrant) constitutes the charging paper. The defendant is asked to plead to it. If s/he pleads guilty, the magistrate proceeds to sentence. If s/he pleads not guilty, an evidentiary trial is had.

In theory, the prosecution presents its evidence first at trial, and the charge should be dismissed if the prosecution's evidence is insufficient, without requiring the defendant to testify or to present defensive evidence. In practice, however, magistrates frequently begin the trial by simply reading the police report or asking the officer to state under oath that it is true and then asking the defendant to tell his or her side of the story. This shortcut procedure is neither authorized by law nor is it constitutional; but if the prosecution's case is relatively simple and easily provable or if the defendant has a good defensive story, the better course for the defense is usually to go along with the magistrate's chosen practice and not to rock the boat by raising legal or constitutional objections to the manner in which the magistrate wishes to proceed. Summary trials before magistrates are ordinarily very informal, and since the magistrate will sometimes acquit a technically guilty defendant on the basis of mitigating circumstances that appeal to his or her sense of fairness, it is helpful to keep on the magistrate's good side. Nevertheless, in appropriate cases – particularly (1) when the complainant or the arresting officer does not appear in court or (2) when there is doubt that the prosecution's evidence will establish the elements of any offense or (3) when the defendant does not wish to testify or has no believable exonerating story to tell or would be assisted in testifying by the prior testimony of prosecution witnesses or (4) when, on the whole, the defendant appears unlikely to attract the magistrate's sympathies – the defendant can, and should, insist upon a procedurally proper trial.

The constitutional presumption of innocence gives every criminal defendant a right to require that the prosecution prove the facts establishing guilt “by probative evidence and beyond a reasonable doubt” (*Estelle v. Williams*, 425 U.S. 501, 503 (1976) (dictum); see § 38.1 *infra*). This means that “one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial” (*Taylor v. Kentucky*, 436 U.S. 478, 485 (1978); *Holbrook v. Flynn*, 475 U.S. 560, 567-68 (1986) (dictum)). Thus the prosecution must produce legally admissible evidence, subject to cross-examination (*see Brookhart v. Janis*, 384 U.S. 1 (1966); *cf. Moore v. United States*, 429 U.S. 20 (1976) (per curiam)), that is sufficient “to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense” (*Jackson*

v. Virginia, 443 U.S. 307, 316 (1979); *see also Pilon v. Bordenkircher*, 444 U.S. 1, 2 (1979) (per curiam). This fundamental constitutional model of a criminal trial is not dispensable merely because the offense or the penalty is minor. *See, e.g., Thompson v. City of Louisville*, 362 U.S. 199 (1960); *Johnson v. Florida*, 391 U.S. 596, 598 (1968) (per curiam); *Vachon v. New Hampshire*, 414 U.S. 478, 480 (1974) (per curiam); *cf. Berkemer v. McCarty*, 468 U.S. 420 (1984).

In every criminal prosecution the Fifth Amendment privilege against self-incrimination gives the defendant a right not to testify if s/he chooses to remain silent. *Griffin v. California*, 380 U.S. 609 (1965); *Carter v. Kentucky*, 450 U.S. 288 (1981); *and see Baxter v. Palmigiano*, 425 U.S. 308, 317, 318-19 (1976) (dictum); *Jenkins v. Anderson*, 447 U.S. 231, 235 (1980) (dictum). S/he therefore cannot be called upon to make a defense before the prosecution has presented and proved its case in open court. *Cf. Brooks v. Tennessee*, 406 U.S. 605 (1972).

Defense counsel will usually have to take primary responsibility for reminding the magistrate (as tactfully as possible) of these basic principles and of other applicable rules of law in summary trials because such trials are customarily conducted informally as a matter of local practice. Except in some metropolitan areas, the state is frequently not represented by a law-trained prosecutor: The arresting police officer or a ranking police officer conducts the prosecution, and the district attorney's office is not involved. In many localities, indeed, the magistrate is not a lawyer: The Supreme Court of the United States has rejected the contention that law-trained judges are constitutionally required for the trial of minor offenses, at least if a trial *de novo* by a law-trained judge is available as a matter of right on appeal (see § 2.2.5 *infra*). *North v. Russell*, 427 U.S. 328 (1976).

Because of the casual, assembly-line atmosphere and carelessness or even ignorance of formal legal procedures that pervade summary trials, defense counsel who wants procedural regularity may have to demand it explicitly and tenaciously.

2.2.5. Disposition and Review

A magistrate has jurisdiction to make the final disposition in summary cases; that is, s/he may acquit the defendant or convict and sentence the defendant. Review of the conviction and sentence, usually by a trial court of record – the court of general jurisdiction of the locality – is frequently but not invariably allowed. This review may take the form of a technical “appeal” (available either as of right or on the discretionary allowance of an appeal by the court of record), or it may take the form of a prerogative writ proceeding, commonly *certiorari*. In some jurisdictions both appeal and *certiorari* may lie.

Counsel should be aware that the time for filing an appeal typically is short, sometimes only five days or so; periods for filing *certiorari* tend to be somewhat longer. Local statutes should be checked and often appeal papers prepared in anticipation of conviction.

Appeal commonly is for trial *de novo*. This means that, once an appeal

is filed, the prosecution recommences from scratch and the defendant stands as a person newly accused in the court of record, which tries the case by hearing evidence exactly as though the proceeding had begun in that court. The prosecution (now, generally by a law-trained prosecutor) presents its evidence, the defendant may present evidence, the court acquits or convicts, and upon conviction the court sentences the defendant afresh. This means, of course, that when the magistrate has not imposed the statutory maximum sentence, a defendant who appeals for trial *de novo* risks a harsher sentence on the appeal. See *Colten v. Kentucky*, 407 U.S. 104 (1972); *Ludwig v. Massachusetts*, 427 U.S. 618, 627 (1976). S/he may be able to avoid this risk by using other forms of appeal proceedings or *certiorari* proceedings that involve more limited review, raising only questions of the jurisdiction of the magistrate, the constitutionality and construction of the underlying criminal statute, or other issues of “law” not requiring factual determination and not occasioning an entire trial *de novo* and resentencing. The defendant is constitutionally protected, to some extent, against the prosecutor’s “upping the ante” by filing new and more serious charges in the court of record in retaliation for the defendant’s appeal (*Blackledge v. Perry*, 417 U.S. 21, 28 (1974); *Thigpen v. Roberts*, 468 U.S. 27 (1984); and see *Bordenkircher v. Hayes*, 434 U.S. 357, 362-63 (1978) (dictum); *United States v. Goodwin*, 457 U.S. 368, 372-77 (1982) (dictum); *Wasman v. United States*, 468 U.S. 559, 565-66 (1984) (plurality opinion) (dictum)).

Appeal, and in some cases *certiorari*, may lie, even though the defendant has pleaded guilty in the magistrate’s court. This plea is inadmissible against the defendant in a *de novo* trial on appeal, since it is rightly regarded simply as a procedural device for kicking the case upstairs. Methods of taking appeal or petitioning for a prerogative writ vary.

Ordinarily the defendant must file both an appearance (bail) bond and a cost bond (or a single bond covering both appearance and costs) as the condition of appeal. Part or all of this may be waived under state procedure (and the cost bond, at least, must be waived as a matter of federal constitutional law, see § 5.2 *infra*) for indigents.

After disposition in the court of record, appeal on questions of law (or on particular questions of law specified by statute) may lie to an appellate court.

2.3. Misdemeanor Procedure

2.3.1. Complaint and Warrant or Summons

Like summary cases, misdemeanor cases frequently begin with a complainant’s filing a complaint (sometimes called a criminal arrest complaint or an affidavit for an arrest warrant) before a magistrate. Upon the magistrate’s *ex parte* consideration of the complaint, s/he may issue an arrest warrant or, in some cases in some jurisdictions, a summons or notice to appear.

In some localities (principally large cities), there is an administrative practice of having an assistant district attorney examine the complaint before it is filed. Police present their complaints to that assistant as a matter of

routine, and a private citizen who goes before a magistrate will be referred by the magistrate to the district attorney's office. Where this practice prevails, the assistant district attorney checks the complaint for substance and form and attaches a paper (sometimes called a buck slip) indicating that s/he has cleared the complaint.

2.3.2. Arrest and Bail

More frequently than in summary cases, arrests are made without a warrant. In most jurisdictions, police are authorized to make warrantless arrests on probable cause for misdemeanors involving a breach of the peace and for any misdemeanor committed in their presence (so-called *on view* or *sight* arrests).

Following an arrest with or without a warrant, the police bring the defendant in front of a magistrate. There, in the case of a warrantless arrest, a complaint is filed, and in some jurisdictions a *pro forma* warrant is issued.

Police are often authorized to admit arrested persons to bail in misdemeanor cases. A misdemeanor arrest warrant will frequently carry an endorsement by the issuing magistrate setting the amount of bail. If it does not or if arrest is made without a warrant, the police set stationhouse bail in an amount governed by their discretion or by bail schedules prescribed by legislation, court rule, or police administration; and the defendant may also apply to a magistrate or a court of record for bail.

2.3.3. First Court Appearance: The Preliminary Hearing

Soon after arrest the defendant is brought – or after the defendant's release on stationhouse bail or after service of a summons s/he appears – before a magistrate for a preliminary hearing. The term *preliminary hearing* is used confusingly to mean sometimes one, sometimes another, or sometimes both of two proceedings, more clearly differentiated by the names *preliminary arraignment* (see § 2.3.4 *infra*) and *preliminary examination* (or PX, for short) (see § 2.3.5 *infra*).

When a preliminary hearing includes both of these proceedings, the magistrate reads the complaint or charging paper to the defendant and advises the defendant of the rights to have or waive counsel and to have a preliminary examination. The magistrate appoints counsel if the defendant is entitled to counsel (see § 11.5.1 *infra*) and does not waive legal representation; the magistrate asks the defendant how s/he pleads, and – upon a plea of not guilty – hears prosecution evidence (usually presented by a law-trained prosecutor) to determine whether there is sufficient proof (described in technical language as “probable cause” or a “*prima facie* case”) to justify detaining the defendant pending the filing of charges and a trial in a court of record. Upon a plea of guilty the magistrate simply commits the defendant (that is, orders the defendant detained for trial) without further examination. In either case, the magistrate sets the amount of bail upon which a defendant who has been ordered detained will be released pending appearance in the trial court; or if stationhouse bail has previously been set, s/he may continue the defendant on that same bail. (In some jurisdictions the defendant is not asked to plead to

the complaint; s/he is simply informed that s/he has a right to a preliminary examination and asked whether s/he elects or waives the examination.)

The preliminary hearing in a misdemeanor case, unlike the magistrate's hearing in a summary case, is not a dispositive proceeding. The magistrate cannot convict the defendant; s/he can only commit the defendant ("bind the defendant over") for proceedings in the court of record, which alone has jurisdiction to try the prosecution on the merits. Similarly, the magistrate cannot acquit a defendant; s/he can only discharge the defendant from custody on the ground that a *prima facie* case has not been made out. Such a discharge does not bar the defendant's rearrest and subsequent bind-over by the same or another magistrate on a fresh record. In some jurisdictions discharge does – and in some it does not – preclude the prosecutor from proceeding without rearrest to charge the defendant in a court of record by filing an information (see § 2.3.6 *infra*) and thus requiring the defendant to go to trial on the merits of the offense for which s/he was discharged. When the prosecutor is permitted to proceed in this fashion following a magistrate's discharge, the sole effect of the discharge is to allow the defendant to remain at liberty prior to conviction.

In felony cases (see § 2.4.3 *infra*) and in misdemeanor cases in jurisdictions permitting grand jury indictments for misdemeanors, discharge by the magistrate usually does not preclude the grand jury from indicting the defendant and thereby forcing the defendant to trial. Practice varies with regard to whether defendants indicted after a magistrate's discharge will remain at large throughout the trial or may be arrested on a bench warrant issued by the criminal court upon the indictment (see § 2.4.4 *infra*).

2.3.4. Preliminary Arraignment

2.3.4.1. Procedure in Jurisdictions That Do Not Afford a Full Preliminary Hearing

In some jurisdictions misdemeanor defendants are not entitled to the full preliminary hearing described in § 2.3.3 *supra*; they receive only a preliminary arraignment. This means that they are brought or appear before a magistrate; the charges are read to them; they are advised of their rights to counsel, to bail, and to trial; counsel is appointed for them, if appropriate; they are sometimes asked to plead to the charges; bail is set by the magistrate; and unless bail has already been posted in a sufficient amount (see § 2.3.2 *supra*) or is posted forthwith, they are remanded into custody pending their first appearance in a court of record or until they post bail for that appearance.

Under *Gerstein v. Pugh*, 420 U.S. 103 (1975), discussed in § 11.2 *infra*, a defendant who has been arrested without a warrant is constitutionally entitled to some form of judicial determination of probable cause before s/he can be committed to jail or required to post bail for trial. As construed in *Gerstein*, "the Fourth Amendment requires the States to provide a fair and reliable determination of probable cause as a condition for any significant pretrial restraint of liberty" (*Baker v. McCollan*, 443 U.S. 137, 142 (1979) (dictum)). Jurisdictions that do not provide a full preliminary hearing must,

therefore, have a mechanism for making this determination as part of their preliminary arraignment procedure – for example, by having the magistrate review a sworn complaint or affidavits to assure that they disclose sufficiently incriminating facts, in sufficiently concrete detail, to establish probable cause. See *In re Walters*, 15 Cal. 3d 738, 543 P.2d 607, 126 Cal. Rptr. 239 (1975).

If the defendant pleads not guilty or if no plea is required at this kind of preliminary arraignment, the defendant may be given a date for his or her first appearance in the court of record (that is, for a formal arraignment), or the case may be referred to the calendaring officer of the court of record (“the trial court”). The prosecutor will thereafter file an information against the defendant in the trial court (see § 2.3.6 *infra*), and the defendant’s next trip to court will be his or her formal arraignment in the trial court upon that information (see §§ 2.3.6, 14.1-14.12 *infra*).

If the defendant pleads guilty at the preliminary arraignment, the case is ordinarily calendared or referred to be calendared for a single appearance in the trial court, at which the defendant will be arraigned upon an information (which may be filed in open court on the date of this appearance), and the defendant will be expected to plead guilty before the trial judge, who will often impose sentence forthwith. (See § 11.7.1 *infra*.) The reason for requiring the defendant to plead at the preliminary arraignment in some jurisdictions that do not provide for a full preliminary hearing is to facilitate the setting of an early date for these proceedings at arraignment in the trial court in cases in which the defendant is not contesting guilt. See § 28.2 *infra*.

2.3.4.2. Procedure in Jurisdictions That Afford a Full Preliminary Hearing

In jurisdictions in which the defendant is entitled to a full preliminary hearing – both the preliminary arraignment described in § 2.3.4.1 *supra* and the preliminary examination described in § 2.3.5 *infra* – it is often the case that only the preliminary arraignment is held at the time of the defendant’s first appearance before the magistrate. This may be the general practice in the jurisdiction or it may be the procedure used in a particular case because of practicability. Frequently the defendant has no lawyer at that time. So, after the charges have been read and the defendant has been advised of the rights to counsel, to bail, and to a preliminary examination, the proceeding is adjourned to a later date to permit the defendant to retain counsel. When the defendant is indigent and does not waive counsel, the magistrate may appoint counsel to appear for him or her at the delayed preliminary hearing date or, under the clumsy system in effect in some localities, may refer the case to the trial court for the appointment of counsel.

Appointment of trial counsel for indigent defendants is constitutionally required in all criminal prosecutions, whether classified as felony, misdemeanor, or summary prosecutions, in which any term of imprisonment is going to be imposed as a result of conviction (*Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Scott v. Illinois*, 440 U.S. 367 (1979); *Baldasar v. Illinois*, 446 U.S. 222 (1980)), “even for a brief period” (*Alabama v. Shelton*, 535 U.S. 654, 657 (2002)),

including cases in which the court imposes “a suspended sentence that may ‘end up in the actual deprivation of a person’s liberty’” (*id.* at 658) in the event of a violation of probation or some other condition of the suspended sentence. The Supreme Court has held this right to appointed counsel applicable at the preliminary arraignment and preliminary examination stages of felony prosecutions (*see White v. Maryland*, 373 U.S. 59 (1963) (*per curiam*); *Coleman v. Alabama*, 399 U.S. 1 (1970); *Moore v. Illinois*, 434 U.S. 220 (1977); *cf. Gerstein v. Pugh*, *supra*, 420 U.S. at 122-23), and it should apply at the parallel stages of misdemeanor prosecutions as well (*Harvey v. Mississippi*, 340 F.2d 263 (5th Cir. 1965), approved in *James v. Headley*, 410 F.2d 325, 327 (5th Cir. 1969) (*dictum*); *State v. Young*, 863 N.W.2d 249 (Iowa 2015)).

When the preliminary hearing is set over – either because the defendant is unrepresented or because local practice routinely requires a second separate appearance for preliminary examination after the preliminary arraignment – the magistrate may commit the defendant pending the preliminary examination and may set new bail for the defendant’s appearance at that examination or may continue the defendant’s release on whatever bail s/he has previously posted.

The preliminary examination can be waived by a defendant, and many magistrates accept or even coerce these waivers from uncounseled accuseds at their first appearance. Coercion, and perhaps even acceptance, of a waiver of preliminary examination by a defendant who is not represented by a lawyer is unconstitutional. (See § 11.5.1 *infra*.) Remedies for the deprivation of preliminary examination are discussed in §§ 11.4, 11.6 *infra*.

2.3.5. Preliminary Examination

At the preliminary examination, ordinarily the prosecution may amend the complaint or charging paper to charge additional or other offenses relating to the episode for which the defendant was arrested or summoned.

The prosecution presents its evidence; but since it is required to make only a *prima facie* case at this stage, it frequently discloses only a part of what it will ultimately present against the defendant at trial. In some jurisdictions or localities magistrates will receive, and base a bind-over upon, hearsay evidence. Where this is permitted, the prosecutor frequently calls only the investigating police officer. Cross-examination by defense counsel is permitted (although it is frequently unconscionably limited by the magistrate, again on the theory that only a *prima facie* showing, not guilt, is at issue); and the defendant may, although s/he usually does not, present exculpatory evidence.

At the conclusion of the hearing, the magistrate may discharge the defendant or may bind the defendant over for trial on specified charges. In many jurisdictions these may be any charges on which there is sufficient evidence in the magistrate’s record to constitute probable cause; they need not be limited to the charges made in the complaint. (If, however, the complaint failed to give the defendant fair notice of the charges on which s/he is subsequently bound over, so that s/he was denied the opportunity to defend against those charges – or at least to decide advisedly whether to attempt to

defend against them – at the preliminary examination, this practice is subject to serious constitutional challenge. See § 11.10 *infra*.) The magistrate now sets bail for the defendant who is bound over. Frequently, but not invariably, s/he will continue the amount of bail previously set.

2.3.6. Information and Arraignment

The misdemeanor defendant is tried in a court of record. Prosecution in that court begins with the filing of an information, which is a sworn statement by the prosecuting attorney describing what the defendant did (often in conclusory terms that track the statutory definition of the offense charged) and characterizing it as criminal. In some jurisdictions the prosecutor may charge in an information only offenses for which the defendant has been previously bound over; in others s/he may charge a bound-over defendant with any related offenses (or sometimes any offenses at all) of which there is evidence in the magistrate’s transcript, whether or not the magistrate held the defendant for those offenses; in still others the prosecutor (sometimes as a matter of right, sometimes by leave of court) may charge a bound-over defendant with offenses that go beyond the magistrate’s transcript and may also file an information against a defendant who has been entirely discharged by the magistrate or who has never been arrested and brought before a magistrate.

The defendant is arraigned on the information; that is, the information is read or handed to the defendant in open court, and s/he is required to plead to the charges in it. Ordinarily s/he has had advance notice of the arraignment date, and frequently the case proceeds to trial immediately following a plea of not guilty at arraignment or to sentence immediately following a plea of guilty or *nolo contendere*. If trial or sentencing is not immediate, a trial date or sentencing date is usually set following the entry of the defendant’s plea.

Special pleas (for example, double jeopardy) and motions and objections attacking the information (for failure to charge an offense or on other grounds) or the propriety of the proceedings at the preliminary hearing or any other anterior stage are – depending upon local practice – required to be made by the defendant either before arraignment or before entering one of the general pleas (not guilty; guilty; *nolo contendere*) or before the start of trial.

In many localities, there are more or less formal procedures for “diversion” of criminal prosecutions: – that is, for suspension of the charges against the defendant so that more lenient dispositions are possible than would ordinarily follow a criminal trial and conviction. For example, the criminal charges may be dismissed if a defendant manifesting mental disorder agrees to voluntary civil commitment proceedings or if the prosecutor elects to undertake involuntary civil commitment proceedings in lieu of proceeding criminally. Or the criminal charges may be adjourned in contemplation of dismissal (“ACD’d”) – a practice (also called “stetting” in some jurisdictions) under which the criminal charges are held in abeyance for a designated period of time on the understanding that, if the defendant shapes up and behaves (or completes certain restitutionary or corrective actions), the prosecution will then be dismissed. Arraignment is commonly the stage of proceedings at

which diversion is on the table for discussion by counsel and the court. Defense counsel proposing a diversion plan is ordinarily advised to broach the subject with the prosecutor *before* arraignment unless the prosecutor is expected to be unsympathetic and the judge sympathetic. (In jurisdictions where diversion is a commonplace practice, it is usually available in summary prosecutions and in felony prosecutions as well as in misdemeanor prosecutions, but defense counsel will seldom want to resort to it in summary-prosecution cases because the consequences of the diversion are likely to be less favorable to the defendant than the relatively mild criminal sentence that can be anticipated upon conviction.)

2.3.7. Trial; Disposition; Review

Most jurisdictions give the defendant a right to trial by jury for the majority of misdemeanor offenses; all are required by the federal Constitution to recognize the right to jury trial for “serious” misdemeanors – a category that includes, at the least, any misdemeanor for which a sentence of more than six months’ imprisonment is authorized. See § 32.1 *infra*. Misdemeanor defendants, however, frequently waive a jury and elect a bench trial.

Evidentiary trial is had in the usual fashion: The prosecution presents its case in chief first. The defendant customarily moves for an acquittal on the prosecution’s evidence (see Chapter 38 *infra*) or “demurs to the evidence,” as the procedure is called in some jurisdictions. If acquittal is denied, the defendant may present defense evidence. The prosecution may then present rebuttal evidence, although this is far less common in misdemeanor than in felony cases. The defendant renews his or her motion for acquittal (see Chapter 41 *infra*). If it is denied, counsel make their closing arguments to the jury or the bench; then, in a jury-trial case, comes the judge’s charge. The jury or judge returns a verdict or finding of acquittal or conviction; and, in the event of conviction, the judge often imposes sentence without more ado. In some jurisdictions the convicted defendant has a right to a postponement of several days before sentence is pronounced (called, in the jargon, “demanding his or her time”), but deferred sentencing hearings and presentence reports are not commonplace in misdemeanor cases.

Following the filing and disposition of any authorized post-trial motions (see § 2.4.5 *infra*) and the entry of a formal judgment of conviction and commitment (or sentence to a fine), the defendant may appeal for review of the ordinary sort by an appellate court. Bail pending appeal is usually allowed in the discretion of the trial judge, reviewable for abuse. In some jurisdictions bail pending appeal is allowed as a matter of right in misdemeanor cases; in others it is a right in any case in which the sentence does not include a term of imprisonment.

2.4. Felony Procedure

2.4.1. Arrest and Bail

Felony procedure is generally similar to misdemeanor procedure

through the stage of the magistrate's bind-over. A few significant differences deserve note. Ordinarily police are authorized to arrest without a warrant when they have probable cause to believe that a suspect has committed a felony; most felony arrests are, in fact, made without warrants. Magistrates often have little or no power to issue summonses in lieu of arrest warrants in felony cases, and they sparingly exercise what little power they have. As a result, felony prosecutions almost invariably involve an arrest, and it is typical for the complaint to be filed after arrest. Stationhouse bail is also much less frequently authorized in felony than in misdemeanor cases, and in some jurisdictions magistrates themselves are powerless to admit an arrested person to bail on some or all serious butailable felony charges. In these cases bail-setting must be sought by *habeas corpus* or by a motion or other statutorily prescribed procedure in a court of record. This means that most defendants get at least a short taste of jail at the beginning of a felony case.

2.4.2. Preliminary Hearing; The Role of the Prosecutor

A law-trained prosecutor is more frequently involved in the drafting of felony complaints than of misdemeanor complaints, and s/he sometimes participates with the police in postarrest interrogation of a defendant. Prosecutors therefore tend to know more about felony cases earlier in the process and to undertake early responsibility for deciding whether and what to charge. They also tend to prepare more carefully for the preliminary examination, which in felony cases is almost never left solely to the police.

Magistrates are generally more willing in felony than in misdemeanor matters to grant the prosecution or the defense time to prepare for the examination, and prosecutors will often request a continuance for the purpose of defeating the defendant's right to a preliminary examination by the device described in §§ 2.4.4, 11.4 *infra*.

In any event, more in felony cases than in misdemeanor cases do preliminary arraignment and preliminary examination assume the aspect of two distinct procedural stages, often separated by a few days or longer unless, of course, the defendant at preliminary arraignment waives a preliminary examination and is immediately bound over.

2.4.3. The Grand Jury

The principal difference between misdemeanor and felony procedure involves the intervention of the grand jury in felony cases. In many jurisdictions felony defendants may be prosecuted only by indictment. An indictment is a charging paper (in content similar to an information) returned by a grand jury. A grand jury is a body of citizens, usually 15 to 23 in number, ordinarily chosen from the general venire of jurors for a term of court, who meet in secret to hear the prosecutor's presentation of evidence (or, in theory, any other witnesses that the grand jury may choose to subpoena) in support of written charges (called "bills of indictment") drafted by the prosecutor (or, in theory, any other charges that the grand jury may want to consider). Grand jury proceedings are not attended by a judge; the grand jury takes its legal

instructions from the prosecutor; neither the defendant nor defense counsel is present during its evidentiary hearings; the defendant and defense witnesses may be called to testify by the grand jury in its discretion (subject to any valid claim of the privilege against self-incrimination).

If a majority of grand jurors is satisfied that there is probable cause to believe that the defendant named in a bill is guilty or that there is *prima facie* evidence of the defendant's guilt or that the evidence against the defendant would warrant conviction by a trial jury if unrebutted and believed (the standards are differently phrased in different jurisdictions but differ little in substance), the grand jury "returns" (that is, reports out to the court) the bill of indictment endorsed as a "true bill." This is the indictment that requires the defendant to go to trial. If a majority of the jurors is unwilling to return a true bill, the jurors "ignore" the bill ("no-bill" or "*ignoramus*" the case), a disposition that precludes the prosecutor from proceeding to trial at this juncture but does not bar the prosecutor from resubmitting the bill to the same or another grand jury at any time within the statute of limitations. (In some jurisdictions, a resubmission may be made only with leave of court.)

It should be noted that a felony defendant's right to prosecution only by indictment of a grand jury may be waived in most jurisdictions. On a written waiver of the right, the case is prosecuted by information (as in misdemeanor procedure), or in some jurisdictions the grand jury returns an indictment based solely upon the bill and written waiver, without hearing evidence.

A number of jurisdictions permit felony charges (or some subclass of less serious felony charges) to be prosecuted by information. In these jurisdictions the grand jury procedure is available but not required; the prosecutor has the option to proceed by indictment or by information.

2.4.4. *Relation of the Grand Jury to Preliminary Hearing*

In theory (and in most cases in actuality) the grand jury does not act on a defendant's case until after s/he has had a full preliminary hearing and been bound over (the style in felony cases is "bound over to the grand jury"). But the grand jury is legally empowered to indict any person without an antecedent bind-over, preliminary hearing, or even arrest; and once its indictment has been returned, a judge of the criminal court may, without further inquiry, issue a "bench warrant" authorizing the defendant's arrest and detention pending trial. Using these two legal authorities, a prosecutor who does not want to expose the prosecution's case at preliminary examination will frequently – often as a matter of routine practice in some types of cases, such as sex and narcotics cases – (a) request the magistrate at preliminary arraignment to continue the preliminary hearing of an arrested accused, (b) submit the case to the grand jury during the period of the continuance, (c) obtain an indictment and a bench warrant, and (d) by thus obviating the need for a bind-over to justify holding the defendant for trial, effectively circumvent the defendant's right to a preliminary examination. The possibilities for defeating this prosecutorial tactic are discussed in § 11.4 *infra*.

When a bench warrant is issued, the issuing judge will ordinarily set bail by endorsement on the warrant. If s/he does not, a motion for bail may be made to any judge of the court. If the bail endorsed on the warrant is too high, a motion to reduce it is appropriate.

2.4.5. Arraignment; Trial; Disposition; Review

The indictment, like an information, serves as the accusatory pleading on which the defendant is tried. S/he is arraigned by being read the indictment in open court and asked how s/he pleads to it. Ordinarily s/he will plead not guilty, guilty, or *nolo contendere* (for present purposes, the equivalent of a guilty plea) or request a continuance to permit adequate preparation before pleading. As in misdemeanor practice (see § 2.3.6 *supra*), special pleas, motions, and objections attacking the indictment, the grand jury proceedings, or other preliminary proceedings are required to be filed – depending on the jurisdiction – prior to arraignment, to the entry of the pleas of not guilty, guilty, or *nolo contendere*, or to trial. (See Chapter 20 *infra*.) In jurisdictions that allow felony prosecutions to be initiated by information, the arraignment procedure for information-based cases is typically identical to that for indictment-based cases. Valid challenges to the facial sufficiency of an information to charge an offense or other defects in the information require dismissal of the prosecution (see § 20.4 *infra*); well-taken motions aimed at deflecting or shaping the course of proceedings (such as motions for diversion or for a change of venue) call for appropriate relief before the case proceeds further.

On a guilty plea the defendant may be sentenced forthwith, following arguments by counsel or following a brief evidentiary hearing on the question of sentence. Ordinarily, a defendant who wishes to address the court personally is permitted to make an unsworn statement. (Practice differs as to whether, and to what extent, counsel is permitted to guide the defendant’s statement by questioning.) Alternatively, sentencing may be deferred pending a presentence investigation by the probation officer of the court or a fuller evidentiary hearing or both. More frequently than in misdemeanor procedure, a convicted felony defendant has a right to “demand [his] [her] time” and thereby secure a delayed sentencing proceeding.

In murder cases (and, less often, in the case of other offenses divided into degrees), a defendant is sometimes permitted to plead guilty only to the offense generally, following which plea a judge or jury hears evidence to determine the degree of the offense and to set the sentence. Similarly, a jury may be impaneled to fix sentence on a plea of guilty to any felony for which the applicable statutes authorize or require jury sentencing.

After a plea of not guilty to a felony, the case seldom proceeds to trial immediately following arraignment. Rather, it is assigned a future trial date. The case is heard by a jury unless the defendant waives jury trial. Trial practice is similar to that in misdemeanor cases but with a host of minor differences: Rules governing joinder of offenses and defendants may be different, more time and greater *voir dire* questioning of prospective jurors is generally allowed in selecting a felony jury, more peremptory challenges to

jurors are generally permitted in felony trials, and so forth. Following conviction, greater use is made of the practices of deferred sentencing, presentence investigation, and evidentiary hearings on sentence than in misdemeanor cases.

Post-trial motions by a convicted defendant seeking a new trial (on grounds including trial error, jury misconduct, and newly discovered evidence) or sentencing correction are authorized within specified time limits. These limits are ordinarily very short, so counsel will need to be alert to prepare and file post-trial motions promptly (or to request an extension of time [“EOT”] to file them [in courts where EOTs are allowable]). In many jurisdictions, post-trial motions must include all claims of error that the defense wishes to preserve for appeal.

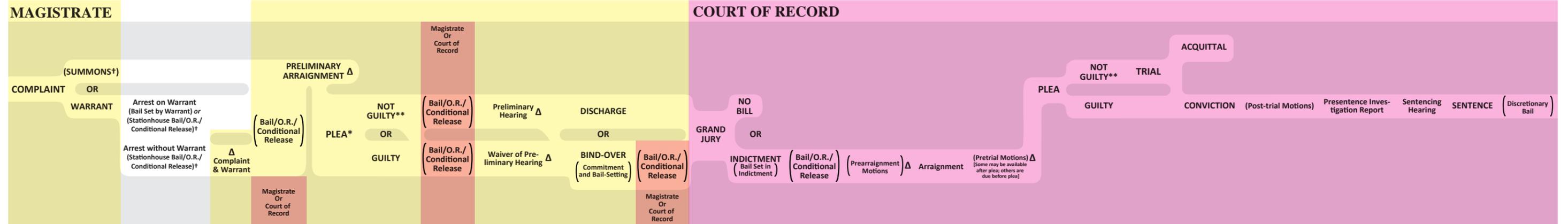
Appeal lies from the final judgment to an appellate court for consideration of claims of trial-court error within the ordinary scope of appellate review. Time limits for filing a notice of appeal (or bill of errors, or whatever form of document a jurisdiction requires in order to perfect appellate jurisdiction) are also characteristically very short and may or may not (depending on the jurisdiction) be extendable by the trial court on motion. Bail pending appeal is allowed in the discretion of the trial court, subject to appellate revision for abuse.

2.5. *Flow-Chart of Summary, Misdemeanor, and Felony Procedures*

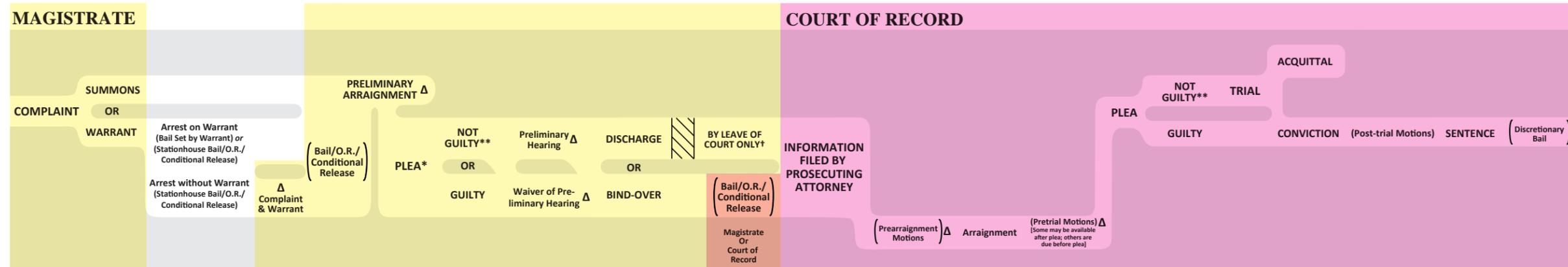
Set out below is a flow-chart of the three sorts of procedures described in the foregoing sections of this chapter:

OUTLINE AND FLOW-CHART OF A CRIMINAL CASE § 2.5

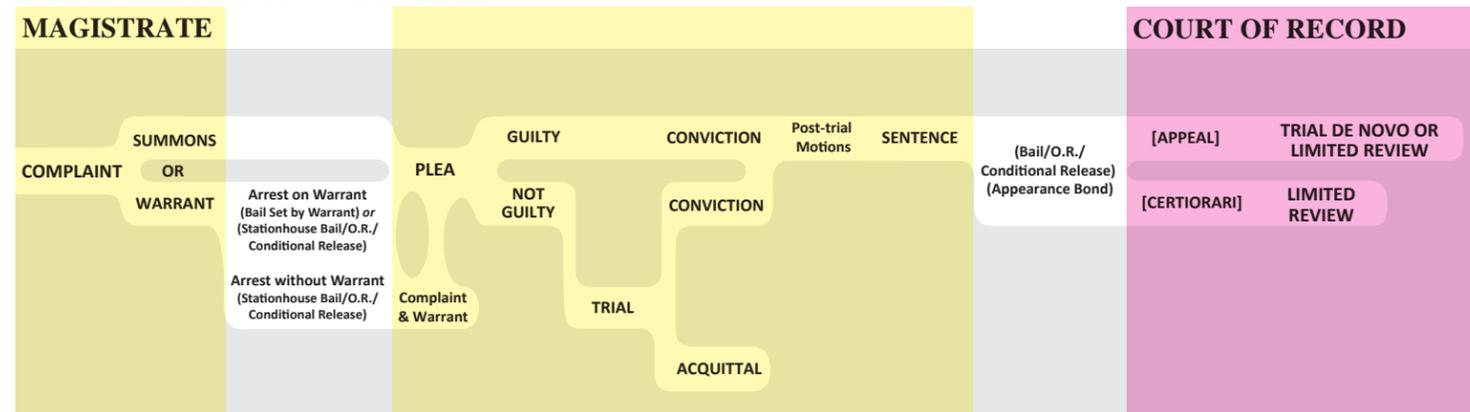
FELONY PROCEDURE



MISDEMEANOR PROCEDURE



SUMMARY PROCEDURE



[†] Infrequently available

* In many jurisdiction no "plea" is taken before the magistrate. The issue is couched in terms of the defendant's requesting or waiving preliminary hearing.

** Pleas of not guilty do not invariably result in the defendant's going to hearing or to trial. Such pleas may be and frequently are, withdrawn and guilty pleas entered, prior to hearing or trial.

Δ Diversion into alternatives to criminal prosecution may be available.

PART TWO: INITIAL STAGES OF THE CASE THROUGH ARRAIGNMENT

Chapter 3

The Lawyer's Entrance into the Case – First Steps

3.1. *Introduction: Stages at Which the Lawyer May Enter the Case; The Need to Move Quickly*

Defense counsel may have occasion to enter a criminal case at almost any of the stages described in Chapter 2. In the early stages, at least, the crucial first steps to be taken are essentially the same. They are, in essence: (1) to make contact with the client, obtain the client's authorization to represent him or her, warn the client against speaking with the police or others, and obtain information that counsel can use to seek the client's release; (2) to speak to the investigating officer, find out whatever counsel can about the charges and the availability of release on the client's own recognizance or stationhouse bail, and erect all possible protections against police interrogation, searches, and identification procedures; and (3) to try to arrange for the client's release.

The major differences in the tasks that confront counsel at the different stages of entry involve the order in which the various initial steps are required to be taken and the amount of time available to familiarize oneself with the situation and its demands and to make decisions. The lawyer who has some general knowledge of the interests of the client that need to be protected at a given stage can usually begin to function adequately notwithstanding both a lack of detailed information concerning the intricacies of local practice and a lack of opportunity to prepare completely on technical matters. S/he will have to learn the details and the relevant technical points of substantive criminal law and procedure rapidly as s/he proceeds about the work of providing representation.

In these situations, as in all later stages of the case, counsel's preparation and research should be as thorough as practicable. Knowledge of the individual case and client, of the applicable law, and of the local procedures and functionaries can spell the difference between wise choices of action and foolish ones. But at the outset of a criminal case particularly, a trade-off does exist between the virtues of time-consuming preparation and the importance of getting started quickly to prevent the client's interests from being irreparably damaged by fast-breaking events that will not wait for counsel to make a consummately prepared appearance.

A. Representing Clients Who Have Been Arrested and Are Still at the Police Station

3.2. *Police Practices Following Arrest*

Representation of a client in custody shortly after arrest requires at least some general knowledge of post-arrest practices. These practices are

described in the four subsections that follow.

3.2.1. Logging in

Following an arrest, the arrested person (hereafter called “defendant”) is usually taken to the police station (or divisional or precinct headquarters) in the precinct in which the arrest took place. The defendant’s arrival at the station is ordinarily, but not invariably, noted in a police log. In some jurisdictions the police treat logging-in as part of the “booking” or “slating” process described in § 3.2.4 *infra*. The log normally contains a dozen or so defendants to the page, and it records not merely the name and the time of logging but also the time and the place of arrest, some identifying characteristics of the defendant (such as gender, race, and date of birth), and the arrest charge.

Some police departments conceive logging-in as a recording routine unrelated to “booking” and maintain two books – the log and the blotter. Under this latter practice all persons brought to the station may be logged in on arrival, and those against whom it is decided to lodge charges may later be noted in the arrest book or “blotter.” Or persons against whom it is clear that charges will be lodged may be noted immediately on the blotter, whereas persons brought in “for investigation” or “on suspicion” may be noted in the log (sometimes called the “small book”).

In any event, police generally feel no compelling obligation to make an immediate log or blotter entry when there are investigative reasons for not doing so. For example, the police may refrain from logging in a defendant whom they want to interrogate at length, free of any interference from a defendant’s relatives or a defense lawyer. Such omissions or delays may violate published police procedures (and may, in some cases in some jurisdictions, violate requirements prescribed by statutes, court rules, or judicial criminal-procedure rulings), but officers dealing with a serious crime or an unappetizing defendant often take these requirements lightly.

In addition to recording the defendant’s name in a logbook showing either arrests or arrivals at the station, the police in many jurisdictions will record the defendant’s name and any personal property taken from the defendant in a property log. Unlike property seized as the proceeds or evidence of a crime (and held by the police or the prosecution until trial), this personal property can be retrieved at any time by the defendant or counsel (with proper authorization). Frequently, a defendant’s personal property will include clothing, footwear, or other items that counsel will want to retrieve in order to substantiate a defense of misidentification. It may also include cell phones and other electronic appliances that counsel should retrieve promptly, before police investigation or processing of the case alerts officers to the possibility that these gadgets have potential evidentiary value and are subject to seizure and inspection with a search warrant.

3.2.2. Interrogation and Other Investigative Procedures

Whatever the logging-in practice, the police usually subject the

defendant to some interrogation subsequent to arrival at the station and prior to the full “booking” process. If the arrest charge is at all serious, the case will be assigned from the outset to – and the interrogation will be conducted by – a rank officer, detective, special deputy, criminal investigator, or other specialized investigative agent (depending, of course, on the size and the organization of the police force). In a metropolitan police department, the interrogation is normally handled by detectives in their own headquarters in the precinct stationhouse. When officers from special squads, such as homicide, narcotics or vice, are involved, the defendant may be taken – either immediately from the place of arrest or from the station where s/he was initially brought by arresting officers – to the central headquarters of the special squad.

The interrogation is designed to secure the defendant’s admission of the offense for which s/he was arrested, the defendant’s implication of any other persons involved in the offense, and the defendant’s admission of other “uncleared” or “open” offenses that s/he may have committed. In particular cases, such as those involving the arrest of persons known or believed to be gang members, the police may also seek, through interrogation, to learn general information about recent developments in the neighborhood or the gang or about its members, which information they believe to be useful for intelligence or crime control.

In addition to interrogation, a defendant may be subjected to other investigative procedures before or immediately after booking. S/he may be exhibited to witnesses in a lineup or show-up. S/he may be taken to the scene of the crime to “reenact” or demonstrate what happened. S/he may be taken home or elsewhere to assist the police in finding secreted or discarded weapons, loot, contraband, or evidence; and in this connection, s/he may be asked to give consent to warrantless police searches that, without this consent, would require a search warrant. Specimens of the defendant’s hair or blood, swabs, washes, or body scrapings may be taken for laboratory analysis. Each of these police actions may develop incriminating evidence. Legally, a defendant may have rights not to be subjected to some of these procedures altogether and not to be subjected to others in the absence of his or her attorney or in the absence of a judicial warrant. But these rights can be waived – and they often will be waived unless counsel takes adequate steps to insure their protection.

3.2.3. Defendant’s Rights of Communication

Theoretically, any arrested person has the right under *Miranda v. Arizona*, 384 U.S. 436 (1966), to make contact with the outside world, in order to obtain counsel prior to undergoing interrogation. *Minnick v. Mississippi*, 498 U.S. 146, 152-54 (1990). *Miranda* expressly requires that any in-custody interrogation be preceded by several warnings including the warning that the suspect has the right to the presence of counsel, and, if indigent, the right to court-appointed counsel, during interrogation. *Dickerson v. United States*, 530 U.S. 428, 435 (2000); *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011); *Berghuis v. Thompkins*, 560 U.S. 370, 380 (2010) (dictum); see §§ 26.5, 26.7 *infra*. “[A] person taken into custody [must] be advised immediately” of these rights (*Doyle v. Ohio*, 426 U.S. 610, 617 (1976) (dictum); see, e.g., *Stansbury v. California*,

511 U.S. 318 (1994); *Berkemer v. McCarty*, 468 U.S. 420 (1984)), and “the police [must] respect the accused’s decision to exercise the rights outlined in the warnings” (*Moran v. Burbine*, 475 U.S. 412, 420 (1986) (dictum); see, e.g., *Missouri v. Seibert*, 542 U.S. 600, 608, 611-12 (2004) (plurality opinion); *id.* at 620-22 (Justice Kennedy, concurring); *Smith v. Illinois*, 469 U.S. 91 (1984) (per curiam)).

As a practical matter, however, police often proceed to interrogate defendants without offering them any opportunity to make a phone call prior to questioning. In some cases in which the police have failed to give the defendant an opportunity to contact counsel, it may be possible to argue that any resulting confession or identification testimony must be suppressed under federal or state constitutional doctrines (see *Haynes v. Washington*, 373 U.S. 503 (1963); and see generally Chapters 26, 27 *infra*) or under state statutes requiring that the police afford an arrestee an opportunity to make a telephone call to an attorney (see, e.g., *Commonwealth v. Jones*, 362 Mass. 497, 502-04, 287 N.E.2d 599, 603-04 (1972) (explained in *Commonwealth v. Jackson*, 447 Mass. 603, 615, 855 N.E.2d 1097, 1106 (2006)) (intentional police denial of an arrestee’s “statutory right to use a telephone” can result in suppression of “an incustody [sic] inculpatory statement or corporeal identification”); *State v. Beaupre*, 123 N.H. 155, 159, 459 A.2d 233, 236 (1983)).

3.2.4. Booking or Slating; Fingerprinting; and Photographing

Following the period of interrogation and the decision of the police to formally charge the defendant with an offense, the charges are noted in police records. This is the booking or slating process, which involves making a record of the name of the defendant and of some identifying data (usually gender, race, date of birth, address, phone), the time and place of the arrest, and the offenses charged. This information is recorded in summary form on a police blotter and, in more detail, on arrest cards, in arrest reports, in paper or electronic files, in computer data bases, or in more than one of these media.

The booking or slating process may also include the police officer’s filling out extensive, specialized printed or electronic forms. The forms commonly include some type of arrest report, calling for the defendant’s name, nickname, age, date of birth, identifying characteristics (gender, race, height, weight), address and phone number. They often require information concerning the time, date, and location of the offense; the time, date and location of the arrest; whether any other defendants were arrested for the same offense; whether any force was employed in effecting the arrest; whether the defendant confessed to the offense and possibly also what the defendant said. In addition to these arrest reports, the police frequently prepare a supplement to the original “event” or “incident” or “complaint” report that was filed at the time when the crime was first reported. This supplement usually recounts the details of the arrest, possibly the content of any confessions or admissions, the results of any identification procedures, and a statement of whether the arrest “closes” the case or whether there are still unarrested perpetrators being sought. Finally, in particular cases, the police may fill out additional forms. For example, firearms cases require special forms listing

serial numbers and descriptions of guns and bullets; narcotics cases require detailed information about the nature and weight of the drugs and the property numbers assigned to the drugs, as well as a “buy report” by the undercover officer; eyewitness identifications may require special cards or forms listing the description originally given and the words spoken by the witness in identifying or failing to identify the defendant. The nature of the forms and the precise procedures followed by the police vary greatly among jurisdictions. It is important that counsel become familiar with both the types of forms used locally and the information contained upon those forms, in order to subpoena documents that can prove invaluable at trial. See §§ 9.17, 9.18, 9.20 *infra*.

The defendant’s fingerprints and photograph are almost invariably taken as a part of the booking process. These may be used in various ways in the investigation of the charge for which the defendant has been arrested. In addition, they will usually be retained by the police or placed into a central data system for use in later investigations.

3.3. *Responding to a Phone Call from a Recently Arrested Client Who Is at the Police Station or from a Relative or Friend of the Client*

In some cases, counsel may receive a phone call from a client who is at the police station. In other cases, counsel may be called by a relative or friend on behalf of an arrested client. Subsection 3.3.1 explains the steps that counsel should take immediately in the first of these situations; subsection 3.3.2 does the same for the second. Both subsections provide cross-references to later sections that explain follow-up steps counsel should take in their respective settings.

3.3.1. *A Phone Call from a Client Who Is At the Police Station: Ascertaining the Client’s Whereabouts; Assuring the Privacy of the Conversation*

An arrested person who calls the attorney while in police custody should be asked to identify his or her whereabouts by precinct or headquarters’s name and street address or, if these are unknown, by general location and building description. S/he should be asked whether s/he has heard or seen anything suggesting that s/he might be taken by the police to any other location; if so, where and when. As a failsafe, s/he should also be asked the street location where s/he was arrested, the charge, and whatever s/he knows about the identity of the arresting and investigating officers.

Once counsel has obtained this information bearing on the client’s location, counsel should move on to the steps set forth in sections 3.4 (describing the additional information counsel should obtain from the client and the advice that should be given to the client), 3.5 (discussing the telephone conversations that counsel should have with the police on the client’s behalf), and 3.6 (recommending that counsel go to the police station and identifying steps s/he should take while there). Section 3.7 describes some precautions counsel can take if s/he is unable to go to the police station.

3.3.2. *A Phone Call from a Relative or Friend of a Client Who Is At the Police Station: Locating the Client and Gaining Access to the Client By Telephone*

3.3.2.1. *The Matters to Cover in the Phone Conversation with the Client's Relative or Friend*

If the call requesting the attorney to represent a defendant in police custody comes from a relative or friend of the client rather than the client himself or herself, counsel must move quickly to try to find the client and prevent him or her from making any incriminating statements to the police. The lawyer's success at that job can literally mean the difference between conviction and acquittal when the case gets to trial.

Because of the need for prompt action, counsel should keep the phone conversation with the client's relative or friend as brief as possible. (Counsel should be sure to explain the need for succinctness, in order to avoid seeming insensitive to the caller's fears and concerns.) At this point the only vital information is that which is needed to locate the defendant, gain access to him or her, and establish oneself in the eyes of the police as defendant's counsel. The attorney should obtain the following from the caller:

1. The defendant's name (with spelling).
2. The caller's name (with spelling) and relationship to the defendant. The police may require that the attorney furnish this information in order to establish the attorney's right to visit the defendant for an initial interview.
3. The caller's telephone number(s) (cellphone, home landline, and phone number at work), so that counsel can call back for a follow-up conversation after locating and communicating with the client. If the caller does not have a cellphone, counsel should ask for the cellphone number of a family member or friend who can reach the caller easily.
4. Authorization from the caller to represent the defendant, at least at this stage.
5. Any information the caller may have about which police station the defendant was taken to. If the caller does not know, the attorney should ask: where the arrest was made; whether it was made by uniformed or plainclothes police officers; and whether the officers belonged to a special squad (such as homicide, robbery, burglary, narcotics, vice) or were otherwise identifiable by the caller.
6. The offense for which the defendant was arrested, if the caller knows. The nature of the offense may be important in attempting

to locate the defendant, especially if a special squad is involved in the interrogation. But a lengthy description of the facts leading up to the arrest is not only unnecessary but counterproductive at this stage, in light of the need for quick action.

7. Any information the caller can provide about whether the defendant's family or friends can and will put up bail for the defendant, and how much they are likely to be able to raise for this purpose.

3.3.2.2. *Locating the Client*

The most effective way to locate the defendant is usually a series of trial-and-error telephone calls. The order of the calls depends in part upon the amount of time that has elapsed since the arrest, but the first call should ordinarily go to the desk officer of the police station for the precinct where the arrest occurred, and the second call should go to the detectives who are likely to be interrogating the defendant there. If counsel fails to obtain information about the defendant's whereabouts from the precinct-station desk or detectives, calls should next be made to the headquarters of any potentially relevant special squads.

If these phone calls prove fruitless, counsel should call the commanding officer on duty in the arrest precinct, explain that the client has disappeared following an arrest in the commander's precinct, and request that the commander locate the client immediately and inform counsel where s/he is being held. If the commander claims ignorance, counsel should ask for the name and phone number of the highest ranking official of the police department then on duty and should call this official to confront him or her with the client's disappearance and make the same requests. Counsel should next call a member of the prosecutor's staff and object to the incommunicado detention of the defendant. "Holding incommunicado is objectionable because arbitrary – at the mere will and unregulated pleasure of a police officer," *Ashcraft v. Tennessee*, 322 U.S. 143, 152 n.8 (1944); it violates both Due Process (*Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)) and the Fourth Amendment to the federal Constitution. "[T]he Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest." *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975). All else failing, counsel should call a judge of the court of record of the county and ask to appear before the judge at the earliest possible time to present a petition for a writ of *habeas corpus* directed to the chief of police, the prosecutor, or both, charging them with the illegal custody of the defendant. See *Rasul v. Bush*, 542 U.S. 466, 474 (2004): "[a]t its historical core, the writ of habeas corpus has served as a means of reviewing the legality of Executive detention, and it is in that context that its protections have been strongest." *INS v. St. Cyr*, 533 U.S. 289, 301, . . . (2001). See also *Brown v. Allen*, 344 U.S. 443, 533, . . . (1953) (Jackson, J., concurring in result) ("The historic purpose of the writ has been to relieve detention by executive authorities without judicial trial'")."

3.3.2.3. *Keeping Records of Calls*

It is essential that counsel keep a record of the times at which s/he made telephone calls to locate the defendant and the names (correctly spelled), ranks, and badge numbers of all officers to whom s/he spoke. These may be needed in moving to suppress incriminating statements on the ground of unnecessary police delay (see § 26.11 *infra*) or on the theory that such delay was a factor in producing an involuntary statement (see § 26.3.2 *infra* and particularly *Haynes v. Washington*, 373 U.S. 503 (1963)). In more extreme cases of police delay, the information may be needed for petitions for a writ of *habeas corpus* to free the defendant from police custody.

3.3.2.4. *Persuading a Police Officer to Allow Counsel to Speak with a Recently Arrested Client on the Telephone*

If counsel is able to locate the client, counsel should try to gain access to the client by telephone as quickly as possible. Police officers taking counsel's call will often be strongly resistant to the notion of counsel's speaking with the client. In attempting to cut through police interference, it is usually wise to begin by seeming cooperative and congenial. Most police officers experience a surfeit of angry phone calls from citizens, victims, and lawyers, and they usually react to aggressive calls from defense lawyers truculently. By contrast, a cordial phone conversation that attempts to deal with the officer on a professional-to-professional basis may be disarming and eventually successful.

In dealing with the police, it is always useful to anticipate their interests and, if possible, offer counsel's assistance in achieving the officers' goals in exchange for counsel's access to the client. Thus, for example, counsel might say:

Officer, until I speak with my client, it's my duty, as [his] [her] lawyer, to tell you that [he] [she] does not wish to answer any questions until I get there. Now, if I can have a chance to talk with [him] [her] on the phone right now, so that I can get a better sense of what this case is all about, it may be that I'll end up advising [him] [her] to cooperate with you and possibly to cut a deal. But, I can't make any decision about that, and I certainly can't advise my client about that unless you let me talk with [him] [her] on the phone.

Although it is *very* rare that counsel will ever end up advising the client to cooperate with the police, the fact that this advice is prudent in even a small number of cases means that counsel should not feel reluctant to promise to *consider* advising the client in that manner.

In all such dealings with the police, counsel should take precautions against later being misquoted (for example, by an officer who testifies that s/he questioned the defendant only after both the client and the attorney waived counsel's presence during the interrogation). Counsel should make notes of the conversation immediately and, when time permits, write a memo

to the file regarding the content of the conversation.

If an amiable approach fails to shake police refusals to allow counsel to speak with his or her client, more aggressive demands are in order. Insistence that the police respect the client's rights to communication (see § 3.2.3 *supra*) can be ratcheted up by threatening to hold the officers legally responsible if they continue to stonewall. Successful civil-rights actions against police for violating the rights of arrestees are not commonplace, but there have been enough of them to make many officers buckle in the face of defense counsel who appear determined to enforce those rights by litigation. *See, e.g., Martinez v. Mares*, 613 Fed. Appx. 731 (10th Cir. 2015); *Goodman v. Las Vegas Metropolitan Police Department*, 613 Fed. Appx. 610 (9th Cir. 2015); *Al-Lamadani v. Lang*, 624 Fed. Appx. 405 (6th Cir. 2015); *Coggins v. Buonora*, 776 F.3d 108 (2d Cir. 2015); *Crowe v. County of San Diego*, 608 F.3d 406, 432 (9th Cir. 2010).

If the officer allows counsel to speak to the client, counsel should cover the matters described in § 3.4 *infra*. Counsel should also talk further with the police to try to obtain additional information about the case, provide protections for the client from interrogation and other police investigative procedures, and explore the possibility of the police releasing the client on his or her own recognizance (O.R.) or on bail. *See* § 3.5 *infra*. Thereafter, counsel should go to the police station if at all possible and follow the steps recommended in § 3.6 *infra*. Section 3.7 presents some alternative precautions counsel can take if s/he is unable to go to the police station.

If the officer does not allow counsel to talk with the client on the telephone, counsel should record the officer's name and badge number and the name and phone number of his or her commanding officer and should then give the officer the precautionary instructions itemized in § 3.5 subdivision 2(e) *infra*. Counsel should immediately call the commanding officer and attempt to persuade him or her to order the arresting officer to permit counsel to speak with the client on the phone. If the commanding officer proves unbudging, counsel should deliver the same set of precautionary instructions and should inform the commanding officer that counsel is memorializing those requests and the time when counsel gave them to both the arresting officer and the commanding officer. Counsel should then go promptly to the police station where the defendant is being held (see § 3.6 *infra*). Frequently, counsel will obtain better results in person than s/he did on the phone.

3.4. Matters to Cover in a Telephone Conversation With A Client Who is Presently in Police Custody

3.4.1. Preliminary Matters to Discuss with the Client

The first thing to do is to obtain an explicit statement by the client that s/he wants counsel to represent him or her. (If counsel was initially contacted by a relative or friend of the client, counsel should explain that the caller asked counsel to represent the client and to give whatever help counsel can provide.) Counsel should ask the client whether s/he wants counsel to represent him or her and explain that counsel is willing to represent the client for the time

being, at least until there is time to get together and talk about whether the client wants counsel to continue on the case. Assuming the client is willing to be represented by counsel, counsel should obtain an explicit statement to that effect from the client and then should tell the client that counsel is now formally the client's lawyer. In the event that counsel is able to follow the preferred course of personally traveling to the police station (see § 3.6 *infra*), counsel should also tell the client that s/he will be coming down to see the client immediately (or as soon as counsel anticipates s/he can get there), giving a specific time estimate.

The other preliminary matter to which counsel should attend in the phone conversation with the client is to ensure that the conversation will be private. Counsel should ask the client which room in the police station s/he is calling from (detectives' room? an interrogation room?) and whether any officers might be listening to the call. If there is any possibility that a police officer or other individual may be eavesdropping on the conversation, counsel should warn the client to use "yes" and "no" answers whenever possible. In serious felony cases, particularly those with some notoriety or those involving gang activity or major drug rings, counsel also must be alert to the possibility of wiretapping of the police phone or of police officers listening on an extension phone and must modify his or her own end of the phone conversation accordingly.

3.4.2. *Protecting the Client from Police Interrogation*

The first and most emphatic advice that the attorney should give in a telephone conversation with a client who is presently in custody is:

Say nothing to the police. Tell them nothing at all. Do not answer any questions from the police until you and I have had a chance to talk privately.

If the police try to question you or to talk to you at all – about *anything* – tell them your lawyer told you not to talk. If they say anything about having evidence against you or if they tell you what the evidence is or if they bring in someone else who says something against you, then they are just trying to get you to talk. Don't fall for it. If they promise to drop the charges after you confess or if they threaten to stick you with more charges if you don't talk, they're just trying to trick you. Don't fall for any of their tricks. Whatever they say, tell them your lawyer told you not to talk.

Sometimes, the police tell arrested people that their lawyers don't know anything and that only the police know what's good for you. That's just another police trick. They're trying to get you to say something so that they can get the judge to lock you up for a long time.

So, make sure you don't say anything to them. Just keep saying that your lawyer told you not to talk.

This phraseology is preferable to any of the other standard formulations used by lawyers in advising their clients not to confess. Telling the client not to say “anything” is better than telling him or her not to “make a statement,” since many clients believe that a “statement” means a written, signed confession. It is also better than advising the client not to make any written or oral confessions, since often clients will not understand that “confessions” include what they believe to be exculpatory statements (for example: “I didn’t break into the house, I just stood outside as a lookout”). Advising the client to say explicitly “My lawyer told me not to say anything” is better than advising the client to remain silent, because it is more concrete and therefore easier for the client to understand; it gives the client *something* to say instead of having to suffer the discomfort of standing mute in the face of questions or accusations, and so it may be easier for the client to do; and it avoids the risk that the client’s total silence may later be used against him or her as a “tacit admission.” See § 26.20 *infra*.

The advice not to talk to the police should be given in *all* cases. Concededly, there is sometimes a possibility that wholehearted cooperation on the client’s part might result in the police exercising their discretion to drop the charges or at least to release the client pending preliminary arraignment. However, the possibility of obtaining those benefits is usually so slim and the consequences of confession so devastating in the long run that a cost-benefit analysis has to result in advising the client not to talk. In the few cases in which the client’s alibi or explanation is so foolproof that it would have persuaded the police to drop the charges, that same result can usually be achieved through negotiations with the prosecutor involving none of the risks that talking to the police entails. Counsel can minimize even the comparatively negligible risk of adverse consequences flowing from a lack of cooperation with the authorities by telling the client to explain that s/he is refusing to speak with the police solely because of counsel’s advice. By placing the onus on the attorney, the client can obtain whatever benefits might accrue from appearing to be cooperative while avoiding the overwhelmingly detrimental consequences of a confession.

3.4.3. *Cautioning the Client Against Speaking with Cellmates or Visitors*

In addition to telling the client not to speak with the police, counsel should caution the client against speaking with cellmates or co-defendants. Cellmates may be snitches, and co-defendants may become turncoats. Counsel should be aware that this is a lesson that most clients find hard to accept. Counsel may wish to mention that a large number of people who get busted end up snitching in order to save their own skins.

Counsel should also warn the client about the possibility that the police will eavesdrop on any visits or telephone conversations that s/he may have with family or friends while at the police station. To minimize this danger, it is wise to advise the client (i) to make and receive no visits or phone calls except from counsel or from close family members who need to be reassured that the client is all right, and (ii) during any family calls and visits, to say nothing unnecessary and certainly nothing about the client’s actions or whereabouts before s/he was arrested or anything else that might have any connection with the case.

3.4.4. *Advising the Client About Lineups, Show-ups, and Other Police Investigative Procedures*

Once counsel has fully warned the client against speaking with the police and against speaking with cellmates, co-defendants, and visitors, counsel will have established the most urgently needed protections of the client's interests. There is additional advice that counsel can give regarding other police investigative procedures, but this should be given if, and only if, counsel believes that the client is capable of assimilating the lengthy discourse involved and will not suffer such information overload that s/he ends up forgetting some of counsel's critical advice about talking to no one. That judgment by counsel needs to be based on the client's age, emotional state, and degree of physical exhaustion. Throughout the phone conversation, counsel should periodically ask the client questions that will force the client to repeat back the advice that counsel has just given (for example: "Okay, now what are you going to say when the police say that if you tell them what happened, they'll drop the charges and you can go home?"). Such questions will not only serve as a mechanism for double-checking the client's comprehension of the previously given advice, but they will also enable the attorney to gauge whether the client's current attention span warrants venturing into the realm of useful-but-not-indispensable additional advice.

If the client seems reasonably alert, counsel should next advise him or her how to deal with lineups and other identification procedures that may occur while s/he is at the police station. It is presently unclear to what extent the police can lawfully compel an unwilling accused to submit to identification confrontations in the absence of counsel. See § 27.6 *infra*. The client should accordingly be advised to object to any lineup, show-up, or confrontation for identification purposes that is held in counsel's absence, and to tell the police, if they say anything about showing the client to any witness for possible identification, that the client wants to have his or her lawyer present and that s/he is asking the police either to phone the lawyer (giving them the lawyer's number) or to let the client phone the lawyer, so that the lawyer can come down to the station and represent the client during any identification procedure. The client should also be instructed that in the event that the police do display the client to any person for identification, the client should not speak any words or answer any questions – including his or her name – during the procedure. S/he should not, however, physically resist being exhibited; and if the police insist on going ahead with the exhibition after s/he has told them that s/he objects to it, the client should follow whatever orders the police may give with regard to the client's going up onto a lineup stage or stepping forward or walking about or speaking words that everyone in the lineup is asked to speak. S/he should never attempt to hide his or her face or to make faces. These tactics, or a failure to obey instructions to step forward or to walk about or to say words that other persons in the lineup speak, will only focus attention on him or her and thereby increase the chances of being identified as the perpetrator; they may also be used against the client as evidence of guilt; and physical resistance to the officers may result in a beating or the lodging of assault-upon-an-officer charges or both. If the police tell the client that s/he is being taken to a lineup or identification room,

s/he should orally object to the absence of counsel but should not sit down or physically refuse to go, since this action may result in the witnesses being brought back to view the client in the cell – a far more suggestive form of confrontation than the lineup itself. If the police tell the client that s/he is being taken anywhere to be shown to witnesses, s/he should insist, *first*, that s/he be given a chance to phone his or her lawyer and to have the lawyer present and, *second*, that s/he not be shown to witnesses except in a lineup with other people who resemble the client. Once in a lineup or identification confrontation, s/he should observe and remember everything about it that s/he can, particularly (a) how many other persons were in the lineup, how they were dressed, and what they looked like (getting their names, if possible without attracting attention to the client, or afterwards if the client sees these persons again while s/he is in custody); (b) how many witnesses were asked for identifications, what they said, what the officers said to them, their names, and what they looked like; (c) how many police officers were present and their names, badge numbers, and descriptions; and (d) the time and place of the lineup. The client should not attempt to take notes during the lineup or in any place where s/he may be observed by the witnesses to the lineup, but when s/he returns to the cell, s/he should request paper and a pen from the guards and immediately write down everything that s/he can remember.

The client should also be instructed that if anyone asks for permission to go to the client's house or to any other place in order to search for evidence or weapons or pieces of clothing or anything else, s/he should say, "My lawyer told me to say, 'No,'" whether or not s/he thinks that the things the police are looking for will be found or that the search will prove the client innocent. S/he should be instructed to give the same answer if the police ask the client to lead them to any place or thing or to act out or demonstrate any action; and to object to being taken from the cell area for any reason, saying that s/he wants to stay there and wait for an attorney who is coming. S/he should be instructed not to sign any forms or papers and not to write down anything for the police. Again, the proper answer is "My lawyer told me to say 'No' until s/he gets here." The client should be instructed that if anyone attempts to inspect or examine his or her body, to take swabs or washes or scrapings from it, to cut nails or take hair samples, the client should tell them "My attorney said to wait until s/he gets here"; but if they go ahead anyway, the client should not try to fight them off.

3.4.5. Advising the Client How to Deal with News Reporters

Counsel should advise the client not to talk to reporters or other media representatives and, if asked questions by them, to tell them that counsel has insisted that s/he say nothing at all to anyone until counsel gets there. If media representatives start taking photographs with cameras or cellphones, the client should not attempt to duck or dodge, cover his or her face, or make faces, but should remain calm and follow any police directives about whether to stand in a certain place or move to some other location. If the client has the opportunity to ask the police to prevent the taking of photographs before a camera or cellphone is aimed, s/he should do so; but s/he should not

attempt to call out or signal an officer after a camera or cellphone has been positioned for a photograph. Photographs of a defendant dodging or shouting or behaving in any other manner that could seem furtive or menacing can be exceedingly prejudicial.

3.4.6. Concluding the Telephone Conversation with the Client in Police Custody

At the conclusion of the phone conversation, counsel should try to reduce the client's anxiety by letting the client know when counsel will be back in touch with the client and what counsel will be doing to try to secure the client's release:

1. If counsel intends to adopt the preferred course of action of going to the police station (see § 3.6 *infra*), counsel should tell that to the client, and give the client a reasonable time estimate of how long it will take for counsel to get to the station. Counsel should tell the client not to worry if the client is moved before counsel arrives, since counsel will try to track the client down and visit the client wherever s/he has been taken. Counsel should add, however, that there is a possibility that the police will not allow counsel to see the client and that if the client does not see counsel, it is because of police interference and not due to any lack of effort on counsel's part.
2. If counsel is not going to go to the station or if counsel is not planning to leave for the station immediately, counsel should give the client a telephone number at which counsel can be reached.
3. Whether counsel intends to go to the police station or not, counsel should:
 - a. Offer to phone someone on the client's behalf (*e.g.*, a spouse or domestic partner or parent or other family member to reassure them that the client is all right; and/or an employer or fellow employee to explain that the client may not be able to show up for work);
 - b. Explain that counsel will take all of the steps that might help to secure the client's immediate release (which, depending on local practice, might include talking with the police about releasing the client on his or her own recognizance or on station house bail, see §§ 3.5, 3.8 *infra*);
 - c. Explain that if the client is not released, then the client will be taken to court, and the judge will decide whether to release the client or set bail; counsel will be in court with the client, and counsel will try to convince the judge in court to release the client or, if bail is set, to make it as low as possible.

Before ending the conversation, counsel should instruct the client to

get the attention of a police officer and tell the officer, while counsel listens on the phone, that the client does not wish to talk further with the police in the absence of counsel and that the client wants all further dealings with the police to be conducted by counsel on the client's behalf. Once the client has made a statement of this sort, with counsel in a position to testify that s/he heard it made, the client has obtained the fullest possible protection against police interrogation while in custody, short of counsel's physical presence. For, under the rule of *Edwards v. Arizona*, 451 U.S. 477 (1981), the police may not thereafter question the client, even with full *Miranda* warnings and waivers, "unless the [client] . . . himself [or herself] initiates further communication, exchanges or conversations with the police" (*id.* at 485). See also *Minnick v. Mississippi*, 498 U.S. 146, 150-56 (1990); *Smith v. Illinois*, 469 U.S. 91, 95 (1984) (per curiam); *Shea v. Louisiana*, 470 U.S. 51, 54-55 (1985); *Montejo v. Louisiana*, 556 U.S. 778, 794-95 (2009) (dictum). The procedure advised in this paragraph is important; without it, counsel's own admonitions to the police not to interrogate the client may be ignored, and any promises made by the police that they will not interrogate the client may be broken. See *Moran v. Burbine*, 475 U.S. 412 (1986). *But cf.* *People v. Grice*, 100 N.Y.2d 318, 321-22, 324, 794 N.E.2d 9, 10-12, 13, 763 N.Y.S.2d 227, 229-30, 232 (2003) (state constitutional right to counsel attaches, and "interrogation is prohibited unless the right is waived in the presence of counsel," if an attorney or "the attorney's professional associate" informs the police "'of the fact that the defendant is represented by counsel or that an attorney has communicated with the police for the purpose of representing the defendant'").

3.5. Telephone Conversations with the Police on Behalf of a Client Who Is Presently in Police Custody

In dealing with the police on behalf of a recently arrested client who is still in police custody, counsel should pursue three major goals: (i) to prevent the police from interrogating the client or conducting other investigative procedures; (ii) to secure the immediate release of the client; and (iii) to obtain as much information as possible about the facts of the offense for which the client has been arrested.

The prevention of interrogation should be counsel's primary objective, since a confession will severely limit counsel's chances of winning the case at trial and preventing long-term incarceration. However, in structuring conversations with the police, the topic of interrogation should normally be left for last, since counsel's efforts to prevent interrogation will be seen by the police as marking the beginning of an adversarial relationship between them and counsel; from that point onward, counsel can expect that the officer(s) will cease being cooperative and providing information.

Thus counsel should ordinarily structure conversations with the police in the following manner:

1. Ask to speak to whatever officer happens to be with the client at the moment, whether that is the arresting officer, the investigating officer, the booking officer, or a detective. (This will be the officer most likely

to be on the verge of – or in the course of – interrogating the client. Imminent interrogation should be the attorney’s immediate concern; later phone calls or a trip to the police station can deal with officers who might be planning to interrogate the client later on; as for interrogations that have already taken place, there is very little counsel can do about those until the time comes to start preparing motions to suppress.)

2. In the conversation with the officer, counsel should:
 - a. Begin by explaining that counsel is representing the client.
 - b. “Confide” in the officer that counsel has no information about the case whatsoever, and therefore would appreciate some idea of why the client was arrested. (As a practical matter, this approach is much more likely to elicit information about the case than an aggressive demand for information or a series of lawyer-like questions.) Follow up with questions about the facts of the crime and the grounds for the arrest as the officer sees them (couching the questions, to the extent plausible, as requests for clarification of things that the officer has already said). In the course of any ensuing conversation about the arrest, counsel should ask the officer what specific charges are now placed against the client (being sure to ask “Is that all the charges?”); whether other charges are being considered; and if so, what they are.
 - c. If the police have authority to release a defendant on bail or without bail (usually called “own recognizance” or “O.R.”) – which may be the case only in summary and misdemeanor cases, see § 3.8 *infra* – counsel should talk with the officer about whether O.R. is possible and, if not, whether stationhouse bail is available (and, if so, what the bail amount is) for the charges on which the client was arrested and any other additional charges that may be placed against the client.
 - d. Ask the officer where the client is now, including the precise location within the building; whether there are any plans to move the client elsewhere and, if so, where and when; whether the officer will be handling all of the remaining booking of the client or whether that will be handled by other officers, and, if so, who.
 - e. Having obtained all possible information concerning the charges, facts of the offense, and possibilities for release, deliver the following instructions, advice, and requests regarding police interrogation and other investigative procedures:
 - (i) Tell the officer that counsel is requesting the officer not to interrogate the client or to ask the client any questions; tell the officer that counsel has instructed

the client to say nothing, to answer no questions, and to waive no rights; tell the officer that, as attorney for the defendant, counsel is informing the officer that the client is hereby asserting his or her right to refuse to answer questions and his or her right to refuse to answer questions without the presence of counsel; if counsel intends to go to the police station, add that counsel is requesting that no interrogation take place until counsel arrives at the station (expressing the hope that counsel will be able to cooperate with the officer as soon as s/he arrives but saying that s/he must really ask the officer not to deal any further with the client at this time, until counsel has had a chance to confer with the client and to find out what the matter is all about).

- (ii) Tell the officer not to ask for the client's consent to conduct any searches or investigations; tell the officer that counsel has instructed the client to give no consents; and tell the officer that counsel, on behalf of the client, is informing the officer that the defendant refuses to consent to any search or other investigation.
 - (iii) Tell the officer not to place the client in a lineup or exhibit the client for identification or make any physical or mental examination, body inspection, or test of any sort on the client in the absence of counsel; tell the officer that counsel has instructed the client to give no consents and to participate in no investigative procedures in the absence of counsel; state that, as counsel for the defendant, counsel is asserting the defendant's right to have counsel present during any identification or other investigative procedure.
 - (iv) Say to the officer that counsel is formally requesting that the officer relay the foregoing instructions and requests for the handling of the defendant to any other officers who may become involved in the booking or interrogation of the defendant or who may come into contact with the defendant while s/he is at the police station.
- f. Conclude the phone conversation with the officer as follows:
- (i) If the client has indicated that s/he needs medical treatment, tell the officer to take the client to the hospital, and then ask what hospital the client will be taken to [adding, if appropriate, that counsel will meet them at the hospital].
 - (ii) If counsel intends to go to the police station, tell the

officer that counsel will be at the station as soon as s/he possibly can, and request that the officer not move the client from the station for any purpose (except for medical treatment if the client has indicated that s/he needs medical treatment).

- (iii) Take the officer's name (with spelling), rank, and badge number, and ask the officer where s/he will be and how counsel can contact him or her during the next few hours.
3. Having completed the phone conversation with the officer who currently has custody of the client, counsel then should repeat that conversation: (a) with any officers that the first officer indicated would later be involved in the booking of the defendant or investigation of the case; and (b) with any other officers who will likely take part in the booking or investigation or in interrogating the defendant, notwithstanding the first officer's failure to mention them.

3.6. *Counsel's Activities on the Client's Behalf at the Police Station*

After speaking by telephone with the client (if possible) and the police, counsel should go as quickly as possible to the police station. The following discussion canvasses the matters that counsel should attend to at the station. If counsel is unable to go to the station personally or to send someone (like a law partner or law clerk), then counsel should make the additional phone calls described in § 3.7 *infra*.

Upon arriving at the police station, counsel should show the desk officer some identification (like a Bar I.D. card) or other document confirming that counsel is an attorney. S/he should say that s/he is representing the defendant (or has been asked to represent the defendant) and that s/he wishes to see the defendant immediately. If a delay of more than a few minutes occurs, s/he should repeat this request and ask, alternatively, to see the commanding officer. If the commanding officer proves obstructive, counsel may be able to obtain assistance from the prosecutor's office. In some urban areas, a deputy prosecutor is assigned to be on call for after-hours emergencies and can be reached by phone through the prosecutor's office or perhaps by e-mail. In extreme situations, counsel should contact a judge of the local court of record and arrange to present a prompt petition for a writ of *habeas corpus* directed to the chief of police, the prosecutor, or both. Again, in some areas, there is an emergency judge available for after-hours crises. If the desk officer or the commanding officer tells counsel that s/he can see the client but only after the completion of interrogation (or lineup procedures, or other investigative procedures, or booking), counsel should insist that the procedures stop until counsel has had a chance to confer with the client.

Once counsel reaches the client, s/he should request the use of a room in which the two can consult privately. As soon as counsel and the client are

out of earshot of the police and other persons, counsel should immediately instruct the client that: (a) s/he should respond to any questions from the police or anyone else by saying “my lawyer told me not to talk”; (b) s/he should respond to any requests for permission to search for evidence or weapons or anything else by saying “my lawyer told me to say, ‘no’”; (c) s/he should not sign or write any papers for the police or anyone else; (d) s/he should not agree to leave the cell area or go with the police to any other place except to court or another holding facility (but s/he should not forcibly resist a police officer’s attempt to take him or her to another location); and (e) if the police say that they intend to exhibit the client to any witnesses or subject him or her to any sort of bodily or mental examination, s/he should ask to phone counsel so that s/he can confer with counsel and have counsel present during the proceeding, and she should say that s/he does not want the exhibition or examination to be held in the absence of counsel. Once these crucial instructions have been given, counsel can move on and ask the client for information about the client’s background (home life, employment, etc.) that counsel can use in trying to persuade the police to release the client (see § 3.8 *infra*). Thereafter, to the extent that time permits, counsel can question the client about the information that counsel will need at the preliminary arraignment. See § 3.21 *infra*.

After the interview with the client has been completed, there are several matters that counsel will need to discuss with the police. The first matter that should be covered (before the conversation with the police takes a confrontational turn, leading to the drawing of battle lines) is the subject of the client’s release. If the police have authority to release a defendant on his or her recognizance, counsel should do whatever s/he can to persuade the officer to exercise that authority favorably. See § 3.8.1 *infra*. If the police have authority to release defendants on stationhouse bail, counsel should ask whether bail is available for the charge on which the client has been arrested and, if so, what the bail amount is.

After the subject of the client’s release has been resolved to whatever extent it can be at this point, counsel should ask the investigating officer whether the client has made any written or oral statements. If s/he has, counsel should request to see them or, in the case of oral statements, to be told of their contents immediately. Counsel should ask whether the client has been exhibited to any possible witnesses for identification purposes and whether any tests or examinations have been conducted on the client. If so, counsel should ask the nature of the identification proceedings or tests, who conducted them, what results they produced, and the names of all persons present during the identification or testing procedures. Counsel should ask whether any future identification or testing procedures are anticipated, what procedures and when; and s/he should ask and arrange to be present when they are conducted. Counsel should tell the investigating officer that s/he has instructed the client not to talk to anyone and not to give any consents or waivers in counsel’s absence; and s/he should ask the officer not to question or talk with the client unless counsel is present and not to take any consents or waivers from the client without counsel’s prior approval.

Before leaving a client in custody, counsel should have the client inform

an officer, in counsel's presence, that the client does not wish thereafter to talk or deal with the police or prosecuting authorities without counsel but wants to communicate with them only through counsel. See § 3.4.6 *supra*. Counsel should give the officer counsel's professional card and should also give one to the desk officer on the way out.

Counsel who obtains permission to attend identification or examination procedures should ordinarily act as unobtrusively as possible. S/he should not attempt to interfere with them in any way or to play any part in them while any potential identifying witness is present. Prior to the exhibition of the client and *out of sight and earshot of any potential identifying witness*, counsel should (a) inform the police that s/he objects to the identification proceeding altogether, if she does (for example, if s/he contends that the client has been illegally arrested or is being illegally detained, see § 27.7 *infra*), and (b) object to any feature of the proposed exhibition procedure that she believes will impair its reliability (see §§ 27.2-27.4 *infra*). Counsel should couple the latter objection with affirmative suggestions for modification of the procedure only if s/he is reasonably confident that (i) the police will adopt those suggestions and (ii) the result will be that the client is not identified. (If the client *is* identified through a procedure endorsed by counsel, counsel's role in shaping the proceeding can only hamstring subsequent defense challenges to the propriety or reliability of the identification; if the police reject counsel's suggestions, a prosecutor will later be able to contend that those suggestions limit the aspects of the identification proceeding about which the defense can complain in a suppression motion.) During the proceeding itself – while potential identifying witnesses are present – counsel's role is strictly that of an observer. S/he should watch and take notes on everything that happens, be sure to get the names of all persons present, and ask questions both before and afterwards about anything s/he does not understand.

Before the proceeding begins, counsel should ask whether it will involve the defendant's performing any kind of action – for example, speaking (to provide a voice exemplar) or turning or walking about on a lineup stage. If so, counsel should request the opportunity to confer privately with the defendant in advance of the exhibition procedures, so that s/he will not have to interrupt them for the purpose of giving the defendant advice. Counsel may or may not have suggestions to offer the client about how s/he should behave in performing the actions s/he will be called upon to take. But even if counsel does not, it is ordinarily helpful for counsel to forewarn the client specifically what those actions will be, because foreknowledge may reduce the danger that the client will exhibit guilty-looking signals as a result of nervousness or surprise.

At a lineup or show-up, counsel should ask to speak to the possible identifying witnesses *before* the defendant is exhibited to them. It will be the rare case in which the police will permit such interviews. But at the earliest time when counsel can obtain access to the witnesses, counsel should ask them (i) to think back to their original observation of the person whom they saw in connection with the offense and to describe that person as s/he then appeared; (ii) to describe the circumstances under which they observed that person; (iii) how sure they are that they could recognize the person if they saw

the person again; (iv) by what characteristics they could recognize the person; (v) what descriptions of the person they gave to the police prior to the present identification proceeding; (vi) whether they have been asked by the police to attempt to identify any persons other than those exhibited in the current proceeding, either in the flesh or by photograph or video, and whether they made any identifications on these occasions; and (vii) what they were told by the officers who brought them or asked them to come to the station today. When there is more than one identifying witness, counsel should, if possible, speak separately with each. Interviewing identifying witnesses as a group will result in the loss of important information unique to each of them and will probably cause them to homogenize their impressions, to the client's ultimate detriment.

Whenever counsel is permitted to attend a show-up, counsel should object to the show-up procedure and request that the police conduct a lineup instead. Counsel should point out the likelihood that any show-up results will be suppressed in court because there are no exigencies requiring a show-up instead of a lineup. See § 27.3.1 *infra*.

Counsel should attempt to ensure that any lineup is composed of at least six persons who resemble the defendant in general characteristics – age, skin color, height, weight, body type, hair style, clothing, and accessories; and counsel should ask that all subjects be exhibited in street clothes, not jail garb or, in the case of police officer “fillers” in the line, articles of clothing that are identifiable as parts of a police uniform. If more than one witness is to view the lineup, the witnesses should not be present during one another's viewings; the positions of all subjects in the lineup should be changed between witnesses; and the witnesses should not be assembled where they can talk together either before or after the conclusion of the proceedings. At the lineup, counsel should record the names, descriptions, and means of later contacting all witnesses who are present to view the lineup (whether or not they attempt to make any identifications), what is said to them, and what they say. Counsel should also record the names, descriptions, and contact information for all persons in the lineup array. Counsel should record the manner in which the lineup is conducted, including distances, lighting, any directions to the subjects to walk, motion, or speak; what they do; and when in the course of these proceedings any identification is made. S/he should also note the names, ranks, and badge numbers of all officers present and of those who brought witnesses to the lineup. Similar interviews, observations, and notes should be made at show-ups.

Police detectives and officers usually record their own observations of lineups and show-ups in handwritten notes and typed reports. It is commonplace for the array of persons on a lineup stage to be photographed in a composite still, and in some jurisdictions the entire lineup proceeding is videotaped by the police. Counsel should note whether any of these records are being made, so that s/he can later subpoena them or request their production through pretrial discovery proceedings. See §§ 9.18, 9.20 *infra*.

In the case of other testing procedures, counsel should record the names of all technicians and officers present and the means of contacting them and should ask them to describe for counsel what procedures, materials, substances,

chemicals, and so forth, they are using, as they proceed. If possible, counsel should get them to describe, *before* any testing is done, what indicators or results they believe will demonstrate positive and negative findings. Counsel should also ask them whether their testing procedures will affect the substances being tested and, if so, request that they leave a sufficient amount of the substances untouched for subsequent defense testing. Any refusals of the technicians or officers to cooperate in these regards or to explain what they are doing should be noted.

3.7. *Actions That Can Be Taken to Protect the Client's Rights in Lieu of a Trip to the Police Station*

There is no fully adequate substitute for a trip by counsel to the police station. However, if for some reason counsel cannot go to the station, there are phone calls s/he can make that will further some of the same objectives.

After counsel's preliminary phone conversations with the police (§§ 3.3.2.4 and 3.5 *supra*) and after speaking with the client by telephone (§ 3.4 *supra*), attorneys who cannot go to the stationhouse should phone the police again, ask for the officer who is currently responsible for handling the client's case, and:

1. If the police have the authority to release the defendant on his or her own recognizance (O.R.), try to persuade the officer to do so. See § 3.8.1 *infra*.
2. If O.R. is not an option but stationhouse bail is, elicit all information necessary for obtaining stationhouse bail. See § 3.8.2 *infra*.
3. Reiterate and reinforce all advice, instructions, and requests that counsel gave in the earlier phone conversation with this officer or other officers regarding police interrogation of the client, identification procedures, and other investigative procedures. See § 3.5 *supra*.

3.8. *Securing the Client's Release on Bail or Own Recognizance or By Habeas Corpus*

The most effective protection against stationhouse investigative procedures is, of course, for counsel to secure the client's release as rapidly as possible. As long as a defendant remains in the hands of the police, they can conveniently conduct any number of investigative procedures that may produce incriminating evidence. Ordinarily, too, getting out of custody is what the client most wants at this stage.

3.8.1. *Release on the Client's Own Recognizance ("O.R.")*

In some jurisdictions, the police have authority (most commonly in summary and misdemeanor cases) to release a defendant immediately after booking, without bail, pending the defendant's first court appearance on

the charge. This practice is usually called “own recognizance” (“O.R.”) or “release on the defendant’s own recognizance” (“R.O.R.”).

Often, eligibility for stationhouse release on O.R. is defined categorically, in terms of the type or degree of offense charged and sometimes also whether the defendant has a prior record and/or pending charges; the police are not expected to exercise discretion in releasing defendants on the basis of their individual characteristics or situation. But in some localities the police do have such discretion, either in all summary/misdemeanor cases or in those where specified eligibility criteria are met. Counsel may be able to influence the exercise of that discretion by telling the decision-making officer favorable information about the client’s life circumstances (*e.g.*, that continued custody could cost the client his or her job, or would cause profound hardship for the client’s family). Even if the police are not formally recognized as having discretion to allow or refuse a defendant release on O.R. – where entitlement to O.R. depends solely on the nature of the charge and the defendant’s record – the arresting officer (or the booking or investigating officers) may be able to effectuate a client’s release by choosing the offense with which the defendant is charged so that it is one for which O.R. is authorized. In these situations too, counsel may be able to invoke the sympathy of an officer who is making the initial charging decision or an officer who has authority to reduce the initial charge.

3.8.2. Stationhouse Bail

The police may have authority (again, most commonly in summary and misdemeanor cases) to release defendants on bail immediately after booking. This is usually called “stationhouse bail.” The amount of bail is ordinarily set according to a fixed schedule and depends on the offense charged. In some localities, however, the police exercise a limited discretion in setting the amount. The police also may exercise *de facto* discretion by their determination of what offense to charge the defendant with. *Cf.* § 3.8.1 *supra*.

3.8.3. Seeking O.R. or a Lower Bail From a Magistrate or Court

If O.R. and stationhouse bail are not available or are refused, or if bail is fixed in an amount that the client cannot make or deems excessive, local practice may provide for an application to a magistrate or judge for release on the client’s own recognizance or bail at a manageable level. In the absence of any provision for some other procedure, a petition for *habeas corpus* is the customary, time-honored forum for seeking O.R. or bail. *United States v. Hamilton*, 3 U.S. (3 Dall.) 17 (1795); *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 99-100 (1807); *State v. Brown*, 338 P.3d 1276, 1284 (N.M. 2014) (“In 1679, Parliament adopted the Habeas Corpus Act to ensure that an accused could obtain a timely bail hearing”); *State v. Bevacqua*, 147 Ohio St. 20, 23, 67 N.E.2d 786, 788 (1946) (“The accused may, upon refusal of the court to reduce the bail fixed, sue out a writ of habeas corpus in a court of competent jurisdiction where bail may immediately be given pending hearing and a final adjudication made as to whether the bail required in the court, in which the

charge pends, is excessive. Upon this question the authorities are practically unanimous.”); *State ex rel. Gerstein v. Schulz*, 180 So. 2d 367, 369 (Fla. App. 1965) (“The jurisdiction of the circuit court, in habeas corpus, to grant bail when it has been refused by a trial court is well recognized, without regard to whether the circuit court so acting has appellate jurisdiction of the court involved. The authority of the circuit court to so proceed stems from the guarantee of bail by the Declaration of Rights, coupled with the power granted to that court by the Constitution to issue writs of habeas corpus.”); II MATTHEW HALE, PLEAS OF THE CROWN 143 (1st Amer. ed. 1847); see, e.g., *People ex rel. Tseitlin ex rel. Robinson v. Ponte*, 133 A.D.3d 694, 19 N.Y.S.3d 173 (mem.) (N.Y. App. Div., 2d Dep’t 2015); *Ex parte Bentley*, 2015 WL 9592456 (Tex. App. 2015). Procedures for securing the client’s release on recognizance, for getting bail set by a magistrate or judge, and for posting bail are considered in §§ 4.7-4.14 *infra*.

If counsel is unsuccessful in obtaining the client’s release by proceedings in the designated court of first instance, counsel can seek relief in a higher court (by appeal, in some jurisdictions; by an original *habeas corpus* petition or bail application, in other jurisdictions). See, e.g., *Commonwealth v. Madden*, 458 Mass. 607, 939 N.E.2d 778 (2010). Procedures for obtaining pretrial release on O.R. or bail are ordinarily cumulative; that is, a lawyer whose client is refused O.R. or bail, or reasonable bail, by the police can go next to a magistrate, then to a judge of a court of record, then to an appellate court or judge. Similarly, if one bail-setting authority is unavailable, the lawyer may proceed up the ladder to the next level, informing the higher-level authority (by affidavit or other documentation) of counsel’s unsuccessful efforts to reach the lower-level authority. In most jurisdictions, a defendant who is denied relief by one judge may also seek the same relief from another judge of coordinate jurisdiction; the governing procedural doctrine is that *habeas corpus* proceedings are not subject to *res judicata*. *Sanders v. United States*, 373 U.S. 1, 7-8 (1963); *Schlup v. Delo*, 513 U.S. 298, 317 (1995).

The basic doctrinal rules relating to bail – conferring a right to bail and prohibiting excessive bail – are described in §§ 4.2-4.4 and 4.6 *infra*. Notwithstanding these rules, the usual approach of lower courts in setting bail is to pay attention first to the nature of the offense charged and then to the prior criminal record of the defendant. Prosecutors customarily rely exclusively on these two factors in arguing against favorable bail settings; both the categorization of the criminal charge as a serious one in the abstract and any particularly ugly or aggravating facts in the circumstances of the individual case can be counted upon to increase the amount of bail required. Conversely, defense counsel wants to concentrate on mitigating elements in the offense and in the defendant’s record. As counsel moves up the line of courts to those in which legal doctrine is likely to be important, however, s/he will also want increasingly to take account of the statutory and constitutional principles of bail discussed in §§ 4.2-4.4 and 4.6. These focus on the amount of security required to assure the defendant’s appearance at trial; they therefore require consideration of the question whether the defendant has sufficient stability of residence, employment, and family contacts to indicate that s/he is a good risk for release without financial security or for release on a smaller amount of bail than would ordinarily be demanded of one

charged with the offense for which the defendant is held. In attempting to show this to a court, counsel should not rely merely upon the client's account of his or her background or even the client's sworn statement (see § 4.5 *infra*) but should verify the client's account independently and obtain supporting affidavits if time permits. A Bail Project or R.O.R. Project should be brought in immediately if one exists in the area. See § 4.6 *infra*.

Documentation of all of the facts likely to weigh in the defendant's favor in an appellate court should be presented to the court of first instance, even though counsel expects the first-instance judge to disregard them. Technically, appellate courts review lower-court bail and O.R. decisions under an abuse-of-discretion standard, so appellate judges will want to assure themselves that any information on which they rely was before the court below. If the time required to document facts that will favor the defendant in a higher court would unduly delay counsel's filing of a request for bail or O.R. in the court of first instance, counsel should file the initial request without that documentation but, in anticipation of the probable denial of the original request, s/he should prepare a successor request *with* the documentation for filing in the court of first instance before proceeding upstairs. Repeated applications to the same court are permissible because, as mentioned above, "[t]he inapplicability of *res judicata* to habeas . . . is inherent in the very role and function of the writ" (*Sanders v. United States, supra*, 373 U.S. at 8).

3.8.4. Habeas Corpus

If the client has been arrested illegally (that is, arrested without probable cause or otherwise in violation of constitutional or statutory restrictions on the arrest power, see § 25.7 *infra*) or is being detained too long without a preliminary arraignment or without a judicial determination of probable cause (see § 11.2 *infra*), then the client's confinement is illegal and should be challenged immediately by a petition for a writ of *habeas corpus* directed to the chief of police and the prosecutor. *Habeas* is the appropriate remedy for any kind of illegal detention. *Braden v. 30th Judicial Circuit Court of Kentucky*, 410 U.S. 484 (1973); *Boumediene v. Bush*, 553 U.S. 723, 739 (2008) ("The Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom."); see, e.g., *People ex rel. Chakwin on Behalf of Ford v. Warden, New York Correctional Facility, Rikers Island*, 63 N.Y.2d 120, 470 N.E.2d 146, 480 N.Y.S.2d 719 (1984); §§ 4.11.1-4.11.2 *infra*; and see § 4.13 *infra* with regard to *habeas corpus* in a federal district court.

Habeas corpus may also be available if the client is being subjected to illegal or abusive methods of investigation while in custody, although in such a case the writ would not order the client's outright release but would order only that the client be released unless the improper investigative techniques are discontinued. In *Bell v. Wolfish*, 441 U.S. 520, 527 n.6 (1979), the Supreme Court raised and reserved "the question of the propriety of using a writ of habeas corpus to obtain review of the conditions of confinement, as distinct from the fact or length of the confinement itself." This means that insofar as *federal* judicial relief may be required, counsel

would do best to caption the initial federal pleading in the alternative, as a petition for a writ of *habeas corpus* under 28 U.S.C. § 2241(c)(3) and as a civil complaint for injunctive relief under 28 U.S.C. § 1343(3) and 42 U.S.C. § 1983. See *Winston v. Lee*, 470 U.S. 753 (1986); *Nelson v. Campbell*, 541 U.S. 637 (2004); *Hill v. McDonough*, 547 U.S. 573 (2006); and cf. *Hutto v. Finney*, 437 U.S. 678 (1978); *County of Riverside v. McLaughlin*, 500 U.S. 44, 56-57 (1991). State law, of course, determines whether the appropriate *state-court* remedy would be an injunction or a conditional writ of *habeas corpus* or both.

B. The “Wanted” Client: Representing Clients Who Have Not Yet Been Arrested But Who Are Being Sought by the Police

3.9. The Initial Phone Call from the “Wanted” Client or from Someone Concerned about the Client

An attorney may receive a call from a client who is “wanted” by the authorities in either of two basic situations: when a potential client contacts the attorney for the first time because of his or her suspicion (or knowledge) that s/he is being sought by the police; or when an already-existing client suspects (or knows) that s/he is being sought by the police for crimes other than the one(s) on which s/he is already being represented by the attorney. If the attorney is contacted by the client himself or herself (rather than by a relative or friend on behalf of the client), the contact usually takes the form of a phone call: Few clients trust an unknown (or even partially known) attorney enough to appear in the attorney’s office and face what the client believes to be a significant risk of betrayal to authorities.

Sometimes counsel may receive a call or visit from the family member or the friend of a potentially “wanted” client, acting at the client’s instance or because the caller is independently worried about the prospect of an arrest. If this person appears to be genuinely concerned with protecting the client and promoting the client’s best interests, counsel should have him or her put counsel directly in touch with the client, and counsel should then proceed as described in the following paragraphs and sections through § 3.13. If the person appears to be motivated by his or her own interests without regard to the client’s, counsel will ordinarily want to decline any involvement in the matter. Representation of anyone in this situation is all too likely to embroil counsel in ethical and personal conflicts s/he would be wise to avoid.

In all dealings with “wanted” clients, the attorney must be sensitive to the paranoia that develops when an individual leads the life of a fugitive. At the beginning of any phone conversation with a “wanted” client, counsel should explain that the attorney-client privilege covers anything that the client may say about his or her situation and current whereabouts. It is clear under the code of ethics that such conversations do, indeed, fall within the attorney-client privilege. If any attorney labors under the delusion that lawyers are obliged to surrender their clients or facilitate their clients’ arrests by telling the authorities where the client can be found, ethical considerations militate that the attorney either refuse to speak with the “wanted” client at all or, at the very least, begin the conversation by warning the client that the attorney

may relay to the police any or all of the information that the client divulges. If an attorney, albeit aware of the attorney-client shield, nevertheless feels personally uncomfortable with knowing the client's location, that attorney certainly has the prerogative of asking the client not to reveal his or her whereabouts to the attorney. (Indeed, that type of request may have the fringe benefit of noticeably reducing the client's suspicions about the attorney.)

In any event, after settling the issue of attorney-client privilege, counsel should elicit precisely why the client believes that s/he is wanted by the authorities. A client ordinarily becomes aware that s/he is wanted for arrest because of police efforts to locate the client, because of news reports, or because s/he learns of the arrest of companions. S/he may be wrong in believing that s/he is wanted, and counsel acting on behalf of a supposedly wanted client should be careful when making inquiries of the authorities not to give them any ideas or information that they do not already have. Before calling them, the attorney should question the client thoroughly about why the client believes that s/he is wanted, in order to assure that his or her belief is well-founded. If its source is a family member or acquaintance whom the client trusts but whose information seems to counsel to be vague or dubious, counsel is advised to speak to that source directly before making any contact with law enforcement.

Other matters to cover in an initial interview of a client in this situation are discussed in § 3.22 *infra*.

3.10. *Making Inquiries of the Police and Prosecutor*

After obtaining the client's permission to contact the authorities, counsel needs to consider how much information can be revealed to them without suggesting that the client feels or is guilty of some offense and ought to be wanted by the police if s/he is not already. Forearmed with a plausible, non-incriminating reason for the inquiry, counsel should phone the police officer who would logically handle the client's arrest (either those officers who are said to be looking for the client or the desk officer in the precinct station for the district of the client's residence, or a "warrants squad" officer if the department has a separate section responsible for serving arrest warrants and if a warrant may have been issued) or the prosecutor's office (if, in this locality, the prosecutor's office customarily gets involved in prearrest investigations and charging decisions) or, in some jurisdictions, the division of the court clerk's office that is responsible for maintaining records of all judicially approved arrest warrants. Counsel should identify himself or herself as an attorney, say that s/he has been informed that the police may be looking for the client, and ask whether this is so. If it is, s/he should ask whether an arrest warrant for the client has been issued, what the charges are, and whether the warrant specifies a bail figure. If there is no warrant or if the warrant does not specify a bail figure, counsel should ask whether the police are authorized to release arrestees on O.R. or to set bail on the charges for which the client is sought, and what the amount of any bail required will be.

Particularly in cases in which the police are seeking the client for a warrantless arrest, the precinct desk officer may have little information to

give counsel and may refer counsel to the investigating officers. In any event, on the basis of the information counsel receives from the desk officer (or prosecutor or court clerk), counsel should consider whether s/he wants to speak directly with the investigating officers in order to ask them about the nature of the charges, the circumstances of the supposed offense or offenses, and the likelihood of police release after arrest on the client's own recognizance or stationhouse bail. This will depend on whether counsel believes that s/he can get more information than s/he will be giving out in such a conversation. It also will depend on counsel's assessment of the likelihood that an offer to arrange the surrender of the wanted client can be used as leverage to bargain for concessions from the police on the issue of post-arrest release of the client. As indicated in §§ 3.8.1 and 3.8.2 *supra*, the police may have (or may claim that they have) little discretion in granting release on a client's own recognizance or stationhouse bail. Nevertheless, in some jurisdictions they do have a range of *de jure* discretion and they – or the prosecutor – can always exercise *de facto* discretion either by (1) changing the offense charged (unless a warrant has been issued) or (2) agreeing to go jointly with counsel to a magistrate or judge (who is not bound by the bail schedule) and to recommend that bail be set in an amount different from the bail-schedule figure.

In some cases, the police will refuse to make any concessions on release or bail in return for the client's surrender, because they feel that they do not have discretion to make them, or because they are confident that they can soon and easily arrest the client anyway, or because they want to have the client detained following his or her apprehension in order to further their in-custody investigations or to keep the client "off the street." If the police stonewall, counsel should phone the prosecutor's office and attempt to negotiate a surrender and the setting of reasonable release terms (O.R. or manageable bail) directly with a prosecuting attorney. If the prosecutor is willing, the arrest of the defendant can take place in the courthouse itself, and the arresting officer can take the defendant directly to the court detention area to await the prosecutor's completion of the charging documents preliminary to the client's immediate release. If the prosecutor is unwilling, counsel often can arrange with a courtroom clerk to have the case called so that the client can surrender in open court.

Even though these alternative procedures for arranging surrender are available, counsel should ordinarily begin by attempting to negotiate with the police. Generally, police officers are more interested than prosecutors in "closing" open police cases by arrest, since the officers will thereby generate self-serving statistics. Accordingly, police officers have the greatest incentive to agree to bargains proposed by defense counsel, such as the trade-off of surrender for post-arrest release.

3.11. *The Follow-up Conversation with the Client*

After talking with the authorities, counsel will want to confer again with the client, to discuss the client's feelings about surrendering and to advise the client concerning the wisdom of that course in general as well as the specifics of any agreements that counsel thinks s/he can negotiate

with the authorities and the mechanics of surrender if one is arranged.

3.11.1. *Counseling the Client on the Advisability of Surrender*

There are several potential benefits to surrendering: (a) The most significant from the client's perspective will be the possibility of post-arrest release by the police, pursuant to any agreements that counsel can negotiate. (b) A less immediate but equally tangible benefit will be the enhanced likelihood of release on O.R. or a low bail at arraignment, since counsel will be able to argue to the judge that the client's decision to surrender voluntarily demonstrates both that flight is unlikely and that the defendant is a responsible individual. (c) By surrendering at a prearranged time with counsel present, the client can avoid the embarrassment and inconvenience of being dragged out of his or her home or place of employment by the police and can preclude the risk of physical injury from a violent confrontation with the arresting officer. (d) By surrendering in the presence of counsel, the client ensures that there will be no post-arrest custodial interrogation.

The alternative course of not surrendering and of attempting to evade the police entails significant risks (of inconvenience, embarrassment, possible physical injury, and greater likelihood of pretrial detention) and usually provides very little benefit unless the offenses charged are not serious ones and the client is able to leave the jurisdiction permanently. Although evasion may buy the client a little extra time "on the street," the police are fairly assiduous about executing arrest warrants for felonies and other major crimes. Long delays are characteristic only in congested metropolitan precincts and when the charges are for minor offenses.

Counsel will need to advise the client concerning all of these factors so that the client can make an informed decision whether to surrender. Although counsel can (and often should) advise the client to surrender, the final decision must be left to the client.

3.11.2. *Other Matters to Discuss with the Client*

If time permits, counsel should conduct a further, full-scale interview of the client (see Chapter 6) or as much of one as is practicable. Here, counsel should focus upon exploring with the client factual information and tactical considerations that will enable counsel and the client to decide whether before, at, or immediately after, the client's surrender, (a) the client should make an oral or written statement to the police, propose a lineup, or otherwise cooperate with police investigative procedures (see § 6.12 *infra*); (b) counsel should begin discussing the facts of the case with the police or prosecutor in an effort to persuade them to drop the charges (see Chapter 8 *infra*); or (c) counsel should begin to engage in plea bargaining with the prosecutor (see §§ 15.8-15.13 *infra*), including in the bargaining package an agreement for the client's release on O.R. or the setting of a reasonable bail amount.

3.12. *Arranging the Surrender*

If the client decides to surrender, then the attorney can finalize the negotiations with the police and arrange the mechanics of the surrender. Counsel should insist upon securing assurances from the police that the client will not be interrogated, exhibited to witnesses for identification, or subjected to searches or examinations while in custody prior to being released. A time and place for surrender should be agreed upon, and counsel should accompany the client to assure that the arrangements which s/he has made with the police or prosecutor are carried out. Before the surrender, counsel should make a detailed file memorandum recording the agreed-upon surrender terms, identifying the officer or official with whom they were arranged, and noting the time and manner (*e.g.*, a phone conversation between specified phone numbers) in which the officer or official agreed to the terms.

If the police and prosecutor are both unwilling to make satisfactory arrangements or if counsel suspects that the agreements which they have made against interrogation and other post-arrest investigative procedures or their agreements to release the client immediately on O.R. or a specified amount of bail will not be honored faithfully, s/he should phone a magistrate, explain the problem, and request a time when s/he can surrender the client in open court, make bail, and have the client released forthwith. When bail in a reasonable amount has not been previously set by an arrest warrant or by a stationhouse bail schedule or through counsel's negotiations with the authorities, counsel should appear before a magistrate or judge to have bail set, in the manner indicated in § 3.8.3 *supra* and in §§ 4.7-4.14 *infra*, or to have an arrest warrant setting bail issued *before* the surrender of the client.

Arrangements should also be made in advance, either with a professional bail bondsman or by getting the requisite cash, securities, or property deed in hand, to have the necessary security for posting bail available at the time of surrender.

An attorney seeking to avoid harmful publicity arising from the surrender of a client of notoriety should consider picking a time and place inconvenient or inaccessible to the media. Once reporters have obtained facts about a case or photographs of the defendant, it is virtually impossible to restrain their subsequent dissemination, notwithstanding its prejudicial impact on the defendant and his or her ability to get a fair trial. *See Oklahoma Publishing Co. v. District Court*, 430 U.S. 308 (1977); *Smith v. Daily Mail Publishing Co.*, 443 U.S. 97, 103 (1979).

3.13. *The Surrender*

If in the course of the actual surrender of the client, a police officer begins to renege on his or her agreements with counsel, counsel should inform the officer that unless s/he adheres to the agreed-upon surrender terms, counsel will inform the local defense bar that that particular officer cannot be trusted in negotiations on surrender or any other matters. Since many officers are very concerned with closing cases and amassing arrest

statistics, the threat to their credibility as honest traders may cause (or at least encourage) the officer to adhere to the original terms of the agreement. Should the officer persist in violating the terms of a surrender agreement, counsel should make a file memorandum detailing the incident, for potential use in (a) seeking immediate corrective action from superior officers, a prosecutor, or a judge (in a *habeas corpus* or injunctive proceeding (see § 3.8.4 *supra*)) and (b) later litigating motions to suppress any evidence obtained by the police during the client's detention (see Chapters 25-27 *infra*).

C. Appointment or Retainer at Preliminary Arraignment

3.14. Preliminary Arraignment

The preliminary arraignment is usually the first proceeding following arrest at which the defendant is taken before a judicial officer (ordinarily a magistrate, justice of the peace, or judge of some other minor court). In many instances it is also the first time that the defendant has an opportunity to see a lawyer. Counsel is often appointed, particularly in felony cases, at the preliminary arraignment. In some instances just about the only function performed at the preliminary arraignment is the appointment of counsel. But in some jurisdictions the defendant may be called upon to plead to the charges, and frequently s/he is required to decide whether to insist upon, or waive the right to, a preliminary examination – that is, a hearing before the magistrate at which the prosecution will have to establish probable cause to hold the defendant for trial. See §§ 2.3.3-2.3.5 *supra*; 11.1, 11.7 *infra*.

3.15. Insistence on Adequate Time

It is essential that a newly appointed or newly retained attorney not act precipitously in making decisions at the preliminary arraignment. Often the magistrate, anxious to push cases along, pressures defense counsel to make immediate elections. Elections made in haste at the preliminary arraignment – to enter or not to enter a plea, to waive or to demand a preliminary examination, to insist upon or to waive the time limits for preliminary examination – may prejudice the defendant's rights or preclude the raising of vital defenses at a later stage. Counsel must, therefore, insist upon a reasonable opportunity to interview the client and to weigh alternative courses of action. Allowance of five or ten minutes to do these things, as magistrates will suggest in some instances, seldom provides sufficient time to make critical decisions. Counsel who is forced to proceed in this situation ought (a) to object strenuously, asserting that s/he is not prepared to go ahead, stating the circumstances of counsel's recent entry into the case, and invoking the client's Sixth Amendment right to effective representation by counsel, see § 3.23.3 *infra*; (b) to enter no plea; and (c) to waive no subsequent procedures, such as preliminary examination or indictment. Counsel should be sure that his or her objections, requests for adequate preparation time, and declaration of inability to represent a previously unknown client on such short notice are recorded by the court reporter.

3.16. *Preliminary Examination*

When a defendant at preliminary arraignment is offered an opportunity to ask for a preliminary examination, s/he should ordinarily request the examination. This is frequently an important opportunity, perhaps the only one, to get discovery of the prosecution's case. Waiver of preliminary examination ought to be the exception rather than the rule. There are, however, some cases in which waiver would be well advised. See §§ 11.7.3, 28.2 *infra*. For this reason, counsel should insist on *time to decide one way or the other* whether s/he wants a preliminary examination and should resist the magistrate's blandishments to "go on with the examination now, since you won't lose anything that way." If the magistrate insists on going forward, counsel should formally ask for a continuance, again citing the Sixth Amendment. (See § 3.23.3 *infra*.) If this is denied, it is usually wise to let the examination proceed over counsel's recorded objection rather than to waive it. See generally Chapter 11 *infra*.

3.17. *Pleas*

When a defendant is asked to enter a plea to the charges, counsel should consider entering a guilty plea only if some very distinct advantage accrues to the defendant from doing so. Sometimes the prosecutor will agree to accept a plea to a less serious charge than that for which the defendant is being held or will agree to a favorable fine or sentencing disposition at this stage. The final choice of alternatives, between accepting a prosecution offer to dispose of the case at the preliminary arraignment and going on to the criminal court, should be left to the client, for s/he must live with the outcome. When in doubt, counsel should advise against a guilty plea, since a not guilty plea can ordinarily be switched later to a guilty plea with greater freedom and with fewer possible adverse consequences than attend attempts to switch the other way. In all events, counsel should exercise care before recommending disposition of a case at preliminary arraignment. Although in most instances a favorable offer from the prosecutor is motivated by the desire to avoid cluttering up the criminal trial dockets with cases that the prosecutor does not consider important, sometimes it reflects the prosecutor's doubts that s/he can prove any charge against the defendant. See generally Chapter 15 *infra*.

3.18. *Bail*

The preliminary arraignment provides an opportunity to have bail set or reduced, or O.R. allowed, for a client who has not previously been released on bail. Counsel will need to be prepared with facts concerning the defendant's background to support requests for O.R. or for a favorable bail setting or for a bail reduction. When it appears likely that the difference in the amount of bail set will justify the inconvenience of the intervening detention to the defendant, it may be better for counsel who first comes into a case at preliminary arraignment to ask that the case be passed for a few hours or even for a day in order to obtain verified information about a client rather than to proceed with only the information that the client can provide on the spur of the moment without supporting investigation. See generally Chapter 4. Clients left in custody for this purpose should be given

the warnings and protections set out in §§ 3.4.2-3.4.6, 3.6 *supra*, and their custodians should be given the admonitions advised in §§ 3.4.6, 3.5, 3.6 *supra*.

D. Representing Clients Who Are at Large Prior to Preliminary Arraignment: Clients Who Have Been Served with a Summons or Notice to Appear; Clients Who Have Been Released on Stationhouse Bail or O.R.'d at the Police Station

3.19. Counsel's Expanded Opportunities and Responsibilities if the Client is At Large Prior to Preliminary Arraignment

If a client is at large prior to preliminary arraignment – because the client was served with a summons or notice to appear (see §§ 2.2.1, 2.3.1 *supra*) or because an arrested client was released on stationhouse bail or on the client's own recognizance at the police station (see § 3.8 *supra*) – counsel will need to prepare for the preliminary arraignment just as s/he would in other scenarios discussed in this chapter and in Chapters 10-11 *infra*.

Even if the client was O.R.'d by the police or released after posting stationhouse bond, counsel cannot assume that there is no risk of pretrial detention following preliminary arraignment. In many jurisdictions, it is a common practice for magistrates and judges at preliminary arraignment to set a bond for a previously O.R.'d defendant or to increase the amount of bail for a defendant who posted stationhouse bail. Counsel certainly has a strong argument that the defendant's appearing for court after having been previously released is a compelling reason for maintaining the same conditions of release, but counsel cannot count on persuading the magistrate or judge. Accordingly, counsel needs to prepare for a bail determination at preliminary arraignment just as s/he would in other cases. (See Chapter 4.) Counsel also must advise the client of the risk of detention so that the client has realistic expectations of what may happen in court and can make arrangements for raising additional bail money if needed and for protecting his or her job and fulfilling family obligations in the event of detention.

Cases in which the client is at large prior to arraignment do, however, provide counsel with opportunities that are unavailable in other scenarios discussed in this chapter. Counsel will usually have much more time to prepare for the preliminary arraignment. Accordingly, counsel can conduct a full-scale interview of the client (as discussed in Chapter 6) rather than the more abbreviated initial interviews discussed in §§ 3.21-3.23 *infra*. Ideally, counsel will have the time to begin investigating the case and thereby gather information s/he can use to argue for O.R. or low bail at preliminary arraignment and to inform counsel's witness examinations and arguments at a preliminary examination. Such early investigation also may yield information that counsel can use to try to persuade the prosecutor who will appear at the preliminary arraignment that the prosecution should forego bringing a charge, or should file a lesser charge than s/he might otherwise file, or should agree to some diversion procedure (see § 2.3.6 *supra*). As a result of such investigation, counsel may even be in a position to consider – and to counsel the client about – the advisability of a guilty plea at the preliminary arraignment, which would

rarely be the case in other scenarios discussed in this chapter. See § 3.17 *supra*. Counsel needs to move as quickly as possible to take advantage of all of these opportunities because they may be critical to securing the client's release at the preliminary arraignment and a favorable outcome to the case.

E. Considerations Relating to the First Interview with the Client

3.20. *Pressures on the First Interview*

In most of the scenarios discussed in this chapter, counsel will not be able to conduct the type of full-scale initial interview of the client that is described in Chapter 6. A lengthy, thorough interview of this sort will often be impossible if counsel first makes contact with the client while s/he is in police custody (section A of this chapter) or while s/he is wanted for arrest (section B) or when s/he is already before the court at preliminary arraignment (section C). Usually the only scenario in which a full-scale interview can be conducted prior to preliminary arraignment is when the client was served with a summons or notice to appear or was released on stationhouse bail or on the client's own recognizance (O.R.) at the police station (section D).

In the scenarios in which counsel is operating under great time pressure, the concerns of thorough preparation will sometimes have to be sacrificed to a need for speed in seeing the client and obtaining from the client some limited information required for an immediate purpose, such as getting bail set. But although it is frequently essential that counsel act quickly, the value of quick action may well be negated if counsel proceeds in ignorance. The first interview with the client is psychologically critical, quite out of proportion to its other functions in the case. The defendant who senses ignorance or disorganization as the characteristic of a previously unknown lawyer, particularly a court-appointed lawyer, is going to have enormous difficulties in ever establishing a satisfactory attorney-client relationship. It is therefore essential for counsel to plan in advance – even if necessarily hurriedly – to deal with the significant questions and decisions s/he is going to be faced with when s/he meets the client for the first time.

3.21. *The Client in Custody*

3.21.1. *Preparing to Address the Client's Concerns and Questions*

A major concern of the client who is in custody shortly after arrest will ordinarily be to obtain release on O.R. or bail quickly. S/he is likely to ask counsel whether and how arrangements can be made to get the client released. Counsel should know as much as possible about the answers to these questions before the initial interview. If counsel is not already familiar with the law and practices of O.R. and bail in the jurisdiction (see Chapter 4), s/he should quickly do the necessary research and make inquiries of an experienced local criminal attorney, a reliable bail bondsman, or a staffer of an available R.O.R. Project. If possible, counsel should already have

taken the first steps toward securing the client's release on O.R. or bail (see §§ 3.8.1-3.8.2 *supra*), except in cases in which these forms of pretrial release are legally unavailable or obviously ill-advised (see § 4.18 *infra*).

A second question that the client will almost invariably ask counsel at the initial interview is what are the penalties for the offense[s] with which the client is charged. If counsel knows the charges, s/he should research the potential penalties in preparation for the interview. If s/he does not know the charges before leaving for the stationhouse, it is a good idea to take copies of the criminal code along so that s/he can look up the penalties when s/he learns the charges from the investigating officer or the desk officer. Recidivist sentencing provisions and enhancement provisions (for “armed” offenses and the like) are complex in many jurisdictions; they are applicable to a wide range of offenses. It is useful for counsel to have a photocopy of these provisions at hand or else ready access to them on a tablet or phone or laptop. What counsel *does* know about the case before meeting with the client – the circumstances surrounding the arrest as these have been reported to counsel by the client or another caller on the client's behalf (see §§ 3.3.1, 3.3.2.1 *supra*) – will often inform counsel what other sections of the code are likely to be relevant.

Finally, counsel should prepare for the initial interview by obtaining at least a preliminary notion of the elements of the offense with which the client is charged, so as to be able to take the client's story from the outset with an eye to the relevant issues. And if – without wasting time en route to the stationhouse – counsel can pick up some gum or candy and a pack of cigarettes to leave with the client, that is the kind of thoughtfulness that may pave the way toward a good attorney-client relationship.

3.21.2. *Matters to Cover in the Interview*

Counsel will have a lot of questions to ask the client in their first interview. Particularly important are matters that, if not identified and pursued by defense investigation within a few hours after arrest, may later be undiscoverable or discoverable only at inordinate cost. Seeing a client in custody provides a unique opportunity to explore the circumstances surrounding the client's arrest, any attendant search, and the post-arrest handling of the client by the police, including interrogation, lineups or other identification confrontations, and tests or examinations conducted in the stationhouse. The police personnel involved may still be on the scene where the client can point them out to counsel, or at least the client's memory of their appearance will be fairly fresh. Another high priority is the identification of possible witnesses to the charged offense who can still be located at this time but who may be difficult or impossible to track down later. Inquiry into these and similar urgent matters must be made of the client immediately.

Nevertheless, the interview at this stage had best be kept relatively abbreviated for many reasons, including the client's impatience, counsel's lack of opportunity to prepare, and the absence of guaranteed privacy. An abbreviated initial interview would be directed at the following goals: (a) obtaining a summary description of the facts relating to the offense with

which the defendant is charged, particularly its location and any physical characteristics of the place or of objects that should be seen or preserved quickly; (b) discussion of the circumstances surrounding the arrest – whether it was made pursuant to a warrant, whether an accompanying search was made, and the results of any search (see Chapter 25 *infra*); (c) some discussion of defenses that may be available to the client, particularly factual ones, and an identification of possible witnesses, with attention to factors that may require immediate steps to locate them while the trail is relatively fresh; (d) a review of what police activities the client has encountered or observed since the client’s arrest, including any abuse, interrogation, viewing by eyewitnesses, physical examinations and tests, and attempts to discuss or implicate the defendant in other crimes (see §§ 3.2 *supra*; Chapters 25-27 *infra*); and (e) thorough exploration of facts that counsel will need in seeking the client’s release on O.R. or manageable bail (see §§ 4.4, 4.5, 4.12.3 *infra*).

Before counsel leaves a client in custody, s/he should give the client (or repeat, if s/he has previously given by telephone) all the instructions described in §§ 3.4.2-3.4.5 *supra* for dealing with the police (see § 6.12 *infra*). S/he should have the client inform the police, in counsel’s presence, that the client wishes thereafter to communicate with the police and prosecuting authorities only through the medium of counsel. See §§ 3.4.6, 3.6 *supra*. Counsel should then give (or repeat) instructions to the investigating officer not to interrogate the client, seek consents or waivers from the client, conduct any tests or examinations on the client, or exhibit the client for identification in counsel’s absence. See §§ 3.4.6, 3.5, 3.6 *supra*. The name, rank, and number of the officer to whom counsel gives these instructions should be noted.

Counsel should also inquire of the client whether s/he has any complaints about his or her present treatment in custody. Major abuses should be investigated immediately (see § 6.10 *infra*); minor grievances can often be resolved quickly through counsel’s mediation with the desk officer, the investigating officer, or the commanding officer at the station. The importance of apparently small matters (for example, securing the return of the client’s eyeglasses or medications that were taken away at the time of arrest; arranging the release of cash from the client’s property envelope) cannot be overstated: These provide opportunities for counsel to do something visibly positive for the client and thereby win the client’s confidence. See §§ 6.3-6.5 *infra*.

3.21.3. “Rights Card” to Give to a Client in Custody

It is a wise practice for counsel to make and carry a supply of cards or forms that s/he can give to clients in custody for their use in preserving their rights during police investigation. Such a card may read, for example:

My lawyer has instructed me not to talk to anyone about my case or anything else and not to answer questions or reply to accusations. On advice of counsel and on the grounds of my rights under the Fifth and Sixth Amendments, I shall talk to no one in the absence of counsel. I shall not give any consents or make any waivers of my legal rights. Any requests for information or for consent to conduct searches

or seizures or investigations affecting my person, papers, property, or effects should be addressed to my lawyer, whose name, address, and phone number are _____. I want all communications with the authorities henceforth to be made only through my lawyer. I request that my lawyer be notified and allowed to be present if any identification confrontations, tests, examinations, or investigations of any sort are conducted in my case, and I do not consent to any such confrontations, tests, examinations, or investigations.

The client should be instructed to show this card to any officer or other person who asks the client questions, accuses the client of anything, talks to the client in any way about the case, or starts to examine or exhibit the client while in custody.

Cards of this sort serve four important purposes. First, they enable the client to assert his or her rights even if s/he is unable to remember what they are or what to say in order to claim them. Many clients who are simply given the oral advice suggested in § 6.12 *infra* will forget most of it. Second, they allow the client to make an *express* claim of his or her rights. In some situations, the mere silence of the client may not be sufficient to protect the client's interests fully. See §§ 26.8, 26.20, 39.10 subdivision (I) *infra*. Also, as a practical matter, it may be difficult for the client psychologically to maintain silence in situations that seem to call for some response; the response of flashing the card gives the client something to *do* to relieve this tension. Third, the card makes it easier for the defense to prove in court that the client claimed his or her rights and waived none of them. Any lawyer who has seen a police witness flash a “*Miranda* card” in the courtroom appreciates the probative force of a written record in the inevitable disputes about what was said between officers and arrestees behind the closed doors of a stationhouse. Defense counsel should attempt to give the client something of an even break in this swearing contest. Fourth, the card gives the client a sense of reassurance in his or her capacity to handle the often frightening experience of confronting police investigators in confinement, and it also gives the client an added ground for confidence in counsel's professional ability and concern.

3.22. *The Wanted Client*

In the case of a client who is wanted but unapprehended (discussed in section B of this chapter), there may be time and opportunity for a thorough initial interview, covering all of the matters mentioned in §§ 6.1-6.6, 6.8-6.10, 6.12, and the relevant portions of the interview checklist in § 6.15 *infra*. But often the likelihood of the client's imminent arrest will make it impractical to conduct such an extensive interview.

If a more rushed interview is necessary, counsel should concentrate upon (1) the facts surrounding the offense for which the client is wanted, including both the facts that would support a charge against the client and the facts relevant to possible defenses against that charge; (2) the client's attitude toward surrendering voluntarily (see §§ 3.11-3.11.1 *supra*); (3) the specific arrangements that can be made for a voluntary surrender and for the client's

prompt release on bail or recognizance thereafter or for the client's protection while in custody if prompt release appears unlikely (see §§ 3.10-3.12 *supra*); (4) advice to the client regarding his or her rights in custody following either a voluntary surrender or arrest and how the client should behave in custody in order to assert and preserve those rights (see §§ 3.4.2-3.4.6 *supra*; § 6.12 *infra*); and (5) the client's attitude toward contesting guilt, on the one hand, or acknowledging guilt and either beginning plea negotiations or attempting to obtain the dropping or reduction of charges by an appeal to police or prosecutorial discretion, on the other hand (see §§ 15.8-15.13 and §§ 8.1-8.6 *infra*, respectively).

Whether the interview is thorough or has to be abbreviated, a primary emphasis should be placed upon the facts and considerations relevant to those decisions immediately facing counsel and the client, identified in §§ 3.11-3.11.2 *supra*. Before the interview counsel should have obtained from the police as much information as possible about the nature of the charges and the police version of the facts underlying them. These should be discussed with the client for the purpose of determining whether there are any factual defenses or equitable considerations that might persuade the police or a prosecutor not to proceed with the client's arrest but to drop charges. If that outcome appears unlikely, the next questions on the agenda are whether, when, and under what conditions to arrange a voluntary surrender. Next come the questions whether, following surrender, the client ought to make a statement to the police or otherwise cooperate with their investigation and whether, before or immediately after the client's surrender (or arrest), counsel should commence plea bargaining with the prosecutor.

Obviously, in an interview that explores these subjects, counsel will need to know and to tell the client the specific penalties for the offense[s] with which the client is, or is likely to be, charged. Even more in the case of the wanted client than in the case of the just-arrested client (see § 3.21.1 *supra*), counsel will be expected to come into the interview with this information in hand. Counsel will also need to be conversant with the legal elements of the offense[s]. S/he will need to know the procedures for setting and posting bail, the amounts of bail customarily required, and the availability of O.R. and other forms of conditional release, for the offense[s] in question. See Chapter 4. Finally, counsel should be prepared to advise the client what to expect concerning police procedures following surrender or arrest and how to respond to those procedures. Under no circumstances should a client be permitted to surrender without first being given detailed advice with regard to how s/he should act in custody. See §§ 3.4.2-3.4.5, 3.6 *supra*; § 6.12 *infra*.

3.23. The Client at Preliminary Arraignment

3.23.1. Ensuring That There Is Sufficient Time for An Adequate Interview

Counsel entering the case at the time of the defendant's first appearance in court (usually at the preliminary arraignment) is particularly likely to be confronted with a drastic curtailment of the opportunity for an initial client

interview. Counsel's first task will often be to impress upon the court the necessity for allowing him or her sufficient time to discuss essential matters with the new client. In addition to whatever rights to a continuance and to legal representation at preliminary arraignment may be provided by state law, counsel should invoke the client's federal Sixth and Fourteenth Amendment rights to counsel (see § 3.23.3 *infra*), which guarantee the opportunity for lawyer-client consultation in the course of judicial proceedings when there are "tactical decisions to be made and strategies to be reviewed" (*Geders v. United States*, 425 U.S. 80, 88 (1976)). If counsel is denied ample time for an adequate interview, s/he should object and should resist as strongly as possible being pressed to proceed with the preliminary arraignment.

3.23.2. Essential Information to Obtain

Some information relating to the nature of the charge and to the date of the offense will be available from court records (principally the complaint) at the arraignment. Armed with this information, counsel should interview the client to determine what the client knows about the facts of the case; whether s/he thinks that s/he has any available defense and what that might be; whether the client has a history of mental illness or shows any signs of mental unbalance or incomprehension of the court proceedings; and whether the client has a prior criminal record or has other charges presently pending or outstanding. Counsel should also determine from the court record, from the prosecuting officer, or from the client whether bail has been set and in what amount; s/he should ascertain from the client how much bail the client can make; and if bail has not been set or if it is unreasonably or unmanageably high, s/he should obtain from the client all the facts relevant to the setting or reduction of bail. See §§ 4.4, 4.5, 4.11.3 *infra*. These facets of the case are generally most critical to the decisions confronting counsel at the preliminary arraignment. See §§ 3.14-3.18 *supra*; §§ 4.7, 11.1, 11.7, 16.1 *infra*. Their importance varies, however, depending upon the jurisdiction in which counsel is practicing. In many jurisdictions rights not asserted and motions not made prior to or at the preliminary arraignment may be irrevocably forgone. In the absence of firm knowledge about matters that must be handled prior to this arraignment, counsel should seek a continuance pending further research.

3.23.3. Request for a Continuance

Requests for a continuance for time to interview, investigate, research, prepare, and subpoena relevant evidence should be predicated upon the defendant's Sixth and Fourteenth Amendment rights to adequate representation by counsel and should be supported by (a) an explicit statement of the circumstances of counsel's belated entry into the case and (b) an explicit representation that counsel is unprepared to protect the client's interests at arraignment at this time. See, e.g., *Routhier v. Sheriff, Clark County*, 93 Nev. 149, 151-52, 560 P.2d 1371, 1372 (1977) ("During the preliminary examination the magistrate, upon defense counsel's demand, directed a prosecution witness to divulge the name of the police informant who allegedly set up and witnessed the transaction which led to the felony charge. However, the magistrate refused to order disclosure of the informant's address. He also refused to continue the

examination to permit Routhier to call and interrogate the ‘newly discovered’ witness. The refusal to grant the continuance is the central issue on appeal. ¶ It is undisputed that the informant was a material witness and, since that name was not disclosed until the preliminary examination was in progress, we hold that the magistrate’s failure to grant the continuance was error; the district judge should have so ruled” (citing, *inter alia*, *Coleman v. Alabama*, 399 U.S. 1 (1970)).

The Sixth and Fourteenth Amendments guarantee the right to counsel at preliminary arraignment (*Rothgery v. Gillespie County*, 554 U.S. 191, 198, 213 (2008); *White v. Maryland*, 373 U.S. 59 (1963) (per curiam); *Arsenault v. Massachusetts*, 393 U.S. 5 (1968) (per curiam); *Coleman v. Alabama*, *supra*; *Gerstein v. Pugh*, 420 U.S. 103, 122-23 (1975) (dictum); see § 11.5.1 *infra*); and the right to counsel in any judicial proceeding ordinarily comports the right to have adequate time to enable counsel to prepare to conduct the proceeding (*e.g.*, *Powell v. Alabama*, 287 U.S. 45 (1932); *Hawk v. Olson*, 326 U.S. 271 (1945); *Megantz v. Ash*, 412 F.2d 804 (1st Cir. 1969); *Rastrom v. Robbins*, 440 F.2d 1251 (1st Cir. 1971); *Moore v. United States*, 432 F.2d 730, 735 (3d Cir. 1970) (en banc); *Twiford v. Peyton*, 372 F.2d 670 (4th Cir. 1967); *Garland v. Cox*, 472 F.2d 875 (4th Cir. 1973); *MacKenna v. Ellis*, 263 F.2d 35, 41-44 (5th Cir. 1959); *Davis v. Johnson*, 354 F.2d 689 (6th Cir. 1966), *aff’d after remand*, 376 F.2d 840 (6th Cir. 1967); *Wolfs v. Britton*, 509 F.2d 304 (8th Cir. 1975); *United States v. King*, 664 F.2d 1171 (10th Cir. 1981)). “[T]he denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution’s requirement that an accused be given the assistance of counsel. The Constitution’s guarantee of assistance of counsel cannot be satisfied by mere formal appointment.” *Avery v. Alabama*, 308 U.S. 444, 446 (1940) (dictum).

Despite the useful rhetoric of *Avery* and the authorities just cited, which may be invoked in support of a motion for a continuance, counsel should keep in mind that appellate courts review denials of continuances only under an “abuse of discretion” standard and are slow to find abuse. “Not every restriction on counsel’s time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant’s Sixth Amendment right to counsel. . . . [B]road discretion [is] . . . granted trial courts on matters of continuances; only an unreasoning and arbitrary ‘insistence upon expeditiousness in the face of a justifiable request for delay’ violates the right to the assistance of counsel.” *Morris v. Slappy*, 461 U.S. 1, 11-12 (1983). See also *United States v. Cronin*, 466 U.S. 648, 659-62 (1984); but see *Winston v. Lee*, 470 U.S. 753, 758 n.3 (1985); *Lee v. Kemna*, 534 U.S. 362 (2002), *relief granted on remand*, 2004 WL 1575555 and 2004 WL 1719449 (W.D. Mo. 2004). It is, therefore, imperative to make a detailed factual record both of counsel’s unpreparedness and of the justifications for it when requesting a continuance.

Chapter 4

Bail

4.1. *Introduction*

As indicated in § 3.8 *supra*, one of defense counsel's first tasks is to arrange for the arrested client's release from custody as quickly as possible. Immediate steps to free the client on bail or another form of conditional release are outlined in that section. This chapter examines forms of conditional release and their problems in greater detail.

4.2. *Arrest and Conditional Release*

Anglo-American criminal procedure typically calls for an arrest at the outset of prosecution. The purpose of the arrest is to secure the defendant's presence for trial and for punishment in the event of conviction. The assumption underlying arrest is that pretrial detention may be necessary to secure a defendant's presence and that, if necessary, it is authorized.

A qualifying assumption, which evolved early in the history of English criminal procedure and became one of the great rallying points in the long English struggle for individual liberty, is that a defendant *should not* be detained prior to trial if some other less oppressive means of securing the defendant's presence is practicable. See I JAMES FITZJAMES STEPHEN, *A HISTORY OF THE CRIMINAL LAW OF ENGLAND* 233-43 (1883); II FREDERIC POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW* 584-90 (2d ed., 1968 re-issue of the 1898 edition); IX WILLIAM SEARLE HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 115-19 (1st ed. 1926); ZECHARIAH CHAFEE, *HOW HUMAN RIGHTS GOT INTO THE CONSTITUTION* 51-64 (1952). In early English practice an accused was released in the custody of kinsmen, who obliged themselves to assure the accused's presence for trial. As bailees of the accused's body, they were called bails, and when the custom grew of requiring them to post some valuable security for their obligation, the security posted – and the general practice of releasing a defendant on security or bond conditioned upon appearance at trial – came to be called bail. The right of a criminal accused to pretrial release on bail was protected by the celebrated English Habeas Corpus Act of 1679, whose legacy is the Habeas Corpus Clause of the federal Constitution and of many state constitutions. It was reconfirmed by the Bill of Rights of 1689, whose prohibition of excessive bail remains enshrined in the Eighth Amendment and similar state constitutional provisions. Today the bail right is, to some degree, guaranteed by the constitutions and statutes of every American jurisdiction. See § 4.3 *infra*.

Although the constitutions speak only of “bail,” their purpose is to approve, if not to require, the defendant's release pending trial on the least onerous conditions likely to assure appearance for trial. Several different forms of conditional release are currently in use. *Bail* involves the defendant's secured promise to appear. S/he signs a bail bond, in which s/he undertakes to be present for trial (or for some other stage in the criminal proceeding), and

s/he posts cash or negotiable securities, or pledges personal or real property, to guarantee the performance of that undertaking. It may be required that another person (a “surety”) execute the bond, as a joint obligor, and post or pledge negotiables or personal or real property for the defendant’s appearance. Surety companies or bonding companies today perform this service in consideration of a premium (usually about 10 per cent of the face of the bond) regulated by law (and often on condition of the defendant’s pledging additional collateral to protect the surety). A defendant may also be released on an unsecured promise to pay a designated sum in default of appearance. This is frequently called *release on his or her own bond*. Or s/he may be released on a simple promise to appear, a practice ordinarily called *release on his or her own recognizance* (“*R.O.R.*”) or just *own recognizance* (“*O.R.*”). Occasionally defendants today are still *released into the custody of some other person*, on the informal assurance of that person (sometimes an attorney) that they will appear. This latter practice is used principally in petty cases and cases involving defendants who are minors. Other forms of conditional release are noted in §§ 4.3.1, 4.8 *infra*.

4.3. The Right to Bail

4.3.1. State Constitutional and Statutory Guarantees of Bail

Most jurisdictions give arrested persons an absolute right to have bail set for their release on any noncapital charge. This right may be conferred by the state constitution, a state statute, or both.

State constitutions usually guarantee the right to bail expressly, although many of these have an exception for capital cases (see § 4.3.3 *infra*) and some have one or more additional exceptions – *e.g.*, for enumerated crimes such as murder and treason; or for enumerated crimes when combined with a finding of a need for preventive detention due to a risk of danger to others, or when combined with a finding that the defendant was already on bail for another specified offense or was on probation or parole or had previously been convicted of a specified offense.

In many jurisdictions, the state constitution contains both this kind of explicit guarantee of a right to bail and also a prohibition against “excessive bail.” Other state constitutions contain only a prohibition against “excessive bail,” with no explicit recognition of the underlying right to have bail set. The Eighth Amendment to the Constitution of the United States contains a provision of this latter sort. It may be strongly argued that these “excessive bail” clauses assume and thus compel an underlying right to bail. The historical evidence supports this view (see Caleb Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959, 965-89, 1125 (1965)), as does the logic classically expressed by Justice Butler in *United States v. Motlow*, 10 F.2d 657, 659 (Butler, Circuit Justice, 1926): “The provision forbidding excessive bail would be futile if magistrates were left free to deny bail.” See also *Hunt v. Roth*, 648 F.2d 1148, 1156-62 (8th Cir. 1981), *vacated as moot sub nom. Murphy v. Hunt*, 455 U.S. 478 (1982) (per curiam); *United States ex rel. Goodman v. Kehl*, 456 F.2d 863, 868 (2d Cir. 1972) (dictum); *Trimble v. Stone*, 187 F. Supp. 483, 484-85

(D.D.C. 1960). Nevertheless, the Supreme Court of the United States has hinted at a contrary conclusion (*United States v. Salerno*, 481 U.S. 739, 752, 753-55 (1987), citing *Carlson v. Landon*, 342 U.S. 524, 544-46 (1952)) and has pointedly reserved the question “whether the Excessive Bail Clause speaks at all to Congress’ power to define [that is, to limit] the classes of criminal arrestees who shall be admitted to bail” (*United States v. Salerno*, *supra*, 481 U.S. at 754). The *Salerno* case upheld the facial constitutionality of federal preventive detention legislation enacted in 1984, providing that “[i]f, after a hearing . . . , [a] . . . judicial officer finds that no condition or combination of conditions [of pretrial release] will reasonably assure . . . the safety of any other person and the community, he shall order the detention of [an arrested] . . . person [charged with a crime of violence, an offense punishable by life imprisonment or death, or an enumerated major drug offense or recidivist felony offense] prior to trial,” 18 U.S.C. § 3142(e). The legislation also allows detention without bail upon a finding, under similar procedures, that no condition or combination of conditions of pretrial release “will reasonably assure the appearance of the person” for trial, but this latter provision was not at issue in *Salerno*, which raised only the question whether the Eighth Amendment or the Due Process Clause of the Fifth Amendment “limits permissible government considerations [in the regulation of pretrial release] solely to [preventing the accused’s possible] . . . flight.” 481 U.S. at 754. The Court held that neither constitutional provision had this effect: that although “[i]n our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception,” *id.* at 755, the exception includes the power to deny pretrial release “when the government musters convincing proof that the arrestee, already indicted or held to answer for a serious crime, presents a demonstrable danger to the community,” *id.* at 750. In reaching this result, the Court emphasized that the statute:

- (i) “operates only on individuals who have been arrested for a specific category of extremely serious offenses,” *id.*;
- (ii) permits pretrial detention only when a judicial officer has found both (a) “probable cause to believe that the charged crime has been committed by the arrestee,” *id.*, and (b) “that no conditions of release can reasonably assure the safety of the community or any person,” *id.*;
- (iii) requires the latter finding to be made (a) “by clear and convincing evidence,” *id.*, and (b) after “a full-blown adversary hearing,” *id.*, which (c) must be “prompt,” *id.* at 747, and (d) is attended by “numerous procedural safeguards,” *id.* at 755 (that is, the arrestee “may request the presence of counsel . . . , may testify and present witnesses in his behalf, as well as proffer evidence, and . . . may cross examine other witnesses,” *id.* at 742);
- (iv) denies the presiding judge “unbridled discretion in making the detention determination,” but rather specifies “the considerations relevant to that decision,” which “include the nature and seriousness of the charges, the substantiality of the government’s

evidence against the arrestee, the arrestee’s background and characteristics, and the nature and seriousness of the danger posed by the suspect’s release,” *id.* at 742-43;

- (v) provides that a decision to detain (a) must be supported by “written findings of fact and a written statement of reasons for [the] . . . decision,” *id.* at 752, and (b) is subject to “expedited appellate review,” *id.* at 743;
- (vi) restricts “the maximum length of pretrial detention . . . by . . . stringent time limitations,” *id.* at 747; and
- (vii) meanwhile “requires that detainees be housed in a ‘facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal,’” *id.* at 748.

See also *Hilton v. Braunskill*, 481 U.S. 770, 778-79 (1987) (endorsing *Salerno*); *Foucha v. Louisiana*, 504 U.S. 71, 80-82 (1992) (discussing *Salerno* at length); *Zadvydas v. Davis*, 533 U.S. 678, 691 (2001) (*Salerno* “not[es] that ‘maximum length of pretrial detention is limited’ by ‘stringent’ requirements”). Even at this, the Court in *Salerno* appeared to concede the possibility that the statute “might operate unconstitutionally under some conceivable set of circumstances” (*id.* at 745) and upheld it only against a “facial challenge” (481 U.S. at 748). Compare *Schall v. Martin*, 467 U.S. 253 (1984) (rejecting a Due Process challenge to a somewhat less protective New York statute authorizing “brief pretrial detention” of juveniles charged with delinquency (*id.* at 263), upon “a finding of a ‘serious risk’ that [the] . . . juvenile may commit a crime before [the trial] . . . date” (*id.*)) with *Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 780-92 (9th Cir. 2014) (en banc) (holding that the Due Process Clause invalidates an Arizona constitutional amendment making illegal immigrants ineligible for bail when charged with serious felony offenses). *Salerno* is a poorly reasoned decision that deserves little respect from state courts called upon to construe state constitutional “excessive bail” and “due process” clauses; and its reasoning in support of preventive detention has no application at all, of course, to state constitutions that contain the common form of clause making all noncapital offensesailable. *See, e.g., Ex Parte Colbert*, 805 So. 2d 687, 688-89 (Ala. 2001) (denial of bail based on the defendant’s history of violence and the consequent danger to the community violated the state constitution’s guarantee of “an absolute right to bail in all noncapital cases”); *In re Underwood*, 9 Cal. 3d 345, 348, 350, 508 P.2d 721, 722, 724, 107 Cal. Rptr. 401, 402, 404 (1973) (then-existing state constitutional guarantee of bail [later modified] was not subject to “a ‘public safety’ exception” for “persons dangerous to themselves or others”); *State v. Sutherland*, 329 Or. 359, 364, 369, 987 P.2d 501, 503, 505 (1999) (state statute authorizing pretrial detention for enumerated crimes violated the state constitutional provision “requir[ing] courts to set bail for defendants accused of crimes other than murder or treason”); *Simms v. Oedekoven*, 839 P.2d 381, 383, 385 (Wyo. 1992) (state statute “which permits detention without bail for an accused who is found to be a flight risk” violates the state constitutional provision that “provides without equivocation that ‘all persons shall beailable’”).

State statutes also generally allow a right to bail in all noncapital cases. Most of these statutes give discretion to magistrates and courts of record to set the amount of bail in individual cases, but some contain schedules listing the amounts of bail for specified offenses or authorize courts to promulgate such schedules. A number of jurisdictions have statutes that permit the police to release arrested persons on “stationhouse bail” in specified classes of cases, usually summary offenses and misdemeanors. See § 3.8.2 *supra*. These statutes also may leave the amount of bail to be determined by police discretion or may contain – or authorize the judicial promulgation of – bail schedules. (Even in the absence of express statutory authorization, some courts formally or informally promulgate bail schedules to which they conform as a matter of routine in fixing bail, although they will make exceptions in unusual circumstances. Police also frequently operate pursuant to administratively promulgated schedules, and they are less willing than courts to vary the bail-setting in individual cases.) Statutes ordinarily regulate procedures relating to bail in more detail than do constitutional provisions: They identify the authorities who are empowered to set and to receive bail; prescribe proceedings for the setting and posting of bail; describe the allowable forms of bonds; limit charges for commercial bonds and otherwise regulate commercial bail bondsmen; and define the conditions and procedures for forfeiture. Some statutes authorize release on the defendant’s own recognizance (see §§ 3.8.1, 4.2 *supra*) or upon the defendant’s deposit of the bail-premium amount with the clerk of court (see § 4.8 *infra*). For example, the Federal Bail Reform Act, 18 U.S.C. §§ 3141-3142(d), governing federal criminal cases outside the District of Columbia, provides for a scheme of pretrial release in which money bail is not to be demanded unless other forms of conditional release (R.O.R., release in the custody of a responsible person, travel or residence restrictions, a bail-premium deposit) are not reasonably likely to secure the defendant’s appearance at trial (see *Bell v. Wolfish*, 441 U.S. 520, 536 n.18 (1979) (dictum)). Cf. D.C. CODE § 23-1321.

Even in jurisdictions where statutes provide a broad right to bail (and where legislatures do not follow the lead of Congress by enacting “preventive detention” legislation), the fact that the state constitution also guarantees the bail right may be significant for several reasons. First, it is invariably in the constitutions, not the statutes, that the prohibition of “excessive bail” is found. These constitutional “excessive bail” clauses are the defendant’s essential protection both against exorbitant judicial bail-setting in individual cases and against exorbitant amounts prescribed by legislative bail schedules. Second, the statutes regulating bail may be unconstitutional in other respects than exorbitance. For example, the Supreme Court of the United States has construed the Eighth Amendment’s Excessive Bail Clause to require that the amount of bail be set in each individual case, in view of the circumstances of each individual defendant, in an amount no greater than is necessary to assure the defendant’s appearance for trial. *Stack v. Boyle*, 342 U.S. 1 (1951). (This aspect of *Stack* was reaffirmed in *United States v. Salerno*, 481 U.S. at 754 (dictum) (“when the government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more”).) Under this construction, uniform bail schedules for offenses, although widely used, appear to be per se unconstitutional. See

Ackies v. Purdy, 322 F. Supp. 38 (S.D. Fla. 1970). Third, where state laws define the jurisdiction of some appellate courts in terms of the presence of a constitutional question, the constitutional status of the bail right permits a resort to those courts that would be unavailable if the right were merely statutory.

4.3.2. Federal Constitutional Rights to Bail in State Criminal Cases

For several reasons it would be significant if the federal Constitution guaranteed a right to bail (or a right against excessive bail, see § 4.3.1 *supra*) in state criminal cases. First, the substance of such a right would be determined by federal case law, including decisions such as *Stack v. Boyle*, 342 U.S. 1 (1951), which may be more liberal than state-law bail decisions. Second, a defendant's federal constitutional rights to bail could be enforced not merely in the state courts but (after exhaustion of state-court remedies) by *habeas corpus* in the federal courts. See § 4.14 *infra*.

It has not yet been authoritatively decided whether a state criminal defendant does have any federal constitutional rights in connection with bail. See *Simon v. Woodson*, 454 F.2d 161, 164-65 (5th Cir. 1972). But strong arguments are available to support such rights:

Beginning with *Mapp v. Ohio*, 367 U.S. 643 (1961), the Supreme Court has followed a course of decisions that has “incorporated” into the Due Process Clause of the Fourteenth Amendment – and thus made binding upon the state courts – virtually all of the other major criminal procedure guarantees of the Bill of Rights. See *Gideon v. Wainwright*, 372 U.S. 335 (1963) (Sixth Amendment right to counsel); *Mincey v. Arizona*, 437 U.S. 385 (1978) (Fourth Amendment right against unreasonable search and seizure); *Malloy v. Hogan*, 378 U.S. 1 (1964) (Fifth Amendment privilege against self-incrimination); *Pointer v. Texas*, 380 U.S. 400 (1965) (Sixth Amendment right of confrontation); *Klopfer v. North Carolina*, 386 U.S. 213 (1967) (Sixth Amendment right to speedy trial); *Washington v. Texas*, 388 U.S. 14 (1967) (Sixth Amendment right to compulsory process); *Duncan v. Louisiana*, 391 U.S. 145 (1968) (Sixth Amendment right to jury trial); *Benton v. Maryland*, 395 U.S. 784 (1969) (Fifth Amendment right against double jeopardy); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (Fourth Amendment right against unreasonable searches and seizures; under *Mapp*, the same doctrinal rules that govern federal cases apply to state criminal cases); *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (Second Amendment right to keep and bear arms); see generally *Faretta v. California*, 422 U.S. 806, 818 (1975); *Herring v. New York*, 422 U.S. 853, 856-57 (1975); *McDonald v. City of Chicago*, *supra*, 561 U.S. at 759-66. The guarantee of the Eighth Amendment against excessive bail eminently qualifies for similar incorporation for several reasons:

(a) Historically, the struggle to establish the right to bail was central in the evolution of the English conception of the liberty of the citizen. See Caleb Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959, 965-68 (1965). See also § 4.2 *supra*. Thus the right fairly falls within even the most conservative test for incorporation: It is a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as

fundamental,” *Palko v. Connecticut*, 302 U.S. 319, 325 (1937).

(b) The bail right is universally recognized in American state constitutions. See Comment, *Determination of Accused’s Right to Bail in Capital Cases*, 70 YALE L.J. 966, 977 (1961); Comment, 7 VILL. L. REV. 438, 450 (1962). This, too, is evidence of its fundamental quality. Cf. *Ferguson v. Georgia*, 365 U.S. 570, 574-83 (1961); *Baldwin v. New York*, 399 U.S. 66, 72-73 (1970).

(c) The Supreme Court has recognized that “[u]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.” *Stack v. Boyle*, 342 U.S. 1, 4 (1951). And the Court has already held that the other principal reflection of the presumption of innocence – the right against conviction except on proof beyond a reasonable doubt (see *Taylor v. Kentucky*, 436 U.S. 478, 483-86 (1978)) – is embodied in the Fourteenth Amendment (e.g., *In re Winship*, 397 U.S. 358 (1970); *Ivan V. v. City of New York*, 407 U.S. 203 (1972); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Sandstrom v. Montana*, 442 U.S. 510 (1979); *Francis v. Franklin*, 471 U.S. 307 (1985); *Jackson v. Virginia*, 443 U.S. 307 (1979) (dictum); cf. *Cool v. United States*, 409 U.S. 100, 104 (1972); *County Court of Ulster County v. Allen*, 442 U.S. 140, 156 (1979) (dictum); and see *Estelle v. Williams*, 425 U.S. 501, 503 (1976) (dictum). But see *Bell v. Wolfish*, 441 U.S. 520, 532-33 (1979).

(d) The Supreme Court has incorporated the Eighth Amendment’s prohibition of cruel and unusual punishments. *Robinson v. California*, 370 U.S. 660 (1962); *Furman v. Georgia*, 408 U.S. 238 (1972); *Woodson v. North Carolina*, 428 U.S. 280 (1976). The reasoning of *Washington v. Texas*, 388 U.S. 14, 17-18 (1967), suggests that this circumstance favors the incorporation of the balance of the amendment as well.

(e) Several federal decisions have concluded, albeit usually in dictum, that the Fourteenth Amendment does incorporate the Excessive Bail Clause of the Eighth. *Hunt v. Roth*, 648 F.2d 1148, 1155-56 (8th Cir. 1981), vacated as moot sub nom. *Murphy v. Hunt*, 455 U.S. 478 (1982) (per curiam); *Meechaicum v. Fountain*, 696 F.2d 790 (10th Cir. 1983); *United States ex rel. Keating v. Bensinger*, 322 F. Supp. 784, 786 (N.D. Ill. 1971); *Sistrunk v. Lyons*, 646 F.2d 64, 66-71 (3d Cir. 1981) (dictum); *Henderson v. Dutton*, 397 F.2d 375, 377 n.3 (5th Cir. 1968) (dictum); *Pilkinton v. Circuit Court*, 324 F.2d 45, 46 (8th Cir. 1963) (dictum); *Goodine v. Griffin*, 309 F. Supp. 590, 591 (S.D. Ga. 1970) (dictum); *Hernandez v. Heyd*, 307 F. Supp. 826, 828 (E.D. La. 1970) (dictum), and cases cited. And the Supreme Court has cited the *Pilkinton* case, with apparent approval, for the proposition that “the Eighth Amendment’s proscription of excessive bail has been assumed to have application to the States through the Fourteenth Amendment” (*Schilb v. Kuebel*, 404 U.S. 357, 365 (1971) (dictum)). See also *McDonald v. City of Chicago*, 561 U.S. 742, 764 & n.12 (2010) (dictum) (including the Eighth Amendment’s “prohibition against excessive bail” among “the provisions of the Bill of Rights” that the Court has recognized as incorporated in the Fourteenth Amendment, and citing *Schilb v. Kuebel*, 404 U.S. 357 (1971) for this proposition); *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1979) (dictum).

Even if the Eighth Amendment bail right were not incorporated, the Due Process Clause of the Fourteenth Amendment would require the allowance of some form of conditional release in cases in which pretrial incarceration adversely affected the defendant's right to a fair trial – for example, when it impeded his or her ability to locate witnesses important to the defense. See *Kinney v. Lenon*, 425 F.2d 209 (9th Cir. 1970). Pretrial incarceration can be shown to prejudice a defendant's defense in a broad range of ways and situations covering many criminal cases. See Foote, *supra* at 1137-51.

Whether or not any underlying substantive federal constitutional right to bail exists, it seems plain that “[a]s to . . . offenses . . . for which a state has provided a right of bail it may not, any more than as to other substantive or procedural benefits under its criminal law system, engage in such administration as arbitrarily or discriminatorily to effect denial or deprivation of the right to a particular accused” (*Mastrian v. Hedman*, 326 F.2d 708, 711 (8th Cir. 1964) (dictum)). Accord, *Atkins v. Michigan*, 644 F.2d 543, 549-50 (6th Cir. 1981); cf. *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 463 (1981) (dictum) (“[a] state-created right can, in some circumstances, beget yet other rights to procedures essential to the realization of the parent right”); *Board of Pardons v. Allen*, 482 U.S. 369 (1987). This is so because the Due Process and Equal Protection Clauses of the Fourteenth Amendment require that all state-law rules be fairly and even-handedly applied (e.g., *Schwartz v. Board of Bar Examiners*, 353 U.S. 232 (1957)), particularly when liberty is at stake in their application (e.g., *Thompson v. City of Louisville*, 362 U.S. 199 (1960); *Shuttlesworth v. City of Birmingham*, 382 U.S. 87, 93-95 (1965); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170-71 (1972); *Humphrey v. Cady*, 405 U.S. 504, 512 (1972)). “Even in applying permissible standards, officers of a State cannot [adversely affect a citizen's interests] . . . when there is no basis for their finding that he fails to meet these standards, or when their action is invidiously discriminatory.” *Schwartz v. Board of Bar Examiners*, *supra*, 353 U.S. at 239. These concepts forbid the deprivation of liberty by factually baseless or legally arbitrary applications of any legal rules. *Vitek v. Jones*, 445 U.S. 480, 488-89 (1980); *Hicks v. Oklahoma*, 447 U.S. 343, 346-47 (1980); *Evitts v. Lucey*, 469 U.S. 387, 400-01, 403-04 (1985); *Halbert v. Michigan*, 545 U.S. 605, 610 (2005); *Whalen v. United States*, 445 U.S. 684, 690 n.4 (1980) (dictum); *Superintendent v. Hill*, 472 U.S. 445, 454-55 (1985) (dictum); cf. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-36 (1982); *Goss v. Lopez*, 419 U.S. 565, 572-76 (1975). As applied to the question of bail, they entitle a state criminal defendant to have his or her “motion for bail . . . handled without ‘arbitrariness’ and ‘discriminatoriness’” (*United States ex rel. Keating v. Bensinger*, *supra*, 322 F. Supp. at 787) and require federal constitutional relief if “[w]hat the state court did [in administering its local bail rules can be shown to] . . . be beyond the range within which judgments could rationally differ in relation to the apparent elements of the situation” (*Mastrian v. Hedman*, *supra*, 326 F.2d at 711 (dictum)).

The implications of the Equal Protection Clause of the Fourteenth Amendment for pretrial incarceration of indigents who cannot afford to post bail are considered in § 4.6 *infra*.

4.3.3. *Capital Cases*

In many jurisdictions some or all capital cases are excepted from the right to bail. A common constitutional and statutory formulation provides that all offenses are bailable except capital offenses where the proof is evident or the presumption great. Some courts read this archaic language to mean capital cases in which the death penalty is likely to be imposed. *See, e.g., State v. Engel*, 99 N.J. 453, 459-60, 493 A.2d 1217, 1220 (1985); *Application of Peters*, 351 P.2d 1020 (Okla. Crim. App. 1960); *Ex parte Sierra*, 514 S.W.2d 760, 761 (Tex. Crim. App. 1974). Others read it more literally to mean capital cases in which the prosecution has strong evidence. Some jurisdictions require the prosecution to demonstrate the defendant's guilt of a capital charge by a preponderance of the evidence in order to justify the denial of bail. *See Fry v. State*, 990 N.E.2d 429 (Ind. 2013) (collecting the authorities from numerous jurisdictions) The least demanding standard is that of jurisdictions which require only that the prosecution establish "a *prime facie* case" – sufficient evidence to survive a motion for a directed verdict of acquittal of the capital offense at a trial. *See, e.g., Commonwealth v. Heiser*, 330 Pa. Super. 70, 478 A.2d 1355 (1984). Under any of these constructions, defense counsel should be alert to the potential of an application for bail as a discovery device for learning what the prosecution's evidence is.

The invalidation of some forms of the death penalty as cruel and unusual punishments in *Furman v. Georgia*, 408 U.S. 238 (1972), spawned considerable litigation over the meaning of the term *capital* in state laws making "capital" offenses non-bailable. Several courts held that offenses punishable by a constitutionally unenforceable death penalty are no longer "capital"; hence they are bailable. Other courts held that offenses remain "capital" and non-bailable if they are statutorily punishable by death, even though the death penalty may no longer be constitutionally imposed. The confusion is compounded by the fact that most of the states have reenacted the death penalty since *Furman* in various forms thought to escape the prohibition of that decision. Some of these states have added laws providing death penalties for restricted classes of offenses without repealing the old, broader death penalty statutes struck down by *Furman*. Decisions of the Supreme Court of the United States in 1976 sustained various forms of the new statutes, invalidated others, and left open the constitutionality of the remainder. *See* §§ 48.14-48.15 *infra*. These decisions have engendered still a third wave of death penalty laws in many states. What offenses are now "capital" in states with second- or third-generation death penalty statutes is questionable (particularly when the older statutes were not technically repealed by the newer ones or when the newer statutes authorize capital punishment only upon a finding of enumerated "aggravating circumstances" in addition to the elements of the offense) – as is the constitutionality of some of the newer death penalty statutes themselves. *Id.*

These complications aside, the jurisdictions differ on the question whether a defendant charged with a crime that is statutorily punishable by death and is non-bailable for that reason becomes eligible for bail if the prosecution announces that it will not seek the death penalty in his or her individual case. *Compare State v. Moyers*, 2014 WL 4278841 (Ala. 2014) (de-

defendant continues to be non-bailable) with *State v. Clark*, 2011 WL 2163544 (Del. Super. Ct. 2011) (granting bail in such a case, with the acquiescence of the prosecution).

It is important to note that constitutional and statutory provisions excepting designated capital offenses from the general right to bail are often construed as merely denying an absolute right to bail, not as disallowing release on bail. In the designated cases magistrates and judges may still admit a defendant to bail in their discretion. *E.g.*, *In re Losasso*, 15 Colo. 163, 24 P. 1080 (1890); *State v. Arthur*, 390 So. 2d 717 (Fla. 1980); *State v. Pichon*, 148 La. 348, 86 So. 893 (1921); *Ex parte Bridewell*, 57 Miss. 39 (1879); *In re Corbo*, 54 N.J. Super. 575, 149 A.2d 828 (1959) (dictum), *cert. denied*, 29 N.J. 465, 149 A.2d 859 (1959); *In re West*, 10 N.D. 464, 88 N.W. 88 (1901); *Ex parte Dexter*, 93 Vt. 304, 107 A. 134 (1919).

4.4. Amount of Bail

If not set by a master bail schedule, the amount of bail is determined by the bail-setting authority (police officer, magistrate, judge, or court clerk by designation of the judge) in light of a number of factors. Most important are (1) the nature of the offense (seriousness of the possible penalty, aggravating circumstances that indicate the defendant’s dangerousness if released, and so forth), (2) the defendant’s character and reputation (and particularly criminal record), (3) the defendant’s financial assets (how much money has to be tied up in bail to keep the defendant in place), (4) the defendant’s employment status and record (as an indication of reliability and of the defendant’s dependence on staying where s/he is; it is also significant that the defendant may lose his or her job if jailed for a period), (5) the defendant’s family status and roots in the community (length of time the defendant has resided in the location, presence of family there, other factors indicating inconvenience of flight, such as residence in public housing, receipt of social security or public assistance payments, and so forth).

The Supreme Court of the United States has said, construing the Eighth Amendment, that “when the government[’s] . . . only [asserted] interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, and no more” (*United States v. Salerno*, 481 U.S. 739, 754 (1987) (dictum)), and that an individualized inquiry into the circumstances of each defendant is required in setting the amount (*Stack v. Boyle*, 342 U.S. 1 (1951)). Bail set according to substantive standards (for example – as is common – by reference solely to the heinousness of the offense) or by procedures (such as use of a bail schedule or refusal of a hearing to consider the defendant’s background) that are inconsistent with these canons is unconstitutional (*see Ackies v. Purdy*, 322 F. Supp. 38 (S.D. Fla. 1970)) and can be challenged by *habeas corpus* or any other method of review prescribed by local law.

As a general matter, the police, magistrates, and many trial-court judges wholly disregard the constitutional conception of bail expressed in *Stack v. Boyle*. Instead of determining the amount of bail in the light of particularized factors relevant to the likelihood of flight and the “function of bail”

as an “assurance of the presence of an accused” at trial (342 U.S. at 5), they consider only the seriousness of the offense charged and the defendant’s prior criminal record in setting the bail figure. Appellate courts are far more likely to make bail determinations under the proper *Stack v. Boyle* standards. See § 3.8.3 *supra*. This means that defense counsel must gather factual information pertinent to both the standards that will likely be used at the lower levels (circumstances of the charged offense; defendant’s criminal history) and the standards that will likely be used on any appeals (defendant’s stability in the community, general reliability, and financial situation). Counsel should be prepared to vary the emphasis on these several factors as s/he moves from court to court.

The next section consists of a form for use in obtaining a sworn statement from a defendant detailing the factors pertinent to setting the amount of bail. It may be used in affidavit form to support a motion for bail, for reduction of bail, or for release on recognizance. Counsel should also attempt to support its assertions by proof from sources other than the defendant, since many judges distrust the interested statements of an accused in these matters. Compare §§ 48.11-48.12 *infra*.

4.5. *Questionnaire for Obtaining Information Pertinent to Bail from Criminal Defendants*

The following questionnaire is designed principally for counsel’s use in obtaining from a client information pertinent to the amount of bail that should be set. Counsel can, however, easily convert the questionnaire into a form that can be notarized and submitted to a magistrate or judge in support of an application for bail in a manageable amount or for reduction of bail or for release on nominal bail or on recognizance, as is appropriate. Of course, caution must be observed not to use the form in this fashion if a client’s answers may supply incriminating information or investigative leads that are not already known to the police and the prosecution. The same caution suggests that ordinarily the details of the charged offense should be obtained from the arresting or prosecuting officer, not from the defendant. See § 8.3.1 *infra*.

Questionnaire for Bail Information

Name: _____ Age: _____

Address: _____

Number Street

City State Zip Code

Phone number: _____

Email address: _____

E-text / website contact information: _____

How long have you lived at your current address? _____

Do you own your home? L Yes L No

Do you have a home mortgage? L Yes L No

How much is the mortgage? _____

What's the value of the home? _____

[Check L if this value is from tax assessment]

[if not, what's the source of the estimated value?] _____

Is any other person a co-owner? L Yes L No

If so, who? _____

Do you rent your home? L Yes L No

How much is your rent?

Is any past due rent now unpaid? L Yes L No

How much? _____

Is this public housing? L Yes L No

Do you receive any kind of rent assistance or subsidy? L Yes L No

Source and amount: _____

Address immediately before present address:

Number	Street		
--------	--------	--	--

City	State	Zip Code	
------	-------	----------	--

How long did you live at that address? _____

Are you currently employed? L Yes L No

Job: _____
Kind of work

Employer's name: _____

Employer's Phone number: _____

Employer's Email address: _____

Employer's E-text / website contact information: _____

Name of supervisor if other than employer: _____

Supervisor's Phone number: _____

Supervisor's Email address: _____

Supervisor's E-text / website contact information: _____

Address of workplace:

Number	Street		
--------	--------	--	--

City	State	Zip Code	
------	-------	----------	--

Employer's address if other than workplace:

Number	Street		
--------	--------	--	--

City	State	Zip Code	
------	-------	----------	--

How long have you been employed by this employer? _____

Amount now earned per week: _____ (In stating the amount earned per week, use the take-home pay *after* all deductions from gross wages, including automatic deductions for child support and debts as well as for taxes, FICA, and medical insurance premiums.)

Is your job waiting for you if you are released at this time? L Yes L No

Job immediately before present job:

Kind of work

Employer's name: _____

Employer's Phone number: _____

Employer's Email address: _____

Employer's E-text / website contact information: _____

Name of supervisor if other than employer: _____

Supervisor's Phone number: _____

Supervisor's Email address: _____

Supervisor's E-text / website contact information: _____

Between what dates were you employed by this employer?

_____ to _____
Month Year Month Year

Reason for leaving that employment: _____

If you are currently unemployed: Since when have you been unemployed? _____

Are you receiving unemployment compensation? L Yes L No

Amount: _____

Describe any efforts you've been making to get work: _____

Are you enrolled as a student in any school? L Yes L No

Name of school: _____

Address of school:

Number	Street		
City	State	Zip Code	

Contact person at school (teacher, principal, dean, or other):

Name: _____

Title: _____

Phone number: _____

Email address: _____

E-text / website contact information: _____

If you are a student and have a part-time job, please fill out all of the employment information requested at pages Q-2 and Q-3 above; and write "PART-TIME" in the space between "Are you currently employed?" and the "Yes" check box in line 5 on page Q-2.

Assets: Do you own:

any land/buildings/property other than your home? L Yes L No

Describe the property: _____

Value: _____

Is any other person a co-owner? L Yes L No

If so, who? _____

If you have a mortgage or mortgages, please fill out the information under "Debts" on page Q-6.

[Assets – continued] Do you own:

an automobile or other vehicle? L Yes L No

Value: _____

Is any other person a co-owner? L Yes L No

If so, who? _____

If you have a mortgage or installment payment arrangement, please fill out the information under “Debts” on page Q-6.

a bank account? L Yes L No Amount: _____

Is any other person a co-owner? L Yes L No

If so, who? _____

other property? L Yes L No

Describe the property: _____

Value: _____

Is any other person a co-owner? L Yes L No

If so, who? _____

Do you have any other source of income than your job?
(include social security, if any) L Yes L No

Nature of source	Amount
------------------	--------

Nature of source	Amount
------------------	--------

Debts and Liabilities: Do you have

p home mortgage(s) L Yes L No

Creditor: _____ Amount: _____

Any unpaid past due amount? L No L Yes: _____

p debt(s) on vehicle mortgage or installment purchase of a vehicle?

L Yes L No

Creditor: _____ Amount: _____

Any unpaid past due amount? L No L Yes: _____

p debt(s) on installment purchase of other property? L Yes L No

Item: _____ Creditor: _____ Amount: _____

Any unpaid past due amount? L No L Yes: _____

Item: _____ Creditor: _____ Amount: _____

Any unpaid past due amount? L No L Yes: _____

p other debt(s)? L Yes L No

Creditor: _____ Amount: _____

Any unpaid past due amount? L No L Yes: _____

Creditor: _____ Amount: _____

Any unpaid past due amount? L No L Yes: _____

p other unpaid account(s)?

Creditor: _____ Amount: _____

Nature of account or obligation: _____

Creditor: _____ Amount: _____

Nature of account or obligation: _____

Do you have court-ordered obligations to support any person? L Yes L No

Name of person	Relationship	Amount ordered
Any unpaid past due amount? L No L Yes: _____		

Name of person	Relationship	Amount ordered
Any unpaid past due amount? L No L Yes: _____		

Do you have any other dependents? L Yes L No

Name of person	Relationship	Indicate any fixed obligation
----------------	--------------	-------------------------------

Name of person	Relationship	Indicate any fixed obligation
----------------	--------------	-------------------------------

Does your family receive public assistance or welfare payments? L Yes L No

Agency from which payments received: _____

Amount: _____

Do you have any medical or health condition requiring medication or treatment? L Yes L No

Nature of condition: _____

Nature and frequency of treatment: _____

Cost of treatment: _____

Source of funds relied on to pay costs: _____

Medical personnel to contact for confirmation:

Name: _____

Title: _____

Phone number: _____

Email address: _____

E-text / website contact information: _____

Does any member of your family have any medical or health condition requiring medication or treatment? L Yes L No

Nature of condition: _____

Nature and frequency of treatment: _____

Cost of treatment: _____

Source of funds relied on to pay costs: _____

Medical personnel to contact for confirmation:

Name: _____

Title: _____

Phone number: _____

Email address: _____

E-text / website contact information: _____

Do you have any illness or physical disability that makes it difficult to get around? L Yes L No

If yes, describe it:

Medical personnel to contact for confirmation:

Name: _____

Title: _____

Phone number: _____

Email address: _____

E-text / website contact information: _____

Does anyone in your immediate family have any such illness or disability? L Yes L No

If yes, describe it:

Medical personnel to contact for confirmation:

Name: _____

Title: _____

Phone number: _____

Email address: _____

E-text / website contact information: _____

With what members of your family – and/or other individuals – do you now live?

Name	Age	Relationship
------	-----	--------------

Name	Age	Relationship
------	-----	--------------

Do you have any other family in this city/town? L Yes L No

county? L Yes L No

state? L Yes L No

Name	Age	Relationship
------	-----	--------------

Address: Number	Street	City	State
-----------------	--------	------	-------

Name	Age	Relationship
------	-----	--------------

Address: Number	Street	City	State
-----------------	--------	------	-------

Present criminal charge(s): _____

Criminal record (all *arrests*, from latest to earliest, *including juvenile arrests*, in all jurisdictions):

For each episode that is not currently pending:

Date of arrest: _____

Jurisdiction (city and state): _____

Charge(s): _____

Disposition if not by court: _____

Plea (guilty or not guilty or *nolo* or insanity; if guilty or *nolo*, of what charges): _____

Court disposition (conviction or acquittal or other: if conviction, of what charges): _____

Sentence: _____

Date sentence imposed: _____

If sentence was incarceration:

Length of time served: _____

Institution[s] in which time was served: _____

Client's prison number: _____

If released on parole:

Release date: _____

Has parole term ended? L Yes L No – time remaining: _____

Parole officer:

Name: _____

Phone number: _____

Email address: _____

E-text / website contact information: _____

Were any charges of parole violation ever made? L Yes L No

Date of charge: _____

Nature of violation charged: _____

Disposition: _____

Current Status: _____

If sentence was probation:

Date probation began: _____

Length of probationary term: _____

Probationary conditions: _____

Has probation period ended? L Yes L No – time remaining: _____

Probation officer:

Name: _____

Phone number: _____

Email address: _____

E-text / website contact information: _____

Were any charges of parole violation ever made? L Yes L No

Date of charge: _____

Nature of violation charged: _____

Disposition: _____

Current Status: _____

Are there any outstanding warrants for you on any criminal charge or for any violation of parole or probation? L Yes L No

Details: _____

Pending criminal matters (all *arrests*, from latest to earliest, *including juvenile arrests*, in all jurisdictions):

For each episode that is currently pending:

Date of arrest: _____

Jurisdiction (city and state): _____

Charge(s): _____

Name of Court: _____

Docket Number: _____

Current status: _____

Released on own recognizance or bond? L Yes L No

Released on bail? L Yes L No

Amount of bail posted: _____

Form of bail posted: _____

If commercial bonding company:

Bonding company name: _____

Contact person's name: _____

Phone number: _____

Email address: _____

E-text / website contact information: _____

Is a lawyer representing you on this charge?

Name of attorney: _____

Street address of attorney: _____

Phone number of attorney: _____

Email address of attorney: _____

E-text / website contact information for attorney: _____

Your Signature

4.6. *Bail and the Indigent*

The anomaly and injustice of jailing people simply because they are too poor to make bail have been abundantly argued in the literature since the mid-1960's. *See, e.g.*, DANIEL J. FREED & PATRICIA M. WALD, *BAIL IN THE UNITED STATES: 1964* (A Report to the National Conference on Bail and Criminal Justice, Washington, D.C., May 27-29, 1964) (1964); JOHN S. GOLDKAMP, *TWO CLASSES OF ACCUSED – A STUDY OF BAIL AND DETENTION IN AMERICAN JUSTICE* (1979); PAUL B. WICE, *FREEDOM FOR SALE – A NATIONAL STUDY OF PRETRIAL RELEASE* (1974); Richard A. Cohen, *Wealth, Bail, and the Equal Protection of the Laws*, 23 VILL. L. REV. 977 (1978); Caleb Foote, *The Coming Constitutional Crisis in Bail*, 113 U. PA. L. REV. 959, 1125 (1965), reprinted in CALEB FOOTE, ed., *STUDIES ON BAIL* 181-283 (1966); Lee Silverstein, *Bail in the State Courts – A Field Study and Report*, 50 MINN. L. REV. 621 (1966). Cognizant of the economic discrimination worked by the requirement of money bail as a condition of pretrial release, courts are increasingly tending to relax the necessity for posting “good” bail if an accused has a stable background in the community. In major metropolitan areas there are agencies (generally called R.O.R. Projects or Bail Projects) that interview defendants shortly after arrest and investigate their backgrounds to determine whether they are eligible under the agency's standards of stability for a recommendation to the court that they be released on recognizance. The courts generally follow these recommendations. Counsel representing an indigent defendant should contact such an agency, if one exists, for help in getting the client released.

On the level of legal right, an argument for the proposition that detention of an indigent in default of bail which s/he cannot make violates the Habeas Corpus Clause, the Eighth Amendment, the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and cognate state constitutional guarantees is fully developed in the Foote article cited above, and may be pressed on *habeas corpus* in state and federal courts. Professor Foote's Equal Protection arguments, in particular, draw strong support from subsequent decisions condemning the incarceration of indigents in default of payment of fines imposed upon conviction (*Williams v. Illinois*, 399 U.S. 235 (1970); *Tate v. Short*, 401 U.S. 395 (1971); *In re Antazo*, 3 Cal. 3d 100, 473 P.2d 999, 89 Cal. Rptr. 255 (1970); *Robertson v. Goldman*, 179 W. Va. 453, 455-56, 457, 369 S.E.2d 888, 890-91, 892 (1988)). *Cf. Bearden v. Georgia*, 461 U.S. 660 (1983); *Estelle v. Williams*, 425 U.S. 501, 505-06 (1976) (dictum). In 1977, those arguments prevailed in a path-breaking decision, *Pugh v. Rainwater*, 557 F.2d 1189 (5th Cir. 1977), *rev'd en banc*, 572 F.2d 1053 (5th Cir. 1978). Although the Former Fifth Circuit *en banc* disapproved on narrow grounds the original panel decision in *Pugh* holding Florida's pretrial release system facially unconstitutional, a majority of the court endorsed the panel's essential conclusion that “[t]he incarceration of those who cannot [afford to post money bail], without meaningful consideration of other possible alternatives [that is, other forms of pretrial release], infringes on both due process and equal protection requirements” (572 F.2d at 1057). “We have no doubt that in the case of an indigent, whose appearance at trial could reasonably be assured by one of the alternate forms of release, pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint” and hence violate the

Constitution (*id.* at 1058). A new Florida pretrial release rule, promulgated while the *Pugh* case was pending on appeal, was adjudged “subject to constitutional interpretation and application” (*id.*) because it did not appear to the *en banc* majority that “the automatic setting of money bails [which had been Florida’s prior practice] will continue [under the new rule] and that the unnecessary and therefore constitutionally interdicted pretrial detention of indigents will be the inevitable result” (*id.*). The majority pointed to a drafting committee note on the new Florida rule which said that the rule “leaves it to the sound discretion of the judge to determine *the least onerous form of release* which will still insure the defendant’s appearance” (*id.* at 1058 n.8 (emphasis added by the court)) and expressed confidence that the Florida courts would follow this interpretation of the rule in view of “the absence of a constitutional alternative” (*id.*).

4.7. Procedures for Setting Bail

When an arrest warrant is issued for a person, the issuing authority usually sets the amount of bail under which the arrestee is to be held. This amount is endorsed on the arrest warrant. If there is no such endorsement or if an arrest is made without a warrant, the police, a magistrate, a judge of the criminal court of record, the court clerk, or more than one of these agencies (depending upon the nature of the offense) may set bail following the arrest, on request of the arrestee or counsel. The amount of bail is inscribed on a charging instrument (often called “a copy of the charge”) and recorded in whatever paper or electronic records the bail-setting authority maintains. If an arrest is made in a county other than that in which the offense is charged, the police officer, magistrate, or court at the place of arrest usually has authority to set bail. In any case in which bail has not been set prior to the preliminary arraignment, it is ordinarily set by the magistrate at that arraignment (except for serious offenses that, in some jurisdictions, are not bailable by magistrates but only by courts of record in *habeas corpus* proceedings). See §§ 2.2.3, 2.3.2-2.4.1, 3.18 *supra*.

Procedures for getting bail set before and after the preliminary arraignment are governed by statute, court rule, and local custom, and they vary widely. See § 4.3.1 *supra*. Sometimes counsel is required to obtain a “copy of the charge” from the arresting officers and to present it to a magistrate or judge *ex parte*. Sometimes *habeas corpus* is employed; sometimes, a simple motion for bail with supporting affidavits. Statutory regulation (including applicable bail schedules) should be checked in counsel’s jurisdiction to determine the persons who have the authority to set bail and the limitations of authority of each.

4.8. Types of Bail Allowable

Three types of bail are ordinarily acceptable: cash or negotiable securities, a surety bond posted by a licensed bonding company, and a real property bond (usually in the form of a deed to property). Whereas cash, securities, and a property deed are returned when the defendant has fulfilled the bail obligation by appearing, the premium paid to a bonding company for the posting of a surety bond is not recoverable. This premium is the surety company’s compensation for the risk it incurs in posting its security.

Premiums that companies may charge for bail bonds are usually regulated by statute (about 10 per cent of the face of the bond, or a little more or less depending on the face amount), but the companies are free to agree or refuse to serve any individual and are usually free to impose conditions when they insure a client, such as a pledge of collateral security to hold the company harmless in the event of default.

By statute, in some jurisdictions, a defendant may make bond by depositing the premium amount directly with the clerk of court, recoverable upon appearance. Some premium-deposit statutes authorize or require the clerk to retain a small portion of the deposit as an “administration fee.” The Supreme Court of the United States has found such a practice constitutionally unobjectionable. *Schilb v. Kuebel*, 404 U.S. 357 (1971).

4.9. Choice Among the Types of Bail

If cash, securities, or a property bond can be posted by the client without hardship, these will be the least costly forms of bail in the long run. However, counsel will want to consider the impact on the disposition of the case which might result from the disclosure that the defendant has the means to make bond in these forms. Particularly in gambling, drug-dealing, prostitution, counterfeiting, and automobile theft cases – and in others involving the lurking suspicion of organized crime – a defendant who posts a sizable cash bond may find that that fact has leaked to the trial judge or jury, with expectable prejudice. Still worse, the fact will likely be considered by the judge at sentencing. In any event, if there is any chance that the defendant will want to dispose of his or her real property in the near future, a property bond should not be used. And if the defendant is one who cannot be easily contacted about appearing or if the chance of the defendant’s failure to appear is more than slight, a bonding company is probably the best choice.

Bail bondsmen are located near most police stations and are usually available around the clock. Before undertaking to secure the appearance of a client, they will want to know about the client’s employment, permanence of residence, criminal record, family status, and the nature of the charge. Of course, they want some immediate cash, but they frequently accept part payment of their premium at the outset. Because of their continuous contact with the police and their familiarity with local court practices and personnel – as well as their knowledge of institutions and people in the neighborhood surrounding the precinct – bondsmen are often a good source of information, especially on procedures relating to the quick release of an accused. However, they differ widely in their helpfulness, trustworthiness, and crucial matters such as demands for collateral security (see the preceding paragraph). So, when practicable, counsel not familiar with the local bondsmen should inquire of some reputable attorney who knows them.

Counsel should consult local practice concerning the availability of procedures for court deposit of a “premium” amount or fractional portion of the bond, as described in § 4.8 *supra*. If the client is indigent, counsel should inquire whether there is a local R.O.R. Project of the sort described

in § 4.6 *supra*. In any event, the release of arrested persons without security, either on their own bond or on their own recognizance (see § 4.2 *supra*), is a growing practice (see §§ 4.3.1, 4.6 *supra*), and these forms of release should always be urged on the bail-setting authority. One or the other form is most likely obtainable by a person with strong roots in the community and a stable employment and family situation. The defendant's bail questionnaire set out in § 4.5 *supra* is useful to document the justifications for a client's release without security; but counsel should support the facts asserted in the statement with proof from sources other than the client if this is practicable.

4.10. *Additional Conditions Imposed Upon Defendants Released on Bail or O.R.*

Court orders (and sometimes police forms) releasing defendants on bail or O.R. often impose restrictions and regulations on the releasee's behavior. They may prohibit the releasee from contacting specified individuals (*e.g.*, the complainant or victim, potential witnesses, codefendants) or consorting with specified classes of persons (*e.g.*, people on probation or parole, ex-convicts, "gang" members). They may impose travel restrictions (or even "house arrest") or curfews. They may forbid the possession or use of drugs or alcohol or firearms or vehicles or even cell phones. They frequently prescribe that the defendant must refrain from any criminal behavior. (The latter restriction is not rendered unimportant by its obvious redundancy. It means that if the defendant is arrested for a subsequent offense, s/he can be summarily incarcerated for violation of this release condition without the procedural protections that would be a precondition for confinement on the new charge.)

Subjection to electronic monitoring – most commonly in the form of GPS tracking devices employing non-removeable bracelets and anklets – is increasingly in vogue. *See, e.g.*, 725 SMITH-HURD ILL. COMP. STAT. ANN. § 5/110-5(f); BALDWIN'S KY. REV. STAT. ANN. §§ 431.067, 431.517; *In re Anunobi*, 278 S.W.3d 425 (Tex. App. 2008); *State v. Clark*, 2011 WL 2163544 (Del. Super. Ct. 2011). This development is a mixed blessing for defendants. On the one hand, it enables counsel to urge that bail (or high bail) is unnecessary to assure against flight because the client can be safely O.R.'d (or released on lower bail) with a tracker. On the other hand, some judges will *add* GPS tracking (and the costs of the GPS equipment and monitoring, see *e.g.*, MICH. COMP. LAWS ANN. § 765.6b) to the same oppressive roster of release conditions – including high bail – that they would have ordered in the absence of the tracking. Counsel should discuss with the client both the benefits and the risks of a GPS surveillance arrangement. (When the client is an addict or a predictable recidivist – because, for example, s/he is an habitual shoplifter, spouse abuser, or street fighter – neither s/he nor counsel would be well advised to provide the law enforcement community with a persuasive means to prove the client's contemporaneous proximity to the site of all future criminal occurrences.)

If electronic surveillance or any other oppressive requirement is included among the conditions for a client's release on bail or O.R., counsel should be alert to the possibility of having the condition rescinded later on

grounds of changed circumstances. *See, e.g., Commonwealth v. Madden*, 458 Mass. 607, 939 N.E.2d 778 (2010).

4.11. Procedures for Posting Bail

After the amount of bail has been set and the means to make up that amount are in hand, the bail is “posted” with the appropriate authority, who orders the defendant’s release or issues a receipt or form authorizing the defendant’s release. Posting bail involves depositing with the authority the defendant’s signed bond (ordinarily a form document), the surety’s bond, if any (also a form), and whatever cash, securities, or deeds are put up for bail, and obtaining a receipt and any additional form required to authorize release. If the authority with whom bail is posted is not the same authority that set the bail, the order or endorsement setting the amount of bail must also be presented.

The identity and procedure of the bail-setting official ordinarily governs the identity of the authority with whom the bail must be posted. When bail is set by the police, it is usually posted with the police; inquiry of the desk officer will locate the proper recipient. Bail set by a magistrate on an arrest warrant or on a copy of the charge or similar procedure (see § 4.7 *supra*) is ordinarily also posted with the police, whereas bail set by a magistrate at a hearing may have to be posted with the magistrate’s clerk. Bail set by a court of record is ordinarily posted with the clerk of the court, but in some localities it may have to be posted with a marshal’s office, sheriff’s office, or other bureau at the detention facility.

In any case in which bail is not posted with the police, counsel or someone acting for the client must deliver the bail receipt or release order or both to the police. It is usually wise for counsel or a trusted paralegal to do this and to wait at the stationhouse until the defendant is physically ushered out of custody, because the investigating officers may delay release in order to conduct additional interrogation or to perform identification or forensic testing procedures. When a professional bondsman is used, the bondsman will usually offer to take the release papers to the station and get the client out of custody. But, particularly in the case of a vulnerable client, counsel is best advised to do these tasks personally or assign them to a reliable associate. Even the most trustworthy and competent professional bondsmen are less likely than counsel to put a high priority on protecting the defendant’s interests by moving quickly.

4.12. Problems in Getting Bail Set or Posting Bond

4.12.1. Problems in Locating the Defendant or Identifying the Charges

Counsel will often encounter considerable difficulty in locating an arrested client for the purpose of getting information needed to arrange the setting of bail, or of having the client sign an affidavit or other document for use in arranging bail, or of having the client sign the bail bond, or of having the client released promptly once the bond is posted. Especially in urban areas, arrestees may be shuttled through several police quarters before they come to rest in one or another jail or detention facility to await a judicial hearing.

A related problem is the difficulty of identifying the exact charges, and all the charges, against the defendant. Often these are not determined by the police until after their investigation of their prisoner is well advanced. Counsel can obviate some of the frustration in these areas by getting as much information as possible about the client's status from the police when s/he first talks with them about the case. See § 3.5 *supra*. S/he should ask the desk officer and the investigating officer (a) exactly where the client is now; (b) whether the client is going to be taken anywhere else; (c) if so, where; (d) what are the present charges (repeating them to the officer and asking, "Have I got them *all*, now?"); (e) whether other charges are being considered or investigated; and (f) what the other charges are. It is also useful to ask each officer tactfully where s/he will be during the next several hours and how s/he can be reached so that counsel can locate the officer and ask for an accounting if the officer's information proves wrong (for example, if the client is removed from the station where the officer said that s/he would be held). Frequently it makes sense to leave a client in custody for several hours or even overnight until the specific charges are firmed up. Otherwise, counsel may have bail set and a bond posted only to find that the defendant has been held on additional charges or to learn that a released defendant has been rearrested on additional charges. See § 4.16 *infra*. Of course, on the other side, the desirability of getting the client out of the hands of the police quickly weighs heavily.

Counsel should consider contacting the prosecutor's office for assistance if obstructions or problems arise in securing the client's release or admission to bail – if, for example, the police appear uninformative or hostile; or if a client cannot be located after reasonable inquiry of them; or if the police fail to lodge charges against a client who is detained; or if stationhouse bail authorized by law is not quickly set or if it is set in an excessive amount; or if the client is being moved around rapidly; or if interrogation or improper investigation of a client in custody appears to be going on. Usually in urban areas a deputy prosecutor is assigned to be on call for after-hours emergencies and can be reached through the prosecutor's office; but if there is no such arrangement, a prosecutor may be reachable on his or her cellphone or a home landline or perhaps by e-mail. If insufficient assistance is obtained from the prosecutor, an application to a court of record is next in order. Traditionally, *habeas corpus* is available to secure relief in these situations. See §§ 3.8.3-3.8.4 *supra*; §§ 4.12.2, 4.13 *infra*. If counsel is dissatisfied with the relief s/he gets, s/he may appeal the adverse disposition of the *habeas* petition to an appellate court and seek an expedited hearing, or in most jurisdictions s/he may apply for an original writ of *habeas corpus* from the appellate court or one of its judges. Following unsuccessful exhaustion of state-court remedies, a federal *habeas corpus* proceeding can be filed. (See § 4.14 *infra*.)

4.12.2. Problems in Locating Officials to Set or Receive Bond

Counsel may also have trouble identifying or locating the person designated to set bail or to approve a bond and authorize the prisoner's release. Police can be very helpful in these regards when they want to cooperate, and inquiry of the desk officer or of the arresting or investigating officers is often

fruitful. If they appear to be acting obstructively, a call to the commanding officer may be advised. Bondsmen in the area are likely to have helpful tips.

If all else fails, an application to a judge for a writ of *habeas corpus* may be required. This should invoke the judge's jurisdiction to entertain *habeas corpus* for the purpose of admitting a detained accused to bail. See, e.g., *People ex rel. Chakwin on Behalf of Ford v. Warden, New York Correctional Facility, Rikers Island*, 63 N.Y.2d 120, 470 N.E.2d 146, 480 N.Y.S.2d 719 (1984); and see § 3.8.3 *supra*; § 4.13 *infra*. It should assert that other attempts to secure the prisoner's admission to bail have failed, and it should be supported by an affidavit of counsel reciting counsel's futile efforts and any obstruction of them by the authorities. In a serious case arising after court hours, the judge may be contacted by e-mail or cellphone or a home landline with an inquiry whether s/he will receive a petition by e-mail or fax or by delivery of a hard copy to his or her home. This frequently results in the judge's telephoning the police and informally arranging to clear up the problem. Obviously, a lawyer who contacts a judge after court hours should be prepared to show that s/he has made every practicable effort to get relief elsewhere first.

4.12.3. "Hold" Orders

Even when an arrested person is charged with aailable offense, s/he may be refused release on bail if a "hold" or "detainer" is lodged against him or her by authorities from other localities where s/he is wanted on outstanding arrest warrants for additional offenses or by local, out-of-county, or out-of-state probation or parole authorities responsible for supervising him or her at the time of the present arrest. (From the standpoint of the latter authorities, the new charges constitute potential probation or parole violations, which may justify the initiation of revocation proceedings.) These detainer practices require close attention and often quick footwork by counsel. In counsel's first discussion with an arrested client, s/he must ask (a) whether the client is on probation or parole; (b) whether there are any warrants out for the client or whether the client is wanted anywhere on any other charges; and (c) whether there is anything the client might be wanted for in any other county or state. Once counsel is aware that s/he is representing a probationer, parolee, or fugitive, s/he may decide to defer attempts to secure bail until the various "detainers" have been lodged and s/he has had a chance to contact the issuing authorities to try to clear them up. In any event, s/he will avoid paying a bond premium for a defendant who cannot be released by reason of the detainers. On the other hand, some probation or parole authorities may not have a defendant arrested if/she has posted bail on a new offense, whereas they automatically place a "hold" on a probationer or parolee in custody. In this situation counsel may want to hustle to post bail before the "hold" order is lodged with the defendant's custodian.

Probation and parole officers can frequently be persuaded informally to lift detainers (or not to lodge them) by (a) describing the new offense to them in terms which persuade them that the defendant's guilt is dubious or that the offense is trifling even if the defendant is guilty; (b) pointing out, if this is true, that the judge who set bail on the new offense set relatively low

bail, thus expressing the belief that the defendant was not likely to flee; (c) pointing out that the new offense is much less serious than the old one, if this is so, and urging that it would be inappropriate to institute heavy back-time revocation proceedings on the basis of a criminal charge for which the defendant will be amply punished (assuming his or her guilt) by the far lighter penalties applicable to the new offense; or (d) persuading them that the new offense is a minor lapse from grace on the part of a probationer or parolee who is otherwise making a good adjustment and that if s/he is jailed for even a short period of time because of the detainer, s/he will lose his or her job, will be dropped from a rehabilitation program in which s/he is enrolled, or will otherwise suffer consequences harmful to the prospect of successfully “making it” on probation or parole. If, notwithstanding these points, the probation or parole officer is adamant about enforcing a detainer, counsel may want to insist that an immediate preliminary revocation hearing conformable to the requirements of *Morrissey v. Brewer*, 408 U.S. 471 (1972), and *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), be held or, if it is not held, that the detainer be lifted. (In federal cases, *see also* FED. RULE CRIM. PRO. 32.1(b).) Unless this constitutionally required preliminary hearing is held, the lodging of a detainer resulting in the defendant’s non-bailability on a new charge ought to be as assailable as is detention upon a violator’s warrant for the old charge alone (*compare* *Moody v. Daggett*, 429 U.S. 78, 88 (1976)); therefore, the detainer may be challenged in *habeas corpus* proceedings (*see* §§ 4.13, 4.14 *infra*) if the probation or parole authorities decline either to lift it or to provide a prompt *Morrissey-Scarpelli* hearing (*cf.* *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484 (1973)). Counsel should also be aware of the cases suggesting that revocation decisions by probation and parole officials are no longer as immune from substantive judicial review as they were once thought to be. *See* *Arciniega v. Freeman*, 404 U.S. 4 (1971); *Douglas v. Buder*, 412 U.S. 430 (1973); *Bearden v. Georgia*, 461 U.S. 660, 666 n.7 (1983); *cf.* *Superintendent v. Hill*, 472 U.S. 445, 455 (1985) (dictum); *but see* *Black v. Romano*, 471 U.S. 606 (1985).

If the detainer is based upon an out-of-state warrant, little can be done about it locally (*see* *Michigan v. Doran*, 439 U.S. 282 (1978); *California v. Superior Court (Smolin)*, 482 U.S. 400 (1987)); efforts will have to be focused upon getting the underlying charges dismissed or upon posting bail for appearance on those charges in the courts of the jurisdiction that issued the warrant. The same may be true in the case of out-of-county but in-state arrest warrants, or it may be possible to post bail locally on both the local and out-of-county charges. Formal procedures permit this in some states; elsewhere, it can be arranged informally through the judges of both courts involved. In federal practice, bail can be set and posted in the district of arrest for appearance in another district, under FED. RULE CRIM. PRO. 5(c)(3)(E) and 40.

4.13. Review and Renewal of Efforts to Have Bail Set

Statutory provisions authorizing stationhouse bail, bail-setting by a magistrate, and bail-setting by a court of record are usually cumulative: that is, they give the police, magistrates, and judges concurrent jurisdiction to set bail. In the absence of, or in addition to, any statutory procedures for bail-setting by the court of record, that court almost invariably has jurisdiction

to issue writs of *habeas corpus*. By immemorial tradition, *habeas corpus* lies for the admission to bail of persons detained under criminal process; hence the grant of *habeas corpus* power without more ordinarily carries with it the power to set bail for a criminal accused. See § 3.8.3 *supra*.

As a result of the cumulative or concurrent character of the bail-setting authorizations, counsel for a client who is denied bail or whose bail is set in an excessive or unobtainable amount may proceed to apply *seriatim* for relief to each authorized official. Dissatisfied with the setting of stationhouse bail, s/he may apply first to a magistrate, then to a court of record pursuant to a statutory bail-setting procedure, then to the same court or to a judge of that court by *habeas corpus* (e.g., *State v. Thornton*, 84 Md. App. 312 578 A.2d 1212 (1990)), then to other judges of the same court or other courts of record having *habeas corpus* jurisdiction (e.g., *People ex rel. Klein v. Krueger*, 25 N.Y.2d 497, 255 N.E.2d 552, 307 N.Y.S.2d 207(1969); and see § 3.8.3 *supra* regarding the inapplicability of *res judicata* in *habeas* proceedings). Denial of relief under the statutory bail-setting procedures may or may not be reviewable by appeal or mandamus; denial of *habeas corpus* relief generally is appealable (see, e.g., *Ludwig v. State*, 812 S.W.2d 323 (Tex. Crim. App. 1991)); and, in addition, in most states appellate courts and their judges also have original *habeas* jurisdiction (see, e.g., *Blackwood v. McPhaul*, 134 Ohio App.3d 138, 730 N.E.2d 452 (1999)). Furthermore, the denial of relief, whether under the statutory procedures or by *habeas corpus*, generally presents no technical bar to second or subsequent applications to the same official, court, or judge; renewed motions for the reduction of bail and successive petitions for a writ are frequently entertained.

The restrictions upon how repeatedly and how far up the chain of authority counsel may press attempts to get the client admitted to bail are, therefore, practical rather than doctrinal. As a matter of common sense and courtesy to the courts, counsel is advised (a) to go first to the lowest official authorized to set bail and then to proceed up the chain of dignity, passing to a higher court only when a lower one has denied relief or is demonstrably unavailable to receive an application for relief; (b) to avoid repeater applications to the same authority unless a convincing showing of some new and significant fact, not previously discoverable, or some changed circumstance can be made; and (c) to quit wasting time and credit with the courts when s/he thinks s/he has obtained as good a deal as s/he is realistically likely to get in a case. (Judges, too, can count, and they recognize that a \$100 difference in the bond set is a \$10 difference in the premium.)

Some lower-court judges are prone to set bail in amounts that are manifestly beyond the defendants' means, in order to assure their continued incarceration. If counsel can convince an appellate court that this is the case, s/he is likely to obtain a significant reduction. See, e.g., *Ex parte Melartin*, 464 S.W.3d 789, 796 (Tex. App. 2015): "When bail is set so high that a person cannot realistically pay it – and an aggregate amount of \$7.2 million would certainly qualify under that standard – the trial court essentially 'displaces the presumption of innocence and replaces it with a guaranteed trial appearance.' . . . That is clearly not the function of bail."); *Norton-Nugin v. State*, 179 So. 3d 557, 559 (Fla. App. 2015) ("the amount of bail cannot be used to punish an accused").

4.14. *Federal Habeas Corpus to Secure Release on Bail*

Sections 4.3.2 and 4.6 *supra* summarize the arguments that a state criminal defendant has federal constitutional rights to bail. To the extent that the arguments prevail, those rights are not left for their vindication exclusively to the state courts. The federal district courts, in the exercise of the *habeas corpus* jurisdiction given by 28 U.S.C. § 2241(c)(3), are authorized to discharge from custody persons confined in violation of the Constitution; thus they may order the release on bail of state criminal defendants whom the Constitution requires to be bailed. *See Rivera v. Concepcion*, 469 F.2d 17 (1st Cir. 1972); *Dawkins v. Crevasse*, 391 F.2d 921 (5th Cir. 1968); *Sheldon v. Nebraska*, 401 F.2d 343, 346 (8th Cir. 1968) (dictum); *United States ex rel. Keating v. Bensinger*, 322 F. Supp. 784 (N.D. Ill. 1971); *cf. Schall v. Martin*, 467 U.S. 253 (1984) (by implication); *Kinney v. Lenon*, 425 F.2d 209 (9th Cir. 1970).

Federal courts will not grant relief to a state prisoner who has not exhausted available remedies in the state courts. But exhaustion is made out whenever either (a) the state courts have denied relief on the merits (*Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 489-92 (1973) (speedy trial); *Rivera v. Concepcion, supra* (bail)); or (b) state court relief is delayed to such an extent that it becomes ineffective in light of the grievance sought to be remedied (*Phillips v. Vasquez*, 56 F.3d 1030, 1033-38 (9th Cir. 1995) (postconviction relief); *Dixon v. Florida*, 388 F.2d 424 (5th Cir. 1968) (same); *St. Jules v. Beto*, 462 F.2d 1365 (5th Cir. 1972) (same); *Dozie v. Cady*, 430 F.2d 637 (7th Cir. 1970) (same); *United States ex rel. Goodman v. Kehl*, 456 F.2d 863, 869 (2d Cir. 1972) (dictum) (bail)). Under the latter theory even relatively short delays by the state courts in acting upon bail matters may constitute exhaustion, since “[r]elief in this type of case must be speedy if it is to be effective.” *Stack v. Boyle*, 342 U.S. 1, 4 (1951).

Counsel may, therefore, be advised to file a federal petition for *habeas corpus* simultaneously with, or shortly after, an application for bail to the state courts; to bring the federal proceeding to a hearing within not more than eight days in strict conformity to 28 U.S.C. § 2243; to file at the hearing a supplemental petition or affidavits reciting that the state courts have denied or delayed release on bail during the preceding eight days or more; and to argue that on this showing the federal court is authorized to entertain on the merits the petitioner’s federal claims to pretrial release. *Cf. In re Shuttlesworth*, 369 U.S. 35 (1962). The simultaneous-filing procedure is technically permissible because satisfaction of the exhaustion doctrine is not a prerequisite of federal *habeas corpus* jurisdiction but merely a condition precedent to the federal court’s ordering relief on the merits. Exhaustion of state remedies after the filing of the federal *habeas* petition, but before the time when the federal court is asked to act upon it, is quite sufficient. *Sharpe v. Buchanan*, 317 U.S. 238 (1942); *Davis v. Jackson*, 246 F.2d 268 (2d Cir. 1957).

4.15. *Judicial Modification of the Amount of Bail or Conditions of Release; Revocation of Bail*

4.15.1. *Reduction of the Amount of Bail*

Apart from the procedures discussed in the preceding paragraphs, a court of record in which a criminal case is pending ordinarily has inherent authority at any time to entertain an application for reduction of the defendant's bail or for the defendant's release on his or her own bond or recognizance. Such a motion would ordinarily be filed on behalf of a defendant who is jailed in default of posting the amount of bail previously set and who seeks reduction as a means of obtaining release on some lesser amount that s/he can make. But a defendant who has posted bond and obtained release may also ask the court to reduce that bond, upon a showing that bail in the amount posted is unnecessary to assure his or her presence for trial. Such a motion will be useless to the defendant who has posted bond with a professional bonding company, since s/he has paid his or her premium already and cannot recover it. But the motion should be considered when cash, securities, or property has been put up as security and the client is in need of funds.

4.15.2. *Increase in the Amount of Bail; Revocation of Bail*

Most jurisdictions authorize a judge who has set bail or a judge of the criminal court to increase the amount of the bond upon a showing that the bond previously set is insufficient to assure the defendant's presence at trial. In the rare case in which this is done, the defendant who has been released on the old bond is rearrested on a bench warrant and held until s/he posts the new bond.

Occasionally trial judges will assert or assume a power to revoke a defendant's bond entirely when s/he has skipped bail or misbehaved (as by threatening witnesses or engaging in courtroom disruption). Such a power is difficult to justify in the absence of explicit statutory authority; and, even under this authority, it may be unconstitutional. To the extent that the defendant's past flight, in violation of a bail obligation, evidences a greater likelihood of future flight, that likelihood should justify only an increase in the amount of bail, not the outright denial of bail, under the ordinary constitutional provisions that confer an absolute right to bail (see § 4.3.1 *supra*). Consistent with those provisions, a defendant's bad history of bail-jumping on previous charges could not support denial of bail on a new charge, and the result should be the same if the defendant is recaptured and held on the identical charge from which s/he jumped bail. (Note, however, that under the crabbed construction given to the Excessive Bail Clause of the federal Constitution in *United States v. Salerno*, 481 U.S. 739 (1987), discussed in § 4.3.1 *supra*, the Court assumed that "a court may refuse bail when the defendant presents a threat to the judicial process by intimidating witnesses," *id.* at 753.) Certainly, revocation of bail as a *punitive* measure, without regard to the likelihood of future flight, is unconstitutional. It not only denies the bail right upon considerations unrelated to that right but also constitutes punishment without trial. See *Bitter v. United States*, 389 U.S. 15 (1967); *cf. United States v. Salerno, supra*, 481

U.S. at 746-47 (dictum); *Bell v. Wolfish*, 441 U.S. 520, 535-37 (1979) (dictum).

4.16. Duration of Bail; Effect of Additional or Superseding Charges

In many jurisdictions, new bail can be demanded for a defendant's appearance at each of the several stages of a criminal prosecution. In a felony case, for example, bond is technically reset at every stage: by a magistrate initially, for appearance at preliminary hearing; by the magistrate again, following bind-over, for the grand jury; by the grand jury, in its indictment, for appearance at the trial. As a practical matter, most bond is set, and bail bonds are written, at whatever pretrial stage, to assure the defendant's appearance at the trial. Interim resettings simply copy or "continue" the amount previously set. (In summary proceedings, however, as noted in § 2.2.5 *supra*, new bail is set and actually demanded, sometimes in an increased amount, for appeal from a magistrate's conviction for trial *de novo* in a court of record.)

Bail set and a bond written for appearance on one charge may not, however, carry over to other charges growing out of the same incident: A defendant who is bound over and bonded out for assault with a deadly weapon may be rearrested and required to post new bail if the grand jury indicts him or her for assault with intent to kill. Local law and the terms of any bonding contract should be carefully studied in consideration of this problem, which could prove costly for a defendant or even land the defendant in jail despite payment of an irrecoverable bond premium on a superseded charge. Frequently, practical resolutions of the problem can be arranged, by persuading the police, prosecutor, magistrate, or judge to (a) keep the original charge pending in lieu of dismissing it and (b) release the defendant on nominal bail on the second charge, in view of his or her secured obligation to appear on the first.

4.17. Legal Obligations and Consequences of the Bond Contract and Bail Status

Complex contractual and noncontractual rights and obligations are created by the transactions involved in a defendant's release on an appearance bond, particularly a bond in which a third party joins as surety. The defendant promises, and the surety guarantees the court, that the defendant will appear; in the event of nonappearance, the posted security is forfeit.

Common law – and sometimes statute – gives the surety the right to arrest the defendant at any time without process or cause (and to return the defendant to the state without extradition if s/he is arrested abroad), whether or not the defendant is in default on his or her obligation to appear. By thus seizing and producing the defendant in court, the surety is discharged of its obligation on the bond. (It should be noted that there is a practice in some localities to insist invariably upon the posting of at least a nominal surety bond, even in cases in which release on recognizance is plainly warranted. The purpose of the practice is to create a surety having broad common-law powers to pursue the defendant out of the state and to return him or her

without extradition. Its consistency with the constitutional Extradition Clause and with the protective procedural provisions of the widely adopted Uniform Criminal Extradition Act [*see Cuyler v. Adams*, 449 U.S. 433 (1981)] is dubious at best.) However, in a case in which a commercial bond is used, the surety agrees by contract with the defendant to post a bond for the defendant's appearance in consideration of the statutorily regulated premium, and this contractual obligation may explicitly or implicitly qualify the surety's arbitrary common-law power to surrender the non-defaulting defendant. In any event, so long as defendants are not in default, the courts are ordinarily willing to protect them against any attempt by a bonding company to get out of its bail obligation by returning them to custody without some extremely cogent reason. These attempts – or any abuse or overreaching of a defendant by a bondsman – should be promptly reported by counsel to the presiding judge of the criminal court, who will ordinarily deal with it informally but effectively by sending a clear signal to the bondsman to stop.

On the other hand, a defendant who *is* in default of his or her obligation to appear for scheduled proceedings thereby is exposed to substantial liabilities in addition to the prospect of arrest on a bench warrant (see § 4.18 *infra*). The defendant's promise to appear runs in favor of the surety as well as the court; and if, having posted collateral with the surety to secure that promise (see § 4.8 *supra*), the defendant defaults, the surety contract ordinarily allows the bonding company to forfeit this collateral, to withdraw its own security (to the extent that this is not forfeited by the court), and – as at common law – to arrest the defendant anywhere at any time and return him or her to the jurisdiction without process or extradition. The defaulting defendant also becomes liable to the court for the amount of the bond; in addition, s/he may incur criminal liability in some jurisdictions under statutes that make bail-jumping an offense.

4.18. *Forfeiture*

If a defendant defaults on the obligation to appear, the presiding judge normally issues a bench warrant for the defendant's arrest. When the defendant is brought before the court on this warrant, s/he is given the opportunity to explain his or her nonappearance in a summary (and ordinarily feisty) proceeding. Depending upon the merit of the defendant's excuse, the judge may "sue out" (that is, forfeit) the defendant's bail bond or may allow the defendant to be re-released on the bond – or on a higher bond – usually with a strict admonition to keep his or her judicial appointments in the future. (Ordinarily, a court also has the power to forfeit bail when the defendant first fails to appear. In such a case it would have to reinstate the bail if it later chose to re-release the defendant on the same bail.) In some jurisdictions if the defendant voluntarily appears within a statutorily specified period of time and before being arrested for failure to appear, s/he will also have the opportunity to plead his or her excuse to the court and thus to avert forfeiture in the court's discretion.

4.19. *To Bail or Not to Bail*

In most cases clients want to be enlarged on bail or recognizance

before trial, and this enlargement is in their best interests. Apart from the obvious point that life is sweeter on the streets than in jail, pretrial detention may be seriously harmful to a defendant in many ways. It may disrupt the defendant's family relations and cause the defendant to lose his or her job. It will certainly interfere, to some extent, with the defendant's ability to assist counsel in preparing his or her defense, particularly in cases in which factual investigation is required among persons or in neighborhoods with which counsel is unfamiliar or where counsel will be seen as an unwelcome stranger (see § 9.4 *infra*) and in cases in which a site visit is critical to preparation of the defendant's testimony or to counsel's understanding of the facts (see § 9.5 *infra*). Interviewing clients in jail usually is more troublesome, time-consuming, and unsatisfactory from the point of view of good lawyer-client rapport than interviewing them in counsel's office. While in jail, the client is accessible to such police investigative techniques as renewed interrogation and lineups; s/he is prey to snitches (fellow inmates who will subsequently testify, truly or falsely, that the defendant made incriminatory statements to them in jail); and s/he is exposed to the influence of jail-house lawyers, whose advice can make counsel's job very difficult. Jail conditions are, of course, frequently deplorable; medical care is seldom adequate; and the jailed client is in jeopardy of sexual assault and other forms of abuse from fellow inmates. The client who spends the pretrial period in jail often comes to trial looking and feeling like a loser, with the result that s/he is likely to be treated as one by the jury and the judge. Finally, the jailed client cannot – as the bailed client can – be placed in a community situation (a job, job-training program, counseling program, and so forth) in which a good adjustment record can be made that will reap dividends at the time of sentencing. See § 12.18 *infra*. For all these reasons, it is generally advisable for counsel to secure the client's release before trial, if at all possible. Moreover, the best way for a lawyer to gain a client's confidence usually is by *doing* something for the client; and one of the earliest and most appreciated things that the lawyer can do for a criminal defendant is to get the defendant out of jail.

There are, however, some instances in which it is better for the client to remain in jail prior to trial. This may be so when (a) it is clear from the outset that the client is going to plead guilty and will almost certainly receive a sentence including some jail time; (b) it is preferable for the client to do the jail time sooner rather than later; *and* (c) state law or local practice requires that the full period of pretrial incarceration be credited against sentence under computation formulas that compare favorably with the formulas for computing postsentencing time. (Before reaching the conclusion that these latter conditions are met, counsel must usually conduct a thorough study of the intricacies of the sentencing and correctional laws of the jurisdiction. *Cf. McGinnis v. Royster*, 410 U.S. 263 (1973).) A still stronger argument for leaving the defendant in jail before trial appears when the defendant is charged with an offense for which it is the local practice to give a "time served" sentence (that is, a sentence equivalent to the period of pretrial incarceration, with full credit for the pretrial incarceration) when the defendant has served any considerable period of time in jail before trial, whereas a bailed defendant is likely to draw a *longer* sentence. It is common, for example, for judges to want to give defendants convicted of certain offenses some significant "taste of jail"

without caring exactly how much. As a rule of thumb, therefore, they may habitually give a time-served sentence to any defendant who has spent, say, a month or more in jail before trial. When the same judge comes to sentence a bailed defendant for the same offense, the judge's habitual practice – or the structure of the state's sentencing law or the processing procedures of the local correctional facility – may require that the shortest jail-time sentence imposed be, say, three months. In this situation a defendant obviously stands to shorten his or her sentence by forgoing bail. Once again, in order to make advised decisions in these matters, counsel must be thoroughly familiar with the details of the jurisdiction's sentencing and corrections law; also, s/he must usually inquire among knowledgeable local criminal lawyers concerning the local judges' sentencing habits.

Chapter 5

State-Paid Assistance for the Defense: Obtaining State Funding for Counsel’s Time and for Defense Services

5.1. Availability of State Funding Under Local Practice

5.1.1. Funding for Counsel’s Time

As explained in § 2.3.4.2 *supra*, indigent defendants have a Sixth Amendment right to court-appointed counsel in all felony cases (*Gideon v. Wainwright*, 372 U.S. 335 (1963); *Johnson v. Zerbst*, 304 U.S. 458 (1938)) and on any charges of misdemeanors or petty offenses for which a term of imprisonment is going to be imposed as a result of conviction, “even for a brief period” (*Alabama v. Shelton*, 535 U.S. 654, 657 (2002)), including cases in which the court imposes “a suspended sentence that may ‘end up in the actual deprivation of a person’s liberty’” (*id.* at 658) in the event of a violation of probation or some other condition of the suspended sentence. This constitutional mandate of counsel applies not only to the trial stage of a criminal case but also to all pretrial proceedings “at or after the time that adversary judicial proceedings have been initiated against [a defendant] . . . ‘whether by way of formal charge, preliminary hearing, indictment, information, or arraignment’” (*Brewer v. Williams*, 430 U.S. 387, 398 (1977)). See *Missouri v. Frye*, 132 S. Ct. 1399, 1405 (2012) (“It is well settled that the right to the effective assistance of counsel applies to certain steps before trial. The ‘Sixth Amendment guarantees a defendant the right to have counsel present at all “critical” stages of the criminal proceedings.’ . . . Critical stages include arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea.”); *Padilla v. Kentucky*, 559 U.S. 356, 364 (2010) (“Before deciding whether to plead guilty, a defendant is entitled to “the effective assistance of competent counsel.”); *Rothgery v. Gillespie County*, 554 U.S. 191, 213 (2008) (“[A] criminal defendant’s initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel.”) It extends though sentencing (*Mempa v. Rhay*, 389 U.S. 128 (1967); *Lafler v. Cooper*, 132 S. Ct. 1376, 1385-86 (2012)), and through at least the first appeal as of right from conviction and sentence (*Douglas v. California*, 372 U.S. 353 (1963); *Swenson v. Bosler*, 386 U.S. 258 (1967); *Halbert v. Michigan*, 545 U.S. 605 (2005); and compare *Coleman v. Thompson*, 501 U.S. 722 (1991), with *Martinez v. Ryan*, 132 S. Ct. 1309 (2012)).

In a number of jurisdictions, a statute or local rule establishes an even broader guarantee of court appointment of counsel for indigent defendants in misdemeanor and petty-offense prosecutions, requiring court-appointed counsel whenever a term of imprisonment is *authorized* – or, in some states, whenever a term in excess of a specified length is authorized – whether or not such a sentence is actually imposed. See *Scott v. Illinois*, 440 U.S. 367, 385–88 & nn.18-22 (1979) (Brennan, J., dissenting) (collecting the relevant authorities).

If counsel is appointed to represent an indigent defendant and if counsel is not already familiar with the local rules, practices, and procedures for compensation of court-appointed counsel, s/he should check with the clerk of court and with lawyers in the jurisdiction who have experience in representing indigent clients in criminal cases. Payment will usually require detailed record-keeping of counsel's time and expenses, and it is therefore essential that counsel know in advance what types of expenses are covered and what types of documentation will be required.

5.1.2. *Funding for Defense Services*

In capital cases, most jurisdictions authorize the provision of expert consultants and investigative assistance to indigent defendants at public expense. In noncapital cases there is great variation from state to state and sometimes from locality to locality, with some courts furnishing little or no aid to indigents beyond the appointment of counsel. (Federal practice is governed by the Criminal Justice Act of 1964, 18 U.S.C. § 3006A(e).) Even where state or county payment for defense support services is authorized, it is frequently limited by statutorily specified ceilings that render it inadequate or is doled out by budget-conscious judges in amounts that are insufficient to meet the real needs of defense. Procedures for drawing down whatever funds are available may also be unsatisfactory. In some localities the court must approve each specific defense expenditure in advance, upon a showing of need in a form that discloses the nature of defense trial preparation to the prosecutor. See § 5.4 *infra*. In other localities defense counsel is reimbursed, after a *post facto* audit, for expenditures that the judge finds were reasonable. The latter system puts the defendant in the unconscionable posture of having to rely on the ability and willingness of the defense attorney to advance sums that may not be repaid. *Cf. State v. Robinson*, 123 N.H. 665, 465 A.2d 1214 (1983).

If counsel is appointed to represent an indigent client and if counsel is not already familiar with the local rules and practices for obtaining funding for defense services, s/he should ascertain from the clerk of court what expenses and services, if any, will be provided out of public funds and how to apply for them. Whether counsel is appointed or retained, if the client cannot afford fees and costs for court process, expert witnesses, consultative services, or investigative aids that counsel believes are legitimately needed, counsel should ascertain the local practice for requesting funds and should comply with it insofar as possible. See *Hinton v. Alabama*, 134 S. Ct. 1081, 1083, 1085, 1088 (2014) (per curiam). Pretrial orders denying funds to defendants who have made an adequate showing of indigency and of need can be challenged by appeal in some jurisdictions and by prerogative writ in others. See, e.g., *Kimminau v. Avilez*, 2014 WL 5507295 (Ariz. App. 2014); *Johnny S. v. Superior Court*, 90 Cal. App. 3d 826, 153 Cal.Rptr. 550 (1979); § 31.1 *infra*. To the extent that local practice fails to authorize public payment for services that counsel needs or when it unreasonably restricts them – either by limiting the amounts available or by imposing crippling procedural preconditions – counsel may have to challenge the practice as unconstitutional. In this situation counsel should move the court to authorize the necessary expenditures without requiring the defendant to comply with the objectionable preconditions

or else dismiss the prosecution, on the ground that failure to provide an impecunious defendant with adequate financial resources for a fair defense denies the defendant the Equal Protection of the Laws and the Due Process of Law guaranteed by the Fourteenth Amendment. See §§ 5.2-5.4 *infra*.

Reasonable recoupment provisions (that is, requirements that an indigent defendant who has been provided state-paid defensive assets repay the state if and when s/he becomes financially able to do so) are not *per se* unconstitutional (*Fuller v. Oregon*, 417 U.S. 40 (1974)), but the terms of any recoupment statute should be carefully reviewed in the light of *Rinaldi v. Yeager*, 384 U.S. 305 (1966), and *James v. Strange*, 407 U.S. 128 (1972).

5.2. ***Rights Under the Equal Protection Clause***

In *Griffin v. Illinois*, 351 U.S. 12 (1956), the Supreme Court held that the Equal Protection Clause compelled a state to furnish a free transcript of a criminal trial to a convicted defendant who needed the transcript for presentation of an appeal and who could not afford to pay for it. Noting that a nonindigent defendant could purchase a transcript and that under Illinois practice convicted defendants “needed a transcript in order to get adequate appellate review of their alleged trial errors” (*id.* at 16), the Court decided the case on the broad ground that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has” (*id.* at 19). See also *Williams v. Illinois*, 399 U.S. 235, 241 (1970); *Bearden v. Georgia*, 461 U.S. 660, 664 (1983); *Estelle v. Williams*, 425 U.S. 501, 505-6 (1976) (dictum); *Black v. Romano*, 471 U.S. 606, 614-15 (1985) (dictum).

Following *Griffin*, the Court has required the provision of free transcripts to indigents on both direct and collateral criminal appeals (*e.g.*, *Draper v. Washington*, 372 U.S. 487 (1963); *Long v. District Court*, 385 U.S. 192 (1966); *Gardner v. California*, 393 U.S. 367 (1969); *Williams v. Oklahoma City*, 395 U.S. 458 (1969); *Mayer v. City of Chicago*, 404 U.S. 189 (1971); see also *M.L.B. v. S.L.J.*, 519 U.S. 102, 107, 110-12 (1996) [discussing the *Griffin-Mayer* line of precedent]; compare *United States v. MacCollom*, 426 U.S. 317 (1976)); the waiver of filing fees for both appeals and collateral-attack proceedings (*Burns v. Ohio*, 360 U.S. 252 (1959); *Smith v. Bennett*, 365 U.S. 708 (1961); see also *M.L.B. v. S.L.J.*, *supra*, 519 U.S. at 111 & n.4 [discussing *Burns v. Ohio* and *Smith v. Bennett*]); and the provision of appointed counsel on at least a criminal defendant’s first appeal as of right from conviction (*Douglas v. California*, 372 U.S. 353 (1963); *Swenson v. Bosler*, 386 U.S. 258 (1967); *Halbert v. Michigan*, 545 U.S. 605 (2005); see also *Coleman v. Thompson*, 501 U.S. 722, 755-56 (1991) (dictum); *Martinez v. Ryan*, 132 S. Ct. 1309, 1315 (2012) (dictum); compare *Ross v. Moffitt*, 417 U.S. 600 (1974); *Wainwright v. Torna*, 455 U.S. 586 (1982) (per curiam); *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Murray v. Giarratano*, 492 U.S. 1 (1989) (plurality opinion)). The full purport of the *Griffin* line of cases remains to be developed. But it is possible to state its principle comprehensively as a command that the state which prosecutes an indigent defendant must furnish him or her with every defensive resource which is necessary “to assure . . . an adequate opportunity to present his [or her] claims fairly in the context of the State’s [criminal] . . . process” (*Ross v. Moffitt*, *supra*, 417 U.S.

at 616 (dictum)) if a nonindigent defendant could purchase that resource.

The cases such as *Roberts v. LaVallee*, 389 U.S. 40 (1967), cited in § 11.5.3 *infra* establish that this command extends to matters needed for trial preparation. *Britt v. North Carolina*, 404 U.S. 226 (1971), in particular, describes the command as a requirement “that the State . . . provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners” (*id.* at 227); and although a free transcript was not required “in the narrow circumstances of [the *Britt*] . . . case” itself (*id.*), the Court detailed those circumstances in a manner which leaves no doubt that generally an indigent defendant must be given free transcription of all relevant prior judicial proceedings “as a discovery device in preparation for trial, and as a tool at the trial itself for the impeachment of prosecution witnesses” (*id.* at 228; *see id.* at 229-30).

In *Mayer v. City of Chicago*, 404 U.S. 189 (1971), the Court phrased the Equal Protection requirement in terms of assuring “the indigent as effective [a trial] . . . as would be available to the defendant with resources to pay his own way.” 404 U.S. at 195. In addition, *Mayer* firmly resists the notion that an indigent defendant’s needs are to be “balanced” against the cost to the state of providing them or denied if they are too expensive. “*Griffin* does not represent a balance between the needs of the accused and the interests of society; its principle is a flat prohibition against pricing indigent defendants out of as effective [a defense] . . . as would be available to others able to pay their own way. . . . The State’s fiscal interest is, therefore, irrelevant.” 404 U.S. at 196-97. *See also Bounds v. Smith*, 430 U.S. 817, 825 (1977) (“the cost of protecting a constitutional right cannot justify its total denial”).

Certainly, the most immediate implications of the *Griffin-Roberts-Britt-Mayer* line of decisions require that the state record all court proceedings in an indigent case at public expense, and that prior to trial a defendant who moves for free transcripts of earlier proceedings – at least in the same case, and perhaps in related cases – must be provided with them in adequate time to use them for trial preparation. *See* §§ 11.5.3, 11.8.7 *infra*.

An indigent defendant’s right to compulsory process *in forma pauperis* to secure the attendance of material defense witnesses (*see* §§ 11.5.3, 29.4.4 *infra*) also seems obvious. *See Greenwell v. United States*, 317 F.2d 108 (D.C. Cir. 1963); *Welsh v. United States*, 404 F.2d 414, 417 (5th Cir. 1968); *compare United States v. Pitts*, 569 F.2d 343, 348-49 & n.10 (5th Cir. 1978); *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 n.7 (1982) (dictum).

Under *Ake v. Oklahoma*, 470 U.S. 68 (1985), an indigent defendant who “demonstrates to the trial judge that his [or her] sanity at the time of the offense is to be a significant factor at trial . . . must [be given free] . . . access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense” (*id.* at 83). *See, e.g., Cowley v. Stricklin*, 929 F.2d 640 (11th Cir. 1991); *Bush v. McCollum*, 231 F. Supp. 560 (N.D. Tex. 1964), *aff’d*, 344 F.2d 672 (5th Cir. 1965); *In re Allen R.*, 127 N.H. 718, 721-22, 506 A.2d 329, 331-32 (1986) (respondent in

a delinquency case had federal and state constitutional rights to a state-paid psychologist to testify on *Miranda* issues at a confession suppression hearing). Although *Ake* itself dealt only with psychiatric experts, the Court's reasoning applies to other kinds of expert assistance as well. The *Ake* decision is grounded upon the State's obligation to afford an indigent defendant "access to the raw material integral to the building of an effective defense," 470 U.S. at 77. The same obligation exists whether the necessary "raw material" is a psychiatrist or some other type of expert. "Criminal cases will arise where the only reasonable and available defense strategy requires consultation with experts or introduction of expert evidence." *Hinton v. Alabama*, 134 S. Ct. 1081, 1088 (2014) (per curiam). In these cases, the state must furnish the necessary funds. See, e.g., *Little v. Armontrout*, 835 F.2d 1240, 1241, 1244-45 (8th Cir. 1987) (en banc) (trial court violated Due Process by denying the defense's motion for appointment of an "expert in hypnosis" to assist the defense at a pretrial suppression hearing and at trial in challenging the hypnotically enhanced identification of the defendant by the complainant); *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980) (requiring the provision of a state-paid independent pathologist to an indigent defendant charged with homicide when the cause of death is debatable and medically complicated); *Cherry v. Estelle*, 507 F.2d 242, 243 (5th Cir. 1975), *subsequent history* in 424 F. Supp. 548 (N.D. Tex. 1976) (impliedly recognizing the right to provision of a state-paid independent ballistics expert under certain circumstances (see *Hoback v. Alabama*, 607 F.2d 680, 682 n.1 (5th Cir. 1979))); *Bowen v. Eymann*, 324 F. Supp. 339 (D. Ariz. 1970) (requiring provision of a state-paid defense expert when the prosecution has failed to conduct potentially exonerating chemical tests); *Jones v. Sterling*, 210 Ariz. 308, 314-15, 110 P.3d 1271, 1277-78 (2005) (requiring provision of an expert to assist in the development of a selective-prosecution defense when the defendant has presented a credible preliminary showing of discrimination); *Jacobson v. Anderson*, 203 Ariz. 543, 57 P.3d 733 (Ariz. App. 2002) (a defendant in a prosecution for vehicular manslaughter and reckless endangerment is entitled to necessary funding for an accident reconstructionist and a criminalist); *People v. Lawson*, 163 Ill. 2d 187, 206, 218-230, 644 N.E.2d 1172, 1181, 1187-92, 206 Ill. Dec. 119, 134-39 (1994) ("trial court abused its discretion by denying defendant's motion for expert assistance" of a shoeprint expert "to testify at trial and assist in the preparation of his defense"); *People v. Watson*, 36 Ill. 2d 228, 221 N.E.2d 645 (1966) (requiring provision of a state-paid examiner of questioned documents); *State v. Moore*, 321 N.C. 327, 328, 331, 343-46, 364 S.E.2d 648, 649-50, 656-58 (1988) (trial judge erred in denying the defendant's request for appointment of an independent psychiatrist to assist in challenging the voluntariness of his confession, and also erred in denying the defense's request for a fingerprint expert to challenge the "state expert's conclusion that defendant's palm print was found at the scene of the attack"); *Rey v. State*, 897 S.W.2d 333, 335, 346 (Tex. Crim. App. 1995) (trial judge violated Due Process by denying the defense's motion for the appointment of "an independent forensic pathologist" to "assist in the evaluation, preparation and presentation of his defense"), and cases collected in *id.* at 338 n.4. From these authorities and Due Process principles sketched in § 5.3 *infra*, the argument for state-paid investigative services, when reasonably needed, seems plain. See *State v. Wang*, 312 Conn. 222, 245, 92 A.3d 220, 235 (2014) ("we hold that due process, as guaranteed under the fourteenth amendment to the United

States constitution, requires the state to provide an indigent self-represented criminal defendant with expert or investigative assistance when he makes a threshold showing that such assistance is reasonably necessary for the preparation and presentation of his defense”); *Corenevsky v. Superior Court*, 36 Cal. 3d 307, 682 P.2d 360, 204 Cal. Rptr. 165 (1984); *Staten v. Superior Court*, 2003 WL 21419614 (Cal. App. 2003); *State v. Second Judicial District Court*, 85 Nev. 241, 453 P.2d 421 (1969); *Mason v. Arizona*, 504 F.2d 1345, 1351-52 (9th Cir. 1974) (dictum); *Smith v. Enomoto*, 615 F.2d 1251, 1252 (9th Cir. 1980) (dictum).

5.3. *Rights Under the Due Process Clause*

Denial of state-paid experts and investigative services to the defense in indigent cases touches Due Process Clause concerns as well as Equal Protection Clause concerns. *Cf. Little v. Streater*, 452 U.S. 1, 16 (1981); *Evitts v. Lucey*, 469 U.S. 387, 405 (1985). A criminal defendant’s inability to marshal the information necessary to present his or her version of the facts, in the context of a litigation process that is quintessentially adversary, smacks of fundamental unfairness. It was just this consideration that led the Supreme Court in *Gideon v. Wainwright*, 372 U.S. 335 (1963), to hold that the right to counsel is a component of Due Process (see *Argersinger v. Hamlin*, 407 U.S. 25, 31-33 (1972); *Ross v. Moffitt*, 417 U.S. 600, 610 (1974) (dictum); *Middendorf v. Henry*, 425 U.S. 25, 41 (1976) (dictum); *McCoy v. Court of Appeals*, 486 U.S. 429, 435 (1988) (dictum)); and counsel unaided in a case in which counsel needs aid to provide an adequate defense hardly satisfies the *Gideon* command (*Williams v. Martin*, 618 F.2d 1021, 1025, 1027 (4th Cir. 1980)). In *McCoy v. Court of Appeals*, the Supreme Court considered the obligations of court-appointed counsel on appeal and concluded that the constitutional “principle of substantial equality [between defendants who can and those who cannot afford to retain counsel] . . . require[s] that appointed counsel make the same diligent and thorough evaluation of the case as a retained lawyer. . . .” (486 U.S. at 438). Appointed counsel at the trial level have obligations that are at least as demanding (see *id.* at 435); and “thorough evaluation of the case” cannot be performed without adequate investigative resources. “Because the right to counsel [announced in *Gideon*] is so fundamental to a fair trial, the Constitution cannot tolerate trials in which counsel, though present in name, is unable to assist the defendant to obtain a fair decision on the merits.” *Evitts v. Lucey*, *supra*, 469 U.S. at 395; see also *Rogers v. Israel*, 746 F.2d 1288 (7th Cir. 1984). The federal caselaw cited in §§ 3.23.3 *supra* and § 18.9.2.1 *infra* to the effect that defense counsel must be given adequate time to prepare, also suggests that s/he must be given adequate resources with which to prepare. A like command may be implicit in the Sixth and Fourteenth Amendment rights to compulsory process, see §§ 18.9.2.4, 29.4.4 *infra*, and in the Due Process requirement of a fair adversarial balance in criminal procedures, see § 18.9.2.7 *infra*.

Perhaps timely disclosure to the defense of the prosecutor’s case and such exculpatory or mitigating materials as diligent police investigation has unearthed may fulfill these Due Process requirements. That, however, is subject to considerable doubt, since the police are not likely to be as vigorous in their researches for a defendant as in those against the defendant. In any event, the denial to an indigent defendant both of disclosure of the products of the

state's investigation (see §§ 18.1-18.10 *infra*) and of resources to conduct his or her own investigation clearly invites attack under the Due Process Clause. For this reason counsel is advised to couple a full range of discovery requests with applications for state-paid investigative and expert assistance. See § 18.7.3 *infra*.

5.4. Procedures

Whatever local procedures are available for requesting state-paid assistance should be employed unless their use is unduly burdensome. If the local procedures are too restrictive to satisfy counsel's needs, counsel should file a motion requesting state funding and challenging the relevant aspects of local practice. See, e.g., *People v. Lawson*, 163 Ill. 2d 187, 222, 224, 230, 644 N.E.2d 1172, 1189, 1192, 206 Ill. Dec. 119, 136, 139 (1994) (rejecting the state's argument that "an accused is not entitled to funds for expert assistance unless he identifies the specific expert and provides an estimate of the costs involved"; "a denial of expert assistance funding to a criminal accused, who has not yet identified the particular individual he wishes to hire and given an estimate of costs, but who has otherwise demonstrated his constitutional entitlement to such assistance, represents the elevation of form over substance"); *State v. Moore*, 321 N.C. 327, 345-47, 364 S.E.2d 648, 657-58 (1988) (rejecting the state's argument that a defense motion for appointment of an expert must "present a specific basis for questioning the accuracy of the state[] [expert's] determination"; "The state's proposed test would demand that the defendant possess already the expertise of the witness sought."). Cf. *Hinton v. Alabama*, 134 S. Ct. 1081, 1083, 1085, 1088 (2014) (per curiam) ("Hinton's trial attorney rendered constitutionally deficient performance" by presenting a toolmark "expert he knew to be inadequate" when counsel "could not find a better expert willing to work for \$1,000" and counsel mistakenly "believed that he was unable [under state law] to obtain more than \$1,000 to cover expert fees"; the trial judge who granted counsel's request for funding for an expert cited a \$1,000 statutory maximum, but counsel should "have corrected the trial judge's mistaken belief that a \$1,000 limit applied" and sought additional funding); *Yun Hseng Liao v. Junious*, 817 F.3d 678, 682-83, 695 (9th Cir. 2016) (the defendant was deprived of effective assistance of counsel because his lawyer relied on a court clerk's erroneous statement that a motion for funds for an additional expert evaluation of the defendant had been denied when in fact it had been granted; counsel's "failure to verify what the court clerk" said, and counsel's failure to conduct "any further inquiry into the status of his motion," and his decision to instead proceed "to trial without the benefit of the [additional] medical examination" were prejudicial because they "eviscerated a viable defense").

If the local rules require that expenditures be approved in advance by the court, on the filing of an affidavit or motion describing the services for which each expenditure is required and/or justifying the need for those services, counsel should request leave to make the required filing *ex parte* under seal. Counsel should insist that the defendant is not required to disclose the theory and strategy of the defense to the prosecutor – and certainly cannot be compelled to disclose potentially self-incriminating information (see §§ 12.6.4.3, 16.6.1, 18.12 *infra*) – as the precondition of state financial assistance.

Cf. Simmons v. United States, 390 U.S. 377, 384-94 (1968), and cases cited following *Simmons* in § 16.6.1 *infra*. The double-bind problem is recognized in *United States v. Branker*, 418 F.2d 378, 380-81 (2d Cir. 1969) (dictum); *cf. United States v. Kahan*, 415 U.S. 239 (1974) (per curiam); but *Branker*'s proposed solution to it – precluding prosecutorial use at trial of any evidence disclosed by the defendant in proceedings seeking *forma pauperis* assistance – is probably insufficiently protective to justify compelling the disclosure in the first place, at least in the absence of a formal grant of use and derivative-use immunity (see *Maness v. Meyers*, 419 U.S. 449, 461-63, 468-70 (1975); *Pillsbury Co. v. Conboy*, 459 U.S. 248, 256-57 & n.13 (1983)). In any event, *Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985), explicitly states that the federal constitutional right to state-paid expert assistance which *Ake* recognizes is triggered when “the defendant is able to make an *ex parte* threshold showing to the trial court” of the facts which support that right. See, e.g., *State v. Dahl*, 874 N.W.2d 348, 353 (Iowa 2016) (“When a trial court deems an indigent defendant’s application for appointment of a private investigator may have some merit but does not contain adequate information for the court to determine whether it should grant the application, the court should hold an *ex parte* hearing before ruling on the merits of the application. At that hearing, the court should require the defendant to provide additional information that will allow it to rule on the merits. If the court holds an *ex parte* hearing, the court must report the *ex parte* hearing. The court must also seal any transcript or order that would disclose defense strategy or work product and file a separate order announcing its decision to grant or deny the application.”); Donna H. Lee, Note, *In the Wake of Ake v. Oklahoma: An Indigent Criminal Defendant’s Lack of Ex Parte Access to Expert Services*, 67 N.Y.U. L. REV. 154, 170-71 n.122 (1992).

In assessing the sufficiency an indigent defendant’s “threshold showing” of a need for any particular sort of expert or investigative assistance, *Ake* adopts the analytic framework of *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). See *Ake v. Oklahoma*, *supra*, 470 U.S. at 77. Although the *Mathews* analysis formally requires consideration of three factors (“the private interest that will be affected by the action of the State”; “the governmental interest that will be affected if the safeguard is to be provided”; and “the probable value of the additional or substitute procedural safeguards that are sought, and the risk of an erroneous deprivation of the affected interest if those safeguards are not provided” (*id.*)), the first two factors generically favor the defendant in most criminal prosecutions – and certainly in all prosecutions for crimes that entail the possibility of a severe sentence. (The “private interest” against undergoing heavy criminal punishment is obvious; the only relevant “governmental interest” is in minimizing fiscal expenditures, and this interest can ordinarily be taken into account by adjusting the *amount* allocated for defense services.) So the key to showing that the specific circumstances of the defendant’s case generate an entitlement to any given type and amount of assistance will ordinarily be to satisfy *Mathews*’s third consideration by making an adequate factual demonstration of “the probable value . . . [to the defense case of the kind of expert or investigative assistance] sought, and the risk of an erroneous deprivation of the . . . [defendant’s “fundamental [right] . . . to present witnesses in his own defense” (*Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); see § 39.1 *infra*) if those . . . [particular defense

services] are not provided” (*Ake v. Oklahoma*, *supra*, 470 U.S. at 77). Counsel will need to show that the services which the requested expert or investigator can perform are “likely to be a significant factor in [the defendant’s] . . . defense [and that] with such assistance, the defendant might have a reasonable chance of success” (*id.* at 82-83). Compare *Caldwell v. Mississippi*, 472 U.S. 320, 323 n.1 (1985) (finding no violation of Due Process in the denial of funds for defense experts where an indigent defendant “offered little more than undeveloped assertions that the requested assistance would be beneficial”).

Confronted with a state-law or local requirement that a defendant document specific defense needs or proposed expenditures as the precondition of receiving funds for expert or investigative assistance, counsel who believes that such documentation will result in improvident disclosure of defense planning to the prosecutor should submit an affidavit or declaration

- asserting the needs or proposed expenditures of the defense in unrevealing, conclusory form (see § 29.4.4 *infra*);
- averring that a more particularized description would reveal counsel’s “litigating strategies” (*United States v. Valenzuela-Bernal*, 458 U.S. 858, 862 n.3 (1982), § 18.13 *infra*) or would reveal leads to potentially incriminating matter (see § 18.12 *infra*) or both, and would thus unconstitutionally subject the defendant to a burden to which defendants with money are not subjected;
- citing *Ake*; and
- offering to make the detailed showing *ex parte*, in chambers.

Cf. Greenwell v. United States, 317 F.2d 108 (D.C. Cir. 1963).

When no state procedure is applicable, a simple motion to the court for provision of state-paid assistance or, in the alternative, for dismissal of the prosecution by reason of deprivation of the opportunity to prepare a defense, is probably most appropriate. The motion may be supported by counsel’s affidavit (1) describing defense investigative and preparatory needs insofar as they can be described without making any harmful disclosures, and (2) offering to make a fuller showing *in camera* or by sealed affidavits to be considered by the court *ex parte*. The motion should also be supported, of course, by the defendant’s detailed affidavit of poverty. The latter affidavit can be prepared from the information furnished by the client in response to the questions in the bail-information questionnaire set out in § 4.5 *supra*.

Chapter 6

Interviewing the Client

6.1. *Establishing the Lawyer-Client Relationship*

The first interview with a criminal client is probably the most important exchange that counsel will have with the client. It largely shapes the client's judgment of the lawyer. Any initial impressions counsel makes may be indelible. At the least, this interview will strongly affect all future dealings between the two. The lawyer's primary objective in the initial interview is to establish an attorney-client relationship grounded on mutual confidence, trust, and respect.

To gain the client's confidence, counsel must convey a sincere interest in helping the client as well as project the image of a competent, knowledgeable lawyer. The client must be given an adequate opportunity to explain his or her problems, and counsel must be able to respond to them with reasonable assurances and to answer any questions needing immediate attention or preoccupying the client.

6.2. *Preparing for the Interview*

Proper preparation for an interview is indispensable if counsel hopes to gain the client's confidence and trust. Counsel needs to be acquainted with the specific charges against the client and the elements of the charged offenses in order to avoid floundering when taking the client's story. Knowledge of the applicable penalty provisions is indispensable in order to answer the question – which the client will almost certainly ask – what kind of a sentence the client is facing.

In the course of locating a client in custody or of checking out the status of a “wanted” client, counsel will ordinarily have spoken to the desk officer in the arrest precinct or in the defendant's home precinct and to the investigating officer. In these conversations, counsel should be sure to learn the specific charges against the defendant as well as any other charges being considered. See §§ 3.5, 3.10 *supra*. If counsel can review the relevant statutes quickly, s/he should take the time, before the initial interview, to look up the elements of the crime *and particularly the penalty*, including any applicable probation provisions, parole provisions, and recidivist sentencing provisions. See § 3.21.1 *supra*.

Counsel should undertake to be as well informed as time permits about the prospects and procedures for getting the client conditionally released from custody. See § 3.21.1 *supra*. If counsel has the chance, without significantly delaying the initial interview, s/he should also try to learn from the investigating officer the sort of factual case the police have against the defendant. But if the defendant is in custody, it is usually better to get in to see the defendant quickly than to tarry very long in talking to the police about the case.

6.3. *Putting the Client at Ease and Establishing a Relationship of Trust*

An understanding of the client's mindset is essential in striking up an attorney-client relationship. Counsel must remember that the client is a person in trouble and that the last thing s/he needs is more trouble from counsel. Counsel should therefore make the beginning of the initial interview with the client as undemanding as possible. Questions should be kept very simple until the client's abilities to understand questions, to think, and to articulate answers have been evaluated. Thereafter, counsel should keep well within the limits of the client's vocabulary and comprehension skills. (Counsel who is dealing with a mentally impaired client should be attentive at the outset to determine as well as s/he can the areas and dimensions of the impairment. Careful observation may lay the foundation for a later decision to have the client mentally examined (see §§ 16.1.2, 16.3 *infra*) and may provide facts to support an application to the court, if that proves advisable, for court-ordered or state-paid examination (see § 16.3 *infra*). The nature and degree of the client's disability may also prove significant in later attacking confessions s/he has made to the police, purported consents to police searches and seizures, and other purported waivers of rights. In any event, the way in which counsel gives the client precautionary advice (see §§ 3.4.2 - 3.4.6, 3.6, §§ 3.21.2 *supra*) and information will need to be tailored to the client's comprehension level.) If the client's primarily language is not English, and if counsel is not sufficiently fluent in that language, counsel should ordinarily try to obtain a disinterested interpreter rather than a member of the client's family who may intrude his or her own biases into the interview and before whom the client may be ashamed to tell the truth.

Counsel should avoid displaying any indication that the client is making a bad impression or is at fault for failing to answer counsel's questions relevantly. Conversely, counsel wants to convey the sense that the client is doing well and is giving counsel helpful information. The client usually enters upon this meeting with certain preconceptions about lawyers that are far from favorable. These include the notions that lawyers are self-interested, uncaring, grasping, and untrustworthy. If the client is street-wise, s/he is also likely to hold the more specific belief that criminal defense lawyers only want to talk their clients into pleading guilty to save themselves the trouble of trying cases. Counsel should attempt to rectify, or at least alleviate, these preconceptions by showing genuine concern for the client as an individual human being – not just another faceless defendant in a parade of stereotyped defendants – and by showing a willingness to work on the client's behalf.

To build rapport with the client, counsel should make use of any available personalizing touches. Offering to do concrete things for the client (for example, if the client is in lock-up, offering to contact the client's spouse or domestic partner or other family members; or, if the client evidences particular concern over the police officers' seizure of the client's cash or other personal property, promising to look into the situation and do whatever can be done to retrieve the property) is a more credible demonstration of counsel's willingness to work for the client than general self-touting professions of

industriousness in the future.

Perhaps the single most important impression to convey is that counsel views his or her own job as being exclusively to serve and help the client to the best of counsel's abilities. S/he should avoid giving the client any grounds for suspicion or confusion about the lawyer's role or loyalties or motives – doubts which may arise if the lawyer begins to ask for information without saying why s/he wants it. The client should be told that the lawyer's only purpose and only interest are to represent the client and that, in order to make sure that nothing is overlooked which could help the client, counsel needs certain information. If the relevance of counsel's questioning to the client's needs and interests is not perfectly obvious – obvious, that is, to a layperson, not a lawyer – counsel should explain why s/he is asking this or that.

The client should be made to feel comfortable and secure in the presence of counsel. When explaining something to the client, it is usually better to ask “okay?” than “Do you understand that?” Whatever the client tells counsel should be received with interest and an attempt to understand, even if it does not appear relevant to the immediate tasks at hand as counsel conceives them. Patience in hearing the client out is crucial. Under stress s/he may be rambling and inarticulate. S/he should not be shut off without explanation – or at all, unless time is pressing; and, when s/he must be turned from one subject to another, counsel should explain the need to change the subject in a way that does not make the client feel like a fool.

6.4. *Giving the Client a Business Card*

As a means for establishing rapport and putting the client at ease, it is often useful to give the client a business card and to use the card as a prop to reinforce certain messages. Pointing out the lines on the card containing counsel's phone numbers, counsel should explain that s/he is giving the client the numbers so that the client can call whenever the client has questions or has information to impart to counsel. Counsel can say explicitly that it will be necessary for counsel and the client to keep in touch and to work together closely in fighting against the charges. This reinforces the message that counsel is there to help the client, and it also conveys the crucial idea that the client should inform counsel about any and all case-related information s/he can think of. Finally, it implicitly tells the client that the client will also need to make an effort to get along with counsel and to assist in finding witnesses and preparing the case.

6.5. *Explaining the Attorney-Client Relationship*

A useful way to emphasize that counsel's sole interest lies in serving the client, without sounding like this is a sales pitch learned on a used car lot, is to find some obviously relevant, operational reason for describing counsel's role. Often the best occasion comes in connection with an explanation of the attorney-client privilege – an explanation that is independently necessary, in any event, in order to assure the client that s/he can tell his or her story to counsel in complete confidence. Counsel may say something like this, for example:

Now, I'm going to ask you to tell me some things about yourself and also about this charge they have against you. Before I do, I want you to know that everything you tell me is strictly private, just between you and me. Nothing you tell me goes to the police or the prosecutor or the judge or your family or anybody else. Nobody can make me tell them what you said to me, and I won't.

Maybe you've heard about this thing that they call the attorney-client privilege. The law says that when a person is talking to [his] [her] lawyer, whatever [he] [she] tells the lawyer is confidential and secret between the two of them. This is because the law recognizes that the lawyer's obligation is to [his] [her] client and to nobody else; that the lawyer is supposed to be 100 per cent on the client's side; that the lawyer is only supposed to help [his] [her] client and never do anything – or tell anybody anything – that might hurt the client in any way. The prosecutor is the one who is supposed to represent the government in prosecuting cases; and the judge's job is to judge the cases. But the law wants to make sure that – even if everybody else is lined up against an accused – there is one person who is not supposed to look out for the government but to be completely for the person who's accused of the crime. That is the person's lawyer.

As your lawyer, I am completely for you. And I couldn't be completely for you if I could be forced to tell anybody else the things that you say to me in private. So you can trust me and tell me anything you want without worrying that I will ever pass it along to anyone else because I won't. I can't be questioned or forced to talk about what you tell me, even by a court, and I am not allowed to tell it to anyone else without your permission because I am 100 per cent on your side, and my job is to work for you and only for you; so everything we talk about stays just between us. Okay?

6.6. *Settling the Roles of Attorney and Client and Explaining the Need for a Truthful Rendition of the Facts*

Counsel can further allay the client's suspicions by explaining that all of the fundamental decisions about the objectives of representation will be made by the client and not by counsel. Counsel should indicate that every major decision about how the defense will proceed – such as whether to go to trial or to offer a guilty plea – will be the client's to make: Counsel will keep the client advised of any developments in the case and, when decisions of any consequence have to be made, counsel will discuss all of the options with the client, so that the client can make well-informed choices. Counsel should explain that s/he will raise any defense that the law permits and will take any action necessary to protect the client's rights. But counsel should also mention that it will be counsel's role to make strategic judgments about how to investigate the case, how to formulate the defense in legal terms, and what evidence to present if the case goes to trial. Counsel should promise to talk with the client about issues of this sort, and to get the client's thinking about the best possible strategies to adopt, before counsel makes decisions that will necessarily

depend, in the final analysis, upon counsel's legal training and experience.

The explanation of roles also provides a convenient opportunity for impressing on the client that counsel will need to get from the client a complete, truthful account of all of the facts relating to the case, in order to investigate and prepare for trial effectively. If counsel delays making this point until counsel begins asking questions about the circumstances of the crime and the client's involvement or non-involvement, the client may get the impression that counsel expects the client to lie and is warning the client not to. It's better to use counsel's preliminary explanations of attorney-client role relationships, near the beginning of the interview, to introduce the point that counsel's ability to defend the client effectively depends on the client giving counsel a complete, accurate, honest picture of the facts.

Having covered the roles of attorney and client, counsel can easily turn to the need for a full and accurate account of the facts that the client knows, believes, or can foresee that other people will believe concerning the crime, the client's whereabouts and behavior at the time of the crime, and the client's interactions with other persons (complainants and victims, potential co-defendants, potential witnesses, police and other law-enforcement personnel) who may be involved in the case. Counsel should explain that some clients think an attorney wants to hear only favorable information, but that that is incorrect and harmful to the client's defense. Unless counsel is told about every unfavorable fact that the police and the prosecution could try to show, counsel will be unprepared to challenge those facts, and counsel may develop a defense strategy that will fall apart instead of one that will work. Counsel can also mention that many people accused of a crime have gotten convicted precisely because they did not tell their lawyers about damaging facts that the prosecutor came up with at trial, catching defense counsel by surprise. Counsel should reassure the client that it is not counsel's job to judge the client, but rather to represent the client whether s/he is guilty or innocent, and that that is precisely what counsel intends to do. In addition to saying these words, counsel has to incorporate their message in counsel's own conduct and questioning style: Counsel must avoid giving any sign of moral condemnation of the client's conduct.

6.7. Note-taking During the Interview: Explaining the Need for Taking Notes; Techniques for Taking Notes in the Least Disruptive Manner

It is advisable to explain to the client early in the interview counsel's need to take notes. Naive clients will often be apprehensive about counsel's recording things they say which are incriminating or even merely embarrassing. They may fear that counsel will turn these notes over to the prosecutor or the judge or will disclose them to the client's family or acquaintances. System-savvy clients will often fear that a record of what they told counsel in an initial interview will box them in against subsequent changes in their story.

An effective way of alleviating these concerns is by linking the explanation of note-taking with counsel's preceding explanation of the attorney-client

privilege. Counsel should begin by saying: “I hope you won’t mind if I take notes of some of the things you tell me” and then explain that these notes are only for counsel’s own use, to help counsel remember details of what the client says. Counsel should tell the client that counsel will never show the notes to anyone else, and that no one – not even a court – can force counsel to show them the notes, because whatever counsel writes down is legally protected by the rule of attorney-client privilege. In this manner, counsel simultaneously reinforces his or her earlier explanation of attorney-client privilege by giving the client a concrete demonstration of how the privilege works in practice. It is also useful to tell the client that counsel understands that the client may later remember or learn information which differs from the client’s present recollections, and that counsel’s notes are only intended to record the client’s best efforts to recall relevant facts at the time of this preliminary discussion.

When the client begins to relate relevant facts about his or her background or the circumstances of the offense, counsel will have a natural tendency to start taking notes immediately. This is a temptation to be resisted. Counsel does better to postpone writing or typing anything for a while after the client starts providing pertinent information, because looking the client in the eye and appearing interested in the client’s words – not immediately falling into the role of indifferent stenographer – are the most effective techniques for establishing rapport and encouraging recollection and disclosure. After engaging the client in a conversational run-through of the gist of the information counsel is seeking (or hearing the client out if s/he is one who has a story s/he is anxious to tell), counsel can move on into note-taking mode by (a) asking “would it be okay now if I took some notes about what we’ve been discussing?”; (b) summarizing aloud the essential material that the client has thus far related, while counsel writes it down and asks, item by item, “have I got that right?”; and then (c) continuing with alternating periods of conversational interchange and this kind of note-taking.

In summarizing things the client has said and requesting his or her ratification of them while counsel takes notes, counsel should not preface this procedure with language like “let’s go back over what’s important” or “I want to get down the key points in what you’ve said.” These throat-clearing overtures imply that everything the client has said but counsel omits from the summary is *unimportant*, *not* “key.” The result of these inadvertently judgmental pronouncements is likely to be to leave the client miffed by counsel’s apparent dismissal of some matters that the client cares about, or to telegraph to the client, prematurely, that there is a particular version of the story that counsel wants the client to tell, or both. Deadpan formulas like “let me make sure I’m understanding what you said about [event *A*] or [topic *B*]” work best. As counsel summarizes and writes, s/he can ask clarifying or amplifying questions.

Long periods of writing in silence should be avoided. If an extended note has to be written, counsel should vocalize it as s/he writes and then ask the client, “Is that correct?” (At later stages of the relationship with a client, writing or reading notes silently for a protracted period may occasionally be useful for particular purposes – for example, to give the client a chance to absorb or think over a point without feeling pressured to respond quickly, or to

unnerv a client who counsel believes is lying – but these are exceptions to the general rule that the client should not ordinarily be left hanging while counsel concentrates on counsel’s notes.) Once the client gets into the swing of his or her story, it is usually wise for counsel to take notes of every significant point while the client is talking. Excessive writing is ill-advised, however, because it impedes counsel’s ability to observe the client’s nonverbal expressions and also suggests that counsel is more interested in the facts than in the client as a person.

Perhaps the best way to take sufficiently detailed notes without excessive writing is to develop the knack of writing down key words and key phrases, using the client’s own language rather than translating it or summarizing it in counsel’s terms. *After the interview*, when counsel is alone, s/he can go over the notes while memory of the interview itself is fresh and can write out or dictate a lengthier, more detailed and coherent version of what the client said, together with counsel’s observations, interpretations, and impressions. Using the client’s exact words in the original notes will stimulate counsel’s recall of the things that were said before and after the noted words. Counsel should review the notes and prepare the refined interview report as soon as possible after the interview. When counsel has enough control over his or her schedule, s/he will find it useful to leave a half-hour or so free immediately following interviews for the latter purpose. This may appear profligate, but experience shows that it is more efficient than either trying to write out copious notes during an interview or trying to reconstruct the details of information obtained in an interview by going over terse notes half a day or more after they were taken.

Detailed records of client interviews, particularly of interviews conducted shortly after the time of the offense with which the client is charged, are invaluable tools in defense work. They serve subsequently to refresh both counsel’s and the client’s memories. They can be used for a wide range of practical purposes: *e.g.*, to support counsel’s representations of fact during efforts to convince the prosecutor to drop or reduce the charges or during plea bargaining; to support counsel’s representations to the court in support of requests for continuances, state-paid investigative or consultative assistance, or *forma pauperis* subpoenas to gather defensive evidence; to support counsel’s representations to the court in support of motions; to assist in preparing the defendant to testify. They will also be admissible at trial in the client’s behalf if the prosecution seeks to create the impression that the client’s trial testimony is a recent fabrication. In addition, notes will shield counsel from unwarranted attacks (such as inadequate representation and suppression of facts favorable to the defense) should the defendant ultimately be convicted.

In some jurisdictions, however, interview notes or reports may be discoverable by the prosecution and usable to impeach the client if s/he testifies at trial. See §§ 9.11, 18.11, 27.12(b), 33.03 *infra*. When this is the case, counsel may be able to insulate these materials against disclosure by (1) including within counsel’s written notes of the client’s oral statements sufficient analytic and evaluative commentary to imbue the whole writing with “work product” protection (*see Upjohn Co. v. United States*, 449 U.S. 383, 397-402 (1981)); and (2) not reading or submitting the notes to the client for approval after counsel has put them into final form (*cf. Goldberg v. United States*,

425 U.S. 94, 105-07 (1976)). For discussion, see §§ 9.11, 18.13 *infra*. Counsel can develop and employ a set of covert codes through which s/he – but not a judge who may later inspect the notes on a prosecutor’s motion for discovery – can distinguish counsel’s summaries and commentaries from phrases that are direct quotations of the client’s words. (As simple a gimmick as consistently using “S/he states” and “S/he believes” to signal direct quotation, while using “S/he says” and “S/he feels” to signal other matter, will usually do the trick.) But, even with these precautions, “work product” protection is not completely guaranteed, particularly if the client testifies at trial (*see United States v. Nobles*, 422 U.S. 225, 236-40 (1975), discussed in §§ 18.10.2, 18.12, 18.13, 39.4 *infra*). Where disclosure to the prosecution is a possibility under local practice, counsel must weigh its risks against the advantages of preserving retrievable, contemporaneous documentation of client-interview material.

6.8. *Interviewing the Client About the Facts of the Offense*

In situations other than a rushed interview at the police station or on the day of preliminary arraignment (see §§ 3.20-3.21.3, 3.23 *supra*), counsel is advised to begin the substantive portion of the initial interview by asking about the facts of the offense charged. A client expects his or her attorney to be interested in the client’s innocence or justification and in hearing about defense witnesses. Counsel’s avoiding or even delaying these subjects may be viewed by the client as incompetent lawyering or as a manifestation that the lawyer doubts the client’s innocence.

While homing in on the facts of the offense, counsel’s opening questions should avoid appearing to assume that the client knows anything about the crime itself, since the obvious corollary is that counsel thinks the client is guilty (or at least involved). A neutral way of beginning is by asking the client what the police say s/he did. A question like “Let’s start with anything you know about what the police are saying happened” will usually prompt a narrative by the client, in which s/he will relate both the nature of the charges and the degree to which s/he has personal knowledge of the facts of the crime or, conversely, claims to know nothing about it. If s/he responds initially with nothing more than an abstract statement of the charges, counsel can follow up with “What led the police to think [that you’re involved] *or* [that you did that], do you suppose?”

An effective way of conducting a fact interview is to employ a three-stage interviewing process:

1. Counsel should begin by inviting the client to tell the story in his or her own words, with few, if any, interruptions by the lawyer. This puts the client most at ease and gives the lawyer insight into what the client thinks is more and less important. It provides a collection of unsolicited details on which to cross-examine the client later if the lawyer suspects untruth. And it tells the lawyer something about how the client’s mind works, how the client conceptualizes his or her situation, the client’s concerns and attitudes, his or her intelligence and verbal ability. There is no sense in starting to ask

questions that may be beyond the client's comprehension level or entirely at odds with what s/he thinks and feels the case is all about.

2. Once the client's narrative rendition of the facts is completed, counsel should go over the story again, aiding the client to remember and recount everything s/he can about the relevant events, conditions, things, and people. An effective way to tease out detail is to take up delimited blocks or parts of the client's story (bounded by a time period or event ["what happened that night before you left the house?" or "what was going on while you were with Sam?" or *whatever*] or by coherent topic lines ["how you and Sam came to be together that night" or "everything you remember about what the person you saw there looked like" or *whatever*]) and go through each block, one after another, using the journalistic "who, what, why, when, where, and how" approach to fill in specific, concrete observations omitted by the client when s/he related that block of information. A technique that works well with some clients is to cast all questions and answers in the present tense (for example: "and what do you do next?"), thereby stimulating the client's reliving of the experience.
3. In the third round of the interview, counsel should fill in additional details and elicit explanations. Counsel should pick up on words used by the client in rounds one and two, asking the client to explain any terms that are unfamiliar to counsel. Counsel should elicit the names, street addresses, phone numbers, email and e-text addresses of any and all witnesses to the crime or related events that happened prior to or subsequent to the crime. If the client is unable to provide a full name, counsel should seek out any identifying information, such as the witness's nickname, social-media logo, place of employment, vehicle s/he uses, relatives, and friends. If the client is unable to provide a street address or phone number, counsel should ask the client where the witness hangs out or goes on particular recurring occasions ("goes bowling" or "shops for food," or *whatever*) so that counsel can arrange for the client or a relative or friend of the client to accompany counsel or a defense investigator to the spot and try to point out the witness. Counsel should also fill in any omissions or unclarity in the client's rendition of the events. Counsel can spot the less obvious omissions by putting himself or herself in the client's situation and deducing what the client would be likely to have seen, heard, and felt, as well as by imagining the natural consequences of the events described by the client.

In interviewing the client about the facts of the offense, counsel should refrain from overtly cross-examining the client unless the client is obviously lying and discovery of the truth appears immediately necessary for effective defense investigation. Blatant manifestations of distrust can irreparably injure the attorney-client relationship. Counsel will have ample opportunities later

to put tough questions to the client, after the attorney-client relationship has solidified. See § 6.14 *infra*.

6.9. *Interviewing the Client About Facts Needed for Suppression Motions*

To gather the facts needed for drafting and litigating suppression motions, counsel will need to elicit all of the information that the client knows about the police investigation of the case as well as the circumstances of the client's arrest, booking, and interrogation. Counsel should begin with any contact that the client had with the police in connection with the case prior to arrest – for example, investigative interviews that did not lead to arrest at that point in time, police searches of the client's house prior to the arrest, and police interviews with relatives or friends of the client prior to the arrest. Counsel then should take the client step-by-step through the sequence of events beginning with the police accosting of the client to arrest him or her, teasing out a detailed account of the arrest, police searches and seizures, administration of *Miranda* warnings, and interrogation. Thereafter, counsel should use the same sort of chronological approach to cover all of the details of the booking process and any interrogation that took place in the police car on the way to the station or at the stationhouse.

If the client was arrested on the scene rather than some days or months later, and if s/he has been in custody since the time of arrest, counsel also will want to record the articles of clothing that the client is wearing and their colors. These could be highly significant in showing that the client's attire at the time of arrest did not match the complainant's and/or eyewitnesses' description of the perpetrator. If the client was not arrested on the scene, or if the client was released after arrest and thus has had an opportunity to change clothes prior to seeing counsel, counsel will need to ask the client to describe what s/he was wearing on the day of arrest (if s/he remembers) and to identify any witnesses who can corroborate the client's description.

6.10. *Complaints of Brutality or Mistreatment; Other Custodial Complaints*

If the client reports that s/he has been abused by the police, custodial personnel, or other inmates, counsel should promptly investigate these allegations. The client should be questioned in detail respecting the time, place, and nature of any official misconduct (including any failure by officers to prevent or stop or record abuse of the client by other inmates), its background, and the identity or description of all persons involved or present at the time. Observable contusions and lacerations on the client should be photographed in color. A private physician should be summoned to examine major injuries if possible; the county medical society or a civil liberties group, like the American Civil Liberties Union, can help find a physician for this purpose. Witnesses should be interviewed who last saw the client prior to arrest and who can testify concerning his or her physical condition at that time. Counsel should also investigate whether any police officers or facility guards who were involved in the incident sustained injuries of their own, since the justification

most commonly given for injuries to a client is that the officer or guard had to use force to effectuate the arrest or subdue an unruly prisoner.

As long as counsel takes these steps to avert the risk of further abuse and to gather evanescent evidence before bruises and memories fade, counsel can delay until later any decisions about what should be done to rectify injuries already inflicted upon the client. If there appears to be merit in an action for damages in a state court or in the federal courts under the Civil Rights Act, 42 U.S.C. § 1983 (*see Monroe v. Pape*, 365 U.S. 167 (1961); and *see* § 3.3.2.4 *supra*), counsel can subsequently speak with the client about the desirability of filing such an action, through counsel or some other attorney whom the client selects. Sometimes the prospect of a civil-rights action can provide valuable leverage in plea-bargaining in the criminal case; sometimes threats to bring such an action will arouse resentment and sour the bargaining atmosphere. Some clients will view the mention of a possible civil-rights action as a sign that counsel cares for their welfare and knows how to protect them; but there is a risk that by advertent to that possibility, counsel will raise unrealistic expectations on the part of the client or the client's family members about the likelihood of success in § 1983 actions or about counsel's subsequent availability to file one. All told, counsel does best to restrict discussion during early client interviews to gathering detailed factual information regarding any abuse and any means for documenting it; s/he should not affirmatively broach the subject of civil litigation and – if the client brings up that subject – s/he should tell the client that the time is not yet ripe to talk about it.

Frequently, clients who are in custody complain about lack of medical treatment, exercise, food, and numerous other things. Most of these problems can be corrected administratively by informing the authorities in charge about them. Counsel should see the commanding officer on duty if the client is in a police station or the ranking jail official if s/he is in a jail. State-court relief may be available if the conditions of the client's confinement are substantially out of line with civilized standards; federal court relief is available only if they are really egregious (*see Bell v. Wolfish*, 441 U.S. 520 (1979)). Recourse to the courts is appropriate if requests for necessary medical attention are not promptly honored. In addition to state statutes and regulations that impose responsibility on custodial officers for the well-being of prisoners, the Due Process Clause of the Fourteenth Amendment requires that a prisoner's serious medical needs be met by his or her custodians, at least in some presently ill-defined circumstances. *Kindl v. City of Berkley*, 798 F.3d 391 (6th Cir. 2015); *see City of Revere v. Massachusetts General Hospital*, 463 U.S. 239, 244-45 (1983) (dictum) (“The Due Process Clause . . . does require the responsible government or governmental agency to provide medical care to persons . . . who have been injured while being apprehended by the police.”); *Youngberg v. Romeo*, 457 U.S. 307, 315 (1982) (dictum) (“The mere fact that Romeo has been committed under proper procedures does not deprive him of all substantive liberty interests under the Fourteenth Amendment. . . . Indeed, the state concedes that respondent has a right to adequate food, shelter, clothing, and medical care. ¶ . . . [T]he right to personal security constitutes a ‘historic liberty interest’ protected substantively by the Due Process Clause . . . [and] not extinguished by lawful confinement, even for penal purposes.”); *Collins*

v. City of Harker Heights, Texas, 503 U.S. 115, 127-28 (1992) (dictum) (“The ‘process’ that the Constitution guarantees in connection with any deprivation of liberty . . . includes a continuing obligation to satisfy certain minimal custodial standards.”); *cf. City of Canton, Ohio v. Harris*, 489 U.S. 378 (1989).

6.11. Fee-setting

If counsel is going to handle the case on a fee basis rather than as court-appointed counsel for an indigent client or as a *pro bono* matter, counsel also will need to discuss fees with the client. Misunderstandings about fees are a vexatious and unnecessary irritant, and it behooves counsel to come to an early and very clear fee agreement. After determining the nature of the case and the evidentiary and investigatory problems likely to be involved, counsel should calculate a fair fee and agree upon it with the client. Fee-setting in a criminal case is typically based on an advance estimate of the amount of time that will be necessary to handle the case and not on a post-audit hourly basis. What expenses are to be paid by whom and what exact stages of the process (that is, through to, but not including, trial; *or* through trial; *or* through a first appeal; *or* whatever) are to be covered by the fee should be explicitly stated and the agreement reduced to writing and signed. It is wise for counsel to advise the client that failure to pay the full fee before trial will result in counsel’s withdrawal from the case. Experience indicates that fees in criminal cases are hard to collect after trial, no matter what its outcome.

6.12. Advice to the Client at the Conclusion of the Interview

At the conclusion of the initial interview, counsel should give the client the warnings set out below. These warnings should be given, whether or not the client is in custody and whether or not s/he has previously been given the same warnings.

Counsel should advise the client to:

1. Say nothing at all to the police, tell them nothing under any circumstances, and reply to all police questions or approaches by saying that the client’s lawyer has told the client not to answer questions or to talk with anyone unless the lawyer is present.
2. Tell police officers who start any conversation with the client or who make any requests of the client that they need to talk to counsel about whatever they want; show the officers counsel’s business card (see § 6.4 *supra*) and tell them to phone or email counsel; and (if counsel has given the client a rights card (§ 3.21.3 *supra*)) show that to the officers as well.
3. Handle approaches by prosecuting attorneys in the same way, and under no circumstances discuss any offer or deal with the police or prosecuting attorneys in counsel’s absence.

4. Discuss the case with no one, including cellmates, co-defendants, co-defendants' lawyers, reporters, or any persons who may have been involved in events relating to the case or who may have information about those events; and tell anyone who wants to discuss the case or who has information about it to contact counsel.
5. Neither write nor sign any papers or forms requested by the police or prosecuting attorneys or relating to the case in any way.
6. Refuse (if the client is at liberty) to go anywhere with the police or with prosecuting attorneys who may ask the client to accompany them, unless they have an arrest warrant; and tell them that if they want the client to go anywhere or to do anything, they should contact counsel first.
7. Refuse (if the client is in custody) to participate in any lineup or to appear before any person for possible identification in counsel's absence; refuse to accompany the police or prosecuting attorneys to any place outside of the regular cell and recreation areas of the detention facility, except to court, in counsel's absence; object to any inspection of the client's body, physical examination, or test of any sort in counsel's absence; request permission to telephone counsel immediately in the event that the police begin any lineup or identification procedure, inspection, examination or test; and, if put in a lineup or exhibited for identification over his or her objection, observe and remember all of the circumstances (see § 3.4.4 *supra*).
8. Refuse consent to anyone who may ask the client's permission to search the client's home or automobile or any place or thing belonging to the client (including items in the possession of the police), or who may request access to the client's cell phone, computer, camera, or other communications or recording device.
9. Respond to all accusations and to anyone who gives any evidence against the client or says anything against the client by stating that the client's lawyer has told the client not to talk to anybody unless the lawyer is present.
10. Do not try to duck or dodge if media photographers have trained a camera on the client, and do not try to shield his or her face, but – if any police officers or custodial personnel are present – tell them to stop the photographer from taking pictures. See § 3.4.5 *supra*.
11. Telephone counsel as soon as possible if anything at all comes up relating to the case – if anyone whom the client does not know tries to talk to him or her about it; if the client hears that a co-defendant or other person involved in events relating to the case has snitched on the client; or if the client gets any new information or receives any communication from the court about the case.

12. If the client goes or is taken to court and counsel is not present when the client's case is called, tell the judge that counsel is supposed to be present and request that the judge wait for counsel to arrive (if the client knows that counsel is aware of this court date) or that the judge telephone counsel or permit the client to telephone counsel and inform counsel that the client is in court (if the client suspects that counsel does not know about the proceedings).

In some situations, counsel may decide that it is in the client's interest to make a statement to the police or to the prosecutor or otherwise to cooperate in their investigations. This is most common in cases in which counsel believes that the authorities can be persuaded to drop charges (see §§ 9.15, 18.6 *infra*) or in cases in which a favorable plea bargain appears to be negotiable (see §§ 15.10, 15.13 *infra*), particularly when the authorities and the client are considering the client's turning state's evidence and testifying against accomplices. Even if the client is contesting guilt and a trial appears likely, there are instances (rare, to be sure) in which the defense stands to gain by cooperating with the prosecution's evidence-gathering efforts. For example, defense counsel who has interviewed an eyewitness to the offense and is confident that the witness will not identify the defendant in a lineup may want to have a lineup held. Or if the defendant's story includes an admission of some incriminating facts (for example, presence at the scene of the offense, or commission of the *actus reus*) but denies others (for example, taking any part in the *actus*, or having the requisite *mens rea*) or asserts facts supporting some affirmative defense (for example, self-defense, or mistake of fact), a written or oral statement to the police may be advised as the best means of putting the defendant's version of the facts before a judge or jury without the defendant's being subject to impeachment. (Prosecutors tend to present these incriminating admissions in their case-in-chief, even when they have ample independent proof of the facts admitted. And if the prosecution offers only a portion of the defendant's statement, the defense is entitled to put the whole of it into evidence.) Thus adduced at trial – whether by the prosecution or the defense – the statement does not open the defendant up to either cross-examination or the sorts of impeaching evidence (see §§ 39.10, 39.13.1 *infra*) to which the defendant would be exposed if s/he told the same story on the stand in court.

Counsel's decisions to cooperate in the staging of a lineup, to permit the client to make a statement, or to provide other evidence to the prosecution in these situations will, of course, qualify the general advice to the client described earlier. In all of these cases, however, counsel should be present during any face-to-face dealings between the client and the police or prosecutors, and counsel should examine any writing or physical evidence before it is turned over to them. The client should never be allowed to communicate with the authorities in counsel's absence. Hence it is best always to give the client the full roster of advice in this section without modification; then if circumstances justify exceptions to the general rules stated here, counsel can subsequently work with the client to decide upon these exceptions and to implement them.

If the client is in police custody at the time of the interview, counsel should not leave without first having the client personally tell a police officer,

with counsel listening (and coaching if necessary), that the client does not wish to speak to the police or prosecuting authorities at any time in the future in the absence of counsel but wants to conduct all communications with the authorities from now on solely through the medium of counsel. See § 3.4.6 *supra*.

6.13. *Offering to Contact the Client's Family*

Counsel will ordinarily want to be in touch with the client's family very early in the case. See § 9.6 *infra*. The family will often be worrying about the client, particularly if s/he has been arrested and retained in custody; and the client will often be worrying about the family's fears and concerns. It is therefore a good idea, if at all possible, for counsel to telephone or visit – or at least to send a message to – the client's family shortly after an initial interview of a client in custody, to (a) give them whatever reassurances counsel can about the client's current situation and the prospects of release, (b) inform them when and how counsel will subsequently contact them and how they can contact counsel, and (c) inform them when, where, and how they can visit the client.

At the close of the initial interview with the client, counsel should offer to get in touch with the client's family in this way. Counsel should ask the client whether s/he would like counsel to do this and, if so, whom to call. It is important for counsel to keep in mind that the client is undergoing a frightening experience and that any help that counsel can give him or her on a human level is well worth the effort.

6.14. *Subsequent Interviews with the Client*

Usually the client must be interviewed on more than one occasion. In counsel's preparation for trial, facts will be discovered that were untouched in earlier interviews, and these must be reviewed and analyzed with the client. Increasingly, the client should be cross-examined in a fashion that may range from counsel's mild expression of surprise at a contradiction to open incredulity and grilling, depending upon counsel's best judgment of what is necessary at once to preserve the lawyer-client relationship and to get the truth. Clients may lie to their lawyer for a variety of reasons (*e.g.*, fear of alienating the lawyer by revealing that the client actually committed the crime or some other act the lawyer might dislike; an attempt to cover up a family member's or friend's involvement; bad advice from cellmates or others about the need to withhold unfavorable information from counsel). If a client is to be saved from himself or herself, s/he must be made to tell counsel the truth. And whether or not s/he is lying, s/he must be confronted with any inconsistencies among the pieces of the story s/he is telling or between the client's story and other information obtained by counsel, since these inconsistencies may be exposed at trial.

One way to cross-question the client vigorously without creating the impression that counsel disbelieves or distrusts the client is to engage in an explicit exercise of role-playing, in which counsel first prepares and rehearses the testimony that the client might give in his or her own defense at trial and then plays prosecutor for purposes of cross-examining the client. This kind of dry run of cross-examination, as well as direct examination, will be necessary

later, in any event, in any case in which the client is considering testifying at trial. (See §§ 29.5.3, 29.5.4, 29.6 *infra*). During the case-planning and investigative stages (see Chapters 7 and 9 *infra*) and before undertaking plea bargaining or deciding on a plea (see Chapters 8 and 14 *infra*), the same technique can be used to confront the client with any embarrassing holes or contradictions in the client's story while maintaining an attitude of complete confidence in the client's truthfulness, although "the prosecutor" will have some pretty tough questions to throw at the client. At some point during these interviews with the client, preferably near the time of trial when counsel has all the information that s/he will have at trial, the client should be given an objective appraisal of the case, with counsel avoiding unfounded optimism or pessimism.

6.15 *Interview Checklist*

The following checklist covers most of what the lawyer will have to learn from a client in order to develop an effective defense at all stages of a criminal case from first contact through trial. It models a thorough interviewing process; more than a single interview will ordinarily be needed to gather all of the information it includes. When the charge is relatively minor, less extensive fact-gathering may be adequate. But counsel will do well to assume at the outset that all of the subjects flagged by this checklist need to be on the agenda; decisions to curtail coverage should be made deliberately only after counsel has enough of a sense of the case to be sure that it is safe to omit the matters listed in any specific area.

(to be completed by attorney following the interview)

Attorney's file no.: _____

Criminal case no.: _____

Client's name: _____

Charges: _____

Date and hour of interview: _____

Place of interview: _____

Name of interviewer: _____

INTERVIEW SHEET

Name (have the client spell even common names):

All aliases and nicknames:

Street address (if apartment or room, include number):

Phones, land and cell (and name of person whose phone it is, if not the client's own):

Email, e-text, and website addresses:

Date of birth:

Place of birth:

Place of residence at time of arrest:

Prior places of residence (from latest to earliest):

Residence:

From (date):

To (date):

Education:

Name/location
of school

Current Grade

Date last
attended

Elementary:

High School:

Vocational School:

College:

Other:

Armed Forces:

Branch of service:

Date of beginning of active duty:

Date of discharge:

Type of discharge:

Rank at time of discharge:

Any honors or medals:

Combat service:

Time overseas:

Court martial charges, if any (including: finding; date of finding; sentence, if any; portion of sentence remitted; and portion of sentence served, facility[ies] in which the client was held, and the dates when the client was in each facility):

Present employment:

For each employer if more than one:

Name of employer:

Street address:

Phone:

Email, e-text, and website addresses:

Type of business:

Client's immediate supervisor:

Client's job designation:

Narrative description of what the client does in the usual course of his or her work:

Pay (starting): (present):

Employed since (date):

Indicate season if seasonal:

If presently unemployed, check L

Since (date):

Receiving unemployment compensation? L Yes L No

Amount:

Other means of support:

Prior employment:

For each employer if more than one:

Name of employer:

Street address:

Phone:

Email, e-text, and website addresses:

Type of business:

Client's immediate supervisor:

Client's job designation:

Narrative description of what the client did in the usual course of his or her work:

Pay (starting): (ending):

Employed from (date): to (date):

Indicate season if seasonal:

Reason for leaving:

Social security number:

Marital status:

Single

Divorced

Married

Ceremonial

Common-law

Cohabiting (“domestic partnership”)

Current spouse or domestic partner:

Name:

Street address:

Phone:

Email, e-text, and website addresses:

Dates of beginning of relationship [and of marriage]:

Employed: L Yes L No

Employer's name:

Employer's street address:

Employer's phone:

Employer's email, e-text, and website addresses:

Narrative description of what the spouse or partner does in the usual course of his or her work:

Previous marriages or domestic relationships:

For each spouse or domestic partner:

Name:

Street address:

Phone:

Email, e-text, and website addresses:

Dates of beginning and end of relationship [and of marriage]:

Street address[es] where client lived with spouse or domestic partner:

Employed: L Yes L No

Employer's name:

Employer's street address:

Employer's phone:

Employer's email, e-text, and website addresses:

Narrative description of what the spouse or partner did in the usual course of his or her work:

Children (list all children, whether they live with the client or not):

For each child:

Name:

Age:

Street address:

Phone:

Email, e-text, and website addresses:

Employed: L Yes L No

Employer's name:

Employer's street address:

Employer's phone:

Employer's email, e-text, and website addresses:

Narrative description of what s/he does in the usual course of his or her work:

Client's father:

Name:

Living L Deceased L

If living:

Age:

Street address:

Phone:

Email, e-text, and website addresses:

Employed: L Yes L No

Employer's name:

Employer's street address:

Employer's phone:

Employer's email, e-text, and website addresses:

Narrative description of what father does in the usual course of his work:

Client's mother:

Name:

Living L Deceased L

If living:

Age:

Street address:

Phone:

Email, e-text, and website addresses:

Employed: L Yes L No

Employer's name:

Employer's street address:

Employer's phone:

Employer's email, e-text, and website addresses:

Narrative description of what mother does in the usual course of her work:

Siblings:

For each sibling:

Name:

Age:

Street address:

Phone:

Email, e-text, and website addresses:

Employed: L Yes L No

Employer's name:

Employer's street address:

Employer's phone:

Employer's email, e-text, and website addresses:

Narrative description of what sibling does in the usual course of his or her work:

By whom was the client raised? Indicate if parents were separated during any period of the client's childhood. If the client was raised by persons other than a parent, get data for those persons as for parents, *supra*.

Is the client a non-citizen? If so, what is his or her immigration status? (Even legal immigrants may be at risk of immigration consequences following an arrest or charge, either as a result of the unfavorable outcome of the criminal case or merely because government officials learn of the client's non-citizen status. For discussion of potential immigration issues, see §§ 15.3, 15.6.1 *infra*.) What is the client's nationality if not U.S.? Is a spouse or domestic partner or family member a non-citizen? If so, what is his or her immigration status? What is his or her nationality? Has s/he ever expressed concern about immigration problems if government officials learn of his or her non-citizenship status or whereabouts? Has the client or a family member ever had contact with immigration authorities? If so, what is the name of any individual immigration agent known by the client to be involved, and what is that agent's title, office or department, street address, phone, email, e-text, and website addresses? If the names of individual agents are unknown, what is the name of the agency or department involved, and its street address, phone, email, and website addresses? Does the client or a family member or acquaintance have paper or electronic documents that would contain this contact information?

Does (or did) client use drugs? L Yes L No

Type(s):

Since (date):

Present frequency of use:

Has the client received treatment for a drug problem or participated in any form of detoxification or rehabilitation program (including peer-group programs)?

L Yes L No

For each occasion:

Describe treatment or regimen:

Dates of beginning and end of treatment or regimen:

Name of agency:

Address:

Phone:

Email and website addresses:

Name(s) of counselor(s) or professional personnel:

Street address:

Phone:

Email, e-text, and website addresses:

Does the client or a family member or acquaintance have paper or electronic documents that would contain this contact information or information about the client's treatment or performance?

Does (or did) client use alcohol? L Yes L No

Volume and frequency of use:

If heavy drinker, since (date):

Has the client received treatment for an alcohol problem or participated in any detoxification or rehabilitation program (including AA or other peer-group programs)? L Yes L No

For each occasion:

Describe treatment or regimen:

Dates of beginning and end of treatment or regimen:

Name of agency:

Street address:

Phone:

Email and website addresses:

Name(s) of counselor(s) or professional personnel:

Street address:

Phone:

Email, e-text, and website addresses:

Does the client or a family member or acquaintance have paper or electronic documents that would contain this contact information or information about the client's treatment or performance?

Client's physical and mental condition:

Present physical disabilities:

Present physical illnesses:

Is client presently under medical care? L Yes L No

Doctor's name:

Street address:

Phone:

Email, e-text, and website addresses:

Serious physical injuries (and all head injuries):

For each injury:

Type:

Cause:

Date:

If hospitalized, name, street address, and city of hospital, and dates of hospitalization:

Name[s] of physician[s] and other individual professional personnel:

For each individual known:

Phone:

Email, e-text, and website addresses:

Does the client or a family member or acquaintance have paper or electronic documents that would contain identifying or contact information for this hospital or information about the client's treatment or performance?

Has the client ever been in a mental hospital or institution? L Yes L No

For each hospital or institution:

Name, street address, and city of hospital:

Admission date:

Discharge date:

Event[s] leading to hospitalization:

Diagnosis:

Name[s] of physician[s] and other individual professional personnel:

For each individual known:

Phone:

Email, e-text, and website addresses:

Does the client or a family member or acquaintance have paper or electronic documents that would contain identifying or contact information for this hospital or institution or information about the client's treatment or performance?

Has the client ever been found mentally incompetent by a court? L Yes L No

For each occasion:

Name and location of court:

Name of judge:

Name[s] of attorney[s]:

Date of adjudication:

Nature of proceeding:

Event[s] leading up to proceeding:

Does the client or a family member or acquaintance have paper or electronic documents that would contain this contact information or information about the client's treatment or performance?

Has the client ever been treated by a psychiatrist or psychologist? L Yes L No

For each treating professional:

Name:

Street address:

Phone:

Email, e-text, and website addresses:

Date treatment began: Date treatment ended:

Circumstances leading to treatment:

Diagnosis:

Nature of treatment:

Does the client or a family member or acquaintance have paper or electronic documents that would contain this contact information or information about the client's treatment or performance?

Has the client ever undergone a psychiatric or psychological evaluation?

L Yes L No

For each evaluator:

Name:

Street address:

Phone:

Email, e-text, and website addresses:

Circumstances leading to evaluation:

Diagnosis or result of evaluation:

Does the client or a family member or acquaintance have paper or electronic documents that would contain this contact information or information about the client's treatment or performance?

Prior criminal record (all *arrests*, from latest to earliest, *including pending charges*, and *including juvenile adjudications and arrests*, and in all jurisdiction):

For each episode:

Date of arrest:

Jurisdiction (city and state):

Charge(s):

Disposition if not by court:

Plea (guilty or not guilty or *nolo* or insanity; if guilty or *nolo*, of what charges):

Trial by judge or jury:

Name of judge:

Court disposition (conviction or acquittal or other: if conviction, of what charges):

Sentence:

Date sentence imposed:

Name of attorney:

Street address of attorney:

Phone number of attorney:

Email, e-text, and website addresses of attorney:

Sentence of incarceration:

Length of time served:

Institution[s] in which client was incarcerated:

Client's prison number:

Sentence of probation or parole:

From (date): To (date):

Names of all probation and parole officers:

Street address of each officer:

Phone number of each officer:

Email, e-text, and website addresses of each officer:

Was client ever charged with violation of probation or parole conditions? Yes No

Date of violation and nature of violation charged:

Disposition of violation charge:

Does the client or a family member or acquaintance have paper or electronic documents that would contain identifying or contact information for the courts, judges, cases, prosecutors, defense attorneys, probation and parole officers involved or information about the proceedings and dispositions?

Was Client on Probation or Parole at the Time of this Arrest?

Yes No

On which of the above prior charges? (indicate by number):

Check whether probation or parole

Amount of back time owed:

Was Client Under any Pending Charges at the Time of this Arrest?

Yes No

Which of the above prior charges was pending (indicate by number):

Form of conditional release on that charge:

If the client was on bail for that charge, get the data specified under

Present custodial status / Bail, *infra*

Does the client or a family member or acquaintance have paper or electronic documents that would contain identifying or contact information for the courts, judges, cases, prosecutors, defense attorneys, probation and parole officers involved or information about the proceedings and dispositions?

Was the Client Wanted for Arrest on Other Charges in any Jurisdiction at the Time of this Arrest? L Yes L No

For each charge:

Jurisdiction:

Charge(s):

Nature of incident:

How client knows s/he is wanted:

Name of law enforcement agency involved, if known:

Street address:

Phone number:

Email and website addresses:

Officers involved, if known:

Street addresses:

Phone numbers:

Email, e-text, and website addresses:

Does the client or a family member or acquaintance have paper or electronic documents (such as a warrant or notice) that would contain identifying or contact information for the agencies and agents involved or information about the nature of the charges and status of proceedings?

Has the client consulted an attorney about these charges? L Yes L No

Name of attorney:

Street address of attorney:

Phone number of attorney:

Email, e-text, and website addresses of attorney:

Present custodial status:

Jail (name and address):

Prison (name and address):

Jail or prison number:

Bail:

Where posted:

When posted:

Amount:

Form (cash, property, professional surety):

If bonding company:

Street address:

Phone number:

Contact person:

Email, e-text, and website addresses:

Who paid for the bail:

Has collateral security been put up? L Yes L No

If so:

Nature of collateral: _____

Amount secured: _____

Who put up the collateral: _____

Does the client or a family member or acquaintance have paper or electronic documents that would contain identifying or contact information for the bondsman and terms of the bond?

Other form of conditional release (describe):

Facts relating to the offense charged and the client’s connection with it or whereabouts and activities at the time of the offense; facts relating to the client’s arrest and subsequent interactions with law enforcement agents:

The client should be asked to tell everything s/he knows about the present charge, in chronological order: what s/he did, what happened to him or her, who was involved, when and how the client was arrested, and everything that the police have done with the client since arrest. At the conclusion of the client’s story, counsel should ask questions – who, what, why, when, where, and how – for

clarification. Before terminating the interview, counsel should be sure s/he knows at least the following:

The client's version of the events on which the charge is based or, if the client denies involvement, where the client was and what s/he was doing at the time of the events on which the charge is based:

Witnesses (indicate if immediate contact is advised for any reason):

Witnesses to the events on which the charge is based (including the complainant and persons who may be prosecution witnesses):

Alibi witnesses:

Background and character witnesses:

For each witness:

Name (get spelling and all aliases and nicknames):

Street address:

Phone:

Email, e-text, and website addresses:

Physical characteristics useful for identifying the individual:

Other information helpful in locating the witness (where does s/he work, where does s/he hang out, is s/he on public assistance, and so forth, as appropriate):

Arrest:

Who, what, why, when, where, and how?

For all officers involved in the event, everything the client knows about the officer's:

Name:

Badge number:

Rank or title:

Agency or Department:

Street address:

Phone number:

Email and website addresses:

Physical characteristics useful for identifying the individual:

Does the client or a family member or acquaintance have paper or electronic documents (such as a warrant or notice) that would contain identifying or contact information for the agencies and officers involved or information about the nature of the charges and status of proceedings?

Who was with the client when s/he was arrested? Were they also arrested? Get information as for witnesses, *supra*.

Was the client under the influence of drugs when arrested or had s/he taken drugs recently? L Yes L No

Was client drunk when arrested or had s/he taken alcohol recently?
L Yes L No

Was client ill when arrested? L Yes L No If so, describe illness:

Was client struck or roughly handled during arrest or thereafter? L Yes L No

If so, describe injuries:

Date and time of arrest:

Exact location of arrest:

Did the arresting officers have a warrant? L Yes L No

What did they say the charge was?

What questions did they ask the client?

What did the client tell them?

Did police at the time of the arrest or any other time take anything from the client's person, home, place of work, automobile, place where the client was, or from the premises or property of any other person? L Yes L No

Things taken:

Did police have a search warrant? L Yes L No

Describe circumstances under which the things were taken:

For all officers involved, everything the client knows about the officer's:

Name:

Badge number:

Rank or title:

Agency or Department:

Street address:

Phone number:

Email and website addresses:

Physical characteristics useful for identifying the individual:

For all other persons present, get information as for witnesses,
supra:

Did police make any other search of the client's person or possessions, or enter the home, place of work, automobile, or place where the client was, or search the property or enter the premises of any other person? L Yes L No

Did police have a search warrant? L Yes L No

For all officers involved, everything the client knows about the officer's:

Name:

Badge number:

Rank or title:

Agency or Department:

Street address:

Phone number:

Email and website addresses:

Physical characteristics useful for identifying the individual:

For all other persons present, get information as for witnesses,
supra:

After arrest:

Every location to which client was taken by police:

Exact times of confinement in each place:

Number of officers present in each place:

For all officers involved, everything the client knows about the officer's:

Name:

Badge number:

Rank or title:

Agency or Department:

Street address:

Phone number:

Email and website addresses:

Physical characteristics useful for identifying the individual:

Was the client interrogated? L Yes L No

Where did the interrogation take place?

When and how long?

For all officers involved, everything the client knows about the officer's:

Name:

Badge number:

Rank or title:

Agency or Department:

Street address:

Phone number:

Email and website addresses:

Physical characteristics useful for identifying the individual:

For all other persons present, get information as for witnesses, *supra*.

Was a lie detector test given? L Yes L No

What specific questions did the officers ask? (This is often a good means of learning something about the prosecution's case.)

Did the police confront the client with any evidence against the client? If so, what:

Did the police tell the client that any person had incriminated the client or that any co-defendant or purported co-perpetrator had confessed? If so, who:

Did the client tell the police anything? L Yes L No

Did the client make a written statement? L Yes L No

Did s/he sign it? L Yes L No

Did the client fill out or sign any forms? L Yes L No

Describe the forms:

What did the client say in any written or signed statement or in filling out any form? (The client should be asked to tell counsel everything s/he remembers, in detail.)

Did the client make an oral statement? L Yes L No

Was it tape-recorded or video-recorded? L Yes L No

Was it stenographically transcribed? L Yes L No

Did anybody write it out or take notes on it? L Yes L No

Other circumstances at the time of the client's statement, in detail:

What did the client say in any oral statement? (The client should be asked to tell counsel everything s/he remembers, in detail.)

For each written or oral statement or form filled out:

Was the client previously warned:

That s/he had a right to remain silent? L Yes L No

That anything s/he said could be used against him or her?
L Yes L No

That s/he had a right to a lawyer before making a statement?
L Yes L No

That if s/he could not afford a lawyer, one would be appointed before any questioning? L Yes L No

What did the client say in response to these warnings?

Was the client asked whether s/he understood each warning?
L Yes L No

How did s/he respond?

Was s/he asked whether s/he was willing to make a statement after having been given these warnings? L Yes L No

How did s/he respond?

Was s/he asked to sign a form or card with these warnings on it?
L Yes L No

How did s/he respond to each warning, waiver, or question on the form or card?

Did any co-defendant or purported co-perpetrator confess or incriminate the client? If so, everything the client knows about the person's:

Name (get spelling and all aliases and nicknames):

Street address:

Phone:

Email, e-text, and website addresses:

Physical characteristics useful for identifying the individual:

Other information helpful in locating the person (where does s/he work, where does s/he hang out, is s/he on public assistance, and so forth, as appropriate):

Was the client given any physical examination; was a DNA or blood sample taken; was hair taken or combed; was a drug or alcohol test administered or body inspection of any sort made; was the client examined by a doctor or mental health professional?

Where:

When:

Describe the examination, test, or inspection:

For all persons present, everything the client knows about the person's:

Name:

Badge number:

Rank or title:

Agency or Department:

Street address:

Phone number:

Email and website addresses:

Physical characteristics useful for identifying the individual:

Did anyone say anything about what the examination, test, or inspection showed? L Yes L No

Was the client asked for permission to make the examination, test, or inspection? L Yes L No

How did s/he respond?

Was s/he told that s/he had a right to refuse or to have an attorney present? L Yes L No

How did s/he respond?

Was the client exhibited in a lineup or brought, under any circumstances, before any person for identification? L Yes L No

Where:

When:

Describe the situation:

All persons present (including police, identifying witnesses, other persons in lineup, co-defendants): everything the client knows about the person's:

Name:

Badge number:

Rank or title:

Agency or Department:

Street address:

Phone number:

Email and website addresses:

Physical characteristics useful for identifying the individual:

What did the police say to the identifying witness:

What did the identifying witness say:

Was the client asked for permission to put him or her in the lineup or to exhibit him or her for identification? L Yes L No

How did s/he respond?

Was s/he told that s/he had a right to refuse or to have an attorney present? L Yes L No

If so, how did s/he respond?

Was s/he asked to do anything during the identification procedure (walk around, turn to one side, gesture, speak)? L Yes L No

If so, what did s/he do or say?

Was s/he told that s/he had a right not to do these things?
L Yes L No

If so, how did s/he respond?

Was the client asked to reenact anything L Yes L No

If so, get the same information as for lineup and identification procedures, *supra*):

Was client asked to give permission for the search of any place or thing? L Yes L No

Where:

When:

By whom was the request made?

For all persons present, everything the client knows about the person's:

Name:

Badge number:

Rank or title:

Agency or Department:

Street address:

Phone number:

Email and website addresses:

Physical characteristics useful for identifying the individual:

For what place or thing was permission to search requested?

What was the search supposed to be looking for?

What was said to the client by the person requesting permission?

What did the client say?

Was the client told that s/he had a right to refuse permission?

L Yes L No

How did s/he respond?

Was anything said about a search warrant? L Yes L No

What was the client told about the warrant?

Prior judicial proceedings on the present charges:

Has the client already appeared in court on the present charges?
L Yes L No

For each prior court appearance:

When:

What court:

Name, street address or location, department and room number
of court:

Nature of proceedings:

Who was present (names or descriptions of judge, prosecutor, police):

For all persons present (judge, court reporter, prosecutor, police, co-defen-
dants, witnesses), everything the client knows about the person's:

Name:

Badge number:

Rank or title:

Agency or Department:

Street address:

Phone number:

Email and website addresses:

Physical characteristics useful for identifying the individual:

Were charges read or shown to the client? L Yes L No

What were they:

Was the client asked to plead? L Yes L No

What did s/he plead:

Who testified:

What did they testify:

Did the client testify?

What did s/he testify?

Was the client represented by a lawyer? L Yes L No

Name of attorney:

Street address of attorney:

Phone number of attorney:

Email, e-text, and website addresses of attorney:

Physical characteristics useful for identifying the individual:

Does the client or a family member or acquaintance have the attorney's card or any paper or electronic documents that would contain identifying or contact information for the attorney or information about the nature of the charges and proceedings?

What else happened in court:

Was the client given a slip of paper or a form of any sort? L Yes L No

If so, where is it? (Counsel wants to obtain this form as soon as s/he can get it from the client or the client's family, since it will state the charges and next court appearance date more accurately than the client can remember them and will contain the court's case number.)

Are there any co-defendants or uncharged, purported co-perpetrators?

L Yes L No

For each one, everything the client knows about the person's:

Name:

Street address:

Phone number:

Email and website addresses:

Physical characteristics useful for identifying the individual:

If the person is in custody, where:

If at liberty, get information as for witnesses, *supra*.

What role did the co-defendant or uncharged, purported co-perpetrator play in connection with the offense charged, according to (1) the police; (2) the prosecutor; (3) the co-defendant or uncharged, purported co-perpetrator himself or herself; (4) any witnesses who spoke to the issue?

For each attorney who represented a co-defendant, everything the client knows about:

Name of attorney:

Street address of attorney:

Phone number of attorney:

Email, e-text, and website addresses of attorney:

Physical characteristics useful for identifying the individual:

When relevant, counsel should obtain:

1. Information relating to bail (see § 4.5 *supra*).
2. The client's signed release giving counsel the right to inspect all hospital, prison, court, and juvenile court records relating to the client (releases for each on separate sheets).
3. A signed retainer and fee agreement (see § 6.11 *supra*).

Chapter 7

Case Planning

7.1. *Evolving a General Strategy for Defending the Case: Reaching and Refining a Set of Aims and Objectives*

Effective defense work requires counsel to attend to an extensive roster of tasks simultaneously during the period prior to trial. In addition to court appearances at arraignments and hearings (see Chapters 2-4 *supra*; Chapters 11, 14 *infra*), defense counsel must seek out and take statements from prosecution witnesses, conduct discovery and field investigation, draft and litigate motions, interview defense witnesses and prepare them to testify, engage in plea negotiations with the prosecutor, subpoena police reports and other documents, consult defense experts, and confer with the client. See Chapter 10 *infra*.

This complex set of tasks is complicated further by time pressures. Various factors affect how quickly a case progresses: the seriousness of the charges; the speedy-trial rules of the jurisdiction; prosecutors' workload and court congestion; whether the defendant is at liberty or incarcerated pending trial, and so forth. Depending upon these factors and the stage of the case at which counsel enters it, counsel may have only a short period within which to perform the multitude of tasks that need to be completed before trial. And some of the tasks may involve long delays beyond counsel's control. For example, if counsel subpoenas reports from a police department, hospital or public agency, s/he should anticipate that the records division of that institution will be slow in responding; or if counsel plans to retain an expert witness, s/he should expect that it will take some time to locate an appropriate expert and for the expert to schedule and perform the examinations or tests that counsel needs.

The only possible solution to this problem – albeit an imperfect solution – is to begin performing the tasks as soon as counsel has a skeletal understanding of the facts of the case, and thereafter to revise counsel's plans and strategies progressively as additional information becomes known. The first substantial interview of the client will tell counsel the most important foundational facts: the circumstances surrounding the offense from the client's perspective, or the client's account of his or her whereabouts and activities elsewhere if s/he denies involvement in the offense. Counsel needs to form a tentative plan of action immediately after this interview. That plan had best take the form of a provisional "theory of the case" (see § 7.2.1 *infra*) which will shape counsel's next moves, at least until such time as new information warrants a revision of counsel's working strategy.

This chapter is designed to assist counsel in forming a plan of action and implementing it. Every case is unique in its facts and in the series of tasks that must be performed to prepare it for trial. But some generalizations are possible regarding techniques and considerations that can usefully guide counsel's strategic planning. Section 7.2 describes a process for developing a theory of the case and explains the ways in which counsel can use the defense theory to guide the vital fact-gathering process (§ 7.2.2 *infra*), the selection

and drafting of motions (§ 7.2.3 *infra*), and the actions that counsel should take early in the case to begin preparing for sentencing in the event of a conviction at trial or a guilty plea (§ 7.2.4 *infra*). Section 7.3 discusses ways in which counsel can use narrative thinking in case planning.

Planning techniques of this sort can help counsel to make efficient use of whatever time is available to work on a case. But they will be of little avail if counsel’s overall caseload is so high that s/he does not have sufficient time to devote to the case at each point at which actions or judgments are demanded. Accordingly, counsel is obliged – both by the Sixth Amendment’s guarantee of effective assistance of counsel and by the canons of ethics requiring thorough and competent preparation – to limit counsel’s caseload and other responsibilities so as to ensure adequate time for providing each client with the high quality of representation to which s/he is entitled. *See* AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.1 (2015); AMERICAN BAR ASSOCIATION, CODE OF PROFESSIONAL RESPONSIBILITY EC 6-4 (1980); American Bar Association, Formal Op. 06-441 (May 13, 2006) (“Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation”); *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122 (W.D. Wash. 2013); *Public Defender, Eleventh Judicial Circuit of Florida v. State*, 115 So. 3d 261, 270, 274, 279, 282 (Fla. 2013); *State ex rel. Missouri Public Defender v. Waters*, 370 S.W.3d 592, 597, 605-08, 612 (Mo. 2012). As the ABA Standards for Criminal Justice explain:

“Defense counsel should not carry a workload that, by reason of its excessive size or complexity, interferes with providing quality representation, endangers a client’s interest in independent, thorough, or speedy representation, or has a significant potential to lead to the breach of professional obligations. A defense counsel whose workload prevents competent representation should not accept additional matters until the workload is reduced, and should work to ensure competent representation in counsel’s existing matters. Defense counsel within a supervisory structure should notify supervisors when counsel’s workload is approaching or exceeds professionally appropriate levels.”

AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Standard 4-1.8(a) (4th ed. 2015) (“Appropriate Workload”).

7.2. *Developing a Theory of the Case and Using It to Guide Case Planning*

7.2.1. *Developing the Defense Theory of the Case*

On the basis of the first full-scale client interview (see Chapter 6) and whatever other information counsel obtains when entering a case (see §§ 3.5, 3.10, 6.2 *supra*), counsel should formulate a preliminary defense “theory of the case.” The “theory of the case” is a detailed summary of the defense that counsel will mount at trial; it weaves together the version of the facts and an articulation of the legal rules or normative precepts on which counsel will rely to secure a favorable verdict. The theory of the case that counsel

develops at this stage must be tentative and flexible enough to change as new information is gathered. Counsel does not yet have a complete picture of what the prosecution witnesses and defense witnesses will say and what pertinent scientific, tangible, or documentary evidence exists or can be produced to prove or disprove guilt. So counsel's initial theory of the case should always be considered a work-in-progress. As new facts are learned, counsel should continually update the theory of the case, interpolating the new information and reassessing previous judgments about options and alternative courses of action.

In order for the prosecution to establish guilt at trial, it will have to prove both (i) that a crime was committed, and (ii) that the defendant was the person who committed it. A defense theory of the case will usually involve attacks upon either one or both of these two components.

7.2.1.1. *Defense Theories That Refute the Prosecution's Assertion That a Crime Was Committed*

There are essentially three ways of precluding the prosecution from proving that a crime was committed.

First, the defense can show that, even accepting the prosecution's basic version of events, there is insufficient proof of one or more of the legal elements of the crime charged. For example, if the crime (or the degree of crime) requires proof of a certain monetary value (such as Grand Larceny or certain degrees of Destruction of Property), counsel can refute the existence of that particular crime either by contending that the prosecution has failed to prove the requisite value or by presenting defense evidence that the object in question was not worth as much as the prosecution asserts. Or, if the crime involves a mental element, the defense can refute it either by contending that the prosecution's evidence is not sufficient to warrant the inference that the defendant entertained the requisite *mens rea* or by presenting defense evidence (through the defendant, other defense witnesses, or both) that controverts the existence of the guilty mental state.

Second, the defense can show that, even accepting the prosecution's basic version of events, some affirmative defense renders the defendant's actions noncriminal. For example, in a murder case, the prosecution witnesses may be truthfully recounting their observations of the defendant's stabbing of the victim; but when their testimony is meticulously parsed and/or supplemented with defense evidence (consisting of testimony by the defendant, other defense witnesses, physical evidence, and so forth), the defense will ask the fact-finder to conclude that the victim provoked the attack by actions which induced the defendant to have a reasonable fear of imminent bodily harm, within the applicable doctrine of self-defense.

Third, the defense can show that the prosecution's witnesses are not telling the truth, either because they are fabricating (*i.e.*, lying or fantasizing) or because they are honestly mistaken. As a general matter, it is easier to prove

mistake than outright fabrication because the fact-finder (judge or jury) will ordinarily be reluctant to believe that a prosecution witness is lying under oath. However, a theory of fabrication may prevail if the defense can show that the witness has a compelling motive to lie. A theory that the complaining witness is fabricating the existence of a crime can be supported with evidence that:

- (i) The witness has a motive to accuse the defendant falsely in order to get him or her into trouble because of past incidents that have caused the witness to be angry at or jealous of the defendant or the defendant's family or friends;
- (ii) The witness has some other motive for fabricating a crime, such as: to collect insurance money; to cover up some other criminal behavior of the witness or the complainant; or to win a reward from law enforcement authorities for snitching (for example, dismissal of pending charges against the complainant; a financial reward; admission into a witness protection program); or
- (iii) (In cases in which the complaining witness is a police officer) the officer fabricated the crime in order to inflate his or her arrest figures and thereby gain credit with superiors (by, for example, planting drugs on the defendant in a drug case) or in order to cover up an ill-founded arrest that would have made the officer look bad or exposed the officer to a civil suit for false arrest (and, when violence was involved in the arrest, for assault and battery).

A theory that the complaining witness is mistaken in thinking a crime took place can be supported by showing that some innocent set of events occurred which the complainant misinterpreted as a crime. For example: the defendant merely asked the complainant for a hand-out, and the complainant thought the defendant was shaking him or her down in a robbery; the police encountered the defendant running away from the vicinity of a closed shop with a burglar alarm ringing and therefore assumed the defendant had attempted to break in, when, in fact, the alarm went off because of a short circuit and the defendant was running to find and alert the shop owner; a store security guard observed the defendant taking merchandise past a cash register and arrested the defendant for shoplifting, when the defendant was merely looking for a register that was less crowded. Of course, in addition to explaining away the complainant's testimony as a fabrication or a mistake, counsel will have to explain away the testimony of any eyewitnesses. The theory may be the same for the eyewitnesses as for the complainant, or it may be different (as, for example, when the defense asserts that the complainant is mistaken and that an eyewitness is lying in a desire to support the complainant, who is a relative or co-worker).

7.2.1.2. *Defense Theories That Refute the Prosecution's Assertion That the Defendant Was the Perpetrator*

The prosecutorial evidence linking the defendant to the crime will

usually take the form of one or more of the following: (i) an identification of the defendant by the complainant, an eyewitness, or both; (ii) an incriminating statement by the defendant, confessing to the offense, admitting conduct or exhibiting knowledge that implicitly implicates the defendant, or reciting an alibi that the police have shown to be false; (iii) testimony or statements by a co-defendant or uncharged snitch identifying the defendant as the perpetrator; and/or (iv) scientific evidence, such as DNA analysis, serology evidence in sex offenses, fingerprint analysis, hair analysis, fiber analysis identifying threads found at the crime scene as stemming from an article of the defendant's clothing, or a swab of the defendant's hand showing that s/he recently fired a gun.

Several of these forms of prosecutorial evidence are subject to suppression or exclusion on pretrial motions. Motions to suppress confessions, admissions, and other statements are covered in Chapter 26, and motions to suppress identification testimony in Chapter 27. Motions to sever a co-defendant's case from the defendant's on the ground that the co-defendant made a statement incriminating the defendant, and back-up arguments that the statement should, at the very least, be redacted to remove all references to the defendant, are described in § 23.9.1 *infra*.

Assuming that the defense does not succeed in suppressing or excluding the incriminating evidence of the defendant's identity as the perpetrator, there are several ways of refuting the evidence at trial.

Identification testimony by the complainant or an eyewitness can be challenged by asserting that the witness, although honest, is mistaken in identifying the defendant for one or more of the following reasons:

- (i) The defendant bears some resemblance to the actual perpetrator and was selected because s/he was the only one among the suspects viewed (in a show-up, lineup or photo array) who fit the perpetrator's description.
- (ii) The police caused (or helped to cause) the identification by something they said to the witness or by their employment of a suggestive identification procedure that conveyed to the witness who it was that the police wished the witness to identify.
- (iii) Some event occurred that caused the witness to superimpose the defendant's face, which s/he saw after the offense (or, less usually, on an unrelated occasion before the offense), on top of the memory of the perpetrator's face, and the witness now honestly but mistakenly believes that defendant's face was the perp's. This theory can be used when, for example: the witness saw the defendant in police custody or at the police station and deduced that the police naturally would have caught the right person; the witness saw the defendant in the vicinity of the crime or heard the defendant saying something similar to the words spoken by the perpetrator or saw the defendant wearing clothes similar to

those worn by the perpetrator; or the witness and the defendant had an encounter that suggested to the witness that the defendant was the perpetrator.

- (iv) The witness is identifying a person of another race or ethnicity, and thus the identification process is subject to the weaknesses and vagaries of cross-racial or cross-ethnic identification.

Identification testimony by the complainant or an eyewitness also can be refuted by asserting that the witness is lying. To make this theory persuasive, the defense might urge, for example, that:

- (i) The witness bears a grudge against the defendant.
- (ii) The witness needs to pin the crime on somebody in order to escape prosecution for his or her own complicity in it or in order to gain some benefit, such as the dismissal of pending charges against the witness or cash compensation as an informer, and the defendant happens to be an available scapegoat (because the defendant fits the description of the perpetrator or was at the scene of the crime or possesses a criminal record that would make the defendant's guilt believable).
- (iii) Although there is no clear motive to which the defense can point, the defense does not bear the burden of proving why the eyewitness is lying but merely has to raise a reasonable doubt of his or her veracity; and the untrustworthy demeanor of the witness is sufficient to raise a reasonable doubt.

These same theories can be used to discredit a co-defendant or snitch who identifies the defendant as the perpetrator.

A confession or incriminating statement by the defendant, which the defense was unable to suppress on constitutional grounds in a pretrial hearing, may nevertheless be assailable at trial under state-law doctrines of involuntariness. See § 26.12 *infra*. Even when such challenges are unavailable or unlikely to prevail, counsel can argue to the fact-finder at trial that the circumstances under which the statement was made render it untrustworthy. See § 26.18 *infra*. Typical circumstances that may persuade a judge or jury to discredit a defendant's confession in whole or in part are overbearing police interrogation; police promises of leniency if the defendant confesses; a defendant's drug or alcohol intoxication, physical injuries, depression or lack of sleep; a defendant's suggestibility (resulting from, *e.g.*, mental impairment or a desire to please the authorities) or limited competence in the language in which s/he confessed; fear of recrimination by a third party if the defendant does not take the rap; and motivation to protect a family member or loved one by taking the rap. When details in a purportedly incriminating statement make the difference between guilt and innocence, counsel can contest the prosecution's interpretation of the statement by pointing out

ambiguities in the defendant's words or in the questions to which s/he was responding. Finally, the facts may support a thesis that the police fabricated the statement in an attempt to bolster their case. (Judges sitting as the fact-finder in a bench trial are often loth to conclude that police officers are lying; juries may be more receptive to claims of police perjury, particularly if jurors or their relatives or friends have had bad experiences with cops or come from communities where cops are in bad odor at the time of the trial.)

In challenging a prosecution case based on scientific evidence, counsel can employ any one or more of three approaches. (i) S/he can present a defense expert who reached a conclusion contrary to that of the prosecution expert, and can assert that the defense expert's conclusion is the correct one, or at least that a reasonable doubt has been raised. (ii) S/he can use a defense expert, or cross-examination of the prosecution expert, to show that even if the prosecution expert's conclusions are correct, they are not very damning. For example, the impact of a scientific finding that the defendant has the same blood type as the perpetrator can be minimized by showing that one-quarter of the human race shares that blood type. (iii) S/he can use a defense expert, or cross-examination of the prosecution expert, to show that there are potential inaccuracies or uncertainties in the scientific method employed (in general, or under the circumstances of this particular case) that raise legitimate doubts about the correctness of the prosecution expert's results. Most genuine experts are sufficiently cautious that they will freely admit the potential for inaccuracy that plagues many scientific tests.

In any case in which the prosecution is likely to use scientific evidence at trial, counsel should consider retaining a defense expert to consult with counsel about these possible approaches and to testify at trial if appropriate. When the client is indigent, counsel can request court funds to retain the expert. See Chapter 5 *supra*. Often, it will be worthwhile to test the waters by talking with the prosecution's expert prior to retaining a defense expert. Many forensic experts on the police force, unlike line police officers, are willing to talk with defense attorneys. By questioning the prosecution's expert about the nature, bases, and degree of certainty of his or her conclusions, and particularly by inquiring whether there is anything unusual or difficult about the analysis of the data being interpreted in this case, counsel can make a preliminary assessment of the utility of challenging the expert testimony with a rival witness. If, for example, the prosecution's scientific evidence is based upon a simple, straightforward test, the test is normally highly accurate, its application in the present case was routine, and the tester seems unshakeable, it may be wise to stick to factual defenses rather than retaining a rival expert, especially if the defendant is a paying client who can ill afford the expert's fee. Additional factors to consider in assessing the likelihood of successfully challenging the prosecution's forensic-science evidence are discussed in § 37.14 *infra*.

7.2.1.3. *The Building Blocks for Constructing a Defense Theory of the Case*

Ultimately, counsel's selection of a theory of the case will depend on an evaluation of the relative strengths of the prosecution's evidence and

the evidence available to the defense. The defendant is often a vital source of ideas and information pointing to potential defense evidence, because s/he is positioned at the center of events from the defense perspective and can give counsel both a general framework for constructing a favorable version of what happened and specific leads to possible defense witnesses. S/he may also be able to provide some insights into provable biases of prosecution witnesses. S/he is substantially less likely, however, to be able to assist counsel in identifying other areas of weakness in the prosecution's evidence. So constructing a successful theory of the defense will usually require counsel to take the initiative in identifying, investigating, and developing exploitable flaws in the prosecution's case. And counsel will almost always have to bear primary responsibility for canvassing the full range of potential challenges to the prosecution's theory of the case, for determining whether these can be combined or are mutually incompatible (or incompatible with theories based upon potential defense evidence) and for assessing what combination or election of defenses has the greatest likelihood of success.

In looking for potential weaknesses in the prosecution's case, counsel should obtain all pretrial statements made by each prosecution witness – whether to police or other persons – and should minutely compare the texts of what the witness said at different times. If a version of events that a witness gave soon after the crime is more favorable to the defense than the witness's present version, the defense theory of the case may be that the witness's memory has faded over time and that the witness's present inability to remember significant details casts doubt on anything s/he now says that was not in his or her original statement. Or the theory may be that the witness's self-inconsistencies demonstrate that s/he is fabricating his or her entire tale (or at least its incriminating parts) in order to procure the defendant's conviction (because that will benefit the witness in some way, or because of personal animosity arising from jealousy, anger, revenge-seeking, or other bias); the witness has never been able to tell a straight story; so none of his or her conflicting versions of the tale are worthy of belief. Inconsistencies between the statements of different prosecution witnesses can be used to support similar defense theories. When those witnesses have had opportunities to talk with one another before trial, defense counsel will often be able to demonstrate that their successive statements are increasingly compatible and to argue that this homogenization discloses the factual vacuum at the core of the prosecution's case. The homogenizing process may be demonstrable even when prosecution witnesses have interacted little during the pretrial period; it is a natural consequence of the prosecutor's rehearsing witnesses to present a unified version of what happened; and defense counsel can argue that it has critically impaired the fact-finder's ability to reach any confident, reliable conclusions about facts that the prosecution is required to prove beyond a reasonable doubt.

Another technique for pinpointing exploitable weaknesses in the prosecution's case is to consider whether there are aspects of the prosecution witnesses' conduct that fail to comport with normal human behavior. For example, if the complainant or eyewitness has known the defendant for years, it stands to reason that s/he would give the police the defendant's name as soon as s/he is interviewed by them. If s/he failed to give the

defendant's name to the authorities until some time later, counsel can use this quirk to support a theory that the witness has decided to pin the crime on the defendant falsely as a result of a grudge that began after the date of the crime (or a longstanding grudge that the witness was not quick enough to act upon at the time of the police interview). In order to detect anomalies of this sort, counsel will often find it productive to trace through, from beginning to end, an imaginary "normal" scenario for a crime like the one charged. By comparing that scenario with the provable events in the defendant's own case, counsel can identify actions and statements on the part of prosecution witnesses that are out of whack with behavior that a trier of fact would expect from people in the witnesses' purported circumstances.

A similar fact-modeling process, mentally tracing step-by-step the normal sequence of police procedures in a case such as the defendant's, will enable counsel to pinpoint exploitable flaws in the police officers' versions of searches, seizures, confessions, and identification procedures. For example, in a case in which counsel is challenging a police officer's *Terry* frisk of the defendant (see § 25.10 *infra*) and the officer claims that s/he believed the bulge in the defendant's pocket was a gun, counsel can develop the officer's failure to take the normal steps for protecting himself or herself from an armed suspect, such as radioing for backup, drawing his or her own service revolver, and immobilizing the defendant by having him or her "assume the position" with hands up against a wall or against a car, well away from coat or pants pockets.

7.2.1.4. *Implications of the Choice of Defense Theory for Trial Preparation*

There are several ways in which the defense theory of the case will shape counsel's trial preparation.

First of all, the theory of the case will inform the way in which counsel assigns priorities to the tasks to be performed in the defense investigation of the case. As a practical matter, even though counsel may wish to arrange an investigative interview of every possible prosecution and defense witness, often that will not be feasible. In many jurisdictions, the prosecution is not obligated to inform the defense of the identity of all of its witnesses (see § 18.7.2 *infra*), and the investigator will have to spend considerable time searching for unknown prosecutorial witnesses. Even defense witnesses may not be easy to find, since often the client has no idea of the names or addresses of people who were standing on the street, observing the events. In an imperfect world, in which each aspect of the defense investigation consumes time and limited investigative resources, counsel will have to determine the relative importance and temporal urgency of tasks, looking first – or directing an investigator to look first – for certain witnesses, documents, and exhibits. Thus, for example, in an assault case in which the defendant's self-defense claim does not dispute the occurrence of the assault or even the manner in which the assault was committed but instead depends upon an incident earlier the same day in which the complainant threatened to kill the defendant the next time they met, counsel will assign priority to finding any witnesses to the earlier threat and witnesses who can recount a history of threats and violence by the complainant

against the defendant or attest to the complainant's reputation for violence. Of course, counsel's initial assignment of priorities will have to be progressively revised in accordance with new information that is learned. For example, if the prosecution reveals in discovery that prosecution witnesses will recount the defendant's making statements during the assault that are inconsistent with a theory of self-defense, counsel then will have to assign top priority to finding defense witnesses who describe the sound track of the assault differently.

Once counsel has identified the most important witnesses, the defense theory of the case determines what questions should be asked of those witnesses. In essence, counsel is working backwards from a goal defined by the theory of the case. Having identified what ultimate picture of events and people the defense will want to ask the fact-finder to accept at the end of the trial, counsel can specify what defensive facts need to be elicited during the trial, and thence counsel can deduce the questions that need to be asked of witnesses to learn those facts. This focusing function of the defense theory of the case also plays an important role in deciding, for example, which expert witnesses to retain and what to ask them to evaluate; what legal research has to be conducted in preparation for drafting jury instructions or making bench arguments on the merits at trial; and what additional legal research and planning have to be undertaken in anticipation of evidentiary issues that are likely to come up at trial.

Third, the defense theory of the case will shape counsel's decisions about what motions to file. For example, if the defendant made a statement to the police telling a wholly exculpatory story of self-defense and if the defense theory at trial will mirror that statement, counsel may decide to refrain from filing a motion to suppress the statement. Or if the defense's theory at trial depends upon testimony by a co-defendant and if a severance of the co-defendant's case from the defendant's will probably have the practical result of rendering the co-defendant unavailable as a defense witness, counsel may opt in favor of abandoning a legally viable severance motion. See § 23.7 *infra*.

Fourth, the defense theory of the case will shape the way in which counsel conducts the preliminary hearing and any suppression hearings. As explained in §§ 11.4, 11.8.2, 24.2 *infra*, evidentiary hearings of this sort can be used for the purpose of laying a foundation for later impeachment of prosecution witnesses at trial. If, at the time of the preliminary hearing or suppression hearing, counsel has a vision of what the defense theory will be at trial, counsel can design his or her cross-examination at the hearing to serve this purpose most effectively, creating the best possible transcript material for use at trial even if this requires the curtailment or sacrifice of some lines of cross-examination that might have increased the defense's relatively marginal chance of winning the hearing itself. See § 24.4 *infra*.

These are only some of the more significant ways in which the defense theory of the case can shape trial preparation. It would not be an overstatement to say that the theory of the case should inform every single act of counsel's. For example, counsel's decision whether to seek a continuance or whether to assert a speedy trial demand when the prosecution seeks a continuance

will depend upon the availability of defense witnesses needed to prove the defense theory of the case. Counsel's advice to the client about whether to take the witness stand at trial will depend upon the theory of the case, as well as additional considerations such as whether the judge is likely to penalize the defendant at sentencing for what the judge may view as perjurious testimony.

7.2.2. Gathering the Facts Needed to Support the Defense Theory of the Case

There are four institutionally recognized methods for gathering factual information bearing on a case:

- (i) Client interviews (see Chapter 6).
- (ii) Defense investigation, including interviewing potential prosecution and defense witnesses, collecting and examining police reports and other documents (whether onsite or by subpoenaing them), and inspecting physical scenes and objects (see Chapter 9).
- (iii) Informal and formal procedures for discovery of materials from the prosecution (see Chapter 18).
- (iv) Retention of expert witnesses who can perform scientific tests, such as ballistics, serology, or fingerprint examinations, that will shed light on the pertinent facts (see Chapter 30).

In addition to these methods, there are three informal means of gleaning facts: filing motions that will require the prosecutor to respond with pleadings that reveal aspects of the prosecution's case; conducting hearings, such as the preliminary hearing and suppression hearings, in such a way as to gain disclosure of the prosecution's case at trial (see §§ 11.4, 11.8.2, 22.2, 24.4.2 *infra*); and informal conversations with the prosecutor about the case during plea negotiations, other meetings, or casual conversations while waiting for a court hearing to begin (see § 15.10 *infra*).

Counsel should take advantage of all of these means of obtaining factual information. Because some of them involve more lag time than others, the former procedures should be set in motion first so that they will be completed in time for trial. Generally, the following steps should be taken at the earliest practicable time:

- (i) Counsel should prepare subpoenas for documents. These will not take counsel long to prepare and must be prepared early because it may take a long while for the relevant agencies to comply with the subpoenas.
- (ii) Counsel should direct an investigator to start tracking down and interviewing prosecution and defense witnesses and gathering necessary documents and exhibits. Counsel should use the theory of

the case to assign priorities to these investigative tasks, explaining to the investigator the order in which s/he should perform the various necessary tasks. If counsel does not have an investigator and the client is indigent, counsel should promptly file a motion for court funds to retain an investigator (see Chapter 5 *supra*; § 9.4 *infra*).

- (iii) Counsel should identify and contact any expert consultants and expert witnesses who may be needed (see §§ 16.2-16.3, 30.1-30.5 *infra*), or, if counsel is representing an indigent client, file a motion for court funds to retain the experts (see Chapter 5 *supra*; §§ 16.3, 30.3 *infra*).
- (iv) Counsel should conduct an immediate informal discovery session with the prosecutor or, if the prosecutor is unable to meet that day, schedule an appointment as early as possible.

By taking these steps expeditiously, counsel will gather the information needed to shape further investigation of the case, the information needed to prepare suppression motions and other substantive motions (see Chapter 17), and the information needed to conduct plea negotiations effectively (see §§ 15.3-15.7 *infra*). The motions proceedings and plea negotiations, in turn, will provide counsel with more facts, which can be used in conducting suppression hearings and the trial.

7.2.3. Filing Motions That Are Consistent with the Theory of the Case

The motions that counsel should ordinarily consider filing – in addition to motions for state-paid defense resources that the defendant cannot afford (see Chapter 5) – are:

- (i) Motions for dismissal of the charging paper on grounds of its facial insufficiency, the court's lack of jurisdiction, legal bars to prosecution (such as claims of double jeopardy; of an applicable statute of limitations; or of the unconstitutionality of the criminal statute underlying the charge), or fatal defects in required pre-charge procedures (see Chapters 12, 13, 20).
- (ii) Motions for a change of venue (see §§ 22.1-22.3 *infra*) or recusal of a judge (see §§ 22.4-22.7 *infra*).
- (iii) Motions for various forms of diversion (see Chapter 21 *infra*).
- (iv) Motions to expedite or delay the pace of proceedings (see Chapter 28 *infra*).
- (v) Motions for discovery (see § 18.7 *infra*).

- (vi) Motions for protective orders to forestall potentially damaging prosecutorial activities (see §§ 9.14, 17.4, 18.7.4, 18.9.2.6-18.9.2.7 *infra*).
- (vii) Motions to suppress tangible evidence, confessions and incriminating statements, and identification testimony (see Chapters 24-27).
- (viii) Motions for severance of counts or defendants (see Chapter 23).

This is not, of course, an exclusive list: counsel may have to develop motions to deal with case-specific problems, such as, for example, prosecutorial interference with defense access to witnesses (see § 9.14 *infra*). Counsel should familiarize himself or herself with local rules setting deadlines for the filing of motions. See § 17.7 *infra*.

7.2.4. Setting in Motion the Process Needed to Prepare for Sentencing in the Event of Conviction

Effective representation of a client at sentencing often requires that counsel begin preparing for the possibility of conviction and sentencing very early in the case. *See, e.g.*, AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Standard 4-8.3(a) (4th ed. 2015) (“Early in the representation, and throughout the pendency of the case, defense counsel should consider potential issues that might affect sentencing.”). Mitigating information about a client’s background may take a long time to gather, especially if it is necessary to obtain prior institutional records of various sorts. In a case in which counsel may ultimately argue at sentencing for probation with a condition of participation in a community-based program (*e.g.*, an alcohol- or drug-treatment program), it will often be useful for the client to voluntarily enroll in the program (or one like it) well before trial, so that, in the event of conviction, counsel will be able to show the sentencing judge documentation of the client’s faithful participation in the program and of beneficial effects already apparent.

Accordingly, counsel’s theory of the case should dictate not only a detailed plan for trial preparation but also a blueprint of plans for sentencing in the event of conviction, the steps that should be taken in advance to prepare for sentencing, and when each of those steps should be taken. To develop this blueprint, counsel will need to “become familiar with . . . applicable sentencing laws and rules, . . . what options might be available as well as what consequences might arise if the client is convicted, . . . available sentencing alternatives and . . . community and other resources which may be of assistance in formulating a plan for meeting the client’s needs.” *Id.* As counsel works on the case, s/he must “continually evaluate the impact that each decision or action may have at later stages, including . . . sentencing.” ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 4-1.3(f).

“Defense counsel should also consider whether consultation with an expert specializing in sentencing options or other sentencing issues is appropriate.” ABA STANDARDS FOR CRIMINAL JUSTICE, Standard 4-8.3(a). At

some point in the case, it may be appropriate for counsel to seek court funds to retain a mitigation expert. See Chapter 5. But it will often be possible – and advisable – for counsel to consult with a mitigation expert informally before that point.

7.3. The Role of Narrative Theory in Case Planning*

7.3.1. The Nature of Narrative and Its Importance in Litigation

“Narrative,” as we use the term, means constructing and telling stories and includes the rhetorical creation of an imaginative world in which the story can happen – a world that gives the story its point. See JEROME BRUNER, ACTS OF MEANING 86 (1990); Jerome Bruner, *The Narrative Construction of Reality*, 18 CRIT. INQUIRY 1, 13-14 (1991). There are several reasons why this narrative process is crucial in litigation.

First, narrative is “a primary and irreducible form of human comprehension” (Louis O. Mink, *Narrative Form as a Cognitive Instrument*, in ROBERT H. CANARY & HENRY KOZICKI (eds.), THE WRITING OF HISTORY: LITERARY FORM AND HISTORICAL UNDERSTANDING 129, 132 (1978)) – humankind’s basic tool for giving meaning to experience or observation – for understanding what is going on. It is the way most people make sense of the world most of the time. “[N]arrative . . . gives shape to things in the real world and often bestows on them a title to reality.” JEROME BRUNER, MAKING STORIES: LAW, LITERATURE, LIFE 8 (2002). We link perceptions into happenings, happenings into events, events into stories; and our narrative expectations tell us how each story hangs together and how it will end. Jurors bring this everyday sense-making process to their work and use it to descry the “facts” from the evidence. See, e.g., REID HASTIE, STEVEN D. PENROD & NANCY PENNINGTON, INSIDE THE JURY (1983); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 CARDOZO L. REV. 519 (1991). Trial lawyers seeking to persuade jurors of a particular version of the facts need to tap into the process. See, e.g., Anthony G. Amsterdam & Randy Hertz, *An Analysis of Closing Arguments to a Jury*, 37 N.Y.L. SCH. L. REV. 55 (1992).

Second, the narrative process also tells us how a story *should* end. “[N]arrative is necessarily normative” (Bruner, *Narrative Construction of Reality*, *supra* at 15), providing the interface between facts and values. “Stories fly like arrows toward their morals.” WILLIAM H. GASS, TESTS OF TIME 4 (2002). They embody a society’s manifest of moral imperatives. See BRUNER, ACTS OF MEANING, *supra* at 47. So, effective story-telling by a lawyer can help to make the lawyer’s case to jurors who want to reach the *right* result.

*This section is a shortened version of the *Introduction* in Ty Alper, Anthony G. Amsterdam, Todd Edelman, Randy Hertz, Rachel Shapiro Janger, Jennifer McAllister-Nevins, Sonya Rudenstine & Robin Walker-Sterling, *Stories Told and Untold: Lawyering Theory Analyses of the First Rodney King Assault Trial*, 12 CLINICAL L. REV. 1 (2005). Elaboration of the points presented here and additional authorities can be found at pages 4-32 of that article.

Third (an elaboration of the preceding point), the narrative process is specialized for reconciling our expectations about the normal, proper course of life with deviations from it. “Deviance is the very condition for life to be ‘narratable.’” PETER BROOKS, *READING FOR THE PLOT: DESIGN AND INTENTION IN NARRATIVE* 139 (1992). The launching pad of narrative is *breach*, a violation of expectations, disequilibrium. See BRUNER, *MAKING STORIES*, *supra* at 15-20. The landing pad of narrative is *balance*, the reestablishment of equilibrium. See ANTHONY G. AMSTERDAM & JEROME BRUNER, *MINDING THE LAW* 45-47, 121-24 (2000). Narrative has always done for the human mind what juries are called upon to do for the body politic in every trial, and particularly in criminal trials – to deal with deviance by restoring order. Small wonder, then, if jurors resort to narrative to do much of the work.

Fourth, jurors come to their task equipped not only with the narrative process as a mode of thought but with a store of specific narratives channeling that process. Stock scripts and stock stories accreted from exposure to the accountings and recountings that continually bombard us – through television, movies, newspapers, books, the internet, and word of mouth from our earliest childhood (see BRUNER, *ACTS OF MEANING*, *supra* at 82-84) – provide all of us with walk-through models of how life is lived, how crimes are committed, how reality unfolds. When a juror perceives the familiar lineaments of one or another of these narratives emerging from the evidence, s/he “recognizes” what is afoot and s/he is cued to interpret other pieces of evidence and eventually the whole of it consistently with the familiar story line. “This means that in order to perform effectively, many lawyers, particularly litigators, may be obliged to keep abreast of (in order to tap into) the popular storytelling forms and images that people commonly carry around in their heads.” Richard Sherwin, *The Narrative Construction of Legal Reality*, 18 Vt. L. Rev. 681, 692 (1994).

Fifth, evidentiary trials in which facts are contested are not conducted on the premise of Kurosawa’s *Rashomon* – that multiple inconsistent versions of reality are all equally true – nor do most jurors operate on this premise. The uncompromising ontological first principle of every trial is that *something real really happened out there*. Jurors are permitted to vote that they cannot tell what happened, but this verdict is conceptualized as a failure of persuasion on the part of whichever party bears the burden of proof. And every trial lawyer knows that it is very dangerous – a desperation tactic of last resort – to stake his or her case on the argument that the truth is so recondite that the opposing party has failed to meet its burden on that account alone. Even if the lawyer’s aim is simply to cast enough doubt on the opponent’s case to prevent the jury from agreeing that an applicable burden of proof has been met, s/he will almost always want to suggest some alternative thing or things that could plausibly have *really happened out there*, instead of the thing that the opponent needs to prove. Under these circumstances trials of “the facts” tend to turn into story-telling contests. There is a hard core of material that the contestants must incorporate and account for in their stories – for example, the jury in a homicide trial may know from seemingly incontrovertible ballistics and fingerprint evidence that at some point in time the defendant handled the gun that fired the fatal shots – and the story-teller is required to encompass these mandatory materials in his or her plot. But where they cease

to “tell the whole story,” the story-telling competition begins; and the storyteller whose tale best interprets the mandatory materials consistently with the audience’s understanding of the human scene can hope to carry off the prize.

Sixth, story-telling offers the litigator a vital means to expand or change the audience’s understanding of the human scene. And it equips the litigator to explore in his or her own head, as a necessary prelude, a range of *possibilities* for expanding or changing the audience’s perception of that scene. For, in addition to its other functions, narrative serves as the mind’s primary way of surveying alternative possible worlds. It is imagination’s instrument for getting beyond the familiar and the obvious, for playing out never-experienced scenarios and projecting the consequences of counterintuitive conceptions. It enables us to travel paths we have not walked before and to see where they lead, to create realms of *what if* where we can experiment with new varieties of thinking and believing, of doing and being. See AMSTERDAM & BRUNER, *MINDING THE LAW*, *supra* at 235-39; JEROME BRUNER, *ACTUAL MINDS, POSSIBLE WORLDS* (1986).

So, what follows from all this? Our reason for rehearsing the functions that the narrative process serves in litigation is not to encourage litigators to make greater use of narrative. That would be as superfluous as exhorting fish to make greater use of water. Litigators are inextricably immersed in narrative; they cannot survive without it. See AMSTERDAM & BRUNER, *MINDING THE LAW*, *supra* at 110. Our aim is rather to suggest that litigators will navigate the medium more effectively to the extent that they *focus consciously* on narrative construction as an integral part of their work, *survey systematically and creatively* the range of options available to them in constructing narratives, and make *strategic choices* among the options with an understanding of the basic elements of narrative construction and how those elements fit together.

7.3.2. The Specific Uses that a Litigator Can Make of Narrative

The following inventory enumerates potential uses of narrative in jury-trial litigation. Some involve the litigator’s own thinking (categories 1 and 2 immediately below). (We include in the term “litigator” all members of a litigation team.) Some have to do with gauging the thinking of other people in the litigation process (category 3). Some involve making explicit references or implicit allusions to stock scripts in communications aimed at the jury (categories 4, 5 and 6). In subpart 7, we catalog the range of techniques by which a litigator communicates to the jury; and in subpart 8, we briefly discuss the choice between explicit and implicit invocations of stock scripts.

1. *Using narrative to generate hypotheses that guide investigation and to avoid shutting down investigation by making premature judgments.* To be efficient, factual investigation must be directed by working hypotheses about what happened and why. See § 7.2.1.4 *supra*. Hypotheses fleshed out in narrative form – with a scene, characters, actions, instruments, and motives (see § 7.3.3 *infra*) – serve this function particularly well, because their projection requires the litigator to construct in his or her imagination a world containing all of the details that are necessary for the plot to unfold. These details in turn suggest others that

would probably exist in conjunction with the necessary details, or that could *not* coexist with the necessary details, providing specific focuses for investigation.

Projecting alternative possible causal or explanatory stories that could fit around information already in hand enables a litigator to multiply hypotheses. And having multiple hypotheses in mind throughout a litigation can be crucial to success. Litigators tend too often to zero in on the first plausible version of events that emerges from available information, or at most the first couple of plausible scenarios. They tend to confine their investigations to attempting to confirm the most immediately obvious favorable scenario (or two) or to refute the most immediately obvious unfavorable scenario (or two). They forget that the fundamental tenet of effective investigation is: *The world is a mysterious, surprising place, where strange things happen.* Narrative provides the best safeguard against these tendencies. Narrative restores the mystery of the world. Insisting upon telling oneself alternative possible stories even after it has become “obvious” what happened is an invaluable check against premature closure.

2. *Using narrative to develop a theory of the case.* As explained in § 7.2.1 *supra*, a defense lawyer’s *theory of the case* is a detailed summary of the factual propositions that counsel plans to assert as the basis for a favorable verdict or decision, with the facts organized in such a way that they invoke the application of the normative dictates (substantive rules of law; procedural rules, such as those relating to burdens of proof and presumptions; considerations of fairness, propriety, and other moral values; empathy or sympathy) that counsel will rely on. The defense theory of the case should inform every aspect of counsel’s preparation and presentation. See § 7.2 *supra*. Because of the efficacy of narrative in mediating facts and norms, the theory of the case usually takes the form of a story. When it does, counsel will often benefit from modeling it on one or more of the stock stories current in the culture, and s/he will almost always benefit by considering alternative possible versions of the story and assessing their relative believability by drawing on the culture’s current register of accepted stories as examples of what is plausible and coherent, what makes a tale hang together sufficiently to be convincing.

Even when counsel’s theory of the case cannot be encompassed by a single story, it is likely to depend in part upon the persuasiveness of key facts. Jurors’ probable reactions to evidence of those facts can sometimes be usefully gauged by reference to the prevalence of similar factual elements in the scenes, plots, and characters of currently accepted story types. Conversely, if a theory of the case calls for discrediting the opposing party’s story or components of it, popular narratives featuring an appearance/reality dichotomy – as many popular detective stories, courtroom dramas and other suspense “thrillers” do – can suggest useful litigation strategies for reducing the opponent’s evidence to the status of deceiving appearances.

3. *Using narrative to fathom or affect the thinking of witnesses and other sources of information, jurors and other trial participants.* Litigators must constantly make strategic decisions on the basis of predictions about how people are thinking or how they will react to something that the lawyer does. In investigative interviewing and in interviews preparing witnesses to testify at trial, the litigator

frames questions in ways that are designed both to elicit information and to shape it by structuring the framework within which the witness understands the information and its significance. Because memories are commonly stored and recounted in narrative form and the information remembered is affected by the stories the witness has in mind or can be gotten to think about as giving the information meaning (*see* BRUNER, *ACTS OF MEANING*, *supra* at 55-58), counsel needs to be alert to detect those stories and the possibilities for rewriting them. This is equally true in cross-examining the prosecution's witnesses. Witnesses who have had little or no prior experience with the law are frequently playing out in their heads scripts for appropriate witness responses that they have picked up from TV or the movies; this is a setting in which life tends to imitate art almost slavishly. And even witnesses who have had considerable prior experience in a witness role (such as police officers) often have organized aspects of that experience (such as cross-examination by defense lawyers) – together with the courtroom stories they have heard (*e.g.*, at the precinct station) – into scripts that can be put to good use by a cross-examiner who discerns them.

Voir dire examination of prospective jurors calls for much of the same sensitivity to narrative processes and stock scripts as witness interviewing and examination. So, often, does predicting how the prosecutor will interpret and react to what defense counsel does. And whether or not counsel makes deliberate use of narrative strategies, techniques and allusions in his or her own presentation of the case, the jurors are likely to be perceiving and interpreting the evidence they hear as the unfolding of a story that they recognize from familiar models. Counsel has to anticipate the stories jurors will see in the evidence, in order either to deconstruct them or to turn them to advantage.

4. *Using narrative to attune the jury to lines of thinking that advance the litigator's case or set back the opposing party's case.* Narrative involves a special way of thinking, of processing information, of proceeding from premises to conclusions. If a litigator can get jurors into a narrative mindset early in a trial – by, for example, stressing in *voir dire* interchanges with prospective jurors, in an opening statement, and/or in the way s/he talks about the trial process when making and arguing objections in the hearing of the jury – that the jury's job is to [reconstruct the story] [figure out the real story] [get to the bottom of the story] of what happened, s/he can tap into this mode of thinking and use it to shape the jurors' understanding of the case.

One important characteristic of narrative thinking, for example, is that it is inescapably hermeneutic. In a story, the meaning of the whole is derived from the parts at the same time that the meaning of the parts is derived from the whole. *See* Bruner, *Narrative Construction of Reality*, *supra* at 7-11. In a deductive evidence-marshaling jury argument, this process can be derided as “circular” or as “bootstrapping,” but a litigator can make it acceptable, even necessary, to a jury despite this derision if s/he can persuade the jurors that the process is the best way to see how the story hangs together.

Another important characteristic of narrative thinking is that it generates expectations through a presumption of relevancy. This is why a reader knows that if s/he is told in Chapter One there is a gun hanging

on the wall, s/he can expect a gunshot and a dead body or at least a near miss by the end of Chapter Three. See ANTON TCHEKHOV, *LITERARY AND THEATRICAL REMINISCENCES* 23 (Samuel S. Kotliansky trans. 1927). A related structural feature of stories is that they translate Time into a sequence of events that must be “of relatively equal importance (or value), and . . . of approximately similar ‘kinds’” (GASS, *supra* at 11). These aspects of narrative thinking can be used to imbue small items or events with large significance. And narrative thinking not only intensifies people’s ordinary tendency to regard the actions of other people as a product of will – indeed, of character – rather than of external circumstances. It also gives this tendency the twist of focusing attention on “‘reasons’ for things happening, rather than strictly [on] . . . their ‘causes’” (Bruner, *Narrative Construction of Reality*, *supra* at 7). By working with these and other distinctive qualities of narrative thinking, a litigator can cue the jurors to process what they see and hear at trial in ways that bolster his or her case, undermine the opposition’s, or both.

5. *Using particular narratives to accredit, discredit, configure or code pieces of evidence or information.* A jury is likely to find evidence persuasive to the extent that the “facts” it portrays conform to the jurors’ understanding of The Way the World Works. Jurors enter a trial with strong views, based on personal experience and on the second-hand information prevalent in their cultural milieu, about The Way the World Works. But these views are neither monolithic nor immutable. We all carry around in our heads an inharmonious assortment of notions, sometimes even flatly inconsistent notions, about what is usual, plausible, probable, possible, right, in human affairs. These notions usually take story form. See AMSTERDAM & BRUNER, *MINDING THE LAW*, *supra* at 39-47. Depending on which stories are salient when we are trying to make sense of things, we can come to different conclusions about what happened and why. By reminding the jury of apt stories to be thinking about as it receives and evaluates the evidence at a trial, a litigator can prompt the jurors to be more trusting or more skeptical regarding particular kinds of evidence or the facts the evidence is offered to prove.

The stories can be drawn from “news” or fiction. For example, when objecting in open court to the admission of crime-lab evidence on grounds of unreliability (see § 33.11 *infra*), counsel might refer to media exposés of ineptitude at forensic laboratories (see § 37.14 *infra*). Additionally or alternatively, counsel could make disparaging comparisons between the crime-scene investigators in the present case and those in well-known TV entertainment series like *CSI*, where the forensic science techniques are invariably sophisticated and flawless.

Stories are also useful in coding items of evidence or other pieces of a case. Coding is the process by which words, images, objects, and ideas become associatively linked with others, so that the former bring the latter to mind. See AMSTERDAM & BRUNER, *MINDING THE LAW*, *supra*, at 187-92. Narrative construction involves considerable coding, which contributes heavily to the verisimilitude of good stories. And the conceptual, emotional, even sensory “baggage” packed into an item by narrative coding travels with the item beyond the story where the packing was done.

6. *Using particular narratives to cue the jury's interpretation of the case as a whole or to free the jury from sets that dispose it to fit the case into a harmful mold.* The ultimate task of the jurors in any jury trial is not only to decide what happened in terms of physical bodies moving in space and time, or even bodies moved by minds possessing specified mental states. It is also to *interpret and categorize the actions and mental states as understandable human behavior* susceptible to legal and moral judgment. "Placing things, events, and people in these categories is very much a matter of *what stock script one recognizes* as being in play or *what story one chooses to tell.*" *Id.* at 47. A litigator who taps into stock narratives familiar to jurors – either the conventional story lines of prevalent news and entertainment *genres* or specific books, films, or TV shows that are recognizable by name, by leading characters, or by other signature features – can put those narratives to work as a cognitive framework for the jury's interpretation of the evidence that will shape an understanding of "what really happened" and what it means.

7. *Techniques for communicating narratives to the jury.* One virtue of grounding a litigator's case in stock stories is that s/he can begin to evoke the scripts and trappings of the story during pretrial proceedings or at the very outset of the trial. This makes it possible to use the *voir dire* examination of prospective jurors to sound out the jury's likely reactions to a story before the litigator commits to it by presenting evidence or even taking an overt position regarding the facts of the case in opening argument.

If story-based images have attached to a case in pretrial publicity, that makes it easier for the litigator to advert to them in connection with *voir dire* examination of prospective jurors. But if they have not, it may still be possible to use language evocative of stock narratives in talking with the jurors on *voir dire* or in framing written *voir dire* questions in courts where the judge conducts the oral questioning. These evocations have the dual purpose of priming the jury early to think in terms of the narratives that a litigator expects to tap into later and of giving the litigator an opportunity to observe any reactions of prospective jurors to the narrative. Their reactions may suggest that s/he will be wise to play it down – or, conversely, to play it up – or to strike particular jurors.

Means for suggesting narratives to the jury at later points in the trial abound. During opening and closing argument, counsel may or may not be permitted to make explicit references to stories current in public discourse, but s/he will usually be able to trigger recognition of widespread and recurrent stock narratives – and even of the better-known books or films or TV series that exemplify them – by implicit allusions. She can usually find occasions for similar allusions in questioning witnesses and in making and arguing objections. Witnesses can be prepared to testify in ways that make the narratives come to mind. The litigator's style of witness examination and even his or her physical activity in the courtroom can be designed to summon up the narratives s/he wants the jurors to recognize in the evidence. For example, it is advisable for counsel to consult the client extensively at the defense table in cases where the prosecution is seeking to depict the client as impulsive and lacking in self-control but not in cases where the prosecution's theory is that the defendant was a criminal mastermind.

8. *Choosing between explicit and implicit invocation of stock stories.* When a litigator has the option of making more or less explicit references to the stock stories that s/he wants jurors to have in mind, s/he needs to balance the values of clarity and dramatic emphasis against their risks. One risk is related to the risk of premature commitment. The more unequivocally a litigator has announced his or her reliance on a particular narrative, the more difficult it will be to back off it if subsequent developments weaken that theory of the case or reveal a better one. Overt or overly clear identification of a particular stock story as the theme of a litigator's case invites opposing counsel to argue that the case is built around a fable or that the facts don't fit the fable. More oblique reference to the stock story would confront opposing counsel with a hard choice between ignoring it or reinforcing it by recognizing it and undertaking to refute it. And if a refutation seemed sufficiently persuasive, the litigator could always reply, "That isn't what I meant at all." Similarly, the clarity of a reference increases the extent to which it offers traction for resistance. A juror may be roused to quarrel with the story who would not have reacted to a more ambiguous reference that was nonetheless sufficient to engage the imaginations of jurors more in tune with the tale.

7.3.3. *The Basic Structure and Process of Narrative*

Journalists learn and teach that the recipe for making stories is the Five W's: *Where? Who? What? When? Why?* There is a conspicuous resemblance between this formula and literary theorist Kenneth Burke's Pentad or "Five Key Terms of Dramatism":

1. Scene: the situation, the setting, the where and when;
2. Agent: the actors, the cast of characters;
3. Act: the action, the plot;
4. Agency: the means, the instruments of action;
5. Purpose: the motivations, goals, aims of the characters.

KENNETH BURKE, *A GRAMMAR OF MOTIVES* xv (1945). Either roster will serve as a handy checklist of the elements that need attention in constructing stories for the uses identified in the preceding subsection. "Elements" as in *elemental*. For each element represents a whole dimension in which choices are possible and arrays of variables should be canvassed before making the final choices.

The five dimensions are, of course, interconnected. They need to be in tune. *See id.* at 3. Choices made in one dimension affect each of the others. (For example, adding characters to a story may require an expansion of the scene to encompass a longer period of time or a wider stage. It may also, by increasing the complexity of the interpersonal dynamics, change the motivations of the characters previously onstage.) Intensifying the focus upon one dimension may diminish the significance of another. *See id.* at 17. And transmutations from one dimension to another can be accomplished by the narrative alchemy that Kenneth Burke describes as re-forging distinctions in the "great central moltenness" where all of the dimensions have a common ground (*see id.* at xix). (Capital defense attorneys, for example, transmute Scene into Agent when they construct mitigation stories in which the defendant's

childhood environment becomes the Villain of the plot.)

The interdependence and partial interchangeability of Scene, Agent, Act, Agency, and Purpose make narrative a highly variable and flexible medium. Still, there is a certain constancy in the way in which agents act to pursue their purposes within the temporal framework of the scene. This constancy resides in what is usually called “plot” – the “principle of interconnectedness and intention [necessary] . . . in moving through the discrete elements – incidents, episodes, actions – of a narrative” (BROOKS, *supra* at 5). It reflects “a ‘mental model’ whose defining property is its unique pattern of events over time” (Bruner, *Narrative Construction of Reality*, *supra* at 6). Most stories have a common plot structure. The unfolding of the plot requires (implicitly or explicitly):

1. an initial *steady state* grounded in the legitimate ordinariness of things
2. that gets disrupted by a *Trouble* consisting of circumstances attributable to human agency or susceptible to change by human intervention,
3. in turn evoking *efforts at redress or transformation*, which lead to a *struggle*, in which the efforts succeed or fail,
4. so that the old steady state is *restored* or a new (*transformed*) steady state is created,
- [5. and the story often concludes with some *point or coda* – say, for example, Aesop’s characteristic *moral of the story*: “Bird of a feather flock together,” or “One lie will lead to another and ultimately seal one’s doom” – a/k/a “*This is the Way the World Works.*”]

See AMSTERDAM & BRUNER, *MINDING THE LAW*, *supra* at 113-14. For illustrations of the structure in appellate opinions, see *id.* at 77-99, 143-64.

7.3.4. *The Special Features of Narrative in a Jury-Trial Setting*

Although stories have a core of common elements and a common basic structure, they differ widely depending upon the purposes for which they are told, the setting in which they are told, and the conventions and constraints of that setting. Fictional stories told for didactic purposes (in the tradition of Aesop’s Fables) have different conventions and constraints than do cautionary tales, or novels and dramas aimed at exploring the human condition, or novels and movies and TV shows aimed at entertainment. Purportedly nonfiction stories told by historians have different conventions and constraints than those told by ethnographers and anthropologists or by propagandists. The following conventions and constraints bind the stories that litigators can tell in jury trials:

First, the stories that litigators ask the jury to believe as constituting “the facts” of the case (although not necessarily the stories to which they refer for analogies or illustrations) must appear to be true. Jurors view their job as getting at the truth of what happened. A litigator’s version of events must appear to be true not only from the standpoint of verisimilitude (lifelikeness) but from the standpoint of external referentiality (conformity to any information that jurors will take to be objective “fact”). And a trial litigator’s resources for creating facts are limited. S/he cannot, like a novelist or playwright, conjure physical props out of thin air or put into the mouths of witnesses any words that s/he cannot convince them to utter under oath. If admissible evidence of fact *X* just isn’t out there (or if bad luck or a client’s inability to pay for thoroughgoing investigation prevents the litigator from obtaining evidence of fact *X*), then the litigator’s story at trial has either got to jibe with the nonexistence of fact *X* or contain a sub-story that explains why fact *X* is unprovable though true.

Further, some jurors have an unshakeable belief that truth is a matter of objective fact to be discerned exclusively by logical deduction from physical evidence and the accurate testimony of reliable witnesses. These jurors will resent and resist any suggestion by a trial attorney that the jury needs to *interpret* the evidence. They will be positively outraged at the idea that *stories* have anything to do with truth-finding. Such jurors are not immune to the influence of narrative. Indeed, their denial of the need for interpretation in fact-finding may make them peculiarly prone to reach uncritical conclusions on the basis of stories that they do not realize they have in their heads – like the very story that the only way to get at truth is Sherlock Holmes’. But a litigator facing jurors of this sort needs to tell his or her stories in the manner advised by the classic rhetors, using art to conceal his or her art.

Second, a litigator’s story to a jury usually needs to accommodate the opposition’s story (because it needs to trump it) and always needs to be made as immune as possible against challenge. Trial stories are stories told in contemplation of contest. Except on the rare occasions when a story can be unveiled for the first time in rebuttal closing argument, the opposition will get a chance to refute it or coopt it. This means that, to the extent possible, stories should be built in such a way that an assault on any piece will not bring down the whole; vulnerable pieces should be eliminated; loose ends are usually better left hanging than tucked in, if the opposition is likely to pull them out again. And, the litigator always needs to consider whether something s/he is thinking of putting into his or her story can be spun by the opposition to support a competing story.

Third, a litigator’s story to a jury will invariably be an incomplete story, a story without a last chapter. It has to point to a concluding chapter that the jury’s verdict will write. It has to have a role for jury to play, and that role has to be made an attractive one – sleuth, quester-after-Truth, avenger, righter-of-otherwise-irremediable-wrongs.

And, fourth, of course, the last chapter that the jury is called upon to write must be a verdict in favor of the litigator’s client. Q.E.D.

Chapter 8

Dealings with the Police and Prosecutor

8.1. *General Considerations in Dealing with the Police and Prosecutor*

8.1.1. *Counsel's Goals in Contacts with the Police and Prosecutor*

Counsel should usually establish contact with the investigating officers as early as possible in the course of a case. Thereafter, s/he should speak to them whenever the needs of the client dictate. Similarly, counsel should establish contact with the prosecuting attorney as soon as one is assigned to the case and should communicate with him or her periodically thereafter.

The purposes of these contacts are (a) to learn as much as possible about the charges against the defendant (those already lodged and others that may later be lodged) and potential prosecution evidence; about the temperament of the prosecutor and of any officer who may play a role in the charging process or who may testify at a trial; about the prosecutor's and officers' attitudes regarding the crime and the defendant as a person; and about their other concerns, their motivations, objectives, and plans; (b) to protect the defendant during police and prosecutorial investigative activity; (c) to persuade the police or the prosecutor to drop or reduce charges or to agree to some form of diversion (see § 2.3.6 *supra*); and (d) if appropriate – with the client's approval – to negotiate a mutually agreeable disposition or settlement of the case.

8.1.2. *The Importance of Amiability and Honesty*

Contact with the police and prosecutor is likely to be productive only if it is amiable. Even when dealing with hostile or offensive adversaries, counsel should play the diplomat's role. It is wise to establish two distinct levels of discourse with the police and the prosecuting attorney: (a) things said that counsel is free to disclose and to use in presenting the case at trial and (b) things said “off the record” or in confidence. Counsel should always make clear the level on which s/he is talking with the police and prosecution. If police officers or the prosecutor get the feeling that they have been “double-crossed” – that counsel has revealed information communicated in confidence – *all* communications to counsel in this and future cases are likely to be terminated abruptly.

8.1.3. *Discussions With the Police Generally*

Except in cases in which there are particular reasons to keep a low profile (for example, when counsel's independent researches disclose that the police conducted a slipshod initial investigation and are doing no further investigating, so that counsel prefers to let sleeping hounds lie), the more frequently counsel speaks with the police, the better. Every conversation with an officer gives counsel a little additional information about how the officer views the case, what the officer will testify, what the officer knows

concerning other prosecution evidence, and how eager the officer is to see the client convicted. Details that the officer tells counsel may be useful in impeaching the officer if the case goes to trial. (These statements may be used in questioning the officer on cross; and if s/he denies making them or professes not to remember making them, they may be proved extrinsically to the extent that they are “noncollateral.” See § 37.4 *infra*.)

Equally important, the more frequent the conversations between an officer and counsel, the more difficult it is for the officer to recall what s/he has said to counsel, and the more cautious s/he will be not to embroider the facts when testifying.

Discussions with the police are usually most fruitful before a prosecuting attorney is assigned to the matter because until that stage the officers regard it as “their case,” are freer to talk about it, and have more influence in relevant decisions (see §§ 8.2, 8.3, 8.6 *infra*).

8.1.4. *Discussions With the Prosecutor Generally*

Once a prosecutor has been assigned to the case, frequent conversation with him or her is useful both as a means for acquiring factual information and as a means for learning and influencing the prosecutor’s attitude.

The more the prosecutor sees that counsel is involved with the case, the more s/he is likely to conclude that counsel is working hard at it. The value of this is twofold. First, if the prosecutor thinks that defense counsel is going all out, the prosecutor’s estimate of the time and trouble involved in trying the case will increase and so may the prosecutor’s willingness to offer concessions in order to settle the case before trial. Second, counsel’s visible dedication to a client often tends to make the prosecutor’s own attitude toward the client more sympathetic, because the prosecutor figures that the client must have something on the ball to inspire all that zeal.

Both of these impressions can, of course, backfire in some cases, causing the prosecutor to prepare more thoroughly or to develop a more competitive turn of mind. Counsel should seek to learn as much as possible about this particular prosecutor’s practices and psychology by asking other informed defense practitioners. Particularly when a prosecutor is carrying a heavy caseload, counsel may be wise to keep contact with him or her down to a minimum, in order to decrease the visibility of the case or to avoid arousing the prosecutor’s combativeness.

8.2. *Navigating a Criminal Justice System in Which the Police and Prosecutor Typically Exercise Discretion on Many Important Issues*

8.2.1. *The Exercise of Discretion by the Police*

The criminal process, particularly in its early stages, is honey-combed with police discretion.

Not all persons who are known by the police to have committed a crime are arrested. Many minor infractions are handled by a warning from the officer.

When a person is arrested, the arresting officer initially decides what the charge should be, arrests the person on that charge, and takes the person to the precinct. Here the desk officer reviews the available facts, including the arresting officer's story, the arrestee's story, information about the arrestee and the crime that is disclosed by an initial records search, and information received in connection with the apprehension and processing of co-defendants or other suspects. S/he may then book the arrestee on the same charge that the arresting officer selected or on a different charge; or, again, if the offense is not serious, s/he may send the arrestee home without lodging any charges.

If the offense is serious, an arrestee will be taken (either routinely or after the exercise of similar discretion by the desk officer) to an investigating officer or detective. See § 3.2.2 *supra*. Now it is the investigating officer's job to determine whether the arrestee has committed a crime and, if so, what crime. The investigating officer, too, may decide that the arrestee is not guilty, or that the case is weak, or that for some reason it should not be prosecuted – or should be diverted (see § 2.3.6 *supra*) – and may send the arrestee home. Or the officer may decide to charge the arrestee with one or more offenses, which may or may not be those for which s/he was arrested.

After further investigation the officer may, once again, drop or reduce or divert or increase or add to the charges that s/he originally lodged. The fact that the arrestee has been booked initially on one charge does not guarantee that s/he will not subsequently be charged with other offenses growing out of the same set of facts or with other crimes growing out of other facts that s/he has admitted or to which s/he has been connected.

8.2.2. *The Exercise of Discretion by the Prosecutor*

The prosecutor reviews the charges lodged by the police. On the basis of the police report, discussion with the investigating officers and, sometimes, an independent investigation, the prosecutor may decide to drop or divert the charges, or to proceed on the charges made by the police, or to charge more serious or less serious or different offenses. S/he thus determines the charges to be presented at the preliminary hearing.

Thereafter it is the function of the magistrate or judge at the preliminary hearing to determine the charges on which the defendant is to be held for trial or for the grand jury. However, in a case that can be prosecuted by information (see §§ 2.3.6, 2.4.3 *supra*), the prosecutor is often permitted to charge additional offenses for which the defendant was not bound over. And in indictable cases, the prosecutor is usually free to present to the grand jury whatever charges s/he pleases. See §§ 2.3.6, 2.4.4 *supra*.

After the bind-over and after an information or indictment has been filed, ordinarily the prosecutor remains free to drop the prosecution (a) formally,

by entering a *nolle prosequi* (usually called *nol pros*) – for which leave of court is sometimes required but ordinarily given routinely when requested (*cf. Rinaldi v. United States*, 434 U.S. 22, 29-30 n.15 (1977) (per curiam), discussing federal practice) – or (b) informally, by an indefinite continuance (often called *stetting*).

The prosecutor also retains discretion – again, sometimes subject to leave of court or to the requirement that the prosecutor file a statement of reasons with the court – to accept a plea of guilty to a lesser offense than that charged in the information or the indictment. S/he continues to have discretion to shunt the case into some of the diversion programs described in § 2.3.6 *supra*; judicial approval of the diversion is usually required after bind-over; but many judges are content to rubber-stamp any diversion arrangement that a prosecutor recommends.

If the defendant is convicted, either by pleading guilty or by going to trial, the prosecutor may recommend a sentence to the court or may inform the court that the defendant is cooperating. The court has complete discretion to accept or reject the prosecutor’s sentencing recommendation, and practice varies locally in this regard; but it is fair to say that there are few places where the position taken by the prosecutor on sentence is wholly unimportant. Additionally, when the defendant is a recidivist, the prosecutor generally exercises considerable discretion to “charge the priors”: that is, to invoke the stiffer penalties allowed by law for second or successive convictions.

8.2.3. Factors Influencing Discretion

The factors that may influence the police or the prosecutor not to press charges – or to press less serious charges – or to divert a prosecution – or to exercise their discretion in favor of the accused in other ways – are innumerable. A few important ones, however, deserve mention.

Many prosecutors will not charge an individual whom they personally believe to be innocent, no matter how strong the evidence appears. Personal belief in an arrestee’s innocence is usually less important to the police, but not unimportant.

The likelihood of conviction – the strength of the prosecution’s case – is also more important to the prosecutor than to the police. (It is the prosecutor who stands to look like a fool in court; police efficiency is judged in terms of clearance by arrest.) In assessing the strength of the prosecution’s case, the prosecutor must consider the weight of the evidence, the likely availability of the evidence at the time of trial, and the habits, attitudes, and sympathies of judges and juries in the locality.

Docket congestion and his or her own workload tell with the prosecutor. Particularly if a case is relatively unimportant (in terms of the egregiousness of the crime and the probable future dangerousness of the accused) and if preparing and presenting it in court are going to involve much time and work, the prosecutor will tend to favor a non-court disposition. This is particularly so if s/he is confident that the disposition will leave pertinent

parties – principally the police, the complainant, and the news media – satisfied.

Both the police and the prosecutor are concerned with the accused's past record, which they view as indicative of whether the defendant is a likely source of future trouble to them or of danger to the community. A defendant with a good record is likely to get a break, especially if the offense charged is one that carries a penalty that seems unduly harsh. If an available diversion program offers means for keeping tabs on the defendant, or resources for dealing with problems that appear to have been factors in the defendant's criminal behavior (like alcohol or drug abuse, homelessness, or domestic strife), it may provide a satisfactory alternative to continued criminal prosecution.

Both police and prosecutor are also concerned with the question whether, if a case goes to trial, the evidence will disclose serious police misconduct or ineptitude.

Finally, both police and prosecutor are likely to view favorably the accused's willingness to cooperate in apprehending or in convicting other offenders or in solving other crimes.

8.2.4. *The Role of Defense Counsel in Navigating the Discretion-Riddled System*

The implications of the large discretion exercised by police and prosecutors, of its exercise at numerous points in the criminal proceeding, and of the variety of factors that affect it should be obvious. Counsel must begin early and work continuously to project to these officials the best possible image of the client and of the facts surrounding the charge.

At the same time, hard practicality – as well as the compulsions of professional and personal integrity – precludes the projection of an image that subsequently is likely to be found inaccurate. Counsel also has to worry about his or her own image. If s/he is not trusted, s/he either will not be dealt with or s/he will not be dealt with fairly. If s/he appears lazy, careless, or weak, s/he is likely to be taken advantage of, and the police or the prosecutor may bear down heavily in the hope that s/he will capitulate. The stronger counsel appears to be, the more trouble the case will appear to be to prosecute. On the other hand, if s/he is too combative, s/he may raise the spirit of combat in the police or the prosecutor.

Usually, counsel's most effective posture is one of complete sincerity, of unquestioning commitment to protect every right that the law gives the client, of unflagging willingness to work as hard as necessary in the client's behalf, yet of infinite reasonableness in seeking some fair accommodation that will dispose of the case in the most efficient and just manner. When counsel takes a hard line on a point, it must appear to be because the facts of the case are strong, not because s/he is an inventive, tricky, or obstructive lawyer. Counsel is merely doing the right thing and knows how to do it well. If the alternative to a reduced charge is a long trial, this is not because counsel wants to make trouble for the prosecutor but because the greater charge

requires the finding of a certain state of mind; counsel's client certainly did not have the state of mind; the stories of a dozen witnesses make this clear; counsel has statements from them all; and s/he is going to have to call them all. If the complainant is unconvincing, the police and the prosecutor should not believe the complainant's version of the story; and it is a matter of some, but secondary, importance that a jury also is not likely to believe the complainant or to convict the defendant. In any event, the important thing is that the criminal process not bear so harshly on the defendant that it will defeat its own aims and leave everybody concerned with a mess of troubles.

8.3. *Early Dealings with the Police*

8.3.1. *Initial Discussions with the Arresting and Investigating Officers*

Before (or, if that is impracticable, then immediately after) the initial interview with the client, counsel should speak to the investigating officer and ask what are the charges against the defendant and the facts of the case as the officer understands them. Counsel should ask whether any other or additional charges are being considered and, if so, what charges. S/he should ask the names of all witnesses. S/he should ask to see the police report, which the officer may or may not be willing to disclose. Counsel should also speak to the arresting officer to ask what s/he observed, what s/he was told, whether s/he knows of other witnesses, and what their names and addresses are.

Counsel should tell both officers that s/he will probably speak with them again and should ask what times and places are convenient to see or call them. Counsel should not attempt to bargain or argue with the officers. Rather, s/he should seek to learn as much as possible about the evidence the police have against the client, what they think of the client as a person (or as a problem), and whether they are hostile, sympathetic, or indifferent to the client. If they appear sympathetic, counsel can then raise the question whether they are amenable to dropping or reducing the original charges or agreeing to some form of diversion.

If counsel is unacquainted with the officers involved, it is useful to check out their reputations with an experienced local criminal lawyer, reliable bondsman, or R.O.R. Project staffer who would know whether information given by these particular officers can be trusted. Even when the officers appear trustworthy, however, it is generally not prudent to tell the police of counsel's plans, the facts counsel knows, or the client's reaction to the charge. The only *quid pro quo* that counsel can offer for their information at this early stage is friendliness, courtesy, and sincere appreciation for their willingness to be helpful.

8.3.2. *Protecting the Client from Police Investigative Activity*

Before concluding counsel's initial discussions with an arresting or investigating officer, counsel should tell the officer in the most amiable and inoffensive manner possible (1) that the police and other law enforcement

personnel are not to interrogate or speak to the client or to confront the client with any evidence or witness except in counsel's presence; (2) that they are not to ask the client for any permissions, consents, or waivers but should address these requests to counsel; (3) that the client (if detained) is not to be taken or removed from the present place of detention for any purpose without notice to counsel; (4) that the client is not to be put in a lineup or exhibited for identification in the absence of counsel; and (5) that the client is not to be subjected to any physical or mental examination, personal inspection, or scientific test in counsel's absence. See §§ 3.5, 3.6, 3.21.2 *supra*. Counsel can temper the appearance of obstructionism that is inescapably latent in these admonitions by saying that counsel has to err on the side of caution in preserving all of the client's legal rights until such time as counsel has learned enough about the case to determine whether any of those rights should be waived in the interest of cooperation with the authorities. See § 3.3.2.4 *supra*.

To demonstrate counsel's willingness to be as accommodating as possible, counsel should offer to be available on reasonable notice to attend any lineups, identification viewings, examinations, or tests or to discuss the case or its investigation with the police. Counsel should ask whether the police intend to conduct any of these proceedings. If they do, s/he should try to arrange with the investigating officer to have them all done at a mutually convenient time. If they do not, or if they have not yet decided, counsel should give the officer his or her phone number and email address and request that the officer contact counsel in the event that they subsequently do decide to conduct any of these sorts of investigations, so that counsel can be present.

If the client is in custody, counsel should also have the client personally advise the investigating officer or one of the custodial officers, in counsel's presence, that the client henceforth does not want to converse with the police or prosecuting authorities without counsel's assistance but wants to deal with them only through counsel. See §§ 3.4.6, 3.6, 3.21.2 *supra*. (To guard against the possibility that the police do not notify counsel or will not wait for counsel to appear, the client must also be advised to make appropriate objections and to look for and remember the things which counsel would have wanted to observe. See §§ 3.4.2, 3.4.4, 3.6, 3.21.3, 6.12 and the relevant items in the checklist, § 6.15 *supra*.)

Police may well disregard counsel's requests or harass counsel by scheduling lineups, identification viewings, examinations, or tests at inconvenient hours or scheduling them one a day over a period of time. If counsel concludes that the police are conducting improper investigative proceedings or are scheduling investigative proceedings abusively or without adequate notice to counsel, s/he should call the prosecutor and ask the prosecutor to mediate a reasonable agreement with the police regarding the methods and timing of subsequent investigation.

If the prosecutor declines to intervene or cannot solve the problem, counsel should consider whether there are grounds to move the court to enjoin further police investigations, suppress the results of those already conducted, or both. See §§ 3.4.6, 3.8.4 *supra*; § 18.9.2.7 *infra*; Chapters 25-27

infra. In this connection, particular attention should be paid to the potential interaction of the constitutional doctrine of *Gerstein v. Pugh*, 420 U.S. 103 (1975), discussed in § 11.2 *infra*, and of *Kirby v. Illinois*, 406 U.S. 682 (1972):

- *Gerstein* requires that any person arrested without a warrant be given a prompt postarrest determination of probable cause by a judicial officer unless (perhaps) s/he is equally promptly indicted by a grand jury. *Powell v. Nevada*, 511 U.S. 79, 80 (1994); *County of Riverside v. McLaughlin*, 500 U.S. 44, 47, 52-53 (1991); *Atwater v. City of Lago Vista*, 532 U.S. 318, 352 (2001) (dictum); *Baker v. McCollan*, 443 U.S. 137, 142-43 (1979) (dictum); *Albright v. Oliver*, 510 U.S. 266, 274 (1994) (plurality opinion) (dictum); and see § 2.3.4.1 *supra*; §§ 11.2, 11.3 *infra*. Failing either a prompt probable-cause determination or a prompt indictment, his or her detention becomes unconstitutional, and s/he is entitled to release on *habeas corpus*. See § 3.8.4 *supra*. Although the Supreme Court has not yet ruled on the question whether “a suppression remedy applies” to a *Gerstein* violation through “failure to obtain authorization from a magistrate for a significant period of pretrial detention” (*Powell v. Nevada, supra*, 511 U.S. at 85 n.*), the rationale of the Fourth Amendment exclusionary rule should require suppression. See, e.g., *Anderson v. Calderon*, 232 F.3d 1053, 1071 (9th Cir. 2000) (dictum) (“we conclude that the appropriate remedy for a *McLaughlin* violation is the exclusion of the evidence in question – if it was “fruit of the poisonous tree”); *Norris v. Lester*, 545 Fed. Appx. 320, 321, 327 (6th Cir. 2013) (“appellate counsel was ineffective for failing to argue [under *County of Riverside v. McLaughlin, supra*] that [Norris]’ confession was obtained after the violation of his constitutional right to a prompt probable-cause determination”). *But see Lawhorn v. Allen*, 519 F.3d 1272, 1290-92 (11th Cir. 2008); *People v. Willis*, 215 Ill. 2d 517, 831 N.E.2d 531, 294 Ill. Dec. 581 (2005); and compare *State v. Huddleston*, 924 S.W.2d 666, 673 (Tenn. 1996) (“we conclude that the exclusionary rule should apply when a police officer fails to bring an arrestee before a magistrate within the time allowed by *McLaughlin*”) with *State v. Carter*, 16 S.W.3d 762, 766-68 (Tenn. 2000) (“In *State v. Huddleston*, this Court determined that when a person confesses after having been detained for more than 48 hours following an arrest without a warrant and without a judicial determination of probable cause, the confession should be excluded unless the prosecution establishes that the confession “was sufficiently an act of free will to purge the primary taint of the unlawful invasion.” . . . The burden is on the State to prove by a preponderance of the evidence the admissibility of a confession obtained under the circumstances here presented. . . . ¶ . . . *Huddleston* . . . focused on the reason for the continued detention of the arrestee; that is, whether the individual was being held without probable cause ‘for the purpose of gathering additional evidence to justify the arrest. . . .’ . . . ¶ Here . . . there is no evidence that Carter was held for the purpose of gathering additional evidence or for other investigatory purposes”; this consideration and others

support a finding that the prosecution met its burden showing dissipation of the taint of a *Gerstein* violation.).

- The judicial probable-cause determination required by *Gerstein* marks the initiation of “adversary judicial proceedings” – the “first formal charging proceeding” (*Moran v. Burbine*, 475 U.S. 412, 428 (1986); see also *id.* at 429-32) – that, according to *Kirby*, triggers the defendant’s Sixth Amendment right to counsel (see §§ 2.3.4.2, 3.23.3 *supra*; §§ 26.10.1, 27.6 *infra*). And “once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all ‘critical’ stages of the criminal proceedings” (*Montejo v. Louisiana*, 556 U.S. 778, 786 (2009) (dictum); see, e.g., *United States v. Wade*, 388 U.S. 218 (1967); *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 198, 213 (2008); *Moore v. Illinois*, 434 U.S. 220, 227-29 (1977)). (An indictment equally triggers this Sixth Amendment right. E.g., *Estelle v. Smith*, 451 U.S. 454, 469-70 (1981).)
- The police should not be permitted to delay the point at which an arrestee acquires his or her Sixth Amendment rights under *Kirby* simply by failing to comply with the *Gerstein-McLaughlin* Fourth-Amendment timetable for making a probable-cause determination. So, whether or not a judicial probable-cause proceeding is actually made in the case of any particular defendant, that defendant’s full roster of Sixth Amendment rights attaches at the expiration of the *Gerstein-McLaughlin* deadline; and no police investigative proceeding after that point in time is permissible in the absence of counsel.

8.3.3. Lobbying the Police to Drop or Reduce the Charges or to Agree to a Diversion Arrangement

Counsel should ordinarily not bargain or negotiate with the police. The costs in disclosure are too great, the dispositive power of the police is too limited, and counsel’s later opportunities to negotiate with the prosecutor are ample. But in cases in which the facts already known to the police will support an argument that no charges are warranted or that the charges should be less severe than those the police have made or are contemplating, counsel should urge the police to drop or reduce the charges.

For this purpose, counsel may want to discuss the legal elements of the offense the police have in mind, and to demonstrate that some required element is missing. When it is clear that the police are not about to let the case go without lodging *some* charge against the client, counsel can suggest a specific lesser charge. Discussion of legal and factual weaknesses in the evidence against the client is recommended, however, only if that discussion is not likely to teach the police how they can fill gaps in their case by further investigation or fabrication.

Generally counsel does better to try to persuade the investigating

officers that facts discovered since the arrest or ambiguities in the facts cleared up since the arrest exonerate the client than to argue that there was no basis for the arrest in the first place. Police feel called upon to defend their arrests and may reject any notion that the arrest was unfounded.

References to the client's good record and to the severity of the damage that a serious criminal charge could do to someone in the client's circumstances – causing the client to be fired from a good job or suspended from school or to lose custody of his or her children, for example – may persuade the officers to drop or reduce the charges or to agree to a diversion arrangement. Portraying the client sympathetically or explaining apparently unfavorable traits (“That kid is not being tough, officer; he's scared stiff in this police station.”) may also be helpful.

Police (or prosecutors later in the pretrial process) may condition their willingness to drop charges upon the defendant's agreement to waive claims of civil liability for illegal arrest, mistreatment following arrest, wrongful prosecution, and so forth, against the officers and governmental agencies involved. Counsel should evaluate the costs and benefits of entering into any such agreement and should be prepared to negotiate for favorable terms. Counsel's leverage in negotiating is enhanced by state and federal rules limiting the conditions that may be exacted as the price for dismissing charges, and limiting officials' power to coerce defendants to accept oppressive conditions. *See, e.g., Marshall v. City of Farmington Hills*, 578 Fed. Appx. 516, 520 (6th Cir. 2014) (“A release-dismissal is enforceable only if a court ‘specifically determine[s]’ that: (1) it was entered into voluntarily; (2) there is no evidence of prosecutorial misconduct; and (3) enforcing the agreement ‘will not adversely affect relevant public interests.’”); *cf. Town of Newton v. Rumery*, 480 U.S. 386, 398 & n.10 (1987).

8.4. Early Dealings with the Prosecutor

Counsel's early dealings with the prosecutor are principally aimed at learning the prosecutor's evidence and the prosecutor's attitude toward the seriousness of the offense and the character of the defendant. Counsel should ask the prosecutor what the prosecution's proof consists of and what the prosecutor thinks is an appropriate and reasonable disposition of the case. Counsel should ask to see specific items in the prosecution's case file, such as the police report or an incriminating statement by the defendant or a co-defendant.

If counsel can honestly and convincingly urge the client's innocence or the unfounded nature of a given charge, s/he may attempt to convince the prosecutor at this stage to drop charges or to present lesser ones. Counsel should remember that the prosecutor's personal view of guilt or innocence is important and that it is based on information – both favorable and unfavorable to the defendant – that may not be admissible as evidence in court. A complainant's shabby character or prior unfounded complaints may do counsel no good when the case goes to trial; it is with the prosecutor that they can be put to good effect.

In rare cases, when counsel is very sure of the client, s/he may

consider suggesting a lie detector test. This suggestion should never be made without the client's prior consent and only in a case in which counsel, after a thorough factual investigation and a skeptical cross-examination of the client in the light of that investigation, is completely persuaded of the client's innocence. Almost never should the suggestion of a lie detector test include a stipulation of its admissibility in evidence. Polygraphs are fairly reliable, but when they err, it is usually on the side of false positives (incorrect indications that a truthful answer is a lie). In the more typical case, counsel's greatest effectiveness will be in urging reduced charges based on factual weaknesses in the prosecution's evidence, the defendant's good record or sympathetic character, the excessive harshness of the penalty for the greater charge, and/or the availability of a lesser charge with a more fitting penalty. Or counsel may be able to convince the prosecutor that a diversion arrangement will satisfy the state's interests in the case more efficiently, or more economically, or more humanely than continuing to press for a criminal conviction and sentence.

Occasionally, a prosecutor who is indisposed to exercise discretion favorably will profess to have none. Defense counsel faced with an unbudging protestation that the prosecutor's "hands are tied" may find it useful to write a short letter or memorandum to the prosecutor demonstrating that they are not (*see, e.g., Bond v. United States*, 134 S. Ct. 2077, 2092-93 (2014); *United States v. Lovasco*, 431 U.S. 783, 794-95 & n.15 (1977); *Bordenkircher v. Hayes*, 434 U.S. 357, 364-65 (1978); *United States v. Batchelder*, 442 U.S. 114, 123-25 (1979); *Rummel v. Estelle*, 445 U.S. 263, 281 (1980); *United States v. Goodwin*, 457 U.S. 368, 380 & n.11 (1982); *Wayte v. United States*, 470 U.S. 598, 607-08 (1985); *Ball v. United States*, 470 U.S. 856, 859 (1985); *McCleskey v. Kemp*, 481 U.S. 279, 311-12 (1987); *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 807 (1987); *Town of Newton v. Rumery*, 480 U.S. 386, 396-97 (1987) (plurality opinion); *cf. Marshall v. Jerrico, Inc.*, 446 U.S. 238, 248 (1980); *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985)), before calling the prosecutor to resume discussions. (This tells the prosecutor nothing that s/he does not already know, but it is a nicer way of pointing out that you also know it than by calling the prosecutor a liar.)

In dealing with the prosecutor, counsel should always have a thorough grip of all the possible lesser charges on the books. Counsel will often find that it is most effective to urge the prosecutor to drop or reduce charges prior to preliminary hearing, since, once the magistrate has bound a defendant over on a charge, there is considerable inertial pressure on the prosecutor to take it to trial. This is especially so when the prosecutor and magistrate are of different political parties and the prosecutor is required to project a public image of being no less tough on crime than is the magistrate.

Plea negotiation, which may follow unsuccessful attempts to persuade the prosecutor to drop or reduce charges without a guilty plea or other *quid pro quo*, is discussed in §§ 15.8-15.13 *infra*.

8.5. Talking with a Complainant About Dropping the Charges

By law, by police or prosecutorial routine, or by judicial practice, some minor charges are pressed only on private complaint. In these cases particularly,

efforts to persuade the complainant to drop charges are important. But they may also be important in cases in which the offense is prosecuted or the prosecution is continued past the stage of the complaint without formal concern for the complainant's wishes. As a practical matter the complainant's attitude, even in the latter cases, is likely to affect the exercise of prosecutorial discretion.

There is nothing wrong with defense counsel's talking to a complainant about dropping the charges, so long as counsel is honest and not overbearing. *See, e.g.*, N.Y. County Lawyers' Ethics Opinion 711, N.Y. LAW J., Aug. 21, 1996, at 2, col. 3 (*available at* https://www.nycla.org/siteFiles/Publications/Publications486_0.pdf) (a defense attorney may "ask[] the complaining witness to request the prosecution to drop the charges," as long as counsel does not "bully" or lie to the witness or "seek to advise the complaining witness as to whether the benefits of dropping the charges outweigh the benefits of going forward"). It is usually a good idea to have a reliable witness present during the discussion, or unfounded charges against counsel may later be made.

In cases in which the complainant appears sympathetic, the damaging effect of the prosecution on the defendant's record or the harshness of the possible penalty may be mentioned. When guilt is clear, offers of restitution will frequently satisfy complainants who have suffered property loss as a result of minor offenses. With the client's consent these offers may properly be made.

8.6. *Offers to Cooperate with the Police or Prosecution*

The police or the prosecution will sometimes offer a client the opportunity to "cooperate" by testifying against accomplices in exchange for dismissal or reduction of charges or in exchange for a recommendation of leniency to the trial judge. Such an arrangement should rarely be made with the police. Unless the prosecutor is brought in, counsel should decline to discuss it.

In evaluating an offer to which the prosecutor is a party, counsel must be sure to learn the nature of the evidence that the prosecution has against the client or else s/he may buy a bad bargain. Some prosecutors use cooperation offers to "break" multi-defendant cases that they cannot prove against *any* of the defendants; therefore, counsel should ask to see the police reports or the witnesses' statements establishing the client's guilt before counsel discusses "cooperation."

There are basically three kinds of promises that the prosecution can make:

- (a) An immunity grant under an applicable immunity statute or "state's evidence" statute is legally binding and can be relied upon to protect the client.
- (b) An informal promise by the prosecutor not to prosecute or not to press certain charges is only as good as the prosecutor's word.

- (c) The promise of a favorable sentencing recommendation by the prosecutor is not even that good, since judges in most jurisdictions are free to ignore the recommendation.

The third kind of promise should never be accepted without inquiry of experienced criminal lawyers in the area who know the judge or judges (and, often, then only if the prosecutor can assure counsel that the case will be brought on for sentencing before a particular judge). Neither the second nor the third kind of promise should be accepted without a basis for trust in the prosecutor. Local statutes should be studied to see whether the bargain can be cast in a mold that brings it within the scope of a legally enforceable immunity provision. The prosecutor should also be asked what s/he can do to assure the client against retaliation by co-defendants: for example, an arrangement that they be committed to an institution other than the client's; or an arrangement for the client's formal admission into a witness protection program.

After counsel has learned exactly what is expected of the client and what the client will receive, and after counsel has decided how good the bargain is, s/he should explain it to the client. The contingencies in the promised benefits (particularly those relating to sentencing recommendations) should be very carefully pointed out. Counsel should also warn the client of the possibility of recrimination by other prisoners if the client testifies against a co-defendant, even though the client and co-defendant are sent to different institutions. Ultimately, the decision must be the client's. Advising the client in the matter involves many of the same considerations involved in advising a client whether to accept a negotiated plea. See §§ 15.14-15.17 *infra*.

The final agreement with the prosecutor should specify precisely the proceedings in which the client is required to testify and should not leave unclear the scope of the client's obligations in the event that proceedings against the co-defendant later take varying twists (for example, prosecution of the co-defendant on multiple charges involving separate trials; re prosecution of the co-defendant following reversal of an initial conviction). See *Ricketts v. Adamson*, 483 U.S. 1 (1987).

Chapter 9

Defense Investigation

A. General Aspects of Defense Investigation

9.1. Introduction: Scope of the Chapter

Hang out for long with experienced defense attorneys and you will hear this story about the seventy-year-old indigent drunk-and-disorderly recidivist appearing for arraignment in front of a judge who had sent him to jail half-a-dozen times in the past. “As you know, Sam,” the judge tells him, “if you can’t afford to hire yourself a good defense lawyer, I can assign you one cost-free.” “Thanks,” says Sam, “but if it’s all the same to Your Honor, this time I’d rather you assign me one or two good defense witnesses.”

Believable facts are the fuel that drives criminal defense work. Factual information is always counsel’s most vital resource, not only in litigating the case at trial but in performing every other crucial defense function: – urging the police or prosecutor to drop or reduce charges, negotiating a plea bargain with the prosecutor, advocating a favorable sentencing disposition to a probation officer or a judge.

Investigation is counsel’s principal means for obtaining and vetting the information s/he needs. Although there are other fact-gathering tools – formal discovery proceedings (see Chapter 18); motions practice (see Chapter 19); plea-bargaining discussions (see Chapter 15); informal interchanges with a prosecutor (see § 7.2.2 *supra*) – they tend to be less reliable and comprehensive than independent defense spadework: meticulously searching the streets, paper and electronic files and records, and the internet.

One key component of defense investigation, the interview with the client, is discussed in Chapter 6. The following aspects of investigation are discussed in the present chapter: locating and interviewing defense witnesses (§§ 9.7-9.11 *infra*); interviewing and taking statements from prosecution witnesses (§§ 9.12-9.16 *infra*); observing the scene of the crime and other relevant sites (§ 9.5 *infra*); and gathering documents and exhibits (§§ 9.17-9.20 *infra*). An additional form of investigation – the retention of expert consultants to look into aspects of a case that may have forensic-science angles – is discussed in Chapter 30.

9.2. Using the Defense Theory of the Case to Guide the Investigation

Section § 7.2 *supra* describes a process for counsel’s developing a defense theory of the case and using it to guide investigation. Because counsel’s time and resources are not unlimited, the investigation must be selective – often painfully so. A well-considered theory of the case provides the basis for efficient selectivity and thoughtful assignment of priorities.

In most cases, one single issue or a very few issues should stand out as having paramount importance. The prosecution must prove all of the elements of the crime it has charged, but the defense needs to do nothing more than defeat one of those elements. It is seldom profitable to take on more than one or, at most, a couple. The defense should aim at the few weakest points in the prosecution's case or at the few strongest points in the defendant's defense.

As § 7.2 also suggests, however, counsel must avoid premature fixation on his or her initial defense theory. While searching for facts to support that theory, counsel must be alert to those that do not and to facts that suggest a preferable theory. Counsel's best investigative strategy will be to go first to the sources that are most likely to contain information relevant to his or her preliminary, working theory of the case; but in exploring those sources, s/he should collect all other information potentially germane to the case that can be gathered from the same or nearby sources with relatively little additional time and effort. Counsel must constantly re-evaluate the information s/he has thus far gathered and determine whether to stay on the same track or switch to a new one. By keeping his or her eyes open and plans flexible as s/he excavates the locations of most likely paydirt, s/he may find unexpected nuggets that call for digging in new directions. Counsel must always have priorities but be willing to change them.

9.3. *Starting Promptly and Preserving Perishable Evidence*

Counsel's first priority should be to establish a rational order of priorities. To do this, counsel must get a quick picture of the case in broad outline. In addition to interviewing the client to obtain his or her version of events, counsel will need to learn the essence of the prosecution's version. Because the discovery process described in Chapter 18 may take some time to launch, and because most police officers are reluctant to talk with a defense attorney or investigator, the most effective technique for rapidly uncovering the prosecution's basic version of events is usually to go to the police station and obtain a copy of the incident report filled out by the police at the time the complainant first called in about the crime (see § 9.20 subdivision one *infra*) and/or the arrest report filled out when the defendant was apprehended (see § 9.20 subdivision two).

A quick start is essential in investigation. Physical evidence and human memory deteriorate rapidly. An object of importance may be discarded or carried off by persons unknown. Witnesses may disappear or forget. Particularly in urban areas, individuals are highly mobile. They may go away suddenly and leave no trace. Or if they remain in the area, they may soon blend into the neighborhood, becoming impossible to locate as their principal identifying characteristic – proximity to the offense or arrest – dissolves. If and when they are ever found again, they may be useless as witnesses because they have forgotten crucial details.

It is especially important to move quickly in tracking down and speaking with alibi witnesses. Alibis depend critically upon the witness's having a detailed recollection of what s/he and the defendant were doing at a precise point in

time. Since often those activities will be quite ordinary, such as hanging out on a street corner, even the slightest delay on counsel's part can cause uncertainties to creep in. After a couple of days, and certainly after a couple of weeks, the witness will no longer be certain whether a street-corner conversation with the defendant took place at, for example, 9 p.m. or 9:10. And the entire alibi could depend on that ten minute difference if the distance between the scene of the crime and the location of the conversation could be traversed in ten minutes. There are certain techniques the defense can use in jogging alibi witnesses' memories and preserving alibi evidence, see § 39.26 *infra*, but the best technique is to get to the witness while his or her memory is fresh.

Before presenting an alibi theory at trial, defense counsel will have to make a rigorously critical review of the credibility of the testimony supporting that theory. Alibis are often difficult to sell to a judge or jury. But counsel should not allow initial skepticism regarding a client's claim of alibi to dampen or delay thoroughgoing investigation of potential alibi witnesses. See *Stitts v. Wilson*, 713 F.3d 887, 893 (7th Cir. 2013) ("When a defendant's alibi is that he was at a nightclub at the time of the shooting, where there are presumably many people, we cannot fathom a reason consistent with Supreme Court precedent that would justify a trial counsel's decision to interview only a single alibi witness without exploring whether there might be others at the venue who could provide credible alibi testimony. There is simply no evidence in the record to suggest that exploring the possibility of other alibi witnesses 'would have been fruitless' under these circumstances."). See also, e.g., *Rivas v. Fischer*, 780 F.3d 529, 531, 532-33, 550 (2d Cir. 2015) (when the chief medical examiner "changed his estimate as to the time of death six years after the fact, seemingly on the basis of no new evidence," to a time when the defendant "had an incomplete alibi," "any reasonable attorney . . . [would have] conclude[d] that investigating the basis of [the medical examiner's] new findings was essential," and therefore defense counsel's failure to investigate further violated his "'duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary'").

Counsel's other top priorities when starting the investigation should be to locate and preserve contact with items or information sources that are perishable: – physical objects that are mobile or changeable; witnesses who are mobile or imprecisely identified but related to some specific location at a recent point in time; witnesses whose involvement is such that they may forget if not questioned quickly. Counsel should move on these items as rapidly as s/he can. This is so not only because of the risk of irreparable losses but also because early investigation makes the most efficient use of counsel's limited resources: an hour's search while the track is warm may be worth days later. Once a reasonable effort has been made to find the known perishable items, counsel should evaluate everything s/he has, estimate the points of strength, and proceed with further investigation to consolidate them.

9.4. Use of an Investigator

Whether counsel should hire an investigator or conduct the investigation personally will depend in part upon the financial resources available

to the defense. If the defendant is indigent, counsel can request state funding for investigative services. State statutes and rules commonly provide for such funding. *See, e.g., Kimminau v. Avilez*, 2014 WL 5507295 (Ariz. App. 2014); *Johnny S. v. Superior Court*, 90 Cal. App. 3d 826, 153 Cal. Rptr. 550 (1979). Insofar as they do not, or to the extent that they fall short of providing the amount of funding needed by the defense, counsel can invoke the constitutional doctrines surveyed in §§ 5.2-5.3 *supra*, as the basis for requesting adequate investigative support. *See, e.g., State v. Wang*, 312 Conn. 222, 245, 92 A.3d 220, 235 (2014); *State v. Second Judicial District Court*, 85 Nev. 241, 453 P.2d 421 (1969); *Staten v. Superior Court*, 2003 WL 21419614 (Cal. App. 2003); *Mason v. Arizona*, 504 F.2d 1345, 1351-52 (9th Cir. 1974) (dictum); and *cf. Hinton v. Alabama*, 134 S. Ct. 1081, 1083, 1085, 1088 (2014) (per curiam); *Stubbs v. Thomas*, 590 F. Supp. 94, 99-102 (S.D.N.Y. 1984). Procedures for seeking state funding are discussed in § 5.4 *supra*.

An investigator is recommended, when practicable, for several reasons. Money spent to hire an investigator is usually economically spent, since an investigator's time is less costly than counsel's. Counsel does, or will, have other things to do in the case that can be done only by a lawyer, which may occupy counsel at times when investigative needs are critical. A good investigator also has sources of information unavailable to all but the most experienced defense lawyers in a locality – community contacts, official contacts (acquaintances in the police department, prison records department, probation department, and so forth), and contacts with other professional fact gatherers (news reporters, social workers, bail bondsmen, local politicians and their staffers). An investigator can be called to testify if any conflicts arise between the stories given by witnesses at trial and the stories they previously gave in an investigative interview, whereas judges usually have discretion to refuse to allow a lawyer to take the witness stand in a case in which s/he is appearing as counsel. And, if counsel decides that photographs or recordings are necessary for the defense, a person other than counsel will have to take them and be available to testify to lay a foundation for their admission into evidence, should the prosecutor not stipulate to their authenticity and accuracy.

Intelligent use of an investigator, however, requires thoughtful attention by counsel. Counsel must explain the case and the initial theories of the defense fully to the investigator at the outset and must inform the investigator periodically of counsel's current thinking in order to avoid squandering defense resources in the collection of useless information. Frequent, regularly scheduled check-ins by phone ordinarily serve this purpose best; most of the time, they can be kept brief.

If counsel is practicing in a jurisdiction that permits the prosecutor to obtain notes of interviews of witnesses who testify at trial for the defense, counsel will need to explain to the investigator the reasons for refraining from taking notes when interviewing defense witnesses and for reporting orally to counsel about the content of the interviews. *See* § 9.11 *infra*.

9.5. *The Importance of Personally Observing the Scene of the Crime and Other Relevant Sites*

Whether or not counsel uses an investigator, it is usually wise for counsel personally to inspect the site of any important event in the case: – the offense, the arrest, a search and seizure. Although counsel will be principally looking for specific items, s/he will often perceive others that put a whole new complexion on the case – items having a significance that would escape anyone but counsel. Frequently, for example, at the time of trial, when a prosecution witness is testifying about events in detail not previously known to the defense, it becomes apparent to counsel who has been at the scene – and only because s/he has been at the scene – that the witness is mistaken or confused on matters of spatial relations. (A witness who, on direct examination, has carefully drawn a diagram of an unobstructed street corner can be quite visibly flustered by the question on cross-examination whether there is not, in fact, a substantial construction barrier on that corner.) Where necessary, counsel should seek a court order for access to a crime scene that is not otherwise available to counsel. *See, e.g., State in the Interest of A.B.*, 219 N.J. 542, 547, 554, 561, 99 A.3d 782, 785, 789, 793 (2014) (the trial court did not “abuse[] its discretion by entering a discovery order allowing the accused, his attorney, and his investigator to inspect and photograph specified areas of the alleged victim’s home for no more than thirty minutes in the presence of a prosecutor’s investigator”; “The right to the effective assistance of counsel in a criminal proceeding includes the right to conduct a reasonable investigation to prepare a defense.”; “a defense attorney’s visit to the scene of the crime is a rather ordinary undertaking, and in some circumstances, such an inspection might constitute a professional obligation. . . . The State generally will have thoroughly investigated a crime scene, securing evidence and taking photographs. Familiarity with a crime scene may be essential for an effective direct or cross-examination of a witness – and even for presenting exculpatory evidence.”; “The [trial] court issued the inspection order only after carefully weighing the . . . [juvenile defendant’s] fair-trial rights and [complainant] N.A.’s privacy interests and imposing reasonable time and manner restrictions.”).

It is also helpful in many cases for counsel to participate in a re-enactment of pertinent events, such as a search-and-seizure episode in which the client claims that the police barged through an apartment doorway without knocking, whereas the police will expectably claim that they knocked and saw illicit activities inside when the door was opened. By playing the role of a police officer in this situation, counsel can become dramatically aware of physical restrictions on the witness’s field of vision that may break the officer’s testimony wide open on a motion to suppress. Of course, counsel should be sure that the scene has not undergone changes between the time of the critical events and that of counsel’s visit. And re-enactments should not be undertaken, if avoidable, in places where the public or the police can watch the replay.

9.6. *Enlisting the Aid of the Client’s Family*

Counsel should consider whether the client’s domestic partner, parents, siblings, or members of the client’s extended family can play a useful role in

finding witnesses or leads. In talking to such family members, counsel should explain the importance and difficulty of thorough investigation and the help the family can render in this regard.

Additionally, if the defendant is in custody, the family should be encouraged to visit the client in order to keep up his or her morale as s/he awaits trial. Counsel also may want to have the family make efforts to persuade the client's employer not to fire the client or, if the client has already lost that job as a result of arrest, to find the client a new job in anticipation of the possibility that his or her prospective employment status will become a significant sentencing factor in the event of a conviction. (Counsel discussing these matters with family should take care not to convey the impression that s/he expects the client to be convicted. S/he can avert that impression by adopting a tone along the lines of *we don't know at this point how the case may turn out, but it's always a good idea to prepare for all possible outcomes including a worst-case scenario.*)

B. Locating and Interviewing Defense Witnesses

9.7. *The Need to Interview Any Witnesses Whom the Defendant Wishes to Call*

As explained in § 9.2 *supra*, counsel will ordinarily determine the order and scope of the defense investigation, and which witness interviews have priority, in accordance with counsel's theory of the case. The one exception to this rule is that counsel must talk with any witnesses whom the client requests be interviewed, however tangential they may appear to counsel. Notwithstanding counsel's belief that these witnesses are unimportant, counsel may be wrong. Moreover, every client is entitled at least to the small comfort that his or her lawyer does not disbelieve the client without fair inquiry. Finally, failure to look for witnesses named by the client is, perhaps, the most frequent ground of post-conviction attacks against the competence of trial counsel. *See, e.g., Cannedy v. Adams*, 706 F.3d 1148, 1159-62 (9th Cir. 2013). *See also Mosley v. Butler*, 762 F.3d 579, 587-88 (7th Cir. 2014). Accordingly, counsel should make efforts to find the witnesses and, if the witnesses cannot be located, inform the client of that fact and also make notes of counsel's efforts to find them and of the conversation with the client. If counsel succeeds in finding the witnesses but decides, after talking with them, that they have nothing useful to say or are unconvincing, counsel should discuss these matters with the client and make a file note both of the reasons for counsel's conclusions and of the discussion of them with the client. *See* §§ 1.3, 6.6 *supra*.

9.8. *Locating Witnesses*

Primary sources for identifying and locating witnesses include the defendant, his or her family and friends (and their phones and handhelds), the police, the prosecutor, news media and their reporters, social media, and various websites. If these provide inadequate leads, counsel must resort to visiting the scene as quickly as possible and contacting any person who might be connected with the incident to inquire who knows or saw anything relevant. This aspect of defense investigation is time-consuming and often

frustrating. Its importance, however, cannot be emphasized enough.

Counsel should always ask any person interviewed whether other witnesses were present and then get the fullest possible description of them. When identification is by name, the spelling of the name and its phonetic spelling should be taken, if possible. The more kinds of contact information counsel can obtain for each witness – street addresses, phone numbers, email and e-text addresses, website and social media logos – the better. Counsel should ask whether the witness has any aliases or nicknames; where the witness lives or lived; where s/he works or worked; whether s/he is on public assistance and, if so, where s/he collects checks, food stamps, or any other regular source of income; whether s/he belongs to a union or frequents a hiring hall and, if so, which one; where s/he “hangs out” and with whom; whether s/he has a girlfriend or boyfriend, and where that person lives; whether the witness plays the numbers or gambles in some other manner and where; whether s/he has ever been in prison, been arrested, or been in the military.

In trying to locate a witness when only the witness’s name is known, checks should be made of on-line resources, electric and gas companies, voting registrations, tax assessment records, traffic courts, the Department of Motor Vehicles, credit card companies, credit-rating bureaus, hospital and department store billing records, probation and parole departments, the Veteran’s Administration, the Department of Public Welfare, and the Social Security Office. If the neighborhood is known as well, counsel should also check local social work agencies, settlement houses, churches, finance companies, debt-collection agencies, employment agencies, labor union offices and hiring halls, political ward leaders, liquor stores, bars, and the precinct station.

If the crime took place in a public area (on the street or in the lobby or the hallway of a building), it is often productive to go door-to-door to every store front, house, and apartment or room that abuts or overlooks the scene of the crime. This canvassing technique will usually produce witnesses who were in a position to see the crime or events immediately preceding or following it. Counsel also should check whether any CCTV or other electronic surveillance equipment covers the location. If so, counsel should take steps to examine the recordings as soon as possible and, if they look helpful, to obtain copies. Here again, time is of the essence: Many surveillance devices do not retain recordings for more than 24 or 48 hours.

If the scene of the investigation is a low-income or working-class neighborhood, counsel and/or the investigator should dress in casual clothes. Dressing in a suit may make the attorney or investigator look like a plain-clothes police detective or probation officer, thereby ensuring that no one on the street will talk to him or her. It is often very effective to have the defendant or one of his or her relatives or friends accompany counsel or the investigator, to demonstrate that counsel or the investigator has benign intentions and to introduce counsel or the investigator to contacts on the street.

9.9. *Keeping Track of Witnesses*

Having located and interviewed defense witnesses, counsel should be sure to gather the information necessary to keep track of them in the event that they change their residence address and/or telephone number prior to the trial date. Although counsel may have decided provisionally that particular individuals will not be called as witnesses (because their information is not helpful or because their appearances, backgrounds, or uncertainty of recollection leaves them too susceptible to discrediting cross-examination), it is rare that counsel can predict all the future contingencies that may make it necessary to call any individual as a witness after all. It is wise to keep tabs on every witness interviewed who knows anything about the case.

In interviewing the witness, counsel should ask for not only (a) the witness's current contact information – street address, land and cell phone numbers, email and e-text addresses, website and social media logos, place of employment – but also (b) any plans the witness may have to move, and when and where, and (c) in any event, the full range of contact information for other persons through whom s/he can be reached when needed. The rapport-building preliminary conversation described in § 9.10 *infra* lends itself naturally to a discussion of the witness's interests, hobbies, work and leisure activities; if counsel makes notes of these, it may be possible to use the information to track the witness down in the event that s/he changes his or her address and phone number.

9.10. *Interviewing Defense Witnesses*

Counsel (or the defense investigator) should ordinarily begin any interview of a witness by identifying himself or herself as the attorney (or attorney's investigator) for the defendant. Counsel (or the investigator) should show the witness some form of identification.

Then it is usually advisable to engage the witness briefly in some topic of casual conversation to put the witness at ease and establish rapport. The choice of topic will depend upon the witness and upon counsel's (or the investigator's) own style. If the defendant is in custody, and the witness is a relative or friend of the defendant, the witness will usually be eager to hear about the defendant's health and emotional state, and this topic can serve as an effective ice-breaker. If the witness is a stranger to the defendant, counsel will need to come up with some topic that the witness and counsel have in common: photographs, trophies, and posters on the witness's wall may suggest hobbies or interests about which counsel can speak knowledgeably. Of course, if counsel is ignorant of the subject matter or if such casual conversation is not consistent with counsel's personal style, s/he should skip these rapport-building devices. Visibly artificial attempts at striking up a conversation are often worse than jumping immediately into the business at hand.

Frequently, counsel will need to overcome a witness's reluctance to talk. The witness may be unwilling to "get involved" because s/he is queasy about what s/he will have to do as a witness or because s/he is worried about

the degree of inconvenience it will entail. Counsel will need to overcome this reticence by an effective pitch of some sort. One argument that sometimes works is to stress the importance of the witness's giving information, since s/he is the only one who has it and the client's liberty is at stake. Counsel can also say that the right thing for the witness to do as [a member of defendant's family] [a friend of the defendant] [a neighbor of the defendant] [a citizen] [or whatever], is to step up and tell counsel whatever s/he knows; and that if the witness were, unfortunately, placed in the predicament of counsel's client, s/he would expect others to come forward. If all else fails and counsel believes the witness has important information, counsel can subpoena the witness and hope that the witness will talk to counsel prior to trial. However, this should not be done – except in an otherwise altogether hopeless case – if the prosecutor is probably unaware of the witness and if there is a substantial chance that the witness's story will be damning.

The basic three-stage interviewing process sketched in § 6.8 *supra* is usually effective in taking a witness's story. In addition, counsel should ask every witness whether the witness has discussed the case with anyone else, with whom, and what was said. Particular care should be taken to have the witness describe in detail what s/he has told the police and any prosecution agents to whom s/he has spoken, what they said, and what specific questions they asked. The line of questioning pursued by these investigators often gives counsel valuable insights into the opposition's theory of the case, as well as leads to areas and sources of information that the defense would not otherwise hit upon.

Just as counsel must cross-examine his or her client, when interviewing the client, so s/he must cross-examine other witnesses. This has several purposes: to dig out the truth – and in detail – as an aid to counsel's further investigation; to evaluate the witness's potential contribution to the defense if called to testify at a trial; and to educate and prepare the witness for cross-examination by the prosecutor. The latter two purposes can generally be served at a subsequent interview; therefore, unless the first purpose is compelling, counsel may be advised to forego too vigorous cross-examination in an initial witness interview. Counsel stands to gain considerably by being in the witness's good graces, and it makes no sense to anger the witness unnecessarily by pressing the witness hard before favorable relations are established. If a witness finds it an uncomfortable or unpleasant experience to be interviewed by counsel, the witness will not be readily available for subsequent interviewing and may even shade his or her story so as to discourage counsel from calling him or her at trial. The approach to cross-examining one's client suggested in § 6.14 *supra* – describing the questioning as a role play or dry run of the cross-examination that the prosecutor might conduct at a trial – is also a useful device for asking other potential defense witnesses the probing questions that are necessary to test the durability of their stories without implying that counsel personally has any doubts about their truthfulness.

If cross-questioning shakes a witness (or may leave the witness feeling shaken) but counsel concludes that the witness's story is nevertheless sufficiently solid to be potentially useful to the defense, counsel should follow up with some supportive questioning that will assist the witness to regain a warranted

measure of confidence and should end by reassuring the witness that the witness is doing just fine. Counsel should never let a witness leave an interview feeling that his or her story has been demolished or disbelieved unless, in fact, counsel is convinced that the story is a fabrication. Minor inconsistencies and errors that counsel realizes are unimportant because they are perfectly natural and will not seriously impair the witness's credibility may nevertheless cause a legally unsophisticated witness to experience painful self-doubts. Unless those doubts are assuaged by some comfort from counsel at the end of the interview, the witness is likely to dwell on them following the interview, and the witness's story is likely to become weaker, more hesitant, and more heavily qualified than it needs to be or should be.

9.11. *Refraining from Taking Written Statements of Defense Witnesses or Taking Verbatim Interview Notes in Jurisdictions Where They Are Discoverable by the Prosecution*

In some jurisdictions, the prosecution can obtain court-ordered discovery of written statements that defense counsel or a defense investigator obtains from defense witnesses and (less frequently) even the attorney's or investigator's notes of oral statements taken from defense witnesses. See §§ 18.11, 34.7.2 39.4 *infra*. The statements and notes can be used by the prosecutor both to impeach the witnesses' testimony at trial and more generally to guide prosecution investigation aimed at refuting the defense case. Accordingly, defense attorneys in these jurisdictions should ordinarily refrain (and instruct investigators to refrain) from taking written statements of defense witnesses or taking notes during the interview of a defense witness.

Section 18.13 *infra* suggests that the information given by the witness can usually be preserved (to assist counsel to remember it and possibly for the purpose of refreshing the witness's recollection later), with minimum risk of prosecutorial discovery, by recording the information in a "strategy memorandum." Particularly if this is done by counsel rather than by counsel's investigator, the contents of the memo are likely to be insulated from discovery as "attorney work product." Whenever counsel conducts an interview personally, s/he should record the information in such a strategy memorandum, interweaving legal theories and strategic considerations with the information obtained from the witness. If a defense investigator conducts the interview, s/he should be instructed to report the content of the interview orally to counsel so that counsel can record the information in a strategy memorandum. The concluding paragraph of § 6.7 *supra* suggests a technique for writing the memo so that counsel can later identify the passages in it that are verbatim transcriptions of the witness's own words – the passages that are simultaneously most useful for defense trial preparation and most susceptible to prosecutorial discovery – but a judge examining the memo on the prosecutor's motion will probably not be able to segregate and disclose those passages.

C. Interviewing and Taking Statements from Adverse Witnesses

9.12. *The Unique Aspects of Interviewing Adverse Witnesses*

Many of the investigative techniques that have been described in connection with defense witnesses will also prove effective in dealing with adverse witnesses. The methods described in § 9.8 *supra* for tracking down witnesses, in § 9.9 for keeping tabs on witnesses, and in § 9.10 for interviewing witnesses will ordinarily be useful, whether the interviewee is a potential defense witness or a potential prosecution witness.

The primary difference in dealing with potential prosecution witnesses is that counsel will usually want to take a written statement from all such witnesses, or, if the witness refuses to give counsel a written statement, counsel will want to take verbatim notes of what the witness says. Techniques for taking such statements and notes are described in § 9.13 *infra*. (Unlike defense-friendly witnesses, potential prosecution witnesses are not likely to be willing to write out a statement in longhand.) There are additional considerations when the adverse witness is a police officer (see § 9.15 *infra*) or a co-defendant or uncharged co-perpetrator (see § 9.16 *infra*). Finally, there are special steps that counsel will need to take and possibly motions to file when an adverse witness reports that s/he has been instructed by police or prosecutors to refuse to talk with the defense. See § 9.14 *infra*.

9.13. *Taking Statements from Adverse Witnesses*

9.13.1. *The Reasons for Taking Statements*

In interviewing prosecution witnesses, the defense has two central goals: (i) to learn facts about the prosecution's case that will enable counsel to pinpoint weaknesses and develop rebuttal evidence; and (ii) to elicit statements from the witness, at a time when s/he has probably not yet been coached by the prosecutor (or at least has not been extensively coached), which can be used to impeach the witness at trial.

The best way of nailing down the witness's statements for use as impeachment material is to record what s/he says in a written document signed by the witness. S/he will have a hard time credibly disowning the making or the details of statements s/he has signed, and an even harder time if s/he has handwritten the statements.

Section § 9.11 *supra* advises counsel ordinarily not to take written statements from potential defense witnesses because they are susceptible to court-ordered discovery by the prosecution. Taking written statements from a prosecution witness usually presents no such risk because most jurisdictions' pretrial discovery rules provide that the prosecutor can obtain statements only of those witnesses whom defense counsel intends to call to testify in the defense case-in-chief at trial. There are a few jurisdictions that extend the prosecution's discovery rights to include statements taken by defense counsel from prosecution witnesses. *See, e.g., Commonwealth v. Durham*, 446 Mass. 212,

843 N.E.2d 1035 (2006). But even in these jurisdictions, it is usually advisable for counsel to take written statements from adverse witnesses because the statement will seldom tell the prosecutor anything that s/he cannot learn directly from the witness, and the impeachment value of a statement made in writing is particularly high.

If counsel is not sure whether a particular individual will turn out to be a likely defense witness or a likely prosecution witness, the safest course of action is to interview the witness initially without taking notes. If it then appears that the witness's story is more damaging than helpful to the defense, counsel can take a written statement.

9.13.2. Arranging To Be Accompanied to Interviews of Adverse Witnesses

Whenever counsel conducts an interview of an adverse witness, counsel will want to bring along an observer (either counsel's investigator or a law partner or some other employee). This "shotgun rider" serves two principal functions. First, s/he will be available to testify concerning what the adverse witness said, should occasion arise for the defense to impeach that witness with a prior inconsistent statement. Second, the "shotgun rider" can protect counsel against possible charges of berating, overbearing, or attempting to corrupt the witness.

9.13.3. Techniques for Taking a Written Statement; Contents of the Statement

The preliminary procedures for identifying oneself and attempting to build rapport, described in § 9.10 *supra*, should be used in interviewing potential prosecution witnesses. The identification of counsel (or counsel's investigator) is essential to ward off a witness's claiming at trial that the interviewer misrepresented himself or herself as working for the police or the prosecutor's office. Establishing some degree of rapport – some human connection between interviewer and witness – is important, if at all possible, in order to break through the witness's reluctance to talk with someone "from the other side" and the witness's almost inevitable disinclination to sign a document proffered by a stranger.

Once counsel (or the investigator) has established as much rapport as seems likely on a first contact, s/he should go through the witness's version of the facts once without taking a statement or even mentioning the possibility of a written statement. Having heard the story once through, counsel should then ask the witness to go through the story once more, and while s/he does so, counsel or the investigator should write up the witness's account in narrative form in a multi-page statement. The three-round format for fact-interviewing, described in § 6.8 *supra*, lends itself nicely to the interviewing of an adverse witness. The first round, in which the witness tells the story in his or her own words, is conducted without anything being written down. The second round, in which counsel goes through the witness's statement in detail, is the stage at which counsel (or the investigator) will simultaneously

write down what the witness is saying. And, during the third round, as counsel asks the witness for additional details and clarification, counsel (or the investigator) can make corrections and additions to the written statement.

The statement should begin with a formal heading containing wording such as the following:

This is the statement of [name of witness], date of birth _____, given to [names of counsel or investigator and of any other individual who accompanies the interviewer], on [date and time of statement] at [location where the statement is given, such as “the living room of my apartment, 250 Main Street, apartment 4W”].

I have been told by [name of counsel or investigator] that [he or she] is working for the defense of defendant, [name of defendant], who has been charged with committing an offense on [date of offense] at [location of offense].

The body of the statement should be written in the first person singular, since it will be signed by the witness himself or herself. It should be written in the witness’s own vernacular: Counsel (or the investigator) should faithfully record any grammatical errors or slang terms rather than damaging the statement’s accuracy by correcting the witness’s speech.

The statement should be written out in narrative form, in full sentences and paragraphs. Every other line should be skipped so that there is room for corrections by the witness. The pages of the statement should be consecutively numbered so that it will be impossible for the witness to claim later that counsel or the investigator added or deleted pages.

When counsel (or the investigator) has finished writing the statement, s/he should read the statement aloud to the witness, sitting next to him or her and allowing him or her to read along as counsel (or the investigator) reads aloud. The witness should be invited to make any additions, deletions, or corrections that s/he wishes, and every alteration of this type should be initialed by the witness. As each page is completed, the witness should be asked to initial the bottom of the page.

When the entire statement has been read aloud, the witness should be asked whether s/he has anything to add or correct, and any such additions or corrections should be made. Then counsel (or the investigator) should write a concluding paragraph with wording such as the following:

I have read this [number of pages in the statement]-page statement and have had it read to me by [name of counsel or investigator]. I have also had the opportunity to make all of the additions, deletions, and corrections I desired. To the best of my knowledge, this statement is accurate, correct, and complete.

The witness then should be asked to sign the statement on the line immediately

below the concluding paragraph and to record the date of the signature.

9.13.4. *Alternatives to a Signed Statement When the Witness Is Unwilling To Sign a Statement*

As persuasive as defense counsel or the investigator may be, some witnesses will never consent to sign a statement. However, there are some alternatives to a signed statement that are almost as effective for impeaching a witness at trial who strays from the account s/he gave counsel or the investigator.

Even if the witness is unwilling to sign the statement, s/he may be willing to initial each of the pages of the statement as well as all of the corrections. This initialing is, for counsel's purpose, tantamount to a signature, since it evidences the witness's adoption of the statement. Alternatively, the witness who is unwilling to sign or initial anything may be willing to write out in longhand on the statement any corrections that s/he wishes to make to counsel's (or the investigator's) original written version. This too can later be said persuasively to manifest an implied adoption of the whole document as corrected. Counsel can sometimes trigger written corrections by omitting some insignificant details when s/he (or the investigator) first writes out the statement; then, when reading the statement to the witness, recalling those details orally and asking the witness to pen them in briefly.

If the witness is unwilling to sign, initial, or even hand-correct the statement, counsel nevertheless should review the statement with the witness in its entirety and elicit the witness's oral ratification of its accuracy. If the witness is unwilling to orally ratify the statement, s/he should be asked to orally ratify counsel's (or the investigator's) notes. A casual-sounding question (like "Okay, so [what I've shown you here] *or* [what I've read to you] is what you remember, right?"), followed by an affirmative answer from the witness will suffice for impeachment purposes, allowing the defense investigator (or other shotgun rider) to testify that the witness orally ratified counsel's written statement or notes. *Cf. Goldberg v. United States*, 425 U.S. 94, 105, 107-08 n.12, 110-11 & n.19 (1976).

9.14. *Overcoming Prosecution Witnesses' Unwillingness to Talk with an Adversary; Steps to Take If the Witness Says That S/he Has Been Advised by the Prosecutor to Refuse to Talk with the Defense*

With some prosecution witnesses it will be necessary to overcome not only the natural reluctance to speak with a stranger (see § 9.10 *supra*) and whatever animosity the witness may be feeling toward counsel's client, but also a notion that witnesses are forbidden to speak with "the other side." Counsel will need to explain to these individuals that witnesses do not "belong" to one side or the other; that the witness has as much obligation as a citizen to talk to defense counsel as to the prosecution; and that if the witness does not do so, the trial will be unfair. Of course, an unsubpoenaed witness has no *legal* obligation to talk to either the prosecution or the defense (*e.g., United States v.*

White, 454 F.2d 435, 438-39 (7th Cir. 1971)), and counsel must not suggest that s/he has. But the witness's *moral* obligation to tell what s/he knows to the defense, as well as to the police or prosecutor, should be emphasized.

If a prospective prosecution witness continues to refuse to talk to counsel, counsel should ask whether the prosecutor (or a police officer) has told the witness not to talk to the defense. If the answer is yes or if counsel is not satisfied with the truth of a no answer, counsel should call the prosecutor and ask whether any instructions have been given to any witness. If they have, counsel should point out to the prosecutor that the courts have repeatedly held that such instructions violate an accused's due process right to investigate the case. *See, e.g., Gregory v. United States*, 369 F.2d 185 (D.C. Cir. 1966); *United States v. Munsey*, 457 F. Supp. 1, 4-5 (E.D. Tenn. 1978); *Kines v. Butterworth*, 669 F.2d 6, 8-9 (1st Cir. 1981) (dictum), and cases cited; *State v. Simmons*, 57 Wis. 2d 285, 203 N.W.2d 887, 892-93 (1973) (dictum), and cases cited; *see also United States v. Gonzales*, 164 F.3d 1285, 1292 (10th Cir. 1999); *United States v. Carrigan*, 804 F.2d 599, 603-04 (10th Cir. 1986); *Johnston v. National Broadcasting Company, Inc.*, 356 F. Supp. 904, 910 (E.D.N.Y. 1973); *Coppolino v. Helpern*, 266 F. Supp. 930 (S.D.N.Y. 1967); *State v. Murtagh*, 169 P.3d 602, 608, 610-13, 615, 617 (Alaska 2007); *People v. Eanes*, 43 A.D.2d 744, 350 N.Y.S.2d 718 (N.Y. App. Div., 2d Dep't 1973); *State v. Hofstetter*, 75 Wash. App. 390, 395-403, 878 P.2d 474, 478-82 (1994), and cases cited. *See generally* Brad Rubin & Betsy Hutchings, *Blockading Witnesses: Ethical Pitfalls for Prosecutors*, N.Y. LAW J., Dec. 6, 2006, at 4, col. 4. Counsel should add that such instructions clearly violate canons of professional ethics. *See* AMERICAN BAR ASSOCIATION, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 3.4(f) (2015) (except in certain designated special circumstances, "[a] lawyer shall not . . . request a person other than a client to refrain from voluntarily giving relevant information to another party"); AMERICAN BAR ASSOCIATION, CANONS OF PROFESSIONAL ETHICS, Canon 39 (1937) ("[a] lawyer may properly interview any witness or prospective witness for the opposing side in any civil or criminal action without the consent of opposing counsel or party"); AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Standard 3-3.4(h) (4th ed. 2015) ("The prosecutor should not discourage or obstruct communication between witnesses and the defense counsel, other than the government's employees or agents if consistent with applicable ethical rules. The prosecutor should not advise any person, or cause any person to be advised, to decline to provide defense counsel with information which such person has a right to give. The prosecutor may, however, fairly and accurately advise witnesses as to the likely consequences of their providing information, but only if done in a manner that does not discourage communication.").

Counsel then should ask the prosecutor to call the witness immediately and tell him or her that s/he can talk to the defense. Counsel should request that the prosecutor's phone conversation with the witness take place with defense counsel on the phone. If the prosecutor is resistant to this notion, counsel should explain that counsel's inability to independently verify the prosecutor's removal of the taint of the earlier instructions will necessitate counsel's filing a motion for sanctions in order to safeguard the defendant's constitutional right to unimpeded access to witnesses.

Unless the prosecutor gives complete satisfaction, counsel should file a motion with the court of record having jurisdiction of the case. Depending upon local practice, such a motion may be styled like ordinary motions or in the form of an Order to Show Cause. The motion should seek the following alternative forms of relief: (a) dismissal of the charging paper on the ground that the prosecutor's misconduct has so severely interfered with the preparation of the defense that there is no way either of knowing how much harm has been done or of setting it right at this stage; (b) a court-ordered deposition of each of the witnesses with whom the prosecutor or any police officer has discussed the case, so that counsel can ask the questions that s/he would have asked in an investigative interview if not for the prosecutor's interference (*see, e.g., United States v. Carrigan*, 804 F.2d 599, 604 (10th Cir. 1986) (upholding a trial court's order of a deposition: "[a]n order merely to cease . . . [prosecutorial] interference, after the fact, might be insufficient because the witnesses' free choice might have been already perverted and the witnesses likely to refuse voluntary interviews")); or, at least (c) a hearing in which each of the witnesses who has spoken with the prosecutor or any police officer is brought before the court and instructed by the judge that s/he is free to speak to the defense. *Cf.* the procedure approved in *United States v. Mirenda*, 443 F.2d 1351, 1355 n.3, 1356 (9th Cir. 1971); and *see United States v. Vole*, 435 F.2d 774, 778 (7th Cir. 1970) ("[w]itnesses are the special property of neither party and in the absence of compelling reasons, the . . . court should facilitate access to them before trial whenever it is requested").

Of course, counsel may decide that the trouble and friction involved in this procedure are not justified by its likely yield or that at least this course of action should be delayed until counsel sees whether more ordinary discovery procedures (see Chapter 18) reveal what counsel wants.

9.15. Interviewing Police Officers

As explained in earlier sections, it is usually in the defendant's interest for counsel to talk with the police officers on the case as often as practicable. See §§ 8.1.1, 8.1.3, 8.2.4, 8.3.1, 8.3.3 *supra*. These conversations may reveal information that will be useful in preparing for a suppression hearing or trial and may also produce statements that can be used to impeach an officer at a suppression hearing or trial. See § 8.1.3 *supra*. Conversations with officers also may afford opportunities for counsel to persuade them to exercise whatever discretion they may have in the defendant's favor. See §§ 8.21, 8.24, 8.3.3 *supra*. *But cf.* §§ 8.3.3, 8.6 *supra* (explaining that counsel ordinarily should bargain or negotiate only with the prosecutor, not the police).

If a police officer refuses to speak with counsel, counsel should ask why. If the officer indicates that s/he has been instructed not to talk by the prosecutor or by a superior officer or that s/he is following a departmental policy, counsel should file the type of motion described in § 9.14 *supra*, challenging the prosecutor's or police department's interference with the defendant's due process right to investigate the case. Even if the officer's refusal to talk is not the product of prosecutorial or departmental interference and is merely an individual choice, counsel nevertheless may want to seek

a judicial order compelling him or her to tell counsel what s/he knows, on the theory that police officers are not mere private witnesses but are state officials with criminal law enforcement duties and due process obligations (*Curran v. Delaware*, 259 F.2d 707 (3d Cir. 1958)), and hence may no more instruct themselves than they may instruct one another to refuse information to the defense (*cf. Coppolino v. Helpern*, 266 F. Supp. 930 (S.D.N.Y. 1967)).

Even when counsel succeeds in getting a police officer to talk, it is unlikely that counsel will persuade the officer to sign a written statement or even to permit counsel to write out a statement. However, as long as counsel conducts the interview with an investigator or other employee of counsel's present, that individual can serve as an impeachment witness if, at trial, the officer denies the information s/he related to counsel. See § 9.13.2 *supra*. Some officers may also be willing to ratify counsel's notes orally if counsel reads them aloud and asks "have I got that right?" See § 9.13.4 *supra*.

9.16. *Interviewing Co-defendants and Uncharged Co-perpetrators*

It is essential that counsel try to speak with all co-defendants of the client and all uncharged co-perpetrators. Although their version of the events may parallel and support the client's, it is equally likely that co-defendants and uncharged co-perpetrators have turned state's evidence, or may do so in the future, and will end up testifying for the prosecution against the client. In addition, even when co-defendants don't turn state's evidence, they may present a defense at trial that denies their own guilt by placing all of the blame on counsel's client.

Before questioning co-defendants or co-perpetrators, counsel should ascertain whether they are represented by an attorney. If they are, a local rule or ethics opinion may require that counsel obtain consent from that attorney before interviewing his or her client. Even in jurisdictions that have no such rule, counsel should ordinarily follow this procedure as a matter of professional courtesy.

An interview with a co-defendant or co-perpetrator should cover everything s/he knows about the criminal episode and charges and should get a detailed account of everything s/he has said or given to the authorities. Counsel should ask whether s/he has been approached about possibly testifying for the prosecution, and, if so, what s/he has discussed with whom and when. Counsel should take a written statement from each co-defendant and co-perpetrator if s/he will give it. If not, counsel should attempt to get his or her oral confirmation of the accuracy of counsel's write-up or notes of what the co-defendant or co-perpetrator has said. If s/he later testifies against the defendant, s/he can be impeached with a written statement or counsel's memorialization of what s/he said orally. See § 37.4 *infra*. If s/he does not testify, and if counsel wishes to call him or her as a defense witness but is stymied by a claim of the Fifth Amendment privilege, a written or memorialized oral statement may be admissible as an admission against penal interest, provided that counsel has followed the procedures required by local rules or caselaw for taking a statement against penal interest. (These usually

include the requirement that the witness know at the time of the statement that it is against his or her penal interest. Accordingly, counsel or the investigator may need to advise the witness of that fact just before finalizing the statement.)

D. Gathering Police Reports, Other Documents, and Physical Evidence That May Be Needed as Defense Exhibits at a Motions Hearing or at Trial

9.17. *The Need to Gather the Materials, and the Timetable*

Counsel's prospects of prevailing at an evidentiary motions hearing or at trial will usually depend upon the thoroughness with which s/he has sought out and obtained police reports, other pertinent documents, and physical evidence relevant to the case. Police reports containing witnesses' prior statements are often the only way of learning what the prosecution witnesses will say at trial (since many will refuse to talk to counsel), so as to plan an effective cross-examination. These police reports are also indispensable for impeachment purposes. Official documents such as hospital records, Weather Bureau records, and the medical examiner's report in a homicide case are similarly invaluable in planning the defense theory of the case and in cross-examining prosecution witnesses whose stories are at odds with the official reports.

Counsel will need to begin gathering the documents and other materials as quickly as possible. Certain real evidence such as objects dropped at the scene of the crime – or the layout of the crime scene as it was at the time of the crime – is highly perishable and will disappear if counsel does not retrieve it or photograph it quickly. Even less obviously perishable objects may be lost through delay: In some jurisdictions, tape recordings of police radio communications are routinely erased after a certain number of months and the tapes re-used by the police department; private CCTV recordings tend to be destroyed by recycling much sooner, often after only after 24 or 48 hours. Finally, many documents (like police reports, hospital records, school reports, and even court transcripts) may take weeks to acquire; the acquisition process must be started early so that it can be completed in time for trial.

9.18. *Methods for Gathering the Materials*

Some of the materials that counsel will wish to gather are public documents, available for the asking. For example, in many jurisdictions, the initial police report (usually called a “complaint report” or “incident report”) is a public document that can be obtained by simply going to the police station in the precinct in which the crime occurred and paying a nominal fee for photocopying the document.

Most of the documents and exhibits that counsel will wish to gather, however, will need to be subpoenaed. The constitutional and statutory law governing subpoena practice are described in § 29.4 *infra*; the procedures for obtaining subpoenas, in § 29.4.3; and the procedures for serving and enforcing them, in §§ 29.4.5-29.4.7.

Subpoenas for documents, called subpoenas *duces tecum*, are addressed to the custodian of records of whatever agency or entity is in possession of the documents, directing the custodian to appear in court with the original documents on the date of the motions hearing or trial. These subpoenas are ordinarily required to specify with considerable particularity the documents or records sought. In theory the subpoenas *duces tecum* are not to be employed for discovery but only to procure evidentiary matter for use at trial. As a practical matter, however, counsel can often persuade the custodian to permit counsel to inspect the subpoenaed document prior to the beginning of the court proceedings, or counsel may persuade the judge to order the custodian to show counsel the document before court, during preliminary proceedings, or during a recess, in the interest of saving time at trial.

Physical objects and artifacts (including recordings) that are in the possession of law enforcement agencies or officers, government officials, or third parties can also be reached by subpoenas *duces tecum*. If counsel wishes to inspect them or to have them tested by defense experts before trial, a motion for production and inspection should be made. See § 18.7.3 subdivision 1 *infra*.

9.19. Preserving Real Evidence

When counsel obtains a physical object that has evidentiary value in the case, counsel will need to take certain steps to preserve it in its original form and to guard against allegations at trial that the object has been altered.

The object should be retained in the custody of some credible person (an investigator or counsel's administrative assistant will do) under lock and key. The custodian should bag the object and tag it with the name and number of the case to which it relates, and the date and time when the custodian received it and locked it down. S/he can then be called at trial to identify it and to testify that there has been no change in its condition since the time it was first received. Defense lawyers who maintain a strict, routine procedure of this sort for handling evidence will usually find that their reputation for doing so – or a pretrial representation to the prosecutor of counsel's proposed chain-of-custody testimony in the case at hand – will elicit a prosecution stipulation of authenticity and unchanged condition, rendering unnecessary any actual in-court appearance of defense chain-of-custody witnesses.

If the physical condition of any object is important and is subject to change, counsel should have the custodian inspect the object, photograph it, and make a written, signed description of its relevant characteristics at the time of its receipt. One copy of the photograph and of the description should be retained with the object, additional copies in counsel's case file.

At trial, counsel will either have to get an authenticity-and-unchanged-condition stipulation from the prosecutor or present witnesses who trace the chain of custody of the object between the time and place of its acquisition by counsel (or counsel's investigator) and the time and place of its deposit in counsel's locked evidence facility. These witnesses will have to identify the object in the courtroom as the one they handled; they will have to recount

when, where, how, and from whom they received it, and when, where and how they subsequently deposited it in the secure facility or turned it over to the next person in the chain *en route* to the facility; and they will have to attest that the object was not altered while in their possession. For this reason, counsel should, if possible, have the object picked up in the first instance by counsel’s investigator or administrative assistant rather than by counsel personally, since it is undesirable – and, in some courts, forbidden – for counsel to testify. The fewer people who handle the object on its way to the secure facility, the better. In most cases, counsel will also have to present the same kind of chain-of-custody testimony covering the period between the object’s connection to relevant events (the crime scene, or whatever episode the object is offered to document) and the object’s acquisition by counsel. It is wise to have written, signed statements made by all witnesses who will be called to provide this testimony. These statements, too, should be duplicated, and copies kept both with the object in lock-down and in counsel’s file.

If counsel wishes to have tests made of the object or to show it to anyone, counsel should have the custodian deliver the object manually to the tester or person in question, and the custodian should then recover it manually when the test or inspection has been completed. The custodian should make notes of the date, time, place, and recipient of delivery and a similarly detailed record of the object’s return, all to be locked in with the object. This simplifies problems of proving the identity of the object and the lack of change in its condition at the time of trial. If the object is to be left with the tester or person, even briefly, s/he should be instructed (1) not to allow it out of his or her possession until it is recovered by the custodian; (2) to keep it in a secure place, under lock-down, whenever s/he is not actually working with it; and (3) that s/he will very likely be required to testify in court (a) that s/he complied with the preceding two instructions, and (b) that s/he did nothing to impair the object’s probative value while handling it. When an object is to be tested, counsel should also instruct the tester to bag-and-tag it or to make some mark on the object that, while not affecting its probative quality, will allow the tester to identify it at trial as the same object that s/he tested. The expert’s written report to counsel should describe the object and indicate what tag or mark the expert made.

9.20. *Types of Materials to Gather or Generate*

There are as many sources of information as there are different factual situations. Among the most useful to keep in mind are:

Complaint Reports

The complaint report (sometimes called “event report” or “incident report”) is filled out by an investigating officer when the complainant first reports the crime. This document usually contains: identifying information about the complainant (name, street address, phone number, email); a record of the time and location of the crime; the complainant’s description of the crime; the complainant’s or eyewitnesses’ descriptions of the perpetrator(s); and a list of any injuries suffered by the complainant. The complaint report

is extremely useful at suppression hearings and at trial. The complainant's account of the events can be used to impeach the complainant if s/he diverges from this account in his or her testimony. The description of the perpetrator's appearance and attire is usually the only written record of the complainant's and eyewitnesses' descriptions prior to their observing the defendant in a show-up or lineup, and it can be used to impeach these witnesses if they subsequently mold their descriptions of the perpetrator to fit the defendant. Often the description of the injuries suffered by the complainant will contain the name of the hospital that treated those injuries, thereby identifying the hospital to which counsel should direct a subpoena for the complainant's medical records.

Arrest Reports

The arrest report is filled out by the officer who arrested (or assisted in the arrest of) the defendant. This document will identify the defendant by name and physical description (including supposed ethnicity and sometimes apparel) and may also contain some information about the defendant's background (including supposed gang affiliation). The report will be useful in suppression hearings because it often lists: incriminating statements allegedly made by the defendant; property allegedly seized from the defendant; and the precise time of arrest (which serves as a baseline for calculating the length of any interrogations before, during, and after the booking process). If arrest reports in the jurisdiction also contain a factual account of the offense, then counsel should obtain the arrest reports for all co-defendants, since the accounts in those reports will often be inconsistent with the accounts in the defendant's arrest report, and such inconsistencies can be used to impeach the witnesses who gave the accounts to the officers, the officers who prepared the reports, or both.

Recordings of 911 Telephone Calls and Police Radio Communications

If a crime is reported by an emergency phone call to the police (usually called a "911 call"), many police departments record and temporarily store the recording of the telephone conversation between the caller and the police operator. Similarly, if the investigating officers engage in radio communications with the police dispatcher or with each other during the investigation of a case, many jurisdictions record and store recordings of the transmissions. These various recordings can be crucial, since they may contain descriptions of the perpetrator given by the complainant prior to viewing the defendant in a show-up or lineup, or they may demonstrate a sequence of events at odds with the complainant's or police officers' versions of the crime or the police investigation or both. In many jurisdictions these recordings are routinely erased after a designated period of time (in some jurisdictions, three months) and the tapes re-used; accordingly, defense counsel must subpoena them immediately after starting work on the case. *Cf. Freeman v. State*, 121 So. 3d 888, 895-97 (Miss. 2013).

Arrest Photographs

When arrest photographs were taken, these will often be relevant and should be subpoenaed. When length of hair or facial hair is relevant to the description of the perpetrator, a mug shot will often be the best available evidence of the defendant's appearance at the time of the offense. In some jurisdictions the police take full-color photographs; if the defendant was arrested shortly after the offense, these will show the clothing s/he was wearing and can be used at a suppression hearing (to demonstrate inconsistencies with the complainant's description of the perpetrator – and thereby that the police lacked probable cause to arrest – or that the identification procedures were unreliable) and at trial (to argue that discrepancies between the appearance of the perpetrator and the appearance of the defendant on the day of the offense raise a reasonable doubt).

Eyewitness Identification Reports

In some jurisdictions the police prepare special forms whenever an identification procedure is employed, to record the result of the procedure and the precise words used by the eyewitness in identifying (or failing to identify) the defendant. These forms are obviously important in connection with any identification suppression claim and also can be used to impeach the witness at trial if s/he claims a greater degree of certainty or a different basis for recognizing the defendant than is reflected in the witness's words at the time of the pretrial identification.

Forms and Reports for Confessions

If the defendant gave a written statement, it will often be handwritten onto a police form which contains not only the content of the statement but the date and time when it was completed and signed by the defendant, and sometimes also the date and time of the beginning of the interrogation session that produced the statement. The form may also indicate the names and badge numbers of the officers who took the statement. This form – or whatever paper or electronic document the police use to record the statement if not a standard form – is ordinarily invaluable in providing information that counsel needs in order to calculate the duration and circumstances of interrogation as the basis for a suppression motion (see Chapters 24 and 26 *infra*) or for arguing at trial that the statement was made under conditions that render it unreliable. However, counsel should be aware that the times noted on a defendant's written statement may not be accurate: unscrupulous police officers may jiggle them to improve the prosecution case. Some police departments video-record defendants' statements and all or part of the preceding interrogation. See § 26.14 *infra*. Counsel must obtain these recordings by subpoena or discovery; but, once again, s/he will want to be alert to the possibility that the police have been self-servingly selective in recording only portions of their interchanges with the defendant, or that they have doctored the recording *ex post*. If a defendant's incriminating statement was oral and was never put into writing, there will often be notes about its making and contents in the arrest report or in supplementary investigation reports.

Additional Police Reports That Are Filled Out When the Crime Is of a Certain Type

Depending upon the nature of the case, any one or more of the following reports may also exist. These reports frequently contain a factual narrative of the crime that will prove useful at a suppression hearing or trial.

1. In drug possession or sale cases there will frequently be a “buy report” describing the transaction in detail if it was conducted by an undercover officer. There will always be a chemist’s report documenting the nature and weight of the drug and possibly containing a police officer’s description of the circumstances under which the drug came into the officer’s possession.
2. In cases in which the police recover a firearm, there will usually be a weapons report describing the gun and its serial number and also describing any slugs and shell casings that were recovered. There will also usually be a ballistics report describing the results of a test-firing of the gun, reporting whether the gun is operable, and possibly also reporting the results of any tests to match the gun with expended bullets recovered in connection with this case or other cases.
3. In cases in which scientific evidence of the perpetrator’s identity was recovered from the scene of the crime or the putative crime weapon – fingerprints, footprints, body fluids, hairs, clothing or fabric fragments, and so forth – there will usually be (a) reports by evidence technicians describing their collection of the evidence and (b) reports by the relevant police or lab experts describing the degree to which the recovered materials match the defendant’s prints, secretions, hair, clothing, or whatever.
4. In cases of sex offenses there will usually be (a) reports of a physical examination of the complainant, describing physiological indications of forcible intercourse and noting the blood type and/or DNA of any foreign body fluids found on the complainant or the complainant’s clothes, or at the scene of the offense, and (b) serology or DNA reports detailing test procedures used to identify the individual who is the source of these body fluids.
5. If the crime involved a shooting and the defendant is arrested shortly after the commission of the crime, there may be a report of an examination of the defendant’s body or clothing to determine whether s/he recently fired a gun (a “gunshot residue” or “GSR” test).
6. If a complainant was injured, some jurisdictions require that the police fill out a specialized report describing the nature and extent of the injury and of any treatment administered before

the complainant was turned over to hospital or other medical personnel.

7. In homicide cases there will usually be an autopsy report available from the medical examiner's or coroner's office.

Property Reports

These are of two kinds: (a) In many jurisdictions the investigating officers are required to fill out property reports whenever any tangible evidence is recovered from the suspect or from the scene of a crime. If the crime was a serious felony, some police departments dispatch a special "crime scene squad" which will produce its own reports on property recovered from the scene. (b) Whenever a defendant is incarcerated, personal property in his or her possession that is *not* viewed by the police as having evidentiary value is vouchered and stored in the lockup. Listed items on the voucher may have relevance for defense purposes overlooked by the officers.

Police Photographs and Diagrams

The police may have photographs and diagrams of the crime scene and possibly also a police artist's sketch or composite of the suspect. These materials are usually available to the defense only through the discovery procedures described in Chapter 18.

Supplemental Investigation Reports

In addition to the complaint report and the arrest report, one or more supplemental investigation reports may be written up by the detectives or other officers who are interviewing potential witnesses, conducting searches for physical evidence, and/or seeking various sorts of incriminating information. In heavy felony cases, a series of supplementary reports (sometimes called "evidence supplements") will often track the progressive stages of an extended evidence-gathering process.

Police Regulations and Policy Statements

In many localities the police department has regulations or policy statements governing procedures for making arrests and *Terry* stops, conducting on-the-street pat-downs, taking confessions, and conducting identification viewings. Copies of these regulations and policy statements should be obtained, either informally from the police department or via subpoena. An officer's violation of his or her own department's internal regulations can be a weighty factor in a judge's determination of the validity of the police actions that produced evidence against counsel's client.

Reports and Other Materials Generated by the Booking Process

Various reports and materials are generated during the booking process

described in §§ 3.2.1 and 3.2.4 *supra*. Those most often useful at a suppression hearing or at trial include:

1. The arrest photographs of the defendant mentioned earlier in this section;
2. Notations on the police blotter indicating the time when the defendant was received at the police station (often useful at a hearing on a motion to suppress incriminating statements, as a means for establishing the length of interrogation); and
3. Notations in the property book at the precinct station showing:
 - (a) property that was seized from the defendant as evidence and
 - (b) other personal property that was in the defendant's possession at the time of arrest.

Preliminary Hearing Transcripts

If a preliminary hearing has already been held in the case, counsel should obtain a copy of the transcript. Frequently, that transcript will prove useful in impeaching the police officers and other witnesses who testified. If a separate preliminary hearing was held for a co-defendant or a co-perpetrator who is being charged in a different case number, transcripts of those hearings should also be obtained.

Search Warrants and Arrest Warrants

If a search was conducted by the police pursuant to a search warrant or if the defendant was arrested pursuant to an arrest warrant, counsel should obtain the warrant and any affidavits the police filed in order to obtain the warrant. These items will usually be turned over by the prosecutor in informal discovery (see Chapter 18). Alternatively, counsel can obtain them from the office of the clerk of the court that issued the warrant. In addition to their obvious utility in litigating suppression motions, they ordinarily contain informational details that can be used at trial to undermine the prosecution's latter-day version of the criminal episode or the prosecution's retrospectively embroidered testimony identifying the defendant as a perpetrator.

Photographs

Although police photographs of the crime scene are often available through discovery (see Chapter 18), these will seldom be adequate to fulfill all defense needs, and counsel will have to commission the taking of additional photographs. Defense photographs should be taken from several angles and at several distances, so that all spatial relations involved are fully depicted. Counsel should remember that photographs are not admissible until a foundation has been laid by a person who testifies that they are an accurate reproduction of

the scene that s/he observed. A photographer should therefore be selected who will be available at the time of the trial and who will make a good and personable witness. S/he should be informed that s/he will be asked at trial, as a basis for testifying that the photographs are accurate, whether s/he has a present recollection of the scene that s/he photographed. Counsel should ordinarily obtain:

1. Photographs of the scene of the crime (to show matters that are not apparent in the police photographs, such as the absence of street lights, in support of a contention that the scene was too dark for the complainant and eyewitnesses to get a good look at the perpetrator; or the presence of CCTV cameras in cases where the police appear to be claiming that no electronic surveillance records exist).
2. In cases involving motions to suppress tangible evidence, photographs of the scene of a challenged arrest or *Terry* stop (to help illustrate the precise course of events) or of the scene of a challenged search (to show, for example, that items which the police will testify were in “plain view” could not in fact have been seen from the officers’ vantage point).
3. In cases involving a motion to suppress identification testimony or a misidentification defense at trial, photographs of the scene of a show-up identification (to illustrate, for example, how far the witness actually stood from the defendant during the show-up, or the dim lighting in the location where the show-up took place at the relevant time of day).
4. In cases in which the defendant was injured, and that injury is relevant to the theory of the defense (for example, as evidence of physical abuse by the police in a hearing on a motion to suppress a confession or as evidence of an assault by the complainant in a self-defense case), photographs of the defendant’s injuries. These should be taken as quickly as possible before the bruises fade or the injuries heal.
5. In cases in which the defendant’s hair length or facial hair at the time of the incident will be relevant to an identification suppression motion, motion to suppress tangible evidence (to show lack of probable cause to arrest), or misidentification defense at trial, photographs of the defendant.

Diagrams and Maps

Diagrams of the scene of the crime, the scene of the arrest, or the scene of a search will frequently prove useful in suppression hearings and at trial. In jurisdictions that have or can arrange the technology in the courtroom for projecting computerized images onto a screen for the fact-

finder, such diagrams can be prepared in digital form. Otherwise, diagrams can be displayed on poster board or on large sheets of graph paper. Diagrams and maps should be drawn to scale whenever possible. In some cities it may be possible to obtain a large area map from the city planner's office. Street maps available online will suffice only if the characteristics of an area covering several square blocks is in issue and if precise measurements are unimportant. When a crime site is indoors and precise measurements *are* important, the architect's plans for the building may be available from the office of the building owner, construction company, or a government agency responsible for approving construction plans or conducting periodic inspections.

Records of Lighting and Weather Conditions

In hearings on identification suppression motions and in presenting a defense of misidentification at trial, it will frequently be important to show that an eyewitness's or complainant's ability to observe was limited because of poor lighting or weather conditions. Records showing weather conditions and the time of sunrise and sunset can usually be obtained from the United States Weather Bureau.

Medical Records of the Defendant

If a motion to suppress a defendant's incriminating statements involves a claim that the defendant was physically abused by the police, or that the defendant was ill or suffering some physical injury at the time of the statement, it will be essential to obtain hospital and other medical records pertaining to any examination or treatment that the defendant received more or less contemporaneously with the statement. Similarly, in assault prosecutions in which counsel is considering a self-defense theory, hospital and medical records bearing on any injuries the defendant received at the time of the episode underlying the charge are invaluable.

Medical Records of the Complainant

If one of the offenses charged is an assault or battery count that depends upon the prosecution's proving a certain kind or degree of injury, the medical records of the complainant will provide crucial information. Even when the nature of the complainant's injuries is not technically an element of the charge, his or her medical records may be useful to show that s/he is exaggerating the harm or the suffering s/he claims to have experienced, and counsel can then argue that the rest of the complainant's testimony is no more credible than his or her inflated account of injuries. Also, medical records frequently record the complainant's version of how s/he was injured, and this account may be useful in impeaching a complainant who testifies at a trial, preliminary examination, or motions hearing.

Records To Support an Alibi Defense

Various kinds of records can support an alibi defense. Depending upon the facts, counsel may find it useful to obtain: time-clock entries to

demonstrate that the defendant was at work at the time of the crime; electronic records corroborating that the defendant's credit card or subway- fare card or highway-toll "e-z pass" or some other sort of transportation card or pass was used at a particular location at a particular time; phone or social-media records or electronic surveillance recordings placing the defendant elsewhere than at the crime scene at a relevant time; and network or local TV station logs documenting that the television program which the defendant claims s/he was watching (and the precise activity s/he describes seeing on the show) was, in fact, being aired at the time s/he says s/he viewed them.

News Media Files and Photographs

If the crime involved a certain amount of notoriety, it may have been reported in the local newspapers or other media. If so, news items may quote statements by the complainant or other witnesses that will be useful in impeaching them. In addition, newspapers may possess still photographs and TV stations may possess footage of relevant scenes, events, or people.

Other Possible Sources of Video Recordings of the Crime or Arrest or Other Relevant Events

Video footage of a crime or an arrest or some other episode relevant to a criminal case may be obtainable from a wide array of other sources than the news media. There are often videocameras recording events inside and directly outside stores, malls, places of entertainment, parking garages, apartment houses and private homes, public housing projects, police stations, hospitals, other public buildings, parks, playgrounds and street areas. Counsel will need to move quickly to find and view any such recording and to have it copied if it appears useful, because many private and public establishments obliterate their recordings (by destroying them or by re-using the storage material) after a relatively short period of time. In some jurisdictions, police officers wear body cameras and/or their patrol cars have dashboard cameras; counsel can seek recordings made by these devices through formal or informal discovery proceedings (see Chapter 18 *infra*) or by subpoena (see § 9.18 *supra*). Videos recorded by passersby on their cellphones may be posted on YouTube, Facebook, or some other social media site, and searchable through the site. Witnesses to an event may have recorded some or all of the event on their cellphones; whenever counsel interviews a witness, counsel should ask whether the witness made such a recording and still has it.

Chapter 10

Summary of Things to Do Before First Court Appearance

10.1. *Checklist of Things to Do for an Arrested Client Between the Time of Arrest and the Client's First Court Appearance*

- I. *Locate the client.* See §§ 3.3.2.1 - 3.3.2.2 *supra*.
- II. *Telephone the precinct or place of detention.* See §§ 3.3.2.4, 3.4, 3.5 *supra*.
 - A. Obtain information about the charges and the amount of bail from the desk officer and the investigating officer.
 - B. Tell the investigating officer not to speak with the client until counsel arrives, not to request consents or waivers from the client, and not to exhibit the client for identification or to make any examinations or tests on the client in counsel's absence.
 - C. Speak to the client, tell the client that counsel is coming to see client immediately, and advise the client:
 1. To speak to no one about the case;
 2. To decline to answer any questions by the police or to give consents or waivers to the police, on advice of counsel;
 3. Not to write or sign any papers or forms;
 4. To decline to consent to any lineups, identifications, examinations, or tests in counsel's absence;
 5. Not to offer physical resistance if placed in a lineup or subjected to any examinations or tests, but to remember the circumstances of all lineups, identifications, examinations, and tests in counsel's absence, and to write out a description of them for counsel as soon as they are over;
 6. Not to dodge news photographers or cover his or her face.
 - D. Have the client inform a police officer, with counsel listening on the phone, that the client wishes all future dealings and communications with the authorities to be conducted solely through counsel.
- III. *Telephone the client's family or a bondsman or both and arrange to have bail money or security and a bail bond brought to the place of detention.* See §§ 3.8, 4.7-4.12 *supra*.
- IV. *Review the elements of the charge and penalty.* See §§ 3.21.1, 6.2 *supra*.

- V. *With proper identification, immediately go to the place of detention and:*
- A. Interview the client. See §§ 3.6, 3.20-3.21 *supra* and Chapter 6.
 1. Establish rapport. See §§ 6.1, 6.3-6.5 *supra*.
 2. Obtain the client's version of events leading to and following arrest. See §§ 3.21.2, 6.8-6.10, 6.15 *supra*.
 3. Obtain names of all potential witnesses. See §§ 3.21.1, 9.3, 9.7-9.8 *supra*.
 4. Obtain biographical information usable to persuade the police to release the client or drop charges. See § 3.6, paragraph 3; § 3.8.
 5. Obtain a statement or affidavit containing the information needed for bail-setting. See §§ 4.4-4.5 *supra*.
 6. Establish the roles of lawyer and client. See § 6.6 *supra*.
 7. Set the fee and state clearly what it covers. See § 6.11 *supra*.
 8. Repeat warnings and advice relating to the client's conduct in custody and in response to police investigative procedures, and have the client tell a police officer, in counsel's presence, that all subsequent communications between the client and the authorities are to be conducted through counsel. See §§ 3.4.2-3.4.5, 3.6, 3.21.2, 6.12 *supra*.
 9. Give the client counsel's professional card (see § 6.4 *supra*) and a "rights card" (see § 3.21.3 *supra*).
 10. Offer to talk to the client's family. See § 6.13 *supra*.
 - B. Speak to the investigating officer and:
 1. Verify the charges. See §§ 3.5, 4.12.1, 8.3.1 *supra*.
 2. Find out the police version of the offense and arrest. See §§ 3.5, 8.1.1, 8.1.3, 8.3.1, 9.3 *supra*.
 3. Obtain the names and contact information of all potential witnesses. See §§ 9.3, 9.8 *supra*.
 4. Urge the officer to consider dismissing or reducing the charges or agreeing to a diversion arrangement in cases where these options are realistic. See §§ 2.3.6, 8.1.1, 8.2.1, 8.2.3, 8.3.1, 8.3.3 *supra*.
 5. Repeat the requests not to question the client, exhibit or examine the client in counsel's absence, and so forth. See §§ 3.4, 3.5, 3.6, 3.21.2, 8.3.2 *supra*.
 6. Ask whether there are any plans to move the client elsewhere, exhibit the client, and so forth. See §§ 3.5, 3.6, 4.12.1, 8.3.2 *supra*.
 7. Ask how counsel can contact officer again. See §§ 4.12.1, 8.3.1 *supra*.
 - C. Accompany and represent the client at any identification

confrontations or testing procedures. See § 3.6 *supra*.

- VI. *Complete any arrangements necessary to secure the client's release on bail or recognizance, including resort to court, if necessary.* See §§ 3.8 and Chapter 4 *supra*.
- VII. *Begin the field investigation.*
- A. Locate objects and witnesses that may be lost if the search is delayed. See §§ 9.3, 9.8, 9.17 *supra*.
 - B. Retain an investigator or photographer, if desired. See §§ 9.4, 9.20 subdivision twenty *supra*.
 - C. Interview:
 1. The police. See §§ 8.1.1, 8.1.3, 8.3.1-8.3.3, 9.15 *supra*.
 2. The prosecutor. See §§ 8.1.1, 8.1.4, 8.4 *supra*.
 3. The complainant. See §§ 8.5, 9.13-9.14 *supra*.
 4. Witnesses. See §§ 9.7-9.14 *supra*.
 5. Co-defendants and uncharged co-perpetrators. See § 9.16 *supra*.
 6. The client's family. See § 3.4.6 subdivision 3a and §§ 6.13, 9.6 *supra*.
 - D. Visit the scene of the crime and any other relevant sites. See § 9.5 *supra*.
 - E. Consider other possible other sources of information and pursue those that appear pertinent. See § 9.20 *supra*.
 - F. Consider seeking a psychiatric examination of the client. See §§ 16.1.2, 16.2-16.6 *infra*.
- VIII. *Maintain contacts with the police and the prosecutor to explore whether they can be persuaded to drop or reduce charges or to arrange diversion of the prosecution.* See §§ 2.3.6, 8.1.1, 8.2, 8.3.1, 8.3.3, 8.4, 8.6 *supra*.

10.2. A Note on the Coroner's Inquest and Similar Institutions

In many jurisdictions a coroner or a coroner's jury or a medical examiner or an examining magistrate is required to investigate all cases of possible homicidal death to determine whether a criminal homicide has been committed. The statutes governing these investigations vary widely. They may or may not require a formal hearing as a part of the investigation, and they may or may not require a finding of homicidal death as the precondition of filing of a complaint (or an indictment or information) charging a particular person with the offense of homicide.

Whether or not it is a statutory prerequisite to a homicide prosecution, this sort of investigation will have important implications for the course of an ensuing prosecution because (a) it memorializes, often in the form of sworn testimony, both medical and nonmedical evidence bearing on the cause and circumstances of death that may be favorable to the defense; (b) it constitutes a source of discovery by defense counsel of similar evidence that may be favorable to the prosecution (see §§ 5.2 *supra*, 18.9.2.8 *infra*); (c) it commits witnesses to their stories in a fashion that may shape or explain their later trial testimony and in a form that can be used for impeachment at trial (see § 37.4 *infra*); and (d) it frequently generates pretrial publicity that may be helpful or harmful to the defense.

The same consequences may attach to fire marshal's investigations in arson cases, when these are authorized by statute in a particular jurisdiction. They may also attach to legislative committee hearings or administrative "crime commission" investigations, as these are conducted in a number of states for the purpose of uncovering criminal activity and referring it to the prosecuting authorities.

Since, theoretically, none of these proceedings is directed against specific individuals, the statutes and resolutions authorizing them ordinarily make no allowance for any sort of participation by defense attorneys. However, when the proceedings are, in fact, aimed at particular persons or when they necessarily implicate identifiable persons (as in a homicide case in which the identity of the killer is clear and undisputed and the only question is whether the killing was justifiable), the federal Constitution may give these persons a right to appear by counsel, to cross-examine witnesses, and to present defensive evidence. The Supreme Court held in *Jenkins v. McKeithen*, 395 U.S. 411 (1969), that persons under investigation by one form of "crime commission" were entitled to these rights; and the logic of the *Jenkins* opinion appears to extend not only to most of the other common forms of "crime commissions" and legislative crime-investigating committees but also to the older and more pervasive institutions of the coroner (or equivalent) and the fire marshal. *But see Securities and Exchange Commission v. Jerry T. O'Brien, Inc.*, 467 U.S. 735 (1984).

Chapter 11

Preliminary Hearing

11.1. *Nature and Functions of the Preliminary Hearing*

The first judicial appearance of the defendant is called the preliminary hearing (or, in some states, the commitment hearing or the examining trial). This is the proceeding described in §§ 2.3.3-2.3.5, 2.4.2 *supra*. A magistrate (or a justice of the peace, municipal court judge, or other member of the minor judiciary) usually presides, although in most jurisdictions judges of courts of record also have statutory authority to sit as committing magistrates (see § 11.6.2 *infra*). Arrested defendants are brought before the magistrate for a preliminary hearing shortly after arrest. See §§ 11.1.1, 11.1.2, 11.2 *infra*. Summoned defendants are required by the summons to appear before the magistrate.

11.1.1. *The Formal Functions of the Preliminary Hearing*

The traditional function of the preliminary hearing is to provide an early postarrest safeguard against improvident detention. The magistrate hears the prosecution's evidence against an arrested person (or as much of it as the prosecution chooses to present at this stage) for the purpose of determining whether that person should be released from custody or whether s/he should be "bound over" or "held over" or "committed" – that is to say, incarcerated or required to post bail for his or her appearance – pending subsequent stages of a criminal prosecution. The standard used for this determination is "probable cause" (see § 25.7.4 *infra*) or, in some states, a *prima facie* case (see § 12.1.2 *infra*). If the prosecution's evidence establishes probable cause to believe that an offense was committed and that the arrested person committed it, the arrestee is bound over to await the filing of an information in the criminal court of record (see §§ 2.3.3, 2.3.4.2-2.3.6 *supra*) or to await the action of the grand jury upon a bill or bills of indictment (see §§ 2.4.3, 2.4.4 *supra*; § 12.1 *infra*). If the magistrate fails to find probable cause, the arrestee is discharged from custody. S/he may nevertheless be indicted (or, in some jurisdictions, prosecuted by information) and required to stand trial; but if s/he has been discharged by the magistrate at the preliminary hearing, s/he remains at liberty throughout the trial (unless either (1) s/he is rearrested, given a second preliminary hearing, and bound over (see § 11.11 *infra*) or (2) s/he is indicted and thereafter arrested and committed on a bench warrant supported by the indictment (see § 2.4.4 *supra*; § 12.17 *infra*)).

In many jurisdictions, the preliminary hearing has a second function: to weed out and foreclose prosecutions on groundless charges, so as to spare the accused the expense and degradation of a full-scale criminal trial. In these jurisdictions the prosecutor may not file an information (or may file an information only with leave of court) against a defendant who has not been bound over at a preliminary hearing. Some of the jurisdictions, in addition, limit the offenses that may be charged in an information to those specific charges upon which the magistrate bound the defendant over. *See, e.g., State v. Rodriguez*, 146 N.M. 824, 826-28, 215 P.3d 762, 764-66 (2009).

Other jurisdictions permit an information to charge any offense (or at least any offense “related” to the charges upon which the defendant was bound over) that is supported by probable cause appearing in the transcript of the evidence presented at the preliminary hearing, whether or not the magistrate bound the defendant over upon those specific charges. See § 2.3.6 *supra*. These various restrictions upon prosecutions by information assign to the preliminary hearing a pretrial screening function that is complementary to the grand jury’s (see § 2.4.3 *supra*; § 12.1 *infra*): A defendant may be charged in a criminal court only after the prosecutor has first made a showing of probable cause (or a *prima facie* case) either at a preliminary hearing or before the grand jury.

In addition to the two functions just described, the preliminary hearing has gradually accreted others that have received formal or theoretical recognition in varying degrees. Obviously, any procedure requiring the production of arrested individuals before a magistrate or judge shortly following arrest potentially protects citizens against police mistreatment and assures the early implementation of several procedural rights given to accused persons by the federal and state constitutions and laws. A postarrest judicial proceeding will realize this potential insofar as (1) a notation is made in court records that an arrested person is in custody and where s/he is in custody, thereby preventing secret imprisonments and enabling the arrestee’s friends or attorney to locate the arrestee and to secure his or her release by *habeas corpus* if the confinement is unlawful (see §§ 3.3.2.2, 3.8.4, 4.12.1, 4.14, 8.3.2 *supra*); (2) the police are required to justify the arrest by showing probable cause (see §§ 2.3.4.1, 8.3.2 *supra*; §§ 11.2, 25.7.4 *infra*); (3) the arrested person is informed of his or her rights (see §§ 2.3.3 2.3.4.1 *supra*), principally the privilege against self-incrimination (see §§ 12.6.1, 18.12 *infra*), the right to bail (see Chapter 4), the right to counsel (see §§ 2.3.4.1, 2.3.4.2 *supra*; § 11.5.1, 26.10 *infra*), and the right to a preliminary examination (see § 2.3.4.2 *supra*; §§ 11.2-11.3 *infra*); (4) some of those rights are immediately implemented, for example, through the setting of bail and the appointment of counsel by the magistrate (see § 2.3.4.1 *supra*); and (5) custody of the accused is transferred from the arresting and investigating officers to other authorities – jailers responsible to the court for the arrested person’s safekeeping and not charged with prosecutive duties. Increasingly, these various protective steps have been recognized as components of the preliminary hearing and as rights of the accused. Most of them, though not all, are given by statute, judicial decision, or practice in the large majority of jurisdictions. To assure their timely effectuation, almost every jurisdiction requires by statute or court rule that an arrested person be brought before a judicial officer “promptly” or “forthwith” or “without unnecessary delay” following arrest. *E.g.*, FED. RULE CRIM. PRO. 5(a)(1)(A); MINN. RULE CRIM. PRO. 4.02, subd. 5(1); TENN. RULE CRIM. PRO. 5(a)(1).

11.1.2. *The Trend Toward Bifurcation of the Preliminary Hearing*

With the emergence of these additional functions, the preliminary hearing has tended to evolve from a single proceeding into two distinct procedural stages: the preliminary arraignment (sometimes called the preliminary appearance) and the preliminary examination (often nicknamed the PX or the

“prelim”). As long as the hearing was concerned almost exclusively with the justifiability of pretrial detention, the important thing was the examination by the magistrate of the evidence against the arrestee. To the extent that a preliminary arraignment of any sort was held, it was either (as at common law) an inquisition of the prisoner (that is, a part of the taking of the evidence) or else a mere reading of the charges against the prisoner as a prelude to taking evidence. But as various procedural rights came to be afforded to an accused, the preliminary arraignment began to assume an independent significance: It became the stage of the proceedings at which the accused was informed of those rights and afforded an opportunity to exercise them. And once the right to counsel at the preliminary examination was given (see § 11.5.1 *infra*), a strong pressure was generated to split the originally unitary preliminary hearing into two separate court appearances. The defendant seldom had a lawyer when s/he first appeared in court; it was necessary either to adjourn the hearing for appointment or retainer of counsel or else to appoint counsel at the preliminary arraignment itself. Particularly where the preliminary examination had the screening function described in § 11.1.1 *supra*, lawyers appointed at the preliminary arraignment were prone to seek continuances of the examination in order to get the time necessary to prepare for it.

This development has proceeded at differing speeds and produced different practices in different localities. In some courts it is still customary to hold a single preliminary hearing shortly following arrest, at which (1) a complaint is filed against the defendant and is given or read to the defendant; (2) s/he is advised of his or her rights (the privilege against self-incrimination, the right to counsel, the right to bail, if any, and the right to have a preliminary examination at which the prosecution will have to show probable cause or a *prima facie* case to justify the defendant’s detention); (3) counsel is appointed to represent the defendant (or if s/he has sufficient funds to retain counsel, s/he is given a brief recess for that purpose); (4) s/he is asked either to plead to the complaint or to elect or waive preliminary examination; and (5) unless s/he pleads guilty or waives examination or asks for a continuance of the examination, the court proceeds immediately to hear the prosecution’s evidence. When the defense does seek a continuance of the preliminary examination, some of these courts may set it for a date several days or weeks later; others may adjourn for only an hour or two, with the admonition to counsel to “take a couple of hours to talk to your client and get prepared, if you want, but the prosecution has its witnesses here and we are going to proceed with the preliminary hearing today.” At the other end of the spectrum, there are many localities that maintain entirely separate preliminary-arraignment and preliminary-hearing calendars. The arraignment, comprising steps (1) through (4) *supra* and the setting of bail (see §§ 2.3.3, 2.3.4.1, 3.18, 4.7 *supra*), is held soon after arrest, but the prosecution is not then expected to have its witnesses in court. The examination (unless the defendant waives examination) is set (either by the magistrate at the preliminary arraignment or routinely by an administrative judge or calendar clerk) for a date a week or two following the preliminary arraignment.

11.2. *The Federal Constitutional Rights to a Prompt Post-arrest Determination of Probable Cause and to a Prompt Preliminary Appearance*

In *Gerstein v. Pugh*, 420 U.S. 103 (1975), the Supreme Court of the United States held that the Fourth Amendment to the federal Constitution, which has long been construed as forbidding arrests without probable cause (see § 25.7 *infra*), entitles every arrested person to “a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest” (420 U.S. at 114). Consequently, persons arrested without an arrest warrant (and hence without a prearrest judicial finding of probable cause) may not be confined pending trial unless they are given the opportunity for a probable cause determination “by a judicial officer . . . promptly after arrest” (*id.* at 125). *Accord*, *Powell v. Nevada*, 511 U.S. 79, 80 (1994); *County of Riverside v. McLaughlin*, 500 U.S. 44, 47, 52-53 (1991); *Atwater v. City of Lago Vista*, 532 U.S. 318, 352 (2001) (dictum); *Albright v. Oliver*, 510 U.S. 266, 274 (1994) (plurality opinion) (dictum); *Baker v. McCollan*, 443 U.S. 137, 142-43 (1979) (dictum).

Although the Court has been “hesitant to announce that the Constitution compels a specific limit” on *how* “promptly” after arrest the constitutional probable cause determination must be afforded, the Court has announced guiding principles “to provide some degree of certainty so that States and counties may establish procedures with confidence that they fall within constitutional bounds” (*County of Riverside v. McLaughlin, supra*, 500 U.S. at 56). “[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*.” *Id.* But even a hearing provided within 48 hours “may nonetheless violate *Gerstein* if the arrested individual can prove that his or her probable cause determination was delayed unreasonably” (*id.*). “Examples of unreasonable delay are 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.* In cases in which “an arrested individual does not receive a probable cause determination within 48 hours,” the government bears the “burden . . . to demonstrate the existence of a bona fide emergency or other extraordinary circumstance” to justify the delay (*id.* at 57). *Accord*, *Powell v. Nevada, supra*, 511 U.S. at 80. “The fact that in a particular case it may take longer than 48 hours to consolidate [the probable cause determination with other] pretrial proceedings[, such as arraignment,] does not qualify as an extraordinary circumstance. Nor, for that matter, do intervening weekends.” *County of Riverside v. McLaughlin, supra*, 500 U.S. at 57.

Gerstein is a very narrow decision in several regards. First, it fails, by its terms, to protect persons arrested under arrest warrants (see *Michigan v. Doran*, 439 U.S. 282, 285 n.3 (1978)) and may also be inapplicable to persons indicted by a grand jury (see § 2.4.4 *supra*; § 11.4 *infra*). *Gerstein v. Pugh, supra*, 420 U.S. at 117 n.19. (*But see In re Walters*, 15 Cal. 3d 738, 543 P.2d 607, 126 Cal. Rptr. 239 (1975), extending *Gerstein* to require a postarrest probable cause determination in cases of arrests made under a warrant.)

Second, *Gerstein* does not require that the probable cause determina-

tion be “accompanied by the full panoply of adversary safeguards – counsel, confrontation, cross-examination, and compulsory process for witnesses” (*Gerstein v. Pugh*, *supra*, 420 U.S. at 119). To the contrary, it sanctions “[t]he use of an informal procedure” (*id.* at 121), in which there is no constitutional right to the appointment of counsel (*id.* at 122-23); no “confrontation and cross-examination” needs be allowed (*id.* at 121-22); and the determination of probable cause may presumably be made “on hearsay and written testimony” (*id.* at 120). All that is constitutionally required is “a fair and reliable determination of probable cause” (*id.* at 125; *see also Baker v. McCollan*, *supra*, 443 U.S. at 143 & n.2; *Hewitt v. Helms*, 459 U.S. 460, 475 (1983)).

Finally, failure to give an accused a prompt probable cause determination does not foreclose subsequent prosecution or provide grounds for its dismissal; it merely renders the accused’s pretrial confinement unconstitutional. *Gerstein v. Pugh*, *supra*, 420 U.S. at 119; *see Bell v. Wolfish*, 441 U.S. 520, 534 n.15 (1979).

Notwithstanding all of these limitations – which cumulatively render *Gerstein*’s “probable cause determination” a pale shadow of the preliminary examination already allowed by state law in most jurisdictions – *Gerstein* does have significant implications for state preliminary examination practice. In some States, *Gerstein*’s requirement of “prompt” probable cause determinations has the salutary effect of “acceleration of existing [state procedures]” (*Gerstein*, *supra*, 420 U.S. at 124). As noted above, the United States Supreme Court has established as a rule of thumb that promptness for *Gerstein* purposes ordinarily means within 48 hours, and it has said explicitly both that delays beyond 48 hours must be justified by a showing of extraordinary circumstances and that the practice of consolidating *Gerstein* determinations with other preliminary proceedings (such as an adversarial hearing on probable cause) “does not qualify as an extraordinary circumstance” (*County of Riverside v. McLaughlin*, *supra*, 500 U.S. at 57). Moreover, when the *Gerstein* requirement is violated, any confessions or other statements taken from the defendant during the period of excessive delay are arguably inadmissible in evidence as the fruits of an unconstitutional detention. *See* § 8.3.2 *supra*. In this respect, *Gerstein* provides the constitutional predicate for an updated version of what used to be known as the “*McNabb-Mallory*” exclusionary rule. *See* § 26.11 *infra*.

In addition to the Fourth Amendment *Gerstein* rule, there are Due Process protections against protracted detention of a suspect without fair and reliable procedures for determining his or her probable guilt. *See Tatum v. Moody*, 768 F.3d 806 (9th Cir. 2014) (holding that “[w]here . . . investigating officers, acting with deliberate indifference or reckless disregard for a suspect’s right to freedom from unjustified loss of liberty, fail to disclose potentially dispositive exculpatory evidence to the prosecutors, leading to the lengthy detention of an innocent man, they violate the due process guarantees of the Fourteenth Amendment” (*id.* at 816)); *Lopez-Valenzuela v. Arpiao*, 770 F.3d 772 (9th Cir. 2014) (en banc) (holding that the blanket preclusion of bail or pretrial release for undocumented aliens arrested on any of a broad range of felony charges, without regard to whether the individual alien’s release would involve a risk of flight or other danger, violates due process).

11.3. *The State-Law Right to a Full Preliminary Examination*

Gerstein v. Pugh, 420 U.S. 103 (1975) does not support a federal constitutional right to a full-scale adversary preliminary examination. (An argument can be made for such a right, but it would stretch current Fourth Amendment doctrine. See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 390-92 (1974).) Rather, by a 5-4 vote, *Gerstein* holds that the requisite determination of “probable cause to believe the suspect has committed a crime . . . [can be] decided by a magistrate in a nonadversary proceeding on hearsay and written testimony” (420 U.S. at 120; see *id.* at 119-25). See also, e.g., *Schall v. Martin*, 467 U.S. 253, 274-75 (1984). Most States, however, do provide by statute for the kind of adversarial evidentiary hearing described in § 11.5.2 *infra*; and many state courts will enforce the state-law hearing requirement by reversing a conviction obtained at a trial following an inadequate preliminary examination, even though the trial itself was otherwise error-free. E.g., *State v. Essman*, 98 Ariz. 228, 403 P.2d 540 (1965); *State v. Howland*, 153 Kan. 352, 110 P.2d 801 (1941); *Mascarenas v. State*, 80 N.M. 537, 458 P.2d 789 (1969); *Blandshaw v. State*, 245 S.C. 385, 140 S.E.2d 784 (1965). See also, e.g., *State v. Rodriguez*, 146 N.M. 824, 826-28, 831, 215 P.3d 762, 764-66, 769 (2009) (vacating a conviction because the state charged the defendant “by information with an offense not considered or included in the bind-over order” and thereby deprived him “of his due process rights by subjecting him to criminal prosecution without probable cause”).

11.4. *Challenging the Prosecutor’s Use of a Supervening Indictment to Foreclose a Preliminary Examination*

In some jurisdictions, prosecutors commonly do an end run around the defendant’s right to a preliminary examination by obtaining a continuance of the examination from the magistrate and then rushing to the Grand Jury to obtain a supervening indictment. Because the return of the indictment is alone sufficient to sustain the defendant’s detention (see § 2.4.4 *supra*), it has traditionally been thought that indictment renders the preliminary examination unnecessary. See, e.g., 18 U.S.C. § 3060(e) (in federal criminal cases, “[n]o preliminary examination . . . shall be required to be accorded an arrested person . . . if at any time subsequent to the initial appearance of such person [at preliminary arraignment] . . . and prior to the date fixed for the preliminary examination . . . , an indictment is returned or . . . an information is filed . . .”); FED. RULE CRIM. PRO. 5.1(a)(2).

This tactical ploy by the prosecution to prevent a preliminary examination may be fought at the time of the first appearance by defense counsel’s objecting to any prosecution request for a continuance. See § 11.9 *infra*. But frequently defense counsel is in no position to oppose a continuance because s/he is not prepared to go forward with the hearing, particularly if s/he has just been appointed.

When an indictment is thereafter returned, it is technically true that the two formal functions of the preliminary examination (see § 11.1.1 *supra*) are mooted. Arguably, however, an indictment does not moot the need for the

judicial determination of probable cause which was recognized as a Fourth Amendment imperative in *Gerstein v. Pugh*, 420 U.S. 103 (1975). *Gerstein* left unsettled the question whether an indictment by a grand jury satisfies its requirement of a probable cause determination by a “judicial officer” (see 420 U.S. at 125; compare *id.* at 117 n.19). Counsel can argue that grand juries lack the neutrality implicit in the “judicial officer” prescription because, as a practical matter, they are invariably dominated by the prosecutor (see, e.g., *Hawkins v. Superior Court*, 22 Cal.3d 584, 589-92, 586 P.2d 916, 919-21, 150 Cal. Rptr. 435, 438-40 (1978), and authorities cited; Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1171 (1960), and authorities cited), and that the only procedural forum which state law provides for an unbiased *Gerstein* determination is a preliminary examination.

In some States, the sections of the criminal code relating to preliminary hearing and to the grand jury can be construed together as making a magistrate’s bind-over the jurisdictional prerequisite for grand jury consideration of any criminal charge. Here, denial of a full preliminary hearing renders an indictment invalid, and the prosecutor’s end-run tactic can be thwarted by a motion to dismiss the indictment for lack of jurisdiction. See, e.g., *State v. Funderburk*, 259 S.C. 256, 191 S.E.2d 520 (1972). In other States, the statutory scheme does not speak unambiguously concerning the relationship between preliminary hearings and the grand jury process. But counsel can argue that whenever the defendant has a right to a preliminary examination under a statute that makes no express provision for the termination of this right by indictment (compare 18 U.S.C. § 3060(e), *supra*), the right survives indictment, and that its denial prejudices the defense in ways that require the trial court, on a defendant’s timely motion, to either (a) dismiss the indictment without prejudice to the prosecutor’s seeking a new indictment if and after a preliminary examination has been held, or (b) stay proceedings on the indictment and refer the case to a magistrate to conduct a preliminary hearing before the defendant is required to plead to the indictment, or (c) conduct a preliminary hearing itself, with the arraignment judge or another judge of the trial court sitting as a committing magistrate (see § 11.1 *supra*; § 11.6.2. *infra*).

In support of the prejudice argument, counsel can point to the preliminary examination’s informal function of providing discovery to the defense in a criminal justice system that eliminates or curtails most of the discovery mechanisms available in civil cases. A plurality of the Supreme Court of the United States adverted to the discovery function of the preliminary examination as a legitimate defense interest in *Coleman v. Alabama*, 399 U.S. 1, 9 (1970), in reasoning that the examination was a “critical stage” requiring the appointment of counsel. Another plurality of the Court recognized that interest in *Adams v. Illinois*, 405 U.S. 278, 282 (1972), although holding it insufficient to warrant the retroactive application of *Coleman* in the absence of a showing of “actual prejudice” (405 U.S. at 285), at least in a jurisdiction that provided “alternative [discovery] procedures” (*id.* at 282). See § 11.8.3 *infra*. The Georgia Supreme Court in *Manor v. State*, 221 Ga. 866, 148 S.E.2d 305 (1966), mentioned the denial of discovery opportunities in holding that a defendant whose waiver of preliminary examination was coerced is entitled to a reversal of the ensuing conviction, notwithstanding the supervention of an

otherwise valid indictment. *Id.* at 868-69, 148 S.E.2d at 307. Recognition of the defendant’s discovery interest also appears in a significant line of District of Columbia federal criminal cases, which, prior to the enactment in 1968 of a statute deeming the return of a supervening indictment to be a valid basis for foregoing preliminary examination (18 U.S.C. § 3060(e)), held that denial of certain preliminary hearing rights are not cured by a supervening indictment. *Blue v. United States*, 342 F.2d 894 (D.C. Cir. 1964); *Dancy v. United States*, 361 F.2d 75 (D.C. Cir. 1966); *Ross v. Sirica*, 380 F.2d 557 (D.C. Cir. 1967). (In federal prosecutions, these cases have been overturned by the statute, of course (see *Coleman v. Burnett*, 477 F.2d 1187, 1198-1200 (D.C. Cir. 1973); *United States v. Anderson*, 481 F.2d 685, 691-92 (4th Cir. 1973), *aff’d*, 417 U.S. 211 (1974), and cases cited), but the reasoning of the *Blue-Dancy-Ross* line should remain persuasive in state jurisdictions where no statute expressly dictates a contrary result.) The same recognition of “the important discovery function served by an adversarial preliminary hearing” figures prominently in the decision of the California Supreme Court in *Hawkins v. Superior Court*, 22 Cal.3d 584, 588, 586 P.2d 916, 918-19, 150 Cal. Rptr. 435, 437-38 (1978), holding that a defendant who is denied a preliminary examination by the prosecutor’s discretionary decision to proceed by indictment instead of by information is thereby denied the equal protection of the laws under the California Constitution. As the New York Court of Appeals has put it:

“[S]ince the prosecutor must present proof of every element of the crime claimed to have been committed, no matter how skeletally, the preliminary hearing conceptually and pragmatically may serve as a virtual minitrial of the prima facie case. . . . In its presentation, the identity of witnesses, to greater or lesser degree, testimonial details and exhibits, perforce will be disclosed. Especially because discovery and deposition, by and large, are not available in criminal cases, this may not only be an unexampled, but a vital opportunity to obtain the equivalent. It has even been suggested that ‘in practice [it] may provide the defense with the most valuable discovery technique available to him.’ . . .

“. . . Most important, early resort to that time-tested tool for testing truth, cross-examination, in the end may make the difference between conviction and exoneration.” (*People v. Hodge*, 53 N.Y.2d 313, 318-19, 423 N.E.2d 1060, 1063, 441 N.Y.S.2d 231, 234 (1981).)

See also State v. Graves, 126 S.W.3d 873, 877, 878 (Tenn. 2003) (state rule requiring preservation of “an electronic recording or its equivalent of a preliminary hearing,” and mandating “dismissal of the indictment and a remand for a new preliminary hearing unless the State establishes (1) that all material and substantial evidence that was introduced at the preliminary hearing was made available to the defendant and (2) that the testimony made available to the defendant was subject to cross-examination” reflects “the importance of the preliminary hearing in general,” including “its importance to the defense as a discovery tool” and the opportunity it affords the defense “to confront and cross-examine witnesses under oath”). These cases lay the foundation for an argument that would invalidate the use of the grand jury by the prosecutor to end-run preliminary examinations. The

argument is that the supervening return of an indictment does not avoid the defendant's right to a preliminary examination, which accrues as an incident of his or her arrest prior to indictment, because the indictment – even if it justifies the defendant's detention for trial – leaves the defendant prejudiced by denial of a major benefit of the examination: discovery adequate to “provide the defense with valuable information about the case against the accused, enhancing its ability to evaluate the desirability of entering a plea or to prepare for trial” (*Hawkins v. Superior Court*, *supra*, 22 Cal.3d at 588, 586 P.2d at 919, 150 Cal. Rptr. at 438), together with the opportunity for “skilled interrogation of witnesses by [the defense] . . . lawyer [that] can fashion a vital impeachment tool for use in cross-examination of the State's witnesses at the trial, or preserve testimony favorable to the accused of a witness who does not appear at the trial” (*Coleman v. Alabama*, *supra*, 399 U.S. at 9). The prosecution cannot fairly be permitted to proceed in a fashion that gives it the advantages of two differing procedures – arrest without prescreening of the grand jury; indictment without discovery at the preliminary examination – and the disadvantages of neither. *Cf. People v. Hodge*, *supra*, 53 N.Y.2d at 318-20, 423 N.E.2d at 1063-64, 441 N.Y.S.2d at 234-35; *Coleman v. Burnett*, *supra*, 477 F.2d at 1207-12; and see *United States v. Milano*, 443 F.2d 1022, 1025 (10th Cir. 1971) (holding that under 18 U.S.C. § 3060(e) a preliminary examination is not required after indictment but reserving the question whether the same result would obtain in a case of “deliberate prosecutorial connivance to deprive a person of a preliminary hearing by delay until after indictment”).

11.5. Defense Rights at the Preliminary Hearing

11.5.1. Right to Counsel

The Sixth Amendment right to counsel applies at every “critical stage” of the proceedings (*White v. Maryland*, 373 U.S. 59 (1963) (per curiam)), “at or after the time that adversary judicial proceedings have been initiated against [the individual] . . . – ‘whether by way of formal charge, preliminary hearing, indictment, information, or arraignment’” (*Brewer v. Williams*, 430 U.S. 387, 398 (1977)). See also *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 198, 213 (2008); *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009) (dictum). The right is triggered at “such time as the “government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified”” (*Moran v. Burbine*, 475 U.S. 412, 432 (1986)). Under these principles it has long been clear that a defendant has a right to counsel at arraignment, and, if s/he is indigent, the right to appointed counsel under *Gideon v. Wainwright*, 372 U.S. 335 (1963). See *Hamilton v. Alabama*, 368 U.S. 52 (1961); *Michigan v. Jackson*, 475 U.S. 625, 627-28, 629, 636 (1986); *Missouri v. Frye*, 132 S. Ct. 1399, 1405 (2012) (dictum); *Gonzales v. Commissioner of Correction*, 308 Conn. 463, 68 A.3d 624 (2013). In *Rothgery v. Gillespie County, Texas*, *supra*, 554 U.S. at 198, 213, the Court explicitly recognized that the Sixth Amendment right to counsel is applicable to preliminary-arraignment-type proceedings (*id.* at 195) – that is, “a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction” (*id.* at 213).

11.5.2. Right To Cross-Examine Prosecution Witnesses and To Present Defense Witnesses; Right To Subpoena Witnesses; Right to Disclosure of Exculpatory and Impeaching Evidence

Under state law in most jurisdictions, the defendant has the right to cross-examine the prosecution's witnesses at the preliminary examination. *See, e.g., Sheriff of Washoe County v. Vasile*, 96 Nev. 5, 604 P.2d 809 (1980). The right to cross-examine at the preliminary examination may also be protected by the federal guarantee of confrontation incorporated in the Fourteenth Amendment (*Pointer v. Texas*, 380 U.S. 400 (1965); *Barber v. Page*, 390 U.S. 719 (1968); *cf. Olden v. Kentucky*, 488 U.S. 227 (1988) (per curiam); *compare California v. Green*, 399 U.S. 149, 165-66 (1970); and *see Mascarenas v. State*, 80 N.M. 537, 458 P.2d 789 (1969)), or by the Due Process Clause (see § 11.8.3 *infra*).

State law also commonly accords the defense the right to present evidence at a preliminary examination. *See, e.g., State v. Essman*, 98 Ariz. 228, 403 P.2d 540 (1965). This right is arguably guaranteed by the federal Due Process Clause as well. *Cf. Jenkins v. McKeithen*, 395 U.S. 411, 429 (1969).

The defendant's right to call witnesses to testify at the preliminary examination is reinforced by the ancillary right to subpoena them (*see, e.g., Coleman v. Burnett*, 477 F.2d 1187, 1202-07 (D.C. Cir. 1973)), *in forma pauperis* under the Equal Protection principle of *Griffin v. Illinois*, 351 U.S. 12 (1956), if the defendant is indigent and makes an adequate showing that the witness's testimony will be material and helpful to the defense on the issue of probable cause (*see Washington v. Clemmer*, 339 F.2d 715, 718-19, 725-28 (D.C. Cir. 1964); *cf. United States v. Valenzuela-Bernal*, 458 U.S. 858, 866-71 & n.7 (1982)).

There is disagreement among the state courts as to whether the disclosure rights assured to defendants at the trial stage by *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny (discussed in § 18.9.1 *infra*) apply at a preliminary examination. For a holding that they do and for reference to the conflicting authorities, *see People v. Gutierrez*, 214 Cal. App. 4th 343, 153 Cal. Rptr. 3d 832 (2013).

Although *Gerstein v. Pugh*, 420 U.S. 103 (1975), holds that the rights discussed in this section are not necessary incidents of the preliminary determination required by the Fourth Amendment, *Gerstein* does not deny that they may be constitutionally obligatory in the "full preliminary hearing . . . procedure used in many States" (*id.* at 119). Rather, *Gerstein* says that "[w]hen the hearing takes this form, adversary procedures are customarily employed" and "[t]he importance of the issue to both the State and the accused justifies the presentation of witnesses and full exploration of their testimony on cross-examination" (*id.* at 120). Analogously, *Gerstein* recognizes no constitutional right to counsel at a Fourth Amendment preliminary hearing, *id.* at 122-23, but asserts that if the State chooses to conduct a full preliminary examination in lieu of a minimal preliminary hearing, then "appointment of counsel for indigent defendants" is required (*id.* at 120). In *Routhier v. Sheriff, Clark County*, 93 Nev. 149, 151-52, 560 P.2d 1371, 1372

(1977), the Nevada Supreme Court relied on Sixth Amendment precedent as well as state law to hold that a defendant had a right to a continuance of a preliminary hearing in order to locate, call, and cross-examine an informant whose identity was first disclosed at the hearing and who was involved in setting up the drug transaction for which the defendant was arrested.

11.5.3. Right to Transcription of the Proceedings

An indigent defendant can assert a federal constitutional right to the transcription of the proceedings at state expense, since (a) the transcript would be an important aid to defense trial preparation as well as to impeachment of prosecution witnesses at trial (*cf. Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (plurality opinion); *Britt v. North Carolina*, 404 U.S. 226, 228 (1971)); (b) a solvent defendant could employ a stenographer to make a transcript; and (c) the Equal Protection Clause of the Fourteenth Amendment, as construed in *Griffin v. Illinois*, 351 U.S. 12 (1956), forbids the states to deny an indigent, for the sole reason of indigency, an important litigation tool that a solvent individual could buy. *See Roberts v. LaVallee*, 389 U.S. 40 (1967); *Britt v. North Carolina*, *supra*, 404 U.S. at 228 (dictum); *Bounds v. Smith*, 430 U.S. 817, 822 & n.8 (1977) (dictum); *United States ex rel. Wilson v. McMann*, 408 F.2d 896 (2d Cir. 1969); *Peterson v. United States*, 351 F.2d 606 (9th Cir. 1965); *cf. Washington v. Clemmer*, 339 F.2d 715, 717-18 (D.C. Cir. 1964); *compare United States v. MacCollom*, 426 U.S. 317 (1976).

In localities where it is not routine practice to have preliminary hearings attended by a court reporter or stenographer, counsel should be sure to have a stenographer or recording device present and should move for payment of the cost by the state if the client is indigent.

11.6. Procedures To Challenge Denial of Rights to or at a Preliminary Hearing

11.6.1. Before the Hearing

Counsel who, prior to the stage of bind-over, is dissatisfied with the preliminary arraignment or preliminary examination procedures should apply to the court in which the case will ultimately be tried for an order to rectify the deficiencies. In most jurisdictions the appropriate form of action will be a prerogative writ proceeding – prohibition or mandamus – directed to the magistrate or to the prosecutor. For example, if a magistrate refuses to subpoena defense witnesses or refuses a defense request for free transcription of the testimony in the case of an indigent, counsel should seek mandamus to compel the magistrate to provide these services or prohibition to restrain the examination without them.

In some jurisdictions a bill in equity is used in lieu of the prerogative writs. In others, a simple motion in the court of record is entertained.

If the prosecutor obtains a continuance and if defense counsel suspects that the prosecutor is going to the grand jury, counsel may seek mandamus to compel the magistrate to proceed forthwith with the preliminary examination

or prohibition to restrain the prosecutor from presenting the case to the grand jury before the examination has been had. If counsel's objective is to obtain a hearing promptly, s/he can file either a mandamus or a *habeas corpus* petition (see § 3.8.4 *supra*) complaining that the date set for the hearing – or the date to which the hearing is adjourned or continued – will result in excessive delay.

If a preliminary arraignment or a preliminary examination is being unduly delayed by the real or supposed unavailability of a magistrate to conduct it, counsel should also consider applying to one of the judges of the court of record to conduct the proceedings in the judge's capacity as a committing magistrate. See § 11.6.2 *infra*.

11.6.2. After the Hearing or Bind-over

If counsel is retained or appointed following the preliminary hearing stage, s/he should immediately ascertain from the client, the prosecutor, or court records whether both a preliminary arraignment and a preliminary examination have been held. (Since the client is unlikely to know what a "preliminary examination" is or to distinguish it from a preliminary arraignment, the best question to ask the client is whether there was a hearing at which people took the witness stand and testified.)

If any part of a preliminary hearing has been held, ordinarily counsel should have the stenographic notes transcribed or, if the client is an indigent, move for their transcription at state expense. See § 11.5.3 *supra*; § 11.8.7 *infra*. If the transcript shows defects in the hearing that counsel wishes to challenge or if there has been no hearing and no valid waiver or if there is no transcript of the hearing and no valid waiver of a transcript, counsel should decide whether s/he wants a preliminary hearing at this time. (See § 11.7.3 *infra*.) If s/he decides that s/he does want a preliminary hearing, one or more of several procedural devices may be available. First, in many jurisdictions courts of record are given statutory authority to conduct a "court of inquest" or their judges are empowered to sit as committing magistrates. Where this authority exists, a motion to the trial court to have one of its judges conduct a preliminary hearing that will afford the defendant the rights that s/he has heretofore been denied seems appropriate. Second, in jurisdictions where *habeas corpus* is traditionally available to review the magistrate's decision to bind a defendant over, the writ would seem equally appropriate to challenge denial of, or procedural defects in, the preliminary hearing. See, e.g., *Sheriff of Washoe County v. Vasile*, 96 Nev. 5, 604 P.2d 809 (1980). Third, a motion to dismiss the indictment or information may be the simplest and most effective procedure in some States. See, e.g., *State v. Essman*, 98 Ariz. 228, 403 P.2d 540 (1965). Elsewhere, a motion to quash the bind-over or the magistrate's transcript, to dismiss any outstanding charging paper, and to remand the case to the magistrate for preliminary hearing would seem appropriate. (*Gerstein v. Pugh*, 420 U.S. 103 (1975), described in § 11.2 *supra*, does not appear to permit an attack on a charging paper upon the sole ground that *Gerstein's* requirement of a Fourth Amendment probable cause determination has not been satisfied. For that particular defect, standing alone, *habeas corpus* is the exclusive remedy. See *id.* at 119. If, however, any *other* federal constitutional

rights have been infringed by proceedings at the preliminary arraignment or the preliminary examination (see §§ 11.4, 11.6 *supra*), a motion to dismiss or quash the charging papers is in order. See *Hamilton v. Alabama*, 368 U.S. 52 (1961); *Coleman v. Alabama*, 399 U.S. 1, 10-11 (1970) (plurality opinion).

11.7. Defensive Conduct of the Preliminary Arraignment

11.7.1. Pleading

The general nature of the proceedings at preliminary arraignment is described in §§ 2.3.3, 2.3.4, 11.1.2 *supra*. A few points deserve further mention here.

In some jurisdictions, the defendant is asked to plead to the complaint at the preliminary arraignment. In other jurisdictions, s/he does not plead but simply elects to have or waive preliminary examination. Where pleading is required, local practice differs regarding the significance of a plea of guilty. It is sometimes treated merely as a waiver of preliminary examination, authorizing the defendant's bind-over without the presentation of evidence by the prosecution. Sometimes it is treated as a waiver of both preliminary examination and indictment in indictable cases (see § 2.4.3 *supra*; § 12.1 *infra*). Sometimes it is additionally treated as an indication by the defendant that s/he intends to plead guilty in the trial court to which s/he is bound over. The defendant may subsequently switch signals and plead not guilty in the court of record; but if s/he does so without good reason, the prosecutor and the trial judge will be displeased and will remember their displeasure at the time of sentencing in the event of a conviction. (These effects of a guilty plea to a complaint charging a felony or a misdemeanor must be distinguished from the effect of the defendant's plea of guilty to a summary offense that is a lesser included offense of the one charged in the complaint. Since a summary offense is within the dispositive jurisdiction of the magistrate (see §§ 2.2.4-2.2.5 *supra*), the defendant is convicted and sentenced by the magistrate upon this latter plea, and the greater charges are then dismissed.) Some jurisdictions do, while others do not, recognize special pleas (see §§ 14.5-14.6 *infra*) at preliminary arraignment. Where they are recognized, they are ordinarily required to be entered prior to a general plea of not guilty, or they are waived (*cf.* §§ 14.5, 14.7 *infra*), with the consequence either (1) that they may not later be made in the trial court or (2) that they may later be made only upon leave granted within the trial court's discretion. Motions to dismiss the complaint for failure to state an offense within the jurisdiction of the court (*cf.* § 20.4 *infra*) or for technical deficiencies (see § 11.7.2 *infra*) usually must also be made before a plea of not guilty is entered. Obviously, careful consideration of local practice is required prior to pleading.

Counsel who is first appointed at preliminary arraignment should request adequate time to interview the defendant and to do whatever investigation and research appear to be necessary before pleading. See §§ 3.14-3.18, 3.23.3 *supra*. In particular, counsel should not succumb to browbeating by a hurried magistrate who urges counsel to "go ahead and enter a safe plea of not

guilty,” since such a plea may, in fact, be far from safe. The decision whether to demand or to waive preliminary examination also requires thoughtful consideration. See § 11.7.3 *infra*.

Some courts appoint counsel for indigent defendants at preliminary arraignment only *after* the defendant (1) has pleaded, (2) has demanded or waived a preliminary examination, or (3) has done both. Counsel appointed at this juncture should immediately inform the court that s/he wants to consult with the client and will also need time to do additional research and investigation in order to advise the client whether to stand upon or to change the pleas and elections already made. If counsel then concludes that the defendant’s pleas or elections were improvident, counsel should move to vacate them on the ground that the defendant’s Sixth Amendment right to counsel at preliminary arraignment (see §§ 3.23.3, 11.5.1 *supra*) would be violated by holding the defendant to any decisions which s/he made prior to the appointment of an attorney. See *Hamilton v. Alabama*, 368 U.S. 52, 53-54 (1961).

11.7.2. Technical Objections

Objections to the form of a complaint may be made at preliminary arraignment by a motion to dismiss the complaint as insufficient or defective on its face. Also in some states the magistrate’s jurisdiction depends on the validity of the arrest, with the result that a successful attack on the arrest (see § 25.7 *infra*) requires dismissal of the complaint.

These technical defenses should be raised very sparingly. In most instances the defects can be cured by the filing of a new complaint or by a rearrest, and the defendant gains nothing of substance. In fact, s/he may have to post new and higher bail for being vexatious. On the other hand, local rules may sometimes require that certain objections be taken or that certain motions be made at the preliminary arraignment in order to preserve the right to make the contentions involved subsequently at trial or on appeal.

11.7.3. The Decision Whether to Demand or Waive Preliminary Examination

Defense counsel should not ordinarily waive preliminary examination. It provides unique opportunities for discovery of the prosecution’s case. See §§ 11.4 *supra*; 11.8.2 *infra*. Waiver of the examination is usually appropriate only in one of the following situations:

(1) The chances of a defense victory are slim and the taking of evidence would benefit the prosecution because one or more of its witnesses will probably become unavailable by the time of trial (because of declining health, plans to leave the jurisdiction, or other circumstances) and the prosecution would have a credible argument that the witness’s preliminary-examination testimony is admissible at trial on the ground of the witness’s unavailability and the defendant’s opportunity to cross-examine the witness amply at the preliminary examination. See *Crawford v. Washington*, 541 U.S. 36, 57 (2004) (prosecution may be able to introduce, at trial, recorded “preliminary

hearing testimony” of a currently unavailable witness “if the defendant had an adequate opportunity to cross-examine” the witness on the pertinent subject matter at the preliminary hearing). *Compare People v. Fry*, 92 P.3d 970, 972 (Colo. 2004) (preliminary hearing testimony of an unavailable prosecution witness was not admissible at trial “[b]ecause preliminary hearings in Colorado do not present an adequate opportunity for cross-examination”).

(2) The prosecution has a solid case, and the chances are less than slight that a preliminary examination will produce anything but high bail and intensification of the hostility of prosecution witnesses. Frequently, with the passage of time a complainant will mellow, but once s/he has testified under oath, s/he is unlikely to change the story and is impeachable if s/he does. Moreover, once s/he has testified for the prosecution, s/he may refuse to be interviewed by anyone representing the defendant’s interests. See § 9.14 *supra*.

(3) The likely adverse publicity outweighs any possible gain from the examination.

(4) Counsel learns of a defect in the prosecution’s case that, in all probability, would not be corrected before the case went to trial if not brought to the prosecutor’s attention at the preliminary examination. This may happen especially in metropolitan areas where the prosecutor’s office is handling an enormous caseload and relies primarily upon the police to make sure that all needed witnesses and essential elements of a case are produced at trial.

(5) The defendant is undercharged. If facts known to counsel suggest that the defendant is guilty of more, or more serious, offenses than those charged in the complaint, counsel may want to avoid a preliminary examination that could alert the prosecutor to the additional or more serious offenses.

Other exceptional reasons to waive may occasionally appear. When in doubt whether to waive or demand the examination, counsel should demand it.

11.8. *Defensive Conduct of the Preliminary Examination*

11.8.1. *The Nature of the Proceedings at Preliminary Examination*

The preliminary examination is in most respects conducted like a trial. The rules of evidence are ordinarily enforced (although counsel handling a federal matter should note FED. R. EVID. 1101(d)(3)), often with some relaxation of the hearsay rule. (Indeed, in some jurisdictions magistrates may bind a defendant over on nothing but hearsay evidence.)

The prosecution must make a showing of probable cause of every element of the offense and of the defendant’s identity as its perpetrator. The *corpus delicti* must ordinarily be proved before any admissions of the defendant may be received in evidence, but the magistrate has some discretion to allow variance from this order of proof. Compare § 26.17 *infra*.

Witnesses are questioned in the ordinary fashion, and real evidence is admitted as exhibits. Cross-examination of witnesses is permitted, although some magistrates tend to limit its scope to a narrower compass than would be allowed at trial. See § 11.8.3 *infra*. Sequestration of witnesses is allowed within the sound discretion of the magistrate.

There is modification of these rules in varying degrees in some jurisdictions, and local practice must be checked. In some localities, preliminary examination in misdemeanor cases is conducted for the prosecution by a police officer rather than a law-trained prosecutor; here, the proceedings are somewhat more informal, and the magistrate plays a greater role in questioning witnesses.

11.8.2. *Cross-examining for Discovery and Impeachment*

Defense counsel has three principal goals at the preliminary examination: (1) to secure the dismissal or reduction of the charges against the defendant if the prosecution does not meet its burden of proof; (2) to put the testimony of the prosecution witnesses on record in a way that makes them most impeachable at trial; and (3) to discover as much of the prosecutor's case as possible.

Once the prosecution has made out its *prima facie* case, there is no great likelihood that cross-examination will destroy it so completely as to warrant a dismissal. Therefore, counsel's focus narrows to the twin objectives of discovery and of nailing down impeachable prosecution testimony. As a practical matter, these are the major objectives of the defense from the outset of most preliminary examinations, since most magistrates will predictably find probable cause to bind most defendants over most of the time.

Frequently, counsel may find that s/he is working at cross-purposes in seeking to discover and to lay a foundation for impeachment simultaneously. S/he will obviously have to accommodate these objectives in particular situations with an eye to which objective is more important in dealing with an individual prosecution witness. If counsel vigorously cross-examines the witness, in an effort to get a contradiction or concession on record, the witness will normally dig in and give a minimum of information in an effort to save his or her testimonial position; and, more than likely, s/he will be uncooperative if counsel thereafter attempts to interview the witness prior to trial. On the other hand, if counsel engages the witness in routine examination, amiable and ranging, counsel may be able to pick up many clues for investigation and for planning of the defense. Of course, some witnesses resent any kind of cross-examination. If counsel thinks that this type of witness is lying or confused, counsel may wish to pin the witness down. Under no circumstances, however, should counsel educate the witness about the weaknesses of his or her testimony. To avoid mutual education by prosecution witnesses, counsel should ordinarily ask that all witnesses be excluded from the courtroom during one another's testimony. See § 34.6 *infra*.

The probable utility of cross-examining for impeachment depends

almost as much on the prosecutor as on the witness. If the prosecutor is one who prepares witnesses as carefully for preliminary examination as for trial, the likelihood of getting anything out of the witness that will be useful to impeach him or her at trial is small. Most prosecutors, however, do not have the time to prepare witnesses thoroughly for the preliminary examination, with the result that the examination provides a unique opportunity to catch the prosecution witnesses, on record, with their guards down. On the other hand, the importance of using the preliminary examination for discovery depends largely upon the amount of funds available to conduct an independent investigation and the liberality of practice with respect to other criminal pretrial discovery devices in the locality. Investigation can be very expensive, and counsel must recognize that most clients simply cannot afford it. The investigative services made available to appointed counsel in indigent cases are generally woefully inadequate. As for other discovery procedures, it is fair to say that although there is a trend toward more liberal discovery, the trend has not yet gone very far – and *least* far in the area of defense access to the statements of prosecution witnesses. For a fuller discussion of pretrial discovery, see Chapter 18 *infra*. Counsel at the preliminary examination stage should therefore be careful to avoid undue optimism about what s/he will learn later if s/he lets this opportunity for some discovery go by.

11.8.3. Resisting Limitations on Cross-examination

Many magistrates allow defense counsel very grudging room for cross-examination at a preliminary examination on the reasoning that guilt is not at issue, that the prosecution needs only show a case the jury could believe, and that, therefore, nothing which cross-examination might disclose is relevant.

The theoretical answers to this reasoning are (a) that it would be plainly relevant if cross-examination forced the witness to withdraw his or her testimony on direct examination and (b) that the statute expressly permitting the defendant to cross-examine prosecution witnesses, call defense witnesses, or both at preliminary examination (as most statutes do) assumes that the magistrate is not to restrict the inquiry to a bare-bones hearing of the prosecution's evidence, untested for credibility. (Most of the cases cited in § 11.4 *supra* contain quotable language endorsing the right of the defense to conduct a probing cross-examination at the preliminary examination. See particularly the two *Coleman* opinions, *Hawkins*, and *Hodge*.)

Magistrates, however, like to push the hearing along and will often not be persuaded by these theories. Counsel should continue to attempt to cross-examine, as long as s/he can decently do so, in order to make clear for the record the extent of the limitations imposed on cross-examination. S/he should then respectfully ask the magistrate whether all cross-examination is going to be disallowed and, if not, what areas the magistrate is not going to let counsel go into. If the magistrate says that s/he cannot tell until counsel asks the questions, counsel should resume attempts to cross-examine. Eventually the magistrate will shut counsel off altogether. Counsel should then object to the denial of cross-examination on the grounds of the client's statutory right to a preliminary examination (§ 11.3 *supra*) and the statutory and constitutional

rights to cross-examination and to confrontation (§ 11.5.2 *supra*; see §§ 18.9.2.3, 37.1 *infra*), effective representation by counsel (§ 11.5.1 *supra*; see § 18.9.2.1 *infra*), and a fair hearing (see §§ 18.9.2.3, 39.1 *infra*), as well as on the ground that the statute giving defendants a right to present testimony envisions that the magistrate will hear both sides of the case. The record should be clear that this objection has been overruled if it has. Counsel is now in a position to challenge the propriety of the bind-over by the procedures enumerated in § 11.6.2 *supra* if s/he can convince a higher court that upon one or another of these legal grounds, s/he had a right to cross-examine which was unduly restricted.

An unfortunate *dictum* in a plurality opinion of the Supreme Court appears to accept, without federal constitutional quarrel, a state-law practice permitting the magistrate “to terminate the preliminary hearing once probable cause is established” (*Adams v. Illinois*, 405 U.S. 278, 282 (1972)). This language, predictably, will be seized upon by lower courts as giving an examining magistrate virtually unlimited power to curtail defensive cross-examination. But the Supreme Court did not, in fact, have before it in the *Adams* case any instance of curtailment of the defensive conduct of a preliminary hearing. The plurality opinion was merely noting, as relevant to the question of the retroactivity of the constitutional requirement of appointed counsel at preliminary examination (see § 11.5.1 *supra*), that “because of limitations upon the use of the preliminary hearing for discovery and impeachment purposes, counsel cannot be as effectual as at trial” (404 U.S. at 282). So it is fair to urge that the *Adams dictum* must be read narrowly: as allowing magisterial discretion to curb cross-examination pursued “for discovery and impeachment purposes” only, “once probable cause is established” (*id.*), but not as authorizing the restriction of cross-examination designed to test the foundation of the probable cause showing itself, even if the cross-examination does also provide some discovery. For it seems plain that if, with one exception not presently relevant, a *parolee* has a right “to confrontation and cross-examination” at a preliminary parole-revocation hearing (*Morrissey v. Brewer*, 408 U.S. 471, 487 (1972)), a criminal defendant has rights that are at least as ample at a preliminary examination, which is “part of a criminal prosecution” (*id.* at 480). See also *Gagnon v. Scarpelli*, 411 U.S. 778, 781-82, 788-90 (1973); and see § 18.9.2.3 *infra*. (*Gerstein v. Pugh*, 420 U.S. 103 (1975), does not hold to the contrary. See § 11.5.2 *supra*.)

Certainly, counsel is on far firmer ground when s/he can justify his or her questions on cross-examination as going to probe the prosecution’s showing of probable cause than when they have no justification except discovery. Only when there is no possibility of successfully urging that a line of questioning goes to probable cause and, therefore, that it is within the purview of the classic functions of preliminary examination (see § 11.1.1 *supra*) should counsel attempt to justify it on the basis of a right to discovery as such (see Chapter 18 *infra*; cf. § 11.4 *supra*), pointing out, if possible, why in the case at bar, unlike *Adams*, there are no effective “alternative procedures” for discovery (405 U.S. at 282).

11.8.4. Calling Adverse Witnesses

Because the prosecution needs do nothing more than make a *prima facie*

case at the preliminary examination, it will frequently call only some of the witnesses whom it plans to use at trial. When persons whom defense counsel has identified as potential prosecution witnesses refuse to be interviewed by the defense, counsel may want to serve them with defense subpoenas for the slated date of the preliminary examination, approach them before court, and offer them the opportunity to talk with counsel – or with counsel’s investigator – outside of the courtroom instead of having to appear in court. This cage-rattling technique can produce useful discovery. Similarly, issuing subpoenas *duces tecum* for the production of records, other documents and physical objects can provide a means for prying these materials out of the hands of uncooperative custodians at an earlier stage than the formal discovery process discussed in Chapter 18.

However, two cautions need to be observed here – one simple and obvious, the other more complex.

First, counsel should not subpoena any person or material that the prosecutor is otherwise unlikely to identify as a potential source of relevant information.

Second, counsel will seldom be advised to actually put an adverse witness on the stand, as distinguished from releasing him or her from the defense subpoena after out-of-court questioning. Most jurisdictions continue to follow the traditional rules of witness examination that prohibit a direct examiner from asking leading questions or impeaching his or her own witness, and most jurisdictions apply the same restrictions at preliminary hearings as at trials. Under these conditions, calling an unfriendly witness is a bad gamble: counsel will be handicapped against extracting any useful testimony, and anything useful that s/he does extract will be exposed to deconstruction or reconstruction by the prosecutor’s use of leading questions and impeachment on cross. Consequently, counsel should ordinarily refrain from putting any adverse witness on the stand unless (a) the evidence rules applicable to preliminary examinations in counsel’s jurisdiction do *not* forbid direct examiners to lead and impeach their own witnesses, or (b) the presiding magistrate is known to be liberal in granting defense requests to declare witnesses hostile (see § 39.29 *infra*). (Counsel’s best chances for getting witnesses declared hostile are (i) situations in which a witness has publicly demonstrated strong personal animosity toward the defendant apart from the events giving rise to the criminal charge, and (ii) situations in which other prosecution witnesses have recounted incriminating hearsay declarations of the witness. In the latter situations, counsel can invoke the defendant’s state-law right to contest the prosecutor’s *prima facie* case and can also make some mileage out of the constitutional rights of confrontation and Due Process (see § 11.5.2 *supra*; §§ 18.9.2.3, 18.9.2.4 *infra*). Nevertheless, most magistrates will almost always exercise their discretion to refuse to allow defense counsel to use hostile-witnesses questioning techniques at a preliminary examination.)

11.8.5. Calling Favorable Defense Witnesses

Counsel should not present favorable defense testimony at a preliminary

examination unless there is the strongest likelihood that the defendant will be discharged after it is presented. See § 11.1.1 *supra*. This is a very rare situation because the prosecution's burden of proving a *prima facie* case is not exacting, most magistrates are prosecution-friendly, and they will disregard any defense evidence on the theory that its credibility is a matter for the jury or the trial judge to determine.

Before making the rare decision to present defense testimony, counsel should always ask for the dismissal of the charge based upon the inadequacy of the prosecution's evidence. Argument on the question of dismissal at this point, even if dismissal is refused, will often reveal whether the judge would be inclined to dismiss the case on the basis of the defense that counsel is considering putting on. If not, counsel would be foolish to offer up his or her potential trial witnesses for pretrial cross-examination by the prosecution. *Cf.* § 11.8.2 *supra*.

11.8.6. Objecting to Inadmissible Evidence

To the extent that local practice makes the rules of evidence applicable to preliminary examinations (see § 11.8.1 *supra*), counsel will sometimes have the opportunity to object to prosecution evidence as inadmissible. Ordinarily s/he should object only if (a) there is a good chance that the prosecution will fail to make a *prima facie* case if the objectionable evidence is excluded; (b) counsel is sure s/he already knows everything s/he could learn from the evidence; or (c) the evidence is likely to be seriously damaging, and either (i) an objection is required under local rules in order to preserve a claim of its inadmissibility at trial (see § 11.7.2 *supra*), or (ii) there is substantial reason to believe that the witness may become unavailable to the prosecution by the time of trial and that the prosecution would be able to introduce the witness's preliminary hearing testimony at trial (see § 11.7.3 subdivision one *supra*). If the prosecution has a facially sufficient case, counsel will need investigative leads to defend against it. Helpful discovery can be obtained by permitting prosecution witnesses at preliminary hearings to make all the hearsay and other inadmissible statements that they want. Even more can often be obtained by cross-examining them on these statements. By allowing the testimony to come in, counsel can also lay a foundation for earlier objection at trial when the direct examination of a witness starts down an impermissible track. Referring to the transcript of the witness' testimony at the preliminary hearing, counsel will be able to demonstrate to the trial judge exactly where the prosecutor's line of questioning is headed. See § 40.4.2 *infra*.

The tactic of nonobjection can sometimes turn out to be a two-edged sword, enabling the prosecutor, as well as defense counsel, to learn previously unknown facts. This consideration will weigh more or less heavily against defense counsel's use of the tactic, depending upon how careless or careful the prosecutor is known to be in his or her investigation and preparation both before and after the preliminary examination.

11.8.7. Obtaining a Transcript

Many of the tactical suggestions just made have assumed that there

will be a reporter or stenographer transcribing the testimony. Whether a court reporter routinely attends preliminary examinations depends on local practice. Counsel should not assume that a reporter will be in attendance but should inquire. If local practice does not provide for a court reporter, the expense of a stenographer should be considered by the defense. Alternatively, the magistrate can be asked to allow counsel to operate a recording device at the defense table. Either a court reporter's transcript or a defense recording will usually serve as an invaluable aid in counsel's preparation for cross-examination at trial. The added advantage of a transcript is its greater utility at trial to impeach a witness who alters his or her testimony. A defense-made recording of the witness's preliminary-examination testimony will be subject to prosecutorial quibbles about accuracy and intelligibility when offered for impeachment purposes at trial.

In some jurisdictions where preliminary hearing testimony is routinely recorded, it is nevertheless not transcribed unless specially ordered by a party. Again, counsel should inquire whether this is the situation and should order a transcript if necessary.

Where both recording and transcription are routine, the transcripts are usually forwarded several days or weeks after the hearing to the office of the clerk of court. Counsel may wish to examine the hearing transcript in the clerk's office before deciding whether to order a defense copy. *See, e.g.,* FED. RULE CRIM. PRO. 5.1(g).

If the client is unable to afford a transcript (or a stenographer, when testimony is not reported) counsel should request transcription (or reporting and transcription, as the case may be) at state expense. In the event that local law does not give counsel a right to what s/he wants, s/he should invoke the federal Equal Protection and Due Process doctrines summarized in §§ 5.2, 5.3, 11.5.3 *supra*. Procedures for enforcing an indigent client's rights under these doctrines and/or state law are discussed in § 11.6 *supra*.

11.9. Continuances

In a few jurisdictions, a continuance of the preliminary hearing of a defendant in custody may be made only with his or her personal assent. The more ordinary practice permits continuances in the discretion of the magistrate upon the application of either prosecution or defense. That discretion is doubtless now limited by *Gerstein v. Pugh*, 420 U.S. 103 (1975), and *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), see § 11.2 *supra*; and the citation of *Gerstein* and *McLaughlin* in opposition to a prosecution-sought continuance is appropriate *unless* local law can be construed to permit the judge to make a probable cause determination upon affidavits without a full evidentiary hearing.

The prosecutorial tactic of using a continuance to permit presentation of the case to the grand jury is discussed in § 11.4 *supra*, along with objections that can be made to this tactic. If defense counsel is ready for the hearing and if the prosecutor seeks a continuance during a period when the grand jury is in session, counsel should oppose the continuance except on a representation

by the prosecutor in open court that s/he will not present the matter to the grand jury. If the prosecutor refuses to make such a representation and the continuance is nonetheless granted, counsel has made a record on which s/he can seek either mandamus against the magistrate to proceed forthwith or prohibition or an injunction against the prosecutor to forbid the prosecutor's presenting bills to the grand jury. See § 11.6.1 *supra*.

In other situations in which the magistrate grants the prosecution a continuance that defense counsel believes is excessive, counsel may challenge it for abuse of discretion by mandamus or by *habeas corpus* if the client is in custody. See §§ 3.8.4, 11.6.1 *supra*. Counsel should consider, alternatively, asking a judge of the court of record to assume jurisdiction as a committing magistrate and to conduct the examination. See *id.* and § 11.6.2 *supra*. Or counsel may be willing to agree to a continuance desired by the prosecution in exchange for the prosecutor's recommendation of favorable terms of bail and a promise not to go to the grand jury during the continuance.

The defense itself may want a continuance for various reasons – to investigate and prepare the case; to let a complainant's temper cool off; to demonstrate to the prosecutor that a defendant released on bail is behaving as a law-abiding citizen or has gotten a job or is starting to make restitution or that some other change of circumstances warrants the favorable exercise of the prosecutor's discretion to drop, reduce, or divert the contemplated charges (see §§ 8.2.2-8.2.4, 8.3.4, 8.4, 8.6 *supra*). When counsel is unprepared to conduct the preliminary examination and can show adequate justification for being unprepared, a defense request for a continuance may invoke the defendant's federal Sixth and Fourteenth Amendment rights to counsel (see §§ 3.23.3, 11.5.1, 11.7.1 *supra*) as well as the magistrate's state-law discretion. During the period of any continuance, the magistrate should be asked to release the defendant on bail or on some form of conditional release. See §§ 2.3.4, 3.8.3, 4.2-4.10 *supra*. If a defendant is not R.O.R.'d and cannot make bail, the magistrate may be asked to hold the defendant in the courthouse cellblock or to commit the defendant to jail rather than leave the defendant in the police lockup where s/he will remain in the hands of the investigating officers.

11.10. Bind-over; Review

The defendant may ordinarily be bound over to the grand jury or for trial for any offense shown by the evidence, even though not charged in the complaint. This practice, although traditionally accepted in many jurisdictions, should be subject to challenge on Due Process grounds, as depriving the defendant of fair notice and an opportunity to defend at the preliminary examination. See § 18.9.2.2 *infra*; *cf.* § 11.4 *supra*. “Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused” (*Dunn v. United States*, 442 U.S. 100, 106 (1979); *see also* *Cole v. Arkansas*, 333 U.S. 196 (1948); *Presnell v. Georgia*, 439 U.S. 14 (1978) (per curiam)); and this principle is not restricted to the trial stage of a criminal case (*see* *Jenkins v. McKeithen*, 395 U.S. 411, 429 (1969) (plurality opinion) (discussed in § 10.2 *supra*); *Morrissey v. Brewer*, 408 U.S. 471, 486-87 (1972) (preliminary hearing in parole revocation proceedings)).

In some jurisdictions, the bind-over is essentially unreviewable. In others, a motion to dismiss the consequent information may lie in a non-indictable case on the ground that the preliminary examination transcript fails to show probable cause to hold the defendant to answer or probable cause to charge a particular offense. In still others, *habeas corpus* or a motion to quash the bind-over or the magistrate's transcript is available to review the magistrate's finding of probable cause. *See, e.g., Woodall v. Sheriff, Clark County*, 95 Nev. 218, 591 P.2d 1144 (1979).

Ordinarily the issue on the writ or motion is decided on the basis of the preliminary examination transcript, since the magistrate's order to commit the defendant for court was based on that record. In some states, however, the *habeas corpus* court will hold its own hearing on the question of probable cause.

The simple admission of inadmissible evidence at a preliminary examination is not usually sufficient to sustain the vacating of the bind-over on motion or *habeas corpus* unless the remaining admissible evidence fails to support a finding of probable cause. But the admission of unconstitutionally obtained evidence at the hearing may require that the bind-over be vacated: The analysis in § 20.3.3 *infra* regarding the applicability of constitutional exclusionary rules to the grand jury applies *a fortiori* to preliminary examinations.

Defense counsel's decision to proceed with a motion to dismiss or with *habeas* involves some of the same considerations as the decision to move to dismiss a complaint before the magistrate for technical reasons (see § 11.7.2 *supra*). Because the prosecution can rearrest and present evidence that it neglected or did not deem necessary at the first hearing, a ruling by a court of record invalidating a bind-over may give the defendant only a Pyrrhic victory, the results of which are (A) that s/he must go through the arrest process again and post new bail and (B) that the prosecution is alerted to defects in its case while there is still time for it to cure them before jeopardy attaches (see § 20.8 *infra*; see also § 17.5.2, 40.8.4 *infra*). As a matter of probabilities, though, the likelihood of rearrest is considerably less when counsel successfully overturns a bind-over than when s/he successfully urges some technical objection before the magistrate.

Counsel should be alert to the consideration that in some jurisdictions the scope of review of the magistrate's bind-over is broader on *habeas corpus* than on a motion to quash. When this is the case and when *habeas corpus* is available only to applicants in actual custody – that is, when state practice does not follow federal case law recognizing bail status as “custody” for *habeas corpus* purposes (see § 28.5.4 *infra*) – counsel may well be advised not to post bail at the preliminary hearing but to apply for bail in the *habeas* case after filing the petition for the writ.

11.11. Discharge; Rearrest

If it appears at the preliminary examination that there is no probable cause to believe that an offense was committed or no probable cause to believe that the defendant committed it, the magistrate “discharges” the defendant

from custody. Following such a discharge, counsel should ask the magistrate to order the defendant's arrest record expunged or, alternatively, marked to reflect that the defendant was discharged for want of probable cause upon preliminary examination. See § 47.6 *infra*.

When the prosecutor disagrees with a magistrate's discharge (or if new evidence is discovered subsequent to the discharge), the prosecutor may order the defendant rearrested and presented for a second hearing, usually before a different magistrate. In some localities, by rule or practice, this second hearing is held before a higher ranking member of the judiciary – the chief magistrate or a judge of the court of record sitting as a committing magistrate. Although the rearrest practice is lawful, it is disfavored by many judges, and defense counsel may properly wear an air of abused innocence to the second hearing. Obtaining a transcript of the first hearing (see § 11.8.7 *supra*) is especially useful in these cases, since the prosecution can be made to look bad, whether its evidence is the same or different.

Chapter 12

Defensive Procedures Between Bind-over and the Filing of the Charging Paper

A. Matters Relating to the Grand Jury

12.1. Introduction to Grand Jury Requirements and Procedures

Most States, by constitution or statute, require the prosecution of some or all serious crimes by indictment. The Fifth Amendment to the federal Constitution similarly requires that prosecutions for any “capital, or otherwise infamous crime [in the federal courts be by] . . . indictment.” The requirement is conceived principally as a protection to the defendant, and s/he may waive it. Indictments are the product of a grand jury. See § 2.4.3 *supra*.

Grand juries are convened, ordinarily at the outset of, or shortly preceding, each criminal term of court and are composed of a number of citizens (usually 15 to 23) selected by statutorily prescribed methods (see §§ 12.3, 32.3 *infra*) and possessing statutorily prescribed qualifications (usually age, residence, “good moral character”). There are also a few non-statutory restrictions on juror selection practices and nonstatutory grounds of disqualification:

- (1) The Equal Protection Clause of the Fourteenth Amendment to the federal Constitution and parallel provisions of state constitutions forbid systematic exclusion of racial, ethnic, religious, or economic groups. See § 12.1.1, 12.3 *infra*.
- (2) Statutes or common-law judicial decisions in some, but not all, jurisdictions require that grand jurors be unbiased. *E.g.*, ARIZ. REV. STAT. § 21.211 and ARIZ. RULE CRIM. PRO. 12.2; *State v. Murphy*, 110 N.J. 20, 29-33, 538 A.2d 1235, 1239-41 (1988) (“We believe that the guarantee of an indictment by grand jury, enshrined in our State and federal constitutions, now means more than indictment by a body that may have prejudged the case. . . . ¶ . . . We are satisfied that the procedures established in New Jersey by statute and by rule to implement the constitutional right to indictment contemplate indictment by an unbiased grand jury. ¶ . . . Accordingly, we now hold that, as an officer of the court, the prosecuting attorney has a responsibility to bring to the attention of the presiding judge any evidence of partiality or bias that could affect the impartial deliberations of a grand juror.”).
- (3) The Fourteenth Amendment’s Due Process Clause and parallel guarantees of state constitutions may impose some, albeit not stringent, restrictions on service by grand jurors who have been prejudged against a defendant through adverse newspaper

publicity and the like. *See Beck v. Washington*, 369 U.S. 541, 546 (1962) (dictum). *Cf.* § 32.1 subdivision (1) *infra*.

12.1.1. Constitutional Protections Against Discrimination in Grand Jury Selection

The Fourteenth Amendment’s Equal Protection Clause prohibits systematic exclusion of racial, ethnic, religious, or economic groups from jury service. *Coleman v. Alabama*, 389 U.S. 22 (1967), and cases cited (African Americans); *Turner v. Fouche*, 396 U.S. 346, 356-61 (1970) (same); *Hernandez v. Texas*, 347 U.S. 475 (1954) (Mexican-Americans); *Castaneda v. Partida*, 430 U.S. 482 (1977) (same); *Schowgurow v. State*, 240 Md. 121, 213 A.2d 475 (1965) (atheists); *Labat v. Bennett*, 365 F.2d 698 (5th Cir. 1966) (wage earners); *cf. Amadeo v. Zant*, 486 U.S. 214 (1988). This principle condemns the systematic exclusion of any “distinct class” of citizens shown to be viewed or treated differently from other classes in the local community (*Hernandez v. Texas, supra*, 347 U.S. at 478; *Castaneda v. Partida, supra*, 430 U.S. at 494-95). The prohibition applies to grand juries as well as trial juries. *Strauder v. West Virginia*, 100 U.S. 303 (1879); *Campbell v. Louisiana*, 523 U.S. 392 (1998).

In *Taylor v. Louisiana*, 419 U.S. 522 (1975), the Supreme Court held that the systematic exclusion of women from juries in criminal cases is forbidden by the Sixth Amendment as incorporated into the Due Process Clause of the Fourteenth; and in subsequent cases the Court has treated *Taylor* as overruling its antiquated holding in *Hoyt v. Florida*, 368 U.S. 57 (1961), that exclusion of women from criminal juries did not violate the Equal Protection Clause. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 134-35 (1994) (describing *Taylor v. Louisiana* as having “repudiated the reasoning of *Hoyt*,” and observing that although “*Taylor* distinguished *Hoyt* . . . , [t]he Court now . . . has stated that *Taylor* ‘in effect’ overruled *Hoyt*” (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 n.1 (1991))). Given the Court’s application of the Equal Protection Clause in *J.E.B.* to prohibit a state actor’s intentional discrimination on the basis of gender in using peremptory strikes in jury selection, and given the Court’s record in other contexts of barring gender discrimination on Equal Protection grounds (*see, e.g., United States v. Virginia*, 518 U.S. 515 (1996); *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723-28 (1982)), it is evident that women should now be held to be a “distinct class” whose exclusion from any jury selection process would render the resulting juries unconstitutional. *See also Gibson v. Zant*, 705 F.2d 1543 (11th Cir. 1983); *Machetti v. Linahan*, 679 F.2d 236 (11th Cir. 1982); *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966) (three-judge court).

Whether the systematic exclusion of particular age groups – for example, young people or the elderly – would also be condemned is a more difficult question, which the Supreme Court has reserved. *Hamling v. United States*, 418 U.S. 87, 137 (1974). *See* Donald H. Zeigler, *Young Adults as a Cognizable Group in Jury Selection*, 76 MICH. L. REV. 1045 (1978).

A grand jury whose composition is affected by systematic racial exclusion may be challenged even by a defendant who is not a member of the excluded class. *Campbell v. Louisiana*, 523 U.S. 392, 394 (1998) (“a white

criminal defendant has standing to object to discrimination against black persons in the selection of grand jurors”). See also *Peters v. Kiff*, 407 U.S. 493 (1972). Regarding means of proving systematic exclusion claims, see § 12.3 *infra*.

12.1.2. *Grand Jury Procedures*

Once the jurors for a term have been selected, their names are published or made available through the office of the jury commissioners or the clerk of court. They meet in closed session, with no judicial officer in attendance. In most States, no one except the prosecutor, a stenographer, and the single witness testifying is permitted to be present during testimony to the grand jury; and the prosecutor and witnesses are also barred from the jury’s deliberations. In some States, however, a witness can be accompanied and advised by counsel during his or her grand jury testimony. See §§ 12.6.1, 12.6.4.3 *infra*.

The grand jury is theoretically free, on its own initiative, to consider any matters of felony (and sometimes other matters) within its jurisdiction and to call any witnesses it pleases. But as a matter of actual practice, grand juries usually limit their consideration to cases presented by the prosecutor and to the witnesses whom the prosecutor suggests they call. The prosecutor drafts “bills” charging defendants with offenses, presents witnesses to the grand jury in support of the bills, and, at the conclusion of the testimony, asks the jury to return the bills as “true bills,” or indictments.

The grand jury is supposed to indict a defendant if, upon the evidence presented to it, it finds that there are sufficient grounds to believe the defendant guilty of an offense. In some jurisdictions the test of sufficiency of the grounds is described as “probable cause” or “reasonable cause”; in others it is described as a *prima facie* case – that is, evidence which, if believed, unexplained and uncontradicted, would warrant the defendant’s conviction by a trial jury.

Practice varies regarding the applicability of rules of evidence to the grand jury. In some jurisdictions the jurors are adjured by statute to receive only legally admissible evidence. In others they are left relatively unrestricted with regard to what they may hear. (For example, except with respect to privileges, the Federal Rules of Evidence are explicitly made inapplicable to federal grand jury proceedings by Rule 1101(d)(2).) In practice, with no judge and no defense counsel present, grand juries hear just about anything the prosecutor wants them to hear. (Sections 12.1.3 and 20.3 *infra* discuss possible grounds and procedures for obtaining judicial review of the admissibility, legality, and sufficiency of evidence received by the grand jury. Sections 12.6-12.8 *infra* discuss damage-control techniques that defense counsel can use during the grand jury proceeding itself.)

The grand jury has the subpoena power. Witnesses who refuse to testify before it are taken into court, ordered to testify by the judge, and, upon further refusal, punished by the judge for contempt.

The grand jury ordinarily takes its legal advice from the prosecutor, although it may also request instructions from the presiding judge of the felony

court. (The judge’s general “charge” to the grand jury at the beginning of a session usually consists of administrative instructions and civic exhortations, conveying no principles of substantive law except – in some localities – a reference to the probable-cause or *prima-facie*-case standard for indictment.)

Following their deliberations on the evidence, the jurors, by majority vote, return bills of indictment into the felony court, signed as “true bills” by their foreman. These are the indictments required by constitution and statute and constitute the charging papers on which felony defendants are subsequently put to trial. Although grand juries differ in their tempers, for the most part they simply rubber-stamp the prosecutor’s work product and obligingly return as “true” all of the bills that the prosecutor presents, excepting those which s/he quietly lets it be known s/he does not want returned. In “no-billing” the latter cases, the grand jury serves the function of taking the heat off the prosecutor for not going forward with prosecutions that s/he prefers not to undertake but cannot overtly decline without arousing the ire of some political or personal constituency.

12.1.3. Grounds for Challenging Defects in Grand Jury Proceedings

In some jurisdictions, there is little or no judicial review of claims of impropriety in grand jury proceedings. In other jurisdictions, relatively robust review is provided. *See., e.g., Crimmins v. Superior Court, In and For Maricopa County*, 137 Ariz. 39, 43, 668 P.2d 882, 886 (1983) (the prosecutor failed to present evidence that the defendant may have had the basis for a valid citizen’s arrest of the complainant, offered inaccurate police testimony portraying the complainant as guiltless, and failed to instruct the grand jurors on the law authorizing citizen’s arrest; “[T]he omission of significant facts, coupled with the omission of instruction on statutes which give the omitted facts their legal significance, rendered the presentation of the case against Crimmins less than fair and impartial. . . . We believe that the grand jury’s inability to determine the case based on accurately depicted facts and the applicable law flawed their decision and entitles Crimmins to a new determination of probable cause. Petitioner was denied his right to due process and a fair and impartial presentation of the evidence by the manner in which the proceeding was conducted.”); *State v. Joao*, 53 Haw. 226, 230, 491 P.2d 1089, 1091-92 (1971) (the prosecutors vouched for the credibility of the state’s only witness and failed to correct that witness’s false testimony understating his criminal record; “We hold that the conduct of the prosecutors was contrary to those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions’ . . . and therefore violated the due process clause of the Fourteenth Amendment of the Constitution of the United States, and article 1, section 4 of the Hawaii Constitution”; trial court order quashing the indictment is affirmed); *Herrera v. Sanchez*, 328 P.3d 1176, 1182-85 (N.M. 2014) (“During . . . [the defendant’s voluntary] grand jury testimony, the prosecuting attorney prevented . . . [her] from answering a grand juror’s question regarding whether . . . [s/he] ever told anyone that her husband was physically abusive to her. . . . ¶ By preventing . . . [the defendant] from answering a direct, relevant question from a grand juror, the prosecuting attorney

interfered with the grand jury’s statutory duty to make an independent inquiry into the evidence supporting a determination of probable cause. . . . ¶ The prosecuting attorney [also] erred . . . when she expounded upon this Court’s prescribed jury instructions by telling the grand jury, ‘She [the defendant] was directly appealing to you to consider the consequences of your verdict. That is absolutely inappropriate. Please do not let anything she said to you about, you know, implying what the right decision is influence your decisions. She was improperly seeking your sympathy.’ . . . ¶ . . . Providing accurate, unbiased instructions to the grand jury is critical to the structural integrity of our grand jury system. We hold that the prosecuting attorney’s failure to do so in this case warrants dismissal of the indictment regardless of whether Petitioner has demonstrated prejudice.”). See also § 20.3.1 subdivision (2) *infra*.

In most jurisdictions, the appropriate procedure for challenging improper prosecutorial conduct or other defects in grand jury proceedings is a motion to quash or dismiss the indictment. See § 20.3 *infra*. If the motion is denied, appellate review is ordinarily available by interlocutory appeal or by pretrial prerogative-writ proceedings (see Chapter 31 *infra*) or both. See, e.g., *Herrera v. Sanchez*, *supra*, 328 P.3d at 1180. The trial court should be asked to postpone arraignment on the indictment pending these appellate proceedings; if it fails to do so, a stay should be requested from the appellate court. Whether challenges to grand jury improprieties survive for post-trial review on an appeal from conviction is a dubious question in many States. Counsel is ordinarily advised to play it safe by pursuing whatever pretrial appellate remedies local practice provides.

12.2. Deciding Whether to Waive Indictment

12.2.1. Advantages to Proceeding By Means of Indictment

The various legal rules governing grand jury proceedings present a number of potential grounds for challenging the composition and conduct of any particular jury. See § 12.1.3 *supra*; §§ 20.3.1, 20.3.3 *infra*. In some jurisdictions, a defendant can also ask the trial judge review the grand jury transcript and dismiss an indictment on the ground that the prosecution’s evidence is insufficient to meet the applicable probable-cause or *prima-facie-evidence* standard. See § 12.1.2 *supra*; § 20.3.2 *infra*. These defense opportunities will be lost if a defendant waives indictment and consents to be prosecuted by information. The defendant who waives also loses the slight chance that the grand jury may rebuff the prosecutor and no-bill the indictment.

Finally, s/he loses one rather significant trial advantage. Informations may be amended substantially by the prosecutor prior to or during trial. Indictments may not be amended so as to charge “an offense that is different from that alleged in the grand jury’s indictment,” without resubmission to the grand jury (*United States v. Miller*, 471 U.S. 130, 142 (1985) (dictum)). See *id.* at 142-45; *Ex parte Bain*, 121 U.S. 1 (1887); *Russell v. United States*, 369 U.S. 749, 770-71 (1962) (dictum). And, by reason of the prohibition against double jeopardy (see §§ 20.8, 40.8.4.2 *infra*), a prosecutor who finds at trial that the evidence is varying from the allegations of the indictment cannot stop the trial

in order to resubmit the case to the grand jury. Consequently, an indictment imposes a much tighter check on the prosecution's proof at trial than does an information. Significant variance of the proof from the facts alleged in an indictment requires an acquittal (*see Sanabria v. United States*, 437 U.S. 54, 68-69 (1978), recognizing the principle and holding that double jeopardy bars a prosecutor's appeal from such an acquittal, even when the trial judge has taken an erroneously narrow view of the indictment's allegations), whereas a similar variance in an information case would ordinarily allow the defendant nothing more than a continuance. Similarly, the trial judge may not, in his or her charge, submit to the petit jury theories or grounds for conviction which an indictment does not support (*see Stirone v. United States*, 361 U.S. 212 (1960); *United States v. Miller*, *supra*, 471 U.S. at 138-40 (dictum); *State v. Hicks*, 768 S.E.2d 373 (N.C. App. 2015)), although s/he may submit such theories or grounds in an information case, provided that the defendant has been given sufficient notice and preparatory opportunity to meet those theories or grounds at the trial.

12.2.2. Considerations Affecting Waiver

The advantages mentioned in the preceding subsection suggest that generally a defendant should not waive indictment unless there is some affirmative reason for doing so. This is particularly true in the case of a defendant who is a member of a racial, ethnic, religious, or gender-defined minority that has traditionally been underrepresented on juries in the area. Frequently, in these cases, a systematic-exclusion claim is as strong as any defense that the defendant is likely to have.

Sound affirmative reasons for waiving indictment are presented in the following circumstances:

(1) *There is a substantial certainty of indictment; the next grand jury term will not begin soon; and the defendant is in jail or otherwise inconvenienced by the delay.* A proceeding by information needs not await the next term of the grand jury, which may be several weeks (or, in rural counties, months) after bind-over. This delay can be particularly oppressive to a defendant who has not made bail. The period of pretrial incarceration may or may not be credited against a subsequent sentence, depending on local practice. See § 4.19 second paragraph *supra*. In any event, some defendants who are bound over for the grand jury and detained in default of bail are being held on charges for which they will not be sentenced to imprisonment, with the result that the whole period of pretrial detention is wasted. In such a case, anything that speeds the process up is advantageous. There may be other situations, too, in which a speed-up is desirable. A defendant on bail may be planning a move and want the case resolved quickly. In some jurisdictions a court-ordered mental examination is authorized only after the charging paper is filed. Defense counsel may want to have that examination made as early as possible, since the nearer to the time of the offense a psychiatric evaluation is made, the more persuasive its results may prove to be as the basis for a possible insanity or diminished-capacity defense or for favorable sentencing consideration. (See §§ 16.1.2, 16.3 *infra*).

(2) *The defendant intends to plead guilty at trial.* There are two considerations

here. First, in a plea case, even more than in a case that goes to trial, waiver of the grand jury tends to speed up final disposition. Second, in negotiating with the prosecutor, a defendant's willingness to save the prosecution the trouble of going before the grand jury is worth something.

(3) *The grand jury proceeding or the indictment may occasion substantial adverse publicity.*

(4) *Counsel has reason to believe that testimony before the grand jury may alert the prosecutor to defects in the prosecution's case that have gone unnoticed through the stage of the preliminary hearing and are not otherwise likely to be noticed by the prosecutor prior to trial; or counsel apprehends that testimony before the grand jury may give the prosecutor other investigative leads or alert the prosecutor to additional charges.*

(5) *The prosecutor is known to call prospective defense witnesses before the grand jury to badger them or to get their testimony on record for purposes of impeachment at trial; and counsel apprehends that a potential defense witness or witnesses may be vulnerable to this tactic.*

Other affirmative reasons for waiver may occasionally appear.

12.3. Challenge to the Array or to the Polls

Unless compelling considerations call for waiving indictment, counsel should consider whether there is any available ground of attack on the selection procedure or composition of the grand jury. See § 12.1.1 *supra*; § 20.3.1 *infra*. Objections to the method of selection or to the qualifications of the jurors generally (including claims of systematic exclusion of a racial, ethnic, religious, economic, gender-defined, or other “distinct class” (§ 12.1.1 *supra*)) are made by a challenge to the array (that is, to the group of jurors collectively). Objections to a particular juror (on grounds of bias, lack of statutory qualifications, and so forth) are made by a challenge to the polls (that is, to specified individuals). Both sorts of challenges are ordinarily required to be made in writing and prior to the convening of the jury (or, in some jurisdictions, prior to indictment).

Counsel should therefore obtain from the court clerk's office or the office of the jury commission, as soon after bind-over as it is available, the list of grand jurors (or the roster of the grand jury “pool,” “box,” or “wheel”) for the ensuing term. This list is often required by local law to be made accessible for inspection by counsel. If not, counsel should move the court having control over the grand jury to order the list disclosed on the grounds that “without inspection, a party almost invariably would be unable to determine whether he has a potentially meritorious jury challenge” (*Test v. United States*, 420 U.S. 28, 30 (1975)), and that the federal constitutional right against systematic exclusion of classes of citizens from the grand jury implies an ancillary right to a fair opportunity to discover and prove systematic-exclusion claims (*Coleman v. Alabama*, 377 U.S. 129, 133 (1964); *Amadeo v. Zant*, 486 U.S. 214 (1988); *cf. Ham v. South Carolina*, 409 U.S. 524 (1973)). The grand jury list usually notes the name and address of each prospective juror, and sometimes occupation. Thus individual jurors can be checked out if desired. In larger cities there are

jury investigating services, but these tend to be costly, and checking out grand jurors is seldom worth the cost. The jurors are probably individually qualified as far as the statutory criteria go; the kind of bias that disqualifies is narrow; and if the juror's name has not come up in counsel's investigation of the case and the complainant, the juror is probably not technically challengeable.

The accepted method of proving claims of systematic exclusion has been described as follows:

“The first step is to establish that the group [claimed to be excluded] is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied. . . . Next, the degree of underrepresentation must be proved, by comparing the proportion of the group in the total population to the proportion called to serve [as jurors] . . . , over a significant period of time. . . . This method of proof, sometimes called the ‘rule of exclusion,’ has been held to be available as a method of proving discrimination in jury selection against a delineated class. . . . Finally . . . a selection procedure that is susceptible of abuse or is not racially neutral supports the presumption of discrimination raised by the statistical showing.” (*Rose v. Mitchell*, 443 U.S. 545, 565 (1979), quoting *Castaneda v. Partida*, 430 U.S. 482, 494 (1977).)

The opinion in *Duren v. Missouri*, 439 U.S. 357 (1979), indicates that underrepresentation alone is not sufficient; it must also be shown that “this underrepresentation is due to systematic exclusion of the group in the jury-selection process” (*id.* at 364), as the result of “discriminatory purpose” (*id.* at 368 n.26). See also *Berghuis v. Smith*, 559 U.S. 314, 327 (2010). However, *Duren* recognizes that both systematic exclusion and discriminatory purpose may be inferred from a “significant discrepancy shown by the statistics” comparing a group's numbers in the general population with its numbers in jury pools and panels, and on juries (*Duren v. Missouri*, *supra*, 439 U.S. at 368 n.26). See also *Berghuis v. Smith*, *supra*, 559 U.S. at 327-33 (dictum); *Woodfox v. Cain*, 772 F.3d 358, 372-76 (5th Cir. 2014).

Counsel will therefore want to investigate both grand and petit jury lists, going back ten years or so, in order to demonstrate a pattern of discrimination. These are public records, available from the clerk of the criminal court or from the commissioners' office. If the clerk's or commissioners' records contain racial designations, the jury is probably challengeable upon the showing of even a relatively small discrepancy between the percentages of the racial minority group in the general population and on jury panels. *Avery v. Georgia*, 345 U.S. 559 (1953); *Whitus v. Georgia*, 385 U.S. 545 (1967); *Alexander v. Louisiana*, 405 U.S. 625 (1972); *cf. Foster v. Chatman*, 136 S. Ct. 1737, 1755 (2016) (recognizing the probative force of racial designations in the cognate context of *Batson* analysis (§ 33.3.2 *infra*)); *Adkins v. Warden*, 710 F.3d 1241, 1256 (11th Cir. 2013) (same); and see *Castaneda v. Partida*, *supra*, 430 U.S. at 493-95. When racial designations or similar indications of a selection process that “is not racially neutral” (*Rose v. Mitchell*, *supra*, 443 U.S. at 565) do not appear in the records, it is important to seek out other aspects of the procedure that are “susceptible

of abuse” (*id.*). Any nonrandom method of culling or cutting prospective jurors would seem to be “susceptible of abuse” in this sense. *See id.* at 548 n.2, 566; *Henson v. Wyrick*, 634 F.2d 1080 (8th Cir. 1980); and *see Castaneda v. Partida*, *supra*, 430 U.S. at 497, describing the key-man system as “highly subjective.” But in the absence of some form of identification of prospective jurors by nonneutral characteristics in the records available to jury-selection officials, a stronger statistical showing of underrepresentation is apparently required.

In any event counsel should conduct the most thorough statistical study practicable for a period going back at least a decade, comparing the proportion of minority individuals in the general population of the county or court district (as reflected in the latest federal census figures), with the proportions of minority individuals (a) who are on the jury rolls and (b) who have actually served as jurors. *See Alexander v. Louisiana*, 405 U.S. 625 (1972). If the jury records do not contain racial identifications, tax digests may. Sophisticated statistical methods for analyzing the data are available, and it is wise to consult a statistician for possible use as an expert witness. *See, e.g.*, NJP LITIGATION CONSULTING (Elissa Krauss & Sonia Chopra, eds.), JURYWORK: SYSTEMATIC TECHNIQUES, chs. 5 & 6 (2d ed. 2012-13); NATIONAL JURY PROJECT & NATIONAL LAWYERS GUILD, THE JURY SYSTEM: NEW METHODS FOR REDUCING PREJUDICE (David Kairys, ed. 1975); Michael O. Finkelstein, *The Application of Statistical Decision Theory to the Jury Discrimination Cases*, 80 HARV. L. REV. 338 (1966); David Kairys, *Juror Selection: The Law, A Mathematical Method of Analysis, and a Case Study*, 10 AM. CRIM. L. REV. 771 (1972); Peter W. Sperlich & Martin L. Jaspovice, *Statistical Decision Theory and the Selection of Grand Jurors: Testing for Discrimination in a Single Panel*, 2 HASTINGS CONST. L.Q. 75 (1975). Judicial receptivity to these statistical modes of proof is reflected in *Castaneda v. Partida*, *supra*, 430 U.S. at 496-97 n.17; *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 339-40 (1977); *Vasquez v. Hillery*, 474 U.S. 254, 259-60 (1986); *cf. McCleskey v. Kemp*, 481 U.S. 279, 293-94 & n.13 (1987).

12.4. Motions to Suppress

Motions to suppress illegally obtained evidence are considered in greater detail in Chapters 24-27 *infra*. Although ordinarily made after indictment, in most jurisdictions they can be made earlier. The advantage of moving to suppress prior to the convening of the grand jury is that evidence suppressed at that time cannot be presented to the grand jurors. *Compare Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), with *United States v. Calandra*, 414 U.S. 338 (1974). The importance of forestalling its presentation is intensified in jurisdictions which follow the rule that an indictment will not be quashed on the grounds of the receipt of illegally obtained evidence by the grand jury. *See* § 20.3.3 *infra*. Counsel should accompany a preindictment motion to suppress with an application for a stay of all other proceedings in the case pending determination of the motion so that the prosecutor cannot go to the grand jury with the evidence while the question of its legality is under consideration by the court.

12.5. *Requesting Recording of Grand Jury Proceedings*

In some jurisdictions the grand jury proceedings are routinely recorded, and a transcript of the notes of testimony is delivered to the defendant following indictment. There are slip-ups in the routine, however, and defense counsel may be wise to contact the prosecutor to obtain an express assurance that a stenographer will be present when the case against the client is presented.

In most jurisdictions the practice relating to disclosure of grand jury records to the defense has traditionally gone to the far extreme of illiberality. Although the prosecutor makes free use of the grand jury transcript (if there is one), defense counsel has very limited access to it. Defense counsel is commonly forbidden to inspect it at all before trial except in a case in which the client is charged with perjury committed before the grand jury or in which counsel can show that grounds may exist for a motion to dismiss the indictment on account of matters occurring before the grand jury. See §§ 12.6-12.7, 20.3.1 subdivisions (2)-(4) *infra*. Even after a prosecution witness has testified at trial, defense inspection of the witness's transcribed grand jury testimony for purposes of impeachment is said to rest in the discretion of the trial court. This discretion, however, is increasingly being exercised in favor of permitting defense inspection at trial for impeachment purposes; in some jurisdictions (as in the federal courts), such at-trial inspection has become virtually a matter of right. See FED. RULE CRIM. PRO. 26.2(a), (f)(3). See also § 34.7.1 *infra*. A few jurisdictions are beginning to move in the direction of more liberal pretrial disclosure of grand jury minutes to the defense as well (see § 18.7.3 subdivision 9 *infra*), and constitutional arguments supporting the requirement of disclosure in some circumstances are available (see § 18.9.2.5-18.9.2.7 *infra*).

Depending upon the extent to which defense counsel anticipates that s/he will later be able to obtain access to transcribed grand jury testimony, s/he may or may not want to take steps to assure that stenographic notes are taken and transcribed in the first place. Frequently, the decision whether or not to have a stenographer record or transcribe particular grand jury proceedings is made by a budget-conscious prosecutor. Prosecutors usually like to have grand jury testimony transcribed, since they get far more use out of it than the defense does (both because of its greater accessibility to them and because, in the *ex parte* grand jury proceedings, the prosecutor can lead and cross-question witnesses without equal privileges for the defense). If the proceedings are not recorded, therefore, it is usually for financial reasons. Defense counsel who concludes that (notwithstanding the prosecutorial advantages just described) it would be in a client's interest to preserve a record of the grand jury proceedings, and whose client can afford it, may want to consider offering to pay for a stenographic transcript, either on condition that counsel receive a copy in the event of indictment or without condition. (The condition would be illegal in a number of jurisdictions whose statutes flatly prohibit disclosure of grand jury proceedings to any person without court order.) Alternatively, counsel may want to move the criminal court for an order requiring the recording and transcription of grand jury proceedings at public expense, under the theory of *McMahon v. Office of the City and County of Honolulu*, 51 Haw. 589, 590-91, 465 P.2d 549, 550-51 (1970) ("a defendant is under

some circumstances constitutionally entitled to some part of the grand jury transcript”; “[w]e have no difficulty in requiring that presentations of evidence to grand juries . . . shall be recorded” because “[o]therwise there would be no remedy to make effective a constitutional right which may clearly exist”).

In any event, if the defendant or prospective defense witnesses are subpoenaed to appear before the grand jury, counsel should contact the prosecutor and insist that a transcript of their testimony be made. The prosecutor will have one made anyway, if s/he wants one for later impeachment, so counsel loses little by the demand. A transcript will be necessary to support the defendant’s claim that his or her privilege against self-incrimination was violated before the grand jury if it was. See § 12.6 *infra*. Counsel may also later wish to contend that the defendant or defense witnesses were called before the grand jury for the purpose of harassing and intimidating them; and either the transcript or the prosecutor’s refusal to order a transcript will provide helpful support for that contention.

12.6. *Advising and Protecting Defendants Subpoenaed by the Grand Jury*

12.6.1. *Rights of Defendants Subpoenaed by the Grand Jury*

Statutes in a number of jurisdictions provide that grand jury witnesses are entitled to be represented by counsel. The statutes commonly provide that counsel may be present in the grand jury room while the witness is testifying but may not make objections or ask questions. *See, e.g.*, COLO. REV. STAT. 16-5-204(4)(d); SMITH-HURD ILL. COMP. STAT. chap.725, § 5/112-4.1; KAN. STAT. ANN. § 22-3009(b); N.Y. CRIM. PRO. LAW § 190.52(2); 42 PA. CON. STAT. § 4549(c). Elsewhere, statutes or local practice give grand jury witnesses the right to confer with an attorney before testifying and to have the attorney standing by outside the grand jury room for consultation when the witness requests advice during his or her examination. *See, e.g.*, VERNON’S ANN. TEX. CODE CRIM. PRO. art. 20.17; *Opinion of the Justices to the Governor*, 373 Mass. 915, 920, 371 N.E.2d 422, 424 (1977) (“It is recognized that a witness may need advice during his examination with respect to claiming the privilege against self-incrimination. Hence the practice in the Commonwealth (and many other jurisdictions) has been to break off the examination of a witness when he seeks legal advice and allow him to leave the room, consult with his counsel waiting in the corridor, and then return for continued examination. This may happen repeatedly in the course of the questioning.”)

In a few jurisdictions a prospective defendant or a person who is a target of a grand jury investigation cannot be compelled to testify before the grand jury. *E.g., People v. Avant*, 33 N.Y.2d 265, 307 N.E.2d 230, 352 N.Y.S.2d 161 (1973). Elsewhere (and so far as the federal Constitution is concerned), prospective defendants and targets of investigation can be subpoenaed to testify (*United States v. Wong*, 431 U.S. 174, 179-80 n.8 (1977)), and they need not be advised of their target status by the prosecutor (*United States v. Washington*, 431 U.S. 181 (1977)), although, like any other witness, they may decline to

answer specific questions asked them on examination before the grand jury under a valid claim of the privilege against self-incrimination (see *United States v. Mandujano*, 425 U.S. 564, 571-76 (1976) (plurality opinion)). That privilege is given to witnesses, whether or not they are “suspects” (*Zurcher v. Stanford Daily*, 436 U.S. 547, 562 n.8 (1978) (dictum)), both by state constitutions and laws and by the Fifth Amendment to the Constitution of the United States (see § 18.12 *infra*), which is made applicable to state proceedings by the Fourteenth Amendment (*Malloy v. Hogan*, 378 U.S. 1 (1964)) and has been applied specifically to protect state grand jury witnesses (*Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977); *Stevens v. Marks*, 383 U.S. 234 (1966)).

Although a plurality of the Supreme Court of the United States has said that grand jury witnesses need not be given *Miranda* warnings (see §§ 26.5, 26.7 *infra*) such as those which are required prior to police interrogation of persons in custody (*United States v. Mandujano*, *supra*, 425 U.S. at 578-81; see *Minnesota v. Murphy*, 465 U.S. 420, 431 (1984) (dictum)), the question remains open in the light of two concurring opinions in *Mandujano* (425 U.S. at 598-602, 609). Even the *Mandujano* plurality does not purport to decide whether a grand jury witness must be warned at least (1) that s/he may invoke the Fifth Amendment and refuse to answer any potentially incriminating question (see *id.* at 582 n.7) and (2) that s/he may have an attorney stand by outside the grand jury room and may interrupt his or her testimony to consult with that attorney whenever s/he wishes advice during the course of the examination (see *id.* at 581). See also *United States v. Washington*, *supra*, 431 U.S. at 186, 190. The contention that these latter warnings must be given to witnesses whom the grand jury has reasonable grounds to suspect of a crime – if not to all grand jury witnesses – is strongly supported by *Estelle v. Smith*, 451 U.S. 454 (1981), §§ 16.6.1, 26.10.2 *infra* (see also *Satterwhite v. Texas*, 486 U.S. 249 (1988)), and by the dictum in *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973) [§ 25.18.1 *infra*], that in “trial-type situations” (412 U.S. at 238), like formal grand jury proceedings, a “waiver of trial rights . . . such as the waiver of the privilege against compulsory self-incrimination” (*id.*) and the right to counsel (*id.* at 237) “must meet the strict standard of an intentional relinquishment of a ‘known’ right” (*id.* at 238). See also, e.g., *Carnley v. Cochran*, 369 U.S. 506 (1962). This is particularly true when, as in the case of a witness whom the grand jury has cause to suspect, “the inquiring government is acutely aware of the potentially incriminating nature of the disclosures sought” (*Garner v. United States*, 424 U.S. 648, 657 (1976); see also *id.* at 660; cf. *Roberts v. United States*, 445 U.S. 552, 559 (1980); *Minnesota v. Murphy*, *supra*, 465 U.S. at 429-30; but see *id.* at 428-29), with the result that it is both practicable to require warnings and unfairly heedless of “the fundamental purpose of the Fifth Amendment – the preservation of an adversary system of criminal justice” (*Garner v. United States*, *supra*, 424 U.S. at 655) – to omit giving them. See, e.g., *State v. Cook*, 11 Ohio App.3d 237, 241, 464 N.E.2d 577, 581-82 (1983) (“In order to secure the Fifth Amendment privilege of a putative defendant-witness in the context of a grand jury proceeding, . . . the witness must be told that he has a constitutional privilege to refuse to answer any question that might incriminate him[,] . . . that any incriminating answers or statements he does make can be used against him in a subsequent prosecution[,] . . . [and] that he may have an attorney

outside the grand jury room and may consult with him if he wishes.”); *O’Neal v. State*, 468 P.2d 59, 71 (Okla. Crim. App. 1970) (“one being investigated by the grand jury is not just a witness and cannot be treated as such. The target of a grand jury investigation is not an ordinary witness; he is suspect and is entitled to be warned of his right against self-incrimination; and unless the witness is so warned and advised of his constitutional rights related thereto, any testimony revealed by him before the grand jury may not be used against him to prosecute a later charge arising out of that testimony”); *Commonwealth v. Woods*, 466 Mass. 707, 719-20, 1 N.E.3d 762, 772 (2014) (“Because grand jury testimony is compelled, it ought to be ameliorated with an advisement of rights where there is a substantial likelihood that the witness may become an accused; that is, where the witness is a ‘target’ or is reasonably likely to become one. Accordingly, we adopt a rule that where, at the time a person appears to testify before a grand jury, the prosecutor has reason to believe that the witness is either a ‘target’ or is likely to become one, the witness must be advised, before testifying, that (1) he or she may refuse to answer any question if a truthful answer would tend to incriminate the witness, and (2) anything that he or she does say may be used against the witness in a subsequent legal proceeding. . . . ¶ This rule is not a new constitutional rule, but rather an exercise of our power of superintendence ‘to regulate the presentation of evidence in court proceedings.’ . . . Therefore, this rule is only required to be applied prospectively to grand jury testimony elicited after the issuance of the rescript in this case.”).

12.6.2. Steps to Take if Counsel Enters a Case After the Client Has Already Testified Before a Grand Jury

Counsel who enters a case after a client has already appeared and testified before a grand jury should move the court, at the earliest opportunity, for an order requiring transcription and disclosure to counsel of the stenographic notes of the client’s grand jury appearance, so that counsel can determine whether there has been any infringement of the client’s Fifth Amendment privilege, and what corrective measures may be advised. *See, e.g.*, FED. RULE CRIM. PRO. 6(e)(3)(E)(ii). Remedies that may be available include: (a) a motion to quash the grand jury’s use of the client’s testimony against him or her (*cf. Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920)) if the grand jury proceeding is ongoing, or (b) a motion to quash any indictment based upon that testimony (*cf. United States v. Hubbell*, 530 U.S. 27, 38-40 (2000)); and see § 20.3.1 subdivision (3) *infra*, or (c) a motion *in limine* (*see* §§ 17.5.3, 40.4.1 *infra*) to preclude the prosecution’s use of the client’s testimony (*see, e.g., Garrity v. New Jersey*, 385 U.S. 493 (1967)) or of any material derived from it (*cf. United States v. Hubbell, supra*) as evidence at a subsequent trial.

If the client is again summoned to testify before that or another grand jury, counsel should instruct the client to decline to answer any questions until the transcript of the client’s earlier grand jury appearance has been furnished to counsel, on the grounds that without it counsel cannot make an intelligent decision regarding the extent to which the client now can and should claim privilege (*cf. Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983)), and that any interrogation of the client before the grand jury under these

circumstances would violate both the Fifth Amendment and Due Process. *Cf. Stevens v. Marks*, 383 U.S. 234 (1966); *Raley v. Ohio*, 360 U.S. 423 (1959).

12.6.3. Steps to Take if Counsel Enters a Case Before Service of a Grand Jury Subpoena Upon the Client

When counsel enters a case before the service of a grand jury subpoena upon a client, counsel's primary role at the grand jury stage lies in advising and assisting the client to claim such protections as the law gives the client against grand jury process. The available grounds for motions to quash grand jury subpoenas *duces tecum* or *ad testificandum* are reviewed in § 12.8 *infra*. They are lamentably few. The grounds upon which a duly subpoenaed witness may refuse to answer particular questions before the grand jury are also lamentably few. *See United States v. Calandra*, 414 U.S. 338 (1974). Basically, the latter grounds are:

(1) A claim of the Fifth Amendment privilege against self-incrimination (discussed in § 12.6.4 *infra*);

(2) A right not to answer questions based upon illegal electronic surveillance in violation of the Omnibus Crime Control and Safe Streets Act of 1968 [§§ 25.31, 25.32 *infra*] (*see Gelbard v. United States*, 408 U.S. 41 (1972)), and, therefore, to have proceedings conducted to determine whether, in fact, some illegal surveillance occurred and underlies the grand jury questioning (*see id.* at 52-58; 18 U.S.C. § 3504; *cf. Alderman v. United States*, 394 U.S. 165 (1969));

(3) A right not to answer questions that seek disclosure of associations protected by the First Amendment (*see Branzburg v. Hayes*, 408 U.S. 665, 708 (1972) (dictum); *cf. Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *DeGregory v. Attorney General*, 383 U.S. 825 (1966); *Liveright v. Joint Committee*, 279 F. Supp. 205 (M.D. Tenn. 1968)), or disclosure of information protected by any "valid [evidentiary] privilege . . . established by the Constitution, statutes, or the common law" (*United States v. Calandra, supra*, 414 U.S. at 346 (dictum)); and

(4) Possibly a right to relief against questioning pursued entirely for purposes of harassment (*United States v. Dionisio*, 410 U.S. 1, 12 (1973)), or demonstrably unrelated to any legitimate function of the grand jury inquiry (*see In re National Window Glass Workers*, 287 F. 219 (N.D. Ohio 1922)), particularly in cases in which the grand jury investigation may trench upon freedom of association or other First Amendment concerns (*see Branzburg v. Hayes, supra*, 408 U.S. at 707-08, 709-10 (concurring opinion of Justice Powell)).

Except for the Fifth Amendment, most of these grounds for refusing to answer grand jury questions are not factually presented in the ordinary criminal case. Counsel who does have a case presenting them should consult NATIONAL LAWYERS GUILD (GRAND JURY PROJECT), REPRESENTATION OF WITNESSES BEFORE FEDERAL GRAND JURIES (4th ed. 1999 & Supp. 2015).

12.6.4. *Advising a Client Under Grand Jury Subpoena*

12.6.4.1. *Immunity Statutes and Their Relationship to the Fifth Amendment Privilege*

Advising a client under grand jury subpoena concerning the Fifth Amendment privilege often requires examination of an applicable immunity statute. In most jurisdictions, immunity statutes permit the compulsion of testimony notwithstanding the fact that it is self-incriminating. They replace the privilege with a grant of immunity that, depending on the terms of the statute, may protect the witness against any prosecution on account of matters concerning which s/he is questioned or testifies (so-called transactional immunity) or may protect the witness only against the use of the witness's answers to prosecute him or her (so-called use immunity).

The latter, more limited, form of immunity – use immunity – was held insufficient to displace the privilege and hence inadequate to support compulsion of a witness's testimony in *Counselman v. Hitchcock*, 142 U.S. 547 (1892). See *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 79-81 (1965). It may still be held inadequate under some state constitutional privileges against self-incrimination. See, e.g., *State v. Gonzalez*, 853 P.2d 526, 530-33 (Alaska 1993); *State v. Thrift*, 312 S.C. 282, 296-301, 440 S.E.2d 341, 349-52 (1994). But in *Kastigar v. United States*, 406 U.S. 441 (1972), the Supreme Court overruled *Counselman's* requirement of “transactional immunity” as far as the federal Fifth Amendment is concerned. See also *United States v. Hubbell*, 530 U.S. 27, 38-40 (2000) (discussing *Kastigar*); *Lefkowitz v. Cunningham*, 431 U.S. 801, 809 (1977) (dictum). An immunity statute satisfies the Fifth Amendment, the Court held in *Kastigar*, if it provides “use and derivative-use immunity” (406 U.S. at 457), which the Court defined as “[i]mmunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom” (406 U.S. at 453). *Kastigar* sustained a federal immunity-grant statute that, as construed, imposed a “total prohibition on use” of compelled self-incriminating testimony (*id.* at 460): – “a comprehensive safeguard, barring the use of compelled testimony as an ‘investigatory lead,’ and also barring the use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures” (*id.*). See also *United States v. Hubbell*, *supra*, 530 U.S. at 38-39 (explaining that *Kastigar* upheld the constitutionality of the federal immunity statute “because the scope of the ‘use and derivative-use’ immunity that it provides is coextensive with the scope of the constitutional privilege against self-incrimination,” and that *Kastigar* “particularly emphasized the critical importance of protection against a future prosecution “‘based on knowledge and sources of information obtained from the compelled testimony’”). The Court in *Kastigar* emphasized that a criminal defendant “raising a claim under this statute need only show that he testified under a grant of immunity in order to shift to the government the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources” (406 U.S. at 461-62). See also *United States v. Hubbell*, *supra*, 530 U.S. at 40, 45. The *Kastigar* opinion implies that not only the statute but also the Constitution “imposes on the prosecution the affirmative duty to prove that [its] . . . evidence [derives] . . . from a legitimate source wholly

independent of the compelled testimony” (406 U.S. at 460). *See also United States v. Hubbell, supra*, 530 U.S. at 40, 45-46 (rejecting the government’s attempt to shift the burden to the accused and explaining that *Kastigar* held that “the statute imposes an affirmative duty on the prosecution . . . ‘to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony,’” and that *Kastigar* made clear “that the statutory guarantee of use and derivative-use immunity is as broad as the constitutional privilege itself” and “is coextensive with the constitutional privilege”); *Pillsbury Co. v. Conboy*, 459 U.S. 248, 255, 261 (1983). A witness’s testimony compelled under an immunity statute may be used against the witness in a subsequent prosecution for perjury committed before the grand jury (*United States v. Apfelbaum*, 445 U.S. 115 (1980)); but, subject to this single exception, statements made by the witness after s/he has claimed the privilege and been granted immunity “may not be put to any testimonial use whatever against him in a criminal trial” (*New Jersey v. Portash*, 440 U.S. 450, 459 (1979) (holding that “a person’s testimony before a grand jury under a grant of immunity cannot constitutionally be used to impeach him [as a witness] when he is a defendant in a later criminal trial” (*id.* at 459-60))).

Counsel should examine closely the terms and the judicial construction of any state immunity statute possibly relevant to the client’s situation. Particularly if enacted prior to *Kastigar* or under the requirements of state constitutional holdings following *Counselman*, it may provide the client with full transactional immunity. This immunity would be binding upon the state that offers it in consideration for a witness’s testimony, whether or not the federal Fifth Amendment obliged the State to go so far. *See Piccirillo v. New York*, 400 U.S. 548 (1971); *cf. Raley v. Ohio*, 360 U.S. 423 (1959). On the other hand, if the statute purports to grant only “use” immunity, counsel should examine the scope of that immunity to assure its conformance to the *Kastigar* requirements. Unless it conforms to those requirements, testimony may not be compelled under it.

12.6.4.2. Mechanisms by Which Immunity Is Conferred

In terms of the mechanism by which immunity is conferred, the immunity statutes may again be classified into two categories. One, the automatic or “immunity bath” statute, protects the witness who testifies in certain described proceedings (grand jury proceedings, legislative investigations, and so forth) relating to certain described subjects (gambling, narcotics, and so forth), whether or not the witness claims the privilege and even though the witness may volunteer incriminating information. The other, the “claim” statute, protects the witness only if s/he claims the privilege (again, in certain described proceedings relating to described subjects) and if s/he is then expressly granted immunity under the statute.

Defense counsel whose client is subpoenaed to appear before the grand jury in any situation in which the client’s testimony may result in his or her indictment or may in any way incriminate the client with regard to any criminal offense (whether s/he has previously been bound over or charged

by complaint or is merely under investigation) should ordinarily advise the client not to testify unless an “immunity bath” statute clearly applies and clearly provides full “transactional immunity” precluding future prosecution of the client for any and all matters relating to the testimony s/he may give. Under any other circumstances, testimony given before the grand jury in the absence of an explicit claim of the privilege may be used against the client (see *United States v. Washington*, 431 U.S. 181 (1977); *United States v. Mandujano*, *supra*, 425 U.S. at 572-76 (plurality opinion); cf. *Garner v. United States*, 424 U.S. 648, 653-56 (1976); *Minnesota v. Murphy*, 465 U.S. 420, 427-31 (1984)); and even apparently innocuous testimony can often turn out subsequently to assist the prosecution in constructing a case along some line or theory that neither the client nor counsel has sufficient information to anticipate at this early stage of the proceeding. Accordingly, the client should almost always claim the Fifth Amendment right to refuse to answer grand jury questioning and should avoid appearing before the grand jury if at all possible.

If the jurisdiction is one that forbids the calling of a prospective defendant (see § 12.6.1 *supra*) the prosecutor should be advised that that counsel’s client will not appear and should be asked to withdraw the subpoena. If the prosecutor refuses to do so, counsel should then move the court to quash it.

In a jurisdiction that allows the defendant to be called, counsel should advise the prosecutor that if the client is compelled to appear before the grand jury, the client will claim the Fifth Amendment in response to all questions bearing in any way upon any criminal charge. Counsel should ask the prosecutor, therefore, to discharge the client from the obligation to appear, since his or her compelled appearance would only harass and prejudice the client before the grand jury, without serving any legitimate purpose in furtherance of the jury’s inquiry. If the client is not then excused from appearing, counsel should instruct the client to appear and claim the privilege. This claim may not subsequently be used against the client at any criminal trial (*United States v. Washington*, *supra*, 431 U.S. at 191 (dictum)), nor may the client be made by the state to suffer any “grave [adverse] consequences solely because he refused to waive immunity from prosecution and give self-incriminating testimony” (*Lefkowitz v. Cunningham*, *supra*, 431 U.S. at 807). See, e.g., *Gardner v. Broderick*, 392 U.S. 273 (1968); *Lefkowitz v. Turley*, 414 U.S. 70 (1973).

12.6.4.3. Instructions to Give the Client

As noted in § 12.6.1 *supra*, some States permit counsel for a grand jury witness to accompany the witness into the grand jury room and to advise the client during his or her testimony. Counsel should always take advantage of this right. In addition to protecting the client from incriminating questioning and other prosecutorial abuse, counsel stands to learn potentially useful information about the prosecution’s theory of the case – and sometimes about specific pieces of prosecution evidence – by noting the prosecutor’s questions and considering their drift. Prior to entering the grand jury room, counsel should advise the client that during his or her testimony s/he should pause briefly before answering each question, so as to give counsel time to determine whether there is a basis and reason for the client to refuse to answer.

In States which do not permit counsel to be present during a client's testimony, counsel should give the following instructions to the client. It is best to set them out in writing on a sheet of paper that the client can take into the grand jury room. A written prompt both reminds the client what s/he should say and gives the client confidence in saying it. As a stage prop, it also signals to the grand jurors that the client's hesitation to answer questions is a matter of routine protocol dictated by the client's legal adviser, not an indication of guilt or truculence.

In answer to *every* question, say: "I RESPECTFULLY REQUEST PERMISSION TO LEAVE THE GRAND JURY ROOM TO CONSULT WITH MY LAWYER, SO THAT COUNSEL MAY ADVISE ME OF MY CONSTITUTIONAL RIGHTS IN REGARD TO ANSWERING THAT QUESTION."

If permission to leave is granted, come out and tell me what the question was.

If permission to leave is refused and you are directed to answer the question, say: "I RESPECTFULLY DECLINE TO ANSWER ON ADVICE OF COUNSEL, ON THE GROUNDS OF MY STATE AND FEDERAL PRIVILEGES AGAINST SELF-INCRIMINATION."

Never say anything other than these two things in the grand jury room unless I instruct you specifically that you can.

Before the client enters the grand jury room, counsel should have determined whether any of the usual preliminary questions (name, current address, length of residence there) would be potentially incriminating. If not, the client should be told in advance that it is okay to answer those. But the client should be instructed to read the responses written on the card in answer to all other questions, even though the client may believe that the answer to a particular question would not, in fact, be incriminating.

The test of a valid claim of privilege is whether any conceivable answer the witness might give *could* furnish a link in a chain of evidence incriminating the witness, not whether a specific answer *would* do so. *Blau v. United States*, 340 U.S. 159 (1950); *Hoffman v. United States*, 341 U.S. 479 (1951); and see *Maness v. Meyers*, 419 U.S. 449, 461 (1975). Cf. *Hübel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177, 190-91 (2004) (rejecting a Fifth Amendment challenge to a "stop and identify" statute because "[i]n this case petitioner's refusal to disclose his name was not based on any articulated real and appreciable fear that his name would be used to incriminate him, or that it 'would furnish a link in the chain of evidence needed to prosecute'" (quoting *Hoffman v. United States*, *supra*, 341 U.S. at 486), and also because "[a]nswering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances," although the Court acknowledges that "a case may arise where there is a substantial allegation that furnishing identity at the time of a stop would have given the police a link in the chain of evidence

needed to convict the individual of a separate offense” and the Court explains that “[i]n that case, the court can then consider whether the privilege applies, and, if the Fifth Amendment has been violated, what remedy must follow”).

A witness who claims the privilege is not required to explain how the answer will incriminate him or her – or even to assert that it will (since that assertion is obviously incriminating). *Hoffman v. United States*, *supra*, 341 U.S. at 486-87. S/he needs only assert that it *may*. And counsel is not obliged to leave a client to make unassisted determinations of the applicability of the Fifth Amendment to particular questions that the client is asked in closed-door grand jury proceedings. Rather, counsel may properly instruct the client to make a routine claim of privilege – if the client’s right to consult counsel about each question is refused – as a means of forcing the constitutional issue out of the grand jury room into open court, where an attorney can properly instruct and defend the client.

Counsel should emphatically warn the client not to *ad lib* in the grand jury room, to watch out for the trick questions that prosecutors often snap back disarmingly at witnesses who claim the privilege – “Would that really incriminate you?” or “Now how could that possibly incriminate you?” – and to answer these questions, like all others, by saying, “I respectfully decline to answer, on advice of counsel, on the grounds of my state and federal privileges against self-incrimination.” The client should be told that if anyone offers the client immunity, s/he should say nothing; but, once again, answer the next question by saying: “I respectfully request permission to leave the grand jury room to consult with my lawyer, so that counsel can advise me of my constitutional rights in regard to answering that question.”

Counsel should always accompany the client to the grand jury session and remain immediately outside the grand jury room, available for consultation. If immunity is offered, counsel should confer with the prosecutor and ask the statutory basis for the immunity. After inspecting the statute, counsel may conclude that it does not apply to the case or that it is constitutionally insufficient in the scope of immunity it allows and may then advise the client to persist in refusing to testify. If the prosecutor or the grand jury wishes to press the point, the client will be taken before a judge, in open court, for proceedings to compel the client’s testimony. *See United States v. Mandujano*, *supra*, 425 U.S. at 575-76 (plurality opinion). The judge will ask what specific questions the client refuses to answer and will hear counsel’s objections to those questions. If the objections are overruled, the client will again be ordered to testify prior to being held in contempt. Counsel who continues to think that s/he has valid objections to the client’s compelled testimony should request that the final order to testify be stayed pending counsel’s proceeding by appeal or prerogative writ (whichever local practice allows) to obtain review of the judge’s order. If a stay is refused, the client should be instructed to state politely that s/he refuses to answer questions, on advice of counsel, because of his or her privilege against self-incrimination. As long as the client’s manner is inoffensive, counsel is now in a strong position to urge that the question of the validity of the claim of privilege should be tested in civil, rather than criminal, contempt proceedings. *See Shillitani v. United States*, 384 U.S. 364, 371

n.9 (1966); *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 801 (1987) (dictum). Either form of contempt commitment may be challenged by appeal or by *habeas corpus* in state and federal courts. See §§ 3.84, 4.13-4.14 *supra*. The trial judge should be asked to stay the contempt order pending appeal or to release the client on bail or recognizance pending appeal. *Cf. Pillsbury Co. v. Conboy*, 459 U.S. 248, 251 (1983). If the judge refuses, the same relief may be sought by motion on the appeal or in *habeas*. *In re Grand Jury Proceedings (Lewis, Applicant)*, 418 U.S. 1301 (Douglas, Circuit Justice, 1974); *cf. In re Roche*, 448 U.S. 1312 (Brennan, Circuit Justice, 1980). Many judges are reluctant to release recalcitrant grand jury witnesses from confinement pending appeal of contempt commitments because the purpose of these commitments is coercive and they believe that immediate coercion of the witness is necessary to enable the grand jury to go forward with its investigation. Counsel faced with a judge of this mind may find it useful to call the court's attention to a dictum of the Supreme Court of the United States in *United States v. Wilson*, 421 U.S. 309, 318 (1975): "A grand jury ordinarily deals with many inquiries and cases at one time, and it can rather easily suspend action on any one, and turn to another while [contempt] proceedings . . . are completed. . . . 'Delay necessary for a hearing would not imperil the grand jury proceedings.'"

Under no circumstances should the client be left to make his or her own unaided decision before the grand jury whether or not to claim the privilege against self-incrimination, or whether or not to testify under an immunity grant. S/he is always entitled to have the matter brought out into open court, through the procedures described in this section, so that counsel can address the complex issues involved. *Cf. Maness v. Meyers*, *supra*, 419 U.S. at 465-70; *Pillsbury Co. v. Conboy*, *supra*, 459 U.S. at 261-62.

12.7. Advising Defense Witnesses Subpoenaed by the Grand Jury

Some prosecutors will issue grand jury subpoenas for witnesses whom they expect to testify favorably to the defense, in order to nail the testimony of these witnesses down on record for possible use to impeach them at a subsequent trial. Defense witnesses may be compelled to testify unless they have a valid ground for invoking the privilege against self-incrimination on their own behalf or unless their testimony is otherwise privileged (under the lawyer-client, doctor-patient, priest-penitent, or other recognized privileges) or unless they are questioned on matters irrelevant to the grand jury's investigations.

Counsel should advise a witness with a claim of privilege other than self-incrimination to assert it and should support the witness in its assertion through the same procedures that are outlined in § 12.6.4.3 *supra* for protecting a client's claim of self-incrimination. A witness with a potential self-incrimination claim should be advised to secure a lawyer to represent him or her independently. Counsel should interview all potential defense witnesses before they testify and should prepare their testimony much as it would be prepared for trial. See § 29.5 *infra*. Counsel should also explain to the witness the nature of grand jury proceedings, in order to make the witness as comfortable as possible while testifying. If local practice allows a lawyer to accompany and advise a witness during his or her grand jury testimony, it

is usually advisable for counsel to do so, or to arrange for another lawyer to do so. (The latter course will be necessary if counsel's representing both the client and the witness would raise potential conflict-of-interest problems.) In jurisdictions that do not permit lawyers to advise witnesses during grand jury proceedings – which is to say, in most jurisdictions – counsel nonetheless may wish to accompany the witness to the antechamber of the grand jury room and to stand by while s/he testifies, especially if the witness is apprehensive.

When counsel was not allowed to accompany a witness into the grand jury room, counsel will want to take whatever steps are permitted under local law to find out the questions the witness was asked and what s/he said to the grand jury. If local statutes do not prohibit a grand jury witness from disclosing matters occurring before the grand jury, counsel should interview the witness after s/he appears before the grand jury, for the purpose of learning both the testimony s/he gave (as an arm against future impeachment) and the questions s/he was asked (as a means for discerning the prosecution's theory of the case). If an applicable statute does purport to forbid grand jury witnesses to reveal what occurred during their grand jury appearances – as numerous state statutes do – counsel may want to interview the witness anyway, challenging the statute on the ground that it is unconstitutional as applied to defense counsel's interviewing of a potential defense witness because it precludes fair opportunity to prepare and present a defense. *Cf.* § 9.14 *supra*; §§ 18.9.2.1, 18.9.2.4, 39.1 *infra*. Of course, counsel undertaking such a challenge must advise the witness about the statute before the interview and should secure legal representation for the witness if the witness is going to talk.

In cases in which it is apparent that the prosecutor is subpoenaing defense witnesses simply for harassment – subpoenaing a witness repetitively, for example – counsel may move to quash the subpoenas as abusive, on the ground that the prosecution is using the grand jury to intimidate defense witnesses and deprive the defendant of a fair trial. *Cf. Webb v. Texas*, 409 U.S. 95 (1972), summarized in § 39.1 second paragraph *infra*.

12.8. Resisting Grand Jury Process

Motions to quash grand jury subpoenas *ad testificandum* may be made on the grounds that:

- (1) The person subpoenaed is a prospective defendant (in jurisdictions that recognize the “prospective defendant” rule (see § 12.6.1 *supra*));
- (2) The subpoena has no legitimate purpose in furtherance of an investigation within the jurisdiction of the grand jury but is being used solely for “harassment” (*United States v. Dionisio*, 410 U.S. 1, 12 (1973) (dictum)); *cf. United States v. Mandujano*, 425 U.S. 564, 582-83 n.8 (1976) (plurality opinion) (dictum); or
- (3) The grand jury is not pursuing a *bona fide* inquiry looking to indictment but is employing its subpoena power for some other purpose – for example, to gather evidence against a defendant

who has already been indicted (*In re National Window Glass Workers*, 287 F. 219 (N.D. Ohio 1922)); *cf.* *United States v. Mandujano*, *supra*, 425 U.S. at 594 (concurring opinion of Justice Brennan).

Grand jury subpoenas *duces tecum* seeking the production of documents, records, or writings are susceptible to a motion to quash predicated on the same grounds or on the ground that the materials sought are privileged or constitutionally protected against disclosure. *Hale v. Henkel*, 201 U.S. 43, 70-77 (1906). A motion to quash may invoke the state and federal privileges against self-incrimination (*see United States v. Dionisio*, *supra*, 410 U.S. at 11 (dictum); *Zurcher v. Stanford Daily*, 436 U.S. 547, 562 n.8 (1978) (dictum); *United States v. Judson*, 322 F.2d 460 (9th Cir. 1963)), under any of the following circumstances:

- (1) The production of the documents, records, or writings could
 - (a) constitute an admission of their existence or possession in a context in which such an admission poses a substantial threat of incrimination (*United States v. Hubbell*, 530 U.S. 27, 37-38, 43-45 (2000); *United States v. Doe*, 465 U.S. 605 (1984); *Fisher v. United States*, 425 U.S. 391, 410-12 (1976) (dictum)), or (b) constitute an implicit authentication of them, when the authentication poses such a threat (*id.* at 412-13 & n.12 (dictum); *Andresen v. Maryland*, 427 U.S. 463, 473 & n.7 (1976) (dictum); *United States v. Hubbell*, *supra*, 530 U.S. at 37-38), or (c) lead to the individual's being "compelled to take the witness stand and answer questions designed to determine whether he has produced everything demanded by the subpoena," the "answers [to which] . . . , as well as the act of production itself, may . . . communicate information about the existence, custody, and authenticity of the documents" (*id.* at 38-40, 43-45; *compare Braswell v. United States*, 487 U.S. 99, 100, 108-10, 119 (1988) (a "custodian of corporate records" "is not entitled to resist a subpoena on the ground that his act of production will be personally incriminating" because "the custodian's act of production is not deemed a personal act, but rather an act of the corporation," and "[a]ny claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation – which of course possesses no such privilege")); or
- (2) The writings are "private books and papers" of the person who is ordered to produce them and their contents are potentially incriminating (*Boyd v. United States*, 116 U.S. 616, 633, 634-35 (1886)).

Boyd invoked the Fourth and Fifth Amendments to invalidate a federal statute which provided that in certain cases the court might issue a notice to a party opposing the government, requiring the production of any business book, invoice or paper that the government asserted would tend to prove specified allegations. "[A] compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the fourth amendment to the constitution, in all cases in which a search and seizure would be, because it is a material ingredient, and effects the sole object and purpose of search and seizure." *Boyd v. United States*,

116 U.S. at 622. “Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man’s own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is . . . [forbidden]. In this regard the fourth and fifth amendments run almost into each other.” *Id.* at 630. Despite its celebration by Justice Brandeis as a decision that would “be remembered as long as civil liberty lives in the United States” (*Olmstead v. United States*, 277 U.S. 438, 474 (1928) (dissenting opinion)), *Boyd* has fallen into a near-total amnesic abyss on the part of the late-Twentieth-Century Supreme Court. In a string of decisions, the Court has held that the Fifth Amendment privilege is not violated by compelling the production from an individual of his or her accountant’s papers (*Fisher v. United States*, *supra*, 425 U.S. at 405-14) or his or her “business records” (*United States v. Doe*, *supra*, 465 U.S. at 606), or by “compelling a target of a grand jury investigation to authorize foreign banks to disclose records of his accounts, without identifying those documents or acknowledging their existence” (*Doe v. United States*, 487 U.S. 201, 202 (1988)), or by seizing an individual’s business records under a valid search warrant (*Andresen v. Maryland*, *supra*, 427 U.S. at 470-77). It has also rejected a Fourth Amendment challenge to a subpoena compelling a bank to produce an individual’s account records. *United States v. Miller*, 425 U.S. 435, 440-45 (1976). The opinions in the first two of these cases and in *Miller* do take pains to distinguish *Boyd* by pointing out that the writings in question were not the personal records or “private papers” of the persons whom they incriminated (*Fisher v. United States*, *supra*, 425 U.S. at 414; *United States v. Doe*, *supra*, 465 U.S. at 610 n.7; *United States v. Miller*, *supra*, 425 U.S. at 440); the Court in *Doe v. United States* does note that “petitioner asserts no Fifth Amendment right to prevent the banks from disclosing the account records, for the Constitution ‘necessarily does not proscribe incriminating statements elicited from another’” (487 U.S. at 206; *see, e.g., Securities and Exchange Commission v. Jerry T. O’Brien, Inc.*, 467 U.S. 735, 742-43 (1984); *Couch v. United States*, 409 U.S. 322 (1973)); and *Andresen* rests squarely on the ground that a search warrant, unlike a subpoena, authorizes the seizure of documents but does not compel their possessor to take any action to produce them (*Andresen v. Maryland*, *supra*, 427 U.S. at 473-77). So *Boyd* arguably survives in drastically narrowed form, to the extent of forbidding subpoenas addressed to an individual for the production of his or her own private papers whose contents potentially incriminate the individual (*cf. G.M. Leasing Corp. v. United States*, 429 U.S. 338, 355-56 (1977) (treating *Boyd* ambiguously); *United States v. Ward*, 448 U.S. 242, 251-54 (1980) (same); *United States v. Doe*, *supra*, 465 U.S. at 610-11 nn.7, 8 (same)), or at least survives in the case of peculiarly private papers such as nonbusiness letters and diaries (*see, e.g., In re Grand Jury Subpoena Duces Tecum*, 741 F. Supp. 1059, 1061-72 (S.D.N.Y. 1990); *cf. Hill v. California*, 401 U.S. 797, 805-06 (1971) (reserving the question); *Fisher v. United States*, *supra*, 425 U.S. at 401 n.7 (same)). For discussion of Fourth and Fifth Amendment issues raised by document subpoenas and for critiques of regressive aspects of current doctrines bearing on those issues, *see* Donald A. Dripps, “Dearest Property”: *Digital Evidence, and the History of Private “Papers” as Special Objects of Search and Seizure*, 103 J. CRIM. L. & CRIM. 49 (2013); Donald A. Dripps, *Perspectives on the Fourth Amendment Forty Years Later: Toward the Realization of an Inclusive Regulatory Model*, 100 MINN. L. REV. 1885 (2016); Robert P. Mosteller, *Simplifying Subpoena*

Law: Taking the Fifth Amendment Seriously, 73 VA. L. REV. 1 (1987); Robert P. Mosteller, *Cowboy Prosecutors and Subpoenas for Incriminating Evidence: The Consequences and Correction of Excess*, 58 WASH. & LEE L. REV. 487 (2001); and see *United States v. Hubbell*, *supra*, 530 U.S. at 49-56 (Justice Thomas, dissenting, suggesting that the time may be ripe for reinvigoration of *Boyd*); *cf. Riley v. California*, 134 S. Ct. 2473, 2491 (2014), discussed in § 25.8.2 concluding paragraph *infra* (holding that the Fourth Amendment forbids warrantless searches of cell phones incident to arrest, in large part because “a cell phone search would typically expose to the government far more than the most exhaustive search of a house: A phone not only contains in digital form many sensitive records previously found in the home; it also contains a broad array of private information never found in a home in any form – unless the phone is.”).

Subpoenas *duces tecum* seeking records that are protected by the lawyer-client, doctor-patient, or other privileges may also be quashed. *Continental Oil Co. v. United States*, 330 F.2d 347 (9th Cir. 1964); *cf. Fisher v. United States*, *supra*, 425 U.S. at 402-05 (dictum). It is a recognized ground for quashing or limiting a subpoena *duces tecum* that the subpoena is oppressively overbroad or indefinite. See *In re Certain Chinese Family Benevolent and District Ass'ns*, 19 F.R.D. 97 (N.D. Cal. 1956), and cases cited. And “[t]he Fourth Amendment provides protection against a grand jury subpoena *duces tecum* too sweeping in its terms ‘to be regarded as reasonable.’ *Hale v. Henkel*, 201 U.S. 43, 76 [(1906)]; *cf. Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208, 217 [(1946)]” (*United States v. Dionisio*, *supra*, 410 U.S. at 11-12 (dictum)). *Accord, United States v. Calandra*, 414 U.S. 338, 346 (1974) (dictum); *Fisher v. United States*, *supra*, 425 U.S. at 401 (dictum); *United States v. Miller*, *supra*, 425 U.S. at 445-46 (dictum); *Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984) (dictum); *D’Alimonte v. Kuriansky*, 144 A.D.2d 737, 739, 535 N.Y.S.2d 151, 152 (N.Y. App. Div., 3d Dep’t 1988); *cf. United States v. Doe*, *supra*, 465 U.S. at 607-08 n.3. Local law should be consulted regarding additional substantive grounds for attacking grand jury process and the procedures by which the attacks can be made.

Grand juries (and occasionally prosecutors in support of their own criminal investigations) sometimes seek and obtain a court order requiring that a named individual submit to fingerprinting, photographing, or blood-testing or provide exemplars for handwriting or voice comparison. These kinds of orders, compelling responses beyond the scope of traditional subpoenas *ad testificandum* or *duces tecum*, were virtually unknown before the late 1960’s, probably because of doubts that they were consistent with the state and federal privileges against self-incrimination and also – more basically – because there existed no authority in law for courts to make them. But following the decisions of the Supreme Court of the United States in *Schmerber v. California*, 384 U.S. 757 (1966); *United States v. Wade*, 388 U.S. 218, 221-23 (1967); and *Gilbert v. California*, 388 U.S. 263, 266-67 (1967), holding the Fifth Amendment inapplicable to “non-testimonial” compulsions, prosecuting authorities were emboldened to begin to seek these orders; and orders compelling suspects to speak and write for voice and handwriting comparisons were sustained over constitutional objection in *United States v. Dionisio*, 410 U.S. 1, 12 (1973), and *United States v. Mara*, 410 U.S. 19 (1973). In both cases, the Supreme Court considered only Fourth and Fifth Amendment contentions made against the

orders; the parties apparently did not ask, and the Supreme Court certainly did not answer, the question what authority empowered criminal courts to issue these unprecedented orders, constitutional or not. A basic rule of any legal system has always been supposed to require that a litigant applying to a court for the issuance of process must show something more than that the process, if issued, would not violate anybody's constitutional rights. S/he must show that there is some affirmative authority in law for the court to issue that kind of process and that s/he has some legal right to invoke the court's authority. Prosecutors have not generally been thought exempt from these rudimentary requirements. *See, e.g., Goodwin v. Superior Court*, 90 Cal. App. 4th 215, 226, 108 Cal. Rptr. 2d 553, 561-62 (2001) ("There is wisdom in a procedure authorizing an ex parte order, on an adequate showing and before criminal proceedings are brought, compelling a suspect who is out of custody to attend a lineup. Further, there is no constitutional impediment to such a procedure. However, despite the best intentions of the Sheriff and respondent court, that procedure does not currently exist in California law. The court therefore lacked jurisdiction to grant the order at issue."); *Lynch v. Overholser*, 369 U.S. 705 (1962); *State v. Olson*, 274 Minn. 225, 143 N.W.2d 69 (1966). Therefore, counsel should oppose prosecutorial requests for these kinds of orders on the grounds that, whether or not it would be constitutional for the legislature to authorize them, the legislature has not done so; and in the absence of legislation, courts are not at liberty to entertain applications for orders alien to the common-law tradition. *Cf.* § 18.11 concluding paragraph *infra*. Although this contention appears to be foreclosed in the federal courts (*see United States v. Euge*, 444 U.S. 707 (1980), construing a general statutory grant of the subpoena power as authorizing the compulsion of handwriting exemplars), it remains open as a matter of state law when state grand juries or prosecutors ask state courts to issue these orders.

12.9. Advocacy to the Grand Jury

In some jurisdictions, defense counsel is permitted to communicate directly with the grand jury by a letter or other written submission, which may urge the grand jury not to indict (giving supporting reasons), or may request that the jury call the defendant or defense witnesses to testify.

Letters urging against indictment may sometimes be quite fruitful, particularly when they offer constructive alternatives to criminal prosecution: for example, the representation that the client is prepared to enlist in the army; that military discipline will do more to shape up the client than a term in prison; and that an indictment would bar the client's acceptance by the armed services. On the other hand, it is ordinarily unwise to put defense testimony in before the grand jury because, in the absence of defense counsel and a judge, the prosecutor can rattle witnesses or shape their testimony by heavy-handed leading questions and then will have an almost unlimited right to use the grand jury transcript for impeachment. Also, at this point in time, defense counsel seldom knows enough about the prosecution's theory of the case to be sure that nothing which the prosecutor could extract from a defense witness by unrestricted interrogation will lead to evidence bolstering that theory.

In any event, before addressing any communication to the grand jury, counsel should consult local statutes, rules, and customs. In many jurisdictions *any* communication by counsel to the grand jurors is improper and may be punishable criminally or by contempt.

12.10. Identifying Grand Jury Witnesses

The secrecy of the grand jury does not extend beyond matters occurring in the grand jury room. Statutes or rules in many jurisdictions provide that a defendant is entitled to receive a list of grand jury witnesses at or after the time of indictment. See § 13.7 penultimate paragraph *infra*. Counsel should review these provisions and take whatever steps they require to obtain the list as promptly as possible. In other jurisdictions, copies of grand jury subpoenas, like other subpoenas, are kept in the office of the clerk or the bailiff of the court and are not embargoed. Inspecting them is a rapid, low-cost method of identifying prosecution witnesses. Elsewhere, if the defendant's case is being presented to the grand jury at a time when few other cases are on, it may be productive for counsel or an investigator to go to the corridor outside the courtroom where the grand jury is meeting and observe what witnesses are called in.

B. Other Defense Activity During the Pre-filing Stage

12.11. Checklist of Additional Steps to Consider Taking during the Pre-filing Stage

The routine procedures that immediately follow bind-over are the prosecutor's drafting and filing of an information or informations in a misdemeanor (nonindictable) case (see § 2.3.6 *supra*) or, in a felony (indictable) case, the prosecutor's presentation of a bill or bills to the grand jury and the jury's return of the bills as "true bills" or indictments (see §§ 2.4.3, 12.1.2 *supra*).

During the period between a bind-over and the filing of the charging paper, counsel representing a client in a felony case will be taking the various steps discussed in Part A of this chapter with regard to the grand jury, including, where applicable: (1) challenging the array of grand jurors, or individual grand jurors, on grounds of improper selection, disqualification, and so forth (§ 12.3 *supra*); (2) moving to suppress illegally obtained evidence before its presentation to the grand jury (§ 12.4 *supra*); (3) requesting recording of the grand jury testimony (§ 12.5 *supra*); (4) considering waiver of indictment (§ 12.2 *supra*); (5) discussing bills with the prosecutor (§ 12.13 *infra*); (6) advising the defendant and defense witnesses with respect to testifying before the grand jury (§§ 12.6-12.7 *supra*); (7) resisting grand jury process (§ 12.8 *supra*); (8) making some form of defense presentation to the grand jury (§ 12.9 *supra*); and (9) investigating grand jury witnesses (§ 12.10 *supra*).

In addition to these matters relating to the grand jury, counsel will need to attend to a number of other things during the immediate post-bind-over period:

- A. *Matters looking backward to the preliminary hearing* (§ 12.12 *infra*):
1. Arranging transcription of the notes of testimony of the preliminary hearing;
 2. Obtaining review of the bind-over by *habeas corpus*, motion to quash the transcript, or other appropriate procedure;
 3. Securing reopening of the preliminary hearing or a new preliminary hearing or attacking waiver of the preliminary hearing;
 4. Obtaining review by *habeas corpus*, motion for reduction of bail, or other statutory bail-setting procedure, of the magistrate's setting or denial of bail at the preliminary hearing.
- B. *Matters looking forward to the information*: Discussing charges with the prosecutor (§ 12.13 *infra*).
- C. *Matters looking forward to trial*:
1. Conducting defense investigation in light of new matter disclosed at the preliminary examination (§ 12.14 *infra*);
 2. Discussing with the client the prosecution's case presented at the examination (§ 12.14 *infra*);
 3. Considering whether the defendant needs to be committed for pretrial mental examination (§ 12.15 *infra*);
 4. Exploring the possibility of negotiating a plea with the prosecutor (§ 12.13 *infra*).
- D. *Matters relating to the timetable of the prosecution* (§ 12.16 *infra*).
- E. *Preparation for the possible issuance of a bench warrant upon the indictment* (§ 12.17 *infra*).
- F. *Matters looking forward to sentencing* (§ 12.18 *infra*):
1. Placing the defendant in a job, rehabilitation program, or other situation in which s/he can make a good adjustment record;
 2. Advising the defendant in regard to other changes of life style that may increase his or her attractiveness to a sentencing judge.

12.12. *Matters Looking Backward to the Preliminary Hearing*

These were discussed in prior chapters. Concerning review of the magistrate's bail decision, see §§ 4.13-4.14 *supra*. Concerning transcription of the notes of testimony of the preliminary hearing, see §§ 11.5.3, 11.6.2, 11.8.7 *supra*. Concerning review of the bind-over, see § 11.10 *supra*. Concerning procedures for reopening the preliminary hearing or challenging a waiver of that hearing, see § 11.6.2 *supra*.

Procedures seeking review of the bind-over or reopening of the preliminary hearing or challenging a waiver of the hearing should be undertaken as early as possible and, in any event, before the presentation of the case to the grand jury. The doctrine that a supervening indictment moots all attacks on the preliminary hearing or bind-over, although assailable (see § 11.4 *supra*), remains strong in most jurisdictions. Under the practice prevailing in some localities, the filing of a petition for *habeas corpus* or other application for review may work an automatic *supersedeas* of all proceedings in the criminal case. When it does not, counsel should be careful to move in the review proceeding for an order restraining the prosecutor from presenting the case to the grand jury during the pendency of that proceeding.

12.13. *Discussions with the Prosecutor*

As indicated in § 8.2.2 *supra*, the prosecutor retains considerable discretion concerning the charges s/he will press or drop (or, in some jurisdictions, add) by information following the bind-over. S/he has still greater discretion regarding the charges s/he presents to the grand jury. *Id.* And s/he often has discretionary authority to divert the prosecution or to cooperate with the defense in presenting a diversion option to the court. See §§ 2.3.6, 3.19, 8.2.2-8.2.4, 8.4 *supra*. Accordingly, counsel will find it useful to discuss the case with the prosecutor at this stage and, in light of the evidence presented at the preliminary examination, urge the dropping or reducing or diversion of charges. The events surrounding the commission of the offense and apprehension of the defendant will often have cooled somewhat by this time; the complainant may have calmed down or been impressed at the preliminary hearing with the gravity of the defendant's situation; hence the time may be ripe for urging a favorable exercise of the prosecutorial discretion. See §§ 8.2.3, 8.4 *supra*.

If the prosecutor is indisposed to drop, reduce, or divert charges without a *quid pro quo*, plea negotiation is sometimes best begun at this time. See §§ 15.6-15.16.2 *infra*. The further along the process goes, the more work the prosecutor will have already done and the less s/he will save by dealing with the defense. Once the prosecutor has calendared the case for trial, s/he has made something of a psychological commitment to try it and has arranged his or her other affairs so as to leave the trial date free. Before this happens, s/he is likely to be more negotiable.

12.14. *Defense Investigation*

Matters learned at the preliminary examination may cast a new light on the nature of the prosecution's case and may open up new leads or establish new priorities for defense investigation. See § 9.2 *supra*. Shortly after the examination counsel should review the case and consider whether redirection or intensification of defense investigation is advised. This may also be a good time to pursue cross-examination of the client, confronting the client with items of prosecution evidence presented at the examination and pointing out that the magistrate apparently credited them. See § 6.14 *supra*.

12.15. *Commitment for Mental Examination*

In some jurisdictions a defendant may be committed for pretrial mental examination to determine competence to stand trial at any time following bind-over. Counsel dealing with a client who may be mentally ill or intellectually disabled should consider whether moving for such a commitment is advisable. See §§ 16.1.2, 16.3, 16.5-16.6 *infra*.

12.16. *The Timetable of Proceedings*

Questions relating to a criminal defendant's constitutional, statutory, and common-law rights to a speedy trial, including rights (a) to have the proceedings expedited; (b) to be released on recognizance if the proceedings are inordinately delayed; and (c) to have the proceedings dismissed with or without prejudice, by reason of the inordinate delay, are discussed in §§ 28.4-28.5.4 *infra*. Those sections should be consulted. Suffice it to say here that in some jurisdictions statutes require that an information be filed or an indictment be returned within a specified period of time after a bind-over (or after "commitment," which may be construed to mean either bind-over or arrest). In other jurisdictions, statutes require that a defendant must be tried within a specified time after bind-over or after commitment. Remedies under the statutes range from the release of the defendant from custody on his or her own recognizance to the dismissal of the prosecution with prejudice. Backstopping the statutes are constitutional provisions and the power of the court (sometimes expressly given by statute or rule, sometimes implied as "inherent") to dismiss charges for want of prosecution. Under these various guarantees of the right to speedy trial, counsel may (and sometimes must) make appropriate motions prior to the filing of the charging paper. These may be in the nature of a demand for expedition of the proceedings, or they may be an application for relief by way of discharge from custody or from prosecution. After considering §§ 28.4-28.5.4, counsel should consult local statutes, rules, and practice.

Conversely, there are cases in which the defense may want to slow the pace of proceedings. Prosecutors – particularly overloaded prosecutors – will often be amenable to calendaring post-bind-over proceedings at times later than those prescribed by the applicable statutes and rules, if the defendant files a waiver of his or her applicable speedy-trial rights. Mutually convenient dates and the terms of any waiver should be negotiated informally with the prosecutor. If the prosecutor persists in forging ahead on a schedule that is

harmful to the interests of the defense, counsel should prepare motions or prerogative-writ papers seeking a continuance of the arraignment date and other proceedings in the trial court, for filing immediately after the return of an indictment or the lodging of an information. See § 3.23.3 *supra*; §§ 13.11 subdivision (3), 14.2-14.4, 28.1.2, 28.3 *infra*.

12.17. Anticipation of a Bench Warrant

Once an indictment is returned against a defendant who has not been previously arrested, a bench warrant authorizing his or her arrest will ordinarily be issued by the criminal trial court upon the prosecutor's request. See §§ 2.3.3, 2.4.4 *supra*. Therefore, when counsel represents an unarrested client and knows that the prosecutor is presenting the case to the grand jury, counsel should suggest to the prosecutor prior to indictment an arrangement to surrender the client, without warrant, in the event an indictment is returned.

The arrangements for surrender are similar to those at an earlier stage, discussed in §§ 3.11-3.13 *supra*, except that in the bench warrant phase it is easier to arrange for the client's surrender before a judge of the trial court instead of a magistrate if that seems advisable. Should the prosecutor be uncooperative, counsel may be able to block a warrant by appearing before the judge prior to indictment. Counsel should inform the judge about counsel's offers to surrender the client in the event of indictment and about the prosecutor's refusal and should request that the court notify counsel when a warrant is sought so that counsel may surrender the client in court. Alternatively, counsel may request that the judge issue a summons in lieu of a warrant when this is authorized by local law or practice.

A bench warrant may also be issued for a defendant previously released on bail if the grand jury indicts on new or additional charges. See § 4.16 *supra*. Prior to indictment or immediately after indictment, counsel should discuss with the prosecutor an arrangement under which the bench warrant will continue the amount and terms of bail already in effect and specify that the bond already posted will secure the defendant's appearance for trial. If the defendant was released on O.R. (see §§ 3.8.1, 4.2 *supra*), counsel should request the prosecutor's cooperation in continuing the O.R. terms pending trial or – if the prosecutor is unwilling to do that – counsel should try to negotiate with the prosecutor an agreement that the bench warrant will set bail at a manageable figure and with manageable release conditions (see §§ 4.4-4.10 *supra*), and that the warrant will be served on the client in the courthouse, so that bail can be posted immediately without the client being taken into custody (*cf.* §§ 3.10, 3.12 *supra*). Failing such an agreement, counsel should ask the prosecutor where and when s/he will be applying for a bench warrant; and counsel should appear with the client to request the judge to release the client on recognizance or to set a favorable bail amount. If the prosecutor refuses even counsel's reasonable request for notice, counsel can report this stonewalling to the arraignment judge or duty judge and request that the court itself notify counsel when the prosecutor's warrant application is presented. Once notified, counsel should be present with the client and should be prepared to argue for his or her proposed terms of pretrial release. See §§ 4.2-4.10 *supra*. If s/he anticipates that the judge

will not go for O.R., s/he should estimate as best s/he can the amount of bail the judge is likely to set, and, if possible, s/he should have the necessary security or bond arranged beforehand, so that the client can be released from the courtroom without spending any time in confinement. See § 3.12 *supra*.

12.18. *Anticipation of Possible Conviction and Sentencing; Assisting the Client to Make a Favorable Appearance at the Time of Sentence*

Even while working to prevent a client's being charged and convicted, counsel cannot afford to ignore the possibility that the client *may* be convicted and that some day, sooner or later, s/he will stand before the court for sentencing. To prepare for this contingency, counsel should begin at a very early stage of the case to think about things that can be done to improve the client's image at sentencing – while there is still time to do them. See § 7.2.4 *supra*. The client who comes before a sentencing judge on a presentence report showing that s/he has successfully completed four months of a six-month job-training program since arrest and release on bail or recognizance, for example, is a far more likely candidate for probation than the client who remains just as unemployed and unemployable during those four months as s/he was at the time of the offense. Counsel should, therefore, advise and assist the client at the earliest possible opportunity to find a situation in the community in which the client can make and document a good, solid record of adjustment prior to trial and sentencing. In particular, counsel should consider the possibilities of getting the client placed in:

- (a) a steady, responsible job (see § 9.6 *supra*; § 48.2 subdivision 3 *infra*);
- (b) a job-training program;
- (c) an out-patient psychiatric or psychological counseling program (see §§ 16.1.8, 48.8 *infra*);
- (d) a community-based rehabilitation program for alcoholics or drug addicts, if appropriate and if (i) the client's enrollment in such a program would not furnish unprivileged evidence against the client or otherwise prejudice the defense on the criminal charge in the event of a not guilty plea and trial, and (ii) counsel has determined by inquiries in the probation department or among local criminal lawyers that the particular program is well regarded by the court (see § 48.8 concluding paragraph *infra*); or
- (e) any other sort of counseling program – family counseling, vocational counseling, speech therapy, remedial reading – that responds to the basic problems that apparently got the client into trouble (see *id.*).

Counsel should also consider whether the client would look better to the probation department or the court if the client altered his or her place of residence, life style, or companions, and should advise the client accordingly with all possible tact. The client's family and various social service agencies may prove helpful in all of these regards, but counsel will find that sometimes there is simply no substitute for counsel's advising the client or for counsel's tracking down a job or placement opportunity for the client.

Chapter 13

Defense Procedures After the Filing of the Charging Paper and Before Arraignment

13.1. *Checklist of the Steps To Take During the Period Between the Filing of the Charging Paper and Arraignment*

During the period between the filing of the charging paper and arraignment, counsel will need to consider a number of matters, including:

- A. *Matters relating to the client's arrest* (§ 13.2 *infra*):
 1. Entering an appearance as counsel for the defendant;
 2. Protecting the client against arrest on a bench warrant.
- B. *Matters looking backward to the preliminary hearing* (§ 20.2 *infra*):
 1. *Habeas corpus* or a motion to quash the transcript or the information or for other relief on the ground of denial of a preliminary hearing or on the ground of defects in the procedures at preliminary hearing or on the ground of insufficiency of the evidence to support a bind-over;
 2. In a nonindictable case, a motion to quash the information as unsupported by the preliminary hearing transcript or bind-over.
- C. *Matters looking backward to the grand jury: Motions to quash or to dismiss the indictment* (§ 20.3 *infra*) based on:
 1. Objections to the procedures used in selecting grand jurors, to the composition of the jury, or to the qualifications of jurors;
 2. Objections to procedural irregularities before the grand jury;
 3. Objections to the evidence before the grand jury on grounds of:
 - a. Insufficiency;
 - b. Inadmissibility or illegal procurement;
 4. Objections based on compelled self-incrimination of the defendant before the grand jury or on immunity grants.

- D. *Matters relating to the face of the charging paper: Motions to quash or to dismiss on grounds of:*
1. Failure to charge an offense (§ 20.4 *infra*);
 2. Objections to venue (§ 20.5 *infra*);
 3. Technical defects (§ 20.6 *infra*);
 4. A statute of limitations (§ 20.7 *infra*);
 5. Double jeopardy (§ 20.8 *infra*);
 6. Misjoinder (§ 20.9 *infra*).
- E. *Matters looking forward to the arraignment and trial:*
1. Objections to the defendant's mental competency to plead; motions for commitment of the defendant for mental examination (§ 13.4 *infra*);
 2. Discussions with the prosecutor (§ 13.5 *infra*);
 3. Defense investigation (§ 13.6 *infra*);
 4. Motions for state-paid investigative or consultative assistance and for other support services that the defendant cannot afford; arrangements for compensation of court-appointed counsel (Chapter 5 *supra*);
 5. Defense discovery, including a motion for a bill of particulars, a demand for a list of witnesses, and the initiation of other pretrial discovery procedures (§ 13.7 *infra*);
 6. Motions to suppress illegally obtained evidence (§ 13.8 *infra*);
 7. Motions for a change of venue (§ 13.9 *infra*);
 8. Challenges to the venire of trial jurors (§ 13.10 *infra*).
- F. *Matters relating to the timetable for proceedings* (§ 13.11 *infra*).
- G. *Conferring with the client* (§ 13.12 *infra*).

In the drafting and presentation of the prearraignment motions discussed in §§ 13.3-13.4 and 13.7-13.11 *infra*, counsel should also consult §§ 17.3-17.11 *infra*, dealing with practice on pretrial motions generally.

13.2. *Entering Counsel's Appearance for the Defense; Guarding Against a Bench Warrant*

After the prosecution files the charging paper (an information or indictment), the next prosecutive step will be the arraignment of the defendant on that charging paper.

When a defendant is in custody, ordinarily the defendant, defense counsel who appeared at the preliminary hearing, or both of them will be notified of the arraignment date by the prosecutor, court clerk, or court administrator. If new counsel has entered a case following bind-over, s/he should immediately advise the prosecutor, jail authorities, and clerk of the criminal court that s/he is now representing the defendant and should ask to be informed as soon as any charging paper is filed. Once advised of the filing, s/he should enter an appearance for the defendant in the criminal docket number, so as to be sure that s/he will be notified of all subsequent proceedings.

When a defendant is on bond, the arraignment notice may be sent to the defendant, to defense counsel who appeared at the preliminary hearing, to the bonding company or other surety, or to all of them. Bonding companies are usually pretty faithful about relaying the notice to the defendant and to counsel, but they may slip up; and defendants themselves will sometimes fail to notify their lawyers of the receipt of notices from the court. Therefore, if counsel has received no notice within a short time after the end of a grand jury term when a bill against a client should have been presented – or within a short time after bind-over in a case that can be prosecuted by information – counsel should make inquiries of the client, the bonding company, and the clerk of the court, in that order.

When a defendant who has never been arrested is indicted, the prosecutor will usually obtain a bench warrant from a judge of the court in which the indictment has been filed. The bench warrant is executed by arrest; the defendant is brought immediately before the court; an arraignment date is set; the defendant is committed without preliminary examination; and bail is set by the presiding judge.

If counsel has not already forestalled the issuance of a bench warrant by the procedures advised in § 12.17 *supra*, s/he should undertake those procedures immediately after indictment or should arrange the surrender of the client (see §§ 3.11.1, 3.12-3.13 *supra*). If these efforts fail and the client is arrested, counsel must take the usual steps to protect the client in custody and to obtain the client's release on bail or recognizance as quickly as possible. See § 10.1 subdivisions I-VI *supra* and the references therein. If the case is one in which the defendant has been previously bailed, then surrendered or was rearrested after indictment because of the addition of charges by the grand jury, counsel should urge the court to release the defendant on recognizance or nominal bail on the additional charges, in light of the defendant's obligation, secured by the bail previously posted, to appear for trial on the original charges. See § 4.16 *supra*.

13.3. *Motions to Quash or Dismiss the Charging Paper*

There are numerous grounds for moving to quash or dismiss the information in a misdemeanor case or an indictment in a felony case. These are addressed in Chapter 20. Local statutes and rules need to be consulted to determine the deadline for filing such a motion and the formal requirements for the motion. See § 17.7 *infra*.

13.4. *Raising the Question of the Defendant's Competency to Plead or to Be Tried*

In some jurisdictions, objections to the defendant's mental competency to plead or to be tried are raised by a special plea at arraignment, while in others they may or must be raised by prearraignment motion. For discussion of this subject and the matters counsel should consider in determining whether to raise a claim of incompetency, see §§ 16.1.2, 16.3, 16.5-16.10 *infra*.

13.5. *Discussions with the Prosecutor – Negotiation and Discovery*

As the case progresses toward the trial stage, defense counsel will want to continue and intensify discussions with the prosecutor concerning possible dispositions without trial. See §§ 8.2.2-8.2.4, 8.4, 12.13 *supra*. Plea negotiation is discussed in §§ 15.8-15.13 *infra*. In addition to the possibility that negotiation will lead to agreement on a favorable disposition, counsel should keep in mind its discovery potential. Whether s/he offers to negotiate or not, counsel is often advised to discuss the prosecution's evidence with the prosecutor shortly before arraignment and to request inspection of the prosecutor's file or items in it: the police report, laboratory reports, statements of prosecution witnesses, the defendant's prison record and probation or parole records (vital documents that defense counsel often cannot obtain from their sources but that the prosecutor will usually have), the criminal records of the complainant and prosecution witnesses, and so on. At this stage the file is likely to be fuller and the prosecutor more knowledgeable than heretofore.

13.6. *Defense Investigation*

At arraignment the defendant will have to enter a plea to the charge. See §§ 14.1, 14.5-14.11 *infra*. Although the plea may later be changed under some circumstances (see §§ 14.7, 14.8, 15.7.2, 17.1 *infra*), leave to change it is ordinarily within the court's discretion. The initial plea entered at arraignment can be quite important, both for this reason and because the arraignment judge may be a particularly favorable one before whom to enter a guilty plea if the defendant is eventually going to plead guilty (see § 15.7.2 *infra*). Consequently, counsel's factual investigation of the case should be completed before the initial choice of plea at arraignment, if at all practicable. The plea decision will usually be preceded by negotiations with the prosecutor (§ 13.5 *supra*), in which the bargaining position of the defense will depend in major part upon defense counsel's grasp of the facts of the case. See §§ 15.3-15.11 *infra*. The need to be knowledgeable in bargaining

puts a premium on pushing defense factual investigation as far and fast as possible prior to arraignment. See Chapter 9. New investigative leads may be provided by the charging paper itself, by a bill of particulars, by a witness list, or through initial discovery proceedings. See §§ 13.7-13.8 *infra*.

13.7. *Defense Discovery: Motion for a Bill of Particulars, Motion for a List of Witnesses, and Other Devices*

Upon the filing of a charging paper that is insufficiently detailed to inform the defendant of the vital statistics of the offense charged, s/he may move for a bill of particulars, setting out in the motion the additional information that s/he seeks. S/he is ordinarily entitled to:

- (1) The specific date and time of the offense;
- (2) Its street location;
- (3) The name of the complainant or victim; and
- (4) The means by which it is asserted that the defendant committed the offense.

See, e.g., Dzikowski v. State, 436 Md. 430, 449-50, 82 A.3d 851, 862 (Md. App. 2011) (“The State violated . . . [the applicable statute] when it filed a bill of particulars in which, rather than inform the petitioner of the conduct that was the basis for the reckless endangerment count, it instead simply directed the petitioner to discovery. In so doing, the State switched the burden to the petitioner to identify the facts underlying the indictment. Because a charging document must inform the defendant ‘of the specific conduct with which he is charged,’ . . . , logically, and . . . [under the applicable rule of criminal procedure], a bill of particulars, in supplementation of a short form indictment that fails to so inform, must specify the alleged conduct to which the subject charge relates. Discovery, even open-file discovery, that includes police reports and witness statements, is not the same and cannot substitute for a legally sufficient bill of particulars. While such discovery may contain the full facts of the case, when a defendant is charged using a short form indictment, it is not, and cannot be, a substitute, or satisfy a demand, for a bill of particulars. Discovery does not particularize or relate, from the perspective of the State, the factual information contained therein to the offense charged. It is this perspective and relation of factual information to the offense charged that satisfies the form and substance of a bill of particulars.”); *State v. Larson*, 941 S.W.2d 847, 850-53 (Mo. App. 1997) (“Dr. Larson was charged by information with fifty counts of Class A misdemeanor animal abuse . . . ¶ Dr. Larson filed a motion for bill of particulars claiming that the information was deficient. Specifically, he asserted that each charge identified neither the acts of abuse nor the specific animal. As a result, Dr. Larson claimed prejudice in the preparation of his defense and the inability to prevent multiple prosecution for the charged offenses. The trial court denied Dr. Larson’s motion. ¶ . . . Where an information alleges all essential facts constituting the offense, but fails to assert facts necessary for an accused’s defense, the information is subject to a challenge by a bill of particulars. . . . A bill of particulars clarifies the charging document. It prevents surprise and restricts the state to what is set forth in the bill. ¶ The information in Counts 1 through 50 did not sufficiently

apprise Dr. Larson of which hog – male, female, dead, alive, white, black, red, Hampshire, Yorkshire or Duroc – he was charged with having abused. Without providing some reasonable description identifying each hog allegedly abused, Dr. Larson would be subject to multiple prosecutions with no way to disprove that the State of Missouri had already litigated criminal charges against him for abusing a particular hog. ¶ . . . The trial court, therefore, abused its discretion in not granting Dr. Larson’s motion for a bill of particulars.”). *Cf. Hunter v. State*, 829 P.2d 64, 65 (Okla. Crim. App. 1992) (“Initially, we are very disturbed by the fact that the prosecution in the present case did not file the Bill of Particulars seeking the death penalty until seven days prior to trial. At present, there is no set time prior to trial within which the State must file a Bill of Particulars. . . . However, both parties agree that the notice need only be given within a reasonable time prior to trial. We find that giving notice that the State intends to seek the death penalty seven days prior to trial is clearly unreasonable. By comparison, the State is required to give ten days notice of its intention to use evidence of other crimes. . . . It is our opinion the State knows or should know no later than the preliminary hearing whether or not they intend to seek the death penalty in a particular case. We find the notice in the present case simply inadequate. The defendant has the right to a fair trial; how can one properly prepare for a death case trial in one week. This Court adopts the standard that the State must file the Bill of Particulars prior to or at the arraignment of the defendant. The trial court may for good cause shown, extend this time but should use its sound discretion in so doing.”).

Allowance of a bill of particulars is generally said to rest in the discretion of the court, and the standard jargon is that the bill does not lie to discover prosecution “evidence” (that is, means of proving facts, as distinguished from the operative facts of the offense themselves). But counsel should note the more liberal practice recognized in *Will v. United States*, 389 U.S. 90, 99 (1967). In most jurisdictions the defendant may not demur to the facts stated in the bill or move to dismiss it on the ground of failure to state an offense (see § 20.4 *infra*); and in the event that the prosecution’s proof at trial varies from the particulars contained in the bill, the defendant is usually given nothing more in the way of relief than a continuance (or mistrial and continuance if continuance without a mistrial is not feasible); only very rarely will a court dismiss a prosecution for variance of the proof from a bill of particulars. The bill is therefore a device of limited utility.

More significant is the defendant’s right to a list of witnesses. The right is given by statute or rule in most jurisdictions and may entail (depending upon statutory phraseology) a right to the names of all witnesses who appeared before the grand jury or at the preliminary hearing or a right to the names of all witnesses whom the prosecution plans to use at trial. (The latter right is generally held not to include prosecution rebuttal witnesses. It is enforced at trial, during the prosecution’s case in chief, by defense objection to any witness not named in the list. The court may exclude the testimony of the witness, or it may allow the witness to testify and may grant a defense continuance to meet the testimony, in the discretion of the judge. See § 18.7.2 *infra*.) The right to a witness list is given by statutes or rules of two sorts: those which require that the names of witnesses be endorsed on the charging paper and

those which authorize the defense to demand the names from the prosecutor. Even under statutes of the former sort, it is often common for prosecutors to withhold a witness list unless defense counsel ask them for it. After checking local practice, counsel should demand the list from the prosecutor, move to dismiss the charging paper by reason of the absence of witnesses' names on it, or move the court for an order requiring the prosecutor to produce a list, as occasion warrants.

In addition to the motion for a bill of particulars and the demand for a witness list, defense counsel may, in some jurisdictions, proceed before arraignment with the various discovery devices discussed in Chapter 18 *infra*.

13.8. *Motions for the Suppression of Illegally Obtained Evidence*

Substantive and procedural matters relating to these motions are discussed in Chapters 24-27 *infra*. The motions may ordinarily be made during a part or all of the period after arraignment and prior to trial. But where they are also authorized before arraignment, there may be good reason to make them at that time. *First*, the motions are often a valuable informal discovery technique. Hearings on suppression motions can provide considerable information about the prosecutor's case. Any investigative leads unearthed in this manner are most useful if they come sufficiently early so that the defense has ample time to follow them up thoroughly. *Second*, in many cases – particularly those in which the principal charges are for possession crimes – the defense will stand or fall entirely on a motion to suppress. If this is lost, the defendant is advised to plead guilty. Of course, s/he usually may plead not guilty at arraignment, move to suppress thereafter, and, in the event the motion is lost, change the plea to guilty. But there are some advantages to having the decks cleared for an initial guilty plea at arraignment if counsel thinks this advised (for example, when the arraignment judge turns out to be a favorable sentencer). For this reason, it is often sensible to make the suppression motion before arraignment and, if necessary, move to continue arraignment pending disposition of the motion.

13.9. *Motion for a Change of Venue*

Motions for a change of venue, discussed in §§ 22.1-22.3 *infra*, are ordinarily made following arraignment. In some jurisdictions, however, they may or must be made before arraignment. Local practice should be checked.

13.10. *Challenges to the Venire of Trial Jurors*

Matters relating to the selection of trial jurors (sometimes called petit jurors or traverse jurors) are discussed in Chapters 32 and 33 *infra*. It is sufficient to note here that challenges to the venire or to the array of trial jurors, raising contentions of improper selection methods or standards or of the disqualification of the jurors on a ground common to all of them, are required in some jurisdictions to be made within a designated time after the filing of the charging paper. Local practice must be consulted.

13.11. *Matters Relating to the Timetable for Proceedings*

Questions of the timing of the various stages of the criminal proceeding following filing of the charging paper are discussed in Chapter 28 *infra*. These sections deal with procedures and grounds for defense efforts to speed the proceeding up or to slow it down. Several matters, particularly, require consideration by defense counsel at the prearraignment stage. These include:

(1) Counsel will sometimes have grounds to move to dismiss the charging paper because it was not filed within a period of time limited by statute or rule following bind-over or commitment. See § 12.16 *supra*. The motion ordinarily must be made prior to plea.

(2) Counsel may wish to expedite trial or to lay a foundation for a motion to dismiss the prosecution because of lack of expedition of the trial. State statutes or rules frequently limit the time within which a defendant must be tried following bind-over or “commitment” or the filing of the charging paper. (In some jurisdictions, more than one of these periods is limited.) The statutes and rules, however, are usually qualified (explicitly or by judicial construction) by a principle known as the “demand rule,” which obliges a defendant to invoke the statutory rights by a motion to bring the case on for trial. In the absence of such a motion, no motion to dismiss the prosecution for delay beyond the statutory periods prescribed for trial will subsequently lie. See § 28.5.2 *infra*. In some jurisdictions, the period nominally prescribed by statute as running from bind-over or commitment or the filing of the charging paper is held by judicial construction to be tolled during the period of a defendant’s failure to demand trial, with the result that the period actually runs from the date of demand. This version of the demand rule requires counsel’s attention in the days immediately following indictment or information.

(3) Counsel may, on the other hand, want to consider a motion for continuance of the arraignment in order to allow time for preparation for matters that will arise at arraignment. See Chapters 14, 15.

13.12. *Conferring with the Client*

Arraignment is a stage at which the defendant will be required to enter pleas and to make various objections and motions. See Chapter 14 *infra*. Failure to raise available claims through the proper use of these procedures will ordinarily forfeit the claims irrevocably. Also, like any other court appearance, arraignment is a theater in which the defendant and defense counsel will be performers whose behavior will make a more or less favorable impression on the judge and the prosecutor. If the defendant is pleading guilty, s/he will have an elaborate role to perform. See §§ 14.1, 15.16.1, 15.17, 48.11.4 *infra*. How s/he plays it will affect both the validity of the plea and the judge’s attitude when exercising the discretion – often quite considerable discretion – authorized by law or local practice in the choice of sentence and in ancillary decisions such as whether to suspend sentence or admit the defendant to postconviction diversion programs. See Chapter 48 *infra*. Even if the client is not pleading guilty, his or her demeanor at arraignment may

affect the sentence s/he will receive after conviction at a trial. (This is most likely when the arraignment judge will also be the sentencing judge. But it can also happen if the defendant's demeanor at arraignment arouses a particularly sympathetic or antipathetic reaction on the part of a prosecutor who will later be making a sentencing recommendation.) And counsel's own demeanor will have to be thoughtfully planned. Often, arraignment is the first occasion on which the defendant will see his or her lawyer performing in court. The lawyer's *persona* may well need to be very different than that which the lawyer has displayed in previous interactions with the client. It will have to implement the defense theory of the case (see Chapter 7 *supra*), which may require counsel to be more accommodating toward the judge or prosecutor than the client would expect from a gung-ho defense attorney unless the client understands beforehand why counsel is behaving as she is.

Before arraignment, therefore, counsel needs to have an extended sit-down with the client to:

- (a) Discuss all of the options regarding pleas, objections, and motions that can be made at arraignment; decide which options counsel will pursue; and get both the client and counsel as comfortable as possible with those choices. See §§ 1.3, 6.5-6.6, 6.14 *supra*; §§ 15.2-15.7, 15.14-15.17 *infra*.
- (b) Forewarn the client about everything that is likely to happen in court – including the nature of counsel's own performance – in sufficient detail so that there will be no surprises.
- (c) Prepare the client to play the client's role, and rehearse that role sufficiently to maximize the likelihood that s/he will play it well. See §§ 29.6-29.7, 48.11.4 *infra*.

Chapter 14

Arraignment and Defensive Pleas

14.1. Arraignment Procedure Generally

Arraignment is the stage of proceedings when a misdemeanor or felony defendant ordinarily appears for the first time in the court that has jurisdiction to try the case. The defendant has been notified of the arraignment date as indicated in § 13.2 *supra*.

A judge presides at arraignment. The charging paper (indictment or information) is handed to the defendant and is usually read to the defendant by the clerk. In metropolitan courts with a heavy docket, it is often customary for defense counsel to waive reading of the charging paper in open court. The defense loses nothing by going along with this custom; it may irk the judge if counsel does not. Counsel who is being appointed to represent the defendant for the first time at this arraignment will want to study the written charging paper in detail and discuss the charges with the client. See §§ 14.2-14.4 *infra*. Counsel who has been representing the client before the arraignment will have already discussed the charges with the client and made all necessary plans for how to handle the defense response to them at the arraignment. See § 13.12 *supra*.

The defendant is ordinarily asked to enter a plea to the charging paper. S/he may enter one or more of a variety of pleas. See §§ 14.5-14.11 *infra*. If s/he pleads not guilty, a trial date is set. If s/he enters a special plea requiring a hearing or an argument before trial on the merits, a date is ordinarily set for that purpose.

If the defendant indicates a wish to plead guilty, s/he is ordinarily advised by the judge:

- that s/he has the right to have a trial; the rights to be represented by counsel, call witnesses, and cross-examine the prosecution's witnesses at trial; and the right to jury trial (if applicable);
- that a plea of guilty waives all these rights; and
- that upon the plea the defendant will be convicted and may be sentenced by the court in its discretion to a term of imprisonment of as much as x years (specifying the maximum) and to a fine of as much as y dollars (specifying the maximum).

In some jurisdictions, local law or practice may require that the judge also inform defendants that, if they are not a United States citizen, a conviction may result in removal or exclusion from the United States. *See, e.g.*, FED. RULE CRIM. PRO. 11(b)(1)(O). See generally § 15.6.1 subdivision (E) *infra*. If mandatory minimum sentences or other special sentencing consequences apply to convictions of the particular offenses charged, local law or practice

may require the judge to inform the defendant of these. The defendant will be asked whether s/he understands the judge's warnings.

Ordinarily the judge will then proceed to interrogate the defendant to determine whether his or her plea is voluntary. The defendant will be asked:

- whether s/he is pleading guilty of his or her own free will, because s/he is guilty, and for no other reason, and
- whether anyone has made any threats or any promises to the defendant to induce the guilty plea or has promised that the defendant will receive any sentence less than the maximum in this case.

Some judges will reiterate that it is the judge's duty to decide what the sentence should be and that the judge will not be a party to, and will not honor, any promises on sentence but will sentence the defendant solely in light of his or her background and the nature of the offense. Some judges also will ask the defendant whether s/he is guilty of the charge of x (reading each charge) and then ask the defendant to describe briefly in his or her own words what s/he did (that is, to confess in factual detail in open court).

Most judges will also ask:

- whether the defendant has consulted his or her lawyer;
- whether the lawyer has advised the defendant concerning the consequences of the guilty plea; and
- whether the defendant is satisfied with the services of the lawyer.

This interrogation is sometimes conducted by the prosecuting attorney instead of the judge. In other courts defense counsel is expected to conduct it. Courts differ considerably regarding the extent of the inquiry that they conduct or require. Some ask a few perfunctory questions of the defendant or defense counsel; others cross-examine the defendant at length. (In federal practice, FED. RULE CRIM. PRO. 11 requires the judge to address the defendant personally and to make specified inquiries. Some States have similar requirements by statute or court rule.) If the defendant gives satisfactory answers, his or her formal plea of guilty is taken. S/he may then be sentenced at once, or a sentencing date may be set, with or without presentence investigation by the probation officer of the court and with or without a subsequent evidentiary hearing on sentence. (Again, local practice differs considerably regarding the extent to which a pre-sentence work-up is mandatory or discretionary following a guilty plea; and in any given jurisdiction, the requirements may depend on the grade or nature of the offense.)

14.2. *Rushed Proceedings; Making the Record Clear; Continuances*

Counsel should expect that arraignment will be a hectic proceeding. Especially in metropolitan courts, dozens of cases are scheduled for arraignment in a morning. Defendants and their lawyers are moving back and forth from the bench. The judge is frequently impatient. Sometimes the prosecution will request a continuance to continue its investigation, and this will be granted before the defendant or counsel reaches the bench.

Counsel will have to keep composure in this confusion. If s/he does not understand what the judge is doing, or has done, with counsel's case, s/he should respectfully ask the court for an explanation. The record should be clear on whether the arraignment has been held or continued and, if continued, on whose motion. Defense objections to a prosecution-sought continuance should be noted. If defense counsel is confronted by something unexpected, s/he should ask for time to confer with the client or for a continuance to a later hour or date. S/he should resist being harried or pressured into snap judgments on previously unconsidered matters.

14.3. *Appointment of Counsel at Arraignment*

If a defendant is called for arraignment and appears without counsel, s/he is usually advised by the judge of the right to counsel and to have counsel appointed if s/he is indigent. If s/he says s/he wants a lawyer and swears under oath that s/he cannot afford one (or executes a form pauper's affidavit), the court will appoint a lawyer. Sometimes a lawyer is appointed from among the members of the bar who are in the courtroom on other matters. The judge may say something like: "Counselor, will you talk with this defendant and advise the defendant on arraignment?" Such a request leaves it unclear whether the lawyer is being asked to represent the client and, if so, whether for the arraignment only or for the whole case. Counsel's first job is to clarify his or her own role. S/he should ask the court whether s/he is being appointed to represent the defendant as the defendant's attorney. Counsel should not accept an appointment to "talk to this defendant." Either s/he represents the defendant or s/he does not. Further, s/he should ask the court whether the appointment is to represent the defendant generally in the matter, at this and later stages, or only for the arraignment. If the latter, counsel should express the understanding that this means that the court will appoint other counsel to represent the defendant at subsequent stages if subsequent proceedings are advised. Counsel should make a clear request on behalf of the client for the assurance of adequate representation throughout the case. As an attorney s/he has an obligation to accept appointment, but s/he has neither the obligation nor the right to be used to create the appearance of representation without its reality.

Counsel's second job, therefore, is to request adequate time to interview the defendant privately and to prepare for the arraignment. This is as important as at a preliminary arraignment, and counsel's position should be the same. See §§ 3.15-3.16, 3.23 *supra*. Ample opportunity for lawyer-client consultation is guaranteed by the Sixth Amendment to the federal Constitution (*see Geders v.*

United States, 425 U.S. 80 (1976); *Martin v. United States*, 991 A.2d 791, 793-96 (D.C. 2010); cf. *Perry v. Leeke*, 488 U.S. 272, 278-85 (1989)), and counsel must insist on it. Ordinarily a continuance of the arraignment to a later day should be requested. If the request is denied and counsel is forced to proceed, s/he should make an objection for the record on the ground that s/he is unprepared, has just been appointed, is not being afforded sufficient time to acquaint himself or herself with the case, and that thereby the defendant's Sixth Amendment right to counsel at the arraignment (*Hamilton v. Alabama*, 368 U.S. 52 (1961); *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 198, 213 (2008); *Gonzales v. Commissioner of Correction*, 308 Conn. 463, 68 A.3d 624 (2013)) is being violated. See § 3.23 *supra*. If the defendant is nevertheless compelled to plead, counsel should advise the defendant to stand mute, whereupon the court will enter a not guilty plea. See § 14.10 *infra*. After counsel has had time to investigate the case further, s/he may want to move to withdraw that plea, again asserting the client's Sixth Amendment right, in order to make other pleas or to raise defenses or objections customarily waived by a not guilty plea. See §§ 14.5-14.6 *infra*. Should counsel be relieved from representing the defendant after entry of the plea and the appointment of another lawyer, counsel should inform that lawyer of the circumstances under which the plea was taken.

14.4. Continuances

Arraignment may be continued, in the discretion of the presiding judge, on motion of either the prosecution or the defense. Defense counsel should request a continuance whenever s/he is unprepared to proceed (see §§ 14.2-14.3 *supra*) or needs additional time for some purpose (for example, to complete negotiations with the prosecutor; see §§ 15.8-15.13 *infra*). Whenever a defense motion is pending that, if granted, would terminate the proceedings or affect the choice of a defensive plea (see §§ 14.5-14.6 *infra*), counsel should either move to continue the arraignment or ask leave to withhold entry of a plea until the motion is decided.

Local practice varies with regard to whether motions for continuances of arraignment are made (a) in writing prior to the arraignment date; (b) by telephone, more or less informally, to the judge or clerk prior to the arraignment date; or (c) in open court when the case is called for arraignment. In localities in which more than one of these procedures is permitted, counsel should nevertheless ordinarily try to give the court at least some advance notice of a request for continuance. The court will appreciate this courtesy and may be more sympathetic to the request. It is also important to attempt to obtain the prosecutor's agreement to, or acquiescence in, a defense motion for continuance, if possible.

If an application for a continuance is denied, counsel should ordinarily object and then have the client stand mute (see § 14.10 *infra*). Only if s/he is adequately prepared to enter special pleas or to decide to forgo them and enter a not guilty plea, should s/he do so. See §§ 14.5-14.6 *infra*. Standing mute is the only safe course if counsel is unprepared and is forced, over objection, to plead. The judge will then instruct the clerk or counsel to enter a plea of not guilty. Should subsequent developments suggest a guilty plea, the plea of not

guilty entered at arraignment can ordinarily be withdrawn and a guilty plea can be entered, with leave of court, at a later stage. This leave is usually easy to obtain. Should special pleas later appear advised, a motion to withdraw the not guilty plea for the purpose of pleading specially is in order. See § 17.1.1 *infra*.

14.5. *Special Pleas*

In some jurisdictions, particularly those that maintain the old common-law forms of criminal procedure, certain defensive contentions must be raised by special pleas at arraignment. In other jurisdictions these contentions are raised by motion, before or at arraignment or a specified time prior to trial on the merits, as prescribed by statute or rule of court.

Where special pleas are used, they must ordinarily be made prior to the entry of a general plea (guilty or not guilty). Usually a defendant may plead both generally and specially at arraignment, but s/he must enter the special pleas *first*. Several states are quite strict in holding that a general plea waives the right to present any defensive contention raisable but not raised by a prior special plea. Except where the grounds for the special plea are not then available or discoverable (*cf. O'Connor v. Ohio*, 385 U.S. 92, 93 (1966); *Smith v. Yeager*, 393 U.S. 122, 126 (1968); *Reed v. Ross*, 468 U.S. 1 (1984); *Amadeo v. Zant*, 486 U.S. 214 (1988)), it is probable that these sorts of enforced waivers can be made to stick. See *Davis v. United States*, 411 U.S. 233 (1973); *Francis v. Henderson*, 425 U.S. 536 (1976); *cf. Wainwright v. Sykes*, 433 U.S. 72 (1977); *Engle v. Isaac*, 456 U.S. 107 (1982); *but see Humphrey v. Cady*, 405 U.S. 504, 517 (1972); *Blackledge v. Perry*, 417 U.S. 21 (1974); *cf. Menna v. New York*, 423 U.S. 61 (1975) (per curiam), discussed in *Abney v. United States*, 431 U.S. 651, 659-62 (1977). On the other hand, where – as is common – the arraignment or trial judge is given broad discretion to permit the withdrawal of a general plea in order to allow the belated entry of special pleas, the irregular, unfavorable exercise of that discretion in particular cases may not foreclose federal constitutional claims against subsequent appeal or collateral attack. The mere existence of judicial discretion to enforce or relax a state procedural rule does not open the door to federal challenge. *Beard v. Kindler*, 558 U.S. 53 (2009); *Engle v. Isaac*, *supra*, 456 U.S. at 135 n.44. But a showing that the discretion has been exercised erratically or inexplicably does. See *Barr v. City of Columbia*, 378 U.S. 146, 149-50 (1964); *James v. Kentucky*, 466 U.S. 341, 345-49 (1984); *Johnson v. Mississippi*, 486 U.S. 578, 587-89 (1988); *Williams v. Georgia*, 349 U.S. 375, 382-89 (1955), *reaffirmed in Shuttlesworth v. City of Birmingham*, 376 U.S. 339 (1964) (per curiam). Counsel who seeks and is denied leave to enter an untimely special plea under these discretionary practices should therefore be sure that the special plea and the grounds for it are preserved in the record for appeal, and should document the irregularity with which the discretion has been exercised in other cases. Reported appellate decisions may or may not suffice to make the point that a discretionary procedural bar is being whimsically applied in counsel's State. If they do not, counsel may be able to establish the point by putting transcripts of other cases into the record or by presenting affidavits from experienced criminal trial practitioners.

14.6. *Checklist of Special Pleas and Other Matters That Must Be Presented at Arraignment*

In the various jurisdictions, counsel may find that one or more of the following special pleas must be used to raise the indicated claims. Local practice should be consulted.

- A. *Plea to the jurisdiction.* This plea challenges the jurisdiction of the court over the subject matter or the person of the defendant.
- B. *Pleas in abatement.* These pleas are used to attack the face of the charging paper for substantive or technical inadequacy. They raise points like those that are considered in connection with the motions discussed in §§ 20.4-20.7, 20.9 *infra*.
- C. The contention that prosecution is barred by a statute of limitations is sometimes raised by a special plea. In other localities it is raised by a plea in abatement, by pretrial motion, or by demurrer or motion at trial. See § 20.7 *infra*. Unless state law treats the bars created by a criminal statute of limitations as jurisdictional (*see, e.g., People v. Williams*, 21 Cal. 4th 335, 981 P.2d 42, 87 Cal. Rptr. 2d 412 (1999); *Cunningham v. District Court of Tulsa County*, 432 P.2d 992 (Okla. Crim. App. 1967)), a defendant's failure to use the appropriate procedure for claiming the bar will forfeit the claim (*see Musacchio v. United States*, 136 S. Ct. 709, 716-18 (2016)).
- D. *Special pleas in bar.* These include:
 1. Pardon (that is, a grant of executive clemency);
 2. Double jeopardy (technically, *autrefois convict*, *autrefois acquit*, or former jeopardy; see § 20.8 *infra*);
 3. Immunity (see § 12.6.4 *supra*).
- E. *Plea of not guilty by reason of insanity* (that is, lack of criminal responsibility by reason of mental disease under *M'Naghten* or its modern-day counterparts *at the time of the offense charged*). In some jurisdictions the defendant is automatically committed for pretrial mental examination upon the entry of this plea. See §§ 16.11-16.13 *infra*.
- F. *Plea of incompetency to be tried* (that is, *present* mental disorder rendering the defendant incapable of appreciating the nature of the proceedings or of consulting with counsel in his or her defense). In some jurisdictions the defendant is automatically committed for pretrial mental examination upon the entry of this plea. See §§ 16.5, 16.7-16.10 *infra*. The contention is sometimes made by an objection to pleading on the ground that the defendant is mentally incompetent to plead.

In addition to these special pleas, some jurisdictions require the filing of certain notices or motions at arraignment. The principal ones are:

- G. *Notice of intention to present the defense of insanity* (that is, lack of criminal responsibility) or *other psychiatric defenses*. In a number of jurisdictions the notice procedure is used in lieu of, or in addition to, a special plea of not guilty by reason of insanity. Unlike the traditional special plea, the notice is frequently required to state the names and addresses of the witnesses whom the defendant intends to call in support of the insanity defense. A few jurisdictions require similar notice of intention to present expert testimony in support of other mental defenses, such as diminished capacity. The constitutionality of these several requirements is governed by the principles discussed in the following paragraph. See also § 16.6.1 *infra*.
- H. *Notice of intention to present the defense of alibi*. This notice also is ordinarily required to contain specified details: the names and addresses of alibi witnesses and the place where the defendant contends that s/he was at the time of the offense. State courts have generally sustained the constitutionality of notice-of-alibi statutes against attacks based upon the state privileges against self-incrimination. In *Williams v. Florida*, 399 U.S. 78 (1970), the Supreme Court upheld a notice-of-alibi provision challenged under the Fifth and Fourteenth Amendments. However, *Wardius v. Oregon*, 412 U.S. 470 (1973), holds “that the Due Process Clause . . . forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants” (*id.* at 472); and a strong argument can be based on *Brooks v. Tennessee*, 406 U.S. 605 (1972), that the Fifth Amendment also forbids enforcement of alibi rules unless local practice provides the defendant with sufficient discovery, *prior* to the time when the alibi notice is required to be filed, to permit defense counsel to make an advised decision whether or not to rely upon an alibi defense. See §§ 18.11-18.12 *infra*. Both *Williams* and *Wardius* reserve the question of the constitutionality of the sanction commonly prescribed by notice-of-alibi statutes: exclusion of the defendant’s alibi evidence at trial if s/he fails to file timely notice. See *Williams, supra*, 399 U.S. at 83 n.14; *Wardius, supra*, 412 U.S. at 472 n.4. The treatment of similar issues in *United States v. Nobles*, 422 U.S. 225, 241 (1975), and *Taylor v. Illinois*, 484 U.S. 400 (1988), strongly suggests that the exclusionary sanction will be sustained. See also *Estelle v. Smith*, 451 U.S. 454, 466 n.10 (1981); *Michigan v. Lucas*, 500 U.S. 145, 149-53 (1991); *Nevada v. Jackson*, 133 S. Ct. 1990, 1992-93 (2013) (*per curiam*). But where, as is usual, the statutes give the trial judge discretion to relieve defendants of this sanction, a failure to allow relief in particular cases may be challenged under the principle of *Barr v. City of Columbia*, 378 U.S. 146 (1964), and cognate cases (see § 14.5 *supra*), because the right to present alibi evidence is unquestionably protected by the Sixth Amendment against arbitrary or unreasonable restriction by the states. *Cf. Chambers v. Mississippi*, 410

U.S. 284, 302 (1973), discussed in §§ 18.9.2.4, 39.1 *infra*; *Holmes v. South Carolina*, 547 U.S. 319 (2006); *Rock v. Arkansas*, 483 U.S. 44, 52-53 (1987); *Taylor v. Illinois*, *supra*, 484 U.S. at 406-09 (dictum).

- I. *Motions to suppress illegally obtained evidence* (see § 13.8 *supra*; §§ 17.4-17.11 *infra*; Chapters 24-27 *infra*).
- J. *Election or waiver of jury trial* (see § 32.2 *infra*).
- K. *Motions to dismiss or to quash the indictment or the information*. As noted in § 14.5 *supra*, many jurisdictions have abolished or limited special pleas and now provide that some or all of the contentions discussed in §§ 20.2-20.9 *infra* should be raised by motions to dismiss or to quash the charging paper. Like the special pleas, these motions may be required to be filed prior to the entry of a general plea; or some other deadline for their filing, before or shortly after arraignment, may be fixed by statute or rule of court.

In some jurisdictions there are rather strict technical rules governing the order in which special pleas and motions must be made. Local practice should be consulted.

14.7. General Pleas – the Plea of Not Guilty

The general pleas are not guilty, guilty, and *nolo contendere* (or *non vult*). The plea of not guilty (at common law, a general plea in bar) raises what is known in the jargon as “the general issue.” That is, it requires the prosecution to prove its case on the facts beyond a reasonable doubt and permits the defendant to show any defense to the charge that is not required to be set up by special plea, motion, or notice. As noted in §§ 14.5-14.6 *supra*, these latter matters must ordinarily be pleaded *before* the entry of a general plea of not guilty, or they are waived.

A not guilty plea at arraignment may later be withdrawn by leave of court to permit the defendant to enter a guilty plea, and courts are liberal in granting leave at any time prior to the close of trial. Therefore, unless a case presents some issue that must be raised by special plea, motion, or notice, it is ordinarily safe to enter a not guilty plea at arraignment as a holding operation, leaving the defendant the option of pleading guilty later at some more advantageous time. See § 15.7.2 *infra* on considerations of timing in entering a guilty plea.

14.8. The Guilty Plea

A plea of guilty is an admission by the defendant that s/he is legally guilty of the charges to which the plea is entered. The consequence is that a judgment of conviction may be entered on the plea and the defendant sentenced to the penalties provided by law for the offense. The plea ordinarily waives all rights to make any defense against conviction and thus forecloses an

appeal raising even claims that error was committed in judicial proceedings prior to the entry of the plea (for example, pre-plea rulings on motions attacking the composition or procedure of the grand jury, motions to suppress evidence, motions for the provision of state-paid defense resources to an indigent defendant).

In some jurisdictions a limited number of fundamental contentions may be raised on appeal or by *certiorari* or on collateral attack (see § 49.2 *infra*) following a guilty plea: the facial constitutionality of the criminal statute charged; the jurisdiction of the court (including, in a few States, a statute-of-limitations bar (see § 14.6 subdivision (C) *supra*)); the question whether the charging paper charges an offense (§ 20.4.1 *infra*). In some jurisdictions, a statute or court decision also authorizes the appeal of pre-plea rulings on suppression motions and similar matters, notwithstanding a guilty plea. *See, e.g.*, FED. RULE CRIM. PRO. 11(a)(2) (amended in 1983 to permit defendants to enter a conditional plea of guilty or *nolo contendere*, with the assent of the court and prosecutor, that reserves the right to appellate review of specified rulings on pretrial motions; this statutory amendment resolved the previously open question of the propriety of conditional guilty pleas in the federal courts (*see United States v. Morrison*, 449 U.S. 361, 363 n.1 (1981))). But counsel should make very sure that post-plea review is expressly authorized by statute or authoritative judicial decision in the particular jurisdiction before s/he advises a guilty plea in the expectation that any ground of legal defense will survive it. The Supreme Court of the United States has gone very far in according finality to guilty pleas and in holding them effective waivers of all defense claims. *Brady v. United States*, 397 U.S. 742 (1970); *McMann v. Richardson*, 397 U.S. 759 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970); *North Carolina v. Alford*, 400 U.S. 25 (1970); *Tollett v. Henderson*, 411 U.S. 258 (1973); *see also Corbitt v. New Jersey*, 439 U.S. 212, 218-25 (1978); *United States v. Goodwin*, 457 U.S. 368, 377-80 & n.10 (1982); *Mabry v. Johnson*, 467 U.S. 504, 508-09 (1984). Essentially, these decisions hold that a voluntary and understanding guilty plea entered by an adequately counseled defendant is conclusive upon the issue of guilt unless the applicable state law provides otherwise (*see Lefkowitz v. Newsome*, 420 U.S. 283 (1975); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 324-25 (1979); *Shea v. Louisiana*, 470 U.S. 51, 53 (1985); *cf. Berkemer v. McCarty*, 468 U.S. 420, 424-25 & n.2 (1984)).

In the absence of a controlling statute or court decision authorizing appellate review of pre-plea issues despite a guilty plea, most state courts will not consider these issues, with the result that the only issues that survive a plea of guilty are:

- (a) whether the plea itself was voluntary (*e.g.*, *Machibroda v. United States*, 368 U.S. 487 (1962); *Fontaine v. United States*, 411 U.S. 213 (1973); *Godinez v. Moran*, 509 U.S. 389, 400 (1993) (dictum)) and made with an understanding of the charge (*e.g.*, *Bradshaw v. Stumpf*, 545 U.S. 175, 182-83 (2005) (dictum); *United States v. Ruiz*, 536 U.S. 622, 629 (2002) (dictum); *Marshall v. Lonberger*, 459 U.S. 422, 436 (1983) (dictum); *Smith v. United States*, 309 F.2d 165 (9th Cir. 1962)), including all of its critical elements (*see Henderson v. Morgan*, 426 U.S. 637, 647 n.18 (1976)), and with an understanding of the

possible penalty (*Marvel v. United States*, 380 U.S. 262 (1965); *Chapin v. United States*, 341 F.2d 900 (10th Cir. 1965); cf. *Lane v. Williams*, 455 U.S. 624, 630 & n.9 (1982) (reserving the question whether and under what circumstances a failure to inform a defendant of a mandatory parole term will invalidate a guilty plea); *Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985) (dictum that failure to inform a defendant that his eligibility for parole is restricted because of a prior conviction would not invalidate a guilty plea));

- (b) whether an adequate inquiry into voluntariness and understanding was conducted on the record before the plea was accepted (*McCarthy v. United States*, 394 U.S. 459 (1969); *Boykin v. Alabama*, 395 U.S. 238 (1969); *United States v. Tien*, 720 F.3d 464, 470 (2d Cir. 2013); see also *United States v. Timmreck*, 441 U.S. 780, 784 (1979) (stating in dictum that a violation of FED. RULE CRIM. PRO. 11 would be raisable on direct appeal, while holding that such a violation is not raisable in collateral attack proceedings in the absence of a showing of prejudice resulting in a miscarriage of justice); § 14.1 *supra* (describing the procedure that judges usually follow when accepting a guilty plea));
- (c) whether any promise made to the defendant as a part of a plea bargain has been violated (*Santobello v. New York*, 404 U.S. 257 (1971); *Blackledge v. Allison*, 431 U.S. 63 (1977); *Mabry v. Johnson*, *supra*, 467 U.S. at 509 (dictum); compare *United States v. Benchimol*, 471 U.S. 453 (1985) (per curiam));
- (d) whether the defendant was mentally competent to plead (*e.g.*, *Godinez v. Moran*, 509 U.S. 389, 400-01 (1993) (dictum); *Taylor v. United States*, 282 F.2d 16 (8th Cir. 1960));
- (e) whether s/he was adequately represented by counsel in connection with the plea (see *Tollett v. Henderson*, 411 U.S. 258 (1973); *Hill v. Lockhart*, 474 U.S. 52, 56-57 (1985) (dictum); *Johnson v. Uribe*, 700 F.3d 413 (9th Cir. 2012)), or, in cases in which the defendant waived counsel, whether the waiver of counsel was effective (see *Williams v. Kaiser*, 323 U.S. 471 (1945); *United States ex rel. Durocher v. LaVallee*, 330 F.2d 303 (2d Cir. 1964); compare *Iowa v. Tovar*, 541 U.S. 77 (2004));
- (f) whether the court had jurisdiction of the offense;
- (g) whether some constitutional right precluded the defendant's prosecution for the offense to which s/he pleaded guilty (as distinguished from the procedures used in the prosecution or in the investigation of the offense underlying it) (see *Blackledge v. Perry*, 417 U.S. 21 (1974); *Menna v. New York*, 423 U.S. 61 (1975) (per curiam); *Haring v. Prosser*, 462 U.S. 306, 320 (1983) (dictum)); and

- (h) whether there are any issues relating to sentence.

Courts frequently have discretion to permit the withdrawal of a valid guilty plea (that is, a voluntary and understanding plea made by a competent, adequately counseled defendant), but most are reluctant to do so. See § 17.1.2 *infra*. The entry of a guilty plea at arraignment may, therefore, be irrevocable.

A plea of guilty may be entered to the offense charged in the charging paper or, with the prosecutor's agreement, to any lesser included offense. See § 42.4 *infra*. Sometimes leave of court is required for a plea to a lesser offense, and in a few jurisdictions the prosecutor is required to file a statement of reasons for agreeing to a guilty plea to a lesser offense.

A number of jurisdictions disallow a plea of guilty to a specific degree of homicide. The defendant may plead guilty to homicide (or to murder) "generally," leaving to the court the determination of the degree of the offense.

Some jurisdictions forbid a plea of guilty to a capital charge. If an offense is punishable capitally, the defendant's guilty plea to it may be taken (with agreement of the prosecutor), but the defendant may thereupon be sentenced only to some punishment less than death. (This practice is plainly unconstitutional under *United States v. Jackson*, 390 U.S. 570 (1968). See *Funicello v. New Jersey*, 403 U.S. 948 (1971) (per curiam); *Atkinson v. North Carolina*, 403 U.S. 948 (1971) (per curiam); compare *Corbitt v. New Jersey*, 439 U.S. 212 (1978).)

In jurisdictions where sentencing is done by a jury following trial and conviction on a not guilty plea, the effect of a guilty plea may be to waive jury sentencing and authorize sentencing by the court.

Considerations involved in the decision to plead guilty and in guilty plea negotiation are discussed in Chapter 15 *infra*. The colloquy ordinarily employed by judges when they accept a guilty plea is described in § 14.1 *supra*.

14.9. *Nolo Contendere* or *Non Vult*

The pleas of *nolo contendere* or *non vult contendere* mean that the defendant does not contest the charge. They have the same effect as a guilty plea for the purpose of the criminal proceeding: that is, they authorize conviction and sentence without more ado. They differ from the guilty plea in that they do not constitute an admission of guilt and are, therefore, inadmissible in any collateral proceedings (other than collateral proceedings challenging conviction on the plea). Hence they are used principally in cases in which there are, or may be, civil proceedings arising out of the same set of facts on which the criminal prosecution is grounded (such as vehicular homicide, fraud, and antitrust cases). The *nolo* plea usually may be entered only with leave of court and agreement by the prosecutor. Neither leave nor agreement is likely to be given unless defense counsel can point to the pendency or probability of a related civil action.

14.10. *Standing Mute*

In some jurisdictions the defendant is permitted to stand mute at arraignment. Defense counsel announces that the defendant is standing mute, and the judge thereupon enters a plea of not guilty. The device is most useful in cases in which defense counsel is unprepared to plead and when counsel's motion for a continuance has been overruled and counsel's objection to proceeding has been noted for the record. See §§ 14.3-14.4 *supra*. Standing mute in this situation dramatizes the point that defendant waives nothing and particularly does not waive the special pleas and defenses that a not guilty plea might forfeit. See §§ 14.5-14.6 *supra*.

14.11. *Pleading to Priors*

In most jurisdictions recidivist sentencing statutes authorize more severe penalties for a second or subsequent conviction of some or all offenses. See § 15.6.1 subdivision (A)(2), 48.13.1 *infra*. In many jurisdictions the previous offenses upon which the prosecutor will rely to support invocation of the stiffer recidivist penalties are not charged at the initial stages of a criminal prosecution but are made the subject of a supplemental information filed after a verdict of guilty. See § 48.13.1 *infra*. In other jurisdictions, however, the previous offenses (called in the jargon "the priors") are charged in the initial charging paper, and the defendant is required to plead to them, as well as to the offense presently charged, at the time of arraignment. By pleading guilty to the priors, s/he admits that s/he was, in fact, previously convicted, as alleged. By pleading not guilty, s/he contests that issue, which is then submitted to the jury on the proof of the previous convictions by the prosecutor and any proof the defendant may offer (mistaken identity, and so forth).

The result of pleading not guilty to the priors is, therefore, that the jury which is trying the defendant's guilt on the present charge learns in the prosecution's case in chief about the defendant's prior convictions. See *Spencer v. Texas*, 385 U.S. 554 (1967). Since there is ordinarily no real contest to be made about the defendant's record, it is usually wise to plead guilty to the priors (or to stipulate the priors, as local practice may have it). This obviates the need for proof of the priors at trial and should preclude the prosecutor from presenting evidence of prejudicial priors to the jury. Cf. *Old Chief v. United States*, 519 U.S. 172 (1997). Before pleading to the priors, however, counsel should review the terms of the applicable recidivist statute to determine whether s/he can plausibly argue that it does *not* call for alleging and proving the defendant's earlier convictions to the jury, but rather is one of those statutes which make prior convictions solely a matter for post-verdict trial by the sentencing judge. See, e.g., *State v. Skipper*, 906 So. 2d 399 (La. 2005). This argument would support a motion to strike the allegations of priors from the charging paper, thus obviating the need for the defendant to plead to them.

A different procedure for contesting priors should be used when the defendant admits their factual accuracy but disputes their legal validity or the legal propriety of their use as the basis for enhanced penalties under the recidivist statute. This sort of collateral attack on previous convictions must

be entertained by all courts if a prior is challenged on federal right-to-counsel grounds. *Burgett v. Texas*, 389 U.S. 109 (1967); see *Baldasar v. Illinois*, 446 U.S. 222 (1980); *United States v. Addonizio*, 442 U.S. 178, 187 (1979) (dictum); *Lewis v. United States*, 445 U.S. 55, 60 (1980) (dictum); cf. *United States v. Mendoza-Lopez*, 481 U.S. 828 (1987). See § 48.9 *infra*. If its invalidity is asserted to rest on other grounds, the state's practice may, or may not, permit such an attack. But in any case in which the attack is permitted, it raises issues of law for the court, not the jury, and so it would appear to be appropriately presented either by a motion to quash or strike the particular allegations of priors that are contested or by a simple objection to presenting that portion of the charging paper to the jury or to the court for purposes of sentencing. When collateral attack in this form is not permitted, counsel will have to use some sort of postconviction remedy to vacate the earlier convictions (see § 49.2.3 *infra*; cf. *Johnson v. Mississippi*, 486 U.S. 578 (1988)), and s/he should undertake to do so before arraignment on the present charge, if possible. Sometimes a continuance of the arraignment will be advised, but ordinarily the postconviction proceeding against the previous convictions will be protracted and therefore render continuance of arraignment on the present charge impracticable. In this situation counsel should explain that s/he is asking the court to entertain a collateral attack on the priors; that the attack presents only a question of law; that counsel does not want the priors to go to the jury because they will prejudice the defendant on the guilt issue; and that the defendant will stipulate to the priors or enter a guilty plea to them, with the reservation of all rights subsequently to challenge their legal validity and the validity of their use in this proceeding.

14.12. Dismissal of Charges on Motion of the Prosecution

The prosecutor may move at arraignment to dismiss charges in the interest of justice or for want of evidence or because the defendant has agreed to cooperate and testify against others. See §§ 8.22-8.23 *supra*. Or the prosecutor may agree to have the criminal charges diverted. See §§ 2.36, 8.22, 8.4 *supra*. This is another stage at which discussion with the prosecutor may invoke a favorable exercise of the prosecutorial discretion. See §§ 8.2.2, 8.2.3, 8.2.4, 8.4, 8.6, 12.13 *supra*.

Prosecutors will frequently insist that the defendant sign a stipulation of the validity of his or her arrest (or that there was probable cause for the arrest) or a waiver of any legal claims in connection with the arrest as the condition of an "interest of justice" dismissal. If the prosecution's case is known to be very weak, defense counsel can afford to resist the execution of such a stipulation or waiver, and the prosecutor will often back down. See § 8.3.3 *supra*. But if the prosecution has any strength, the signing of a stipulation or a waiver is usually a small price to pay for dismissal, since the client is unlikely to persist in any desire to sue the police (a desire usually voiced very loudly when the prosecutor offers to drop charges but soon forgotten), and even more unlikely to win a suit if s/he sues. Local law should, however, be carefully consulted in regard to the form of the stipulation or waiver, and consideration must be given to which of the client's various possible concerns with the arrest is paramount. A stipulation that there was probable cause for the arrest, for example, may preclude the client from subsequently having the

arrest record expunged, but it may not bar a damage action for false arrest on grounds other than lack of probable cause. A waiver of the right to bring a civil-rights action in connection with the arrest will bar the damage action (*see Town of Newton v. Rumery*, 480 U.S. 386 (1987)) but not preclude expungement.

Other sorts of conditions or concessions may also be demanded by a prosecutor as the *quid pro quo* for dismissing charges. See §§ 8.5-8.6 *supra*; § 15.13 *infra*. These should be thoroughly discussed with the client, with due appreciation for the truism that what looks like a good deal now (such as an agreement to make restitution to a complainant in installments over a period of time) may begin to gall the client seriously as time passes. Plea bargaining is discussed in Chapter 15 *infra*.

Chapter 15

Guilty Pleas: Preparing for and Conducting Plea Negotiations; Counseling the Client About a Plea Offer

A. Introduction

15.1. Overview of the Chapter

This chapter examines the processes by which counsel prepares for and conducts plea negotiations with the prosecutor and advises the client about a bargained plea. The chapter leads off with a discussion (in § 15.2) of the relative roles of counsel and client in deciding whether the client should plead guilty rather than contesting a criminal charge. Part B (§§ 15.3-15.7) discusses the benefits and costs to a defendant of resolving a criminal charge by pleading guilty. It then reviews the factors that counsel should consider in developing an advantageous plea bargain to propose to the prosecutor or in assessing a plea offer from the prosecutor and advising the client whether to take an available deal. Part C (§§ 15.8-15.13) focuses on plea negotiations, explaining the steps that counsel should take to prepare for negotiation, techniques to use in negotiating, strategic considerations to keep in mind, and matters to consider in memorializing a plea agreement. Part D (§§ 15.14-15.17) addresses a variety of matters that counsel should consider when counseling a client about a plea offer and when preparing a client for the entry of a guilty plea in court.

Some other aspects of guilty pleas are covered in other chapters. Section 14.1 *supra*, dealing with the arraignment process, describes the procedures that judges ordinarily follow when taking a guilty plea. Section 14.8 *supra* explains that guilty pleas commonly extinguish the availability of appellate and collateral review of most pretrial rulings; this section also identifies the relatively limited number of claims that can be raised on appeal or by *certiorari* or on collateral attack after a guilty plea. Section 17.1.2 *infra* describes the procedures that may be available for withdrawing or vacating a guilty plea.

15.2. The Roles of Client and Counsel in Deciding Whether to Accept a Guilty Plea

The decision whether to plead guilty or to contest a criminal charge is ordinarily the most important single decision in any criminal case. This decision must ultimately be left to the client's wishes. Counsel cannot plead a client guilty or not guilty against the client's will. *See, e.g., Florida v. Nixon*, 543 U.S. 175, 187-88 (2004) ("A guilty plea . . . is an event of signal significance in a criminal proceeding. By entering a guilty plea, a defendant waives constitutional rights that inhere in a criminal trial, including the right to trial by jury, the protection against self-incrimination, and the right to confront one's accusers. . . . While a guilty plea may be tactically advantageous for the defendant, . . . the plea is not simply a strategic choice; it is 'itself a conviction,' . . . and the high stakes for the defendant require 'the utmost solicitude,' Accordingly, counsel lacks authority to consent to a guilty plea on a client's behalf . . . ; moreover, a defendant's tacit acquiescence in

the decision to plead is insufficient to render the plea valid”); § 1.3 *supra*.

It is also the case, however, that counsel may – and, indeed, must – give the client the benefit of counsel’s professional advice on this crucial decision, and often the only way for counsel to protect the client from disaster is by using a considerable amount of persuasion to convince the client that a plea which the client instinctively disfavors is, in fact, in his or her best interest. This persuasion is most often needed to convince a client that s/he should plead guilty in a case in which opting for a trial would be destructive.

The limits of allowable persuasion are fixed by the lawyer’s conscience. Of course, s/he must make absolutely clear to the client that if the client decides to plead not guilty despite counsel’s advice, counsel will defend the client vigorously and will raise every defense that the client legitimately has. Counsel also must acknowledge the limits of his or her own predictive capacities. In describing both the likely benefits of a guilty plea and the likely consequences of going to trial, s/he must not make probabilities sound like certainties. Although s/he may emphasize the risks of going to trial in a way that accurately portrays the danger involved, s/he should avoid language that makes it seem as though *counsel* is threatening the client. And it should go without saying that counsel must scrupulously stick to the facts and probabilities as s/he sees them, without exaggeration. *See, e.g., Tovar Mendoza v. Hatch*, 620 F.3d 1261, 1272 (10th Cir. 2010) (defendant’s “reliance on [defense counsel’s] . . . blatant and significant misrepresentations about the amount of time [defendant] . . . would spend in prison [if defendant accepted the plea offer] rendered his no contest plea unknowing and violative of Tovar’s due process rights”). Beyond this, the question of how much s/he should bend the client’s ear in a particular case must rest on counsel’s judgment. Counsel’s appraisal of the case is probably far better than the defendant’s, and counsel’s difficult and painful responsibilities include making every reasonable effort to save a client from his or her own ill-informed or ill-estimated choices.

***B. The Decision Whether To Plead Guilty or Go to Trial;
Factors to Consider in Developing and Evaluating
a Potential Plea Bargain***

**15.3. *Overview of the Cost-Benefit Analysis Involved in
Deciding Whether to Plead Guilty or Go to Trial***

The determination of the advisability of a guilty plea usually requires a complex cost-benefit analysis that takes into account: (i) the likelihood of winning the case at trial; (ii) the chances that the judge, in the event of conviction, would penalize the defendant at sentencing for going to trial and – in the judge’s opinion – wasting the court’s time and (if the defendant testifies) perjuring himself or herself on the witness stand; and (iii) a number of specific advantages that, in any particular case, could be gained through a guilty plea. Even a reasonable prospect of winning at trial might be bartered away if the benefits of a plea are substantial enough or if the severity of the sentence which is likely to be imposed in the event of a conviction is daunting. On the other hand, a defendant could reasonably

opt for trial even in the face of overwhelming prosecution evidence when a guilty plea is unlikely to produce any sentencing advantages or other benefits.

In order to determine what plea bargain to seek from the prosecutor and in order to assess whether to recommend to the client to take a prosecutor's plea offer (and precisely what to say to the client about its likely benefits and costs), counsel will have to research the above issues – the chances of winning at trial; the possible consequences of going to trial and losing; and the roster of potential benefits of a guilty plea in the client's individual circumstances – thoroughly enough to be able to make a well-informed, reliable judgment. *See, e.g., Lafler v. Cooper*, 132 S. Ct. 1376, 1391 (2012) (accused was denied effective assistance of counsel because defense counsel advised the accused to reject a plea offer based on counsel's erroneous view of the law, resulting in the accused's rejecting the plea, “being convicted at trial, . . . [and] receiv[ing] a minimum sentence 3½ times greater than he would have received under the plea”); *United States v. Rodriguez-Vega*, 797 F.3d 781, 786-88 (9th Cir. 2015) (counsel inadequately advised the defendant about the plea offer, thereby denying her of effective assistance of counsel, by informing her that she faced the “‘potential’ of removal” rather than advising her “that her conviction rendered her removal virtually certain, or words to that effect”; although the defendant “received notice that she might be removed [*i.e.*, deported] from a provision in the plea agreement and the court's plea colloquy under Federal Rule of Criminal Procedure 11[,] . . . [t]he government's performance in including provisions in the plea agreement, and the court's performance at the plea colloquy, are simply irrelevant to the question whether *counsel's* performance fell below an objective standard of reasonableness”); *Pidgeon v. Smith*, 785 F.3d 1165, 1167-68, 1172-73 (7th Cir. 2015) (counsel deprived his client of effective assistance by “incorrectly advis[ing] . . . Pidgeon” that a guilty plea was necessary in order to avoid a life sentence under the State's “persistent repeater law,” when actually Pidgeon's prior conviction “did not qualify as a serious felony offense, meaning that Pidgeon did not face the possibility of life imprisonment”); *Kovacs v. United States*, 744 F.3d 44, 48, 50 (2d Cir. 2014) (counsel “rendered ineffective assistance by giving erroneous advice concerning the deportation consequences of pleading guilty . . . , with the result that [Kovacs] is at risk of detention and deportation if he reenters the United States”); *Heard v. Addison*, 728 F.3d 1170, 1172 (10th Cir. 2013) (defense counsel “provided ineffective assistance in failing to advise [Heard] . . . of viable defenses to the charges against him” when counseling Heard about a plea offer); *Dando v. Yikins*, 461 F.3d 791, 799-802 (6th Cir. 2006) (defense counsel was ineffective in recommending a “no contest” plea to the client without first “adequately investigat[ing] the availability of a duress defense and the related possibility that Dando suffered from Battered Women's Syndrome”); *Maples v. Stegall*, 427 F.3d 1020, 1022, 1034 (6th Cir. 2005) (defense “counsel provided ineffective assistance by advising [the defendant] . . . that his guilty plea reserved his speedy trial claim for appeal, when in reality it did not”).

Section 15.4 discusses the range of factors that counsel should consider to assess the likelihood of winning at trial. Section 15.5 discusses the risk that a judge might penalize a defendant at sentencing for opting in favor of trial instead of pleading guilty. Section 15.6 examines the kinds of benefits that

a guilty plea might obtain. Section 15.7 identifies a number of additional factors that may bear on the advisability of a guilty plea in a particular case.

15.4. Assessing the Likelihood of Winning at Trial

The threshold determination of the chances of acquittal at trial will require more than a simple weighing of the relative strengths of the prosecution's and defense's theories of the case and supporting evidence. Counsel's calculus will have to incorporate a host of variables that are difficult to predict, such as the probable resolution of debatable issues of admissibility of specific evidentiary items, the odds of a prosecution or defense witness being unavailable at the time of trial, and the effect of the judge's application of a variety of presumptions and other legal doctrines.

15.4.1. The Strength of the Case for the Prosecution

The first step is to analyze the strength of the prosecution's case from a dual perspective:

- (a) How likely is the prosecution to establish a *prima facie* case (that is, to survive a defense motion to dismiss at the conclusion of the prosecutor's case-in-chief (see § 38.1 *infra*))?

and

- (b) How likely is the prosecution to persuade the trier of fact to return a guilty verdict at the conclusion of the trial?

These two questions need independent consideration because the first is usually easier to answer than the second (judges being more predictable in their assessment of the sufficiency of evidence than in their assessment of its weight, and juries being less predictable than judges) and because, if the prosecution is unlikely to establish a *prima facie* case, all potential problems and uncertainties relating to defense evidence fall out of the calculus.

Counsel should begin by examining the charging instrument and listing all of the elements that the prosecution will need to prove in order to sustain each of the counts. Then, on the basis of the information that counsel has learned through discovery and investigation, counsel should analyze the prosecutor's ability to prove each of these factual elements with the witnesses, documents, and exhibits believed to be available to the prosecutor.

If counsel has learned through investigation that a prosecution witness will be out of town or otherwise unavailable on the trial date, counsel will need to predict whether the prosecutor will be able to obtain a continuance in order to secure the witness's presence, or whether the judge is likely to grant a defense motion to dismiss the case for want of prosecution. See § 28.4 *infra*. If counsel has learned through investigation that a prosecution witness is reluctant to come to court, counsel will need to predict whether the prosecutor will be able to compel the witness's attendance by successfully serving and enforcing a subpoena. Similarly, if counsel can predict that certain documents the prosecution needs will go missing – for example,

in some jurisdictions, tape recordings of 911 calls, which the prosecution must turn over to the defense, are routinely erased before the time when the prosecutor gets around to requesting them from the police – counsel will have to evaluate whether the loss or destruction of those documents will cause the judge to grant a defense motion for sanctions such as dismissal of the case or preclusion of the testimony of prosecution witnesses about matters that would have been reflected in the lost document. See § 34.7.1.1 *infra*.

In analyzing the strength of the prosecution's case, counsel will need to consider both doctrinal rules relating to presumptions and permissive inferences, and the realistic likelihood that a trier of fact will find them persuasive. For example, on a charge of criminal possession of stolen property, the prosecutor may be able to survive a motion for a directed verdict by relying on the formal doctrine that a person who is in possession of recently stolen goods is presumed to know that the goods were stolen; but triers of fact are often unwilling to convict if nothing more than that is proven. See § 41.4.4 *infra*.

Analysis of the strength of the prosecution's case must also take account of factors that could discredit its witnesses or evidence. For example, when a prosecution witness has made statements to the police (recorded in police reports) or in pretrial hearings (the preliminary examination or a suppression hearing) or to the defense investigator (either an oral statement or, preferably, a written, signed statement), counsel will be able to use these statements to impeach the witness's inconsistent testimony at trial. See § 37.4 *infra*. If a prosecution witness has prior convictions, counsel may be able to impeach the witness's credibility with those. See § 37.5 *infra*. Or counsel may be able to undercut a prosecution based on forensic-science evidence by criticizing the methodology or competence of the prosecution's experts or debunking their purported field of specialization as fundamentally unreliable. See § 37.14 *infra*.

In addition to measuring the prosecution's probable case against the applicable burdens of proof – the *prima-facie*-evidence standard for surviving a motion to dismiss (see § 38.1 *infra*) and the beyond-a-reasonable-doubt standard for conviction (see §§ 41.2-41.3, 42.5 subdivision (4) *infra*) – counsel needs to consider other evidentiary doctrines that can undercut that case. These include the missing-witness doctrine (see § 29.4.7 *infra*) and the rules relating to accomplice testimony (see §§ 41.2.2 subdivision (2), 42.3 subdivision (5) *infra*), and uncorroborated confessions (see §§ 41.2.2 subdivision (1), 42.3 subdivision (5) *infra*).

Counsel will not be in a position to conduct this kind of thorough evaluation of the prosecution's case until s/he has completed all or most of the defense investigation (see Chapter 9 *supra*) and the formal discovery process (see Chapter 18 *infra*). Counsel's analysis of the prosecution's theory of the case and of the persuasiveness of the evidence available to the prosecutor will be heavily dependent on counsel's study of police reports and witness statements. These documents usually set the upper boundary of what the prosecutor will be able to prove convincingly at trial, because they can be used to impeach prosecution testimony that goes beyond them. They may also contain inconsistent statements that could turn the tide in favor of the

defense at trial. Also, information about prior convictions of prosecution witnesses has to be obtained through defense investigation and discovery before counsel can make a sufficiently confident assessment of the prosecution's trial evidence to support the serious consideration of a guilty plea.

15.4.2. *The Strength of the Case for the Defense*

In much the same way that counsel evaluates the prosecution's case, counsel will need to assess the strengths and weaknesses of the defendant's. After identifying all viable defense theories of the case (see Chapter 7), counsel should itemize the facts that must be proven to sustain each theory, the witnesses and exhibits available to prove each of these facts, their persuasiveness, and their vulnerabilities.

In analyzing the prosecution's charges, counsel will have already drawn up a list of the elements that the prosecution has to prove in order to make out a *prima facie* case. If counsel can successfully attack the prosecutor's proof on one or more of these elements, a motion for a directed verdict of acquittal at the close of the prosecution's evidence will be a central feature of the defense. Assuming contingently that the judge denies the defense motion, counsel will need to consider whether any of the loopholes in the prosecution's case can be widened to the point of acquittal through the presentation of defense witnesses. For example, a tenuous prosecution case on *mens rea* might be successfully undermined by the defendant's testimony that s/he did not possess the requisite mental state. Conversely, counsel's assessment of the odds of acquittal will need to weigh the danger that the presentation of defense evidence could strengthen an otherwise weak prosecution case. If the prosecution's case was doubtful in regard to both the identity and criminal *mens* of the perpetrator, the defendant's testimony disputing only the *mens* will foreclose a mistaken-identity defense in the endgame. See § 39.2 *infra*.

In addition to potential attacks on the prosecution's proof of the elements of the offenses it has charged (and their lesser included offenses, see § 42.4 *infra*), counsel will need to consider the availability of defenses such as alibi and self-defense. (For discussion of the differing burdens of proof that apply to defense theories, depending upon whether they are labeled "affirmative defenses," see § 41.3 *infra*.) In some cases, counsel will also need to consider mental defenses such as incompetency and insanity. See Chapter 16. Assessing each possible theory of defense requires an analysis that is essentially a mirror-image of the one used to evaluate the prosecution's case: Counsel must itemize the elements of the defense, enumerate the facts necessary to establish each of these elements, identify the witnesses and exhibits necessary to prove each of the facts, and then assess their persuasiveness.

Here, too, counsel will have to take account of practical contingencies, such as the likelihood that defense witnesses will fail to show up for court. If counsel anticipates that a defense witness may be out of town on the trial date or may be reluctant to testify, counsel will need to gauge the likelihood that the problem can be alleviated by securing a continuance or judicial enforcement of a subpoena.

Counsel also must consider whether any defense witnesses can be impeached with prior inconsistent statements or a prior record or other discrediting material. In this regard, counsel will need to be particularly concerned about the question of how the defense case will look if the defendant has priors and does – or, alternatively, does not – testify. If s/he takes the stand, state law usually allows the prosecutor to impeach him or her with prior convictions, prior bad acts, or both. See § 36.4.2 *infra*. If s/he does not take the stand, the trier of fact is supposed to obey the legal rule that no adverse inferences can be drawn from the defendant's failure to testify. The reality, however, is that fact-finders – not only juries but even judges in a bench trial – may well believe that the defendant's refusal to testify indicates guilt or at least the existence of detrimental information that the defendant is trying to conceal. In a bench trial, counsel must also consider the possibility that the judge may already know about, or will learn about, the defendant's prior record even if s/he does not take the stand, as a result of: (1) the judge's having presided over a prior hearing in the case or a prior case of the defendant's; (2) sloppy administrative procedures that counsel will not be able to correct (such as court jackets that indicate the docket numbers of the defendant's other cases); or (3) courthouse leaks (such as a bailiff mentioning the repeated court appearances of the defendant).

15.4.3. *Circumstances That May Prejudice the Trier of Fact Against the Defendant*

In comparing the strengths of the competing cases for the prosecution and for the defense, counsel will need to factor in numerous variables that may undermine the objectivity of the trier of fact.

The most significant of these factors is the risk that jurors or the judge conducting a bench trial may feel distaste for, or outrage over, a particularly violent or repugnant crime. Hard drug offenses, violent sex crimes, and crimes involving gruesome injuries to the victim are likely to be viewed by fact-finders as peculiarly abhorrent. While many fact-finders have the capacity to appraise a defendant's case objectively even in the face of graphic, grisly evidence, there are others whose objectivity and ability to apply a reasonable-doubt standard will be overwhelmed by sheer disgust or by the fear of setting free a probable perpetrator of atrocities s/he may repeat.

The fact-finder's objectivity will frequently also be compromised in cases involving a particularly vulnerable victim, such as a young child or a senior citizen. The courtroom demeanor, behavior, and physical characteristics of the victim, the defendant, and potential prosecution and defense witnesses may well sway the fact-finder's judgment. And counsel's calculus must include the additional biases that may arise in cases involving interracial crimes.

The problem of the prejudice that is likely to attach to a defendant with a prior record was mentioned in the preceding subsection. It is sufficiently important to require further discussion here. Local evidence rules may limit the impeachment of a testifying defendant to admission of a documentary record setting out the name[s] of the previous crime[s] of which s/he has been

convicted, or they may authorize more or less detailed factual information about the prior[s]. Counsel must consider the probable impact of the name[s] or admissible facts of the crime[s] not only upon the trier's assessment of the defendant's credibility but upon the trier's impression of the defendant as a criminal *type* deserving less than the benefit of the doubt. (Sometimes the name of the crime is worse than the facts. When unscrupulous medical clinics staged automobile accidents to set up exaggerated insurance claims, the individuals to whom they paid a few dollars for crowding into the back seats of rear-ended vehicles were subsequently convicted of the crime of federal "health care fraud.")

In a bench trial, counsel also must consider whether the judge has prior knowledge of inadmissible evidence as a result of having presided over a pretrial suppression hearing or other pretrial proceeding. If, for example, a judge has suppressed a confession or tangible evidence in a pretrial hearing but then refuses to recuse himself or herself (see §§ 22.4-22.7 *infra*), s/he may be unable to put the illegal but incriminating evidence wholly out of mind.

The potential prejudicial impact of media reports of a crime is an additional factor for consideration. Newspaper, television and social-media accounts may have informed the fact-finder of damaging information that would be inadmissible in evidence at the trial on a not-guilty plea. Counsel cannot rely on theoretical rights to exclude biased jurors (see §§ 22.2, 32.4, 33.3.1 *infra*) and to recuse biased judges as fully effective protection against these dangers. In a bench trial, counsel also must bear in mind that many judges are highly sensitive to criticism in the media and are more likely to convict when an acquittal could expose them to adverse publicity.

Another danger that present legal rules signally fail to avert is that complainants and their supporters may pack the courtroom with manifestly grieving or outraged countenances. *See, e.g., Carey v. Musladin*, 549 U.S. 70 (2006). Pervasive enactment of "victim's rights" legislation (*see, e.g., Douglas E. Beloof & Paul G. Cassell, The Crime Victim's Right to Attend the Trial: The Reascendant National Consensus*, 9 LEWIS & CLARK L. REV. 481 (2005)) has intensified this problem.

To inform an assessment of the probable effects of these factors, counsel should gather as much information as is practicable about the views and biases of local judges and juries. If the defendant's case is not eligible for jury trial (see § 32.1 *infra*) or if counsel is considering advising the defendant to elect a bench trial (see § 32.2 *infra*), counsel should try to get a sense of individual judges' proclivities and attitudes by talking with attorneys who have previously appeared before those judges. (How early in the pretrial process the identity of the trial judge will be ascertainable depends on local court structures and practices. In some circumstances, counsel may be able to steer the trial to a favorable judge or away from an unfavorable one. See § 22.7 *infra*; see also § 15.7.2 *infra*.) When jury trial is an option, counsel should not only search media sources for whatever coverage they may have given to counsel's individual case but for what they may reveal about local attitudes toward similar crimes and defendants; and counsel should talk with experienced criminal defense attorneys about what to expect from the relevant jury pool.

15.4.4. *Relative Ability, Experience, and Personableness of the Lawyers*

Counsel's assessment of the fact-finder's likely reactions to the evidence at trial also has to take into account the relative abilities, experience, and personableness of the prosecutor and counsel himself or herself. Factors such as these may have a considerable effect on whether counsel will be able to exclude prejudicial prosecution evidence or persuade the judge to admit favorable defense evidence; how the jurors will react to the lawyers' opening statements and closing arguments; and how the jurors perceive and evaluate each side's witnesses and the case as a whole.

15.4.5. *The Possibility of a Divided Jury*

Counsel also will need to consider whether the nature of the evidence or the law or the character of the parties to the alleged offense is sufficiently controversial to set a jury at loggerheads, with the result that the jury may deadlock or bring in a compromise verdict of guilty on a lesser included charge. A hung jury is ordinarily a defense victory: Even if the prosecutor is disposed to invest resources in a retrial, the defense bargaining position becomes considerably stronger after a first jury has failed to find the prosecution's case persuasive.

15.5. *Assessing the Likelihood That the Judge Will Penalize the Defendant at Sentencing Because the Defendant Opted in Favor of a Trial Instead of a Guilty Plea*

There are various factors that may cause a judge at sentencing to consciously or unconsciously penalize a defendant for having opted in favor of a trial instead of a guilty plea.

The judge may be irritated that the defendant has (in the judge's opinion) wasted the court's time by demanding a trial. This is especially true when the prosecution's evidence of guilt is overwhelming and/or the defendant lacks a viable theory of defense. Conversely, if the defendant does present a viable albeit ultimately unsuccessful defense, many (although not all) judges will be tolerant of the defendant's insistence on a trial.

The judge is particularly likely to covertly punish the defendant for insisting on a trial if the defendant takes the witness stand at trial and tells a story that the judge believes is perjurious. In most situations in which the defendant testifies to an exonerating version of the events relating to the offense charged, the jury (or the judge in a bench trial) will have to find the defendant's testimony incredible in order to convict. So, in such cases, there is always at least some risk that the judge will conclude at sentencing that an enhanced penalty is appropriate. Even when the defendant does not take the stand, the defense presentation of testimony by friends or relatives of the defendant may cause the judge to covertly penalize the defendant at sentencing for having committed what the judge views as subornation of perjury.

Most judges make it a practice to encourage the attorneys to conduct a final round of plea negotiations immediately before trial. Some judges go even further, inquiring about the precise terms of the plea bargains that have been offered or asking in a general way whether the lawyers for each side have made a plea offer that they regard as reasonable. If the judge believes that the prosecutor's plea offer was reasonable, s/he is likely to feel even more strongly that the defendant has wasted the court's time by insisting on a trial. Conversely, when prosecutor's best plea offer seems unreasonable, the judge is likely to direct his or her irritation at the prosecutor rather than the defendant. In these cases, defense counsel should consider bringing the prosecutor's obstinacy to the attention of a judge who has prompted negotiations but not has not explicitly inquired why they are stalling. However, this strategy can backfire and should ordinarily not be used unless the defendant is prepared to accept an offer that the judge is likely to believe *is* reasonable. For if the judge pressures the prosecutor into offering a more favorable plea which the defendant then refuses to accept, the judge will be doubly irritated at the defendant's apparent disingenuousness and lack of gratitude for the judge's intervention on his or her behalf.

The extent to which judges participate directly in plea negotiations between the prosecution and defense counsel varies widely from jurisdiction to jurisdiction and from locality to locality. Some jurisdictions prohibit or radically restrict judicial involvement in plea bargaining. *See, e.g.,* FED. RULE CRIM. PRO. 11(c)(1), *discussed in United States v. Davila*, 133 S. Ct. 2139 (2013); *State v. Buckalew*, 561 P.2d 289 (Alaska 1977); *State v. Anyanwu*, 681 N.W.2d 411 (Minn. App. 2004). Others recognize its legitimacy in varying degrees. *See, e.g., State v. McMahan*, 94 So. 3d 468 (Fla. 2012); *State v. Davis*, 155 Vt. 417, 584 A.2d 1146 (1990); *State v. Jabbaar*, 991 N.E.2d 290 (Ohio App. 2013). Counsel should ascertain the local rules and practices in this regard and should ask experienced criminal defense attorneys about:

- (a) particular presiding judges' attitudes toward brokering negotiations, and
- (b) each available judge's predilections regarding what constitutes an appropriate disposition in cases like the defendant's,

before deciding whether, when, and how to engage a judge in counsel's dealings with the prosecutor.

15.6. *Assessing Whether a Guilty Plea Would Produce Any Significant Advantages at Sentencing and/or By Averting Collateral Consequences of a Conviction*

No intelligent plea decision can be made by either lawyer or client without a full understanding of the possible consequences of a conviction. These consequences include (a) the potential sentence the judge might impose in the event of a conviction at trial or a guilty plea, and (b) the potential collateral consequences of a conviction at trial or by means of a guilty plea (*see generally* Michael Pinard & Anthony C. Thompson, *Offender Reentry and*

the Collateral Consequences of Criminal Convictions: An Introduction, 30 N.Y.U. REV. L. & SOC. CHANGE 585 (2006)). In some cases, the collateral consequences may be so severe that even the faintest ray of hope at trial is magnified in significance. If, for example, a conviction of the offense charged will result in the automatic revocation of the defendant's parole from a prior prison sentence on which s/he owes long years of back time or will subject a noncitizen defendant to removal or exclusion from the country, the defendant may have little to lose by denying guilt and going to trial, even with a weak defense. The direct and collateral consequences of a conviction are the baseline for identifying the plea offer that counsel will seek from the prosecutor and measuring the worth of any bargain that results from plea negotiations.

So, in order to prepare for plea bargaining, counsel will need to research all of the potential consequences the client may suffer in the event of a conviction and to determine precisely what concessions could be extracted from the prosecutor that would reduce the severity of the sentence likely to be imposed and/or would avert or minimize the potential collateral consequences. Section 15.6.1 describes the subjects that counsel should research in order to acquire an adequate understanding of the potential consequences of a conviction. Section 15.6.2 discusses the types of concessions that counsel might seek to obtain from the prosecutor in plea negotiations to avert or reduce the consequences of a conviction.

15.6.1. Identifying the Possible Consequences of a Conviction

To take account of all of the potential consequences of a conviction, counsel will need to research:

- (A) *The maximum penalties authorized by law upon the conviction, including:*
- (1) The maximum sentences prescribed by statute for each of the charged offenses, which will ordinarily take the form of imprisonment, a fine, restitution, or some combination of these sanctions. In cases involving more than a single charge, counsel will need to determine whether sentences of imprisonment can run consecutively (as is frequently the case (*but see, e.g., People v. Torrez*, 316 P.3d 25, 35 (Colo. App. 2013) (statute creates a “substantive right . . . ‘to the imposition of concurrent sentences’ when two or more convictions are based on identical evidence”))), and whether the judge who will preside at sentencing ordinarily imposes consecutive rather than concurrent sentences in the absence of prosecutorial support for concurrent sentencing as part of a plea bargain. In jurisdictions with “sentencing guidelines” and other such systems of determinate-sentencing formulas, identifying the maximum sentence will often require a multi-variable analysis of the “baseline” sentence for each offense or category of offenses, any applicable aggravating and/or mitigating circumstances that may affect the

baseline sentence, the rules on concurrent and consecutive sentencing for multiple convictions, and a variety of other possibly applicable factors. See § 48.12 *infra*.

- (2) Subjection to liability for enhanced punishment under statutes such as:
 - (a) Repeater sentencing provisions (sometimes called “recidivist” or “second offender” or “persistent violator” or “habitual criminal” laws, including “three strikes” laws). See § 48.13.1 *infra*.
 - (b) “Sexually violent predator” (sometimes called “sexual psychopath”) laws that provide for civil commitment after conviction of a specified sexual offense. See § 48.13.2 *infra*.
 - (c) Special indeterminate sentencing legislation applicable to the defendant, like “youthful offender” or “youth corrections” legislation.

- (B) *Any applicable mandatory minimum penalties.* If imposition of a mandatory minimum requires a finding of a fact other than the existence of a prior conviction, the Sixth Amendment and the Due Process Clause require that this finding be made by a jury, based on proof beyond a reasonable doubt, not by a judge. *Alleyne v. United States*, 133 S. Ct. 2151, 2160 & n.1, 2161-64 (2013). See § 48.6 subdivision (4) *infra*, discussing the *Apprendi* doctrine.

- (C) *Applicable statutes, rules, and regulations governing probation, relating to eligibility for probation, duration of the probationary period, conditions that may be imposed upon the allowance of probation, and grounds for revocation.* These must be considered with regard both to the offense presently charged and to any offense or offenses for which the defendant was on probation at the time of this offense. Conviction on the present offense may result in revocation of a prior probation and in a prison sentence for the prior offense that exceeds the maximum for the present offense. See *Black v. Romano*, 471 U.S. 606, 616 (1985). If probation on the present offense is a possibility, counsel should review the rules governing administration of probationary supervision. Although these are often oppressive and galling, there are at least some outer boundaries on a court’s power to set conditions of probation. See, e.g., *United States v. Green*, 618 F.3d 120, 122-24 (2d Cir. 2010) (“A condition of supervised release must provide the probationer with conditions that ‘are sufficiently clear to inform him of what conduct will result in his being returned to prison’”; “it violates due process if ‘men of common intelligence must necessarily guess at its meaning and differ as to its application.’”; “The condition of supervised

release that prohibits Green from the ‘wearing of colors, insignia, or obtaining tattoos or burn marks (including branding and scars) relative to [criminal street] gangs’ . . . does not provide Green with sufficient notice of the prohibited conduct. The range of possible gang colors is vast and indeterminate.”); *United States v. Malenya*, 736 F.3d 554, 559-61 (D.C. Cir. 2013) (probation conditions prohibiting the “possess[ion] or use [of] a computer or . . . access to any on-line service without the prior approval of the United States Probation Office” violated the governing statute’s requirement that “conditions of supervised release . . . ‘involve[] no greater deprivation of liberty than is reasonably necessary’”; “We have often noted the ubiquity of computers in modern society and their essentialness for myriad types of employment. . . . A ban on computer and internet usage, qualified only by the possibility of probation office approval, is obviously a significant deprivation of liberty.”; “It is unclear if *any* computer or internet restriction could be justified in Malenya’s case, but the condition in its current form is surely a greater deprivation of liberty than is reasonably necessary to achieve the goals referenced in [the statute]”); *People v. Martin*, 51 Cal. 4th 75, 82, 244 P.3d 496, 500, 119 Cal. Rptr. 3d 99, 104 (2010) (“when under a plea agreement a defendant pleads guilty to one or more charges in exchange for dismissal of one or more charges, the trial court cannot, in placing the defendant on probation, impose conditions that are based solely on the dismissed charge or charges unless the defendant agreed to them or unless there is a ‘transactional’ relationship between the charge or charges to which the defendant pled and the facts of the dismissed charge or charges”). *See also Paroline v. United States*, 134 S. Ct. 1710, 1726 (2014) (*dictum*) (restitution orders in criminal cases may come “within the purview of the Excessive Fines Clause”).

- (D) *Applicable statutes, rules, and regulations governing parole, relating to these same factors, with an eye particularly to the minimum term in prison required to be served before parole eligibility, and the requirements of the “parole plan” demanded by the parole authorities as a condition of admission to parole.* In some jurisdictions six months must be added to the professed minimum prison time because it invariably requires six months or more for the prisoner to work out a satisfactory parole plan – job, acceptable living quarters, community “sponsor” – demanded as the precondition of release. Owing to parole eligibility standards or parole plan requirements, it is also possible to predict that for some defendants the possibility of parole is illusory. A frequently encountered example is the policy of some parole boards to deny parole to any prisoner who has a detainer lodged against him or her for trial on other charges or for service of sentence on other convictions in any jurisdiction. Parole issues must be considered with regard both to the present offense and to any offense or offenses for which the defendant was on parole at the time of this offense.
- (E) *In cases in which the defendant is not a U.S. citizen, the immigration laws,*

regulations, and practices that bear on the question whether a conviction of any of the charged crimes could result in removal or exclusion. A noncitizen may be subject to removal or exclusion if s/he is convicted of any one of a wide range of crimes, including those classified by the Immigration and Nationality Act as “aggravated felonies”; “crimes involving moral turpitude”; certain types of controlled substance offenses; certain types of firearms offenses; and certain crimes of domestic violence, stalking crimes against children, or violations of protection orders. *See generally* MANUEL D. VARGAS, REPRESENTING IMMIGRANT CRIMINAL DEFENDANTS IN NEW YORK STATE (5th ed. 2011); Manuel D. Vargas, *Immigration Consequences of Guilty Pleas or Convictions*, 30 N.Y.U. REV. L. & SOC. CHANGE 701 (2006). *See also, e.g.*, FED. RULE CRIM. PRO. 11(b)(1)(O) (the plea colloquy in federal criminal cases must include a judicial warning to a defendant who is “not a United States citizen” that a conviction may result in the defendant’s being “removed from the United States, denied citizenship, and denied admission to the United States in the future”); *People v. Peque*, 22 N.Y.3d 168, 176, 3 N.E.3d 617, 621, 980 N.Y.S.2d 280, 284 (2013) (“deportation is a plea consequence of such tremendous importance, grave impact and frequent occurrence that . . . due process compels a trial court to apprise a defendant that, if the defendant is not an American citizen, he or she may be deported as a consequence of a guilty plea to a felony”). Immigration laws are in a state of flux and there is always the risk that statutory amendments, regulation changes, or agency interpretations or policies could result in an expansion of the categories of crimes that are a basis for removal or exclusion. Accordingly, if counsel’s client is not a citizen, it is essential that counsel research the possible immigration consequences of a conviction and consider whether a guilty plea might entail, increase, avoid or reduce the risk of any such consequences. *See Padilla v. Kentucky*, 559 U.S. 356, 364 (2010) (“The[] changes to our immigration law have dramatically raised the stakes of a noncitizen’s criminal conviction. The importance of accurate legal advice for noncitizens accused of crimes has never been more important.”). *See also, e.g.*, *United States v. Akinsade*, 686 F.3d 248, 251, 255-56 (4th Cir. 2012) (counsel committed ineffective assistance by misinforming the client that the charge to which the client was pleading was not a deportable offense); *Hernandez v. State*, 124 So. 3d 757, 762-63 (Fla. 2013) (even if the accused was warned by the judge during the plea colloquy of the risk of deportation and the accused explicitly affirmed his understanding, defense counsel nonetheless can be found to be ineffective under *Padilla v. Kentucky, supra*, for “failing to warn [the accused] . . . of the clear immigration consequences of his plea”: “an equivocal warning from the trial court is less than what is required from counsel and therefore cannot, by itself, remove prejudice resulting from counsel’s deficiency”); *Commonwealth v. DeJesus*, 468 Mass. 174, 174-75, 9 N.E.3d 789, 791 (2014) (counsel committed ineffective assistance by advising his noncitizen client that a guilty

plea to possession with intent to distribute cocaine would make him “eligible for deportation” when in fact “applicable immigration law . . . makes deportation or removal [for this crime] . . . automatic or ‘presumptively mandatory’”). *Cf. United States v. Juarez*, 672 F.3d 381, 384, 385-90 (5th Cir. 2012) (counsel, who advised the client to plead guilty to lying about United States citizenship and illegal re-entry after deportation following a conviction of an aggravated felony, committed ineffective assistance because counsel “failed to independently research and investigate the derivative citizenship defense” which “is a defense to the alienage element of both crimes to which Juarez pled guilty”).

- (F) *Forfeiture statutes condemning automobiles and other paraphernalia used to commit drug, liquor, gambling, and like offenses, or the proceeds of offenses.*
- (G) *Civil disabilities imposed by state law, including:*
 - (1) Loss of any outstanding occupational license (taxi operator license, professional license, license to operate a bar, and so forth) and ineligibility for future licensing.
 - (2) Loss of a driver’s license (frequent under traffic and drug legislation) and ineligibility for future licensing.
 - (3) Loss of public office or employment and ineligibility for future public office or employment.
 - (4) Loss of voting rights (*see Richardson v. Ramirez*, 418 U.S. 24 (1974); *compare Hunter v. Underwood*, 471 U.S. 222 (1985)).
 - (5) Sex offender registration requirements and other types of criminal registration requirements.
- (H) *Liabilities under federal law or regulations, including:*
 - (1) Ineligibility for military service (including National Guard service, which, in turn, is the precondition for certain employments).
 - (2) Ineligibility for public office or employment.
- (I) *Privately imposed sanctions:*
 - (1) Higher insurance rates (particularly in traffic cases).
 - (2) Hurdles to employment, admission to professions, admission to educational institutions, financing, residential opportunities, credit, and so forth.

In addition to knowing each of the consequences that may follow conviction, counsel must undertake to calculate the likelihood of the actual occurrence of each.

15.6.2. Determining the Concessions that Could be Obtained from a Prosecutor to Avert or Reduce the Consequences of a Conviction

After conducting the research described in section 15.6.1 *supra* regarding the possible consequences of a conviction, counsel will need to identify the concessions that conceivably could be extracted from a prosecutor, as part of a plea bargain, to avert or reduce the severity of these consequences. The types of concessions that are most common are:

(1) *A prosecutor's agreement to accept a guilty plea that reduces the maximum possible term of incarceration.* Depending upon the sentencing laws of the jurisdiction, the sentencing practices of the judge presiding over the case, and the specific circumstances of the case, this may involve:

- (a) *A plea of guilty to some lesser offense[s] included within the offense[s] charged.* A guilty plea to a lesser offense is the classic form of “copping a plea” and the one that most defendants think of first. It usually produces a guaranteed reduction of the statutory maximum sentence to which the defendant is exposed, limiting the “max” to the penalty authorized by law for the lesser offense. It also usually – but not invariably – lessens the sentence that the defendant will actually receive. Approval of the court for a plea of guilty to a lesser included offense is not often required and, where required, is ordinarily routinely given. There is little or no way the prosecutor can renege once the plea is entered. This sort of agreed disposition is therefore less risky than some others. However, its value to the defendant varies greatly, depending upon judicial sentencing patterns – and, in particular, upon the relationship between the maximum sentence authorized by law and the actual sentences customarily given for the greater and the lesser included offenses. Assume, for example, the common phenomenon of a judge who (a) never sentences first offenders to more than a third of the statutory maximum term for armed robbery and (b) assumes that any defendant who pleads guilty to simple robbery is really guilty of armed robbery and is copping a plea. Counsel representing a first offender before this judge is not likely to see a great difference in the sentence if the client pleads guilty to simple robbery rather than going to trial and being convicted of aggravated robbery. If counsel wants to make a deal that means much in terms of time served, s/he will have to consider other possible forms of plea bargaining.
- (b) *A plea of guilty to less than all of the offenses charged, with dismissal of the others on a nolle prosequi.* “Knocking off” indictments or counts also ordinarily produces a guaranteed reduction of the maximum sentencing power of the court. But this is so only when state law or the constitutional law of double jeopardy (see § 48.7 subdivision (3) *infra*) does not bar cumulative punishment for the several offenses. Counsel, therefore, must research this issue. Counsel

should also be aware of local judicial practice with regard to consecutive or concurrent sentencing for convictions on related offenses. Some courts invariably give concurrent sentences for these offenses, so counsel has gained nothing by a dropping of some charges. It is also significant that the *nolle prosequi* often requires leave of court, and leave is not always routinely given. Furthermore, the prosecutor may sometimes renege on a *nol pros*; local law and the prosecutor's habits should be checked out.

- (c) *A plea of guilty to offenses charged in a new indictment or information that are less serious than the offense[s] presently charged but are not lesser included offenses.* On this plea, the prosecutor *nol prosses* the original indictment or information. Although the *nol pros* requires leave of court, the court may have no choice but to grant it if the new offenses selected for the plea bar prosecution of the original charges under the principles of double jeopardy. See § 20.8 *infra*.
- (d) *Affecting the application of the jurisdiction's sentencing guidelines to the defendant's case by means of a plea of guilty to a reduced charge.* In jurisdictions that employ sentencing guidelines and similar types of determinate-sentencing formulas, it will usually be the case that pleading guilty to a lesser offense or to less than all of the offenses charged will limit the potential maximum sentence by affecting the determinations of the "base offense level" and "combined offense level." In some such jurisdictions, however, such a guilty plea may have no practical effect on the ultimate sentence, either because (i) a lesser included offense, although having a lower maximum sentence, falls within the same guidelines category as the higher charge; or (ii) the guidelines or local practice allow a judge at sentencing to consider the criminal conduct underlying a dismissed or bargained-away charge when determining what guideline range applies.

(2) *A prosecutor's agreement, as part of a plea bargain, to support (or not to oppose) a particular sentence, or otherwise to assist the defense in securing a more favorable sentence:*

- (a) In jurisdictions that do not employ sentencing guidelines, defense counsel commonly seek one or more of the following types of agreements from the prosecutor which may influence the judge's sentencing decision:
 - (i) The prosecutor's commitment to recommend a specific sentence or to make a specified form of recommendation or statement to the sentencing judge. Commitments of this type might specify:

- (A) The recommendation of a specific sentence.

- (B) The recommendation of a sentence not more than *X*.
- (C) The recommendation of a suspended sentence, with or without probation. The suspension may be unconditional or may be conditioned on the defendant's doing specified things (such as, for example, enrolling in a community-based treatment program) or refraining from doing specified things.
- (D) The recommendation that sentences on several present charges be concurrent or that they be made concurrent with sentences on previous convictions, including sentences on which the defendant's probation or parole may be revoked by reason of the present conviction.
- (E) The recommendation that a term of imprisonment be served in a specialized facility (minimum-security prison, residential drug program, and so forth).
- (F) The recommendation that the defendant be sentenced under specialized sentencing provisions (*e.g.*, a "youthful offender" provision or the like).
- (G) A general recommendation of leniency or announcement to the court that the defendant is "cooperating."

It is important to recognize that, in most jurisdictions, *sentencing recommendations are only recommendations*. They are the riskiest form of agreement because the judge may not go along with them. Some judges invariably do; some never do; some do or do not, depending on the case. Negotiating for a sentencing recommendation is effective only if counsel has sufficient information about the judge who will be – or about all of the judges who may be – the sentencing judge. In some cases it may be possible to meet with the judge in chambers, in a formal or informal pretrial conference, to sound out his or her reaction to a proposed sentencing recommendation by the prosecutor. *See, e.g., Cripps v. State*, 122 Nev. 764, 137 P.3d 1187 (2006); see § 18.14 subdivision (1) *infra*. Defense counsel may wish to suggest such a conference when the judge's attitude toward sentencing recommendations is uncertain. *See, e.g., State v. Warner*, 762 So. 2d 507 (Fla. 2000).

In some localities, a formal or informal practice of "conditional" plea bargaining has developed. Under this practice the prosecution and defense negotiate (i) the terms of the sentence that the defendant will receive if s/he pleads guilty (an "on the nose" bargain) or (ii) the rules that will be followed

in sentencing the defendant if s/he pleads guilty (for example, that the sentence will be no more than X [nor less than Y]; that the prosecution will inform the court that the defendant is cooperating with the authorities and will ask the court to consider this circumstance in mitigation, or any other arrangement among those described in this section. The parties' agreement is then submitted to the sentencing judge for approval. If the judge agrees (i) to impose the bargained sentence or (ii) to observe the bargained sentencing rules, the defendant pleads guilty and the judge performs as agreed. If the judge does not agree, then the deal is off, and the case goes to trial (or to renegotiation). *See, e.g., People v. Clancey*, 56 Cal. 4th 562, 570, 572-77, 299 P.3d 131, 135, 137-40, 155 Cal. Rptr. 3d 485, 490, 492-95 (2013). If this procedure is customary in counsel's jurisdiction, counsel should ordinarily follow it. If it is not, counsel should consider suggesting it to the prosecutor and the judge for use on an *ad hoc* basis.

- (ii) The prosecutor's agreement to make no recommendation on sentence and to take no position on the question, leaving defense counsel free to argue the matter to the court. This sort of agreement is usefully made to break the stalemate in negotiation that occurs when the prosecutor and defense counsel are agreed that the defendant should receive some consideration for a guilty plea but are far apart on the sort of sentence that should be imposed.
 - (iii) The prosecutor's agreement not to "press the priors," that is, not to invoke the provisions of recidivist sentencing legislation of various sorts (including habitual-criminal and sexual predator provisions). The prosecutor may or may not have authority under local practice to decide unilaterally whether the stiffer penalties of recidivist law will be invoked. Counsel should determine whether the judge has any power to invoke the priors *sua sponte*.
- (b) In jurisdictions that employ sentencing guidelines and similar sorts of determinate-sentencing formulas, a prosecutor's agreement to one or more aspects of sentencing can have a significant effect on the ultimate determination of sentence by the judge. Depending on the nature of the local guidelines and local practice, counsel might seek to obtain:
- (i) A prosecutorial "agree[ment] that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply." FED. RULE CRIM. PRO. 11(c)(1)(C). Under some guidelines, "such a recommendation or request binds the court once the court accepts the plea agreement" (*id.*).

- (ii) A prosecutorial commitment to “recommend, or agree not to oppose the defendant’s request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply” (FED. RULE CRIM. PRO. 11(c)(1)(B)). It is usually the case that “such a recommendation or request does not bind the court” at sentencing (*id.*).
- (iii) Prosecutorial support for a downward departure from the presumptive guidelines sentence. In some jurisdictions, there is a well-established process for obtaining such prosecutorial support if a defendant agrees to cooperate with the government by providing information and/or agreeing to testify against others. In such systems, a downward departure usually is not a guarantee even when the defendant has followed through with the contemplated cooperation because (A) the judge is not required to follow the prosecutor’s recommendation and (B) the prosecutor often has latitude to treat the defendant’s assistance as insufficient to satisfy the agreement. *Cf. Ricketts v. Adamson*, 483 U.S. 1 (1987).

(3) *A prosecutor’s agreement, as part of a plea bargain, to secure the dropping of other charges against the defendant in other jurisdictions, federal or state.* The prosecutor may or may not be able to deliver on this agreement. Counsel should ordinarily get personal assurances from the other prosecutors involved. S/he should also be familiar with prosecutorial policies, or s/he may be making a bad deal. For example, the federal government very infrequently prosecutes for a federal offense following state conviction on a charge based upon the same incident (see § 20.8.7 *infra*), so an agreement to have federal charges dropped is often worth little.

(4) *In the case of a defendant who is not a citizen, a prosecutor’s agreement to accept a plea to a charge that does not expose the defendant to the risk of removal or exclusion, along with dismissal of all charges that have those potential consequences.* See § 15.6.1 subdivision (E) *supra*.

(5) *A prosecutor’s agreement to accept a plea to a charge that does not expose the defendant to certain collateral consequences (such as mandatory sex offender registration, or ineligibility for a professional license of a certain type).* See § 15.6.1 subdivision (G) *supra*.

15.7. Other Factors That May Bear on the Advisability of a Guilty Plea

15.7.1. The Presence or Absence of Debatable or Dubious Legal Points Relating to Substantive or Evidentiary Matters on Which the Judge Might Commit Reversible Error in a Pretrial Ruling or in the Course of a Trial

In comparing the costs of guilty plea and of a trial, counsel must keep in mind that guilty pleas foreclose appellate review of most pretrial rulings. See § 14.8 *supra*. If the trial court has ruled against the defense on a pretrial issue that has a reasonable prospect of prevailing on appeal, and if that ruling is not among the very few which will be appealable after a guilty plea, counsel has to consider whether the better course of action would be to go to trial in order to preserve the issue. Of course, this calculus must take into account not only how likely it is that the issue will be good for a reversal on a post-trial appeal (or prerogative writ proceeding) but how much time the client might have to serve before an appellate ruling is handed down, and also any other harms that may attend the trial and a possible retrial (embarrassment, stress, whatever).

The advisability of a guilty plea depends, as well, upon the presence or absence of legal issues that will require rulings by the judge at trial, and the likelihood that the judge may commit reversible error in one or more of those rulings. Counsel will want to pay attention particularly to any unsettled issues of construction of the statute under which the client is charged – issues that can generate challenges to jury instructions (see § 42.5 *infra*) or, in a bench trial, to the trial judge's conclusions of law (see § 46.3 *infra*) – and debatable issues of the admissibility of significant pieces of prosecution or defense evidence. Like a hung jury (see § 15.4.5 *supra*), an appellate reversal usually produces a significant improvement of the client's prospects in the endgame.

15.7.2. The Possibility of Using a Guilty Plea to Steer the Case Before a Favorable Sentencing Judge

Despite systemic attempts to achieve some uniformity in sentencing, individual judges continue to differ enormously in their sentencing patterns and attitudes. Often the most significant thing that counsel can do to affect a client's sentence is to have the sentence imposed by the right judge or not imposed by the wrong judge. Experienced criminal lawyers in a locality (and the prosecutor if s/he is trustworthy and cooperative) will usually be able to advise counsel about who are the right and wrong judges in particular sorts of cases.

The judge who presides over the entry of a guilty plea ordinarily assumes jurisdiction over future stages of the case and becomes the sentencing judge. For this reason, plea negotiation with the prosecutor may profitably include consideration of bringing the case on for arraignment – and entry of a guilty plea – at a time when the arraignment judge is a favorable sentencer. If this cannot be done at the initial arraignment (as it can in localities where the prosecutor controls the calendar call at arraignment), a continuance by

agreement may be in order. Alternatively, the defendant may plead not guilty at arraignment, with an eye to changing the plea at a later time. Sometimes judges will receive a plea at other than regular arraignment sessions, and this possibly should be explored with the prosecutor. Or the prosecutor may have sufficient control over calendaring for trial so that the case can be listed for trial before a favorable judge, with the understanding that the defendant will withdraw his or her initial not guilty plea and will plead guilty on the trial date.

In the absence of a negotiated plea, counsel whose client is pleading guilty will have to make such decisions concerning timing as counsel can effectuate unilaterally. Whether the plea should be entered at arraignment will depend on whether there is a chance that a more lenient judge will sit on post-arraignment motions or at trial. Similar sentencing considerations may determine whether to ask for a jury trial or to waive a jury; different judges will be sitting in different jury and nonjury courts. Knowledge of individual judicial predilections and of court calendars is indispensable.

15.7.3. *Considerations That May Arise in a Case in Which the Defendant Is Detained Pending Trial*

When the defendant is detained pending trial, it may be possible to include in the plea agreement a prosecutorial commitment to support post-plea release of the defendant pending sentencing, either on the defendant's own recognizance or with a bond the defendant can afford. *Cf.* §§ 4.2, 4.7-4.11 *supra*. Such an arrangement not only speeds up the client's release from galling pretrial confinement but gives him or her the chance to demonstrate good behavior in the community during the presentencing period and thereby "earn" a sentence of probation. See §§ 4.19, 7.24, 12.18 *supra*.

Even when a guilty plea will not serve to secure the defendant's liberty pending sentencing, a defendant who is detained before trial may nevertheless have an interest in pleading guilty in order to cut down on the period of detention prior to sentencing. This will obviously be the case when a sentence of probation is expected or in misdemeanor cases in which the period of pretrial detention pending a trial may exceed the likely length of the sentence that would be imposed upon conviction. It may even be the case when a longer incarcerative sentence is likely, if the period of time spent in pretrial detention is not automatically credited against the length of a sentence.

Although reducing the duration of incarceration in this way is a valid consideration, counsel who discusses it with the client will want to be sure that the discomfort of being in jail does not overwhelm the client's judgment and push him or her into a hasty decision to forgo a trial in which s/he may have a winning defense.

15.7.4. *The Potential Advantages of a Guilty Plea in a Case in which the Prosecutor Has Under-Charged the Defendant*

Occasionally, counsel will encounter a case in which the charges

filed by the prosecution are significantly less serious than those that counsel's independent interviewing and investigation reveal could be proved at a trial. If the client pleads not guilty and thereby puts the case on the prosecution's trial-preparation agenda, s/he could end up facing graver charges. See §§ 8.2.2, 12.13 *supra*. Under these circumstances, a quick plea of guilty may be advisable in order to bar the subsequent filing of aggravated charges. The constitutional prohibition against double jeopardy (see § 20.8 *infra*) bars a defendant's prosecution upon greater charges following his or her conviction of a lesser included offense (*e.g.*, *United States v. Dixon*, 509 U.S. 688 (1993); *Heath v. Alabama*, 474 U.S. 82, 87-88 (1985) (dictum)), except (a) "where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence" (*Brown v. Ohio*, 432 U.S. 161, 169 n.7 (1977); *Illinois v. Vitale*, 447 U.S. 410, 419-21 & n.8 (1980); compare *Garrett v. United States*, 471 U.S. 773, 789-92 (1985)); or (b) the State files the more serious charge at the outset, but the defendant elects to seek adjudication of the lesser charge first and succeeds in obtaining such an adjudication over the prosecutor's objection (see *Ohio v. Johnson*, 467 U.S. 493 (1984); cf. *Jeffers v. United States*, 432 U.S. 137, 151-54 (1977) (plurality opinion)); or (c) the adjudication of the lesser charges is effected pursuant to a plea bargain that the defendant later breaches (see *Ricketts v. Adamson*, 483 U.S. 1 (1987)).

15.7.5. Cases in Which a Client Manifests Strong Discomfort With One or the Other of the Options of Entering a Guilty Plea or Going to Trial

Another factor to consider is whether the defendant does not "feel" guilty and is agreeing to a guilty plea only with considerable reluctance. Given the fact that the decision is the client's to make and that it is the client who will have to live with the sentencing consequences of that decision, the comfort of the client should be a major factor. Moreover, if the client is unhappy with the plea, his or her discomfort may be sufficiently apparent to the judge during the plea colloquy that the judge may be unwilling to accept the plea. As indicated in § 14.1 *supra*, the judge may interrogate the defendant extensively before allowing the entry of a guilty plea. (Problems of the latter sort may be avoided or ameliorated in jurisdictions that allow an "Alford plea." See § 15.16.1 *infra*.)

Conversely, the client may have concerns that make him or her uncomfortable with the prospect of undergoing a trial, regardless of its outcome. Some defendants have psychological or emotional problems that render them unable to cope with the nervous stress that attends a trial, particularly a lengthy trial. Some defendants fear a spouse's or family member's reactions to hearing the testimony that will emerge at trial, particularly when the offense is a sex offense or involves extreme violence. Some defendants are worried about the bad publicity that a trial may generate. In these situations, counsel will need to play the role of a dispassionate but not uncompassionate adviser, helping the client to examine his or her feelings with a measure of objectivity but not underrating their importance.

C. Plea Negotiations

15.8. *Defense Counsel's Obligations in Plea Negotiations*

“Plea bargaining” and “bargain justice” conjure up shabby images in many minds, ranging from a sluggardly or exploitative defense practice to politicking and graft. Undoubtedly, there are some corruptions of plea bargaining. But the negotiated resolution of criminal matters is no more to be scorned for that reason than are all contracts because some contracts are fraudulent. There is absolutely nothing wrong with defense counsel’s settling a criminal case with authorization from the client and after fair dealings with the prosecutor.

What is involved in settlement, and in the antecedent negotiation, is an attempt to come to agreement on a disposition that serves and reconciles, as far as possible, the legitimate interests of the prosecution and the defendant, without the wasted effort and needless vagaries of trial. In criminal – as in civil – matters, negotiation is the essence of lawyering. Experienced criminal lawyers know that one of defense counsel’s most important functions, perhaps the most important, is working out with the prosecutor the best possible disposition of a client’s case in situations in which there is no realistic prospect of acquittal. Not only may the lawyer properly do this, but s/he violates the obligation of competent representation if s/he fails to pursue plea-bargaining opportunities that could produce a better outcome for the client than a trial. See *Missouri v. Frye*, 132 S. Ct. 1399, 1407-08 (2012); *Williams v. Jones*, 571 F.3d 1086, 1090-91 (10th Cir. 2009); *Johnson v. Uribe*, 700 F.3d 413 (9th Cir. 2012); *Ebron v. Commissioner of Correction*, 307 Conn. 342, 53 A.3d 983 (2012).

15.9. *Opening Discussions with the Prosecutor*

From the outset of proceedings, counsel will have been discussing the case with the prosecutor. See §§ 8.1.1, 8.1.4, 8.2.2-8.2.4, 8.4, 8.6, 12.13, 13.5 *supra*. Initial discussions should have focused principally on learning what the prosecutor was willing to disclose about the prosecution’s case. But counsel should also have learned something about the prosecutor’s attitude; counsel should have tried to affect that attitude in favor of the client; and in the course of urging a favorable exercise of the prosecutor’s broad charging discretion, counsel should have asked specifically and ascertained what the prosecutor regards as a satisfactory disposition of the case. Counsel can ordinarily do this much without making any offer to plead the client guilty or even intimating that the client might be receptive to a plea agreement. Counsel can, therefore, proceed this far without explicit authorization by the client.

15.10. *When Negotiation Should Begin*

Exactly when negotiation in a stricter sense should begin – that is, when defense counsel should begin to raise the possibility of a guilty plea if some mutually satisfactory terms of settlement can be agreed upon – depends on a variety of circumstances.

Obviously, the paramount consideration is whether the defendant will derive any specific benefits as a result of pleading early in the process. One common example of a situation in which an early plea is often essential is when the crime was committed by a group of perpetrators. If all of the perpetrators have been arrested, the one who first cooperates to “break” the case and implicate the others will very likely receive the most consideration from the prosecution. If some members of the group have not yet been identified, or have not yet been apprehended, the defendant who seeks to win governmental consideration by disclosing their names and/or whereabouts also will need to move quickly in order to provide that information before the police acquire it through independent investigation.

The defense may also gain collateral advantages from prompt commencement of plea negotiations with the prosecutor. Plea negotiation is one of the most profitable methods of informal discovery. Most prosecutors will disclose their case to some extent in order to persuade defense counsel that a guilty plea is advised. Indeed, some prosecutors will disclose facts about their case *only* if a guilty plea is being discussed. And counsel wants to begin discovery as early as possible. See Chapters 7 and 18.

Conversely, there may be reasons for delaying plea negotiations. One of the most important reasons for delay exists when counsel knows that the defendant is being sought for other crimes for which s/he has not yet been arrested. If counsel delays the negotiation and the defendant does end up being arrested for the other crimes, then counsel can negotiate for a plea that covers both the current case and the new cases. If counsel had gone ahead and worked out a plea bargain to cover only the current case, the prosecutor might insist on a second plea agreement (and often a far less favorable overall deal) when the new case[s] entered the system.

Moreover, even in cases in which an early plea might be beneficial, counsel is frequently in no position to negotiate at the outset of the case. Adequate factual investigation and legal research are the necessary preconditions for intelligent negotiation. And negotiation involves offering something, even if the something is only a possibility. Offering something *does* require authorization from the client. Counsel frequently will have nothing to offer at an early stage.

The client’s attitude should play a major part in determining whether counsel initiates plea negotiations early in the process. Some clients will expect their attorney to begin promptly to discuss a plea with the prosecutor. The police, in their immediate post-arrest interrogation of a defendant, often stress the value of cooperation, in order to obtain a confession of the offense for which the arrest was made, to encourage the defendant to confess to – and hence to “clear” – other unsolved crimes, and to persuade the defendant to finger any accomplices or help “break” other crimes. These suggestions by the police set a tone that may make the defendant quite anxious to clinch a quick deal; and, particularly if s/he is system-savvy, s/he will expect counsel to jump into bargaining with both feet.

On the other hand, many clients persist long after arrest in vigorously protesting innocence and expounding plausible tales (some true, some not), which, if true, render the suggestion of a guilty plea inconceivable. Counsel cannot broach the subject of a possible guilty plea to such clients, for the purpose of obtaining their authority to negotiate, without appearing to call the client a liar. At this early stage in the process, counsel has not yet established the rapport needed to probe the client's position tactfully yet skeptically to see whether the client will stick to it in the face of all of the hard questions and hard facts that counsel will eventually have to put to the client. See §§ 6.8, 6.14, 12.14 *supra*.

Accordingly, the best approach in gauging how early to initiate plea negotiation is ordinarily to be guided by the client's outlook in the initial interview. If the client admits guilt and feels that s/he has been caught red-handed, counsel may raise the question of a possible guilty plea and suggest that – if the client wishes – counsel will explore the prosecutor's attitude toward some sort of a plea bargain at the same time that counsel looks further into the facts of the case. Counsel should explain that:

1. Of course, counsel will make no commitments and will not indicate to the prosecutor that the client has any interest in pleading guilty.
2. Counsel does not as yet have any idea of the prosecutor's position. But counsel will undertake to find out what the prosecutor might be willing to accept in the way of a reduced sentence.
3. After counsel learns what the prosecutor is offering, counsel will relay that offer to the client so that the client can evaluate whether the offer is even worth considering. Counsel will at that point give the client his or her advice, but the final decision will be the client's.
4. Even if the client authorizes counsel to initiate discussions with the prosecutor, counsel intends to investigate the facts thoroughly in order to determine whether the prosecution's case is strong or weak. Counsel will not even consider a plea, or advise the client to consider a plea, unless counsel's investigation shows that the prosecutor's case is strong and likely to result in conviction at trial.
5. Counsel is starting out with the attitude that "if this case can be fought, we are going to fight it." Counsel's only reason for bringing up the possibility of a plea is that s/he does not want to overlook any opportunity for getting the most favorable deal for the client if the client later decides that s/he would do better with a plea than with a trial.

Even with a client who acknowledges guilt, counsel is wise not to seem too attracted to a possible plea disposition at the outset, lest the client get the impression that counsel is anxious to sell out the client in order to save counsel work. But if counsel's mention of talking to the prosecutor elicits

a positive reaction from the client, counsel might as well start talking early.

On the other hand, if the client denies involvement in the offense or speaks of contesting guilt and if there appear no pressing reasons to begin negotiation, counsel can let the matter go until defense investigation and research have given counsel a thorough, detailed grasp of the case. After counsel has investigated the facts and had a chance to study and make some tentative evaluation of the matters discussed in §§ 15.3-15.7 *supra*, s/he should raise with the client the question of a possible guilty plea. At this stage, counsel is not yet prepared to tell the client with any certainty what the advantages of a guilty plea will be, but s/he is in a position to suggest that there may be some advantages, depending on the prosecutor's attitude toward negotiation. Even though counsel may have come to the unilateral conclusion that the case is plainly one for a not-guilty plea and trial, s/he owes it to the client to give the client the option of having negotiation with the prosecutor explored as an alternative. Of course, if counsel and the client are agreed at this stage that the case should be fought out on the guilt issue, no matter what sort of disposition the prosecutor might agree to – or if the client is adamant against any thought of a guilty plea notwithstanding counsel's belief that negotiations looking to a plea might profitably be considered – the matter is ended. There remains nothing for counsel to do but prepare for trial and perhaps raise the issue with the client again later in light of subsequent developments.

15.11. *The Conditions Precedent for Effective Defense Negotiation – Things to Know about the Law, the Case, and the Motivations of the Prosecutor*

Thorough investigation must precede any serious negotiation. Counsel must know enough about the prosecution and defense cases – that is, about the facts, their likely provability in court, and the likely responses of a judge or jury to them – to make, at least provisionally, the sort of evaluation suggested in § 15.4 *supra*.

Counsel should also have a comprehensive working knowledge of:

(1) *The identity of every lesser offense included within the offense charged against the defendant* (see § 15.6.2 subdivision (1)(a) *supra*; § 42.4 *infra*) and the consequences of conviction (see § 15.6.1 *supra*) for each lesser included offense.

(2) *The identity of every other offense that might be charged against the defendant on the basis of the facts of the case, or on the basis of some of those facts* (see § 15.6.2 subdivision (1)(c) *supra*), and the consequences of conviction for each of these offenses.

(3) *Legal doctrines relating to:*

(a) *The authority of the court to suspend sentence and the consequences of different forms of suspended sentences* (see § 15.6.2 subdivision (2)(a)(i)(C) *supra*; § 48.6 subdivision (F) *infra*);

- (b) *The potential applicability of specialized sentencing provisions, such as “youthful offender” laws (see § 15.6.2 subdivision (2)(a)(i)(F) supra; § 48.6 subdivision (B) infra), and the procedures for, and consequences of, sentencing the defendant under those laws – procedures and consequences which may be more favorable to the defendant than the ordinary sentencing provisions in some aspects or circumstances and less favorable in others;*
- (c) *Merger of offenses and concurrent or consecutive sentencing in the event of conviction of more than one offense (see § 15.6.2 subdivision (2)(a)(i)(D) supra; § 48.6 subdivision (H) infra).*

(4) *The defendant’s previous criminal record, including probation or parole status at the time of the present offense, and all other charges presently pending or contemplated against the defendant in any jurisdiction (see §§ 15.6, 15.6.2 subdivision (3) supra; § 48.6 subdivision (I) infra).*

(5) *In jurisdictions that use sentencing guidelines and similar sorts of determinate-sentencing formulas, the guideline categories that may apply to the case based on the charged offenses, the circumstances of the crime, the defendant’s previous criminal record, and other specified factors; and the guideline categories applicable to lesser included offenses and to alternative offenses that might be charged on the basis of the underlying factual scenario giving rise to the prosecution (see § 15.6.2 subdivision (2)(b) supra; § 48.6 subdivision (C) infra).*

(6) *If a client is not a citizen, the potential immigration consequences of a plea to the charged offense[s], any lesser included offenses, and all alternatively chargeable offenses (see §§ 15.6.1 subdivision (E), 15.6.2 subdivision (4) supra).*

(7) *The identity of, and conditions at, the various places of confinement to which the defendant might be committed at the court’s discretion (or assigned by state correctional officials at the court’s recommendation) in the event of an incarcerative disposition (see § 48.6 subdivision (D) infra), including specialized rehabilitative and training programs available at these various institutions.*

(8) *The defendant’s family resources and the local community resources available to the defendant, which may offer assistance in making some nonincarcerative disposition of the case that has affirmative rehabilitative or restitutionary potential, including:*

- (a) Employment opportunities for the defendant;
- (b) Educational and job-training opportunities for the defendant;
- (c) In-patient or out-patient medical or psychiatric treatment facilities for the defendant;
- (d) Alternative places of residence for the defendant, including places out of the locality;

- (e) Present or potential financial resources of the defendant to make restitution to the complainant, in an appropriate case.

Counsel should know, in addition, whether the client is able and willing to cooperate with the prosecution in:

(9) *Incriminating other persons or turning state's evidence.*

(10) *Confessing guilt of uncleared offenses and thereby assisting in their clearance by the police.*

It is also helpful, if possible, for counsel to know:

(11) *Any more or less formally articulated policies of the prosecutor's office bearing on the sort of case involved.*

(12) *Previous similar cases in which plea negotiations favorable to the defense have been worked out.* (Argument from precedent is often quite effective in negotiation.)

Armed with this information, counsel is in a position to draft a set of possible settlement terms that entail less onerous consequences or have more rehabilitative promise than does conviction of the charged offense[s]. Counsel should consider the availability and potential of each of the concessions that could be obtained from a prosecutor to avert or reduce the consequences of a conviction (see § 15.6.2 *supra*), as well as the possibility of enlisting the prosecutor's aid in using a guilty plea to steer the case to a favorable judge for sentencing (see § 15.7.2 *supra*) and/or to expedite the release of a defendant who is currently detained pending trial (see § 15.7.3 *supra*).

Counsel should also consider what the defendant can offer the prosecutor, including:

- (A) A plea of guilty to one or another offense.
- (B) Voluntary submission to treatment programs, changes of residence (for example, moving out of a certain neighborhood or moving out of the jurisdiction), and other matters that could not be compelled by law.
- (C) Voluntary financial restitution or submission to community service.
- (D) Cooperation to incriminate or convict other persons.
- (E) Cooperation to clear uncleared crimes.
- (F) A waiver of claims to damages for unlawful arrest and other violations of the defendant's rights in the initial stages of the criminal proceeding (see § 8.3.3 *supra*).

15.12. *Techniques of Plea Negotiation*

The process of negotiation with a prosecutor is in some ways like negotiation looking to settlement of a civil case. Ordinarily, the prosecutor must be impressed with the discrepancy between what s/he wants and what s/he is likely to get or with the inconvenience involved in getting what s/he wants before s/he will settle for less than what s/he wants. The major difference in criminal negotiation is that it is the prosecutor alone, not a client, who decides what the prosecutor wants. Considerations of justice sometimes affect this calculus, and the prosecutor may be swayed by all of the considerations mentioned in §§ 8.2.3, 8.4, and 8.6 *supra*. In negotiating with the prosecutor, defense counsel must also bear in mind that criminal cases, more than most civil cases, tend to attract media coverage, so the prosecutor could be concerned about justifying any “deals” to the public. An additional problem is that prosecutors rely heavily on the police and need their cooperation. When the police feel that they have done a good job in building a case, they may be chagrined to see the prosecutor dismiss or compromise it. This latter consideration may suggest the desirability of counsel’s doing a bit of lobbying with the investigating officer after counsel has begun plea negotiations with the prosecutor. See generally §§ 8.2.3, 8.3.3 *supra*. In a case in which the complainant’s wishes are likely to be significant to the prosecutor, a discussion with the complainant also may be advised. See generally § 8.5 *supra*. In both cases, of course, extreme caution must be observed in counsel’s decision to involve these parties in the affair. Often the prosecutor will not consult them, and their involvement may stir up trouble for the defense.

Like any negotiation, plea negotiation involves the art of agreeing with the other side’s position on all points that are not essential to counsel as a means of getting the other side to agree with counsel’s position on essential points. This means, analytically, that counsel must figure out what the prosecutor really wants and how to give the prosecutor what s/he wants without sacrificing what counsel wants. For example, a prosecutor who says that s/he thinks “this defendant ought to be taken off the streets” does not necessarily want incarceration; s/he may be saying that s/he wants the defendant out of the community so as not to give the complainant, the police, and this prosecutor any further trouble. S/he may be quite satisfied with a suspended sentence and probation if the defendant will move to a different neighborhood or county, whereupon probationary supervision can be shifted to that jurisdiction.

The multitude of possible offenses that could be charged in any factual situation (including offenses of which the defendant is not technically guilty) and the large range of sentencing alternatives for those offenses under the laws of most jurisdictions (see § 15.6.1 *supra*) ordinarily give counsel plenty of possibilities for effective compromise if s/he reviews them thoroughly and uses imagination. Similarly, the range of informal accommodations must be viewed with imagination. A prosecutor who adamantly refuses to make a formal sentencing recommendation to the court, for instance, may be willing to make an informal recommendation to the probation officer who is writing up the pre-sentence report on the case – and the latter recommendation may be just as valuable to the defense as the former.

At the personal level, it is important to minimize the extent of counsel's disagreements with the prosecutor without giving in to the prosecutor on substantive matters. It is particularly important for counsel to appear not to be standing in personal opposition to the prosecutor, even when counsel's position is opposed to the prosecutor's position. One way for defense counsel to avoid a clash of personalities with the prosecutor is for counsel to establish a personal posture that is not completely identified with counsel's bargaining position, by associating the bargaining position with the client and appearing to play the role of an honest broker between the client's interests and the prosecutor's. Thus, the "I-really-see-the-case-the-way-you-do-because-any-sensible-lawyer-would-know-that-what-you-say-makes-sense-but-you've-got-to-help-me-to-sell-it-to-my-client-by-giving-me-something-more-to-take-to-the-client-that-s/he-can-live-with" approach is frequently productive. This use of the absent client as a third force in negotiation allows defense counsel to hold firm to his or her position while establishing a broad base of personal and professional agreement with the prosecutor. It also avoids arousing any instincts that the prosecutor may have toward combative gamesmanship – that is, the game of "beating" defense counsel in flea-market haggling. However, when possible, counsel should never say that the client *does not* or *will not* accept the prosecutor's position, since this may simply redirect the prosecutor's combativeness toward the client. The better formulation is a "What-worries-my-client-is- . . ." or an "I-just-don't-think-I-can-sell-that-to-my-client-unless- . . ." approach or their equivalents.

Keeping on the prosecutor's good side and avoiding clashes that may arouse the prosecutor's ire at either the defendant or defense counsel is indispensable because, as a practical matter, the prosecutor ordinarily has the upper hand in the bargaining process. Although defense counsel may be able to appeal to some judges to lean on a prosecutor who stands adamant on an outrageous bargaining position (see § 15.5 *supra*; § 18.14 subdivision 1 *infra*), the prosecutor can usually get away with either stonewalling or playing very rough at the bargaining table. *See, e.g., Weatherford v. Bursey*, 429 U.S. 545, 561 (1977) ("there is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial"); *Ricketts v. Adamson*, 483 U.S. 1, 9 n.5 (1987), citing *Mabry v. Johnson*, 467 U.S. 504 (1984) (same); *Bordenkircher v. Hayes*, 434 U.S. 357 (1978) (finding no constitutional objection to a prosecutor's filing a recidivist charge, carrying a mandatory life sentence, for the admitted purpose of inducing the defendant to accept the prosecutor's offer of a plea bargain involving a five-year sentencing recommendation); *United States v. Goodwin*, 457 U.S. 368, 377-80 (1982) (reaffirming *Bordenkircher*); *Alabama v. Smith*, 490 U.S. 794, 802 (1989) (same). The prosecutor is under heavy pressure to settle most cases in order to reduce the prosecution's trial docket to manageable proportions, and that pressure is defense counsel's greatest asset as long as counsel does nothing to give the prosecutor the impression that this case deserves "special treatment." But if the prosecutor gets riled, s/he usually has sufficient resources to make any particular case unpleasantly "special" for the defendant.

15.13. *The Plea Agreement with the Prosecutor*

In many jurisdictions, agreements between defense counsel and the prosecutor are not reduced to writing. The reputation and integrity of each attorney are the only guarantees that each will keep his or her word. *See Mabry v. Johnson*, 467 U.S. 504 (1984). In theory, of course, a guilty plea entered in consideration of an oral prosecutorial promise that is not fulfilled must be set aside. *E.g., Santobello v. New York*, 404 U.S. 257 (1971); *Blackledge v. Allison*, 431 U.S. 63 (1977). But proof of the facts necessary to bring the theory into play is not easy; postconviction litigation over broken plea bargains can consume years; and the relief, if any, that the client ultimately gets may be nothing more than the right to stand trial. Therefore, if counsel does not know the particular prosecutor, s/he should check out the prosecutor's reputation by inquiry among knowledgeable members of the bar *before* a guilty plea is entered.

Some States and localities have developed a practice under which the terms of plea bargains are set out in writing and filed with the court. *See, e.g., People v. West*, 3 Cal. 3d 595, 477 P.2d 409, 91 Cal. Rptr. 385 (1970). (This practice is often but not always incidental to the "conditional" plea bargaining process described in § 15.6.2 *supra*.) Such a procedure for memorializing the plea agreement should ordinarily be followed if the prosecutor and the court can be persuaded to accept it. Defense counsel should always offer to draft the written instrument for the prosecutor's review rather than *vice versa*, since the drafter of a document has the advantages of initiative, inertia, and a working familiarity with the draft during any negotiations that may be required to secure its approval or arrange for its revision into final form.

A plea agreement contemplating that the defendant will serve as an informer or a witness against accomplices or will otherwise assist the prosecution in any way other than the mere entry of a plea of guilty should be detailed and unambiguous regarding (1) the specific actions that the defendant is to take, (2) the investigations or cases in which (or the persons against whom) s/he is to take those actions, (3) the circumstances under which s/he is to take the actions, and (4) the duration of the defendant's obligations to act. *See* § 8.6 *supra*. If the defendant is to testify against accomplices, the agreement should specify precisely the proceedings in which s/he is required to testify, and should not leave unclear the scope of the defendant's duties in the event that proceedings against an accomplice later take varying twists (for example, prosecution of the accomplice on multiple charges involving separate trials; reprosecution of the accomplice following a mistrial or the appellate reversal of an initial conviction). Unclearly about the defendant's responsibilities in these eventualities must be avoided, since a defendant who subsequently disagrees with the prosecutor's interpretation of his or her responsibilities does so at the risk that the entire plea bargain will be set aside and s/he will then be prosecuted for the most serious offenses originally charged, if the courts should happen to prefer the prosecutor's interpretation to the defendant's. *See Ricketts v. Adamson*, 483 U.S. 1 (1987).

When writing up a plea agreement, counsel will also need to take particular care regarding another aspect of any commitment made by the

defendant to divulge factual information that could incriminate him or her in either the present offense or other offenses. Almost invariably, in cases in which the defendant has agreed to divulge information or to testify against accomplices, the prosecution will want to delay the defendant's sentencing until after the information has been provided or the testimony has been given. By holding the sentencing over the defendant's head, the prosecutor guarantees compliance on the part of the defendant. Defense counsel must be concerned, however, with ensuring that the information or testimony will not be used against the defendant subsequently if, for any reason, the plea agreement falls apart. Language such as the following should therefore be included in the written agreement:

The parties hereby agree that any statements, testimony, evidence, information, or leads of any sort that:

(a) are capable of incriminating the defendant in the present offense or any other offense; and that

(b) have been or are now or hereafter given by the defendant or the defendant's attorney to any of the following entities or individuals during the negotiation of this plea agreement or following its negotiation but before the agreement is fully executed by the defendant's sentencing:

- (i) the prosecutor or any other prosecuting authority of any jurisdiction;
- (ii) any police or criminal investigating authority of any jurisdiction;
- (iii) any law enforcement authority of any jurisdiction;
- (iv) any court of any jurisdiction;
- (v) any probation department or other agency of any such court;
- (vi) any agent or successor of any entity designated in items (i) through (v),

are expressly understood to have been given in consideration of this agreement and shall not be used against the defendant in any way, directly or derivatively, by or before any entity or individual designated in items (i) through (vi), except:

(1) with the defendant's express consent, in the course of proceedings undertaken to secure the defendant's conviction and sentencing pursuant to this plea agreement; or

(2) for the sole purpose of upholding and enforcing that conviction and sentencing after they have been obtained according to the terms of this plea agreement and so long as neither of them has been vacated.

In no event shall any such statements, testimony, evidence, information, or leads be used against the defendant in connection with any criminal charge other than the charge[s] to which the defendant is presently agreeing to plead guilty.

Unless an agreement of this sort has been made with the prosecutor, counsel ordinarily should not divulge, or permit the defendant to divulge, any incriminating information to anyone during, or after, plea bargaining. *See Hutto v. Ross*, 429 U.S. 28 (1976) (*per curiam*).

If counsel is unable to obtain such an agreement but counsel and the client conclude that a guilty plea with a cooperation condition is nonetheless necessary or advisable, and if counsel is worried that the prosecutor may not live up to his or her end of the bargain after the defendant's testimony against accomplices has been given, then counsel should try to talk the prosecutor into going ahead with sentencing promptly after the guilty plea rather than delaying the sentencing until the defendant has testified. Counsel may urge that the defendant has no love for the accomplices and can be counted on to testify against them without the coercion applied by keeping the defendant's own sentencing pending. Counsel may point out that the defendant will be more impeachable as a prosecution witness if those charges are still pending than if they have already been disposed of; and that even after sentencing, the sentence and the plea bargain are subject to rescission at the prosecutor's option if the defendant reneges on his or her promise to testify. *See Ricketts v. Adamson*, *supra*, 483 U.S. at 8-12. If the prosecutor is adamant about delaying the sentencing, counsel should suggest alternative means of ameliorating the prejudice to the defendant. For example, if the defendant is in custody, counsel can suggest that the prosecutor join in a motion to release the defendant on his or her own recognizance or an affordable bail pending the delayed sentencing. *Cf.* §§ 4.2, 4.7-4.11 *supra*.

If a memorandum reciting the terms of the plea agreement is not filed with the court, counsel should make such a memorandum for his or her own files. A contemporaneous, detailed memo will enhance counsel's credibility if it ever becomes necessary for counsel to establish what was and was not agreed upon as the basis for the plea. Unfortunately, counsel may end up having to prove the specifics of the plea bargain years later, in response to attacks by either a faithless prosecutor or an ungrateful client.

D. Counseling the Client

15.14. *Advising the Client Whether to Plead Guilty*

In advising a client whether to accept or reject a plea bargain, counsel should ordinarily begin by emphasizing that the final decision is entirely the client's and that counsel's job is merely to give the client advice on the basis of counsel's legal knowledge and experience in criminal practice [and/or with the local criminal court – and the particular judge who is handling the case – if counsel does have such experience]. *See* §15.2 *supra*. (The narrower and more specific the basis upon which counsel can claim specialized insight the better.

Clients may resent claims which make it sound as though what counsel is saying is simply that his or her judgment or analytic capability is superior to the client's.) Counsel should stress that the ultimate decision is up to the client to make on the basis of his or her own independent judgment. See §§ 1.3, 15.2 *supra*.

Counsel should then explain to the client all of the factors that militate for and against a plea, covering each of the considerations in §§ 15.3-15.7.4 *supra* that is relevant. Essentially, counsel will need to explain to the client:

1. The realistic probability of winning a favorable outcome at trial, with a full explanation of the comparative strengths of the cases for the prosecution and the defense, as well as extraneous factors that might influence the result. (See § 15.4 *supra*.)
2. Any realistic probability that the judge might penalize the defendant at sentencing because the defendant opted in favor of a trial instead of a guilty plea. (See § 15.5 *supra*.)
3. The sentencing advantages that counsel expects or predicts the defendant will obtain through a guilty plea, including the specific terms of any agreement that counsel has reached with the prosecutor. Counsel should inform the client of the maximum sentence that s/he can receive (a) if s/he pleads guilty and, alternatively, (b) if s/he is convicted after a trial, and should give counsel's best estimate of the sentence that the client will actually receive on each hypothesis, making clear the limits of counsel's ability to predict what the judge will do. (See § 15.6 subdivisions (A)-(D) *supra*.)
4. The risks of collateral consequences that might flow from a guilty plea and, alternatively, from conviction after a trial. (See § 15.6 subdivisions (E)-(I) *supra*.) In any case in which the client is not a citizen and in which a conviction of any of the charges in the charging instrument or their lesser included offenses could result in removal or exclusion, counsel must carefully explain these immigration consequences along with any benefits that pleading guilty might have in averting that risk. See § 15.6.1 subdivision (E) *supra*.
5. The prospects of using a guilty plea to steer the case before a favorable judge for sentencing if that is a consideration in play. (See § 15.7.2 *supra*.)
6. Any other special aspects of the case or the defendant that might cause a guilty plea to be particularly advantageous or detrimental. (See §§ 15.7.1, 15.7.3-15.7.4 *supra*.)

In discussing all of these complex matters, counsel must take pains to phrase the explanations in language that will be comprehensible to the client. Counsel should periodically check with the client to make sure that the client is, in fact, understanding counsel's explanations.

One of the most difficult decisions for a defense attorney to make is whether to employ the lawyer's considerable persuasive powers to influence the client's choice between a guilty plea and a trial. Clients who have criminal charges hanging over their heads are often experiencing extreme stress and anxiety, and therefore they may defer unduly to the lawyer's persuasion rather than thinking independently. The best rule of thumb is to use persuasion only when the cost-benefit analysis clearly and unequivocally points to a certain result, and otherwise to restrict one's role to furnishing the client with the information (including counsel's objective predictions of alternative outcomes) necessary for the client to make a fully informed, independent decision.

The client should be given adequate time to think about the decision. For this reason it is often advisable to meet with the client to discuss the plea several days (or, in cases where the plea will expose the client to severe penalties, several weeks) before the decision must be conveyed to the prosecutor. Counsel might also consider encouraging the client to talk the decision over with his or her spouse or partner or other members of the family or some other trusted personal advisor.

15.15. *Making a Record of the Advice Given to the Client*

It is one of the unhappy realities of criminal practice that defense attorneys need to take certain precautions to guard against later accusations of ineffectiveness or misconduct. Criminal defendants faced with lengthy prison sentences occasionally resort to unwarranted accusations of ineffectiveness or misconduct on the part of their lawyers as a last-ditch effort to overturn their convictions. Among the most common claims of ineffectiveness or misconduct of defense counsel are allegations that counsel coerced the client to plead guilty or gave the client inadequate advice concerning the significance and consequences of the plea or concerning the client's rights. If counsel wishes to guard against the risk of these attacks, counsel should make file notes of all conversations with the client leading up to the client's decision to plead guilty. This record should reflect that counsel gave the client all of the explanations and advice described in § 15.14 *supra*. The file record should also reflect when it was that the client communicated his or her decision to counsel, what that decision was, and that counsel immediately inquired whether the client clearly understood that the decision had to be the client's own and not the lawyer's.

15.16. *Special Problems in Counseling the Client Whether to Plead Guilty*

15.16.1. *The Guilty Plea and the Innocent Client*

Views differ on whether a lawyer may properly advise (or even permit) a guilty plea by a client who protests his or her innocence. Fortunately, the moral problem arises infrequently. If the case is such that a guilty plea is advised, the client probably (although not invariably) is guilty; and if counsel discusses the evidence critically with the client and subjects the client to the sort of cross-examination that in every case will be necessary to prepare adequately for trial (see §§ 6.14, 12.14 *supra*; 29.5.3-29.6 *infra*), the client will usually admit guilt.

Should the client continue to assert innocence, counsel should consider the feasibility and desirability of a plea entered in accordance with *North Carolina v. Alford*, 400 U.S. 25 (1970), known in many jurisdictions as an “*Alford* plea.” In *Alford*, the Court held that “an express admission of guilt . . . is not a constitutional requisite to the imposition of criminal penalty [sic]” (*id.* at 37), and therefore that a plea of guilty may constitutionally be accepted from a defendant who protests his or her innocence, as long as (i) the “defendant intelligently concludes that his interests require entry of a guilty plea” and (ii) “the record before the judge contains strong evidence of actual guilt” (*id.*). In the wake of *Alford*, several jurisdictions have adopted procedures permitting defendants to plead guilty without an admission of guilt, provided that the defendant concedes on the record that the prosecution’s evidence is sufficient to support a guilty verdict and that the defendant is therefore entering a plea of guilty as a tactical choice. The *Alford* plea colloquy was held adequate, notwithstanding the absence of a prosecutorial proffer of the proof against defendant, because the trial court ensured that the defendant understood the nature of the proceedings and the rights he was waiving, and elicited the defendant’s explanation that he was pleading guilty because he feared a conviction of a higher charge.

Alford pleas, however, are not accepted in all jurisdictions. And even in jurisdictions that permit such pleas, some judges will not accept a guilty plea without an admission of guilt.

If *Alford* pleas are permitted in counsel’s jurisdiction and are accepted by the judge presiding over the case, then counsel will need to make two final decisions before advising the client to enter an *Alford* plea. The first of these is a tactical decision whether the nature or tone of an *Alford* plea would vitiate whatever benefits counsel hopes to gain for the client through the entry of a guilty plea. Judges who view a full confession of guilt as “the first step toward rehabilitation” are unlikely to give substantial credit for an *Alford* plea. Moreover, whatever sentence-related benefits the client would receive from the plea may ultimately be diminished or even lost altogether if admission of the crime and an expression of remorse are necessary in order to qualify for a community treatment program that is a condition of probation (*e.g.*, a sex offender treatment program that requires an admission of guilt as a prerequisite for participation) or in order to eventually qualify for parole. *See Carroll v. Commonwealth*, 54 Va. App. 730, 733, 742-49, 682 S.E.2d 92, 93, 98-101 (2009) (upholding the trial court’s finding that the defendant, who had pled guilty with an *Alford* plea, “violated the conditions of his probation by refusing to admit that he committed the crime charged during court-ordered sex offender treatment”); *In the Matter of Silmon v. Travis*, 95 N.Y.2d 470, 474, 477, 741 N.E.2d 501, 503, 505, 718 N.Y.S.2d 704, 706, 708 (2000) (rejecting a challenge to the Parole Board’s denial of parole to a defendant, whose conviction was by means of an *Alford* plea, on the ground that he has never “accept[ed] responsibility for the crime”). *See also McKune v. Lile*, 536 U.S. 24, 29, 31, 43-45 (2002) (holding that the adverse consequences that a state prisoner suffered – denial of visitation rights and other privileges, and transfer to a maximum-security unit – as a result of refusing to participate in a sex offender treatment program, which required that he “admit having

committed the crime for which he is being treated,” were not so severe as to violate the Fifth Amendment privilege against self-incrimination).

The second decision facing counsel is a question of conscience: whether to take advantage of the *Alford* procedure and urge the client to enter a guilty plea notwithstanding the client’s emphatic protestations of innocence. The fact that the *Alford* procedure is not unconstitutional does not mean that counsel is morally free to press it on a client. A defense attorney can reasonably adopt the position that s/he should urge a client to follow the *Alford* procedure only if the client’s guilt is clear – that is, if counsel concludes that the client’s denials, however fervid, are face-saving or self-deluded – and if the tactical advantages of the plea are equally clear.

15.16.2. *Clients Who Are Unrealistic About the Chances of Winning at Trial*

Counsel will sometimes encounter a client who unrealistically believes that s/he will win at trial notwithstanding counsel’s best explanation of the reasons why conviction is a virtual certainty. The first step in convincing the client of the realities of the situation should be to review with the client all of the written statements that counsel or counsel’s investigator has taken from prosecution witnesses (see § 9.13 *supra*) and all of the other prosecution evidence known to counsel, in its most convincing form (graphic photos, highlighted lab reports, and so forth). If this fails to convince the client, then counsel should consider conducting a moot court version of the trial, including the defendant’s direct and cross-examination, to show the defendant the precise manner in which the evidence would emerge at trial. See §§ 6.14, 12.14 *supra*; 29.5.3-29.6 *infra*.

15.17. *Preparing the Client for the Entry of the Plea in Court*

If the client decides to plead guilty, counsel should give the client a detailed explanation of what to expect in court when the client enters the plea. This preparation has three functions. First, it helps to set the client at ease, so that s/he will make a better impression in court. Second, it helps to reduce the likelihood that the client will say something that precludes the judge from finding that all of the criteria for a “knowing, intelligent, and voluntary” plea have been satisfied. Finally, it guards against the client’s mentioning aggravating facts about the offense that need not be stated.

Section 14.1 *supra* describes the procedure that judges commonly follow when accepting a guilty plea. As that section explains, jurisdictions (and also individual judges within a jurisdiction) vary considerably with regard to the number and types of questions the judge asks the defendant and defense counsel. If counsel is not already familiar with the practices of the judge who will preside over the entry of a guilty plea, counsel should consult other defense lawyers who have experience with that judge’s guilty-plea practices.

Both in order to prepare the client for the judge’s questions and to ensure that the client fully understands the implications and consequences

of a guilty plea, counsel should discuss at least the following subjects with the client in considerable detail:

1. The nature of a criminal trial and the rights that a defendant has at trial, including the rights to representation by counsel, trial by jury (assuming the charged crime is eligible for a jury trial), cross-examination of the prosecution's witnesses, and presentation of defense witnesses.
2. The effect of a guilty plea in waiving all of these rights and also waiving appellate review of most (possibly all) pre-plea issues (see § 14.8 *supra*).
3. The potential sentencing consequences of conviction of the offense[s] to which the defendant is pleading guilty (see § 15.6.1 *supra*), including the extent to which the judge is (or, more likely, "is not") bound by any promises that the prosecutor has made to support (or not to object to) a particular sentence (see § 15.6.2 subdivision (2) *supra*).
4. Any potentially applicable rules relating to probation and parole (see § 15.6.1 subdivision (C) and (D) *supra*; § 48.6 subdivision (E) *infra*).
5. Collateral consequences that might flow from the conviction (see § 15.6.1 subdivisions (E)-(I) *supra*), particularly any potential immigration consequences if the defendant is not a citizen (see § 15.6.1 subdivision (E)).

It is usually advisable for counsel not only to explain these subjects but also to ask the precise questions that are commonly put to a defendant by the judge who will be presiding over the plea. Counsel should carefully explain any terms and concepts that are likely to be unfamiliar to the client.

Unless an *Alford* plea is contemplated, counsel also will need to prepare the client for his or her or her admission of guilt of the crime to which s/he is pleading guilty. (Judges vary substantially in the language that they use in asking the client to admit or deny guilt. Here again, it is extremely useful to learn the formulation used by the specific judge who will be presiding over the entry of the plea, so that the client can be prepped with the right code words.) Counsel should keep in mind that there are some clients who will admit guilt to their lawyers and will agree to a plea of guilty when speaking with their lawyers but who never really accept the notion of their guilt as anything but a highly private affair – a secret between themselves and counsel – not for public announcement. Thus when the judge questions them about their version of the offense, they deny guilt. This, of course, will prove embarrassing to all concerned, and it may cause the judge to refuse to take the guilty plea. Avoidance of the situation is possible if counsel advises the client before the plea hearing that a public admission of guilt in court will be required.

If the client was released on his or her own recognizance or on bail pending trial, and if there is any risk that the judge will modify the prior order and set a new, higher bail pending sentencing after a guilty plea, it is essential that counsel alert the client to this risk and provide counsel's best estimate of its likelihood and the likely amount of the increased bail. The client will need advance warning in order to try to obtain the money or security needed to meet the new bail requirement or, if that is not feasible, to make whatever arrangements are needed regarding his or her family, employers, and other personal responsibilities while s/he is detained pending sentencing. To the extent necessary, counsel should assist the client in arranging and posting the new bail. See §§ 4.7-4.11 *supra*.

Chapter 16

Representing Clients Who Are Mentally Ill or Intellectually Disabled

A. Introduction and Overview

16.1. *Stages at Which a Defendant's Mental Problems May Be Relevant*

As explained in § 1.3 *supra*, a defense attorney's obligation to "maintain an effective and regular relationship with all clients" is not in any way "diminish[ed]" when a "client appears to have a mental impairment or other disability that could adversely affect the representation" (AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Standard 4-3.1(c) (4th ed. 2015)). *See also* ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.14(a) (2015) ("When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."). As long as the client is competent, s/he must be allowed to make those fundamental decisions that are reserved for the accused in a criminal case. *See* § 1.3 *supra*. *See, e.g., Cooke v. State*, 977 A.2d 803, 809, 843 (Del. 2009) ("Here, defense counsel pursued a 'guilty but mentally ill' verdict over Cooke's vociferous and repeated protestations that he was completely innocent and not mentally ill. This strategy deprived Cooke of his constitutional right to make the fundamental decisions regarding his case."; "We conclude that defense counsel's strategy infringed upon the defendant's personal and fundamental constitutional rights to plead not guilty, to testify in his own defense, and to have the contested issue of guilt beyond a reasonable doubt decided by an impartial jury.").

There are, however, some clients who are not competent to make decisions affecting their own welfare; and counsel may need to take special measures in these cases. If counsel reasonably believes that mental illness or an intellectual disability has so severely "diminish[ed]" the client's "capacity to make adequately considered decisions in connection with the representation . . . [that] a normal client-lawyer relationship with the client" cannot be maintained, and if counsel furthermore "reasonably believes" that the client "is at risk of substantial physical, financial or other harm unless action is taken and [that the client] cannot adequately act in the client's own interest," then counsel may take "reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian." ABA MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.14(a), (b).

Even when a mentally ill or intellectually disabled client is competent for purposes of steering his or her own course, the client's limitations may present special difficulties for defense counsel. And whether or not a client's

impairments impact the attorney-client relationship, they may also give rise to claims and defenses that would not otherwise be available. The following subsections identify the stages of a case at which a client's mental illness or intellectual disability is likely to be relevant for one purpose or another.

16.1.1. *The Initial Interview and Subsequent Client Counseling*

If a client has mental problems, counsel will usually need to take special pains and precautions in evaluating the client's perceptions, recollections, and interpretations of pertinent facts; in eliciting information when interviewing the client; in preparing the client to testify or to participate in other court proceedings (including interviews with court personnel); and in explaining and talking through with the client all of the matters that bear on decisions which the client must make (such as whether to plead guilty or contest guilt) and decisions which the client and counsel collaborate in making (such as whether certain witnesses should be called to testify). Mental illness and mental limitations potentially affect every aspect of the client's comprehension and behavior, often in subtle and nonobvious ways, and so potentially affect every aspect of the client's interaction with counsel.

In the initial interview and subsequent meetings with a mentally ill or intellectually disabled client, counsel should be constantly attentive to the areas and dimensions of the client's impairment. See § 6.3 *supra*. Counsel should make file notes of whatever limitations or dysfunctions s/he observes on the client's part. If counsel decides at some point to apply for court funds for retention of a psychiatrist or psychologist (see § 16.3 *infra*), counsel's previous observations will be an important source of the facts necessary to support the application.

If counsel feels that s/he is unable to interact effectively with the client, counsel should consider retaining a mental health professional to assist in understanding and communicating with the client as well as for other purposes in the case. See § 16.2 *infra*.

A defendant's incompetence to participate understandingly is a bar to any court proceeding. So, in theory, counsel may raise the issue of the defendant's competence as early as preliminary arraignment, by a motion to postpone proceedings pending a mental examination. However, the risks involved in projecting mental-health issues into a case (see § 16.3 *infra*) before counsel's investigation and research have progressed sufficiently to support an evaluation of those risks and possible countervailing benefits will ordinarily make such a motion unwise, particularly inasmuch as the client's role in preliminary-arraignment and preliminary-examination proceedings is relatively limited. Only if (1) the client is floridly psychotic and visibly unable to play those roles, or (2) state law requires special pleas based on mental impairment to be raised at preliminary arraignment or permanently forfeited (see § 11.7.1 *supra*), would an objection to proceeding in these early stages be strategically sound.

16.1.2. *Considering the Possibility of a Mental Examination Prior to Arraignment*

If a client appears to be mentally ill or intellectually disabled, counsel should give some thought, very early in the case, to the possibility of having the client undergo a mental evaluation. Such an evaluation should obviously be considered if the client is demonstrating symptoms of mental disorder so severe as to impede counsel's ability to communicate with the client or if a history of mental illness plainly flags the probable availability of the defenses of lack of criminal responsibility or (when recognized) diminished capacity. But it is also a good idea to seek the aid of a mental health professional in any serious case in which the nature of the crime or the history or behavior of the defendant suggests that s/he is having significant trouble in getting along in his or her present mental or emotional condition. If the client has been having trouble functioning normally, counsel wants to know about it early, for several reasons. It may signal a condition that is serious enough to affect the client's capacity to stand trial. See §§ 16.7-16.10 *infra*. It may affect the reliance that counsel should place on the client's judgment or perceptions. It may be a factor counsel can cite in plea negotiations with the prosecutor to advocate for diversion or a favorable plea offer. See § 16.1.6 *infra*. It may suggest the possibility of a psychiatric defense on the issues of guilt or degree of the offense charged (see §§ 16.1.1-16.1.3 *infra*) or the possibility of developing mental health material useful to the client at the sentencing stage (see § 16.1.8 *infra*).

As explained in § 16.3 *infra*, one of the ways to have the client examined is to invoke the provisions of law authorizing a defendant's pretrial commitment to a state mental facility for evaluation or the appointment of mental health experts to examine the defendant on behalf of the court. Some jurisdictions provide for a court-ordered pretrial mental examination at any time following bind-over; in others, a motion for an examination can be made as soon as the charging paper has been filed in the trial court. See § 12.2.2 subdivision (1) *supra*. However, a court-ordered examination entails significant risks. These are discussed in § 16.3 *infra*, together with other possible, less risky ways to obtain a mental evaluation.

16.1.3. *Defense Investigation*

In any case in which a client appears to be mentally ill or intellectually disabled, counsel should begin immediately to gather any institutional or agency records concerning the mental health of the defendant. These include hospital records generated by emergency or out-patient treatment or by periods of hospitalization; records compiled by private psychiatrists or psychologists or community mental health centers where the defendant was evaluated and/or had therapy; psychiatric or psychological reports contained in a court file or in probation or corrections or parole files if the client was charged in any prior criminal or juvenile delinquency cases; and school records (particularly special education records). In order to obtain these records, counsel will need release forms signed by the client, authorizing counsel or counsel's investigator to inspect and copy each of these kinds of confidential records.

16.1.4. Arraignment

In some jurisdictions, a plea of incompetency to be tried or (less frequently) a plea of not guilty by reason of insanity must be entered by the accused at arraignment. See § 14.6 subdivisions (E) and (F) *supra*. In a number of jurisdictions, defense counsel must file a notice at (or within a specified number of days after) arraignment of an intention to present a defense of insanity or other psychiatric defenses. See § 14.6 subdivision (G) *supra*.

16.1.5. Pretrial Motions and Other Pretrial Pleadings

There are a number of pretrial motions and other pleadings that may be required by a client's mental problems.

Counsel may want to file a motion with the court seeking court funds for retention of a defense expert. See § 16.3 *infra*.

Depending upon the results of the examination and the facts of the case, the client's mental problems may provide a basis for:

(a) A suppression motion challenging a confession or other incriminating statement (i) on the due process ground that it was not ““the product of a rational intellect and a free will”” (*Mincey v. Arizona*, 437 U.S. 437 U.S. 385, 398 (1978); see §§ 26.4.2-26.4.3 *infra*) or (ii) on cognate state-law grounds (see § 26.12 *infra*), or (iii) on the ground that the defendant's capacity to make a “knowing and intelligent” waiver of *Miranda* rights was critically impaired (see § 26.8.2 subdivisions (2), (3) *infra*); or (iv) on the ground that the defendant's waiver of *Miranda* rights was involuntary because interrogators overbore his or her limited powers of resistance (see § 26.8.1 *infra*).

(b) A suppression motion challenging the seizure of tangible evidence through a purportedly consensual search, on the ground that the defendant's mental problems were exploited in obtaining the consent (see § 25.18.1 *infra*).

(c) An objection to proceeding to trial, on the ground of the defendant's incompetence to be tried (see § 14.6 subdivision (F) *supra*; §§ 16.7-16.10 *infra*).

(d) A plea of not guilty by reason of insanity (or an equivalent notice, see § 14.6 subdivisions (E) and (G) *supra*) or (in jurisdictions that recognize some form of diminished-capacity defense) a plea or notice raising that defense (see § 14.6 subdivision (G) *supra*; §§ 16.11-16.12, 39.25 *infra*).

Also, in some jurisdictions a statute or court rule provides a basis for moving for dismissal or diversion in the “interests of justice” (or some linguistic equivalent (see § 21.1 *infra*), which counsel may invoke in a case in which a mentally ill or intellectually disabled defendant is receiving services through the mental health system or from a private mental health professional.

16.1.6. *Plea Negotiations with the Prosecutor*

Depending on the seriousness of the charge and the nature of the client's mental problem, counsel may be able to persuade the prosecutor that the case should be treated therapeutically rather than criminally. For example, a prosecutor may be willing to agree to a diversion arrangement (particularly when the offenses charged do not suggest that the defendant will be a danger to others) which enrolls the defendant in a facility or program that will provide appropriate supervision and/or treatment. See §§ 2.3.6, 3.19, 8.2.2-8.2.4, 8.4 *supra*. Even if the prosecutor is intent upon a conviction, s/he may be willing to agree to a bargained disposition involving no jail time or prison time, if s/he is persuaded that a term of probation conditioned upon mental health services will address the defendant's needs and make it unlikely that the defendant will be arrested for other offenses in the future.

16.1.7. *Trial*

The insanity defense is available as a defense at trial in most jurisdictions. See §§ 16.11-16.13 *infra*. Some jurisdictions recognize a defense of "diminished capacity," which permits the defendant to use evidence of impaired mental capacity to show that s/he was incapable of forming the requisite *mens rea* for the charged offense(s). See § 39.25 *infra*. In a smaller number of jurisdictions, expert testimony is admissible to show that the defendant's psychological proclivities make it unlikely that s/he would commit a crime of the kind charged. See *id.*

16.1.8. *Sentencing*

Counsel can sometimes use the defendant's mental problems as a mitigating factor at sentencing. It is especially persuasive to be able to show that the defendant has been successfully attending a community-based program arranged by counsel to deal with the mental problems. A client who begins some form of therapy program early in the case has the advantage of appearing before the sentencing judge in the posture of a person on the road to voluntary reform and rehabilitation. See §§ 7.2.4, 12.18 *supra*. An opinion from a mental health professional working with the client that the client is not dangerous in society or that imprisonment would interrupt a productive course of outpatient therapy will probably be very important to the judge and may make the difference between a prison sentence and probation. Even if incarceration is indicated, the judge may be persuaded that a short county jail sentence, which will allow early resumption of the client's therapy program, is preferable to a prison term.

B. Retention of a Defense Psychiatrist or Psychologist

16.2. *Reasons for Retaining a Mental Health Expert: The Many Functions a Defense Expert Can Perform in a Criminal Case*

16.2.1. *Using a Mental Health Expert as a Witness at a Pretrial Hearing or Trial*

In any case in which counsel presents a mental defense at trial (see §§ 16.11-16.12, 39.25 *infra*), counsel will probably need to call a mental health professional to testify as an expert witness. Counsel also may need to call a mental health expert as a witness at a suppression hearing in which the client's mental problem bears upon a ground for suppressing a statement or tangible evidence (see § 16.1.5 *supra*).

In most cases in which a mental health expert serves as a testifying witness, s/he will be crucial in ways that go beyond presenting factual information based on his or her examination of the defendant and explaining its medical and psychological significance in light of his or her specialized knowledge of a scientific field. S/he can make the defendant's mental life accessible to the fact-finder (whether that is a judge at a suppression hearing, a jury at trial, or a judge at a bench trial), organizing and presenting the defendant's perceptions and actions as a comprehensible and coherent story and "pedigreeing" that story by showing that it has an extensive scientific foundation and wasn't made up to order. S/he can provide concepts and contexts to frame information – ways of thinking about mental disorders, their manifestations, their predisposing and precipitating factors, and their prognosis. Where predictions are needed (for example, regarding the defendant's likely response to treatment), s/he can make them; but s/he can also provide the basis for predictions without speaking to them explicitly (*e.g.*, by testifying about the availability of treatment sources and inspiring confidence in them). She can present information obtained from third parties that would otherwise be inadmissible hearsay – and information from records that lack sufficient authentication for admission as independent exhibits – by testifying that s/he relied on these sources of information in forming his or her opinion, and then relating the information in detail. See § 33.13 *infra*.

16.2.2. *Potential Functions of a Mental Health Expert Other Than Testifying at a Pretrial Hearing or Trial*

Beyond the functions that a mental health professional can perform as an expert witness, s/he can assist the defense in a wide range of ways to prepare a criminal case for trial or sentencing.

One such function has already been mentioned: If counsel is experiencing difficulties in communicating with the client, a mental health professional can serve as a facilitator. See § 16.1.1 *supra*. A mental health professional can help counsel understand what the client is saying, thinking, and feeling. S/he can help counsel to understand the client's sensitivities, resistances, and motivations. If there are matters the client finds it difficult to hear or con-

sider, a mental health professional will usually be better able than counsel to talk with the client about these matters. For example, in what is likely to be a flashpoint for some clients in cases involving mental defenses, a mental health professional can help the client get a fix on what terms like “mental defenses” and “being mentally ill” do and don’t imply, and to accept the implications of using a defense of this sort to seek a favorable outcome in the case. If there are subjects that the client is blocked against discussing – or simply too embarrassed to discuss – with counsel, a mental health professional is trained and experienced in cutting through precisely those barriers. Sometimes it is only with the professional’s assistance that – even after the client has been gotten to open up to counsel about closeted thoughts, feelings, experiences and events – the client can be persuaded to testify about these intensely disturbing matters in open court.

During the pretrial investigation of the case, a mental health expert can help counsel to identify what records might be available to document the client’s history of mental problems (e.g., hospital records, school records, other institutional records, see § 16.1.3 *supra*) and how to find them. Once those records have been obtained, the expert can help counsel to understand the records: – the abbreviations and partial illegibilities; what recorded observations and events mean; how commonplace or rare those observations and events are; the implications of those observations and events; the implications of material in the records as potential evidence or potential investigative leads; the presence of potential analytic pitfalls in relying on those implications; and – often most important – what the *absence* of particular events or information from the records may signify. (See Sir Arthur Conan Doyle, *Silver Blaze*, in 1 SHERLOCK HOLMES, THE COMPLETE NOVELS AND STORIES 455, 472 (Bantam Classic edition 1986):

- [The inspector]: “Is there any point to which you would wish to draw my attention?”
- [Sherlock Holmes]: “To the curious incident of the dog in the night-time.”
- [The inspector]: “The dog did nothing in the night-time.”
- [Sherlock Holmes]: “That was the curious incident. . . .”

As counsel develops a theory of the case (see § 7.2 *supra*) and considers possible story lines to present in a pretrial suppression hearing or a trial or at sentencing (see § 7.3 *supra*), an expert can help to identify narratives that explain and connect events. S/he can provide a sounding board for trying out the plausibility of logical inferences and gauging whether a story line is plausible, given the information already known, the information that the expert predicts can be gathered, the realities of life for individuals with a mental condition like the client’s, and the practices and practical constraints of the mental health system. S/he can also provide a different angle of vision – a different interpretive perspective – on people, events, and other aspects of the case.

Even if the expert is not going to testify, s/he can help counsel to prepare a case for a suppression hearing or trial. S/he can recommend, identify, and enlist other professionals, including other potential testifying experts.

S/he can help counsel anticipate and prepare to answer the prosecution's case by predicting what experts (or what kinds of experts) the prosecutor might recruit and what they are likely to say on the witness stand. S/he can educate counsel about possible lines of attack on prosecution experts and their credentials, theories, analyses, and conclusions (including writings by the prosecution experts, and authoritative texts with which the experts or their writings might be impeached). At the hearing or trial, the expert can observe the testimony of prosecution experts and advise counsel on what subjects to cover in cross-examination and how to handle them. See §§ 30.2, 37.14 *infra*.

If the case is a high-profile one that is being covered by the media, the expert can help counsel to present or defend the case in any media forum that is expected or desired. If the media are not yet paying attention to the case and if counsel wishes them to, the expert can help counsel strategize about how to accomplish that goal. If, as is usually the case, counsel would like to deflect or defuse media attention, the expert can help counsel figure out how best to do so.

The expert can assist counsel's plea bargaining efforts by providing information about the client or available programs that counsel can cite when trying to persuade the prosecutor to divert the case or to agree to a favorable plea and sentence. See § 16.1.6. If the prosecutor seems open to these options but wants more reassurance, counsel might arrange for the expert to meet with the prosecutor. See §§ 2.3.6, 3.19, 8.2.2-8.2.4, 8.4 *supra*.

Finally, the expert can help counsel to prepare for sentencing by identifying appropriate community-based therapeutic programs for the client and perhaps arranging for the client's admission to a particular program. At capital sentencing hearings, expert testimony by mental health professionals has become commonplace. They can often play an equally crucial role in non-capital sentencing proceedings by (a) presenting expert testimony if evidentiary sentencing hearings are held upon convictions of charges like the client's in counsel's jurisdiction; or (b) preparing a written report and sentencing recommendation for counsel's submission to the court (or a probation officer, see § 48.1 *infra*) and perhaps also by appearing at sentencing to answer any questions the judge may have, in cases where sentencing proceedings are non-evidentiary.

16.3. *Retaining a Mental Health Expert*

Ordinarily, counsel should begin the task of finding a psychiatrist or psychologist as soon as counsel detects any indications that the client has significant mental problems. As explained in §§ 16.1.2-16.1.3 and 16.2.2, the expert may be able to play an invaluable role at even the earliest stages of the case. Also, psychiatrists and psychologists often have such crowded schedules that appointments for evaluations must be scheduled several weeks in advance.

Counsel cannot arrange a mental health evaluation without the client's agreement. Unless the client is obviously incompetent, s/he should have the final say on whether s/he will be subjected to an evaluation. See §§ 1.3, 16.1 *supra*. Counsel can attempt to be persuasive, however, and may be

most effective if s/he can get the client to understand that psychiatrists work with “sane” people and not just with people who have “mental illnesses”; that psychiatrists are very useful in helping “well” people with adjustment problems; and that many people who are not at all “sick” see psychiatrists.

There are essentially four ways of obtaining a mental evaluation of the defendant: (i) retaining a private psychiatrist or psychologist at his or her regular rate of compensation (which is usually billed on an hourly basis); (ii) arranging for a private examination on an informal basis, either *pro bono* or for a sliding-scale fee adjusted to the income of the defendant and/or any family members who are willing to provide financial assistance; (iii) requesting that the court appoint a state-paid psychiatrist or psychologist for the defense; and (iv) invoking statutory provisions that authorize or trigger a defendant’s examination by a state psychiatrist or psychologist or other purportedly “neutral” expert, on either an in-patient or out-patient basis. Since the cost of a private examination at the usual rates charged by a psychiatrist or psychologist is prohibitive for most clients and their families, counsel usually will need to consider one of the other alternatives.

The major problem with requesting a court-ordered mental examination by a state-employed or “neutral” expert is that the resulting report will be provided not only to defense counsel but also to the judge and the prosecutor. If the report contains unfavorable facts about the defendant’s mental condition or background, it may provide the prosecutor with bases for (i) seeking rescission of bail on the ground of the defendant’s supposed dangerousness (see §§ 4.3.1, 4.15.2 *supra*), or an increase of the amount of bail to a prohibitive figure by a judge who prefers not to have a mentally questionable defendant running free until trial; (ii) refuting the defense position on mental issues raised at a suppression hearing or at trial, and/or (iii) arguing for a harsher sentence than the defendant might otherwise have received. See § 16.5 *infra*. In addition, in some jurisdictions and depending upon subsequent developments in the case, the court may rule that the defendant’s statements about the offense, made during the defense-requested examination and recounted in the report, can be used by the prosecution as evidence of guilt at trial (see §§ 16.6.1, 18.12 *infra*) or can be used to impeach the defendant’s inconsistent trial testimony (see §§ 18.12, 39.13.1 *infra*).

A request for court funds to hire a defense expert may also be problematic, although less so. First of all, unless the judge permits counsel to make the request on an *ex parte* basis (see § 5.4 *supra*), the very act of seeking court funds for a mental health expert will tip off the prosecution to the fact that the defendant has mental problems and may lead to the prosecutor’s seeking a court-ordered examination, directing its own investigative efforts into troubling aspects of the defendant’s background, opposing pretrial release or a community-based disposition because s/he does not want “a possible nut wandering around loose” or doing all of these things. Even when applications for state-paid expert assistance are received *ex parte*, it is difficult to keep the prosecutor from learning that the defendant is being attended by a mental-health expert: the expert’s visits to a jailed defendant will be logged at the detention facility; discussions among counsel and the

court about scheduling are likely to reveal that court dates are being set in ways that accommodate the client's evaluation by a mental health expert; the local low-cost forensic-science community may well be small, close-knit, and loose-lipped. In addition, in some jurisdictions judges will not grant a defense motion for court funds until after a court-ordered examination has shown that the defendant does indeed have mental problems warranting the appointment or retainer of a defense expert. In such jurisdictions the request for the defense expert will activate an order for a mental examination by a state-employed or "neutral" expert, with all of the problems described in the preceding paragraph.

Thus, if retaining a mental health professional at his or her ordinary rates is beyond the client's means, counsel will want to investigate the resources available in the community for nonofficial, cost-free or *pro bono* examination. These include: hospital clinics (which often offer individual or group therapy as well as evaluation at nominal or no cost); hospitals with psychiatric residencies; community mental health centers; the county medical society; social welfare agencies; the psychiatry and psychology departments of private universities and of the local branch of the State University; and private psychiatrists and psychologists who have been involved in the past with the criminal justice system or who might welcome the chance to render service or obtain experience in a criminal case. ACLU chapters often have substantial numbers of mental-health professionals among their members; the chapter chairperson may be able to provide useful referrals or leads.

If counsel is unable to arrange for the informal examination of an indigent client by a private psychiatrist or psychologist, then counsel will have to apply for state funds to hire a defense expert. Counsel should move the court *ex parte* for funds "to retain [or for court appointment of] a psychiatrist [or psychologist] as a defense consultant to examine the defendant and advise counsel regarding the defendant's mental state for purposes of assisting counsel to prepare the defense" (see §§ 5.1.2-5.4 *supra*). This form of retainer or appointment will assure that information revealed by the client to the expert and information conveyed between counsel and the expert is shielded by attorney-client privilege. *See, e.g., People v. Lines*, 13 Cal. 3d 500, 507-16, 531 P.2d 793, 797-804, 119 Cal. Rptr. 225, 229-36 (1975); *United States v. Alvarez*, 519 F.2d 1036, 1045-47 (3d Cir. 1975); *Neuman v. State*, 773 S.E.2d 716, 719-23 (Ga. 2015). *See also Elijah W. v. Superior Court*, 216 Cal. App. 4th 140, 146, 150-60, 156 Cal. Rptr. 3d 592, 595, 599-606 (2013). If the motion is denied, counsel should file whatever objections may be necessary to preserve a claim of error, including state and federal constitutional error (see §§ 17.6, 17.11 *infra*), in its denial; and counsel may want to pursue available avenues of pretrial appellate review (see Chapter 31 *infra*).

If all of the previously described methods for obtaining a defense mental health expert have failed, then counsel must weigh the potential benefits of a court-ordered examination against all of the risks that this process entails. If the benefits clearly outweigh the risks, counsel should request the court-ordered examination, stating on the record that (1) s/he is making this request only because the court has denied the defendant's application for

state funds for a defense expert, and (2) the defendant is preserving his or her objections to that denial notwithstanding counsel's subsequent motion for a court-ordered examination.

16.4. *Selecting a Mental Health Expert: Choosing Between Psychiatrists and Psychologists; Choosing Among Specialties*

This section sets forth some very rough generalizations about the suitability of various types of mental health experts for criminal cases. In selecting an expert for a particular case, counsel is well advised to consult other defense lawyers who have retained a mental health expert in a similar type of case. If other lawyers are unable to make a recommendation, counsel should ask a faculty member of a university psychiatry or psychology department or a reputable local psychiatrist or psychologist to list experts with the specialized qualifications necessary to handle the case effectively.

In a case in which counsel raises an incompetency claim (see §§ 16.7-16.10 *infra*) or an insanity defense (see §§ 16.11-16.13 *infra*), it is usually advisable to retain a psychiatrist.

In a case involving an intellectually disabled client, counsel should almost invariably retain a psychologist. An assessment of the defendant's comprehension and functioning levels will necessitate the I.Q. tests that psychologists administer. For this same reason, in any case in which counsel intends to challenge the defendant's comprehension of *Miranda* rights, counsel should usually retain a psychologist, preferably one with some expertise in the specialized area of comprehension of *Miranda* rights.

If counsel's primary goal is to obtain a report about the client's mental problems for use at sentencing or perhaps in negotiating with the prosecutor, counsel should usually turn to a psychologist, preferably one who has familiarity with treatment programs that might be appropriate for an individual with the client's type of mental problem. As a general rule, psychologists tend to go deeper into an individual's family history, social background, and emotional problems than many psychiatrists. There are two exceptions to this general rule, however. Counsel will need to retain a psychiatrist in any case in which the client is presently taking or appears to require psychotropic medication: Psychiatrists have the medical training necessary to calculate and prescribe psychotropic drugs. A psychiatrist also should be retained in cases in which counsel's sentencing proposal will recommend admission to a residential mental health facility: Most facilities of this sort will be more swayed by a psychiatrist's recommendation than a psychologist's.

In some cases counsel will need to obtain a neurological evaluation of the defendant, which can be conducted by either a neurologist or a psychiatrist with a speciality in neurology. (There are also some psychologists specializing in neurological matters who have the requisite qualifications but these are not common, and counsel should have a recommendation for the particular psychologist from a trusted source before choosing this alternative.)

A neurological evaluation is necessary to ascertain whether a client's disturbed behavior is due to brain damage caused by prenatal problems, birth trauma, or childhood head injuries. Such an explanation of the client's behavior, especially when coupled with an assessment that the malady is treatable through medication (as it often is), can be highly persuasive in a sentencing argument.

In cases involving sex offenses, counsel should seek out an expert in assessment and treatment of sex offenders. Frequently, behavioral psychologists are especially skilled in developing modes of treatment for sex offenders.

C. Mental Health Examinations

16.5. *Opposing a Court-Ordered Mental Health Examination*

In some jurisdictions, the defense's raising of a claim that the defendant is incompetent to plead or to be tried – which, depending on the jurisdiction, may be raised by a special plea at arraignment or by a prearraignment motion (see §§ 12.15, 14.5 subdivision (F) *supra*) – automatically triggers a court order for a psychiatric examination. Such orders often are for an in-patient examination at a state mental institution or specialized facility. The commitment period generally ranges from 30 to 90 days, although theoretically required by the federal Constitution to be “strictly limited” to a duration reasonably necessary for evaluating the defendant's competency (*cf. McNeil v. Director*, 407 U.S. 245, 250 (1972)). Usually, the court also has the option of ordering an out-patient examination by one or more psychiatric experts appointed by the court. At the conclusion of the examination, the mental health professional who examined the defendant sends a report to the judge, and a copy is provided to defense counsel and the prosecutor.

As explained in § 16.3 *supra*, it will usually be in the defendant's interest to oppose a court-ordered mental examination because the prosecutor will receive a copy of the report and will be able to use any unfavorable information in it to argue for the client's detention pending trial, to refute at pretrial suppression hearings or at trial any defense contentions based on the defendant's mental problems, and to urge a harsher sentence. As that section also explains, there is an additional risk in some jurisdictions that any statements the defendant makes to the evaluator about the offense can be used by the prosecution at trial as evidence of guilt or to impeach the defendant if s/he testifies. See § 16.6 *infra*. Therefore, defense counsel will usually want to oppose a court-ordered mental examination and, if counsel needs an evaluation of the client, to seek it through the alternative methods discussed in § 16.3.

Statutes and rules authorizing mental health examinations usually are silent concerning the criteria that the judge should consider in assessing the appropriateness of a court-ordered examination. The statutes commonly confer upon the judge the discretion to order an examination whenever s/he deems it appropriate. In default of any statutory standards that can be invoked, counsel will have to rely on commonsense arguments to persuade the judge that there simply is no need for a court-ordered examination. If counsel is able to arrange an examination through some other means (see

§ 16.3 *supra*), s/he can argue to the court that this is a better way of proceeding. If counsel is able to arrange a private mental health evaluation, she can point out that this will save the state the expense of a period of commitment and a state-conducted evaluation. In cases of this sort as well as those in which counsel seeks state funds to retain a defense mental health expert to evaluate the defendant, counsel can argue that providing for the defendant's evaluation by a defense consultant *before* any court-ordered commitment or examination would spare the State potentially needless costs and complications. In any case in which the court is inclined to have the defendant evaluated at all, it will be because there is some indication of significant mental disorder. And "when the defendant's mental condition is seriously in question," *Ake v. Oklahoma*, 470 U.S. 68, 82 (1985), requires the appointment of a *defense* mental-health expert for defendants who cannot afford to retain one. *Ake's* command cannot be satisfied through examination by a court-appointed neutral expert; what is required is that the defendant be afforded "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense" (*id.* at 83). See, e.g., *United States v. Sloan*, 776 F.2d 926 (10th Cir. 1985); *Powell v. Collins*, 332 F.3d 376, 392 (6th Cir. 2003) ("Today, we join with those circuits that have held that an indigent criminal defendant's constitutional right to psychiatric assistance in preparing an insanity defense is not satisfied by court appointment of a 'neutral' psychiatrist — *i.e.*, one whose report is available to both the defense and the prosecution."); *Moore v. State*, 390 Md. 343, 379-83, 889 A.2d 325, 346-48 (2005); *De Freece v. State*, 848 S.W.2d 150 (Tex. Crim App. 1993). Thus, the court's initiation of a court-ordered examination will almost certainly lead to the need for appointment of a defense expert as well. It would be more economical and orderly to have the defense expert examine the defendant initially, so that the whole process of a court-ordered examination can be avoided unless the defense decides to raise mental health issues in the first instance.

In the event that the judge orders a mental health examination over counsel's objections, counsel will ordinarily want to argue that the examination should be conducted on an out-patient basis and not in a state mental institution or other specialized facility. In a number of jurisdictions, the applicable statute or court rule or common-law rules permit the commitment of defendants to a state institution only upon medical affidavits making a *prima facie* showing of the defendant's incompetency, or when "there is reason to believe" that the defendant is incompetent. Counsel should scrutinize the affidavits or other evidence mounted in favor of the preliminary determination of incompetency, pointing out (a) any reasons for doubting unfavorable evidence (for example, when the affidavits contain multiple hearsay, as they often do), and (b) any evidence indicating that an out-patient examination would serve as well as a an institutional commitment. In jurisdictions whose statutes or court rules expressly state a presumption in favor of out-patient examinations, counsel should stress the legal effect of that presumption, arguing that the professed preliminary showing of incompetency is insufficient to rebut the presumption.

Even if the evidence makes out the requisite initial showing of incompetency, the judge usually possesses discretion not to commit the defendant for an in-patient examination. Counsel can argue that it would

be an inappropriate exercise of judicial discretion to commit a defendant involuntarily to a mental hospital if there are community mental health facilities available for the defendant's diagnosis on an out-patient basis. *Cf. State v. Page*, 11 Ohio Misc. 31, 228 N.E.2d 686 (C.P., Cuyahoga Cty. 1967).

In those cases in which the court announces its intention to order an in-patient examination, counsel can insist upon a hearing that satisfies the requirements of procedural due process. *Cf. Vitek v. Jones*, 445 U.S. 480, 491-94 (1980); *Jones v. United States*, 463 U.S. 354, 361-62 (1983) (dictum). This would appear to include both a full adversary hearing on whatever issues of fact are decisive of the propriety of a commitment order under state law (*Vitek v. Jones, supra*, 445 U.S. at 494-96) and a right to challenge the findings supporting such an order on the ground that there is "no basis" for them in fact (*see Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957)).

Judicial orders committing the defendant for an in-patient examination are commonly unappealable as interlocutory; but they may be challenged by prerogative writs such as prohibition or mandamus, as local appellate practice makes appropriate. See Chapter 31. The committing court should be requested to stay its commitment order pending review by the writs. If it refuses to do so, a stay should be sought from the appellate court in which the application for the writ is filed. When no other form of review of commitment orders is recognized by local practice, *habeas corpus* should be used (see §§ 3.8.4, 4.14 *supra*), and the *habeas* court should be asked to stay the defendant's commitment *pendente lite*.

16.6. Procedural Protections at a Mental Health Examination

16.6.1. Fifth Amendment Protections Against Self-Incrimination

In *Estelle v. Smith*, 451 U.S. 454 (1981), the Court held that the Fifth Amendment privilege against self-incrimination is applicable to a criminal defendant's "statements . . . uttered in the context of a psychiatric examination" (*id.* at 465). Specifically, *Smith* ruled that a defendant's Fifth Amendment rights were violated by the admission of opinion testimony of a psychiatrist called by the prosecution to prove the defendant's probable future dangerousness at the penalty stage of a state capital trial, when the psychiatrist's opinion was based upon his questioning of the defendant during a pretrial competency examination ordered *sua sponte* by the trial court, without notice to the defendant or an effective waiver of the privilege. *See Penry v. Johnson*, 532 U.S. 782, 793-94 (2001) (describing the ruling in *Smith*).

Although the *Smith* case involved a capital sentencing hearing, the rule it established is fully applicable to noncapital cases. *See, e.g., United States v. Chitty*, 760 F.2d 425, 430-32 (2d Cir. 1985). Moreover, the rule is not limited to evidence used at sentencing; it also applies to prosecution evidence offered on the issue of guilt. *See Estelle v. Smith, supra*, 451 U.S. at 462-63 (the Court observes that it could "discern no basis to distinguish between the guilt and penalty phases of [a] . . . capital murder trial so far as the protection of the Fifth Amendment privilege is concerned"). *See, e.g., People v. Pokovich*, 39 Cal. 4th

1240, 1246, 1253, 141 P.3d 267, 271, 276, 48 Cal. Rptr. 158, 163, 169 (2006).

Smith therefore supports the defendant's right to claim the Fifth Amendment and refuse to talk to a psychiatrist in any court-ordered mental examination unless the order for the examination explicitly provides that nothing disclosed by the defendant during the examination and no results of the examination may subsequently be used against the defendant for any purpose except to determine competency to stand trial (see *Estelle v. Smith, supra*, 451 U.S. at 468), and that the same restriction applies to "any evidence derived directly and indirectly" from the defendant's disclosures and examination results (see *Kastigar v. United States*, 406 U.S. 441, 453 (1972)). Counsel should either insist upon the inclusion of such a provision in the judicial order for an examination or advise the defendant not to say a word to the examiner under any circumstances, whichever seems more appropriate to the needs of the particular situation.

A more difficult question is whether the defendant is entitled to such a restrictive order if the defense acquiesces in or affirmatively seeks the mental examination. For, although defense counsel will almost always oppose the ordering of such an examination (see § 16.5 *supra*), s/he may find it necessary to accept or even to request an examination in situations in which the court has denied a motion for appointment of a defense mental health expert (see § 16.3 *supra*). The defendant in *Estelle v. Smith* had "neither initiate[d] a psychiatric evaluation nor attempt[ed] to introduce any psychiatric evidence" (451 U.S. at 468), and *Smith* was distinguished on this ground in *Buchanan v. Kentucky*, 483 U.S. 402 (1987), in which the Supreme Court held that when a defendant had both "joined in a motion for [a pretrial psychiatric] . . . examination" (*id.* at 423) and presented an expert witness at trial "to establish . . . a mental-status defense" (*id.* at 404), the prosecutor could constitutionally use the results of the examination to impeach this witness. See also *Penry v. Johnson, supra*, 532 U.S. at 795 (discussing *Buchanan*); *Kansas v. Cheever*, 134 S. Ct. 596, 600-02 (2014) (discussing *Estelle v. Smith* and *Buchanan*). *Buchanan* poses the thorny problems: (a) whether *Smith*'s prohibition of prosecutorial use of pretrial psychiatric examination results continues to govern cases in which the examination was unopposed or sought by the defendant or was ordered in response to the defendant's raising of a claim of incompetency or some other psychiatric issue before trial *but the defendant presents no evidence in support of any psychiatric issue at the trial or sentencing*, and (b) whether the exception to the *Smith* prohibition recognized by *Buchanan* is limited to the use of pretrial examination results *to rebut expert psychiatric evidence presented by the defendant at a trial or sentencing*, or whether the defendant's raising of a psychiatric issue at the trial or sentencing opens the door to the prosecutor's use of the results generally.

Regarding problem (a), the argument appears substantial that, unless and until the defendant actually presents evidence in support of a psychiatric plea or defense, *Smith* prohibits the prosecutor's incriminating use of any information produced by a pretrial psychiatric examination of the defendant, even one requested or invited by the defense. This is so because the logic of *Smith* was not that *Smith*'s Fifth Amendment rights were violated by the competency examination conducted in that case – to the contrary, the Supreme Court acknowledged that the competency examination had been "validly ordered"

by the trial judge *sua sponte* (*Estelle v. Smith, supra*, 451 U.S. at 468) – but rather that the Fifth Amendment came into play “[w]hen [the psychiatrist] . . . went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of . . . future dangerousness, [so that] his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting” (*id.* at 467; *see id.* at 465). *See also Allen v. Illinois*, 478 U.S. 364 (1986), upholding compulsory psychiatric examination of an individual subject to civil commitment proceedings so long as that individual “is protected from use of his [or her] compelled answers in any subsequent criminal case in which [s/]he is the defendant” (*id.* at 368). Under this logic it should make no difference that the defendant originally moves for the examination or triggers it by a pretrial plea of incompetency unless such a motion or plea can properly be treated as a waiver of the Fifth Amendment privilege. But it cannot. Under *Pate v. Robinson*, 383 U.S. 375 (1966), and *Drope v. Missouri*, 420 U.S. 162 (1975), every person accused of a crime has a federal constitutional right to an adequate psychiatric evaluation and judicial determination of competency to stand trial; and it would impermissibly place the defendant “‘between the rock and the whirlpool’” (*Garrity v. New Jersey*, 385 U.S. 493, 498 (1967)) to treat the defendant’s invocation of this right as a waiver of the Fifth Amendment privilege. *See Simmons v. United States*, 390 U.S. 377, 389-94 (1968), reaffirmed in *United States v. Salvucci*, 448 U.S. 83, 89-90 (1980); *Brooks v. Tennessee*, 406 U.S. 605, 607-12 (1972); *Lefkowitz v. Cunningham*, 431 U.S. 801, 807-08 (1977); *cf. Jeffers v. United States*, 432 U.S. 137, 153 n.21 (1977) (plurality opinion); *United States v. Goodwin*, 457 U.S. 368, 372 (1982) (dictum); *Spaziano v. Florida*, 468 U.S. 447, 455 (1984) (dictum); and *compare United States v. Jackson*, 390 U.S. 570, 581-83 (1968), *with Middendorf v. Henry*, 425 U.S. 25, 47-48 (1976), and *Corbitt v. New Jersey*, 439 U.S. 212, 218-20 & n.8 (1978); *compare Jackson v. Denno*, 378 U.S. 368, 387-89 & nn.15, 16 (1964), *with Spencer v. Texas*, 385 U.S. 554, 565 (1967), and *Jenkins v. Anderson*, 447 U.S. 231, 236-37 (1980). To treat the defendant’s request for a psychiatric examination as a waiver of the privilege is the more impermissible because the very purpose of the examination is to obtain information that is necessary in order to assess the merits of potential psychiatric defenses and the defendant’s capability to participate in judgments relating to those defenses: A forced choice between forgoing such information and forgoing a constitutional right has none of the qualities of a valid waiver. *Compare Brooks v. Tennessee, supra*, 406 U.S. at 607-12, *with Town of Newton v. Rumery*, 480 U.S. 386 (1987). In discussing *Smith* and *Buchanan*, the Supreme Court has suggested that the justification for finding a waiver of the Fifth Amendment “‘[w]hen a defendant asserts the insanity defense and introduces supporting psychiatric testimony’” is that in this situation “‘his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he has interjected into the case’” (*Powell v. Texas*, 492 U.S. 680, 684 (1989) (per curiam), quoting *Estelle v. Smith, supra*, 451 U.S. at 465). *Accord, Kansas v. Cheever, supra*, 134 S. Ct. at 601 (“The rule of *Buchanan*, which we reaffirm today, is that where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit an offense, the prosecution may present psychiatric evidence in rebuttal. . . . Any other rule would undermine the adversarial process, allowing a defendant to provide the jury, through an

expert operating as proxy, with a one-sided and potentially inaccurate view of his mental state at the time of the alleged crime.”; “When a defendant presents evidence through a psychological expert who has examined him, the government likewise is permitted to use the only effective means of challenging that evidence: testimony from an expert who has also examined him.”). No similar justification exists for finding waiver when the defendant has merely sought a mental examination for the purpose of determining whether to interject psychiatric issues into the case and has then elected not to do so. Thus *Smith*’s ban upon the use of evidence obtained from a pretrial psychiatric examination of a defendant to prove guilt or enhance penalty should apply “whether the defendant or the prosecutor requested the examination and whether it was had for the purpose of determining competence to stand trial or sanity” (*Gibson v. Zahradnick*, 581 F.2d 75, 80 (4th Cir. 1978); *State v. Berget*, 826 N.W.2d 1, 28-37 (S.D. 2013); see *Battie v. Estelle*, 655 F.2d 692, 700-03 (5th Cir. 1981); and see *Collins v. Auger*, 577 F.2d 1107, 1109-10 (8th Cir. 1978)). It follows that orders for any of these sorts of examinations are required to contain a provision restricting the use of their products to the purposes for which the examination was ordered, and defense counsel should demand such a provision. See, e.g., *People v. Diaz*, 3 Misc.3d 686, 777 N.Y.S.2d 856 (N.Y. Sup. Ct., Kings Cty. 2004). An alternative form of protection, available under some circumstances, is a provision forbidding the examiners to question the defendant about matters relating to the crime, as distinguished from matters bearing on his or her mental condition at subsequent stages of the case (such as at the time of sentencing, when the defense intends to rely upon the defendant’s current mental state as a mitigating factor). See, e.g., *United States v. Johnson*, 383 F. Supp. 2d 1145, 1152 (N.D. Iowa 2005).

Regarding problem (b), it is noteworthy that *Buchanan* describes the “narrow” issue it decides as “whether the admission of findings from a psychiatric examination . . . proffered solely to rebut other psychological evidence presented by . . . [the defendant] violated his . . . [constitutional] rights” (*Buchanan v. Kentucky*, 483 U.S. at 404; see also *id.* at 424-25). It treats this issue as “one of the situations that we distinguished from the facts in *Smith*” (*id.* at 423). See also *Kansas v. Cheever*, *supra*, 134 S. Ct. at 600-01 (discussing *Buchanan*). The *Smith* opinion itself, in noting that the prosecution might be permitted to use evidence obtained by a pretrial psychiatric examination of the defendant in rebuttal, appeared to limit this possibility to cases in which the defense (i) presents expert psychiatric evidence and (ii) addresses the evidence to the specific issue on which the prosecution offers its rebuttal evidence. *Estelle v. Smith*, *supra*, 451 U.S. at 466 n.10; see also *id.* at 465-66; *Powell v. Texas*, *supra*, 492 U.S. at 683-84, 685 n.3; *Kansas v. Cheever*, *supra*, 134 S. Ct. at 603; *Gholson v. Estelle*, 675 F.2d 734, 741 & n.6 (5th Cir. 1982); *Battie v. Estelle*, *supra*, 655 F.2d at 701-02. There are pre-*Smith* cases allowing the prosecution greater latitude in rebuttal – for example, permitting the prosecution to use the defendant’s statements made during the psychiatric examination to impeach the defendant’s trial testimony, by analogy to *Harris v. New York*, 401 U.S. 222 (1971) (see § 26.19 *infra*). *People v. Brown*, 399 Mich. 350, 249 N.W.2d 693 (1976); *People v. White*, 401 Mich 482, 257 N.W.2d 912 (1977). But in the light of *Smith* these decisions are assailable under the settled principle that a defendant’s statements obtained in disregard of the Fifth

Amendment may not be used even to impeach the defendant's inconsistent testimony at trial (*Mincey v. Arizona*, 437 U.S. 385, 397-98 (1978); *New Jersey v. Portash*, 440 U.S. 450, 458-60 (1979); *United States v. Leonard*, 609 F.2d 1163 (5th Cir. 1980)). See, e.g., *People v. Pokovich*, *supra*, 39 Cal. 4th at 1253, 141 P.3d at 276, 48 Cal. Rptr. at 169 ("the Fifth Amendment's privilege against self-incrimination prohibits the prosecution from using at trial, for the purpose of impeachment, statements a defendant has made during a court-ordered mental competency examination"); *Gibbs v. Frank*, 387 F.3d 268 (3d Cir. 2004).

16.6.2. State Law Prohibitions Against Using Statements Made During a Mental Health Examination as Proof of Guilt at Trial

Apart from the Fifth Amendment protections enunciated in *Estelle v. Smith*, there are state statutes, court rules, and common-law decisions providing that statements made during a competency evaluation cannot be used to prove the accused's guilt at trial. See, e.g., *United States v. Alvarez*, 519 F.2d 1036 (3d Cir. 1975); *Lee v. County Court*, 27 N.Y.2d 432, 267 N.E.2d 452, 318 N.Y.S.2d 705 (1971). The scope of this prohibition varies from jurisdiction to jurisdiction and may depend, within any given jurisdiction, on: the nature of the examination (that is, whether it was ordered to determine the defendant's competence to stand trial or the defendant's sanity at the time of the offense); whether the examination was ordered on defense motion or on motion of the prosecution or by the court *sua sponte*; whether it was ordered before or after the defendant tendered a claim of incompetency or a plea raising some psychiatric defense, such as not guilty by reason of insanity; whether the defendant raises some such defense at trial; and whether, if s/he does, s/he calls defense mental health experts to support it. Compare the approaches taken in *People v. Spencer*, 60 Cal. 2d 64, 383 P.2d 134, 31 Cal. Rptr. 782 (1963); *In re Spencer*, 63 Cal. 2d 400, 406 P.2d 33, 46 Cal. Rptr. 753 (1965); *People v. Arcega*, 32 Cal. 3d 504, 651 P.2d 338, 186 Cal. Rptr. 94 (1982); *Parkin v. State*, 238 So. 2d 817, 820 (Fla. 1970); *People v. Stevens*, 386 Mich. 579, 194 N.W.2d 370 (1972); *State v. Whitlow*, 45 N.J. 3, 210 A.2d 763 (1965); *State ex rel. LaFollette v. Raskin*, 34 Wis. 2d 607, 150 N.W.2d 318 (1967).

D. Incompetency To Stand Trial

16.7. The Standard for Determining Competency

The criminal procedure statutes of virtually every State codify the common-law rule that a criminal defendant may not be tried for a crime while s/he is incompetent to stand trial. The prevailing test of incompetency in most jurisdictions is the relatively simple one whether the defendant (a) by reason of mental disease or disorder is (b) unable at the time of plea or trial to (i) understand the nature and purpose of the proceedings or (ii) consult and cooperate with counsel in preparing and presenting the defense. E.g., *Dusky v. United States*, 362 U.S. 402 (1960). This is probably the federal constitutional test as well. See *Indiana v. Edwards*, 554 U.S. 164, 170 (2008); *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996); *Pate v. Robinson*, 383 U.S. 375 (1966); *Drope v. Missouri*, 420 U.S. 162, 171-72 (1975); see also,

e.g., *In the Matter of Lopez v. Evans*, 25 N.Y.3d 199, 202, 206, 31 N.E.3d 1197, 1199, 1202, 9 N.Y.S.3d 601, 602, 605 (2015) (holding on state constitutional grounds that “when a parolee lacks mental competency to stand trial, it is a violation of his or her due process rights to conduct a parole revocation hearing” because “[a]n incompetent parolee is not in a position to exercise rights, such as the right to testify and the opportunity to confront adverse witnesses . . . that are directly related to ensuring the accuracy of fact-finding”).

Under this typical formulation of the competency standard, courts usually will not find a defendant incompetent unless s/he is floridly psychotic. However, in cases in which a finding of incompetency would be in the client’s interest, counsel can argue that the second half of the incompetency standard – inability to confer and cooperate with counsel – should be extended to encompass: (a) defendants whose mental disorder affects their ability to recall the events of the period when the offense is alleged to have been committed (*see Wilson v. United States*, 391 F.2d 460 (D.C. Cir. 1968)); (b) defendants whose mental disorder impairs their ability to testify intelligibly in their own defense; (c) defendants whose mental disorder precludes their participation in a rational fashion in certain crucial decisions, such as whether to plead guilty in return for a bargained disposition or whether to invoke the defense of insanity at the time of the crime (*see* § 16.13 *infra*); and (d) defendants whose physical disability prevents them from assisting in their own defense. *See generally* Melinda G. Schmidt, N. Dickon Reppucci & Jennifer L. Woodard, *Effectiveness of Participation as a Defendant: The Attorney-Client Relationship*, 21 BEHAV. SCI. & L. 175 (2003).

As for the first half of the prevailing standard, Supreme Court decisions involving constitutional claims by condemned inmates that they are incompetent to be executed can be invoked to shed some analogical light on what is required in the way of mental ability to “understand the nature and purpose of the proceedings” at the pretrial and trial stages of a criminal prosecution. In *Panetti v. Quarterman*, 551 U.S. 930 (2007), the Court was confronted with a claim that Panetti suffered from psychotic delusions that had “recast . . . [his] execution as ‘part of spiritual warfare . . . between the demons and the forces of the darkness and God and the angels and the forces of light . . .’ . . . [and that] although . . . [he] claims to understand ‘that the state is saying that [it wishes] to execute him for [his] murder[s],’ he believes in earnest that the stated reason is a ‘sham’ and the State in truth wants to execute him ‘to stop him from preaching’” (*id.* at 954-55). The lower federal courts found these delusions irrelevant because the “‘test for competency to be executed requires the petitioner know no more than the fact of his impending execution and the factual predicate for the execution’” (*id.* at 942). The Supreme Court held this test unconstitutionally narrow. Although the Court did “not attempt to set down a rule governing all competency determinations” (*id.* at 960-61), it did observe that in the seminal case of *Ford v. Wainwright*, 477 U.S. 399 (1986), “[w]riting for four Justices, Justice Marshall . . . indicat[ed] that the Eighth Amendment prohibits execution of ‘one whose mental illness prevents him from comprehending the reasons for the penalty or its implications . . .’ [whereas] Justice Powell, in his separate opinion, asserted that the Eighth Amendment ‘forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it’” (*id.* at

957). The *Panetti* Court concluded that “the principles set forth in [both of these] *Ford* [opinions] are put at risk by a rule that deems delusions relevant only with respect to the State’s announced reason for a punishment or the fact of an imminent execution . . . as opposed to the real interests the State seeks to vindicate” (*id.* at 959). “A prisoner’s awareness of the State’s rationale for an execution is not the same as a rational understanding of it.” *Id.* The same conception of *rational* understanding plainly should apply at earlier stages of a criminal case as well. A defendant who knows that s/he is being haled into court to be prosecuted on a criminal charge but who delusionally believes that the charge is the work of a conspiracy between the State and the devil (or ISIS, or Wall Street) will not make the cut for competence.

16.8. Results of a Finding of Incompetency

If a defendant is found incompetent to stand trial, s/he will be confined in a mental health facility – usually a State Hospital and, in cases of violent offenses, a secure ward of that hospital. In *Jackson v. Indiana*, 406 U.S. 715 (1972), the Court imposed the following due process restrictions upon the duration of the confinement:

“[A] person charged by a State with a criminal offense who is committed solely on account of his incapacity to proceed to trial cannot be held more than the reasonable period of time necessary to determine whether there is a substantial probability that he will attain that capacity 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. Furthermore, even if it is determined that the defendant probably soon will be able to stand trial, his continued commitment must be justified by progress toward that goal.” (*Id.* at 738.)

Thus in cases in which the hospital concludes that restoration to competency is not probable and in which the State refrains from seeking civil commitment, the defendant will be released. However, the State ordinarily does institute civil-commitment proceedings unless the offense currently charged is minor and the defendant has no significant prior record. Even low-grade priors like panhandling or turnstile-jumping or drunk-and-disorderly can, if recurrent, provoke a State’s attorney to view the defendant as a nuisance who should be gotten off the streets. And in some jurisdictions statutes *mandate* the initiation of civil commitment proceedings if a defendant is found to be incompetent to stand trial.

Of course, even when the State elects to seek civil commitment, it will not necessarily succeed in committing the defendant. Under typical civil commitment statutes, an individual is subject to commitment only if s/he is mentally ill or intellectually disabled *and* if these conditions render the individual dangerous to self or others. *See, e.g., O’Connor v. Donaldson*, 422 U.S. 563, 576 (1975) (“a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by

himself or with the help of willing and responsible family members or friends”). And under *Addington v. Texas*, 441 U.S. 418, 425-33 (1979), a State bears the burden proving illness and dangerousness by “clear and convincing” evidence or an equivalent standard (*id.* at 433). Individuals whose incompetency is based on factors other than mental disease or defect – such as amnesia or physical disability – will probably be deemed ineligible for civil commitment. And there are many mentally ill and intellectually disabled people who, although incompetent to stand trial, are not dangerous to self or others.

If the State seeks and succeeds in obtaining an order of involuntary civil commitment, the commitment will, as a practical matter, continue until such time as (a) the institutional psychiatrists believe that the defendant has recovered from his or her mental illness or at least has ceased to be physically dangerous to self or others, or (b) the institution runs out of beds and is glutted with inmates sicker than the defendant. In theory, “even if . . . involuntary confinement was initially permissible, it could not constitutionally continue after that [initial] basis [– illness plus dangerousness –] no longer existed” (*O’Connor v. Donaldson*, *supra*, 422 U.S. at 575; *see, e.g., Van Orden v. Schafer*, 129 F. Supp.3d 839, 867-70 (E.D. Mo. 2015)). But unless counsel is prepared for long-haul monitoring of the hospital’s continuing justification for confining a defendant, it will probably be bed pressure rather than the Constitution that eventually determines a release date.

16.9. *Strategic Considerations in Deciding Whether to Raise a Claim of Incompetency*

Counsel should ordinarily be very hesitant to raise a claim of incompetency in a case in which the client is not facing a lengthy sentence of imprisonment if convicted. As explained in § 16.8 *supra*, the consequence of a finding of incompetency may well be civil commitment to a mental hospital. Because mental problems are often of long duration – and because the hospital will probably get away with confining the client until its staff gets around to asking itself whether there are sicker people who need the client’s bed – a finding of incompetency to be tried is often a one-way ticket to indefinite warehousing in an oppressive state institution. Defendants facing heavy felony charges may be advised to accept prolonged hospitalization as an escape from the risk of an even longer prison sentence. But in less serious felony cases and in most misdemeanor cases, the cost-benefit calculus tips the other way.

There are also other adverse consequences that can flow from raising a claim of incompetency. In the event that the defendant is found to be only temporarily incompetent, with the prospect of regaining capacity to stand trial, s/he may be held for months in the mental hospital and then returned to court to face the original charge; then, if s/he is convicted and sentenced to a term of incarceration, the length of the sentence will not be proportionately reduced to give “credit” for the months s/he spent in the mental hospital. And in the event that the defendant is not found incompetent at all, the incompetency proceedings – the mental examination and the incompetency hearing – may provide the prosecution with information about the defendant’s

background and psychic make-up that the prosecutor can use: (i) to urge that the defendant should be held in custody pending trial (*i.e.*, that an initial order setting bail should be rescinded or that the amount of bail should be increased); (ii) to counter claims that defense counsel might make at a suppression hearing when challenging incriminating statements or tangible evidence seized by “consent” searches, on theories that rely in whole or part upon the defendant’s vulnerable mental condition; (iii) at trial, to impeach the defendant’s credibility as a witness, refute defenses of diminished capacity or insanity, and sometimes affirmatively prove guilt; and (iv) at sentencing, to argue for a harsher sentence on the ground that the defendant’s mental problems render him or her too dangerous to leave at large in the community. See § 16.3 *supra*. There are legal doctrines that the defense can invoke to ward off these consequences (see § 16.6.1 *supra*) but they are full of legal and practical wrinkles that may render their protection less than fully effective in any particular case.

Counsel also must take into account that competency proceedings can consume several months, since there will probably be at least two mental examinations (one by defense experts and one by prosecution experts), and the court proceedings will be repeatedly continued because the experts’ reports are not ready or the attorneys or experts have scheduling conflicts. This delay is yet another factor rendering an incompetency claim inadvisable in cases in which a client is in custody pending trial or is likely to be committed for an in-patient evaluation, especially if the case is a misdemeanor or low-grade felony.

A claim of incompetency may be advisable even in a misdemeanor or low-grade felony, however, in the rare case where counsel can feel confident that the client faces little or no risk of civil commitment if found incompetent. This circumstance would arise when: (i) the finding of incompetency would rest upon some physical condition or non-organic mental problem (such as amnesia) that could not serve as a “mental disease or defect” rendering the client eligible for civil commitment under state statutory standards; or (ii) even though the finding of incompetency is based on a mental disease or defect, the defense psychiatrist or psychologist is certain that there is no basis for a finding that the defendant is so “dangerous” to self or others as to require civil commitment. In these unusual circumstances counsel can feel reasonably safe that a finding of incompetency would spare the defendant from facing trial on the charged offenses without exposing him or her to the peril of civil commitment. However, even in these situations, the incompetency claim should not be pursued unless the defense psychiatrist or psychologist is confident that the defendant will not be classified as likely to regain capacity and thereby subjected to a period of hospitalization followed by return to court to face trial on the charges.

In more serious felony cases and in any misdemeanor or low-grade felony cases that meet the preceding, rare conditions, counsel will want to consider the following matters before finally determining whether to raise an incompetency claim:

- (1) The advantages to the defense of having the defendant examined and of conducting a hearing on the issue of the defendant’s competency, including:

- (a) The possibility of putting into the record, in a form that may make it admissible at a subsequent trial, evidence favorable to psychiatric defenses, such as insanity and diminished capacity.
 - (b) The possibility of early disclosure to the judge, who may preside at trial and sentencing, of evidence of mental illness that may attract the judge's sympathy.
 - (c) The possibility of using the hearing for discovery of some portion of the prosecution's case.
- (2) The disadvantages of having the defendant examined and of conducting a hearing on the issue of the defendant's competency (see §§ 16.3, 16.5-16.6 *supra*), including:
- (a) Advance disclosure to the prosecutor of evidence – or of leads to evidence – that may subsequently be used by the defense to support mental-impairment defenses at trial or mental-impairment theories in connection with suppression motions, giving the prosecutor opportunities to cross-examine defense experts, learn their weaknesses, and make a record for their subsequent impeachment.
 - (b) Disclosure to the court and to the prosecutor of evidence – or of leads to evidence – that the prosecution can use affirmatively to rebut mental-impairment defenses at trial or mental-impairment theories presented by the defense on suppression motions; or to impeach the defendant if s/he testifies at trial, or to prove the prosecution's case on the guilt issue.
 - (c) Disclosure to the court and to the prosecutor of matters respecting the defendant's character and mental condition that may be prejudicial at sentencing in the event of conviction; or on such other matters as the allowance or amount of bail pending trial or appeal.
 - (d) The possibility that if counsel decides not to present psychiatric defenses at trial, the jury may nevertheless learn from allusions to the pretrial hearing by witnesses, the judge, the prosecutor, or court attendants – or from newspaper accounts of the hearing or from courthouse gossip – that there is some question whether the defendant may be mentally ill.
 - (e) The delay of other proceedings occasioned by the hearing.

- (3) The likelihood of success in convincing the court that the defendant is not competent to stand trial.
- (4) The benefits of success, including:
 - (a) The possibility of avoiding a trial on the merits of the charges against the defendant either because the defendant is unlikely ever to recover competency to be tried or because the prosecution is likely to drop the charges rather than try a “stale” case after the defendant finally recovers competency.
 - (b) Other advantages of delaying the trial, including the abatement of prejudicial publicity or community sentiment that may make it difficult for the defendant to get a fair trial or a reasonable plea bargain at the present time.
 - (c) The potential advantages of a pretrial finding of incompetency for the defendant’s presentation of psychiatric defenses at trial if the finding can be brought to the attention of the trial jury, for example, by calling as defense witnesses any hospital personnel who may examine or treat the defendant following his or her commitment upon such a finding.
 - (d) The acquisition of additional evidence supporting psychiatric defenses at trial, which may emerge during the defendant’s commitment for examination, observation, and treatment, particularly inasmuch as the hospital personnel who encounter the defendant in this setting *begin* with the assumption that s/he is mentally disordered and may interpret their observations in this light.
- (5) The costs of success (see § 16.8 *supra*) including:
 - (a) Delay of the trial until the defendant is subsequently found competent.
 - (b) Possible incarceration of the defendant in a mental institution during the period of this delay; and, in some cases, lifelong institutionalization.
 - (c) The possibility that, if and when the defendant is found to have recovered his or her competency and is returned to court for the resumption of criminal prosecution, the course of diagnosis and treatment which s/he has received during the period of pretrial hospitalization will have generated information about the defendant’s mental condition that the prosecution can use as evidence – or to lead to

evidence – to rebut mental-impairment defenses at trial or mental-impairment theories presented by the defense on suppression motions; or to impeach the defendant if s/he testifies at trial, or to prove the prosecution’s case on the guilt issue.

- (d) The effect upon the defendant’s record of a formal adjudication of incompetency.
- (6) The defendant’s attitude toward taking the position that s/he is incompetent.

16.10. Procedures for Raising and Litigating a Claim of Incompetency

If counsel concludes that a claim of incompetency to plead or be tried may be in the defendant’s interest, the first step to take is to retain a psychiatrist or psychologist to examine the defendant, determine whether s/he is arguably incompetent under the standards described in § 16.7 *supra*, and advise counsel regarding the potential benefits and costs of raising the claim, outlined in § 16.9. *Cf. Blakeney v. United States*, 77 A.3d 328, 342-43, 345 (D.C. 2013) (“The test for determining when defense counsel is obligated to raise the issue of the defendant’s competency with the court cannot be stated with precision. . . . That a defendant suffers from a severe mental disorder does not necessarily mean he is incompetent; the latter is a ‘much narrower concept.’ . . . [W]e hold that criminal defense counsel must raise the issue of the defendant’s competency with the court if, considering all the circumstances, objectively reasonable counsel would have reason to doubt the defendant’s competency. Failure to do so is constitutionally deficient performance.”); *Humphrey v. Walker*, 294 Ga. 855, 874-75, 757 S.E.2d 68, 83 (2014). Procedures for obtaining a defense mental health expert are described in § 16.3 *supra*.

Assuming that the examination results in a report attesting to the defendant’s incompetency and assuming that counsel concludes that an incompetency claim is the proper strategy, counsel then will proffer the report to the court together with whatever written pleading, motion, or “suggestion” of present incompetency is required by local practice in order to raise the claim. In many jurisdictions the judge will, at this point, routinely grant a prosecutorial request that the defendant be ordered to submit to an examination by a prosecution psychiatrist or psychologist. But if the judge has previously denied the counsel’s request for an independent defense expert and ordered a mental health examination by a “neutral” expert instead (see §§ 16.3, 16.5 *supra*), counsel should now object to the court’s granting the prosecution an adversarial benefit that was denied to the defense. *Cf. Wardius v. Oregon*, 412 U.S. 470, 474-75 & n.6 (1973). See § 18.9.2.7 *infra*.

After all of the mental examinations are completed and the reports filed, the judge will convene an evidentiary hearing on the issue of competency. The defense has a due process right to an adversarial hearing unless the

examinations have dispelled any significant doubt of incompetency. *Pate v. Robinson*, 383 U.S. 375 (1966); *Drope v. Missouri*, 420 U.S. 162 (1975). The jurisdictions differ as to who bears the burden of proof at the hearing, with some placing the burden upon the state once the issue has been raised, and others assigning the burden to the defense. See *Cooper v. Oklahoma*, 517 U.S. 348, 360-62 & nn.16-18 (1996) (citing state statutes and caselaw). In the latter jurisdictions, the quantum of the burden imposed on the defense is a “preponderance of the evidence” (see *id.* at 361 n.17). The Supreme Court held in *Cooper* that imposing upon the accused the heavier burden of “clear and convincing evidence” would violate the Due Process Clause (see *id.* at 362-69). Although the Court has not yet addressed the distinct question of what burden must be placed upon the state when a finding of incompetency is sought against a defendant who opposes it and when the result is involuntary hospitalization, the reasoning of *Cooper* and the Court’s decision in the civil commitment context in *Addington v. Texas*, 441 U.S. 418 (1979), strongly suggest that the burden must be placed upon the state to prove incompetency by “clear and convincing evidence.” See *Jones v. United States*, 463 U.S. 354 (1983) (distinguishing *Addington* in cases in which a defendant has been found not guilty by reason of insanity because, in such cases, commitment is warranted by “the proof . . . [adduced at trial that the defendant] committed a criminal act as a result of mental illness” (*id.* at 366-67) – a circumstance justifying “the widely and reasonably held view that insanity acquittees constitute a special class that should be treated differently from other candidates for commitment” (*id.* at 370); and see *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992).

E. Insanity

16.11. *The Standard for Acquittal on the Ground of Insanity at the Time of the Crime (a/k/a the Verdict of Not Guilty by Reason of Insanity, Colloquially Called NGI)*

The traditional *M’Naghten* rule, which is still employed in a number of States, provides “that to establish a defence on the ground of insanity, it must be clearly proved that, at the time of the committing of the act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong” (*M’Naghten’s Case*, 8 Eng. Rep. 718, 722 (1843)). Other States employ the American Law Institute (ALI) test, which provides that “[a] person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law” (AMERICAN LAW INSTITUTE, MODEL PENAL CODE § 4.01 (1962), 10 U.L.A. 490-91 (1974)). See generally *Clark v. Arizona*, 548 U.S. 735, 749-52 & nn.12-22 (2006) (surveying varying formulations of the insanity defense and citing federal and state statutes and caselaw). See also *id.* at 747, 756 (rejecting a due process challenge to Arizona’s “fragment[ary]” *M’Naghten* rule which asks only the “moral incapacity” question “whether a mental disease or defect leaves a defendant unable to understand that his action is wrong” and not the “alternative” “cognitive incapacity” question

“whether a mental defect leaves the defendant unable to understand what he is doing”); *Delling v. Idaho*, 133 S. Ct. 504, 504-06 (2012) (Breyer, J., dissenting from denial of *certiorari*, joined by Ginsburg and Sotomayor, J.J.) (expressing the view that the Court should grant *certiorari* to determine whether the Due Process Clause prohibits “Idaho’s modification of the insanity defense,” under which “insanity remains relevant to criminal liability, but only in respect to intent,” and which “permits the conviction of an individual who knew *what* he was doing, but had no capacity to understand that it was wrong”).

In all jurisdictions the defense bears the burden of introducing sufficient evidence to raise the issue of insanity. The requisite quantum of evidence varies among jurisdictions. Some States provide that the defense can raise the issue by merely presenting “some evidence,” or enough evidence to raise a reasonable doubt, whereupon the burden shifts to the prosecution to prove sanity beyond a reasonable doubt, just as the prosecution must prove every other element of the offense beyond a reasonable doubt. In other States the defense bears the burden of persuasion and must prove insanity by a preponderance of the evidence. Constitutional challenges to placing the burden on the defense have been consistently rejected. *Rivera v. Delaware*, 429 U.S. 877 (1976) (per curiam); see *Patterson v. New York*, 432 U.S. 197, 201-05 (1977) (dictum); *Jones v. United States*, 463 U.S. 354, 368 n.17 (1983) (dictum).

16.12. Strategic Considerations in Deciding Whether to Raise an Insanity Defense

The primary consideration militating against the raising of incompetency claims in misdemeanors and low-grade felony cases (see § 16.9 *supra*) – the risk of institutionalization in a mental hospital for many years more than the defendant could serve if convicted at trial and sentenced to a term of incarceration – also may render an insanity defense highly inadvisable. Indeed, the risks are even greater in the context of insanity defenses. A defendant who is found incompetent to stand trial and who is then subjected to involuntary civil commitment proceedings is entitled to a hearing at which the state must show by clear and convincing evidence both that the defendant is mentally ill and that s/he is dangerous to self or others. See § 16.8 *supra*. In a number of States the statutes provide for civil commitment of an insanity acquittee as an automatic consequence of the finding of insanity made at trial, even though that finding is usually made under the far weaker “preponderance of the evidence” standard and does not involve an express finding of dangerousness. In *Jones v. United States*, 463 U.S. 354 (1983), the Court sustained the constitutionality of a statute of this type. Under such a statutory scheme, an insanity acquittee is theoretically “entitled to release when he has recovered his sanity or is no longer dangerous” (*id.* at 368). See, e.g., *Foucha v. Louisiana*, 504 U.S. 71 (1992), holding Due Process violated by a state statute that permitted the continuing confinement of an insanity acquittee even after a hospital review committee had concluded that the acquittee’s mental illness was in remission); see also *Kansas v. Crane*, 534 U.S. 407, 412-13 (2002); *Richard S. v. Carpinello*, 589 F.3d 75, 82-85 (2d Cir. 2009). But once in an institution, the acquittee is likely as a practical matter to be confined at the discretion of the institution’s medical staff, since they will both create and

evaluate the record on which any subsequent determination of recovery or dangerousness is going to be based, and their observations and findings are bound to be given great deference by the courts. *See, e.g., State v. Klein*, 156 Wash. 2d 103, 124 P.3d 644 (2005).

Even in the States that extend the usual procedural protections in civil commitment proceedings to insanity acquittees, an insanity acquittal still poses greater risks than a finding of incompetency to stand trial. A defendant who is found incompetent to stand trial cannot have the pending criminal charge used against him or her in the determination of “dangerousness” for civil commitment purposes, since s/he has never been convicted of the charge and must be presumed innocent. In contrast, “[a] verdict of not guilty by reason of insanity establishes two facts: (i) The [defendant] . . . committed an act that constitutes a criminal offense, and (ii) he committed the act because of mental illness” (*Jones v. United States, supra*, 463 U.S. at 363). And in *Jones*, the Court concluded that “[t]he fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness” (*id.* at 364), even when the criminal act is “a nonviolent crime against property” (*id.* at 365). The Court’s conclusions on this point were made solely in the context of reviewing the reasonableness of a finding of legislative fact underlying a challenged statute (*see id.* at 364-65), and the Court’s deference to legislative judgment in *Jones* would not necessarily justify a finding of fact in an individual case that the evidence shows a particular defendant to be “dangerous.” *Cf. id.* at 365 n.14. However, notwithstanding this argument for distinguishing *Jones*, there is considerable risk that lower courts will follow the reasoning of *Jones* and find in individual cases that a criminal conviction satisfies the criterion of “dangerousness” for purposes of civil commitment.

Thus, the suggestion in § 16.9 *supra* that counsel could consider a claim of incompetency to stand trial with somewhat less trepidation in cases in which a defense psychiatrist is confident that the defendant will not qualify for civil commitment as “dangerous” to self or others, is inapplicable in the NGI context. Even in jurisdictions that do not provide for automatic commitment but require a finding of dangerousness to support confinement of an insanity acquittee, the risk that the defendant’s conviction alone will suffice to establish dangerousness is too great.

16.13. *Defending Against the Judicial Interposition of an Insanity Defense*

In some jurisdictions the court can raise the issue of insanity *sua sponte*. *See generally* Justine A. Dunlap, *What’s Competence Got to Do with It: The Right Not to Be Acquitted by Reason of Insanity*, 50 OKLA. L. REV. 495, 508-10 (1997). In jurisdictions of this sort defense counsel may have to defend against the judge’s interposition of the insanity defense, in order to avoid an insanity acquittal with the probable consequence of prolonged institutionalization in a mental hospital. Counsel can take the position that “the trial judge may not force an insanity defense on a defendant found competent to stand trial *if* the individual intelligently and voluntarily decides to forego that defense” (*Freundak v. United States*, 408 A.2d 364, 367 (D.C. 1979) (emphasis in

original); *accord*, *State v. Brown*, 179 Vt. 22, 32-36, 890 A.2d 79, 88-91 (2005) (citing caselaw from other States); *State v. Jones*, 99 Wash. 2d 735, 664 P.2d 1216 (1983)). However, counsel should be prepared for an inquiry into the defendant's competency to intelligently waive an insanity defense, which is not necessarily the same as competency to stand trial. *See Frendak v. United States*, *supra*, 408 A.2d at 367; *Phenis v. United States*, 909 A.2d 138, 154-60 (D.C. 2006).

Even if a judge is permitted to foist an insanity defense on an unwilling defendant, it does not follow that the consequence of the defense once established should be automatic involuntary civil commitment in those jurisdictions where such commitment is the usual fate of insanity acquittees. The *Jones* case discussed in § 16.12 *supra* attached importance to the fact that “automatic commitment under [the challenged statute was provided] . . . only if the *acquittee himself* advances insanity as a defense . . .” (*Jones v. United States*, 463 U.S. 354, 367 (1983) (emphasis in original); *see also id.* at 367 n.16). Counsel in jurisdictions with statutes that are ambiguous on the subject can argue that they should be construed as imposing the same limitation, under the doctrine calling for statutory construction that avoids unnecessary constitutional issues (*e.g.*, *In re M.F.*, 298 Ga. 138, 780 S.E.2d 291 (2015); *State v. Dahl*, 874 N.W.2d 348 (Iowa 2016)); and, if the statute is not so construed, counsel can distinguish *Jones* in arguing that the statute is unconstitutional for all of the reasons advanced in the dissenting opinions in that case (463 U.S. at 371-87).

PART THREE: PROCEEDINGS BETWEEN ARRAIGNMENT AND TRIAL

Chapter 17

Defense Procedures and Considerations Between Arraignment and Trial

A. Checklist of Matters for Counsel to Consider Between Arraignment and Trial

17.1. Matters Looking Backward to Arraignment and Prearraignment Proceedings: Considering Whether to Change the Plea Entered at Arraignment

17.1.1. Changing a Previously Entered “Not Guilty” Plea

If the defendant entered a plea of not guilty at arraignment and thereafter the defendant decides to enter a guilty plea, it is ordinarily easy to obtain leave of the court to do so. See §§ 14.7, 15.7.2 *supra*. For discussion of the factors that counsel and the client should consider in assessing a plea offer, see §§ 15.3-15.7 *supra*. For discussion of the matters counsel should take into account when counseling a client about a guilty plea, see §§ 15.2, 15.14-15.17 *supra*.

In some cases, counsel may want to strike a defendant’s not guilty plea in order to enter special pleas (see §§ 14.5-14.6 *supra*) or to make pre-plea motions (see § 13.1 *supra*) that are ordinarily waived by the general plea of not guilty. The usual mechanism for the purpose is a motion to withdraw the plea entered at arraignment. Some judges will grant the motion as a matter of course. Others will require a showing of good cause (*e.g.*, changed circumstances; inadequate information or time to make a fully advised decision before pleading at arraignment). The Sixth Amendment doubtless requires that leave be granted (a) if the defendant was unrepresented by counsel at the arraignment (*see Hamilton v. Alabama*, 368 U.S. 52 (1961); *cf. Stevens v. Marks*, 383 U.S. 234, 243-44 (1966)), or (b) if the plea at arraignment was entered after valid defense objections that counsel was being forced to plead despite inadequate opportunity to consult with the client or to research and investigate the case (see §§ 3.23.3, 14.3 *supra*).

17.1.2. Vacating or Withdrawing a Guilty Plea

If the defendant entered a plea of guilty at arraignment and counsel thereafter wishes to withdraw or vacate it in order to plead specially, raise prearraignment matters, or plead not guilty (see §§ 13.1, 14.5-14.6, 15.3 *supra*), s/he will have to file a motion for relief from the plea.

If the plea was arguably invalid for any of the reasons identified in § 14.8 *supra*, counsel should file a motion to vacate it. The motion should be made before sentencing unless the claim of invalidity of the plea is based

on disappointment with the sentence (see § 14.8 subdivision (c)). In most jurisdictions, appellate review of defects in a guilty plea cannot be obtained without prior exhaustion of trial-level remedies, such as a motion to vacate (or “strike”) the plea. *See, e.g., State v. Lavy*, 121 Idaho 842, 828 P.2d 871 (1992).

If the plea colloquy satisfied constitutional and state law standards and the guilty plea was valid, it may subsequently be withdrawn only by leave of court, in the court’s discretion, usually for good cause shown. For obvious reasons, leave is granted more freely prior to sentencing than after sentencing, whether or not the applicable rules explicitly so provide. Judges differ considerably in their willingness to permit guilty pleas to be withdrawn. In multi-judge courts in which the judges rotate assignments from time to time, defense counsel should inquire of experienced criminal lawyers concerning the respective judges’ attitudes, obtain the assignment schedule, and time the motion accordingly. (Of course, the motion should not, for this purpose, be delayed beyond any deadline set by local rules for a motion to withdraw, nor should it be delayed until sentencing if the defendant’s change of heart occurs before sentencing.)

The argument that an accused should be routinely permitted to withdraw a guilty plea before sentence, at least when neither the prosecutor nor the court has relied upon it to their disadvantage, has so far failed to command a majority of the Supreme Court of the United States (*see Neely v. Pennsylvania*, 411 U.S. 954 (1973) (opinion of Justice Douglas, dissenting from denial of *certiorari*); *Dukes v. Warden*, 406 U.S. 250 (1972)), and has been rejected by a substantial number of state high courts. *See, e.g., Osborn v. State*, 672 P.2d 777, 788 (Wyo. 1983) (“There is a general consensus that the withdrawal of a plea of guilty is not an absolute right and the right to do so is within the sound discretion of the trial court. . . . A presentencing withdrawal motion is measured by whether it would be fair and just to allow it. . . . The burden is on the defendant to establish good grounds for withdrawing his plea Most of the foregoing cited authority also set out the policy to be that withdrawal of a plea of guilty before sentencing should be freely allowed but, as also indicated, that policy is frequently qualified. It has been considered an abuse of discretion to not hold a hearing whereby a defendant may develop support of his reasons for wanting to change his guilty plea.”). Nevertheless, the argument is worth making as a matter of state and federal constitutional due process. “Identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). “Several federal constitutional rights are involved in a waiver that takes place when a plea of guilty is entered in a state criminal trial. First, is the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment and applicable to the States by reason of the Fourteenth. . . . Second, is the right to trial by jury. . . . Third, is the right to confront one’s accusers.” *Boykin v. Alabama*, 395 U.S. 238,

243 (1969). Unless *some* state interest is served by holding a defendant to a waiver of these basic rights, due process should forbid a State to insist on doing so.

In any event, a trial court's refusal to permit a defendant to withdraw a guilty plea on timely motion before sentencing is assailable on appeal for abuse of discretion. *See, e.g., Commonwealth v. McCall*, 320 Pa. Super. 473, 467 A.2d 631 (1983). And if a defendant can demonstrate that trial judges have been exercising their discretion in an inexplicable pattern, denying leave to withdraw in some cases while granting it in others that present indistinguishable circumstances, the argument for finding an abuse of discretion will be a strong one. *See Williams v. Georgia*, 349 U.S. 375, 388-90 (1955), and cognate cases collected in § 14.5 *supra*.

A factor often considered by courts in determining whether to exercise their discretion in favor of permitting withdrawal of the plea is whether the defendant puts forth a credible assertion of innocence. Such an assertion of innocence will be treated as particularly compelling in cases in which the plea was an *Alford* plea (see § 15.16.1 *supra*), and the defendant therefore has never admitted guilt.

In the event that a guilty plea is vacated or withdrawn by leave of the court, it may not be used against the defendant as evidence of guilt at a subsequent trial on the charge to which the defendant initially pleaded guilty. This proposition was settled in federal practice by *Kercheval v. United States*, 274 U.S. 220 (1927); *see also* FED. RULE CRIM. PRO. 11(f); FED. RULE EVID. 410; *but cf. United States v. Mezzanatto*, 513 U.S. 196 (1995); and the *Kercheval* rule appears to have been constitutionalized by a dictum in *Hutto v. Ross*, 429 U.S. 28, 30 n.3 (1976) (per curiam).

17.2. Matters Looking Forward to Trial

During the period between arraignment and trial, counsel will need to attend to a number of important matters, including:

- (1) *Required notices.* Depending upon the rules of the jurisdiction and the circumstances of the case, the defendant may be required to file, within a designated period prior to trial, specified notices relating to matters s/he intends to raise at trial. The most commonly required are notices of intention to present evidence of alibi or of insanity. *See* § 14.6 subdivisions (G) and (H) *supra*. Failure to file the notice precludes the presentation of the defense except in the discretion of the court. *But see* § 14.6 subdivision (H) *supra*, regarding potential challenge to the arbitrary exercise of this discretion. Local practice should be consulted regarding the time and form of required notices.
- (2) *Filing of pretrial motions.* *See* § 17.4 *infra*. *See also* §§ 17.3, 17.5-17.11 *infra*.
- (3) *A pretrial conference or conferences.* *See* §§ 18.14-18.15 *infra*.

- (4) *Election or waiver of jury trial.* See § 32.2 *infra*.
- (5) *Challenges to the venire of petit jurors.* See § 32.4 *infra*.
- (6) *Investigation of prospective jurors.* See § 32.5 *infra*.
- (7) *The timetable for proceedings.* See § Chapter 28 *infra*.

B. Selecting and Drafting Pretrial Motions: Strategic and Practical Considerations

17.3. The Importance of Motions Practice; The Objectives to Be Sought

Pretrial motions practice is crucial to effective defense work. Successful litigation of motions can win the case – either by producing outright dismissal of the charging paper (for example, when the defense prevails on a motion challenging the legal sufficiency of the charging paper) or by excluding evidence that the prosecution needs in order to win the case at trial (for example, when the defense prevails on a motion to suppress tangible evidence, incriminatory statements, or identification testimony).

Even when the defense loses a motion, there are often net benefits to litigating it. Motions practice serves as a highly effective discovery technique. The prosecutor’s written and oral responses to a defense motion may provide defense counsel with information about the prosecution’s case that it would not otherwise be able to obtain before trial. Evidentiary hearings on motions provide invaluable opportunities to ferret out such information in detail and also to pin down prosecution witnesses on the record, developing transcripts that can be used at trial to impeach the witnesses with prior inconsistent statements.

The defense also gains other fringe benefits from motions practice. The judge’s ruling on the motion may provide a fertile source of reversible error on appeal. In cases in which a guilty plea is under consideration but counsel is not sure about the strength of the government’s case, an evidentiary hearing on a motion to suppress can provide a preview of the prosecution’s evidence that will enable counsel to realistically evaluate the wisdom of taking the offered plea. Or if counsel has concluded that a plea is wise but the client is unconvinced, the client’s observation of the prosecution’s witnesses at an evidentiary suppression hearing may change the client’s mind and enable him or her to reach the right decision. In instances in which police conduct is particularly reprehensible, the unpleasant prospect of its exposure at a motions hearing may occasionally persuade the prosecutor to drop the charges or may give the defense considerable leverage in plea bargaining. Hearings on motions, whether they are evidentiary hearings or oral arguments, may also strengthen the attorney-client relationship and lead the client to place greater trust in the attorney’s advice generally, since the client sees the attorney fighting for him or her in court.

17.4. *The Motions That Counsel Should Consider*

Counsel will need to make a decision early in the case about what motions to file. In most jurisdictions a statute or court rule establishes a deadline (usually a specified number of days after arraignment or a specified number of days before trial) for filing motions. See § 17.7 *infra*.

Counsel should begin by examining the charging paper to determine whether it suffers from deficiencies that render it subject to a motion to dismiss. See §§ 20.4-20.7 *infra*. Counsel also should consider whether the charging paper can be challenged on double jeopardy grounds. See § 20.8 *supra*. If the charges are based on more than one incident, counsel should consider a motion to sever counts (see §§ 23.1-23.4 *infra*), and if the client is charged jointly with one or more co-defendants, counsel should consider a motion for severance of defendants (see §§ 23.6-23.9 *infra*). In rare cases motions for consolidation of charges or defendants may be advisable. See §§ 23.5, 23.10 *infra*.

On the basis of counsel's interviews with the client (see §§ 3.21.2, 6.9-6.10, 6.15 *supra*), informal discovery obtained from the prosecutor (see §§ 8.1.4, 8.4, 15.9-15.10 *supra*) or at the preliminary hearing (see §§ 11.7-11.8), and independent defense investigation (see §§ 9.15, 9.20 *supra*), counsel should determine whether the prosecution's case is likely to include any tangible evidence obtained by searches or seizures, any confessions or incriminating admissions by the defendant, or any identification testimony. If so, counsel should evaluate the potential of a motion to suppress evidence under the doctrines summarized in Chapters 25 (tangible evidence), 26 (confessions and admissions), and 27 (identifications).

If the informal discovery process has proven inadequate and the prosecutor has refused to turn over information that the defense requires, counsel should file motions for discovery. See § 18.7 *infra*. Counsel should also consider motions for sanctions if counsel learns that evidence has been destroyed (see §§ 18.9.26, 18.9.27 *infra*) or that the prosecutor has told witnesses not to talk with counsel or defense investigators (see § 9.14 *supra*).

If the client has a limited prior record and the charged offense is not extremely serious, counsel might consider any remedies available in the jurisdiction for diverting the case out of the criminal justice system. See Chapter 21 *infra*. In some jurisdictions, diversion can be sought by means of a pretrial motion. See §§ 21.1, 21.3-21.4 *infra*.

Counsel should give thought to the trial forum. If there are reasons to believe that the defendant would not receive a fair trial in the jurisdiction in which the case is presently pending, counsel can file a motion for a change of venue. See §§ 22.1-22.3 *infra*. If there are reasons to believe that the judge presiding over the case may not be impartial, counsel can file a motion for recusal. See §§ 22.4-22.7 *infra*.

Depending upon the jurisdiction and the circumstances of the case,

there may be grounds for a motion to challenge aspects of juror selection. See § 32.4 *infra*.

Depending upon the defense theory of the case (see § 7.2 *supra*), counsel may need to retain an investigator (see § 9.4 *supra*) and expert consultants or expert witnesses (see § 16.2 *supra*; §§ 30.1-30.2 *infra*). If so, and if the client is indigent, counsel will have to file a motion for state funds. See §§ 5.1.2-5.4, 16.3, 16.5 *supra*; § 30.3 *infra*.

Developments during the pretrial stage may necessitate motions addressed to the timing of pretrial proceedings and trial. It may become strategically desirable to advance the dates of pretrial hearings, the trial, or both. See § 28.2 *infra*. Or counsel may want to file a motion for a continuance in order to gain more time for investigation and preparation. See § 28.3 *infra*. If the prosecution seeks a continuance, counsel may respond with a motion to dismiss for want of prosecution (see § 28.4 *infra*) or on grounds of denial of a speedy trial (see § 28.5 *infra*) or both.

17.5. *Deciding Whether to Raise an Issue in a Pretrial Motion or at Trial*

Local practice may give the defense the option of raising certain defenses and contentions either by pretrial motion or at trial. Counsel should consider the following reasons for and against litigating a motion prior to trial.

17.5.1. *Reasons for Litigating an Issue by Pretrial Motion*

Election of the pretrial motion forum ordinarily results in an earlier adjudication of the issues raised. This may be important not only when success on the issues will require dismissal of the entire prosecution, so that termination of the case in the defendant's favor is expedited, but also when success on the issues will weaken the prosecution's litigating posture or morale and thereby increase the defense's leverage in plea bargaining. Conversely, when there is a substantial likelihood that the defense will lose the issues no matter when they are presented, they may be more effective bargaining counters if mentioned to the prosecutor during plea negotiations as contentions that the defense intends to raise at trial rather than being raised and definitively lost prior to the negotiation.

A major reason to opt for the pretrial motion forum exists whenever defense motions may produce discovery of the prosecution's case that can be used to guide defense investigation and improve defense trial preparation (see, *e.g.*, § 9.14 *supra*; §§ 17.9, 24.2, 24.4.2 *infra*) or provide an opportunity to cross-examine prosecution witnesses and get them committed on record to statements which will curb their trial testimony or be usable to impeach it (see §§ 17.9, 24.2, 24.4.3 *infra*).

If interlocutory appellate review of adverse rulings on pretrial motions is available (see § 31.1 *infra*), the motion procedure will give counsel

a chance to obtain appellate remedies for errors that, as a practical matter, are uncorrectable after verdict.

The pretrial motion procedure also minimizes the risk of lengthy sidebar proceedings or proceedings in the jury's absence that will bore or irritate the jurors. It reduces the risk that prejudicial material exposed in these proceedings will be leaked to the jury. See § 40.4 *infra*.

If counsel is seeking dismissal on a legal issue that is both technical and close, litigating it in a pretrial motion forum rather than at trial may also improve the defense's chances of prevailing. Judges are understandably reluctant to dismiss a case on a narrow legal point after the parties have prepared and all of the witnesses have appeared for trial.

Depending upon the idiosyncrasies of local practice, there may be various other benefits to litigating certain issues by pretrial motion. In jurisdictions in which motions scheduled in advance of the trial date are heard by a motions judge rather than the trial judge, counsel can use the choice of forum to select the more favorable judge. In such jurisdictions, litigating issues before a judge other than the trial judge also avoids the risk that the trial judge will hear evidence during the motions hearing that is inadmissible at trial but may unconsciously prejudice the judge's verdict in a bench trial or rulings in a jury trial. And if the motions judge happens to be an especially favorable sentencer, counsel may be able to take advantage of an appearance before that judge as an occasion for withdrawing the defendant's not guilty plea and pleading guilty. See §§ 15.7.2, 17.1.1 *supra*.

17.5.2. *Reasons for Litigating an Issue at Trial Rather Than in a Pretrial Motions Forum*

On the other hand, there may be considerable advantages to postponing the presentation of certain defenses and contentions until after trial has begun. Some defense contentions will be more compelling in the context of the case as it develops at trial than in isolation as they appear on pretrial motion.

A consideration militating strongly in favor of delaying various issues until trial is that this plan of action can prevent the prosecutor from ever obtaining appellate review of a ruling favorable to the defense. Local practice may permit prosecutorial appeals (or petitions for prerogative writs) following pretrial rulings but not following rulings made in the course of trial. See, e.g., *Commonwealth v. Surina*, 438 Pa. Super. 333, 652 A.2d 400 (1995). Moreover, the beginning of trial marks the point at which jeopardy attaches for purposes of the federal constitutional guarantee against double jeopardy. See § 20.8.2.1 *infra*. Rulings in favor of the defendant prior to that point may be appealed by the prosecution to the extent permitted by local practice, whereas rulings in favor of the defendant after that point may not be appealed if either: (a) they are tantamount to an acquittal, or (b) they result in an acquittal. Probably also they cannot be appealed if they result in the termination of the trial without a general verdict or finding of guilty, other than upon the defendant's own motion – such as, for example, when the charges are dismissed by the court

sua sponte or at the instance of the prosecution following a trial ruling in favor of the defendant upon a motion or objection that does not affirmatively request dismissal or a mistrial – at least in the absence of “a manifest necessity” for terminating the trial. See §§ 20.8.3, 20.8.5 *infra*. Although the law in this area is tortuous and confused, the bottom line is that serious, often insurmountable practical, statutory, and constitutional difficulties impede prosecutorial appeals from midtrial rulings in the defendant’s favor, whereas pretrial (or post-trial) rulings of identical purport can be readily appealed by the prosecutor.

17.5.3. Casting the Issue in the Form of a Pretrial Motion When the Pretrial Forum Is Preferable

If, after weighing the competing considerations, counsel concludes that they favor motions litigation, counsel should employ any applicable pretrial motion procedure provided by statute or court rule. If neither statutes nor rules authorize any such procedures, counsel will have to be resourceful in inventing them. In a number of jurisdictions, for example, courts will entertain common-law motions *in limine* seeking pretrial rulings on (a) issues of law whose disposition importantly affects defense trial strategy (such as the admissibility of evidence that the prosecution is expected to offer to impeach the defendant if the defendant elects to testify), *e.g.*, *People v. Patrick*, 233 Ill. 2d 62, 73, 908 N.E.2d 1, 7, 330 Ill. Dec. 149, 155 (2009) (“We conclude that a trial court’s failure to rule on a motion in limine on the admissibility of prior convictions when it has sufficient information to make a ruling constitutes an abuse of discretion.”); *State v. Lamb*, 321 N.C. 633, 365 S.E.2d 600 (1988); *State v. Lariviere*, 527 A.2d 648 (R.I. 1987); compare *New Jersey v. Portash*, 440 U.S. 450 (1979), with *Luce v. United States*, 469 U.S. 38 (1984); (b) the admissibility of prosecution evidence when its preclusion “renders the state’s proof with respect to the pending charge so weak in its entirety that any reasonable possibility of effective prosecution has been destroyed” (*City of Defiance v. Kretz*, 60 Ohio St. 3d 1, 4, 573 N.E.2d 32, 35 (1991)); (c) the admissibility of prosecution evidence which, if mentioned in the prosecutor’s opening statement or proffered at trial, may prejudice the defendant despite an eventual ruling by the trial judge sustaining a defense objection to the evidence (*e.g.*, *People v. Johnson*, 215 Ill. App. 3d 713, 575 N.E.2d 1247, 159 Ill. Dec. 187 (1991); *Gasaway v. State*, 249 Ind. 241, 231 N.E.2d 513 (1967); *State v. Nakamitsu*, 138 Hawai’i 51, 375 P.3d 1289 (Table) (Hawai’i App. 2016), *cert granted*, 2016 WL 3152602 (Hawai’i June 6, 2016); *State v. Rushton*, 260 Or. App. 765, 320 P.3d 672 (2014); *Commonwealth v. Padilla*, 923 A.2d 1189 (Pa. Super. 2007); *State v. Latham*, 30 Wash. App. 776, 638 P.2d 592, 594-95 (1982), *aff’d*, 100 Wash. 2d 59, 667 P.2d 56 (1983); *State v. Gaston*, 192 Wash. App. 1032, 2016 WL 398317 (2016)); (d) the permissibility of particular prosecution arguments in opening or closing (*e.g.*, *State v. Martinez*, 319 Conn. 712, 728-31, 127 A.3d 164, 173-75 (2015)); (e) the admissibility of defense evidence (*cf.* *United States v. Helstoski*, 442 U.S. 477 (1979) (prosecution motion for a ruling *in limine* on the admissibility of prosecution evidence)); or (f) issues of law whose disposition renders the presentation of certain defense evidence unnecessary or irrelevant (*e.g.*, *Lewis v. United States*, 445 U.S. 55 (1980)). See Stephen H. Peskin, *Innovative Pre-Trial Motions in Criminal Defense*, 1 AM. J. TRIAL ADVOCACY 35, 64-73 (1977), and authorities collected; *Luce v.*

United States, supra, 469 U.S. at 41 n.4 (1984) (dictum)). The latter two kinds of motions *in limine* are particularly useful when defense counsel expects to lose the motion at the trial level but wishes to preserve the legal issue for appeal and when the defense evidence in question is difficult or costly to gather or present or is inconsistent with alternative defense trial strategies or may be less persuasive factually than is the legal claim for its admissibility.

17.6. *Choosing Between Oral and Written Motions*

When local practice gives the defense the option to make pretrial motions orally or in writing, it is ordinarily better to make them in writing. Written motions assure that both the relief sought by the defense and the grounds upon which it is sought are preserved in the record, whereas oral motions entail the risk that counsel may omit to make (or the court reporter may fail to hear) significant points. Many state appellate courts will not entertain claims of error unless the record shows that the specific legal contention sought to be raised on appeal was presented to the trial court; and federal constitutional contentions must ordinarily be made in state trial courts with explicit reference to the provision of the Constitution on which counsel relies in order to support subsequent Supreme Court review (see § 49.2.2 *infra*) and to avoid the danger that the federal claim will be held to have been waived for purposes of postconviction federal habeas corpus (see § 49.2.3.2 *infra*). If, for any reason, a motion *is* made orally, counsel should be sure that a stenographer or reporter is present. Similarly, a stenographer or reporter should be present when the judge rules orally on any matter.

17.7. *Timely Filing of the Motion: Methods for Extending the Filing Deadline and for Obtaining Relief from Forfeitures Entailed as a Consequence of Untimely Filing*

In most jurisdictions the applicable state statute or court rule specifies a certain time period within which all motions must be filed. Counsel must pay careful attention to the deadline; failure to meet it will almost always result in the court refusing to entertain the motion.

If counsel finds that s/he will be unable to file a motion on time (because, for example, counsel cannot obtain discovery from the prosecutor within the specified time period or because counsel's heavy trial schedule precludes the preparation and timely filing of the motion), counsel will need to take one of the following measures to protect the client's rights: (i) at arraignment, request that the court extend the normal period for filing motions; (ii) on or before the deadline, file a motion for an extension of time (commonly called an "EOT") for filing a particular motion or all defense motions, as the situation warrants; (iii) if the impediment is a lack of necessary factual information resulting from insufficient discovery or investigation, file the motion on time but in an incomplete or even skeletal form, and explain in the body of the motion that the supporting facts will be supplemented at a later time after discovery or investigation has been completed; (iv) secure a firm commitment from a trustworthy prosecutor that s/he will consent to (or will not oppose) defense counsel's filing of

the motion *nunc pro tunc* after the expiration of the normal filing period.

It cannot be emphasized too strongly that defense attorneys must not rely on longstanding local customs of permitting late filing of motions without prior leave of court. All too many defense attorneys have found, to their dismay, that theirs was the first case in which the customary informality and relaxed filing procedure was suddenly abrogated.

In the event that counsel does encounter the unfortunate situation in which s/he missed a filing deadline without prior leave or prosecutorial assent, all is not necessarily lost. Depending upon the facts of the case, counsel may be able to argue that the usual procedural requirement of timely filing is unenforceable or should be waived for one or more of the following reasons:

1. The state procedural rule establishing the deadline was not “‘firmly established and regularly followed’ by the time as of which it is to be applied” (*Ford v. Georgia*, 498 U.S. 411, 424 (1991)). *See also James v. Kentucky*, 466 U.S. 341 (1984), and cognate cases collected in § 14.5 *supra*.
2. Prior to the expiration of the filing period, the defense did not know, and could not reasonably have known, the facts that provide the basis for filing a motion. *Gouled v. United States*, 255 U.S. 298, 305 (1921); *United States v. Johnson*, 713 F.2d 633, 649 (11th Cir. 1983) (defense lacked knowledge of facts because the prosecutor failed to provide adequate discovery); *DiPaola v. Riddle*, 581 F.2d 1111, 1113-14 (4th Cir. 1978) (circumstances of the incident prevented the defendant from knowing of the illegal aspects of the police officers’ actions, and therefore defendant could not have told counsel); *and see Murray v. Carrier*, 477 U.S. 478, 488 (1986) (dictum). This doctrine would also justify the waiver of the timeliness requirement if the client’s inability to communicate effectively with counsel (because of, for example, the client’s intellectual limitations or educational deficits) prevented counsel from learning the relevant facts from the client in time to meet the filing deadline.
3. Prior to the expiration of the filing period, the defense did not know, and could not reasonably have known, of the legal basis for the motion because the caselaw giving rise to such a motion had not yet been decided. *Reed v. Ross*, 468 U.S. 1, 16 (1984); *see Murray v. Carrier, supra*, 477 U.S. at 488 (dictum).
4. Prosecutorial interference or some other external factor beyond counsel’s control prevented counsel from filing the motion in a timely fashion. *Amadeo v. Zant*, 486 U.S. 214 (1988); *see also Banks v. Dretke*, 540 U.S. 668, 691-98 (2004); *Strickler v. Greene*, 527 U.S. 263, 283-90 (1999); *Murray v. Carrier, supra*, 477 U.S. at 488 (dictum).
5. Counsel reasonably relied on a longstanding local practice under

which late-filing was always permitted. *See Spencer v. Kemp*, 781 F.2d 1458, 1470-71 (11th Cir. 1986).

6. Regardless of whether there was or was not good cause for counsel's procedural default, filing of the motion *nunc pro tunc* should be permitted because, at this stage, there will be no prejudice to the prosecution or to the administration of justice if the defense is permitted to file the motion, whereas preclusion of the motion may well result in a later finding of ineffectiveness of counsel (*see Kimmelman v. Morrison*, 477 U.S. 365 (1986); *see, e.g., Grumbley v. Burt*, 591 Fed. Appx. 488, 499-501 (6th Cir. 2015); *Tice v. Johnson*, 647 F.3d 87, 106-08 (4th Cir. 2011); *Thomas v. Varner*, 428 F.3d 491, 499-504 (3d Cir. 2005); *People v. Ferguson*, 114 A.D.2d 226, 228-31, 498 N.Y.S.2d 800, 801-03 (N.Y. App. Div., 1st Dep't 1986)) and a retrial that will be costly both to the parties and to the administration of justice.

The foregoing arguments may result in the court's agreeing to entertain the motion on the merits despite its lateness. If the court does not do so, counsel will have to put on the record any facts that bring the case within one of the six enumerated principles or could otherwise be viewed as excusing counsel's procedural default, so as to lay the groundwork for an appeal contending that the trial judge abused his or her discretion in holding the motion procedurally barred. Counsel should not expect to prevail on many such appeals. The watchword here is to be *very* careful not to miss motions deadlines.

17.8. *The Form of the Motion; The Need for Affidavits*

Requirements regarding the form of the motion vary considerably among jurisdictions, and counsel will need to check the applicable statutes and court rules as well as local practice and custom in his or her particular court. In some jurisdictions law and facts are combined in a single pleading; in other jurisdictions the motion is limited to factual averments and may or must be accompanied by a separate memorandum of points and authorities setting forth the law.

Some jurisdictions require the attachment of affidavits or affirmations. Often, this requirement can be satisfied by an affirmation of counsel, setting forth all the facts that s/he has a good-faith basis for believing to be true. Depending upon local rules, counsel may or may not have to specifically identify the sources of each of the facts which s/he is affirming and may or may not have to state that any facts of which she has no personal knowledge are asserted "on information and belief." In those jurisdictions in which counsel is required to attach affidavits by the witnesses themselves, counsel should keep these affidavits as cursory as possible to avoid giving the prosecutor material with which to impeach the witness at an evidentiary hearing on the motion or at trial.

17.9. *Deciding Whether to Seek an Evidentiary Hearing for Claims That Can Be Proven with Affidavits Alone*

When counsel's position on a motion depends upon the establishment

of facts that are not already in the record, counsel should decide whether to request an evidentiary hearing of the motion or to file supporting factual affidavits with the motion. Of course, local practice may compel one of these procedures or the other for certain motions. In the case of motions to suppress evidence, for example, the defense is ordinarily required to prove the facts by oral testimony and authenticated documents at an evidentiary hearing and may also be required to make a factual proffer or to file affidavits as a threshold matter in order to establish his or her entitlement to a hearing. See § 17.8 *supra*; § 7.10 *infra*.

On the other hand, in many jurisdictions, counsel will have the option of proceeding by affidavit or seeking an evidentiary hearing on motions such as a motion for a continuance to procure the attendance of a defense witness, or a motion to dismiss the charging paper because prosecutorial delay has violated the defendant's right to a speedy trial, or a motion for change of venue on the ground of prejudicial publicity, or a motion for sanctions against the prosecution for concealing or destroying potential defense evidence or harassing defense witnesses or instructing prosecution witnesses to refuse to talk to the defense. When local practice leaves the option to the movant, counsel should consider the following factors in making the choice: (a) the relative persuasiveness of the factual showings that can be made, respectively, by affidavit and by live testimony; (b) the opportunities that an evidentiary hearing may give the defense for pretrial discovery of the prosecution's case and for locking potential prosecution witnesses into impeachable positions by cross-examination; (c) the opportunities that an evidentiary hearing may give the prosecution for pretrial discovery of the defendant's case and for locking defense witnesses into impeachable positions by cross-examination; (d) the delay of the trial that may be necessitated by a pretrial evidentiary hearing; and (e) in courts in which "long" or evidentiary pretrial motions are heard by a different judge from "short" or on-the-papers motions, the judge who will be most favorable to the defense.

17.10. *Drafting the Motion So as to Gain Relief Without Unduly Disclosing the Defense Case*

In drafting written motions that will have to come on for an evidentiary hearing – which will usually include all motions to suppress evidence – counsel should be careful to avoid unnecessary disclosure of either the facts or law that s/he intends to rely upon at the hearing. If a motion gives the prosecutor unnecessary advance notice of the points on which counsel intends to cross-examine prosecution witnesses, the prosecutor can coach those witnesses to avoid traps and undermine defense strategies. For example, if a suppression motion sets out in detail the police conduct that counsel is challenging, the police officers (who are, by nature, deeply interested in sustaining their arrests, searches, and confessions) are likely to conform their testimony to fit whatever theories validate their conduct. In addition, undue disclosure of counsel's factual and legal theories will give the prosecutor the time and opportunity to gather rebuttal witnesses and adjust the prosecution's proof.

Thus the best practice in drafting evidentiary motions is (a) to state the

relief wanted with great clarity, (b) to state the source of law relied on (statute, rule of criminal procedure, state constitutional provision, federal constitutional provision, leading precedent (e.g., “*Miranda v. Arizona*”), or whatever) specifically, but (c) to disclose as little as possible of the legal theory and the factual matter that will be presented in support of the motion. If counsel thinks it desirable to clarify the defense’s factual and legal contentions for the court, this can best be done by a brief filed and served at the close of the evidentiary hearing.

This approach may need to be modified, however, in jurisdictions in which local statutes or court rules require a threshold showing of law and fact in order to get an evidentiary hearing. The key in such jurisdictions is (a) to draft the motion so as to meet the applicable standard just marginally, without revealing any additional facts or law, and (b) to the extent possible, to stick to the facts already known to the prosecution and the legal theories that will be obvious to the prosecutor or that cannot be cured by prosecutorial coaching of witnesses. Thus, for example, if counsel moves to suppress an identification from a photo spread, counsel should cite the federal and state due process clauses, document the general proposition that unreliable and unnecessarily suggestive police-staged identification procedures violate due process (see §§ 27.2, 27.3.3 *infra*), and then relate one or more obvious defects in the photo spread without mentioning other less obvious defects and particularly without advertent to defects that can be patched up testimonially by the prosecutor (such as the suggestive writing on the backs of the photographs, which the identifying witness can be coached to say s/he never saw) and without revealing any materials that counsel will use in cross-examining prosecution witnesses (such as a statement the identifying witness gave to a defense investigator, admitting that s/he saw the suggestive writing and also mentioning suggestive comments by the police).

A sufficient reason for sometimes diverging from the general strategy of keeping the legal expositions in defense motions as sparse as possible is that there are some judges who will be impressed by an elaborately reasoned, thoroughly documented legal analysis and will take the motion more seriously, according the defense more latitude at the evidentiary hearing, than they would on a bare-bones motion. They believe that short, boilerplate motions are likely to be nonmeritorious; consequently, they will insist that hearings on such motions be kept to a bare minimum of fact development and will truncate counsel’s examinations of witnesses. Experienced criminal practitioners in the locality will know which judges are of this bent. Even when drafting a motion which will be heard by one of them, though, counsel should refrain from spelling out its *factual basis* in any greater detail than is necessary to provide a point of entry for counsel’s learned legal arguments.

17.11. *Invoking State Constitutional Provisions in the Motion*

In the years since the Warren Court era, the Supreme Court of the United States has increasingly cut back on the protections that the federal Constitution’s Bill of Rights gives criminal defendants, particularly in regard to searches and seizures, interrogations and confessions. Quite a few state supreme courts have reacted by construing the parallel provisions of their state

constitutions so as to preserve some of the safeguards eliminated by the United States Supreme Court. *State v. Short*, 851 N.W.2d 474, 486 (Iowa 2014) (“As a result of the United States Supreme Court’s retreat in the search and seizure area, there has been a sizeable growth in independent state constitutional law. A survey of jurisdictions in 2007 found that a majority of the state supreme courts have departed from United States Supreme Court precedents in the search and seizure area to some degree.”). See generally Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State Constitutional Law*, 63 TEX. L. REV. 1141 (1985); William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986); William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1 (1995); Judith S. Kaye, *Dual Constitutionalism In Practice And Principle*, 42 RECORD BAR ASS’N CITY OF NEW YORK 285 (1987); Hans E. Linde, *First Things First: Rediscovering the States’ Bills of Rights*, 9 U. BALT. L. REV. 379 (1980); Robert F. Utter, *The Practice of Principled Decision-Making in State Constitutionalism: Washington’s Experience*, 65 TEMP. L. REV. 1153 (1992).

State courts are, of course, free to construe state constitutional provisions as providing greater protection for individual rights than the Constitution of the United States (*PruneYard Shopping Center v. Robbins*, 447 U.S.74, 81 (1980); *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (per curiam); *New Jersey v. T.L.O.*, 469 U.S. 325, 343 n.10 (1985); *Oregon v. Hass*, 420 U.S. 714, 719 (1975)), although they may not drop below the protections afforded by federal constitutional guarantees (*Burgett v. Texas*, 389 U.S. 109, 114 (1967)).

In urging state courts to rely on the state constitution to reach a result contrary to a holding of the Supreme Court of the United States, counsel should provide the court with a rationale for interpreting the state constitutional provision more expansively than its federal analogue. Although the state courts need not cite a rationale for resorting to the state constitution, counsel’s identification of a rationale may prove decisive in persuading a trial judge – and later the state appellate courts – to adopt state grounds of decision. So:

(a) When dealing with a state constitutional provision whose wording differs from its federal counterpart, or whose history suggests the framers’ intent to establish a standard different from the federal constitutional standard, counsel can argue that “well established rules governing judicial construction of constitutional provisions . . . [forbid courts to] . . . presume . . . that the framers of the . . . [state] Constitution chose the . . . [distinctive state] form ‘haphazardly,’ nor may we assume that they intended that it be accorded any but its ordinary meaning” (*People v. Anderson*, 6 Cal. 3d 628, 637, 493 P.2d 880, 886, 100 Cal. Rptr. 152, 158 (1972); see, e.g., *State v. Glass*, 583 P.2d 872 (Alaska 1978); *State v. Simpson*, 95 Wash. 2d 170, 622 P.2d 1199 (1980)).

(b) When dealing with a state constitutional provision whose wording mirrors the federal constitutional guarantee and whose constitutional history proves of no avail, counsel can:

(i) argue that the U.S. Supreme Court’s precedents are unworkably vague (*see, e.g., Commonwealth v. Upton*, 394 Mass. 363, 373, 476 N.E.2d 548, 556 (1985) (“We reject the ‘totality of the circumstances’ test now espoused by a majority of the United States Supreme Court. That standard is flexible, but is also ‘unacceptably shapeless and permissive.’ . . . The Federal test lacks the precision that we believe can and should be articulated in stating a test for determining probable cause.”); *People v. Griminger*, 71 N.Y.2d 635, 640, 524 N.E.2d 409, 412, 529 N.Y.S.2d 55, 58 (1988) (“[W]e have recognized that the more structured ‘bright line’ *Aguilar–Spinelli* test better served the highly desirable ‘aims of predictability and precision in judicial review of search and seizure cases’, and that ‘the protection of the individual rights of our citizens are best promoted by applying State constitutional standards.’”)), or otherwise dysfunctional (*see, e.g., State v. Pierce*, 136 N.J. 184, 211, 642 A.2d 947, 961 (1994) (“We also perceive that the *Belton* rule, as applied to arrests for traffic offenses, creates an unwarranted incentive for police officers to ‘make custodial arrests which they otherwise would not make as a cover for a search which the Fourth Amendment otherwise prohibits’”); *State v. Jacumin*, 778 S.W.2d 430, 436 (Tenn. 1999) (“We agree with the Courts cited above that the principles developed under *Aguilar v. Texas* . . . and *Spinelli v. United States* . . . if not applied hypertechnically, provide a more appropriate structure for probable cause inquiries incident to the issuance of a search warrant than does *Gates*.”));

(ii) identify specific aspects of “policy, justice and fundamental fairness” that compel a more protective state constitutional standard (*People v. P.J. Video, Inc.*, 68 N.Y.2d 296, 303, 501 N.E.2d 556, 560, 508 N.Y.S.2d 907, 911 (1986)). *See, e.g., State v. Novembrino*, 105 N.J. 95, 146, 519 A.2d 820, 850 (1987) (“the privacy rights of our citizens and the enforcement of our criminal laws . . . [are] matters of ‘particular state interest’ that afford an appropriate basis for resolving . . . [the] issue on independent state grounds”); *State v. Stoddard*, 206 Conn. 157, 537 A.2d 446 (1988) (declining to follow *Moran v. Burbine*, 475 U.S. 412 (1986), and construing the state constitution as establishing more exacting due process protections for the right to counsel because of Connecticut’s history of rigorous enforcement of the right to counsel); *Commonwealth v. Hernandez*, 456 Mass. 528, 532, 924 N.E.2d 709, 712 (2010) (declining to follow *Virginia v. Moore*, 553 U.S. 164 (2008) because “the exclusion of evidence is an appropriate remedy when a defendant is prejudiced by an arrest made without statutory or common-law authority. . . . [Earlier Massachusetts cases] explained that the application of the exclusionary rule is appropriate where it is ‘inherent in the purpose of a statute which the government has violated,’ and that such a purpose is inherent in ‘statutes closely associated with constitutional rights.’”); *State v. Bauder*, 181 Vt. 392, 396, 924 A.2d 38, 42 (2007) (“we have . . . long held that our traditional Vermont values of privacy and individual freedom – embodied in Article 11 [of the state constitution] – may require greater protection than that afforded by the federal Constitution”); *State v. Jones*, 706 P.2d 317, 324 (Alaska 1985) (“In previous cases, we have stated that the state constitutional guarantee against unreasonable searches and seizures is broader in scope than Fourth Amendment guarantees under the United States Constitution. In part, this broader protection results from the more extensive right of privacy guaranteed by Article I, Section 22 of our state constitution.”); and/or

(iii) cite state constitutional decisions from other States rejecting that ruling of the Supreme Court, commentators' criticisms of the Supreme Court ruling, and analyses in the opinions of the dissenting Supreme Court Justices. *See, e.g., State v. Pierce, supra*, 136 N.J. at 200-03, 642 A.2d at 955-57; *State v. Novembrino, supra*, 105 N.J. at 152-56 & nn.35-38, 519 A.2d at 853-56 & nn.35-38; *State v. Cordova*, 109 N.M. 211, 217, 784 P.2d 30, 36 (1989).

In any event, counsel should always invoke parallel state constitutional guarantees when making any federal constitutional claim, even in States whose highest court has adopted the posture that it will construe its Bill of Rights provisions as coextensive with those of the federal Constitution as construed by the United States Supreme Court, and whether the federal precedents are unfavorable, favorable, or nonexistent. If counsel wins a friendly state court decision based exclusively on federal constitutional grounds, it will be subject to review and reversal by an unfriendly U.S. Supreme Court. *See, e.g., Kansas v. Marsh*, 548 U.S. 163 (2006). Were the same ruling based on the state constitution, or on alternative federal and state constitutional grounds, it would be immune against U.S. Supreme Court tampering. *See, e.g., Colorado v. Nunez*, 465 U.S. 324 (1984). "If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision." *Michigan v. Long*, 463 U.S. 1032, 1041 (1983).

C. Resisting Prosecution Attempts to Freeze a Defendant's Assets

17.12. Statutory and Sixth Amendment Bases for Opposing Government Applications for Asset Freezing

In federal criminal prosecutions and in some state jurisdictions, statutes authorize courts to freeze a defendant's assets before trial, in order to assure the preservation of funds that may later be tapped, in the event of conviction, to pay fines, forfeitures and restitutionary orders. The statutory texts specify the criminal charges to which the authorization applies, the categories of assets subject to freezing, the procedures that the prosecution must follow, and the showing that it must make, in order to obtain a pre-conviction order enjoining the defendant from transferring or expending property or funds (and, in some cases, the appointment of a receiver to administer the sequestered assets). These texts tend to be dense and require close scrutiny for implicit as well as explicit limitations on the sequestration power. The Sixth Amendment to the federal Constitution also provides a narrow sphere of protection: Assets which are not "tainted" (as contraband or the proceeds or instruments of crime) and which a defendant requires in order to "pay a reasonable fee" to retain the services of counsel of choice in defending against the criminal charges s/he is facing may not be ordered frozen (*Luis v. United States*, 136 S. Ct. 1083, 1096 (2016) (plurality opinion)).

Chapter 18

Pretrial Discovery; The Pretrial Conference

A. Introduction

18.1. Scope and Organization of the Chapter

As a matter of practice, criminal discovery involves two processes or phases: *informal* and *formal* discovery. Most prosecutors are willing to hand over to the defense upon request certain categories of materials which it is clear that a court would order the prosecutor to divulge if the defense made a motion to discover them. Informal discovery devices (such as the *discovery letter* (see § 18.5 *infra*) and the *discovery conference* (see § 18.6 *infra*)) provide a quick route to obtaining this material. When the informal devices fail because the prosecutor refuses voluntarily to divulge information requested by the defense, counsel must turn to formal discovery devices, such as motions to compel the prosecutor to disclose the information.

Part B of this chapter examines informal methods for obtaining discovery. Part C canvasses formal discovery procedures, describing the devices that can be employed and exploring constitutional doctrines that can be invoked in support of motions for court-ordered discovery going beyond that provided by statutes and local common law. Part D discusses the prosecutor's right to discovery from the defense.

While employing informal and formal discovery devices, defense counsel should not lose sight of opportunities to use other pretrial proceedings to acquire information about the prosecution's case. The recognized mechanisms for overt discovery in criminal cases – both informal and formal – remain far more limited than those in civil practice and are usually inadequate to advise the defense of everything it needs to know to prepare fully for trial. In this current state of the practice, defense counsel's ingenuity in devising self-help techniques is distinctly at a premium.

A pretrial conference, customary in many jurisdictions and usually available upon defense request even when it is not a standard practice, often provides a valuable opportunity for such unofficial discovery, as well as serving a number of other functions that are important to the defense. Part E discusses the pretrial conference.

Other chapters discuss other mechanisms that counsel can employ to obtain discovery. Discussions with the police and/or prosecutor will often yield useful information. See §§ 8.1.3, 8.1.4, 8.3.1, 8.4, 9.15, 13.5 *supra*. Applications for bail or for the reduction of bail sometimes can operate as a discovery device. See § 4.3.3 *supra*. A grand jury hearing may offer opportunities for learning the identity of prosecution witnesses. See § 12.10 *supra*. Several motions that counsel can file may lead to the prosecutor's disclosing facts not previously known to the defense. See § 17.3 *supra*. Evidentiary hearings, such as the preliminary hearing (see § 11.8.2 *supra*) and suppression hearings (see

§§ 24.2, 24.4 *infra*) present invaluable opportunities to uncover information. Police and court records and transcripts of prior judicial proceedings are also important sources to delve into. See §§ 9.17-9.18, 9.20 *supra*. Section 34.7 *infra* discusses additional discovery processes that are available at trial.

18.2. The General Position of the Defense on Discovery

It is frequently said that no discovery was allowed by the common law in criminal cases. This is not strictly accurate; and at least since Chief Justice Marshall presided at the trial of Aaron Burr, American trial courts have exercised a discretionary power to compel the production of materials requested by a defendant and found by the court to be necessary for adequate preparation of the defense. *United States v. Burr*, 25 Fed. Cas. 30 (No. 14,692d) (C.C.D. Va. 1807). Nonetheless, most States largely follow the “closed-book” policy of the common law by precluding some of the most effective tools of civil discovery (like interrogatories and depositions) and, even for those discovery devices that are allowed, employing procedures that are far more restrictive than in civil matters.

When arguing in support of specific discovery requests, counsel will often find it useful to take the position that the same general policy that supports “wide-open” discovery in civil cases should be applied as well in criminal cases. “We have elected to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive.” *United States v. Nixon*, 418 U.S. 683, 709 (1974). The quest for truth at trial is better served, under an adversary system, if the evidence of one party does not come as a surprise to the other but, having been disclosed in advance while there is still time to check it out through adequate investigation, appears in court subject to meaningful cross-examination and rebuttal. This assures “the reliability of the adversarial testing process” (*Kimmelman v. Morrison*, 477 U.S. 365, 385 (1986)). See also AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Commentary to Standard 11-1.1 (4th ed. 2015) (“[P]reparation is essential to the proper conduct of a trial. Experienced trial counsel know that effectiveness at trial depends upon meticulous evaluation and preparation of the evidence to be presented. Where counsel’s evaluation and preparation are hampered by a lack of information, the trial becomes a pursuit of truth and justice more by chance than by design. This can only lead to a diminished respect for the criminal justice system, the judiciary, and the attorneys who participate.” (footnotes omitted)). See, e.g., N.C. GEN. STAT. ANN. § 15A-903(a) (“Upon motion of the defendant, the court must order: (1) The State to make available to the defendant the complete files of all law enforcement agencies, investigatory agencies, and prosecutors’ offices involved in the investigation of the crimes committed or the prosecution of the defendant.”).

The arguments against this eminently civilized approach to criminal cases are essentially two:

First, it is said that criminal defendants, more than civil litigants, once

forewarned are likely to flee the jurisdiction, bribe or intimidate witnesses, or engage in other misbehavior. Counsel may concede that these dangers, if they are real, justify curbing criminal discovery. But quite apart from the fact that there has never been any adequate showing made to support the proposition that the dangers *are* greater in criminal cases generically than in civil cases (*compare NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 239-41 (1978), finding a special danger of witness intimidation in NLRB proceedings because of the “peculiar character of labor litigation” (*id.* at 240)), it is evident that the supposed dangers are differentially present in different sorts of criminal cases and in different sorts of discovery requests. No amount of argument about generalities can make concerns for flight, bribery, or intimidation anything other than preposterous when the defendant is an indigent, is jailed in default of bail, and wants production of the police report. Counsel should, therefore, urge that the liberality of civil discovery practice is appropriate unless the prosecutor can make some particularized showing that in *this* case and with respect to *this* discovery request the speculative dangers have some factual substance to them.

Second, the objection is mounted against criminal discovery that it is a “one-way street”: that the Privilege Against Self-Incrimination precludes the prosecutor from obtaining discovery against the defendant and that it is inefficient or unfair to give the defendant unilateral discovery against the prosecutor. Defense counsel can disarm this argument if s/he is willing to offer reciprocal disclosure to the prosecution. If s/he is not, s/he may at least be able to point to the caselaw suggesting that the Fifth Amendment is not an absolute bar to criminal discovery in favor of the prosecution but would permit the prosecutor to obtain disclosure of the products of defense investigation in an appropriate case (see §§ 18.11-18.13 *infra*; *cf. Kansas v. Cheever*, 134 S. Ct. 596 (2014)) – a point that can often be made consistently with arguing vigorously that the present case is not an appropriate one. Yet even if the Fifth Amendment were an absolute bar – or to the extent that it is a bar – the “one-way street” objection is logically unsound. That is so because the “one-way street” in question is no anomalous creation of criminal discovery but is the very hallmark of the American accusatorial system of criminal procedure, preferred and, in large measure, commanded by the Fifth Amendment itself. See *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964). The Fifth Amendment Privilege Against Self-Incrimination embodies “a judgment . . . that the prosecution should [not] be free to build up a criminal case, in whole or in part, with the assistance of enforced disclosures by the accused” (*Ullmann v. United States*, 350 U.S. 422, 427 (1956)). No one would suppose that because it protects the defendant from being compelled to incriminate himself or herself, the prosecution should be permitted to incriminate the defendant with perjurious or unreliable evidence. See § 18.9.2.5 *infra*. The efficiency and fairness of prescreening the prosecution’s evidence for veracity and reliability are not diminished simply because the overriding policy of the Fifth Amendment makes impossible what would be equally, but independently, desirable if constitutionally permissible: the prescreening of defense evidence as well. Any aversion to one-way streets, in this context, is nothing more or less than a rejection of basic Fifth Amendment values. Such a rejection is particularly indefensible because the best founded attacks on the policy of the Privilege Against Self-Incrimination have always rested

upon its tendency to protect the guilty, whereas it is the innocent who are particularly hurt by denial of discovery on “one-way street” logic. Furthermore, the realities of criminal investigation are a one-way street the other way. Police and prosecutors have resources to gather and preserve evidence incomparably greater than those of the accused. See *Wardius v. Oregon*, 412 U.S. 470, 475-76 n.9 (1973). If equal advantage were the measure of fairness in criminal procedure – which the Fifth Amendment denies – discovery in favor of the defense would nevertheless be required in virtually all situations.

18.3. *The Advisability of Pursuing Informal Discovery Methods Before Resorting to Formal Discovery Devices*

As a general rule, counsel should always pursue informal discovery options, asking the prosecutor for whatever is wanted, before counsel embarks upon discovery motions and other formal discovery devices. Judges understandably dislike being asked for coercive orders when it is not clear that coercion is necessary, and they are likely to tell counsel to pursue informal remedies first. (Indeed, in some jurisdictions, the discovery rules require that defense attorneys employ informal discovery procedures before resorting to discovery motions.) Also, when defense counsel has sought and been denied informal discovery, the balance of goodwill tips in the defense’s favor, with the judge blaming the prosecution for the expenditure of court time on a discovery matter.

B. *Informal Discovery*

18.4. *Designing a Strategy for Informal Discovery*

Prior to engaging in informal discovery, counsel will need to thoroughly familiarize himself or herself with local discovery rules and the constitutional doctrines (described in § 18.9 *infra*) that can be invoked in support of defense discovery. Even though counsel will usually not explicitly cite these rules and doctrines, a knowledge of the scope of the defendant’s formal discovery rights is important in deciding what information to request and the degree to which counsel can insist that s/he is entitled to the information. And occasionally it may be possible to break through an impasse in informal negotiations by demonstrating to the prosecutor that a particular doctrine or citation supports counsel’s discovery request.

Counsel should not restrict informal discovery requests to the information to which the defense is entitled as a matter of law. Instead counsel should seek everything that a liberal and enlightened criminal procedure would allow to the defense. See § 18.2 *supra*. Later in the process, when counsel is seeking judicial relief because of the prosecutor’s refusal to disclose information, counsel will need to calculate whether to be venturesome or to limit discovery motions to materials that are plainly discoverable under the recognized statutes, rules, and constitutional doctrines. At that stage, there are considerations to be weighed against over-ambition. See § 18.8 *infra*. But, given the basic notion of informal discovery – that defense counsel is merely asking for whatever information the prosecutor is willing to disclose

voluntarily – counsel needs not, and should not, feel restricted to the categories of information that the prosecutor can be compelled to disclose through formal discovery.

18.5. *The Discovery Letter*

Ordinarily, it is preferable to make discovery requests in written form. Discovery letters permit the type of careful phrasing that is difficult to achieve in oral requests. Moreover, if the prosecutor denies the request and counsel moves the court for a discovery order, it will be important to show precisely what counsel requested; a letter serves as the best record that any particular request was made and obviates arguments about how the request was framed. Finally, the written format permits an extended series of requests that would tax a prosecutor's time and patience if made orally in a discovery conference or a phone conversation.

To the extent possible, counsel should make the requests in the discovery letter highly specific. The more precisely a request identifies the item or information sought, the more unreasonable – and potentially unconstitutional – the prosecutor's refusal to produce it will appear. *Cf. United States v. Agurs*, 427 U.S. 97, 106-07 (1976). On the other hand, a discovery request limited to materials that defense counsel has sufficient information to identify with particularity may fail to cover some items that are crucial to the defense. One device for dealing with this problem is to frame discovery requests in the form of a series of concentric circles of increasing breadth and generality. Thus, for example, in an armed robbery prosecution, counsel might request:

- (I) The following real or physical objects or substances:
 - (A) The “thing of value” that it is alleged in Count One of the indictment the defendant took from the complainant, John Smith, on or about May 1, 2016;
 - (B) Any other thing that it is claimed was taken from John Smith during the course of the robbery alleged in Count One;
 - (C) The “pistol” described by Detective James Hall at page 6, line 4 of the transcript of the preliminary hearing in this case;
 - (D) Any other weapon that it is claimed was used by the defendant during the course of the robbery alleged in Count One of the indictment;
 - (E) Any other thing that it is claimed was used by the defendant as an instrumentality or means of committing the robbery alleged in Count One;

- (F) Any real or physical object or substance that:
- (1) the prosecution intends to offer into evidence at any trial or hearing in this case;
 - (2) the prosecution is retaining in its custody or control for potential use as evidence at any trial or hearing in this case;
 - (3) is being retained for potential use as evidence at any trial or hearing in this case by, or within the custody or control of:
 - (a) any personnel of the Oak City Police Department;
 - (b) any personnel of the State Bureau of Investigation;
 - (c) any personnel of the Oakland County Criminalistics Laboratory;
 - (d) [following paragraphs designate other relevant agencies];
 - (4) has been submitted to any professional personnel [as defined in a “Definitions” paragraph of the discovery request, encompassing all forensic science experts and investigators] for examination, testing, or analysis in connection with this case by:
 - (a) the District Attorney’s office;
 - (b) any person previously described by paragraph (I)(F)(3)(a), (b), (c) or (d);
 - (5) has been gathered or received in connection with the investigation of this case by:
 - (a) the District Attorney’s office;
 - (b) any personnel previously described by paragraph (I)(F)(3)(a), (b), (c), or (d);
 - (6) is relevant to:
 - (a) the robbery alleged in Count One of the indictment;

- (b) the identity of the perpetrator of that robbery;
- (c) the investigation of that robbery;
- (d) the physical or mental state, condition, or disposition of the defendant at the time of:
 - (i) that robbery;
 - (ii) the confession allegedly made by the defendant, described by Detective James Hall at page 10, lines 12-23 of the transcript of the preliminary hearing in this case;
 - (iii) any other confession, admission, or incriminating statement allegedly made by the defendant;
 - (iv) the present stage of the proceedings or any previous or subsequent stages of the proceedings;
- (G) Every real or physical object or substance within the categories previously described by paragraphs (I)(A) through (I)(F), which hereafter comes into the possession, custody, or control of, or is, or hereafter becomes, known to:
 - (1) the District Attorney's office;
 - (2) any person previously described by paragraph (I)(F) (3)(a), (b), (c), or (d).
- (II) [The following paragraphs would describe other categories of materials – defendant's statements, witnesses' statements, police and investigative reports and records, lab test results, exculpatory materials, and so forth – in a similar manner.]

Discovery requests in this form have the virtue of covering everything that might be discoverable, whether known or unknown to defense counsel, while insulating counsel's requests for narrower or more specific categories from denial on the ground that the broader or more general categories are impermissible "fishing expeditions" or include undiscoverable material.

Counsel should always include in every discovery letter a paragraph stating that each request for discovery should be construed as seeking not only information presently in the possession of the prosecution or its agents, but also "all like matter that hereafter comes into the possession of, or becomes known to, an attorney for the prosecution, the police, any other law enforcement or investigative agency, or any other agent of the prosecution."

18.6. *The Discovery Conference*

As a general rule, counsel should attempt to meet with the prosecutor for a discovery conference in addition to sending the type of discovery letter described in § 18.5 *supra*. The conference often will yield information not produced in the prosecutor’s written response to a discovery letter.

The key to conducting a discovery conference effectively is to set an informal, conversational tone from the beginning. See §§ 8.1.2, 15.12 *supra*. If counsel treats the conference as governed by strict rules, s/he will soon find the prosecutor denying every request on the theory that discovery in criminal cases is very limited. If, on the other hand, counsel suggests that the two attorneys simply “talk over the case,” the give-and-take of ordinary conversation usually will result in the prosecutor’s disclosing information to which the defense is not technically entitled. Of course, “give-and-take” means precisely that: prosecutors usually will not give information that they are not required to give unless they feel that they are getting information in exchange. Accordingly, counsel should decide in advance what bits of information can be disclosed to the prosecutor as barter without in any way damaging the defense case or giving away too much of the defense strategy.

In addition to seeking information about the case, counsel should use the discovery conference as a vehicle for learning the prosecutor’s attitude toward the seriousness of the offense and for discussing the possibility of dismissing or reducing the charges (see § 8.4 *supra*) or diverting the prosecution (see §§ 2.3.6, 3.19, 8.2.2-8.2.4, 8.4 *supra*; Chapter 21 *infra*).

It may also be useful to let the prosecutor know that counsel intends to work hard at the case (either explicitly, by saying so and explaining counsel’s concern for the client, or implicitly, by describing the motions that counsel intends to file or other work counsel intends to do on the case). The pros and cons of this approach are canvassed in § 8.1.4 *supra*.

Finally, if the defendant is interested in “cutting a deal” with the State – furnishing testimony against a co-defendant or other persons, or supplying criminal-intelligence wanted by law enforcement, in exchange for dismissal of the prosecution or reduction of charges or acceptance of a plea to a lesser charge (see §§ 6.12, 8.6, 15.10, 15.11 subdivision (9), 15.13 *supra*) – counsel might begin discussing this possibility with the prosecutor at the discovery conference.

C. *Formal Discovery: Mechanisms and Legal Bases*

18.7. *Types of Formal Discovery Procedures*

Local practice varies widely with regard to whether and which discovery procedures are available. Counsel will need to consult local statutes, court rules, and caselaw, and counsel should confer with other defense attorneys practicing in the jurisdiction, to ascertain what types of discovery devices

are customary. Even if certain devices are not recognized by the local courts, counsel can argue that they should be.

Authorities and arguments supporting the recognition of various devices are found in the following literature, most of which is outspoken in favor of broadened criminal discovery: AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Chapter 11 (“Discovery Standards”) (4th ed. 2015); William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 WASH. U. L.Q. 279; Richard M. Calkins, *Criminal Justice for the Indigent*, 42 U. DET. L.J. 305, 334-35, 337-39 (1965); Richard M. Calkins, *Grand Jury Secrecy*, 63 MICH. L. REV. 455 (1965); Daniel J. Capra, *Access to Exculpatory Evidence: Avoiding the Agurs Problems of Prosecutorial Discretion and Retrospective Review*, 53 FORDHAM L. REV. 391 (1984); Ronald L. Carlson, *False or Suppressed Evidence: Why a Need for the Prosecutorial Tie?*, 1969 DUKE L.J. 1171; Robert L. Fletcher, *Pre-Trial Discovery in State Criminal Cases*, 12 STAN. L. REV. 293 (1960); Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1172-98 (1960); Sheldon Krantz, *Pretrial Discovery in Criminal Cases: A Necessity for Fair and Impartial Justice*, 42 NEB. L. REV. 127 (1962); David W. Louisell, *Criminal Discovery: Dilemma Real or Apparent?*, 49 CALIF. L. REV. 56 (1961); Robert P. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CAL. L. REV. 1567 (1986); Robert P. Mosteller, *Exculpatory Evidence, Ethics, and the Road to the Disbarment of Mike Nifong: The Critical Importance of Full Open-File Discovery*, 15 GEO. MASON L. REV. 257 (2008); Barry Nakell, *Criminal Discovery for the Defense and the Prosecution – The Developing Constitutional Considerations*, 50 N.C. L. REV. 437 (1972); Barry Nakell, *The Effect of Due Process on Criminal Defense Discovery*, 62 KY. L.J. 58 (1973-74); Mary Prosser, *Reforming Criminal Discovery: Why Old Objections Must Yield to New Realities*, 2006 WIS. L. REV. 541; Daniel A. Reznick, *The New Federal Rules of Criminal Procedure*, 54 GEO. L.J. 1276 (1966); Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097 (2004); Hon. H. Lee Sarokin & William E. Zuckermann, *Presumed Innocent? Restrictions on Criminal Discovery in Federal Court Belie this Presumption*, 43 RUTGERS L. REV. 1089 (1991); Roger J. Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U. L. REV. 228, 749 (1964); Peter Westen, *The Compulsory Process Clause*, 73 MICH. L. REV. 71, 121-31 (1974); Bureau Draft, *A State Statute to Liberalize Criminal Discovery*, 4 HARV. J. LEGISLATION 105 (1966); Edward M. Glickman, Note, *Disclosure of Grand Jury Minutes to Challenge Indictments and Impeach Witnesses in Federal Criminal Cases*, 111 U. PA. L. REV. 1154 (1963); Katherine L. Hensley, Note, *Discovery Depositions: A Proposed Right for the Criminal Defendant*, 51 S. CAL. L. REV. 467 (1978).

A general approach to defense counsel’s argument for broadened discovery rights is contained in § 18.2 *supra*, and constitutional considerations that may be advanced to support those rights are enumerated in § 18.9 *infra*. The most commonly recognized formal discovery devices are discussed in §§ 18.7.1-18.7.6 *infra*.

18.7.1. Motion for a Bill of Particulars

See § 13.7 *supra*.

18.7.2. Motion for a List of Prosecution Witnesses

See § 13.7 *supra*. If the prosecutor responds to a motion or order for production of a witness list by serving up an obviously inflated list calculated to hamper defense preparation, counsel can seek the court's intervention to extract a more realistic list. *Cf. Chafin v. State*, 246 Ga. 709, 713-14, 273 S.E.2d 147, 152-53 (1980). If counsel's independent investigation suggests, conversely, that the prosecutor is probably withholding the names of some potential prosecution witnesses, counsel can bring the matter to the court's attention by a motion to compel full disclosure; or alternatively counsel can (1) move at a pretrial conference or other pretrial, post-discovery proceeding to preclude the testimony of an unlisted witness (*see, e.g., State v. Martinez*, 124 N.M. 721, 954 P.2d 1198 (N.M. App. 1998)), or (2) await trial and, when the prosecutor calls an unlisted witness, object to his or her testifying (*see, e.g., Rouse v. State*, 243 So. 2d 225 (Fla. App. 1971); *People v. White*, 123 Ill. App. 2d 102, 259 N.E.2d 357 (1970)). At trial the judge will have discretion to (a) exclude the testimony of the witness, or (b) allow the witness to testify and allow the defense a continuance to prepare for cross-examining the witness and to gather defense witnesses responsive to the unannounced witness's testimony. *State v. Prieto*, 366 Wis. 2d 794, 876 N.W.2d 154 (Wis. App. 2015). *See, e.g., Rogers v. State*, 261 Ga. 649, 649-50, 409 S.E.2d 655, 656-57 (1991) (“[I]f a defendant makes a timely written demand for a list of witnesses, a witness whose name does not appear on the list may not testify without defendant's consent. The prosecution's failure to list a witness can be cured in many situations, however, if defendant is granted a continuance or allowed to interview the witness before the testimony is given. ¶ In this case, Rogers made a timely written demand for a list of witnesses We conclude that the testimony of the witness should not have been allowed without giving Rogers some remedy for the prosecution's noncompliance with the statute. The record is clear that Rogers insisted on his right to a witness list and on his right to a remedy for the failure of the witness to appear on the list.”).

In a few jurisdictions, the defendant's right to a witness list is not limited to potential prosecution witnesses but extends to witnesses whom the prosecutor knows have exculpatory evidence. *See, e.g., FLA. RULE CRIM. PRO. 3.220(b)(1)(A); Richardson v. State*, 246 So. 2d 771 (1971). Local rules should be consulted.

18.7.3. Discovery Motions

In addition to the two specific types of discovery motions that have been described thus far – motions for a bill of particulars and motions for a list of witnesses – most jurisdictions provide for a generalized discovery motion in which the defense can seek production of any other information to which it is entitled by statute, court rule, or caselaw.

Depending upon the facts of the case, the defense may wish to move for production or inspection of:

1. *Physical objects.* Counsel should ask that these be released for testing by defense experts, if advised; or the court can be asked to order that defense experts be allowed to attend testing by prosecution experts.
2. *Police and other investigative reports; records and materials generated by police procedures and activities* (911 telephone calls; arrest photographs; booking records; eyewitness identification forms; and so forth); *photographs, diagrams, and other items generated by law enforcement and prosecutorial evidence gathering.* See § 9.20 *supra* for a roster of the kinds of documents and materials that are commonly accumulated in the course of police processing and prosecutorial working-up of a case.
3. *Medical and scientific reports.*
4. *Written and oral statements of the defendant.*
5. *Written and oral statements of any co-defendants or other alleged accomplices.*
6. *Statements of witnesses.*
7. *Official records* (maintained by prisons, jails, hospitals, probation departments, and so forth) relating to the defendant, co-defendants, and prosecution and defense witnesses, including materials relevant to credibility in the personnel files of police witnesses; investigative reports relating to previous complaints by the present complainant; and records of all police and prosecutorial transactions with any undercover agents or informants involved.
8. *Criminal records* of the defendant, co-defendants, prosecution and defense witnesses, and informants.
9. *The grand jury transcript.* A special shibboleth of secrecy has traditionally surrounded grand jury proceedings and made courts reluctant to disclose grand jury records. See § 12.5 *supra*. There has, however, been some erosion of this protectionistic attitude, “consonant with the growing realization that disclosure, rather than suppression, of relevant materials ordinarily promotes the proper administration of criminal justice” (*Dennis v. United States*, 384 U.S. 855, 870 (1966)). Some jurisdictions provide for pre-trial discovery by the defense of the grand jury transcript or an electronic recording of the grand jury proceedings, either upon defense motion or as a matter of routine (*see, e.g.*, ALASKA RULE CRIM. PRO. 6(m); MASS. RULE CRIM. PRO. 14(a)(1)(A)(ii); N.J. RULE CRIM. PRO. 3:6-6(b)), while others provide the more limited pretrial discovery mechanism of allowing the defense to seek disclosure in

connection with a motion to dismiss the indictment based upon “a matter that occurred before the grand jury” (FED. RULE CRIM. PRO. 6(e)(3)(E)(ii)) or the insufficiency of the evidence before the grand jury to support the charges in the indictment (N.Y. CRIM. PRO. LAW § 210.30(3)). A number of jurisdictions also provide for discovery *at trial* of the prior statements of prosecution witnesses, for purposes of impeachment (see § 34.7 *infra*), and these provisions ordinarily include witnesses’ grand jury testimony.

10. *Photographs and other visual aids* shown to witnesses by investigating officers for purposes of identification. See *Simmons v. United States*, 390 U.S. 377, 388 (1968) (dictum).

18.7.4. Other Discovery-Related Motions

In addition to the foregoing motions, local practice may recognize (or counsel may be able to persuade the judge to recognize) one or more of the following types of motions, which involve the court’s ordering the prosecution or prosecution witnesses to participate in certain discovery-related procedures:

1. Motions for medical or psychiatric examination of the complainant or other prosecution witnesses.
2. Motions for an order requiring the complainant and other prosecution witnesses to speak with the defense because of prosecutorial or police interference with the defense right to investigate. See § 9.14 *supra*.
3. Motions for an order requiring police witnesses to speak with the defense. See § 9.15 *supra*.

In addition, counsel can, in certain circumstances, move for the detention of persons as material witnesses. See §§ 18.10.1, 29.4.1 *infra*.

18.7.5. Depositions

Although depositions are a key feature of discovery in civil cases, most jurisdictions do not authorize depositions in criminal cases, except when it is necessary to preserve the testimony of a witness for trial (*see, e.g.*, FED. RULE CRIM. PRO. 15(a)) or in other exceptional circumstances (*see, e.g.*, § 9.14 *supra*, discussing deposition as a possible remedy for the prosecutor’s impermissibly advising a witness to decline to talk with defense counsel or a defense investigator).

In a small number of jurisdictions, depositions are available in criminal cases for their customary function of discovery. See AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE 11-5.1, Commentary n.4 (3d ed. 1996) (citing statutes and rules). In these jurisdictions, depositions may be freely available just as in civil cases (FLA. RULE CRIM. PRO. 3.220(h)(1); VT. RULE

CRIM. PRO. 15(a)) or they may require that counsel seek a court order and make a specified showing of a need for depositions (*see, e.g.*, ARIZ. RULE CRIM. PRO. 15.3(a); N.H. REV. STAT. § 517:13(II)). Some of these jurisdictions bar the defendant from attending the deposition unless there is a stipulation of the parties or unless counsel obtains a court order based upon a showing of good cause. *See, e.g.*, FLA. RULE CRIM. PRO. 3.220(h)(7); VT. RULE CRIM. PRO. 15(b).

In jurisdictions that permit depositions by the prosecution as well as the defense, the applicable statute or rule commonly recognizes that the defendant may not be deposed by the prosecution. *See, e.g.*, ARIZ. RULE CRIM. PRO. 15.3(a); N.H. REV. STAT. § 517:13(II). *See also* FED. RULE CRIM. PRO. 15(e)(1) (procedure for preserving the testimony of a witness in a criminal trial may not be used to depose a defendant “without that defendant’s consent”). Even if such a limitation were not set by the relevant statute or rule, the Fifth Amendment’s Privilege Against Self-Incrimination would preclude the prosecution from deposing the defendant. *See* § 18.12 *infra*.

Where depositions are available to defense counsel, they will ordinarily be an invaluable tool for discovery of the prosecution’s case and for locking prosecution witnesses into statements that can be used to impeach the witness at trial if s/he changes his or her account. In these respects, depositions offer the kinds of tactical benefits discussed in other chapters with regard to preliminary hearings (*see* § 11.8.2 *supra*) and suppression hearings (*see* §§ 24.2, 24.4 *infra*). But depositions can be even more effective for these purposes because they usually cover a wider range of subjects and because their use as a discovery tool is not merely tolerated but specifically intended.

An issue that may arise at trial in a jurisdiction that affords depositions in criminal cases is whether, in the event that a prosecution witness who was deposed is unavailable at trial, the prosecution can introduce the witness’s deposition into evidence. The rule of *Crawford v. Washington*, 541 U.S. 36 (2004), discussed in § 36.3.3 *infra*, should bar such a practice. *See, e.g.*, *Corona v. State*, 64 So. 3d 1232, 1241 (Fla. 2011) (discovery depositions, available to the defense in criminal cases under state rules, “do not meet *Crawford*’s cross-examination requirement” of “afford[ing] [the accused] an adequate opportunity to cross-examine the . . . declarant” because, *inter alia*, such depositions are “not designed as an opportunity to engage in adversarial testing of the evidence against the defendant,” and they are admissible at trial solely “for purposes of impeachment” and not as “substantive evidence”). *But see Thomas v. State*, 966 N.E.2d 1267, 1272 (Ind. App. 2012) (concluding that the prosecution’s introduction of a deposition of an unavailable witness at trial did not violate *Crawford* because defense counsel had an adequate prior opportunity to cross-examine that witness at the deposition, but ultimately holding that “even assuming that *Crawford*’s requirements were not met, any error in admitting the deposition was harmless”).

18.7.6. Freedom of Information Laws (FOILs)

A number of jurisdictions have enacted freedom of information laws (commonly called FOILs), some of them patterned on the federal Freedom

of Information Act, 5 U.S.C. § 552. Although the Supreme Court has said of the federal Act that it “was not intended to supplement or displace rules of discovery” (*John Doe Agency v. John Doe Corp.*, 493 U.S. 146, 153 (1989)), and lower courts have said the same of their state FOILs, these laws may be written sufficiently broadly to reach certain government records that defense counsel would like to examine. *See, e.g., United States Department of Justice v. Julian*, 486 U.S. 1 (1988).

Unless the jurisdiction’s statute explicitly forbids its use by parties to litigation against the government or exempts the types of records counsel is seeking (*see, e.g., Martin v. Musteen*, 303 Ark. 656, 799 S.W.2d 540 (1990)), counsel may find it profitable to follow the statutory procedures for requesting access to records that arguably fall within its compass. *See, e.g., In the Matter of Gould v. New York City Police Department*, 89 N.Y.2d 267, 274-75, 675 N.E.2d 808, 811-12, 653 N.Y.S.2d 54, 57-58 (1996) (even though “petitioners seek [to use FOIL] to obtain documents relating to their own criminal proceedings, and . . . disclosure of such documents is governed generally by CPL [Criminal Procedure Law] article 240 [on discovery in criminal cases,] . . . the Criminal Procedure Law does not specifically preclude defendants from seeking these documents under FOIL, [and therefore] we cannot read such a categorical limitation into the statute”; “the Police Department’s argument and the dissent’s concern that the requests serve not the underlying purposes of FOIL, but the quite different private interests of petitioners in obtaining documents bearing on their [criminal] cases and will produce an enormous administrative burden” are “unavailing as the statutory language imposes a broad duty to make certain records publicly available irrespective of the private interests and the attendant burdens involved”; the rulings below “establishing a blanket exemption from FOIL disclosure for [police] complaint follow-up reports and police activity logs” are reversed and the cases are remitted to the trial courts “to determine, upon an in camera inspection if necessary, whether the Police Department can make a particularized showing that any claimed exemption applies”).

FOIL requests are ordinarily submitted in writing directly to the governmental agency whose records are sought. If the agency does not produce them, a civil action is brought against the agency to compel production. The FOIL specifies the court or courts in which the civil action may be brought and the procedure for bringing it.

18.8. *General Strategy When Employing Formal Discovery Procedures*

Section 18.4 *supra* advised that counsel seek as much information as possible through informal discovery procedures. A different tack may be advisable in making formal discovery motions. By limiting these motions to what counsel is likely to get as a matter of settled law and local custom, counsel can display an attitude of undemanding reasonableness that may persuade the court to exercise its discretion in favor of discovery in areas where the prevailing practice allows discovery but does not require it. Since discovery law in most jurisdictions confers broad discretionary power on the trial judge, it often makes sense to get or keep on the judge’s good side by

requesting nothing that s/he could regard as exorbitant. In deciding whether to employ this strategy, or whether to go for broke and ask for everything that an enlightened criminal procedure would give the defense, or whether to take some intermediate position between these two extremes, counsel will need to assess the temperament of his or her individual judge. When counsel's theory of the case makes one or a few particular items crucial subjects for discovery (see § 7.2.1.4 *supra*), s/he may do best by focusing on those items in his or her requests for court-ordered discovery, and forgoing other items – or at least forgoing any other items which are not routine, unremarkable staples of local discovery practice.

In any event, counsel should make discovery requests as specific as possible, identifying the material that is wanted (*cf. United States v. Agurs*, 427 U.S. 97, 106-07 (1976)) and describing its relevance and importance for the preparation of the defense unless self-evident (*cf. United States v. Valenzuela-Bernal*, 458 U.S. 858, 871-74 (1982)). If counsel is unable to identify with specificity some of the information that s/he wants, counsel should use the concentric-circles approach described in § 18.5 *supra* to guard against the risk that the judge will deny the entire discovery motion as a “fishing expedition.”

When requesting a discovery order, counsel should recount his or her attempts to obtain the information through informal discovery, and the prosecutor's refusal to disclose it. See § 18.3 *supra*. If counsel sent a discovery letter to the prosecutor (see § 18.5 *supra*), a copy of the letter as well as any prosecutorial responses should be attached as an appendix to the discovery motion. When seeking materials or information to which the defense is not plainly entitled as a matter of routine under established precedent, counsel should take pains to demonstrate his or her efforts and inability to obtain the information independently: for example, counsel should recite his or her attempts to interview the prosecution witness(es) who know the information and the fact that the witness(es) refused to speak with counsel or the defense investigator. By documenting his or her assiduity, counsel demonstrates that s/he genuinely needs the judge's intervention and is not just being lazy. The absence of any alternative to judicial process as a means for obtaining vital information strengthens counsel's entitlement to the court's assistance. *Compare California v. Trombetta*, 467 U.S. 479, 488-90 (1984).

18.9. Constitutional Doctrines That Can Be Invoked in Support of Defense Discovery

The *Brady* rule described in § 18.9.1 *infra*, gives the defense a federal constitutional right to discovery of exculpatory information and information that impeaches prosecution evidence. This is a firmly established doctrine, recognized in all jurisdictions. The other doctrines described in this section, which provide constitutional rationales for broader defense discovery rights, have not as yet been authoritatively recognized. Accordingly, when relying on the latter doctrines, counsel will need to fully brief their legal basis and should also present a compelling factual showing of need.

18.9.1. *The Brady Doctrine: The Right to Prosecutorial Disclosure of Evidence Helpful to the Defense*

Brady v. Maryland, 373 U.S. 83 (1963), and its progeny require that the prosecution disclose, upon defense request, evidence in the prosecutor’s possession that is material and potentially helpful to the defense. The Court ruled in *Brady* that “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution” (*id.* at 87). *Accord*, *Wearry v. Cain*, 136 S. Ct. 1002 (2016) (*per curiam*); *Smith v. Cain*, 132 S. Ct. 627 (2012); *Cone v. Bell*, 556 U.S. 449, 451, 469-70 (2009); *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Strickler v. Greene*, 527 U.S. 263, 280-81 (1999); *Kyles v. Whitley*, 514 U.S. 419, 432-38 (1995); *Gumm v. Mitchell*, 775 F.3d 345, 363-74 (6th Cir. 2014); *United States v. Tavera*, 719 F.3d 705, 711-12 (6th Cir. 2013).

In *Brady*, the evidence improperly suppressed by the prosecution was a co-defendant’s confession that identified the co-defendant as the lone triggerman in a robbery-murder. In *United States v. Bagley*, 473 U.S. 667 (1985), the Court made clear that “[i]mpeachment evidence . . . as well as exculpatory evidence, falls within the *Brady* rule,” and thus the *Brady* doctrine extends to “evidence that the defense might . . . use[] to impeach the Government’s witnesses by showing bias or interest” (*id.* at 676). *Accord*, *Wearry v. Cain*, *supra*, 136 S. Ct. at 1006-07 (“the rule stated in *Brady* applies to evidence undermining witness credibility”); *Strickler v. Greene*, *supra*, 527 U.S. at 280; *Kyles v. Whitley*, *supra*, 514 U.S. at 433. *See also* *Smith v. Cain*, *supra*, 132 S. Ct. at 630-31; *Barton v. Warden*, 786 F.3d 450, 465-70 (6th Cir. 2015) (*per curiam*); *Lewis v. Connecticut Comm’r of Correction*, 790 F.3d 109, 113, 123-24 (2d Cir. 2015); *Amado v. Gonzalez*, 758 F.3d 1119, 1133-34, 1138-39 (9th Cir. 2014); *Johnson v. Folino*, 705 F.3d 117, 129-30 (3d Cir. 2013); *United States v. Mahaffy*, 693 F.3d 113, 130-33 (2d Cir. 2012); *In re Stenson*, 174 Wash. 2d 474, 488-89, 276 P.3d 286, 293-94 (2012). For example, “*Brady* requires prosecutors to disclose any benefits that are given to a government informant, including any lenient treatment for pending cases” (*Maxwell v. Roe*, 628 F.3d 486, 510 (9th Cir. 2010), and cases cited). *See also*, e.g., *Fuentes v. Griffin*, 829 F.3d 233, 247 (2d Cir. 2016) (“if the prosecution has a witness’s psychiatric records that are favorable to the accused because they provide material for impeachment, those records fall within *Brady* principles”).

The *Brady* “rule encompasses evidence ‘known only to police investigators and not to the prosecutor’ . . . [and] therefore, ‘the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government’s behalf in this case, including the police’” (*Strickler v. Greene*, *supra*, 527 U.S. at 280-81 (quoting *Kyles v. Whitley*, *supra*, 514 U.S. at 437-38)). *See* *Youngblood v. West Virginia*, 547 U.S. 867 (2006) (*per curiam*); *Barton v. Warden*, *supra*, 786 F.3d at 465; *Aguilar v. Woodford*, 725 F.3d 970, 982-83 (9th Cir. 2013); *State ex rel. Griffin v. Denney*, 347 S.W.3d 73, 78 (Mo. 2011) (“Even if the prosecutor was subjectively unaware that a weapon was confiscated from . . . [a suspect other than the defendant], the State is nonetheless under a duty to disclose the evidence. . . . In this case, the murder occurred in prison, and the prison guards were acting on the government’s behalf. Therefore,

the State had a duty to discover and disclose any material evidence known to the prison guards.”); *McCormick v. Parker*, 821 F.3d 1240 (10th Cir. 2016) (the prosecutor violated *Brady* by failing to disclose to the defense that the alleged Sexual Assault Nurse Examiner (SANE) who testified for the state at trial “wasn’t certified as a SANE nurse in Texas when she testified” and that she had “misrepresented herself as a certified SANE nurse ‘to patients, court officials and the public’” (*id.* at 1244); there was no indication that “the prosecutor actually knew about [witness] Ridling’s lapsed credentials” (*id.* at 1246) but “Ridling was part of the prosecution team for *Brady* purposes . . . [and] [a]ccordingly, we must impute her knowledge of her own lack of certification to the prosecutor” (*id.* at 1247)); and see *Carillo v. County of Los Angeles*, 798 F.3d 1210 (9th Cir. 2015). *A fortiori*, a prosecutor’s duty to learn about exculpatory and impeaching evidence “includes evidence held by other prosecutors”; “knowledge of that evidence is imputed to . . . [the trial prosecutor] under *Brady*” (*Aguilar v. Woodford, supra*, 725 F.3d at 982).

“It is well established that the state violates a defendant’s right to due process under *Brady* when it withholds evidence that is ‘favorable to the defense’ (and material to the defendant’s guilt or punishment). . . . In describing evidence that falls within the *Brady* rule, the Supreme Court has made clear that impeachment evidence is ‘favorable to the defense’ even if the jury might not afford it significant weight.” *Lambert v. Beard*, 537 Fed. Appx. 78, 86 (3d Cir. 2013). “We further hold that, to the extent the state court determined that the Police Activity Sheet was not exculpatory or impeaching under *Brady* because it was ambiguous, such determination was an unreasonable application of clearly established Supreme Court precedent.” *Id.* at 85-86.

Defense counsel should always make a general *Brady* request in his or her discovery letter to the prosecution (see § 18.5 *supra*) and in discovery motions (see § 18.7.3 *supra*). Such a request might be framed in terms such as the following:

any and all materials and information within the possession of the prosecution or law enforcement agents which could constitute evidence favorable to the accused, or which could lead to material favorable evidence, including exculpatory or mitigating matters and any matters that could be used to impeach the prosecution’s evidence or to undermine the prosecution’s case, within the meaning of *Brady v. Maryland*, 373 U.S. 83 (1963).

In addition, counsel should make particularized requests for any specific items or categories of *Brady* information that counsel can identify, on the basis of defense investigation, as likely to be in the hands of prosecuting or law enforcement authorities. While the prosecution does not escape its obligation to turn over *Brady* information when the defense request is “merely a general request” – or even when “there has been no [defense] request at all” – (*United States v. Agurs, supra*, 427 U.S. at 106-07; *Strickler v. Greene, supra*, 527 U.S. at 280; *Kyles v. Whitley, supra*, 514 U.S. at 433-34), the chances of reversal of a conviction may be somewhat improved if the prosecution failed to honor a specific *Brady* request. See *United States v. Bagley, supra*, 473 U.S. at 682-83 (opinion

of Blackmun, J.); *Pennsylvania v. Ritchie*, 480 U.S. 39, 58 n.15 (1987). *See also, e.g., People v. Vilardi*, 76 N.Y.2d 67, 71-78, 555 N.E.2d 915, 916-21, 556 N.Y.S.2d 518, 519-24 (1990) (a specific *Brady* request by defense counsel triggers the enhanced protections afforded by the state constitutional version of the *Brady* doctrine).

Because *Brady* and its progeny involved invalidations of convictions in response to post-trial revelations that the prosecutor had failed to disclose information favorable to the accused at any time prior to the conclusion of a trial, they do not speak directly to the requisite timing of *Brady* disclosures. But their rationale implies that disclosure of *Brady* material “must be made at such time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case” (*United States v. Pollack*, 534 F.2d 964, 973 (D.C. Cir. 1976)). *See, e.g., Fuentes v. Griffin, supra*, 829 F.3d at 249-50 (the prosecution’s failure to turn over a psychiatric report about the complainant was prejudicial for a number of reasons including, “importantly, [that] timely disclosure of the [report] . . . would have provided defense counsel with an opportunity to seek an expert opinion with regard to the [report’s] . . . indication of other significant symptoms, in order to establish reasonable doubt in the minds of the jurors because of [complainant] G.C.’s predisposition toward emotional instability and retaliation – an opinion he was able to obtain after he eventually learned of the psychiatric record but not in time to present it to the jury”). *See also, e.g., AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE*, Standard 11-2.1(a) (4th ed. 2015) (“Prosecutorial Disclosure”) (disclosure “within a specified and reasonable time prior to trial”). *Compare United States v. Ruiz*, 536 U.S. 622, 625, 631, 633 (2002) (the *Brady* doctrine “does not require the Government to disclose material impeachment evidence prior to entering a plea agreement with a criminal defendant,” given that pre-plea prosecutorial disclosure of “information establishing the factual innocence of the defendant” and other constitutional and systemic protections guard against the risk that “innocent individuals, accused of crimes, will plead guilty”), *with State v. Huebler*, 275 P.3d 91, 96-98 (Nev. 2012) (“the considerations that led to the decision in [*United States v.*] *Ruiz* do not lead to the same conclusion when it comes to material exculpatory information”: “While the value of impeachment information may depend on innumerable variables that primarily come into play at trial and therefore arguably make it less than critical information in entering a guilty plea, the same cannot be said of exculpatory information, which is special not just in relation to the fairness of a trial but also in relation to whether a guilty plea is valid and accurate.”; “We are persuaded by language in *Ruiz* and due-process considerations that a defendant may challenge the validity of a guilty plea based on the prosecution’s failure to disclose material exculpatory information before entry of the plea.”), *and Bridgeforth v. Superior Court*, 214 Cal. App. 4th 1074, 1077, 1087, 154 Cal. Rptr. 3d 528, 530, 538 (2013) (“applying the traditional three-factor due process analysis utilized in *Ruiz* . . . [and] the remaining considerations cited in *Ruiz*” to hold that the Due Process clauses of the federal and state constitutions require “the prosecution to disclose, prior to the preliminary hearing, evidence in its possession that is both favorable to the defense and material to the probable cause determination to be made at the preliminary hearing”). And, in any event, both prosecutors and judges should be sensitive to the argument that timely pretrial discovery is a better way to

run a system than disclosure at trial, with a constitutionally compelled mistrial and continuance, or postconviction litigation of questions of nondisclosure. “[T]he aim of due process ‘is not punishment of society for the misdeeds of the prosecutor but avoidance of an unfair trial to the accused.’” *Smith v. Phillips*, 455 U.S. 209, 219 (1982). This is why, as the Supreme Court noted pointedly in *Agurs*, “the prudent prosecutor will resolve doubtful questions in favor of disclosure” (427 U.S. at 108). See also *Cone v. Bell*, *supra*, 556 U.S. at 470 n.15 (“Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor’s ethical or statutory obligations. . . . As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure.”); *Kyles v. Whitley*, *supra*, 514 U.S. at 439-40 (“Unless . . . the adversary system of prosecution is to descend to a gladiatorial level unmitigated by any prosecutorial obligation for the sake of truth, the government simply cannot avoid responsibility for knowing when the suppression of evidence has come to portend such an effect on a trial’s outcome as to destroy confidence in its result. ¶ This means, naturally, that a prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence. . . . This is as it should be. Such disclosure will serve to justify trust in the prosecutor as ‘the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.’ . . . And it will tend to preserve the criminal trial, as distinct from the prosecutor’s private deliberations, as the chosen forum for ascertaining the truth about criminal accusations.”); *Strickler v. Greene*, *supra*, 527 U.S. at 281 (the *Brady* doctrine reflects “the special role played by the American prosecutor in the search for truth in criminal trials” and the prosecutor’s interest in ensuring that “‘justice shall be done’” (quoting *Berger v. United States*, 295 U.S. 78, 88 (1935))); *Banks v. Dretke*, *supra*, 540 U.S. at 696 (“[a] rule . . . declaring ‘prosecutor may hide, defendant must seek,’ is not tenable in a system constitutionally bound to accord defendants due process.”); *In re Kline*, 113 A.3d 202, 204, 213 (D.C. 2015) (District of Columbia Rule of Professional Conduct 3.8(e), which “prohibits a prosecutor in a criminal case from intentionally failing to disclose to the defense any evidence or information that the prosecutor knows or reasonably should know tends to negate the guilt of the accused,” “requires a prosecutor to disclose all potentially exculpatory information in his or her possession regardless of whether that information would meet the materiality requirements of *Bagley*, *Kyles*, and their progeny”).

18.9.2. Other Bases for Constitutional Contentions of Rights to Discovery

The following subparagraphs sketch additional constitutional principles that defense counsel can invoke in developing arguments to support discovery requests for particular kinds of materials or information that are not encompassed – or are only dubiously encompassed – by the *Brady* doctrine.

18.9.2.1. The Sixth Amendment Right to Counsel

The Sixth Amendment right to counsel, incorporated into the

Fourteenth Amendment by *Gideon v. Wainwright*, 372 U.S. 335 (1963); *see also*, e.g., *Alabama v. Shelton*, 535 U.S. 654, 661-62 (2002), guarantees more than that the defendant must have a lawyer. It assures “effective aid in the preparation and trial of the case” (*Powell v. Alabama*, 287 U.S. 45, 71 (1932)), and it is violated whenever defense counsel’s performance is inadequate to “ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding” (*Strickland v. Washington*, 466 U.S. 668, 691-92 (1984); *see id.* at 685-86; *Rompilla v. Beard*, 545 U.S. 374, 387-90 (2005); *Wiggins v. Smith*, 539 U.S. 510, 521-22, 524-28, 533, 534-35 (2003); *Williams v. Taylor*, 529 U.S. 362, 390-91, 395-97 (2000)). The Sixth Amendment is not solely – or even primarily – an admonition to defense attorneys to do the best job they can under the circumstances. More basically, it invalidates any state-created procedure that compels counsel to operate under circumstances which preclude an effective defense effort. *Powell v. Alabama*, *supra*, 287 U.S. at 71-73; *Holloway v. Arkansas*, 435 U.S. 475, 481-86 (1978); *Holt v. Virginia*, 381 U.S. 131 (1965); *Ferguson v. Georgia*, 365 U.S. 570 (1961); *Brooks v. Tennessee*, 406 U.S. 605 (1972); *Geders v. United States*, 425 U.S. 80 (1976); *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980) (dictum). “[T]he right to the assistance of counsel has been understood to mean that there can be no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process that has been constitutionalized in the Sixth and Fourteenth Amendments.” *Herring v. New York*, 422 U.S. 853, 857 (1975). For example, the Sixth Amendment has repeatedly been held to condemn eve-of-trial appointments of counsel that leave the lawyer inadequate time to prepare for trial. E.g., *Jones v. Cunningham*, 313 F.2d 347 (4th Cir. 1963); *Martin v. Virginia*, 365 F.2d 549 (4th Cir. 1966); *Roberts v. United States*, 325 F.2d 290 (5th Cir. 1963); *Townsend v. Bomar*, 331 F.2d 19 (6th Cir. 1964); *People v. Stella*, 188 A.D.2d 318, 318-19, 590 N.Y.S.2d 478, 478-79 (N.Y. App. Div., 1st Dep’t 1992). *See also*, e.g., *Catalan v. Cockrell*, 315 F.3d 491, 492-93 (5th Cir. 2002); *Routhier v. Sheriff, Clark County*, 93 Nev. 149, 151-52, 560 P.2d 1371, 1372 (1977); and *see* § 3.23.3 *supra*. Timely appointment of counsel was required by *Powell v. Alabama*, *supra*, the fountainhead of all right-to-counsel cases, because during the pretrial period “consultation, thoroughgoing investigation and preparation were vitally important” (287 U.S. at 57). If adequate *time* to prepare is a constitutional mandate, adequate *information* to prepare is arguably no less necessary. For, as the Supreme Court has recognized, the pretrial gathering of this information is a vital part of the effective assistance of counsel that the Constitution commands. *See Coleman v. Alabama*, 399 U.S. 1, 9 (1970); *Adams v. Illinois*, 405 U.S. 278, 281-82 (1972); *see also Rompilla v. Beard*, *supra*, 545 U.S. at 387 (“The notion that defense counsel must obtain information that the State has and will use against the defendant is not simply a matter of common sense.”); *Wiggins v. Smith*, *supra*, 539 U.S. at 522, 524-26, 531-32, 534; *Williams v. Taylor*, *supra*, 529 U.S. at 396; *Strickland v. Washington*, *supra*, 466 U.S. at 690-91.

18.9.2.2. *The Right to Fair Notice of Charges*

In *Cole v. Arkansas*, 333 U.S. 196 (1948), the Supreme Court recognized the “principle of procedural due process . . . that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if

desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal” (*id.* at 201). *See also Dunn v. United States*, 442 U.S. 100, 106-07 (1979). “These standards no more than reflect a broader premise that has never been doubted in our constitutional system: that a person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend.” *Jackson v. Virginia*, 443 U.S. 307, 314 (1979).

“Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled court proceedings so that reasonable opportunity to prepare will be afforded, and it must ‘set forth the alleged misconduct with particularity.’” *In re Gault*, 387 U.S. 1, 33 (1967) (juvenile delinquency proceeding). This principle may – though it probably needs not – be derived from the express right given an accused by the Sixth Amendment “‘to be informed of the nature and cause of the accusation’” (*see Faretta v. California*, 422 U.S. 806, 818 (1975) (dictum); *Herring v. New York*, 422 U.S. 853, 856-57 (1975)). Even in noncriminal matters the Supreme Court has found a due process right to adequate notice of the issues posed for adjudication in a proceeding affecting individual interests. *E.g.*, *Morgan v. United States*, 304 U.S. 1 (1938); *Gonzales v. United States*, 348 U.S. 407 (1955); *Goldberg v. Kelly*, 397 U.S. 254, 267-68 (1970) (dictum); *cf. Wolff v. McDonnell*, 418 U.S. 539, 563-64 (1974); *Goss v. Lopez*, 419 U.S. 565, 578-82 (1975); *Vitek v. Jones*, 445 U.S. 480, 494-96 (1980); *but see Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 14 n.6 (1979). A passing *dictum* in *United States v. Agurs*, 427 U.S. 97, 112 n.20 (1976), says that “the notice component of due process refers to the charge rather than the evidentiary support for the charge”; but the line between these two will often be shadowy.

18.9.2.3. The Sixth Amendment Right to Confrontation

The extent to which the Sixth Amendment right to confrontation governs pretrial discovery is unclear in the light of *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987). The lead opinion in *Ritchie*, written by Justice Powell, is a majority opinion except on one point: its analysis of the Confrontation Clause. On that point, Justice Powell, with three other Justices concurring, concluded that “the right of confrontation is a *trial* right” and cannot be “transform[ed] . . . into a constitutionally-compelled rule of pretrial discovery” (*id.* at 52). However, three Justices – Justices Brennan and Marshall in dissent, and Justice Blackmun concurring solely in the plurality’s result on this point – concluded that the Confrontation Clause does confer upon the defense a constitutional right to discovery of information that would facilitate effective cross-examination. *See id.* at 61-62 (Blackmun, J., concurring) (“In my view, there might well be a confrontation violation if, as here, a defendant is denied pretrial access to information that would make possible effective cross-examination of a crucial prosecution witness”); *id.* at 66 (Brennan, J., dissenting) (“the right of cross-examination . . . may be significantly infringed by . . . the wholesale denial of access to material that would serve as the basis for a significant line of inquiry at trial”; the trial court’s “denying access to the prior statements of the victim . . . deprived Ritchie of material crucial to any effort to impeach the victim at trial . . . [and was] a violation of the

Confrontation Clause”). The remaining two Justices, Justices Stevens and Scalia, took no position on the Confrontation Clause issue, concluding that the writ of *certiorari* should have been dismissed because the lower court’s judgment was not yet final. *See id.* at 78 (Stevens, J., dissenting).

The elements of a Confrontation Clause argument in support of discovery are set forth in Justice Brennan’s dissent in *Ritchie*. *See* 480 U.S. at 66-72. Since the argument has not been rejected by a majority of the Court – and, indeed, was expressly supported by three members of the Court – counsel can continue to press it as a basis for discovery requests. *See, e.g., State v. Peseti*, 101 Hawai’i 172, 186, 65 P.3d 119, 133 (2003); *Commonwealth v. Barroso*, 122 S.W.3d 554, 559-60, 561 (Ky. 2003).

18.9.2.4. The Right To Present Defensive Evidence

The Sixth Amendment guarantees a criminal defendant the right “to have compulsory process for obtaining witnesses in his favor.” In *Pennsylvania v. Ritchie*, 480 U.S. 39 (1987), a majority of the Court recognized that “[o]ur cases establish, at a minimum, that criminal defendants have the right to the Government’s assistance in compelling the attendance of favorable witnesses at trial and the right to put before a jury evidence that might influence the determination of guilt” (*id.* at 56). “[C]onclud[ing] . . . that compulsory process provides no *greater* protections in this area than those afforded by due process,” the Court elected to analyze the claim solely as a *Brady* issue (*id.* at 56; see § 18.9.1 *supra*), without “decid[ing] . . . whether and how the guarantees of the Compulsory Process Clause differ from those of the Fourteenth Amendment.”

Pending the Court’s resolution of the parameters of the compulsory process right, counsel can argue that the Compulsory Process Clause of the Sixth Amendment, when coupled with the Due Process Clause, confers a right to present defensive evidence (*Webb v. Texas*, 409 U.S. 95 (1972) (“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 [quoting *Washington v. Texas*, 388 U.S. 14, 19 (1967)]”); *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) (“Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants “a meaningful opportunity to present a complete defense [quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986)].””); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); see § 39.1 *infra*), which, in turn, implies a corollary right to pretrial discovery of information in the sole possession of the prosecution that might lead to defensive evidence. *Cf. Roviario v. United States*, 353 U.S. 53 (1957); *United States v. Augenblick*, 393 U.S. 348, 356 (1969) (dictum). *See generally* Jean Montoya, *A Theory of Compulsory Process Clause Discovery Rights*, 70 IND. L.J. 845 (1995).

18.9.2.5. *The Right Against Concealment of Evidence That Impeaches Prosecution Testimony*

A line of decisions from *Mooney v. Holohan*, 294 U.S. 103 (1935), to *Miller v. Pate*, 386 U.S. 1 (1967), condemns the prosecution's presentation of perjured testimony. See generally *Strickler v. Greene*, 527 U.S. 263, 281 & n.19 (1999) (dictum); *United States v. Agurs*, 427 U.S. 97, 103-04 (1976) (dictum). Specifically, the Court has held that the Due Process Clause invalidates a state conviction obtained after a trial at which the prosecutor has knowingly elicited false testimony from a witness, even on a matter relating to the witness's credibility rather than directly to the defendant's guilt (*Alcorta v. Texas*, 355 U.S. 28 (1957)), or at which the prosecutor has knowingly permitted the witness to testify falsely on such a matter (*Napue v. Illinois*, 360 U.S. 264 (1959)). Under *Napue*, if the prosecution knows of any evidence inconsistent with the testimony of one of its material witnesses and "relevant to his credibility," the defense and "the jury [are] . . . entitled to know of it" (*Giglio v. United States*, 405 U.S. 150, 155 (1972)). See, e.g., *Dow v. Virga*, 729 F.3d 1041, 1047-51 (9th Cir. 2013); *Guzman v. Secretary*, 663 F.3d 1336 (11th Cir. 2011); *Sivak v. Hardison*, 658 F.3d 898 (9th Cir. 2011). Cf. *Coggins v. Buonora*, 776 F.3d 108 (2d Cir. 2015); *Moore v. Illinois*, 408 U.S. 786, 797-98 (1972) (dictum). And see *Phillips v. Ornosky*, 673 F.3d 1168, 1183-85 (9th Cir. 2012) ("*Hayes v. Brown*, 399 F.3d 972 (9th Cir. 2005) (en banc) controls this case. . . . In *Hayes*, as here, the prosecutor had reached a deal with the attorney for a key state witness, James, providing for the dismissal of all felony charges against him . . . if he testified against Hayes at trial. *Id.* at 977. As in this case, the prosecution elicited a promise from James's attorney that James would not be informed of the deal, and at trial James testified that he had received no promise of benefits in exchange for his testimony. *Id.* at 977, 980. As we observed in *Hayes*, and as is equally applicable here, that a witness may have been unaware of the agreement entered into on his behalf may mean that his testimony denying the existence of such an agreement is not knowingly false or perjured, but it does not mean it is not false nevertheless. As we explained in *Hayes*: ¶ '[T]hat the witness was tricked into lying on the witness stand by the State does not, in any fashion, insulate the State from conforming its conduct to the requirements of due process. . . . The fact that the witness is not complicit in the falsehood is what gives the false testimony the ring of truth, and makes it all the more likely to affect the judgment of the jury. That the witness is unaware of the falsehood of his testimony makes it more dangerous, not less so.' ¶ . . . In *Hayes* we made clear in no uncertain terms that the practice of 'insulating' a witness from her own immunity agreement so that she can profess ignorance of the benefits provided in exchange for her testimony is an egregious violation of the prosecution's obligations under *Napue*."). It is but a short step to hold that since the whole of every witness's testimony impliedly asserts its veracity, nondisclosure of any material known to the prosecution that is legally admissible to impeach the witness would also violate due process. Cf. *Giles v. Maryland*, 386 U.S. 66 (1967). The California Supreme Court, for example, has required disclosure of the felony record of a prosecution witness on this theory. *In re Ferguson*, 5 Cal. 3d 525, 487 P.2d 1234, 96 Cal. Rptr. 594 (1971). See also *State v. Ireland*, 11 Or. App. 264, 500 P.2d 1231 (1972).

18.9.2.6. *The Right Against Prosecutorial Suppression of Evidence Favorable to the Defense*

The *Brady* doctrine described in § 18.9.1 *supra* governs prosecutorial disclosure of evidence favorable to the defense. A closely related, but older and conceptually distinct doctrine prohibits the prosecutor from *suppressing* such evidence. This right was recognized as an alternative ground of decision in *Pyle v. Kansas*, 317 U.S. 213 (1942), and *Wylde v. Wyoming*, 362 U.S. 607 (1960). It is best expounded in *United States ex rel. Almeida v. Baldi*, 195 F.2d 815 (3d Cir. 1952).

This doctrine is at the heart of the caselaw described in § 9.14 *supra*, establishing a right to judicial relief when the prosecution suppresses evidence by instructing witnesses not to speak with defense counsel or a defense investigator. The doctrine would also seem to imply a right of defense access to any exculpatory or favorable materials that are within the exclusive control of the prosecutor, such as impounded physical objects. The Supreme Court has recognized that if a police officer or prosecutor, acting in “bad faith,” destroys evidence “potentially useful” to the defense, its destruction violates the accused’s due process rights (*see Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988) (dictum); *Illinois v. Fisher*, 540 U.S. 544, 547-48 (2004) (per curiam) (dictum)). State constitutional due process protections may be broader in this regard: As Justice Stevens’ concurring opinion in *Fisher* notes (*id.* at 549 n.*): “Since *Youngblood* was decided, a number of state courts have held as a matter of state constitutional law that the loss or destruction of evidence critical to the defense does violate due process, even in the absence of bad faith.” *See State v. Tiedemann*, 162 P.3d 1106, 1115-17 (Utah 2007) (rejecting *Arizona v. Youngblood*’s “bad faith” requirement on state constitutional grounds); *People v. Handy*, 20 N.Y.3d 663, 669, 988 N.E.2d 879, 882, 966 N.Y.S.2d 351, 354 (2013) (declining to reach the question of whether to reject *Youngblood* on state constitutional grounds and instead “resolv[ing] this case, following the approach taken by the Maryland Court of Appeals in *Cost v. State*, 417 Md. 360, 10 A.3d 184 (2010), by holding that, under the New York law of evidence, a permissive adverse-inference instruction should be given when a defendant, using reasonable diligence, has requested evidence reasonably likely to be material, and when that evidence has been destroyed by agents of the State”). As long as the evidence has *not* been destroyed but is still in the state’s possession, the language and logic of the Supreme Court’s federal Due Process decisions are clear that “the good or bad faith of the prosecution is irrelevant” and that the prosecution “must disclose material exculpatory evidence” (*Illinois v. Fisher*, *supra*, 540 U.S. at 547). *Accord*, *Arizona v. Youngblood*, *supra*, 488 U.S. at 57.

18.9.2.7. *The Right Against an Unfair Balance of Advantage Favoring the Prosecution*

The decision in *Wardius v. Oregon*, 412 U.S. 470 (1973), appears to be seminal inasmuch as it recognizes that the Due Process Clause “does speak to the balance of forces between the accused and his accuser” (*id.* at 474). *See also United States v. Ash*, 413 U.S. 300, 309 (1973), noting the Sixth Amendment’s concern against “the imbalance in the adversary system that otherwise [that

is, without defense counsel] resulted with the creation of a professional prosecuting official.” These decisions suggest that Justice Cardozo’s famous phrase about keeping “the balance true” (*Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934)), may be more than just a jurisprudential attitude: It may be a constitutionally enforceable right of the defense.

Although this notion is still embryonic, two obvious implications of *Wardius* deserve note. First of all, any criminal procedures that provide “nonreciprocal benefits to the State” in regard to the investigation, preservation, and presentation of its evidentiary case should be constitutionally assailable “when the lack of reciprocity interferes with the defendant’s ability to secure a fair trial” (*Wardius v. Oregon*, *supra*, 412 U.S. at 474 n.6). For example, if procedures are available by which the prosecution can detain witnesses or collect and secure other evidence, favorable to its case, then either the prosecution should be obliged equally to collect, secure, and make available witnesses and evidence favorable to the defense, or at least the defense should be given equal use of the procedures. *Cf. People ex rel. Gallagher v. District Court*, 656 P.2d 1287 (Colo. 1983) (defendant was denied due process when police refused to perform forensic testing requested by defense counsel before testing was rendered impossible by the preparation of the homicide victim’s body for burial); *Snyder v. State*, 930 P.2d 1274, 1277 (Alaska 1996) (“the Due Process Clause of the Alaska Constitution entitles a DWI arrestee to an independent chemical test even if that person refuses to take the statutorily prescribed breath test”). Compare the cases holding that the unnecessary destruction of material evidence in the course of forensic testing by the prosecution, so as to preclude independent testing by defense experts, constitutes a violation of due process (*State v. Vannoy*, 177 Ariz. 206, 209-12, 866 P.2d 874, 878-80 (Ariz. App. 1993); *People v. Gomez*, 198 Colo. 105, 596 P.2d 1192 (1979); *People v. Garries*, 645 P.2d 1306 (Colo. 1982); *State v. Blackwell*, 245 Ga. App. 135, 137-42, 537 S.E.2d 457, 460-63 (2000); *People v. Taylor*, 54 Ill. App. 3d 454, 369 N.E.2d 573, 12 Ill. Dec. 76 (1977); *People v. Dodsworth*, 60 Ill. App. 3d 207, 376 N.E.2d 449, 17 Ill. Dec. 450 (1978); *State v. Morales*, 232 Conn. 707, 726-27, 657 A.2d 585, 594-95 (1995) (“Like our sister states, we conclude that the good or bad faith of the police in failing to preserve potentially useful evidence cannot be dispositive of whether a criminal defendant has been deprived of due process of law. Accordingly, we, too, reject the litmus test of bad faith on the part of the police, which the United States Supreme Court adopted under the federal constitution in *Youngblood* [*infra*]. Rather, in determining whether a defendant has been afforded due process of law under the state constitution, the trial court must employ the *Asherman* balancing test [referring to *State v. Asherman*, 193 Conn. 695, 724-26, 478 A.2d 227, 245-47 (1984)], weighing the reasons for the unavailability of the evidence against the degree of prejudice to the accused. More specifically, the trial court must balance the totality of the circumstances surrounding the missing evidence, including the following factors: ‘the materiality of the missing evidence, the likelihood of mistaken interpretation of it by witnesses or the jury, the reason for its nonavailability to the defense and the prejudice to the defendant caused by the unavailability of the evidence.’”); *State v. Matafeo*, 71 Haw. 183, 187, 787 P.2d 671, 673 (1990) (dictum) (“This court has held that “the duty of disclosure is operative as a duty of preservation,” [and] that principle must be applied on a

case-by-case basis,’ . . . ¶ In certain circumstances, regardless of good or bad faith, the State may lose or destroy material evidence which is ‘so critical to the defense as to make a criminal trial fundamentally unfair’ without it.”)) *with California v. Trombetta*, 467 U.S. 479 (1984) (limiting the federal constitutional version of this doctrine to “evidence that both possess[es] an exculpatory value that was apparent before the evidence was destroyed, and [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means” (*id.* at 489)), and *Arizona v. Youngblood*, 488 U.S. 51, 57-58 (1988), limiting the doctrine to destruction in “bad faith”). If court orders or compulsory process can be issued to assist the prosecution in conducting lineups, fingerprint or handwriting or voice comparisons, or other scientific tests, the results of those investigations must be disclosed to the defense; and judicial process must be made available for the conduct of similar investigations at the instance of the defense, at least to search out “evidence that might be expected to play a significant role in the . . . defense” (*California v. Trombetta*, *supra*, 467 U.S. at 488). See *Evans v. Superior Court*, 11 Cal. 3d 617, 522 P.2d 681, 114 Cal. Rptr. 121 (1974); *cf. United States v. Ash*, 461 F.2d 92, 104 (D.C. Cir. 1972) (en banc) (dictum), *rev’d on other grounds*, 413 U.S. 300 (1973).

Second, *Wardius* raises the question to what extent “the State’s inherent information-gathering advantages suggest that if there is to be any imbalance in discovery rights, it should work in the defendant’s favor” (*Wardius v. Oregon*, *supra*, 412 U.S. at 475 n.18). In a case in which counsel can compile a strong record of his or her unsuccessful attempts to obtain important defensive information from the prosecution and his or her equally unsuccessful efforts to acquire the information through independent sources, it may be possible to persuade a court that the traditional plight of the impecunious defendant – going into trial blind in the face of a well-prepared adversary – itself requires the allowance of corrective discovery measures under *Wardius*.

18.9.2.8. *The Obligation of the Equal Protection Clause That a State Not Permit an Indigent Defendant To Be Deprived of “The Basic Tools of an Adequate Defense” by Reason of Poverty*

The equal protection doctrine guaranteeing an indigent defendant “the basic tools of an adequate defense” (*Britt v. North Carolina*, 404 U.S. 226, 227 (1971) (dictum)), is discussed in § 5.2 *supra*. One method of compensating for the investigative disadvantage suffered by impoverished defendants, compared to defendants who have money, is to give the defense full discovery of the products of the prosecution’s investigation.

18.10. *Responses to Prosecutorial Assertions That the Information That the Defense Is Seeking Is Privileged*

18.10.1. *The “Informer’s Privilege”*

The courts have recognized an “informer’s privilege” that empowers the prosecution to conceal the name of a confidential source of information,

upon a claim of the privilege by the prosecutor and a representation that disclosure would endanger the prosecution's interests.

In *Roviaro v. United States*, 353 U.S. 53 (1957), the Supreme Court discussed the applicability of the privilege to block a criminal defendant's request for the name of an informer who appeared, from the trial testimony, to have been a central figure in the narcotics transactions with which the defendant was charged. The Court there required disclosure of the name, concluding "that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend 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." (*id.* at 62). See also *United States v. Valenzuela-Bernal*, 458 U.S. 858, 870-71 (1982) (dictum); *State v. Jackson*, 239 Conn. 629, 631-37, 687 A.2d 485, 486-89 (1997); *Commonwealth v. Madigan*, 449 Mass. 702, 705-11, 871 N.E.2d 478, 481-86 (2007); *State v. Florez*, 134 N.J. 570, 578-83, 636 A.2d 1040, 1044-46 (1994).

The Court cut back somewhat on the *Roviaro* doctrine in *McCray v. Illinois*, 386 U.S. 300 (1967), upholding a trial court's refusal to order disclosure of the name of an informer at a hearing on a motion to suppress tangible evidence, even though the informer's information was being relied upon to support a warrantless arrest and incidental seizure. However, the diffuseness of the *McCray* decision makes it difficult to ascertain exactly how much of *Roviaro* it retracts. Certainly, "*McCray* does not establish an absolute rule against disclosure," even at a suppression hearing (*State v. Casal*, 103 Wash. 2d 812, 817, 699 P.2d 1234, 1237 (1985)). "*McCray* . . . concluded only that the Due Process Clause of the Fourteenth Amendment did not require the State to expose an informant's identity routinely, upon a defendant's mere demand, when there was ample evidence in the preliminary hearing to show that the informant was reliable and his information credible." *Franks v. Delaware*, 438 U.S. 154, 170 (1978). Moreover, *McCray*'s limitations upon *Roviaro* arguably apply only to informers whose information bears exclusively upon a pretrial search-and-seizure issue and do not affect the *Roviaro* rules governing informers who have information pertinent to the central trial issue of guilt or innocence. So, for the present, defense counsel would be warranted in continuing to press for the disclosure of informers' names, both before and at trial, as defensive needs dictate. See, e.g., *Sheriff of Washoe County v. Vasile*, 96 Nev. 5, 7-8, 604 P.2d 809, 810-11 (1980) ("During cross examination of Officer Douglas at the preliminary examination, defense counsel asked for the name of the person who introduced Officer Douglas to Vasile and who was seated in the car during the purported marijuana sale. The prosecutor's objection, based on the confidential informant privilege, . . . was sustained. ¶ . . . The informant . . . was apparently the only independent witness who could hear and see the transaction in question. He was a material witness whose identity should have been disclosed. The magistrate's refusal to require disclosure or dismiss the charges was error."); *State v. Chapman*, 209 Mont. 57, 679 P.2d 1210 (1984). Of course, the attempt should be made to assimilate the case as much to *Roviaro*, and to segregate it as much from *McCray*, as possible. If an informer's identity

is needed both to challenge a search and seizure, for example, and to defend on the guilt issue, a pretrial discovery motion should rest on the latter need.

Even when the informer's privilege does bar disclosure of an informer's identity, it does not protect "the contents of a communication [when these] will not tend to reveal the identity of an informer"; nor does it protect the informer at all "once . . . [his or her] identity . . . has been [otherwise] disclosed to those who would have cause to resent the communication" (*Roviaro v. United States*, 353 U.S. at 60 (dictum)). Its purpose is to prevent the improvident unmasking of government undercover agents. Cf. *Weatherford v. Bursey*, 429 U.S. 545, 557-60 (1977). Nothing in the privilege, therefore, precludes inquiry into such matters as a confidential informant's batting average (see § 25.35.2 *infra*), or the terms of the informant's compensation by the government, or the informant's own guilt of criminal offenses, or the promises of immunity made to the informant to induce him or her to inform. Nor, once an informant is known, does the privilege authorize the prosecution to shield that informant from being interviewed by the defense. When counsel ascertains an informant's identity and finds that the informant is evading attempts to be contacted and interviewed or when it otherwise appears that s/he may vanish before trial, counsel should not hesitate to seek his or her arrest as a material witness. See § 29.4.1 *infra*. Police spies, "special agents," and undercover informers often are criminals cooperating with the government in return for nonprosecution; they are exceedingly unstable and likely to disappear without a trace; and the prosecution cannot be relied upon to know of their whereabouts. If defense counsel wants to be assured that they will be around at the time of trial, counsel may have no option but to use material-witness procedures to have them jailed. Less aggressive procedures are available (see § 29.4.7.3 *infra*) but are not sure-fire.

18.10.2. *Work Product*

In federal cases, the "work product" doctrine of *Hickman v. Taylor*, 329 U.S. 495 (1947), and *Upjohn Co. v. United States*, 449 U.S. 383, 397-402 (1981), appears to apply to criminal discovery (see *United States v. Nobles*, 422 U.S. 225, 236 (1975) (dictum)), protecting "the mental processes of the attorney" (422 U.S. at 238), whether that attorney be the prosecutor or defense counsel (see *id.* at 238 & n.12; cf. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 862 n.3 (1982)). But see *Goldberg v. United States*, 425 U.S. 94, 101-08 (1976) ("work product" protection does not bar production at trial of prior statements of government witnesses that are "otherwise producible under the Jencks Act [see § 34.7.1.1 *infra*]" (*id.* at 108)).

Whether such a limitation of defense discovery is recognized in state criminal cases is, of course, in the first instance a matter of local law. But local law cannot extend "work product" protection to any materials that are constitutionally required to be disclosed to the defense. *Davis v. Alaska*, 415 U.S. 308 (1974); cf. *Chambers v. Mississippi*, 410 U.S. 284 (1973). Thus, for example, a "work product" privilege could not override the prosecutor's due process obligation to disclose exculpatory materials and such impeaching information as the existence of promises made by the prosecutor to prosecution witnesses. See § 18.9.1 *supra*.

18.10.3. Other Claims of Governmental Privilege

It is not uncommon for prosecutors to stonewall defense discovery requests by broad claims of some unspecified privilege to protect “governmental secrets” or “government operations” or the “confidential relations” of government employees. If any privilege of this sort is recognized beyond the scope of the informer’s privilege (§ 18.10.1 *supra*) and the attorney’s work product doctrine (§ 18.10.2 *supra*), it is extremely narrow (*see, e.g., United States v. Nixon*, 418 U.S. 683 (1974); *Kerr v. United States District Court*, 426 U.S. 394 (1976); *Schneider v. City of Jackson*, 226 S.W.3d 332, 344 (Tenn. 2007) (“the law enforcement privilege has not previously been adopted as a common law privilege in Tennessee and should not be adopted herein”)), and is arguably altogether inapplicable in criminal prosecutions because “it is unconscionable to allow [a government] . . . to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense” (*United States v. Reynolds*, 345 U.S. 1, 12 (1953) (dictum)). State statutes creating governmental-operations privileges are narrowly construed in order to maintain consistency with the “fundamental proposition that [an accused] is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information” (*City of Santa Cruz v. Municipal Court*, 49 Cal. 3d 74, 84, 776 P.2d 222, 228, 260 Cal.Rptr. 520, 526 (1989), quoting *Pitchess v. Superior Court*, 11 Cal. 3d 531, 535, 522 P.2d 305, 308, 113 Cal.Rptr. 897, 900 (1974)).

D. Discovery by the Prosecution Against the Defense

18.11. The Prosecution’s Right to Discovery

Most States have enacted statutes requiring that defendants who intend to employ a defense of alibi or insanity must file a pretrial notice of their intention and inform the prosecution of certain particulars relating to the proposed defense, including the names of witnesses who will be called to prove it. See §§ 14.6 subdivisions (G) and (H); 17.2 subdivision (1) *supra*. In addition, in many States, statutes confer upon the prosecution a right to obtain discovery from the defense of certain other categories of information such as the names and sometimes statements of intended defense witnesses, reports of defense experts, and tangible evidence. The latter statutes are generally of one or the other of two types: those that give the prosecution affirmative independent discovery rights; and those that give the prosecution reciprocal discovery rights, allowing the prosecutor to obtain certain types of information from the defense only if and after the defense has first sought similar information from the prosecution.

Even when discovery by the prosecutor is legislatively authorized, it is “limited . . . by . . . constitutional privileges” (*Standefer v. United States*, 447 U.S. 10, 22 (1980) (dictum)). The limitations imposed by the Fifth Amendment Privilege Against Self-Incrimination are discussed in § 18.12 *infra*, and those established by the Sixth Amendment right to counsel in § 18.13 *infra*.

If counsel is practicing in a jurisdiction that has no statute authorizing

prosecutorial discovery, counsel should oppose all discovery motions by the prosecution on the ground that such a radical change from traditional procedures is a matter for the Legislature and should not be ordered by a court without express legislative authority. *Cf.* § 12.8 concluding paragraph *supra*. It is one thing for the judiciary to institute discovery procedures in favor of the defense, inasmuch as these procedures tend to promote constitutional values that are particularly committed to the care of courts. See § 18.9 *supra*; and see *Jencks v. United States*, 353 U.S. 657 (1957). It is quite another thing to institute unprecedented procedures in favor of the prosecution – procedures that often raise close constitutional questions and that prosecutors (unlike criminal defendants) surely have the power to obtain from the Legislature if the Legislature deems those procedures advisable. *Cf. United States v. LaSalle National Bank*, 437 U.S. 298, 312-13 (1978) (dictum).

18.12. Fifth Amendment Limitations Upon Prosecutorial Discovery

When the Court in *Williams v. Florida*, 399 U.S. 78 (1970), sustained the constitutionality of an alibi-notice statute, the Court’s Fifth Amendment analysis started from the premise that the defendant intended to present the alibi information at trial. There could be no viable claim of compelled self-incrimination, the Court said, because the choice to adduce or withhold this information was left entirely to the defendant; all the statutory requirement of an alibi notice did was to advance the *time* of disclosure of material that the defendant had freely elected to spread upon the record at trial in any event (*id.* at 83-86). The corollary of this reasoning is that court-ordered disclosure to the prosecution of any potentially incriminating matter that the defense does *not* intend to produce at trial violates the Fifth Amendment. See *Prudhomme v. Superior Court*, 2 Cal. 3d 320, 466 P.2d 673, 85 Cal. Rptr. 129 (1970). Indeed, the Supreme Court has impliedly so held several times since *Williams*. See *Brooks v. Tennessee*, 406 U.S. 605 (1972); *New Jersey v. Portash*, 440 U.S. 450 (1979); *United States v. Doe*, 465 U.S. 605 (1984); compare *Estelle v. Smith*, 451 U.S. 454 (1981), with *Buchanan v. Kentucky*, 483 U.S. 402, 422-24 (1987), and *Kansas v. Cheever*, 134 S. Ct. 596, 600-02 (2014).

No pretrial discovery sought by the prosecution may therefore be ordered that would require the defendant, personally or through counsel, to make any oral or written statement whose contents “would furnish a link in the chain of evidence needed to prosecute the [defendant] . . . for a crime” (*Hoffman v. United States*, 341 U.S. 479, 486 (1951); see *Blau v. United States*, 340 U.S. 159, 161 (1950); *Maness v. Meyers*, 419 U.S. 449, 461 (1975)), or that would provide “‘an investigatory lead,’ [or produce] . . . evidence . . . by focusing investigation on [the defendant] . . . as a result of his compelled disclosures” (*Kastigar v. United States*, 406 U.S. 441, 460 (1972); see also *United States v. Hubbell*, 530 U.S. 27, 40-46 (2000), discussed in §12.6.4.1 *supra*), unless the information which is ordered to be disclosed is either information that the defendant intends to adduce at trial or information that the prosecutor could properly bring out on cross-examination of the defendant in the light of what the defendant does intend to adduce at trial – that is, material “reasonably related to those [subjects that will be] brought out in direct examination” of the defendant (*United States v. Nobles*, 422 U.S. 225, 240 (1975)), or material

constituting proper rebuttal of other defense evidence (see *Buchanan v. Kentucky*, *supra*, 483 U.S. at 422-24; *Kansas v. Cheever*, *supra*, 134 S. Ct. at 600-02, 603).

Ordering the defendant to disclose tangible evidence, on the other hand, would not violate the Fifth Amendment Privilege because, under currently prevailing doctrine, the Privilege forbids only “testimonial self-incrimination” (*Fisher v. United States*, 425 U.S. 391, 399 (1976)) and accordingly does not extend to the production of physical objects (see *Schmerber v. California*, 384 U.S. 757 (1966) (extracting blood from a drunk-driving suspect for chemical analysis does not violate Fifth Amendment); *United States v. Mara*, 410 U.S. 19 (1973) (requiring a suspect to produce handwriting exemplars does not violate Fifth Amendment); *United States v. Dionisio*, 410 U.S. 1 (1973) (requiring a suspect to speak for voice identification does not violate Fifth Amendment)). The Supreme Court has also applied this doctrine to permit compelled production of preexisting writings (*Fisher v. United States*, *supra*, 425 U.S. at 414), including an incriminated person’s own business records (*United States v. Doe*, 465 U.S. 605 (1984)). The latter cases severely limit but do not completely overrule *Boyd v. United States*, 116 U.S. 616 (1886), insofar as *Boyd* construed the Fourth and Fifth Amendments as forbidding courts to compel the production of a person’s papers. *Boyd* is not now good law as to “business records” (*United States v. Doe*, *supra*, 465 U.S. at 606; see also *Fisher v. United States*, *supra*, 425 U.S. at 414; *Andresen v. Maryland*, 427 U.S. 463 (1976)), but it may survive as a protection of nonbusiness papers (see *Fisher v. United States*, *supra*, 425 U.S. at 414 (distinguishing *Boyd*); *United States v. Miller*, 425 U.S. 435, 440 (1976) (same)), or at least of intimate private papers. And there is reason to believe that the *Fisher/Miller/Doe* line of cases may be reconsidered in the near future. Given the uncertain state of the law – which is discussed in detail in § 12.8 *supra* – defense counsel is warranted in interposing Fourth and Fifth Amendment objections to any prosecutorial discovery request seeking nonbusiness documents whose contents incriminate a defendant.

The Fifth Amendment unquestionably forbids prosecutorial discovery of any document – business or nonbusiness, and whether written by the defendant or by anyone else – when the *act of producing that document*, as distinguished from the contents of the document, would be incriminating. This is the case whenever (a) the act of production would constitute an admission of the existence or possession of the document, in a context in which such an admission would be probative of the defendant’s guilt (*United States v. Hubbell*, 530 U.S. 27, 36 & n.19 (2000); *United States v. Doe*, *supra*, 465 U.S. at 612-14; *Fisher v. United States*, *supra*, 425 U.S. at 410-12 (dictum)), or (b) the act of production would constitute an implicit authentication of the document, when such an authentication could be used by the prosecution as part of its case against the defendant (*id.* at 412-13 & n.12 (dictum); *Andresen v. Maryland*, *supra*, 427 U.S. at 473 & n.7 (dictum)), or (c) the act of production would open the door to the individual’s being “compelled to take the witness stand and answer questions designed to determine whether he has produced everything demanded by the subpoena,” the “answers [to which] . . . , as well as the act of production itself, may . . . communicate information about the existence, custody, and authenticity of the documents” (*United States v. Hubbell*, *supra*, 530 U.S. at 38-40, 43-45). In these situations, notably, the prosecution

cannot avoid the Fifth Amendment objection by forswearing evidentiary use of the implications arising from the act of production (*see United States v. Doe, supra*, 465 U.S. at 612-14); if the prosecution *could* use those implications in any way to make its case against the defendant, then the defendant cannot constitutionally be required to produce.

Similarly, the pretrial discovery of other tangible objects possessed by the defendant whose existence or possession is incriminating, or of information obtained by defense counsel from third parties whose identities or connections with the case could lead the prosecution to incriminating evidence should be forbidden because, whatever the original source of that information may have been, it is now being sought from the defendant through compulsory process addressed to the defendant (*compare United States v. Miller, supra*, 425 U.S. at 440-45; *Andresen v. Maryland, supra*, 427 U.S. at 473-77; *Couch v. United States*, 409 U.S. 322 (1973)) for possible use by the prosecutor in prosecuting the defendant. *See People v. Hawrish*, 8 N.Y.3d 389, 393-97, 866 N.E.2d 1009, 1012-16, 834 N.Y.S.2d 681, 684-88 (2007) (when the defendant in a domestic violence case was ordered by the court to “surrender any and all firearms owned or possessed,” the unlicensed handgun which he surrendered to the police should have been suppressed as a compelled communication in violation of the Fifth Amendment Privilege Against Self-Incrimination: “the surrender of evidence can be testimonial if, by doing so, defendant tacitly concedes that the item demanded exists or is in defendant’s possession or control when these facts are unknown to the authorities and would not have been discovered through independent means”). Admittedly, *United States v. Nobles*, 422 U.S. 225 (1975), appears to hold that the Fifth Amendment privilege does not cover records of defense interviews with persons other than the accused, at least when those persons are independently available to the prosecution. But *Nobles* was a case involving the prosecution’s power to secure discovery of portions of a defense investigator’s report after (1) the prosecution had concluded its case-in-chief at trial and (2) the defense had called the investigator to testify concerning interviews with prosecution witnesses. *See Corbitt v. New Jersey*, 439 U.S. 212, 219 n.8 (1978). In this situation the defense has voluntarily presented evidence about a set of facts; its evidence indicates that the underlying facts are not only already known to the prosecution but also have already been the subject of testimony by prosecution witnesses; and its Fifth Amendment claim is therefore necessarily limited to a contention that a particular recorded version of those same facts is privileged merely because it was made by an agent of the defense other than the accused. *Nobles*’ rejection of that contention does not imply that a defendant can be compelled by court order to come forward with materials whose existence, possession, or authentication are incriminating *unless and until* s/he has voluntarily elected to adduce those materials at trial. This compulsion would obviously affront the basic policy of the Self-Incrimination Clause that requires the prosecution “‘to shoulder the entire load’” (*Miranda v. Arizona*, 384 U.S. 436, 460 (1966); *compare Andresen v. Maryland, supra*, 427 U.S. at 475-76 & n.8).

Counsel should therefore resist, on Fifth Amendment grounds, any and all prosecutorial discovery prior to the time when s/he has had an opportunity to investigate and prepare the defense case; and s/he should insist upon the

right to defer decision concerning what s/he will present at trial until s/he has been given ample prior disclosure of the prosecutor's case to enable counsel to make that decision intelligently. If prosecutorial discovery is ever to be ordered, the defendant has a due process right to reciprocal discovery under *Wardius v. Oregon*, 412 U.S. 470 (1973); see also, e.g., *Camp v. Neven*, 606 Fed. Appx. 322 (9th Cir. 2015); see § 18.9.2.7 *supra*; and the decision in *Brooks v. Tennessee*, 406 U.S. 605 (1972), demonstrates that no disclosure may be required of the defense unless (i) *prior* to the time when the defendant is asked to disclose, (ii) s/he is given a sufficient preview of the prosecutor's case to make an advised and intelligent decision concerning what, if any, defense evidence s/he will present at trial. *Brooks* invalidated a statute requiring that if a defendant was going to testify, s/he must testify before any other defense evidence was presented. That requirement was held to violate the Fifth Amendment on the ground that the constitutional Privilege Against Self-Incrimination forbids forcing the defense to decide whether or not to present the defendant's testimony before "its value can be realistically assessed" (*id.* at 610). See also *Portuondo v. Agard*, 529 U.S. 61, 70 (2000) (discussing *Brooks*). But surely, if a criminal defendant cannot be compelled to decide whether to testify and to "subject himself to impeachment and cross-examination at a time when the strength of *his* other evidence is not yet clear" (*id.* at 612 (emphasis added)), a defendant cannot be compelled to furnish the prosecution with information that may be used in any fashion to incriminate him or her – even merely by "focusing investigation on [the defendant] . . . as a result of his compelled disclosures" (*Kastigar v. United States*, 406 U.S. 441, 460 (1972)) – prior to the time when the defendant has been sufficiently informed about the prosecutor's evidence to decide what defense evidence will be "necessary or even helpful to his case" (*Lakeside v. Oregon*, 435 U.S. 333, 339 n.9 (1978) (dictum)). Under *Brooks*, such a requirement violates not merely the Fifth Amendment but also the Sixth Amendment right to counsel, "[b]y requiring the accused and his lawyer to make [an important tactical decision regarding the presentation of defensive evidence] . . . without an opportunity to evaluate the actual worth of their evidence" (*Brooks v. Tennessee, supra*, 406 U.S. at 612). See also *Cuyler v. Sullivan*, 446 U.S. 335, 344 (1980) (dictum).

It is a difficult question whether the Fifth Amendment forbids conditioning defense discovery upon reciprocal disclosures that, if ordered directly, would violate the privilege. Certainly, when the defendant has a constitutional right to discovery under any of the doctrines identified in § 18.9 *supra*, the defendant's enforcement of that right cannot be conditioned upon the waiver of another constitutional right, and in such instances, the reciprocal disclosure requirement would seem to be invalid. *Cf. Simmons v. United States*, 390 U.S. 377, 389-94 (1968), reaffirmed in *United States v. Salvucci*, 448 U.S. 83, 89-90 (1980); *Lefkowitz v. Cunningham*, 431 U.S. 801, 807-08 (1977); *Brooks v. Tennessee, supra*, 406 U.S. at 607-12. In other cases, however, it is likely that a requirement of reciprocation can be imposed and the defense presented with the choice of both giving and getting or neither.

18.13. "Work Product" Protections Against Prosecutorial Discovery

When the "work product" doctrine was discussed in § 18.10.2 *supra* in

connection with defense discovery of prosecutorial files, it was explained that the prosecution's ability to use the "work product" privilege to insulate its files from defense discovery is initially a matter of state law. However, when the issue is one of whether defense files are "work product," the issue assumes constitutional dimension. The function of the "work product" doctrine is to provide "a privileged area within which [the attorney] . . . can analyze and prepare his client's case" (*United States v. Nobles*, 422 U.S. 225, 238 (1975)), in order to "assure the thorough preparation and presentation of . . . the case" (*id.*); and the Sixth Amendment countenances "no restrictions upon the function of counsel in defending a criminal prosecution in accord with the traditions of the adversary factfinding process" (*Herring v. New York*, 422 U.S. 853, 857 (1975)). The Sixth Amendment right to the effective assistance of counsel (described and documented in § 18.9.2.1 *supra*) therefore arguably requires "work product" protection of defense counsel's trial preparation, in addition to whatever "work product" protection it is given by state law. The *Nobles* case holds nothing to the contrary, although it does permit limited prosecutorial discovery of a defense investigator's report *after* the defense has presented the investigator's testimony at trial and thereby waived both the "work product" and Sixth Amendment protections. See *United States v. Nobles*, 422 U.S. at 240 n.15.

The "work product" doctrine is primarily designed to shield materials that reveal an attorney's analyses and assessments of the case, including evaluations of potential witnesses. For this reason, it is particularly protective of counsel's own summaries of oral statements of witnesses, as distinguished from written or transcribed statements of witnesses or even defense investigators' reports reflecting the oral statements of witnesses. See *Upjohn Co. v. United States*, 449 U.S. 383, 399-402 (1981). In the case of witnesses whose testimony will be favorable to the defense – as distinguished from potential prosecution witnesses (see §§ 9.12-9.13 *supra*) – counsel may wish to increase the likelihood of avoiding prosecutorial discovery by taking oral statements instead of written statements from witnesses and by including appropriate evaluative matter in his or her writeups of those statements. See § 9.11 *supra*. Counsel can obtain maximum protection by (a) refraining from taking written statements from these witnesses; (b) instructing defense investigators to take only oral statements from witnesses and to report their contents orally to counsel; (c) personally interviewing witnesses whose information promises to be favorable; (d) summarizing counsel's interviews of these witnesses in a way that melds the witnesses' own words with counsel's observations of the credibility and potential uses of the witnesses' statements; (e) coding these summaries as suggested in the concluding paragraph of § 6.7 *supra* so as to enable counsel – but not a judge who may later inspect the summary *in camera* on a prosecution motion for discovery – to distinguish passages that are unmarked direct quotations of the witness from passages that are counsel's commentaries; (f) collecting the summaries of information gotten from two or more witnesses in a single document (or in several documents, each of which contains information from more than a single witness) in which counsel connects the several witnesses' statements and relates them to the defense theory of the case (see § 7.2 *supra*); and (g) captioning the document[s] "strategy memorandum." Anything that discloses counsel's "litigating strategies [is not] . . . the subject of permissible inquiry by his opponent . . ." (*United*

States v. Valenzuela-Bernal, 458 U.S. 858, 862 n.3 (1982) (dictum)). Counsel can consult these memoranda while preparing defense witnesses to testify (see § 29.5 *infra*) but should not give them to the witness to read.

E. The Pretrial Conference

18.14. Defense Uses of the Pretrial Conference

In most cases, it is customary for the court, the prosecutor, and the defense lawyer to confer briefly at sidebar immediately prior to the commencement of trial, to review the status of pretrial matters (for example, to assure that all the necessary procedural steps required to bring the defendant to trial have been taken; to assure that all pending motions that should be disposed of before trial have been disposed of); to estimate the probable length of trial and to plan convenient recesses; to make special arrangements for the appearance of particular witnesses when appropriate (for example, to schedule an expert witness's appearance to accommodate his or her other commitments); to discuss any problems occasioned by the failure of witnesses to appear; and sometimes to attempt to expedite matters by stipulations.

In protracted cases in some jurisdictions, an earlier and more formal pretrial conference is held, ordinarily in chambers, to define issues, stipulate to the qualifications of experts, stipulate to the admission of certain items of evidence or to some of the technical predicates for their admissibility in order to dispense with time-wasting foundation testimony, and generally for the same purposes as a pretrial conference in a civil case (not excluding, with some judges, settlement negotiations, see §§ 15.6.2 subdivision (2)(G), 15.7.2 *supra*) – that is, to look for means to make the presentation and disposition of the case more efficient by agreement of the parties upon matters of procedure. At the close of the conference the judge may enter a pretrial order embodying the agreements reached. (In federal practice *see* FED. RULE CRIM. PRO. 17.1. Several States have similar rules.)

Counsel may be well advised to request such a pretrial conference if one is not routinely held. Its utility should be considered for the following purposes, among others:

(1) *To attempt to enlist some judicial support if counsel feels that the prosecutor is taking an unreasonable position in pressing certain charges which should be dropped* (see §§ 8.2.2-8.2.3, 8.4, 12.13 *supra*); or that the prosecutor is taking an unreasonable position in plea negotiations (see §§ 15.9-15.13 *supra*); or to “try out” an agreed sentencing recommendation on the judge (see § 15.6.2 subdivision (2)(G) *supra*). Judges differ considerably on whether they will involve themselves in plea negotiation and what they regard as a reasonable disposition of particular kinds of cases. Counsel must therefore know or inquire about the attitudes of the presiding judge before deciding whether to bring up these subjects.

(2) *To explore the possibility of diverting the prosecution and to discuss the components of an acceptable diversion plan.* See §§ 2.3.6, 8.2.2, 14.12 *supra*; Chapter 21 *infra*.

(3) *To set or change dates for pretrial proceedings and/or for trial (or to arrange a schedule for setting those dates at a later time), and to work out agreements regarding contingencies that may call for reconsideration of whatever timetable is set.* See Chapter 28.

(4) *To anticipate evidentiary problems that will arise at trial and attempt to resolve them.* Particularly important may be the opportunity to alert the judge and prosecutor to defense objections to expected lines or items of prosecution evidence at trial and to arrange (1) that the prosecutor not mention these items in his or her opening statement (see § 35.2 *infra*) and (2) that the prosecutor's examination be conducted in a fashion that will permit both a defense objection and a ruling on it prior to the time when matters have been disclosed to the jury that may cause prejudice and may therefore require a mistrial if the defense objection is sustained (see §§ 11.8.6, 17.5.3 *supra*; §§ 35.2, 35.5, 36.6, 39.10, 40.1, 40.3.2, 40.4, 40.4.2-40.4.4, 40.8 *infra*). Counsel may want to suggest that the prosecutor forgo offering items of evidence that will create problems of admissibility or prejudice at a joint trial, so that, if the prosecutor insists on presenting these items, counsel can request a severance (see Chapter 23).

(5) *To arrange to stipulate certain matters, in the interest of trial convenience (for example, see §§ 36.7.1, 39.16.2 *infra*), and to put certain sorts of exhibits into safe and unexceptionable form (for example, see § 36.4.1 *infra*).*

(6) *To obtain agreement that certain witnesses need not be subpoenaed by either party and that neither will request or be entitled to a missing witness charge as a result.* See § 29.4.7 *infra*. Counsel may also want to seek other agreements or advance judicial rulings regarding matters that will determine whether s/he is going to call particular witnesses: for example, rulings on whether certain convictions or arrests may be used by the prosecutor in cross-examining the defendant or character witnesses (see § 17.5.3 *supra*; §§ 39.21-39.24 *infra*).

(7) *To discover what can be discovered of the prosecutor's case through discussion of the foregoing and similar matters.*

(8) *To impress the judge.* A pretrial conference offers an excellent opportunity for defense counsel to become known to the judge, who ordinarily will already be familiar with the prosecutor. If counsel's learning, preparation, and reasoned judgment make a good impression, the judge may be more receptive to counsel's positions on questions that arise at trial than if counsel were entirely unknown.

(9) *To get a sense of the judge's attitude toward the case.* Counsel will want to learn, if s/he can, both how the judge is likely to react to certain kinds of evidentiary issues at trial (for example, whether the judge is disposed to exercise liberally or sparingly the court's discretion to exclude prejudicial matter (see § 36.2.3 *infra*); whether the judge is likely to respond favorably to a highly technical hearsay argument) and how the judge is likely to react to the case and to the defendant at sentencing in the event of conviction. The answer to the latter questions may well cause counsel to decide that a jury waiver or even a guilty plea is advised rather than a trial before this judge. (See § 15.7.2 *supra*.)

18.15. *Memorializing the Pretrial Conference*

If the judge who conducts the pretrial conference drafts an order purporting to record agreements and dispositions reached at the conference, counsel should give it careful study upon its receipt and immediately call to the judge's attention any point on which counsel's recollection differs from the judge's or anything to which counsel objects. If the judge does not draft an order, counsel should make his or her own file memorandum memorializing the conference. If agreements reached there include important matters on which s/he intends to rely, s/he may want to embody them in a proposed pretrial order for the judge's signature; or s/he may want to embody them in a letter of "understanding" to the judge, of which a copy should be sent to the prosecutor and another filed. In this fashion, counsel will be able to document the legitimacy of any complaints s/he may have in the unhappily common event that the court or the prosecution breaches an agreed course of conduct at trial.

Chapter 19

Motions Practice in General

A. Motions Hearings

19.1. Evidentiary and Non-evidentiary Motions Hearings

Section 17.3 *supra* discusses the various aims that defense motions can serve. Section 17.4 provides a roster of motions counsel should consider. Section 17.5 examines the strategic question whether counsel should raise issues by pretrial motion or at trial when local practice allows both options. It concludes with a discussion of tactics and procedures relating to motions *in limine*. Sections 17.6-17.8 deal with other procedural aspects of motions. Sections 17.10-17.11 discuss the drafting of written motions and the advisability of invoking state constitutional law as well as federal constitutional law in both written and oral motions that raise constitutional claims. Section 17.9 canvasses considerations bearing on the decision whether to present claims in the form of an evidentiary motion or a non-evidentiary motion. That section is the prelude to this one.

Depending upon the type of motion involved and the specific facts at issue on the motion, a motions hearing can be either a non-evidentiary legal argument by the attorneys or a trial-like evidentiary hearing.

Motions that raise purely legal issues, such as motions challenging the sufficiency of the charging paper (see § 20.4 *infra*) and motions for a bill of particulars (see § 18.7.1 *supra*) are presented at non-evidentiary hearings, since they involve no factual disputes that need to be resolved through the presentation of testimony. The same is true of motions that turn upon facts already known to the court, such as most motions for recusal of the judge (§§ 22.4-22.7 *infra*), or facts fully ascertainable through a review of court records, such as most motions to dismiss the charging paper on double jeopardy grounds (§ 20.8 *infra*) or for a violation of speedy trial guarantees (§ 28.5 *infra*).

The quintessential type of motion that turns upon factual issues and therefore requires an evidentiary hearing is a motion to suppress evidence. Motions to suppress tangible evidence (Chapter 25), incriminating statements (Chapter 26), and identification testimony (Chapter 27) all typically result in an evidentiary hearing followed by legal arguments on the law and facts. In some jurisdictions the defense must demonstrate the right to an evidentiary hearing by arguing, in a non-evidentiary legal argument, the sufficiency of the facts alleged in the suppression motion to state a claim under the applicable law. See §§ 17.8-17.10 *supra*. The prosecutor can, of course, obviate the need for an evidentiary hearing on a motion to suppress by stipulating to the facts alleged by the defense, thereby reducing the hearing to a legal argument on whether the stipulated facts satisfy the legal rules governing suppression.

Local practice may also require that a motion for an evidentiary hearing be supported by affidavits setting out the facts that the defendant intends to establish through testimony at the hearing. See § 17.8 *supra*.

This requirement for a *preliminary* demonstration of the factual merits of the defendant's claim to a motions remedy is distinct from the procedure of submitting the motion for final adjudication of the merits on affidavits instead of live testimony. These procedures are discussed in §§ 17.9-7.10 *supra*, together with the relevant tactical considerations in handling them.

Motions for severance (Chapter 23) and motions for discovery (§§ 18.7.3-18.7.5 *supra*) can be either evidentiary or non-evidentiary, depending upon the specific issues and facts that they raise. Thus, for example, a motion to sever co-defendants based upon a co-defendant's statement implicating the defendant (see § 23.9.1 *infra*) would ordinarily go to a non-evidentiary hearing in which the judge reviews the statement and hears arguments on its legal implications, but a motion to sever based upon the defense's intention to present the testimony of the co-defendant in the defense case might necessitate an evidentiary hearing on the contents of the testimony (see § 23.9.2 *infra*). Most motions for discovery turn upon undisputed facts about the general nature of the materials that the prosecution is unwilling to turn over to the defense; but a particular discovery motion could involve an evidentiary hearing on the question, for example, whether witnesses were unconstitutionally instructed by the prosecutor or police officers to refuse to speak with defense counsel and his or her investigator (see § 9.14 *supra*). Motions to dismiss for prosecutorial misconduct might turn upon facts already known to the judge – such as acts of misconduct that occurred in proceedings at which the judge was presiding, or acts reflected in the transcript of a prior proceeding – or they might, in certain cases, require direct and cross-examination of the prosecutor and witnesses to the prosecutor's behavior outside the courtroom.

Motions for a change of venue (§§ 22.1-22.3 *infra*) and motions challenging jury selection procedures (§ 32.4 *infra*) may turn upon case-specific facts (such as the nature and extent of prejudicial pretrial publicity in the case) or upon more general, less disputable facts (such as the county's standard procedure for selecting the venire). Some jurisdictions require that the facts supporting such motions be established through affidavits; other jurisdictions require that the facts be presented at an evidentiary hearing; still others permit the defense to choose between these two options. The factors that counsel should consider in making the choice are summarized in § 17.9 *supra*.

19.2. *Scope of the Chapter*

The following sections deal solely with non-evidentiary motions hearings, describing the procedures followed in such hearings and suggesting approaches to take in arguing motions. Techniques for conducting evidentiary hearings on motions to suppress are covered in Chapter 24; and much of the tactical advice offered in that chapter applies to other evidentiary motions hearings as well. See, *e.g.*, §§ 24.2, 24.4-24.6 *infra*; and see § 18.1 concluding paragraph *supra*.

B. Non-Evidentiary Motions Arguments

19.3. Procedure

Usually defense counsel, as the proponent of the motion, argues first, and the prosecutor responds thereafter. Depending upon local practice and the preferences of the judge presiding over the motions hearing, defense counsel may or may not be offered the opportunity to reply to the prosecutor's arguments. Counsel should always request leave to reply if s/he has something useful to say, whether or not rebuttal argument is standard operating procedure in this court. When practicing in courts that are less formal, where the question of who argues first is decided by which lawyer starts talking first, defense counsel should usually seize the initiative and speak first. The attorney who argues first has the invaluable opportunity to acquaint the judge with the facts and issues in the light most favorable to the presenter – a matter of particular importance inasmuch as the judge may not have read the motion. To some extent the first speaker can also control the order in which issues are taken up, addressing first the issues on which s/he is strongest.

Most judges conduct motions arguments like appellate arguments, feeling free to interrupt and pepper attorneys with factual and legal questions. Techniques for responding to judges' questions are described in § 19.7 *infra*.

Although counsel has the right to object to statements made by the prosecutor, many judges insist that counsel refrain from interrupting his or her opponent and instead make all objections at the conclusion of the prosecutor's argument. If this is the local custom, counsel should conform to it *unless*: (i) appellate caselaw suggests that "contemporaneous objection" rules require counsel to object at the moment when the prosecutor makes the improper statement; or (ii) the prosecutor is reciting information that is both very likely to be ruled inadmissible and strongly prejudicial to the defendant, in which case defense counsel should object and insist that the judge prohibit the prosecutor from continuing to relate the prejudicial information.

19.4. Guarding Against Undue Disclosures of Defense Trial Evidence and Trial Strategy

Whenever s/he is arguing pretrial motions or conducting any type of pretrial hearing, counsel must carefully guard against revealing to the prosecutor aspects of the defense trial evidence or strategy. This is particularly important with respect to matters that involve weaknesses of prosecution witnesses (such as their inconsistent statements to defense counsel's investigator) when the prosecutor does not already know about these matters, because their disclosure could lead to the prosecutor's coaching the witness to avoid defense traps.

Usually, the objective of avoiding revelation of defense secrets will not conflict with the objective of winning a motions argument. Most non-evidentiary motions focus upon aspects of the legal history of the case (such as the length of delays, as pertinent to speedy trial issues; the existence and

nature of prior proceedings, as pertinent to double jeopardy issues; and so forth) that do not implicate the facts of the offense and accordingly do not call for any discussion of defense evidence or the defense theory of the case. However, some motions may be problematic. For example, when counsel is litigating a motion for severance of defendants on the ground of conflicting defenses (see § 23.9.3 *infra*), the judge may reject counsel's attempt to describe his or her projected defense in broad, ambiguous terms and may demand of counsel a detailed description of the defense that counsel will offer at trial as a predicate for the judge's assessment of whether that defense so severely conflicts with the co-defendant's as to require a severance.

Whenever confronted with the dilemma of whether to reveal defense secrets whose disclosure might win the motion for the defense, counsel must calculate the relative prospects of winning the motion with and without the revelation; whether winning the motion will terminate the case, and, if not, the degree to which winning the motion would improve the defense's chances of winning the trial; and the degree to which revealing the defense evidence or trial strategy would impair the defense's chances of winning the trial. In unusual cases in which the revelation is extremely important to winning the motion, extremely damaging to the defense's chances of winning the trial, and arguably protected by the defendant's Fifth Amendment Privilege Against Self-Incrimination (see § 18.12 *supra*), counsel should consider asking leave to present certain facts or arguments to the court *ex parte*, either in a sealed affidavit or in chambers. Judges will be resistant to this suggestion because it is untraditional and deprives the prosecutor, to some extent, of the right of reply. But proceedings conducted partly in the open and partly *ex parte* are becoming customary in a number of contexts (such as defense motions for state-paid expert assistance (see § 5.4 *supra*); prosecution submission of prior statements of prosecution witnesses to the court for screening before their production to the defense at trial (see § 34.7 *infra*); and prosecution submission of electronic surveillance logs to the court for screening and redaction before their production to the defense), and it is therefore possible that the judge will consider a similar procedure in the present context. In theory, the same request could be made in all cases in which the information that counsel seeks to withhold from the prosecutor is defense "work product" (see § 18.13 *supra*). But this is a very dangerous position for the defense to urge in most jurisdictions, because "work product" protection is usually extended to the prosecutor as well as defense counsel, and the defense has much to lose from any general legitimation of *ex parte* proceedings as a means of limiting pretrial disclosure in a system in which the prosecutor has every investigative advantage over the defense. See Chapter 18.

19.5. *The Extent to Which Counsel Should Orally Recite Facts and Law Already Set Forth in the Motion*

In arguing a motion, counsel cannot assume that the judge has read the motions papers or any other pleadings in the case. Many trial judges are so overloaded (or lazy) that they are unable to find the time to read motions papers. Or they are prevented from reading particular motions papers because the administrative processes of the court have caused the motion to sit unread

in the clerk's office, awaiting filing in the court file. Nor can counsel assume that the judge will supplement what s/he hears in the oral argument by reading the motion and other pleadings after the argument. Many trial judges rule on motions from the bench at the conclusion of the attorneys' arguments.

Accordingly, unless counsel knows for certain that the judge has read the motion (as, for example, when the judge's opening remarks or questions refer to a particular passage in the motion), counsel will need to recite in oral argument any facts and law that are essential to the defense position. On the other hand, counsel cannot take the risk of offending the judge by stating or even implying counsel's assumption that the judge has not read the motion. For this reason counsel should avoid giving the impression that s/he is reiterating information and legal analysis contained in the motion. Also, as explained in § 19.6 *infra*, counsel typically wants to avoid engaging in detailed legal documentation in the oral argument.

Usually, the best way of reconciling all of these concerns is to touch upon each of the essential facts and legal points, while mentioning the pages of the motion on which important legal points are more extensively developed and supported with citations. As long as counsel couches the references to the body of the motion as if they were shorthand substitutes for lengthier argument rather than directions to the judge to read a motion s/he has never looked at, this approach will be inoffensive. It may also have the salutary effect of inducing the judge to read at least those portions of the motion prior to ruling, if s/he has not done so already.

19.6. *The Inadvisability of String-citing Cases or Analyzing Court Decisions at Length*

Counsel should almost never recite strings of citations to court decisions or engage in complex legal analysis in oral argument. Such matters are extremely tedious, and counsel's dwelling on them may lead the judge either to tune out or to cut counsel's argument short. Moreover, because these are not matters that the judge is going to remember (and few judges take notes during attorneys' arguments), spending time on these matters is unproductive and wastes the opportunity to use the argument to make more memorable and persuasive points.

As a general rule of thumb, counsel should treat the law bearing on the motion merely as a legal framework for organizing the key points to be made about the case at hand. S/he should state the legal framework simply and briefly and then devote most of the argument to fitting facts into that framework. Counsel should focus particularly on things that: (i) are dramatic (speaking to the heart of the case and making the judge *want* to rule in the defendant's favor); (ii) are factually persuasive; and (iii) give the judge some overall feeling about the case, enabling him or her to see the forest rather than the trees.

In those cases in which it is necessary to depend upon detailed analysis of prior caselaw, counsel should ordinarily set forth the analysis in the written motion and then direct the judge's attention to the relevant pages of the motion

instead of orally reiterating the analysis. See § 19.5 *supra*; see also § 24.6.4 *infra*. If counsel refrained from setting forth a detailed legal analysis in the written motion for strategic reasons (see § 17.10 *supra*), s/he can sometimes offer to brief the issues in a supplementary memorandum of points and authorities. But this is more commonly done in argument at the close of an evidentiary motions hearing, particularly one in which extensive testimony has been taken. It is often impracticable in a non-evidentiary hearing, either because the judge intends to rule from the bench or because counsel simply has no good reason for failing to brief the issues fully beforehand. When, in these or other situations, counsel's only option is to analyze the caselaw orally, s/he should bring to the argument copies of any court decisions that were not amply covered in the written motion, and, upon reaching the points in the argument that depend on those decisions, offer to hand copies of the decisions to the judge and prosecutor rather than citing and quoting at length. Counsel can then alleviate much of the tedium and confusion of oral legal analysis by directing the judge's attention to relevant passages of the opinion (which should be highlighted, if they are short), essentially using the opinion as a prop in counsel's argument.

19.7. *The Importance of Being Responsive to the Judge's Questions*

The key to arguing motions is to be responsive to the judge's questions and address his or her concerns as thoroughly as possible. Since most judges rule on motions from the bench, they depend upon counsel's answers to their questions to resolve the issues that the judge finds most troublesome. The judge's questions will usually pinpoint the areas in which the judge most sorely needs to be persuaded in order to rule in the defendant's favor.

Counsel cannot afford to give short shrift even to questions that seem irrelevant or uninformed. Anything that is troubling the decision-maker is, by definition, relevant. And questions that betray the judge's unfamiliarity with the issues or caselaw show a need to educate the judge through the answer to the question.

In preparing for oral argument, counsel should attempt to anticipate the questions that the judge is likely to ask and should develop persuasive answers. Since trial judges are generally concerned with staying well within established rules of law, counsel should be prepared to demonstrate that the rule counsel is advocating is wholly consistent with the controlling caselaw, and s/he should bring copies of the cases to the hearing to use as props in the argument if necessary. See § 19.6 *supra*. Since trial judges are usually disinclined to adopt rules of great breadth and scope (either because they are cautious about binding themselves in the future or because they fear that the adoption of sweeping new rules invites appellate reversal), counsel should be prepared to show the limits of the rule s/he is advocating, preferably by distinctions that limit the rule to the unique facts of counsel's own case.

When the judge asks questions of counsel's opponent, counsel should listen to the questions as carefully as if they were directed to counsel himself or herself. As previously noted, the judge's questions usually identify the concerns that are of paramount importance to the judge. Accordingly, counsel cannot

afford to allow the prosecutor to be the only party to address these matters. During counsel's reply to the prosecutor, counsel should say that s/he would like to state the defendant's position on the question that the judge addressed to the prosecutor, and then do so. If local practice does not normally afford counsel the opportunity to reply to the prosecutor, but counsel has a very persuasive answer to a question directed at the prosecutor, counsel should – at the close of the prosecutor's argument – ask leave to state the position of the defense in regard to the prosecutor's answer to the judge's question.

Chapter 20

Motions to Quash or Dismiss the Charging Paper

20.1. *Overview of the Grounds for Quashing or Dismissing the Charging Paper*

There are numerous grounds for moving to quash or dismiss a charging paper or one or more of its counts. These include:

1. Denial or inadequacy of a preliminary hearing, and certain other defects in the conduct of the preliminary hearing. See § 20.2 *infra*.
2. Defects in the composition or functioning of the grand jury. See § 20.3 *infra*.
3. Lack of personal or subject-matter jurisdiction. See, e.g., *Mascarenas v. State*, 80 N.M. 537, 458 P.2d 789 (1969); *A Juvenile v. Commonwealth*, 380 Mass. 552, 556-63, 405 N.E.2d 143, 146-50 (1980). Although most other grounds for dismissal of a prosecution must be raised within specified time limits (see § 20.3.4 *infra*), lack of jurisdiction can be called to the court's attention at any time (see, e.g., *Harrell v. State*, 721 So. 2d 1185 (Fla. App. 1998)).
4. Failure to charge an offense. See § 20.4 *infra*.
5. Objections to venue. See § 20.5 *infra*.
6. Technical defects. See § 20.6 *infra*.
7. A statute of limitations. See § 20.7 *infra*.
8. Double jeopardy. See § 20.8 *infra*.
9. Misjoinder. See § 20.9 *infra*.

In most jurisdictions, statutes or court rules require that motions challenging the sufficiency of the charging paper be made in writing, within a specified period of time. See § 17.7 *supra*; § 20.3.4 *infra*.

20.2. *Motions to Quash or Dismiss an Information or Indictment on Grounds Relating to the Preliminary Hearing*

In nonindictable cases many of the objections to denial or inadequacy of a preliminary hearing that are summarized in § 12.12 *supra* survive the filing of an information. After the information is filed, they may be raisable – depending upon local practice – by the procedures previously available (see the sections referenced by § 12.12) or by a motion to quash or to dismiss the

information or by both. *See, e.g., State v. Essman*, 98 Ariz. 228, 403 P.2d 540 (1965).

Motions to quash or to dismiss informations on the ground that illegally obtained evidence was presented before the magistrate at preliminary hearing are considered in § 20.3.3 *infra*.

A motion to quash or to dismiss an information will also lie to raise the objection that the information charges offenses not shown in the transcript of the preliminary examination or offenses for which the defendant was not bound over (in the jurisdictions where a bind-over on a specific charge is a prerequisite to charging that offense in an information). *See* §§ 2.3.6, 11.1.1 *supra*.

If the argument made in § 11.4 *supra* – that indictment does not moot the right to a preliminary examination – prevails, certain attacks on the preliminary examination will also survive indictment in an indictable case and may be raised by the procedures enumerated in § 11.6.2 *supra*, including a motion to quash or to dismiss the indictment.

20.3. Motions to Quash or to Dismiss an Indictment on Grounds Relating to Defects in the Composition or Functioning of the Grand Jury

20.3.1. Challenges to the Composition or Procedures of the Grand Jury

Motions to quash or to dismiss an indictment are available in most jurisdictions on various grounds that challenge the composition or procedures of the grand jury. Particularly important are:

- (1) Challenges to the method of selection of the grand jurors or to their qualifications collectively or individually, including claims of systematic exclusion of a racial, ethnic, religious, economic, gender-based, or other distinctive demographic group; claims that the jury panel was prejudiced by inflammatory publicity; and claims of bias of an individual juror (*see* §§ 12.1, 12.1.1, 12.3 *supra*);
- (2) Challenges to the manner of proceeding or to the functioning of the grand jury – for example, claims that unauthorized persons were present during the jury’s deliberations (*see* Andrea G. Nadel, Annot., *Presence of Unauthorized Persons During State Grand Jury Proceedings as Affecting Indictment*, 23 A.L.R.4th 397 (1983 & Supp. 2015); *cf. United States v. Mechanik*, 475 U.S. 66, 70, 72 & n.2 (1986) (leaving unresolved the status of such objections in federal practice)), or that the prosecutor engaged in prejudicial misconduct before the grand jury (*see, e.g., People v. Huston*, 88 N.Y.2d 400, 668 N.E.2d 1362, 646 N.Y.S.2d 69 (1996); *State v. Martin*, 823 N.W.2d 913 (Minn. App. 2012); *Commonwealth v. Baker*, 11 S.W.3d 585 (Ky. App. 2000); *State v. Joao*, 53 Haw. 226, 491 P.2d 1089 (1971) and cognate cases cited in § 12.1.3 *supra*; *cf. Bank of Nova Scotia v. United*

States, 487 U.S. 250, 254-56 (1988)), or that less than a majority of the grand jurors concurred in returning the indictment (see § 12.1.2 concluding paragraph *supra*);

- (3) Claims that the defendant’s rights were violated in the course of his or her appearance before the grand jury, for example, by compulsion of the defendant’s testimony in violation of the privilege against self-incrimination (*e.g.*, *State v. Turner*, 300 Kan. 662, 333 P.3d 155 (2014); see §§ 12.6.1-12.6.3, 12.6.4.3 third and fourth paragraphs *supra*); and
- (4) Claims that the indictment was returned in violation of a grant of immunity given the defendant before the grand jury (see §§ 12.6.4.1-12.6.4.2 *supra*).

20.3.2. Challenges to the Sufficiency of the Evidence Presented to the Grand Jury

In some jurisdictions a motion to quash or to dismiss an indictment will lie upon the ground that there was insufficient evidence before the grand jury to support a finding of probable cause or to meet whatever other burden of proof is required by local law for the return of an indictment. *See, e.g.*, *Felix F. v. Commonwealth*, 471 Mass. 513, 31 N.E.3d 42 (2015); *People v. Nitzberg*, 289 N.Y. 523, 47 N.E.2d 37 (1943); *People v. Jackson*, 18 N.Y.2d 516, 223 N.E.2d 790, 277 N.Y.S.2d 263 (1966); *State v. Nordquist*, 309 N.W.2d 109, 112-17 (1981) (dictum); *but see Costello v. United States*, 350 U.S. 359 (1956) (federal practice), discussed in § 20.3.3 *infra*. In other jurisdictions there are judicial decisions purporting to authorize these motions on the ground that no evidence was presented to the grand jury which would rationally warrant the submission of the case to a trial jury (*see, e.g.*, *State v. Parks*, 437 P.2d 642, 644 (Alaska 1968) (dictum) (“[W]e would hold an indictment to be insufficient and subject to dismissal if it appeared that no evidence was presented to the grand jury that rationally established the facts. . . . ¶ Under such a rule, the question is one of sufficiency of the evidence – whether it is adequate to persuade reasonable minded persons that if unexplained or uncontradicted it would warrant a conviction of the person charged with an offense by the judge or jury trying the offense.”)); but attempts to satisfy the no-evidence standard are obviously rarely successful.

20.3.3. Challenges to the Admissibility of Evidence Presented to the Grand Jury

Attacks on the admissibility of evidence received by the grand jury will support a motion to quash or to dismiss an indictment only in jurisdictions that both permit review of the grand jury transcript for probable cause (see § 20.3.2 *supra*) and restrict grand juries to legally competent evidence (see § 12.1.2 *supra*). In these jurisdictions an indictment will be set aside if exclusion of the inadmissible evidence would leave insufficient remaining evidence to support it. *See, e.g.*, *People v. Hardy*, 42 Misc.3d 211, 976 N.Y.S.2d 774 (Clinton Cty. Ct. 2013), and cases cited.

A more complex question is presented by attacks on an indictment on the ground that illegally or unconstitutionally obtained evidence was presented before the grand jury – for example, coerced confessions, evidence procured by unlawful searches and seizures or electronic surveillance, perjured testimony known by the prosecutor to be perjured. In *United States v. Calandra*, 414 U.S. 338, 344-45, 346 (1974), the Supreme Court of the United States repeated with approval a collection of *dicta* in earlier cases to the effect that, in the federal courts, indictments need not be dismissed by reason of the grand jury’s use of unconstitutional evidence (see *Lawn v. United States*, 355 U.S. 339, 349-50 (1958); *United States v. Blue*, 384 U.S. 251, 255 n.3 (1966); *Gelbard v. United States*, 408 U.S. 41, 60 (1972), because “[a]n indictment returned by a legally constituted and unbiased grand jury, . . . if valid on its face, is enough to call for trial of the charge on the merits. The Fifth Amendment requires nothing more” (*Costello v. United States*, 350 U.S. 359, 363 (1956)). But this conclusion manifestly does not follow from its premise. For, *in addition* to the requirements of the Fifth Amendment (or whatever state-law counterpart it may have in any jurisdiction, conferring a right to prosecution by indictment of a grand jury), criminal procedures must satisfy the requirements of other constitutional and statutory safeguards, including those that proscribe impermissible methods of obtaining evidence (see, *e.g.*, Chapters 25, 26, 27 *infra*) and that have been read by implication to exclude the use of evidence obtained by the proscribed methods (*e.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961)). The purposes of the exclusionary rules discussed in those chapters (see *e.g.*, §§ 25.39-25.42, 26.2, 26.5, 26.16) – as recognized even by Supreme Court opinions that withdraw the exclusionary sanction in certain classes of cases (see, *e.g.*, §§ 25.3 concluding paragraph, 25.17) – should condemn any use of unconstitutionally obtained evidence to aid a prosecution, as Justice Holmes recognized in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, 392 (1920): “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.” Particularly in light of the doctrine that illegally obtained evidence may not “legally form the basis for an arrest or search warrant” (*Alderman v. United States*, 394 U.S. 165, 177 (1969) (dictum); *cf.* *United States v. Giordano*, 416 U.S. 505, 529-34 (1974); and see § 25.42 *infra*), it is difficult to comprehend how the same evidence can “legally form the basis for” an indictment. And if the police may not even use the evidence to advance their investigation (see *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963)), surely the prosecutor should not be permitted to use it to advance the prosecution by obtaining an indictment. So the argument is logically forceful that the federal Constitution does compel the voiding of an indictment based upon evidence obtained in violation of federal statutory or constitutional guarantees. See Note, *Disclosure of Grand Jury Minutes to Challenge Indictments and Impeach Witnesses in Federal Criminal Cases*, 111 U. PA. L. REV. 1154 (1963); compare *United States v. Tane*, 329 F.2d 848 (2d Cir. 1964). This requirement would apply in both federal and state cases, to the same extent and for the same reasons that the exclusionary rules governing trial evidence do. See §§ 25.39-25.41 *infra*. It would call for the dismissal of indictments whenever the unconstitutional evidence cannot be said to have been harmless in its impact on the grand jury, within the rule of *Chapman v. California*, 386 U.S. 18 (1967); *Harrington v. California*, 395 U.S. 250 (1969); *United States v. Hasting*, 461 U.S.

499, 508-12 (1983); and *Satterwhite v. Texas*, 486 U.S. 249 (1988) – not merely when the other, constitutionally untainted evidence is sufficient to support a finding of probable cause. *Cf. Vasquez v. Hillery*, 474 U.S. 254, 262-64 (1986).

The broad language of the *Calandra* opinion, however, expressly refuses “to extend the exclusionary rule to grand jury proceedings” (414 U.S. at 390). Technically, this language is *dictum* insofar as it implies that indictments are not to be quashed on the ground of the grand jury’s receipt of illegally obtained evidence. *Calandra* did not involve a motion to quash by an indicted defendant but held only that an unindicted grand jury witness was not entitled to a judicial order immunizing the witness from grand jury questioning based upon leads obtained through an unreasonable search and seizure. Counsel may therefore wish to contend:

- (a) That *Calandra* does not foreclose a motion to quash by “a criminal defendant” who has been “indicted by the grand jury” (414 U.S. at 352 n.8), because these motions do not entail the sort of “interruption of the grand jury proceedings” (*id.* at 353 n.8) with which *Calandra* is primarily concerned (*see id.* at 349-50).

Alternatively, it is arguable at least:

- (b) That *Calandra* is limited to cases in which grand jury evidence is challenged on Fourth Amendment grounds, as distinguished from other grounds of illegality – such as the coercion of confessions or incriminating admissions (*see, e.g., Mincey v. Arizona*, 437 U.S. 385, 397-98 (1978)) – which (i) implicate its “trustworthiness” (*cf. Harris v. New York*, 401 U.S. 222, 224 (1971)), or (ii) involve the grand jury more directly in a constitutional violation (*compare United States v. Calandra, supra*, 414 U.S. at 353-54, *with New Jersey v. Portash*, 440 U.S. 450, 458-59 (1979); *cf. § 25.41 infra; but see United States v. Blue, supra*, 384 U.S. at 255 n.3 (*dictum*));

or

- (c) That *Calandra* is limited to cases in which no motion to suppress has been filed prior to submission of the case to the grand jury (*see United States v. Calandra, supra*, 414 U.S. at 352-53 n.8, distinguishing *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); and *see § 12.4 supra*).

These arguments would not bar the defendant’s reindictment following new grand jury proceedings in which his or her constitutional rights were observed; they would merely require the dismissal of indictments obtained “by exploitation of . . . illegality” (*Wong Sun v. United States*, 371 U.S. 471, 488 (1963); § 25.39 *infra*), so as to provide a “remedy . . . denying the prosecution the fruits of its transgression” (*United States v. Morrison*, 449 U.S. 361, 366 (1981)).

However, the tone of *Calandra* bodes ill for these several distinctions and plainly implies that – at least until the membership of the Supreme Court

changes sufficiently – there is no real hope for the argument of a constitutional right to dismissal of indictments based on illegally obtained evidence. *See also United States v. Washington*, 431 U.S. 181, 185 n.3 (1977); *United States v. Ceccolini*, 435 U.S. 268, 275 (1978); *United States v. Blue*, *supra*, 384 U.S. at 255 n.3; *Bracy v. United States*, 435 U.S. 1301 (Rehnquist, Circuit Justice, 1978).

The hope is stronger that *Calandra* can be distinguished:

- (a) In *information* cases, in which *Calandra*'s solicitude for the "special role" of the grand jury (414 U.S. at 343), is obviously beside the point, upon a motion to quash an information or a magistrate's transcript on the ground of receipt of illegally obtained evidence at the preliminary examination (*but see* FED. RULE CRIM. PRO. 5.1(e)); and
- (b) In both information and indictment cases in which the motion to quash is based upon a claim of illegal electronic surveillance in violation of the Omnibus Crime Control and Safe Streets Act of 1968 (see §§ 25.31-25.32 *infra*) and can therefore draw support from 18 U.S.C. § 2515, which "directs that ' . . . no part of the contents of [an illegally intercepted] . . . communication and no evidence derived therefrom may be received in evidence in any [trial, hearing or other] . . . proceeding in or before any [court,] . . . grand jury . . . [or other authority of the United States, a State, or a political subdivision thereof] if the disclosure of that information would be in violation of this chapter'" (*Gelbard v. United States*, 408 U.S. 41, 43 (1972)). *Compare id.* at 59-61 with *United States v. Calandra*, *supra*, 414 U.S. at 355-56 n.11.

In any event, *Calandra* does not affect the right given by state law in some jurisdictions (see §§ 20.3.2-20.3.3 *supra*) to have informations and indictments set aside on the ground that the magistrate's or grand jury transcript contains insufficient legally competent evidence to support them. For this purpose, illegally obtained evidence is not legally competent evidence (*see, e.g., Badillo v. Superior Court*, 46 Cal. 2d 269, 294 P.2d 23 (1956)) – not because of the federal exclusionary rule that *Calandra* declined to apply to grand juries but because the state-law screening function of preliminary examinations and indictments in these jurisdictions forbids magistrates or grand juries to act upon evidence that will not be admissible at trial.

20.3.4. Deadlines for Filing Motions to Quash an Indictment Due to Defects in the Composition or Functioning of the Grand Jury

The various motions to quash or to dismiss an indictment on the grounds summarized in the above subsections (§§ 20.1-20.3.3) are ordinarily required to be made within specified time limits (*e.g., x* number of days after the indictment is filed; *x* number of days before arraignment; prior to the defendant's entry of a general plea at arraignment (see § 14.5 *supra*)). Local time limitations should be checked and carefully observed, because untimeliness can

irrevocably forfeit meritorious claims of error in the proceedings leading up to indictment. See *Davis v. United States*, 411 U.S. 233 (1973); *Francis v. Henderson*, 425 U.S. 536 (1976); cf. *Wainwright v. Sykes*, 433 U.S. 72 (1977). For the few grounds on which such forfeitures can be challenged, see § 14.5 *supra*. Concerning the possibility of obtaining an extension of time for filing motions, see § 17.7 *supra*.

20.3.5. Strategic Considerations

Success on any of the motions discussed above does not bar reindictment following new grand jury proceedings that avoid the defects of the old. Reindictment is precluded only if the statute of limitations has run; and in many jurisdictions there are provisions that toll the statute during the pendency of a technically deficient indictment or that permit reindictment within a specified time after its dismissal, even though the limitations period has expired. Counsel may sometimes decide that, in light of the probabilities of reindictment, available motions are not advised. But knocking out an indictment is often a victory that demoralizes the prosecution considerably and commensurately improves the bargaining posture of the defense. See § 15.12 *supra*. Fringe benefits of the motions to quash or dismiss should also not be ignored: (1) If denied, they leave a claim of error that may be pressed on appeal from conviction; (2) if granted, they ordinarily delay the trial at least one criminal term (which may, of course, be a blessing or a bane, depending on the circumstances of the defense); and (3) whether granted or denied, they may occasion some inquiry into the proceedings before the grand jury (perhaps even serving as the basis for a defense request to examine all or portions of the grand jury transcript or to interview grand jury witnesses regarding matters relating to their grand jury appearances), knowledge of which may enable counsel to gain some measure of informal discovery of the prosecution's case.

20.4. Challenges to an Information or Indictment for Failure to Charge an Offense

A motion to quash or to dismiss an indictment or information, or a demurrer to it, is used to challenge the legal sufficiency of its allegations. They may be legally insufficient for several different reasons, often confusingly grouped under the single rubric, “failure to charge a public offense.”

Demurrers and motions to quash or to dismiss that attack the facial sufficiency of a charging paper are ordinarily required to be filed before the defendant's plea, although the contention that what is charged is not a crime (§ 20.4.1 *infra*) will usually be heard at any time. See, e.g., *People v. Tedtaotao*, 2015 WL 6941122 (Guam 2015).

20.4.1. Failure to Charge Acts That Are Criminal in Nature

The allegations may state fully and clearly what specific acts the defendant is charged with doing, but these acts may be no crime. See, e.g., *State v. Kline*, 717 S.W.2d 849 (Mo. App. 1986); *State v. Miller*, 159 N.C. App.

608, 583 S.E.2d 620 (2003), *aff'd per curiam*, 358 N.C. 133, 591 S.E.2d 520 (2004) (mem.); *State v. Harrison*, 805 S.W.2d 241 (Mo. App. 1991). For example, a defendant might be charged under a statute penalizing one who “resists an officer in the execution of his duty” by an information alleging that the defendant did “run away and refuse to stop when called upon to stop by” the officer. A motion to dismiss or demurrer here tests the prosecution’s legal theory. Specifically, it raises the issue of law whether one who runs away from a police officer thereby “resists” the officer within the meaning of the statute.

Ordinarily, the sole focus of this species of motion to dismiss is the text of the charging paper: Do the actions and circumstances which the charging paper sets forth constitute a crime or do they not? However, if there is no dispute between the parties that the factual scenario on which the charge is based includes additional circumstances relevant to the criminality of the actions charged, those circumstances can be considered by the court in ruling on the motion. *See, e.g., State v. Hankins*, 155 So. 3d 1043, 1045-46 (Ala. Crim. App. 2011); *State v. Pagano*, 104 Md. App. 113, 122, 655 A.2d 55, 59-60 (1995), *aff'd*, 341 Md. 129, 669 A.2d 1339 (1996); *State v. Fernow*, 328 S.W.3d 429, 431 (Mo. App. 2010) (the indictment alleged that the defendant “while being held in custody after arrest for burglary, a felony, knowingly escaped from custody” but the facts underlying this allegation, as represented by the parties to the court on the motion to dismiss, were that the defendant “was not in custody after arrest for burglary. At the time . . . [he] absconded, he was being held in custody pursuant to a capias warrant issued for his failure to appear at his probation revocation hearing, where burglary was the underlying offense.”). Prosecutors will ordinarily take the position that consideration of any factual information outside the four corners of the charging paper is improper on a motion to dismiss. But where there is no genuine factual debate about what happened when and where, and under what circumstances – so that the only real contest between the prosecution and defense is whether a set of agreed-upon events comes within the terms of a criminal statute – defense counsel can sometimes persuade the prosecutor to stipulate to the specifics of those events as the basis for a ruling on the motion, in order to save the State the cost and trouble of a trial.

Counsel should always check the caselaw to determine whether the courts have previously dealt with the kinds of acts with which the defendant is charged or equivalent acts. Frequently, prosecutors will charge defendants with acts that have previously been deemed insufficient to constitute a crime because the prosecutor is not aware of the prior decision or because the prior decision, while persuasive, is not controlling.

If there is no prior caselaw on the issue, then counsel’s motion should be devoted primarily to a construction of the statute. In addition to parsing the statutory language, counsel should examine the relevant legislative history for indications that the legislature (1) considered various factual situations to which the statute was intended to apply and did not mean it to reach facts like those in the defendant’s case or (2) enacted the statute to achieve certain goals of policy that do not call for an application of the statute to acts such as those committed by the defendant.

20.4.2. Failure to Allege Facts That Make Out Every Element of Each of the Charged Offenses

A charging paper may quite simply have something missing. The conduct with which it charges the defendant is perfectly consistent with criminality, but some ingredient of the crime or of the charge is omitted. Thus, for example, a charging paper alleging that the defendant committed burglary by unlawfully entering the complainant's dwelling is legally insufficient because it omits an element of burglary: "intent to commit a crime therein." The allegation of unlawful entry might support a charge of criminal trespass, but it is insufficient to support the charged crime of burglary. *See, e.g., State ex rel. Day v. Silver*, 210 W.Va. 175, 180, 556 S.E.2d 820, 825 (2001) ("We . . . hold that in order for an indictment for larceny to be sufficient in law, it must identify with specificity the particular items of property which are the subject of the charge by specifically describing said property, unless the property is incapable of identification as in cases involving fungible goods, United States currency, or comparable articles. Likewise, in order for an indictment for destruction of property to be sufficient in law, it must identify with specificity the particular items of property which are the subject of the charge by specifically describing said property, unless the property is incapable of identification as in cases involving fungible goods, United States currency, or comparable articles.").

Local practice varies enormously with regard to the significance that an omission must have in order to be fatal. Most jurisdictions require allegations of: (1) the name of the defendant, (2) a description or characterization of the defendant's conduct that asserts (in factual or conclusory terms) every legal element of the offense charged (including acts done, any circumstances surrounding them that are necessary to make them unlawful, and the requisite mental state or *mens rea*), (3) the place of the crime (disclosing venue in the court, see § 20.5 *infra*), and (4) the approximate date of the crime (within the statute of limitations, see § 20.7 *infra*). Beyond these rudiments, the jurisdictions differ (and often differ from offense to offense) regarding what must be charged. Some jurisdictions require the name of the victim and great particularization of the means or instrumentalities of the offense. Others disregard these matters. Some disregard even the rudiments just described. Conspicuous among the latter are jurisdictions that provide statutory "short forms," declaring that a charging paper shall be sufficient for the crime of *x* if it alleges: "On [date], defendant A committed the crime of *x* against complainant B within the jurisdiction of this Court." Local practice must be consulted.

20.4.3. Lack of Specificity

A charging paper may be wholly unspecific and conclusory. It may duplicate the language of the criminal statute (defendant A "did commit a lewd act") without giving the slightest idea what the defendant *did*. Again, the jurisdictions vary considerably in the factual specificity required. Many permit allegations in conclusory statutory language under all but the vaguest statutes. *Cf. Michigan v. Doran*, 439 U.S. 282, 290 (1978) (dictum). However, there are limits. The following formulation of federal pleading rules is also common in state practice: "It is generally sufficient that an indictment set forth the

offense in the words of the statute itself, as long as ‘those words of themselves fully, directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished.’ . . . ‘Undoubtedly the language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged.’” (*Hamling v. United States*, 418 U.S. 87, 117-18 (1974)). See also *United States v. Resendiz-Ponce*, 549 U.S. 102, 108-10 (2007); *United States v. Bailey*, 444 U.S. 394, 414 (1980).

Conclusory pleading has several recognized vices. First, it impairs the defendant’s right to be “‘fairly inform[ed] . . . of the charge against which he must defend’” (*United States v. Resendiz-Ponce*, *supra*, 549 U.S. at 108, quoting *Hamling v. United States*, *supra*, 418 U.S. at 117; and see § 18.9.2.2 *supra*). Second, it frustrates the defendant’s interest in having “‘the record . . . sho[w] with accuracy to what extent he may plead a former acquittal or conviction [that is, double jeopardy (see § 20.8 *infra*)]’” in the event of a subsequent prosecution (*Sanabria v. United States*, 437 U.S. 54, 66 (1978)). Third, it deprives the defendant of any opportunity to test the prosecution’s legal theory without contesting its facts (an opportunity traditionally provided by the motion to dismiss and by its progenitor, the common-law demurrer (see, e.g., *Russell v. United States*, 369 U.S. 749 (1962); and see §§ 20.4.1-20.4.2 *supra*). Fourth, it deprives the defendant, in an indictable case, of any opportunity to obtain judicial review of the concurrence of findings of fact by the grand jury and the trial jury or judge – a concurrence that the right to prosecution by indictment supposes (see *Stirone v. United States*, 361 U.S. 212 (1960); *United States v. Miller*, 471 U.S. 130, 138-40, 142-45 (1985)).

Although some judges seem to think that a vague charging paper can be cured by a bill of particulars (see § 13.7 *supra*), the bill actually remedies only the first two of these four vices. It does not touch the third because of the general rule that a demurrer or motion to dismiss will not lie to a bill of particulars. It does not touch the fourth because the bill is the product of the prosecutor, not the grand jury. Therefore, as long as the defendant’s interests are not harmed by delay at the pleading stage, counsel may do well to attack even venerable and accepted forms of conclusory charging papers, particularly indictments, on the ground that these disempower the court to perform its function of testing the sufficiency of the prosecutor’s case in law and that they subvert the defendant’s constitutional right of indictment by grand jury.

20.5. Challenges to an Information or Indictment for Failure to Establish Venue

A charging paper is generally held fatally defective if it does not allege facts establishing venue in the court where it is filed. Allegations in terms of “X street” or “Y township” are ordinarily sufficient; the court will judicially notice that X street or Y township is within the geographical jurisdiction of the court, if it is.

Criminal venue is governed by statute within constitutional limitations.

The prevalent state constitutional provision guaranteeing trial by a jury of the vicinage may or may not comport a venue restriction (see WAYNE R. LAFAVE, JEROLD H. ISRAEL, NANCY J. KING & ORIN S. KERR, 4 CRIMINAL PROCEDURE §§ 16.1-16.2 (4th ed.); Lisa E. Alexander, *Vicinage, Venue, and Community Cross-Section: Obstacles to a State Defendant's Right to Trial by a Representative Jury*, 19 HASTINGS CONST. L.Q. 261 (1991); Drew Kershen, *Vicinage*, 29 OKLA. L. REV. 801 (1976); 30 OKLA. L. REV. 1 (1977)); and even those forms of state jury-trial guarantees that omit explicit reference to “vicinage” may be read as restricting the place of trial or the area from which the trial jury pool can be drawn (see *Alvarado v. State*, 486 P.2d 891 (Alaska 1971)). The Sixth Amendment to the federal Constitution requires trial “by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.” See *United States v. Johnson*, 323 U.S. 273, 275 (1944); *Platt v. Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 245-46 (1964); cf. U.S. CONST. art. III § 2, cl. 3. The incorporation of the Sixth Amendment into the Fourteenth by *Duncan v. Louisiana*, 391 U.S. 145 (1968) [§ 4.3.2 *supra*; § 32.1 *infra*], may, therefore, entail some measure of federal constitutional restraint upon state legislative power to manipulate criminal venue. See *Williams v. Florida*, 399 U.S. 78, 92-97 (1970); *Mareska v. State*, 534 N.E.2d 246 (Ind. App. 1989); but see *Price v. Superior Court*, 25 Cal. 4th 104, 625 P.3d 618, 108 Cal. Rptr. 2d 409 (2001); *State v. Bowman*, 588 A.2d 728 (Maine 1991).

The general constitutional and statutory rule is that offenses are triable only in the county (or circuit or other judicial unit) comprising the place where the offense was committed. The “crime-committed” formula depends principally on the statutory elements of the offense: If a defendant mails a false application to a state agency in another county, for example, venue may turn on whether the statute punishes “making” a false statement or “filing” one. Crimes, the operative elements of which occur in more than one county, are generally triable in either. Conspiracies are triable wherever the conspiracy was maintained (a mystic notion meaning, in practice, wherever any one of the conspirators spent any considerable amount of time during the conspiracy) or wherever any act in furtherance of the conspiracy was done. When the substantive law of conspiracy requires an overt act, venue demands at least one overt act within the territorial jurisdiction of the court. (At the trial stage, this latter rule may become quite significant. In the course of forum-shopping, prosecutors – particularly federal prosecutors – frequently pick a jurisdiction having only very attenuated contacts with a conspiracy and allege only one or two overt acts within it. If they fail to prove these specific overt acts at trial, an acquittal is compelled, even though the conspiracy is otherwise abundantly proved.)

Local practice should be consulted for the intricacies of venue lore.

20.6. Technical Defects in the Indictment or Information

Charging papers may be assailed by motion on a host of technical grounds, some relating to the nature of the charging language (“duplicity,” vagueness, noncompliance with prescribed statutory forms), others relating to strictly formal matters (failure of an indictment to carry the signature or

endorsement of the grand jury foreperson or the prosecutor as required by law, failure of the indictment to carry an endorsement of the names of the witnesses who testified before the grand jury as required by law, and so forth). Some of these defects are remediable and will be ordered remedied without resubmission of the bill. Others are fatal. Again, local practice must be consulted.

20.7. *Statutes of Limitations*

Statutes of limitations of prosecutions, like statutes of limitations governing civil matters, prescribe the permissible period of time within which a charging paper may be filed after an event, asserting liability based on that event. In many jurisdictions, a charging paper is subject to demurrer or dismissal if it either (a) does not allege the date of the offense charged with reasonable specificity (“on or about” will do) or (b) alleges a date that is beyond the period of limitations. The demurrer or motion to dismiss is ordinarily required to be made before plea. In other jurisdictions, questions of limitations are raised by a special plea at arraignment. In still others the defendant must go to trial and raise the issue by a demurrer to the evidence or a motion for acquittal at the close of the prosecution’s case. Local practice should be consulted.

20.8. *Challenges to the Indictment or Information on Double Jeopardy Grounds*

At common law, double jeopardy challenges were ordinarily raised by special pleas at arraignment. Today, in many jurisdictions they must be raised by prearraignment motion.

20.8.1. *Introduction: The General Rules Governing Double Jeopardy Challenges*

Guarantees against being “twice put in jeopardy” may be found in the Fifth Amendment to the federal Constitution and in most state constitutions. In *Benton v. Maryland*, 395 U.S. 784 (1969), the Supreme Court incorporated the Fifth Amendment guarantee into the Due Process Clause of the Fourteenth Amendment and thereby made it binding in state criminal prosecutions. See § 4.3.2 *supra*. The Court thereafter declared its *Benton* decision fully retroactive (*Ashe v. Swenson*, 397 U.S. 436, 437 n.1 (1970); and see *Robinson v. Neil*, 409 U.S. 505 (1973)), but it has reserved the question whether “each of the several aspects of the [federal] constitutional guarantee against double jeopardy” developed by its Fifth Amendment cases is applicable in state prosecutions (*Waller v. Florida*, 397 U.S. 387, 390-91 (1970); cf. *Illinois v. Somerville*, 410 U.S. 458, 468 (1973)). Subsequent cases strongly imply an affirmative answer to this question (see *Greene v. Massey*, 437 U.S. 19, 24 (1978); *Crist v. Bretz*, 437 U.S. 28, 32 (1978); *Hudson v. Louisiana*, 450 U.S. 40, 42 n.3 (1981); and see *McDonald v. City of Chicago*, 561 U.S. 742, 764-65 & nn.12-14 (2010) (listing the Fifth Amendment’s Double Jeopardy Clause among the rights that have been incorporated and are fully applicable to the States)), but these decisions are not categorical on the point (see *Crist v. Bretz*, *supra*, 437 U.S. at 37-38;

Whalen v. United States, 445 U.S. 684, 689-90 n.4 (1980)). The argument for full-scale incorporation is supported by numerous decisions involving other incorporated Bill of Rights guarantees, which consistently rely on doctrines and precedents announced in federal prosecutions as establishing the rules to be applied in state cases as well. *See, e.g., Ker v. California*, 374 U.S. 23, 30-34, 46 (1963) (Fourth Amendment guarantee against unreasonable search and seizure); *Malloy v. Hogan*, 378 U.S. 1, 9-11 (1964) (Fifth Amendment privilege against self-incrimination); *Lakeside v. Oregon*, 435 U.S. 333, 336 (1978) (same); *New Jersey v. Portash*, 440 U.S. 450, 456-57 (1979) (same); *Washington v. Texas*, 388 U.S. 14, 22 (1967) (Sixth Amendment right to compulsory process); *Baldwin v. New York*, 399 U.S. 66, 68-69 (1970) (Sixth Amendment right to jury trial); *Apprendi v. New Jersey*, 530 U.S. 466 (2000) (same); *Ring v. Arizona*, 536 U.S. 584 (2002) (same); *Pointer v. Texas*, 380 U.S. 400 (1965) (Sixth Amendment right to confrontation); *Crawford v. Washington*, 536 U.S. 584 (2004) (same); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (Sixth Amendment right to counsel); *Scott v. Illinois*, 440 U.S. 367 (1979) (same); *Graham v. Florida*, 560 U.S. 48 (2010) (Eighth Amendment prohibition of Cruel and Unusual Punishment); *cf. Ludwig v. Massachusetts*, 427 U.S. 618, 624-30 (1976). “The Court thus has rejected the notion that the Fourteenth Amendment applies to the States only a ‘watered-down, subjective version of the individual guarantees of the Bill of Rights.’” *Malloy v. Hogan*, *supra*, 378 U.S. at 10-11.

Federal and state constitutional double jeopardy guarantees establish the general rule that a defendant may not be reprosecuted for the “same offense” if the first trial ended in acquittal or conviction, or if the first trial passed the stage at which jeopardy “attaches” and then ended in a mistrial declared without some “manifest necessity” or the defendant’s assent. Each element of this general rule, however, has been qualified by complex definitions and exceptions. Section 20.8.2 *infra* discusses the concepts of “attachment of jeopardy” and “same offense.” Sections 20.8.3, 20.8.4, and 20.8.5 examine, respectively, the double jeopardy doctrines governing prosecution when there has been an acquittal, conviction, or mistrial.

Sections 20.8.6 and 20.8.7 then discuss other double jeopardy doctrines. Section 20.8.6 describes the collateral estoppel doctrine that applies to retrials. Section 20.8.7 explains the “dual sovereignty” exception to double jeopardy guarantees.

20.8.2. Definitions

20.8.2.1. “Attachment of Jeopardy”

Double jeopardy protections come into play only after a first trial has passed the stage at which jeopardy “attaches.” In a jury trial, jeopardy attaches when the jury is sworn. *Crist v. Bretz*, 437 U.S. 28, 35-38 (1978); *Martinez v. Illinois*, 134 S. Ct. 2070, 2074-75 (2014) (per curiam). In a bench trial, jeopardy attaches when the first witness is sworn and the presentation of evidence commences. *Crist v. Bretz*, *supra*, 437 U.S. at 37 n.15; *Serfass v. United States*, 420 U.S. 377, 388 (1975).

20.8.2.2. “Same Offense”

The guarantee against double jeopardy forbids a defendant’s “be[ing] subject for the *same offence* to be twice put in jeopardy of life or limb” (U.S. CONST., amend. V (emphasis added)). Thus a threshold issue in double jeopardy analysis is whether the offense for which the defendant is being prosecuted is the “same offense” for which s/he was previously tried. This issue is obviously clear-cut when the second charge leveled against the defendant is a violation of the same criminal code provision that bottomed the first. More difficult issues emerge, however, when the defendant’s conduct violates two separate statutory provisions, and s/he is prosecuted first for one statutory violation and then the other.

“Where the same conduct violates two statutory provisions, the first step in the double jeopardy analysis is to determine whether the legislature . . . intended that each violation be a separate offense. If . . . [the legislature] intended that there be only one offense – that is, a defendant could be convicted under either statutory provision for a single act, but not under both – there would be no statutory authorization for a subsequent prosecution after conviction [or acquittal] of one of the two provisions, and that would end the double jeopardy analysis.” (*Garrett v. United States*, 471 U.S. 773, 778 (1985).)

Techniques for divining legislative intent in the common situation in which it is unclear differ considerably among the jurisdictions. In construing federal legislation, the Supreme Court has employed the so-called *Blockburger* test, deriving from *Blockburger v. United States*, 284 U.S. 299 (1932), which “emphasizes the elements of the two crimes . . . [and asks whether] ‘each requires proof of a fact that the other does not’” (*Brown v. Ohio*, 432 U.S. 161, 166 (1977)). See, e.g., *Rutledge v. United States*, 517 U.S. 292, 297 (1996); *United States v. Dixon*, 509 U.S. 688, 696 (1993); *Ball v. United States*, 470 U.S. 856, 861 (1985). The Court has cautioned that the “*Blockburger* rule[,] . . . [although] a useful canon of statutory construction,” is not “a conclusive determinant of legislative intent” and “the *Blockburger* presumption must . . . yield to a plainly expressed contrary view on the part of [the legislature]” (*Garrett v. United States*, *supra*, 471 U.S. at 779). See also *Missouri v. Hunter*, 459 U.S. 359, 368 (1983); *Wood v. Milyard*, 721 F.3d 1190, 1195 (10th Cir. 2013). But, at least in the context of successive prosecutions – as distinguished from multiple charges joined for simultaneous adjudication in a single trial (see § 48.7 subdivision (3) *infra*) – it is arguable that the *Blockburger* test should prevail and preclude subjecting a defendant to two trials for offenses having identical elements unless the legislature intended specifically to authorize not merely cumulative punishments but multiple trials. And it would be a rare statute that could reasonably be found to manifest the latter intent. See *Ex Parte Chaddock*, 369 S.W.3d 880, 883, 886 (Tex. Crim. App. 2012) (even if “the Legislature manifested its intention that an accused be *punished* for both offenses,” the Double Jeopardy Clause nonetheless bars “*successive prosecutions*” for both offenses; “Multiple punishments that result from a single prosecution do not subject a defendant to the evils attendant upon successive prosecutions, namely the ‘embarrassment, expense and ordeal’ of repetitive trials, ‘compelling

[the accused] to live in a continuing state of anxiety and insecurity,’ and creating ‘a risk of conviction through sheer governmental perseverance.’”).

In interpreting their state constitutions and statutes, some state courts employ the *Blockburger* test. *See, e.g., State v. Watkins*, 362 S.W.3d 530 (Tenn. 2012). Other courts use the “same transaction” or compulsory-joinder approach articulated by Justice Brennan, concurring, in *Ashe v. Swenson*, 397 U.S. 436, 450-60 (1970). *See, e.g., State v. Boyd*, 271 Or. 558, 533 P.2d 795 (1975), and the authorities collected in *Brooks v. Oklahoma*, 456 U.S. 999, 1000 (1982) (opinion of Justice Brennan, dissenting from the denial of *certiorari*).

20.8.3. *Reprosecution After An Acquittal*

Double jeopardy guarantees clearly and unequivocally bar reprosecution for the same offense after an individual has been acquitted. *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977); *see, e.g., Ball v. United States*, 163 U.S. 662, 671 (1896); *United States v. Scott*, 437 U.S. 82, 91 (1978); *Bullington v. Missouri*, 451 U.S. 430, 437-38, 445 (1981), and cases cited; *Yeager v. United States*, 557 U.S. 110, 117-20, 122-23 (2009). *Cf. Blueford v. Arkansas*, 132 S. Ct. 2044, 2050-52 (2012). “A trial court’s actions constitute ‘an acquittal on the merits when “the ruling of the judge . . . represents a resolution [in defendant’s favor] . . . of some or all of the factual elements of the offenses charged.” . . . In determining whether a trial court’s ruling represents a resolution in the defendant’s favor of some or all of the factual elements of the offense charged, we consider both the form and the substance of the trial court’s ruling. . . . A finding of insufficient evidence to convict amounts to an acquittal on the merits because such a finding involves a factual determination about the defendant’s guilt or innocence.” *State v. Sahr*, 812 N.W.2d 83, 90 (Minn. 2012) (reviewing relevant decisions of the U.S. Supreme Court and applying them to bar reprosecution after a trial judge has dismissed a charging paper on the basis of the prosecution’s “concession that it lacked sufficient evidence to prove an essential element” of the offense initially charged (*id.*) and has denied the prosecution leave to amend that charge by adding a count alleging a lesser-included crime (*id.* at 87)). *See also, e.g., Martinez v. Illinois*, 134 S. Ct. 2070, 2071, 2076 (2014) (per curiam) (the trial judge’s grant of defense counsel’s motion for “a directed not-guilty verdict” when the State “declined to present any evidence” and instead moved for a continuance after the jury had been empaneled and sworn, “was an acquittal because the court ‘acted on its view that the prosecution had failed to prove its case.’ . . . And because Martinez was acquitted, the State cannot retry him.”). *And see Evans v. Michigan*, 133 S. Ct. 1069, 1073, 1074-75 (2013) (the trial judge’s midtrial entry of a “directed verdict of acquittal” in a jury trial, based upon the judge’s “view that the State had not provided sufficient evidence of a particular element of the offense” which “turn[ed] out” not to be “a required element at all,” constituted “an acquittal for double jeopardy purposes” and barred a retrial notwithstanding the judge’s error: “[A]n acquittal precludes retrial even if it is premised upon an erroneous decision to exclude evidence, . . .; a mistaken understanding of what evidence would suffice to sustain a conviction, . . .; or a ‘misconstruction of the statute’ defining the requirements to convict, In all these circumstances, ‘the fact that the acquittal may result from erroneous evidentiary

rulings or erroneous interpretations of governing legal principles affects the accuracy of that determination, but it does not alter its essential character.’ . . . [O]ur cases have defined an acquittal to encompass any ruling that the prosecution’s proof is insufficient to establish criminal liability for an offense.”).

Unlike jury trials, in which a verdict of “not guilty” obviously is an “acquittal” for purposes of double jeopardy (*Fong Foo v. United States*, 369 U.S. 141 (1962) (per curiam)), there may be questions whether a dismissal in a bench trial constituted an acquittal so as to bar re prosecution (see, e.g., *Smalis v. Pennsylvania*, 476 U.S. 140 (1986)). The rule (which also applies to ambiguous rulings terminating a jury trial) is that “the trial judge’s characterization of his own action cannot control the classification of the action” (*United States v. Scott*, *supra*, 437 U.S. at 96 (quoting *United States v. Jorn*, 400 U.S. 470, 478 n.7 (1971) (plurality opinion))). Instead, the test is whether “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” (*United States v. Scott*, *supra*, 437 U.S. at 97). See, e.g., *Sanabria v. United States*, 437 U.S. 54 (1978); *Martinez v. Illinois*, *supra*, 134 S. Ct. at 2076.

Although double jeopardy issues ordinarily arise when the government seeks to prosecute an individual after a first trial has concluded (either in a verdict or a mistrial), double jeopardy protections also may come into play if a trial judge grants a mid-trial judgment of acquittal on one or more counts of the charging paper and is inclined to reconsider that ruling after the defense case has already commenced and the defense has begun presenting evidence. If the judge’s ruling qualifies as a “judgment of acquittal” for double jeopardy purposes (under the test described in the preceding paragraph) and if state law does not expressly authorize judicial reconsideration of such a ruling (and – arguably – if, in addition, the judge does not reserve the right to reconsider or indicate that the ruling is not final), double jeopardy protections bar the trial judge from reconsidering the ruling. *Smith v. Massachusetts*, 543 U.S. 462, 473-74 (2005). Compare *Price v. Vincent*, 538 U.S. 634 (2003); *Schiro v. Farley*, 510 U.S. 222 (1994).

20.8.4. Re prosecution After Conviction in the First Trial

Once convicted, a defendant may not be re prosecuted for the same offense. E.g., *Brown v. Ohio*, 432 U.S. 161 (1977); *Harris v. Oklahoma*, 433 U.S. 682 (1977) (per curiam). This rule is said not to preclude a second prosecution in certain “special circumstances” (*Ricketts v. Adamson*, 483 U.S. 1, 8 (1987)). Three such circumstances recognized by the caselaw are: (i) when “the State is unable to proceed on the [second] . . . charge at the outset because the . . . facts necessary to sustain that charge have not occurred or have not been discovered despite the exercise of due diligence” (*Brown v. Ohio*, *supra*, 432 U.S. at 169 n.7 (dictum); see *Garrett v. United States*, *supra*, 471 U.S. at 789-92); (ii) when the prosecution makes multiple charges in the alternative at the outset and the defendant elects to obtain a disposition of some of them prior to the others (*Jeffers v. United States*, 432 U.S. 137, 151-54 (1977); see *Ohio v. Johnson*, 467 U.S. 493 (1984)); and (iii) when the

conviction on the earlier charges was the result of a plea agreement that the defendant later violates (*Ricketts v. Adamson*, *supra*, 483 U.S. at 8-12).

Double jeopardy guarantees also do not bar reprosecution of a previously convicted defendant if the defendant succeeded in getting the first conviction set aside by a post-trial motion, an appeal, or postconviction proceedings. *See, e.g., United States v. Tateo*, 377 U.S. 463, 465-68 (1964). However, retrial will be barred even after a conviction has been set aside if the basis for that action was a finding by either the trial court or an appellate court that the evidence was insufficient to support the conviction. *Hudson v. Louisiana*, 450 U.S. 40 (1981); *Burks v. United States*, 437 U.S. 1 (1978); *Monge v. California*, 524 U.S. 721, 729 (1998) (dictum). *But see Tibbs v. Florida*, 457 U.S. 31 (1982) (reprosecution is permissible if the basis for reversal was not insufficiency of the evidence but rather that the appellate court, sitting as a “thirteenth juror,” found the conviction to be “against the weight of the evidence” [see § 47.3 subdivision (2) *infra*]).

20.8.5. Reprosecution After the First Trial Ends in a Mistrial

Double jeopardy guarantees will not bar reprosecution if the first trial ended in a mistrial, at the request of, or with the acquiescence of, the defendant (*United States v. Dinitz*, 424 U.S. 600 (1976)), except when the defendant’s request for the mistrial was occasioned by prosecutorial misconduct “intended to ‘goad’ the [defendant] into moving for a mistrial” (*Oregon v. Kennedy*, 456 U.S. 667, 676 (1982) (dictum); *see, e.g., State v. Parker*, 391 S.C. 606, 707 S.E.2d 799 (2011)).

A mistrial declared without the defendant’s assent will bar reprosecution (*see, e.g., Downum v. United States*, 372 U.S. 734 (1963); *United States v. Jorn*, 400 U.S. 470 (1971)), except when the mistrial was declared under circumstances of “manifest necessity” (*see, e.g., Illinois v. Somerville*, 410 U.S. 458 (1973); *Arizona v. Washington*, 434 U.S. 497 (1978); *Renico v. Lett*, 559 U.S. 766, 773-75 (2010); *Blueford v. Arkansas*, *supra*, 132 S. Ct. at 2052-53). *Compare Mansfield v. State*, 422 Md. 269, 290-93, 29 A.3d 569, 581-83 (2011) (the judge’s declaration of a mistrial at the close of evidence in a bench trial – based on her knowledge of the defendant’s having been twice previously convicted of similar crimes, once in a jury trial over which the judge herself presided – was not justified by a “manifest necessity,” and retrial therefore was barred by double jeopardy, because the judge possessed this knowledge before jeopardy attached and, “rather than proceeding to try the petitioner, knowing what she did of his criminal history, the trial judge should have recused herself”); *In re Morris v. Livote*, 105 A.D.3d 43, 47, 962 N.Y.S.2d 59, 62 (N.Y. App. Div., 1st Dep’t 2013) (double jeopardy barred a retrial after the first trial ended with the judge’s granting the prosecution’s motion for a mistrial based on “defense counsel’s improper questioning” of a prosecution witness: “Although defense counsel’s disregard of the court’s instructions was blameworthy and understandably angered the court, the [defense] cross-examination did not rise to the level of the gross misconduct displayed in cases in which retrial was permitted”).

20.8.6. *Collateral Estoppel*

The Supreme Court has held that the federal Fifth Amendment embodies a “rule of collateral estoppel” (often called “issue preclusion”) in criminal cases (*Yeager v. United States*, 557 U.S. 110, 119-20 & n.4 (2009); *Ashe v. Swenson*, 397 U.S. 436, 444 (1970)), so that, following acquittal at a first trial, a criminal defendant may not be retried for any offense – whether or not it is the “same offense” within the definition of § 20.8.2.2 *supra* – if conviction of the offense requires proof of facts that are inconsistent with the facts established in the accused’s favor by his or her prior acquittal (*e.g.*, *Yeager v. United States*, *supra*, 557 U.S. at 119-20; *Simpson v. Florida*, 403 U.S. 384 (1971) (per curiam); *Harris v. Washington*, 404 U.S. 55 (1971) (per curiam); *Turner v. Arkansas*, 407 U.S. 366 (1972) (per curiam); *Wilkinson v. Gingrich*, 806 F.3d 511, 516-20 (9th Cir. 2015)). *Cf.* *Schiro v. Farley*, 510 U.S. 222, 232-36 (1994); and compare *Dowling v. United States*, 493 U.S. 342, 350-52 (1990). Conviction of a lesser included offense or degree of the offense probably constitutes an implicit acquittal of the greater offense or degree for this purpose, as it certainly does for purposes of the rule barring reprosecution for the “same offense” following an acquittal (*Price v. Georgia*, 398 U.S. 323 (1970); *De Mino v. New York*, 404 U.S. 1035 (1972) (per curiam)). Compare *Yeager v. United States*, *supra*, 557 U.S. at 121-23 (when a jury acquits a defendant on some counts of a multi-count indictment and hangs on others that require a finding of the same “critical issue of ultimate fact” as “an essential element,” the prosecution is barred from retrying the defendant on the counts on which the jury hung; “collateral estoppel” or “issue-preclusion analysis” cannot ascribe significance to a jury’s inability to reach a verdict on the latter counts “[b]ecause a jury speaks only through its verdict” and thus “there is no way to decipher what a hung count represents”; “To identify what a jury necessarily determined at trial, courts should scrutinize a jury’s decisions, not its failures to decide.”), and *Roesser v. State*, 294 Ga. 295, 295, 298, 300, 751 S.E.2d 297, 297, 299, 301 (2013) (applying *Yeager v. United States*, *supra*, to hold that collateral estoppel barred retrial of the defendant for voluntary manslaughter, following a trial in which the jury acquitted the defendant of “malice murder, felony murder, and aggravated assault but was unable to reach a verdict on the lesser included offense of voluntary manslaughter”; “the jury in acquitting Roesser of [the higher counts] . . . necessarily determined that Roesser acted in self-defense and . . . this issue of ultimate fact constitutes a critical element of voluntary manslaughter”), with *Bobby v. Bies*, 556 U.S. 825, 835 (2009) (collateral estoppel does not apply to “a subsidiary finding that, standing alone, is not outcome determinative” but does apply to “a determination necessary to the bottom-line judgment”).

20.8.7. *Reprosecution by a Different Sovereign*

The double jeopardy clause does not bar successive prosecutions by different sovereigns. So, for example, a defendant convicted of bank robbery in a state court may subsequently be prosecuted for federal bank robbery of the same bank. *See, e.g.*, *Abbate v. United States*, 359 U.S. 187 (1959); *United States v. Wheeler*, 435 U.S. 313 (1978); *Puerto Rico v. Sanchez Valle*, 136 S. Ct. 1863, 1870-71 (2016) (dictum); *but see id.* at 1877 (concurring opinion of Justice Ginsburg, joined by Justice Thomas, questioning the future of the doctrine).

Similarly, when two different States are in a position to prosecute a defendant for the same or closely related conduct, the separate prosecutions do not violate the Fifth Amendment. *Heath v. Alabama*, 474 U.S. 82 (1985). The “two sovereignties” principle does not, however, permit successive prosecutions by a State and its political subdivisions (for example, municipalities); these are barred by double jeopardy whenever successive prosecutions by the same prosecuting agency would be (*Waller v. Florida*, 397 U.S. 387 (1970); *United States v. Wheeler*, *supra*, 435 U.S. at 318-22 (dictum); *Puerto Rico v. Sanchez Valle*, *supra*, 136 S. Ct. at 1872 (dictum)).

As a matter of executive policy, the federal Government seldom prosecutes persons previously convicted or acquitted of state crimes based on the same conduct. See *Thompson v. United States*, 444 U.S. 248 (1980):

“The Department of Justice has a firmly established policy, known as the ‘Petite’ policy, under which United States Attorneys are forbidden to prosecute any person for allegedly criminal behavior if the alleged criminality was an ingredient of a previous state prosecution against that person. An exception is made only if the federal prosecution is specifically authorized in advance by the Department itself, upon a finding that the prosecution will serve ‘compelling interests of federal law enforcement.’” (*Id.* at 248.)

20.9. *Misjoinder*

State statutes, rules of court, and common-law doctrines restrict the circumstances under which (a) a single charging paper may charge more than one offense against a single defendant and (b) a single charging paper may charge an offense or offenses against more than one defendant. In some jurisdictions a separate bill of indictment is returned for each offense charged, even though several charges are based on the same event or episode (for example, housebreaking, larceny, receiving, and conspiracy). Other jurisdictions permit the joinder of any number of separate charges in a single charging paper (usually in separate paragraphs, or “counts”) if they are based on the same transaction or series of transactions or are part of a “common plan” or “common scheme” by the defendant or if the charges, although based on distinct transactions, are legally the same or similar (for example, housebreaking on May 5 and housebreaking on June 12). More than one defendant may usually be joined if all were involved in the criminal transaction, whether or not conspiracy is alleged.

The usual remedy for misjoinder (or for prejudicial joinder) is severance of the charges for trial. See generally Chapter 23 *infra*. In some jurisdictions, however, charging papers that misjoin offenses or defendants are subject to dismissal on that ground. In researching local law on the question, counsel should keep in mind the possible contention that under a statute permitting joinder in specified circumstances (for example, “common scheme”), a charging paper is defective for misjoinder if it fails to *expressly* allege facts supporting an inference that the specified circumstances (“common scheme”) exist. These allegations are frequently omitted, even in traditional forms of charging

papers. Another question common under many of the joinder statutes is whether things joinable to joinable things are thereby joinable to each other; that is, whether, under a statute that allows joinder of (a) different offenses arising out of one transaction and (b) the same or similar offenses arising out of different transactions, an indictment may charge: (1) housebreaking and (2) larceny, both on May 5, *plus* (3) housebreaking and (4) arson, both on June 12. The statutes are full of grounds for legal argument, and they should be read with a critical eye.

Chapter 21

Motions for Diversion, ACD, Stetting

21.1. *The Nature of the Motion; Defense Counsel's Responsibilities*

As noted in §§ 2.3.6 and 8.2.2 *supra*, many localities have more or less formal procedures for “diverting” criminal cases out of the system. Such diversion procedures go by different names in different jurisdictions (including “adjournment in contemplation of dismissal” (“ACD”) and “stetting”). *See, e.g.*, KY. RULE CRIM. PRO. 8.04 and <http://courts.ky.gov/courtprograms/pretrialservices/Pages/PretrialDiversion.aspx> (“pretrial diversion” in misdemeanors and criminal violations); N.J. STAT. ANN. § 2C:43-12 and <http://www.judiciary.state.nj.us/criminal/crpti.htm> (“pretrial intervention,” “ordinarily” limited to first-offenders, in any type of criminal case except minor violations that would likely result in a suspended sentence, and with a presumption against its use in public corruption cases, domestic violence cases, and violent crimes involving infliction or a threat to inflict serious or significant bodily injury or involving use of a deadly weapon); N.Y. CRIM. PRO. LAW § 170.55 (“adjournment in contemplation of dismissal” in misdemeanors). *See generally* Debra T. Landis, Annot., *Pretrial Diversion: Statute or Court Rule Authorizing Suspension or Dismissal of Criminal Prosecution on Defendant's Consent to Noncriminal Alternative*, 4 A.L.R.4th 147 (1981 & Supp.); Paul J. Larkin, Jr., *Swift, Certain and Fair Punishment: 24/7 Sobriety and Hope: Creative Approaches to Alcohol- and Illicit Drug-Using Offenders*, 105 J. CRIM. L. & CRIM. 39 (2016).

The usual features of such diversion programs are that the criminal case is held in abeyance for a designated period of time and one or more conditions are set that the defendant must satisfy in order to obtain its ultimate dismissal. The condition may be solely that the defendant remain arrest-free for a specified period of time. Usually, however, the defendant must successfully complete a community-based program of some sort (*e.g.*, alcohol or drug treatment; counseling of some sort (such as individual or family counseling, or anger management); an educational program (such as a GED program)) and/or that the defendant perform a certain number of hours of community service. Some of the kinds of monitoring, periodic reporting-in, or surveillance mentioned in § 4.10 *supra* may also be ordered. Upon the defendant's satisfaction of the conditions, the charges are dismissed. If the defendant fails to complete the program or violates some other condition of the diversion arrangement, the case is usually restored to the court calendar to resume the customary progression of pretrial stages of a criminal case.

In many of the jurisdictions that have such a diversion option, the prosecutor has complete discretion whether to employ this option in a particular case. Although judicial approval may be needed if the case has progressed beyond a certain stage – usually arraignment – (*see, e.g.*, KY. RULE CRIM. PRO. 8.04(1)), judges commonly sign off on any diversion arrangement supported by the prosecutor. Dealings with the prosecutor on the subject are discussed in §§ 2.3.6, 3.19, 8.2.2, 8.2.3, and 8.4 *supra*.

In some jurisdictions, however, a statute or rule or local practice authorizes defense counsel to file a motion with the court to seek diversion of the case. *See, e.g.*, CONN. GEN. STAT. ANN. § 54-56e (authorizing a judicial order of pretrial “accelerated rehabilitation” “on motion of the defendant”); N.Y. CRIM. PRO. LAW § 170.55(1) (authorizing a judicial grant of adjournment in contemplation of dismissal “upon motion of . . . the defendant”). Where such a motion is available, a judicial grant of relief may or may not require the prosecutor’s consent. *Compare, e.g.*, N.Y. CRIM. PRO. LAW § 170.55(1) (requiring the prosecutor’s “consent”), *with* N.J. STAT. ANN. § 2C:43-12(f) (“If the applicant [to the Pretrial Intervention program] desires to challenge the decision . . . of a prosecutor not to consent to . . . enrollment into a supervisory treatment program, a motion shall be filed before the designated judge (or assignment judge) authorized pursuant to the Rules of Court to enter orders”), *and State v. Tucker*, 219 Conn. 752, 755, 761, 762-63, 595 A.2d 832, 834, 837, 838 (1991) (trial judge’s grant of defendant’s motion for “accelerated rehabilitation” in a drug sale case, which was granted “over the state’s objection,” is affirmed on appeal, as is the court’s early termination of the probationary period and the dismissal of the charge), *and Commonwealth v. Pyles*, 423 Mass. 717, 718-23, 672 N.E.2d 96, 97-100 (1996) (trial court did not improperly “infringe[] on the district attorney’s authority” by granting the defendant’s request, “[o]ver the Commonwealth’s objection,” to continue the case after a guilty plea without a finding for a period of one year with conditions, the satisfaction of which would result in dismissal of the criminal case – a longstanding state procedure that the Supreme Judicial Court describes as “analogous” to legislatively-established “forms of disposition by means of pretrial diversion”).

In jurisdictions that authorize the court to grant diversion over a prosecutor’s objection, counsel should consider making a motion supported by a proposed diversion plan in any promising case in which the prosecutor has rejected defense counsel’s pre-court request for the favorable exercise of the prosecutor’s discretion to divert cases out of the system. Even in jurisdictions in which court-ordered diversion requires prosecutorial consent, such a motion may nonetheless be a valuable tool because a prosecutor who initially rejected a defense attorney’s appeal to his or her discretion may thereafter acquiesce in diversion if a judge – who has been persuaded by the motion that diversion is the right outcome – leans on the prosecutor to cooperate. *See* § 21.4 *infra*.

Counsel’s responsibilities to a criminal client include the obligation to explore the possibility of diversion in appropriate cases. *See* AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Standard 14-3.2 (4th ed. 2015) (“At the outset of a case, and whenever the law, nature and circumstances of the case permit, defense counsel should explore the possibility of a diversion of the case from the criminal process.”).

As explained in § 2.3.6 *supra*, counsel should ordinarily consider diversion only in felony and misdemeanor cases, because in summary-offense prosecutions the consequences of diversion tend to be harsher for the client than the relatively mild sentence that is likely to follow a conviction. (In some jurisdictions, the diversion program is structured to guard against such inequitable outcomes. *See, e.g.*, <http://www.judiciary.state.nj.us/criminal/>

crpti.htm (explaining that New Jersey’s pretrial intervention program is not intended for “[m]inor [v]iolations,” and so a defendant is “[n]ot eligible [for it] if the likely result [of the defendant’s case] would be a suspended sentence without probation or a fine”); KY RULE CRIM. PRO. 8.04(2) (a pretrial diversion “agreement may not specify a period longer than could be imposed upon probation after conviction of the crime charged”).)

21.2. *Invoking the Prosecutor’s Discretion in the First Instance*

Generally, in any case in which the circumstances of the crime and/or the defendant’s background or other aspects of the case make it realistic to seek diversion, counsel should begin by attempting to persuade the prosecutor to divert the case (or, if judicial approval is required, to join with defense counsel in requesting this relief from the judge). If the prosecutor’s agreement can be secured, this is always the easiest way to obtain diversion. For discussion of the types of arguments that may persuade a prosecutor to exercise his or her discretion in the defendant’s favor, see §§ 8.2.2-8.2.4 *supra*.

The following two sections discuss what counsel can do if the prosecutor rejects defense counsel’s request for diversion. Section 21.3 focuses on jurisdictions in which the applicable statute or rule authorizes a judge to grant diversion upon defense request even though the prosecutor objects. Section 21.4 addresses the types of arguments that counsel can make to a judge when the statute or rule requires prosecutorial consent to diversion.

21.3. *Seeking a Judicial Order of Pretrial Diversion in Jurisdictions In Which Prosecutorial Consent to Diversion Is Not Required*

In some jurisdictions, a statute or court rule or case law identifies specific criteria for a court to consider when assessing whether to grant diversion. *See, e.g., State v. Washington*, 866 S.W.2d 950, 951 (Tenn. 1993) (“Tennessee case law directs that ‘the following factors and circumstances should be considered in determining [whether] diversion is warranted: circumstances of the offense; the criminal record, social history and present condition of the defendant, including his mental and physical conditions where appropriate; the deterrent effect of punishment upon other criminal activity; defendant’s amenability to correction; the likelihood that pretrial diversion will serve the ends of justice and the best interests of both the public and defendant; and the applicant’s attitude, behavior since arrest, prior record, home environment, current drug usage, emotional stability, past employment, general reputation, marital stability, family responsibility and attitude of law enforcement.’”; “while the circumstances of the case and the need for deterrence may be considered as two of many factors, they cannot be given *controlling* weight unless they are ‘of such overwhelming significance that they [necessarily] outweigh all other factors’”).

In jurisdictions that lack such an inventory of relevant criteria, counsel may find it useful to cite statutes, rules or caselaw from other jurisdictions as illustrations of the types of factors that legislatures and courts have deemed to be appropriate determinants of the suitability of diversion.

As a general matter, whether the judge is bound by or chooses to consider an itemized list of factors, it is usually safe to assume that the judge will focus particularly on the circumstances of the alleged crime and the circumstances of the defendant's life. Although the arguments that counsel will make about these subjects naturally will turn upon the particulars of the case, the following two subsections offer some general suggestions.

21.3.1. Addressing the Circumstances of the Crime

Presumably counsel will want to emphasize any mitigating aspects of the crime. *See, e.g., State v. Tucker*, 219 Conn. 752, 761, 595 A.2d 832, 837 (1991) (affirming the trial judge's grant of "accelerated rehabilitation" in a drug sale case, despite the prosecutor's objection, and also affirming the trial judge's early termination of the probationary period and dismissal of the charge because, *inter alia*, "[t]he defendant was a first time offender, and no evidence before the court suggested that his alleged sale of narcotics had been accompanied by violence or had resulted in harm to another"); *State v. Gutierrez*, 2008 WL 190989, at *1, *4 (N.J. Super. Ct. App. Div. Jan. 24, 2008) (per curiam) (affirming the trial judge's grant of pretrial diversion in a DWI case, "over the objection of the . . . Prosecutor," because, *inter alia*, "no one was injured, defendant did not strike another vehicle or a pedestrian, defendant was not charged with any crimes other than possession of CDS [a controlled dangerous substance], and he did not leave the scene.").

In referring to mitigating aspects of the crime, counsel should scrupulously avoid disclosing to the prosecution the projected trial testimony of defense witnesses, or even revealing the defendant's version of the events. Since counsel cannot count on winning a motion for pretrial diversion, particularly if the prosecutor is opposing it, counsel cannot afford to reveal facts that, although supportive of the motion, would give discovery to the prosecutor and thereby undermine the defendant's chances of winning the trial in the event diversion is denied. Generally, counsel should focus upon mitigating aspects of the prosecution's version of the crime, beginning statements with such phrasing as: "even under the prosecution's version of the events . . ." For example, counsel might say: "Even under the prosecution's theory of what happened, no one was injured and the complainant recovered her property."

Statements taken by counsel or a defense investigator from potential prosecution witnesses should seldom be submitted on a motion for pretrial diversion. These are too valuable for impeachment at trial, and too vulnerable to prosecutorial undercutting (by coaching the witness to explain away any impeaching material; by procuring additional witnesses to bolster an impeachable witness's weak points; etc.) to jeopardize. Counsel should ordinarily refrain from any use or even mention of such statements that can tip off their existence to the prosecutor. However, in cases where a statement will clearly be of no worth in cross-examining the witness at trial but contains assertions that would be persuasive in a motion for pretrial diversion (such as the assertions that a complainant wishes to drop the charges, or that s/he was not injured, or that s/he and the defendant have resolved their

differences since the antagonistic events giving rise to the charges), counsel might consider attaching the statement to the motion.

In rare cases counsel might also consider arranging for the defendant to take a private polygraph test and, if the defendant passes it, attaching the polygraph results to a motion for pretrial diversion. Although most jurisdictions exclude polygraph evidence at trial, the less formal rules of evidence applicable to pretrial motions would likely allow the submission of polygraphic vindication on a diversion motion. Judges who tend to assume that all defendants are guilty may be more inclined to offer diversion over a prosecutor's objection if a polygraph test confirms a defendant's claim of innocence. Recourse to polygraph testing is most useful in cases in which counsel believes a client's exonerating story but can develop little or no evidence to support it other than the defendant's own assertions. Even in this situation, however, the dangers and uncertainties that attend polygraph procedures – including the risk of false positives – call for extreme caution: Counsel who are considering going the polygraph route should (1) *first* commission a confidential polygraph examination by a reputable examiner and (2) submit the results only if (a) the examiner reaches a firm conclusion of the truthfulness of the client's declarations of innocence *and* of all significant aspects of the client's story relating to his or her activities or whereabouts at the time of the crime; and (b) the recorded dialogue between the examiner and the defendant will not give the prosecutor a preview of unobvious aspects of the defense case at trial or provide the prosecutor with material for impeaching the defendant's trial testimony.

In describing the mitigating aspects of the crime on a diversion motion, counsel should not play into rejoinders by the prosecutor or the judge that counsel is inappropriately minimizing the gravity of the offense or the trauma to the victim. It is often an effective tactic to state explicitly that counsel does not wish to minimize the gravity of the offense and then to go on to make the point that nonetheless the offense is less serious than the usual roster of violent crimes prosecuted in criminal court.

21.3.2. Addressing the Circumstances of the Defendant's Life

In some jurisdictions, pretrial diversion is limited to defendants who have no prior convictions. Even in jurisdictions where diversion is not so limited, a defendant's lack of prior convictions will usually be an important factor to emphasize. In all jurisdictions, it is always worthwhile to stress the lack of prior *arrests* in any case in which the defendant has never been arrested before. Of course, before making any such assertions about the defendant's prior record, it is essential that counsel not only question the client thoroughly but also check court records, probation records, and, if possible, police records.

The guiding philosophy of diversion in most jurisdictions is that the use of community-based rehabilitative services can obviate the need for expending the resources of the criminal justice system. Thus, it will usually be productive to present a judge with any information counsel can offer to show

that the defendant is likely to benefit from rehabilitative services. As §§ 7.2.4 and 12.18 *supra* suggest, counsel will often want to encourage a client with an alcohol or substance abuse problem to voluntarily enroll in a treatment program at the earliest possible opportunity so that s/he has a successful track record of participation in the program that can be cited at sentencing in the event of conviction. If the client is already participating in such a program at the time when pretrial diversion can be requested, evidence of the client's successful performance in the program may be very persuasive to a judge in deciding whether to grant diversion. *See, e.g., State v. Gutierrez*, 2008 WL 190989, at *1 (N.J. Super. Ct. App. Div. Jan. 24, 2008) (per curiam) (affirming the trial judge's grant of pretrial diversion, "over the objection of the . . . Prosecutor," because, *inter alia*, "the probation officer pointed to defendant's enrollment in an outpatient drug and alcohol treatment program, and his 'amenability to treatment, [which] bode well for the likelihood of success with PTI [Pretrial Intervention] services'"). In such cases, counsel should obtain a letter from the program (and, ideally, from the defendant's own counselor), attesting to the client's faithful attendance and the progress s/he has already made. Counsel's advice and assistance to the client in arranging other aspects of his or her daily life so as to support a prediction that s/he will shape up and present no law-enforcement issues in the future will also be very useful. *See* § 21.5 *infra*. In any case in which the defendant made significant changes in his or her mode of living or sought professional assistance for his or her problems even before the arrest, this is a fact that a judge may view as particularly compelling. *See, e.g., State v. Tucker*, 219 Conn. 752, 761, 595 A.2d 832, 837 (1991) ("As for the defendant's personal potential for rehabilitation, the court could reasonably have inferred from his voluntary act of enlisting in the Navy some two weeks *before* his arrest that he would not resist supervisory authority, and that diversionary measures would be likely to ensure that he would not offend again."). If this was not the case, however, counsel may be able to portray the arrest as having caused the defendant to realize how far s/he had fallen and to finally muster the determination to change.

If the defendant is currently employed, this is always a useful fact to emphasize. The judge will ordinarily appreciate that it is better for society – not only for the defendant and the defendant's family and dependents – to resolve the prosecution without a criminal conviction that may result in the loss of the defendant's current job and make it more difficult to secure other jobs in the future. *See, e.g., Commonwealth v. Pyles*, 423 Mass. 717, 723, 672 N.E.2d 96, 100 (1996) (affirming the trial judge's grant of a "continuance without a finding" because, *inter alia*, the defendant "held a responsible job"). If the defendant is not currently employed but had a good work history in the past, it is advisable to tell the judge about that, along with information about the defendant's current efforts to find a job. *See, e.g., State v. Gutierrez*, *supra*, 2008 WL 190989, at *1 ("[t]he probation officer . . . reported that until recently, defendant had maintained 'lawful, gainful' employment").

Military service is likely to be viewed by many judges as a strong mitigating factor, especially if counsel is able to connect the difficulties the defendant has experienced in civilian life to the lingering effects of combat. *Cf. Porter v. McCollum*, 558 U.S. 30, 30-31, 41, 43 (2009) (per curiam)

(finding defense counsel to have been ineffective at the penalty phase of a capital trial because counsel failed to uncover and present evidence of, *inter alia*, Porter's military service: "Petitioner George Porter is a veteran who was both wounded and decorated for his active participation in two major engagements during the Korean War; his combat service unfortunately left him a traumatized, changed man."; because of counsel's failure, the jury and judge never heard about Porter's "struggles to regain normality upon his return from war": "Our Nation has a long tradition of according leniency to veterans in recognition of their service, especially for those who fought on the front lines as Porter did. . . . Moreover, the relevance of Porter's extensive combat experience is not only that he served honorably under extreme hardship and gruesome conditions, but also that the jury might find mitigating the intense stress and mental and emotional toll that combat took on Porter.").

Judges are often also impressed by letters of support from responsible members of the community who know the defendant and can speak to his or her good qualities and prospects for rehabilitation. *See, e.g., State v. Washington*, 866 S.W.2d 950, 951 (Tenn. 1993) (finding that the grounds for diversion were "especially compelling" because, *inter alia*, the defendant's "request for diversion was supported by local civic and political leaders, by her pastor, and by school officials").

If counsel is able to obtain a statement from the complainant that s/he supports the handling of the case through a means other than a criminal prosecution (see § 8.5 *supra*), this will often be highly persuasive to a judge. *See, e.g., Commonwealth v. Pyles*, 423 Mass. 717, 718, 724, 672 N.E.2d 96, 97, 100 (1996) (diversion was appropriate, notwithstanding the seriousness of the charge – assault with a dangerous weapon based on allegations that "the defendant, during an argument, cocked and pointed a handgun at his twelve year old nephew, in the presence of the boy's mother (defendant's sister)" – because, *inter alia*, "the victim's mother (defendant's sister) stated that it was unnecessary to incarcerate her brother to deal with the problem that had occurred").

21.4. *Seeking Judicial Relief Despite a Statute or Rule Requiring Prosecutorial Consent to Diversion*

Even in a jurisdiction in which a statute or rule expressly conditions a grant of diversion on prosecutorial consent, it may nonetheless be worthwhile to file a motion for diversion with the court. Notwithstanding the apparently unequivocal language of the applicable statute or rule, it may be possible to persuade a judge that an exception is possible. *See, e.g., People v. Siragusa*, 81 Misc.2d 368, 371-73, 366 N.Y.S.2d 336, 341-43 (Dist. Ct., Nassau Cty. 1975) (although "[t]he statute makes the District Attorney's consent mandatory before the Court can grant a defendant an A.C.O.D. [adjournment in contemplation of dismissal]," the court nonetheless grants the ACOD over the prosecutor's objection because "[t]he Court finds that the prosecutor had originally given his consent" and subsequently "withdr[e]w that consent solely because the defendant refused to agree to release the County and the police from any civil liability," which "[t]he Court finds . . . to be an unreasonable condition amounting to undue pressure and an act of coercion and duress").

When filing a motion under these circumstances, defense counsel can (and ordinarily will) make the types of arguments described in § 21.3 *supra*. But it is always advisable – and often essential – also to present the judge with a reason to view the prosecutor’s objection to diversion as unreasonable. This might be done by “show[ing] that a prosecutorial veto (a) was not premised upon a consideration of all relevant factors, (b) was based upon a consideration of irrelevant or inappropriate factors, or (c) amounted to a clear error in judgment,” especially if “the prosecutorial error complained of will clearly subvert the goals underlying [the pretrial diversion program]” (*State v. Gutierrez*, 2008 WL 190989, at *1, *3, *5 (N.J. Super. Ct. App. Div. Jan. 24, 2008) (per curiam) (quoting this standard for a judicial override of a prosecutor’s objection to diversion, and then applying the standard to hold that the prosecutor’s “reject[ion] [of the] defendant from PTI [Pretrial Intervention Program] solely because of his immigration status” was “a patent and gross abuse of discretion that a reviewing court is obliged to overturn”). Cases holding that a prosecutor’s discretion to withhold consent to diversion is judicially reviewable and was abused can be cited. *See, e.g., State v. Maguire*, 168 N.J. Super. 109, 116-18, 401 A.2d 1106, 1110-11 (1979) (overriding the prosecutor’s objection to diversion of three defendants as “arbitrary and capricious, and a patent and gross abuse of discretion” because the prosecutor’s use of “exactly the same wording” in the “three separate letters” of denial, issued “seven months . . . [after] the [timely] applications,” show that the prosecutor “failed to deal with defendants on a prompt and individual basis.”; “The fact that defendants were involved in a single night of wrongful conduct does not justify grouping them as he did. We are dealing with young persons whose futures hang in the balance, and whose applications for diversion mandate prompt individualized study and consideration. This was not afforded to them here. Rather, it would appear that the prosecutor may have personal reservations about the philosophical underpinnings of PTI and the court’s role in connection therewith. Such an attitude, however, should not deter him from acting on the individual merits of each case.”); *People v. Siragusa*, *supra*, 81 Misc.2d at 372, 366 N.Y.S.2d at 342 (“The practice of a prosecutor demanding releases of defendant’s claims against the government and police officers in exchange for his consent to an A.C.O.D. [adjournment in contemplation of dismissal] must be discouraged”); *Commonwealth v. Benn*, 544 Pa. 144, 147, 149, 675 A.2d 261, 262, 264 (1996) (although “[it] is well established that admission to ARD [accelerated rehabilitative disposition program] rests with the discretion of the district attorney,” “the district attorney committed an abuse of discretion” by denying the application for ARD based on appellant’s previous “probation without verdict and expunged record”; “The abuse was compounded by [the district attorney’s] weighing negatively the fact that appellant denied having a prior record. The only way that the district attorney could have known of appellant’s record was to have had access to information that, by statute, should have been unavailable. . . . Further, the intent of the probation without verdict and expungement statutes would be obviated if the district attorney could use the ARD questionnaire to force disclosure of matters that the legislature has made private.”); *State v. Curry*, 988 S.W.2d 153, 159-60 (Tenn. 1999) (“We agree with the trial court that the prosecutor failed to consider all of the relevant factors and, therefore, abused his discretion in denying the defendant’s application for

pretrial diversion.”; “[T]he prosecutor’s denial letter concentrated solely upon the circumstances of the offense and, arguably, a veiled consideration of deterrence. There was no apparent consideration given to the defendant’s lack of a criminal record, favorable social history, and obvious amenability to correction. Moreover, the prosecutor did not articulate or state why those factors that were considered, i.e., seriousness of the offense and deterrence, necessarily outweighed the other relevant factors. The evidence presented a close case on the diversion question; however, the failure by the prosecutor to consider and articulate all of the relevant factors constitutes an abuse of discretion.”); *State v. Markham*, 755 S.W.2d 850, 852-53 (Tenn. Crim. App. 1988) (the district attorney general’s denial of the applications for pretrial diversion was an abuse of discretion because “Appellees do not have criminal records, . . . they are persons of good character and are amenable to correction,” “[t]here is no showing that the facts of this case are particularly flagrant in comparison with other criminal conspiracies designed to defraud the State,” “[t]here is no evidence in the record which suggests that in this case deterrence is an overriding consideration,” and “the district attorney general denied the application for diversion prior to completion of the pretrial investigation authorized by statute, [and thus] his decision was made without the benefit of the report, which found Appellees to be good candidates for diversion”).

Even if a judge is unable or unwilling to grant diversion over the prosecutor’s objection, bringing the matter to a judge may cause the judge to put some pressure on the prosecutor to acquiesce. It is usually the case that prosecutors are far more willing to accede to a judge’s strongly expressed wishes than to a request from a defense attorney.

21.5. *Developing and Implementing a Proposed Diversion Plan*

The key to securing diversion is ordinarily to convince the judge – or the prosecutor and the judge – that the defendant will be “crime-free” (which usually means *no further trouble to the authorities*) and well-behaved (according to the judge’s/prosecutor’s vision of appropriate social behavior) in the future. Thus, whatever counsel can do to develop and to set in motion a specific, detailed regimen for the future correction of the problematic aspects of the client’s life will ordinarily be indispensable. Areas that counsel can profitably mine in working up a diversion plan are outlined in § 12.18 *supra*. Any movement on those fronts that counsel can effectuate before the diversion motion comes on for hearing will be especially valuable. But if none can be made by that time, counsel should try to demonstrate that the specificity and practicality of his or her proposed diversion program make it a sound bet for success in the future.

21.6. *Guilt, Penitence and Future Promise*

Some prosecutors and judges will begin their consideration of a defense diversion motion from the premise that the defendant is almost certainly guilty of the crime charged or a lesser crime (since, in their view, virtually all defendants are). They will want and expect the defendant to admit guilt and to display contrition as an indicator of the likelihood that s/he will behave suitably in the future if the prosecution is resolved without

a criminal conviction. This attitude presents some problems for the defense.

Defense counsel will need to ascertain whether the prosecutor and judge on the case are of this mind. If they *may be*, counsel and the client will have to determine whether the defense strategy on the motion should be (1) to concede guilt (a) of the charged offense or (b) of some lesser offense, and to make the defendant's penitence an element of their argument for diversion; or (2) to urge that this is the rare case in which diversion is being sought by an accused person who is genuinely innocent; or (3) to try to keep the prosecutor or the court from getting into the issue of guilt-or-innocence at all, by couching the issue of diversion as wholly future-oriented – not backward-looking – and, if this attempt fails, whether (a) to fall back to position (1); or (b) to fall back to position (2); or (c) to persist in refusing to discuss the defendant's guilt or innocence.

Choosing among these strategies and implementing one's chosen strategy involve considerations and techniques much like those discussed in Chapter 15 *supra*, relating to guilty pleas. If counsel believes that an admission of guilt will be important in obtaining diversion but the client resists it, counsel will need to work to persuade the client – without overbearing the client's will – to make the necessary admission. See §§ 15.2-15.5, 15.7.5, 15.14-15.15 *supra*. If counsel is unsuccessful in this persuasion, counsel will have to work out with the client a game plan for the hearing on the diversion motion which implements strategy (3) with minimal damage. In any event, whether the defense strategy is (1) or (2) or (3), counsel will have to prepare for the motion hearing by explaining to the client exactly what will happen at the hearing and by rehearsing the client to play his or her part in it. See § 15.16 *supra*.

The strategy of admitting guilt poses a complication in the context of diversion motions that it no longer poses, in most jurisdictions, in the context of guilty pleas. Guilty pleas and incriminating statements made in guilty-plea colloquies or during plea negotiations are commonly inadmissible at trial if the plea is vacated or if the negotiations fall through. *See, e.g.*, FED. RULE EVID. 410; § 17.1.2 concluding paragraph *supra*. The applicable rules and precedents may not be broad enough to encompass incriminating statements made in connection with diversion motions. There is a strong argument that such statements are constitutionally inadmissible: Confessions made to police and prosecutors are held involuntary and inadmissible if “‘obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence’” (*Hutto v. Ross*, 429 U.S. 28, 30 (1976) (per curiam); see the cases collected in § 26.3.3 *infra*); and an admission of guilt which is made in order to obtain the leniency of diversion is no different than an interrogating officer's promise of “leniency – no jail” (*Sharp v. Rohling*, 793 F.3d 1216, 1219 (10th Cir. 2015)). Nevertheless, counsel should check to see whether there is any law in his or her jurisdiction strengthening or weakening the case for inadmissibility if diversion is denied after a defendant has admitted guilt in an effort to obtain it.

Chapter 22

Motions for a Change of Venue or for Disqualification of the Judge

A. Motions for a Change of Venue

22.1. Initial Venue and Change of Venue

The general principles governing initial venue in criminal cases are sketched in § 20.5 *supra*. As that section indicates, a charging paper filed in the wrong venue is usually subject to a motion to quash or to dismiss. In some jurisdictions, however, the defendant's remedy may be merely a motion for transfer to the court of proper venue.

When the applicable venue doctrine would allow prosecution of a particular offense in more than one court, ordinarily the prosecutor has the initial option. After the commencement of the prosecution, statutes or court rules may permit either party to move for a change of venue to another court in which the prosecution could properly have been begun. In the absence of an explicit authorization by statute or formal court rule, the prosecutor should not be able to obtain a change of venue. *See, e.g., Jacksori v. Superior Court*, 13 Cal. App. 3d 440, 91 Cal. Rptr. 565 (1970). *Cf.* §§ 12.8 concluding paragraph, 18.11 concluding paragraph *supra*. *But see* Caroline Zane, Annot., *Power of State Trial Court in Criminal Case to Change Venue on its Own Motion*, 74 A.L.R.4th 1023 (1989 & Supp.). In any event, the prosecutor cannot obtain a change of venue, over the defendant's objection, to a place where the prosecution could not initially have been brought, consistent with the state and federal constitutional guarantees mentioned in § 20.5.

The defendant, however, is allowed a venue change to other places under certain circumstances. These are addressed in the next two sections.

22.2. Motions for a Change of Venue on the Ground That a Fair Trial Cannot Be Had in the Court in Which the Charge Is Pending

22.2.1. Grounds for the Motion

Counsel can seek a change of venue based upon public hostility against the defendant, public belief that the defendant is guilty, public outrage over the offense, and prejudicial news reporting or editorializing that vilifies the defendant or discloses inadmissible evidence against the defendant. In addition to the state-law right to a venue change, the federal constitutional guarantee of a fair trial by an impartial jury is implicated here. *See Sheppard v. Maxwell*, 384 U.S. 333 (1966), and cases cited together with *Sheppard* in § 32.1 subdivision 1 *infra*. "This Court has long recognized that adverse publicity can endanger the ability of a defendant to receive a fair trial To safeguard the due process rights of the accused, a trial judge has an affirmative constitutional duty to minimize the effects of prejudicial pretrial publicity." *Gannett Co. v. DePasquale*, 433 U.S.

368, 378 (1979). “Trial courts must be especially vigilant to guard against any impairment of the defendant’s right to a verdict based solely upon the evidence and the relevant law.” *Chandler v. Florida*, 449 U.S. 560, 574 (1981) (dictum).

The federal right does not necessarily require change of venue as a remedy. Other procedural devices may sometimes be effective to insulate a jury from the effects of inflammatory publicity and similar prejudicing influences: – a continuance (see § 28.3 *infra*), sequestration of the jurors (see § 34.3.1 *infra*), or scrupulous interrogation on the *voir dire* (see Chapter 33 *infra*), for example. See *Dobbert v. Florida*, 432 U.S. 282, 302-03 (1977); *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 563-64 (1976) (dictum); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980) (plurality opinion) (dictum). But if these devices are not employed or are insufficient, vindication of the federal fair-trial right demands a venue change. *Groppi v. Wisconsin*, 400 U.S. 505 (1971); *Coleman v. Kemp*, 778 F.2d 1487 (11th Cir. 1985), *rehearing en banc denied*, 782 F.2d 896 (11th Cir. 1986); *Ruiz v. State*, 265 Ark. 875, 582 S.W.2d 915 (1979); *People v. Boss*, 261 A.D.2d 1, 701 N.Y.S.2d 342 (N.Y. App. Div., 1st Dep’t 1999) (per curiam). Cf. *Skilling v. United States*, 561 U.S. 358, 377-85 (2010). And, of course, the defendant may not be required to waive other significant rights, such as the right to a jury trial (see § 32.1 *infra*) or a speedy trial (see § 28.5.4 *infra*), as the price of a fair trial. Cf. *Jackson v. Denno*, 378 U.S. 368, 387-89 & nn.15, 16 (1964); *Simmons v. United States*, 390 U.S. 377, 389-94 (1968), and cases cited following *Simmons* in § 16.6.1, paragraph 5 *supra*.

When a defendant charged in county *A* moves for a change of venue to county *B* on the grounds that s/he cannot get a fair trial in *A*, the court is ordinarily allowed discretion to transfer the case instead to county *C*. The defendant’s right is only to get out of *A*, not to get into *B*. For this reason, considerable caution is advised before counsel decides to file a change-of-venue motion. Counsel should ascertain from knowledgeable local attorneys or court personnel *where*, in granting such motions, the court (or this particular judge) has been sending cases; and, after investigating those localities, counsel should thoroughly investigate the risks and costs of being transferred there. In particular, the pattern has developed in a number of metropolitan counties to transfer venue almost invariably to one or more nearby rural counties – possibly because it is thought that the jurors there will have been less exposed to inflammatory publicity but more likely simply because court calendars in the rural counties are not so badly backlogged. These counties may be unmitigated disaster areas for the transferred defendant. Adverse publicity there may be less voluminous and less provable without being less pervasive in fact. Even if it is less pervasive, the local jurors may also be (a) less sophisticated and skeptical in their reactions to the adverse publicity to which they have been exposed; (b) more homogeneous (see §§ 33.4.2.2 concluding paragraph and 33.10 *infra*); (c) more punitive; (d) less likely to include members of a minority defendant’s race and social class; and (e) unprovably but unmistakably hostile to “foreigners” – including both defendants and their lawyers. Compare *People v. Boss*, *supra*, 261 A.D.2d 1, 3, 8, 701 N.Y.S.2d 342, 343, 347 (N.Y. App. Div., 1st Dep’t 1999) (upon granting the defense’s request for a change of venue in the “case of the four police officers accused of murdering Amadou Diallo” in the Bronx, the court rejects the defendants’ request to shift the case to

an adjoining county that “carries the advantage of convenience” because “within reasonable limits, the community to which the trial is transferred should reflect the character of the county where the crime was committed” and “[a] change of venue should, of course, not afford defendants an unfair demographic advantage”; the court orders that the case “be removed to an urban county rather than a suburban or rural county. Counties where substantial numbers of New York City law enforcement officers reside are particularly undesirable. We have examined data published by the United States Bureau of the Census which reveal that several counties containing urban areas, namely Albany, Erie, Monroe, and Onondaga, have populations featuring a reasonable degree of ethnic diversity. Since the demographics of each of these counties are approximately the same, we have chosen, as the place of trial, Albany County, which is geographically closest to Bronx County.”).

Statutes sometimes delimit the geographic bounds within which a venue change may be allowed. If circumstances render fair trial anywhere within the area of allowed change impossible, the statutes may be attacked as unconstitutional. *See Groppi v. Wisconsin, supra; Nebraska Press Ass’n v. Stuart, supra*, 427 U.S. at 563 n.7 (dictum).

22.2.2. *Timing of the Motion*

In some jurisdictions, a motion for venue change from a court in which the defendant asserts that s/he cannot be fairly tried must await the conclusion of *voir dire* examination of prospective jurors (see Chapter 33). Only after an attempt to empanel a fair jury has been made and – in the opinion of the presiding judge – has failed, may venue be shifted. In other jurisdictions, a motion for change of venue may be made before trial. Local practice governing the timeliness of motions should be checked.

22.2.3. *Evidence that Can Be Presented in Support of the Motion*

The motion is customarily supported by affidavits, and the defendant is allowed an evidentiary hearing if the motion and affidavits are facially sufficient. The following sorts of evidence should be considered by counsel who is attempting to prove that a fair trial cannot be had in the locality:

(1) *Newspaper articles, internet and social media postings, video recordings, audio recordings, and TV or radio scripts.* These may be attached as riders to affidavits and presented as exhibits at a hearing. The prosecutor will ordinarily stipulate their authenticity. If s/he does not, the news reporters or editorial personnel who published them will have to be called to authenticate them. If the news media are uncooperative, subpoenas *duces tecum* are in order. *See Coleman v. Zant*, 708 F.2d 541, 546-48 (11th Cir. 1983). Counsel should be sure particularly to put into the record texts and recordings of publicity containing inadmissible inculpatory or inflammatory material. *Cf. Gannett Co. v. DePasquale*, 443 U.S. 368, 378 (1979).

(2) *Testimony of persons knowledgeable about public opinion.* Individuals whose

occupations bring them in touch with prevalent public opinions may be called as witnesses or their affidavits attached to a motion. News reporters, political ward leaders, and members of the service trades (cab drivers, bartenders, barbers, delivery people, shopkeepers, and so forth) are frequently used. After a foundation is laid by showing that the witness (a) has occasion to talk to a great many persons daily and (b) has, in fact, discussed this case with a great many persons, s/he may be asked such questions as (i) what proportion of the persons to whom s/he talked discussed the case; (ii) whether they expressed the view that the defendant was guilty; (iii) whether they expressed the view that the crime was atrocious or that the perpetrator should be shot; and (iv) (if local practice demands this question) whether they expressed the view that the defendant could not get a fair trial in the locality. In a number of jurisdictions, a change of venue apparently depends upon the answer to this last question – obviously, a wholly unrealistic test. Counsel should urge its abandonment – and, if necessary, its unconstitutionality – on the ground that the same circumstances which are likely to make trial unfair are likely to make the local populace bad judges of whether a fair trial is possible. *Cf. Irvin v. Dowd*, 366 U.S. 717, 728 (1961); *Holbrook v. Flynn*, 475 U.S. 560, 569-70 (1986) (dictum). Usually the witness may also be asked (v) whether s/he has an opinion as to whether the defendant can receive a fair trial locally and (vi) what that opinion is. S/he will be permitted to answer only if s/he has demonstrated sufficient contact with public attitudes to qualify as an expert.

(3) *Opinion polls.* Counsel should consider commissioning an opinion poll to establish through accepted polling techniques the nature and pervasiveness of public attitudes about the defendant and the case. Useful questions include: (a) Have you ever heard of . . . [name of defendant], who is accused of . . . [crime]? (b) Do you think s/he is guilty? (c) Do you know that s/he has made a confession? (d) Have you heard that s/he has a criminal record? [Other publicized inadmissible matters should be made the subject of separate questions.] (e) Have you read . . . [or seen, or heard] [specified news stories or postings on the internet or social media]? (f) Do you think that most people in . . . County believe s/he is guilty? (This question is preferable to “Do you think s/he can get a fair trial in . . . County,” but local law may require that the latter question be asked. See paragraph (2) *supra.*) Commercial attitude-polling organizations or advertising firms with expertise in consumer studies may be retained to do the job. Professors of psychology, sociology, communications, or advertising at neighboring universities may be competent to design a poll and may be willing to conduct it with student assistance at a cost cheaper than that which a commercial pollster would charge.

(4) *Summoning passersby.* At the hearing on a motion for change of venue, the court may be asked to have the marshal bring in the first 20 or 25 persons who pass by on the street outside the courthouse. This procedure was developed in the era predating modern opinion-polling methods and is sometimes recognized by statute or local practice. It is obviously dangerous and should not be used if an opinion poll is possible.

(5) *Evidence of petitions, resolutions, speeches, and so forth.* If petitions relating to the case have been circulated or resolutions passed or speeches made at

public meetings, these may be proved by observers. Since only the making of these sorts of declarations is to be proved and not the truth of what is declared, there is, of course, no hearsay problem.

(6) *Evidence of news conferences, press releases, and so forth by the police and the prosecutor.* It is desirable to prove, if it is so, that adverse publicity emanated from state officials. This has been an important consideration in cases holding that defendants were denied a fair trial by reason of inflammatory publicity or the publication of inadmissible evidence. *E.g., Rideau v. Louisiana*, 373 U.S. 723 (1963); *United States ex rel. Bloeth v. Denno*, 313 F.2d 364 (2d Cir. 1963). *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 554-55 (1976).

22.2.4. Steps to Take if the Motion is Denied

If a pretrial motion for change of venue is denied, counsel should consider the availability of appellate review by means of a prerogative writ. See Chapter 31 *infra*. The fate of most defendants who lose pretrial motions is that they are convicted and their claims of jury bias are rejected on appeal from conviction on the ground that the trial judge did a sufficiently colorable job of jury selection at the *voir dire* stage to protect the defendant's fair-trial rights. *See, e.g., United States v. Haldeman*, 559 F.2d 31 (D.C. Cir. 1976) (en banc); *United States v. Blanton*, 719 F.2d 815 (6th Cir. 1983) (en banc). Giving a trial judge the opportunity to "cure" the dubious denial of a venue-change motion by at-trial juror screening which is often more cosmetic than corrective makes no sense if defense counsel can avoid it.

However, in many jurisdictions, pretrial appellate review is unavailable, either for want of an established prerogative-writ procedure or because of rulings that require a defendant to attempt to empanel a fair jury before s/he can complain on appeal that s/he could not get one. In these jurisdictions, counsel cannot afford to rest on the record made at the hearing on the change-of-venue motion but must also conduct intensive *voir dire* examination of prospective jurors at trial in order to establish their hostility to the defendant or their exposure to the prejudicial publicity of which counsel complains (see §§ 33.3, 33.5 subdivision (2), 33.6 *infra*). *See, e.g., Dobbert v. Florida*, 432 U.S. 282, 301-03 (1977). A challenge to the venire or the panel may also be advised. See §§ 32.4 subdivision(1), 33.2 *infra*.

Requests to the court for other protective measures – continuance, sequestration – will improve counsel's record. If prejudicial publicity has continued between the time of the pretrial hearing and the trial, counsel should submit affidavits documenting its content, extensiveness, and date of publication and should renew the motion for a change of venue on the record previously made and this augmentation of it. The same procedure should be repeated during trial and at the time of posttrial motions whenever significant additional inflammatory matter is published unless the jury is sequestered. The temporal proximity of inflammatory publications to the jury's deliberations is an important factor in appellate and postconviction consideration of claims that the defendant was improperly denied a change of venue or a fair trial because of such publications (*see, e.g., Patton v. Yount*,

467 U.S. 1025 (1984)), and counsel should accordingly be careful to update the record periodically until after verdict.

22.3. Other Grounds for a Motion for a Change of Venue

Statutes, rules or local practice in counsel’s jurisdiction will ordinarily specify other grounds for defense motions for a change of venue. These should be consulted for particulars. The available grounds may include:

- (1) *In the interest of justice, for the convenience of the parties and witnesses.* For example, if the defendant lives in a county other than the one in which the crime was alleged to have been committed, and if it would be a hardship for the defendant to travel to court, the defense can seek a change of venue to the county in which the defendant resides. Such a request may also be appropriate to accommodate the needs of “character witnesses [who are likely to reside] . . . in the district of [the defendant’s] . . . residence” (*United States v. Johnson*, 323 U.S. 273, 279 (1944) (Murphy, J., concurring)). (For discussion of character witnesses, see §§ 39.21-39.24 *infra*.)
- (2) *For the purpose of the defendant’s pleading guilty and disposing of the prosecution in the district of arrest.* This procedure allows a defendant to avoid the need to return to the district where the crime was alleged to have been committed if s/he is not going to contest guilt and s/he wishes to expedite a final disposition of the charges. *See, e.g.*, FED. RULE CRIM. PRO. 20.

B. Motions for Recusal or Disqualification of the Judge

22.4. The Right to an Impartial Judge

Statutes, court rules, local practice, canons of judicial ethics, and opinions rendered by a jurisdiction’s professional-ethics committee or agency provide varying grounds and procedures for objecting to a particular judge’s presiding at trial or on pretrial matters. The applicable statutes or court rules may or may not detail specific grounds for challenge: – personal interest in the outcome of the case, relationship to a party, bias, and so forth. The AMERICAN BAR ASSOCIATION MODEL CODE OF JUDICIAL CONDUCT (2007), which has been adopted *verbatim* in almost all jurisdictions, provides that “A judge shall disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to . . . [certain specified] circumstances” (MODEL CODE, Rule 2.11(A)). The specified circumstances address situations in which the judge or a family member has personal connections with the litigants or personal interests in a case, and also call for disqualification a/k/a recusal in three situations of particular significance in criminal matters: where –

- (1) “The judge has a personal bias or prejudice concerning a party or a party’s lawyer, or personal knowledge of facts that are in dispute in the proceeding” (MODEL CODE, Rule 2.11(A)(1));

- (2) “The judge, while a judge or a judicial candidate, has made a public statement, other than in a court proceeding, judicial decision, or opinion, that commits or appears to commit the judge to reach a particular result or rule in a particular way in the proceeding or controversy” (MODEL CODE, Rule 2.11(A)(5)); and
- (3) “The judge:
- (a) served as a lawyer in the matter in controversy, or was associated with a lawyer who participated substantially as a lawyer in the matter during such association;
 - (b) served in governmental employment, and in such capacity participated personally and substantially as a lawyer or public official concerning the proceeding, or has publicly expressed in such capacity an opinion concerning the merits of the particular matter in controversy;
 - (c) was a material witness concerning the matter; or
 - (d) previously presided as a judge over the matter in another court.” (MODEL CODE, Rule 2.11(A)(6)).

In addition to the grounds for recusal provided by the applicable ethical prescriptions, statutes and court rules, the Due Process Clause of the Fourteenth Amendment and equivalent state constitutional provisions guarantee a right to an impartial judge. *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 883-84 (2009); *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997); *In re Murchison*, 349 U.S. 133, 136 (1955); *Williams v. Pennsylvania*, 136 S. Ct. 1899 (2016). *See, e.g., Hurles v. Ryan*, 752 F.3d 768 (9th Cir. 2014); *In re Ruth H.*, 26 Cal. App. 3d 77, 84-86, 102 Cal. Rptr. 534, 538-39 (1972); *State v. Sawyer*, 297 Kan. 902, 906-07, 909-12, 305 P.3d 608, 611-12, 613-15 (2013); *People v. Stevens*, 498 Mich. 162, 164, 869 N.W.2d 233, 238-39 (2015); *see also Tumey v. Ohio*, 273 U.S. 510 (1927); *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Brown v. United States*, 377 F. Supp. 530, 539 (N.D. Tex. 1974); *Butler v. United States*, 414 A.2d 844, 852-53 (D.C. 1980) (en banc); *cf. Mayberry v. Pennsylvania*, 400 U.S. 455 (1971); *Johnson v. Mississippi*, 403 U.S. 212 (1971); *Taylor v. Hayes*, 418 U.S. 488 (1974); *Connally v. Georgia*, 429 U.S. 245, 247-50 (1977) (per curiam); *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (dictum); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242-43 (1980) (dictum); and *see* Ronald Rotunda, *Judicial Disqualification in the Aftermath of Caperton v. A.T. Massey Coal Co.*, 60 SYRACUSE L. REV. 247 (2010).

In *Williams v. Pennsylvania*, *supra*, the Supreme Court sketched the contours of the federal constitutional command of recusal of a judge for bias. “Due process guarantees ‘an absence of actual bias’ on the part of a judge. . . . Bias is easy to attribute to others and difficult to discern in oneself. To establish an enforceable and workable framework, the Court’s precedents apply an objective standard that, in the usual case, avoids having to determine whether actual bias is present. The Court asks not whether a judge harbors an actual, subjective bias, but instead whether, as an objective matter, ‘the

average judge in his position is “likely” to be neutral, or whether there is an unconstitutional “potential for bias.” . . . Of particular relevance, the Court has determined that an unconstitutional potential for bias exists when the same person serves as both accuser and adjudicator in a case” (136 S. Ct. at 1905). Refining this standard for application to the sub-set of cases in which a judge has played a role as a prosecuting attorney in the defendant’s case before being appointed or elected to the bench, the Court held that “under the Due Process Clause there is an impermissible risk of actual bias when a judge earlier had significant, personal involvement as a prosecutor in a critical decision regarding the defendant’s case” (*id.*). Hence, *Williams* found that Due Process obliged a state supreme court chief justice to recuse himself in a postconviction proceeding brought by a death-sentenced inmate when that justice had been the district attorney at the time of the inmate’s prosecution and had personally approved the decision of his subordinates to seek the death sentence in the case. And this result was required even though the D.A.’s position was as the head of an office employing more than two hundred assistants, where the practice was that the initial decision to paper a case as capital was made by a line prosecutor and passed up the chain of command for the D.A.’s final review, and where the D.A. acted to approve dozens of capital prosecutions a year. “A prosecutor may bear responsibility for any number of critical decisions, including what charges to bring, whether to extend a plea bargain, and which witnesses to call. Even if decades intervene before the former prosecutor revisits the matter as a jurist, the case may implicate the effects and continuing force of his or her original decision. In these circumstances, there remains a serious risk that a judge would be influenced by an improper, if inadvertent, motive to validate and preserve the result obtained through the adversary process.” *Id.* at 1907.

22.5. Grounds for Recusal or Disqualification of the Judge

In some jurisdictions the mere filing of a motion for recusal or “substitution” bars the judge from presiding and requires transfer of the matter to another judge. *See, e.g.*, CAL. CODE CIV. PRO. § 170.6, as construed in *Solberg v. Superior Court*, 19 Cal. 3d 182, 561 P.2d 1148, 137 Cal.Rptr. 460 (1977); *State v. Harrison*, 360 Wis. 2d 246, 255-59, 858 N.W.2d 372, 377-78 (2015). The brake against improvident use of these “judicial preemptory strike” procedures is that the lawyer who resorts to them too frequently ends up in serious disfavor with the entire local judiciary – not only the judges s/he strikes but those s/he seeks to draw.

In most jurisdictions, the defense must demonstrate specific grounds for recusal. Recusal statutes and caselaw uniformly require that a judge recuse himself or herself when s/he has a personal interest in the outcome of the case, a relationship to a party, or some actual bias or prejudice.

In any case in which there will be a bench trial – either because the criminal charge against the defendant does not entail a right to jury trial (see § 32.1 *infra*) or because the defendant has waived the right to a jury (see § 32.2 *infra*) – counsel should be alert to the possibility of obtaining recusal of the currently assigned judge if that judge is aware of unfavorable information

about the defendant or the case that could impair the judge's objectivity as the finder of fact. Although there is caselaw in many jurisdictions holding that prior knowledge of the case or the defendant does not necessarily bar a judge from serving as the fact-finder in a bench trial – on the rationale that judges are presumed to be capable of ignoring inadmissible information and reaching a verdict solely on the facts elicited at trial – recusal nonetheless may be required if the information known to the judge is highly prejudicial, such as:

- (1) When the information known to the judge strongly suggests that the defendant is guilty of the charges. *See, e.g., Butler v. United States*, 414 A.2d 844 (D.C. 1980) (en banc) (the defendant was deprived of due process when the judge presided over the bench trial after having been informed by defense counsel that the prosecution could prove its case beyond a reasonable doubt and that the defendant intended to commit perjury); *Brent v. State*, 63 Md. App. 197, 492 A.2d 637 (1985) (the judge should have recused himself from presiding over a bench trial after learning of the defendant's willingness to plead guilty and after having presided over the guilty plea proceedings of co-defendants, at which statements were made implicating the defendant); *People v. Zappacosta*, 77 A.D.2d 928, 431 N.Y.S.2d 96 (N.Y. App. Div., 2d Dep't 1980) (the judge should have recused himself from presiding over the bench trial because the judge had presided over the guilty plea proceeding of defendant's wife, who was his co-perpetrator, and the judge thereby heard statements incriminating the defendant). *See also In re George G.*, 64 Md. App. 70, 494 A.2d 247 (1985) (the juvenile court judge should have recused himself as the trier of fact in a juvenile delinquency bench trial because the judge had previously convicted three co-perpetrators of the same crime, rejecting the same defense that the defendant intended to offer). *Cf. Watson v. State*, 934 A.2d 901, 906-08 (Del. 2007) (the Family Court judge who had convicted the juvenile in a bench trial based in part on the judge's rejection of the credibility of the juvenile's testimony, should have recused herself from a trial of the same juvenile shortly thereafter on an unrelated charge in which the juvenile's credibility would again be at issue).
- (2) When the judge is aware of inadmissible evidence about the defendant's other criminal activity, prior record, or prejudicial aspects of the defendant's character or history. *See, e.g., Commonwealth v. Goodman*, 454 Pa. 358, 362 & n.4, 311 A.2d 652, 654 & n.4 (1973) (the judge who presided over the suppression hearing should have recused himself from the bench trial in a marijuana possession case because, at the suppression hearing, "an impression was left from hearsay testimony as to probable cause that the appellants were trafficking in narcotics," and this evidence was both "highly inflammatory" and "inadmissible during the trial of the cause"). *See also In re Gladys R.*, 1 Cal. 3d 855, 861-62, 464 P.2d 127, 132, 83 Cal. Rptr. 671, 676 (1970) (the judge in a juvenile delinquency bench trial committed reversible error by reviewing

a social study with “negative indications about [the child’s] . . . home environment”); *In the Matter of James H.*, 41 A.D.2d 667, 341 N.Y.S.2d 92 (N.Y. App. Div., 2d Dep’t 1973), *appeal withheld and case remanded on other grounds*, 34 N.Y.2d 814, 316 N.E.2d 334, 359 N.Y.S.2d 48 (1974), *appeal dismissed*, 36 N.Y.2d 794, 330 N.E.2d 649, 369 N.Y.S.2d 701 (1975) (when the probation officer stated during a juvenile delinquency bench trial that the case was “a ‘Training School’ case,” the judge should have granted the defense motion for disqualification to avoid an appearance of prejudice).

Even if the judge does not view himself or herself as actually biased, s/he must consent to recusal if his or her knowledge of prejudicial information would cause the proceedings to have an “appearance of partiality” (*see, e.g., Perotti v. State*, 806 P.2d 325, 328 (Alaska App. 1991) (the “appearance of partiality . . . [arising] ‘in light of the objective facts’” (*id.* at 328) required that the trial judge recuse himself from serving as the sentencing judge in an adult criminal case in which he had presided over the proceeding to transfer the case from juvenile to adult court and had made a finding of non-amenable to rehabilitative treatment based on improperly-obtained psychiatric evidence); *People v. Zappacosta, supra*, 77 A.D.2d at 930, 431 N.Y.S.2d at 99 (courts must be “[s]ensitive to the imperative that we avoid any situation which allows even a suspicion of partiality”); *Commonwealth v. Goodman, supra*, 454 Pa. at 361, 311 A.2d at 654 (“[w]e have every confidence that the trial judges of this Commonwealth are sincere in their efforts to avoid consideration of incompetent inflammatory evidence in reaching these judgments but we also are acutely aware that the appearance of bias or prejudice can be as damaging to public confidence in the administration of justice as would be the actual presence of either of these elements”). *See also Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 888 (2009) (“[T]he States have implemented . . . [“judicial reforms”] to eliminate even the appearance of partiality. Almost every State . . . has adopted the American Bar Association’s objective standard: ‘A judge shall avoid impropriety and the appearance of impropriety.’ ABA Annotated Model Code of Judicial Conduct, Canon 2 (2004) . . . The ABA Model Code’s test for appearance of impropriety is ‘whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.’ Canon 2A, Commentary”); *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1908 (2016); AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, Standard 6-1.9(a) (4th ed. 2015) (“[t]he trial judge should recuse himself or herself whenever the judge has any doubt as to his or her ability to preside impartially or whenever his or her impartiality reasonably might be questioned”).

Moreover, even if recusal is not *required*, counsel can urge the judge to exercise his or her discretion in favor of recusal as a prophylactic measure to guard against any possible unconscious influences of the judge’s prior knowledge on his or her fact-finding function, or any possible appearance of impropriety. Counsel can point to decisions recognizing that even when the judge intends to faithfully ignore inadmissible information, it may still have an effect upon his or her mind. *See, e.g., United States v. Walker*, 473 F.2d 136, 138 (D.C. Cir. 1972) (although a “[j]udge is presumed to have a trained and

disciplined judicial intellect, . . . [this] disciplined judicial mind should not be subjected to any unnecessary strain; even the most austere intellect has a subconscious”); *People v. Zappacosta, supra*, 77 A.D.2d at 930, 431 N.Y.S.2d at 99 (“[e]ven the most learned [j]udge would have difficulty in excluding such information from his subconscious deliberations”); *In re George G., supra*, 64 Md. App. at 80, 494 A.2d at 252 (although “the sincerity [and] . . . the integrity of the trial judge” could not be doubted, “[s]ubconsciously, . . . [the impermissible information] apparently lingered on in the deep recesses of his mind”). Counsel can suggest that, at least when recusal and substitution of another judge will impose no significant burden or inconvenience upon the judiciary, these measures are warranted to guard against even the possibility of unconscious influences upon the judge. *See, e.g., United States v. Walker, supra*, 473 F.2d at 138-39 (rejecting the argument that a judge *must* recuse himself or herself after learning that one of the defendants had offered a guilty plea, but observing that “it would be better if [the judge] . . . exercised his prerogative to recuse himself [in such a situation since this rule] . . . should be easy to observe and put no burden on the administration of justice”); *People v. Smith*, 264 Cal. App. 2d 718, 722, 70 Cal. Rptr. 591, 594 (1968) (indicating that “where a motion is properly made before trial, a pretrial [suppression] hearing before another judge is . . . preferable to a determination by the trial judge”); *Banks v. United States*, 516 A.2d 524, 529 (D.C. 1986) (although the trial judge did not commit an abuse of discretion by conducting a bench trial of a defendant whose guilty plea broke down because the defendant asserted his innocence and the prosecution refused to offer an *Alford* plea, “the preferable procedure would have been for the trial judge to certify the case to another judge for trial after he rejected the plea”). The same reasoning, calling for recusal when it is not burdensome to the judicial system, would also apply to cases in which there is a potential for the appearance of impropriety. *See, e.g., State v. Lawrence*, 344 N.W.2d 227, 231 (Iowa 1984), *partially overruled on other grounds, State v. Liddell*, 672 N.W.2d 805 (Iowa 2003) (upholding the trial judge’s exercise of discretion in favor of recusal because the judge “felt his trial rulings might be questioned in the mistaken belief that he was reacting in some way to the fact that he had been asked to step aside”).

In addition to these situations in which information known to the judge may render it difficult for the judge to be an objective finder of fact at a bench trial – or would give rise to an unacceptable appearance of impropriety – the manner in which a judge conducts a bench trial may manifest such an apparent bias in favor of the prosecution that recusal is required or at least highly desirable to avoid an appearance of impropriety. *See, e.g., People v. Arnold*, 98 N.Y.2d 63, 64, 67-68, 772 N.E.2d 1140, 1142, 1144-45, 745 N.Y.S.2d 782, 784, 786-87 (2002) (the trial court abused its discretion in a bench trial by calling a police officer as a court witness to clarify an ambiguity in the prosecution’s case after both sides had rested; “Although the law will allow a certain degree of judicial intervention in the presentation of evidence, the line is crossed when the judge takes on either the function or appearance of an advocate at trial”; the judge in this case “assumed the parties’ traditional role of deciding what evidence to present, and introduced evidence that had the effect of corroborating the prosecution’s witnesses and discrediting defendant on a key issue”); *People v. Zamorano*, 301 A.D.2d 544, 546-47, 754

N.Y.S.2d 645, 648 (N.Y. App. Div., 2d Dep’t 2003) (the trial court in a bench trial abused its discretion in various ways, including taking “on the function and appearance of an advocate when, after the People’s cross-examination, [the judge] asked the defendant numerous questions about the attack and tried to point out the inconsistencies and unbelievability of his theory of defense”). *See also, e.g., In the Matter of Jacquelin M.*, 83 A.D.3d 844, 845, 922 N.Y.S.2d 111, 112-13 (N.Y. App. Div., 2d Dep’t 2011) (the “Family Court Judge [in a juvenile delinquency bench trial] took on the function and appearance of an advocate by extensively participating in both the direct and cross-examination of the two . . . [prosecution] witnesses and eliciting testimony which strengthened the . . . [prosecution’s] case” and by summoning the accused’s probation officer to court to refute the accused’s direct examination testimony that she gave “a certain document which would support her defense” to the probation officer, and by informing defense counsel that “unless he agreed to stipulate as to what . . . [the] Probation Department records would reflect, those records would be admitted into evidence through the Probation Officer’s testimony”).

A judge’s lack of objectivity – or even just an appearance of partisanship – can be problematic in a jury trial as well. “Although the judge in a criminal jury trial does not find facts, he or she still must make many rulings that affect the defendant’s ability to obtain a fair trial. Some of these rulings rise and fall on the judge’s discretion alone, and they can have dramatic impact on the evidence the jury hears as well as both parties’ ability to present their arguments. . . . It nearly goes without saying that a criminal trial judge also is inevitably vested with considerable discretion at sentencing.” *State v. Sawyer*, 297 Kan. 902, 911, 305 P.3d 608, 614 (2013) (rejecting the trial judge’s and lower appellate court’s reasoning that recusal was not necessary because “this case was tried to a jury rather than to the bench”). Accordingly, in jury trials just as in bench trials, counsel should consider seeking recusal or disqualification if a judge has made statements evidencing a bias against the defendant or in favor of the prosecution or has manifested such a bias in the way that s/he conducted pretrial proceedings or is conducting the trial. *See id.* at 908, 911-12, 305 P.3d at 613, 614-15 (although defense counsel’s motion for recusal did not specify bias sufficient to require recusal under the applicable state statute, the Due Process Clause required recusal because “Judge McNally had previously chosen to recuse in Sawyer’s assault and battery bench trial; the judge’s intemperate demeanor in Sawyer’s intervening jury trial for lewd and lascivious behavior drew a stern admonition from the Court of Appeals; and Judge McNally’s mere observation that this case involved a jury trial rather than a bench trial did nothing to ameliorate any earlier need for recusal”). *See also, e.g., People v. Stevens*, 498 Mich. 162, 869 N.W.2d 233 (2015) (“Judicial misconduct may come in myriad forms, including belittling of counsel, inappropriate questioning of witnesses, providing improper strategic advice to a particular side, biased commentary in front of the jury, or a variety of other inappropriate actions.” *Id.* at 172-73, 869 N.W.2d at 243. “A trial judge’s conduct deprives a party of a fair trial if the conduct pierces the veil of judicial impartiality. A judge’s conduct pierces this veil and violates the constitutional guarantee of a fair trial when, considering the totality of the circumstances, it is reasonably likely that the judge’s conduct improperly influenced the jury by creating the appearance of advocacy or partiality against

a party. . . . When the issue is preserved and a reviewing court determines that the trial judge’s conduct pierced the veil of judicial impartiality, the court may not apply harmless-error review. Rather, the judgment must be reversed and the case remanded for a new trial.” *Id.* at 164, 869 N.W.2d at 238-39.); *People v. Kocsis*, 137 A.D.3d 1476, 1481-82, 28 N.Y.S.3d 466, 471-72 (N.Y. App. Div. 3d Dep’t 2016) (the judge in a jury trial “deprived [the defendant] of a fair trial” by providing “guidance and instructions” to the prosecutor regarding “the rules of evidence”: “During the course of the trial, the ADA [Assistant District Attorney] in question demonstrated difficulty in laying the proper foundation for the admission into evidence of certain photographs and bank records and in utilizing a particular document to refresh a witness’s recollection. In response, County Court conducted various sidebars, during the course of which the court, among other things, explained the nature of defense counsel’s objections, outlined the questions that the ADA needed to ask of the testifying witnesses, referred the ADA to a certain evidentiary treatise and afforded him a recess in order to consult and review the appropriate section thereof.”; the “County Court’s assistance in this regard – although well-intentioned – arguably created the perception that the People were receiving an unfair tactical advantage”); *People v. Retamozzo*, 25 A.D.3d 73, 74, 86-87, 802 N.Y.S.2d 426, 427, 434-35 (N.Y. App. Div., 1st Dep’t 2005) (the trial judge in a jury trial “deprived defendant of his constitutional right to a fair trial by excessive interference in the examination of witnesses,” including asking questions and making comments during counsel’s cross-examinations of prosecution witnesses that undermined the cross-examinations, and asking questions during the defendant’s testimony that conveyed “considerable skepticism”; the record does not contain “a single instance of a question asked by the trial judge that plausibly could be viewed as helpful to the defense”); *People v. Chatman*, 14 A.D.3d 620, 620-21, 789 N.Y.S.2d 208, 210 (N.Y. App. Div., 2d Dep’t 2005) (the trial judge in a jury trial “assumed the appearance of an advocate at the trial” by “improperly elicit[ing] from the investigating detective testimony that the defendant did not mention his alleged alibi at the time of his arrest, and refused to answer any questions” and by “extensive[ly] questioning . . . the defendant’s alibi witness”); *People v. Raosto*, 50 A.D.3d 508, 509, 856 N.Y.S.2d 86, 88 (N.Y. App. Div., 1st Dep’t 2008) (the trial judge in a jury trial “unduly injected himself into the proceeding to such an extent as to deny defendant a fair and impartial trial” by “conduct[ing] lengthy and inappropriate cross-examinations of defendant and defense witnesses, which were neither neutral nor aimed at clarification, but disrupted the flow of testimony and plainly conveyed to the jury the court’s disbelief of these witnesses”).

22.6. Procedures for Seeking Recusal or Disqualification

Local practice must be consulted with regard to the appropriate form of challenge to a judge (motion for recusal or disqualification or substitution; affidavit of bias; whatever) and the time when it must be made.

As noted in § 22.5 *supra*, in some jurisdictions the filing of a facially sufficient affidavit or motion requires that the judge recuse himself or herself, without inquiry into the truth of the matters of fact averred. Under other

procedures the underlying factual questions are heard before the judge who is challenged or another judge.

The defense is entitled to put allegations of bias into the record in any manner necessary to present them to the court and save them for review. *See Holt v. Virginia*, 381 U.S. 131 (1965); *In re Little*, 404 U.S. 553 (1972). Ordinarily, a written motion with supporting affidavits is desirable to protect the record.

In some jurisdictions there is a procedure – sometimes called a motion for change of venue, sometimes called an affidavit of bias – that is actually used (by custom) as a form of peremptory challenge to the judge. It may not require any assertion of bias, or it may require simply an allegation of bias in conclusory form that the judges do not take seriously or resent. Ordinarily, motions or affidavits for removal of a judge under these peremptory-challenge procedures are timely only if filed before the judge has taken any action in the case; sometimes they are required to be filed within a specific time after the assignment of the case to the judge.

22.7. *Tactical Considerations in Deciding Whether to Seek Recusal and in Framing the Recusal Request*

In deciding whether to seek recusal or disqualification of the judge, counsel must balance the liabilities of keeping the present judge (that is, the likely effects of the biasing factors upon the judge’s rulings and, in the event of conviction, the sentence s/he imposes) against the risk of incurring judicial wrath. If the motion is denied and the judge retains the case, whatever latent biasing factors originally existed may well be exacerbated by the judge’s anger over being accused of bias. Even if the motion is granted, there may be repercussions: The judge to whom the case is transferred may resent counsel and the client for what the judge perceives as an attack upon a colleague or the judiciary in general.

In deciding whether to seek recusal, counsel also will need to compare the present judge with the other judges to whom the case might be assigned if the recusal motion is granted. Notwithstanding whatever biases the current judge may harbor, s/he may be more prone to be fair in his or her rulings at trial and/or a more lenient sentencer than the other judges who could receive the case if it is transferred.

Counsel can both maximize the chances of gaining recusal and minimize the risks of incurring judicial wrath by the way in which the recusal request is framed. When possible, counsel should rely upon the “appearance of impropriety” as the primary basis for recusal. See § 22.5 fourth paragraph *supra*.

Depending upon the temperament of the judge and counsel’s relationship with the judge, counsel may want to consider making an informal recusal request before filing a motion or invoking statutory recusal procedures. Such an initial soft-sell approach permits a graceful way out that will be accepted by some judges who would feel obliged to resist a formal motion making specific allegations of bias against them. However, some judges may resent such

informal requests, viewing them as an attempt to use a back-door approach to obtain recusal for reasons that are so insubstantial that the attorney is not even willing to put them on the record.

In making the difficult decisions whether to seek recusal and how to frame recusal requests, counsel should always investigate both the general local attitudes toward these procedures and the known past reactions of the individual judge in question. In some jurisdictions, and with some judges, recusal motions are accepted as a routine forum-shopping device, which may ordinarily be safely used, without incurring judicial ire. Conversely, what is accepted as stock pleading in one locality – or to one judge – may be taken as a deadly insult in another locality or by another judge in the same locality.

Chapter 23

Motions for Severance or for Consolidation of Counts or Defendants

A. Motions Challenging the Joinder of Counts or Seeking Consolidation of Counts

23.1. Introduction: The Problem of Joined Counts; Overview of the Possible Remedies

As § 20.9 *supra* explained, prosecutors may be authorized (by state statutes, rules of court, or caselaw) to include in a single charging paper all charges arising from (1) the same event or episode (for example, housebreaking, larceny, and receiving stolen property); and possibly also (2) separate events or episodes that are (depending upon variations in local rules) (a) part of the same transaction or series of transactions, (b) part of a “common plan” or “common scheme” by the defendant, or (c) legally the same or similar (for example, housebreaking on May 5 and housebreaking on June 12).

In cases in which all the charges against the defendant arise from the same event or episode (such as the ordinary set of housebreaking-larceny-receiving charges based on a single break-in), the joinder results in little prejudice to the defendant, and thus there is little reason to seek severance. Indeed, the defendant may even derive some benefit from a joint trial: The same proof, and all the proof, would likely be admitted at separate trials; and the more trials there are, the more chance there is that the defendant will lose at least one of them. In any event, most courts will compel a joint trial in this situation, whether the defendant wants one or not.

However, in cases in which the prosecution has joined charges arising from different episodes or transactions (on the basis of the factual connection between the transactions or the legal similarity of the charges), the defendant faces a significant risk that the trier of fact, whether jury or judge, will view the aggregation of charges as increasing the likelihood that the defendant is guilty of each one. Thus, in cases that are going to trial, counsel will usually wish to challenge the joinder of the counts or seek severance. *See, e.g., People v. Hall*, 120 A.D.3d 588, 589, 991 N.Y.S.3d 114, 116 (N.Y. App. Div., 2d Dep’t 2014) (“the defendant was deprived of the effective assistance of counsel, based on defense counsel’s failure to make a proper pretrial motion to sever the charges of robbery from the drug charges”). In rare cases, however, there may be countervailing benefits to having the counts joined for trial, and counsel may want to leave the joinder unchallenged; or when the prosecutor has filed separate charging instruments, counsel may want to seek consolidation of the charges for a single trial. In addition, if the defendant wishes to enter pleas of guilty to separate charging instruments or wishes to enter a plea of guilty to one charging instrument upon the basis of an agreement with the prosecutor that other charges will be dismissed (see §§ 15.6.2 *supra*), consolidation may facilitate the implementation of a favorable plea agreement and may also enable the defendant to steer

the case before the most favorable sentencing judge (see § 15.7.2 *supra*).

Section 23.2 describes the strategic variables that counsel should consider in deciding whether to challenge joinder of counts. Sections 23.3 and 23.4 then examine the motions that counsel can file to obtain dismissal or a severance on grounds of misjoinder and to obtain a severance on the grounds that the joinder, although technically valid, is prejudicial to the defendant. Section 23.5 discusses motions for consolidation.

Counsel must check local statutes, court rules, and caselaw to determine not only the terms of the joinder rules used in the jurisdiction but also the procedural requirements for raising joinder issues. In many jurisdictions objections to misjoinder and/or motions for severance must be made at arraignment or within a specified period of time after arraignment. See § 17.7 *supra*.

23.2. Deciding Whether to Oppose a Trial on Multiple Charges

As explained in § 23.1 *supra*, usually the only joinder of charges that the defense might want to challenge is a joinder of charges arising from different events or episodes. In deciding whether to make such a challenge, counsel should consider:

(a) *What will be the effect of the trier's knowing that the defendant is charged with several offenses, quite apart from any proof of his or her guilt of those offenses?*

Generally the more a defendant is charged with, the worse s/he looks. Jurors and even many judges in bench trials tend to operate on the principle that where there's smoke, there's fire. At the outset of the trial, when they are forming critical first impressions of the case that may affect their perceptions of much of the proof that follows, they know little about the defendant except what s/he is charged with. If the charges are several, the defendant starts with several sins.

In some cases, however, there may be countervailing considerations. If the defendant is obviously overcharged – if, for example, s/he breaks into a few vending machines and is charged, for each machine, with burglary, theft, and malicious destruction – the cumulative weight of the overcharging may make out a case of persecution that will sway a jury or judge in the defendant's favor.

(b) *What will be the effect on the trier of the cumulation of evidence?*

Again, generally the more evidence there is against a defendant, the worse. But this may depend on whether the evidence comes from several sources or from one. If two package store proprietors give the same “pretty sure” identifications of the defendant as the person who robbed them, conviction is more likely than if separate juries or judicial triers of fact heard each of the identifying witnesses. On the other hand, if a single complainant relates that the defendant committed an offense against him or her on several successive occasions, proof of an airtight alibi for one or more of those

occasions may convince the jury or the judge in a bench trial that the whole story is a fabrication, particularly if the defense can point to some motive for fabricating.

(c) *Will one defense depreciate another?*

If a defendant has a weak or unconvincing defense to one charge and a more substantial defense to another, the incredibility of the former is likely to attain the latter. Or both defenses may be believable separately but unbelievable together, as when a defendant charged with two rapes pleads alibi to the first and consent to the second.

(d) *Is it desirable to put the defendant on the stand in one case but not in the other?*

If so, separate trials are essential. Apart from problems of cross-examination, a defendant cannot practicably take the stand and leave part of the charges against him or her unanswered.

(e) *Is there a “clinching” piece of evidence in one case that would not be admissible in the other if it were tried separately?*

If so, the item may “clinch” both cases, as when a defendant charged with two holdups left a fingerprint at the scene of one.

(f) *To what extent will a unitary wrap-up of all charges against the defendant expedite the task of gathering the requisite defense witnesses?*

Although, in an ideal world, defense witnesses would be willing to come to court again and again, the reality is that defense witnesses other than the defendant’s family will soon lose patience and stop coming to court. Even when local practice makes it possible to put these witnesses “on call,” they may be unwilling to be available for more than one trial date. If this is the case, then counsel might consider reducing the risk of losing witnesses by trying all charges in a joint trial.

(g) *To what extent may the process of successive prosecution cause the prosecutor to offer favorable plea bargains?*

Most prosecutors are so overburdened that they are hard pressed to find the time to try cases. Frequently, a prosecutor who is unwilling to make a good plea offer to resolve joint charges slated for a single trial will be far more amenable to offering whatever it takes to avoid the daunting prospect of a series of trials. If the various charges involve the same complainant or other witnesses, the prosecutor also may be eager to avoid repeated trials because the likelihood of prosecution witnesses losing patience and failing to appear increases with each successive court date.

(h) *To what extent will a unitary wrap-up affect sentencing?*

As explained in § 15.5 *supra*, the judge may penalize a defendant at

sentencing for taking a case to trial when the evidence of guilt was obviously strong. If the defendant is facing several different charges, all of which are strong prosecution cases, and the defendant is unwilling to plead guilty to any of the charges, counsel may be well advised to try all of the cases in a single trial. If the cases are separated, and the defendant insists on going through with each trial, the court's substantial expenditure of time and resources may redound to the defendant's detriment at disposition.

In assessing the possible sentencing implications of joinder, counsel must also study the rules governing sentencing on multiple charges and the terms of recidivist sentencing laws. See §§ 48.6 subdivisions (B), (H); 48.13.1 *infra*. Increased penalties may be available for successive but not simultaneous convictions. Also, the defendant probably has a better chance of receiving concurrent sentences on two convictions after a single trial before a single judge than after two trials before different judges, or even the same judge.

As noted in § 23.1 *supra*, consolidation of charges for purposes of a plea or pleas covering all of the charges can sometimes be used to work out the details of a satisfactory plea bargain (see § 15.6.2 *supra*) and to bring the case before the judge who is known to be the most favorable sentencer (see § 15.7.2 *supra*).

(i) *Will a unitary wrap-up affect the defendant's pretrial detention status?*

If the defendant is being held in custody on bail s/he cannot afford to post, counsel should consider the potential benefits of a unitary wrap-up as a way of shortening the defendant's pretrial detention. If the defendant is likely to be acquitted of all charges or if s/he is likely to receive probation upon conviction, the resolution of all cases at once means that the defendant will be immediately released. To resolve them piecemeal probably means that the defendant will stay in custody until all of the pending charges have been resolved.

(j) *Could a unitary wrap-up affect the defendant's eligibility for parole?*

If the defendant is tried on only one of several pending charges, the prosecutor may "dead-list" the others (that is, not bring them on for trial) and may lodge them as detainers against the defendant who is committed to serve a sentence of imprisonment on the first charge. The detainers will not only hang over the defendant's head; they may make the defendant ineligible for parole. See § 15.6.1 subdivision (D) *supra*. The prosecutor may or may not be required to bring the dead-listed charges on for trial upon the defendant's demand. See § 28.5 *infra*.

23.3. *Motions Challenging the Charging Paper for Misjoinder or an Insufficient Showing of the Basis for Joinder*

As § 20.9 *supra* explained, the local statute, rule, or caselaw usually provides a basis for defense counsel to challenge the joinder of counts in an indictment or information on the ground that the applicable standards do not

permit charges of this nature to be filed in a single charging paper. As § 20.9 also notes, in some jurisdictions, a multi-count charging paper can be attacked for misjoinder if it fails to explicitly allege the facts (“same transaction”; “common plan”; whatever) upon which the permissibility of joinder depends.

23.4. *Motions for a Severance of Charges on the Ground of Prejudicial Joinder*

Unlike motions challenging misjoinder, see §§ 20.9, 23.3 *supra*, motions for a severance by reason of prejudicial joinder ask the court to order separate trials of properly joined counts on the ground that trying them together would unfairly disadvantage the defendant.

In seeking to persuade the court that the defendant would be prejudiced by a joint trial of two or more charges, counsel can point to the types of potential harm described in paragraphs (a) through (e) of § 23.2 *supra*. Often, there is local caselaw that can be cited in support of a severance to avoid the particular form of prejudice urged by counsel. *See, e.g., United States v. Sampson*, 385 F.3d 183, 190-93 (2d Cir. 2004) (the joint trial of drug offenses occurring in 1998 with drug offenses occurring in 2000 “caused Sampson substantial prejudice with regard to the 1998 counts” because “he would have taken the stand in his defense on the 1998 counts” and he had “reasons for wanting to remain silent on the 2000 counts”); *Cross v. United States*, 335 F.2d 987, 989-91 (D.C. Cir. 1964) (the joint trial of charges of robbing a church rectory and robbing a tourist home on different dates was prejudicial because Cross “wished to testify on Count II [the tourist home robbery] and remain silent on Count I [the church rectory robbery]”); *State v. Lozada*, 357 N.J. Super. 468, 471, 815 A.2d 1002, 1003-04 (2003) (applying and extending the holding of *State v. Chenique-Puey*, 145 N.J. 334, 343, 678 A.2d 694, 698 (1996), that “in order to avoid the prejudice to defendant resulting from the jury’s knowledge of the restraining order when it tries the underlying crimes, . . . ‘ . . . trial courts should sever and try sequentially charges of contempt of a domestic-violence restraining order and of an underlying criminal offense when the charges arise from the same episode”).

In many localities counsel will find that the judges are obdurate in favor of joint trials to the fullest extent allowed by law and that they are reluctant to grant a severance whenever joinder is technically permissible, because of the supposed saving of court time. In these localities particularly, the inquiry into “prejudice” is likely to turn into a balancing of the economies and other considerations favoring or disfavoring joint trial. *See, e.g., State v. Freshment*, 309 Mont. 154, 164-71, 43 P.3d 968, 976-80 (2002). Accordingly, counsel is wise to point to the lack of evidentiary overlap between the counts that s/he is asking to have severed – demonstrating (to the extent that the facts allow) that the prosecution’s witnesses on one count will be completely (or substantially) different from those on the other count(s), and representing (when this is true) that the defense witnesses on the different counts will be completely (or substantially) different as well. Under these circumstances a judge might conclude that a joint trial would not save much time and, therefore, that it is not worth the judge’s while to suffer the unwieldiness of numerous sets of

witnesses and a lengthy proceeding, particularly in the face of the defendant's tenable (and preserved) claims of potential prejudice to his or her defense.

It is not necessarily fatal to joint trial that some charges will be tried to a jury while others are tried to the court. In a number of localities it is standard procedure to conduct simultaneous jury and bench trials, with the judge sitting as the trier of fact on the bench-tried charges and sending the others out to the jury. Other courts do not seem to do this, and in those courts the defendant can obtain a *de facto* severance by waiving jury trial on some charges but not on others. In many jurisdictions, however, the waiver is only effective if it is agreed to by the prosecutor and accepted by the court (see § 32.2.1 *infra*), and one or the other may decline to agree to a jury waiver in some, but not all, cases that would otherwise be jointly tried.

23.5. Consolidation of Counts

For reasons made apparent by §§ 23.1 and 23.2 *supra*, it will be the rare case in which the defense should seek consolidation for trial of charges that the prosecutor has filed in separate charging instruments.

However, as those sections also noted, a different calculus may apply to cases in which the defendant intends to enter a guilty plea covering charges in various charging instruments. If the various charging instruments are before different judges, counsel may be able to consolidate all of them, for purposes of a plea, before the judge who would be the most favorable sentencer. (If local procedure makes it impossible to predict which judge would receive the consolidated plea, it may be best to leave the cases before separate judges and then use the sequencing of sentencings to secure the best overall result. For example, if there is a reasonable chance of obtaining a sentence of probation, it may be wise to schedule the sentencing by the most favorable judge first, counting on the other judges to defer to that judge's grant of probation rather than overriding it with a sentence of incarceration in another case. If the defendant is likely to end up with a term of incarceration, then it may be best to go to the harsher sentencer first and then ask the more lenient, follow-up sentencer to make the prison term in his or her case concurrent rather than consecutive – assuming, of course, that the applicable sentencing statute does not mandate consecutive terms (see § 48.6 subdivision (H) *infra*).

When consolidation is desired, it may be ordered on stipulation, or on joint motion of the parties, or on motion of one of them, or it may be effected informally by the prosecutor's listing the cases for trial or plea together, with the acquiescence of the defense. Consolidation can be ordered in any case in which the rules governing joinder would have permitted the joinder of counts initially. If the prosecution and defense are agreed that consolidation will serve their mutual interests, the court will probably accept a stipulation consolidating even those charges that could not technically have been joined.

B. Motions Challenging the Misjoinder of Defendants or Seeking Severance of Defendants

23.6. *Introduction: The Problem of Joined Defendants; Overview of the Possible Remedies*

Prosecutors almost always take advantage of local rules permitting the joinder for trial of co-defendants who are charged with participating in the same offense or offenses. Joinder of defendants is ordinarily in the prosecutor's interest for several reasons: (i) it saves the prosecutor from the burden of conducting successive trials, each with the same evidence; (ii) it minimizes the risk that prosecution witnesses will lose patience and stop coming to court; and (iii) it enables the prosecutor to gain the impermissible benefit of aggregating the evidence against each defendant individually to mount a persuasive cumulative case against both.

The considerations that might lead defense counsel to favor or oppose a joint trial are listed in § 23.7 *infra*. As the discussion there indicates, it will usually be in the defendant's interest to seek a severance from joined co-defendants.

Challenges to the misjoinder of defendants are described in § 23.8 *infra*. Section 23.9 takes up the constitutional, statutory, and common law grounds for severance by reason of prejudicial (although technically permissible) joinder. Section 23.10 concludes by examining defense motions for consolidation of defendants.

Many jurisdictions require that objections to joinder and motions for severance must be made at arraignment or within a specified time after arraignment. Local statutes and court rules must be consulted. See § 17.7 *supra*.

23.7. *Deciding Whether to Oppose a Joint Trial of Defendants*

The considerations favoring and disfavoring joint trial of defendants are exceedingly complex. The most significant are:

(a) *Will evidence be admitted at a joint trial that could not be admitted at the defendant's trial if s/he were tried separately?*

A principal item of concern in joint trials, and one that has generated considerable constitutional caselaw, is the admission at a joint trial of a co-defendant's confession that implicates not only the co-defendant but also the defendant. Section 23.9.1 *infra* examines the constitutional rules relating to this issue. For the present purpose of summarizing the considerations militating for and against a joint trial, it is sufficient to observe that the existence of a confession by the co-defendant significantly impairs the defendant's chances of prevailing at a joint trial. Although the confession may not legally be considered as evidence of the defendant's guilt (see § 23.9.1), the jury or judicial trier of fact will hear it and will almost surely consider it in fact, whether consciously or unconsciously, insofar as it implicates the defendant. Even co-defendants' confessions that do not explicitly implicate the defendant

(or that have been redacted to remove references to the defendant, see § 23.9.1) can be extremely damaging to the defense, particularly when they factually contradict the defendant's theory of defense or when the facts are such that both defendants are probably guilty if either one is.

Certain non-confessional evidence that would be inadmissible against the defendant at a severed trial may also be admissible and hurtful at a joint trial. For example, in a robbery trial, if the defendant admits to being with the co-defendant at the time the crime was committed, evidence that the co-defendant was found in possession of stolen items a short while later will probably be the undoing of the defendant as well as the co-defendant.

(b) Conversely, will evidence be excluded at a joint trial that would be admitted against the defendant at a separate trial?

Products of an illegal search and seizure of a co-defendant may be admissible against the defendant because the defendant lacks standing to complain of the illegality. See § 25.15 *infra*. At a joint trial, they might have to be excluded, although this point is not clear. See *McDonald v. United States*, 335 U.S. 451 (1948).

(c) What are the relative strengths of the defensive cases of the defendant and co-defendant(s)?

Defendants with weak defenses tend to look particularly bad in comparison to those who have stronger defenses. If the co-defendant is likely to take the stand, this may cast a bad light on the defendant's failure to take the stand. (On the other hand, in a case in which the defendant should not testify because s/he could be impeached with a damaging prior record, it may be possible to present the defendant's defense through the co-defendant's testimony.)

(d) What is the apparent relative blameworthiness of the defendant and the co-defendant(s)?

Joint trial invites the trier of fact, whether jury or judge, to assess degrees of culpability. If convictions of lesser included offenses are possible, the jury may mete out a sort of rough justice among co-defendants according to what appears to be their culpability. This suggests that the least culpable defendant has the most to gain from joint trial. But counsel cannot count on his or her client appearing the least culpable unless the stories of prosecution witnesses or irrefutable physical circumstances – for example, relative size and age – make the favorable comparison strongly evident. Otherwise, the co-defendants and their attorneys will also be vying to look the best of the bunch. In this and other situations of antagonistic defenses, separate trial should be sought.

(e) Is there something particularly attractive or unattractive about the co-defendant(s)?

The jury's or judge's positive or negative reactions to a co-defendant

may rub off on the defendant at a joint trial.

(f) *Can counsel cooperate and work well with counsel for the co-defendant(s)?*

Do their defensive theories or trial strategies conflict?

(g) *Will the number of defendants tend to protract the trial and wear the jury out?*

Might it leave the jury confused and unable to identify the individual defendants? In “mass trials,” when there is considerable evidence of wrongdoing, the jury usually convicts everybody in sight.

(h) *What are the local rules, and what is the local practice, regarding limitation of the procedural rights of joined defendants?*

For example, will counsel’s cross-examination of prosecution witnesses be cut off as “cumulative” of that of counsel for a co-defendant? In a jury trial, will each joined defendant be permitted the full number of peremptory challenges to which s/he would be entitled at a separate trial, or will the defendants be required to apportion peremptories?

(i) *If trial is severed, who is likely to be tried first?*

Prior trial of the co-defendants may allow defense counsel full discovery of the prosecution’s case in advance of his or her own trial. On the other hand, if they are convicted, they may turn state’s evidence in an attempt to win sentencing consideration.

23.8. Motions Challenging Misjoinder of Defendants

Statutes, court rules, and caselaw must be reviewed to determine the local rules governing joinder of defendants and also to determine whether the remedy for misjoinder is a motion to dismiss the charging paper (see § 20.9 *supra*) or a motion to sever the defendant’s trial from that of the co-defendant(s). In some jurisdictions, counsel will also be able to frame a motion for dismissal or severance on the technical ground that the charging paper does not expressly allege the facts required to support a joinder of defendants. See § 20.9 *supra*.

The generally prevailing rule is that defendants may be joined in a single charging paper, or their charging papers may be joined for trial, if the defendants 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. A defendant can challenge the charging paper for misjoinder if, in addition to charging offenses in which both of two defendants allegedly participated, it charges offenses that only the co-defendant is accused of committing. See, e.g., *Davis v. United States*, 367 A.2d 1254, 1260-64 (D.C. 1976).

23.9. *Motions for a Severance of Defendants on the Ground of Prejudicial Joinder*

Motions for severance may request a separate trial for the defendant notwithstanding the technically proper joinder of co-defendants in the charging paper. A severance may be granted if, for any reason, the defendant will suffer prejudice as a result of being tried jointly with the co-defendant(s). *See, e.g., Chartier v. State*, 124 Nev. 760, 191 P.3d 1182 (2008); *Rollerson v. United States*, 127 A.3d 1220 (D.C. 2015).

A cardinal problem here, as with the required showing of prejudice generally, is that at the time of the hearing on a pretrial motion for severance, most of what will occur at trial remains largely speculative. After trial has begun and if prejudice develops, a motion for mistrial and severance may be made; but by this time the judge has an interest in not having wasted the court hours already invested, and s/he will be particularly loth to grant the motion. Counsel can sometimes turn these several related problems to advantage, however. If, on a pretrial motion, counsel can convince the court that the case is one in which trial problems may arise depending on the nature of the prosecutor's proof, the court will frequently ask the prosecutor what the proof is going to be – for example, whether a co-defendant's confession will be used and whether it will incriminate the defendant. Motions for severance, therefore, have considerable discovery potential and may result in the disclosure of advance information about the prosecution evidence that counsel could not obtain by regular discovery procedures.

The most common bases for seeking severance are the following:

23.9.1. *Severance on the Basis of a Co-defendant's Confession Implicating the Defendant*

In *Bruton v. United States*, 391 U.S. 123 (1968), the Court held that the admission at a joint trial of a co-defendant's confession which incriminated the defendant violated the defendant's Sixth Amendment right of confrontation despite clear instructions to the jury limiting the use of the confession to its maker. Even in the situation known as "interlocking confessions," in which the defendant and co-defendant both confessed and their incriminating statements support each other, the *Bruton* rule prohibits the introduction at a joint trial of a co-defendant's statement that incriminates the defendant. *Cruz v. New York*, 481 U.S. 186 (1987) (rejecting the plurality opinion in *Parker v. Randolph*, 442 U.S. 62 (1979)), and adopting the approach espoused by Justice Blackmun's concurring opinion in *Parker*).

The *Bruton* rule is limited to co-defendants' statements incriminating the defendant, and therefore a co-defendant's confession can be introduced at a joint trial "with a proper limiting instruction when . . . the confession is redacted to eliminate not only the defendant's name, but any reference to her existence" (*Richardson v. Marsh*, 481 U.S. 200, 211 (1987)). *See also Gray v. Maryland*, 523 U.S. 185, 192-93 (1998) (addressing "a question that *Richardson* left open" and holding that "*Bruton's* protective rule" fully applies when

the ostensible “redaction [of the co-defendant’s confession] . . . replaces a defendant’s name with an obvious indication of deletion, such as a blank space, the word ‘deleted,’ or a similar symbol,” with the result that “the jury will often realize that the confession refers specifically to the defendant”); *Washington v. Secretary, Pennsylvania Dep’t of Corrections*, 801 F.3d 160, 162, 163, 167 (3d Cir. 2015) (“admission into evidence of a confession by a non-testifying codefendant that redacted James Washington’s name and replaced it with . . . generic terms describing Washington and his role in the charged crimes” violated the Confrontation Clause because “there were two obvious alterations that notified the jury that Washington’s name was deleted”); *United States v. Taylor*, 745 F.3d 15, 29-30 (2d Cir. 2014) (redaction of the co-defendants’ names from Taylor’s statement failed to overcome the Confrontation Clause problem because the resulting “stilted circumlocutions” and the retention of the name of the co-perpetrator who testified for the prosecution would have made it “obvious [to the jury] that names have been pruned from the text” and “the choice of implied identity is narrow” since “[t]he unnamed persons correspond by number (two) and by role to the pair of co-defendants” on trial with Taylor); *Eley v. Erickson*, 712 F.3d 837, 854-62 (3d Cir. 2013) (the trial court violated the Confrontation Clause by denying severance and allowing the admission of a jailhouse informant’s account that a non-testifying co-defendant confessed to committing the charged crime with “‘other two’” individuals, which the jury doubtless would have understood to refer to Eley and another co-defendant). The *Bruton* rule is limited to cases in which the co-defendant does not testify at trial in a manner that exposes him or her to cross-examination on the confession by the defendant’s attorney. *Nelson v. O’Neil*, 402 U.S. 622 (1971).

In jury trials, the *Bruton* rule provides a powerful argument in support of a defense motion for a severance in virtually every case in which the prosecution intends to introduce a co-defendant’s statement that incriminates the defendant. Some jurisdictions also apply the *Bruton* rule to bench trials. See, e.g., *State v. M.M.*, 133 Wash. App. 1031, 2006 WL 1731316 (2006) (per curiam). There are decisions to the contrary (e.g., *United States v. Cardenas*, 9 F.3d 1139, 1154-56 (5th Cir. 1993)), but to deny *Bruton*’s protections in bench trials is arguably at odds with the reasoning of *Lee v. Illinois*, 476 U.S. 530 (1986), a bench-trial case. The Court held in *Lee* that the trial judge’s consideration of a non-testifying co-defendant’s confession incriminating the defendant violated the defendant’s Sixth Amendment right of confrontation. See *id.* at 539-46. See also *Crawford v. Washington*, 541 U.S. 36, 58 (2004) (replacing the analytic rubric used in *Lee* and other pre-*Crawford* cases to assess Confrontation Clause claims but explaining that *Lee*’s result was “faithful to the Framers’ understanding” of the requirements of the Confrontation Clause). The *Lee* case is distinguishable from the usual *Bruton* situation because the judge in *Lee* not only admitted the co-defendant’s confession into evidence but considered it as substantive evidence against the defendant (see § 36.5.2 *infra*), whereas typically a judge in a bench trial would profess to compartmentalize his or her mind and not consider a co-defendant’s statement against the defendant. The *Lee* decision is instructive, however, because the majority’s opinion contains an extended discussion of the presumptive unreliability and harmfulness of co-defendants’ confessions even in the context of a bench trial. See *Lee, supra*, 476 U.S. at 541-46 (the “truthfinding function of the Confrontation Clause is

uniquely threatened when an accomplice’s confession is sought to be introduced against a criminal defendant without the benefit of cross-examination” (*id.* at 541)). See also *Crawford v. Washington*, *supra*, 541 U.S. at 64-65 (explaining, in the context of a jury trial, that cross-examination is essential to test the reliability of a “potential suspect[’s]” statement that inculpatates the accused); *Lilly v. Virginia*, 527 U.S. 116, 131 (1999) (plurality opinion) (“we have over the years ‘spoken with one voice in declaring presumptively unreliable accomplices’ confessions that incriminate defendants” (quoting *Lee v. Illinois*, *supra*, 476 U.S. at 541)); *Williamson v. United States*, 512 U.S. 594, 601 (1994). The *Lee* Court’s reasoning provides support for the conclusion that judicial self-control is not an adequate substitute for the *Bruton* rule in bench trials; and *Crawford* adds (albeit in connection with a different aspect of judicial self-control) a strong admonition that it would violate the Constitution’s “intended constraint on judicial discretion” (*Crawford v. Washington*, *supra*, 541 U.S. at 76) to rely upon individual judges’ subjective willingness and ability to protect accused persons as a substitute for “the constitutionally prescribed method of assessing reliability” (*id.* at 62) through confrontation and cross-examination. See *id.*: (“The Framers . . . knew that judges, like other government officers, could not always be trusted to safeguard the rights of the people; the likes of the dread Lord Jeffreys were not yet too distant a memory. They were loath to leave too much discretion in judicial hands.”). Caselaw supporting the general proposition that judges should avoid engaging in mental gymnastics in lieu of objective procedural precautions is discussed in § 22.5 *supra*. In any event, in the present state of the law – with no authoritative ruling or even hint by the Supreme Court of the United States that the *Bruton* rule does *not* apply to bench trials – counsel can and should argue that a joint bench trial in which a co-defendant’s confession may be offered into evidence presents a significant risk of running into reversible constitutional error, and that this risk alone is a sufficient reason for granting a severance of defendants in such a bench trial.

23.9.2. Severance on the Basis of the Defendant’s Need To Call the Co-defendant as a Witness

In some jurisdictions, a statute or court rule or caselaw provides a basis for severance in those cases in which the defense can show that a co-defendant’s testimony would be favorable to the defendant. See, e.g., *United States v. Cobb*, 185 F.3d 1193, 1195 (11th Cir. 1999) (“the district court should have granted Stephen Cobb’s motion to sever the trial so his brother and co-defendant, Jerry Cobb, could provide exculpatory testimony”); *Rollerson v. United States*, 127 A.3d 1220, 1226-30 (D.C. 2015). The theory underlying this doctrine is that in a joint trial, the co-defendant could elect to invoke his or her Fifth Amendment Privilege not to take the witness stand, and therefore the joint trial would prejudice the defendant by depriving him or her of a witness with exculpatory testimony. If the cases are severed and the co-defendant’s case is tried before the defendant’s, then the co-defendant is free to testify at the defendant’s trial. (If the co-defendant is acquitted at his or her own trial, s/he can also be subpoenaed and compelled to testify; if s/he is convicted, his or her Fifth Amendment Privilege certainly continues until s/he is sentenced and probably also continues throughout the pendency of his or her appeal, but s/he may elect to waive it in order to testify on the defendant’s behalf.)

Typically, the applicable standard requires that the defense show both that the co-defendant has exculpatory testimony to offer on the defendant's behalf and that s/he is willing to testify for the defendant if the cases are severed. This showing is ordinarily made through an affidavit by counsel or the defense investigator affirming that s/he has spoken with the co-defendant, recounting the substance of the co-defendant's exculpatory testimony (in as little detail as possible, to avoid giving discovery to the prosecution), and relating the co-defendant's willingness to testify if the cases are severed and his or her trial is held first.

Although decisions recognizing this ground for severance are usually based on a statute, rule of court, or state court's supervisory powers, counsel can argue that the right to call the co-defendant as a witness – and whatever procedures such as severance are necessary to bring that about – are grounded in the Sixth Amendment rights to compulsory process and to present defensive evidence (see § 18.9.2.4 *supra*; § 39.1 *infra*; *Washington v. Texas*, 388 U.S. 14 (1967)), the Fourteenth Amendment Due Process right to a fair trial (see *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006)), and cognate state constitutional guarantees. And because, in most jurisdictions, the prosecution could secure the testimony of the co-defendant *against* the defendant, if it were incriminating, by granting the co-defendant immunity from prosecution, the principle of *Wardius v. Oregon*, 412 U.S. 470 (1973), discussed in § 18.9.2.7 *supra*, strongly suggests that a severance sought by the defendant in order to obtain the same co-defendant's exculpatory testimony is constitutionally required in order to maintain “the balance of forces between the accused and his accuser” (412 U.S. at 474).

23.9.3. Severance on the Basis of the Defendants' Conflicting and Irreconcilable Defenses

State law frequently affords a basis for severance on the ground that the defense which a co-defendant intends to offer irreconcilably conflicts with the defense that the defendant intends to offer. The theory underlying this ground for severance is that the benefits of judicial economy which justify a joint trial do not outweigh the concrete prejudice that the defendant suffers when a co-defendant essentially proves the case for the prosecution by rebutting the defendant's witnesses with a conflicting version of the events.

Typically, the applicable caselaw imposes a stringent standard that a defendant must meet in order to obtain severance on this ground. The cases may require, for example, that counsel show that the defenses of the defendant and the co-defendant are directly conflicting and not merely inconsistent or that the conflicts are such that a trier of fact could conclude, solely on the basis of the conflicts, that the defendant is guilty. Compare *United States v. Mayfield*, 189 F.3d 895, 897, 900 (9th Cir. 1999) (“Mayfield argues that the district court abused its discretion by refusing to sever the trials despite Gilbert's mutually exclusive defense and prejudicial evidence that was improperly elicited by Gilbert's counsel. Although the district court's initial denial of Mayfield's severance motion was understandable, based on pretrial representations made by the government about the evidence that would be admitted, the district court abused its discretion when at trial it gave Gilbert's counsel free rein to

introduce evidence against Mayfield and act as a second prosecutor. Gilbert's counsel's trial tactics necessitated severance or some alternative means of mitigating the substantial risk of prejudice.”; “Gilbert's counsel used every opportunity to introduce impermissible evidence against Mayfield, and her closing argument barely even addressed the government's evidence against her client and instead focused on convincing the jury that Mayfield was the guilty party, not her client. . . . It is beyond dispute that, if the jury accepted Gilbert's defense, which was that Mayfield was the drug ringleader who had control over the drugs, it necessarily had to convict Mayfield.”), *with Zafiro v. United States*, 506 U.S. 534, 538-41 (1993) (“the District Court did not abuse its discretion in denying petitioners' motion to sever” under FED. RULE CRIM. PRO. 14 based on a claim of “mutually antagonistic defenses”; “Rule 14 leaves the determination of risk of prejudice and any remedy that may be necessary to the sound discretion of the district courts” and “petitioners have not shown that their joint trial subjected them to any legally cognizable prejudice”).

23.9.4. Severance on the Basis of the Disparity or Dissimilarity of the Evidence Against the Defendants

State law may also provide a basis for severance when the evidence against the co-defendant is much stronger than the evidence against the defendant, and the specter is thereby raised that the defendant will be found guilty by association. “It is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together.” *Krulewitch v. United States*, 336 U.S. 440, 454 (1949) (concurring opinion of Justice Jackson). Usually, state law requires that the disparity of the evidence be substantial.

Although this doctrine affords a basis for severance in jury trials, it would probably be rejected as a ground for severance in a bench trial. Most judges would deny the notion that they are susceptible to being swayed by guilt-by-association. However, even in a bench trial, counsel may be able to secure severance when the evidence is not only disparate but includes items inadmissible against the defendant, admissible against the co-defendant, and incriminating as to the defendant. Although the *Bruton* rule described in § 23.9.1 *supra* deals exclusively with co-defendants' confessions that incriminate the defendant, the logic underlying that rule calls for severance also in this situation. *See, e.g., Zafiro v. United States*, 506 U.S. 534, 539 (1993) (dictum) (explaining that one of the types of prejudice that can justify severance under FED. RULE CRIM. PRO. 8(b) is when there is “[e]vidence that is probative of a defendant's guilt but technically admissible only against a codefendant,” and citing *Bruton* as support). And § 23.9.1 makes the argument for the applicability of the *Bruton* principle to bench trials.

23.10. Defense Motions for Consolidation of Defendants

Although rare, there are some cases in which the defendant would benefit by being tried with co-defendants. *See* § 23.7 *supra*. The procedures for consolidation of defendants are the same as those for consolidation of

offenses, described in § 23.5 *supra*. Usually, if the prosecutor has decided for strategic reasons to try the co-defendants separately, s/he will resist the defendant's motion for consolidation. In arguing the motion to the court, defense counsel should both point to whatever specific prejudice the defendant is suffering as a result of being tried separately and also advert to any economies that would be effected by a joint trial, noting previous cases in which the prosecutor has elected to conduct a single trial of multiple defendants in similar circumstances, apparently in recognition of the force of those economies.

Chapter 24

Suppression Hearings

24.1. *The Timing of the Suppression Hearing*

Suppression motions practice varies considerably among jurisdictions. Some States require motions to suppress to be made in writing and filed by a specified pretrial deadline (see § 17.7 *supra*); other States allow the motions to be made in writing or orally at trial.

In jurisdictions that require pretrial motions, the hearing on the motion may, depending upon the jurisdiction, be conducted in advance of trial or at the trial. In some jurisdictions, evidentiary hearings on motions to suppress are routinely held days or even weeks before the trial. (Such an early scheduling of suppression hearings is particularly advantageous to the defense, since it enhances the usefulness of the hearings for discovery. See §§ 24.2, 24.4.2 *infra*.) In other jurisdictions the suppression hearing is commonly held immediately before trial – just prior to the selection and swearing of the jurors in a jury trial – and, depending upon local practice, defense counsel may or may not find it easy to obtain a continuance of the trial for the purpose of getting a transcript of the suppression hearing. In still other jurisdictions the suppression hearing (frequently called a *voir dire*) takes place in the course of trial, at the time when the first witness is asked about the challenged evidence.

The trial-objection procedure, which has fallen into disfavor in most jurisdictions as pretrial motions practice has developed, permits the defendant to object to suppressible evidence for the first time at trial. A *voir dire* hearing is then held on the objection. In jury trials, the jury is removed while the hearing proceeds, with the judge sitting as the trier of whatever issues of fact are dispositive of the defendant's suppression claims. To be sure, even in jurisdictions that require pretrial motions, the defense can request the suppression of evidence for the first time at trial in exceptional circumstances – for example, when defense counsel could not reasonably have known of the challenged evidence or the factual or legal grounds for challenging it prior to trial. See § 24.8 *infra*. Similarly, in these pretrial-motion jurisdictions the defense can renew a previously denied suppression motion at trial on the basis of newly discovered evidence. See *id.* What distinguishes the trial-objection jurisdictions is that objections to suppressible evidence are routinely entertained, with no need to show special circumstances, at the time when the evidence is presented by the prosecution in its case-in-chief at trial. But the objection must be made when the first prosecution witness begins to testify about the suppressible evidence; an objection made later in the trial will be held untimely.

24.2. *Defense Goals and Strategies at a Suppression Hearing*

Suppression hearings may be used by the defense for several different purposes. To put a hearing to the most effective use, defense counsel needs to make a preliminary determination of which purposes s/he should be pursuing in this particular case. Often, a clear-cut choice between one purpose

and another will be necessary, because the purposes or important means for achieving them are inconsistent. This is ordinarily not a choice that can be put off until the time of the evidentiary hearing: Both the content of the suppression motion and the nature of counsel's pre-hearing preparation will vary considerably depending upon counsel's choice of goals and consequent strategies for the hearing.

The first and most obvious potential goal is to win the hearing and secure suppression of whatever evidence is challenged. Victory in a suppression hearing will frequently result in the prosecutor's having to dismiss the entire case against the defendant. For example, suppression of the drugs and all police testimony relating to their seizure in a drug possession case usually leaves the prosecutor without any evidence of the defendant's alleged wrongdoing. In many cases, suppression of eyewitness identification testimony or of a confession deprives the prosecution of the only available evidence of the defendant's identity as the perpetrator of the offense. Even when a defense victory at the suppression hearing does not terminate the prosecution, the suppression ruling may create major gaps in the prosecutor's proof and thereby substantially improve the chances for an acquittal at trial.

An alternative defense goal at the suppression hearing is to obtain discovery of the prosecution's theory of the case and supporting evidence on the issue of guilt. Depending upon which claims are litigated and the way in which defense counsel shapes the hearing, the prosecutor's evidence at the suppression hearing may provide a full preview of the prosecution's case-in-chief at trial. For example, if the suppression motion challenges the legality of the defendant's arrest on the ground that the arresting officers lacked probable cause, the prosecutor may be obliged to present extensive testimony regarding the facts of the crime known to the police and the facts that led the police to believe that the defendant was the perpetrator. In addition to obtaining this disclosure of the prosecution's evidence, counsel may also be able to obtain discovery of documents that would not otherwise be available until mid-trial: In some jurisdictions the prosecution's presentation of a witness in a suppression hearing activates a prosecutorial duty to turn over to the defense any prior written statements of that witness or documents prepared by that witness. *See, e.g.*, N.Y. CRIM. PRO. LAW § 240.44. Beyond this discovery of the content of the prosecution's case, defense counsel also gains a valuable opportunity to watch prosecution witnesses on the stand and acquire insights into their vulnerability to particular approaches on cross-examination. Indeed, it is often possible to use a suppression hearing to test risky lines of cross-examination in order to determine what questions can be safely used at trial. In jury trials and in bench trials in jurisdictions with liberal recusal rules permitting the defense to obtain a different judge for the trial (see § 24.8 *infra*), the ultimate trier of fact will never hear the results of defense counsel's experimentation. And even when the judge presiding at the motion hearing does sit at the defendant's bench trial, counsel can use experimentation in the motion hearing to decide what evidence should be put into the trial record. Naturally, these discovery benefits will be enhanced in jurisdictions where the suppression hearing is held in advance of trial. However, even discovery procured in a mid-trial hearing can prove immensely

useful in determining what additional cross-examination would be fruitful or dangerous and in deciding other questions of trial tactics, such as whether to put the defendant on the stand or to present other defense witnesses.

A third potential goal of the suppression hearing is to extract concessions from prosecution witnesses on the record, for defense counsel's use in examining and impeaching those witnesses at trial. Often prosecutors fail to coach their witnesses prior to the suppression hearing with the same care that they employ in preparing for trial, and it will be possible to lure an unwary prosecution witness into conceding affirmatively helpful points. At the very least, counsel can circumscribe the damage that any witness will be able to do at trial, by locking him or her into a version of the facts that s/he cannot alter without being exposed to impeachment by the inconsistent testimony that s/he gave at the hearing. See §§ 24.4.3, 37.4 *infra*. Finally, the mere fact that the witness is telling his or her version of the facts twice – once at the suppression hearing and again at trial – often proves beneficial: Particularly when the suppression hearing takes place some time before trial, witnesses will change details in their stories and can then be discredited by confronting them with the discrepancies. All of these means of controlling or undercutting prosecution witnesses' trial testimony will be greatly enhanced by obtaining a transcript of the suppression hearing to use for impeachment at trial. See § 24.8 *infra*.

There are several other benefits that the defense may gain from litigating suppression motions. The most important ones are catalogued in the concluding paragraph of § 17.3 *supra*. But while these benefits should be considered as factors in counsel's initial decision whether or not to file a suppression motion and bring it on for evidentiary hearing – together with the countervailing considerations of cost and risk that such a motion may entail (see § 17.9 *supra*) – they will seldom play more than a minor role in shaping counsel's tactics and techniques for conducting the hearing. Counsel's primary determinants in preparing for and handling an evidentiary suppression hearing will almost always be strategies for pursuing one or more of the three key goals of getting prosecution evidence suppressed, obtaining discovery, and/or creating impeachment material for use at trial. When these three goals prove inconsistent, counsel will have to choose among them. See § 24.4 *infra*.

24.3. Procedural Aspects of the Suppression Hearing

24.3.1. The Defense Response When a Prosecution or Defense Witness Fails To Appear

Frequently, the prosecutor will announce that an essential prosecution witness has failed to appear and that the prosecution is therefore seeking a continuance of the suppression hearing. Police witnesses are particularly common no-shows. If the hearing is scheduled for the day of trial and the prosecutor is requesting a continuance of the trial as well, counsel should invoke any applicable speedy-trial sanctions, such as dismissal of the case or release of a defendant who is being held on bond. See § 28.4 *infra*. Even if the suppression hearing is scheduled days or weeks before trial, counsel should ask

for sanctions as a result of the prosecutor's unwillingness to proceed: If the prosecutor or the judge remarks that the hearing can be re-scheduled without delaying the trial, counsel should respond that sanctions are nonetheless appropriate to deter prosecutors from cavalierly ignoring suppression hearing dates, to the detriment of the court's calendar and discouragement of defense witnesses. The apt sanction, counsel should insist, is a judicial ruling that the motion has been conceded (in essence, forfeited) by the prosecution. *See, e.g., People v. Goggans*, 123 A.D.2d 643, 506 N.Y.S.2d 908 (N.Y. App. Div., 2d Dep't 1986). If the judge seems dubious about the appropriateness of this remedy, counsel should point out that it is the closest possible analogue to the trial-date sanction of dismissal when the prosecutor declines to proceed and is the only effective deterrent of prosecutorial neglect. For discussion of *Goggans* and of remedies for prosecutorial unreadiness, see § 28.4.

Occasionally, prosecutors will attempt to get around a witness's failure to appear by going forward with hearsay testimony to cover the matters that the missing witness would have recounted. Although hearsay testimony usually is admissible in suppression hearings, counsel should point out the inherent unreliability of second-hand information that is insulated from testing by cross-examination and should argue accordingly that the hearsay testimony is not sufficient to satisfy the prosecutor's burden of persuasion at the hearing. See §§ 24.3.4, 24.3.5 *infra*.

A trickier problem for defense counsel arises when a missing prosecution witness is crucial for the *defendant's* case at the hearing and the prosecutor elects to go forward by presenting other witnesses who participated in the same events or observed them. Defense counsel is well advised to forestall this situation by subpoenaing all prosecution witnesses whom s/he may need, including police and other law enforcement personnel. See § 29.4.1 *infra*. If counsel has failed to subpoena a prosecution witness who is crucial for the defense case, counsel will need to seek a continuance, and that continuance will probably be charged to the defense for speedy-trial purposes. See §§ 28.5.2, 28.5.4 *infra*. If counsel did subpoena the prosecution witness, then counsel should explain that the witness is essential to the defense presentation and, in requesting a continuance, should ask that the continuance be charged to the prosecution – or, as a fall-back position, that the continuance be charged jointly to defense and prosecution. The prosecutor will undoubtedly argue that, because the prosecution is willing to go forward, the continuance should be charged solely to the defense; but counsel's surrebuttal is that any delay resulting from the failure of a witness to obey a court subpoena should be charged to the party with whom the witness is allied and which is best able to control the witness. If the witness is a law enforcement agent, counsel should point out that delays resulting from the dilatoriness or negligence of such personnel are ordinarily counted against the prosecution in the speedy-trial calculus, even when the prosecutors themselves have not been derelict. *See Doggett v. United States*, 505 U.S. 647, 652-53 (1992); *United States v. Velasquez*, 749 F.3d 167, 175-77, 180-81 (3d Cir. 2014).

If the missing witness is needed by the defense solely to impeach another prosecution witness in the event that the latter witness denies a prior inconsistent statement, defense counsel does not necessarily have to request a continuance.

Counsel has the option of alerting the judge to the possible need for the witness and then offering to proceed without the witness, on the understanding that counsel will be given the opportunity to complete the hearing by calling the missing witness at a later date if necessary. As counsel can point out to the judge, it may never be necessary to present the missing witness, because the testifying witness may admit to making the impeaching statement. See § 37.4 *infra*. In any such colloquies with the judge, defense counsel must be careful to guard against alerting the prosecutor to the nature of the anticipated impeachment; if the court wishes a detailed proffer, counsel should insist that that proffer be made *ex parte* to avoid disclosure of defense strategies to the prosecution.

If the missing witness is solely a foundational witness (for example, a police communications division officer whose testimony will establish the standard police procedures for recording radio communications), defense counsel should consider offering to go forward if the prosecutor will stipulate to the foundational facts that counsel wishes to adduce. The stipulation should, in most cases, suffice to fill counsel's needs. It is usually advisable to make the stipulation offer in open court. Then, if the prosecutor refuses to stipulate and defense counsel is forced to ask for a continuance to obtain the missing foundational witness, the judge will know to attribute the disruption of the court's calendar to the prosecutor's obstructionism and will be more disposed to grant the continuance. Or the judge may intervene and put pressure on the prosecutor to agree to the stipulation.

Whenever defense counsel does need to seek a continuance of a suppression hearing, counsel should be ready to argue both the factual basis for the request and the defendant's legal right to obtain a continuance in order to prepare adequately for the hearing. See § 28.3 *infra*. In requesting the continuance, however, counsel should again be alert to the danger of revealing defense strategies to the prosecution. If the continuance is necessitated by a defense witness's failure to appear and if revelation of the witness's name might lead the police to interview the witness before the next hearing, counsel should simply omit the witness's name or offer to reveal it to the judge *ex parte*.

24.3.2. *Waiving the Defendant's Presence in Suppression Hearings That Involve an Identification Suppression Claim*

Counsel litigating an identification suppression claim should consider waiving the client's presence during the testimony of all witnesses whose eyewitness identifications s/he is challenging. This waiver is strongly desirable from the defense perspective for two reasons.

First, the eyewitness's observation of the defendant during the suppression hearing will aggravate the effect of prior suggestive police procedures and may ensure the witness's identification of the defendant at trial. Not only will the witness have seen the defendant for an additional, prolonged period of time, so that s/he will be more likely to feel and testify persuasively at trial that the defendant "looks familiar" but also the witness will have seen the defendant in a highly suggestive setting. (Unlike a lineup, the setting of the

suppression hearing makes it quite obvious which person in the courtroom has been charged as the culprit.) Second, the presence of the defendant at the suppression hearing frustrates any hope of obtaining from the witness an unvarnished description of the perpetrator for use in arguing the suppression motion: The witness will simply describe the individual s/he is observing at counsel table, seated next to defense counsel.

In several jurisdictions the courts have recognized the accused's right to waive his or her presence at an identification suppression hearing, relying on either or both of two rationales: (i) that the constitutional protections against suggestive pretrial identification procedures entitle the defense to avoid an additional unnecessary and suggestive encounter between the accused and the eyewitness, and (ii) that the accused's right to be present during all court hearings is a personal, waivable right because it exists solely for the accused's protection and not for the protection of any governmental interests. *See, e.g., People v. Huggler*, 50 A.D.2d 471, 473-74, 378 N.Y.S.2d 493, 496-97 (N.Y. App. Div., 3d Dep't 1976); *Singletary v. United States*, 383 A.2d 1064, 1070 (D.C. 1978).

The court will usually insist that counsel demonstrate on the record that the defendant's waiver is a knowing and voluntary relinquishment of the right to be present at the hearing. Counsel can make the requisite showing either: (i) by presenting a written waiver signed by the defendant, which sets forth the defendant's understanding of his or her right to be present, the reasons for waiving the right to be present, and the defendant's desire to waive the right; or (ii) by bringing the defendant to the hearing solely for the purpose of responding to the court's inquiry into the voluntariness of the waiver and then sending the defendant out of the courtroom before any eyewitness enters.

Whether the defendant's presence should be waived for all or only part of the hearing depends upon the roster of witnesses who will testify at the hearing. If most of the witnesses are eyewitnesses to the crime, then the defendant's presence should be waived during the entire hearing and the defendant should be kept away from any parts of the courthouse where s/he might encounter or be observed by any of the eyewitnesses. On the other hand, if there is a significant portion of the hearing that the defendant can safely attend – and naturally also if the defendant will take the stand at the hearing – then counsel should waive the defendant's presence only during the portions of the hearing when eyewitnesses will be in or around the courtroom. Counsel should make arrangements for the defendant to sit during those portions of the hearing in a location where s/he is not likely to be observed by any of the eyewitnesses and to enter and leave the courtroom by a route that will not lead to any encounters with the eyewitnesses.

24.3.3. Enforcing the “Rule on Witnesses” in a Suppression Hearing

Throughout a trial both parties have the right to insist that the opposing witnesses be excluded from the courtroom, in order to prevent them from hearing information that might affect their testimony. See § 34.6 *infra*. This “rule on witnesses” should similarly be invoked by the defense

at a suppression hearing. At the beginning of the hearing, defense counsel should request that the courtroom be cleared of any prosecution witnesses who might testify either at the suppression hearing or at the trial. Counsel also must be alert throughout the hearing to the possibility of a prosecution witness entering and remaining in the courtroom. If, notwithstanding counsel's precautions, a prosecution witness does overhear another witness's testimony, counsel should request that the court impose the only sanction that will both remedy the violation and deter future misconduct by prosecution witnesses: exclusion of the witness's testimony at the suppression hearing and trial.

As at trial the operation of the rule on witnesses does not bar the defendant from the courtroom. S/he has a right to be present while all testimony in the case is taken. See § 34.1 *infra*. For discussion of the circumstances under which the defendant should waive his or her right to be present at a suppression hearing, see § 24.3.2 *supra*.

24.3.4. *Who Proceeds First in the Suppression Hearing: The Burdens of Production and Persuasion*

Even though the suppression motion is a defense motion, it is customary in many jurisdictions for the prosecution to proceed first and to present the testimony of all police officers and other witnesses whom the prosecution intends to call. As a result, the defense has the distinct advantage of being able to cross-examine (and thereby lead and control) the officers and other prosecution witnesses. In some jurisdictions, however, the defense is expected to proceed first, at least on some suppression issues. In these jurisdictions, defense counsel will usually want to invoke the constitutional caselaw dealing with burdens of production and persuasion, described in this section, to argue that the prosecutor should be required to proceed first. On rare occasions, the defense may reap some benefit from proceeding first and calling the police officers as defense witnesses – for example, when: (i) the officers are known to be unprepared and the prosecutor is an experienced and able examiner who can effectively shape their testimony on direct; or (ii) the rules of evidence in the particular jurisdiction permit parties to lead and impeach their own witnesses; or (iii) the judge will permit the officers and other prosecution witnesses to be called as hostile witnesses (see § 39.29 *infra*). But in most jurisdictions the greater latitude allowed for leading and impeaching witnesses on cross-examination makes it wise for defense counsel to force the prosecutor to proceed first whenever possible.

The allocation of the burden of production (also known as the burden of going forward) and of the burden of persuasion (also known as the burden of proof) varies with the constitutional issue being litigated:

(i) *Search and seizure issues.* Federal constitutional law permits the burden of going forward to be imposed on the defense (see *Rawlings v. Kentucky*, 448 U.S. 98, 104-05 (1980)), but state statutes, court rules, or state constitutional caselaw may elect to impose that burden on the prosecution instead (see, e.g., *State v. Boyd*, 275 Kan. 271, 273, 64 P.3d 419, 422 (2003); *People v. Dodt*, 61 N.Y.2d 408, 415, 474 N.Y.S.2d 441, 445, 462 N.E.2d 1159, 1163 (1984)).

In jurisdictions where the defense does bear the burden of going forward on Fourth Amendment issues, that burden is easily satisfied whenever the search or seizure was made without a warrant. Once the defense has shown that a search or seizure was conducted and that the police lacked a warrant authorizing it, the Fourth Amendment shifts the burden of persuasion to the prosecution to prove that the warrantless search or seizure falls within one of the established exceptions to the warrant requirement. *Riley v. California*, 134 S. Ct. 2473, 2482 (2014) (“[i]n the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement”); *McDonald v. United States*, 335 U.S. 451, 456 (1948); *United States v. Jeffers*, 342 U.S. 48, 51 (1951); cf. *Vale v. Louisiana*, 399 U.S. 30, 34 (1970); *Schneekloth v. Bustamonte*, 412 U.S. 218, 219, 222 (1973) (dictum); *Florida v. Royer*, 460 U.S. 491, 497 (1983) (plurality opinion); see § 25.2.1 *infra*. When the police did possess a warrant authorizing the search or seizure, federal constitutional law would appear to permit the imposition of the burden of persuasion of the invalidity of the warrant or the search upon the defense (see, e.g., *Malcolm v. United States*, 332 A.2d 917, 918-19 (D.C. 1975)), but some States impose the burden of persuasion upon the prosecution even in these cases (see, e.g., *Graddy v. State*, 277 Ga. 765, 596 S.E.2d 109 (2004); *State v. Heald*, 314 A.2d 820, 828-29 (Me. 1973); *State v. Martin*, 145 N.H. 362, 364, 761 A.2d 516, 518 (2000)). As for the quantum of evidence that the prosecution must present to satisfy its burden, on most issues the federal constitution requires nothing more than a preponderance of the evidence (*United States v. Matlock*, 415 U.S. 164, 177, 178 n.14 (1974); cf. *Colorado v. Connelly*, 479 U.S. 157, 167-69 (1986); *Nix v. Williams*, 467 U.S. 431, 444 n.5 (1984); and see *Bourjaily v. United States*, 483 U.S. 171, 175-76 (1987) (dictum)), although “the States are free, pursuant to their own law, to adopt a higher standard” with respect to the prosecutorial burden (*Lego v. Twomey*, 404 U.S. 477, 489 (1972)). Some States have, indeed, imposed upon the prosecution the higher standard of clear-and-convincing evidence in proving certain specific exceptions to the warrant requirement. See, e.g., *Stone v. State*, 348 Ark. 661, 669, 74 S.W.3d 591, 596 (2002) (consent searches); *Blair v. Pitches*, 5 Cal. 3d 258, 274, 486 P.2d 1242, 1253, 96 Cal. Rptr. 42, 53 (1971) (consent searches); *People v. Zimmerman*, 101 A.D.2d 294, 475 N.Y.S.2d 127 (N.Y. App. Div., 2d Dep’t 1984) (consent searches); *People v. Dorney*, 17 Ill. App. 3d 785, 788, 308 N.E.2d 646, 648 (1974) (abandonment); *State v. Ibarra*, 953 S.W.2d 242, 245 (Tex. Crim. App. 1997) (consent searches). In jurisdictions where the defense is assigned a burden of persuasion in warrant cases, the applicable standard is a preponderance of the evidence. See, e.g., *State v. Edwards*, 98 Wis. 2d 367, 297 N.W.2d 12 (1980).

(ii) *Challenges to the admissibility of a confession.* When the issue is the voluntariness of a confession or other incriminating statement by the defendant, the prosecution bears the burden of persuasion. *Lego v. Twomey*, *supra*, 404 U.S. at 489 (dictum); see also *United States v. Raddatz*, 447 U.S. 667, 678 (1980); *Missouri v. Seibert*, 542 U.S. 600, 608 n.1 (2004) (plurality opinion). The quantum of proof required as a matter of federal constitutional law is “a preponderance of the evidence” (*Lego v. Twomey*, *supra*, 404 U.S. at 489; accord, *Missouri v. Seibert*, *supra*, 542 U.S. at 608 n.1 (plurality opinion)), although several States have, “pursuant to their own law, . . . adopt[ed] [the] . . . higher standard” (*Lego v. Twomey*, *supra*, 404 U.S. at 489) of proof beyond a reasonable doubt

(see, e.g., *People v. Jiminez*, 21 Cal. 3d 595, 580 P.2d 672, 147 Cal. Rptr. 172 (1978), partially overruled on other grounds, *People v. Cahill*, 5 Cal. 4th 478, 853 P.2d 1037, 20 Cal. Rptr.2d 582 (1993); *State v. Carter*, 412 A.2d 56, 60 (Me. 1980); *Lowe v. State*, 800 So. 2d 552, 554-55 (Miss. App. 2001)). Although the jurisdictions vary with respect to which party bears the burden of production in a confession suppression hearing, the Supreme Court's imposition of the burden of persuasion on the prosecution and the fact that it is the prosecutor who is proffering the evidence support the argument that the proper procedure is to place the burden of production on the prosecution. When the issue is a waiver of *Miranda* rights, the prosecution again bears the burden of persuasion (*Miranda v. Arizona*, 384 U.S. 436, 475-76, 479 (1966); see also *Brewer v. Williams*, 430 U.S. 387, 402-04 (1977); *Tague v. Louisiana*, 444 U.S. 469 (1980) (per curiam); *Missouri v. Seibert*, *supra*, 542 U.S. at 608 n.1 (plurality opinion); *J.D.B. v. North Carolina*, 564 U.S. 261, 269-70 (2011)), by a preponderance of the evidence (*Colorado v. Connelly*, *supra*, 479 U.S. at 167-69; *Missouri v. Seibert*, *supra*, 542 U.S. at 608 n.1 (plurality opinion)). Although the *Connelly* opinion states unequivocally that “[w]henver the State bears the burden of proof in a motion to suppress a statement that the defendant claims was obtained in violation of our *Miranda* doctrine, the State need prove waiver only by a preponderance of the evidence” (479 U.S. at 168), it is possible that a heavier burden of proof exists on the separate issue raised by *Edwards v. Arizona*, 451 U.S. 477 (1981), in *Miranda* cases in which “an accused has [once] invoked his right to have counsel present during custodial interrogation” (*id.* at 484). *Edwards* held that an accused person in custody who has “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” (*id.* at 484-85). See also *Smith v. Illinois*, 469 U.S. 91, 95 (1984) (per curiam); *Minnick v. Mississippi*, 498 U.S. 146, 150-56 (1990); *Davis v. United States*, 512 U.S. 452, 458 (1994) (dictum); *Montejo v. Louisiana*, 556 U.S. 778, 794-95 (2009) (dictum); § 26.9.3 *infra*. “The [*Edwards*] rule ensures that any statement made in subsequent interrogation is not the result of coercive pressures. *Edwards* conserves judicial resources which would otherwise be expended in making difficult determinations of voluntariness, and implements the protections of *Miranda* in practical and straightforward terms.” *Minnick v. Mississippi*, *supra*, 498 U.S. at 151. The Supreme Court has repeatedly said that “[t]he merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application” – its capacity to provide ““clear and unequivocal”” guidelines to the law enforcement profession” (*id.*, quoting *Arizona v. Roberson*, 486 U.S. 675, 682 (1988)). Arguably, to preserve the clarity and firmness of “[t]his ‘rigid’ prophylactic rule” (*id.*), embodying an unprecedented “*per se* approach” (*Solem v. Stumes*, 465 U.S. 638, 647 (1984)), the prosecution should be required to show by clear and convincing evidence “once a suspect has invoked the right to counsel, [that] any subsequent conversation . . . was initiated by him” (*id.* at 641). See *Smith v. Illinois*, *supra*, 469 U.S. at 95 n.2; and see, e.g., *State v. Tidwell*, 775 S.W.2d 379, 386 (Tenn. Crim. App. 1989). The question, however, remains an open one. *But see Moore v. Berghuis*, 700 F.3d 882, 888 (6th Cir. 2012), discussed in § 26.9.3 *infra*, reasoning that “[t]he government did not show by a preponderance of the evidence, and the [state] . . . trial court did not clearly find, that Moore, and

not the officer, initiated further conversation” after Moore had invoked his right to counsel under *Edwards*. The Sixth Circuit opinion does not explicitly consider its choice of this quantum of proof or address possible alternatives; and because its “review [of] the district court’s denial of Moore’s petition for a writ of habeas corpus [was restricted by] . . . the standards of review as set forth in the Antiterrorism and Effective Death Penalty Act of 1996” (*Moore v. Berghuis, supra*, 700 F.3d at 886; see § 49.2.3.2 *infra*), its phrasing of the quantum cannot be taken as addressing the applicable burden in non-AEDPA cases.

(iii) *Identification suppression issues*. When the issue is whether the defendant’s right to counsel at a post-arraignment lineup was violated, the prosecution bears the burdens of production and persuasion and must show either that counsel was actually present or that there was a valid waiver of the right to counsel. See, e.g., *United States v. Garner*, 439 F.2d 525, 526-27 (D.C. Cir. 1970). If a violation of the right to counsel is established, then the prosecution cannot elicit an in-court identification unless it shows by clear and convincing evidence that the in-court identification has an independent source. See *United States v. Wade*, 388 U.S. 218, 240 n.31 (1967); *United States ex rel. Whitmore v. Malcolm*, 476 F.2d 363, 365 n.2 (2d Cir. 1973). If the suppression motion challenges eyewitness identification procedures on due process grounds, many jurisdictions require that the defense satisfy an initial burden of showing suggestivity, with the burden then shifting to the State to show by clear and convincing evidence that the identification was nevertheless reliable. See, e.g., *People v. Monroe*, 925 P.2d 767, 774 (Colo. 1996); *People v. McTush*, 81 Ill. 2d 513, 520, 410 N.E.2d 861, 865, 43 Ill. Dec. 727 (1980); *State v. Howe*, 129 N.H. 120, 123, 523 A.2d 94, 96 (1987); *People v. Rahming*, 26 N.Y.2d 411, 417, 259 N.E.2d 727, 731, 311 N.Y.S.2d 292, 297 (1970).

In jurisdictions where the defense is ordinarily expected to proceed first at suppression hearings, defense counsel can insist that the order of procedure be reversed for any issues on which federal constitutional caselaw requires the prosecution to bear the burden of production. (Where the allocation of the burden of production has not yet been resolved by the Supreme Court but has been imposed upon the prosecution by state courts in other jurisdictions, counsel should use the logic of that caselaw to urge the local court to alter its practice.) If defense counsel once succeeds in convincing the court that the Constitution places the burden of production upon the prosecutor on at least one issue, counsel can then argue that the hearing will be too unwieldy if the defense is left to carry the burden of production on other issues. Counsel should point out that the alternation of burdens of production would result in both parties calling the same witnesses to the witness stand and alternating styles of examination depending upon the issue to which each particular question is relevant – a procedure calculated to result in numerous time-consuming objections and rulings.

If the judge is not persuaded and insists that the defense must carry the burden of production on some issues, counsel should request leave to call police officers and any other persons who are allied in interest with the prosecution as hostile witnesses, with the right to ask leading questions on direct examination. See § 39.29 *infra*. (In support of this request, counsel should point out that police

personnel not only have reasons of professional pride and self-advancement for seeking to uphold the legality of arrests, searches, seizures, confessions, and identification procedures in which they have participated but are also subject to potential civil and criminal liability if their conduct in these connections is found to have violated constitutional rights. *See, e.g., Monroe v. Pape*, 365 U.S. 167 (1961) (civil liability under the federal Civil Rights Acts); *Screws v. United States*, 325 U.S. 91 (1945) (criminal liability under the federal Civil Rights Acts); § 3.3.2.4 *supra*; and *see United States v. Price*, 383 U.S. 787, 794 (1966) (criminal liability of private individuals who are “willful participant[s] in joint activity with the State or its agents”).) When the defendant’s burden of production can be satisfied by proving an easily-established threshold fact – for example, that the search was warrantless – counsel should seek a stipulation from the prosecutor conceding the threshold fact and, once the stipulation is made, insist that the prosecutor proceed with his or her witnesses, allowing subsequent opportunity for rebuttal testimony by the defense. As a rule, such requests should be made in open court at the beginning of the hearing so that, if the prosecutor refuses to stipulate, the judge will understand that the prosecution is the party responsible for wasting the court’s time by disputing the indisputable. Counsel should then announce that s/he will present evidence only to the extent necessary to prove the threshold fact, reserving further testimony for rebuttal.

24.3.5. *The Admissibility of Hearsay Testimony in Suppression Hearings*

As a general matter, hearsay is admissible in suppression hearings. *United States v. Matlock*, 415 U.S. 164, 172-77 (1974); *United States v. Raddatz*, 447 U.S. 667, 679 (1980) (dictum). However, there are certain limitations upon the prosecution’s use of hearsay. The defense has a right to confront and cross-examine the prosecution’s witnesses at a suppression hearing (*see, e.g., United States v. Hodge*, 19 F.3d 51, 53 (D.C. Cir. 1994); *United States v. Salsedo*, 447 F. Supp. 1235, 1241 (E.D. Cal. 1979), *vacated on other grounds, United States v. Torres*, 622 F.2d 465 (9th Cir. 1980) (per curiam) (summarized in § 24.3.6 second paragraph *infra*); *People v. Edwards*, 95 N.Y.2d 486, 491, 719 N.Y.S.2d 202, 204-05, 741 N.E.2d 876, 878-79 (2000); *State v. Ehtesham*, 309 S.E.2d 82, 84 (W. Va. 1983)), and a prosecutor cannot use hearsay evidence in such a way as to deprive the defense of meaningful cross-examination of a prosecution witness (*see, e.g., State v. Terrell*, 283 N.W.2d 529, 531 (Minn. 1979) (the prosecution cannot make its case at a suppression hearing merely by submitting a transcript of grand jury testimony to show the lawfulness of a search); *People v. Kaufman*, 457 Mich. 266, 577 N.W.2d 466 (1998) (per curiam) (explaining the Michigan rule that precludes the prosecution from “relying exclusively on preliminary examination transcripts in the conduct of suppression hearings” (*id.* at 273, 577 N.W.2d at 469), and adopting a limited exception for cases in which “the lawyers . . . cho[o]se to have the motion decided on the basis of the preliminary examination transcript” (*id.* at 276, 577 N.W.2d at 471); the court observes that “[c]ertainly, there are cases in which further testimony would be harmful to the defendant’s interests, and that determination is normally reserved for defense counsel” (*id.*))).

A second limitation upon the general rule of admissibility of hearsay is

that the prosecutor's hearsay evidence is subject to exclusion if particularized reasons appear for doubting its reliability. Thus if defense counsel has a good-faith basis for asserting that the out-of-court declarant lacked personal knowledge of the matters s/he reportedly stated or had some bias against the defendant, the prosecutor should be required to produce the declarant for cross-examination by the defense. *See United States v. Matlock, supra*, 415 U.S. at 175-77 (in holding that hearsay evidence was admissible at a suppression hearing, the Court stresses that the witness "harbored no hostility or bias against defendant that might call her statements into question" and that the hearsay statements "were also corroborated by other evidence received at the suppression hearing" and bore "indicia of reliability"). Multiple hearsay can be challenged as particularly unreliable because of the inherent potential for errors and inaccuracies when a statement is relayed between several individuals.

Finally, even if the proffered hearsay evidence is admissible, it may be insufficiently persuasive to meet the prosecutor's burden of proof (see § 24.3.4 *supra*) on a particular suppression issue. *See, e.g., People v. Moses*, 32 A.D.3d 866, 868, 823 N.Y.S.2d 409, 411 (N.Y. App. Div., 2d Dep't 2006) (the prosecution's burden of production at a hearing on a motion to suppress identification testimony as the fruit of an unlawful *Terry* stop was not satisfied by the testimony of a police officer who transported the complainant to the location of the show-up but was not involved in the stop of the defendant, could not testify to the circumstances of the stop, and offered nothing more than a "vague and equivocal hearsay" account of a statement made by the arresting officer which "was inadequate to demonstrate" the validity of the arresting officer's actions in stopping and detaining the defendant and transporting him to the location of the show-up).

24.3.6. *The Defense Right to Disclosure of Prior Statements of Prosecution Witnesses*

In some jurisdictions, statutes or court rules give the defendant the right to obtain from the prosecutor all prior statements of witnesses who testify for the prosecution at the suppression hearing. *See, e.g., FED. RULE CRIM. PRO.* 12(h) and 26.2(g); *United States v. Dockery*, 294 A.2d 158 (1972); *N.Y. CRIM. PRO. LAW* § 240.44. The prosecutor typically is obligated to disclose all written or oral statements in his or her possession or the possession of the police or other governmental agencies. The statutes and rules usually provide that this disclosure must be made after each witness has finished his or her direct examination. As a practical matter, however, counsel can often obtain the prior statements of all prosecution witnesses from the prosecutor at the beginning of the suppression hearing by requesting them at that time in the interest of efficiency. If the prosecutor refuses counsel's request and insists upon the prerogative of turning over the statements only at the technically obligatory time, counsel should inform the judge of this and explain that there may be delays during the hearing while counsel pauses to read the statements turned over by the prosecutor. Mentioning the issue before the hearing commences may lead the judge to lean on the prosecutor to turn over the statements immediately; at the least, it will improve the judge's patience when defense counsel does indeed take time to read the statements during the course of the hearing.

In jurisdictions that do not provide for disclosure by statute or court rule, counsel should nevertheless request all prior statements of each prosecution witness and should assert that the denial of access to these materials is an unconstitutional infringement upon the defendant's right to cross-examine. *Cf. United States v. Salsedo*, 477 F. Supp. 1235 (E.D. Cal. 1979), *vacated*, *United States v. Torres*, 622 F.2d 465 (9th Cir. 1980) (per curiam) (the district court relied on a federal statute to order the government to "deliver to the defendants all documents in its possession relating to the issue of probable cause for the stop, seizure pursuant to the stop, and the fruits of the stop and seizure" (*id.* at 1244); the district court explained that "[d]epriving the defendants of the government's records as to what the agents knew at the time of the stop makes meaningful cross-examination almost impossible," and the "deni[al] [of] the right of effective cross-examination . . . is . . . constitutional error of the first magnitude" (*id.* at 1241, quoting *Davis v. Alaska*, 415 U.S. 308, 318 (1974)); on appeal by the government, the court of appeals vacates the district court's order because "[a]fter the filing of the district court opinion, the government delivered to the defendants the notes requested at the suppression hearing," withholding only "the surveillance logs," and then, "[a]t oral argument, the government stated: (1) it would deliver the surveillance logs to the district court for *in camera* inspection; and (2) in the event that the district court determined that the surveillance logs were relevant to the subject matter of the government agent's testimony, the logs would be released to the defendants" (622 F.2d at 465)). In the event that the judge refuses to order the production of the documents, defense counsel should request their disclosure again at trial (see § 34.7.1.1 *infra*) and then consider whether they reveal any basis for a motion to reopen the suppression hearing on the ground of newly discovered information contained in the documents.

In those jurisdictions where the defendant is expected to proceed first at the suppression hearing and is obligated to conduct direct examinations of police officers, defense counsel should nevertheless request all prior statements of the officers in the possession or control of the prosecution. To support the logic of this request, counsel can point to the disclosure provision in the Federal Rules of Criminal Procedure, which declares that, for purposes of the rules on "Producing Statements at a Suppression Hearing," "a law enforcement officer is considered a government witness." FED. RULE CRIM. PRO. 12(h). As the commentary to the federal rule explains, this provision reflects the practical consideration that a police officer's loyalty invariably belongs to the government regardless of who has called the officer as a witness; the systemic interest in testing the credibility of the officer can be effectuated only by permitting defense counsel to have access to prior statements of the witness. If the court denies access, counsel will again have to be alert to the possibility of moving to reopen the suppression hearing after obtaining the documents at trial.

24.4. *Techniques for Cross-examining Prosecution Witnesses at a Suppression Hearing*

Defense counsel must tailor his or her cross-examination style and the form of cross-examination questions to fit the goal that s/he is pursuing in litigating the suppression hearing. See § 24.2 *supra*. The nature of the

cross-examination will vary considerably depending on whether counsel is trying to win the hearing, obtain discovery, or create impeachment material for use at trial.

24.4.1. Examination Techniques When Counsel's Primary Goal Is To Win the Suppression Hearing

If counsel has decided that winning the suppression hearing takes precedence over any other potential goals, s/he will often have to pass up tempting opportunities for discovery on cross-examination in order to avoid the risk of eliciting material that would bolster the prosecution's case on suppression issues. For example, if the defense is seeking suppression of objects seized from a defendant incident to arrest and is urging that the arrest was invalid for lack of probable cause, counsel would not cross-examine an arresting officer whose direct examination by the prosecutor established that the officer acted upon incriminating information from an informant but neglected to address the subject of the informant's veracity. See § 25.35.2 *infra*.

When the goal of winning the hearing overrides that of discovery, counsel will ordinarily proceed in the following ways:

(i) As suggested by the preceding illustration, counsel will forgo cross-examination of a prosecution witness altogether when the prosecutor's direct examination has left holes in the showing which the relevant doctrinal rules require the prosecution to make in order to sustain the legality of the law-enforcement activity which counsel is challenging. The temptation to cross-examine for discovery may be intense in this situation, precisely because counsel would like to know the omitted information and whether it could be put to defense use at trial on the issue of guilt or innocence. But that temptation has to be resisted because the witness's answers on cross or on redirect examination by the prosecutor may serve to cure the defects in the prosecution's justification for the law-enforcement agent's actions.

(ii) When counsel does choose to cross-examine a prosecution witness, s/he will tailor his or her questions to elicit only material that undermines the credibility of statements made by the witness on direct without broadening the subjects of the witness's testimony. That is, counsel will ask only questions that disparage the witness's direct testimony by eliciting some retraction or concession which limits what the witness has said explicitly on direct, and will avoid asking any questions that inject new material into the examination. The trick is to be sure to stay out of areas that could open the door to redirect questioning which adds anything to what the witness said on direct, even though those areas would be ideal for discovery. (As indicated in § 37.2.3, redirect examination is ordinarily not permitted to go into matters that are beyond the scope of the cross.)

(iii) Counsel's cross-examination questions will be tightly framed and closed-ended – seeking yes-or-no answers or their equivalent, rather than the kind of open-ended questions suitable for discovery purposes. For example, in litigating a claim that the police did not have probable cause to arrest

the defendant on the basis of the complainant's description, counsel might ask: "Officer, the description you received from Ms. [X] did not include any mention of a blue coat, did it?" Counsel would not ask: "What exactly did the complainant say when she was describing her assailant?" Although the latter question would provide excellent discovery, it also gives the officer the chance to bring up portions of the description that match the defendant.

(iv) During the prosecutor's direct examination of witnesses, counsel will object to all potentially inadmissible evidence that could impair the chances of winning the suppression hearing, even though counsel might like to know the inadmissible information for discovery purposes.

In addition to passing up opportunities to obtain discovery of the prosecution's case, counsel may also allow a strong prospect of winning the hearing to dictate the otherwise inadvisable course of revealing facets of the defense case (including, for example, statements taken from prosecution witnesses by defense investigators) that ordinarily would be saved until trial. And suppression hearings that have a realistic chance of winning are the only suppression hearings in which counsel should seriously consider presenting the testimony of defense witnesses and the defendant. See § 24.5 *infra*.

24.4.2. Examination Techniques When Counsel's Primary Goal in Litigating the Suppression Motion Is To Obtain Discovery

When counsel is contemplating using a suppression hearing for the purpose of discovery, s/he will have to engage in a cost-benefit analysis, weighing the value to the defense of each particular item of discovery in preparing for trial against the likelihood and value of winning the suppression motion and the extent to which that likelihood might be impaired by any particular discovery tactic. As implied in § 24.4.1 *supra*, defense counsel would usually be ill-advised to pursue discovery when the chances of winning the suppression of crucial prosecution evidence are very strong, since the cross-examination questions necessary for discovery often will fill gaps in the prosecutor's case at the hearing. If, however, the chances of winning the hearing are remote or if the damage that questioning for discovery could cause to those chances is minimal, then counsel can take advantage of the excellent discovery opportunities afforded by a suppression hearing.

Defense strategies and techniques in a hearing conducted primarily for discovery purposes are the converse of those just described for handling a suppression hearing aimed to produce a defense victory:

(i) Counsel should ordinarily cross-examine every prosecution witness to the maximum extent permitted by the court, covering every area that could conceivably arise at trial. But counsel should not refer to any prior statements of the witness or other documents of which the prosecutor might be unaware that could give the defense an edge at trial.

(ii) Counsel should use predominantly open-ended cross-examination

questions, for example: “What was the description of the perpetrator?” “What else did the complainant say?” “What did you do next?” Follow-up questions should be used to assure that subjects are canvassed from every angle: *e.g.*, “Think back and tell us everything s/he said in describing the perpetrator.” “Tell us her exact words as best you can recall them.” “Anything else she said about the perpetrator’s clothing?” “Anything at all about the perpetrator’s facial characteristics?” Closed-ended questions should be used only to bottom out each subject of inquiry before moving to the next: “Have you now told us everything said between you and the complainant that provided you with any information which could be used to identify the perpetrator?” [Followed – unless the answer is a categorical “no” – by: “What else? We want the court to hear everything that was said.”] By definition, questions calling for yes-or-no answers cannot unearth any *new* subjects of information or alert counsel to the possible existence of subjects s/he does not already know about. What’s wanted are forms of questioning that invite the witness to tell everything s/he knows about the case. Counsel should use questions like, “Is there anything else you haven’t mentioned about [*X topic*] [*X episode*] [*X time period*]?” and “What more can you remember about [*X topic*] [*X episode*] [*X time period*]?” to get at material that counsel may not have previously contemplated.

(iii) Counsel should not put the defendant or any defense witness on the stand at the suppression hearing. Since the hearing is not being conducted to win, there is no reason to give the prosecutor discovery of the defense case at trial or to risk producing material that the prosecutor can use for impeachment of defense witnesses at trial.

In preparing to use a suppression hearing for discovery, counsel’s major task will be to construct reasonable arguments to justify every cross-examination question as relevant to some issue being litigated at the hearing. The problem here is similar to the one discussed in § 11.8.3 *supra* relating to preliminary examinations. The prosecutor will predictably object to defense cross-examination questions that appear to be aimed at obtaining discovery of the prosecution’s trial evidence. (The technically correct prosecutorial objection here is irrelevancy, although many prosecutors cite the nonexistent objection that a question should be disallowed simply because it is “discovery.”) When the prosecutor does object, most judges will be inclined to curb defense questioning in order to speed up the hearing, and even judges who are sympathetic to the defense effort to obtain some discovery will need to protect the record by demanding that defense counsel explain how the challenged question can produce information bearing on the suppression claim that is being adjudicated. Accordingly, for every discovery-oriented cross-examination question that counsel intends to ask, s/he will need to be prepared to demonstrate that the question is relevant to the issues at the suppression hearing. For this purpose, it is useful to keep in mind that a cross-examination question is technically relevant whenever (i) any possible answer to it would make any fact that supports the defendant’s legal theory or theories on the suppression motion more probable, or would make any fact that supports the prosecution’s theory or theories less probable, than it would be without the answer; *or* (ii) any possible answer would reflect adversely upon the general credibility of the witness or upon the accuracy of any fact supporting the prosecution’s theory

or theories which the witness's direct-examination testimony bolsters; *or* (iii) any possible answer would decrease the force of any inference that might be drawn from any piece of testimony given by the witness on direct examination in support of the prosecution's theory or theories; *or* (iv) any possible answer might begin a process of undermining the witness's confidence in any piece of testimony given on direct examination that supports the prosecution's theory or theories, so that the witness might be led eventually to retract it.

In preparing for a suppression hearing at which the primary goal is discovery, counsel will need to plan out thoroughly the sequence of cross-examination questions for each prosecution witness. Even if counsel is able to justify the questions against the prosecutor's objections of irrelevancy, the judge may increasingly lose patience with an attorney who appears to be primarily engaged in seeking discovery and may, at some point, rule out further cross-examination. Thus counsel will want to structure the cross-examination of every witness in such a way that the key questions covering the matters in which counsel is most interested are asked early in the examination, before questioning is likely to be cut off. In order to decrease judicial impatience, it is useful to intersperse questions that bear clearly and directly on the issues being litigated among counsel's more suspiciously discovery-oriented questions: Judges are far less likely to cut off cross-examination when they feel that discovery is a secondary goal rather than counsel's primary purpose. Counsel should also strive to keep the cross-examination questions flowing at a rapid-fire rate; judges with crowded calendars will not tolerate slow examination styles or delays while the attorney thinks of new questions or consults documents.

To the inexperienced practitioner it may seem that suppression hearings conducted for the purpose of discovery require little preparation. As the foregoing discussion has suggested, however, counsel will need to devote substantial time to planning before the hearing in order to take full advantage of the opportunities for discovery.

24.4.3. Examination Techniques When Counsel's Primary Goal Is To Lay a Foundation for Impeachment at Trial

In suppression hearings conducted primarily for the purpose of creating transcript material that can be used to impeach prosecution witnesses at trial, counsel will usually be pursuing one or more of the following objectives:

- (1) To lure the witness into making statements that are affirmatively helpful because:
 - (a) They tend to negate some element of the offense (thereby preventing conviction altogether or limiting conviction to a lesser included charge);
 - (b) They tend to establish some fact that supports an affirmative defense (for example, self-defense);

- (c) They tend to establish some fact that mitigates the gravity of the offense and will thereby help at sentencing (for example, the fact that the defendant was the look-out and was not directly involved in the beating of the complainant).
- (2) To circumscribe unfavorable testimony so that the witness cannot make even more damaging statements at trial (for example, by pinning an eyewitness down to the statement that s/he could not have observed the face of the perpetrator for more than a minute, in order to prevent the witness from lengthening the time when s/he testifies at trial and thus enhancing the persuasiveness of his or her identification of the defendant).

Generally, in pursuing any of these objectives, counsel should make heavy use of “closed” questions – that is, forms of questioning which demand specific answers and leave the witness with the smallest possible range of choice about what to say or what words to say it in. (“At the moment when you first saw the two people standing in the doorway, how many feet were you from the closer of those two people?” “Well, when why you say ‘a couple of feet,’ do you mean that it was closer to two feet or closer to ten feet?” “Closer to six feet or closer to ten feet?”) Questions calling for yes-or-no answers will often constitute a substantial part of this sort of cross-examination. (“You told the police officers at the scene that those two people came running at you, didn’t you?” “‘Running’ was the word you used to describe how they came toward you, isn’t that right?”) An effective way to lock a witness in to unambiguous answers is to take full advantage of the cross-examiner’s right to use leading questions, stating the exact factual proposition that counsel wants to extract from the witness and asking the witness only whether or not that proposition is correct. (“It is true, is it not, that as soon as you saw the two persons start running toward you, you began to run away from them?” “And when you were grabbed, you were grabbed around the neck from behind, isn’t that correct?” “You had turned your face away from them by that time, right?” “As soon as you started running, you turned to look where you were running, didn’t you?”) Particularly when the objective of the cross-examination is to circumscribe damaging testimony, it is important to bottom out the witness’s story by establishing that what s/he has described as the things s/he saw or heard or did that fall within any significant category of information constitute *all* s/he heard or saw or did within that category. This is best achieved by “nothing else” questions. (“So, the period between the first moment when you saw two people standing in the doorway and the moment when you turned to run away was the only time before the lineup when you were able to observe the features of either of those two people, was it not?” “There was no other time when you were facing them, right?” “Apart from what you told the police at the scene, you didn’t observe anything else about the facial features of either of the two persons, did you?” “Except for the one word ‘Hey!’ that was shouted at you, you heard nothing else said by either of the two persons prior to the lineup, did you?”)

Counsel should be prepared to adjust the order of subjects covered to fit

the demeanor of the witness. Frequently, civilian witnesses will be fairly pliant at the beginning of a cross-examination (either because the witness is nervous and cowed or because the witness does not have any reason yet to distrust or dislike the defense attorney) and will become progressively more difficult to handle (as the nervousness wears off or as the witness comes to realize that the defense attorney is succeeding in extracting statements that are helpful to the defense). Thus it often will prove useful to lead off the cross-examination with the factual propositions that counsel is most concerned with proving or anticipates having the most difficulty extracting from the witness. On the other hand, if there are a few points that can be tied down without pushing the witness hard and without the witness perceiving that s/he is conceding anything significant or embarrassing, these points should usually be taken up before the first point on which counsel expects to have to dominate the witness perceptibly, since that will mark the end of the honeymoon period with most witnesses.

In attempting to extract concessions from hostile witnesses who are trying to out-manuever counsel by saying the opposite of whatever counsel is seeking, it will often be productive to use false leads. This technique consists of getting the witness to believe that counsel wants the converse of what s/he really wants or of getting the witness so concerned to avoid falling into an apparent trap that s/he will back away from it and thereby fall into counsel's real trap. For example, in an identification suppression hearing at which counsel is trying to show that an eyewitness's fingering of the defendant in a lineup resulted from the witness's having selected the defendant's picture from a photo array the week before (rather than from having seen the defendant commit the crime), counsel might ask questions which appear to be aimed at disparaging the witness's perceptual abilities by showing that the photo is not a good likeness of the defendant in person. In response, the witness is likely to deny any significant dissimilarities between the defendant's picture and the defendant's appearance at the lineup, and to exaggerate the degree of confidence with which s/he recognized the defendant when s/he saw the defendant's photo in the array.

False leads can be used in four different ways in a suppression hearing:

- (i) To establish propositions that will be useful solely in attempting to win the suppression hearing (for example, that the defendant did not give consent to the search of his room that led to the recovery of contraband);
- (ii) To establish propositions that will be useful both in the suppression hearing and at trial (for example, in an identification suppression hearing: that it was dark at the time of the incident – a fact tending to establish the unreliability of the identification as a basis for suppression and also bolstering the defense of misidentification that counsel intends to present at trial);
- (iii) To establish propositions that will be neither useful nor harmful at the suppression hearing but will be useful at trial (for example, at a confession suppression hearing: that the defendant was arrested less than fifteen minutes after the robbery complainant emerged

from a dark alley at midnight and borrowed a cell phone to call the police – a fact irrelevant to the defendant’s claim of coercion but one that bolsters the misidentification defense at trial); and

- (iv) To establish propositions that will be harmful to the defendant at the suppression hearing but useful to his or her defense at trial.

Statements in the last of these categories can often be drawn out of an unfriendly witness, such as a police officer, precisely *because* of their evident harmfulness to the defendant’s claim for suppression. Consider the following two illustrations:

- (A) Assume that the charge is possession of drugs and that the police claim they obtained consent to search the defendant’s bedroom and bureau from his brother, who shared the bedroom and the bureau. If defense counsel contests the brother’s authority to consent (see § 25.18.2 *infra*) and behaves during cross-examination as if s/he is trying to get the police officer to say that the bureau was used exclusively by the defendant, the officer will probably react by strengthening his or her testimony that the brother had equal, if not greater, access to the bureau. By the end of the cross-examination, counsel will probably have gotten the officer to say that most, if not all, of the clothing in the bureau at the time of the search belonged to the brother; that most of the clothing in the drawer with the drugs belonged to the brother; that the bureau was closer to the brother’s bed; and that the brother acted as if he had free and constant access to the bureau. Counsel will thereupon have lost the battle by helping the prosecution to justify the search on consent grounds. However, counsel will have won the war by acquiring material to use in impeaching the officer at trial if the officer tries to change stories when counsel springs the defendant’s true defense: that the drugs belonged to the brother and were placed by the brother in his drawer of his bureau.
- (B) Suppose that the charge is assault with a firearm and that the defendant has made a statement to the police admitting the commission of the shooting but explaining it on self-defense grounds. Counsel has a good-faith basis for challenging the voluntariness of the statement and proceeds to do so. Inevitably, when counsel begins to cross-examine police officers on the subject of voluntariness and tries to get them to agree that the defendant resisted the coercive efforts of the police, the officers will insist that the defendant willingly came forward and was absolutely cooperative. Once again, the defense will have lost the suppression hearing. But, at trial, defense counsel will be able to force the officers to admit that the defendant’s actions were not those of a guilty person who has something to hide.

24.4.4. Examination Techniques When Counsel Has a Mixture of Goals at the Suppression Hearing

The foregoing three sections focused on cases in which counsel had a single overriding objective at the suppression hearing. In many cases, however, counsel may wish to pursue more than one goal. For example, there may be a realistic chance of winning the suppression hearing, yet counsel may be insufficiently sanguine about the probability of victory to be wholly comfortable about forgoing opportunities for discovery and creation of impeachment material. As the previous sections have suggested, pursuing multiple goals may jeopardize them all. For example, cross-examining for discovery or to create impeachment material may unavoidably elicit facts that will destroy any chance of winning the hearing. In many cases counsel is realistically required to choose one strategy and follow it single-mindedly – unless, of course, during the hearing that strategy is proving unworkable.

There are other cases, however, in which counsel can, with careful advance planning, pursue a range of goals. For example, if counsel is litigating several different suppression claims or theories, it may be possible to seek victory on one claim or theory, while using others to obtain discovery and create impeachment material. For example, in an identification suppression hearing, counsel might seek discovery through a claim that the police lacked probable cause to arrest the defendant (see §§ 25.7 and 27.7 *infra*), might seek to pin down impeachment material by cross-examination predicated on the claim that a show-up on the scene was impermissibly suggestive (see § 27.3.1 *infra*), and might seek to win yet a third claim – that a subsequent lineup was unconstitutionally held without the presence of counsel (see § 27.6 *infra*).

In deciding whether to mix strategies, counsel will need to be completely familiar with the facts of the case and all possible legal issues that could be litigated at the suppression hearing, and s/he will need to conduct a cost-benefit analysis that considers (i) the likelihood and value of succeeding on each strategy if pursued alone, (ii) the extent to which potentially winning strategies will be impaired by mixing them with other strategies, and (iii) whether the predictable impairment is outweighed by the probable gains to be achieved from pursuing a mixture of strategies.

24.4.5. Using Diagrams in Cross-Examination

In litigating Fourth Amendment claims, counsel will often find it helpful to ask each officer to draw a diagram of the scene of the arrest, search, or seizure in issue, describing the events in detail in relation to the diagram. Diagrams drawn by each officer should be removed from view before the entry of the next police witness, and counsel should ask the court not only for leave to remove the diagram after the testimony of the first witness but also for a ruling precluding the use of that diagram by the prosecutor in examining subsequent prosecution witnesses. The policy underlying the rule on witnesses (see § 34.6 *infra*) supports such a request, and by keeping from each police witness the diagrams drawn by the

others, visibly inconsistent versions of the affair can sometimes be elicited that will persuade the judge or an appellate court to discredit the officers.

24.5. Determining Whether to Present the Testimony of the Defendant and Other Defense Witnesses

There are several strategic factors that must be considered in deciding whether to present the defendant or other defense witnesses in a suppression hearing. The decisions will have to be made at least tentatively at an early stage of counsel's preparation, in order to leave sufficient time to rehearse the defendant's testimony and to subpoena the other witnesses and prepare them to testify. See §§ 29.5-29.6 *infra*. (Even when a witness is loyal to the defendant, a subpoena is advisable, to make the necessary record for a continuance in the event of the witness's failure to appear. See § 29.4.1 *infra*.) On the other hand, counsel should not allow himself or herself to feel locked in to the tentatively chosen strategy; s/he must constantly re-evaluate goals and strategies and adapt them to unanticipated developments at the hearing.

24.5.1. Testimony by the Defendant

In deciding whether to put the defendant on the witness stand in a suppression hearing, counsel should consider that whatever testimony the defendant gives at the hearing can probably be used to impeach the defendant if s/he testifies at trial. Although a defendant's testimony in a suppression hearing cannot be used against him or her in the prosecutor's case-in-chief at trial on the issue of guilt (*Simmons v. United States*, 390 U.S. 377 (1968); *Brown v. United States*, 411 U.S. 223, 228 (1973) (dictum); *United States v. Salvucci*, 448 U.S. 83, 89-90 (1980) (dictum)), the prosecution is usually free to use it for impeachment of the defendant's trial testimony to the extent that the two are inconsistent (see §§ 39.10, subdivision (G), 39.13.1 *infra*; *cf. Harris v. New York*, 401 U.S. 222 (1971) (a confession suppressed on *Miranda* grounds can be used as a prior inconsistent statement to impeach the defendant at trial)). (Counsel can, however, argue that this kind of impeachment should be barred by *New Jersey v. Portash*, 440 U.S. 450 (1979), which holds that an accused cannot be impeached with prior testimony which s/he was compelled to give in violation of the Fifth Amendment Privilege Against Self-Incrimination. Arguably a defendant's testimony in a suppression hearing is "compelled" and involuntary in the sense that the defendant is confronted with the "Hobson's choice" (*Simmons v. United States*, *supra*, 390 U.S. at 391) "either to give up what he believed, with advice of counsel, to be a valid . . . [constitutional] claim [to have evidence suppressed] or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination" (*id.* at 394). *Cf. Harrison v. United States*, 392 U.S. 219 (1968); *McDaniel v. North Carolina*, 392 U.S. 665 (1968) (per curiam).) Counsel may be able to limit cross-examination at the suppression hearing so as to avoid incriminating admissions (*see, e.g., People v. Lacy*, 25 A.D.2d 788, 788, 270 N.Y.S.2d 1014, 1015-16 (N.Y. App. Div., 3d Dep't 1966) (at a hearing on a motion to suppress incriminating statements, "the defendant . . . may take the stand and testify as to his request for counsel at the time of the arrest and as to all facts relevant to the proceedings . . . leading to and including the signing of the alleged confession

and waiver and by so testifying, the defendant does not subject himself ‘to cross-examination upon the [circumstances of the crime]’”), but often this will not be easy to do if the cross-examining prosecutor is at all capable.

If the defendant’s testimony would probably be instrumental in winning the suppression hearing and if a victory at the hearing would probably necessitate the prosecutor’s dismissal of the case, these prospects usually justify accepting the risks of impeachment. Even if the chances of victory at the suppression hearing are not overwhelming, testimony by the defendant at the hearing may be justified if there is little chance that the defendant will testify at trial or if the defendant’s testimony at the hearing will be limited to matters that do not overlap any of the subjects about which the defendant may testify at trial. *See, e.g., People v. Lacy, supra*, 25 A.D.2d at 788, 270 N.Y.S.2d at 1015-16.

Apart from the risk of impeachment at trial, there may be tactical reasons to forgo presenting the defendant’s testimony at a suppression hearing. It is often possible to establish a marginal case of unconstitutional police conduct on the basis of police testimony alone, whereas the defendant’s version of the relevant events portrays the officers’ behavior as considerably more egregious and blatantly unlawful. The question whether to put the defendant on the stand in this situation is particularly difficult. Many judges believe that defendants are prone to exaggerate police misconduct; these judges are slow to credit any defendant’s testimony, particularly when it consists of horror stories. Therefore, calling the defendant to testify entails the risk of irritating the judge to such an extent that s/he will strain the facts and the law to uphold the police.

On the other hand, if the defendant’s description of atrocious police conduct is strongly credible, and particularly if it is corroborated by independent witnesses or evidence, proof of flagrant police abuse can spell the difference between victory and defeat in a suppression hearing. The Supreme Court has held – in a decision of uncertain breadth – that the scope of taint attending an unconstitutional search and seizure may depend in part on the flagrancy of the unconstitutionality. *Brown v. Illinois*, 422 U.S. 590, 603-05 (1975); *cf. United States v. Leon*, 468 U.S. 897, 911 (1984); see § 25.41 *infra*. And, as a practical matter, trial and appellate judges who can be persuaded that the police have behaved abominably are more likely to rule in the defendant’s favor on any close questions in the case.

Several collateral dangers bear upon the decision whether to put the defendant on the stand in a suppression hearing. The defendant’s testimony may give the prosecutor discovery of the defenses planned for trial and thereby improve the prosecutor’s presentation on the issue of guilt. In cross-examining the defendant at the suppression hearing, the prosecutor can develop a sense of the defendant’s personality and susceptibility to certain cross-examination tactics and may consequently do a better job of cross-examination at trial. Finally, if the judge at the suppression hearing is the same judge who will preside at a bench trial and/or at sentencing, unpersuasive testimony by the defendant at the hearing could prove detrimental in later stages of the case: The judge’s discrediting of this testimony could lead the judge also to discredit the defendant’s testimony at trial. And/or the judge’s belief that the

defendant has perjured himself or herself could lead to a harsher sentence.

Notwithstanding all these risks, there will be many cases in which the chances of victory at the suppression hearing are sufficiently strong, and the contribution that the defendant's testimony can make is sufficiently important, that defense counsel will opt in favor of having the defendant testify. The final decision must be made by the defendant personally (see § 39.11 *infra*); counsel should explain the potential benefits and risks and advise the defendant about the best course.

When the defendant does testify at the suppression hearing, it is usually best that s/he testify last. Having heard all of the prior evidence, s/he will be in a position to rebut police testimony effectively and to explain any apparent inconsistencies in the accounts of defense witnesses. See §§ 29.6, 39.3 *infra*.

24.5.2. Testimony by Defense Witnesses Other Than the Defendant

Calling defense witnesses other than the defendant to testify at a suppression hearing involves significant dangers and complications. The bottom line is that defense counsel should not do so unless (1) counsel's purpose in conducting the hearing is to win suppression (see §§ 24.2, 24.4.1 *supra*); and (2) the evidence that counsel is seeking to suppress is likely to make the difference between conviction and acquittal at trial; and (3) counsel's chances of winning the suppression of this evidence are strong if counsel calls the defense witnesses and considerably weaker if s/he does not; and (4) the hearing judge insists that the defense lead off the hearing by presenting evidence sufficient to meet an applicable burden of production; and (5) defense counsel cannot get around the judge's sequence-of-proof requirement in one of the ways suggested in § 24.3.4 *supra*; and (6) counsel cannot meet the production burden with documentary evidence (like police reports and records). In this situation, counsel obviously has no choice but call at least *some* witnesses. But s/he should (a) call as few witnesses as possible, and limit the examination of each witness to material that is indispensable for satisfying the defense's production burden; (b) announce at the outset that s/he is presenting the testimony of these witnesses only under the compulsion of the judge's sequence-of-testimony ruling; (c) announce that s/he is limiting his or her examination of the witnesses to matters that bear directly on the issues of law-enforcement illegality that are the basis of the motion to suppress; and (d) scrupulously observe that limitation.

The problems – in order of complexity – are these:

(A) When counsel introduces the testimony of any witnesses, s/he risks perpetuating testimony that the prosecution can introduce in its case-in-chief at trial, within the prior-recorded-testimony exception to the hearsay rule, if the witnesses become unavailable at the time of trial. The law on this subject is vexed.

(1) Many jurisdictions have codified the prior-testimony exception in the form in which it appears in FED. RULE EVID. 804(b)(1), allowing

the admission of the former testimony of a presently unavailable witness “if the party against whom the testimony is now offered . . . had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.” Defense counsel’s obvious objection to the application of this exception is that s/he did not have a “similar motive” for questioning the witness at the suppression hearing as s/he would have for cross-examining the witness at trial, inasmuch as the sole focus of the suppression hearing was the legality of the manner in which the prosecution obtained its evidence, not the reliability and probative force of the evidence in proving the defendant’s guilt. But this distinction is less than clear in the case of some defense theories for suppression, like a Due Process challenge to identification testimony as unreliable (see §§ 27.2-27.4 *infra*) or a Due Process challenge to incriminating statements as involuntary when the defense claim of involuntariness relies in part on the idea that an impressionable defendant was coached to make the statements by police questioning that was “leading or suggestive” (*Fikes v. Alabama*, 352 U.S. 191, 195 (1957); see, e.g., *Jurek v. Estelle*, 623 F.2d 929, 941 (5th Cir. 1980)). And some judges might well be persuaded to find a “similar motive” in any case in which defense counsel at the suppression hearing uses some of the techniques advised in §§ 24.4.2-24.4.3 as means for developing discovery and impeachment material.

(2) Federal constitutional Confrontation-Clause analysis would proceed along much the same track to an equally uncertain conclusion. See § 36.3.3 *infra*. The principal pertinent cases are *Crawford v. Washington*, 541 U.S. 36 (2004), and *Lee v. Illinois*, 476 U.S. 530, 546 n.6 (1986). *Crawford* permits a prosecutor’s use at trial of the pretrial testimony of a witness “where the . . . [witness] is unavailable [at the time of trial], and . . . where the defendant has had a prior opportunity to cross-examine” (541 U.S. at 59). *Lee* holds that the kind of “opportunity to cross-examine” contemplated by *Crawford* would not be satisfied by a defendant’s cross-examination of a *prosecution* witness at a suppression hearing (see 476 U.S. at 546 n.6). Logically, the rationale of *Lee* – that defense counsel at a suppression hearing has no reason to go beyond matters bearing on the lawfulness of the prosecution’s evidence-gathering methods and to cross-examine on subjects relating to the defendant’s guilt or innocence – seems as applicable to defense suppression-hearing witnesses as to those for the prosecution. But because, as a practical matter, defense counsel takes the initiative in developing the scope of examination of a witness whom s/he calls to the stand and questions on direct, some judges might distinguish *Lee* and find *Crawford*’s “prior opportunity” test satisfied in the case of a *defense* suppression-hearing witness.

(3) As a back-up argument for precluding the prosecutor’s use at trial of the testimony of such a witness who has become unavailable since the suppression hearing, counsel could invoke the rationale of *Simmons v. United States*, 390 U.S. 377 (1968). This would require extending *Simmons*’s holding – that a defendant’s testimony admitting a possessory interest in property for the purpose of acquiring standing to challenge the legality of its warrantless seizure may not be used in the prosecution’s case-in-chief at trial to show the defendant’s possession of the instruments and proceeds of a crime because “[t]he need to choose between waiving the Fifth Amendment privilege and

asserting an incriminating interest in evidence sought to be suppressed, or invoking the privilege but thereby forsaking the claim for exclusion, creates what the [*Simmons*] Court characterized as an ‘intolerable’ need to surrender one constitutional right in order to assert another” (*United States v. Kahan*, 415 U.S. 239, 242 (1974) (per curiam)) – to encompass any sort of evidence that the defense is compelled to present in court (*cf. Harrison v. United States*, 392 U.S. 219 (1968)) in order to assert the defendant’s rights against the governmental illegality that necessitated the motion to suppress. *Cf. Fisher v. United States*, 425 U.S. 391, 399-400 n.5 (1976) (dictum); *Andresen v. Maryland*, 427 U.S. 463, 472 & n.6 (1976) (dictum). Such an extension is not predictable (*see United States v. Kahan, supra*, 415 U.S. at 243; *cf. United States v. Nobles*, 422 U.S. 225, 233-34 (1975)), and counsel cannot afford to rely on it in the present state of the law.

(4) The upshot, then, is that the risk of perpetuating potential prosecution trial evidence by calling defense witnesses at a suppression hearing is considerable in some circumstances and difficult to calculate in others.

(B) Even if the prosecution were forbidden to use a defense witness’s suppression-hearing testimony in its case-in-chief at trial, it could almost certainly use that testimony to impeach the witness if his or her trial testimony deviates at all from what s/he said at the hearing. *See* § 17.9 *supra*; § 34.7.2 *infra*. The defense might argue that the logic of *New Jersey v. Portash*, 440 U.S. 450 (1979), § 24.5.1 *supra*, prohibits this use of the prior testimony because the defendant was “compelled” to present it in order to vindicate the constitutional rights at issue in the suppression hearing; but the argument requires extensions of both *Portash* and *Simmons* in the teeth of *United States v. Nobles, supra*, 422 U.S. at 233-34 (*see* §§ 18.12-18.13 *supra*), and *Kansas v. Cheever*, 134 S. Ct. 596, 600-02 (2014) (*see* § 16.6.1 *supra*); and the chances of winning all of these uphill battles under current constitutional doctrine are slim.

(C) Finally, apart from the dangers of prosecutorial use of the testimony at trial, counsel who calls defense witnesses at a suppression hearing may give the prosecutor discovery of the version of the facts that the defense intends to present at trial, together with “batting practice” in cross-examining potential defense trial witnesses.

So defense counsel’s wisest practice is to present defense testimony only under the circumstances described in the first paragraph of this section and, even when those circumstances exist, to take the precautions advised there. Any witness whom counsel is obliged to call should be painstakingly prepared to testify, by rehearsals that teach the witness to give the shortest practicable responsive answers to all questions asked on either direct or cross-examination. *See* §§ 29.5-29.6 *infra*. Direct examination questions should be tightly framed to avoid opening the door to wide-ranging cross-examination by the prosecutor. And when defense counsel later prepares the same witness to testify at trial, counsel will need to take the witness through a detailed review of the transcript of his or her suppression-hearing testimony, to minimize the likelihood that the witness will inadvertently diverge from it and expose himself or herself to avoidable impeachment.

24.6. Arguing the Motion

24.6.1. Timing of the Argument; Reasons for Seeking a Continuance

After the conclusion of the evidence-taking at a suppression hearing, counsel for both parties will ordinarily be expected to proceed immediately to make their legal arguments for and against the motion. Defense counsel needs to be ready to present his or her position succinctly, integrating the applicable legal principles with the facts adduced at the hearing. For this purpose, counsel will find it useful to have taken notes, during the testimony of the principal witnesses, of key points made by each of them. Motions judges are often impatient with extended argument, and counsel will want to zero in promptly on crucial details.

In rare cases counsel may have to request a continuance of oral argument because the evidence has generated new legal issues that counsel had not anticipated and now needs to research or because counsel's notes and memory of the evidence are not sufficient and counsel wants to review a transcript of the hearing in preparation for argument. Since judges will usually be resistant to continuing the arguments (particularly when trial is scheduled to begin shortly after the suppression hearing), counsel may be required to explain precisely why the additional research or transcript is essential to his or her ability to represent the defendant competently in arguing the motion. If the court nevertheless denies the request for a continuance, counsel will have to proceed with the oral argument. In this situation counsel should consider requesting leave to submit a supplementary written memorandum based upon counsel's additional research and review of the transcript. If the court denies even that request and immediately rules on the motion, counsel should thereafter conduct the contemplated legal research, acquire the transcript, or both, and should incorporate any favorable new legal authorities or transcript references in a motion for reconsideration of the ruling. When trial begins immediately on the heels of the suppression hearing, counsel should inform the judge of his or her intention to submit a memorandum in support of reconsideration and should ask the judge to instruct the prosecutor not to mention during jury-selection *voir dire* or in an opening statement the evidence which counsel is continuing to contend should be suppressed. See § 18.14 *supra*; § 33.4.1 *infra*. Counsel will have to promise the court to produce the memorandum promptly, so that the judge can consider it before the trial progresses to a point at which the prosecution's presentation of the challenged evidence cannot practicably be further delayed.

24.6.2. Order of the Parties' Arguments

In oral arguments on suppression motions, it is customary in most jurisdictions for the defense to proceed first because the defendant is the moving party. On issues on which the prosecution bears the burden of persuasion (see § 24.3.4 *supra*), defense counsel could perhaps insist that the prosecutor argue first. However, it is usually in defense counsel's interest to argue first, so as to gain the advantage of framing the issues and also – in

jurisdictions where rebuttal argument is conventional – to get the last word.

24.6.3. *Using Burdens of Production and Persuasion*

When arguing the motion, defense counsel should make aggressive use of the applicable burdens of production and persuasion. (See § 24.3.4 *supra*.) If the evidentiary record is bare or insufficient on an issue on which the prosecution bears the burden of production or persuasion, it will usually reward counsel’s effort to remind the judge that the prosecutor had an obligation to establish the missing facts and that, therefore, any deficiency of evidence on the issue is fatal to the prosecution.

24.6.4. *Factors to Consider in Constructing Legal and Factual Arguments*

The essence of a good suppression argument is to highlight the facts adduced at the evidentiary hearing that bring the case within the legal principles on which counsel is relying. Those principles – established by precedent, by constitutional or statutory text, or by logical extrapolation from the extant caselaw – are background. Facts are foreground. Having just heard the evidence, the judge wants to know what to make of it. Ordinarily, having just heard at least as much unimportant evidence as important evidence, the judge wants to be told exactly what counsel is asserting is important. Zeroing in on key details is the way to persuade the judge to rule in counsel’s favor. It is also the way to obtain specific findings of fact that will insulate a favorable ruling from appellate reversal in jurisdictions where the prosecutor can appeal from a suppression order or get the order reviewed by prerogative writ proceedings.

Because form optimally mirrors function, it will usually be most effective for counsel to shape his or her argument by presenting the applicable legal principles not in the manner of a doctrinal primer but rather as a framework for identifying and emphasizing critical, favorable facts. Thus, for example, in a case in which a police officer stopped the defendant on the street and then frisked him or her (as a result of which the officer found a gun), counsel might structure the argument in the following manner:

- (i) Begin the argument by explaining that the defendant is moving for suppression on two separate and independent grounds: on the ground that the officer’s stop of the defendant amounted to an unconstitutional seizure, and the gun therefore must be suppressed as a fruit of the seizure; and on the alternative ground that even if the officer had a lawful basis to stop the defendant, s/he did not have a lawful basis to frisk the defendant, and the gun therefore must be suppressed as a fruit of this unlawful search of the defendant’s person.
- (ii) In arguing the first claim (that the stop was unconstitutional), begin by stating that there is no dispute about the fact that the officer did indeed stop the defendant; then tersely state the applicable legal standard for gauging whether a stop constitutes a “seizure”

within the meaning of the Fourth Amendment (and/or the state constitution) and move on quickly to a detailed recitation of facts adduced at the hearing which demonstrate that the officer's actions did indeed constitute such a "seizure" – beginning with the most dramatic or legally crucial such facts; then tersely state the applicable standard for assessing whether the officer had an adequate basis for stopping the defendant, and similarly promptly move on to the facts demonstrating that s/he did not – mustering the evidence in the same way, strongest first; and conclude by stating the legal principle that the unconstitutionality of the stop requires suppression of the gun as a fruit of an unlawful seizure.

- (iii) In arguing the second claim (that the frisk was unconstitutional), begin by stating that there is no dispute about the fact that a frisk amounting to a "search of the person" took place; then tersely state the applicable legal standard for determining the constitutionality of a frisk and get rapidly into the evidence showing that the officer did not have the requisite information to meet that standard; and conclude by stating the legal principle that the gun must be suppressed as a fruit of the unlawful frisk even if it is not suppressed as a fruit of the unlawful stop.

When the relevant legal principles are well settled (like the federal constitutional standards for determining the validity of a stop or frisk), counsel should ordinarily keep the discussion of the law quite brief. As a general rule, counsel should state the legal principles simply and concisely, and then devote most of the argument to fitting facts into the legal framework. Even when the law is not so well settled and the issues in the case make it necessary for counsel to argue law, counsel is well advised to refrain from reciting strings of citations of court decisions or engaging in complex legal analysis in oral argument. See § 19.6 *supra*. If counsel's legal position does require intricate reasoning or reference to authorities that are not the staple stuff of suppression motions in counsel's jurisdiction, s/he does best by handing up a concise written memorandum of law or highlighted photocopies of purportedly controlling judicial opinions. See §§ 19.6-19.7 *supra*.

In arguing facts, counsel should consider the availability and strategic advisability of various grounds for urging the court to find that the testimony of the other side's witness(es) is incredible. Since judges are often loth to disbelieve witnesses – particularly police officers and others who make a respectable appearance – counsel should ordinarily (a) include in his or her argument any legally sustainable theories that do *not* require the judge to reject the testimony of an opposing witness; (b) argue that opposing witnesses are mistaken rather than lying, to the extent that s/he is obliged to contest their testimony and can plausibly assert that it is innocently erroneous; and (c) contest the testimony of as few opposing witnesses – and as little of the testimony of each – as s/he needs to contest in order to win. However, when counsel's position does demand that s/he ask the judge to discredit an opposing witness, s/he should be prepared to argue, for example, that a police officer's testimony should be found to be incredible and rejected because:

(1) The officer’s account of actions or events defies “common sense” or “common knowledge” (*see, e.g., People v. Lastorino*, 185 A.D.2d 284, 285, 586 N.Y.S.2d 26, 27 (N.Y. App. Div., 2d Dep’t 1992) (rejecting, as incredible, a police officer’s testimony “that the defendant, who was aware he was under surveillance for at least several minutes, exited his vehicle and left the driver’s door open and a loaded gun visible on the seat, virtually inviting the police to discover the gun”); *People v. Void*, 170 A.D.2d 239, 241, 567 N.Y.S.2d 216, 217 (N.Y. App. Div., 1st Dep’t 1991) (rejecting, as incredible, a police officer’s testimony “that the defendant consented to a police search of the apartment, where a substantial amount of cocaine was stored in plain view in the kitchen sink – a location where the drugs could be readily discovered”); *People v. Addison*, 116 A.D.2d 472, 474, 496 N.Y.S.2d 742, 744 (N.Y. App. Div., 1st Dep’t 1986) (in rejecting a police officer’s testimony that he had reasonable grounds to believe that the defendant was armed and dangerous because the defendant “reach[ed] for his waistband as the . . . officer approached,” the court observes that there were five police cars and several officers on the scene, and “we find it incredible that defendant, in the face of such a show of force, would . . . reach for his waistband”)).

(2) At the hearing, counsel impeached the officer with a prior inconsistent statement or statements. *See, e.g., People v. Miret-Gonzalez*, 159 A.D.2d 647, 552 N.Y.S.2d 958 (N.Y. App. Div., 2d Dep’t 1990), *app. denied*, 76 N.Y.2d 739, 558 N.Y.S.2d 901 (1990) (the court finds a police officer’s testimony incredible, in part because the officer’s account of the car stop and search was contradicted by his incident report); *People v. Lebron*, 184 A.D.2d 784, 785-87, 585 N.Y.S.2d 498, 550-02 (N.Y. App. Div., 2d Dep’t 1992) (the police officer’s testimony was contradicted by statements and omissions in prior police reports).

(3) The officer has a motive to present perjurious testimony. *See, e.g., People v. Berrios*, 28 N.Y.2d 361, 368, 270 N.E.2d 709, 713, 321 N.Y.S.2d 884, 889 (1971) (acknowledging that “[s]ome police officers . . . may be tempted to tamper with the truth” at a suppression hearing in order to justify their actions in conducting a search or seizure).

(4) The officer’s “demeanor” on the witness stand or the witness’s “mode of telling his [or her] story” indicates that s/he is not telling the truth (*People v. Perry*, 128 Misc.2d 430, 432, 488 N.Y.S.2d 977, 979 (N.Y. Sup. Ct., N.Y. Cty. 1985)). *See also People v. Carmona*, 233 A.D.2d 142, 144-45, 649 N.Y.S.2d 432, 434 (N.Y. App. Div., 1st Dep’t 1996) (in an opinion rejecting the officer’s testimony as incredible, the appellate court refers disparagingly to the officer’s testimony “that he approached the defendant merely to exercise a common law right of inquiry” as a “well-rehearsed claim”).

Finally, counsel should anticipate the judge’s reactions to the legal and factual issues in the case and should frame arguments so as to meet the judge’s likely concerns. For example, as suggested in § 19.7 *supra*, counsel can foresee the reluctance of a trial judge to announce any broad legal rules which go beyond the boundaries of settled precedent, and counsel can forestall that concern by taking pains to explicitly, narrowly delineate the limits of the ruling s/he is advocating.

24.7. *The Prospect of Appellate Review; Obtaining or Avoiding Findings by the Motions Judge in Order to Improve the Defendant's Chances on Appeal*

If the motion to suppress is denied, the defense typically cannot take an interlocutory appeal but can obtain appellate review after conviction and sentencing. See § 31.1 *infra*. If the motion to suppress is granted, the prosecution in some jurisdictions has a statutory or common-law right to take an interlocutory appeal or to challenge the suppression ruling by a petition for a prerogative writ. See §§ 17.5.2, 20.8.2.1 *supra*. If the motion was granted in part and denied in part, an interlocutory appeal by the prosecutor may activate a defense right to cross-appeal on rulings adverse to the defendant. See, e.g., *People v. Fenelon*, 88 Ill. App. 3d 191, 410 N.E.2d 451, 43 Ill. Dec. 451 (1980); *Commonwealth v. Mottola*, 10 Mass. App. Ct. 775, 412 N.E.2d 1280 (1980), *review denied*, 383 Mass. 890, 441 N.E.2d 1042 (1981). When the prosecutor forgoes interlocutory review (or is not entitled to pursue it) and goes to trial without the suppressed evidence, a defendant's acquittal insulates the suppression ruling from appellate reversal. See § 20.8.2.1 *supra*.

In some jurisdictions the judge is required to record specific findings of fact and conclusions of law in ruling on suppression motions. In other jurisdictions the judge is permitted to announce a yea-or-nay ruling on the motion without explaining it. Depending on the nature of the judge's decision and the lay of the evidence, defense counsel may wish to ask the judge to make or clarify particular findings of fact or legal rulings, in order to improve the defendant's posture in appellate review proceedings.

If the judge has ruled in the defendant's favor and counsel anticipates that the prosecutor will appeal, counsel obviously has an incentive to aid the judge in insulating the ruling from reversal. Counsel should consider requesting that the judge amend or revise any troublesome or ambiguous findings of fact or legal conclusions. It is particularly in the defendant's interest for counsel to urge the judge to rest his or her decision explicitly on record-specific factual grounds, both because appellate review of *nisi prius* fact-finding is more limited than appellate review of *nisi prius* legal reasoning and because appellate judges will be more inclined to upset a motions judge's pro-defense rulings in proportion to the breadth of their potential precedential impact.

If the judge has ruled against the defendant on a ground which counsel suspects is legally erroneous but which the judge did not spell out clearly on the record, counsel may wish to request elaboration of the judge's reasoning. Absent an overt articulation of incorrect legal reasoning, many appellate courts will uphold a trial court's ruling if the appellate judges can conjecture any possible permissible rationale for it. However, if a request for clarification will likely lead a judge to seek out more unassailable bases for the denial of a suppression motion or to bolster the denial by making additional findings of fact contrary to the defense, counsel will be wiser to leave ambiguities in the record and decide later what possible use to make of them in appellate arguments. As in most other matters, it is important for counsel to know as much about the judge's predilections, temperament, opinion-writing habits

and intelligence as counsel can learn from discussing these subjects with experienced local defense attorneys.

24.8. *After the Suppression Hearing: Protecting the Defendant's Rights at Trial and Preserving Appellate Remedies*

When the prosecution seeks interlocutory review of a suppression order, counsel with a client in custody should request the trial court to release the client on his or her own recognizance (see § 4.02 *supra*) pending appeal. Counsel can argue that the trial court's suppression ruling provides the best basis for predicting the outcome of the appeal and that it is highly unfair to subject the defendant to protracted incarceration for a crime for which s/he will probably never be convicted. If the trial court does not release the defendant pending appeal, counsel should ask the appellate court to do so, by a motion filed in the appeal, by a separate appeal of the trial court's refusal to grant release, or by a petition for a writ of habeas corpus (see §§ 3.8.3-3.8.4 *supra*), as local practice makes appropriate. Counsel may request in the alternative that the appellate court hear the appeal of the suppression ruling on an expedited basis.

If the defense loses the suppression motion or if the defense wins and the prosecutor elects to forgo interlocutory appellate review, many judges will insist upon proceeding immediately to trial. Often, the defense will want a continuance in order to obtain the transcript of the suppression hearing for use in impeaching prosecution trial witnesses. If, without revealing defense strategy imprudently, counsel can articulate specific ways in which the transcript would assist the defense at trial, counsel should advert to them as supporting a motion for a continuance for the purpose of effectuating the defendant's constitutional rights to effective assistance of counsel, confrontation, and a fair trial. See § 28.3 *infra*. When the defendant is indigent, counsel should move that a transcript be made and furnished to him or her at state expense, under the Sixth and Fourteenth Amendment doctrines noted in §§ 5.2-5.3, 11.5.3 and 18.9.2.1 *supra*.

If the trial will be a bench trial – either because the charges are not eligible for jury trial or because the defendant has concluded that a bench trial is preferable to a jury trial – and if the usual procedure in the jurisdiction is for the judge who presided at the suppression hearing to also serve as the finder of fact in a bench trial, counsel will need to consider whether to seek recusal of the judge. In presiding over a suppression hearing, a judge often hears testimony, such as hearsay evidence, that would be inadmissible under the more stringent rules of evidence applicable at trial. Moreover, if the judge suppressed evidence (such as a confession or an identification), the judge will surely find it difficult to put it completely out of mind in deciding the defendant's guilt or innocence at trial. For the standards governing recusal, tactical considerations in deciding whether to seek recusal, and suggestions for the framing of recusal requests, see §§ 22.4-22.7 *supra*.

Counsel litigating suppression motions must familiarize themselves with the idiosyncratic local requirements for obtaining appellate review of suppression rulings. In some jurisdictions the pretrial denial of a motion to suppress evidence can be reviewed on appeal only if defense counsel

renews the motion or objects to the admission of the evidence at trial. In some jurisdictions a suppression ruling unfavorable to the defense can be appealed even after a guilty plea (or a conditional guilty plea) (see § 14.8 *supra*); in other jurisdictions the right to appeal can be preserved only by going through the motions of a “stipulated trial” (see § 36.7.2 *infra*); in still others the defendant must plead not guilty and go through a full-fledged trial in order to obtain appellate review of the suppression ruling.

Occasionally, in cases in which the defense has lost a suppression motion, new facts emerge at trial that would have significantly strengthened the original motion or provided an independent basis for suppression. Under these circumstances counsel should move to reopen the suppression hearing. See *Gouled v. United States*, 255 U.S. 298, 305, 312-13 (1921) (“where, in the progress of a trial, it becomes probable that there has been an unconstitutional seizure of papers, it is the duty of the trial court to entertain an objection to their admission, or a motion for their exclusion, and to consider and decide the question as then presented, even where a motion to return the papers may have been denied before trial”); *United States v. Raddatz*, 447 U.S. 667, 678 n.6 (1980) (dictum) (recognizing that a federal “district court’s authority to consider anew a suppression motion previously denied is within its sound judicial discretion”); *cf. Murray v. Carrier*, 477 U.S. 478, 488 (1986) (holding, in the context of collateral challenges to a criminal conviction, that defense counsel’s reasonable lack of knowledge of the facts giving rise to a legal claim constitutes sufficient cause to excuse counsel’s failure to pursue the claim in timely fashion). See also, *e.g., Commonwealth v. Haskell*, 438 Mass. 790, 792, 784 N.E.2d 625, 627-28 (2003) (“renewal [of a suppression motion] ‘is appropriate where new or additional grounds are alleged which could not reasonably have been known when the motion was originally filed,’ . . . but the remedy is not restricted to those circumstances” since “[a] judge’s power to reconsider his own decisions during the pendency of a case is firmly rooted in the common law”).

Chapter 25

Motions To Suppress Tangible Evidence

A. Introduction: Tools and Techniques for Litigating Search and Seizure Claims

25.1. Overview of the Chapter and Bibliographical Note

The Fourth Amendment to the Constitution of the United States, forbidding “unreasonable searches and seizures,” is the subject of an extensive jurisprudence. Issues raised by the numerous Fourth Amendment doctrines are multiple and complex; the law is often uncertain and in flux. The best general treatment of the subject is WAYNE R. LAFAYE, *SEARCH AND SEIZURE* (5th ed. 2012 & Supp.). *See also* JOSEPH G. COOK, *CONSTITUTIONAL RIGHTS OF THE ACCUSED – PRETRIAL RIGHTS* 175-461 (1972); JOHN WESLEY HALL, JR., *SEARCH AND SEIZURE* (3d ed. 2000); ARNOLD MARKLE, *THE LAW OF ARREST AND SEARCH AND SEIZURE* (1974); WILLIAM E. RINGEL, *SEARCHES & SEIZURES, ARRESTS & CONFESSIONS* (2d ed. 2003 & Supp.); JOSEPH A. VARON, *SEARCHES, SEIZURES AND IMMUNITIES* (2d ed. 1974). There are voluminous law review articles of good quality on specific subtopics.

Rather than attempt still another doctrinal discourse, this chapter approaches the law of search and seizure from a different angle. After a brief description of the major constitutional guarantees that defense counsel may invoke to challenge the legality of police searches and seizures and thereby the admissibility of prosecution evidence produced by those activities (§ 25.2 *infra*), the text sets out a checklist of questions that counsel can ask and answer (with minimal investigation) about the facts of any particular case s/he is handling (§ 25.3 *infra*). The references following each question will direct counsel to subsequent sections containing functional analyses of the law applicable to the basic factual situation targeted by the question. These analyses should assist counsel in identifying particular aspects of law enforcement activity that may be assailable in each situation, together with the theoretical grounds and supporting authorities for assailing them.

25.2. Constitutional and Statutory Restraints on Searches and Seizures

25.2.1. General Principles of Fourth Amendment Law

The Fourth Amendment’s proscription of unreasonable searches and seizures governs federal prosecutions by its express terms and state prosecutions by incorporation into the Due Process Clause of the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643 (1961). It regulates the actions of the police, other law enforcement agents, other government officials (see §§ 25.15.2 subdivision (v), 25.36, 25.38 *infra*) and private citizens acting in league with government agents (*see, e.g. State v. Scrotsky*, 39 N.J. 410, 189 A.2d 23 (1963); *Milan v. Bolin*, 795 F.3d 726, 729 (7th Cir. 2015) (dictum); *cf. Wilson v. Layne*, 526 U.S. 603, 614 (1999) (dictum) (“We hold that it is a violation of the Fourth

Amendment for police to bring members of the media or other third parties into a home during the execution of a warrant when the presence of the third parties in the home was not in aid of the execution of the warrant”).

Perhaps the simplest way of viewing the vast array of Fourth Amendment caselaw is by breaking it down into five categories of cases:

(i) Caselaw defining the powers of police officers to conduct a search of a person, place, or thing, and to seize items discovered in that search, without the benefit of a search warrant. The Supreme Court has repeatedly declared that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions” (*Katz v. United States*, 389 U.S. 347, 357 (1967)). See, e.g., *Riley v. California*, 134 S. Ct. 2473, 2482 (2014); *Georgia v. Randolph*, 547 U.S. 103, 109 (2006); *Kyllo v. United States*, 533 U.S. 27, 31 (2001); *Minnesota v. Dickerson*, 508 U.S. 366, 372-73 (1993); *Thompson v. Louisiana*, 469 U.S. 17, 19-20 (1984); *United States v. Karo*, 468 U.S. 705, 714-15, 717 (1984). The “jealously and carefully drawn” exceptions to the warrant requirement (*Jones v. United States*, 357 U.S. 493, 499 (1958)) include searches and seizures made with the valid consent of an authorized person (see § 25.18 *infra*), incident to a valid arrest (see § 25.8 *infra*), under “exigent circumstances” (see § 25.20 *infra*), in an operable motor vehicle that there is probable cause to believe contains criminal objects (see § 25.24 *infra*), and after an officer’s observation of contraband or crime-related objects in “plain view” (see § 25.22.2 *infra*). In addition to these specific exceptions to the warrant requirement, the courts also will excuse the absence of a warrant and will test a search or seizure under the standard of “general reasonableness” in situations in which the “intrusion on the individual’s Fourth Amendment interests” is minimal (*United States v. Place*, 462 U.S. 696, 703 (1983); see, e.g., *Samson v. California*, 547 U.S. 843 (2005); *United States v. Sczubelek*, 402 F.3d 175, 184-87 (3d Cir. 2005)), or the police activity at issue is of a type that “historically has not been, and as a practical matter could not be, subjected to the warrant procedure” (*Terry v. Ohio*, 392 U.S. 1, 20 (1968); see, e.g., *Illinois v. McArthur*, 531 U.S. 326, 330-37 (2001); *Delaware v. Prouse*, 440 U.S. 648, 653-55 (1979); *Michigan v. Summers*, 452 U.S. 692, 699-701 (1981)), or ““in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant . . . requirement impracticable”” (*O’Connor v. Ortega*, 480 U.S. 709, 720 (1987) (plurality opinion)) “and where the ‘primary purpose’ of the searches is ‘[d]istinguishable from the general interest in crime control”” (*Los Angeles v. Patel*, 135 S. Ct. 2443, 2452 (2015); see, e.g., *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002); *Griffin v. Wisconsin*, 483 U.S. 868 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); §§ 25.36-25.38 *infra*).

(ii) Caselaw concerning warrantless seizures of the person, either in the form of an “arrest” or in the form of the less extensive restraint first differentiated in *Terry v. Ohio*, 392 U.S. 1 (1968), and commonly called a “*Terry* stop.” See §§ 25.4-25.14 *infra*.

(iii) Caselaw dealing with searches and seizures made pursuant to a search warrant. See § 25.17 *infra*.

(iv) Caselaw pertinent to the procedural issue of when a defendant has a sufficient interest in the area searched or the item seized to mount a challenge to the search or seizure. See §§ 25.15, 25.23, 25.32 penultimate paragraph, 25.33 *infra*.

(v) Caselaw addressing the procedural question of whether, if a search or seizure was unconstitutional, the prosecution may nevertheless use particular items of evidence at trial because they are not viewed as “tainted” by the unlawful search or seizure. See §§ 25.39-25.42 *infra*.

25.2.2. State Constitutional Protections Against Searches and Seizures

As explained in § 17.11 *supra*, many state courts in recent years have begun to construe state constitutional provisions as providing greater protections than the parallel provisions of the Constitution of the United States as interpreted by the Supreme Court of the United States. This has occurred particularly in the area of searches and seizures. *See, e.g., State v. Short*, 851 N.W.2d 474, 486 (Iowa 2014) (“A survey of jurisdictions in 2007 found that a majority of the state supreme courts have departed from United States Supreme Court precedents in the search and seizure area to some degree.”). Quite a few state courts have developed an extensive body of state constitutional law on searches and seizures, rejecting major doctrines that limit Fourth Amendment rights. Although the state constitutional decisions are too numerous to survey systematically, some of the most significant ones will be noted in the relevant subsections of this chapter. As § 17.11 advises, defense counsel should always invoke state constitutional provisions in addition to the federal Fourth Amendment, even when there are no state constitutional precedents on the issue. This is a cost-free practice, and the advantages of winning a search-and-seizure claim on state-law grounds always make that possibility worth pursuing. See the concluding paragraph of § 17.11.

25.2.3. Statutory Provisions Relating to Searches and Seizures

There is a federal statute (18 U.S.C. §§ 2510-2520) – and, in several jurisdictions, there are state statutes – governing police use of electronic surveillance. See §§ 25.31-25.32 *infra*.

In many jurisdictions there are statutes (i) delineating the circumstances under which a police officer or a private citizen may make an arrest for a felony or misdemeanor (see § 25.7 *infra*), (ii) limiting the degree of force that may be employed in the course of an arrest (*cf.* § 25.7 concluding paragraph); and (iii) enacting “knock-and-announce” requirements under which a police officer must give adequate warning of the officer’s identity and intention to enter a dwelling before entering forcibly (see § 25.21 *infra*). Other statutory regulations of searches and seizures are found in some States.

25.3. *Analyzing Search and Seizure Issues: The Questions to Ask*

In examining a case for possible search and seizure issues, counsel should begin by breaking down the series of governmental actions into their component parts, since each specific act by a government agent may give rise to a separate claim for relief. For example, in a case in which the police stop a person, pat the person down, arrest the person, and seize objects from the person's possession, counsel should consider all of the following issues: Did the police have a sufficient basis for making the initial *Terry* stop? Even if the police had the requisite basis for a *Terry* stop, did they have the additional "specific and articulable facts" necessary for a *Terry* frisk? If there was an adequate basis for the *Terry* frisk, did the manner in which the frisk was conducted exceed constitutional limits for a pat-down? Did the police thereafter have an adequate basis for an arrest? Did the subsequent search incident to arrest exceed constitutional limits? If not, was the seizure of each particular object that the search uncovered constitutionally justified? Any of the distinct police actions identified in these questions could generate a basis for suppressing evidence.

The following questions should be asked in analyzing search and seizure claims:

- (1) Was the defendant stopped, accosted, arrested, or taken into custody by government agents at any time?
 - (a) If so, is it in the interest of the defense to characterize the agents' action as an arrest or as a *Terry* stop? See § 25.5 *infra*. Do the facts support the preferred characterization? See § 25.6 *infra*.
 - (b) If the agents' action is characterized as an arrest:
 - (i) Did the agents have the requisite probable cause to make the arrest? See §§ 25.7, 25.11 *infra*.
 - (ii) Did the agents search the defendant incident to the arrest? If so, did the search comply with the requirements for searches incident to arrest? See § 25.8 *infra*.
 - (iii) Did the post-arrest custodial treatment of the defendant comport with constitutional and statutory requirements? See §§ 25.8.3, 25.14 *infra*.
 - (c) If the agents' action is characterized as a *Terry* stop:
 - (i) Did the agents have the requisite factual basis for a *Terry* stop? See §§ 25.9, 25.11 *infra*.
 - (ii) Did the agents conduct a *Terry* frisk? If so, did they have the requisite facts to support a *Terry* frisk? See §§ 25.10-25.11 *infra*.

- (iii) Was the period of the stop unduly extended or the post-stop investigation conducted in a manner that exceeded the justifications for search activities incidental to the stop? See §§ 25.6.1, 25.27, 25.28 *infra*.
 - (d) Did the agents search any closed containers that the defendant had in his or her possession? See §§ 25.8.2, 25.12 *infra*.
 - (e) Was the defendant's body or clothing inspected? Was any physical examination of the defendant made? Were any tests conducted on the defendant's body or on any object or fluid, hair, or like substance taken from the defendant's body? See § 25.14 *infra*.
 - (f) Did the incident occur in a school setting? See § 25.38 *infra*.
- (2) Did government agents enter or search the defendant's home, any premises with which s/he had more than transitory connections, or any premises in which the defendant was legitimately present at the time of the agents' entry or search?
 - (a) If so, does the defendant have a constitutionally protected interest that permits him or her to challenge the agents' entry into the premises, the agents' search of areas within the premises, or both? See § 25.15 *infra*.
 - (b) If the defendant does have the requisite interest:
 - (i) Was the agents' entry and was the search authorized by a search warrant? If so, was the warrant validly issued, and was it validly executed? See § 25.17 *infra*.
 - (ii) Was the agents' entry and was the search authorized by an arrest warrant? If so, did the agents limit their activities to arresting the subject of the warrant or use the arrest entry to conduct an impermissible search? See §§ 25.19, 25.22 *infra*.
 - (iii) Was the agents' entry and was the search authorized by exigent circumstances? If so, did the agents confine their activities to a range within the scope of this justification? See §§ 25.20, 25.22 *infra*.
 - (iv) Was the agents' entry and was the search authorized by the consent of the defendant? If so, was the defendant's consent voluntary? See § 25.18.1 *infra*.
 - (v) Was the agents' entry and was the search authorized

by the consent of some individual other than the defendant? If so, did that individual have the authority to consent to the search of the area? Was the consent voluntary? See § 25.18.2 *infra*.

- (vi) Was the agents' entry purportedly made for "regulatory" or "administrative" purposes? See § 25.36 *infra*. Was it purportedly made to enforce parole or probation regulations? See § 25.37 *infra*. Did it occur on school premises? See § 25.38 *infra*.
 - (c) Did the agents at any time after they entered the premises detain or search the person of the defendant? If so:
 - (i) Did the agents have the requisite basis for detaining the defendant? See § 25.22.3 *infra*.
 - (ii) Did the agents have the requisite basis for searching the person of the defendant? See § 25.22.3 *infra*.
 - (d) Did the agents seize any item that was allegedly in plain view? If so, did the seizure comport with the rules governing the plain view exception to the warrant requirement? See § 25.22.2 *infra*.
 - (e) Did the agents comply with the rules requiring them to announce their identity and intention to enter before effecting a forcible entry of a dwelling? See § 25.21 *infra*.
- (3) Did the agents stop, search, or seize any motor vehicle?
- (a) If so, does the defendant have a constitutionally protected interest that permits him or her to challenge the agents' conduct in stopping, searching or seizing the vehicle? See § 25.23 *infra*.
 - (b) If the defendant does have the requisite interest:
 - (i) Did the agents stop the vehicle while it was moving? If so, did the agents have the requisite factual basis for a *Terry* stop? See § 25.27 *infra*.
 - (ii) Did the agents order the defendant out of the vehicle? If so, did they have the requisite basis to issue that order? See § 25.28 *infra*.
 - (iii) Did the agents conduct a search of the vehicle incident to an arrest of the defendant? If so, was the arrest valid? Was the search properly limited in scope? See § 25.26 *infra*.

- (iv) Did the agents conduct an evidentiary search of the vehicle? If so, did they have the requisite probable cause for that search? See § 25.24 *infra*.
 - (v) During the stop or search of the vehicle, did the agents seize any item that was allegedly in plain view? If so, did the seizure comport with the rules governing the plain view exception to the warrant requirement? See § 25.22.2 *infra*.
 - (vi) Was the asserted basis for the stop of the vehicle a traffic infraction? See § 25.28 *infra*.
 - (vii) Was the vehicle impounded and thereafter searched in an “inventory search”? If so, was the search conducted pursuant to standardized procedures? Was the alleged inventory a mere pretext for an otherwise impermissible evidentiary search? See § 25.25 *infra*.
 - (viii) Did the agents open any closed containers that were in the vehicle? See § 25.24 *infra*.
- (4) Did government agents use electronic surveillance and/or other forms of surveillance to gather information about the defendant? If so:
- (a) Was surveillance of any sort maintained by agents into or around the defendant’s home, any premises with which s/he had more than transitory connections, or any premises in which the defendant was legitimately present at the time of the surveillance? See §§ 25.31, 25.33 *infra*.
 - (b) Was any telephone owned or used by the defendant tapped? See § 25.32 *infra*.
- (5) Did government agents act on the basis of information obtained from informants, whether those informants were “special agents,” police spies, or private citizens? See § 25.35 *infra*.

When law enforcement activity that may give rise to search and seizure issues has occurred, it is important to think comprehensively about all the items that could be suppressed as a result of a ruling that the search or seizure was unconstitutional. For example, if an arrest is found to be unlawful, the suppressible fruits of that arrest may include any physical object or substance seized at or after the time of the arrest, any show-up or lineup observations made at or after the time of the arrest, identifications of the defendant’s photograph in a photographic array that was made possible because the defendant was photographed upon arrest, confessions or statements of the defendant made in custody after the arrest or otherwise induced by pressures

flowing from the arrest, any physical object or substance or observation obtained by a search or seizure whose validity depends upon consent given while the defendant was in custody after the arrest or upon consent otherwise induced by pressures flowing from the arrest, testimony of witnesses whose identity was learned by interrogation of the defendant following the arrest, and fingerprint identification evidence based upon exemplars taken at the time of the arrest. See § 25.39 *infra*. While some of these potential fruits of the arrest may be found eventually to be too far removed from the illegality to require suppression, see *id.*, counsel cannot afford to overlook any conceivably viable suppression arguments.

In analyzing the validity of a search or seizure, it is crucial to isolate the facts and circumstances known to the police at the time of the search or seizure from those facts later learned by the police. The constitutionality of police officers' conduct "must [be] judge[d] . . . in light of the information available to them at the time they acted" (*Maryland v. Garrison*, 480 U.S. 79, 85 (1987)). See also *Florida v. J.L.*, 529 U.S. 266, 271 (2000) ("The reasonableness of official suspicion must be measured by what the officers knew before they conducted their search."); *United States v. Jacobsen*, 466 U.S. 109, 115 (1984) ("[t]he reasonableness of an official invasion of the citizen's privacy must be appraised on the basis of the facts as they existed at the time that invasion occurred"). It is not always easy to determine what facts were known by the police at the time of a search or seizure. For example, police officers often amend the complaint report, supposedly containing the facts learned from the victim on the scene (see §§ 9.18, 9.20 first subdivision *supra*), to add a detailed description of the defendant based upon the officers' observations of the defendant after arrest. Counsel should not accept these reports at face value but must cross-examine the police officer to ascertain what precise facts were known to him or her when s/he undertook the search or seizure.

In a few categories of cases, the Supreme Court has held that an unlawful police search or seizure may not require suppression if the actions of the police were so obviously in "good faith" and objectively reasonable that suppression would not further the exclusionary rule's rationale of deterring police misconduct. The context in which this principle is most often invoked – a police officer's good faith reliance on a search warrant issued by a magistrate which turns out to have been defective because the magistrate was mistaken in finding probable cause – is discussed in § 25.17 *infra*. The other situations in which the Court has recognized a "good faith" exception to the exclusionary rule are (1) when the police, in making an arrest, reasonably relied on a computer record of a warrant which a court clerk erroneously failed to update to reflect the later quashing of the warrant (*Arizona v. Evans*, 514 U.S. 1, 14-16 (1995)); (2) when an arresting officer's reasonable but erroneous belief in the existence of "an outstanding arrest warrant" stemmed from "a negligent bookkeeping error by another police employee" who failed to update the police computers when the warrant was recalled (*Herring v. United States*, 555 U.S. 135, 137 (2009)), although this version of the "good faith" rule would be inapplicable and "exclusion [of the fruits of the arrest] would certainly be justified" "[i]f the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries

to lay the groundwork for future false arrests” or if “systemic errors” in a warrant system were so “routine or widespread” as to make it “reckless for officers to rely on . . . [the] unreliable warrant system” (*id.* at 146-47); and (3) “when the police conduct a search in compliance with binding precedent that is later overruled” (*Davis v. United States*, 564 U.S. 229, 232 (2011)). The Supreme Court also has held that a police officer’s “mistake of law can . . . give rise to the reasonable suspicion necessary to uphold . . . [a] seizure under the Fourth Amendment” as long as the mistake was “*objectively* reasonable” (*Heien v. North Carolina*, 135 S. Ct. 530, 534 (2014) (upholding the validity of a police officer’s stop of a car “because one of its two brake lights was out” and “[i]t was . . . objectively reasonable for an officer . . . to think that [the] . . . faulty right brake light was a violation of North Carolina law” even though “a [North Carolina appellate] court later determined that a single working brake light was all the law required” (*id.* at 539-40))). See also § 25.28 *infra*. Finally, as discussed, in § 25.21 *infra*, the Supreme Court has withdrawn the exclusionary rule as a remedy for violations of the Fourth Amendment’s “knock and announce” requirement. See *Hudson v. Michigan*, 547 U.S. 586, 588, 594 (2006). In some States, one or more of the foregoing limitations on the availability of suppression have been rejected by the state courts as a matter of state constitutional law. See, *e.g.*, § 25.17 *infra* (citing state caselaw that relies on the state constitution to reject the Supreme Court’s good faith rule for search warrants issued without probable cause). See generally § 17.11 *supra*.

B. On-the-Street Encounters with the Police: Arrests, Searches Incident to Arrest, Terry Stops, Terry Frisks, and Other Encounters

25.4. The Spectrum of On-the-street Encounters Between Citizens and the Police: – Contacts; Terry Stops; Arrests

As the Supreme Court has observed, “[s]treet encounters between citizens and police officers are incredibly rich in diversity. They range 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)). The Court thus far has identified three categories of encounters, which have differing ramifications for police prerogatives and citizens’ rights: contacts, *Terry* stops, and arrests.

25.4.1. Contacts

The Fourth Amendment is not called into play by “law enforcement officers . . . 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 . . . [even if] the officer identifies himself as a police officer. . . . The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. . . . He may not be detained even momentarily without [triggering Fourth Amendment protections that require] reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds” (*Florida v. Royer*,

460 U.S. 491, 497-98 (1983) (plurality opinion)). Compare *Kolender v. Lawson*, 461 U.S. 352 (1983), with *Hübel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177 (2004), discussed in § 25.11.2 *infra*.

25.4.2. The Dividing Line Between Contacts and “Seizures” Within the Meaning of the Fourth Amendment

If a police officer, going beyond this kind of detention-free contact, “accosts [the] individual and restrains his freedom to walk away, he has ‘seized’ that person” within the meaning of the Fourth Amendment’s restrictions upon “seizures” (*Terry v. Ohio*, 392 U.S. 1, 16 (1968); *Brown v. Texas*, 443 U.S. 47, 50 (1979); *Brendlin v. California*, 551 U.S. 249, 254-55 (2007)). The restraint may be physical (*Sibron v. New York*, 392 U.S. 40, 67 (1968)), or it may take the form of a command to “stand still” or to “come along” or any other gesture or expression indicating that the person is not free to go as s/he pleases (*Dunaway v. New York*, 442 U.S. 200, 203, 207 n.6 (1979); see *Florida v. Royer*, 460 U.S. 491, 501-03 & n.9 (1983) (plurality opinion); *id.* at 511-12 (concurring opinion of Justice Brennan); *Brendlin v. California*, *supra*, 551 U.S. at 254-55). “What has evolved from our cases is a determination that an initially consensual encounter between a police officer and a citizen can be transformed into a seizure or detention within the meaning of the Fourth Amendment, ‘if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.’” *Immigration and Naturalization Service v. Delgado*, 466 U.S. 210, 215 (1984). The touchstone of a Fourth Amendment seizure of a person is whether the police behavior “would . . . have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business” (*Michigan v. Chesternut*, 486 U.S. 567, 569 (1988)). *Accord*, *Kaupp v. Texas*, 538 U.S. 626, 629 (2003) (per curiam); see also *Brendlin v. California*, *supra*, 551 U.S. at 254-55, 262 (“A police officer may make a seizure by a show of authority and without the use of physical force, but there is no seizure without actual submission; otherwise, there is at most an attempted seizure, so far as the Fourth Amendment is concerned. . . . When the actions of the police do not show an unambiguous intent to restrain or when an individual’s submission to a show of governmental authority takes the form of passive acquiescence, there needs to be some test for telling when a seizure occurs in response to authority, and when it does not. The test was devised by Justice Stewart in *United States v. Mendenhall*, 446 U.S. 544 (1980), who wrote that a seizure occurs if ‘in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave,’ *id.*, at 554 (principal opinion). Later on, the Court adopted Justice Stewart’s touchstone . . . but added that when a person ‘has no desire to leave’ for reasons unrelated to the police presence, the ‘coercive effect of the encounter’ can be measured better by asking whether ‘a reasonable person would feel free to decline the officers’ requests or otherwise terminate the encounter’ [W]hat may amount to submission depends on what a person was doing before the show of authority: a fleeing man is not seized until he is physically overpowered, but one sitting in a chair may submit to authority by not getting up to run away.”). See, e.g., *United States v. Smith*, 794 F.3d 681, 682, 684-88 (7th Cir. 2015); *United*

States v. Black, 707 F.3d 531, 537-39 (4th Cir. 2013); *Clark v. State*, 994 N.E.2d 252, 263 (Ind. 2013). Cf. *United States v. Drayton*, 536 U.S. 194, 203-04 (2002) (police questioning of passengers on a bus did not amount to a “seizure” for Fourth Amendment purposes when “[t]he officers gave the passengers no reason to believe that they were required to answer the officers’ questions,” “left the aisle free so that [passengers] could exit,” and did “[n]othing . . . that would suggest to a reasonable person that he or she was barred from leaving the bus or otherwise terminating the encounter”); *California v. Hodari D.*, 499 U.S. 621 (1991) (there was no “seizure” for purposes of the Fourth Amendment when police officers chased a suspect who failed to comply with their directive to halt; therefore, the officers’ lack of a basis for the directive and the pursuit provided no Fourth Amendment ground for suppression of contraband the suspect discarded during the chase; the Court says that “the so-called *Mendenhall* test, formulated by Justice Stewart’s opinion in *United States v. Mendenhall*, 446 U.S. 544, 554 (1980), and adopted by the Court in later cases . . . [citing *Chesternut* and *Delgado*] states a *necessary*, but not a *sufficient*, condition for seizure – or, more precisely, for seizure effected through a ‘show of authority.’ *Mendenhall* establishes that the test for existence of a ‘show of authority’ is an objective one: not whether the citizen perceived that he was being ordered to restrict his movement, but whether the officer’s words and actions would have conveyed that to a reasonable person” (*id.* at 627-28); if, after such a show of authority, the citizen does not attempt to flee or resist but rather “yield[s],” s/he is deemed to have been seized (*id.* at 626; *see also id.* at 629); but if, instead of complying with the show of authority, the citizen flees, no “seizure” is effected until s/he is thereafter physically restrained or submits to restraint (*id.* at 628-29)).

As a doctrinal matter, these rules involve a strictly objective inquiry; they do not turn either on the suspect’s subjective belief that s/he is or is not free to leave (*Brendlin v. California*, *supra*, 551 U.S. at 258 n.4) or on the officer’s unmanifested intentions to restrain the suspect if the suspect attempts to leave (*id.* at 259-62) (the passenger in a stopped automobile was “seized” within the meaning of the Fourth Amendment even though the record did not establish that the officer ““was even aware [the passenger] was in the car prior to the vehicle stop”” and thus the officer may not have intended to stop the passenger: “the objective *Mendenhall* test of what a reasonable passenger would understand . . . leads to the intuitive conclusion that all the occupants were subject to like control by the successful display of authority”). *See also Kaupp v. Texas*, *supra*, 538 U.S. at 632 (handcuffing of a suspect was a significant factor in the classification of police conduct as a seizure tantamount to an arrest notwithstanding evidence that the sheriff’s department ““routinely”” used handcuffs for safety reasons when transporting individuals: “the officers’ motivation of self-protection does not speak to how their actions would reasonably be understood” by the suspect); *United States v. Mendenhall*, *supra*, 446 U.S. at 554 n.6 (opinion of Justice Stewart, announcing the judgment of the Court); *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984); *United States v. Hensley*, 469 U.S. 221, 234-35 (1985). However, as a practical matter, judges conducting a suppression hearing in the first instance often tend to be moved in the direction of finding a “seizure” when the officers can be gotten to concede that they would not have permitted the suspect to leave if the suspect had attempted to

do so. Therefore, counsel may be well advised to ask the officer or officers a question like: “If [the client] had simply ignored you, turned [his] [her] back on you and walked away, are we to understand that you would have done nothing to prevent [him] [her] from taking off?” Officers with an ego will commonly be unwilling to say that they would have done nothing in this insulting situation; and, if they do say so, the question and answer will have done the defense no harm under the ultimate “objective *Mendenhall* test” (*Brendlin v. California, supra*, 551 U.S. at 260). Prosecutorial objections to the question can be met by the observation that U.S. Supreme Court opinions attach significance to the information that the question seeks to elicit (*see, e.g., Florida v. Royer, supra*, 460 U.S. at 503 (plurality opinion) (“the State conceded in the Florida courts that Royer would not have been free to leave the interrogation room had he asked to do so. Furthermore, the state’s brief in this Court interprets the testimony of the officers at the suppression hearing as indicating that had Royer refused to consent to a search of his luggage, the officers would have held the luggage and sought a warrant to authorize the search.”); *Dunaway v. New York, supra*, 442 U.S. at 203, 212 (“although . . . [Dunaway] was not told he was under arrest, he would have been physically restrained if he had attempted to leave”); *id.* at 212 (Dunaway “was never informed that he was ‘free to go’; indeed, he would have been physically restrained if he had refused to accompany the officers or had tried to escape their custody”)) – perhaps because an officer’s subjective intentions will frequently manifest themselves in subtle, visible appearances or “actions . . . [that] show an unambiguous intent to restrain” (*Brendlin v. California, supra*, 551 U.S. at 255).

Some states courts extend their state constitutional guarantees against unreasonable searches and seizures to police conduct that would not be characterized as a “seizure” under the federal Fourth Amendment caselaw. There are, for example, decisions requiring that the police have a degree of justification for conduct that the United States Supreme Court put beyond the bounds of Fourth Amendment regulation in *United States v. Drayton, supra*, 536 U.S. at 203-04 (*see, e.g., People v. McIntosh*, 96 N.Y.2d 521, 755 N.E.2d 329, 730 N.Y.S.2d 265 (2001)), and in *Hodari D., supra*, 499 U.S. at 629 (*see, e.g., People v. Holmes*, 81 N.Y.2d 1056, 1057-58, 619 N.E.2d 396, 397-98, 601 N.Y.S.2d 459, 460-61 (1993)).

25.4.3. Terry Stops

There is a “general rule that seizures of the person require probable cause to arrest” (*Florida v. Royer*, 460 U.S. 491, 499 (1983) (plurality opinion)), but the Court in *Terry v. Ohio* “created a limited exception to this general rule: certain seizures are justifiable under the Fourth Amendment if there is articulable suspicion that a person has committed or is about to commit a crime” (*Florida v. Royer, supra*, 460 U.S. at 498 (plurality opinion)). “The predicate permitting seizures on suspicion short of probable cause is that law enforcement interests warrant a limited intrusion on the personal security of the suspect. The scope of the intrusion permitted will vary to some extent with the particular facts and circumstances of each case. This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, 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. For further discussion of the circumstances justifying a *Terry* stop, see §§ 25.9, 25.11 *infra*; for discussion of the rules governing *Terry* frisks, see § 25.10 *infra*.

25.4.4. Arrests.

The divider that separates *Terry* stops from arrests is described as the "point [at which] . . . police procedures [are] . . . qualitatively and quantitatively . . . so intrusive with respect to a suspect's freedom of movement and privacy interests as to trigger the full protection of the Fourth and Fourteenth Amendments" (*Hayes v. Florida*, 470 U.S. 811, 815-16 (1985)). Plainly, that line is not always easy to pinpoint. As the Court itself has observed, its decisions in "*Terry* [*v. Ohio*, 392 U.S. 1 (1968)], *Dunaway* [*v. New York*, 442 U.S. 200 (1979)], [*Florida v. Royer*, 460 U.S. 491 (1983)] and [*United States v. Place*, 462 U.S. 696 (1983)] considered together, may in some instances create difficult line-drawing problems in distinguishing an investigative stop from a *de facto* arrest" (*United States v. Sharpe*, 470 U.S. 675, 685 (1985)). Certainly, any time the police "forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes," the police have "crossed" the line between *Terry* stops and arrests and have effected a "seizure[] . . . sufficiently like [an] arrest[] to invoke the traditional rule that arrests may constitutionally be made only on probable cause" (*Hayes v. Florida*, *supra*, 470 U.S. at 816.) *Accord*, *Kaupp v. Texas*, 538 U.S. 626, 631-32 (2003) (per curiam) (a seizure requiring probable cause occurred when "a group of police officers rous[ed] . . . [the 17-year-old defendant] out of bed in the middle of the night," handcuffed him and took him to the police station in his underwear, and then questioned him in an interrogation room, even though the officers said "we need to go and talk," the defendant verbally acquiesced, and the sheriff's department routinely used handcuffs for transporting individuals); *Dunaway v. New York*, *supra*, 442 U.S. at 212 (when the police removed the defendant from his home, transported him to the police station against his will and interrogated him, the defendant's "detention . . . was in important respects indistinguishable from a traditional arrest"). With respect to lesser intrusions upon an individual's freedom, the point of arrest is flexible, determined on a case-by-case basis by whether the circumstances of the detention were "more intrusive than necessary to effectuate an investigative detention otherwise authorized by the *Terry* line of cases" (*Florida v. Royer*, *supra*, 460 U.S. at 504 (plurality opinion). See *United States v. Bailey*, 743 F.3d 322, 340-41 (2d Cir. 2014) (the police "exceeded the reasonable bounds of a *Terry* stop when they handcuffed Bailey": although "not every use of handcuffs automatically renders a stop an arrest requiring probable cause," the "government failed to make . . . [the requisite] showing" that the police had "a reasonable basis to think that the person detained pose[d] a present physical threat and that handcuffing [was] the least intrusive means to protect against that threat"); *Reid v. State*, 428 Md. 289, 293, 51 A.3d 597, 599 (2012) (police officer's "use of a Taser to fire two metal darts into Reid's back converted what otherwise may have been a *Terry* stop into a *de facto* arrest for Fourth Amendment purposes"). *Accord*, *Michigan v. Summers*, 452 U.S. 692,

696-97 (1981) (to escape “the general rule that an official seizure of the person must be supported by probable cause, even if no formal arrest is made,” the detention must be “significantly less intrusive than an arrest”). The criteria normally considered in making that assessment are described in § 25.6 *infra*. For further discussion of the standards for making an arrest, see § 25.7 *infra*.

25.4.5. “Custody” for Purposes of the Miranda Doctrine

It should be noted that there is one other constitutionally significant point on the spectrum of intrusiveness of police contacts with citizens. The protections established in *Miranda v. Arizona*, 384 U.S. 436 (1966), and its progeny, are triggered by the police placing a criminal defendant in “custody.” See § 26.6.1 *infra*. In *Berkemer v. McCarty*, 468 U.S. 420 (1984), the Court made clear that the *Miranda* concept of custody envisions a greater degree of intrusiveness than a *Terry* stop. See *id.* at 439-40. It is uncertain, however, whether the *Miranda* concept of “custody” is synonymous with the Fourth Amendment concept of “arrests” that require probable cause. For detailed discussion of what constitutes “custody” under *Miranda*, see § 26.6.1.

25.5. Tactical Reasons for Seeking a Categorization of Police Conduct as an Arrest or as a Terry Stop

Because there is no “litmus-paper test for distinguishing a consensual encounter from a seizure or for determining when a seizure exceeds the bounds of an investigative stop” (*Florida v. Royer*, 460 U.S. 491, 506 (1983) (plurality opinion)), the classification of the police action in each case will depend substantially upon the facts that defense counsel elicits from the witnesses and on the quality of counsel’s arguments.

Obviously, it is always in the interest of the defense to characterize a police action as a seizure of the person rather than a “consensual encounter,” because only seizures trigger the protections of the Fourth Amendment. The determination whether the defense stands to gain by characterizing the seizure as a *Terry* stop or as an arrest is not quite so clear-cut. Before the criteria for classifying seizures are discussed, it is useful to examine the strategic considerations that may make one or the other of the two classifications more beneficial to the defendant.

Ordinarily, defense counsel will wish to establish that a particular restraint was an arrest rather than a *Terry* stop (or, in cases in which the degree of police restraint escalated over a period of time, that the arrest occurred earlier, rather than later, in the sequence of events). The arrest categorization usually favors the defense because the preconditions for a valid arrest are more demanding than those for a *Terry* stop (see §§ 25.7, 25.9 *infra*), making it more difficult for the prosecution to justify the seizure. Moreover, in certain cases, the classification of the seizure as an “arrest” will provide additional grounds for suppression apart from the central claim that the invalidity of the seizure tainted all evidence derived from it. (For discussion of the concept of “derivative evidence,” see § 25.39 *infra*.) For example, in cases involving confessions or other statements of the defendant,

the greater level of custody involved in an arrest will ordinarily guarantee *Miranda* protection. See § 26.6.1 *infra*; *Orozco v. Texas*, 394 U.S. 324, 327 (1969); compare *Berkemer v. McCarty*, 468 U.S. 420, 434 (1984) (“there can be no question that respondent was ‘in custody’ at least as of the moment he was formally placed under arrest and instructed to get into the police car”), with *id.* at 439-42; cf. § 25.4.5 *supra*. And the greater degree of coerciveness inherent in an arrest will be a factor for consideration in determining the voluntariness both of incriminating statements (see § 26.3 *infra*; cf. *Payne v. Arkansas*, 356 U.S. 560, 567 (1958)) and of consents to search or seizure (see § 25.18.1 *infra*; cf. *Schneekloth v. Bustamonte*, 412 U.S. 218, 240 n.29 (1973) (dictum) (“courts have been particularly sensitive to the heightened possibilities for coercion when the ‘consent’ to a search was given by a person in custody”).

In certain cases, however, it may be in the interest of the defense to characterize a restraint as a *Terry* stop rather than an arrest. One of the most important examples of this is when the classification of the restraint as a *Terry* stop can be used to invalidate a subsequent search of the defendant. If the restraint were characterized as an arrest and the arrest was lawful because the police had probable cause to arrest, then any post-arrest search of the person would be valid as a search incident to arrest. See § 25.8 *infra*. On the other hand, if the restraint were classified as a *Terry* stop and if the police lacked the requisite basis for a *Terry* frisk – specific and articulable facts warranting a reasonable conclusion that the defendant was armed and dangerous, see § 25.10 *infra* – then the frisk would be invalid and the fruits of the frisk would have to be suppressed. (When considering the latter strategy, counsel should also consider whether s/he can bring the case within the general rule that “a search incident to a lawful arrest may not precede the arrest” (*Sibron v. New York*, 392 U.S. 40, 67 (1968)), and can avoid the narrow exception to that rule permitting a search incident to arrest to be made immediately preceding the arrest as a part of a single course of action (see § 25.8.4 *infra*).)

25.6. Criteria for Categorizing a Restraint (That Is, Any Seizure of the Person) as a Terry Stop on the One Hand or an Arrest on the Other

As already explained, the defense will always want to classify a police action as a “seizure of the person” in order to bring the Fourth Amendment’s protections into play. This initial step of showing that a “seizure” occurred is ordinarily achieved by establishing that the police made some “show of official authority” (*Florida v. Royer*, 460 U.S. 491, 502 (1983) (plurality opinion)), that would cause a “reasonable person” to believe “that he was not free to leave” (*id.*). See § 25.4.2 *supra*. Thus, in *Royer*, the plurality concluded that a Fourth Amendment “seizure” had occurred when officers approached a suspect in an airport concourse, 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. *Id.* at 502-03. See also *Reid v. Georgia*, 448 U.S. 438 (1980) (per curiam).

The next step is to categorize the seizure as either a *Terry* stop or,

conversely, an arrest. Counsel should consider developing the facts on each of the following subjects that bear upon the stop-*versus*-arrest classification.

25.6.1. *The Length of the Restraint*

On numerous occasions the Court has said that one of the factors that distinguish *Terry* stops from arrests is the relative brevity of a *Terry* stop. *See, e.g., United States v. Place*, 462 U.S. 696, 709 (1983) (explaining that “[a]lthough we have recognized the reasonableness of seizures longer than the momentary ones involved in *Terry*, . . . the brevity of the invasion of the individual’s Fourth Amendment interests is an important factor in determining whether the seizure is so minimally intrusive as to be justifiable on reasonable suspicion,” and then invalidating a 90-minute detention of an air traveler’s luggage on reasonable suspicion: “[A]lthough we decline to adopt any outside time limitation for a permissible *Terry* stop, we have never approved a seizure of the person for the prolonged 90-minute period involved here and cannot do so on the facts presented by this case”); *Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion) (“This much, however, is clear: an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop”); *Dunaway v. New York*, 442 U.S. 200, 212 (1979) (stops are limited to “brief and narrowly circumscribed intrusions”); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878, 880-82 (1975); *Terry v. Ohio*, *supra*, 392 U.S. at 10. *See also, e.g., United States v. Arvizu*, 534 U.S. 266, 273 (2002) (dictum) (“brief investigatory stops”). *Cf. United States v. Sokolow*, 490 U.S. 1, 10-11 (1989) (dictum).

In *United States v. Sharpe*, 470 U.S. 675 (1985), the Court retreated somewhat from an iron-clad rule that a *Terry* stop must be no longer than momentary. While continuing to recognize that “‘brevity . . . is an important factor’” (*id.* at 685, quoting *United States v. Place*, *supra*), the Court in *Sharpe* stressed that “our cases impose no rigid time limitations on *Terry* stops” (*Sharpe*, *supra*, 470 U.S. at 685) and stated:

“[W]e have emphasized the need to consider the law enforcement purposes to be served by the stop as well as the time reasonably needed to effectuate those purposes. . . . In assessing whether a detention is too long in duration to be justified as an investigative stop, we consider it appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant. . . . A court making this assessment should take care to consider whether the police are acting in a swiftly developing situation” (*Id.* at 685-86.)

Applying this standard in *Sharpe*, the Court concluded that the 20-minute investigative detention there was a *Terry* stop, not an arrest, because: (i) the police officer “pursued his investigation in a diligent and reasonable manner” and “proceeded expeditiously”: there was no indication “that the officers were dilatory in their investigation”; (ii) to perform the investigation it was necessary to detain the suspect during the 20-minute period; (iii) the police were acting in a swiftly developing situation; and (iv) “[t]he delay in this case was attributable almost entirely to the evasive actions” of one of the suspects

and, in the absence of that suspect's "maneuvers, only a short and certainly permissible pre-arrest detention would likely have taken place" (*id.* at 687-88).

In the wake of the *Sharpe* decision, the relevant question is whether the detention exceeded the "time reasonably needed to effectuate" the "law enforcement purposes to be served by the stop" (*id.* at 685). *Accord, Rodriguez v. United States*, 135 S. Ct. 1609, 1612 (2015) ("We hold that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures."); *Illinois v. Caballes*, 543 U.S. 405, 407 (2005) (dictum) ("A seizure . . . can become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" justifying the seizure); *Illinois v. McArthur*, 531 U.S. 326, 332 (2001) (dictum) ("this time period was no longer than reasonably necessary for the police, acting with diligence, to [complete the activity that justified the suspect's restraint]"); and see, e.g., *United States v. Jenson*, 462 F.3d 399, 404 (5th Cir. 2006); *State v. Coles*, 218 N.J. 322, 344-47, 95 A.3d 136, 148-50 (2014). (The predicate for this question – and thus another necessary element for characterizing a police action as a stop rather than as an arrest – is that the purposes served by the officer's actions are consistent with the function of a *Terry* stop: to confirm or dispel an officer's suspicions by nonintrusive methods of investigation. See, e.g., *People v. Ryan*, 12 N.Y.3d 28, 30-31, 904 N.E.2d 808, 809-10, 876 N.Y.S.2d 672, 673-74 (2009) (even assuming that the police had reasonable suspicion to stop the defendant, the detention exceeded the permissible bounds of a *Terry* stop and became a seizure requiring probable cause when the police held the defendant at the location for 13 minutes while they conducted a photo identification procedure, apparently "to make it convenient for the police to arrest defendant if a positive identification subsequently occurred"). When, as in *United States v. Place*, *supra*, the police seized a suspect's luggage for 90 minutes in order to arrange for a narcotics-sniffing dog and when the police had forewarning of the suspect's arrival which would have permitted them to make advance preparations and thereby shorten the detention period, a reviewing court could properly conclude that the police failed to act diligently. See *United States v. Sharpe*, *supra*, 470 U.S. at 684-85 (explaining the holding in *Place*). But diligence is not the only issue. The most diligent of police officers is not permitted to extend a *Terry* stop indefinitely simply because the purpose of the stop cannot be achieved in a finite period of time. As the Court acknowledged in elaborating its new standard in *Sharpe*, "[o]bviously, if an investigative stop continues indefinitely, at some point it can no longer be justified as an investigative stop." 470 U.S. at 685. And the Court in *Sharpe*, when describing the need for allowing the police to pursue their investigations, specified that it was contemplating investigations that were to be conducted "quickly" (*id.* at 686). See also *United States v. Foreste*, 780 F.3d 518, 525 & n.4 (2d Cir. 2015) (if police officers conduct successive stops of the same individual based on the "same reasonable suspicion," and if "the officer conducting the subsequent investigation is aware of the prior investigation and the suspicion that supported it, the investigations' duration and scope must be both individually and collectively reasonable under the Fourth Amendment"; "The same would be true were the suspicion justifying the second investigation generated from the first investigation rather than if it were identical to it. In either case, the second stop can be viewed as an extension of the first stop, justifying the stops' joint evaluation for reasonableness under the Fourth Amendment.").

25.6.2. *Whether the Police Transported the Defendant from the Location of the Stop*

The police frequently transport a suspect from the place of initial accosting to another location, either to conduct questioning in a more private setting, or to display the suspect to an eyewitness in a show-up identification procedure, or for some other investigative purpose. In *Hayes v. Florida*, 470 U.S. 811 (1985); *Dunaway v. New York*, 442 U.S. 200 (1979); *Florida v. Royer*, 460 U.S. 491 (1983); and *Kaupp v. Texas*, 538 U.S. 626 (2003) (*per curiam*), the ambulatory nature of the detention was a significant factor in the Court’s classification of the detention as an arrest rather than a *Terry* stop.

In *Hayes v. Florida*, the Court concluded that the forcible removal of a suspect from his home and the non-consensual transportation of the suspect to the police station constituted such an “intrusi[on] with respect to a suspect’s freedom of movement and privacy interests as to trigger the full protection of the Fourth and Fourteenth Amendments.” 470 U.S. at 816. Similarly, in *Dunaway v. New York*, two of “[t]he pertinent facts relied on by the Court” in finding that the detention was an arrest “were that (1) the defendant was taken from a private dwelling; [and] (2) he was transported unwillingly to the police station” (*United States v. Sharpe, supra*, 470 U.S. at 684 n.4 (explaining the holding in *Dunaway*)).

In *Royer*, one of the factors that transformed “[w]hat had begun as a consensual inquiry in a public place” (460 U.S. at 503) into a full arrest was the transportation of the defendant some 40 feet to a small airport room for questioning. In condemning this movement of the suspect, the plurality in *Royer* stressed that “[t]he record does not reflect any facts which would support a finding that the legitimate law enforcement purposes which justified the detention in the first instance were furthered by removing Royer to the police room prior to the officer’s attempt to gain his consent to a search of his luggage” (460 U.S. at 505). *See also United States v. Sharpe, supra*, 470 U.S. at 684 (discounting the portion of the *Royer* opinion that seemed to rely on the length of the detention, and defining the opinion as being concerned primarily with “the fact that the police confined the defendant in a small airport room for questioning”).

In the *per curiam* opinion in *Kaupp v. Texas*, the Court relied on the reasoning in *Hayes v. Florida* and *Dunaway v. New York* to hold that the police conducted a seizure that was “‘in important respects indistinguishable from a traditional arrest’ and therefore required probable cause or judicial authorization” when they removed the 17-year-old defendant from his home in the middle of the night in handcuffs, “placed [him] in a patrol car, dr[o]ve[] [him] to the scene of a crime and then to the sheriff’s offices, where he was taken into an interrogation room and questioned” (*Kaupp v. Texas, supra*, 538 U.S. at 631). “[W]e have never ‘sustained against Fourth Amendment challenge the involuntary removal of a suspect from his home to a police station and his detention there for investigative purposes . . . absent probable cause or judicial authorization.’” *Id.* at 630 (quoting *Hayes v. Florida, supra*, 470 U.S. at 815). The Court in *Kaupp* reiterated that “[s]uch involuntary transport to a police station for questioning is ‘sufficiently like arres[t] to invoke the

traditional rule that arrests may constitutionally be made only on probable cause” (*Kaupp v. Texas, supra*, 538 U.S. at 630 (quoting *Hayes v. Florida, supra*, 470 U.S. at 816)).

25.6.3. *The Nature of the Setting in Which the Detention Takes Place*

In *Berkemer v. McCarty*, 468 U.S. 420 (1984), in the course of holding *Miranda* inapplicable to roadside questioning of motorists detained pursuant to traffic stops, the Court made some general observations concerning the distinction between *Terry* stops and arrests. Explaining that typical traffic stops differ from the usual *Miranda* custodial setting in that the “exposure to public view . . . diminishes the motorist’s fear that, if he does not cooperate, he will be subjected to abuse,” the Court then commented that in this respect, “the usual traffic stop is more analogous to a so-called ‘*Terry* stop’ . . . than to a formal arrest” (*id.* at 438-39). The Court noted that *Terry* stops are normally characterized by “[t]he comparatively non-threatening character of [the] detentions” (*id.* at 440).

Non-public setting played an important part in the decision in *Florida v. Royer, supra*. In condemning the transportation of the suspect, the plurality stressed that the effect of the move was to shift the suspect from a “public place” to “a small room – a large closet . . . [where] [h]e was alone with two police officers” (460 U.S. at 502). Although the *Royer* plurality did not expressly characterize the change in location as designed to increase the pressure on the suspect, that conclusion is implicit in the plurality’s strong criticism of the lack of any “legitimate law enforcement purposes” in “removing Royer to the police room prior to the officers’ attempt to gain his consent to a search of his luggage” (*id.* at 505).

Significantly, the progenitors of the “stop” doctrine, *Terry v. Ohio* and *Sibron v. New York*, originally recognized the “stop” power in the context of stops made on the street or in a public place. In extending that power to cases in which police officers board a bus and question passengers, the Court in *United States v. Drayton*, 536 U.S. 194 (2002), and *Florida v. Bostick*, 501 U.S. 429 (1991), said that “[t]he fact that an encounter takes place on a bus does not on its own transform standard police questioning of citizens into an illegal seizure” (*Drayton, supra*, 536 U.S. at 204; *Bostick, supra*, 501 U.S. at 439-40). Acknowledging that “[w]here the encounter takes place is one factor” in assessing whether a “seizure” has taken place (*Bostick, supra*, 501 U.S. at 437), the Court explained that “an encounter [that] takes place on a bus” may be no more intrusive than one that “occurred on the street” “because many fellow passengers are present to witness [the] officers’ conduct, [and thus] a reasonable person may feel even more secure in his or her decision not to cooperate with police on a bus than in other circumstances” (*Drayton, supra*, 536 U.S. at 195).

Except for a pair of scenarios – one of which the Supreme Court has addressed in several decisions – all of the Court’s rulings upholding stops have involved “on-the-street” situations (*Dunaway v. New York, supra*, 442 U.S. at 210-11), or encounters in similarly public places, such as buses or airport

concourses (*United States v. Mendenhall*, 446 U.S. 544, 560-66 (1980) (plurality opinion on this point)). The first exception is a situation in which officers who are executing a valid search warrant for contraband in a home detain an occupant of the premises during the search – a scenario the Court addressed in *Michigan v. Summers*, 452 U.S. 692 (1981), and again in *Muehler v. Mena*, 544 U.S. 93 (2005). See § 25.22.3 *infra*. In *Summers*, the Court held that in this situation, officers executing a valid search warrant have “the limited authority to detain the occupants of the premises while a proper search is conducted” (452 U.S. at 705). *Accord, Los Angeles County v. Rettele*, 550 U.S. 609, 613-14 (2007) (per curiam). *Cf. Bailey v. United States*, 133 S. Ct. 1031, 1038 (2013) (*Summers* doctrine is strictly limited to “cases [in which] the occupants detained were found within or immediately outside a residence at the moment the police officers executed the search warrant”); *United States v. Watson*, 703 F.3d 684, 691-92 (4th Cir. 2013). In *Muehler*, the Court added that the police also may engage in the additional intrusion of handcuffing an occupant during the search if this measure is necessitated by “inherently dangerous” circumstances such as those that existed in the *Muehler* case, where the “warrant authoriz[ed] a search for weapons and a wanted gang member reside[d] on the premises” and there was a “need to detain multiple occupants” (544 U.S. at 100). But, as the Court emphasized in establishing the general rule in *Summers*, the police officers’ possession of a search warrant in these cases precludes any possibility that the police have arranged for detention in a non-public place for the sake of exploiting the coercive atmosphere to gain information or consent to a search or seizure. The *Summers* Court made a point of explaining that “the type of detention imposed here is not likely to be exploited by the officer” to extract information from the suspect since “the information the officers seek normally will be obtained through the search and not through the detention” (*Summers, supra*, 452 U.S. at 701). *See also Muehler, supra*, 544 U.S. at 101-02 (explaining that, although the police questioned the handcuffed suspect about her immigration status, the case did not require that the Court consider the constitutionality of “questioning that extended the time [the detainee] . . . was detained” or that otherwise “constitute[d] an independent Fourth Amendment violation”). Moreover, in this scenario, extraction of a consent to search or seize would be superfluous since the officers already have a warrant.

The second exceptional scenario is *Illinois v. McArthur*, 531 U.S. 326 (2001), where the Court upheld the conduct of police who, after discussions with a homeowner on his front porch, refused to permit him to enter his home unaccompanied by a police escort during a two-hour period while they were seeking a search warrant for the home, based on probable cause to believe there was marijuana inside. The Court justified the restraint of the homeowner’s freedom because “the police had good reason to fear that, unless restrained, . . . [he] would destroy the drugs before they could return with a warrant (*id.* at 332), and it noted that, on the two or three occasions when a police officer accompanied the homeowner into the house during the two-hour wait, the homeowner had “reentered simply for his own convenience, to make phone calls and to obtain cigarettes” and had given his consent to the officer’s escorting him inside for these purposes (*id.* at 335).

Accordingly, in situations other than the *Summers-Muehler* and *McArthur*

scenarios, counsel can argue that any detention of a suspect in a “police dominated” setting (*Berkemer v. McCarty*, *supra*, 468 U.S. at 439), where no or few other members of the public are “present to witness officers’ conduct” (*United States v. Drayton*, *supra*, 536 U.S. at 204) and to reinforce “[t]he comparatively nonthreatening character of [the] detention[.]” (*Berkemer v. McCarty*, *supra*, 468 U.S. at 440), transforms what might otherwise be merely a *Terry* stop into an arrest requiring probable cause. The argument has particular force when the police have moved the suspect from a public location to a setting of that sort – a particularly intimidating action. See the discussion of *Florida v. Royer*, *supra*, in the second paragraph of this section.

25.6.4. *Whether the Detention Was for the Purpose of Interrogation*

If the purpose of police detention of a suspect is interrogation, the courts are particularly likely to view the interrogation as an arrest requiring probable cause rather than a *Terry* stop. In *Dunaway v. New York*, *supra*, the Court concluded that when the police transported the suspect to the police station for the purpose of interrogation, the “detention . . . was in important respects indistinguishable from a traditional arrest” (442 U.S. at 212). *See also United States v. Sharpe*, *supra*, 470 U.S. at 684 n.4 (explaining the holding in *Dunaway*). In *Kaupp v. Texas*, *supra*, the Court applied the reasoning of *Dunaway* to hold that the police had conducted a seizure that was “in important respects indistinguishable from a traditional arrest’ and therefore required probable cause or judicial authorization” when they removed the 17-year-old defendant from his home in the middle of the night in handcuffs and drove him “to the sheriff’s offices, where he was taken into an interrogation room and questioned” (538 U.S. at 631 (quoting *Dunaway v. New York*, *supra*, 442 U.S. at 212)). Such “involuntary transport to a police station *for questioning*,” the Court explained, is “sufficiently like arres[t] to invoke the traditional rule that arrests may constitutionally be made only on probable cause” (*Kaupp v. Texas*, *supra*, 538 U.S. at 630 (emphasis added)). Similarly, in *Florida v. Royer*, *supra*, it was deemed significant that the police transported the defendant to the police room for the purpose of interrogation rather than legitimate “reasons of safety and security” (460 U.S. at 504-05 (plurality opinion)). By contrast, in *Michigan v. Summers*, *supra*, 452 U.S. at 701-02 & n.15, the Court emphasized that the detention of the suspect, which the Court classified as a *Terry* stop, was not designed to extract information from the suspect.

25.7. *Circumstances Justifying an Arrest*

25.7.1. *Authorization by Statute or Common Law*

“Whether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law.” *Michigan v. DeFillipo*, 443 U.S. 31, 36 (1979). In virtually all jurisdictions the conditions for a valid arrest are specified by either statute or caselaw. State law may require the suppression of evidence obtained as a consequence of a legally unauthorized arrest (*see, e.g., Commonwealth v. Le Blanc*, 407 Mass. 70, 75, 551 N.E.2d 906, 909 (1990) (“The police officer in this case acted without statutory or common law authority both when he stopped

the defendant and when he arrested him. Our case law supports exclusion of evidence when such conduct prejudices the defendant. . . . The requirement that a police officer have lawful authority when he deprives individuals of their liberty is closely associated with the constitutional right to be free from unreasonable searches and seizures.”)), but such an arrest does not *eo ipso* violate the Fourth Amendment or require suppression as a matter of federal constitutional law (*Virginia v. Moore*, 553 U.S. 164, 176-77 (2008)). The state-law validity of an arrest may also have other consequences unaffected by federal law: In many States, for example, a defendant can be convicted of the crime of resisting arrest only if the arrest is lawful. *E.g.*, *State v. Robinson*, 6 Ariz. App. 424, 433 P.2d 75 (1967); *People v. Peacock*, 68 N.Y.2d 675, 496 N.E.2d 683, 505 N.Y.S.2d 594 (1986); *State v. Mobley*, 240 N.C. 476, 83 S.E.2d 100 (1954).

25.7.2. Arrest Warrants

In cases in which a defendant is arrested on an arrest warrant, the defense can challenge the validity of the warrant, and thereby the validity of the arrest, by arguing that the warrant was issued without a showing of probable cause to believe that the defendant committed an offense. *See Giordenello v. United States*, 357 U.S. 480 (1958), as explained in *Aguilar v. Texas*, 378 U.S. 108, 112 n.3 (1964); *Steagald v. United States*, 451 U.S. 204, 213 (1981) (dictum). In determining whether such an argument is viable, counsel will need to obtain the affidavit or sworn complaint submitted by the police or prosecutor in support of the request for the arrest warrant and examine the sufficiency of the facts presented to the magistrate or judge who issued the warrant. In cases in which an arrest warrant does not correctly name the defendant and instead is issued on the basis of an alias, a nickname, or a description of the person sought, counsel also may be able to challenge the validity of the warrant on the grounds that it does not identify the defendant with the requisite particularity. *See, e.g., United States v. Doe*, 703 F.2d 745 (3d Cir. 1983).

The practical value of challenging arrest warrants has been drastically curtailed by the holdings in *United States v. Leon*, 468 U.S. 897 (1984), and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), that the exclusionary rule does not apply to evidence obtained through police actions taken in “good faith” reliance upon an apparently valid warrant issued as a consequence of a magistrate’s erroneous finding of probable cause. For discussion of this complicated subject, see § 25.17 *infra*.

25.7.3. Arrests Without a Warrant: The Basic Authorizations for Warrantless Arrest in Felony and Misdemeanor Cases Respectively

In most jurisdictions the requirements for a warrantless arrest depend upon whether the underlying crime is a felony or a misdemeanor.

(A) If the underlying crime is a felony, a warrantless arrest can be made whenever the arresting officer (or the officer who ordered or requested the arrest) was in possession of facts providing probable cause to believe that the crime was committed and that the person to be arrested had committed it.

Maryland v. Pringle, 540 U.S. 366, 370 (2003); *United States v. Watson*, 423 U.S. 411 (1976); *United States v. Santana*, 427 U.S. 38 (1976); *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979). This is the ubiquitous state-law rule and is also the rule of the Fourth Amendment.

(B) If the underlying crime is a misdemeanor, the rule in most jurisdictions is that a warrantless arrest can be made only when the offense was committed in the presence of the arresting officer. See *Atwater v. City of Lago Vista*, 532 U.S. 318, 355-60 (2001) (“Appendix to Opinion of the Court,” listing and quoting state statutes). The Supreme Court has explicitly reserved the question “whether the Fourth Amendment [also] entails an ‘in the presence’ requirement for purposes of misdemeanor arrests” (see *id.* at 341 n. 11, citing, with a “*cf.*” signal, Justice White’s statement in a dissent in *Welsh v. Wisconsin*, 466 U.S. 740, 756 (1984), that the “‘requirement that a misdemeanor must have occurred in the officer’s presence to justify a warrantless arrest is not grounded in the Fourth Amendment’”). The answer to that question is important because “violations of state arrest law” are not necessarily “also violations of the Fourth Amendment” (*Virginia v. Moore*, 553 U.S. 164, 173 (2008)). See § 25.7.1 *supra*.

(1) Counsel contending that the Fourth Amendment does embody the majority state-law rule limiting misdemeanor arrests to offenses committed in the presence of the arresting officer can point to passages in a number of Supreme Court opinions which treat that proposition as axiomatic. See *Virginia v. Moore*, *supra*, 553 U.S. at 171 (“In a long line of cases, we have said that when an officer has probable cause to believe a person committed even a minor crime in his presence, . . . [t]he arrest is constitutionally reasonable.”); *id.* at 178 (“When officers have probable cause to believe that a person has committed a crime in their presence, the Fourth Amendment permits them to make an arrest”); *Maryland v. Pringle*, 540 U.S. 366, 370 (2003) (“A warrantless arrest of an individual in a public place for a felony, or a misdemeanor committed in the officer’s presence, is consistent with the Fourth Amendment if the arrest is supported by probable cause.”); *Atwater v. City of Lago Vista*, *supra*, 532 U.S. at 354 (“[i]f an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender.”).

(2) The argument for a “presence” requirement also has strong historical support. Most of the common-law authorities extensively canvassed in the *Atwater* opinion, 532 U.S. at 326-43, condition an officer’s arrest power in misdemeanor cases upon the circumstance that the misdemeanor was “committed in the presence of the arresting officer” (JACOB W. LANDYNSKI, SEARCH AND SEIZURE AND THE SUPREME COURT – A STUDY IN CONSTITUTIONAL INTERPRETATION 45 (Johns Hopkins University Studies in Historical and Political Science, Ser. 84, No. 1, 1966), quoted in *Atwater*, *supra*, 532 U.S. at 336; and see the earlier American commentaries cited in *id.* at 343) or “committed in his view” (see the English treatises quoted in *Atwater*, *supra*, 532 U.S. at 330-31), or that the offender was found or “taken in the very act” (*Money v. Leach*, 3 Burr. 1742, 1766, 97 Eng. Rep. 1075, 1088 (K.B.1765), quoted in *Atwater*, *supra*, 532 U.S. at 332 n.6).

(3) Pre-*Atwater* decisions of the federal courts of appeals in several Circuits had rejected the “presence” requirement as a Fourth Amendment precondition for valid arrest upon probable cause, and it is unclear to what extent *Atwater* will spark a reconsideration of those precedents. See, e.g., *United States v. Laville*, 480 F.3d 187, 191-94 (3d Cir. 2007); *United States v. Dawson*, 305 Fed. Appx. 149, 160 n.9 (4th Cir. 2008); *United States v. McNeill*, 484 F.3d 301, 311 (4th Cir. 2007); *Rockwell v. Brown*, 664 F.3d 985, 996 (5th Cir. 2011); *Alford v. Haner*, 446 F.3d 935, 937 n.2 (9th Cir. 2006); *Hall v. Hughes*, 232 Fed.Appx. 683, 684-85 (9th Cir. 2007). Pending Supreme Court resolution of the issue, counsel should press the claim, when relevant, that the Fourth Amendment does prohibit misdemeanor arrests for offenses of which the arresting officer has no personal, observational knowledge, so that s/he is relying solely on third parties for the information necessary to establish probable cause.

25.7.4. The Probable Cause Requirement for Arrest

As indicated in the preceding two sections, a showing of “probable cause” is the minimum precondition for a valid arrest, with or without a warrant.

Much of the law of the Fourth Amendment is concerned with the concept of “probable cause.” Not only arrest warrants but also search warrants are issued upon a magistrate’s or a judge’s finding of probable cause; not only warrantless arrests but also many types of warrantless searches depend upon the officer’s possession of probable cause. Whether the issue is the validity of an arrest or a search, the constitutional phrase *probable cause* means “‘a reasonable ground for belief’” (*Brinegar v. United States*, 338 U.S. 160, 175 (1949)). “Probable cause exists where ‘the facts and circumstances within . . . [the officers’] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the [requisite] belief’” *Id.* at 175-76. *Accord, Florida v. Harris*, 133 S. Ct. 1050, 1055 (2013) (“A police officer has probable cause to conduct a search when ‘the facts available to [him] would “warrant a [person] of reasonable caution in the belief”’ that contraband or evidence of a crime is present. . . . The test for probable cause is not reducible to ‘precise definition or quantification.’ . . . All we have required is the kind of ‘fair probability’ on which ‘reasonable and prudent [people,] not legal technicians, act.’”); *Safford Unified School District # 1 v. Redding*, 557 U.S. 364, 371 (2009) (“a ‘fair probability’ . . . or a ‘substantial chance’”); *Maryland v. Pringle, supra*, 540 U.S. at 370-71; *Wong Sun v. United States*, 371 U.S. 471, 479 (1963). Specifically, probable cause to *arrest* is established when there are reasonable grounds to believe that the particular person sought to be arrested has committed a crime; probable cause for a *search* is established when there are reasonable grounds to believe that objects connected to criminal activity or otherwise subject to seizure are presently located in the particular place to be searched. *Zurcher v. Stanford Daily*, 436 U.S. 547, 556-57 n.6 (1978); *Steagald v. United States*, 451 U.S. 204, 213 (1981); *Safford Unified School District # 1 v. Redding, supra*, 554 U.S. at 370. There are elaborate definitions of the concept of probable cause (e.g., *Gerstein v. Pugh*, 420 U.S. 103, 111-12 (1975); *Dunaway v. New York*, 442 U.S. 200, 208 n.9

(1979)), and innumerable constructions of it in individual factual situations.

The topic of probable cause for the issuance of warrants will be taken up in discussing search warrants. See § 25.17 *infra*. With respect to warrantless arrests, the probable cause requirement must be “strictly enforced” (*Henry v. United States*, 361 U.S. 98, 102 (1959)) because “the informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others . . . while acting under the excitement that attends the capture of persons accused of crime” (*United States v. Lefkowitz*, 285 U.S. 452, 464 (1932)).

“The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate’s disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people’s homes secure only in the discretion of police officers. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.” (*Johnson v. United States*, 333 U.S. 10, 13-14 (1948).)

Accord, *United States v. Watson*, 423 U.S. 411, 432 n.6 (1976) (Powell, J., concurring) (emphasizing the Court’s “longstanding position that . . . [such a warrantless arrest] should receive careful judicial scrutiny”).

In determining whether the police had probable cause to arrest, the central question is what facts the police knew before the arrest. “[A]n arrest is not justified by what the subsequent search discloses.” *Henry v. United States*, *supra*, 361 U.S. at 104. See also *Maryland v. Pringle*, *supra*, 540 U.S. at 371 (“To determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide ‘whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to’ probable cause”); *Florida v. Harris*, 133 S. Ct. 1050, 1059 (2013) (“we do not evaluate probable cause in hindsight, based on what a search does or does not turn up”); and see § 25.3 penultimate paragraph *supra*. For discussion of some of the factors commonly considered by the courts in assessing whether there was probable cause, see § 25.11 *infra*.

When an arrest is made (with or without a warrant) upon probable cause to believe that a particular individual has committed an offense but the police arrest the wrong individual, their arrest is nonetheless legal if (i) they honestly believe that the person arrested is the individual sought and (ii) they have probable cause for this belief. *Hill v. California*, 401 U.S. 797 (1971).

Fourth Amendment restrictions on the amount of physical force that can be used to effect an arrest or other seizure are the subject of a body of case law emanating from *Tennessee v. Garner*, 471 U.S. 1 (1985). See, e.g., *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), and cases discussed; *Tolan v. Cotton*, 134 S. Ct. 1861 (2014); *Mullenix v. Luna*, 136 S. Ct. 305, 308-10 (2015) (per curiam); *State v. White*, 142 Ohio St. 3d 277, 280-85, 29 N.E.3d 939, 944-47 (2015). In some circumstances, violations of these restrictions may require the exclusion of evidence produced by the excessive force. See *Rochin v. California*, 342 U.S. 165 (1952); cf. § 25.14 *infra*, discussing *Winston v. Lee*, 470 U.S. 753 (1985), and cognate cases.

25.8. Searches Incident to Arrest

25.8.1. The “Search Incident to Arrest” Doctrine

Warrantless searches of an arrested person’s clothing and body surfaces are routinely permitted incident to a valid arrest. *United States v. Robinson*, 414 U.S. 218 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973); *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2174-76, 2182-83 (2016); *United States v. Chadwick*, 433 U.S. 1, 14 (1977) (dictum). “[A] lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area.” *New York v. Belton*, 453 U.S. 454, 457 (1981). The rationale for this exception to the warrant requirement is that “[w]hen a custodial arrest is made, there is always some danger that the person arrested may seek to use a weapon, or that evidence may be concealed or destroyed. To safeguard himself and others, and to prevent the loss of evidence, it has been held reasonable for the arresting officer to conduct a prompt, warrantless ‘search of 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.” (*United States v. Chadwick*, *supra*, 433 U.S. at 14.) This rationale has crucial implications for the *scope* of the search permitted incident to arrest (see the following paragraphs) but does not require any case-by-case factual showing of a likelihood that any particular arrestee possesses a weapon or destructible evidence. Rather, what has evolved – in the interest of a bright-line rule – is the treatment of a valid arrest as *generically* posing the requisite likelihoods and *categorically* authorizing a search calculated to address them. “The constitutionality of a search incident to an arrest does not depend on whether there is any indication that the person arrested [actually] possesses weapons or evidence. The fact of a lawful arrest, standing alone, authorizes a search.” *Michigan v. DeFillippo*, 443 U.S. 31, 35 (1979). See also *Birchfield v. North Dakota*, *supra*, 136 S. Ct. at 2183 (under “the search-incident-to-arrest exception, . . . [the arresting officer’s] authority [to search the arrestee’s person] is categorical. It does not depend on an evaluation of the threat to officer safety or the threat of evidence loss in a particular case.”); *Illinois v. LaFayette*, 462 U.S. 640, 644-45 (1983) (dictum); *Michigan v. Long*, 463 U.S. 1032, 1048, 1049 & n.14 (1983) (dictum). But see *State v. Conn*, 278 Kan. 387, 391-94, 99 P.3d 1108, 1112-13 (2003) (“In Kansas, the permissible circumstances, purposes, and scope of a search incident to arrest are controlled by statute.” Because the statute authorizing search incident to arrest states the permissible

“purpose” of such a search as being “(a) Protecting the officer from attack”; “(b) Preventing the person from escaping”; or “(c) Discovering the fruits, instrumentalities, or evidence of the crime” . . . this court rejected the view that case law applying the Fourth Amendment . . . meant that a search of an automobile could automatically be conducted when an occupant was arrested.” Because “the trooper in this case did not indicate any concern for safety,” “the search cannot be justified as a search incident to arrest.” A search incident to arrest may be made either at the site of the arrest (*United States v. Robinson*, *supra*, 414 U.S. at 224-26, 236), or at the stationhouse to which the arrested person is taken (*United States v. Edwards*, 415 U.S. 800 (1974)).

The rule’s rationales do circumscribe it in two principal ways. First, they preclude the extension of the authority for warrantless search to generic situations that are *not* conceived to be akin to arrests from the standpoint of inciting probable armed resistance or evidence destruction. *See, e.g., Knowles v. Iowa*, 525 U.S. 113, 116-19 (1998) (the rationales of the “search incident to arrest” doctrine do not justify a full search of a vehicle when the police stop a motorist for speeding and issue a citation rather than arresting him); *Virginia v. Moore*, 553 U.S. 164, 176-77 (2008) (reaffirming *Knowles*) (dictum); *Sibron v. New York*, 392 U.S. 40, 67 (1968) (“a search incident to a lawful arrest may not precede the arrest”). Second, searches that are innately too intrusive or too expansive to be justified by concerns about armed resistance or evidence destruction cannot be sustained under the search-incident-to-arrest exception to the warrant requirement. *See, e.g., Riley v. California*, 134 S. Ct. 2473, 2493 (2014), discussed further in § 25.8.2 *infra* (“when a cell phone is seized incident to arrest,” a search “warrant is generally required before . . . a search” may be made of digital information on the phone); *Commonwealth v. Morales*, 462 Mass. 334, 335, 344, 968 N.E.2d 403, 405, 411-12 (2012) (a search incident to arrest that resulted in exposure of the defendant’s buttocks to public view on a public street constituted a “strip search” that violated both the federal and state constitutions). *Cf. Birchfield v. North Dakota*, *supra*, 136 S. Ct. at 2177-78, 2184-85 (holding that a motorist who has been arrested for drunk driving can be compelled to submit to a warrantless breath test to determine his or her intoxication level but cannot be compelled to submit to a blood draw because “[b]lood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test” (*id.* at 2184)).

“[T]he search-incident-to-arrest rule actually comprises ‘two distinct propositions’: ‘The first is that a search may be made of the *person* of the arrestee by virtue of the lawful arrest. The second is that a search may be made of the area within the control of the arrestee.’” *Id.* at 2175-76. The limits of the latter proposition have been established by a series of Supreme Court decisions whose upshot is that searches incident to arrest are restricted to “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 [to attack the arresting officer] or destructible evidence” (*Chimel v. California*, 395 U.S. 752, 763 (1969)). *See also United States v. Chadwick*, 433 U.S. 1, 14 (1977); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 (1979). “That limitation, which . . . define[s] the boundaries of the exception, ensures that the scope

of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. . . . If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.” *Arizona v. Gant*, 556 U.S. 332, 339 (2009). Police officers could not, for example, predicate their entry and search of a house on the arrest of a defendant outside the house. *See, e.g., Vale v. Louisiana*, 399 U.S. 30 (1970); *Shipley v. California*, 395 U.S. 818 (1969). *See also Arizona v. Gant, supra*, 556 U.S. at 343-44 (narrowing previous rulings in *New York v. Belton supra*, and *Thornton v. United States*, 541 U.S. 615, 617 (2004), to “hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search,” but announcing an additional rule, which “does not follow from *Chimel*,” to permit a search incident to arrest in certain “circumstances unique to the vehicle context” (see § 25.26 *infra*)).

Within the “wingspan” area defined by *Chimel*, a warrantless search incident to arrest is valid if – but only if – the arrest itself is valid under the doctrines summarized in § 25.7 *supra*. *See, e.g., Beck v. Ohio*, 379 U.S. 89 (1964).

25.8.2. Searches of Containers in the Possession of Arrested Persons

An issue that frequently arises in cases of searches incident to arrest or *Terry* frisks is whether these warrantless search powers extend to a closed container that the defendant is carrying, such as a knapsack or gym bag.

In *United States v. Chadwick*, 433 U.S. 1 (1977), the Court implied that large locked receptacles, such as luggage, may be taken from an arrested person as a matter of routine incident to arrest. But the Court also stated explicitly (although in *dictum*) that containers seized in this manner may not thereafter be *opened* without a warrant based upon probable cause. *Id.* at 14-16 & n.10. *See also Horton v. California*, 496 U.S. 128, 142 n.11 (1990) (*dictum*); *United States v. Place*, 462 U.S. 696, 701 n.3 (1983) (*dictum*).

In *New York v. Belton*, 453 U.S. 454 (1981), which the Court later circumscribed in *Arizona v. Gant*, 556 U.S. 332 (2009), the Court appeared to take a contrary position. *Belton* upheld an arresting officer’s opening of a zippered pocket in a leather jacket found on the seat of a car following arrest of the car’s occupants. In *dictum* the Court in *Belton* stated a very broad rule that the scope of search incident to arrest of a motorist extends to “the contents of any containers found within the passenger compartment” (*Belton, supra*, 453 U.S. at 460), including “luggage, boxes, [and] bags” (*id.* at 460-61 n.4), “whether [the container] . . . is open or closed” (*id.* at 461).

The subsequent opinion in *United States v. Ross*, 456 U.S. 798 (1982), further compounds the confusion. First, the Court in *Ross* gratuitously comments that “[a] container carried at the time of arrest *often* may be searched without a warrant and even without any specific suspicion concerning its

contents” (*id.* at 823 (emphasis added)). Second, the Court asserts (in the different context of a *Carroll* vehicle search (see § 25.24 *infra*)), that “a traveler who carries a toothbrush and a few articles of clothing in a paper bag or knotted scarf [may] claim an equal right to conceal his possessions from official inspection as the sophisticated executive with the locked attaché case” (*id.* at 822). The latter observation appears to rule out any distinction between “paper bags, locked trunks, lunch buckets, and orange crates” (*id.*), so far as the Fourth Amendment privacy interests of the respective possessors of these containers is concerned. Within the framework of the search-incident-to-arrest doctrine, the containers might still be distinguished, allowing search of the paper bag and not the trunk, on the ground that the arrestee’s ability to seize weapons or destructible evidence from the former is greater. That distinction is, however, difficult to reconcile with the holding of *United States v. Robinson*, *supra*, 414 U.S. at 235, that “[t]he authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect.” *Belton* not merely quotes this *Robinson* language but draws from it the conclusion that the power of search incident to arrest encompasses “containers [which are] . . . such that they could hold neither a weapon nor evidence of the criminal conduct for which the suspect was arrested” (453 U.S. at 461). Differences in the accessibility of various containers to the arrestee can hardly be thought decisive of the application of a doctrine that permits search of containers that could not hold a weapon or evidence in the first place. See *Thornton v. United States*, 541 U.S. 615, 623 (2004) (the *Belton* rule does not “depend[] on differing estimates of what items were or were not within reach of an arrestee at any particular moment”). So *Belton* rests the search-incident-to-arrest power not upon the risk that the arrestee may grab the contents of the container but upon the concept that a “lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have” in containers within his or her reach (*id.*). But if this is so, the question arises why the search-incident-to-arrest power is restricted to the area within the arrestee’s reach, as *Belton* concedes that it is (*id.* at 457-58, 460), and as *Gant* declares unequivocally that it is (see *Arizona v. Gant*, *supra*, 556 U.S. at 335 (“a vehicle search incident to a recent occupant’s arrest” is not constitutionally “authorize[d]” “after the arrestee has been secured and cannot access the interior of the vehicle”). *Chadwick* squarely holds that the privacy interests inhering in “property in the possession of a person arrested in public” (433 U.S. at 14) but outside of his or her reach are *not* dissipated by the fact of a lawful custodial arrest (433 U.S. at 13-16). And it adds that “[u]nlike searches of the person, *United States v. Robinson*, 414 U.S. 218 (1973) . . ., searches of possessions within an arrestee’s immediate control cannot be justified by any reduced expectations of privacy caused by the arrest” (433 U.S. at 16 n.10).

This area of Fourth Amendment law was muddied still further when the Court in *California v. Acevedo*, 500 U.S. 565 (1991), revised the rules governing a *Carroll* vehicle search (see § 25.24 *infra*) to eliminate the distinction that *Ross*, in explaining the import of *Chadwick* and *Arkansas v. Sanders*, 442 U.S. 753 (1979), drew between what the police may do when they have probable cause

to believe that a seizable object is concealed in a vehicle and what they may do when they have probable cause merely to believe that a seizable object may be contained within some particular receptacle carried in the vehicle. The *Acevedo* decision concerned solely a *Carroll* vehicle search and accordingly did not address the nature and scope of the “search incident to arrest” doctrine.

In *Arizona v. Gant supra*, in 2009, the Court disavowed the lower courts’ “broad reading of *Belton*” as authorizing “a vehicle search . . . incident to every arrest of a recent occupant notwithstanding that in most cases the vehicle’s passenger compartment will not be within the arrestee’s reach at the time of the search” (*Gant, supra*, 556 U.S. at 343). Explaining this curtailment of the lower courts’ expansive applications of *Belton*, the *Gant* Court stated:

“To read *Belton* as authorizing a vehicle search incident to every recent occupant’s arrest would . . . untether the rule from the justifications underlying the *Chimel* exception – a result clearly incompatible with our statement in *Belton* that it ‘in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.’ 453 U.S., at 460, n. 3. Accordingly, we reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.” (*Id.*)

Although the five-Justice majority in *Gant* characterized its decision as merely a “narrow reading of *Belton*” (*Gant, supra*, 556 U.S. at 348 n.9), the four dissenting Justices viewed the *Gant* majority opinion as “effectively overrul[ing]” both *Belton* and *Thornton v. United States* (*Gant, supra*, 556 U.S. at 355 (Justice Alito, dissenting, joined in pertinent part by Chief Justice Roberts and Justices Kennedy and Breyer)). Even by the shoddy standards for clarity and durability that characterize the U.S. Supreme Court’s Fourth Amendment jurisprudence generally (see Justice Frankfurter’s classic statement that “[t]he course of true law pertaining to searches and seizures . . . has not – to put it mildly – run smooth” (*Chapman v. United States*, 365 U.S. 610, 618 (1961) (concurring opinion))), the *Belton-Gant* caselaw is a disaster area. Its unprincipled and unstable quality gives counsel an especially strong argument for urging state high courts to reject it and adopt more protective state constitutional rules to govern this sector, as suggested in § 17.11 *supra*. See, e.g., *State v. Gaskins*, 866 N.W.2d 1, 12-13 (Iowa 2015) (“declining to adopt *Gant*’s broad evidence-gathering purpose as a rationale for warrantless searches of automobiles and their contents incident to arrest under article I, section 8 of the Iowa Constitution” and invalidating a warrantless search of a small portable locked safe found in an automobile following the driver’s arrest for marijuana possession and removal to a squad car; “We now agree with the approach taken by the courts that have rejected the *Belton* rule that authorized warrantless searches of containers without regard to the *Chimel* considerations of officer safety and protecting evidence. ‘When lines need to be drawn in creating rules, they should be drawn thoughtfully along the logical contours of the rationales giving rise to the rules, and not as artificial lines drawn

elsewhere that are unrelated to those rationales’ . . . ¶ . . . [W]e decline to adopt *Gant*’s alternative evidence-gathering rationale for warrantless searches incident to arrest under the Iowa Constitution because it would permit the SITA exception to swallow completely the fundamental textual rule in article I, section 8 that searches and seizures should be supported by a warrant. In other words, ‘use of a [SITA] rationale to sanction a warrantless search that has nothing to do with its underlying justification – preventing the arrestee from gaining access to weapons or evidence – is an anomaly.’”).

Even though *Gant* did not address (and had no reason to address) the preexisting rules governing searches of containers incident to the arrest of an individual outside the automobile context, *Gant* throws into question some of the lower court caselaw on this subject because that caselaw was expressly predicated on *Belton*. See, e.g., *State v. Roach*, 234 Neb. 620, 627-30, 452 N.W.2d 262, 267-69 (1990) (concluding that *Belton* applies outside the automobile context and relying on the court’s own and other courts’ broad readings of *Belton* to uphold a search of a closed container in the possession of an individual arrested inside a house). Given *Gant*’s repudiation of a broad reading of *Belton*, counsel can argue that the best source of Supreme Court guidance on the proper handling of container searches incident to arrest is *Chadwick*. In States in which the courts relied on *Belton* to authorize container searches even when the container was not physically accessible to the arrestee at and after the time s/he was seized by the arresting officers, counsel can challenge that rule by invoking *Gant*’s explanation that, in the absence of “circumstances unique to the automobile context” (*Arizona v. Gant*, *supra*, 556 U.S. at 335), the “search-incident-to-arrest . . . rule does not apply” when “there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search” (*id.* at 339). See also, e.g., *State v. Lamay*, 140 Idaho 835, 839-40, 103 P.3d 448, 452-53 (2004) (pre-*Gant* decision that rejected *Belton* as inapplicable outside the automobile context and held that the customary rules on searches incident to arrest inside a dwelling do not permit the search of an arrestee’s knapsack if the arrestee is handcuffed and the knapsack is “nearly fifteen feet away . . . and located in a different room”); *People v. Gokey*, 60 N.Y.2d 309, 311, 313-14, 457 N.E.2d 723, 724, 725, 469 N.Y.S.2d 618, 619, 620 (1983) (state high court, which had previously rejected *Belton* in favor of a state constitutional rule that resembles the rule the Supreme Court eventually adopted in *Gant*, applies its state constitutional rule to hold that a warrantless search of an arrestee’s duffel bag was unlawful, even though the bag was “within the immediate control or ‘grabbable area’” of the arrestee “at the time of his arrest” because the “defendant’s hands were handcuffed behind his back and he was surrounded by five police officers and their dog” and thus the circumstances did not “support a reasonable belief that the suspect may gain possession of a weapon or be able to destroy evidence located in the bag”).

In *Riley v. California*, 134 S. Ct. 2473 (2014), the Court addressed the question “whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested” (*id.* at 2480). Distinguishing between “physical objects” and “digital content on cell phones,” the Court concluded that the two governmental interests underlying “*Robinson*’s categorical rule” for searches of “physical objects” – the risks of

“harm to officers and destruction of evidence” – do not have “much force with respect to digital content on cell phones” (*id.* at 2484-85). Moreover, while “*Robinson* regarded any privacy interests retained by an individual after arrest as significantly diminished by the fact of the arrest itself,” “[c]ell phones . . . place vast quantities of personal information literally in the hands of individuals,” and “[a] search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*” (*id.* at 2485). *See also id.* at 2488-89 (“Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse.”); *id.* at 2489 (“Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee’s person. The term ‘cell phone’ is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone.”); *id.* at 2494-95 (“Modern cell phones[,] . . . [w]ith all they contain and all they may reveal, . . . hold for many Americans ‘the privacies of life’” (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886))). Accordingly, the Court “decline[d] to extend *Robinson* to searches of data on cell phones, and h[e]ld instead that officers must generally secure a warrant before conducting such a search” (*Riley v. California, supra*, 134 S. Ct. at 2485). *See also id.* at 2494 (“even though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone”); *United States v. Camou*, 773 F.3d 932, 939, 940-41, 943 (9th Cir. 2014) (a Border Patrol agent’s search of an arrestee’s cell phone, which was retrieved from the arrestee’s vehicle, “was not roughly contemporaneous with Camou’s arrest and, therefore, was not incident to arrest,” because “one hour and twenty minutes passed between Camou’s arrest and Agent Walla’s search of the cell phone” and “a string of intervening acts occurred between Camou’s arrest and the search of his cell phone” that “signaled the arrest was over” by the time of the cell phone search; the search also was not justifiable under the exigent circumstances exception because the search “occurred one hour and twenty minutes after [Camou’s] arrest,” and, furthermore, “even if we were to assume that the exigencies of the situation permitted a search of Camou’s cell phone to prevent the loss of cell data, the search’s scope was impermissibly overbroad” in that it “went beyond contacts and call logs to include a search of hundreds of photographs and videos stored on the phone’s internal memory”; the search also was not justifiable under the automobile exception because *Riley*’s reasoning requires that cell phones be classified as “non-containers for purposes of the vehicle exception to the warrant requirement”); *United States v. Lopez-Cruz*, 730 F.3d 803, 805-06, 808 (9th Cir. 2013) (discussed in § 25.15.4 concluding paragraph *infra*).

25.8.3. “Inventory” Searches Incident to Incarceration

If an arrested person is to be incarcerated, the police may remove, examine, and inventory everything in his or her possession at the lockup. *Illinois v. LaFayette*, 462 U.S. 640, 646-48 (1983). This “inventory search” power permits the opening, without a warrant, of any container carried by the person, whether or not the police have any reason to suspect its contents and whether or not they could practicably secure the container during the period of the person’s incarceration without opening it up. *Id.* Presumably the

rule of *Riley v. California*, 134 S. Ct. 2473 (2014) – which bars the application of the “search incident to arrest” doctrine to the digital content of a cell phone because “[c]ell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee’s person” (*id.* at 2489; see § 25.8.2 *supra*, discussing *Riley*) – applies as well in the context of “inventory” searches incident to incarceration and requires that such a search be authorized either by a search warrant or by some “case-specific exception” that “justif[ies] a warrantless search of a particular phone” (*id.* at 2494). See also *State v. Granville*, 423 S.W.3d 399, 402 (Tex. Crim. App. 2014) (pre-*Riley* decision holding that a search warrant was needed for the police to examine the contents of a cell phone that was taken from the defendant “during the booking procedure and placed in the jail property room”: the arrestee, a “high-school student[,] did not lose his legitimate expectation of privacy in his cell phone simply because it was being stored in the jail property room”; the officer “could have seized appellant’s phone and held it while he sought a search warrant, but, even with probable cause, he could not ‘activate and search the contents of an inventoried cellular phone’ without one”).

Inventory searches must be conducted “in accordance with established inventory procedures” (*Illinois v. LaFayette*, *supra*, 462 U.S. at 648). See *id.* at 644 (explaining that the validity of inventory searches is to be determined by the principles of *Delaware v. Prouse*, 440 U.S. 648, 654 (1979), a decision that calls for standardized procedures to control “the discretion of the official in the field” (440 U.S. at 655)); see also *Colorado v. Bertine*, 479 U.S. 367, 372-76 (1987) (analogizing inventory searches of automobiles to inventory searches of arrested individuals and reaffirming that inventory searches of automobiles must be conducted in accordance with “standard criteria”); *Florida v. Wells*, 495 U.S. 1, 4 (1990); *City of Indianapolis v. Edmond*, 531 U.S. 32, 45 (2000).

Jail personnel may also conduct an intrusive visual search of the body – including body cavities – of an individual who is being admitted into the general population of a holding facility, for the purpose of detecting and confiscating any materials that would compromise the facility’s security. *Florence v. Board of Chosen Freeholders of County of Burlington*, 132 S. Ct. 1510 (2012).

25.8.4. Search Prior to the Point of Arrest

The general rule is that “a search incident to a lawful arrest may not precede the arrest” (*Sibron v. New York*, 392 U.S. 40, 67 (1968)). However, the Court has recognized two narrow exceptions to this rule.

If the search and the arrest are parts of a single course of events and “the formal arrest followed quickly on the heels of the challenged search” (*Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980)), then it is not “particularly important that the search preceded the arrest rather than vice versa” (*id.*). However, the police officer must, of course, have “probable cause to place [the defendant] under arrest” at the time of the search (*id.*), and “[t]he fruits of the search of [the defendant’s] person . . . [cannot be] necessary to support probable cause to arrest” (*id.* at 111 n.6). Accord, *Sibron v. New York*, *supra*, 392 U.S. at 63 (“[i]t is axiomatic that an incident search may not precede an

arrest and serve as part of its justification”). See also *People v. Reid*, 24 N.Y.3d 615, 617, 619, 620, 26 N.E.3d 237, 238, 239, 240, 2 N.Y.S.3d 409, 410, 411, 412 (2014) (Although a search can precede an arrest as long as “the two events were substantially contemporaneous,” the officer “testified [that], but for the search there would have been no arrest at all,” notwithstanding that “probable cause to arrest the driver existed before the search,” and “[w]here that is true, to say that the search was incident to the arrest does not make sense.”; “[T]he ‘search incident to arrest’ doctrine, by its nature, requires proof that, at the time of the search, an arrest has already occurred or is about to occur. Where no arrest has yet taken place, the officer must have intended to make one if the ‘search incident’ exception is to be applied.”).

In cases in which the search and the arrest are not a single course of events, a search prior to arrest nevertheless may be valid if it is restricted to the “very limited search necessary to preserve” some evidence of “ready destructibility” that the suspect would otherwise likely destroy (*Cupp v. Murphy*, 412 U.S. 291, 296 (1973)). Thus, in *Cupp*, the Court approved the officers’ taking scrapings of what appeared to be dried blood from the fingernails of a suspect, at a point in time when the police already had probable cause to arrest the suspect, even though the formal arrest did not occur until a month later. The Court emphasized that the scope of the search must be strictly limited to the measures needed to “preserve . . . highly evanescent evidence” (*id.* at 296), and that “a full *Chimel* search [the type of extensive search permitted incident to arrest upon probable cause] would [not be] . . . justified . . . without a formal arrest and without a warrant” (*id.*) See the discussion in *Illinois v. McArthur*, 531 U.S. 326, 331-34 (2001), of police authority to prevent alerted suspects from destroying evidence; and see the cases dealing with a similar issue in the context of building searches, discussed in § 25.22.3 *infra*. Note that this authority depends upon the possession by the police of probable cause to believe that seizable evidence exists and is within the capacity of the suspect to destroy. See *Illinois v. McArthur*, *supra*, 531 U.S. at 334 (“We have found no case in which this Court has held unlawful a temporary seizure *that was supported by probable cause* and was designed to prevent the loss of evidence (emphasis added)); *Knowles v. Iowa*, 525 U.S. 113, 116 (1998) (in cases in which *there is probable cause to arrest a suspect*, “the need to preserve evidence for later use at trial” is one of the justifications for allowing a warrantless search incident to arrest). If the police lack probable cause either (i) to search for seizable evidence or (ii) to arrest a suspect, they have no power to seize evidence in the first place (see, e.g., *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993)), so they cannot justify a “preventive” search on the theory that it is necessary to preserve destructible evidence.

25.9. Circumstances Justifying a Terry Stop

In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court held that a state could constitutionally authorize its law enforcement officers to conduct a “stop” – a brief on-the-street detention for the purpose of inquiry and observation – under circumstances giving rise to a rational suspicion of criminal activity but not amounting to the probable cause necessary for arrest. *Terry* “created an exception to the requirement of probable cause, an

exception whose ‘narrow scope’ . . . [the Supreme] Court ‘has been careful to maintain’” (*Ybarra v. Illinois*, 444 U.S. 85, 93 (1979)). See also *Dunaway v. New York*, 442 U.S. 200, 207-10 (1979); *Florida v. Royer*, 460 U.S. 491, 499 (1983) (plurality opinion); *id.* at 509-11 (concurring opinion of Justice Brennan); *Kaupp v. Texas*, 538 U.S. 626, 630 (2003).

A *Terry* stop must rest upon specific, identifiable facts that, “judged against an objective standard” (*Terry v. Ohio*, *supra*, 392 U.S. at 21; see *Delaware v. Prouse*, 440 U.S. 648, 654 (1979)), give rise to “a reasonable and articulable suspicion that the person seized is engaged in criminal activity” (*Reid v. Georgia*, 448 U.S. 438, 440 (1980) (per curiam); see *Brown v. Texas*, 443 U.S. 47, 51-53 (1979)). Considering “the totality of the circumstances,” the “detaining officers must have a particularized and objective basis for suspecting the particular person stopped of criminal activity” (*United States v. Cortez*, 449 U.S. 411, 417-18 (1981)). See also *Arizona v. Johnson*, 555 U.S. 323, 327 (2009); *United States v. Arizuzu*, 534 U.S. 266, 273-74 (2002); *Illinois v. Wardlow*, 528 U.S. 119, 123-24 (2000); *Ornelas v. United States*, 517 U.S. 690, 696 (1996); *United States v. Sokolow*, 490 U.S. 1, 7-8 (1989) (dictum); *Kolender v. Lawson*, 461 U.S. 352, 356 n.5 (1983) (dictum). Conduct or circumstances that “describe a very large category of presumably innocent [persons]” will not suffice (*Reid v. Georgia*, *supra*, 448 U.S. at 441; *Brown v. Texas*, *supra*, 443 U.S. at 52; cf. *Ybarra v. Illinois*, *supra*, 444 U.S. at 91; compare *United States v. Sokolow*, *supra*, 490 U.S. at 8-11). Rather, the “particularized suspicion” must be focused upon “the particular individual being stopped” (*United States v. Cortez*, *supra*, 449 U.S. at 418). See also, e.g., *United States v. Black*, 707 F.3d 531, 540-41 (4th Cir. 2013); *State v. Teamer*, 151 So. 3d 421, 427-28 (Fla. 2014) (“The discrepancy between the vehicle registration and the color the deputy observed does present an ambiguous situation, and the Supreme Court has recognized that an officer can detain an individual to resolve an ambiguity regarding suspicious yet lawful or innocent conduct. . . . However, the suspicion still must be a reasonable one. . . . In this case, there simply are not enough facts to demonstrate reasonableness. . . . [T]he color discrepancy here is not ‘inherently suspicious’ or ‘unusual’ enough or so ‘out of the ordinary’ as to provide an officer with a reasonable suspicion of criminal activity, especially given the fact that it is not against the law in Florida to change the color of your vehicle without notifying the DHSMV. ¶ The law allows officers to draw rational inferences, but to find reasonable suspicion based on this single noncriminal factor would be to license investigatory stops on nothing more than an officer’s hunch. Doing so would be akin to finding reasonable suspicion for an officer to stop an individual for walking in a sparsely occupied area after midnight simply because that officer testified that, in his experience, people who walk in such areas after midnight tend to commit robberies. Without more, this one fact may provide a ‘mere suspicion,’ but it does not rise to the level of a reasonable suspicion.”). Information “completely lacking in indicia of reliability would either warrant no police response or require further investigation before a forcible stop of a suspect would be authorized” (*Adams v. Williams*, 407 U.S. 143, 147 (1972) (dictum)). See, e.g., *Florida v. J.L.*, 529 U.S. 266, 271 (2000) (an anonymous tip which lacks “moderate indicia of reliability” will not justify a stop, and this is the rule even where the tip contains an “accurate description of a subject’s . . . location and appearance”; “[t]he reasonable suspicion here

at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person”; and the *Terry* requirement of “standard pre-search reliability testing” in terms of reasonable suspicion is not relaxed in cases where the tip asserts that the subject is in possession of an illegal firearm); *United States v. Freeman*, 735 F.3d 92, 97-103 (2d Cir. 2013); *United States v. Brown*, 448 F.3d 239 (3d Cir. 2006); *United States v. Patterson*, 340 F.3d 368 (6th Cir. 2003); *United States v. Mallides*, 473 F.2d 859 (9th Cir. 1973); *Irwin v. Superior Court*, 1 Cal. 3d 423, 462 P.2d 12, 82 Cal. Rptr. 484 (1969), *modified in In re Tony C.*, 21 Cal. 3d 888, 894, 582 P.2d 957, 960, 148 Cal. Rptr. 366, 369 (1978); *cf. Navarette v. California*, 134 S. Ct. 1683, 1686, 1688-90 (2014); *United States v. Ramsey*, 431 U.S. 606, 612-15 (1977); *Jernigan v. Louisiana*, 446 U.S. 958, 959-60 (1980) (opinion of Justice White, dissenting from the denial of *certiorari*).

The power of the police to conduct a *Terry* stop is more limited when the stop is for the purpose of “investigat[ing] past criminal activity . . . rather than . . . to investigate ongoing criminal conduct” (*United States v. Hensley*, 469 U.S. 221, 228 (1985)). The *Terry* decision itself and almost all of the caselaw establishing standards for *Terry* stops involved situations in which the “police stopped or seized a person because they suspected he was about to commit a crime . . . or was committing a crime at the moment of the stop” (469 U.S. at 227). In such situations the stop is justified by the exigencies of crime prevention and the need to avert an imminent threat to public safety. *Id.* at 228. “A stop to investigate an already completed crime does not necessarily promote the interest of crime prevention as directly . . . [and] officers making a stop to investigate past crimes may have a wider range of opportunity to choose the time and circumstances of the stop.” *Id.* at 228-29. To conduct a stop for the purpose of investigating a completed crime, a police officer must “have a reasonable suspicion, grounded in specific and articulable facts, that [the] . . . person . . . was involved in or is wanted in connection with a completed felony” (*id.* at 229). Moreover, in authorizing such investigatory stops in *United States v. Hensley*, the Court strongly indicated that these stops may be conducted only in cases in which the police previously “have been unable to locate [the] . . . person” (469 U.S. at 229) and therefore need to exercise the “stop” power in order to prevent “a person they encounter” (*id.*) from “flee[ing] in the interim and . . . remain[ing] at large” (*id.*) *See id.* at 234-35 (emphasizing that the defendant was “at large” and that the officers who conducted the stop could reasonably conclude, on the basis of a “wanted flyer,” that “a warrant might have been obtained in the period after the flyer was issued”). It is only the inability to find the defendant in a fixed location – to fully “choose the time and circumstances of the stop” (*id.* at 228-29) – that creates the exigency necessary to conduct a stop for the purpose of investigating a completed crime. *See id.* at 228-29; *see also Brown v. Texas, supra*, 443 U.S. at 51. Thus, at least arguably, when the police have known the defendant’s address and failed to avail themselves of the opportunity of conducting a purely voluntary “contact” at the defendant’s home (see § 25.4.1 *supra*), they may not use their suspicions about the defendant’s involvement in a completed crime to conduct a *Terry* stop.

For discussion of some of the factors commonly considered by the courts in gauging whether there was an adequate basis for a *Terry* stop, see § 25.11 *infra*.

25.10. *Circumstances Justifying a Terry Frisk; The Plain Touch Doctrine*

In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court ruled that a state could constitutionally authorize not only a “stop” but also, under appropriate circumstances, a “frisk”: – that is, a pat-down for weapons or a similar “self-protective” search. The frisk must be made incidental to a valid accosting or stop. *See, e.g., State v. Serna*, 235 Ariz. 270, 275, 331 P.3d 405, 410 (2014) (a *Terry* frisk could not be conducted during a consensual encounter between a civilian and a police officer even though the civilian admitted to having a gun because “the initial stop was based on consent, not on any asserted suspicion of criminal activity,” and “*Terry* allows a frisk only if two conditions are met: officers must reasonably suspect both that criminal activity is afoot and that the suspect is armed and dangerous”).

A *Terry* frisk cannot be conducted for the purpose of seeking evidence; it can only be conducted for the purpose of discovering weapons that might be used against the officer. *See Sibron v. New York*, 392 U.S. 40, 64-65 (1968); *Ybarra v. Illinois*, 444 U.S. 85, 93-94 (1979); *Michigan v. Long*, 463 U.S. 1032, 1049-52 & n.16 (1983); *Minnesota v. Dickerson*, 508 U.S. 366, 373 (1993); *Florida v. J.L.*, 529 U.S. 266, 269-70 (2000). To justify a frisk, the officer needs more than the reasonable suspicion of criminal activity that will justify a stop and needs more than merely a hunch that the suspect might be armed. The officer must be able to “point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant” the conclusion that the officer “is dealing with an armed and dangerous individual” (*Terry v. Ohio*, *supra*, 392 U.S. at 21, 27). *See Sibron v. New York*, *supra*, 392 U.S. at 63-64; *Ybarra v. Illinois*, *supra*, 444 U.S. at 92-93; *Michigan v. Long*, *supra*, 463 U.S. at 1049-52 & nn.14, 16; *Minnesota v. Dickerson*, *supra*, 508 U.S. at 373; *Florida v. J.L.*, *supra*, 529 U.S. at 269-72; *Arizona v. Johnson*, 555 U.S. 323, 327 (2009); *Dunaway v. New York*, 442 U.S. 200, 209 n.11 (1979) (dictum); *State v. Serna*, *supra*, 235 Ariz. at 275, 331 P.3d at 410 (“mere knowledge or suspicion that a person is carrying a firearm” will not suffice because *Terry* requires “that a suspect be ‘armed and presently dangerous’”). *But cf. Samson v. California*, 547 U.S. 843, 846, 851-52 (2006) (police officer, “who was aware that [Samson] was on parole” and stopped him based on a belief that there was “an outstanding parole warrant” for him but then confirmed that no such warrant had been issued, could nonetheless frisk Samson because Samson’s expectation of privacy was diminished by having signed a statutorily-required agreement to a parole condition of being subject to a “search or seizure by a parole officer or other peace officer . . . with or without cause”); *compare State v. Ochoa*, 792 N.W.2d 260, 291 (Iowa 2010) (“reject[ing] the holding of *Samson* under the Iowa Constitution” and “conclud[ing] that a parolee may not be subjected to broad, warrantless searches by a general law enforcement officer without any particularized suspicion or limitations to the scope of the search”).

In addition to limiting the situations in which an officer can make a frisk, the Fourth Amendment also regulates the manner in which frisks may be conducted. A frisk must be “limited to that which is necessary for the discovery of weapons” (*Terry v. Ohio*, *supra*, 392 U.S. at 26). *See Sibron v. New York*, *supra*,

392 U.S. at 65-66; *United States v. Brignoni-Ponce*, 422 U.S. 873, 880-82 (1975); *Pennsylvania v. Mimms*, 434 U.S. 106, 111-12 (1977) (per curiam); *Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion); *id.* at 509-11 (concurring opinion of Justice Brennan). “If the protective search goes beyond what is necessary to determine if the suspect is armed, it is no longer valid under *Terry* and its fruits will be suppressed.” *Minnesota v. Dickerson*, *supra*, 508 U.S. at 373. Emphasizing that the frisk approved in *Terry* consisted of “a limited patting of the outer clothing of the suspect for concealed objects which might be used as instruments of assault” and that it was only after the discovery of such objects that “the officer in *Terry* place[d] his hands in the pockets of the men he searched,” the Court in *Sibron v. New York*, *supra*, condemned a frisk in which the officer, “with no attempt at an initial limited exploration for arms, . . . thrust his hand into [the defendant’s] pocket” (392 U.S. at 65). See also *State v. Privott*, 203 N.J. 16, 31-32, 999 A.2d 415, 424-25 (2010) (police officer exceeded the permissible scope of a *Terry* frisk by “lift[ing] defendant’s tee-shirt to expose defendant’s stomach, and in doing so, observ[ing] a plastic bag with suspected drugs in the waistband of defendant’s pants”). In *Minnesota v. Dickerson*, *supra*, 508 U.S. at 378-79, the Court held that a “police officer . . . overstepped the bounds of the ‘strictly circumscribed’ search for weapons allowed under *Terry*” by “continu[ing] exploration of defendant’s pocket after having concluded that it contained no weapon.” The frisk must be “limited to those areas in which a weapon may be placed or hidden” (*Michigan v. Long*, *supra*, 463 U.S. at 1049 (during a *Terry* search of the passenger compartment of an automobile, the *Terry* frisk doctrine permits officers to search only those areas that could contain a weapon and were accessible to the suspect)). See also *United States v. Askew*, 529 F.3d 1119, 1123, 1127-44 (D.C. Cir. 2008) (*en banc*) (police officers’ partial unzipping of the defendant’s outer jacket during a show-up to allow the victim to see whether the defendant’s sweatshirt matched that of the perpetrator exceeded the lawful bounds of a *Terry* frisk).

If, in the course of a *Terry* frisk, “a police officer lawfully pats down a suspect’s outer clothing and feels an object whose contour or mass makes its identity [as contraband] immediately apparent,” the officer may be able to seize the object pursuant to the “plain touch” (sometimes called the “plain feel”) doctrine (*Minnesota v. Dickerson*, *supra*, 508 U.S. at 373, 375-76). For the “plain touch” doctrine to justify a seizure, “the officer who conducted the search . . . [had to have been] acting within the lawful bounds marked by *Terry*” at the time s/he discovered the contraband (*id.* at 377); the “incriminating character of the object . . . [had to have been] immediately apparent” to the officer without, for example, engaging in ““squeezing, sliding and otherwise manipulating the contents of the defendant’s pocket”” after it was already apparent that the “pocket . . . contained no weapon” (*id.* at 378-79); the officer’s recognition of the contraband nature of the object must reach the level of “probable cause” (*id.* at 377); and it must be evident from the circumstances that the officer was not exploiting an authorized *Terry* frisk for weapons to engage in “the sort of evidentiary search that *Terry* expressly refused to authorize . . . and that [the Court has] . . . condemned in subsequent cases” (*id.* at 378). *But cf. People v. Diaz*, 81 N.Y.2d 106, 110-12 & n.2, 612 N.E.2d 298, 301-02 & n.2, 595 N.Y.S.2d 940, 943-44 & n.2 (1993) (rejecting the “plain touch” doctrine altogether on state constitutional grounds).

25.11. Factors Commonly Relied on by the Police to Justify an Arrest or a Terry Stop or Frisk

Invariably, the police invoke the same general factors in case after case to justify their decisions to arrest or to conduct a *Terry* stop and frisk. In part, this may be due to police experience that these factors are reliable indicators of criminal conduct. In part, it may be because police officers have learned the proper formulaic responses necessary in order to obtain judicial ratification of their actions. The following subsections discuss some of the more controversial factors in the standard litany.

25.11.1. “High Crime Neighborhood”

Police routinely cite the high crime rate in a neighborhood to justify a stop or an arrest. Although the prevalence of crime in a certain area may be of some relevance in determining probable cause or articulable suspicion (*see Carroll v. United States*, 267 U.S. 132, 159-60 (1925); *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000)), the Supreme Court has indicated that this factor should be given little weight as a predicate for either an arrest or a *Terry* stop. In *Brown v. Texas*, 443 U.S. 47 (1979), the Court invalidated a *Terry* stop that was based in part on the crime-prone character of the neighborhood, saying: “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” (*id.* at 52). *Accord, Illinois v. Wardlow, supra*, 528 U.S. at 124 (“An individual’s presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime” (citing *Brown v. Texas, supra*); *United States v. Black*, 707 F.3d 531, 542 (4th Cir. 2013) (“In our present society, the demographics of those who reside in high crime neighborhoods often consist of racial minorities and individuals disadvantaged by their social and economic circumstances. To conclude that mere presence in a high crime area at night is sufficient justification for detention by law enforcement is to accept *carte blanche* the implicit assertion that Fourth Amendment protections are reserved only for a certain race or class of people. We denounce such an assertion.”); *People v. Shabaz*, 424 Mich. 42, 60-61, 378 N.W.2d 451, 459 (1985); *People v. Holmes*, 81 N.Y.2d 1056, 1058, 619 N.E.2d 396, 398, 601 N.Y.S.2d 459, 461 (1993) (suspect’s presence in a “known narcotics location,” even when combined with his flight from the police and a “bulge in the pocket of his jacket,” did not provide the requisite basis for a *Terry* stop: “Given the unfortunate reality of crime in today’s society, many areas of New York City, at one time or another, have probably been described by the police as ‘high crime neighborhoods’ or ‘narcotics-prone locations.’”). Mere presence in a crime-ridden locale also cannot supply the predicate for a *Terry* frisk. *See Ybarra v. Illinois*, 444 U.S. 85, 93-96 (1979) (holding that the defendant’s presence in a sparsely occupied one-room bar “at a time when the police had reason to believe that the bartender would have heroin for sale” (444 U.S. at 91) did not justify a reasonable belief that the defendant was armed and dangerous).

25.11.2. *Failure To Respond to Police Inquiry; Flight*

Frequently the police detain or arrest an individual because the individual refused to answer questions or because s/he walked or ran away when the police attempted to question him or her.

When suspects choose to answer the questions of the police, “the responses they give to [the] officers’ questions” can be considered in the calculus of probable cause or articulable suspicion (*United States v. Ortiz*, 422 U.S. 891, 897 (1975)). It is not clear, however, whether (and, if so, to what extent) a refusal to answer inquiries may be given weight in justifying a stop or arrest. In a number of cases, a majority or plurality of the Supreme Court or an individual Justice has stated that a suspect’s refusal to answer police questions cannot provide a predicate for satisfaction of the Fourth Amendment criteria for a *Terry* stop or an arrest. See *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000) (“when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business”; an individual has the “right to . . . remain silent in the face of police questioning”); *Florida v. Bostick*, 501 U.S. 429, 437 (1991) (a suspect’s “refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure”); *Berkemer v. McCarty*, 468 U.S. 420, 439 (1984) (a “detainee is not obliged to respond” to a police officer’s questions); *Kolender v. Lawson*, 461 U.S. 352, 365 (1983) (Justice Brennan, concurring) (a *Terry* suspect “must be free . . . to decline to answer the questions put to him”); *Florida v. Royer*, 460 U.S. 491, 498 (1983) (plurality opinion) (a suspect’s “refusal to listen [to police questions] or answer does not, without more, furnish . . . grounds” for a *Terry* stop); *Terry v. Ohio*, *supra*, 392 U.S. at 34 (Justice White, concurring) (a suspect’s “refusal to answer furnishes no basis for an arrest”). Similar statements can be found in lower court opinions. See, e.g., *Moya v. United States*, 761 F.2d 322, 325 (7th Cir. 1985); *People v. Howard*, 50 N.Y.2d 583, 591-92, 408 N.E.2d 908, 914, 430 N.Y.S.2d 578, 584 (1980). In *Hibel v. Sixth Judicial District Court of Nevada*, 542 U.S. 177 (2004), however, the Court rejected a Fourth Amendment challenge to a “stop and identify” statute that allowed an officer to detain a person to “ascertain his identity” if the “circumstances . . . reasonably indicate that the person has committed, is committing or is about to commit a crime” and that permitted the suspect’s failure to give the officer his or her name under these circumstances to be punished criminally as “obstruct[ing] and delay[ing] . . . a public officer in attempting to discharge his duty” (*id.* at 181-82). In upholding the statute, the Court stated that “[t]he principles of *Terry* permit a State to require a suspect to disclose his name in the course of a *Terry* stop,” as long as the “statute does not alter the nature of the stop itself . . . [-] does not change its duration . . . or its location” (*id.* at 187-88, 189). The *Hibel* ruling is expressly limited to situations (and, thus, jurisdictions) in which a statute authorizes an arrest of an individual for refusing to divulge his or her name during a *Terry* stop. See *id.* at 187-88 (explaining that prior Court statements, such as those quoted above, regarding a suspect’s right to refuse to answer questions concern the nature and import of Fourth Amendment protections while the *Hibel* “case concerns a different issue, . . . [in that] the source of the legal obligation arises from Nevada state law, not

the Fourth Amendment”). *See also, e.g., City of Topeka v. Grabauskas*, 33 Kan. App. 2d 210, 222, 99 P.3d 1125, 1134 (2004) (rejecting the prosecution’s *Hübel* argument because “[u]nlike the State of Nevada, we have no statute requiring persons to identify themselves . . . [and thus] *Hübel* is clearly distinguishable from this case”). Moreover, even in jurisdictions possessing a statute such as the one upheld in *Hübel*, “the statutory obligation does not go beyond answering an officer’s request to disclose a name” (*Hübel, supra*, 542 U.S. at 187), and thus a suspect’s failure to answer police questions about other matters presumably cannot be factored into the calculus of probable cause or articulable suspicion. *See id.* at 185 (explaining that “the Nevada Supreme Court . . . [had] interpreted . . . [the applicable statute] to require only that a suspect disclose his name. . . . ‘The suspect is not required to provide private details about his background, but merely to state his name to an officer when reasonable suspicion exists’ As we understand it, the statute does not require a suspect to give the officer a driver’s license or any other document. Provided that the suspect either states his name or communicates it to the officer by other means – a choice, we assume, that the suspect may make – the statute is satisfied and no violation occurs.”); *and see id.* at 187-88 (explaining that a state statutory requirement that “a suspect . . . disclose his name in the course of a valid *Terry* stop is consistent with” “the purpose, rationale, and practical demands of a *Terry* stop” and “does not alter the nature of the stop itself”). Finally, even under a statute such as the one upheld in *Hübel*, the initial stop that prompts the question about identity must be “based on reasonable suspicion, satisfying the Fourth Amendment requirements” for *Terry* stops (*id.* at 184; *see id.* at 188; *see also, e.g., Commonwealth v. Ickes*, 582 Pa. 561, 873 A.2d 698 (2005) (striking down a “stop and identify” statute that, unlike the one in *Hübel*, failed to require a valid *Terry* stop as a predicate for the request for identification)); “an officer may not arrest a suspect for failure to identify himself if the request for identification is not reasonably related to the circumstances justifying the stop” (*Hübel, supra*, 542 U.S. at 188); and it must be apparent from the circumstances that “[t]he officer’s request [for identification] was . . . not an effort to obtain an arrest for failure to identify after a *Terry* stop yielded insufficient evidence” (*id.* at 189).

Flight may be relevant to the determination of probable cause or articulable suspicion (*see Illinois v. Wardlow, supra*, 528 U.S. at 124-25; *Sibron v. New York*, 392 U.S. 40, 66-67 (1968)), but it is not dispositive and cannot, in and of itself, supply the basis for an arrest or a stop. *See, e.g., Illinois v. Wardlow, supra*, 528 U.S. at 124 (“flight,” although “suggestive” of “wrongdoing,” “is not necessarily indicative of wrongdoing”); *United States v. Green*, 670 F.2d 1148, 1152 (D.C. Cir. 1981); *People v. Holmes*, 81 N.Y.2d 1056, 1058, 619 N.E.2d 396, 398, 601 N.Y.S.2d 459, 461 (1993) (suspect’s flight from the police, even when combined with his presence in a “known narcotics location” and a “bulge in the pocket of his jacket,” did not provide the requisite basis for a *Terry* stop). Moreover, unless the flight occurs under circumstances in which it is reasonable to infer guilty knowledge, the flight cannot be considered at all. *See, e.g., Wong Sun v. United States*, 371 U.S. 471, 482-83 (1963) (“when an officer insufficiently or unclearly identifies his office or his mission, the occupant’s flight . . . must be regarded as ambiguous conduct [and] . . . afford[s] no sure . . . inference of guilty knowledge”); *People v. Shabaz, supra*, 424 Mich. at 64, 378 N.W.2d at

461. *See also Illinois v. Wardlow, supra*, 528 U.S. at 128-29, 131-35 (Justice Stevens, concurring in part and dissenting in part, joined by Justices Souter, Ginsburg, and Breyer) (identifying a variety of “instances in which a person runs for entirely innocent reasons” and scenarios in which “[f]light to escape police detection . . . may have an entirely innocent motivation”). *Cf. id.* at 124 (majority opinion) (*Terry* stop was justified by the totality of circumstances, including the suspect’s “unprovoked,” “[h]eadlong flight” “upon noticing the police”).

25.11.3. Furtive Gestures

Frequently, a “furtive gesture” of the defendant’s will be the impetus for a stop or an arrest. Although “deliberately furtive actions” may be considered (*Sibron v. New York, supra*, 392 U.S. at 66), the purported furtiveness of the gestures must be carefully scrutinized to determine whether they could be equally consistent with innocent behavior. *See, e.g., Reid v. Georgia*, 448 U.S. 438, 441 (1980) (per curiam) (invalidating a *Terry* stop because the allegedly furtive “manner in which the petitioner and his companion walked through the airport” was “too slender a reed to support the seizure”); *Brown v. Texas, supra*, 443 U.S. at 52 (striking down a *Terry* stop that was based upon the defendant’s “look[ing] suspicious” and appearing to be walking away from a companion upon the arrival of the police, while in a “high drug problem area” (*id.* at 49)); *compare Florida v. Rodriguez*, 469 U.S. 1 (1984) (per curiam). If the officer’s assertions about “furtive gestures” are vague, defense counsel should consider pinning the officer down on precisely which gestures s/he viewed as suspicious, in order to be able to argue that these actions are consistent with innocent conduct. However, if counsel knows from interviews with the defendant or witnesses that the defendant’s actions really were suspicious, counsel should refrain from giving the officer an opportunity to clarify a vague account.

25.11.4. Arrests and Terry Stops Based on Tips from Informants

Frequently, a police officer’s decision to make an arrest or a *Terry* stop is based on information obtained from a third party – either an ordinary citizen or a covert police informer. The standards regulating police reliance on such information are the same in these cases as in other contexts, such as automobile searches (see § 25.24 *infra*) and “hot pursuit” or “exigent circumstances” entries into premises (see §§ 25.19-25.20 *infra*) and are discussed in § 25.35 *infra*.

25.12. Police Seizures of Objects from the Defendant’s Person; Police Demands That a Defendant Hand Over an Object in His or Her Possession

Any activity by a police officer or other state agent that is “designed to obtain information . . . by physically intruding on a subject’s body . . . [is] a Fourth Amendment search” (*Grady v. North Carolina*, 135 S. Ct. 1368, 1371 (2015) (per curiam)). Frequently, in the course of an on-the-street encounter between a defendant and the police, a police officer will seize an object from the defendant. Such “a seizure of personal property [is] . . . *per se* unreasonable within the meaning of the Fourth Amendment unless it is accomplished pursuant to a

judicial warrant . . . [or is justified by] some . . . recognized exception to the warrant requirement” (*United States v. Place*, 462 U.S. 696, 701 (1983)). *See, e.g., Beck v. Ohio*, 379 U.S. 89 (1964); *Torres v. Puerto Rico*, 442 U.S. 465 (1979). Objects may be seized from the defendant’s person and may be searched without a warrant pursuant to the doctrine of “search incident to arrest” if all of the requirements of that doctrine, including probable cause to arrest, are satisfied. *See* § 25.8 *supra*. And if the defendant is carrying an object that is visibly contraband, in plain view of the officer, then the seizure and search of that object may be justifiable under the “plain view” doctrine. *See* § 25.22.2 *infra*.

Under certain narrowly defined exigent circumstances – for example, when “the seizure is minimally intrusive and operational necessities render it the only practicable means of detecting certain types of crime” (*Arizona v. Hicks*, 480 U.S. 321, 327 (1987)) – the police may be able to conduct a “*Terry*-type investigative [detention]” of an object (*United States v. Place, supra*, 462 U.S. at 709). However, this limited extension of the *Terry* doctrine has thus far been applied only in cases of “investigative detention of [a] vehicle suspected to be transporting illegal aliens” (*see Arizona v. Hicks, supra*, 480 U.S. at 327, citing *United States v. Cortez*, 449 U.S. 411 (1981), and *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975)) and in a case involving a “seizure of [a] suspected drug dealer’s luggage at [an] airport to permit exposure to [a] specially trained dog” (*see Arizona v. Hicks, supra*, 480 U.S. at 327, citing *United States v. Place, supra*). In each of the cited cases, the Court demanded “reasonable suspicion” of the criminal nature of the object seized, in the ordinary sense of the *Terry* doctrine (*see* § 25.9 *supra*), as a necessary precondition of the seizure.

The police cannot avoid these constitutional restrictions upon seizures by simply ordering the defendant to turn over the object rather than physically taking it from the defendant’s possession. *See, e.g., Kelley v. United States*, 298 F.2d 310, 312 (D.C. Cir. 1961) (police officers’ demand that “appellant systematically disclose the contents of his clothing, first one pocket, then another, and then another, was no less a search . . . than if the police had themselves reached into the appellant’s pockets”); *United States v. Hallman*, 365 F.2d 289, 291-92 (3d Cir. 1966); *In the Matter of Bernard G.*, 247 A.D.2d 91, 94, 679 N.Y.S.2d 104, 105 (N.Y. App. Div., 1st Dep’t 1998) (police officers’ “ask[ing] . . . [a juvenile] to empty his pockets . . . was the equivalent of searching his pockets themselves”). In cases in which the police officers frame their demand in the form of a request and purportedly obtain the defendant’s consent to the officers’ taking control of the object or searching it, the constitutionality of their actions will ordinarily turn on whether there was a valid, voluntary “consent” under the principles set forth in § 25.18.1 *infra*. *See, e.g., Florida v. Royer*, 460 U.S. 491 (1983); *People v. Gonzalez*, 115 A.D.2d 73, 499 N.Y.S.2d 400 (N.Y. App. Div., 1st Dep’t 1986), *aff’d*, 68 N.Y.2d 950, 502 N.E.2d 1001, 510 N.Y.S.2d 86 (1986). But when the sole justification for the encounter is a *Terry*-type investigative detention, a request for consent to conduct a search of the defendant’s person or possessions which is unrelated to that justification has been held impermissible, tainting the ensuing consent and a search pursuant to it. *State v. Smith*, 286 Kan. 402, 184 P.3d 890 (2008).

25.13. *The Defendant's Alleged Abandonment of Contraband Upon the Arrival of the Police: The "Dropsie" Problem*

Police officers frequently testify that, when approached or accosted, the defendant threw away an incriminating object, which was then picked up by the officer, or that the defendant disclosed the object to their sight in an attempt to hide it somewhere away from his or her person. This testimony is calculated to invoke the doctrines that the observation of objects "placed . . . in plain view" is not a search (*Rawlings v. Kentucky*, 448 U.S. 98, 106 (1980) (dictum); *see, e.g., Rios v. United States*, 364 U.S. 253, 262 (1960)), and that it is neither a search nor a seizure to pick up "abandoned" objects thrown on a public road (*California v. Greenwood*, 486 U.S. 35 (1988); *California v. Hodari D.*, 499 U.S. 621, 624 (1991)). *See, e.g., Lee v. United States*, 221 F.2d 29 (D.C. Cir. 1954)).

In these "dropsie" or "throw-away" cases, the defense can prevail by showing that:

(a) The alleged abandonment of the property was itself the product of unlawful police action. Thus abandonment will not be found if (i) the defendant was illegally arrested or illegally detained prior to the time of the alleged "drop" (*see Reid v. Georgia*, 448 U.S. 438 (1980) (per curiam); *United States v. Beck*, 602 F.2d 726 (5th Cir. 1979); *Commonwealth v. Harris*, 491 Pa. 402, 421 A.2d 199 (1980); *State v. Bennett*, 430 A.2d 424 (R.I. 1981)); (ii) the police were engaged in an unlawful search prior to the time of the alleged "drop" (*see United States v. Newman*, 490 F.2d 993 (10th Cir. 1974); *State v. Dineen*, 296 N.W.2d 421 (Minn. 1980)); or (iii) the police were in the course of unlawfully pursuing the defendant at the time of the alleged "drop." (Prior to the decision in *California v. Hodari D.*, *supra*, there were a number of state high court decisions holding that if police officers initiated visible pursuit of an individual without the requisite justification for an arrest or a *Terry* stop (*see* §§ 25.7, 25.9 *supra*) and if the individual responded by fleeing and tossing away an incriminating object, an unconstitutional "seizure" of the individual had occurred at the time when the pursuit became manifest (because, for example, the police activated a flasher or a siren or called to the individual to stand still), and the discarded object was tainted by this illegality and therefore subject to suppression. *See, e.g., People v. Shabaz*, 424 Mich. 42, 378 N.W.2d 451 (1985); *People v. Torres*, 115 A.D.2d 93, 499 N.Y.S.2d 730 (N.Y. App. Div., 1st Dep't 1986); *Commonwealth v. Barnett*, 484 Pa. 211, 398 A.2d 1019 (1979). As a matter of federal constitutional law, those decisions have been cast in doubt by the holding in *Hodari D.* that an individual who flees when accosted by police is not "seized" for Fourth Amendment purposes until s/he is caught and physically restrained (*see* § 25.4.2 first paragraph *supra*). However, the pre-*Hodari* caselaw should continue to obtain in jurisdictions where (A) state law requires a justification for the initial accosting, and that justification is lacking (*see, e.g., People v. Holmes*, 81 N.Y.2d 1056, 619 N.E.2d 396, 601 N.Y.S.2d 459 (1993)) or (B) the state courts have rejected *Hodari* as a matter of state law and continue to hold that a "seizure of the person" occurs at the point of initiation of a manifest police pursuit (*see, e.g., State v. Oquendo*, 223 Conn. 635, 613 A.2d 1300 (1992); *Commonwealth v. Stoute*, 422 Mass. 782, 665 N.E.2d 93 (1996); *Commonwealth v. Barros*, 435 Mass. 171,

755 N.E.2d 740 (2001)). See *State v. Quino*, 74 Haw. 161, 840 P.2d 358 (1992).

(b) The “dropped” object fell into a constitutionally protected area. See, e.g., *Rios v. United States*, *supra*, 364 U.S. at 262 n.6 (a taxicab “passenger who lets a package drop to the floor of the taxicab in which he is riding can hardly be said to have ‘abandoned’ it”); *Work v. United States*, 243 F.2d 660, 662-63 (D.C. Cir. 1957) (the trash receptacle into which the defendant placed a phial of narcotics upon police officers’ entry into a house was within the constitutionally protected “curtilage” of the home); *Commonwealth v. Ousley*, 393 S.W.3d 15, 18, 26-29, 33 (Ky. 2013) (police officers’ search of “closed trash containers,” which were near the defendant’s home, was unlawful because “[t]he containers had not been put out on the street for trash collection” and were within the “curtilage” of the home). (Section 25.15.3 *infra* discusses the concept of “curtilage” in detail.)

(c) The police “dropsie” story is a fabrication, as it often is. See, e.g., *People v. Quinones*, 61 A.D.2d 765, 766, 402 N.Y.S.2d 196, 198 (N.Y. App. Div. 1st Dep’t 1978). In seeking to show that the police officers are fabricating, defense counsel should cross-examine the officers on what they did prior to the “drop” that caused the defendant to disclose to them incriminating matters that were otherwise well-concealed. If plainclothes police are involved, this fact, together with the fact that the defendant had not previously encountered the officers, should be brought out. Even the habitual credulity of judges with regard to police testimony is sometimes shaken by accounts of a defendant’s tossing away incriminating (and often highly valuable) objects at the approach of unannounced, unknown, and unidentifiable police.

25.14. Post-arrest Custodial Treatment of the Defendant

The post-arrest treatment of persons in custody is regulated by statute or caselaw in virtually all jurisdictions. The typical post-arrest procedures are described in § 3.2 *supra*. Counsel should be alert to the possibility that an arresting officer’s failure to follow a constitutionally or statutorily required procedure rendered the post-arrest confinement unlawful and supplies a basis for suppressing evidence obtained during the post-arrest period. For example, if the police keep the defendant at the stationhouse for an undue length of time instead of bringing him or her to court expeditiously for arraignment, this will almost certainly violate local statutory requirements and may also fall afoul of the constitutional protections in this area (see § 11.2 *supra*), thereby tainting evidence such as confessions or lineup identifications obtained during the period of undue delay. See § 26.11 *infra*; cf. § 27.7 *infra*. Police brutality during the post-arrest period may render any subsequent confessions or consents to searches unlawful. See § 26.3.1 *infra*.

The post-arrest period is often the stage at which the police or prosecution investigators conduct physical examinations, extractions of body fluids, hair, and so forth from arrested persons. An individual’s body is protected by the Fourth and Fourteenth Amendments’ prohibition of unreasonable searches of the person, including any procedure that is “designed to obtain information” and that involves “physically intruding on a subject’s body” (*Grady v. North Carolina*, 135 S. Ct. 1368, 1371 (2015) (per curiam)). See *Birchfield*

v. North Dakota, 136 S. Ct. 2160, 2173 (2016) (“our cases establish that the taking of a blood sample or the administration of a breath test is a search” for Fourth Amendment purposes). Searches that intrude into the body or breach the body wall – and perhaps other intimate personal examinations – are governed by a set of constitutional principles originating in *Schmerber v. California*, 384 U.S. 757 (1966), and *Winston v. Lee*, 470 U.S. 753 (1985), and elaborated in *Birchfield*. The “individual’s interests in privacy and security are weighed against society’s interests in conducting the [search] procedure . . . [in order to determine] whether the community’s need for evidence outweighs the substantial privacy interests at stake” (*Winston v. Lee*, *supra*, 470 U.S. at 760). Compare, e.g., *Florence v. Board of Chosen Freeholders of County of Burlington*, 132 S. Ct. 1510, 1513, 1518, 1521, 1523 (2012) (jail’s policy of requiring that “every detainee who will be admitted to the general population . . . undergo a close visual inspection while undressed,” notwithstanding the absence of “reasonable suspicion of a concealed weapon or other contraband,” did not violate the Fourth Amendment, given the “undoubted security imperatives involved in jail supervision” and the “reasonable balance [that had been struck] between inmate privacy and the needs of the institution[]”), *with United States v. Fowlkes*, 804 F.3d 954, 958, 966 (9th Cir. 2015) (“the forcible removal of an unidentified item of unknown size from Fowlkes’ rectum [during processing at jail after a strip search] by officers without medical training or a warrant violated his Fourth Amendment rights”; “the record is devoid of any evidence from which the officers reasonably might have inferred that evidence would be destroyed if they took the time to secure a warrant and summon medical personnel. . . . ¶ Similarly, the record contains no evidence that a medical emergency existed. . . . Thus, there was time to take steps – potentially including, *inter alia*, securing medical personnel, a warrant, or both – to mitigate the risk that the seizure would cause physical and emotional trauma.”), and *with People v. Hall*, 10 N.Y.3d 303, 312-13, 886 N.E.2d 162, 169, 856 N.Y.S.2d 540, 547 (2008) (“manual body cavity search” of a suspect at the police station to remove contraband observed during a lawfully conducted strip search violated the Fourth Amendment because there were no exigent circumstances preventing the police from obtaining a warrant). In the application of this balancing test, the following factors are central to an assessment of the “reasonableness,” and thereby of the constitutionality, of the search:

(a) Whether the police officers obtained a search warrant; or, if they failed to obtain a warrant, whether their failure to obtain a warrant was justified because the imminent disappearance of the evidence made it impracticable to obtain a warrant. *Schmerber*, *supra*, 384 U.S. at 770; *Winston v. Lee*, *supra*, 470 U.S. at 761. See, e.g., *Missouri v. McNeely*, 133 S. Ct. 1552, 1563, 1568 (2013) (“in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant”; “while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically”). Accord, *Birchfield v. North Dakota*, *supra*, 136 S. Ct. at 2173-74, discussed in subdivision (d) of this section; *State v. Schaufele*, 325 P.3d 1060, 1068 (Colo. 2014) (“the trial court properly adhered to *McNeely* in suppressing evidence of Schaufele’s blood draw” because

McNeely holds “that the Fourth Amendment requires officers in drunk-driving investigations to obtain a warrant before drawing a blood sample when they can do so without significantly undermining the efficacy of the search . . .”).

(b) Whether the search was justified by a “clear indication” that incriminating evidence would be found. *Schmerber, supra*, 384 U.S. at 770; *see Winston v. Lee, supra*, 470 U.S. at 762 (quoting the *Schmerber* “clear indication” standard). The Court in *United States v. Montoya de Hernandez*, 473 U.S. 531, 540 (1985), subsequently glossed the “clear indication” standard as requiring nothing more than probable cause, but there remains room to argue that a particularly exacting judicial review of the probable-cause determination is appropriate in this context because the degree of justification required for a search always depends upon the extent of “the invasion which the search entails” (*Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967); *see, e.g., Terry v. Ohio*, 392 U.S. 1, 21 (1968); *Tennessee v. Garner*, 471 U.S. 1, 7-9 (1985)), and “‘intrusions into the human body’ . . . perhaps implicate[] . . . [the] most personal and deep-rooted expectations of privacy” (*Winston v. Lee, supra*, 470 U.S. at 760).

(c) “[T]he extent to which the procedure may threaten the safety or health of the individual.” *Winston v. Lee, supra*, 470 U.S. at 761. With respect to this factor it is particularly relevant to consider whether: “all reasonable medical precautions were taken”; any “unusual or untested procedures were employed”; and “the procedure was performed ‘by a physician in a hospital environment according to accepted medical practices’” (*id.*; *Schmerber v. California, supra*, 384 U.S. at 771-72).

(d) “[T]he extent of intrusion upon the individual’s dignitary interests in personal privacy and bodily integrity.” *Winston v. Lee, supra*, 470 U.S. at 761. With regard to this consideration, it is relevant to examine whether the procedure involved any “‘trauma, or pain’” or violated “the individual’s interest in ‘human dignity’” (*id.* at 762 n.5). *See, e.g., Maryland v. King*, 133 S. Ct. 1958, 1969, 1980 (2013) (“DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure . . . [w]hen officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody”; the Court observes that “[a] buccal swab [to obtain a DNA sample] is a far more gentle process than a venipuncture to draw blood . . . [;] [it] involves but a light touch on the inside of the cheek . . . [and] no ‘surgical intrusions beneath the skin’”; and there are “significant state interests in identifying . . . [the arrestee] not only so that the proper name can be attached to his charges but also so that the criminal justice system can make informed decisions concerning pretrial custody”); *compare Birchfield v. North Dakota, supra* (upholding state implied-consent laws requiring that drunk-driving arrestees submit to breath tests without a warrant because “breath tests do not ‘implicat[e] significant privacy concerns . . .’”; “the physical intrusion is almost negligible,” in that “[b]reath tests ‘do not require piercing the skin’ and entail ‘a minimum of inconvenience. . .’”; the “effort is no more demanding than blowing up a party balloon”; “there is nothing painful or strange about . . . [the procedure of taking a tube into one’s mouth, which is akin to] use of

a straw to drink beverages”; “the process [does not] put into the possession of law enforcement authorities a sample from which a wealth of additional, highly personal information could potentially be obtained”; it “results in a BAC [blood alcohol concentration] reading on a machine, nothing more”; and “participation in a breath test is not an experience that is likely to cause any great enhancement in the embarrassment that is inherent in any arrest” (136 S. Ct. at 2176-77), *with id.* (“[b]lood tests are a different matter” (*id.* at 2178) and cannot be compelled without a warrant under “the search incident to arrest doctrine” (*id.* at 2185) because “[t]hey ‘require piercing the skin’ and extract a part of the subject’s body”; “for many [people], the process [of having blood drawn, even for medical diagnostic purposes] is not one they relish”; and “a blood test, unlike a breath test, places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested.”) (*id.* at 2178)). A prime example of a deprivation of dignity sufficient to violate the Due Process Clause occurred in *Rochin v. California*, 342 U.S. 165 (1952), when “police officers broke into a suspect’s room, attempted to extract narcotics capsules he had put into his mouth, took him to a hospital, and directed that an emetic be administered to induce vomiting” (*Winston v. Lee, supra*, 470 U.S. at 762 n.5). *See also United States v. Booker*, 728 F.3d 535, 537 (6th Cir. 2013) (applying the Fourth Amendment to suppress contraband that was removed from the defendant’s rectum by an emergency-room doctor to whom the police brought the defendant, “reasonably suspecting that Booker had contraband hidden in his rectum” and who “intubated Booker for about an hour, rendered him unconscious for twenty to thirty minutes, and paralyzed him for seven to eight minutes”; “Even though the doctor may have acted for entirely medical reasons, the unconsented procedure while Booker was under the control of the police officers must, in the circumstances of this case, be attributed to the state for Fourth Amendment purposes. The unconsented procedure, moreover, shocks the conscience at least as much as the stomach pumping that the Supreme Court long ago held to violate due process.”). “[D]ue process concerns could be involved if the police initiate [] physical violence while administering the [blood alcohol] test, refuse [] to respect a reasonable request to undergo a different form of testing, or respond [] to resistance with inappropriate force.” *South Dakota v. Neville*, 459 U.S. 553, 559 n.9 (1983) (dictum); *see also id.* at 563. *Cf. Kingsley v. Hendrickson*, 135 S. Ct. 2466 (2015) (recognizing that the use of “excessive force” against a pretrial detainee violates Due Process).

(e) Whether there is a “compelling need” (*Winston v. Lee, supra*, 470 U.S. at 766) for the intrusion or examination because it represents the most accurate and effective method for detecting facts critical to the issue of guilt or innocence. Thus a blood test was approved in *Schmerber* because the test is “a highly effective means of determining the degree to which a person is under the influence of alcohol” and “the difficulty of proving drunkenness by other means . . . [rendered the] results of the blood test . . . of vital importance if the State were to enforce its drunken driving laws” (*Winston v. Lee, supra*, 470 U.S. at 762-63 (explaining the holding in *Schmerber*)). Conversely, the Court

concluded in *Winston v. Lee* that the state had not shown a “compelling need” for the surgical removal of a bullet from the defendant’s body, since the state possessed “substantial” alternative evidence of guilt (*see id.* at 765-66).

Certain types of physical examinations conducted by law enforcement investigators or consultants may run afoul of other constitutional prohibitions. Tests and examinations that involve the eliciting of “communications” from the accused (such as polygraph tests or the use of “truth serums”) – and perhaps others that require his or her willed cooperation – are impermissible in the absence of a valid waiver of the Privilege Against Self-Incrimination. *See Estelle v. Smith*, 451 U.S. 454 (1981) (psychiatric examination); *Schmerber v. California*, *supra*, 384 U.S. at 764 (dictum) (“lie detector tests”); *South Dakota v. Neville*, *supra*, 459 U.S. at 561 n.12 (dictum) (same); § 16.6.1 *supra*. A physical examination that is extremely abusive, degrading, or unfair may violate the Due Process Clause of the Fourteenth Amendment. *See Rochin v. California*, 342 U.S. 165 (1952); *Taglavore v. United States*, 291 F.2d 262 (9th Cir. 1961) (alternative ground); *United States v. Townsend*, 151 F. Supp. 378 (D. D.C. 1957). *See also Kingsley v. Hendrickson*, 135 S. Ct. 2466, 2470 (2015) (clarifying that when “an individual detained in a jail prior to trial” brings a claim under 42 U.S.C. § 1983 against “jail officers, alleging that they used excessive force against him, in violation of the Fourteenth Amendment’s Due Process Clause,” the detainee needs not show that “the officers were *subjectively* aware that their use of force was unreasonable,” and instead needs show “only that the officers’ use of that force was *objectively* unreasonable”). Finally, to an extent that is not yet clear, tests and examinations whose reliability depends upon careful administration are impermissible if conducted in the absence of counsel and without a valid waiver of the right to counsel, following the initiation of adversary judicial proceedings. *See Winston v. Lee*, *supra*, 470 U.S. at 763 n.6 (reserving the question). *Compare United States v. Wade*, 388 U.S. 218 (1967), and *Moore v. Illinois*, 434 U.S. 220 (1977), *with Gilbert v. California*, 388 U.S. 263, 267 (1967); and see §§ 26.10, 27.6 *infra*.

C. Police Entry and Search of Dwellings or Other Premises

25.15. The Threshold Issue: Defendant’s Expectation of Privacy

25.15.1. Introduction to the Concepts of Constitutionally Protected Interests and “Standing” To Raise Fourth Amendment Claims

In the preceding discussion of arrests and *Terry* stops, it was unnecessary to deal with the question whether the police conduct adversely affected any constitutionally protected interest of the defendant. A defendant always has a sufficient interest in the privacy and security of his or her own body to provide a basis for challenging a seizure of the person in the form of an arrest or a *Terry* stop or to challenge a search of the person incident to an arrest or stop. *See, e.g., People v. Burton*, 6 N.Y.3d 584, 588, 848 N.E.2d 454, 457, 815 N.Y.S.2d 7, 10 (2006). When addressing issues raised by searches of dwellings or other premises, however, it becomes necessary to inquire whether the defendant has the kind of relationship to the premises that permits

him or her to complain if the Constitution is violated in searching them.

Prior to *Rakas v. Illinois*, 439 U.S. 128 (1978), this inquiry was framed in terms of whether a criminal defendant had “standing” to challenge the violation. *Rakas* changed the terminology to “whether the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect” (*id.* at 140). See also *United States v. Payner*, 447 U.S. 727, 731-32 (1980); *United States v. Salvucci*, 448 U.S. 83, 95 (1980); *Rawlings v. Kentucky*, 448 U.S. 98, 104-06 (1980). But *Rakas* also recognized that this terminological change would seldom affect either the nature of the traditional inquiry or its result (439 U.S. at 138-39); and the term “standing” continues to be used in some jurisdictions as a convenient label for the *Rakas* determination that a particular defendant “is entitled to contest the legality of [the law enforcement conduct which s/he challenges as the basis for invoking the exclusionary rule]” (*Rakas, supra*, 439 U.S. at 140). See, e.g., *United States v. Payner, supra*, 447 U.S. at 731.

25.15.2. Expectation of Privacy; Areas in Which a Defendant Will Ordinarily Be Deemed To Have the Requisite Expectation

The test of a defendant’s right to base a suppression claim upon an unconstitutional search of premises is whether the defendant “had an interest in connection with the searched premises that gave rise to ‘a reasonable expectation [on his or her part] of freedom from governmental intrusion’ upon those premises” (*Combs v. United States*, 408 U.S. 224, 227 (1972)). An individual may have “a legitimate expectation of privacy in the premises he was using and therefore . . . claim the protection of the Fourth Amendment with respect to a governmental invasion of those premises, even though his ‘interest’ in those premises might not have been a recognized property interest at common law” (*Rakas v. Illinois, supra*, 439 U.S. at 143 (dictum)). When the defendant’s relationship to searched premises is such that s/he “could legitimately expect privacy in the areas which were the subject of the search and seizure [that s/he seeks] . . . to contest,” s/he is entitled to challenge the legality of the search and seizure (*id.* at 149 (dictum)).

All of the following are examples of premises for which a defendant can claim the requisite expectation of privacy:

(i) The defendant’s home. See, e.g., *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (“‘At the very core’ of the Fourth Amendment ‘stands the right of a man to retreat into his home and there be free from unreasonable governmental intrusion’”); *Wilson v. Layne*, 526 U.S. 603, 610 (1999) (“The Fourth Amendment embodies th[e] centuries-old principle of respect for the privacy of the home”); *United States v. Karo*, 468 U.S. 705, 714 (1984) (“[a]t the risk of belaboring the obvious, private residences are places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant, and that expectation is plainly one that society is prepared to recognize as justifiable”); *United States v. Johnson*, 457 U.S. 537, 552 n.13 (1982) (“the Fourth Amendment accords special protection to the home”); *Payton v. New York*, 445 U.S. 573, 589-90 (1980); *Minnesota v. Carter*, 525

U.S. 83, 99 (1998) (Justice Kennedy, concurring) (“it is beyond dispute that the home is entitled to special protection as the center of the private lives of our people”). See also *State v. Brown*, 216 N.J. 508, 517, 529, 535-36, 83 A.3d 45, 50, 57, 61 (2014) (“in determining whether a defendant has a possessory or proprietary interest in a building or residence and therefore standing to object to a warrantless search” under the New Jersey Constitution when the state asserts that “the building was abandoned or, alternatively, . . . [that the defendant was a] trespasser[],” “the focus must be whether, in light of the totality of the circumstances, a police officer had an objectively reasonable basis to conclude that a building was abandoned or a defendant was a trespasser before the officer entered or searched the home”; “the record supports the trial court’s finding that the State did not meet its burden of . . . establish[ing] that the property [“a dilapidated row house in the City of Camden”], although in decrepit condition [“with one or more windows broken, the interior in disarray, the front door padlocked, and the back door off its hinges but propped closed”], was abandoned or that defendants were trespassers”; “The constitutional protections afforded to the home make no distinction between a manor estate in an affluent town and a ramshackle hovel in an impoverished city.”).

(ii) An unleased room that is occupied from time to time by the defendant, in rental property owned by the defendant’s parents. *Murray v. United States*, 380 U.S. 527 (1965) (per curiam), *vacating* 333 F.2d 409 (10th Cir. 1964). See also *United States v. Murphy*, 516 F.3d 1117, 1124 (9th Cir. 2008), *superseded on another issue by* *Fernandez v. California*, 134 S. Ct. 1126 (2014) (the rent-paying lessor of various storage units “testified that he allowed Murphy to stay in the storage units [rent-free] . . . and gave him a key that opened all of the units”; “Murphy’s living situation was unconventional, but the record shows that the storage units were the closest thing that he had to a residence. He was sleeping in unit 14 and storing his belongings in unit 17. For the purposes of the Fourth Amendment, this is sufficient to create an expectation of privacy and thus the authority to refuse a search.”).

(iii) A home that the defendant is visiting as a social guest at the invitation of the homeowner or another resident. See *Minnesota v. Carter*, *supra*, 525 U.S. at 109 n.2 (Justice Ginsburg, dissenting) (explaining that although the Court majority ruled that there was no reasonable expectation of privacy under the facts of the case, it is “noteworthy that five Members of the Court [one of whom joined the majority opinion and also issued a concurring opinion, one of whom concurred in the judgment, and three of whom dissented] would place under the Fourth Amendment’s shield, at least, ‘almost all social guests’” (quoting *id.* at 99 (Justice Kennedy, concurring))); *State v. Talkington*, 301 Kan. 453, 483, 345 P.3d 258, 278-79 (2015) (defendant had “a reasonable expectation of privacy as a social guest in his host’s residence,” which extended to “standing to assert a reasonable, subjective expectation of privacy in the backyard, *i.e.*, curtilage, of his host’s residence”). See also *Minnesota v. Olson*, 495 U.S. 91, 98 (1990) (accused had a reasonable expectation of privacy in a friend’s duplex in which he was “[s]taying overnight” as a “houseguest”); *Jones v. United States*, 362 U.S. 257 (1960), as explained in *Rakas v. Illinois*, *supra*, 439 U.S. at 141, and *Minnesota v. Carter*, *supra*, 525 U.S. at 89-90 (majority opinion). Cf. *id.* at 102 (Justice Kennedy, concurring) (although, “as a general

rule, social guests will have an expectation of privacy in their host’s home,” “[t]hat is not the case before us” in that “defendants have established nothing more than a fleeting and insubstantial connection with . . . [the] home”; they were using the “house simply as a convenient processing station” for packaging cocaine; they had never “engaged in confidential communications with [the homeowner] . . . about their transaction”; they “had not been to . . . [the] apartment before, and [they]. . . left it even before their arrest”).

(iv) A hotel room in which the defendant is staying, however temporarily or sporadically. *Stoner v. California*, 376 U.S. 483 (1964); *United States v. Jeffers*, 342 U.S. 48 (1951) (a hotel room rented by defendant’s aunts, who had given defendant a key and permission to use the room at will; he “often entered the room for various purposes” (*id.* at 50)).

(v) A defendant’s office or work area, even if it is shared with other employees. *O’Connor v. Ortega*, 480 U.S. 709, 714-19 (1987) (a public employee’s office); *United States v. Lefkowitz*, 285 U.S. 452 (1932) (a business office); *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 311-15 (1978) (employees’ work areas in a factory building); *Mancusi v. DeForte*, 392 U.S. 364 (1968) (a union office shared by defendant and other union officials); *Villano v. United States*, 310 F.2d 680 (10th Cir. 1962), *limited on other grounds*, *United States v. Price*, 925 F.2d 1268 (10th Cir. 1991) (an employee’s desk in a retail store); *United States v. Blok*, 188 F.2d 1019 (D.C. Cir. 1951) (an employee’s desk in a government office).

(vi) “Public” places in which it is customary to allow temporary exclusive occupancy with a measure of privacy, such as taxicabs (*Rios v. United States*, 364 U.S. 253, 262 n.6 (1960); *but cf. Rakas v. Illinois*, *supra*, 439 U.S. at 149 n.16 (dictum)), pay telephone booths (*Katz v. United States*, 389 U.S. 347 (1967)), public lavatory cabinets (*Bielicki v. Superior Court*, 57 Cal. 2d 602, 371 P.2d 288, 21 Cal. Rptr. 552 (1962); *People v. Mercado*, 68 N.Y.2d 874, 501 N.E.2d 27, 508 N.Y.S.2d 419 (1986)), and rented lockers in commercial storage facilities (*United States v. Karo*, *supra*, 468 U.S. at 720 n.6 (dictum)). *Compare Hudson v. Palmer*, 468 U.S. 517 (1984); *Bell v. Wolfish*, 441 U.S. 520, 556-58 (1979).

For discussion of privacy rights in the interior of automobiles, see § 25.23 *infra*.

25.15.3. “Curtilage” and “Open Fields”; Multifamily Apartment Complexes

The “curtilage” of a home – that is, “the area immediately surrounding a dwelling house” (*United States v. Dunn*, 480 U.S. 294, 300 (1987)) – is treated as “part of the home itself for Fourth Amendment purposes” (*Oliver v. United States*, 466 U.S. 170, 180 (1984)) and thus receives the same “Fourth Amendment protections” (*id.* (dictum)). *Accord, Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (“the curtilage of the house . . . enjoys protection as part of the home itself”); *State v. Kruse*, 306 S.W.3d 603 (Mo. App. 2010).

In determining whether any particular area is or is not within the curtilage, “the extent of the curtilage is determined by factors that bear upon

whether an individual reasonably may expect that the area in question should be treated as the home itself. . . . [C]urtilage questions should be resolved with particular reference to four factors: the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the home, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by. . . . [T]hese factors are useful analytic tools . . . to the degree that, in any given case, they bear upon the centrally relevant consideration – whether the area in question is so intimately tied to the home itself that it should be placed under the home’s ‘umbrella’ of Fourth Amendment protection” (*United States v. Dunn*, *supra*, 480 U.S. at 300-01). Applying this four-part analysis in *Dunn*, the Court concluded that “the area near a barn, located approximately 50 yards from a fence surrounding a ranch house” (*id.* at 296) and “60 yards from the house itself” (*id.* at 302) “lay outside the curtilage of the ranch house” (*id.* at 301) and was not entitled to Fourth Amendment protection because (i) “the substantial distance” from not only the house but also the fence surrounding the house “supports no inference that the barn should be treated as an adjunct of the house” (*id.* at 302); (ii) “[v]iewing the physical layout of defendant’s ranch in its entirety, . . . it is plain that the fence surrounding the residence serves to demark a specific area of land immediately adjacent to the house that is readily identifiable as part and parcel of the house,” and the area in question “stands out as a distinct portion of defendant’s ranch, quite separate from the residence” (*id.*); (iii) “the law enforcement officials possessed objective data indicating . . . that the use to which the barn was being put could not fairly be characterized as so associated with the activities and privacies of domestic life that the officers should have deemed the barn as part of defendant’s home” (*id.* at 302-03); and (iv) “[r]espondent did little to protect the barn area from observation by those standing in the open fields . . . [since] the fences were designed and constructed to corral livestock, not to prevent persons from observing what lay inside the enclosed areas” (*id.* at 303).

In the urban context, application of the four-part test of *United States v. Dunn* will ordinarily produce the result that “curtilage” is coextensive with a fenced yard. *See Oliver v. United States*, *supra*, 466 U.S. at 182 n.12 (“for most homes, the boundaries of the curtilage will be clearly marked”); *California v. Ciraolo*, 476 U.S. 207, 212-13 (1986) (treating the area within a fenced yard as curtilage under an analysis that anticipates *Dunn*’s); *Estate of Smith v. Marasco*, 430 F.3d 140, 156-58 (3d Cir. 2005); *People v. Morris*, 126 A.D.3d 813, 814, 4 N.Y.S.3d 305, 307 (N.Y. App. Div., 2d Dep’t 2015); *People v. Theodore*, 114 A.D.3d 814, 816-17, 980 N.Y.S.2d 148, 151 (N.Y. App. Div., 2d Dep’t 2014). This is consistent with pre-*Dunn* caselaw. *See, e.g., Weaver v. United States*, 295 F.2d 360 (5th Cir 1961); *Hobson v. United States*, 226 F.2d 890 (8th Cir. 1955); *State v. Parker*, 399 So. 2d 24 (Fla. App. 1981), *review denied*, 408 So. 2d 1095 (Fla. 1981); *People v. Pakula*, 89 Ill. App. 3d 789, 411 N.E.2d 1385, 44 Ill. Dec. 919 (1980). Separate closed structures on residential property – garages, for example – are generally held protected by the Fourth Amendment without reference to the ordinary indicia of “curtilage,” such as fencing in. *Taylor v. United States*, 286 U.S. 1 (1932); *see, e.g., State v. Daugherty*, 94 Wash. 2d 263, 616 P.2d 649 (1980). *See also Commonwealth v. Ousley*, 393 S.W.3d 15, 27-29 (Ky. 2013) (trash cans, which were “sitting on the driveway very near the home,” were within the

“curtilage” even though “the area in question” was not “enclosed by a fence”: “The home was in an urban area that does not lend itself to enclosures” and a resident’s decision to forgo fencing “(for example, because the lot on which his home sits is small) cannot deprive him of having curtilage surrounding his home”); *State v. Kruse*, 306 S.W.3d 603, 611-12 (Mo. App. 2010) (“The State argues that Kruse did not have an expectation of privacy in his backyard. The State notes that there were no gates or objects to hinder entrance into the backyard. Nothing obstructed a person’s view into the back yard except the buildings. There appears to be a well-travelled route from the driveway to the rear of the property, marked by large pieces of wood resembling railroad ties. The two ‘no trespassing’ signs were posted on doors, which the State says implies that access was denied to the interior of the residence or shed without permission. ¶ We cannot agree that there was no expectation of privacy in the backyard. The officers arrived at the Kruse residence after midnight. No exterior lights were on to welcome the public to come on the premises. The entrance to the residence is in the front yard. The ‘no trespassing’ signs would ordinarily be understood to assert a privacy interest on the entire property. The back yard could not be seen from the road and was not in plain view. The back yard and backdoor were enclosed by trees on three sides and the home on the fourth side. ¶ By entering into the back yard, the police were entering onto property as to which there was a privacy interest protected by the Fourth Amendment”). Cf. *Carroll v. Carman*, 135 S. Ct. 348 (2014) (per curiam) (dealing inconclusively with a situation that might have stirred “curtilage” issues).

With respect to tenants living in multifamily apartment complexes, some courts have viewed their curtilage as very limited. See, e.g., *Commonwealth v. Thomas*, 358 Mass. 771, 774-75, 267 N.E.2d 489, 491 (1971). However, if the building is secured against entry by the general public, then any of the tenants may be able to rely upon the collective expectation of privacy in the corridors and hallways (e.g., *United States v. Heath*, 259 F.3d 522 (6th Cir. 2001); *United States v. Carriger*, 541 F.2d 545, 549-52 (6th Cir. 1976); *United States v. Booth*, 455 A.2d 1351 (D.C. 1983); see also *United States v. Whitaker*, 820 F.3d 849, 853-54 (7th Cir. 2016) (although the defendant, who lived in a multi-apartment building with “closed hallways,” did not have “a reasonable expectation of complete privacy in the hallway,” this “does not also mean that he had no reasonable expectation of privacy against persons in the hallway snooping into his apartment using sensitive devices not available to the general public”; accordingly, the “police engaged in a warrantless search within the meaning of the Fourth Amendment when they had a drug-sniffing dog come to the door of the apartment and search for the scent of illegal drugs”) and the basement (e.g., *Garrison v. State*, 28 Md. App. 257, 345 A.2d 86 (1975)). Compare *McDonald v. United States*, 335 U.S. 451 (1948), with *United States v. Dunn*, 480 U.S. 294 (1987). Similarly, if the backyard to the building is not accessible to the general public, and particularly if it is surrounded by a fence, the backyard area may be “sufficiently removed and private in character that [a tenant] . . . could reasonably expect privacy” (*Fixel v. Wainwright*, 492 F.2d 480, 484 (5th Cir. 1974)). See also *United States v. Burston*, 806 F.3d 1123, 1125, 1127-28 (8th Cir. 2015) (even though the defendant lived in an “eight-unit apartment building,” and even though the lawn in front of his apartment window “was not in an enclosed area” and “the public [was not] physically

prevented from entering or looking at that area other than by the physical obstruction of . . . [a] bush,” the court nonetheless classifies the area as curtilage under the four-part analysis of *United States v. Dunn*, *supra*, because the area “was in close proximity to Burston’s apartment – six to ten inches”; “Burston made personal use of the area by setting up a cooking grill between the door and his window”; and “[o]ne function of the bush,” which was “planted in the area in front of the window, [and] which partially covered the window,” “was likely to prevent close inspection of Burston’s window by passersby”). Counsel urging these results can argue that, in light of the established principle that “the Fourth Amendment accords special protection to the home” (*United States v. Johnson*, 457 U.S. 537, 552 n.13 (1982); *see, e.g., Groh v. Ramirez*, 540 U.S. 551, 559 (2004); *Kyllo v. United States*, 533 U.S. 27, 31 (2001); *Wilson v. Layne*, 526 U.S. 603, 610 (1999); *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984); *Florida v. Jardines*, *supra*, 133 S. Ct. at 1414; *Minnesota v. Carter*, 525 U.S. 83, 99 (1998) (Justice Kennedy, concurring)), it would be anomalous to deny at least as much protection to shared residential facilities as is given to shared workplace facilities (see § 25.15.2 subdivision (v) *supra*).

The Fourth Amendment’s protection of the home and its curtilage does not extend to “the open fields” (*United States v. Dunn*, *supra*, 480 U.S. at 300; *see Oliver v. United States*, *supra*, 466 U.S. at 180; *Hester v. United States*, 265 U.S. 57 (1924)). “[O]pen fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office, or commercial structure would not be. It is not generally true that fences or ‘No Trespassing’ signs effectively bar the public from viewing open fields in rural areas.” *Oliver v. United States*, *supra*, 466 U.S. at 179.

Moreover, if a police officer, while situated in an “open field” – or in any area accessible to the general public – engages in “naked-eye observation of the curtilage” (*California v. Ciraolo*, 476 U.S. 207, 213 (1986)), that observation is not treated as a “search” subject to Fourth Amendment restrictions. See §§ 25.22.2, 25.33 *infra*.

25.15.4. Police Search or Seizure of an Object Belonging to the Defendant from Premises in Which the Defendant Has No Privacy Interest

Even if the defendant does not have a privacy interest in any premises searched by the police, s/he may nevertheless challenge a police examination or seizure of an object during a police search of the premises if the defendant is the owner of that object. As the Court observed in *United States v. Jacobsen*, 466 U.S. 109, 113 (1984), “an individual’s possessory interests in [a certain piece of] . . . property” confer upon that individual a Fourth Amendment right to challenge a police officer’s “meaningful interference with [his or her] . . . possessory interests in that property” (*id.*) Thus, in *Jacobsen*, the Court concluded that the defendant had the requisite privacy interest to challenge

government agents' assertion of control over, and search of, a package which the defendant had consigned to a private freight carrier, even though the defendant obviously had no privacy interest in the Federal Express office where the search took place. *Id.* at 114-15. *See also, e.g., Safford Unified School District # 1 v. Redding*, 557 U.S. 364, 374 n.3 (2009); *Bond v. United States*, 529 U.S. 334, 336-37, 338-39 (2000); *Walter v. United States*, 447 U.S. 649 (1980); *United States v. Barber*, 777 F.3d 1303, 1305 (11th Cir. 2015) (passenger in a car stopped by the police had standing to challenge the search of the bag at his feet, “even if he lacked standing to contest the search of the car,” because it was “his bag” and he “had a reasonable expectation of privacy in his bag”); *State v. Crane*, 329 P.3d 689, 694-95 (N.M. 2014) (construing the state constitution to hold that a motel occupant had a reasonable expectation of privacy in garbage that was placed in “opaque garbage bags,” which were “sealed from plain view . . . [and] placed directly in the dumpster, rather than being left in the motel room for disposal by the housekeeping staff”).

The individual’s privacy interest in objects that s/he owns extends to “[l]etters and other sealed packages [since these objects] are in the general class of effects in which the public at large has a legitimate expectation of privacy” (*United States v. Jacobsen, supra*, 466 U.S. at 114). This is the case as well for the contents of a cell phone. *See Riley v. California*, 134 S. Ct. 2473, 2494-95 (2014) (discussed in § 25.8.2 *supra*) (“Modern cell phones[,] . . . [w]ith all they contain and all they may reveal, . . . hold for many Americans ‘the privacies of life’” (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886))); *United States v. Lopez-Cruz*, 730 F.3d 803, 805-06, 808 (9th Cir. 2013) (pre-*Riley* decision holding that the defendant, whose car was stopped by border patrol agents and who agreed to the agents’ request to inspect and search two cell phones that the defendant identified as belonging to a friend of his, “had a reasonable expectation of privacy in the phones” and could challenge an agent’s actions in accepting an incoming call and “passing himself as Lopez” and thereby obtaining information that incriminated Lopez: “Lopez had possession of the phones and was using them. He certainly had the right to exclude others from using the phones. He also had a reasonable expectation of privacy in incoming calls and a reasonable expectation that the contents of those calls ‘would remain free from governmental intrusion.’”). *See also* § 25.33 *infra* (caselaw recognizing a defendant’s privacy right in cellphone site location information that can be used to ascertain his or her location at the present time and/or to trace his or her whereabouts in the past).

25.15.5. “Automatic Standing”

In some States, criminal defendants have “automatic standing” to challenge seizures of contraband whenever they are charged with possession of that contraband: They need not show any proprietary interest or expectation of privacy in the place from which the contraband was seized. This “automatic standing” rule was the law of the Fourth Amendment before *United States v. Salvucci*, 448 U.S. 83 (1980). When the Supreme Court abolished it in *Salvucci*, some state courts responded by reinstating the rule as a matter of state constitutional law. *E.g., State v. Settle*, 122 N.H. 214, 447 A.2d 1284 (1982); *Commonwealth v. Porter P.*, 456 Mass. 254, 261 n.5, 923 N.E.2d 36, 45

n.5 (2010); *State v. Alston*, 88 N.J. 211, 440 A.2d 1311 (1981); *Commonwealth v. Sell*, 504 Pa. 46, 470 A.2d 457 (1983); *State v. Simpson*, 95 Wash. 2d 170, 622 P.2d 1199 (1980); see also *People v. Millan*, 69 N.Y.2d 514, 508 N.E.2d 903, 516 N.Y.S.2d 168 (1987) (adopting a version of automatic standing that grants standing whenever a charge of criminal possession is based upon a statutory presumption of constructive possession). In States that have not reconsidered the “automatic standing” issue since *Salvucci*, counsel should draw upon the reasoning of these decisions to urge the state courts to restore “automatic standing.” See § 17.11 *supra*.

25.16. Police Entry of Premises: General Principles

An entry into a building is a “search” within the Fourth Amendment. *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 325 (1979). To be constitutional, any police entry of a building must either: (i) be authorized by a search warrant (see § 25.17 *infra*), or (ii) “fall[] within one of the narrow and well-delineated exceptions to the warrant requirement” (*Flippo v. West Virginia*, 528 U.S. 11, 13 (1999) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)); see §§ 25.18-25.20 *infra*). E.g., *Groh v. Ramirez*, 540 U.S. 551, 559 (2004) (“Because “the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion” stands “[a]t the very core” of the Fourth Amendment,’ . . . , our cases have firmly established the “basic principle of Fourth Amendment law” that searches and seizures inside a home without a warrant are presumptively unreasonable” (quoting *Payton v. New York*, 445 U.S. 573, 586 (1980)); *id.* at 590 (“the Fourth Amendment has drawn a firm line at the entrance to the house”); *Kyllo v. United States*, 533 U.S. 27, 31 (2001) (“With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no.”); *United States v. Karo*, 468 U.S. 705, 714-15 (1984) (“[s]earches and seizures inside a home without a warrant are presumptively unreasonable absent exigent circumstances”); *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984) (a “presumption of unreasonableness . . . attaches to all warrantless home entries”); *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (“when it comes to the Fourth Amendment, the home is first among equals”). See also *State v. Jackson*, 742 N.W.2d 163, 177 (Minn. 2007) (“in order to be constitutionally reasonable, nighttime searches [of the home] require additional justification beyond the probable cause required for a daytime search”); *State v. Gill*, 755 N.W.2d 454, 459-60 (N.D. 2008) (joining several federal circuits in holding that warrantless entries of a home cannot be justified by a so-called “community caretaking function of law enforcement officers”).

If a police entry of a building violates the applicable Fourth Amendment rules, all observations made by the police within the building and all objects seized by the entering officers are excludable. *Johnson v. United States*, 333 U.S. 10 (1948); *Chapman v. United States*, 365 U.S. 610 (1961); *Work v. United States*, 243 F.2d 660 (D.C. Cir. 1957); *United States v. Merritt*, 293 F.2d 742 (3d Cir. 1961). Evidence derived from these observations or things is also excludable. See § 25.39 *infra*.

For discussion of whether a police officer’s use of a flashlight or other implement or technological device to see into or obtain information about

a private area constitutes a “search” for Fourth Amendment purposes, see § 25.33 *infra*.

25.17. Entry of Premises Pursuant to a Search Warrant

Search warrants are issued by a magistrate (or, in some jurisdictions, by a judge) in an *ex parte* proceeding. Defense attorneys are almost never in a position to contest the sufficiency of the application for a warrant before the warrant is executed. Their first opportunity to challenge a search made pursuant to a search warrant ordinarily comes after the search has been completed, the defendant arrested, and charges filed.

In *United States v. Leon*, 468 U.S. 897 (1984), and *Massachusetts v. Sheppard*, 468 U.S. 981 (1984), the Supreme Court limited the grounds for such challenges. *Leon* and *Sheppard* held that evidence obtained by a search conducted under a search warrant should not be suppressed if the police officers executing the warrant reasonably relied on the magistrate’s determination of probable cause in issuing the warrant, even though the magistrate’s finding of probable cause was erroneous. *Leon* and *Sheppard* are not substantive constitutional decisions; they do not modify the explicit Fourth Amendment rule that a search warrant issued without probable cause is unconstitutional; they simply withdraw the ordinary Fourth Amendment exclusionary rule as a means of enforcing this particular constitutional command. See also the concluding paragraph of § 25.3 *supra*, describing a handful of other circumstances in which the Supreme Court has created a “good faith” exception to the exclusionary rule *a là Leon* and *Sheppard*.

In the wake of *Leon* and *Sheppard*, there are essentially seven situations in which defense counsel can seek suppression of the proceeds of a search conducted pursuant to a search warrant: (i) when the affidavit submitted in support of the issuance of the warrant states merely “bare bones” conclusions (*United States v. Leon, supra*, 468 U.S. at 923 n.24, 926) or is “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable” (*id.* at 923); (ii) when the police knowingly or negligently fail to limit their application for a warrant to the pertinent unit of a multi-unit building; (iii) when “the magistrate or judge in issuing a warrant was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth” (*id.* at 923); (iv) when the affidavit includes information obtained by an earlier unconstitutional search or seizure and this information is necessary to sustain a finding of probable cause; (v) when the magistrate who issues the warrant is not neutral and detached, thereby rendering reliance on the warrant unreasonable (*id.*); (vi) when the warrant is “so facially deficient – *i.e.*, in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid” (*id.*); and (vii) when the police, in executing the warrant, exceeded the authority granted by it. These seven situations are discussed in greater detail in the following subsections.

The retraction of the Fourth Amendment exclusionary rule in *Leon* and *Sheppard* does not, of course, control the evidentiary consequences of

state constitutional violations in the issuance of warrants. Defense counsel can and should ask state courts to reject *Leon* and *Sheppard* as a matter of state constitutional law and to continue to suppress evidence obtained by any search made pursuant to a warrant issued without probable cause. *See, e.g., State v. Novembrino*, 105 N.J. 95, 157-58, 519 A.2d 820, 856-57 (1987); *People v. Bigelow*, 66 N.Y.2d 417, 426-27, 488 N.E.2d 451, 457-58, 497 N.Y.S.2d 630, 636-37 (1985). The argument for state constitutional repudiation of regressive criminal-procedure decisions handed down by the post-Warren Supreme Court of the United States (see § 17.11 *supra*) is particularly forceful in this context. Over the past half-century the “basic conclusion” of the Kerner Commission that “[o]ur nation is moving toward two societies, one black, one white – separate and unequal” (NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT 1 (1968)), has proved increasingly prophetic. More and more, police activity has become the paradigmatic, iconic locus for the fact and for the public awareness that government treats white people differently than people of color. More and more, minority communities have focused their disillusionment, their outrage, their anger, and their fear upon the police as the prime agency of governmental oppression. Ferguson Missouri, Staten Island New York, and their prominent precursors and progeny are only the most obvious demonstrations of this. In a world where minority communities fundamentally distrust the police, any legal ruling that visibly countenances illegal activity carried out by police officers will enhance that distrust. And this is a matter that should concern state judges of every ideological bent, because minority-community bitterness against the police specifically and against law-enforcement processes more generally is all too likely to increase the level of violence which it is the purpose of policing and of the criminal law to prevent. Particularly for ghetto-dwellers who are “without means of escape from an oppressive urban environment” (FINAL REPORT OF THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE: TO ESTABLISH JUSTICE, TO ENSURE DOMESTIC TRANQUILITY [“EISENHOWER COMMISSION”] xxi (1969)) and for whom the police stand as the primary agents and symbols of that oppression (*see, e.g.,* ALICE GOFFMAN, *ON THE RUN: FUGITIVE LIFE IN AN AMERICAN CITY* (2014)), any retrenchment of visible judicial control over the police can only add to the legitimate feelings of frustration which are “poisoning the spirit of trust and cooperation that is essential to [the] . . . proper functioning” of legal institutions (EISENHOWER COMMISSION xv-xvi). Rulings like *Leon* and *Sheppard*, which forswear judicial redress for *conceded* constitutional violations committed by police officers as a result of systemic failings that the police themselves cannot prevent, can only subvert law enforcement as well as the rule of law.

25.17.1. “Bare Bones” Affidavits

In *United States v. Leon*, *supra*, the Court recognized that a search warrant and a search conducted pursuant to that warrant are patently invalid if the affidavit submitted in support of the issuance of the warrant states merely “bare bones” conclusions (*Leon*, *supra*, 468 U.S. at 923 n.24, 926), or is “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable” (*id.* at 925). The inadequacy of such an affidavit is so well settled in Fourth Amendment jurisprudence that an officer would be grossly derelict not to know it. *See, e.g., Nathanson v. United States*, 290 U.S.

41 (1933); *Aguilar v. Texas*, 378 U.S. 108 (1964); *Riggan v. Virginia*, 384 U.S. 152 (1966) (per curiam); *Illinois v. Gates*, 462 U.S. 213, 239 (1983) (dictum) (“[a]n officer’s statement that ‘[a]ffiants have received reliable information from a credible person and do believe’ that heroin is stored in a home, is likewise inadequate”). In these situations, the logic of *Leon* – to preserve the exclusionary rule in warrant cases when any adequately trained police officer would know that a search warrant is unconstitutional – implies that suppression is required. See *State v. Castagnola*, 145 Ohio St. 3d 1, 46 N.E.3d 638 (2015) (“[W]hen a defendant’s motion to suppress evidence challenges the validity of a search warrant, claiming that an undisclosed inference stated as an empirical fact usurped the magistrate’s inference-drawing authority, a reviewing court should consider (1) whether the inference was so significant that it crossed the line between permissible interpretation and usurpation of the magistrate’s role in finding probable cause, considering both the relevance and the complexity of the inference and (2) whether the affiant intended the inference to deprive the magistrate of his or her authority to determine whether probable cause existed.” 145 Ohio St. 3d at 24, 46 N.E.3d at 661-62. Applying *Leon*’s standards – under which “[s]uppression remains an appropriate remedy (1) when an officer relies on a warrant that is based on an affidavit “so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable” and (2) when a warrant is ‘so facially deficient – i.e., in failing to particularize the place to be searched or the things to be seized – that the executing officers cannot reasonably presume it to be valid” (145 Ohio St. 3d at 22-23, 46 N.E.3d at 660) – “we suppress the evidence at issue here because the search-warrant affidavit lacked indicia of probable cause and the search warrant failed to state with particularity the items to be searched for on Castagnola’s computer [so] that the detective could not have relied upon it in good faith” (145 Ohio St. 3d at 25, 46 N.E.3d at 662). Searches based on wholly conclusory affidavits – those that merely recite the ultimate fact in issue or the affiant’s belief of it (for example, that *X* has a sawed-off shotgun in a certain house) – thus remain challengeable under *Leon* and *Sheppard*. Conclusory assertions that the person to be arrested or whose house is to be searched is a “known criminal” or is “known” to deal in narcotics should be accorded “no weight” (see *Spinelli v. United States*, 393 U.S. 410, 414, 418-19 (1969)). Allegations that the person named in the warrant consorts with “known” criminals, narcotics dealers, and the like, are doubly worthless (see *United States v. Hatcher*, 473 F.2d 321 (6th Cir. 1973)).

25.17.2. Improper Multi-unit Warrant Applications

If officers seeking a warrant know “or even if they should have known” that the premises described in their application includes separate units with different occupants, they are constitutionally obliged to limit the application to the unit that they are presenting probable cause to search (*Maryland v. Garrison*, 480 U.S. 79, 85-87 (1987) (dictum); see also *United States v. Voustianiouk*, 685 F.3d 206, 215 (2d Cir. 2012)). A violation of this obligation should entail exclusion of any evidence seized from the other units, because the rationale of *Leon* and *Sheppard* is to withdraw the exclusionary rule as a remedy for magistrates’ errors in the search warrant process but preserve it as a remedy for police errors.

25.17.3. Affidavits Containing “Deliberate Falsehoods” or Statements Manifesting a “Reckless Disregard for the Truth”

In *Franks v. Delaware*, 438 U.S. 154 (1978), the Court held

“that, where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant’s request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit’s false material set to one side, the affidavit’s remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.” (*Id.* at 155-56.)

The rule of *Franks* “has a limited scope, both in regard to when exclusion of the seized evidence is mandated, and when a hearing on allegations of misstatements must be accorded” (*id.* at 167).

“To mandate an evidentiary hearing, the challenger’s attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. There must be allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof. They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained. Allegations of negligence or innocent mistake are insufficient. The deliberate falsity or reckless disregard whose impeachment is permitted . . . is only that of the affiant, not of any nongovernmental informant. Finally, if these requirements are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required. On the other hand, if the remaining content is insufficient, the defendant is entitled, under the Fourth and Fourteenth Amendments, to his hearing.” (*Id.* at 171-72.)

Accord, *United States v. Leon*, *supra*, 468 U.S. at 914, 925. *See, e.g.*, *United States v. Glover*, 755 F.3d 811, 819-21 (7th Cir. 2014) (“The government’s response to Glover’s motion to suppress revealed Doe’s history as an informant, his multiple convictions, his prior gang affiliation, his use of aliases, and his interest in being paid for useful information. Glover renewed his request for a hearing under *Franks v. Delaware*, . . . to determine whether the officer acted with reckless disregard for the truth by omitting the credibility information from the probable cause affidavit. To obtain a *Franks* hearing, the defendant must

make a ‘substantial preliminary showing’ of (1) a material falsity or omission that would alter the probable cause determination, and (2) a deliberate or reckless disregard for the truth. . . . This is a burden of production. Proof by a preponderance of the evidence is not required until the *Franks* hearing itself. . . . ¶ In this case, the omitted credibility information was clearly material . . . ¶ The district court did not show that it considered whether the credibility omissions themselves, even in the absence of more direct evidence of the officer’s state of mind, provide sufficient circumstantial evidence to support a reasonable and thus permissible inference of reckless disregard for the truth. We hold that they do. . . . ¶ On remand the government may provide a satisfactory explanation for the omission of the damaging information about the informant’s credibility, but Glover is entitled to test its explanation. We therefore REVERSE the denial of defendant’s motion to suppress and REMAND for a *Franks* hearing.”)

25.17.4. Warrants Based on Tainted Evidence

If an affidavit for a search warrant includes information that is the product of an earlier unconstitutional search or seizure by the police and does not contain sufficient independent evidence to make out probable cause without reference to the tainted information, the resulting warrant and any search made under its authority are invalid. *United States v. Karo*, 468 U.S. 705, 719-21 (1984) (dictum); see § 25.42 *infra*. To the extent that the earlier unconstitutionality was the consequence of improper police conduct rather than improper magisterial conduct, it continues to invoke the exclusionary sanction that *Leon* and *Sheppard* retain as a curb on the police and withdraw only as a curb on magistrates. *United States v. Nora*, 765 F.3d 1049, 1058-60 (9th Cir. 2014).

25.17.5. A Neutral and Detached Magistrate

Exclusion of evidence seized under a warrant is obligatory, even when the police acted in “good faith,” if the magistrate who issued the warrant was not neutral and detached. *Leon*, *supra*, 468 U.S. at 925. This principle would include situations “where the issuing magistrate wholly abandoned his judicial role in the manner condemned in *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319 (1979)” (*Leon*, *supra*, 468 U.S. at 923), “allow[ing] himself to become a member, if not the leader, of the search party which was essentially a police operation . . . [and] acting . . . as an adjunct law enforcement officer” (*Lo-Ji*, *supra*, 442 U.S. at 327). It would also include situations in which the magistrate “serve[s] merely as a rubber stamp for the police” (*Leon*, *supra*, 468 U.S. at 914).

25.17.6. The Particularity Requirement

The *Leon/Sheppard* doctrine does not alter the longstanding Fourth Amendment requirement that a warrant must identify the premises to be searched and the things to be seized with reasonable particularity. See *Leon*, *supra*, 468 U.S. at 923; *Sheppard*, *supra*, 468 U.S. at 988 n.5; and see, e.g., *Groh v. Ramirez*, 540 U.S. 551, 557-63 (2004); *Maryland v. Garrison*, 480 U.S. 79, 84 (1987) (dictum). The Supreme Court has “clearly stated that the presumptive rule against warrantless searches applies with equal force to searches whose only defect is a lack of particularity in the warrant” (*Groh v. Ramirez*, *supra*,

540 U.S. at 559). “The manifest purpose of this particularity requirement [is] . . . to prevent general searches. By limiting the authorization to search to the specific areas and things for which there is probable cause to search, the requirement ensures that the search will be carefully tailored to its justifications, and will not take on the character of the wide-ranging exploratory searches the Framers [of the Fourth Amendment] intended to prohibit.” *Maryland v. Garrison*, *supra*, 480 U.S. at 84 (dictum). *See also Groh v. Ramirez*, *supra*, 540 U.S. at 557-58 (“The fact that the *application* [for the warrant] adequately described the ‘things to be seized’ does not save the warrant from its facial invalidity. The Fourth Amendment by its terms requires particularity in the warrant, not in the supporting documents.”; the Court declines to reach the question of whether “the Fourth Amendment prohibits a warrant from cross-referencing other documents,” noting that “most Courts of Appeals have held that a court may construe a warrant with reference to a supporting application or affidavit if the warrant uses appropriate words of incorporation, and if the supporting document accompanies the warrant”); *Lo-Ji Sales, Inc. v. New York*, *supra*, 442 U.S. at 325-26; *Stanford v. Texas*, 379 U.S. 476 (1965); *Dalia v. United States*, 441 U.S. 238, 255-56 (1979) (dictum); *United States v. Galpin*, 720 F.3d 436, 446 (2d Cir. 2013) (“Where, as here, the property to be searched is a computer hard drive, the particularity requirement assumes even greater importance. As numerous courts and commentators have observed, advances in technology and the centrality of computers in the lives of average people have rendered the computer hard drive akin to a residence in terms of the scope and quantity of private information it may contain.”); *State v. Castagnola*, *supra*, 145 Ohio St. 3d at 19-21, 46 N.E.3d at 657-59 (“the search warrant lacked particularity and was therefore invalid” because the authorization to search “[r]ecords and documents stored on computers” in the defendant’s home “did not contain any description or qualifiers of the ‘records and documents stored on the computer’ that the searcher was permitted to look for”); *Wheeler v. State*, 135 A.3d 282, 304-05 (Del. 2016) (“warrants, in order to satisfy the particularity requirement, must describe what investigating officers believe will be found on electronic devices with as much specificity as possible under the circumstances. . . . ¶ . . . Where, as here, the investigators had available to them a more precise description of the alleged criminal activity that is the subject of the warrant, such information should be included in the instrument and the search and seizure should be appropriately narrowed to the relevant time period so as to mitigate the potential for unconstitutional exploratory rummaging”); *State v. Henderson*, 289 Neb. 271, 289, 854 N.W.2d 616, 633 (2014) (“a warrant for the search of the contents of a cell phone must be sufficiently limited in scope to allow a search of only that content that is related to the probable cause that justifies the search”). *Cf. In re Appeal of Application for Search Warrant*, 71 A.3d 1158, 1162, 1172, 1174, 1181, 1183 (Vt. 2012) (a judicial officer who “granted a warrant to search the residence and to seize electronic devices to be searched at an off-site facility” had the authority to attach *ex ante* conditions “requiring that the search [of the electronic devices] be performed by third parties or trained computer personnel separate from the investigators and operating behind a firewall,” “requiring that the information be segregated and redacted prior to disclosure,” “requiring police to use focused search techniques,” and “prohibiting the use of specialized search tools without prior court authorization”; “Because

modern computers contain a plethora of private information, exposing them to wholesale searches presents a special threat of exposing irrelevant but damaging secrets.”; “especially in a nonphysical context, particularity may be achieved through specification of how a search will be conducted”). *But cf. United States v. Grubbs*, 547 U.S. 90, 98-99 (2006) (“The Fourth Amendment does not require that the warrant set forth the magistrate’s basis for finding probable cause,” and, in the case of an anticipatory search warrant, “does not require that the triggering condition . . . be set forth in the warrant itself”).

25.17.7. Scope of the Search Permitted in Executing a Warrant

The “good faith” doctrine of *Leon* and *Sheppard* does not affect the courts’ obligation to review “the reasonableness of the manner in which [a search warrant] . . . was executed” (*Maryland v. Garrison*, 480 U.S. 79, 84 (1987)).

The permissible scope of a search pursuant to a warrant is strictly limited to the premises specified in the warrant. *Id.* at 86-87. *See, e.g., United States v. Bershchansky*, 788 F.3d 102, 105, 111-12 (2d Cir. 2015) (Department of Homeland Agents, who were authorized by a warrant to search “Apartment 2 at the location where Bershchansky lived,” exceeded the scope of the warrant “by searching Apartment 1 instead”). When the officers who are applying for a warrant know or should know that a particular building contains multiple units, their application and the warrant are required to specify the individual unit to be searched. *See* § 25.17.2 *supra*. If, however, they reasonably believe that the entire building is a single unit and in good faith obtain a warrant for the building as a whole, their “failure to realize the overbreadth of the warrant” will be deemed “objectively understandable and reasonable” (*Maryland v. Garrison, supra*, 480 U.S. at 88), and their search of any portion of the building will be sustained until such time as it discloses that separate units do exist within the building (*id.* at 86-89). At that time a continuation of the search beyond the unit for which probable cause was shown to the magistrate – and perhaps any further search at all until the warrant is reissued with a more limited specification of the place to be searched – is unconstitutional (*id.* at 86-87), and the products of the search are suppressible.

Within the premises specified by the warrant, “the scope of a lawful search is ‘defined by the object of the search and the places in which there is probable cause to believe that it may be found’” (*id.* at 84; *see* § 25.22.1 *infra*). This is a corollary of the pervasive Fourth Amendment principle that “[t]he scope of [a] search must be “strictly tied to and justified by” the circumstances which rendered its initiation permissible” (*New York v. Belton*, 453 U.S. 454, 457 (1981) (dictum). *See also Birchfield v. North Dakota*, 136 S. Ct. 2160, 2181 (2016) (dictum) (“Search warrants protect privacy in two main ways. First, they ensure that a search is not carried out unless a neutral magistrate makes an independent determination that there is probable cause to believe that evidence will be found. . . . Second, if the magistrate finds probable cause, the warrant limits the intrusion on privacy by specifying the scope of the search – that is, the area that can be searched and the items that can be sought.”). The officers may search “the entire area in which the object of the search

may be found,” performing whatever additional “acts of entry or opening may be required to complete the search. Thus a warrant that authorizes an officer to search a home for illegal weapons also provides authority to open closets, chests, drawers, and containers in which the weapon might be found.” (*United States v. Ross*, 456 U.S. 798, 820-21 (1982) (dictum)). Cf. *Dalia v. United States*, 441 U.S. 238, 257-58 (1979) (dictum). However, the search may not extend into areas that could not contain the objects specified in the warrant. See *United States v. Ross*, *supra*, 456 U.S. at 824 (dictum). “[A] warrant to search for a stolen refrigerator would not authorize the opening of desk drawers.” *Walter v. United States*, 447 U.S. 649, 657 (1980) (plurality opinion) (dictum).

Nor may the officers seize anything not specified in the warrant. *Marron v. United States*, 275 U.S. 192, 196-98 (1927); *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 394 n.7 (1971) (dictum); *Marshall v. Barlow’s, Inc.*, 436 U.S. 307, 323 (1978) (dictum); see also *United States v. Ganius*, 755 F.3d 125, 137-38 (2d Cir. 2014) (government exceeded the scope of a “warrant for the seizure of particular [business record] data on a computer” by retaining a forensic mirror image of the computer’s hard drive for two-and-a-half years “until [the government] finally developed probable cause to search and seize” computer files containing “personal financial records . . . not covered by the . . . [original search] warrant”); *United States v. Sedaghaty*, 728 F.3d 885, 910-15 (9th Cir. 2013) (“The question we consider de novo is whether the search was unreasonable because agents relied on the affidavit in support of the warrant to expand the authorized scope of items detailed in the warrant itself.” “The plain text of the warrant . . . clearly delineates what is to be seized.” “May a broad ranging probable cause affidavit serve to expand the express limitations imposed by a magistrate in issuing the warrant itself? We believe the answer is no. The affidavit as a whole cannot trump a limited warrant.”); cf. *Lo-Ji Sales, Inc. v. New York*, *supra*, 442 U.S. at 325.

The sole exception to the four-corners-of-the-warrant limitation upon objects that can be seized is grounded in the “plain view” doctrine discussed in § 25.22.2 *infra*: Objects not encompassed by the warrant’s terms but which the officer encounters while conducting a search of the limited scope described in the preceding paragraph may be seized if, but only if, their appearance and situation give the officer probable cause to believe that they are contraband or otherwise subject to seizure. *Arizona v. Hicks*, 480 U.S. 321 (1987); *Texas v. Brown*, 460 U.S. 730 (1983) (plurality opinion).

Regarding searches of *persons* found on the premises, see § 25.22.3 *infra*.

25.18. Warrantless Entries of Buildings and Searches on Consent

The police may enter a building without a warrant whenever they obtain the valid consent of a party who has the authority to admit persons to the building. *Washington v. Chrisman*, 455 U.S. 1, 9-10 (1982). “The standard for measuring the scope of a suspect’s consent under the Fourth Amendment is that of ‘objective’ reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect?”

Florida v. Jimeno, 500 U.S. 248, 251 (1991). *Cf. United States v. Lopez-Cruz*, 730 F.3d 803, 805-06, 808 (9th Cir. 2013) (although the defendant consented to a border patrol agent’s request to inspect and search two cell phones that the defendant identified as belonging to a friend of his, “the agent’s answering of the phone [which led to the acquisition of information that incriminated the defendant] exceeded the scope of the consent that [the agent] obtained and, thus, violated Lopez’s Fourth Amendment right”).

25.18.1. *Voluntariness of the Consent*

In order to be valid, the consent must be voluntary. *Amos v. United States*, 255 U.S. 313 (1921). It must “not be coerced, by explicit or implicit means, by implied threat or covert force . . . no matter how subtly . . . applied” (*Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973) (dictum)). “[W]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving [by a preponderance of the evidence (*see United States v. Matlock*, 415 U.S. 164, 177, 177-78 n.14 (1974))] that the consent was, in fact, freely and voluntarily given.” *Schneckloth v. Bustamonte*, *supra*, 412 U.S. at 222, and cases cited; *see also Florida v. Royer*, 460 U.S. 491, 497 (1983) (plurality opinion); *United States v. Mendenhall*, 446 U.S. 544, 557 (1980) (dictum).

As with confessions, see § 26.2 *infra*, the test of voluntariness is said to turn upon “the totality of all surrounding circumstances” (*Schneckloth v. Bustamonte*, *supra*, 412 U.S. at 226): “[A]ccount must be taken of subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents” (*id.* at 229; *cf. United States v. Watson*, 423 U.S. 411, 424-25 (1976)). Factors that may render a person “vulnerable” and particularly susceptible to coercion include youth, emotional disturbance, lack of education, and mental deficiency. *See, e.g., State v. Butler*, 232 Ariz. 84, 88-89, 302 P.3d 609, 613-14 (2013); *In re J.M.*, 619 A.2d 497, 502-04 (D.C. 1992); and see § 26.4 *infra*.

Courts are loth to find voluntary consent when police entry is sought under an apparent show of authority to enter and is merely acquiesced in by the occupant. *Johnson v. United States*, 333 U.S. 10 (1948); *Bumper v. North Carolina*, 391 U.S. 543 (1968); *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329 (1979). *See also United States v. Shaw*, 707 F.3d 666, 669 (6th Cir. 2013) (“An officer may not falsely tell a homeowner that he has an arrest warrant for a house, then use that falsity as the basis for obtaining entry into the house.”). Valid consent may be obtained from an individual who is in police custody (*United States v. Watson*, *supra*, 423 U.S. at 424), but “courts have been particularly sensitive to the heightened possibilities for coercion when the ‘consent’ to a search was given by a person in custody” (*Schneckloth v. Bustamonte*, *supra*, 412 U.S. at 240 n.29). *See, e.g., United States v. Hall*, 565 F.2d 917, 920 (5th Cir. 1978); *Guzman v. State*, 283 Ark. 112, 120, 672 S.W.2d 656, 659-60 (1984); *Commonwealth v. Smith*, 470 Pa. 220, 228, 368 A.2d 272, 277 (1977). *Cf. Kaupp v. Texas*, 538 U.S. 626, 631 (2003) (per curiam) (police officers’ removal of a 17-year-old suspect from his home in the middle of the night and transporting of him to the stationhouse could not be deemed “consensual” even though the suspect said “Okay” in response to an officer’s statement “we need to go and talk” because there was “no reason to think [the suspect’s] answer was anything more

than ‘a mere submission to a claim of lawful authority’”). Consent during a period of *illegal* custody should be *eo ipso* ineffective. See *Florida v. Royer, supra*, 460 U.S. at 507-08 (plurality opinion); *id.* at 508-09 (concurring opinions of Justices Powell and Brennan); *United States v. Murphy*, 703 F.3d 182, 190 (2d Cir. 2012); *State v. Betts*, 194 Vt. 212, 219-21, 75 A.3d 629, 635-36 (2013) (the rule that “consent obtained during an illegal detention is invalid” necessarily calls for holding as well that “consent for a search is not voluntary when obtained in response to the threat of an unlawful detention”). See § 25.39 *infra*.

At least with regard to persons who have not been taken to the stationhouse or other place of closed confinement, the police may obtain valid consent for a warrantless search without first warning the consenting party of his or her Fourth Amendment rights. *Coolidge v. New Hampshire*, 403 U.S. 443, 484-90 (1971); *Schneekloth v. Bustamonte, supra*, 412 U.S. at 234; *United States v. Matlock, supra*, 415 U.S. at 167 n.2; *United States v. Watson, supra*, 423 U.S. at 424-25; *Edwards v. Arizona*, 451 U.S. 477, 483-84 (1981) (dictum). “[K]nowledge of a right to refuse is not a prerequisite of a voluntary consent.” *Schneekloth v. Bustamonte, supra*, 412 U.S. at 234. See also *United States v. Drayton*, 536 U.S. 194, 206 (2002); *Ohio v. Robinette*, 519 U.S. 33, 39-40 (1996). *But cf. State v. Budd*, 185 Wash. 2d 566, 573, 374 P.3d 137, 141 (2016) (reaffirming a state constitutional rule that when the police engage in a so-called “knock and talk,” in which they “go to a home without a warrant and ask for the resident’s consent to search the premises,” the “police ‘must, prior to entering the home, inform the person from whom consent is sought that he or she may lawfully refuse to consent to the search and that they can revoke, at any time, the consent that they give, and can limit the scope of the consent to certain areas of the home’”; “Officers must give these warnings before entering the home because the resident’s knowledge of the privilege is a ‘threshold requirement for an intelligent decision as to its exercise.’”). Even with respect to persons at large in the world, however, “knowledge of the right to refuse consent is one factor to be taken into account” in determining the voluntariness of consent for federal Fourth Amendment purposes (*Schneekloth v. Bustamonte, supra*, 412 U.S. at 227; see also *United States v. Drayton, supra*, 536 U.S. at 206; *United States v. Mendenhall, supra*, 446 U.S. at 558-59), and the Court has not rejected the argument that explicit warnings should be required in the case of persons who are in police custody “in the confines of the police station” (*United States v. Watson, supra*, 423 U.S. at 424), or in similar settings where “the techniques of police questioning and the nature of custodial surroundings produce an inherently coercive situation” (*Schneekloth v. Bustamonte, supra*, 412 U.S. at 247), in which the reasoning of *Miranda v. Arizona*, 384 U.S. 436 (1966) (see §§ 26.5-26.9 *infra*) appears to be fully applicable (see *Berkemer v. McCarty*, 468 U.S. 420, 437-40 (1984); *Arizona v. Roberson*, 486 U.S. 675, 685-86 (1988); *United States v. Washington*, 431 U.S. 181, 187 n.5 (1977) (dictum); *Roberts v. United States*, 445 U.S. 552, 560-61 (1980) (dictum). *And see Schneekloth v. Bustamonte, supra*, 412 U.S. at 240 n.29, 247 n.36. *Cf. Ohio v. Robinette, supra*, 519 U.S. at 35 (motorist who was stopped for speeding on the open road, and who was thereafter given a verbal warning and received his driver’s license back from the police officer, did not have to be “advised that he is ‘free to go’” in order for his consent to the officer’s request to search the car to be “recognized as voluntary”).

The extent to which state law can require *ex ante* blanket consent to certain searches and seizures as a condition of receiving various licences, privileges, or benefits is largely an open question. The convoluted reasoning in *United States v. Knights*, 534 U.S. 112 (2001), summarized in § 25.37 third paragraph *infra* plainly implies that a State cannot condition a convict’s release on probation upon his or her agreement to be subject to searches and seizures that would violate the Fourth Amendment in the case of non-probationers. Since *Knights* “signed . . . [a] probation order, which stated immediately above his signature that “I HAVE RECEIVED A COPY, READ AND UNDERSTAND THE ABOVE TERMS AND CONDITIONS OF PROBATION AND AGREE TO ABIDE BY SAME,” and since one of those terms was “that *Knights* would ‘[s]ubmit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime, with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer” (*id.* at 114), the case would have been a no-brainer if consents of this sort were legally effective. Conspicuously avoiding this straightforward approach (which the Government forcefully advocated), the Court wrote that it “need not decide whether *Knights*’ [sic] acceptance of the search condition constituted consent in the *Schneckloth* sense of a complete waiver of his Fourth Amendment rights, . . . because we conclude that the search of *Knights* was reasonable under our general Fourth Amendment approach of ‘examining the totality of the circumstances,’ . . . with the probation search condition being a salient circumstance (*id.* at 118) because “[t]he probation condition . . . significantly diminished *Knights*’ [sic] reasonable expectation of privacy” (*id.* at 119-20). A generation later, in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), summarized in § 25.14 subdivision (d) *supra*, the Supreme Court, “[h]aving concluded that the search incident to arrest doctrine does not justify the warrantless taking of a blood sample” from a motorist arrested for drunk driving (*id.* at 2185), was required to address the question whether “such tests are justified based on the driver’s legally implied consent to submit to them” (*id.*) under state “implied-consent laws” that “go beyond” the “typical penalty for . . . [refusal to submit to blood testing for sobriety – namely,] suspension or revocation of the motorist’s license” – and “make it a crime for a motorist to refuse to be tested after being lawfully arrested for driving while impaired” (*id.* at 2166-67). The Court answered that question in the negative, but on extremely narrow grounds. “Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. . . . Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them. ¶ It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads. ¶ . . . [R]easonableness is always the touchstone of Fourth Amendment analysis, . . . [a]nd applying this standard, we conclude that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense.” *Id.* at 2185-86. Pending the descent of the other shoe, defense counsel should take the position that consents extracted in advance as the price for receiving government “privileges” are void by analogy to cases like *Garrity*

v. New Jersey, 385 U.S. 493 (1967); *Gardner v. Broderick*, 392 U.S. 273 (1968); *Lefkowitz v. Turley*, 414 U.S. 70 (1973); and *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977), which hold that “when a State compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment and cannot be used against the declarant in a subsequent criminal prosecution” (*id.* at 805). In each of these Fifth Amendment cases, the “potent sanctions” threatened were nothing more or less than the termination of public employment or of “the opportunity to secure public contracts” (*id.* at 806) – advantages which the State had no obligation to extend to any particular individuals in the first place.

25.18.2. Authority To Consent: Consent by a Party Other Than the Defendant

The test of a third party’s authority to consent is whether the third party possessed – or reasonably appeared to the police to possess – “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)). *See also Georgia v. Randolph*, 547 U.S. 103, 109 (2006) (“the exception for consent extends even to entries and searches with the permission of a co-occupant whom the police reasonably, but erroneously, believe to possess shared authority as an occupant”); *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990). “Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property, . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize 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.” *United States v. Matlock*, *supra*, 415 U.S. at 171 n.7. *See also Frazier v. Cupp*, 394 U.S. 731, 740 (1969); *Georgia v. Randolph*, *supra*, 547 U.S. at 111-12 (“The constant element in assessing Fourth Amendment reasonableness in the consent cases . . . is the great significance given widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules.”; “[W]hen it comes to searching through bureau drawers, there will be instances in which even a person clearly belonging on premises as an occupant may lack any perceived authority to consent; ‘a child of eight might well be considered to have the power to consent to the police crossing the threshold into that part of the house where any caller, such as a pollster or salesman, might well be admitted,’ . . . , but no one would reasonably expect such a child to be in a position to authorize anyone to rummage through his parents’ bedroom”); *Payton v. New York*, 445 U.S. 573, 583 (1980) (a three-year old child’s opening of the door to the house could not constitute valid consent to a police entry to arrest the child’s father); *Stoner v. California*, 376 U.S. 483 (1964) (a hotel manager’s consent to the entry of a guest’s room is ineffective); *Chapman v. United States*, 365 U.S. 610 (1961) (a landlord’s consent to the entry of a tenant’s house is ineffective); *United States v. Peyton*, 745 F.3d 546, 552-56 (D.C. Cir. 2014) (defendant’s great-great-grandmother, with whom he shared a one-bedroom apartment, lacked both actual and apparent authority to consent to a search

of a closed shoebox of his that was next to his bed: “The fact that a person has common authority over a house, an apartment, or a particular room, does not mean that she can authorize a search of anything and everything within that area.”); *Reeves v. Warden*, 346 F.2d 915 (4th Cir. 1965) (a co-tenant cannot consent to entry of an area reserved for defendant’s private occupancy and use); *State v. Colvard*, 296 Ga. 381, 381-82, 383, 768 S.E.2d 473, 474, 475 (2015) (defendant’s uncle, in whose apartment the defendant lived, did not have authority to consent to a search of the defendant’s bedroom, which was “used exclusively” by the defendant, and had a lock on the door for which the uncle did not have a key; the uncle “could not go into the bedroom when the door was locked,” and the bedroom door was locked at the time of the police entry, although “it did not appear that the bedroom door was securely fastened” since the police were able to “pop [it] open” easily).

Although “voluntary consent of an individual possessing [or reasonably appearing to possess the requisite] authority” may suffice “*when the suspect is absent*” (*Georgia v. Randolph, supra*, 547 U.S. at 109 (emphasis added)), a different standard applies when a co-occupant “who later seeks to suppress the evidence . . . is present at the scene and expressly refuses to consent” (*id.* at 106). In *Randolph*, the Court addressed the latter scenario and held that “a physically present inhabitant’s express refusal of consent to a police search is dispositive as to him, regardless of the consent of a fellow occupant” (*id.* at 122-25). *Accord, Fernandez v. California*, 134 S. Ct. 1126, 1133 (2014) (dictum). *See also United States v. Johnson*, 656 F.3d 375, 377-79 (6th Cir. 2011) (the defendant’s objection to the search at the scene was sufficient to override the consent given by his wife and her grandmother, even though the defendant “was not a full-time resident of the home and his possessory interest was therefore inferior to that of” the consenting individuals, “who lived there full-time”: the Supreme Court in *Randolph* “expressly avoided making . . . distinctions” between “relative degrees of possessory interest among residential co-occupants”). *Compare Fernandez v. California, supra*, 134 S. Ct. at 1130, 1134 (a domestic violence victim’s consent to police entry of the home she shared with the defendant was valid, notwithstanding the defendant’s objection at the time the police arrived, because the “consent was provided by [the] . . . abused woman well after her male partner had been [lawfully] removed” by the police: when “an occupant . . . is absent due to a lawful detention or arrest,” the absent occupant “stands in the same shoes as an occupant who is absent for any other reason”; the Court emphasizes, however, that the defendant did not “contest the fact that the police had reasonable grounds for removing him from the apartment so that they could speak with . . . an apparent victim of domestic violence, outside of [the defendant’s] . . . potentially intimidating presence,” and did “not even contest the existence of probable cause to place him under arrest”), *with State v. Coles*, 218 N.J. 322, 328, 347-48, 95 A.3d 136, 139, 150-51 (2014) (“As the United States Supreme Court’s *Fernandez* opinion makes clear, valid third-party consent is subject to the exception that the third party’s consent cannot be manufactured through the unlawful detention of the defendant”; the New Jersey Supreme Court holds on state constitutional grounds, “bolstered by Fourth Amendment principles,” that the officers’ initially valid detention of the defendant became unlawful once his identity and residence were confirmed and thus he “was being unlawfully detained

by police, a few houses away from his home” at the time the police obtained consent from his aunt to search his bedroom in her house; the “asserted consent-based search” was unlawful because “[t]he officer’s action detaining defendant in a patrol car when probable cause to arrest was lacking effectively prevented any objection from defendant” and “[it] also prevented him from disputing his aunt’s statements in response to police inquiries about control over the room”).

25.18.3. *Application of the “Private Search” Doctrine to Home Entries by Law Enforcement Officers*

This subject – which is analytically distinct from the subject of consent searches but bears some situational and analogical similarity to it – is canvassed thoroughly, with discussion of the relevant authorities, in *State v. Wright*, 221 N.J. 456, 459-78, 114 A.3d 340, 342-53 (2015):

“In this case, we consider whether the ‘third-party intervention’ or ‘private search’ doctrine applies to a warrantless search of a home.

“The doctrine originally addressed situations like the following: Private actors search an item, discover contraband, and notify law enforcement officers or present the item to them. The police, in turn, replicate the search without first getting a warrant. *See, e.g., United States v. Jacobsen*, 466 U.S. 109 (1984) [§ 25.22.2 subdivision (ii) *infra*]. Because the original search is carried out by private actors, it does not implicate the Fourth Amendment. And if the officers’ search of the item does not exceed the scope of the private search, the police have not invaded a defendant’s protected privacy interest and do not need a warrant.

“The State now seeks to expand the doctrine to a very different setting: the search of a private home. In this case, a resident reported a leak in her apartment to her landlord, who showed up the following day with a plumber. The landlord and plumber entered the apartment while no one was home, spotted the leak in the kitchen, and checked elsewhere for additional leaks. In the rear bedroom, the plumber saw drugs on top of a nightstand and inside an open drawer. He and the landlord notified the police.

“Instead of using that information to apply for a search warrant, an officer walked into the apartment and looked around the kitchen and bedroom area. He, too, noticed the drugs and found a scale as well. The police conducted a full search moments later, with the resident’s consent, and found other contraband.

“

“Relying on the protections in the State Constitution, we conclude that the private search doctrine cannot apply to private dwellings. Absent exigency or some other exception to the warrant requirement, the police must get a warrant to enter a private home and conduct a search, even if a private actor has already searched

the area and notified law enforcement.

“To be sure, whenever residents invite someone into their home, they run the risk that the third party will reveal what they have seen to others. . . . A landlord, like any other guest, may tell the police about contraband he or she has observed. And the police, in turn, can use that information to apply for a search warrant. . . . But that course of events does not create an exception to the warrant requirement.

“

“We recognize that residents have a reduced expectation of privacy in their home whenever a landlord or guest enters the premises. But residents do not thereby forfeit an expectation of privacy as to the police. In other words, an invitation to a plumber, a dinner guest, or a landlord does not open the door to one’s home to a warrantless search by a police officer.

“

“The proper course under the State and Federal Constitutions is the simplest and most direct one. If private parties tell the police about unlawful activities inside a person’s home, the police can use that information to establish probable cause and seek a search warrant. In the time it takes to get the warrant, police officers can secure the apartment or home from the outside, for a reasonable period of time, if reasonably necessary to avoid any tampering with or destruction of evidence. *Illinois v. McArthur*, 531 U.S. 326, 334 . . . (2001) [§ 25.6.3, fifth paragraph *supra*]. But law enforcement cannot accept a landlord’s invitation to enter a home without a warrant unless an exception to the warrant requirement applies.”

25.19. Warrantless Entry for the Purpose of Making a Valid Arrest

If the police possess a valid *arrest* warrant for an occupant of a building, they may enter the premises without a *search* warrant for the purpose of effecting the arrest. *Payton v. New York*, 445 U.S. 573, 602-03 (1980) (dictum).

Before the decisions in *Payton v. New York* in 1980 and *Steagald v. United States*, 451 U.S. 204 (1981), there was a substantial body of caselaw permitting “arrest entries” without any sort of warrant in a variety of circumstances. The only warrantless arrest entries that survive *Payton* and *Steagald* are those made “in ‘hot pursuit’ of a fugitive” (*Steagald v. United States, supra*, 451 U.S. at 221) or under other “exigent circumstances” (see § 25.20 *infra*) that make it impracticable to obtain a warrant (*Steagald v. United States, supra*, 451 U.S. at 213-16, 218, 221-22). See *United States v. Johnson*, 457 U.S. 537 (1982); *Minnesota v. Olson*, 495 U.S. 91, 100-01 (1990) (elaborated in § 25.20). The mere “inherent mobility’ of persons” sought to be arrested does not suffice to establish this exception to the warrant requirement because the police can cope with that problem “simply by waiting for a suspect to leave the third

person's home before attempting to arrest that suspect" (*Steagald v. United States*, *supra*, 451 U.S. at 221 n.14). *Cf. Payton v. New York*, *supra*, 445 U.S. at 583 (dictum). See also *United States v. Allen*, 813 F.3d 76, 79, 85-86 (2d Cir. 2016) (defendant, who opened his apartment door at police officers' request and spoke to the officers from "'inside the threshold' while the officers stood on the sidewalk," "was under arrest" when "[t]he officers told Allen that he would need to come down to the police station to be processed for the assault," and the police thereby violated *Payton* even though the police had not yet physically entered the apartment: "While it is true that physical intrusion is the 'chief evil' the Fourth Amendment is designed to protect against, . . . we reject the government's contention that this fact requires that *Payton's* warrant requirement be limited to cases in which the arresting officers themselves cross the threshold of the home before effecting an arrest. The protections of the home extend beyond instances of actual trespass. . . . By advising Allen that he was under arrest, and taking control of his further movements, the officers asserted their power over him *inside his home.*"); *United States v. Nora*, 765 F.3d 1049, 1054, 1060 (9th Cir. 2014) ("The government properly concedes that the police arrested Nora 'inside' his home for purposes of the *Payton* rule. Although officers physically took Nora into custody outside his home in the front yard, they accomplished that feat only by surrounding his house and ordering him to come out at gunpoint. We've held that forcing a suspect to exit his home in those circumstances constitutes an in-home arrest under *Payton.*" "Although Nora's arrest was supported by probable cause, the manner in which officers made the arrest violated *Payton.* Evidence obtained as a result of Nora's unlawful arrest must be suppressed."); *People v. Gonzales*, 111 A.D.3d 147, 148-50, 972 N.Y.S.2d 642, 643-44 (N.Y. App. Div., 2d Dep't 2013) (police who were told by a complainant that her cousin's boyfriend had assaulted her in a basement apartment went to the door of that apartment accompanied by the complainant; they knocked; "[w]hen the defendant opened the door, the police asked the complainant if he was the person who had assaulted her, and she said yes. The defendant, who had never left the apartment, even partially, tried to close the door, but the police pushed their way inside and handcuffed him. Minutes later, still inside the apartment, the defendant made an inculpatory statement. . . . ¶ In *Payton v. New York*, 445 U.S. 573 . . . the United States Supreme Court announced a clear and easily applied rule with respect to warrantless arrests in the home: 'the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant' The rule under the New York Constitution is the same (see N.Y. Const., art. 1, § 12; *People v. Levan*, 62 N.Y.2d 139, 144, 476 N.Y.S.2d 101, 464 N.E.2d 469). *Payton* and *Levan* require suppression of the defendant's statement under the clear, undisputed facts of this case.").

Police making any of the permissible types of arrest entry without a search warrant – entries pursuant to an arrest warrant, "hot pursuit" entries, and entries under exigent circumstances – are governed by the following rules:

(i) The intended arrest itself must be valid within the principles of § 25.7 *supra*. If the arrest is not valid, the arrest entry falls with it. *E.g., Massachusetts v. Painten*, 368 F.2d 142 (1st Cir. 1966), *cert. dismissed*, 389 U.S. 560 (1968).

(ii) There must be probable cause to believe that the person sought to be arrested is within the premises. *E.g., Lankford v. Gelston*, 364 F.2d 197 (4th Cir. 1966); see *Steagald v. United States*, *supra*, 451 U.S. at 214 n.7 (by implication); *Payton v. New York*, *supra*, 445 U.S. at 583, 603 (by implication). An arrest entry can be sustained only when the officers “[p]ossessing an arrest warrant . . . [have] probable cause to believe [that the person named in the warrant] was in his home” (*Maryland v. Buie*, 494 U.S. 325, 332 (1990) (dictum)).

(iii) Upon entry, the police may “search anywhere in the house that . . . [the person sought] might . . . [be] found” (*id.* at 330). However, the entry and search may not exceed the bounds appropriate in hunting for a person (*id.* at 335-36), and they may not intrude into closed areas too small to contain a human being (see *United States v. Ross*, 456 U.S. 798, 824 (1982) (dictum)), unless the officers have probable cause to believe that the person sought to be arrested is armed and that they therefore “need to check the entire premises [for weapons] for safety reasons” (*Payton v. New York*, *supra*, 445 U.S. at 589 (dictum); see *Warden v. Hayden*, 387 U.S. 294, 298-300 (1967)). *Cf. Arizona v. Hicks*, 480 U.S. 321 (1987), elaborated in § 25.22.2 *infra*.

(iv) “Once . . . [the person sought has been] found, . . . the search for him . . . [is] over, and there . . . [is] no longer that particular justification for entering any rooms that had not yet been searched.” *Maryland v. Buie*, *supra*, 494 U.S. at 333. “[A]s an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.” *Id.* at 334. See also § 25.8 *supra*. “Beyond that, however, . . . [the only basis for continuing the search or entering additional rooms after the arrest is the “protective sweep” doctrine described in § 25.22.4 *infra*, which requires] articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.” *Maryland v. Buie*, *supra*, 494 U.S. at 334.

Another limited exception to the search warrant requirement is a kind of hybrid of “arrest entry” reasoning and “consent” reasoning. In *Washington v. Chrisman*, 455 U.S. 1 (1982), the United States Supreme Court held that when a person who has been validly arrested in a location other than his or her home requests and receives permission from the arresting officer to return home before being taken to the lockup, the officer may accompany that person into the home, as an exercise of “the arresting officer’s authority to maintain custody over the arrested person” (*id.* at 6). *Contra, State v. Chrisman*, 100 Wash. 2d 814, 676 P.2d 419 (1984) (on remand, the Washington Supreme Court rejects the *Washington v. Chrisman* holding on state constitutional grounds).

25.20. Warrantless Entry Under “Exigent Circumstances”

As mentioned in § 25.19 *supra*, police may make a warrantless entry for the purpose of effecting an arrest under “exigent circumstances” that preclude the acquisition of an arrest warrant. Thus, in *Warden v. Hayden*, 387 U.S. 294 (1967), the Court approved a building entry by officers without

a warrant for the purpose of arresting a fugitive under circumstances of “hot pursuit”: The police observed the defendant flee from the crime scene, saw him enter the building, and reached the building less than five minutes after the defendant. *Cf. United States v. Santana*, 427 U.S. 38, 42-43 & n.3 (1976); *Steagald v. United States*, 451 U.S. 204, 218, 221-22 (1981) (dictum).

“[T]he police bear a heavy burden when attempting to demonstrate an urgent need that might justify warrantless searches or arrests.” *Welsh v. Wisconsin*, 466 U.S. 740, 749-50 (1984). “Before agents of the government may invade the sanctity of the home, the burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries.” *Id.* at 750. *Accord, Vale v. Louisiana*, 399 U.S. 30, 34-35 (1970); *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 358-59 (1977); *Mincey v. Arizona*, 437 U.S. 385, 393-94 (1978); *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). “[I]n the absence of hot pursuit there must be at least probable cause to believe that [facts constituting exigent circumstances – such as the “imminent destruction of evidence, . . . or 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” – are] . . . present.” *Minnesota v. Olson*, 495 U.S. 91, 100 (1990). *See, e.g., United States v. Collins*, 510 F.3d 697, 701 (7th Cir. 2007) (the government’s claim of “exigent circumstances” for a warrantless entry of a dwelling, based on an asserted risk of destruction of evidence, is rejected because “[t]he government has failed to show that in this case the police had probable cause to believe that evidence was being, or was about to be, destroyed when they entered”); *United States v. Ramirez*, 676 F.3d 755, 762 (8th Cir. 2012) (a hotel room occupant’s “attempt to shut the door once he became aware of the police presence outside [the] room” (by partially opening the door in response to an officer’s knocking and claiming to be housekeeping staff) did not provide a reasonable basis for believing that “the destruction of evidence was imminent”; the occupant “was under no obligation to allow the officers to enter the premises at that point and was likewise within his bounds in his attempt to close the door”); *Turrubiate v. State*, 399 S.W.3d 147, 149, 154 (Tex. Crim. App. 2013) (an exigent circumstances exception is not supported by “probable cause to believe that illegal drugs are in a home coupled with an odor of marijuana from the home and a police officer making his presence known to the occupants”; there must be “additional evidence of . . . attempted or actual destruction based on an occupant’s movement in response to the police knock”). *Compare Kentucky v. King*, 563 U.S. 452, 455, 462, 471 (2011) (if the police had a reasonable basis to believe that evidence in a dwelling was at risk of imminent destruction, which the Court “assume[s] for purposes of argument,” the exigent circumstances exception could justify a warrantless entry of the dwelling even though “the police, by knocking on the door of a residence and announcing their presence, cause[d] the occupants to attempt to destroy evidence.” As long as “[t]he conduct of the police prior to their entry into the apartment was entirely lawful,” and “the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment,” “the exigent circumstances rule applies”), *with King v. Commonwealth*, 386 S.W.3d 119, 122 (Ky. 2012), *cert. denied*, 133 S. Ct. 1995 (2013) (on remand of *Kentucky v. King* from the U.S. Supreme Court, the Kentucky Supreme Court holds that “the Commonwealth

failed to meet its burden of demonstrating exigent circumstances justifying a warrantless entry” because “the sounds . . . [from inside the dwelling that the police] described at the suppression hearing [as evidencing efforts to destroy evidence] were indistinguishable from ordinary household sounds, and were consistent with the natural and reasonable result of a knock on the door”), and *State v. Campbell*, 300 P.3d 72, 74, 78-79 (Kan. 2013) (“the exigent circumstances exception does not apply in light of the officer’s unreasonable actions in creating the exigency” by not “simply knock[ing] on the door and wait[ing] for an answer . . . [or “announc[ing] his presence” but instead] covering the peephole and positioning himself to block the occupant’s ability to determine who was standing at the door,” thereby causing an occupant to “open[] the door about a third of the way” while visibly armed with a gun).

In *Welsh v. Wisconsin*, *supra*, the Court held that in cases of arrest entries under a claim of exigent circumstances, “an important factor to be considered in determining whether any exigency exists is the gravity of the underlying offense for which the arrest is being made” (466 U.S. at 753). Explaining that “application of the exigent-circumstances exception in the context of a home entry should rarely be sanctioned when there is probable cause to believe that only a minor offense . . . has been committed” (*id.*), the Court in *Welsh* struck down a warrantless home entry to make an arrest for the offense of driving while intoxicated. The Court found that “the best indication of the State’s interest in precipitating an arrest” was the State’s classification of the offense as “a noncriminal, civil forfeiture offense” and refused to allow an arrest entry for such an offense, notwithstanding the risk that “evidence of the petitioner’s blood-alcohol level might have dissipated while the police obtained a warrant” (*id.* at 754). The *Welsh* opinion did not go quite as far as holding that “warrantless entry to arrest a misdemeanor is never justified, but only that such entry should be rare” (*Stanton v. Sims*, 134 S. Ct. 3, 6 (2013) (per curiam)). There is, however, language in the *Welsh* opinion that supports a categorical rule limiting warrantless arrest entries under exigent circumstances to felony arrests. See *Welsh v. Wisconsin*, *supra*, 466 U.S. at 750 n.12, 752-53. At the very least, *Welsh* “counsel[s] that suspicion of minor offenses should give rise to exigencies only in the rarest of circumstances” (*White v. Stanley*, 745 F.3d 237, 240-41 (7th Cir. 2014) (“smell of burning marijuana” inside a house did not provide a basis for exigent-circumstances entry of the house)). See also *Minnesota v. Olson*, *supra*, 495 U.S. at 100-01 (holding that the lower court “applied essentially the correct standard in determining . . . that in assessing the risk of danger, the gravity of the crime and likelihood that the suspect is armed should be considered,” and approving the lower court’s “fact-specific application of th[is] . . . proper legal standard . . . [to reject a claim of exigent circumstances even though the] grave crime [of murder] was involved . . . [because] defendant ‘was known not to be the murderer but thought to be the driver of the getaway car,’ . . . and . . . the police had already recovered the murder weapon”); *Harris v. O’Hare*, 770 F.3d 224, 235 (2d Cir. 2014). Cf. *Brigham City v. Stuart*, *supra*, 547 U.S. at 405 (distinguishing *Welsh v. Wisconsin* on the ground that “*Welsh* involved a warrantless entry by officers to arrest a suspect for driving while intoxicated” and “the ‘only potential emergency’ confronting the officers was the need to preserve evidence (i.e., the suspect’s blood-alcohol level)” whereas “[h]ere, the officers were confronted with

ongoing violence occurring within the home”); *Stanton v. Sims*, *supra*, 134 S. Ct. at 6 (noting that in *Welsh* “there was no immediate or continuous pursuit of [Welsh] from the scene of a crime” and cautioning that “despite our emphasis in *Welsh* on the fact that the crime at issue was minor – indeed, a mere nonjailable civil offense – nothing in the opinion establishes that the seriousness of the crime is equally important *in cases of hot pursuit*”; the “federal and state courts nationwide are sharply divided on the question whether an officer with probable cause to arrest a suspect for a misdemeanor may enter a home without a warrant while in hot pursuit of that suspect” (*id.* at 5 (citing cases))).

When the police make a valid arrest entry in “hot pursuit,” they may lawfully observe anything in the building that comes into “plain view” while they are seeking out the suspect and effecting his or her arrest, and they may seize objects in “plain view” if, but only if, there is probable cause to believe that the objects are contraband or crime-related. See § 25.22.2 *infra*. They may not search the premises more intensively or intrusively than is necessary to find the person sought to be arrested (*see Arizona v. Hicks*, 480 U.S. 321 (1987)), except when that person is known to be armed. In *Warden v. Hayden*, *supra*, the Court did allow police who entered a building in “hot pursuit” of an armed fugitive to make a warrantless search within the building to the extent necessary to find weapons. 387 U.S. at 298-300. *But see, e.g., People v. Jenkins*, 24 N.Y.3d 62, 65, 20 N.E.3d 639, 641, 995 N.Y.S.2d 694, 696 (2014) (although the police lawfully broke down the door of an apartment as they pursued an armed suspect into the apartment and also acted lawfully in searching the apartment and arresting the defendant and another man who were hiding under a bed, the officers’ subsequent search of a closed box – which was found to contain a gun – was unlawful and therefore the gun should have been suppressed: “by the time [the] Officer . . . opened the box, any urgency justifying the warrantless search had abated” because “[t]he officers had handcuffed the men and removed them to the living room where they (and the two women) remained under police supervision,” and thus “the police ‘were in complete control of the house’” and “there was no danger that defendant would dispose of or destroy the weapon . . . , nor was there any danger to the public or the police”; accordingly, “the police were required to obtain a warrant prior to searching the box”).

In addition to “hot pursuit” arrest entries, law enforcement officers may make warrantless building entries in the “exigent circumstances” presented by a manifest need to render assistance to an occupant who is in physical danger or to prevent serious bodily injury. *See City and County of San Francisco v. Sheehan*, 135 S. Ct. 1765, 1774-75 (2015) (police officers, who were dispatched to a group home for mentally ill residents to help take a resident to a secure ward at a hospital, did not violate the Fourth Amendment by using a social worker’s key to enter the resident’s room when she did not respond to the officers’ knocking on her door, announcing their identity, and saying that they wanted to help her; the officers’ subsequent reentry of the apartment, after they initially retreated in the face of the resident’s approaching them with a knife and threatening to kill them, also was justified as “part of a single, continuous” entry in a “continuing emergency” in which the police “knew that delay could make the situation more dangerous”);

Michigan v. Fisher, 558 U.S. 45, 47-49 (2009) (per curiam) (the “emergency aid exception” to the warrant requirement – which permits “law enforcement officials . . . [to] ‘enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury’” – justified a warrantless entry of a home by police officers who “respond[ed] . . . to a report of a disturbance” and, upon “arriv[ing] at the scene,” “encountered a tumultuous situation in the house,” “found signs of a recent injury, perhaps from a car accident, outside,” and “could see violent behavior inside” the house; the circumstances were sufficient to justify a reasonable belief on the officers’ part that an occupant “had hurt himself (albeit non-fatally) and needed treatment that in his rage he was unable to provide, or that [the occupant] was about to hurt, or had already hurt someone else.”); *Brigham City v. Stuart*, *supra*, 547 U.S. at 403 (“law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury”); *Michigan v. Tyler*, 436 U.S. 499, 509-10 (1978) (firefighting officials require neither “a warrant [n]or consent before entering a burning structure to put out the blaze” (*id.* at 509); and, because “[f]ire officials are charged not only with extinguishing fires, but with finding their causes” (*id.* at 510), they “need no warrant [or consent] to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished” (*id.*)). See also, e.g., *Ryburn v. Huff*, 132 S. Ct. 987, 990-92 (2012) (per curiam); *United States v. Barone*, 330 F.2d 543 (2d Cir. 1964); *Mincey v. Arizona*, *supra*, 437 U.S. at 392-93 (dictum), and authorities cited; *but see Carlson v. Fewins*, 801 F.3d 668 (6th Cir. 2015) (exigency dissipated).

In *dicta*, the Supreme Court has frequently suggested the existence of a more general “exigent circumstances” exception to the warrant requirement. See, e.g., *Johnson v. United States*, 333 U.S. 10, 14-15 (1948); *United States v. Jeffers*, 342 U.S. 48, 51 (1951); *Chapman v. United States*, 365 U.S. 610, 615 (1961); *Mincey v. Arizona*, *supra*, 437 U.S. at 392-94; *Michigan v. Summers*, 452 U.S. 692, 702 n.17 (1981); *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2173-74 (2016); *cf. Torres v. Puerto Rico*, 442 U.S. 465, 471 (1979); *New York v. Belton*, 453 U.S. 454, 457 (1981). However, the Court has never sustained a warrantless building entry on the “exigent circumstances” theory when the purpose of the entry was to make a *search* unassociated with an arrest or with the peacekeeping responsibilities of the police to provide emergency aid and to avert serious bodily injury. Probably the “exigent circumstances” exception extends no further than “hot pursuit” and “emergency assistance” cases (see *Vale v. Louisiana*, *supra*, 399 U.S. at 34-35; *Mincey v. Arizona*, *supra*, 437 U.S. at 392-93), although the tenor of some of the Supreme Court *dicta* does. See *State v. Vargas*, 213 N.J. 301, 305, 313-17, 321-26, 63 A.3d 175, 177, 182-84, 187-89 (2013) (reviewing relevant decisions of the U.S. Supreme Court and concluding that these decisions do not support treating the “community-caretaking” function of the police – as manifested here by the police officers’ seeking to “check on the welfare of a resident” in response to concerns expressed by the landlord – as “a justification for the warrantless entry and search of a home in the absence of some form of an objectively reasonable emergency”).

25.21. “Knock and Announce” Requirements: Restrictions upon the Manner of Police Entry

The preceding sections deal with restrictions upon the *circumstances* under which building entries can be made. There are also legal restrictions upon the *manner* of police entry.

In most jurisdictions, “knock and announce” statutes require that the police announce their presence and identity as officers, explain the purpose of their intended entry, and request to be admitted peaceably, before they may break and enter. *See, e.g., Miller v. United States*, 357 U.S. 301 (1958) (construing 18 U.S.C. § 3109 and the local law of the District of Columbia). Although these statutes are commonly framed in terms of police “breaking” open a door, their requirements are usually held to apply whenever the police open any door, whether locked or unlocked, forcibly or nonforcibly (*see Sabbath v. United States*, 391 U.S. 585 (1968)), and in some jurisdictions the statutes are also applied to police entries through an already open door (*People v. Buckner*, 35 Cal. App. 3d 307, 313-14, 111 Cal. Rptr. 32, 36-37 (1973)).

The statutes or cases construing the statutes usually provide for emergency exceptions to the “knock and announce” requirement. The exceptions commonly include situations in which there is reasonable ground to believe that an announcement would (i) jeopardize the safety of the entering officer, (ii) cause the destruction of evidence, or (iii) be a useless gesture because it is apparent from the surrounding circumstances that the occupants of the premises already know of the authority and purpose of the police. *See, e.g., Miller v. United States, supra*, 357 U.S. at 308-10; *Sabbath v. United States, supra*, 391 U.S. at 591; *cf. Dalia v. United States*, 441 U.S. 238, 247-48 (1979); *Washington v. Chrisman*, 455 U.S. 1, 10 n.7 (1982).

The Supreme Court has recognized that “knock and announce” requirements are embodied in the Fourth Amendment. *See Wilson v. Arkansas*, 514 U.S. 927 (1995) (the “common-law ‘knock and announce’ principle forms a part of the reasonableness inquiry under the Fourth Amendment”). *Accord, United States v. Banks*, 540 U.S. 31, 36-37 (2003); *United States v. Ramirez*, 523 U.S. 65, 70 (1998); *Richards v. Wisconsin*, 520 U.S. 385, 387 (1997); and *see Terebesi v. Torrosso*, 764 F.3d 217, 241-43 (2d Cir. 2014). *Cf. Carroll v. Carman*, 135 S. Ct. 348 (2014) (per curiam). The Court has held, however, that the exclusionary rule is not available to suppress evidence obtained in the course of a building entry that is unconstitutional solely because the entering officers violated the Fourth Amendment “knock and announce” rule. *Hudson v. Michigan*, 547 U.S. 586, 599-600, 602 (2006). *See id.* at 602-03 (Justice Kennedy, concurring in part and concurring in the judgment, thus supplying the vote necessary to produce a 5-Justice majority, but writing separately to “underscore[]” the following “[t]wo points”: “First, the knock-and-announce requirement protects rights and expectations linked to ancient principles in our constitutional order . . . [and] [t]he Court’s decision should not be interpreted as suggesting that violations of the requirement are trivial or beyond the law’s concern. Second, the continued operation of the exclusionary rule, as settled and defined by our precedents, is not in doubt. Today’s decision determines only that in

the specific context of the knock-and-announce requirement, a violation is not sufficiently related to the later discovery of evidence to justify suppression.”). Because *Hudson v. Michigan* concerned only the consequences of a federal Fourth Amendment violation, it does not preclude state courts from enforcing their respective state-law “knock and announce” requirements by exclusion and suppression. See, e.g., *State v. Jean-Paul*, 295 P.3d 1072, 1076 (N.M. App. 2013) (adhering to New Mexico’s pre-*Hudson* exclusionary rule: “[W]hile both the federal and state constitutions include the knock-and-announce requirement, the remedies for a violation under the two constitutions are not the same.”); *State v. Rockford*, 213 N.J. 424, 453, 64 A.3d 514, 530 (2013) (reserving the question “whether the exclusionary rule is the appropriate remedy for an unconstitutional execution of a knock-and-announce warrant under our State Constitution” in the wake of *Hudson*); § 17.11 *supra*. For the reason stated in § 25.17 concluding paragraph *supra*, the case for state-law rejection of *Hudson* is a strong one. See, e.g., *State v. Cable*, 51 So. 3d 434 (Fla. 2010) (“[I]n *Benefield v. State*, 160 So. 2d 706 (Fla.1964), . . . this Court held that a violation of Florida’s knock-and-announce statute vitiated the ensuing arrest and required the suppression of the evidence obtained in connection with the arrest.” *Id.* at 435. “[T]he [*Benefield*] Court noted that ‘[s]ection 901.19, Florida Statutes, . . . appears to represent a codification of the English common law . . . ¶ ‘Entering one’s home without legal authority and neglect to give the occupants notice have been condemned by the law and the common custom of this country and England from time immemorial. It was condemned by the yearbooks of Edward IV, before the discovery of this country by Columbus. . . . ¶ This sentiment has moulded our concept of the home as one’s castle as well as the law to protect it. The law forbids the law enforcement officers of the state or the United States to enter before knocking at the door, giving his name and the purpose of his call. There is nothing more terrifying to the occupants than to be suddenly confronted in the privacy of their home by a police officer decorated with guns and the insignia of his office. This is why the law protects its entrance so rigidly.’” *Id.* at 439. “[B]ecause *Hudson* does not address the remedy for state-created statutory violations, *Hudson* does not require us to recede from *Benefield*.” *Id.* at 442.); *Berumen v. State*, 182 P.3d 635 (Alaska App. 2008) (“[T]he issue before us is one of state law, so the United States Supreme Court’s decision in *Hudson* does not bind us.” *Id.* at 637. “The police officers in this case violated a longstanding requirement of Alaska law that is designed to protect the privacy and dignity of this state’s citizens. On the issue of whether the police must announce their claimed authority and purpose, and on the related issue of whether the police are allowed to break into a building if they have neither sought nor been refused admittance, the statute is written in clear and unambiguous terms. . . . ¶ . . . [T]he evidence found in the hotel room was ‘secured through such a flagrant disregard’ of the procedure specified by the Alaska legislature that it ‘cannot be allowed to stand without making the courts themselves accomplices in [willful] disobedience of [the] law.’” *Id.* at 642.).

Police entries that involve SWAT-squad tactics or other exercises of massive force can be challenged as unreasonable searches and as violations of Due Process under both the Fourth and Fourteenth Amendments (see, e.g., *Estate of Smith v. Marasco*, 430 F.3d 140, 151-53 (3d Cir. 2005); *Milan v. Bolin*,

795 F.3d 726 (7th Cir. 2015); *Carlson v. Fewins*, 801 F.3d 668 (6th Cir. 2015)), and state law if they are excessively violent. *Hudson* should not withdraw the Fourth Amendment exclusionary remedy in such cases, because they would evoke the independent principle of *Rochin v. California*, 342 U.S. 165 (1952), which is, at its root, a prohibition against “convictions . . . brought about by methods that offend ‘a sense of justice’” (*id.* at 173 (emphasis added)) or governmental “conduct that shocks the conscience” (*id.* at 172).

25.22. Scope of Permissible Police Activity after Entering the Premises

25.22.1. The Requisite Relationship Between Police Activity Inside the Dwelling and the Purpose of the Entry

The scope of an officer’s investigatory powers, once inside a building, is defined by the circumstances that permitted his or her entry under the principles of §§ 25.16-25.20 *supra*. *United States v. King*, 227 F.3d 732, 750-54, 755 (6th Cir. 2000); *United States v. Sedaghaty*, 728 F.3d 885, 910-15 (9th Cir. 2013); *United States v. Angelos*, 433 F.3d 738, 746 (10th Cir. 2006). This is a corollary of the general rule that “the purposes justifying a police search strictly limit the permissible extent of the search” (*Maryland v. Garrison*, 480 U.S. 79, 87 (1987) (dictum)). *Accord, id.* at 84 (“the scope of a lawful search is ‘defined by the object of the search and the places in which there is probable cause to believe that it may be found’”). *See also, e.g., Wilson v. Layne*, 526 U.S. 603, 611 (1999) (dictum) (“the Fourth Amendment . . . require[s] that police actions in execution of a warrant be related to the objectives of the authorized intrusion”); *New York v. Belton*, 453 U.S. 454, 457 (1981) (dictum) (“[t]he scope of [a] search must be ‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible”); *Horton v. California*, 496 U.S. 128, 140 (1990) (dictum) (“[i]f the scope of the search exceeds that permitted by the terms of a validly issued warrant or the character of the relevant exception from the warrant requirement, the subsequent seizure is unconstitutional without more”). A search must be “carefully tailored to its justifications,” so as to avoid “tak[ing] on the character of the wide-ranging exploratory searches the Framers [of the Fourth Amendment] intended to prohibit” (*Maryland v. Garrison, supra*, 480 U.S. at 84). *See also Maryland v. Buie*, 494 U.S. 325, 335-36 (1990); *cf. United States v. Foster*, 100 F.3d 846, 849 (10th Cir. 2006) (“Under the law of this circuit, ‘even evidence which is properly seized pursuant to a warrant must be suppressed if the officers executing the warrant exhibit “flagrant disregard” for its terms.’ . . . The basis for blanket suppression when a search warrant is executed with flagrant disregard for its terms ‘is found in our traditional repugnance to “general searches” which were conducted in the colonies pursuant to writs of assistance.’ . . . To protect against invasive and arbitrary general searches, the Fourth Amendment mandates that search warrants ‘particularly describ[e] the place to be searched and the persons or things to be seized.’”).

Thus, as explained in § 25.17.7 *supra*, when the police enter a dwelling or other premises pursuant to a search warrant, the search ordinarily may not extend into areas that are not covered by the warrant or into areas that could

not contain the objects specified in the warrant. If the entry was predicated upon the consent of a member of the household, the officers' movement within the home is limited by the scope of the consent that was given and the extent of the individual's authority to consent. See § 25.18 *supra*. If the entry was made for the purpose of effecting an arrest, whether with or without a warrant, the officers possess only the freedom of movement necessary to locate and to apprehend the person sought to be arrested (see § 25.19 *supra*), unless they can justify a further search of the premises as a "protective sweep" (see § 25.22.4 *infra*). If the entry was made in the exercise of the officers' peacekeeping functions, they may not undertake even the most minimal search beyond the needs of those functions. *Arizona v. Hicks*, 480 U.S. 321 (1987). See, e.g., *In the Matter of the Welfare of J.W.L.*, 732 N.W.2d 332, 339 (Minn. App. 2007) (a police officer, who lawfully entered a dwelling without a warrant under the exigent circumstances exception due to a 911 call from inside the dwelling, thereafter violated the Fourth Amendment by taking photographs of graffiti in a bedroom that were subsequently used to connect the defendant to graffiti incidents).

25.22.2. Police Officers' Search and Seizure of Objects While Searching the Premises; The "Plain View" Exception to the Warrant Requirement

Often, while inside a building, dwelling unit, or other premises, police officers catch sight of an object that they believe to be contraband or evidence of a crime. The officer will then inspect the object further or will seize it.

As explained in § 25.15.4 *supra*, a defendant has a constitutionally protected interest against the search or seizure of an object that belongs to him or her, regardless of whether s/he is on the premises at the time the search or seizure takes place, and regardless of whether s/he has any privacy interest in the premises. Like other searches and seizures made without a warrant, "warrantless searches of such effects are presumptively unreasonable" (*United States v. Jacobsen*, 466 U.S. 109, 114-15 (1984)), and must be brought within one of the exceptions to the warrant requirement in order to be valid.

However, an officer's mere observation of an object from a location where the officer is entitled to be is not considered a "search" within the meaning of the Fourth Amendment. See § 25.33 *infra*. "[O]bjects falling in the plain view of an officer who has a right to be in the position to have that view" may be scrutinized without any further justification and without Fourth Amendment limitation (*Harris v. United States*, 390 U.S. 234, 236 (1968); see *Arizona v. Hicks*, 480 U.S. 321, 325 (1987) (dictum)). As long as the officer's entry and movement to the location were justified by either a warrant or an exception to the warrant requirement, the "viewing of the object in the course of a lawful search is as legitimate as it would have been in a public place" (*id.* at 327).

Although simple observation of the object is not a constitutionally regulated "search," any action by the police that "meaningfully interfere[s]" with [a] defendant's possessory interest in [an object] . . . amount[s] to a seizure" within the Fourth Amendment (*Arizona v. Hicks*, *supra*, 480 U.S. at 324; *Horton v. California*, *supra*, 496 U.S. at 136-37). And any physical manipulation

of the object that reveals its hidden features or contents is a “search” of the object. Thus, in *Hicks*, when officers who had entered a residence in an emergency peace-keeping situation observed what they suspected to be stolen stereo equipment, the Court acknowledged in *dictum* that their “mere recording” of a stereo component’s serial number would not constitute a search or seizure if the serial number was in plain view (480 U.S. at 324), but the Court held that when the officers went beyond merely observing the stereo equipment and moved it slightly for the purpose of disclosing serial numbers that were *not* in plain view, their action constituted a “search of objects in plain view” (*id.* at 327). This was an “independent search,” “unrelated to the objectives of the authorized intrusion” into the residence, which “produce[d] a new invasion of defendant’s privacy,” and it consequently violated the Fourth Amendment in the absence of adequate justification (*id.* at 325).

To justify a “seizure” or a “search” of an object which is in “plain view,” the prosecution must demonstrate that the following three conditions are satisfied:

(i) The officer must be lawfully in the location from which s/he observed the object. *See, e.g., Arizona v. Hicks, supra*, 480 U.S. at 326 (“the initial intrusion that brings the police within plain view of such [evidence] [must be] . . . supported . . . by one of the recognized exceptions to the warrant requirement,’ . . . such as the exigent-circumstances [exception]”); *Horton v. California, supra*, 496 U.S. at 137 (*dictum*) (“[i]t is, of course, an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed”); *State v. Kruse*, 306 S.W.3d 603 (Mo. App. 2010); *cf. Florida v. Jardines*, 133 S. Ct. 1409 (2013); *Minnesota v. Dickerson*, 508 U.S. 366, 375 (1993), discussed in § 25.10 *supra* (police must be “lawfully in a position from which they view an object”).

(ii) The seizure or search of the object must be justified by “probable cause to believe the [object] . . . was stolen” (*Arizona v. Hicks, supra*, 480 U.S. at 328) or is “contraband” (*id.* at 327), or was an instrument or is evidence of a crime. *Cf. Minnesota v. Dickerson, supra*, 508 U.S. at 375 (police must have “probable cause to believe that an object in plain view is contraband”). As the Court explained in *Arizona v. Hicks*, a seizure or search of an object discovered “during an unrelated search and seizure” must be justified under the same “standard of *cause*” that “would have been needed to obtain a warrant for that same object if it had been known to be on the premises” (*id.* at 327). The “incriminating character [of the object] must . . . be ‘immediately apparent’” (*Horton v. California, supra*, 496 U.S. at 136). *Cf. Minnesota v. Dickerson, supra*, 508 U.S. at 375 (“If . . . the police lack probable cause to believe that an object in plain view is contraband without conducting some further search of the object – *i.e.*, if ‘its incriminating character [is not] ‘immediately apparent,’ . . . – the plain-view doctrine cannot justify its seizure.”). Thus, in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the plain view exception did not justify a police seizure of “two automobiles parked in plain view on the defendant’s driveway . . . [because even though] the cars were obviously in plain view, . . . their probative value remained uncertain until after the interiors were

swept and examined microscopically” (*Horton v. California*, *supra*, 496 U.S. at 134-37 (explaining the holding in *Coolidge*)). Compare *id.* at 142 (upholding a police seizure of firearms and stun guns in plain view under circumstances in which “it was immediately apparent to the officer that they constituted incriminating evidence”). See also, e.g., *People v. Sanders*, 26 N.Y.3d 773, 775, 777-78, 47 N.E.3d 770, 771-72, 27 N.Y.S.3d 491, 492-93 (2016) (a police officer’s warrantless seizure of the hospitalized defendant’s clothes, which “were in a clear plastic bag that rested on the floor of a trauma room a short distance away from the stretcher on which defendant was situated in a hospital hallway,” was not justified by the plain view exception because, although the officer “knew defendant to have been shot,” the officer did not have “probable cause to believe that defendant’s clothes were the instrumentality of a crime” since the officer did not know at that time “that entry and exit wounds were located on an area of defendant’s body that would have been covered by the clothes defendant wore at the time of the shooting.”). If a police officer has probable cause to believe that a substance seized in plain view is a narcotic, then the additional seizure involved in destroying a minute amount of the substance in the course of a narcotics “field test” does not necessitate a search warrant. *United States v. Jacobsen*, *supra*, 466 U.S. at 124-26.

(The probable-cause requirement just described is subject to a narrow exception under exigent circumstances when “the seizure is minimally intrusive and operational necessities render it the only practicable means of detecting certain types of crime” (*Arizona v. Hicks*, *supra*, 480 U.S. at 327). The limits of this principle are discussed in the second paragraph of § 25.12 *supra*.)

(iii) In cases in which a police seizure of an object involves an invasion of the defendant’s interests above and beyond the initial observation of the object, the additional intrusion also must be constitutionally justified. “[N]ot only must the officer be lawfully located in a place from which the object can be plainly seen, but he or she must also have a lawful right of access to the object itself” (*Horton v. California*, 496 U.S. 128, 137 (1990)). Cf. *Minnesota v. Dickerson*, *supra*, 508 U.S. at 375 (“the officers [must] have a lawful right of access to the object”). Thus, for example, “[i]ncontrovertible testimony of the senses that an incriminating object is on premises belonging to a criminal suspect may establish the fullest possible measure of probable cause. But even where the object is contraband, this Court has repeatedly stated and enforced the basic rule that the police may not enter and make a warrantless seizure” (*Horton v. California*, *supra*, 496 U.S. at 137 n.7). See, e.g., *People v. Vega*, 276 A.D.2d 414, 414, 714 N.Y.S.2d 291, 291-92 (N.Y. App. Div., 1st Dep’t 2000) (police officers who observed contraband in the defendant’s room from the officers’ “lawful vantage point” in “the hallway in th[e] residential hotel” could not rely on the “plain view” doctrine to enter the room and seize the contraband: “it was still necessary to establish that the police had lawful access to the [interior of the defendant’s room] . . . either by way of a search warrant or some exception to the warrant requirement, such as exigent circumstances.”).

In *Coolidge v. New Hampshire*, *supra*, a plurality of the Court concluded that the plain view doctrine should also be subject to a requirement that “the discovery of [the] evidence in plain view . . . be inadvertent” (403 U.S. at

469). Subsequently, in *Horton v. California*, a majority of the Court rejected this rule, holding that “even though inadvertence is a characteristic of most legitimate ‘plain view’ seizures, it is not a necessary condition” (496 U.S. at 130). However, in the two decades between the *Coolidge* and *Horton* decisions, state court decisions in 46 States had followed the *Coolidge* plurality’s approach of recognizing an “inadvertent discovery” requirement for “plain view” searches and seizures. *Horton, supra*, 496 U.S. at 145 (dissenting opinion of Justice Brennan); *see id.* at 149-52, Appendix A (listing the state court decisions). In many of these States, it may be possible to persuade the state courts to retain the “inadvertent discovery” rule as a matter of state constitutional law. *See, e.g., State v. Meyer*, 78 Hawai’i 308, 314 & n.6, 893 P.2d 159, 165 & n.6 (1995); *Commonwealth v. Balicki*, 436 Mass. 1, 9-10, 762 N.E.2d 290, 298 (2002). *See generally* § 17.11 *supra*.

25.22.3. *Detention and Searches of Persons Found on the Premises*

Sometimes, in executing a search warrant for a building, the police detain and search one or more individuals who were on the premises at the time the police entered.

If the search warrant specifically names a certain person and authorizes the search of that person, then the police may conduct the search as long as the warrant and the search comply with the requirements described in § 25.17 *supra*. If the warrant does not authorize the search of individuals but merely authorizes a search of the premises to find certain objects, then the officers cannot extend their search of the premises to the individuals present on the premises. “[A] warrant to search a place cannot normally be construed to authorize a search of each individual in that place.” *Ybarra v. Illinois*, 444 U.S. 85, 92 n.4 (1979). *See also United States v. Watson*, 703 F.3d 684, 689-94 (4th Cir. 2013). If the police have specific and articulable facts giving rise to a reasonable belief that a particular individual on the premises is armed and dangerous, then the officers may conduct a *Terry* frisk of that individual. *See* § 25.10 *supra*. But “[t]he ‘narrow scope’ of the *Terry* exception does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked, even though that person happens to be on premises where an authorized . . . search is taking place” (*Ybarra v. Illinois, supra*, 444 U.S. at 94).

In *Ybarra*, the Court struck down a police pat-down of a patron of a bar, who was on the premises during the execution of a search warrant for the bar and the bartender. The Court explained that “a person’s mere propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person” (444 U.S. at 91). As several lower courts have recognized, the principles established in *Ybarra* necessarily apply not only to searches of patrons of a commercial establishment but also to searches of individuals who are visiting a private home at the time that the police effect an entry and search of the home. *E.g., United States v. Clay*, 640 F.2d 157, 161-62 (8th Cir. 1981); *People v. Tate*, 367 Ill. App. 3d 109, 853 N.E.2d 1249, 304 Ill. Dec. 883 (2006); *State v. Vandiver*, 257 Kan. 53, 891 P.2d 350 (1995); *Beeler v. State*, 677 P.2d 653 (Okla. Crim. App. 1984); *Lippert*

v. State, 664 S.W.2d 712 (Tex. Crim. App. 1984). *Cf. Leveto v. Lapina*, 258 F.3d 156, 163-65 (3d Cir. 2001) (Alito, J.) (IRS agents executing a search warrant could not validly frisk a homeowner in the absence of justification for a *Terry* frisk). *See also Guy v. Wisconsin*, 509 U.S. 914, 914-15 (1993) (Justice White, dissenting from denial of *certiorari*) (describing a division of authority among lower courts with regard to “whether this Court’s holding in *Ybarra v. Illinois* . . . applies where a search warrant for drugs is executed in a private home”).

In *Michigan v. Summers*, 452 U.S. 692, 705 (1981), and *Muehler v. Mena*, 544 U.S. 93 (2005), the Court did hold that an owner or resident of premises may be detained and prevented from leaving the premises while the police execute a search warrant of the premises. *See also Bailey v. United States*, 133 S. Ct. 1031 (2013); *Los Angeles County v. Rettele*, 550 U.S. 609 (2007) (per curiam); *Illinois v. McArthur*, 531 U.S. 326 (2001), discussed in § 25.6.3 *supra*. Using broad language, the Court stated in *Summers*, and reiterated in *Muehler*, that “a warrant to search for contraband . . . implicitly carries with it the limited authority to detain the occupants of the premises while a proper search [of the premises themselves] is conducted” (*Summers, supra*, 452 U.S. at 705; *Muehler, supra*, 544 U.S. at 98 (quoting *Summers*); *Los Angeles County v. Rettele, supra*, 550 U.S. at 613 (quoting *Summers*); *Bailey, supra*, 133 S. Ct. at 1037 (quoting *Summers*)). However, the facts of these cases and the reasoning of the opinions demonstrate that the phrase “occupant[] of the premises” is meant to refer solely to “residents” (terms that are used interchangeably by the *Summers* Court (*see id.* at 701-03; *see also Rettele, supra*, 550 U.S. at 609, 615; *Muehler, supra*, 544 U.S. at 106, 110 (Justice Stevens, concurring) [the concurring opinion, representing the views of 4 Justices, describes occupants as “resident[s],” each of whom “had his or her or own bedroom”]) and not to persons who happen to be visiting the premises at the time when the police effect their entry. In *Summers*, in which the Court announced the rule that an occupant may be detained while the police search a home pursuant to a warrant, the defendant owned the house that was searched and several of the Court’s rationales for upholding the detention were predicated upon the defendant’s status as the owner of the premises. The Court explained that the defendant, as owner of the house, could facilitate the search by “open[ing] locked doors or locked containers to avoid the use of force that is . . . damaging to property” (452 U.S. at 703); the Court pointed out that “residents” like the defendant would ordinarily wish to “remain in order to observe the search of their possessions” (*id.* at 701); and it observed that since the place of detention was the detainee’s own residence, the seizure would “add only minimally to the public stigma associated with the search itself” (*id.* at 702). In *Muehler*, the Court did not revisit the reasoning for the rule, treating its earlier holding in *Summers* as “categorical[ly]” authorizing the detention of a resident who “was asleep in her bed” when the police executed the warrant and “entered her bedroom” (544 U.S. at 96, 98), and the Court focused on a new question presented by the facts of *Muehler*: whether the police improperly engaged in the additional intrusion of handcuffing this resident for the duration of the search. The Court concluded that handcuffing is permissible if this measure is necessitated by “inherently dangerous” circumstances such as those that existed in the *Muehler* case, where the “warrant authoriz[ed] a search for weapons and a wanted gang member reside[d] on the premises” and there

was a “need to detain multiple occupants” (*id.* at 100). *But cf. id.* at 102 (Justice Kennedy, concurring and thus supplying the vote necessary to produce a 5-Justice majority: “[t]he restraint should . . . be removed if, at any point during the search, it would be readily apparent to any objectively reasonable officer that removing the handcuffs would not compromise the officers’ safety or risk interference or substantial delay in the execution of the search.”). In *Bailey*, the Court made clear that the *Summers* rule is strictly limited to “cases [in which] the occupants detained were found within or immediately outside a residence at the moment the police officers executed the search warrant” (133 S. Ct. at 1038). “A spatial constraint defined by the immediate vicinity of the premises to be searched is . . . required for detentions incident to the execution of a search warrant. The police action permitted here – the search of a residence – has a spatial dimension, and so a spatial or geographical boundary can be used to determine the area within which both the search and detention incident to that search may occur. Limiting the rule in *Summers* to the area in which an occupant poses a real threat to the safe and efficient execution of a search warrant ensures that the scope of the detention incident to a search is confined to its underlying justification. Once an occupant is beyond the immediate vicinity of the premises to be searched, the search-related law enforcement interests are diminished and the intrusiveness of the detention is more severe.” *Id.* at 1042. *Dicta* in the *Bailey* opinion use the term “occupant” without specifying the precise connection that it implies between the premises being searched and the individual whose detention is in question under *Summers* (*see id.* at 1038-41), but the Court does describe the *Summers* rule as involving a “detention [that] occurs in the individual’s own home” (*id.* at 1041), and the Court emphasizes that the “exception [that *Summers* created] to the Fourth Amendment rule prohibiting detention absent probable cause must not diverge from its purpose and rationale” (*id.* at 1038).

As some lower courts have concluded, the *Summers* rule cannot be construed as authorizing detentions of individuals who happen to be visiting the premises at the time of a police entry. *See, e.g., Lippert v. State*, 664 S.W.2d 712 (Tex. Crim. App. 1984); *State v. Broadnax*, 98 Wash. 2d 289, 654 P.2d 96 (1982). *See also Commonwealth v. Catanzaro*, 441 Mass. 46, 51-52 & n.10, 803 N.E.2d 287, 291 & n.10 (2004). In order to detain visitors, the police must have the specific and articulable facts necessary to conduct a *Terry* stop. *See* § 25.9 *supra*. Nor does the *Summers* rule authorize a *frisk* of anyone – visitor, resident or owner – in the course of executing a search warrant for premises. *See, e.g., Leveto v. Lapina*, 258 F.3d 156, 163-66 (3d Cir. 2001) (Alito, J.); *Denver Justice and Peace Committee, Inc. v. City of Golden*, 405 F.3d 923, 928-32 (10th Cir. 2005). As § 25.10 *supra* indicates, the power to detain an individual briefly for investigation, whether under *Terry* or under *Summers*, carries with it no automatic power to frisk that individual; any frisk must be justified by a particularized and objectively reasonable suspicion that the detainee is armed and dangerous. *See, e.g., id.* at 932.

25.22.4. “Protective Sweep” of the Premises

“A ‘protective sweep’ is a quick and limited search of a premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in

which a person might be hiding.” *Maryland v. Buie*, 494 U.S. 325, 327 (1990). When the police “effect[] the arrest of a suspect in his home pursuant to an arrest warrant, [the police] may conduct a warrantless protective sweep of all or part of the premises . . . if the searching officer ‘possesse[s] . . . a reasonable belief based on “specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant[] . . .” the officer in believing’ . . . that the area swept harbor[s] . . . an individual posing a danger to the officer or others” (*id.* at 327-28). *See also id.* at 334, 335-37. The Court in *Buie* “emphasize[d] that such a protective sweep, aimed at protecting the arresting officers, if justified by the circumstances, is . . . not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found. . . . The sweep lasts no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises” (*id.* at 335-36).

D. Automobile Stops, Searches, Inspections, and Impoundments

25.23. The Threshold Issue: Defendant’s Interest in the Automobile or Expectation of Privacy Inside it

Just as a defendant who seeks to challenge a police entry and search of premises must have a constitutionally protected interest or legitimate expectation of privacy in the premises, see § 25.15 *supra*, so, too, a defendant who seeks to challenge a police stop or search of an automobile must have a sufficient possessory or privacy interest in the vehicle – or, alternatively, a sufficient personal interest in its unhindered movement – to complain about the particular police action in question.

A defendant has the requisite interest to complain of an unconstitutional automobile search in each of the following situations:

- (i) The automobile belongs to the defendant, even though it is out of his or her possession at the time of the search (*see, e.g., Cash v. Williams*, 455 F.2d 1227, 1229-30 (6th Cir. 1972); *United States v. Powell*, 929 F.2d 1190, 1196 (7th Cir. 1991) (an absentee owner has standing to challenge the search of a vehicle although s/he does not have standing to challenge the mere stopping of the vehicle for a purported traffic violation); *State v. Foldesi*, 131 Idaho 778, 963 P.2d 1215 (Idaho App. 1998)), as long as the defendant has not given up possession of the vehicle in a manner that deprives him or her of any remaining legitimate expectation of privacy in it (*United States v. Jenkins*, 92 F.3d 430, 434-35 (6th Cir. 1996); *see generally Rakas v. Illinois*, 439 U.S. 128 (1978)).
- (ii) The automobile is in the defendant’s lawful possession under circumstances that comport the possessor’s ordinary right to exclude undesired intrusions by others. *See Rakas v. Illinois, supra*, 439 U.S. at 144 n.12 (dictum). This includes situations in which the defendant is driving a family member’s or friend’s automobile with the permission of the owner. *See, e.g., United States v. Valdez Hocker*,

333 F.3d 1206 (10th Cir. 2003); *People v. Lewis*, 217 A.D.2d 591, 593, 629 N.Y.S.2d 455, 457 (N.Y. App. Div., 2d Dep’t 1995). Cf. *Minnesota v. Olson*, 495 U.S. 91, 96-100 (1990); *Jones v. United States*, 362 U.S. 257 (1960), as explained in *Rakas v. Illinois*, *supra*, 439 U.S. at 141. It includes situations in which the defendant has rented the vehicle from a car rental agency (*United States v. Walton*, 763 F.3d 655 (7th Cir. 2014) (granting standing even though the renter’s driving license was suspended); *United States v. Cooper*, 133 F.3d 1394 (11th Cir. 1998) (granting standing even though the rental agreement had expired before the search); *United States v. Henderson*, 241 F.3d 638, 646-47 (9th Cir. 2000) (dictum) (same)) or is “listed on a rental agreement as an authorized driver” (*United States v. Walker*, 237 F.3d 845, 849 (7th Cir. 2001), and cases cited). When a rental agreement limits the persons who may drive the vehicle, the question of the standing of an unauthorized driver – someone to whom the renter has entrusted the vehicle in violation of that limitation – has divided the courts. See *United States v. Thomas*, 447 F.3d 1191 (9th Cir. 2006) (holding that an unauthorized driver has standing if, but only if, he or she has received the renter’s permission to use the car), and cases collected in *id.* at 1196-97.

- (iii) The vehicle is a taxicab in which the defendant is a lawful passenger. See *Rios v. United States*, 364 U.S. 253, 262 n.6 (1960).
- (iv) The defendant is a lawful occupant of the vehicle at the time of the search (*United States v. Mosley*, 454 F.3d 249 (3d Cir. 2006) (“when a vehicle is illegally stopped by the police, no evidence found during the stop may be used by the government against any occupant of the vehicle unless the government can show that the taint of the illegal stop was purged” (*id.* at 251)), and cases cited; see also *United States v. Kimball*, 25 F.3d 1, 5-6 (1st Cir. 1994)) and the search invades an area of the vehicle in which, as a lawful occupant, the defendant has “any legitimate expectation of privacy” (*Rakas v. Illinois*, *supra*, 439 U.S. at 150 n.17 (dictum)). See also *Bond v. United States*, 529 U.S. 334, 338-39 (2000) (“a bus passenger [who] places a bag in an overhead bin” has a reasonable expectation that “other passengers,” “bus employees,” and police officers will not “feel the bag in an exploratory manner”).

A defendant can complain of an unconstitutional *stop* of an automobile if s/he was in the vehicle at the time of the stop. *Brendlin v. California*, 551 U.S. 249, 251, 257 (2007) (“When a police officer makes a traffic stop, the driver of the car is seized within the meaning of the Fourth Amendment. . . . We hold that a passenger is seized as well and so may challenge the constitutionality of the stop.”; “A traffic stop necessarily curtails the travel a passenger has chosen just as much as it halts the driver”); *United States v. Grant*, 349 F.3d 192, 196 (5th Cir. 2003). If the defendant was not in the automobile at the time of the stop, s/he can nevertheless challenge the stop if s/he is the owner of the automobile (see *Cash v. Williams*, *supra*, 455 F.2d at 1229-30) or if s/he has established a sufficient privacy interest

in the automobile through repeated use to invoke the same rights as an owner (*cf. Jones v. United States*, 362 U.S. 257 (1960)), as explained in *Rakas v. Illinois*, *supra*, 439 U.S. at 141; *Minnesota v. Olson*, *supra*, 495 U.S. at 96-100).

Even when an individual has the requisite possessory interest or expectation of privacy in an automobile, s/he cannot claim any privacy rights with respect to the car's Vehicle Identification Number (VIN) located on the dashboard "because of the important role played by the VIN in the pervasive governmental regulation of the automobile and the efforts by the Federal Government to ensure that the VIN is placed in plain view" (*New York v. Class*, 475 U.S. 106, 114 (1986)). In *Class*, the Court held that the public nature of the VIN empowers the police to move papers obstructing the VIN, in order to view the number in the course of a valid stop for a traffic violation, at least under circumstances in which the driver on his or her own initiative leaves the vehicle and therefore is not in a position to accede to a lawful request to move the papers so that the number can be inspected. *See id.* at 114-16. *Contra, People v. Class*, 67 N.Y.2d 431, 494 N.E.2d 444, 503 N.Y.S.2d 313 (1986) (reaffirming, on state constitutional grounds, the opinion reversed in *New York v. Class*, *supra*). In cases in which an entry into a car was not justified by a traffic violation, some lower courts have ruled that the public nature of the VIN does not justify the opening of the vehicle for the purpose of inspecting the VIN. *See People v. Piper*, 101 Ill. App. 3d 296, 427 N.E.2d 1361, 56 Ill. Dec. 815 (1981); *State v. Simpson*, 95 Wash. 2d 170, 622 P.2d 1199 (1980); *but see United States v. Forrest*, 620 F.2d 446 (5th Cir. 1980).

For discussion of the "automatic standing" principle and of the evolution of the general concepts governing "standing" to challenge searches and seizures, see § 25.15 *supra*.

25.24. Evidentiary Searches of Automobiles: The "Automobile Exception" to the Warrant Requirement

Automobiles are the subject of a specialized Fourth Amendment jurisprudence stemming from *Carroll v. United States*, 267 U.S. 132 (1925). As presently interpreted, *Carroll* permits warrantless stopping and search of moving vehicles if, but only if, the searching officers have probable cause to believe that seizable objects are concealed in the vehicle. *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 315 n.10 (1978) (dictum); *Wyoming v. Houghton*, 526 U.S. 295, 300-01 (1999); *compare Chambers v. Maroney*, 399 U.S. 42 (1970), and *Colorado v. Bannister*, 449 U.S. 1 (1980) (per curiam), and *Maryland v. Dyson*, 527 U.S. 465 (1999) (per curiam), with *Preston v. United States*, 376 U.S. 364 (1964), and *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968). *See also California v. Carney*, 471 U.S. 386 (1985) (extending the *Carroll* rule to a motor home parked in a downtown parking lot); *Florida v. White*, 526 U.S. 559, 565, 566 (1999) (the *Carroll* rule permitting search of a vehicle based on probable cause to believe that it contains contraband justified the seizure of a car based on "probable cause to believe that the vehicle *itself* was contraband" where "the warrantless seizure . . . did not involve any invasion of defendant's privacy" because the vehicle was in "a public area").

If there is probable cause to believe that seizable objects may be concealed in any part of the vehicle, then the police may search every part of the vehicle and every container within it which is capable of holding the seizable object. *Wyoming v. Houghton*, *supra*, 526 U.S. at 307; *California v. Acevedo*, 500 U.S. 565, 580 (1991); *United States v. Ross*, 456 U.S. 798 (1982); *United States v. Johns*, 469 U.S. 478, 482-83 (1985). The only limitation on the scope of the search is that it may not extend into areas incapable of holding the object, including containers that are not “capable of concealing the object of the search” (*Wyoming v. Houghton*, *supra*, 526 U.S. at 307 (dictum); *United States v. Ross*, *supra*, 456 U.S. at 820-21, 823-24 (dictum)).

The *Carroll* decision and its progeny establishing special rules for automobile searches and seizures are based in substantial part upon the inherent mobility of automobiles, which renders the securing of a warrant impracticable. See *Wyoming v. Houghton*, *supra*, 526 U.S. at 304; *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (per curiam); *California v. Carney*, *supra*, 471 U.S. at 390-91. (The caselaw also mentions two other factors that distinguish automobiles from buildings: – the lesser degree of privacy that an automobile offers (e.g., *Pennsylvania v. Labron*, *supra*, 518 U.S. at 940; *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976)), and the fact that automobiles are subject to extensive noncriminal regulation by the state (e.g., *Pennsylvania v. Labron*, *supra*, 518 U.S. at 940; *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973)). But the latter factors have never been invoked independently to uphold a warrantless police search that invades what privacy an automobile *does* afford, in a case where no noncriminal regulatory concern drew police attention to a particular vehicle.) Accordingly, in *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), the Court held that an almost totally immobilized automobile could not be searched without a warrant. *Coolidge* arguably forbids the application of *Carroll*’s automobile exception to the warrant requirement in situations in which there are no reasonable grounds to apprehend that a vehicle may be moved before a warrant can be obtained. See *id.* at 462 (plurality opinion) (except “where ‘it is not practicable to secure a warrant,’ . . . the ‘automobile exception,’ despite its label, is simply irrelevant”); *Preston v. United States*, 376 U.S. 364 (1964); *United States v. Bradshaw*, 490 F.2d 1097 (4th Cir. 1974); *State v. LeJeune*, 276 Ga. 179, 182-83, 576 S.E.2d 888, 892-93 (2003) (alternative ground); *United States v. Bazinet*, 462 F.2d 982, 986 n.3 (8th Cir. 1972) (dictum); *United States v. McCormick*, 502 F.2d 281 (9th Cir. 1974); cf. *State v. Gonzales*, 236 Or. App. 391, 236 P.3d 834 (2010), *subsequent history in* 265 Or. App. 655, 337 P.3d 129 (2014). The *Carroll* rule applies, in other words, only “[w]hen a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes – temporary or otherwise” (*California v. Carney*, *supra*, 471 U.S. at 392). Compare *State v. Witt*, 223 N.J. 409, 447-48, 126 A.3d 850, 872-73 (2015) (“In . . . [*State v. Alston*, 88 N.J. 211, 233, 440 A.2d 1311 (1981)] we held that the automobile exception authorized the warrantless search of an automobile only when the police have probable cause to believe that the vehicle contains contraband or evidence of an offense and the circumstances giving rise to probable cause are unforeseeable and spontaneous. . . . ¶ Here, we part from the United States Supreme Court’s interpretation of the automobile exception under the Fourth Amendment and return to the *Alston* standard, this time supported by

Article I, Paragraph 7 of our State Constitution. *Alston* properly balances the individual’s privacy and liberty interests and law enforcement’s investigatory demands. *Alston*’s requirement of ‘unforeseeability and spontaneity,’ . . . does not place an undue burden on law enforcement. For example, if a police officer has probable cause to search a car and is looking for that car, then it is reasonable to expect the officer to secure a warrant if it is practicable to do so. In this way, we eliminate the . . . fear that ‘a car parked in the home driveway of vacationing owners would be a fair target of a warrantless search if the police had probable cause to believe the vehicle contained drugs.’ . . . In the case of the parked car, if the circumstances giving rise to probable cause were foreseeable and not spontaneous, the warrant requirement applies.”).

When the police have probable cause to make a warrantless search of a vehicle under *Carroll* but, instead of searching it on the street, they lawfully impound it, they may exercise the *Carroll* prerogative to search it without a warrant later at the police station (e.g., *Chambers v. Maroney*, *supra*, 399 U.S. at 52; *Michigan v. Thomas*, 458 U.S. 259, 261-62 (1982) (per curiam); *Florida v. Meyers*, 466 U.S. 380 (1984) (per curiam); and see *United States v. Ross*, *supra*, 456 U.S. at 807 n.9 (“if an immediate search on the street is permissible without a warrant, a search soon thereafter at the police station is permissible if the vehicle is impounded”)), at least when no additional invasion of privacy interests results from their delay in making the search and when the delay is not inordinate (see *United States v. Johns*, *supra*, 469 U.S. at 487 (dictum), citing Justice White’s dissenting opinion in *Coolidge v. New Hampshire*, *supra*, 403 U.S. at 525). The same rule permitting delayed searches applies to closed containers found in the vehicle. *United States v. Johns*, *supra*, 469 U.S. at 482-83. *But see State v. Witt*, *supra*, 223 N.J. at 448-49, 126 A.3d at 873 (“We also part from federal jurisprudence that allows a police officer to conduct a warrantless search at headquarters merely because he could have done so on the side of the road. . . . ‘Whatever inherent exigency justifies a warrantless search at the scene under the automobile exception certainly cannot justify the failure to secure a warrant after towing and impounding the car’ at headquarters when it is practicable to do so. . . . Warrantless searches should not be based on fake exigencies. Therefore, under Article I, Paragraph 7 of the New Jersey Constitution, we limit the automobile exception to on-scene warrantless searches.”).

25.25. Inventory Searches of Impounded Vehicles

The immediately preceding section dealt with the circumstances under which the police can conduct warrantless searches of automobiles “for the purpose of investigating criminal conduct, with the validity of the searches . . . dependent on the application of the probable cause and warrant requirements of the Fourth Amendment” (*Colorado v. Bertine*, 479 U.S. 367, 371 (1987)). “By contrast, an inventory search may be ‘reasonable’ under the Fourth Amendment even though it is not conducted pursuant to a warrant based upon probable cause.” *Id.*

The police may conduct an “inventory search” of the contents of an impounded automobile, including an examination of the contents of

containers found in the automobile (*id.* at 374-75), if the inventory search complies with the following three requirements:

(i) The search must be conducted in accordance with “standardized procedures” (*id.* at 372), based upon “reasonable police regulations relating to inventory procedures” (*id.*). *Accord, Florida v. Wells*, 495 U.S. 1, 4 (1990) (“standardized criteria . . . or established routine”); *South Dakota v. Opperman*, 428 U.S. 364, 366, 376 (1976). *See, e.g., Wells, supra*, 495 U.S. at 4-5 (suppressing contraband found in the course of an alleged inventory search because “the Florida Highway Patrol had no policy whatever with respect to the opening of closed containers encountered during an inventory search . . . [and] absent such a policy, the instant search was not sufficiently regulated to satisfy the Fourth Amendment”).

(ii) The police must not be acting “in bad faith or for the sole purpose of investigation” (*Colorado v. Bertine, supra*, 479 U.S. at 372). *See also id.* at 374 (speaking of “reasonable police regulations relating to inventory procedures administered in good faith”); *id.* at 376 (noting that “[t]here was no showing that the police chose to impound Bertine’s van in order to investigate suspected criminal activity”); *Florida v. Wells, supra*, 495 U.S. at 4 (“an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence”); *South Dakota v. Opperman, supra*, 428 U.S. at 376 (police had no “investigatory . . . motive”); *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973) (officer conducting the search had no purpose to look for criminal evidence). *See also City of Indianapolis v. Edmond*, 531 U.S. 32, 45-46 (2000) (dictum) (discussing the “inventory search” caselaw).

(iii) The automobile must be lawfully “in the custody of the police” (*Colorado v. Bertine, supra*, 479 U.S. at 372), in the sense that an adequate justification exists for the police to impound it (*see South Dakota v. Opperman, supra*, 428 U.S. at 365-66, 375; *Cady v. Dombrowski, supra*, 413 U.S. at 443). Depending upon state law, the police may be empowered to impound an automobile for traffic or parking violations (*South Dakota v. Opperman, supra*, 428 U.S. at 365-66, 375); incident to the arrest of the driver (*Colorado v. Bertine, supra*, 479 U.S. at 368 & n.1); and in connection with routine highway management duties, such as the removal of a disabled vehicle that was “a nuisance along the highway” (*Cady v. Dombrowski, supra*, 413 U.S. at 443).

In approving an inventory search in *South Dakota v. Opperman, supra*, the Court emphasized that the car’s owner was “not present to make other arrangements for the safekeeping of his belongings” (428 U.S. at 375). In its subsequent decision in *Colorado v. Bertine*, the Court held that the Fourth Amendment does not require the police to forgo an inventory search in favor of the “less intrusive” procedure of offering a driver “the opportunity to make other arrangements for the safekeeping of his property” (479 U.S. at 373). Arguably, *Bertine* means only that the police need not opt for “less intrusive” procedures in deciding whether to conduct an inventory search incident to impoundment, whereas *Opperman* implies that the police do have to consider less intrusive alternatives in determining whether it is necessary to impound the car in the first place. The *Bertine* opinion recognizes that

impoundments must be based on “standardized criteria, related to the feasibility and appropriateness of parking and locking [the] . . . vehicle rather than impounding it” (479 U.S. at 376), but because the only challenge made to the impoundment in *Bertine* was a claim that the applicable police regulation gave too much discretion to individual officers (*see id.* at 375-76), the Court there did not elaborate this parking-and-locking passage or consider what other constitutional requirements, if any, govern impoundments as a distinct species of Fourth Amendment “seizures” of automobiles. Some state courts have found impoundments to be unreasonable and violative of the Fourth Amendment when the sole purpose of the impoundment was safekeeping of the automobile while the driver was in custody and that goal could have been achieved by the less intrusive measures of turning the car over to an unarrested passenger (*Virgil v. Superior Court*, 268 Cal. App. 2d 127, 73 Cal. Rptr. 793 (1968)), or leaving the car parked in a legal parking space if this would not be unduly time-consuming for the police and would not expose the car to undue risk of theft or vandalism (*State v. Slockbower*, 79 N.J. 1, 397 A.2d 1050 (1979); *State v. Simpson*, 95 Wash. 2d 170, 662 P.2d 1199 (1980)).

If the police have the authority to impound an automobile and to conduct an inventory search of it, they can make the search at the scene, at the police station, or at other locations. *Colorado v. Bertine*, *supra*, 479 U.S. at 373 (inventory search was not rendered unreasonable simply because the vehicle “was towed to a secure, lighted facility”). “[T]he security of the storage facility does not completely eliminate the need for inventorying; the police may still wish to protect themselves or the owners of the lot against false claims.” *Id.*

The state courts have been active in developing independent state constitutional restrictions upon inventory searches. *See, e.g., State v. Daniel*, 589 P.2d 408, 417 (Alaska 1979) (police cannot open “closed, locked or sealed luggage, containers, or packages contained within a vehicle” during an inventory search); *State v. Opperman*, 247 N.W.2d 673, 675 (S.D. 1976) (“noninvestigative police inventory searches of automobiles without a warrant must be restricted to safeguarding those articles which are within plain view of the officer’s vision”). This is an area in which defense counsel is particularly advised to follow the suggestion of § 17.11 *supra* and invoke state-law principles as alternative grounds for challenging searches and seizures.

25.26. Searches of Automobiles Incident to the Arrest of the Driver or Occupants

Automobiles may be subjected to a warrantless search of limited scope incidental to the valid arrest of their drivers or occupants, under the doctrine of “search incident to arrest” (*see* § 25.8 *supra*), as modified by the Supreme Court in *Arizona v. Gant*, 556 U.S. 332 (2009), to account for certain “circumstances unique to the vehicle context” (*id.* at 343). Such searches may be made without a warrant only at the immediate time and place of the arrest. *See Preston v. United States*, 376 U.S. 364 (1964); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968); *Chambers v. Maroney* 399 U.S. 42, 47 (1970); *Cardwell v. Lewis*, 417 U.S. 583, 591-92 n.7 (1974); *id.* at 599 n.4 (Stewart, J., dissenting); *United States v. Chadwick*, 433 U.S. 1, 14-15 (1977). This “search

incident to arrest” rule applies not only in “situations where the officer makes contact with the occupant [of a vehicle] while the occupant is inside the vehicle” but also “when the officer first makes contact with the arrestee after the latter has stepped out of his vehicle” (*Thornton v. United States*, 541 U.S. 615, 617 (2004)). In accordance with the search-incident-to-arrest rule that applies to all situations including the automobile context, the search may “include ‘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” (*Arizona v. Gant*, *supra*, 556 U.S. at 339; *see also id.* at 343 (narrowing *New York v. Belton*, 453 U.S. 454 (1981), to clarify that the customary search-incident-to-arrest rule “authorizes police to search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search”). In *Gant*, the Court responded to “circumstances unique to the vehicle context” by holding that police officers also may search a vehicle incident to the arrest of a “recent occupant” “when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle’” (*id.*). *See also id.* at 343-44 (explaining that “[i]n many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence,” “[b]ut in others, including *Belton* and *Thornton*, the offense of arrest will supply a basis for searching the passenger compartment of an arrestee’s vehicle and any containers therein”; the Court applies its new rule to hold a vehicle search unlawful because “*Gant* clearly was not within reaching distance of his car at the time of the search” and thus the search could not be justified under the customary search-incident-to-arrest rule, and “*Gant* was arrested for driving with a suspended license – an offense for which police could not expect to find evidence in the passenger compartment of *Gant*’s car”). *See also State v. Noel*, 236 W. Va. 335, 779 S.E.2d 877 (2015). *Compare State v. Snapp*, 174 Wash. 2d 177, 181-82, 275 P.3d 289, 291 (2012) (construing the state constitution to reject that portion of the *Gant* rule that allows a search of a vehicle incident to the arrest of a recent occupant when “it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle”).

When an automobile is stopped to ticket the driver for a traffic violation, a warrantless “search of the passenger compartment of [the] . . . automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief . . . that the suspect [driver or occupant] is dangerous and the suspect may gain immediate control of weapons [from the vehicle]” (*Michigan v. Long*, 463 U.S. 1032, 1049 (1983)). Unlike a search incident to arrest, which is authorized by the mere fact of a valid arrest, this latter sort of weapons search requires *both* a valid stop *and* reasonable grounds to believe that the driver or occupant is dangerous and may grab a weapon from the car to use against the officers. *Id.* at 1046-53 & nn.14, 16.

So far as the Fourth Amendment is concerned, an officer who sees a driver violate the traffic laws may choose either to make an arrest and thereby acquire the full power of search incident to arrest or to issue a ticket or other form of summons and acquire only the relatively limited search power

described in *Long*. See *Virginia v. Moore*, 553 U.S. 164, 176-77 (2008); *Knowles v. Iowa*, 525 U.S. 113, 114, 118-19 (1998); *United States v. Robinson*, 414 U.S. 218 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973). Even if state law categorizes the traffic infraction as one that must be handled by a ticket or other form of summons rather than a full-scale arrest, an arrest which thus violates state law does not give rise to a Fourth Amendment basis for suppressing evidence unless either the arrest or the search incident to that arrest violated the Fourth Amendment rules summarized in §§ 25.7.2-25.8.4 *supra*. See *Virginia v. Moore*, *supra*, 553 U.S. at 167, 171, 177-78 (even though police officers' arrest of Moore for driving on a suspended license violated Virginia state law, which restricted the officers to "issu[ing] Moore a summons instead of arresting him," the arrest satisfied the applicable Fourth Amendment standard of "probable cause to believe a person committed . . . [a] crime in [the officer's] presence," and accordingly the contraband obtained by the police in a valid search incident to arrest was not suppressible under the Fourth Amendment). Suppression in such cases may be available, however, on state constitutional grounds. See, e.g., *Commonwealth v. Hernandez*, 456 Mass. 528, 531-32, 924 N.E.2d 709, 711-12 (2010); and see § 17.11 *supra*.

25.27. "Terry Stops" of Automobiles and Attendant Searches

"The law is settled that in Fourth Amendment terms a . . . stop [of a moving vehicle] entails a seizure of the driver [and any passengers in the vehicle] 'even though the purpose of the stop is limited and the resulting detention quite brief.'" *Brendlin v. California*, 551 U.S. 249, 255 (2007). See also *Arizona v. Johnson*, 555 U.S. 323, 327 (2009). By analogy to the *Terry* stop doctrine (§ 25.9 *supra*), "law enforcement agents may briefly stop a moving automobile to investigate a reasonable suspicion that its occupants are involved in criminal activity" (*United States v. Hensley*, 469 U.S. 221, 226 (1985)). See, e.g., *United States v. Sharpe*, 470 U.S. 675 (1985); *Delaware v. Prouse*, 440 U.S. 648 (1979) (dictum). In limited circumstances, the police can also conduct a *Terry* stop of an automobile "to investigate past criminal activity" (*United States v. Hensley*, *supra*, 469 U.S. at 228). See § 25.9 *supra*. Neither sort of investigative stop may be made in the absence of "reasonable suspicion" (*Brendlin v. California*, *supra*, 551 U.S. at 254 n.2, 255-56). See also *United States v. Mosley*, 454 F.3d 249 (3d Cir. 2006). The standard of "reasonable suspicion" for an automobile stop is the same as that for a pedestrian stop, discussed in § 25.9 *supra*. See, e.g., *United States v. Uribe*, 709 F.3d 646, 649-50 (7th Cir. 2013); *United States v. Cohen*, 481 F.3d 896 (6th Cir. 2007); *State v. Teamer*, 151 So. 3d 421, 427-30 (Fla. 2014).

"[A]s in the case of a pedestrian reasonably suspected of criminal activity," the *Terry* frisk doctrine permits "a patdown of the driver or a passenger [of a lawfully stopped vehicle] during a . . . [vehicle] stop" if the police have "reasonable suspicion that the person subjected to the frisk is armed and dangerous" (*Arizona v. Johnson*, *supra*, 555 U.S. at 327). Also by analogy to *Terry*, police who validly stop a vehicle may search some areas of it for weapons if the officers possess a reasonable belief, based on specific and articulable facts, that a detained suspect is dangerous and that s/he can gain immediate control of weapons from the vehicle. *Michigan v. Long*, 463 U.S. 1032, 1049 (1983). The search must, however, be "limited to those

areas [of the vehicle] in which a weapon may be placed or hidden” (*id.*).

25.28. Traffic Stops and Attendant Searches

Automobiles may, of course, be stopped for traffic violations (*see United States v. Robinson*, 414 U.S. 218 (1973); *Whren v. United States*, 517 U.S. 806 (1996)) if – but only if – the police have “reasonable suspicion” to justify the traffic stop. *See Arizona v. Johnson*, 555 U.S. 323, 327 (2009); *Brendlin v. California*, 551 U.S. 249, 254 n.2, 255-56 (2007); *Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014). (*Heien* also holds that a police officer’s “objectively reasonable” mistake of law – a plausible interpretation of an ambiguous traffic-code provision which is subsequently construed by a state appellate court in a manner contrary to the officer’s “reasonably, even if mistakenly” advised reading of it (*id.* at 535) – does not invalidate the “reasonable suspicion” required for a traffic-violation stop if the officer’s visual observations of the vehicle bring it, factually, within his mistaken reading. *See* § 25.3 concluding paragraph *supra.*) *See also United States v. Paniagua-Garcia*, 813 F.3d 1013, 1014 (7th Cir. 2016) (“The government failed to establish that the officer [who stopped the defendant’s car] had probable cause or a reasonable suspicion that Paniagua was violating the no-texting [while driving] law. The officer hadn’t seen any texting; what he had seen was consistent with any one of a number of lawful uses of cellphones.”); *United States v. Murphy*, 703 F.3d 182, 188 (2d Cir. 2012) (the trial court did not err in rejecting, as incredible, a police officer’s testimony at a suppression hearing that he observed the defendant’s car exit the interstate without signaling and thus in violation of traffic laws); *State v. Kooima*, 833 N.W.2d 202, 210 (Iowa 2013) (“Cases decided by us and other courts require a personal observation of erratic driving, other facts to substantiate the allegation the driver is intoxicated, or details not available to the general public as to the defendant’s future actions in order to spawn a reasonable inference . . . [that an anonymous] tipster had the necessary personal knowledge that a person was driving while intoxicated and the stop comports with the requirements of the Fourth Amendment. To hold otherwise would cause legitimate concern because such tips would let the police stop persons on anonymous tips that might have been called in for vindictive or harassment purposes or based solely on a hunch or rumor.”).

An officer making this sort of stop may order the driver out of the car, whether the officer proposes to arrest the driver or merely to give the driver a summons. *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (*per curiam*). In the former case, the officer may conduct a complete search of the driver’s person and may also search the passenger compartment of the car incident to the driver’s arrest, to the extent indicated in § 25.26 *supra*; in the latter, the officer may frisk the driver and search the passenger compartment of the car for weapons if, but only if, the requisite conditions for a *Terry* frisk (*see* §§ 25.10, 25.26 *supra*) are met. If the officer invokes the *Mimms* doctrine to order the driver out of the car, the officer can detain the driver outside the car for the period necessary to conduct an inquiry and inspect the Vehicle Identification Number. *New York v. Class*, 475 U.S. 106, 115-16 (1986); *Arizona v. Johnson*, *supra*, 555 U.S. at 333; *see* § 25.23 *supra*. *See also Rodriguez v. United States*, 135 S. Ct. 1609, 1615 (2015) (traffic stops often “include[] ‘ordinary

inquiries incident to [the traffic] stop,” which “[t]ypically . . . involve checking the driver’s license, determining whether there are outstanding warrants against the driver, and inspecting the automobile’s registration and proof of insurance”; an officer may conduct these checks but “may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual.”). *Compare Sharp v. United States*, 132 A.3d 161, 169-70 (D.C. 2016) (when “the encounter does not begin with a stop for a traffic violation” – as in this case of a defendant who was seated behind the wheel of a lawfully parked car – an officer cannot ask the driver to exit the vehicle in a manner that would appear to a reasonable person to foreclose “a genuine choice to decline the request and stay in the car,” absent “reasonable articulable suspicion to justify the seizure”); *State v. Keaton*, 222 N.J. 438, 442, 448, 450, 119 A.3d 906, 908, 912, 913 (2015) (a police officer does not have “a legal right to enter an overturned car in order to obtain registration and insurance information for the vehicle, without first requesting permission, or allowing defendant an opportunity to retrieve the documents himself”; although a police officer who conducts a lawful traffic stop “may search the car for evidence of ownership” “[i]f the vehicle’s operator is unable to produce proof of registration,” such a “warrantless search of a vehicle is only permissible after the driver has been provided the opportunity to produce his credentials and is either unable or unwilling to do so.”). Regarding DWI sobriety testing, see § 25.14 subdivision (d) *supra*.

The *Mimms* doctrine also allows “an officer making a traffic stop . . . [to] order passengers to get out of the car pending completion of the stop” (*Maryland v. Wilson*, 519 U.S. 408, 415 (1997)). See *Arizona v. Johnson*, *supra*, 555 U.S. at 333 (“The temporary seizure of driver and passengers ordinarily continues, and remains reasonable, for the duration of the stop.”); *but see Maryland v. Wilson*, *supra*, 519 U.S. at 415 n.3 (expressly reserving the question whether “an officer may forcibly detain a passenger for the entire duration of the stop”); and *cf. United States v. Hensley*, 469 U.S. 221, 235-36 (1985); *People v. Porter*, 136 A.D.3d 1344, 1345, 24 N.Y.S.3d 470, 472 (N.Y. App. Div., 4th Dep’t 2016) (the police unlawfully detained the passenger of a lawfully stopped car, who had “asked whether he could leave the scene,” by telling him that “he must remain present with them until the inventory search [of the arrested driver’s car] was complete”; “the justification for th[e] stop [of the car and for detaining the passenger pursuant to that stop] ended once the driver had been arrested for th[e] [traffic] offense.”). The officer also can conduct a protective “patdown of . . . a passenger during a [lawful] traffic stop” under the customary *Terry* frisk standard if the officer has a “reasonable suspicion that the person subjected to the frisk is armed and dangerous” (*Arizona v. Johnson*, *supra*, 555 U.S. at 327, 333; see § 25.10 *supra*). Search activity exceeding the scope of a *Terry* frisk is not permitted; and when an officer, during a traffic stop, requests and receives permission from a passenger to conduct a search of his or her possessions for evidence unrelated to the traffic violation that justified the stop, the request has been held impermissible, the consent tainted, and the ensuing search and seizure unconstitutional. *State v. Smith*, 286 Kan. 402, 184 P.3d 890 (2008).

Because “[t]emporary detention of individuals during the stop of an automobile by the police, even if only for a brief period and for a limited

purpose, constitutes a [Fourth Amendment] ‘seizure’ of ‘persons’” (*Whren v. United States*, *supra*, 517 U.S. at 809), and because “a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution’s shield against unreasonable seizures,” a “seizure justified only by a police-observed traffic violation . . . ‘become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission’ of issuing a ticket for the violation” (*Rodriguez v. United States*, *supra*, 135 S. Ct. at 1612). “Authority for the seizure . . . ends when tasks tied to the traffic infraction are – or reasonably should have been – completed.” *Id.* at 1614. “On-scene investigation into other crimes . . . detours [*that’s a verb*] from that mission,” as do “safety precautions taken in order to facilitate such detours” (*id.* at 1616). Accordingly, the Court held in *Rodriguez* that a dog sniff of a car stopped for a traffic infraction, which resulted in the dog’s alerting to the presence of drugs and an ensuing search of the car and seizure of drugs violated the Fourth Amendment because it was “conducted after completion of . . . [the] traffic stop” and thus “‘prolonged [the traffic stop] beyond the time reasonably required to complete th[e] mission’ of issuing a ticket for the violation” (*id.* at 1612).

25.29. License Checks; Stops of Automobiles at Roadblocks and Checkpoints

In *Delaware v. Prouse*, 440 U.S. 648 (1979), the Court condemned the previously widespread practice of “spot checks” of vehicles selected by roving patrols. The Court in *Prouse* held that the Fourth Amendment does not permit the flagging down of selected automobiles for the purpose of “check[ing] [the] . . . driver’s license and the registration of the automobile” unless “there is at least articulable and reasonable suspicion that a motorist is unlicensed or that an automobile is not registered” (440 U.S. at 663).

The Court in *Prouse* suggested, however, that it might sustain other “methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion” by police officers (*id.*). It included “[q]uestioning of all oncoming traffic at roadblock-type stops [as] . . . one possible [constitutional] alternative” (*id.*). In the subsequent case of *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990), the Court upheld the constitutionality of “a State’s use of highway sobriety checkpoints” (*id.* at 447), where motorists passing through selected sites were “briefly stopped” (*id.* at 455), “briefly examined for signs of intoxication” (*id.* at 447), and asked some questions (*id.*), in accordance with established “guidelines setting forth procedures governing checkpoint operations [and] . . . site selection” (*id.*). “The average delay for each vehicle was approximately 25 seconds.” *Id.* at 448. The Court acknowledged that “a Fourth Amendment ‘seizure’ occurs when a vehicle is stopped at a checkpoint” (*id.* at 450). *Accord*, *City of Indianapolis v. Edmond*, 531 U.S. 32, 40 (2000) (“It is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment.”). The *Sitz* Court concluded, however, that “the balance of the State’s interest in preventing drunken driving, the extent to which this system can reasonably be said to advance that interest, and the degree of intrusion upon individual motorists who are briefly stopped” (496 U.S. at 455) provided

the requisite constitutional justification for the use of the sobriety checkpoint procedure. The Court emphasized that the “‘objective’ intrusion [upon seized motorists], measured by the duration of the seizure and the intensity of the investigation, [w]as minimal” (*id.* at 452) and that the procedure did not suffer from the same “degree of ‘subjective intrusion’ and . . . potential for generating fear and surprise [on the part of seized motorists]” (*id.*) as did the roving-patrol stops condemned in *Prouse* (*see Sitz, supra*, 496 U.S. at 452-53). The Court in *Sitz* further distinguished the sobriety checkpoint procedure from the roving-patrol stops on the grounds that the “checkpoints are selected pursuant to . . . guidelines, and uniformed police officers stop every approaching vehicle” (*id.* at 453), thereby avoiding the “kind of standardless and unconstrained discretion [which] is the evil the Court has discerned . . . in previous cases” (*id.* at 454 (quoting *Prouse, supra*, 440 U.S. at 661)), and the State in *Sitz* presented “empirical data” (*id.*) demonstrating that the checkpoint procedure made at least some measurable contribution to controlling “the drunken driving problem” (*id.* at 451; *see id.* at 454-55). Finally, the Court in *Sitz* took pains to make clear “what our inquiry is *not* about” (*id.* at 450). Explaining that the issue “address[ed] [was] only the initial stop of each motorist passing through a checkpoint and the associated preliminary questioning and observation by checkpoint officers[,]” the Court noted that “[d]etention of particular motorists for more extensive field sobriety testing may require satisfaction of an individualized suspicion standard” (*id.* at 450-51). The Court further cautioned that “[n]o allegations are before us of unreasonable treatment of any person after an actual detention at a particular checkpoint” (*id.* at 450).

Thereafter, in *City of Indianapolis v. Edmond, supra*, the Court struck down a “highway checkpoint program whose primary purpose . . . [was] the discovery and interdiction of illegal narcotics” (531 U.S. at 34), and in which the police stopped a predetermined number of vehicles, conducted a license and registration check, and walked around each stopped car with a narcotics-detection dog (*see id.* at 34-35). In holding this practice unconstitutional, the Court distinguished *Sitz* and also an earlier decision that had upheld the routine stopping of vehicles and the brief questioning of their occupants by immigration authorities at designated checkpoints near an international border (*United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), discussed in § 25.30 *infra*). “In none of these cases,” the Court explained, “did we indicate approval of a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing” (*Edmond, supra*, 531 U.S. at 38). Emphasizing that “our checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion” (*id.* at 41), the Court declared that “[w]e decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes” (*id.* at 44). *See also id.* at 34, 41-42, 48; *Singleton v. Commonwealth*, 364 S.W.3d 97, 104-06 (Ky. 2012) (applying *Edmond* to strike down a traffic checkpoint that was designed to catch violators of a city ordinance requiring that motor vehicles display a “city sticker” that shows residence or employment within city limits).

The Court returned to these issues in *Illinois v. Lidster*, 540 U.S. 419 (2003), rejecting a Fourth Amendment challenge to “a highway checkpoint

where police stopped motorists to ask them for information about a recent hit-and-run accident” (*id.* at 421). The Court distinguished *Edmond* on the ground that that case “involved a checkpoint at which police stopped vehicles to look for evidence of drug crimes committed by occupants of those vehicles” (*id.* at 423) whereas the “primary law enforcement purpose [of the checkpoint in *Lidster*] was *not* to determine whether a vehicle’s occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others [and] . . . [t]he police expected the information elicited to help them apprehend, not the vehicle’s occupants, but other individuals” (*id.* at 425). Applying the criteria the Court had previously employed in *Sitz*, the Court upheld the checkpoint in *Lidster* because “[t]he relevant public concern was grave” in that “[p]olice were investigating a crime that had resulted in a human death . . . [a]nd the stop’s objective was to help find the perpetrator of a specific and known crime, not of unknown crimes of a general sort”; “[t]he stop advanced this grave public concern to a significant degree” in that “[t]he police appropriately tailored their checkpoint stops to fit important criminal investigatory needs”; and, “[m]ost importantly, the stops interfered only minimally with liberty of the sort the Fourth Amendment seeks to protect,” in that “each stop required only a brief wait in line – a very few minutes at most,” “[c]ontact with the police lasted only a few seconds,” “[p]olice contact consisted simply of a request for information and the distribution of a flyer,” and, “[v]iewed subjectively, the contact provided little reason for anxiety or alarm” since “[t]he police stopped all vehicles systematically” and “there is no allegation here that the police acted in a discriminatory or otherwise unlawful manner while questioning motorists during stops” (*id.* at 427-28).

In addition to approving the checkpoints in *Sitz* and *Lidster* and border stops by immigration authorities in *Martinez-Fuerte*, the Court has indicated that it is likely to accept standardized checkpoint procedures in other settings if the stops are not protracted, do not involve any physical searches of the car or occupants, and are not made solely at the discretion of officers in the field. In *Texas v. Brown*, 460 U.S. 730 (1983), the Court and all parties appear to have assumed the constitutionality of a “routine driver’s license checkpoint” (*see id.* at 733 (plurality opinion)). And in *Prouse*, the Court noted that its holding did not “cast doubt on the permissibility of roadside truck weigh-stations and inspection checkpoints, at which some vehicles may be subject to further detention for safety and regulatory inspection than are others” (440 U.S. at 663 n.26).

In light of the Court’s opinions in these cases, the validity of various spot-check practices (for example, pollution emission tests, agricultural produce inspections, and game wardens’ inspections, as well as driver’s license and registration inspections) involving the brief stopping of vehicles without a reasonable suspicion that the particular vehicle stopped is being operated in violation of an applicable regulatory law appears to turn upon four considerations:

First is whether the “primary purpose [of the checkpoint program] was to detect evidence of ordinary criminal wrongdoing” (*City of Indianapolis*

v. Edmond, *supra*, 531 U.S. at 41) by one or more of the “vehicle’s occupants” (*Illinois v. Lidster*, *supra*, 540 U.S. at 423). Such situations are governed by “an *Edmond*-type rule of automatic unconstitutionality” (*id.* at 424). The Court stated in *dicta* in *Edmond* that an exception to this rule may apply to “emergency” situations, such as where the police set up “an appropriately tailored roadblock . . . to thwart an imminent terrorist attack or to catch a dangerous criminal who is likely to flee by way of a particular route” (*Edmond*, *supra*, 531 U.S. at 44). But, in the absence of such “exigencies” (*id.*), *Edmond* prohibits a checkpoint “program whose primary purpose is ultimately indistinguishable from the general interest in crime control,” except when, as in *Lidster*, “[t]he stop’s primary law enforcement purpose was *not* to determine whether a vehicle’s occupants were committing a crime, but to ask vehicle occupants, as members of the public, for their help in providing information about a crime in all likelihood committed by others” and “[t]he police expected the information elicited to help them apprehend, not the vehicle’s occupants, but other individuals” (*Lidster*, *supra*, 540 U.S. at 423).

Second is the extent to which some sort of spot check is necessary and will likely be effective to enforce the regulatory scheme in question. *See Illinois v. Lidster*, *supra*, 540 U.S. at 427; *Michigan Department of State Police v. Sitz*, *supra*, 496 U.S. at 451; *Delaware v. Prouse*, *supra*, 440 U.S. at 658-61. Counsel challenging a checkpoint stop should contend that the standard of necessity is high. In approving the use of sobriety checkpoints in *Sitz*, the Court cited statistical and anecdotal evidence of the extent of “alcohol-related death and mutilation on the Nation’s roads” (496 U.S. at 451 & n.*) and observed that “[n]o one can seriously dispute the magnitude of the drunken driving problem or the States’ interest in eradicating it” (*id.* at 451; *accord, id.* at 455-56 (Justice Blackmun, concurring)). Similarly, in sustaining immigration checkpoint stops in border regions (see § 25.30 *infra*), the Supreme Court has repeatedly emphasized “the enormous difficulties of patrolling a 2,000-mile open border” (*United States v. Cortez*, 449 U.S. 411, 418 (1981)), and the vital national importance of patrolling it effectively (*see, e.g., Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878-79, 881 (1975); *United States v. Martinez-Fuerte*, *supra*, 428 U.S. at 551-57). And, in upholding a “highway checkpoint where police stopped motorists to ask them for information about a recent hit-and-run accident,” the Court in *Illinois v. Lidster* explained that “[t]he relevant public concern was grave . . . [in that] [p]olice were investigating a crime that had resulted in a human death . . . [and] [t]he stop advanced this grave public concern to a significant degree” (540 U.S. at 421, 427). *See also id.* at 425 (“voluntary requests [of “members of the public in the investigation of a crime”] play a vital role in police investigatory work”). With regard to the assessment of “the degree to which . . . [a checkpoint procedure] advances the public interest” (*Sitz*, *supra*, 496 U.S. at 453), the Court has made clear that reviewing courts may not strike down a law enforcement technique that is a reasonable means of dealing with the problem simply because some “[e]xperts in police science” might view a different technique as “preferable” [*sic*] (*id.*). However, a procedure may be found to violate the Fourth Amendment if the state fails to present empirical data justifying the procedure (*see Sitz*, *supra*, 496 U.S. at 454-55) or if the procedure falls below an as-yet unspecified threshold of effectiveness

(see *Sitz*, *supra*, 496 U.S. at 454-55 (finding that the sobriety checkpoint procedure under review sufficiently advanced the state's interest in controlling drunk driving because it resulted in arrests of "approximately 1.6 percent of the drivers passing through the checkpoint," which compared favorably with the "0.5 percent" "ratio of illegal aliens detected to vehicles stopped" by the immigration checkpoint procedure approved in *Martinez-Fuerte*)).

Third is the extent to which the visibility and regularity of the spot-check practice are likely to reduce motorists' apprehensions of danger and the feeling that they are being singled out for official scrutiny. See *Illinois v. Lidster*, *supra*, 540 U.S. at 425, 427-28; *Michigan Department of State Police v. Sitz*, *supra*, 496 U.S. at 452-53; *Delaware v. Prouse*, *supra*, 440 U.S. at 657.

Fourth is the extent to which the spot-check procedures limit and control the exercise of discretion by individual officers in determining which vehicles to stop and which ones to detain for longer or shorter periods. See *Michigan Department of State Police v. Sitz*, *supra*, 496 U.S. at 452-53; *Delaware v. Prouse*, *supra*, 440 U.S. at 653-55, 661-63. This latter factor is probably the most significant, for the Supreme Court's Fourth Amendment decisions have increasingly recognized that restricting police discretion in the execution of the search-and-seizure power is the Amendment's central purpose. See, e.g., *Johnson v. United States*, 333 U.S. 10, 13-17 (1948); *McDonald v. United States*, 335 U.S. 451, 455-56 (1948); *Beck v. Ohio*, 379 U.S. 89, 97 (1964); *See v. City of Seattle*, 387 U.S. 541, 545 (1967); *United States v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297, 316-17 (1972); *United States v. Martinez-Fuerte*, *supra*, 428 U.S. at 558-59, 566; *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 357 (1977); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 323-24 (1978); *Mincey v. Arizona*, 437 U.S. 385, 394-95 (1978); *Brown v. Texas*, 443 U.S. 47, 51 (1979); *Steagald v. United States*, 451 U.S. 204, 220 (1981); *Donovan v. Dewey*, 452 U.S. 594, 599, 601, 605 (1981); *New York v. Burger*, 482 U.S. 691, 703 (1987) (dictum). As in other fields of constitutional law in which excessive discretion embodied in a statutorily or administratively prescribed procedure may void it, factual evidence of divergent and particularly of discriminatory police practices in the administration of the procedure should be admissible and persuasive on this last issue. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Niemotko v. Maryland*, 340 U.S. 268 (1951); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

25.30. Border Searches of Automobiles

The "border search" doctrine allows customs and immigration officials to stop and search all vehicles (or persons) entering the United States from abroad. It requires no warrant, probable cause, *Terry*-type "reasonable suspicion," or other justification. This unfettered search power is, however, limited to the "border itself [or] . . . its functional equivalents" (*Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973)). See also *United States v. Flores-Montano*, 541 U.S. 149, 154 (2004) ("the expectation of privacy is less at the border than it is in the interior").

Other than at the border and its functional equivalents, customs and immigrations *searches* of automobiles may not be made without a warrant

or probable cause. *Almeida-Sanchez v. United States*, *supra*, 413 U.S. at 274-75 (condemning a warrantless “roving patrol” search without probable cause); *United States v. Ortiz*, 422 U.S. 891 (1975) (condemning a warrantless “fixed check point” search without probable cause). Roving patrols of customs or immigration agents are permitted to make brief warrantless stops of vehicles in regions near the border on the basis of “reasonable suspicion” that a particular vehicle contains smuggled goods or illegal aliens. *United States v. Brignoni-Ponce*, 422 U.S. 873, 880-84 (1975); *United States v. Villamonte-Marquez*, 462 U.S. 579, 587-88 (1983) (dictum) (discussing the border-search doctrines applicable to automobiles while developing a somewhat different rule for ships “located in waters offering ready access to the open sea”). These roving-patrol stops are akin to domestic *Terry* stops and are governed by similar rules. See §§ 25.4-25.6, 25.9, 25.27 *supra*. “The officer may question the driver and passengers about their citizenship and immigration status, and he may ask them to explain suspicious circumstances, but any further detention or search must be based on consent or probable cause.” *United States v. Brignoni-Ponce*, *supra*, 422 U.S. at 881-82.

Equally limited stops of all or selected vehicles may be made routinely at fixed checkpoints in the border area, without a warrant, probable cause, or reasonable suspicion. *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976). But the “claim that a particular exercise of [administrative] discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review” (*id.* at 559). Routine checkpoint stops, like roving-patrol stops made upon “reasonable suspicion,” must be restricted to “brief questioning” and may not include either prolonged detention or search in the absence of “consent or probable cause” (*id.* at 566-67). *See also United States v. Flores-Montano*, *supra*, 541 U.S. at 155 n.2 (reserving “the question ‘whether, and under what circumstances, a border search might be deemed “unreasonable” because of the particularly offensive manner in which it is carried out”).

The opinions in *Ortiz* and *Brignoni-Ponce* purport to reserve the question whether searches and more extensive detentions in connection with immigration stops (either by roving patrols or at fixed checkpoints) may be made without reasonable suspicion or probable cause concerning the individual vehicle stopped, under the authorization of a search warrant “issued to stop cars in a designated area on the basis of conditions in the area as a whole” (*Brignoni-Ponce*, *supra*, 422 U.S. at 882 n.7; *see also Ortiz*, *supra*, 422 U.S. at 897 n.3). This question was generated by Justice Powell’s concurring opinion in *Almeida-Sanchez*, which adopts the concept of an “area” search warrant from the Supreme Court’s building-code cases (*see Camara v. Municipal Court*, 387 U.S. 523 (1967); § 25.36 *infra*) and suggests that such a warrant might validate immigration searches in border areas. Because Justice Powell’s concurrence was necessary to make up a 5-4 majority in *Almeida-Sanchez* and the Court has not become more sympathetic to Fourth Amendment rights since his departure, the likelihood is strong that “area” search warrants will be sustained in border-region immigration cases. *See also United States v. Martinez-Fuerte*, *supra*, 428 U.S. at 555, 564 n.18.

The “border search” principles described in this section are limited to *international* borders and do not apply to interstate boundary lines. *Torres v.*

Puerto Rico, 442 U.S. 465, 472-73 (1979); *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 702 (1965) (by implication); see also *United States v. Flores-Montano*, *supra*, 541 U.S. at 152 (“The Government’s interest in preventing the entry of unwanted persons and effects is at its zenith at the international border.”); *United States v. Montoya De Hernandez*, 473 U.S. 531, 538 (1985) (“the Fourth Amendment’s balance of reasonableness is qualitatively different at the international border than in the interior”); *id.* at 544 (“at the international border, . . . the Fourth Amendment balance of interests leans heavily to the Government”).

E. Surveillance by Law Enforcement Agents

25.31. Electronic Eavesdropping and Wiretapping

Traditionally, governmental surveillance into premises without a physical trespass upon the premises was thought not to be a Fourth Amendment “search.” Tom-peeping and eavesdropping were insulated from Fourth Amendment restriction by the doctrine that “the eye cannot commit a search,” nor can the ear. See, e.g., *Polk v. United States*, 291 F.2d 230 (9th Cir. 1961), 314 F.2d 837 (9th Cir. 1963); *Anspach v. United States*, 305 F.2d 48, 960 (10th Cir. 1962). The Supreme Court applied these concepts in *Olmstead v. United States*, 277 U.S. 438 (1928), to hold that telephone wiretapping was not a “search” and in *Goldman v. United States*, 316 U.S. 129 (1942), to hold that no “search” had been conducted by officers who monitored conversations in a suspect’s room by means of an electronic sound-amplifying device placed against the party wall in an adjoining room. During almost 40 years, the Court – although indicating increasing disaffection with *Olmstead* – subjected electronic surveillance to Fourth Amendment restriction only when the surveillance involved some form of physical trespass. See *Silverman v. United States*, 365 U.S. 505 (1961) (involving an electronic device inserted within the perimeter of a suspect’s premises); *Clinton v. Virginia*, 377 U.S. 158 (1964) (per curiam), *rev’g* 204 Va. 275, 130 S.E.2d 437 (1963) (same); *Hoffa v. United States*, 387 U.S. 231 (1967) (involving an electronic device planted on a suspect’s premises by trespassing officers); *Berger v. New York*, 388 U.S. 41 (1967) (same). Eventually, *Olmstead* and *Goldman* were expressly overruled in *Katz v. United States*, 389 U.S. 347 (1967). *Katz* held specifically that the monitoring of conversations through an electronic listening and recording device attached to the outside of a public telephone booth was a Fourth Amendment search; and it said more generally that “electronically listening to and recording . . . words [spoken in an area of] . . . privacy upon which [a person] . . . justifiably relied” would constitute a search without regard to “the presence or absence of a physical intrusion into any given enclosure” (389 U.S. at 353). See also § 25.33 *infra*.

Congress responded to *Katz* by legislation comprehensively regulating the subject of electronic surveillance (together with telephone wiretapping, § 25.32 *infra*). The Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 802, 82 Stat. 212, codified as 18 U.S.C. §§ 2510-2520, broadly prohibits electronic eavesdropping and wiretapping, creates criminal and civil liability for violators, declares the fruits of forbidden electronic eavesdropping or wiretapping inadmissible in any state or federal judicial,

administrative, or legislative proceedings, but also excepts from these bans eavesdropping and tapping conducted for law enforcement purposes under the authorization of 18 U.S.C. §§ 2516-19. The latter sections authorize:

- (a) the issuance of electronic surveillance or wiretap orders by federal judges, upon application of the Attorney General, Deputy Attorney General, Associate Attorney General, or any federal prosecutor of a specified grade “specially designated by the Attorney General” (*see United States v. Giordano*, 416 U.S. 505 (1974)), for the purpose of investigating specified federal offenses; and
- (b) the issuance of similar orders by state judges, in States that so provide by statute, upon application of the “principal prosecuting attorney” of the State or of one of its political subdivisions, for the purpose of investigating specified state-law offenses punishable by imprisonment for more than one year and “designated in [the] applicable State statute” (18 U.S.C. § 2516).

In either instance, judges may issue orders only upon written and sworn applications containing detailed averments of the matters described in 18 U.S.C. § 2518(1) and upon finding:

- (1) that there is probable cause to believe that a person is committing, has committed, or is about to commit one of the specified offenses;
- (2) that there is probable cause to believe that particular communications concerning the offense will be obtained through the authorized surveillance or tap;
- (3) that there is probable cause to believe that the facilities or places to be tapped or put under surveillance are used in connection with the commission of the offense, or are leased to, listed in the name of, or commonly used by, the person committing the offense; and
- (4) that “normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous.” (18 U.S.C. § 2518(3).)

See, e.g., United States v. Gonzalez, 412 F.3d 1102, 1113-15 (9th Cir. 2005) (wiretap evidence is suppressed because the government did not satisfy 18 U.S.C. § 2518(1)(c)’s “necessity” requirement: the government “did not establish that adequate traditional tools were tried before the wiretap was sought or that these untried alternatives were reasonably unlikely to be productive,” and the government “makes no claim that normal investigative procedures were reasonably determined to be too dangerous to try”); *United States v. Blackmon*, 273 F.3d 1204, 1206 (9th Cir. 2001) (wiretap evidence is suppressed because “the wiretap application contained material misstatements and omissions, and because the application does not otherwise make a particularized showing of necessity”).

The application and order must set forth the name of every person who is reasonably believed to be committing the offense and whose communications are expected to be intercepted (*United States v. Donovan*, 429 U.S. 413, 423-28 (1977)), but it needs not name persons likely to be overheard unless there is probable cause (see § 25.7.4 *supra*) to believe that they are implicated in the offense (*United States v. Kahn*, 415 U.S. 143 (1974)). (The *Kahn* opinion contains *dictum* to the effect that “when there is probable cause to believe that a particular telephone is being used to commit an offense but no particular person is identifiable, a wire interception order may, nevertheless, properly issue under the statute” (*id.* at 157).)

A surveillance order impliedly authorizes covert entry into private premises for the purpose of installing listening devices. No “explicit authorization of the entry is . . . required” (*Dalia v. United States*, 441 U.S. 238, 259 n.22 (1979)), although “the ‘preferable approach’ would be for Government agents . . . to make explicit to the authorizing court their expectation that some form of surreptitious entry will be required to carry out the surveillance” (*id.*), and their failure to do so may perhaps be deemed relevant when “the manner in which a warrant is executed is subject[ed] to later judicial review as to its reasonableness” (*id.* at 258).

The authorizing order must contain specified recitations restricting its scope (18 U.S.C. § 2518(4)), and it may not authorize surveillance or taps “for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days” (18 U.S.C. § 2518(5)), although extensions may be granted upon new showings sufficient to authorize initial issuance of an order (*id.*). “The plain effect of the detailed restrictions of § 2518 is to guarantee that wiretapping or bugging occurs only when there is a genuine need for it and only to the extent that it is needed.” *Dalia v. United States*, *supra*, 441 U.S. at 250 (*dictum*). Warrantless eavesdropping and tapping are authorized only in “an emergency situation” involving conspiracies that threaten the national security or characterize “organized crime,” and, in these cases, subsequent judicial approval must be obtained within 48 hours (18 U.S.C. § 2518(7)).

Detailed provisions are made concerning the execution of surveillance orders (*see, e.g., Scott v. United States*, 436 U.S. 128 (1978) (construing the provision of Section 2518(5) requiring that surveillance be conducted “in such a way as to minimize the interception of [noncriminal] communications”)); the *post facto* service of inventories upon persons affected (*see United States v. Donovan*, *supra*; *United States v. Chun*, 503 F.2d 533 (9th Cir. 1974)); recording and sealing of surveillance logs and documents, pretrial service of the surveillance applications and orders upon parties to any proceeding when the fruits of a surveillance or tap are to be offered in evidence, and motions to suppress the evidentiary use of these fruits (18 U.S.C. § 2518(8)-(10)).

Violations of some, but not all, of the procedural provisions of the statute require the suppression of evidence obtained through electronic surveillance (*United States v. Chavez*, 416 U.S. 562 (1974); *United States v. Giordano*, *supra*; *United States v. Donovan*, *supra*, 429 U.S. at 432-40; *United States*

v. Lomeli, 676 F.3d 734, 739, 741-42 (8th Cir. 2012)), whereas violations of the Fourth Amendment uniformly entail suppression (*Berger v. New York*, *supra*; *Katz v. United States*, *supra*), subject only to the qualifications of § 25.3 concluding paragraph, and §§ 25.17 and 25.21 *supra*. (Concerning electronic surveillance of communications between an individual and his or her attorney, see § 26.13 *infra*.)

Counsel handling an electronic surveillance case should consult the statutory provisions against the background of the constitutional restrictions upon electronic surveillance announced in *Berger*, *supra*, 388 U.S. at 53-64; *Katz*, *supra*, 389 U.S. at 354-59; and *Osborn v. United States*, 385 U.S. 323, 327-30 (1966) – restrictions that are similar, but may not be identical, to those of the statute. *Dicta* throughout the opinion in *United States v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297 (1972), appear to give the Supreme Court’s constitutional blessing to the statute in general (*see also Nixon v. Administrator of General Services*, 433 U.S. 425, 463-65 (1977) (dictum)), but they would not preclude attack upon particular aspects or instances of statutorily authorized surveillance under the constitutional standards of *Berger*, *Katz*, and *Osborn*. *See United States v. Chun*, *supra*, 503 F.2d at 537-38. The *Eastern District* decision rejected the Government’s contention that warrantless electronic surveillance approved by the President was constitutional in certain “national security” cases involving suspected domestic subversion. It did not determine what constitutional restrictions might apply to electronic surveillance in “foreign intelligence” cases. The latter subject is now regulated in detail by Title I of the Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95- 511, 92 Stat. 1783, codified as 50 U.S.C. §§ 1801-13.

Electronic interception of any communication is permissible without a warrant or other prerequisite – that is, with no requirement of probable cause, reasonable suspicion, necessity, or other justification – by a law enforcement officer (or by any person, under most relevant circumstances) if the officer (or person) “is a party to the communication or [if] one of the parties to the communication has given prior consent to such interception” (18 U.S.C. § 2511(2) (c), (d)). This statutory provision appears to broaden somewhat the exception that *Rathbun v. United States*, 355 U.S. 107 (1957), carved out of former Section 605 of the Federal Communications Act, which had prohibited most wiretapping prior to *Katz* (see § 25.32 *infra*). Its validity – now that electronic surveillance generally has been brought within the purview of the Fourth Amendment by *Katz* – raises questions akin to those raised by “bugged” informers (§ 26.10.2 *infra*). Although the law on the latter subject is a conceptual shambles (see *id.*), the present practical bottom line is plain enough: “Neither the Constitution nor any Act of Congress [imposes any restraints upon electronic monitoring or recording of conversations] . . . by Government agents with the consent of one of the conversants” (*United States v. Caceres*, 440 U.S. 741, 744 (1979); see *id.* at 749-52).

25.32. Telephone Wiretapping

Telephone wiretapping was banned by § 605 of the Federal Communications Act of 1934, 48 Stat. 1103, 47 U.S.C. § 605 (1964). The

Supreme Court construed the statute as rendering wiretap evidence inadmissible in federal prosecutions, even when the tap was made by state officers acting without federal participation and in compliance with a state law allowing tapping. *Benanti v. United States*, 355 U.S. 96 (1957). In *Schwartz v. Texas*, 344 U.S. 199 (1952), the Court held that Section 605 did not require the exclusion of wiretap evidence in state criminal prosecutions; but *Schwartz* was overruled in *Lee v. Florida*, 392 U.S. 378 (1968). See *Fuller v. Alaska*, 393 U.S. 80 (1968) (per curiam). Section 605 was then amended to conform to the detailed congressional regulation of wiretapping and electronic eavesdropping contemporaneously enacted as 18 U.S.C. §§ 2510-20. That regulation is described in § 25.31 *supra*. The only substantive points requiring additional mention here are:

(A) A party has standing to complain of an unlawful wiretap if either (1) s/he is a party to the tapped conversation or (2) his or her telephone is tapped, whether or not s/he is a party to the conversation. *Alderman v. United States*, 394 U.S. 165, 176-80 (1969); *Rakas v. Illinois*, 439 U.S. 128, 144 n.12 (1978) (dictum); *United States v. Karo*, 468 U.S. 705, 716-17 n.4 (1984) (dictum).

(B) The use of a “pen register” to record the numbers dialed from a telephone (or other such “dialing, routing, addressing, or signaling information” from other “instrument[s] or facilit[ies] from which a wire or electronic communication is transmitted” (18 U.S.C. § 3127(3))) – but without monitoring the “contents of any communication” (*id.*) – is not subject to the restrictions of 18 U.S.C. §§ 2510-20 (*United States v. New York Telephone Co.*, 434 U.S. 159 (1977)), and does not constitute a “search” subject to Fourth Amendment constraints (*Smith v. Maryland*, 442 U.S. 735 (1979)). Pen registers and their technological counterparts are regulated by 18 U.S.C. § 3121-27, but violations of those sections do not entail exclusionary consequences. See, e.g., *United States v. Thompson*, 936 F.2d 1249 (11th Cir. 1991) (the Communications Assistance for Law Enforcement Act of 1994, which was enacted “after the Supreme Court’s holding in *Smith v. Maryland* . . . made no provision for exclusion” (936 F.2d at 1252); hence, “information obtained from a pen register placed on a telephone can be used as evidence in a criminal trial even if the court order authorizing its installation does not comply with the statutory requirements.” (*id.* at 1249-50)); cf. *United States v. Forrester*, 495 F.3d 1041, as amended, 512 F.3d 500, 504, 510 n.6 (9th Cir. 2008) (“computer surveillance that enabled the government to learn the to/from addresses of . . . [the defendant’s] e mail messages, the Internet protocol (“IP”) addresses of the websites that he visited and the total volume of information transmitted to or from his account . . . was analogous to the use of a pen register that the Supreme Court held in *Smith v. Maryland* . . . did not constitute a search for Fourth Amendment purposes. Moreover, whether or not the surveillance came within the scope of the then-applicable federal pen register statute, . . . [the defendant] is not entitled to the suppression of the evidence obtained through the surveillance because there is no statutory or other authority for such a remedy” (495 F.3d at 1043); “Surveillance techniques that enable the government to determine not only the IP addresses that a person accesses but also the uniform resource locators (“URL”) of the pages visited might be more constitutionally problematic. A URL, unlike an IP address, identifies the

particular document within a website that a person views and thus reveals much more information about the person’s Internet activity.” (512 F.3d at 503 n.6)).

25.33. Other Forms of Electronic and Nonelectronic Surveillance

If the police use a device or technology merely as a means to view what was already exposed to observation by the public at large, then there is no “search” for Fourth Amendment purposes. *See, e.g., Texas v. Brown*, 460 U.S. 730, 740 (1983) (plurality opinion) (an officer’s use of a flashlight to examine the interior of an automobile was not a “search” since “the interior of an automobile . . . may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers”); *United States v. Dunn*, 480 U.S. 294, 305 (1987) (“the officers’ use of the beam of a flashlight, directed through the essentially open front of defendant’s barn, did not transform their observations into an unreasonable search within the meaning of the Fourth Amendment”). *See also, e.g., California v. Ciraolo*, 476 U.S. 207, 215 (1986) (warrantless observation of marijuana plants in the fenced yard of a home, made possible because police officers flew over the yard in a private plane and observed it from an altitude of 1,000 feet, did not violate the homeowner’s reasonable expectation of privacy because the marijuana plants were “visible to the naked eye,” albeit only with the assistance of the aircraft); *Florida v. Riley*, 488 U.S. 445, 451 (1989) (police flew a helicopter at an altitude of 400 feet above a backyard greenhouse and thus observed marijuana invisible from the ground because of enclosing walls, fences, and foliage; “[a]ny member of the public could legally have been flying over Riley’s property in a helicopter at the altitude of 400 feet and could have observed Riley’s greenhouse”). *Cf. Dow Chemical Co. v. United States*, 476 U.S. 227, 237-39 (1986) (in the context of inspections of commercial property, where “the Government has ‘greater latitude,’” the Court approves the use of an aerial camera that enhanced human vision “somewhat” but was not “so revealing of intimate details as to raise constitutional concerns”; the Court notes that use of “[a]n electronic device to penetrate walls or windows so as to hear and record confidential discussions of chemical formulae or other trade secrets would raise very different and far more serious questions.”).

But if the police use an electronic device or other artificial contrivance to extend their surveillance into an area or into a field of information that is normally inaccessible to public observation, then a “search” has occurred for purposes of the Fourth Amendment. *See, e.g., Silverman v. United States*, 365 U.S. 505, 506-07, 509, 511 (1961) (police violated the Fourth Amendment by eavesdropping on conversations in defendants’ house by means of a microphone that was inserted into a heating duct in what amounted to an “unauthorized physical penetration into the premises”); *Regalado v. California*, 374 U.S. 497 (1963) (per curiam) (police surveillance through peepholes routinely drilled in hotel room doors – apparently by collaboration of the police and hotel management in “high crime” areas – was a Fourth Amendment search); *Kyllo v. United States*, 533 U.S. 27, 29, 31 (2001) (“the use of a thermal-imaging device aimed at a private home from a public street to detect relative amounts of heat within the home constitutes a ‘search’ within the meaning of the Fourth Amendment”: “obtaining by sense-enhancing technology any

information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area,’ . . . constitutes a search – at least where (as here) the technology in question is not in general public use.”). See also *Florida v. Jardines*, 133 S. Ct. 1409, 1417-18 (2013) (“The government’s use of trained [drug-sniffing] police dogs to investigate the home and its immediate surroundings is a ‘search’ within the meaning of the Fourth Amendment.”); *United States v. Burston*, 806 F.3d 1123, 1125, 1127-28 (8th Cir. 2015) (a police officer conducted an unlawful search by releasing a drug-sniffing dog “off-leash to sniff the air” in an area within the curtilage of the defendant’s apartment while the officer “remained six feet from the apartment”).

The basic principle in this area was established by *Katz v. United States*, 389 U.S. 347, 353 (1967), holding that “electronically listening to and recording . . . words [spoken in a zone of] . . . privacy upon which [a person] . . . justifiably relied” is a “search” for Fourth Amendment purposes, without regard to “the presence or absence of a physical intrusion into any given enclosure.” The principle is illustrated by comparing the decisions in *United States v. Knotts*, 460 U.S. 276 (1983), and *United States v. Karo*, 468 U.S. 705 (1984). In *Knotts*, the Court held that police officers’ tracing of the movements of an automobile by means of an electronic beeper planted in a can of chloroform purchased by a drug manufacturing suspect was not a “search” since it revealed nothing more than what could be observed through “[v]isual surveillance from public places” (460 U.S. at 282). In *Karo*, the police employed the same tactic of installing an electronic beeper in a can of ether, but the can thereafter ended up inside a private home. Distinguishing the *Knotts* case as limited to surveillance of a public area, the Court in *Karo* held that “the monitoring of a beeper in a private residence, a location not open to visual surveillance, violates the Fourth Amendment rights of those who have a justifiable interest in the privacy of the residence” (468 U.S. at 714). Compare *United States v. Jones*, 132 S. Ct. 945, 949 (2012) (“hold[ing] that the Government’s installation of a GPS [Global-Positioning-System] device on a target’s vehicle, . . . and its use of that device to monitor the vehicle’s movements, constitutes a ‘search’” – although basing this ruling on a “common-law trespassory test” rather than “the *Katz* reasonable-expectation-of-privacy test” – and concluding that the government’s attachment of the GPS tracking device to the underside of Jones’ vehicle constituted a “physical intrusion” into “private property for the purpose of obtaining information” and thus a “‘search’ within the meaning of the Fourth Amendment when it was adopted”), *with id.* at 957-58, 964 (Alito, J., concurring in the judgment, joined by Ginsburg, Breyer & Kagan, JJ.) (rejecting the majority’s reliance on “18th-century tort law” and reaching the same result as the majority by “asking whether defendant’s reasonable expectations of privacy were violated by the long-term monitoring of the movements of the vehicle he drove,” and concluding that although “relatively short-term monitoring of a person’s movements on public streets accords with expectations of privacy that our society has recognized as reasonable,” “the use of longer term GPS monitoring” – such as occurred in this case, where “law enforcement agents tracked every movement that defendant made in the vehicle he was driving” for “four weeks” – “impinges on expectations of privacy” and thus constitutes a “search” for purposes of the Fourth Amendment).

And see Grady v. North Carolina, 135 S. Ct. 1368, 1370-71 (2015) (per curiam) (applying *United States v. Jones*, *supra*, to hold that a satellite-based monitoring program for recidivist sex offenders, which tracked program participants by means of a tracking device that participants were required to “wear . . . at all times,” “effect[ed] a Fourth Amendment search”: “a State . . . conducts a search when it attaches a device to a person’s body, without consent, for the purpose of tracking that individual’s movements”; “The State’s program is plainly designed to obtain information. And since it does so by physically intruding on a subject’s body, it effects a Fourth Amendment search.”).

Courts are increasingly finding a privacy interest in various other forms of electronic data and requiring that the police obtain a warrant in order to obtain that data. *See, e.g., Tracey v. State*, 152 So. 3d 504, 522, 525-26 (Fla. 2014) (an individual has a reasonable “expectation of privacy of location as signaled by one’s cell phone – even on public roads”; “Simply because the cell phone user knows or should know that his cell phone gives off signals that enable the service provider to detect its location for call routing purposes, and which enable cell phone applications to operate for navigation, weather reporting, and other purposes, does not mean that the user is consenting to use of that location information by third parties for any other unrelated purposes.”; “no warrant based on probable cause authorized the use of Tracey’s real time cell site location information to track him,” so police officers’ use of “cell site location information emanating from his cell phone in order to track him in real time” was an unlawful search and “the evidence obtained as a result of that search was subject to suppression.”); *Commonwealth v. Augustine*, 467 Mass. 230, 231, 232, 4 N.E.3d 846, 849, 850 (2014) (construing the state constitution to hold that the state must obtain a search warrant in order to acquire “historical cell site location information for a particular cellular telephone” from “a cellular telephone service provider”; the court observes that although the information “at issue here is a business record of the defendant’s cellular service provider, he had a reasonable expectation of privacy in it”); *State v. Earls*, 214 N.J. 564, 569, 70 A.3d 630, 633 (2013) (construing the state constitution to hold that “cell-phone users have a reasonable expectation of privacy in their cell-phone location information, and that police must obtain a search warrant before accessing that information”); *State v. Reid*, 194 N.J. 386, 399, 945 A.2d 26, 33-34 (2008) (the state constitution “protects an individual’s privacy interest in the subscriber information he or she provides to an Internet service provider”). *But see City of Ontario v. Quon*, 560 U.S. 746, 761-62 (2010) (upholding a police department’s review of text messages sent and received on a government-owned pager that was issued to a police officer and that was reviewed by the department for the purpose of “determin[ing] whether [the officer’s] overages were the result of work-related messaging or personal use,” where the officer had been given advance notice “that his [text] messages were subject to auditing”).

**F. Probable Cause or Articulable Suspicion Based
on Information Obtained from Other Police Officers
or Civilian Informants**

**25.34. Police Action Based on Information Learned from Other
Police Officers**

Frequently, Officer *A* concludes that a person is guilty of an offense and conveys that conclusion to Officer *B* – directly or through some form of police bulletin or dispatch or “wanted flyer” – in connection with a request or directive that the person be arrested or held for questioning. Some courts were inclined to sustain *B*’s arrest or stop of the person in this situation, even though *A* lacked probable cause or articulable suspicion for *A*’s conclusion, on the theory that *B* had probable cause or articulable suspicion generated by a communication from an apparently reliable informant – namely, fellow officer *A*. This bootstrap has, however, been firmly rejected by the Supreme Court on the obvious ground that “an otherwise illegal arrest cannot be insulated from challenge by the decision of the instigating officer to rely on fellow officers to make the arrest” (*Whiteley v. Warden*, 401 U.S. 560, 568 (1971)). Accord, *United States v. Hensley*, 469 U.S. 221, 230 (1985). Police dispatches gain no credibility from the mere fact of their internal transmission. Cf. *Franks v. Delaware*, *supra*, 438 U.S. at 163-64 n.6.

Thus, when police officers rely on a flyer or dispatch to make an arrest, the admissibility of evidence uncovered during a search incident to that arrest “turns on whether the officers who *issued* the flyer [or dispatch] possessed probable cause to make the arrest” (*United States v. Hensley*, *supra*, 469 U.S. at 231 (dictum)). See, e.g., *People v. Powell*, 101 A.D.3d 756, 758, 955 N.Y.S.2d 608, 610 (N.Y. App. Div., 2d Dep’t 2012). Similarly, in cases of *Terry* stops based on a flyer or dispatch, “[i]f the flyer [or dispatch] has been issued in the absence of a reasonable suspicion, then a stop in the objective reliance upon it violates the Fourth Amendment” (*United States v. Hensley*, *supra*, 469 U.S. at 232). Of course, this adequacy of the underlying information is only the necessary condition – not a sufficient condition – for the validity of a detention based upon internal police communications. In addition, the officer who effects the detention must be aware of the communication and must be able to identify the person detained as the individual sought. See *State v. Gardner*, 135 Ohio St. 3d 99, 104-05, 984 N.E.2d 1025, 1029-30 (2012) (even if there is a valid arrest warrant for an individual, a police seizure of that individual cannot be predicated on the existence of the warrant unless the arresting officer “knew that there was a warrant for the individual’s arrest”).

**25.35. Police Action Based on Information Learned from a
Civilian Informant**

25.35.1. The General Standard

Unless a police officer witnessed the crime or some objective manifestation of criminal conduct, police action – whether it be an arrest, a search, a *Terry* stop or a *Terry* frisk – will usually depend upon information learned from

civilians. The source of the information may be either an ordinary citizen (a complainant or an eyewitness) or a “police informer” who is trading the information for cash or leniency on criminal charges to which s/he is subject. The identity of the source of the information may not even be known to the police, as in the case of an anonymous phone tip or an informant relaying information that s/he heard “on the street” without revealing the precise source of the information.

Defense attorneys usually confront the issue of informants’ tips in either of two contexts: (i) when the officer presented the information to a magistrate in support of a request for a search warrant or arrest warrant and defense counsel is challenging a search or arrest made pursuant to the resulting warrant, or (ii) when the officer relied on the informant’s tip in making a warrantless arrest, search, stop, or frisk. If the officer acted pursuant to a warrant, the scope of review of the magistrate’s reliance upon information derived from nonpolice informants will be quite limited under Fourth Amendment doctrine, although it may be more expansive under state constitutional law. See § 25.17 *supra*. Essentially, the issue in warrant cases is whether the informant’s information, as presented in the police affidavit in support of the warrant, was “so lacking in indicia of probable cause as to render” the issuance of a warrant manifestly unreasonable (*United States v. Leon*, 468 U.S. 897, 923 (1984)). See § 25.17.1 *supra*.

In cases in which the officer acted without a warrant, the reviewing court must engage in a far more piercing examination of the reliability and sufficiency of the informant’s communications to the police. Judicial review of police reliance on information from informants was formerly governed by a two-pronged test of “veracity” and “basis of knowledge” established in *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969). The *Aguilar-Spinelli* standard has been preserved in several States as a matter of state constitutional law (*see, e.g., Commonwealth v. Upton*, 394 Mass. 363, 476 N.E.2d 548 (1985); *People v. Johnson*, 66 N.Y.2d 398, 405-07, 488 N.E.2d 439, 444-45, 497 N.Y.S.2d 618, 623-24 (1985); *State v. Jackson*, 102 Wash. 2d 432, 443, 688 P.2d 136, 143 (1984)), but federal Fourth Amendment doctrine is now controlled by the opinion in *Illinois v. Gates*, 462 U.S. 213 (1983). Although the *Gates* case itself involved a warrant, its rules have generally been accepted as governing warrantless police action based on hearsay information.

Under the *Gates* opinion, the question whether information received from an informant supplies the requisite predicate for a search or seizure (whether that predicate be probable cause or articulable suspicion) is to be determined by the “totality of the circumstances,” including, *inter alia*, the “informant’s ‘veracity,’ ‘reliability,’ and ‘basis of knowledge’” (462 U.S. at 230-39). Whereas the *Aguilar-Spinelli* standard treated “veracity” and “basis of knowledge” as separate criteria, both of which had to be satisfied, the *Gates* standard treats them as intertwined aspects of a “totality-of-the-circumstances analysis” in which “a deficiency in one [aspect] may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability” (426 U.S. at 233). In *Gates*, the Court concluded that it was possible to overlook the lack of direct evidences of “veracity” and “basis of knowledge” of an anonymous letter because the

information in the letter was so detailed as to imply that the informant must be highly knowledgeable and accurate, and “independent investigative work” by the police had corroborated substantial portions of the details relating to conduct by the suspects which “at least suggested” criminal activity (*id.* at 243-46). *See also Navarette v. California*, 134 S. Ct. 1683, 1686, 1688-90 (2014) (an anonymous 911 call reporting that “a vehicle had run [the caller] . . . off the road” “bore adequate indicia of reliability for the officer to credit the caller’s account” and to rely on this information in conducting a traffic stop because (1) the caller’s report that “she had been run off the road by a specific vehicle – a silver Ford F-150 pickup, license plate 8D94925 – . . . necessarily claimed eyewitness knowledge of the alleged dangerous driving” and “[t]hat basis of knowledge lends significant support to the tip’s reliability”; (2) police confirmation of “the truck’s location near mile marker 69 (roughly 19 highway miles south of the location reported in the 911 call) at 4:00 p.m. (roughly 18 minutes after the 911 call) . . . suggests that the caller reported the incident soon after she was run off the road,” and “[t]hat sort of contemporaneous report has long been treated as especially reliable”; and (3) “the caller’s use of the 911 emergency system,” which has “features that allow for identifying and tracing callers,” is an additional “indicator of veracity,” although this is not “to suggest that tips in 911 calls are *per se* reliable”; the Court majority in this 5-4 decision acknowledges that “this is a ‘close case.’”). *Compare Florida v. J.L.*, 529 U.S. 266, 270, 271-72 (2000) (an anonymous tip that a certain individual at a particular location was in possession of a gun did not provide the police with an adequate basis for a stop and frisk, even though the police found a person matching the description at that precise location, because “an anonymous tip alone seldom demonstrates the informant’s basis of knowledge or veracity” and, although “there are situations in which an anonymous tip, suitably corroborated, exhibits ‘sufficient indicia of reliability to provide reasonable suspicion to make the investigatory stop,’” the “unknown, unaccountable informant . . . neither explained how he knew about the gun nor supplied any basis for believing he had inside information about [the subject]” and the police confirmation of the accuracy of the tipster’s “description of [the] subject’s readily observable location and appearance . . . does not show that the tipster has knowledge of concealed criminal activity”: “The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person.”); *United States v. Freeman*, 735 F.3d 92, 94, 97-103 (2d Cir. 2013) (an anonymous caller’s two calls to 911 reporting that an individual “‘is possibly armed with a firearm’ and was ‘arguing with a female’” and describing this individual’s appearance in detail and giving his precise location “did not provide the police with the reasonable suspicion needed to stop Freeman”: “[t]he fact that the call was recorded and that the caller’s apparent cell phone number is known does not alter the fact that the identity of the caller is still unknown, leaving no way for the police (or for the reviewing court) to determine her credibility and reputation for honesty”; the detailed information about the individual’s appearance and location “does nothing to ‘show that the tipster has knowledge of concealed criminal activity’”; and “the facts that the stop occurred at night in a ‘high crime’ area” do not “enhance the reliability of the phone call by confirming in it some individualized detail.”); *United States v. Martinez*, 486 F.3d 855, 863 (5th Cir. 2007) (finding no reasonable suspicion

where the “police had verified information that the person in the car they stopped was the ‘Angel’ whom the informant desired to accuse” but “had no verified information . . . that linked Martinez to any criminal behavior” and “[t]he informant also provided no verifiable predictive information about Martinez’s future behavior that would have indicated any ‘inside knowledge’ about Martinez”); *United States v. Brown*, 448 F.3d 239, 252 (3d Cir. 2006) (concluding that “an excessively general description, combined with an honest but unreliable location tip [*i.e.*, a tip by a citizen whose identity is known but whose reliability is not known to the police,] in the absence of corroborating observations by the police, does not constitute reasonable suspicion under the ‘narrowly drawn authority’ of *Terry v. Ohio*”); *State v. Kooima*, 833 N.W.2d 202, 210-11 (Iowa 2013) (“we hold a bare assertion [of drunk driving] by an anonymous tipster, without relaying to the police a personal observation of erratic driving, other facts to establish the driver is intoxicated, or details not available to the general public as to the defendant’s future actions does not have the requisite indicia of reliability to justify an investigatory stop. Such a tip does not meet the requirements of the Fourth Amendment.”).

The pre-*Gates* caselaw applying the *Aguilar-Spinelli* test contains extensive discussion of the concepts of “veracity” and “basis of knowledge” with respect to informants’ tips. Although *Gates* overrules the *Aguilar-Spinelli* approach of treating these factors as separate and independent criteria, it acknowledges the relevance of both and does not undermine the earlier judicial analyses of “veracity” and “basis of knowledge.”

25.35.2. “Veracity” of the Informant

The “veracity” inquiry examines whether there are facts showing either that the informant is generally credible or that the information that s/he gave on this particular occasion is reliable. *Aguilar v. Texas*, *supra*, 378 U.S. at 114-15. Information from an informant of unknown or doubtful reliability is worth little. *E.g.*, *Wong Sun v. United States*, 371 U.S. 471, 480-81 (1963); *Taylor v. Alabama*, 457 U.S. 687, 688-89 (1982); *Florida v. J.L.*, *supra*, 529 U.S. at 270-71. *See, e.g.*, *United States v. Glover*, 755 F.3d 811, 815-16 (7th Cir. 2014) (“Officer Brown’s affidavit did not include any available information on Doe’s credibility. . . . ¶ . . . The complete omission of information regarding Doe’s credibility is insurmountable, and it undermines the deference we would otherwise give the decision of the magistrate to issue the search warrant.”). “Even a known informant’s information may require corroboration if an affidavit supplies little information concerning that informant’s reliability.” *United States v. Clay*, 630 Fed.Appx. 377, 385 (6th Cir. 2015).

“[T]he ordinary citizen who has never before reported a crime to the police” is generally viewed as “more reliable than one who supplies information on a regular basis” (*United States v. Harris*, 403 U.S. 573, 599 (1971) (Harlan, J., dissenting)). If the source of information is an informant who supplies information on a regular basis, then a critical question is whether the information supplied in prior cases proved to be accurate. *See, e.g.*, *McCray v. Illinois*, 386 U.S. 300, 303-04 (1967); *United States v. Ross*, 456 U.S. 798, 817 n.22 (1982). Mere conclusory allegations about the accuracy of the informant

in prior cases are insufficient (*see Gates, supra*, 462 U.S. at 239; *Aguilar v. Texas, supra*, 378 U.S. at 114-15); details must be supplied concerning the number of times the informant has provided information in the past and the extent to which that information led to arrests and convictions. *See, e.g., State v. Robinson*, 185 Vt. 232, 239, 969 A.2d 127, 132 (2009) (“The mere statement that the informant had in the past provided unspecified, albeit purportedly ‘credible,’ ‘accurate,’ or ‘reliable’ information that ‘concerned’ drug deals or dealers does not establish the informant’s inherent credibility”); *United States v. Neal*, 577 Fed. Appx. 434, 441 (6th Cir. 2014) (“This Court has repeatedly held that an affidavit that furnishes details of an informant’s track record of providing reliable tips to the affiant can substantiate the informant’s credibility, such that other indicia of reliability may not be required when relying on the informant’s statements. ¶ However, where the affidavit does not aver facts showing the relationship between the affiant and the informant, or detail the affiant’s knowledge regarding the informant providing prior reliable tips that relate to the same type of crimes as the current tip concerns, this Court has generally found that other indicia of reliability must be present to substantiate the informant’s statements.”). *Compare McCray v. Illinois, supra*, 386 U.S. at 303-04 (credibility of an informant was sufficiently established by the informant’s having supplied information on fifteen to twenty prior occasions that proved accurate and resulted in numerous arrests and convictions), *with State v. Betts*, 194 Vt. 212, 224-25, 75 A.3d 629, 638-39 (2013) (trooper’s affidavit, which “indicated that the confidential informant [who was the source of the information upon which the police relied] had ‘provided . . . information in the past that has led to the arrest of at least three separate individuals for various narcotics offenses’” – but which “contain[ed] no indication as to the actual nature of the informant’s cooperation or information in the past, how the information ‘led’ to the alleged arrests, or the final outcome of any of the cases in which he or she was involved” – failed to provide the reviewing court with a sufficient “basis upon which to discharge its constitutional duty to independently analyze the informant’s credibility”). In cross-examining a police officer on the issue of prior performance of an informant, defense counsel should try to pin down precisely how many *bad* tips the informant has given in the past. Although the courts have not squarely confronted the question of how high a “batting average” is necessary to establish the credibility of an informant and although it certainly is not “required that informants used by the police be infallible” (*Illinois v. Gates, supra*, 462 U.S. at 245 n.14), there will be a point at which the number of prior instances of inaccuracy tips the scales in favor of a finding of unreliability. *See id.* at 234 (courts must engage in “a balanced assessment of the relative weights of all the various indicia of reliability (and unreliability) attending an informant’s tip”); *Massachusetts v. Upton*, 466 U.S. 727, 732 (1984) (per curiam) (dictum) (same).

Apart from the general credibility of the informant, information given on a particular occasion gains reliability if it is an admission against penal interest. *See, e.g., United States v. Harris, supra*, 403 U.S. at 583-85 (plurality opinion); *Spinelli v. United States, supra*, 393 U.S. at 425 (Justice White, concurring); *United States v. Ruiz*, 623 Fed. Appx. 378 (9th Cir. 2015). Conversely, when the informant is known to have an incentive to give incriminating information – when, for example, the informant was paid for the information – there is reason

to distrust the information. *See, e.g., Rutledge v. United States*, 392 A.2d 1062, 1066 (D.C. 1978) (“the 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”). For an excellent enumeration and analysis of the factors to be considered in evaluating the veracity of a citizen informant, *see United States v. Brown*, 448 F.3d 239, 249-51 (3d Cir. 2006).

The necessary showing of veracity “requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person” (*Florida v. J.L.*, 529 U.S. 266, 272 (2000) (“Florida contends that the tip was reliable because its description of the suspect’s visible attributes proved accurate: There really was a young black male wearing a plaid shirt at the bus stop. . . . These contentions misapprehend the reliability needed for a tip to justify a *Terry* stop. ¶ An accurate description of a subject’s readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. . . . Cf. 4 W. LaFare, Search and Seizure § 9.4(h), p. 213 (3d ed.1996) (distinguishing reliability as to identification, which is often important in other criminal law contexts, from reliability as to the likelihood of criminal activity, which is central in anonymous-tip cases.”).

25.35.3. The Informant’s “Basis of Knowledge”

Whereas the “veracity” inquiry focuses on whether the informant is likely to be telling the truth, the inquiry into the informant’s “basis of knowledge” is concerned with whether the informant has a sufficient basis for knowing the information s/he relates, even assuming that s/he is telling the truth. In *Aguilar v. Texas*, *supra*, the Court held that one of the principal defects in a police officer’s affidavit was its failure to reveal “some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were” (378 U.S. at 114).

The “basis of knowledge” concern is satisfied whenever the informant asserts a direct perceptual basis for knowing the facts: when, for example, the informant personally saw criminal behavior or contraband (*see, e.g., United States v. Bruner*, 657 F.2d 1278, 1297 (D.C. Cir. 1981)), or was a participant in the crime (*see, e.g., United States v. Estrada*, 733 F.2d 683, 686 (9th Cir. 1984)). Mere conclusory recitations, such as that “the informant had personal knowledge,” will not suffice (*United States v. Long*, 439 F.2d 628, 630-31 (D.C. Cir. 1971); *People v. Leftwich*, 869 P.2d 1260, 1266-67 (Colo. 1994); *State v. Baca*, 97 N.M. 379, 381, 640 P.2d 485, 487 (1982)); there must be some concrete, factual indication of the basis for the informant’s “personal knowledge” (*see, e.g., United States v. Wall*, 277 Fed. Appx. 704 (9th Cir. 2008)).

The Court explained in *Spinelli v. United States*, *supra*, that “[i]n the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused’s criminal activity in sufficient detail that the magistrate may know that he is relying on

something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation" (393 U.S. at 416). When testing this sort of "self-verifying detail" (*United States v. Gifford*, 727 F.3d 92, 99 (1st Cir. 2013)), the courts must critically consider whether the details are such that they must have been derived from direct observation or insider information, as distinguished from scuttlebutt. *See id.* at 100 ("While the Government offers the informant's statements regarding the contemporaneous state of the marijuana grow as well as the autumn grow as self-authenticating, without any statements as to the informant's basis of knowledge, there is no means of determining whether that information was obtained first-hand or through rumor. The information is not so specific and specialized that it could only be known to a person with inside information. Further, information about Gifford's former and current occupation are not so self-verifying to establish the reliability of the informant."). *See also, e.g., United States v. Martinez*, 486 F.3d 855, 861-64 (5th Cir. 2007) (finding no reasonable suspicion where an informant "provided no verifiable predictive information . . . that would have indicated any 'inside knowledge'"); *United States v. Bush*, 647 F.2d 357, 364 & n.6 (3d Cir. 1981) (the informant's statement that two men had flown to New York to obtain heroin and would return that evening was not an adequate "self-verifying detail," since it was not the type of fact that "arguably would only be known to someone with reliable information" and it was "surely equally probable that the informant was merely repeating a rumor overheard on the street"); *Shivers v. State*, 258 Ga. App. 253, 573 S.E.2d 494 (2002); *West v. State*, 137 Md. App. 314, 768 A.2d 150 (2000).

25.35.4. *Partial Corroboration of the Informant's Statement Through Police Investigation*

In upholding reliance on the informant's tip in *Illinois v. Gates, supra*, the Court stressed that the information "had been corroborated in major part" as a result of police investigation (462 U.S. at 243). The Court explained that "[t]he corroboration of the letter's predictions that the Gateses' car would be in Florida, that Lance Gates would fly to Florida in the next day or so, and that he would drive the car north toward Bloomingdale all indicated, albeit not with certainty, that the informant's other assertions also were true" (*id.* at 244). These events, though not necessarily dispositive of criminal activity, were viewed by the Court as "suggestive of a prearranged drug run" (*id.* at 243). In contrast, in *Florida v. J.L., supra*, the Court held that an anonymous tip that a certain individual at a particular location was in possession of a gun did not provide the police with an adequate basis for stopping and frisking that individual, even though the police observations corroborated that there was a person matching the description at that precise location, because the corroborating observations must support the reliability of the tip's "assertion of illegality," not just the reliability of its "identif[ication] [of] a determinate person" (529 U.S. at 272; see § 25.35.2 concluding paragraph, *supra*). Thus, in gauging whether an informant's tip has been adequately corroborated through police investigation, the courts have been careful to require that the activity witnessed by the police be at least "suspicious" (*Rutledge v. United States*, 392 A.2d 1062, 1066-67 (D.C. 1978)), or "suggestive of . . . criminal activity" (*People v. Elwell*, 50 N.Y.2d 231, 241, 406 N.E.2d 471, 477, 428 N.Y.S.2d 655, 662

(1980)). *See also, e.g., United States v. Reaves*, 512 F.3d 123, 127-28 (4th Cir. 2008).

In some circumstances, the corroboration can come from prior reports of criminal activity. Thus, in *Massachusetts v. Upton*, 466 U.S. 727 (1984), the Court found that an informant’s tip describing stolen goods concealed in her former boyfriend’s motor home was partially corroborated by police reports of recent burglaries in which the descriptions of certain of the items stolen “tallied with” the informant’s descriptions of the stolen goods (*see id.* at 733-34).

25.35.5. Disclosure of the Informant’s Name at the Suppression Hearing

In cases in which a search or seizure was based either wholly or partly on an informant’s tip, defense counsel almost invariably will want to obtain the informant’s name from the police or the prosecutor, so as to be able to make an independent investigation of the informant’s prior “track record,” the informant’s “basis of knowledge,” and any bias that the informant may have against the defendant. Disclosure of the informant’s identity is not available as a matter of right, but can be ordered in the discretion of the judge presiding at a suppression hearing. *See, e.g., Schmid v. State*, 615 P.2d 565, 570-71 (Alaska 1980). The so-called “informer’s privilege” and its effect upon the defendant’s right to disclosure of the names of confidential informers at a suppression hearing is discussed in § 18.10.1 *supra*.

G. Settings Governed by Specialized Fourth Amendment Standards

25.36. “Administrative” Searches of Commercial Premises

Entries and inspections of commercial premises are the subject of specialized canons of Fourth Amendment doctrine usually identified by the rubrics “searches of licensed dealers in regulated industries” and “administrative searches.” Warrantless entries and inspections are permissible in the case of a few “‘pervasively regulated business[es],’ . . . and . . . ‘closely regulated’ industries ‘long subject to close supervision and inspection’” (*Marshall v. Barlow’s Inc.*, 436 U.S. 307, 313 (1978)), but this category is a narrow one. *See Los Angeles v. Patel*, 135 S. Ct. 2443, 2454-55 (2015) (“Over the past 45 years, the Court has identified only four industries that ‘have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise,’ *Barlow’s, Inc.*, 436 U.S., at 313 Simply listing these industries refutes petitioner’s argument that hotels should be counted among them. Unlike liquor sales, *Colonnade Catering Corp. v. United States*, 397 U.S. 72 . . . (1970), firearms dealing, *United States v. Biswell*, 406 U.S. 311. . . (1972), mining, *Donovan v. Dewey*, 452 U.S. 594 . . . (1981), or running an automobile junkyard, *New York v. Burger*, 482 U.S. 691 . . . (1987), nothing inherent in the operation of hotels poses a clear and significant risk to the public welfare. ¶ Moreover, ‘[t]he clear import of our cases is that the closely regulated industry . . . is the exception.’”).

For “administrative” searches and inspections of other sorts of business

premises and commercial enterprises, a search warrant or subpoena is required but may be issued without an individualized showing of cause. *Camara v. Municipal Court*, 387 U.S. 523 (1967); *See v. City of Seattle*, 387 U.S. 541 (1967). What is required in these latter cases, “in order for an administrative search to be constitutional, [is that] the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker” (*Los Angeles v. Patel*, *supra*, 135 S. Ct. at 2452). *See, e.g., Michigan v. Tyler*, 436 U.S. 499, 507-08 (1978) (“To secure a warrant to investigate the cause of a fire, an official must show more than the bare fact that a fire has occurred. The magistrate’s duty is to assure that the proposed search will be reasonable, a determination that requires inquiry into the need for the intrusion on the one hand, and the threat of disruption to the occupant on the other. For routine building inspections, a reasonable balance between these competing concerns is usually achieved by broad legislative or administrative guidelines specifying the purpose, frequency, scope, and manner of conducting the inspections. In the context of investigatory fire searches, which are not programmatic but are responsive to individual events, a more particularized inquiry may be necessary. The number of prior entries, the scope of the search, the time of day when it is proposed to be made, the lapse of time since the fire, the continued use of the building, and the owner’s efforts to secure it against intruders might all be relevant factors. Even though a fire victim’s privacy must normally yield to the vital social objective of ascertaining the cause of the fire, the magistrate can perform the important function of preventing harassment by keeping that invasion to a minimum.”).

25.37. Searches of a Probationer’s or Parolee’s Residence

In *Griffin v. Wisconsin*, 483 U.S. 868 (1987), the Supreme Court upheld a warrantless search of a probationer’s home by probation officers, pursuant to a state regulation that authorized “any probation officer to search a probationer’s home without a warrant as long as his supervisor approves and as long as there are ‘reasonable grounds’ to believe the presence of contraband – including any item that the probationer cannot possess under the probation conditions” (*id.* at 871). Acknowledging that “[a] probationer’s home, like anyone else’s, is protected by the Fourth Amendment’s requirement that searches be ‘reasonable,’” and that “we usually require that a search be undertaken only pursuant to a warrant (and thus supported by probable cause, as the Constitution says warrants must be)” (*id.* at 873), the Court explained that “[a] State’s operation of a probation system, like its operation of a school [see § 25.38 *infra*], government office or prison, or its supervision of a regulated industry [see § 25.36 *supra*], . . . presents ‘special needs’ beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements” (*id.* at 873-74). The Court held that “the special needs of Wisconsin’s probation system make the warrant requirement impracticable and justify replacement of the standard of probable cause by ‘reasonable grounds’” (*id.* at 876) and that “[t]he search of Griffin’s residence was ‘reasonable’ within the meaning of the Fourth Amendment because it was conducted pursuant to a valid regulation governing probationers” (*id.* at 880). *See also United States v. Payne*, 181 F.3d 781, 784, 786-87, 791 (6th Cir. 1999) (upholding the constitutionality of a Kentucky parole department policy similar

to the probation regulation upheld in *Griffin, supra*, because “the Kentucky policy is sufficiently specific and adopts a standard that is at least as demanding as the standard upheld in *Griffin*,” but suppressing the items seized by the parole officers because their “searches of the trailer [which “the government and Payne’s attorney have treated . . . as Payne’s residence”] and Payne’s truck were not justified by a reasonable suspicion that he possessed contraband”).

The *Griffin* rule is, by its terms and its underlying rationale, limited to “a ‘special needs’ search conducted by a probation officer monitoring whether the probationer is complying with probation restrictions” (*United States v. Knights*, 534 U.S. 112, 117 (2001)). See, e.g., *United States v. Carnes*, 309 F.3d 950, 960-61 (6th Cir. 2002) (“The government’s argument . . . that the special needs of law enforcement allowed the government to seize and listen to the six tapes seized at 1731 Harmon, is unavailing. . . . At the suppression hearing, the government argued that the tapes were seized to help establish a violation of the residency requirement of Carnes’s parole agreement. . . . The fact that the tapes were not listened to until well after the parole hearing shows that they were not originally seized, nor subsequently listened to, pursuant to the special authority granted the government for supervising parolees. . . . Where the government claims that ‘special needs’ of law enforcement justify an otherwise illegal search and seizure, a court must look to the ‘actual motivations of individual officers’. . . . Here, there is no evidence that the officers who seized the six tapes on January 14, 1997, were motivated by a desire to establish a violation of the residency requirement of Carnes’s parole agreement. Rather, the government’s failure to listen to the tapes until well after the parole hearing suggests some other motivation.”).

In *United States v. Knights, supra*, the Court addressed the distinct scenario of a defendant who had been placed on probation pursuant to a California statute that established a probation condition that the probationer will “[s]ubmit his . . . person, property, place of residence, vehicle, personal effects, to search at anytime [sic], with or without a search warrant, warrant of arrest or reasonable cause by any probation officer or law enforcement officer” (534 U.S. at 114) and who signed a probation order agreeing to abide by this condition and thus “was unambiguously informed of it” (*id.* at 114, 119). The question before the Court was “whether a [warrantless] search [of the probationer’s residence] pursuant to this probation condition, and supported by reasonable suspicion, satisfied the Fourth Amendment” (*id.*). Distinguishing the *Griffin* rule and its limitations, the Court observed that “nothing in the condition of probation suggests that it was confined to searches bearing upon probationary status and nothing more” (*id.* at 116). Nor did the Fourth Amendment “limit[] searches pursuant to this probation condition to those with a ‘probationary’ purpose” (*id.*). Analyzing the totality of the circumstances, and factoring in “the probation search condition . . . [as] a salient circumstance” (*id.* at 118) because it “significantly diminished Knights’ [sic] reasonable expectation of privacy” (*id.* at 120), the Court concluded that “the balance of the [] considerations requires no more than reasonable suspicion to conduct a search of this probationer’s house” (*id.* at 121). Because “Knights concede[d] . . . that the search in this case was supported by reasonable suspicion” (*id.* at 122), the Court upheld the warrantless search.

The *Knights* rule is self-evidently limited to cases in which a probation or parole condition clearly authorizes the state to search the probationer's or parolee's home, and in which the defendant was "unambiguously informed" of this condition (*id.* at 119). See, e.g., *Jones v. State*, 282 Ga. 784, 787-88, 653 S.E.2d 456, 459 (2007) (the *Knights* rule does not apply because the State has not identified any "valid law, legally authorized regulation, or sentencing order" that limited the defendant's "right not to have his home searched without a warrant" as a result of his probationary status and that provided him with adequate "notice of that deprivation of rights"). Moreover, the state courts are free to adopt a more protective rule under their state constitutions. See, e.g., *State v. Short*, 851 N.W.2d 474, 504-06 (Iowa 2014) ("[*State v.*] *Cullison* [, 173 N.W.2d 533 (1970)] rejected reasoning designed to strip or dilute constitutional protections for probationers home searches. . . . So should we. ¶ That leaves the additional constitutional requirements of obtaining a warrant from a neutral magistrate describing the place to be searched and the things to be sought with particularity. Whatever else may have been true in the past, obtaining a warrant from a judicial officer is not particularly onerous. ¶ The factual assertion in *Griffin* that it was impracticable for a probation officer to obtain a warrant was wrong then and it is even more wrong today. . . . ¶ . . . [U]nder the search and seizure provision of article I, section 8 of the Iowa Constitution, a valid warrant is required for law enforcement's search of a parolee's home."); *Commonwealth v. LaFrance*, 402 Mass. 789, 790, 792-95, 525 N.E.2d 379, 380, 381-83 (1988) ("[B]oth art. 14 of the Massachusetts Declaration of Rights and the Fourth Amendment to the Constitution of the United States forbid the search of a probationer or her premises unless the probation officer has at least a reasonable suspicion that a search might produce evidence of wrongdoing. The requirement that the probation officer have reasonable suspicion should be set forth expressly in any order imposing such a special condition. . . . ¶ . . . We accept for art. 14 purposes the principle that a reduced level of suspicion, such as 'reasonable suspicion,' will justify a search of a probationer and her premises. . . . ¶ . . . We need not define here the limits of reasonable suspicion. . . . It may be that *Terry v. Ohio* . . . [see § 25.9 *supra*] will provide guidance in defining reasonable suspicion. . . . ¶ The Supreme Court divided in the *Griffin* case over the question whether under the Fourth Amendment a warrant was required in support of the search of the probationer's home. . . . ¶ We are persuaded that a warrantless search of a probationer's home, barring the appropriate application of a traditional exception to the warrant requirement, cannot be justified under art. 14. Mr. Justice Blackmun's dissent in the *Griffin* case (joined on this point by Justices Brennan and Marshall) has the better of the argument concerning the propriety of a warrantless search of a probationer's home. . . . We agree with Justice Abrahamson of the Supreme Court of Wisconsin, dissenting in *State v. Griffin*, that the issuance of a search warrant on a proper showing of reasonable cause 'is not an undue burden on the probation officer and provides the protection for the probationer guaranteed by the constitution[]'); see generally § 17.11 *supra*.

25.38. Searches and Seizures of Students in School

The Fourth Amendment clearly applies to searches and seizures made by police officers inside a school building. See, e.g., *Piazzola v. Watkins*, 316

F. Supp. 624, 626-27 (M.D. Ala. 1970), *aff'd*, 442 F.2d 284 (5th Cir. 1971). It is equally clear that if a school official conducts a search or seizure of a student at the behest of the police, the school official is acting as an agent of the police and is subject to the same restrictions that would govern police conduct under the circumstances. *See, e.g., Picha v. Wielgos*, 410 F. Supp. 1214, 1219-21 (N.D. Ill. 1976); *Piazzola v. Watkins*, *supra*, 316 F. Supp. at 626-27; *M.J. v. State*, 399 So. 2d 996 (Fla. App. 1981); *State v. Heirtzler*, 147 N.H. 344, 349-52, 789 A.2d 634, 638-41 (2001). *See generally* Michael Pinard, *From the Classroom to the Courtroom: Reassessing Fourth Amendment Standards in Public School Searches Involving Law Enforcement Authorities*, 45 ARIZ. L. REV. 1067 (2003).

Absent police involvement, searches of students in public schools by teachers, principals, or other school officials are governed by Fourth Amendment rules originating in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985). The *T.L.O.* case established the premise that “the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject” (*id.* at 340), including the warrant requirement and the probable cause requirement (*id.* at 340-41). Thus, “the legality of a search of a student . . . depend[s] simply on the reasonableness, under all the circumstances, of the search” (*id.* at 341). The determination of “the reasonableness of any search involves a two-fold inquiry: first, one must consider ‘whether the . . . action was justified in its inception,’ . . . ; second, one must determine whether the search as actually conducted ‘was reasonably related in scope to the circumstances which justified the interference in the first place’” (*id.*). Compare *id.* at 345-47 (applying the standard to the facts of the *T.L.O.* case and concluding that (i) the school vice-principal’s “decision to open T.L.O.’s purse was reasonable” because a teacher had observed T.L.O. smoking cigarettes in the girls’ bathroom in violation of school rules and it was therefore reasonable to suspect that T.L.O. had cigarettes in her purse; (ii) when the vice-principal, in opening and removing a pack of cigarettes, observed a package of rolling papers, the “reasonable suspicion that T.L.O. was carrying marihuana as well as cigarettes in her purse . . . justified further exploration of T.L.O.’s purse, which turned up more evidence of drug-related activities: a pipe, a number of plastic bags of the type commonly used to store marihuana, a small quantity of marihuana, and a fairly substantial amount of money”; and (iii) “[u]nder these circumstances, it was not unreasonable to extend the search to a separate zippered compartment of the purse; and when a search of that compartment revealed an index card containing a list of ‘people who owe me money’ as well as two letters, the inference that T.L.O. was involved in marihuana trafficking was substantial enough to justify [the vice-principal] . . . in examining the letters to determine whether they contained any further evidence.”), with *Safford Unified School District # 1 v. Redding*, 557 U.S. 364, 368-69, 373-77 (2009) (applying the *T.L.O.* standard and concluding that (i) an assistant principal had adequate “suspicion . . . to justify a search of [a student’s] . . . backpack and outer clothing” in the student’s “presence and in the relative privacy of [the assistant principal’s] . . . office,” based upon information from other students giving rise to a reasonable suspicion that the student was “giving out contraband pills” in violation of a school rule and that the student was “carrying [such pills] . . . on her person and in the [backpack]”; but that (ii) when the school nurse and an administrative assistant thereafter conducted

a more intrusive search of the student's person in the nurse's office, directing the student to "remove her clothes down to her underwear, and then 'pull out' her bra and the elastic band on her underpants," "thus exposing her breasts and pelvic area to some degree," this "quantum leap from outer clothes and backpacks to exposure of intimate parts" violated the Fourth Amendment because the facts known to the school officials did not indicate that there was "danger to the [other] students from the power of the drugs [that the student was "reasonably suspected of carrying" – which were "common pain relievers"] or their quantity, . . . [or] any reason to suppose that . . . [the student] was carrying pills in her underwear."), and *G.C. v. Owensboro Public Schools*, 711 F.3d 623, 633-34 (6th Cir. 2013) (in a decision issued even before the Supreme Court's announcement of strict privacy protections for cell phones' digital content in *Riley v. California*, 134 S. Ct. 2473 (2014), the court of appeals holds that school officials' search of a cell phone confiscated from a student violated *T.L.O.*, notwithstanding the school officials' "background knowledge of [G.C.'s] drug abuse . . . [and] depressive tendencies," because "there is no evidence in the record to support the conclusion . . . that the school officials had any specific reason at the inception of the . . . search to believe that G.C. then was engaging in any unlawful activity or that he was contemplating injuring himself or another student"), and *In the Interest of Dumas*, 357 Pa. Super. 294, 298, 515 A.2d 984, 986 (1986) (striking down a school search under the *T.L.O.* standard because the assistant principal "was unable to articulate any reasons for [] his suspicion" that the student who had been caught smoking cigarettes was "involved with marijuana"), and *Coronado v. State*, 835 S.W.2d 636, 637, 641 (Tex. Crim. App. 1992) (although "the first prong of *T.L.O.* is met" in that the assistant principal had "reasonable grounds to suspect that [the student] was violating school rules by 'skipping'" class and leaving school early, the assistant principal's "searches of . . . [the student's] clothing and person, locker, and vehicle were excessively intrusive in light of the infraction of skipping school," notwithstanding the assistant principal's reasons for suspecting that the student was selling drugs to other students).

The Court in *T.L.O.* expressly reserved "the question, not presented by th[at] case, whether a schoolchild has a legitimate expectation of privacy in lockers, desks, or other school property provided for the storage of school supplies," and what "standards (if any) govern[] searches of such areas by school officials or by other public authorities acting at the request of school officials" (469 U.S. at 337 n.5). A number of lower court decisions have concluded that students have a reasonable expectation of privacy in their lockers, at least in the absence of an express school policy or state regulation that could render such an expectation unreasonable. *See, e.g., Commonwealth v. Snyder*, 413 Mass. 521, 526, 597 N.E.2d 1363, 1366 (1992) (citing caselaw from other jurisdictions). In situations involving a school policy or state regulation establishing a school's right of access to the contents of students' lockers, some courts have found that students lacked a reasonable expectation of privacy in their lockers (*see, e.g., In Interest of Isiah B.*, 176 Wis. 2d 639, 649-50, 500 N.W.2d 637, 641 (1993)), or had a reduced expectation of privacy in their lockers (*see, e.g., Commonwealth v. Cass*, 551 Pa. 25, 38-39, 709 A.2d 350, 356-57 (1998)), while other courts have held that students possess an undiminished expectation of privacy in their lockers despite such policies

or regulations (*see, e.g., State v. Jones*, 666 N.W.2d 142, 147-48 (Iowa 2003)).

Another question reserved in *T.L.O.* was “whether individualized suspicion is an essential element of the reasonableness standard . . . for searches by school authorities” (469 U.S. at 342 n.8.). Thereafter, the Court has twice upheld a program of random drug testing, without individualized suspicion, of students who voluntarily participated in extracurricular activities. *See Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 830-38 (2002) (in upholding a school district’s policy of random drug testing of students voluntarily participating in competitive extracurricular activities, the Court applies a three-pronged standard – which considers the nature of the privacy interest affected; the character of the intrusion; and the nature and immediacy of the government’s concerns and the efficacy of the policy in meeting them – and concludes that (1) the privacy interests of the children were diminished because they voluntarily chose to participate in extracurricular activities which were highly regulated; (2) urinalysis was a “negligible” intrusion, especially given that the test results were not turned over to law enforcement officials, the only consequence of refusing to participate in drug testing was nonparticipation in the extracurricular activity, and students did not face expulsion or suspension or any other school-related sanctions even if they tested positive; and (3) there was sufficient evidence of student use of drugs to justify the need for the drug testing program.); *Vernonia School District 47J v. Acton*, 515 U.S. 646, 648, 654-65 (1995) (in upholding a school district’s policy of “random urinalysis drug testing of students who participate in the District’s school athletics programs,” the Court applies the same three-pronged analytic apparatus employed in *Earls*, and concludes that (1) the very nature of school sports results in a lesser degree of privacy, and student athletes “voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally”; (2) the urinalysis testing process, as administered under the district’s guidelines, involved a “negligible” degree of intrusion; and (3) there was concrete evidence of a significant increase in the use of drugs by the student body, “particularly those involved in interscholastic athletics,” and there was a basis for concluding that in the case of “drug use by school athletes, . . . the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high.”). As the Court’s analyses in *Acton* and *Earls* make clear, the constitutionality of a search of students without individualized suspicion turns upon a balancing of context-specific facts and circumstances. *See, e.g., Doe ex rel. Doe v. Little Rock School District*, 380 F.3d 349, 351, 354-56 (8th Cir. 2004) (rejecting a school district’s attempt to apply *Acton* and *Earls* to justify a district practice of “subject[ing] secondary public school students to random, suspicionless searches of their persons and belongings,” and explaining that, “[u]nlike the suspicionless searches of participants in school sports and other competitive extracurricular activities that the Supreme Court approved in *Vernonia* and *Earls*, in which ‘the privacy interests compromised by the process’ of the searches were deemed ‘negligible,’ . . . the type of search at issue here invades students’ privacy interests in a major way”; “[i]n sharp contrast to these cases, the fruits of the searches at issue here are apparently regularly turned over to law enforcement and are used in criminal proceedings against students whose contraband is discovered”; and the district had failed to present the kinds of “particularized

evidence” offered by the school districts “[i]n both *Vernonia* and *Earls* . . . to ‘shore up’ their assertions of a special need to institute administrative search programs for extracurricular-activity participants.”); *B.C. v. Plumas Unified School District*, 192 F.3d 1260, 1268 & nn.10-11 (9th Cir. 1999) (rejecting a school district’s attempt to apply *Acton* to justify the use of a drug-sniffing dog to sniff all of the students in a classroom for drugs, and explaining that, “[i]n contrast [to *Acton*], the search in this case took place in a classroom where students were engaged in compulsory, educational activities,” and that, “[i]n sharp contrast” to *Acton*, “the record here does not disclose that there was any drug crisis or even a drug problem” at the school at the time of the search). See also *York v. Wahkiakum School District No. 200*, 163 Wash. 2d 297, 299, 178 P.3d 995, 997 (2008) (rejecting *Vernonia School District 47J v. Acton* on state constitutional grounds and holding that “warrantless random and suspicionless drug testing of student athletes violates the Washington State Constitution”).

H. Derivative Evidence: Fruits of Unlawful Searches and Seizures

25.39. The Concept of “Derivative Evidence”: Evidence That Must Be Suppressed as the Fruits of an Unlawful Search or Seizure

When government agents have violated the restrictions of the Fourth Amendment or state constitutional or statutory protections against unlawful searches or seizures, the court must suppress not only evidence directly obtained by the violation but also “derivative evidence” – that is, evidence to which the police are led “by the exploitation of that illegality” (*Wong Sun v. United States*, 371 U.S. 471, 488 (1963)). See also *Brown v. Illinois*, 422 U.S. 590, 597-603 (1975); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *Oregon v. Elstad*, 470 U.S. 298, 305-06 (1985) (dictum). “Under the Court’s precedents, the exclusionary rule encompasses both the ‘primary evidence obtained as a direct result of an illegal search or seizure’ and . . . ‘evidence later discovered and found to be derivative of an illegality,’ the so-called “‘fruit of the poisonous tree.’” *Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016) (dictum).

“*Wong Sun* . . . articulated the guiding principle for determining whether evidence derivatively obtained from a violation of the Fourth Amendment is admissible against the accused at trial: ‘The exclusionary prohibition extends as well to the indirect as the direct products of such invasions.’ 371 U.S., at 484. . . . As subsequent cases have confirmed, the exclusionary sanction applies to any ‘fruits’ of a constitutional violation – whether such evidence be tangible, physical material actually seized in an illegal search, items observed or words overheard in the course of the unlawful activity, or confessions or statements of the accused obtained during an illegal arrest and detention.” *United States v. Crews*, 445 U.S. 463, 470 (1980) (dictum). It also applies to the testimony of witnesses that has a sufficiently close “causal connection” to the constitutional violation (*United States v. Ceccolini*, 435 U.S. 268, 274 (1978); see *id.* at 274-75 (dictum)), although in order to exclude “live-witness testimony . . . , a closer, more direct link between the illegality and that kind of testimony is required” (*id.* at 278; see also *id.* at 280), except

perhaps “where the search was conducted by the police for the specific purpose of discovering potential witnesses” (*id.* at 276 n.4; *see also id.* at 279-80).

The possible chains of causal connection may be elaborate (*e.g.*, *Smith v. United States*, 344 F.2d 545 (D.C. Cir. 1965); *United States v. Tane*, 329 F.2d 848 (2d Cir. 1964)), and counsel should be alert to follow them out. “[T]he question” determining the excludability of any particular piece of evidence is said to be “whether the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance so as to remove the ‘taint’ imposed upon that evidence by the original illegality” (*United States v. Crews*, *supra*, 445 U.S. at 471). *Accord*, *Utah v. Strieff*, *supra*, 136 S. Ct. at 2061; *compare Dunaway v. New York*, 442 U.S. 200, 216-19 (1979), and *Taylor v. Alabama*, 457 U.S. 687 (1982), with *Rawlings v. Kentucky*, 448 U.S. 98, 106-10 (1980); and *see United States v. Ceccolini*, *supra*, 435 U.S. at 276 (“we have declined to adopt a ‘*per se* or “but for” rule’ that would make inadmissible any evidence, whether tangible or live-witness testimony, which somehow came to light through a chain of causation that began with an illegal arrest”); *id.* at 273-74.

Categories of derivative evidence that have been held tainted by a defendant’s unconstitutional arrest or detention, so as to require their suppression include:

(a) *Any physical object or substance seized without a warrant at or after the time of arrest, the validity of whose seizure depends on the arrest.* *Beck v. Ohio*, 379 U.S. 89 (1964); *Sibron v. New York*, 392 U.S. 40, 62-66 (1968); *Whiteley v. Warden*, 401 U.S. 560 (1971). Searches incident to arrest (§ 25.8 *supra*) and “frisks” incident to a *Terry* stop (§ 25.10 *supra*) are unconstitutional if the arrest or stop is unconstitutional. *E.g.*, *United States v. Di Re*, 332 U.S. 581 (1948); *Henry v. United States*, 361 U.S. 98 (1959). Similarly, if an unconstitutionally arrested or detained person attempts to drop or throw away objects or exposes them to the police when attempting to discard them, their observation and seizure are tainted by the arrest or detention. *Reid v. Georgia*, 448 U.S. 438 (1980) (*per curiam*); *see* § 25.13 *supra*.

(b) *Any observations made in the course of effecting the arrest – before, during, or after the arrest – whose validity depends on the arrest.* *Johnson v. United States*, 333 U.S. 10 (1948). Thus, when police enter a building pursuant to the “arrest entry” doctrine (§ 25.19 *supra*), unconstitutionality of the arrest or intended arrest will invalidate their observations of objects in “plain view” (§ 25.22.2 *supra*) within the building and their subsequent searches or seizures of those objects. *See Johnson v. United States*, *supra*, 333 U.S. at 12-13, 17; *Massachusetts v. Painten*, 368 F.2d 142 (1st Cir. 1966), *cert. dismissed*, 389 U.S. 560 (1968).

(c) *Confessions or statements made in custody after the arrest or otherwise induced by pressures flowing from the arrest* “unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is “sufficiently an act of free will to purge the primary taint”” (*Taylor v. Alabama*, *supra*, 457 U.S. at 690). *See Wong Sun v. United States*, *supra*, 371 U.S. at 484-88; *Brown v. Illinois*, *supra*, 422 U.S. at 597-603; *Dunaway v. New York*, *supra*, 442 U.S. at 216-19; *Lanier v. South Carolina*, 474 U.S. 25 (1985) (*per curiam*);

Kaupp v. Texas, 538 U.S. 626, 632-33 (2003) (per curiam). Compare *Rawlings v. Kentucky*, 448 U.S. 98, 106-10 (1980); and cf. *United States v. Ceccolini*, supra, 435 U.S. at 273-79 (dictum). But cf. *New York v. Harris*, 495 U.S. 14, 21 (1990) (“where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State’s use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of *Payton v. New York*, 445 U.S. 573 (1980)”). Compare *State v. Luwertsema*, 262 Conn. 179, 192-97, 811 A.2d 223, 231-34 (2002), partially overruled on other grounds, *State v. Salamon*, 287 Conn. 509, 949 A.2d 1092 (2008) (rejecting the *New York v. Harris* rule as a matter of state constitutional law); *People v. Harris*, 77 N.Y.2d 434, 568 N.Y.S.2d 702, 570 N.E.2d 1051 (1991) (same).

(d) Any physical object or substance or observation obtained by a search or seizure whose validity depends upon consent, when the consent is given in custody after the arrest or otherwise induced by pressures flowing from the arrest. Consent to a police search or seizure (§ 25.18 supra) is ineffective if given during an unlawful confinement (*Florida v. Bostick*, 501 U.S. 429, 433-34 (1991) (if Bostick’s consent to search had been obtained during a period of unlawful detention, the results of that search “must be suppressed as tainted fruit”); *Florida v. Royer*, 460 U.S. 491, 507-08 (1983) (plurality opinion); *id.* at 509 (concurring opinion of Justice Powell); *id.* (concurring opinion of Justice Brennan); *United States v. Murphy*, 703 F.3d 182, 190 (2d Cir. 2012); *Watson v. United States*, 249 F.2d 106 (D.C. Cir. 1957); *United States v. Klapholz*, 230 F.2d 494 (2d Cir. 1956)), just as a confession or incriminating statement would be (see § 26.15 infra).

(e) Fingerprint exemplars taken after the arrest (*Davis v. Mississippi*, 394 U.S. 721 (1969); *Hayes v. Florida*, 470 U.S. 811 (1985); *Bynum v. United States*, 262 F.2d 465 (D.C. Cir. 1958); see *Taylor v. Alabama*, supra, 457 U.S. at 692-93 (dictum)), and, by the same logic, any other evidence obtained through physical custody of the defendant – lineup identifications, body-test results, and so forth (see § 25.14 supra). E.g., *United States v. Crews*, 445 U.S. 463, 472 (1980) (the Court assumes the Government is correct in conceding that pretrial photo and lineup identifications following an arrest made without probable cause must be suppressed); *Young v. Conway*, 698 F.3d 69, 84-85 (2d Cir. 2012) (a state-court order suppressing the complainant’s lineup identification as the fruit of an unconstitutional arrest without probable cause also should have precluded an in-court identification by the complainant because “the State failed to meet its burden to prove an independent basis [for an in-court identification] by clear and convincing evidence”); *People v. Teresinki*, 30 Cal. 3d 822, 832, 180 Cal. Rptr. 617, 622-23, 640 P.3d 753, 758-59 (1982) (a pretrial identification by an eyewitness to a robbery based upon booking photos resulting from a vehicle stop and investigative detention made without reasonable suspicion must be suppressed); *Ferguson v. State*, 301 Md. 542, 547-53, 483 A.2d 1255, 1257-60 (1984) (an identification by a robbery victim in a holding cell show-up following an arrest without probable case must be suppressed); *State v. Le*, 103 Wash. App. 354, 360-67, 12 P.3d 653, 656-60 (2000) (an identification by a police officer who had witnessed a fleeing burglar and was called to view the defendant in a show-up at the scene of the defendant’s warrantless arrest in his home – a dwelling entry that violated the rule of *Payton v. New York* – should have been suppressed, although the trial court’s failure to suppress

it was harmless error because of other overwhelming evidence of guilt); 6 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 11.4(g) (5th ed. 2012 & Supp.); *but see United States v. Olivares-Rangel*, 458 F.3d 1104, 1112-16 (10th Cir. 2006) (holding that the exclusion of physical evidence obtained by routine processing of an arrestee following an unconstitutional arrest – in this case, an arrest tainted by an investigative stop without reasonable suspicion – is required only if the arrest was made for the purpose of obtaining that evidence). Different kinds of police lawlessness may entail different evidentiary consequences. *Compare People v. Gethers*, 86 N.Y.2d 159, 654 N.E.2d 102, 630 N.Y.S.2d 281 (1995) (a police-arranged identification following an arrest without probable cause must be excluded), *with People v. Jones*, 2 N.Y.3d 235, 810 N.E.2d 415, 778 N.Y.S.2d 133 (2004) (a police-arranged identification following a warrantless home arrest in violation of *Payton v. New York* ordinarily needs not be excluded).

(f) *Evidence derived from any of the foregoing sources.* See, e.g., *United States v. Nora*, 765 F.3d 1049 (9th Cir. 2014). However, evidence obtained by the police following an unconstitutional search or seizure is not suppressible if the prosecution shows that (i) the police officers’ knowledge of the evidence and access to it derived from an “independent source” unconnected with the search or seizure (*Segura v. United States*, 468 U.S. 796 (1984); *Murray v. United States*, 487 U.S. 533 (1988)), or (ii) the evidence “ultimately or inevitably would have been discovered by lawful means” in the course of events even if the search or seizure had not produced it (*Nix v. Williams*, 467 U.S. 431, 444 (1984) (a Sixth Amendment decision placed on grounds equally applicable to the Fourth Amendment exclusionary rule)); or (iii) “the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that ‘the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained’” (*Utah v. Strieff*, 136 S. Ct. 2056, 2061 (2016)). This third exception to the exclusionary rule goes by the name of “the attenuation doctrine” (*id.*). Applying it in the *Strieff* case, the Court held that the “doctrine applies when an officer makes an unconstitutional investigatory stop; learns during that stop that the suspect is subject to a valid arrest warrant; and proceeds to arrest the suspect and seize incriminating evidence during a search incident to that arrest” (*id.* at 2059). “The three factors articulated in *Brown v. Illinois*, 422 U.S. 590 (1975), guide our analysis. First, we look to the ‘temporal proximity’ between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search. . . . Second, we consider ‘the presence of intervening circumstances.’ . . . Third, and ‘particularly’ significant, we examine ‘the purpose and flagrancy of the official misconduct.’” *Utah v. Strieff*, 136 S. Ct. at 2062. The latter two considerations were determinative, the Court wrote, because (a) “the second factor, the presence of intervening circumstances, strongly favors the State”; “the warrant was valid, it predated . . . [the] investigation [which generated the *Terry* stop of *Strieff*], and it was entirely unconnected with the stop. And once . . . [the investigating officer] discovered the warrant, he had an obligation to arrest *Strieff*.” (*Utah v. Strieff*, 136 S. Ct. at 2062); and (b) the investigating officer “was at most negligent . . . [i]n stopping *Strieff*”: he made “errors in judgment” but “there is no indication that this unlawful stop was part of any systemic or recurrent police

misconduct. To the contrary, all the evidence suggests that the stop was an isolated instance of negligence that occurred in connection with a bona fide investigation of a suspected drug house”: “[I]t is especially significant that there is no evidence that . . . [this] illegal stop reflected flagrantly unlawful police misconduct.” (*Id.* at 2063.)

25.40. Prosecutorial Burden of Disproving “Taint” of Unlawful Search and Seizure

When unconstitutional activity by the police or other government agents has been shown that may have led to evidence proffered by the prosecution, the prosecutor has the burden of demonstrating that the evidence is untainted. *Harrison v. United States*, 392 U.S. 219, 224-26 (1968); *Brown v. Illinois*, 422 U.S. 590, 604 (1975); *Dunaway v. New York*, 442 U.S. 200, 218 (1979); *Rawlings v. Kentucky*, 448 U.S. 98, 107, 110 (1980); *Taylor v. Alabama*, 457 U.S. 687, 690 (1982); *Kaupp v. Texas*, 538 U.S. 626, 633 (2003) (per curiam); *United States v. Paroutian*, 299 F.2d 486 (2d Cir. 1962), *aff’d after remand*, 319 F.2d 661 (2d Cir. 1963); *cf. Alderman v. United States*, 394 U.S. 165, 183 (1969) (dictum); and compare *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274, 286-87 (1977). *See, e.g., United States v. Stokes*, 733 F.3d 438, 446 (2d Cir. 2013) (the trial court erred in finding that the government had satisfied its burden of proving “by a preponderance of the evidence that the guns and ammunition would inevitably have been discovered”: the trial court “failed to account for all of the demonstrated historical facts in the record, and in doing so, failed adequately to consider . . . plausible contingencies that might not have resulted in the guns’ discovery”); *Rodriguez v. State*, 187 So. 3d 841, 849 (Fla. 2015) (“The question before this Court is whether the inevitable discovery rule requires the prosecution to demonstrate that the police were in the process of obtaining a warrant prior to the misconduct or whether the prosecution need only establish that a warrant could have been obtained with the information available prior to the misconduct.”; “Because the exclusionary rule works to deter police misconduct by ensuring that the prosecution is not in a better position as a result of the misconduct, the rule cannot be expanded to allow application where there is only probable cause and no pursuit of a warrant. If the prosecution were allowed to benefit in this way, police misconduct would be encouraged instead of deterred, and the rationale behind the exclusionary rule would be eviscerated.”).

In *Nix v. Williams*, 467 U.S. 431, 444 n.5 (1984), the Supreme Court implied that “the usual burden of proof” on this issue is “a preponderance of evidence.” It may, however, be greater in situations in which the illegality is peculiarly likely to have tainted the sort of evidence that the prosecution is offering or when there is peculiar “difficulty in determining” questions of cause and effect because these involve “speculative elements” (*id.*). Both considerations were mentioned in *Nix* as distinguishing *United States v. Wade*, 388 U.S. 218, 240 (1967), which held that the prosecutor’s burden of proof in showing that in-court identification testimony is not tainted by the witness’s exposure to the accused in an earlier, unconstitutional identification confrontation is “clear and convincing evidence.” *See also Moore v. Illinois*, 434 U.S. 220, 225-26 (1977) (dictum). *And see Kastigar v. United States*, 406 U.S. 441, 461-62 (1972),

holding that when an individual has given compelled testimony under an immunity grant, the prosecution bears “the heavy burden of proving that all of the evidence it proposes to use was derived from legitimate independent sources.” See also *Braswell v. United States*, 487 U.S. 99, 117 (1988); *United States v. Hubbell*, 530 U.S. 27, 40 & n.22 (2000). Both *Nix* and *Wade* were Sixth Amendment right-to-counsel cases; *Kastigar* and *Braswell* and *Hubbell* were Fifth Amendment self-incrimination cases; the Supreme Court has not squarely addressed the prosecutor’s burden of proving its evidence untainted following a Fourth Amendment search-and-seizure violation. But there appears to be no reason to distinguish among kinds of constitutional violations when it comes to the standards for determining whether derivative evidence is “purged of the primary taint” (*Johnson v. Louisiana*, 406 U.S. 356, 365 (1972)). The *Nix* opinion derived its statement of the “usual burden of proof at suppression hearings” from Fourth and Fifth Amendment caselaw (see also *Colorado v. Connelly*, 479 U.S. 157, 167-69 (1986)); *Wade*’s companion case, *Gilbert v. California*, 388 U.S. 263, 272-73 (1967), expressly adopted principles of taint that were first announced in the Fourth Amendment context (see also *Moore v. Illinois*, *supra*, 434 U.S. at 226, 231); the Court in *Harris v. New York*, 401 U.S. 222, 224-25 (1971), relied upon a Fourth Amendment case (*Walder v. United States*, 347 U.S. 62 (1954)) when deciding the exclusionary consequences of a *Miranda* violation; and it later treated *Harris* as authoritative in another Fourth Amendment case (*United States v. Havens*, 446 U.S. 620, 624-27 (1980)). The exclusionary rules that enforce the Fourth, Fifth, and Sixth Amendments are said to have the same essential purpose: “to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it” (*Elkins v. United States*, 364 U.S. 206, 217 (1960)). See *Colorado v. Connelly*, *supra*, 479 U.S. at 166; *Linkletter v. Walker*, 381 U.S. 618, 633, 636-37 (1965) (Fourth Amendment); *Stone v. Powell*, 428 U.S. 465, 484-88 (1976) (same); *Illinois v. Krull*, 480 U.S. 340, 347 (1987) (same); *Johnson v. New Jersey*, 384 U.S. 719, 729-31 (1966) (Fifth Amendment); *Stovall v. Denno*, 388 U.S. 293, 297 (1967) (Sixth Amendment); cf. *United States v. Payner*, 447 U.S. 727, 735-36 n.8 (1980); *United States v. Johnson*, 457 U.S. 537, 561 (1982). Rules for litigating issues of taint under all three Amendments are therefore presumptively similar. But see *Oregon v. Elstad*, 470 U.S. 298, 304-09 (1985).

State constitutional decisions may heighten the prosecution’s burden of dissipating taint. See, e.g., *State v. Rodrigues*, 128 Hawai’i 200, 211-15, 286 P.3d 809, 820-24 (2012) (discussing and applying a state constitutional rule that follows Justice Brennan’s dissent in *Nix v. Williams* by requiring that the prosecution “satisfy a heightened burden of proof” of “clear and convincing evidence” in order to rely on the inevitable discovery exception); and see generally § 17.11 *supra*.

25.41. Relevance of the “Flagrancy” of the Police Conduct in Ascertaining “Taint”

A passage in *Brown v. Illinois*, 422 U.S. 590, 604 (1975), indicates that “the purpose and flagrancy of . . . official misconduct are . . . relevant” in determining the scope of taint that flows from Fourth Amendment violations. See also *Dunaway v. New York*, 442 U.S. 200, 218 (1979); *Rawlings v. Kentucky*, 448

U.S. 98, 109-10 (1980); *Taylor v. Alabama*, 457 U.S. 687, 693 (1982); *Kaupp v. Texas*, 538 U.S. 626, 633 (2003) (per curiam).

The *Brown* case itself involved the question of the admissibility of a confession following an illegal arrest (as did *Dunaway*, *Rawlings*, *Taylor*, and *Kaupp*). The *Brown* majority opinion leaves unclear whether the “flagrancy” principle is limited to that issue or is applicable to determinations of taint in other contexts. Arguably, “flagrancy” is particularly relevant in connection with the inquiry whether confessions – “(verbal acts, as contrasted with physical evidence)” (422 U.S. at 600) – are tainted by unconstitutional police treatment of a suspect because the *degree* of official disregard of a suspect’s rights is particularly likely to affect the suspect’s choice to confess. See *Oregon v. Elstad*, 470 U.S. 298, 312 (1985). The *Brown* majority notes specifically that “[t]he manner in which Brown’s arrest was effected gives the appearance of having been calculated to cause surprise, fright, and confusion” (422 U.S. at 605). If this is the rationale for considering “flagrancy” as a factor in the exclusionary calculus in confession cases, then “flagrancy” should also be considered in cases involving motions to suppress the tangible fruits of searches and seizures based on consent given after an unconstitutional arrest or stop, or in unconstitutional detention, or as a result of other unconstitutional police conduct that is potentially intimidating. And the courts do consistently consider the “flagrancy of . . . official misconduct” in consent-search cases. *E.g.*, *United States v. Martinez*, 486 F.3d 855, 865 (5th Cir. 2007) (applying the flagrancy principle in determining to exclude firearms seized in a dwelling search based upon consent given following a stop made without reasonable suspicion); *United States v. Robeles-Ortega*, 348 F.3d 679, 684-85 (7th Cir. 2003) (applying the flagrancy principle in determining to exclude drugs seized in a dwelling search based upon consent given following a forcible, warrantless entry by five DEA agents with drawn guns); *United States v. Jones*, 234 F.3d 234, 243 (5th Cir. 2000) (applying the flagrancy principle in determining to exclude drugs seized in a vehicle search based on consent given after a vehicle stop was unconstitutionally prolonged); *State v. Munroe*, 244 Wis. 2d 1, 13-14, 630 N.W.2d 223, 228-29 (Wis. App. 2001) (applying the flagrancy principle in determining to exclude drugs seized in a motel-room search based on consent given after an entry to request identification was unconstitutionally prolonged).

But the “flagrancy” principle appears to apply more broadly than in cases involving intimidating police conduct that may influence a suspect’s will to confess or consent. The *Brown* majority supports its “flagrancy” statement with a footnote citing lower court decisions that involved both confessional and nonconfessional evidence (*Brown v. Illinois*, *supra*, 422 U.S. at 604 n.9); and it purports, at the outset of its opinion, to be explicating the principles announced in *Wong Sun v. United States*, 371 U.S. 471 (1963), “to be applied where the issue is whether statements *and other evidence* obtained after an illegal arrest or search should be excluded” (422 U.S. at 597 (emphasis added)). A concurring opinion by Justice Powell explains the relevance of “flagrancy” by reference to a notion which has appeared in a few other Supreme Court decisions (see, e.g., *United States v. Peltier*, 422 U.S. 531, 542 (1975); *United States v. Janis*, 428 U.S. 433, 454 n.28, 458-59 n.35 (1976)), that the exclusionary rule “is most likely to be effective” in cases of willful or gross police violations of

the Constitution (422 U.S. at 611). If *this* is the rationale for the “flagrancy” principle – or any part of its rationale – then the principle should apply to all exclusionary-rule issues. “In view of the deterrent purposes of the exclusionary rule[,] consideration of official motives may play some part in determining whether application of the exclusionary rule is appropriate. . . .” *Scott v. United States*, 436 U.S. 128, 135-36 (1978) (dictum). See also *id.* at 139 n.13; *United States v. Leon*, 468 U.S. 897, 911 (1984). Strong support for the proposition that “flagrancy” is relevant in this broader manner to the adjudication of issues bearing on the excludability of derivative evidence is provided by the Supreme Court’s opinion in *Utah v. Strieff*, 136 S. Ct. 2056 (2016), summarized in § 25.39 subdivision (f) *supra*. As noted there, *Strieff* repeatedly refers to the “flagrancy of the official misconduct” as “particularly’ significant” (*id.* at 2062) and “especially significant” (*id.* at 2063) and explains that its consideration “reflects . . . [the exclusionary rule’s core deterrent] rationale by favoring exclusion only when the police misconduct is most in need of deterrence – that is, when it is purposeful or flagrant” (*id.*). For additional cases that take account of the flagrancy of unconstitutional police conduct in applying the exclusionary rule to evidence other than confessions and the products of consent searches, see, e.g., *People v. Sampson*, 86 Ill. App. 3d 687, 694, 408 N.E.2d 3, 9, 41 Ill. Dec. 657, 663 (1980) (requiring a hearing on a motion to suppress a lineup identification following an arrest without probable cause); *Ferguson v. State*, 301 Md. 542, 549-53, 483 A.2d 1255, 1258-60 (1984) (excluding a show-up identification following an arrest without probable cause); *Hill v. State*, 692 S.W.2d 716, 723 (Tex. Crim. App. 1985) (excluding a lineup identification following an arrest without probable cause or any legal authorization, made for the purpose of exhibiting the defendant in the lineup); *State v. Le*, 103 Wash. App. 354, 360-62, 12 P.3d 653, 657-58 (2000) (holding that a pretrial identification by a police officer who had witnessed a fleeing burglar and was called to view the defendant in a show-up at the scene of the defendant’s warrantless home arrest in violation of the rule of *Payton v. New York*, 445 U.S. 573 (1980), should have been suppressed, although its admission was harmless because of other overwhelming evidence of guilt); and *cf. United States v. Olivares-Rangel*, 458 F.3d 1104, 1112-16 (10th Cir. 2006) (holding that the exclusion of physical evidence obtained by routine processing of an arrestee following an unconstitutional arrest is required only if the arrest was made for the purpose of obtaining that evidence). Compare *Brendlin v. California*, 551 U.S. 249, 259-61, 263 (2007) (rejecting a lower court approach that would have permitted a police claim of lawful intent to *uphold* a seizure – by treating an officer’s assertion that s/he had no intent to seize an individual as a basis for finding that no such seizure took place – and instead announcing a rule that is designed to avert the “powerful incentive” that police have to engage in certain “kind[s] of” conduct the Court has previously found to be unlawful). *But cf. Whren v. United States*, 517 U.S. 806 (1996) (rejecting the argument that an objectively valid traffic stop is unconstitutional when it is used as a pretext for an impermissible investigative search, and stating more generally that, in making the initial determination whether police action is constitutional, the Supreme Court has “never held . . . that an officer’s motive invalidates objectively justifiable behavior under the Fourth Amendment” (*id.* at 812); thus, that “[s]ubjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis” (*id.* at 813)); *Arkansas v. Sullivan*, 532 U.S.

769 (2001) (per curiam) (same); *Devenpeck v. Alford*, 543 U.S. 146, 153 (2004) (“Our cases make clear that an arresting officer’s state of mind (except for the facts that he knows) is irrelevant to the existence of probable cause.”).

See § 24.5.1, third paragraph *supra* for a tactical *caveat* regarding defense recourse to “flagrancy” analysis.

25.42. Unavailability of “Tainted” Evidence as Justification for Any Subsequent Police Action

Illegally obtained evidence or information that may not be used in court also may not be used to justify any subsequent police action. The fruits of an illegal search, for example, may not be used to supply the probable cause required for a later arrest (*Johnson v. United States*, 333 U.S. 10 (1948)), or search (see *United States v. Paroutian*, 299 F.2d 486 (2d Cir. 1962), *aff’d after remand*, 319 F.2d 661 (2d Cir. 1963); cf. *New Jersey v. T.L.O.*, 469 U.S. 325, 344 (1985) (dictum)), or for the issuance of a warrant (*United States v. Giordano*, 416 U.S. 505, 529-34 (1974); *Steagald v. United States*, 451 U.S. 204 (1981) (by implication); *Hair v. United States*, 289 F.2d 894 (D.C. Cir. 1961)). When they are so used, the products of the second police action are tainted by the illegality of the first (see *Alderman v. United States*, 394 U.S. 165, 177 (1969) (dictum); *United States v. Karo*, 468 U.S. 705, 719 (1984) (dictum)), unless the prosecution shows “sufficient untainted evidence” (that is, information not derived in any way from the first action) to justify the later one (*id.*). This evidence must be “genuinely independent of [the] . . . earlier, tainted [police action],” a condition that cannot be met if either (1) the police “decision to seek [a] . . . warrant [or conduct the second search] was prompted by what they had seen during the initial entry,” or (2) “information obtained during that entry was presented to the Magistrate and affected his decision to issue the warrant [or is necessary to justify the second search without a warrant, if it was so made]” (*Murray v. United States*, 487 U.S. 533, 542 (1988)). Cf. *United States v. Hubbell*, 530 U.S. 27 (2000), discussed in § 12.6.4.1 *supra*.

Chapter 26

Motions To Suppress Confessions, Admissions, and Other Statements of the Defendant

A. Introduction

26.1. *Strategic Reasons for Seeking Suppression of the Defendant's Statements, Whether Inculpatory or Exculpatory*

The doctrines described in this chapter supply grounds for suppressing not only confessions but any statement by the defendant – “whether inculpatory or exculpatory – that the *prosecution* may seek to introduce at trial” (*Rhode Island v. Innis*, 446 U.S. 291, 301 n.5 (1980) (emphasis in original); *see also Miranda v. Arizona*, 384 U.S. 436, 476-77 (1966)).

Ordinarily, counsel will want to suppress all statements made by the defendant. In the case of a confession or a damaging admission, this is self-evident; the confession or admission is frequently the most damning thing the prosecutor has. In cases involving ostensibly exculpatory statements, a suppression motion is also the prudent course, since the facts that emerge at trial may render the statement more damaging than counsel can predict. For example, a statement asserting self-defense may prove to be detrimental in a case in which the state has no other persuasive proof that the defendant was the person who committed the assault. Also, counsel's pursuit of a suppression motion may serve the ancillary goals of discovery and creation of transcript material for use in impeaching prosecution witnesses at trial. See §§ 24.2, 24.4.2-24.4.3 *supra*.

B. Involuntary Statements

26.2. *General Standard for Assessing Voluntariness*

As noted in § 24.3.4 subdivision (ii) *supra*, whenever the defense claims that a defendant's statement was “involuntary” and is therefore inadmissible in evidence as a matter of Due Process, the prosecution bears the burden of proving by a preponderance of the evidence (and, in some jurisdictions, by proof beyond a reasonable doubt) that the statement was voluntarily made.

“The [Due Process] question in each case is whether a defendant's will was overborne at the time he confessed” (*Reck v. Pate*, 367 U.S. 433, 440 (1961); *cf. United States v. Washington*, 431 U.S. 181, 188 (1977)): – “whether the behavior of the State's law enforcement officials was such as to overbear . . . [the defendant's] will to resist and bring about confessions not freely self-determined” (*Rogers v. Richmond*, 365 U.S. 534, 544 (1961)), or whether the confession was “the product of an essentially free and unconstrained choice by its maker” (*Culombe v. Connecticut*, 367 U.S. 568, 602 (1961) (plurality opinion), approved in *Schneekloth v. Bustamonte*, 412 U.S. 218, 225-26 (1973)). This question is said to be determined “on the ‘totality of the circumstances’ in any particular case” (*Boulden v. Holman*, 394 U.S. 478, 480 (1969)).

Despite the psychological flavor of the “voluntariness” label, the Supreme Court’s involuntary-statement caselaw has gradually evolved to focus as much upon police mistreatment of suspects for its own sake as upon the effects of the mistreatment in wearing the suspect down. *See, e.g., Spano v. New York*, 360 U.S. 315, 320-21 (1959); *Blackburn v. Alabama*, 361 U.S. 199, 206-07 (1960); *Jackson v. Denno*, 378 U.S. 368, 385-86 (1964); *Beecher v. Alabama*, 389 U.S. 35 (1967) (per curiam); *Sims v. Georgia*, 389 U.S. 404 (1967) (per curiam); *Brooks v. Florida*, 389 U.S. 413 (1967) (per curiam); *Crane v. Kentucky*, 476 U.S. 683, 687-88 (1986); *but see Moran v. Burbine*, 475 U.S. 412, 432-34 (1986).

“This Court has long held that certain interrogation techniques either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the Due Process Clause of the Fourteenth Amendment. . . . Although these decisions framed the legal inquiry in a variety of different ways, usually through the ‘convenient shorthand’ of asking whether the confession was ‘involuntary,’ . . . the Court’s analysis has consistently been animated by the view that ‘ours is an accusatorial and not an inquisitorial system,’ . . . and that, accordingly, tactics for eliciting inculpatory statements must fall within the broad constitutional boundaries imposed by the Fourteenth Amendment’s guarantee of fundamental fairness.” (*Miller v. Fenton*, 474 U.S. 104, 109-10 (1985).)

Indeed, *some* coercive behavior on the part of government agents is an indispensable ingredient of an involuntary-statement claim: In *Colorado v. Connelly*, 479 U.S. 157 (1986), the Court rejected a defendant’s contention that his confession was involuntary solely because his mental illness drove him to confess. But this does not mean that a defendant’s mental, emotional, or physical vulnerability is immaterial. To the contrary, *Connelly* reaffirms the clear holding of *Blackburn v. Alabama*, 361 U.S. 199 (1960), that mental illness is “relevant to an individual’s susceptibility to police coercion” (479 U.S. at 165); and in *Yarborough v. Alvarado*, 541 U.S. 652 (2004), the Court definitively declared that “whether ‘the defendant’s will was overborne,’ . . . [is] a question that logically can depend on ‘the characteristics of the accused’” (*id.* at 667-68), so “we do consider a suspect’s age and experience” – together with other “characteristics of the accused . . . [including] the suspect’s . . . education, and intelligence, . . . as well as a suspect’s prior experience with law enforcement” as bearing on “the voluntariness of a statement” (*id.*). *See also Haley v. Ohio*, 332 U.S. 596, 599 (1948), discussed in § 26.4.1 *infra*. Personal qualities and conditions relevant to the assessment of a suspect’s susceptibility to coercion include intellectual disability (*Reck v. Pate, supra*, 367 U.S. at 441-44; *Culombe v. Connecticut, supra*, 367 U.S. at 620-21, 624-25, 635), educational privation (*Payne v. Arkansas*, 356 U.S. 560 (1958); *Fikes v. Alabama*, 352 U.S. 191 (1957)), physical pain and drug ingestion (*Townsend v. Sain*, 372 U.S. 293 (1963); *Beecher v. Alabama*, 408 U.S. 234 (1972)), and any “unique characteristics of a particular suspect” (*Miller v. Fenton, supra*, 474 U.S. at 109) that impair the suspect’s “powers of resistance to overbearing police tactics” (*Reck v. Pate, supra*, 367 U.S. at 442). In addition, the propriety or impropriety of police conduct is itself measured, to a large extent, by its tendency to weaken the suspect’s will. *See, e.g., Spano v. New York*, 360 U.S. 315 (1959); *Lynumn v. Illinois*,

372 U.S. 528 (1963); *cf. Moran v. Burbine, supra*, 475 U.S. at 423 (“[a]lthough highly inappropriate, even deliberate deception of an attorney [that keeps the attorney from coming to the police station to advise a suspect who is undergoing interrogation] could not possibly affect a suspect’s decision to waive his *Miranda* rights unless he were at least aware of the incident”).

Thus the caselaw provides a basis for presenting involuntary-statement claims from any one or more of three perspectives:

- (a) with an emphasis upon the *behavior* of the police as constituting “coercive government misconduct” (*Colorado v. Connelly, supra*, 479 U.S. at 163) that is “revolting to the sense of justice” (*id.*, quoting *Brown v. Mississippi*, 297 U.S. 278, 286 (1936); *see, e.g., Brooks v. Florida, supra*, 389 U.S. at 414-15; *cf. Crowe v. County of San Diego*, 608 F.3d 406, 432 (9th Cir. 2010) (“One need only read the transcripts of the boys’ interrogations, or watch the videotapes, to understand how thoroughly the defendants’ conduct in this case ‘shocks the conscience.’ Michael and Aaron – 14 and 15 years old, respectively – were isolated and subjected to hours and hours of interrogation during which they were cajoled, threatened, lied to, and relentlessly pressured by teams of police officers. ‘Psychological torture’ is not an inapt description. In *Cooper [v. Dupnik]*, 963 F.2d 1220, 1223 (9th Cir. 1992)], we held that police violated an adult suspect’s substantive due process rights when they ‘ignored Cooper’s repeated requests to speak with an attorney, deliberately infringed on his Constitutional right to remain silent, and relentlessly interrogated him in an attempt to extract a confession.’ . . . The interrogations of Michael and Aaron are no less shocking. Indeed, they are more so given that the boys’ interrogations were significantly longer than Coopers’s, the boys were minors, and Michael was in shock over his sister’s brutal murder. The interrogations violated Michael’s and Aaron’s Fourteenth Amendment rights to substantive due process.”));
- (b) with an emphasis upon the *effects* of the police behavior on the accused’s psychological state, considering the accused’s individual weaknesses and vulnerabilities (*see, e.g., Culombe v. Connecticut, supra*, 367 U.S. at 620-21, 624-25, 635; *Davis v. North Carolina*, 384 U.S. 737 (1966); *Colorado v. Spring*, 479 U.S. 564, 573-74 (1987) (dictum)), as bearing on the question whether the confession was “‘the product of a rational intellect and a free will’” (*Mincey v. Arizona*, 437 U.S. 385, 398 (1978); *see also Townsend v. Sain, supra*, 372 U.S. at 308 (“[a]ny questioning by police officers which *in fact* produces a confession which is not the product of a free intellect renders that confession inadmissible” (emphasis in the original)); or
- (c) with an emphasis upon the *tendency* of the police behavior to overbear the will of someone in the accused’s position and condition (*see, e.g., Sims v. Georgia*, 389 U.S. 404 (1967); *Miller v. Fenton*,

supra, 474 U.S. at 116 (“the admissibility of a confession turns as much on whether the techniques for extracting the statements, as applied to *this* suspect, are compatible with a system that presumes innocence and assures that a conviction will not be secured by inquisitorial means as on whether the defendant’s will was in fact overborne” (emphasis in the original)).

Defense counsel should select the perspective or perspectives that will make the most of the facts of the particular case.

It should be noted that although the lower courts occasionally confuse or interweave analyses of involuntariness and *Miranda* claims, the two claims are separate and distinct. See, e.g., *Dickerson v. United States*, 530 U.S. 428, 432-35 (2000); *Miller v. Fenton*, *supra*, 474 U.S. at 109-10; *Oregon v. Elstad*, 470 U.S. 298, 303-04 (1985); *Colorado v. Connelly*, *supra*, 479 U.S. at 163-71; cf. *United States v. Patane*, 542 U.S. 630, 636-41 (2004) (plurality opinion). The doctrines may overlap in their application to the facts of a particular case: for example, the facts showing the involuntariness of the statement will usually also show the involuntariness of the defendant’s waiver of *Miranda* rights. Cf. *Colorado v. Connelly*, *supra*, 479 U.S. at 169-70. But counsel should be precise in identifying the constitutional basis of the claim, both because it may significantly affect the appropriate analysis (see, e.g., *Yarborough v. Alvarado*, *supra*, 541 U.S. at 667 (“the objective *Miranda* custody inquiry could reasonably be viewed as different from doctrinal tests that depend on the actual mindset of a particular suspect”)) and because it may affect the scope of relief for any constitutional violation that is found. For example, a statement suppressed on *Miranda* grounds cannot be used in the prosecution’s case in chief but can be used to impeach the defendant if s/he testifies at trial, whereas a statement suppressed because of a finding of involuntariness under the Due Process Clause cannot be used by the prosecution for any purpose. See § 26.19 *infra*. And the scope of exclusion of derivative evidence is broader in the case of involuntary statements than in the case of statements obtained in violation of *Miranda*. See § 26.16 *infra*.

26.3. Police Coercion Rendering a Statement Involuntary

As explained in § 26.2 *supra*, “coercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary’ within the meaning of the Due Process Clause of the Fourteenth Amendment” (*Colorado v. Connelly*, 479 U.S. 157, 167 (1986)). “While each confession case has turned on its own set of factors justifying the conclusion that police conduct was oppressive, all have contained a substantial element of coercive police conduct.” *Id.* at 163-64. The concept of “coercive police activity” includes physical force or the threat of force (see § 26.3.1 *infra*), excessively long detention or intimidating circumstances of detention (see § 26.3.2 *infra*), promises of leniency or threats of adverse governmental action (see § 26.3.3 *infra*), and certain tricks and artifices (see § 26.3.4 *infra*).

26.3.1. Physical Force or Threat of Force

As the Supreme Court observed in *Sims v. Georgia*, 389 U.S. 404, 407

(1967) (per curiam): “It needs no extended citation of cases to show that a confession produced by violence or threats of violence is involuntary and cannot constitutionally be used against the person giving it.” *See, e.g., Arizona v. Fulminante*, 499 U.S. 279, 287-88 (1991) (“Fulminante’s will was overborne in such a way as to render his confession the product of coercion” as a result of a fellow inmate, who was a government agent, offering to protect him from other inmates if he confessed: “Our cases have made clear that a finding of coercion need not depend upon actual violence by a government agent; a credible threat is sufficient.”); *Payne v. Arkansas*, 356 U.S. 560 (1958) (a confession was rendered involuntary by the totality of police conduct “and particularly the culminating threat” (*id.* at 567) that the Chief of Police was preparing to admit a lynch mob into the jail); *State v. Hilliard*, 318 S.E.2d 35, 36 (W. Va. 1983) (a confession was rendered involuntary when a police officer told the accused he would “knock [his] . . . head off” if he didn’t confess).

Serious physical abuse or the threat of it will ordinarily be held to render subsequent statements involuntary even when it is not closely related in time or circumstances to police interrogation or the making of the statements. *See, e.g., Sims v. Georgia, supra*, 389 U.S. at 405-07 (on the facts of the case, set forth at greater length in *Sims v. Georgia*, 385 U.S. 538 (1967), a confession was rendered involuntary because the defendant was physically abused, even though the abuse took place several hours prior to, and in a different location from, the confession); *Beecher v. Alabama*, 389 U.S. 35 (1967) (per curiam), as construed in *Colorado v. Connelly, supra*, 479 U.S. at 163 n.1 (the “crucial element of police overreaching” was holding a gun to the head of the wounded defendant at the time of his arrest, five days prior to the interrogation and confession).

26.3.2. Intimidating or Overbearing Circumstances of Interrogation or Detention

The coerciveness of interrogation increases with the length of the interrogation (*see, e.g., Haley v. Ohio*, 332 U.S. 596 (1948) (15-year-old questioned from midnight to 5 a.m.); *Spano v. New York*, 360 U.S. 315 (1959) (adult interrogated for eight hours); *Doody v. Ryan*, 649 F.3d 986, 990, 1023 (9th Cir. 2011) (*en banc*) (“sleep-deprived” 17-year-old interrogated by a “tag team of detectives” in a “relentless, nearly thirteen-hour interrogation”); *In the Interest of Jerrell C. J.*, 283 Wis. 2d 145, 162-63, 699 N.W.2d 110, 118-19 (2005) (14-year-old questioned for five-and-a-half hours)) and with the length of time that the suspect is held incommunicado by the police (*see, e.g., Haley v. Ohio, supra*, 332 U.S. at 600 (15-year-old held incommunicado and denied access to his mother for five days); *Gallegos v. Colorado*, 370 U.S. 49 (1962) (14-year-old held incommunicado for five days); *In the Interest of Jerrell C. J., supra*, 283 Wis. 2d at 162-63, 699 N.W.2d at 118-19 (“In this case, [14-year-old] Jerrell was handcuffed to a wall and left alone for approximately two hours. He was then interrogated for five-and-a-half more hours before finally signing a written confession The duration of Jerrell’s custody and interrogation was longer than the five hours at issue in *Haley*. Indeed, it was significantly longer than most interrogations. Under these circumstances, it is easy to see how Jerrell would be left wondering ‘if and when the inquisition would ever cease.’” (footnote omitted.))). *See also Crowe v. County of San Diego*, 608 F.3d 406, 432 (9th Cir. 2010)

(holding, in a civil rights action, that the police interrogations of two juvenile suspects violated their “Fourteenth Amendment rights to substantive due process” because the 14-year-old and 15-year-old youths “were isolated and subjected to hours and hours of interrogation during which they were cajoled, threatened, lied to, and relentlessly pressured by teams of police officers”). Prolonged detention under oppressive or debilitating conditions can render a confession involuntary even in the absence of extensive interrogation. *See Brooks v. Florida*, 389 U.S. 413, 414-15 (1967) (per curiam) (“Putting to one side quibbles over the dimensions of the windowless sweatbox into which Brooks was thrown naked with two other men, we cannot accept his statement as the voluntary expression of an uncoerced will. For two weeks this man’s home was a barren cage fitted only with a hole in one corner into which he and his cell mates could defecate. For two weeks he subsisted on a daily fare of 12 ounces of thin soup and eight ounces of water. For two full weeks he saw not one friendly face from outside the prison, but was completely under the control and domination of his jailers. These stark facts belie any contention that the confession extracted from him within minutes after he was brought from the cell was not tainted by the 14 days he spent in such an oppressive hole.”).

Even if the period of detention is not excessively long, unusually harsh conditions of confinement preceding the confession, such as deprivations of food, sleep, or medication, can render the confession involuntary. *See, e.g., Greenwald v. Wisconsin*, 390 U.S. 519 (1968) (denial of food, sleep, and medication for high blood pressure); *Reck v. Pate*, 367 U.S. 433 (1961) (inadequate food and medical attention); *Payne v. Arkansas*, 356 U.S. 560 (1958) (three days with little food); *State v. Garcia*, 301 P.3d 658, 666-67, 668 (Kan. 2013) (a confession was rendered involuntary by “coercive tactics” of “withholding requested relief for an obviously painful untreated gunshot wound over the course of a several-hours-long interrogation” (“[e]ven if Garcia did not confess solely to obtain medical treatment”) and by the officer’s assurance to the suspect that “a murder charge and accompanying life sentence could be avoided by admitting to the robbery and testifying against” another (even though “[i]t appears that Garcia refused to take the bait because he thought it was a trick.”)).

26.3.3. Promises of Leniency or Threats of Adverse Governmental Action

A confession is involuntary if “obtained by any direct or implied promises, however slight, [or] by the exertion of any improper influence” (*Hutto v. Ross*, 429 U.S. 28, 30 (1976) (per curiam), quoting *Bram v. United States*, 168 U.S. 532, 542-43 (1897)). *See, e.g., Lynnum v. Illinois*, 372 U.S. 528, 534 (1963) (a confession was rendered involuntary largely because police told the defendant “that state financial aid for her infant children would be cut off, and her children taken from her, if she did not ‘cooperate’”); *Haynes v. Washington*, 373 U.S. 503, 514 (1963) (a confession was rendered involuntary in part because of “the express threat of continued incommunicado detention and . . . the promise of communication with and access to family”); *Sharp v. Rohling*, 793 F.3d 1216, 1219 (10th Cir. 2015) (a confession was rendered involuntary by the interrogating officer’s promise of “leniency – no jail”); *United States v. Lopez*, 437 F.3d 1059, 1066 (10th Cir. 2006) (“the federal agents’ promising Lopez

that he would spend 6 rather than 60 years in prison if he admitted to killing Box by mistake and the Agents' misrepresenting the strength of the evidence they had against Lopez, resulted in Lopez's first confession being coerced and, thus, involuntary"; "although Lopez's second confession came after a night's sleep and a meal, and almost twelve hours elapsed between confessions, the coercion producing the first confession had not been dissipated."); *United States ex rel. Everett v. Murphy*, 329 F.2d 68 (2d Cir. 1964) (a confession was rendered involuntary when police falsely promised assistance in arranging less serious charges than they knew would be brought); *Rincher v. State*, 632 So. 2d 37, 40 (Ala. Crim. App. 1993) (a 17-year-old's stationhouse statement was "coerced" because a police captain "promised . . . [him] that he could go home if he made a statement"); *People v. Perez*, 243 Cal. App. 4th 863, 866-67, 196 Cal. Rptr. 3d 871, 875 (2016) ("Perez's statements were clearly motivated by a promise of leniency, rendering the statements involuntary": "a police sergeant told Perez that if he '[told] the truth' and was 'honest,' then, 'we are not gonna charge you with anything'"); *People v. Ramadan*, 314 P.3d 836, 838, 844-45 (Colo. 2013) (the defendant's statements were rendered involuntary by the interrogating officer's telling him "that, if he did not tell the truth, he would likely be deported to Iraq" and "insinuat[ing] that Ramadan would not be deported if he admitted to committing the sexual assault"); *State v. Howard*, 825 N.W.2d 32, 34, 41 (Iowa 2012) (an interrogating detective "crossed the line into an improper promise of leniency" and thereby rendered the confession inadmissible by repeatedly referring to "getting help" for the suspect (who had been arrested for sexually abusing a minor) and overtly suggesting that "if Howard admitted to sexually abusing A.E. he merely would be sent to a treatment facility similar to that used to treat drug and alcohol addiction in lieu of further punishment"); *State v. Polk*, 812 N.W.2d 670, 676 (Iowa 2012) (an interrogating officer "crossed the line" and rendered the resulting confession involuntary by "combining statements that county attorneys 'are much more likely to work with an individual that is cooperating' with suggestions . . . [that the defendant] would not see his kids 'for a long time' unless he confessed"); *In the Interest of J.D.F.*, 553 N.W.2d 585, 589 (Iowa 1996) ("J.D.F.'s inculpatory admission was induced by the police promising that they would take him home rather than to the juvenile intake center"); *State v. Brown*, 286 Kan. 170, 182 P.3d 1205 (2008) (a child welfare agency worker unconstitutionally coerced a statement by pressuring the defendant to admit culpability for his child's injury or else risk losing custody of his children); *Dye v. Commonwealth*, 411 S.W.3d 227, 232-34 (Ky. 2013) (police coerced a confession by falsely telling the 17-year-old defendant that the only way to avoid the death penalty was to confess, even though the police "knew, or should have known, that . . . [he] was not death-eligible," and by telling the defendant that "a confession is the only way he will avoid daily prison assault"); *State v. Wiley*, 61 A.3d 750, 760 (Me. 2013) (an interrogating officer's "concrete representation of a short jail sentence followed by probation in exchange for Wiley's cooperation" was a "primary motivating force for the ensuing confession" and rendered it involuntary); *State v. Smith*, 203 Neb. 64, 66, 277 N.W.2d 441, 443 (1979) (a confession was rendered involuntary when police promised to "attempt to have the matter transferred to juvenile court" if defendant cooperated).

26.3.4. *Tricks or Artifices*

Although the Supreme Court has never ruled a confession involuntary solely because it was induced by tricks or artifices, the Court has cited trickery as one of the factors considered when holding a confession involuntary in the light of “the totality of the situation” (*Spano v. New York*, 360 U.S. 315, 323 (1959) (a police officer who was a close childhood friend of the defendant’s misleadingly told the defendant that he, the officer, would get in trouble with the police force if the defendant failed to confess). *See also Colorado v. Spring*, 479 U.S. 564, 576 n.8 (1987) (dictum) (citing *Spano*, *supra*, and *Lynumn v. Illinois*, *supra*).

Lower courts have similarly treated police artifice as a factor in the “totality of the circumstances” leading to a finding of involuntariness. *See, e.g., Dye v. Commonwealth*, 411 S.W.3d 227, 232-34 (Ky. 2013), summarized in § 26.3.3 *supra*; *United States v. Lall*, 607 F.3d 1277, 1287 (11th Cir. 2010) (“Gaudio explicitly assured Lall that anything he said would not be used to prosecute him. . . . Gaudio’s promise was deceptive. . . . Gaudio told him he would not be charged for any statements or evidence collected on the night of the robbery. . . . It is inconceivable that Lall, an uncounseled twenty-year-old, understood at the time that a promise by Gaudio that he was not going to pursue any charges did not preclude the use of the confession in a federal prosecution. Indeed, it is utterly unreasonable to expect any uncounseled layperson, especially someone in Lall’s position, to so parse Gaudio’s words. On the contrary, the only plausible interpretation of Gaudio’s representations, semantic technicalities aside, was that the information Lall provided would not be used against him by Gaudio or anyone else. Under these circumstances, Gaudio’s statements were sufficient to render Lall’s confession involuntary and to undermine completely the prophylactic effect of the *Miranda* warnings Gaudio previously administered.”); *United States v. Lopez*, 437 F.3d 1059, 1065 (10th Cir. 2006) (“in this case, the agents’ misrepresentation of the evidence against Lopez, together with Agent Hopper’s promise of leniency to Lopez if he confessed to killing Box by mistake, are sufficient circumstances that would overbear Lopez’s will and make his confession involuntary”); *United States v. Morales*, 233 F. Supp. 160 (D. Mont. 1964) (a juvenile’s statement was rendered involuntary partly because he was falsely told that his accomplices had signed statements implicating him); *Gray v. Commonwealth*, 480 S.W.3d 253, 260-61 (Ky. 2016) (the police “overbore Gray’s free will” by showing him “falsified documents purporting to represent the official results of a state-police lab’s DNA examination” and making false statements about other evidence inculcating him); *In re Elias V*, 237 Cal. App. 4th 568, 571, 579, 583, 588, 188 Cal. Rptr. 3d 202, 204, 211, 214, 218 (2015) (a 13-year-old’s confession was rendered involuntary because his will was “‘overborne’” by the police officers’ use of “the type of coercive interrogation techniques condemned in *Miranda*,” including the so-called “‘Reid Technique,’” which uses “a ‘cluster of tactics’ [termed “‘maximization/ minimization’”] designed to convey . . . ‘the interrogator’s rock-solid belief that the suspect is guilty and that all denials will fail’ [and] ‘to provide the suspect with moral justification and face saving excuses for having committed the crime in question,’” and also including police claims of fictitious evidence implicating the suspect, notwithstanding that even “the most recent edition of the Reid manual on interrogations notes that .

. . . ‘this technique should be avoided when interrogating a youthful suspect with low social maturity’ because such suspects ‘may not have the fortitude or confidence to challenge such evidence and depending on the nature of the crime, may become confused as to their own possible involvement if the police tell them evidence clearly indicates they committed the crime.’”); *State v. Swindler*, 296 Kan. 670, 680-81, 294 P.3d 308, 315-16 (2013) (a statement was rendered involuntary because the police obtained it by using a “bait and switch” tactic of assuring the defendant that “he was free to terminate the interrogation and leave at any time” but then breaking these “rules of engagement . . . as soon as they thought Swindler might slip away without telling them what they wanted to hear”); *People v. Thomas*, 22 N.Y.3d 629, 642-43, 8 N.E.3d 308, 314-15, 985 N.Y.S.2d 193, 199-200 (2014) (police officers’ “highly coercive deceptions” – threatening the defendant that if he “continued to deny responsibility for his child’s injury, his wife would be arrested and removed from his ailing child’s bedside,” and falsely asserting that “his disclosure of the circumstances under which he injured his child was essential to assist the doctors attempting to save the child’s life” – “were of a kind sufficiently potent to nullify individual judgment in any ordinarily resolute person and were manifestly lethal to self-determination when deployed against defendant, an unsophisticated individual without experience in the criminal justice system”); *Young v. State*, 670 P.2d 591, 594-95 (Okla. Crim. App. 1983) (a statement was rendered involuntary partly because of a polygraph examiner’s “gross misstatement of the law” that the defendant would have to convince the judge and jury that he was “‘perfectly innocent’”); *State v. Caffrey*, 332 N.W.2d 269, 272-73 (S.D. 1983) (a juvenile’s statement was rendered involuntary partly because of the “interrogating officers['] deliberately mislead[ing] [him] . . . into thinking that he would be compelled to submit to a lie detector test”); *United States v. Anderson*, 929 F.2d 96 (2d Cir. 1991) (a DEA agent gave defendant Anderson *Miranda* warnings and “then proceeded to tell Anderson that if he asked for an attorney, no federal agents would be able to speak to him further; the agent added ‘this [is] the time to talk to us, because once you tell us you want an attorney we’re not able to talk to you and as far as I [am] concerned, we probably would not go to the U.S. Attorney or anyone else to tell them how much [you] cooperated with us.’ The ‘if you want a lawyer you can’t cooperate’ language was repeated three times.” (*id.* at 97); “[T]hese statements were false and/or misleading. It is commonplace for defendants who have acquired counsel to meet with federal law enforcement officials and agree to cooperate with the government.” (*id.* at 100); “Under the totality of the circumstances, Agent Valentine’s statements contributed to the already coercive atmosphere inherent in custodial interrogation and rendered Anderson’s . . . confession involuntary as a matter of law.” *Id.* at 102.); *In the Interest of Jerrell C.J.*, 283 Wis. 2d 145, 163-64, 699 N.W.2d 110, 119 (2005) (“pressures brought to bear on the [14-year-old] defendant” included police officers’ use of “psychological techniques” during interrogation: “Not only did the detectives refuse to believe Jerrell’s repeated denials of guilt, but they also joined in urging him to tell a different ‘truth,’ sometimes using a ‘strong voice’ that ‘frightened’ him. Admittedly, it does not appear from the record that Jerrell was suffering from any significant emotional or psychological condition during the interrogation. Nevertheless, we remain concerned that such a technique applied to a juvenile like Jerrell over a prolonged period of time could result in an involuntary confession.”).

Beyond their bearing on the issue of voluntariness, deceptive interrogation practices may affect the admissibility and weight of incriminating statements under other evidentiary principles. When interrogating officers ply a suspect with misleading information or use psychological ploys that create a significant risk of eliciting false admissions, counsel should urge the exclusion of any inculpatory responses as unreliable, under the court’s authority to refuse to admit evidence which is substantially more prejudicial than probative. See § 36.2.3 *infra*. In *Aleman v. Village of Hanover Park*, 662 F.3d 897, 906-07 (7th Cir. 2011), Circuit Judge Posner wrote for the court that “[t]he question of coercion is separate from that of reliability” and that “a trick that is as likely to induce a false as a true confession renders a confession inadmissible because of its unreliability even if its voluntariness is conceded. . . . If a question has only two answers – A and B – and you tell the defendant [untruthfully] that the answer is not A, and he has no basis for doubting you, then he is compelled by logic to ‘confess’ that the answer is B. . . . A confession so induced is worthless as evidence, and as a premise for an arrest.” (Judge Posner’s concluding phrase implies that if the defendant’s inculpatory statements are indispensable to the probable cause required for a subsequent arrest or search, the arrest or search is unconstitutional and any evidence which they produce is excludable on that account. See, *e.g.*, §§ 25.7, 25.16, 25.24, 25.26, 25.39, 25.42 *supra*; § 26.15 *infra*.) And even if the court refuses to entirely exclude a deception-induced inculpatory statement, defendant’s counsel is free to argue to the trier of fact at trial (see § 26.18 *infra*) that the deceptive interrogation procedure renders the statement incredible (see Brian L. Cutler & Richard A. Leo, *Analyzing Videotaped Interrogations and Confessions*, 40 THE CHAMPION (forthcoming, 2016); Brian L. Cutler & Richard A. Leo, *False Confessions in the 21st Century*, 40 THE CHAMPION 46 (May 2016)) and also casts doubt upon “the reliability of the investigation” as a whole by “discrediting . . . the police methods employed in assembling the case” (*cf.* *Kyles v. Whitley*, 514 U.S. 419, 446 (1995)).

Under some circumstances there may be a constitutionally significant distinction between “affirmative misrepresentations” by the police and their misleading of a suspect through “mere silence” (*Colorado v. Spring*, *supra*, 479 U.S. at 576 & n.8). In *Spring*, the Supreme Court reversed the finding of two state appellate courts that a suspect’s waiver of the privilege against self-incrimination was invalid and that his incriminating statements were improperly obtained when the interrogating officers who gave him his *Miranda* warnings (see § 26.5 *infra*) failed to inform him of the specific crimes about which he would be questioned (and when the context of the interrogation did not make these apparent). The Court rejected this finding on the broad ground that a suspect’s knowledge of the topic of an interrogation is not a necessary precondition for a valid waiver of the Fifth Amendment privilege and that interrogating officers are therefore not obliged to inform suspects on this subject. However, in dealing with *Spring*’s argument that his interrogators had practiced a form of trickery by failing to tell him what crimes they were investigating, the Court emphasized both that “the Colorado courts made no finding of official trickery” (479 U.S. at 575), and that “mere silence by law enforcement officials as to the subject matter of an interrogation” (*id.* at 576) is distinguishable from the “affirmative misrepresentations by the

police [that were found] sufficient to invalidate a suspect's waiver of the Fifth Amendment privilege" in *Spano v. New York* [360 U.S. 315 (1959)] . . . and *Lynumn v. Illinois* [372 U.S. 528, 534 (1963)] . . ." (479 U.S. at 576 n.8). "In this case, we are not confronted with an affirmative misrepresentation by law enforcement officials as to the scope of the interrogation and do not reach the question whether a waiver of *Miranda* rights would be valid in such a circumstance." *Id.* Cf. *Moran v. Burbine*, 475 U.S. 412, 422-24 (1986), noted in § 26.8.1 *infra*. See generally WELSH S. WHITE, *MIRANDA'S WANING PROTECTIONS: POLICE INTERROGATION PRACTICES AFTER DICKERSON* 209-15 (2001); Welsh S. White, *Police Trickery in Inducing Confessions*, 127 U. PA. L. REV. 581 (1979).

26.4. Characteristics of the Defendant That Are Relevant to the Assessment of Voluntariness

The Supreme Court has long recognized that personal characteristics of a suspect that render him or her particularly vulnerable to coercion – such as youth, mental illness, intellectual disability, limited intellect, limited education, intoxication, and the effects of drugs – are significant factors in the "totality of the circumstances" that determine the voluntariness of a statement. See, e.g., *Haley v. Ohio*, 332 U.S. 596 (1948) (age of 15); *Culombe v. Connecticut*, 367 U.S. 568 (1961) (I.Q. of 64, illiteracy); *Fikes v. Alabama*, 352 U.S. 191 (1957) (less than third-grade education). See § 26.2, fourth paragraph, *supra*.

In *Colorado v. Connelly*, 479 U.S. 157 (1986), the Court made clear that a claim of involuntariness for Fourteenth Amendment Due Process purposes cannot be based *solely* on the personal frailties of a suspect. Reversing a lower court finding of involuntariness predicated exclusively on the accused's mental illness, the Court emphasized that federal constitutional protections are triggered only by "state action" (*id.* at 165), and it accordingly held that some form of "coercive police activity is a necessary predicate to the finding that a confession is not 'voluntary' within the meaning of the Due Process Clause" (*id.* at 167). *Connelly* does, however, reaffirm in dictum that a suspect's "mental condition is surely relevant to an individual's susceptibility to police coercion" (*id.* at 165): "as interrogators have turned to more subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the 'voluntariness' calculus" (*id.* at 164). And in *Yarborough v. Alvarado*, 541 U.S. 652 (2004), the Court repeated (again in dictum) that "we do consider a suspect's age and [extent of prior] experience [with the criminal justice system]" when gauging, for purposes of assessing the "voluntariness of a statement," whether "the defendant's will was overborne," . . . a question that logically can depend on "the characteristics of the accused" (*id.* at 667-68; and see *id.* at 668 (the "characteristics of the accused" relevant to this assessment "can include the suspect's age, education, and intelligence, . . . as well as a suspect's prior experience with law enforcement")). See also *Procunier v. Atchley*, 400 U.S. 446, 453-54 (1971) (dictum) (a suspect's "[l]ow intelligence, denial of the right to counsel and failure to advise of the right to remain silent were not in themselves coercive [but] . . . were relevant . . . in establishing a setting in which actual coercion might have been exerted to overcome the will of the suspect"); *State v. Carrillo*, 156 Ariz. 125, 136, 750 P.2d 883, 894 (1988) (dictum) ("[W]e do not believe *Connelly* forbids consideration

of the accused’s subjective mental state. Certainly the police are not permitted to take advantage of the impoverished, the mentally deficient, the young, or the inexperienced by employing artifices or techniques that destroy the will of the weakest but leave the strong, the tough, and the experienced untouched.”). Thus a suspect’s vulnerable state of mind can lend coercive force to police words and actions that would not be deemed coercive in the case of a suspect with normal powers of resistance. *See, e.g., Reck v. Pate*, 367 U.S. 433, 442 (1961) (the defendant’s “youth, his subnormal intelligence, and his lack of previous experience with the police” impaired “his powers of resistance to overbearing police tactics”); *Haley v. Ohio, supra*, 332 U.S. at 599 (five hours of incommunicado interrogation rendered a confession involuntary because the defendant was only 15 years old, and “[t]hat which would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens”); *United States v. Preston*, 751 F.3d 1008, 1028 (9th Cir. 2014) (en banc) (“Even if we would reach a different conclusion regarding someone of normal intelligence, we hold that the officers’ use of the [interrogation] methods employed here to confuse and compel a confession from the intellectually disabled eighteen-year-old before us produced an involuntary confession”); *United States v. Blocker*, 354 F. Supp. 1195, 1201-02 (D. D.C. 1973) (“[i]n this case, defendant’s age [21] and limited mental ability suggest that the defendant would be particularly susceptible to psychological coercion in the form of threats and promises of leniency”). Moreover, personal characteristics such as youth and intellectual disability may be sufficient in and of themselves to render a statement inadmissible under state-law doctrines of involuntariness. *See* § 26.12 *infra*.

The following are common factors that may be considered as bearing on voluntariness under a federal constitutional analysis:

26.4.1. Youth

The Supreme Court “has emphasized that admissions and confessions of juveniles require special caution” (*In re Gault*, 387 U.S. 1, 45 (1967)), and that the courts must take “the greatest care . . . to assure that the [juvenile’s] admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright, or despair” (*id.* at 55 (footnote omitted)). In reversing the conviction of a 15-year-old in *Haley v. Ohio*, 332 U.S. 596, 599 (1948), the Court wrote:

“What transpired would make us pause for careful inquiry if a mature man were involved. And when, 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.”

The Court similarly stressed the inherent vulnerability of young people in finding in *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962), that a 14-year-old’s confession was involuntary:

“[A] 14-year-old boy, no matter how sophisticated, is unlikely to have any conception of what will confront him when he is made accessible only to the police. . . . He cannot be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions.”

In *Yarborough v. Alvarado*, the Court reiterated that the “characteristics of the accused [relevant to the assessment of the “voluntariness of a statement”] can include the suspect’s age, education, and intelligence, . . . as well as a suspect’s prior experience with law enforcement” (541 U.S. at 668) (dictum). See also *id.* at 667-68 (“we do consider a suspect’s age and experience” when gauging, for purposes of assessing the “voluntariness of a statement,” whether “the defendant’s will was overborne”). Cf. *Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (explaining, in the context of criminal sentencing, that the Court has recognized, based on “science and social science” as well as “common sense” and “what ‘any parent knows,’” that “children ‘are more vulnerable . . . to . . . outside pressures”).

The lower courts have similarly treated the youth of the suspect as a highly significant factor in assessing the voluntariness of a confession. See, e.g., *Woods v. Clusen*, 794 F.2d 293 (7th Cir. 1986); *Williams v. Peyton*, 404 F.2d 528 (4th Cir. 1968); *Shelton v. State*, 287 Ark. 322, 699 S.W.2d 728 (1985); *State in the Interest of S.H.*, 61 N.J. 108, 293 A.2d 181 (1972); *People v. Ward*, 95 A.D.2d 351, 466 N.Y.S.2d 686 (N.Y. App. Div., 2d Dep’t 1983); *State v. Caffrey*, 332 N.W.2d 269 (S.D. 1983); *In the Interest of Jerrell C.J.*, 283 Wis. 2d 145, 159, 699 N.W.2d 110, 117 (2005) (“Simply put, children are different than adults, and the condition of being a child renders one ‘uncommonly susceptible to police pressures.’ . . . We therefore view Jerrell’s young age of 14 to be a strong factor weighing against the voluntariness of his confession.”). In urging courts to recognize the need for particular solicitude to assure that juveniles’ inculpatory statements are not admitted into evidence unless they are truly voluntary, counsel can point to empirical findings that a disproportionately high percentage of documented instances of false confessions (about 33%) involve juvenile suspects. Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 941-43 (2004). See also Steven A. Drizin & Greg Luloff, *Are Juvenile Courts a Breeding Ground for Wrongful Convictions?*, 34 N. KY. L. REV. 257 (2007); Saul M. Kassin, Steven A. Drizin, Thomas Grisso, Gisli H. Gudjonsson, Richard A. Leo & Allison D. Redlich, *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 8-9, 19, 30-31 (2010); Allison D. Redlich, *The Susceptibility of Juveniles to False Confessions and False Guilty Pleas*, 62 RUTGERS L. REV. 943 (2010); Joshua A. Tepfer, Laura H. Nirider & Lynda Tricarico, *Arresting Development: Convictions of Innocent Youth*, 62 RUTGERS L. REV. 887, 904-08 (2010); *J.D.B. v. North Carolina*, 564 U.S. 261, 269 (2011) (“[T]he pressure of custodial interrogation is so immense that it ‘can induce a frighteningly high percentage of people to confess to crimes they never committed.’ *Corley v. United States*, 556 U.S. 303, 329 (2009) (citing Drizin & Leo, . . . [supra]); see also *Miranda*, 384 U.S., at 455, n. 23. . . . That risk is all the more troubling – and recent studies suggest, all the more acute – when the subject of custodial interrogation is a juvenile. See Brief for Center on Wrongful

Convictions of Youth et al. as *Amici Curiae* 21–22 (collecting empirical studies that ‘illustrate the heightened risk of false confessions from youth’.”); *In the Matter of Jimmy D.*, 15 N.Y.3d 417, 431, 938 N.E.2d 970, 979, 912 N.Y.S.2d 537, 546 (2010) (Lippman, C.J., dissenting) (“So long as juveniles cannot be altogether preserved from rigors of police interrogation, it would behoove us not to minimize the now well-documented potential for false confessions when suggestible and often impulsive and impaired children are ushered into the police interview room.”; “Children do resort to falsehood to alleviate discomfort and satisfy the expectations of those in authority, and, in so doing, often neglect to consider the serious and lasting consequences of their election. There are developmental reasons for this behavior which we ignore at the peril of the truth-seeking process.”). A reference to these findings in briefing and argument is often useful for a couple of reasons. First, although the voluntariness and the reliability of confessions are analytically distinct issues (see § 26.18 *infra*), a judge who is persuaded that a confession poses significant risks of unreliability will, as a practical matter, be more prone to suppress it as involuntary. Second, in courts where the judge who presides at the suppression hearing is likely to be the same judge who will also sit as the trier of fact in a subsequent bench trial of the issue of the defendant’s guilt or innocence (see § 24.8 *supra*), the defendant’s interests are obviously best served by persuading the judge during the suppression hearing that any inculpatory statement s/he hears is not only technically suppressible but probably inaccurate.

26.4.2. Mental Illness

A factor such as mental illness, which impairs the suspect’s “mental condition[,] is surely relevant to an individual’s susceptibility to police coercion” (*Colorado v. Connelly*, *supra*, 479 U.S. at 165 (discussing *Blackburn v. Alabama*, 361 U.S. 199 (1960))). *See also, e.g., Spano v. New York*, 360 U.S. 315, 322 & n.3 (1959) (emotional instability); *Fikes v. Alabama*, 352 U.S. 191, 193, 196 (1957) (schizophrenia); *Eisen v. Picard*, 452 F.2d 860, 863-66 (1st Cir. 1971) (psychotic-depressive reaction); *Jackson v. United States*, 404 A.2d 911, 924 (D.C. 1979) (“Here, there was compelling evidence to show that appellant was mentally ill at the time of his statements: his history of mental illness, the incoherent nature of his statement, the testimony of Detective Wood and Dr. Papish, and the trial court’s acknowledgement of the irrationality of appellant’s statement.”); Drizin & Leo, *supra* at 973-74.

26.4.3. Intellectual Disability

A suspect may be rendered particularly vulnerable to police coercion by intellectual disability. *See, e.g., Sims v. Georgia*, 389 U.S. 404 (1967) (limited mental capacity); *Davis v. North Carolina*, 384 U.S. 737 (1966) (low level of intelligence); *Reck v. Pate*, 367 U.S. 433 (1961) (intellectual disability); *Culombe v. Connecticut*, 367 U.S. 568 (1961) (I.Q. of 64); *United States v. Preston*, 751 F.3d 1008, 1027-28 (9th Cir. 2014) (en banc) (18-year-old with an I.Q. of 65); *Shelton v. State*, 287 Ark. 322, 699 S.W.2d 728 (1985) (juvenile who was nearly 18 but had marginal intelligence and maturity); *In the Interest of Thompson*, 241 N.W.2d 2 (Iowa 1976) (I.Q. of 71); *State in the Interest of Holifield*, 319 So. 2d 471 (La. App. 1975) (intellectual disability; I.Q. of 67); *People v. Knapp*, 124 A.D.3d 36, 46,

995 N.Y.S.2d 869, 877 (N.Y. App. Div., 4th Dep’t 2014) (I.Q. of 68; a defense expert testified that the “defendant is ‘a suggestible and overly compliant individual, which is not unusual in [intellectually disabled]. . . individuals who are frequently “yea-saying,” in turn causing him to be easily intimidated by the interrogation process”); *In the Interest of Jerrell C. J.*, *supra*, 283 Wis. 2d at 160, 699 N.W.2d at 117 (“low average intelligence”). *See also Atkins v. Virginia*, 536 U.S. 304, 320 & n.25 (2002) (observing that there is a “possibility of false confessions” in cases of intellectually disabled defendants, and noting that the “disturbing number of inmates on death row [who] have been exonerated . . . included at least one [intellectually disabled] . . . person who unwittingly confessed to a crime that he did not commit.”); *Drizin & Leo*, *supra* at 970-73.

26.4.4. Limited Education

Educational privation and illiteracy also are factors that can cause a suspect to be less capable of resisting domination by the police. *See, e.g., Sims v. Georgia*, 389 U.S. 404 (1967) (third-grade education and illiteracy); *Clewis v. Texas*, 386 U.S. 707 (1967) (fifth-grade education); *Culombe v. Connecticut*, 367 U.S. 568, 620-21, 624-25, 635 (1961) (illiteracy); *Fikes v. Alabama*, *supra*, 352 U.S. at 196 (defendant was “uneducated”); *State v. Graham*, 277 Ark. 465, 642 S.W.2d 880 (1982) (limited education and illiteracy); *In the Interest of Jerrell C. J.*, *supra*, 283 Wis. 2d at 160, 699 N.W.2d at 117 (“limited education” coupled with “low average intelligence”).

26.4.5. Effects of Drugs or Alcohol

As the Supreme Court has recognized, a suspect’s will and ability to resist interrogation can be impaired by the effects of drugs. *See, e.g., Beecher v. Alabama*, 389 U.S. 35 (1967) (morphine); *Townsend v. Sain*, 372 U.S. 293 (1963) (scopolamine, a drug with “truth serum” properties). *See also Colorado v. Connolly*, *supra*, 479 U.S. at 165-66 (discussing *Townsend v. Sain*). *Accord, United States v. Taylor*, 745 F.3d 15, 19-20, 23-26 (2d Cir. 2014) (xanax); *In re Cameron*, 68 Cal. 2d 487, 439 P.2d 633, 67 Cal. Rptr. 529 (1968) (thorazine); *People v. Fordyce*, 200 Colo. 153, 612 P.2d 1131 (1980) (morphine).

Several lower court decisions have recognized that intoxication by alcohol can have the same resistance-impairing effects as drugs and should be considered in assessing the voluntariness of a statement. *See, e.g., State v. Mikulewicz*, 462 A.2d 497 (Me. 1983); *State v. Discoe*, 334 N.W.2d 466 (N.D. 1983).

26.4.6. Lack of Prior Experience With the Police

The Supreme Court has repeatedly recognized that “lack of previous experience with the police” can impair a suspect’s “powers of resistance to overbearing police tactics” (*Reck v. Pate*, 367 U.S. 433, 442 (1961)). *See, e.g., Clewis v. Texas*, 386 U.S. 707, 712 (1967); *Spano v. New York*, 360 U.S. 315, 321-22 (1959); *Yarborough v. Alvarado*, 541 U.S. 652, 667-68 (2004) (dictum). *Accord, Woods v. Clusen*, 794 F.2d 293, 297 (7th Cir. 1986); *In the Interest of Jerrell C. J.*, *supra*, 283 Wis. 2d at 161, 699 N.W.2d at 117 (limited “experience with law enforcement” – two prior arrests for misdemeanor offenses that never

resulted in a delinquency finding – “may have contributed to . . . [a 14-year-old’s] willingness to confess”). *See also Fare v. Michael C.*, 442 U.S. 707, 726-29 (1979) (dictum) (prior “experience with the police” is relevant to assessment of the voluntariness of *Miranda* waivers).

26.4.7. Combination of Factors

Frequently, counsel’s case will feature more than one of the foregoing factors and others – physical exhaustion, pain resulting from physical injuries, emotional depression, and so forth. Counsel should argue that the several factors combined to render the defendant particularly susceptible to coercion. *See, e.g., A.M. v. Butler*, 360 F.3d 787, 800-01 (7th Cir. 2004) (11-year-old with no prior court experience); *Woods v. Clusen*, 794 F.2d 293 (7th Cir. 1986) (16-year-old with no prior court experience); *Thomas v. North Carolina*, 447 F.2d 1320 (4th Cir. 1971) (15-year-old with an I.Q. of 72 and limited education); *In the Interest of Thompson*, 241 N.W.2d 2 (Iowa 1976) (17-year-old with an I.Q. of 71 and a fourth-grade reading level); *State in the Interest of Holfield*, 319 So. 2d 471 (La. App. 1975) (intellectually disabled 14-year-old with an I.Q. of 67); *In the Interest of Jerrell C. J.*, *supra*, 283 Wis. 2d at 159, 699 N.W.2d at 117 (14-year-old with an I.Q. of 84 and limited prior involvement with the juvenile justice system). *Cf. Edmonds v. Oktibbeha County*, 675 F.3d 911, 914, 915, 916 (5th Cir. 2012) (recognizing, in the context of a section 1983 suit against police deputies, that the “thirteen-year-old[accused]’s separation from his mother, his desire to please adults, and his inexperience with the criminal justice system all weigh against [a finding of] voluntariness [of his confession],” but ultimately concluding that voluntariness was established by the totality of the circumstances, including the accused’s disclosure “in his videotaped retraction (and also later on national television)” that he falsely confessed in order “to help his sister” and that “the deputies did not coerce him into confessing.”).

C. Miranda Violations

26.5. The Miranda Doctrine Generally

The rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), excludes any incriminating response made to custodial interrogation unless the response was preceded by specified warnings of the defendant’s rights and an effective waiver by the defendant of those rights. “In order to be able to use statements obtained during custodial interrogation of the accused, the State must warn the accused prior to such questioning of his right to remain silent and of his right to have counsel, retained or appointed, present during interrogation.” *Fare v. Michael C.*, 442 U.S. 707, 717 (1979) (dictum). *See, e.g., Dickerson v. United States*, 530 U.S. 428 (2000) (reaffirming the *Miranda* doctrine and clarifying that, notwithstanding the Court’s previous references to the “*Miranda* warnings as ‘prophylactic’” (*id.* at 437), “*Miranda* announced a constitutional rule” (*id.* at 444)); *Doyle v. Ohio*, 426 U.S. 610, 617 (1976); *Michigan v. Mosley*, 423 U.S. 96, 99-100 & n.6 (1975) (dictum).

“Custodial interrogation” is a term of art. The *Miranda* doctrine applies only when a defendant is in “custody” – or its “functional equivalent” –

(see § 26.6.1 *infra*) and makes statements in response to “interrogation” (see § 26.6.2 *infra*).

If these two conditions are satisfied, *Miranda* requires the suppression of the defendant’s statements whenever (a) the required warnings were not given or were defective (see § 26.7 *infra*); (b) the defendant’s waiver of *Miranda* rights was involuntary (see § 26.8.1 *infra*) or was not “knowing and intelligent” (see § 26.8.2 *infra*); or (c) the police failed to honor the defendant’s assertion of the right to remain silent or the right to counsel (see § 26.9 *infra*).

The *Miranda* rule governs statements made by a person in custody for any criminal offense, “regardless of the nature or severity of the offense of which he is suspected or for which he was arrested” (*Berkemer v. McCarty*, 468 U.S. 420, 434 (1984) (finding constitutional error in the admission of unwarned incriminating statements made after an arrest for a “misdemeanor traffic offense” (*id.* at 429))). The Supreme Court has created only two exceptions to the *Miranda* rule. First, in *New York v. Quarles*, 467 U.S. 649 (1984), the Supreme Court recognized “a narrow exception to the *Miranda* rule” (467 U.S. at 658), when police officers, “in the very act of apprehending a suspect [who had been reported to be armed and who was found to be wearing an empty shoulder holster when arrested], 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 [a public] . . . supermarket” (*id.* at 657). “[O]n these facts” (*id.* at 655), and when the only question asked by the arresting officer was “about the whereabouts of the gun” (*id.* at 657), the Court held that “there is a ‘public safety’ exception to the requirement that *Miranda* warnings be given before a suspect’s answer may be admitted into evidence” (467 U.S. at 655). *Quarles* has since been described as holding that “when the police arrest a suspect under circumstances presenting an imminent danger to the public safety, they may without informing him [or her] of [the *Miranda*] . . . rights ask questions essential to elicit information necessary to neutralize the threat to the public” (*Berkemer v. McCarty*, *supra*, 468 U.S. at 429 n.10). Second, in *Pennsylvania v. Muniz*, 496 U.S. 582 (1990), the Court recognized “a ‘routine booking question’ exception which exempts from *Miranda*’s coverage questions to secure the “‘biographical data necessary to complete booking or pretrial services,’” such as “name, address, height, weight, eye color, date of birth, and current age,” as long as the questions asked are “reasonably related to the police’s administrative concerns” and are not “‘designed to elicit incriminatory admissions’” (*id.* at 601-02 & n.14). Compare *United States v. Pacheco-Lopez*, 531 F.3d 420, 423-24 (6th Cir. 2008) (the “booking exception” of *Pennsylvania v. Muniz* did not apply to an officer’s questions to the defendant about “where he was from, how he had arrived at the house, and when he had arrived” because the house was “ostensibly linked to a drug sale” and therefore questions about the defendant’s “origin” and his connections to the house were “‘reasonably likely to elicit an incriminating response,’ thus mandating a *Miranda* warning”); *People v. Hiraeta*, 117 A.D.3d 964, 964, 986 N.Y.S.2d 217, 218-19 (N.Y. App. Div., 2d Dep’t 2014) (the booking exception did not apply to “the defendant’s statement to a detective regarding his gang affiliation, which was probative of his identity as one of the victim’s attackers”); *United*

States v. Phillips, 146 F. Supp.3d 837, 848 (E.D. Mich. 2015) (“the Defendant’s responses to the officer’s questions regarding his criminal history and the location of his vest resulted from a ‘custodial interrogation,’ not biographical questioning subject to the booking exception”). With these sole exceptions, “[i]n the years since the decision in *Miranda*, we have frequently reaffirmed the central principle established by that case: if the police take a suspect into custody and then ask him [or her] questions without informing him [or her] of the [*Miranda*] rights . . . , [the] responses cannot be introduced into evidence to establish . . . guilt” (*Berkemer v. McCarty*, *supra*, 468 U.S. at 429).

26.6. *The Precondition for Applicability of Miranda Protections: “Custodial Interrogation”*

26.6.1. “Custody”

Miranda comes into play only “after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way” (*Miranda v. Arizona*, 384 U.S. 436, 444 (1966)). See also *id.* at 477, 478; *Estelle v. Smith*, 451 U.S. 454, 466-67 (1981).

Thus, the *Miranda* warnings and waivers are not required when investigating officers interview an unarrested suspect in his or her residence, even though “the ‘focus’ of [a criminal] . . . investigation may . . . have been on [him or her]” (*Beckwith v. United States*, 425 U.S. 341, 347 (1976)); they are not required when a suspect comes voluntarily to the police station in response to an officer’s telephonic request for an interview, at least when the suspect is “immediately informed that [s/he is] . . . not under arrest” and when “there is no indication that [his or her] . . . freedom to depart [is] . . . restricted in any way” (*Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (*per curiam*)); see also *California v. Beheler*, 463 U.S. 1121 (1983) (*per curiam*)); and they are not required when a probationer is questioned by his or her probation officer during a probation-supervision conference in the latter’s office, even when attendance at such conferences is a condition of probation enforceable by its possible revocation (*Minnesota v. Murphy*, 465 U.S. 420 (1984) (“Murphy was not ‘in custody’ for purposes of receiving *Miranda* protection since there was no “‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest” (*id.* at 430)). Cf. *United States v. Mandujano*, 425 U.S. 564, 578-82 (1976) (plurality opinion) (alternative ground) (subpoenaed grand jury witness has no right to *Miranda* warnings or to have counsel present in the grand jury room). “[T]he roadside questioning of a motorist detained pursuant to a traffic stop [does not] . . . constitute custodial interrogation” (*Berkemer v. McCarty*, 468 U.S. 420, 423 (1984)), nor does questioning during a “‘*Terry* stop”” (468 U.S. at 439-40; see §§ 25.4.4-25.6.4 *supra*), unless the person stopped “is subjected to treatment that renders him [or her] ‘in custody’ for practical purposes” (468 U.S. at 440), under the “settled [principle] that the safeguards prescribed by *Miranda* become applicable as soon as a suspect’s freedom of action is curtailed to a ‘degree associated with formal arrest”” (468 U.S. at 440). See §§ 25.4.4-25.4.5, 25.6-25.6.4 *supra*.

However, *Miranda* applies to the questioning of a person who is

handcuffed and surrounded by police officers, even in a public place. *New York v. Quarles*, 467 U.S. 649, 654 n.4, 655 (1984) (dictum); and see *Berkemer v. McCarty*, *supra*, 468 U.S. at 441 n.34, 442 n.36, giving other examples of street-arrest questioning that constitute “custodial interrogation.” And it applies to any questioning of a person involuntarily detained in closed quarters, even though those quarters may be the person’s own home and even though the questioning may be wholly unrelated to the reason for the detention. *Mathis v. United States*, 391 U.S. 1 (1968) (a state prison inmate questioned in prison by a federal revenue agent shortly before federal authorities decide to pursue a criminal tax investigation); *Orozco v. Texas*, 394 U.S. 324 (1969) (a suspect arrested and questioned by police officers in his boardinghouse bedroom); *United States v. Hashime*, 734 F.3d 278, 280-81, 283-84, 285 (4th Cir. 2013) (the interrogation of a 19-year-old was “custodial” even though it took place in his home, the officers said that “they were not there to arrest anyone but rather to execute a search warrant,” “the door to the room in which he was interrogated was open,” the officers told him that he “was free to leave,” and the officers offered him “multiple breaks” during the interrogation: although these factors “do cut against custody, they are decidedly outweighed” by the “sheer length” of the three-hour interrogation, the number of federal and state law enforcement officers who “streamed into the house with their guns drawn,” and the fact that Hashime ““was roused from bed at gunpoint, . . . not allowed to move unless guarded, and ultimately separated from his family” during the interrogation.); *United States v. Craighead*, 539 F.3d 1073, 1084-89 (9th Cir. 2008) (the court finds an in-home interrogation “custodial” for *Miranda* purposes under a standard that considers: “(1) the number of law enforcement personnel and whether they were armed; (2) whether the suspect was at any point restrained, either by physical force or by threats; (3) whether the suspect was isolated from others; and (4) whether the suspect was informed that he was free to leave or terminate the interview, and the context in which any such statements were made.”); *In re I.J.*, 906 A.2d 249, 262-63 (D.C. 2006) (a 16-year-old juvenile, who was residing in a youth center pursuant to a court order of probation, was in “custody” for *Miranda* purposes when he was questioned by a police officer, in an office of the center, about a crime the youth allegedly committed on the premises). See also *State v. McKenna*, 166 N.H. 671, 675, 686, 103 A.3d 756, 760, 769 (2014) (the court holds on state constitutional grounds that a defendant was in “custody” for *Miranda* purposes when police officers questioned him as he was walking around the grounds of his restaurant and campground for an hour and a half, at least at the point at which they stopped him from walking into a wooded area and told him to remain in the open areas; “Although the defendant was informed that he was not under arrest, there is no evidence that the officers ever informed the defendant that he was free to terminate the interrogation. In addition, we accord substantial weight to the fact that the officers’ questions were accusatory and focused on the defendant’s alleged criminal activity.”). Cf. *Howes v. Fields*, 132 S. Ct. 1181, 1191, 1193 (2012) (questioning of a prison inmate does not automatically trigger *Miranda*’s requirements because “service of a term of imprisonment, without more, is not enough to constitute *Miranda* custody”; *Miranda* “custody” was not established on a record showing that the inmate was taken aside and questioned in private about “events that took place outside the prison” because “[a]ll of the[] objective facts are consistent with an

interrogation environment in which a reasonable person would have felt free to terminate the interview and leave””: the inmate “was told at the outset of the interrogation, and was reminded again thereafter, that he could leave and go back to his cell whenever he wanted”; the inmate “was not physically restrained or threatened and was interviewed in a well-lit, average-sized conference room, where he was ‘not uncomfortable’”; and the inmate “was offered food and water, and the door to the conference room was sometimes left open.”).

The determination “whether a suspect is ‘in custody’ is an objective inquiry” that involves the following “[t]wo discrete inquiries”:

“first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave. Once the scene is set and the players’ lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest.” (*J.D.B. v. North Carolina*, 564 U.S. 261, 270 (2011) (quoting *Thompson v. Keohane*, 516 U.S. 99, 112 (1995))).

Accord, *Berkemer v. McCarty*, *supra*, 468 U.S. at 442; *Stansbury v. California*, 511 U.S. 318, 322-25 (1994) (per curiam). In the case of a minor, the Supreme Court has recognized that this “reasonable person” test must take into account the age of the child “so long as the child’s age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer” (*J.D.B. v. North Carolina*, *supra*, 564 U.S. at 277). *See id.* at 264-65 (“It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child’s age properly informs the *Miranda* custody analysis.”); *id.* at 269 (“By its very nature, custodial police interrogation entails ‘inherently compelling pressures.’ . . . Even for an adult, the physical and psychological isolation of custodial interrogation can ‘undermine the individual’s will to resist and . . . compel him to speak where he would not otherwise do so freely.’ . . . Indeed, the pressure of custodial interrogation is so immense that it ‘can induce a frighteningly high percentage of people to confess to crimes they never committed.’ . . . That risk is all the more troubling – and recent studies suggest, all the more acute – when the subject of custodial interrogation is a juvenile.”).

If the defendant was formally arrested or was placed under physical restraint “of the ‘degree associated with a formal arrest,’” this plainly suffices to establish “custody” for *Miranda* purposes (*New York v. Quarles*, *supra*, 467 U.S. at 655 (dictum)). If s/he was not, the custody inquiry requires “‘examin[ation] [of] all of the circumstances surrounding the interrogation,’ . . . including any circumstance that ‘would have affected how a reasonable person’ in the suspect’s position ‘would perceive his or her freedom to leave’” (*J.D.B. v. North Carolina*, *supra*, 564 U.S. at 271). *See also id.* (the custody test “ask[s] how a reasonable person in the suspect’s position would understand his freedom to terminate questioning and leave”; “On the other hand, the ‘subjective views

harbored by either the interrogating officers or the person being questioned’ are irrelevant.”). Relevant factors include (i) whether the detention was merely “temporary and brief” or was “prolonged” (*Berkemer v. McCarty*, *supra*, 468 U.S. at 437-38; *see also id.* at 441); (ii) whether the defendant was subjected to only a “modest number of questions” or was subjected to “‘persistent questioning’” (*id.* at 442 & n.36; *see also id.* at 438); and (iii) whether the questioning took place in a public location, where “exposure to public view both reduces the ability of an unscrupulous policeman to use illegitimate means to elicit self-incriminating statements and diminishes the [suspect’s] . . . fear that, if he does not cooperate, he will be subjected to abuse” (*id.* at 438). “Some of the factors relevant to whether a reasonable person would believe he was free to leave include ‘the purpose, place, and length of interrogation,’ along with ‘the extent to which the defendant is confronted with evidence of guilt, the physical surroundings of the interrogation, the duration of the detention, and the degree of pressure applied to the defendant.’” *State v. Snell*, 142 N.M. 452, 456, 166 P.3d 1106, 1110 (N.M. App. 2007), quoting *State v. Munoz*, 126 N.M. 535, 544, 972 P.2d 847, 856 (N.M. 1998).

26.6.2. “Interrogation”

The *Miranda* concept of “interrogation” encompasses:

“express questioning or its functional equivalent. That is to say, the 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” (*Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980)).

Accord, *Arizona v. Mauro*, 481 U.S. 520, 525-27 (1987); *Grueninger v. Director, Virginia Department of Corrections*, 813 F.3d 517, 524-28 (4th Cir. 2016); *State v. Wright*, 444 N.J. Super. 347, 363-67, 133 A.3d 656, 666-68 (2016).

As the Supreme Court has explained, the *police-should-know* test “focuses primarily upon the perceptions of the suspect, rather than the intent of the police. This focus reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police” (*Rhode Island v. Innis*, *supra*, 446 U.S. at 301). The assessment of the suspect’s perceptions is predicated upon a “reasonable person” standard rather than a subjective standard, because “the police surely cannot be held accountable for the unforeseeable results of their words or actions” (*id.* at 301-02). Accordingly, “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 302 (emphasis in original)).

“In deciding whether particular police conduct is interrogation,” the courts have been admonished to “remember the purpose behind [the] . . . decisions in *Miranda* and *Edwards* [*v. Arizona*, 451 U.S. 477 (1981)]: preventing government officials from using the coercive nature of confinement to extract

confessions that would not be given in an unrestrained environment” (*Arizona v. Mauro*, *supra*, 481 U.S. at 529-30). Thus if the police set in motion “compelling influences [or] . . . psychological ploys” (*id.* at 529) that “implicate this purpose” (*id.* at 530) and create an “atmosphere of oppressive police conduct” (*id.* at 528 n.5), their behavior “properly could be treated as the functional equivalent of interrogation” (*id.* at 527).

In urging that police conduct short of explicit questioning amounted to “interrogation,” counsel can point to the following sorts of factors:

- (i) “the police carried on a lengthy harangue in the presence of the suspect” rather than simply “a few offhand remarks” (*Rhode Island v. Innis*, *supra*, 446 U.S. at 303).
- (ii) “under the circumstances, the officers’ comments were particularly ‘evocative’” (*id.*). *See, e.g., State v. Bond*, 237 Wis. 2d 633, 642-43, 647, 614 N.W.2d 552, 556-57, 558 (2000) (a police officer’s statement to the defendant in a witness-intimidation case that “you’re the man behind the man,” implying that the defendant was “the man who does the dirty work, . . . the muscle,” was “particularly ‘evocative’” or provocative,” and “the functional equivalent of interrogation”).
- (iii) the police used “psychological ploys, such as to ‘posi[t]’ ‘the guilt of the subject,’ to ‘minimize the moral seriousness of the offense,’ and ‘to cast blame on the victim or on society’” (*Rhode Island v. Innis*, *supra*, 446 U.S. at 299 (quoting *Miranda*, *supra*, 384 U.S. at 450)). *See also Arizona v. Mauro*, *supra*, 481 U.S. at 526, 529. The *Miranda* opinion cites a number of police manuals describing sophisticated interrogation techniques; counsel will often find it helpful to peruse these and other “police science” hornbooks because any similarity between the techniques they advise to elicit incriminating statements and the behavior of the officers in counsel’s own case will be highly persuasive that the latter behavior was “interrogation.” *See, e.g., Hill v. United States*, 858 A.2d 435, 443 (D.C. 2004) (finding that the officer’s statement to the defendant that “he was being charged with second-degree murder and that . . . [his friend] “told [the police] what happened”” was the “functional equivalent of interrogation” because the officer employed “classic interrogation techniques” recommended in the Reid manual on criminal interrogations, which was cited in the *Miranda* opinion); *United States v. Rambo*, 365 F.3d 906, 909-10 (10th Cir. 2004) (“While the district court concluded that the lack of questions indicated there was no interrogation by Moran, the use of questions is not required to show that interrogation occurred. . . . ¶ The portion of the interview available on videotape opens with Moran informing Rambo that much of the blame will fall on Rambo’s shoulders. As the Supreme Court has recognized, one of the techniques used by police during interrogation is to ‘posit the guilt of the subject.’ . . . Thus, Moran’s first comments are an

example of interrogation explicitly recognized by the Supreme Court. Moreover, other questions and comments recorded on the videotape support the conclusion that Rambo was under interrogation. ¶ Given the context, Moran’s comment ‘if you want to talk to me about this stuff, that’s fine,’ is fairly understood as an attempt to refocus the discussion on the robberies. Moran reiterates this invitation four times during the course of the interview. . . . ¶ While the government claims that Moran’s only goal was to obtain a waiver of the right to remain silent, that assertion ignores the appropriate test for determining if an interrogation occurred. It is true that an investigating officer’s intention may be relevant, but it is the objectively measured tendency of an action to elicit an incriminating response which is ultimately determinative. . . . Moran’s interaction with Rambo was reasonably likely to produce incriminating information and, therefore, Rambo was under interrogation.”); *In re Elias V*, 237 Cal. App. 4th 568, 571, 579, 583, 588, 188 Cal. Rptr. 3d 202, 204, 211, 214, 218 (2015), quoted in § 26.3.4 second paragraph *supra*. See also the Cutler & Leo articles cited in the penultimate paragraph of § 26.3.4.

- (iv) the police were aware that the suspect was:
 - (A) “unusually disoriented or upset at the time of his arrest” (*Rhode Island v. Innis, supra*, 446 U.S. at 302-03). See, e.g., *Xu v. State*, 191 S.W.3d 210, 217 (Tex. App. 2005) (“the officers should have known their interrogation would result in Xu’s oral statement. . . . The detectives described Xu as emotional and upset throughout the day. He was described as ‘hysterical.’ He repeatedly wept and clutched a picture of his wife and daughter. The detectives knew Xu’s English was broken and that he came from China, where the culture is far different than that of the United States.”).
 - (B) “unusual[ly] susceptib[le] . . . to a particular form of persuasion” (*Rhode Island v. Innis, supra*, 446 U.S. at 302 n.8) because of young age, intellectual disability, mental illness, or the effects of alcohol or other substances. See, e.g., *Benjamin v. State*, 116 So. 3d 115, 123 (Miss. 2013) (a police officer’s “tactics” of “foster[ing] the suspect’s mistaken belief that talking would allow him to avoid a night in jail” and encouraging the suspect’s mother to “pressure” him to talk to the police “constituted the functional equivalent of interrogation” because the police should have known that these “psychological ploys . . . were reasonably likely to elicit an incriminating response from fourteen-year-old Benjamin”); *In the Matter of Ronald C.*, 107 A.D.2d 1053, 486 N.Y.S.2d 575 (N.Y. App. Div., 4th Dep’t 1985) (because the defendant was only 13 years old and was unaccompanied by a parent or counsel, the police should have known that placing the alleged burglar’s tools in

front of him was likely to elicit an incriminating response).

- (C) “unusual[ly] susceptib[le]” (*Rhode Island v. Innis, supra*, 446 U.S. at 302 n.8) to priming for any other reason. *See, e.g., State v. Juranek*, 287 Neb. 846, 856, 844 N.W.2d 791, 801 (2014) (“the detective knew about Juranek’s propensity to talk without being interrogated and should have expected that if asked about the incident, Juranek would confess again”).
- (v) the police *intended* to elicit an admission. Even though the officers’ intentions are not controlling, the “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 evoke an incriminating response” (*Rhode Island v. Innis, supra*, 446 U.S. at 301 n.7, 303 n.9). *See, e.g., Drury v. State*, 368 Md. 331, 332, 341, 793 A.2d 567, 568, 573 (2002) (a police officer’s action in showing the defendant “physical evidence” and telling him “that the evidence would be processed for fingerprints” was the “functional equivalent of interrogation”: the officer’s “actions were aimed at invoking an incriminating remark”; “indeed, there is no explanation for his conduct but that he expected to elicit such statements.”). *Cf.* § 25.4.2, second paragraph *supra*.

26.7. *Validity of the Miranda Warnings*

Miranda requires that the police preface any custodial interrogation with the following warnings to the suspect:

- (a) that s/he has a right to remain silent (*Miranda v. Arizona, supra*, 384 U.S. at 467-68);
- (b) that any statement s/he makes can and will be used in court as evidence against him or her (*id.* at 469; *Estelle v. Smith*, 451 U.S. 454, 466-67 (1981));
- (c) that s/he has a right “to consult with a lawyer and to have the lawyer with him [or her] during interrogation” (*Miranda v. Arizona, supra*, 384 U.S. at 471); and
- (d) that if s/he cannot afford a lawyer, s/he has a right to have a lawyer appointed, “prior to any interrogation,” to represent him or her without cost (*id.* at 474).

See generally id. at 444, 467-73.

Each of the *Miranda* warnings must be given expressly, and an incriminating statement made during custodial interrogation is inadmissible unless a foundation is laid for it by an affirmative showing in the trial record that all of the warnings were given. *See Clark v. Smith*, 403 U.S. 946 (1971)

(per curiam) (reversing a conviction for admission of a confession made after three of the four *Miranda* warnings were given; only the right of an indigent to have state-paid counsel was omitted); accord, *Michigan v. Tucker*, 417 U.S. 433, 445 (1974) (dictum). Proof by the prosecution that the defendant knew his or her *Miranda* rights will not excuse a failure to warn. *Miranda v. Arizona*, *supra*, 384 U.S. at 468-69, 471-73.

The police need not precisely parrot the language of *Miranda* when they give *Miranda* warnings. *Duckworth v. Eagan*, 492 U.S. 195, 201 (1989) (upholding a warning which included the statement “‘We have no way of giving you a lawyer, but one will be appointed for you, if you wish, if and when you go to court’” (*id.* at 198), on the ground that the warning *also* said explicitly, “‘You have a right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning’” (*id.*); the Court viewed this combination of advice as conveying the accurate information that, although the police were not obliged to furnish the arrested person with a lawyer, they were obliged to stop questioning him if he requested a lawyer (*id.* at 202-03.); *Florida v. Powell*, 559 U.S. 50, 53, 62 (2010) (the *Miranda* requirement that an individual must be “‘clearly informed,’ prior to custodial questioning, that he has, among other rights, ‘the right to consult with a lawyer and to have the lawyer with him during interrogation’” was satisfied by a police officer’s advising the defendant that he “has ‘the right to talk to a lawyer before answering any of . . . [the law enforcement officers’] questions’”; that “‘[i]f you cannot afford to hire a lawyer, one will be appointed for you without cost and before any questioning’”; and that “‘[y]ou have the right to use any of these rights at any time you want during this interview’” (*id.* at 53), because “‘[i]n combination, the two warnings reasonably conveyed . . . [the suspect’s] right to have an attorney present, not only at the outset of interrogation, but at all times.’”); see also *California v. Prysock*, 453 U.S. 355 (1981) (per curiam). What is required is that the warnings be “‘a fully effective equivalent’” of the *Miranda* cautions (*Duckworth v. Eagan*, *supra*, 492 U.S. at 202, quoting *Miranda*, *supra*, 384 U.S. at 476 (emphasis in the original *Duckworth* opinion)) and “‘reasonably ‘conve[y] to [a suspect] his rights as required by *Miranda*’” (*Duckworth*, *supra*, 492 U.S. at 203, quoting *California v. Prysock*, *supra*, 453 U.S. at 361). Cf. *United States v. Botello-Rosales*, 728 F.3d 865, 867-68 (9th Cir. 2013) (per curiam) (“the Spanish-language [*Miranda*] warning administered to Botello before he was interrogated failed to ‘reasonably convey’” the “government’s obligation to appoint an attorney for an indigent suspect who wishes to consult one” because “the Spanish word ‘libre’ [used by the detective] to mean ‘free,’ or without cost” actually “translates to ‘free’ as being available or at liberty to do something”; this “constitutional infirmity” was not “cure[d]” by the officers’ prior administration of “correct *Miranda* warnings in English to Botello” because “[e]ven if Botello understood the English-language warnings, there is no indication in the record that the government clarified which set of warnings was correct.”); *United States v. Murphy*, 703 F.3d 182, 193 (2d Cir. 2012) (a police officer’s “instruct[ion] [to] the defendants that they could ‘decide at anytime to give up these rights, and not talk to us’ . . . ¶ . . . failed to ‘ensure that the person in custody ha[d] sufficient knowledge of his . . . constitutional rights relating to the interrogation’”: the officer’s “incorrect formulation strongly suggested that the defendants *should* talk if they wished

to exercise their rights – or, put another way, that they would waive their rights if they remained silent.”); *United States v. Wysinger*, 683 F.3d 784 (7th Cir. 2012) (an admonition to a suspect that he had the “right to talk to a lawyer for advice before we ask any questions or have one – have an attorney with you during questioning” (*id.* at 798) was inadequate because it told the suspect “that he could talk to an attorney before questioning *or* during questioning” when “[i]n fact, Wysinger had a right to consult an attorney both before *and* during questioning” (*id.*): “A person given a choice between having a lawyer with him before questioning or during questioning might wait until it is clear that questioning has begun before invoking his right to counsel” (*id.* at 800); here, the interrogating agent “implied that Wysinger could decide whether to exercise his rights after [the] Agent . . . ‘la[id] it out for’ him and told him ‘what the story is,’ and that, in the meantime, he should ‘listen for a minute.’ The time to invoke his rights, in other words, had not yet arrived.” (*id.* at 801); an incorrectly worded *Miranda* warning, one that suggests that *Miranda* rights apply only to direct questioning or to the time before direct questioning, followed by diversionary tactics that redirect the suspect away from asserting those rights, frustrates the purpose of the *Miranda* protections” (*id.* at 800)); *Lujan v. Garcia*, 734 F.3d 917, 931-32 (9th Cir. 2013) (“The problem here is that the words used by law enforcement did not reasonably convey to Petitioner that he had the right to speak with an attorney present at all times – before and during his custodial interrogations. In the end, we find that the ‘choice’ communicated to Petitioner was that he could speak without an attorney or he could remain silent throughout his interrogations. Speaking with an attorney present was not an option presented to Petitioner. Thus, *Miranda* was never satisfied. ¶ Before his first interrogation, Petitioner was told the following regarding his *Miranda* rights: ¶ Your rights are you have the right to remain silent, whatever we talk about or you say can be used in a court of law against you, and if you don’t have money to hire an attorney one’s appointed to represent you free of charge. So, those are your rights. If you have questions about the case, if you want to tell us about what happened tonight, we’ll take your statement, take your statement from beginning to end. We’ll give you an opportunity to explain your side of the story. That’s what we’re looking for and we’re looking for the truth. So you understand all that? ¶ . . . [The State] argues that, during Petitioner’s third interrogation, Detective Rodriguez provided an ‘enhanced *Miranda* warning’ that advised Petitioner above what the *Miranda* warning itself provides by telling Petitioner that his legal counsel would likely advise against making any statements to the police. The detective advised Petitioner, ‘I doubt that if you hire an attorney they’ll let you make a statement, usually they don’t. That’s the way it goes. So, that’s your prerogative, that’s your choice.’ This advice did not inform Mr. Lujan of his constitutional right to counsel. It was improper, unauthorized legal advice.”); *People v. Dunbar*, 24 N.Y.3d 304, 308, 316, 23 N.E.3d 946, 947-48, 953, 998 N.Y.S.2d 679, 680, 681, 686 (2014) (a local booking practice, in which a detective investigator from the D.A.’s office advised suspects that “‘this is your opportunity to tell us your story,’ and ‘your only opportunity’ to do so before going before a judge,” fatally “undermined the subsequently-communicated *Miranda* warnings” by conveying to suspects that “remaining silent or invoking the right to counsel would come at a price – they would be giving up a valuable opportunity to speak with an assistant district attorney,

to have their cases investigated or to assert alibi defenses. . . . By advising them that speaking would facilitate an investigation, the interrogators implied that these defendants' words would be used to help them, thus undoing the heart of the warning that anything they said could and would be used against them.”). A state court is, of course, free to construe its state constitution as requiring strict conformity with the language of *Miranda*. See § 17.11 *supra*.

26.8. Validity of the Defendant's Waiver of Miranda Rights

In addition to showing that the defendant received valid *Miranda* warnings (see § 26.7 *supra*), the prosecution must show that the defendant made a voluntary, knowing, and intelligent waiver of the *Miranda* rights. *Edwards v. Arizona*, 451 U.S. 477, 482-84 (1981); *see, e.g., Garner v. United States*, 424 U.S. 648, 657 (1976) (dictum); *Fare v. Michael C.*, 442 U.S. 707, 724-27 (1979) (dictum); *United States v. Garibay*, 143 F.3d 534 (9th Cir. 1998); *United States v. Lall*, 607 F.3d 1277, 1282-84 (11th Cir. 2010). The element of “voluntariness” is discussed in § 26.8.1 *infra*, and the “knowing and intelligent” element in § 26.8.2.

A waiver needs not be express: “[I]n at least some cases waiver can be clearly inferred from the actions and words of the person interrogated” (*North Carolina v. Butler*, 441 U.S. 369, 373 (1979)). In certain circumstances, “a waiver of *Miranda* rights may be implied through ‘the defendant’s silence, coupled with an understanding of his rights and a course of conduct indicating waiver’” (*Berghuis v. Thompkins*, 560 U.S. 370, 385 (2010) (quoting *Butler, supra*, 441 U.S. at 376)). *See Berghuis, supra*, 560 U.S. at 385-86 (“The record in this case shows that Thompkins waived his right to remain silent,” notwithstanding the absence of an explicit waiver, because “[t]here was more than enough evidence in the record to conclude that Thompkins understood his *Miranda* rights” and thus that “he chose not to invoke or rely on those rights when he did speak; Thompkins’s answer to the interrogating officer’s question was ‘a ‘course of conduct indicating waiver’ of the right to remain silent,” and “there is no evidence that Thompkins’s statement was coerced.”).

For discussion of the state’s burden of persuasion in showing a waiver of *Miranda* rights, see § 24.3.4 *supra*.

26.8.1. The Requirement That Miranda Waivers Be Voluntary

A waiver of *Miranda* rights, “[o]f course, . . . must at a minimum be ‘voluntary’ to be effective against an accused” (*Colorado v. Connelly*, 479 U.S. 157, 169 (1986) (dictum); *Miranda, supra*, 384 U.S. at 444, 476.) “[T]he relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.” *Colorado v. Spring*, 479 U.S. 564, 573 (1987) (dictum); *Moran v. Burbine*, 475 U.S. 412, 420 (1986) (dictum); *Fare v. Michael C., supra*, 442 U.S. at 725 (dictum).

The Court has indicated that the “indicia of coercion” recognized in the context of the due process issue of the voluntariness of statements (see

§§ 26.2-26.4.7 *supra*) are also relevant to the voluntariness of a waiver of *Miranda* rights (see *Colorado v. Spring, supra*, 479 U.S. at 573-74; *Colorado v. Connelly, supra*, 479 U.S. at 169-70). The decisive question is whether the defendant’s “‘will [was] overborne and his capacity for self-determination critically impaired’ because of coercive police conduct” (*Colorado v. Spring, supra*, 479 U.S. at 574). In making that inquiry, the courts may consider: “‘the duration and conditions of detention . . . , the manifest attitude of the police toward . . . [the accused], his physical and mental state, [and] the diverse pressures which sap or sustain his powers of resistance and self-control’” (*id.* (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961) (opinion of Justice Frankfurter))).

Excessively long detention or detention under oppressive conditions can suffice to render a *Miranda* waiver involuntary. See § 26.3.2 *supra*. *Miranda* says expressly that the fact that an accused’s statement was made after “lengthy interrogation or incommunicado incarceration . . . is inconsistent with any notion of a voluntary relinquishment of the privilege [against self-incrimination]” (*Miranda v. Arizona, supra*, 384 U.S. at 476 (emphasis added)).

The voluntariness of a *Miranda* waiver can also be undermined by a police officer’s use of force or the threat of force (see § 26.3.1 *supra*) or by police promises of leniency or threats of adverse governmental action (see § 26.3.3 *supra*). “[E]vidence that the accused was . . . tricked . . . into a waiver will, of course, show that the defendant did not voluntarily waive his [Fifth Amendment] privilege.” *Miranda, supra*, 384 U.S. at 476. *Accord, United States v. Lall*, 607 F.3d 1277, 1282-84 (11th Cir. 2010), summarized in § 26.3.3 second paragraph *supra*. See also *Miranda, supra*, 384 U.S. at 449-55 (describing the methods by which “interrogators . . . induce a confession out of trickery” (*id.* at 453)). Cf. *Moran v. Burbine*, 475 U.S. 412 (1986) (accepting the basic proposition that police “‘trick[ery]’ . . . can vitiate the validity of a waiver” (*id.* at 423), but concluding that police misrepresentations to the suspect’s attorney did not undermine the voluntariness of waivers by a suspect who was unaware of the misrepresentations). And see the discussion of *Colorado v. Spring*, 479 U.S. 564 (1987), in the concluding paragraph of § 26.3.4 *supra*.

As in the due process voluntariness context (see § 26.4 *supra*), the defendant’s “mental condition is surely relevant to an individual’s susceptibility to police coercion” (*Colorado v. Connelly, supra*, 479 U.S. at 165 (dictum); see *J.D.B. v. North Carolina*, 564 U.S. 261, 272 (2011) (discussed in § 26.6.1 *supra*)), and thereby to the assessment of the voluntariness of a waiver of *Miranda* rights (*Colorado v. Spring, supra*, 479 U.S. at 573-74 (dictum); see also *Fare v. Michael C., supra*, 442 U.S. at 725 (dictum)). Counsel should develop any factor bearing on a defendant’s psychological or emotional vulnerability. See, e.g., *Woods v. Clusen*, 794 F.2d 293 (7th Cir. 1986) (16-year-old with no prior court experience); *United States v. Blocker*, 354 F. Supp. 1195 (D. D.C. 1973) (21-year-old with “low intelligence” and only one prior arrest); *In re Estrada*, 1 Ariz. App. 348, 403 P.2d 1 (1965) (14-year-old with a low level of education and literacy); *In re Roderick P.*, 7 Cal. 3d 801, 500 P.2d 1, 103 Cal. Rptr. 425 (1972) (intellectually disabled 14-year-old with no prior arrests); *In the Interest of Thompson*, 241 N.W.2d 2 (Iowa 1976) (17-year-old with an I.Q. of 71); *State in the Interest of Holifield*, 319 So. 2d 471 (La. App. 1975) (14-year-old with an I.Q. of 67);

Commonwealth v. Cain, 361 Mass. 224, 279 N.E.2d 706 (1972) (15-year-old with no prior experience with police, who was denied access to his father).

26.8.2. The Requirement That Miranda Waivers Be “Knowing and Intelligent”

A *Miranda* waiver “must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the ‘totality of the circumstances surrounding the interrogation’ reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived” (*Moran v. Burbine*, 475 U.S. 412, 421 (1986) (dictum); see *Colorado v. Spring*, 479 U.S. 564, 573-74 (1987) (dictum)).

Personal characteristics of a defendant that were identified in previous sections as bearing on the voluntariness of a statement (see § 26.4 *supra*) and the voluntariness of a *Miranda* waiver (see § 26.8.1 *supra*) also are relevant to a determination of whether a defendant’s waiver of *Miranda* rights was “knowing and intelligent.” Thus, a defendant may have been unable to comprehend the language employed in *Miranda* warnings and/or the concepts embodied in the warnings because of:

- (1) *Youth*. See, e.g., *A.M. v. Butler*, 360 F.3d 787, 801 n.11 (7th Cir. 2004) (in the course of finding that a juvenile’s *Miranda* waiver was involuntary, the court states that “[t]here is no reason to believe that this 11-year-old could understand the inherently abstract concepts of the *Miranda* rights and what it means to waive them,” and cites an empirical study “finding that 96 percent of 14-year-olds lack an adequate understanding of the consequences of waiving their rights”); *State v. Benoit*, 126 N.H. 6, 13-14, 18-19, 490 A.2d 295, 300-01, 304 (1985) (establishing a heightened state constitutional standard for determining the constitutionality of a juvenile’s waiver of *Miranda* rights, and citing empirical studies that “have concluded that, due to their immaturity, many children are incapable of exercising informed judgment concerning the substance and significance of waiving their constitutional rights and that, hence, certain procedural safeguards should be employed to insure that waivers by children are genuinely knowing, intelligent and voluntary”); *In the Matter of B.M.B.*, 264 Kan. 417, 429-33, 955 P.2d 1302, 1310-13 (1998) (discussing the empirical data on juveniles’ comprehension of *Miranda* rights and adopting a categorical rule that when a juvenile suspect is under 14, the police must advise not only the juvenile but also his or her parent or guardian of the juvenile’s “right to an attorney and to remain silent,” and must afford the juvenile an “opportunity to consult with his or her parent, guardian, or attorney as to whether he or she will waive his or her rights to an attorney and against self-incrimination”); *Commonwealth v. A Juvenile (No. 1)*, 389 Mass. 128, 131-35, 449 N.E.2d 654, 656-58 (1983) (discussing the empirical studies “suggest[ing] that most juveniles do not understand the

significance and protective function of these rights even when they are read the standard *Miranda* warnings,” and holding that a finding of “a knowing and intelligent waiver by a juvenile” requires that “the State must first prove that the juvenile and his parent, or if a parent is not available, someone in loco parentis, were fully advised of the juvenile’s right against self-incrimination through administration of the standard *Miranda* warnings”; “in most cases it should show that a parent or an interested adult was present, understood the warnings, and had the opportunity to explain his rights to the juvenile so that the juvenile understands the significance of waiver of these rights”; this showing is indispensable for juveniles under the age of 14 and important, albeit not decisive, for older children.); *State in the Interest of S.H.*, 61 N.J. 108, 115, 293 A.2d 181, 184-85 (1972) (treating it as axiomatic that “[r]ecitation of the *Miranda* warnings to a boy of 10 even when they are explained is undoubtedly meaningless”); *In the Interest of Jerrell C. J.*, 283 Wis. 2d 145, 151, 159 n.6, 699 N.W.2d 110, 113, 117 n.6 (2005) (in the course of holding that a 14-year-old’s confession was involuntary and establishing a general rule requiring that “all custodial interrogations of juveniles in future cases be electronically recorded where feasible, and without exception when questioning occurs at a place of detention,” the court observes that “scholarly research” supports the proposition that, “[b]ecause their intellectual capacity is not fully developed, children are less likely to understand their *Miranda* rights”). *Cf. Miller v. Alabama*, 132 S. Ct. 2455, 2464 (2012) (explaining that the Court has recognized, based on “science and social science” as well as “common sense” and “what ‘any parent knows,’” that “children are constitutionally different from adults for purposes of sentencing” because, *inter alia*, “children have a “lack of maturity and an underdeveloped sense of responsibility,” leading to recklessness, impulsivity, and heedless risk-taking,” and “children ‘are more vulnerable . . . to . . . outside pressures’”). *See generally* Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids*, 23 CORNELL J.L. & PUB. POL’Y 395 (2013).

- (2) *Intellectual disability. See, e.g., Cooper v. Griffin*, 455 F.2d 1142, 1145-46 (5th Cir. 1972) (two juveniles, who were 15 and 16 years old, and whose I.Q. “was said to range between 61 and 67” (*id.* at 1145) “could not have made a ‘knowing and intelligent’ waiver of their rights” (*id.* at 1146): they “surely had no appreciation of the options before them or of the consequences of their choice. Indeed it is doubtful that they even comprehended all of the words that were read to them” (*id.*)); *People v. Jiminez*, 863 P.2d 981, 982, 985 (Colo. 1993) (the defendant, who was found by a psychologist to be “function[ing] at about the 6 year old level,” and who had never been to school and had “a very limited vocabulary,” did not make a “knowing and intelligent” waiver of his *Miranda* rights); *Smith v. State*, 918 A.2d 1144 (Del. 2007) (an intellectually disabled 14-year-old, who “was functioning at a second grade level” (*id.* at

1151), “could not sign his name because he did not know how” (*id.*) and who “could not read the *Miranda* warnings himself, [and] so was given a quick and confusing explanation of what they supposedly meant” (*id.*) did not make a “knowing” waiver of his *Miranda* rights (*id.*); *State v. Thorpe*, 274 N.C. 457, 461, 164 S.E.2d 171, 174 (1968) (an intellectually disabled 20-year-old, “who had left school before he completed the third grade,” did not make a valid waiver of his right to counsel during questioning).

- (3) *Mental illness*. See, e.g., *Commonwealth v. Hilton*, 443 Mass. 597, 603, 607, 823 N.E.2d 383, 390, 393 (2005) (defendant who “suffer[ed] from schizophrenia and ha[d] a schizotypal personality disorder,” did not understand “the *Miranda* warnings” and thus could not have made a “knowing and intelligent” waiver).
- (4) *Intoxication or the effects of drugs*. See, e.g., *Commonwealth v. Anderl*, 329 Pa. Super. 69, 81, 477 A.2d 1356, 1362 (1984) (“we conclude that the appellee’s waiver of his *Miranda* rights was vitiated by his intoxication and that the statements made by the appellee while in custody should be suppressed”); *State v. Young*, 117 N.M. 688, 692, 875 P.2d 1119, 1123 (1994) (“[V]oluntary intoxication is relevant to determining whether a waiver was knowing and intelligent. See . . . 1 Wayne R. LaFare & Jerold H. Israel, *Criminal Procedure* § 6.9, at 527 (1984). On remand, the trial court shall consider the evidence of Defendant’s intoxication in determining whether Defendant knowingly and intelligently waived his rights.”); *State v. Kinn*, 288 Minn. 31, 36, 178 N.W.2d 888, 891 (1970), *partially overruled on other grounds in State v. Herem*, 384 N.W.2d 880 (Minn. 1986) (“The lower court’s attention is called to the fact that the evidence indicates that defendant was obviously intoxicated during all of the time that the investigation and arrest took place. In view of this circumstance, the court should consider the evidence as it bears upon the question of whether defendant was mentally competent to waive his constitutional rights at any point.”); *People v. Knedler*, 329 P.3d 242, 245-46 (Colo. 2014) (recognizing that “a defendant’s level of intoxication at the time of the *Miranda* advisement is relevant to a waiver’s validity” and that a defendant may be so “intoxicated that he or she could not have made a knowing and intelligent waiver,” and explaining the “set of subfactors to [be used in] assess[ing] a defendant’s competence in cases involving intoxication,” but ultimately concluding that “Knedler’s decision to waive his rights was informed and deliberate”).

In cases in which counsel will argue that a defendant was disabled from making a “knowing and intelligent” waiver due to one of the foregoing circumstances, the key to prevailing on the claim will often be to present a mental health expert to testify to the defendant’s capacity to comprehend the language and/or the concepts in the *Miranda* warnings. See, e.g., *People v. Jiminez*, *supra*, 863 P.2d at 982-83 (the trial court’s finding that the defendant

did not make a “knowing and intelligent waiver” relied on “the testimony of . . . a psychologist, who had examined the defendant initially to determine his competency,” and who was called by the defense to testify to the defendant’s cognitive impairments, lack of education, and “very limited vocabulary”); *Commonwealth v. Hilton*, *supra*, 443 Mass. at 603, 823 N.E.2d at 390 (the judge at the suppression hearing “credited expert testimony proffered by the defense concerning the defendant’s significant mental impairments” and “[s]pecifically . . . found that the defendant is [intellectually disabled] . . ., functionally illiterate, and given to ‘delusional and bizarre thinking[,]’ . . . [that] [s]he has ‘a tenuous connection to reality, poor judgment, and a tendency to misinterpret events and their meaning,’ with ‘little ability to understand abstract concepts’ . . . [and that she] suffers from schizophrenia and has a schizotypal personality disorder”). See also *In re Ariel R.*, 98 A.D.3d 414, 417, 419, 950 N.Y.S.2d 17, 20-21 (N.Y. App. Div., 1st Dep’t 2012) (the defendant’s treating psychiatrist, who was called as a witness for the defense at a confession suppression hearing, should have been allowed to “render an opinion as to whether [the juvenile] appellant could have understood the juvenile *Miranda* warnings read to him”; although the psychiatrist “did not perform any tests on appellant that were specifically designed to determine appellant’s competency to waive *Miranda*,” his “evaluations of appellant’s receptive communication skills and IQ . . . [were] sufficient to enable him to form an opinion as to the ultimate question of whether appellant had adequate language and cognitive skills to understand the *Miranda* warnings.”); *Smith v. State*, 918 A.2d 1144 (Del. 2007) (the denial of a suppression motion presented without the benefit of expert testimony was required to be reversed in the light of expert testimony presented at a subsequent competency hearing). For general discussion of the use of expert witnesses and the right to court funds for retention of experts when representing indigent defendants, see §§ 5.1.2-5.4, 16.2-16.3 *supra*. If the defendant is still in school, and especially if the defendant is in special education, counsel should obtain the defendant’s school records and should consult any special education teachers who might be able to testify about the defendant’s reading and comprehension abilities. See, e.g., *Cooper v. Griffin*, *supra*, 455 F.2d at 1143-46 (on the basis of special education teachers’ testimony concerning the low I.Q. scores and comprehension levels of the defendants, the court concludes that their *Miranda* waivers were not “knowing and intelligent”). Counsel might also consider putting the defendant on the witness stand at the suppression hearing to testify about his or her understanding of the meaning of the various *Miranda* warnings. See, e.g., *State in the Interest of Holifield*, 319 So. 2d 471, 472-73 (La. App. 1975) (“The defendant juvenile also was called to the witness stand. His testimony leaves considerable doubt regarding his capacity to understand the meaning of words used in the normal criminal process.”).

Even if a defendant had the intellectual capacity to comprehend *Miranda* warnings, there will be substantial questions about whether a waiver was “knowing and intelligent” in any case in which s/he was not a native English speaker and in which the *Miranda* warnings were read to him or her in English rather than in his or her native language. See, e.g., *United States v. Barry*, 979 F. Supp. 2d 715, 719 (M.D. La. 2013) (a *Miranda* waiver was not voluntary, knowing and intelligent because “the warnings were not in Barry’s native tongue, there was no use of a translator, the rights were

not explained to him at length, and his understanding was assumed but not confirmed”); *see also United States v. Botello-Rosales*, 728 F.3d 865, 867-68 (9th Cir. 2013) (per curiam), summarized in § 26.7 third paragraph *supra*.

26.9. Statements Taken after the Defendant Has Asserted His or Her Miranda Rights to Silence or Counsel

The discussion in § 26.8 *supra* described the normal standard for assessing waivers of *Miranda* rights. If, instead of making an immediate and final waiver of *Miranda* rights, the defendant asserts at any time the right to silence or the right to counsel, there are more stringent standards for determining the validity of any subsequent *Miranda* waivers.

Provided that the defendant has used language adequate to assert the right (see § 26.9.1 *infra*), the standard to be applied following an assertion of the right to silence is the one discussed in § 26.9.2 *infra*, and the standard to be applied after an assertion of the right to counsel is the one discussed in § 26.9.3 *infra*.

26.9.1. Sufficiency of the Language Used in Asserting the Right

An assertion of *Miranda* rights needs not expressly refer to the rights. As long as the defendant’s statements manifest a “clear indication[]” of his or her desire to exercise a particular right, they are sufficient to invoke the right (*Brewer v. Williams*, 430 U.S. 387, 404-05, 412 n.1 (1977) (discussing invocation of the right to counsel). *See Miranda v. Arizona, supra*, 384 U.S. at 444-45 (the right to counsel is asserted whenever the suspect “indicates in any manner” that s/he wants a lawyer); *Davis v. United States*, 512 U.S. 452, 459 (1994) (dictum) (the right to counsel is invoked if a suspect makes a “statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney”). *See, e.g., Michigan v. Mosley*, 423 U.S. 96 (1975) (by implication) (the right to silence was invoked when a suspect told the police that he did not want to say “[a]nything about the robberies” (*id.* at 105 n.11)); *Smith v. Illinois*, 469 U.S. 91 (1984) (per curiam) (the right to counsel was invoked when, in response to administration of *Miranda* warnings, defendant said: “‘Uh, yeah, I’d like to do that’” (*id.* at 93)). *See also Arizona v. Roberson*, 486 U.S. 675, 681-84 (1988); *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987) (dictum); *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Garcia v. Long*, 808 F.3d 771 (9th Cir. 2015) (the defendant asserted his right to silence by responding to the officer’s question “‘do you wish to talk to me?’” with “a simple ‘no’” (*id.* at 773); notwithstanding “other statements Garcia made during the interview” (*id.*), “‘no’ meant ‘no.’” (*id.*)); *Hurd v. Terhune*, 619 F.3d 1080, 1088-89 (9th Cir. 2010) (“Hurd unambiguously invoked his right to silence when the officers requested that he reenact the shooting . . . [and] Hurd responded to the officers’ requests by saying, among other things, ‘I don’t want to do that,’ ‘No,’ ‘I can’t,’ and ‘I don’t want to act it out because that – it’s not that clear.’”); *United States v. Rodriguez*, 518 F.3d 1072, 1077-78, 1081 (9th Cir. 2008) (the defendant, who responded to a question whether he wanted to talk to a law enforcement official by stating “‘I’m good for tonight,’”

had “at best, [made] an ambiguous invocation of the right to silence,” but his subsequent statement had to be suppressed “because his interrogator failed to clarify [defendant’s] . . . wishes with regard to his *Miranda* warnings” before commencing interrogation); *Anderson v. Terhune*, 516 F.3d 781, 787 (9th Cir. 2008) (en banc) (“Following the issuance of *Miranda* in 1966 and the literally thousands of cases that repeat its rationale, we rarely have occasion to address a situation in which the defendant not only uses the facially unambiguous words ‘I plead the Fifth,’ but surrounds that invocation with a clear desire not to talk any more. The state court accurately recognized that under *Miranda*, ‘if [an] individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease,’ . . . but then went on to eviscerate that conclusion by stating that the comments were ‘ambiguous in context ¶ . . . because they could have been interpreted as not wanting officers to pursue the particulars of his drug use as opposed to not wanting to continue the questioning at all. By asking defendant what he meant by pleading the fifth, the officer asked a legitimate clarifying question.’ ¶ Using ‘context’ to transform an unambiguous invocation into open-ended ambiguity defies both common sense and established Supreme Court law. It is not that context is unimportant, but it simply cannot be manufactured by straining to raise a question regarding the intended scope of a facially unambiguous invocation of the right to silence.”); *Deviney v. State*, 112 So. 3d 57 (Fla. 2013) (a suspect’s repeated declarations during interrogation that he was “done” and “ready to go home” (*id.* at 77) “represented an unequivocal invocation of his right to remain silent” (*id.*) particularly when “Deviney further indicated his desire to end questioning by standing and attempting to leave the interrogation room” (*id.* at 78)); *State v. Maltese*, 222 N.J. 525, 546, 120 A.3d 197, 209 (2015) (the “defendant affirmatively asserted his right to remain silent” by “repeatedly stat[ing] that he wanted to speak with his uncle, whom he considered ‘better than a freaking attorney,’ before answering any further questions,” and “specifically stat[ing] that he wanted to consult with his uncle about ‘what to do’”); *State v. King*, 300 P.3d 732, 733 (N.M. 2013) (“King clearly invoked his right to remain silent” (*id.* at 735) when he responded to the officer’s inquiry “‘Do you wish to answer any questions?’” by stating “‘Not at the moment. Kind of intoxicated.’” (*id.* at 733): “There is nothing ambiguous about his statement, which made it clear that he did not want to speak with the police. The adverb ‘not’ is unequivocally a negative expression” (*id.* at 735); “Although King’s statement suggested that he might want to talk at a later time, there was absolutely no respite from the interrogation in this case (*id.* at 736)”; § 26.9.3 *infra* (further discussing the standards governing the invocation of the right to counsel).

If the defendant’s initial assertion is adequately clear, then it is not rendered ambiguous by subsequent statements indicating a willingness to speak with the police. *Smith v. Illinois*, 469 U.S. 91 (1984) (per curiam). Such “subsequent statements are relevant only to the question whether the accused [later] waived the right he had invoked. Invocation and waiver are entirely distinct inquiries, and the two must not be blurred” (*id.* at 98).

The courts will honor a partial assertion of *Miranda* rights and give effect to the limitations established by the suspect if those limitations are

clearly and unequivocally stated. Thus, in *Connecticut v. Barrett*, 479 U.S. 523 (1987), the Court recognized that the defendant’s statement “‘he was willing to talk about [the incident] verbally but he did not want to put anything in writing until his attorney came’” (*id.* at 526) constituted an invocation of the right to counsel with respect to written, but not oral, statements. *See also United States v. Jumper*, 497 F.3d 699, 706 (7th Cir. 2007) (the defendant asserted his right to silence with respect to specific questions by saying, in answer to these questions, “‘I don’t want to answer that.’”).

The defendant can invoke his or her right to silence or to counsel even after initially waiving such rights. “The mere fact that he may have answered some questions or volunteered some statements on his own does not deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.” *Miranda v. Arizona*, *supra*, 384 U.S. at 444-45.

26.9.2. Assertion of the Right to Silence

“If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease.” *Miranda v. Arizona*, *supra*, 384 U.S. at 473-74; *see Michigan v. Mosley*, 423 U.S. 96, 100-01 (1975) (dictum). However, this does not mean that an arrested individual who has once declined to answer questions “can never again be subjected to custodial interrogation by any police officer at any time or place on any subject” (*Mosley*, *supra*, 423 U.S. at 102).

In *Mosley*, the Court sustained the admission of a murder confession by a defendant, notwithstanding his earlier assertion of his right to silence, because the unusual facts of the case showed that his assertion had been “‘scrupulously honored’” (*id.* at 104) by the police. The defendant had been arrested for several robberies and, upon administration of full *Miranda* warnings, told the arresting officer that he did not want to say “[a]nything about the robberies” (*id.* at 105 n.11). The arresting officer respected that assertion of the right to silence by “promptly ceas[ing] the interrogation” (*id.* at 97), and the defendant was never again questioned about the robberies for which he had been arrested (*see id.* at 105-06). “After an interval of more than two hours” (*id.* at 104), the defendant was taken from his cell to “another location” in the building (*id.*) “by another police officer” (*id.*), who was not shown to have had any connection with the earlier questioning (*see id.* at 105). This second police officer gave the defendant another complete set of *Miranda* warnings and then questioned the defendant “about an unrelated holdup murder” (*id.* at 104). In response to the second administration of *Miranda* warnings, the defendant signed a *Miranda* “notification form” and proceeded to answer questions, initially denying the murder and then, within 15 minutes, admitting guilt (*see id.* at 98). During all of these proceedings the defendant never asked to see a lawyer. *Id.* at 101 n.7. The Supreme Court held that “the admissibility of statements obtained after [a] . . . person in custody has decided to remain silent depends under *Miranda* on whether his ‘right to cut off questioning’ was ‘scrupulously honored’” (*id.* at 104), and that, on this record, Mosley’s “‘right to cut off questioning’ was fully respected” (*id.*). “This is not a case . . . where the police failed to honor

a decision of a person in custody to cut off questioning, either by refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind.” *Id.* at 105-06.

Under *Mosley*, the courts will find that the police failed to “scrupulously honor” a suspect’s invocation of the right to remain silent and will suppress any ensuing statement if the police (a) do not cease questioning as soon as the suspect invokes his or her right to silence (*see, e.g., Anderson v. Smith*, 751 F.2d 96, 102-03 (2d Cir. 1984); *State v. Aguirre*, 301 Kan. 950, 349 P.3d 1245 (2015)), or (b) engage in “repeated rounds of questioning to undermine the will of the person being questioned” (*Michigan v. Mosley*, *supra*, 423 U.S. at 102; *see, e.g., United States v. Hernandez*, 574 F.2d 1362, 1368-69 (5th Cir. 1978); *United States v. Rambo*, 365 F.3d 906, 910-911 (10th Cir. 2004) (“If Rambo invoked his right to remain silent and Moran failed to ‘scrupulously honor[]’ that right, Rambo’s confession must be suppressed. . . . The government contends that it was Rambo who reinitiated communication after invoking his right to remain silent and, therefore, Moran was not required to terminate the interview. That argument ignores Moran’s active role in continuing the interview after Rambo invoked his rights. When Rambo stated that he did not want to discuss the robberies, Moran made no move to end the encounter. Instead he acknowledged Rambo’s request, but told Rambo that he would be charged with two aggravated robberies and that other agencies would want to speak with Rambo. Those comments reflect both further pressure on Rambo to discuss the crimes and a suggestion that despite Rambo’s present request to terminate discussion of the topic, he would be questioned further.”); *People v. Jackson*, 103 A.D.3d 814, 816-17, 959 N.Y.S.2d 540, 543 (N.Y. App. Div., 2d Dep’t 2013) (an “arresting officer failed to ‘scrupulously honor’ the defendant’s [assertion of the right to silence] . . . when he deliberately engaged the defendant in conversation . . . [and] told the defendant that, unless someone confessed to ownership of the gun, all three occupants of the car would be charged with its possession, . . . [thereby] engaging in the functional equivalent of interrogation in that he knew or should have known that his comments were reasonably likely to elicit an incriminating response”).

When litigating cases in which interrogation was resumed after a defendant’s assertion of the right to silence, counsel may be advised to seek a state constitutional ruling forbidding such a resumption even under circumstances in which *Mosley* would allow it. *See, e.g., State v. O’Neill*, 193 N.J. 148, 176-78, 936 A.2d 438, 454-55 (2007); and *see generally* § 17.11 *supra*.

26.9.3. Assertion of the Right to Counsel

“If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.” *Miranda v. Arizona*, *supra*, 384 U.S. at 474; *Lujan v. Garcia*, 734 F.3d 917, 932 (9th Cir. 2013). A request for an attorney triggers “additional safeguards” beyond those recognized in *Mosley* as attending an invocation of the right to remain silent (*Edwards v. Arizona*, 451 U.S. 477, 484 (1981)).

“[W]e . . . hold that when an accused has invoked his right to have

counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. 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.” (*Id.* at 484-85.)

See also *Minnick v. Mississippi*, 498 U.S. 146, 150 (1990); *Shea v. Louisiana*, 470 U.S. 51, 54-55 (1985); *Moore v. Berghuis*, 700 F.3d 882 (6th Cir. 2012) (a murder suspect turned himself in and asked the police to call the number on his attorney’s business card; an officer called and got the attorney’s answering service; the officer told the suspect that he had reached only the attorney’s answering device, not the attorney (*id.* at 884). The officer then “‘asked [Moore] did he want to talk to [the officer] and [Moore] said yes he did.’ The officer . . . then had Moore sign a form waiving his constitutional rights, and ‘asked [Moore] could he tell [the officer] about . . . the fatal shooting . . . ’” (*id.* at 888). “[T]o demonstrate that Moore waived his asserted right to counsel and was therefore ‘not subject to further interrogation by the authorities until counsel [was] made available to him,’ the government must have shown that Moore ‘himself initiate[d] further communication, exchanges, or conversations with the police.’ *Edwards*, . . . Though the Supreme Court in [*Berghuis v.*] *Thompson*, [560 U.S. 370 (2010), summarized in § 26.8] recently addressed the issue of waiver of *Miranda* rights, we do not read *Thompson*’s waiver analysis to alter the *Edwards* rule regarding waiver of the right to counsel. In *Thompson*, the Court did not alter, or even speak to, the *Edwards* analysis regarding the waiver of the right to counsel; instead, *Thompson* clarifies the waiver analysis for the right to remain silent.” 700 F.3d at 888.); *Davis v. United States*, 512 U.S. 452, 458 (1994) (dictum); *McNeil v. Wisconsin*, 501 U.S. 171, 176-77 (1991) (dictum); *Montejo v. Louisiana*, 556 U.S. 778, 794-95 (2009) (dictum). *But see* *Maryland v. Shatzer*, 559 U.S. 98, 109, 110 (2010) (the *Edwards* rule does not bar “reinterrogat[ion] after a break in custody that is of sufficient duration to dissipate . . . [the] coercive effects” of the initial period of “*Miranda* custody”; this will ordinarily be the case when the “break in custody” has been at least “14 days,” a period of time that “provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to shake off any residual coercive effects of his prior custody.”).

“*Edwards* set forth a ‘bright-line rule’ that all questioning must cease after an accused requests counsel.” *Smith v. Illinois*, 469 U.S. 91, 98 (1984) (per curiam). “*Edwards* is ‘designed to prevent police from badgering a defendant into waiving his previously asserted *Miranda* rights.’ . . . The rule ensures that any statement made in subsequent interrogation is not the result of coercive pressures.” *Minnick v. Mississippi*, *supra*, 498 U.S. at 150-51. *See also* *Smith v. Illinois*, *supra*, 469 U.S. at 97-99 (rejecting arguments that a request for counsel made partway through the administration of *Miranda* warnings was insufficient to trigger the *Edwards* rule and that equivocations in the suspect’s responses to the remaining warnings could be considered as rendering his initial request

for counsel ambiguous). “The *Edwards* rule . . . is *not* offense specific: Once a suspect invokes the *Miranda* right to counsel for interrogation regarding one offense, he may not be reapproached regarding *any* offense unless counsel is present.” *McNeil v. Wisconsin*, *supra*, 501 U.S. at 177 (dictum). *Accord*, *Arizona v. Roberson*, 486 U.S. 675, 682 (1988).

“Invocation of the *Miranda* 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.’ . . . [I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, . . . [the Supreme Court’s] precedents do not require the cessation of questioning. . . . Although a suspect need not ‘speak with the discrimination of an Oxford don,’ . . . he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney.” *Davis v. United States*, *supra*, 512 U.S. at 459. *See also id.* at 462 (upholding the determination of the “courts below . . . that . . . [Davis]’ remark to the . . . agents – ‘Maybe I should talk to a lawyer’ – was not a request for counsel” and that the agents could continue questioning “to clarify whether [Davis] . . . in fact wanted a lawyer”); *Connecticut v. Barrett*, 479 U.S. 523, 529 (1987) (the *Edwards* rule was not triggered by a defendant’s announcement that he would not give the police a written statement unless his lawyer was present but had no problem in talking about the incident: “Barrett’s limited requests for counsel . . . were accompanied by affirmative announcements of his willingness to speak with the authorities.”). *Compare Sessoms v. Grounds*, 776 F.3d 615, 617-18, 630-31 (9th Cir. 2015) (*en banc*) (the defendant’s question to the interrogating officers “‘There wouldn’t be any possible way that I could have a – a lawyer present while we do this?’” combined with his follow-up statement “‘that’s what my dad asked me to ask you guys . . . uh, give me a lawyer,’” constituted “an unambiguous request for counsel, which should have cut off any further questioning”); *United States v. Hunter*, 708 F.3d 938, 948 (7th Cir. 2013) (“Given the decisive language and the prior context of Hunter’s request to Detective Karzin, we find that Hunter’s request, ‘Can you call my attorney?’ was an unambiguous and unequivocal request for counsel”); *United States v. Wysinger*, 683 F.3d 784, 795-96 (7th Cir. 2012) (the defendant unequivocally invoked his right to counsel in an exchange with the interrogating officer that began with the defendant’s asking “‘I mean, do you think I should have a lawyer? At this point?’,” to which the officer responded “‘If you want an attorney, by all means, get one,’” and the defendant replied “‘I mean, but can I call one now? That’s what I’m saying.’”); *Wood v. Ercole*, 644 F.3d 83, 92 (2d Cir. 2011) (the defendant “unambiguously asserted his right to counsel” by saying “‘I think I should get a lawyer’”); *Yenawine v. Motley*, 402 Fed. Appx. 997, 998 (6th Cir. 2010) (the defendant’s request for counsel was sufficient to trigger *Edwards*’s protection and to require the exclusion of his inculpatory statement where “(1) the . . . [defendant] was under police interrogation when he stated, ‘[M]aybe I should talk to an attorney’; (2) the . . . [defendant] named his attorney and gave the police officer his attorney’s business card; and (3) shortly thereafter, the police continued questioning the . . . [defendant] and he gave a statement”); *Ballard v. State*, 420 Md. 480, 491,

24 A.3d 96, 102 (2011) (the defendant “unambiguous[ly] and unequivocal[ly] assert[ed] . . . the right to counsel” by stating: ““You mind if I not say no more and just talk to an attorney about this?””); *People v. Slocum*, 133 A.D.3d 972, 975-76, 20 N.Y.S.3d 440, 444 (N.Y. App. Div., 3d Dep’t 2015) (the defendant unequivocally invoked his right to counsel by responding to the officer’s question “if he felt that he should have an attorney or if he wanted to be represented by the Public Defender’s office” by saying ““Yeah, probably.””).

“[I]f a suspect requests counsel [with the degree of clarity described in the preceding paragraph] at any time during the interview, he is not subject to further questioning until a lawyer has been made available or the suspect himself reinitiates conversation.” *Davis v. United States*, *supra*, 512 U.S. at 458 (dictum). With the sole exception of the situation in which the suspect has “reinitiate[d] conversation,” the invocation of the *Miranda* right to counsel “bar[s] police-initiated interrogation unless the accused has counsel with him at the time of questioning” (*Minnick v. Mississippi*, *supra*, 498 U.S. at 153). *See also id.* (“when counsel is requested, interrogation must cease, and officials may not reinitiate interrogation without counsel present, whether or not the accused has consulted with his attorney”).

In order to sustain the admissibility of an incriminating statement under the *Edwards* exception for a suspect’s reinitiation of discussions with the police, the prosecution must show not only that the defendant took the initiative in resuming the interchange by broaching or specifically requesting further conversation with police officers or prosecuting authorities but also that, in the ensuing interchange, any responses made by the defendant to police interrogation (as defined in § 26.6.2 *supra*) manifested a valid waiver of the rights to remain silent and to have counsel (under the standards described in § 26.8 *supra*). *See Minnick v. Mississippi*, *supra*, 498 U.S. at 156 (“*Edwards* does not foreclose” further police questioning if “the accused . . . initiated the conversation or discussions with the authorities” and if there was “a waiver of Fifth Amendment protections”); *Smith v. Illinois*, *supra*, 469 U.S. at 94-95 (“if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked”); *Oregon v. Bradshaw*, 462 U.S. 1039, 1044 (1983) (plurality opinion) (dictum) (“even if a conversation . . . is initiated by the accused, where reinterrogation follows, the burden remains upon the prosecution to show that subsequent events indicated a waiver of the Fifth Amendment right to have counsel present during the interrogation”); *Benjamin v. State*, 116 So. 3d 115, 123 (Miss. 2013) (even if the police officer’s post-assertion interactions with the 14-year-old suspect had been initiated by the suspect himself rather than improperly engineered by the officer, the resulting statement nonetheless would have to be suppressed because “we cannot say that the record demonstrates that Benjamin’s waiver was made with full awareness of the nature of the right and the consequences of abandoning it”: “Benjamin’s youth rendered him particularly susceptible to parental pressure” and “[i]t is manifestly apparent that Benjamin conceded to pressure from his mother and to his desire to avoid a night in jail in deciding to waive his rights.”).

The Supreme Court has not yet established definitive criteria for the kind of communication from a detained individual to his or her custodians that will satisfy the “initiation” prong of the *Edwards* rule. In *Oregon v. Bradshaw*, the Court split 4-to-4 on whether a defendant’s question to officers “‘Well, what is going to happen to me now?’” manifested a “willingness and a desire for a generalized discussion about the investigation” or was “merely a necessary inquiry arising out of the incidents of the custodial relationship” that could not “be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation” (462 U.S. at 1045-46 (plurality opinion)). The confession in *Bradshaw* was held admissible, but only through the concurring vote of Justice Powell, who adopted an analysis that was rejected by all eight other members of the Court.

In applying the “initiation” requirement, the lower courts have found waivers to be invalid when the police prompted or stimulated the suspect’s initiation of communications by, for example, reciting incriminating evidence in detail (*see, e.g., Wainwright v. State*, 504 A.2d 1096 (Del. 1986); *Koza v. State*, 718 P.2d 671 (Nev. 1986)), or informing the suspect that his or her accomplices have given confessions incriminating him or her (*see, e.g., State v. Quinn*, 64 Md. App. 668, 498 A.2d 676 (1985)), or telling the suspect about further investigation that police officers are conducting to gather incriminating evidence (*State v. McKnight*, 131 Hawai’i 379, 393-34, 319 P.3d 298, 312-13 (2013) (officer told the defendant “that they planned to execute a search warrant on his residence”)). *Cf. United States v. Rambo*, 365 F.3d 906, 910-11 (10th Cir. 2004), summarized in § 26.9.2, third paragraph, *supra*.

D. Other Constitutional, Common-Law, and Statutory Bases for Suppressing Statements

26.10. Suppression under the Sixth Amendment Right to Counsel: The Massiah Principle

In *Massiah v. United States*, 377 U.S. 201 (1964), the Court held that the Sixth Amendment right to counsel required the exclusion of an incriminating statement made by a defendant to an electronically bugged police undercover informer in the absence of the defendant’s lawyer after indictment. As construed in subsequent cases, the *Massiah* rule reaches all statements “‘deliberately elicited’” by any overt or covert government agent from an accused who neither has a lawyer present nor has waived the right to have a lawyer present at any time after the “initiation of adversary . . . proceedings” (*United States v. Henry*, 447 U.S. 264, 273-74 n.11 (1980)). *See Maine v. Moulton*, 474 U.S. 159, 171-76 (1986); *Kuhlmann v. Wilson*, 477 U.S. 436, 456-59 (1986) (dictum); *Kansas v. Ventris*, 556 U.S. 586, 590 (2009) (dictum).

Unlike the *Miranda* doctrine (*see* § 26.6.1 *supra*), the *Massiah* principle is not limited to situations in which the accused is in custody. *Rhode Island v. Innis*, 446 U.S. 291, 300 n.4 (1980) (dictum); *United States v. Henry*, *supra*, 447 U.S. at 273-74 & n.11 (dictum); *Massiah*, *supra*, 377 U.S. at 206. *Massiah* himself was at large on bond when he made his incriminating statement, and the circumstances of its making were in no way coercive. *See id.* at 202-03.

The central issues in applying *Massiah* are whether the defendant's statement was made at a "critical stage" of the proceedings (§ 26.10.1 *infra*), whether it was "deliberately elicited" by the authorities (§ 26.10.2 *infra*), and, in cases in which the prosecution claims that the defendant waived the right to counsel, whether that waiver was valid (§ 26.10.3 *infra*).

26.10.1. "Critical Stages" of the Proceedings

The *Massiah* doctrine applies to "any interrogation occurring after the first formal charging proceeding, the point at which the Sixth Amendment right to counsel initially attaches" (*Moran v. Burbine*, 475 U.S. 412, 428 (1986) (dictum); *see also id.* at 429-32). "[O]nce the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings," and "[i]nterrogation by the State is such a stage" (*Montejo v. Louisiana*, 556 U.S. 778, 786 (2009) (dictum)). *See also Brewer v. Williams*, 430 U.S. 387, 398 (1977) ("a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him – 'whether by way of formal charge, preliminary hearing, indictment, information or arraignment'"); *Rothgery v. Gillespie County, Texas*, 554 U.S. 191, 194 (2008) ("the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty"); *id.* at 198, 213; § 11.5.1 *supra*. Compare *Gerstein v. Pugh*, 420 U.S. 103, 122-25 (1975) (when the "state system[] of criminal procedure" (*id.* at 123) assigns only a "limited function and . . . nonadversary character" (*id.* at 122) to probable cause determinations, such determinations are not "critical stages" for purposes of the right to counsel).

The Supreme Court has rejected the proposition that *Massiah* applies prior to the commencement of adversary proceedings on a particular charge if the suspect is already represented by an attorney in connection with other charges on which adversary proceedings have commenced. *See Texas v. Cobb*, 532 U.S. 162, 168 (2001) ("a defendant's statements regarding offenses for which he ha[s] not been charged . . . [are] admissible notwithstanding the [prior] attachment of his Sixth Amendment right to counsel on other charged offenses," even if those other charges are "factually related"; the attachment of the right to counsel on one charge will carry over to other offenses only when those offenses, whether or not formally charged, "would be considered the same offense [as the charged offense] under the . . . test [of *Blockburger v. United States*, 284 U.S. 299 (1932), discussed in § 20.8.2.2 *supra*]"); *McNeil v. Wisconsin*, 501 U.S. 171, 175-76 (1991); *Moran v. Burbine*, *supra*, 475 U.S. at 428-32; *see also Maine v. Moulton*, *supra*, 474 U.S. at 180 n.16 (dictum); *Honeycutt v. Donat*, 535 Fed. Appx. 624, 629 (9th Cir. 2013). This is the rule in most jurisdictions. *See, e.g., State v. Sparklin*, 296 Or. 85, 672 P.2d 1182 (1983); *State v. Clawson*, 270 S.E.2d 659 (W. Va. 1980). *Cf. Rubalcado v. State*, 424 S.W.3d 560, 571-73 (Tex. Crim. App. 2014) (applying the rule of *Texas v. Cobb* but nonetheless concluding that the attachment of the right to counsel in a case in one county required the suppression of statements a police agent elicited from the defendant about uncharged conduct in another county because those statements "incriminate[d] [the] defendant with regard to [the] two separate

offenses simultaneously” and the State ultimately used the statements against the defendant at trial in the case in which the right to counsel had already attached). Nevertheless, in States in which the courts have not yet ruled on the protections afforded by the state constitutional right to counsel in this context, counsel should urge them to adopt a state constitutional rule that an accused has the right to have counsel present during interrogation once the accused is represented by an attorney, regardless of whether that representation is on the charges about which the suspect is being interrogated or on other charges. *See, e.g., People v. Cohen*, 90 N.Y.2d 632, 638-39 & n.*, 687 N.E.2d 1313, 1316-17 & n.*, 665 N.Y.S.2d 30, 33-34 & n.* (1997) (the attachment of the state constitutional right to counsel on one charge will bar questioning on another, not-yet-charged offense if “the two criminal matters are so closely related transactionally, or in space or time, that questioning on the unrepresented matter would all but inevitably elicit incriminating responses regarding the matter in which there had been an entry of counsel” or if the “defendant is in custody on the charge upon which the right to counsel has indelibly attached,” regardless of whether the new matter is “related or unrelated” to the charge for which the defendant is in custody); and see generally § 17.11 *supra*.

In *Escobedo v. Illinois*, 378 U.S. 478 (1964), the Court indicated that a suspect’s retention of counsel before interrogation can activate the Sixth Amendment right to counsel during pre-arraignment interrogation, at least when the suspect explicitly requests the presence of counsel during interrogation. Later cases have, however, reinterpreted *Escobedo* as based on the Fifth Amendment privilege against self-incrimination rather than the Sixth Amendment (*see Moran v. Burbine, supra*, 475 U.S. at 428-31; *United States v. Gouveia*, 467 U.S. 180, 188 n.5 (1984)), and have rejected the argument that pre-arraignment retention of an attorney alters the general rule that Sixth Amendment protections commence at the first formal charging proceeding (*Moran v. Burbine, supra*, 475 U.S. at 429-32). Counsel can urge the state courts to adopt a more protective rule on state constitutional grounds. *See, e.g., People v. Grice*, 100 N.Y.2d 318, 321, 794 N.E.2d 9, 10-11, 763 N.Y.S.2d 227, 229 (2003) (“A suspect’s [state constitutional] right to counsel can . . . attach before an action is commenced when a person in custody requests to speak to an attorney or when an attorney who is retained to represent the suspect enters the matter under investigation”); *People v. Houston*, 42 Cal. 3d 595, 724 P.2d 1166, 230 Cal. Rptr. 141 (1986) (abrogated by a subsequent initiative constitutional amendment) (rejecting *Moran v. Burbine* on state constitutional grounds and holding that the right to counsel protects a suspect’s relationship with retained counsel even earlier than the first formal charging proceeding); *State v. Stoddard*, 206 Conn. 157, 537 A.2d 446 (1988) (rejecting *Moran v. Burbine* on state constitutional grounds and construing the due process clause of the state constitution to require that “a suspect . . . be informed promptly of timely efforts by counsel to render pertinent legal assistance [and that] . . . [a]rmed with that information, the suspect . . . be permitted to choose whether he wishes to speak with counsel, in which event interrogation must cease” (206 Conn. at 166-67, 537 A.2d at 452)); and see generally § 17.11 *supra*.

26.10.2. *Statements “Deliberately Elicited” by the Government*

The *Massiah* protections apply to ordinary police interrogation (*see Brewer v. Williams*, 430 U.S. 387 (1977); *Montejo v. Louisiana*, 556 U.S. 778, 786-87 (2009) (dictum)), to court-ordered psychiatric examinations of the defendant whose products are used to incriminate him or her (*Estelle v. Smith*, 451 U.S. 454, 469-71 & n.14 (1981); *Powell v. Texas*, 492 U.S. 680 (1989) (per curiam)), to conversations between the defendant and police spies or state-activated jailhouse snitches (*United States v. Henry*, 447 U.S. 264 (1980)), and to similar “investigatory techniques that are the equivalent of police interrogation” (*Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986) (dictum)). *See also, e.g., Commonwealth v. Hilton*, 443 Mass. 597, 603-04, 614-15, 823 N.E.2d 383, 391, 398-99 (2005) (“for purposes of a Sixth Amendment analysis, court officer Marrin [“whose job responsibilities included the transportation of detainees between the holding cells and the court room, maintaining order in the court room, and providing security for the judges and the public” and who conversed with the defendant as “Marrin was escorting the defendant back to the holding area”] must be viewed as an agent of law enforcement”; “[o]nce the Sixth Amendment right to counsel has attached, the *Massiah* line of cases . . . prohibits ‘government efforts to elicit information from the accused’ . . . , including interrogation by ‘the government or someone acting on its behalf’”; references in the caselaw to “the Sixth Amendment as prohibiting questioning by ‘the police’ and their agents . . . do not mean that the Sixth Amendment’s protections are implicated only by actions involving the ‘police,’ but merely operate to describe the most common fact pattern raised by such cases.”); *State v. Oliveira*, 961 A.2d 299, 310-11 (R.I. 2008) (a child protective services investigator was an “agent of the state” for Sixth Amendment purposes, even though she “did not interview defendant at the direct behest of the police or prosecution,” because the agency’s “protocol required that she work cooperatively with law enforcement personnel,” she had already “exchanged information” with the police about the case, and she acknowledged that “one of her purposes in interviewing defendant was to ‘add to the evidence’”); *Rubalcado v. State*, 424 S.W.3d 560, 574-76 (Tex. Crim. App. 2014) (the complaining witness was a “government agent” for Sixth Amendment purposes because the “police encouraged [her] to call appellant for the purpose of eliciting a confession” and “supplied [her] with the recording equipment, and an officer was present during those calls”).

When a police officer, informer, or agent “stimulate[s]” conversations with the defendant for the purpose of “elicit[ing] [incriminating] information,” this ““indirect and surreptitious interrogatio[n]”” comes within *Massiah*’s strictures against deliberately eliciting incriminating statements (*United States v. Henry*, *supra*, 447 U.S. at 273). Similarly, if the agent engages the defendant “in active conversation about [his or her] . . . upcoming trial [in a manner that is] . . . certain to elicit” incriminating statements, the agent’s “mere [] participat[ion] in this conversation [will be deemed] . . . ‘the functional equivalent of interrogation’” in violation of *Massiah* (*Maine v. Moulton*, *supra*, 474 U.S. at 177 n.13; *Kuhlmann v. Wilson*, *supra*, 477 U.S. at 459 (dictum)). *See also, e.g., Fellers v. United States*, 540 U.S. 519, 524-25 (2004) (the lower court

“erred in holding that the absence of an ‘interrogation’ foreclosed petitioner’s [Sixth Amendment] claim”: “the officers in this case ‘deliberately elicited’ information from petitioner” by informing him, upon “arriving at petitioner’s house, . . . that their purpose in coming was to discuss his involvement in the distribution of methamphetamine and his association with certain co-conspirators” as well as to arrest him in connection with his indictment on a methamphetamine conspiracy charge; the Sixth Amendment right to counsel applies in this situation even though the interchange between the petitioner and the arresting officers was no longer than 15 minutes and the petitioner apparently made his inculpatory admissions immediately upon being advised of the arresting officers’ purpose.); *Ayers v. Hudson*, 623 F.3d 301, 311-12 (6th Cir. 2010) (“agency in the *Massiah* context [is not limited] to cases where the State gave the informant instructions to obtain evidence from a defendant”; “[t]o hold otherwise would allow the State to accomplish ‘with a wink and a nod’ what it cannot do overtly”).

On the other hand, there is no *Massiah* violation if the police plant a stool pigeon in an accused’s jail cell as a cellmate but the “police and their informant” take no additional “action, beyond merely listening, that [is] . . . designed deliberately to elicit incriminating remarks” (*Kuhlmann v. Wilson*, *supra*, 477 U.S. at 459). “[A] defendant does not make out a violation of [*Massiah*] . . . simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police.” *Kuhlmann v. Wilson*, *supra*, 477 U.S. at 459.

If a civilian informer deliberately elicits statements from an accused within the foregoing principles, the courts will find a *Massiah* violation even though the government agents who employed the informer instructed him or her to refrain from questioning the accused (*United States v. Henry*, *supra*, 447 U.S. at 268, 271) or to refrain from inducing the suspect to make incriminating statements (*Maine v. Moulton*, *supra*, 474 U.S. at 177 n.14). Compare *Kuhlmann v. Wilson*, *supra*, 477 U.S. at 460-61 (finding no *Massiah* violation when the informant not only was instructed to refrain from questioning or eliciting incriminating statements but “followed those instructions”).

26.10.3. Waiver

“[T]he Sixth Amendment right to counsel may be waived by a defendant, so long as relinquishment of the right is voluntary, knowing, and intelligent.” *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009) (citing, *inter alia*, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). See also, e.g., *Carnley v. Cochran*, 369 U.S. 506, 513-16 (1962); *Montejo*, *supra*, 556 U.S. at 797-98 (remanding so that *Montejo* can “press any claim he might have that his Sixth Amendment waiver was not knowing and voluntary, e.g., his argument that the waiver was invalid because it was based on misrepresentations by police as to whether he had been appointed a lawyer”). It is “incumbent upon the State to prove ‘an intentional relinquishment or abandonment of a known right or privilege’ . . . [and] courts [assessing “an alleged waiver of the right to counsel” must] indulge in every reasonable presumption against waiver” (*Brewer v. Williams*, 430 U.S. 387, 404 (1977)). See also *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988).

When the defendant’s incriminating statement was made to any sort of a police spy, there can obviously be no waiver: The fact that the accused is unaware s/he is making a statement for government consumption suffices to exclude the possibility of a waiver as defined by *Johnson v. Zerbst*, *supra*, 304 U.S. at 464: – that is, an “intentional relinquishment or abandonment of a known right or privilege.” When the statement was made to a person whom the defendant knew to be a government agent, the test of a valid waiver of the right to counsel is basically similar in the Sixth Amendment context of *Massiah* and in the Fifth Amendment context of *Miranda*. See *Patterson v. Illinois*, 487 U.S. 285 (1988); *Montejo v. Louisiana*, *supra*, 556 U.S. at 786, 794-95. The principles and precedents discussed in § 26.8 *supra* are generally controlling. See, e.g., *Brewer v. Williams*, *supra*, 430 U.S. at 401-06. For example, a waiver made after administration of the ordinary *Miranda* warnings will “typically” be effective (*Montejo v. Louisiana*, *supra*, 556 U.S. at 786, 794-95; *Patterson v. Illinois*, *supra*, 487 U.S. at 300). However, because the Sixth Amendment imposes on “the prosecutor and the police . . . an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel” (*Maine v. Moulton*, *supra*, 474 U.S. at 171), some waivers that would be valid in the *Miranda* setting are not valid in the *Massiah* setting (see *Patterson v. Illinois*, *supra*, 487 U.S. at 297 n.9 (dictum) (“we have permitted a *Miranda* waiver to stand where a suspect was not told that his lawyer was trying to reach him during questioning [citing *Moran v. Burbine*, 475 U.S. 412 (1986)]; in the Sixth Amendment context, this waiver would not be valid”); cf. *Powell v. Texas*, 492 U.S. 680 (1989) (per curiam) (holding, in the context of a court-ordered pretrial psychiatric examination, that a determination that “the defendant waived his Fifth Amendment privilege by raising a mental-status defense [at trial] . . . [does] not suffice to resolve the defendant’s separate Sixth Amendment claim” (*id.* at 685), and that the lower court erred by “conflat[ing] . . . the Fifth and Sixth Amendment analyses” (*id.* at 683) and by treating the defendant’s waiver of his Fifth Amendment right to remain silent as also waiving the Sixth Amendment right to counsel)).

In *Michigan v. Jackson*, 475 U.S. 625 (1986), the Supreme Court established a now-defunct “prophylactic rule that once a criminal defendant invokes his Sixth Amendment right to counsel, a subsequent waiver of that right – even if voluntary, knowing, and intelligent under traditional standards – is presumed invalid if secured pursuant to police-initiated conversation” (*Michigan v. Harvey*, 494 U.S. 344, 345-46 (1990)). In *Montejo v. Louisiana*, *supra*, the Court overruled *Jackson* and eliminated this “prophylactic rule,” explaining that even “after arraignment, when Sixth Amendment rights have attached,” a defendant is adequately protected by the “three layers of prophylaxis” that apply both before and after arraignment: “Under *Miranda*’s prophylactic protection of the right against compelled self-incrimination, any suspect subject to custodial interrogation has the right to have a lawyer present if he so requests, and to be advised of that right. 384 U.S., at 474. Under *Edwards v. Arizona*’[s] prophylactic protection of the *Miranda* right, once such a defendant ‘has invoked his right to have counsel present,’ interrogation must stop. 451 U.S. [477], at 484 [(1981)]. And under *Minnick v. Mississippi*’s prophylactic protection of the *Edwards* right, no subsequent interrogation may take place until counsel is present, ‘whether or not the

accused has consulted with his attorney.’ 498 U.S. [146], at 153 [(1990)].” (*Montejo*, *supra*, 556 U.S. at 794-95.) State courts are free to retain the *Jackson* rule as a matter of state constitutional law. *See, e.g., State v. Bevel*, 231 W. Va. 346, 348, 745 S.E.2d 237, 239 (2013) (“we decline to adopt *Montejo* and find that the right to counsel that has been recognized in this state for more than a quarter century continues to be guaranteed by article III, section 14 of the West Virginia Constitution”); and see generally § 17.11 *supra*.

26.11. Statements Obtained During a Period of Unnecessary Delay Following Arrest

In *McNabb v. United States*, 318 U.S. 332 (1943), and *Mallory v. United States*, 354 U.S. 449 (1957), the Supreme Court exercised its supervisory powers over the federal courts to enforce prompt-arraignment requirements (currently contained in Federal Rule of Criminal Procedure 5(a)) by excluding confessions obtained from arrested persons during a period of unlawful delay in bringing them before a judicial officer for a determination of probable cause. As a result of subsequent legislative enactments described in detail in *Corley v. United States*, 556 U.S. 303 (2009), the “*McNabb-Mallory* rule” has been modified to provide a basis for excluding confessions obtained during “unreasonable or unnecessary” delays of more than six hours before preliminary arraignment in federal prosecutions (*Corley*, 556 U.S. at 322). *See, e.g., United States v. Thompson*, 772 F.3d 752, 762-63 (3d Cir. 2014) (“Thompson’s confession[,] [which] came considerably after the six-hour period had run,” is suppressed under the *McNabb-Mallory* rule because “the government delayed Thompson’s arraignment so that they could continue to persuade him to cooperate,” and the court “hold[s] that pursuit of cooperation is not a reasonable excuse for delay in presentment”); *United States v. Pimental*, 755 F.3d 1095, 1101, 1104 (9th Cir. 2014) (suppressing “incriminating statements that Torres Pimental made to Agent Aradanas on Sunday morning, about forty-eight hours after his Friday morning arrest, and before he was presented to a magistrate judge on Tuesday,” because “[i]t is undisputed that Torres Pimental’s incriminating statements . . . were made more than six hours after his . . . arrest and before his . . . initial appearance,” and this “delay was not a result of the distance to be traveled to the nearest available magistrate holding a presentment calendar that Friday,” and the “delay in presenting Torres Pimental [also] does not fall within” other “reasonable delays apart from transportation, distance, and the availability of a magistrate”).

In most States the criminal code contains a provision requiring prompt delivery of a newly arrested defendant to court for arraignment. Such provisions supply a predicate for a state-law exclusionary rule analogous to the *McNabb-Mallory* rule. *See generally* Romualdo P. Eclavea, Annot., *Admissibility of Confession or Other Statement Made by Defendant as Affected by Delay in Arraignment – Modern State Cases*, 28 A.L.R.4th 1121 (1984 & Supp.).

Arguably, the decision in *Gerstein v. Pugh*, 420 U.S. 103 (1975), lays a federal constitutional foundation for something akin to the *McNabb-Mallory* exclusionary rule in state prosecutions. As explained in § 11.2 *supra*, *Gerstein* establishes a Fourth Amendment right to a prompt judicial determination

of probable cause following a warrantless arrest. *See, e.g., Fisher v. Washington Metropolitan Area Transit Authority*, 690 F.2d 1133, 1140 (4th Cir. 1982); *Lively v. Cullinane*, 451 F. Supp. 1000, 1004-05 (D. D.C. 1978). Accordingly, when the police hold a defendant beyond the period prescribed by *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991), as the limit of permissible detention without a probable-cause determination (see § 11.2 *supra*), counsel can argue that the Fourth Amendment requires the suppression of any statements made by the defendant during the unlawfully protracted custody. *See, e.g., State v. Huddleston*, 924 S.W.2d 666, 675-76 (Tenn. 1996) (suppressing a statement obtained by the police during a 72-hour period in which the defendant was held without a judicial determination of probable cause in violation of *Gerstein* and *County of Riverside v. McLaughlin*); *Norris v. Lester*, 545 Fed. Appx. 320, 321, 327 (6th Cir. 2013) (“appellate counsel was ineffective for failing to argue [under *County of Riverside v. McLaughlin*] that [Norris]’ confession was obtained after the violation of his constitutional right to a prompt probable-cause determination”). The general Fourth Amendment rule excluding statements made in confinement following an unconstitutional arrest (§ 26.15 *infra*) supports this result. However, as the Supreme Court observed in *Powell v. Nevada*, 511 U.S. 79, 85 n.* (1994), the Court has not yet ruled on the specific question whether “a suppression remedy applies” to a *Gerstein* violation of “failure to obtain authorization from a magistrate for a significant period of pretrial detention.”

26.12. State Common-law Doctrines Requiring the Suppression of Statements as Involuntary

In addition to the federal constitutional doctrine excluding coerced confessions, see §§ 26.2-26.4.7 *supra*, there are state common-law doctrines that may exclude a confession on the ground that it is “involuntary.” *See Colorado v. Connelly*, 479 U.S. 157, 167 (1986); *Rogers v. Richmond*, 365 U.S. 534, 540-44 (1961); *State v. Kelly*, 61 N.J. 283, 290-93, 294 A.2d 41, 45-46 (1972). Although the issue under the federal Constitution (and many state constitutional self-incrimination and due process clauses) is whether the defendant’s will was overborne, the issue under the state’s common law is likely to be whether the confession was made in circumstances that render it untrustworthy or unreliable.

In addition, the common-law doctrine affords a basis for suppressing statements coerced by private citizens. Whereas coercive behavior by private citizens cannot supply the “state action” necessary for a due process violation (*see Colorado v. Connelly, supra*, 479 U.S. at 165-67), it may render a defendant’s statement unreliable and thus inadmissible under state common law (*see, e.g., State v. Kelly, supra*, 61 N.J. at 292-94, 294 A.2d at 46-47 (holding a statement coerced by a private security guard inadmissible under state law because it was unreliable although not unconstitutionally involuntary)).

The substantive details and procedural aspects of the common-law doctrine of involuntariness vary considerably among jurisdictions, and counsel must consult local statutes and caselaw. In a number of jurisdictions, for example, the prosecutor must lay a foundation for the introduction of any statement of the defendant by showing that it was made “without the slightest

hope of benefit” and “without the remotest fear of injury.” *See, e.g., State v. Ritter*, 268 Ga. 108, 109-10, 485 S.E.2d 492, 494 (1997) (“Under Georgia law, only voluntary incriminating statements are admissible against the accused at trial. OCGA § 24-3-50. When not made freely and voluntarily, a confession is presumed to be legally false and can not be the underlying basis of a conviction. . . . To make a confession admissible, it must have been made voluntarily, i.e., ‘without being induced by another by the slightest hope of benefit or remotest fear of injury.’ OCGA § 24-3-50. . . . A reward of lighter punishment is generally the ‘hope of benefit’ to which OCGA § 24-3-50 refers. . . . The State bears the burden of demonstrating the voluntariness of a confession by a preponderance of the evidence.”); *State v. Crank*, 105 Utah 332, 142 P.2d 178, 184-85 (1943) (“When the state seeks to put the confession before the jury it must establish its competency to the court. To do this it must show that the confession was given by the accused as his voluntary act; as an expression of his independent and free will, uninfluenced by fear of punishment or by hope of reward; that it was not induced or influenced by any advantages or benefits that might accrue to him or those near or dear to him, nor was it given to lighten any penalties or punishments the law might impose on him if tried and convicted without confessing; and that it was not given [*sic* in 142 P.2d at 184; spelled correctly as “given” in 105 Utah at 347] as a result of a desire to escape or avoid any misery, threats, acts, or conduct of any other person, having it in their power, or whom he believed had it in their power, to inflict upon him, or upon those whom it was his duty or privilege to protect.”).

In cases in which the facts provide defense counsel with a viable state common-law challenge to a defendant’s statement, counsel should ordinarily attempt to litigate that claim in a pretrial hearing even if the normal practice is to raise the issue by an evidentiary objection at trial. A mid-trial ruling excluding the statement as unreliable will come too late to prevent the trier of fact from hearing the contents of the statement in a bench trial; and even in a jury trial there is a risk of the jurors’ getting wind that the question being litigated while they are sent out to wait involves a confession by the defendant. Accordingly, in jurisdictions that permit motions *in limine*, counsel will usually want to raise the common-law contention as an *in limine* matter and, if the statement is excluded, counsel should consider moving to recuse the motions judge from sitting as fact-finder at a bench trial. *See* §§ 17.5, 22.5 *supra*. If the jurisdiction is one in which the court may entertain or decline to entertain motions *in limine* at its discretion, counsel will increase the likelihood of obtaining a pretrial adjudication of the common-law ground by joining it with a constitutional ground (*see* §§ 26.2-26.11 *supra* and §§ 26.15-26.16 *infra*) on which pretrial suppression motions are authorized by statute or court rule or which are customarily litigated on pretrial motions *in limine* under local practice. Since the facts bearing on the common-law and constitutional grounds will invariably overlap, counsel can present strong arguments of judicial convenience for hearing the two (or more) claims at the same time. (An exception to this strategy is the situation in which the suppression hearing will be conducted by a pro-prosecution judge and there is a realistic prospect that the trial judge will be more defense-friendly.)

26.13. *Statements Obtained by Eavesdropping on a Conversation Between the Defendant and Defense Counsel*

The Supreme Court has forbidden prosecutorial use of statements obtained by government agents through electronic eavesdropping on conversations between an accused and his or her lawyer. *Black v. United States*, 385 U.S. 26 (1966) (per curiam); *O'Brien v. United States*, 386 U.S. 345 (1967) (per curiam); *Roberts v. United States*, 389 U.S. 18 (1967) (per curiam); see also *Hoffa v. United States*, 385 U.S. 293, 306-09 (1966) (dictum). The lower courts also have steadfastly excluded evidence produced by eavesdropping that intrudes upon attorney-client communications. See, e.g., *State v. Beaupre*, 123 N.H. 155, 459 A.2d 233 (1983) (an officer was in the room with the suspect while he telephoned his attorney); *State v. Sugar*, 84 N.J. 1, 417 A.2d 474 (1980) (the police used an electronic device to listen in on a conversation between the suspect and counsel in an interrogation room). See also *State v. Lenarz*, 301 Conn. 417, 425, 22 A.3d 536, 542 (2011) (holding that a prosecution had to be dismissed because the contents of the defendant's computer, seized by police executing a valid search warrant in the course of their investigations and later transmitted to the forensics lab and the prosecutor, contained extensive information about defense strategy that was protected by attorney-client privilege: "[W]e conclude generally that prejudice may be presumed when the prosecutor has invaded the attorney-client privilege by reading privileged materials containing trial strategy, regardless of whether the invasion of the attorney-client privilege was intentional.").

Although the rule is clear, its doctrinal underpinnings are murky. In *Weatherford v. Bursey*, 429 U.S. 545 (1977), the Court characterized its *Black* and *O'Brien* decisions as grounded upon the Fourth Amendment, but in *United States v. Morrison*, 449 U.S. 361, 364-65 (1981) (dictum), it treated them as based upon the Sixth Amendment right to counsel. The Sixth Amendment analysis is complicated further by the subsequent holding in *Moran v. Burbine*, 475 U.S. 412 (1986), that the Sixth Amendment does not protect the attorney-client relationship prior to the attachment of the right to counsel at the first formal charging proceeding.

In this unsettled state of the law, counsel is advised to advance alternative grounds for any motion to suppress statements obtained by police eavesdropping on attorney-client conversations. Counsel should urge that the statements be suppressed under the Fourth Amendment (see *Weatherford v. Bursey*, *supra*; *Gennusa v. Canova*, 748 F.3d 1103, 1112-13 (11th Cir. 2014)); the Sixth Amendment (see *United States v. Morrison*, *supra*); state constitutional protections of the right to counsel (see, e.g., *People v. Grice*, 100 N.Y.2d 318, 321, 794 N.E.2d 9, 10-11, 763 N.Y.S.2d 227, 229 (2003), summarized in § 26.10.1 concluding paragraph *supra*); state constitutional protections against unreasonable searches and seizures (§ 25.2.2 *supra*); the statutory or common-law privilege for attorney-client communications (see, e.g., *State v. Beaupre*, *supra*, 123 N.H. at 159, 459 A.2d at 236); and, in cases of electronic eavesdropping, the federal and state statutory restrictions upon electronic surveillance (see §§ 25.31-25.32 *supra*).

26.14. *Electronic Recording of Interrogations*

In a number of jurisdictions, the police are required to electronically record interrogations, usually with video-recording equipment. In some jurisdictions, this requirement was established by a court decision (*see, e.g., Stephan v. State*, 711 P.2d 1156, 1157 (Alaska 1986) (“we hold that an unexcused failure to electronically record a custodial interrogation conducted in a place of detention violates a suspect’s right to due process, under the Alaska Constitution, . . . and that any statement thus obtained is generally inadmissible”); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (adopting the requirement by means of the court’s “supervisory power to insure the fair administration of justice”)); in others, it was established by a statute (*see, e.g., SMITH-HURD ILL. COMP. STAT. ANN. ch. 725, § 5/103-2.1; WIS. STAT. ANN. § 968.073*) or court rule (*see, e.g., IND. RULE EVID. 617*). Typically, the police are required to record “all custodial interrogation including any information about rights, any waiver of those rights, and all questioning” (*State v. Scales, supra*, 518 N.W.2d at 592). There may be exceptions for situations in which recording is not feasible (*see, e.g., IND. RULE EVID. 617(a); WIS. STAT. ANN. § 972.15(2)(a)*). Some statutes confer upon the prosecution a procedural benefit at the suppression hearing if a statement was electronically recorded; counsel should be alert to the possibility of challenging such provisions on constitutional grounds. *See, e.g., State v. Barker*, 2016 WL 1697911 (Ohio April 28, 2016) (holding that a statute on electronic recording of juveniles’ custodial statements, which provided that statements “are presumed to be voluntary if . . . electronically recorded” (*id.* at *1), “may not supersede the constitutional rule announced in *Miranda*” and therefore “cannot lessen the protections announced in *Miranda* by removing the state’s burden of proving a suspect’s knowing, intelligent, and voluntary waiver of rights prior to making a statement during a custodial interrogation” (*id.* at 6); and holding further that such a statutory presumption, at least as applied to juveniles, violates due process, because the “[a]pplication of the statutory presumption would remove all consideration of the juvenile’s unique characteristics from the due-process analysis unless the juvenile introduced evidence to disprove voluntariness when the interrogation was electronically recorded” and “there is no rational relationship between the existence of an electronic recording and the voluntariness of a suspect’s statement[,] . . . especially . . . where, as with R.C. 2933.81(B), the statute requires only that the *statement* sought to be admitted, not the entire interrogation, be recorded” (*id.* at *10)).

Although video-recording provides a degree of protection against abusive police practices, it is not nearly as protective as proponents of this reform may believe. A crafty detective or officer can do an end-run around the recording requirement by making promises or threats (or engaging in other types of psychological manipulations of the defendant) before the video-camera is turned on. Moreover, if the interrogation is protracted, the police presumably will turn off the camera periodically to allow the defendant to use the bathroom or to take a break from interrogation. During these breaks, the police have additional opportunities to engage in off-camera manipulations of the defendant. As a result, the video the judge eventually sees at a suppression hearing (and that the jury may see at trial) is often a carefully stage-managed

performance, with the police as both on-stage actors and behind-the-scenes directors. In such cases, the use of a recording actually may make things worse for the defendant because the video images provide the judge and jury with a compelling – but dangerously false – appearance of careful, responsible police work.

Accordingly, defense attorneys in jurisdictions with electronic recording of interrogations need to be alert to the possibility that police improprieties took place off-camera. Counsel should interview the client carefully about what the police said and did before the video camera was turned on and during all breaks in the recording. Although litigation about such off-camera statements and actions of the police will usually come down to the defendant’s word against the officers’, counsel can at least use the police reports and the time counters in the video to document all of the opportunities the police had to apply pressure on the defendant off-camera (*e.g.*, at the scene of the arrest, in the police car on the way to the station, during booking, in the interrogation room before the camera was turned on, and during breaks in the interrogation). Naturally, counsel should also watch for any indications of alterations in the video. Some state statutes prescribe safeguards against alterations (*see, e.g.*, SMITH-HURD ILL. COMP. STAT. ANN. ch. 725, § 5/103-2.1(b)(2)).

26.15. *Statements Obtained Through Violation of the Defendant’s Fourth Amendment Rights or Illegal Eavesdropping*

The derivative-evidence principle described in §§ 25.39-25.42 *supra* requires the suppression of statements that are the “fruits” of a Fourth Amendment violation. *See Wong Sun v. United States*, 371 U.S. 471 (1963). Potential fruits include:

- (a) statements obtained from a defendant following his or her unconstitutional arrest or detention (*e.g.*, *Brown v. Illinois*, 422 U.S. 590 (1975); *Dunaway v. New York*, 442 U.S. 200 (1979); *Lanier v. South Carolina*, 474 U.S. 25 (1985) (per curiam); *Kaupp v. Texas*, 538 U.S. 626, 632-33 (2003) (per curiam); *but cf. New York v. Harris*, 495 U.S. 14, 21 (1990) (summarized in § 25.39 subdivision (c) *supra*));
- (b) statements obtained by means of eavesdropping following an unlawful entry into protected premises (*e.g.*, *Berger v. New York*, 388 U.S. 41 (1967); see § 25.31 *supra*);
- (c) statements obtained by means of electronic eavesdropping in violation of the constitutional doctrines governing electronic surveillance (*e.g.*, *Katz v. United States*, 389 U.S. 347 (1967); see §§ 25.31, 25.33 *supra*); and
- (d) statements made in response to being told of illegally seized

evidence or in response to being confronted with the evidence itself (e.g., *Ruiz v. Craven*, 425 F.2d 235 (9th Cir. 1970); *State v. Blair*, 691 S.W.2d 259 (Mo. 1985); cf. *Fahy v. Connecticut*, 375 U.S. 85 (1963)).

As indicated in § 25.40 *supra*, the rules requiring suppression of derivative evidence are limited by a dissipation-of-taint principle. Thus, for example, statements made in police custody following an unconstitutional arrest or *Terry* stop are inadmissible unless “intervening events break the causal connection between the illegal arrest [or stop] and the confession so that the confession is “sufficiently an act of free will to purge the primary taint”” (*Taylor v. Alabama*, 457 U.S. 687, 690 (1982)). *Accord*, *Kaupp v. Texas*, *supra*, 538 U.S. at 632-33; compare *Rawlings v. Kentucky*, 448 U.S. 98, 106-10 (1980). In determining whether the prosecution has met its burden of showing a break in the connection (see § 25.40), “[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 are all relevant” (*Brown v. Illinois*, 422 U.S. 590, 603-04 (1975)). *Accord*, *Kaupp v. Texas*, *supra*, 538 U.S. at 632-33. More particularly, the Supreme Court has recognized that illegal detentions “designed to provide an opportunity for interrogation [are] . . . likely to have coercive aspects likely to induce self-incrimination” (*Michigan v. Summers*, 452 U.S. 692, 702 n.15 (1981) (dictum)). The relevant Fourth Amendment restrictions on arrest and investigative detention are discussed in §§ 25.4-25.14 *supra*.

Statements obtained by electronic eavesdropping in violation of some, but not all, of the statutory regulations codified in 18 U.S.C. §§ 2510-2520 must also be suppressed. Compare *United States v. Chavez*, 416 U.S. 562 (1974), and *United States v. Giordano*, 416 U.S. 505 (1974), with *United States v. Donovan*, 429 U.S. 413 (1977). See, e.g., *United States v. North*, 735 F.3d 212 (5th Cir. 2013). See §§ 25.31-25.32 *supra*.

26.16. Statements Tainted by Prior Ones That Were Unlawfully Obtained: The “Cat out of the Bag” Doctrine

Prior to *Oregon v. Elstad*, 470 U.S. 298 (1985), the finding that an incriminating statement had been taken from an accused in violation of either the due process requirement of voluntariness or the *Miranda* rules commonly led to the suppression of any subsequent statement of the accused on the same subject before consulting a lawyer. This result was not commanded by any majority opinion of the Supreme Court of the United States but appeared to be required by the Court’s *per curiam* decision in *Robinson v. Tennessee*, 392 U.S. 666 (1968), approving Justice Harlan’s concurring opinion in *Darwin v. Connecticut*, 391 U.S. 346, 349-51 (1968). Justice Harlan there reasoned that once an accused has given the police a confession, his or her subsequent statements to them about the crime are more likely to be the products of a belief that the “cat is out of the bag” than of an independent choice to commit a fresh act of self-incrimination. Thus, if the first confession was constitutionally inadmissible, it tainted all later statements made by the accused without the legal advice necessary to place the first confession in perspective.

In *Elstad*, the Court rejected similar reasoning as the basis for an argument that “an initial failure of law enforcement officers to administer the warnings required by *Miranda* . . . , without more, ‘taints’ subsequent admissions made after a suspect has been fully advised of and has waived his *Miranda* rights” (470 U.S. at 300). *Elstad* holds that if the only illegality in obtaining a first incriminating statement is a *Miranda* violation, “a careful and thorough administration of *Miranda* warnings serves to cure the condition that rendered the unwarned statement inadmissible” (*id.* at 310-11). Thus, the “admissibility of any subsequent statement . . . turn[s] . . . solely on whether it is knowingly and voluntarily made” (*id.* at 309).

As a result of the analysis in *Elstad* and later Supreme Court decisions elaborating *Elstad*, the federal scope-of-taint rule to be applied in successive-statement situations now turns upon the reason the first statement is found to be unconstitutional.

26.16.1. *Statements Tainted by a Prior Statement Taken In Violation of the Due Process Clause and the Self-Incrimination Clause of the Fifth Amendment*

In *Elstad*, the Supreme Court recognized that “[t]here 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” (470 U.S. at 312). Accordingly, *Elstad*’s repudiation of the concept of presumptive taint is limited to *Miranda* violations (§§ 26.5-26.9.3 *supra*) and does not extend to involuntary confessions (§§ 26.2-26.4 *supra*). *E.g., United States v. Lopez*, 437 F.3d 1059, 1066-67 & n.4 (10th Cir. 2006); *Shelton v. State*, 287 Ark. 322, 699 S.W.2d 728 (1985). The *Elstad* opinion says that “[w]hen a prior statement is actually coerced” (470 U.S. at 310), or perhaps even when it is simply “obtained through overtly or inherently coercive methods which raise serious Fifth Amendment and Due Process concerns” (*id.* at 312 n.3), “the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession” (*id.* at 310); and the admissibility of the second confession is subject to a “requirement of a break in the stream of events” (*id.*, citing *Westover v. United States*, decided with *Miranda v. Arizona*, 384 U.S. 436 (1966)). *See also Brown v. Illinois*, 422 U.S. 590, 605 n.12 (1975); *cf. Clewis v. Texas*, 386 U.S. 707, 710 (1967) (requiring the exclusion of a third incriminating statement made after two earlier ones where there was “no break in the stream of events . . . sufficient to insulate the [later] statement from the effect of all that went before”). In these due process cases, a second confession must be shown to be “an act independent of the [previous] confession” (*Reck v. Pate*, 367 U.S. 433, 444 (1961)), and the prosecution plainly bears the burden of proof on that issue (*Nix v. Williams*, 467 U.S. 431 (1984) (dealing with the exclusionary consequences of a confession obtained in violation of the Sixth Amendment and suggesting that the prosecution’s burden of proving the

dissipation of taint – “by a preponderance of the evidence” (467 U.S. at 444) – is the same in Fifth Amendment cases (*see id.* at 442 & n.3)), discussed in § 25.40 *supra*). *See, e.g., People v. Guilford*, 21 N.Y.3d 205, 209, 213, 991 N.E.2d 204, 206, 209, 969 N.Y.S.2d 430, 432, 435 (2013) (suppressing a statement as the fruit of an earlier involuntary statement because the prosecution failed to prove that the defendant had been “restored to the status of one no longer under the influence” of the coercion that tainted the earlier statement “so as to render plausible the characterization of [the] subsequent admission as voluntary”: Although the 49½-hour interrogation that produced the involuntary first statement was followed by an “eight-hour ‘break,’” during which the defendant was arraigned and had an opportunity to confer with counsel, these circumstances could not “attenuate[] the taint of the wrongful interrogation” and “transform . . . [the defendant’s] coerced capitulation into a voluntary disclosure.”); *United States v. Anderson*, 929 F.2d 96, 102 (2d Cir. 1991) (“[A]gent Valentine coerced Anderson’s first confession with improper tactics. Moreover, nothing in the record suggests that the taint clinging to the first confession was dissipated. No significant time elapsed between the first questioning by agent Valentine and when Anderson made his statement to agent Moorin. The suspect was at all times in custody and under close police supervision with the same agents present on both occasions. Agent Moorin made no effort to dispel the original threat. In fact, his statement that Anderson ‘could only help himself by cooperating’ only reaffirmed agent Valentine’s earlier coercive statements [that if Anderson exercised his *Miranda* rights, he could not thereafter cooperate with the Government and gain the benefits of cooperation]. The district court correctly found a continuing presumption of compulsion applied to the second statement. Hence, Anderson’s waiver, tainted by the earlier, coerced confession, was also involuntary and should be suppressed. Moreover, suppression of the second statement here also serves the objectives of deterrence and trustworthiness. It operates as a disincentive for police to coerce a confession by threatening a defendant with false and/or misleading statements. The fact-finding process is also enhanced since a confession obtained in the manner this one was may be untrustworthy.”).

26.16.2. Statements Tainted by a Prior Statement Taken In Violation of *Miranda*

Although *Elstad* rejected a general rule of presumptive taint in the *Miranda* context, a violation of *Miranda* in the taking of one statement may nonetheless provide a basis for suppressing a subsequent statement as a fruit of the earlier violation in certain circumstances.

The Court in *Elstad* distinguished the case before it from cases “concerning suspects whose invocation of their rights to remain silent and to have counsel present were flatly ignored while police subjected them to continued interrogation” (470 U.S. at 313 n.3). Thus, as Justice Brennan observed in his dissenting opinion in *Elstad*, “the Court concedes that its new analysis does *not* apply where the authorities have ignored the accused’s actual invocation of his *Miranda* rights to remain silent or to consult with counsel. . . . In such circumstances, courts should continue to apply the traditional presumption of tainted connection” (470 U.S. at 346 n.28 (emphasis in original)). *See, e.g.,*

State v. Hartley, 103 N.J. 252, 511 A.2d 80 (1986) (concluding that the “cat out of the bag” doctrine has continuing vitality in cases in which the initial statement is suppressed on grounds of police failure to scrupulously honor a suspect’s invocation of the rights to counsel or to remain silent).

In *Missouri v. Seibert*, 542 U.S. 600 (2004), the Court addressed the applicability of *Elstad* to a situation in which police officers question a suspect without *Miranda* warnings and then administer the warnings and re-question the suspect for the purpose of obtaining an admissible, *Mirandized* statement. A majority of the Court ruled that, in at least some circumstances, such a sequence of interrogations renders *Elstad* inapplicable and requires the suppression of the second statement as a fruit of the *Miranda* violation in obtaining the first statement. A four-Justice plurality concluded that the admissibility of the subsequent *Mirandized* statement turns on “whether it would be reasonable to find that in these circumstances the warnings could function ‘effectively’ as *Miranda* requires” (542 U.S. at 611-12). The inquiry into effectiveness involves the questions whether “the warnings [could] effectively advise the suspect that he had a real choice about giving an admissible statement at that juncture” and whether the warnings could “reasonably convey that [the suspect] could choose to stop talking even if he had talked earlier” (*id.* at 612). Relevant factors include “the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator’s questions treated the second round as continuous with the first” (*id.* at 615). It is also a plausible reading of the *Seibert* plurality opinion that *Miranda* warnings and other corrective procedures administered after a suspect has made initial admissions in violation of *Miranda* cannot “function ‘effectively’ as *Miranda* requires” (*id.* at 611-12) if they do not inform the suspect that those earlier admissions cannot be used in evidence against him or her, so that the suspect is no longer laboring under the impression that “what he has just said will be used, with subsequent silence being of no avail” (*id.* at 613). On the facts of the *Seibert* case itself, the plurality concluded that the midstream *Miranda* warnings were ineffective because “[t]he warned phase of questioning proceeded after a pause of only 15 to 20 minutes, in the same place as the unwarned segment,” with “the same officer” doing the questioning; “he said nothing to counter the probable misimpression that the advice that anything Seibert said could be used against her also applied to the details of the inculpatory statement previously elicited”; and “[i]n particular, the police did not advise . . . [Seibert] that her prior statement could not be used” (*id.* at 616). (A footnote to the sentence making the latter point says: “We do not hold that a formal addendum warning that a previous statement could not be used would be sufficient to change the character of the question-first procedure to the point of rendering an ensuing statement admissible, but its absence is clearly a factor that blunts the efficacy of the warnings and points to a continuing, not a new, interrogation” (*id.* at 616 n.7).) Justice Kennedy concurred in the judgment in *Seibert*, providing the fifth vote for suppression of Seibert’s statement, on the narrower ground that “in the infrequent case, such as we have here, in which the two-step interrogation technique was used in a calculated way to undermine the *Miranda* warning” (*id.* at 622), “post-

warning statements that are related to the substance of prewarning statements must be excluded unless curative measures are taken before the postwarning statement is made . . . to ensure that a reasonable person in the suspect's situation would understand the import and effect of the *Miranda* warning and of the *Miranda* waiver" (*id.*), and "[n]o curative steps were taken in this case" (*id.*). Under Justice Kennedy's approach, "a substantial break in time and circumstances between the prewarning statement and the *Miranda* warning may suffice in most circumstances, as it allows the accused to distinguish the two contexts and appreciate that the interrogation has taken a new turn. . . .; [a]lternatively, an additional warning that explains the likely inadmissibility of the prewarning custodial statement may be sufficient" (*id.*). See also *Bobby v. Dixon*, 132 S. Ct. 26, 31-32 (2011) (per curiam) ("the effectiveness of th[e] [*Miranda*] warnings was not impaired by the sort of 'two-step interrogation technique' condemned in *Seibert*" because "there was simply 'no nexus' between Dixon's unwarned admission to forgery and his later, warned confession to murder" and there was a "significant break in time and dramatic change in circumstances" between the two interrogations, "creat[ing] 'a new and distinct experience'" and "ensuring that Dixon's prior unwarned interrogation did not undermine the effectiveness of the *Miranda* warnings he received before confessing to Hammer's murder"). Compare *Reyes v. Lewis*, 798 F.3d 815 (9th Cir. 2015) ("Reyes's postwarning confession should have been suppressed" because the "police officers deliberately employed a two-step interrogation technique, and . . . they did not take appropriate 'curative measures,' in violation of [*Missouri v.*] *Seibert*" (*id.* at 834); during the administration of the *Miranda* warnings, Detective Brandt "played down their importance," saying he "wanted 'just to clarify stuff,' [and] suggesting by his use of the word 'clarify' that the 'stuff' had already been conveyed in the earlier interview, and that the only purpose of the later interview was clarification. Brandt then said he wanted to 'read you your rights' because 'you've been sitting in that room and the door was locked and you're not free to leave.' To a reasonable person not trained in the law, let alone a fifteen-year-old high school freshman, these stated reasons were hardly an effective means of conveying the fact that the warning he was about to give could mean the difference between serving life in prison and going home that night." (*id.* at 832-33); "After Brandt read the *Miranda* warnings, he said, 'Do you understand each of these rights that I've explained to you? Yeah? OK. Can we talk about the stuff we talked about earlier today? Is that a yes?' While giving the *Miranda* warnings, Brandt did not pause to ask 'Is that a yes?' after asking if Reyes understood 'each of the rights' listed. Only after the *Miranda* warnings had been completed and after Brandt asked whether 'we [can] talk about the stuff we talked about earlier today' did Brandt finally ask 'Is that a yes?' and wait for a response. In contrast to the interrogation in *Seibert*, Brandt did not ask Reyes for a signed waiver of rights or a signed acknowledgment of having read and understood the *Miranda* warnings. ¶ The psychological, spatial, and temporal break between the unwarned and warned interrogations was not enough to cure the violation. Perhaps most important, Brandt had been a continuous presence throughout." *Id.* at 833.); *United States v. Barnes*, 713 F.3d 1200, 1203, 1205-07 (9th Cir. 2013) (per curiam) ("the interrogation was a 'deliberate two-step' approach in contravention of *Missouri v. Seibert*": the "evidence reflects that the agents deliberately employed the two-step

interrogation tactic”; “[t]here was no break or dividing point in the interrogation”; “[t]he agents treated the second round of interrogation as continuous with the first”; and “the agents took no curative measures to mitigate their error” such as “tak[ing] a substantial time break in the interrogation or warn[ing] Barnes that what he had said before the warnings could not be used against him.”); *United States v. Capers*, 627 F.3d 470, 477, 483, 485 (2d Cir. 2010) (resolving an issue that “Justice Kennedy had no reason to explore” – “how a court should determine when a two-step interrogation had been executed deliberately” – by “hold[ing] that the burden rests on the prosecution to disprove deliberateness,” and applying this rule to require suppression of the defendant’s second (post-warning) confession because “the Government has failed to meet its burden of demonstrating that Capers was not subjected to a [deliberate] two-step interrogation” and because “there were no curative measures to ensure that the defendant was not misled with regard to his rights prior to his second confession”); *Kelly v. State*, 997 N.E.2d 1045, 1053-55 (Ind. 2013) (post-warning statements were the “product of the ‘question-first’ interrogation practice disapproved of in *Seibert* and therefore inadmissible” because the pre-warning and post-warning statements “concern the same subject . . . [and] were made in the same location, mere minutes apart, in response to the same officer. Most significantly, however, Chief Kiphart and another officer referred to Kelly’s pre-warning admission three times during the post-warning interrogation. . . . Such references, we believe, inevitably diluted the potency of the *Miranda* warning such that it was powerless to cure the initial failure to warn, even if that failure was a product of good-faith mistake.”); *State v. Navy*, 386 S.C. 294, 303-04, 688 S.E.2d 838, 842 (2010) (*Seibert* requires suppression of two postwarning statements, given the absence of “the curative measures suggested by Justice Kennedy,” even though the record does not show that this was a case of a “deliberate” police use of a “‘question first’ strategy”); *Martinez v. State*, 272 S.W.3d 615, 626-27 (Tex. Crim. App. 2008) (applying Justice Kennedy’s analysis in *Seibert* to suppress a videotaped statement obtained with a “deliberate two-step strategy” because “the officers did not apprise appellant of his *Miranda* rights when they began custodial interrogation and failed to apply any curative measures in order to ameliorate the harm caused by the *Miranda* violation”).

Elstad does not govern cases in which a defendant testifies at trial in order to rebut or explain an incriminating pretrial statement that was erroneously admitted in violation of *Miranda*. That situation continues to be governed by the exclusionary rule of *Harrison v. United States*, 392 U.S. 219 (1968). See *Lujan v. Garcia*, 734 F.3d 917, 924-30 (9th Cir. 2013) (in *Harrison* the “Court held that if Harrison had testified ‘in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible’” (*id.* at 925); “*Harrison* outlines a clear exclusionary rule that applies to the States” (*id.* at 927); “The opinions of *Elstad* and *Harrison* should not be conflated to create ambiguity where there is none. *Harrison* sets forth a clearly established rule that has not been undermined by *Elstad*. ¶ Under the *Harrison* exclusionary rule, when a criminal defendant’s trial testimony is induced by the erroneous admission of his out-of-court confession into evidence as part of the government’s case-in-chief, that trial

testimony cannot be introduced in a subsequent prosecution, nor can it be used to support the initial conviction on harmless error review, because to do so would perpetuate the underlying constitutional error.” *Id.* at 930.)

Even in cases in which a defendant’s second statement is not subject to federal constitutional suppression as the fruit of an earlier *Miranda* violation because of the rule of *Elstad* and the limitations of *Seibert*, counsel can urge the state courts to reject *Elstad* as a matter of state constitutional law and to preserve the “cat out of the bag” doctrine in its entirety. *See, e.g., State v. O’Neill*, 193 N.J. 148, 180-81, 936 A.2d 438, 457 (2007); *People v. Bethea*, 67 N.Y.2d 364, 493 N.E.2d 937, 502 N.Y.S.2d 713 (1986); *State v. Aguirre*, 301 Kan. 950, 961-62, 349 P.3d 1245, 1252 (2015) (“In *State v. Matson*, 260 Kan. 366, 374, 921 P.2d 790 (1996), this court said that the validity of a *Miranda* waiver, after a suspect has previously invoked those rights, depends on whether ‘the accused (a) initiated further discussions with the police and (b) knowingly and intelligently waived the previously asserted right.’ . . . The State failed the *Matson* test by reinitiating the second interrogation. ¶ Consequently, the taint of the *Miranda* rights violation in the first interview was not sufficiently attenuated to validate the rights waiver for the second interview, and the statements obtained in the second interview should have been suppressed, as well.”); and see generally § 17.11 *supra*.

26.16.3. Statements Tainted by a Prior Statement Taken In Violation of the Sixth Amendment

The Supreme Court has expressly reserved the question “whether the rationale of *Elstad* applies when a suspect makes incriminating statements after a knowing and voluntary waiver of his right to counsel notwithstanding earlier police questioning in violation of [the] Sixth Amendment standards” discussed in § 26.10 (*Fellers v. United States*, 540 U.S. 519, 525 (2004)). The analytic approach the Court used in *Elstad* to reject the concept of presumptive taint for fruits of a *Miranda* violation and to distinguish the situation of a coerced confession (see §§ 26.16-26.16.1 *supra*) would seem to render *Elstad* inapplicable when the interests at stake are those protected by the Sixth Amendment right to counsel. As in the due process context, the prosecution bears the burden of proving that a Sixth Amendment violation in taking the previous statement did not taint the subsequent statement. *See Nix v. Williams*, 467 U.S. 431, 441-48 (1984).

26.16.4. Statements Tainted by a Prior Statement Taken In Violation of the Fourth Amendment

The reasoning of *Elstad* and the distinction that it drew between *Miranda* violations and coercion in violation of the Due Process Clause (see §§ 26.16-26.16.1 *supra*) also suggest that *Elstad* does not limit the pre-*Elstad* caselaw governing suppression of a second statement following a previous statement obtained in violation of the Fourth Amendment (see *Dunaway v. New York*, 442 U.S. 200, 218 n.20 (1979) (dealing with “subsequent statements . . . which . . . were ‘clearly the result and the fruit of the first’” where an initial statement was the product of an arrest without probable cause). As in

the other contexts discussed in §§ 26.16.1 and 26.16.3 *supra*, the prosecution bears the burden of proving dissipation of taint. See *Nix v. Williams, supra*, 467 U.S. at 441-48 (addressing the prosecutorial burden of disproving taint in the Sixth Amendment context and suggesting that the same rule applies in Fourth Amendment cases (*id.* at 442)).

26.16.5. Potential Implications of Elstad for Physical Fruits of an Unconstitutionally Obtained Statement

The principles discussed in the preceding subparts have to do with suppression of *statements* as the fruits of a constitutional violation in obtaining a previous statement. In *United States v. Patane*, 542 U.S. 630 (2004), a plurality of three Justices, joined by two other Justices on narrower reasoning, employed the rationale of *Elstad* to conclude that a *Miranda* violation in obtaining a statement does not provide a basis for suppressing “the physical fruits of the suspect’s unwarned but voluntary statements” (*id.* at 634, 636 (plurality opinion)). *Accord, id.* at 644-45 (Justice Kennedy, concurring in the judgment, joined by Justice O’Connor). Here again, the Court limited its analysis to *Miranda* violations, distinguishing them from the situation of a coerced statement. See *id.* at 634 (plurality opinion); *id.* at 645 (Justice Kennedy, concurring in the judgment). See, e.g., *Dye v. Commonwealth*, 411 S.W.3d 227, 236-38 (Ky. 2013) (suppression of the defendant’s statement as involuntary in violation of Due Process also required the suppression of the physical “evidence seized pursuant to the . . . search warrant . . . which was issued upon information contained in his involuntary confession”). Even with respect to *Miranda* violations, counsel can seek a more protective rule on state constitutional grounds. See, e.g., *State v. Farris*, 109 Ohio St. 3d 519, 529, 849 N.E.2d 985, 996 (2006) (“We . . . join the other states that have already determined after *Patane* that their state constitutions’ protections against self-incrimination extend to physical evidence seized as a result of pre-*Miranda* statements”); *State v. Knapp*, 285 Wis. 2d 86, 89, 130, 700 N.W.2d 899, 901, 921 (2005) (after the Supreme Court’s *vacatur* and remand of the state supreme court’s previous decision in light of *United States v. Patane*, the Wisconsin Supreme Court relies on the state constitution to reinstate its previous result that physical evidence had to be suppressed as a fruit of a *Miranda* violation); and see generally § 17.11 *supra*.

E. Trial Issues in Cases Involving Incriminating Statements by the Defendant

26.17. Prosecutorial Proof of Corpus Delicti

In some jurisdictions, a trial judge can refuse to admit a confession into evidence before the prosecution has presented a *prima facie* case of the commission of the offense charged. This preliminary showing is commonly called the *corpus delicti*. See, e.g., *State v. Curlew*, 459 A.2d 160, 163-64 (Me. 1983) (“Maine case law . . . leaves the order of proof within the sound judicial discretion of the trial judge. . . . [T]he exercise of discretion . . . should be guided by a strong preference for proof of the corpus delicti prior to admitting in evidence a confession or admission of the defendant.”).

The *corpus delicti* needs not include proof of the identity of the defendant (although, of course, it is possible that some of the evidence comprising the *corpus delicti* will *also* tend to identify the defendant). See, e.g., *Stano v. State*, 473 So. 2d 1282, 1287 (Fla. 1985) (“There are three elements to the corpus delicti of a homicide: 1) The fact of death; 2) the criminal agency of another; and 3) the identity of the victim.”). In other jurisdictions the term “*corpus delicti*” simply expresses the near-universal rule that a defendant’s confession must be corroborated in order to make a submissible case for the prosecution; *corpus delicti* analysis relates to the standard of proof for a directed verdict and does not control the order of proof. See, e.g., *Allen v. Commonwealth*, 287 Va. 68, 752 S.E.2d 856 (2014); § 41.2.2 subdivision (1) *infra*.

Jurisdictions that do enforce the *corpus delicti* principle as regulating the order of proof ordinarily give the trial judge discretion to permit the prosecutor to vary the order and to prove the confession prior to the *corpus*, subject to “connecting up.” See, e.g., *State v. Hendrickson*, 140 Wash. App. 913, 921-24, 168 P.3d 42, 424-26 (2007). Defense counsel should object to the confession and resist any variance in the order of proof. Frequently the prosecution’s case on *corpus delicti* is borderline, and a judge who has heard the details of a confession will tend to lean somewhat against the accused in determining whether the *corpus* has been proved.

26.18. *The Right of the Defense to Show the Circumstances Under Which the Statement Was Made*

When a defense motion to suppress an incriminating statement of the defendant has been denied and the prosecution introduces the statement at trial, the defense will frequently want to show the coercive circumstances that prompted the statement, so as to persuade the trier of fact that the statement should be accorded little weight in the assessment of guilt or innocence. In *Crane v. Kentucky*, 476 U.S. 683 (1986), the Court made clear that a defendant cannot be precluded from presenting evidence of this sort at trial despite the denial of a pretrial motion challenging the confession as involuntary on the basis of the same evidence. The Court explained that the guarantees of “procedural fairness” embodied in the Sixth and Fourteenth Amendments (*id.* at 689-90) require that the defense be permitted to present evidence at trial concerning “the physical and psychological environment that yielded the confession . . . regardless of whether the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress, and entirely independent of any question of voluntariness” (*id.* at 689). See also *People v. Bedessie*, 19 N.Y.3d 147, 149, 161, 970 N.E.2d 380, 381, 388-89, 947 N.Y.S.2d 357, 358, 365-66 (2012) (recognizing that, “in a proper case,” the accused is entitled to present “expert testimony [at trial] on the phenomenon of false confessions” because “there is no doubt that experts in such disciplines as psychiatry and psychology or the social sciences may offer valuable testimony to educate a jury about those factors of personality and situation that the relevant scientific community considers to be associated with false confessions”); *State v. Perea*, 322 P.3d 624, 640-41 (Utah 2013) (“expert testimony regarding the phenomenon of false confessions should be admitted so long as it meets the standards set out in rule 702 of the Utah Rules of Evidence and it is relevant to the facts of the

specific case”: “[f]alse confessions are an unsettling and unfortunate reality of our criminal justice system”; “expert testimony about factors leading to a false confession assists a ‘trier of fact to understand the evidence or to determine a fact in issue’”; “[r]ecent laboratory-based studies have identified several factors that increase the likelihood of false confessions”; and “[t]o require a defendant to testify regarding the factors that contributed to his alleged false confession, rather than allow the use of an expert witness, opens the defendant up to cross-examination and impinges on his constitutionally guaranteed right against self-incrimination.”). The Cutler & Leo articles cited in the penultimate paragraph of § 26.3.4 *supra* provide information and insights that will be helpful to defense counsel in arguing that the trier of fact should discredit incriminating statements produced by commonplace police interrogation tactics as unreliable.

26.19. *The Prosecutor’s Power to Use a Suppressed Statement for Impeachment*

The rules governing prosecutorial use of suppressed statements to impeach a defendant’s trial testimony vary, depending upon the constitutional doctrine under which the statement was suppressed.

If a statement was suppressed on grounds of involuntariness (§§ 26.2-26.4 *supra*), then the statement is inadmissible for impeachment or any other purpose at trial. *Mincey v. Arizona*, 437 U.S. 385, 397-98, 402 (1978); *see New Jersey v. Portash*, 440 U.S. 450, 458-60 (1979); *Kansas v. Ventris*, 556 U.S. 586, 590 (2009) (dictum).

If a statement was suppressed on *Miranda* grounds (§§ 26.5-26.9.3 *supra*) but was not found involuntary, federal constitutional law does not forbid the prosecutor to use that statement for impeachment of the defendant’s inconsistent testimony at trial. *Harris v. New York*, 401 U.S. 222 (1971); *Oregon v. Hass*, 420 U.S. 714 (1975).

Statements suppressed on Sixth Amendment grounds (§§ 26.10-26.10.3 *supra*) also may be used by the prosecution to impeach a defendant’s inconsistent testimony at trial. In *Kansas v. Ventris*, *supra*, the Court held that a statement which had been deliberately elicited by a jailhouse informant acting as an agent for law enforcement officers and which had not been preceded by a valid waiver of the right to counsel was “concededly elicited in violation of the Sixth Amendment” but “was admissible to challenge [the defendant’s] . . . inconsistent testimony at trial.” 556 U.S. at 594.

State courts may take a dim view of the prosecutor’s use of illegally obtained statements for impeachment, and counsel should argue that the state constitution prohibits prosecutors from using statements suppressed on *Miranda* or Sixth Amendment grounds for any purpose at trial. *See, e.g., People v. Disbrow*, 16 Cal. 3d 101, 113, 545 P.2d 272, 280, 127 Cal. Rptr. 360, 368 (1976) (abrogated by a subsequent initiative constitutional amendment); *State v. Santiago*, 53 Hawai’i 254, 265-66, 492 P.2d 657, 664 (1971); and *see generally* § 17.11 *supra*.

Even under the federal constitutional rule permitting statements obtained in violation of *Miranda* and the Sixth Amendment to be used for impeachment of the defendant, they cannot be used to impeach defense witnesses other than the defendant. *See, e.g., James v. Illinois*, 493 U.S. 307 (1990) (the state court erred in “expanding the scope of the impeachment exception to permit prosecutors to use illegally obtained evidence to impeach the credibility of defense witnesses” (*id.* at 313); the “impeachment exception [is] limited to the testimony of [the] defendant[.]” (*id.* at 320)).

26.20. Admissibility of Evidence of the Defendant’s Pre- or Post-arrest Silence

Prosecutors commonly offer evidence of a defendant’s pretrial failure to avow innocence or deny guilt in either of two contexts. Proof that the defendant failed to deny accusations made in his or her presence by police or private citizens may be offered (usually in the prosecution’s case in chief) as “adoptive admissions,” or “tacit admissions.” And proof that the defendant did not tell the police – or did not tell anyone before trial – the exculpatory story that s/he relates in his or her trial testimony may be offered (usually on cross-examination of the defendant, but sometimes through prosecution witnesses called in rebuttal) to impeach the defendant’s testimony as a “recent fabrication.”

Common-law rules of evidence regarding these two kinds of proof vary considerably from State to State. Some States have precluded prosecutorial use of an accused’s pretrial silence because the evidence has low probative value (given that the accused’s taciturnity may have been motivated by an awareness of the right to silence or of the risks of responding to police questioning, by distrust of the police, or by any of a host of other factors) and there is a high risk that the introduction of the evidence will prejudice the accused. *See, e.g., People v. Williams*, 25 N.Y.3d 185, 190-93, 31 N.E.3d 103, 105-08, 8 N.Y.S.3d 641, 643-46 (2015); *and see State v. Easter*, 130 Wash. 2d 228, 235 n.5, 922 P.2d 1285, 1289 n.5 (1996) (citing caselaw from other States in which the courts “ruled on evidentiary grounds [that] pre-arrest silence is not admissible because of its low probative value and high potential for undue prejudice”).

Apart from such common-law evidentiary doctrines, proof of the defendant’s silence to show an “adoptive admission” or “recent fabrication” raises federal and state constitutional issues. The constitutional analysis is affected by whether the silence that the prosecutor seeks to prove occurred (1) before or after arrest and (2) before or after administration of the *Miranda* warnings described in § 26.7 *supra*.

In *Doyle v. Ohio*, 426 U.S. 610, 619 (1976), the Supreme Court held that an accused’s “silence, at the time of arrest and after receiving *Miranda* warnings” is constitutionally inadmissible against him or her, even for the purpose of impeaching the accused’s trial testimony as a recent fabrication. The reasoning of *Doyle* is that the *Miranda* warnings implicitly assure the person to whom they are given that s/he may remain silent with impunity, and it is fundamentally unfair and a violation of due process to use the person’s subsequent silence as incriminating evidence (426 U.S. at 617-19),

particularly inasmuch as the silence is “insolubly ambiguous because of what the State is required to advise the person arrested” (*id.* at 617). *See also* *Portuondo v. Agard*, 529 U.S. 61, 74-75 (2000) (dictum); *Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993) (dictum); *Hurd v. Terhune*, 619 F.3d 1080, 1088-89 (9th Cir. 2010); *People v. Shafier*, 483 Mich. 205, 218-19, 768 N.W.2d 305, 313 (2009); *People v. Clary*, 494 Mich. 260, 833 N.W.2d 308 (2013); *State v. Brooks*, 304 S.W.3d 130, 133-34 (Mo. 2010). The *Doyle* doctrine prohibits the state from “mak[ing] use of the defendant’s exercise of [his] . . . rights [to remain silent] in obtaining his conviction” (*Wainwright v. Greenfield*, 474 U.S. 284, 292 (1986)), and thus bars not only the use of silence to impeach the accused but also any use of the accused’s assertion of his *Miranda* rights as proof of sanity in a case in which an insanity defense is asserted (*id.* at 295).

In *Greer v. Miller*, 483 U.S. 756 (1987), the Court held that *Doyle* did not require the invalidation of a conviction when the prosecutor asked a single impermissible question touching on the defendant’s silence after *Miranda* warnings and the trial court immediately sustained a defense objection and gave a curative instruction. *Greer* illustrates the desirability of filing a pretrial motion for an order *in limine* forbidding the prosecutor’s use or attempted use of evidence that is inadmissible under *Doyle*. See § 17.5 *supra* regarding the utility of such motions, at least in jurisdictions where the defendant is entitled to a jury trial and those in which it is possible to litigate motions *in limine* before a judge other than the one who will sit at a bench trial of the issue of guilt or innocence (§ 22.5 *supra*).

Doyle concerned the implications of the administration of *Miranda* warnings and thus does not govern prosecutorial evidence of either a defendant’s pre-arrest silence (*Jenkins v. Anderson*, 447 U.S. 231, 239-40 (1980)), or post-arrest silence when no *Miranda* warnings were given (*Fletcher v. Weir*, 455 U.S. 603, 606-07 (1982) (per curiam)). In *Jenkins* and *Fletcher*, the Court rejected Fifth and Fourteenth Amendment challenges to the prosecution’s use of un-*Mirandized* defendants’ silence to cross-examine them at trial. Significantly, the defendants in *Jenkins* and *Fletcher* had not combined their silence with an explicit invocation of the Fifth Amendment Privilege Against Self-Incrimination. Moreover, because the prosecutorial use of silence in both cases occurred during the cross-examination of a testifying defendant at trial, the cases fit within the principle that once an accused has chosen to abandon his or her position of silence by testifying, the prosecution has an overriding interest in being permitted to test the accused’s story for veracity through “the traditional truth-testing devices of the adversary process” (*Jenkins v. Anderson, supra*, 447 U.S. at 238).

In *Salinas v. Texas*, 133 S. Ct. 2174 (2013), the Court granted *certiorari* on the question “[w]hether or under what circumstances the Fifth Amendment’s Self-Incrimination Clause protects a defendant’s refusal to answer law enforcement questioning before he has been arrested or read his *Miranda* rights” (Petition for a Writ of *Certiorari* at i, *Salinas v. Texas* (No. 12-246), 2012 WL 3645103, at *i). *Salinas* once again involved a defendant who did not expressly invoke his Fifth Amendment Privilege Against Self-Incrimination, but the case differed from *Jenkins* and *Fletcher* in that the prosecutor used the defendant’s

prearrest, non-*Mirandized* silence in the prosecution's case-in-chief. In a 5-4 decision, the Court rejected the defendant's Fifth Amendment claim, but the majority was unable to agree on a rationale. A plurality opinion, authored by Justice Alito and joined by Chief Justice Roberts and Justice Kennedy, concluded that Salinas's "Fifth Amendment claim fails because he did not expressly invoke the privilege against self-incrimination in response to the officer's question" (*Salinas*, *supra*, 133 S. Ct. at 2178 (plurality opinion)). Justices Thomas and Scalia concurred in the judgment on the broader rationale that "Salinas' claim would fail even if he had invoked the privilege because the prosecutor's comments regarding his precustodial silence did not compel him to give self-incriminating testimony" (*id.* at 2184 (Thomas J., concurring in the judgment, joined by Scalia, J., arguing for the overruling of the entire jurisprudence of *Griffin v. California* and its progeny (see § 39.9 *infra*))). The four dissenting Justices concluded that even when there has been no express invocation of the Fifth Amendment Privilege, use of an accused's silence in the prosecution's case-in-chief is nonetheless barred if "an exercise of the Fifth Amendment's privilege" can be "fairly infer[red] from an individual's silence and surrounding circumstances" (*id.* at 2191 (Breyer J., dissenting, joined by Ginsburg, Sotomayor, and Kagan, JJ.)).

In the wake of *Salinas*, it seems readily apparent that a suspect's explicit invocation of the Fifth Amendment Privilege Against Self-Incrimination *will* bar the prosecution from using the suspect's silence as evidence in its case in chief at trial. See, e.g., *United States v. Okatan*, 728 F.3d 111 (2d Cir. 2013) (Okatan, seated in his automobile, was approached by a border patrol agent who questioned Okatan about his reasons for being in the area, then "warned Okatan that lying to a federal officer is a criminal act and asked whether he was there to pick someone up. Okatan said that he wanted a lawyer" and the agent then arrested him (*id.* at 114). "[E]ven when an individual is not in custody, because of 'the unique role the lawyer plays in the adversary system of criminal justice in this country,' . . . a request for a lawyer in response to law enforcement questioning suffices to put an officer on notice that the individual means to invoke the privilege [against self-incrimination]" (*id.* at 119). "[W]e conclude that where, as here, an individual is interrogated by an officer, even prior to arrest, his invocation of the privilege against self-incrimination and his subsequent silence cannot be used by the government in its case in chief as substantive evidence of guilt." *Id.* at 120.) Although Justice Alito's plurality opinion in *Salinas* only addresses the question of what happens when a suspect fails to invoke the Privilege explicitly, the opinion's wording and reasoning convey that the plurality surely would have reached the opposite result if the Privilege *had* been invoked explicitly. Moreover, even if only a single member of the plurality were to support a bar to the use of silence in such a situation, that single vote would combine with the four *Salinas* dissenters' votes to create a majority in favor of a prohibitory rule.

The prosecution should also be barred from using a suspect's silence in its case in chief if the suspect explicitly invoked the right to counsel after being advised of it, whether through *Miranda* warnings or in some other form. Such an invocation should command the protections of the *Doyle* exclusionary rule because the prosecution's use of silence under these circumstances

would work the same type of unfairness that was condemned in *Doyle*.

This is another area in which state constitutional guarantees may offer more protection than their federal parallels. See § 17.11 *supra*. Some state courts have concluded that their respective constitutions bar prosecutorial use of a suspect's pretrial silence, either categorically (*see Commonwealth v. Molina*, 628 Pa. 465, 502, 104 A.3d 430, 452 (2014) (the state constitution "is violated when the prosecution uses a defendant's silence whether pre or post-arrest as substantive evidence of guilt"); *People v. Pavone*, 26 N.Y.3d 629, 47 N.E.3d 56, 26 N.Y.S.3d 728 (2015) (dictum) (holding that the prosecution's use of the defendant's pretrial silence violates the state constitution's due process guarantee, "whether the People use defendant's silence as part of the case-in-chief or for impeachment purposes" (*id.* at 641, 47 N.E.3d at 66, 26 N.Y.S.3d at 738) and "reject[ing] the People's artificial distinction between defendants who are arrested and remain silent before *Miranda* warnings have been provided, and those who remain silent afterwards" (*id.* at 642, 47 N.E.3d at 67, 26 N.Y.S.3d at 739): "[i]ndeed this Court has even held that *pre-arrest* silence cannot be used against a defendant in the People's case-in-chief." *Id.*), or at least if it took place after arrest (*State v. Hoggins*, 718 So. 2d 761 (Fla. 1998); *State v. Davis*, 38 Wash. App. 600, 686 P.2d 1143 (1984)) or "at or near' the time of arrest, during official interrogation, or while in police custody" (*State v. Muhammad*, 182 N.J. 551, 569, 868 A.2d 302, 312 (2005)).

Chapter 27

Motions To Suppress Identification Testimony

27.1. Introduction and Overview

In a substantial proportion of criminal cases, the prosecution proves the defendant's identity as the perpetrator through an in-court identification of the defendant: The complainant or an eyewitness testifies that the individual seated next to defense counsel is the person who committed the crime. (The exceptions are cases in which the perpetrator's identity is proved through scientific evidence (such as DNA, fingerprint, or serology evidence), documentary evidence, circumstantial evidence (such as the defendant's possession of the fruits of a recent crime), the defendant's confession, and/or the testimony of a turncoat accomplice.)

Although some cases may involve a defendant who is a longstanding acquaintance of the complainant or eyewitness, most identifications in criminal cases are based upon the complainant's or eyewitnesses's momentary observation of a stranger. Frequently, that identification has been shaped (or at least affected) by the witness's participation in one or more of the following police identification procedures:

- (a) A "lineup" in which the witness observes the defendant standing among a group (usually ranging from seven to ten persons) and is asked to select the perpetrator.
- (b) A "show-up" in which the witness is shown only the defendant and asked whether the defendant was the perpetrator.
- (c) A "photographic identification procedure" in which the witness is shown:
 - (i) a group of photographs (a "photo array" usually consisting of five to ten "mug shots"; an entire book of mug shots, known as a "mug-book"; or a set of mug shot photos displayed on a computer screen) and asked to select the perpetrator; or
 - (ii) a single photograph and asked whether the person depicted was the perpetrator.

As the Supreme Court has recognized, 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)), and "[t]he influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor – perhaps it is responsible for more such errors than all other factors combined" (*United States v. Wade*, 388 U.S. 218, 229 (1967)). See also *Perry v. New Hampshire*, 132 S. Ct. 716,

728 (2012) (“the annals of criminal law are rife with instances of mistaken identification” (quoting *Wade, supra*, 388 U.S. at 228)).

The Court has established three separate constitutional doctrines regulating the use of identification testimony, each of which provides a basis for suppressing identification testimony by the complainant and any eyewitnesses:

- (a) *The Due Process doctrine*: Testimony concerning pretrial identifications at police-staged confrontations that are “so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification” are constitutionally inadmissible (*Simmons v. United States*, 390 U.S. 377, 384 (1968) (dictum)). *Accord, Perry v. New Hampshire, supra*, 132 S. Ct. at 724-25 (dictum). See §§ 27.2-27.5 *infra*.
- (b) *The Sixth Amendment doctrine*: Police-staged lineups and show-ups held after the right to counsel has attached may be unconstitutional if they were conducted in the absence of counsel for the defendant. See § 27.6 *infra*.
- (c) *The Fourth Amendment doctrine*: Testimony regarding a lineup or other custodial identification made as a result of an illegal arrest or detention is inadmissible. See § 27.7 *infra*.

State-law doctrines may provide additional bases for objecting to identification testimony. See § 27.8 *infra*.

In a number of jurisdictions, statutes or court rules provide for a pretrial hearing on a defense motion to suppress identification testimony. At such a hearing the prosecutor ordinarily presents the police officer who conducted the identification procedure and the complainant or eyewitness who made the identification. (In some jurisdictions the prosecutor presents only the police officer, taking advantage of the admissibility of hearsay evidence in a suppression hearing (see § 24.3.5 *supra*) to have the officer testify to the witness’s identification as well as the witness’s account of his or her ability to observe the perpetrator.) In any pretrial identification suppression hearing at which an identifying witness will testify, it is advisable for the defense to waive the defendant’s presence during the witness’s testimony. See § 24.3.2 *supra*.

In other jurisdictions defense objections to identification testimony or motions to suppress it are litigated in a mid-trial hearing or a series of *voir dire* examinations of the prosecution’s identification witnesses. In jury trials it “may often be advisable [and,] . . . [i]n some circumstances . . . may be constitutionally necessary” to conduct such hearings outside the presence of the jury (*Watkins v. Sowders*, 449 U.S. 341, 349 (1981)), although there is no “*per se* [constitutional] rule compelling such a procedure in every case” (*id.*). Here, too, counsel should arrange that the defendant be removed from the courtroom during the *voir dire* proceedings litigating the admissibility of identification testimony.

This chapter examines the various doctrines governing suppression

or exclusion of identification testimony. Procedural requirements governing suppression motions and strategic considerations in drafting the motions are discussed in §§ 17.3-17.11. Techniques for conducting a suppression hearing are discussed in Chapter 24.

A. Due Process Grounds for Suppressing an Identification as Unreliable

27.2. The Due Process Standard

Police-staged identification procedures that are unduly suggestive may impair the reliability of the resulting identification and render it inadmissible. *Foster v. California*, 394 U.S. 440 (1969). The focus of the Due Process standard for admissibility of identification testimony is the interplay between (1) actions by law enforcement agents that may undermine the reliability of an identification, and (2) the susceptibility of each identifying witness's testimony to distortion by those actions. As in the case of confessions (see § 26.2 *supra*), unreliability alone – unaffected by any governmental behavior that could contribute to it – will not support suppression or exclusion of identification testimony. Some state activity conducing to inaccuracy is necessary. See *Perry v. New Hampshire*, 132 S. Ct. 716, 730 (2012), discussed in § 27.5 *infra*. Once that activity is shown, “[i]t is the reliability of identification evidence that primarily determines its admissibility” (*Watkins v. Sowders*, 449 U.S. 341, 347 (1981); *Manson v. Brathwaite*, 432 U.S. 98, 113-14 (1977)).

Under current Due Process doctrine, the admissibility of an identification is determined by weighing “the corrupting effect of the suggestive identification” against factors showing the identification to be reliable notwithstanding the suggestiveness of the police-staged confrontation (*Manson v. Brathwaite*, *supra*, 432 U.S. at 114). See also *Neil v. Biggers*, 409 U.S. 188, 199 (1972) (the “central question” is whether “the identification procedure was reliable even though the confrontation procedure was suggestive”). In gauging the reliability of the identification, “[t]he 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” (*Manson v. Brathwaite*, *supra*, 432 U.S. at 114). See also *Neil v. Biggers*, *supra*, 409 U.S. at 199-200; *Simmons v. United States*, 390 U.S. 377, 385 (1968). If a suggestive police identification procedure created a “very substantial likelihood of irreparable misidentification,” then the court must suppress both the pretrial identification (*Neil v. Biggers*, *supra*, 409 U.S. at 197 (dictum)) and any in-court identifications tainted by the constitutionally defective pretrial identification (see *Coleman v. Alabama*, 399 U.S. 1, 4-6 (1970) (dictum)).

Thus, the prevailing federal Due Process inquiry has two distinct components. The court determines, first, whether any police identification procedure was suggestive. If it was suggestive, then the distorting influence of the procedure is weighed against considerations indicating that the identification is nevertheless reliable. See, e.g., *State v. Thamer*, 777 P.2d 432, 435 (Utah 1989)

“We apply a two-step test to determine whether a pre-indictment or pre-information photo array is so suggestive that the subsequent admission of an in-court identification violates the due process clause. First, we must determine whether there was a pretrial photographic identification procedure used which was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. . . . Second, if the photo array is impermissibly suggestive, then the in-court identification must be based on an untainted, independent foundation to be reliable.”); *State v. Novotny*, 297 Kan. 1174, 1180-83, 307 P.3d 1278, 1284-86 (2013) (essentially the same). Section 27.3 *infra* examines the factors involved in assessing the suggestiveness of a police identification procedure, and § 27.4 examines the reliability factors. Section 27.5 explores the possible arguments that a defendant is entitled to suppression of an unreliable identification even when there was no police suggestiveness.

Of course, the state courts are free to construe their state constitutions as establishing a more protective due process standard than the federal test for admission of identification testimony. *See, e.g., Young v. State*, 374 P.3d 395 (Alaska 2016) (construing the state constitution to “depart from *Manson v. Braithwaite* and the Alaska cases that relied on it as the touchstone” because “[d]evelopments in the science related to the reliability of eyewitness identifications, and courts’ responses to those developments, have significantly weakened our confidence in the *Braithwaite* test as a tool for preventing the admission of unreliable evidence at trial, and therefore its capacity for protecting the due process rights afforded by the Alaska Constitution” (*id.* at 413); “we are convinced that the *Braithwaite* test does not adequately assess the reliability of eyewitness identifications and thus allows the admission of very persuasive evidence of doubtful reliability” (*id.* at 416); the court replaces “the [*Neil v.*] *Biggers* factors” with a list that reflects the “scientific literature” on “the factors that can affect the reliability of eyewitness identifications” (*id.* at 417); the court also holds that a defendant’s presentation of “some evidence of suggestiveness” is sufficient to require “an evidentiary hearing on the issue,” that “a defendant need not show that a procedure was ‘unnecessarily suggestive’ in order to get a hearing,” and that “[a]t the hearing the State must present evidence that the identification is nonetheless reliable” (*id.* at 427); the court further holds that “[i]f eyewitness identification is a significant issue in a case, the trial court should issue an appropriate jury instruction that sets out the relevant factors affecting reliability.” (*id.* at 428)); *State v. Henderson*, 208 N.J. 208, 287 n.10, 288-93, 27 A.3d 872, 919 n.10, 919-922 (2011) (construing the state constitution’s due process clause to remedy the “shortcomings” of the Supreme Court’s *Manson v. Braithwaite* standard by adopting a “new framework” that “allows judges to consider all relevant factors that affect reliability in deciding whether an identification is admissible; that is not heavily weighted by factors that can be corrupted by suggestiveness; that promotes deterrence in a meaningful way; and that focuses on helping jurors both understand and evaluate the effects that various factors have on memory.”); *State v. Dubose*, 285 Wis. 2d 143, 148, 165-66, 699 N.W.2d 582, 584-85, 593-94 (2005) (“adopt[ing] standards for the admissibility of out-of-court identification evidence similar to those set forth in the United States Supreme Court’s [pre-*Manson*] decision in *Stovall v. Denno*, 388 U.S. 293 . . . (1967) [§ 27.3.1 *infra*]” and holding that “evidence obtained from an out-of-court showup is inherently suggestive and will not be

admissible unless, based on the totality of the circumstances, the procedure was necessary”; recognizing that “[a] lineup or photo array is generally fairer than a showup,” and therefore specifying that “[a] showup will not be necessary . . . unless the police lacked probable cause to make an arrest or, as a result of other exigent circumstances, could not have conducted a lineup or photo array.”); *People v. Adams*, 53 N.Y.2d 241, 423 N.E.2d 379, 440 N.Y.S.2d 902 (1981) (rejecting the “totality of the circumstances” analysis of *Neil v. Biggers*, *supra*, and *Manson v. Brathwaite*, *supra*, in favor of the Supreme Court’s earlier analytical approach, which looked first at the suggestiveness of the identification and, upon finding it unduly suggestive, excluded the identification unless the prosecution could show that the identification had an “independent source”); *Commonwealth v. Johnson*, 420 Mass. 458, 463, 472, 650 N.E.2d 1257, 1260, 1265 (1995) (same as *People v. Adams*, *supra*: “reject[ing] *Brathwaite*” on state constitutional grounds and “adher[ing] to the stricter rule of per se exclusion previously followed by the Supreme Court and first set forth in the *Wade-Gilbert-Stovall* trilogy”); *State v. Lawson*, 352 Or. 724, 740, 761-62, 291 P.3d 673, 685, 696-97 (2012) (“Based on [an] . . . extensive review of the current scientific research and literature,” the state supreme court takes “judicial notice of the data contained in those various sources as legislative facts” to revise the state-law “test governing the admission of eyewitness testimony.” *Inter alia*, the burden rests on “the state as the proponent of the eyewitness identification” to “establish all preliminary facts necessary to establish admissibility of the eyewitness evidence”; then, “[i]f the state satisfies its burden,” the burden shifts to the defendant to establish that, “although the eyewitness evidence is otherwise admissible, the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay or needless presentation of cumulative evidence.”); and see generally § 17.11 *supra*.

27.3. Suggestiveness of Police Identification Procedures

There are a number of useful reference works that will assist counsel to identify the suggestive features in any particular police-staged identification confrontation. See NATIONAL RESEARCH COUNCIL OF THE NATIONAL ACADEMIES, IDENTIFYING THE CULPRIT: ASSESSING EYEWITNESS IDENTIFICATION (National Academies Press 2014); BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG (2011); ELIZABETH F. LOFTUS, EYEWITNESS TESTIMONY (1996); ELIZABETH LOFTUS, JAMES M. DOYLE & JENNIFER E. DYSART, EYEWITNESS TESTIMONY: CIVIL AND CRIMINAL (4th ed. 2007); NATHAN R. SOBEL, EYEWITNESS IDENTIFICATION – LEGAL AND PRACTICAL PROBLEMS (2d ed. 2002); PATRICK M. WALL, EYEWITNESS IDENTIFICATION IN CRIMINAL CASES (1965); A. DANIEL YARMEY, THE PSYCHOLOGY OF EYEWITNESS TESTIMONY (1979); Brandon L. Garrett, *Eyewitnesses and Exclusion*, 65 VAND. L. REV. 451 (2012); John B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After a Century of Research*, 100 J. CRIM. L. & CRIM. 825, 841-43 (2010); Radha Natarajan, Note, *Racialized Memory and Reliability: Due Process Applied to Cross-Racial Eyewitness Identifications*, 78 N.Y.U. L. REV. 1821 (2003); Fredric D. Woocher, Note, *Did Your Eyes Deceive You? Expert Psychological Testimony on the Unreliability of Eyewitness Identification*, 29 STAN. L. REV. 969 (1977); cf. Samuel R. Gross & Michael Shaffer, *Exonerations in the United States 1989-2012: Report*

by the National Registry of Exonerations, https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf (June 2012), pp. 40-56; Cory S. Clements, *Perception and Persuasion in Legal Argumentation: Using Informal Fallacies and Cognitive Biases to Win The War of Words*, 2013 B.Y.U. L. REV. 319. See also *Commonwealth v. Gomes*, 470 Mass. 352, 369-76, 22 N.E.3d 897, 910-16 (2015) (discussing five principles of eyewitness identification that “we determine to have achieved a near consensus in the relevant scientific community and therefore are ‘so generally accepted’ that it is appropriate that they now be included in a revised model jury instruction regarding eyewitness identification,” and “also summariz[ing] the research that informed our conclusions as to each generally accepted principle”); *Commonwealth v. Bastaldo*, 472 Mass. 16, 18, 32 N.E.3d 873, 877 (2015) (supplementing the court’s decision in *Gomes*, *supra*, by further discussing cross-racial and cross-ethnic identifications, and holding that “[i]n criminal trials that commence after the issuance of this opinion, a cross-racial instruction should always be included when giving the model eyewitness identification instruction, unless the parties agree that there was no cross-racial identification,” and that trial judges have the “discretion to include a cross-ethnic eyewitness identification instruction in appropriate circumstances”). The following subsections discuss recurring features of identification procedures that judicial opinions have recognized as suggestive. Counsel should emphasize these when they are present but should also consult the social-science literature cited above to document other factors that tend to make identifications unreliable.

27.3.1. Show-ups

The Supreme Court has recognized that show-up identification procedures, in which the accused is exhibited to the witness in a one-on-one confrontation, are inherently suggestive. See, e.g., *United States v. Wade*, 388 U.S. 218, 234 (1967) (“[i]t is hard to imagine a situation more clearly conveying the suggestion to the witness that the one presented is believed guilty by the police”); *Stovall v. Denno*, 388 U.S. 293, 302 (1967) (dictum) (“[t]he practice of showing suspects singly to persons for the purpose of identification, and not as part of a lineup, has been widely condemned”).

Notwithstanding the inherent suggestiveness of show-ups, the Court has sustained a show-up in the victim’s hospital room against due process challenge when the use of this procedure was “imperative” because the witness was so gravely wounded that it was impossible to “kn[o]w how long . . . [the witness] might live” (*Stovall v. Denno*, *supra*, 388 U.S. at 302). Under these circumstances the Court found that the show-up was not “unnecessarily suggestive” (*id.*; emphasis added): “the police followed the only feasible procedure” (*id.*). Several lower courts have similarly sustained immediate, on-the-scene show-ups as justified by the need to find the perpetrator rapidly. However, show-ups will not be approved when the lapse of time between the crime and the show-up rendered it unnecessary to employ the inherently suggestive show-up procedure. See, e.g., *People v. Cruz*, 129 A.D.3d 119, 122, 125, 10 N.Y.S.3d 214, 218, 220 (N.Y. App. Div., 1st Dep’t 2015) (a show-up which took place “approximately one hour after the 911 telephone call had been placed” was unnecessarily suggestive because there were no “exigent circumstances

warranting a showup identification”: “The 55 year old complainant, though bruised and visibly shaken, was not suffering from any life threatening wounds that would have made her otherwise unable or unavailable to make an identification at a later time or at the precinct where she was already located.”); *People v. Brown*, 121 A.D.2d 733, 504 N.Y.S.2d 457 (N.Y. App. Div., 2d Dep’t 1986) (a show-up which was “conducted an hour after the crime was committed” was not justified by “exigent circumstances” or a showing that “it would have been unduly burdensome . . . ‘to form some kind of lineup’”).

The inherent suggestiveness of a show-up is exacerbated by the police officers’ use of procedures that:

- (a) provide the witness with additional reasons for believing that the person being shown is the perpetrator (*see, e.g., Velez v. Schmer*, 724 F.2d 249 (1st Cir. 1984) (the police used suggestive language: “‘This is him, isn’t it?’”); *Styers v. Smith*, 659 F.2d 293 (2d Cir. 1981) (a show-up at the police station after a police officer told the victim that he was leaving to pick up the robbery suspects); *People v. Adams*, 53 N.Y.2d 241, 248-49, 423 N.E.2d 379, 382, 440 N.Y.S.2d 902, 905 (1981) (“[s]howing the suspects together also enhanced the possibility that if one of them were recognized the others would be identified as well . . . [and] permitting the victims as a group to view the suspects . . . increased the likelihood that if one of them made an identification the others would concur”); *People v. Buckery*, 130 A.D.3d 640, 641, 12 N.Y.S.3d 291, 292 (N.Y. App. Div., 2d Dep’t 2015) (before the show-up of the defendant and three others for a robbery committed by four people, a police officer “walked up to the complainant, holding the wallet [which had been “recovered from one of the suspects other than the defendant”], and . . . the complainant identified it immediately before being asked by the police whether he recognized any of the suspects”); *State v. Moore*, 343 S.C. 282, 287, 540 S.E.2d 445, 448 (2000) (“the witness was brought to a location where two individuals, wearing clothing similar to that described by the witness, were surrounded by uniformed police officers”); *State v. Williams*, 162 W. Va. 348, 249 S.E.2d 752 (1978) (the police told the victim that his money was found in the possession of the three suspects whom he was about to view)), or
- (b) magnify the custodial features of the situation, so as to enhance the impression that the police are certain of the defendant’s guilt (*see, e.g., Clark v. Caspari*, 274 F.3d 507, 511 (8th Cir. 2001) (during the show-up, the two suspects were handcuffed and “surrounded” by police officers, “one of whom was holding a shotgun”); *United States ex rel. Hudson v. Brierton*, 699 F.2d 917 (7th Cir. 1983) (the defendant was locked in a jail cell at the time of viewing); *People v. Williams*, 127 A.D.3d 1114, 1116, 7 N.Y.S.3d 434, 437 (N.Y. App. Div., 2d Dep’t 2015) (“the defendant was the only person standing in the street, in handcuffs, surrounded

by the police with high-beam headlights shining on his face, during the showup proceeding”); *People v. Brown*, 121 A.D.2d 733, 504 N.Y.S.2d 457 (N.Y. App. Div., 2d Dep’t 1986) (during the show-up the suspects were surrounded by several police officers and had handcuffs dangling from their wrists).

27.3.2. Lineups

A lineup is impermissibly suggestive if some aspect of the defendant’s appearance (age, race, skin complexion, height, weight, attire) renders him or her distinctive from the others in the line, especially if the unique characteristic makes the defendant the only person in the line who fits the known description of the perpetrator. *See, e.g., Raheem v. Kelly*, 257 F.3d 122, 135–37 (2d Cir. 2001) (a lineup was suggestive in the case of two witnesses because they had given a description of the perpetrator as wearing a black leather coat and the defendant was the only person in the line wearing a black leather coat); *United States v. Downs*, 230 F.3d 272, 273, 275 (7th Cir. 2000) (a lineup was suggestive because the witnesses had described the perpetrator as “lightly unshaven” and the defendant “was the only man in a line-up of five who lacked a moustache”); *Martin v. Indiana*, 438 F. Supp. 234 (N.D. Ind. 1977), *aff’d*, 577 F.2d 749 (7th Cir. 1978) (a lineup was suggestive because the perpetrator had been described as a tall black man in his mid-thirties, and the only black man in the line other than the defendant was short and eighteen years old); *State v. Henderson*, 116 Ariz. 310, 569 P.2d 252 (1977) (a lineup was suggestive because the perpetrator had been described as being in his early to middle thirties, and the defendant was 36 years old but the other five persons in the lineup were in their early to middle twenties); *People v. Perry*, 133 A.D.3d 410, 410, 18 N.Y.S.3d 539, 539 (N.Y. App. Div., 1st Dep’t 2015) (a lineup was suggestive because the defendant was the only participant who matched the complainant’s description of the perpetrator as having a “deformed right eye”; notwithstanding “the practical difficulties in finding fillers with similarly defective eyes,” a “simple eye patch provided to each of the lineup participants or a hand over an eye would have sufficed to remove any undue suggestiveness of the procedure.”); *People v. Robinson*, 123 A.D.3d 1062, 1062, 999 N.Y.S.2d 499, 500 (N.Y. App. Div., 2d Dep’t 2014) (a lineup was suggestive where “three [of the four] fillers appear[ed] visibly older than the defendant” and “[t]he age disparity was sufficiently apparent as to orient the viewer toward the defendant as a perpetrator of the crimes charged”); *People v. Pena*, 131 A.D.3d 708, 709, 16 N.Y.S.3d 184, 184 (N.Y. App. Div., 2d Dep’t 2015) (a lineup was suggestive where the defendant “was the only lineup participant dressed in a red shirt, the item of clothing which figured prominently in the description of the assailant’s clothing that the complainant gave to the police”); *People v. Sapp*, 98 A.D.2d 784, 469 N.Y.S.2d 803 (N.Y. App. Div., 2d Dep’t 1983) (a lineup was suggestive where the defendant was the only person in the line wearing the type of jacket that the witness had described the perpetrator as wearing); *State v. Boykins*, 173 W. Va. 761, 765-66, 320 S.E.2d 134, 138 (1984) (a lineup was suggestive where the defendant “was the only person in the lineup who wore a dark blue or black toboggan: the type of clothing the culprit allegedly wore,” and “all but one of the people in the lineup was [sic] taller than” the defendant).

The manner in which the police conduct the lineup can also make it impermissibly suggestive. *See, e.g., United States v. Wade*, 388 U.S. 218, 234 (1967) (dictum) (practice of permitting witnesses to be present during each other's viewing of a lineup is "a procedure said to be fraught with dangers of suggestion"); *People v. Boyce*, 89 A.D.2d 623, 452 N.Y.S.2d 676 (N.Y. App. Div., 2d Dep't 1982) (suggestive post-lineup remarks by the police).

27.3.3. Photographic Identifications

Courts have consistently recognized that:

"improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. 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. Regardless of how the initial misidentification comes about, the witness thereafter is apt to retain in his memory the image of the photograph rather than of the person actually seen, reducing the trustworthiness of subsequent lineup or courtroom identification." (*Simmons v. United States*, 390 U.S. 377, 383-84 (1968).)

Showing a potential identification witness a single photograph is both highly suggestive and unnecessarily so because – in the absence of extraordinary circumstances – the police can easily put together a photo array. *See Manson v. Brathwaite*, 432 U.S. 98, 99, 109, 117 (1977) (dictum) (accepting the state's concession); *United States v. Dailey*, 524 F.2d 911, 914 (8th Cir. 1975); *State v. Al-Bayyinah*, 356 N.C. 150, 157, 567 S.E.2d 120, 124 (2002). In *Simmons* and *Manson*, the Supreme Court declined to adopt a "per se rule" (*Manson*, 432 U.S. at 112) excluding identifications that follow a single-photo display, but both cases allow the admission of such identifications only after conducting the two-step analysis described in § 27.2 *supra* and finding a strong showing that, "under the "totality of the circumstances[,"] the identification was reliable even though the confrontation procedure was suggestive" (*Manson*, 432 U.S. at 106). *See also, e.g., State v. Ostrem*, 535 N.W.2d 916, 921 (Minn. 1995) ("In determining whether pretrial eyewitness identification evidence must be suppressed, a two-part test is applied. . . . The first inquiry focuses on whether the procedure was unnecessarily suggestive. . . . Whether a pretrial identification procedure is unnecessarily suggestive turns on whether the defendant was unfairly singled out for identification. . . . Single photo line-up identification procedures have been widely condemned as unnecessarily suggestive. . . .

However, under the second prong of the test, the identification evidence, even if suggestive, may be admissible if the totality of the circumstances establishes that the evidence was reliable. . . . If the totality of the circumstances shows the witness' identification has adequate independent origin, it is considered to be reliable despite the suggestive procedure. . . . The test is whether the suggestive procedures created a very substantial likelihood of irreparable misidentification.”). *Compare State v. Jackson*, 454 So. 2d 398, 400-01 (La. App. 1984) (“In the present case, the witness was shown a two-view mug shot of the defendant from the D.A.’s file. There can be little doubt that this procedure was impermissibly suggestive. The display of a single photograph of the defendant rather than an array of photographs depicting different individuals has repeatedly been held to be improper. . . . ¶ . . . [T]he photographic identification took place some eight months after the crime. This substantial lapse of time, coupled with the relatively brief period of observation and the absence of a physical description, casts grave doubt upon the reliability of the in-court identification. . . . ¶ Weighing these indicia of reliability against the corrupting effect of the one photograph show-up, we conclude there was a substantial likelihood of misidentification. Accordingly, the trial judge committed reversible error in admitting the identification testimony.”); *Wise v. Commonwealth*, 6 Va. App. 178, 367 S.E.2d 197 (1988) (a police investigator showed bank-robbery eyewitnesses “a bank surveillance photograph depicting a man who had robbed a Maryland bank” and then showed them “a photo array consisting of six photographs” (*id.* at 180, 367 S.E.2d at 198); “We believe that significant problems are inherent in the use of a single-photograph identification procedure. . . . [A] single photograph display is one of the most suggestive methods of identification and is always to be viewed with suspicion.’ . . . [S]ince the police showed Phelps and Wampler a single photograph of Wise as part of their out-of-court identification procedure, we find the out-of-court identification process was unduly suggestive. ¶ . . . In the present case, both Phelps and Wampler first identified Wise five months after the robbery when shown a single photograph of him. The record shows that both witnesses were unable to describe the robber’s facial features at any time prior to seeing the single photograph. Further, Phelps could not pick him out of the photo array in January 1986, one month prior to seeing the single photograph. Wampler was not shown the photo array at that time. We believe that these facts demonstrate an absence of other indicia of reliability and require us to find that the trial court erred in admitting evidence of their out-of-court identifications. ¶ . . . [S]ince we find that neither Wampler’s nor Phelps’ in-court identifications originated independently of their out-of-court identifications, we conclude that the trial court erred in admitting this evidence at trial.” (*Id.* at 184-87, 367 S.E.2d at 200-02.)); *People v. Marshall*, 26 N.Y.3d 495, 506-08, 45 N.E.3d 954, 962-64, 25 N.Y.S.3d 58, 66-68 (2015) (even if the defendant’s photograph was shown to the witness by the prosecutor as part of “trial preparation” and “not for purposes of an identification,” the witness’s exposure “to defendant’s likeness” creates a risk that “the display was unduly suggestive, and therefore, tainted an in-court identification”).

A “photo array” – a group of photographs (usually mug shots) including the defendant’s photograph – will be found suggestive if the defendant’s photograph is the only one that matches the description of the

perpetrator (*see, e.g., United States v. Sanders*, 479 F.2d 1193 (D.C. Cir. 1973) (only the defendant's photograph depicted facial hair that was in any way comparable to the witness's description of the perpetrator); *Commonwealth v. Thornley*, 406 Mass. 96, 99-101, 546 N.E.2d 350, 352-53 (1989) (a thirteen-photograph array was suggestive because both witnesses had described the perpetrator as wearing glasses, and "the defendant's picture was the only one in the array with glasses"); *Butler v. State*, 102 So. 3d 260, 263, 265-66 (Miss. 2012) (a photo of a lineup stage was impermissibly suggestive because the witness described the perpetrator as "around five-feet-five-inches tall," the accused is "actually five-feet-six-inches tall," the "other suspects in the photo lineup were between five-feet-eleven-inches and six-feet-four-inches tall," and their relative heights would have been apparent because the suspects "were pictured standing beside a height marker") or if the defendant's photograph differs from the others in some way that would give it special salience (*see, e.g., Sloan v. State*, 584 S.W.2d 461, 467 (Tenn. Crim. App. 1978) ("the photographic identification procedure was suggestive in that the photograph of defendant was emphasized by the fact that it was a portrait of him in a Navy uniform, and the other photographs were mugshots"); *People v. Smith*, 122 A.D.3d 1162, 1163, 997 N.Y.S.2d 534, 535-36 (N.Y. App. Div., 3d Dep't 2014) (a photo array was unduly suggestive, even though "[t]he array depicts six individuals of equivalent age and ethnicity who are reasonably similar in appearance," because of a formatting difference between the defendant's photo and the other photos: "[W]hile the other five photos depict individuals from the shoulders up with the upper portion of their photos consisting of nothing more than a blank, gray background, defendant is shown from the chest up with the top of his head reaching to the very top of the photo," and "[t]hus, defendant's face occupies the space that, in all of the other photos, is bare.")).

As with lineups, *see* § 27.3.2 *supra*, a police officer's comments or the way in which the police conduct the photographic identification can render even a properly constituted photo array suggestive. *See, e.g., Simmons v. United States*, *supra*, 390 U.S. at 383 ("[t]he 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"); *United States v. Trivette*, 284 F. Supp. 720 (D. D.C. 1968) (a detective drew the witness's attention to the defendant's photograph by asking "Is that the man?"); *Young v. State*, 374 P.3d 395, 399-400, 407 (Alaska 2016) (a "detective's comment made . . . [the photo array] identification procedure 'so suggestive as to create 'a very substantial likelihood of irreparable misidentification'": after the eyewitness – who was "a criminal defense lawyer and former prosecutor" – "put his finger tentatively on Young's photograph, . . . the detective told him to 'trust your instincts'"; although the witness "testified that he 'was kind of going there' in selecting Young as the shooter and may well have picked Young anyway, he also testified that he took the detective's comment to mean 'that's the guy we want you to pick' and that it ended his deliberations."); *People v. Fernandez*, 82 A.D.2d 922, 440 N.Y.S.2d 677 (N.Y. App. Div., 2d Dep't 1981) (four eyewitnesses were permitted to view photographs together).

If the police or the prosecution failed to preserve the photo array used in the identification procedure, counsel should ask the court to apply

a presumption that the array was impermissibly suggestive. *See, e.g., United States v. Honer*, 225 F.3d 549, 553 (5th Cir. 2000) (“when the government fails to preserve the photographic array used in a pretrial line-up ‘there shall exist a presumption that the array is impermissibly suggestive’”); *People v. Holley*, 26 N.Y.3d 514, 517, 45 N.E.3d 936, 937, 25 N.Y.S.3d 40, 41 (2015) (dictum) (“When using a photo array as an identification procedure, the People should preserve a record of what was viewed. Failure to do so gives rise to a rebuttable presumption that the array was unduly suggestive. The obligation to preserve is not diminished by the type of system used. Computer screen or mug shots book, the People’s obligation is the same.”).

27.3.4. Aggregation of Identification Procedures

Frequently, a witness is exposed to a combination of identification procedures. For example, a witness who identifies the defendant in a show-up or a photographic identification display is thereafter shown the defendant in a lineup. The employment of successive identification procedures all involving the defendant is itself suggestive because the witness learns to recognize the defendant from the previous police-arranged viewing(s). *See Foster v. California*, 394 U.S. 440, 442-43 (1969).

27.4. Reliability of the Identification

As explained in § 27.2 *supra*, under the federal Due Process rule, even unduly suggestive police procedures will not render an identification inadmissible if the factors indicating its reliability outweigh the suggestiveness of the police conduct.

The factors to be considered in assessing the reliability of an identification “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” (*Manson v. Brathwaite*, 432 U.S. 98, 114 (1977)). Thus, in *Manson*, the Court held that the identification was reliable because:

- (a) The witness had a good “opportunity to view” the perpetrator: the scene was well-lit and the witness was “within two feet” of the perpetrator and “looked directly at” him for “two to three minutes” (*id.* at 114).
- (b) The witness’s “degree of attention” was excellent, in that the witness was “a specially trained, assigned, and experienced officer [who] . . . could be expected to pay scrupulous attention to detail, for he knew that subsequently he would have to find and arrest [the perpetrator] . . . [and] that his claimed observations would be subject later to close scrutiny and examination at any trial” (*id.* at 115). In addition, since the witness was of the same race as the defendant, there were no problems of cross-racial identification. *Id.*

- (c) The description given by the witness was extremely detailed and accurate, including the perpetrator's "race, his height, his build, the color and style of his hair, and the high cheekbone facial feature" as well as the "clothing the [perpetrator] . . . wore" (*id.*).
- (d) The witness was absolutely certain of the identification, stating, "There is no question whatsoever" (*id.*).
- (e) The witness gave his description to the investigating officer "within minutes of the crime" and "[t]he photographic identification took place only two days later" (*id.* at 116).

In cases not exhibiting the indicia of reliability that marked the identification in *Manson*, lower courts have held that the suggestiveness of police procedures outweighed the identification's reliability. *See, e.g., Raheem v. Kelly*, 257 F.3d 122, 138-40 (2d Cir. 2001) (the witnesses to a robbery and shooting in a bar were "drinking scotch" and were not paying attention to the robbers until the witnesses "heard the shot and saw the shooter holding a gun, [and] the hold-up was announced," and "[p]lainly their attention was immediately focused more on th[e] man" who "brandished his gun at them" than at the other robber, and "[f]urther, it is human nature for a person toward whom a gun is being pointed to focus his attention more on the gun than on the face of the person pointing it"); *Velez v. Schmer*, 724 F.2d 249, 251-52 (1st Cir. 1984) (the witnesses had only about a minute to observe the perpetrator and gave virtually no description); *Dickerson v. Fogg*, 692 F.2d 238, 245 (2d Cir. 1982) (the victim was "frightened and agitated . . . having just had his life threatened and a gun at his neck"); *Jackson v. Fogg*, 589 F.2d 108 (2d Cir. 1978) (the eyewitnesses had only a few seconds to observe the gunman before running for cover); *United States v. Dailey*, 524 F.2d 911 (8th Cir. 1975) (the witness had limited opportunity to observe the perpetrator, seeing him for no more than 30 seconds in heavy rain, and there was a discrepancy between the description and the defendant's appearance); *People v. Fuller*, 71 A.D.2d 589, 418 N.Y.S.2d 427 (N.Y. App. Div., 1st Dep't 1979) (there was a gross discrepancy between the appearance of the 17-year-old defendant and the witness's description of the perpetrator's age and build); *State v. Moore*, 343 S.C. 282, 289, 540 S.E.2d 445, 449 (2000) (the eyewitness "saw the two defendants for only a very brief period of time, at some distance"; her "attention was likely not as acute as it might have been had she been the victim of a crime"; and "the degree of accuracy of [her] description is tenuous, at best . . . [inasmuch as] [h]er descriptions were based primarily on the suspects' clothing and race, and that one was taller than the other").

27.5. *Suppression of an Identification as Unconstitutionally Unreliable Even Though Police Action Is Minimal or Non-existent*

Under the federal due process standard for suppressing an identification as unconstitutionally unreliable, "a preliminary judicial inquiry into the reliability of an eyewitness identification" is required only if the identification was "procured under unnecessarily suggestive circumstances arranged by law

enforcement” (*Perry v. New Hampshire*, 132 S. Ct. 716, 730 (2012)). *See id.* at 720-21 (“We have not extended pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers. . . . Our decisions . . . turn on the presence of state action and aim to deter police from rigging identification procedures, for example, at a lineup, showup, or photograph array. When no improper law enforcement activity is involved, . . . it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.”).

In States that have not already chosen to follow the federal constitutional standard on this issue, counsel can argue that the state constitution or state statutes or rules should be construed to afford a suppression remedy for unreliable identifications even in the absence of suggestive police conduct. *See, e.g., State v. Chen*, 208 N.J. 307, 310-11, 27 A.3d 930, 932 (2011) (“Recent social science research reveals that suggestive conduct by private actors, as well as government officials, can undermine the reliability of eyewitness identifications and inflate witness confidence. We consider that evidence in light of the court’s traditional gatekeeping role to ensure that unreliable, misleading evidence is not presented to jurors. We therefore hold [under N.J. RULE EVID. 104] that, even without any police action, when a defendant presents evidence that an identification was made under highly suggestive circumstances that could lead to a mistaken identification, trial judges should conduct a preliminary hearing, upon request, to determine the admissibility of the identification evidence.”). *See also State v. Hibel*, 290 Wis. 2d 595, 610-13, 618, 714 N.W.2d 194, 202-03, 206 (2006) (even when an identification does not stem from a “police procedure,” as in cases of “‘spontaneous’ identifications resulting from ‘accidental’ confrontations” between an eyewitness and the suspect, the “circuit court still has a limited gatekeeping function to exclude such evidence under [WIS. STAT.] § 904.03”). *See generally* § 17.11 *supra*. *Compare State v. Johnson*, 312 Conn. 687, 688-90, 700, 703-05, 94 A.3d 1173, 1174-75, 1180-81, 1183-84 (2014) (rejecting the argument that “the due process clauses of the Connecticut constitution provide protection against allegedly unduly suggestive eyewitness identification procedures undertaken by a private actor,” but recognizing that due process principles are implicated if “the [identification] evidence is so extremely unreliable that its admission would deprive the defendant of his right to a fair trial” and furthermore recognizing that state evidentiary law “goes above and beyond minimal constitutional requirements” and provides a basis for excluding, at trial, “unreliable identification evidence that is tainted by unduly suggestive private conduct”).

In seeking to persuade a state court to construe the state constitution to provide a suppression remedy for unconstitutionally unreliable identifications even though police action is minimal or non-existent, counsel will often find it useful to direct the court’s attention to the extensive empirical evidence on the unreliability of eyewitness identifications even when the police were not involved. *See, e.g.,* the sources cited in § 27.3 *supra* and in *State v. Chen*, *supra*,

208 N.J. at 938-40, 27 A.3d at 320-23; *Perry v. New Hampshire*, *supra*, 132 S. Ct. at 738-39 & nn.5-11 (Sotomayor, J., dissenting).

B. Other Grounds for Suppressing Identification Testimony

27.6. Violations of the Sixth Amendment Right to Counsel

Sections 26.10 and 26.10.1 *supra* describe the doctrine establishing that the Sixth Amendment right to counsel attaches at the time of commencement of adversary judicial proceedings. As noted in that section, some state courts have relied upon state constitutional guarantees to afford the protections of the right to counsel even earlier in the criminal process.

Once the right to counsel has attached, the defendant is entitled to the assistance of counsel at a lineup or show-up. *United States v. Wade*, 388 U.S. 218 (1967). The violation of that right requires the suppression of testimony relating to any identification made at the lineup or show-up. *Moore v. Illinois*, 434 U.S. 220, 231-32 (1977); *Gilbert v. California*, 388 U.S. 263, 272-74 (1967). In cases in which the right to counsel was violated, witnesses who participated in the unconstitutional lineup or show-up are also precluded from making an in-court identification of the defendant unless the prosecution proves “by clear and convincing evidence that the in-court identifications [are] . . . based upon observations of the suspect other than the lineup [or show-up] identification” (*see United States v. Wade, supra*, 388 U.S. at 240).

Unlike lineups and show-ups, photographic identification procedures do not require the presence of counsel under the Sixth Amendment caselaw. *United States v. Ash*, 413 U.S. 300 (1973).

27.7. Violations of the Fourth Amendment: Identifications Resulting from an Illegal Arrest or Terry Stop

If a lineup, show-up, or other identification exhibition is held while the defendant is in custody following an illegal arrest or *Terry* stop, any resulting identification must be suppressed as the fruit of the Fourth Amendment violation. See § 25.39 subdivision (e) *supra*. In-court identifications tainted by the illegality of the earlier ones would also be inadmissible. *See United States v. Crews*, 445 U.S. 463, 472-73 (1980) (dictum); *Young v. Conway*, 698 F.3d 69, 84-85 (2d Cir. 2012).

A fact pattern that arises with considerable frequency and provides fertile grounds for suppression of identifications is that an eyewitness gives a very vague description of the perpetrator, the police arrest or detain the defendant because s/he matches the description, and an identification procedure is then held. If the defense succeeds in invalidating the arrest or *Terry* stop on the ground that the vague description failed to provide the requisite probable cause or articulable suspicion, see §§ 25.7.4, 25.9 *supra*, the identification must be suppressed.

27.8. State Law Grounds of Objection to Identifications

In addition to the constitutional rules that may require suppression of an identification, some jurisdictions have evidentiary doctrines that afford a basis for objecting to identification testimony. In some jurisdictions, police officers and other observers of an out-of-court identification are barred from recounting the identification, either by rules prohibiting third-party bolstering of identifications (*see, e.g., People v. Walston*, 99 A.D.2d 847, 472 N.Y.S.2d 453 (N.Y. App. Div., 2d Dep't 1984); *Brownfield v. State*, 668 P.2d 1165 (Okla. Crim. App. 1983); *Lyons v. State*, 388 S.W.2d 950 (Tex. Crim. App. 1965)), or by a hearsay-based rule barring such testimony generally or in specific circumstances such as when the eyewitness does not testify at trial (*see, e.g., People v. Johnson*, 68 Ill. App. 3d 836, 842, 386 N.E.2d 642, 647, 25 Ill. Dec. 371, 376 (1979)) or when the eyewitness takes the stand but is unable to make an in-court identification (*see generally* Francis M. Dougherty, Annot., *Admissibility and weight of extrajudicial or pretrial identification where witness was unable or failed to make in-court identification*, 29 A.L.R.4th 104 (1984 & Supp.)). Some jurisdictions recognize an objection to identification evidence when the identification is so unreliable that its probative value is outweighed by its prejudicial nature. *See, e.g., State v. Lawson*, 352 Or. 724, 740, 761-62, 291 P.3d 673, 685, 696-97 (2012), summarized in § 27.2 concluding paragraph, *supra*; *State v. Johnson*, 312 Conn. 687, 700, 94 A.3d 1173, 1180-81 (2014), summarized in § 27.5 second paragraph *supra*; and see § 36.2.3 *infra*.

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