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

Federal Public Defender
Northern District of Florida
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INTRODUCTION

This manual was prepared 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 you read every page. For those of you who aren't so new, the manual should be a good resource.

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

Joseph F. DeBelder
Federal Public Defender

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 is not, however, a courthouse in Panama City, and the Panama City cases are heard in either Tallahassee or Pensacola.

There are four active United States District Judges: Chief Judge Mark Walker, M. Casey Rodgers, Allen Winsor, and T. Kent Wetherell, II. Four judges have taken senior status and maintain a caseload: Lacey Collier, Robert Hinkle, C. Roger Vinson, and William Stafford. The United States Magistrate Judges are Zachary Bolitho, Hope Cannon, Martin Fitzpatrick, Michael Frank, and Midori Lowry. The United States Attorney is Jason Coody. Jessica Lyublanovits is the Clerk of the Court. Steve Pridgen is the Chief Probation Officer. The United States Marshal is R. Don Ladner, Jr.

Joseph DeBelder is the Federal Public Defender and is primarily in our Tallahassee office. The three offices within the district are at 3 West Garden Street, Suite 200,

Pensacola, FL 32502; 227 N. Bronough St., Suite 4200, Tallahassee, FL 32301; and 101 S.E. Second Place, Suite 112, Gainesville, FL 32601. Of the nine Assistant Federal Public Defenders in our trial unit, Randall Lockhart, Lauren Cobb, Ginnie Bare, and Juan Rodriguez work out of our Pensacola Office; Darren Johnson and Megan Saillant are in the Gainesville Office; Janese Caruthers, Elizabeth Vallejo, and Richie Summa are in the Tallahassee Office. The Capital Habeas Unit is in the Tallahassee Office. Linda McDermott is the CHU Chief and Katie Blair is the Assistant CHU Chief. Assistant Federal Public Defenders Sean Gunn and John Abatecola work in the Unit as do Research and Writing attorneys Abdel Reyes-Torres, Ray Denecke, Christine Yoon, Daniel Lawless, Jessica Houston, Mary Harrington, Christina Mathieson, and Lauren Rolfe.

You will find the Judges, court personnel, probation officers, marshals, court security officers, and those 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 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 directing you to the link for 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]

The current hourly rate is $164. The maximum payment is $12,800 for felonies, $9,100 for appeals, $3,600 for misdemeanors, and $2,700 for violation of probation or supervised release cases.[2] The statute allows for payment over these maximums

[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

"for extended or complex representation."18 U.S.C. § 3006A(d)(3). Any request for payment over the maximum must come with "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." *Guide to Judiciary Policies and Procedures,* Vol. VII, Chapt. 2, § 230.30(b)(1). You'll find the details at the same site in footnote 2 below.

The District Court's website has information regarding CJA payments as well as contact information for the Deputy Clerk responsible for payments. You can go to their website at https://www.flnd.uscourts.gov/criminal-justice-act.

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 $2,800.[3] As with the case maximums, though, there is a provision for exceeding the maximum. Similarly, too, the request must be approved by the Court of Appeals.

As is true of district courts around the country, our Court has its own Criminal Justice Act Plan. The current plan became effective in October of 2020. It is available on our website at: fln.fd.org. It provides for 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 CJA Panel Committee that consists of the Federal Public Defender, the CJA Panel Representative, and a lawyer from each of the four divisions within the district. The Clerk of the Court is also a non-voting member of the CJA Committee. The CJA 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 case. It will typically be one of our legal assistants calling to see if you're available to take an appointment. We choose the

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United States Courts website:
http://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-ss-230-compensation-and-expenses#a230_23

[3] Up-to-date information for expert and other services is available at:
https://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-3-ss-310-general#a310_40

panel members on a rotational basis. Absent unusual circumstances, whoever is next on the list gets called. We pass the name on to the judge, and the judge makes the appointment. ABSENT UNUSUAL CIRCUMSTANCES, IF YOU DECLINE A CASE, YOU WILL BE MOVED TO THE BOTTOM OF THE LIST.

Sometimes, 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 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. Section XII of the CJA Plan addresses compensation for Panel Members. It requires the Court to notify an attorney of any potential voucher reduction and provides the attorney with an opportunity to be heard.

PANEL TRAINING

We hold them in our Pensacola, Tallahassee, and Gainesville offices, and hope to make arrangements for Panama City, as well. Panel members can fulfill their training obligation by attending eight of the luncheons. We recommend, however, 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. Typically, we show a video we've recorded at one of the national federal public defender conferences or from the Federal Judicial Network or a webinar produced by the Training Branch of the Defender Services Office. Information about the month's training will be emailed and will also be at fln.fd.org.

There are other ways to complete the training requirement. In the months to come, other organizations will return to their pre-pandemic offerings. The Training Branch has held annual training sessions at various locations around the country. The dates and locations will be posted on the Training Branch's website, fd.org. The Federal Public Defender Offices in Florida's Middle and Southern Districts both hold annual and sometimes periodic 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 you can access through the Training Branch's

webpage. We keep most of our training videos on a website you can also access. If you call Richard Bellew in our Pensacola Office, he can provide you with the access information.

If you fulfill your training requirement other than by attending our monthly luncheons, you need to get at least eight hours of training in federal criminal defense. You will also need 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 will get a call from one of our legal assistants a few hours before the court session. We'll generally email you the available paperwork, be it an indictment, a complaint, or a 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 based on a summons.

The Pretrial Services Officer will conduct an interview of the client and prepare a report before the initial appearance. *See* 18 U.S.C. § 3154(1). Before beginning, the Pretrial Services Officer will advise the defendant he or she may have a lawyer present during the interview. The Pretrial Services Officer will also contact the attorney before the interview. If appointed and available, you should try to attend.

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 to the officer. The officer 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).

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 forms authorizing the release of various records (school, psychological, financial). The pretrial officer will complete the report and submit it to the magistrate judge before the hearing. The officer will provide copies to the Assistant U.S. Attorney and the lawyer representing the defendant. The contents of the report are confidential and generally cannot be used for any purpose other than the initial appearance. *See* 18 U.S.C. § 3153(c)(1) and (c)(3).[4] You will be able to keep your copy. *See Guide to Judiciary Policy,* Vol. 8A, Chpt. 2, § 240.20.40.

The report will include background information, but the most useful information will be the criminal history. You will find the criminal history information to be reliable. You will need it later to estimate the sentencing guideline range.

Once the initial appearance hearing begins, the magistrate judge will determine whether the defendant is indigent based on an affidavit completed by the defendant before the hearing. In the typical case, the defendant has 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 setting 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 an opportunity to learn something about the case. The hearing will also help paint a realistic picture of the circumstances for the defendant and his or her family. In the limited world of discovery afforded in federal court, note that, Rule 5.1(h) may entitle you to a 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.

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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.

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 violating probation or violating supervised release. *See* Fed. R. Crim. P. 32.1(b)(1). The value, in terms of discovering the circumstances of the violation, has to be determined on a case by case basis. The nature of the violation is usually straightforward and is described in both the violation warrant and the report from the probation officer.

DETENTION

Detention is governed by the Bail Reform Act of 1984 (18 U.S.C. § 3142). 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 the government 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 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." But roughly 50% of defendants in North Florida and nationwide, are detained and held until their case is resolved. Those who are released, however, rarely have to post a surety bond. Most are released with conditions. 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 an order listing the conditions of release and advising 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 the first way to discover 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 can expect to get an outline of the government's case. 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).[6] (Note the defense may also proceed by proffer. 18 U.S.C. § 3142(f)).

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. 18 U.S.C. § 3500; Fed. R. Crim. P. 26.2 and 46(j). Then, too, sometimes the government's presentation, 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 clerk records the proceeding, you may arrange for a court reporter to transcribe the recording.

Our office policy recommends holding a detention hearing in nearly every case. Beyond the reasons mentioned above, it avoids having to convince a client you've just met to surrender a right that is of utmost importance to him or her.

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 the defendant must be detained, the judge must enter a written order. 18 U.S.C. § 3142(i). *See also United States v. Hurtado*,

[6] 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).

779 F.2d 1467, 1480 (11th Cir. 1985).

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. 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 criminal history outlined above, and is not facing a claim from the government he represents a serious risk of flight or a serious risk to obstruct justice, he should be released without having to go through a detention hearing.

Another hurdle 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." *Hurtado*, 779 F.2d at 1479.[7]

[7] 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

Those faced with violating probation or supervised release are less likely to be released. Rule 32.1 of the Federal Rules of Criminal Procedure states those arrested for violating probation or supervised release may be released based on the standards set out in 18 U.S.C. § 3143(a), which is the statute governing release pending sentencing or appeal. That statute and Rule 32.1(a)(6), place the burden on the defendant to show he or she will neither flee nor pose a risk to the community. The statute requires 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 reviewed by the district judge. 18 U.S.C. § 3145(b). The review is de novo. *Hurtado*, 779 F.2d at 1480. That does not mean 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 to review the testimony from the detention hearing. While it is conceivable the judge might 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. Depending upon where the case is being prosecuted, those in the Panama City Division, are held in one of the facilities in either Tallahassee or Pensacola. Here, by division, are the names and addresses of the facilities:

Pensacola	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)

evidence. Unless you meet your burden of production, that will be the end of the hearing and your client will be detained.

Tallahassee	FDC Tallahassee (men only) 501 Capital Circle, N.E. Tallahassee, FL 32301 (850) 877-0930	Washington County Jail 1100 Brickyard Road Chipley, FL 32428 (850) 638-6110
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 Levy County Jail P.O. Drawer 1719 9150 N.E. 80th Ave. Bronson, FL 32621-1719

DISCOVERY

Discovery, especially for those used to practicing under the rules of the State of Florida, is notoriously limited. 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. 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 called the "Jencks Act").[8]

[8] 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):

Rule 26.2(B) of the Rules of the United States District Court for the Northern District of Florida (Local Rules) helps some. It 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 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." In practice, the time requirements are treated as largely aspirational.

Notably missing from all this is a witness list. That omission hurts. Most 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. A few 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 before trial. Some assistants disclose them almost immediately; others, though, provide them on the Friday before jury selection or even the morning

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> 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.

of trial.

The most useful information, the police reports or reports prepared by the federal agents, need not 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 report), 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, most of the Assistant United States Attorneys will provide at least some, if not all, reports to you. Here again, the time when you receive the reports will vary.

The end result of all this is that you may have to scramble to see what you can come up with. Sometimes where the prosecution was begun in state court, discovery has 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, most 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.

The local rule states "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 for example.

SPEEDY TRIAL

The federal speedy trial rule is found at 18 U.S.C. § 3161.[9] It bears little resemblance

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

to the Florida rule. The statute governs two time periods—the time from arrest to indictment and the time from the indictment to trial.[10] 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." 18 U.S.C. § 3161(c)(1). The 70-day period applies to retrials. 18 U.S.C. § 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 based on the speedy trial statute, the federal judge may dismiss it with or without prejudice. 18 U.S.C. § 3162. If the judge dismisses it without prejudice, the government may obtain a new indictment. The factors courts 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." 18 U.S.C. § 3162(a)(1). It is only in the rarest of circumstances you'll find a defendant who wins his case based on 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

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delay.

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

suffers a tolling of the speedy trial period during the delay. *See* 18 U.S.C. § 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 does not 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). If it is a motion that requires a hearing, speedy trial is tolled until the hearing takes place. 18 U.S.C. § 3161(h)(1)(D). If, at the conclusion of the hearing the judge takes the matter under advisement, speedy trial runs again once 30 days have passed. 18 U.S.C. § 3161(h)(1)(H); *United States v. Jones*, 601 F.3d 1247, 1255 (11th Cir. 2010). Even filing a motion in limine tolls 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 day of the initial appearance and any postponement for a preliminary hearing or detention hearing is excluded. *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, many misdemeanor cases arise out of the military bases or other federal lands. There are also bank robbery cases, fraud and theft cases, immigration law violations, child pornography cases, and a variety of other offenses. Most cases do not involve 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 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 differs little 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 judges expect to have the issue of guilt or innocence resolved within that time. Once appointed, you'll need to begin work on the case right away.

The defense to any particular case will vary. Lexis-Nexis publishes a book by Donald L. Samuel, *Eleventh Circuit Criminal Handbook*, which describes the nature of and various defenses to most offenses you will see.[11]

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 notification. If you are concerned about the scheduling, 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 nothing 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).

[11] 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.

Trial

Each judge enters an order that sets the trial date and addresses pretrial matters. 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 regarding the jury instructions and verdict form before the trial, and tells you what time you need to be in court.

One way the trial of a case differs from state trials is 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 says that if the court conducts 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 judges in the Northern District of Florida conduct the voir dire.[12]

The clerk will provide you with juror questionnaires the morning of jury selection, not long before jury selection begins. While you may want to ask the judge for additional time to review the questionnaires, many 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. But 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 usually 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

[12] "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).

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 before trial so the prosecutor need not prepare for one, 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 rare exceptions, those who go to trial won't receive credit for acceptance of responsibility. *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, the judge may well conclude 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).[13] 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.[14] 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. As another example, for 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 five offense levels increasing the offense level to 21, the sentencing range rises to 41-51 months.

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[13] *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").

[14] 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).

The standard jury instructions are called 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. The defense will then respond with objections and other suggested instructions. 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 decades had a policy that essentially prohibits plea negotiations as to anything that would affect a defendant's sentence or applicable minimum mandatory. In concrete terms, the United States Attorney's Office, absent problems with proof, will not agree to the dismissal of any charge that will favorably alter the sentence of a defendant. There are only rare exceptions to this rule.

Some of the harshest sentences result from the increased penalties called for by the federal drug laws where the defendant has a prior conviction for a "serious drug felony" or a "serious violent felony." *See* 21 U.S.C. §§ 841, 802(57), 802(58). If that is to happen, the government must file a timely notice of its intent to seek an enhanced 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 eliminates what can be longer mandatory minimums and greater maximum penalties.

Absent meaningful plea negotiations, defendants who enter guilty pleas do so with no certainty as to what their sentence will be. Appropriately, most 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), the Sentencing Guidelines became advisory. But 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 less than half of all cases. Of those outside the range, only about

2% are above the advisory guideline range.

Given the role of the Guidelines and the absence of plea negotiations, you should calculate the guideline range as accurately as possible. Your calculation will serve as the only meaningful estimate as to what sort of sentence your client will receive upon entering a guilty plea or proceeding to trial. 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 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 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.

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. While the form is used in the vast majority of cases, the government's policies regarding plea negotiations rarely provide any real incentive to use it. 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 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 has educational value. The defendant, however, may 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. Review the document carefully as the content can affect the Sentencing Guideline calculations.[15] As is true

[15] 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,

with the plea forms, there is the option of proceeding without a factual basis signed by the defendant.

Depending on the Judge presiding over the hearing, some Assistant United States Attorneys will expect the defendant to admit all the allegations in the factual basis. Others will only ask the defendant to concede those facts supporting the charges. Ultimately, the judge will ask the client about the facts. Defendants sometimes disagree with peripheral facts, those unnecessary to establish a factual basis, and that is usually fine. Judges, however, will reject the plea if the defendant does not admit to those facts necessary to support a conviction. More than one defendant, who wanted to forego a trial, has had his case decided by a jury because he cannot or will not admit the necessary facts.

The plea agreement and statement of facts contain important and complicated representations. Review the paperwork with the client well before the plea hearing. In a letter sent to panel members years ago, 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" hoping to obtain a lesser sentence under Section 5K1.1 of the United States Sentencing Guidelines and 18 U.S.C. § 3553(e). In fiscal year 2021, for example, there were departures below the recommended Guidelines sentence for substantial assistance in 25% of all cases. Nationwide, it is only 9.6%. There is good reason to seek such an agreement. With one exception, it is the only way the judge can impose a sentence below any mandatory minimum. The reductions in the sentence can be dramatic, with many reductions at 50% or less 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. When they enter their plea, very few defendants know whether they will ultimately receive a break on their sentence. The government typically announces its decision just a few days before sentencing.

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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 tell the judge about the disagreement amounts to an admission.

Three provisions govern substantial assistance departures. Besides 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 nearly all 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 United States Attorney's Office controls the process and that, 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 the client can do everything possible, satisfy the judge 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.[16]

SENTENCING

Presentence Investigation Report

For those defendants who enter a guilty plea 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 be there. 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. Where the defendant is seeking a reduction based on acceptance of responsibility (*see* USSG § 3E1.1), the probation officer will likely be asking the defendant about the circumstances of the offense.[17]

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[16] 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). However, absent a motion from the Government, the judge still lacks the authority to impose a sentence below any statutory mandatory minimum sentence.

[17] 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

The probation officer will also ask about current and past drug use.[18]

The report is a lengthy document that addresses your client's circumstances and personal history. Access to it is limited. *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, the defendant's criminal history, and the Sentencing Guidelines calculations.[19]

Local Rule 88.1(A) states that sentencing will "ordinarily" occur "approximately" 70 days after a guilty plea was entered 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 ECF. The rule requires any objections to be filed in writing within 14 days of the report. Fed. R. Crim. P. 32(f)(1). Most lawyers in the Northern District write the probation officer directly with any objections. The letters are filed through the electronic filing process, though may be viewed only by the Court and the parties. The rule contemplates 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 provides 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).

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defendant entered his guilty plea or to rely upon a written submission by the defendant.

[18] *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.

[19] 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).

Sentencing Guidelines

While judges may impose a sentence below or above the sentencing guideline range, 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. The United States Sentencing Commission maintains a website with a wealth of information at www.ussc.gov, including online tutorials. 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, review your client's circumstances with someone familiar with the Guidelines. It isn't realistic to think you can pick up the Guidelines Manual and confidently predict your client's sentence. There are 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.

Some aspects of the Guidelines are 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 a consideration.[20] 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 an exception in drug cases, remains the only path to a sentence below any mandatory minimum sentence.[21]

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[20] 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 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 far more latitude in imposing a "variance," so your client is much more likely to get a "variance."

[21] There is one other exception for those convicted of drug trafficking: the "Safety Valve." In the Guidelines, the safety-valve criteria is in USSG § 5C1.2. There is also the statutory drug safety-valve in 18 U.S.C. § 3553(f).

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). It also allows the judge to consider the defendant's conduct 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 guideline range and the sentence. *See, e.g., United States v. Cousineau*, 929 F.2d 64, 67-68 (2d Cir. 1991).

There are two 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 a defendant could enter a guilty plea expecting one sentence, only to find, upon receiving the presentence report, the sentence will be dramatically longer because of either provision.[22]

Armed Career Criminal Act

The Armed Career Criminal classification is outlined in § 4B1.4 of the Guidelines,

[22] It is unlikely that a defendant would be caught unawares by the Armed Criminal Act and 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).

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 who is in violation of the other circumstances in 18 U.S.C. § 922(g), needs three prior convictions of a "violent felony" or a "serious drug offense." Unlike the Career Offender classification, a predicate can 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 a "violent felony" and the use of a knife, firearm, or destructive device," also count. 18 U.S.C. § 924(e)(2)(B). 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). In *Wooden v. United States,* 142 S. Ct. 1063 (2022), the Court has clarified the definition of "occasions different from one another."

There is much litigation as to what constitutes a "serious drug offense" and a "violent felony." These are ongoing and changing issues.

A "serious drug offense" is a conviction for manufacturing, distributing, or possession with intent to manufacture or distribute a controlled substance that carries a term of imprisonment of at least 10 years. 18 U.S.C. § 924(e)(2)(A). Importantly, however, the 11th Circuit has held that the definition of "controlled substance offense" under 4B1.2(b) does NOT include inchoate offenses. *United States v. Brandon Dupree*, Case No. 19-13776 (11th Cir. Jan. 18, 2023).

The question of what amounts to a "violent felony" has been a complicated one. 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 called the elements clause. Subsection (B)(2)(ii) includes a list of enumerated offenses and a second clause courts call 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 it violated the Fifth Amendment's guarantee of due process. Because of the decision, some offenses used in the past as predicates can no longer be used.

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 contain "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, 1270 (11th Cir. 2016); *United States v. Howard*, 742 F.3d 1334, 1348-1349 (11th Cir. 2014).[23]

Sometimes an offense that includes both generic and non-generic elements or that is broad enough to include both violent force and something less, may still count. In *Taylor*, 495 U.S. at 601, the Court recognized 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, the description may 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." *McCloud*, 818 F.3d at 599.

The modified categorical approach has its limits. It may not be used if the statute 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

[23] *But see United States v. Stitt,* 139 S. Ct. 399, 407 (2018), holding that a generic burglary includes entry into "vehicles designed or adapted for overnight use."

means of committing a single element," the offense is indivisible. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016). Determining what is and what 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 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 did not have to find whether the entry was lawful, the statute was indivisible, and the modified categorical approach was inapplicable.

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 need not 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).

The question of divisibility affects whether the Florida offenses of battery on a law enforcement officer, aggravated battery on a pregnant woman, and battery in a jail or prison count as violent felonies. The underlying battery statute provides that the offense may be committed by touching or striking, but also by intentionally causing bodily harm. *See Fla. Stat.* § 784.03. "Touching," at least, does not qualify as a violent felony. *See United States v. Curtis Johnson*, 559 U.S. 133 (2010). But, as a state prosecutor can prove his or her case by proving either alternative, the statute is divisible. *See United States v. Gandy*, 917 F.3d 1333 (11th Cir. 2019). It means that if the state information charged both alternatives, the federal prosecutor can rely on *Shepard* documents to show the defendant was convicted of committing a battery by intentionally causing bodily harm. If he or she does, the offense counts as a violent felony. If he or she doesn't, it isn't. There is a debate of sorts as to whether "touches or strikes" is also divisible. *See Gandy*, 917 F.3d at 1339. It shouldn't be much of one, though. Florida's Standard Jury Instructions don't' require the jury to choose between touching and striking, so the two possibilities have to be alternative means of committing the offense, rather than alternative elements. *See.* § 8.3, *Fla. Std. Jury Instr. Crim. Cases.*

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 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. *See Stokeling v. United States,* 139 S. Ct. 544, 554 (2019) (violent physical force is force capable of causing physical pain or injury.) If it includes a lesser degree 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.

In August of 2016, the Sentencing Commission changed the 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 still has 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.

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 cases are not separate for career offender classification if the sentences "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, juvenile offenses do not. *See, e.g., United States v. Mason*, 284 F.3d 555, 558 (4th Cir. 2002).

Other Recidivism Provisions

Although they are seen less, there are other provisions for increasing the sentence based on recidivism. "Repeat and Dangerous Sex Offender Against Minors" penalizes those whose instant offense is any of several 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 six percent of all 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.[24]

[24]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, the teller

Nearly all prison sentences are followed by a period of supervision called "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 statutes that require restitution). There is also a required 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. Fortunately, the sentences are 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. 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. Where the client decides not to pursue an appeal, our office policy requires lawyers to send the client a letter confirming that understanding. You should do the same.

(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.

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. Once the Eleventh Circuit assigns a case number and issues the docketing statement, 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 must still order transcripts of all proceedings. *See United States v. Osorio-Cadavid*, 955 F. 2d 686 (11th Cir. 1992).

The Court of Appeals will mail you a briefing schedule, which gives you 40 days from the date the appellate record is filed, to serve and file the initial brief. Fed. R. App. P. 31(a). Rather than rely only on the Federal Rules of Appellate Procedure, you must also follow the Eleventh Circuit's own Rules and 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 website. The requirements for the brief are 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 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, call us.

RESOURCES

There are resources available to help you navigate the world of federal criminal law. 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. There is also a mobile-friendly web-based app available. Thomson Reuters publishes its version of the Guidelines.

The best publication we have found for doing Guideline research is a Thomson Reuters publication, *Federal Sentencing Guidelines Handbook*. It is a thick expensive publication. We have copies of the book in the library of each office. You'll also need a copy of the United States Code and the Federal Rules of Criminal Procedure. Thomson Reuters 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 access the rules and relevant sections of the United States Code.

If you have a question about the 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.

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 Eleventh Circuit case law. It, too, is a paperback published annually. A copy of the book is in each of our libraries.

We maintain our webpage at fln.fd.org. It includes 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 Defender Services Office maintains a helpful webpage at www.fd.org. They have a toll-free help line you can call with questions 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.

Most important, our lawyers welcome questions and look forward to offering whatever assistance they can.

The Sentencing Resource Counsel, which is funded by the Defender Services Office, regularly sends emails to our office addressing pertinent legal issues. We send a handful of those to Panel members. To see more of those our lawyers rely upon, send a request via email to Margaret_ Clemons@fd.org.

The docket and the pleadings from the 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 that you might need to find:

Armed Career Criminal Act (Firearms and 3 prior convictions for serious 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. §§ 3559
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

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

Re: United States v. ***** ******
Case No.

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)(B), and (C). 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. These statements should include any and all jail calls, FDC calls, or any other recorded telephone calls of Defendant. See, *United States v. Lanoue*, 71 F.3d. 966, 973-74 (1st Cir. 1996). This request also includes draft transcripts of recordings in addition to the recordings themselves. See, *United States v. Shields*, 767 F.Supp. 163 (N.D. Ill. 1991).

(2) Defendant's Prior Record Under Fed. R. Crim. P. 16(a)(1)(D). 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)(E). 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. "[E]vidence is material as long as

there is a strong indication that it will play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting impeachment or rebuttal." *United States v. Lloyd*, 992 F.2d 348, 351 (D.C.Cir.1993) (citations and internal quotations omitted). For any ESI discovery produced, a table of contents should be produced with the discovery. *See* Dep't of Justice and Admin. Office of the U.S. Courts Joint Working Grp. on Elec. Tech. in the Criminal Justice Sys., Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases (2012), Strategies and Commentary at 2.

(4) Reports of Examinations and Tests Under Fed. R. Crim. P. 16(a)(1)(F). 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. This should include results of tests which show inconclusive findings or negative results, including but not limited to fingerprint, firearm, DNA, or other tests or analysis. This response also should include the results of any mental health/psychological test of Defendant of which the government could know through due diligence.

(5) Expert Witnesses Under Fed. R. Crim. P. 16(a)(1)(G). A written summary of testimony the government intends to use under Rules 702, 703, or 705 of the Federal Rules of Evidence whether or not the expert prepared a report. The summary must describe the witness's opinions, the bases and reasons for the opinions, and the witness's qualifications.

(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). This should include "any evidence that is inconsistent with any element of any crime charged against the defendant...[and] any information that casts doubt upon the accuracy of any evidence, including but not limited to witnesses' testimony." Statement of Deputy Attorney General James M. Cole before the Senate Judiciary Committee (June 6, 2012). The information should also include all evidence and information which mitigates the offense and/or mitigates Defendant's sentence. ABA Rule 3.8(d). Regarding any witness(es) that may be called by the government, the defendant requests immediate disclosure of the following:

a. Documents clearly and completely showing the criminal record of the witness. The defendant also wishes to be informed if any witness has any pending criminal charge(s).

b. Information that a witness made any statement or failed to make any statement (e.g., failed to name the defendant as a participant), that arguably could be exculpatory toward the defendant.

c. Information that a witness has given inconsistent statements about any arguably material matter. This should include any information that indicates that a witness has given a statement that is inconsistent with the statement of any other witness.

d. Information that a witness was under the influence of drugs at the time of the events about which he/she will testify or at any time during which she discussed these events with the Government or its agents.

e. Information that a witness previously has suffered or is suffering from a mental illness that arguably could affect the witness' ability to discern or to tell the truth, or could affect the witness' perception or interpretation of the events to which the witness will testify.

f. Copies of transcripts from any prior trials or hearings or deposition where the witness has testified as a government witness, whether for state or federal governments. If no transcripts exist, a listing of the dates, case names, courts, and case numbers where the witness has testified as a government witness, whether for the state or the federal governments.

g. All witness interview notes taken by law enforcement officers and witness interview reports created by law enforcement officers.

h. Any other information that arguably would be pertinent to a witness' credibility. Any such evidence is exculpatory if it is potentially useful in impeaching a government witness. Failure to disclose, or discover, such evidence known to or in the possession of the government can result in a verdict that is not worthy of confidence.

(7) *Giglio* Material. The existence and substance of any possible benefits, 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) 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. If any witness(es) failed to identify the defendant from a lineup, the defendant should be informed of that fact pursuant to *Brady* and its progeny.

(9) 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.

(10) 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.

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

(12) 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.

(13) Pursuant to Rule 12(b)(4)(B), Federal Rules of Civil Procedure, for purposes of considering a motion to suppress pursuant to Rule 12(b)(3)(C), Defendant requests notice of the Government’s intent to use in its case in chief at trial any evidence that the Defendant may be entitled to discover under Rule 16. If a search was conducted pursuant to a search warrant, either state or federal, the defendant requests a copy of the warrant application, the warrant, and the return, (e.g., inventory).

(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 is requested to make such materials and statements available sufficiently in advance so as to avoid any delays or interruptions at trial.

(16) Government Surveillance. The government shall disclose any and all records reflecting government surveillance of the Defendant and other individuals conducted as part of or connected to this investigation. 'Government surveillance' as used in this request means any method by which law enforcement, national security or other federal, state, or local government agents obtained information regarding the Defendant. Specifically, it includes all forms of location tracking (including cell site location tracking, use of a GPS device, monitoring the location of a cellular phone or other electronic device, etc., hidden video, drones or other location monitoring tools), any use of a cell-site simulator or similar device (such as a stingray, triggerfish, WIT technology, etc.), access to telephone or email transactional records or metadata, and any access to, or storage, acquisition, collection, monitoring, targeting or use in connection with this investigation of oral, wire, electronic communications or of other information related to or concerning the Defendant. It also includes access to the contents of communications either directly by the government or via third parties (including wiretaps, FISA intercepts, any other means of obtaining communications content, installation of pen registers/trap-and-trace devices, access to signaling, dialing, routing or other telephone billing, account or transactional information or metadata, any monitoring of internet activity of any type, and any installation of software on a machine not owned by the government). Government surveillance also includes any instance where the government obtains records from a third party, such as a phone company, internet service provider, financial institution, or other party, and obtains any records of the Defendant's location, communications, or records related to him/her or this investigation. This request for 'all records' includes both the raw and refined data obtained from the electronic surveillance. It also includes any authorizing documentation (including subpoenas, court orders, warrants, etc.) and any requests for authorization or records (including certifications, directives, motions, affidavits, declarations, national security or exigency letters, etc.) seeking judicial, governmental, or other third-party

authorization or disclosure of records, whether or not such authorization or disclosure was granted.

Thank you for your consideration of these requests. If you do not believe you have to furnish a particular portion of the requested information, please let me know as soon as possible so that I can determine whether an appropriate motion is necessary. With regards to any electronic discovery production, please send it to the attention of _____ at _____ @fd.org.

Sincerely,

s/Joseph F. DeBelder

Joseph F. DeBelder
Federal Public Defender

SAMPLE 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.