Education and Training Series

Recurring Problems in the Trial of a Criminal Action

Federal Judicial Center

1520 H Street, N.W.
Washington, D.C. 20005
Telephone 202/633-6011

RECURRING PROBLEMS IN THE TRIAL OF A CRIMINAL ACTION

By HONORABLE DONALD S. VOORHEES
United States District Judge
Western District of Washington
Seattle, Washington

Federal Judicial Center
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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 which they touch. Rather, they are a collection of relatively recent decisions upon many of the procedural problems which 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.

Although I have made an effort to make sure that the citations are correct, I know that these materials are not error free. Please let me know of any citation or substantive error of which you become aware.

Needless to say, because of the unofficial character of these materials, they should not be cited.

D.S.V.
August, 1981

INDEX

August 1981

Jury Related Problems

A. Replacement of juror with alternate

Decision to substitute alternate juror is committed to the sound discretion of the trial court.

534 F.2d 1344 (CA 9, 1976)
615 F.2d 1093 (CA 5, 1980)

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

564 F.2d 620 (CA 2, 1977)

Trial court may replace a juror whenever the court is convinced that the juror's ability to perform his duty is impaired. (In this case the juror was napping regularly through the trial.)

550 F.2d 277 (CA 5, 1977)

Juror may be replaced because of juror's illness, or illness of member of juror's family, or because of matrimonial difficulties aggravated by jury service.

571 F.2d 980 (CA 6, 1978)

Or because juror is intoxicated.

534 F.2d 1344 (CA 9, 1976)

Before making a substitution, the better procedure is for the trial court to notify counsel of the court's intention and to solicit comment before actually making the substitution. Although the court has the right for good cause to make a substitution without the consent of counsel, it would be well to seek and secure the concurrence of counsel, if possible, in the proposed substitution.

It is error to replace a juror over defendant's objection absent a showing that the juror is or has become unable to perform his duties.

564 F.2d 1189 (CA 5, 1977)

B. Substitution of alternate after deliberations have begun.

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

It is error to substitute an alternate for a juror who has become disabled after the jury had commenced its deliberations.

529 F.2d 1153 (CA 9, 1975)

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

489 F.2d 274 (CA 10, 1973)
608 F.2d 699 (CA 6, 1979)
635 F.2d 1124 (CA 4, 1980)

It is plain error for an alternate to be with the deliberating jurors even for a short period of time. This is true even though the alternate is admonished not to participate in the deliberations unless a regular juror becomes ill or disqualified.

584 F.2d 1358 (CA 4, 1978)

C. Communications Between Trial Court and Jury

It is reversible error for the trial court ever to communicate with the jury out of the presence of the defendant.

570 F.2d 258 (CA 8, 1978)

The court should immediately communicate with counsel any communication received by the court from any juror.

560 F.2d 507 (CA 2, 1977)
562 F.2d 1345 (CA 2, 1977)

It is reversible error for the court to inquire of the jurors as to their numerical division at any time prior to verdict.

272 U.S. 448 (1926)
594 F.2d 1303 (CA 9, 1979)
600 F.2d 435 (CA 3, 1979)

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

522 F.2d 1310 (CA D.C. 1975)
594 F.2d 1046 (CA 5, 1979)

It is error for the trial court to confer with the foreman of a jury outside of the presence of counsel and the defendant. (In this case the foreman 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.)

U.S.A. vs. United States Gypsum Company, 438 U.S. 422 (1978).

"Any ex parte meeting or communication between the judge and the foreman of a deliberating jury is pregnant with possibilities for error. 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. In addition, 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."

D. Misconduct of Juror

When advised of alleged jury misconduct, trial court should give notice to all parties and then question the involved juror or jurors on the record about the alleged misconduct.

587 F.2d 813 (CA 6, 1978)

The purpose of the hearing is to determine whether or not the alleged misconduct has so prejudiced the defendant that he cannot receive a fair trial.

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

512 F.2d 766 (CA 8, 1975)

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

512 F.2d 766 (CA 8, 1975)
546 F.2d 135 (CA 5, 1977)

E. Outside Contact with Juror

When the trial court becomes aware of the fact that someone has made some kind of improper contact with a juror, the court should not decide and take final action ex parte on the information but should determine the circumstances, the impact thereof upon the juror, and whether or not it was prejudicial, in a hearing with all interested parties permitted to participate.

582 F.2d 1152 (CA 7, 1978)
605 F.2d 507 (CA 10, 1979)

If it comes to the attention of the court that a juror has been improperly contacted, the court should notify counsel and confer with them with respect to the procedure to be followed and the possible replacement of that juror with an alternate.

The court has the discretion to interrogate or not to interrogate all of the other jurors to ascertain whether anyone of the others has been tainted by the improper contacts.

571 F.2d 980 (CA 6, 1978)

It was reversible error to have Deputy Marshal and an FBI agent play a tape for the jury in the jury room after deliberations had begun.

634 F.2d 1267 (CA 10, 1980)

F. Temporary Disability of Deliberating Juror

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

536 F.2d 313 (CA 10, 1976)

G. Questions from Jury

When an inquiry has been received from the jury, the trial judge should reveal its contents to counsel and solicit the views of counsel before taking any action.

558 F.2d 1053 (CA 2, 1977)
562 F.2d 1345 (CA 2, 1977)

The trial court must not respond to a jury question without affording counsel the right to be heard before the response is made.

522 F.2d 1310 (CA D.C., 1975)
593 F.2d 293 (CA 8, 1979)

No response should be made to a jury inquiry out of the presence of the defendant.

565 F.2d 111 (CA 7, 1977)

When a jury makes explicit its difficulties with the court's instructions, the trial court is obligated to clear away those difficulties "with concrete accuracy."

326 U.S. 607 (1946)
592 F.2d 1066 (CA 9, 1979)

In responding to questions from the jury, the court should not answer the questions informally in the form of a colloquy between the court and the foreman but rather should respond in a formal way so that the defendant has an adequate opportunity to evaluate the propriety of the proposed response or supplemental instruction and to formulate objections or suggest a different response.

591 F.2d 526 (CA 9, 1977)

H. Rereading Testimony

If requested to do so by a deliberating jury, it is within the court's discretion to have the court reporter read portions of the testimony of a witness to a deliberating jury.

502 F.2d 566 (CA 5, 1974)
552 F.2d 833 (CA 9, 1976)

Tapes of recorded conversations may be replayed at the request of a deliberating jury.

528 F.2d 143 (CA 9, 1973)

I. Separation of Jury

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

574 F.2d 931 (CA 7, 1978)
602 F.2d 799 (CA 7, 1979)

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

559 F.2d 31 (CA D.C., 1976)

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

503 F.2d 208 (CA 7, 1974)

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 a jury separates at night when they will converse with friends and relatives. It is fundamental that the jury 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.

635 F.2d 744 (CA 8, 1980)

J. Deadlocked Jury

If the court is advised that the jury has become deadlocked, the court should not declare a mistrial until the court has assured itself that the jury is indeed deadlocked. The court must determine whether there is a probability that the jury can reach a verdict within a reasonable time or whether they are hopelessly deadlocked. The questioning should be in open court.

505 F.2d 845 (CA 9, 1974)

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

566 F.2d 1377 (CA 9, 1978)

K. Form of Verdict

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

521 F.2d 76 (CA 8, 1975)

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

554 F.2d 231 (CA 5, 1977)
557 F.2d 1 (CA 1, 1977)

Even after a verdict is announced in court, a juror remains free to register his or her dissent to the verdict prior to the time that it is accepted by the court.

507 F.2d 166 (CA 5, 1975)

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.

571 F.2d 876 (CA 5, 1978)
597 F.2d 81 (CA 6, 1979)
612 F.2d 483 (CA 10, 1979)

Pro Se Representation

A defendant in a criminal prosecution has the right to counsel of his choice. If he cannot afford to employ a counsel, one must be appointed for him. He has the right, however, to waive his right to counsel and to represent himself if he chooses to do so.

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

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

1. The court must determine that the defendant is mentally competent to make the decision to appear pro se. The standard of competence for waiving counsel and appearing pro se is higher than the standard of competence to stand trial.

473 F.2d 1113 (CADC, 1972)
526 F.2d 131 (CA 2, 1975)

2. The court must interrogate the defendant to be sure that he understands the disadvantages of self-representation, the nature of the charge and the range of penalties, that he will be on his own in a complex area where experience and professional training are greatly to be desired, that a lawyer 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.

332 U.S. 708 (1948)
422 U.S. 806 (1975)
545 F.2d 273 (CA 1, 1976)

3. A determination that an accused lacks expertise or professional capabilities does not justify denying him the right of self-representation.

414 F.2d 1040 (CA 9, 1969)
486 F.2d 182 (CA 9, 1973)
539 F.2d 45 (CA 10, 1976)

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

534 F.2d 1007 (CA 2, 1976)

C. Appointing standby counsel.

Standby counsel should be appointed to assist the defendant and to replace him if the court should determine during trial that the defendant can no longer be permitted to represent himself.

486 F.2d 182 (CA 9, 1973)

D. A pro se defendant does not have the right to have a non-lawyer act as his assisting counsel.

539 F.2d 1199 (CA 9, 1976)

E. Hybrid representation.

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

508 F.2d 82 (CA 5, 1975)
526 F.2d 1019 (CA 10, 1975)
556 F.2d 630 (CA 2, 1977)

F. Role of court is unchanged when accused appears pro se. Representation of a defendant by himself does not alter the court's role nor impose new obligations on the trial judge.

512 F.2d 10 (CA 9, 1975)

One 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.

548 F.2d 305 (CA 10, 1977)

G. 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.

473 F.2d 1113 (CADC 1972)
486 F.2d 182 (CA 9, 1973)
577 F.2d 258 (CA 5, 1978)

Jencks Act Materials

Title 18 U.S.C. § 3500 is the so-called Jencks Act.

A. The Jencks Act provides that no statement of a government witness is discoverable by a defendant until after that witness has testified on direct examination at trial.

1. The Court cannot compel the government to produce Jencks Act materials 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.

2. The government cannot be compelled to produce statement of government witness at pretrial hearing. They must be produced only after the witness has testified at trial.

515 F.2d 818 (CA 9, 1975)
569 F.2d 771 (CA 3, 1978)
607 F.2d 1257 (CA 9, 1979)

3. Only statements in the possession of the prosecutorial arm of the federal government must be produced. Hence, a statement of a witness in his own prior presentence report is not producible.

556 F.2d 1265 (CA 5, 1977)

B. After a government witness has testified on direct, the government must produce on request any statement in its possession of that witness which relates to the subject matter of his testimony.

1. The prosecution must produce only those statements which relate generally to the events and activities testified to by the witness.

571 F.2d 376 (CA 7, 1978)

2. The defendant is not entitled to a statement which 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.

384 F.2d 554 (CA 3, 1967)

C. At the request of the government the court shall review the statement in camera and excise any portions which do not relate to the direct testimony of the witness.

1. The trial court may review materials in camera to determine whether they are in fact Jencks Act material.

565 F.2d 212 (CA 2, 1977)

2. In determining whether a Jencks Act statement exists, the trial court may interrogate the witness or government representatives who might have knowledge of the existence of such a statement.

519 F.2d 233 (CA 5, 1975)

3. If the government deletes any portion of a statement produced by it, 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. "The duty may be onerous and unpleasant, but so, indeed, are many of the duties that judges assume."

589 F.2d 1258 (CA 5, 1979)

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

E. 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, which 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.

Jencks Act Materials

1. Notes taken by government agent in interviewing 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.

   504 F.2d 1355 (CA 8, 1974)
   521 F.2d 1318 (CA 9, 1975)

2. 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.

   556 F.2d 366 (CA 5, 1977)
   597 F.2d 903 (CA 5, 1979)
   617 F.2d 831 (CADC, 1980)
   648 F.2d 367 (CA 5, 1981)

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

   581 F.2d 553 (CA 5, 1978)

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

   586 F.2d 1041 (CA 5, 1978)

   Only those parts of the report are producible which are relevant to the agent's testimony at trial.

   523 F.2d 1122 (CADC, 1975)

5. Attorney's notes.

   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.

   582 F.2d 483 (CA 9, 1978)

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

581 F.2d 193 (CA 9, 1978)

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

575 F.2d 117 (CA 7, 1978)

If there is a question as to whether a report, statement or notes are 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 whether the witness himself read the statement. General inquiries by the interviewer as to whether he has correctly understood what the witness has said and the witness's affirmative responses do not constitute adoption or approval of the notes.

425 U.S. 94 (1976)
567 F.2d 1289 (CA 5, 1978)
590 F.2d 10 (CA 1, 1978)

Bruton Problems

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 a codefendant's confession, implicating another defendant, was placed before the jury at their joint trial even though a cautionary instruction was given that the confession was to be considered only as against the confessing defendant where the confessing defendant did not take the witness stand and was not therefore subject to cross-examination by the defendant who was implicated by the statement.

A. Confession of one codefendant is admissible if that confession does not refer to the other defendant and the jury is instructed that the confession is received only as to the confessing defendant.

507 F.2d 708 (CA 5, 1975)
515 F.2d 130 (CA 2, 1975)

B. The Bruton rule is not applicable if the confessing codefendant testifies at the trial since he is then subject to cross-examination by the other defendants.

402 U.S. 622 (1971)
562 F.2d 1001 (CA 5, 1977)
570 F.2d 643 (CA 6, 1978)
584 F.2d 876 (CA 9, 1978)

C. Bruton does not apply to an out-of-court statement which is admissible as the statement of a co-conspirator under FRE 801.

554 F.2d 665 (CA 5, 1977)
571 F.2d 1069 (CA 9, 1977)
578 F.2d 1058 (CA 5, 1978)
593 F.2d 88 (CA 8, 1979)

D. Bruton does not apply to a hearsay statement which is admitted as an excited utterance under FRE 803(2).

522 F.2d 448 (CA 1, 1975)

E. Likewise, Bruton does not apply to an out-of-court statement against penal interest under FRE 804(3).

526 F.2d 615 (CA 8, 1975)

F. Avoidance of Bruton problem

1. When Court learns before trial that the government proposes to introduce an out-of-court statement of one defendant, the court should make inquiry as to the statement intended to be used and then decide what, if any, remedial steps are required. The court may:

    a. Exclude the statement at a joint trial.
    b. Delete references to codefendant against whom statement is inadmissible.
    c. Order severance.
    d. Try defendants together but before different juries.

2. It is permissible to edit the statement or confession of a codefendant in order to delete any reference to the name of the non-confessing defendant.

    575 F.2d 139 (CA 7, 1978)
    594 F.2d 905 (CA 2, 1979)
    608 F.2d 741 (CA 9, 1979)

3. The Bruton problem is not avoided by the deletion of the defendant's name if the jury might well draw the inference that the omitted name referred to the defendant. In editing the statement of the co-defendant, the court must eliminate, if possible, all words that point toward the defendant.

    575 F.2d 1178 (CA 6, 1978)
    590 F.2d 24 (CA 1, 1978)

4. Edited interlocking confessions of two or more non-testifying codefendants are admissible with limiting instruction that each confession is to be considered by the jury only as against the confessing defendant.

    442 U.S. 62 (1979)

5. Bruton problem may be avoided by trying cause before two juries with only one jury hearing the out-of-court statement covering the Bruton problem.

Co-Conspirator Statements

Federal Rules of Evidence, Rule 801(d). A statement is not hearsay if --

(1) . . .

(2) The statement is offered against a party and is ...

(E) a statement by a co-conspirator 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 which 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.)

A. The Court's concern must be with those statements which are offered to prove the truth of the matter asserted.

The rules relating to co-conspirator statements relate to utterances which would otherwise be banned by the hearsay rule.

417 F.2d 1116 (CA 2, 1969)

A statement does not fall within the ambit of the co-conspirator rule unless it would otherwise be excludable by reason of being a hearsay declaration. A declaration which has relevance for a reason other than the truth of the matter asserted may be admissible, if relevant, as a non-hearsay "verbal act."

417 U.S. 211 (1974)
424 F.2d 657 (CA 2, 1970)
561 F.2d 406 (CA 1, 1977)

Tape recordings which were introduced to show the scope of certain gambling operations were not offered to prove the truth of the contents of any of the conversations. The conversations were hence not hearsay and were admissible as verbal acts.

566 F.2d 929 (CA 5, 1978)

B. To be admissible there must be a showing by evidence independent of the statement itself:

1. That there was a conspiracy in existence.

2. That the declarant was a member of that conspiracy.

3. That the defendant against whom the statement is offered was a member of that conspiracy.

4. That the statement was made in furtherance of that conspiracy.

5. That the statement was made during the course of that conspiracy.

1. The showing must be by evidence independent of the statement itself.

In determining whether an alleged co-conspirator's statement is admissible, the court cannot take into consideration the statement itself.

417 F.2d 1116 (CA 2, 1969)
573 F.2d 1046 (CA 8, 1978)
576 F.2d 1121 (CA 5, 1978)
584 F.2d 870 (CA 9, 1978)

The First Circuit has suggested that the trial court may consider the independent evidence in the light of the color shed upon it by trustworthy and reliable portions of the hearsay statement itself, but this is a minority position.

561 F.2d 406 (CA 1, 1977)

The Sixth Circuit has held that the trial court may consider the hearsay statements themselves in deciding the preliminary question of admissibility.

606 F.2d 149 (CA 6, 1979)

2. There must have been a conspiracy in existence.

   Before admitting the statement of a co-conspirator, the trial judge must find that a conspiracy existed.

   544 F.2d 353 (CA 9, 1976)
   573 F.2d 1046 (CA 8, 1978)
   582 F.2d 1128 (CA 7, 1978)

   It is not necessary, however, that a conspiracy be charged in the indictment.

   538 F.2d 466 (CA 2, 1976)
   540 F.2d 465 (CA 10, 1976)
   578 F.2d 757 (CA 9, 1978)

3. The statement must have been made by a member of that conspiracy.

   To be admissible the statement must have been made by one who was a member of the conspiracy at the time of the declaration, but the declarant need not be named in the indictment as a codefendant.

   519 F.2d 645 (CA 8, 1975)
   542 F.2d 186 (CA 4, 1976)
   609 F.2d 603 (CA 2, 1979)

4. The defendant against whom the statement is offered must have been a member of that conspiracy.

   A declaration of an alleged conspirator is not admissible against an accused without proof of the latter's membership in the conspiracy.

   373 F.2d 168 (CA 2, 1967)
   537 F.2d 120 (CA 5, 1976)

5. The statement must have been made in furtherance of that conspiracy.

   By the terms of FRE 801(d)(2)(E) a co-conspirator'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 that requirement. Some courts are more ready than others to find reasons as to why a particular statement was in furtherance of the conspiracy.

The following are representative cases in which the "in furtherance" requirement was an issue on appeal:

In a prosecution for conspiracy to distribute controlled substances, it was held to be error to admit an out-of-court statement by a defendant that he was going to Tucson to obtain narcotics from a named person, a statement by that defendant about the identity of a person to whom he had been speaking over the telephone, and a statement by him that another defendant had arranged a trip to pick up narcotics. The court stated that those statements did nothing to advance the aims of the alleged conspiracy.

591 F.2d 513 (CA 9, 1979)

In a prosecution for conspiracy to steal and sell hand tools from a Naval facility, it was held to be error to permit a tool dealer to testify that a defendant had said to him: "If he had to go legitimate, we would have to quit." The Court stated: "We can suggest no reasonable interpretation of (the) statement, or the facts surrounding its making, that reasonably could lead us to believe that the statement was somehow 'in furtherance of' the conspiracy. There is nothing to support a conclusion that (the declarant), by making the statement, was seeking to induce (the tool dealer) to deal with the conspirators or in any other way to cooperate or assist in achieving the conspirators' common objectives. Rather, the statement was at best, nothing more than (the declarant's) casual admission of culpability to someone he had decided to trust."

522 F.2d 1068 (CA 9, 1975)

In a prosecution for conspiracy to possess stolen checks, it was held to be error to permit a witness to testify that she had asked one of the defendants how they got certain checks and that the defendant had replied that a named co-defendant took them from the mailbox while the defendant acted as a lookout. The court stated that the statements appeared to be "casual comments which were neither intended to further nor had the effect of furthering the conspiracy in any way."

600 F.2d 154 (CA 8, 1979)

An undercover agent was permitted to testify that, when he arrived to take delivery of a quantity of heroin, a co-conspirator stated to him that the source of supply was in the house packaging and preparing the heroin. The court held that the trial court could properly have concluded that the statement furthered the conspiracy because the declarant made the statement to prevent the prospective purchaser from leaving before the sale was concluded.

405 F.2d 74 (CA 9, 1968)

It was held not error to permit a witness, who had at various times sold narcotics for his brother, to testify that shortly after the release of the witness from jail his brother had told the witness that he and another defendant were selling drugs. In holding the statements to be in furtherance of the conspiracy, the Court stated: "It is reasonable to conclude that the statement was made in an effort... again to enlist (the witness) as a seller of narcotics for the conspiracy."

549 F.2d 517 (CA 8, 1977): This opinion includes a comment upon the divergence among the circuits in the application of the "in furtherance" requirement.

In the Watergate prosecution it was held not to be error to admit statements recorded on the Presidential tapes in which various defendants narrated their views as to what had happened in the past. The court held that they were in furtherance of the conspiracy to obstruct justice because the success of that conspiracy "required the coordination and control of a large number of individuals having knowledge of the events being covered up" and required the conspirators "to make regular strategic decisions on how best to proceed to prevent the full story... from becoming known..." The court pointed out that as the "cover-up began to unravel, it became increasingly important to review what had taken place in order to identify and shore up the loose ends."

559 F.2d 31 (CADC, 1976)

It was held not error to permit the wife of a co-conspirator to testify that her husband had told her what was going on and who had been assigned roles in a scheme for distributing drugs. The evidence was held to be in furtherance of the conspiracy because the information was passed along to the wife for the purpose of enlisting her in the criminal enterprise.

561 F.2d 1252 (CA 7, 1977)

Witness was permitted to testify that a co-conspirator identified a fellow co-conspirator as his source of narcotics. This was held to be admissible. Citing 488 F.2d 484 (CA 8, 1973) and 547 F.2d 1346 (CA 8, 1976) in which there was in reality no analysis of the "in furtherance" requirement, the court stated: "This court has repeatedly held that statements of a co-conspirator identifying a fellow co-conspirator as his source of narcotics are statements made in furtherance of the conspiracy."

564 F.2d 26 (CA 8, 1977)

After a bank robbery the three robbers went uninvited to the apartment of a fourth person. Two of the robbers left the apartment after the money had been divided. The apartment lessee was permitted to testify that the third robber then told him how the bank had been robbed, left with him a bag, which had been used in the robbery, for him to dispose of, and left him some money in "thanks" for the use of his apartment. The Court held that the statements were in furtherance of the conspiracy in that they were directed at protecting the conspirators by placating the witness and inducing him to dispose of the bag used in the robbery.

596 F.2d 1082 (CA 1, 1979)

Undercover officers were permitted to testify that when they met with one defendant to discuss a proposed heroin deal, he named his connection, a co-defendant, and stated that the latter "was very, very careful because he had just completed a $50,000 heroin deal in Miami, Florida." The court held this statement to be in furtherance of the conspiracy because the declarant intended by this statement to convince his prospective purchasers "that he had a good connection and meant business even though the officers were not permitted to meet that connection."

603 F.2d 1029 (CA 2, 1979)

The "in furtherance" requirement must not be applied too strictly lest it defeat the purpose of the co-conspirator exception.

608 F.2d 1028 (CA 5, 1979)

6. The statement must have been made during the course of that conspiracy.

To be admissible a co-conspirator's statement must be made during the life of the conspiracy.

314 F.2d 718 (CA 9, 1963)

Statement by an alleged co-conspirator after his arrest is inadmissible.

565 F.2d 573 (CA 9, 1977)
586 F.2d 1147 (CA 7, 1978)

The arrest of one conspirator does not necessarily terminate the conspiracy. The test is not the arrest of one or more of the conspirators but whether the remainder of the conspirators were able to continue with the conspiracy. The statements of conspirators still at large are admissible.

533 F.2d 1006 (CA 6, 1976)

C. The court alone determines the admissibility of a co-conspirator's statement. The jury plays no role in that determination.

At one time co-conspirators' statements were admitted by the court with instructions to the jury that they were to consider those statements only if they independently found that the statements met all of the evidentiary requirements for the admissibility of co-conspirator's statements. It is now clear that the trial court alone makes the determination as to admissibility, and the jury plays no role in determining the admissibility of such a statement.

557 F.2d 1 (CA 1, 1977)
582 F.2d 1128 (CA 7, 1978)

The trial court does not advise the jury of the court's findings with respect to the admissibility of the statements.

606 F.2d 149 (CA 6, 1979)

If the court admits a co-conspirator's statement, the jury then considers that statement as it does any other evidence.

542 F.2d 623 (CA 3, 1976)
576 F.2d 1121 (CA 5, 1978)

It is no longer proper to instruct the jury that they should consider the statements only if they first find that the government has established all the requisites for admissibility of co-conspirator statements.

606 F.2d 156 (CA 6, 1979)
611 F.2d 1335 (CA 10, 1979)

D. The court applies the preponderance of evidence test in determining whether an alleged co-conspirator's statement is admissible.

In determining whether an alleged co-conspirator's statement is admissible the court must determine that each element of admissibility has been established by a preponderance of the evidence.

542 F.2d 186 (CA 4, 1976)
548 F.2d 20 (CA 1, 1977)
590 F.2d 717 (CA 8, 1979)
611 F.2d 399 (CA 1, 1979)

The Ninth Circuit requires only that there be a prima facie showing that the statement meets each of the requisites for admissibility.

524 F.2d 609 (CA 9, 1975)
562 F.2d 1138 (CA 9, 1977)
645 F.2d 1323 (CA 9, 1981)

E. The Court controls the order of proof.

The order of the admission of proof is within the discretion of the court. The court may hence admit declarations by alleged co-conspirators prior to the time that all of the requirements for admissibility have been established by independent evidence.

519 F.2d 516 (CA 9, 1975)

The court has the discretion to require the government to establish the elements of admissibility prior to receiving co-conspirator's statements, or the court may conditionally admit

the out-of-court statements on the condition that the prosecution subsequently produce independent evidence of the conspiracy.

519 F.2d 516 (CA 9, 1975)
565 F.2d 533 (CA 8, 1977)
606 F.2d 149 (CA 6, 1979)

It is preferable, whenever possible, that government's independent proof of conspiracy be introduced first, thereby avoiding danger of injecting inadmissible hearsay into the record in anticipation of proof which never materializes.

573 F.2d 1046 (CA 8, 1978)
590 F.2d 575 (CA 5, 1979)

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 co-conspirator's statement about which evidence has been received. If the court concludes that the prosecution has not borne its burden, the statement cannot 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.

550 F.2d 1294 (CA 2, 1977)
590 F.2d 575 (CA 5, 1979)
628 F.2d 632 (CA 1, 1980)
635 F.2d 664 (CA 8, 1980)

Better practice is for district court to place in the record an explicit ruling that the government has established all of the requisites for the admissibility of a co-conspirator's statement

"accompanied by such exposition as seems appropriate under the circumstances."

603 F.2d 444 (CA 3, 1979)

If at conclusion of trial court determines that alleged co-conspirator statements should not have been admitted, court must decide whether a cautionary instruction will cleanse the record of prejudice or whether a mistrial must be declared.

616 F.2d 1295 (CA 5, 1980)

G. In-court testimony of co-conspirator is receivable.

Although out-of-court statements made by co-conspirator must meet all the tests of admissibility, a co-conspirator may testify in court as to all aspects of the conspiracy.

538 F.2d 461 (CA 1, 1976)

H. Effect of dismissal of conspiracy charge as against declarant.

If, at the close of the government's case, the court dismisses the conspiracy charge as against a defendant, whose out-of-court hearsay statements were admitted, his statements must be withdrawn from the consideration of the jury or a mistrial declared.

550 F.2d 431 (CA 9, 1976)
578 F.2d 277 (CA 10, 1978)

But see: 550 F.2d 1294 (CA 2, 1977)
613 F.2d 391 (CA 2, 1979)

Civil Contempt/Criminal Contempt

Civil contempt is remedial in scope to enforce compliance with a court order whereas 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.

543 F.2d 894 (CADC, 1976)
555 F.2d 146 (CA 7, 1977)
621 F.2d 1255 (CA 3, 1980)

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

544 F.2d 1175 (CA 3, 1976)

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 is hence for a fixed period of time.

571 F.2d 111 (CA 2, 1978)

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 caries 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 determines that holding the contemnor in civil contempt would be inappropriate or fruitless.

600 F.2d 1027 (CA 2, 1979)

It is essential that 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.

548 F.2d 123 (CA 4, 1977)
629 F.2d 619 (CA 9, 1980)

Civil Contempt

In order to compel compliance with an order, a court may impose a fine and/or order imprisonment for an indefinite period of time.

540 F.2d 1213 (CA 4, 1976)
609 F.2d 165 (CA 5, 1980)

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. If he is an indigent, due process requires that counsel be provided for him if he is facing the prospect of imprisonment.

468 F.2d 1368 (CA 9, 1972)
518 F.2d 955 (CA 2, 1975)
553 F.2d 1154 (CA 8, 1977)
572 F.2d 1286 (CA 8, 1977)

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

543 F.2d 894 (CADC, 1976)
567 F.2d 955 (CA 10, 1977)
600 F.2d 420 (CA 3, 1979)

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

563 F.2d 8 (CA 2, 1977)
602 F.2d 110 (CA 6, 1979)

If a defendant is ordered to give handwriting exemplars and he refuses to do so, he may be committed for civil contempt, and the court may postpone the trial date.

584 F.2d 960 (CA 10, 1978)

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

569 F.2d 775 (CA 3, 1978)

A judgment of civil contempt becomes moot after being purged.

610 F.2d 1141 (CA 3, 1979)

Civil Contempt

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

639 F.2d 29 (CA 1, 1980)
642 F.2d 28 (CA 2, 1981)

Criminal Contempt

"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."

267 U.S. 517 (1925)

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

382 U.S. 162 (1965)

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

18 U.S.C. § 401 provides that a Court of the United States 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.

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

Rule 42. Criminal Contempt.

(a) Summary Disposition. A criminal contempt may be punished summarily if the judge certifies that he 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 United States 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. He 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.

C. Rights of defendant in criminal contempt.

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

622 F.2d 830 (CA 5, 1980)

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 conduct is wrongful.

553 F.2d 874 (CA 4, 1977)
641 F.2d 684 (CA 9, 1981)

Rule 42 describes the procedure which must be followed in prosecuting a criminal contempt charge. The defendant must be given a reasonable time to prepare his defense. Sufficient time must be accorded him to engage an attorney of his choice, to weigh the merits of the charge, to evaluate possible defenses, and to marshal the evidence deemed necessary to proceed.

570 F.2d 244 (CA 8, 1978)

Person charged with criminal contempt has right to counsel whether the contempt be petty or serious.

548 F.2d 123 (CA 4, 1977)

The defendant has the right to testify and call other witnesses in his behalf, either by way of defense or explanation.

571 F.2d 958 (CA 5, 1978)

The defendant has the right to a jury trial unless the period of imprisonment cannot exceed six months or the fine exceed $500. The defendant is not entitled to a jury trial if, prior to trial, the court on its own motion or upon the government's motion limits the maximum sentence to less than six months or the fine to $500 or less.

384 U.S. 373 (1966)
502 F.2d 813 (CA 7, 1974)
571 F.2d 1105 (CA 9, 1978)
629 F.2d 619 (CA 9, 1980)

When the criminal contempt carries possible penalty of imprisonment, the person charged has the right to counsel.

548 F.2d 123 (CA 4, 1977)

A court may impose a fine for criminal contempt or a period of imprisonment but may not both fine and imprison a defendant.

546 F.2d 187 (CA 5, 1977)
548 F.2d 252 (CA 8, 1977)

The severity of sentence is left to the sound discretion of the trial court.

279 F.2d 401 (CA 9, 1960)

Summary Contempt

18 U.S.C. § 401 provides that a court of the United States shall have power to punish by fine or imprisonment 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:

> "A criminal contempt may be punished summarily if the judge certifies that he 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."

A. Nature of punishable conduct.

Summary contempt is available only when the conduct constituting the contempt occurs within the sight or hearing of the judge.

Fed. Rules Crim. Proc. 42(a)

In order 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.

461 F.2d 345 (CA 7, 1972)

There must be misconduct which actually obstructs the court in the performance of its judicial duty.

292 F.2d 806 (CA 7, 1961)

Trial judges must be on guard against confusing offenses to their sensibilities with obstruction to the administration of justice. The contemnor must have the intent to obstruct, disrupt or interfere with the administration of justice.

563 F.2d 889 (CA 8, 1977)

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.

371 F.2d 810 (CA 2, 1967)
619 F.2d 1354 (CA 9, 1980)

The 42(a) procedure should be reserved for that type of contemptuous act which threatens the judge or disrupts or obstructs court proceedings and where immediate punishment is essential to prevent demoralization of the court's authority before the public. The failure by a spectator to stand at the closing ceremony is not such behavior and, even though it was behavior in the presence of the court, the procedure is governed by Rule 42(b) rather than 42(a).

509 F.2d 752 (CA 9, 1975)

Although affirming jail sentences imposed upon spectators for refusing to rise at the opening of court, a Court of Appeal has suggested that such "symbolic acts, when not coupled with further disturbance or disruption, sometimes might not rise to the level of an actual and material obstruction of the judicial process." But otherwise if accompanied by some disturbance, disorder or interruption.

412 F.2d 848 (CA 7, 1969)
461 F.2d 389 (CA 7, 1972)

To preserve order in the courtroom for the proper conduct of business, the court must act instantly to suppress disturbance or violence or physical obstruction or disrespect to the court when occurring in open court.

267 U.S. 517 (1925)

B. 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."

434 F.2d 861 (CA 2, 1970)
461 F.2d 345 (CA 7, 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 more mandatory where the contempt charged has in it the element of personal criticism or attack upon the judge. The judge must banish the slightest personal impulse to reprisal, but he should not bend backward and injure the authority of the court by too great leniency.

267 U.S. 517 (1925)

C. Finding attorney in summary contempt.

Although citations of attorneys for summary contempt have been affirmed on appeal, the Courts of Appeal have stated that where the line between vigorous advocacy and actual obstruction defies strict delineation, doubts should be resolved in favor of vigorous advocacy.

461 F.2d 389 (CA 7, 1972)
552 F.2d 498 (CA 3, 1977)

Before an attorney can be found guilty of contempt there must be a showing that he knew or reasonably should have known that he was exceeding the outermost limits of his proper role and hindering rather than facilitating the search for truth. There must be some sort of actual damaging effect upon judicial order before an attorney may be held in criminal contempt.

575 F.2d 732 (CA 9, 1978)

D. Summary contempt procedure.

1. Warning should be given.

The preferable procedure is for the court to warn an individual that if he persists in his conduct he will be cited for contempt prior to the time he is actually cited. A warning may be effective to prevent further disorder.

351 F.2d 91 (CA 6, 1965)
461 F.2d 345 (CA 7, 1972)

2. Judge must prepare, sign and file order of contempt.

Rule 42(a) requires the court to enter an order of contempt. In that order the court must certify that he saw or heard the conduct constituting the contempt and that it took place in his presence.

The purpose of the certification in the order of contempt is to permit informed appellate review. The recitation of facts is of critical importance. A criminal contempt order must stand or fall on the sufficiency of the specifications of wrong-doing upon which it is based. If the judgment is

to be sustained, the conduct complained of in the order must in itself constitute contempt. Conclusory language and general citations to the record are insufficient.

435 F.2d 861 (CA 2, 1970)
451 F.2d 372 (CA 9, 1971)

It is probably advisable to incorporate the entire record by reference 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 which lead to the contempt citation.

The form of the order of contempt may be as follows:

"In conformity with Rule 42(a) 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, the said jail sentence to commence (at once/at the conclusion of the trial).

The order of contempt should be dated and signed by the judge.

It need not be sworn.

461 F.2d 345 (CA 7, 1972)

The court may act immediately to commit the contemnor and thereafter file its order of contempt. The order should, however, be prepared and filed as soon as possible.

176 F.2d 163 (CA 2, 1949)
182 F.2d 880 (CA 9, 1950)
194 F.2d 948 (CA 6, 1952)

The court may cite an individual for contempt and file a certificate but defer sentencing until the conclusion of the trial. (If the court does not feel that an immediate sanction is necessary, it is probably wiser for the court to proceed under Rule 42(b) rather than under the summary procedure of Rule 42(a).)

191 F.2d 157 (CA 9, 1951)
552 F.2d 498 (CA 3, 1977)
592 F.2d 1215 (CA 1, 1979)
619 F.2d 1354 (CA 9, 1980)
629 F.2d 619 (CA 9, 1980)

3. Imposition of punishment.

Contempts in the presence of the court are punishable by the court summarily. The contemnor does not have the right to counsel, to notice or to an opportunity to present a defense provided the punishment does not exceed six months.

8A Moore Fed. Practice 42.02(3).

The contemnor should, however, be given an opportunity to speak in his own behalf in the nature of a right of allocution.

418 U.S. 488 (1974)

In imposing punishment, the judge may properly take into consideration the extent of the willful and deliberate 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.

563 F.2d 889 (CA 8, 1977)

Recalcitrant Witness

28 U.S.C. § 1826(a) provides that whenever a witness refuses without just cause to comply with an order of the court to testify, the court may summarily order his confinement until such time as the witness is willing to give his testimony.

Confinement shall not exceed the life of:

(1) The court proceeding.

(2) The term of the grand jury.

But in no event longer than 18 months.

A. Court must order witness to respond.

The court must give the witness an explicit unambiguous order to answer the question propounded.

380 F.2d 993 (CA 2, 1967)
421 U.S. 309 (1975)

B. Witness must be warned.

The trial court must explicitly warn the witness of the consequences of continued refusal to answer a proper question.

380 F.2d 993 (CA 2, 1967)
546 F.2d 1242 (CA 5, 1977)

C. 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.

355 U.S. 66 (1957)
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 imprisonment pursuant to the procedure of Rule 42(a) of the Fed. Rules of Crim. Proc.

421 U.S. 309 (1975)
456 F.2d 382 (CA 1, 1972)
605 F.2d 736 (CA 4, 1979)

The witness must be accorded the opportunity to present his reasons for refusing to testify.

629 F.2d 619 (CA 9, 1980)

D. When witness is cited in civil contempt, he should be advised that he may purge himself of his contempt.

When the court commits a witness in civil contempt, he should advise the witness that he can purge himself of his contempt by answering the question propounded him.

571 F.2d 111 (CA 2, 1978)

After a witness has been committed, he may be brought back into the courtroom and given a chance to purge himself of civil contempt and avoid prosecution for criminal contempt.

542 F.2d 381 (CA 7, 1976)

E. When witness is cited in civil contempt, he should be advised that he is also subject to punishment for criminal contempt.

If a witness is committed in civil contempt, he should be advised that if he does not purge himself of that contempt, he may be prosecuted for criminal contempt and thereafter punished by a fine or commitment for that criminal contempt.

227 F.2d 848 (CA 9, 1955)

There must be a forthright positive notification to the witness that he 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 him of a possible penal sentence.

227 F.2d 848 (CA 9, 1955)
254 F.2d 687 (CA 9, 1958)

Refusal of a witness to answer a proper question, after being directed to do so by the court, subjects him to criminal contempt even though the witness is the defendant himself.

525 F.2d 703 (CA 2, 1975)
546 F.2d 1242 (CA 5, 1977)

F. Procedure if witness fails to purge himself of his contempt.

At the conclusion of the trial, the witness should be released from custody but thereafter a proceeding under Rule 42(b) may be commenced to cite the witness for criminal contempt.

254 F.2d 687 (CA 9, 1958)

If the court acts to cite the witness for criminal contempt during the progress of the trial, the court may proceed under Rule 42(a). If the court proceeds after the termination of the trial it should proceed under 42(b) as the defendant's refusal to answer the question no longer obstructs the progress of the trial.

421 U.S. 309 (1975)
546 F.2d 1242 (CA 5, 1977)

G. Procedure upon refusal by witness to respond to question before grand jury.

A witness who refuses to answer a question before a grand jury cannot 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), which gives the witness notice and a reasonable time within which to prepare his defense.

382 U.S. 162 (1965)
482 F.2d 1016 (CA 9, 1973)
509 F.2d 1252 (CA 2, 1975)
608 F.2d 640 (CA 5, 1979)
643 F.2d 226 (CA 5, 1981)

H. Civil contempt followed by criminal contempt is not double jeopardy.

Civil contempt followed by criminal contempt for the same refusal to answer a proper question does not subject the witness to double jeopardy.

330 U.S. 258 (1947)
355 U.S. 66 (1957)
384 U.S. 364 (1966)
566 F.2d 402 (CA 2, 1977)
571 F.2d 111 (CA 2, 1978)

I. Punishment for civil contempt.

A witness who refuses to answer a proper question at trial cannot be confined in civil contempt beyond the duration of the trial itself.

227 F.2d 844 (CA 9, 1955)

J. Punishment for criminal contempt.

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 sound discretion of the district court.

542 F.2d 381 (CA 7, 1976): A witness was found in criminal contempt and sentenced to four years imprisonment.

565 F.2d 24 (CA 2, 1977): A witness was found in criminal contempt and sentenced to five years imprisonment.

K. The witness has the right to a jury trial unless, prior to the contempt hearing, the court limits the maximum sentence to less than six months or the fine to $500 or less.

502 F.2d 813 (CA 7, 1974)
571 F.2d 1105 (CA 9, 1978)

L. If indigent, the witness is entitled to appointed counsel.

484 F.2d 1215 (CA 4, 1973)

M. If a witness is serving a sentence, he is not entitled to credit for time served upon contempt citation.

If a witness is already serving a sentence, the court may order that sentence to be interrupted by imprisonment for civil contempt.

572 F.2d 1373 (CA 9, 1978)

Recalcitrant Witness

A 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.

504 F.2d 1165 (CA 7, 1974)

Disruptive Defendant

A disruptive defendant cannot be permitted by his behavior to obstruct the orderly progress of a trial.

397 U.S. 337 (1970)

A. Options available to court.

After disruptive defendant has been warned, trial court has these options:

1. Cite him for contempt.
2. Remove him from courtroom until he promises to conduct himself properly.
3. Have him bound and gagged.

397 U.S. 337 (1970)

B. Defendant should be warned.

Before taking action against disruptive defendant, the court should warn him of the consequences of his continued disruptive behavior.

397 U.S. 337 (1970)

C. Ejecting defendant.

Court may order the removal of a defendant from the courtroom if the defendant interupts the proceedings. The court should state that the defendant may return any time that he assures the court that he will not create a disturbance.

507 F.2d 563 (CA 10, 1974)
569 F.2d 504 (CA 9, 1978)

After he has been ejected, a disruptive defendant can reclaim his right to be present as soon as he assures the court that he will conduct himself properly.

587 F.2d 968 (CA 9, 1978)

If defendant is removed from the courtroom, electronic arrangements should be made so that the defendant may hear the proceedings.

507 F.2d 563 (CA 10, 1974)

D. Shackling and gagging of defendant.

If the defendant's behavior is disruptive of court proceedings, the court has the option of keeping the defendant in the courtroom but of shackling him or shackling and gagging him in order to prevent a continuation of the disruptive behavior.

526 F.2d 226 (CA 8, 1975)
526 F.2d 698 (CA 5, 1976)
531 F.2d 281 (CA 5, 1976)

In making the decision to shackle a defendant, the court may take into consideration the defendant's past conduct in the courtroom, his prior escapes from custody, his disruptive conduct in other proceedings, and his prison disciplinary record.

531 F.2d 281 (CA 5, 1976)

If the court orders that a defendant be shackled or shackled and gagged, the court must state for the record the reasons for such action. The defendant and his counsel should be given opportunity to respond to the reasons presented and to try to persuade the judge that such measures are unnecessary.

526 F.2d 698 (CA 5, 1976)
531 F.2d 281 (CA 5, 1976)

E. Defendant may lose his right to testify.

The conduct of the defendant may be so disruptive that the court may properly deny him the privilege of testifying in his own behalf.

504 F.2d 935 (CA 9, 1974)

He may be denied this privilege only after having been warned by the court of that consequence.

504 F.2d 935 (CA 9, 1974)

Fifth Amendment

A. 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, that is, would tend to indicate that he was guilty of a crime or would furnish a link in the chain of evidence needed to prosecute him for a crime.

580 F.2d 1212 (CA 3, 1978)

1. This privilege protects a federal witness from incrimination under state as well as federal law.

557 F.2d 683 (CA 9, 1977)
579 F.2d 1001 (CA 6, 1978)

2. This privilege is confined to instances where the witness has reasonable cause to apprehend danger from answer.

541 F.2d 672 (CA 7, 1976)
579 F.2d 1001 (CA 6, 1978)

3. A defendant's right against self-incrimination is not violated by his being required to give handwriting or voice exemplars or to don certain clothing.

544 F.2d 242 (CA 6, 1977)
544 F.2d 353 (CA 9, 1976)
605 F.2d 910 (CA 5, 1979)

4. Fear for the safety of one's self or others is not a ground for refusing to testify.

579 F.2d 1001 (CA 6, 1978)

5. Defense counsel cannot claim the privilege for a witness. The privilege is a personal one and must be invoked by the witness.

512 F.2d 637 (CA 6, 1975)

6. Fear of prosecution by a foreign state is not grounds for invoking the Fifth Amendment.

559 F.2d 234 (CA 5, 1977)
628 F.2d 1260 (CA 9, 1980)

B. A defendant who takes the stand waives his Fifth Amentment privilege to the extent of cross-examination relevant to the issues raised by his direct testimony.

582 F.2d 898 (CA 5, 1978)
587 F.2d 201 (CA 5, 1979)

1. The breadth of the waiver is determined by the scope of relevant cross-examination. The defendant cannot claim privilege against cross-examination on matters reasonably related to the subject matter of the direct examination.

563 F.2d 1331 (CA 9, 1977): (In this case the trial court was sustained in permitting the prosecution to ask questions to which the defendant, Patty Hearst, claimed the privilege 42 times.)
646 F.2d 970 (CA 5, 1981)
648 F.2d 587 (CA 9, 1981)

2. If a defendant testifies in his own behalf but refuses to answer relevant questions upon cross-examination, the trial court may properly advise the jury that they may consider defendant's refusal in assessing his credibility or might strike the defendant's testimony in whole or in part.

546 F.2d 1242 (CA 5, 1977)
611 F.2d 78 (CA 5, 1980)
612 F.2d 432 (CA 9, 1979)

C. A prosecution witness may invoke his Fifth Amendment privilege even though the question asked him upon cross-examination is a proper one.

587 F.2d 201 (CA 5, 1979)

1. If the claim of privilege is sustained, the Court may strike the witness's testimony in whole or in part.

384 F.2d 624 (CA 5, 1967)
603 F.2d 535 (CA 5, 1979)
648 F.2d 557 (CA 9, 1980)

2. If a prosecution witness claims the privilege when questioned upon collateral matters by defense counsel, his testimony on direct need not be stricken.

544 F.2d 642 (CA 2, 1976)
549 F.2d 1088 (CA 6, 1977)

3. 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.

545 F.2d 1029 (CA 5, 1977)

D. Procedure to be followed when a witness claims Fifth Amendment privilege.

1. 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 as to whether the witness has reasonable cause to believe an answer to the question would support a conviction or would furnish a link in the chain of evidence needed to prove a crime.

559 F.2d 189 (CA 2, 1977)

2. Out of the presence of the jury the trial judge should examine the witness on the record relative to his claim of privilege. The witness is permitted to state in very general, circumstantial terms the reason why he feels he might be incriminated by answering a given question. The court can then examine him only so far as to determine whether there are reasonable grounds to apprehend a danger to the witness from his being compelled to answer.

536 F.2d 1042 (CA 5, 1976)
546 F.2d 1378 (CA 10, 1976)

3. The judge must be sensitive to the fact that the witness frequently cannot prove that his claim is legitimate without surrendering it.

568 F.2d 531 (CA 7, 1977)

4. 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 apprehension.

   341 U.S. 479 (1951)
   562 F.2d 334 (CA 5, 1977)

5. 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 would be compelled to surrender the very protection which the privilege is designed to guarantee.

   580 F.2d 1212 (CA 3, 1978)
   603 F.2d 469 (CA 3, 1979)

6. The court should not sustain a witness's blanket claim of the privilege but rather should consider and rule upon the claim as to specific lines of inquiry.

   625 F.2d 693 (CA 5, 1980)
   646 F.2d 48 (CA 2, 1981)
   646 F.2d 365 (CA 9, 1981)

E. The court should be alert to any indication that a witness wishes to invoke the privilege. It may be exercised in a variety of ways: a refusal to answer the question, asking the court or the attorney if the witness has to answer, mentioning the Fifth Amendment, or simply remaining silent. If this happens the court should ask the witness whether he desires to claim the privilege or whether he wants to consult with an attorney. The court may adjourn the trial in order to give the witness time to consult with an attorney.

   450 F.2d 1131 (CA 5, 1971)
   571 F.2d 941 (CA 5, 1978)

F. Witness not to be called if it is known he is going to claim the Fifth Amendment privilege.

1. Neither the prosecution nor the defense should be permitted to call a witness who, it is known, will claim the Fifth Amendment privilege.

545 F.2d 1029 (CA 5, 1977)

2. A defendant may not call as a witness a co-defendant who has indicated his intention to claim the privilege.

503 F.2d 598 (CA 9, 1974)

G. The criterian 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 he will be prosecuted.

253 F.2d 135 (CA 2, 1958)
256 F.2d 654 (CA 8, 1958)
472 F.2d 607 (CA 6, 1973)
488 F.2d 1206 (CA 1, 1973)
507 F.2d 292 (CA 9, 1974)
609 F.2d 867 (CA 7, 1979)

Identification Testimony

Testimony is admissible that a witness prior to trial identified the accused in a lineup or from a photographic spread provided the lineup or the photographic spread 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. The factors to be considered are: The opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of the witness's prior description of the criminal, the level of certainty demonstrated at the identification, and the time between the crime and the identification.

432 U.S. 98 (1977)

A. Court must determine admissibility of testimony relative to out-of-court identification.

This is a two-step process:

First: Court must decide whether identification procedure was unnecessarily suggestive.
Second: If procedure is found to have been unnecessarily suggestive, court must then determine whether procedure created a substantial risk of misidentification. If the answer to either of these inquiries is in the negative, testimony as to the identification is admissible.

527 F.2d 1345 (CA 5, 1976)
545 F.2d 1217 (CA 9, 1976)
568 F.2d 1108 (CA 5, 1978)
592 F.2d 1277 (CA 5, 1979)
599 F.2d 518 (CA 3, 1979)

B. A lineup is the preferable means of identification, but an accused does not have a right to a lineup.

527 F.2d 1345 (CA 5, 1976)
564 F.2d 983 (CA 2, 1977)
631 F.2d 1229 (CA 5, 1980)

Decision to order lineup is within sole discretion of trial judge.

606 F.2d 853 (CA 9, 1979)

C. Single photograph identification or single person showup is suspect.

Display of photographs of the suspect alone is one of the most suggestive and therefore most objectionable methods of pretrial identification.

528 F.2d 1242 (CA 7, 1976)

Testimony relative to single person showup immediately after crime may be admissible.

626 F.2d 697 (CA 9, 1980)

D. Witness may testify in court as to his out-of-court identification of accused.

An identifying statement is not hearsay if the declarant testifies and the statement is one of identification of a person made after perceiving him.

Federal Rules of Evidence 801(d)(1)(C)

Evidence of an extra-judicial identification is admitted because the earlier identification has greater probative value than an identification made in the courtroom. A witness may be permitted to testify that he has previously identified a photograph of the defendant and this includes allowing that witness to identify at trial the particular photograph seen by him during the pretrial investigation.

555 F.2d 447 (CA 5, 1977)

Witness may testify as to pretrial photospread identification even though he is unable to make an in-court identification.

507 F.2d 898 (CA 3, 1975)
512 F.2d 182 (CA 3, 1975)

E. Equivocal identifications.

Witness is permitted to testify that he had selected a photograph of the defendant from a photospread as "resembling" the perpetrator of the crime.

Though a prior identification may be equivocal, the jury is entitled to give it such weight as it will after hearing the testimony under direct and cross-examination.

447 F.2d 1377 (CA 2, 1971)
564 F.2d 1377 (CA 9, 1977)

The fact that an identification in court is less than positive does not render it inadmissible.

583 F.2d 748 (CA 5, 1978)
605 F.2d 910 (CA 5, 1979)

F. In-court identification is permissible.

In-court identifications are admissible although they can be exceedingly unreliable because of the suggestive nature of the setting in which the identification is made.

An in-court identification is, however, admissible if the government can show that the in-court identification was based upon observation of the suspect other than upon an improper pretrial proceeding.

512 F.2d 1047 (CA 8, 1975)
530 F.2d 286 (CA 8, 1976)
599 F.2d 518 (CA 3, 1979)

The court must weigh the reliability of a proposed in-court identification against the corrupting effect of any out-of-court pretrial identification procedures.

625 F.2d 862 (CA 9, 1980)

The defendant in a criminal trial has no right to an in-court lineup in connection with in-court identification.

538 F.2d 750 (CA 7, 1976)

G. Mug shots are inadmissible.

Admission of mug shots is in conflict with rules of evidence prohibiting the introduction of testimony regarding defendant's bad character or past criminal record.

504 F.2d 878 (CA 5, 1974)
525 F.2d 414 (CA 7, 1975)
548 F.2d 1224 (CA 5, 1977)

If the introduction of mug shots is unavoidable, steps must be taken to minimize the prejudicial impact upon the defendant.

568 F.2d 207 (CA 1, 1978)

H. Defendant entitled to cautionary jury instruction relative to identification testimony.

469 F.2d 552 (CADC, 1972)
564 F.2d 983 (CA 2, 1977)
572 F.2d 9 (CA 1, 1978)

I. Identification testimony by experts is generally held to be admissible only if expert proposes to testify as to identification features not within everyday experience of lay jurors.

501 F.2d 146 (CA 9, 1974)
506 F.2d 1165 (CA 9, 1974)
525 F.2d 386 (CA 8, 1975)
559 F.2d 561 (CA 9, 1977)
566 F.2d 884 (CA 4, 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 presence of jury before identification testimony by expert is received.

501 F.2d 146 (CA 9, 1974)
506 F.2d 1165 (CA 9, 1974)

Tape Recordings of Conversations

A. It is within the court's discretion to admit tapes of telephone conversations.

526 F.2d 971 (CA 7, 1975)

A tape is generally admissible unless the unintelligible portions are so substantial that the recording as a whole is untrustworthy.

514 F.2d 22 (CA 9, 1975)

Admission of tape recordings containing inaudible portions is a matter within the sound discretion of the trial court.

548 F.2d 228 (CA 8, 1977)

Even though the audibility of the tape is poor, it is admissible if enough of the conversation is audible and relevant to the purpose for which it is admitted.

571 F.2d 71 (CA 1, 1978)
574 F.2d 305 (CA 5, 1978)

B. Pretrial procedure re tape recordings.

The trial court may condition the use of tape recordings upon the advance preparation of an accurate transcript.

515 F.2d 130 (CA 2, 1975)
540 F.2d 465 (CA 10, 1976)

When transcripts are to be used to supplement tape recordings, parties should first seek to arrive at a stipulated transcript. If parties cannot agree, each side should produce its own transcript or its own version of disputed portions.

563 F.2d 1246 (CA 5, 1977)

A pretrial conference is the preferred manner of handling problem of obtaining stipulation as to accuracy of transcript of recorded conversation.

535 F.2d 938 (CA 5, 1976)

Where the prosecution and the defense cannot agree as to the contents of a tape, the proper procedure is for the jury to receive transcripts of the disputed portions from both sides. The defense may waive its right to

submit its version of the conversations if it does not do so timely.

525 F.2d 289 (CA 2, 1975)

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 playback of tapes.

508 F.2d 1134 (CA 8, 1975)

If jurors are permitted to have transcripts, the court must give an instruction to the effect that it is the words which they hear which are decisive rather than those which they read in the transcripts.

547 F.2d 1048 (CA 8, 1977)

D. Courtroom procedure re 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.

Where the defense and prosecution disagree as to the contents of portions of a tape, the jury shall be given transcripts of the versions of both sides. The tape is then played as the jurors are looking at one transcript and then replayed as the jurors are looking at another transcript.

525 F.2d 289 (CA 2, 1975)

E. The jurors may rehear tape recordings after they have begun deliberations.

It is within the discretion of the trial court to replay or not to replay tapes at the request of the jury after it has retired for deliberation.

548 F.2d 228 (CA 8, 1977)
569 F.2d 1386 (CA 5, 1978)

Balancing Probative Value of Evidence Against Prejudicial Effect

Rule 403 and Rules 609(a) and 609(b) of the Federal Rules of Evidence require the trial court to balance the probative value of evidence against its prejudicial effect.

A. Balancing under Rule 403.

Rule 403: "Although relevant, evidence 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 is within discretion of trial court.

The balancing required by Rule 403 is generally left within the wide and wise discretion of the trial court.

557 F.2d 309 (CA 2, 1977)
560 F.2d 507 (CA 2, 1977)

Weighing of probative value of evidence as against its prejudicial effect is entrusted to broad discretion of trial judge.

584 F.2d 268 (CA 8, 1978)

2. Criteria to be applied.

Evidence which is otherwise admissible is not rendered inadmissible because it is strongly probative on an essential element of an offense.

591 F.2d 861 (CADC 1978)

"Unfair prejudice" 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."

588 F.2d 1283 (CA 9, 1979)

In determining whether the probative value 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 its 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.

591 F.2d 861 (CADC 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 its prejudicial effect.

560 F.2d 507 (CA 2, 1977)

4. Reasoning must 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 both the prejudice and the probative worth of the proper testimony. It is reversible error for the trial court, when requested to do so by defense counsel, to refuse to state on the record its reasons for excluding relevant testimony.

539 F.2d 924 (CA 2, 1976)

B. Balancing under Rule 609(a).

Rule 609(a): "For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited from him or established by public record during cross examination but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted, and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the defendant, or (2) involved dishonesty or false statement, regardless of the punishment.

Balancing Probative Value of Evidence
Against Prejudicial Effect

1. Balancing and ruling should be made prior to trial.

Trial court should, when feasible, rule in advance as to the admissibility of defendant's criminal record so that he can make an informed decision as to whether or not to testify.

565 F.2d 170 (CA 1, 1977)

2. No balancing permitted with crimes of dishonesty.

The admission of prior convictions of crimes involving "dishonesty or false statement" is not within the discretion of the court.

548 F.2d 1315 (CA 9, 1976)

Crimes involving dishonesty or false statement are crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or 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.

547 F.2d 1079 (CA 9, 1976)

3. Balancing required only where there is potential prejudice to <u>defendant</u>.

Rule 609(a) permits balancing to be done only to determine whether the probative value outweighs the prejudicial effect "to the defendant." It is error to exclude proof of prior felony conviction of government witness on the ground that the prejudicial effect to that witness outweighs the probative value of that evidence.

561 F.2d 803 (CA 9, 1977)
562 F.2d 673 (CADC, 1977)

4. Criteria to be applied in balancing.

When the defendant himself is the witness, the following factors may be considered by the trial judge in balancing:

(1) The impeachment value of the prior crime,
(2) The time of conviction and the defendant's subsequent history,

(3) The similarity between the past crime and the charged crime,
(4) The importance of defendant's testimony and
(5) The centrality of the credibility issue.

3 Weinstein & Berger, Evidence ¶ 609[03].

5. Danger in admitting proof of conviction of same or similar crime to that charged.

The fact that the prior conviction is for the same offense requires particularly careful consideration before permitting its use.

553 F.2d 782 (CA 2, 1977)

When the prior crime parallels that for which the defendant is being tried, prejudice to the defendant is magnified. The relevant determination for a trial judge is the bearing that a particular conviction has on veracity.

409 F.Supp. 890 (W.D.N.Y. 1976)

Held that it was error for the trial court to allow defendant to be impeached with a former conviction arising out of the identical factual circumstances and involving many of the identical elements as the offense for which he was on trial.

555 F.2d 1273 (CA 5, 1977)

6. Trial court should place its reasoning on record.

Suggests that the trial court make its determination after a hearing on the record and an explicit finding that the prejudicial effect of the evidence to the defendant will be outweighed by its probative value.

568 F.2d 188 (CA 10, 1978)

The Fifth Circuit mandates that the trial judge make an on-the-record finding that probative value outweighs prejudicial effect before admitting a prior conviction for impeachment purposes.

608 F.2d 626 (CA 5, 1979)

Indicates that a preferred, if indeed not the required, course for the trial court is to make an explicit finding in terms of the rule and to give some indication of the reasons for the finding.

591 F.2d 922 (CADC 1978)

C. Balancing under Rule 609(b).

"Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect."

1. Such convictions only rarely admissible.

Convictions over ten years old are to be admitted very rarely and only under exceptional circumstances.

565 F.2d 479 (CA 7, 1977)
578 F.2d 528 (CA 4, 1978)

There is in effect a presumption in the rule that convictions over ten years old are more prejudicial than helpful and should be excluded.

588 F.2d 1145 (CA 6, 1978)

2. Reasoning must be placed on the record.

If the trial court departs from the ten year prohibition, the court must make specific findings on the record as to the particular facts and circumstances it has considered

in determining that the probative value of the conviction substantially outweighs its prejudicial impact.

578 F.2d 528 (CA 4, 1978)
588 F.2d 1145 (CA 6, 1978)

The court must find not merely that the probative value outweighs the prejudicial effect but that the probative value of the conviction "substantially" outweighs its prejudicial effect.

578 F.2d 528 (CA 4, 1978)

Reception of Expert Testimony

A. Reception of expert testimony is within discretion of trial court.

The trial court has broad discretion to determine whether a proferred expert is in fact an expert.

509 F.2d 1263 (CA 8, 1975)

B. Criteria to be applied by trial court.

To warrant the use of expert testimony, two elements are required. First, the subject of the inference must be so distinctly related to some science, profession, business or occupation as to be beyond the knowledge of the average layman, and second, the witness must have such knowledge or experience in the field or calling as to make it appear that his opinion or inference will probably aid the trier in his search for truth.

393 F.2d 417 (CA 9, 1968)

The court must determine whether the witness's knowledge of the subject matter is such that his opinion will most likely assist the trier of fact in arriving at the truth.

553 F.2d 1013 (CA 6, 1977)

The trial court must first determine whether the specialized knowledge involved will assist the trier of fact to understand the other evidence or to determine a fact in issue. Then it must satisfy itself that the proferred witness is qualified as an expert by knowledge, skill, experience, training, or education.

548 F.2d 1261 (CA 6, 1977)

The court must find that the offered expert testimony is reasonably likely to add to common understanding of the particular issue before the jury.

590 F.2d 381 (CA 1, 1979)

C. Procedure with respect to expert testimony.

Before permitting an expert to testify it is proper for the court to conduct upon request a voir dire examina-

tion of the witness, out of the presence of the jury, in order to determine whether he should be permitted to testify as an expert.

543 F.2d 1156 (CA 5, 1976)

The court may question and permit questioning by opposing counsel at length to determine the expertise of the witness.

511 F.2d 25 (CA 6, 1975)

Opposing counsel should be permitted to cross-examine the witness on his qualifications before he is permitted to testify as an expert.

559 F.2d 561 (CA 9, 1977)

Requiring Defendant to Display Body or to Don Clothing

Defendant may be required to display to the jury a tattoo upon his arm.

564 F.2d 755 (CA 7, 1977)

Defendant may be required to shave beard in order not to frustrate trial identification by witnesses.

575 F.2d 1310 (CA 10, 1978)

The privilege against self-incrimination does not prevent a defendant from being required to don an article of clothing or a mask.

433 F.2d 937 (CA 9, 1970)
572 F.2d 687 (CA 9, 1978)
575 F.2d 1310 (CA 10, 1978)

Curative Instructions

Many potentially reversible incidents can be cured by a prompt and forceful admonition to the jury.

When considering whether a new trial should be granted, a Court of Appeals will consider the forcefulness and timeliness of the trial court's curative instruction.

561 F.2d 763 (CA 9, 1977)

A. Prior inconsistent statement.

When evidence of a prior inconsistent statement of a witness is admitted, the court must upon request by counsel instruct the jury that the prior inconsistent statement was admitted in evidence for impeachment purposes only and not as evidence of the truth of the prior inconsistent statement.

592 F.2d 1038 (CA 9, 1979)

B. Evidence admissible for one purpose but not for another.

Where 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.

592 F.2d 680 (CA 2, 1979)

C. When evidence has been withdrawn from the jury.

When evidence has been withdrawn by the court from the jury's consideration, the court should instruct the jury that the evidence is to be disregarded by them.

517 F.2d 710 (CA 5, 1975)

D. Prejudicial remark by prosecutor.

When government counsel makes a prejudicial remark in closing argument, the court should give an immediate and forceful curative instruction.

Motion for Judgment of Acquittal

A. Criteria to be applied by court in ruling upon motion for judgment of acquittal.

Motion for acquittal must be granted when evidence, viewed in light most favorable to government, is such that a reasonably minded juror must have a reasonable doubt as to existence of essential elements of crime charged.

547 F.2d 1250 (CA 5, 1977)

An accused is entitled to a judgment of acquittal only where there is no evidence upon which reasonable minds might fairly conclude guilt beyond reasonable doubt.

589 F.2d 707 (CADC 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.

590 F.2d 1379 (CA 5, 1979)

Mistrial

A. Court has the power to declare a 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.

557 F.2d 697 (CA 10, 1977)

B. 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.

434 U.S. 497 (1978)
582 F.2d 186 (CA 2, 1978)

Declaration of mistrial is to be avoided if possible.

509 F.2d 312 (CADC, 1974)

Trial judge must exercise extreme caution before declaring mistrial.

516 F.2d 1034 (CA 3, 1975)

The trial judge should not foreclose the defendant's right to take his 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.

400 U.S. 470 (1971)

C. Alternative courses of action must be considered.

Before declaring a mistrial a trial court must consider alternative courses of action, and, after finding none of them to be adequate, make a finding of manifest necessity for the declaration of a mistrial.

434 U.S. 497 (1978)

Mistrial

Trial court should, before declaring a mistrial, completely canvass alternatives to declaring mistrial. To avoid bar of double jeopardy government generally must demonstrate that, under the circumstances, the trial judge had no alternative but to declare a mistrial.

589 F.2d 117 (CA 2, 1979)
591 F.2d 218 (CA 3, 1979)

Before a trial judge declares a mistrial he must make explicit findings, preferably after a hearing, that there are no reasonable alternatives to a mistrial. The judge should solicit suggested alternatives from counsel.

552 F.2d 46 (CA 2, 1977)

The court should seek the views of the affected defendant to determine whether he wishes to proceed or to have a mistrial declared. The important consideration is that the defendant retain primary control over the course to be followed in the event of error.

553 F.2d 1064 (CA 7, 1977)

D. 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 a jury can reach the verdict within a reasonable time. The court should question the jury, either individually or through its foreman, on the possibility that its deadlock could be overcome by further deliberations.

505 F.2d 845 (CA 9, 1974)

Merely questioning the jury foreman may not be sufficient, but questioning the foreman individually and the jury either individually or as a group is satisfactory.

566 F.2d 1377 (CA 9, 1978)

Suggests that trial court should not only inquire of the foreman but also of the individual jurors as to whether they feel that there is any prospect of the jury's reaching a verdict.

536 F.2d 1149 (CA 6, 1976)

Whether judge has properly exercised his discretion to declare a mistrial because of a deadlocked jury depends upon following factors: (1) a timely objection by defendant, (2) the jury's collective opinion that it 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 which the judge has had with the jury, and (7) the effects of possible exhaustion and the impact which the coercion of further deliberations might have on the jury.

566 F.2d 1377 (CA 9, 1978)

E. Improvident declaration of mistrial can cause release on double jeopardy grounds of defendant convicted at second trial.

579 F.2d 141 (CA 2, 1978)
593 F.2d 415 (CA 1, 1979)

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 upon an accused the right to confront face-to-face in the courtroom those who give testimony against him.

> "This Court has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial and that 'a primary interest secured by (the provision) is the right of cross-examination.'"
>
> Ohio v. Roberts, 448 U.S. 56 (1980)

If the out-of-court declarant testifies, the confrontation problem disappears because the accused then has the right to confront that witness and cross-examine him with reference to his out-of-court statement.

> California v. Green, 399 U.S. 149 (1970)
> Nelson v. O'Neil, 402 U.S. 622 (1971)

If the out-of-court declarant does not testify, the accused may or may not be deprived of his right of confrontation by the admission of out-of-court statement.

Leading recent Supreme Court cases dealing with the right of confrontation are:

> California v. Green, 399 U.S. 149 (1970)
> Dutton v. Evans, 400 U.S. 74 (1970)
> Mancusi v. Stubbs, 408 U.S. 204 (1972)
> Ohio v. Roberts, 448 U.S. 56 (1980)

A. If a defendant objects to the admission of an out-of-court statement as a denial of his 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."

      448 U.S. 56 (1980)

B. Non-availability of the declarant at time of trial.

A witness is not unavailable unless the prosecution has made a good faith effort to obtain his presence at trial.

399 U.S. 149 (1970)
408 U.S. 204 (1972)

The ultimate question is whether the witness is unavailable despite good faith efforts undertaken by the prosecution prior to trial to locate and present that witness.

448 U.S. 56 (1980)

Witness is unavailable if his absence was procured by defendant.

98 U.S. 145 (1878)

Witness is unavailable if beyond the process of the court at time of trial.

408 U.S. 204 (1972)

This requirement of unavailability is, however, not absolute. If the utility of trial confrontation is remote, the prosecution may not be required to demonstrate the non-availability of the declarant.

400 U.S. 74 (1970)

C. Indicia of reliability.

An out-of-court statement is admissible over a confrontation objection only if it bears adequate "indicia of reliability."

"The focus of the Court's concern has been to insure that there 'are indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant' ... and to 'afford the trier of fact a satisfactory basis for evaluating the truth of the prior statement'..."

408 U.S. 204 (1972)

Right of Confrontation

"The primary concern of our inquiry must be to determine whether, under the circumstances, the unavailability of the declarant for cross-examination deprived the jury of a satisfactory basis for evaluating the truth of the extra-judicial statement."

522 F.2d 833 (CA 9, 1976)

"To be considered for admission the statement must bear sufficient indicia of reliability to assure an adequate basis for evaluating the truth of the declaration, for its truth will not be tested by adversary cross-examination at trial."

560 F.2d 45 (CA 2, 1977)

"...the focus of our concern must be whether indicia of reliability are present and whether the trier of fact was afforded a satisfactory basis for evaluating the truth of the prior statement."

603 F.2d 42 (CA 8, 1979)

D. Admissibility of out-of-court statements within exceptions to hearsay rule.

"...certain hearsay exceptions rest upon 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 where the evidence falls within a firmly rooted hearsay exception. In other cases the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness."

448 U.S. 56 (1980) (This opinion points out that dying declarations and cross-examined prior trial testimony are two hearsay exceptions so firmly rooted that their admission does not violate the confrontation clause. By implication it suggests that not all hearsay statements, falling within a hearsay exception, are automatically admissible without further inquiry.)

Dutton v. Evans, 400 U.S. 74 (1970) identified the following as factors attesting to the reliability of the challenged out-of-court statement in that case:

(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 upon faulty recollection;

(4) it was not likely that the declarant misrepresented the defendant's involvement; and

(5) the statement was spontaneous.

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.

547 F.2d 1346 (CA 8, 1976)
552 F.2d 833 (CA 9, 1976)
557 F.2d 309 (CA 2, 1977)
560 F.2d 45 (CA 2, 1977)
603 F.2d 42 (CA 8, 1979)
604 F.2d 1199 (CA 9, 1979)
630 F.2d 1357 (CA 9, 1980)
633 F.2d 77 (CA 8, 1980)
635 F.2d 1183 (CA 6, 1980)

E. When confrontation objection is made, court should conduct hearing out of the presence of the jury to test the out-of-court statement against the criteria for admissibility.

604 F.2d 1199 (CA 9, 1979)

At the conclusion of the hearing, the court should spell out on the record its reasons for admitting or refusing the proffered statement.

F. An accused's right of confrontation gives to him the right to be present at all stages of a trial.

It was held to be error for a trial court to exclude a defendant from the courtroom while the court questioned deputy sheriffs, bailiffs, and jurors in order to determine whether an altercation in the courtroom might have prejudiced the defendant's right to a fair trial.

562 F.2d 596 (CA 8, 1977)

It was error for the trial court to exclude an accused from the presence of a witness whose deposition was being taken. The defendant was charged with being an accessory after the fact of the kidnapping of a young woman. Her psychiatrist advised the trial court that she should not be required to endure a trial situation or face the defendant. The trial court authorized the taking of her videotaped deposition but ordered that the defendant was not to be within the vision of the witness at the deposition. By means of a monitor the defendant was able to observe the proceedings and consult with his own attorney but the witness was at all times unaware of the defendant's presence in the building. The restriction upon the defendant's right to confront the witness face-to-face was held to be an abridgement of his right of confrontation.

593 F.2d 815 (CA 8, 1979)

Defendant has right to be present during in camera hearing regarding jury misconduct.

596 F.2d 344 (CA 8, 1979)

G. Defendant may waive his right of confrontation by voluntary absence from trial.

524 F.2d 167 (CA 4, 1975)
557 F.2d 930 (CA 2, 1977)

Even if a defendant voluntarily absents himself, trial court should not proceed with trial until it has balanced factors favoring continuance against those favoring proceeding with trial.

524 F.2d 167 (CA 4, 1975)
557 F.2d 930 (CA 2, 1977)
596 F.2d 137 (CA 5, 1979)

Right of Confrontation

H. If a defendant becomes ill, the court must adjourn the trial until the defendant can be present.

541 F.2d 958 (CA 2, 1976)

Waiver of Right to Twelve Person Jury

A defendant may waive his right to a trial by jury and may waive his right to have twelve persons on that jury. If he indicates a desire to waive either right, the Court must interrogate him on the record to be sure that he is voluntarily and knowingly waiving his right to be tried by a jury of twelve persons.

A. The defendant may waive his right to a jury trial.

Federal Rules 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 is not alone sufficient, however. The defendant must be interrogated on the record by the Court to make sure that the waiver is voluntarily and knowingly made. The Court should question the defendant to make sure that the defendant knows the difference between a jury and a non-jury trial and that he knows also that the verdict of the jury must be unanimous.

A waiver of the right to trial by jury should be accepted by the trial judge only after fulfilling "the serious and weighty responsibility...of determining whether there was an intelligent and competent waiver by the accused." There must be an express and intelligent consent by the defendant. The duty of the trial court is not 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.

511 F.2d 355 (CADC, 1975)

When a defendant waives his right to jury trial, the record should reflect that the defendant was interrogated by the trial judge on the issue of voluntariness prior to the acceptance of his waiver. The trial judge should satisfy himself that the defendant is knowingly and intelligently waiving his right to a jury trial.

560 F.2d 1303 (CA 7, 1977)
583 F.2d 362 (CA 7, 1978)

B. The defendant may waive his right to have twelve persons in the jury.

The stipulation for a jury of less than twelve persons must be in writing. Here again, however, a written stipulation to that effect is not sufficient to effect a waiver by the defendant of his right to be tried by a jury of twelve persons.

If a defendant indicates his willingness to be tried by a jury of less than twelve persons, the court must interrogate him on the record to be sure that his waiver is voluntarily and knowingly made. "Questioning may disclose uncertainty or confusion on the defendant's part. After explanation by the trial judge of the alternatives, a defendant may conclude he wants to preserve his right to a twelve person jury."

603 F.2d 69 (CA 9, 1979)

C. A defendant cannot waive his right to a unanimous verdict.

A defendant in a criminal prosecution cannot waive his right to a unanimous verdict.

581 F.2d 1338 (CA 9, 1978)