Ninth Circuit Judges' Benchbook on Pretrial Criminal Proceedings

2004 EDITION

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PREFACE

I am very honored that the Circuit Executive's Office saw fit to disseminate another edition of this *Benchbook*.

The book, a *Manual on Recurring Problems in Criminal Trials*, written by the late District Judge Donald Voorhees, Western District of Washington, was the original inspiration for the *Benchbook*.

The first edition of the *Benchbook* was distributed in non-bound format in 1997, followed by bound editions in 1998, 2000, and 2002. Due to budget limitations, it is not possible to publish this edition of the *Benchbook* in bound form. However, it is accessible electronically.

The electronic edition in Adobe PDF format contains several interactive features, including the "Bookmarks" tab that connects to main headings, internal links between the table of contents and various headings, and the ability to turn to any page using the "Go To" function (by typing the page number at the bottom of the window, or through the "View" menu).

I welcome suggestions and comments, both as to content and to user-friendliness.

Changes from the previous editions include the addition of new chapters addressing Title III wiretaps, federal jurisdiction in criminal cases, and juvenile prosecutions. As with all chapters of the *Benchbook*, these new chapters do not purport to be an exhaustive and complete discussion on each topic. Rather, each chapter attempts to reflect recent Ninth Circuit and Supreme Court case law.

Case law has been updated through June 30, 2004.

The *Benchbook* is a starting point for additional research and will serve its purpose if my colleagues on the bench find it useful and not too misleading. Rather than constitute a compilation of holdings of various cases, I continue to attempt to find crisp statements of applicable principles of law.

Because each edition builds on and hopefully improves past editions, I would like to recognize the assistance I have received. Since my appointment to the federal bench in 1991, my judicial assistant, Katy Higgins, has helped me compile an ever-growing outline of Supreme Court and Ninth Circuit case law in the area of pretrial criminal law.

In producing the 1997 and 1998 versions of the *Benchbook*, I received invaluable support from many individuals, in particular Laura Ryan of the Circuit Executive's Office and my law clerks Sarah Jeffries Johnson, Patti Monroe Wisnom and Tracey Zobenica.

My permanent law clerk, Nicole Zomberg, provided invaluable research and editing assistance as to the 2000 edition, and much appreciated support was provided by Julie Martel and Jay C. Kim of the Circuit Executive's Office.

In 2002 Ms. Zomberg once again spearheaded editing responsibilities and I received enthusiastic and invaluable assistance from my law clerk Angela Martinez, with Jay Kim's continued support.

As to this addition, my most recent law clerks, Skip Skinner, Matthew Bowman, and Amy Duncan, have expended a great amount of time and expertise in assisting me with research and editing responsibilities, and I am indebted to them. In the summer of 2003, Mr. Skinner also helped prepare a 2003 supplement to the 2002 edition of the *Benchbook*. Obviously, that work constituted a very substantial contribution to this 2004 revision.

This revision of the *Benchbook* is possible because of the continued interest and support of the Circuit Executive's Office, in particular Debra Landis and Robin Donoghue.

Finally, I again dedicate this annotation to my best friend, my wife Maureen, whom I met on July 31, 1964, and from whom I have learned countless important lessons in life.

John M. Roll
October 2004
Tucson, Arizona

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CHAPTER 1. INTRODUCTION

The language of Fed. R. Crim. P. 12(b) was amended in 2002. The comment states that most of the changes were stylistic and were intended to make the language consistent throughout the rules. The language now clearly indicates that Fed. R. Crim. P. 47 (Motions and Supporting Affidavits) governs pretrial motions. Rule 12(b)(4) previously was Rule 12(d). It was incorporated in Rule 12(b) because disclosure of discovery information is so closely related to defense objections and motions:

(1) In General. Rule 47 applies to a pretrial motion.

(2) Motions That May Be Made Before Trial. A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.

(3) Motions That Must Be Made Before Trial**.** The following must be raised before trial:

(A) a motion alleging a defect in instituting the prosecution;

(B) a motion alleging a defect in the indictment or information—but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense;

(C) a motion to suppress evidence;

(D) a Rule 14 motion to sever charges or defendants; and

(E) a Rule 16 motion for discovery.

(4) Notice of the Government's Intent to Use Evidence.

(A) At the Government's Discretion. At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(B) At the Defendant's Request. At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

As with previous editions of the *Benchbook*, the primary focus is on case law from the United States Supreme Court and the Ninth Circuit Court of Appeals in the pretrial criminal law area.

CHAPTER 2. BAIL

Release and detention are addressed in 18 U.S.C. §§ 3141–3156.

A. Pretrial release.

Pretrial conditions of release may include:

1. "release[] on personal recognizance or upon execution of an unsecured appearance bond," 18 U.S.C. § 3142(a)(1); or

2. "release[] on a condition or combination of conditions" including:

    a. supervision by a designated person;

    b. travel restrictions;

    c. reporting to pretrial services as directed;

    d. undergoing medical or mental health treatment;

    e. encumbering property, *but see United States v. Frazier*, 772 F.2d 1451, 1453 (9th Cir. 1985) (requirement that property used to secure appearance bond be unencumbered was improper unless necessary to reasonably assure appearance at trial); and/or

    f. executing a bail bond.

18 U.S.C. § 3142(a)(2), (c).

B. Pretrial detention.

The Bail Reform Act of 1984 "requires the release of a person facing trial under the least restrictive condition or combination of conditions that will reasonably assure the appearance of the person as required and the safety of the community." *United States v. Gebro*, 948 F.2d 1118, 1121 (9th Cir. 1991) (citing 18 U.S.C. § 3142(c)(2)).

"The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes." *United States v. Salerno*, 481 U.S. 739, 747 (1987) (citing 18 U.S.C. § 3142(f)). A detention hearing is available if the case involves a crime of violence, an offense for which the sentence is life imprisonment or death, a serious drug offense, or certain repeat offenders. 18 U.S.C. § 3142 (f)(1).

If "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community," the person shall be detained. 18 U.S.C. § 3142(e).

1. *Detention hearing*. The holding of a detention hearing in order "to determine whether any condition or combination of conditions . . . will reasonably assure the appearance of such person as required and the safety of any other person and the community" is provided for in 18 U.S.C. § 3142(f).

2. *Burdens of proof*. At a pretrial detention hearing, the government has the burden of showing:

    a. by a preponderance of the evidence that the defendant is a flight risk; and

    b. by clear and convincing evidence that the defendant poses a danger to the community.

United States v. Gebro, 948 F.2d 1118, 1121 (9th Cir. 1991) (citation omitted).

3. *Factors re detention in general*. Factors to be considered in deciding whether a person should be detained pretrial include the nature and circumstances of the offense, the weight of the evidence, the history and characteristics of the person, and the risk of danger to any person or the community. 18 U.S.C. § 3142(g).

   a. *Likelihood of success on possible defense motions*. The district court is not required to explore the defendant's likelihood of success in challenging the lawfulness of the arrest or the seizure of evidence. *United States v. Winsor*, 785 F.2d 755, 756–57 (9th Cir. 1986) (citation omitted).

   b. *Aliens*. In determining conditions of release for an alien, the court should consider the alien's ties to the United States, including "how long the defendant has resided in this country, whether defendant has been employed in the United States, whether defendant owns any property in this country, and whether defendant has any relatives who are United States residents or citizens." *United States v. Townsend*, 897 F.2d 989, 995 (9th Cir. 1990) (citations omitted).

4. *Findings required*. "[A] detention order . . . shall . . . include written findings of fact and a written statement of the reasons for the detention . . . ." 18 U.S.C. § 3142(i)(1). The court may make such findings either in writing or orally on the record. Fed. R. App. P. 9(a)(1) ("The district court must state in writing, or orally on the record, the reasons for an order regarding the release or detention of a defendant in a criminal case.").

5. *De novo review*. In reviewing a magistrate judge's detention order, the district court must make its own *de novo* determination of the facts. *United States v. Koenig*, 912 F.2d 1190, 1191–93 (9th Cir. 1990).

CHAPTER 3. MOTIONS TO CONTINUE TRIAL

A. Ruling on defendant's motion to continue trial.

Four factors should be considered in ruling on a defendant's motion to continue trial:

1. the defendant's diligence in readying the defense;

2. the likelihood that a continuance would satisfy the defendant's need;

3. the inconvenience to the court, opposing party, and witnesses that would result from a continuance; and

4. the extent to which the defendant would be harmed by denial.

United States v. Tham, 960 F.2d 1391, 1396 (9th Cir. 1992) (citation omitted). *See also United States v. Zamora-Hernandez*, 222 F.3d 1046, 1049 (9th Cir. 2000) (citing four factors listed above; on facts presented, failure to continue trial resulting in defense counsel not having complete transcript of prior trial when retrial commenced did not deprive defendant of his right to present a defense), *cert. denied*, 531 U.S. 1200 (2001); *United States v. Croft*, 124 F.3d 1109, 1118 (9th Cir. 1997) (citations omitted).

Caveat: *Defendant's objection to defense counsel's motion*. "When . . . the defendant repeatedly asserts his speedy trial rights and makes clear that he does not want the continuance that his lawyer has requested, the district court must at a minimum conduct a far more probing inquiry into the continuity of counsel question." *United States v. Lloyd*, 125 F.3d 1263, 1271 (9th Cir. 1997).

B. Speedy Trial Act.

The Speedy Trial Act appears at 18 U.S.C. §§ 3161–3174.

1. *In general*. The Speedy Trial Act specifies time limits for matters to proceed to trial and exceptions to those limits. Accordingly, motions to continue should be evaluated in light of the Speedy Trial Act. "The Act was originally intended to accomplish the dual purposes of 'assist[ing] in reducing crime and the danger of recidivism' and 'giv[ing] real meaning to [the] Sixth Amendment right' of an accused individual to a speedy trial." *United States v. Martinez-Martinez*, 369 F.3d 1076, 1085 (9th Cir. 2004) (citations omitted).

2. 30-day rule. 18 U.S.C. § 3161(b) states in part that "[a]ny information or indictment charging an individual with the commission of an offense shall be filed within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges."

   A superseding indictment which is issued before the original indictment is dismissed may add charges without violating the Speedy Trial Act. *United States v. Gastelum-Almeida*, 298 F.3d 1167, 1173 (9th Cir. 2002)

3. *70-day rule*. 18 U.S.C. § 3161(c)(1) states in part that "[i]n any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs." *But see* 18 U.S.C. § 3164(b) ("trial of any person [detained solely because awaiting trial or released but designated by "the

Government as being of high risk"] shall commence not later than ninety days following the beginning of such continuous detention or designation . . . ."; delays pursuant to 18 U.S.C. § 3161(h) are excluded).

4. *Application of Speedy Trial Act upon remand*. The Speedy Trial Act's 70-day rule applies to cases remanded following appeal. 18 U.S.C. § 3161(e). The 70-day time period begins to run "from the date the action occasioning the retrial becomes final," unless additional time, up to 180 days from remand, is required due to the "unavailability of witnesses or other factors resulting from passage of time . . . ." 18 U.S.C. § 3161(e). "A decision of our court becomes final for purposes of a retrial on the date that the mandate issues." *United States v. Lloyd*, 125 F.3d 1263, 1265 (9th Cir. 1997) (citation omitted). *But see United States v. Pitner*, 307 F.3d 1178, 1182–83 (9th Cir. 2002) (an interlocutory appeal does not trigger a new 70-day period of excluded time; § 3161 (e) does not apply to interlocutory appeals).

5. *Excluded time*. 18 U.S.C. § 3161(h) specifies permissible reasons for excluding time from the 70-day rule of the Speedy Trial Act.

   Some of the more common grounds for exclusion are:

   a. *Other proceedings*. "Any period of delay resulting from other proceedings concerning the defendant . . . ." 18 U.S.C. § 3161(h)(1);

   b. *Pretrial motions.* "[T]he plain language of 18 U.S.C. § 3161(h)(1)(F) . . . directs a district court not to count any 'delay resulting from any pretrial motion,

from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion.'(emphasis added)." *United States v. Daychild*, 357 F.3d 1082, 1090 n.7 (9th Cir. 2004) (quoting 18 U.S.C. § 3161(h)(1)(F)). "[T]he day a party files a motion is excludable for speedy trial purposes." *Daychild, id.*

c. *Matters under advisement.* The Speedy Trial Act is tolled for a maximum of thirty (30) days after the court takes a motion under advisement. 18 U.S.C. § 3161(h)(1)(J); *United States v. Sutter*, 340 F.3d 1022, 1030 (9th Cir. 2003); *United States v. Aviles*, 170 F.3d 863, 869 (9th Cir.) (citations omitted), *cert. denied*, 528 U.S. 848 (1999), *amended by* 216 F.3d 881 (2000);

d. *Additional briefing.* 18 U.S.C. §3161(h)(1)(F) "excludes time after a hearing has been held where a district court awaits additional filings from the parties that are needed for the proper disposition of the motion." *Henderson v. United States*, 476 U.S. 321, 331 (1986);

e. *Continuance based on continuance of unsevered co-defendant's trial.* 18 U.S.C. § 3161(h)(7) permits the tolling of the Speedy Trial Act against a defendant based upon an unsevered co-defendant's motion for a continuance. *United States v. Nelson*, 137 F.3d 1094, 1109 (9th Cir.), *cert. denied*, 525 U.S. 901 (1998). *See also United States v. Butz*, 982 F.2d 1378, 1381 (9th Cir.) (interpreting 18 U.S.C. §§ 3161(h)(7), (8)(A) as providing that "trial delay due to [a] continuance granted to [a co-defendant] applies to [a defendant] as excludable time"), *cert. denied*, 510 U.S. 891 (1993).

"It is well established that an exclusion from the Speedy Trial clock for one defendant applies to all co-defendants." *United States v. Messer*, 197 F.3d 330, 336 (9th Cir. 1999) (but finding that one year delay resulting from co-defendant's trial in another jurisdiction on unrelated charges constituted unreasonable delay) (citation omitted). *See also United States v. Baker*, 63 F.3d 1478, 1497 (9th Cir. 1995) ("[T]here may be some situations in which tolling the speedy trial clock due to a codefendant's actions may violate another defendant's Sixth Amendment right."), *cert. denied*, 516 U.S. 1097 (1996);

f. *Unavailability of defendant or key witness.* "Any period of delay resulting from the absence or unavailability of the defendant or an essential witness." 18 U.S.C. § 3161(h)(3)(A). *Cf. United States v. Martinez-Martinez*, 369 F.3d 1076, 1086 (9th Cir. 2004) ("the twenty-two day delay between arrest and indictment which was attributable to [the defendant's] own hospitalization was properly excluded under the auspices of the Speedy Trial Act.);

g. *Mental or physical disability of defendant*. "Any period of delay resulting from the fact that the defendant is mentally incompetent or physically unable to stand trial." 18 U.S.C. § 3161(h)(4);

h *Time between change of plea and withdrawal*. Where a defendant enters a plea of guilty then withdraws his plea, the time is excluded time under the Speedy Trial Act, 18 U.S.C. § 3161(i). *United States v. Solorzano-Rivera*, 368 F.3d 1073, 1077 (9th Cir. 2004), and

i *Ends of justice*. "Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel or at the request of the attorney for the Government, if the judge . . . find[s] . . . the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A).

(1) *In general*. To be excluded time under the ends of justice exclusion of the Speedy Trial Act, the district court must give "reasons for finding . . . the ends of justice served by the granting of [a] continuance outweigh the best interests of the public and the defendant in a speedy trial." 18 U.S.C. § 3161(h)(8)(A). *See also United States v. Newman*, 6 F.3d 623, 627 (9th Cir. 1993); *United States v. Lewis*, 980 F.2d 555, 560 (9th Cir. 1992).

"[I]n order to comply with the Speedy Trial Act[,] the district court must satisfy two requirements whenever it grants an 'ends of justice' continuance:

[a] the continuance must be 'specifically limited in time'; and

[b] it must be 'justified [on the record] with reference to the facts as of the time the delay is ordered.'"

United States v. Lloyd, 125 F.3d 1263, 1268 (9th Cir. 1997) (quoting *United States v. Jordan*, 915 F.2d 563, 565–66 (9th Cir. 1990)). *See also United States v. Ramirez-Cortez*, 213 F.3d 1149, 1154 (9th Cir. 2000).

(2) *Factors to be considered in deciding whether to grant a continuance based on "ends of justice."*

(a) *Complex cases*. The fact that a case is unusual or complex may be considered by the court in deciding whether the ends of justice warrant a continuance. 18 U.S.C. § 3161(h)(8)(B)(ii).

Complexity may arise from "the number of defendants, the nature of the prosecution, or the existence of novel questions of fact or law . . . ." 18 U.S.C. § 3161(h)(8)(B)(ii).

Only continuances based upon needs arising from the complexity of the case, articulated by the court, are excludable under the Speedy Trial Act. *United States v. Clymer*, 25 F.3d 824, 828–29 (9th Cir. 1994). *See also United States v. Aviles*, 170 F.3d 863, 869 (9th Cir.) ("We do not count continuances granted by the district court where it made no specific findings supporting a general mantra of 'complexity.'") (citation omitted), *cert. denied*, 528 U.S. 848 (1999), *amended by* 216 F.3d 881 (2000). Such continuances may not be "open-ended." *Clymer*, 25 F.3d at 828.

(b) *Continuity of counsel*. Where failure to grant a continuance in a non-complex case could deprive the government or the defendant of continuity of counsel, this factor may be considered in deciding whether the ends of justice would be served by the granting of a continuance. 18 U.S.C. § 3161(h)(8)(B)(iv).

In deciding whether to grant a motion to continue because of the government's need for continuity of counsel, the court must consider "a number of factors, including, (1) the size of the prosecutor's office, (2) whether there is another qualified prosecutor available, (3) how much special knowledge the first prosecutor has developed about the case, (4) how difficult the case is, and (5) how different it is from other cases generally handled by the particular United States Attorney's Office." *United States v. Lloyd*, 125 F.3d 1263, 1271 (9th Cir. 1997).

(c) *Death penalty evaluation process*. A continuance granted to allow the government an opportunity to complete the death penalty evaluation process may be justified under the "ends of justice" exception to the Speedy Trial Act. *United States v. Murillo*, 288 F.3d 1126, 1133 (9th Cir.) (citation omitted), *cert. denied*, 537 U.S. 931 (2002).

(3) *General congestion of court calendar*. "Section 3161(h)(8)(C) [of the Speedy Trial Act] clearly forbids granting continuances because of 'general congestion of the court's calendar.'" *United States v. Engstrom*, 7 F.3d 1423, 1427 (9th Cir. 1993) (quoting 18 U.S.C. § 3161(h)(8)(C)).

Although "court congestion cannot serve as a basis for a continuance, where a trial date is set and later changed at the request of the parties, district courts certainly cannot be required to reset cases in unworkable or 'unavailable' time slots." *United States v. Shetty*, 130 F.3d 1324,

1328 (9th Cir. 1997) (citing *Engstrom*, 7 F.3d at 1427), *cert. denied*, 523 U.S. 1078 (1998).

6. *Dismissal is sanction for violation of Speedy Trial Act.* "If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant." 18 U.S.C. § 3162(a)(2).

   Where dismissal is required, the district court must determine whether dismissal should be with or without prejudice. 18 U.S.C. § 3162(a)(2) (setting forth facts to be considered); *United States v. Hardeman*, 249 F.3d 826, 829 (9th Cir. 2000) (citations omitted).

7. *Waiver.* "Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under [18 U.S.C. § 3162(a)(2)]." 18 U.S.C. § 3162(a)(2).

   "The [Speedy Trial] Act provides for no exception to the waiver of the right to dismissal for failure to make a timely motion." *United States v. Brickey*, 289 F.3d 1144, 1150 (9th Cir. 2002) (citation omitted).

   A defendant who agrees to waive indictment and plead to an information, then decides not to plead guilty cannot complain that a timely indictment was not filed in violation of the Speedy Trial Act. *United States v. Lopez-Osuna*, 232 F.3d 657, 662–63 (9th Cir.), *amended by* 242 F.3d 1191, 1196–98 (2000).

See also Chapter 11, B., 3., b., Motions to Dismiss—Speedy Trial Act violation.

CHAPTER 4. MOTIONS RE COUNSEL

A. Right to Counsel—In general.

"The Sixth Amendment provides that '[i]n all criminal *prosecutions*, the *accused* shall enjoy the right . . . to have the Assistance of Counsel for his defence.'" *United States v. Hayes*, 231 F.3d 663, 669 (9th Cir. 2000) (en banc) (quoting U.S. CONST. amend. VI), *cert. denied*, 532 U.S. 935 (2001).

"The [Supreme] Court has consistently held that the right to counsel attaches only after the initiation of formal charges . . . ." *Hayes*, 231 F.3d at 671 (finding no Sixth Amendment right to counsel attached despite pre-indictment Fed. R. Crim. P. 15 depositions).

"The right to appointment of two attorneys in federal capital cases is a well-established one." *United States v. Waggoner*, 339 F.3d 915, 917 (9th Cir. 2003) (the right to two attorneys no longer applies once the government elects not to pursue death penalty).

B. Motion for new counsel.

1. *Motion for new appointed counsel.*

   a. *Factors to be considered in ruling upon a motion for appointment of new counsel*. In reviewing a district court's denial of a motion for appointment of new counsel, the appellate court considers:

      (1) the timeliness of the motion,

      (2) the adequacy of the court's inquiry into defendant's complaint, and

      (3) the extent of the conflict.

United States v. George, 85 F.3d 1433, 1438 (9th Cir. 1996) (citation omitted).

(1) *Timeliness of the motion*. Although timeliness is a factor, "[t]he fact that [a motion for substitution of new counsel] was made on the eve of trial alone is not dispositive." *United States v. Adelzo-Gonzalez*, 268 F.3d 772, 780 (9th Cir. 2001) (citations omitted).

(2) *Adequacy of inquiry*. "Before ruling on a motion to substitute counsel due to an irreconcilable conflict, a district court must conduct 'such necessary inquiry as might ease the defendant's dissatisfaction, distrust, and concern.'" *United States v. Adelzo-Gonzalez*, 268 F.3d 772, 777 (9th Cir. 2001) (quoting *United States v. Garcia*, 924 F.2d 925, 926 (9th Cir. 1991)). *See also United States v. McKenna*, 327 F.3d 830, 843–44 (9th Cir.) (denial of defendant's request for new appointed counsel upheld where source of conflict was defendant's insistence that her attorneys file motions that her attorneys felt were not supported by evidence), *cert. denied*, 124 U.S 359 (2003); *United States v. Nguyen*, 262 F.3d 998, 1004 (9th Cir. 2001) ("For an inquiry regarding substitution of counsel to be sufficient, the trial court should question the attorney or defendant 'privately and in depth,' and examine available witnesses.") (quoting *United States v. Moore*, 159 F.3d 1154, 1160 (9th Cir. 1998)).

(3) *Extent of the conflict*. "[A]n irreconcilable conflict between [the defendant] and the appointed counsel which substantially interfere[s] with the appointed counsel's ability

to provide adequate representation" supports a defendant's request for new counsel. *United States v. Adelzo-Gonzalez*, 268 F.3d 772, 780 (9th Cir. 2001) (defense counsel's objection to defendant's motion for new counsel was further evidence of antagonism between appointed counsel and the defendant; the district court "should have suspended the proceedings and appointed an attorney for the defendant for purposes of the pending motion [for appointment of new counsel]") (citation omitted).

"[I]f the relationship between lawyer and client completely collapses, the refusal to substitute new counsel violates [the defendant's] Sixth Amendment right to effective assistance of counsel." *United States v. Moore*, 159 F.3d 1154, 1158 (9th Cir. 1998) (strong evidence of irreconcilable conflict required reversal of conviction) (citation omitted).

b. *Competent counsel may nevertheless be inadequate.* "Even if present counsel is competent, a serious breakdown in communications can result in an inadequate defense." *United States v. Nguyen*, 262 F.3d 998, 1003 (9th Cir. 2001) (citation omitted). *See also United States v. Corona-Garcia*, 210 F.3d 973, 976–77 (9th Cir.) (where district court conducted inquiry, conflict was not severe, and motion was made when trial was imminent, not error to deny defendant's request for substitution of counsel), *cert. denied*, 531 U.S. 898 (2000). *But see United States v. Holloway*, 259 F.3d 1199, 1201 (9th Cir. 2001) ("What is considered sufficient is representation that is competent. A 'meaningful relationship' between client and counsel has been judged by high authority to be unnecessary to satisfy the Sixth Amendment," quoting *Morris v. Slappy*,

461 U.S. 1, 14 (1983)); (finding no error in district court's ruling denying new counsel where defendant failed to point "to any incompetency on the part of counsel").

2. *Motion to substitute new retained counsel.* A defendant's right to substitute retained counsel may be affected by the timeliness of the attempted substitution. Although *United States v. D'Amore* 56 F.3d 1202, 1204 (9th Cir. 1995) suggests that absent compelling *e*, circumstances, the district court may not deny a defendant's motion to substitute retained counsel on the eve of trial, the Ninth Circuit has recently held that *D'Amore* and *United States v. Lillie*, 989 F.2d 1054, 1056 (9th Cir. 1993) are overruled to the extent that they "require a trial court to find a compelling reason before granting or denying a continuance." *United States v. Garrett*, 179 F.3d 1143, 1145–46 (9th Cir.) (en banc) (on facts presented, district court did not abuse discretion in denying defendant's eve of trial motion to continue, made so that defendant could have retained counsel substituted for appointed counsel), *cert. denied*, 528 U.S. 978 (1999).

   "In reviewing a denial of substitution of [retained] counsel, [the Ninth Circuit] consider[s]":

   (1) the timeliness of the motion;

   (2) the adequacy of the trial court's inquiry; and

   (3) the extent of conflict created.

   United States v. Nguyen, 262 F.3d 998, 1004 (9th Cir. 2001). See also *United States v. Prime*, 363 F.3d 1028, 1035 (9th Cir. 2004) (repeating above three factor test,

but describing third factor as "whether the asserted conflict was so great as to result in a complete breakdown in communication and a consequent inability to present a defense.") (citing *United States v. Castro*, 972 F.2d 1107, 1109 (9th Cir. 1992)); *United States v. Franklin*, 321 F.3d 1231, 1238–39 (9th Cir. 2003) (district court did not abuse discretion in denying defendant's request for new retained counsel six days before trial where conflict appeared to be primarily over litigation tactics).

C. Motion to represent self.

A defendant who voluntarily and intelligently elects to defend himself or herself has a constitutional right to do so. *Faretta v. California*, 422 U.S. 806, 835–36 (1975). "[I]n order to represent himself, the accused must 'knowingly and intelligently' forgo [the traditional benefits associated with the right to counsel]." *Faretta*, 422 U.S. at 835 (citations omitted).

1. *Requirements.* "[I]n order to invoke the [S]ixth [A]mendment right to self representation, the [defendant's] request must be:

    A. knowing and intelligent,

    B. unequivocal,

    C. timely, and

    D. not for purposes of delay."

    United States v. Schaff, 948 F.2d 501, 503 (9th Cir. 1991) (citations omitted). *See also United States v. McKenna*, 327 F.3d 830, 844 (9th Cir. 2003) (no right to self-representation where request of defendant was not

unequivocal); *United States v. Smith*, 282 F.3d 758, 762–63 (9th Cir. 2002) (defendant's letter to court and appointed counsel did not meet the requirement that "[a] defendant's request to proceed pro se . . . be explicit and unequivocal.") (citation omitted).

2. *Defendant's duty to abide by procedure and protocol.* The request may be denied if the defendant demonstrates an inability or unwillingness "to abide by rules of procedure and courtroom protocol." *McKaskle v. Wiggins*, 465 U.S. 168, 173 (1984) (citation omitted). *See also United States v. Lopez-Osuna*, 232 F.3d 657, 665 (9th Cir.) (citations omitted), *amended by* 242 F.3d 1191, 1200 (2000).

   ***Caveat*:** "'[C]ourts indulge in every reasonable presumption against waiver'" of counsel. *United States v. Arlt*, 41 F.3d 516, 520 (9th Cir. 1994) (quoting *Brewer v. Williams*, 430 U.S. 387, 404 (1977)). *See also United States v. Keen*, 104 F.3d 1111, 1114 (9th Cir. 1996).

   However, the right to represent oneself "exists despite the fact that, in most cases, a defendant would be better served if represented by counsel." *Bribiesca v. Galaza*, 215 F.3d 1015, 1019 (9th Cir. 2000).

3. *Waiver of right to counsel—model language*. Before a waiver of right to counsel will be considered knowing, intelligent and voluntary, the defendant must be aware of:

   a. the nature of the charges against him or her, *United States v. Keen*, 104 F.3d 1111, 1114 (9th Cir. 1996);

   b. the possible penalties, including the effect of prior convictions, *Keen*, 104 F.3d at 1114, 1116; *United*

States v. Erskine, 355 F.3d 1161, 1169–71 (9th Cir. 2004) (reversing conviction because court informed defendant of incorrect maximum penalty, *i.e.*, one year imprisonment when actual maximum penalty was five years);

c. the dangers and disadvantages of self-representation, *Snook v. Wood*, 89 F.3d 605, 613 (9th Cir. 1996) (citation omitted). The Ninth Circuit has "suggested model language regarding the 'dangers and disadvantages' demands":

> The court will now tell you about some of the dangers and disadvantages of representing yourself. You will have to abide by the same rules in court as lawyers do. Even if you make mistakes, you will be given no special privileges or benefits, and the judge will not help you. The government is represented by a trained, skilled prosecutor who is experienced in criminal law and court procedures. Unlike the prosecutor you will face in this case, you will be exposed to the dangers and disadvantages of not knowing the complexities of jury selection, what constitutes a permissible opening statement to the jury, what is admissible evidence, what is appropriate direct and cross examination of witnesses, what motions you must make and when to make them during the trial to permit you to make post-trial motions and protect your rights on appeal, and what constitutes appropriate closing argument to the jury.

United States v. Erskine, 355 F.3d 1161, 1168 (9th Cir. 2004) (quoting *United States v. Hayes*, 231 F.3d 1132, 1138–39 (9th Cir. 2000); and

d. the "'constitutional right to have [a] lawyer perform certain core functions,'" the possible consequences of mishandling the core functions, and the ability of a lawyer to perform them better than the defendant. *United States v. Mohawk*, 20 F.3d 1480, 1484 (9th Cir. 1994) (quoting *United States v. Kimmel*, 672 F.2d 720, 721 (9th Cir. 1982)).

See also United States v. Lopez-Osuna, 232 F.3d 657, 664 (9th Cir.) ("In order for a waiver of the right to counsel to be knowing and intelligent, the defendant must be made aware of the 'three elements' of self-representation: '(1) the nature of the charges against him; (2) the possible penalties; and (3) the dangers and disadvantages of self-representation.'") (quoting *United States v. Hernandez*, 203 F.3d 614, 623–24 (9th Cir. 2000)), *amended by* 242 F.3d 1191 (2000); *United States v. Farhad*, 190 F.3d 1097, 1099–1100 (9th Cir. 1999) (citations omitted), *cert. denied*, 529 U.S. 1023 (2000); *United States v. Arlt*, 41 F.3d 516, 520 (9th Cir. 1994) (citations omitted).

The Supreme Court has found waiver where the defendant was (1) "literate, competent, and understanding," (2) "voluntarily exercising his informed free will," (3) warned by the trial judge that "he thought it was a mistake not to accept the assistance of counsel," and (4) informed that he would be "required to follow all the 'ground rules' of trial procedure." *Faretta v. California*, 422 U.S. 806, 835–36 (1975).

4. *No ironclad approach*. Although "[o]ther circuits have prescribed a meticulous litany," the Ninth Circuit has "never demanded an ironclad approach." *United States v. Keen*, 104 F.3d 1111, 1114 (9th Cir. 1996) (citations omitted). *See also United States v. Lopez-Osuna*, 232

F.3d 657, 664 (9th Cir.) ("This court has refrained from requiring the district court to use a particular script when conducting an inquiry into whether a defendant knowing and intelligently waived the right to counsel.") (citation omitted), *amended by* 242 F.3d 1191 (2000); *United States v. Hernandez*, 203 F.3d 614, 623–24 (9th Cir. 2000) ("This court has never demanded that district courts use a particular set of words or phrases when conducting the inquiry into whether a defendant's self-representation request is voluntary and intelligent. We do *require*, however, as a precondition to accepting the request, that the defendant be made aware of the 'three elements' of self-representation: he must be '*made aware* of (1) the nature of the charges against him; (2) the possible penalties; and (3) the dangers and disadvantages of self-representation.'") (quoting *United States v. Farhad*, 190 F.3d 1097, 1099 (9th Cir. 1999), *cert. denied*, 529 U.S. 1023 (2000)).

5. *Focus is on competence to waive right to counsel*. The focus should be on the defendant's competence to waive the right to counsel, not legal competence. *United States v. Arlt*, 41 F.3d 516, 518 (9th Cir. 1994) (citations omitted).

   Technical legal knowledge is not required. *Godinez v. Moran*, 509 U.S. 389, 400 (1993). A defendant's lack of legal qualifications or competence is not a basis for the trial court to deny a defendant the right to self-representation. *See, e.g., Van Lynn v. Farmon*, 347 F.3d 735, 737 (9th Cir. 2003) (that defendant, in representing self, "would be unable to present her case in an informed, reasonable and intelligent manner" is not a legal basis for denying defendant the right to self-representation); *Peters v. Gunn*, 33 F.3d 1190, 1192–93 (9th Cir. 1994) (despite defendant's poor reading skills, trial court reversed for denying self-representation).

6. *Standby counsel*. An indigent criminal defendant who represents himself or herself has no right to court-appointed standby advisory counsel. *United States v. Salemo*, 81 F.3d 1453, 1460 (9th Cir.) (citation omitted), *cert. denied*, 519 U.S. 982 (1996). However, the court may appoint standby counsel to protect the court's interest in fair and orderly proceedings. *Salemo*, 81 F.3d at 1459 (citation omitted).

   "The presence of advisory counsel is not itself a determinative element in our assessment of whether a defendant understood the charges pending against him; however, it is one factor we consider in our analysis." *United States v. Lopez-Osuna*, 232 F.3d 657, 665 (9th Cir.), *amended by* 242 F.3d 1191 (2000).

   ***Caveat*:** "If standby counsel's participation over the defendant's objection effectively allows counsel to make or substantially interfere with any significant tactical decisions, or to control the questioning of witnesses, or to speak *instead* of the defendant on any matter of importance, the *Faretta* right is eroded." *McKaskle v. Wiggins*, 465 U.S. 168, 178 (1984) (quoted in *Lopez-Osuna*, 232 F.3d at 665).

7. *Timeliness*. "Our court has since added a gloss to *Faretta* establishing a bright-line rule for the timeliness of *Faretta* requests: a request is timely if made before the jury is empaneled, unless it is shown to be a tactic to secure delay." *Moore v. Calderon*, 108 F.3d 261, 264 (9th Cir.) (habeas relief granted where defendant demanded right to represent self before jury was empaneled and record did not suggest request was a delay tactic) (citations omitted), *cert. denied*, 521 U.S. 1111 (1997). *See also Avila v. Roe*, 298 F.3d 750 (9th Cir. 2002); *United States v. Hernandez*, 203 F.3d 614,

621 (9th Cir. 2000) ("We have held that a demand for self-representation is timely if made before meaningful trial proceedings have begun, and have also held that a request is timely if made prior to jury selection.") (citations and internal quotations omitted).

Factors that may be considered in determining whether a defendant's motion for self-representation was made for delay include:

(1) the effect of any resultant delay on the proceedings, and

(2) 'the events preceding he motion, to determine whether they are consistent with a good faith assertion of the *Faretta* right and whether the defendant could reasonably be expected to have made the motion at an earlier time.'

Avila, 298 F.3d at 753 (describing above test as a "totality of the circumstances" test) (quoting *Fritz v. Spalding*, 682 F.2d 782, 784–85 (9th Cir. 1982)).

D. Right to counsel of choice.

1 *In general.* "A criminal defendant is entitled to the retained counsel of his choice (though not to the appointed counsel of his choice)." *United States v.Lillie*, 989 F.2d 1054, 1055 (9th Cir. 1993) (citations omitted). However, the right is not without limits. *See Wheat v. United States*, 486 U.S. 153, 159, 164 (1988) (permissible for court to reject defendant's attempted waiver of right to conflict free representation); *United States v. Stites*, 56 F.3d 1020, 1026 (9th Cir. 1995) (permissible for trial court to reject lawyer guilty of serious misbehavior), *cert. denied*, 516 U.S. 1138 (1996).

2. *Pro hac vice admission.* "A defendant's right to the counsel of his choice includes the right to have an out-of-state lawyer admitted *pro hac vice*." *Lillie*, 989 F.2d at 1056 (citation omitted). *See also United States v. Walters*, 309 F.3d 589, 592 (9th Cir. 2002) (district court local rule limiting *pro hac vice* admission to practice, as applied, violated defendant's Sixth Amendment right to hire counsel of choice). *But see United States v. Ries*, 100 F.3d 1469, 1471 (9th Cir. 1996) (district court's denial of *pro hac vice* counsel of choice because of counsel's misconduct was matter within discretion of court), *cert. denied*, 522 U.S. 848 (1997).

E. Counsel's conflict of interest.

"A criminal defendant's Sixth Amendment right to counsel includes the right to be represented by an attorney with undivided loyalty." *Lockart v. Terhune*, 250 F.3d 1223, 1226 (9th Cir. 2001) (citing *Wood v. Georgia*, 450 U.S. 261, 271 (1981)). *See also Campbell v. Rice*, 302 F.3d 892, 897–99 (9th Cir. 2002) (potential conflict of interest existed when defendant's attorney "was being prosecuted by the same district attorney's office that was prosecuting" defendant; although on facts presented no showing made that attorney's performance was thereby impaired, convictions reversed because defendant was absent from "critical stage of proceedings when defense attorney and prosecutor discussed potential conflict with judge).

"When a trial court is made aware of an attorney's actual or potential conflict of interest, Supreme Court precedent requires that the trial court 'either appoint separate counsel or . . . take adequate steps to ascertain whether the risk was too remote to warrant separate counsel.'" *Campbell v. Rice*, 302 F.3d 892, 897 (9th Cir. 2002) (quoting *Holoway v. Arkansas*, 435 U.S. 475, 484 (1978).

"A criminal defendant has a Sixth Amendment right to a conflict-free attorney. Trial courts may allow an attorney to proceed despite a conflict 'if the defendant makes a voluntary, knowing, and intelligent waiver.'" *United States v. Martinez*, 143 F.3d 1266, 1269 (9th Cir.) (quoting *Garcia v. Bunnell*, 33 F.3d 1193, 1195 (9th Cir. 1994), *cert. denied*, 514 U.S. 1024 (1995)), *cert. denied*, 525 U.S. 911 (1998).

1. *Payment of attorney's fees*. Payment of a defendant's attorney's fees by an unknown third party raises questions concerning the independence of counsel and an evidentiary hearing may be required. *Quintero v. United States*, 33 F.3d 1133, 1135 (9th Cir. 1994).

2. *Defense attorney's acceptance of employment with government*. A defense attorney's acceptance of employment with the United States Attorney's Office creates a duty on the trial court to ascertain whether a conflict exists. *Garcia v. Bunnell*, 33 F.3d 1193, 1194–95 (9th Cir. 1994), *cert. denied*, 514 U.S. 1024 (1995).

3. *Representation of parties related to present litigation*.

    a. *Former prosecutor*. It is not per se reversible error for an attorney who once prosecuted the defendant to defend the defendant in a successive, unrelated matter. *Maiden v. Bunnell*, 35 F.3d 477, 480–81 n.4 (9th Cir. 1994). *Cf. United States v. Rodriguez*, 347 F.3d 818, 825 (9th Cir. 2003) (fact that defense attorney was in firm of former U.S. Attorney who had left that office before the defendant was charged, on facts presented, did not "demonstrate 'that counsel was influenced in his basic strategic decisions' by loyalty to another client or former client.").

b. *Former attorney for co-defendant*. It is possible for a criminal defendant to waive his or her right to conflict-free representation where current counsel has previously represented a co-defendant in the same matter. *United States v. Martinez*, 143 F.3d 1266, 1268–70 (9th Cir.) (rejecting defendant's claim that court should have overruled defendant's attempted waiver of right to conflict-free representation), *cert. denied*, 525 U.S. 911 (1998). "The relevant question . . . is whether [defense counsel's] conflict was so severe as to be non-waivable." *Martinez*, 143 F.3d at 1270. Any waiver is valid only when the defendant has been sufficiently informed of the consequences of choice. *See e.g. Belmontes v. Woodford*, 350 F.3d 861, 885 (9th Cir. 2003) (waiver invalid when defendant was not fully advised of his attorney's prior relationship with co-defendant); *United States v. Shwayder*, 312 F.3d 1109, 1117 (9th Cir. 2002) (defendant's waiver of conflict of interest arising from attorney's prior representation of co-defendant was not valid where waiver was not knowing and intelligent because defendant was insufficiently informed of consequences of choice) (quoting *Lockhart v. Terhune*, 250 F.3d 1223, 1232 (9th Cir. 2001)).

Under Fed. R. Crim. P. 44(c), the court must take specific precautions when joint representation of co-defendants occurs. Compliance with Rule 44(c) is required where defendants were jointly charged, the case against one defendant has been concluded, and a co-defendant wishes to be represented by the lawyer who represented the defendant. *United States v. Stites*, 56 F.3d 1020, 1024–25 (9th Cir. 1995), *cert. denied*, 516 U.S. 1138 (1996)

"In successive representation, 'conflicts of interest may arise if the cases are substantially related or if the attorney reveals privileged communications of the former client or otherwise divides his loyalties.'" *Fitzpatrick v. McCormick*, 869 F.2d 1247, 1252 (9th Cir. 1989) (citation omitted). *See also United States v. Shwayder*, 312 F.3d 1109 (9th Cir. 2002).

c. *Current attorney for suspect*. An actual conflict of interest exists on counsel's part when counsel represents a defendant charged with a crime and also represents another suspect in a factually related crime. *Lockart v. Terhune*, 250 F.3d 1223, 1230 (9th Cir. 2001) (attorney's representation of murder defendant and of suspect in on-going murder investigation in which defendant was also a suspect constituted actual conflict of interest and, on facts presented, defendant's purported waiver of conflict was ineffective).

4. *Dual/joint representation*.

a. *Hearing requirements—Joint representation*. Any time joint representation of defendants is attempted, the trial court must conduct a hearing regarding each defendant's right to conflict-free representation. Fed. R. Crim. P. 44(c); *United States v. Finlay*, 55 F.3d 1410, 1415 (9th Cir.) (despite single attorney's joint representation of two defendants at trial, failure to hold hearing was harmless error on facts presented), *cert. denied*, 516 U.S. 871 (1995).

Compliance with Rule 44(c) includes advising the jointly represented co-defendants of their right to separate counsel, making certain that each defendant knowingly and freely consents to joint representation,

and ascertaining that no conflict exists. *United States v. Lightbourne*, 104 F.3d 1172, 1178 (9th Cir. 1997).

b. *Defendant's waiver of conflict*. Any inquiry regarding waiver must encompass "all of the risks that are likely to develop." *United States v. Allen*, 831 F.2d 1487, 1500 (9th Cir. 1987) (determination of knowing and intelligent waiver reversed where magistrate judge only discussed trial consequences) (citations omitted), *cert. denied*, 487 U.S. 1237 (1988).

c. *Overruling attempted waiver*. If the potential for conflict is at least very likely, the trial court may overrule a defendant's attempted waiver of the right to conflict-free representation. *United States v. Wheat*, 813 F.2d 1399, 1404 (9th Cir. 1987), *aff'd*, 486 U.S. 153, 164 (1988) (where serious potential for conflict exists, district court must be given substantial latitude to override defendant's waiver). *See also United States v. Martinez*, 143 F.3d 1266, 1269 (9th Cir.), *cert. denied*, 525 U.S. 911 (1998).

Where the district court reasonably concludes that to permit a certain attorney to appear on behalf of a defendant would undermine the integrity of the proceeding, counsel may be excluded. *United States v. Stites*, 56 F.3d 1020, 1024, 1026 (9th Cir. 1995) (lawyer guilty of serious misbehavior during civil representation of defendant was properly barred from undertaking criminal representation of defendant), *cert. denied*, 516 U.S. 1138 (1996).

Defendants who agree to be jointly represented cannot claim that "'[w]ith different counsel we would have sworn that the facts were different.'" *United*

States v. Lightbourne, 104 F.3d 1172, 1178 (9th Cir. 1997).

d. *Joint representation agreements*. A conflict of interest on the part of counsel for the remaining defendants may arise when the government enters a cooperation agreement with a former defendant who was part of a joint defense agreement with other counsel. *United States v. Henke*, 222 F.3d 633, 636–38 (9th Cir. 2000) (holding that defense counsel's request to withdraw should have been granted by the district court where continued representation impaired the right to cross-examine the cooperating witness, although disqualification is not per se).

5. *Corporate counsel*. A corporation's attorney-client relationship with an attorney "does not extend automatically to [a corporate employee] in his individual capacity." *United States v. Martin*, 278 F.3d 988, 1000 (9th Cir. 2002) (attorney-client privilege did not extend from corporation's general counsel to a defendant who was an officer of the corporation; the privilege did not preclude attorney from disclosing to the government the defendant's activities) (citation omitted).

F. Adversary hearing.

Potentially, pretrial seizure of assets may interfere with a criminal defendant's opportunity to pay counsel of choice. *United States v. Rupley*, 706 F. Supp. 751, 754 (D. Nev. 1989) (citing *United States v. Moya-Gomez*, 860 F.2d 706, 725 (7th Cir. 1988), *cert. denied sub nom. Estevez v. United States*, 492 U.S. 908 (1989)). *See also United States v. Unimex*, 991 F.2d 546, 550–51 (9th Cir. 1993) (defendant corporation's Sixth Amendment and due process rights violated where all assets were seized prior to trial and defendant corporation was denied pretrial appearance to show that some assets were

nonforfeitable, and therefore, were available for retention of counsel).

Because the government may seize forfeitable assets of a defendant upon conviction, 18 U.S.C. § 982, 21 U.S.C. § 853, "the government may . . . restrain forfeitable assets prior to conviction if it appears that the defendant may otherwise transfer or conceal those assets by the time of conviction." *United States v. Ripinsky*, 20 F.3d 359, 361–62 (9th Cir. 1994) (holding that *substitute* assets may not be restrained prior to conviction) (citing 21 U.S.C. § 853(e)).

"[I]n order for a restraining order under [21 U.S.C.] § 853 to be constitutional, the district court must hold a hearing under [Fed. R. Crim. P. 65] to determine whether probable cause exists to issue an injunction." *United States v. Roth*, 912 F.2d 1131, 1133 (9th Cir. 1990).

G. Prosecutorial interference with attorney-client relationship.

"Despite the high approbation our system has for the attorney-client privilege, the Supreme Court has twice held that government invasion of that privilege or the defense camp is not sufficient by itself to cause a Sixth Amendment violation. The defendant must have been *prejudiced* by such actions." *United States v. Hernandez*, 937 F.2d 1490, 1493 (9th Cir. 1991) (citing *United States v. Morrison*, 449 U.S. 361, 365 (1981) and *Weatherford v. Bursey*, 429 U.S. 545, 558 (1977)). *See also United States v. Danielson*, 325 F.3d 1054, 1059 (9th Cir. 2003) (where confidential informant, with government approval, solicited defendant's trial strategy from defendant, matter remanded to district court for hearing re whether defendant was prejudiced thereby).

CHAPTER 5. COMPETENCE TO STAND TRIAL

A. Standard for competency.

The standard is now the same for both competence to stand trial and competence to plead guilty. *Godinez v. Moran*, 509 U.S. 389, 395–99 (1993). The standard is whether a defendant:

1. has sufficient ability to consult with counsel with a reasonable degree of rational understanding; and

2. has a rational as well as factual understanding of the proceedings against him or her.

Godinez, 509 U.S. at 396. *See also Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) (citation omitted); *Dusky v. United States*, 362 U.S. 402, 402 (1960).

"Competency requires that the defendant have the 'capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense.'" *United States v. Loyola-Dominguez*, 125 F.3d 1315, 1318 (9th Cir. 1997) (quoting *Drope v. Missouri*, 420 U.S. 162, 171 (1975)).

"Whether a defendant is capable of understanding the proceedings and assisting counsel is dependent upon evidence of the defendant's irrational behavior, his demeanor in court, and any prior medical opinions on his competence." *Miles v. Stainer*, 108 F.3d 1109, 1112 (9th Cir. 1997), *cert. denied*, 124 S. Ct. 1104 (2004). *See also United States v. Gastelum-Almeida*, 298 F.3d 1167 (9th Cir. 2002).

B. Necessity for competency hearing.

A competency hearing must be conducted if "a reasonable judge would . . . experience a genuine doubt respecting the

defendant's competence." *United States v. Lewis*, 991 F.2d 524, 527 (9th Cir.) (citations and internal quotations omitted), *cert. denied*, 510 U.S. 878 (1993).

Factors relevant in determining whether a competency hearing is required include "evidence of a defendant's irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial." *Drope v. Missouri*, 420 U.S. 162, 180 (1975) (on facts presented, including defendant's attempted suicide on the second day of trial, district court should have ordered competency hearing). *See also United States v. Loyola-Dominguez*, 125 F.3d 1315, 1318 (9th Cir. 1997) (defendant's suicide attempt on eve of trial warranted competency evaluation).

"Only when 'the evidence raises a "bona fide doubt"' about the defendant's competence to stand trial must a trial judge sua sponte conduct an evidentiary hearing." *Davis v. Woodford*, 333 F.3d 982, 997 (9th Cir. 2003) (quoting *Pate v. Robinson*, 383 U.S. 375, 385 (1966).

C. Burden of proof.

The accused must prove incompetence by a preponderance of the evidence. 18 U.S.C. § 4241(d). *Cf. Cooper v. Oklahoma*, 517 U.S. 348, 355–56 (1996) (while a state may require an accused to prove incompetence by a preponderance of the evidence, it may not require such proof by clear and convincing evidence); *Medina v. California*, 505 U.S. 437, 440, 452 (1992) (a state may require the accused to prove incompetence by a preponderance of the evidence).

D. Finding of incompetence—Treatment.

Once a defendant is found incompetent, the defendant must be committed to the custody of the Attorney General for

treatment pursuant to 18 U.S.C. § 4241(d).

Treatment is "not to exceed four months" unless an additional reasonable time is needed and "there is a substantial probability that in the foreseeable future [the defendant] will attain the capacity to permit the trial to proceed." § 4241(d)(1). If the pending charges are disposed of earlier, that period of time becomes the maximum additional time period for detention. § 4241(d) (2).

The Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if

(1) important governmental interests are at stake;

(2) the treatment will *significantly further* those important governmental trial-related interests, administration of the drugs is substantially likely to render the defendant competent to stand trial, and the treatment is substantially unlikely to have side effects that may undermine the fairness of the trial;

(3) taking account of less intrusive alternatives, the involuntary medication is *necessary* to further the important governmental interests; and

(4) administration of the drugs is *medically appropriate* and in the patient's best interests.

Sell v. United States, 539 U.S. 166, 180–81 (2003).

"[T]he forced administration of antipsychotic drugs to control the behavior of a pretrial detainee—absent overriding justification and proof of medical appropriateness—is impermissible because it may violate the defendant's

constitutional right to due process, including her right to a fair trial." *Benson v. Terhune*, 304 F.3d 874, 881–82 (9th Cir. 2002) (citing *Riggins v. Nevada*, 504 U.S. 127, 134–38 (1992)). *See also United States v. Rivera-Guerrero*, 377 F.3d 1064, 1070 (9th Cir. 2004) (constitutional avoidance required that Federal Magistrates Act be interpreted to prevent the delegation to magistrate judges of final determinations regarding involuntary medication).

E. Restoration to competence—Competency hearing.

18 U.S.C. § 4241(e) provides that "when . . . the facility in which a defendant is hospitalized pursuant to [18 U.S.C. § 4241(d)] determines that the defendant . . . is able to understand the nature and consequences of the proceedings against him and to assist properly in his defense, . . . [t]he [district] court shall hold a hearing, conducted pursuant to the provisions of [18 U.S.C.] section 4247(d), to determine the competency of the defendant."

Section 4247(d), in turn, provides that the defendant, at such a hearing, "shall be represented by counsel" and "shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing."

CHAPTER 6. MOTIONS RE WITNESSES

A. Witness lists.

1. The defense has no right to a witness list in non-capital cases. *United States v. Steel*, 759 F.2d 706, 709 (9th Cir. 1985); *United States v. Sukumolachan*, 610 F.2d 685, 688 (9th Cir. 1980); *United States v. Dreitzler*, 577 F.2d 539, 553 (9th Cir. 1978), *cert. denied*, 440 U.S. 921 (1979).

2. The defense may be entitled to a list of those witnesses to the crime that the government will not be calling at trial. *United States v. Cadet*, 727 F.2d 1453, 1468–69 (9th Cir. 1984).

3. A witness list may be required by the trial court in "mega-trials." *United States v. Baker*, 10 F.3d 1374, 1392 (9th Cir. 1993), *cert. denied*, 513 U.S. 934 (1994). *But see United States v. Hicks*, 103 F.3d 837, 841 (9th Cir. 1996) ("A district court that orders the Government and the defendant to exchange witness lists and summaries of anticipated witness testimony in advance of trial has . . . committed error."), *cert. denied*, 520 U.S. 1193 (1997).

B. Motion to interview government witnesses.

1. Both sides have the right to interview witnesses before trial, but a witness has the right not to be interviewed. *Cacoperdo v. Demosthenes*, 37 F.3d 504, 509 (9th Cir. 1994) (citation omitted), *cert. denied*, 514 U.S. 1026 (1995). *See also United States v. Black*, 767 F.2d 1334, 1337–38 (9th Cir.), *cert. denied*, 474 U.S. 1022 (1985).

2. "Absent a fairly compelling justification, the government may not interfere with defense access to witnesses." *United States v. Black*, 767 F.2d 1334, 1337 (9th Cir.) (merely informing witness that he may decline interview is

not improper) (citations omitted), *cert. denied*, 474 U.S. 1022 (1985).

C. Motion for mental examination of witness.

The decision whether to grant a defense request for a mental examination of a witness is committed to the discretion of the trial court. *Gilpin v. McCormick*, 921 F.2d 928, 931 (9th Cir. 1990) (upholding denial of defense request for psychiatric examination of sexual assault victims); *Colley v. Sumner*, 784 F.2d 984, 990 (9th Cir.) (defendant not entitled to psychiatric examination of sexual assault victim and witness who had previously been sexually assaulted), *cert. denied*, 479 U.S. 839 (1986); *United States v. Brown*, 770 F.2d 768, 770 (9th Cir. 1985) (district court did not abuse discretion in denying defense request for psychological examinations of government witnesses despite drug addiction and psychological problems of witnesses), *cert. denied sub nom. Brown v. United States*, 474 U.S. 1036 (1985), *sub nom. Knight v. United States*, 474 U.S. 1067, *sub nom*. *Brown v. United States*, 476 U.S. 1172 (1986).

D. Government motion to compel testimony.

The government may obtain an order, pursuant to 18 U.S.C. § 6002, to compel a witness to testify even if refusal is based on the privilege against self-incrimination. In any subsequent prosecution of that witness, the government can make no use, direct or indirect, of the compelled testimony and any information derived therefrom. *Kastigar v. United States*, 406 U.S. 441, 453, 462 (1972). However, a witness compelled to testify may be prosecuted "for perjury, giving a false statement, or otherwise failing to comply with the order." 18 U.S.C. § 6002.

E. Depositions of witnesses.

1. *Fed. R. Crim. P. 15.* "[Fed. R. Crim. P. 15(a)] allows the district court broad discretion in deciding whether to order depositions in a criminal case and explicitly states that such depositions will be reserved for 'exceptional circumstances [where] it is in the interest of justice that the testimony of a prospective witness . . . be taken and preserved for use at trial . . . .'" *United States v. Olafson*, 213 F.3d 435, 442 (9th Cir.) (quoting Fed. R. Crim. P. 15(a)), *cert. denied*, 531 U.S. 914 (2000).

   a. *Burden of proof.* The burden of proof in a Rule 15(a) motion rests with the movant to demonstrate:

      (1) the witness' unavailability to testify at trial;

      (2) "the expected testimony would be favorable"; and

      (3) "whether the [witness] would be available for deposition and willing to testify."

      United States v. Zuno-Arce, 44 F.3d 1420, 1425 (9th Cir.) (citations omitted), *cert. denied*, 516 U.S. 945 (1995).

   b. *Factors to be considered re foreign deposition*. Factors to be considered by the trial court in ruling upon a motion for a foreign deposition include "whether the deponent would be available at the proposed location for deposition," whether the deponent "would be willing to testify," and "whether the safety of United States officials would be compromised by going to the foreign location." *United States v. Olafson*, 213 F.3d 435, 442 (9th Cir.) (court correctly exercised its discretion in denying foreign deposition where reliable information existed regarding the witness' statements on citizenship and

alienage and no necessity was demonstrated) (citations omitted), *cert. denied*, 531 U.S. 914 (2000). In order to address the safety factor, the court may consider a phone deposition. *Olafson*, 213 F.3d at 443 (on facts presented, court was not required to grant a phone deposition).

2. *Fugitive*. The fact that the proposed deponent is a fugitive and will avoid the consequences of any perjurious testimony does not, in itself, preclude the court from ordering a deposition. *United States v. Hernandez-Escarsega*, 886 F.2d 1560, 1569–70 (9th Cir. 1989) (but holding that on facts presented, district court properly concluded that exceptional circumstances did not exist), *cert. denied*, 497 U.S. 1003 (1990).

3. *Videotaped testimony.* "When the government is unable to secure a [witness'] presence at trial, Rule 15 is not violated by the admission of videotaped testimony so long as the government makes diligent efforts to secure the defendant's physical presence at the deposition and, failing this, employs procedures that are adequate to allow the defendant to take an active role in the deposition proceedings." *United States v. Medjuck*, 156 F.3d 916, 920 (9th Cir. 1998) (citations omitted), *cert. denied*, 527 U.S. 1006 (1999).

4. *Confrontation clause.* "The Sixth Amendment Confrontation Clause 'guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.' Neither right is absolute; courts have permitted depositions to be taken and introduced at trial without the physical presence of the defendant at the depositions." *United States v. Medjuck*, 156 F.3d 916, 919 (9th Cir. 1998) (quoting *Coy v. Iowa*, 487 U.S. 1012, 1016 (1988)), *cert. denied*, 527 U.S. 1006 (1999). Among other things,

however, the procedure used must be "adequate to allow the defendant to take an active role in the deposition proceedings." *Medjuck*, 156 F.3d at 920 (citation omitted).

F. Appointment of expert witness.

An indigent defendant is entitled to the appointment of an expert witness when a reasonably competent attorney would engage such services for a client having independent financial means to pay for them. Criminal Justice Act, 18 U.S.C. § 3006A(e)(1); *United States v. Labansat*, 94 F.3d 527, 530 (9th Cir. 1996) (refusal to appoint eye-witness reliability expert not error), *cert. denied*, 519 U.S. 1140 (1997). *See also United States v. DePew*, 210 F.3d 1061, 1065 (9th Cir. 2000) ("For us to hold that the district court abused its discretion by not authorizing employment of an expert witness, [the defendant] must show that (1) 'a reasonably competent counsel would have required the assistance of the requested expert for a paying client,' and (2) '[the defendant] was prejudiced by the lack of expert assistance.'") (quoting *Labansat*, 94 F.3d at 530) (upholding denial of expert to testify concerning capabilities of a thermal imager).

G. Motion to present or exclude expert witness—*Daubert* hearing.

"Expert testimony is admissible under Fed. R. Evid. 702 if it addresses an issue 'beyond the common knowledge of the average layperson.'" *United States v. Hanna*, 293 F.3d 1080, 1086 (9th Cir. 2002) (quoting *United States v. Morales*, 108 F.3d 1031, 1039 (9th Cir. 1997) (en banc) (in prosecution for making threats against the president, expert testimony as to how a reasonable person in defendant's "position would foresee that his communications would be perceived by those to whom he communicated" was erroneous as the average person was qualified to decide that matter).

1. *Admissibility of expert opinion.* "[The] admissibility of expert opinion testimony generally turns on the following preliminary question of law determinations by the trial judge under [Fed. R. Evid.] 104(a)":

    [a] Whether the opinion is based on scientific, technical, or other specialized knowledge;

    [b] "Whether the expert's opinion would assist the trier of fact in understanding the evidence or determining a fact in issue;

    [c] Whether the expert has appropriate qualifications—*i.e.*, some special knowledge, skill, experience, training or education on that subject matter. . . .[;]

    [d] Whether the testimony is relevant and reliable. . . .[;]

    [e] Whether the methodology or technique the expert uses 'fits' the conclusions (the expert's credibility is for the jury). . . .[; and]

    [f] Whether its probative value is substantially outweighed by the risk of unfair prejudice, confusion of issues, or undue consumption of time.

    United States v. Hankey, 203 F.3d 1160, 1168 (9th Cir.) (expert on street gangs and code of silence met expert testimony requirements of *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997), and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)) (citations omitted), *cert. denied*, 530 U.S. 1268 (2000).

"[*Daubert*] suggested a flexible, factor-based approach to analyzing the reliability of expert testimony." *United States v. Prime*, 363 F.3d 1028, 1032 (9th Cir. 2004) (citing *Daubert v. Merrell Dow Pharms. Inc.*, 509 U.S. 579,593–95 (1993)).

The non-exclusive factors include:

1) whether a method can or has been tested;

2) the known or potential rate of error;

3) whether the methods have been subjected to peer review;

4) whether there are standards controlling the technique's operation; and

5) the general acceptance of the method within the relevant community.

Id. (citing *Daubert*, 509 U.S. at 593–94).

"[T]he trial judge's responsibility to keep unreliable expert testimony from the jury applies not only to 'scientific' testimony, but to all expert testimony." *Id.* (citing *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 148 (1999). The applicability of the *Daubert* factors "depends upon the particular circumstances of the particular case at issue." *Id*. (quoting *Kumho Tire Co.*, 526 U.S. at 150).

2. *Scope of Daubert*. In *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592–93, 597 (1993), the Supreme Court ruled that Fed. R. Evid. 702 imposes upon a trial judge a special obligation to act as a gatekeeper regarding scientific testimony.

"[T]he trial judge must determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Daubert*, 509 U.S. at 592.

In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147–48 (1999), the Supreme Court stated that *Daubert* referred to scientific testimony because it involved scientific testimony. The Supreme Court further explained, however, that the gatekeeping obligations announced in *Daubert* apply to all expert testimony, and not merely scientific testimony. *Kumho Tire Co.*, 526 U.S. at 147.

Although prior to *Kumho Tire*, "[a] number of Ninth Circuit cases [had] held that *Daubert* does not apply to 'non-scientific' testimony at all," those "cases are still good law to the extent that they permit the admission of expert testimony on the basis of the expert's 'knowledge, skill, experience, training, or education,' which is consistent with *Kumho Tire*." *United States v. Hankey*, 203 F.3d 1160, 1169 n.7 (9th Cir.), *cert. denied*, 530 U.S. 1268 (2000).

3. *Test.* "[T]he trial judge must determine at the outset . . . whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993). In *Kumho Tire Co., v. Carmichael*, 526 U.S. 137, 147 (1999), the Supreme Court explained that the district court's gatekeeping obligation applies to all expert testimony.

   The district court must decide whether expert testimony is:

a. relevant,

b. trustworthy, and

c. where appropriate, scientifically valid.

United States v. Amador-Galvan, 9 F.3d 1414, 1418 (9th Cir. 1993) (remanding case to district court for *Daubert* hearing concerning admissibility of expert witness regarding reliability of eye-witness testimony).

4. *Daubert hearing—Form.* A *Daubert* hearing need not be conducted "in a separate, pretrial hearing, outside the presence of the jury." *United States v. Alatorre*, 222 F.3d 1098, 1102 (9th Cir. 2000). *See also United States v. Mendoza-Paz*, 286 F.3d 1104, 1113 (9th Cir. 2002).

   The district court is required to "make *some* kind of reliability determination to fulfill its gatekeeping function." *Mukhtar v. Cal. State Univ. Hayward*, 299 F.3d 1053, 1066 (9th Cir. 2002) (although district court is not required to conduct a separate hearing, it failed to fulfill gatekeeping obligation to determine reliability before admitting expert's testimony) (quoting *United States v. Velarde*, 214 F.3d 1204, 1209 (10th Cir. 2000)), *amended by* 319 F.3d 1073 (2003).

5. *Application to specific settings.*

   a. *Voice identification*. *United States v. Jones*, 24 F.3d 1177, 1179–80 (9th Cir. 1994) (district court's decision to permit an "expert" on voice identification to give only "lay" opinion testimony upheld).

   b. *Eyewitness identification*. *United States v. Hicks*, 103 F.3d 837, 847 (9th Cir. 1996) (district court's exclusion of expert regarding stages of eye-witness identification and related concepts upheld where (1)

district court held hearing to determine admissibility, and (2) court gave detailed jury instruction regarding evaluation of eyewitness testimony), *cert. denied*, 520 U.S. 1193 (1997). *See also United States v. Rincon*, 28 F.3d 921, 925–26 (9th Cir.), *cert. denied*, 513 U.S. 1029 (1994). *See generally United States v. Amador-Galvan*, 9 F.3d 1414, 1417–18 (9th Cir. 1993) (case remanded for *Daubert* hearing regarding admissibility of expert testimony on eyewitness identification).

c. *Cultural expert.* Expert testimony "sought to establish the reasonableness of [a defendant's] alleged belief solely by the application of generic cultural and ethnic stereotypes and data" is committed to the court's discretion. *United States v. Verduzco*, 373 F.3d 1022, 1034 (9th Cir. 2004) (exclusion of sociologist who was to testify as to why defendant might not have taken first opportunity to report crime, as part of duress defense, not abuse of discretion). *See also United States v. Castaneda*, 94 F.3d 592, 595–96 (9th Cir. 1996) (where jury capable of understanding defendant's fear of government, not error for district court to exclude certain proffered testimony of cultural witness).

d. *Expert on child sexual abuse victims*. *United States v. Bighead*, 128 F.3d 1329, 1330–31 (9th Cir. 1997) (expert properly permitted to testify on rebuttal regarding general behavioral characteristics of sexual abuse victims). *But see United States v. Binder*, 769 F.2d 595, 602 (9th Cir. 1985) (district court erred in permitting experts to testify that child victims in case "could be believed").

e. *Modus operandi of drug traffickers.* Admissibility of testimony regarding drug trafficking modus operandi

may depend on the presence of a conspiracy charge. "[E]xpert testimony concerning the structure of drug trafficking organizations [is] inadmissible under Fed. R. Evid. 401 and 403 'where the defendant is not charged with a conspiracy to import drugs or where such evidence is not otherwise probative of a matter properly before the court.'" *United States v. McGowan*, 274 F.3d 1251, 1254 (9th Cir. 2001) (quoting *United States v. Vallejo*, 237 F.3d 1008, 1012 (9th Cir.), *amended by* 246 F.3d 1150 (2001)). *See also United States v. Pineda Torres*, 287 F.3d 860, 863–64 (9th Cir.) (reversible error for expert testimony regarding drug trafficking organizations to be admitted in non-conspiracy importation prosecution, where offered to prove defendant's knowledge of presence of drugs), *cert. denied*, 537 U.S. 1066 (2002); *United States v. Varela-Rivera*, 279 F.3d 1174, 1179 (9th Cir. 2002). *But see United States v. Valencia-Amezcua*, 278 F.3d 901, 908–10 (9th Cir. 2002) (modus operandi testimony may be admitted even when conspiracy not charged); *United States v. Murillo*, 255 F.3d 1169, 1176–78 (9th Cir. 2001) (evidence regarding modus operandi of drug couriers admissible despite absence of conspiracy charge), *cert. denied*, 535 U.S. 948 (2002).

Testimony regarding drug trafficking modus operandi is not subject to a *Daubert* analysis. *United States v. Cordoba*, 104 F.3d 225, 230 (9th Cir. 1997), *cert. denied*, 529 U.S. 1081 (2000). *But cf. United States v. Hermanek*, 289 F.3d 1076, 1093–96 (9th Cir. 2002) (after *Kumho*, expert testimony regarding drug jargon is subject to *Daubert* test; expert's testimony regarding "interpretations of new words and phrases as references to cocaine" did not meet reliability requirement of Fed. R. Evid. 702), *cert. denied*, 537 U.S. 1223 (2003).

A percipient fact witness with personal knowledge of the organization is not subject to *Vallejo* limitations regarding roles of participants. *United States v. Beckman*, 298 F.3d 788, 795 (9th Cir. 2002) (distinguishing *United States v. Vallejo*, 237 F.3d 1008, 1017 (9th Cir. 2001)).

f. *Drug valuation testimony*. *Daubert*'s gatekeeping obligation imposed upon trial judges encompasses specialized knowledge, including expert testimony regarding the value of drugs in a prosecution for drug trafficking. *United States v. Mendoza-Paz*, 286 F.3d 1104, 1112–13 (9th Cir. 2002) (because reliability test is flexible, even though drug valuation expert's testimony "was not subject to empirical testing, could not be reviewed for error rates, and the estimates it contained had not been accepted in any expert community", the expert opinion was admissible). *Cf. United States v. Gonzales*, 307 F.3d 906, 909 (9th Cir. 2002) (pay/owe sheets found in a defendant's possession may be admissible in a drug prosecution as "tools of the trade").

g. *Drug jargon*. After *Kumho Tire*, expert testimony regarding drug jargon is subject to *Daubert* test. *United States v. Hermanek*, 289 F.3d 1076, 1093–96 (9th Cir. 2002), *cert. denied*, 537 U.S. 1223 (2003); *United States v. Plunk*, 153 F.3d 1011, 1017 (9th Cir.) (expert testimony regarding code words and drug jargon), *amended by* 161 F.3d 1195 (1998), *cert. denied*, 526 U.S. 1060 (1999);

h. *Gang membership*. Gang membership testimony may be admissible even though reliability cannot be tested in same manner as expert scientific testimony. *United States v. Hankey*, 203 F.3d 1160, 1167–73 (9th Cir.)

(expert testimony concerning significance of gang membership met reliability standard of *Kumho Tire*), *cert. denied*, 530 U.S. 1268 (2000).

i. *Polygraph evidence*.

(1) *Pre-1986 rule.* "Prior to 1986, evidence of the results of a polygraph examination was potentially admissible." *United States v. Benavidez-Benavidez*, 217 F.3d 720, 723 (9th Cir.) (citations omitted), *cert. denied*, 531 U.S. 903 (2000).

(2) *1986 rule.* "In 1986, [the Ninth Circuit] assessed the state of the law and polygraph science and adopted a *per se* rule that unstipulated polygraph evidence 'was inadmissible as technical or scientific evidence under Fed. R. Evid. 702 because it "does not assist the trier of fact to understand the evidence or to determine a fact in issue."'" *United States v. Benavidez-Benavidez*, 217 F.3d 720, 723–24 (9th Cir.) (quoting *Brown v. Darcy*, 783 F.2d 1389, 1395 (9th Cir. 1986)), *cert. denied*, 531 U.S. 903 (2000).

However, if the administering of a polygraph, regardless of results, was an operative fact, evidence of the polygraph examination was admissible. *Brown*, 783 F.2d at 1397. *See, e.g., Thorne v. City of El Segundo*, 726 F.2d 459, 469–71 (9th Cir. 1983) (polygraph questions asked of employee admissible in sexual discrimination action), *cert. denied*, 469 U.S. 979 (1984); *Smiddy v. Varney*, 665 F.2d 261, 265 (9th Cir. 1981) (plaintiff properly allowed to offer evidence of polygraph in false arrest action against polygraph examiner and others), *cert. denied*, 459 U.S. 829 (1982).

(3) *Current rule*. In 1997, the Ninth Circuit ruled that unstipulated polygraph evidence is no longer per se inadmissible. *United States. v. Cordoba*, 104 F.3d 225, 227–28 (9th Cir. 1997) (remanding case for *Daubert* hearing regarding polygraph evidence admissibility). *But see United States v. Scheffer*, 523 U.S. 303, 305 (1998) (a per se rule excluding polygraph evidence in a court-martial proceeding was not violative of an airman's Sixth Amendment right to present a defense). *See also United States v. Benavidez-Benavidez*, 217 F.3d 720, 725–26 (9th Cir.) (district court did not abuse its discretion in excluding evidence of polygraph results where court concluded, after a full *Daubert* hearing, that evidence should be excluded, in part based upon Fed. R. Evid. 403), *cert. denied*, 531 U.S. 903 (2000); *United States v. Cordoba*, 194 F.3d 1053, 1062–63 (9th Cir. 1999) (district court did not abuse its discretion when it excluded unstipulated polygraph evidence as not satisfying *Daubert*), *cert. denied*, 529 U.S. 1081 (2000).

No *Daubert* hearing is required where polygraph evidence is inadmissible under Fed. R. Evid. 704(b). *United States v. Booth*, 309 F.3d 566, 573 (9th Cir. 2002) (because Rule 704(b) "prohibits an expert in a criminal case from stating 'an opinion or inference as to whether the defendant did or did not have the mental state . . . constituting an element of the crime charged or of a defense thereto,'" polygraph opinion was inadmissible as to whether defendant "was being truthful when he denied intent to defraud or knowledge of fraud.") (quoting *United States v. Campos*, 217 F.3d 707, 710–12 (9th Cir.), *cert. denied*, 531 U.S. 952 (2000)).

j. *Handwriting.* A *Daubert* analysis is required before admission of a handwriting expert's proposed testimony. *United States v. Prime*, 363 F.3d 1028, 1032–33 (9th Cir. 2004) (where other factors were met, any lack of standardization did not bar admissibility). ***Caveat***: Because a jury is free to draw its own conclusions regarding "whether the same person's handwriting appears on two documents," a document examiner is not required for admission for comparison purposes. *United States v. Alvarez-Farfan*, 338 F.3d 1043, 1045 (9th Cir. 2003) (citing, *inter alia*, *United States v. Woodson*, 526 F.2d 550, 551 (9th Cir. 1975)).

k. *Heroin withdrawal*. The admissibility of expert testimony regarding the symptoms of heroin withdrawal and whether they could preclude a voluntary waiver of *Miranda* is committed to the court's sound discretion. *United States v. Rodriguez-Rodriguez*, 364 F.3d 1142, 1147 (9th Cir. 2004) (where "'expert's testimony was general and did not relate to any conduct that was observed on the date of [Rodriguez's] arrest,'" the trial court did acted within its discretion in excluding the testimony).

H. Government motion to exclude defense witness.

1. *Non-disclosure.* "Exclusion of a witness as a sanction for a violation of a discovery rule in a criminal trial is generally appropriate 'only in cases involving "wilful and blatant"' violations." *United States v. Verduzco*, 373 F.3d 1022, 1033 (9th Cir. 2004) (on facts presented, but for the existence of other proper grounds for exclusion, district court would have erred by excluding expert witness for "minor discovery violation"). *See also United States v. Finley*, 301 F.3d 1000, 1017 (9th Cir. 2002) (district court committed reversible error in excluding defense expert witness for alleged disclosure violation; even though

defense disclosure re expert witness "may not have been as full and complete as it could have been," it "met the minimum requirements of Fed. R. Crim. P. 16(b)(1)(C)); *Territory of Guam v. Palomo*, 35 F.3d 368, 374 (9th Cir. 1994) (quoting *Taylor v. Illinois*, 484 U.S. 400, 415 (1988)), *cert. denied*, 513 U.S. 1089 (1995).

2. *Fed. R. Evid. 401 exclusion.* Fed. R. Evid. 401 may also be a ground for exclusion of a defense witness. *See United States v. Johnson*, 297 F.3d 845, 862–63 (9th Cir. 2002) (court's exclusion of guidelines expert proffered by defense in order to demonstrate for jury what cooperating witnesses would have faced under guidelines absent cooperation did not constitute abuse of discretion), *cert. denied*, 537 U.S. 1232 (2003).

I. Motion to sequester witnesses.

1. *Fed. R. Evid. 615—In general.* Fed. R. Evid. 615 authorizes the court to "order witnesses excluded so that they cannot hear the testimony of other witnesses . . . ." Where a party makes a motion to exclude witnesses under this rule and no exception applies, the court must exclude witnesses. *United States v. Seschillie*, 310 F.3d 1208, 1213 (9th Cir. 2002) (citing *United States v. Brewer*, 947 F.2d 404, 408 (9th Cir. 1991) and *United States v. Ell*, 718 F.2d 291, 293–94 (9th Cir. 1983)), *cert. denied*, 538 U.S. 953 (2003).

2. *Scope of Fed R. Evid. 615.* "It is a common practice for a judge to instruct a witness not to discuss his or her testimony with third parties until the trial is completed. Such nondiscussion orders are a corollary of the broader rule that witnesses may be sequestered to lessen the danger that their testimony will be influenced by hearing what other witnesses have to say . . . ." *Perry v. Leeke*, 488 U.S.

272, 281 (1989). *See also United States v. Croft*, 124 F.3d 1109, 1121 (9th Cir. 1997) (where district court excluded witnesses from being present during the trial, court's refusal to also sequester witnesses and direct that they avoid speaking with anyone not error).

3. *Purpose of Fed. R. Evid. 615.* "The purpose of [Rule 615] is to prevent witnesses from 'tailoring' their testimony to that of earlier witnesses." *United States v. Ell*, 718 F.2d 291, 293 (9th Cir. 1983). *See also United States v. Seschillie*, 310 F.3d 1208 (9th Cir. 2002), *cert. denied*, 538 U.S. 953 (2003).

4. *Exceptions to Fed. R. Evid. 615.* Fed. R. Evid. 615 contains certain specific exceptions to the general rule of exclusion of witnesses. One such exception is when a witness is an "essential party" under Rule 615(3). *United States v. Seschillie*, 310 F.3d 1208, 1213 (9th Cir. 2002) (expert witness may qualify as an "essential witness" for purposes of Rule 615, such as when the expert's presence is required to advise counsel) (citations omitted), *cert. denied*, 538 U.S. 953 (2003).

5. *Violation of Fed. R. Evid. 615.* When a witness violates Rule 615, three sanctions are available:

   (a) holding the witness in contempt;

   (b) cross-examination of the witness regarding the violation; or

   (c) preclusion of the witness from testifying.

   United States v. Hobbs, 31 F.3d 918, 921 (9th Cir. 1994) (citing *Holder v. United States*, 150 U.S. 91, 92 (1893)).

   The sanction of precluding a witness from testifying should be used "sparingly" and only in "'particular

circumstances.'" *Hobbs*, 31 F.3d at 921–22 (citing *Holder*, 150 U.S. at 92). The Ninth Circuit has held that "it is ordinarily an abuse of discretion to disqualify a witness unless the defendant or his counsel have somehow cooperated in the violation of the order." *United States v. Torbert*, 496 F.2d 154, 158 (9th Cir.) (citations omitted), *cert. denied*, 419 U.S. 857 (1974).

"When determining whether the disqualification of a defense witness constitutes an abuse of discretion, some courts have also considered whether the excluded witness's testimony would have been cumulative to the testimony or evidence presented by other witnesses." *Hobbs*, 31 F.3d at 922 (citations omitted).

J. Motion for transcripts of prior testimony of witnesses.

An indigent defendant may have the right to a free transcript of the prior testimony of witnesses, depending upon two factors: "(1) the value of the transcript to the defendant in connection with the appeal or trial for which it is sought, and (2) the availability of alternative devices that would fulfill the same functions as a transcript." *Britt v. North Carolina*, 404 U.S. 226, 227 (1971) (on facts presented, not reversible error for state judge to decline to provide murder defendant with free transcripts of first trial which ended in a mistrial) (citation omitted).

1. *Suppression hearing*. *See United States v. Devlin*, 13 F.3d 1361, 1363–64 (9th Cir. 1994) (defendant was entitled to suppression hearing transcript where prosecution witnesses testified at the hearing and government ordered transcripts in preparation for trial).

2. *Prior trial—Mistrial.* "'[W]here a mistrial has occurred, courts have generally regarded a transcript of the prior trial

as a tool "reasonably necessary" to an effective defense . . . .'" *United States v. Devlin*, 13 F.3d 1361, 1364 (9th Cir. 1994) (quoting *United States v. Rosales-Lopez*, 617 F.2d 1349, 1355 (9th Cir. 1980), *aff'd*, 451 U.S. 182 (1981)). *See also United States v. Zamora-Hernandez*, 222 F.3d 1046, 1049–50 (9th Cir. 2000) (finding on facts presented that failure to continue trial resulting in defense counsel, when retrial commenced, not having complete transcript of prior trial did not adversely affect defendant's right to present his defense where transcripts were available in time for use during trial), *cert. denied*, 531 U.S. 1200 (2001). *Britt* has been interpreted as requiring that a complete transcript be provided to the defendant, including opening and closing arguments and pretrial motions. *Kennedy v. Lockyer*, 379 F.3d. 1041 (9th Cir. 2004) (habeas petition granted because trial court ordered that only transcripts of witnesses' testimony be provided to the defendant).

K. Defense motion to present immunized testimony.

1. *General rule*. The general rule is that a defendant is not entitled to compel the government to grant immunity to a defense witness. *United States v. Young*, 86 F.3d 944, 947 (9th Cir. 1996) (citing *United States v. Westerdahl*, 945 F.2d 1083, 1086 (9th Cir. 1991)).

   "'[T]his court has emphatically rejected the argument that the [S]ixth [A]mendment provides a defendant with a right to demand use immunity for defense witnesses who invoke their privilege against self-incrimination.'" *United States v. Baker*, 10 F.3d 1374, 1414 (9th Cir. 1993) (quoting *United States v. Brutzman*, 731 F.2d 1449, 1451–52 (9th Cir. 1984)), *cert. denied*, 513 U.S. 934 (1994). *See also United States v. Duran*, 189 F.3d 1071, 1087 (9th Cir. 1999), *cert. denied*, 529 U.S. 1081 (2000).

2. *Exception*. "In order to fall under an exception to this rule, defendants must show that: (1) the testimony was relevant; and (2) the government distorted the judicial fact-finding process by denying immunity." *United States v. Young*, 86 F.3d 944, 947 (9th Cir. 1996) (where government's case consisted of witnesses who received favorable plea agreements or immunity and defendant's witness was the only one who could have impeached government's main witness, court's denial of evidentiary hearing regarding defendant's motion for court to give immunity or order government to give immunity was error) (citation omitted).

   a. *Relevance*. "To satisfy the relevance prong, 'a defendant need not show that the testimony sought was either "clearly exculpatory" or "essential to the defense"; the testimony need be only relevant.'" *United States v. Whitehead*, 200 F.3d 634, 640 (9th Cir.) (quoting *United States v. Westerdahl*, 945 F.2d 1083, 1086 (9th Cir. 1991)), *cert. denied*, 531 U.S. 885 (2000).

   b. *Government's distortion of fact-finding process*. "The fact-finding process is intentionally distorted where the prosecutor intentionally causes the witness to invoke the Fifth Amendment privilege . . . or 'grant[s] immunity to a witness in order to obtain his testimony, while denying immunity to a defense witness whose testimony would directly contradict that of the government witness.'" *United States v. Duran*, 189 F.3d 1071, 1087 (9th Cir. 1999) (quoting *United States v. Westerdahl*, 945 F.2d 1083, 1087 (9th Cir. 1991)), *cert. denied*, 529 U.S. 1081 (2000). *See also United States v. Whitehead*, 200 F.3d 634, 640 (9th Cir.), *cert. denied*, 531 U.S. 885 (2000).

> "Undue prosecutorial interference in a defense witness's decision to testify arises when the prosecution intimidates or harasses the witness to discourage the witness from testifying, for example, by threatening the witness with prosecution for perjury or other offenses." *Williams v. Woodford*, 306 F.3d 665, 699 (9th Cir. 2002).

L. Motion for disclosure re alibi.

Fed. R. Crim. P. 12.1(a), requires that, on motion of the government stating the time, date, and place at which the alleged offense was committed, the defendant shall serve the government written notice of the defendant's intention to offer a defense of alibi. Such notice shall state the specific place or places at which the defendant claims to have been at the time of the alleged offense and the names, addresses, and telephone numbers of the witnesses upon whom the defendant intends to rely to establish such alibi.

Fed. R. Crim. P. 12.1(b) requires that the government disclose the names and addresses and telephone numbers of witnesses the government will use "to establish the defendant's presence at the scene of the alleged offense and any other witnesses to be relied on to rebut . . . the defendant's alibi witnesses." The government may obtain relief from this rule where the government's witness is in danger if disclosure occurs. *United States v. Wills*, 88 F.3d 704, 710 (9th Cir.), *cert. denied*, 519 U.S. 1000 (1996). R

The 2002 Amendments to Rule 12.1 now require that the defense, and if applicable, the government, disclose the phone numbers regarding alibi.

M. Motion for handwriting exemplars.

The government need not make a preliminary showing of reasonableness prior to obtaining an order requiring a suspect

to provide handwriting and/or printing exemplars for comparison purposes. *United States v. Mara*, 410 U.S. 19, 21–22 (1973) (grand jury subpoena for production sufficient to require compliance).

Requiring the submission of handwriting samples for identification purposes does not violate the Fifth Amendment privilege against self-incrimination. *Gilbert v. California*, 388 U.S. 263, 266–67 (1967). Requiring a suspect to write specific phrases for comparison purposes is not testimonial in nature and does not violate the privilege against self-incrimination. *United States v. Antill*, 579 F.2d 1135, 1136 (9th Cir. 1978).

N. Child witness—Competence to testify.

"A child is presumed to be competent." 18 U.S.C. § 3509(c)(2). *See also* Fed. R. Evid. 601.

"'[T]here is no precise age which determines the question of competency. This depends on the capacity and intelligence of the child, his appreciation of the difference between truth and falsehood, as well as of his duty to tell the former.'" *Kentucky v. Stincer*, 482 U.S. 730, 742 n.11 (1987) (quoting *Wheeler v. United States*, 159 U.S. 523, 524 (1895)).

"No federal court has held that the Constitution places limits on allowing even the youngest child to testify at trial." *Walters v. McCormick*, 122 F.3d 1172, 1176 (9th Cir. 1997) (admission of video-taped testimony of four-year old sex abuse victim violated neither due process nor confrontation clause where the court held a hearing and determined that the child knew what the truth was and felt obligated to tell it and the defendant was allowed to make the jury aware of the child's alleged incapacity) (citation omitted), *cert. denied*, 523 U.S. 1060 (1998).

O. Motion to exclude witness based upon violation of Federal Anti-Gratuity Statute.

1. *In general*. The Federal Anti-Gratuity Statute criminalizes the bribery of witnesses. 18 U.S.C. § 201(c)(2) (prohibiting "directly or indirectly, giv[ing], offer[ing] or promis[ing] anything of value to any person, for or because of the testimony under oath . . . ."). A leading case applying 18 U.S.C. § 201(c)(2) is *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998), *rev'd*, 165 F.3d 1297 (en banc), *cert. denied*, 527 U.S. 1024 (1999).

2. *Exclusionary rule inapplicable*. The Ninth Circuit has repeatedly ruled that even assuming the government's extension of benefits to a witness constituted a violation of the Federal Anti-Gratuity Statute, "'[t]he use of the exclusionary rule is an exceptional remedy typically reserved for violations of constitutional rights . . . .'" *United States v. Feng*, 277 F.3d 1151, 1154 (9th Cir. (finding on facts presented, no violation of the statute had occurred) (quoting *United States v. Smith*, 196 F.3d 1034, 1040 (9th Cir. 1999), *cert. denied*, 529 U.S. 1028 (2000)), *cert. denied*, 537 U.S. 897 (2002).

3. *Favorable treatment extended to cooperating witnesses.* This statute does not preclude the government from offering favorable treatment to a cooperating witness. *United States v. Smith*, 196 F.3d 1034, 1038 (9th Cir. 1999), *cert. denied*, 529 U.S. 1028 (2000); *United States v. Garcia-Sanchez*, 189 F.3d 1143, 1147 (9th Cir. 1999); *United States v. Duran*, 189 F.3d 1071, 1088 (9th Cir. 1999), *cert. denied*, 529 U.S. 1081 (2000). This argument arose, in part from *United States v. Singleton*, 144 F.3d 1343 (10th Cir. 1998), *rev'd*, 165 F.3d 1297 (en banc), *cert. denied*, 527 U.S. 1024 (1999).

4. *Immigration benefits and leniency*. "[T]he government's use of incentives to elicit relevant testimony," including

immigration benefits or leniency, is not a violation of the Federal Anti-Gratuity Statute. *United States v. Feng*, 277 F.3d 1151, 1154 (9th Cir.) (court "'would not be inclined to view leniency in state proceedings or forestalling deportation as markedly different in character or consequence than a lesser sentence or no prosecution at all. . . . '") (quoting *United States v. Murphy*, 193 F.3d 1, 9 (1st Cir. 1999)), *cert. denied*, 537 U.S. 897 (2002).

CHAPTER 7. MOTIONS RE GRAND JURY PROCEEDINGS AND INDICTMENT

A. Grand jury improperly drawn.

Two grounds exist to challenge the method by which the grand jury was drawn: 1) equal protection under the Fourteenth Amendment and 2) a fair representation challenge under the Sixth Amendment. *United States v. Esquivel*, 88 F.3d 722, 725 (9th Cir.), *cert. denied*, 519 U.S. 985 (1996). *See also* Fed. R. Crim. P. 6(b)(1), (2).

1. *Equal protection*.

   a. To make a prima facie showing of an equal protection violation, the defendant must prove:

      (1) the group, of which the defendant is a member, is a "recognizable, distinct class, singled out for different treatment under the laws, as written or as applied;"

      (2) underrepresentation of the group "by comparing the proportion of the group in the total population to the proportion called to serve as grand jurors, over a significant period of time;" and

      (3) "discriminatory intent."

      United States v. Esquivel, 88 F.3d 722, 725 (9th Cir.) (citation and internal quotations omitted), *cert. denied*, 519 U.S. 985 (1996).

   b. Once a prima facie case is shown, the government must show that "permissible racially neutral selection criteria and procedures have produced the monochromatic result." *Castaneda v. Partida*, 430

U.S. 482, 494 (1977) (quoting *Washington v. Davis*, 426 U.S. 229, 241 (1976)).

2. *Fair representation challenge under Sixth Amendment.*

To make a prima facie showing of an impermissibly unrepresentative grand jury under the Sixth Amendment, a defendant must show:

(1) that the group alleged to be excluded is a "distinctive" group in the community;

(2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and

(3) that this the underrepresentation is due to systematic exclusion of the group in the jury-selection process.

Duren v. Missouri, 439 U.S. 357, 364 (1979) (Missouri statute automatically exempting women from jury service if exemption requested violated "fair cross-section" requirement of Sixth Amendment). *See also United States v. Bushyhead*, 270 F.3d 905, 910 (9th Cir. 2001) (defendant failed to show that the "current Nevada jury plan, using county voting lists, excludes Native Americans from the jury pool in violation of the [Jury Selection and Service Act]"), *cert. denied*, 535 U.S. 1008 (2002); *United States v. Nelson*, 137 F.3d 1094, 1101 (9th Cir.) (proof that Hispanics were under-represented in the jury pool not demonstrated), *cert. denied*, 525 U.S. 901 (1998); *United States v. Artero*, 121 F.3d 1256, 1260–62 (9th Cir. 1997) (practice of drawing grand jurors from voter registration lists did not deny defendant a grand jury which was

representative of a cross-section of the community; although Hispanics constituted a higher percentage of the population than was represented on the grand jury, because of citizenship and English fluency requirements for jurors, the deviation was not impermissible), *cert. denied*, 522 U.S. 1133 (1998).

"'[T]he second prong of the *Duren* test requires proof, typically statistical data, that the jury pool does not adequately represent the distinctive group in relation to the number of such persons in the community.'" *Nelson*, 137 F.3d at 1101 (quoting *United States v. Esquivel*, 88 F.3d 722, 726 (9th Cir.), *cert. denied*, 519 U.S. 985 (1996)).

3. *Standing.* A white criminal defendant has standing to raise equal protection and due process claims in connection with the selection of grand jurors where members of a different racial group are excluded. *See Campbell v. Louisiana*, 523 U.S. 392, 397–403 (1998) (practice of passing over African-Americans as presiding grand jurors could be raised by white defendant where presiding grand jurors are selected by court and are in addition to grand jury panel).

B. Motions re selection of grand and petit jurors—Right to inspect records.

A criminal defendant has an unqualified right to inspect grand and petit jury lists at all reasonable times during the preparation of a motion to challenge compliance with the jury selection procedure. *Test v. United States*, 420 U.S. 28, 29–30 (1975); *United States v. Armstrong*, 621 F.2d 951, 955 (9th Cir. 1980)*; United States v. Beaty*, 465 F.2d 1376, 1381–82 (9th Cir. 1972). *See* Jury Selection and Service Act of 1968, 28 U.S.C. § 1867(f).

"The right 'to inspect, produce, and copy such records or papers at all reasonable times during the preparation and

pendency of such a motion' granted in section 1867(f) extends not only to the grand jury panel, but also to the master wheel." *Armstrong*, 621 F.2d at 955 (quoting 28 U.S.C. § 1867(f)).

Inspection is based upon the possibility that the grand jury was selected discriminatorily and/or does not represent a fair cross-section of the community. *Test*, 420 U.S. at 29–30.

C. Motion to strike surplusage from indictment or information.

A motion to strike surplusage from an indictment is based upon Fed. R. Crim. P. 7(d). "The purpose of a motion to strike under [Rule] 7(d) is to protect a defendant against 'prejudicial or inflammatory allegations that are neither relevant nor material to the charges.'" *United States v. Terrigno*, 838 F.2d 371, 373 (9th Cir. 1988) (quoting *United States v. Ramirez*, 710 F.2d 535, 544–45 (9th Cir. 1983)).

D. Motion to dismiss indictment or remand to grand jury.

1. *In general—disfavored.* "[B]ecause the grand jury's determination is a preliminary one, and because the full panoply of constitutional protections will be available at trial, courts have been disinclined to extend due process rights to grand jury proceedings." *United States v. Sears, Roebuck & Co., Inc.*, 719 F.2d 1386, 1391 n.7 (9th Cir. 1983) (exclusionary rule does not apply to grand jury proceedings) (citation omitted), *cert. denied*, 465 U.S. 1079 (1984). *See also United States v. Calandra*, 414 U.S. 338, 349–50 (1974); *Costello v. United States*, 350 U.S. 359, 363–64 (1956) (hearsay rule does not apply to grand jury proceedings).

2. *Standard for dismissal.* Because of separation of powers principles, a grand jury indictment "may be dismissed only

in 'flagrant case[s]' of prosecutorial misconduct." *Sears, Roebuck & Co., Inc.*, 719 F.2d at 1391 (quoting *United States v. Kennedy*, 564 F.2d 1329, 1338 (9th Cir. 1977), *cert. denied sub nom. Myers v. United States*, 435 U.S. 944 (1978)).

Dismissal of an indictment on constitutional grounds may occur only where a defendant has been denied the right to have a "legally constituted grand jury make an informed and independent evaluation of the evidence" in determining whether probable cause exists to charge defendant with a crime. *Sears, Roebuck & Co., Inc.*, 719 F.2d at 1391 n.7 (citation omitted). *See also United States v. Estacio*, 64 F.3d 477, 481 (9th Cir. 1995), *cert. denied*, 517 U.S. 1121 (1996).

3. *False testimony*—Franks-*type standard.* False testimony presented to a grand jury will not result in dismissal if it did not "substantially influence [] the grand jury's decision to indict." *Bank of Nova Scotia v. United States*, 487 U.S. 250, 256 (1988). *See also United States v. Brown*, 337 F.3d 1095 (9th Cir. 2003); *United States v. Claiborne*, 765 F.2d 784, 791 (9th Cir. 1985) ("if sufficient non-perjurious testimony exists to support the indictment, the courts will not dismiss the indictment due [to?] the presence of perjured testimony").

E. Duty to present exculpatory testimony.

"The government is under no obligation to present exculpatory evidence in a grand jury proceeding." *United States v. Estacio*, 64 F.3d 477, 481 (9th Cir. 1995). *See also United States v. Williams*, 504 U.S. 36, 52 (1992).

F. Timing of motion to dismiss.

A defendant who does not object to an indictment prior to trial waives all objections except jurisdiction and failure to

charge an offense. *Echavarria-Olarte v. Reno*, 35 F.3d 395, 397 (9th Cir. 1994) (citations omitted), *cert. denied*, 514 U.S. 1090 (1995). *See also United States v. Klinger*, 128 F.3d 705, 708 (9th Cir. 1997) (a challenge to an indictment on the grounds of multiplicity or duplicity must be made prior to trial, citing Fed. R. Crim. P. 12(b)(2) and 12(f)).

G. Sufficiency of indictment.

1. *Required content*. "[A]n indictment is sufficient if: (1) it contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend; and (2) it enables him to plead an acquittal or conviction in bar of future prosecutions for the same offense." *United States v. Hill*, 279 F.3d 731, 741 (9th Cir. 2002) (citing *Hamling v. United States*, 418 U.S. 87, 117 (1974)). *See also United States v. Davis*, 363 F.3d 920, 922 (9th Cir. 2003) (quoting *United States v. Bailey*, 444 U.S. 394, 414 (1980) and citing Fed. R. Crim. P. 7(c)), *cert. denied*, 124 S. Ct. 1119 (2004).

   "An indictment will withstand a motion to dismiss 'if it contains the elements of the charged offense in sufficient detail (1) to enable the defendant to prepare his defense; (2) to ensure him that he is being prosecuted on the basis of the facts presented to the grand jury; (3) to enable him to plead double jeopardy; and (4) to inform the court of the alleged facts so that it can determine the sufficiency of the charge.'" *United States v. Rosi*, 27 F.3d 409, 414 (9th Cir. 1994) (quoting *United States v. Bernhardt*, 840 F.2d 1441, 1445 (9th Cir.), *cert. denied sub nom. McCarthy v. United States*, 488 U.S. 954 (1988)). It is acceptable if the indictment merely sets forth the language of the statute if the statute clearly sets forth all elements. *Rosi*, 27 F.3d at 414 (citation omitted); *See also United States v. Kim*, 298 F.3d 746, 750 (9th Cir. 2002) (although 21 U.S.C. §

802(46)(B) authorizes pharmacists to sell pseudoephedrine for "legitimate medical use," it is not necessary that the indictment negate any exemption or exception in a prosecution charging a pharmacist with possessing a listed chemical knowing that it would be used to manufacture a controlled substance), *amended by* 317 F.3d 917 (2003).

"The Supreme Court and the Ninth Circuit have long held that 'each count in an indictment [] is regarded as if it were a separate indictment' and 'must be sufficient in itself'" *United States v. Rodriguez-Gonzalez*, 358 F.3d 1156, 1159 (9th Cir. 2004) (holding that indictment alleging two counts of illegal entry did not thereby, without more, cause second count to become a felony) (citations omitted). "[E]ach count 'must stand or fall on its own allegations without reference to other counts not expressly incorporated by reference.'" *Id*.

2. *Charging in conjunctive but proving in disjunctive.* "When a statute specifies two or more ways in which an offense may be committed, all may be alleged in the conjunctive in one count and proof of any one of those conjunctively charged acts may establish guilt." *United States v. Booth*, 309 F.3d 566, 572 (9th Cir. 2002) (indictment alleging conjunctively that defendant "conducted the unlawful financial transactions 'with the intent to promote the carrying on of the specified unlawful activity *and* knowing that the transaction was designed . . . to conceal and disguise' the proceeds" permitted the jury to convict if it found either that the defendant intended to conduct the unlawful activity or knew the transactions were designed to conceal," distinguishing *United States v. Gaddis*, 424 U.S. 544 (1976)) (citations omitted).

3. *Aiding and abetting*. An indictment alleging aiding and abetting in violation of 18 U.S.C. § 2 must be accompanied by a reference to a substantive offense. *Echavarria-Olarte v. Reno*, 35 F.3d 395, 398 (9th Cir.

1994), *cert. denied*, 514 U.S. 1090 (1995); *United States v. Medina*, 940 F.2d 1247, 1249–50 (9th Cir. 1991).

4. *Accessory after the fact*. An indictment alleging accessory after the fact is deficient as a matter of law if it does not specify the underlying crime. *United States v. Hill*, 279 F.3d 731, 740–41 (9th Cir. 2002) (indictment defective where accessory after the fact was alleged but principal offense, Deadbeat Parents Punishment Act, was not alleged.)

5. *Attempt.* An indictment alleging an attempt to commit a crime requires an allegation of specific intent. *United States v. Pernillo-Fuentes*, 252 F.3d 1030, 1032 (9th Cir. 2001) (indictment charging defendant with attempted illegal reentry was fatally defective because it failed to allege specific intent as described in *United States v. Gracidas-Ulibarry*, 231 F.3d 1188 (9th Cir. 2000) (en banc)).

6. *Voluntariness of entry*. In a prosecution for illegal reentry after deportation, voluntary entry need not be alleged in the indictment. *United States v. Rodriguez-Rodriguez*, 364 F.3d 1142, 1145–46 (9th Cir. 2004).

7. *Sentencing factors*. "[An indictment] need not set forth factors relevant only to the sentencing of an offender found guilty of the charged crime." *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998) (indictment need not allege earlier conviction in prosecution for illegal re-entry after deportation in violation of 8 U.S.C. § 1326 because a prior aggravated felony conviction merely constitutes a sentencing enhancement). *But see United States v. Rodriguez-Gonzalez*, 358 F.3d 1156, 1159 (9th Cir. 2004) (holding that indictment alleging two counts of illegal entry did not thereby, without more, cause second

count to become a felony). *See also Harris v. United States*, 536 U.S. 545, 556 (2002) ("brandishing and discharging" a firearm during a drug-trafficking crime, as prohibited in 18 U.S.C. § 924 (c)(1)(A), are "sentencing factors to be found by the judge, and not offense elements to be found by the jury."); *McMillan v. Pennsylvania*, 477 U.S. 79, 85–86, 91 (1986) (Pennsylvania Mandatory Minimum Sentencing Act constitutionally provided for firearm possession as a sentencing enhancement rather than as an element of the offense). But See § 8, *infra.*

8. Apprendi *factors*.

a *In general*. When "enumerated aggravating factors operate as 'the functional equivalent of an element of a greater offense,' the Sixth Amendment requires that they be found by a jury." *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 494 n.19 (2000)) (internal citation omitted). *See also Harris v. United States*, 536 U.S. 545, 563 (2002) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum," whether the statute calls it an element or a sentencing factor, "must be submitted to a jury and proved beyond a reasonable doubt.") (citing *Apprendi*, 530 U.S. at 490)).

Apprendi requires that special circumstances sentences be admitted to by a defendant at change of plea or proven to a jury beyond a reasonable doubt. *See also Blakely v. Washington*, 124 S. Ct. 2531 (2004) (holding that the Washington State sentencing procedure violates Apprendi because it permits sentencing enhancement found by the court by not admitted to by the defendant and not found by the jury; the statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or

admitted by the defendant, not the maximum sentence a judge may impose after finding additional facts). *See also United States v. Ameline*, 376 F.3d 967, 974–75 (9th Cir. 2004) (holding that Blakely applies to the federal sentencing guidelines). ***Caveat:*** As this edition goes to print, petitions have been filed with the United States Supreme Court seeking further clarification of *Blakely.*

b. *Drug quantities*. In the aftermath of *Apprendi*, a federal indictment alleging a drug-trafficking crime should allege the drug quantity involved if the quantity increases the prescribed statutory maximum sentence. *United States v. Cotton*, 535 U.S. 625, 627 (2002). *See also United States v. Jordan*, 291 F.3d 1091, 1095–96 (9th Cir. 2002) (in drug prosecution, quantity exposing the defendant to a sentence "above the default maximum sentence for a crime involving an indeterminate quantity" should have been included in the indictment); *United States v. Buckland*, 289 F.3d 558, 568 (9th Cir. 2002) (en banc) ("drug quantity and type, which fix the maximum sentence for conviction . . . must be charged in the indictment . . . .").

c. *Death penalty*. In the aftermath of *Apprendi*, Defendants are entitled to have the elements of sentencing factors of the death penalty offense found by the jury. *Ring v. Arizona*, 536 U.S. 584, 609 (2002). *Ring* is not retroactive on habeas review. *Schriro v. Summerlin*, 124 S. Ct 2519 (2004).

H. Sufficiency of evidence.

Fed. R. Crim. P. 12(b)(2) authorizes any party to "raise by pretrial motions any defense, objection, or request that the court can determine without a trial of the general issue."

Under this rule, the court may decide such "matters as former jeopardy, former conviction, former acquittal, statute of limitations, immunity, [and] lack of jurisdiction." *United States v. Smith*, 866 F.2d 1092, 1095–96 n.3 (9th Cir. 1989).

1. Rule 12(b) should not be invoked so as to require the court to, in effect, prematurely rule on the sufficiency of the evidence. *United States v. Nukida*, 8 F.3d 665, 669–70 (9th Cir. 1993) (motion to dismiss for lack of interstate commerce nexus was premature; government had right to present case to jury and judge).

2. "In *Midland [Asphalt Corp. v. United States*, 489 U.S. 794, 802], the Supreme Court held that '[o]nly a defect so fundamental that it causes the grand jury no longer to be a grand jury, or the indictment no longer to be an indictment gives rise to the constitutional right not to be tried. *See also United States v. Hickey*, 367 F.3d 888, 894 (9th Cir. 2004) (holding that an "allegation of insufficient evidence before the grand jury, even if meritorious, would not rise to the level of a fundamental defect.") "Sufficiency of evidence is to be resolved at trial and not at pretrial motions. *United States v. Lunstedt*, 997 F.2d 665, 667 (9th Cir. 1993). *See also United States v. Russell*, 804 F.2d 571, 576 (9th Cir. 1986) (Ferguson, J., concurring) ("I know of no law that permits the dismissal of an indictment based upon the non-existence of facts . . . prior to trial.").

I. Typographical error / technical error.

"[A] minor or technical deficiency in the indictment will not cause reversal of a conviction absent prejudice to the defendant." *United States v. Neill*, 166 F.3d 943, 947 (9th Cir.) (citation omitted), *cert. denied*, 526 U.S. 1153 (1999). "Amendment of the indictment to fix typographical errors is appropriate as long as the error did not mislead the defendant." *Neill*, 166 F.3d at 947 (on facts presented, error in

identifying bank in control of the money taken during robbery was minor or technical error) (citation omitted).

Examples of technical errors not fatal to the indictment include the following:

1. *An error or omission in statutory citation.* "Unless the defendant was misled and thereby prejudiced, neither an error in a citation nor a citation's omission is a ground to dismiss the indictment or information or to reverse a conviction." Fed. R. Crim. P. 7(c)(3) (2002). *See also Echavarria-Olarte v. Reno*, 35 F.3d 395, 399 (9th Cir. 1994), *cert. denied*, 514 U.S. 1090 (1995) (quoting previous version of Fed. R. Crim. P. 7(c)(3), substantively identical to current version).

2. *Failure of the indictment to identify defendant and victim as Indians. United States v. James*, 980 F.2d 1314, 1317–18 (9th Cir. 1992), *cert. denied*, 510 U.S. 838 (1993) (even though required for jurisdiction, failure of indictment to allege that the defendant and victim were Indians cured by reference to specific statute). *But see Hilderbrand v. United States*, 261 F.2d 354, 357 (9th Cir. 1958) (failure of indictment to allege that defendant was Indian required dismissal where indictment cited only to general murder statute);

3. *Failure of the indictment to allege that the bank was feerally insured. United States v. Coleman*, 656 F.2d 509, 511–12 (9th Cir. 1981) (failure of indictment to allege that bank was federally insured not a fatal defect where indictment referred to applicable statute);

4. *Erroneous identification of the bank having care and custody of the money where banks that were robbed were correctly identified in indictment. United States v. Neill*,

166 F.3d 943, 947–48 (9th Cir.) (indictment correctly named the two banks which were robbed but in one count erroneously identified the bank having custody of the money), *cert. denied*, 526 U.S. 1153 (1999);

5. *Failure of indictment to state that a civil case was a "pending proceeding" in prosecution for endeavoring to influence judicial officer in violation of 18 U.S.C. § 1503, where indictment tracked statutory language. United States v. Fleming*, 215 F.3d 930, 934–36 (9th Cir. 2000); and

6. *Indictment's misidentification of PCP as a Schedule III controlled substance. United States v. Gill*, 280 F.3d 923, 930 (9th Cir. 2002) (indictment's misidentification of PCP as a Schedule III controlled substance not prejudicial).

7. *Misidentification of the date of conviction in an information filed pursuant to 21 U.S.C. § 851(a) alleging a prior conviction for sentencing enhancement purposes. United States v. Hamilton*, 208 F.3d 1165, 1168–69 (9th Cir.), *cert. denied*, 531 U.S. 867 (2000) or the state where conviction occurred. *United States v. Severino*, 316 F.3d 939, 944–45 (9th Cir. 2003) (*en banc*) (4 judges dissenting).

J. Duplicity.

1. *Definition*. Fed. R. Crim. P. 8(a), requires that each count of an indictment or information charge a different offense. "An indictment is duplicitous where a single count joins two or more distinct and separate offenses." *United States v. Ramirez-Martinez*, 273 F.3d 903, 913 (9th Cir. 2001) (citing *United States v. UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977)).

"The court limits its review to a reading of the indictment itself to determine whether it may be read to

charge a single violation." *United States v. King*, 200 F.3d 1207, 1212 (9th Cir. 1999) (in a prosecution for bank fraud, "each execution of a scheme to defraud need not give rise to a charge in the indictment" in order to avoid being duplicitous) (citation omitted).

a. A duplicitous count defeats a defendant's right to know the charges, may erode double jeopardy protection, and could result in a non-unanimous verdict. *United States v. Aguilar*, 756 F.2d 1418, 1420 n.2 (9th Cir. 1985) (citation omitted). *See also United States v. King*, 200 F.3d 1207, 1212 (9th Cir. 1999); *United States v. Todd*, 964 F.2d 925, 928 (9th Cir. 1992).

b. An indictment should not be dismissed for duplicity if it "can be read to charge only one violation in each count." *United States v. Martin*, 4 F.3d 757, 759 (9th Cir. 1993) (quoting *United States v. Yarbrough*, 852 F.2d 1522, 1530 (9th Cir.), *cert. denied*, 488 U.S. 866 (1988)).

2. *Remedy.* Once duplicity is established, the trial court may (1) allow election, so long as the defendant is not prejudiced thereby and the election does not alter the nature of the charge, or (2) dismiss the offending count. *United States v. Aguilar*, 756 F.2d 1418, 1423 (9th Cir. 1985).

In addition, the court may address a duplicitous indictment by instructing the jury that all members of the jury are required "to agree as to which of the distinct charges the defendant actually committed." *United States v. Ramirez-Martinez*, 273 F.3d 903, 914–15 (9th Cir. 2001) (reversal required where two discrete counts in indictment charged defendant with the general intent crime

of transporting undocumented aliens and the specific intent crime of attempt to transport undocumented aliens and the court did not give the jury a unanimity instruction as to attempted transportation and transportation) *cert. denied*, 537 U.S. 930 (2002).

3. *Multiple allegations re means of commission.* A single count in an indictment may permissibly allege that a crime was committed in a multiplicity of ways. Fed. R. Crim. P. 7(c)(1).

4. *Waiver.* "Federal Rule of Criminal Procedure 12(b)(2) requires a defendant to raise 'challenges based on the alleged duplicity of an indictment' before trial." *United States v. Technic Services, Inc.*, 314 F.3d 1031, 1039 (9th Cir. 2002) (defendant waived challenge to allegedly duplicitous count by not raising matter before trial) (citing *United States v. Klinger*, 128 F.3d 705, 708 (9th Cir. 1997)).

See also Chapter 11., B., 4., Motions to Dismiss—Double jeopardy violation.

K. Multiplicity.

1. *Definition.* "An indictment is multiplicitous if it charges a single offense in several counts." *United States v. Rude*, 88 F.3d 1538, 1546 (9th Cir. 1996), *cert. denied*, 519 U.S. 1058 (1997); *United States v. UCO Oil Co.*, 546 F.2d 833, 835 (9th Cir. 1976), *cert. denied*, 430 U.S. 966 (1977).

"'The chief danger raised by a multiplicitous indictment is the possibility that the defendant will receive more than one sentence for a single offense.'" *United States v. Matthews*, 240 F.3d 806, 818 (9th Cir. 2001) (quoting *United States v. Galvan*, 949 F.2d 777, 781 (5th Cir. 1991)).

2. *Test*.

   a. *In general*. "The test for multiplicity . . . is whether each separately violated statutory provision 'requires proof of an additional fact which the other does not.'" *United States v. McKittrick*, 142 F.3d 1170, 1176 (9th Cir. 1998) (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)), *cert. denied*, 525 U.S. 1072 (1999). *See also United States v. Vargas-Castillo*, 329 F.3d 715 (9th Cir.), *cert. denied*, 124 S. Ct. 504 (2003); *United States v. Technic Services Inc.*, 314 F.3d 1031, 1046 (9th Cir. 2002) (quoting *Blockburger*, 284 U.S. at 304).

   b. *Conspiracy cases—Factor analysis test*. Because in conspiracy prosecutions, the *Blockburger* test "does not provide sufficient protection against 'artful crafting of conspiracy charges which could permit the government to subdivide one criminal conspiracy into multiple violations of a single statute' in violation of the principle established in *Braveman* [*v. United States*, 317 U.S. 49 (1942)]," the Ninth Circuit has "adopted the 'factor analysis' test in *Arnold v. United States*, 336 F.2d 347, 350 (9th Cir. 1964)." *United States v. Montgomery*, 150 F.3d 983, 990 (9th Cir.) (separate counts of conspiracy to manufacture methamphetamine and conspiracy to distribute methamphetamine, both charged under 21 U.S.C. § 846, did not violate double jeopardy clause on facts presented), *cert. denied*, 525 U.S. 917 (1998).

      The factor analysis test utilized by the Ninth Circuit has been described as follows: "'[T]o determine whether two conspiracy counts charge the same offense and so place the defendant in double jeopardy,' we consider five factors: (1) the differences

in the periods of time covered by the alleged conspiracies; (2) the places where the conspiracies were alleged to occur; (3) the persons charged as coconspirators; (4) the overt acts alleged to have been committed; and (5) the statutes alleged to have been violated." *United States v. Stoddard*, 111 F.3d 1450, 1454 (9th Cir. 1997) (quoting *United States v. Guzman*, 852 F.2d 1117, 1120 (9th Cir. 1988)).

c. *Multiple importation and possession for distribution charges*. Even though a defendant who imports and possesses both marijuana and cocaine in the same transaction generically imports controlled substances and possesses controlled substances for distribution, an indictment alleging separate charges of importing marijuana and cocaine and distributing marijuana and cocaine is not multiplicitous. *United States v. Vargas-Castillo*, 329 F.3d 715, 719 (9th Cir.), *cert. denied*, 124 S. Ct. 504 (2003).

3. *Remedy*. The proper remedy for a multiplicitous indictment is consolidation of the offending counts and dismissal of the surplus counts. *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 220, 225–26 (1952); *United States v. Matthews*, 240 F.3d 806, 818 (9th Cir. 2000).

See also Chapter 11, B., 4., Motions to Dismiss—Double jeopardy violation.

L. Variance.

1. *Variance defined*. "'A *variance* occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment.'" *United States v. Gil*, 58 F.3d 1414, 1422 (9th Cir.) (quoting *United States v. Von Stoll*,

726 F.2d 584, 586 (9th Cir. 1984)), *cert. denied*, 516 U.S. 969 (1995).

2. *Fifth Amendment protection.* "The Fifth Amendment's Grand Jury Clause endows defendants who are charged with felonies with a substantial right to be tried only on the charges set forth in an indictment by a grand jury." *United States v. Shipsey*, 190 F.3d 1081, 1085 (9th Cir. 1999) (finding that constructive amendment of theft by false pretenses indictment required reversal) (citing *Stirone v. United States*, 361 U.S. 212, 215, 217 (1960) and other cases).

3. *Impermissible amendment of indictment.* "After an indictment has been returned and criminal proceedings are underway, the indictment's charges may not be broadened by amendment, either literal or constructive, except by the grand jury itself." *United States v. Adamson*, 291 F.3d 606, 614 (9th Cir. 2002) (wire fraud misrepresentation shown at trial different from misrepresentation alleged in indictment; reversal required due to fatal variance) (citations omitted).

    a. *Constructive amendment.* "[W]here a defendant is convicted of a crime and where a grand jury never charges the defendant with an essential element of that crime, a constructive amendment of the indictment has occurred, and reversal is warranted." *Jones v. Smith*, 231 F.3d 1227, 1233 (9th Cir. 2000) (citing *Stirone*, 361 U.S. at 218). *See also United States v. Tekle*, 329 F.3d 1108, 1115–16 (9th Cir.) (finding that in indictment alleging money laundering scheme, constructive amendment of indictment did not occur because conduct was charged in other counts of the indictment), *cert. denied*, 124 S. Ct. 419 (2003).

"[A] 'critical consideration [in determining if a constructive amendment has occurred] is whether the introduction of the new theory changes the offense charged . . . or so alters the case that the defendant has not had a fair opportunity to defend.'" *Jones*, 231 F.3d at 1233 (quoting *Lincoln v. Sunn*, 807 F.2d 805, 813 (9th Cir. 1987)).

b. *Variance distinguished from constructive amendment.* "The line between a constructive amendment and a variance is at times difficult to draw . . . . Nevertheless, the line is significant because, whereas a constructive amendment always requires reversal, 'a variance requires reversal only if it prejudices a defendant's substantial rights.'" *Adamson*, 291 F.3d at 615 (quoting *United States v. Olson*, 925 F.2d 1170, 1175 (9th Cir. 1991)).

"[W]e have found constructive amendment of an indictment where (1) 'there is a complex of facts [presented at trial] distinctly different from those set forth in the charging instrument,' or (2) 'the crime charged [in the indictment] was substantially altered at trial, so that it was impossible to know whether the grand jury would have indicted for the crime actually proved.'" *Adamson*, 291 F.3d at 615 (finding variance rather than constructive amendment) (quoting *United States v. Von Stoll*, 726 F.2d 584, 586 (9th Cir. 1984)).

4. *Application to specific settings.*

a. *Conspiracy—Overt act.* Every crime introduced as part of the conspiracy need not be alleged in the indictment as an overt act. *United States v. Gil*, 58 F.3d 1414, 1423 (9th Cir.), *cert. denied*, 516 U.S. 969 (1995).

b. *Variance as to date of crime*. Where the variance as to when the crime was committed does not mislead the defendant and there is no double jeopardy risk, variance is harmless error. *United States v. Tsinhnahijinnie*, 112 F.3d 988, 991 (9th Cir. 1997) (two-year variance between date alleged in indictment and proof at trial affected substantial rights of defendant). "The government ordinarily need prove only that the crime occurred on a date reasonably near the one alleged in the indictment, not on the exact date." *Tsinhnahijinnie*, 112 F.3d at 991 (citations omitted). *See also United States v. Godinez-Rabadan*, 289 F.3d 630, 632–33 (9th Cir.) (because the crime of being found in the United States in violation of 8 U.S.C. § 1326(a) is a continuing offense, an indictment alleging that the defendant was found in the United States during an eight month period did not cause the indictment to be insufficient), *cert. denied*, 537 U.S. 917 (2002); *United States v. Hinton*, 222 F.3d 664, 672–73 (9th Cir. 2000) (18-day variance between date alleged in indictment and date of actual offense not a fatal variance), *cert. denied*, 531 U.S. 1200 (2001).

M. Grand jury charge—Constitutionality.

A model charge that instructs grand jurors that the grand jury 1) cannot decide the wisdom of the applicable law; 2) is not to consider punishment should the defendant be convicted; and 3) "should" indict if probable cause exists, does not violate the defendant's Fifth Amendment rights. *United States v. Marcucci*, 299 F.3d 1156, 1159–65 (9th Cir. 2002), *cert. denied*, 538 U.S. 934 (2003) (approving model charge recommended by the Administrative Office of the United States Courts) (2-1 decision).

Caveat: The Ninth Circuit granted en banc review regarding a model charge that instructs grand jurors that the grand jury "must" indict if probable cause exists. *United States v. Navarro-Vargas*, 367 F.3d 896, 897, *vacated and reh'g en banc granted by* --- F.3d ----, 2004 WL 1918689 (9th Cir. Aug 25, 2004).

N. Sufficiency of information alleging prior conviction.

1. *Applicable statute re prior conviction allegations*. 21 U.S.C. § 851(a) states in part:

   "No person who stands convicted of an offense under [21 U.S.C. § 841 et seq.] shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, . . . , the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon."

2. *Specificity requirement*. "If the defendant, reading the information in context, will have no trouble understanding which prior conviction the prosecutor means to identify, the information then has 'stat[ed] . . . the previous convictions,' and the statutory purposes of providing defendant notice has been satisfied." *United States v. Severino*, 316 F.3d 939, 943–44 (9th Cir.) (*en banc*) (4 judges dissenting), *cert. denied*, 316 U.S. 939 (2003).

3. *Service requirement*. The service by mail requirement of 21 U.S.C. § 851(a) by mail is satisfied when a copy of the information is placed in the mail before trial. *United States v. Severino*, 316 F.3d 939, 945 (9th Cir.) (en banc) (on facts presented, placing of information in mail before change of plea hearing met service requirement although not received by counsel until after change of plea hearing) (4 judges dissenting), *cert. denied*, 316 U.S. 939 (2003).

CHAPTER 8. FEDERAL JURISDICTION

A. Extraterritorial jurisdiction.

"To determine whether a given statute has extraterritorial application, we examine (1) the statute's text for any indication that Congress intended it to apply extraterritorially and (2) compliance with principles of international law." *United States v. Hill*, 279 F.3d 731, 739 (9th Cir. 2002) (citing *United States v. Felix-Gutierrez*, 940 F.2d 1200, 1204 (9th Cir. 1991), *cert. denied*, 508 U.S.906 (1993)). *See also United States v. Neil*, 312 F.3d 419 (9th Cir. 2002) (upholding extraterritorial jurisdiction for sexual contact with a minor committed aboard a cruise ship, citing two-part inquiry of *Hill* and *Felix-Gutierrez*; finding statutory intent for extraterritorial jurisdiction in 18 U.S.C. § 2243(a) reference to "special maritime and territorial jurisdiction").

1. *Harboring a fugitive, accessory after the fact, aiding and abetting, and conspiracy.* Harboring a fugitive, accessory after the fact, aiding and abetting and conspiracy have all "been deemed to confer extraterritorial jurisdiction to the same extent as the offenses that underlie them." *United States v. Hill*, 279 F.3d 731, 739 (9th Cir. 2002) (citation omitted).

2. *International Parental Kidnapping Crime Act (IPKCA).* The International Parental Kidnapping Crime Act (IPKCA), 18 U.S.C. § 1204(a), which criminalizes the removal and retention of a child outside the United States, is within the Commerce Clause power of the United States. *United States v. Cummings*, 281 F.3d 1046, 1048–51 (9th Cir.) (citing *United States v. Lopez*, 514 U.S. 549, 558 (1995)), *cert. denied*, 537 U.S. 895 (2002).

3. *International law*. In evaluating whether international law supports extraterritorial jurisdiction, two principles that may apply include the territorial principle and the passive personality principle. *United States v. Neil*, 312 F.3d 419, 421 (9th Cir. 2002).

    a. "Under the territorial principle, the United States may assert jurisdiction when acts performed outside of its borders have detrimental effects within the United States." *Id*. at 422 (applying principles of international law to find extraterritorial jurisdiction over sexual contact with minor aboard a cruise ship) (citations omitted).

    b. Under the passive personality principle, "a state may, under certain circumstances, assert jurisdiction over crimes committed against its nationals. *Id*. (citations omitted).

B. Commerce clause and interstate commerce.

Congress, pursuant to the Commerce Clause of the Constitution, art. I, § 8, cl. 3, may regulate "three broad categories of activity":

a. "the channels of interstate commerce;"

b. "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;" and

(3) "those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce."

United States v. Cortes, 299 F.3d 1030, 1033 (9th Cir. 2002) (quoting *United States v. Lopez*, 514 U.S. 549, 558–59 (1995)), *cert. denied*, 537 U.S. 1224 (2003).

1. *Gun-Free School Zones Act of 1990.* The Gun Free School Zones Act of 1990, 18 U.S.C. § 922(g)(1)(A), which prohibited the knowing possession of a firearm in a school zone was beyond Congress' power under the Commerce Clause. *United States v. Lopez*, 514 U.S. 549, 561 (1995).

2. *Federal arson statute.* The federal arson statute, which prohibits causing damage "by means of fire or an explosive [to] property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce," 18 U.S.C. § 844(i), was a constitutional exercise of power by Congress because the statute was interpreted as only encompassing "property actively employed for commercial purposes." *United States v. Cortes*, 299 F.3d 1030, 1034 (9th Cir. 2002) (citing *Jones v. United States*, 529 U.S. 848, 855 (2000)), *cert. denied*, 537 U.S. 1224 (2003). *See also United States v. Lamont*, 330 F.3d 1249 (9th Cir. 2003).

3. *Federal carjacking statute.* The federal carjacking statute, 18 U.S.C. 2219, is a proper exercise of Congress' power to regulate interstate commerce because "carjacking, as a criminal enterprise, directly and substantially affects interstate commerce." *United States v. Cortes*, 299 F.3d 1030, 1036 (9th Cir. 2002), *cert. denied*, 537 U.S. 1224 (2003).

4. *Federal possession of child pornography statute.* 18 U.S.C. 2252(a)(4)(B)is not an unconstitutional exercise of congressional power. *United States v. Adams*, 343 F.3d 1024, 1026 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 2871

(2004). However, "18 U.S.C." § 2252(a)(4)(B) contains an express jurisdictional element that is intended to satisfy Commerce Clause concerns;" the jurisdictional hook is absent in the case of intrastate pornography. *United States v. McCoy*, 323 F.3d 1114, 1115 (9th Cir. 2003).

5. *Hobbs Act.* Prosecutions under the Hobbs Act, 18 U.S.C. § 1951(a), where the defendant's actions have a direct effect on interstate commerce, is properly within federal jurisdiction. *United States v. Lynch*, 367 F.3d 1148, 1154–55 (9th Cir. 2004). "The Supreme Court [] [has] emphasized the broad reach of the 'affects commerce' language of the Act in *United States v. Culbert*, 435 U.S. 371, 373 (1978)." *Id*. at 1154. "[T]he statutory language sweeps within it all persons who have 'in any way or degree . . . affect[ed] commerce . . . by robbery or extortion." *Id.*

   Under the Fifth Circuit's *Collins* test, derived from *United States v. Collins*, 40 F.3d 95, 99–101 (5th Cir. 1994), a strictly intrastate robbery "could not fulfill the effect on interstate commerce nexus required for a Hobbs Act conviction." *Lynch*, 367 F.3d at 1156 (citing *Collins*).

6. *Use and carrying of firearm statute.* The use and carrying of a firearm statute, 18 U.S.C. § 924(c)(1)(A), which prohibits any person from using or carrying a firearm during a drug trafficking offense or crime of violence, is not beyond the scope of the Commerce Clause. *United States v. Lynch*, 367 F.3d 1148, 1158 (9th Cir. 2004).

C. Thirteenth Amendment.

Federal jurisdiction for prosecution pursuant to 18 U.S.C. § 245(b)(2)(B), protecting the exercise of certain civil rights, is based upon the Thirteenth Amendment. *United States v. Allen*, 341 F.3d 870, 884 (9th Cir. 2003) (protecting

individual's right to not be excluded from public park), *cert. denied*, 124 S. Ct. 1876 (2004).

D. Article 1, § 8, Cl. 10.

Federal jurisdiction for the prosecution of matters pursuant to the Maritime Drug Law Enforcement Act arises from Article 1, Section 8, Clause 10 of the Constitution. *United States v. Moreno-Morillo*, 334 F.3d 819, 823 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 1161 (2004).

CHAPTER 9. MOTIONS RE VENUE AND JURY WAIVER

A. Motion for change of venue as to district.

1. *Proper venue.* "The Sixth Amendment and Rule 18 of the Federal Rules of Criminal Procedure guarantee that a defendant will be tried in the state where the crime was committed." *United States v. Pace*, 314 F.3d 344, 349 (9th Cir. 2002) (citing U.S. Const. art. III, § 2, cl. 3; U.S. Const. amend. VI; Fed. R. Crim. P. 18). "The government bears the burden of establishing venue by a preponderance of the evidence." *Id*. (citation omitted).

   "When a defendant has been indicted on multiple counts, venue must be proper for each count." *United States v. Pace*, 314 F.3d 344, 349 (9th Cir. 2002) (citation omitted). *See also United States v. Corona*, 34 F.3d 876, 879–80 (9th Cir. 1994) (venue in the district of Nevada for conspiracy to possess with intent to distribute cocaine did not create venue for substantive offense committed in another district even though occurring in furtherance of the conspiracy). *See also* Fed. R. Crim. P. 18.

   "[T]he locus delicti [of the charged offense] must be determined from the nature of the crime alleged and the location of the act or acts constituting it. In performing this inquiry, a court must initially identify the conduct constituting the offense (the nature of the crime) and then discern the location of the commission of the criminal acts." *United States v. Rodriguez-Moreno*, 526 U.S. 275, 279 (1999) (citations and internal quotations omitted).

   a. *Single noncontinuing act offense.* "Crimes consisting of a single noncontinuing act are 'committed' in the district where the act is performed." *United States v. Corona*, 34 F.3d 876, 879 (9th Cir. 1994). *See also United States v. Pace,* 314 F.3d 344 (9th Cir. 2002).

b. *Continuing offenses*. "[A]ny offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed." 18 U.S.C. § 3237(a). *See also United States v. Pace,* 314 F.3d 344, 350 (9th Cir. 2002) ("Wirefraud is a 'continuing offense,' subject to § 1327, and thus venue may lie in all of the places where any part was accomplished.") (citing 18 U.S.C. § 3237(a)); *United States v. Williams,* 291 F.3d 1180, 1189 (9th Cir. 2002) (because "a violation of the Travel Act is a 'continuing offense' under the general venue statute . . . a Travel Act offense may be prosecuted in any district '"from, through, or into which"' the travel occurred") (quoting *United States v. Polizzi*, 500 F.2d 856, 899 (9th Cir. 1974), *cert. denied*, 419 U.S. 1120 (1975), and 18 U.S.C. §3237(a)); *United States v. Ruelas-Arreguin*, 219 F.3d 1056, 1061 (9th Cir. 2000).

c. *Specific immigration offenses*. "Notwithstanding any other law, such prosecutions or suits [under this subchapter] may be instituted at any place in the United States at which the violation may occur or at which the person charged with a violation under [8 U.S.C.] section 1325 or 1326 of this title may be apprehended." 8 U.S.C. § 1329. *See, e.g., United States v. Ruelas-Arreguin,* 219 F.3d 1056, 1061 (9th Cir.) (where defendant entered into California but was found in Arizona, venue was proper in either locale), *cert. denied*, 531 U.S. 1024 (2000). *But see United States v. Hernandez*, 189 F.3d 785, 791 (9th Cir. 1999) (venue for prosecution of defendant for being a deported alien found in the United States exists where defendant was first found, not anywhere the defendant

was subsequently moved by authorities), *cert. denied*, 529 U.S. 1028 (2000).

d. *Use and carrying of firearm*. In a prosecution for use and carrying of a firearm during and in relation to any crime of violence in violation of 18 U.S.C. § 924(c)(1), venue is proper in any district where the crime of violence was committed. *United States v. Rodriguez-Moreno*, 526 U.S. 275, 282 (1999).

e. *Extraterritorial jurisdiction.*

(1) *In general.* "[T]he federal venue statute for offenses committed on the high seas, or elsewhere out of the jurisdiction of any particular State or district" is 18 U.S.C. § 3238. *United States v. Feng*, 277 F.3d 1151, 1154 (9th Cir.), *cert. denied*, 537 U.S. 897 (2002). That statute states in part: "The trial of all offenses begun or committed upon the high seas, or elsewhere out of the jurisdiction of any particular State or district, shall be in the district in which the offender, or any one or two or more joint offenders, is arrested or is first brought; but if such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia." 18 U.S.C. § 3238.

(2) *"First brought to or arrested in."* "To establish venue under the first clause of § 3238, the government must show that the [defendants] were 'first brought' to or 'arrested' [in the district exercising jurisdiction]. The word 'brought' under the statute means 'first brought into a jurisdiction

[from outside the United States' jurisdiction] while in custody.'" *United States v. Feng*, 277 F.3d 1151, 1155 (9th Cir.) (quoting *United States v. Liang*, 224 F.3d 1057, 1060–61 (9th Cir. 2000)), *cert. denied*, 537 U.S. 897 (2002).

"The term 'arrested' in the statutory context means that venue is in that district . . . where the defendant is *first restrained* of his liberty in connection with the offense charged." *Feng,* 277 F.3d at 1155 (quoting *Liang*, 224 F.3d at 1061).

(3) *Alternate basis for jurisdiction*. "The second clause of § 3238 regarding venue in a district of the last known residence of an offender or in the District of Columbia only applies 'if such offender or offenders are not so arrested or brought into any district.'" *United States v. Feng*, 277 F.3d 1151, 1155 (9th Cir.) (quoting 18 U.S.C. § 3238), *cert. denied*, 537 U.S. 897 (2002). "Thus, the second clause provides an alternate basis upon which to establish venue in cases where venue has not been established under the first clause of the statute." *Feng,* 277 F.3d at 1155.

2. *Pretrial publicity*. "A change of venue must be granted when there exists in the district 'so great a prejudice against the defendant that the defendant cannot obtain a fair and impartial trial.'" *United States v. Collins*, 109 F.3d 1413, 1416 (9th Cir.) (quoting Fed. R. Crim. P. 21(a)), *cert. denied*, 522 U.S. 870 (1997).

"'A defendant need only demonstrate one of two different types of prejudice in support of a motion to transfer venue: presumed or actual.'" *Ainsworth v. Calderon*, 138 F.3d 787, 795 (9th Cir.) (quoting *United*

States v. Sherwood, 98 F.3d 402, 410 (9th Cir. 1996)), *amended by* 152 F.3d 1223 (1998).

a. *Presumed prejudice*.

(1) *Test.* "'Prejudice is presumed when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime.'" *United States v. Collins*, 109 F.3d 1413, 1416 (9th Cir.) (quoting *Harris v. Pulley*, 885 F.2d 1354, 1361 (9th Cir. 1988), *cert. denied*, 493 U.S. 1051 (1990)), *cert. denied*, 522 U.S. 870 (1997).

"Prejudice is presumed when the adverse publicity is so pervasive and inflammatory that the jurors cannot be believed when they assert that they can be impartial." *United States v. Croft*, 124 F.3d 1109, 1115 (9th Cir. 1997) (citing *United States v. Dischner*, 974 F.2d 1502, 1524 (9th Cir. 1992), *cert. denied*, 507 U.S. 923 (1993)).

(2) *Factors.* Factors to be considered when analyzing a claim of presumed prejudice include:

(a) "whether there was a 'barrage of inflammatory publicity immediately prior to trial amounting to a huge . . . wave of public passion,'"

(b) "whether the media accounts were primarily factual," and

(c) "whether the media accounts contained inflammatory, prejudicial information that was not admissible at trial."

Ainsworth v. Calderon, 138 F.3d 787, 795 (9th Cir.) (quoting *Patton v. Yount*, 467 U.S. 1025,

1033 (1984) and citing *Sheppard v. Maxwell*, 384 U.S. 333, 360–61 (1966) and *Harris v. Pulley*, 885 F.2d 1354, 1362 (9th Cir. 1988), *cert. denied*, 493 U.S. 1051 (1990)), *amended by* 152 F.3d 1223 (1998).

Information printed several months before trial is not presumptively prejudicial. *Ainsworth*, 138 F.3d at 795 (citing *Harris*, 885 F.2d at 1362). *See also Neb. Press Ass'n v. Stuart,* 427 U.S. 539, 554 (1976).

(3) *Rarely applicable.* "The presumption is 'rarely applicable and is reserved for an "extreme situation."'" *United States v. Croft*, 124 F.3d 1109, 1115 (9th Cir. 1997) (quoting *Harris v. Pulley*, 885 F.2d 1354, 1361 (9th Cir. 1988), *cert. denied*, 493 U.S. 1051 (1990)).

b. *Actual prejudice*. "Actual prejudice is demonstrated where a sufficient number of the jury panel 'had such fixed opinions that they could not judge impartially the guilt of the defendant' so that it is clear that a trial before that panel would be inherently prejudicial." *United States v. Collins*, 109 F.3d 1413, 1416 (9th Cir.) (quoting *Harris v. Pulley*, 885 F.2d 1354, 1364 (9th Cir. 1988), *cert. denied*, 493 U.S. 1051 (1990)), *cert. denied*, 522 U.S. 870 (1997).

"To establish actual prejudice, the defendant must demonstrate that the jurors exhibited 'actual partiality or hostility that could not be laid aside.'" *United States v. Sherwood*, 98 F.3d 402, 410 (9th Cir. 1996) (quoting *Harris*, 885 F.2d at 1363). *See also Gallego v. McDaniel*, 124 F.3d 1065, 1070 (9th Cir. 1997) (citation omitted), *cert. denied*, 524 U.S. 917 (1998).

3. *Transfer in other cases*. "Upon the defendant's motion, the court may transfer the proceeding, or one or more counts, against that defendant to another district for the convenience of the parties and witnesses and in the interest of justice." Fed. R. Crim. P. 21(b) (2002).

4. *Waiver of proper venue.* "The right to proper venue . . . may be waived." *United States v. Johnson*, 297 F.3d 845, 861 (9th Cir. 2002) (where venue defect was clear from the face of the indictment, defendants waived objection to venue by not raising venue issues until after government completed its case), *cert. denied* 537 U.S. 1242 (2003). "'[I]f a defect in venue is clear on the face of the indictment, a defendant's objection must be raised before the government has completed its case,' or the objection to venue will be waived." *Id*. (quoting *United States v. Ruelas-Arreguin*, 219 F.3d 1056, 1060 (9th Cir.), *cert. denied*, 531 U.S. 1024 (2000)).

B. Motion for change of venue—Divisions within district.

Under Fed. R. Crim. P. 18, a criminal trial must be held in the district in which the crime was committed, but it need not be held in the same division in which the crime was committed. *United States v. Herbert*, 698 F.2d 981, 984 (9th Cir.), *cert. denied*, 464 U.S. 821 (1983).

1. *Jury Selection and Service Act—Divisions within district*. "The Jury Selection and Service Act specifically provides for splitting a district into divisions and using only one division's jury wheel for petit juries . . . ." *United States v. Herbert*, 698 F.2d 981, 984 (9th Cir.) (upholding maintenance of divisions in Arizona) (citing 28 U.S.C. § 1861), *cert. denied*, 464 U.S. 821 (1983). *See also United States v. Cannady*, 54 F.3d 544, 547–48 (9th Cir.) (upholding the use of divisions in the Central District of California), *cert. denied*, 516 U.S. 878 (1995).

2. *Systematic exclusion of distinctive group as a result of transfer*. However, if the transfer of cases results in the systematic exclusion of a distinctive group in the community, such transfer may violate a defendant's Fifth and Sixth Amendment rights as set forth in *Duren v. Missouri*, 439 U.S. 357 (1979). *United States v. Etsitty*, 130 F.3d 420, 424–26 (9th Cir. 1997) (transfer of case from Prescott to Phoenix did not constitute systematic exclusion of Native Americans), *amended by* 140 F.3d 1274, *cert. denied*, 525 U.S. 1003 (1998).

3. *Grounds for transfer.* "The court must set the place of trial within the district with due regard for the convenience of the defendant and the witnesses, and the prompt administration of justice." Fed. R. Crim. P. 18 (2002). *See also United States v. Scholl,* 166 F.3d 964, 969–70 (9th Cir.) (district court did not abuse its discretion in transferring case from Tucson division to Phoenix division based on convenience of witnesses and unavailability of courtroom in Tucson even though defendant resided in Tucson as did defense counsel), *cert. denied*, 528 U.S. 873 (1999).

C. Motion to waive jury trial.

1. *In general.* The Sixth Amendment to the Constitution guarantees a criminal defendant the right to a jury trial. U.S. CONST. amend. VI.

2. *Waiver*. Fed. R. Crim. P. 23(a) (2002) states that in order to effectuate waiver, the following is required:

   (1) the defendant waives a jury trial in writing;

   (2) the government consents; and

(3) the court approves.

"To be valid, a defendant's waiver of [the right to a jury trial] must be voluntary, knowing, and intelligent, and the defendant must be competent to waive the jury right." *United States v. Bishop*, 291 F.3d 1110, 1113 (9th Cir. 2002) (citation omitted), *cert. denied*, 537 U.S. 1176 (2003).

"*United States v. Cochran*, 770 F.2d 850, 852 (9th Cir. 1985), teaches that trial courts should conduct a thorough and searching colloquy with the defendant before accepting a jury trial waiver." *Bishop*, 291 F.3d at 1113–14 ("[A] colloquy is required where the record indicates that the defendant may have lacked the ability to make an intelligent waiver"; on facts presented, no colloquy required re jury trial waiver) (citing *United States v. Duarte-Higareda*, 113 F.3d 1000, 1003 (9th Cir. 1997)).

CHAPTER 10. DISCOVERY MOTIONS

As a general proposition, there is no constitutional right to discovery in a criminal case. *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). However, certain discrete areas of discovery do exist.

See also Chapter 6, Motions Re Witnesses.

A. Confidential informants—Discovery.

The government's privilege to withhold disclosure of the identity of an informant stems from *Roviaro v. United States*, 353 U.S. 53, 59 (1957).

In "weigh[ing] the defendant['s] right[] to confront the government's witnesses against the government's interest in not compromising investigations and in protecting the informant's identity," three factors must be examined:

(1) the degree to which the informant was involved in the criminal activity;

(2) how helpful the informant's testimony would be to the defendant; [and]

(3) the government's interest in non-disclosure.

United States v. Gil, 58 F.3d 1414, 1421 (9th Cir.) (citations omitted), *cert. denied*, 516 U.S. 969 (1995).

1. *Test*. Disclosure is required only where it would be relevant and helpful to the defense or essential to a fair determination of the cause. *Roviaro v. United States*, 353 U.S. 53, 60–61 (1957); *United States v. Hernandez-Berceda*, 572 F.2d 680, 682 (9th Cir.), *cert. denied*, 436

U.S. 949 (1978). *See also United States v. Henderson*, 241 F.3d 638, 645 (9th Cir. 2000) ("To obtain disclosure, a defendant must show a need for the information, and in doing so, must show more than a 'mere suspicion' that the informant has information which will prove 'relevant and helpful' to his defense, or that will be essential to a fair trial.") (citations omitted), *cert. denied*, 532 U.S. 986 (2001).

The fact that a confidential informant observed criminal conduct does not mean disclosure would be helpful to the defense. *United States v. Williams*, 898 F.2d 1400, 1402 (9th Cir. 1990) (confidential informant's identity would not have been helpful to defense where informant's purchase of cocaine from defendant was used to obtain search warrant but was not charged); *United States v. Fixen*, 780 F.2d 1434, 1435, 1440 (9th Cir. 1986) (disclosure of confidential informant would not have been helpful where informant arranged with defendant for delivery of cocaine).

2. *Burden of proof*. The burden of proof is on the defendant to demonstrate the need for disclosure. *United States v. Williams*, 898 F.2d 1400, 1402 (9th Cir. 1990); *United States v. Fixen*, 780 F.2d 1434, 1439 (9th Cir. 1986) (citations omitted).

3. *Speculation insufficient*. There must be more than mere speculation that disclosure would be helpful. *United States v. Trejo-Zambrano*, 582 F.2d 460, 466 (9th Cir.) (citation omitted), *cert. denied sub nom. Fierro-Soza v. United States,* 439 U.S. 1005 (1978).

4. *Tipster*. A mere tipster who has no information either inculpatory or exculpatory need not be disclosed. *United States v. Gil*, 58 F.3d 1414, 1421 (9th Cir.), *cert. denied*, 516 U.S. 969 (1995).

5. *Danger to confidential informant*. The district court must balance:

    a. the extent to which disclosure would be relevant and helpful to the defendant's case, and

    b. the government's interest in protecting the identity of a particular informant.

    United States v. Spires, 3 F.3d 1234, 1238 (9th Cir. 1993) (citation omitted).

6. In camera *hearing*. An *in camera* hearing is a favored procedure. *United States v. Spires*, 3 F.3d. 1234, 1238 (9th Cir. 1993). *See also United States v. Amador-Galvan*, 9 F.3d 1414, 1417 (9th Cir. 1993).

7. *Production of informant*. "The Government is not under any general obligation to produce an informant at trial. The Government, however, is required to exert reasonable efforts to produce an informant whenever the informant's 'presence has been properly requested by the defendant.'" *United States v. LaRizza*, 72 F.3d 775, 779 (9th Cir. 1995) (quoting *United States v. Bonilla*, 615 F.2d 1262, 1264 (9th Cir. 1980)).

8. *Extent of disclosure*. Where disclosure of identity is required, disclosure of an informant's name and felony record, without disclosing his or her address in order to prevent harassment, may be permissible. *Clark v. Ricketts*, 958 F.2d 851, 854–55 (9th Cir. 1991), *cert. denied*, 506 U.S. 838 (1992).

9. *Disclosure when issue is probable cause.* A trial court need not order disclosure of a confidential informant's identity where the sole ground for seeking information is

to determine the existence of probable cause. *McCray v. Illinois*, 386 U.S. 300, 311–13 (1967) (defense entitled to disclosure of informant for trial purposes and "not at [a motion to suppress hearing] to determine probable cause for an arrest or search"); *United States v. Williams*, 898 F.2d 1400, 1401–02 (9th Cir. 1990); *United States v. Fixen*, 780 F.2d 1434, 1439 (9th Cir. 1986). *But see United States v. Anderson*, 509 F.2d 724, 729 (9th Cir. 1974) ("[I]t seems clear that the *McCray* majority did not intend to promulgate a rule which would invariably preclude disclosure of an informant's identity to the accused or his attorney simply because the informant's information related solely to probable cause."), *cert. denied,* 420 U.S. 910 (1975).

B. Jencks Act material.

The Jencks Act, 18 U.S.C. § 3500, requires that the government, on motion of the defendant, disclose any recorded statement or report of a government witness "in the possession of the [government]" after that "witness has testified on direct examination in the trial of the case." 18 U.S.C. § 3500(a), (b).

1. *Definition of a "statement."* A "statement" includes: (1) a written statement made by the witness, (2) a recording or transcription of an oral statement of the witness "which is a substantially verbatim recital" of such statement, or (3) a statement made by a witness to a grand jury. 18 U.S.C. § 3500(e)(1), (2), (3).

2. *"In the possession of the United States."* The Jencks Act applies to any statements of a witness "in the possession of the United States." 18 U.S.C. § 3500(a).

   a. *Scope*. For purposes of the Jencks Act, "in the possession of the United States" has been held to mean in the possession of the prosecutor. *United States v.*

Durham, 941 F.2d 858, 861 (9th Cir. 1991) (citing *United States v. Polizzi*, 801 F.2d 1543, 1552 (9th Cir. 1986)).

***Caveat**: Fed. R. Crim. P. 16(a)(1)(C) and Brady material.*

(1) *Fed. R. Crim. P. 16 definition*. Rule 16(a)(1)(C), has ascribed a broader definition to the phrase "within the . . . control of the government" than is given the Jencks Act term "in the possession of the United States." *See United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir.), *cert. denied*, 493 U.S. 858 (1989).

See also Chapter 10, E., 2., Discovery Motions —"In the possession of the government."

(2) Brady *definition.* For purposes of requests made pursuant to *Brady v. Maryland*, 373 U.S. 83, 87 (1963) and its progeny, "material under the control of the government" has a scope which is broader than the Jencks Act. *United States v. Zuno-Arce*, 44 F.3d 1420, 1427 (9th Cir.), *cert. denied*, 516 U.S. 945 (1995).

See also Chapter 10, B., 2., Discovery Motions —"In the possession of the United States."

b. *Reports of state agents*. Reports of state law enforcement officers have been held to be outside the Jencks Act where they are not "in the possession of the government." *United States v. Durham*, 941 F.2d 858, 861 (9th Cir. 1991). However, if the state law enforcement officer is a member of a joint

investigation with federal officers, the rule may be otherwise. *See Durham*, 941 F.2d at 861 n.3.

3. *"Related to the subject matter of the testimony of the witness."* A witness' statement is discoverable only to the extent that it is "relate[d] to the subject matter as to which the witness has testified." 18 U.S.C. § 3500(b). *See also United States v. Alvarez*, 86 F.3d 901, 906 (9th Cir. 1996), *cert. denied*, 519 U.S. 1082 (1997); *United States v. Wood*, 550 F.2d 435, 440 (9th Cir. 1976) (interview notes of witness were unrelated to subject matter of witness' testimony and were therefore outside Jencks Act).

4. *"Statements"—Application to specific material.*

   a. *Agents' reports*. "[R]eports of government agents made in the course of criminal investigation are subject to production under the Jencks Act if the government agent testifies." *United States v. Alvarez*, 86 F.3d 901, 906 (9th Cir. 1996) (citation omitted), *cert. denied*, 519 U.S. 1082 (1997).

   b. *Summary of witness statement*. A report which is merely an agent's summary of a witness statement is not discoverable under the Jencks Act unless the summary is verbatim or is adopted by the witness. *United States v. Rewald*, 889 F.2d 836, 867 (9th Cir. 1989) (citations omitted), *amended by* 902 F.2d 18, *cert. denied*, 498 U.S. 819 (1990). Accordingly, a police report which merely contains an agent's interpretation or impression of a witness interview is not discoverable. *Rewald*, 889 F.2d at 867 (citations omitted).

   c. *Agent's notes of interview read back to witness.* Notes taken by an agent which are read back to a witness to insure accuracy constitute a statement of the witness for purposes of the Jencks Act. *United States v. Riley*,

189 F.3d 802, 805–06 (9th Cir. 1999) (notes of agent read back to witness to insure accuracy thereby became statement of witness for purposes of Jencks Act).

d. *Rough interview notes*. Rough interview notes of federal agents ordinarily need not be disclosed pursuant to the Jencks Act. *United States v. Alvarez*, 86 F.3d 901, 904 n.2 (9th Cir. 1996) (citation omitted), *cert. denied*, 519 U.S. 1082 (1997); *United States v. Pisello*, 877 F.2d 762, 767–68 (9th Cir. 1989). Rough notes by federal agents must be preserved, however. *United States v. Durham*, 941 F.2d 858, 860–61 (9th Cir. 1991)*; United States v. Harris*, 543 F.2d 1247, 1253 (9th Cir. 1976).

"*Harris* does not go so far as to require that an FBI agent produce rough notes in every case before testifying." *United States v. Williams*, 291 F.3d 1180, 1191 (9th Cir. 2002). *Pisello* "clarified that whether such notes must be produced should be answered on a case-by-case basis after examining all the facts" and "does not require the production of notes when the substance of the notes has been preserved in a formal memorandum, such as a 302 report." *Williams*, 291 F.3d at 1191.

Although rough notes are not ordinarily discoverable under Jencks, they "must be disclosed pursuant to *Brady* if they contain material and exculpatory information." *Alvarez*, 86 F.3d at 904 n.2.

e. *Rough surveillance notes*. An agent's rough notes during surveillance are ordinarily not discoverable due to their incomplete nature. *United States v. Alvarez*, 86 F.3d 901, 906 (9th Cir. 1996) (citation omitted),

cert. denied, 519 U.S. 1082 (1997); *United States v. Spencer*, 618 F.2d 605, 606–07 (9th Cir. 1980).

f. *Tape-recorded surveillance notes*. Tape-recorded surveillance notes are not discoverable because of their rough, incomplete nature. *United States v. Alvarez*, 86 F.3d 901, 906 (9th Cir. 1996), *cert. denied*, 519 U.S. 1082 (1997).

g. *Radio transmissions*. Radio transmissions are not discoverable because of their incomplete nature. *United States v. Bobadilla-Lopez*, 954 F.2d 519, 522–23 (9th Cir. 1992), *cert. denied*, 506 U.S. 1056 (1993).

h. *Government attorney's notes*. Notes taken by a prosecutor which are read back to a witness to ensure accuracy constitute a statement of the witness for purposes of the Jencks Act. *Goldberg v. United States*, 425 U.S. 94, 98, 100–01 (1976); *United States v. Ogbuehi*, 18 F.3d 807, 810–11 (9th Cir. 1994). *Cf. United States v. Riley*, 189 F.3d 802, 805–06 (9th Cir. 1999) (agent's notes of witness interview became Jencks material as to witness when read back to witness to insure accuracy).

5. In camera. It may be necessary for the district court to inspect *in camera* police reports of an interview to determine whether they constitute Jencks material. *United States v. Rewald*, 889 F.2d 836, 867 (9th Cir. 1989), *amended by* 902 F.2d 18, *cert. denied*, 498 U.S. 819 (1990); *United States v. Long*, 715 F.2d 1364, 1366–67 (9th Cir. 1983).

6. *Timing of disclosure.* The court lacks authority to force the government to produce Jencks Act statements before the witness testifies. *United States v. Mills*, 641 F.2d 785, 789–90 (9th Cir.), *cert. denied*, 454 U.S. 902 (1981). An

order requiring earlier disclosure is unenforceable. *United States v. Taylor*, 802 F.2d 1108, 1118 (9th Cir. 1986), *cert. denied*, 479 U.S. 1094 (1987).

7. *Pretrial hearings*. The defense right to Jencks Act disclosure applies to pretrial suppression hearings. Fed. R. Crim. P. 12(h) and 26.2(g); *United States v. Bramble*, 103 F.3d 1475, 1479 (9th Cir. 1996).

C. *Brady* material.

1. *Definition of* Brady *material*. *Brady* material is evidence favorable to an accused and material to either guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *United States v. Dupuy*, 760 F.2d 1492, 1501 n.3 (9th Cir. 1985). "*Brady* material is any evidence material either to guilt or punishment which is favorable to the accused, irrespective of the good faith or bad faith of the prosecution." *United States v. Hanna*, 55 F.3d 1456, 1459 (9th Cir. 1995) (citation omitted).

2. Brady *violation*. "The evidence at issue":

   [1] must be favorable to the accused, either because it is exculpatory, or because it is impeaching;

   [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and

   [3] prejudice must have ensued.

   Strickler v. Greene, 527 U.S. 263, 281–82 (1999). *See also United States v. Howell*, 231 F.3d 615, 624 (9th Cir. 2000), *cert. denied*, 534 U.S.831 (2001).

"A Brady violation occurs when the prosecutor suppresses evidence that is favorable to the accused and prejudice ensues." *United States v. Booth*, 309 F.3d 566, 573 (9th Cir. 2002) (nothing apparent about hard drives on repossessed computers that "would have made their allegedly exculpatory nature apparent to the government.") (citations omitted). *See also United States v. Si,* 343 F.3d 1116, 1122–23 (9th Cir. 2003) (names and identifying information regarding on-going investigations with which informant was involved were not favorable).

"[U]nder Brady, an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment." *Strickler v. Greene*, 527 U.S. 263, 288 (1999).

3. *Effect of* Brady *violation*. Failure to turn over *Brady* materials is a constitutional violation if it deprives the defendant of a fair trial. *United States v. Bagley*, 473 U.S. 667, 675 (1985) (citation omitted).

4. *Scope—Exculpatory and impeachment evidence.* The *Brady* rule encompasses impeachment evidence as well as exculpatory evidence. *Kyles v. Whitley*, 514 U.S. 419, 433 (1995); *United States v. Bagley*, 473 U.S. 667, 676 (1985); *United States v. Hanna*, 55 F.3d 1456, 1459 (9th Cir. 1995). However, "not every witness statement which fails to inculpate a defendant should be treated as exculpatory." *United States v. Zuno-Arce*, 44 F.3d 1420, 1426 (9th Cir.) (citation omitted), *cert. denied*, 516 U.S. 945 (1995).

   It includes evidence "known only to police investigators and not to the prosecutor." *Kyles*, 514 U.S. at 438.

5. *No defense request necessary to trigger obligation to disclose.* "The requirements of due process obligate a prosecutor to disclose material exculpatory evidence on its

own motion and without request." *Singh v. Prunty*, 142 F.3d 1157, 1161 (9th Cir.) (citing *Kyles v. Whitley*, 514 U.S. 419, 432–34 (1995) and *United States v. Agurs*, 427 U.S. 97, 107–08 (1976)), *cert. denied*, 525 U.S. 956 (1998). *See also Benn v. Lambert*, 283 F.3d 1040, 1053 (9th Cir.) *cert. denied*, 537 U.S. 942 (2002).

6 *Anticipated testimony*. "Prior statements of a witness that are both material and inconsistent with his anticipated testimony" are *Brady* material. *United States v. Hanna*, 55 F.3d 1456, 1459 (9th Cir. 1995) (citation omitted).

7. *Material within control of government*. *Brady* requires disclosure only of items under the control of the government. *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991) (citation omitted). "[T]he prosecutor is 'deemed to have knowledge of and access to anything in the custody or control of any federal agency participating in the same investigation of the defendant.'" *United States v. Zuno-Arce*, 44 F.3d 1420, 1427 (9th Cir.) (quoting *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir.), *cert. denied*, 493 U.S. 858 (1989)), *cert. denied*, 516 U.S. 945 (1995).

8. *Defense awareness or means of obtaining*. Any allegation of suppression of *Brady* material requires assessment of what the government knew at trial in comparison to the defendant. *Giles v. Maryland*, 386 U.S. 66, 96 (1967) (White, J., concurring); *United States v. Dupuy*, 760 F.2d 1492, 1501–02 n.5 (9th Cir. 1985). If the means of obtaining the evidence were provided to the defendant, the *Brady* claim fails. *Dupuy*, 760 F.2d at 1501–02 n.5 (citations omitted).

9. *Timing of disclosure*. Generally, disclosure of *Brady* material is to occur before trial. *United States v. Nagra*,

147 F.3d 875, 881 (9th Cir. 1998) (citation omitted). Disclosure must be made at a time when it would be of value to the accused. *United States v. Aichele*, 941 F.2d 761, 764 (9th Cir. 1991) (citation omitted).

Substantial opportunity for the defendant to use the information at trial cures any prejudice from delayed disclosure. *United States v. Gordon*, 844 F.2d 1397, 1403 (9th Cir. 1988). *See also United States v. Kearns*, 5 F.3d 1251, 1254 (9th Cir. 1993) (disclosure prior to end of trial, "assuming" this to be untimely, did not require reversal).

A defendant is not entitled to impeachment evidence concerning government witnesses prior to entering a plea agreement. *United States v. Ruiz*, 536 U.S. 622, 625 (2002).

10. *Types of* Brady *material involving witnesses.* "'Evidence impeaching the testimony of a government witness falls within the *Brady* rule when the reliability of the witness may be determinative of a criminal defendant's guilt or innocence.'" *Singh v. Prunty*, 142 F.3d 1157, 1161 (9th Cir.) (quoting *United States v. Brumel-Alvarez*, 991 F.2d 1452, 1458 (9th Cir. 1992)), *cert. denied*, 525 U.S. 956 (1998).

    a. *Criminal history*. The entire criminal history of a government informant is *Brady* material. *United States v. Strifler*, 851 F.2d 1197, 1202 (9th Cir. 1988) ("Normally, the criminal record of a witness is available to the prosecutor and, as it bears on the witness's credibility, must be turned over to the defendant."), *cert. denied*, 489 U.S. 1032 (1989).

    b. *Favorable plea agreements in unrelated cases / Prosecutorial intervention on behalf of cooperating witness*. The prosecutor's dismissal and/or favorable plea settlement of unrelated charges against a

cooperating witness constitutes *Brady* material and must be disclosed. *Singh v. Prunty*, 142 F.3d 1157, 1161–63 (9th Cir.) (dismissal of some charges and witness' plea to solitary charge, as well as prosecutor's intervention regarding bond hearing of witness, constituted *Brady* material), *cert. denied*, 525 U.S. 956 (1998). *See also Benn v. Lambert*, 283 F.3d 1040, 1057 (9th Cir.), *cert. denied*, 537 U.S. 942 (2002).

c. *Probation files*. A criminal defendant has no constitutional right to examine a witness' presentence report. *United States v. Anzalone*, 886 F.2d 229, 233 (9th Cir. 1989); *United States v. Chavez-Vernaza*, 844 F.2d 1368, 1375 (9th Cir. 1987). However, the defense is entitled to *Brady* material contained within a government witness' probation file. *See United States v. Strifler*, 851 F.2d 1197, 1201 (9th Cir. 1988) ("A defendant is entitled to material in a probation file that bears on the credibility of a significant witness in the case."), *cert. denied*, 489 U.S. 1032 (1989). Thus, where a defendant claims that a government witness' pre-sentence investigation report contains *Brady* material, the court may conduct an *in camera* inspection of the report. *Strifler*, 851 F.2d at 1201. *See also United States v. Alvarez*, 358 F.3d 1194, 1209 (9th Cir. 2004) (in camera review of probation files for co-conspirator witnesses required when probation reports not completed).

d. *Payments*. Government payments to witnesses are *Brady* material. *Bagley v. Lumpkin*, 798 F.2d 1297, 1302 (9th Cir. 1986).

e. *Cooperation agreements*. Cooperation agreements are *Brady* material. *United States v. Kojayan*, 8 F.3d 1315, 1322 (9th Cir. 1993).

f. *Pending charges against informant*. Although the fact that the informant currently has pending charges against him or her is proper impeachment, the details of the pending charges are "at most only marginally relevant for impeachment purposes." *United States v. Garcia*, 988 F.2d 965, 969 (9th Cir. 1993). *See also Belmontes v. Woodford*, 350 F.3d 861, 879 (9th Cir. 2003) (state had duty to disclose "any information which bears on credibility" of confidential informant, including state involvement in dismissal or favorable disposition of multiple traffic citations).

g. *Government memorandum re witness*. A government memorandum criticizing the integrity of a confidential informant is *Brady* material. *United States v. Brumel-Alvarez*, 991 F.2d 1452, 1458 (9th Cir. 1992). *See also Benn v. Lambert*, 283 F.3d 1040, 1054 (9th Cir.) (detective's "deactivation memo stating that [witness] . . . could not be trusted to follow departmental rules" constituted *Brady* material), *cert. denied,* 537 U.S. 942 (2002).

h. *Lies during investigation.* Lies by an informant during the investigation are relevant to credibility. *United States v. Bernal-Obeso*, 989 F.2d 331, 335–36 (9th Cir. 1993) (an informant's lies about his criminal record were relevant because informant may also have lied to agents "about the activities of his quarry"). *See also Benn v. Lambert*, 283 F.3d 1040, 1056–57 (9th Cir.), *cert. denied*, 537 U.S. 942 (2002).

i. *Psychiatric report re witness*. *United States v. Sterling*, 742 F.2d 521, 527 (9th Cir. 1984) (district court did not abuse discretion in refusing to provide defense access to psychiatric records of government witness after court inspected records *in camera*), *cert. denied*, 471 U.S. 1099 (1985). *See also United States v. Antone*, 981 F.2d 1059, 1061–62 (9th Cir. 1992).

See also Chapter 6, C., Motions Re Witnesses—Motion for mental examination of witness.

j. *Possible bias, prejudice or motivation*. A witness' possible bias, prejudice or motivation are "subject to exploration at trial, and [are] 'always relevant as discrediting the witness and affecting the weight of his [or her] testimony.'" *Davis v. Alaska*, 415 U.S. 308, 316 (1974) (quoting 3A J. WIGMORE, EVIDENCE § 940, at 775 (Chadbourn rev. 1970)).

k. *Prosecutor's interview notes of government witness*. The interview notes of a government attorney constitute *Brady* material to the extent they contain evidence of conflicting statements by the witness. *United States v. Service Deli Inc.*, 151 F.3d 938, 942–43 (9th Cir. 1998).

D. Alibi.

Regarding discovery related to alibi, as authorized by Fed. R. Crim. P. 12.1, see Chapter 6, L., Motions Re Witnesses—Motions for disclosure re alibi.

E. Fed. R. Crim. P. 16 materials.

1. *Disclosure by government.* "Rule 16 governs pretrial discovery and imposes on the government a continuing duty to disclose evidence 'prior to or during trial.'" *United States v. Mikaelian*, 168 F.3d 380, 389 (9th Cir.) (quoting Fed. R. Crim. P. 16(c)), *amended by* 180 F.3d 1091 (1999).

Upon request of the defendant pursuant to Fed. R. Crim. P. 16(a), disclosure must include the following items:

a. *Oral statement of defendant.* "Upon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial." Fed. R. Crim. P.16(a)(1)(A) (2002);

b. *Written or recorded statement of defendant.* "Upon defendant's request, the government must disclose. . . any relevant written or recorded statement by the defendant . . . " as well as "the portion of any written record containing the substance of any relevant oral statement made before or after arrest if the defendant made the statement in response to interrogation by a person the defendant knew was a government agent," and "the defendant's recorded testimony before a grand jury relating to the charged offense." Fed. R. Crim. P 16(a)(1)(B)(i), (ii), and (iii) (2002);

c. *Defendant's prior record.* "[T]he defendant's prior criminal record . . . ." Fed. R. Crim. P. 16(a)(1)(D) (2002);

d. *Documents and tangible objects.* "[T]he government must permit the defendant to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items, if the item is within the government's possession, custody, or control . . . ." Fed. R. Crim. P. 16(a)(1)(E) (2002);

e. *Reports of examinations and tests.* "[T]he government must permit a defendant to inspect and to copy or photograph the results or reports of any physical or mental examination and of any scientific test or

experiment . . . ." Fed. R. Crim. P. 16(a)(1)(F) (2002). *See also United States v. Cedano-Arellano*, 332 F.3d 568, 571 (9th Cir. 2003) (holding that defense was entitled to narcotics dog's training and certification records), *cert. denied*, 124 U.S. 1119 (2004);

f. *Expert witnesses*. "[A] written summary of [expert] testimony that the government intends to use . . . during its case-in-chief at trial . . . . [This] summary . . . shall describe the witnesses' opinions, the bases and the reasons for those opinions, and the witnesses' qualifications." Fed. R. Crim. P. 16(a)(1)(G) (2002). *See also United States v. Mendoza-Paz*, 286 F.3d 1104, 1111 (9th Cir.) (government's Rule 16(a)(1)(E) disclosure regarding drug valuation expert and chemist were sufficient to provide defendant "with a fair opportunity to test the merit of the expert's testimony through focused cross-examination") (citation and internal quotations omitted), *cert. denied*, 537 U.S. 1038 (2002); *United States v. Figueroa-Lopez*, 125 F.3d 1241, 1246–47 (9th Cir. 1997) (government failed to comply with Rule 16 when it did not provide the defense with information from a government expert regarding drug trafficking modus operandi, although error was harmless), *cert. denied*, 523 U.S. 1131 (1998).

Requests and disclosures should be timely made pursuant to Rule 16(a)(1)(E). *United States v. VonWillie*, 59 F.3d 922, 928 n.4 (9th Cir. 1995) (citation omitted); and

g. *Lay witness list and witness summaries*. Lay witness lists and/or summaries are beyond Rule 16 and in so ordering the court commits error. *United States v.*

Hicks, 103 F.3d 837, 841 (9th Cir. 1996), *cert. denied*, 520 U.S. 1193 (1997).

See also Chapter 6, G., 4., Motions Re Witnesses —*Daubert* hearing–Form.

2. *"In the possession of the government."*

   a. *Out-of-district documents.* "'[I]n the possession of the government' under Rule 16(a)(1)[E] may sometimes include out-of-district documents of which the prosecutor has knowledge and to which the prosecutor has access." *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir.), *cert. denied*, 493 U.S. 858 (1989).

   b. *Federal agencies*. It has been held that the prosecutor has "knowledge of and access to anything in the possession, custody or control of any federal agency participating in the same investigation of the defendant." *United States v. Bryan*, 868 F.2d 1032, 1036 (9th Cir.), *cert. denied*, 493 U.S. 858 (1989). *But see United States v. Santiago*, 46 F.3d 885, 893 (9th Cir.) (no requirement that agency have participated in same investigation), *cert. denied*, 515 U.S. 1162 (1995).

3. *Reciprocal disclosure by defendant.* Reciprocal discovery obligations on the part of the defendant are triggered by certain defense requests under Fed. R. Crim. P. 16. The 2002 amendments changed Rule 16 so as to state that reciprocal discovery of documents and objects, as well as reports of examinations and tests, is required when the "defendant intends to use [these items] in the defendant's case in chief at trial." Fed. R. Crim. P. 16 (b)(1)(A)(ii) and (B)(ii).

   a. *Documents and tangible objects.* If a defendant has requested and received disclosure of documents and

tangible objects from the government pursuant to Rule 16(a)(1)(E) or (F), upon request of the government, defendant must provide reciprocal discovery. Fed. R. Crim. P. 16(b)(1)(A) (2002).

b. *Examinations and tests.* Rule 16(b)(1)(B) (2002) provides for similar reciprocal disclosure as to results or reports of examinations and tests following a defense request pursuant to Rule 16(a)(1)(E) or (F).

c. *Expert witness.* Reciprocal discovery is provided for, *inter alia*, if the defendant has received pursuant to Rule 16(a)(1)(G) a written summary of a government expert. *But see United States v. Finley*, 301 F.3d 1000, 1017 (9th Cir. 2002) (district court committed reversible error in excluding defense expert witness for alleged disclosure violation; even though defense disclosure re expert witness "may not have been as full and complete as it could have been," it "met the minimum requirements of Rule 16(b)(1)(C)."

F. Fed R. Crim P. 17(c)(1)—Subpoena for production of documentary evidence.

Fed. R. Crim. P. 17(c)(1) (2002) states in part that "[a] subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them."

The Ninth Circuit has not specifically addressed many of the issues surrounding Rule 17(c) subpoenas, although district courts within the Ninth Circuit have ruled upon certain issues common to pretrial issuance of these subpoenas.

1. *In general.* The purpose of Rule 17(c) is to "expedite the trial by providing a time and place before trial for the inspection of subpoenaed materials." *United States v. Nixon*, 418 U.S. 683, 698–99 (1974) (citation omitted).

   Ordinarily, Rule 17(c) should not be employed as a discovery device. *Nixon*, 418 U.S. at 698 (citation omitted); *Bowman Dairy Co. v. United States*, 341 U.S. 214, 220 (1951). *But see United States v. Tomison*, 969 F. Supp. 587, 593 n.14 (E.D. Cal. 1997) ("Rule 17(c) may well be a proper device for discovering documents in the hands of third parties.").

2. *Pretrial production*. Pretrial production of items pursuant to Rule 17 (c) is appropriate when the documents are:

   (a) evidentiary and relevant,

   (b) not otherwise procurable in advance of trial,

   (c) necessary for proper preparation for trial, and

   (d) sought in good faith.

   United States v. Nixon, 418 U.S. 683, 699–700 (1974). *See also United States v. Reed*, 726 F.2d 570, 577 (9th Cir.) (Rule 17(c) requires a showing of "relevancy, admissibility, and specificity"), *cert. denied*, 469 U.S. 871 (1984); *United States v. Tomison*, 969 F. Supp. 587, 593 (E.D. Cal. 1997) (evidence is obtainable pursuant to Rule 17(c) where the evidence is "too massive for the defendant to adequately review unless obtained prior to trial" and the other requirements are met); *United States v. Jenkins*, 895 F. Supp. 1389, 1393 (D. Haw. 1995).

3. *Ex parte application*. "[Rule 17(c)] should be interpreted to provide for ex parte applications in situations . . . where the defendant seeks to serve a subpoena duces tecum for

the pre-trial production of documents on a third party, and cannot make the required showing without revealing trial strategy." *United States v. Tomison*, 969 F. Supp. 587, 595 (E.D. Cal. 1997). *See also United States v. Jenkins*, 895 F. Supp. 1389, 1397 (D. Haw. 1995).

4. *Ex parte inspection*. "Rule 17(c) makes no provision for allowing only one party access to the documents." *United States v. Jenkins*, 895 F. Supp. 1389, 1394 (D. Haw. 1995) (citation omitted).

5. *Pretrial inspection by parties*. "Rule 17(c) provides that if the court determines that documents may be produced before the court prior to trial, the court may allow the documents 'to be inspected by the parties and their attorneys.'" *United States v. Jenkins*, 895 F. Supp. 1389, 1394 (D. Haw. 1995) (citation omitted).

6. *Impeachment*. "Courts have repeatedly held that Rule 17(c) subpoenas should not be used to obtain, before trial, materials to be used for impeachment purposes." *United States v. Jenkins*, 895 F. Supp. 1389, 1393–94 (D. Haw. 1995) (citing *inter alia United States v. Nixon*, 418 U.S. 683, 701 (1974) and *United States v. Fields*, 663 F.2d 880, 881 (9th Cir. 1981)).

7. *Standing to move to quash subpoena*. "By providing the basis for a motion to quash to be that 'compliance' would be 'unreasonable or oppressive,' the language [of Rule 17(c)] suggests that the party to whom the subpoena is directed is the only party with 'standing' to oppose it." *United States v. Tomison*, 969 F. Supp. 587, 591–92 (E.D. Cal. 1997).

G. Production of grand jury transcripts.

A motion to produce grand jury transcripts is made pursuant to Fed. R. Crim. P. 6(e). In order to be entitled to early disclosure of grand jury transcripts, a particularized need must be established. The defense has the burden of showing that disclosure is appropriate. *Dennis v. United States*, 384 U.S. 855, 870–72 (1966); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 400 (1959).

1. *Standard for disclosure*. "The standards the district court should follow" in granting disclosure of the grand jury transcripts are "(1) that the desired material will avoid a possible injustice, (2) that the need for disclosure is greater than the need for continued secrecy, and (3) that only the relevant parts of the transcripts should be disclosed." *United States v. Plummer*, 941 F.2d 799, 806 (9th Cir. 1991) (citation omitted).

2. *Deletion of extraneous information*. When a particularized need exists, the district judge's function is reduced to eliminating only extraneous material or issuing protective orders in unusual situations. *United States v. Plummer*, 941 F.2d 799, 806 (9th Cir. 1991) (citation omitted).

   "Disclosure of grand jury transcripts should be limited to those portions of the transcripts for which a compelling need for disclosure outweighs the need for continued secrecy." *United States v. Fischbach & Moore, Inc.*, 776 F.2d 839, 845–46 (9th Cir. 1985) (citing *Douglas Oil Co. of Cal. v. Petrol Stops Northwest*, 441 U.S. 211, 228–29 (1979) and *In re Barker*, 741 F.2d 250, 255–56 (9th Cir. 1984)).

3. *Order granting production.* If the district court orders disclosure, it must specify the reasons for concluding that a compelling need for disclosure exists. *United States v.*

Fischbach & Moore, Inc., 776 F.2d 839, 845 (9th Cir. 1985) (absent explanation by district court as to reason for ruling, the district court provides the circuit court "no basis on which to review [its] conclusion").

4. *Mere speculation does not constitute particularized need.* Mere speculation that improprieties occurred before the grand jury is inadequate to establish a particularized need. *United States v. Walczak*, 783 F.2d 852, 857 (9th Cir. 1986).

5. *Fed. R. Crim. P. 26.2 disclosure—Discoverability at suppression hearing*. A witness' testimony before the grand jury which relates to the same subject about which the witness testified at a motion to suppress hearing or trial is discoverable after the witness has testified on direct examination. Fed. R. Crim. P. 12(h) and 26.2(g) (suppression hearing), Fed. R. Crim. P. 26.2(f)(3).

6. *Government disclosure to third parties*. Before the government may release grand jury materials to third parties pursuant to Fed. R. Crim. P. 6(e)(3) including private parties, it must give notice to adverse parties unless it makes a specific showing of the need to make the disclosure *ex parte*. *United States v. Nix*, 21 F.3d 347, 351–52 (9th Cir. 1994). The government must meet the same standard for disclosure as required of a private party. *Nix,* 21 F.3d at 351. Disclosure may also be made to state and local authorities where violations of state criminal law may be involved. Fed. R. Crim. P. 6(e)(3)(E)(iii) (2002). ***Note***: Pursuant to the USA PATRIOT ACT of 2001, the 2002 amendment to Rule 6(e)(3)(D) permits disclosure of grand jury matters relating to terrorist activities to other federal officials.

7. *Witness' request for grand jury testimony.* Although a witness is not entitled to a transcript of his or her grand jury testimony as a matter of right, *United States v. Fitch*, 472 F.2d 548, 549 n.6 (9th Cir.), *cert. denied sub nom. Meisel v. United States*, 412 U.S. 954 (1973), disclosure may be ordered unless the government demonstrates a particularized and substantial reason why disclosure should not occur. *Bursey v. United States*, 466 F.2d 1059, 1080 (9th Cir. 1972) (citation omitted). The general rule of secrecy set forth in Fed. R. Crim. P. 6(e)(2) does not apply to witnesses. *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 425 (1983).

H. Bill of particulars.

Fed. R. Crim. P. 7(f) (2002) authorizes the court to "direct the filing of a bill of particulars."

1. *Purpose.* The purpose of a bill of particulars is:

   a. to reduce surprise;

   b. to enable adequate trial preparation; and

   c. to protect the defendant against being placed in double jeopardy.

   United States v. Long, 706 F.2d 1044, 1054 (9th Cir. 1983) (citation omitted); *United States v. Giese*, 597 F.2d 1170, 1180–81 (9th Cir.) (defendant was not entitled to "the 'when, where, and how' of every act in furtherance of the conspiracy") (citation omitted), *cert. denied*, 444 U.S. 979 (1979).

   "A defendant is not entitled to know all the *evidence* the government intends to produce but only the *theory* of the government's case." *United States v. Ryland*, 806 F.2d

941, 942 (9th Cir. 1986) (citation omitted), *cert. denied*, 481 U.S. 1057 (1987).

2. *Test*. The test for the granting of a bill of particulars is whether the indictment is so vague that a bill of particulars is required. *United States v. Giese*, 597 F.2d 1170, 1180 (9th Cir.), *cert. denied*, 444 U.S. 979 (1979).

3. *Full discovery obviates need.* "Full discovery . . . obviates the need for a bill of particulars." *United States v. Giese*, 597 F.2d 1170, 1180 (9th Cir.) (citation omitted), *cert. denied*, 444 U.S. 979 (1979).

I. Personnel files.

Pursuant to *United States v. Henthorn*, 931 F.2d 29, 30–31 (9th Cir. 1991), defense counsel is entitled to have the government ask federal agencies employing government witnesses who are federal agents as to whether any of the federal agents have within their personnel files information adversely affecting the credibility of the witnesses. *See, e.g., United States v. Calise*, 996 F.2d 1019, 1021 (9th Cir. 1993) (notation in ATF agent's file that a magistrate judge had found the agent's testimony "absolutely incredible" was discoverable), *cert. denied*, 510 U.S. 1078 (1994).

1. *Limited to federal agents*. The scope of *Henthorn* is limited to federal agencies. *United States v. Dominguez-Villa*, 954 F.2d 562, 566 (9th Cir. 1992) (*Henthorn* requirements are inapplicable to personnel files of state law enforcement officers).

2. *Applies to trial witnesses*. "Under *Henthorn*, the government has a duty, upon defendant's request for production, to inspect for material information the personnel records of federal law enforcement officers who

will testify at trial . . . ." *United States v. Santiago*, 46 F.3d 885, 895 (9th Cir.) (citation omitted), *cert. denied*, 515 U.S. 1162 (1995). *See also United States v. Booth*, 309 F.3d 566, 574 (9th Cir. 2002) (no *Henthorn* violation as a result of prosecution's failure to review personnel file of FBI agent who had no role in the investigation of the case and was not a potential government witness).

3. *Review of personnel files by prosecutor*. The district court cannot require that the prosecutor personally inspect personnel files for *Henthorn* material. *United States v. Herring*, 83 F.3d 1120, 1121 (9th Cir. 1996); *United States v. Jennings*, 960 F.2d 1488, 1491–92 (9th Cir. 1992).

J. Government funded discovery.

A motion for government funded assistance for an indigent defendant may be based upon 18 U.S.C. § 3006A(e).

1. *Transcripts of tape-recording*. A motion for government-funded transcripts of tape-recordings must establish that denial will result in ineffective assistance of counsel. *United States v. Becerra*, 992 F.2d 960, 965 (9th Cir. 1993) (no error in trial court's denial where reasonably retained counsel would have, prior to requesting transcripts, first listened to tape recording and determined relevance) (citation omitted).

   In order to be entitled to transcripts, defense counsel must show:

   (1) that reasonably competent retained counsel would require the transcription services for a client who could pay for them and

   (2) that the lack of services [would] prejudice[] his defense.

Becerra, 992 F.2d at 965 (citation omitted).

2. *Investigative services*. In order to be entitled to investigative services, an indigent defendant "must demonstrate that reasonably competent retained counsel would require the investigative work for a client with the means to pay for it." *United States v. Smith*, 893 F.2d 1573, 1580 (9th Cir. 1990).

3. *Expert witnesses*. *See* Chapter 6, G., 4., Motions Re Witnesses,—*Daubert* hearing–Form.

K. Co-conspirator statements.

1. *Admissibility*. Fed. R. Evid. 801(d)(2)(E) states that "[a] statement is not hearsay if . . . [t]he statement is offered against a party and is . . . a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

2. *No pretrial hearing required*. Although "[s]tatements by one co-conspirator during the course and in furtherance of a conspiracy are admissible as vicarious admissions against another co-conspirator," *United States v. Zemek*, 634 F.2d 1159, 1169 (9th Cir. 1980) (citation omitted), *cert. denied sub nom. Mazzuca v. United States*, 452 U.S. 905, *sub nom. Williams v. United States*, 452 U.S. 905, *sub nom. Janovich v. United States*, 452 U.S. 905, *sub nom. Caliguri v. United States*, 450 U.S. 985, *sub nom. Carbone v. United States*, 450 U.S. 916 (1981), the Ninth Circuit does not require a pretrial determination of the admissibility of co-conspirator statements. *United States v. Perez*, 658 F.2d 654, 658 n.2 (9th Cir. 1981) (citing *Zemek*, 634 F.2d at 1169–70)), in contrast to *United States v. James*, 576 F.2d 1121 (5th Cir. 1978), *modified en banc*, 590 F.2d 575, *cert. denied*, 442 U.S. 917 (1979).

L. Sentencing guideline information.

A defendant is not entitled to be apprised of sentencing guideline information pretrial. *United States v. Turner*, 881 F.2d 684, 687 (9th Cir.) (defendant not entitled to sentencing guideline information prior to a change of plea), *cert. denied*, 493 U.S. 871 (1989). *But see Blakely v. Washington*, 124 S. Ct 2531 (2004) (holding that the Washington State sentencing procedure violates *Apprendi* because it permits sentencing enhancements found by the court but not admitted to by the defendant and not found by the jury; the statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant, not the maximum sentence a judge may impose after finding additional facts). *See also United States v. Ameline*, 376 F.3d 967, 974-75 (9th Cir. 2004) (holding that *Blakely* applies to the federal sentencing guidelines). ***Caveat***: As this edition goes to print, petitions have been filed with the United States Supreme Court seeking further clarification of *Blakely.*

CHAPTER 11. MOTIONS TO DISMISS

A. Motion to dismiss—Government.

1. *Dismissal before trial*. While a motion to dismiss made by the government pursuant to Fed. R. Crim. P. 48(a) must be by leave of the court, where the motion is unopposed, only under extraordinary circumstances may the motion be denied. *United States v. Gonzalez*, 58 F.3d 459, 461 (9th Cir. 1995).

   The court may deny the motion if necessary to prevent "prosecutorial harassment, *e.g.*, charging, dismissing, and recharging, when the government moves to dismiss an indictment over the defendant's objection." *Rinaldi v. United States*, 434 U.S. 22, 30 n.15 (1977) (citations omitted); *Gonzalez*, 58 F.3d at 461.

2. *Dismissal during trial*. "The government may not dismiss the prosecution during trial without the defendant's consent." Fed. R. Crim. P. 48(a) (2002).

B. Motion to dismiss—Defense.

1. *Pre-indictment delay—Due process*. The due process clause of the Fifth Amendment guarantees that impermissible preaccusatory delay will not occur. *United States v. Manning*, 56 F.3d 1188, 1194 (9th Cir. 1995); *United States v. Krasn*, 614 F.2d 1229, 1235 (9th Cir. 1980) (citations omitted). However, "[p]reindictment delay violates due process only if the defendant proves actual, nonspeculative prejudice from the delay, and if the length of the delay when balanced against the reason for it offends fundamental conceptions of justice." *United States v. Dudden*, 65 F.3d 1461, 1466 (9th Cir. 1995) (citation omitted). *See also United States v. Gregory*, 322

F.3d 1157, 1165 (9th Cir. 2003) (defendant failed to "show that he suffered 'actual, non-speculative prejudice from the delay and that the delay, when weighed against the government's reasons for it, offends those fundamental conceptions of justice which lie at the base of our civil and political institutions.'") (quoting *United States v. Gilbert*, 266 F.3d 1180, 1187 (9th Cir. 2001); *United States v. Ross*, 123 F.3d 1181, 1184–87 (9th Cir. 1997) (no actual prejudice demonstrated despite pre-indictment delay of twelve years in mail bomb prosecution), *cert. denied*, 522 U.S. 1066 (1998); *Manning*, 56 F.3d at 1194 (citation omitted); *United States v. Butz*, 982 F.2d 1378, 1380 (9th Cir.) (citation omitted), *cert. denied*, 510 U.S. 891 (1993).

a. *Burden of proof*. The defense has the heavy burden of establishing "actual, non-speculative prejudice", *e.g.*, loss of testimony. *United States v. Huntley*, 976 F.2d 1287, 1290 (9th Cir. 1992) (citations omitted); *United States v. Krasn*, 614 F.2d 1229, 1235 (9th Cir. 1980) (citation omitted).

   Before an indictment can be dismissed, a defendant must show:

   (1) that substantial prejudice resulted from the delay in seeking an indictment; and

   (2) that the delay was an intentional measure to gain a tactical advantage.

   United States v. Marion, 404 U.S. 307, 324 (1971).

b. *Statute of limitations*. "'[T]he applicable statute of limitations . . . is . . . the primary guarantee against bringing overly stale criminal charges.'" *United States v. Marion*, 404 U.S. 307, 322 (1971) (quoting *United States v. Ewell*, 386 U.S. 116, 122 (1966)).

c. *Factors*. Factors to be weighed are:

(1) the actual prejudice to the defendant,

(2) the length of the delay, and

(3) the reason for the delay.

United States v. Manning, 56 F.3d 1188, 1194 (9th Cir. 1995); *United States v. Krasn*, 614 F.2d 1229, 1235 (9th Cir. 1980) (citations omitted).

2. *Pre-indictment delay—Fed. R. Crim. P. 48(b)*. Fed. R. Crim. P. 48(b) (2002) states that "[t]he court may dismiss an indictment, information, or complaint if unnecessary delay occurs in: (1) presenting a charge to a grand jury; (2) filing an information against a defendant; or (3) bringing a defendant to trial."

"Although the rule confers discretion upon the district judge, a Rule 48(b) dismissal 'should be imposed only in extreme circumstances.'" *United States v. Huntley*, 976 F.2d 1287, 1291 (9th Cir. 1992) (quoting *United States v. Sears, Roebuck & Co., Inc.*, 877 F.2d 734, 737 (9th Cir. 1989)). *See also United States v. Jiang*, 214 F.3d 1099, 1101 (9th Cir. 2000).

3. *Post-indictment delay*.

a. *Sixth Amendment violation*. There is a four-part inquiry that governs Sixth Amendment speedy trial challenges:

(1) whether the delay was uncommonly long;

(2) whether the government or the defendant was responsible for the delay;

(3) whether the defendant asserted his or her right to a speedy trial; and,

(4) whether the defendant suffered prejudice.

Doggett v. United States, 505 U.S. 647, 651 (1992) (8½-year delay between indictment and arrest violated defendant's Sixth Amendment right to a speedy trial); *Barker v. Wingo*, 407 U.S. 514, 530 (1972). *See also United States v. Gregory*, 322 F.3d 1157, 1161 (9th Cir. 2003) (citing the four *Barker* factors); *McNeely v. Blanas,* 336 F.3d 822, 826 (9th Cir. 2003) (four-part *Barker v. Wingo* test applied to unaccounted for delay of almost 2 ½ years; dismissal with prejudice required based on Sixth Amendment right to speedy trial); *United States v. Murillo*, 288 F.3d 1126, 1132–33 (9th Cir.) (although "[a] delay of thirteen months between arrest and trial is 'presumptively prejudicial' and triggers a *Barker* inquiry," weighing of the four *Barker* factors showed no constitutional violation), *cert. denied*, 537 U.S. 931 (2002); *United States v. Lam,* 251 F.3d 852 (9th Cir.) (22-month delay between first superseding indictment and trial date did not violate defendant's Sixth Amendment right to a speedy trial, applying four factor test of *Barker v. Wingo*), *amended by* 262 F.3d 1033, *cert. denied*, 534 U.S. 1013 (2001).

Although delay alone may demonstrate actual prejudice, "[a]ctual prejudice is typically demonstrated in three ways: 'oppressive pretrial incarceration, anxiety and concern of the accused, and the possibility that the [accused's] defense will be impaired.'" *United States v. Gregory*, 322 F.3d 1157, 1163 (9th Cir. 2003) (on facts presented, 22-month delay did not require dismissal; defendant was charged in first superseding

indictment as co-defendant in drug-trafficking and 22 months later and after a guilty plea by defendant, in a superseding indictment alleging drug-trafficking on the part of co-defendants and money laundering by the defendant) (quoting *Doggett,* 505 U.S. at 654).

b. *Speedy Trial Act violation.* The Speedy Trial Act appears at 18 U.S.C. §§ 3161–74.

(1) *Rule.* A defendant is to be brought to trial within 70 days of indictment or initial appearance, whichever is later, not counting excludable time. 18 U.S.C. § 3161(c)(1) and (h).

(2) *Dismissal is sanction for violation.* "If a defendant is not brought to trial within the time limit required by section 3161(c) as extended by section 3161(h), the information or indictment shall be dismissed on motion of the defendant." 18 U.S.C. § 3162(a)(2).

(a) *With or without prejudice.* Where dismissal is required, the district court must determine whether dismissal should be with or without prejudice. 18 U.S.C. § 3162(a)(2); *United States v. Hardeman*, 249 F.3d 826, 829 (9th Cir. 2000) (citations omitted).

(b) *Factors to be considered.* "In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of [the Speedy Trial Act]

and on the administration of justice." 18 U.S.C. § 3162(a)(2).

(3) *Waiver.* "Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under [18 U.S.C. § 3162(a)(2)]." 18 U.S.C. § 3162(a)(2). "The [Speedy Trial] Act provides for no exception to the waiver of the right to dismissal for failure to make a timely motion." *United States v. Brickey,* 289 F.3d 1144, 1150 (9th Cir. 2002) (citation omitted). *See also United States v. Lam*, 251 F.3d 852 (9th Cir.), *amended by* 262 F.3d 1033, *cert. denied*, 534 U.S. 1013 (2001)

See also Chapter11, B., 13., Motion to Dismiss—Statute of Limitations (six month grace period following Speedy Trial Act dismissal without prejudice).

c. *Superseding indictment*.

(1) *Content*. A superseding indictment, "issued while the original indictment was pending and which reasserted the same charge, was timely." *United States v. Carrasco,* 257 F.3d 1045, 1052 (9th Cir.) (citation omitted), *cert. denied*, 534 U.S. 1061 (2001). *See also United States v. Palumba*, 31 F.3d 1456, 1463–64 (9th Cir. 1994) (when mail fraud charges were contained in the original complaint, omitted from the original indictment, then reasserted in the superseding indictment, the Speedy Trial Act was violated.)

(2) *Timeliness*. Delay in the filing of a superseding indictment may be a basis for dismissal. *United States v. Turner*, 926 F.2d 883, 889 (9th Cir.) (on facts presented, four-month delay between

indictment and superseding indictment did not violate "any fundamental notions of justice"), *cert. denied*, 502 U.S. 830 (1991).

See also Chapter 3, B., Motions to Continue Trial—Speedy Trial Act.

4. *Double jeopardy violation*. The Fifth Amendment protects a defendant against being twice put in jeopardy. *Abney v. United States*, 431 U.S. 651, 661 (1977) (citations omitted). "The Fifth Amendment Double Jeopardy Clause forbids the duplicative prosecution of a defendant for the 'same offense.'" *United States v. James*, 109 F.3d 597, 600 (9th Cir. 1997) (citing U.S. CONST. amend. V and *Blockburger v. United States*, 284 U.S. 299, 304 (1932)). *See also United States v. Hickey*, 367 F.3d 888 (9th Cir. 2004).

   a. *Former test—"Same conduct" test. Grady v. Corbin*, 495 U.S. 508, 521 (1990), held that a subsequent prosecution is barred by the double jeopardy clause if the government will attempt to prove an offense based on conduct for which the defendant has already been prosecuted. *Grady* was overruled in *United States v. Dixon*, 509 U.S. 688, 703–04 (1993).

   b. *Current test*—Blockburger—*"Same elements" test*.

      (1) Grady *overruled*. In *United States v. Dixon*, 509 U.S. 688, 703–04 (1993), the Supreme Court overruled *Grady v. Corbin*, 495 U.S. 508, 521 (1990), and returned to the "same elements" test announced in *Blockburger v. United States*, 284 U.S. 299, 304 (1932). "*Blockburger* is the only test for analyzing a double jeopardy claim . . . ."

United States v. Wright, 79 F.3d 112, 114 (9th Cir. 1996).

(2) *"Same elements" test*. "Under *Blockburger*, 'double jeopardy is not implicated so long as each violation requires proof of an element which the other does not.'" *United States v. Hickey*, 367 F.3d 888, 892 (9th Cir. 2004) (quoting *United States v. Vargas-Castillo*, 329 F.3d 715, 720 (9th Cir.), *cert. denied*, 124 S. Ct, 504 (2003)). *See also United States v. Williams*, 291 F.3d 1180, 1186–88 (9th Cir. 2002) (applying *Blockburger*, prosecution "under two separate provisions of the Mann Act for each trip across state lines with a minor prostitute" did not violate the Double Jeopardy Clause because each statute requires "proof of a fact that the other does not").

This test is also referred to as the "same elements" test and provides that if each offense contains identical elements, double jeopardy precludes successive prosecution. "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not." *Blockburger*, 284 U.S. at 304 (citations omitted). *See also Rutledge v. United States*, 517 U.S. 292, 297 (1996).

c. *Application of double jeopardy principles to specific situations.*

(1) *Successive federal/state prosecutions*.

(a) *In general*. "Under the separate sovereign doctrine, a single act that violates the laws of

two separate sovereigns constitutes two separate crimes, and prosecutions by each of these sovereigns does not violate the Double Jeopardy Clause." *United States v. Price*, 314 F.3d 417, 420 (9th Cir. 2002) (Clark County Health District's action against company for alleged violation of the Clark County Health District Air Pollution Control Regulations followed by federal prosecution of company for alleged violation of Clean Air Act constituted actions by separate sovereigns and did not violate the double jeopardy principles) (citing *Heath v. Alabama*, 474 U.S. 82, 88 (1985)). *See also United States v. Koon*, 34 F.3d 1416, 1438 (9th Cir. 1994) (federal prosecution following state prosecution for same conduct did not violate double jeopardy) (citing *Heath v. Alabama*, 474 U.S. 82, 93 (1985) and *United States v. Guy*, 903 F.2d 1240, 1242 (9th Cir. 1990)), *aff'd in part, rev'd in part, on other grounds*, 518 U.S. 81 (1996). *See also United States v. Figueroa-Soto*, 938 F.2d 1015, 1020 (9th Cir. 1991) ("[T]he same acts may be punished by two sovereigns if they offend the laws of both sovereigns."), *cert. denied*, 502 U.S. 1098 (1992).

(b) *Sham or tool exception*. The double jeopardy clause does not prohibit successive federal/state prosecutions for the same conduct unless the first prosecution is a sham or tool to assist the second prosecution. *Bartkus v. Illinois*, 359 U.S. 121, 123–24, 136–37 (1959) (no double jeopardy violation where, following defendant's acquittal on federal bank robbery charges, federal officials persuaded state to

prosecute defendant for state robbery charges arising from same conduct); *United States v. Koon*, 34 F.3d 1416, 1438–39 (9th Cir. 1994) (federal prosecution following state prosecution for same conduct did not violate double jeopardy), *aff'd in part, rev'd in part, on other grounds*, 518 U.S. 81 (1996); *United States v. Figueroa-Soto*, 938 F.2d 1015, 1018–20 (9th Cir. 1991) (successive state/federal prosecution regarding drug trafficking permissible), *cert. denied*, 502 U.S. 1098 (1992).

"As a practical matter . . . it is extremely difficult and highly unusual to prove that a prosecution by one government is a tool, a sham or a cover for the other government." *Figueroa-Soto*, 938 F.2d at 1019.

(2) *Successive prosecutions in same court*.

(a) *In general*. A general verdict of not guilty precludes retrial on lesser-included offenses. *Ball v. United States*, 163 U.S. 662, 670 (1896). *See also Brown v. Ohio*, 432 U.S. 161, 168 (1977) (prosecution for auto theft following conviction for lesser included offense of joyriding barred by Double Jeopardy Clause, citing *Blockburger* test); *Wilson v. Czerniak*, 355 F.3d 1151,1152 (9th Cir. 2004) (Double Jeopardy Clause prohibited prosecution for aggravated felony murder after defendant had been tried and acquitted of lesser included offense of intentional murder, in multiple count state indictment) (2-1 decision); *United States v. Blount*, 34 F.3d 865, 867–68 (9th Cir. 1994) (court could not acquit on felony and then reinstate lesser-included misdemeanor charges).

The Ninth Circuit applies "a three-pronged test to determine whether a prior prosecution precludes a later one":

(1) were the issues in the two cases sufficiently similar;

(2) was the issue fully litigated in the first action; and

(3) was the issue necessarily decided in the first action.

United States v. Carbullido, 307 F.3d 957, 961 (9th Cir. 2002) (on facts presented, determination of insanity in earlier prosecution precluded second prosecution for another act in same time period based upon collateral estoppel) (quoting *United States v. Stoddard*, 111 F.3d 1450, 1458 (9th Cir. 1997)).

(b) *Filing of new charge after acquittal on related charge*.

(1) *Conspiracy.* "'[T]o determine whether two conspiracy counts charge the same offense and so place the defendant in double jeopardy,' we consider five factors":

[a] the differences in the periods of time covered by the alleged conspiracies;

[b] the places where the conspiracies were alleged to occur;

[c] the persons charged as co-conspirators;

[d] the overt acts alleged to have been committed; and

[e] the statutes alleged to have been violated.

United States v. Stoddard, 111 F.3d 1450, 1454–57 (9th Cir. 1997) (quoting *United States v. Guzman*, 852 F.2d 1117, 1120 (9th Cir. 1988)).

(2) *Management and control of place where controlled substances were distributed.* The crime of knowingly opening or maintaining premises for the purpose of distributing drugs, prohibited by 21 U.S.C. § 856(a)(1), is not the same offense, under the *Blockburger* test, as managing or controlling premises for the purpose of distributing drugs, prohibited by 21 U.S.C. § 856(a)(2). *United States v. Ford*,371 F.3d 550 (9th Cir. 2004) (but acquittal on the former, on facts presented, resulted in collateral estoppel to prosecution for the latter).

(c) *Retrial after reversal for insufficient evidence.* Double jeopardy precludes a retrial where conviction has been reversed for insufficient evidence. *Burks v. United States*, 437 U.S. 1, 18 (1978). *See also United States v. James*, 109 F.3d 597, 600–02 (9th Cir. 1997) (where (1) the government failed to prove that bank was federally insured in prosecution of defendant for four separate bank robberies; (2)

a jury convicted defendant of three robberies but could not reach verdict on the fourth, and (3) the convictions were reversed on appeal due to lack of evidence on the federal insurance issue, the government could not indict defendant on conspiracy to rob banks and prove the three overturned robbery convictions as overt acts of the conspiracy; the fourth robbery could be used as proof of the conspiracy).

(d) *Superseding indictment*. The mere filing of a superseding indictment adding a charge to a pending indictment does not constitute an impermissible "successive prosecution." *United States v. Eshkol*, 108 F.3d 1025, 1027 (9th Cir.) (filing of superseding indictment did not violate defendant's "due process right, independent of the Fifth Amendment protection against double jeopardy, to be free from successive prosecutions"), *cert. denied*, 522 U.S. 841 (1997).

(e) *Rejection of guilty plea*. While it is permissible for a judge to reject the terms of a plea agreement after having accepted a guilty plea, it is improper for the judge to insist upon reinstatement of a preceding indictment. *In re Ellis*, 356 F.3d 1198 (9th Cir. 2004) (en banc).

(f) *Trial after vacating of guilty plea*. "While it is true that '[j]eopardy ordinarily attaches upon the court's acceptance of a plea agreement,' a guilty plea that is only conditionally accepted does not give rise to jeopardy." *United States v. Patterson*, 292 F.3d 615, 624 (9th Cir. 2002) (trial following court's vacating of guilty plea

in light of lack of agreement regarding quantity of marijuana plants did not violate double jeopardy clause) (quoting *United States v. Smith*, 912 F.2d 322, 324 (9th Cir. 1990)); *United States v. Cordova-Perez*, 65 F.3d 1552, 1557 (9th Cir. 1995) (district court's rejection of conditional guilty plea on ground that agreement insufficiently reflected seriousness of conduct did not violate double jeopardy clause), *cert. denied*, 519 U.S. 838 (1996).

(g) *Hung jury*. Retrial after a hung jury does not violate double jeopardy principles. *Richardson v. United States*, 468 U.S. 317, 325–26 (1984).

(h) *Declaration of mistrial*. "When a court declares a mistrial, 'retrial will only be permitted if the defendant consented to the mistrial or if the mistrial was caused by "manifest necessity."'" *United States v. McKoy*, 78 F.3d 446, 449 (9th Cir.) (quoting *Weston v. Kernan*, 50 F.3d 633, 636 (9th Cir.), *cert. denied*, 516 U.S. 937 (1995)), *cert. denied*, 519 U.S. 817 (1996). *See also United States v. Gaytan*, 115 F.3d 737, 742 (9th Cir. 1997) (absent consent of the defendant or manifest necessity, declaration of a mistrial precludes retrial) (citations omitted).

(i) *Retrial following granting of a new trial.* Where a new trial is granted following a verdict of guilty and the reason for granting the new trial is unrelated to sufficiency of the evidence, double jeopardy is not violated by a retrial of that charge. *United States v. Sarkisian*, 197 F.3d 966, 983 (9th Cir. 1999), *cert. denied sub nom Mikayelyan v. United States*, 530 U.S. 1220 (2000). This is because no event has

terminated defendant's original jeopardy. *Sarkisian*, 197 F.3d at 983. *Cf. United States v. Recio*, 371 F.3d 1093 (9th Cir. 2004) (where circuit court reversed for insufficiency of evidence but Supreme Court reversed the circuit court, double jeopardy did not preclude retrial).

"[T]he Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient." *Burks v. United States*, 437 U.S. 1, 18 (1978).

(3) *Tribal prosecutions*. Prosecutions in tribal court do not trigger double jeopardy protection against federal prosecution. *United States v. Wheeler*, 435 U.S. 313, 329–30 (1978).

(4) *Prison discipline*. Imposition of prison discipline which has a remedial purpose does not bar, on double jeopardy grounds, prosecution for conduct which resulted in discipline. *United States v. Brown*, 59 F.3d 102, 103–05 (9th Cir. 1995).

(5) *Prior use as relevant conduct for sentencing guideline purposes does not constitute double jeopardy*. The fact that criminal activity now being prosecuted was considered as "relevant conduct" for sentencing guideline purposes in a different criminal proceeding does not violate double jeopardy principles. *Witte v. United States*, 515 U.S. 389, 397–98 (1995).

d. *Appealability of district court order*. Denial of a motion to dismiss an indictment on double jeopardy grounds is appealable by interlocutory appeal. *Abney*

v. United States, 431 U.S. 651, 659 (1977). However, even an interlocutory appeal does not divest the district court of jurisdiction if the interlocutory appeal is deemed frivolous by the district court. *United States v. LaMere*, 951 F.2d 1106, 1108–09 (9th Cir. 1991). "Both the Supreme Court and [the Ninth Circuit] have held that the [Supreme Court and the Ninth Circuit] have interlocutory appellate jurisdiction to reach the merits only of 'colorable' double jeopardy claims." *United States v. Hickey*, 367 F.3d 888, 891 (9th Cir. 2004) (citations omitted).

5. *Double punishment*. Double jeopardy issues may arise when a defendant faces criminal prosecution and has been subject to forfeiture and/or civil fines. The Double Jeopardy Clause protects "against the imposition of multiple *criminal* punishments for the same offense." *Hudson v. United States*, 522 U.S. 93, 99 (1997) (citations omitted).

    a. *Criminal forfeiture.* A criminal prosecution coupled with a criminal forfeiture arising out of the same indictment, pending before the same court, and resolved at the same time, does not violate double jeopardy. *United States v. Petty*, 80 F.3d 1384, 1387 n.1 (9th Cir. 1996).

    b. *Civil forfeiture.* "[N]othing in [*United States v.*] *Halper,* [490 U.S. 435 (1989)] . . . or *Austin* [*v. United States*, 509 U.S. 602 (1993)] purported to replace our traditional understanding that civil forfeiture does not constitute punishment for the purpose of the Double Jeopardy Clause." *United States v. Ursery*, 518 U.S. 267, 287 (1996).

    c. *Civil penalty*. Whether a civil penalty constitutes punishment for double jeopardy purposes should be determined by (1) statutory construction analysis and

(2) "'whether the statutory scheme was so punitive either in purpose or effect'" as to constitute punishment. *Hudson v. United States,* 522 U.S. 93, 99 (1997) (quoting *United States v. Ward*, 448 U.S. 242, 248–49 (1980)).

d. *Administrative forfeiture*. An uncontested summary administrative forfeiture does not "constitute punishment for purposes of the Double Jeopardy Clause." *United States v. Sardone,* 94 F.3d 1233, 1236 (9th Cir. 1996) (citing *United States v. Ursery*, 518 U.S. 267 (1996)).

6. *Destruction of evidence*. For destruction of evidence to constitute a denial of due process and a basis for dismissal, bad faith on the part of the police is necessary. *Arizona v. Youngblood*, 488 U.S. 51, 57–58 (1988). *See also United States v. Martinez-Martinez*, 369 F.3d 1076, 1087–88 (9th Cir. 2004) (no Due Process violation where defendant claimed intoxication defense at trial and argued that government should have tested him for presence of drugs).

"Unless a criminal defendant can demonstrate 'bad faith on the part of the police,' the failure of the police to preserve 'potentially useful evidence' does not constitute a denial of due process of law." *United States v. Rambo*, 74 F.3d 948, 954 (9th Cir.) (quoting *Youngblood*, 488 U.S. at 58), *cert. denied*, 519 U.S. 819 (1996). *See also United States v. Garcia*, 37 F.3d 1359, 1366 (9th Cir. 1994) (absent bad faith, a defense instruction that the evidence likely supported the defense may not be warranted), *cert. denied*, 514 U.S. 1067 (1995).

"In order to prevail on this claim [of bad faith to collect potentially exculpatory evidence, the defendant] must first demonstrate that [the evidence was] material.

Evidence is material to a defendant's case if it 'possess[es] an exculpatory value that was apparent before the evidence was destroyed, and [was] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.'" *United States v. Martinez-Martinez*, 369 F.3d 1076, 1087 (9th Cir. 2004) (quoting *California v. Trombetta*, 467 U.S. 479, 488–89 (1984)).

7. *Loss of testimonial evidence*. Actions taken by the government which cause a defense witness to be unavailable may be the basis for a motion to dismiss under the Sixth Amendment confrontation clause. *United States v. Valenzuela-Bernal*, 458 U.S. 858, 861, 867, 872–74 (1982).

   a. *Standard of proof*. Where the defense asserts that the government's release of a material witness has caused the loss of testimonial evidence, the defense must establish:

      (1) the government acted in bad faith; and

      (2) this conduct resulted in prejudice to the defendant.

      United States v. Dring, 930 F.2d 687, 693 (9th Cir. 1991) (citing *United States v. Valenzuela-Bernal*, 458 U.S. 858, 866–67 (1982)), *cert. denied*, 506 U.S. 836 (1992). *See also United States v. Carreno*, 363 F.3d 883, 887 (9th Cir. 2004) (applying *Dring* two-prong test to defense motion to dismiss for deportation of witnesses in alien-smuggling prosecution).

      As to the prejudice prong, the defendant must make a plausible showing that the evidence would have been material and favorable to the defense and not merely cumulative. *Dring*, 930 F.2d at 693–94 (citation omitted).

b. *Remedy.* The government's inaction regarding securing attendance at trial of a material witness may warrant a new trial or, if purposeful, dismissal. *United States v. Montgomery*, 998 F.2d 1468, 1478 (9th Cir. 1993) (loss of informant required granting of new trial) (citations omitted). *See also United States v. Valenzuela-Bernal*, 458 U.S. 858, 873–74 (1982) ("As in other cases concerning the loss of material evidence, sanctions will be warranted for deportation of alien witnesses only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact.") (citation omitted).

8. *Governmental misconduct—Supervisory power.*

a. *Grounds for dismissal.* Only three grounds exist for the court's dismissal of a case as an exercise of supervisory power:

(1) "to implement a remedy for the violation of a statutory or constitutional right;"

(2) "to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before a jury;" and

(3) "to deter future illegal conduct."

United States v. Miller, 4 F.3d 792, 795 (9th Cir. 1993); *United States v. Simpson*, 927 F.2d 1088, 1090 (9th Cir. 1991) (citing *United States v. Hasting*, 461 U.S. 499, 505 (1983)).

b. *Invocation.* Such power is to be exercised sparingly. *See, e.g., United States v. Isgro*, 974 F.2d 1091, 1097–99 (9th Cir. 1992), *cert. denied*, 507 U.S. 985

(1993). *See also United States v. King*, 200 F.3d 1207, 1214 (9th Cir. 1999) (dismissal of an indictment under the court's supervisory power is "'a harsh, ultimate sanction'" which is "'more often referred to than invoked'") (quoting *United States v. Owen*, 580 F.2d 365, 367 (9th Cir. 1978)).

c. *Requirements*. In order to warrant dismissal, there must be:

(1) flagrant governmental misbehavior, and

(2) substantial prejudice to the defendant.

United States v. Kearns, 5 F.3d 1251, 1253 (9th Cir. 1993) (citation omitted).

Actual prejudice must be shown. *United States v. Isgro*, 974 F.2d 1091, 1097 (9th Cir. 1992), *cert. denied*, 507 U.S. 985 (1993) (citation omitted).

9. *Outrageous governmental misconduct—Due process*.

a. *Due process*. In order to warrant dismissal on due process grounds, government misconduct must be "so grossly shocking and so outrageous as to violate the universal sense of justice." *United States v. King*, 200 F.3d 1207, 1213 (9th Cir. 1999) (citation and internal quotations omitted); *United States v. Green*, 962 F.2d 938, 941 (9th Cir. 1992) (citation omitted).

b. *Test*. To warrant dismissal on this ground, a defendant "must prove that the government's conduct was 'so excessive, flagrant, scandalous, intolerable, and offensive as to violate due process.'" *United States v. Edmonds*, 103 F.3d 822, 825 (9th Cir. 1996) (quoting *United States v. Garza-Juarez*, 992 F.2d 896, 904 (9th Cir. 1993), *cert. denied*, 510 U.S. 1058 (1994)).

c. *Remedies.* "The Ninth Circuit traditionally has identified two remedies: 1) dismissal of the indictment, which is drastic, disfavored, and thus used only in the most egregious cases; or 2) suppression at trial of evidence improperly obtained." *United States v. Haynes*, 216 F.3d 789, 796 (9th Cir. 2000) (citation omitted), *cert. denied*, 531 U.S. 1078 (2001).

d. *Conduct found not to violate due process and/or to be insufficiently outrageous to warrant dismissal*. Conduct found not to violate due process and/or to be insufficiently outrageous to warrant dismissal includes:

(1) FBI use of informant/prostitute who became involved with defendant, *United States v. Simpson*, 813 F.2d 1462, 1465 (9th Cir.), *cert. denied*, 484 U.S. 898 (1987). *See also United States v. Gurolla*, 333 F.3d 944, 950 (9th Cir.) (although outrageous government conduct is demonstrated "when the government 'engineer[s] and direct[s] a criminal enterprise from start to finish.'" ;"[t]he standard is not met when the government merely infiltrates an existing organization, approaches persons it believes to be already engaged in or planning to participate in the conspiracy, or provides valuable and necessary items to the venture.") (citations omitted), *cert. denied*, 124 S. Ct. 496 (2003).

(2) government supplying contraband to defendant who was patient in drug treatment center, *United States v. Smith*, 924 F.2d 889, 897 (9th Cir. 1991);

(3) undercover agent's commission of offense equally serious to crime with which defendant is charged, *United States v. Hugs*, 109 F.3d 1375, 1379 (9th

Cir. 1997) (undercover agent's unlawful killing of game out of season did not warrant dismissal, even though "killing of wildlife by government agents raises significant questions regarding extent to which serious crimes may be committed by agents to prevent others from committing similar offenses") (citing *United States v. Stenberg*, 803 F.2d 422, 430–31 (9th Cir. 1986));

(4) payment of $580,000 to informant for one year's assistance, *United States v. Cuellar*, 96 F.3d 1179, 1180, 1182 (9th Cir. 1996), *cert. denied*, 520 U.S. 1109 (1997). ***Caveat***: *United States v. Bernal-Obeso*, 989 F.2d 331, 333–34 (9th Cir. 1993) (recognition of risks from use of informants rewarded for assistance);

(5) undercover agent's misidentification or denial that he or she is an officer, *Lewis v. United States*, 385 U.S. 206, 207, 210 (1966); *United States v. Bramble*, 103 F.3d 1475, 1478 (9th Cir. 1996); and

(6) "absent an allegation and finding that the United States government perpetrated or directed the alleged abuse," a defendant's mistreatment while being "confined in Mexico pursuant to a United States arrest warrant", *United States v. King*, 200 F.3d 1207, 1213 (9th Cir. 1999) (not grounds for dismissal on due process grounds).

10. *Selective prosecution.* "A selective-prosecution claim is . . . an . . . assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution." *United States v. Armstrong*, 517 U.S. 456, 463 (1996).

"To demonstrate the existence of a prima facie case for selective prosecution, a defendant must present evidence that":

(1) others similarly situated were not prosecuted, and

(2) the prosecution was based on an impermissible motive.

United States v. Alexander, 287 F.3d 811, 817–18 (9th Cir. 2002) (quoting *United States v. Nelson*, 137 F.3d 1094, 1105 (9th Cir.), *cert. denied*, 525 U.S. 901 (1998)). *See also Belmontes v. Woodford*, 350 F.3d 861 (9th Cir. 2003) (applying selective prosecution analysis to special circumstances decision re death penalty; concluding that state had overcome any showing by defendant); *United States v. Culliton*, 328 F.3d 1074 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 1087 (2004).

a. *Requirements—Equal protection standard*. "The requirements for a selective-prosecution claim draw on 'ordinary equal protection standards.'" *United States v. Armstrong*, 517 U.S. 456, 465 (1996) (quoting *Wayte v. United States*, 470 U.S. 598, 608 (1985)).

In order to warrant dismissal on equal protection grounds, "[t]he claimant must demonstrate that the federal prosecutorial policy 'had a discriminatory effect and that it was motivated by a discriminatory purpose.'" *Armstrong*, 517 U.S. at 465 (that the prosecutorial policy as to crack cocaine had a discriminatory effect and was motivated by a discriminating purpose must be shown in order to establish equal protection violation) (quoting *Wayte*, 470 U.S. at 608). *See also United States v. Arenas-Ortiz*, 339 F.3d 1066 (9th Cir.), *cert. denied*, 124 S. Ct. 950 (2003).

b. *Discovery*. In order to be entitled to discovery on the issue of selective prosecution, the defendant must

produce some evidence that similarly situated defendants of other races or other protected classes could have been prosecuted but were not. *United States v. Armstrong*, 517 U.S. 456, 469 (1996) (citations omitted). *See also United States v. Arenas-Ortiz*, 339 F.3d 1066 (9th Cir.) (district court's denial of discovery order affirmed; defendant sought discovery re alleged selective prosecution of Hispanic males for violation of 8 U.S.C.§ 1326), *cert. denied*, 124 S. Ct. 950 (2003); *United States v. Turner*, 104 F.3d 1180, 1184 (9th Cir.) (discovery order vacated regarding crack cocaine), *cert. denied sub nom. Johnson v. United States*, 520 U.S. 1223, *sub nom. Jones v. United States*, 520 U.S. 1203 (1997).

c. *Caveat re this defense*. "[T]he 'decision to prosecute is particularly ill-suited to judicial review' because factors such as the 'strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.'" *United States v. Culliton*, 328 F.3d 1074, 1081 (9th Cir. 2003) (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)), *cert. denied*, 124 S. Ct. 1087 (2004).

11. *Immunized testimony—Misuse by government.* Use immunity is derived from 18 U.S.C. § 6002. Informal immunity is governed by contract principles. *United States v. Dudden*, 65 F.3d 1461, 1467 (9th Cir. 1995) (citation omitted).

a. *Use immunity.*

(1) *18 U.S.C. § 6002 protection*. The prosecution of a witness previously immunized pursuant to 18 U.S.C. § 6002 is allowable, but the government

may make no use, direct or indirect, of the compelled testimony and any information derived therefrom. *Kastigar v. United States*, 406 U.S. 441, 460–61 (1972); *United States v. Montoya*, 45 F.3d 1286, 1292 (9th Cir.), *cert. denied*, 516 U.S. 814 (1995).

(2) *Burden of proof*. "A person compelled to testify against himself under a grant of immunity [pursuant to 18 U.S.C. § 6002] need only show that he testified in order 'to shift to the government "the heavy burden" of proving an independent source for all its evidence.'" *United States v. Montoya*, 45 F.3d 1286, 1292 (9th Cir.) (quoting *United States v. Mapelli*, 971 F.2d 284, 288 (9th Cir. 1992)), *cert. denied*, 516 U.S. 814 (1995).

The government has the affirmative duty to prove a wholly independent source by a preponderance of the evidence. *Montoya*, 45 F.3d at 1292 (citations omitted).

(3) *Exposure to immunized testimony*. "'[T]here is no *per se* rule requiring the withdrawal of a prosecutor or other government official who may have been exposed to immunized testimony.'" *United States v. Montoya*, 45 F.3d 1286, 1292 (9th Cir.) (quoting *United States v. Crowson*, 828 F.2d 1427, 1430 (9th Cir. 1987), *cert. denied*, 488 U.S. 831 (1988)), *cert. denied*, 516 U.S. 814 (1995).

(4) *Necessity for* Kastigar *hearing*. A *Kastigar* hearing is required only where a defendant has demonstrated that his or her prior testimony was compelled by a grant of immunity. *United States v. Anderson*, 79 F.3d 1522, 1526 (9th Cir. 1996)

(citation omitted). However, the government may meet its burden through affidavits showing independent prior sources. *United States v. Montoya*, 45 F.3d 1286, 1292 (9th Cir.), *cert. denied*, 516 U.S. 814 (1995).

Caveat: A *Kastigar* hearing may be required for both formal (18 U.S.C. § 6002) and informal immunity. *United States v. Dudden*, 65 F.3d 1461, 1468 (9th Cir. 1995) (citation omitted).

b. *Informal immunity.* An informal immunity agreement may, as a result of the government's promise, preclude use or derivative use of defendant's statements. *United States v. Dudden*, 65 F.3d 1461, 1467 (9th Cir. 1995) (citation omitted).

Under an informal immunity agreement, "the government can . . . grant [the defendant] varying degrees of immunity . . . ." *United States v. Plummer*, 941 F.2d 799, 802 (9th Cir. 1991).

"'When . . . the defendant has not been forced to testify and so had not claimed the Fifth Amendment privilege against self-incrimination, the government can grant the defendant varying degrees of immunity in an informal agreement.'" *Anthony v. Cambra*, 236 F.3d 568, 580 (9th Cir. 2000) (quoting *United States v. Dudden*, 65 F.3d 1461, 1467 (9th Cir. 1995)), *cert. denied*, 533 U.S. 941 (2001).

Principles of contract law govern informal immunity agreements entered into between the government and the defendant. *United States v. Chiu*, 109 F.3d 624, 625 (9th Cir. 1997) (where proffer agreement provided that the government would not use any statements made by the defendant during the government's case-in-chief, it was not a violation of

the proffer agreement for the government to use the information to prepare the witnesses to testify). "[I]mmunity agreements are 'to be read as a whole and given a reasonable interpretation, not an interpretation that would produce absurd results.'" *Anthony*, 236 F.3d at 581 (quoting *United States v. Irvine*, 756 F.2d 708, 710 (9th Cir. 1985)).

c. *State immunity*. "'[O]nce a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence.'" *United States v. Anderson*, 79 F.3d 1522, 1526 n.5 (9th Cir. 1996) (government permitted to enhance defendant's federal sentence by referring to matters disclosed by defendant pursuant to immunity agreement which did not compel testimony) (quoting *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 79 n.18 (1964)). *But See Blakely v. Washington*, 124 S. Ct. 2531 (2004) (holding that the Washington State sentencing procedure violates Apprendi because it permits sentencing enhancement found by the court by not admitted to by the defendant and not found by the jury; the statutory maximum for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant, not the maximum sentence a judge may impose after finding additional facts). *See also United States v. Ameline*, 376 F.3d 967, 974–75 (9th Cir. 2004) (holding that Blakely applies to the federal sentencing guidelines). ***Caveat***: As this edition goes to print, petitions have been filed with the United States Supreme Court seeking further clarification of *Blakely*.

12. *Vindictive prosecution*. "A prosecutor violates due process when he seeks additional charges solely to punish a defendant for exercising a constitutional or statutory right." *United States v. Gastelum-Almeida*, 298 F.3d 1167, 1172 (9th Cir.) (citing *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) and *United States v. Hernandez-Herrera*, 273 F.3d 1213, 1217 (9th Cir. 2001)), *cert. denied*, 537 U.S. 986 (2002).

    "'To establish a prima facie case of prosecutorial vindictiveness, a defendant must show either direct evidence of actual vindictiveness or facts that warrant an appearance of such.'" *United States v. Montoya*, 45 F.3d 1286, 1299 (9th Cir.) (quoting *United States v. Sinigaglio*, 942 F.2d 581, 584 (9th Cir. 1991)), *cert. denied*, 516 U.S. 814 (1995).

    The focus is on whether the new charges brought after an unfavorable result are related to the original charge or are unrelated. If they are related to the original charge, vindictive prosecution is presumed. If the new charges are unrelated to the original charge, the presumption of vindictiveness does not arise. *United States v. Hernandez*, 80 F.3d 1253, 1261 (9th Cir. 1996) (citation omitted).

    a. *Initial indictment*. "Where a defendant claims that the filing of an initial indictment constitute[s] vindictive prosecution, 'the defendant must show vindictiveness on the part of those who made the charging decision.'" *United States v. Edmonds*, 103 F.3d 822, 826 (9th Cir. 1996) (quoting *United States v. McWilliams*, 730 F.2d 1218, 1221 (9th Cir. 1984)).

    b. *Superseding indictment*. The filing of a superseding indictment does not, standing alone, constitute vindictive prosecution. *United States v. Goodwin*, 457 U.S. 368, 380–84 (1982) (no presumption of prosecutorial vindictiveness arose from government

obtaining felony indictment against defendant after plea negotiations failed as to misdemeanor based on same incident).

"In the context of pretrial negotiations, 'vindictiveness will not be presumed simply from the fact that a more severe charge followed on, or even resulted from, the defendant's exercise of a right." *United States v. Gastelum-Almeida*, 298 F.3d 1167, 1172 (9th Cir.) (quoting *United States v. Gamez-Orduno,* 235 F.3d 453, 462 (9th Cir. 2000)), *cert. denied*, 537 U.S. 986 (2002). "Prosecutors often threaten increased charges and, if a guilty plea is not forthcoming, make good on that threat." *Id*. (citing *Gamez-Orduno*, 235 F.3d at 463). "Such prosecutorial actions as part of plea negotiations do no violate due process." *Id*. (citing *Gamez-Orduno,* 235 F.3d at 463).

"To establish a claim of vindictive prosecution, the defendant must make an initial showing that charges were added because the accused exercised a statutory, procedural, or constitutional right." *Id*. (citing *United States v. Garza-Juarez,* 992 F.2d 896, 906 (9th Cir. 1993), *cert. denied*, 510 U.S. 1058 (1994)).

c. *Plea negotiations*. "During plea negotiations . . . prosecutors may threaten additional charges and may carry through on this threat. This action alone does not violate a defendant's due process rights, nor does it create a presumption of vindictiveness." *See United States v. Noushfar*, 78 F.3d 1442, 1446 (9th Cir. 1996) (citation omitted), *amended by* 140 F.3d 1244 (1998). *See also United States v. Goodwin*, 457 U.S. 368, 380–81 (1982); *United States v. Hernandez-Herrera*, 273 F.3d 1213, 1217 (9th Cir. 2001), *cert. denied,* 537 U.S. 868 (2002); *United States v. Gamez-Orduno*, 235

F.3d 453, 462 (9th Cir. 2000) ("in the context of pretrial plea negotiations vindictiveness will not be presumed simply from the fact that a more severe charge followed on, or even resulted from, the defendant's exercise of a right") (citation omitted).

d. *Filing of new charges post-defense motion to suppress*. "[An] allegation that [additional] charges were filed because the defendants had moved to suppress evidence is also insufficient to create a presumption of vindictiveness." *United States v. Noushfar*, 78 F.3d 1442, 1446 (9th Cir. 1996) (citing *United States v. Goodwin*, 457 U.S. 368, 381 (1982)), *amended by* 140 F.3d 1244 (1998).

e. *Increase in charges pretrial as compared to post-trial*. "When . . . there is no evidence of actual vindictiveness, 'cases involving increased charges or punishments after trial are to be sharply distinguished from cases in which the prosecution increases charges in the course of pretrial proceedings.'" *United States v. Frega*, 179 F.3d 793, 801 (9th Cir. 1999) (quoting *United States v. Gallegos-Curiel*, 681 F.2d 1164, 1167 (9th Cir. 1982)), *cert. denied*, 528 U.S. 1191 (2000).

"A prosecutor should remain free before trial to exercise the broad discretion entrusted to him to determine the extent of the societal interest in prosecution." *United States v. Goodwin*, 457 U.S. 368, 382 (1982).

13. *Statute of limitations*. With the exception of capital offenses and a select number of other crimes, no one may be prosecuted unless the indictment is filed within five years after the offense is committed. 18 U.S.C. §§ 3281, 3282. *See also United States v. Koonin*, 361 F.3d 1250, 1252 (9th Cir. 2004) (18 U.S.C. § 3282 provides for a

"five-year general statute of limitation for noncapital offenses").

However, when an indictment is dismissed after the applicable statute of limitations has expired, the government has six months to seek a new indictment unless "the defect--whether it's a limitations problem 'or some other' problem--is not capable of being cured." *United States v. Clawson*, 104 F.3d 250, 251–52 (9th Cir. 1996) (citing 18 U.S.C. § 3288). *See also United States v. United States v. Shipsey*, 190 F.3d 1081 (9th Cir. 1999).

In addition, "[a] [statute of] limitation[s] period begins to run only when all the elements of the underlying offense have been committed." *United States v. Beardslee*, 197 F.3d 378, 385 (9th Cir.) (citation omitted), *amended by* 204 F.3d 983, *cert. denied*, 530 U.S. 1277 (2000). In conspiracy cases, the statute begins to run the day after the last overt act is completed. *Koonin,* 361 F.3d at 1252.

14. *Violation of Posse Comitatus Act.*

a. *In general*. "The [Posse Comitatus Act] prohibits Army and Air Force personnel from participating in civilian law enforcement activities unless otherwise permitted by federal law." *United States v. Hitchcock,* 286 F.3d 1064, 1069 (9th Cir.) (citing 18 U.S.C. § 1385), *amended by* 298 F.3d 1021 (2002). Pursuant to congressional directive, the Navy and Marine Corps are under similar prohibition. *Id*. at 1069.

b. *Exceptions to prohibition*.

(1) *Indirect assistance.* Notwithstanding this prohibition, military agencies may provide indirect assistance to civilian authorities. Whether military

involvement constitutes indirect assistance depends upon three tests:

[1] The involvement must not constitute the exercise of regulatory, proscriptive, or compulsory military power,

[2] must not amount to direct active involvement in the execution of the laws, and

[3] must not pervade the activities of civilian authorities."

Id. (quoting *United States v. Kahn*, 35 F.3d 426, 431 (9th Cir. 1994)).

(2) *Independent military purpose.* Regulations "permit direct assistance in civilian law enforcement '[i]nvestigations and other actions related to enforcement of the Uniform Code of Military Justice (UCMJ).'" *Id*. (citation omitted).

(3) *Maintaining law and order on military bases.* "The regulations [] permit direct assistance in '[i]nvestigations and other actions related to the authority to maintain law and order on a military installation or facility.'" *Id*. at 1070 (citation omitted).

15. *Perjury trap.* The Ninth Circuit has yet to recognize the perjury trap defense. *United States v. McKenna*, 327 F.3d 830, 837 (9th Cir. 2003).

"The perjury trap doctrine has been applied in other jurisdictions only where the government used 'its investigatory powers to secure a perjury indictment on matters which are neither material nor germane to a

legitimate ongoing investigation of the grand jury.'" *United States v. McKenna*, 327 F.3d 830, 837 (9th Cir.) (motion to dismiss perjury and false declaration under oath charges based on perjury trap defense denied) (quoting *United States v. Chen*, 933 F.2d 793, 796 (9th Cir. 1991)), *cert. denied*, 124 S. Ct. 359 (2003).

"When testimony is elicited before a grand jury that is 'attempting to obtain useful information in furtherance of its investigation', or 'conducting a legitimate investigation into crimes which had in fact taken place in its jurisdiction,' the perjury trap doctrine is, by definition, inapplicable." *Chen*, 933 F.2d at 797 (internal citation omitted).

CHAPTER 12. MOTIONS TO SUPPRESS PRETRIAL IDENTIFICATION

Due process may be violated if the identification procedure used is so unduly suggestive as to give rise to a substantial likelihood of mistaken identification. *United States v. Jones*, 84 F.3d 1206, 1209 (9th Cir.), *cert. denied*, 519 U.S. 973 (1996) (citation omitted). *See also Neil v. Biggers*, 409 U.S. 188, 198 (1972); *Foster v. California*, 394 U.S. 440, 442 (1969) (citations omitted); *Stovall v. Denno*, 388 U.S. 293, 301–02 (1967).

A. "Suggestiveness."

"An identification procedure is suggestive when it 'emphasize[s] the focus upon a single individual' thereby increasing the likelihood of misidentification." *United States v. Montgomery*, 150 F.3d 983, 992 (9th Cir.) (quoting *United States v. Bagley*, 772 F.2d 482, 493 (9th Cir. 1985), *cert. denied*, 475 U.S. 1023 (1986)), *cert. denied*, 525 U.S. 917 (1998).

B. Burden of proof.

The government must show by clear and convincing evidence that the in-court identification was based on observations other than the illegal identification procedure. *Tomlin v. Myers*, 30 F.3d 1235, 1242 n.16 (9th Cir. 1994) (citation omitted).

C. Reliability.

"[R]eliability is the linchpin in determining the admissibility of identification testimony . . . ." *Manson v. Brathwaite*, 432 U.S. 98, 114 (1977). If reliability factors outweigh the suggestive identification procedure, in-court identification is permissible. *United States v. Wang*, 49 F.3d 502, 505 (9th Cir. 1995) (citation omitted). *See also United*

States v. Montgomery, 150 F.3d 983, 993 (9th Cir.), *cert. denied*, 525 U.S. 917 (1998).

D. Totality of circumstances.

In evaluating the likelihood of misidentification, the court must consider the totality of the circumstances. *Stovall v. Denno*, 388 U.S. 293, 302 (1967). These include:

1. the opportunity of the witness to observe the defendant at the time of the crime;

2. the witness' degree of attention;

3. the accuracy of any prior description by the witness;

4. the witness' level of certainty at the time of confrontation; and

5. the time between the crime and the confrontation.

Neil v. Biggers, 409 U.S. 188, 199–200 (1972); *United States v. Jones*, 84 F.3d 1206, 1209–10 (9th Cir.), *cert. denied*, 519 U.S. 973 (1996); *United States v. Matta-Ballesteros*, 71 F.3d 754, 769 (9th Cir. 1995), *amended by* 98 F.3d 1100 (1996), *cert. denied*, 519 U.S. 1118 (1997); *United States v. Carbajal*, 956 F.2d 924, 929 (9th Cir. 1992), *cert. denied*, 510 U.S. 900 (1993).

"'If under the totality of the circumstances the identification is sufficiently reliable, identification testimony may properly be allowed into evidence even if the identification was made pursuant to an unnecessarily suggestive procedure.'" *United States v. Montgomery*, 150 F.3d 983, 993 (9th Cir.) (quoting *United States v. Bagley*, 772

F.2d 482, 492 (9th Cir. 1985), *cert. denied*, 475 U.S. 1023 (1986)), *cert. denied*, 525 U.S. 917 (1998).

E. No per se rule of exclusion.

"If an identification procedure is impermissibly suggestive, the reviewing court must decide 'if the identification testimony . . . is nonetheless sufficiently reliable to be admitted into evidence.'" *United States v. Plunk*, 153 F.3d 1011, 1021 (9th Cir.) (quoting *United States v. Nash*, 946 F.2d 679, 681 (9th Cir. 1991)), *amended by* 161 F.3d 1195 (1998), *cert. denied*, 526 U.S. 1060 (1999).

"There simply is no per se rule of exclusion for unnecessarily suggestive identification techniques." *Plunk*, 153 F.3d at 1021 (citations omitted). *See also United States v. Duran-Orozco*, 192 F.3d 1277, 1282 (9th Cir. 1999) (citation omitted).

F. One-person show-ups.

Although one-person show-ups are clearly suggestive, they may be permissible because of "the benefit of permitting witnesses to make an identification while the image of the perpetrator is still fresh . . . ." *United States v. Jones*, 84 F.3d 1206, 1210 (9th Cir.) (citation omitted), *cert. denied*, 519 U.S. 973 (1996). "[W]here the procedure employed does not give rise to 'a very substantial likelihood of irreparable misidentification,' identification evidence is for the jury to weigh." *United States v. Kessler*, 692 F.2d 584, 587 (9th Cir. 1982) (quoting *Manson v. Brathwaite*, 432 U.S. 98, 116 (1977)). *See also Jones*, 84 F.3d at 1210 (citation omitted).

G. Live line-ups.

In analyzing a line-up, "a reviewing court must determine if the procedures in question were 'unnecessarily suggestive.'" *Van Tran v. Lindsey*, 212 F.3d 1143, 1156 (9th Cir.) (quoting

Neil v. Biggers, 409 U.S. 188, 198 (1972)), *cert. denied*, 531 U.S. 944 (2000).

A live line-up "can . . . be impermissibly suggestive, if the people in the lineup or the procedures employed at the lineup make it so." *Van Tran*, 212 F.3d at 1156 n.18 (citation omitted).

There is "no absolute requirement that the other persons in the lineup be 'nearly identical'" to the defendant. *Van Tran*, 212 F.3d at 1156 (line-up not unlawful even though "some of the fillers in the lineup were 'arguably somewhat heavier, thinner, taller or shorter, unkempt, or older'" than the defendant).

H. Photo line-ups.

In analyzing a defendant's objection to the use of a photo line-up, the totality of the circumstances must be considered. *See Neil,* 409 U.S. at 196*; Simmons v. United States*, 390 U.S. 377, 383 (1968) (citing *Stovall v. Denno*, 388 U.S. 293, 302 (1967)).

I. Presence of counsel.

1. *Post-indictment physical line-up*. "The Sixth Amendment gives defendants the right to have counsel present at post-indictment lineups." *United States v. Barker*, 988 F.2d 77, 78 (9th Cir. 1993) (citing *United States v. Wade*, 388 U.S. 218 (1967)).

2. *Photo line-up*. The defendant has no right to have counsel present at photo identification procedures conducted with witnesses. *United States v. Ash*, 413 U.S. 300, 321 (1973). *See also United States v. Plunk*, 153 F.3d 1011, 1020 (9th Cir.) (out-of-court photo and voice identification

procedures are not critical stages of the proceedings entitling the suspect to presence of counsel) (citing *Ash*, 413 U.S. at 321), *amended by* 161 F.3d 1195 (1998), *cert. denied*, 526 U.S. 1060 (1999). There is no risk of the defendant's will being overpowered, since the defendant is not physically present. *United States v. Barker*, 988 F.2d 77, 78 (9th Cir. 1993) (citation omitted).

3. *Voice identification*. Pretrial voice identification is not a critical stage of the proceedings at which the suspect is entitled to presence of counsel. *United States v. Plunk*, 153 F.3d 1011, 1020 (9th Cir.) (citing *United States v. Kim*, 577 F.2d 473, 481 (9th Cir. 1978)), *amended by* 161 F.3d 1195 (1998), *cert. denied*, 526 U.S. 1060 (1999).

J. In-court identification permissible despite failure to identify from line-up.

A witness' failure to identify the defendant in a pretrial photo line-up does not result in any in-court identification being unduly suggestive. *Johnson v. Sublett*, 63 F.3d 926, 929 (9th Cir.), *cert. denied*, 516 U.S. 1017 (1995).

K. Inherent suggestiveness of in-court identification.

"There is no constitutional entitlement to an in-court line-up or other particular method[] . . . lessening the suggestiveness of [an] in-court identification . . . ." *United States v. Domina*, 784 F.2d 1361, 1369 (9th Cir. 1986), *cert. denied*, 479 U.S. 1038 (1987). *See also United States v. Burdeau*, 168 F.3d 352, 358 (9th Cir.), *cert. denied*, 528 U.S. 958 (1999).

L. Surveillance photos.

Showing of surveillance photos of perpetrator to a witness is not an impermissibly suggestive procedure. *See United*

States v. Browne, 829 F.2d 760, 764–65 (9th Cir. 1987) ("incredibl[e]" for defendant to suggest that showing surveillance photos taken during robbery created possibility of misidentification), *cert. denied,* 485 U.S. 991 (1988); *United States v. Monks*, 774 F.2d 945, 957 (9th Cir. 1985) (bank surveillance photos shown to teller did not taint in-court identification) (citations omitted).

M. Vehicle line-up.

See Johnson v. Sublett, 63 F.3d 926, 931–32 (9th Cir.) (Due process protections against undue suggestiveness, as articulated in *Stovall v. Denno*, 388 U.S. 293 (1967), do not extend to car line-ups, but the argument "deserves credit for creativity."), *cert. denied*, 516 U.S. 1017 (1995).

CHAPTER 13. JOINDER AND SEVERANCE

Fed. R. Crim. P. 8 and 13 pertain to joinder of defendants and/or offenses, and Fed. R. Crim. P. 14 addresses severance.

A. Joinder.

1. *Fed. R. Crim. P. 8—Joinder of offenses and of defendants.*

   a. *Offenses*. Fed. R. Crim. P. 8(a) states that "The indictment or information may charge a defendant in separate counts with 2 or more offenses if the offenses charged—whether felonies or misdemeanors or both—are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan." (2002 Amendment.)

      "In determining whether the offenses are based on the same transaction, '"transaction" is to be interpreted flexibly and may comprehend a series of related occurrences.'" *United States v. Fiorillo*, 186 F.3d 1136, 1145 (9th Cir. 1999) (rejecting defendant's claim that explosives counts had been misjoined with wire fraud and hazardous waste counts against him) (quoting *United States v. Terry*, 911 F.2d 272, 276 (9th Cir. 1990)), *cert. denied sub nom. Krueger v. United States*, 528 U.S. 1142 (2000).

   b. *Defendants*. Fed. R. Crim. P. 8(b) states that "The indictment or information may charge 2 or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses. The defendants may be charged in one or more counts together or separately. All defendants need not be charged in each count." (2002 Amendment.)

2. *Fed. R. Crim. P. 13—Joinder of indictments or informations*. Fed. R. Crim. P. 13 provides that "The court may order that separate cases be tried together as though brought in a single indictment or information if all offenses and all defendants could have been joined in a single indictment or information." (2002 Amendment.)

B. Severance.

Fed. R. Crim. P. 14(a) states that "If the joinder of offenses or defendants in an indictment, an information, or a consolidation for trial appears to prejudice a defendant or the government, the court may order separate trials of counts, sever the defendants' trials, or provide any other relief that justice requires." (2002 Amendment.)

C. Joinder of defendants—In general.

The public has a substantial interest in the joint trial of defendants who are indicted together. *United States v. Camacho*, 528 F.2d 464, 470 (9th Cir.), *cert. denied sub nom. Raygoza v. United States*, 425 U.S. 995 (1976).

The interests of justice are served "'by avoiding the scandal and inequity of inconsistent verdicts.'" *Zafiro v. United States*, 506 U.S. 534, 537 (1993) (quoting *Richardson v. Marsh*, 481 U.S. 200, 210 (1987)).

Judicial economy is also a consideration in ruling on a motion to sever defendants. *United States v. Taren-Palma*, 997 F.2d 525, 533 (9th Cir. 1993), *cert. denied*, 511 U.S. 1071 (1994). *See also Richardson*, 481 U.S. at 209–10 (separate trials may involve presentation of virtually identical evidence to separate juries).

1. *Test.* The test is whether joinder of defendants is "'so manifestly prejudicial that it outweighs the dominant concern with judicial economy . . . .'" *United States v. Doe*, 655 F.2d 920, 926 (9th Cir. 1980) (quoting *United States v. Brashier*, 548 F.2d 1315, 1323 (9th Cir. 1976), *cert. denied*, 429 U.S. 1111 (1977)).

2. *Alternative test.* Severance of properly joined defendants is not required unless:

    a. there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or

    b. [a joint trial] prevent the jury from making a reliable judgment about guilt or innocence.

    Zafiro v. United States, 506 U.S. 534, 539 (1993). *See also United States v. Cruz*, 127 F.3d 791, 798 (9th Cir. 1997), *cert. denied sub nom. Mesa v. United States*, 522 U.S. 1097 (1998); *United States v. Baker*, 10 F.3d 1374, 1388–89 (9th Cir. 1993) (citation omitted), *cert. denied*, 513 U.S. 934 (1994).

D. Grounds for severance of defendants.

1. *Disparate evidence.* Whether to grant a severance of defendants based upon disparity of the evidence hinges upon whether the jury can reasonably compartmentalize the evidence as it relates to the separate defendants. *United States v. Cruz*, 127 F.3d 791, 799 (9th Cir. 1997) (citation omitted), *cert. denied sub nom. Mesa v. United States*, 522 U.S. 1097 (1998); *United States v. Vasquez-Velasco*, 15 F.3d 833, 846 (9th Cir. 1994) (citations omitted); *United States v. Taren-Palma*, 997 F.2d 525, 533 (9th Cir. 1993), *cert. denied*, 511 U.S. 1071 (1994).

Cautionary instructions may afford the jury proper guidance so as to avoid the necessity for severance. *United States v. Nelson,* 137 F.3d 1094, 1108 (9th Cir.) (limiting instructions cured any prejudice to defendant arising from evidence of other crimes by co-defendants), *cert. denied*, 525 U.S. 901 (1998). Juries are presumed to follow curative instructions. *Zafiro v. United States*, 506 U.S. 534, 540–41 (1993); *Richardson v. Marsh*, 481 U.S. 200, 211 (1987).

2. *Inflammatory evidence against co-defendant*. Cautionary instructions may neutralize any prejudice which would otherwise result from inflammatory evidence being admitted against a co-defendant. *United States v. Castro*, 887 F.2d 988, 998 (9th Cir. 1989) (citation omitted); *United States v. Escalante*, 637 F.2d 1197, 1201–02 (9th Cir.) (citation omitted), *cert. denied*, 449 U.S. 856 (1980).

3. *Exculpatory testimony from co-defendant*. A defendant is entitled to severance if it is shown that a co-defendant would testify favorably on behalf of the defendant if severance were to be granted. *United States v. Seifert*, 648 F.2d 557, 563 (9th Cir. 1980) (citation omitted). *See also United States v. Pitner*, 307 F.3d 1178, 1181 (9th Cir. 2002) (three prong test; describing third prong as requiring "'that the testimony would [have been]. . . substantially exculpatory.'") (quoting *United States v. Reese*, 2 F.3d 870, 892 (9th Cir. 1993)).

   a. *Showing required*. The defendant seeking severance due to the need for a co-defendant's testimony must show:

      (1) the defendant would call a co-defendant to testify at a severed trial;

(2) the co-defendant would testify; and

(3) the testimony would be favorable to the defendant. *United States v. Seifert*, 648 F.2d 557, 563 (9th Cir. 1980) (citation omitted).

b. *Factors to be considered*. In evaluating the need for severance, the trial court should consider:

(1) the good faith of the defendant's intent to have the co-defendant testify;

(2) the weight and credibility of the predicted testimony;

(3) the probability that the testimony will materialize;

(4) judicial economy; and

(5) the degree to which the testimony will be exculpatory.

United States v. Mariscal, 939 F.2d 884, 885 (9th Cir. 1991) (citations omitted).

c. *Conditional offer to testify*. A co-defendant's offer to testify conditioned on being tried first is ordinarily insufficient to require severance. *United States v. Mariscal*, 939 F.2d 884, 886 (9th Cir. 1991); *United States v. Gay*, 567 F.2d 916, 920–21 (9th Cir.), *cert. denied*, 435 U.S. 999 (1978).

d. *Affidavit of co-defendant*. The proffered testimony of the co-defendant, as reflected in his or her affidavit, must be substantially exculpatory. *United States v. Taren-Palma*, 997 F.2d 525, 533 (9th Cir. 1993) (affidavit which merely contradicted government's proof and asserted ultimate facts was not substantially

exculpatory so as to require severance) (citation omitted), *cert. denied*, 511 U.S. 1071 (1994).

4. Bruton—*Post-arrest statements inculpating co-defendant*. "Under *Bruton* [*v. United States*, 391 U.S. 123 (1968)] and its progeny, the admission of a [post-arrest] statement made by a non-testifying codefendant violates the Confrontation Clause when that statement facially, expressly, clearly, or powerfully implicates the defendant." *United States v. Angwin*, 271 F.3d 786, 796 (9th Cir. 2001) (citations omitted), *cert. denied*, 122 S. Ct. 1385 (2002). In *Richardson v. Marsh*, 481 U.S. 200, 208 (1987), quoting *Bruton*, 391 U.S. at 124 n.1, 135, the Supreme Court stated: "In *Bruton*, the codefendant's confession 'expressly implicated' the defendant as his accomplice . . . . [A]t the time that confession was introduced there was not the slightest doubt that it would prove 'powerfully incriminating.'"

   "A statement is not facially incriminating merely because it identifies a defendant; the statement must also have a sufficiently devastating or powerful inculpatory impact to be incriminatory on its face." *Angwin,* 271 F.3d at 796 (citations and internal quotations omitted).

   a. *Non-implicating statements*. However, post-arrest statements of a co-defendant that do not implicate a defendant may be admissible. *United States v. Louderman*, 576 F.2d 1383, 1390 (9th Cir.), *cert. denied*, 439 U.S. 896 (1978). *But see Crawford v. Washington*, 124 S. Ct. 1354, 1374 (2004) (any testimonial evidence offered against defendant requires either confrontation or "unavailability and a prior opportunity for cross-examination").

b. *"Contextual implication" only.* Nor does *Bruton* require severance where the statement is not incriminating on its face, but becomes so only when linked with other evidence, *i.e.*, "contextual implication" only. *Richardson v. Marsh*, 481 U.S. 200, 208–09 (1987).

c. *Redaction*. Severance may also be avoided by redaction so as to delete inculpatory references to the defendant. *Richardson v. Marsh*, 481 U.S. 200, 211 (1987) (severance of co-defendants on *Bruton* grounds was not required where the confession of a co-defendant was redacted so as to delete all references to defendant and the district court gave appropriate limiting instruction); *United States v. Sears*, 663 F.2d 896, 902 (9th Cir. 1981), *cert. denied sub nom. Werner v. United States*, 455 U.S. 1027 (1982).

Substitution of a symbol or neutral pronoun for the defendant's name may be sufficient. *United States v. Enriquez-Estrada*, 999 F.2d 1355, 1359 (9th Cir. 1993). Redaction and limiting instructions may permit admission without severance. *Enriquez-Estrada*, 999 F.2d at 1359 (citation omitted).

Caveat: Even redaction involving substitution of a symbol or neutral pronoun "that replaces a defendant's name with an obvious indication of deletion, such as a blank space, the word 'deleted,' or a similar symbol . . . [is] within *Bruton*'s protective rule." *Gray v. Maryland*, 523 U.S. 185, 192, 195 (1998) (redacted confession of co-defendant violated *Bruton* where redaction merely consisted of substitution of word "deleted" for the name of non-confessing defendant; the word "deleted" is "similar enough to *Bruton's* unredacted confessions as to warrant the same legal results"). *See also United States v. Parks,* 285 F.3d 1133, 1139 (9th Cir.) ("By blanking out the name of

the third party or inserting the word 'deleted' in place of the name, the court not only fails to avoid an inference that the defendant was the party named but, rather, may underscore the importance of the accusation.") (citing *Gray,* 523 U.S. at 193), *cert. denied*, 537 U.S. 1061 (2002); *United States v. Mayfield*, 189 F.3d 895, 901–02 (9th Cir. 1999) (deleting co-defendant's name and substituting "an individual," in overall context of case, caused reference to defendant to be unavoidable); *United States v. Gillam*, 167 F.3d 1273, 1277 (9th Cir.) (substitution of "someone who 'worked at FDA' . . . who 'was getting ready to retire'" for name of defendant was error under *Gray* because the reference left little doubt that it referred to defendant), *cert. denied*, 528 U.S. 900 (1999); *United States v. Peterson*, 140 F.3d 819, 822 (9th Cir. 1998) (substitution of "person X" for name of non-confessing defendant violates *Bruton* in light of *Gray*).

d. *Interlocking confessions*. Earlier case law suggested that the admission of an interlocking confession, with the giving of a limiting instruction, did not violate a defendant's Sixth Amendment rights. *See, e.g., Parker v. Randolph*, 442 U.S. 62, 75 (1979).

However, in *Cruz v. New York*, 481 U.S. 186, 193 (1987), the Supreme Court stated: "[W]here a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, . . . the Confrontation Clause bars its admission at their joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him." *See also Gerlaugh v. Stewart*, 129 F.3d 1027, 1032 (9th Cir. 1997) (stating that in 1987, *Cruz*

altered the rule that "statements of codefendants [were not barred] from evidence so long as they were 'interlocking'"), *cert. denied*, 525 U.S. 903 (1998).

e. *Limiting instruction where confessing co-defendant testifies*. *Bruton v. United States*, 391 U.S. 123 (1968), prohibited the introduction of a non-testifying co-defendant's confession. However, even where a co-defendant testifies, if that co-defendant's post-arrest confession is used to impeach the co-defendant and the confession implicates the defendant, it is reversible error for the district court to fail to give a limiting instruction advising the jury that the confession of the co-defendant cannot be considered against the defendant. *United States v. Sauza-Martinez*, 217 F.3d 754, 758-60 (9th Cir. 2000).

5. *Antagonistic defenses*. "To warrant severance on the basis of antagonistic defenses, co-defendants must show that their defenses are irreconcilable and mutually exclusive." *United States v. Angwin*, 271 F.3d 786, 795 (9th Cir. 2001) (citations omitted), *cert. denied*, 122 S. Ct. 1385 (2002).

a. "*Mutually exclusive" defenses*. "Defenses are mutually exclusive when 'acquittal of one codefendant would necessarily call for the conviction of the other.'" *United States v. Angwin,* 271 F.3d 786, 795 (9th Cir. 2001) (quoting *United States v. Tootick*, 952 F.2d 1078, 1081 (9th Cir. 1991)), *cert. denied*, 122 S. Ct. 1385 (2002).

b. *Showing required*. "To be entitled to severance on the basis of mutually antagonistic defenses, a defendant must show that the core of the codefendant's defense is so irreconcilable with the core of his own defense that the acceptance of the codefendant's theory by the jury precludes acquittal of the defendant." *United States v.*

Throckmorton, 87 F.3d 1069, 1072 (9th Cir. 1996) (severance not required even though co- defendant claimed to be government agent and acknowledged defendant's guilt) (citation omitted), *cert. denied*, 519 U.S. 1132 (1997).

c. *No per se rule as to mutually antagonistic defenses*. Defenses which are merely mutually antagonistic defenses do not, per se require severance. *Zafiro v. United States*, 506 U.S. 534, 538 (1993) (severance based on mutually antagonistic defenses not required where two defendants claimed ignorance of presence of drugs in apartment).

Counsel must articulate a specific prejudice. *Zafiro*, 506 U.S. at 539; *United States v. Baker*, 10 F.3d 1374, 1388-89 (9th Cir. 1993), *cert. denied*, 513 U.S. 934 (1994).

Antagonistic defenses which are not irreconcilable at their core do not require severance. *United States v. Cruz*, 127 F.3d 791, 800 (9th Cir. 1997) ("The jury could have accepted Taitano's claim that he was an innocent bystander and still found that the case against Mesa had not been proven . . . . Similarly, it could have found that Cruz was entrapped and also that insufficient evidence supported Mesa's conviction."), *cert. denied sub nom. Mesa v. United States*, 522 U.S. 1097 (1998). *See also United States v. Johnson*, 297 F.3d 845, 859 (9th Cir. 2002) (where "the jury could have easily accepted either group's defense without convicting the other group, the defenses . . . were not mutually antagonistic), *cert. denied*, 537 U.S. 1242 and 538 U.S. 955 (2003).

6. *Co-defendant's comment on defendant's failure to testify.* In *De Luna v. United States*, 308 F.2d 140, 141 (5th Cir. 1962), the Fifth Circuit held that an accused has a constitutional right to be free from prejudicial comments, even from a co-defendant's attorney. Thus, where a co-defendant shows that he or she would benefit from commenting upon the defendant's failure to testify, severance is required. *De Luna*, 308 F.2d at 141. This case was cited with approval in *United States v. De La Cruz Bellinger*, 422 F.2d 723, 726–27 (9th Cir.) (declining, however, to adopt a per se rule and instead requiring a showing of probable prejudice), *cert. denied*, 398 U.S. 942 (1970). *But see United States v. Sandoval*, 913 F. Supp. 498, 500 (S.D. Tex. 1995) (opinion by Judge Kazen, stating that "[t]he import of the *De Luna* opinion is that comments upon a defendant's silence are improper not only when made by judges or prosecutors but by co-defendant's counsel as well") (citation omitted).

7. *Co-defendant's self-representation*. A defendant is not entitled to severance of trials merely because a co-defendant chooses to represent himself or herself. *United States v. Atcheson*, 94 F.3d 1237, 1244 (9th Cir. 1996), *cert. denied*, 519 U.S. 1156 (1997).

8. *Case management—Mega-trials*. The district court can order separate trials "as an aspect of its inherent right and duty to manage its own calendar." *United States v. Gay*, 567 F.2d 916, 919 (9th Cir.) (citations omitted), *cert. denied*, 435 U.S. 999 (1978). Mega-trials may present hardships and impracticalities worked upon defendants, the court, jurors, taxpayers and the circuit so as to require severance of defendants. *United States v. Baker*, 10 F.3d 1374, 1390–92 (9th Cir. 1993) (suggesting severance of some defendants would have been appropriate in sixteen-month trial which began with fifteen defendants named in 44-count indictment), *cert. denied*, 513 U.S. 934 (1994).

E. Grounds for severance of counts.

1. *Selective testimony*. A defendant who is able to show that he or she has important testimony to give concerning one count and a strong need to refrain from testifying on another count may be entitled to severance of counts. *United States v. Whitworth*, 856 F.2d 1268, 1277 (9th Cir. 1988) (citations omitted), *cert. denied*, 489 U.S. 1084 (1989); *United States v. Nolan*, 700 F.2d 479, 483 (9th Cir.) (citation omitted), *cert. denied*, 462 U.S. 1123 (1983).

   However, when the evidence concerning both counts will be admissible at both trials, severance serves no purpose. *United States v. Kenny*, 645 F.2d 1323, 1345 (9th Cir.), *cert. denied*, 452 U.S. 920 (1981). *See also Davis v. Woodford*, 333 F.3d 982, 991–92 (9th Cir. 2003) (where evidence was cross-admissible, crimes of murder and assault with intent to commit rape involving different victims at different locations, on facts presented, were permissibly joined for trial).

2. *Incidental proof of prior conviction*. Severance may be necessary when proof of a prior conviction is required on some counts but not others. *United States v. Lewis*, 787 F.2d 1318, 1321–23 (9th Cir.), *amended by* 798 F.2d 1250 (1986). *But see United States v. Nguyen*, 88 F.3d 812, 815–18 (9th Cir.) (based on limiting instructions, on facts presented, not reversible error to jointly try charges of felon in possession with conspiracy to transfer shotgun), *cert. denied*, 519 U.S. 986 (1996); *United States v. VonWillie*, 59 F.3d 922, 930 (9th Cir. 1995) (on facts presented, felon in possession of firearms and use of firearms during drug offense were not prejudicially joined for trial).

3. *"Offenses not arising out of the same series of acts or transactions."* Fed. R. Crim. P. 8(a) permits two or more offenses to be charged in the same indictment or information, but only if the offenses are "are of the same or similar character, or are based on the same act or transaction, or are connected with or constitute parts of a common scheme or plan." (2002 Amendment.) *See, e.g., United States v. Vargas-Castillo*, 329 F.3d 715, 722 (9th Cir.) (where defendant allegedly brought both cocaine and marijuana into the United States in a single event, his "marijuana and cocaine offenses were properly joined as they were clearly based on the same act or transaction") (citing previous version of Rule 8(a), substantively identical to current version), *cert. denied*, 124 S. Ct. 504 (2003).

   Where two crimes are not logically related and there is no substantial overlap in the evidence as to the two crimes, the crimes should not be joined for trial. *United States v. Sarkisian*, 197 F.3d 966, 976 (9th Cir. 1999) (misjoinder occurred where an extortion count was joined for trial with motor vehicle theft counts and "[t]he only meaningful connections" were that "some of the same defendants were charged in both counts, and the extortion incident occurred while the car scheme was ongoing"), *cert. denied sub nom. Mikayelyan v. United States*, 530 U.S. 1220 (2000).

4. *Cautionary instructions*. Misjoinder of counts may be cured by limiting instructions. *United States v. Lane*, 474 U.S. 438, 450 n.13 (1986).

F. Severance of counts and double jeopardy.

A defendant who has successfully sought the severance of related counts cannot later claim that double jeopardy principles were violated by virtue of subsequent prosecution on the severed count. *Territory of Guam v. Gill*, 59 F.3d 1010, 1012 (9th Cir. 1995) ("'[T]here is no violation of the

Double Jeopardy Clause when [the defendant] elects to have the two offenses tried separately and persuades the trial court to honor his election.'") (quoting *Jeffers v. United States*, 432 U.S. 137, 152–54 (1977)).

CHAPTER 14. ARREST

An arrest, whether warrantless or pursuant to a warrant, must be based upon probable cause. *Whiteley v. Warden*, 401 U.S. 560, 564–66 (1971). "The standard for determining whether a person is under arrest is not simply whether a person believes that he is free to leave, *see United States v. Mendenhall*, 446 U.S. 544, 554 (1980), but rather whether a reasonable person would believe that he or she is being subjected to more than 'temporary detention . . . .'" *United States v. Hernandez*, 322 F.3d 592, 596–97 (9th Cir. 2003) (citing *United States v. Butler*, 249 F.3d 1094, 1100 (9th Cir. 2001)), *cert. denied*, 124 S. Ct. 1036 (2004). *See also United States v. Bravo*, 295 F.3d 1002, 1011 (9th Cir. 2002) (detainee who was handcuffed at port of entry but told the handcuffs would be removed in the security office and that he would be released if no contraband was found in vehicle was not under arrest; nevertheless, "an officer cannot negate a custodial situation simply by telling a suspect that he is not under arrest."), *cert. denied*, 538 U.S. 971 (2003).

A. Probable cause to arrest.

"Probable cause [to arrest] is established if, at the time the arrest is made, 'the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense.'" *Bailey v. Newland,* 263 F.3d 1022, 1031 (9th Cir. 2001) (quoting *Beck v. Ohio,* 379 U.S. 89, 91 (1964)), *cert. denied*, 535 U.S. 995 (2002). *See also United States v. Carranza,* 289 F.3d 634, 640 (9th Cir.) ("Probable cause [to arrest] existed if 'under the totality of the circumstances known to the arresting officers, a prudent person would have concluded that there was a fair probability that [the defendant] had committed a crime.'") (quoting *United States v. Garza*, 980 F.2d 546, 550 (9th Cir. 1992)), *cert. denied*, 537 U.S. 1037 (2002).

1. *Experience of officer*. "In drug investigations, the court may consider the experience and expertise of the officers involved. This experience and expertise may lead a trained narcotics officer to perceive meaning from conduct which would otherwise seem innocent to the untrained observer." *United States v. Buckner*, 179 F.3d 834, 837 (9th Cir. 1999) (citations omitted), *cert. denied sub nom. Murry v. United States*, 528 U.S. 1094 (2000).

2. *Passenger in vehicle containing drugs*. Being a passenger in a vehicle transporting a large quantity of drugs, when coupled with other circumstances, may constitute probable cause to arrest. *See United States v. Hernandez*, 322 F.3d 592, 597 (9th Cir. 2003) (rear seat passenger's presence "in a vehicle containing commercial quantities of illegal drugs, together with his suspicious behavior, his relationship to the other occupants of the vehicle, and his proximity to those illegal drugs, gave border agents probable cause to arrest him") (citing *United States v. Heiden*, 508 F.2d 898, 901–02 (9th Cir. 1974)), *cert. denied*, 124 S. Ct. 1036 (2004); *United States v. Carranza*, 289 F.3d 634, 640–41 (9th Cir.) (passenger's presence in vehicle carrying commercial quantity of drugs across border constitutes probable cause to arrest "even though such evidence without more is not enough to sustain a guilty verdict.") (citation omitted), *cert. denied*, 537 U.S. 1037 (2002); *United States v. Buckner*, 179 F.3d 834, 837–39 (9th Cir. 1999) (reversing district court and finding, on facts presented, probable cause to arrest passenger in vehicle containing 37 pounds of marijuana), *cert. denied sub nom. Murry v. United States*, 528 U.S. 1094 (2000); *Heiden*, 508 F.2d at 901–02 (probable cause existed to arrest passenger in vehicle containing 110 pounds of marijuana in trunk). *But see United States v. Soyland*, 3 F.3d 1312, 1314 (9th Cir. 1993) (no probable cause existed to arrest passenger in vehicle having odor of

methamphetamine and containing marijuana cigarettes) (citation omitted), *cert. dismissed sub nom. Whitaker v. United States*, 115 S. Ct. 32 (1994).

B. Arrest warrant.

An arrest warrant may be issued upon a showing that there is "probable cause to believe that an offense has been committed and that the defendant committed it." Fed. R. Crim. P. 4(a).

"'[T]here is no constitutional mandate forbidding the use of deception in executing a valid arrest warrant.'" *United States v. Michaud*, 268 F.3d 728, 733 (9th Cir. 2001) (agents' ruse used to cause defendant to open door did not constitute an unlawful arrest warranting suppression of defendant's subsequent statements) (quoting *Leahy v. United States*, 272 F.2d 487, 490 (9th Cir. 1960)), *cert. denied* 537 U.S. 867 (2002).

1. *Suspect's residence*. "[A]n arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton v. New York*, 445 U.S. 573, 603 (1980) (finding a New York statute authorizing police to make warrantless entries into residences in order to make felony arrests unconstitutional).

2. *Third-party's residence.* Law enforcement officers may enter a third-party's residence with an arrest warrant and "without a search warrant or consent, if the police [have probable cause] to believe" that the person named in the arrest warrant is in the residence. *United States v. Gorman*, 314 F.3d 1105, 1110–11 (9th Cir. 2002). *See also United States v. Underwood*, 717 F.2d 482 (9th Cir. 1983) (en banc) (an arrest warrant is sufficient authority to enter any residence in order to

effectuate the arrest of the person named in the warrant if there is reason to believe the person to be arrested is present) (discussing *Payton*).

C. Arrest without arrest warrant.

1. *In general.* A warrantless felony arrest may be made based upon probable cause. *Tennessee v. Garner*, 471 U.S. 1, 7 (1985) ("A police officer may arrest a person if he has probable cause to believe that person committed a crime.") (citation omitted).

2. *In a residence.*

   a. *Routine arrest—No arrest warrant*. A law enforcement officer may not enter a suspect's residence without an arrest warrant in order to effectuate a routine felony arrest. *Payton v. New York*, 445 U.S. 573, 576 (1980) (arrest warrant required for entry).

   b. *Exigent circumstances—No arrest warrant.* "[W]arrantless arrests in the home are prohibited by the Fourth Amendment absent probable cause and exigent circumstances." *Ortiz-Sandoval v. Clarke*, 323 F.3d 1165, 1170–72 (9th Cir. 2003) (warrantless entry into residence permissible because exigent circumstances existed).

3. *Collective knowledge*. When there has been communication among agents, probable cause can be based upon the investigating agents' collective knowledge. *United States v. Butler*, 74 F.3d 916, 920–21 (9th Cir.) (probable cause may exist "even if some of the information known to other officers is not communicated to the arresting officer" and "[a]n officer may arrest based

on information relayed to him or her through official police channels") (citation omitted), *cert. denied*, 519 U.S. 967 (1996). *See also Bailey v. Newland*, 263 F.3d 1022, 1031–32 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 1556 (2002); *United States v. Valencia*, 24 F.3d 1106, 1108 (9th Cir. 1994); *United States v. Del Vizo*, 918 F.2d 821, 826 (9th Cir. 1990) (citation omitted).

4. *Pretextual arrest—Traffic stop*. An arrest is lawful so long as probable cause exists to believe that a traffic violation has occurred. *Whren v. United States*, 517 U.S. 806, 810 (1996) (traffic stop). "Whren foreclosed the possibility that a search or seizure may be invalidated solely because of the subjective intentions of a state officer . . . ." *United States v. Ibarra*, 345 F.3d 711 (9th Cir. 2003) (the stop of defendant's vehicle, "made on the pretext of attempting to enforce traffic laws, [but actually] made as a pretext to investigate suspected drug activity," was not a violation of defendant's Fourth Amendment rights), *cert. denied*, 124 S. Ct. 1464 (2004). *See also United States v. Hudson*, 100 F.3d 1409, 1414 (9th Cir. 1996) (stating that *Whren* supersedes Ninth Circuit precedent regarding pretextual arrests), *cert. denied*, 522 U.S. 939 (1997).

   A traffic stop cannot be challenged as pretextual so long as the stop is supported by probable cause to believe a traffic violation was committed. *Whren v. United States*, 517 U.S. 806, 810 (1996). *See also United States v. Michael R.*, 90 F.3d 340, 347 (9th Cir. 1996) (citation omitted).

5. *Traffic stop—Occupants of vehicle.* After a valid traffic stop, the police may order the suspect to get out of the vehicle. *Ruvalcaba v. City of Los Angeles*, 64 F.3d 1323, 1326–27 (9th Cir. 1995) (officer safety enabled officer to order the exit of all occupants of the vehicle), *cert. denied*, 517 U.S. 1216 (1996).

Officers may also order passengers to exit the vehicle pending completion of a traffic stop investigation. *Maryland v. Wilson*, 519 U.S. 408, 414–15 (1997).

See also Chapter 16, B., 1., c., Search and Seizure–Without Warrant—When a *Terry* stop becomes an arrest.

D. Consequences of unlawful arrest.

1. *Evidence found or statements taken may be suppressed.* A *Payton* violation will result in suppression. "[A] warrantless entry [into a home] will lead to the suppression of any evidence found, or statements taken, inside the home." *New York v. Harris*, 495 U.S. 14, 20 (1990) (notwithstanding unlawful arrest occurring when police entered house to make warrantless arrest, statements made outside of home nevertheless admissible) (citing *Payton v. New York*, 445 U.S. 573 (1980)).

2. *Good faith exception to suppression*. Where an arresting officer acts in good faith in making an arrest, the exclusionary rule does not necessarily require suppression of the evidence. *Arizona v. Evans*, 514 U.S. 1, 14–16 (1995) (drugs seized as a result of defendant being arrested on warrant erroneously appearing in computer were admissible based upon good faith exception of *United States v. Leon*, 468 U.S. 897 (1984)).

3. *Identity is not suppressible.* An unlawful arrest does not result in identity being suppressed. *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1039 (1984) ("The 'body' or identity of a defendant . . . is never itself suppressible as a fruit of an unlawful arrest . . . .") (citations omitted); *United States v. Crews*, 445 U.S. 463, 475, 477 (1980) (victim's in-court identification not suppressible despite unlawful arrest of defendant); *United States v. Guzman-*

Bruno, 27 F.3d 420, 421–22 (9th Cir.) (citations omitted), *cert. denied*, 513 U.S. 975 (1994).

4. *No bar to prosecution*. "An illegal arrest, without more, has never been viewed as a bar to subsequent prosecution . . . ." *United States v. Crews*, 445 U.S. 463, 474 (1980) (citations omitted). *See also United States v. Arzate-Nunez*, 18 F.3d 730, 735 n.5 (9th Cir. 1994) (citations omitted).

CHAPTER 15. SEARCH AND SEIZURE—IN GENERAL

The Fourth Amendment of the Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. AMEND. IV.

This chapter includes the definitions of search and seizure and discusses the exclusionary rule, exceptions to the rule, standing to challenge the lawfulness of searches and/or seizures, and timeliness of motions to suppress.

A. Definition of Search.

"A 'search' occurs when an expectation of privacy that society is prepared to consider reasonable is infringed." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). *See also Soldal v. Cook County, Illinois,* 506 U.S. 56, 63 (1992); *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1265 (9th Cir. 1999).

B. Definition of Seizure.

1. *Seizure of property.* "A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property." *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). *See also Soldal v. Cook County, Illinois,* 506 U.S. 56, 63 (1992).

2. *Seizure of person.* "'[W]henever an officer restrains the freedom of a person to walk away, he has seized that person.'" *Brower v. County of Inyo*, 489 U.S. 593, 595 (1989) (quoting *Tennessee v. Garner*, 471 U.S. 1, 7

(1985)). *See also Ganwich v. Knapp, et al.*, 319 F.3d 1115, 1125 (9th Cir. 2003) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). "For purposes of the Fourth Amendment, a seizure occurs when a law enforcement officer, by means of physical force or show of authority, in some way restrains the liberty of a citizen." *United States v. Chan-Jimenez*, 125 F.3d 1324, 1326 (9th Cir. 1997) (seizure occurred when officer retained a motorist's driver's license and registration during investigation of possible criminal activity) (citing *Florida v. Bostick*, 501 U.S. 429, 434 (1991)). *But see United States v. Drayton*, 536 U.S. 194, 203-04 (2002) (police did not seize passengers when they boarded bus and began questioning passengers).

A seizure of a person under the Fourth Amendment does not occur until the person is either physically subdued or submits to authority. *California v. Hodari D.*, 499 U.S. 621, 625–26 (1991). *See also United States v. Enslin*, 327 F.3d 788, 795–96 (9th Cir.) (technical seizure occurred when marshals ordered individual to "show hands" during consent search, though reasonable for officers' safety; compliance with order disclosed gun), *cert. denied*, 124 S. Ct. 308 (2003); *United States v. Smith*, 217 F.3d 746, 750 (9th Cir. 2000) ("seizure only occurs when either the suspect is physically subdued or submits to the assertion of authority") (citing *Hodari D.,* 499 U.S. at 625–26, and *United States v. Santamaria-Hernandez*, 968 F.2d 980, 982–83 (9th Cir. 1992)); *United States v. Hernandez*, 27 F.3d 1403, 1406 (9th Cir. 1994) (if subject does not yield to show of authority, seizure occurs only when the police physically subdue the subject) (citation omitted), *cert. denied*, 513 U.S. 1171 (1995).

C. Exclusionary rule.

The Fourth Amendment prohibits unreasonable searches and seizures, and violation of this prohibition may result in the

suppression of evidence obtained therefrom. *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (exclusionary rule applicable to state prosecutions); *Weeks v. United States*, 232 U.S. 383, 397 (1914) (exclusionary rule is applicable to federal prosecutions). *See also United States v. Colin*, 314 F.3d 439, 441 (9th Cir. 2002) (unlawful stop of vehicle tainted subsequent consent to search and evidence found as a result of consent); *United States v. Patzer,* 277 F.3d 1080, 1084–86 (9th Cir. 2002) (unlawful arrest tainted subsequent consent to search, resulting in statements and evidence being "fruit of the poisonous tree"); *United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000) ("evidence gathered as a result of the unconstitutional stop must be suppressed") (citing *Wong Sun v. United States*, 371 U.S. 471, 484–85 (1963)).

"[T]he Fourth Amendment's exclusionary rule applies to statements and evidence obtained as a product of illegal searches and seizures." *United States v. Crawford*, 372 F.3d 1048, 1054 (9th Cir. 2004) (en banc) (citing *Wong Sun v. United States*, 371 U.S. 471, 484–88 (1963)). "The exclusionary rule requires a causal connection between the illegal conduct and the evidence sought to be suppressed." *Id.*

The exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . . ." *United States v. Calandra*, 414 U.S. 338, 348 (1974).

D. Exceptions to exclusionary rule.

1. *Good faith exception.*

   a. *Purpose of exclusionary rule*. "[T]he [exclusionary] rule's application has been restricted to those instances where its remedial objectives are . . . served." *Arizona*

v. Evans, 514 U.S. 1, 11 (1995) (citing *United States v. Leon*, 468 U.S. 897, 908 (1984)).

b. *Good faith exception*. "[W]here the officer's conduct is objectively reasonable," that is, "the officer [acted] as a reasonable officer would and should act in similar circumstances," a good faith exception applies. *United States v. Leon*, 468 U.S. 897, 919–20 (1984). *See also Arizona v. Evans*, 514 U.S. 1, 11–12 (1995).

c. *Mistake of law.* A police officer's erroneous understanding of the law as a basis for a stop is not excused based on the good faith exception. *United States v. Lopez-Soto*, 205 F.3d 1101, 1106 (9th Cir. 2000) (good faith exception did not excuse officer's erroneous belief that vehicle without registration sticker in rear window violated Baja California law; suppression of fruits of stop required) (citing *United States v. Gantt*, 194 F.3d 987, 1006 (9th Cir. 1999)). *See also United States v. Mariscal*, 285 F.3d 1127, 1130 (9th Cir. 2002) (officer's mistake of law re Arizona traffic law could not be basis for founded suspicion stop). *But see United States v. Wallace*, 213 F.3d 1216, 1220–21 (9th Cir.) (officer's erroneous belief as to law regarding tinted windows on vehicle did not require suppression of evidence where tint nevertheless violated the law; "[officer] was not taking the bar exam"), *cert. denied*, 531 U.S. 974 (2000).

d. *Mistake of fact.* "[A] mere mistake of fact will not render a stop illegal, if the objective facts known to the officer gave rise to a reasonable suspicion that criminal activity was afoot." *United States v. Mariscal*, 285 F.3d 1127, 1131 (9th Cir. 2002). "[A]n officer's correct understanding of the law, together with a good-faith error regarding the facts, can establish reasonable suspicion." *United States v. King*, 244 F.3d 736, 739 (9th Cir. 2001). *See also United States v.*

Miguel, 368 F.3d 1150, 1154 (9th Cir. 2004) (erroneous computer entry regarding vehicle's license registration being expired was basis for stop; founded suspicion existed despite database error).

2. *Inevitable discovery.* "[E]vidence obtained in violation of the Constitution [may] still be admitted at trial if the government [can] prove 'by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means.'" *United States v. Lang*, 149 F.3d 1044, 1047 (9th Cir.) (evidence obtained as a result of statements taken in violation of *Miranda* held to be nevertheless admissible because evidence would have been discovered even in the absence of the statements) (quoting *Nix v. Williams*, 467 U.S. 431, 444 (1984)), *amended by* 157 F.3d 1161 (1998), *cert. denied*, 526 U.S. 1133 (1999).

3. *Silver platter doctrine*. The "silver platter doctrine" was an exception to the exclusionary rule. It permitted federal agents to use in federal prosecutions evidence unlawfully gathered by state police. *Lustig v. United States*, 338 U.S. 74, 79 (1949). This doctrine was rejected in *Elkins v. United States*, 364 U.S. 206, 223–24 (1960). *But see United States v. Medina*, 181 F.3d 1078, 1081–82 (9th Cir. 1999) (declining to apply *Elkins* on facts presented because of absence of any deterrent effect), *cert. denied*, 529 U.S. 1056 (2000).

E. Standing.

Evidence should be suppressed only if a defendant proves that his or her own Fourth Amendment rights were violated during the search. *United States v. Salvucci*, 448 U.S. 83, 85 (1980).

1. *Reasonable expectation of privacy required.* A reasonable expectation of privacy in the area searched is required. *United States v. Nohara*, 3 F.3d 1239, 1241 (9th Cir. 1993) (citing *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring)).

   A reasonable expectation of privacy exists if one has an actual, subjective expectation of privacy and if the expectation is one society is prepared to recognize as reasonable. *Katz*, 389 U.S. at 361 (Harlan, J., concurring); *Nohara*, 3 F.3d at 1241.

2. *Burden of proof.* The defendant bears the burden of demonstrating standing. *Rawlings v. Kentucky*, 448 U.S. 98, 104 (1980); *United States v. Dorais*, 241 F.3d 1124, 1130 (9th Cir. 2001) (citation omitted).

3. *No automatic standing based on possessory crime*. The right of a defendant charged with a possessory crime to automatically challenge the search has been abolished. *United States v. Salvucci*, 448 U.S. 83, 85 (1980) (overruling *Jones v. United States*, 362 U.S. 257 (1960)).

   Merely because the prosecutor contends that the defendant possessed a seized item does not establish that the defendant had a privacy interest in the area searched. *Salvucci*, 448 U.S. at 88–89; *United States v. Singleton*, 987 F.2d 1444, 1447 (9th Cir. 1993).

4. *Mere possessory interest insufficient*. "[A] mere possessory interest in the item seized does not by itself confer standing to challenge the search of the place in which the item was found." *United States v. Zermeno*, 66 F.3d 1058, 1061 (9th Cir. 1995).

5. *No "co-conspirator" standing*. A defendant must demonstrate that his or her own expectations of privacy or

property interests were violated. *United States v. Padilla*, 508 U.S. 77, 81 (1993); *United States v. Lingenfelter*, 997 F.2d 632, 636 (9th Cir. 1993) (citations omitted).

That a defendant is a member of a conspiracy and a co-conspirator has standing neither adds to nor detracts from the defendant's standing. *Padilla*, 508 U.S. at 81–82; *Lingenfelter*, 997 F.2d at 636.

6. *Overnight guest.* An overnight guest at a residence may have a legitimate expectation of privacy in the house of someone else and therefore have standing to challenge the lawfulness of a search. *Minnesota v. Olson*, 495 U.S. 91, 96–97, 100 (1990). *See also United States v. Davis,* 332 F.3d 1163, 1167-68 (9th Cir. 2003); *United States v. Gamez-Orduno,* 235 F.3d 453, 458 (9th Cir. 2000). *But see Minnesota v. Carter*, 525 U.S. 83, 89–91 (1998) (although overnight guests under *Olson* may enjoy an expectation of privacy in a host's home, individuals present for a relatively short period of time for essentially business purposes may not qualify for treatment as overnight guests); *United States v. Silva*, 247 F.3d 1051, 1055–56 (9th Cir. 2001) (no standing to contest search of shed even though defendant had a key to the shed and had alleged that he had spent the night in the shed the night before it was searched).

7. *Reasonable expectation of privacy—Applied.*

   a. *Apartment hallway*. There is no reasonable expectation of privacy in an apartment building hallway or other common area. *United States v. Nohara*, 3 F.3d 1239, 1241–42 (9th Cir. 1993) (citations omitted).

b. *Curtilage*. "The Fourth Amendment protects the curtilage of a home, and the extent of the curtilage is determined by whether the individual may reasonably expect that the area in question should be treated as the home itself." *United States v. Soliz*, 129 F.3d 499, 502 (9th Cir. 1997) (fenced area around house not curtilage where gate had fallen down, no "no trespassing" signs were in place, and the fence surrounding the house was a chain link fence) (citing *United States v. Dunn*, 480 U.S. 294, 300 (1987), and *Oliver v. United States*, 466 U.S. 170, 180 (1984)).

"For the purposes of the Fourth Amendment, curtilage is important because it expands the constitutional boundaries of the home beyond the four walls of the house." *United States v. Cannon*, 264 F.3d 875, 880 (9th Cir. 2001), *cert. denied*, 534 U.S. 1143 (2002).

"To aid in this inquiry, the Supreme Court has developed a four-factor test. The court must consider":

a. the proximity of the area claimed to be curtilage to the home;

b. whether the area is included within an enclosure surrounding the home;

c. the nature of the uses to which the area is put; and

d. the steps taken by the resident to protect the area from observation by people passing by.

Soliz, 129 F.3d at 502 (citing *Dunn*, 480 U.S. at 301). *See also United States v. Depew*, 210 F.3d 1061, 1066–67 (9th Cir. 2000) (although the four factors are

considered, "the key consideration is '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'") (quoting *Dunn*, 480 U.S. at 301).

c. *Passengers*. Occupants of a vehicle have standing to challenge the stopping of the vehicle even in the absence of "possessory or ownership interest in the vehicle." *United States v. Colin*, 314 F.3d 439, 442–43 (9th Cir. 2002) (citing *United States v. Twilley*, 222 F.3d 1092, 1095 (9th Cir. 2000)).

d. *Storage lockers.* "[A] defendant who merely possesses the authority to access a storage rental room but does not use it, without more, lacks Fourth Amendment standing to challenge the unlawful search of that area." *United States v. Sarkisian*, 197 F.3d 966, 987 (9th Cir. 1999) (citations omitted), *cert. denied sub nom. Mikayelyan v. United States*, 530 U.S. 1220 (2000).

e. *Prison telephone calls*. "[N]o prisoner should reasonably expect privacy in his outbound telephone calls." *United States v. Van Poyck*, 77 F.3d 285, 290–91 (9th Cir.), *cert. denied*, 519 U.S. 912 (1996).

"[A]ny expectation of privacy in outbound calls from prison is not objectively reasonable and . . . the Fourth Amendment is therefore not triggered by the routine taping of such calls." *Van Poyck*, 77 F.3d at 291.

"This analysis does not apply to 'properly placed' telephone calls between a defendant and his attorney . . . ." *Van Poyck*, 77 F.3d at 291 n.9.

f. *Hotel guests*. "It is well-settled that '[t]he Fourth Amendment protection against unreasonable searches and seizures is not limited to one's home, but also extends to such places as hotel or motel rooms.'" *United States v. Bautista,* 362 F.3d 584, 589 (9th Cir. 2004) (quoting *United States v. Cormier*, 220 F.3d 1103, 1108–09 (9th Cir. 2000).

(1) *Lawful occupation.* "[A] lawfully occupying hotel patron enjoys Fourth Amendment protection in that room." *United States v. Cunag*, 371 F.3d 1060, 1063 (9th Cir. 2004) (citing *Stoner v. State of California*, 376 U.S. 483, 490 (1964)).

(2) *Unlawful occupation.* An individual who procures a hotel room through fraud "does not enjoy the protection afforded by the Fourth Amendment." *United States v. Cunag*, 371 F.3d 1060, 1063 (9th Cir. 2004) (citing *Rakas v. Illinois*, 439 U.S. 128, 141 n.9 (1978) (citation omitted). *But see United States v. Bautista,* 362 F.3d 584, 586 (9th Cir. 2004) (holding that a hotel patron who had acquired the room through the suspected use of a stolen credit card number, which room had not been repossessed by the hotel, was entitled to Fourth Amendment protection).

g. *Surveillance cameras.*

(1) *Hotel rooms and other private areas.* "[T]he Fourth Amendment forbids warrantless videotaping of a private office . . . and hotel rooms." *United States v. Gonzalez*, 328 F.3d 543, 548 (9th Cir. 2003) (citations omitted).

However, a defendant has no reasonable expectation of privacy in a hotel room visited briefly by the defendant for a criminal transaction,

where an informant has consented to have activities in the room videotaped. *See United States v. Shryock*, 342 F.3d 948, 978 (9th Cir. 2003) (defendants "bore the risk that the other parties were informants") (citing *United States v. Nerber*, 222 F.3d 597, 599 (9th Cir. 2000)), *cert. denied*, 124 S. Ct. 1729 and 124 S. Ct. 1736 (2004).

(2) *Public/commercial areas.* "Although 'an individual can have a legitimate expectation of privacy in a commercial area,' . . . that legitimate expectation is less than one would have while on residential property." *United States v. Gonzalez*, 328 F.3d 543, 548 (9th Cir. 2003) (citations omitted).

"Videotaping of suspects in public places, such as banks, does not violate the fourth amendment . . . ." *United States v. Taketa*, 923 F.2d 665, 677 (9th Cir. 1991). *See also Gonzalez*, 328 F.3d at 548 (no objectively reasonable expectation of privacy for commission of crime in public area mailroom).

F. Timeliness of motion to suppress.

"Federal Rule of Criminal Procedure 12(b)(3) 'requires that motions to suppress evidence be raised prior to trial' and 'under Rule [12(e)] failure to bring a timely suppression motion constitutes a waiver of the issue.'" *United States v. Murillo*, 288 F.3d 1126, 1135 (9th Cir.) (citing previous Rule 12; amended in 2002 without substantive changes) (quoting *United States v. Wright*, 215 F.3d 1020, 1026 (9th Cir.), *cert. denied*, 531 U.S. 969 (2000)), *cert. denied*, 537 U.S. 931 (2002). *See also United States v. Tekle*, 329 F.3d 1108,

1112–13 (9th Cir.) (defendant waived right to move to suppress evidence seized pursuant to search warrant and district court did not abuse discretion in denying defendant relief from waiver), *cert. denied*, 124 S. Ct. 419 (2003).

CHAPTER 16. SEARCH AND SEIZURE—WITHOUT WARRANT

A warrantless "search is *per se* illegal unless it falls within an exception to the [F]ourth [A]mendment's warrant requirement." *United States v. Ojeda*, 276 F.3d 486, 488 (9th Cir. 2002) (citing *Katz v. United States*, 389 U.S. 347, 357 (1967)). *See also Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993) (warrantless searches are per se unreasonable "subject only to a few specifically established and well delineated exceptions.").

While warrantless searches without probable cause are generally prohibited, "even where an exception to the probable cause rule is appropriate, the 'irreducible constitutional requirement of reasonableness' still applies." *Morgan v. United States*, 323 F.3d 776, 781 (9th Cir. 2003) (citation omitted).

This section addresses the exceptions to the Fourth Amendment search warrant requirement, including searches and seizures outside the Fourth Amendment, searches and seizures subject to the Fourth Amendment but not requiring probable cause, warrantless searches and seizures where probable cause is required, and warrantless entries and/or searches where probable cause to arrest is required.

A. Searches and seizures outside the Fourth Amendment.

1. *Foreign searches and seizures*.

   a. *In general*. The Fourth Amendment is generally inapplicable to searches and seizures by foreign officials of property "owned by a nonresident alien and located in a foreign country." *United States v. Verdugo-Urquidez*, 494 U.S. 259, 261 (1990) (search of Mexican residences by DEA officials working in concert with Mexican officials was outside Fourth

Amendment). *See also United States v. LaChapelle*, 869 F.2d 488, 489 (9th Cir. 1989). This is so even if the targets are Americans. *United States v. Peterson*, 812 F.2d 486, 490 (9th Cir. 1987) (citation omitted).

b. *Exceptions*. Exceptions include:

(1) foreign conduct which shocks the judicial conscience, *United States v. Barona*, 56 F.3d 1087, 1091 (9th Cir. 1995) (citation omitted), *cert. denied*, 516 U.S. 1092 (1996); *United States v. Rose*, 570 F.2d 1358, 1362 (9th Cir. 1978); or

(2) "when United States agents' participation in the investigation is so substantial that the action is a joint venture between the United States and foreign officials," *United States v. Barona*, 56 F.3d 1087, 1091, 1093 (9th Cir. 1995) (exclusionary rule applies when the action is a joint venture between the United States and foreign officials and defendant is "among the class of persons that the Fourth Amendment was meant to protect") (citation and internal quotations omitted), *cert. denied*, 516 U.S. 1092 (1996).

2. *Searches by private individuals*. The Fourth Amendment does not protect against unreasonable intrusions by private individuals, *United States v. Jacobsen*, 466 U.S. 109, 113 (1984); *Walter v. United States*, 447 U.S. 649, 656 (1980), unless they are acting as government agents or instruments. *Coolidge v. New Hampshire*, 403 U.S. 443, 487 (1971). *See also United States v. Young*, 153 F.3d 1079, 1080–81 (9th Cir. 1998) (Federal Express search of suspicious package as part of a security program with no federal involvement constituted a search outside the Fourth Amendment); *United States v. Cleaveland*, 38 F.3d 1092, 1094 (9th Cir. 1994) (police presence for citizen's safety does not constitute government involvement);

United States v. Ross, 32 F.3d 1411, 1413–14 (9th Cir. 1994) (search of luggage by airline officials per FAA procedures constituted state action).

Dual motives of a private citizen, including to assist the police, do not implicate the Fourth Amendment. *Cleaveland*, 38 F.3d at 1094 (electric power worker, who suspected electrical diversion for marijuana crop and had police accompany him when meter read in the event problems arose, had "legitimate, independent motive" and such conduct did not "trigger Fourth Amendment scrutiny").

a. *Test*. The test for whether a search conducted by a private citizen constitutes government action depends upon two factors:

(1) whether the government knew of and acquiesced in the intrusive conduct; and

(2) whether the party performing the search intended to assist law enforcement efforts or further his own ends.

United States v. Reed, 15 F.3d 928, 931 (9th Cir. 1994) (quoting *United States v. Miller*, 688 F.2d 652, 657 (9th Cir. 1982)).

b. *Burden of proof*. The burden is on the defendant to prove government involvement in a private search context. *United States v. Cleaveland*, 38 F.3d 1092, 1093 (9th Cir. 1994) (citation omitted).

3. *Consensual citizen encounters*. Police may stop a citizen for questioning at any time and, so long as the citizen recognizes that he or she is free to leave, such brief,

consensual exchanges do not constitute seizures. *Florida v. Bostick*, 501 U.S. 429, 434 (1991); *Florida v. Royer*, 460 U.S. 491, 497 (1983) (police may approach a person in a public place and inquire as to his or her willingness to answer questions) (citations omitted). *See also United States v. Ayon-Meza*, 177 F.3d 1130, 1133 (9th Cir. 1999) (Fourth Amendment has no application to voluntary "walk and talk" citizen encounter at airport).

"[T]he Fourth Amendment permits officers to approach bus passengers at random to ask questions and request their consent to searches, provided a reasonable person would feel free to decline the requests or otherwise terminate the encounter." *United States v. Drayton*, 536 U.S. 194, 195 (2002) (citing *Bostick*). *But see United States v. Stephens*, 206 F.3d 914, 917 (9th Cir. 2000) (in encounter on Greyhound bus, test of whether a seizure occurred "is not whether a reasonable person would feel 'free to leave'", but rather "whether, considering all of the circumstances, 'a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.'") (quoting *Bostik*, 501 U.S. at 436).

4. *Search of international mail*. Customs officials may search incoming international mail at will so long as applicable regulations are followed. *United States v. Taghizadeh*, 41 F.3d 1263, 1266 (9th Cir. 1994).

5. *Open fields*. "Open field" merely refers to an "unprotected area." *United States v. Van Damme*, 48 F.3d 461, 465 (9th Cir. 1995). "'An open field need be neither "open" nor a "field."'" *Van Damme*, 48 F.3d at 465 (quoting *Oliver v. United States*, 466 U.S. 170, 180 n.11 (1984)). *See also United States v. Barajas-Avalos*, 359 F.3d 1204, 1214–16 (9th Cir. 2004) ("right to privacy does not extend to a person's open fields;" open fields included the natural clearing surrounding a travel trailer not used as a home

within the definition in *Hester v. United States*, 265 U.S. 57 (1924)) (citations omitted).

Because the Founding Fathers rejected James Madison's proposal to include "and their other property" in the list of protected areas in the Fourth Amendment, *i.e.*, "persons, houses, papers, and effects," "an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." *Oliver*, 466 U.S. at 176–78. *See also Hester*, 265 U.S. at 59.

6. *Pen register*. The installation and use of a pen register is not a search within the meaning of the Fourth Amendment. *Smith v. Maryland*, 442 U.S. 735, 745–46 (1979).

7. *Canine sniffs*. Subjecting luggage to a dog sniff is not a search within the meaning of the Fourth Amendment. *United States v. Place*, 462 U.S. 696, 707 (1983). *Cf. United States v. Lingenfelter*, 997 F.2d 632, 637–39 (9th Cir. 1993) (canine sniff of warehouse doors not a search).

   However, because "'close proximity sniffing of the person is offensive whether the sniffer be canine or human'" and infringes the "reasonable expectation of privacy, . . . it constitutes a search." *B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1266 (9th Cir. 1999) (quoting *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 479 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983)).

8. *Garbage*. The Fourth Amendment does not apply to garbage placed outside the curtilage for collection. *California v. Greenwood*, 486 U.S. 35, 37, 40–41 (1988) (no reasonable expectation of privacy in garbage placed outside house for collection); *United States v. Bowman*,

215 F.3d 951, 963 (9th Cir. 2000) (no legitimate expectation of privacy in sealed garbage placed curbside).

9. *Aerial surveillance*. The Fourth Amendment does not apply to an officer's view of a premises from aircraft. *Florida v. Riley*, 488 U.S. 445, 450–52 (1989); *California v. Ciraolo*, 476 U.S. 207, 215 (1986).

10. *Unmanned surveillance camera—public land.* An unmanned surveillance camera on national forest land open to the public does not implicate the Fourth Amendment because there is no reasonable expectation of privacy. *United States v. McIver*, 186 F.3d 1119, 1124–26 (9th Cir. 1999), *cert. denied*, 528 U.S. 1177 (2000).

11. *Transmitters/Tracking devices.* The mere placing of a traking device on the undercarriage of a vehicle does not implicate the Fourth Amendment, because neither a search nor a seizure has occurred. *United States v. McIver*, 186 F.3d 1119, 1126–27 (9th Cir. 1999), *cert. denied*, 528 U.S. 1177 (2000).

    No expectation of privacy exists regarding the monitoring of a vessel by means of a transmitter. *United States v. Juda,* 46 F.3d 961, 968 (9th Cir.) (no privacy right in ship's location on high seas), *cert. denied sub nom. Paris v. United States*, 514 U.S. 1090, *sub nom. Juda v. United States*, 515 U.S. 1169 (1995).

    See also Chapter 17, G., 2., Search and Seizure–Pursuant to Search Warrant—Transmitters/Tracking devices.

12. *Abandoned property.* "A defendant who voluntarily abandons property has no standing to contest its search and seizure." *United States v. Stephens*, 206 F.3d 914, 917 (9th Cir. 2000) (finding, however, that a bus passenger's

"abandonment" of a bag was not voluntary) (citation omitted).

B. Searches and seizures subject to the Fourth Amendment but not requiring probable cause.

1. *Founded suspicion—Stop and frisk.* "Beginning with *Terry v. Ohio*, 392 U. S. 1 (1968), the [Supreme] Court has recognized that a law enforcement officer's reasonable suspicion that a person may be involved in criminal activity permits the officer to stop the person for a brief time and take additional steps to investigate further." *Hiibel v. Nevada*, 124 S. Ct. 2451, 2458 (2004) (upholding Nevada stop and identify statute) (citations omitted). *See also United States v. Christian*, 356 F.3d 1103, 1107-08 (9th Cir. 2004) (pre-*Hiibel* decision, recognizing that a brief stop to determine identification does not constitute an impermissible seizure; distinguishing between arrest for furnishing false name from situation where suspect arrested for merely refusing to give name or merely giving evasive responses).

   "Generally, '[a] *Terry* stop involves no more than a brief stop, interrogation and, under proper circumstances, a brief check for weapons.'" *United States v. Miles,* 247 F.3d 1009, 1012–13 (9th Cir. 2001) (shaking a small box in suspect's clothes in order to determine contents exceeded the scope of *Terry* patdown). "[Q]uestions concerning a suspect's identity are a routine and accepted part of many *Terry* stops." *Hiibel*, 124 S. Ct. at 2458.

   a. *Standard for founded suspicion stop*. For a lawful *Terry* stop, the officer must have "a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." *United States v. Sokolow*, 490 U.S. 1,

7 (1989) (citing *Terry v. Ohio*, 392 U.S. 1, 30 (1968)). *See also Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000) (upholding *Terry* stop based upon unprovoked flight from law enforcement officer in high crime area); *United States v. Tiong*, 224 F.3d 1136, 1140 (9th Cir. 2000) ("The quantum of proof needed for reasonable suspicion is less than a preponderance of evidence, and less than probable cause.") (citation omitted).

In deciding whether a founded suspicion existed for a stop, the totality of circumstances must be considered. *United States v. Arvizu*, 534 U.S. 266, 273 (2002). "All relevant factors must be considered in the reasonable suspicion calculus—even those factors that, in a different context, might be entirely innocuous." *United States v. Fernandez-Castillo*, 324 F.3d 1114, 1117 (9th Cir.) (citing *Arvizu*, 534 U.S. at 277–78), *cert. denied*, 124 S. Ct. 418 (2003).

Founded suspicion "is not a matter of hard certainties, but of probabilities." *United States v. Mattarolo,* 209 F.3d 1153, 1157 (9th Cir.) (citing *United States v. Cortez*, 449 U.S. 411, 417–18 (1981)), *cert. denied*, 531 U.S. 888 (2000).

It "requires more than an officer's 'hunch,' even a hunch that later turns out to be a good one." *Mattarolo*, 209 F.3d at 1157 (citing *Terry*, 392 U.S. at 27).

"Reasonable suspicion . . . can arise from information different in quality and content and even less reliable than that required for the establishment of probable cause." *Mattarolo,* 209 F.3d at 1157 (citing *Alabama v. White*, 496 U.S. 325, 330 (1990)).

"The officer's training and experience are factors to consider in determining if the officer's suspicions were reasonable." *Mattarolo,* 209 F.3d at 1157 (citing *United States v. Michael R.*, 90 F.3d 340, 346 (9th Cir. 1996)).

(1) *Specific articulable facts*. "[S]pecific, articulable facts which, together with objective and reasonable inferences, form a basis for suspecting that the particular person . . . is engaged in criminal activity" are required. *United States v. Hernandez-Alvarado*, 891 F.2d 1414, 1416 (9th Cir. 1989) (citation omitted). *See also United States v. Ordaz*, 145 F.3d 1111, 1112 (9th Cir. 1998) (agents who saw unidentifiable vehicle being loaded had founded suspicion to stop each of four cars emerging from the area of suspicious activity).

(2) *Factors—Border Patrol stops*. "In the context of Border Patrol [stops], the factors to be considered in determining whether 'reasonable suspicion' exists to justify stopping a vehicle include, but are not limited to":

1) characteristics of the area;

2) proximity to the border;

3) usual patterns of traffic and time of day;

4) previous alien or drug smuggling in the area;

5) behavior of the driver, including 'obvious attempts to evade officers';

6) appearance or behavior of passengers;

7) model and appearance of the vehicle; and

8) officer experience.

United States v. Garcia-Barron, 116 F.3d 1305, 1307 (9th Cir. 1997) (quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 885 (1975)). *See also United States v. Diaz-Juarez*, 299 F.3d 1138, 1141 (9th Cir. 2002) ("non-exclusive set of factors"), *cert. denied*, 538 U.S. 934 (2003); *United States v. Montero-Camargo*, 208 F.3d 1122, 1130 (9th Cir.) (en banc), *cert. denied sub nom. Sanchez-Guillen v. United States*, 531 U.S. 889 (2000).

Caveat: "Hispanic appearance . . . may not be considered as a relevant factor where particularized or individualized suspicion is required." *Montero-Camargo*, 208 F.3d at 1135.

(3) *Totality of the circumstances.* "In determining whether reasonable suspicion existed to justify a brief detention to determine an individual's identity and to maintain the status quo while verifying or dispelling [police] suspicion that criminal activity was occurring or contemplated, the court must consider 'the totality of the circumstances' . . . ." *United States v. Osborn*, 203 F.3d 1176, 1181 (9th Cir.) (quoting *United States v. Cortez*, 449 U.S. 411, 417 (1981)), *cert. denied*, 530 U.S. 1237 (2000).

In deciding whether the totality of circumstances constitute a reasonable suspicion, it is inappropriate to view each factor in isolation and to give no weight to factors for which an innocent

explanation may exist. *United States v. Arvizu*, 534 U.S. 266, 274 (2002). *See also United States v. Diaz-Juarez*, 299 F.3d 1138, 1141 (9th Cir. 2002) ("Individual factors that may appear innocent in isolation may constitute suspicious behavior when aggregated together.") (citing *United States v. Sokolow*, 490 U.S. 1, 9–10 (1989)), *cert. denied*, 538 U.S. 934 (2003).

(4) *Anonymous tip*.

(a) *Corroborated*. An anonymous tip, if significant details are corroborated by law enforcement, may constitute founded suspicion authorizing a *Terry* stop. *See, e.g., Alabama v. White*, 496 U.S. 325, 331–32 (1990). *Cf. United States v. Terry-Crespo*, 356 F.3d 1170, 1173–77 (9th Cir. 2004) (tip from 911 caller, who identified himself, supported a reasonable suspicion stop of defendant).

(b) *Uncorroborated*. A tip without sufficient indicia of reliability will not justify a *Terry* stop. *Florida v. J.L.*, 529 U.S. 266, 270–72 (2000). *See also United States v. Morales*, 252 F.3d 1070, 1074–77 (9th Cir. 2001) (anonymous tip re vehicle containing drugs, without more, did not possess sufficient indicia of reliability to constitute founded suspicion); *United States v. Thomas*, 211 F.3d 1186, 1189–90 (9th Cir. 2000) (anonymous tip that house possibly contained narcotics did not provide founded suspicion for stop of vehicle leaving garage of house after thumping sound heard inside garage). *But see United States v. Fernandez-Castillo*, 324 F.3d 1114, 1121–24

(9th Cir.) (2-1 decision) (founded suspicion stop upheld based upon tip to police from unidentified Montana Department of Transportation worker re erratic operation of vehicle followed by officer's observation of vehicle weaving within lane) (citing *United States v. Arvizu*, 534 U.S. 266, 273–74 (2002)), *cert. denied*, 124 S. Ct. 418 (2003).

(5) *Sudden flight*. Unprovoked flight from a law enforcement officer can be the basis for a *Terry* stop. *Illinois v. Wardlow*, 528 U.S. 119, 124–25 (2000) (defendant's unprovoked flight from high crime area upon noticing police created founded suspicion).

(6) *Good faith error*. "'A mistaken premise can furnish grounds for a *Terry* stop, if the officers do not know that it is a mistake and are reasonable in acting upon it.'" *United States v. Garcia-Acuna*, 175 F.3d 1143, 1147 (9th Cir.) (an erroneous license plate report, relied upon in good faith, may support founded suspicion) (quoting *United States v. Shareef*, 100 F.3d 1491, 1505 (10th Cir. 1996)), *cert. denied*, 528 U.S. 1030 (1999). *But see United States v. Mariscal*, 285 F.3d 1127, 1130–31 (9th Cir. 2002) (where police officer stopped vehicle based upon erroneous understanding of traffic law, the stop violated the Fourth Amendment).

(7) *Consequences of unlawful stop.* When a founded suspicion stop is unlawful, "the evidence obtained pursuant to the stop is tainted, 'unless subsequent events have purged the taint.'" *United States v. Sigmond-Ballesteros*, 285 F.3d 1117, 1127 (9th Cir. 2002) (on totality of circumstances, investigatory stop of vehicle was not supported by founded suspicion) (quoting *United States v.*

Chavez-Valenzuela, 268 F.3d 719, 727 (9th Cir. 2001), *amended by* 279 F.3d 1062 (9th Cir. 2002)).

b. *Frisk—"Plain feel."* An officer who possesses "a reasonable articulable suspicion that [a suspect poses] a threat to his safety or the safety of others, [may] detain [the suspect] to conduct an investigatory, 'pat down' frisk . . . ." *United States v. Terry-Crespo*, 356 F.3d 1170, 1173 (9th Cir. 2004) (citations omitted).

In what has been described as a "plain feel" exception to the warrant requirement, the Supreme Court has ruled that an officer may seize contraband during a valid frisk if the officer's sense of touch makes it immediately apparent that the item is contraband. *Minnesota v. Dickerson*, 508 U.S. 366, 375–76 (1993) (evidence suppressed because officer determined item in pocket was contraband only after squeezing and manipulating the contents of the defendant's pocket). *See also Bond v. United States*, 529 U.S. 334, 338–39 (2000) (although visual inspection of luggage in plain view does not implicate the Fourth Amendment, tactile observation, *i.e.*, physical manipulation, triggers Fourth Amendment protection).

c. *When a* Terry *stop becomes an arrest*. Circumstances may convert a *Terry* stop into an arrest. *United States v. Torres-Sanchez*, 83 F.3d 1123, 1127 (9th Cir. 1996). *See also Washington v. Lambert*, 98 F.3d 1181, 1185 (9th Cir. 1996) (excessively aggressive police actions may convert a *Terry* stop into an arrest).

Whether a Terry stop has become an arrest depends upon the totality of the circumstances. *Gallegos v.City of Los Angeles*, 308 F.3d 987, 991 (9th Cir. 2002) (on

facts presented, ordering suspect from truck at gunpoint, handcuffing him, putting him in back of patrol car, and detaining him for 45–60 minutes did not constitute an arrest). "There is clearly no mechanical checklist to distinguish between *Terry* stops and formal arrest or the equivalent of arrest." *United States v. Parr*, 843 F.2d 1228, 1231 (9th Cir. 1988). *See also Gallegos*, 308 F.3d at 991.

(1) *In general.* A founded suspicion stop "must be carefully tailored to its underlying justification . . . and [may] last no longer than is necessary to effectuate the purpose of the stop." *Florida v. Royer*, 460 U.S. 491, 500 (1983) (where police approached suspect at an airport, retained his driver's license and airline ticket, and asked the suspect to accompany them to a police room, the contact was beyond the scope of a permissible *Terry* investigative stop). *See also United States v. Chavez-Valenzuela*, 268 F.3d 719, 724–26 (9th Cir. 2001) (continued detention after purpose of stop has been satisfied violates the Fourth Amendment), *amended by* 279 F.3d 1062 (2002). *Cf. Ganwich v. Knapp, et al.*, 319 F.3d 1115, 1120 (9th Cir. 2003) (excessively intrusive detention of occupants during search warrant execution included requiring occupants to submit to interrogations). *But see United States v. Brooks*, 367 F.3d 1128, 1138 (9th Cir. 2004) (permissible to ask tenant of hotel room that was subject of 911 call whether "any illegal items were in the hotel room," as inquiry might have disclosed presence of firearms).

"Under ordinary circumstances, drawing weapons and using handcuffs are not part of a *Terry* stop . . . . Nevertheless, 'we allow intrusive and aggressive police conduct without deeming it

an arrest . . . when it is a reasonable response to legitimate safety concerns on the part of the investigating officers.'" *United States v. Miles,* 247 F.3d 1009, 1012–13 (9th Cir. 2001) (citations omitted).

A legal conclusion by the investigating officer as to whether his or her conduct constituted an arrest or merely a *Terry* detention is irrelevant. *Gallegos v.City of Los Angeles*, 308 F.3d 987, 992 (9th Cir. 2002) ("Whether . . . detention . . . was an arrest or an investigatory stop depends on what the officers *did*, not on how they *characterize* what they did.") (citation omitted).

(2) *Suspect placed under arrest.* "[T]he line from investigatory stop to arrest" was "necessarily crossed" when suspects were told they were under arrest. *Rohde v. City of Roseburg*, 137 F.3d 1142, 1144 (9th Cir.), *cert. denied,* 525 U.S. 817 (1998).

(3) *Steps used during detention*. Facts may permit officers to draw guns, handcuff suspect, and take other steps without converting a founded suspicion stop to an arrest requiring probable cause. *Allen v. City of Los Angeles*, 66 F.3d 1052, 1056–57 (9th Cir. 1995) (42 U.S.C. § 1983 lawsuit).

(4) *Effect of firearms.* An officer's use of firearms increases the seriousness of the stop. *Washington v. Lambert*, 98 F.3d 1181, 1188 (9th Cir. 1996); *United States v. Alvarez*, 899 F.2d 833, 838 (9th Cir. 1990), *cert. denied*, 498 U.S. 1024 (1991).

(5) *Handcuffing.* "'[H]andcuffing . . . is not part of a typical *Terry* stop.'" *Washington v. Lambert*, 98

F.3d 1181, 1188 (9th Cir. 1996) (quoting *United States v. Bautista*, 684 F.2d 1286, 1289 (9th Cir. 1982), *cert. denied*, 459 U.S. 1211 (1983)). *But see Haynie v. County of Los Angeles*, 339 F.3d 1071, 1077 (9th Cir. 2003) ("A brief, although complete, restriction of liberty, such as handcuffing, during a *Terry* stop is not a de facto arrest, if not excessive under the circumstances."; § 1983 civil action; citing *Bautista*, 684 F.2d at 1289).

(6) *Forcing suspect to lie down.* Forcing a suspect at gunpoint to exit a vehicle, be handcuffed, and lie down on the ground may convert a *Terry* stop into an arrest. *United States v. Del Vizo*, 918 F.2d 821, 824–25 (9th Cir. 1990).

(7) *Requiring suspect to sit in patrol car.* A *Terry* stop is not automatically converted into an arrest by police requiring a defendant to sit in a patrol car. *United States v. Torres-Sanchez*, 83 F.3d 1123, 1127 (9th Cir. 1996).

(8) *Length of detention.* A twenty-minute detention may, *United States v. Chamberlin*, 644 F.2d 1262, 1267 (9th Cir. 1980), *cert. denied*, 453 U.S. 914 (1981), or may not, *United States v. Torres-Sanchez*, 83 F.3d 1123, 1128–29 (9th Cir. 1996), exceed permissible time limits for a *Terry* stop.

(9) *Border detentions*. "The fact that [the detention] occurred at the border influences our inquiry into whether a reasonable innocent person would have believed that he was under arrest." *United States v. Bravo*, 295 F.3d 1002, 1009–10 (9th Cir. 2002) (detention that included handcuffing, frisk, pat-down, shoe search, and vehicle search did not constitute arrest where defendant was informed

that detention would be temporary, though defendant was under arrest after drugs were found in the vehicle), *cert. denied*, 538 U.S. 971 (2003). *See also United States v. Hernandez*, 322 F.3d 592, 597 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 1036 (2004) (border detention including brief handcuffing of passenger did not become arrest until after vehicle search); *United States v. Zaragoza,* 295 F.3d 1025, 1028 (9th Cir. 2002) (briefly handcuffing defendant at port of entry and informing him that detention was temporary did not constitute arrest), *cert. denied*, 538 U.S. 956 (2003).

d. *Vessel detention*. The reasonable suspicion standard of *Terry* applies to the detention of vessels. *See, e.g., United States v. Thompson*, 282 F.3d 673, 677 n.6 (9th Cir. 2002) (applying *Terry*, on facts presented, a 15–20 minute delay between the end of a safety inspection and receipt of results of a warrants check did not convert the detention of the vessel from a *Terry* stop to an arrest) (citation omitted).

e. *Mail detention*.

(1) *In general.* "First class mail, such as letters and sealed packages, is protected by the Fourth Amendment from unreasonable search and seizure." *United States v. Gill*, 280 F.3d 923, 928 (9th Cir. 2002) (citing *United States v. Van Leeuwen*, 397 U.S. 249, 251 (1970)).

(2) *Founded suspicion applicable to mail.* Nevertheless, "[p]ostal authorities may seize and detain packages if they have a reasonable and articulable suspicion of criminal activity." *United*

States v. Aldaz, 921 F.2d 227, 229 (9th Cir. 1990) (citations omitted), *cert. denied*, 501 U.S. 1207 (1991). *See also United States v. Hernandez*, 313 F.3d 1206 (9th Cir. 2002) (citing *Aldaz*), *cert. denied*, 538 U.S. 1023 (2003); *United States v. Gill,* 280 F.3d 923, 929 (9th Cir. 2002) (detention of package mailed on Thursday and opened pursuant to search warrant following Wednesday not unreasonable).

(3) *Definition of founded suspicion for purposes of detention of mail.* "A reasonable suspicion 'is formed by specific, articulable facts which, together with objective and reasonable inferences, form the basis for suspecting that the particular . . . [object] detained is [involved] in criminal activity.'" *United States v. Gill,* 280 F.3d 923, 928 (9th Cir. 2002) (quoting *United States v. Lopez-Soto*, 205 F.3d 1101, 1105 (9th Cir. 2000)). *See also United States v. Hernandez*, 313 F.3d 1206, 1210 (9th Cir. 2002) (package may be detained if postal authorities "'have a reasonable and articulable suspicion' that it contains contraband or evidence of illegal activity.") (quoting *United States v. Aldaz*, 921 F.2d 227, 229 (9th Cir. 1990)), *cert. denied*, 538 U.S. 1023 (2003).

(4) *Unreasonable delay prohibited.* The delay in delivery of mail detained based upon founded suspicion must be reasonable. *United States v. Van Leeuwen,* 397 U.S. 249, 252–53 (1970) (29 hour delay of mail while search warrant was obtained not unreasonable). *See also United States v. Hernandez*, 313 F.3d 1206, 1213 (9th Cir. 2002) (22 hour detention of package from time seized to time canine sniff requested was not unreasonable), *cert. denied*, 538 U.S. 1023 (2003); *United States*

v. Gill, 280 F.3d 923, 929 (9th Cir. 2002) (detention of package mailed on Thursday and opened pursuant to search warrant following Wednesday not unreasonable); *United States v. Dass*, 849 F.2d 414, 414–15 (9th Cir. 1988) (delays ranging from 7 to 23 days unreasonable); *United States v. Hillison*, 733 F.2d 692, 696 (9th Cir. 1984) (nine hour delay reasonable).

However, "the main Fourth Amendment interest in a mailed package attaches to the privacy of its contents, not the speed with which it is delivered." *Hillison*, 733 F.2d at 696 (citations omitted). *See also Gill*, 280 F.3d at 929.

2. *Consent searches*. "[A] search conducted pursuant to a valid consent is constitutionally permissible." *Schneckloth v. Bustamonte*, 412 U.S. 218, 222 (1973). "The Fourth Amendment test for a valid consent to search is that the consent be voluntary . . . ." *Ohio v. Robinette*, 519 U.S. 33, 40 (1996) (citation omitted).

   a. *Totality of circumstances*. The court must examine the totality of the circumstances. *United States v. Mendenhall*, 446 U.S. 544, 557 (1980); *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973); *United States v. Patayan Soriano*, 361 F.3d 494, 501 (9th Cir. 2004).

   b. *Burden of proof*. The burden is on the government to prove that consent was voluntary. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973). The government must prove voluntary consent by a preponderance of the evidence. *United States v. Matlock*, 415 U.S. 164, 177 (1974).

c. *Mere acquiescence.* "Mere acquiescence to lawful authority is insufficient" to constitute consent. *United States v. Spires*, 3 F.3d 1234, 1237 (9th Cir. 1993).

d. *Implied consent searches.* Consent to a search may be express or implied. *Morgan v. United States*, 323 F.3d 776, 781 (9th Cir. 2003). In a criminal case, "[t]he government always bears the burden of proof to establish the existence of effective consent . . . . This burden is heavier where consent is not explicit, since consent 'is not lightly to be inferred.'" *United States v. Impink*, 728 F.2d 1228, 1232 (9th Cir. 1984) (citations omitted) (quoting *United States v. Patacchia*, 602 F.2d 218, 219 (9th Cir.), *amended by* 610 F.2d 648 (1979)).

(1) *Consent implied from conduct.* "Under certain narrow circumstances, [] 'courts will infer consent from the cooperative attitude [and conduct] of a defendant.'" *United States v. Rosi*, 27 F.3d 409, 413–14 (9th Cir. 1994) (third party "invited" search by fully cooperating, telling agents to "go ahead and look around," and suggesting a location where officers could search for evidence) (quoting *Impink*, 728 F.2d at 1232). *See also United States v. Mejia*, 953 F.2d 461, 466 (9th Cir. 1991), *cert. denied*, 504 U.S. 926 (1992) (finding implied consent for officers to enter defendant's bedroom where defendant's wife first gave express consent to enter house, and then at the officers' inquiry wife led officers to bedroom without objecting); *Pavao v. Pagay*, 307 F.3d 915, 920 (9th Cir. 2002) (in § 1983 case, jury was justified in finding implied consent where verbal and bodily reaction of resident indicated that officer could enter house). *But see United States v. Shaibu*, 920 F.2d 1423, 1427 (9th Cir. 1990) ("[T]he government may not show consent to enter [a home] from the defendant's failure to object to the entry.").

(2) *Airport security screening procedures*. "An airport screening search is reasonable if:

[a] it is no more extensive or intensive than necessary, in light of current technology, to detect weapons or explosives;

[b] it is confined in good faith to that purpose; and

[c] passengers may avoid the search by electing not to fly."

Torbet v. United Airlines, Inc., 298 F.3d 1087, 1089 (9th Cir. 2002) (passenger "impliedly consented to the random search by placing his bag on the x-ray conveyor belt.") (citation omitted).

(3) *Military bases*. "[A] person may impliedly consent to a search on a military base." *Morgan v. United States*, 323 F.3d 776, 782 (9th Cir. 2003). ("A person presenting himself at a military gate is similar to a person presenting himself at a security checkpoint at an airport, and in both situations there may be implied consent for a search.").

e. *Scope of search*. The scope of the search consented to is based on objective reasonableness, *i.e.*, what a typical reasonable person would understand is being consented to by the citizen. *Florida v. Jimeno*, 500 U.S. 248, 251–52 (1991) (a suspect may limit the scope of the search consented to). *See also United States v. Cannon*, 29 F.3d 472, 477 (9th Cir. 1994).

f. *Fruit of the poisonous tree*. Consent obtained during an unlawful detention may be suppressed as fruit of the poisonous tree. *United States v. Chavez-Valenzuela*,

268 F.3d 719, 727–28 (9th Cir. 2001) (finding that consent obtained during impermissibly long founded suspicion stop constituted fruit of the poisonous tree) (citing *Florida v. Royer*, 460 U.S. 491, 507–08 (1983), and *Wong Sun v. United States,* 371 U.S. 471, 491 (1963)), *amended by* 279 F.3d 1062 (2002).

See also Chapter 15, C., Search and Seizure in General—Exclusionary Rule.

g. *Factors re consent*. Factors regarding whether consent was voluntarily given include:

(1) whether the consenting person is in custody, *United States v. Patayan Soriano*, 361 F.3d 494, 501, 502 (9th Cir. 2004); *United States v. Chan-Jimenez*, 125 F.3d 1324, 1327 (9th Cir. 1997);

(2) whether officers' guns were drawn, *Patayan Soriano and Chan-Jimenez,supra*;

(3) whether *Miranda* warnings were given, *Patayan Soriano and Chan-Jimenez, supra*; *United States v. Torres-Sanchez,* 83 F.3d 1123, 1129 (9th Cir. 1996) (consent found to be valid even though suspect was not given *Miranda* warnings);

(4) whether the person was told he or she had the right not to consent, *Patayan Soriano and Chan-Jimenez, supra*; *Schneckloth v. Bustamonte*, 412 U.S. 218, 248–49 (1973) (whether a defendant realized that he or she had a right to refuse a request to search is but one of the totality of circumstances to be considered in determining voluntariness of consent);

(5) whether the person was told a search warrant could be obtained, *Patayan Soriano and Chan-Jimenez,*

supra; United States v. Morning, 64 F.3d 531, 533 (9th Cir. 1995), *cert. denied*, 516 U.S. 1152 (1996). "[C]onsent is not likely to be held invalid where an officer tells a defendant that he could obtain a search warrant if the officer had probable cause upon which a warrant could issue." *United States v. Kaplan*, 895 F.2d 618, 622 (9th Cir. 1990) (citations omitted). *See also United States v. Torres-Sanchez*, 83 F.3d 1123, 1130 (9th Cir. 1996) (although defendant was not given *Miranda* warnings, was never told of the right to refuse consent, and was never told that a search warrant could be obtained, consent was voluntary);

(6) whether the person was told he or she was free to leave, *Ohio v. Robinette*, 519 U.S. 33, 39–40 (1996). There is no Fourth Amendment requirement that the police notify a lawfully seized person that he or she is free to go before a valid consent to search can be obtained. *Id.*;

(7) the defendant's belief as to the likelihood that contraband would be discovered, *United States v. Spires*, 3 F.3d 1234, 1237 (9th Cir. 1993) (citation omitted); and

(8) the presence or absence of threats. *Patayan Soriano*, 361 F.3d at 502–03 (statement by agent to defendant that children could be taken away did not invalidate consent to search because of subsequent assurances to the contrary before consent was given).

The first five of these factors are frequently identified as the "five non-exclusive factors relevant" to whether consent was voluntary. *See, e.g., United*

States v. Perez-Lopez, 348 F.3d 839, 846 (9th Cir. 2003) (citations omitted) (matter remanded re consent issue after circuit court ruled that, contrary to district court's ruling, *Miranda* warnings were fatally flawed). *See also Patayan Soriano*, 361 F.3d at 502.

"No one factor is determinative in the equation . . . . [T]hese factors are only guideposts, not a mechanized formula to resolve the voluntariness inquiry." *Patayan Soriano*, 361 F.3d at 502 (citations ommitted).

h. *Third party consent*. Valid third party consent to search a property, container, or area may exist where the third party has "either actual or apparent authority to consent to the search." *United States v. Davis*, 332 F.3d 1163, 1169 (9th Cir. 2003). *See also United States v. Fultz*, 146 F.3d 1102, 1105 (9th Cir. 1998); *United States v. Welch*, 4 F.3d 761, 764 (9th Cir. 1993).

(1) *Actual authority*. Actual authority to search a property, container, or area exists if:

(a) the owner . . . has expressly authorized the third party to give consent . . .[, or]

(b) the third party has mutual use of . . . and joint access to or control over the [property, container, or area].

Davis, 332 F.3d at 1169 (quoting *Fultz*, 146 F.3d at 1105, and citing *Welch*, 4 F.3d at 764). *See also United States v. Dearing*, 9 F.3d 1428, 1429 (9th Cir. 1993) ("A third party has actual authority when he has 'mutual use of the property [and also has] joint access or control for most purposes.")

(quoting *United States v. Matlock*, 415 U.S. 164, 171 n.7 (1974))

(2) *Apparent authority.*

(a) *Requirements for application of apparent authority.* A consent-giver may have apparent authority if:

[1] the consent-giver gave untrue information

[2] it was objectively reasonable to believe the information given was true; and

[3] if true, the consent-giver would have possessed actual authority.

United States v. Dearing, 9 F.3d 1428, 1429–30 (9th Cir. 1993). *See also United States v. Davis*, 332 F.3d 1163, 1169–70 (9th Cir. 2003) (2-1 decision) (finding neither actual nor apparent authority to consent); *United States v. Enslin*, 327 F.3d 788 (9th Cir.) (third-party consent was given voluntarily and with apparent authority), *cert. denied*, 124 S. Ct. 308 (2003); *United States v. Reid,* 226 F.3d 1020, 1025–26 (9th Cir. 2000) (2-1 decision) (a reasonable person would not have assumed that person who answered the door, known to the police not to be the resident, had apparent authority to consent to search of apartment); *United States v. Fiorillo*, 186 F.3d 1136, 1144 (9th Cir. 1999), *cert. denied sub nom. Krueger v. United States*, 528 U.S. 1142 (2000).

Agents must reasonably believe that the person giving consent had actual authority to do so. *Fultz*, 146 F.3d at 1105 (9th Cir. 1998) (third party consent to police search of homeless man's belongings stored in segregated boxes in garage was invalid); *Welch*, 4 F.3d at 764–65 (9th Cir. 1993) (third party's consent to police to permit search of girlfriend's purse was invalid).

When an owner gives someone partial control, the owner may assume the risk that the person will at times exceed the scope of authorized control and give consent to search. *United States v. Kim*, 105 F.3d 1579, 1582 (9th Cir.), *cert. denied*, 522 U.S. 940 (1997).

(b) *Mistake of Fact—Mistake of Law.* While a mistaken belief as to facts may support an application of the apparent authority doctrine, mistaken belief as to the law will not. *Fultz*, 146 F.3d at 1106 (no valid consent where police mistakenly believed that homeowner could consent to police search of defendant's boxes in garage when homeowner told police that boxes in garage belonged to defendant and not to her); *Welch*, 4 F.3d at 765 (mistaken "legal assumption that the mere presence of . . . handbag in the trunk gave . . . [defendant's companion] the right to open it without [the defendant's] consent" did not warrant application of the apparent authority doctrine).

Compare Chapter 15, D., 1., c. and d., Search and Seizure–In General—Mistake of Law, and —Mistake of Fact.

i. *Consent by one occupant where co-occupant refuses consent.* "[A] co-tenant's consent to the search of a residence [is] effective even if the other co-tenant protest[s] . . . ." *United States v. Flores*, 172 F.3d 695, 698 (9th Cir.) (citing *United States v. Morning*, 64 F.3d 531, 536 (9th Cir. 1995), *cert. denied*, 516 U.S. 1152 (1996)), *cert. denied*, 528 U.S. 886 (1999).

"[A]ny of the co-inhabitants [with joint access or control over the premises] has the right to permit the inspection in his own right and . . . the others have assumed the risk that one of their number might permit the common area to be searched." *United States v. Matlock,* 415 U.S. 164, 171 n.7 (1974).

j. *Consent given to undercover agent to enter premises followed by entry of back-up officers.* "[W]here an undercover agent is invited into a home, establishes the existence of probable cause to arrest or search, and immediately summons help from other officers, the warrantless entry of the other officers does not violate the Fourth Amendment." *United States v. Bramble*, 103 F.3d 1475, 1478 (9th Cir. 1996) (citing *United States v. Akinsanya*, 53 F.3d 852, 856 (7th Cir. 1995), and *United States v. Jachimko*, 19 F.3d 296, 298–99 (7th Cir. 1994)).

k. *Parolee consent as condition of parole.* A parolee's blanket consent to search may or may not be a general waiver of rights under the Fourth Amendment. *United States v. Crawford*, 372 F.3d 1048 (9th Cir. 2004) (en banc) (3-judge majority opinion assuming without deciding that parolee's general consent to search did not waive Fourth Amendment rights; 5-judge concurrence finding that waiver rules do not apply to parolees, but that "special needs" doctrine permits

searches as conditions of parole; 3-judge dissent expressing view that Fourth Amendment does not permit suspicionless searches as conditions of parole).

See also Chapter 16, B., 11., Search and Seizure–Without Warrant—Special needs–Searches of probationers and parolees.

3. *Plain view*. "Evidence may be seized without a warrant . . . when it is within 'plain view.'" *United States v. Garcia*, 205 F.3d 1182, 1187 (9th Cir.), *cert. denied*, 531 U.S. 856 (2000). Plain view can be the basis for a warrantless seizure if the property seized was observed:

   a. from a vantage point where the viewing officer had the lawful right to be; and

   b. the evidentiary value of the item was immediately apparent.

   Horton v. California, 496 U.S. 128, 136–37 (1990) (overruling *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), to the extent *Coolidge* required inadvertent discovery). *See also United States v. Bradley*, 321 F.3d 1212, 1214–15 (9th Cir. 2003) (observations of contraband inside residence when police executed warrantless entry to check on safety of nine-year-old child could be used to support search warrant application because items were in plain view); *Garcia*, 205 F.3d at 1187 ("The 'plain view' exception requires: (1) that the initial intrusion must be lawful; and (2) that the incriminatory nature of the evidence must be immediately apparent to the officer.") (citation omitted).

4. *Protective sweep*.

   a. *Defined*. "A 'protective sweep' is a quick and limited search of 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).

b. *Requirements*. The searching officer must possess "a reasonable belief based on 'specific and articulable facts'" that the action is necessary. *Michigan v. Long*, 463 U.S. 1032, 1049 (1983) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)). *See also Maryland v. Buie*, 494 U.S. 325, 327 (1990); *United States v. Reid*, 226 F.3d 1020, 1027–28 (9th Cir. 2000) (no exigent circumstances existed permitting warrantless search); *United States v. Noushfar*, 78 F.3d 1442, 1448 (9th Cir. 1996) ("'[T]here must be 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.'") (quoting *Buie*, 494 U.S. at 334), *amended by* 140 F.3d 1244 (1998).

5. *Border searches*. "[M]ost border searches involving vehicles do not require any articulable level of suspicion." *United States v. Bennett*, 363 F.3d 947, 951 (9th Cir. 2004) (citing *United States v. Flores-Montano*, 124 S. Ct. 1582, 1585 (2004)). "The border search doctrine is a narrow exception to the Fourth Amendment prohibition against warrantless searches without probable cause." *United States v. Sutter*, 340 F.3d 1022, 1025 (9th Cir.) (citation omitted), *amended by* 348 F.3d 789 (2003), *cert. denied*, 124 S. Ct. 1687 (2004). "Pursuant to this exception, codified at 19 U.S.C. §§ 1581 and 1582, routine searches of persons and their effects entering the country may be conducted without any suspicion whatsoever." *Sutter*, 340 F.3d at 1025 (quotation ommitted). The border includes

the primary and secondary inspection areas. *Id*. at 1026–27.

a. *Routine border searches*. Routine border searches "are not subject to any requirement of reasonable suspicion, probable cause, or warrant . . . ." *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985) (citations omitted). *See also United States v. Vargas-Castillo,* 329 F.3d 715, 722 (9th Cir.) ("Routine border searches do not require a warrant or an articulable level of suspicion.") (citations omitted), *cert. denied*, 124 S. Ct. 504 (2003); *United States v. Bravo*, 295 F.3d 1002, 1006 (9th Cir. 2002) (citing *Montoya de Hernandez*, 473 U.S. at 538), *cert. denied*, 538 U.S. 971 (2003).

"Border searches . . . [are] considered to be 'reasonable' by the single fact that the person or item in question ha[s] entered into our country from outside." *United States v. Ramsey*, 431 U.S. 606, 619 (1977).

"In a border search, a person is subject to search of luggage, contents of pockets, and purse without any suspicion at all." *United States v. Vance*, 62 F.3d 1152, 1156 (9th Cir. 1995) (citing *Montoya de Hernandez*, 473 U.S. at 538).

An individual may be detained during a border search of a vehicle during the time of the search. *United States v. Carranza*, 289 F.3d 634, 640 (9th Cir.), *cert. denied*, 537 U.S. 1037 (2002). *See also United States v. Hernandez*, 322 F.3d 592, 597 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 1036 (2004) (finding no Fourth Amendment violation in detaining rear seat passenger during search of vehicle at port of entry; detention included brief handcuffing of

passenger, but detention did not become arrest until after vehicle search); *United States v. Bravo*, 295 F.3d 1002, 1006 (9th Cir. 2002) (detention of driver of vehicle during search of car, including handcuffing, was permissible), *cert. denied*, 538 U.S. 971 (2003); *United States v. Zaragoza,* 295 F.3d 1025, 1028 (9th Cir. 2002) (briefly handcuffing defendant at port of entry constituted a permissible detention and did not taint the subsequent statements made by the defendant), *cert. denied*, 538 U.S. 956 (2003).

Whether a border search is routine or non-routine depends upon the degree of intrusiveness. *United States v. Ramos-Saenz*, 36 F.3d 59, 61 (9th Cir. 1994) (citation omitted).

b. *Exception—Non-routine border searches*. A non-routine border search requires reasonable suspicion. *See, e.g., United States v. Okafor*, 285 F.3d 842, 846 (9th Cir.), *cert. denied*, 537 U.S. 989 (2002); *United States v. Molina-Tarazon*, 279 F.3d 709, 712 (9th Cir. 2002). "[S]earches involving extended detention or an intrusive search of a person's body are not routine." *United States v. Bravo*, 295 F.3d 1002, 1006 (9th Cir. 2002), *cert. denied*, 538 U.S. 971 (2003).

***Caveat**:* This exception does not carry over to the intrusive search of a vehicle. *United States v. Flores-Montano*, 124 S. Ct. 1582, 1585–87 (2004) ("Complex balancing tests to determine what is a 'routine' search of a vehicle, as opposed to a more 'intrusive' search of a person, have no place in border searches of vehicles . . . . While it may be true that some searches of property are so destructive as to require a different result, this [disassembly of a vehicle's fuel tank] was not one of them.") (disapproving of *United States v.*

Molina-Tarazon, 279 F.3d 709, 714 (9th Cir. 2002) (2-1 decision) (removal and inspection of fuel tank on vehicle was a non-routine search requiring reasonable suspicion)).

"The 'critical factor' in determining whether a border search is 'routine' is the 'degree of intrusiveness it poses.'" *United States v. Tsai*, 282 F.3d 690, 694 (9th Cir. 2002) (quoting *Molina-Tarazon*, 279 F.3d at 713) (search of traveler's briefcase and luggage constituted a routine search even though agent suspected traveler of alien smuggling).

(1) *Pat-down search*. A pat-down border search requires "minimal suspicion." *United States v. Vance*, 62 F.3d 1152, 1156 (9th Cir. 1995) (citations omitted).

(2) *Strip search*. A strip search at the border requires "real suspicion." *Id*. (citations omitted).

(3) *Monitored bowel movement*. A monitored bowel movement at the border requires a "'particularized and objective basis for suspecting the particular person of alimentary canal smuggling.'" *United States v. Gonzalez-Rincon*, 36 F.3d 859, 863 (9th Cir. 1994) (quoting *United States v. Oba*, 978 F.2d 1123, 1128 (9th Cir. 1992)), *cert. denied*, 514 U.S. 1008 (1995).

(4) *`X-ray or other technological means.* "[E]xamination of luggage and other containers by x-ray or other technological means may be done at the border with no required showing of particularized suspicion, at least so long as the means of examination are not personally intrusive, do not significantly harm the objects scrutinized,

and do not unduly delay transit." *United States v. Okafor*, 285 F.3d 842, 846 (9th Cir.) (insertion of probe into bag, even if it constituted a non-routine border search, was based on reasonable suspicion), *cert. denied*, 537 U.S. 989 (2002). *See also United States v. Camacho*,368 F.3d 1182, 1184–85 (9th Cir. 2004) (border search of vehicle's tire with hand-held portable density gauge referred to as a "Buster" requires no suspicion).

(5) *Use of force to accomplish search.* "[F]orce is a factor that bears on the intrusiveness of [a] search." *United States v. Molina-Tarazon*, 279 F.3d 709, 713 (9th Cir. 2002). *But see United States v. Flores-Montano*, 124 S. Ct. 1582, 1585 (2004) (upholding suspicionless disassembly of gas tank and disapproving of *Molina-Tarazon*).

c. *Permanent checkpoint.* Although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure", the stopping of vehicles at reasonably located permanent Border Patrol checkpoints requires no "individualized suspicion." *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976) (upholding San Clemente checkpoint).

d. *Temporary checkpoint.* A stop conducted at a clearly visible temporary checkpoint pursuant to a routine inspection of all vehicles for illegal aliens does not violate the Fourth Amendment. *United States v. Soto-Camacho*, 58 F.3d 408, 411 (9th Cir. 1995); *United States v. Hernandez*, 739 F.2d 484, 485 (9th Cir.), *cert. denied*, 469 U.S. 1021 (1984). *Compare United States v. Brignoni-Ponce*, 422 U.S. 873, 882 (1975) (roving border patrol stops of vehicles must be based upon reasonable suspicion).

e. *Extended border search.*

(1) *Defined.* Searches spatially and temporally close to the border qualify as extended border searches. *See United States v. Ogbuehi*, 18 F.3d 807, 812–13 (9th Cir. 1994) (agent could request that suspect who had cleared customs return to the building for further questioning without reasonable suspicion because search was a border search and not an "extended border search").

(2) *Requirements.* The Ninth Circuit has "recognized only two situations in which a car and its passengers are properly subject to an 'extended border search', that is, a search away from the border where entry is not apparent." *United States v. Corral-Villavicencio*, 753 F.2d 785, 788 (9th Cir. 1985) (citation omitted). These situations are:

(a) *Weil search.* "'[T]he right of customs agents to search a vehicle without probable cause is not confined to vehicles that have crossed the border . . . . *[I]f customs agents are reasonably certain that parcels have been (a) smuggled across the border and (b) placed in a vehicle, whether the vehicle has itself crossed the border or not, they may stop and search the vehicle.*'" *United States v. Corral-Villavicencio*, 753 F.2d 785, 788 (9th Cir. 1985) (quoting *United States v. Weil*, 432 F.2d 1320, 1323 (9th Cir. 1970), *cert. denied*, 401 U.S. 947 (1971)); and

(b) *Alexander search.* *Alexander v. United States*, 362 F.2d 379 (9th Cir.), *cert. denied*, 385 U.S. 977 (1966), has been referred to as "[t]he leading case in this circuit on extended border

searches." *United States v. Cardona*, 769 F.2d 625, 629 (9th Cir. 1985).

"'Where . . . a search for contraband . . . is not made at or in the immediate vicinity of the point of international border crossing, the legality of the search must be tested by a determination whether the totality of the surrounding circumstances, including the time and distance elapsed as well as the manner and extent of surveillance, are such to convince the fact finder with reasonable certainty that any contraband which might be found in or on the vehicle at the time of search was aboard the vehicle at the time of entry into the jurisdiction of the United States.'" *Cardona*, 769 F.2d at 629 (quoting *Alexander*, 362 F.2d at 382).

f. *Functional equivalent of border search.* The search of baggage from "an international flight is considered a border search, because it was conducted at the functional equivalent of a border checkpoint." *United States v. Okafor*, 285 F.3d 842, 845 (9th Cir.) (citing *Almeida-Sanchez v. United States*, 413 U.S. 266, 272–73 (1973)), *cert. denied*, 537 U.S. 989 (2002). "The government has broad authority to conduct searches of vessels at the functional equivalent of the border, but only if its agents are reasonably certain that a vessel and its contraband contents have crossed the border." *United States v. Bennett*, 363 F.3d 947, 950 (9th Cir. 2004) (citations omitted) (search of boat).

Such searches may be conducted "without any articulable level of suspicion, so long as the search is routine." *Okafor*, 285 F.3d at 845 (quoting *United*

States v. Montoya de Hernandez, 473 U.S. 531, 537-38 (1985)).

g. *Search pursuant to 8 U.S.C. § 1357(a)(3).* Pursuant to 8 U.S.C. § 1357(a)(3), Border Patrol Agents are authorized, without a warrant, "within a distance of twenty-five miles from any . . . external boundary [of the United States] to have access to private lands, but not dwellings, for the purpose of patrolling the border to prevent the illegal entry of aliens into the United States." *See also United States v. Romero-Bustamante*, 337 F.3d 1104 (9th Cir. 2003) (ruling that "Congress did not intend § 1357(a)(3) to authorize searches of individual backyards . . . .")

6. *Inventory search.*

a. *Defined.* "[I]nventory procedures serve to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger." *Colorado v. Bertine*, 479 U.S. 367, 372 (1987).

b. *Requirement.* "Inventory searches have been held constitutional if they are conducted in accordance with the standard procedures of the agency conducting the search or come under another exception to the Fourth Amendment warrant requirement." *United States v. Ramos-Oseguera*, 120 F.3d 1028, 1036 (9th Cir. 1997) (inventory search procedures authorizing the cataloguing and safekeeping of visible property did not authorize search of pocket of jeans) (citing *Florida v. Wells*, 495 U.S. 1, 3–4 (1990)), *cert. denied*, 522 U.S. 1135 (1998). *See also United States v. Bowhay*, 992 F.2d 229, 230–31 (9th Cir. 1993).

In order to avoid being designated an evidentiary search, inventory practices must limit the searcher's discretion. *Wells*, 495 U.S. at 4.

c. *Subsequent searches after discovery*. Once an item has been seized and searched by police, so long as it remains in the legitimate uninterrupted possession of the police, it may be searched again without a warrant. *United States v. Turner*, 28 F.3d 981, 983 (9th Cir. 1994) (citations omitted), *cert. denied*, 513 U.S. 1158 (1995). *See also Hell's Angels Motorcycle Corp. v. McKinley*, 360 F.3d 930, 933–34 (9th Cir. 2004) (reexamination of items seized incident to warrant permissible).

7. *Temporary checkpoint*. Although a seizure for Fourth Amendment purposes occurs at temporary checkpoints, *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 450 (1990) (sobriety checkpoint upheld based on highway safety purpose), where checkpoints are selected by guidelines and every approaching vehicle is briefly stopped, the government's interest in addressing criminal conduct may outweigh the privacy expectations of the individual. *Id*. at 453, 455. *See also Illinois v. Lidster*, 124 S. Ct. 885, 888–91 (2004) (upholding highway checkpoint whose primary purpose was to ask vehicle occupants for information about a nearby crime). *But see City of Indianapolis v. Edmond*, 531 U.S. 32, 40–44, 48 (2000) (city's drug interdiction checkpoints violated Fourth Amendment, where "primary purpose was to detect evidence of ordinary criminal wrongdoing" by vehicle occupants themselves).

8. *Military base checkpoints*. "The Government's interest in maintaining national security and promoting public safety on base roadways" may permit the brief stopping of all

vehicles at a designated gate to a military base. *United States v. Hawkins*, 249 F.3d 867, 875 (9th Cir. 2001).

9. *Consensual interception of telephone/chat room conversations.* "Like private telephone conversations, either party to a chat room exchange has the power to surrender each other's privacy interest to a third party." *United States v. Meek*, 366 F.3d 705 (9th Cir. 2004) (citing *United States v. Karo*, 468 U.S. 705, 726 (1984) and *Katz v. United States*, 389 U.S. 347 (1967)).

   a. *In general*. An otherwise unauthorized interception of wire communications is lawful where "one of the parties to the communication has given prior consent to such interception." 18 U.S.C. § 2511(2)(c).

   b. *Informant's consent*. "Unless [the informant's] consent to cooperate was voluntarily given, the conversations between him and [the defendant are] not admissible in evidence under 18 U.S.C. § 2511(2)(c)." *United States v. Brandon*, 633 F.2d 773, 776 (9th Cir. 1980).

      (1) *Fact question*. The question of voluntariness is a fact question assessed under the totality of circumstances. *United States v. Brandon*, 633 F.2d 773, 776 (9th Cir. 1980).

      (2) *Proof required*. Ordinarily, a mere showing that the informant engaged in a conversation knowing that it was being intercepted is sufficient for the government to meet its burden of proof. *United States v. Sanford*, 673 F.2d 1070, 1072 (9th Cir. 1982).

      (3) *Informant's motive*. The fact that the informant cooperated out of self-interest (*e.g.*, to avoid prosecution) does not constitute improper

government coercion or inducement. *United States v. Brandon*, 633 F.2d 773, 777 (9th Cir. 1980).

10. *Mail cover.*

a. *Mail cover defined.* A "[m]ail cover is . . . a nonconsensual record . . . of any data appearing on the outside cover of any sealed or unsealed class of mail matter . . . to obtain information in order to":

(i) Protect national security,

(ii) Locate a fugitive,

(iii) Obtain evidence of commission or attempted commission of a crime,

(iv) Obtain evidence of a violation or attempted violation of a postal statute, or

(v) Assist in the identification of property, proceeds or assets forfeitable under law.

39 C.F.R. § 233.3(c)(1).

b. *Procedure for obtaining mail cover.* "Mail covers may be ordered only pursuant to a written request to the Chief Postal Inspector or his authorized agents specifying the reasonable grounds necessary for the cover." *United States v. Hinton*, 222 F.3d 664, 674 (9th Cir. 2000) (citing 39 C.F.R. §233.3(d), (e)), *cert. denied*, 531 U.S. 1200 (2001).

c. *Exceptions.* "Exceptions apply to undelivered mail, damaged mail, and mail that poses an immediate threat to persons or property." *United States v. Hinton*, 222

F.3d 664, 674 (9th Cir. 2000) (citing 39 C.F.R. §233.3(f)(1),(2)), *cert. denied*, 531 U.S. 1200 (2001).

d. *Consequences of failure to follow requirements.* "There is no expectation of privacy in the addresses on [mail]." *United States v. Hinton*, 222 F.3d 664, 675 (9th Cir. 2000), *cert. denied*, 531 U.S. 1200 (2001). *See also United States v. Van Leeuwen*, 397 U.S. 249, 250–52 (1970).

Because there is no "constitutional right of privacy to the information on the outside of a . . . package", suppression is not required. *Hinton*, 222 F.3d at 674–75 ("suppression is not the appropriate remedy for a failure to follow agency regulations") (citing *United States v. Ani*, 138 F.3d 390, 392 (9th Cir. 1998)).

11. *Special needs—Searches of probationers and parolees.*

a. *In general.* A warrantless search of a probationer, supported by reasonable suspicion and authorized by the conditions of probation, is reasonable within the Fourth Amendment. *United States v. Knights*, 534 U.S. 112, 122-23 (2001). *But see United States v. Crawford*, 372 F.3d 1048 (9th Cir. 2004) (en banc) (3-judge majority opinion assuming without deciding that parolee's general consent to search did not waive Fourth Amendment rights; 5-judge concurrence finding that waiver rules do not apply to parolees, but that special needs doctrine permits searches as conditions of parole; 3-judge dissent expressing view that Fourth Amendment does not permit suspicionless searches as conditions of parole).

b. *Limited exception*. Generally, absent a "limited exception of some special needs and administrative search cases," the Supreme Court is unwilling to examine the "'actual motivations of individual

officers'" conducting the probation search. *United States v. Knights*, 534 U.S. 112, 122 (2001) (quoting *Whren v. United States*, 517 U.S. 806, 813 (1996)).

The Ninth Circuit recently pointed out that *Knights* overturned "[a] . . . line of cases in this circuit . . . that a probation search that was a subterfuge for a criminal investigation violated the Fourth Amendment." *United States v. Stokes*, 292 F.3d 964, 967 (9th Cir.) (citations omitted), *cert. denied*, 537 U.S. 964 (2002).

c. *Rationale.* When a condition of probation is that the probationer is required to permit the warrantless search of person and property by the probation officer at any time, "[t]he explicit search provision diminishe[s] [the probationer's] expectation of privacy." *United States v. Stokes*, 292 F.3d 964, 967 (9th Cir.) ("probation officer was entitled to carry out a search of [the probationer's] vehicle with no more than reasonable suspicion that [the probationer] was engaged in criminal activity") (citing *United States v. Knights,* 534 U.S. 112, 119–20 (2001)), *cert. denied*, 537 U.S. 964 (2002).

d. *Caveat—State parole or probation searches*. An exception to the general rule that federal law governs the admissibility of evidence in federal court, even when gathered by state agents, may arise in the context of state probation searches. "In the limited context of state parole or probation searches, we may sometimes look to state law for guidance about the controlling federal issue." *United States v. Conway*, 122 F.3d 841, 843 (9th Cir. 1997) (Wallace, J., concurring), *cert. denied*, 522 U.S. 1065 (1998).

12. *Regulatory or administrative searches*.

a. *Regulatory searches*—Colonnade-Biswell *exception.* "[U]nder the so-called *Colonnade-Biswell* exception, warrantless searches and seizures on commercial property used in 'closely regulated' industries are constitutionally permissible." *United States v. Argent Chem. Lab., Inc.*, 93 F.3d 572, 575 (9th Cir. 1996) (veterinary drug business) (citing *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) and *United States v. Biswell*, 406 U.S. 311 (1972)), *cert. denied*, 520 U.S. 1115 (1997).

b. *Administrative searches—Airports and courthouses.* "It is well established that searches conducted as part of a general regulatory scheme, done in furtherance of administrative goals rather than to secure evidence of a crime, may be permissible under the Fourth Amendment without a particularized showing of probable cause. Limited administrative searches may be conducted at the border, . . . in airports, . . . and in state courthouses . . . ." *United States v. Bulacan*, 156 F.3d 963, 967 (9th Cir. 1998) (search of item at federal courthouse after it was determined that the item was neither an explosive device nor a weapon, constituted impermissible search requiring suppression of drugs seized as a result of search) (citations omitted).

13. *Public employee searches.*

a. *Standard for search*. "[A] warrantless search of an employee's office by a public employer for work-related, non-investigatory reasons or pursuant to an investigation of work-related employee misconduct, [is] not subject to review under the probable cause standard, but rather the less rigorous standard of 'reasonableness under all the circumstances.'" *United States v. Jones*, 286 F.3d 1146, 1150 (9th Cir. 2002)

(federal agent's warrantless search of public employee's office, on facts presented, was not a search authorized by *O'Connor v. Ortega*, 480 U.S. 709 (1987)) (quoting *O'Connor*, 480 U.S. at 725–26).

b. *Rationale for relaxed standard.* The less heightened standard "for public employer searches has its origins in the 'realities of the workplace' that frequently require employers 'to enter the offices and desks of their employees for legitimate work-related reasons wholly unrelated to illegal conduct' in order to 'complete the government agency's work in a prompt and efficient manner.'" *United States v. Jones*, 286 F.3d 1146, 1150 (9th Cir. 2002) (quoting *O'Connor v. Ortega*, 480 U.S. 709, 721 (1987)).

c. *Notice of possible search.* Notice to employees that they their containers at work may be searched may eliminate the expectation of privacy. *United States v. Gonzalez*, 300 F.3d 1048, 1055 (9th Cir. 2002) (notice to employee at government store that containers may be searched permitted store to "search his backpack for stolen merchandise, even though the search was on a random basis without reasonable suspicion").

14. *Special needs re domestic violence court orders.* Law enforcement officers may conduct a warrantless entry into a residence, without probable cause, in order to accompany an individual who possesses a court order authorizing retrieval of belongings from the premises. *Henderson v. City of Simi Valley,* 305 F.3d 1052, 1057–61 (9th Cir. 2002) (an order issued under the California Domestic Violence Prevention Act justified special needs exception for officers' warrantless entry into residence while accompanying juvenile; case involved § 1983 action

against city for alleged Fourth Amendment violation by officers).

15. *Coast Guard inspections, searches and seizures*. "The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States." 14 U.S.C. § 89(a). *See also United States v. Todhunter*, 297 F.3d 886, 889 (9th Cir. 2002) (even in the absence of suspicion, the Coast Guard "had the right to board the [ship] in navigable waters to ascertain that the vessel was complying with all federal laws") (citation omitted).

C. Warrantless searches and seizures where probable cause is required.

1. *Probable cause defined.* Probable cause requires "'a reasonable belief, evaluated in light of the officer's experience and the practical considerations of everyday life,'" that contraband or evidence would be found in the place to be searched." *United States v. Perez*, 67 F.3d 1371, 1375 (9th Cir. 1995) (stale information four days old eviscerated probable cause for warrantless search of vehicle) (quoting *United States v. George*, 883 F.2d 1407, 1412 (9th Cir. 1989) and *United States v. Robertson*, 606 F.2d 853, 858 (9th Cir. 1979)), *withdrawn in part on other grounds*, 116 F.3d 840 (1997).

2. *Vehicle searches*.

   a. *"Automobile exception"—In general*. Once probable cause exists to believe that a motor vehicle contains contraband and the vehicle can be moved, officers may conduct a warrantless search of the vehicle and the scope of that search is as broad as a magistrate could authorize through a warrant. *California v. Carney*, 471

U.S. 386, 394–95 (1985); *United States v. Ross*, 456 U.S. 798, 823 (1982); *Carroll v. United States*, 267 U.S. 132, 149, 156 (1925). "This rule is known as the 'automobile exception' to the general rule that the police must obtain a warrant before executing a search." *United States v. Pinela-Hernandez*, 262 F.3d 974, 978 (9th Cir. 2001) (citing *Carney*, 471 U.S. at 390), *cert. denied*, 122 S. Ct. 2347 (2002).

b. *Rationale for automobile exception to warrant requirement*. The rationale for allowing such searches is that vehicles are mobile, can be moved quickly, and the expectation of privacy is reduced by pervasive regulations governing vehicles. *United States v. Hatley*, 15 F.3d 856, 858 (9th Cir. 1994).

c. *Passenger's belongings.* Probable cause to search a vehicle includes the right to search a passenger's belongings located within the vehicle if those belongings are capable of concealing the object of the search. *Wyoming v. Houghton*, 526 U.S. 295, 307 (1999).

d. *Search of container in vehicle.* Although "[t]he line between probable cause to search a vehicle and probable cause to search a package in that vehicle is not always clear," probable cause to believe that a container in a vehicle contains contraband, while authorizing a warrantless search of the container for which probable cause exists, does not necessarily authorize the search of the entire vehicle. *California v. Acevedo*, 500 U.S. 565, 574, 580 (1991) (announcing elimination of the distinction between the search of a vehicle where probable cause exists to believe the vehicle contains contraband, which did not require a warrant, and probable cause to believe that a container

in a vehicle contained contraband, which did require a warrant to search the container).

e. *Vehicle on private property.* The vehicle exception to the warrant requirement applies even when the vehicle is parked on private land. *United States v. Hatley*, 15 F.3d 856, 859 (9th Cir. 1994); *United States v. Hamilton*, 792 F.2d 837, 843 (9th Cir. 1986).

f. *Disabled vehicle.* A vehicle, not obviously disabled, may also be subject to such searches. *United States v. Hatley*, 15 F.3d 856, 859 (9th Cir. 1994). It would be unduly burdensome for police to ascertain mobility before taking action. *Id*. at 859.

g. *Motor home.* For purposes of the motor vehicle exception to the search warrant requirement, a motor home can be a vehicle. *California v. Carney*, 471 U.S. 386, 393–94 (1985); *United States v. Hamilton*, 792 F.2d 837, 842–43 (9th Cir. 1986) (mobile home on private property is subject to warrantless search if probable cause exists).

Whether a mobile home is a motor vehicle depends on factors such as whether the vehicle is readily mobile or elevated on blocks, whether it is licensed, whether it is connected to utilities, and whether it has convenient access to a public road. *Hamilton*, 792 F.2d at 843 (citing *Carney*, 471 U.S. at 394 n.3).

h. *Houseboat*. A warrantless search of a mobile houseboat is permissible where probable cause exists that evidence is present. *United States v. Albers*, 136 F.3d 670, 673 (9th Cir. 1998) (applying *California v. Carney*, 471 U.S. 386 (1985), test for motor homes to houseboats).

A houseboat that does not meet the *Carney* requirements may not be searched pursuant to the automobile exception. *Albers*, 136 F.3d at 673.

i. *Postponed search*. If probable cause to search a vehicle existed at the time of a suspect's arrest, a warrantless search of the suspect's vehicle at the police station is permissible. *Chambers v. Maroney*, 399 U.S. 42, 51–52 (1970). *See also Michigan v. Thomas*, 458 U.S. 259, 261–62 (1982).

Law enforcement officers having probable cause to conduct a warrantless seizure of supposed evidence are not required to view the evidence at the scene of the seizure. *United States v. Johns*, 469 U.S. 478, 487 (1985) ("[W]here police officers are entitled to seize the container and continue to have probable cause to believe that it contains contraband, we do not think that delay in the execution of the warrantless search is necessarily unreasonable.") (citations omitted); *United States v. Albers*, 136 F.3d 670, 674 (9th Cir. 1998) (law enforcement officers possessing probable cause to suspect that videotapes and film on houseboat contained evidence were not required to view the film at the location of the seizure).

3. *Body fluid seizures*. A warrantless seizure of blood or urine is permissible when:

a. exigent circumstances exist for the seizure, such as loss of evidence;

b. probable cause exists to believe that evidence of a crime is present in the suspect's body; and

c. the method of seizure is in accordance with accepted practice.

United States v. Edmo, 140 F.3d 1289, 1291–93 (9th Cir. 1998) ("requiring an arrestee to submit to a urine test is reasonable under the Fourth Amendment" where probable cause existed to believe defendant had consumed a controlled substance) (citing *Schmerber v. California*, 384 U.S. 757, 769–71 (1966)); *United States v. Chapel*, 55 F.3d 1416, 1418–20 (9th Cir. 1995) (overruling *United States v. Harvey*, 701 F.2d 800, 805 (9th Cir. 1983), which held that arrest must occur before a sample is seized), *cert. denied*, 16 U.S. 1065 (1996).

See also Chapter 17, G., 1., Search and Seizure–Pursuant to Search Warrant—Blood, semen samples.

4. *Emergency doctrine.*

a. *Defined.* "The emergency doctrine provides that if a police officer, while investigating within the scope necessary to respond to an emergency, discovers evidence of illegal activity, that evidence is admissible even if there was not probable cause to believe that such evidence would be found." *United States v. Cervantes*, 219 F.3d 882, 888 (9th Cir. 2000) (citations omitted), *cert. denied*, 532 U.S. 912 (2001).

"The emergency doctrine is derived from police officers' community caretaking function." *United States v. Bradley*, 321 F.3d 1212, 1214–15 (9th Cir. 2003) (warrantless entry into residence to check on welfare of unattended nine-year-old child justified under emergency doctrine) (citing *Cervantes*, 219 F.3d at 889).

b. *Requirements.* "The emergency doctrine's requirements are . . .":

(1) [t]he police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property[,]

(2) [t]he search must not be primarily motivated by intent to arrest and seize evidence[, and]

(3) [t]here must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched.

United States v. Cervantes, 219 F.3d 882, 888, 890 (9th Cir. 2000) (adopting the test from *People v. Mitchell*, 347 N.E.2d 607, 609 (N.Y.), *cert. denied*, 426 U.S. 953 (1976), and quoting *Murdock v. Stout*, 54 F.3d 1437, 1441 n.3 (9th Cir. 1995)), *cert. denied*, 532 U.S. 912 (2001). *See also United States v. Deemer*, 354 F.3d 1130 (9th Cir. 2004) (finding emergency doctrine not applicable to search of hotel room next to room from which 911 telephone call was made, because third requirement was not met); *Martin v. City of Oceanside*, 360 F.3d 1078 (9th Cir. 2004) (in a § 1983 action, emergency doctrine justified entry of house based on reasonable belief that woman in house was in danger).

5. *Hot pursuit / exigent circumstances*.

a. *In general*. A warrantless entry onto premises may be permissible where exigent circumstances exist. Exigent circumstances have been defined as "those circumstances that would cause a reasonable person to believe that entry . . . was necessary to prevent physical harm to the officers or other persons, the destruction of

relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." *United States v. McConney*, 728 F.2d 1195, 1199 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824 (1984). *See also United States v. Brooks,* 367 F.3d 1128, 1135–37 (9th Cir. 2004) (911 call, coupled with other circumstances, constituted probable cause for exigent circumstance entry into hotel room); *United States v. Alaimalo,* 313 F.3d 1188, 1193–94 (9th Cir. 2002) (exigent circumstances and probable cause required for warrantless entry into residence), *cert. denied*, 124 S. Ct. 242 (2003)*; Ortiz-Sandoval v. Clarke*, 323 F.3d 1165, 1171–72 (9th Cir. 2003) (warrantless entry justified by exigent circumstances where police were investigating murder and no weapon had been recovered); *United States v. Ojeda,* 276 F.3d 486, 488 (9th Cir. 2002).

In order for exigent circumstances based upon crime prevention to authorize a warrantless entry into a residence, law enforcement officers must also have probable cause to believe that criminal activity is occurring. *Murdock v. Stout*, 54 F.3d 1437, 1441 (9th Cir. 1995) (citations omitted).

b. *Hot pursuit must be immediate and continuous.* "The hot pursuit exception to the warrant requirement only applies when officers are in 'immediate' and 'continuous' pursuit of a suspect from the scene of the crime." *United States v. Johnson,* 256 F.3d 895, 907–08 (9th Cir. 2001) (en banc) (because "the continuity of the chase was clearly broken," a search warrant was required) (citing *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984)).

c. *Exigent circumstances without hot pursuit.* However, exigent circumstances may exist even in the absence of hot pursuit. *Ortiz-Sandoval v. Clarke*, 323 F.3d 1165,

1171–72 (9th Cir. 2003) (even though police waited to enter residence to look for defendant and firearm, exigent circumstances existed based upon "the gravity of the crime and likelihood that the suspect [was] armed").

d. *Examples*. Examples of exigent circumstances justifying a warrantless entry and/or search:

(1) when necessary to safeguard life or limb, *Mincey v. Arizona*, 437 U.S. 385, 392 (1978) (officer can make warrantless entry when he or she "reasonably believe[s] that a person within is in need of immediate aid");

(2) where there is probable cause to arrest or search and an urgent need for immediate police action because delay would increase the risk of harm or escape or destruction of evidence or some other consequence improperly frustrating legitimate law enforcement efforts, *United States v. Gooch,* 6 F.3d 673, 679 (9th Cir. 1993) (citation omitted); *United States v. Al-Azzawy*, 784 F.2d 890, 894 (9th Cir. 1985) (citations omitted), *cert. denied*, 476 U.S. 1144 (1986);

(3) where police are responding to a crime in progress, *Murdock v. Stout*, 54 F.3d 1437, 1442–43 (9th Cir. 1995); *United States v. Erickson*, 991 F.2d 529, 533 (9th Cir. 1993); *United States v. Valles-Valencia*, 811 F.2d 1232, 1235–36 (9th Cir.), *amended by* 823 F.2d 381 (1987). This may include 911 calls. *United States v. Brooks*, 367 F.3d 1128, 1135–37 (9th Cir. 2004); or

(4) where community caretaking functions may permit a search, *Cady v. Dombrowski*, 413 U.S. 433, 447–48 (1973) (search of off-duty police officer's car for service revolver after car accident upheld). *But see United States v. Erickson*, 991 F.2d 529, 532 (9th Cir. 1993) (community caretaking function "cannot alone justify" warrantless search of residence).

e. *Request for permission to search after exigent circumstances entry.* "[Q]uestioning [] related to the exigency that prompted [the officer] to the scene" is permissible. *United States v.Brooks*, 367 F.3d 1128, 1138 (9th Cir. 2004) (permissible to ask tenant of hotel room which was subject of 911 call whether "any illegal items were in the hotel room," as inquiry may disclose presence of firearms).

6. *Officer safety.* "[W]here an undercover agent is invited into a home, establishes the existence of probable cause to arrest or search, and immediately summons help from other officers, the warrantless entry of the other officers does not violate the Fourth Amendment." *United States v. Bramble*, 103 F.3d 1475, 1478 (9th Cir. 1996) (citations omitted).

D. Warrantless entry and/or search where probable cause to arrest is required.

1. *Incident to arrest.* "[T]he standard for a valid 'search incident to arrest' is: '[g]iven a lawful arrest, it is enough that the search . . . be roughly contemporaneous with the arrest.'" *United States v. Tank*, 200 F.3d 627, 631 (9th Cir. 2000) (quoting *United States v. Moorehead*, 57 F.3d 875, 878 (9th Cir. 1995)).

a. *Scope.* It is reasonable for a police officer to search an "arrestee's person and the area 'within [the arrestee's]

immediate control,'" *i.e.*, "the area from within which [the arrestee] might gain possession of a weapon or destructible evidence." *Chimel v. California*, 395 U.S. 752, 763 (1969).

b. *Timeliness*. This exception permits the search of a vehicle or room after the suspect has been removed from the vehicle or room. *United States v. LaFromboise*, 105 F.3d 512, 513 (9th Cir. 1997) (search of vehicle immediately after arrestee removed) (citation omitted); *United States v. Hudson*, 100 F.3d 1409, 1419–20 (9th Cir. 1996) (search of bedroom within three minutes after arrestee removed), *cert. denied*, 522 U.S. 939 (1997).

A search of a car "within minutes of the arrest" satisfies "the requirement that a search incident to a lawful arrest be conducted roughly contemporaneously with the arrest." *United States v. Tank*, 200 F.3d 627, 631 (9th Cir. 2000). *See also United States v. McLaughlin*, 170 F.3d 889, 891, 893 (9th Cir. 1999) (search of vehicle five minutes after defendant arrested and removed from vehicle nevertheless a search incident to arrest).

c. *Search of motor vehicle incident to arrest.* "[W]hen a police officer has made a lawful custodial arrest of an occupant of an automobile, the Fourth Amendment allows the officer to search the passenger compartment of that vehicle as a contemporaneous incident of arrest." *Thornton v. United States*, 124 S. Ct. 2127, 2129 (2004) (citing *New York v. Belton*, 453 U.S. 454 (1981)).

Police may search a motor vehicle, its passenger compartments, and containers therein as a

contemporaneous search incident to arrest. *United States v. McLaughlin*, 170 F.3d 889, 891 (9th Cir. 1999) (citing *Belton*, 453 U.S. at 460).

The passenger compartment of a vehicle may be searched incident to the arrest of an occupant or recent occupant of the vehicle. *Thornton v. United States*, 124 S. Ct. 2127, 2129 (2004) (search of vehicle incident to arrest permissible after arrestee had exited his vehicle).

"[T]he applicability of the *Belton* rule does not depend upon a defendant's ability to grab items in a car but rather upon whether the search is roughly contemporaneous with the arrest." *McLaughlin*, 170 F.3d at 891–92 (citation omitted). The reason for the rule is officer safety and preservation of evidence. *McLaughlin*, 170 F.3d at 894 (Trott, J., concurring).

d. *Search incident to routine traffic citation.* A routine traffic citation may not be used as the basis for the search of an entire vehicle incident to arrest. *Knowles v. Iowa*, 525 U.S. 113, 114 (1998) (stop of motorist for speeding did not authorize a search of the vehicle incident to arrest even though state law authorized law enforcement officer to place suspect under arrest for suspected violation of any traffic or motor vehicle equipment law).

e. *Execution of arrest warrant and search incident thereto.* "[A]n arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton v. New York*, 445 U.S. 573, 603 (1980).

However, where the suspect is positioned outside a residence, an officer may not push the suspect into the

dwelling then claim the right to conduct a search thereof pursuant to the arrest. *United States v. Albrektsen*, 151 F.3d 951, 953–54 (9th Cir. 1998) (misdemeanor arrest warrant did not authorize officer to enter house when suspect was standing in the doorway).

f. *Reexamination of seized items.* "[P]ersonal items seized and examined by police during searches incident to a lawful arrest are not protected from further warrantless searches by police." *Hell's Angels Motorcycle Corporation v. McKinley*, 360 F.3d 930, 933 (9th Cir. 2004) (*Bivens* lawsuit dismissed).

2. *Pretextual stops / traffic stops*. *See* Chapter 14, C., 4., Arrest—Pretextual arrest– Traffic stop.

3. *Exigent circumstances—Body fluid.* "A search incident to a warrantless arrest based upon probable cause is allowed where the officer 'might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence.'" *United States v. Edmo*, 140 F.3d 1289, 1292 (9th Cir. 1998) (quoting *Schmerber v. California*, 384 U.S. 757, 770 (1966)). This includes blood, *Schmerber*, 384 U.S. at 770–71, and urine, *Edmo*, 140 F.3d at 1292.

CHAPTER 17. SEARCH AND SEIZURE—PURSUANT TO SEARCH WARRANT

A. Issuance of a search warrant.

Pursuant to Fed. R. Crim. P. 41, a magistrate judge or a state court of record may issue a warrant authorizing the seizure of a person or the search of property within a federal district upon a showing that probable cause exists to believe that contraband or evidence will be found. (2002 Amendment.) In addition, a magistrate judge may issue a warrant for a person or property outside the district when (a) the person or property is inside the district when the warrant is issued but may move outside the district before execution, or (b) the warrant relates to terrorism (as defined by 18 U.S.C. § 2331) activities that may have occurred within the district. Rule 41(b)(3).

1. *Affidavit.* The sworn affidavit (or, in the case of a warrant upon oral testimony, the sworn testimony) must establish probable cause. Fed. R. Crim. P. 41(d)(1).

2. *Test re probable cause.* The test to be applied is whether, using common sense and considering the totality of the circumstances, a magistrate judge can reasonably conclude that there is a "fair probability" that contraband or evidence of a crime will be found in the place to be searched. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). "[A] magistrate judge must look to the 'totality of the circumstances' to determine whether the supporting affidavit establishes probable cause." *United States v. Alvarez*, 358 F.3d 1194, 1203 (2004) (totality included internal consistency of statements of confidential informants) (quoting *Gates*, 462 U.S. at 230). *See also United States v. Reeves*, 210 F.3d 1041, 1046 (9th Cir.) (citation omitted), *cert. denied*, 531 U.S. 1000 (2000).

”Under the totality of the circumstances test, otherwise innocent behavior may be indicative of criminality when viewed in context . . . . [I]ssuing judges may rely on the training and experience of affiant police officers." *United States v. Chavez-Miranda*, 306 F.3d 973, 978 (9th Cir. 2002) (citation omitted), *cert. denied*, 537 U.S. 1217 (2003).

“A magistrate is entitled to draw reasonable inferences about where evidence is likely to be kept, based on the nature of the evidence and the type of offense.” *United States v. Angulo-Lopez*, 791 F.2d 1394, 1399 (9th Cir. 1986) (citations omitted). *See also United States v. Henson*, 123 F.3d 1226, 1238–39 (9th Cir. 1997).

“‘The affidavit need “only enable the magistrate to conclude that it would be reasonable to seek the evidence in the place indicated.”’” *United States v. Valencia*, 24 F.3d 1106, 1109 (9th Cir. 1994) (quoting *United States v. Taylor*, 716 F.2d 701, 706 (9th Cir. 1983)). *See also Angulo-Lopez*, 791 F.2d at 1399 (“In the case of drug dealers, evidence is likely to be found where the dealers live.”) (citations omitted).

A magistrate judge’s finding of probable cause is entitled to great deference. *United States v. Terry*, 911 F.2d 272, 275 (9th Cir. 1990) (citation omitted).

3. *Establishing probable cause.*

   a. *Tip*. Whether an informant’s tip is sufficient to establish probable cause for issuance of a search warrant is to be determined from the totality of the circumstances. *Illinois v. Gates*, 462 U.S. 213, 230–31, 238 (1983) (anonymous tip corroborated by police constituted probable cause to search)

(overruling *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969)). *See also United States v. Clark*, 31 F.3d 831, 834 (9th Cir. 1994) ("an anonymous tip is insufficient to establish probable cause absent independent corroboration, either through police investigation or some other indication of reliability") (citation omitted), *cert. denied*, 513 U.S. 1119 (1995).

(1) *Anonymous tip*. "While an anonymous tip would not by itself establish probable cause, independent police corroboration of even innocent activity reported in the tip may support a finding of probable cause." *United States v. Perez*, 67 F.3d 1371, 1383 (9th Cir. 1995) (citing *Gates*, 462 U.S. at 243 n.13), *withdrawn in part on other grounds*, 116 F.3d 840 (1997). *But see United States v. Mendonsa*, 989 F.2d 366, 369 (9th Cir. 1993) (police confirmation of "innocent static details" is insufficient corroboration of an anonymous tip to support probable cause).

(2) *Known informant*. "When a search warrant is based solely on an informant's tip, . . . 'the proper analysis is whether probable cause exists from the totality of the circumstances to determine a sufficient level of reliability and basis of knowledge for the tip.'" *United States v. Elliott,* 322 F.3d 710, 715 (9th Cir. 2003) (quoting *United States v. Bishop*, 264 F.3d 919, 924 (9th Cir. 2001)). *See also United States v. Nielsen*, 371 F.3d 574, 579–80 (9th Cir. 2004) (reliability evidenced by similarity of firsthand information from three confidential informants).

b. *Canine sniffs*. A canine sniff by a dog of established reliability may, standing alone, supply probable cause.

United States v. Lingenfelter, 997 F.2d 632, 639 (9th Cir. 1993) (citation omitted).

c. *Anticipatory search warrants.* An anticipatory search warrant is a warrant that becomes effective only upon the occurrence of a future event. *United States v. Vesikuru*, 314 F.3d 1116, 1119 (9th Cir. 2002) (citing *United States v. Rowland*, 145 F.3d 1194, 1200 (10th Cir. 1998)). "[A]n anticipatory search warrant is conditioned upon the occurrence of a triggering event. If the triggering event does not occur, probable cause to search is lacking." *Vesikuru,* 314 F.3d at 1119.

In order to be valid, "[a]n affidavit in support of an anticipatory search warrant must show that the property sought is on a sure course to the destination targeted for the search." *United States v. Ruddell,* 71 F.3d 331, 333 (9th Cir. 1995) (anticipatory search warrant upheld where a controlled delivery by an undercover agent was planned and the contraband to be delivered by the agent was on a "sure course" to the defendant's premises) (citation omitted).

An anticipatory search warrant which fails to clearly specify in the warrant or accompanying attachments the conditions precedent to execution is unconstitutional. *United States v. Hotal*, 143 F.3d 1223, 1226–27 (9th Cir. 1998). *See also United States v. Hendricks*, 743 F.2d 653, 654–55 (9th Cir. 1984) (granting of motion to suppress anticipatory search warrant required where there was not certainty that drugs would ever go to the place named in the warrant), *cert. denied*, 470 U.S. 1006 (1985). "Requiring the warrant to set forth the conditions precedent to the search serves two important purposes: it (1) limits the discretion of the officers executing the

warrant, and (2) informs the property owner or resident of the proper scope of the search." *Vesikuru,* 314 F.3d at 1119 (citation omitted).

Note that the Ninth Circuit has "not held that the condition precedent must be stated within the four corners of the warrant itself. [Instead, t]he Fourth Amendment's particularity requirement is satisfied if (1) an affidavit setting forth the triggering event for the search accompanies the warrant at the time of the search, and (2) the warrant sufficiently incorporates that accompanying affidavit." *Vesikuru,* 314 F.3d at 1120 (citations omitted).

d. *Stale information.* An affidavit must be based on facts "'so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time.'" *Durham v. United States*, 403 F.2d 190, 193 (9th Cir. 1968) (quoting *Sgro v. United States*, 287 U.S. 206, 210 (1932)). *See also United States v. Lacy*, 119 F.3d 742, 745–46 (9th Cir. 1997) (fact that child pornography had been downloaded from computer ten months earlier did not cause seizure of hard drives and disks to be based upon impermissibly stale information where ample reason existed to believe items were still in the residence), *cert. denied*, 523 U.S. 1101 (1998).

The mere lapse of time is not controlling. *Lacy*, 119 F.3d at 745 (citation omitted). Staleness must be evaluated "'in light of the particular facts of the case and the nature of the criminal activity and property sought.'" *Lacy*, 119 F.3d at 745 (quoting *United States v. Pitts*, 6 F.3d 1366, 1369 (9th Cir. 1993)).

(1) In drug trafficking investigations, probable cause may continue for weeks, if not months. *Pitts*, 6 F.3d at 1369.

(2) Greater lapses of time are permitted when evidence indicates an ongoing criminal business. *See, e.g., United States v. Alvarez,* 358 F.3d 1194, 1203 (2004) ("evidence of 'the existence of a widespread, firmly entrenched, and ongoing narcotics operation' diminishes a defendant's staleness arguments.") (citations omitted); *Pitts*, 6 F.3d at 1369; *United States v. Greany*, 929 F.2d 523, 525 (9th Cir. 1991) (two-year old information regarding marijuana growing activity not too stale).

B. Contents of search warrant—Particularity requirement.

A search warrant must describe items with sufficient particularity to prevent "a general, exploratory rummaging in a person's belongings." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971) (citations omitted). *See also United States v. Rude*, 88 F.3d 1538, 1551 (9th Cir. 1996), *cert. denied*, 519 U.S. 1058 (1997). "Without a sufficiently specific warrant, [appellate courts] consider the search warrantless." *United States v. Meek*, 366 F.3d 705, 715 (9th Cir. 2004) (citing *Groh v. Ramirez*, 124 S. Ct. 1284, 1290 (2004)).

"A search warrant must allege with reasonable particularity the types of items that may be seized." *United States v. Clark*, 31 F.3d 831, 836 (9th Cir. 1994) (citation omitted), *cert. denied*, 513 U.S. 1119 (1995). Sufficient particularity must exist so as to give meaningful guidance to the searching officers. *Clark*, 31 F.3d at 836. "[I]t need only be 'reasonably specific, rather than elaborately detailed.'" *Rude*, 88 F.3d at 1551 (quoting *United States v. Brock*, 667 F.2d 1311, 1322 (9th Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983)).

A warrant "must be specific enough to enable the person conducting the search reasonably to identify the things

authorized to be seized." *United States v. Spilotro*, 800 F.2d 959, 963 (9th Cir. 1986) (citations omitted). *See also United States v. McGrew*, 122 F.3d 847, 849 (9th Cir. 1997) ("The particularity requirement safeguards the right to be free from unbounded, general searches.") (citation omitted).

"[The Ninth Circuit] consider[s] one or more of the following to determine specificity:

[a] whether there was probable cause to seize particular items in the warrant,

[b] whether the warrant sets out objective standards by which executing officers can determine which items are subject to seizure, and

[c] whether the government could have described the items more particularly when the warrant was issued."

United States v. Wong, 334 F.3d 831, 836–37 (9th Cir. 2003) (citation omitted).

1. *Construing search warrant and affidavit together.* "[A] 'search warrant may be construed with reference to the affidavit for purposes of satisfying the particularity requirement if (1) the affidavit accompanies the warrant, and (2) the warrant uses suitable words of reference which incorporate the affidavit therein.'" *United States v. McGrew*, 122 F.3d 847, 849 (9th Cir. 1997) (quoting *United States v. Hillyard*, 677 F.2d 1336, 1340 (9th Cir. 1982)). *See also United States v. Bridges*, 344 F.3d 1010, 1015 (9th Cir. 2003).

2. *List of things to be seized*. The list of things to be seized should:

    a. be incorporated by reference in the warrant; and

b. accompany the warrant when the warrant is executed.

United States v. Towne, 997 F.2d 537, 544 (9th Cir. 1993).

Where a list is inadvertently omitted from a valid search warrant, the list of things to be seized which is part of the application may suffice if agents have the list with them when conducting the search. If not, agents may seize only evidence in plain view. *United States v. Van Damme*, 48 F.3d 461, 465–67 (9th Cir. 1995). *See also United States v. McGrew*, 122 F.3d 847, 849–50 (9th Cir. 1997) (on facts presented, failure to attach affidavit to search warrant or bring affidavit along on search and absence of any description in warrant of things to be seized required suppression of items seized).

"A generalized seizure . . . may be justified if the government establishes probable cause to believe that the entire business is merely a scheme to defraud or that all of the business's records are likely to evidence criminal activity." *United States v. Kow*, 58 F.3d 423, 427 (9th Cir. 1995). *See also United States v. Bridges*, 344 F.3d 1010, 1018–19 (9th Cir. 2003) (but finding that government failed to make showing).

3. *Particularity as to crime committed*. The crime to which the items relate must be specified only (1) when required by statute or (2) when necessary to identify the items to be seized. *United States v. Hill*, 55 F.3d 479, 481 (9th Cir. 1995) (citations omitted), *cert. denied*, 520 U.S. 1132 (1997). *See also United States v. Meek*, 366 F.3d 705, 713 (9th Cir. 2004) (statutory variance in affidavit's statutory citation was not fatal to warrant's validity where "affidavit established probable cause as to a violation of California law and the items sought under the warrant corresponded to that probable cause determination"). *But see United*

States v. Bridges, 344 F.3d 1010, 1018–19 (9th Cir. 2003) (warrant's failure to state criminal activity being investigated coupled with failure to incorporate by reference the affidavit containing the crime description fatal to search warrant); *United States v. McGrew*, 122 F.3d 847, 849 n.2 (9th Cir. 1997) ("This court has 'criticized repeatedly the failure to describe in a warrant the specific criminal activity suspected . . . .'") (quoting *United States v. Kow*, 58 F.3d 423, 427 (9th Cir. 1995)).

4. *Firearms*. Even though firearms are not listed in a search warrant, they may be seized, if in plain view, as evidence of narcotics offenses. *United States v. Simpson*, 10 F.3d 645, 647 (9th Cir. 1993) (citations omitted), *vacated on other grounds*, 513 U.S. 983 (1994).

5. *Search of residence includes curtilage.* A search warrant which authorizes the search of a residence also authorizes the search of the curtilage of the residence. *United States v. Gorman*, 104 F.3d 272, 274–75 (9th Cir. 1996). *See also United States v. Cannon*, 264 F.3d 875, 880 (9th Cir. 2001) ("the Fourth Amendment is not violated by a search of the grounds or outbuildings within a residence's curtilage where a warrant authorizes a search of the residence") (citing *Gorman*), *cert. denied*, 534 U.S. 1143 (2002). *Cf. United States v. Elliott,* 322 F.3d 710, 716 (9th Cir.) (affidavit establishing that defendant was a drug trafficker and reciting that drug-traffickers have drugs packaged for sale "in the place where they live or sell from, in their vehicles or on their persons" authorized search of defendant's person) (citation omitted), *cert. denied*, 124 S. Ct. 169 (2003).

   Curtilage means "the land immediately surrounding and associated with the home . . . to which extends the intimate activity associated with the 'sanctity of a man's home and the privacies of life.'" *Oliver v. United States*, 466 U.S. 170, 180 (1984) (quoting *Boyd v. United States*,

116 U.S. 616, 630 (1886)); *United States v. Van Damme*, 48 F.3d 461, 465 (9th Cir. 1995).

Four factors are evaluated to determine if an area is curtilage:

a. proximity to the residence;

b. whether the area is enclosed;

c. whether the area is used for the intimate activities of the home; and

d. any steps taken to protect the area from observation by passersby.

United States v. Soliz, 129 F.3d 499, 502 (9th Cir. 1997) (citing *United States v. Dunn*, 480 U.S. 294, 301 (1987)) *See also United States v. Romero-Bustamante*, 337 F.3d 1104, 1107 (9th Cir. 2003); *Gorman*, 104 F.3d at 274.

C. Execution of search warrant—Reasonableness.

1. *Unreasonable executions*. A search may be unreasonable for purposes of the Fourth Amendment if executed in an unreasonable fashion. *Franklin v. Foxworth*, 31 F.3d 873, 875–76 (9th Cir. 1994) (reasonableness of seizure turns on the facts and circumstances of each case, including severity of the crime, whether suspect poses an immediate threat to safety, resistance to arrest, and evasion). Even though the court inadvertently postdates a search warrant by one day, "the search is within the scope of the warrant." *United States v. Hitchcock*, 286 F.3d 1064, 1071–72 (9th Cir.) (but "good faith exception has no application here") *mandate stayed by* 284 F.3d 1322 (9th Cir.), *amended and superseded by* 298 F.3d 1021 (9th Cir. 2002).

2. *Detention of occupants*. For Fourth Amendment purposes, "a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Michigan v. Summers*, 452 U.S. 692, 705 (1981). *See also v. Ganwich v. Knapp, et al.*, 319 F.3d 1115, 1120–22 (9th Cir. 2003) (detention of occupants during search may serve "important law enforcement interests" including prevention of flight, minimization of risk of harm to officers by ensuring that weapons are not obtained by occupants, and ensuring that occupants are available to assist officers in case a door or cabinet needed unlocked; on facts presented, however, detention exceeded permissible scope).

3. *Service of search warrant*. Fed. R. Crim. P. 41(f)(3) provides: "The officer executing the warrant must":

   (A) give a copy of the warrant and a receipt for the property taken to the person from whom, or from whose premises, the property was taken; or

   (B) leave a copy of the warrant and receipt at the place where the officer took the property.

   Rule 41(f)(3). The policies underlying the warrant requirement include "providing the property owner assurance of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *United States v. Celestine*, 324 F.3d 1095, 1100–01 (9th Cir 2003) (citations omitted) (failure to serve search warrant affidavit not fatal where face sheet and attachments that were served "provided sufficient indicia of the agents' lawful authority to conduct the search, what and where they legally could search, and the crimes for which evidence was sought . . . .").

"[A]bsent exigent circumstances, if a person is present at the search of her premises, [Fed. R. Crim. P. 41(f)] requires officers to give her a complete copy of the warrant at the outset of the search." *United States v. Gantt*, 194 F.3d 987, 1005 (9th Cir. 1999) (suppression of evidence derived from search warrant required where FBI agents failed to give occupant of hotel room to be searched a copy of the search warrant and its attachment). *See also United States v. Tekle,* 329 F.3d 1108, 1112–13 (9th Cir.) (quoting *Gantt,* 194 F.3d at 1001, but finding waiver of motion to suppress), *cert. denied*, 124 S. Ct. 419 (2003); *United States v. Celestine*, 324 F.3d 1095, 1101 (9th Cir. 2003) (court was not clearly erroneous in concluding from conflicting testimony that warrant was timely served when service occurred within 10 minutes of start of search).

The good faith exception of *United States v. Leon*, 468 U.S. 897 (1984), is inapplicable to a failure to properly execute a search warrant. *Gantt*, 194 F.3d at 1005–06.

4. *Knock and announce.*

   a. *In general*. "The officer may break open any outer . . . door . . . of a house . . . to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant." 18 U.S.C. § 3109.

      Officers must give adequate opportunity for the occupant to answer the knock. *United States v. Mendonsa*, 989 F.2d 366, 370–71 (9th Cir. 1993).

   b. *Purposes of requirement.* "The requirement that law enforcement officers give notice of their authority and purpose prior to forcing entry to execute a warrant

serves three purposes: it protects citizens and law enforcement officers from violence; it protects individual privacy rights; and it protects against needless destruction of private property." *United States v. Contreras-Ceballos*, 999 F.2d 432, 434–35 (9th Cir. 1993) (citation omitted).

c. *Categories of entry.* In *United States v. Banks*, 540 U.S. 31 (2003), the Supreme Court rejected a "categories of entry" analysis, instead emphasizing that "reasonableness [is] a function of the facts of cases so various that no template is likely to produce sounder results than examining the totality of circumstances in a given case . . . ." *See also United States v. Bynum*, 362 F.3d 574, 579 (9th Cir. 2004).

d. *Forced entry—Express or implied refusal to open.*

(1) *Forcible entry.* "The Knock and Announce Rule allows an officer to 'break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance . . . .'" *United States v. Chavez-Miranda*, 306 F.3d 973, 980 (9th Cir. 2002) (quoting 18 U.S.C. § 3109), *cert. denied*, 537 U.S. 1217 (2003). "the *Banks* Court made it clear that '[o]nce the exigency . . . mature[s] . . . the officers [are] not bound to learn anything more or wait any longer before going in, even though their entry entail[s] some harm to the building.'" *Bynum*, 362 F.3d at 579 (quoting *United States v. Banks*, 540 S. Ct. 31 (2003)).

(2) *Time delay between announcement and forcible entry.* "There is no established time that the police must wait; instead, the time lapse must be reasonable considering the particular circumstances

of the situation." *United States v. Chavez-Miranda*, 306 F.3d 973, 980 (9th Cir. 2002) (citations omitted), *cert. denied*, 537 U.S. 1217 (2003).

(3) *Factors re reasonableness of delay*. Factors regarding the reasonableness of the time between announcement and forced entry include:

[a] "the size and layout of the residence;

[b] the time of day;

[c] the nature of the suspected offense;

[d] the evidence demonstrating guilt; and

[e] the officers' other observations that would support forced entry."

United States v. Chavez-Miranda, 306 F.3d 973, 980 (9th Cir. 2002) (citation omitted). *But see United States v. Banks*, 540 S. Ct. 31 (2003) ("no template is likely to produce sounder results than examining the totality of circumstances in a given case").

That law enforcement officers carried out a "predetermined no-knock entry plan" is not dispositive. *See also United States v. Bynum*, 362 F.3d 574, 582 (9th Cir. 2004) (no-knock plan permissible where firearm present and suspect "is willing and able to use" it).

e. *Exceptions to knock and announce requirement.*

(1) *Exigent circumstances*. Not every entry need be preceded by an announcement. Exigent circumstances may warrant entry without announcement. *Wilson v. Arkansas*, 514 U.S. 927, 934–37 (1995).

(1) *Factors*. Factors such as peril to officers and destruction of evidence may justify non-announcement. *Wilson v. Arkansas*, 514 U.S. 927, 936 (1995). *See also United States v. Perez*, 67 F.3d 1371, 1383–84 (9th Cir. 1995) (where defendant was known to be dangerous and police had reason to believe that defendant knew police were about to enter residence, exigent circumstances existed and police could enter without complying with knock and announce requirement), *withdrawn in part on other grounds*, 116 F.3d 840 (1997).

(2) *Situation at time of entry controls*. The lawfulness of an officer's decision to enter without first complying with knock and announce requirements must be evaluated as of the time of entry. *Richards v. Wisconsin*, 520 U.S. 385, 395 (1997) (Wisconsin state courts could not craft a blanket felony drug investigation exception to knock and announce requirements).

(2) *"Mild" exigent circumstances*. Before *United States v. Banks*, 540 S. Ct. 31 (2003), the Ninth Circuit analyzed the reasonableness of exigency under "set[s] of sub-rules," *Id*. at 528, including the rule that "mild" exigent circumstances may excuse simultaneous knock and entry when entry can be accomplished without destruction of property,

United States v. Hudson, 100 F.3d 1409, 1417 (9th Cir. 1996).

Banks rejected analysis based upon the amount of force used and, instead, articulated a "totality of the circumstances" analysis. *Banks*, 540 S. Ct. 31 ("In *Ramirez*[, 523 U.S. 65, 69-71 (1998),] (a case from the Ninth Circuit), we rejected an attempt to subdivide felony cases by accepting 'mild exigency' for entry without property damage, but requiring 'more specific inferences of exigency' before damage would be reasonable.").

(3) *Open door.* Because the knock and announce requirements of 18 U.S.C. § 3109 "require[] that police officers 'not open the closed door of a dwelling until they have announced their authority and purposes and have been refused admittance,' . . . the statute does not apply to officers who enter through open doors." *United States v. Phillips*, 149 F.3d 1026, 1029 (9th Cir. 1998) (quoting *United States v. Contreras-Ceballos*, 999 F.2d 432, 434 (9th Cir. 1993)), *cert. denied*, 526 U.S. 1052 (1999).

This includes entry through an opened door after a ruse is used by agents. *Contreras-Ceballos*, 999 F.2d at 435 (knock and announce not required when door opened after trooper announced that he was from Federal Express).

f. *Consequences of violation*. Failure of police officers to "knock and announce" before entering may cause a subsequent search to be unreasonable, *Wilson v. Arkansas*, 514 U.S. 927, 934 (1995), or statements

obtained thereafter to be suppressed. *See also United States v. Banks,* 282 F.3d 699, 703 (9th Cir. 2002).

See also Chapter 15, C. and D., Search and Seizure–In General—Exclusionary rule, and —Exceptions to the exclusionary rule.

5. *Plain view—During execution of search warrant.* Evidence discovered in the course of execution of a search warrant is subject to the requirements of the plain view doctrine. "To satisfy the plain view doctrine: (1) the officer must be lawfully in the place where the seized item was in plain view; (2) the item's incriminating nature was 'immediately apparent;' and (3) the officer had 'a lawful right of access to the object itself.'" *United States v. Wong*, 334 F.3d 831, 836–37 (9th Cir. 2003) (where review of computer files lawfully seized pursuant to search warrant issued in murder investigation resulted in discovery of child pornography, the evidence was in plain view).

D. Standing to challenge search warrant.

In order to have standing to challenge the legality of a search warrant, a defendant must factually establish standing by showing that he had a legitimate expectation of privacy in the site of the search. *United States v. Long*, 301 F.3d 1095, 1099–1100 (9th Cir. 2002) (defendant failed to establish residency or reasonable expectation of privacy in residence searched pursuant to search warrant and therefore lacked standing to challenge search warrant), *cert. denied*, 537 U.S. 1216 (2003).

See also Chapter 15, E., Search and Seizure–In General—Standing.

E. *Franks* challenge to search warrant.

1. *In general.* Inquiry as to the accuracy of the statements contained in the search warrant affidavit may be required pursuant to *Franks v. Delaware*, 438 U.S. 154, 155–56 (1978). "There is, of course, a presumption of validity with respect to the affidavit supporting the search warrant. 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." *Franks,* 438 U.S. at 171.

   "[A] party moving for a *Franks* hearing must submit 'allegations of deliberate falsehood or of reckless disregard for the truth, and those allegations must be accompanied by an offer of proof.'" *United States v. Chavez-Miranda*, 306 F.3d 973, 979 (9th Cir. 2002) (quoting *Franks*, 438 U.S. at 171), *cert. denied*, 537 U.S. 1217 (2003). *See also United States v. Meek*, 366 F.3d 705, 713 (9th Cir. 2004) (defendant was not entitled to a Franks hearing absent "a substantial preliminary showing that a false statement was deliberately or recklessly included in or omitted from a warrant affidavit, and that the false statements or omissions were material to the finding of probable cause."); *United States v. Prime*, 363 F.3d 1028, 1031 n.1 (9th Cir. 2004) (finding "no evidence that the immaterial inaccuracies contained in the affidavit were either deliberate or made with reckless disregard for the truth . . . .").

   The question to be answered in a *Franks* hearing is whether the affidavit contained deliberately or recklessly false statements without which probable cause would not have existed. *Franks*, 438 U.S. at 155–56, 171–72. *See*

also United States v. Long, 301 F.3d 1095, 1101 (9th Cir. 2002) (suppression pursuant to *Franks* not required where probable cause existed after warrant was "purged of intentionally or recklessly false statements," police mistakes were made in good faith, attempts were made to correct the mistakes by contacting the magistrate judge, and certain evidence was in plain view), *cert. denied*, 537 U.S. 1216 (2003); *United States v. Elliott,* 322 F.3d 710, 716 (9th Cir.) (describing two-step analysis: "First, . . . whether any 'erroneous statements or omissions' in the search warrant affidavit 'were made knowingly and intentionally, or with reckless disregard for the truth,'" and, if so, "whether 'with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause.'") (citations omitted), *cert. denied*, 124 S. Ct. 169 (2003).

If the defendant establishes a *Franks* violation by a preponderance of the evidence, "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." *Franks*, 438 U.S. at 156.

2. *Showing required for hearing*. The five prong test which must be met in order for a defendant to be entitled to a *Franks* hearing is set out in *United States v. Kiser*, 716 F.2d 1268, 1271 (9th Cir. 1983) (citations omitted):

> [a] [T]he defendant must make specific allegations that indicate the portions of the warrant claimed to be false. . . .
>
> [b] There must be a contention of deliberate falsehood or reckless disregard for the truth. . . .
>
> [c] The allegations must be accompanied by a detailed offer of proof, preferably in the form of affidavits. . . .

[c] The offer of proof must challenge the veracity of the affiant, not that of his informant. . . .

[d] Finally, the challenged statements in the affidavit must be necessary to a finding of probable cause.

See also United States v. Reeves, 210 F.3d 1041, 1044 (9th Cir.), *cert. denied*, 531 U.S. 1000 (2000); *United States v. Fisher*, 137 F.3d 1158, 1164 (9th Cir. 1998) ("To be entitled to [a *Franks*] hearing, [a defendant has] to make a substantial preliminary showing (1) that the affidavit contained false statements made knowingly or with reckless disregard for their falsity, and (2) that without the false statements the affidavit would not establish probable cause.") (citation omitted); *United States v. Fowlie*, 24 F.3d 1059, 1066 (9th Cir. 1994) (citations omitted), *cert. denied*, 513 U.S. 1086 (1995); *United States v. Jaramillo-Suarez*, 950 F.2d 1378, 1387 (9th Cir. 1991).

3. *Omissions*. Omissions from an affidavit may entitle a defendant to a *Franks* hearing "if the defendant can make a substantial preliminary showing that":

(1) the affidavit [underlying a search warrant] contains intentionally or recklessly false statements or misleading omissions, and

(2) the affidavit cannot support a finding of probable cause without the allegedly false information.

United States v. Reeves, 210 F.3d 1041, 1044 (9th Cir.) (no *Franks* hearing required where pre-*Franks in camera* hearing demonstrated that informant had previously provided truthful and reliable information despite a criminal history "containing some charges involving dishonesty"; because probable cause would have existed

even had the informant's prior criminal history been disclosed, no *Franks* hearing was required) (citation omitted), *cert. denied*, 531 U.S. 1000 (2000); *United States v. Hall*, 113 F.3d 157, 159–61 (9th Cir. 1997) (omission from affidavit that uncorroborated confidential informant, among other convictions, had a conviction for falsely reporting a crime, required suppression of fruits of search warrant).

F. Good faith exception to valid warrant requirement.

1. *In general*. The good faith exception to the requirement of a valid search warrant may apply if an objectively reasonable basis existed for the mistaken belief of the executing officers that the warrant was valid. *Massachusetts v. Sheppard*, 468 U.S. 981, 987–88 (1984) (applying *United States v. Leon*, 468 U.S. 897 (1984) to facts presented); *United States v. Towne*, 997 F.2d 537, 549 (9th Cir. 1993) (citation omitted).

2. *Test re whether good faith exception applies*. The inquiry is "whether a reasonably well-trained officer would have known that this particular search was illegal despite the magistrate judge's authorization." *United States v. Clark*, 31 F.3d 831, 835 (9th Cir. 1994) (citation omitted), *cert. denied*, 513 U.S. 1119 (1995). *See also United States v. Huggins*, 299 F.3d 1039, 1045 (9th Cir.) (search warrant authorizing thermal imaging search was facially valid such that "an officer with 'a reasonable knowledge of what the law prohibits,'" could "give credence to the magistrate judge's finding of probable cause") (citations omitted, quoting *United States v. Leon*, 468 U.S. 897, 919 n.20 (1984)), *cert. denied*, 537 U.S. 1079 (2002).

3. *Factors against application of good faith exception*. Factors include whether the police misled the magistrate judge or whether the magistrate judge abandoned his or her judicial role by issuing a warrant or relying "on an

affidavit so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable." *United States v. Leon*, 468 U.S. 897, 923 (1984) (citations and internal quotations omitted). *See also United States v. Clark*, 31 F.3d 831, 836 (9th Cir. 1994) ("In light of . . . [the] facial deficiency [re items authorized to be seized], the executing officers could not reasonably rely on [the warrant], under the objective test of *Leon*.") (citations omitted), *cert. denied*, 513 U.S. 1119 (1995).

4. *Inapplicability of good faith exception where execution unlawful.* The good faith exception of *United States v. Leon*, 468 U.S. 897, 918–21 (1984), is inapplicable to a violation of Fed. R. Crim. P. 41(f). *United States v. Gantt*, 194 F.3d 987, 1005–06 (9th Cir. 1999) (suppression required where law enforcement officers executing a search warrant on a residence deliberately failed to provide the occupant of the residence a copy of the search warrant and its attachments and no exigent circumstances existed) (citing previous version of Rule 41(d), substantively identical to current Rule 41(f)). *But see United States v. Hitchcock*, 286 F.3d 1064, 1072 (9th Cir.) (even though agent's execution of search warrant occurred the day before the date of the warrant and did not fall within good-faith exception of *Leon*, where post-dating of the warrant occurred as a result of court's inadvertence: "the search [was] within the scope of the warrant" and the motion to suppress was properly denied), *mandate stayed by* 284 F.3d 1322 (9th Cir.), *amended and superseded by* 298 F.3d 1021 (9th Cir. 2002).

G. Warrant requirements as to specific categories of evidence.

1. *Blood, semen samples*. In order for the court to order a defendant to undergo a blood test or other invasive procedure, the following requirements must be met:

a. "probable cause [must exist] to believe that [the suspect] has secreted the item sought in a body cavity", *Fuller v. M.G. Jewelry*, 950 F.2d 1437, 1449 (9th Cir. 1991);

b. the invasive test must be relevant to the crime under investigation; and

c. a likelihood must exist that the invasive test will yield incriminating evidence.

Schmerber v. California, 384 U.S. 757, 770 (1966) (where above requirements met and "delay necessary to obtain a warrant . . . threatened" loss of evidence, warrantless seizure permissible). *See also United States v. Wright*, 215 F.3d 1020, 1025 (9th Cir.) (a warrant supported by probable cause is required in order for blood to be drawn from defendant for comparison purposes), *cert. denied*, 531 U.S. 969 (2000); *Barlow v. Ground*, 943 F.2d 1132, 1137–38 (9th Cir. 1991) (in § 1983 lawsuit, *Schmerber* emergency standard not met so as to justify warrantless seizure of blood from suspect who bit two officers, because AIDS infection is not evanescent), *cert. denied*, 505 U.S. 1206 (1992).

2. *Transmitters/Tracking devices.*

a. *Placement.* The mere placing of a tracking device on the undercarriage of a vehicle does not implicate the Fourth Amendment, because neither a search nor a seizure has occurred. *United States v. McIver,* 186 F.3d 1119, 1126–27 (9th Cir. 1999), *cert. denied*, 528 U.S. 1177 (2000).

b. *Private property.* Where a beeper attached to a container is taken into a residence, a search warrant is required to monitor the beeper while it is inside the

residence. *United States v. Karo,* 468 U.S. 705, 714–15 (1984).

c. *Vessels on high seas.* No expectation of privacy exists regarding the monitoring of vessels by means of a transmitter. *United States v. Juda,* 46 F.3d 961, 968 (9th Cir.) (no privacy right in ship's location on high seas), *cert. denied*, 514 U.S. 1090 (1995).

3. *Tents.* A search warrant is required in order to search a fully closed tent, whether the tent is located on private property, *LaDuke v. Nelson*, 762 F.2d 1318, 1326 n.11, 1332 n.19 (9th Cir. 1985), *amended by* 796 F.2d 309 (1986), a public campground, *United States v. Gooch*, 6 F.3d 673, 677 (9th Cir. 1993), or Bureau of Land Management land, *United States v. Sandoval*, 200 F.3d 659, 660–61 (9th Cir. 2000).

4. *Thermal imaging scanning*. Thermal imaging scanning of a home is a search within the meaning of the Fourth Amendment and cannot be conducted without a search warrant. *Kyllo v. United States*, 533 U.S. 27, 34–35, 40 (2001). *See also United States v. Huggins*, 299 F.3d 1039, 1045 (9th Cir.) (although affidavit in support of search warrant authorizing scan did not include "current power consumption data for the target property in isolation," it contained sufficient comparative data to cause the warrant to be facially valid), *cert. denied*, 537 U.S. 1079 (2002).

5. *Flashlights.* "An observation of the interior of a protected structure through a window, even when enhanced by a flashlight, does not constitute a search when the observation is made from an open field or public place." *United States v. Barajas-Avalos*, 377 F.3d 1040, 1056 (9th Cir. 2004) (citing *United States v. Dunn*, 480 U.S. 294, 298, 304 (1987)).

CHAPTER 18. THE WIRETAP ACT

A. In general.

"Title III of the Omnibus Crime Control and Safe Streets Act of 1968 [the Wiretap Act], 18 U.S.C. §§ 2510-2520, permits law enforcement officials to engage in electronic surveillance if certain privacy safeguards are observed." *United States v. McGuire*, 307 F.3d 1192, 1196 (9th Cir. 2002). These safeguards include necessity for the wiretap, minimization of it, and prompt sealing of it. *Id*.

B. Scope of Act.

"The Wiretap Act [] prohibits only 'interceptions' of electronic communications. 'Intercept' is defined as 'the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device.'" *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 876 (9th Cir. 2002) (quoting § 2510(4)) (pilot sued airlines for alleged violation of federal Wiretap Act), *cert. denied*, 537 U.S. 1193 (2003).

C. Issuance of wiretap order—Requirements.

Under 18 U.S.C. § 2518(3), a judge may issue a wiretap order if the issuing judge determines:

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in [18 U.S.C. § 2516];

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) except as provided in [§ 2518(11)], there is probable cause for belief that the facilities from which, or the place where, the wire, oral or electronic communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by such person.

United States v. Lynch, 367 F.3d 1148 (9th Cir. 2004) (alterations in original) (quoting 18 U.S.C. § 2518(3)).

1. *Necessity*. "An application for a court-authorized wiretap must include 'a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.'" *United States v. McGuire*, 307 F.3d 1192, 1196, 1197 n.2 (9th Cir. 2002) (quoting 18 U.S.C. § 2518(1)(c)) (finding that necessity requirement was satisfied, but also noting "[w]e do not rule out the possibility that in extraordinary circumstances it is permissible for law enforcement to use wiretap procedures at the outset of an investigation."). *See also United States v. Shryock,* 342 F.3d 948, 975–76 (9th Cir. 2003) (necessity requirement satisfied), *cert. denied*, 124 S. Ct. 1729 and 124 S. Ct. 1736 (2004); *United States v. Blackmon*, 273 F.3d 1204, 1207 (9th Cir. 2001) (2-1 decision) (requiring "a full and complete statement of specific allegations indicating why normal investigative procedures failed or would fail in the particular case," and found that the necessity requirement was not met).

2. *Exhaustion.* Although "the wiretap should not ordinarily be the initial step in the investigation, . . . law enforcement officials need not exhaust every conceivable alternative before obtaining a wiretap." *McGuire*, 307 F.3d at 1196–97. *See also United States v. Gomez*, 358 F.3d 1221, 1226–27 (9th Cir. 2004) ("government need not show that informants would be useless in order to secure a court-authorized wiretap"; citing *Shyrock*, 342 F.2d at 976) (also stating that informants are not always trustworthy).

D. Purpose of requirements.

"The purpose of these requirements is to ensure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime." *United States v. Blackmon*, 273 F.3d 1204, 1207 (9th Cir. 2001) (citing *United States v. Kahn*, 415 U.S. 143, 153 n.12 (1974)).

E. Conspiracies.

"[T]he government is entitled to more leeway in its investigative methods when it pursues a conspiracy." *United States v. McGuire*, 307 F.3d 1192, 1197–98 (9th Cir. 2002) (observing that conspiracies pose "special dangers"). *See also United States v. Gomez*, 358 F.3d 1221, 1226–27 (9th Cir. 2004) (noting that traditional investigative techniques may not lead to satellite conspirators) (quoting *United States v. Torres*, 908 F.2d 1417, 1422 (9th Cir. 1990), *cert. denied*, 498 U.S. 905 and 498 U.S. 948).

F. Execution of wiretap.

1. *Minimization.* "Title III requires that wiretapping or electronic surveillance 'be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter.'"

United States v. McGuire, 307 F.3d 1192, 1199 (9th Cir. 2002) (quoting 18 U.S.C. § 2518(5)). "Minimization requires that the government adopt reasonable measures to reduce to a practical minimum the interception of conversations unrelated to the criminal activity under investigation while permitting the government to pursue legitimate investigation." *McGuire*, 307 F.3d at 1199 (citations omitted).

"[W]hether the government complied with the statutory requirement to minimize surveillance by wiretap requires examination of the monitoring officers' conduct in light of the particular circumstances of the case." *McGuire*, 307 F.3d at 1199–1200, 1202 (finding that in wide-ranging conspiracy, interception of virtually all communications may be reasonable; "law enforcement in some circumstances may look at every communication") (citations omitted). *See also Scott v. United States*, 436 U.S. 128, 140 (1978).

2. *Sealing.* Title III states that "[i]mmediately upon the expiration of the [wiretap] order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions." 18 U.S.C. § 2518(8)(a).

"To use wiretap evidence, the government must (1) seal the tapes immediately or (2) provide a 'satisfactory explanation' for the delay in obtaining a seal." *United States v. McGuire*, 307 F.3d 1192, 1202–03 (9th Cir. 2002) (citation omitted).

"[I]mmediately sealing the tapes means 'within one or two days,' and [] 'any delay beyond that certainly calls for explanation.'" *McGuire*, 307 F.3d at 1203–04 (delays of up to 127 days justified by exigent circumstances,

including supervision of wiretap by out-of-district judge and orders entered by judge postponing sealing until judge could be physically present in district) (quoting *United States v. Pedroni*, 958 F.2d 262, 265 (9th Cir. 1992)).

G. Post-Wiretap Act legislation.

Certain electronic surveillance legislation has taken effect since the 1968 enactment of the Wiretap Act. For example, the Electronic Communications Privacy Act "increase[d] the types of communications protected" by broadening the definition of "intercept" "to include the 'aural *or other*' acquisition of a communication." *United States v. McGuire*, 307 F.3d 1192, 1199 n.6 (9th Cir. 2002) (quoting 18 U.S.C. § 2510(4)). The USA PATRIOT Act eliminated storage from the definition of wire communication in order "to reduce protection of voice mail messages to the lower level of protection provided other electronically stored communications." *Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 878 (9th Cir. 2002) (citing H.R. Rep. 107-236(I), at 158–59 (2001)), *cert. denied*, 537 U.S. 1193 (2003).

H. Cooperation of entities and individuals by court order.

"[S]ince 1970, [Title III has provided] that certain enumerated entities and individuals must assist law enforcement in wiretapping or eavesdropping when directed by a court order to do so," if the cooperation does not cause more than a "minimum of interference." *The Company v. United States*, 349 F.3d 1132, 1136–37, 1144–46 (9th Cir. 2003) (citation omitted) (2-1 decision) (holding that complete disabling of automobile onboard navigation / emergency roadside assistance cellular telecommunication service, in order to facilitate monitoring of conversations in a vehicle, was impermissible because it did not constitute a "minimum of interference" with services provided).

CHAPTER 19. CONFESSIONS

This chapter discusses issues arising as to admissibility of confessions. It includes discussions regarding voluntariness, waiver of *Miranda* rights, the definition of "custodial" and "interrogation" for purposes of *Miranda*, and invocation of *Miranda* rights.

A custodial suspect's post-arrest confession made in response to interrogation is only admissible in the government's case-in-chief if the confession is given after a knowing and intelligent waiver of the suspect's *Miranda* rights. *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966). *See also United States v. Garibay*, 143 F.3d 534, 536 (9th Cir. 1998) ("For inculpatory statements made by a defendant during custodial interrogation to be admissible in evidence, the defendant's 'waiver of *Miranda* rights must be voluntary, knowing, and intelligent.'") (citations omitted); *Amaya-Ruiz v. Stewart*, 121 F.3d 486, 495 (9th Cir. 1997), *cert. denied*, 522 U.S. 1130 (1998).

An involuntary confession is never admissible. *See, e.g., Mincey v. Arizona*, 437 U.S. 385, 398 (1978); *Pollard v. Galaza*, 290 F.3d 1030, 1033 (9th Cir. 2002) ("[I]f the statement was procured such that it was involuntary, then the statement is excluded for all purposes.") (citations omitted).

A confession obtained in violation of *Miranda*, although otherwise inadmissible, *see, e.g., Dickerson v. United States*, 530 U.S. 428, 431 (2000), may be admissible for impeachment purposes. *See, e.g., Michigan v. Harvey*, 494 U.S. 344, 362 (1990) (otherwise trustworthy post-arrest statement taken in violation of *Miranda* is admissible for impeachment) (citations omitted).

"An evidentiary hearing on a motion to suppress need be held only when the moving papers allege facts with sufficient

definiteness, clarity, and specificity to enable the trial court to conclude that contested issues of fact exist." *United States v. Howell*, 231 F.3d 615, 620–21 (9th Cir. 2000) (magistrate judge, assigned hearing on motion to suppress statements, did not abuse discretion by declining to hold an evidentiary hearing where defendant only "submitted a boilerplate motion that relied wholly on the fact that the government has the burden of proof to establish adequate *Miranda* warnings.") (citations omitted), *cert. denied*, 122 S. Ct. 79 (2001).

A. Voluntariness of confessions.

Only voluntary confessions are admissible. *Lego v. Twomey*, 404 U.S. 477, 483–485 (1972); *Malloy v. Hogan*, 378 U.S. 1, 7 (1964). *See also* 18 U.S.C. § 3501(a). "A confession is involuntary if coerced either by physical intimidation or psychological pressure." *United States v. Haswood*, 350 F.3d 1024, 1027 (9th Cir. 2003) (citation omitted). "In determining whether a defendant's confession was voluntary, 'the question is "whether the defendant's will was overborne at the time he confessed."'" *United States v. Crawford*, 372 F.3d 1048, 1060 (9th Cir. 2004) (en banc) (citations omitted).

1. *Burden of proof.*

   a. *Preponderance of the evidence.* The government must prove voluntariness of a confession by a preponderance of the evidence. *Lego v. Twomey*, 404 U.S. 477, 489 (1972); *United States v. Haswood*, 350 F.3d 1024, 1027 (9th Cir. 2003).

   b. *Inadmissibility for all purposes*. An involuntary confession cannot be used for any purpose. *Mincey v. Arizona*, 437 U.S. 385, 398 (1978) (citation omitted). *Compare Michigan v. Harvey*, 494 U.S. 344, 345–46 (1990) (post-arrest statement taken in violation of defendant's Sixth Amendment right to counsel because defendant's invocation of counsel was not honored did

not preclude prosecution from using statement for impeachment purposes when defendant testified); *Harris v. New York*, 401 U.S. 222, 224 (1971).

c. *Focus is police action*. "[T]he voluntariness of a waiver 'has always depended on the absence of police overreaching . . . .'" *United States v. Cazares*, 121 F.3d 1241, 1244 (9th Cir. 1997) (quoting *Colorado v. Connelly*, 479 U.S. 157, 170 (1986)). Coercive police conduct is necessary for a finding of involuntariness. *Connelly*, 479 U.S. at 170.

d. *Applies to witnesses as well as defendants.* Statements of a cooperating witness which were induced "by threats or other coercive practices constitutes improper influence and makes a subsequent inculpatory statement involuntary" and inadmissible against a defendant. *Williams v. Woodford*, 306 F.3d 665, 692–93 (9th Cir. 2002) (quoting *United States v. Tingle*, 658 F.2d 1332, 1336 (9th Cir. 1981)).

2. *Test.* The test for voluntariness is whether, viewing the totality of circumstances, "'the government obtained the statement by physical or psychological coercion or by improper inducement so that the suspect's will was overborne.'" *United States v. Harrison*, 34 F.3d 886, 890 (9th Cir. 1994) (quoting *United States v. Leon Guerrero*, 847 F.2d 1363, 1366 (9th Cir. 1988)). *See also Cunningham v. Perez,* 345 F.3d 802, 810–11 (9th Cir. 2003) (interrogation did not violate defendant's constitutional rights to be free from coercive interrogation although interrogation lasted eight hours, questioning continued although suspect maintained innocence, it was suggested that cooperation could result in treatment rather than prison, and suspect's request to call therapist was denied), *cert. denied*, 124 S. Ct. 2070 (2004); *Pollard v.*

Galaza, 290 F.3d 1030, 1033 (9th Cir.), *cert. denied*, 537 U.S. 981 (2002). The pivotal question is whether the suspect's will was overborne. *United States v. Miller*, 984 F.2d 1028, 1031 (9th Cir.) (citations omitted), *cert. denied*, 510 U.S. 894 (1993).

"Whether a confession is voluntary is determined under the totality of the circumstances, which include 'the crucial element of police coercion; the length of the interrogation; its location; its continuity; the defendant's maturity; education; physical condition; and mental health.'" *Taylor v. Maddox*, 366 F.3d 992, 1015–16 (9th Cir. 2004) (quoting *Withrow v. Williams*, 507 U.S. 680, 693 (1993)) (finding, on facts presented, that district court erred in concluding that 16 year old's confession was voluntary).

3. *Mental/emotional/psychological factors*.

   a. *In general.* In order for Fifth Amendment protection to apply, the coercion must be government coercion. *See Colorado v. Connelly*, 479 U.S. 157, 170 (1986) ("[T]he Fifth Amendment privilege is not concerned 'with moral and psychological pressures to confess emanating from sources other than official coercion.'") (quoting *Oregon v. Elstad*, 470 U.S. 298, 305 (1985)). *See also Cunningham v. Perez,* 345 F.3d 802, 810–11 (9th Cir. 2003) (interrogation did not violate defendant's constitutional rights to be free from coercive interrogation although suspect was bi-polar and police denied his request to call his therapist), *cert. denied*, 124 S. Ct. 2070 (2004); *United States v. Orso*, 266 F.3d 1030, 1039 (9th Cir. 2001) (defendant's subjective mental state did not render statement involuntary), *cert. denied*, 537 U.S. 828 (2002); *United States v. Huynh*, 60 F.3d 1386, 1388 (9th Cir. 1995) (citation omitted).

b. *Physical and/or psychological coercion, mental incapacity*. "A confession accompanied by physical violence is per se involuntary, while one accompanied by psychological coercion is not." *United States v. Haswood*, 350 F.3d 1024, 1027 (9th Cir. 2003) (citation omitted). Where the record contains no evidence of physical or psychological coercion by police, defendant's mental incapacity is irrelevant regarding the voluntariness issue. *United States v. Chischilly*, 30 F.3d 1144, 1151 (9th Cir. 1994) (although defendant had I.Q. of 62, functional level of 6-year old, and organic brain syndrome, because police used no physical or psychological coercion, defendant's mental capacity was irrelevant as to voluntariness), *cert. denied*, 513 U.S. 1132 (1995). *See also Henry v. Kernan*, 197 F.3d 1021, 1028 (9th Cir. 1999) (defendant's confession was involuntary "[b]ecause the police tactics and trickery produced a confession which was neither rational nor the product of an essentially free and unconstrained choice"), *cert. denied*, 528 U.S. 1198 (2000).

c. *Defendant under influence of alcohol or drugs.* To affect voluntariness, defendant's condition must have overborne his or her "will to resist the questioning or impair . . . rational faculties." *United States v. Martin*, 781 F.2d 671, 674 (9th Cir. 1985) (demerol administered to defendant at hospital did not cause statements to be involuntary, where trial court concluded that "'the type, dosage, and schedule of painkilling narcotic administered to [defendant] was not sufficient to overbear his will to resist the questioning or impair his rational faculties'"). *See also Mincey v. Arizona,* 437 U.S. 385, 398–99 (1978) (statement from defendant in hospital, in near coma condition, and in great pain, including tubes, needles,

and a breathing apparatus, involuntary); *United States v. Banks,* 282 F.3d 699, 706 (9th Cir. 2002) ("A confession made in a drug or alcohol induced state . . . may be deemed voluntary if it remains 'the product of a rational intellect and a free will . . . .'") (quoting *Medeiros v. Shimoda*, 889 F.2d 819, 823 (9th Cir. 1989), *cert denied*, 496 U.S. 938 (1990)), *rev'd on other grounds*, 540 U.S. 31 (2003); *Shackleford v. Hubbard*, 234 F.3d 1072, 1080 (9th Cir. 2000) ("The fact that a suspect is under the influence of drugs or medication is irrelevant if the suspect's statement was 'the product of a rational intellect and a free will.'") (citations omitted), *cert. denied*, 122 S. Ct. 324 (2001); *United States v. Coleman*, 208 F.3d 786, 791 (9th Cir. 2000) (heroin withdrawal causing "lethargy and physical discomfort" is insufficient alone to establish involuntariness).

d. *Foreign language factors.* "In the case of a foreign national, the voluntariness inquiry [] includes assessment of the following factors":

(1) whether the defendant signed a written waiver;

(2) whether he was read his rights in his native language;

(3) whether he appeared to understand those rights;

(4) whether he had the assistance of a translator;

(5) whether his rights were explained painstakingly; and,

(6) whether he had experience with the American criminal justice system.

United States v. Gamez, 301 F.3d 1138, 1144 (9th Cir. 2002) (citing *United States v. Amano*, 229 F.3d 801, 804–05 (9th Cir. 2000)) (defendant's confession was voluntary where: defendant was detained for 31 hours during questioning about murder of Border Patrol officer; questioning was conducted in Spanish, including waiver of *Miranda* rights in Spanish and signing of a written waiver; and although defendant was fed once he never asked for food, so that failure to provide three meals did not cause statements to be coerced), *cert. denied*, 538 U.S. 1067 (2003).

4. *Promises and threats by law enforcement*.

   a. *Deception and/or ruses by police*. Deception does not necessarily render a confession involuntary. *Frazier v. Cupp*, 394 U.S. 731, 737–39 (1969). *See also United States v. Crawford*, 372 F.3d 1048, 1061 (9th Cir. 2004) (en banc); *United States v. Haswood*, 350 F.3d 1024, 1029 (9th Cir. 2003) ("Even misrepresentations by law enforcement, while reprehensible, do not necessarily evidence coercive conduct.") (citation omitted). *Amaya-Ruiz v. Stewart*, 121 F.3d 486, 495 (9th Cir. 1997) ("The officers' misrepresentation that a witness had seen [the defendant] leaving the stolen truck does not amount to coercion. Misrepresentations linking a suspect to a crime or statements which inflate the extent of evidence against a suspect do not necessarily render a confession involuntary.") (citations omitted), *cert. denied*, 522 U.S. 1130 (1998).

   b. *Threat to impound.* A threat by the police to impound the defendant's car has been held not to cause a defendant's confession to be involuntary. *Territory of Guam v. Muna*, 999 F.2d 397, 400 (9th Cir. 1993).

c. *Threat to inform court of non-cooperation.* A threat to tell the court or the prosecutor of the defendant's refusal to cooperate violates the Fifth Amendment. *United States v. Leon Guerrero*, 847 F.2d 1363, 1366 n.2 (9th Cir. 1988) (citation omitted). *See also United States v. Harrison*, 34 F.3d 886, 892 (9th Cir. 1994) (question by police as to whether defendant thought it would be better if judge were told she had not cooperated was improper and subsequent statement was involuntary).

d. *Recitation of potential sentence.* "'[R]ecitation of the potential sentence a defendant might receive' does not render a statement involuntary." *United States v. Bautista-Avila,* 6 F.3d 1360, 1365 (9th Cir. 1993) (citations omitted). *See also United States v. Okafor*, 285 F.3d 842, 846–47 (9th Cir.) (agent's statement to defendant "that he would be subject to 10 to 20 years in prison and that it would be to his benefit to cooperate with authorities" did not cause defendant's subsequent statement to be involuntary), *cert. denied*, 537 U.S. 989 (2002).

e. *Promises.* A promise to bring a suspect's cooperation to the attention of the prosecutor is permissible. *United States v. Harrison*, 34 F.3d 886, 891 (9th Cir. 1994). *See also United States v. Okafor*, 285 F.3d 842, 847 (9th Cir.) (no impermissible coercion "when the customs agent told [the defendant] that the agent would let the government know if [the defendant] cooperated, and that cooperation could help [the defendant] avoid a lengthy prison sentence"), *cert. denied*, 537 U.S. 989 (2002); *United States v. Coleman*, 208 F.3d 786, 791 (9th Cir. 2000) (agents' promise to defendant that "now is the time to tell" agents anything defendant knew because agents "can tell the prosecutor to give [defendant] little or no time"

was insufficient inducement to cooperate to establish involuntariness) (citation omitted).

f. *Imploring suspect to "tell the truth."* It is not coercive for law enforcement officers to encourage a defendant to tell the truth. *Amaya-Ruiz v. Stewart*, 121 F.3d 486, 494 (9th Cir. 1997), *cert. denied*, 522 U.S. 1130 (1998).

5. *Coercion arising from employment.* "[P]ublic employees who must choose either to incriminate themselves or to forfeit their jobs," and who make statements under such circumstances, have been compelled to make statements, and such statements are inadmissible in a federal trial. *United States v. Koon*, 34 F.3d 1416, 1431 (9th Cir. 1994) (citation omitted), *aff'd in part, rev'd in part, on other grounds*, 518 U.S. 81 (1996).

6. *Role of jury re voluntariness.* 18 U.S.C. § 3501(a) states in part: "[i]f the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances."

   A defendant is entitled to present evidence to the jury bearing on the circumstances of the defendant's confession even though the court has ruled at a pretrial hearing that the confession was voluntary. *Crane v. Kentucky*, 476 U.S. 683, 688–89 (1986).

B. *Miranda* rights—In general.

In *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court held "that a person questioned by law enforcement

officers after being 'taken into custody or otherwise deprived of his freedom of action in any significant way' must first 'be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.'" *Stansbury v. California*, 511 U.S. 318, 322 (1994) (quoting *Miranda*, 384 U.S. at 444). *See also Dickerson v. United States*, 530 U.S. 428, 435 (2000) (recognizing continued vitality of *Miranda*).

Although the government must prove that the defendant was aware of his or her rights and waived them, "[t]o solicit a waiver of *Miranda* rights, a police officer need neither use a waiver form nor ask explicitly whether the defendant intends to waive his rights." *United States v. Cazares*, 121 F.3d 1241, 1244 (9th Cir. 1997) (citation omitted).

"*Miranda* is constitutionally based . . . ." *Dickerson v. United States*, 530 U.S. 428, 440 (2000).

1. *Burden.* The burden is on the government to show that *Miranda* rights were administered and that the defendant agreed to waive them. *Miranda v. Arizona*, 384 U.S. 436, 475 (1966). Proof of waiver must be by a preponderance of the evidence. *Colorado v. Connelly*, 479 U.S. 157, 168–69 (1986) (citation omitted).

2. *Custody requirement—Custody defined.* "An officer's obligation to administer *Miranda* warnings attaches . . . 'only where there has been such a restriction on a person's freedom as to render him "in custody."'" *Stansbury v. California*, 511 U.S. 318, 322 (1994) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)) (applies to custodial interrogation). *See also United States v. Crawford*, 372 F.3d 1048, 1059–60 (9th Cir. 2004) (en banc). "Custodial" means taken into custody or otherwise deprived of freedom of action in a significant way. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) ("By

custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or deprived of his freedom of action in any significant way.”).

a. *When suspect is in “custody.”* To determine whether a person is “in custody” under *Miranda*, “a court must examine all of the circumstances surrounding the interrogation, but ‘the ultimate inquiry is simply whether there [was] a “formal arrest or restraint on freedom of movement” of the degree associated with a formal arrest.’” *Stansbury,* 511 U.S.at 322 (citation omitted). *See also California v. Beheler*, 463 U.S. 1121, 1125 (1983); *Mathiason*, 429 U.S. at 495. “‘[T]he only relevant inquiry is how a reasonable man in the suspect’s position would have understood his situation.’” *Stansbury*, 511 U.S. at 324 (quoting *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984)). *See also Crawford*, 372 F.3d at 1059–60 (“Whether a suspect is in custody turns on whether there is a ‘“formal arrest or restraint on freedom of movement” of the degree associated with a formal arrest.’”) (citations omitted); *United States v. Kim,* 292 F.3d 969, 973 (9th Cir. 2002) (reasonableness evaluated by objective view of circumstances as opposed to subjective view of officers or suspect); *United States v. Wauneka*, 770 F.2d 1434, 1438 (9th Cir. 1985) (“A defendant is in custody when, based upon a review of all the pertinent facts, ‘a reasonable innocent person in such circumstances would conclude after brief questioning he or she would not be free to leave.’”) (citation omitted).

b. *Factors re custody.* “The following factors are among those most likely to be relevant to deciding [whether a

reasonable person would believe that he or she was not free to leave]":

(1) the language used to summon the individual;

(2) the extent to which the defendant is confronted with evidence of guilt;

(3) the physical surroundings of the interrogation;

(4) the duration of the detention; and

(5) the degree of pressure applied to detain the individual.

Kim, 292 F.3d at 974 (quoting *United States v. Hayden*, 260 F.3d 1062, 1066 (9th Cir. 2001), *cert. denied*, 122 S. Ct. 1117 (2002)). *See also Yarborough v. Alvarado,* 124 S. Ct. 2140, 2149–52 (2004) (refusing to grant habeas petition where state court concluded that 17-year-old who voluntarily came to police station, whose parents were present in lobby, and who was permitted to go home after interview, was not in custody).

c. *Unrelated charges*. Custody on unrelated charges is not custody for *Miranda* purposes. *United States v. Turner*, 28 F.3d 981, 983–84 (9th Cir. 1994), *cert. denied*, 513 U.S. 1158 (1995).

3. *"Interrogation."* Interrogation includes express questioning and the functional equivalent thereof. *Arizona v. Mauro*, 481 U.S. 520, 526 (1987) (citation omitted). Interrogation includes words or actions police officers "*should have known* were reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, 446 U.S. 291, 302 (1980).

A confession which is spontaneous is not a result of interrogation for purposes of *Miranda*. *Beaty v. Stewart*, 303 F.3d 975, 991 (9th Cir. 2002) (spontaneous confession made by prisoner to jail psychiatrist was not a result of interrogation; *Miranda* was therefore inapplicable), *cert. denied*, 538 U.S. 1053 (2003).

Not every question in a custodial setting constitutes interrogation. *United States v. Gonzalez-Sandoval*, 894 F.2d 1043, 1046 (9th Cir. 1990) (citing *United States v. Booth*, 669 F.2d 1231, 1237 (9th Cir. 1981)).

a. *Border questioning.* Routine questioning at the border is not custodial interrogation that triggers *Miranda*. *United States v. Manasen*, 909 F.2d 1357, 1358–59 (9th Cir. 1990). *Cf. United States v. Galindo-Gallegos*, 244 F.3d 728, 732 (9th Cir. 2001) (roadside questioning, as to citizenship and legal right to be in country, of large group of individuals apprehended while running near Mexican border was not custodial interrogation triggering necessity of *Miranda* warnings), *amended by* 255 F.3d 1154 (9th Cir. 2001).

   See also Chapter 16, B., 5., Searches and Seizure–Without Warrant—Border searches.

b. *Routine questioning of motorist.* A police officer's roadside questioning of a motorist after a routine traffic stop does not constitute custodial interrogation for purposes of *Miranda*. *Pennsylvania v. Bruder,* 488 U.S. 9, 11 (1988) (citation omitted). *See also Berkemer v. McCarty*, 468 U.S. 420, 438–40 (1984); *United States v. Montero-Camargo,* 177 F.3d 1113, 1121–22 (9th Cir.) (questions asked of motorist regarding alienage of driver and passengers and whether motorist realized he was "out of status"

constituted routine non-custodial pre-arrest questioning), *amended by* 183 F.3d 1172, *withdrawn by* 192 F.3d 946 (1999), *reinstated by* 208 F.3d 1122, 1128 n.8, *cert denied*, 531 U.S. 889 (2000).

c. *Deportation proceedings*. Questions asked by an immigration judge at a deportation proceeding do not constitute interrogation. *United States v. Solano-Godines*, 120 F.3d 957, 961–62 (9th Cir. 1997) ("The immigration judge could not be expected to anticipate that two years later [the defendant] would illegally reenter the United States and that his responses to questions at his civil deportation hearing might incriminate him in a prosecution for this future crime."), *cert. denied*, 522 U.S. 1061 (1998). *See also United States v. Salgado*, 292 F.3d 1169, 1173–74 (9th Cir.) (Immigration Enforcement Officer's biographical questions of defendant, asked to determine whether defendant was subject to administrative action for deportation, did not require the giving of *Miranda* warnings, where defendant was deported and thereafter reentered the United States illegally), *cert. denied*, 537 U.S. 1011 (2002); *United States v. Gutierrez-Cervantez*, 132 F.3d 460, 461 (9th Cir. 1997), *cert. denied*, 522 U.S. 1083 (1998). *But see United States v. Mata-Abundiz*, 717 F.2d 1277, 1278–79 (9th Cir. 1983) (where defendant was jailed on state charge of possession of a firearm by an illegal alien, and INS agent asked defendant biographical questions and then promptly obtained a warrant for defendant's arrest on federal charges, *Miranda* warnings were required).

Caveat: This reflects a change from earlier case law suggesting that a defendant's prior un-*Mirandized* statements at deportation proceedings may be inadmissible at a criminal trial. *United States v. Alderete-Deras*, 743 F.2d 645, 648 (9th Cir. 1984).

d. *Drunk driving*. Slurred speech is "real or physical," but not "testimonial," because it is the nature of the suspect's speech that is incriminating. *Pennsylvania v. Muniz*, 496 U.S. 582, 590–91 (1990).

e. *Booking questions*. Routine gathering of biographical information, such as name, address, and height and weight, for purposes of booking, is not interrogation for *Miranda* purposes. *Pennsylvania v. Muniz*, 496 U.S. 582, 601–02 (1990); *United States v. Perez,* 776 F.2d 797, 799 (9th Cir. 1985); *United States v. Booth*, 669 F.2d 1231, 1238–39 (9th Cir. 1981). However, "[t]he relationship of the question asked to the crime suspected is highly relevant." *United States v. Gonzalez-Sandoval*, 894 F.2d 1043, 1046 (9th Cir. 1990) (questions regarding immigration status and place of birth asked by INS agent investigating INS violations can trigger duty to advise of *Miranda* rights).

f. *Public safety exception*. "[U]nder the public safety exception, *Miranda* warnings need not be given when 'police officers ask questions reasonably prompted by a concern for the public safety.'" *Allen v. Roe*, 305 F.3d 1046, 1050 (9th Cir. 2002) (public safety exception permitted police to ask suspect to help them locate gun used in shooting) (quoting *New York v. Quarles*, 467 U.S. 469, 656 (1984)), *cert. denied*, 537 U.S. 1214 (2003). "In order for the public safety exception to apply, there must have been 'an objectively reasonable need to protect the police or the public from immediate danger.'" *Allen,* 305 F.3d at 1050 (citation omitted). *See also United States v. Reilly*, 224 F.3d 986, 992–94 (9th Cir. 2000) (public safety exception applied to suspect arrested for armed bank robberies and armed carjacking; police

permissibly asked suspect where the gun was without first advising him of his *Miranda* rights); *United States v. Carrillo*, 16 F.3d 1046, 1049–50 (9th Cir. 1994) (permissible to ask suspect prior to search of his person whether he possessed any drugs or needles).

g. *Border crossings*. "[C]ases have . . . held that *Miranda* warnings need not be given in a border crossing situation unless, and until, the questioning agents have probable cause to believe that the person has committed an offense . . . . Stops and routine questioning are the norm at the border in the primary inspection areas. In most cases, the earliest that a person could be in custody is at the point when [he or] she is moved into a secondary inspection area and asked to exit [his or] her vehicle while it is searched." *United States v. Leasure*, 122 F.3d 837, 840 (9th Cir. 1997), *cert. denied*, 522 U.S. 1065 (1998). *But see United States v. Butler,* 249 F.3d 1094, 1099 (9th Cir. 2001) ("Although the existence or non-existence of probable cause might be one factor to consider in determining someone's custodial status in the twilight zone between detention and custody, what ultimately matters to the determination of whether *Miranda* is triggered is custody, which is determined not by the existence of probable cause, but by looking to the 'objective circumstances of the interrogation.'") (citations omitted).

h. *Innocuous questions*. An innocuous question by a law enforcement agent ("How was your night?") followed by an incriminating statement by the defendant who has previously invoked the right to remain silent does not constitute interrogation. *United States v. Moreno-Flores*, 33 F.3d 1164, 1170 (9th Cir. 1994).

4. *Consequences of defective* Miranda *warning*. *Miranda* warnings may be defective if they are not sufficiently clear

and thorough. "*Miranda* itself stated that admissibility of any statement given during custodial interrogation of a suspect depends on whether the police provided the suspect with four warnings: 'the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires.'" *United States v. Perez-Lopez*, 348 F.3d 839, 848 (9th Cir. 2003) (quoting *Miranda*, 384 U.S. at 479) (emphasis omitted). Incriminating statements made after a defective *Miranda* warning should be suppressed as improperly obtained. *Perez-Lopez*, 348 F.3d at 848–49 (informing defendant prior to custodial interrogation that, translated from Spanish, "[i]n case you don't have enough money or funds, you have the right to solicit the Court for an attorney," was fatally defective as failing to advise the defendant of the government's obligation to provide counsel to indigent defendants). Nevertheless, "*Miranda* itself indicated that no talismanic incantation was required to satisfy its strictures . . . ." *Perez-Lopez*, 348 F.3d at 848 (citation omitted).

5. *Re-advising suspect of* Miranda *rights*. There is no per se rule requiring the re-administering of *Miranda* rights. *United States v. Andaverde*, 64 F.3d 1305, 1312 (9th Cir. 1995), *cert. denied*, 516 U.S. 1164 (1996).

   Typically, the mere lapse of time between the administering of *Miranda* rights and further questioning does not require re-administration of rights. *Andaverde*, 64 F.3d at 1312–13 (where second questioning occurred two hours after rights given, no requirement existed that defendant be re-advised of rights).

C. *Miranda* rights—Waiver.

1. *Waiver*. A suspect may, of course, waive his or her *Miranda* rights. *Derrick v. Peterson*, 924 F.2d 813, 824 (9th Cir. 1990) (a written waiver of *Miranda* rights is strong evidence of a valid waiver) (citation omitted), *cert. denied*, 502 U.S. 853 (1991). *Miranda* rights must be knowingly, intelligently, and voluntarily waived. *United States v. Rodriguez-Rodriguez*, 364 F.3d 1142, 1146 (9th Cir. 2004) (on facts presented, alleged heroin withdrawal did not prevent defendant from waiving his *Miranda* rights).

   "A valid waiver of *Miranda* rights depends upon the 'totality of the circumstances including the background, experience, and conduct of defendant.'" *United States v. Garibay*, 143 F.3d 534, 536 (9th Cir. 1998) (citation omitted). "There is a presumption against waiver." *Garibay*, 143 F.3d at 536 (citation omitted).

2. *Factors re waiver*. In deciding whether a waiver has occurred, the totality of circumstances include:

   (1) whether the defendant signed a written waiver;

   (2) whether the defendant was advised of his rights in his native tongue;

   (3) whether the defendant appeared to understand his rights;

   (4) whether a defendant had the assistance of a translator;

   (5) whether the defendant's rights were individually and repeatedly explained to him; and

(6) whether the defendant had prior experience with the criminal justice system.

United States v. Garibay, 143 F.3d 534, 538 (9th Cir. 1998) (district court erred in concluding that a suspect whose primary language was Spanish, who had poor comprehension of English, and who was borderline retarded, knowingly and intelligently waived his *Miranda* rights in English) (citations omitted). *But see United States v. Vallejo,* 237 F.3d 1008, 1014–15 (9th Cir. 2001) (no *Miranda* violation when defendant was given option to speak in Spanish or English during interrogation but did not express a preference).

3. *Selective waiver.* "A defendant may selectively waive his *Miranda* rights by agreeing to answer some questions but not others." *United States v. Soliz*, 129 F.3d 499, 503 (9th Cir. 1997) (where defendant was advised of his *Miranda* rights and agreed to answer questions concerning his citizenship, the defendant's *Miranda* rights were violated when he was also asked questions concerning alien smuggling activities) (citing *Michigan v. Mosley,* 423 U.S. 96, 103–04 (1975)).

However, "[a] valid waiver under the Fifth Amendment does not require that the criminal suspect be aware of all crimes about which he may be questioned." *Soliz*, 129 F.3d at 503 (citing *Colorado v. Spring*, 479 U.S. 564, 577 (1987)).

D. *Miranda* rights—Invocation of right to remain silent.

1. *Invocation of rights—Refusal to answer questions*. Once a defendant asserts the right to remain silent, interrogation must cease. *Michigan v. Mosley,* 423 U.S. 96, 104 (1975);

Hendricks v. Vasquez, 974 F.2d 1099, 1105 (9th Cir. 1992).

2. *Invocation of right to remain silent followed by waiver*.

   a. *Same crime*. If a defendant invokes his or her right to remain silent and thereafter initiates a conversation, such action may constitute a waiver. *Hendricks v. Vasquez*, 974 F.2d 1099, 1105 (9th Cir. 1992) (citation omitted).

   b. *New crime*. Where a defendant invokes the right to remain silent and is later advised of *Miranda* warnings on an unrelated charge, his or her waiver of rights as to the unrelated charge results in those statements being admissible despite the earlier invocation of rights. *Michigan v. Mosley*, 423 U.S. 96, 104–07 (1975).

E. *Miranda* rights—Right to counsel—Invocation.

"The Sixth Amendment right to counsel is triggered 'at or after the time that judicial proceedings have been initiated . . . "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."'" *Fellers v. United States,* 124 S. Ct. 1019, 1022 (2004) (quoting *Brewer v. Williams*, 430 U.S. 387, 398 (1977) (quoting *Kirby v. Illinois*, 406 U.S. 682, 689 (1972))). *See also Maine v. Moulton*, 474 U.S. 159, 170 (1985); *United States v. Danielson*, 325 F.3d 1054, 1066 (9th Cir. 2003). "Once the right to counsel has attached and been asserted, the State must of course honor it." *Moulton*, 474 U.S. at 170 (citation omitted). *See also United States v. Harrison*, 213 F.3d 1206, 1209–10 (9th Cir. 2000).

1. *Invocation of rights—Request for attorney*. "A request for counsel need not be stated as a model of eloquence and clarity," but the request must be "some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney." *Alvarez v. Gomez*, 185 F.3d

995, 997 (9th Cir. 1999). *See also Paulino v. Castro*, 371 F.3d 1083 (9th Cir. 2004) ("Invocation of counsel sufficient to trigger the protections of *Edwards* [*v. Arizona*, 451 U.S. 477 (1981),] 'requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney.'") (quoting *McNeil v. Wisconsin,* 501 U.S. 171, 178 (1991)).

a. *Request must be unambiguous*. "The 'rigid prophylactic rule' of *Edwards* requires a court to 'determine whether the accused actually invoked his right to counsel.'" *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir.) (citations omitted), *cert. denied*, 124 S. Ct. 446 (2003). "The suspect must 'unambiguously request counsel.'" *Id*. at 1070. "[T]he determination whether an accused actually invoked his right to counsel is 'an objective inquiry.'" *Id*. at 1069–70 (quoting *Davis v. United States*, 512 U.S. 452, 458–59 (1994)).

b. *Effect of unambiguous request.* "When an accused invokes his right to have counsel present during custodial interrogation, he may not be subjected to further questioning by the authorities until a lawyer has been made available or the suspect himself reinitiates conversation." *Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003) (citing *Edwards*, 451 U.S. at 484–85). *But see McNeil v. Wisconsin*, 501 U.S. 171, 176–82 (1991) (offense specific invocation of Sixth Amendment right to counsel does not trigger *Edwards* protection for purposes of unrelated, uncharged offense).

c. *Unambiguous request followed by defendant's initiation of contact*. After a defendant has invoked the right to counsel, further interrogation must not take

place "unless the accused himself initiates further communication, exchanges, or conversations with the police." *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981). *See also Oregon v. Bradshaw*, 462 U.S. 1039, 1045–46 (1983) (defendant reinitiated communication with police by asking "[w]ell, what's going to happen to me now?"); *United States v. Michaud*, 268 F.3d 728, 735–38 (9th Cir. 2001) (where cellmate of defendant accompanied defendant to law enforcement officer and indicated that defendant wanted to speak to someone, resumption of interrogation did not violate *Edwards*), *cert. denied*, 537 U.S. 867 (2002).

d. *Ambiguous request.* *Edwards* does not require cessation of questioning if a suspect makes an ambiguous or equivocal reference to an attorney, such that a reasonable officer in light of the circumstances would understand only that the defendant *might* want an attorney. *Davis v. United States*, 512 U.S. 452, 458–62 (1994) ("[m]aybe I should talk to a lawyer" was ambiguous and did not constitute a legally sufficient request for counsel). *See also Paulino v. Castro*, 371 F.3d 1083, 1086–88 (9th Cir. 2004) (state court reasonably concluded that defendant's ambiguous queries did not constitute invocation of right to counsel); *United States v. Banks*, 282 F.3d 699, 706 (9th Cir. 2002); *United States v. Cheely*, 36 F.3d 1439, 1448 (9th Cir. 1994) (defendant's refusal to sign waiver form and explanation that his attorney would not want defendant to speak with police constituted invocation of rights under *Edwards*); *United States v. Fouche*, 833 F.2d 1284, 1287 (9th Cir. 1987) ("[I]f [a suspect] is indecisive in his request for counsel, there may be some question on whether he did or did not waive counsel. Situations of this kind must necessarily be left to the judgment of the interviewing agent.") (quoting *Miranda v. Arizona*, 384 U.S. 436, 485 (1966)), *cert. denied*, 486 U.S. 1017 (1988).

"[L]aw enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." *Davis*, 512 U.S. at 461.

e. *Questions re uncharged matters under investigation*. "[A] suspect's decision to cut off questioning, unlike his request for counsel, does not raise the presumption that he is unable to proceed without a lawyer's advice." *Arizona v. Roberson*, 486 U.S. 675, 683 (1988) (citing *Michigan v. Mosley*, 423 U.S. 96, 101 n.7 (1975)).

"As a matter of law, the presumption raised by a suspect's request for counsel--that he considers himself unable to deal with the pressures of custodial interrogation without legal assistance--does not disappear simply because the police have approached the suspect . . . about a separate investigation." *Roberson,* 486 U.S. at 683. *But see Fetterly v. Paskett,* 163 F.3d 1144, 1148–49 (9th Cir. 1998) (where defendant was charged with unrelated crime, released from custody, and approached by law enforcement officers who were unaware of pending charges and previous appointment of counsel, fact that defendant was represented by appointed counsel for purposes of earlier case did not require suppression of subsequent statements taken regarding new offense).

f. *Request for counsel followed by release and requestioning at later time. Edwards* is not violated where a defendant is advised of *Miranda* rights, invokes his or her right to counsel, is released, and a significant time later is recontacted and questioned without again being advised of *Miranda* rights. *United States v. Coleman,* 208 F.3d 786, 790–91 (2000) ("Because Defendant had been released from custody

for a significant period of time before investigators questioned him again, . . . [statements made after release] did not violate *Edwards*.") (six day period between questionings) (citation omitted).

g. *Flawed warning re right to counsel.* When contradictory *Miranda* warnings are given to a suspect, one being flawed and the other not, "the onus is on the Government to clarify to the arrested party the nature of his or her rights under the Fifth Amendment." *United States v. San Juan-Cruz*, 314 F.3d 384, 389 (9th Cir. 2002) (contradictory warnings as to whether suspect was entitled to have government provide counsel violated Fifth Amendment). *See also United States v. Perez-Lopez*, 348 F.3d 839, 848 (9th Cir. 2003) (informing defendant prior to custodial interrogation that, translated from Spanish, "[i]n case you don't have enough money or funds, you have the right to solicit the Court for an attorney," was fatally defective as failing to advise the defendant of the government's obligation to provide counsel to indigent defendants).

2. *Specific offense protection exception—Sixth Amendment.* Aside from voluntariness and *Miranda* considerations, the Sixth Amendment affords offense specific protection to a defendant who has been charged with an offense and is represented by counsel as to that offense. *McNeil v. Wisconsin*, 501 U.S. 171, 175–76 (1991).

a. *Offense specific.* "[T]he Sixth Amendment right to counsel is offense-specific and therefore prohibits government-initiated interrogation only regarding the offense to which the right of counsel has attached." *United States v. Ortega*, 203 F.3d 675, 680 (9th Cir. 2000) (citing *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991) and *United States v. Covarrubias*, 179 F.3d

1219, 1223 (9th Cir. 1999)). *See also Texas v. Cobb*, 532 U.S. 162, 167–68 (2001).

Where counsel has previously been appointed for a defendant, the defendant may not be questioned further regarding that case unless counsel is notified or the defendant initiates questioning. *Arizona v. Roberson*, 486 U.S. 675 (1988); *Michigan v. Jackson*, 475 U.S. 625 (1986); *Edwards v. Arizona*, 451 U.S. 477 (1981).

However, where counsel has been appointed on an unrelated case, and the defendant is out of custody, law enforcement may question the defendant without the presence of appointed counsel regarding the new matter. *Fetterly v. Paskett*, 163 F.3d 1144, 1148 (9th Cir. 1998).

b. *Exceptions to offense specific protection—* Blockburger *test.*

(1) *Pre-Cobb approach*. "[A]ppellate courts have recognized two clear exceptions to [the] offense specific requirement: the 'inextricably intertwined' or 'closely related' exception and the 'circumvention of Sixth Amendment right' exception." *United States v. Covarrubias*, 179 F.3d 1219, 1223 (9th Cir. 1999). *See also United States v. Ortega,* 203 F.3d 675, 680 (9th Cir. 2000) (an exception exists to the offense-specific requirement "'when the pending charge is so inextricably intertwined with the charge under investigation that the right to counsel for the pending charge cannot constitutionally be isolated from the right to counsel for the uncharged offense'") (quoting *Covarrubias,* 179 F.3d at 1223)).

Caveat: In *Texas v. Cobb*, 532 U.S. 162, 168 n.1 (2001), the Supreme Court expressly declined to recognize a "factually related" exception to *McNeil v. Wisconsin*, 501 U.S. 171 (1991), and declined to adopt the reasoning of several federal and state court decisions including *Covarrubias,* 179 F.3d at 1223. *See also United States v. Percy,* 250 F.3d 720, 726 n.3 (9th Cir.) (citation omitted), *cert. denied*, 122 S. Ct. 493 (2001).

(2) *Cobb approach*. "[W]hen the Sixth Amendment right to counsel attaches, it . . . encompass[es] offenses that, even if not formally charged, would be considered the same offense under the *Blockburger* test." *Texas v. Cobb,* 532 U.S. 162, 173 (2001). The *Blockburger* test requires that "'where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.'" *Cobb,* 532 U.S. at 173 (citing *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

3. *Deliberate elicitation of statements from indicted defendant.* "Government actions that deliberately elicit incriminating statements from an indicted defendant in the absence of counsel are improper under the Sixth Amendment." *United States v. Danielson*, 325 F.3d 1054, 1067, 1073–74 (9th Cir. 2003) (citing *Moulton*, 474 U.S. at 176–80, *United States v. Henry*, 494 U.S. 264, 274 (1980), and *Massiah v. United States*, 377 U.S. 201, 206 (1964)) (holding that defendant's Sixth Amendment rights were violated when tenant of defendant spoke with defendant regarding trial strategy and passed on information to prosecution). *See also Fellers v. United States,* 124 S. Ct. 1019 (2004); *Weatherford v. Bursey*, 429 U.S. 545 (1977).

F. Silence—Admissibility.

1. *Post*-Miranda *silence*. Of course, evidence that a defendant remained silent following arrest and after receiving *Miranda* warnings is inadmissible. *United States v. Hale*, 422 U.S. 171, 180–81 (1975).

2. *Post-crime, pre-arrest, pre*-Miranda *silence*. Evidence that after a crime was committed, a suspect, prior to arrest, failed "to report the incident to the police and to offer his exculpatory story" is permissible for impeachment purposes. *Fletcher v. Weir*, 455 U.S. 603, 604 n.1 (1982) (citing *Jenkins v. Andersen*, 447 U.S. 231 (1980)). Such evidence may also be admissible as evidence of substantive guilt. *United States v. Oplinger*, 150 F.3d 1061, 1066–67 (9th Cir. 1998) (pre-arrest, pre-*Miranda* silence in the face of accusation of criminal activity admissible as evidence of substantive guilt). *See also United States v. Beckman,* 298 F.3d 788, 795 (9th Cir. 2002).

3. *Post-crime, post-arrest, pre*-Miranda *silence*. Evidence of a defendant's post-arrest, pre-*Miranda* silence is inadmissible. *United States v. Whitehead*, 200 F.3d 634, 639 (9th Cir.) ("[W]hen the district court admitted evidence of [the defendant's] post-arrest, pre-*Miranda* silence . . . it plainly infringed upon [his] privilege against self-incrimination."), *cert. denied,* 531 U.S. 885 (2000). *See also United States v. Bushyhead*, 270 F.3d 905, 911–13 (9th Cir. 2001) (trial court erred in admitting defendant's post-arrest but pre-*Miranda* statement, "I have nothing to say, I'm going to get the death penalty anyway"), *cert. denied*, 122 S. Ct. 1586 (2002); *United States v. Velarde-Gomez*, 269 F.3d 1023, 1030–31 (9th Cir. 2001) (stating that evidence of pre-arrest pre-*Miranda* silence is admissible, evidence of post-arrest pre-*Miranda*

silence is inadmissible, although post-arrest pre-*Miranda* demeanor may be admissible). *But see Brecht v. Abrahamson*, 507 U.S. 619, 628 (1993) (citing *Fletcher v. Weir*, 455 U.S. 603, 606–07 (1982)); *United States v. Ross*, 123 F.3d 1181, 1188 (9th Cir. 1997) ("In general, the prosecution is free to impeach a defendant based on his silence when that silence does *not* follow *Miranda* warnings.") (citing *Fletcher*, 455 U.S. at 607), *cert. denied*, 522 U.S. 1066 (1998).

G. Pre-*Miranda* statements followed by post-*Miranda* statements.

1. *Statements made prior to* Miranda *warnings*. Custodial statements taken without *Miranda* warnings are inadmissible in the prosecution's case in chief. *United States v. Patane*, 124 S. Ct. 2620, 2627 (2004) (citing *Dickerson v. United States*, 530 U.S. 428, 443–44 (2000)).

   However,"uncompelled statements taken without *Miranda* warnings can be used to impeach a defendant's testimony at trial." *Id*. (citing *Oregon v. Elstad*, 470 U.S. 298, 307–08 (1985)).

2. *Admissibility of non-testimonial evidence obtained as a result of statements made pre-*Miranda. "[A] failure to give a suspect the warnings prescribed by *Miranda*[does not] require[] suppression of the physical fruits of the suspect's unwarned but voluntary statements." *Patane*, 124 S. Ct. at 2620, 2629.

3. *Admissibility of post-*Miranda *statements following pre-*Miranda *questioning.* When police deliberately fail to advise a suspect of *Miranda* rights, and after obtaining a statement advise the suspect of those rights, and then extract the same statement from the suspect, the statements are inadmissible. *Missouri v. Seibert*, 124 S. Ct. 2601, 2609–11 (2004).

Note: Prior to *Missouri v. Seibert*, the Ninth Circuit had held that if statements are made by a defendant prior to being *Mirandized* and in violation of *Miranda*, suppression of post-*Miranda* statements is not required unless the prior statements were involuntary. *United States v. Polanco*, 93 F.3d 555, 560–61 (9th Cir.) (a post-*Miranda* statement is admissible despite an earlier non-*Mirandized* statement if "(1) the initial, non-*Mirandized* statement was voluntary and (2) the subsequent, *Mirandized* statement was 'knowingly and voluntarily' made") (citing *Oregon v. Elstad*, 470 U.S. 298, 309 (1985)), *cert. denied*, 519 U.S. 973 (1996).

H. Violation of *Miranda* rights—Consequences.

1. *In general.* Generally, a violation of a suspect's *Miranda* rights results in the exclusion of these statements at trial. *Dickerson v. United States*, 530 U.S. 428, 441–42 (2000).

2. *Impeachment of defendant with statement taken in violation of Miranda rights.* An otherwise trustworthy statement obtained from a defendant in violation of his or her *Miranda* rights may nevertheless be admissible for impeachment purposes should the defendant testify and offer false or inconsistent testimony. *See, e.g., Michigan v. Harvey*, 494 U.S. 344, 345–46, 349–50 (1990) (post-arrest statement taken in violation of defendant's Sixth Amendment right to counsel, where defendant's invocation of counsel was not honored, could nevertheless be used for impeachment purposes); *Harris v. New York*, 401 U.S. 222, 225–26 (1971) (post-arrest statement obtained in violation of defendant's *Miranda* rights was admissible for impeachment purposes). *United States v. Danielson*, 325 F.3d 1054 (9th Cir. 2003) ("Any statements so gathered must be excluded from the government's case-in-chief, although 'they are admissible

to impeach conflicting testimony by the defendants,' provided the statements were voluntary.") (quoting *Harvey*, 494 U.S. at 350).

Impeachment is permitted "because [the defendant] assume[s] a reciprocal obligation to 'speak truthfully and accurately' when [the defendant] exercise[s] 'his right to testify on his own behalf.'" *United States v. Ortega*, 203 F.3d 675, 681 (9th Cir. 2000) (quoting *Harvey*, 494 U.S. at 351).

When police deliberately fail to advise a suspect of *Miranda* rights, and after obtaining a statement advise the suspect of those rights, and then extract the same statement from the suspect, the statements are inadmissible. *Missouri v. Seibert*, 124 S. Ct. 2601 (2004). *See also Henry v. Kernan*, 197 F.3d 1021, 1027–28 (9th Cir. 1999) (statement taken by officers who deliberately set out to violate defendant's *Miranda* rights inadmissible for all purposes), *cert. denied*, 528 U.S. 1198 (2000).

3. *Inevitable discovery—Evidence obtained as a result of statements taken in violation of* Miranda. "[E]vidence obtained in violation of the Constitution could still be admitted at trial if the government could prove 'by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means.'" *United States v. Lang*, 149 F.3d 1044, 1047 (quoting *Nix v. Williams*, 467 U.S. 431, 444 (1984)), *amended by* 157 F.3d 1161 (9th Cir. 1998), *cert. denied*, 526 U.S. 1133 (1999).

I. Limitations on government's use of defendant's testimony at suppression hearing.

A defendant's testimony at a suppression hearing is not admissible at trial against the defendant in the government's case-in-chief. *Simmons v. United States*, 390 U.S. 377,

389–94 (1968) (defendant's testimony at hearing on motion to suppress physical evidence is inadmissible on issue of guilt at trial).

However, a defendant's testimony at a suppression hearing may be offered at trial to impeach a defendant who testifies contrary to his or her suppression hearing testimony. *United States v. Beltran-Gutierrez*, 19 F.3d 1287, 1290–91 (9th Cir. 1994).

J. Inadmissibility of defendant's statements made during plea discussions.

"Statements made in the course of plea discussions with a United States Attorney are inadmissible pursuant to [Fed. R. Crim. P. 11(f) (formerly Rule 11(e)(6)(D))] and [Fed. R. Evid. 410]" *United States v. Sayakhom*, 186 F.3d 928, 934 (citing *United States v. Leon Guerrero,* 847 F.2d 1363, 1367 (9th Cir. 1988)), *amended by* 197 F.3d 959 (9th Cir. 1999), *cert. denied*, 528 U.S. 1179 (2000).

"A statement was made in the course of plea discussions with a United States Attorney if (1) the suspect exhibited an actual subjective expectation that she was negotiating a plea at the time of the discussion and (2) her expectation was reasonable given the totality of the circumstances." *Sayakhom*, 186 F.3d at 935–36 (citations omitted).

K. Fruit of the poisonous tree.

Statements which are the fruit of an illegal search and/or detention are inadmissible as fruit of the poisonous tree. *United States v. Crawford*, 372 F.3d 1048, 1054 (9th Cir. 2004) (en banc) (citing *Wong Sun v. United States*, 371 U.S. 471 (1963) and *Brown v. Illinois*, 422 U.S. 590, 599 (1975)). *See also United States v. Zaragoza*, 295 F.3d 1025, 1027–28

(9th Cir. 2002) (because defendant not unlawfully arrested, post-*Miranda* incriminating statements were not the "fruit of the poisonous tree"), *cert. denied*, 538 U.S. 956 (2003).

See also Chapter 15, C. and D., Search and Seizure–In General—Exclusionary rule, and —Exceptions to exclusionary rule.

L. Appearance before magistrate judge—Violation of 18 U.S.C. § 3501.

1. *Confession made within six hours of arrest.* "[A] confession made . . . while such person was under arrest or other detention . . . shall not be inadmissible solely because of delay in bringing such person before a magistrate judge . . . if such confession is found by the trial judge to have been made voluntarily . . . and if such confession was made or given by such person within six hours immediately following his arrest or other detention . . . ." 18 U.S.C. § 3501(c). "18 U.S.C. § 3501(c) provides a six-hour 'safe harbor' after an arrest and before the arraignment during which a confession will not be excludable solely because of delay." *United States v. Padilla-Mendoza*, 157 F.3d 730, 731 (9th Cir. 1998) (citation omitted), *cert. denied*, 525 U.S. 1166 (1999).

   Fed. R. Crim. P. 5(a) "requires that a person arrested for a federal offense be taken before a magistrate 'without unnecessary delay.'" *United States v. Gamez*, 301 F.3d 1138, 1143 (9th Cir. 2002) (quoting Fed. R. Crim. P. 5(a)), *cert. denied*, 538 U.S. 1067 (2003).

2. *Confession made more than six hours after detention.* "[T]he [six hour detention] time limitation . . . shall not apply in any case in which the delay in bringing such person before such magistrate judge . . . is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest

available such magistrate judge. . . ." 18 U.S.C. § 3501(c). "A confession made after the [six hour] safe harbor period may be excluded solely because of the delay, but there is no requirement that it be suppressed." *United States v. Padilla-Mendoza,* 157 F.3d 730, 731 (9th Cir. 1998) (citations omitted), *cert. denied*, 525 U.S. 1166 (1999). *See also United States v. Matus-Leyva,* 311 F.3d 1214, 1217 (9th Cir. 2002) ("delay was neither unreasonable nor contrary to public policy" when it was the result of the "circumstances of this case, which included providing [] medical treatment"); *United States v. Gamez,* 301 F.3d 1138, 1143 (9th Cir. 2002) (public policy favored admission because interrogation delay resulted from postponement until arrival of FBI agent who spoke defendant's native language), *cert. denied*, 538 U.S. 1067 (2003).

"[The Ninth Circuit] will admit a statement made outside of the safe harbor if the delay was reasonable or if public policy concerns weigh in favor of admission." *Padilla-Mendoza* 157 F.3d at 731–32 (district court not clearly erroneous in finding that delay was reasonable where delay was "primarily due to the distance and means of transportation to the nearest available magistrate") (citation omitted). *Cf. Anderson v. Calderon*, 232 F.3d 1053, 1070–73 (9th Cir. 2000) (although suppression of statement required where statement was product of prolonged detention without arraignment, citing *County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991), where the confession was obtained after defendant indicated a desire to confess and while his detention was still lawful, the confession was attenuated from the arraignment violation), *cert. denied*, 534 U.S. 1036 (2001). Compare *United States v. Wilson*, 838 F.2d 1081, 1085 (9th Cir. 1988) (suppression of confession required where federal

agents unnecessarily delayed bringing defendant to arraignment being conducted one flight).

M. Consulate notification of arrest.

The Vienna Convention on Consular Notification (VCCR), where applicable, requires that the consular post be notified without delay of the foreign national's detention. Article 36 (1) (b). However, the exclusionary rule does not apply to violations of the Vienna Convention. *United States v. Lombera-Camorlinga*, 206 F.3d 882, 885 (9th Cir.) (en banc), *cert. denied,* 531 U.S. 991 (2000). *See also United States v. Gamez*, 301 F.3d 1138, 1144 (9th Cir. 2002) ("failure to notify [defendant] of his right to contact the Mexican Consulate prior to interrogating him is not a valid basis for suppression of his statements.") (citing *Lombera-Camorlinga*, 206 F.3d at 883–84), *cert. denied*, 538 U.S. 1067 (2003).

CHAPTER 20. JUVENILES

A. Appearance before Magistrate Judge.

"The Federal Juvenile Delinquency Act . . . provides that a juvenile taken into custody 'shall be taken before a magistrate forthwith' and that '[i]n no event shall the juvenile be detained for longer than a reasonable period of time before being brought before a magistrate.'" *United States v. Juvenile, L.M.K.*, 149 F.3d 1033, 1035 (citation omitted), *amended by* 166 F.3d 1051 (9th Cir. 1998), *cert. denied*, 528 U.S. 840 (1999) (quoting 18 U.S.C. § 5033) (on facts presented, including 33 hour period between arrest and appearance before a magistrate judge, government's failure to comply with Act was not so outrageous as to deny juvenile due process and require dismissal of the charge).

B. Juvenile speedy trial.

1. *Detained juveniles.* The Federal Juvenile Delinquency Act contains a separate speedy trial provision for juvenile defendants who are in detention. 18 U.S.C. § 5036. Detention, for purposes of 18 U.S.C. § 5036, occurs only if the juvenile is placed in a "physically restrictive detention amounting to institutionalization." *United States v. Doe*, 149 F.3d 945, 950 (9th Cir.) (citation omitted) (restrictive bail conditions do not constitute "detention"), *cert. denied*, 525 U.S. 988 (1998).

   A juvenile who is in detention must be brought to trial within thirty days from when detention began. 18 U.S.C. § 5036. "[T]he 30-day clock starts when federal detention on the federal delinquency charge commences." *United States v. Doe*, 366 F.3d 1069 (9th Cir. 2004) (en banc) (overruling *United States v. Andy*, 549 F.2d 1281, 1283 (9th Cir. 1977), which held that the clock began to run

when Attorney General certified or with reasonable diligence could have certified the juvenile for prosecution).

The thirty-day time period may be tolled for three reasons:

I. when delay is caused by the juvenile or the juvenile's counsel;

II. when delay is consented to by the juvenile and the juvenile's counsel; or

III. when delay is in the interest of justice.

18 U.S.C. § 5036. *See also United States v. Doe*, 94 F.3d 532, 535–36 (9th Cir. 1996) (continuance of trial at juvenile counsel's request was excludable because it was caused by the juvenile or counsel and the government's appeal of denial of motion to transfer juvenile for adult prosecution was excludable because it was a delay incurred in the interest of justice); *United States v. Eric B.*, 86 F.3d 869, 875 (9th Cir. 1996) (delay caused by motions filed on juvenile's behalf constituted excludable time).

2. *Non-detained juveniles.* Juveniles who are not subject to "physically restrictive detention amounting to institutionalization" fall under the provisions of the Speedy Trial Act, 18 U.S.C. §§ 3161–3174 (*supra* Ch. 3, B), rather than § 5036. *See United States v. Doe*, 149 F.3d 945, 949–50 (9th Cir. 1998) (restrictive bail requiring stay at a halfway house is not "detention" under § 5036).

C. Federal juvenile jurisdiction.

1. *In general.* "Jurisdiction over juvenile defendants in the federal system is governed by the Federal Juvenile Delinquency Act ('FJDA'), 18 U.S.C. § 5031 *et seq*."

United States v. Male Juvenile, 280 F.3d 1008, 1013 (9th Cir. 2002).

"The [FJDA] prescribes special procedural protections for a juvenile who allegedly commits an act of juvenile delinquency—an act undertaken 'prior to his eighteenth birthday which would have been a crime if committed by an adult.'" *United States v. Ceja-Prado*, 333 F.3d 1046 (9th Cir. 2003) (quoting 18 U.S.C. § 5031). "These protections include a procedural prerequisite for prosecution in federal court: such juveniles 'shall not be proceeded against in any court of the United States' unless the Attorney General or certain other federal officials follow the certification procedures required by 18 U.S.C. § 5032." *Id*. at 1048.

2. *"Violation of federal law" requirement.* "Although the FJDA creates federal jurisdiction over alleged acts of juvenile delinquency, the alleged crime must be a 'violation of a law of the United States' to trigger that jurisdiction." *United States v. Male Juvenile,* 280 F.3d 1008, 1013 (9th Cir. 2002) (quoting 18 U.S.C. § 5032).

3. *Certification by Attorney General.* "[A]s a jurisdictional requirement, the [FJDA] requires certification by the Attorney General that

   I. the juvenile court or other appropriate court of a State does not have, or refuses to assume, jurisdiction over the acts of a juvenile;

   II. the State does not have available programs and services adequate for the needs of a juvenile; or

III. the offense charged is a crime of violence that is a felony or one of several enumerated crimes and there is a substantial Federal interest in the offense."

United States v. Male Juvenile, 280 F.3d 1008, 1013 (9th Cir. 2002) (no requirement that the government certify lack of tribal interest in prosecution) (citing 18 U.S.C. § 5032).

"Proper certification is a jurisdictional requirement." *Id*. at 1014 (citing *United States v. Doe*, 170 F.3d 1162, 1165 (9th Cir.), *cert. denied*, 528 U.S. 978 (1999)). *See also United States v. Ceja-Prado*, 333 F.3d 1046 (9th Cir. 2003) (case without certification should be dismissed for lack of jurisdiction if district court, on remand, finds that defendant is a juvenile, even though defendant claimed to be 21 throughout proceedings and only asserted juvenile status on appeal).

"The certification requirements resulted from Congress' desire to keep juveniles out of the federal court system and instead 'channel juveniles into state and local treatment programs.'" *Male Juvenile*, 280 F.3d at 1014 (quoting *United States v. Juvenile Male*, 864 F.2d 641, 644 (9th Cir. 1988)).

Nevertheless, "the United States Attorney's certification of a 'substantial federal interest' under [18 U.S.C.] § 5032 is not subject to judicial review except for such formalities as timeliness and regularity (*e.g.*, signed by the proper official) and for allegations of unconstitutional prosecutorial misconduct." *United States v. F.S.J.*, 265 F.3d 764, 771 (9th Cir. 2001).

D. Transfer of juvenile to adult court.

1. *Requirement of official record*. "The Juvenile Delinquency Act, 18 U.S.C. §§ 5031-42, requires that,

prior to a juvenile's transfer to adult prosecution, the prior juvenile court records must be received by the court." *United States v. Juvenile Male*, 336 F.3d 1107, 1110 (9th Cir. 2003). Although this requirement was held to be jurisdictional in *Juvenile Male* at 1110–11, the Ninth Circuit has since ruled that it is not jurisdictional. *United States v. Doe*, 366 F.3d 1069, 1077 (9th Cir. 2004) (en banc) ("the district court had subject-matter and personal jurisdiction to conduct Doe's dispositional hearing despite any deficiency in compliance with the record certification requirements of § 5032").

"The official record will provide a more detailed, thorough, and accurate explanation of any previous charges and convictions and will be the most reliable source for such information." *Juvenile Male*, 336 F.3d at 1110–11 (failure to obtain official record deprived the district court of jurisdiction).

2. *Factors to be considered re transfer*. The factors to be considered by the district court in deciding whether to transfer the juvenile to adult court are set forth in 18 U.S.C. § 5032:

> Evidence of the following factors shall be considered, and findings with regard to each factor shall be made in the record, in assessing whether a transfer would be in the interest of justice:
>
> [1] the age and social background of the juvenile;
>
> [2] the nature of the alleged offense;
>
> [3] the extent and nature of the juvenile's prior delinquency record;

[4] the juvenile's present intellectual development and psychological maturity;

[5] the nature of past treatment efforts and the juvenile's response to such efforts; [and]

[6] the availability of programs designed to treat the juvenile's behavioral problems.

In considering the nature of the offense, as required by this paragraph, the court shall consider the extent to which the juvenile played a leadership role in an organization, or otherwise influenced other persons to take part in criminal activities, involving the use or distribution of controlled substances or firearms. Such a factor, if found to exist, shall weigh in favor of a transfer to adult status, but the absence of this factor shall not preclude such a transfer.

§ 5032. *See also Juvenile Male*, 336 F.3d at 1112 (declining to decide whether unadjudicated arrests may be considered as part of the prior delinquency record).

E. Juveniles—Interrogation—*Miranda* Rights.

1. *Notification of* Miranda *rights.* "Whenever a juvenile is taken into custody for an alleged act of juvenile delinquency, the arresting officer shall immediately advise such juvenile of his legal rights, in language comprehensive to a juvenile . . . ." 18 U.S.C. § 5033.

As with adults, the test for when a juvenile is in custody is "how a reasonable person in the suspect's situation would perceive his circumstances." *Yarborough v. Alvarado*, 124 S. Ct. 2140, 2148 (2004) (citing *Berkemer v. McCarty*, 468 U.S. 420 (1984)) (holding that where juvenile voluntarily reported to police station, his parents remained in the lobby, and at the end of the

interview, the juvenile went home, the juvenile was not in custody, notwithstanding counter-indications including the length of the interview and the fact that the juvenile was never told that he was free to leave).

2. *Juvenile's parents—Notification that juvenile is in custody.* 18 U.S.C. § 5033 "requires immediate parental notification as to the existence of initial custody." *United States v. Doe,* 170 F.3d 1162, 1167 (9th Cir.) (finding that police failure to notify juvenile's mother was harmless error on facts presented), *cert. denied*, 528 U.S. 978 (1999).

3. *Juvenile's parents—Notification of juvenile's* Miranda *rights.* "[W]e conclude that [18 U.S.C.] § 5033 requires the government to inform the juvenile's parents of the juvenile's *Miranda* rights." *United States v. Doe*, 170 F.3d 1162, 1167 (9th Cir.)*, cert. denied*, 528 U.S. 978 (1999). *See also United States v. Doe,* 219 F.3d 1009, 1018 (9th Cir. 2000) (delay in notifying juvenile's parents of *Miranda* rights required suppression of juvenile's statements).

CHAPTER 21. REFERRAL OF PRETRIAL CRIMINAL MOTIONS TO MAGISTRATE JUDGE

A. In general.

"The relevant statutory provisions authorizing a district court to refer matters to a magistrate and establishing the mode of review of the magistrate's actions are in 28 U.S.C. § 636(b)(1)." *United States v. Raddatz*, 447 U.S. 667, 673 (1980).

B. Non-dispositive motions.

Referral to a magistrate judge of non-dispositive criminal pretrial motions is provided for in 28 U.S.C. § 636(b)(1)(A).

1. *Authority for referral of non-dispositive pretrial criminal motion*. "[A district] judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion . . . to dismiss or quash an indictment or information made by the defendant, [and] to suppress evidence in a criminal case . . . ." 28 U.S.C. § 636(b)(1)(A).

2. *Reconsideration of magistrate judge's determination of non-dispositive pretrial criminal motion.* "A [district] judge . . . may reconsider any pretrial matter under [28 U.S.C. § 636(b)(1)(A)] where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A).

3. *No objection to ruling required in order to preserve issue for appeal*. A party need not lodge an objection with the district court to a magistrate judge's adverse ruling on a non-dispositive criminal pretrial matter in order to preserve the issue for appeal. *United States v. Abonce-Barrera*, 257 F.3d 959, 967–69 (9th Cir. 2001) (magistrate judge's ruling denying disclosure of a confidential

informant's identity, whereabouts and record were reviewable on appeal despite absence of objection to ruling).

C. Dispositive motions.

Referral of dispositive criminal pretrial motions to magistrate judges is provided for in 28 U.S.C. § 636(b)(1)(B).

1. *"Dispositive motions" defined.* Dispositive motions, for purposes of referral to a magistrate judge, include motions "to dismiss or quash an indictment or information made by the defendant [and] to suppress evidence in a criminal case . . . ." 28 U.S.C. § 636(b)(1)(A).

   Note: A magistrate judge's order for an examination to determine mental competency is "non-dispositive," but the approval of involuntary medication of defendant to restore defendant's competency to stand trial is "dispositive." *United States v. Rivera-Guerrero*, 377 F.3d 1064, 1070 (9th Cir. 2004).

2. *Report and recommendation*. A magistrate judge who conducts a hearing on a dispositive motion must "submit to a [district] judge . . . proposed findings of fact and recommendations for the disposition . . . ." 28 U.S.C. § 636(b)(1)(B).

3. *Timely objection required.* As to rulings on dispositive matters, within ten days after being served with a copy of the magistrate judge's recommendation, a party is required to file written objections to the magistrate judge's proposed findings of fact and recommendations for disposition with the district judge. 28 U.S.C. § 636(b)(1), (b)(1)(C); *United States v. Abonce-Barrera*, 257 F.3d 959, 968 (9th Cir. 2001).

4. *De novo determination required*.

a. *Review of objections*. Upon receiving objections to the magistrate judge's proposed findings of fact and conclusions of law, the district judge must "make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made." 28 U.S.C. § 636(b)(1).

(1) *Acceptance of magistrate judge's report and recommendation.* If the district judge accepts the magistrate judge's report and recommendation, a de novo hearing is not required. *United States v. Raddatz*, 447 U.S. 667, 674–76 (1980) (where district judge reviewed transcripts of the suppression hearing as well as the parties' pleadings and the report and recommendation, nothing further was required for de novo determination on facts presented).

(2) *Rejection of magistrate judge's report and recommendation.* If the district judge rejects a magistrate judge's report and recommendation that was based upon a credibility determination, a de novo evidentiary hearing is required. *United States v. Ridgway,* 300 F.3d 1153, 1157 (9th Cir. 2002) (distinguishing *Raddatz*, which involved a district judge's acceptance of a magistrate judge's credibility determination, and holding that before a district judge may reject a magistrate judge's credibility determination arising from an evidentiary hearing, the district court must conduct a de novo hearing).

However, de novo determination is not synonymous with a de novo hearing. *United States v. Raddatz*, 447 U.S. 667, 674–76 (1980) (where district judge reviewed transcripts of the suppression hearing

as well as the parties' pleadings and the report and recommendation, nothing further was required for de novo determination on facts presented).

b. *Supplemental evidence.* "[A] district court has discretion, but is not required, to consider evidence presented for the first time in a party's objection to a magistrate judge's recommendation." *United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000) (district court did not abuse discretion in refusing to consider supplemental evidence regarding motion to suppress statements heard by magistrate judge), *cert. denied*, 534 U.S. 831 (2001). *But cf. Brown v. Roe*, 279 F.3d 742, 744 (9th Cir. 2002) (in 28 U.S.C. § 2254 case, district court abused discretion by not considering supplemental claim).

D. Felony changes of plea.

A magistrate judge may accept a felony guilty plea with the defendant's consent. *United States v. Reyna-Tapia*, 328 F.3d 1114, 1119 (9th Cir. 2003) (en banc). "[*D*]*e novo* review of the magistrate judges' findings and recommendations [recommending acceptance of a defendant's plea of guilty] is required if, but *only* if, one or both parties file objections to the findings and recommendations." *Id*. at 1116, 1121–22.

CHAPTER 22. MOTIONS FOR RECUSAL OF JUDGE

A. In general.

Recusal of federal judges is governed by 28 U.S.C. §§ 144 and 455. "Recusal ordinarily is required 'only if the bias or prejudice stems from an extrajudicial source,' and not from a judge's conduct or rulings during the course of judicial proceedings." *King v. United States Dist. Court,* 16 F.3d 992, 993 (9th Cir. 1994) (quoting *Pau v. Yosemite Park & Curry Co.*, 928 F.2d 880, 885 (9th Cir. 1991)). *See also Liteky v. United States*, 510 U.S. 540, 548–53 (1994).

See also RECUSAL: ANALYSIS OF CASE LAW UNDER 28 U.S.C. §§ 455 & 144 (Federal Judicial Center 2002), *available at* http://156.132.47.230:8081/public/pdf.nsf/lookup/Recusal.pdf/$file/Recusal.pdf (last visited Aug. 20, 2004).

B. Personal bias or prejudice—28 U.S.C. § 144.

When a party files an affidavit that a judge has a "personal bias or prejudice" against that party or in favor of an adverse party, the matter is to be assigned to another judge for hearing. 28 U.S.C. § 144.

C. 28 U.S.C. § 455—Disqualification.

1. *In general.*

   a. *Impartiality questioned.* "Any . . . judge[] or magistrate judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). *See also United States v. Arnpriester*, 37 F.3d 466, 467 (9th Cir. 1994).

   b. *Personal bias or knowledge.* A judge "shall also disqualify himself . . . [w]here he has a personal bias or prejudice concerning a party, or personal knowledge of

disputed evidentiary facts concerning the proceeding . . . ." 28 U.S.C. § 455(b), (b)(1).

c. *Prior representation / financial interest / relationship.* A judge's prior service as counsel in the matter, or financial interest in the outcome of the proceeding, or a judge's relationship to an individual who is counsel in the proceeding, has a financial interest in the proceeding, or is a party to the proceeding, requires disqualification of the judge. 28 U.S.C. § 455(b)(2), (3), (4) and (5).

2. *Resolving recusal issues under § 455.* Although § 455 is couched in terms of self-enforcing recusal, it has been interpreted as allowing a defendant to bring a motion to recuse. *See In re Manoa Finance Co., Inc.,* 781 F.2d 1370, 1373 (9th Cir. 1986) ("Though section 455 is stated in terms of a self-enforcing obligation upon the judge, it may be invoked by a party.") (citations omitted), *cert. denied sub nom. Yamamoto v. Klenske*, 479 U.S. 1064 (1987).

a. *Judge sought to be disqualified rules on motion*. A motion for disqualification based upon 28 U.S.C. § 455 "is addressed to, and must be decided by, the very judge whose impartiality is being questioned." *In re Bernard*, 31 F.3d 842, 843 (9th Cir. 1994) (citations omitted).

b. *Pervasive bias exception to "extrajudicial source."* "[T]he pervasive bias exception . . . is applicable when the petitioner shows that 'a judge's remarks in a judicial context demonstrate such pervasive bias and prejudice that it constitutes bias against a party.'" *King v. United States Dist. Court*, 16 F.3d 992, 993

(9th Cir. 1994) (quoting *United States v. Monaco*, 852 F.2d 1143, 1147 (9th Cir. 1988), *cert. denied*, 488 U.S. 1040 (1989)).

c. *Judge's duty re recusal.* Although a judge has a duty to refuse to sit when disqualified, a judge has an equally strong duty to sit when there is no valid reason for recusal. *Laird v. Tatum*, 409 U.S. 824, 837 (1972); *Nichols v. Alley*, 71 F.3d 347, 352 (10th Cir. 1995) ("[A] judge has as strong an obligation not to recuse when the situation does not require as he has to recuse when it is necessary . . . .").

CHAPTER 23. NON-ENGLISH SPEAKING DEFENDANT'S RIGHT TO COURT INTERPRETER

A. In general.

A defendant is entitled to a qualified court interpreter if the judge determines that the defendant speaks only or primarily a language other than English and an interpreter is necessary in order for the defendant to comprehend the proceedings and to communicate with counsel. 28 U.S.C. § 1827(d)(1)(A). *See also Gonzalez v. United States*, 33 F.3d 1047, 1049–50 (9th Cir. 1994).

B. Right to competent interpreter.

"Under the Court Interpreters Act, a trial judge must use an interpreter in the courtroom if that judge determines that a party 'speaks only or primarily a language other than the English language . . . so as to inhibit such party's comprehension of the proceedings or communication with counsel or the presiding judicial officer.'" *United States v. Si*, 333 F.3d 1041, 1042 (9th Cir. 2003) (quoting 28 U.S.C. § 1827(d)(1)).

"The determination whether a party needs an interpreter 'is likely to hinge upon various factors, including the complexity of the issues and testimony presented during trial and the language ability of the defendant's counsel.'" *Si*, 333 F.3d at 1044 (quoting *United States v. Carrion*, 488 F.2d 12, 14 (1st Cir. 1973).

Once it is established that an accused is entitled to the services of an interpreter, the interpreter must provide accurate and complete translations. *Chacon v. Wood*, 36 F.3d 1459, 1464 (9th Cir. 1994) (inadvertent ineffective assistance of

counsel occurred where court interpreter deliberately mistranslated counsel's communications to defendant).

Generally, interpreter problems are viewed "within the context of an entire trial." *United States v. Long*, 301 F.3d 1095, 1105 (9th Cir.) (citation omitted), *cert. denied*, 537 U.S. 1216 (2002).

Although "the general standard for interpreters requires continuous word-for-word translation, occasional lapses in the standard will not necessarily contravene a defendant's constitutional rights." *United States v. Long*, 301 F.3d 1095, 1105 (9th Cir. 2002) (citation omitted).

C. Waiver.

A defendant may waive the right to have an interpreter's services. *United States v. Si*, 333 F.3d 1041, 1044–45 (9th Cir. 2003).

CHAPTER 24. LAW OF THE CIRCUIT, LAW OF THE CASE, FEDERAL LAW, AND MEMORANDUM DISPOSITIONS

A. Law of the circuit.

The Ninth Circuit is bound by the law as announced in Ninth Circuit precedent, absent an intervening Supreme Court decision or an Act of Congress. *United States v. Frank*, 956 F.2d 872, 882 (9th Cir. 1991), *cert. denied*, 506 U.S. 932 (1992) (citations omitted).

B. Law of the case doctrine.

1. *Generally.* Law of the case doctrine "'merely expresses the practice of courts generally to refuse to reopen what has been decided . . . .'" *Leslie Salt Co. v. United States*, 55 F.3d 1388, 1393 (9th Cir.) (quoting Justice Holmes in *Messinger v. Anderson*, 225 U.S. 436, 444 (1912)), *cert. denied sub nom. Cargill, Inc. v. United States*, 516 U.S. 955 (1995). *See also Jeffries v. Wood*, 114 F.3d 1484, 1488–89 (9th Cir.) (en banc), *cert. denied*, 522 U.S. 1008 (1997).

2. *Law of the case doctrine—Appellate decisions*. The "law of the case" doctrine provides that "'one panel of an appellate court will not as a general rule reconsider questions which another panel has decided on a prior appeal in the same case.'" *Merritt v. Mackey*, 932 F.2d 1317, 1320 (9th Cir. 1991) (quoting *Kimball v. Callahan*, 590 F.2d 768, 771 (9th Cir.), *cert. denied*, 444 U.S. 826 (1979)). *See also United States v. Scrivner*, 189 F.3d 825, 827 (9th Cir. 1999).

3. *Law of the case doctrine—District courts.* A district court may depart from the law of the case where:

A. the first decision was clearly erroneous;

B. an intervening change in the law has occurred;

C. the evidence on remand is substantially different;

D. other changed circumstances exist; or

E. a manifest injustice would otherwise result.

United States v. Alexander, 106 F.3d 874, 876 (9th Cir. 1997) (where district court granted motion to suppress and new judge to whom case was assigned reconsidered ruling and ultimately held confession admissible, law of case applied and new judge erred in admitting confession). *See also United States v. Scrivner*, 189 F.3d 825, 827 (9th Cir. 1999); *Lindy Pen Co., Inc. v. Bic Pen Corp.*, 982 F.2d 1400, 1404 (9th Cir.) ("Undeniably, the decision of the circuit court in a prior appeal must be followed in all subsequent proceedings in the same case under the law of the case doctrine"; yet the law of the case does not control on remand if the "evidence on remand is substantially different from that presented in previous proceedings.") (citations omitted), *cert. denied*, 510 U.S. 815 (1993).

C. Rule of mandate.

"[A]lthough lower courts are obliged to execute the terms of a mandate, they are free as to 'anything not foreclosed by the mandate,' and, under certain circumstances, '[a]n order issued after remand may deviate from the mandate . . . if it is not counter to the spirit of the circuit court's decision . . . .'" *United States v. Kellington*, 217 F.3d 1084, 1092–93 (9th Cir. 2000) (quoting *Herrington v. County of Sonoma*, 12 F.3d 901, 904 (9th Cir. 1993) and *Lindy Pen Co., Inc. v. Bic Pen Corp.,* 982 F.2d 1400, 1404 (9th Cir.), *cert. denied*, 510 U.S. 815 (1993)).

D. Collateral estoppel.

"Collateral estoppel 'means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" *United States v. Romeo*, 114 F.3d 141,143 (9th Cir. 1997) (collateral estoppel precluded the defendant from being retried for importation where 188.45 pounds of marijuana had been found in trunk at port of entry, the only contested issue was whether defendant knew of the presence of drugs, the defendant was acquitted of possession with intent to distribute marijuana, and the jury hung as to the importation count) (quoting *Ashe v. Swenson*, 397 U.S. 436, 443 (1970)). *See also United States v. Carbullido*, 307 F.3d 957, 964 (9th Cir. 2002) (because defendant's "legal sanity on the day of the currently charged act . . . was within the scope of the issue actually litigated and necessarily decided in the prior prosecution," the second prosecution was precluded).

In making a collateral estoppel determination, the Ninth Circuit employs a three-step approach:

(1) issues in the two actions are identified "for the purpose of determining whether the issues are sufficiently similar and sufficiently material in both actions to justify invoking the doctrine;"

(2) the record of the prior case is examined to determine "whether the issue was 'litigated' in the first case;" and

(3) the record in the prior proceeding is examined "to ascertain whether the issue was necessarily decided in the first case."

United States v. Arnett, 327 F.3d 845, 848 (9th Cir.) (quoting *United States v. Romeo*, 114 F.3d 141, 143 (9th Cir. 1997)) (finding that collateral estoppel precluded defendant from arguing that a shotgun used in California robberies was an antique, an affirmative defense, because an Oregon jury had already decided that it was not in connection with his prosecution in Oregon for robbery), *withdrawn by* 345 F.3d 1120, *reinstated by* 353 F.3d 765 (2003). *See also United States v. Ford*, 371 F.3d 550, 553–54 (9th Cir. 2004) (finding that collateral estoppel did not bar prosecution for 21 U.S.C. § 856(a)(2) following acquittal for 21 U.S.C. § 856(a)(1), because the (a)(1) and (a)(2) do not meet the "same elements" test of *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

E. Federal law governs admissibility of evidence.

Federal courts are not bound by state law in determining the admissibility of evidence in federal courts.

1. *Federal officials*. Evidence obtained by federal officials, even acting in concert with state officials in violation of state law but in compliance with federal law, is admissible in federal court. *United States v. Chavez-Vernaza*, 844 F.2d 1368, 1372 (9th Cir. 1987) (citations omitted).

2. *State officials*. Evidence obtained in accordance with federal law is admissible in federal court even when obtained by state officers in violation of state law (*i.e.*, even in the absence of federal involvement). *United States v. Chavez-Vernaza*, 844 F.2d 1368, 1374 (9th Cir. 1987). *See also United States v. Velarde*, 25 F.3d 848, 848 (9th Cir. 1994).

F. Citation to unpublished memorandum disposition.

Ninth Circuit Rule 36-3 prohibits a party from citing or the court from relying upon an unpublished Ninth Circuit

memorandum disposition, except under limited circumstances. This rule does not violate Article III of the Constitution and is generally intended to prevent precedential value from being assigned to appellate rulings not intended to be given precedential value by the panel authoring the disposition. *See Hart v. Massanari*, 266 F.3d 1155, 1176–1180 (9th Cir. 2001) (discussing various forms of precedent and authority).

1. *Pre-July 2000 rule.* Unpublished memorandum dispositions could be neither cited nor relied upon, "except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel." *Thomas v. Newton Int'l Enters.*, 42 F.3d 1266, 1272 n.7 (9th Cir. 1994) (citing 9TH CIR. R. 36-3).

2. *Current interim rule.* Effective July 1, 2000, through December 31, 2002, and renewed January 1, 2003, through July 1, 2005, the Ninth Circuit has approved a rule that permits additional limited uses of unpublished memorandum dispositions.

    a. *Binding precedent—Limitations.* "Unpublished dispositions and orders . . . are not binding precedent, except when relevant under the doctrines of law of the case, res judicata, and collateral estoppel." 9TH CIR. R. 36-3(a).

    b. *Citing unpublished dispositions to courts of this circuit.* "Unpublished dispositions and orders . . . may not be cited to or by the courts of this circuit except . . . when relevant under the doctrine of law of the case, res judicata, or collateral estoppel." 9TH CIR. R. 36-3(b), (b)(i).

    c. *Citing unpublished dispositions to Ninth Circuit.* For certain limited purposes, unpublished dispositions may

be cited to the Ninth Circuit Court of Appeals. 9TH CIR. R. 36-3(b)(i), (ii), (iii).

3. *Unpublished decisions of other courts.* "Ninth Circuit Rule 36-3 . . . does not apply to unpublished dispositions issued by any other courts within our circuit or elsewhere." *Renick v. Dun & Bradstreet Receivable Management Servs.*, 290 F.3d 1055, 1058 (9th Cir. 2002).

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