GUIDE FOR NEW PANEL MEMBERS

Those are giants, and if you are afraid, turn aside and pray whilst I enter into fierce and unequal battle with them.

Miguel de Cervantes, Don Quixote

Office of Federal Public Defender
Northern District of Florida
May 2018

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INTRODUCTION

We've prepared this manual primarily for those who are both new to the Criminal Justice Act Panel and new to the practice of federal criminal law. If you fall into that category, we recommend that you read every page. For those of you who aren't quite so new, the manual should be a good resource.

Those of you who are new will, of course, need more than just this manual to defend someone in federal court. This manual, though, should be a good starting point. We hope it heads you in the right direction.

Randy Murrell
Federal Public Defender for the Northern District of Florida

THE NORTHERN DISTRICT OF FLORIDA

The Northern District of Florida stretches from Pensacola to Gainesville. Within the district there are four divisions: Pensacola, Panama City, Tallahassee, and Gainesville. Of the 23 counties that make up the District, Escambia, Santa Rosa, Okaloosa, and Walton are in the Pensacola Division; Holmes, Washington, Bay, Jackson, Calhoun, and Gulf are in the Panama City Division; Gadsden, Liberty, Franklin, Leon, Wakulla, Jefferson, Madison, and Taylor are in the Tallahassee Division; and Lafayette, Dixie, Gilchrist, Levy, and Alachua are in the Gainesville Division.

There are currently two active United States District Judges: Chief Judge M. Casey Rodgers and Mark E. Walker. There are five judges who have taken senior status and maintain a caseload: Lacey A. Collier, Robert L. Hinkle, Maurice M. Paul, William H. Stafford, and C. Roger Vinson. There are two vacant positions waiting to be filled. The four United States Magistrate Judges are: Chief Magistrate Judge Elizabeth Timothy, Gary R. Jones, Charles J. Kahn, Jr, and Charles A. Stampelos. There is a vacant position in Panama City waiting to be filled. The Acting United States Attorney is Christopher P. Canova. Jessica J. Lyublanovits is the Clerk of the Court. Anthony Castellano is the Chief Probation Officer. The Acting United States Marshal is Scott Wilson.

Randy Murrell is the Federal Public Defender and is in our Tallahassee office. The four offices within the district are located at: 3 West Garden Street, Suite 200, Pensacola, FL 32502; 30 West Government St., Panama City, FL 32401; 227 N. Bronough St., Suite 4200, Tallahassee, FL 32301; and 101 S.E. Second Place, Suite 112, Gainesville, FL 32601. Of the eleven assistant federal public defenders in our traditional unit, Tom Keith, Randall Lockhart, and Lauren Cobb work out of our Pensacola Office; Jessica Casciola is in our Panama City office; Darren Johnson and Megan Saillant are in the Gainesville Office; Joe DeBelder and Richie Summa are in the Tallahassee Office; and Billy Nolas, Terry Backhus, and Sean Gunn are in our Capital Habeas Unit in the Tallahassee Office.

You'll find the judges, court personnel, probation officers, marshals, court security officers, and our adversaries in the United States Attorney's Office all to be capable, courteous, forthright, and

accommodating.

THE PANEL

The authority for the creation of the Criminal Justice Act (CJA) panels around the country is found in 18 U.S.C. § 3006A. The statute establishes the hourly rate paid to panel members, the amount that may be paid for the various categories of cases, and the amount authorized for payment to investigators and experts. The Act contemplates that 25% of the cases will be assigned to the CJA Panel.

The Court relies on an electronic voucher system to process payments to panel members and such things as requests for transcripts or expert witnesses. Upon your appointment to a case, you'll receive an email from the Clerk's office that will direct you towards the link to the CJA eVoucher program. It includes access to the CJA 20 form, which you'll use to submit your claim for payment. A link on the Court's webpage, "Attorney Resources" provides information about how to use the program.[1]

As of March 23, 2018, the hourly rate is $140 for both in-and out-of-court work. The maximum payment is $10,900 for felonies, $7,800 for felony appeals, $3,100 for misdemeanors, and $2,300 for violation of probation or supervised release cases.[2] The statute allows for payment in excess of these maximums "for extended or complex representation." § 3006A(d)(3). Any request for payment in excess of the maximum must be accompanied by "a detailed memorandum supporting and justifying that the representation given was in an extended or complex case and that excess payment is necessary to provide fair compensation." You'll find the details at the same site listed in footnote 2 below.

The United States District Court for Maine has a Reference Manual with "Attorney Guidance for CJA Vouchers" that you will want to review. It will help you better understand, not the eVoucher program, but the particulars of seeking compensation for your services. It's available at: http://www.med.uscourts.gov/pdf/Criminal_Justice_Act_Reference_Manual.pdf.

You should always obtain prior authorization from the district court before retaining the services of an expert. You'll find the Maine manual helpful, here, too. The maximum amount for an expert or investigator, *with prior approval* from the court, is $2,500. As with the case maximums, though, there is a provision for exceeding this maximum. Similarly, too, the request must be approved by the Court of Appeals.

The Northern District has, as do district courts around the country, its own Criminal Justice Act

[1] The District Court maintains its website at: www.flnd.uscourts.gov.

[2] Up to date information about the hourly rate and the maximum compensation is available at United States Courts website:
http://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-ss-230-compensation-and-expenses#a230_23

Plan. The current plan became effective in June of 2000, though it's scheduled to be revised in the months to come. It establishes staggered three-year appointments for panel lawyers and requires those on the panel to obtain eight hours of training each year in federal criminal law. It also provides for the creation of a Panel Oversight Committee that consists of the Federal Public Defender and a lawyer from each of the four divisions within the district. The Oversight Committee makes recommendations to the judges regarding panel applicants and panel management.

The Federal Public Defender has the responsibility of assisting the District Judges in the appointment of panel members to a given case. It will typically be one of our secretaries calling you to see if you're available to take an appointment. We choose the panel members on a rotational basis. Absent unusual circumstances, whoever is next on the list will get called. We pass the name on to the judge, and the judge makes the appointment.

In some cases the Federal Public Defender, at the request of the District Judge, also reviews the CJA 20 forms for reasonableness. The judge assigned to the case, however, makes the final decision about payment. Although the judge has the authority to pay less than the full amount claimed, panel members have traditionally been careful and precise in their billing, and it is a rare case where the judge reduces the payment.

PANEL TRAINING

Panel members can fulfill their training obligation by attending eight of our brown bag luncheons that are held 11 months out of the year in each of the four primary cities within the district: Pensacola, Panama City, Tallahassee and Gainesville. We recommend, though, that you come to all the training sessions. Most panel members have a limited federal criminal practice, and the training sessions help maintain the necessary level of proficiency. We send out email notices for all the luncheons. Occasionally there are live presentations, but typically, we show a video that we've recorded at one of the national federal public defender conferences or from the Federal Judicial Network.

There are other ways to complete the training requirement. The Training Branch of the Office of Defender Services holds several training sessions a year at various locations around the country. The dates and locations are posted on the Training Branch's website: www.fd.org. The Federal Public Defender Offices in Florida's Middle and Southern Districts both present excellent annual training sessions. Additionally, the United States' Sentencing Commission holds an annual seminar in which it devotes two or three days to the United States Sentencing Guidelines. You'll find the date and location on their webpage: www.ussc.gov.

There are also video presentations that can be accessed through the Training Branch's webpage. We keep most of our training videos on a website that can be accessed by panel members. If you call or email Randy Murrell, he will provide you with the access information.

If you choose to fulfill your training requirement in some way other than by attending our monthly luncheons, you need to be sure to get at least eight hours of training in federal criminal defense.

You will also need to be sure to advise the Federal Public Defender of your attendance.

INITIAL APPEARANCE

Most panel appointments come either just before or just after the initial appearance. If you get the appointment before the initial appearance, you won't have a lot of notice. Typically, you'll get a call from one of our secretaries a few hours before the first appearance. We'll generally email you the available paperwork, be it an indictment, a complaint, or the petition of violation of probation or supervised release.

The procedure at the initial appearance is governed by Fed. R. Crim. P. 5. The Rule requires "a person making an arrest within the United States . . . [to] take the defendant without unnecessary delay before a magistrate judge." Many, if not most, defendants appearing at the initial appearance will be in custody, having usually been arrested that day and brought to the courthouse. Occasionally someone will appear on the basis of a summons.

The Pretrial Services Officer will conduct an interview of the client and prepare a report prior to the initial appearance. *See* 18 U.S.C. § 3154(1). During that interview, the Pretrial Services Officer will advise the defendant that he or she has a right to have a lawyer present during the interview.[3]

There is one caveat about the defendant's dealings with the Pretrial Services Officer. As is true in so many contexts, it is far better for the defendant to forego the interview than to lie during the interview. The officer generally will not ask about the defendant's prior record, but will ask about drug usage. If the defendant lies about anything of significance, it can result in a harsher guidelines score, which can translate into a longer sentence. *See, e.g., United States v. Doe*, 661 F.3d 550, 565-566 (11th Cir. 2011).

In many instances, if it is obvious the defendant is going to be detained, there isn't any real reason to submit to the interview. On the other hand, if release is a possibility, the interview will enhance the chances of release.

If the defendant elects to proceed with the interview without a lawyer, the pretrial officer will have the defendant sign a waiver. With or without the presence of a lawyer, the pretrial officer will also request the defendant to sign several forms authorizing the release of various records (school, psychological, financial). The pretrial officer will complete the report and submit it to the magistrate judge prior to the hearing. The pretrial officer will provide copies to the Assistant U.S. Attorney as well as the lawyer who will be representing the defendant at the initial appearance. The contents of the report are confidential and generally cannot be used for any purpose other than

[3] Our local Criminal Justice Act Plan requires the pretrial services officer to ask the defendant, before the interview starts, whether he or she can afford to hire a lawyer. If the answer is "no, the officer must call our office and provide us an opportunity to meet with the defendant prior to the interview." VII(B), Criminal Justice Act Plan for the Northern District of Florida.

the initial appearance. *See* 18 U.S.C. § 3153(c)(1) and (c)(3).[4] The pretrial services officer will, in fact, ask for the report back at the completion of the hearing.

The report will include background information, but the most useful information may be the criminal history presented. You'll be well served to record that information. Some pretrial officers will make a copy of the criminal history for you following the hearing. Others may require that you ask the magistrate judge at the first appearance to authorize them to provide you with a copy. Regardless, of how you get the criminal history information, you will need it later if you're to determine whether your new client will be subject to any number of sentencing enhancements based on criminal history or to figure out the Sentencing Guidelines score.

Once the initial appearance hearing begins, the magistrate judge will determine whether the defendant is indigent on the basis of an affidavit completed by the defendant prior to the hearing. In the typical case, the defendant has already been indicted, so once the magistrate judge advises the defendant of his or her rights, the arraignment takes place and a trial date is set. The speedy trial statute requires that trial be set within 70 days of the initial appearance (or the filing of the indictment, whichever is later), 18 U.S.C. § 3161(c)(1), and also prohibits the setting of the date sooner than 30 days from the initial appearance. 18 U.S.C. § 3161(c)(2).[5]

If the defendant has not been indicted, the defendant is entitled to a preliminary hearing. *See* Fed. R. Crim. P. 5.1. While the hearing is not intended to serve as part of the discovery process, see, e.g., *United States v. Coley*, 441 F.2d 1299, 1301 (5th Cir. 1971), it provides a valuable opportunity to learn something about the case. Sometimes, too, the hearing will help paint a realistic picture of the circumstances for the defendant and his or her family. You rarely, though, see any "real witnesses." The government may proceed with hearsay or only a proffer by the Assistant United States Attorney, *see Gerstein v. Pugh*, 420 U.S. 103, 120 (1975). If the government calls a witness, it will typically be a law enforcement officer who will outline the case. In the limited world of discovery afforded in federal court, you should note that, Rule 5.1(h) may entitle you to the written statement of any witness who testifies. The clerk will record the proceedings, and it is possible to arrange for a court reporter to transcribe the recording.

Often the preliminary hearing will take place during the initial appearance, but if the detention hearing is scheduled a day or two later, the preliminary hearing may take place at that later date. Although there is also a provision for extending the time for the preliminary hearing, the Rule requires the hearing to be held within 14 days if the defendant is in custody; or 21 days if the defendant is not in custody.

The right to a preliminary hearing extends to those charged with a violation of probation or a

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[4] The information can be used in the presentence report. 18 U.S.C. § 3153(c)(2)(C).

[5] As you'll find in the discussion later in this Guide, speedy trial is a pale shadow of what it is in state court.

violation of supervised release. *See* Fed. R. Crim. P. 32.1(b)(1). The value of that hearing, in terms of discovering the circumstances of the violation, isn't nearly as great. The nature of the violation is usually fairly simple and is described in both the violation warrant and the report from the probation officer.[6] In most instances, we, with the concurrence of the client, waive that hearing.

DETENTION

Detention is governed by the Bail Reform Act of 1984 (18 U.S.C. § 3142). In those cases where the government is permitted to seek detention, the hearing "shall be held immediately upon the person's first appearance." Upon a showing of "good cause," the court may grant a continuance of up to five days, if the request is made by the defendant, or three days, if it's the government that asks for it. 18 U.S.C. § 3142(f)(2)(B). The period does not include weekends or holidays. It is fairly typical for the defense to request a delay of a day or two to secure the presence of family members, an employer, or friends to testify at the hearing. The magistrate judge will order the defendant detained during the period of any continuance.

In *United States v. Salerno*, 481 U.S. 739, 755 (1987), the United States Supreme Court upheld the constitutionality of the Bail Reform Act of 1984. In doing so, the Court recognized that "[i]n our society liberty is the norm, and detention prior to trial . . . is the carefully limited exception." Nonetheless, roughly 50% of defendants in North Florida, as well as nationwide, are detained and held until their case is resolved. Those who are released usually do not have to post a surety bond. Most are released outright. The court may on rare occasions require the defendant to sign a promise to pay, usually $25,000, to the registry of the court should they fail to appear. Those released are under the supervision of a pretrial release officer and have to abide by various conditions. The options include electronic and GPS monitoring. Upon being released, the defendant signs and is provided with a document that lists the conditions of release and advises of the potential criminal penalties for failing to appear. Nationwide, the failure to appear rate is only about 2%.

As most defendants are already indicted by the time they have their first appearance, the detention hearing may be one of the first ways available to find out something about the case. While, as is true with the preliminary hearing, the detention hearing is not a "discovery device" for the defense, *United States v. Smith*, 79 F.3d 1208, 1210 (D.C. Cir. 1996), you'll still usually get an outline of the government's case. As was true, too, with preliminary hearings, the government can meet its burden of presenting the "nature and circumstances of the case," 18 U.S.C. § 3142(g)(1), by a proffer. *United States v. Gaviria*, 828 F.2d 667, 669 (11th Cir. 1987).[7] (Note the defense also has the right to proceed by proffer. 18 U.S.C. § 3142(f)).

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[6] Generally, the Pretrial Services officer will hand you a copy of his or her report when you walk into the courtroom for the initial appearance.

[7] While the government may proceed by proffer, nothing prevents a judge from insisting on live testimony. *See, e.g., United States v. Hammond*, 44 F. Supp. 2d 743, 745-746 (D. Md. 1999).

Thus, even if the chances of release are slim, there is reason to proceed with a hearing. Note that you may be entitled to the written statement of any witness who testifies at the hearing. Fed. R. Crim. P. 26.2 and 46(j). Then, too, sometimes the government's presentation of the case, be it by proffer or the testimony of an officer or agent, gives the defendant a realistic picture of what he or she is facing. As the proceeding is recorded by the clerk, you may be able to arrange for a court reporter to transcribe the recording.

The statute provides for the release of the defendant unless the magistrate judge finds "that 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." 18 U.S.C. § 3142(e). The facts establishing that the defendant poses a threat to an individual or the community must be established by "clear and convincing evidence." 18 U.S.C. § 3142(f). If the government's claim is that no condition can assure the defendant's appearance, that showing must be made by the preponderance of the evidence. *United States v. King*, 849 F.2d 485, 489 (11th Cir. 1988). Should the magistrate judge decide that the defendant must be detained, the magistrate judge must enter a written order. 18 U.S.C. § 3142(i). *See also United States v. Westbrook*, 780 F.2d 1185, 1190 (5th Cir. 1986); *United States v. Vortis*, 785 F.2d 327, 329 (D.C. Cir. 1986); *United States v. Hurtado*, 779 F.2d 1467, 1480 (11th Cir. 1985).

Significantly, the government isn't always entitled to even ask for a detention hearing. The statute provides for a detention hearing in certain circumstances listed in subsection (f) of § 3142: (1) when the defendant is charged with a crime of violence; (2) when the defendant is charged with an offense that carries a maximum penalty of life; (3) when the defendant is charged with a drug offense with a penalty of at least ten years; (4) when the defendant has two or more prior convictions of the type just listed - violent crimes, drug offenses with a potential ten-year penalty, or offenses with a potential life sentence; (5) when the defendant is charged with a crime that involves a minor victim (including the charge of possession of child pornography) or a firearm, explosive, destructive device or any dangerous weapon; (6) when there is a serious risk the defendant will flee; (7) when there is a serious risk the defendant will obstruct justice; or (8) when the defendant is charged with failing to register as a sex offender. Significantly, the statute does not permit the court to hold a detention hearing for the defendant who, although he or she may present some kind of risk to the safety of another individual or the community, does not fall within one of these circumstances. *See United States v. Salerno*, 481 U.S. 739, 747 (1987); *United States v. Ploof*, 851 F.2d 7, 11 (1st Cir. 1988); *United States v. Dillar*d, 214 F.3d 88, 91 (2d Cir. 2002); *United States v. Himler*, 797 F.2d 156, 160 (3d Cir. 1986); *United States v. Byrd*, 969 F. 2d 106, 109 (5th Cir. 1992); *United States v. Singleton*, 182 F.3d 7, 9 (D.C. Cir. 1999); *United States v. Giordano*, 370 F. Supp. 2d 1256 (S.D. Fla. 2005).

Thus, for example, if the defendant is charged with mail fraud, doesn't have the sort of criminal history outlined above, and is not facing a claim from the government that he represents a risk of flight or that he will obstruct justice, he should be released without having to go through a detention hearing.

There is another hurdle that arises in drug cases, child pornography cases, and a host of other cases

listed in § 3142(e)(2). "[S]ubject to rebuttal," there is a presumption that "no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community." The defendant's burden, though, is only that of production of "evidence to suggest that he is either not dangerous or not likely to flee if turned loose on bail." *United States v. Hurtado*, 779 F.2d at 1479.[8]

Those faced with a violation of probation or supervised release are less likely to be released. Rule 32.1 of the Federal Rules of Criminal Procedure states that those arrested for violating probation or supervised release may be released on the basis of the standards set out in 18 U.S.C. § 3143(a), which is the statute governing release pending sentencing or appeal. That statute, as well as Rule 32.1(a)(6), places the burden on the defendant to show that he or she will neither flee nor pose a risk to the community. The statute requires that the showing be made by "clear and convincing evidence."

If the magistrate judge orders the defendant detained, your client has a right to have the detention decision considered by the district judge. 18 U.S.C. § 3145(b). The review is de novo. *United States v. Hurtado*, 779 F.2d at 1480. That does not mean that the judge has to give you another hearing, but instead that no deference is given to the magistrate's findings. *See United States v. Gaviria*, 828 F.2d 667, 670 (11th Cir. 1987); *United States v. Koenig*, 912 F.2d 1190, 1192-1193 (9th Cir. 1990). As a practical matter, the judge must have some way, then, to review the testimony from the detention hearing. While it is conceivable the judge might be willing to listen to the recording, the better approach would be to secure a transcript of the detention hearing. Rule 9(a) of the Federal Rules of Appellate Procedure governs any appeal of the district court's decision.

Those detained are held in a variety of places throughout the district. Here, by division, are the names and addresses of the various facilities:

<u>Pensacola</u>
Escambia County Jail
P. O. Box 17800
(physical address: 2935 N. "L" Street)
Pensacola, FL 32522
(850) 436-9820

Santa Rosa County Jail
5775 E. Milton Rd.
Milton, FL 32570
(850) 983-1121

(Note: if writing an inmate:
P. O. Box 7129, Milton, FL 32570)

[8] The government can rely on the indictment to establish the presumption. *United States v. Hurtado*, 779 F.2d at 1479. Accordingly, at a detention hearing involving the presumption, you might find that the government will rely solely on the indictment and elect not to introduce any evidence. Unless you meet your burden of production, that will be the end of the hearing.

Panama City
Bay County Jail
5700 Star Lane
Panama City, FL 32404
(850) 785-5245

Jackson County Jail
2737 Penn Avenue
Marianna, FL 32448
(850) 482-9651

Washington County Jail
1100 Brickyard Road
Chipley, FL 32428
(850) 638-6110

Tallahassee
FDC Tallahassee (men only)
501 Capital Circle, N.E.
Tallahassee, FL 32301
(850) 877-0930

Wakulla County Jail
(Women)
15 Oak St.
Crawfordville, FL 32327
(850) 926-0800, fax (850) 926-0898

Gainesville
Alachua County Adult Detention Center
3333 N.E. 39th Avenue
Gainesville, FL 32609
(352) 491-4444

Dixie County Detention Center
P. O. Box 350
386 N.E. 255 Street
Cross City, FL 32628
(352) 498-1220

Gilchrist County Jail
9239 S. US 129
Trenton, FL 32639
(352) 463-3490

Levy County Jail
P.O. Drawer 1719
9150 N.E. 80th Ave.
Bronson, FL 32621-1719

Taylor County Jail
589 East U.S. Highway 27
Perry, FL 32347
(850) 584-4333

DISCOVERY

Discovery, especially for those used to practicing under the rules of the State of Florida, is notoriously deficient. Rule 16 of the Federal Rules of Criminal Procedure delivers most of the bad news. The essence of it is that you are entitled to: oral statements of the defendant made in response to interrogation by law enforcement officials; written or recorded statements of the defendant; the defendant's prior record (which usually consists of the less-than-reliable NCIC printout); documents and objects material to the defense or intended to be used by the government in its case-in-chief; reports of examinations and tests; and a summary of any intended expert testimony. Strictly speaking, you're entitled to statements of witnesses, including grand jury testimony, only after the government's witness has testified. Fed. R. Crim. P. 26.2; 18 U.S.C. § 3500 (commonly referred to as the "Jencks Act").[9]

Rule 26.2(B) of the Rules of the United States District Court for the Northern District of Florida (Local Rules) helps some. That rule requires the government to provide those items listed in Federal Rule of Criminal Procedure 16, within seven days of receiving a request from the defense. Rule 26.2(D) requires the government to disclose, within seven days of the arraignment, any information favorable to the defense that meets the tests set out in *Brady v. Maryland*, 373 U.S. 83 (1963); and *Giglio v. United States*, 405 U.S. 150 (1972); the criminal record of any informant who will be testifying at trial; results of and any photos used in a line-up; and copies of any latent fingerprints that have been identified by a government expert as those of the defendant. The rule states that the government, or in the case of defense witnesses, the defense, is "requested" to provide the statements of witnesses "sufficiently in advance [of trial] so as to avoid any delays or interruptions at trial." Local Rule 26.2(E)(4) (emphasis added). Note that the rule requires defense counsel "at the earliest opportunity, and no later than 7 days after arraignment," to "contact the government's attorney and make a good faith attempt to have all properly discoverable material and information promptly disclosed or provided for inspection or copying."

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[9] The Jencks Act includes a section that reads: "Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use at trial." 18 U.S.C. § 3500(c). *See, e.g., United States v. Holmes*, 722 F.2d 37, 41 (4th Cir. 1983):

> Here it is clear that defendants were not afforded a reasonable opportunity to examine and digest the mass of material furnished them on the Sunday before the Monday that the trial began. Especially is this so because, as we have stated, defendants had only the minimum notice that due process requires of the charges against them. Their need for careful study of Jencks Act materials was greater than in the usual case where greater specificity of the charge is alleged. It was therefore an abuse of discretion on the part of the district court to deny a reasonable delay in the progress of the trial to permit counsel to complete their studies and preparation.

Notably missing from all this is a witness list. That omission is, needless to say, a problem. Most of the other judges are satisfied if a witness list is provided by the morning of jury selection. Even then, it's intended as a convenience to the court rather than a reflection of any discovery right.

The government's compliance with the time limits of this local rule varies from one Assistant United States Attorney to the next. Some promptly send copies of the required information. Others will advise you to contact the case agent and obtain most if not all of the information from the agent. Others provide it well after the 7 days have passed. Fortunately, the government seems to always disclose the Jencks Act statements prior to trial. Some of the assistants disclose them almost immediately; others, though, provide them on the Friday before jury selection or even the morning of trial.

The most useful information, the police reports or reports prepared by the federal agents, do not have to be disclosed. The exception is any portion of the reports that contain the sort of witness statement included in the discovery rule or the Jencks Act. It's not a generous standard. *See, e.g., United States v. Jordan*, 316 F.3d 1215 (11th Cir. 2003) ("only those statements which [can] properly be called the witness' own words"). "[A]n interviewer's raw notes, and anything prepared from those notes (such as an FBI 302), are not *Jencks* Act statements of the witness unless they are substantially verbatim and were contemporaneously recorded, or were signed or otherwise ratified by the witness." *Id.* As a practical matter, many of the Assistant United States Attorneys will provide at least some of the reports to you. Here again, the time when you receive the reports will vary.

The end result of all this is that you often have to scramble to see what you can come up with. In some of the cases where the prosecution was begun in state court, discovery has already taken place, so the state lawyer may be able to provide you more information than you'll get in federal court. Then, too, despite the limited nature of federal discovery, many of the Assistant United States Attorneys and the agents assigned to the case will discuss and provide you with considerable information about the case. It is, after all, in the government's interest to resolve the case without a trial, and sometimes a full disclosure by the government will promote a guilty plea. Much can also be learned from preliminary hearings, detention hearings, and sometimes pretrial motions like a motion to suppress. Without the depositions that are available in state court, you can spend much more time than you would on a state case running down at least those witnesses you know about.

The local rule states that "Discovery requests made pursuant to Fed. R. Crim. P. 16 and this local rule . . . should not be filed with the court . . ." Local Rule 26.2(G)(4). Accordingly, you initiate the discovery process by sending a letter to the United States Attorney's Office. *See* Appendix, p. 31.

SPEEDY TRIAL

The federal speedy trial rule is found at 18 U.S.C. § 3161.[10] It bears little resemblance to the

[10] Remember that there is also a constitutional speedy trial right. *See Barker v. Wingo*, 407 U.S.

Florida rule. The statute governs two time periods - the time from arrest to indictment and the time from the indictment to trial.[11] The indictment is to be filed within 30 days from "the date on which the individual was arrested or served with a summons." § 3161(b). The trial is supposed to begin within 70 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." § 3161(c)(1). The 70-day period applies to retrials. § 3161(e).

The federal statute differs from the state rule in that a defendant may not prospectively waive his speedy trial right. *See Zedner v. United States*, 547 U.S. 489, 502 (2006) ("Allowing prospective waivers would seriously undermine the Act because there are many cases . . . in which the prosecution, the defense, and the court would all be happy to opt out of the Act, to the detriment of the public interest."); *United States v. Mathurin*, 690 F.3d 1236, 1243 (11th Cir. 2012) ("because the Act is designed to advance not only a defendant's interest in a speedy trial, but also the public's interest in the same, it does not permit a defendant to waive his rights under the Act prospectively." (auth. omitted)).

The primary difference between the state rule and the federal rule is that, should the judge dismiss an indictment on the basis of the speedy trial statute, the federal judge has the option of dismissing it with or without prejudice. § 3162. If it is dismissed without prejudice, the government is free to obtain a new indictment. The factors the court should consider in determining whether a case should be dismissed with prejudice are elastic: "the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a re-prosecution on the administration of this chapter and the administration of justice." § 3162(a)(1). It is only in the rarest of circumstances that you'll find a defendant who actually wins his case on the basis of the speedy trial statute.

While in state court the defendant can forfeit his right under the speedy trial rule by causing a delay, the federal defendant doesn't forego the right altogether, but instead suffers a tolling of the speedy trial period during the delay. *See* § 3161(h). "Delay" does not require a delay of the trial date. *See United States v. Tinklenberg*, 131 S. Ct. 2007, 2012 (2011). The running of speedy trial, for example, is tolled once the government or the defense files a motion. If it is a motion that doesn't require a hearing, speedy trial is tolled for either 30 days from the time the judge has all the submissions necessary to make a decision, or until the decision is made. (The shorter of the two possibilities controls.) *See, e.g., United States v. Davenport*, 935 F.2d 1223 (11th Cir. 1991).

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514 (1972). In, for example, *United States v. Ingram*, 446 F.3d 1332 (11th Cir. 2006), the Court of Appeals ordered the indictment dismissed with prejudice based upon a two-year post-indictment delay.

[11] The Fifth Amendment requires an indictment from a grand jury. *See* Federal Rule of Criminal Procedure 6 for details. There is also a provision for waiving indictment and proceeding by information. Fed. R. Crim. P. 7(b).

If it is a motion that requires a hearing, speedy trial is tolled until such time as the hearing takes place. § 3161(h)(1)(D). If, at the conclusion of the hearing the judge takes the matter under advisement, speedy trial begins to run again once 30 days have passed. § 3161(h)(1)(H); *United States v. Jones*, 601 F.3d 1247, 1255 (11th Cir. 2010). Even the filing of a motion in limine can toll the running of speedy trial. *See, e.g., United States v. Jernigan*, 341 F.3d 1273, 1285-1287 (11th Cir. 2003). Because, too, "any proceeding" involving the defendant is considered a "delay," the initial appearance and any postponement for a preliminary hearing or detention hearing is excluded as well. *See United States v. Williams*, 314 F.3d 552, 557 (11th Cir. 2002).

DEFENDING THE CASE

Drug cases typically make up as much as a third of the cases here in the Northern District of Florida. Of the felony cases, firearms contribute the next highest percentage. Particularly in Pensacola and Panama City, there are many misdemeanor cases arising out of the military bases or other federal lands. There is an occasional bank robbery charge, as well as fraud and theft cases, immigration law violations, sometimes a child pornography case, and a variety of other offenses. Most cases do not involve truly violent crimes.

One aspect unique to federal practice is the Assimilative Crimes Act. When a defendant is charged with committing a criminal offense on property that is under exclusive federal jurisdiction, *e.g.*, a military base, and the offense is not specifically covered by a federal statute, *e.g.*, driving under the influence of alcohol, a violation of the applicable state statute can be charged. This is done under the Assimilative Crimes Act. 18 U.S.C. § 7 & 13; *see also Lewis v. United States*, 523 U.S. 155 (1998). Under the Act, the substantive statute, *i.e.*, the elements of the offense and the possible penalties for violating that statute, are adopted from the state statute. The Federal Rules of Criminal Procedure and Evidence, however, still govern the proceedings.

Defending a federal case doesn't differ too much from what you're used to in state court. One of the biggest differences is the pace. Absent unusual complexity, nearly all cases are set for trial within the speedy trial limit of 70 days. Most of the judges expect to have the issue of guilt or innocence resolved within that time period. Accordingly, once appointed, you'll need to begin work on the case right away.

The defense to any particular case will, of course, vary. Lexis-Nexis publishes a book by Donald L. Samuel, *Eleventh Circuit Criminal Handbook*, which includes a wonderful description of the nature of and various defenses to most of the offenses you will see. You should have the book for this purpose alone.[12]

[12] The book also includes a discussion and case citations for almost any topic you'll face. We have a copy of the book in each of our offices.

Pretrial Motions

Federal Rule of Criminal Procedure 12 and Local Rule 7.1 address pretrial motions. The local rule requires that unless the motion is unopposed, "[a] party who files a written motion must file a supporting memorandum in the same document with, or at the same time as, the motion." Local Rule 7.1(E). If the other party opposes the motion, he or she "must file a memorandum opposing the motion" within 14 days. *Id*. A memo may not exceed 8,000 words, and the motion must include a certificate with a word count. Local Rule 17.1(F).

While Local Rule 7.1(K) provides that "[t]he court may - and most often does - rule on a motion without oral argument," many motions in criminal cases require an evidentiary showing. In such cases, there is no need to schedule a hearing. Upon receiving the motion, the judge's courtroom deputy will set the hearing and send you notification of the hearing. If you are concerned about the scheduling, you should call the courtroom deputy upon filing the motion.

One difference you'll find in the motions available to defense counsel is the absence of a pretrial motion to challenge the sufficiency of the evidence. There is no provision for a motion analogous to Rule 3.190(c)(4) of the Florida Rules of Criminal Procedure. *See United States v. Ayarza-Garcia,* 819 F.2d 1043, 1048 (11th Cir. 1987); *United States v. Critzer*, 951 F.2d 306, 307 (11th Cir. 1992); *United States v. Jensen*, 93 F.3d 667, 669 (9th Cir. 1996).

Trial

Each judge enters an order that sets the trial date and addresses pretrial matters. You should review the order carefully. It includes instructions about conferring with the Assistant United States Attorney regarding contested legal issues and evidentiary matters, details your responsibility for reaching an agreement on the jury instructions and verdict form in advance of the trial, and tells you what time you need to be in court on the day of the trial.

The trial of a case differs from state trials primarily in the jury selection process. Rule 24(a)(1) of the Federal Rules of Criminal Procedure states that "[t]he court may examine prospective jurors or may permit the parties to do so." The rule goes on to say that if the court chooses to conduct the examination, the court must permit the lawyers to: "(A) ask further questions that the court considers proper; or (B) submit further questions that the court may ask if it considers them proper." With rare exceptions, the reality in the Northern District of Florida is that the judge will conduct voir dire.[13]

The clerk will provide you with juror questionnaires the morning of jury selection. They will be handed to you not long before jury selection begins. While you may want to ask the judge for

[13] "In federal courts . . . judicially-conducted voir dire is the norm." Douglas G. Smith, *Structural and Functional Aspects of The Jury: Comparative Analysis and Proposals for Reform*, 48 Ala. L. Rev. 441, 514 (1997).

additional time to review the questionnaires, many of the judges expect you to review them while the court addresses the venire. If you move quickly, you can probably do so while the judge is addressing routine matters. Nonetheless, it is likely you'll be rushed and will need to use your time efficiently.

Federal Rule of Criminal Procedure 24(b)(2) gives the government six peremptory challenges. "[T]he defendant or defendants jointly have 10 peremptory challenges." *Id*. Back-strikes are generally not permitted.

Another aspect that differs from state practice is the well-quantified additional punishment that comes with going to trial and losing. The United States Sentencing Guidelines provides for a reduction in the sentence for those who enter a guilty plea and accept responsibility for their crime. *See* USSG § 3E1.1. In the terminology of the Guidelines, those who "accept responsibility" receive a two-level reduction in their offense level. If the offense level is 16 or higher and if the guilty plea is entered far enough in advance of trial so that the prosecutor does not have to prepare for trial, the government is supposed to file a motion so advising the court, and the defendant will receive an additional one-level decrease. *See* USSG § 3E1.1(b). In practice, the Assistant United States Attorneys rarely file such a motion, and the probation officer preparing the presentence report routinely awards the third level. Though there are some exceptions, those who choose to go to trial are ordinarily denied that two- or three-level reduction. *But see United States v. Castillo-Valencia*, 917 F.2d 494, 500 (11th Cir. 1990) ("the district court may not refuse to find an acceptance of responsibility per se simply because the defendant has elected to go to trial").

If a defendant testifies at trial and loses, there is the possibility the judge will conclude that the defendant testified falsely. If that happens, the judge will add two levels for obstruction of justice, and it is likely there will be a corresponding increase in the length of the sentence. *See* USSG § 3C1.1 and, *e.g., United States v. Clavis,* 956 F.2d 1079, 1096 (11th Cir. 1992).[14] Thus, a defendant who goes to trial, loses, and is found to have lied on the witness stand, will lose credit for acceptance of responsibility and will suffer the additional penalty that comes with being found to have obstructed justice.[15] The net effect will be an offense level four or five levels higher than it would have been had the defendant entered a guilty plea and accepted responsibility for the crime.

The difference can be dramatic. For someone who falls in the highest criminal history category, category VI, an offense level of 32 produces a range of 17-years to almost 22 years. If five offense levels are added and the offense level increases to 37, the range increases to 30 years to life. For

[14] *But see also* § 3C1.1, comment. (n.2) ("[T]he court should be cognizant that inaccurate testimony or statements may result from confusion, mistake, or faulty memory and, thus, not all inaccurate testimony or statements necessarily reflect a willful attempt to obstruct justice").

[15] The same can happen if the court concludes that a defense *witness* testified falsely. *See United States v. Bradberry*, 466 F.3d 1249 (11th Cir. 2006).

someone at the lowest end, criminal history category I, an offense level of 16 results in a range of 21 to 27 months. With the additional 5 offense levels increasing the offense level to 21, the sentencing range rises to 41-51 months.

The standard jury instructions are referred to as the "Pattern Instructions" and are available at the website of the Eleventh Circuit Court of Appeals: www.ca11.uscourts.gov. Generally, the government will prepare and submit a full set of proposed instructions to the court. Judge Hinkle drafts his own without asking for a draft from the government.

GUILTY PLEAS AND WHAT PASSES AS PLEA NEGOTIATIONS

The United States Attorney for the Northern District of Florida has for many years had a policy that essentially prohibits plea negotiations. In concrete terms, the United States Attorney's Office, absent problems with the proof of the case, will not agree to the dismissal of any charge that will favorably alter the calculations under the United States Sentencing Guidelines. That means that on occasion the United States Attorney's Office will, for example, agree to the dismissal of a charge of conspiracy to distribute cocaine so long as there is a guilty plea to the substantive charge. Such an agreement would be acceptable to the United States Attorney because the dismissal of the conspiracy charge will not alter the Sentencing Guidelines considerations. There are rare exceptions to this rule, but they are almost non-existent. Largely because of this policy, the District, typically, traditionally has one of the highest trial rates in the country.[16]

Some of the harshest sentences are the result of the increased mandatory minimum sentences that are called for by the federal drug laws in cases where the defendant has prior controlled substance convictions. *See* 21 U.S.C. § 841. However, before a defendant may be sentenced to the increased penalties based upon the prior controlled substance convictions, the government must file a timely notice of its intent to seek such a sentence. *See* 21 U.S.C. § 851(a), and, *e.g., United States v. Rutherford*, 175 F.3d 899, 903-904 (11th Cir. 1999). By foregoing the filing of the notice, the government can eliminate the possibility of any increased minimum mandatory sentence.

For many years the policy of the United States Attorney's Office for the Northern District was to file the § 851 enhancement in every case where defendant met the criteria. That changed in 2013 when, then, Attorney General Holder issued a directive to the United States Attorneys throughout the country that limited the filing of § 851 enhancements to only the most aggravated of cases. The North Florida United States Attorney's Office followed that directive and the enhancement was a fairly rare event. In May of 2017, Attorney General Sessions issued a memorandum citing "a core principle that prosecutors should charge and pursue the most serious, readily provable offense." Though the directive provides U.S. Attorneys with some discretion to "consider whether an

[16] While, nationally, about 3 % of those sentenced under the Sentencing Guidelines had their cases resolved by trial, historically, about 10% of the cases in the Northern District of Florida go to trial.

exception may be justified," it seems to have largely reversed Attorney General Holder's policy. In North Florida, the U.S. Attorney's Office appears to be seeking the enhancement in the majority of eligible cases.

In the absence of meaningful plea negotiations, defendants who enter guilty pleas do so without any certainty as to what their sentence will be. Appropriately, most of the judges include in their plea colloquy a question that is something like: "You understand you won't be able to withdraw your guilty plea if the sentence turns out to be longer than you expected?"

With the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), federal judges are not bound by the United States Sentencing Guidelines. Nonetheless, judges use the guidelines as "the starting point and initial benchmark." *Gall v. United States*, 552 U.S. 38, 50 (2007). In North Florida, as is true throughout the country, judges impose sentences within the guidelines in about half of all cases. Of those, only about 2% are above the advisory guideline range.

Given the role of the Guidelines and the absence of plea negotiations, it is critical that you calculate the Guidelines range as accurately as possible prior to the entry of any guilty plea. Your calculation will serve as the only meaningful estimate as to what sort of sentence your client will receive if he or she enters a guilty plea. Our office manual recommends that our lawyers provide that estimate in writing to the client.

Rule 11 of the Federal Rules of Criminal Procedure, which addresses guilty pleas, provides for a plea of nolo contendere. Most of the judges in North Florida, however, will not accept nolo contendere pleas, requiring a guilty plea for those who wish to forego a trial. Subsection (b)(1) of the Rule outlines the requirements of the plea colloquy. You'll find the colloquy is done with far more attention than is typically done in state court, with plea colloquies typically lasting anywhere from 15 to 30 minutes. A copy of one plea colloquy conducted by Judge Hinkle is included in the Appendix, pp. 33-38.

Magistrate Judges may, upon designation by the district court judge, accept guilty pleas, but only with the consent of the defendant. *See* 26 U.S.C. § 636. Some of the district court judges in the Northern District use the magistrate judges for the task; others do not. Those defendants who enter a guilty plea before one of the magistrate judges will be asked to sign a consent form.

The United States Attorney's Office will prepare a written plea agreement. A copy of a typical agreement is included in the Appendix, pp. 39-41. While the form is used in the vast majority of cases, the government's policies regarding plea negotiations often don't provide any real incentive to use the plea agreement form. The one concession that might be of some value is the government's agreement not to file any related charges. If the defendant is cooperating with the government, the "plea and cooperation" agreement also gives the defendant the assurance that he or she will have a chance to earn a reduction in his or her sentence. To the extent the document gives the defendant a better understanding of what he or she is doing, it may have some educational value. The defendant, however, is free to enter a guilty plea without using the form.

Consistent with the requirements of Rule 11, the government will also prepare a written factual basis with a space for your client to sign. It is important to review the document carefully as the content of the factual basis can affect the calculation of the sentence under the Sentencing Guidelines.[17] As is true with the plea forms, there is the option of proceeding without a factual basis signed by the defendant. In many instances, the document drafted by the Assistant United States Attorney will only ask the defendant to acknowledge that there is evidence supporting the factual allegations contained in the document and does not require the defendant to concede that all the facts are correct. Ultimately, though, the judge will ask the client about the facts. Guilty pleas have been rejected where the defendant does not admit to those facts necessary to support a conviction. There are instances where a defendant wants to forego a trial, but ends up having his case decided by a jury because he or she cannot or will not admit during the plea colloquy the facts necessary for the conviction.

The plea agreements and statement of facts contain important and complicated representations. Accordingly, good practice dictates that you review the paperwork with the client well in advance of the plea hearing. In a letter sent out to panel members years ago, Chief Judge Rodgers advised that she will "not accept a plea from a defendant who has seen the plea paperwork for the first time on the day of the plea."

In North Florida, a significant percentage of defendants enter into "plea and cooperation agreements" in hopes of obtaining a lesser sentence pursuant to Section 5K1.1 of the United States Sentencing Guidelines and 18 U.S.C. § 3553(e). In fiscal year 2015, for example, there were departures below the recommended Guidelines sentence for substantial assistance in 18% of all the cases where a sentence subject to the Guidelines was imposed. There is good reason to seek such an agreement. It is the only way the judge can impose a sentence below any mandatory minimum sentence. Furthermore, the reductions in the sentence can be dramatic, with many reductions in the vicinity of 50% of the recommended guideline range or the mandatory minimum. There are, however, no guarantees. More fail than not when they try the substantial assistance route to a lesser sentence. Very few who enter guilty pleas know at the time they enter the plea whether they will ultimately receive a break on their sentence. It is fairly typical for the government to announce its decision just a few days before sentencing.

There are, to be precise, three provisions that govern substantial assistance departures. In addition to USSG § 5K1.1, which allows the judge to impose a sentence below the advisory guideline range, 18 U.S.C. § 3553(e) gives the court the authority to impose a sentence below the otherwise required mandatory minimum sentence. In theory, the Government could file a substantial assistance motion based upon one or the other provision, but, as a practical matter, nearly all substantial

[17] It often comes directly from offense reports. Sometimes, the prosecutor will agree to make corrections or change the wording to make the plea more palatable to the defendant. More often, rather than modifying the statement, there will be an understanding that the client, during the plea colloquy, can tell the judge what portions he disagrees with. The failure to at least tell the judge about the disagreement amounts to an admission.

assistance motions are based on both the rule and the statute. The third provision is Rule 35 of the Federal Rules of Criminal Procedure. It provides for reductions in the sentence after the initial sentence is imposed. Bear in mind that the process is controlled by the United States Attorney's Office, as, at least under the Guidelines scheme, the judge lacks the authority to grant a departure based on substantial assistance unless the government files the appropriate motion. *See, e.g.*, *United States v. Solis*, 169 F.3d 224, 226 (5th Cir. 1999). That means, of course, that the client can do everything possible, satisfy the judge that he or she has provided substantial assistance, and still not get a break if the United States Attorney's Office does not file the motion.[18]

SENTENCING

Presentence Investigation

For those defendants who enter guilty pleas or who are found guilty by a jury, the next step is the presentence investigation. *See* Fed. R. Crim. P. 32(c)-(h). It starts with an interview of the defendant by one of the probation officers. The rule specifically requires the probation officer, upon request, to "give the defendant's attorney notice and a reasonable opportunity to attend the interview." Fed. R. Crim. P. 32(c)(1)(B)(2). The interview is a critical part of the process, and you should prepare your client and be present. Should, for example, your client lie or mislead the probation officer, your client can lose credit for acceptance of responsibility and earn a higher offense level for "obstruction of justice." *See* USSG § 3C1.1. In those cases where the defendant is seeking a reduction based on acceptance of responsibility (*see* USSG § 3E1.1), the probation officer will be asking the defendant about the circumstances of the offense.[19] The probation officer will also be asking about current and past drug use.[20]

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[18] The judge does have the authority to, in effect, go outside the Guidelines scheme and impose a below-Guidelines sentence based upon the defendant's assistance. *See United States v. Barner*, 572 F.3d 1239 (11th Cir. 2009). Absent a motion from the Government, the judge still lacks the authority to impose a sentence below any statutory mandatory minimum sentence.

[19] In lieu of direct questioning about the offense during the presentence interview, it is sometimes possible to get the probation officer to rely upon either the factual basis that was entered when the defendant entered his guilty plea or to rely upon a written submission by the defendant.

[20] *For those who qualify*, successful completion of the Bureau of Prisons' intensive residential drug treatment program provided for in 18 U.S.C. § 3621(e) provides for a reduction of the sentence, at least in theory, for up to a year. (In practice, the reduction may be more like three to six months). To see what circumstances disqualify a prisoner from receiving the early release, *see* 28 C.F.R. § 550.55.

Before a prisoner can participate in the program, he or she must have a documented drug abuse problem. Those individuals who, during the presentence interview, are reluctant or who fail altogether to admit to a history of drug use will probably disqualify themselves from the residential drug treatment program and lose whatever chance they may have had to earn a sentence reduction.

The report is a lengthy document that addresses your client's current situation and a lot of personal history. It is considered to be a confidential document. *See* Local Rule 88.1(B) and, *e.g., United States v. Gomez*, 323 F.3d 1305 (11th Cir. 2003). It includes a recitation of the facts relevant to the offense and the Sentencing Guidelines calculations.[21]

Local Rule 88.1(A) states that sentencing will "ordinarily" occur "approximately" 70 days after the entering of a guilty plea or a guilty verdict. Rule 32(e)(2) of the Federal Rules of Criminal Procedure requires the probation officer to provide the report to you at least 35 days before sentencing. You'll receive it via email. The rule requires any objections to be filed in writing within 14 days of the report. Fed. R. Crim. P. 32(f)(1). Most of the lawyers in the Northern District write the probation officer directly with any objections. The letters are filed through the electronic filing process, although may be viewed only by the Court and the parties. The rule, however, seems to contemplate filing the objections with the court, with a copy of the objections provided to "the opposing party and the probation officer." Fed. R. Crim. P. 32(f)(2). Seven days before sentencing, the probation officer is to provide the government and the defense a final copy of the report that includes an addendum that addresses any objections. Fed. R. Crim. P. 32(g).

Sentencing Guidelines

While sentencing judges are free to impose a sentence below or above the Sentencing Guidelines, the Guidelines remain the most important part of the sentencing process. The Guidelines are too involved to be covered in any meaningful way in this manual. There are, though, resources available to you. The United States Sentencing Commission maintains a website with a wealth of information at www.ussc.gov, including an online tutorial. Best of all, the Sentencing Commission holds a training session each year. The dates and locations are listed on the website.

If you're new to the Sentencing Guidelines, you should review your client's circumstances with someone who is familiar with them. It isn't realistic to think you can pick up the Guidelines Manual and confidently predict your client's sentence. There are some worksheets available at the Sentencing Commission's webpage, and you will probably find them helpful. Know, too, that any of our lawyers or any of your fellow panel lawyers would be happy to help you work through the calculations.

[21] Probation officers make a sentencing recommendation, but Local Rule 88.1(B) prohibits the disclosure of that recommendation to anyone other than the sentencing judge. *See also* Fed. R. Crim. P. 32(e)(3).

There are, however, some aspects of the Guidelines that would be worth mentioning here. Although the importance of departures, be they upward or downward, has diminished dramatically since the decision in *United States v. Booker*, 543 U.S. 220 (2005), they are still important.[22] Judges remain obligated to consider whether a departure is appropriate. *United States v. Jordi*, 418 F.3d 1212, 1215 (11th Cir. 2005). Then, too, even with *Booker*, the departure for substantial assistance, with one exception, remains the only path to a sentence below any mandatory minimum sentence.[23] Departures, as opposed to "variances," for reasons other than substantial assistance, are rare in North Florida and the rest of the country. Still, you should carefully consider whether there is such a basis for a departure. *See Koon v. United States*, 518 U.S. 81 (1996), and sections 5H and 5K of the Guidelines Manual.

Within the first chapter of the Guidelines Manual, the Sentencing Commission addresses something called "relevant conduct." *See* USSG § 1B1.3. It is an important and much debated provision, and is the subject of one of the online tutorials on the Commission's webpage. Under some circumstances, it allows the judge, in arriving at the guideline range, to consider the "reasonably foreseeable" acts of co-conspirators that are in the scope of the activity the defendant agreed to undertake. *See* § 1B1.3(a)(1)(B) and *United States v. Reese*, 67 F.3d 902 (11th Cir. 1995). In some circumstances, too, it allows the judge to consider the defendant's conduct that is related to the crime for which he or she is being sentenced. The conduct need not be charged, and can include conduct that is the subject of a charge that has been dismissed or of which the defendant was acquitted. *See* United *States v. Watts*, 519 U.S. 148, 157 (1997). In drug trafficking cases, where relevant conduct can include related drug transactions covering a period of months or even years, the additional drug quantity from relevant conduct can dramatically increase the sentence. *See, e.g., United States v. Cousineau*, 929 F.2d 64, 67-68 (2d Cir. 1991).

There are two especially pernicious traps for the unwary: the Career Offender provision of the Sentencing Guidelines and the Armed Career Criminal Act that is the product of a statute, but that has a home in the Guidelines Manual too. It is conceivable that a defendant could enter a guilty plea expecting one sentence, only to find, upon receiving the presentence report, that the sentence

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[22] Don't be confused by the terminology. A "departure," be it upward or downward, refers to a below- or above-guidelines sentence that is imposed pursuant to the rules of the Sentencing Guidelines. Other above- or below-guidelines sentences, which are the product of the decision in *United States v. Booker*, 543 U.S. 220 (2005), are sometimes referred to as "variances." When a judge imposes such a sentence, the judge has determined that the application of the Sentencing Guidelines will not fulfill the goals of sentencing established by Congress in 18 U.S.C. § 3553(a). It is hard to get a "departure" because the rules governing departures are rigid and have been narrowly construed by the courts. Judges have much more latitude in imposing a "variance," so your client is much more likely to get a "variance."

[23] There is one other exception for those convicted of drug trafficking: the "Safety Valve." It applies to those with no more than 1 criminal history point and who meet certain other criteria. *See* 18 U.S.C. § 3553(f), USSG §§ 5C1.2, 2D1.1(b)(6).

is going to be dramatically longer because of either or oven both of the two provisions.[24]

Armed Career Criminal

The Armed Career Criminal classification is outlined in § 4B1.4 of the Guidelines, but it is a creation of Congress so is set out in a statute, 18 U.S.C. § 924(e), complete with its own definitions. The statute provides for a minimum mandatory sentence of fifteen years. To qualify, a defendant who possesses a firearm after being convicted of a felony, or in violation of any of the other circumstances listed in 18 U.S.C. § 922(g), needs 3 prior convictions of a "violent felony" or a "serious drug offense." Unlike the Career Offender classification, a predicate can be used to support the enhancement regardless of how long ago it occurred. *See, e.g., United States v. Green*, 904 F.2d 654, 655-656 (11th Cir. 1990). Juvenile offenses involving violent conduct and the use of a knife, firearm, or destructive device, also count. 18 U.S.C. § 924(e)(2)(C). In order for two related offenses to be counted as separate predicates, the defendant must have committed them on "occasions different from one another," 18 U.S.C. § 924(e)(1). *See, e.g., United States v. McCloud*, 818 F.3d 591 (11th Cir. 2016).

A "serious drug offense" is a conviction for distribution or possession with intent to distribute that carries a term of imprisonment of at least 10 years. 18 U.S.C. § 924(e)(2)(A). The question of what amounts to a "violent felony" has been a complicated one for some time. Several Supreme Court cases have made it even more so. With an apology for devoting an inordinate amount of space to a topic you will not regularly see, here's an explanation.

Section 924(e)(2)(B) of the Armed Career Criminal statute defines "violent felony." There are three parts to the definition. Subsection (B)(2)(i) is often referred to as the elements clause. Subsection (B)(2)(ii) includes a list of enumerated offenses (the enumerated offenses clause) and what courts refer to as the "residual clause." In *Samuel Johnson v. United States*, 135 S. Ct. 2551 (2015), the Supreme Court overturned well established precedent when it determined that the residual clause was so vague that it violated the Fifth Amendment's guarantee of due process. Because of the decision, a long list of offenses that in the past had been used as predicates can no longer be used.

[24] While it is unlikely that a defendant would be caught unawares by the Armed Criminal Act, and it is much more likely a defendant could be surprised by the Career Offender classification. There's no requirement that the indictment allege that the defendant is being prosecuted as either one. *See, e.g., United States v. Rubio*, 317 F.3d 1240, 1241 n.1 (11th Cir. 2003); *United States v. Skidmore*, 254 F.3d 635, 642 (7th Cir. 2001). Should a defendant enter a guilty plea to the offense of possession of a firearm by a convicted felon (18 U.S.C. § 922(g)) only to find out he is classified as an armed career criminal and facing a mandatory minimum penalty of 15 years and a maximum penalty of life, he should be able to withdraw his guilty plea, *See, e.g., United States v. Symington*, 781 F.3d 1308 (11th Cir. 2015). It's an option unavailable to those surprised by being classified as a career offender. *See, e.g., United States v. Pease*, 240 F.3d 938, 941 (11th Cir. 2001).

Predicate offenses can still qualify as an enumerated offense or under the elements clause. The list of enumerated offenses is short - burglary, arson, extortion, or an offense that involves the use of explosives. To qualify, the enumerated offense must be a generic one. *Taylor v. United States*, 495 U.S. 575, 598 (1990).

A generic burglary offense, for example, must be one that contains "at least the following elements: an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime." *Id*. at 597. Florida's statute is non-generic because it includes entry into the curtilage. *James v. United States*, 550 U.S. 192, 212 (2007). Alabama's and South Carolina's burglary statutes are, like Florida's, non-generic, but for a different reason - they include entry into such things as vehicles, aircraft, and watercraft. *See United States v. Lockett*, 810 F.3d 1262 (11th Cir. 2016); *United States v. Howard*, 742 F.3d 1334 (11th Cir. 2014).

If an offense is to qualify under the elements clause, the force required must be "violent force – i.e., force capable of causing physical pain or injury" to another person. *Curtis Johnson v. United States*, 559 U.S. 133, 140 (2010).[25] Many statutes that, on their face, appear violent don't qualify. Florida's battery statute provides that the offense can be committed by touching another person against his or her will. It can, therefore, be committed by using something short of "violent force." *See, e.g., United States v. Braun*, 801 F.3d 1301, 1305 (2015). As battery on a law enforcement officer is nothing more than a battery on an officer, it includes conduct that lacks the required violent force. *See Curtis Johnson v. United States*, 559 U.S. at 142. The same is true of Florida's aggravated battery on a pregnant woman. *Braun*, 801 F.3d 1304-05. Florida's robbery and aggravated assault statutes figure into the debate. While the Eleventh Circuit Court of Appeals has repeatedly found Florida robbery qualifies on the basis of the elements clause, *see United States v. Fritts*, 841 F.3d 937 (11th Cir. 2016), and *United States v. Seabrooks*, 839 F.3d 1326 (11th Cir. 2016), the Ninth Circuit, in *United States v. Geozos*, 870 F.3d 890 (9th Cir. 2017), disagreed and the Fourth Circuit, in *United States v. Winston*, 850 F.3d 677 (4th Cir. 2017) and *United States v.* Gardner, 823 F.3d 793 (4th Cir. 2016), concluded similar statutes in Virginia and North Carolina were not violent felonies. The Supreme Court is scheduled to consider the issue in its 2018 term in the case of *Stokeling v. United* States, No. 17-5554. The essence of the argument is that the Florida statute, like some of these others, requires only enough force to overcome the resistance of the victim. If the victim uses only minimal force to resist, the offense, the robber need use only a similar degree of force, something that falls short of the violent force required by *Curtis Johnson.*

The Eleventh Circuit has similarly found that aggravated assault is a violent felony. *See United States v. Golden*, 854 F.3d 1256 (11th Cir. 2017); *Turner v. Warden*, 709 F.3d 1328 (11th Cir. 2013). "Culpable negligence," however, is all that is needed to establish the *mens rea*. *See, e.g., LaValley v. State,* 633 So.2d 1126 (5th DCA 1995), and the court has held that more than "recklessness" is required to fulfill the physical force requirement. *See United States v. Garcia*,

[25] There are two *Johnson* decisions. This one decided in 2010, and the 2015 one, which undid the residual clause.

606 F.3d 1317 (11th Cir. 2010).[26] *See also United States v. McMurray*, 653 F.3d 367, 377 (6th Cir. 2011) (finding Tennessee's aggravated assault statute was not categorically a violent felony because it required only reckless conduct); *United States v. Ossana*, 638 F.3d 895, 903 (8th Cir. 2011) (finding Arizona's aggravated assault statute, like Florida's, includes reckless driving, lacked the required physical force).

So, while for the time being, you won't win the argument about either robbery or aggravated assault, the issue is one that is still being debated. If your client is to benefit from future developments, you will, of course, need to raise the claim in the trial court.

And if all that wasn't complicated enough, in some instances an offense that is non-generic or that is broad enough to include both violent force and something less, may still count. In *Taylor v. United States*, 495 U.S. at 601, the Court recognized what has come to be known as the modified categorical approach. It allows a court to look beyond the elements of the statute and examine documents related to the conviction: "the charging document, the terms of the plea agreement or transcript of the colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant or to some comparable judicial record of this information." *United States v. Shepard*, 125 S. Ct. 1254, 1263 (2004). Police reports may not be considered. *See, e.g., United States v. Sneed*, 600 F.3d 1326, 1333 (11th Cir. 2010). Be forewarned that, unless you object to the description of the prior offense in the presentence report, it will allow the judge to conclude the otherwise non-generic or over broad offense qualifies as a predicate. *See United States v. Bennett*, 472 F.3d 825 (11th Cir. 2006). The objection should be that "the source of the facts is a non-*Shepard* document." *United States v. McCloud*, 818 F.3d at 599.

The modified categorical approach has its limits. It may not be used if the statute at issue is "indivisible." *Descamps v. United States*, 133 S. Ct. 2276, 2282 (2013). "A divisible statute" sets out one or more elements of the offense in the alternative - for example, stating that burglary involves entry into a building or an automobile.'" *Id*. at 2281 (emphasis in the original). If, though, the statute lists, not elements, but "various means of committing a single element," the offense is indivisible. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). The determination of what is and is not an element is a matter of state law. *Id*. at 2256. Often the jury instructions for the offense will show whether the circumstance at issue is an alternative element or only an alternative means of committing the offense. *Id*. at 2256-57. In *Descamps*, a California burglary statute prohibited entry into a long list of places, but was non-generic because it lacked the requirement that the entry be unlawful. Someone who entered a structure unlawfully could be convicted, but a shoplifter who entered lawfully could also be convicted. Because, in deciding guilt or innocence, the jury was not required to find whether the entry was lawful, the statute was indivisible, and the modified categorical approach was inapplicable.

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[26] *Garcia* involved the residual clause of the Sentencing Guidelines rather than the Armed Career Criminal Act. Though the Guidelines use the phrase "crime of violence" and the ACCA the term "violent felony," the residual clause in both the ACCA and the Guidelines is "virtually identical," *Turner v. Warden Coleman FCI*, 709 F.3d at 1335 n. 4, and the "same analytical framework" applies to both. *United States v. Oliver*, 20 F.3d 415, 418 (11th Cir. 1994).

The same principle applies to the Florida burglary statute. Someone can commit a burglary by entering, not the residence, but the curtilage. In deciding whether a defendant is guilty of burglary, though, the jury is not required to find whether the entry was into the residence or the curtilage. It, like California's statute, is indivisible. *See In re: Adams*, 825 F.3d 1283, 1285 (11th Cir. 2016).

There is an ongoing debate as to whether Florida's battery statute is divisible. *See United States v. Vail-Bailon*, 868 F.3d 1293, 1297, n. 3 (11th Cir. 2017), but given that Florida juries don't have to choose between "touching" and "striking," it must surely be indivisible. *See* Fla. Std. J. Inst. (Crim.) 8.11.

Thus, in determining whether a prior conviction qualifies as one of the enumerated offenses, you must first look to the elements of the prior conviction. If the statute at issue is, for example, a generic burglary, it counts as a predicate offense. If it is not, and the statute is indivisible, that is the end of the inquiry, and the conviction does not count. If the statute is divisible, then the question is whether it qualifies under the modified categorical approach, and the court will consider the *Shepard* documents. If the documents show the defendant committed the offense consistent with the generic offense, the predicate offense will count. Otherwise, it does not.

The same analysis applies under the elements clause. If the statute prohibits only violent physical force, it counts. If it includes lesser degrees of force and the statute is indivisible, the inquiry ends, and the conviction does not count. If the statute is divisible, then the question is whether it qualifies under the modified categorical approach.

Career Offender

The Career Offender provision is at § 4B1.1 of the Guidelines Manual. If the individual is charged with "a crime of violence or a controlled substance offense," two prior convictions of either a crime of violence or a controlled substance offense" result in a higher guideline range. A "controlled substance offense" is any felony drug offense which involves distribution or possession with an intent to distribute. *See* USSG § 4B1.2(b). The sale of a $10 rock of crack cocaine to an undercover officer, for example, would qualify.

As of August 1, 2016, the Guidelines have a new definition of "crime of violence." The applicable section, USSG § 4B1.2, no longer has a residual clause. It does still have list of enumerated offenses, though it omits burglary, and an elements clause.

The enumerated offenses clause lists: "murder, voluntary manslaughter, kidnaping, aggravated assault, a forcible sex offense, robbery, arson, extortion," the unlawful use or possession of a variety of firearms or destructive devices - short barreled shotguns, silencers, bombs, grenades, to name a few (*see* 26 U.S.C. § 5845(a), or explosives material (*see* 18 U.S.C. § 841(c)). As with the Armed Career Criminal Act, the offense must be of the generic variety if it is to qualify.

The *Curtis Johnson* requirement of violent force applies to the career offender provision just as it

does to the Armed Career Criminal Act, though it will play a smaller role because the career offender's enumerated offenses clause includes many more offenses.

Many of those sentenced under the old career offender provision filed post-conviction claims arguing that *Samuel Johnson* applied just as it did to the Armed Career Criminal Act. The Supreme Court in *Beckles v. United States*, 137 S. Ct. 886 (2017), held it did not. Whether *Samuel Johnson* applies to the mandatory Guidelines remains unresolved. *See Beckles* at 18, n. 4 (Sotomayor, J. concurring in the judgment) ("The Court[] . . . leaves open the question of whether defendants sentenced to terms of imprisonment before our decision in *United States v. Booker*, 543 U.S. 220 (2005) – that is, during the period in which the Guidelines did "fix the permissible range of sentences," *ante,* at 892, may mount vagueness attacks on their sentences.")

There are other considerations. The predicate offenses must be separate offenses. *See* USSG § 4B1.2(c), 4A1.2, cmt. n.3; and *United States v. Robinson*, 187 F.3d 516, 519-530 (5th Cir. 1999). Unless there is an intervening arrest, two different offenses are not separate for career offender classification if the sentences for the offenses "were imposed on the same day." USSG § 4A1.2(a)(B). Because "prior sentence" is defined as it is for the criminal history calculation under the Guidelines, there are time limits, and some prior convictions may be too old to serve as a predicate. *See* USSG § 4B1.2, cmt. n.3, and USSG § 4A1.2(e). While offenses for which a juvenile was sentenced as an adult count, USSG § 4B1.2, cmt. n.1, true juvenile offenses do not. *See, e.g., United States v. Mason*, 284 F.3d 555, 558 (4th Cir. 2002).

Other Recidivism Provisions

Although we rarely see them, there are other provisions for increasing the sentence on the basis of recidivism. "Repeat and Dangerous Sex Offender Against Minors" penalizes those whose instant offense is any one of a number of federal sex offenses involving a minor and who have been previously convicted of such an offense. *See* USSG § 4B1.5. The "Three Strikes" provision, 18 U.S.C. § 3559(c)(1), requires a mandatory life sentence for those convicted of a "serious violent felony" if they have previously been convicted on separate occasions of "2 or more serious violent felonies" or "one or more serious violent felonies and one or more serious drug offenses." The statute contains its own definitions of "serious violent felony" and "serious drug offense."

Probation, Supervised Release, Restitution, and Fines

Probation, while not an everyday occurrence in federal court, does get imposed. Nationwide, judges impose probation in about 10% of cases. Subject to specific statutory requirements, the Guidelines provide for up to 5 years of probation for most cases, those where the offense level is 6 or higher, and no more than 3 years in the handful of cases where the offense level is less than 6. *See* USSG § 5B1.2.27

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[27] 18 U.S.C. § 3561(a) prohibits probation for those convicted of a Class A or Class B felony. (*See* 18 U.S.C. § 3559 for the classification of felonies.) When, for example, a bank teller is convicted under 18 U.S.C. § 1344 of embezzling money from a bank, which is a Class B felony,

Nearly all prison sentences are followed by a period of supervision entitled "supervised release." *See* 18 U.S.C. § 3583 and USSG § 5D1.1. The Sentencing Guidelines also address the length of supervised release, providing generally for somewhere between two and five years. USSG § 5D1.2. There are exceptions. One of the most notable are the mandatory periods of up to 10 years of supervision under the drug trafficking statute, 21 U.S.C. § 841, and the mandatory 5 years to life for certain sex offenses. *See* 18 U.S.C. § 3583(k).

The Sentencing Guidelines also cover restitution and fines. USSG § 5E1.1 and § 5E1.2. Given the financial status of most of our clients, fines are rarely imposed. Congress, however, has required restitution ordered in every case where it is applicable. *See* USSG § 5E1.1(a)(1) (where there is a listing of the various statutes that require restitution). There is also a special monetary assessment of $100 per count charged in the indictment. *See* 18 U.S.C. § 3013.

Violations of probation or supervised release are handled much as violations of probation in state court. The good news is that the sentences are usually shorter. *See* 18 U.S.C. § 3583(e)(3) and USSG Chap. 7.

APPEALS

As is true in state court, following sentencing, you must consult with your client, advise him or her "about the advantages and disadvantages of taking an appeal," and make "a reasonable effort to discover the defendant's wishes." *Roe v. Flores-Ortega*, 528 U.S. 470, 478 (2000). The claim of ineffective assistance that most frequently merits an evidentiary hearing is one where the defendant says he asked for an appeal, and his lawyer failed to file it. Accordingly, even when the outcome is favorable, you need to discuss the possibility of an appeal with your client and make a note in your file regarding the discussion and your client's decision. In those cases where the client decides not to pursue an appeal, our office policy requires our lawyers to send the client a letter confirming that understanding. You should do the same.

If the client wants to appeal, you must file (or cause the clerk of the court to file) a notice of appeal in the district court within 14 days of the date the written judgment is entered. Fed. R. App. P. 4(b); Fed. R. Crim. P. 32(j). Generally, appointed trial counsel are expected to handle their clients' appeals. Within 14 days of filing the notice, you must (1) file a notice of appearance in the circuit court, and (2) order all transcripts that may be relevant. Fed. R. App. P. 10(b) & 12(b). If you think there may be no meritorious issues, but an appeal is taken nevertheless, you are obligated to order transcripts of all proceedings. *See United States v. Osorio-Cadavid*, 955 F. 2d 686 (11th Cir. 1992).

The circuit court will mail you a briefing schedule, which gives you 40 days from the date the

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the teller (regardless of his or her Guidelines score) must receive a period of incarceration. A day in jail, though, is enough to satisfy the statutory requirement, and the supervision that follows is "supervised release" rather than probation.

appellate record is filed, to serve and file the initial brief. Fed. R. App. P. 31(a). Rather than rely on the Federal Rules of Appellate Procedure, you must follow the Eleventh Circuit's own Rules as well as its Internal Operating Procedures, which modify the Federal Rules of Appellate Procedure. These Rules and the Internal Operating Procedures are published by West and are available on the Eleventh Circuit's web site, http://www.ca11.uscourts.gov/rules/index.php. The requirements for the brief are set forth in Federal Rules of Appellate Procedure 28 and 32. Initial briefs must be accompanied by an appendix, which is described in Federal Rule of Appellate Procedure 30, as modified. Service and filing requirements are set forth in Federal Rule of Appellate Procedure 31, as modified. Rule 31 requires that briefs be filed both on paper and electronically. Requirements of Answer Briefs and Reply Briefs are contained in those rules. Petitions for rehearing and rehearing en banc are controlled by Federal Rules of Appellate Procedure 35 and 40.

An appeal to the district court from a judgment of the magistrate judge court is governed by Federal Rule of Criminal Procedure 58(g), which imposes a 14-day limit for filing the notice of appeal.

The Eleventh Circuit has an exacting set of rules. If you are not familiar with them, give us a call.

RESOURCES

There are resources available to help you navigate the world of federal criminal law, and certain books are essential. You'll need a copy of the United States Sentencing Guidelines. You can order the government-issued version from the U.S. Government Printing Office either on the internet, www.bookstore.gpo.gov, or by phone (866) 512-1800; or you can download the entire 592-page manual from the webpage of the United States Sentencing Commission, www.ussc.gov. West also publishes its version of the Guidelines. The best publication we have found for doing Guideline research is a West Publication, The Sentencing Guidelines Handbook. It is a thick expensive publication. We have copies of the book in the library of each of our offices. You'll also need a copy of the United States Code and the Federal Rules of Criminal Procedure. West publishes its Federal Criminal Code and Rules each year. It is a paperback small enough to carry with you, and it is the easiest way to have access to the rules and relevant sections of the United States Code. You'll also need a copy of the Federal Rules of Appellate Procedure that includes the Eleventh Circuit Rules and Internal Operating Procedures.

If you have a question about Sentencing Guidelines, there is a hotline operated by the Sentencing Commission where you can get an answer within 24 hours. That number is (800) 788-9908.

As mentioned earlier, there is a Lexis-Nexis publication, Donald F. Samuel's Eleventh Circuit Criminal Handbook, which covers the whole waterfront with lots of citations. It is as good a way as any to quickly access relevant Eleventh Circuit case law. It, too, is a paperback that is published annually. A copy of the book is in each of our libraries.

We maintain our webpage at www.fln.fd.org. It includes a brief bank with an index to briefs we've written over the years. You'll find on the webpage, too, sample sentencing memoranda, a 400-

page, indexed compilation of case decisions primarily form the Eleventh Circuit Court of Appeals, and links to other useful websites.

The Office of Defender Services maintains a wonderfully helpful webpage at www.fd.org. They have a toll-free help line that you can call with any kind of question you might have about federal criminal law: (800) 788-9908. The United States Sentencing Commission webpage, www.ussc.gov, has a wealth of information about the Sentencing Guidelines. You can locate a federal prisoner or review Bureau of Prisons policies at www.bop.gov. The District Court for the Northern District of Florida has its website at www.flnd.uscourts.gov.The United States Courts have a web page at www.uscourts.gov.

In addition to our webpage, we distribute via email summaries of opinions from the Eleventh Circuit Court of Appeals and the United States Supreme Court within a day or so after they are issued. If you'd like to sign up for the summaries, all you need to do is call Margaret in our Tallahassee office at (850) 942-8818. Eleven months out of the year we present a monthly brown bag luncheon seminar usually consisting of a video we've recorded at one of the national conferences. Our webpage includes a listing of all the videos. Most are available through our webpage. Most importantly, our lawyers welcome any questions you might have and look forward to offering whatever assistance they can to panel members.

The docket and the pleadings from most federal courts, including the Northern District of Florida, are available over the internet through PACER (Public Access to Electronic Records). Upon registering as a member of the panel, you will have free access to PACER for your court- appointed cases.

One of the greatest mysteries is the United States Code. It covers an enormous amount of territory, and the indexing isn't what it might be. There are some hard-to-find provisions from other sources, as well. Here's a list of some of them that you might need to find:

Armed Career Criminal Act (Firearms and 3 prior convictions for drug offenses or "violent felonies")	18 U.S.C. § 924(e)
Confessions	18 U.S.C. § 3501
Detention	18 U.S.C. § 3141
Drugs	21 U.S.C. § 841
Felonies by Class & Maximum Penalty	18 U.S.C. §§ 3581, 3558
Fines	18 U.S.C. §3571
Firearms	18 U.S.C. §921
Immunity	18 U.S.C. § 6002
Jencks Act	18 U.S.C. §3500

Magistrate	28 U.S.C. § 636
Pre-trial Release (Revocation)	18 U.S.C. §3148
Removal	Fed. R. Cr. P. 5(c)
Restitution	18 U.S.C. §§ 3363-3364
Safety Valve	18 U.S.C. § 3553(f); USSG § 5C1.2; USSG § 2D1.1(b)(6)
Sentencing: Credit for Prior Sentence	18 U.S.C. § 3585
Speedy Trial	18 U.S.C. 3161
Supervised Release (includes revocation)	18 U.S.C. §3583
Violation of Probation	18 U.S.C. § 3565; Fed. R. Cr. P. 32.1

* * * *

Trial is the last blood sport, and to play it well we have to begin early,
and stay late . . .

George Higgins, *Defending Billy Ryan*

APPENDIX

REQUEST FOR DISCOVERY

Mr. Michael Simpson
Assistant United States Attorney
111 N. Adams Street, 4th Floor
Tallahassee, FL 32301

Re: United States v. ***** ******
Case No. 4:05cr49-SPM

REQUEST FOR DISCOVERY

In accordance with Local Rule 26.3 for the United States District Court for the Northern District of Florida and Rule 16, Federal Rules of Criminal Procedure, the Defendant requests that the United States government disclose and make available for inspection, copying or photographing within five (5) working days:

(1) Defendants Statements Under Fed. R. Crim. P. 16(a)(1)(A). Any written or recorded statements made by the defendant; the substance of any oral statement made by the defendant before or after the defendant's arrest in response to interrogation by a then known-to-be government agent which the government intends to offer in evidence at trial; and any recorded grand jury testimony of the defendant relating to the offenses charged.

(2) Defendant's Prior Record Under Fed. R. Crim. P. 16(a)(1)(B). The defendant's complete arrest and conviction record, as known to the government.

(3) Documents and Tangible Objects Under Fed. R. Crim. P. 16(a)(1)(C). Books, papers, documents, photographs, tangible objects, buildings or places, or copies or portions thereof, which the government intends to use as evidence- in-chief at trial, which are material to the preparation of the defendant's defense, or which were obtained from or belong to the defendant.

(4) Reports of Examinations and Tests Under Fed. R. Crim. P. 16(a)(1)(D). Results or reports of physical or mental examinations and of scientific tests or experiments, or copies thereof, which are material to the preparation of the defendant's defense or are intended for use by the

government as evidence-in- chief at trial.

(5) Expert Witnesses Under Fed. R. Crim. P. 16(a)(1)(E). A written summary of testimony the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(6) Brady Material. All information and material known to the government which may be favorable to the defendant on the issues of guilt or punishment, without regard to materiality, that is within the scope of *Brady v. Maryland*, 373 U.S. 83 (1963) and *United States v. Agurs*, 427 U.S. 97 (1976).

(7) Giglio Material. The existence and substance of any payments, promises of immunity, leniency, preferential treatment, or other inducements made to prospective witnesses, within the scope of *United States v. Giglio*, 405 U.S. 150 (1972) and *Napus v. Illinois*, 360 U.S. 264 (1959).

(8) Testifying Informant's Convictions. A record of prior convictions of any alleged informant who will testify for the government at trial.

(9) Defendant's Identification. If a lineup, show-up, photo spread or similar procedure was used in attempting to identify the defendant, the exact procedure and participants shall be described and the results, together with any pictures and photographs, shall be disclosed.

(10) Inspection of Vehicles, Vessels, or Aircraft. If any vehicle, vessel, or aircraft was allegedly utilized in the commission of any offenses charged, the government shall permit the defendant's counsel and any experts selected by the defense to inspect it, if it is in the custody of any governmental authority.

(11) Defendant's Latent Prints. If latent fingerprints, or prints of any type, have been identified by a government expert as those of the defendant, copies thereof shall be provided.

(12) The government shall advise all government agents and officers involved in the case to preserve all rough notes.

(13) The government shall advise the defendant of its intention to introduce evidence in its case-in-chief at trial, pursuant to Rule 404(b), Federal Rules of Evidence.

(14) If the defendant was an "aggrieved person" as defined in 18 U.S.C. § 2510(11), the government shall so advise the defendant and set forth the detailed circumstances thereof.

(15) The government shall anticipate the need for, and arrange for the transcription of, the grand jury testimony of all witnesses who will testify in the government's case-in-chief, if subject to Fed. R. Crim. P. 26.2 and to 18 U.S.C. § 3500. Jencks Act materials and witnesses' statements shall be provided as required by Fed. R. Crim. P. 26.2 and § 3500. However, the government, and where applicable, the defendant, is requested to make such materials and statements available to the other party sufficiently in advance so as to avoid any delays or interruptions at

trial.

The Defendant is aware of his obligations under these rules and the defendant shall provide the following within five (5) working days after the government's request:

(1) Documents and Tangible Objects Under Fed. R. Crim. P. 16(b)(1)(A). Books, papers, documents, photographs, tangible objects, or copies or portions thereof, which the defendant intends to introduce as evidence-in-chief at trial.

(2) Reports of Examinations and Tests Under Fed. R. Crim. P. 16(b)(1)(B). Results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which the defendant intends to introduce as evidence-in-chief at trial, or which were prepared by a witness whom the defendant intends to call at trial and which relate to that witness's testimony.

(3) Expert Witnesses Under Fed. R. Crim. P. 16(b)(1)(C). A written summary of testimony the defendant intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence.

Sincerely,

William R. Clark, Jr.
Assistant Federal Public Defender

PLEA COLLOQUY

PROCEEDINGS
(Call to Order of the Court.)
(Defendant present.)

THE COURT: Good morning. Please be seated.
This is United States versus ****** ******. We're here for a possible change of plea.
Mr. ******, this hearing has been set because the lawyers indicated to the clerk of court that you might wish to enter a guilty plea in the case. You don't have to do that. Whether to plead guilty or not is entirely up to you.
Before I can accept a guilty plea, I'll talk with you here in the courtroom to make sure this is really what you want to do, to make sure that you understand what you're doing and the consequences of what you're doing, and to make sure that there are facts that would support your guilty plea to these charges.
In order to do all of that, I'm going to ask you some questions. We will have you placed under oath just like every witness who testifies in federal court is placed under oath. It's very important that you answer all of my questions truthfully and completely. If it should turn out later that any of your answers were not completely truthful, you would be subject to prosecution for perjury - - a separate federal crime - - just like any witness who gives false testimony in federal court would be subject to prosecution for perjury.
If you don't understand any of my questions, please just tell me. If you would like to stop at any point and talk with Mr. Clark, please tell me that. We'll stop as many times as you'd like for as long as you'd like so that you can consult with your lawyer.
Do you understand all of that?
THE DEFENDANT: Yes, sir.
THE COURT: Please swear the witness.
DEPUTY CLERK: Please state your full name and spell your last name for the record.
THE DEFENDANT: ****** ********, *-*-*-*-*-*-*.
THE COURT: Mr. *******, tell me your age, please.
THE DEFENDANT: I'm 20.
THE COURT: And how far have you gone in school?
THE DEFENDANT: I'm a freshman at Nassau Community College.
THE COURT: At which community college?
THE DEFENDANT: Nassau Community College in Long Island.
THE COURT: Nassau Community College.
MR. CLARK: In Long Island.

THE COURT: Okay. Have you also worked?
THE DEFENDANT: Yes.
THE COURT: What kind of work have you done?
THE DEFENDANT: I've held a seasonal position at UPS.
THE COURT: Have you ever been treated for a mental or psychological problem?
THE DEFENDANT: No.
THE COURT: Have you ever had a mental or psychological problem?
THE DEFENDANT: No.
THE COURT: Have you had any alcohol or drugs in the last 24 hours?
THE DEFENDANT: No.
THE COURT: Let's talk about rights you have as a person charged with a crime in federal court. You have the right to a trial by jury. You have the right to be represented by a lawyer at every stage of the case including at the jury trial. If you are unable to afford a lawyer, you have the right to have one appointed for you. Mr. Clark has been appointed, and he will be available to you all through the case whether you plead guilty or not.
You have the right to remain silent. That right applies throughout the case, including at the jury trial. That means at the trial, you would not be required to testify or say anything at all. You could testify if you wanted to. Whether to testify or not would be entirely up to you.
At the jury trial, you would have the right to confront witnesses. That means the witnesses would come into the courtroom and testify right here in open court with you present. There would not be any secret evidence.
You would have the right to present evidence in your own defense. You would have the right to compel the attendance of witnesses. That means, if there are people you would like to have testify, they could be subpoenaed or otherwise required to come to court and testify.
And at the jury trial, the government would be required to prove your guilt beyond any reasonable doubt.
Do you understand all of those rights?
THE DEFENDANT: Yes.
THE COURT: Now, if you plead guilty, you will be giving up all of those rights, except the right to be represented by a lawyer. Do you understand?
THE DEFENDANT: Yes.
THE COURT: If you plead guilty, there's not going to be a trial of any kind. Do you understand that?
THE DEFENDANT: Yes.
THE COURT: And that's because, by pleading guilty, you admit that you are guilty so there is no need to have a trial to determine whether you're guilty or not. Do you understand?
THE DEFENDANT: Yes.
THE COURT: It may be that you have some defense to these charges. I don't know whether you do or not. But if you plead guilty, it won't matter; because, by pleading guilty, you waive - - that is, you give up - - any defense you might have had. Do you understand?
THE DEFENDANT: Yes.
THE COURT: Now, the charges against you are in three counts. In Count One you're charged with conspiracy. Specifically, conspiracy to commit what can be conveniently referred to as credit-card fraud. The charge is that there was a conspiracy between March 1, 2010, and July 22,

2010.
In Count Two you're charged with the actual offense of credit-card fraud during the same period. In Count Five you're charged with what is sometimes referred to as "aggravated identity theft," using the identity of a real person in transactions including credit-card fraud. That charge is for the time period April 15, 2010 to April l9, 2010.
Do you understand what you are charged with in those counts?
THE DEFENDANT: Yes.
THE COURT: Have you had a chance to talk with Mr. Clark about what the government would have to prove in order to establish you're guilty on those charges?
THE DEFENDANT: Yes.
THE COURT: Let's talk about the facts of the case.
First, there is a written statement of facts titled, "Factual Basis for Plea." This is a five-page document. Mr. ******, I've read a copy of this so that I could be prepared for this hearing.
Is that your signature at the end of the Factual Basis for Plea?
THE DEFENDANT: Yes.
THE COURT: Before you signed this, did you read it line-by-line and word-by word?
THE DEFENDANT: Yes.
THE COURT: When I come to court for a hearing like this one, and there is a statement of facts like this, sometimes a defendant tells me it's all true. Sometimes a defendant tells me it's not all true. That's perfectly okay. This is the government's version of the facts. That doesn't mean you have to agree with it. But I need to find out whether you agree with it or not.
Is everything this says about you true, or are these parts you disagree with?
THE DEFENDANT: There are parts that I disagree with.
THE COURT: All right. Let's do this:
Set that aside for a minute, forget the written statement of facts, and let's talk about this.
First, if I under it, you met a waitress over at Famous Dave's in Pensacola. True?
THE DEFENDANT: Yes.
THE COURT: Ms. ****-*****. And she began swiping customers' credit cards through a skimmer to capture the information of those customers. True?
THE DEFENDANT: True.
THE COURT: And did you put her up to that?
THE DEFENDANT: Yes.
THE COURT: And then you got the information out of the skimmer and used it to create credit cards in your name but that had somebody else's banking information encoded on the stripe on the card. True?
THE DEFENDANT: True.
THE COURT: And you did this together - - you got the information from Ms. ****-*******, but were also working together with Mr. ********. Yes?
THE DEFENDANT: Yes.
THE COURT: - - from stores? And that way you got some merchandise and got some money out of the deal, right?
THE DEFENDANT: Yes
THE COURT: And you paid Ms. ****-******* with some money or with gift cards for her participation?

THE DEFENDANT: Yes.
THE COURT: And then the written statement of facts, going back to that, it has some totals about the amounts of money and numbers of cards. Is that information correct, or is that part of what you disagree with?
THE DEFENDANT: That's correct.
THE COURT: All right. So, for example, on page 3, it says the actual loss, approximate actual loss to 16 victim banks - - these are the banks that the credit cards were issued on - - banks or credit unions or credit card companies came up to something over $19,000. Do you agree with that number?
THE DEFENDANT: Yes.
MR. CANOVA: Judge, for clarification purposes, that would be regarding Pensacola, Florida, the transactions, not the Wakulla, Leon. They're addressed later in the factual basis.
THE COURT: All right. Fair enough. That's the bottom of page 3. That's talking about the - - that's the cards derived from 60 Famous Dave's customers from Pensacola?
MR. CANOVA: Yes, sir. And then on page 4, in the footnote, it addresses the Wakulla and Leon credit cards.
THE COURT: But those also were derived - - I mean, all of this derives from the credit cards used at Famous Dave's in Pensacola?
MR. CANOVA: Not necessarily, Your Honor. Some of it was derived from other sources.
THE COURT: All right. So, Mr. *******, you got some credit-card information, too, not just from Ms. ****-*******?
THE DEFENDANT: Yes.
THE COURT: All right. And the statement of facts says that the additional transactions involved eight banks and 33 individuals, with actual loss of approximately $18,874.08. That's all set out in footnote three on page 4.
MR. CANOVA: Yes, sir.
THE COURT: And then, Mr. CANOVA, those numbers then come up to the total that the government asserts, I guess, as of right now?
MR. CANOVA: Yes, sir; that's correct. And then going into, on page 4, it talks about some additional identities that were recovered from Mr. ******* when he was arrested and that was identified on Mr. *******'s email.
THE COURT: All right. And there may be loss under the guidelines attributed to those, but in terms of actual loss, what the government asserts is that it was $19,579 in Pensacola and another $18,874.
MR. CANOVA: Yes, sir; that's right.
THE COURT: Adds up to something over $38,000, is that what you contend is the actual loss in the case?
MR. CANOVA: Yes.
THE COURT: And then the loss for guidelines purposes would be higher because of the $500 minimum amount per unused card, or for cards where the actual loss was less than $500. Mr. *******, you agree with those numbers?
THE DEFENDANT: Yes.
THE COURT: And I guess to make sure I know what the issues will be and won't be at sentencing, Mr. Canova, is that all the transactions? Sometimes I come to these, and the

government already knows all of the transactions and knows the amount. Sometimes there is still an investigation and you don't know the amount.
MR. CANOVA: Those are all that we have identified thus far. We don't believe there will be any more, but those are all that have been identified, and we've laid it out in here.
THE COURT: All right.
Now, there was a part of this, Mr. *******, that you told me was not true. What's not true in here?
THE DEFENDANT: As far as all of the amount of people supposedly on my email weren't used, and they weren't - - not all of those was credit-card numbers.
THE COURT: All right. So this has additional information about email - - the written statement of facts says information about people in your email, and what you're telling me is that not all of those were used, and some didn't even have - - you didn't even have credit-card information for. True? Do I have that right?
THE DEFENDANT: Some of them are credit-card numbers, but they're publicly listed. It's not like I was using those as credit cards. It's like a BIN list.
THE COURT: All right. And so that the record will be clear, I should say this:
We're going to talk about the United States Sentencing Guidelines here in just a minute. The number of people involved and the amount of money involved, those are factors that affect calculation of the guideline range. They don't affect the question of whether you're guilty of these charges or not. So those are not issues I'm going to try to resolve today. If there are disagreements about those facts, we'll address those at the sentencing hearing down the road.
Let's talk about the maximum sentence that you face on those charges.
On Count One the maximum sentence is five years in prison, a $250,000 fine, three years of supervised release, and you face a special assessment of $100.
On Count Two the maximum sentence is ten years in prison, a $250,000 fine, three years of supervised release, and a $100 special assessment.
On Count Five, the aggravated identity theft charge, the mandatory sentence is two years in prison; and it has to be consecutive to the sentence on Counts One and Two. So no matter what I give you on Counts One and Two, I have to give you an additional two years in prison on Count Five.
There is one possible exception I will talk to you about in just a minute. But unless the exception applies, the sentence on Count Five will be two years in prison, in addition to any sentence on the other counts.
You also face a fine on that count of up to $250,000, supervised release up to one year, and a $100 special assessment.
In addition to those charges, those maximum penalties I just told you about on Counts One, Two, and Five, you also could be required to forfeit property derived from the offenses and to make restitution to the victims of the offenses.
Do you understand that sentencing structure?
THE DEFENDANT: Yes.
THE COURT: Now, I told you there is a possible exception to the mandatory two-year term on Count Five. The exception is that:
If you cooperate with the government, provide assistance to the government, in the investigation or prosecution of others; and if the government decides that that assistance rises to the level of

substantial assistance in the investigation or prosecution of others, then the government can file a motion saying that you have provided substantial assistance; and, if the government does that, then I will not be required to give you the two-year sentence on Count Five. Do you understand?
THE DEFENDANT: Yes.
THE COURT: Second, if the government decides that you have provided substantial assistance, then the government doesn't necessarily have to file a substantial assistance motion. The government can decide for any reason, as long as it's constitutional, not to file a substantial assistance motion. Do you understand?
THE DEFENDANT: Yes.
THE COURT: If the government decides not to file a substantial assistance motion, you'll be stuck with that decision. There won't be anything you can do about it. Do you understand?
THE DEFENDANT: Yes.
THE COURT: And you won't be able to take back your guilty plea. Do you understand that?
THE DEFENDANT: Yes.
THE COURT: Now, if they do file a substantial assistance motion, it's up to me to decide whether to impose a lower sentence than the two-year sentence on Count Five. Do you understand that?
THE DEFENDANT: Yes.
THE COURT: If you don't like my decision about that, you can appeal to a higher court, but you can't take back your guilty plea. Do you understand?
THE DEFENDANT: Yes.
THE COURT: Now, in determining the sentence on Counts One and Two, I will be required to consider the United States Sentencing Guidelines. Have you had a chance to talk with Mr. Clark about the sentencing guidelines and what they might call for in your case?
THE DEFENDANT: Yes.
THE COURT: Mr. Clark is a very experienced lawyer. He's dealt with the United States Sentencing Guidelines many times. Even so, he doesn't necessarily know what the guidelines will call for in your case. There are at least two reasons for that.
First, Mr. Clark may not know all of the facts that go into calculating the guideline range. Second, there sometimes are disagreements about what the guidelines mean or now they should apply in a case. If there are disagreements, I will resolve them. Mr. Clark doesn't necessarily know what rulings I'll make, just like Mr. Canova, the government's lawyer, doesn't necessarily know what rulings I'll make. Do you understand?
THE DEFENDANT: Yes.
THE COURT: If you don't like the sentence, you can appeal to a higher court, but you can't take back your guilty plea. Do you understand?
THE DEFENDANT: Yes.
THE COURT: Now, I've talked with you about the guidelines. I need to tell you this, also: I'm required to consider the guidelines in determining the sentence on Counts One and Two, but I'm not required to impose a sentence within the guideline range. I can impose a lower sentence or a higher sentence, or I can impose a sentence within the range. Do you understand?
THE DEFENDANT: Yes.
THE COURT: There is a written plea agreement in the case and a supplement. In this division, anytime there is a plea agreement, there is a supplement. The supplement indicates whether or

not a defendant has agreed to cooperate with the government; and, if so, it sets out the terms of the cooperation agreement. The plea agreement addresses everything the parties have agreed to. The plea agreement itself is always public. The supplement is always sealed. That way the public docket does not indicate whether or not a defendant has agreed to cooperate with the government.
Mr. *******, is that your signature at the end of the plea agreement and at the end of the supplement?
THE DEFENDANT: Yes, sir.
THE COURT: Before you signed these, did you read them line-by-line and word-by-word?
THE DEFENDANT: Yes, sir.
THE COURT: Did you understand every word of them?
THE DEFENDANT: Yes.
THE COURT: Do you agree to every word of them?
THE DEFENDANT: Yes.
THE COURT: Do those include everything you have agreed to with the government?
THE DEFENDANT: Yes.
THE COURT: Do you have any agreement with the government at all that is not included in the plea agreement or supplement?
THE DEFENDANT: No.
THE COURT: Has anybody made any promises to you about the sentence that will be imposed in this case?
THE DEFENDANT: No.
THE COURT: Has anybody promised you that you will get a substantial assistance motion in this case?
THE DEFENDANT: No.
THE COURT: Have you ever had any discussions directly with anybody from the government - - the prosecutor, any law enforcement officer - - about the sentence that will be imposed in this case?
THE DEFENDANT: No.
THE COURT: Have you ever had any discussion with anybody from the government about pleading guilty or what will happen if you plead guilty?
THE DEFENDANT: No.
THE COURT: Anybody used any force against you?
THE DEFENDANT: No.
THE COURT: Have you had as much time as you'd like to talk about your case with Mr. Clark?
THE DEFENDANT: Yes.
THE COURT: Has he answered all of your questions?
THE DEFENDANT: Yes.
THE COURT: Are you satisfied with the way he has represented you?
THE DEFENDANT: Yes.
THE COURT: Do you have any complaints at all?
THE DEFENDANT: No.
The COURT: Mr. Clark, can you assure me that, so far as you're aware, this plea is freely and voluntarily made with full knowledge of the consequences, and that there are no agreements or

understandings with the government, other than as set out in the plea agreement and supplement?
MR. CLARK: Yes, Your Honor, I can.
THE COURT: Mr. CANOVA, can you give me the same assurance for the government?
MR. CANOVA: Yes, sir.
THE COURT: Mr. ******, knowing the rights you will be waiving and considering everything we've discussed this morning, how do you now plead to Counts One, Two and Five of this indictment?
THE DEFENDANT: Guilty.
THE COURT: Are you pleading guilty because you are, in fact, guilty of these offenses?
THE DEFENDANT: Yes.
THE COURT: I find that you are alert and intelligent and understand the nature of the charges. I find that the facts that the government is prepared to prove and you have admitted are sufficient to sustain a guilty plea.
I accept the plea and adjudicate you guilty in accordance with the plea. I order a presentence report.
Mr. ******, the probation officer is here in the courtroom today, right over here in the jury box. He is going to be preparing a presentence report. That report is the first way I get information to consider on your sentencing.
If there is information that you would like me to have, tell it to the probation officer. If there are people you'd like him to talk to, tell him who they are and how to get in touch with them so he may consider doing that. You should cooperate with him fully in this process.
You have the right to have your lawyer present when you talk to the probation officer. You don't have to do that. It's entirely up to you, but it's a right you do have.
When the report comes out, you'll have the right to read it. You should do so very carefully. If there is anything about that report that is not correct, or if anything is left out that you think should be in it, you need to let Mr. Clark know that right away. The court's rules have strict time limits within which any objections to the presentence report have to be made. So it's important for you to read that report as soon as you get it and talk about it with Mr. Clark.
If there are objections, the lawyers on the two sides and the probation officer will try to sort it out. If everybody is not able to agree, then I will resolve the dispute at the sentencing hearing. In order to get that process started, you've got to talk with Mr. Clark about the presentence report.
Sentencing is set for Wednesday, May 11, 2011, at 10:00 a.m.
What else, if anything, do we need to do in Mr. ******'s case this morning?
MR. CANOVA: Nothing by the government.
MR. CLARK: Nothing, Your Honor.
THE COURT: All right. Then we will be in recess in Mr. *******'s case.

SAMPLE PLEA AGREEMENT

UNITED STATES OF AMERICA
(Case Number)
vs.

(DEFENDANT'S NAME)
/

PLEA AGREEMENT

1. PARTIES TO AGREEMENT

This agreement is entered into by and between (DEFENDANT'S NAME), (ATTORNEY'S NAME), Attorney for (DEFENDANT'S NAME), and the United States Attorney for the Northern District of Florida. This agreement specifically excludes and does not bind any other state or federal agency, including other United States Attorneys and the Internal Revenue Service, from asserting any civil, criminal or administrative claim against (DEFENDANT'S NAME).

2. TERMS

The parties agree to the following terms:

a. (DEFENDANT'S NAME) will plead guilty to (Count One or Counts One, Two, etc. . . .) of the (Indictment or Information). (Maximum penalty, e.g., "Defendant faces a maximum term of ten years' imprisonment, a $250,000 fine, a three year term of supervised release, and a $100 special monetary assessment.")) (DEFENDANT'S NAME) agrees to pay the special monetary assessment on or before the date of sentencing. Defendant also consents and agrees to make restitution (in the amount of _____.)(in an amount to be determined by the court.)

b. Defendant is pleading guilty because (DEFENDANT'S NAME) is in fact guilty of the (charge or charges) contained in the (Indictment or Information). In pleading guilty to (this offense or the offenses), defendant acknowledges that were this case to go to trial, the government could present evidence to support (this charge or the charges) beyond a reasonable doubt.

c. Upon the District Court's adjudication of guilt of (DEFENDANT'S NAME) for (Violation(s) pled to (e.g., violations of 18 U.S.C. §922(g)), the United States Attorney, Northern District of Florida, will not file any further criminal charges against (DEFENDANT'S NAME) arising out of the same transactions or occurrences to which (DEFENDANT'S NAME) has pled.

d. The parties agree that the sentence to be imposed is left solely to the discretion of the District Court, which is required to consult the United States Sentencing Guidelines and take them into account when sentencing the defendant. The parties further understand and agree that the District Court's discretion in imposing sentence is limited only by the statutory maximum sentence and any mandatory minimum sentence prescribed by statute for the offense.

e. Nothing in this agreement shall protect the defendant in any way from prosecution for any offense committed after the date of this agreement.

f. The United States Attorney agrees not to recommend a specific sentence. However, the United States Attorney does reserve the right to advise the District Court and any other authorities of its version of the circumstances surrounding the commission of the offenses by DEFENDANT, including correcting any misstatements by defendant or defendant's attorney, and reserves the right to present evidence and make arguments pertaining to the application of the sentencing guidelines and the considerations set forth in Title 18, United States Code, Section 3553(a).
g. Defendant understands that conviction on this charge may adversely affect (his or her) immigration status and may lead to (his or her) deportation.
3. SENTENCING
a. Defendant understands that any prediction of the sentence which may be imposed is not a guarantee or binding promise. Because of the variety and complexity of issues which may arise at sentencing, the sentence is not subject to accurate prediction. The Court is not limited to consideration of the facts and events provided by the parties. Adverse rulings, or a sentence greater than anticipated shall not be grounds for withdrawal of defendant's plea.
b. The parties reserve the right to appeal any sentences imposed.

CONCLUSION

There are no other agreements between the United States Attorney, Northern District of Florida and (DEFENDANT'S NAME), and (DEFENDANT'S NAME) enters this agreement knowingly, voluntarily and upon advice of counsel.

GREGORY R. MILLER
United States Attorney

(ATTORNEY'S NAME) _____ (AUSA's NAME)

(DEFENDANT'S NAME)
Defendant

Date