Manual on Recurring Problems in Criminal Trials

Fourth Edition

Federal Judicial Center 1996

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Revised to include cases decided during the Supreme Court's 1994–1995 term and United States Court of Appeals cases reported through 67 F.3d 940

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Preface

Among the many significant contributions made to the federal judiciary by the late Judge Donald Voorhees is the *Manual on Recurring Problems in Criminal Trials*. During his tenure on the Federal Judicial Center's Board from 1979 to 1983, Judge Voorhees developed the manual to assist his fellow judges in researching important issues that arise frequently in criminal trials. Many federal judges have found the book to be an invaluable resource—a research tool that enables them quickly to locate authority on specific issues that often confront them.

Although in this edition, as in the previous one, the editors have added some material and made some changes in organization and format, the manual adheres to Judge Voorhees' original concept of simplicity and ease of use. As his "Caveat" (written to accompany the third edition) emphasizes, the book is not meant to be a comprehensive treatise on criminal law, but rather a basic guide to the law governing many of the procedural matters that arise frequently in criminal trials. Consequently, the manual should not be cited as authority in opinions or other materials, nor should the case summaries, which have been updated through mid-October 1995, be considered substitutes for the judicial opinions they reference.

We at the Center take pride in continuing the work begun by Judge Voorhees with the publication of the fourth edition of his manual.

Rya W. Zobel
Director, Federal Judicial Center
1996

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Caveat

These materials were originally prepared for distribution at the seminars for newly appointed district judges at the Federal Judicial Center. They do not purport to be an exhaustive briefing of the subjects that they touch. Rather, they are a collection of decisions on many of the procedural problems that plague trial judges. It goes without saying that a rule laid down in one circuit is not necessarily the rule in all, or any, of the other circuits. The headnotes of the cited cases should, however, lead through the West System to the decided cases upon the same topic from the other circuits. I am hopeful that this outline may be of assistance in suggesting appropriate responses to the recurring problems that confront trial judges.

I wish to give much credit to my secretary, Mary Anne Anderson, who has so ably assisted me in preparing and assembling all of the materials which make up this manual.

Donald S. Voorhees
March 1988

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Part I. Representation of Defendant

A. Pro Se Representation

A defendant in a criminal prosecution has the right to counsel. If the defendant cannot afford to employ counsel, counsel must be appointed by the court. The defendant has the absolute right, however, to waive the right to counsel and proceed pro se.

Faretta v. California, 422 U.S. 806 (1975)

1. Duty of court to determine that waiver of counsel is made knowingly and voluntarily

In order to proceed pro se, the defendant must knowingly and intelligently waive his or her right to counsel.

Faretta v. California, 422 U.S. 806 (1975)
Adams v. Carroll, 875 F.2d 1441 (9th Cir. 1989)
United States v. Campbell, 874 F.2d 838 (1st Cir. 1989)
United States v. Salerno, 61 F.3d 214 (3d Cir. 1995)

The court must interrogate the defendant to be sure that he or she understands the disadvantages of self-representation; the nature of the charge; the range of penalties; that the defendant will be proceeding alone in a complex area where experience and professional training are greatly to be desired; that an attorney might be aware of possible defenses to the charge; and that the judge believes it would be in the best interests of the defendant to be represented by an attorney.

Von Moltke v. Gillies, 332 U.S. 708 (1948)
Faretta v. California, 422 U.S. 806 (1975)
United States v. Chaney, 662 F.2d 1148 (5th Cir. 1981)
United States v. Harris, 683 F.2d 322 (9th Cir. 1982)
But see United States v. Kimmel, 672 F.2d 720 (9th Cir. 1982)

United States v. Welty, 674 F.2d 185 (3d Cir. 1982)
United States v. Edwards, 716 F.2d 822 (11th Cir. 1983)

The court should not delegate this inquiry to the prosecutor.
United States v. Moya-Gomez, 860 F.2d 706 (7th Cir. 1988)

Several circuits have taken the position that no specific inquiries or special hearings must be conducted to determine whether the defendant has knowingly and intelligently waived the right to counsel.
United States v. Tompkins, 623 F.2d 824 (2d Cir. 1980)
United States v. Kimmel, 672 F.2d 720 (9th Cir. 1982)
United States v. Campbell, 874 F.2d 838 (1st Cir. 1989)
United States v. Bell, 901 F.2d 574 (7th Cir. 1990) (court must make sufficient inquiry to satisfy itself that the defendant in fact understands the dangers involved in self-representation)

It is not necessary that the court issue any particular warning or make specific findings of fact before it finds that a defendant has made a knowing and intelligent waiver of the right to counsel and permits the defendant to proceed pro se. However, such on-the-record findings are recommended.
United States v. Campbell, 874 F.2d 838 (1st Cir. 1989)

In the absence of a *Faretta* colloquy, neither waiver nor waiver by conduct can be found, although an alleged death threat issued by the defendant might be egregious enough to warrant forfeiture of right to counsel.
United States v. Goldberg, 67 F.3d 1092 (3d Cir. 1995)

A defendant's assertion of the right to self-representation must be unequivocal. A defendant who vacillates between assertion of the right to proceed pro se and assertion of the right to counsel may be presumed to be requesting the assistance of counsel.
Adams v. Carroll, 875 F.2d 1441 (9th Cir. 1989)

A defendant will not normally be deemed to have waived the right to counsel by reluctantly agreeing to proceed pro se under circumstances where it may appear there is no choice.
United States v. Salerno, 61 F.3d 214 (3d Cir. 1995)

A defendant who is abusive to his or her counsel may waive right to counsel.
United States v. McLeod, 53 F.3d 322 (11th Cir. 1995)

A defendant who invokes the right to proceed pro se only as an alternative to the appointment of a particular defense attorney as his or her counsel is considered to have made an unequivocal request to proceed pro se, and must be allowed to do so.

Adams v. Carroll, 875 F.2d 1441 (9th Cir. 1989)
See Bench Comment, 1982, No. 4 (FJC): "Instructing defendant prior to an effective waiver of right to counsel"

If the defendant is to be shackled, *Faretta* requires that the trial judge inform the defendant of the effect shackling would have on his ability to represent himself.

Abdullah v. Groose, 44 F.3d 692 (8th Cir. 1995)
See also Davidson v. Riley, 44 F.3d 1118 (2d Cir. 1995)

The court should warn an incarcerated defendant who wishes to proceed pro se that he or she will have limited access to legal materials.

United States v. Pina, 844 F.2d 1 (1st Cir. 1988)

A determination that a defendant lacks expertise or professional capabilities does not justify denying him or her the right of self-representation.

Peters v. Gunn, 33 F.2d 1190 (9th Cir. 1994)
Williams v. Bartlett, 44 F.3d 95 (2d Cir. 1994)
United States v. McKinley, 58 F.3d 1475 (10th Cir. 1995)

The court must determine that the defendant is mentally competent to make the decision to appear pro se. The competency standard for waiving counsel is the same as the standard for standing trial.

Godinez v. Moran, 113 S. Ct. 2680 (1993)
Branscomb v. Norris, 47 F.3d 258 (8th Cir. 1995)
United States v. Cash, 47 F.3d 1083 (11th Cir. 1995)

2. Right of defendant to appear pro se after commencement of trial

Once a trial has begun, the right of the defendant to discharge his or her counsel and to appear pro se is sharply curtailed.

Sapienza v. Vincent, 534 F.2d 1007 (2d Cir. 1976)
Chapman v. United States, 553 F.2d 886 (5th Cir. 1977)

A motion to proceed pro se is timely if made prior to the impaneling of a jury unless the motion is shown to be a delaying tactic.

Chapman v. United States, 553 F.2d 886 (5th Cir. 1977)
Fritz v. Spalding, 682 F.2d 782 (9th Cir. 1982)

3. Appointment of standby counsel

The appointment of standby counsel to represent the defendant does not violate the defendant's Sixth Amendment right to proceed pro se even if the appointment is made over the defendant's objection.

McKaskle v. Wiggins, 465 U.S. 168 (1984)

Standby counsel cannot be allowed to take over the defendant's case. The Sixth Amendment requires that a pro se defendant be allowed to control the organization and content of his or her defense. The defendant is to use the advice of standby counsel as he or she sees fit.

McKaskle v. Wiggins, 465 U.S. 168 (1984)
United States v. Campbell, 874 F.2d 838 (1st Cir. 1989)

There is, however, no absolute bar on standby counsel's unsolicited participation in the presentation of a pro se defendant's case before the jury. Standby counsel may properly assist the pro se defendant before the jury in completing tasks the defendant clearly wishes to complete, such as introducing evidence and objecting to testimony. Standby counsel may also help ensure the defendant's compliance with the basic rules of courtroom protocol and procedure. However, standby counsel's participation may not be so intrusive as to destroy the jury's perception that the defendant is representing himself or herself.

McKaskle v. Wiggins, 465 U.S. 168 (1984)

Standby counsel is also permitted to participate in the presentation of a pro se defendant's case outside the presence of a jury. However, the pro se defendant must be allowed to address the judge freely on his or her own behalf, and disputes between counsel and the pro se defendant must be resolved in the defendant's favor in matters that are normally left to the discretion of counsel.

McKaskle v. Wiggins, 465 U.S. 168 (1984)

A defendant's right of self-representation was violated by his exclusion from thirty bench conferences even though his standby counsel participated in the conferences.

United States v. McDermott, 64 F.3d 1448 (10th Cir. 1995)

Standby counsel should be appointed to assist the defendant and to replace the defendant if the court should determine during trial that the defendant can no longer be permitted to proceed pro se.

Mayberry v. Pennsylvania, 400 U.S. 455 (1971)
United States v. Dujanovic, 486 F.2d 182 (9th Cir. 1973)
United States v. Maya-Gomez, 860 F.2d 706 (7th Cir. 1988)

Standby counsel's job is to assist the defendant in procedural matters the defendant is unfamiliar with and to facilitate a speedy and efficient trial by avoiding the delay often associated with pro se representation.

McKaskle v. Wiggins, 465 U.S. 168 (1984)
United States v. Norris, 780 F.2d 1207 (5th Cir. 1986)
United States v. Campbell, 874 F.2d 838 (1st Cir. 1989)

The defendant does not have an absolute right to standby counsel of his or her choice.

United States v. Campbell, 874 F.2d 838 (1st Cir. 1989)

4. Nonlawyer as assisting counsel

A pro se defendant does not have the right to have a nonlawyer act as his or her assisting counsel.

United States v. Kelley, 539 F.2d 1199 (9th Cir. 1976)

5. Hybrid representation

A defendant may appear pro se or by counsel but has no right to appear partly by himself or herself and partly by counsel.

United States v. Shea, 508 F.2d 82 (5th Cir. 1975)
United States v. Hill, 526 F.2d 1019 (10th Cir. 1975)
United States v. Cyphers, 556 F.2d 630 (2d Cir. 1977)
United States v. Campbell, 61 F.3d 976 (1st Cir. 1995)
United States v. Olano, 62 F.3d 1180 (9th Cir. 1995)

6. Role of court unchanged when accused appears pro se

When the accused proceeds pro se, the court's role is not altered and no new obligations are imposed on the trial judge.

United States v. Trapnell, 512 F.2d 10 (9th Cir. 1975)

A litigant who proceeds pro se does so with no greater rights than a litigant represented by a lawyer, and the trial court is under no obligation to become an advocate for or to assist and guide a pro se defendant.

United States v. Pinkey, 548 F.2d 305 (10th Cir. 1977)
Birl v. Estelle, 660 F.2d 592 (5th Cir. 1981)
United States v. Merrill, 746 F.2d 458 (9th Cir. 1984)

7. Control over pro se defendant

If a pro se defendant persists in refusing to obey the court's directions or in injecting extraneous and irrelevant matter into the record, the court may direct standby counsel to take over the representation of the defendant.

United States v. Dougherty, 473 F.2d 1113 (D.C. Cir. 1972)
United States v. Dujanovic, 486 F.2d 182 (9th Cir. 1973)
United States v. Anderson, 577 F.2d 258 (5th Cir. 1978)

8. When one of several defendants acts pro se

When one codefendant elects to proceed pro se, the court must take steps prior to trial to ensure that his or her actions do not prejudice the remaining codefendants.

United States v. Sacco, 563 F.2d 552 (2d Cir. 1977)

9. Constructive waiver

When a defendant repeatedly fails to secure counsel of his or her choice through dilatory conduct, the court may deny an additional continuance for the purpose of securing counsel even if it results in the defendant's being unrepresented at trial.

United States v. Kelm, 827 F.2d 1319 (9th Cir. 1987)
United States v. Gallop, 838 F.2d 105 (4th Cir. 1988)

Proof of dilatory tactics must appear in the record.

United States v. Wadsworth, 830 F.2d 1500 (9th Cir. 1987)

Before proceeding with a criminal prosecution against an unrepresented defendant who has not expressly waived counsel, the court must inquire on the record into the defendant's financial ability to retain counsel and must inform the defendant of his or her right to court-appointed counsel.

United States v. Wadsworth, 830 F.2d 1500 (9th Cir. 1987)

A defendant's persistent and unreasonable demand for dismissal of successive appointed counsel may be treated as the functional equivalent of a knowing and voluntary waiver of counsel.

United States v. Fazzini, 871 F.2d 635 (7th Cir. 1989)

A defendant who is abusive to his or her counsel may waive right to counsel.

United States v. McLeod, 53 F.3d 322 (11th Cir. 1995)

B. Counsel Substitution

A trial court has discretion to refuse to allow last-minute substitution of counsel if permitting substitution would disrupt the court's trial schedule.

United States v. Michelson, 559 F.2d 567 (9th Cir. 1977)
United States v. Solina, 733 F.2d 1208 (7th Cir. 1984)
Neal v. Texas, 870 F.2d 312 (5th Cir. 1989)
United States v. Corporan-Cuevas, 35 F.3d 953 (4th Cir. 1994)
But see United States v. Mullen, 32 F.3d 891 (4th Cir. 1994)(substitution permitted when blame for delay lies with the government); *United States v. D'Amore*, 56 F.3d 1202 (9th Cir. 1995) (court must weigh defendant's Sixth

Amendment interest against any delay or inconvenience caused by request for substitution, even when request is made at the last minute)

For substitution of counsel to be warranted during trial, a defendant must show good cause, such as conflict of interest, complete breakdown of communications, or irreconcilable conflict that could lead to an apparently unjust verdict.

McKee v. Harris, 649 F.2d 927 (2d Cir. 1981)
Wilson v. Mintzes, 761 F.2d 275 (6th Cir. 1985)
United States v. Pierce, 60 F.3d 886 (1st Cir. 1995)

Consideration of a mid-trial motion to substitute counsel requires a balancing of the accused's right to a reasonable opportunity to obtain counsel of his or her choice with the public's interest in the prompt and efficient administration of justice.

Wilson v. Mintzes, 761 F.2d 275 (6th Cir. 1985)

When a defendant makes a request to substitute counsel or to appear pro se on the eve of trial, the court must inquire into the reasons for the defendant's dissatisfaction with his or her attorney before ruling on the request.

Thomas v. Wainwright, 767 F.2d 738 (11th Cir. 1985)
McMahon v. Fulcomer, 821 F.2d 934 (3d Cir. 1987)
Sanchez v. Mondragon, 858 F.2d 1462 (10th Cir. 1988)
United States v. Mullen, 32 F.3d 891 (4th Cir. 1994)
United States v. Pierce, 60 F.3d 886 (1st Cir. 1995)

A defendant does not have the absolute right to counsel of his or her own choosing. The primary aim of the Sixth Amendment is to guarantee an effective advocate for each criminal defendant, rather than to ensure that each defendant will be represented by the lawyer he or she prefers. Substitution of counsel is thus a matter committed to the discretion of the trial court.

Wheat v. United States, 486 U.S. 153 (1988)
Nerisen v. Solem, 715 F.2d 415 (8th Cir. 1983)
Richardson v. Lucas, 741 F.2d 753 (5th Cir. 1984)
Carey v. Minnesota, 767 F.2d 440 (8th Cir. 1985)
United States v. Arrington, 867 F.2d 122 (2d Cir. 1989)
United States v. Morsley, 64 F.3d 907 (4th Cir. 1995)

To determine that a defendant voluntarily chose self-representation, the court must find that he or she does not have good cause warranting a substitution of counsel.

Sanchez v. Mondragon, 858 F.2d 1462 (10th Cir. 1988)

If counsel takes a position antagonistic to the defendant at the hearing on substitution of counsel, the court must appoint independent counsel to represent the defendant at that hearing.

United States v. Wadsworth, 830 F.2d 1500 (9th Cir. 1987)

If the court determines that substitution of counsel is not warranted, the court may insist that the defendant choose between continuing representation by his or her existing counsel and appearing pro se.

United States v. Welty, 674 F.2d 185 (3d Cir. 1982)
United States v. Padilla, 819 F.2d 952 (10th Cir. 1987)
United States v. Gallop, 838 F.2d 105 (4th Cir. 1988)
Meyer v. Sargent, 854 F.2d 1110 (8th Cir. 1988)

Part II. Jury

A. Waiver of Right to Jury Trial and Twelve-Person Jury

1. Waiver of right to jury trial

The defendant may waive his or her right to a jury trial. Federal Rule of Criminal Procedure 23(a) provides that the waiver must be in writing and approved by the court with the consent of the government.

A written waiver alone is not sufficient, however. The court must interrogate the defendant on the record to make sure that the waiver is voluntarily and knowingly made. The court should question the defendant to make sure that the defendant knows (1) the difference between a jury trial and a non-jury trial; (2) that he or she is entitled to participate in the selection of the jury; (3) that the verdict of the jury must be unanimous; and (4) that if the defendant waives a jury, the court alone will determine the question of guilt or innocence.

The trial judge should accept a waiver of the right to trial by jury only after determining that there was an intelligent and competent waiver by the accused. The duty of the trial court is not to permit the jury to be discharged as a mere matter of rote. The trial court should directly question the defendant to determine the validity of any proffered waiver of jury trial.

United States v. David, 511 F.2d 355 (D.C. Cir. 1975)

United States v. Anderson, 704 F.2d 117 (3d Cir. 1983) (colloquy with defendant preferred but not required)

United States v. Martin, 704 F.2d 267 (6th Cir. 1983)

United States v. Garrett, 727 F.2d 1003 (11th Cir. 1984)

United States v. Rodriguez, 888 F.2d 519 (7th Cir. 1989) (omission of full menu of advice is not an independent basis for reversal)

United States v. Robinson, 8 F.3d 418 (7th Cir. 1993) (absence of written waiver is not dispositive)

United States v. Robertson, 45 F.3d 1423 (10th Cir. 1995) (strict compliance with Rule 23(a) is not required, but defendant should be informed on the record)

The Ninth Circuit has held that a presumption of validity attends a jury trial waiver executed pursuant to Rule 23(a).

United States v. Cochran, 770 F.2d 850 (9th Cir. 1985)

But see United States v. Ferreira-Alameda, 815 F.2d 1251 (9th Cir. 1986) (defendant's knowing, voluntary, and intelligent consent is a precondition to an effective waiver and is distinct from the requirement of a written waiver)

The presumption of validity disappears where there is reason to question the defendant's mental or emotional soundness, and the court may not accept a written waiver of jury trial without conducting an in-depth colloquy with the defendant.

United States v. Christensen, 18 F.3d 822 (9th Cir. 1994)

2. Waiver of right to have twelve persons on jury

Federal Rule of Criminal Procedure 23(b) provides that at any time before verdict the parties may stipulate in writing, with the approval of the court, that the jury shall consist of any number fewer than twelve, or that a valid verdict may be returned by a jury of fewer than twelve should the court find it necessary to excuse one or more jurors for just cause after the trial commences. Even without such a stipulation, the rule provides that the court has the discretion to excuse a juror for just cause after the jury has retired to consider its verdict, and to allow the remaining eleven jurors to deliver a verdict.

The rule's requirement of a written stipulation has been deemed procedural and courts have found oral stipulations valid where the defendant gave knowing and intelligent consent in open court.

United States v. Lane, 479 F.2d 1134 (6th Cir. 1973)

United States v. Ricks, 475 F.2d 1326 (D.C. Cir. 1973)

Some courts have held that oral consent of defense counsel, in open court with the defendant present, is sufficient under Rule 23(b) to waive the right to a twelve-member jury.

United States v. Roby, 592 F.2d 406 (8th Cir. 1979)

Williams v. United States, 332 F.2d 36 (7th Cir. 1964)

United States v. Spiegel, 604 F.2d 961 (5th Cir. 1979) (defense counsel consented orally at side bar conference and signed written agreement)

United States v. Fisher, 912 F.3d 728 (4th Cir. 1990) (defendant gave knowing and intelligent consent in chambers and agreement was announced in presence of defendant and counsel in open court)

But see United States v. Reyes, 603 F.2d 69 (9th Cir. 1979) (defense counsel's oral consent in open court insufficient)

In the absence of a stipulation by the defendant, the trial judge has a duty under Rule 23(b) to find, on the record, just cause making it necessary to excuse an absent juror.

United States v. Patterson, 26 F.3d 1127 (D.C. Cir. 1994)

United States v. Reese, 33 F.3d 166 (2d Cir. 1994)

See Bench Comment, 1991, No. 2 (FJC): "What constitutes 'just cause' to dismiss a juror in a criminal trial after deliberations have begun"

3. Defendant may not waive right to unanimous verdict

A defendant in a criminal prosecution may not waive the right to a unanimous verdict.

United States v. Gipson, 553 F.2d 453 (5th Cir. 1977)

United States v. Scalzitti, 578 F.2d 507 (3d Cir. 1978)

United States v. Pachay, 711 F.2d 488 (2d Cir. 1983)

United States v. Ullah, 976 F.2d 509 (9th Cir. 1992)

See Bench Comment, 1984, No. 1 (FJC): "Defendants may not waive requirement of unanimous verdicts in federal criminal trials"

Contra Sanchez v. United States, 782 F.2d 928 (11th Cir. 1986) (If jury has had reasonable time to deliberate and has advised court that it could not reach decision, defendant may waive right to unanimous verdict. Waiver must have been initiated by defendant. Court must carefully explain to defendant defendant's right to a unanimous verdict and the consequences of a waiver of a unanimous verdict.)

B. *Batson v. Kentucky*—Potential Striking by Court of Peremptory Challenge by Prosecution

Batson v. Kentucky, 476 U.S. 79 (1986), authorizes the court to strike the prosecution's peremptory challenge of a potential juror of the same cognizable racial group as the defendant. *Batson* does not mandate the striking of the challenge; it only authorizes the striking of the challenge.

A criminal defendant is also prohibited from exercising peremptory challenges based on purposeful racial discrimination.

Georgia v. McCollum, 505 U.S. 42 (1992)

Peremptory challenges based on gender are prohibited.
J.E.B. v. Alabama ex rel. T.B., 114 S. Ct. 1419 (1994)

Challenges that may result in a disparate impact on women do not raise a *Batson* claim.
United States v. Davis, 40 F.3d 1069 (10th Cir. 1994)

1. Criteria for prima facie case

A prima facie case of discrimination in jury selection is established where the defendant is a member of a cognizable racial group, the prosecutor uses peremptory challenges to remove members of that group from the jury, and "these facts and other relevant circumstances raise an inference" that the prosecutor excluded jurors on account of their race.
Batson v. Kentucky, 476 U.S. 79 (1986)

The defendant must raise the issue in a timely fashion.
Government of Virgin Islands v. Forte, 806 F.2d 73 (3d Cir. 1986)
United States v. Erwin, 793 F.2d 656 (5th Cir. 1986)
United States v. Dobynes, 905 F.2d 1192 (8th Cir. 1990)

An objection made after the jury had been sworn has been held timely.
United States v. Thompson, 827 F.2d 1254 (9th Cir. 1987)
Reynolds v. City of Little Rock, 893 F.2d 1004 (8th Cir. 1990)

a. Cognizable group

American Indians are a cognizable racial group for *Batson* purposes.
United States v. Chalan, 812 F.2d 1302, 1314 (10th Cir. 1987)

Batson may apply to ethnic, as well as racial, groups.
United States v. Bucci, 839 F.2d 825 (1st Cir. 1988)

Black males are not a cognizable group.
United States v. Dennis, 804 F.2d 1208 (11th Cir. 1986)

Young adults are not a cognizable group.
United States v. Cresta, 825 F.2d 538 (1st Cir. 1987)

Teachers are not a cognizable group.
United States v. Johnson, 4 F.3d 904 (10th Cir. 1993)

The Third Circuit has held that in cases involving white defendants, *Batson* prohibits a prosecutor from using peremptory challenges to strike whites from the jury panel on account of their race.
Government of Virgin Islands v. Forte, 865 F.2d 59 (3d Cir. 1989)

b. Defendant's race

The Supreme Court rejected a white defendant's claim that a prosecutor's use of peremptory challenges to strike all black venire members from the jury violated the Sixth Amendment.

Holland v. Illinois, 493 U.S. 474 (1990)

But under the Equal Protection Clause, a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and the excluded jurors share the same race.

Powers v. Ohio, 499 U.S. 400 (1991)

c. Circumstances raising inference of discrimination

Mere exclusion of a juror of the defendant's race, without more, does not raise an inference of purposeful discrimination necessary to establish a prima facie case.

United States v. Porter, 831 F.2d 760 (8th Cir. 1987)
United States v. Dennis, 804 F.2d 1208 (11th Cir. 1986)
United States v. Bergodere, 40 F.3d 512 (1st Cir. 1994)

The number of black jurors peremptorily struck is not dispositive of the issue whether a prima facie case has been established. If a black juror is struck and the defense raises a *Batson* challenge, the court must consider whether there are other factors in the case that support an inference of discriminatory purpose in striking the juror.

United States v. Horsley, 864 F.2d 1543 (11th Cir. 1989)

Use of a peremptory challenge to strike the last remaining juror of a defendant's race is sufficient to raise an inference of exclusion based on race.

United States v. Chalan, 812 F.2d 1302 (10th Cir. 1987)

The presence of minority members on the jury may undercut an inference of impermissible discrimination.

United States v. Young-Bey 893 F.2d 178 (8th Cir. 1990)

However, a prima facie case may be made even where one or more blacks serve on the jury.

United States v. Battle, 836 F.2d 1084 (8th Cir. 1987)
United States v. Clemons, 843 F.2d 741 (3d Cir. 1988)

The Sixth Circuit has held that even the prosecution's use of all its peremptory challenges against blacks does not necessarily give rise to an inference of intentional discrimination. Whether the inference will be drawn depends on such factors as whether the final jury has a significantly lower percentage of minority members than the jury pool,

whether the prosecution used all of its peremptory challenges, and whether the defense displayed a pattern of strikes against non-minority members.

United States v. Sangineto-Miranda, 859 F.2d 1501 (6th Cir. 1988)

The Eleventh Circuit has held that removal of three of four black venire members established a prima facie case of race discrimination.

United States v. Stewart, 65 F.3d 918 (11th Cir. 1995)

The Ninth Circuit has ruled that striking five out of nine black venire members is sufficient to make a prima facie case. Exercising 56% of all peremptory strikes against blacks, who comprised 30% of the venire, also supports an inference of discrimination.

Turner v. Marshall, 63 F.3d 807 (9th Cir. 1995)

See also United States v. Grisham, 63 F.3d 1074 (11th Cir. 1995)

The Third Circuit has rejected a government proposal for a per se rule that no prima facie case exists unless a certain number or percentage of challenged jurors are black.

United States v. Clemons, 843 F.2d 741 (3d Cir. 1988)

The Third Circuit has held that the combination of a defendant's race, exclusion of at least one black potential juror, and the circumstances of the crime (white victim/black defendant) are sufficient to establish a prima facie case.

Simmons v. Beyer, 44 F.3d 1160 (3d Cir. 1995)

The Eighth Circuit has held that a history of systematic exclusion of blacks from juries in a particular district is a relevant factor in determining whether a defendant has made out a *Batson* claim.

United States v. Hughes, 864 F.2d 78 (8th Cir. 1988)

See Bench Comment, 1988, No. 3 (FJC): "Determining a prima facie case under *Batson v. Kentucky*"

2. Procedure after prima facie case of discrimination has been made

Once the defendant has made out a prima facie case of discrimination, the burden shifts to the prosecution to present a neutral explanation for its challenges.

Batson v. Kentucky, 476 U.S. 79 (1986)

The favored method for evaluating a *Batson* challenge is to determine whether the defendant has shown a prima facie violation when the issue is first raised. If the court finds a prima facie case of discrimination, it should require the government to articulate reasons for exercising its

peremptory challenges to remove members of the defendant's racial group. The court should then determine if the reasons presented are facially neutral. If so, the court should provide the defendant with the opportunity to establish pretext and then issue a specific ruling on each juror in question supported by its findings of fact and its rationale for the ruling.

United States v. Joe, 928 F.2d 99 (4th Cir. 1991)

Several circuits require the court to hold an adversary hearing to consider the prosecutor's reasons and permit rebuttal by the defendant.

United States v. Blake, 819 F.2d 71 (4th Cir. 1987)
United States v. Gordon, 817 F.2d 1538 (11th Cir. 1987)
United States v. Wilson, 816 F.2d 421 (8th Cir. 1987)
United States v. Alcantar, 897 F.2d 436 (9th Cir. 1990)

The Fifth, Sixth, and Seventh Circuits do not require such a hearing.

United States v. Davis, 809 F.2d 1194 (6th Cir. 1987)
United States v. Clemons, 941 F.2d 321 (5th Cir. 1991) (trial judge must have discretion to fashion a procedure to meet the particular circumstances presented)
United States v. Baltrunas, 957 F.2d 491 (7th Cir. 1992) (an adversarial hearing may be the most appropriate approach in most cases, but the trial judge has discretion to determine best procedure)

If disclosure of the prosecution's reasons would reveal strategy, an ex parte hearing or in camera submission may be permissible.

United States v. Thompson, 827 F.2d 1254 (9th Cir. 1987)
United States v. Tindle, 860 F.2d 125 (4th Cir. 1988)

However, such procedures should be used only if there are compelling reasons.

United States v. Tucker, 836 F.2d 334 (7th Cir. 1988)
United States v. Tindle, 860 F.2d 125 (4th Cir. 1988)

See Bench Comment, 1988, No. 4 (FJC): "Procedure under *Batson v. Kentucky* when prima facie case of discrimination demonstrated"

3. Permissible and impermissible reasons

A neutral explanation means an explanation based on something other than the race of the juror. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.

Purkett v. Elem, 115 S. Ct. 1769 (1995)
Hernandez v. New York, 500 U.S. 352 (1991)
United States v. Brooks, 2 F.3d 838 (8th Cir. 1993)

United States v. Sneed, 34 F.3d 1570 (10th Cir. 1994)
United States v. Perez, 35 F.3d 632 (1st Cir. 1994)
United States v. Lampkins, 47 F.3d 175 (7th Cir. 1995) (gender-neutral explanation)
United States v. Johnson, 54 F.3d 1150 (4th Cir. 1995)
United States v. Annigoni, 57 F.3d 739 (9th Cir. 1995)
United States v. Tolliver, 61 F.3d 1189 (5th Cir. 1995)

Justification of a juror strike does not require an explanation that is persuasive, or even plausible. Persuasiveness of the justification becomes relevant only at the third step of the *Batson* process when the opponent of the strike must prove purposeful discrimination.

Purkett v. Elem, 115 S. Ct. 1769 (1995)

To meet the burden of production at the second step of *Batson* analysis, the prosecution need only state a reason that is facially race-neutral, even if it bears no relation whatsoever to the case to be tried or to the person's ability to serve as a juror. The reason may be implausible or fantastic, even silly or superstitious, and yet still be legitimate, although it cannot be mere denial of racial motive or mere affirmation of good faith.

Elem v. Purkett, 64 F.3d 1195 (8th Cir. 1995)

To rebut a prima facie case of discrimination, the government must provide reasons that apply to the challenged jurors but not to the unchallenged ones

United States v. Lorenzo, 995 F.2d 1448 (9th Cir. 1993)
Hollingsworth v. Burton, 30 F.3d 109 (11th Cir. 1994)
United States v. Sowa, 34 F.3d 447 (7th Cir. 1994)
Devose v. Norris, 53 F.3d 201 (8th Cir. 1995)
But see United States v. Kunzman, 54 F.3d 1522 (10th Cir. 1995)

Excluding even one juror for a racial reason is prohibited by *Batson*.

United States v. Battle, 836 F.2d 1084 (8th Cir. 1987)
United States v. Gordon, 817 F.2d 1538 (11th Cir. 1987)
United States v. Bishop, 959 F.2d 820 (9th Cir. 1992)

Mere denial of discriminatory motive or affirmation of good faith is insufficient.

Batson v. Kentucky, 476 U.S. 79, 97–98 (1986)
United States v. Wilson, 884 F.2d 1121 (8th Cir. 1989)
United States v. Horsley, 864 F.2d 1543 (11th Cir. 1989)
United States v. Canoy, 38 F.2d 893 (7th Cir. 1994)

While reasons tangentially related to race may be acceptable, the assumption that black jurors would be sympathetic to black defense coun-

sel, or unsympathetic to white victim, is not an acceptable reason for excluding black jurors.

United States v. Brown, 817 F.2d 674 (10th Cir. 1987)
Johnson v. Love, 40 F.3d 658 (3d Cir. 1994)

The assumption that black jurors, but not white jurors, would be pressured by friends of the defendant to be sympathetic to the defendant is also not an acceptable reason for excluding black jurors.

United States v. Wilson, 884 F.2d 1121 (8th Cir. 1989)

A policy of striking all who speak a given language, without regard to the particular circumstances of the trial or the individual responses of the jurors, may be found to be a pretext for racial discrimination.

Hernandez v. New York, 500 U.S. 352 (1991)

C. Jury-Related Problems

1. Challenges for cause

If a prospective juror imparts information on voir dire that indicates an inability to be impartial or to be free from fear, that individual should be excused for cause. If this is not done, a party may have to exercise a peremptory challenge, which should not have to be exercised.

United States v. Nell, 526 F.2d 1223 (5th Cir. 1976)
United States v. Taylor, 554 F.2d 200 (5th Cir. 1977)
United States v. Daly, 716 F.2d 1499 (9th Cir. 1983)

The excusing of a prospective juror for cause must be based on a trial court's finding of actual or implied bias.

Government of Virgin Islands v. Felix, 569 F.2d 1274 (3d Cir. 1978)

The better practice is for the trial court to permit counsel to present their challenges for cause in writing or, if oral, outside the hearing of the prospective jurors. The prospective jurors should not be able to overhear the challenges for cause.

2. Peremptory challenges

Counsel may, in the court's discretion, be required to exercise their peremptory challenges simultaneously rather than alternately.

Pointer v. United States, 151 U.S. 396 (1894)
Carbo v. United States, 314 F.2d 718 (9th Cir. 1963)
United States v. Sarris, 632 F.2d 1341 (5th Cir. 1980)
United States v. Roe, 670 F.2d 956 (11th Cir. 1982)

When there are multiple defendants, the court may in its discretion award additional challenges to the defendants.

United States v. Harris, 542 F.2d 1283 (7th Cir. 1976)

The award of additional peremptories to the defendants is permissible, not mandatory.

United States v. McClendon, 782 F.2d 785 (9th Cir. 1986)

3. Separation of jury

It is within the discretion of the trial court to permit deliberating jurors to separate overnight.

United States v. Arciniega, 574 F.2d 931 (7th Cir. 1978)
United States v. Carter, 602 F.2d 799 (7th Cir. 1979)
Powell v. Spalding, 679 F.2d 163 (9th Cir. 1982)

It is essential to a fair trial—civil or criminal—that a jury be cautioned as to permissible conduct and conversations outside the jury room. Such an admonition is particularly needed before jurors separate at night, when they will converse with friends and relatives. It is fundamental that the jurors be cautioned from the beginning of a trial and generally throughout to keep their considerations confidential and to avoid wrongful and often subtle suggestions offered by outsiders.

United States v. Williams, 635 F.2d 744 (8th Cir. 1980)

If the court permits jurors to separate overnight, it should interrogate jurors the next day to be sure that each has abided by the court's instructions to refrain from talking to anyone about the case and from reading or hearing anything about the case.

United States v. Piancone, 506 F.2d 748 (3d Cir. 1974)

The decision to sequester a jury is within the trial court's discretion.

United States v. Haldeman, 559 F.2d 31, 85 nn. 135–36 (D.C. Cir. 1976) (even over defense objection)

The trial court may sequester the jury during trial if some event occurs that causes the court to want to avoid the risk that the jury might become exposed to some prejudicial influence if not sequestered.

United States v. Robinson, 503 F.2d 208 (7th Cir. 1974)

Sequestration is, however, the most burdensome of tools for ensuring a fair trial. It should be ordered only if no other means is available or effective.

Mastrian v. McManus, 554 F.2d 813 (8th Cir. 1977)

4. Simultaneous use of two juries

When certain testimony is admissible against one codefendant but not against the other, the two codefendants may be tried simultaneously before two different juries. Only the jury trying the codefendant against whom the testimony is admissible will hear that testimony.

United States v. Hayes, 676 F.2d 1359 (11th Cir. 1982)
United States v. Hanigan, 681 F.2d 1127 (9th Cir. 1982)
United States v. Lewis, 716 F.2d 16 (D.C. Cir. 1983)
Smith v. De Robertis, 758 F.2d 1151 (7th Cir. 1985)

If multiple juries are used, the trial judge should carefully explain to them their functions and instruct them particularly not to talk about the case to anyone in the other jury.

United States v. Hayes, 676 F.2d 1359 (11th Cir. 1982)

5. Anonymous jury

The court may withhold jurors' names and addresses and other personal information if necessary to protect the jurors' safety and to guard against jury tampering.

United States v. Scarfo, 850 F.2d 1015 (3d Cir. 1988)
United States v. Crockett, 979 F.2d 1204 (7th Cir. 1992)
United States v. Ross, 33 F.3d 1507 (11th Cir. 1994)
United States v. Wong, 40 F.3d 1347 (2d Cir. 1994)
United States v. Edmond, 52 F.3d 1080 (D.C. Cir. 1995)

6. Release of juror names and addresses

A capital defendant is entitled to receive a list of the venire members and their addresses at least three days before trial commences unless the court finds by a preponderance of the evidence that providing the list "may jeopardize the life or safety of any person."

18 U.S.C. § 3432

Once the jury has been chosen, the news media are entitled to names and addresses of jurors, alternates, and venire members, but not to other information on the venire list.

In re Baltimore Sun Co., 841 F.2d 74 (4th Cir. 1988)
United States v. Antar, 38 F.3d 1348 (3d Cir. 1994) (court must articulate specific findings in the record as to compelling reasons for sealing jury voir dire transcript)

7. Appointment of foreperson by court

Although it is not reversible error for the court to designate the foreperson of the jury, it is not a recommended practice.

Juries are understandably sensitive to any perceived cue from the bench, and the judge's selection of a foreperson arguably clothes that foreperson with unwarranted authority.

United States v. Burton, 737 F.2d 439 (5th Cir. 1984)

8. Replacement of juror with alternate

The decision to replace a juror with an alternate juror is committed to the discretion of the trial court.

United States v. Dominguez, 615 F.2d 1093 (5th Cir. 1980)
United States v. Simpson, 992 F.2d 1224 (D.C. Cir. 1993)

A sitting juror may be replaced with an alternate for reasonable cause.

United States v. Moten, 564 F.2d 620 (2d Cir. 1977)
United States v. Dischner, 974 F.2d 1502 (9th Cir. 1992)
United States v. Warren, 973 F.2d 1304 (6th Cir. 1992)

The trial court may replace a juror whenever it is convinced that a juror's ability to perform his or her duty is impaired.

United States v. Smith, 550 F.2d 277 (5th Cir. 1977) (juror napping throughout trial)

A juror may be replaced because of illness, illness of a member of the juror's family, or family difficulties aggravated by jury service.

United States v. Brown, 571 F.2d 980 (6th Cir. 1978)

A juror may be replaced if he or she is intoxicated.

United States v. Jones, 534 F.2d 1344 (9th Cir. 1976)

9. Substitution of alternate after deliberations have begun

Rule 23(b) of the Federal Rules of Criminal Procedure allows an eleven-juror verdict without the parties' stipulation if the court finds that it is necessary to excuse a juror for just cause after the jury has begun deliberations and that a valid verdict may be returned by the remaining eleven jurors.

Rule 23(b) is the preferred method of proceeding in circumstances in which a juror must be excused after deliberations have begun.

United States v. Gambino, 788 F.2d 938 (3d Cir. 1986)
United States v. Scopo, 861 F.2d 339 (2d Cir. 1988)
United States v. Acker, 52 F.3d 509 (4th Cir. 1995)
United States v. Chorney, 63 F.3d 78 (1st Cir. 1995)

Proceeding with a jury of eleven over defendant's objection is an unusual step and the equities must be sufficiently compelling to support that decision.

United States v. Araujo, 62 F.3d 930 (7th Cir. 1995)
See Bench Comment, 1991, No. 2 (FJC): "What constitutes 'just cause' to dismiss a juror in a criminal trial after deliberations have begun."

Rule 24(c) of the Federal Rules of Criminal Procedure provides that "[a]n alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict."

Although the presence of alternate jurors during jury deliberations violates Rule 24(c), it is not inherently prejudicial.

United States v. Olano, 113 S. Ct. 1770 (1993)

Failure to discharge an alternate when the jury retires is a violation of Rule 24(c). A mistrial or reversal is required if there is a reasonable possibility that the alternate in any manner affected the verdict.

United States v. Watson, 669 F.2d 1374 (11th Cir. 1982)
Johnson v. Duckworth, 650 F.2d 122 (7th Cir. 1981)

Some courts have held that, with the express, knowing, and intelligent consent of the defendant, a disabled deliberating juror may be replaced by an alternate. The jurors must be instructed to commence their deliberations anew.

United States v. Baccari, 489 F.2d 274 (10th Cir. 1973)
United States v. Evans, 635 F.2d 1124 (4th Cir. 1980)
United States v. Kaminski, 692 F.2d 505 (8th Cir. 1982)
United States v. Huntress, 956 F.2d 1309 (5th Cir. 1992)
United States v. McFarland, 34 F.3d 1508 (9th Cir. 1994)
But see United States v. Khoury, 62 F.3d 1138 (9th Cir. 1995)

The Second Circuit has ruled that there are circumstances in which an alternate may be substituted for a regular juror after the jury has commenced its deliberations.

United States v. Hillard, 701 F.2d 1052 (2d Cir. 1983)
But see United States v. Stratton, 779 F.2d 820 (2d Cir. 1985) ("Compared to the risks accepted in *Hillard*, the decision here to accept an eleven-juror verdict was the more prudent course.")

The D.C. Circuit has held that, if the record evidence discloses any possibility that a juror's request to be excused after deliberations have begun stems from the juror's view that the government's evidence is insufficient, the court must deny the request. Moreover, the court may not dismiss the juror under Federal Rule of Criminal Procedure 23(b) and proceed with eleven jurors. The court may not inquire closely into the juror's

motivations in such a case because such inquiry may compromise the secrecy of the deliberations.

United States v. Brown, 823 F.2d 591 (D.C. Cir. 1987)

A juror may not be removed from a deliberating jury in order to avoid a hung jury.

United States v. Hernandez, 862 F.2d 17 (2d Cir. 1988)

10. Temporary disability of deliberating juror

If during deliberations a juror should become temporarily incapacitated, it is permissible to suspend the deliberations for a short time in order to permit the possible recovery of the juror.

United States v. Hall, 536 F.2d 313 (10th Cir. 1976)

Clemmons v. Sowders, 34 F.3d 352 (6th Cir. 1994) (permissible to postpone sentencing phase for a few weeks)

The Ninth Circuit has held that it is permissible to recess a trial for eleven days, after the presentation of evidence has concluded but before the commencement of closing arguments, because of the illness of one juror.

United States v. Diggs, 649 F.2d 731 (9th Cir. 1981)

11. Communications between trial court and jury

Federal Rule of Criminal Procedure 43(a) guarantees a defendant the right to be present "at every stage of the trial including . . . the return of the verdict." Compliance with this rule requires that the trial court respond to an inquiry from the jury only in open court, after revealing its contents to counsel and giving counsel an opportunity to be heard on the matter.

Shields v. United States, 273 U.S. 583 (1927)

Rogers v. United States, 422 U.S. 35 (1975)

United States v. Diggs, 522 F.2d 1310 (D.C. Cir. 1975)

United States v. Taylor, 562 F.2d 1345 (2d Cir. 1977)

United States v. Rapp, 871 F.2d 957 (11th Cir. 1989)

It is error for the trial court to communicate with the jury outside of the presence of the defendant.

Shields v. United States, 273 U.S. 583 (1927)

Rogers v. United States, 422 U.S. 35 (1975)

United States v. Nelson, 570 F.2d 258 (8th Cir. 1978)

United States v. Flaherty, 668 F.2d 566 (1st Cir. 1981) (actual communications are subject to the harmless error rule)

United States v. Smith, 31 F.3d 469 (7th Cir. 1994)

But see United States v. Bertoli, 40 F.3d 1384 (3d Cir. 1994) (defendant did not object to in camera ex parte interviews)

It is error for the trial court to confer with the foreperson of a jury outside of the presence of counsel and the defendant. In *United States v. United States Gypsum Co.*, the foreperson requested, and was accorded, a conference with the trial court in order to describe all of the difficulties that he was having with the deliberating jurors and to seek further guidance from the court.

> Any *ex parte* meeting or communication between the judge and the foreman of a deliberating jury is pregnant with possibilities for error. . . . First, it is difficult to contain, much less to anticipate, the direction the conversation will take at such a meeting. Unexpected questions or comments can generate unintended and misleading impressions of the judge's subjective personal views which have no place in his instruction to the jury—all the more so when counsel are not present to challenge the statements. Second, any occasion which leads to communications with the whole jury panel through one juror inevitably risks innocent misstatements of the law and misinterpretations despite the undisputed good faith of the participants.
>
> 438 U.S. 422, 460 (1978)

Only the trial judge should respond to a jury inquiry. A magistrate judge may not respond to a jury inquiry.

United States v. De La Torre, 605 F.2d 154 (5th Cir. 1979)

The court clerk may not respond to a jury inquiry.

United States v. Patterson, 644 F.2d 890 (1st Cir. 1981)

The court should immediately notify counsel of any communication it receives from any juror.

United States v. Taylor, 562 F.2d 1345 (2d Cir. 1977)
United States v. Rapp, 871 F.2d 957 (11th Cir. 1989)
United States v. Maraj, 947 F.2d 520 (1st Cir. 1991)
United States v. Scisum, 32 F.3d 1479 (10th Cir. 1994)

The trial court enjoys broad discretion in responding to jury questions generally and especially in deciding whether to provide requested testimony either in written form or as read by the court reporter.

United States v. Boyd, 54 F.3d 868 (D.C. Cir. 1995)

A communication from the jury should be answered in open court, in the presence of counsel and the defendant, after counsel has been informed of its substance and given an opportunity to respond.

Rogers v. United States, 422 U.S. 35 (1975)

The court should not answer questions from the jury informally in the form of a colloquy between the court and the foreperson but rather should respond in a formal way so that the defendant has adequate op-

portunity to evaluate the propriety of the proposed response or supplemental instruction and to formulate objections or suggest a different response.

United States v. Artus, 591 F.2d 526 (9th Cir. 1979)
United States v. Ronder, 639 F.2d 931 (2d Cir. 1981)

A trial court's ex parte questioning of a juror about impartiality does not violate the defendant's right of due process or confrontation because the defendant failed to object despite knowledge that the conference was occurring.

United States v. Olano, 62 F.3d 1180 (9th Cir. 1995)

In responding to a jury's request for clarification on a charge, the court's duty is simply to respond to the jury's apparent source of confusion fairly and accurately without creating prejudice, and the particular words chosen are left to the court's discretion.

United States v. Smith, 62 F.3d 641 (4th Cir. 1995)

Juror questions about the meaning of terms should be settled by the court after consulting with counsel.

United States v. Kupau, 781 F.2d 740 (9th Cir. 1986)

In its response to an inquiry, the trial court must be sure that it is not in effect making a finding of fact, since the jury may not enlist the court as a partner in the fact-finding process.

United States v. Walker, 575 F.2d 209 (9th Cir. 1978)

When a jury makes explicit its difficulties with the court's instructions, the court is obligated to clear away those difficulties "with concrete accuracy." It should not simply repeat its earlier instructions.

Bollenbach v. United States, 326 U.S. 607 (1946)
United States v. Walker, 557 F.2d 741 (10th Cir. 1977)
United States v. McCall, 592 F.2d 1066 (9th Cir. 1979)
United States v. Combs, 33 F.3d 667 (6th Cir. 1994)

If the court gives an additional instruction, it should remind the jury of the prior instructions and advise the jury to consider the instructions as a whole.

United States v. L'Hoste, 609 F.2d 796 (5th Cir. 1980)

Written instructions should not be sent to the jury without notice to counsel and an opportunity to object.

Fillipon v. Albion Vein Slate Co., 250 U.S. 76 (1919)

12. Juror misconduct or bias

The scope of an investigation into juror misconduct is within the court's discretion.

United States v. Fryar, 867 F.2d 850 (5th Cir. 1989)
United States v. Copeland, 51 F.3d 611 (6th Cir. 1995)

The court should, if possible, conceal the identity of the party that instigated the inquiry.

United States v. Doe, 513 F.2d 709 (1st Cir. 1975)

When faced with a claim of juror misconduct, the court must conduct an investigation to ascertain whether the alleged misconduct actually occurred. The court must then determine whether the alleged misconduct has so prejudiced the defendant that he or she cannot receive a fair trial.

United States v. Mirkin, 649 F.2d 78 (1st Cir. 1981)
United States v. Bagnariol, 665 F.2d 877 (9th Cir. 1981)
United States v. Estrada, 45 F.3d 1215 (8th Cir. 1995)

The hearing may be held in camera, but it must be in the presence of counsel and the defendant.

United States v. Powell, 512 F.2d 766 (8th Cir. 1975)

In conducting the hearing, the trial court must be careful not to magnify the possible wrong.

United States v. Powell, 512 F.2d 766 (8th Cir. 1975)
United States v. Chiantese, 546 F.2d 135 (5th Cir. 1977)

The purpose of the hearing is to determine if even one juror is unduly biased or prejudiced so as to deny the defendant the right to an impartial panel.

United States v. Hendrix, 549 F.2d 1225 (9th Cir. 1977)

Counsel may not withhold knowledge of misconduct until after the jury starts deliberating and then have a motion for mistrial sustained.

United States v. Widgery, 636 F.2d 200 (8th Cir. 1980)

13. Outside contact with jurors

In *Remmer v. United States,* 347 U.S. 227 (1954), the Supreme Court ruled that any private, off-the-record contact with a juror raises a presumption of prejudice to the defendant. The *Remmer* Court stated that the government bears the heavy burden of proving that any such contact was harmless to the defendant. However, in *Smith v. Phillips,* 455 U.S. 209 (1982), after referring to *Remmer's* presumptive-prejudice standard, the Supreme Court stated that the remedy for "allegations of juror par-

tiality is a hearing in which the defendant has the opportunity to prove actual bias." *Id.* at 215. *See also Rushen v. Spain*, 464 U.S. 114 (1983).

The Sixth and Ninth Circuits have held that under *Phillips* the defendant has the burden of showing that prejudice has resulted from unauthorized juror contact.

United States v. Zelinka, 862 F.2d 92 (6th Cir. 1988)

United States v. Madrid, 842 F.2d 1090 (9th Cir. 1988)

See also Neron v. Tierney, 841 F.2d 1197 (1st Cir. 1988) ("Neron was given the essential 'opportunity to prove actual bias' at an evidentiary hearing.") and

United States v. Boylan, 898 F.2d 230 (1st Cir. 1990) ("*Remmer* standard should be limited to cases of significant ex parte contacts with sitting jurors.")

But see United States v. Littlefield, 752 F.2d 1429 (9th Cir. 1985) ("Recent decisions from a number of circuits, and the Supreme Court's reliance in *Phillips* on *Remmer*, point clearly to the continued vitality of the rule that the government must bear the burden of proof in showing that jury partiality was harmless.")

Other circuits continue to hold that the government has the burden of showing that the defendant was not prejudiced by any improper juror contact.

United States v. Phillips, 664 F.2d 971 (5th Cir. 1981), *overruled on other grounds by United States v. Huntress*, 956 F.2d 1309 (5th Cir. 1992)

United States v. Hillard, 701 F.2d 1052 (2d Cir. 1983)

Owen v. Duckworth, 727 F.2d 643 (7th Cir. 1984)

United States v. Delaney, 732 F.2d 639 (8th Cir. 1984)

United States v. Caporale, 806 F.2d 1487 (11th Cir. 1986)

United States v. Butler, 822 F.2d 1191 (D.C. Cir. 1987)

Stockton v. Virginia, 852 F.2d 740 (4th Cir. 1988)

United States v. Scisum, 32 F.3d 1479 (10th Cir. 1994)

If the trial court becomes aware that someone has made improper contact with a juror, the court should hold a *Remmer* hearing, with all interested parties permitted to participate, to determine the circumstances, the impact thereof on the juror, and whether the contact was prejudicial.

Winters v. United States, 582 F.2d 1152 (7th Cir. 1978)

United States v. Gigax, 605 F.2d 507 (10th Cir. 1979)

United States v. Myers, 626 F.2d 365 (4th Cir. 1980)

United States v. Butler, 822 F.2d 1191 (D.C. Cir. 1987)

United States v. Ianiello, 866 F.2d 540 (2d Cir. 1989)

At the hearing, the court should determine whether the juror has discussed the incident with other jurors.

United States v. Butler, 822 F.2d 1191 (D.C. Cir. 1987)

United States v. Zelinka, 862 F.2d 92 (6th Cir. 1988)

United States v. Angiulo, 897 F.2d 1169 (1st Cir. 1990)

The court should confer with counsel with respect to the procedure to be followed and the possible replacement of the juror. The court has the discretion to interrogate or not to interrogate all of the other jurors to ascertain whether any one of them has been tainted by the improper contact.

United States v. Brown, 571 F.2d 980 (6th Cir. 1978)
United States v. Adams, 799 F.2d 665 (11th Cir. 1986)
United States v. Butler, 822 F.2d 1191 (D.C. Cir. 1987)

Exposure of the jury during deliberations to transcripts that include portions of videotaped testimony deemed inadmissible at trial requires holding of *Remmer* hearing to allow defendant to inquire into jurors' states of mind.

United States v. Walker, 1 F.3d 423 (6th Cir. 1993)

If a juror engages in conversation with a witness during a recess, the preferable procedure is to substitute an alternate for that juror.

United States v. Bohr, 581 F.2d 1294 (8th Cir. 1978)

It is reversible error to have a deputy marshal and an FBI agent play a tape for the jury in the jury room after deliberations have begun. Jury proceedings must be free from the danger of improper influence by an interested party.

United States v. Freeman, 634 F.2d 1267 (10th Cir. 1980)
Contra United States v. Kupau, 781 F.2d 740 (9th Cir. 1986); *Lee v. Marshall*, 42 F.3d 1296 (9th Cir. 1994)

14. Jurors seeing defendant in handcuffs

If jurors inadvertently see the defendant in handcuffs, the court should give an instruction to the jury that no inferences are to be drawn from the fact that the defendant is in handcuffs.

Dupont v. Hall, 555 F.2d 15 (1st Cir. 1977)
United States v. Halliburton, 870 F.2d 557 (9th Cir. 1989)
But see United States v. Rutledge, 40 F.3d 879 (7th Cir. 1994) (no instruction required where defendant refused it)

It must be assumed that jurors would understand and follow a proper instruction that handcuffing of a person in custody for transportation to and from the courtroom is a reasonable precaution that in no way reflects on the presumption of innocence.

Wright v. Texas, 533 F.2d 185 (5th Cir. 1976)

If the court requires a defendant to wear physical restraints in the presence of the jury, the judge must impose no greater restraints than neces-

sary and must take steps to minimize prejudice resulting from the presence of restraints.

Hameed v. Mann, 57 F.3d 217 (2d Cir. 1995)

As a matter of due process, shackling at the penalty phase of a capital trial is forbidden unless it serves an essential state interest and no lesser alternative will suffice.

Duckett v. Godinez, 67 F.3d 734 (9th Cir. 1995)

See infra 74–75.

15. Note taking by jurors

It is within the court's discretion to provide notebooks and pencils to jurors and to permit note taking.

United States v. Riebold, 557 F.2d 697 (10th Cir. 1977)
United States v. Anthony, 565 F.2d 533 (8th Cir. 1977)

If note taking is permitted, jurors should be instructed that their notes are only aids to memory and should not be given precedence over their own independent recollection of the facts, and that they must not allow their note taking to distract their attention from the proceedings.

United States v. Maclean, 578 F.2d 64 (3d Cir. 1978)
United States v. Oppon, 863 F.2d 141 (1st Cir. 1988)
United States v. Wild, 47 F.3d 669 (4th Cir. 1995)

A court may permit jurors to take notes for their personal use during trial, but forbid their use during deliberations.

Clemmons v. Sowders, 34 F.3d 352 (6th Cir. 1994)

16. Jury questioning of witnesses

Questioning of witnesses by jurors in open court is disapproved. If questioning by jurors is to be permitted, the questions should be submitted in writing. If the court finds the questions to be proper, the court may pose the questions in their original form or it may restate them.

United States v. Polowichak, 783 F.2d 410 (4th Cir. 1986)
United States v. Cassiere, 4 F.3d 1006 (1st Cir. 1993)
United States v. Stierwalt, 16 F.3d 282 (8th Cir. 1994)
United States v. Bush, 47 F.3d 511 (2d Cir. 1995)

Courts may not exercise their discretion to allow questioning of witnesses by jurors without regard to balancing of potential benefits and disadvantages of juror questioning. The disfavored practice should be allowed only in "extraordinary or compelling circumstances."

United States v. Ajmal, 67 F.3d 12 (2d Cir. 1995)

17. Rereading testimony

In general, the rereading of testimony is disfavored because of the emphasis it places on specific testimony.

United States v. Nolan, 700 F.2d 479 (9th Cir. 1983)
United States v. Binder, 769 F.2d 595 (9th Cir. 1985) (videotaped testimony)

When a jury requests the reading of certain testimony, it is error to deny that request without consulting counsel.

United States v. Birges, 723 F.2d 666 (9th Cir. 1984)
United States v. Holmes, 863 F.2d 4 (2d Cir. 1988)

The court should take into consideration the reasonableness of the request and the difficulty of complying with it.

United States v. Almonte, 594 F.2d 261 (1st Cir. 1979)

The court did not abuse its discretion in denying the jury's request to read back a portion of the transcripts, where two defendants might have benefited and three might have been harmed.

United States v. Delgado, 56 F.3d 1357 (11th Cir. 1995)

The court may have the court reporter read to the jurors portions of the testimony of a witness. Any such request must be disclosed to counsel and their comments solicited before any testimony is read.

Government of Canal Zone v. Scott, 502 F.2d 566 (5th Cir. 1974)
United States v. King, 552 F.2d 833 (9th Cir. 1976)
United States v. Pimental, 645 F.2d 85 (1st Cir. 1981)
United States v. Zarintash, 736 F.2d 66 (3d Cir. 1984)

Notation that counsel was notified that testimony would be read back to jury did not constitute waiver of defendant's right to be present during readback.

Turner v. Marshall, 63 F.3d 807 (9th Cir. 1995)

A judge's absence from the courtroom during readback of testimony is not prejudicial or in error.

United States v. Grant, 52 F.3d 448 (2d Cir. 1995)

But a judge's absence and unavailability during readback, which was granted by the judge's law clerk, coupled with the judge's failure to rule on whether a victim's direct examination should have been read back to the jury, violated due process.

Riley v. Deeds, 56 F.3d 1117 (9th Cir. 1995)

There are circumstances under which it is not an abuse of discretion to allow a jury to review a transcript during deliberation.

United States v. Lujan, 936 F.2d 406 (9th Cir. 1991)

If the jury is allowed to review a transcript, the court must take adequate precautions to ensure the jury does not unduly emphasize that testimony.

United States v. Hernandez, 27 F.3d 1403 (9th Cir. 1994)

It is within the trial court's discretion to allow tapes of recorded conversations to be replayed at the request of a deliberating jury. Transcripts of the tapes may be used as listening aids.

United States v. Koska, 443 F.2d 1167 (2d Cir. 1971)

United States v. Turner, 528 F.2d 143 (9th Cir. 1975)

United States v. Williams, 548 F.2d 228 (8th Cir. 1977)

United States v. Dorn, 561 F.2d 1252 (7th Cir. 1977), *overruled on other grounds by United States v. Read,* 658 F.2d 1236 (7th Cir. 1981)

United States v. Zepeda-Santana, 569 F.2d 1386 (5th Cir. 1978)

United States v. Scaife, 749 F.2d 338 (6th Cir. 1984) (provided tapes have been admitted as exhibits)

The defendant, his or her counsel, and the judge must be present when tapes are replayed.

United States v. Brown, 832 F.2d 128 (9th Cir. 1987)

When the trial court makes the discretionary decision to have a portion of a witness's testimony reread to the jury, the court should state on the record, before the rereading, exactly what portion of the testimony is to be reread.

United States v. Keskey, 863 F.2d 474 (7th Cir. 1988)

The trial court has discretion to permit the replaying of videotaped testimony. Videotaped testimony is unique, however. It serves as the functional equivalent of a live witness, and for that reason may be given undue emphasis by the jury if replayed. When replaying is allowed, the videotape must be played in its entirety, in open court, and with counsel present.

United States v. Sacco, 869 F.2d 499 (9th Cir. 1989)

Exposure of the jury during deliberations to transcripts that include portions of videotaped testimony deemed inadmissible at trial requires holding of a *Remmer* hearing to allow the defendant to inquire into the jurors' states of mind.

United States v. Walker, 1 F.3d 423 (6th Cir. 1993)

See infra at 90.

See Bench Comment, 1991, No. 1 (FJC): "Jury requests to have transcripts of testimony read back or furnished"

18. Sending exhibits and other items to jury room

It is within the discretion of the trial court to allow exhibits that have been admitted into evidence to be sent to the jury room.

United States v. Humphrey, 696 F.2d 72 (8th Cir. 1982)
United States v. Gleason, 726 F.2d 385 (8th Cir. 1984)
United States v. Foster, 815 F.2d 1200 (8th Cir. 1987)

The trial court may in its discretion send all or part of the admitted exhibits to the jury room before or after the jurors have begun their deliberations.

United States v. De Hernandez, 745 F.2d 1305 (10th Cir. 1984)

A defendant is entitled to a new trial when extrinsic evidence is introduced into the jury room, unless there is no reasonable possibility that the jury's verdict was influenced by material that improperly came before it.

United States v. Ruggiero, 56 F.3d 647 (9th Cir. 1995)

In its discretion the court may permit properly authenticated transcripts of recorded conversations or witnesses' testimony to be taken to the jury room.

United States v. Koska, 443 F.2d 1167 (2d Cir. 1971)
United States v. Rengifo, 789 F.2d 975 (1st Cir. 1986)
United States v. Ulerio, 859 F.2d 1144 (2d Cir. 1988) (English translations of conversations recorded in Spanish)
United States v. Bertoli, 40 F.3d 1384 (3d Cir. 1994)

The court may permit drugs admitted as evidence in trial to be sent to the jury room.

United States v. de la Cruz-Paulino, 61 F.3d 986 (1st Cir. 1995)

It is error to send a dictionary to the jury room at the request of the jurors without consulting counsel. Questions or disputes as to the meaning of terms are to be settled by the court rather than by jurors' reference to a dictionary.

United States v. Kupau, 781 F.2d 740 (9th Cir. 1986)

Evidence that has been admitted only for illustrative purposes during trial is not to go into the jury room. Illustrative evidence is properly used as a testimonial aid for a witness or as an aid to counsel during final argument. It is not to be referred to by the jurors during deliberations.

United States v. Cox, 633 F.2d 871 (9th Cir. 1980)

If a transcript of a tape recording is to be used during deliberations, it should be admitted into evidence; appropriate instructions regarding the

jury's use of a transcript should be given.

United States v. Berry, 64 F.3d 305 (7th Cir. 1995)

Transcripts of tape recordings used to assist the jury when tapes are played during trial may be sent to the jury room for the same purpose, absent any showing that the transcripts are inaccurate or that specific prejudice will result.

United States v. Brown, 872 F.2d 385 (11th Cir. 1989)

Exposure of the jury during deliberations to unredacted transcripts of videotaped testimony requires holding of a *Remmer* hearing to allow the defendant to inquire into the jurors' states of mind.

United States v. Walker, 1 F.3d 423 (6th Cir. 1993)

Allowing the jury to see a case agent's report containing a summary of his investigation and his opinion that the defendant was guilty was inherently prejudicial.

United States v. Harber, 53 F.3d 236 (9th Cir. 1995)

19. Sending copy of indictment to jury

It is within the court's discretion to send a copy of the indictment to the jury, but the court should consider whether doing so may prejudice the defendant.

United States v. Parker, 586 F.2d 1253 (8th Cir. 1978)
United States v. Wedelstedt, 589 F.2d 339 (8th Cir. 1978)

If a count has been dismissed or a particular count does not pertain to the defendant on trial, the indictment should be retyped to eliminate the count or counts for which the defendant is not being tried.

United States v. Gomez, 529 F.2d 412 (5th Cir. 1976)

If several defendants named in the indictment are not on trial or if parties change during the course of the trial, better practice is not to submit a copy of the indictment to the jury.

United States v. Maselli, 534 F.2d 1197 (6th Cir. 1976)

20. Deadlocked jury

If the court is advised that the jury has become deadlocked, the court should not declare a mistrial until it has assured itself that the jury is hopelessly deadlocked. It is not sufficient that the jurors are currently deadlocked. The court must determine whether there is a probability that the jury can reach a verdict within a reasonable time or whether it is hopelessly deadlocked. It is best to poll the jurors individually as to whether they are hopelessly deadlocked. The questioning should be in

open court. The court must not question the jury as to its vote or as to the split of the vote.

United States v. See, 505 F.2d 845 (9th Cir. 1974)

The court should question the foreperson individually and the other jurors either one by one or as a group.

Arnold v. McCarthy, 566 F.2d 1377 (9th Cir. 1978)

Regardless of what other specifics are included in an *Allen* charge, a district court must incorporate a specific reminder to jurors in both the minority and majority that they reconsider their positions in light of the other side's view. Failure to provide a sufficiently balanced charge will result in reversal.

United States v. Burgos, 55 F.3d 933 (4th Cir. 1995)

An *Allen* charge is helpful, and not coercive, when it only expresses encouragement to jurors to reach a verdict if possible, to avoid the expense and delay of a new trial.

United States v. Melendez, 60 F.3d 41 (2d Cir. 1995)

Supplemental instruction that jurors should forget past conflict was not coercive, did not suggest a verdict was necessary or that jurors should surrender conscientious positions in light of the views of other jurors.

United States v. Knight, 58 F.3d 393 (8th Cir. 1995)

See infra at 161–62.

See Bench Comment, 1987, No. 3 (FJC): "Instructing Deadlocked Juries —The *Allen* Charge in Federal Courts"

21. Verdict

a. Polling the jury

Federal Rule of Criminal Procedure 31(d) provides as follows: "If upon the poll there is not unanimous concurrence, the jury may be directed to retire for further deliberations or may be discharged."

Although the rule permits the discharge of the jury, it is preferable to direct the jury to retire for further deliberations, as that might obviate a retrial.

The verdict may not be accepted by the court if a poll of the jurors indicates a lack of unanimity. The court should direct the jury to retire for further deliberations or should dismiss the jury.

United States v. Brooks, 420 F.2d 1350 (D.C. Cir. 1969)
Sincox v. United States, 571 F.2d 876 (5th Cir. 1978)
United States v. Love, 597 F.2d 81 (6th Cir. 1979)

United States v. Morris, 612 F.2d 483 (10th Cir. 1979)
United States v. Chigbo, 38 F.3d 543 (11th Cir. 1994)

Polling of the jury should be accomplished by questioning individual jurors, not by a show of hands.

United States v. Carter, 772 F.2d 66 (4th Cir. 1985)

Polling should be conducted by questioning each juror individually, rather than collectively.

United States v. Miller, 59 F.3d 417 (3d Cir. 1995)

A juror's signature on the verdict form cannot substitute for an oral poll of the jury in open court.

United States v. Marinari, 32 F.3d 1209 (7th Cir. 1994)

If, at the polling, the response of a particular juror is equivocal, the verdict may not be received.

United States v. Smith, 562 F.2d 619 (10th Cir. 1977)
United States v. Freedson, 608 F.2d 739 (9th Cir. 1979)
But see United States v. Netter, 62 F.3d 232 (8th Cir. 1995)

The Eleventh Circuit has held that once a single juror dissents from the verdict, it is per se error to continue polling.

United States v. Spitz, 696 F.2d 916 (11th Cir. 1983)
But see United States v. Chigbo, 38 F.3d 543 (11th Cir. 1994)

The court may not inquire as to the reason for a juror's dissent from the announced verdict.

United States v. Nelson, 692 F.2d 83 (9th Cir. 1982)

It is reversible error for the court to inquire of the jurors as to their numerical division at any time prior to verdict. This is true even if the court does not ask how the jury is divided.

Brasfield v. United States, 272 U.S. 448 (1926)
United States v. Noah, 594 F.2d 1303 (9th Cir. 1979)
Government of the Virgin Islands v. Romain, 600 F.2d 435 (3d Cir. 1979)

An unsolicited disclosure of the jury's numerical division is not, however, a ground for mistrial.

United States v. Diggs, 522 F.2d 1310 (D.C. Cir. 1975)
United States v. Warren, 594 F.2d 1046 (5th Cir. 1979)

It is error for the court to set any time limitations on the jury's deliberations or to suggest that the court is going to keep the jury deliberating until a verdict is reached.

United States v. Amaya, 509 F.2d 8 (5th Cir. 1975)

If a verdict is reached after further deliberations, the trial court has discretion to determine whether the initially dissenting member of the jury was coerced by the poll to capitulate to the views of the majority.

United States v. Brooks, 420 F.2d 1350 (D.C. Cir. 1969)
Amos v. United States, 496 F.2d 1269 (8th Cir. 1974)
United States v. Fiorilla, 850 F.2d 172 (3d Cir. 1988)

Even after a verdict is announced in court, jurors remain free to register their dissents until the verdict is accepted by the court.

United States v. Taylor, 507 F.2d 166 (5th Cir. 1975)

b. Incorrect or unclear verdict

If, through inadvertence, an incorrect verdict form is signed, that error may be corrected at once. Each juror must be polled as to the correct verdict.

United States v. Mears, 614 F.2d 1175 (8th Cir. 1980)

If a verdict is not in proper form or is for any reason unclear, the jury must be returned for further deliberations.

United States v. Thomas, 521 F.2d 76 (8th Cir. 1975)
United States v. Rastelli, 870 F.2d 822 (2d Cir. 1989)

c. Partial verdict

The court may accept a partial verdict on one or more counts of an indictment.

United States v. Ross, 626 F.2d 77 (9th Cir. 1980)

If accepted, a partial verdict is not subject to revision by the jury.

United States v. Di Lapi, 651 F.2d 140 (2d Cir. 1981)
United States v. Dakins, 872 F.2d 1061 (D.C. Cir. 1989)

A jury should be neither encouraged to nor discouraged from returning a partial verdict, but the jurors should be aware of their options.

United States v. Di Lapi, 651 F.2d 140 (2d Cir. 1981)

In a codefendant case, Federal Rule of Criminal Procedure 31(b) permits the jury to return "a verdict or verdicts with respect to a defendant or defendants as to whom it has agreed."

d. Inconsistent verdict

The verdict of a jury need not be internally consistent. Consistency of the verdict on separate counts is not required.

United States v. Haynes, 554 F.2d 231 (5th Cir. 1977)
United States v. Lichtenstein, 610 F.2d 1272 (5th Cir. 1980)
United States v. Dakins, 872 F.2d 1061 (D.C. Cir. 1989)

United States v. Muthana, 60 F.3d 1217 (7th Cir. 1995)
United States v. Acosta, 67 F.3d 334 (1st Cir. 1995)

22. Interviewing of jurors after verdict

Federal courts do not look with favor on the interviewing of jurors after verdict.

Northern P.R. Co. v. Mely, 219 F.2d 199 (9th Cir. 1954)
Smith v. Cupp, 457 F.2d 1098 (9th Cir. 1972)
United States v. Riley, 544 F.2d 237 (5th Cir. 1976)
King v. United States, 576 F.2d 432 (2d Cir. 1978)
United States v. Eldred, 588 F.2d 746 (9th Cir. 1978)
United States v. Cargo Service Stations, Inc., 657 F.2d 676 (5th Cir. 1981)
United States v. Kepreos, 759 F.2d 961 (1st Cir. 1985)

a. By counsel

It is not an abuse of discretion for a trial court to deny a motion by counsel to interview jurors after verdict.

Parker v. Estelle, 558 F.2d 312 (5th Cir. 1977)
United States v. McNeal, 865 F.2d 1173 (10th Cir. 1989)

Post-trial interviews should be permitted only if there are reasonable grounds to believe that a specific, nonspeculative impropriety has occurred that could have prejudiced the defendant.

United States v. Sun Myung Moon, 718 F.2d 1210 (2d Cir. 1983)
United States v. Ianniello, 866 F.2d 540 (2d Cir. 1989)

The court has the power, and sometimes the duty, to order that all post-trial interviews of jurors occur under its supervision.

King v. United States, 576 F.2d 432 (2d Cir. 1978)
United States v. Moten, 582 F.2d 654 (2d Cir. 1978)

The First Circuit has prohibited all post-verdict interviews of jurors by counsel, litigants, or their agents except under the supervision of the district court and then only in such extraordinary situations as are deemed appropriate.

United States v. Kepreos, 759 F.2d 961 (1st Cir. 1985)

b. By news media

Only under the most unusual circumstances is the court justified in directing jurors not to talk to representatives of the news media after verdict.

United States v. Sherman, 581 F.2d 1358 (9th Cir. 1978)

Restrictions of post-trial media interviews with jurors must reflect impending threat of jury harassment rather than generalized misgivings about the wisdom of such interviews.

United States v. Antar, 38 F.3d 1348 (3d Cir. 1994)

23. Testimony by jurors that may impeach verdict

Federal Rule of Evidence 606(b) provides as follows:

> [A] juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith . . . nor may a juror's affidavit or evidence of any statement by the juror . . . be received for these purposes.

Juror testimony is admissible only if it relates to extraneous influences on the deliberations.

United States v. Pimentel, 654 F.2d 538 (9th Cir. 1981)
United States v. Friedland, 660 F.2d 919 (3d Cir. 1981)
United States v. Schwartz, 787 F.2d 257 (7th Cir. 1986)

Extraneous influences include publicity received and discussed in the jury room, consideration of evidence not admitted in court, and contacts between jurors and third parties, including contacts between jurors and the trial judge outside the presence of the defendant and his or her counsel.

United States v. Campbell, 684 F.2d 141 (D.C. Cir. 1982)

The trial court should hold a post-trial jury hearing only when there is clear, strong, substantial, and incontrovertible evidence that specific, nonspeculative impropriety has occurred which could have prejudiced the trial of the defendant.

United States v. Sun Myung Moon, 718 F.2d 1210 (2d Cir. 1983)
United States v. Ianniello, 866 F.2d 540 (2d Cir. 1989)

The hearing should be conducted so as to minimize the intrusion on the jury's deliberations, and fact-finding should be limited to a determination of the precise nature of the information proffered and the degree to which that information was actually discussed or considered.

United States v. Calbas, 821 F.2d 887 (2d Cir. 1987)

The practice of getting affidavits from jurors to impeach their verdicts should not be encouraged, as it is inherently intimidating.

United States v. Gutman, 725 F.2d 417 (7th Cir. 1984)

See Bench Comment, 1992, No. 3 (FJC): "A district court may not order a new trial on the basis of jurors' testimony about factors that influenced the verdict"

Part III. Disclosure Issues

A. Jencks Act Material

The Jencks Act is codified at 18 U.S.C. § 3500.

1. Production of government witness's statements

The Jencks Act provides that statements of a government witness are discoverable by a defendant after that witness has testified on direct examination at trial.

The court may not compel the government to produce Jencks Act material until after a witness has testified. Some U.S. attorneys will, however, voluntarily produce those materials prior to trial or, at the latest, on the first day of trial.

United States v. Campagnuolo, 592 F.2d 852 (5th Cir. 1979)
United States v. Algie, 667 F.2d 569 (6th Cir. 1982)
United States v. White, 750 F.2d 726 (8th Cir. 1984)

Production of statements covered by the Jencks Act is not automatic. The defendant must invoke the statute at the appropriate time.

United States v. Hanna, 55 F.3d 1456 (9th Cir. 1995)

Only statements in the possession of the prosecutorial arm of the federal government must be produced.

United States v. Trevino, 556 F.2d 1265 (5th Cir. 1977)
United States v. Cagnina, 697 F.2d 915 (11th Cir. 1983)
United States v. Molt, 772 F.2d 366 (7th Cir. 1985)
United States v. Capers, 61 F.3d 1100 (4th Cir. 1995)

Statements need not be in the possession of the U.S. attorney's office to be producible under the Jencks Act. Possession by any federal investiga-

tive agency satisfies the requirement that the statement be in the possession of the prosecutorial arm of the federal government.

United States v. Bryant, 448 F.2d 1182 (D.C. Cir. 1971)
United States v. Rippy, 606 F.2d 1150 n.24 (D.C. Cir. 1979)
United States v. Moeckly, 769 F.2d 453 (8th Cir. 1985)

Presentence reports are not considered to be in the possession of the prosecutorial arm of the federal government and are not producible "statements" under the Jencks Act.

United States v. Dingle, 546 F.2d 1378 (10th Cir. 1976)
United States v. Trevino, 556 F.2d 1265 (5th Cir. 1977)
United States v. Bourne, 743 F.2d 1026 (4th Cir. 1984)

Fed. R. Crim. P. 26.2 extends disclosure requirements to suppression and sentencing hearings, hearings to revoke or modify probation or supervised release, detention hearings, and evidentiary hearings in 28 U.S.C. § 2255 proceedings. The rule also requires disclosure of prior relevant statements of defense witnesses in the possession of the defense in essentially the same manner as disclosure of prior statements of prosecution witnesses in the hands of the government.

2. Statement must relate to subject matter of government witness's testimony

After a government witness has testified on direct examination, the government must produce on request any statement of that witness in its possession that relates to the subject matter of the witness's testimony. The prosecution must produce only those statements that relate generally to the events and activities testified to by the witness.

United States v. Mason, 523 F.2d 1122 (D.C. Cir. 1975)
United States v. Mackey, 571 F.2d 376 (7th Cir. 1978)
United States v. Brumel-Alvarez, 991 F.2d 1452 (9th Cir. 1992)
United States v. Kelly, 35 F.3d 929 (4th Cir. 1994)
United States v. Neal, 36 F.3d 1190 (1st Cir. 1994)

The defendant is not entitled to a statement that does not relate to the subject matter of the witness's testimony even though the statement does relate to the subject matter of the indictment, information, or investigation.

United States v. Butenko, 384 F.2d 554 (3d Cir. 1967), *vacated on other grounds by Alderman v. United States*, 394 U.S. 165 (1969)

A defendant seeking statements of government witnesses pursuant to the Jencks Act must provide some foundation for his or her request before the court is required to make an in camera inspection of the materials.

United States v. Boyd, 53 F.3d 631 (4th Cir. 1995)

If the government contends that a portion of the statement does not relate to the testimony the witness gave on direct examination, the court shall review the statement in camera and excise any portions of it that do not relate to the direct testimony of the witness.

Anderson v. United States, 788 F.2d 517 (8th Cir. 1986)
United States v. Rivera Pedin, 861 F.2d 1522 (11th Cir. 1988)

3. Trial court must determine whether statement should be produced under Jencks Act

The court may not simply rely on a prosecutor's statement that undisclosed material is not Jencks Act material. The court shall order the government to deliver the material to court for inspection.

United States v. North American Reporting, Inc., 761 F.2d 735 (D.C. Cir. 1985)
United States v. Miller, 771 F.2d 1219 (9th Cir. 1985)
United States v. Allen, 798 F.2d 985 (7th Cir. 1986)

In determining whether a statement must be produced under the Jencks Act, the trial court may review the statement at issue in camera. The court may also conduct a hearing and interrogate witnesses or government representatives who might have knowledge of the statement.

Palermo v. United States, 360 U.S. 343 (1959)
Campbell v. United States, 365 U.S. 85 (1961)
United States v. Lamont, 565 F.2d 212 (2d Cir. 1977)
Anderson v. United States, 788 F.2d 517 (8th Cir. 1986)

If the government deletes any portion of a statement it produces, the trial court must, on motion of the defendant, examine the deleted portion in camera and make a determination as to whether the deletion was proper.

United States v. Conroy, 589 F.2d 1258 (5th Cir. 1979)
United States v. Truong Dinh Hung, 629 F.2d 908 (4th Cir. 1980)
United States v. Miller, 771 F.2d 1219 (9th Cir. 1985)

It is error for a trial judge who examines a lengthy document containing potential Jencks Act statements in camera to refuse to review the document in its entirety.

United States v. Washington, 797 F.2d 1461 (9th Cir. 1986) (diary)
United States v. Rivera Pedin, 861 F.2d 1522 (11th Cir. 1988) (diary)

4. Defense counsel must be given reasonable time to review Jencks Act materials before cross-examining witness

It is an abuse of discretion for the court not to grant defense counsel's request for adjournment in order to have adequate time to examine Jencks

Act materials.

United States v. Holmes, 722 F.2d 37 (4th Cir. 1983)

5. Statements producible under the Jencks Act

The Jencks Act defines a "statement" as

1. a written statement made by said witness and signed or otherwise adopted or approved by him;
2. a stenographic, mechanical, electrical, or other recording, or a transcription thereof that is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or
3. a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

If there is a question as to whether a statement is producible, the trial court must hold a hearing and receive extrinsic evidence to determine whether the interviewer read back the statement to the witness or permitted the witness to read the statement. A general inquiry by the interviewer as to whether he or she has correctly understood what the witness has said, followed by the witness's affirmative response, does not constitute adoption or approval of the notes.

Goldberg v. United States, 425 U.S. 94 (1976)
United States v. Judon, 567 F.2d 1289 (5th Cir. 1978)
United States v. Strahl, 590 F.2d 10 (1st Cir. 1978)

a. Notes of witness interviews

Notes taken by a government agent in interviewing a witness are producible after the witness testifies if it appears that the notes were adopted or approved by the witness or that they were a substantially verbatim recital of oral statements made by the witness.

Campbell v. United States, 373 U.S. 487 (1963)
Goldberg v. United States, 425 U.S. 94 (1976)
United States v. Finnigan, 504 F.2d 1355 (8th Cir. 1974)
United States v. Johnson, 521 F.2d 1318 (9th Cir. 1975)
United States v. Smith, 31 F.3d 1294 (4th Cir. 1994)
United States v. Scotti, 47 F.3d 1237 (2d Cir. 1995)

Notes of interviews do not fall within the Jencks Act if they contain only occasional verbatim recitations of phrases used by the person interviewed. Such notes do fall within the Jencks Act if they contain extensive verbatim recitations.

Palermo v. United States, 360 U.S. 343 (1959)
United States v. Gantt, 617 F.2d 831 (D.C. Cir. 1980)

United States v. Martino, 648 F.2d 367 (5th Cir. 1981)
United States v. Neal, 36 F.3d 1190 (1st Cir. 1994)

Interview notes made by a government attorney in interviewing a government witness are producible only if those notes have been signed or otherwise adopted or approved by the witness.

Goldberg v. United States, 425 U.S. 94 (1976)
United States v. Adams, 581 F.2d 193 (9th Cir. 1978)
United States v. Goldberg, 582 F.2d 483 (9th Cir. 1978)
United States v. Delgado, 56 F.3d 1357 (11th Cir. 1995)

Discussions of the general substance of what the witness has said do not constitute adoption or approval of the lawyer's notes.

United States v. Adams, 581 F.2d 193 (9th Cir. 1978)

Interview notes made by government counsel and consisting of one-word references and short phrases are not Jencks Act statements because they are not substantially verbatim recitals.

United States v. Consolidated Packaging Corp., 575 F.2d 117 (7th Cir. 1978)

b. Reports by government agents

Production of reports that are not substantially verbatim recitals of oral statements would threaten witnesses with impeachment on the basis of statements that they did not actually make.

Palermo v. United States, 360 U.S. 343 (1959)
United States v. Jodon, 581 F.2d 553 (5th Cir. 1978)
United States v. Mena, 863 F.2d 1522 (11th Cir. 1989)

A report made by a government agent, if pertaining to the subject matter of the testimony of the government agent, is producible after the agent has testified.

Clancy v. United States, 365 U.S. 312 (1961)
United States v. Sink, 586 F.2d 1041 (5th Cir. 1978)
United States v. Welch, 810 F.2d 485 (5th Cir. 1987)

The only parts of the report that are producible are those relevant to the agent's testimony at trial.

United States v. Mason, 523 F.2d 1122 (D.C. Cir. 1975)

Presentence reports are not producible "statements" under the Jencks Act.

United States v. Dingle, 546 F.2d 1378 (10th Cir. 1976)
United States v. Trevino, 556 F.2d 1265 (5th Cir. 1977)
United States v. Bourne, 743 F.2d 1026 (4th Cir. 1984)

c. Grand jury testimony

Grand jury testimony relating to the in-court testimony of a witness must be produced.

United States v. Knowles, 594 F.2d 753 (9th Cir. 1979)

6. Destruction of interview notes

There is a split among the circuits as to whether rough interview notes should be preserved.

The Third, Ninth, and D.C. Circuits have held that these notes must be preserved.

United States v. Harrison, 524 F.2d 421 (D.C. Cir. 1975)
United States v. Harris, 543 F.2d 1247 (9th Cir. 1976)
United States v. Vella, 562 F.2d 275 (3d Cir. 1977)

However, the Ninth Circuit has also held that not every type of rough note need be preserved.

United States v. Bernard, 623 F.2d 551 (9th Cir. 1980)
United States v. Bagnariol, 665 F.2d 877 (9th Cir. 1981)

Several circuits have held that interview notes need not be preserved.

United States v. McCallie, 554 F.2d 770 (6th Cir. 1977)
United States v. Mase, 556 F.2d 671 (2d Cir. 1977)
United States v. Martin, 565 F.2d 362 (5th Cir. 1978)
United States v. Shovea, 580 F.2d 1382 (10th Cir. 1978)
United States v. Williams, 604 F.2d 1102 (8th Cir. 1979)
United States v. Bastanipour, 697 F.2d 170 (7th Cir. 1982)
United States v. Hinton, 719 F.2d 711 (4th Cir. 1983)

The circuits are split as to whether the destruction of interview notes calls for any type of sanction.

United States v. Niederberger, 580 F.2d 63 (3d Cir. 1978) (destruction was harmless error in this case)
United States v. Lieberman, 608 F.2d 889 (1st Cir. 1979) (sanctions may be imposed)
United States v. Gantt, 617 F.2d 831 (D.C. Cir. 1980) (sanctions left to discretion of trial court)
United States v. Bagnariol, 665 F.2d 877 (9th Cir. 1981) (sanctions not warranted for destruction of handwritten draft of report of meeting)
United States v. Echeverry, 759 F.2d 1451 (9th Cir. 1985) (sanctions are within the discretion of the trial court)

B. *Brady* Material

In *Brady v. Maryland,* 373 U.S. 83 (1963), the Supreme Court ruled that the suppression by the prosecution of evidence favorable to an accused, upon request for disclosure by the accused, violates due process where the evidence is material to the guilt or punishment of the accused, irrespective of the good faith or bad faith of the prosecution. The Court held in *United States v. Agurs*, 427 U.S. 97 (1976), that failure to disclose material and favorable evidence violates due process even when the defendant makes no request for the material.

The government's obligation to disclose *Brady* material is contingent on three factors: (1) a request for exculpatory material by the defendant, (2) the evidence being favorable to the defendant, and (3) the materiality of the evidence.

United States v. George, 778 F.2d 556 (10th Cir. 1985)
Government of Virgin Islands v. Martinez, 780 F.2d 302 (3d Cir. 1986) (defendant's confession may be disclosable under *Brady)*
Banks v. Reynolds, 54 F.3d 1508 (10th Cir. 1995)

The defendant's failure to make any request does not relieve the prosecution of its obligation to disclose evidence with an obviously exculpatory character.

Smith v. Secretary Dept. of Corrections, 50 F.3d 801 (10th Cir. 1995)

The failure of law enforcement officers to preserve evidence that potentially exculpates the defendant does not violate *Brady* or the due process clause absent a showing that the officers acted in bad faith.

Arizona v. Youngblood, 488 U.S. 51 (1988) (semen specimens lost prior to testing through negligence)

1. Materiality

Materiality is the touchstone in the determination of whether certain evidence qualifies as *Brady* material.

United States v. Agurs, 427 U.S. 97 (1976)
United States v. Bagley, 473 U.S. 667 (1985)
United States v. Dupuy, 760 F.2d 1492 (9th Cir. 1985)
United States v. Cortijo-Diaz, 875 F.2d 13 (1st Cir. 1989)
Barkauskas v. Lane, 878 F.2d 1031 (7th Cir. 1989)
United States v. Lindell, 881 F.2d 1313 (5th Cir. 1989)
United States v. Robinson, 39 F.3d 1115 (10th Cir. 1994)
United States v. Newton, 41 F.3d 1422 (11th Cir. 1994)
United States v. Veksler, 62 F.3d 544 (3d Cir. 1995)

Materiality is determined by considering the suppressed evidence collectively rather than item by item.

United States v. Bagley, 473 U.S. 667 (1985)
Kyles v. Whitley, 115 S. Ct. 1555 (1995)

A lower standard of materiality applies where there is prosecutorial misconduct and corruption of the truth-seeking function.

United States v. Alzate, 47 F.3d 1103 (11th Cir. 1995)

Evidence may meet the *Brady* materiality requirement whether or not it is admissible.

Bartholomew v. Wood, 34 F.3d 870 (9th Cir. 1994)

The duty to disclose *Brady* material is ongoing; information that may be deemed immaterial upon original examination may become material as the proceedings progress.

Pennsylvania v. Ritchie, 480 U.S. 39 (1987)

2. Doubts to be resolved in favor of disclosure

When the government is in doubt as to the exculpatory nature of material, the prosecutor either should disclose the material to the accused or should submit it to the court for the court's determination whether the material should be disclosed to the accused.

United States v. Bailleaux, 685 F.2d 1105 (9th Cir. 1982)
United States v. Starusko, 729 F.2d 256 (3d Cir. 1984)

If, following a *Brady* request, the government has serious doubts as to the usefulness of a particular piece of evidence to the defense, the government should resolve all doubts in favor of full disclosure.

United States v. Cadet, 727 F.2d 1453 (9th Cir. 1984)

3. Evidence bearing on credibility of government witnesses

If the reliability of a witness may be determinative of the guilt or innocence of the accused, *Brady* requires the disclosure of any evidence bearing on the credibility of that witness.

United States v. Starusko, 729 F.2d 256 (3d Cir. 1984)
United States v. Boyd, 55 F.3d 239 (7th Cir. 1995)

Impeachment evidence that would tend to undermine the credibility of an important government witness falls within the *Brady* rule.

Giglio v. United States, 405 U.S. 150 (1972)
United States v. Bagley, 473 U.S. 667 (1985)
Barkauskas v. Lane, 878 F.2d 1031 (7th Cir. 1989)

Wilson v. Whitley, 28 F.3d 433 (5th Cir. 1994)
United States v. Kelly, 35 F.3d 929 (4th Cir. 1994)
United States v. Duke, 50 F.3d 571 (8th Cir. 1995)
United States v. Payne, 63 F.3d 1200 (2d Cir. 1995)
United States v. Hanna, 55 F.3d 1456 (9th Cir. 1995)

4. Court under no duty to search files of prosecutor

Speculation that the government may possess *Brady* material does not require the court to direct production of government files for an in camera search by the court.

United States v. Michaels, 796 F.2d 1112 (9th Cir. 1986)

The trial court has no obligation to conduct a general *Brady* search of a prosecutor's files when the prosecutor has assured the court that all possibly exculpatory material has been produced.

United States v. Holmes, 722 F.2d 37 (4th Cir. 1983)

However, when the prosecutor submits material to the court for a *Brady* determination, the court has an obligation to examine the material in camera and determine whether disclosure to the defense is required.

Application of Storer Communications, Inc., 828 F.2d 330 (6th Cir. 1987)

Under certain circumstances the court should undertake an in camera investigation rather than accept the government's assurance that there are no *Brady* materials, or that contested materials are not exculpatory under *Brady*.

Pennsylvania v. Ritchie, 480 U.S. 39 (1987)
United States v. Gaston, 608 F.2d 607 (5th Cir. 1979)
United States v. Diaz-Munoz, 632 F.2d 1330 (5th Cir. 1980)
United States v. Leung, 40 F.3d 577 (2d Cir. 1994)

Defense counsel is not entitled to review the government's files in search of materials that arguably fall within the scope of *Brady*.

Pennsylvania v. Ritchie, 480 U.S. 39 (1987)

5. Timing of disclosure of *Brady* material

The district court may order when *Brady* material is to be disclosed.

United States v. Starusko, 729 F.2d 256 (3d Cir. 1984)

Some decisions have held that the Jencks Act controls and that *Brady* material relating to a certain witness need not be disclosed until that witness has testified on direct examination at trial.

United States v. Scott, 524 F.2d 465 (5th Cir. 1975)
United States v. Jones, 612 F.2d 453 (9th Cir. 1979)
United States v. Bencs, 28 F.3d 555 (6th Cir. 1994)

Other decisions have held that *Brady* material must be disclosed prior to trial, in order to afford the defendant the opportunity to make effective use of it during trial.

United States v. Pollack, 534 F.2d 964 (D.C. Cir. 1976)
United States v. Kaplan, 554 F.2d 577 (3d Cir. 1977)
United States v. Campagnuolo, 592 F.2d 852 (5th Cir. 1979)
United States v. Perez, 870 F.2d 1222 (7th Cir. 1989)

Brady information that will require defense investigation or more extensive defense preparation for trial should be disclosed at an early stage of the case.

United States v. Starusko, 729 F.2d 256 (3d Cir. 1984)

If the court declines to order the disclosure of certain material, that material should be sealed and made a part of the record on appeal.

United States v. Gaston, 608 F.2d 607 (5th Cir. 1979)

6. *Brady* applicable only to material available to the prosecution

Brady material is limited to information known to the prosecutor and unknown to the defense.

United States v. Agurs, 427 U.S. 97 (1976)
Mendoza v. Miller, 779 F.2d 1287 (7th Cir. 1985)
United States v. Salerno, 868 F.2d 524 (2d Cir. 1989)
Armco v. United States EPA, 869 F.2d 975 (6th Cir. 1989)
United States v. O'Conner, 64 F.3d 355 (8th Cir. 1995)
Barnes v. Thompson, 58 F.3d 971 (4th Cir. 1995)

The prosecutor has a duty to learn of any evidence favorable to the defendant which is known to others acting on the government's behalf in the case, including the police.

Kyles v. Whitley, 115 S. Ct. 1555 (1995)
United States v. Hanna, 55 F.3d 1456 (9th Cir. 1995)
United States v. Payne, 63 F.3d 1200 (2d Cir. 1995)

The prosecutor need not search the files of the state police.

United States v. Escobar, 674 F.2d 469 (5th Cir. 1982)

The prosecutor need not seek out material that is not in the government's control.

United States v. Walker, 559 F.2d 365 (5th Cir. 1977)
United States v. Riley, 657 F.2d 1377 (8th Cir. 1981)

A prosecutor with knowledge of and access to *Brady* material that exists outside the borders of his or her district must disclose that material to the defense.

United States v. Bryan, 868 F.2d 1032 (9th Cir. 1989)

A prosecutor's "open file" policy is relevant and may be considered in determining whether a *Brady* violation occurred—but it cannot, standing alone, be given dispositive weight.

Smith v. Secretary Dept. of Corrections, 50 F.3d 801 (10th Cir. 1995)

A presentence report on a government witness is not *Brady* material, since presentence reports are not available to the prosecution.

United States v. Dingle, 546 F.2d 1378 (10th Cir. 1976)

The *Brady* right to disclosure of exculpatory evidence in the government's possession extends to evidence in possession of state agencies subject to judicial control.

Love v. Johnson, 57 F.3d 1305 (4th Cir. 1995)

Under *Brady* the agency that is charged with administration of a statute and that has consulted with the prosecutor in the steps leading to prosecution is to be considered as part of the prosecution in determining what information must be made available to a defendant charged with violation of the statute.

United States v. Wood, 57 F.3d 733 (9th Cir. 1995)

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Part IV. Enforcement of Orders During Trial

A. Distinctions Between Civil and Criminal Contempt

Civil contempt is remedial in scope to enforce compliance with a court order. The purpose of criminal contempt is punishment. If the purpose of the contempt is to coerce compliance with a court order, the penalty is civil. If the purpose is to punish an individual for past disobedience of a court order, the penalty is criminal.

Douglass v. First Nat'l Realty Corp., 543 F.2d 894 (D.C. Cir. 1976)
Pabst Brewing Co. v. Brewery Workers Local Union, 555 F.2d 146 (7th Cir. 1977)
United States v. North, 621 F.2d 1255 (3d Cir. 1980)

The Supreme Court has elucidated the civil contempt–criminal contempt distinction as follows:

> If the relief provided is a sentence of imprisonment, it is remedial if "the defendant stands committed unless and until he performs the affirmative act required by the court's order," and is punitive if "the sentence is limited to imprisonment for a definite period." If the relief provided is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court, though a fine that would be payable to the court is also remedial when the defendant can avoid paying the fine simply by performing the affirmative act required by the court's order.

Hicks acting on behalf of Feiock v. Feiock, 485 U.S. 624 (1988).

In civil contempt the defendant can purge himself or herself of contempt by compliance with the court's order and thereby avoid further sanctions. This is not possible with respect to criminal contempt.

United States v. Spectro Foods Corp., 544 F.2d 1175 (3d Cir. 1976)
United States v. Ayer, 866 F.2d 571 (2d Cir. 1989)

Imprisonment in civil contempt is for an indefinite period and may be ended at any time by the party's compliance. In criminal contempt the imprisonment is punitive, not coercive, and hence is for a fixed period of time.

United States v. Hughey, 571 F.2d 111 (2d Cir. 1978)
United States v. North, 621 F.2d 1255 (3d Cir. 1980)
United States v. Ayer, 866 F.2d 571 (2d Cir. 1989)

Criminal contempt is a crime in the ordinary sense. It is a violation of the law, a public wrong. A conviction for criminal contempt frequently results in serious penalties and carries the same stigmas as does an ordinary criminal conviction. The criminal contempt power is best exercised with restraint. A judge should resort to criminal contempt only after he or she determines that holding the contemnor in civil contempt would be inappropriate or fruitless.

In re Irving, 600 F.2d 1027 (2d Cir. 1979)

1. Identifying nature of contempt proceedings

It is essential that the court determine and make known at the earliest practicable time whether the contempt is to be civil or criminal in order that the proceedings may comply with appropriate rules of procedure.

Richmond Black Police Officers Ass'n. v. Richmond, 548 F.2d 123 (4th Cir. 1977)
United States v. Hilburn, 625 F.2d 1177 (5th Cir. 1980)
United States v. Powers, 629 F.2d 619 (9th Cir. 1980)
See Bench Comment, 1981, No. 2 (FJC): "Need for trial court to identify contempt proceeding as being civil contempt or criminal contempt"

2. Types of sanctions

There are three types of contempt sanctions: punitive, compulsory, and compensatory. The first is a criminal contempt sanction. The other two are civil.

United States v. Asay, 614 F.2d 655 (9th Cir. 1980)

3. Joint trials of civil and criminal contempts

Although it is not reversible error to do so, trying civil and criminal contempt charges jointly is not a recommended practice.

United States v. Rylander, 714 F.2d 996 (9th Cir. 1983)

4. Double jeopardy

Civil contempt followed by criminal contempt for the same act does not subject the contemnor to double jeopardy. It is possible for the court to bring an action in criminal contempt after bringing, and acting upon, an action in civil contempt.

United States v. United Mineworkers, 330 U.S. 258 (1947)
Yates v. United States, 355 U.S. 66 (1957)
Shillitani v. United States, 384 U.S. 364 (1966)
United States v. Petito, 671 F.2d 68 (2d Cir. 1982)

Double jeopardy protection attaches in nonsummary criminal contempt prosecutions just as it does in other criminal prosecutions.

United States v. Dixon, 113 S. Ct. 2849 (1993)

B. Civil Contempt

1. Civil contempt may be commenced when a party has failed to comply with a court order

Civil contempt proceedings are intended to coerce compliance with a court order, compensate complainant for losses sustained by reason of noncompliance, or both.

Latrobe Steel Co. v. United Steelworkers of America, 545 F.2d 1336 (3d Cir. 1976)
G. & C. Merriam Co. v. Webster Dictionary Co., 639 F.2d 29 (1st Cir. 1980)
United States v. PATCO, 678 F.2d 1 (1st Cir. 1982)

Sanctions for civil contempt may be imposed without a finding of willfulness. Since the purpose of civil contempt is remedial, it does not matter what the defendant's intention was in doing the contumacious act.

McComb v. Jacksonville Paper Co., 336 U.S. 187 (1949)
In re Walters, 868 F.2d 665 (4th Cir. 1989)
Canterbury Belts, Ltd. v. Lane Walker Rudking, Ltd., 869 F.2d 34 (2d Cir. 1989)

In a civil action, a civil contempt proceeding is instituted by the motion of the plaintiff.

Latrobe Steel Co. v. United Steelworkers of America, 545 F.2d 1336 (3d Cir. 1976)
Wolfe v. Coleman, 681 F.2d 1302 (11th Cir. 1982)

2. Nature of contempt proceeding

A person charged with civil contempt is entitled to be represented by counsel, to be given adequate notice, and to have an opportunity to be

heard. Due process also requires that the court appoint counsel to represent a person charged with civil contempt if that person is indigent and faces the prospect of imprisonment.

United States v. Anderson, 553 F.2d 1154 (8th Cir. 1977)
United States v. Powers, 629 F.2d 619 (9th Cir. 1980)
In re Rosahn, 671 F.2d 690 (2d Cir. 1982)

A civil contempt proceeding, which may lead to a penalty, is a trial rather than a hearing on a motion. Hence, the issue may not be heard on affidavits.

Hoffman, Etc. v. Beer Drivers & Salesmen's, Etc., 536 F.2d 1268 (9th Cir. 1976)

There is no right to a jury trial in civil contempt.

Douglass v. First Nat'l Realty Corp., 543 F.2d 894 (D.C. Cir. 1976)
United States v. Carroll, 567 F.2d 955 (10th Cir. 1977)
In re Grand Jury Investigation, 600 F.2d 420 (3d Cir. 1979)
In re Kitchen, 706 F.2d 1266 (2d Cir. 1983)

If indigent, a witness is entitled to appointed counsel for a civil contempt proceeding.

In re Kilgo, 484 F.2d 1215 (4th Cir. 1973)

Proof of the contempt must be clear and convincing. This standard is higher than preponderance of the evidence but lower than beyond a reasonable doubt.

NLRB v. Teamsters, Chauffeurs, Etc., 592 F.2d 921 (6th Cir. 1979)
AMF, Inc. v. Jewitt, 711 F.2d 1096 (1st Cir. 1983)
N.A. Sales Co. v. Chapman Industries Corp., 736 F.2d 854 (2d Cir. 1984)
Balla v. Idaho State Bd. of Corrections, 869 F.2d 461 (9th Cir. 1989)
Harris v. City of Philadelphia, 47 F.3d 1311 (3d Cir. 1995)

3. Nature of remedies available to court after conviction for civil contempt

In selecting contempt sanctions, a court is obliged to use the least possible power adequate to the end proposed.

Spallone v. U.S., 493 U.S. 265 (1990)

The district court has wide discretion in fashioning a remedy for civil contempt. The sanctions must, however, be remedial and compensatory, not punitive.

G. & C. Merriam Co. v. Webster Dictionary Co., 639 F.2d 29 (1st Cir. 1980)
In re Arthur Treacher's Franchise Litigation, 689 F.2d 1150 (3d Cir. 1982)
N.A. Sales Co. v. Chapman Industries Corp., 736 F.2d 854 (2d Cir. 1984)
Harris v. City of Philadelphia, 47 F.3d 1311 (3d Cir. 1995)

Coercive sanctions are civil only if the contemnor is afforded the opportunity to purge.

International Union, UMWA v. Bagwell, 114 S. Ct. 2552 (1994)

To compel compliance with a court order, the court may order imprisonment for an indefinite period of time or impose a repetitive fine.

Although conditional fines may be imposed to compel compliance with a court order, those fines may not be punitive in nature.

Zoobzokov v. CBS, Inc., 642 F.2d 28 (2d Cir. 1981)

4. Court may impose fine on contemnor to reimburse injured party

The court may order a contemnor to reimburse an injured party for losses actually sustained from noncompliance and for expenses reasonably and necessarily incurred in attempting to enforce compliance.

Norman Bridge Drug Co. v. Banner, 529 F.2d 822 (5th Cir. 1976)

Vuitton et fils SA v. Carousel Handbags, 592 F.2d 126 (2d Cir. 1979)

Commodity Futures Trading Comm'n v. Premex Inc., 655 F.2d 779 (7th Cir. 1981)

Quintar v. Volkswagen of America, 676 F.2d 969 (3d Cir. 1982)

In re Kave, 760 F.2d 343 (1st Cir. 1985)

If a fine is imposed on a contemnor in order to reimburse an injured party, that fine must be based on evidence of the complainant's actual losses.

McDonald's Corp. v. Victory Inv., 727 F.2d 82 (3d Cir. 1984)

The court may in its discretion award attorneys' fees reasonably and necessarily incurred by the injured party in an attempt to force compliance with a court order.

Donovan v. Burlington N., 781 F.2d 680 (9th Cir. 1986) (court has discretion to analyze each contempt case individually and to decide whether an award of fees and expenses is appropriate)

Sizzler Family Steak Houses v. Western Sizzlin Steak House, Inc., 793 F.2d 1529 (11th Cir. 1986)

5. Effect of imprisoning for civil contempt someone already imprisoned or charged

Unless the court orders otherwise, a sentence for civil contempt interrupts a sentence already being served by a contemnor so that his or her release date for the original sentence is postponed by the length of his or her imprisonment for civil contempt.

Bruno v. Greenlee, 569 F.2d 775 (3d Cir. 1978)

In re Garmon, 572 F.2d 1373 (9th Cir. 1978)

If a defendant is ordered to give handwriting samples but refuses to do so, he or she may be committed for civil contempt, and the court may postpone his or her trial date.

United States v. Askew, 584 F.2d 960 (10th Cir. 1978)

6. Procedure if contemnor persuades court that continuance of imprisonment will not persuade him or her to comply

Confinement for contempt may continue so long as the court is satisfied that the confinement might produce the intended result. If after a conscientious consideration of the circumstances, the court is convinced that the confinement has ceased to have the desired coercive effect and is not going to have that effect in the future, the confinement should be terminated. Criminal contempt is then available and can fully vindicate the court's authority.

Simkin v. United States, 715 F.2d 34 (2d Cir. 1983)
United States ex rel. Thom v. Jenkins, 760 F.2d 736 (7th Cir. 1985)

The determination whether a civil contempt has lost its coercive effect is within the discretion of the trial court.

A contemnor need be released only upon a determination that there no longer remains a realistic possibility that continued confinement might cause the contemnor to testify. The burden of proof is on the contemnor to demonstrate that no such realistic possibility exists.

In re Parrish, 782 F.2d 325 (2d Cir. 1986)

See Bench Comment, 1987, No. 2 (FJC): "Considering a motion by a recalcitrant grand jury witness who claims his or her civil contempt incarceration should be terminated because it has lost its coercive effect"

C. Criminal Contempt

1. Applicable statute is 18 U.S.C. § 401

Section 401, Title 18 of the U.S. Code provides as follows:

> A court of the U.S. may punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree or command.

The power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court is most important and indispensable. But its exercise is a delicate one and care is needed to avoid arbitrary or oppressive conclusions.

Cooke v. United States, 267 U.S. 517 (1925)

The limits of power to punish for contempt are "the least possible power adequate to the end proposed."

Harris v. United States, 382 U.S. 162 (1965)

2. Applicable rule of procedure is Federal Rule of Criminal Procedure 42

Rule 42 of the Federal Rules of Criminal Procedure provides as follows:

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

(b) Disposition Upon Notice and Hearing. A criminal contempt except as provided in subdivision (a) of this rule shall be prosecuted on notice. The notice shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the criminal contempt charged and describe it as such. The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the U.S. attorney or of an attorney appointed by the court for that purpose, by an order to show cause or an order of arrest. The defendant is entitled to a trial by jury in any case in which an act of Congress so provides. The defendant is entitled to admission to bail as provided in these rules. If the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the trial or hearing except with the defendant's consent. Upon a verdict or finding of guilt the court shall enter an order fixing the punishment.

3. Attorney who may prosecute criminal contempt action

In *Young v. United States,* 481 U.S. 787 (1987), the Supreme Court held that although district courts have authority to appoint private attorneys to prosecute criminal contempt actions, they should ordinarily request

that the appropriate prosecuting authority prosecute such contempt actions and should appoint a private prosecutor only if this request is denied. The Court also held that counsel for a party that is a beneficiary of a court order may not be appointed to undertake a criminal contempt prosecution for alleged violations of the order. A private attorney appointed to prosecute a criminal contempt should be as disinterested as a public prosecutor, since the attorney is appointed solely to pursue the public interest in vindicating the court's authority.

4. Rights of defendant in criminal contempt action

Criminal contempts are crimes and the defendant has all the safeguards of a criminal defendant.

United States v. Williams, 622 F.2d 830 (5th Cir. 1980)
In re Grand Jury Proceedings Harrisburg Grand Jury 79-1, 658 F.2d 211 (3d Cir. 1981)
Downey v. Clauder, 30 F.3d 681 (6th Cir. 1994)

The defendant does not, however, have the right to have the proceeding initiated by indictment or information. It may be initiated by notice.

Yates v. United States, 316 F.2d 718 (10th Cir. 1963)
In re Grand Jury Proceedings Harrisburg Grand Jury 79-1, 658 F.2d 211 (3d Cir. 1981)

The defendant is presumed innocent, and his or her guilt must be proved beyond a reasonable doubt.

Cliett v. Hammonds, 305 F.2d 565 (5th Cir. 1962)
TWM Mfg. Co. v. Dura Corp., 722 F.2d 1261 (6th Cir. 1983)
Clemente v. United States, 766 F.2d 1358 (9th Cir. 1985)
United States v. Cutler, 58 F.3d 825 (2d Cir. 1995)

Federal Rule of Criminal Procedure 42 describes the procedure that must be followed in prosecuting a criminal contempt action. The defendant must be given reasonable time to prepare his or her defense. The defendant must also be accorded sufficient time to engage an attorney of his or her choice, to weigh the merits of the charge, to evaluate possible defenses, and to marshal the evidence deemed necessary to proceed.

In re Weeks, 570 F.2d 244 (8th Cir. 1978)
See Bench Comment, 1992, No. 1 (FJC): "May a court summarily find an attorney in criminal contempt under Fed. R. Crim. P. 42(a) for tardiness or failure to appear?"

When a criminal contempt charge carries a possible penalty of imprisonment, the person charged has the right to counsel, whether the contempt be petty or serious.

Richmond Black Police Officers Ass'n v. Richmond, 548 F.2d 123 (4th Cir. 1977)
Mann v. Hendrien, 871 F.2d 51 (7th Cir. 1989)

If indigent, a witness is entitled to appointed counsel for a Rule 42(b) criminal contempt proceeding.
In re Kilgo, 484 F.2d 1215 (4th Cir. 1973)

5. Right to jury trial in criminal contempt action depends on potential sentence

The Sixth Amendment right to a jury trial applies to criminal contempt proceedings in the same manner as it applies to every other criminal proceeding. A criminal contempt that is considered a petty offense may be tried without a jury, but there is a right to a jury trial if the contempt is considered a serious offense.
Muniz v. Hoffman, 422 U.S. 454 (1975)
United States v. Troxler Hosiery Co., 681 F.2d 934 (4th Cir. 1982)

18 U.S.C. §§ 401 & 402 do not categorize contempts as "petty" or "serious." In prosecutions for criminal contempt where no maximum penalty is specified by law, the severity of the sentence actually imposed is the best indication of the seriousness of the particular offense.
Bloom v. Illinois, 391 U.S. 194 (1968)
Frank v. United States, 395 U.S. 147 (1969)
United States v. Troxler Hosiery Co., 681 F.2d 934 (4th Cir. 1982)
United States v. Lewis, 65 F.3d 252 (2d Cir. 1995)

a. Imprisonment

If a sentence of greater than six months' imprisonment is imposed on a criminal contemnor, the contempt is deemed to be a serious offense. If a penalty of less than six months' imprisonment is imposed, the contempt is deemed to be a petty offense. Thus, a defendant in a criminal contempt proceeding has the right to a jury trial if he or she is exposed to a period of imprisonment in excess of six months. The defendant is not entitled to a jury trial if, prior to trial, the court states that the maximum sentence shall be imprisonment for no more than six months.
Cheff v. Schnackenberg, 384 U.S. 373 (1966)
Bloom v. Illinois, 391 U.S. 194 (1968)
Frank v. United States, 395 U.S. 147 (1969)
Muniz v. Hoffman, 422 U.S. 454 (1975)
In re Dellinger, 502 F.2d 813 (7th Cir. 1974)
In re Weeks, 570 F.2d 244 (8th Cir. 1978)
Nat'l Maritime Union v. Aquaslide 'N' Dive Corp., 737 F.2d 1395 (5th Cir. 1984)

Rojas v. United States, 55 F.3d 61 (2d Cir. 1995)

Neither 18 U.S.C. § 401 nor Rule 42 of the Federal Rules of Criminal Procedure sets a maximum sentence for criminal contempt. The severity of the sentence is within the discretion of the trial court.

United States v. Patrick, 542 F.2d 381 (7th Cir. 1976) (witness found in criminal contempt and sentenced to four years' imprisonment for refusing to testify)

United States v. Berardelli, 565 F.2d 24 (2d Cir. 1977) (witness found in criminal contempt and sentenced to five years' imprisonment for refusing to testify)

A jury trial is required if the defendant is tried for various acts of contempt committed during a trial and the sentences imposed aggregate more than six months, even though no sentence of more than six months is imposed for any one act of contempt.

Codispoti v. Pennsylvania, 418 U.S. 506 (1974)

b. Fines imposed on individuals

An individual may be punished for criminal contempt without a jury trial if the punishment imposed is not greater than that for a petty offense.

Bloom v. Illinois, 391 U.S. 194 (1968)

Under the current statutory scheme, an individual may be fined up to $5,000 following conviction for a petty offense.

18 U.S.C. §§ 19 & 3571(b)(6), (b)(7)

In *Blanton v. City of North Las Vegas,* 489 U.S. 538 (1989), the Supreme Court noted, in the context of a motor vehicle offense, that it frequently looks to the federal offense classification scheme in deciding when a jury trial must be provided. In concluding that Blanton's offense was a petty offense not requiring a jury trial, the Court reasoned that the $1,000 fine the defendant faced was "well below the $5,000 level set by Congress in its most recent definition of a 'petty' offense." *Id.* at 544.

The Fourth, Ninth, and District of Columbia Circuits have held that if a fine of more than $500 is imposed on an individual criminal contemnor, the contempt is considered a serious offense and the right to a jury trial attaches.

Douglass v. First Nat'l Realty Corp., 543 F.2d 894 (D.C. Cir. 1976)

Richmond Black Police Officers Ass'n v. Richmond, 548 F.2d 123 (4th Cir. 1977)

United States v. Hamdan, 552 F.2d 276 (9th Cir. 1977)

In determining that $500 marks the dividing line between petty and serious contempt offenses for purposes of the Sixth Amendment right to a jury trial, these courts relied in part on 18 U.S.C. § 1, which defined a

petty offense as a misdemeanor for which the maximum punishment was six months' imprisonment or a fine of $500, or both. However, 18 U.S.C. § 1 has since been repealed.

c. Fines imposed on organizations

The Supreme Court has held that a fine of $52 million against a union was a serious criminal contempt sanction that could not be imposed without a jury trial.

International Union, UMWA v. Bagwell, 114 S. Ct. 2552 (1994)

In upholding the imposition of a $10,000 fine on a labor union following a non-jury contempt proceeding, however, the Supreme Court indicated that an organization is not entitled to a jury trial when the fine imposed will not cause it serious financial deprivation.

Muniz v. Hoffman, 422 U.S. 454 (1975)

The Fourth Circuit has upheld the imposition of a fine of $80,000 on a corporation with a net worth of $540,000 following a nonjury criminal contempt trial.

United States v. Troxler Hosiery Co., 681 F.2d 934 (4th Cir. 1982)

The Second Circuit has held that regardless of their financial resources, corporations and all other organizations have the right to a jury trial in criminal contempt proceedings in which they are subjected to a fine in excess of $100,000. In cases involving fines of less than $100,000, the trial court must consider whether the fine will have such a significant financial impact on the organization as to render the contempt a serious offense requiring a jury trial.

United States v. Twentieth Century Fox Film Corp., 882 F.2d 656 (2d Cir. 1989)

Under the current statutory scheme, an organization may be fined up to $10,000 following conviction for a petty offense.

18 U.S.C. §§ 19, 3571(c)(6), 3571(c)(7)

d. Probation

The additional imposition of a term of probation does not raise a petty criminal contempt to the level of a serious offense for purposes of the Sixth Amendment right to a jury trial.

Frank v. United States, 395 U.S. 147 (1969)

6. Trial by another judge

A judge who has been subject to personal attacks throughout the trial should not preside at a post-trial contempt proceeding.

United States v. Pina, 844 F.2d 1 (1st Cir. 1988)

7. Requirements for conviction of criminal contempt

To warrant a conviction for criminal contempt, the conduct must constitute misbehavior that rises to the level of an obstruction of and an imminent threat to the administration of justice and must be accompanied by an intention on the part of the contemnor to obstruct, disrupt, or interfere with the administration of justice.

In re Williams, 509 F.2d 949 (2d Cir. 1975)
In re Pilsbury, 866 F.2d 22 (2d Cir. 1989)

A person bound by a court order may be found in criminal contempt for violating it only if the order is clear and definite and the contemnor has knowledge of it.

United States v. Baker, 641 F.2d 1311 (9th Cir. 1981)
Downey v. Clauder, 30 F.3d 681 (6th Cir. 1994)
United States v. Cutler, 58 F.3d 825 (2d Cir. 1995)

Criminal intent is an essential element of the offense and must be proven beyond a reasonable doubt. It is a volitional act done by one who knows or should reasonably be aware that his or her conduct is wrongful.

United States v. Seale, 461 F.2d 345 (7th Cir. 1972)
United States v. Marx, 553 F.2d 874 (4th Cir. 1977)
In re Kirk, 641 F.2d 684 (9th Cir. 1981)
United States v. Cutler, 58 F.3d 825 (2d Cir. 1995)

An attorney possesses the requisite intent for criminal contempt only if the attorney knows or reasonably should be aware, in view of all of the circumstances—especially in the heat of the controversy—that he or she is exceeding the outermost limits of an attorney's proper role and is hindering, rather than facilitating, the search for truth.

Hawk v. Cardoza, 575 F.2d 732 (9th Cir. 1978)
In re Kirk, 641 F.2d 684 (9th Cir. 1981)

8. Sentencing of one found guilty of criminal contempt

A court may impose a fine or a period of imprisonment for criminal contempt but may not both fine and imprison a defendant.

United States v. Digirlomo, 548 F.2d 252 (8th Cir. 1977)
United States v. Holmes, 822 F.2d 481 (5th Cir. 1987)

The severity of the sentence is left to the discretion of the trial court.

Robles v. United States, 279 F.2d 401 (9th Cir. 1960)
United States v. Cutler, 58 F.3d 825 (2d Cir. 1995)

If found guilty of criminal contempt by a jury, the contemnor may be sentenced to an unlimited number of months or years in prison or fined

an unlimited number of dollars.

United States v. Brummitt, 665 F.2d 521 (5th Cir. 1981) (witness sentenced to five years for refusing to testify)

D. Summary Contempt

Section 401, Title 18 of the U.S. Code provides that a court of the United States shall have the power to punish by fine or imprisonment the misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice.

Rule 42(a) of the Federal Rules of Criminal Procedure provides as follows:

> A criminal contempt may be punished summarily if the judge certifies that the judge saw or heard the conduct constituting the contempt and that it was committed in the actual presence of the court. The order of contempt shall recite the facts and shall be signed by the judge and entered of record.

Given the absence of such fundamental due process requirements as notice and an opportunity to be heard in Rule 42(a), the Supreme Court has held that Rule 42(a) is a rule of necessity, creating a narrow category of contempt reserved for exceptional circumstances.

Maggio v. Zeitz, 33 U.S. 56 (1948)
Harris v. United States, 382 U.S. 162 (1965)
In re Pilsbury, 866 F.2d 22 (2d Cir. 1989)

Unless there is a "compelling reason for an immediate remedy," the procedure articulated in Rule 42(b) is normally to be followed.

Harris v. United States, 382 U.S. 162 (1965)
United States v. Wilson, 421 U.S. 309 (1975)

1. Nature of conduct punishable as summary contempt

Instant action may be necessary where immediate corrective steps are needed to restore order and maintain the dignity and authority of the court.

Johnson v. Mississippi, 403 U.S. 212 (1971)
Codispoti v. Pennsylvania, 418 U.S. 506 (1974)

To preserve order in the courtroom for the proper conduct of business, the court must act instantly to suppress disturbances or violence or physical obstruction or disrespect to the court when it occurs in open court.

Cooke v. United States, 267 U.S. 517 (1925)
United States v. Seale, 461 F.2d 345 (7th Cir. 1972)

Summary contempt is available only when the conduct constituting the contempt occurs within the sight or hearing of the judge. For misbehavior to rise to the level of an obstruction of the judicial process, there must be a "material disruption or obstruction." Mere disrespect or affront to the judge's sense of dignity is not sufficient. Discourtesy is not sufficient.

United States v. Seale, 461 F.2d 345 (7th Cir. 1972)
Gordon v. United States, 592 F.2d 1215 (1st Cir. 1979)

There must be misconduct that actually obstructs the court in the performance of its judicial duty.

Parmelee Transp. Co. v. Keeshin, 292 F.2d 806 (7th Cir. 1961)
Ciraolo v. Madigan, 443 F.2d 314 (9th Cir. 1971)

All elements of the contempt must be within the personal observation of the judge.

Ciraolo v. Madigan, 443 F.2d 314 (9th Cir. 1971)

Trial judges must be on guard against confusing behavior that offends their sensibilities with behavior that obstructs the administration of justice. The contemnor must have the intent to obstruct, disrupt, or interfere with the administration of justice.

United States v. Trudell, 563 F.2d 889 (8th Cir. 1977)

A summary contempt proceeding is appropriate only when there is a need for immediate action to put an end to disruptive acts in the presence of the court.

United States v. Pace, 371 F.2d 810 (2d Cir. 1967)
In re Gustafson, 619 F.2d 1354 (9th Cir. 1980)
United States v. Moschiano, 695 F.2d 236 (7th Cir. 1982)

It is questionable whether the failure of a spectator to simply stand at an opening or closing ceremony is conduct that threatens the judge or disrupts or obstructs court proceedings. If the refusal to stand is accompanied by some disturbance, disorder, or interruption, however, it may be considered a disruptive act.

United States ex rel. Robson v. Malone, 412 F.2d 848 (7th Cir. 1969)
In re Dellinger, 461 F.2d 389 (7th Cir. 1972)
United States v. Abascal, 509 F.2d 752 (9th Cir. 1975)

2. Caution to be observed in exercising summary contempt power

Summary contempt power must be limited to "the least possible power adequate to the end proposed."

Pietsch v. President of United States, 434 F.2d 861 (2d Cir. 1970)
United States v. Seale, 461 F.2d 345 (7th Cir. 1972)

The exercise of the power of contempt is a delicate one, and care is needed to avoid arbitrary or oppressive conclusions. This rule of caution is especially important when the contempt charged has in it the element of personal criticism of or attack on the judge. The judge must banish any impulse for reprisal, but should not bend backward and injure the authority of the court by too great a showing of leniency.

Cooke v. United States, 267 U.S. 517 (1925)

3. Finding attorney in summary contempt

Although citations of attorneys for summary contempt have been affirmed on appeal, the courts of appeals have stated that where the line between vigorous advocacy and actual obstruction defies strict delineation, doubts should be resolved in favor of vigorous advocacy.

In re Dellinger, 461 F.2d 389 (7th Cir. 1972)

Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs, 552 F.2d 498 (3d Cir. 1977)

Before an attorney may be found guilty of contempt there must be a showing that the attorney knew or reasonably should have known that he or she was exceeding the outermost limits of an attorney's proper role and hindering rather than facilitating the search for truth. There must be some sort of actual damaging effect on judicial order before an attorney may be held in criminal contempt.

Hawk v. Cardoza, 575 F.2d 732 (9th Cir. 1978)

There must be a compelling reason for an immediate remedy before an attorney may be found in summary contempt.

United States v. Lowery, 733 F.2d 441 (7th Cir. 1984)

See Bench Comment, 1992, No. 1 (FJC): "May a court summarily find an attorney in criminal contempt under Fed. R. Crim. P. 42(a) for tardiness or failure to appear?"

4. Summary contempt procedure

a. Warning should be given and opportunity to be heard granted

The preferable procedure is for the court to warn the individual that his or her continuation of the conduct at issue will result in a citation for contempt. A warning may be effective to prevent further disorder.

United States v. Schiffer, 351 F.2d 91 (6th Cir. 1965)

United States v. Seale, 461 F.2d 345 (7th Cir. 1972)

United States v. Brannon, 546 F.2d 1242 (5th Cir. 1977) (warning required)

In re Pilsbury, 866 F.2d 22 (2d Cir. 1989) (warning required where reasonable person would not know court considered conduct contumacious)

The contemnor does not have the right to counsel, to notice, to a jury, or to an opportunity to present a defense, but he or she should be given an opportunity before being sentenced to speak in his or her own behalf in the nature of a right of allocution.

Taylor v. Hayes, 418 U.S. 488 (1974)

The court should allow the individual to be heard before citing him or her for contempt, unless doing so would be inconsistent with the preservation of order.

United States v. Brannon, 546 F.2d 1242 (5th Cir. 1977)
In re Pilsbury, 866 F.2d 22 (2d Cir. 1989)

b. Timing of contempt citation and sentencing

The court may cite an individual in summary contempt and file a certificate but defer sentencing until the conclusion of the trial. If, however, the court does not feel that an immediate sanction is necessary, it is probably wiser for the court to proceed under Rule 42(b) than to proceed under the summary procedure of Rule 42(a).

MacInnis v. United States, 191 F.2d 157 (9th Cir. 1951)
Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs, 552 F.2d 498 (3d Cir. 1977)
Gordon v. United States, 592 F.2d 1215 (1st Cir. 1979)
In re Gustafson, 619 F.2d 1354 (9th Cir. 1980)
United States v. Powers, 629 F.2d 619 (9th Cir. 1980)

The circuits are in conflict as to whether a person may be cited in summary contempt at the conclusion of the trial.

Gordon v. United States, 592 F.2d 1215 (1st Cir. 1979) (court may wait until end of trial to charge someone with summary contempt)
In re Gustafson, 619 F.2d 1354 (9th Cir. 1980) (court may not wait until end of trial to charge someone with summary contempt)

c. Judge must prepare, sign, and file order of contempt

Federal Rule of Criminal Procedure 42(a) requires the court to enter an order of contempt. In the order the court must certify that it saw or heard the conduct constituting the contempt and that it took place in the court's presence.

The purpose of the certification in the order of contempt is to permit informed appellate review. A criminal contempt order stands or falls on the specifications of wrongdoing on which it is based. For that reason the order of contempt must recite with accuracy the conduct that caused the court to find someone in summary contempt. Conclusory language and general citations to the record are insufficient.

United States v. Ardle, 435 F.2d 861 (9th Cir. 1970)

United States v. Marshall, 451 F.2d 372 (9th Cir. 1971)
In re Gustafson, 608 F.2d 767 (9th Cir. 1979)

It is probably advisable to incorporate the relevant portion of the trial record into the order as an adjunct to the specific charges. The incorporation of the record is not, however, a substitute for a specific recital by the court of the facts that led to the contempt citation.

The form of the order of contempt may be as follows:

> In conformity with Rule 42(a) of the Federal Rules of Criminal Procedure I hereby certify that [here insert a detailed recital of the acts of contempt].
>
> Because of the foregoing conduct, which obstructed and disrupted the court in its administration of justice, I sentenced [name of contemnor] to _____ days in jail, [or fined him or her the sum of _____ dollars] the said jail sentence to commence [at once/at the conclusion of the trial].

The order of contempt should be dated and must be signed by the judge. It need not be sworn.

United States v. Seale, 461 F.2d 345 (7th Cir. 1972)

The court may commit the contemnor to jail immediately and thereafter file its order of contempt. The order should, however, be prepared and filed as quickly as possible.

United States v. Hall, 176 F.2d 163 (2d Cir. 1949)
Hallinan v. United States, 182 F.2d 880 (9th Cir. 1950)
In re Manufacturers Trading Corp., 194 F.2d 948 (6th Cir. 1952)

d. Punishment that may be imposed

In imposing punishment, the judge may properly take into consideration the willfulness and deliberateness of the defiance of the court's order, the seriousness of the consequences of the contumacious behavior, the necessity of effectively terminating the defendant's defiance as required by the public interest, and the importance of deterring such acts in the future.

United States v. Trudell, 563 F.2d 889 (8th Cir. 1977)

The court may imprison or fine the contemnor but may not do both.

The court may not summarily impose a sentence of imprisonment in excess of six months. If the court feels that a sentence in excess of six months would be appropriate, the court must proceed by notice under Federal Rule of Criminal Procedure 42(b) and accord the contemnor a jury trial.

The judge may impose summary contempt sanctions repeatedly during trial. However, if a single hearing is held for multiple incidents of contempt, the sentence imposed at the hearing may not exceed six months.

United States v. Pina, 844 F.2d 1 (1st Cir. 1988)

E. Recalcitrant Witness

Section 1826(a), Title 28 of the U.S. Code provides that whenever a witness refuses without just cause to comply with an order of the court to testify, the court may summarily order the witness confined until such time as he or she is willing to comply with the court's order.

Confinement shall not exceed the life of

1. the court proceeding, or
2. the term of the grand jury.

In no event may the confinement last longer than eighteen months.

Confinement under 28 U.S.C. § 1826(a) is coercive, not punitive. Its sole purpose is to compel the contemnor to provide the requested testimony.

In re Grand Jury Proceedings, 862 F.2d 430 (2d Cir. 1988)

See Bench Comment, 1987, No. 2 (FJC): "Considering a motion by a recalcitrant grand jury witness who claims his or her civil contempt incarceration should be terminated because it has lost its coercive effect"

1. Court must order recalcitrant witness to respond

The court must give the witness an explicit, unambiguous order to answer the question.

United States v. Wilson, 421 U.S. 309 (1975)

United States v. Chandler, 380 F.2d 993 (2d Cir. 1967)

2. Recalcitrant witness must be warned and accorded opportunity to explain

The trial court must explicitly warn the witness of the consequences of continued refusal to answer a proper question.

United States v. Chandler, 380 F.2d 993 (2d Cir. 1967)

United States v. Brannon, 546 F.2d 1242 (5th Cir. 1977)

The witness must be accorded the opportunity to present his or her reasons for refusing to testify.

United States v. Powers, 629 F.2d 619 (9th Cir. 1980)

3. Recalcitrant witness should first be cited in civil contempt

The court should first apply coercive pressure by means of civil contempt and make use of the more drastic criminal sanctions only if the disobedience continues.

Yates v. United States, 355 U.S. 66 (1957)
Shillitani v. United States, 384 U.S. 364 (1966)

If there is a compelling reason for immediate, strong action, a trial court may hold in criminal contempt a witness who has refused to comply with the court's order to testify at trial (as contrasted with refusing to testify before a grand jury) and may summarily order his or her imprisonment pursuant to Rule 42(a) of the Federal Rules of Criminal Procedure.

United States v. Wilson, 421 U.S. 309 (1975)
Baker v. Eisenstadt, 456 F.2d 382 (1st Cir. 1972)
In re Scott, 605 F.2d 736 (4th Cir. 1979)
In re Boyden, 675 F.2d 643 (5th Cir. 1982)

It is improper to coerce a recalcitrant witness into testifying at the trial of a codefendant by imposing a harsh sentence on charges to which the witness has pled guilty and indicating that the sentence may later be reduced if the witness cooperates.

United States v. Giraldo, 822 F.2d 205 (2d Cir. 1987)

The witness is not entitled to a trial before a jury in a civil contempt proceeding.

Andretta v. United States, 530 F.2d 681 (6th Cir. 1976)
In re Grand Jury Investigation, 600 F.2d 420 (3d Cir. 1979)

4. Recalcitrant witness cited for civil contempt should be advised of possibility of purging the contempt

When a recalcitrant witness is committed in civil contempt, he or she should be advised that the contempt can be purged if he or she answers the question at issue. The witness should also be advised to inform the court immediately if he or she decides to answer the question.

United States v. Hughey, 571 F.2d 111 (2d Cir. 1978)

After a recalcitrant witness has been committed, he or she may be brought back into the courtroom and given a chance to purge the civil contempt and thereby avoid prosecution for criminal contempt.

United States v. Patrick, 542 F.2d 381 (7th Cir. 1976)

5. Recalcitrant witness cited for civil contempt may be subject to punishment for criminal contempt, and should be so advised

A recalcitrant witness committed in civil contempt should be advised that if he or she does not purge that contempt, he or she may be prosecuted for criminal contempt and thereafter punished by a fine or commitment for that criminal contempt.

Yates v. United States, 227 F.2d 848 (9th Cir. 1955)

There must be a forthright positive notification to the witness that he or she is subject to an additional punitive sanction if the court chooses to invoke it and that the coercive restraint for civil contempt does not relieve the witness of a possible penal sentence.

Yates v. United States, 227 F.2d 848 (9th Cir. 1955)
Daschbach v. United States, 254 F.2d 687 (9th Cir. 1958)
But see United States v. Monteleone, 804 F.2d 1004 (7th Cir. 1986) (recommending, but not requiring, notification)

Like any other witness, a testifying defendant who refuses to answer a proper question, after being directed to do so by the court, is subject to sanctions for criminal contempt.

United States v. Martin, 525 F.2d 703 (2d Cir. 1975)
United States v. Brannon, 546 F.2d 1242 (5th Cir. 1977)

6. Procedure if recalcitrant witness is confined for civil contempt but fails to purge the contempt

If a witness refuses to answer a question, the trial judge should instruct the jury that it should not speculate as to what the testimony would have been.

United States v. Anderson, 509 F.2d 312 (D.C. Cir. 1974)

At the conclusion of the trial, a witness held in civil contempt should be released from custody, but thereafter a proceeding under Federal Rule of Criminal Procedure 42(b) may be commenced to cite the witness for criminal contempt.

Daschbach v. United States, 254 F.2d 687 (9th Cir. 1958)

If the court acts to cite the witness summarily for criminal contempt during the progress of the trial, it may proceed under Rule 42(a). If the court proceeds after the termination of the trial, it must proceed under Rule 42(b), as the defendant's refusal to answer the question no longer obstructs the progress of the trial.

United States v. Wilson, 421 U.S. 309 (1975)
United States v. Brannon, 546 F.2d 1242 (5th Cir. 1977)

7. Procedure upon refusal by recalcitrant witness to respond to question before grand jury

A witness who refuses to answer a question before a grand jury may not be cited for criminal contempt under Rule 42(a) because the misbehavior is not in the actual presence of the court. The proper procedure is under Rule 42(b), according to which the witness is given notice and a reasonable time within which to prepare his or her defense.

Harris v. United States, 382 U.S. 162 (1965)
United States v. Alter, 482 F.2d 1016 (9th Cir. 1973)
In re Sadin, 509 F.2d 1252 (2d Cir. 1975)
In re Brummitt, 608 F.2d 640 (5th Cir. 1979)
In re Grand Jury Proceedings, 643 F.2d 226 (5th Cir. 1981)

A civil contempt order for refusal to testify before a grand jury is without further effect after expiration of the grand jury's term or the purging of the contempt.

In re Grand Jury Proceedings, 863 F.2d 667 (9th Cir. 1988)

8. Procedure if recalcitrant witness claims inability to remember or gives evasive or equivocal answers

A witness's equivocal response, evasive answer, or false disclaimer of knowledge or memory constitutes contemptuous conduct.

In re Weiss, 703 F.2d 653 (2d Cir. 1983)

A false assertion of memory loss constitutes a refusal to testify.

In re Battaglia, 653 F.2d 419 (9th Cir. 1981)

A claimed inability to remember is the equivalent of a refusal to testify if it is both obviously false and intentionally evasive and obstructive.

In re Kitchen, 706 F.2d 1266 (2d Cir. 1983)

However, the government must prove these elements by clear and convincing evidence, either extrinsic or intrinsic.

In re Kitchen, 706 F.2d 1266 (2d Cir. 1983)

A civil contempt proceeding on an asserted memory loss requires a three-step analysis:

1. The government must make out a prima facie showing of contempt.
2. The recalcitrant witness must provide some explanation, on the record, for failing to respond to a proper question.
3. If the recalcitrant witness meets his or her burden of production by claiming a loss of memory, the government must carry its

burden of proof by demonstrating that the witness did in fact remember the events in question.

In re Battaglia, 653 F.2d 419 (9th Cir. 1981)

The government has the burden of proving by clear and convincing evidence the falsity of a recalcitrant witness's claim of loss of memory. That proof may include extrinsic proof, such as tape recordings or documents, or it may be found in the witness's demeanor and answers.

In re Bongiorno, 694 F.2d 917 (2d Cir. 1982)

9. Confinement for civil contempt

A recalcitrant witness who refuses to answer a proper question at trial may not be confined for civil contempt beyond the duration of the trial itself.

Yates v. United States, 227 F.2d 844 (9th Cir. 1955)

A recalcitrant witness who refuses to answer a proper question before a grand jury may not be confined for civil contempt beyond the term of the grand jury and in no event longer than eighteen months.

28 U.S.C. § 1826(a)

If the court determines that confinement for civil contempt has ceased to have a coercive effect upon a recalcitrant witness, the civil contempt remedy should be ended.

In re Grand Jury Proceedings, 862 F.2d 430 (2d Cir. 1988)

See supra at 56.

10. Recalcitrant witness serving sentence is not entitled to credit for time served on contempt citation

If a recalcitrant witness is already serving a sentence, the court may order that sentence to be interrupted by imprisonment for civil contempt.

Anglin v. Johnston, 504 F.2d 1165 (7th Cir. 1974)

In re Garmon, 572 F.2d 1373 (9th Cir. 1978)

In re Grand Jury Investigation, 865 F.2d 578 (3d Cir. 1989)

A federal prisoner is not entitled to credit for time spent in custody for a civil contempt unless the court expressly makes the contempt confinement concurrent with a prior criminal sentence.

Bruno v. Greelee, 569 F.2d 775 (3d Cir. 1978)

The circuits are in conflict as to whether a federal district court has authority under 28 U.S.C. § 1826(a) to interrupt a contemnor's pre-existing state sentence for service of a federal civil contempt sentence.

In re Liberatore, 574 F.2d 78 (2d Cir. 1978) (federal tolling of state sentence intrudes on sovereignty of state court)
In re Grand Jury Investigation, 865 F.2d 578 (3d Cir. 1989) (federal tolling of state sentence permissible)

F. Disruptive Defendant

A disruptive defendant may not be permitted by his or her behavior to obstruct the orderly progress of a trial.

Illinois v. Allen, 397 U.S. 337 (1970)

1. Options available to court

After a disruptive defendant has been warned, the trial court has these options:

1. cite the defendant for contempt;
2. remove the defendant from the courtroom until the defendant promises to conduct himself or herself properly; or
3. permit the defendant to remain in court but have him or her bound and gagged.

Illinois v. Allen, 397 U.S. 337 (1970)

2. Defendant should be warned

Before taking action against a disruptive defendant, the court should warn the defendant of the consequences of his or her continued disruptive behavior.

Illinois v. Allen, 397 U.S. 337 (1970)

3. Ejecting defendant

The court may order the removal of a defendant from the courtroom if the defendant interrupts the proceedings. The court should state that the defendant may return anytime after he or she assures the court that there will be no further disturbance.

United States v. Munn, 507 F.2d 563 (10th Cir. 1974)
United States v. Kizer, 569 F.2d 504 (9th Cir. 1978)
Scurr v. Moore, 647 F.2d 854 (8th Cir. 1981)

If a defendant who is appearing pro se disrupts the proceedings, the court should first warn the defendant that if there is any further disruption the court will deny him or her the right to proceed pro se and will direct standby counsel to take over. If there is any further disruption, the court should direct standby counsel to take over. If the defendant continues to be disruptive, he or she may then be removed from the courtroom.

Badger v. Cardwell, 587 F.2d 968 (9th Cir. 1978)

If a defendant is removed from the courtroom, electronic arrangements should be made so that the defendant can hear the proceedings.

United States v. Munn, 507 F.2d 563 (10th Cir. 1974)

After being ejected, a disruptive defendant may reclaim the right to be present by assuring the court that he or she will not engage in inappropriate conduct.

Badger v. Cardwell, 587 F.2d 968 (9th Cir. 1978)

4. Shackling and gagging of defendant

If a defendant's behavior disrupts court proceedings, the court may keep the defendant in the courtroom and have him or her shackled or gagged, or both, in order to prevent a continuation of the disruptive behavior.

Bibbs v. Wyrick, 526 F.2d 226 (8th Cir. 1975)
United States v. Theriault, 531 F.2d 281 (5th Cir. 1976)

In making the decision to shackle a defendant, the court may take into consideration the defendant's past conduct in the courtroom, prior escapes from custody, disruptive conduct in other proceedings, and prison disciplinary record.

United States v. Theriault, 531 F.2d 281 (5th Cir. 1976)

The court may not delegate the decision whether to shackle the defendant to the marshal, but may rely on the marshal's advice.

United States v. Apodaca, 843 F.2d 421 (10th Cir. 1988)

If the court orders that a defendant be shackled or shackled and gagged, the court must make a full statement on the record of the reasons for such action. The defendant and his or her counsel should be given an opportunity to respond to the reasons presented and to try to persuade the court that such measures are unnecessary.

United States v. Theriault, 531 F.2d 281(5th Cir. 1976)
United States v. Apodaca, 843 F.2d 421 (10th Cir. 1988)

If a defendant is shackled, the court should take precautions, such as bringing the defendant to the courtroom out of the presence of the jury, to ensure that any prejudicial effect is minimized.

United States v. Apodaca, 843 F.2d 421 (10th Cir. 1988)
Gilmore v. Armontrout, 861 F.2d 1061 (8th Cir. 1988)

See supra at 27–28.

Part V. Evidence

A. Admissibility

1. Coconspirator statements

According to Federal Rule of Evidence 801(d), "A statement is not hearsay if—

> "(1) . . . .
>
> "(2) The statement is offered against a party and is . . .
>
> "(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy."

(Although the rule states that this type of out-of-court statement is not hearsay, the statements that are made admissible by this rule are typical hearsay statements, that is, they are out-of-court statements offered at trial to prove the truth of the matter asserted.)

Before commencement of trial, government counsel should be advised that no proposed coconspirator statement shall be presented in evidence until it has first been presented to the court out of the presence of the jury and the court has ruled that it will be received in evidence.

a. Court's concern must be with statements offered to prove truth of matter asserted

The rules regarding coconspirator statements relate to utterances that would otherwise be banned by the hearsay rule.

United States v. Geaney, 417 F.2d 1116 (2d Cir. 1969)

A statement does not fall within the ambit of the coconspirator rule unless it would otherwise be excludable by reason of being a hearsay declaration. A declaration that has relevance for a reason other than the truth

of the matter asserted may be admissible, if relevant, as a non-hearsay "verbal act."

Anderson v. United States, 417 U.S. 211 (1974)
United States v. Calarco, 424 F.2d 657 (2d Cir. 1970)
United States v. Martorano, 561 F.2d 406 (1st Cir. 1977)

Tape recordings introduced to show the scope of certain gambling operations, but not offered to prove the truth of the contents of any of the conversations, are not hearsay. The recordings are thus admissible as verbal acts.

United States v. Boyd, 566 F.2d 929 (5th Cir. 1978)

b. Findings required

For a statement to be admissible as a coconspirator statement, the court must find that

1. there was a conspiracy in existence;
2. the declarant was a member of that conspiracy;
3. the defendant against whom the statement is offered was a member of that conspiracy;
4. the statement was made in furtherance of that conspiracy; and
5. the statement was made during the course of that conspiracy.

(1) In determining whether a proposed coconspirator statement is admissible, the trial court may take into consideration the content of the statement itself

At one time most circuits held that in determining whether an alleged coconspirator statement was admissible, a trial court could not take into consideration the proposed statement itself.

In *Bourjaily v. United States,* 483 U.S. 171 (1987), however, the Supreme Court reversed the rulings of those circuits and held that a trial court may take into consideration the content of an alleged coconspirator statement itself in determining whether that statement is to be admitted as a coconspirator statement.

The Supreme Court left open the question whether the court could rely solely on the proposed coconspirator statement to determine that it was admissible as a coconspirator statement.

In addition, in *Bourjaily* the Supreme Court ruled that if a coconspirator statement met all the evidentiary requirements for admission, the trial court need not make a further inquiry as to whether the statement met the challenge of the Confrontation Clause.

See Bench Comment, 1987, No. 4 (FJC): "*Bourjaily v. United States*: Admission of Coconspirator Statements under Federal Rule of Evidence 801(d)(2)(E)"

(2) Existence of a conspiracy must be proved

Before admitting the statement of a coconspirator, the trial judge must find that a conspiracy did in fact exist.

Bourjaily v. United States, 483 U.S. 171 (1987)
United States v. Macklin, 573 F.2d 1046 (8th Cir. 1978)
United States v. Santiago, 582 F.2d 1128 (7th Cir. 1978)

The existence of a conspiracy and the defendant's participation in it are preliminary questions of fact that must be resolved by the court pursuant to Federal Rule of Evidence 104(a) before a coconspirator statement may be admitted into evidence.

Bourjaily v. United States, 483 U.S. 171 (1987)

The court must apply a preponderance-of-the-evidence standard in determining whether such preliminary questions of fact have been established under Rule 104(a).

Bourjaily v. United States, 483 U.S. 171 (1987)

The court may consider the contents of the proposed coconspirator statement itself, along with any independent evidence of the conspiracy, in applying Rule 104(a) to resolve the preliminary factual question whether the existence of a conspiracy has been proven by a preponderance of the evidence.

Bourjaily v. United States, 483 U.S. 171 (1987)

It is not necessary, however, that a conspiracy be charged in the indictment.

United States v. Doulin, 538 F.2d 466 (2d Cir. 1976)
United States v. Jones, 540 F.2d 465 (10th Cir. 1976)
United States v. Kendricks, 623 F.2d 1165 (6th Cir. 1980)
United States v. Kendall, 665 F.2d 126 (7th Cir. 1981)
United States v. Layton, 855 F.2d 1388 (9th Cir. 1988)

Nor is it necessary that the declarant be charged as a codefendant.

United States v. Jones, 542 F.2d 186 (4th Cir. 1976)

It is sufficient that there be a joint venture.

United States v. Regilio, 669 F.2d 1169 (7th Cir. 1981)
United States v. Saimiento-Rozo, 676 F.2d 146 (5th Cir. 1982)

The joint venture on which admission of a coadventurer's statement is based need not be the same as the charged conspiracy, if any, and need not have an illegal objective.

United States v. Layton, 855 F.2d 1388 (9th Cir. 1988)

(3) The statement must have been made by a member of the conspiracy

To be admissible the statement must have been made by one who was a member of the conspiracy at the time of the statement, but the declarant need not be named in the indictment as a codefendant.

United States v. Jones, 542 F.2d 186 (4th Cir. 1976)

United States v. Cambindo Valencia, 609 F.2d 603 (2d Cir. 1979)

(4) The defendant against whom the statement is offered must have been a member of that conspiracy

The statement of an alleged coconspirator is not admissible against an accused without proof of the latter's membership in the conspiracy.

United States v. Nuccio, 373 F.2d 168 (2d Cir. 1967)

United States v. Morrow, 537 F.2d 120 (5th Cir. 1976)

It is admissible against one who joins the conspiracy after the statement was made.

United States v. Holder, 652 F.2d 449 (5th Cir. 1981)

United States v. Coe, 718 F.2d 830 (7th Cir. 1983)

United States v. Harris, 729 F.2d 441 (7th Cir. 1984) (provided conspiracy was in existence when statement was made)

United States v. Dial, 757 F.2d 163 (7th Cir. 1985)

United States v. Jackson, 757 F.2d 1486 (4th Cir. 1985)

United States v. Badalamenti, 794 F.2d 821 (2d Cir. 1986) (provided that before joining, accused was generally aware of what coconspirators had been doing and saying)

The fact that one party to a conversation is a government agent or informer does not of itself preclude admission of statements by the party, if he or she is a member of a conspiracy.

United States v. Williamson, 53 F.3d 1500 (10th Cir. 1995)

(5) The statement must have been made in furtherance of that conspiracy

By the terms of Federal Rule of Evidence 801(d)(2)(E), a coconspirator's statement is not admissible unless it was made "in furtherance of the conspiracy." All circuits recognize that this is a prerequisite to admissibility, but they vary in the strictness with which they interpret it. Some courts are more ready than others to find a statement to be in furtherance of a conspiracy.

The following are comments by many circuits on the "in furtherance" problem.

Mere conversation between coconspirators or merely narrative descriptions were not "in furtherance." To be admissible, declarations must further the common objectives of the conspiracy.

United States v. Eubanks, 591 F.2d 513 (9th Cir. 1979)
United States v. Stephenson, 53 F.3d 836 (7th Cir. 1995)

Casual comments that neither were intended to further the conspiracy nor had the effect of furthering it in any way were not "in furtherance."

United States v. Green, 600 F.2d 154 (8th Cir. 1979)

A statement intended to convince a prospective purchaser that the declarant had a good connection and meant business was "in furtherance."

United States v. Paoli, 603 F.2d 1029 (2d Cir. 1979)

Statements of a coconspirator identifying a fellow coconspirator as his source of narcotics were "in furtherance."

United States v. Williams, 604 F.2d 1102 (8th Cir. 1979)

A statement that the defendant was a primary buyer of marijuana was "in furtherance."

United States v. Magee, 821 F.2d 234 (5th Cir. 1987)

Statements made to a girlfriend of one defendant in an attempt to induce her to join him in his activity and to keep her abreast of its current status were "in furtherance."

United States v. Goodman, 605 F.2d 870 (5th Cir. 1979)

A mere conversation between coconspirators is not "in furtherance" of the conspiracy.

United States v. McGuire, 608 F.2d 1028 (5th Cir. 1979)

Statements that are nothing more than casual conversations about past events are not "in furtherance."

United States v. Lieberman, 637 F.2d 95 (2d Cir. 1980)
United States v. Stephenson, 53 F.3d 836 (7th Cir. 1995)

A statement made for the purpose of inducing continued participation in a conspiracy is "in furtherance."

United States v. Anderson, 642 F.2d 281 (9th Cir. 1981)

Mere conversations between coconspirators or merely narrative declarations are not "in furtherance." The statements must further the common objectives of the conspiracy or set in motion transactions that are an inte-

gral part of the conspiracy. In short, they must assist the coconspirators in achieving their objectives. Statements designed to induce a listener to join a conspiracy are "in furtherance." Mere casual admissions of culpability to someone the declarant has individually decided to trust are not "in furtherance."

United States v. Layton, 720 F.2d 548 (9th Cir. 1983)

Statements between coconspirators that provide reassurance, or serve to maintain trust and cohesiveness among them or to inform each other of the current status of a conspiracy are "in furtherance."

United States v. Ammar, 714 F.2d 238 (3d Cir. 1983)
United States v. Salerno, 868 F.2d 524 (2d Cir. 1989)
United States v. Rastelli, 870 F.2d 822 (2d Cir. 1989)

Statements of reassurance that serve to maintain trust and cohesiveness or to give information relative to the current status of a conspiracy, statements identifying fellow conspirators, statements identifying a coconspirator as the source of narcotics, and statements designed to induce a coconspirator to act are all statements made "in furtherance."

United States v. Lewis, 759 F.2d 1316 (8th Cir. 1985)
United States v. Williamson, 53 F.3d 1500 (10th Cir. 1995)

Where a main objective of a conspiracy has not been attained or abandoned and concealment is essential to the purpose of the objective, attempts to conceal the conspiracy are "in furtherance."

United States v. Howard, 770 F.2d 57 (6th Cir. 1985)

The statements of a declarant need not actually further the conspiracy to be admissible. It is enough that they be intended to promote the conspiratorial objectives. Statements that explain events important to the conspiracy in order to facilitate the conspiracy are "in furtherance."

United States v. Reyes, 798 F.2d 380 (10th Cir. 1986)

The "in furtherance" requirement is satisfied when a conspirator is apprised of the progress of a conspiracy or when the statements are designed to induce his or her assistance.

United States v. Heinemann, 801 F.2d 86 (2d Cir. 1986)
United States v. Persico, 832 F.2d 705 (2d Cir. 1987)

Statements by a coconspirator are "in furtherance" if the statements prompt the listener to respond in a way that facilitates the carrying out of criminal activity.

United States v. Rahme, 813 F.2d 31 (2d Cir. 1987)

(6) The statement must have been made during the course of that conspiracy

To be admissible a coconspirator's statement must be made during the life of the conspiracy.

Carbo v. United States, 314 F.2d 718 (9th Cir. 1963)
United States v. Brookins, 52 F.3d 615 (7th Cir. 1995)
United States v. Williamson, 53 F.3d 1500 (10th Cir. 1995)
United States v. Stephenson, 53 F.3d 836 (7th Cir. 1995)

A statement made by one alleged coconspirator after his or her arrest may be admissible against that coconspirator but is not admissible against the remaining coconspirators.

United States v. DiRodio, 565 F.2d 573 (9th Cir. 1977)
United States v. Washington, 586 F.2d 1147 (7th Cir. 1978)
United States v. Taylor, 802 F.2d 1108 (9th Cir. 1986)

The arrest of one coconspirator does not necessarily terminate the conspiracy. The test is not the arrest of one or more of the coconspirators but whether the remainder of the coconspirators are able to continue with the conspiracy. The statements of coconspirators still at large are admissible.

United States v. Thompson, 533 F.2d 1006 (6th Cir. 1976)
United States v. Hamilton, 689 F.2d 1262 (6th Cir. 1982)
United States v. Taylor, 802 F.2d 1108 (9th Cir. 1986)

c. Court determines admissibility of coconspirator's statement

The trial court alone determines the admissibility of coconspirator statements; the jury plays no role in that determination.

Bourjaily v. United States, 483 U.S. 171 (1987)
United States v. Chaney, 662 F.2d 1148 (5th Cir. 1981)

d. Standard of proof required for admissibility of statement

Bourjaily holds that coconspirator statements are admissible if they are proven by a preponderance of the evidence.

See Bench Comment, 1987, No. 4 (FJC): "*Bourjaily v. United States*: Admission of Coconspirator Statements under Federal Rule of Evidence 801(d)(2)(E)"

e. Court controls order of proof

The Supreme Court in *Bourjaily* specifically declined to express an opinion on the proper order of proof that a trial court should follow in concluding that the preliminary facts relevant to admission of a coconspirator statement have been proven by a preponderance of the evidence. The order of the admission of proof is within the discretion of the court. The court may thus admit declarations by alleged coconspirators prior to the

time that all of the requirements for admissibility have been established by independent evidence.

Bourjaily v. United States, 483 U.S. 171, 176 n.1 (1987)
United States v. Smith, 519 F.2d 516 (9th Cir. 1975)
United States v. Perez, 658 F.2d 654 (9th Cir. 1981)

The court has the discretion to require the government to establish the elements of admissibility prior to receiving coconspirator statements, or to admit the out-of-court statements on the condition that the prosecution subsequently produce independent evidence of the conspiracy.

United States v. Smith, 519 F.2d 516 (9th Cir. 1975)
United States v. Vinson, 606 F.2d 149 (6th Cir. 1979)
United States v. Ricks, 639 F.2d 1305 (5th Cir. 1981)
United States v. Miller, 664 F.2d 826 (11th Cir. 1981)

It is preferable, whenever possible, that the government's independent proof of conspiracy be introduced first, thereby avoiding the danger of injecting inadmissible hearsay into the record in anticipation of proof that never materializes.

United States v. Macklin, 573 F.2d 1046 (8th Cir. 1978)
United States v. James, 590 F.2d 575 (5th Cir. 1979)
United States v. Behrens, 689 F.2d 154 (10th Cir. 1982)

The court should at least require the government to preview the evidence that it believes brings the evidence within the coconspirator rule before allowing introduction of the coconspirator statement.

United States v. Shoffner, 826 F.2d 619 (7th Cir. 1987)

However, a pretrial hearing need not be held if it will be time-consuming and repetitive.

United States v. Hernandez, 829 F.2d 988 (10th Cir. 1987)

f. Court must make findings relative to requisites of admissibility

At the conclusion of all the evidence, the court must on appropriate motion determine as a factual matter whether the prosecution has shown by a preponderance of the evidence all of the requisites for the admissibility of a coconspirator statement about which evidence has been received. If the court concludes that the prosecution has not borne its burden, the statement may not remain in evidence for consideration by the jury. In that event the judge must decide whether the prejudice arising from the erroneous admission can be cured by a cautionary instruction to the jury to disregard the statement or whether a mistrial must be declared.

United States v. Stanchich, 550 F.2d 1294 (2d Cir. 1977)
United States v. James, 590 F.2d 575 (5th Cir. 1979)
United States v. Gantt, 617 F.2d 831 (D.C. Cir. 1980)

United States v. Ciampaglia, 628 F.2d 632 (1st Cir. 1980)
United States v. Fitts, 635 F.2d 664 (8th Cir. 1980)
United States v. Hewes, 729 F.2d 1302 (11th Cir. 1984)

It is error for the court to rule on the admissibility of coconspirator statements at the close of the government's case.

United States v. Cerone, 830 F.2d 938 (8th Cir. 1987)

Even if counsel has not made a motion, it is wise policy for the trial court to place in the record an explicit ruling that the government has established all of the necessary requisites for the admissibility of the coconspirator statements that were admitted together, with such details as seem appropriate under the circumstances.

United States v. Continental Group, Inc., 603 F.2d 444 (3d Cir. 1979)
United States v. Fitts, 635 F.2d 664 (8th Cir. 1980)
United States v. Leon, 679 F.2d 534 (5th Cir. 1982)

g. In-court testimony of coconspirator is receivable

Although an out-of-court statement made by a coconspirator must meet all the tests of admissibility, a coconspirator may testify in court as to all aspects of the conspiracy.

United States v. Rivera Diaz, 538 F.2d 461 (1st Cir. 1976)
United States v. Smith, 692 F.2d 693 (10th Cir. 1982)

h. Effect of dismissal of conspiracy charge against declarant

If, at the close of the government's case, the court dismisses the conspiracy charge against a defendant whose out-of-court hearsay statements were admitted, some courts have held that either the defendant's statements must be withdrawn from the consideration of the jury or a mistrial declared.

United States v. Ratcliffe, 550 F.2d 431 (9th Cir. 1976)
United States v. Davis, 578 F.2d 277 (10th Cir. 1978)

Others have held that the statements need not be withdrawn.

United States v. Stanchich, 550 F.2d 1294 (2d Cir. 1977)
United States v. Gil, 604 F.2d 546 (7th Cir. 1979)
United States v. Clark, 613 F.2d 391 (2d Cir. 1979)

i. Right of confrontation with regard to coconspirator statements

No inquiry concerning the Confrontation Clause need be made concerning a proposed coconspirator statement if evidence has established that the statement is in fact a coconspirator statement.

United States v. Inadi, 475 U.S. 387 (1986)
Bourjaily v. United States, 483 U.S. 171 (1987)
United States v. Layton, 855 F.2d 1388 (9th Cir. 1988)

j. Coconspirator statements received in civil actions

Coconspirator statements are admissible in civil actions in the same manner as they are in criminal actions.

Paul F. Newton & Co. v. Texas Commerce Bank, 630 F.2d 1111 (5th Cir. 1980)
World of Sleep, Inc. v. La-Z-Boy Chair Co., 756 F.2d 1467 (10th Cir. 1985)

k. Spousal privilege with regard to coconspirator statements

When husband and wife are engaged in a criminal conspiracy, a coconspirator statement of either is admissible.

United States v. Price, 577 F.2d 1356 (9th Cir. 1978)

l. Application to joint ventures

Coconspirator exceptions apply to statements by joint venturers.

United States v. Regilio, 669 F.2d 1169 (7th Cir. 1981)
United States v. Saimiento-Rozo, 676 F.2d 146 (5th Cir. 1982)
United States v. Layton, 855 F.2d 1388 (9th Cir. 1988)

m. Pretrial disclosure to defendants of coconspirator statements

Defendants are not entitled to discover coconspirator statements before trial.

United States v. Roberts, 811 F.2d 257 (4th Cir. 1987)
United States v. Orr, 825 F.2d 1537 (11th Cir. 1987)

n. In-court presence of coconspirator declarant not needed

The coconspirator declarant need not be present for cross-examination as a prerequisite for the admission of his or her out-of-court coconspirator statement.

United States v. Inadi, 475 U.S. 387 (1986)
United States v. Caputo, 791 F.2d 37 (3d Cir. 1986)
United States v. Lopez, 803 F.2d 969 (9th Cir. 1986)

2. Identification testimony

Identification testimony is admissible provided that any pretrial identification procedure was not impermissibly suggestive or, if impermissibly suggestive, did not create a substantial risk of misidentification.

Reliability is the linchpin in determining the admissibility of identification testimony.

Manson v. Brathwaite, 432 U.S. 98 (1977)

a. Court must determine admissibility of identification testimony

Determining the admissibility of identification testimony is a two-step process:

1. The court must decide whether the out-of-court identification procedure was unnecessarily suggestive.
2. If the procedure is found to have been unnecessarily suggestive, the court must then determine whether, considering the totality of circumstances, the suggestive procedure created a substantial risk of misidentification.

If the answer to either of these inquiries is negative, testimony as to the identification is admissible.

Neil v. Biggers, 409 U.S. 188 (1972)
Manson v. Brathwaite, 432 U.S. 98 (1977)
United States v. Gidley, 527 F.2d 1345 (5th Cir. 1976)
United States v. Freie, 545 F.2d 1217 (9th Cir. 1976)
United States v. Milhollan, 599 F.2d 518 (3d Cir. 1979)
United States v. Hadley, 671 F.2d 1112 (8th Cir. 1982)
United States v. Hamilton, 684 F.2d 380 (6th Cir. 1982)
United States v. Briley, 726 F.2d 1301 (8th Cir. 1984)

In assessing the reliability of the identification testimony in light of the suggestive identification procedure, the court must consider

1. the opportunity of the witness to observe the criminal at the time of the crime;
2. the degree of attention of the witness at the time of the crime;
3. the accuracy of the witness's prior description of the criminal;
4. the level of certainty demonstrated by the witness at pretrial confrontation; and
5. the length of time between the crime and the pretrial confrontation.

Manson v. Brathwaite, 432 U.S. 98 (1977)
United States v. Barrett, 703 F.2d 1076 (9th Cir. 1983)
Velez v. Schmer, 724 F.2d 249 (1st Cir. 1984)
United States v. Woolery, 735 F.2d 818 (5th Cir. 1984)

b. Lineup

A lineup is the preferable means of identification.

United States v. Gidley, 527 F.2d 1345 (5th Cir. 1976)

The defendant may be compelled by force, if necessary, to attend a lineup.

Appeal of Maguire, 571 F.2d 675 (1st Cir. 1978)

Even though there is no constitutional right to compel the government to conduct a lineup, the court can and should compel the government to do so if the interests of justice and fair play require it.

United States v. Key, 717 F.2d 1206 (8th Cir. 1983)

A defendant does not, however, have a right to demand a lineup.

United States v. ex rel. Clark v. Fike, 538 F.2d 750 (7th Cir. 1976)
United States v. Marchand, 564 F.2d 983 (2d Cir. 1977)
Branch v. Estelle, 631 F.2d 1229 (5th Cir. 1980)

The decision whether to grant a defendant's motion for a lineup is within the discretion of the trial judge.

United States v. Robertson, 606 F.2d 853 (9th Cir. 1979)
United States v. Harvey, 756 F.2d 636 (8th Cir. 1985)

c. Identification in court without prior lineup is disfavored

An in-court identification can itself be impermissibly suggestive, for example, if a defendant is the only black person in the courtroom and is seated next to defense counsel at trial.

United States v. Archibald, 734 F.2d 938 (2d Cir. 1984)

When informed that identification is a critical issue in a case, the court would be well-advised to direct the government to conduct an out-of-court lineup.

United States v. Brown, 699 F.2d 585 (2d Cir. 1983)

Defense counsel may seek court permission to seat two or more persons at counsel's table, to have no one at counsel's table, or to have a number of individuals resembling the defendant in court.

United States v. Thoreen, 653 F.2d 1332 (9th Cir. 1981)

There is no constitutional entitlement to an in-court lineup or other particular method of lessening the suggestiveness of in-court identification, such as seating the defendant elsewhere in the room. Such matters are within the discretion of the trial court.

United States v. Domina, 784 F.2d 1361 (9th Cir. 1986) (a dissent in this case speaks about how prejudicial an in-court identification is)

To ensure the accuracy and reliability of an in-court identification by an eyewitness, procedures such as placing the defendant in the courtroom audience or staging an in-court lineup should be employed wherever necessary.

United States v. Sebetich, 776 F.2d 412 (3d Cir. 1985)

Prior to a proposed in-court identification, the court may permit the defendant to sit in the back of the courtroom with other persons of similar appearance.

Government of Virgin Islands v. Petersen, 507 F.2d 898 (3d Cir. 1975)

The substitution of another person for the defendant at counsel's table prior to an in-court identification is unethical.

United States v. Thoreen, 653 F.2d 1332 (9th Cir. 1981)

d. Single-photograph identification or single-person show-up is suspect

Display of a single photograph of the suspect alone is one of the most suggestive and therefore most objectionable methods of pretrial identification.

Manson v. Brathwaite, 432 U.S. 98 (1977)
Israel v. Odom, 521 F.2d 1370 (7th Cir. 1975)
United States v. Kimbrough, 528 F.2d 1242 (7th Cir. 1976)

Testimony relative to a single-person show-up immediately after a crime occurs may be admissible.

United States v. Williams, 626 F.2d 697 (9th Cir. 1980)
United States v. Rice, 652 F.2d 521 (5th Cir. 1981)
United States v. Bagley, 772 F.2d 482 (9th Cir. 1985)

e. Witness may testify in court to out-of-court identification of accused

According to Federal Rule of Evidence 801(d)(1)(C), an identifying statement is not hearsay if the declarant testifies at trial to an identification that he or she has previously made, after perceiving the person identified, and is subject to cross-examination concerning the statement.

A witness may be permitted to testify that he or she previously identified a photograph of the defendant and may be allowed to identify at trial the particular photograph he or she identified during the pretrial investigation.

Anderson v. Maggio, 555 F.2d 447 (5th Cir. 1977)

A witness may testify to a pretrial photo-spread identification even though he or she is unable to make a positive in-court identification at trial.

Government of Virgin Islands v. Petersen, 507 F.2d 898 (3d Cir. 1975)
United States v. Keller, 512 F.2d 182 (3d Cir. 1975)
Adail v. Wyrick, 711 F.2d 99 (8th Cir. 1983)

A witness who has identified a defendant from a photo spread is properly permitted to identify the defendant in court at trial.

United States v. Givens, 767 F.2d 574 (9th Cir. 1985)

f. Equivocal identifications

A witness is permitted to identify a certain photograph of the defendant in court at trial and testify to selecting that photograph from a photo spread as "resembling" the perpetrator of the crime. Although a prior

identification may be equivocal, the jury is entitled to give it such weight as it will after hearing the testimony of the witness under direct and cross-examination.

United States v. Famulari, 447 F.2d 1377 (2d Cir. 1971)
United States v. Hudson, 564 F.2d 1377 (9th Cir. 1977)

The fact that an identification in court is less than positive does not render it inadmissible.

United States v. Malatesta, 583 F.2d 748 (5th Cir. 1978)
Frank v. Blackburn, 605 F.2d 910 (5th Cir. 1979), *rev'd on other grounds*, 646 F.2d 873 (5th Cir. 1980)

g. Mug shots are inadmissible

Admission of mug shots is in conflict with rules of evidence prohibiting the introduction of testimony regarding a defendant's bad character or past criminal record.

United States v. Sawyer, 504 F.2d 878 (5th Cir. 1974)
United States ex rel. Bleimehl v. Cannon, 525 F.2d 414 (7th Cir. 1975)
United States v. Rixner, 548 F.2d 1224 (5th Cir. 1977)

If the introduction of mug shots is unavoidable, steps must be taken to minimize the prejudicial impact on the defendant.

United States v. Fosher, 568 F.2d 207 (1st Cir. 1978)

h. Defendant entitled to cautionary jury instruction relative to identification testimony

Upon request, the defendant is entitled to a special instruction to the jury on the issue of identification, which emphasizes the dangers inherent in identification testimony, the need to scrutinize such evidence with care, and the need to find the circumstances of the identification convincing beyond a reasonable doubt before returning a verdict of guilty.

United States v. Telfaire, 469 F.2d 552 (D.C. Cir. 1972)
United States v. Marchand, 564 F.2d 983 (2d Cir. 1977)
United States v. Kavanagh, 572 F.2d 9 (1st Cir. 1978)

i. Admissibility of expert testimony relative to identification of accused

The circuits are divided on the question whether to admit expert testimony on eyewitness identification issues.

The Third, Fifth, and Sixth Circuits hold that expert testimony on identification issues is admissible.

United States v. Smith, 736 F.2d 1103 (6th Cir. 1984)

United States v. Downing, 753 F.2d 1224 (3d Cir. 1985) (discussing impact of Fed. R. Evid. 403, 702, and 704 on admission of expert testimony on identification)

United States v. Moore, 786 F.2d 1308 (5th Cir. 1986)

The Seventh and Ninth Circuits hold that expert testimony on eyewitness identification issues is inadmissible.

United States v. Christophe, 833 F.2d 1296 (9th Cir. 1987)

United States v. Hudson, 884 F.2d 1016 (7th Cir. 1989)

The trial court has discretion to admit identification testimony by an expert witness if the expert proposes to testify as to identification features not within the everyday experience of laypersons.

United States v. Burke, 506 F.2d 1165 (9th Cir. 1974)

United States v. Green, 525 F.2d 386 (8th Cir. 1975)

United States v. Collins, 559 F.2d 561 (9th Cir. 1977)

United States v. Sellers, 566 F.2d 884 (4th Cir. 1977) (held, contrary to general rule, that expert could point out similarities and differences between features of defendant and those of person shown in photograph)

There should be an offer of proof outside the presence of the jury before identification testimony by an expert is received. The court can then determine whether the expert can materially assist the jurors beyond their common experience.

United States v. Burke, 506 F.2d 1165 (9th Cir. 1974)

United States v. Farnsworth, 753 F.2d 1224 (3d Cir. 1985)

j. Identification of defendant by law enforcement officers

Identification of the defendant by a police officer or by a parole officer is to be avoided, if possible, because those individuals cannot be fully cross-examined without the risk of eliciting prior criminal activity of the defendant.

United States v. Butcher, 557 F.2d 666 (9th Cir. 1977)

United States v. Farnsworth, 729 F.2d 1158 (8th Cir. 1984)

k. Defendant must be identified at trial as being perpetrator of the crime

In every criminal case, the government is required to prove the identity of the person who committed the crime. To support a conviction, the government must present evidence at trial that the defendant was the perpetrator of the charged crime. This is generally provided by an in-court identification of the accused; however, it can also be inferred from other evidence.

United States v. Darrell, 629 F.2d 1089 (5th Cir. 1980)

United States v. Weed, 689 F.2d 752 (7th Cir. 1982)

For example, it is not necessary to have an in-court identification if there is testimony of a pretrial identification of the defendant as the perpetrator of the crime.

United States v. Singleton, 702 F.2d 1159 (D.C. Cir. 1983)

3. Tape recordings of conversations

a. Tape recordings may be admitted into evidence

It is within the court's discretion to admit tapes of telephone conversations.

United States v. Bastone, 526 F.2d 971 (7th Cir. 1975)

Tapes are to be admitted only if (1) they are authentic, accurate, and trustworthy, and (2) they are audible and comprehensible enough for a jury to consider them.

United States v. Slade, 627 F.2d 293 (D.C. Cir. 1980)
United States v. Robinson, 707 F.2d 872 (6th Cir. 1983)

Tape recordings are deemed inadmissible if substantial portions of them are so inaudible as to render them untrustworthy.

United States v. Jones, 540 F.2d 465 (10th Cir. 1976)
United States v. Robinson, 707 F.2d 872 (6th Cir. 1983)

Before admitting tapes, the court should require the government to produce evidence concerning the competency of the operator, the fidelity of the equipment, the absence of any alterations in the tapes, and the identities of the speakers.

United States v. Biggins, 551 F.2d 64 (5th Cir. 1977)

A tape is generally admissible unless the unintelligible portions are so substantial that the recording as a whole is untrustworthy.

United States v. Lane, 514 F.2d 22 (9th Cir. 1975)
United States v. Zambrana, 864 F.2d 494 (7th Cir. 1988)

Admission of tape recordings containing inaudible portions is a matter within the discretion of the trial court.

United States v. Williams, 548 F.2d 228 (8th Cir. 1977)

Even if the tape has poor audibility, it is admissible if enough of the conversation is audible and relevant to the purpose for which it is admitted.

United States v. Nashawaty, 571 F.2d 71 (1st Cir. 1978)
United States v. Greenfield, 574 F.2d 305 (5th Cir. 1978)

See supra at 30.

b. Pretrial procedure with regard to tape recordings

The trial court may condition the use of tape recordings on the advance preparation of an accurate transcript.

United States v. Gerry, 515 F.2d 130 (2d Cir. 1975)
United States v. Jones, 540 F.2d 465 (10th Cir. 1976)

When a transcript is to be used to supplement tape recordings, the parties should first seek to arrive at a stipulated transcript. If the parties cannot agree, each side should produce its own transcript or its own version of disputed portions of the tape.

United States v. Rochan, 563 F.2d 1246 (5th Cir. 1977)
United States v. Rengifo, 789 F.2d 975 (1st Cir. 1986)

A pretrial conference is the preferred manner of obtaining a stipulation as to the accuracy of a transcript of a recorded conversation.

United States v. Onori, 535 F.2d 938 (5th Cir. 1976)

It is preferable that tape-recorded conversations between the defendant and a government informant be edited to exclude the defendant's use of racial epithets.

United States v. Manzella, 782 F.2d 533 (5th Cir. 1986)

c. Court may permit jurors to have transcripts as they listen to tape recordings

It is within the discretion of the court to permit jurors to have transcripts as they hear tapes played.

United States v. John, 508 F.2d 1134 (8th Cir. 1975)
United States v. Brown, 872 F.2d 385 (11th Cir. 1989)

If jurors are permitted to have transcripts, the court must give an instruction to the effect that it is the words that they hear that are decisive, not those that they read in the transcripts.

United States v. Hassell, 547 F.2d 1048 (8th Cir. 1977)

See supra at 30.

d. Courtroom procedure with regard to tape recordings

If transcripts are to be used, they should be passed out to jurors immediately prior to the playing of the tapes and then collected immediately after the tapes have been played.

If the defense and prosecution disagree on the contents of portions of a tape, the jurors are to be given transcripts of both versions.

United States v. Chiarizio, 525 F.2d 289 (2d Cir. 1975)
United States v. Slade, 627 F.2d 293 (D.C. Cir. 1980)

United States v. Zambrana, 864 F.2d 494 (7th Cir. 1988)

The tape may be played as the jurors are looking at one transcript and replayed as the jurors are looking at another transcript.

United States v. Chiarizio, 525 F.2d 289 (2d Cir. 1975)

e. Jurors may rehear tape recordings after they have begun deliberations

It is within the discretion of the trial court to replay tapes at the request of the jury after it has retired for deliberation.

United States v. Williams, 548 F.2d 228 (8th Cir. 1977)

United States v. Zepeda-Santana, 569 F.2d 1386 (5th Cir. 1978)

United States v. Scaife, 749 F.2d 338 (6th Cir. 1984) (provided tapes have been admitted as exhibits)

It is also within the court's discretion to permit jurors to refer to transcripts during the replaying.

United States v. Dorn, 561 F.2d 1252 (7th Cir. 1977)

See supra at 30.

f. Transcripts of tape recordings to jury room

The court in its discretion may admit properly authenticated transcripts of tape recordings as evidence and permit them to be taken to the jury room along with the rest of the exhibits.

United States v. Rengifo, 789 F.2d 975 (1st Cir. 1986)

United States v. Ulerio, 859 F.2d 1144 (2d Cir. 1988)(English translations of conversations in Spanish)

United States v. Bertoli, 40 F.3d 1384 (3d Cir. 1994)

If a transcript of a tape recording is to be used during deliberations, it should be admitted into evidence; appropriate instructions regarding the jury's use of the transcript should be given.

United States v. Berry, 64 F.3d 305 (7th Cir. 1995)

The court has discretion to permit the jury to take to the jury room any tape recordings that have been admitted as exhibits during the trial. Recordings that have not been admitted as exhibits may not be taken to the jury room.

United States v. Scaife, 749 F.2d 338 (6th Cir. 1984)

If the accuracy of a transcript cannot be verified, it is an abuse of discretion to permit jurors to read it.

United States v. Robinson, 707 F.2d 872 (6th Cir. 1983)

See supra at 30.

4. Balancing probative value of evidence against prejudicial effect

Federal Rules of Evidence 403, 609(a), and 609(b) require the trial court to balance the probative value of evidence against its prejudicial effect.

a. Balancing under Rule 403

According to Rule 403, evidence, although relevant, may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

(1) Balancing within discretion of trial court

The balancing required by Rule 403 is entrusted to the broad discretion of the trial court.

United States v. Medico, 557 F.2d 309 (2d Cir. 1977)
United States v. Robinson, 560 F.2d 507 (2d Cir. 1977)
United States v. Kasto, 584 F.2d 268 (8th Cir. 1978)
United States v. O'Connor, 874 F.2d 483 (7th Cir. 1989)

(2) Criteria to be applied

"Unfair prejudice" as stated in Rule 403 is defined in the Notes of the Advisory Committee on the Proposed Federal Rules of Evidence as "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."

United States v. Back, 588 F.2d 1283 (9th Cir. 1979)
United States v. Grassi, 602 F.2d 1192 (5th Cir. 1979)
United States v. Vretta, 790 F.2d 651 (7th Cir. 1986)

The exclusion of evidence under Rule 403 is an extraordinary remedy that is to be invoked only sparingly.

United States v. Thevis, 665 F.2d 616 (5th Cir. 1982)
United States v. Betancourt, 734 F.2d 750 (11th Cir. 1984)
United States v. Cole, 755 F.2d 748 (11th Cir. 1985)

For evidence to be excluded, its prejudicial effect must substantially outweigh its probative value.

United States v. Hans, 684 F.2d 343 (6th Cir. 1982)
United States v. Smith, 685 F.2d 1293 (11th Cir. 1982)
United States v. Medina, 755 F.2d 1269 (7th Cir. 1985)
United States v. Dillon, 870 F.2d 1125 (6th Cir. 1989) (evidence of flight)

A major function of Rule 403 is to exclude matter of scant or cumulative probative force, dragged in by its heels for the sake of its prejudicial effect.

United States v. Roark, 753 F.2d 991 (11th Cir. 1985)

Evidence that is otherwise admissible is not rendered inadmissible because it is strongly probative on an essential element of an offense.

United States v. Day, 591 F.2d 861 (D.C. Cir. 1978)
United States v. Figueroa, 618 F.2d 934 (2d Cir. 1980)

In determining whether the probative value of evidence is substantially outweighed by the danger of unfair prejudice, it is a sound rule that the balance should generally be struck in favor of admission when the evidence indicates a close relationship to the offense charged. The necessity of the evidence to prove the government's case is a factor to be used in weighing the evidence's admissibility under the balancing test. In so weighing the evidence, the court should be mindful of the heavy burden the government bears to prove its case beyond a reasonable doubt and should not unduly restrict the government in the proof of its case.

United States v. Day, 591 F.2d 861 (D.C. Cir. 1978)

(3) Timing

It is well for the trial court to delay the admission of evidence falling within Rule 403 until virtually all of the other proof has been introduced, as the court is then in a better position to weigh the probative worth of the evidence against the prejudicial effect of it.

United States v. Robinson, 560 F.2d 507 (2d Cir. 1977)

(4) Court's reasoning should be placed on the record

If the trial court decides to exclude relevant evidence by invoking Rule 403, it should confront the problem explicitly, acknowledging and weighing on the record both the prejudicial effect and the probative value of the proposed evidence.

United States v. Dwyer, 539 F.2d 924 (2d Cir. 1976)

The court should articulate the factors considered in the balancing of the probative value against the unfair prejudice.

United States v. Lebovitz, 669 F.2d 894 (3d Cir. 1982)

(5) Minimizing prejudice

The prejudicial effect of evidence may be minimized by the elimination of inflammatory or unnecessary details and by cautionary instructions delivered by the court.

United States v. Benton, 637 F.2d 1052 (5th Cir. 1981)

b. Balancing under Rule 609(a)

According to Rule 609(a):

> For the purpose of attacking the credibility of a witness, (1) evidence that a witness other than the accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused; and (2) evidence that any witness has been convicted of a crime shall be admitted if it involved dishonesty or false statement, regardless of the punishment.

The Federal Rules of Evidence Advisory Committee Notes state that the 1990 amendment to Rule 609(a) "resolves an ambiguity as to the relationship of Rules 609 and 403 with respect to impeachment of witnesses other than the criminal defendant. [Citation omitted.] The amendment does not disturb the special balancing test for the criminal defendant who chooses to testify." The notes further state that "[t]he amendment applies the general balancing test of Rule 403 to protect all litigants against unfair impeachment of witnesses. The balancing test protects civil litigants, the government in criminal cases, and the defendant in a criminal case who calls other witnesses."

See United States v. Figueroa, 976 F.2d 1446 (1st Cir. 1992)

(1) Timing of rulings on Rule 609(a) matters is discretionary

The trial court has broad discretion as to the timing of its rulings relating to the admissibility of the defendant's prior convictions under Rule 609(a).

United States v. Oakes, 565 F.2d 170 (1st Cir. 1977)
United States v. Tercero, 640 F.2d 190 (9th Cir. 1980)
United States v. Fay, 668 F.2d 375 (8th Cir. 1981)

Several decisions have suggested that an advance ruling regarding the admissibility of the defendant's prior convictions is desirable, where feasible, so that the defendant can make an informed decision whether to testify.

United States v. Oakes, 565 F.2d 170 (1st Cir. 1977)
United States v. Cook, 608 F.2d 1175 (9th Cir. 1979) (en banc), *rev'd on other grounds,* 469 U.S. 38 (1984)
United States v. Burkhead, 646 F.2d 1283 (8th Cir. 1981)
United States v. Fay, 668 F.2d 375 (8th Cir. 1981)

Other decisions have suggested that the trial court is better able to weigh a prior conviction's probative value against its prejudicial effect after hearing the direct testimony of the defendant.

Luce v. United States, 469 U.S. 38 (1984)
United States v. Witschner, 624 F.2d 840 (8th Cir. 1980)

(2) Crimes of dishonesty or false statement

Crimes involving dishonesty or false statement include perjury or subornation of perjury, false statement, criminal fraud, embezzlement, false pretense, or any other offense the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the defendant's propensity to testify truthfully.

United States v. Dixon, 547 F.2d 1079 (9th Cir. 1976)

If it is not apparent on its face that a crime involved dishonesty, the court must hold a hearing to determine whether the crime did in fact involve dishonesty.

United States v. Crawford, 613 F.2d 1045 (D.C. Cir. 1979)
United States v. Barnes, 622 F.2d 107 (5th Cir. 1980)

(3) Criteria to be applied in balancing

When the defendant is the witness, the factors that a district court should consider in balancing a prior conviction's probative value against its prejudicial effect are (1) the impeachment value of the prior crime; (2) the temporal relationship between the conviction and the subsequent history of the defendant; (3) the similarity between the prior offense and the offense charged; (4) the importance of the defendant's testimony; and (5) the centrality of the credibility issue at trial.

United States v. Bagley, 772 F.2d 482 (9th Cir. 1985)

(4) Danger in admitting proof of conviction of same or similar crime to that charged

If the prior conviction is for the same offense as that charged, or an offense similar to that charged, particularly careful consideration is required before the conviction may be admitted.

United States v. Ortiz, 553 F.2d 782 (2d Cir. 1977)
United States v. Martinez, 555 F.2d 1273 (5th Cir. 1977)

Evidence of a prior conviction for the very crime for which a defendant is on trial may be devastating in its potential impact on a jury. There is a substantial risk that all exculpatory evidence will be overwhelmed by a jury's human tendency to draw a conclusion that is impermissible in law: because the defendant did it before, he or she must have done it again.

United States v. Bagley, 772 F.2d 482 (9th Cir. 1985)

(5) Trial court should place its reasoning on the record

The trial court should make its determination after a hearing on the record and should make an explicit finding that the evidence's probative value outweighs or does not outweigh its prejudicial effect on the defendant.

United States v. Preston, 608 F.2d 626 (5th Cir. 1979)
United States v. Crawford, 613 F.2d 1045 (D.C. Cir. 1979)
United States v. Fountain, 642 F.2d 1083 (7th Cir. 1981)
United States v. Walker, 817 F.2d 461 (8th Cir. 1987)

Some circuits do not require an on-the-record balancing.

United States v. Rosales, 680 F.2d 1304 (10th Cir. 1981)
United States v. Grandmont, 680 F.2d 867 (1st Cir. 1982)

(6) Evidence admissible with regard to conviction of witness

Questioning about a prior conviction of a witness is limited to the fact of conviction, the date of conviction, and the nature of the offense.

United States v. Gaertner, 705 F.2d 210 (7th Cir. 1983)
United States v. Beckett, 706 F.2d 519 (5th Cir. 1983)
United States v. Castro, 788 F.2d 1240 (7th Cir. 1986)

Cross-examination is limited to the facts admissible on direct examination.

United States v. Sampol, 636 F.2d 621 (D.C. Cir. 1980)

(7) Court must instruct jury regarding proper use of prior-conviction evidence

In admitting evidence of prior convictions of a defendant, the court should instruct the jury that the evidence is to be considered only on the issue of credibility, and not as substantive evidence of guilt.

Murray v. Superintendent, Kentucky State Penitentiary, 651 F.2d 451 (6th Cir. 1981)

(8) Admissibility of prior conviction pending appeal

A prior conviction is admissible even though the conviction is pending appeal.

United States v. Rose, 526 F.2d 745 (8th Cir. 1978)
United States v. Klayer, 707 F.2d 892 (6th Cir. 1983)

(9) Court may place conditions on the exclusion of a prior conviction

The court may exclude proof of a prior conviction on the condition that the defendant not represent that he or she has never been in trouble with the law or that he or she has always been a law-abiding citizen.

United States v. Jackson, 405 F. Supp. 938 (E.D.N.Y. 1975)
United States v. Cook, 608 F.2d 1175 (9th Cir. 1979)

c. Balancing under Rule 609(b)

Under Federal Rule of Evidence 609(b), evidence of a conviction is not admissible if a period of more than ten years has elapsed since the date of the conviction or the date of the release of the witness from the confinement imposed for that conviction, whichever is later, unless the court determines that, in the interests of justice, the conviction's probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

(1) Such convictions are only rarely admissible

Convictions more than ten years old are to be admitted rarely and only under exceptional circumstances.

United States v. Shapiro, 565 F.2d 479 (7th Cir. 1977)
United States v. Cavender, 578 F.2d 528 (4th Cir. 1978)

There is in effect a presumption in the rule that convictions more than 10 years old are more prejudicial than helpful and should be excluded.

United States v. Sims, 588 F.2d 1145 (6th Cir. 1978)

(2) Court's reasoning must be placed on the record if it departs from the ten-year prohibition

If the trial court departs from the ten-year prohibition, it must make specific findings on the record as to the particular facts and circumstances it has considered in determining that the conviction's probative value substantially outweighs its prejudicial impact.

United States v. Cavender, 578 F.2d 528 (4th Cir. 1978)
United States v. Sims, 588 F.2d 1145 (6th Cir. 1978)
United States v. Brown, 603 F.2d 1022 (1st Cir. 1979)
United States v. Portillo, 633 F.2d 1313 (9th Cir. 1980)
United States v. Portillo, 699 F.2d 461 (9th Cir. 1982)
Contra United States v. Holmes, 822 F.2d 802 (8th Cir. 1987)

The court must find not merely that the probative value of the conviction outweighs the prejudicial effect but that the probative value substantially outweighs the prejudicial effect.

United States v. Cavender, 578 F.2d 528 (4th Cir. 1978)

5. Receipt of expert testimony

a. Qualification of expert witness

The trial court has broad discretion to determine whether a proffered expert qualifies as an expert.

United States v. Tomasian, 784 F.2d 782 (7th Cir. 1986)
Davis v. United States, 865 F.2d 164 (8th Cir. 1988)
United States v. Daccarett, 6 F.3d 37 (2d Cir. 1993)

United States v. Willey, 57 F.3d 1374 (6th Cir. 1995)

b. Determination of admissibility of expert testimony

Federal Rule of Evidence 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786 (1993), the Supreme Court held that admissibility of expert testimony is governed by Rule 702 rather than the previous *Frye* test. Under *Daubert*, a trial judge faced with a proffer of expert scientific testimony must determine at the outset, pursuant to Federal Rule of Evidence 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue. This entails a preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue. Pertinent considerations in making this determination are whether a theory or technique can be (and has been) tested; whether it has been subjected to peer review and publication; the known or potential rate of error; and whether the theory or technique is generally accepted.

Appellate decisions applying *Daubert* include:

United States v. Martinez, 3 F.3d 1191 (8th Cir. 1993) (DNA)

United States v. Bonds, 12 F.3d 540 (6th Cir. 1993) (DNA)

United States v. Rincon, 28 F.3d 921 (9th Cir. 1994) (eyewitness identification)

United States v. Chischilly, 30 F.3d 1144 (9th Cir. 1994) (DNA)

United States v. Davis, 40 F.3d 1069 (10th Cir. 1994) (DNA)

United States v. Dorsey, 45 F.3d 809 (4th Cir. 1995) (forensic anthropology)

See generally Federal Judicial Center, Reference Manual on Scientific Evidence (1994)

In making an admissibility determination, a judge must be mindful of other evidence rules, such as Rule 403, which permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Daubert v. Merrell Dow Pharmaceuticals, Inc., 113 S. Ct. 2786 (1993)

United States v. Martinez, 3 F.3d 1191 (8th Cir. 1993)

United States v. Bonds, 12 F.3d 540 (6th Cir. 1993)
United States v. Chischilly, 30 F.3d 1144 (9th Cir. 1994)

Under *Daubert*, the court can take judicial notice of the reliability and scientific validity of the general theory and techniques of DNA profiling. (If new techniques are offered, however, the court must hold an *in limine* hearing.) Even though judicial notice may be taken, this does not mean that testimony concerning DNA profiling is automatically admissible. There must be a preliminary showing that the expert properly performed a reliable methodology in arriving at his or her opinion. The court should make an initial inquiry into the particular expert's application of the scientific principle or methodology in question. The court should require the testifying expert to provide affidavits attesting that he properly performed the protocols involved in DNA profiling. If the opponent of the evidence challenges the application of the protocols in a particular case, the court must determine whether the expert erred in applying the protocols, and, if so, whether such error so infected the procedure as to make the results unreliable. An alleged error in the application of a reliable methodology should provide the basis for exclusion of the opinion only if that error negates the basis for the reliability of the principle itself.

United States v. Martinez, 3 F.3d 1191 (8th Cir. 1993)

A trial judge's expanded role in assessing the admissibility of scientific expert testimony under *Daubert* does not allow the judge to usurp the jury's function in determining the sufficiency of the evidence already admitted.

In Re Joint Eastern & Southern Dist. Asbestos Lit., 52 F.3d 1124 (2d Cir. 1995)

c. Expert opinion testimony

The distinctions that once existed between lay opinion and expert opinion testimony have been blurred by liberalization of Federal Rule of Evidence 701.

See Federal Judicial Center, Reference Manual on Scientific Evidence 64–67 (1994)

Under Federal Rule of Evidence 703, if facts or data on which the expert bases an opinion or inference are of a type reasonably relied on by experts in the particular field in forming opinions or inferences, the facts or data need not be admissible in evidence.

Davis v. United States, 865 F.2d 164 (8th Cir. 1988)
United States v. Theodoropoulos, 866 F.2d 587 (3d Cir. 1989)
United States v. Smith, 869 F.2d 348 (7th Cir. 1989)

Federal Rule of Evidence 703 makes available to the expert all of the data that an expert in the witness's area of expertise would normally rely on in forming an opinion, without requiring that such data be admissible in

evidence. Under the rule the expert is free to give an opinion relying on the types of data an expert in the witness's area of expertise would normally use in forming an opinion.

United States v. Smith, 869 F.2d 348 (7th Cir. 1989)
United States v. West, 58 F.3d 133 (5th Cir. 1995)

At the defendant's request, the government must disclose a written summary of expert testimony it intends to use under Rules 702, 703, and 705 during its case-in-chief. The summary must describe the witnesses' opinions, the bases and reasons for those opinions, and the witnesses' qualifications. A defendant who makes such a request must provide reciprocal disclosure of expert witnesses' testimony to the government.

Fed. R. Crim. P. 16(a)(1)(E) and (b)(1)(C).

d. Evaluation of reasonable reliance

When an expert's opinion is based on facts not admissible in evidence, the court should make a threshold factual inquiry to determine whether the data providing the basis for the opinion are of a type reasonably relied on by experts in that field to form such opinions, and in making such an inquiry, the court may inquire into the relevance of the data as well as their reliability.

Greenwood Utilities Comm'n v. Mississippi Power Co., 751 F.2d 1484 (5th Cir. 1985)

The judge, not the expert, makes the determination of reasonable reliance under Rule 703. In making an independent evaluation of reasonableness, the trial judge should assess whether there are good grounds on which to find the data reliable.

In Re Paoli R.R. Yard PCB Litig., 35 F.3d 717 (3d Cir. 1994)

Because the question of reliability is an admissibility requirement governed by Rule 104(a), a proponent must do more than simply make a prima facie case on reliability. Although a proponent does not have to prove that the proffered expert testimony is correct, he or she must prove by a preponderance of the evidence that the testimony is reliable.

In Re Paoli R.R. Yard PCB Litig., 35 F.3d 717 (3d Cir. 1994)

In admitting expert testimony based on inadmissible evidence, a court does not have to make an explicit finding that the underlying sources of information used by the expert are trustworthy.

United States v. Locasio, 6 F.3d 924 (2d Cir. 1993)

e. Opinion testimony on ultimate issue

Federal Rule of Evidence 704(a) provides that testimony in the form of an opinion is not objectionable because it embraces an ultimate issue to be

decided by the trier of fact. One purpose of the Federal Rules of Evidence was to make opinion evidence admissible if it would be of assistance to the trier of fact.

United States v. Scavo, 593 F.2d 837 (8th Cir. 1979)
United States v. Theodoropoulos, 866 F.2d 587 (3d Cir. 1989) (permitting expert testimony on roles played by defendants in narcotics ring)
United States v. Sheffey, 57 F.3d 1419 (6th Cir. 1995)

Federal Rule of Evidence 704(b) forbids expert testimony as to whether the defendant had the criminal intent required to commit the offense charged. However, the rule permits opinion testimony bearing on the defendant's mental state provided it does not take the form of a mere conclusion as to the defendant's mens rea at the time of the offense charged.

Fairbanks Morse Pump Corp. v. ABBA Parts, Inc., 862 F.2d 717 (8th Cir. 1988)
United States v. Boyd, 55 F.3d 667 (D.C. Cir. 1995)

6. Requiring defendant to display body or to don clothing

It is not a violation of the Fifth Amendment to require a defendant

1. to display to the jury an arm tattoo
   United States v. Alpern, 564 F.2d 755 (7th Cir. 1977)
   United States v. Bay, 762 F.2d 1314 (9th Cir. 1984)
2. to shave a beard
   United States v. Lamb, 575 F.2d 1310 (10th Cir. 1978)
   United States v. Valenzuela, 722 F.2d 1431 (9th Cir. 1983)
3. to don an article of clothing
   United States v. King, 433 F.2d 937 (9th Cir. 1970)
   United States v. Satterfield, 572 F.2d 687 (9th Cir. 1978)
   United States v. Lamb, 575 F.2d 1310 (10th Cir. 1978)
   United States v. Williams, 704 F.2d 315 (6th Cir. 1983)
4. to give voice samples
   United States v. Terry, 702 F.2d 299 (2d Cir. 1983)
   United States v. Williams, 704 F.2d 315 (6th Cir. 1983)
5. to give handwriting samples
   United States v. Pheaster, 544 F.2d 353 (9th Cir. 1976)
   United States v. Campbell, 732 F.2d 1017 (1st Cir. 1984) (held, however, that it is a violation of the privilege to require defendant to write words dictated to him or her because that requires defendant in effect to say: "This is the way I spell these words.")
6. to stand for purposes of identification
   United States v. Wilson, 719 F.2d 1491 (10th Cir. 1983)
7. to remove a pair of glasses
   United States v. Wilson, 719 F.2d 1491 (10th Cir. 1983)
8. to expose his or her teeth and gums to be viewed by a witness

United States v. Maceo, 873 F.2d 1 (1st Cir. 1989)

9. to utter certain phrases so that the jury can compare the defendant's voice with the voice on a tape of a drug transaction

United States v. Leone, 823 F.2d 246 (8th Cir. 1987)

See infra at 121–22.

7. Evidence improperly admitted or admitted for limited purpose

A potential error caused by the improper introduction of evidence or the admission of evidence that is properly admitted for only a limited purpose may oftentimes be avoided by a prompt and forceful admonition to the jury.

When considering whether a new trial should be granted, an appellate court will consider the forcefulness and timeliness of the trial court's curative instruction.

United States v. Nace, 561 F.2d 763 (9th Cir. 1977)
United States v. Johnson, 618 F.2d 60 (9th Cir. 1980)

Curative instructions may not be adequate where the prejudicial evidence bears on a factual issue vital to the case.

United States v. St. Clair, 855 F.2d 518 (8th Cir. 1988) (polygraph test)
United States v. Miller, 874 F.2d 1255 (9th Cir. 1989)

a. Prior consistent and inconsistent statements

Federal Rule of Evidence 801(d)(1)(B) permits the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charged recent fabrication or improper influence or motive.

Tome v. United States, 115 S. Ct. 696 (1995)

When a witness's prior inconsistent statement is admitted in evidence, the court must, on request by counsel, instruct the jury that the statement was admitted only for the purpose of impeaching the witness's testimony in court and is not to be considered as evidence of the truth of the matter referred to in the statement.

United States v. Partin, 493 F.2d 750 (5th Cir. 1974)
United States v. Jones, 592 F.2d 1038 (9th Cir. 1979)

Statements made by a criminal defendant during failed plea bargain negotiations may be used as trial evidence to impeach the defendant's inconsistent testimony, if the defendant has knowingly and voluntarily agreed to waive the provisions of Federal Rule of Evidence 410 and

Federal Rule of Criminal Procedure 11(e)(6) that prohibit admission of such statements against the defendant.

United States v. Mezzanatto, 115 S. Ct. 797 (1995)

b. Evidence admissible for one purpose but not for another

If evidence is admissible for one purpose but is inadmissible for another, the trial judge must upon request instruct the jury as to the limited purpose for which the evidence may be considered.

United States v. Washington, 592 F.2d 680 (2d Cir. 1979)

United States v. Rivera, 837 F.2d 906 (10th Cir. 1988), *vacated and remanded on other grounds*, 900 F.2d 1462 (10th Cir. 1990)

c. When evidence has been withdrawn from jury's consideration

When the court withdraws evidence from the jury's consideration, it should instruct the jury to disregard the evidence.

United States v. Smith, 517 F.2d 710 (5th Cir. 1975)

United States v. Moya-Gomez, 860 F.2d 706 (7th Cir. 1988)

8. "Other crimes" evidence

Federal Rule of Evidence 404(b) provides that

> [e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution . . . shall provide notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

The rule does not extend to evidence of acts that are "intrinsic" to the charged offense.

United States v. Williams, 900 F.2d 823 (5th Cir. 1990)

The court need not make a preliminary finding that the government has proved the "other crime" or "similar act" by a preponderance of the evidence before it submits the evidence to the jury. Instead, such evidence should be admitted if there is sufficient evidence to sustain a finding by the jury that the defendant committed the other crime or similar act.

Huddleston v. United States, 485 U.S. 681 (1988)

The threshold inquiry a court must make before admitting other-crimes evidence under Rule 404(b) is whether the evidence is relevant and probative of a material issue other than character.

Huddleston v. United States, 485 U.S. 681 (1988)

In the Rule 404(b) context, other-crimes evidence is relevant only if the jury can reasonably conclude that the act occurred and that the defendant was the actor.

Huddleston v. United States, 485 U.S. 681 (1988)

Questions of relevance conditioned on proof of a fact are dealt with under Federal Rule of Evidence 104(b): "In determining whether the government has introduced sufficient evidence to meet Rule 104(b), the trial court neither weighs credibility nor makes a finding that the government has proved the conditional fact by a preponderance of the evidence. The court simply examines the evidence in the case and decides whether the jury could reasonably find the conditional fact by a preponderance of the evidence."

Huddleston v. United States, 485 U.S. 681 (1988)
United States v. Sampson, 980 F.2d 883 (3d Cir. 1992)
United States v. Clarke, 24 F.3d 257 (D.C. Cir. 1994)
But see Fed. R. Evid. 413 and 414 (evidence of a defendant's commission of similar crimes of sexual assault and child molestation is admissible and may be considered for its bearing on any matter to which such evidence is relevant)

9. Right of confrontation

The Sixth Amendment provides, in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

This provision confers on an accused the right to confront face-to-face in the courtroom those who give testimony against him or her.

The Confrontation Clause reflects a preference for face-to-face confrontation at trial. A primary interest secured by confrontation is the right of cross-examination.

Douglas v. Alabama, 380 U.S. 415 (1965)
Ohio v. Roberts, 448 U.S. 56 (1980)

If an out-of-court declarant testifies in court, there is no confrontation problem because the accused then has the right to confront that witness and to cross-examine him or her with reference to the out-of-court statement.

California v. Green, 399 U.S. 149 (1970)
Nelson v. O'Neil, 402 U.S. 622 (1971)

To establish a violation of the Confrontation Clause, a defendant is not required to show prejudice with respect to the trial as a whole; the focus is on individual witnesses.

United States v. Sasson, 62 F.3d 874 (7th Cir. 1995)

In a proceeding involving an alleged offense against a child, a court may find that the child is unable to testify in open court in the presence of the defendant and may order that the live testimony of the child be taken by two-way closed circuit television, or that the child's deposition be taken and videotaped.

18 U.S.C. § 3509(b)(1) and (2)
See United States v. Boyles, 57 F.3d 535 (7th Cir. 1995)

a. Findings court must make if defendant objects to admission of out-of-court statement

If a defendant objects to the admission of an out-of-court statement as being a denial of his or her right of confrontation, the trial court must, before admitting the evidence, find

1. that the declarant is unavailable; and
2. that the out-of-court statement bears adequate "indicia of reliability."

Ohio v. Roberts, 448 U.S. 56 (1980)
Lam v. Iowa, 860 F.2d 873 (8th Cir. 1988)

b. Finding of nonavailability of out-of-court declarant

An out-of-court declarant is not unavailable unless the prosecution has made a good faith but unsuccessful effort to obtain the declarant's presence at trial.

Barber v. Page, 390 U.S. 719 (1968)
California v. Green, 399 U.S. 149 (1970)
Mancusi v. Stubbs, 408 U.S. 204 (1972)
Ohio v. Roberts, 448 U.S. 56 (1980)
Lam v. Iowa, 860 F.2d 873 (8th Cir. 1988)

The declarant is unavailable if his or her absence was procured by the defendant.

Reynolds v. United States, 98 U.S. 244 (1879)

The declarant is unavailable if he or she is beyond the process of the court at the time of trial.

Mancusi v. Stubbs, 408 U.S. 204 (1972)

However, where the government released illegal alien witnesses at the border and failed to make adequate provision for their return, they were not unavailable.

United States v. Guadian-Salazar, 824 F.2d 344 (5th Cir. 1987)

c. Proof of adequacy of indicia of reliability

An unavailable declarant's out-of-court statement will be admissible only if the statement is marked by adequate indicia of reliability.

Burns v. Clusen, 798 F.2d 931 (7th Cir. 1986)
Smith v. Fairman, 862 F.2d 630 (7th Cir. 1988)
United States v. Candoli, 870 F.2d 496 (9th Cir. 1989)

The primary concern of the reliability inquiry must be to determine whether, under the circumstances, the unavailability of the declarant for cross-examination deprives the jury of a satisfactory basis for evaluating the truth of the declarant's out-of-court statement.

Means v. Wilson, 522 F.2d 833 (9th Cir. 1976)

To be admitted into evidence, an out-of-court statement must bear sufficient indicia of reliability to provide the jurors with an adequate basis for evaluating the truth of the statement.

United States v. Nelson, 603 F.2d 42 (8th Cir. 1979)
United States v. McCormick, 54 F.3d 214 (5th Cir. 1995)
Miles v. Burris, 54 F.3d 284 (7th Cir. 1995)

d. Admissibility of out-of-court statements within exceptions to hearsay rule

Certain hearsay exceptions rest on such solid foundations that admission of virtually any evidence within them comports with the substance of the constitutional protection. Reliability can be inferred without more in a case in which the evidence falls within a firmly rooted hearsay exception. In other cases the evidence must be excluded, absent a showing of particularized guarantees of trustworthiness.

Ohio v. Roberts, 448 U.S. 56 (1980) (dying declarations and cross-examined, prior trial testimony are two hearsay exceptions so firmly rooted that their admission as out-of-court statements does not violate Confrontation Clause)

White v. Illinois, 502 U.S. 346 (1992) (spontaneous declarations and statements made for medical treatment)

The following have been identified as factors attesting to the reliability of a challenged out-of-court statement:

1. The statement carried on its face a warning to the jury against giving it undue weight.
2. The declarant was in a position to know the identity and role of the participants in the crime.
3. The possibility was remote that the statement was founded on faulty recollection.
4. It was not likely that the declarant misrepresented the defendant's involvement.
5. The statement was spontaneous.

Dutton v. Evans, 400 U.S. 74 (1970)

If the out-of-court statement does not fall within one of the "firmly rooted hearsay exceptions," there must be a case-by-case analysis to determine whether the right of confrontation is violated.

United States v. King, 552 F.2d 833 (9th Cir. 1976)
United States v. Medico, 557 F.2d 309 (2d Cir. 1977)
United States v. Nelson, 603 F.2d 42 (8th Cir. 1979)
United States v. Nick, 604 F.2d 1199 (9th Cir. 1979)
United States v. Iron Shell, 633 F.2d 77 (8th Cir. 1980)
Glenn v. Dallman, 635 F.2d 1183 (6th Cir. 1980)
United States v. Chapman, 866 F.2d 1326 (11th Cir. 1989)

The fact that an extrajudicial declaration may be admissible under the Federal Rules of Evidence does not by itself establish compliance with the Confrontation Clause.

Ohio v. Roberts, 448 U.S. 56 (1980)
United States v. Candoli, 870 F.2d 496 (9th Cir. 1989)

Unavailability analysis under *Ohio v. Roberts* is only required when the challenged out-of-court statement was made in the course of a prior judicial proceeding.

United States v. Inadi, 475 U.S. 387 (1986)

The residual hearsay exception of Federal Rule of Evidence 804(b)(5) is not a firmly rooted hearsay exception. Thus, indicia of reliability sufficient to satisfy the Confrontation Clause must be demonstrated before evidence is admitted under this rule.

Hopkinson v. Shillinger, 866 F.2d 1185 (10th Cir. 1989)

Neither the Confrontation Clause nor Federal Rule of Evidence 802 is violated by the admission of a witness's out-of-court identification statement if the witness testifies at trial but is unable to recall the basis for his or her prior identification because of memory loss. It is not necessary to determine that the testimony of such a witness is also marked by "adequate indicia of reliability" if the witness is subject to unrestricted cross-examination at trial.

United States v. Owens, 484 U.S. 554 (1988)

e. Coconspirator statements not challenged by right of confrontation

No inquiry concerning the Confrontation Clause need be made concerning a coconspirator's statement if evidence has established that the statement is in fact a coconspirator's statement.

United States v. Inadi, 475 U.S. 387 (1986)
Bourjaily v. United States, 483 U.S. 171 (1987)
See supra at 75–84.

See Bench Comment, 1987, No. 4 (FJC): "*Bourjaily v. United States*: Admission of Co-Conspirator Statements Under Federal Rule of Evidence 801(d)(2)(E)"

f. Defendant's right of confrontation includes right to be present at all stages of trial

Federal Rule of Criminal Procedure 43 prohibits trial *in absentia* of a defendant who is not present at the beginning of trial. The rule's list of situations in which the trial may proceed without the defendant is exclusive.

Crosby v. United States, 113 S. Ct. 748 (1993)

A judge must inquire into the reason for a defendant's absence and determine whether it constitutes a voluntary waiver of his or her right to be present.

United States v. Davis, 61 F.3d 291 (5th Cir. 1995)

When a defendant expresses a desire not to attend trial, the court must ensure that the defendant knows of the opportunity to attend and understands the ramifications of his or her choice not to attend so that the decision to waive the right will be intelligently made.

United States v. Nichols, 56 F.3d 403 (2d Cir. 1995)

It was error for a trial court to exclude a defendant from the courtroom while the court questioned deputy sheriffs, bailiffs, and jurors to determine whether an altercation in the courtroom might have prejudiced the defendant's right to a fair trial.

Blackwell v. Brewer, 562 F.2d 596 (8th Cir. 1977)

It was error for the trial court to exclude the accused from the taking of a deposition of a witness.

United States v. Benfield, 593 F.2d 815 (8th Cir. 1979)

The defendant has the right to be present during an in camera hearing regarding jury misconduct.

Nevels v. Parratt, 596 F.2d 344 (8th Cir. 1979)

See Bench Comment, 1986, No. 4 (FJC): "Limitations on a defendant's right under Rule 43 to be present at every stage of trial"

g. Placement of screen between defendant and adverse witness violates Confrontation Clause

Placement of a screen between the defendant and the witness testifying against him or her violates the Confrontation Clause. This clause guarantees a defendant the right to a face-to-face encounter with all witnesses testifying before the trier of fact.

Coy v. Iowa, 487 U.S. 1012 (1988)

But see United States v. Boyles, 57 F.3d 535 (7th Cir. 1995) (allowing a child to testify via videotape was proper where expert testimony indicated that child would likely suffer emotional trauma if forced to testify in court)

See also 18 U.S.C. § 3509(b)(1) and (2) (a child who is found unable to testify in open court in the presence of the defendant may testify by closed-circuit television or videotaped deposition)

See supra at 105–06.

h. Effect of defendant's voluntary absence from trial

The defendant may waive his or her right of confrontation by voluntary absence from trial.

United States v. Peterson, 524 F.2d 167 (4th Cir. 1975)
United States v. Pastor, 557 F.2d 930 (2d Cir. 1977)
United States v. Powell, 611 F.2d 41 (4th Cir. 1979)

If the defendant is absent, the court should try to find out where the defendant is and why he or she is absent. A statement by defense counsel that counsel does not know where the defendant is does not constitute waiver of the defendant's right to be present.

United States v. Rogers, 853 F.2d 249 (4th Cir. 1988)

Even when a defendant is voluntarily absent from trial, the trial court should not proceed with the trial until it has weighed the factors favoring continuance of the trial against those favoring the presence of the defendant at the trial.

United States v. Peterson, 524 F.2d 167 (4th Cir. 1975)
United States v. Pastor, 557 F.2d 930 (2d Cir. 1977)
United States v. Benavides, 596 F.2d 137 (5th Cir. 1979)

A judge must inquire into the reason for a defendant's absence and determine whether it constitutes a voluntary waiver of his or her right to be present.

United States v. Davis, 61 F.3d 291 (5th Cir. 1995)

When a defendant expresses a desire not to attend trial, the court must ensure that the defendant knows of the opportunity to attend and understands the ramifications of his or her choice not to attend so that the decision to waive the right will be intelligently made.

United States v. Nichols, 56 F.3d 403 (2d Cir. 1995)

In a single-defendant trial, proceeding without the defendant is ordinarily not proper.

United States v. Rogers, 853 F.2d 249 (4th Cir. 1988)

i. Defendant has right to be present during jury selection

The defendant has the right to be present during selection of the jury and to participate in it. This right includes the right to be present during any in camera questioning of prospective jurors.

United States v. Alessandrello, 637 F.2d 131 (3d Cir. 1980)
United States v. Pappas, 639 F.2d 1 (1st Cir. 1980)

It is reversible error for the trial court to impanel the jury in the defendant's absence without a personal on-the-record waiver of his or her right to be present. A representation by defense counsel is not sufficient.

United States v. Gordon, 829 F.2d 119 (D.C. Cir. 1987)

See Bench Comment, 1981, No. 3 (FJC): "Excluding the defendant, his [or her] counsel, the public or the press from any portion of the voir dire examination of prospective jurors"

j. Effect of illness of defendant

If a defendant becomes ill and cannot be present when witnesses are questioned, the court must adjourn the trial until the defendant can be present or, if it is a multiple-defendant trial, grant a severance to the ill defendant.

United States v. Toliver, 541 F.2d 958 (2d Cir. 1976)

10. Confessions by defendant

Section 3501, Title 18 of the U.S. Code provides that in any criminal prosecution brought by the United States, any confession of guilt of any criminal offense or any self-incriminating statement, whether oral or in writing, shall be admissible in evidence if it is voluntarily given. Before receiving such a confession or statement in evidence, the trial judge must, out of the presence of the jury, determine if it was voluntarily made. If the trial judge determines that the confession was voluntarily made, it shall be admitted in evidence. The trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as it feels the confession deserves under all the circumstances.

Section 3501 further provides that in determining the voluntariness of a confession, the trial judge shall take into consideration all the circumstances surrounding the making of the confession, including

1. the time elapsed between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment;

2. whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession;
3. whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him;
4. whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and
5. whether or not such defendant was without the assistance of counsel when questioned and when giving such confession.

a. If issue of voluntariness is raised, hearing must be held

Under 18 U.S.C. § 3501, if the issue of voluntariness of a confession is raised, the court must conduct a hearing on that issue.

United States v. Gonzalez, 736 F.2d 981 (4th Cir. 1984)

At that hearing the defendant must be permitted to testify outside of the presence of the jury as to the voluntariness of the confession.

United States v. Dollard, 780 F.2d 1118 (4th Cir. 1985)

If the issue of voluntariness is never raised, the court is not required sua sponte to hold a voluntariness hearing.

United States v. Yamashita, 527 F.2d 954 (9th Cir. 1975)
United States v. Gonzalez, 548 F.2d 1185 (5th Cir. 1977)
United States v. Smith, 638 F.2d 131 (9th Cir. 1981)
United States v. Espinoza-Seanez, 862 F.2d 526 (5th Cir. 1988)
United States v. Santiago Soto, 871 F.2d 200 (1st Cir. 1989)

If during the course of a trial the trial judge finds that the voluntariness of a confession is clearly in doubt, he or she must conduct an inquiry on that issue despite the failure of defense counsel to offer an objection.

United States v. Powe, 591 F.2d 833 (D.C. Cir. 1978)
United States v. Renteria, 625 F.2d 1279 (5th Cir. 1980)

b. Standard to be applied by court

The standard for determining the voluntariness of a confession is whether, taking into consideration all the circumstances, the statement is the product of the accused's free and rational choice. The confession must not have been extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence.

Leon v. Wainwright, 734 F.2d 770 (11th Cir. 1984)
United States v. Martinez-Perez, 625 F.2d 541 (5th Cir. 1980)

To find a defendant's confession voluntary, the court must conclude that the defendant made an independent and informed choice of his or her own free will, that the defendant possessed the capability to do so, and that the defendant's will was not overborne by surrounding pressures and circumstances.

Jurek v. Estelle, 623 F.2d 929 (5th Cir. 1980)

The voluntariness of a confession cannot be equated with the absolute absence of intimidation. Under such a test, virtually no statement would be voluntary because few people give incriminating statements in the absence of official action of some kind.

United States v. Wertz, 625 F.2d 1128 (4th Cir. 1980)
Miller v. Fenton, 796 F.2d 598 (3d Cir. 1986)

Statements or confessions made during a time of mental incompetency or insanity are involuntary and inadmissible.

Sullivan v. Alabama, 666 F.2d 478 (11th Cir. 1982)

The government is required to prove the voluntariness of a confession only by a preponderance of the evidence.

United States v. Falcon, 766 F.2d 1469 (10th Cir. 1985)

To determine the voluntariness of a confession, the court must consider the effect that the totality of the circumstances had on the will of the defendant. The question in each case is whether the defendant's will was overborne when he or she confessed.

Miller v. Fenton, 796 F.2d 598 (3d Cir. 1986)

Independent of the question of voluntariness, a defendant's case may turn on his or her ability to convince the jury that the manner in which his or her confession was obtained casts doubt on its credibility. Thus, at trial a defendant must be allowed to introduce evidence of the circumstances under which the confession was made, even if the defendant marshaled the same evidence earlier in support of an unsuccessful motion to suppress.

Crane v. Kentucky, 476 U.S. 683 (1986)

c. Burden on prosecution to prove voluntariness of confession

The prosecution bears the burden of persuading the court by at least a preponderance of the evidence that the confession was voluntary.

United States v. Martinez-Perez, 625 F.2d 541 (5th Cir. 1980)
United States v. Dodier, 630 F.2d 232 (4th Cir. 1980)
United States v. Tingle, 658 F.2d 1332 (9th Cir. 1981)
Williams v. Maggio, 727 F.2d 1387 (5th Cir. 1984)

d. Court is not to consider truthfulness of confession

The court is to disregard the question whether the defendant in fact spoke the truth in making a confession. During the hearing, the trial judge is to ignore implications of reliability and to shut his or her mind to any internal evidence of authenticity that a confession might bear. The only question before the court is whether the confession was given knowingly and voluntarily.

Doby v. South Carolina Dept. of Corrections, 741 F.2d 76 (4th Cir. 1984) (habeas corpus proceeding)
Doby v. South Carolina Dept. of Corrections, 802 F.2d 718 (4th Cir. 1986)

e. Court to make affirmative finding of voluntariness

When an evidentiary hearing has been held on a motion to suppress a confession, the trial court should make a finding on the record as to the voluntariness of the confession.

f. Court to instruct jury

If the issue of the voluntariness of a confession has been placed before the jury, the court must provide a specific instruction on voluntariness to the jury. The court must instruct the jury to give such weight to the confession as the jury feels that it deserves under all the circumstances.

United States v. McLernon, 746 F.2d 1098 (6th Cir. 1984)

The trial court is required to instruct the jury concerning the weight to be given a defendant's confession only if sufficient relevant evidence was presented to raise a genuine factual issue concerning the voluntariness of the confession.

United States v. Cowden, 545 F.2d 257 (1st Cir. 1976)
United States v. Fera, 616 F.2d 590 (1st Cir. 1980)
United States v. Bondurant, 689 F.2d 1246 (5th Cir. 1982)
United States v. Blue Horse, 856 F.2d 1037 (8th Cir. 1988)

11. Chain of custody

The defendant may challenge an exhibit offered by the prosecution on the ground that the prosecution has failed to prove a chain of custody of that exhibit. The circuits have held that a prosecutor need not prove an absolute chain of custody but only an adequate chain of custody.

The following are requirements set forth by a number of circuits relative to the meeting of a chain-of-custody objection.

The court must ascertain that the exhibit has not been altered in any material respect since the time of the crime.

United States v. Luna, 585 F.2d 1 (1st Cir. 1978)

If the defendant has objected to the admission of an exhibit on the ground that the prosecution has failed to establish a valid chain of custody, the court must consider the following factors: the nature of the article, the circumstances surrounding its preservation and custody, and the likelihood that anyone has tampered with it since the time of the crime. After considering such factors, if the trial court is satisfied that the article has not been altered in any important respect, it may deny the chain-of-custody objection and admit the exhibit into evidence.

United States v. Garcia, 718 F.2d 1528 (11th Cir. 1983)
United States v. Gay, 774 F.2d 368 (10th Cir. 1985)
Hoover v. Thompson, 787 F.2d 449 (8th Cir. 1986)

Whether the government has proven an adequate chain of custody goes to the weight of the evidence rather than to its admissibility.

United States v. Lampson, 627 F.2d 62 (7th Cir. 1980)
United States v. Clark, 664 F.2d 1174 (11th Cir. 1981)

A minor break in the chain of custody affects the weight but not the admissibility of the evidence.

United States v. Clark, 664 F.2d 1174 (11th Cir. 1981)

Courts need to exercise greater care when the issue is the very identity of the evidence rather than possible changes in its condition.

United States v. Lampson, 627 F.2d 62 (7th Cir. 1980)

12. Conducting experiments before or involving jury

The decision whether to allow jurors to participate in experiments involving trial evidence, on request of counsel, is in the broad discretion of the trial court.

United States v. Peltier, 585 F.2d 314 (8th Cir. 1978) (upholding refusal to allow jurors to look through telescopic lens)

It is not error to permit a handler to demonstrate the ability of a dog to sniff out narcotics.

United States v. Rackley, 742 F.2d 1266 (11th Cir. 1984)

B. Witnesses

1. Fifth Amendment privilege against self-incrimination

A witness has the privilege under the Fifth Amendment to decline to respond to a question the answer to which would tend to incriminate him or her, that is, would tend to indicate that the witness was guilty of a

crime or would furnish a link in the chain of evidence needed to prosecute the witness for a crime.

The privilege protects an individual's right to refuse to give information that is compelled, testimonial, and incriminating.

United States v. Doe, 465 U.S. 605 (1984)
Ciccone v. H.H.S., 861 F.2d 14 (2d Cir. 1988)

The privilege may be asserted in any type of proceeding, administrative or judicial, investigatory or adjudicative.

Wehling v. Columbia Broadcasting System, 608 F.2d 1084 (5th Cir. 1979)
National Life Ins. Co. v. Hartford Acc. and Indem. Co., 615 F.2d 595 (3d Cir. 1980)
In re Corrugated Container Antitrust Litig., 620 F.2d 1086 (5th Cir. 1980)
In re Corrugated Container Antitrust Litig., 661 F.2d 1145 (7th Cir. 1981), *aff'd, Pillsbury Co. v. Conboy,* 459 U.S. 248 (1983)
Bank One of Cleveland, N.A. v. Abbe, 916 F.2d 1067 (6th Cir. 1990)

The privilege protects a federal witness from incrimination under state as well as federal law.

F.D.I.C. v. Sovereign State Capital, Inc., 557 F.2d 683 (9th Cir. 1977)
United States v. Damiano, 579 F.2d 1001 (6th Cir. 1978)
In re Grand Jury Proceedings, 860 F.2d 11 (2d Cir. 1988)

Neither defense nor government counsel may claim the privilege for a witness. The privilege is a personal one and must be invoked by the witness.

United States v. Mayes, 512 F.2d 637 (6th Cir. 1975)
United States v. Lightly, 677 F.2d 1027 (4th Cir. 1982)

a. Grounds for invoking privilege

The privilege is confined to instances in which the witness has reasonable cause to apprehend a danger of self-incrimination from compelled answers to questions.

United States v. Kuh, 541 F.2d 672 (7th Cir. 1976)
In re Grand Jury Proceedings, 860 F.2d 11 (2d Cir. 1988)
United States v. Hatchett, 862 F.2d 1249 (6th Cir. 1988)

To assert the privilege, a claimant must be confronted by substantial and real, not merely trifling or imaginary, hazards of incrimination.

United States v. Apfelbaum, 445 U.S. 115 (1980)
United States v. Rubio-Topete, 999 F.2d 1334 (9th Cir. 1993)

Fear for the safety of oneself or others is not a ground for refusing to testify.

Piemonte v. United States, 367 U.S. 556 (1961)

United States v. Damiano, 579 F.2d 1001 (6th Cir. 1978)
United States v. Seifert, 648 F.2d 557 (9th Cir. 1980)
In re Grand Jury Proceedings, 652 F.2d 413 (5th Cir. 1981)
In re Grand Jury Proceedings (Doe), 943 F.2d 132 (1st Cir. 1991)

However, fear of reprisal for testifying may be a defense to confinement for civil contempt if it is subjectively and objectively genuine and reasonable.

In re Grand Jury Proceedings (Mallory), 797 F.2d 906 (10th Cir. 1986)
In re Grand Jury Proceedings (Doe), 862 F.2d 430 (2d Cir. 1988)
Matter of Grand Jury Proceedings of Dec. 1989, 903 F.2d 1167 (7th Cir. 1990)
In re Grand Jury Proceeding (Doe), 13 F.3d 459 (1st Cir. 1994)

Fear of prosecution by a foreign state is not a ground for invoking the privilege unless there is a real and substantial possibility of such prosecution.

Zicarelli v. Investigation Commission, 406 U.S. 472 (1972)
In re Grand Jury Proceedings, 559 F.2d 234 (5th Cir. 1977)
In re Campbell, 628 F.2d 1260 (9th Cir. 1980)
In re Baird, 668 F.2d 432 (8th Cir. 1982)
In re Gilboe, 699 F.2d 71 (2d Cir. 1983)
In re Grand Jury Proceeding 82-2, 705 F.2d 1224 (10th Cir. 1982) (no real and substantial danger of foreign prosecution exists because of court's power and duty to preserve grand jury secrecy)
United States v. (Under Seal), 794 F.2d 920 (4th Cir. 1986) (Fifth Amendment applicable only if foreign jurisdiction has similar privilege)
United States v. Joudis, 800 F.2d 159 (7th Cir. 1986)
In re Sealed Case, 825 F.2d 494 (D.C. Cir. 1987)
Environmental Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052 (3d Cir. 1987)
United States v. Gecas, 50 F.3d 1549 (11th Cir. 1995)

b. Corporations and other collective entities cannot assert privilege

A corporation or other collective entity has no privilege against self-incrimination. Neither a corporation nor its officers may prevent production of relevant corporate records by asserting a corporate privilege against self-incrimination.

Braswell v. United States, 487 U.S. 99 (1988)
Bellis v. United States, 417 U.S. 85 (1974)
United States v. Sourapas, 515 F.2d 295 (9th Cir. 1975)
In re Grand Jury Proceedings United States, 626 F.2d 1051 (1st Cir. 1980)
United States v. Alderson, 646 F.2d 421 (9th Cir. 1981)
United States v. Harrison, 653 F.2d 359 (8th Cir. 1981)
In re Grand Jury Subpoena Duces Tecum, 795 F.2d 904 (11th Cir. 1986)

A corporate custodian may not resist a subpoena for corporate records on the ground that the act of producing them has independent testimonial significance that will incriminate him or her individually. Because the custodian acts as a corporate representative, his or her act of production is deemed an act of the corporation, which has no Fifth Amendment privilege.

Braswell v. United States, 487 U.S. 99 (1988)

However, certain evidentiary consequences flow from the fact that the corporate custodian's act of production is deemed one in his or her representative, rather than individual, capacity. Since the custodian's act of production is deemed an act of the corporation, the government may not make evidentiary use of that act in a proceeding brought against the custodian in his or her individual capacity. For example, in a criminal prosecution against the custodian in his or her individual capacity, the government may not introduce evidence before the jury that the subpoena was served on the custodian-defendant or that the corporate records were delivered by the custodian-defendant. However, the government could make evidentiary use of the corporation's act of production in that proceeding. Thus, the jury would be entitled to infer from other evidence presented in the case that if the individual custodian-defendant held a prominent position in the corporation that produced the records, he or she also had possession of the documents or knowledge of their contents.

Braswell v. United States, 487 U.S. 99 (1988)

See Bench Comment, 1988, No. 5 (FJC): "The Fifth Amendment and Production of Corporate Documents by Custodians and Compelled Consent to Release of Records by Third Parties"

c. Sole proprietor cannot claim privilege for records kept as required by law

If the records kept by a sole proprietor are required by law or regulation to be kept and fall within the required-records exception to the Fifth Amendment privilege, the sole proprietor may not rely on the Fifth Amendment when the records are required to be produced.

Shapiro v. United States, 335 U.S. 1 (1948)
In re Grand Jury Proceedings, 601 F.2d 162 (5th Cir. 1979)
In re Doe, 711 F.2d 1187 (2d Cir. 1983)
In re Kenny, 715 F.2d 51 (2d Cir. 1983)
In re Grand Jury Subpoena Duces Tecum Served upon Underhill, 781 F.2d 64 (6th Cir. 1986)

For records to meet the required-records exception to the Fifth Amendment, the purpose of the government's record-keeping requirement must be essentially regulatory rather than criminal, the records

must contain the type of information that a regulated party would ordinarily keep, and the records must have assumed public aspects that render them at least analogous to public documents.

Grosso v. United States, 390 U.S. 62 (1968)
In re Grand Jury Subpoena Duces Tecum Served upon Underhill, 781 F.2d 64 (6th Cir. 1986)
In re Grand Jury Proceedings, 801 F.2d 1164 (9th Cir. 1986)
United States v. Lehman, 887 F.2d 1328 (7th Cir. 1989)
In re Grand Jury Subpoena, 21 F.3d 226 (8th Cir. 1994)

The required-records exception does not apply where the purpose of the record-keeping requirement is the detection of criminal activity.

Grosso v. United States, 390 U.S. 62 (1968)
Bionic Auto Parts and Sales, Inc. v. Fahner, 721 F.2d 1072 (7th Cir. 1983)

Although the contents of the voluntarily kept business records of a sole proprietorship are not privileged under the Fifth Amendment, the sole proprietor's act of producing or authenticating the records may be privileged.

If a claim of privilege is raised by a sole proprietorship and the court determines that the act of producing the subpoenaed documents involves testimonial self-incrimination, the court must deny enforcement of the subpoena.

United States v. Doe, 465 U.S. 605 (1984)
United States v. G & G Advertising Co., 762 F.2d 632 (8th Cir. 1985)
Rogers Transp., Inc. v. Stern, 763 F.2d 165 (3d Cir. 1985)

d. Waiver of privilege by witness

If a witness fails to invoke the privilege in response to a question on which he or she could have claimed it, the witness is deemed to have waived the privilege as to all questions on the same subject matter.

United States v. O'Henry's Film Works, Inc., 598 F.2d 313 (2d Cir. 1979)

Once incriminating facts are voluntarily revealed, the privilege may not be invoked to avoid disclosure of details.

United States v. Beechum, 582 F.2d 898 (5th Cir. 1978)
United States v. Dooley, 587 F.2d 201 (5th Cir. 1979)
United States v. MacCloskey, 682 F.2d 468 (4th Cir. 1982)
United States v. Green, 757 F.2d 116 (7th Cir. 1985)

Several circuits have held that a witness may waive his or her Fifth Amendment privilege before a grand jury, yet claim the privilege at trial. These circuits limit the waiver to the proceeding in which the waiver is made.

United States v. Licavoli, 604 F.2d 613 (9th Cir. 1979)

United States v. James, 609 F.2d 36 (2d Cir. 1979)
United States v. Fortin, 685 F.2d 1297 (11th Cir. 1982) (waiver to plead guilty did not waive privilege in other criminal trial)
In re Morganroth, 718 F.2d 161 (6th Cir. 1983)

However, the District of Columbia Circuit has held that "a witness who voluntarily testifies before a grand jury without invoking the privilege against self-incrimination, of which he has been advised, waives the privilege and may not thereafter claim it when he is called to testify as a witness at the trial on the indictment returned by the grand jury, where the witness is not the defendant, or under indictment." Nevertheless, the witness "may object to any question that would require disclosure of new matter of substance."

Ellis v. United States, 416 F.2d 791 (D.C. Cir. 1969)
United States v. Miller, 904 F.2d 64 (D.C. Cir. 1990)

e. Waiver of privilege by testifying defendant

A defendant who takes the stand waives any Fifth Amendment privilege regarding cross-examination relevant to the issues raised by his or her direct testimony.

United States v. Beechum, 582 F.2d 898 (5th Cir. 1978)
United States v. Dooley, 587 F.2d 201 (5th Cir. 1979)
United States v. Green, 757 F.2d 116 (7th Cir. 1985)

The breadth of the waiver is determined by the scope of relevant cross-examination. The extent of the cross-examination is within the discretion of the court. The defendant may not claim the privilege against cross-examination on matters reasonably related to the subject matter of his or her direct examination. Like any other witness, the defendant may have his or her credibility impeached and his or her testimony assailed.

Brown v. United States, 356 U.S. 148 (1958)
United States v. Hearst, 563 F.2d 1331 (9th Cir. 1977)
United States v. Hernandez, 646 F.2d 970 (5th Cir. 1981)
United States v. Green, 648 F.2d 587 (9th Cir. 1981)

If a defendant testifies on his or her own behalf but refuses to answer relevant questions on cross-examination, the trial court may properly advise the jury that it may consider the defendant's refusal in assessing his or her credibility or, alternatively, the court may strike the defendant's testimony in whole or in part.

United States v. Brannon, 546 F.2d 1242 (5th Cir. 1977)
United States v. Panza, 612 F.2d 432 (9th Cir. 1979) (court's discretion must be guided by reason and fairness; before striking testimony, court should warn defendant that defendant's testimony will be stricken if he or she persistently refuses to answer proper questions on cross-examination)
United States v. Silva, 611 F.2d 78 (5th Cir. 1980)

If the defendant has testified, the government may comment on the defendant's refusal to answer proper questions during closing argument.

United States v. Beechum, 582 F.2d 898 (5th Cir. 1978)
United States v. Panza, 612 F.2d 432 (9th Cir. 1979)
United States v. Silva, 611 F.2d 78 (5th Cir. 1980)

f. Requiring defendant to give certain evidence does not violate privilege

A defendant's right against self-incrimination is not violated when he or she is required to give handwriting or voice samples, to don certain clothing, to stand in court, or to provide hair samples.

Gilbert v. California, 388 U.S. 263 (1967)
United States v. Dionisio, 410 U.S. 1 (1973)
United States v. Woods, 544 F.2d 242 (6th Cir. 1976)
United States v. Pheaster, 544 F.2d 353 (9th Cir. 1976)
United States v. Bright, 630 F.2d 804 (5th Cir. 1980)
In re Rosahn, 671 F.2d 690 (2d Cir. 1982)
United States v. Hollins, 811 F.2d 384 (7th Cir. 1987)

At the time of trial, the defendant may be compelled to don a mask or wig or other apparel, to remove certain clothing, or to display a scar.

United States v. Turner, 472 F.2d 958 (4th Cir. 1973)
United States v. Murray, 523 F.2d 489 (8th Cir. 1975)
United States v. Walitwarangkul, 808 F.2d 1352 (9th Cir. 1987)
United States v. Robertson, 19 F.3d 1318 (10th Cir. 1994)

Requiring a suspect to reveal the physical manner in which he articulates words (e.g., slurring speech) does not, without more, violate the privilege.

Pennsylvania v. Muniz, 496 U.S. 582 (1990)

The defendant may also be required to give voice exemplars by speaking the exact words spoken at the crime.

United States v. Wade, 388 U.S. 218 (1967)
United States v. Delaplane, 778 F.2d 570 (10th Cir. 1985)
United States v. Domina, 784 F.2d 1361 (9th Cir. 1986)
United States v. Leone, 823 F.2d 246 (8th Cir. 1987)
Burnett v. Collins, 982 F.2d 922 (5th Cir. 1993)
United States v. Oriakhi, 57 F.3d 1290 (4th Cir. 1995)

The defendant may be ordered to shave prior to trial or to return his hair to its dyed state at the time of the crime.

United States v. Valenzuela, 722 F.2d 1431 (9th Cir. 1983)
United States v. Brown, 920 F.2d 1212 (5th Cir. 1991)

The circuits are split as to whether a defendant may be compelled to write words dictated to him or her. The Ninth Circuit has held that the defendant may be compelled to do so.

United States v. Pheaster, 544 F.2d 353 (9th Cir. 1976)

The First Circuit has held that the defendant may not be compelled to do so because the defendant is in effect being compelled to testify: "This is the way I spell these words."

United States v. Campbell, 732 F.2d 1017 (1st Cir. 1984)

The compelled execution of a consent form directing disclosure of foreign bank records does not violate the Fifth Amendment. The privilege protects only against incrimination by compelled, testimonial communications. The act of executing such a consent form does not involve testimonial compulsion because it does not by itself relate a factual assertion or disclose information to the government.

United States v. Doe, 465 U.S. 605 (1984)
Doe v. United States, 487 U.S. 201 (1988)

See supra at 102–03.

g. Prosecution witness may invoke privilege on cross-examination

A prosecution witness may invoke the privilege even though the question asked of the witness on cross-examination is a proper one.

United States v. Dooley, 587 F.2d 201 (5th Cir. 1979)

When a non-party government witness invokes the Fifth Amendment on cross-examination, the court should permit the assertion of the privilege in the presence of the jury in order to allow the jury to draw adverse inferences from his or her silence.

United States v. Seifert, 648 F.2d 557 (9th Cir. 1980)
United States v. Kaplan, 832 F.2d 676 (1st Cir. 1987)

If a prosecution witness's claim of privilege is sustained, the court may strike the witness's testimony in whole or in part.

Fountain v. United States, 384 F.2d 624 (5th Cir. 1967)
United States v. Diecidue, 603 F.2d 535 (5th Cir. 1979)
United States v. Seifert, 648 F.2d 557 (9th Cir. 1980)
Lawson v. Murray, 837 F.2d 653 (4th Cir. 1988)

If a prosecution witness claims the privilege when questioned on collateral or cumulative matters by defense counsel, his or her testimony on direct examination need not be stricken.

United States v. DiGiovanni, 544 F.2d 642 (2d Cir. 1976)
United States v. La Riche, 549 F.2d 1088 (6th Cir. 1977)
United States v. Diecidue, 603 F.2d 535 (5th Cir. 1979)

If a prosecution witness gives damaging testimony on direct examination but severely limits cross-examination by claiming the privilege, the defendant may be entitled to a mistrial.

United States v. Demchak, 545 F.2d 1029 (5th Cir. 1977)

h. Court should be alert to any indication that witness wishes to invoke privilege

The privilege may be exercised in a variety of ways: the witness may refuse to answer the question, ask the court or the attorney if he or she has to answer, mention the Fifth Amendment, or simply remain silent. Whenever the court concludes that the witness may be attempting to invoke the privilege, the court should ask the witness whether he or she desires to claim the privilege or wants to consult an attorney. The court may adjourn the trial in order to give the witness time to consult an attorney.

United States v. Wilcox, 450 F.2d 1131 (5th Cir. 1971)
United States v. Colyer, 571 F.2d 941 (5th Cir. 1978)

Although there is no duty to advise a witness of his or her right not to incriminate himself or herself, it is entirely proper for the court to do so.

United States v. Morrison, 535 F.2d 223 (3d Cir. 1976)
United States v. Silverstein, 732 F.2d 1338 (7th Cir. 1984)

The court should not, however, assume that the witness will claim the privilege. The witness must claim it.

United States v. Colyer, 571 F.2d 941 (5th Cir. 1978)

i. Trial court must determine whether privilege has been properly invoked

The criterion to be applied by the trial court in determining whether the Fifth Amendment has been properly invoked is the possibility of prosecution of the witness rather than the likelihood of prosecution. In other words, the court is not to try to determine whether it is likely or not likely that the witness will be prosecuted but rather whether it is possible that the witness will be prosecuted.

United States v. Miranti, 253 F.2d 135 (2d Cir. 1958)
Isaacs v. United States, 256 F.2d 654 (8th Cir. 1958)
United States v. Seavers, 472 F.2d 607 (6th Cir. 1973)
United States v. Johnson, 488 F.2d 1206 (1st Cir. 1973)
In re Master Key Litigation, 507 F.2d 292 (9th Cir. 1974)
In re Folding Carton Antitrust Litigation, 609 F.2d 867 (7th Cir. 1979)
In re Corrugated Container Antitrust Litigation, 661 F.2d 1145 (7th Cir. 1981)

The trial judge must make a determination based not only on the witness's assertion but also on all the other circumstances of the case whether the witness has reasonable cause to believe an answer to a ques-

tion would support a conviction of the witness or would furnish a link in the chain of evidence needed to prove a crime by the witness.

Klein v. Smith, 559 F.2d 189 (2d Cir. 1977)

Out of the presence of the jury, the trial judge should examine the witness on the record regarding his or her claim of privilege. The witness is permitted to state in very general, circumstantial terms why he or she feels it may be incriminating to answer a given question. The judge may then examine the witness as long as is necessary to determine whether there are reasonable grounds to believe that being compelled to answer the question will subject the witness to a danger of incrimination.

United States v. Melchor Moreno, 536 F.2d 1042 (5th Cir. 1976)
United States v. Dingle, 546 F.2d 1378 (10th Cir. 1976)

Some circuits have approved the further exploration of the witness's claim by the judge in an in camera hearing at which only the witness, his or her counsel, and a reporter are present.

In re Brogna, 589 F.2d 24 (1st Cir. 1978)
United States v. Fricke, 684 F.2d 1126 (5th Cir. 1982)

Once a prima facie claim of privilege is raised, it is the burden of the government to make it "perfectly clear" that the answers sought "cannot possibly" tend to incriminate, for, if the witness were required to prove the hazard, he or she would be compelled to surrender the very protection that the privilege is designed to guarantee.

United States v. Yurasovich, 580 F.2d 1212 (3d Cir. 1978)
Matter of Grand Jury Empanelled Feb. 14, 1978, 603 F.2d 469 (3d Cir. 1979)

The judge must be sensitive to the fact that the witness frequently cannot prove that his or her claim is legitimate without surrendering it.

Ryan v. Commissioner, 568 F.2d 531 (7th Cir. 1977)

The guarantee against testimonial compulsion must be liberally construed. The court, rather than the witness, is to decide whether there is reasonable cause to apprehend danger from an answer, but the court is to require the witness to answer only if it clearly appears to the court that the witness is mistaken in his or her apprehension.

Hoffman v. United States, 341 U.S. 479 (1951)
In re Grand Jury Proceedings, 562 F.2d 334 (5th Cir. 1977)

Sustaining the privilege requires only that it be evident from the implication of the question, in the setting in which it is asked, that a responsive answer to the question or explanation of why it cannot be answered might be dangerous because an injurious disclosure could result.

United States v. Melchor Moreno, 536 F.2d 1042 (5th Cir. 1976)
F.D.I.C. v. Sovereign State Capital, Inc., 557 F.2d 683 (9th Cir. 1977)

United States v. Edgerton, 734 F.2d 913 (2d Cir. 1984)

j. Blanket assertions of privilege are usually not allowed

A witness may not assert a blanket claim of privilege. The claim must be asserted question by question.

National Life Ins. Co. v. Hartford Accident & Indem. Co., 615 F.2d 595 (3d Cir. 1980)
United States v. Allshouse, 622 F.2d 53 (3d Cir. 1980)
United States v. Goodwin, 625 F.2d 693 (5th Cir. 1980)
United States v. Rodriguez, 706 F.2d 31 (2d Cir. 1983)
United States v. Hatchett, 862 F.2d 1249 (6th Cir. 1988)
United States v. Bodwell, 66 F.3d 1000 (9th Cir. 1995)

The court should conduct a hearing out of the jury's presence to determine which questions the witness must answer and which need not be answered.

United States v. Goodwin, 625 F.2d 693 (5th Cir. 1980)
United States v. Zappola, 646 F.2d 48 (2d Cir. 1981)

The court may sustain a blanket assertion of the privilege if it concludes, after inquiry, that the witness could legitimately refuse to answer essentially all relevant questions.

United States v. Tsui, 646 F.2d 365 (9th Cir. 1981)

See Bench Comment, 1987 No. 1 (FJC): "Blanket assertions of the privilege against self-incrimination"

k. Witness not to be called if it is known he or she will claim privilege

Neither the prosecution nor the defense should be permitted to call a witness who they know will claim the privilege.

United States v. Watson, 591 F.2d 1058 (5th Cir. 1979)
United States v. Crawford, 707 F.2d 447 (10th Cir. 1983)
United States v. Plescia, 48 F.3d 1452 (7th Cir. 1995)

A defendant may not call as a witness a codefendant who has indicated his or her intention to claim the privilege.

United States v. Roberts, 503 F.2d 598 (9th Cir. 1974)
United States v. Tuley, 546 F.2d 1264 (5th Cir. 1977)

l. Effect of grant of immunity

Immunized testimony in a grand jury proceeding from a witness who claims the privilege at trial may not be introduced in evidence under

Federal Rule of Evidence 804(b)(1) without a showing of "similar motive."

United States v. Salerno, 505 U.S. 317 (1992)

A witness who has been immunized may not claim the privilege, since the immunity affords him or her the same protection as the Fifth Amendment.

In re Gilboe, 699 F.2d 71 (2d Cir. 1983)
In re Grand Jury Proceedings, 860 F.2d 11 (2d Cir. 1988)

m. Defendant may or may not be able to claim privilege after pleading guilty

A defendant who pleads guilty to one count of a multicount indictment may claim the privilege because he or she is still subject to prosecution on the other counts.

MacKay v. United States, 503 F.2d 591 (10th Cir. 1974)
United States v. Valencia, 656 F.2d 412 (9th Cir. 1981)

If there is only one crime for which the defendant is potentially liable, and the defendant pleads guilty to that crime, the plea is a waiver of the privilege, and he or she may be compelled to testify.

United States v. Yurasovich, 580 F.2d 1212 (3d Cir. 1978)
United States v. Pardo, 636 F.2d 535 (D.C. Cir. 1980)
United States v. Heldt, 668 F.2d 1238 (D.C. Cir. 1981)

If the defendant pleads guilty to a federal charge but is still subject to prosecution by a state, he or she may claim the privilege.

United States v. Metz, 608 F.2d 147 (5th Cir. 1979)

A voluntary guilty plea is a waiver of the privilege only with respect to the crime that was admitted to by the plea.

United States v. Moore, 682 F.2d 853 (9th Cir. 1982)
United States v. Fortin, 685 F.2d 1297 (11th Cir. 1982)
United States v. Rodriguez, 706 F.2d 31 (2d Cir. 1983)

n. Comment in argument after assertion of privilege

The jury may draw no inference from the exercise of the privilege irrespective of whether the inference is favorable to the prosecution or to the defense.

United States v. Nunez, 668 F.2d 1116 (10th Cir. 1981)

If the witness makes a valid claim of privilege, counsel may not make any argument to the jury based on any inference that might be drawn from that claim.

United States v. Castillo, 615 F.2d 878 (9th Cir. 1980)
Solomon v. Kemp, 735 F.2d 395 (11th Cir. 1984)

If the defendant takes the witness stand, the prosecutor may comment on the defendant's failure to deny or explain incriminating facts already in evidence. The prosecutor may do so whether or not the defendant claims the privilege. The defendant may not selectively testify as to the merits yet avoid comment on his or her failure to explain other incriminating evidence.

2. Introducing information adverse to government witness during direct examination

The government may bring out on its direct examination of a government witness the fact that it has entered into an agreement with that witness to permit his or her pleading to a reduced charge.

United States v. Hedman, 630 F.2d 1184 (7th Cir. 1980)
United States v. Roth, 736 F.2d 1222 (8th Cir. 1984)
United States v. Henderson, 717 F.2d 135 (4th Cir. 1983)
United States v. Walker, 871 F.2d 1298 (6th Cir. 1989)

The government may bring out on direct examination of a government witness the circumstances surrounding that witness's motivation for cooperating with the government or any other matter damaging to that witness's credibility. The admission of such evidence during direct examination is permitted to avoid the inference by the jury that the government is attempting to keep from them the witness's possible bias.

United States v. Edwards, 631 F.2d 1049 (2d Cir. 1980)
United States v. McNeill, 728 F.2d 5 (1st Cir. 1984)

There is a split among the circuits regarding the extent to which the government is free to elicit the details of its plea arrangements with its witnesses on direct examination. A majority of circuits allow the government to elicit on direct examination a witness's plea bargain or immunity-agreement promise to testify truthfully.

United States v. Henderson, 717 F.2d 135 (4th Cir. 1983)
United States v. Martin, 815 F.2d 818 (1st Cir. 1987)
United States v. Mealy, 851 F.2d 890 (7th Cir. 1988)
United States v. Walker, 871 F.2d 1298 (6th Cir. 1989)
United States v. Edelman, 873 F.2d 791 (5th Cir. 1989)
United States v. Drews, 877 F.2d 10 (8th Cir. 1989)
United States v. Lord, 907 F.2d 1028 (10th Cir. 1990)
United States v. Spriggs, 996 F.2d 320 (D.C. Cir. 1993)
See also United States v. Oxman, 740 F.2d 1298 (3d Cir. 1984), *vacated on other grounds sub nom. United States v. Pflaumer*, 473 U.S. 922 (1985) (entire plea agreement admissible where government could anticipate later effort to impeach witness)

The Second, Ninth, and Eleventh Circuits do not permit the government to elicit the specific terms of a cooperation agreement relating to the witness's promise to testify truthfully before the witness's credibility is attacked on cross-examination.

United States v. Borello, 766 F.2d 46 (2d Cir. 1985)
But see United States v. Cosentino, 844 F.2d 30, 33 n. 1 (2d Cir. 1988)("Were we writing on a blank slate, we might have followed the other circuits . . .")
United States v. Hilton, 772 F.2d 783 (11th Cir. 1985)
But see United States v. Cruz, 805 F.2d 1464 (11th Cir. 1986) (exception allows evidence on direct if witness's credibility has been attacked in defense's opening statement)
United States v. Wallace, 848 F.2d 1464 (9th Cir. 1988)

Although the government may bring out on direct examination that a government witness is within a witness protection program, this must be handled so as not to imply that the defendant was the reason the witness entered the program.

United States v. DiFrancesco, 604 F.2d 769 (2d Cir. 1979), *rev'd on other grounds*, 449 U.S. 117 (1980)

It is probably better to have the witness protection program brought out only by the defendant.

United States v. Marrionneaux, 552 F.2d 621 (5th Cir. 1977)

3. Cross-examination of government witness

The Sixth Amendment right of an accused to confront the witnesses against him or her includes the opportunity for adequate and effective cross-examination.

Davis v. Alaska, 415 U.S. 308 (1974)
Delaware v. Fensterer, 474 U.S. 15 (1985)
United States v. Owens, 484 U.S. 554 (1988)
Olden v. Kentucky, 488 U.S. 227 (1988)

The right of a defendant to engage in a searching and wide-ranging cross-examination of any government witness is an essential requirement for a fair trial.

United States v. Jones, 557 F.2d 1237 (8th Cir. 1977)

Cross-examination may embrace any matter germane to direct examination, qualifying or destroying it, or attempting to elucidate, modify, explain, contradict, or rebut testimony given by the witness on direct examination.

Villanueva v. Leininger, 707 F.2d 1007 (8th Cir. 1983)
Dorsey v. Parke, 872 F.2d 163 (6th Cir. 1989)

The authority of the court to limit cross-examination comes into play only after the defendant has been permitted to exercise sufficient cross-examination to satisfy the Sixth Amendment.

United States v. Tolliver, 665 F.2d 1005 (11th Cir. 1982)
United States v. Haimowitz, 706 F.2d 1549 (11th Cir. 1983)

Exposure of a witness's bias or motivation in testifying is a proper and important function of cross-examination. The Confrontation Clause is violated when an accused is prohibited from engaging in otherwise appropriate cross-examination designed to demonstrate the bias or motivation of a witness.

Davis v. Alaska, 415 U.S. 308 (1974)
Delaware v. Van Arsdall, 475 U.S. 673 (1986)

Cross-examination into any motivation or incentive that a government witness may have for falsifying testimony is to be given the widest possible scope, particularly with respect to the testimony of those who have a substantial reason for being cooperative with the government.

United States v. Hall, 653 F.2d 1002 (5th Cir. 1981)
United States v. Lynn, 856 F.2d 430 (1st Cir. 1988)
But see United States v. A & S Council Oil Co., 947 F.2d 1128 (4th Cir. 1991) (attack not allowed on credibility of government witness through evidence that witness took otherwise inadmissible polygraph test)

When a cooperating witness who has entered into a plea agreement testifies for the government against a codefendant, effective cross-examination requires that the codefendant be permitted to inquire into the specific terms of the plea agreement. This includes questioning designed to demonstrate the specific crime to which the cooperating witness pled guilty, the range of punishment the witness is exposed to under the guilty plea, and the potential sentence the witness was exposed to before entering into the plea agreement.

United States v. Roan Eagle, 867 F.2d 436 (8th Cir. 1989)

Even when there is no formal plea or "deal" between federal prosecutors and a witness testifying on behalf of the government, the defendant is permitted to cross-examine the witness regarding any hopes the witness may entertain for government leniency on charges pending against him or her.

United States v. Towne, 870 F.2d 880 (2d Cir. 1989)

The trial court has the duty to control cross-examination of government witnesses to prevent it from unduly burdening the record with cumulative or irrelevant material. The court may limit cross-examination to exclude repetitive questioning or to avoid extensive and time-wasting ex-

ploration of collateral matters.

United States v. Weiner, 578 F.2d 757 (9th Cir. 1978)

4. Interviewing of government witnesses by defense counsel

As a general rule, a witness belongs neither to the government nor to the defense.

a. Both sides may interview

Both sides have the right to interview witnesses before trial.

Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966)
Salemme v. Ristaino, 587 F.2d 81 (1st Cir. 1978)
United States v. Cook, 608 F.2d 1175 (9th Cir. 1979)

No provision for disclosing names and addresses of government witnesses is included in Federal Rule of Criminal Procedure 16. However, as part of its inherent power to ensure the proper and orderly administration of justice, the court may require the government to provide the defendant with a list of witnesses.

United States v. Napue, 834 F.2d 1311 (7th Cir. 1987)

The Fifth Circuit has stated that addresses of government witnesses must ordinarily be disclosed to the defense.

United States v. Opager, 589 F.2d 799 (5th Cir. 1979)

In a capital case, the defendant is entitled to a list of the witnesses to be produced at trial unless the court finds by a preponderance of the evidence that providing the list "may jeopardize the life or safety of any person."

18 U.S.C. § 3432

If a witness is in protective custody or if for any reason a witness may be subject to personal danger, it is the duty of the trial court to ensure that counsel for the defense has access to the witness under controlled arrangements. A better procedure is to allow defense counsel to hear directly from the witness whether the witness would be willing to talk to him or her, either alone or in the presence of the witness's own attorney. The court may delay access to a witness in protective custody until shortly before trial when such delay is warranted by the circumstances.

United States v. Walton, 602 F.2d 1176 (4th Cir. 1979)

A witness may of his or her own free will refuse to be interviewed by either side.

Kines v. Butterworth, 669 F.2d 6 (1st Cir. 1981)

b. Witness may refuse to be interviewed by defense counsel

It is imperative that prosecutors and other government officials maintain a posture of strict neutrality when advising witnesses of their rights and duties with respect to talking to defense counsel.

United States v. Rich, 580 F.2d 929 (9th Cir. 1978)

A defendant's rights are not violated when a government witness chooses not to be interviewed.

United States v. Rice, 550 F.2d 1364 (5th Cir. 1977)
United States v. Bittner, 728 F.2d 1038 (8th Cir. 1984)

A government witness may dictate the circumstances under which he or she will submit to an interview by defense counsel.

United States v. Brown, 555 F.2d 407 (5th Cir. 1977)

A government witness may choose to be interviewed by defense counsel only in the presence of a government attorney.

United States v. Nardi, 633 F.2d 972 (1st Cir. 1980)

The government has no duty to present its witnesses for interviews. Its duty is simply not to deny access.

United States v. Pepe, 747 F.2d 632 (11th Cir. 1984)

If a witness declines to be interviewed, defense counsel may not inquire on cross-examination as to why the witness exercised that right.

United States v. Figurski, 545 F.2d 389 (4th Cir. 1976)

c. Government may not discourage interviewing of witnesses by defendant

The government may not deny a defendant access to a witness by hiding the witness.

Lockett v. Blackburn, 571 F.2d 309 (5th Cir. 1978)
United States v. Henao, 652 F.2d 591 (5th Cir. 1981)

The government's deliberate concealment of a named eyewitness whose testimony would admittedly be material constitutes a prima facie deprivation of due process.

Lockett v. Blackburn, 571 F.2d 309 (5th Cir. 1978)

If defense counsel establishes inability to learn the whereabouts or identity of eyewitnesses through normal investigative techniques, the trial court may order the government to disclose the names and addresses of the witnesses.

United States v. Sims, 637 F.2d 625 (9th Cir. 1980)

The prosecution may interfere with a defendant's right of access to a government witness only under the clearest and most compelling circumstances.

Salemme v. Ristaino, 587 F.2d 81 (1st Cir. 1978)
United States v. Cook, 608 F.2d 1175 (9th Cir. 1979)

When the free choice of a potential witness to talk to defense counsel is constrained by the prosecution without justification, the constraint improperly interferes with the defendant's right of access to witnesses.

Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966)
Kines v. Butterworth, 669 F.2d 6 (1st Cir. 1981)

It is not improper for a government representative to advise a government witness of his or her right to decline to be interviewed by defense counsel.

United States v. Bittner, 728 F.2d 1038 (8th Cir. 1984)

d. Government may request a temporary restraining order to prevent harassment of witnesses

Section 1514, Title 18 of the U.S. Code permits the court to issue a temporary restraining order prohibiting the harassment of a victim or witness in a federal criminal case if the government files an appropriate application and the court concludes there is a reasonable basis for believing such harassment exists.

United States v. Stewart, 872 F.2d 957 (10th Cir. 1989)

5. Exclusion of witnesses from courtroom

Federal Rule of Evidence 615 mandates that witnesses be excluded from the courtroom at the request of any party.

Government of the Virgin Islands v. Edinborough, 625 F.2d 472 (3d Cir. 1980)

Ordinarily, when Rule 615 is invoked, the government is permitted to have one case agent in the courtroom during trial.

United States v. Farnham, 791 F.2d 331 (4th Cir. 1986)
Scott v. Fort Bend County, 870 F.2d 164 (5th Cir. 1989)

The federal agent in charge of the preparation of a criminal case for trial may not be excluded from the courtroom even though that agent is to be a government witness. Any prejudice from the presence of that witness while others are testifying can be prevented by requiring the government to present the testimony of that agent at an early stage of its case.

In re United States, 584 F.2d 666 (5th Cir. 1978)
United States v. Mitchell, 733 F.2d 327 (4th Cir. 1984)

It is reversible error to refuse a timely Rule 615 request to permit only one of two federal agents to remain in the courtroom during trial if the result is that the second agent hears the testimony of the first agent before testifying himself or herself.

United States v. Farnham, 791 F.2d 331 (4th Cir. 1986)

If a witness violates the court's exclusion order, it is within the discretion of the court to prohibit that witness from testifying.

United States v. Calhoun, 510 F.2d 861 (7th Cir. 1975)
United States v. Bizzard, 674 F.2d 1382 (11th Cir. 1982)

When a witness fails to obey the court's exclusion order, the court may exclude the testimony of that witness entirely or may permit that witness to testify only as to matters about which he or she has not heard the testimony of other witnesses.

Nick v. United States, 531 F.2d 936 (8th Cir. 1976)

It is a violation of the rule of exclusion of witnesses for counsel to take notes of the testimony of witnesses and then relay the substance of those notes to other witnesses.

United States v. Wodtke, 711 F.2d 86 (8th Cir. 1983)

6. Defense counsel conferring with testifying defendant during recess

It is reversible error for a court to direct a defendant not to consult with his or her attorney during an overnight recess that is called between the defendant's direct examination and cross-examination. Reversal is required under such circumstances without inquiry into the question of prejudice. Such an order violates the defendant's Sixth Amendment right to counsel, which includes the right to discuss a variety of trial-related matters with counsel during a lengthy recess in trial.

Geders v. United States, 425 U.S. 80 (1976)

However, the court has discretion to order a defendant not to consult with counsel during a brief recess between the defendant's direct examination and cross-examination. The defendant has no right to discuss his or her testimony with counsel while it is still in progress, and nothing but the ongoing testimony is likely to be discussed in a brief recess between direct examination and cross-examination. The order condemned in *Geders* was of a different character because the normal conversations between attorney and client that occur during overnight recesses encompass matters beyond the content of a defendant's own testimony.

Perry v. Leeke, 488 U.S. 272 (1989)

C. Other Issues

1. Stipulation of facts

Generally, the government is not bound by a defendant's offer to stipulate to an element of a crime. The government is free to present to the jury evidence to establish a complete picture of the events constituting the charged crime.

United States v. Ellison, 793 F.2d 942 (8th Cir. 1986)

The government is required to stipulate to facts that witnesses would otherwise testify to only if the prejudicial aspects of their testimony outweigh its probative value.

United States v. De John, 638 F.2d 1048 (7th Cir. 1981)

Before accepting a stipulation of fact from a defendant in a criminal prosecution, the trial judge must make sure that the stipulation is knowingly and voluntarily made by the defendant.

United States v. Miller, 588 F.2d 1256 (9th Cir. 1978)

The trial judge must address the defendant and ensure that the stipulation is being made knowingly and voluntarily.

United States v. Miller, 588 F.2d 1256 (9th Cir. 1978)

A stipulation that an identified witness would testify in a certain way is not a stipulation as to the truth of that testimony. It is error for the court to treat such a stipulation as a stipulation that a certain element or elements of the crime have been proven. The stipulation is in fact only a stipulation that the witness would, if called as a witness, so testify.

United States v. Hellman, 560 F.2d 1235 (5th Cir. 1977)

2. Role of judge in trial

Trial judges are not mere moderators. They may comment on the evidence, question witnesses, elicit facts not yet adduced, or clarify those previously presented.

United States v. Wright, 573 F.2d 681 (1st Cir. 1978)
United States v. Dobbs, 63 F.3d 391 (5th Cir. 1995)

A trial judge has the privilege, and at times the duty, to elicit facts he or she deems necessary to the clear presentation of the issues. To this end the judge may examine witnesses who testify, provided that the judge preserves an attitude of impartiality and guards against giving the jury an impression that he or she believes the defendant to be guilty.

United States v. Baron, 602 F.2d 1248 (7th Cir. 1979)
Llach v. United States, 739 F.2d 1322 (8th Cir. 1984)

A judge's questioning of witnesses to clarify evidence for the jury was appropriate despite the fact that the questions may have permitted the witness to emphasize testimony helpful to the prosecution, or elicited answers detrimental to the defense.

Duckett v. Godinez, 67 F.3d 734 (9th Cir. 1995)

The trial judge is well advised to refrain from any challenging questioning of a defendant, and especially to refrain from propounding any question that indicates the judge's disbelief in the essence of the defense.

Johnson v. Scully, 727 F.2d 222 (2d Cir. 1984)

A trial judge may interrogate a witness to clarify the witness's testimony or to ensure that a case is fairly tried. However, when the attorneys are competently conducting their cases, it is improper for the trial judge to question the witnesses. By doing so, the judge places the opposing counsel in a disadvantageous position. The attorney may hesitate to object to the judge's examination for fear of creating, or giving the appearance of creating, a conflict with the judge.

United States v. Welliver, 601 F.2d 203 (5th Cir. 1979), *overruled on other grounds by United States v. Adamson*, 700 F.2d 953 (5th Cir. 1983)

In a complex trial, intervention by the judge is often needed to clarify what is going on. If the facts are becoming muddled and neither side is succeeding in attempts to clarify them, the judge performs an important duty by interposing clarifying comments or questions.

United States v. Hickman, 592 F.2d 931 (6th Cir. 1979)

United States v. Laurins, 857 F.2d 529 (9th Cir. 1988)

A judge's absence during a criminal trial, including court proceedings after the jury begins deliberations, is error of constitutional magnitude.

Riley v. Deeds, 56 F.3d 1117 (9th Cir. 1995)

But see Haith v. United States, 342 F.2d 158 (3d Cir. 1965) (judge's absence is reversible error only if defendant suffered prejudice as a result)

3. Comment on evidence by court

In instructing the jury, a trial judge may comment on the evidence. The judge must do so with great care, however, so as not to unduly prejudice the thinking of the jury.

United States v. Martin, 740 F.2d 1352 (6th Cir. 1984)

A judge may, whenever necessary, assist the jury in arriving at a just conclusion by explaining and commenting on the evidence. However, the judge must make it clear to the jury that all matters of fact are submitted for their determination.

United States v. Saenz, 747 F.2d 930 (5th Cir. 1984)

In commenting on evidence, the trial judge need not refer to all of it, but the court should ensure that the facts are accurately discussed and that, if the evidence is summarized, both sides are analyzed. The judge's comments should be balanced. A trial judge is permitted to express opinions on the interplay of the evidence as long as the judge stays within the judge's role in the fact-finding process and explains to the jury that he or she is only assisting them as the ultimate triers of fact. The fundamental principle circumscribing a trial judge's power to comment on the evidence is that the comment must serve to instruct and assist the jury in understanding the facts and issues in dispute.

United States v. Tello, 707 F.2d 85 (4th Cir. 1983)

In a criminal case a plea of not guilty places every issue in doubt, and not even undisputed facts may be removed from the jury's consideration, either by direction or by omission in the charge. A trial judge may not step in and direct a finding of contested fact in favor of the prosecution regardless of how overwhelmingly the evidence may point in that direction. The trial judge is barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused.

United States v. Argentine, 814 F.2d 783 (1st Cir. 1987)
United States v. Mentz, 840 F.2d 315 (6th Cir. 1988)

When the court grants a defendant's motion for a judgment of acquittal in a codefendant case, the better practice is to simply acknowledge the acquitted defendant's absence and to instruct the jury that the acquittal should not affect their deliberations as to the remaining defendants. It is not necessary to inform the jury that the codefendant's case was dismissed because the government introduced insufficient evidence on which to base a conviction. The jury may infer from such a comment that the court believes there is sufficient evidence to convict the remaining defendants.

United States v. Rapp, 871 F.2d 957 (11th Cir. 1989)

4. Permitting reopening after resting

It is within the discretion of the trial court to permit a party to reopen its case after resting.

United States v. Alderete, 614 F.2d 726 (10th Cir. 1980)
United States v. Washington, 861 F.2d 350 (2d Cir. 1988)

The government may be permitted to reopen its case even after the defendant has moved for acquittal at the close of the government's case.

United States v. Webb, 533 F.2d 391 (8th Cir. 1976)

A court should, however, be reluctant to permit reopening of a case after a party rests.

United States v. White, 583 F.2d 899 (6th Cir. 1978)

In passing on a motion to reopen, the court should consider the timeliness of the motion, the character of the additional testimony, and the effect of granting the motion. The party moving to reopen must provide a reasonable explanation for failure to present the additional evidence during its case in chief.

United States v. Larson, 596 F.2d 759 (8th Cir. 1979)
United States v. Walker, 772 F.2d 1172 (5th Cir. 1985)

The evidence proffered on a motion to reopen should be relevant, admissible, technically adequate, and helpful to the jury in ascertaining guilt or innocence. The belated receipt of such evidence should not imbue it with distorted importance, prejudice the opposing party's case, or preclude opposing counsel from having an adequate opportunity to meet the additional evidence.

United States v. Walker, 772 F.2d 1172 (5th Cir. 1985)

5. Bench conferences

Federal Rule of Criminal Procedure 43(c) provides that a defendant need not be present at a conference or argument on a question of law, and need not sign a written waiver of his or her presence.

Egger v. United States, 509 F.2d 745 (9th Cir. 1975)
United States v. Gunter, 631 F.2d 583 (8th Cir. 1980)
In re Shriner, 735 F.2d 1236 (11th Cir. 1984)

The decision whether to conduct bench conferences, or side bar discussions, is a matter within the trial court's discretion.

United States v. Laurins, 857 F.2d 529 (9th Cir. 1988)

All bench conferences must be fully reported. It is error not to have the court reporter record bench conferences.

United States v. Snead, 527 F.2d 590 (4th Cir. 1975)

The Fifth Circuit has suggested that when a bench conference is held the jury be excluded from the courtroom or the conference be held in chambers so that it can be completely reported.

United States v. Brumley, 560 F.2d 1268 (5th Cir. 1977)

See Bench Comment, 1986, No. 4 (FJC): "Limitations on a defendant's right under Rule 43 to be present at every stage of trial"

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Part VI. Argument

A. Opening Statement

1. By the prosecutor

The purpose of the government's opening statement is to give the jury the broad outlines of its case so that the jury can better understand it. The prosecutor should not depart from that purpose by including overdramatic, unsavory characterizations that serve to poison the jury's mind against the defendant.

Government of Virgin Islands v. Turner, 409 F.2d 102 (3d Cir. 1968)
United States v. Somers, 496 F.2d 723 (3d Cir. 1974)

It is improper for a prosecutor to make remarks in an opening statement that communicate his or her own personal evaluation of the case to the jury.

United States v. Davis, 548 F.2d 840 (9th Cir. 1977)

2. By defense counsel

It is error for the trial court to deny defense counsel the right to make an opening statement unless the defense indicates its intention to call witnesses. Defense counsel has the right to make an opening statement even if counsel intends not to call any witnesses but instead to make the defendant's case through cross-examination of government witnesses. The function of the defense's opening statement is to enable defense counsel to inform the court and jury what the defense expects to prove. The importance of this function is not diminished by the fact that defense counsel expects to prove the defense's theory through cross-examination of government witnesses.

United States v. Stanfield, 521 F.2d 1122 (9th Cir. 1975)
United States v. Hershenow, 680 F.2d 847 (1st Cir. 1982)

The timing of defense counsel's opening statement is within the trial court's discretion. The trial court may require the opening statement of defense counsel to be given immediately following the opening statement of government counsel or may permit defense counsel to give an opening statement after all government evidence has been received.

United States v. Rivera, 778 F.2d 591 (10th Cir. 1985)

B. Final Argument

1. Right to final argument

Denial of the defendant's opportunity for final argument abridges the defendant's Sixth Amendment right to present a defense no matter how strong the case for the prosecution may appear to the court.

Patty v. Bordenkircher, 603 F.2d 587 (6th Cir. 1979)

2. Control by court

The trial court may exercise broad discretion in controlling closing arguments and in ensuring that arguments do not stray unduly from the mark.

United States v. Wables, 731 F.2d 440 (7th Cir. 1984)

3. Time limitations

So long as the defendant has an opportunity to make all legally tenable arguments that are supported by the facts of the case, the trial court may limit the length of final arguments.

United States v. Gaines, 690 F.2d 849 (11th Cir. 1982)
United States v. Bednar, 728 F.2d 1043 (8th Cir. 1984)

4. Prosecutor's comment on defendant's failure to testify

a. Direct reference to defendant's failure to testify

A prosecutor's direct reference to a defendant's failure to testify violates the defendant's privilege against compelled self-incrimination.

Griffin v. California, 380 U.S. 609 (1965)

However, the Supreme Court ruled that a prosecutor's comment that "[the defendant] could have taken the stand and explained it to you, anything he wanted to" did not violate the Fifth Amendment because it was a fair response to an argument initiated by defense counsel to the effect that counsel's non-testifying client had not been given a chance to explain his side of the story.

United States v. Robinson, 485 U.S. 25 (1988)

b. Indirect reference to defendant's failure to testify

The prosecuting attorney must strictly observe the obligation to avoid any adverse comment to the jury on the defendant's failure to testify. The test is whether, in the circumstances of the case, the language used was manifestly intended to be a comment on the failure of the accused to testify or was of such character that the jury would naturally and necessarily take it to be so.

United States v. Williams, 521 F.2d 950 (D.C. Cir. 1975)
United States v. Palacios, 612 F.2d 972 (5th Cir. 1980)
Smith v. Fairman, 862 F.2d 630 (7th Cir. 1988)
United States v. Castillo, 866 F.2d 1071 (9th Cir. 1988)

A prosecutor's closing argument improperly emphasizes the defendant's failure to testify when the prosecutor argues that critical facts in the case have not been controverted and those facts could not have been controverted by anyone other than the defendant.

Runnels v. Hess, 653 F.2d 1359 (10th Cir. 1981)
Lent v. Wells, 861 F.2d 972 (6th Cir. 1988)

Oblique comments on a defendant's failure to testify, if sufficiently suggestive, are as unlawful as direct comments.

United States v. Brown, 546 F.2d 166 (5th Cir. 1977)

In closing argument, the prosecutor may refer to government evidence as uncontradicted if witnesses other than the defendant could have contradicted the evidence. It is impermissible to state that the evidence was uncontradicted if the defendant was the only person who could have contradicted the evidence.

United States v. Sorzano, 602 F.2d 1201 (5th Cir. 1979)
Runnels v. Hess, 653 F.2d 1359 (10th Cir. 1981)
Raper v. Mintzes, 706 F.2d 161 (6th Cir. 1983)
Williams v. Lane, 826 F.2d 654 (7th Cir. 1987)

5. Prosecutor's comment on defendant's failure to present exculpatory evidence

The prosecutor may properly call the jury's attention to the defendant's failure to present alibi witnesses in support of his or her alibi defense.

United States v. Higginbotham, 539 F.2d 17 (9th Cir. 1976)

The prosecutor may comment on a defendant's failure to explain evidence against him or her after the defendant has waived the privilege by taking the witness stand.

Caminetti v. United States, 242 U.S. 470 (1917)

The prosecutor may properly comment on the defendant's failure to present exculpatory evidence as long as the prosecutor does not call attention to the defendant's failure to testify.

United States v. Fleishman, 684 F.2d 1329 (9th Cir. 1982), *overruled on other grounds by United States v. Ibarra-Alcarez*, 830 F.2d 968 (9th Cir. 1987)
United States v. Soulard, 730 F.2d 1292 (9th Cir. 1984)
Moore v. Wyrick, 760 F.2d 884 (8th Cir. 1985)
United States v. Kessi, 868 F.2d 1097 (9th Cir. 1989)

A distinction exists between a comment by the prosecutor concerning failure of the "defense" to counter or explain evidence and failure of the "defendant" to do so. A comment about the former does not violate a defendant's Fifth Amendment rights.

United States v. Fogg, 652 F.2d 551 (5th Cir. 1981)
United States v. Castillo, 866 F.2d 1071 (9th Cir. 1988)

6. Improper arguments by government

It is improper for a prosecutor to appeal to the emotions of the jurors during closing argument.

In re Bushkin Assocs., Inc., 864 F.2d 241 (1st Cir. 1989)

It is improper for the prosecutor to assert his or her personal belief in the truth or falsity of any testimony or the guilt of any defendant. Such expressions are a form of unsworn, unchecked testimony.

United States v. Gallagher, 576 F.2d 1028 (3d Cir. 1978)
United States v. Bess, 593 F.2d 749 (6th Cir. 1979)
United States v. Saa, 859 F.2d 1067 (2d Cir. 1988)

It is improper for a prosecutor to express his or her personal opinion that a defendant has lied on the stand. However, if there is uncontroverted evidence that a testifying defendant has previously lied about a relevant matter, the prosecutor may fairly characterize such testimony as a lie.

Vargas v. United States Parole Comm'n, 865 F.2d 191 (9th Cir. 1988)

It is improper for a prosecutor to argue that in order to acquit the defendant, the jury must find that the government's witnesses lied to them. This argument is incorrect because it ignores the possibility that the jury may return a verdict of not guilty because it finds the evidence insufficient to convict the defendant by proof beyond a reasonable doubt.

United States v. Vargas, 583 F.2d 380 (7th Cir. 1978)
United States v. Teslim, 869 F.2d 316 (7th Cir. 1989)

A prosecutor's "golden rule" argument, which asks jurors to put themselves in the defendant's shoes, and ask themselves what they would have done in that situation, is improper. This argument encourages the jury to

depart from neutrality and decide the case on the basis of personal involvement or bias, rather than on the evidence.

United States v. Teslim, 869 F.2d 316 (7th Cir. 1989)

It is error for the prosecutor to comment on the conduct of the defendant during the trial. Unless the defendant takes the stand, the defendant's personal appearance or conduct at the trial is irrelevant to the question of guilt or innocence. If the defendant remains impassive during the testimony of his or her accuser, the defendant is only conforming to the standard of deportment that courts have a right to expect from all participants in the trial process.

Cunningham v. Perini, 655 F.2d 98 (6th Cir. 1981)

A prosecutor who comments on the courtroom conduct of a defendant who has not testified and states to the jury that it may consider that conduct as evidence of guilt violates the defendant's right to a fair trial.

United States v. Carroll, 678 F.2d 1208 (4th Cir. 1982)
United States v. Pearson, 746 F.2d 787 (11th Cir. 1984)

The prosecution may not imply that the government would not have brought the case unless the defendant were guilty. It may not attempt to invoke the sanction of its office or of the government itself as a basis for conviction.

United States v. Phillips, 664 F.2d 971 (5th Cir. 1981), *overruled on other grounds by United States v. Huntress*, 956 F.2d 1309 (5th Cir. 1992)

It is reversible error for the prosecutor to state that the case would not have been presented had the government not believed that the defendant was guilty.

United States v. Bess, 593 F.2d 749 (6th Cir. 1979)

It is reversible error for the prosecution to argue that the jury should find the defendant guilty because an earlier jury found a coconspirator guilty of the same offenses.

United States v. Miranda, 593 F.2d 590 (5th Cir. 1979)
United States v. Mitchell, 1 F.3d 235 (4th Cir. 1993)

Neither the prosecution nor the defense may say anything to the jury implying that evidence supporting its position exists but has not been introduced in the trial.

United States v. Morris, 568 F.2d 396 (5th Cir. 1978)

It is error for a prosecutor to suggest to the jurors that they would be "violating [their] sacred oath before God" if they turned the defendant loose.

United States v. Juarez, 566 F.2d 511 (5th Cir. 1978)

The prosecutor is prohibited from making race-conscious or racially biased arguments.

McCleskey v. Kemp, 481 U.S. 279, 309 n.30 (1987)
United States v. Hernandez, 865 F.2d 925 (7th Cir. 1989) (reference to "Cuban drug dealers" improper)

It is improper for a prosecutor to argue that the testimony of an undercover black police officer should be believed because the defendant is black and it is unreasonable to believe that a black police officer would give false testimony against a black defendant.

McFarland v. Smith, 611 F.2d 414 (2d Cir. 1979)

See Bench Comment, 1993, No. 5 (FJC): "What district courts should do when counsel make improper comments in closing argument"

7. Arguments must be from the record

Closing arguments of both prosecutor and defense counsel must be derived from the record of the trial.

United States v. Dorr, 636 F.2d 117 (5th Cir. 1981)
United States v. Pool, 660 F.2d 547 (5th Cir. 1981)

The prosecutor is free to draw any reasonable inferences from the evidence adduced at trial.

United States v. Spivey, 859 F.2d 461 (7th Cir. 1988)

It is improper to draw inferences that are so unreasonable as to be more akin to the presentation of new evidence to the jury.

United States v. Keskey, 863 F.2d 474 (7th Cir. 1988)

8. Duty of court to intervene in improper argument

When an improper closing argument is being made by the prosecution, the trial judge has an obligation to intervene at once to ensure protection of the defendant's right to a fair trial.

United States v. Corona, 551 F.2d 1386 (5th Cir. 1977)
United States v. Garza, 608 F.2d 659 (5th Cir. 1979)

If a prosecuting attorney improperly refers to the failure of the defendant to take the stand, the trial judge should immediately admonish the jury that the law does not compel the defendant to testify and that the jurors are to draw no inference of guilt by reason of the defendant's failure to take the witness stand.

United States v. Buege, 578 F.2d 187 (7th Cir. 1978)

See Bench Comment, 1993, No. 5 (FJC): "What district courts should do when counsel make improper comments in closing argument"

9. Comment on failure of codefendant to testify

Comments by a defendant that implicitly or explicitly ask the jury to infer the guilt of a codefendant who has not testified are improper.

DeLuna v. United States, 308 F.2d 140 (5th Cir. 1962)
United States v. Allende, 486 F.2d 1351 (9th Cir. 1973)
United States v. McClure, 734 F.2d 484 (10th Cir. 1984)
United States v. Mena, 863 F.2d 1522 (11th Cir. 1989)

C. Vouching for Witness

It is improper for the prosecution to vouch for the credibility of a government witness. To vouch for a government witness is to reassure the jury that the witness's testimony may be accepted as being true.

Vouching for a witness has occurred if the jury could reasonably believe that the prosecutor was indicating personal belief in that witness's credibility. It is improper for the prosecutor to place the prestige of the government behind a witness by making personal assurances of the veracity of that witness.

United States v. Dennis, 786 F.2d 1029 (11th Cir. 1986)

It is improper vouching for the prosecution, after an assistant U.S. attorney has testified, to make reference to the credibility of the office of the U.S. attorney.

United States v. West, 680 F.2d 652 (9th Cir. 1982)

It is improper vouching for the prosecution to make reference to a provision in the plea agreement of a government witness requiring that witness to submit to a polygraphic examination.

United States v. Brown, 720 F.2d 1059 (9th Cir. 1983)

There is a conflict among the circuits as to whether it is improper vouching for government counsel to elicit on direct examination that a government witness agreed to testify truthfully at trial or that the witness knew that he or she was subject to a perjury charge if he or she testified falsely. The Sixth, Seventh, and Eleventh Circuits have found that this is not improper vouching.

United States v. Hedman, 630 F.2d 1184 (7th Cir. 1980)
United States v. Sims, 719 F.2d 375 (11th Cir. 1983)
United States v. Walker, 871 F.2d 1298 (6th Cir. 1989)

The Second and Ninth Circuits have found that this is improper vouching. The unspoken message is that the prosecutor knows what the truth is and is assuring the jury that the truth will be told.

United States v. Roberts, 618 F.2d 530 (9th Cir. 1980)

United States v. Edwards, 631 F.2d 1049 (2d Cir. 1980)

It is proper to introduce a plea agreement on redirect examination if the credibility of a witness has been attacked on cross-examination. However, when a plea agreement has been introduced on redirect examination, the prosecution should not be permitted to argue during examination of the witness or during summation in a manner that causes the cooperation agreement to be a vouching for the witness.

United States v. Barnes, 604 F.2d 121 (2d Cir. 1979)
United States v. Spivey, 859 F.2d 461 (7th Cir. 1988)
United States v. Kats, 871 F.2d 105 (9th Cir. 1989)

When the prosecutor improperly vouches for the veracity of a witness, the trial judge should strike the remark and immediately instruct jurors that they may consider no evidence other than that presented to them, that the prosecutor is an advocate, not a sworn witness, and that they must treat the prosecutor's assertion as an argument that they are free to reject.

United States v. Modica, 663 F.2d 1173 (2d Cir. 1981)

Part VII. Multiple Defendants

A. Severance of Defendants

Rule 14 of the Federal Rules of Criminal Procedure provides as follows:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by defendant for severance the court may order the attorney for the government to deliver to the court for inspection in camera any statements or confessions made by the defendants which the government intends to introduce in evidence at trial.

A Rule 14 claim assumes that the initial joinder of the defendants was proper but challenges the defendants' joint trial as unduly prejudicial. In contrast, a Rule 8(b) claim questions the propriety of joining two or more defendants in a single indictment in the first instance.

United States v. Morales, 868 F.2d 1562 (11th Cir. 1989)

1. Individuals indicted together are ordinarily to be tried together

The general rule, especially in conspiracy cases, is that persons jointly indicted should be tried together.

Zafiro v. United States, 113 S. Ct. 933 (1993)
United States v. Kelly, 569 F.2d 928 (5th Cir. 1978)
United States v. Cadwell, 864 F.2d 71 (8th Cir. 1988)
United States v. Morales, 868 F.2d 1562 (11th Cir. 1989)
United States v. Krout, 66 F.3d 1420 (5th Cir. 1995)

The trial court has wide discretion in ruling on a motion to sever trials of defendants who have been properly joined.

United States v. Candoli, 870 F.2d 496 (9th Cir. 1989)
United States v. Ford, 870 F.2d 729 (D.C. Cir. 1989)
United States v. Flores-Rivera, 56 F.3d 319 (1st Cir. 1995)

Rule 8(b), not Rule 8(a), governs joinder of multiple-defendant, multiple-offense cases.

United States v. Turoff, 853 F.2d 1037 (2d Cir. 1988)
United States v. Kaufman, 858 F.2d 994 (5th Cir. 1988)
United States v. Grey Bear, 863 F.2d 572 (8th Cir. 1988)
United States v. Doherty, 867 F.2d 47 (1st Cir. 1989)

2. When joinder not permitted

Joinder is not permitted in conspiracy cases in which the substantive offenses alleged in the indictment fall outside the scope of the conspiracy with which the defendant is charged.

United States v. Castro, 829 F.2d 1038 (11th Cir. 1987)

3. Better chance of acquittal does not warrant severance

To secure severance a defendant must demonstrate that he or she will suffer substantial prejudice at a joint trial, not just that he or she stands a better chance of acquittal at a separate trial.

United States v. Serlin, 538 F.2d 737 (7th Cir. 1976)
United States v. Magnano, 543 F.2d 431 (2d Cir. 1976)
United States v. Doyle, 60 F.3d 396 (8th Cir. 1995)

4. Motion for severance by defendant claiming need for testimony of codefendant

When a defendant seeks severance in order to secure the testimony of a codefendant, the defendant must demonstrate the following: (1) a bona fide need for the testimony; (2) the substance of the testimony; (3) its exculpatory nature and effect; and (4) that the codefendant will in fact testify if the cases are severed. If the movant makes such a showing, the court must examine the significance of the testimony to the movant's theory of defense, assess the extent of prejudice caused by the absence of the testimony, pay close attention to considerations of judicial economy, and give weight to the timeliness of the motion.

United States v. Hewes, 729 F.2d 1302 (11th Cir. 1984)
United States v. Ford, 870 F.2d 729 (D.C. Cir. 1989)
United States v. McKinney, 53 F.3d 664 (5th Cir. 1995)

One of the relevant considerations is the sufficiency of the showing that the codefendant would in fact testify at a severed trial and would waive his or her Fifth Amendment privilege.

United States v. Lyles, 593 F.2d 182 (2d Cir. 1979)
United States v. Wilwright, 56 F.3d 586 (5th Cir. 1995)

It is not an abuse of judicial discretion to deny a defendant's motion for severance that is based on a codefendant's offer to testify for the defendant provided that the codefendant is tried first.

United States v. Gay, 567 F.2d 916 (9th Cir. 1978)
United States v. Becker, 585 F.2d 703 (4th Cir. 1978)
United States v. Ford, 870 F.2d 729 (D.C. Cir. 1989)

Severance is not appropriate if the offer of the codefendant to provide exculpatory testimony is conditioned on the defendant's being tried last. The codefendant would be likely to waive the privilege against self-incrimination only if he or she had already been acquitted.

United States v. Bari, 750 F.2d 1169 (2d Cir. 1984)

When a defendant seeks severance on the basis of a need for the testimony of a codefendant, the defendant must show that the codefendant would be called at a separate trial, that the codefendant would in fact testify, and that the testimony would be favorable to the defendant.

United States v. Dickey, 736 F.2d 571 (10th Cir. 1984)
United States v. Harrell, 737 F.2d 971 (11th Cir. 1984)

Given such a showing, the court should examine the significance of the codefendant's testimony in relation to the defense theory; consider whether the codefendant's testimony would be subject to substantial, damaging impeachment; assess the counterargument of judicial economy; and give weight to the timeliness of the motion.

United States v. Drougas, 748 F.2d 8 (1st Cir. 1984)

Conclusory statements by counsel moving for severance are insufficient to establish that a codefendant's testimony at a separate trial would exculpate counsel's client. The defendant moving for severance must proffer facts sufficiently detailed to allow the court to conclude that the testimony of the codefendant would in fact be substantially exculpatory of the defendant at trial.

United States v. Parodi, 703 F.2d 768 (4th Cir. 1983)
United States v. Ford, 870 F.2d 729 (D.C. Cir. 1989)

5. Motion for severance based on antagonistic defenses

Rule 14 does not require severance as a matter of law when codefendants present "mutually antagonistic defenses."

Zafiro v. United States, 113 S. Ct. 933 (1993)

For severance based on antagonistic defenses to be warranted, the defenses must be antagonistic to the point of being irreconcilable and mutually exclusive. They must be so antagonistic that the jury, in order to believe the defense of one defendant, must necessarily disbelieve the defense of the other defendant.

United States v. Ehrlichman, 546 F.2d 910 (D.C. Cir. 1976)
United States v. Talavera, 668 F.2d 625 (1st Cir. 1982)
United States v. Kaufman, 858 F.2d 994 (5th Cir. 1988)
United States v. Sherlock, 865 F.2d 1069 (9th Cir. 1989)
United States v. Turk, 870 F.2d 1304 (7th Cir. 1989)
United States v. Knowles, 66 F.3d 1146 (11th Cir. 1995)
United States v. Shivers, 66 F.3d 938 (8th Cir. 1995)

Severance is not required simply because one defendant may wish to comment on another defendant's refusal to testify.

United States v. Ehrlichman, 546 F.2d 910 (D.C. Cir. 1976)

The defendant must show that a joint trial would be so prejudicial that the court must exercise its discretion in only one way, that is, to grant the defendant's motion for severance.

United States v. Van Cauwenberghe, 827 F.2d 424 (9th Cir. 1987)

6. Defendant's desire to testify on one count but not on another

If the defendant moves to sever the trial of one count of the indictment from the trial of another, severance is warranted only if the defendant has made a convincing showing that he or she has both important testimony to give concerning one count and a strong need to refrain from testifying on the other.

United States v. Jardan, 552 F.2d 216 (8th Cir. 1977)
United States v. Hayes, 861 F.2d 1225 (10th Cir. 1988)
United States v. Quintero, 872 F.2d 107 (5th Cir. 1989)

The court must then weigh considerations of economy and expedition in judicial administration against the defendant's interest in having a free choice with respect to testifying.

United States v. Valentine, 706 F.2d 282 (10th Cir. 1983)

7. Factors to be considered by court in assessing motion for severance

When assessing the merits of a severance motion, the trial court must balance the possibility of prejudice to the defendant against the public interest in judicial efficiency and economy. Severance should be granted only if the defendant can demonstrate that a joint trial will result in specific and compelling prejudice to the conduct of his or her defense.

United States v. Walker, 720 F.2d 1527 (11th Cir. 1983)
United States v. Sherlock, 865 F.2d 1069 (9th Cir. 1989)

8. Defendant's motion for severance waived if not renewed at close of evidence

A defendant's motion for severance is waived if not renewed at the close of the evidence, since it is at that point that any prejudice resulting from a joint trial is ascertainable.

United States v. Marin-Cifuentes, 866 F.2d 988 (8th Cir. 1989)
United States v. Brown, 870 F.2d 1354 (7th Cir. 1989)
United States v. Hudson, 53 F.3d 744 (6th Cir. 1995)

B. *Bruton* Rule

In *Bruton v. United States,* 391 U.S. 123 (1968), the Supreme Court held that the Confrontation Clause of the Sixth Amendment was violated when the confession of one defendant, implicating another defendant, was placed before the jury at the defendants' joint trial and the confessing defendant did not take the witness stand and was therefore not subject to cross-examination. This was a violation even though the court gave the jury a cautionary instruction that the confession was to be considered only as evidence against the confessing defendant.

In *Richardson v. Marsh,* 481 U.S. 200 (1987), the Court held that the *Bruton* rule is limited to confessions of a nontestifying codefendant that are facially incriminating of another defendant. Thus, the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession that is redacted to eliminate the defendant's name and any other reference to the defendant's existence. In *Richardson,* evidence introduced after the codefendant's redacted statement caused the statement to inculpate the defendant. However, the Court found that such "contextual" incrimination did not violate *Bruton* because the jury was likely to obey a cautionary instruction to consider the statement itself as evidence only against the confessing defendant.

In multidefendant cases, the court should explore the possibility of a *Bruton* problem before the potential jurors are sworn in, since the government may be planning to offer in evidence a pretrial confession by one of the codefendants. The court must consider whether there is a possible *Bruton* problem and, if so, methods of avoiding that problem.

1. Determining whether *Bruton* rule is applicable

Bruton does not apply to the confession of one codefendant if that confession does not refer to the other defendant and the jury is instructed that the confession is received as evidence only against the confessing defendant.

Richardson v. Marsh, 481 U.S. 200 (1987)

Bruton does not apply to the confession of a codefendant if the codefendant testifies at trial, because he or she is then subject to cross-examination by the other defendant or defendants. Since the codefendant is available for cross-examination, the Confrontation Clause is not violated and severance is not constitutionally mandated.

Nelson v. O'Neil, 402 U.S. 622 (1971)
United States v. Morgan, 562 F.2d 1001 (5th Cir. 1977)
Hodges v. Rose, 570 F.2d 643 (6th Cir. 1978)

However, if a testifying codefendant refuses to allow cross-examination by another defendant, *Bruton* applies.

Toolate v. Borg, 828 F.2d 571 (9th Cir. 1987)

In *Cruz v. New York,* 481 U.S. 186 (1987), the Supreme Court abolished the "interlocking confessions" exception to the *Bruton* rule that had been espoused by four Justices in *Parker v. Randolph,* 442 U.S. 62 (1979). In *Parker,* a plurality of the Court had concluded that if two defendants have made full confessions, *Bruton* does not apply and the "interlocking confessions" are admissible against their respective makers in a joint trial. *Cruz* held that when a nontestifying codefendant's confession incriminating the defendant is not directly admissible against the defendant, the Confrontation Clause bars its admission at the defendants' joint trial, even if the jury is instructed not to consider it against the defendant, and even if the defendant's own confession is admitted against him or her.

If the nontestifying codefendant's confession is introduced in rebuttal to impeach a testifying defendant's explanation of his or her own confession, and the jury is properly instructed that the nontestifying codefendant's confession is not to be considered for its truth, the Confrontation Clause is not violated and *Bruton* does not apply.

Tennessee v. Street, 471 U.S. 409 (1985)

Some circuits have held that the *Bruton* rule does not apply to an out-of-court statement that is admissible under Federal Rule of Evidence 801(d)(2)(E) as a coconspirator statement.

United States v. Archbold-Newball, 554 F.2d 665 (5th Cir. 1977)
United States v. Warren, 578 F.2d 1058 (5th Cir. 1978), *overruled on other grounds by United States v. Bengivenga*, 845 F.2d 593 (5th Cir. 1988)
United States v. Goins, 593 F.2d 88 (8th Cir. 1979)

Bruton does not apply to an out-of-court statement that is admissible as an excited utterance under Federal Rule of Evidence 803(2).

McLaughlin v. Vinzant, 522 F.2d 448 (1st Cir. 1975)
United States v. Vazquez, 857 F.2d 857 (1st Cir. 1988)

At least one circuit has held that *Bruton* does not apply to an out-of-court statement against penal interest.

United States v. Kelley, 526 F.2d 615 (8th Cir. 1975)
Contra United States v. Flores, 985 F.2d 770 (5th Cir. 1993)

2. Avoidance of *Bruton* problem

When the court learns before trial that the government proposes to introduce an out-of-court confession of one defendant, the court should make inquiry as to the confession intended to be used and then decide what, if any, remedial steps are required. The court may

1. exclude the confession at a joint trial;
2. delete references in the confession to the codefendant against whom the confession is inadmissible;
3. order severance; or
4. try the defendants together but before different juries.

If the confession of a nontestifying codefendant is to be admitted at a joint trial, it must be redacted to eliminate any reference to the non-confessing defendant. In editing the confession, the court must eliminate both the non-confessing defendant's name and any references to his or her existence.

Richardson v. Marsh, 481 U.S. 200 (1987)
United States v. Espinoza-Seanez, 862 F.2d 526 (5th Cir. 1988)

The court may avoid *Bruton* problems by conducting the trial before two juries, with the confessing statement made by one defendant being heard only by the jury that is trying that defendant.

United States v. Hayes, 676 F.2d 1359 (11th Cir. 1982)
United States v. Lewis, 716 F.2d 16 (D.C. Cir. 1983)
Smith v. De Robertis, 758 F.2d 1151 (7th Cir. 1985)

C. Calling of Codefendant as Witness

In a joint trial a defendant may not call to the witness stand a codefendant who has not pled guilty and who has indicated an intention to assert the privilege against self-incrimination.

United States v. Roberts, 503 F.2d 598 (9th Cir. 1974)

When a codefendant who has pled guilty appears as a government witness in a defendant's trial, the codefendant must testify honestly and completely about his or her own participation in the crime for which the defendant is being tried. The codefendant may be examined by defense counsel concerning all aspects of his or her own involvement in the crime, as well as the disposition of any charges entered against him or her.

United States v. Wiesle, 542 F.2d 61 (8th Cir. 1976)

D. Disclosure to Jury of Codefendant's Guilty Plea

Courts and prosecutors are generally prohibited from mentioning to the jury that a codefendant has pled guilty or been convicted.

Keller v. Miami Herald Pub. Co., 778 F.2d 711 (11th Cir. 1985)

1. May be reversible error to disclose guilty plea of codefendant to jury

It is plain error for a prosecutor to make reference in an opening statement to the guilty plea of a codefendant.

United States v. Hansen, 544 F.2d 778 (5th Cir. 1977)
United States v. Handly, 591 F.2d 1125 (5th Cir. 1979)

If jurors learn in some way of a codefendant's guilty plea, the trial judge should immediately admonish them against transferring the guilt of that defendant to any other defendant. It is incumbent upon the trial judge to take appropriate action to protect the substantive rights of the remaining defendants.

United States v. DeLucca, 630 F.2d 294 (5th Cir. 1980)

If a codefendant pleads guilty during trial, the jury should not be advised that the codefendant is no longer in court because he or she has pled guilty or that the action against the codefendant has been "disposed of."

United States v. Gibbons, 602 F.2d 1044 (2d Cir. 1979)

If a codefendant pleads guilty during trial, the court should give the jury an instruction to the following effect:

> You will observe that defendant _____ is no longer in court. The fact that he [or she] is no longer here is because of a ruling made by the court. The reasons for that ruling are not your concern. His [or her] absence should not be considered by you as affecting in any way your determination of the guilt or innocence of any other defendant.

Keller v. Miami Herald Pub. Co., 778 F.2d 711 (11th Cir. 1985)

2. Occasions when disclosure of codefendant's guilty plea is proper

Evidence of a codefendant's guilty plea may be brought out by defense counsel to impeach the testimony of the codefendant or to show the codefendant's acknowledgment of his or her participation in the offense.

United States v. Wiesle, 542 F.2d 61 (8th Cir. 1976)

If a codefendant who has pled guilty takes the witness stand, evidence of his or her guilty plea may be introduced by the prosecution or the defense in order to aid the jury in assessing the codefendant's credibility.

United States v. Baez, 703 F.2d 453 (10th Cir. 1983)
United States v. Griffin, 778 F.2d 707 (11th Cir. 1985)
United States v. Dworken, 855 F.2d 12 (1st Cir. 1988)
United States v. Keskey, 863 F.2d 474 (7th Cir. 1988)
United States v. Portac, Inc., 869 F.2d 1288 (9th Cir. 1989)

If the guilty plea of a codefendant is properly introduced into evidence, the court should instruct the jury that that guilty plea may not be considered as substantive evidence of another defendant's guilt. The codefendant's plea may be considered only as evidence relevant to the codefendant's own credibility.

United States v. Little Boy, 578 F.2d 211 (8th Cir. 1978)
United States v. Baez, 703 F.2d 453 (10th Cir. 1983)
United States v. Louis, 814 F.2d 852 (2d Cir. 1987)
United States v. Magee, 821 F.2d 234 (5th Cir. 1987)
United States v. Dworken, 855 F.2d 12 (1st Cir. 1988)

If a codefendant's plea agreement is introduced, it should be redacted to delete information harmful to the defendant and without probative value as to the codefendant's veracity. Such information includes statements indicating that the prosecutor has additional information verifying the testimony of the codefendant or that the prosecutor personally believes the witness's testimony.

United States v. McLain, 823 F.2d 1457 (11th Cir. 1987)
United States v. Keskey, 863 F.2d 474 (7th Cir. 1988)

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Part VIII. Verdict

A. Special Interrogatories in Criminal Cases

It is generally considered improper to propound special interrogatories to a jury in a criminal prosecution. A jury has the right to render a general verdict without being compelled to return a number of subsidiary findings to support that verdict.

United States v. Bosch, 505 F.2d 78 (5th Cir. 1974)
United States v. Wilson, 629 F.2d 439 (6th Cir. 1980)
United States v. Southard, 700 F.2d 1 (1st Cir. 1983)

Although special verdicts are looked on with disfavor in criminal cases, there is no per se rule against them.

United States v. Desmond, 670 F.2d 414 (3d Cir. 1982)
United States v. Aguilar, 883 F.2d 662 (9th Cir. 1989)

When a jury that has been instructed on a lesser-included offense returns a general guilty verdict, the verdict is fatally ambiguous. This ambiguity cannot be cured by the use of special interrogatories.

United States v. Barrett, 870 F.2d 953 (3d Cir. 1989)

Special interrogatories are properly used in conspiracy cases to establish facts that must be used in sentencing. The necessary facts may be obtained by submitting interrogatories to the jury after it has returned a guilty verdict.

United States v. Buishas, 791 F.2d 1310 (7th Cir. 1986)
United States v. Jordan, 870 F.2d 1310 (7th Cir. 1989)

If a conspiracy count charges defendants with conspiring to distribute two or more different drugs for which Congress has prescribed different ranges of sentences, the trial court should, by the use of a special interrogatory or otherwise, require the jury to return a verdict that will indi-

cate clearly on its face which of the charged drugs defendants were found to have conspired to distribute.

United States v. Dennis, 786 F.2d 1029 (11th Cir. 1986)

Interrogatories may be used if the information sought is relevant to the sentence.

United States v. Pforzheimer, 826 F.2d 200 (2d Cir. 1987)

If the indictment alleges several distinct acts, any one of which might provide a basis for a guilty verdict, the trial court must specifically instruct the jury that it must agree unanimously on the specific illegal act and the specific legal theories supporting the verdict.

United States v. Beros, 833 F.2d 455 (3d Cir. 1987)

B. Directing Verdict by Court

The Sixth Amendment guarantees a defendant the opportunity to have a jury determine the defendant's guilt or innocence. The court may not direct a verdict of guilty in a jury trial no matter how conclusive the evidence is against the defendant.

Sullivan v. Louisiana, 113 S. Ct. 2078 (1993)
United States v. Martin Linen Supply Co., 430 U.S. 564 (1977)
United States v. Rowan, 518 F.2d 685 (6th Cir. 1975)
United States v. Sheldon, 544 F.2d 213 (5th Cir. 1976)
United States v. Mentz, 840 F.2d 315 (6th Cir. 1988)

The court may not strike testimony and direct the jury to disregard it on the ground that it is unbelievable.

United States v. Thompson, 615 F.2d 329 (5th Cir. 1980)

The court may not instruct the jury that a fact has been established, no matter how clear the evidence.

United States v. Mentz, 840 F.2d 315 (6th Cir. 1988)

A dismissal or directed verdict may be ordered at the conclusion of the prosecutor's opening statement only when the prosecution has made a clear and deliberate concession that necessarily prevents a conviction, and then only after the prosecution has been given the opportunity to fully correct errors or omissions.

United States v. Donsky, 825 F.2d 746 (3d Cir. 1987)

C. Motion for Judgment of Acquittal

1. Criteria to be applied by court in ruling on motion for judgment of acquittal

A motion for acquittal must be granted when the evidence, viewed in the light most favorable to the government, is such that a reasonable juror must have a reasonable doubt as to the existence of any essential element of the crime charged.

United States v. Barrera, 547 F.2d 1250 (5th Cir. 1977)
United States v. Foster, 783 F.2d 1087 (D.C. Cir. 1986)

An accused is entitled to a judgment of acquittal only when there is no evidence on which reasonable minds might fairly base a finding of guilt beyond a reasonable doubt.

United States v. Whetzel, 589 F.2d 707 (D.C. Cir. 1978)

Upon a motion for judgment of acquittal, the trial court is not to weigh evidence or assess credibility of witnesses, but is to submit the case to the jury if evidence and inferences therefrom most favorable to the prosecution would warrant a jury finding that the defendant was guilty beyond a reasonable doubt.

United States v. Malatesta, 590 F.2d 1379 (5th Cir. 1979)

2. Reservation of ruling on motion for judgment of acquittal

Under Fed. R. Crim. P. 29(b), a court may reserve its ruling on a motion for judgment of acquittal made at the close of the government's evidence, or at any other stage of the trial. If a court reserves decision, it must rule on the basis of the evidence at the time the decision was reserved.

D. Mistrial

Although a court has the power to declare a mistrial, that power must be exercised with extreme caution in a criminal prosecution. If a mistrial is improvidently declared, the bar of double jeopardy may prevent the retrial of the defendant.

1. Court has power to declare mistrial

It is within the discretion of the trial court to declare a mistrial even over the defendant's objection if the court determines that facts and circumstances within or without the courtroom preclude the possibility of a fair

trial either for the defendant or for the government.

United States v. Riebold, 557 F.2d 697 (10th Cir. 1977)

A mistrial is not to be declared unless (1) there is "manifest necessity" for termination of the proceedings, or (2) "the ends of public justice" would otherwise be defeated.

Arnold v. McCarthy, 566 F.2d 1377 (9th Cir. 1978)

United States v. Malekzadeh, 855 F.2d 1492 (11th Cir. 1988)

A *Batson* violation cannot create manifest necessity to declare a mistrial.

United States v. Sammaripa, 55 F.3d 433 (9th Cir. 1995)

2. Mistrial to be avoided if possible

The power of the courts to declare a mistrial must be exercised with the greatest caution, under urgent circumstances, and for very plain and obvious causes.

Arizona v. Washington, 434 U.S. 497 (1978)

United States ex rel. Webb v. Court of Common Pleas, 516 F.2d 1034 (3d Cir. 1975)

United States v. Klein, 582 F.2d 186 (2d Cir. 1978)

Declaration of a mistrial is to be avoided if possible.

United States v. Anderson, 509 F.2d 312 (D.C. Cir. 1974)

The trial judge should not foreclose the defendant's right to take his or her case to the original jury until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of public justice would not be served by a continuation of the proceedings.

United States v. Jorn, 400 U.S. 470 (1971)

Before granting a mistrial the court should always consider whether the giving of a curative instruction or some less drastic alternative is appropriate.

United States v. Martin, 740 F.2d 299 (4th Cir. 1984)

United States v. Martin, 756 F.2d 323 (4th Cir. 1985)

United States v. McClellan, 868 F.2d 210 (7th Cir. 1989)

3. Alternative courses of action must be considered

Before declaring a mistrial, a trial judge must consider all the procedural alternatives to a mistrial, and, after finding none of them to be adequate, make a finding of manifest necessity for the declaration of a mistrial.

Arizona v. Washington, 434 U.S. 497 (1978)

Fed. R. Crim. P. 26.3 requires a court to provide an opportunity for all parties to comment on the propriety of an order of mistrial, including

whether each party consents or objects to a mistrial, and to suggest other alternatives.

The judge may declare a mistrial even over the objection of the defendant.

United States v. Riebold, 557 F.2d 697 (10th Cir. 1977)

4. Declaring mistrial because of deadlocked jury

If the jury reports that it is deadlocked, the trial judge must determine whether there is a probability that the jury can reach a verdict within a reasonable time. The judge should question the jury, either individually or through its foreperson, on the possibility that its deadlock could be overcome by further deliberations.

United States v. See, 505 F.2d 845 (9th Cir. 1974)
United States v. Byrski, 854 F.2d 955 (7th Cir. 1988)

Merely questioning the jury foreperson may not be sufficient, but questioning the foreperson individually and the jury either individually or as a group is satisfactory.

Arnold v. McCarthy, 566 F.2d 1377 (9th Cir. 1978)

The Sixth Circuit has suggested that the trial judge should ask not only the foreperson but also the individual jurors whether they feel that there is any prospect of the jury reaching a verdict.

United States v. Larry, 536 F.2d 1149 (6th Cir. 1976)

Before declaring a mistrial, the judge should inquire whether the jury has reached a partial verdict as to any defendant as to any count.

United States v. MacQueen, 596 F.2d 76 (2d Cir. 1979)

Whether the court has properly exercised its discretion to declare a mistrial because of a deadlocked jury depends on the following factors: (1) a timely objection by the defendant; (2) the jurors' collective opinion that they cannot agree; (3) the length of the deliberations; (4) the length of the trial; (5) the complexity of the issues presented to the jury; (6) any prior communications that the judge has had with the jury; (7) the effects of possible exhaustion; and (8) the impact that the coercion of further deliberations might have on the jury.

Arnold v. McCarthy, 566 F.2d 1377 (9th Cir. 1978)
Jones v. Hogg, 732 F.2d 53 (6th Cir. 1984)
United States v. Byrski, 854 F.2d 955 (7th Cir. 1988)

See supra at 32–33.

5. Improvident declaration of mistrial

Improvident declaration of a mistrial may bar retrial or may compel the release on double jeopardy grounds of a defendant convicted at a second trial.

Dunkerley v. Hogan, 579 F.2d 141 (2d Cir. 1978)
United States v. Pierce, 593 F.2d 415 (1st Cir. 1979)
Harris v. Young, 607 F.2d 1081 (4th Cir. 1979)
Grandberry v. Bonner, 653 F.2d 1010 (5th Cir. 1981)
United States v. Bridewell, 664 F.2d 1050 (6th Cir. 1981)

The Double Jeopardy Clause does not ordinarily bar the retrial of defendants who themselves ask the court to declare a mistrial.

Oregon v. Kennedy, 456 U.S. 667 (1982)
United States v. Larouche Campaign, 866 F.2d 512 (1st Cir. 1989)
United States v. Weeks, 870 F.2d 267 (5th Cir. 1989)
United States v. Johnson, 55 F.3d 976 (4th Cir. 1995)

A motion for a mistrial made by the defendant normally serves to remove any barrier to reprosecution, but such is not the case when the prosecutor has, through bad faith or overreaching, "goaded" the defendant into requesting a mistrial.

Oregon v. Kennedy, 456 U.S. 667 (1982)
United States v. Calderon, 618 F.2d 88 (9th Cir. 1980)
United States v. Roberts, 640 F.2d 225 (9th Cir. 1981)
United States v. Byrski, 854 F.2d 955 (7th Cir. 1988)
United States v. Johnson, 55 F.3d 976 (4th Cir. 1995)

If the defendant's motion for a mistrial is denied, and a mistrial is later declared on different grounds, the defendant is not deemed to have consented to the mistrial.

Lovinger v. Circuit Court of 19th Judicial Circuit, 845 F.2d 739 (7th Cir. 1988)
United States v. Byrski, 854 F.2d 955 (7th Cir. 1988)

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