# Benchbook

## for United States District Courts

*Seventh Edition*

Federal Judicial Center
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The Federal Judicial Center produced this *Benchbook for United States District Courts* in furtherance of its mission to develop and conduct education programs for the judicial branch. This *Benchbook* is not a statement of official Federal Judicial Center policy. Rather, it was prepared by, and it represents the considered views of, the Center's *Benchbook* Committee, a group of experienced district judges appointed by the Chief Justice of the United States in his capacity as chair of the Center's Board. The committee was assisted by Federal Judicial Center staff.

# Preface

The Seventh Edition of the *Benchbook*—previously the *Benchbook for U.S. District Court Judges* and now the *Benchbook for United States District Courts*—is a concise guide to handling matters that federal judges may experience on the bench. The name change reflects that the *Benchbook* may be valuable to magistrate judges, as well as potentially bankruptcy judges and other participants in district court proceedings, such as federal defenders and CJA attorneys, pretrial services officers, and probation officers.

The *Benchbook* covers procedures that are required by statute, rule, or case law, and offers detailed guidance from experienced trial judges on these requirements and other matters that arise in the courtroom. New judges should benefit from the *Benchbook*, but all judges may find useful reminders about how to handle both routine and more complex issues or how to handle situations they may encounter for the first time. While the *Benchbook* itself should not be cited as authority, the text is based on statutes, rules of procedure, case law, and other authorities, as shown by extensive citations to such authorities. The text also offers suggestions or recommendations that *Benchbook* Committees through the years thought useful for judges to consider. Because circuit law may vary, particularly with respect to procedures, judges should always familiarize themselves with the requirements of their circuit's law.

Each new edition focuses on updating relevant case law, statutes, and rules as needed, while also revising existing material and adding new information that the Committee has determined will be helpful.

In the Seventh Edition, the first three sections have been rewritten to provide a comprehensive step-by-step guide to the procedures and requirements of the Bail Reform Act of 1984, and to provide greater guidance on the right to the assistance of counsel with emphasis on the importance of timely appointment of counsel.

Section 3.01: Death Penalty Procedures was updated to reflect current practice and the information concerning appointment of counsel and interim recommendations adopted by the Judicial Conference of the United States from the Report of the Ad Hoc Committee to Review the Criminal Justice Act (2018). It also provides a list of resources that are available to assist judges who may handle a capital case.

A new Section 5.07: Juror Questions During Trial is not intended to either encourage or discourage the practice, but to provide information and guidance to courts that may consider whether to allow jurors to question witnesses during trial.

The Center will distribute printed copies of the *Benchbook* only to new judges and make it available to all judges electronically. Paper copies will be available to judges upon request. The electronic version provides links to many of the authorities cited in the text.

The *Benchbook* is prepared by the *Benchbook* Committee in collaboration with Center staff. Members are experienced judges appointed to the Committee by the Chief Justice. Thank you to the members of the Committee: Judge Julie A. Robinson (D. Kan.) and Judge Ricardo S. Martinez (W.D. Wash.) who separately served as committee Chair at different times in the process; Judges Irene M. Keeley (N.D. W. Va.), Danny C. Reeves (E.D. Ky.), Nancy D. Freudenthal (D. Wyo.), Kathleen Cardone (W.D. Tex.), Lisa P. Lenihan (W.D. Pa.), Sara L. Ellis (N.D. Ill.), and Jonathan E. Hawley (C.D. Ill.). The Seventh Edition reflects the dedicated efforts of all these judges.

This edition also benefited from the assistance of law professors, as well as staff at the Administrative Office. We thank them for their contributions.

We hope you find this edition of the *Benchbook* to be useful, and we invite comments and suggestions for making it better.

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# Contents

# 1.01 Initial Appearance

*Fed. R. Crim. P. 5, 44(a); 18 U.S.C. § 3006A, § 3142*



The first appearance of an adult defendant after arrest is usually before a magistrate judge and is governed by Fed. R. Crim. P. 5. If a juvenile appears, the court should carefully review 18 U.S.C. §§ 5031–5043. See also section 1.11: Delinquency Proceedings, *infra*.

All defendants have the right to make a first appearance in person, but the court may conduct the initial appearance hearing by video teleconferencing if the defendant voluntarily and intelligently consents. Fed. R. Crim. P. 5(g). Although not required by Rule 5(g), it is a good practice to obtain the consent in writing if possible, and after the opportunity to consult with counsel. There is no right to appear by video teleconferencing, and the court should carefully consider whether it is appropriate to conduct the hearing in such a manner.

As discussed in more detail below, Rule 5 sets forth procedures addressing the various circumstances under which a defendant may make a first appearance.

Whether an arrest occurs within or outside the United States, the defendant must be taken "without unnecessary delay before a magistrate judge," unless a statute provides otherwise. Fed. R. Crim. P. 5(a)(1)(A) & (B). A "reasonable time within which the prisoner should be brought

before a committing magistrate, must be determined in the light of all the facts and circumstances of the case."[1] In practice, the effect of this language is limited to "the exclusion of any confessions obtained during an unreasonable period of detention that violated the prompt presentment requirement."[2] What constitutes "unnecessary delay" or an "unreasonable period of detention" in this context has been outlined in 18 U.S.C. § 3501(c). If a confession that was made after arrest but before the initial appearance may be an issue, see Appendix A, *infra*, for more information.

If the alleged offense was committed in another district, see *infra* section 1.05: Commitment to Another District (Removal Proceedings).

If the defendant is arrested for violating probation or supervised release, Rule 32.1 applies. See *infra* section 4.02: Revocation or Modification of Probation and Supervised Release.

For an arrest made without a warrant, the government must prepare a complaint, present it to a judge, and file it with the court pursuant to Fed. R. Crim. P. 3 and 4. When a person is arrested, the Supreme Court has held that the Fourth Amendment requires that the person be taken before a judge within forty-eight hours for a probable cause hearing, or the burden is on the government to prove the delay beyond that time was not unreasonable.[3]

The initial appearance, or "presentment," while seemingly straightforward, is a very significant step in the prosecution that "is designed to accomplish a variety of important tasks to protect the accused as the adjudication process begins."[4] As the Supreme Court put it,

> presentment is the point at which the judge is required to take several key steps to foreclose Government overreaching: informing the defendant of the charges against him, his right to remain silent, his right to counsel, the availability of bail, and any right to a preliminary hearing; giving the defendant a chance to consult with counsel; and deciding between detention or release.[5]

1. Fed. R. Crim. P. 5, advisory committee's notes to 1944 adoption. *See also id.*, advisory committee's notes to 2002 amendments ("In using the term [without unnecessary delay], the Committee recognizes that on occasion there may be necessary delay in presenting the defendant, for example, due to weather conditions or other natural causes.").

2. United States v. Thompson, 772 F.3d 752, 760 (3d Cir. 2014). *See also* Fed. R. Evid. 402, advisory committee's notes to 1972 proposed rules ("the command, originally statutory and now found in Rule 5(a) . . . , that an arrested person be taken without unnecessary delay before a commissioner or other similar officer, is held to require the exclusion of statements elicited during detention in violation thereof.").

3. County of Riverside v. McLaughlin, 500 U.S. 44, 56–57 (1991) ("This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours." The Fourth Amendment may be violated "if the arrested individual can prove that his or her probable cause determination was delayed unreasonably. Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake.").

4. 1 Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Crim. § 72 (5th ed. Apr. 2023 Update). *See also* Kirby v. Illinois, 406 U.S. 682, 689–90 (1972) ("The initiation of judicial criminal proceedings is far from a mere formalism. . . . It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.").

5. Corley v. United States, 556 U.S. 303, 320 (2009). *See also* Rothgery v. Gillespie County, Tex., 554 U.S. 191, 213 (2008) ("a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel"); *Kirby*, 406 U.S. at 690 ("The initiation of judicial criminal proceedings . . . marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable," including "'the Assistance of Counsel for his defence.'") (citing the U.S. Const., amend. VI).

# I. Preliminary Matters

In order for the initial appearance hearing to proceed more efficiently and without interruption, and to ensure the rights of defendants and victims are protected, the court should consider the following matters before the hearing begins.

## *A. Appointment of Counsel*

Criminal defendants in federal court have a right to counsel, but the vast majority cannot afford to pay for an attorney.[6] Under the Criminal Justice Act (CJA), such defendants are entitled to have counsel appointed for them and "shall be represented at every stage of the proceedings from [the] initial appearance . . . through appeal."[7] Note that Rule 44(a) goes beyond § 3006A(c) in that defendants are entitled to appointed counsel if they are "unable to obtain" counsel, not just when they cannot *afford* counsel: "The right to assignment of counsel is not limited to those financially unable to obtain counsel. If a defendant is able to compensate counsel but still cannot obtain counsel, he is entitled to the assignment of counsel even though not to free counsel."[8]

Although the statute and rule do not state precisely when counsel should be appointed, the 1966 Advisory Committee Notes to Rule 44(a) emphasized that "[t]he Supreme Court has recently made clear the importance of providing counsel both at the *earliest possible time after arrest* and on appeal." (Emphasis added.) The Advisory Committee further specified that the entitlement to counsel "from [the defendant's] initial appearance" in Rule 44(a) "is intended to require the assignment of counsel as promptly as possible after it appears that the defendant is unable to obtain counsel."

Furthermore, Rule 44(a) states that defendants have not just a right to the prompt appointment of counsel, but a right for counsel "to *represent* the defendant at *every stage* of the proceeding from initial appearance through appeal."[9] Thus, merely appointing counsel is not

6. 2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act (Cardone Report) at 17 (2018) ("Today, roughly 93 percent of criminal defendants in federal court require appointed counsel."), https://cjastudy.fd.org.

7. 18 U.S.C. § 3006A(c). *See also* Fed. R. Crim. P. 44(a) ("A defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right.").

8. Fed. R. Crim. P. 44, advisory committee's note to 1966 amendment ("the amended rule provides a right to counsel which is broader . . . than that for which compensation is provided in the Criminal Justice Act of 1964: . . . the right extends to defendants unable to obtain counsel for reasons other than financial"). If it is later determined that a defendant can afford counsel, in whole or in part, reimbursement may be sought under 18 U.S.C. § 3006A(c) or (f).

9. Emphasis added. *See also* 18 U.S.C. § 3006A(c) ("shall be represented at every stage of the proceedings"); Black's Law Dictionary (11th ed. 2019) (defining "effective assistance of counsel" as "conscientious, meaningful legal representation, whereby the defendant is advised of all rights and the lawyer performs all required tasks reasonably according to the prevailing professional standards in criminal cases. *See* Fed. R. Crim. P. 44; 18 USCA § 3006A.").

enough—defense counsel must be appointed in time to actually represent and assist the defendant for the entirety of any judicial proceeding, including the initial appearance.[10]

This is especially important because, as noted above by the Supreme Court in *Corley*, the initial appearance involves "several key steps to foreclose Government overreaching," including the crucial decision whether to release the defendant before trial or hold a detention hearing. The Bail Reform Act of 1984 is a lengthy, complex statute involving legal issues that a defendant cannot be expected to navigate without the assistance of counsel, including whether a detention hearing is authorized by the statute.[11] Even if the defendant will be released, determining which conditions of release should—or should not—be applied involves analysis of many possibilities in order to impose, as the statute requires, only "the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community."[12]

The Judicial Conference of the United States

> recognizes the importance of the advice of counsel for persons subject to proceedings under the Bail Reform Act, 18 U.S.C. § 3142 et seq., prior to their being interviewed by a pretrial services or probation officer. Therefore, the Conference encourages districts to take the steps necessary to permit the furnishing of appointed counsel at this stage of the proceedings to financially eligible defendants, having due regard for the importance of affording the pretrial services officer adequate time to interview the defendant and verify information prior to the bail hearing.[13]

Note also that: (1) the decision whether to hold a detention hearing, which may involve legal issues, occurs during the initial appearance hearing, and (2) if there will be a detention hearing under § 3142(f) and no continuance is granted, the detention hearing would immediately follow the initial appearance hearing and the defendant "has the right to be represented by counsel." 18 U.S.C. § 3142(f). Therefore, to protect defendants' rights and ensure the hearings proceed in an orderly fashion, "defendants should have counsel from the start of the initial appearance, well before a detention hearing occurs."[14]

10. *See* Memorandum, "Right to Counsel at Initial Appearance," Jud. Conf. of the U.S., Comm. on Def. Servs. (Mar. 19, 2024) (joint memorandum from the chairs of the Defender Services and Criminal Law Committees) ("To enable defense counsel to provide meaningful representation *during* the initial appearance, it is vital that the attorney be permitted to meet and confer with the defendant *before* the initial appearance."), https://jnet.ao.dcn/sites/default/files/pdf/DIR24-038.pdf. *See also* Fed. R. Crim. P. 5(d)(2) ("The judge must allow the defendant reasonable opportunity to consult with counsel" during the initial appearance.); U.S. Dep't of Just., Justice Manual, § 9-6.110 ("prosecutors must recognize that 'a defendant who is unable to obtain counsel is entitled to have counsel appointed to represent the defendant at every stage of the proceeding [including] initial appearance,' except where 'the defendant waives this right.' Fed. R. Crim. P. 44(a); *see also* 18 U.S.C. § 3006A"), https://www.justice.gov/jm/title-9-criminal.

11. *See* 18 U.S.C. § 3142(f) (defendant subject to a detention hearing "has the right to be represented by counsel"). For an examination of the many issues and factors involved in pretrial release or detention, see Jefri Wood, The Bail Reform Act of 1984 (Federal Judicial Center, 4th ed. 2022) [hereinafter Bail Reform Act, 4th ed.], https://www.fjc.gov/content/373297/bail-reform-act-1984-fourth-edition; John L. Weinberg & Evelyn J. Furse, Federal Bail and Detention Handbook (Practising Law Institute 2024) (updated annually).

12. 18 U.S.C. § 3142(c)(1)(B).

13. Admin. Office of the U.S. Courts, Guide to Judiciary Policy vol. 7—Defender Services, app. 2A at 9 (citing Report of the Proceedings of the Judicial Conference of the United States, March 1988, at 18–19), https://www.uscourts.gov/rules-policies/judiciary-policies/criminal-justice-act-cja-guidelines.

14. *See* Bail Reform Act, 4th ed., *supra* note 11, at 44:

> The procedures and issues involved in pretrial detention or release are complex, as is the decision whether a detention hearing is even warranted. It is important to ensure that defendants are provided the opportunity to consult with an attorney at the earliest stage of criminal proceedings, before any decisions, or even discussions, regarding release or detention occur.

If counsel for a qualified defendant has not been appointed before the start of the initial appearance hearing, it is never appropriate, in light of the plain language and intent of the statute and rule, to proceed further without first appointing counsel.[15] "Courts that do not currently ensure that every defendant has active representation by counsel during the initial appearance must comply with the governing statute and rules."[16]

As noted above, most criminal defendants will, in fact, require appointed counsel, including those who are "unable to obtain counsel for reasons other than financial."[17] Therefore, courts should have procedures in place to allow for the appointment or preliminary provision of counsel before the initial appearance formally begins and, if necessary, without waiting to see whether the defendant qualifies for free counsel. The "Criminal Justice Act Guidelines," approved by the Judicial Conference of the United States (JCUS), advise that financially eligible defendants "should be provided with counsel *as soon as feasible after being taken into custody*, when first appearing before the court or U.S. magistrate judge, when formally charged, or when otherwise entitled to counsel under the CJA, *whichever occurs earliest*."[18]

The CJA Guidelines also emphasize that "fact-finding concerning the person's eligibility for appointment of counsel should be completed prior to the person's first appearance in court" unless it would cause "undue delay," and that "[a]ny doubts as to a person's eligibility should be resolved in the person's favor; erroneous determinations of eligibility may be corrected at a later time."[19]

Consider a process of provisional appointment of counsel through Administrative Order of the Court or other method prior to a defendant's initial appearance. At the initial appearance itself, such a provisional appointment can be converted to a full appointment of counsel for eligible defendants or terminated for ineligible defendants. For courts that use a financial affidavit to assist in determining a defendant's eligibility for the appointment of counsel, consider having a procedure in place for the defendant to complete the required financial affidavit with

15. *See also* Brewer v. Williams, 430 U.S. 387, 398 (1977) (assistance of counsel "is indispensable to the fair administration of our adversary system of criminal justice" and is a "vital need at the pretrial stage. . . . [T]he right to counsel . . . means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him 'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.'") (citation omitted).

16. Joint Memorandum, *supra* note 10.

17. Fed. R. Crim. P. 44, advisory committee's notes to 1966 amendment.

18. *See* Guide to Judiciary Policy, *supra* note 13, at Part A, § 210.40.10, Timely Appointment of Counsel (emphases added). *See also* Joint Memorandum, *supra* note 10 ("To enable defense counsel to provide meaningful representation *during* the initial appearance, it is vital that the attorney be permitted to meet and confer with the defendant *before* the initial appearance.").

19. Guide to Judiciary Policy, *supra* note 13, at §§ 210.40.20(b), 210.40.30(b). *See also* Jonathan W. Feldman, The Fundamentals of Criminal Pretrial Practice in the Federal Courts 16 (2015) ("When in doubt, the magistrate judge should err on the side of appointing counsel; if the magistrate judge later determines that the defendant can pay all or part of the cost, the magistrate judge can order the defendant to make partial or total payment to the clerk of court."), https://fjc.dcn/sites/default/files/materials/17/2107-V10_Mag_Judge_Criminal_Pretrial Practice_rev_2015.pdf.

the assistance of counsel even before an official appointment is made.[20] A defendant should never be asked to complete a financial affidavit without first having the opportunity to consult with counsel.[21]

*See* Appendix B *for further information.*

## *B. Crime Victims' Rights*

Under the Crime Victims' Rights Act, 18 U.S.C. § 3771, victims of a crime are entitled to be notified of and to attend "any public court proceeding" involving the offense, and the right "to be reasonably heard" at such proceedings that involve the release of the defendant.[22] The government has the primary responsibility for finding victims and making its "best efforts to see that crime victims are notified of, and accorded," their rights under the statute, including the schedule of court proceedings.[23] The court's responsibility is to "ensure that the crime victim is afforded the rights described in subsection (a)," including the "right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding."[24]

## *C. Right to Consular Notification*

At the initial appearance, the court must inform the defendant

> that a defendant who is not a United States citizen may request that an attorney for the government or a federal law enforcement official notify a consular officer from the defendant's country of nationality that the defendant has been arrested—but that even without the defendant's request, a treaty or other international agreement may require consular notification.

Fed. R. Crim. P. 5(d)(1)(F). The court should provide the warning "to every defendant, without attempting to determine the defendant's citizenship."[25] Although law enforcement officers have the primary responsibility to provide this advice "without delay," having the court inform

20. *See, e.g.*, Admin. Office of the U.S. Courts, Instructions for CJA Form 23 Financial Affidavit ("When practicable, employees of the federal public defender office should discuss with the person who indicates that he or she is not financially able to secure representation the right to appointed counsel and, if appointment of counsel seems likely, assist in completion of the financial affidavit."), https://jnet.ao.dcn/sites/default/files/forms/CJA_23_-_Instructions_-_JNET.pdf. *See also* Admin. Office of the U.S. Courts, CJA Form 20, Appointment of and Authority to Pay Court-Appointed Counsel (allowing court to enter *nunc pro tunc* dates authorizing CJA panel attorneys to be paid for work prior to appointment), https://www.uscourts.gov/forms-rules/forms/appointment-and-authority-pay-court-appointed-counsel.

21. Instructions for CJA Form 23, *supra* note 20 (outlining issue and offering alternative approaches; also noting that "CJA Form 23 is not a required statutory form"—other forms of affidavit may be utilized). Note that the financial affidavit "should not be included in the public case file and should not be made available to the public at the courthouse or via remote electronic access." *Id. See also* Jonathan W. Feldman, Issues in Criminal Law and Procedure 1–5 (2014) (discussing financial affidavits and alternative methods of demonstrating financial eligibility for appointed counsel), https://fjc.dcn/sites/default/files/session/2023/Crimissuesoutline10.14.pdf.

22. *See* 18 U.S.C. § 3771(a)(2), (4).

23. *Id.* at § 3771(c)(1). *See also* Fed. R. Crim. P. 60 (implementing several provisions of 18 U.S.C. § 3771); 34 U.S.C. § 20141 (outlining responsibilities of the government to identify any victims of the offense and to notify them of their rights and the services available to them).

24. *Id.* at § 3771(b)(1), (a)(4).

25. *See* Fed. R. Crim. P. 5(d)(1)(F), advisory committee's notes to 2014 amendments.

defendants of these rights at the initial hearing is designed "to provide additional assurance that U.S. treaty obligations are fulfilled, and to create a judicial record of that action."[26]

*For additional information about the right to consular notification, see* Appendix C.

## *D.* Brady v. Maryland *Disclosure Obligation*

Prosecutors are required to turn over to the defense any potentially exculpatory information and impeachment material.[27] By act of Congress,[28] Fed. R. Crim. P. 5(f)(1) now states that:

> In all criminal proceedings, on the first scheduled court date when both prosecutor and defense counsel are present, the judge shall issue an oral and written order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, and the possible consequences of violating such order under applicable law.

Rule 5(f)(2) requires each district to "promulgate a model order for the purpose of paragraph (1) that the court may use as it determines is appropriate." The possible consequences of violating the court's order for timely disclosure of exculpatory evidence include, but are not limited to: exclusion of evidence, adverse jury instructions, dismissal of charges, contempt proceedings, disciplinary action, or sanctions.

At the initial appearance hearing, if the defendant will be released the court must decide what conditions to impose. Although *Brady* information is only required to be disclosed when it may be material to guilt or punishment at trial, potentially exculpatory evidence may influence the release or detention decision, as well as the number and type of conditions imposed on release, because the court must consider, among other factors, "the nature and circumstances of the offense charged" and "the weight of the evidence against the person."[29] In addition to the required warning under Rule 5(f)(1), consider asking the government at the initial appearance, and at the detention hearing if there is one, if it currently possesses any exculpatory evidence or impeachment information relevant to release or detention.[30]

26. *Id.*

27. See section 5.06: Duty to Disclose Information Favorable to Defendant, *infra*, for a discussion of *Brady* and *Giglio v. United States*, 405 U.S. 150 (1972).

28. Pub. L. No. 116-182, § 2, 134 Stat. 894 (Oct. 21, 2020).

29. 18 U.S.C. § 3142(g)(1), (2). *See also* Justice Manual, *supra* note 10, at § 9-5.001(C)(1), (D)(1):

> Department policy recognizes that a fair trial will often include examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, result in an acquittal . . . A prosecutor must disclose information that is inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense, regardless of whether the prosecutor believes such information will make the difference between conviction and acquittal of the defendant for a charged crime. . . . Exculpatory information must be disclosed reasonably promptly after it is discovered.

30. *See* section 5.06, *infra*, at C.5 (discussing supervisory authority of the district court to order the disclosure of *Brady* evidence). After a detention hearing, such evidence could also provide "information . . . that was not known to the [defendant] at the time of the [detention] hearing" that would allow for the reopening of a detention hearing under § 3142(f).

# II. Initial Appearance Hearing Requirements

The initial appearance hearing requirements in Fed. R. Crim. P. 5 set forth the procedure that judges must follow and the information that must be conveyed to a defendant during that court proceeding. There are several important steps involved, and the assistance of counsel throughout the initial appearance hearing is especially crucial. If a defendant is not represented by counsel at the beginning of the hearing and the defendant is entitled to appointed counsel, see section I.A, *supra*, the court should appoint counsel before proceeding further, and certainly before the issue of pretrial release or detention arises. See section 1.02: Appointment of Counsel or Pro Se Representation, *infra*.

## *A. Appearance After Arrest*

1. A defendant must be taken "without unnecessary delay" before a magistrate judge, including those arrested outside of the United States. Fed. R. Crim. P. 5(a)(1). However, if a magistrate judge is not available and the arrest was made in the district where the offense was allegedly committed, the initial appearance may take place before a state or local judicial officer in that district. Fed. R. Crim. P. 5(c)(1).
2. If the arrest was made without a warrant, require that a complaint be prepared and filed pursuant to Fed. R. Crim. P. 3 and 4.
3. For an offense committed in a different district than where the defendant was arrested, see section 1.04: Offense Committed in Another District, *infra*.
4. For the transfer of an arrested individual from the district of arrest to the district where the alleged offense was committed, see section 1.05: Commitment to Another District (Removal Proceedings), *infra*.
5. If the defendant was extradited to the United States, the initial appearance must take place in the district, or one of the districts, where the offense was charged. Fed. R. Crim. P. 5(c)(4).
6. If the person is before the court for violating probation or supervised release, see Fed. R. Crim. P. 32.1. Fed. R. Crim. P. 5(a)(2)(B).
7. The initial appearance hearing may be conducted by video teleconference if the defendant consents. Fed. R. Crim. P. 5(g). Although not required by the Rule, it is a best practice to give the defendant an opportunity to confer with defense counsel in deciding whether to consent.
8. If you have any doubts about the defendant's ability to speak and understand English at any time during the hearing, consider appointing a certified interpreter in accordance with 28 U.S.C. § 1827.

## *B. Procedure in a Felony Case*

The court must inform the defendant:

1. of the nature of the complaint against the defendant and of any affidavit filed therewith;

2. of the defendant's right to retain counsel or to request that counsel be appointed if the defendant cannot obtain counsel (see *infra* section 1.02: Appointment of Counsel or Pro Se Representation);[31]
3. that the court must allow reasonable opportunity for the defendant to consult with counsel during the hearing;
4. of the defendant's right, if any, to a preliminary hearing (Fed. R. Crim. P. 5(d)(1)(D) and 5.1; 18 U.S.C. § 3060);[32]
5. of the circumstances, if any, under which the defendant may secure pretrial release (see *infra* section III, Defendant Entitled to Release Unless a Detention Hearing Is Authorized);[33]
6. of the defendant's right not to make a statement, and that any statement made may be used against the defendant; and
7. that a defendant who is not a citizen of the United States may request that the consular office of defendant's country of nationality be notified of the defendant's arrest, and that treaty obligations may require such notification even without a request by the defendant.

Fed. R. Crim. P. 5(d)(1)–(2).

## *C. Procedure in a Misdemeanor Case*

The initial appearance hearing procedure is similar to that in a felony case. See Fed. R. Crim. P. 58(b)(2). The defendant must be informed of the charge, the minimum and maximum penalties, and possible restitution; the right to counsel; the right to trial, judgment, and sentencing before a district judge unless they consent to trial, judgment, and sentencing before a magistrate judge; the right to a jury trial; the possible right to a preliminary hearing under Fed. R. Crim. P. 5.1; the circumstances under which the defendant may secure pretrial release; and the right to consular notification.

For how to proceed in a misdemeanor case, see Procedures Manual for United States Magistrate Judges, § 5: Initial Appearances 13–15 (2014), https://jnet.ao.dcn/sites/default/files/pdf/Section5-Initial-Appearance-Final-March-2014_20140320.pdf.

## *D. Temporary Detention*

1. Under 18 U.S.C. § 3142(d), the government may move for temporary detention to permit the revocation of conditional release, deportation, or exclusion. Detention shall be ordered if the court finds that

   (1) such person—

   (A) is, and was at the time the offense was committed, on—

   (i) release pending trial for a felony under Federal, State, or local law;

31. *See also* 18 U.S.C. § 3599 (appointment of counsel in death penalty cases); section 3.01: Death Penalty Procedures, *infra*.

32. If the defendant waives the right to a preliminary hearing, see Form AO 468.

33. For release or detention of a material witness, see 18 U.S.C. § 3144.

(ii) release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any offense under Federal, State, or local law; or

(iii) probation or parole for any offense under Federal, State, or local law; or

(B) is not a citizen of the United States or lawfully admitted for permanent residence, as defined in § 101(a)(20) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(20)); and

(2) such person may flee or pose a danger to any other person or the community.

2. Require the government to state the factual basis for the motion. Allow the defendant reasonable opportunity to respond. When detention is sought under § 3142(d)(1)(B), the burden is on the defendant to prove U.S. citizenship or permanent residence status.
3. If the defendant fits within one or more of the categories in § 3142(d)(1), the court must then determine whether the defendant "may flee or pose a danger to any other person or the community" under subsection (2). After the government has presented evidence regarding whether the defendant "may flee or pose a danger," allow the defendant to present evidence on this issue as well. If available, review the pretrial services report before reaching a decision.[34]

   If the court, after the hearing, determines that the defendant "may flee or pose a danger," detention is mandatory. *If not*, the person cannot be temporarily detained under § 3142(d), is entitled to the full initial appearance hearing procedure under Rule 5, and the court must follow the applicable release or detention provisions and procedures of § 3142. The defendant may be detained for a detention hearing on the current charge(s), but only if the grounds for such a hearing under § 3142(f) are met.[35]

4. When the requirements of § 3142(d)(1) *and* (2) are satisfied, the court shall order that the defendant be detained for "not more than ten days" (excluding weekends and holidays) to allow the government time to notify the appropriate authority and for that authority to take custody of the defendant or other action.[36] See Form AO 471, Order to Detain a Defendant Temporarily Under 18 U.S.C. § 3142(d).
5. When temporary detention is ordered, the government must notify the appropriate court, probation or parole official, state or local law enforcement official, or U.S. Immigration and Customs Enforcement official.

34. Subsection (d) does not specify an evidentiary standard for this finding: "Obviously, the statute requires the government to show more than a theoretical possibility of flight or danger. It does not specify, however, the quantum of proof required." Weinberg & Furse, *supra* note 11, at 12. *See also* United States v. Alatishe, 768 F.2d 364, 370 (D.C. Cir. 1985) (noting that "unlike subsection (e) detention, the decision to temporarily detain a defendant need not be supported by clear and convincing evidence," but not stating what the standard is).

35. Note that, although defendants who are subject to a detention hearing under § 3142(f) are sometimes referred to as "temporarily detained" during a continuance, that is not the same. "Temporary detention" for up to ten days may only be ordered under the provisions of § 3142(d).

36. Although temporary detention may be up to ten days, the court should order detention for the minimum time needed. *See* S. Rep. No. 98-225, at 17 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182 ("The ten-day period is intended to give the government time to contact the appropriate court, probation, or parole official, or immigration official and to provide *the minimal time necessary* for such official to take whatever action on the existing conditional release that official deems appropriate.") (emphasis added).

6. If the appropriate official declines to take custody of the defendant during the period of temporary detention, the defendant must be treated in accordance with the other parts of § 3142, although other provisions of law governing release pending trial, deportation, or exclusion may also apply.
7. Immediately after the period of temporary detention expires, an initial appearance hearing should occur. At that initial appearance hearing, the court cannot detain the defendant pending a subsequent detention hearing unless the government meets the requirements for a hearing in § 3142(f)(1) or (2). See section III, *infra*. Consider setting a provisional date for an initial appearance hearing in case the appropriate official does not take custody of the defendant within the period of temporary detention.
8. Note that temporary detention under § 3142(d)(1)(B) is the only place in § 3142 that treats noncitizen defendants differently. Noncitizen defendants who are otherwise subject to pretrial release or detention under the other subsections are entitled to the same individualized assessment regarding safety and appearance as citizens.[37]

See also Jefri Wood, *The Bail Reform Act of 1984* 41–43 (Federal Judicial Center, 4th ed. 2022).

# III. Release at Initial Appearance Unless a Detention Hearing Is Authorized

## *A. General Requirements and Procedure*

During the initial appearance hearing, the court must "detain or release the defendant as provided by statute or these rules." Fed. R. Crim. P. 5(d)(3). The court must follow the procedures and standards governing release or detention before trial set forth in 18 U.S.C. § 3142. There are four possible outcomes:

1. Pursuant to § 3142(b) and (c), the court must release the defendant at the conclusion of the initial appearance hearing if there is no motion for a detention hearing or if such a motion is made and denied. See *infra* section III.C and section 1.03: Release or Detention Pending Trial at II, Release: Procedure and Requirements.
2. The court may order the temporary detention of the defendant for up to ten days if the requirements of § 3142(d) are met. See section II.D, *supra*.
3. If a motion for a detention hearing under § 3142(f) is granted, or the court orders a detention hearing on its own motion under § 3142(f)(2), the court shall hold a detention

37. *See* Bail Reform Act, 4th ed., *supra* note 11, at 25 & n.111 (citing cases indicating immigration status by itself is not a basis for detention); United States v. Soriano Nunez, 928 F.3d 240, 244–45 (3d Cir. 2019) ("Other than during this temporary detention period, individuals on release arising from other offenses and non-citizens are treated the same as other pretrial criminal defendants under the BRA."); United States v. Ailon-Ailon, 875 F.3d 1334, 1338 (10th Cir. 2017) ("The Bail Reform Act directs courts to consider a number of factors and make pre-trial detention decisions as to removable aliens 'on a case-by-case basis.'") (citation omitted); United States v. Santos-Flores, 794 F.3d 1088, 1090 (9th Cir. 2015) ("Congress chose not to exclude removable aliens from consideration for release or detention in criminal proceedings."). *See also* Michael Neal, *Zero Tolerance for Pretrial Release of Undocumented Immigrants*, 30 B.U. Pub. Int. L. J. 1, 12–13 (2021):

> [T]he BRA's sole reference to undocumented immigrants is a provision discussing temporary detention of certain noncitizens. . . . [I]f immigration authorities transfer custody of an undocumented immigrant for criminal prosecution or file a detainer, the temporary detention provision does not apply, and courts must apply the BRA as they would to a citizen.

hearing immediately *following* the initial appearance hearing unless a motion for a continuance is granted. The court must decide the motion for a detention hearing at the initial appearance. A continuance pursuant to § 3142(f) is permitted only if the motion for a detention hearing was granted at the initial appearance hearing and only to allow the party requesting the continuance time to prepare for the detention hearing. There is no provision in the statute or rule that permits a continuance for the court to decide the motion for a detention hearing *after* the initial appearance. The defendant cannot be detained once the initial appearance has ended unless the motion for a detention hearing and then a motion for a continuance were both granted.[38]

4. If the defendant chooses to consent to pretrial detention after a motion for a detention hearing has been granted, the court may order the defendant to be detained until trial or until a detention hearing may be held.[39]

## *B. Motion for a Detention Hearing at the Initial Appearance*

The decision to order pretrial detention involves two distinct steps in two separate hearings. The first step, during the initial appearance hearing, is a motion for a detention hearing under § 3142(f). The second step is the detention hearing itself, but only if the motion for the hearing is granted.

Under the Bail Reform Act of 1984, a defendant must be released before trial at the initial appearance unless the government moves for a detention hearing under 18 U.S.C. § 3142(f)(1) or (2) and the motion is granted. The court may also move for detention *sua sponte* under subsection (f)(2). The initial appearance hearing is governed by Fed. R. Crim. P. 5. Although the *motion* for a detention hearing usually occurs during the initial appearance hearing, the detention hearing itself is a separate and distinct hearing under § 3142 with its own specific procedural requirements, factors to consider, evidentiary standards, and burdens of proof.

The motion for a detention hearing must not be granted automatically. A detention hearing may be held *only* if the government establishes that at least one of the circumstances listed in

38. A continuance after the initial appearance and before a detention hearing, during which the defendant "shall be detained," is authorized by § 3142(f) only *after* the motion requesting a detention hearing has been granted. Unless that motion is granted, there is no authority, in Rule 5 or elsewhere, for a continuance with the defendant remaining in detention once the initial appearance hearing has ended.

39. The Bail Reform Act neither authorizes nor prohibits a defendant's consent to pretrial detention. Due to a lack of statutory instruction and conflicting case law, the *Benchbook* Committee neither endorses nor discourages the practice. However, as with any issue concerning pretrial release or detention, defendants must be provided with the opportunity to consult with counsel. For a discussion of this issue, see Bail Reform Act, 4th ed., *supra* note 11, at 33–34, and Weinberg & Furse, *supra* note 11, at § 6:5.6, 6:5.10 (even if the defendant consents to detention, "the magistrate judge should assure that the record is adequate, requiring government counsel to present evidence and/or proffer and admit into evidence the pretrial services report. The court should then enter an order that fully complies with section 3142(i).").

§ 3142(f)(1) or (2) applies to the defendant.[40] Those § 3142(f) circumstances also limit the types of cases in which a court may order pretrial detention at all.[41]

The motion for a detention hearing is usually made at the initial appearance hearing, and the defendant should have counsel by this time unless that right was knowingly and voluntarily waived. See section I.A: Appointment of Counsel, *supra*. A motion for detention should never be heard or decided unless the defendant has been afforded the opportunity to consult with counsel.

1. For a motion under § 3142(f)(1), the government must allege that the offense involves:

   (A) a crime of violence or an offense under 18 U.S.C. § 1591 or § 2332b(g)(5)(B) with a statutory maximum term of ten or more years;

   (B) an offense with a maximum sentence of life imprisonment or death;

   (C) certain controlled substance offenses carrying a maximum sentence of ten years or more;

   (D) any felony if the defendant was previously convicted of two or more of the above offenses, two similar state or local offenses, or a combination of such offenses;

   (E) any felony not otherwise a crime of violence that involves a minor victim, the possession or use of a firearm or destructive device (as defined in 18 U.S.C. § 921) or any other dangerous weapon, or failure to register as a sex offender under 18 U.S.C. § 2250.

   If the defendant's alleged offense is not one of those listed in § 3142(f)(1)(A)–(C) or (E), or the defendant does not have prior offenses that fall under subsection (D), there is no authority to hold a detention hearing under § 3142(f)(1) and the defendant must be released unless a detention hearing is authorized under § 3142(f)(2).

2. For a § 3142(f)(2) motion, the government or court must show that there is:

   (A) a serious risk that the defendant will flee; or

   (B) a serious risk that the defendant will obstruct or attempt to obstruct justice, or will threaten, injure, intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

40. *See* United States v. Watkins, 940 F.3d 152, 158 (2d Cir. 2019) ("the Government must establish by a preponderance of the evidence that it is entitled to a detention hearing"); *Ailon-Ailon*, 875 F.3d at 1336 ("The Act establishes a two-step process for detaining an individual before trial."); United States v. Twine, 344 F.3d 987, 987 (9th Cir. 2003) (per curiam) (cannot order detention "based solely on a finding of dangerousness" unless at least one condition listed in § 3142(f)(1) or (2) is present); United States v. Singleton, 182 F.3d 7, 9 (D.C. Cir. 1999) ("Absent one of the[] circumstances [listed in § 3142(f)], detention is not an option."). *See also* U.S. Dep't of Just., Criminal Resource Manual, ch. 26 at 5–6 ("the government must first prove one or more of the grounds listed in 3142(f)(1) or (2) *as a prerequisite* to the court considering the factor of danger to the community") (emphasis in original).

41. *See* S. Rep. No. 98-225 at 20 ("the requisite circumstances for invoking a detention hearing in effect serve to limit the types of cases in which detention may be ordered prior to trial"); United States v. Salerno, 481 U.S. 739, 747 (1987) (citing § 3142(f): "The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes."); United States v. Byrd, 969 F.2d 106, 110 (5th Cir. 1992) (detention order vacated because charged offense was not covered by § 3142(f)); United States v. Ploof, 851 F.2d 7, 11 (1st Cir. 1988) (evidence of defendant's plans to kill someone did not justify detention when charged offenses involved white-collar crimes not covered by § 3142(f)(1)); United States v. Friedman, 837 F.2d 48, 49 (2d Cir. 1988) (per curiam) ("motion seeking [pretrial] detention is permitted only when the charge is for certain enumerated crimes, . . . or when there is a serious risk that the defendant will flee, or obstruct or attempt to obstruct justice"); United States v. Himler, 797 F.2d 156, 160 (3d Cir. 1986) (defendant charged with false identification could not be detained absent proof of serious risk of flight).

3. If the motion for detention fails to allege at least one of the factors in subsection (f)(1) or (2), the motion must be denied and the defendant must be released. Note that allegations of "dangerousness" or "danger to the community" do not authorize a detention hearing.[42] Danger is a factor to consider during a detention hearing but is not a factor in the decision to hold a hearing under § 3142(f) except for a "serious risk" that the defendant will "threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate" a witness or juror under § 3142(f)(2).
4. The court should verify the validity of any factors that are the basis of a motion for detention. For the § 3142(f)(1) factors, an indictment is sufficient evidence.[43] For factors under subsection (2), the motion must allege that the risk presented by this particular defendant is "serious" and be supported by specific evidence of the risk involved. It is not sufficient to claim an ordinary risk that the defendant, or defendants in general who are charged with a similar offense or offenses, will flee, potentially obstruct justice, or harm a prospective witness or juror. See *Bail Reform Act, 4th ed.* at 20.
5. Before the court moves for a detention hearing under § 3142(f)(2) when the government has not, it should consider asking the government why it chose not to move for detention.[44] Because the decision to hold a detention hearing may be subject to appeal or review, to facilitate such review the court should state on the record its reasons for making a motion under section § 3142(f)(2).
6. Allow reasonable time for the defendant to consult with counsel and respond to the motion.
7. If the motion for a detention hearing is declined, the defendant must be released. See II, Procedure and Requirements for Release, *supra*.
8. If the motion for detention is granted at the initial appearance hearing, the detention hearing "shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance." 18 U.S.C. § 3142(f).
9. If the defendant or the government moves for a continuance, set a date for the detention hearing.[45] Note that a continuance may only be granted if the motion for a detention hearing is granted. Section 3142(f) authorizes a continuance in order to allow adequate time to prepare for the detention hearing and not, for example, to allow more time to decide whether to move for detention in the first place.[46]

42. *See* Bail Reform Act, 4th ed., *supra* note 11, at 20–21. *See also* Criminal Resource Manual, *supra* note 40, at 5 (under "Cases Which Qualify for Detention Hearings," stating that "the government may not request a detention hearing only on the allegations of danger to the community or another person").

43. If there is no indictment, the government must first establish probable cause in the same manner as at a preliminary hearing.

44. *See, e.g.*, Justice Manual, *supra* note 10, at § 9-6.100 (cautioning that in some cases "detention is not warranted . . . merely because the Bail Reform Act permits such an argument to be made or presumes that detention, based on the charges, is appropriate (as it does for many drug charges, *see* 18 U.S.C. § 3142(e)(3))"—the prosecutor should weigh "all the facts and circumstances, including but not limited to what charges or violations a defendant presently faces, and the strength of the evidence in support of those charges or violations").

45. *See* Form AO 470, Order Scheduling a Detention Hearing.

46. *See* Justice Manual, *supra* note 10, at § 9-6.110 ("Continuances Pending Detention Hearings: While prosecutors can and should invoke this provision in certain cases, they should do so only after a consideration of case- and defendant-specific facts and circumstances, including whether detention appears warranted and such a continuance is reasonably necessary.").

> Under 18 U.S.C. § 3142(f), "[e]xcept for good cause," a continuance may not exceed five days if requested by the defendant, three days if requested by the government (weekends and holidays not included). The defendant is detained for that time, so the continuance should be no longer than needed for the moving party to prepare for the hearing.[47] The court has discretion to grant a shorter continuance than requested,[48] and any motion for a "good cause" continuance beyond the time limits should be closely scrutinized by the court.

See also Jefri Wood, *The Bail Reform Act of 1984* 32–33 (Federal Judicial Center, 4th ed. 2022) (discussing continuances).

During a continuance, upon motion of the government or sua sponte by the court, the court may order that a defendant who is in custody and "appears to be a narcotics addict" be given a medical examination to determine whether the defendant is an addict. 18 U.S.C. § 3142(f).

## C. Conditions of Release

If temporary detention under § 3142(d) does not apply, and either the government does not move for detention at the initial appearance or there are no valid grounds under § 3142(f)(1) or (2) for holding a detention hearing, the defendant *must* be released at the conclusion of the initial appearance. Under § 3142(b), a defendant may be released on personal recognizance or unsecured appearance bond unless the court finds "that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." In that case, the court "shall order the pretrial release of the person . . . subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person and the safety of any other person and the community." 18 U.S.C. § 3142(c)(1)(B). Under either subsection (b) or (c), defendants are subject to the mandatory condition that they not commit a federal, state, or local crime while on release, and they must provide a DNA sample if that is authorized under 34 U.S.C. § 40702 (formerly 42 U.S.C. § 14135a).

For the procedure involved with the release of a defendant, see section 1.03: Release or Detention Pending Trial, *infra*.

## D. Preliminary Hearing

If the defendant is entitled to a preliminary hearing, schedule the hearing to be held no later than fourteen days after the initial appearance if the defendant is detained, or twenty-one days if the defendant is released. Fed. R. Crim. P. 5.1(c). For preliminary hearing procedure, see Procedures Manual for United States Magistrate Judges, § 8: Preliminary Hearings (2016), https://jnet.ao.dcn/court-services/judges-corner/magistrate-judges/procedures-manual-united-states-magistrate-judges/preliminary-hearings, and Jonathan W. Feldman, *The Fundamentals of Criminal Pretrial Practice in the Federal Courts* 25–26 (2015), https://fjc.dcn/sites/default/files/materials/17/2107-V10_Mag_Judge_Criminal_Pretrial Practice_rev_2015.pdf.

47. *Id.*:

> Prosecutors should endeavor, where practicable in light of all facts and circumstances, and consistent with district and judicial procedure and practice, to proceed to a detention hearing reasonably soon after a defendant's arrest, and where feasible and appropriate, be ready to proceed more quickly than the three days permitted in certain cases under the Bail Reform Act.

48. Consider that, because weekends and holidays are excluded from the time limits, if a continuance will extend over a weekend and/or holiday, a five-day continuance could be as long as eight days, and a three-day continuance up to six days.

# IV. Suggested Colloquy[49]

[Note: If in doubt about the defendant's English language ability, consult with defense counsel. Obtain an interpreter if needed. 28 U.S.C. § 1827.]

## *A. Explain the Nature of the Proceedings*

The purpose of this hearing is to

1. advise you of some of your rights;
2. ask how you intend to proceed with counsel in this case;
3. inform you of the substance of the charges pending against you;
4. set some further hearings in your case; and
5. determine how we will proceed on the question of whether you will be released on bond or detained in custody while your case is pending.

## *B. Right to Counsel*

- You have a right to retain counsel or to request that counsel be appointed if you cannot obtain counsel.
- Do you have an attorney?

[If an attorney is present, ask if the attorney is making a general or special appearance; otherwise set for identification hearing.]

[If an attorney is not present, ask the Defendant:]

- Do you intend to hire an attorney, or are you requesting that the Court appoint an attorney for you because you cannot afford or obtain one?

If the defendant cannot afford or is unable to find an attorney, see section 1.02: Appointment of Counsel or Pro Se Representation, *infra*, for appointment of counsel procedure.

If a conflict arises: Have the Federal Public Defender appear specially, then set a date for a hearing on identification of counsel.

Do not proceed further with the initial appearance hearing unless the defendant has the assistance of counsel or, after being advised of the consequences, has chosen to waive the right to counsel and to proceed pro se. See section 1.02: Appointment of Counsel or Pro Se Representation, *infra*, at C, for the warnings to be given to a defendant who does not want counsel.

49. Developed in part from the colloquy in the Procedures Manual for United States Magistrate Judges, Section 5: Initial Appearances (2014), https://jnet.ao.dcn/sites/default/files/pdf/Section5-Initial-Appearance-Final-March-2014_20140320.pdf. Note: this colloquy is for felony cases. For misdemeanors, see the colloquy in the Procedures Manual at 13–15.

## *C. Other Rights*

- If you have been charged by an information rather than an indictment, you may have the right to a preliminary hearing to determine whether there is probable cause to believe that you have committed the offense you have been charged with. You also have the right to waive prosecution by indictment and allow the prosecution to proceed based on the information.
- You may be entitled to be released before trial. That may happen at the end of this hearing or, if a motion for a detention hearing is granted, whether you are released or detained will be determined at that hearing.
- If you are not a United States citizen, you may request that the government notify a consular officer from your country of nationality that you have been arrested. Even without your request, such notification is required for some countries.

## *D. Advisement of Nature of Charges*

### 1. On an Indictment

- A Grand Jury has returned an indictment against you charging you with certain offenses. Have you received a copy of the Indictment in this case?

*To the Assistant United States Attorney (AUSA):*

- Please summarize the charges.

May proceed to arraignment if counsel is already appointed or wait as circumstances dictate. See Fed. R. Crim. P. 10. If proceeding immediately to arraignment, see section 1.07: Arraignment and Plea, *infra*.

### 2. On a Felony Information

- Do you have a copy of the information?
- The United States Attorney has charged you in an information with certain felony offenses.

*To the AUSA:*

- Please summarize the charges and the penalties.

*To the Defendant:*

- Do you understand the charges against you and the maximum penalties you face?

[If yes, generally would proceed to waiver of indictment under Fed. R. Crim. P. 7(b) and to arraignment. See section 1.06: Waiver of Indictment, and section 1.07: Arraignment and Plea, *infra*.]

- You have the constitutional right to be charged by indictment by a grand jury.
- Here, the United States Attorney has filed something called an information, which is a notice of the charges against you.
- Because you are charged with a felony offense, you can only be charged by information if you waive your constitutional right to an indictment.
- An indictment is when a Grand Jury hears evidence about the alleged offenses and returns an indictment finding probable cause that you committed the alleged crimes.
- A Grand Jury consists of twenty-three persons; sixteen must be present to hear the case. At least twelve must find probable cause in order for you to be indicted.
- A Grand Jury may or may not indict you.
- If you waive indictment by a Grand Jury, the case proceeds against you by the U.S. Attorney's information just as though you had been indicted.
- Have you discussed your right to indictment by the Grand Jury with your attorney?
- Do you understand your right to indictment by the Grand Jury?
- Have any threats or promises been made to induce you to waive indictment?
- Do you wish to waive your right to indictment by the Grand Jury?
- Counsel, is there any reason the defendant should not waive indictment?

Have the defendant sign the waiver of indictment (or, if already signed, verify that it is the defendant's signature).

Find that the waiver of indictment has been knowingly and voluntarily made by the defendant, accept the waiver, and let the record reflect that the defendant has waived indictment.

If the defendant does not waive indictment, schedule a preliminary hearing.

### 3. Release or Detention

*To the AUSA:*

- Is the government requesting a detention hearing?

[If yes, ask the government:]

- What is your basis for requesting a detention hearing?

The only permissible bases for requesting a detention hearing are set forth in 18 U.S.C. § 3142(f)(1) and (f)(2). If the government seeks a detention hearing based upon subsection (f)(1), confirm that the offense charged falls within (f)(1). If the basis for requesting a detention hearing is subsection (f)(2), ask the government to provide a factual basis for the request and give defense counsel an opportunity to respond and/or present evidence as well. If the government fails to meet its burden under (f)(1) or (f)(2), release the defendant pursuant to § 3142(b) or (c) at the conclusion of the initial appearance.

- If the government moves for a detention hearing, ask if defense counsel agrees. If not, allow counsel to argue against holding a detention hearing.
- If the court finds that a detention hearing is warranted under § 3142(f), remind the parties that a detention hearing "shall be held immediately upon the person's first appearance" unless either party seeks a continuance. If one party seeks a continuance, set the date for the detention hearing. See Form AO 470. Except for good cause, a continuance may not exceed three days when sought by the government, or five days if sought by the defendant (excluding weekends and holidays). 18 U.S.C. § 3142(f).
- If a detention hearing is not sought or the government's motion to hold a detention hearing is denied, determine the conditions of release under § 3142(b) or (c). Go to section 1.03: Release or Detention Pending Trial, *infra*, at II, Release: Procedure and Requirements.
- Remand the defendant to the custody of the United States Marshal or refer for processing if the defendant is to be released.

### 4. Setting Further Dates

1. A preliminary hearing must be held within a "reasonable time" but no more than fourteen days after the initial appearance hearing if the defendant is in custody or twenty-one days if not in custody. Fed. R. Crim. P. 5.1(c). The time may be extended (1) with the defendant's consent and a showing of good cause, or (2) without the defendant's consent only on a showing of extraordinary circumstances and that justice requires the delay. Fed. R. Crim. P. 5.1(d).
2. If the defendant is indicted and has counsel, or was charged by information and has waived indictment, ask if the defendant is ready to proceed to arraignment. If not, schedule the arraignment.
3. If the defendant will be out of custody, order the defendant to appear when scheduled and to report to the United States Marshal for processing.

## Appendix A

### *"Without unnecessary delay"*

If there was a confession or other self-incriminating statement made by the defendant after arrest, 18 U.S.C. § 3501(c) governs whether such evidence is admissible or must be suppressed. Such statements

> shall not be inadmissible solely because of delay in bringing such person before a magistrate judge or other officer . . . if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay . . . beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate judge or other officer.

This "six-hour rule" of § 3501(c) was held by the Supreme Court to not prohibit the admission of a confession or other incriminating statements that were made voluntarily within six hours of arrest; for statements made beyond six hours, "the court must decide whether delaying that long was unreasonable or unnecessary . . . , and if it was, the confession is to be suppressed."[50]

Note that, under 18 U.S.C. § 3501(d), any such confession is not barred from admission by § 3501 if it was "made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or any other detention."

# Appendix B

## *Timely Appointment of Counsel*

Federal law requires not just the appointment of counsel, but the *timely* appointment of counsel to ensure that all defendants, at a minimum, have the assistance of counsel from the start of their initial appearance hearing, for the duration of that hearing, and during any detention hearing that may follow.[51] To assist courts in meeting this mandate, 18 U.S.C. § 3006A(a) requires every district to have a plan for providing representation to defendants who cannot afford it, and the Criminal Justice Act Guidelines provide a Model Plan as a guide.[52] The Plan directs that:

> Counsel must be provided to eligible persons as soon as feasible in the following circumstances, whichever occurs earliest:
>
> 1. after they are taken into custody;
> 2. when they appear before a magistrate or district court judge;
> 3. when they are formally charged or notified of charges if formal charges are sealed; or
> 4. when a magistrate or district court judge otherwise considers appointment of counsel appropriate under the CJA and related statutes.[53]

The Model Plan also advises that "[w]hen practicable, unless the right to counsel is waived or the defendant otherwise consents to a pretrial service interview without counsel, financially eligible defendants will be provided appointed counsel prior to being interviewed by a pretrial services officer."[54] To facilitate this,

50. Corley v. United States, 556 U.S. 303, 322 (2009). *See also* United States v. Boche-Perez, 755 F.3d 327, 337–38 (5th Cir. 2014) (giving examples of reasonable and unreasonable delays, concluding: "The overall reasonableness of a delay will vary city-to-city, case-to-case, justification-to-justification."); 1 Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Crim. § 74 (5th ed. April 2023 update) (discussing cases).

51. *See* Joint Memorandum, *supra* note 10:

> The Criminal Justice Act (CJA), 18 U.S.C. § 3006A, the Federal Rules of Criminal Procedure, and Judicial Conference policy require courts to provide access to counsel for individuals accused of crimes at the earliest opportunity. . . . Courts that do not currently ensure that every defendant has active representation by counsel during the initial appearance must comply with the governing statute and rules.

*See also* Bail Reform Act, 4th ed., *supra* note 11, at 44 ("defendants should have counsel from the start of the initial appearance, well before a detention hearing occurs"); 18 U.S.C. § 3142(f) (at a detention hearing the defendant "has the right to be represented by counsel" and to have one appointed "if financially unable to obtain adequate representation").

52. *See* Guide to Judiciary Policy, *supra* note 13, at app. 2A: Model Plan for Implementation and Administration of the Criminal Justice Act.

53. *Id.* at § V.A.

54. *Id.* at § V.C.

> [s]ome courts make use of an "on call" or "duty day" attorney for this purpose. A CJA panel attorney or attorneys may be appointed to be on call to advise persons who are in custody, or who otherwise may be entitled to counsel under the CJA, during the pretrial service interview process.[55]

The Plan emphasizes the importance of providing counsel before defendants are interviewed, stating that pretrial services officers should "not conduct the pretrial service interview of a financially eligible defendant until counsel has been appointed, unless the right to counsel is waived or the defendant otherwise consents to a pretrial service interview without counsel." The Plan further states that, after counsel has been appointed, "the pretrial services officer will provide counsel notice and a reasonable opportunity to attend any interview of the defendant by the pretrial services officer prior to the initial pretrial release or detention hearing."[56]

To comply with the CJA's Model Plan, consider such practices as:

> (1) prompt notification of a new arrest;
>
> (2) opportunity for counsel to assist with completion of the financial affidavit;
>
> (3) notice to counsel of the pretrial services interview and a reasonable opportunity to meet with the defendant prior to the pretrial services interview, and
>
> (4) presence of counsel at the pretrial services interview or, when counsel is not present, a prohibition against questions regarding the alleged offense or the defendant's drug use, immigration status, gang affiliation, or criminal history.[57]

Such practices advance the goals of the Criminal Justice Act, protect defendants' constitutional rights, better enable them to navigate the complexities of criminal prosecution, and provide other benefits:

> Experience and research show that timely appointment of counsel can help achieve appropriate pretrial release, ensure the receipt of appropriate treatment services, facilitate early diversion out of the criminal justice system when appropriate, help the defendant maintain employment, and, in general, limit the disruptive impact of a prosecution on a defendant and his family. Research also shows that pretrial release increases the chance that a defendant will receive a shorter sentence and lowers the likelihood of recidivism. Implementation of this strategy will promote the efficient use of judicial and executive resources through fewer defendant transports, elimination of duplicate hearings, and reduction of unnecessary detention between hearings.[58]

Note that the CJA Guidelines apply to "the providers of services under the CJA and related statutes, federal courts, judiciary personnel, and all others responsible for the operation of any aspect of the Defender Services program," and each district's CJA Plan must "ensure compliance with applicable statutory authorities, CJA Guidelines, and other relevant Judicial Conference policies."[59]

55. *Id.* at 11, Defender Services Committee Comment.

56. *Id.* at § IV.B.1.d. *See also* Feldman, *supra* note 19, at 14:

> [A]nother tension during pretrial is the risk that the defendant may unwittingly incriminate himself or herself. . . . Thus, if an attorney is not present during the pretrial interview, the officer conducting the interview is required to explain to the defendant the right to counsel and give the defendant the option of delaying the interview until counsel can be present.

57. Extracts from The Outline of the Defender Services Program Strategic Plan: Mission, Goals, Strategies 1–2 (2023), https://jnet.ao.dcn/sites/default/files/pdf/Defender_Services_Program_Mission_Goals_Strategies_January_2023.pdf.

58. *Id.* at 2.

59. Guide to Judiciary Policy, *supra* note 13, at §§ 130, 210.10(e).

For further information on the Criminal Justice Act recommendations in *The Cardone Report*, see Margaret S. Williams et al., Federal Judicial Center, *Evaluation of the Interim Recommendations from the Cardone Report* (2023), https://fjc.dcn/content/380873/evaluation-interim-recommendations-cardone-report; *Please Proceed—Chairing the Committee to Review the Criminal Justice Act (CJA) with Judge Kathleen Cardone, W.D. Tex.* (Federal Judicial Center Feb. 5, 2021) (16-minute discussion of the Committee's key findings and tools judges can use for informed decision making, https://fjc.dcn/content/350225/please-proceed-chairing-a-judicial-conference-committee-with-judge-kathleen-cardone; *Court Web: An Update on the Cardone Report After the 60th Anniversary of the CJA* (Federal Judicial Center Sept. 25, 2024) (discussion of the interim recommendations, their implementation, the evaluation of the implementation, and resources for continued improvement), https://fjc.dcn/content/388452/court-web-update-cardone-report-after-60th-anniversary-cja.

# Appendix C

## *The Right to Consular Notification*

For detailed guidance relating to the arrest and detention of foreign nationals, see United States Department of State, *Consular Notification and Access: Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them*, https://travel.state.gov/content/dam/travel/CNA-trainingresources/CNA Manual 5th Edition_September 2018.pdf. Regarding the "responsibility of judicial officials for notification of arrests and detentions," the CNA Manual states:

> The Department of State requests that judicial officials who preside over arraignments or other initial court appearances of foreign nationals inquire at that time whether consular notification procedures have been followed as required by the [Vienna Convention on Consular Relations] and any applicable bilateral agreement providing for mandatory notification. . . . Such inquiries will help promote compliance with consular notification procedures, facilitate the provision of consular assistance by foreign governments to their nationals, and ensure that consular notification compliance does not become an issue in litigation.

The State Department also provides a web page, *What is Consular Notification and Access?*, which provides basic information and links to various aspects of consular notification procedures.[60] One of the links is to a reference card that provides "Suggested Statements to Arrested or Detained Foreign Nationals" that courts may use if needed:

> **For All Foreign Nationals Except Those from "Mandatory Notification" Countries**
>
> As a non-U.S. citizen who is being arrested or detained, you may request that we notify your country's consular officers here in the United States of your situation. You may also communicate with your consular officers. A consular officer may be able to help you obtain legal representation, and may contact your family and visit you in detention, among other things. If you want us to notify your consular officers, you can request this notification now, or at any time in the future. Do you want us to notify your consular officers at this time?
>
> **For Foreign Nationals from "Mandatory Notification" Countries**
>
> Because of your nationality, we are required to notify your country's consular officers here in the United States that you have been arrested or detained. We will do this as soon

60. https://travel.state.gov/content/travel/en/consularnotification.html.

> as possible. In addition, you may communicate with your consular officers. You are not required to accept their assistance, but your consular officers may be able to help you obtain legal representation, and may contact your family and visit you in detention, among other things. Please sign to show that you have received this information.[61]

A list of countries and jurisdictions that require mandatory consular notification may be found here: https://travel.state.gov/content/travel/en/consularnotification/QuarantinedForeignNationals/countries-and-jurisdictions-with-mandatory-notifications.html.

61. *See* Consular Notification and Access Reference Card, https://travel.state.gov/content/dam/travel/cna_pdf/272764_CNA_Pocket_Card_LR1.pdf. *See also* 28 C.F.R. § 50.5(a):

> Some of the treaties obligate the United States to notify the consular officer only upon the demand or request of the arrested foreign national. On the other hand, some of the treaties require notifying the consul of the arrest of a foreign national whether or not the arrested person requests such notification.

# 1.02 Appointment of Counsel or Pro Se Representation

*18 U.S.C. § 3006A; Fed. R. Crim. P. 44; CJA Forms 20, 23*

As discussed in section 1.01: Initial Appearance, *supra*, at I.A, if a defendant "is financially unable to obtain counsel, [the court] shall appoint counsel to represent" the defendant "at every stage of the proceedings from [the] initial appearance . . . through appeal." 18 U.S.C. § 3006A(b) & (c). Defendants who may not qualify for free counsel but are otherwise "unable to obtain counsel" are also "entitled to have counsel appointed . . . unless the defendant waives this right." Fed. R. Crim. P. 44(a).[1] "Any doubts as to a person's eligibility should be resolved in the person's favor; erroneous determinations of eligibility may be corrected at a later time."[2]

If counsel has not been assigned by the magistrate judge before the defendant's first court appearance, assignment of counsel should be the first item of business before the judge. Defendants must have the opportunity to be represented by counsel throughout the entire initial appearance hearing, including during any discussion of pretrial detention or release, unless they waive that right.[3] See also section 1.01: Initial Appearance, *supra*, at I.A, Appointment of Counsel, and Appendix B. If the case may involve the death penalty, see section 3.01: Death Penalty Procedures, *infra*. If there is an issue of joint representation, see section 1.08: Joint Representation of Codefendants, *infra*.

[Note: If at any time in the proceedings you have any doubts about the defendant's ability to speak and understand English, consider appointing a certified interpreter in accordance with 28 U.S.C. § 1827.]

A. If the defendant has no attorney:

1. Inform the defendant:

(a) You have a constitutional right to be represented by an attorney at every stage of the proceedings;

1. *See also* Fed. R. Crim. P. 44, advisory committee's notes to 1966 amendment ("If a defendant is able to compensate counsel but still cannot obtain counsel, he is entitled to the assignment of counsel even though not to free counsel.").

2. Admin. Office of the U.S. Courts, Guide to Judiciary Policy vol. 7—Defender Services, Part A: Guidelines for Administering the CJA and Related Statutes, at § 210.40.30(b), https://www.uscourts.gov/administration-policies/judiciary-policies/criminal-justice-act-cja-guidelines. *Accord* Jonathan W. Feldman, The Fundamentals of Criminal Pretrial Practice in the Federal Courts 16 (2015) ("if the magistrate judge later determines that the defendant can pay all or part of the cost, the magistrate judge can order the defendant to make partial or total payment"), https://fjc.dcn/sites/default/files/materials/17/2107-V10_Mag_Judge_Criminal_Pretrial Practice_rev_2015.pdf.

3. *See* Memorandum, "Right to Counsel at Initial Appearance," Jud. Conf. of the U.S., Comm. on Def. Servs. (Mar. 19, 2024) (joint memorandum from the chairs of the Defender Services and Criminal Law Committees), https://jnet.ao.dcn/sites/default/files/pdf/DIR24-038.pdf:

> The Criminal Justice Act (CJA), 18 U.S.C. § 3006A, the Federal Rules of Criminal Procedure, and Judicial Conference policy require courts to provide access to counsel for individuals accused of crimes at the earliest opportunity. . . . Courts that do not currently ensure that every defendant has active representation by counsel during the initial appearance must comply with the governing statute and rules.

(b) If you are unable to afford an attorney, the court will appoint one without cost to you (18 U.S.C. § 3006A, Fed. R. Crim. P. 44); and

(c) If you can afford an attorney but are unable to obtain counsel to represent you during today's proceedings, the court will appoint counsel for you, but you will be responsible for payment; and

(d) You are charged with _____ [list the offense or offenses with which the defendant is charged].

2. Ask the defendant

(a) Do you understand your right to an attorney?

(b) Do you wish to, and are you able to, obtain counsel of your own choosing?

(c) [If not:] Do you want the the court to appoint counsel because you cannot afford one or are unable to obtain one?

B. If the defendant requests appointed counsel:

1. Require the completion of a Financial Affidavit by the defendant, such as Criminal Justice Act Form 23.[4]

2. *Inform the defendant:*

You are swearing to truthfully answer the questions on the affidavit. If you give false information you may be penalized for perjury, which can subject you to a fine and/or imprisonment. Do you understand your obligation to truthfully complete the affidavit?

[Note: Consider allowing a federal public defender to assist the defendant with the affidavit.[5]]

3. Determine whether the defendant is unable to afford privately retained counsel. If the defendant qualifies financially for court-appointed counsel, make that finding and sign the order appointing counsel. If the defendant is able to afford counsel but is unable to obtain counsel to represent the defendant during the initial appearance proceeding

4. Note that, although it is commonly used, "CJA Form 23 is not a required statutory form. . . . When a colorable claim is asserted that disclosure to the government of a completed CJA 23 would be self-incriminating, the court may not [require completion of] the CJA 23 before [the] application for appointment of counsel will be considered." Instructions for CJA Form 23 Financial Affidavit, https://jnet.ao.dcn/sites/default/files/forms/CJA 23 - Instructions - JNET.pdf. To avoid conflict between the Sixth Amendment right to counsel and the Fifth Amendment privilege against self-incrimination, consider an alternative approach such as an "*in camera* examination of the financial affidavit, which then would be sealed and not be made available for the purpose of prosecution, or . . . an adversarial hearing on the defendant's request for appointment of counsel, during which the court would grant use immunity to the defendant's testimony at the hearing." *Id*. *See also* Jonathan W. Feldman, Issues in Criminal Law and Procedure 1–5 (2014) (discussing financial affidavits and alternative methods of demonstrating financial eligibility for appointed counsel), https://fjc.dcn/sites/default/files/session/2023/Crimissuesoutline10.14.pdf.

5. *See* Instructions for CJA Form 23, *supra* note 4 ("When practicable, employees of the federal public defender office should discuss with the person who indicates that he or she is not financially able to secure representation the right to appointed counsel and, if appointment of counsel seems likely, assist in completion of the financial affidavit.").

itself, determine whether to appoint counsel. If yes, sign an order appointing counsel and stating that the defendant will be responsible for the cost, in whole or in part.

C. If the defendant does not want counsel:

The accused has a constitutional right to self-representation. Waiver of counsel must, however, be knowing and voluntary. This means that you must make clear on the record that the defendant is fully aware of the hazards and disadvantages of self-representation.[6] The waiver should also be clear and unequivocal.[7]

If the defendant states that they wish to proceed pro se, you should ask questions similar to the following:

1. Have you ever studied law?
2. Have you ever represented yourself in a criminal action?
3. Do you understand that you are charged with these crimes: [state the crimes with which the defendant is charged]?
4. Do you understand that if you are found guilty of the crime charged in Count I, the court must impose a special assessment of $100 and could sentence you to as many as ___ years in prison, impose a term of supervised release that follows imprisonment, fine you as much as $_____, and direct you to pay restitution? [The assessment is $25 for a Class A misdemeanor, $10 for a Class B, $5 for a Class C or infraction.]

   [Ask the defendant a similar question for each crime charged in the indictment or information.]

5. Do you understand that if you are found guilty of more than one of these crimes, this court can order that the sentences be served consecutively, that is, one after another?
6. Do you understand that there are advisory Sentencing Guidelines that may have an effect on your sentence if you are found guilty?
7. Do you understand that if you represent yourself, you are on your own? I cannot tell you or even advise you how you should try your case.
8. Are you familiar with the Federal Rules of Evidence?
9. Do you understand that the rules of evidence govern what evidence may or may not be introduced at trial, that in representing yourself, you must abide by those very technical rules, and that they will not be relaxed for your benefit?
10. Are you familiar with the Federal Rules of Criminal Procedure?

6. Faretta v. California, 422 U.S. 806, 835 (1975) (defendant "should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open'") (citation omitted). *See also* Brady v. United States, 397 U.S. 742, 748 (1970) ("Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences.").

7. *See* Brewer v. Williams, 430 U.S. 387, 404 (1977) ("courts indulge in every reasonable presumption against waiver" of the right to counsel).

11. Do you understand that those rules govern the way a criminal action is tried in federal court, that you are bound by those rules, and that they will not be relaxed for your benefit?

12. Do you understand that the Bail Reform Act of 1984 governs whether you will be released from custody today or will be detained until your trial—or until sentencing if you plead guilty—and that in representing yourself, you must abide by the technicalities of that statute, which will not be relaxed for your benefit? And that I cannot advise you on how to proceed under that statute?

[Then say to the defendant something to this effect:]

13. I must advise you that in my opinion, a trained lawyer would defend you far better than you could defend yourself. I think it is unwise of you to try to represent yourself. You are not familiar with the law. You are not familiar with court procedure. You are not familiar with the rules of evidence. I strongly urge you not to try to represent yourself.

    An attorney, on the other hand, knows the law of pretrial release and detention, how to prepare a case for trial, the rules of evidence and procedure, how to select a jury, how to present the case to a judge and jury, how to examine witnesses and object to testimony or evidence, and how to protect your rights.

    Therefore, I strongly urge you to accept appointed counsel and not to try to represent yourself.

14. Now, in light of the penalty that you might suffer if you are found guilty, and in light of all of the difficulties of representing yourself, do you still desire to represent yourself and to give up your right to be represented by a lawyer?

15. Is your decision entirely voluntary?

[If the answers to the two preceding questions are yes, and the defendant's mental competency is not in question,[8] say something to the following effect:]

16. I find that the defendant has knowingly and voluntarily waived the right to counsel. I will therefore permit the defendant to [represent themselves] [proceed pro se].

The *Guide to Judiciary Policy* states that: "A waiver of assigned counsel by a defendant should be in writing. If the defendant refuses to sign the waiver, the court or U.S. magistrate judge should certify thereto. No standard form has been prescribed for this purpose."[9]

8. The court has the discretion, but is not required, "to insist upon representation by counsel for those competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." Indiana v. Edwards, 554 U.S. 164, 177–78 (2008) ("the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so").

9. *See* Guide to Judiciary Policy, *supra* note 2, at § 220.50.

It is probably advisable to appoint standby counsel, who can assist the defendant or can replace the defendant if the court determines during trial that the defendant can no longer be permitted to proceed pro se.[10]

D. Potential Pro Se Issues

Courts may face challenges when dealing with a pro se defendant. Issues that can arise during pretrial or trial proceedings include:

- Timeliness of the request to proceed pro se
- Vacillating between wanting counsel or wanting to proceed pro se
- Dissatisfaction or disagreements with appointed counsel
- Refusal to cooperate with standby counsel
- Uncooperative or obstructive behavior, delaying tactics
- Repeated attempts to dismiss or replace appointed counsel

For case law and suggestions on how to handle these and other issues, see Federal Judicial Center, *Manual on Recurring Problems in Criminal Trials* 1–8 (6th ed. 2010). See also *Procedures Manual for United States Judges*, Sec. 6: Appointment of Counsel, at 15–19 (discussing defendant's request to change counsel); Jonathan W. Feldman, *Issues in Criminal Law and Procedure* 9–14 (2014) (discussing defendant's dissatisfaction with assigned counsel).

## Other FJC Sources

- Manual on Recurring Problems in Criminal Trials (Tucker Carrington & Kris Markarian eds., 6th ed. 2010) (*new edition expected in 2026*)
- Blair Perilman & Cari Dangerfield Waters, "Presiding Over District Court Cases with Appointed Criminal Justice Act (CJA) Counsel: A Handbook for New Judges" (June 2019) (in collaboration with the Defender Services Office, Administrative Office of the United States Courts), https://fjc.dcn/sites/default/files/materials/20/6.5.19%20New%20Judges%20CJA%20Handbook%20.pdf

10. *See* McKaskle v. Wiggins, 465 U.S. 168, 184 (1984):

> A defendant's Sixth Amendment rights are not violated when a trial judge appoints standby counsel—even over the defendant's objection—to relieve the judge of the need to explain and enforce basic rules of courtroom protocol or to assist the defendant in overcoming routine obstacles that stand in the way of the defendant's achievement of his own clearly indicated goals.

*See also* Manual on Recurring Problems in Criminal Trials 5–6 (Tucker Carrington & Kris Markarian eds., 6th ed. 2010) (discussion of appointment of standby counsel).

# 1.03 Release or Detention Pending Trial

*18 U.S.C. §§ 3141–3148; Fed. R. Crim. P. 46; Fed. R. App. P. 9(a)(1)*



Pretrial release and detention under the Bail Reform Act of 1984 ("BRA") is governed by 18 U.S.C. § 3142. It is a long and complicated statute that must be carefully followed in order to comply with the intent of the legislation to detain only a limited number of dangerous defendants[1] and to provide defendants with the "numerous procedural safeguards" built into the Act, protections

1. *See* S. Rep. No. 98-225, at 7 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182 [hereinafter Senate Report]:
> There is a *small but identifiable group of particularly dangerous defendants* as to whom neither the imposition of stringent release conditions nor the prospect of revocation of release can reasonably assure the safety of the community or other persons. It is with respect to this *limited group of offenders* that the courts must be given the power to deny release pending trial.

(emphasis added). *See also* United States v. Salerno, 481 U.S. 739, 747, 755 (1987) ("The Bail Reform Act carefully limits the circumstances under which detention may be sought to the most serious of crimes. . . . In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."); United States v. Holloway, 781 F.2d 124, 125–26 (11th Cir. 1986) ("Pretrial detention is to be the exception rather than the rule, . . . and it is hedged around with procedural requirements designed to limit its use to those instances when it is clearly necessary."); United States v. Orta, 760 F.2d 887, 891 (8th Cir. 1985) (en banc) ("The wide range of restrictions available ensures . . . that very few defendants will be subject to pretrial detention. . . . Congress envisioned the pretrial detention of only a fraction of accused individuals awaiting trial.").

that were emphasized by the Supreme Court when it upheld the Act against constitutional challenge.[2]

It is important to remember that the statute begins with a presumption of release—a defendant *shall be released unless* a detention hearing is authorized and the government then proves "that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142(b), (c), (e), (f). Not unlike the presumption of innocence at trial, the burden is *always* on the government to prove that the defendant should be detained—the defendant does not have to prove that they should be released.[3]

Because of the complexity of the statute, and "the individual's strong interest in liberty" emphasized in *Salerno*, the defendant should be provided with the opportunity to consult with counsel before any discussion of release or detention. If the defendant qualifies for appointed counsel but one has not yet been appointed before the start of the initial appearance, do not proceed with the initial appearance hearing—or any court proceeding involving detention—until the defendant has counsel who can represent them during that hearing. See section 1.01: Initial Appearance at I.A, Appointment of Counsel, nn.10–16 and accompanying text.

Note: § 3142(d), temporary detention for defendants who are on release for a prior offense, or who are not U.S. citizens, is usually applied at the defendant's initial appearance hearing and is covered in section 1.01: Initial Appearance, *supra*, at II.D, Temporary Detention.

If there are victims of the offense, they have the right to "reasonable, accurate, and timely notice of any public court proceeding . . . involving the crime or of any release . . . of the accused," the right "not to be excluded from any such proceeding," and "to be reasonably heard at any public proceeding . . . involving release" of the defendant.[4]

A short checklist of significant procedures and requirements in 18 U.S.C. § 3142 is provided in Appendix A.

2. *Salerno*, 481 U.S. at 750–52, 755 (while recognizing "the individual's strong interest in liberty," finding that due process is satisfied by the statute's "careful delineation of the circumstances under which detention will be permitted," the requirement of "a full-blown adversary hearing," and "extensive safeguards . . . [and] procedural protections"). *See also* Senate Report, *supra* note 1, at 8:

> [A] pretrial detention statute may . . . be constitutionally defective if it fails to provide adequate procedural safeguards or if it does not limit pretrial detention to cases in which it is necessary to serve the societal interests it is designed to protect. The pretrial detention provisions of this section have been carefully drafted with these concerns in mind.

*Accord* United States v. Storme, 83 F.4th 1078, 1085 (7th Cir. 2023) ("Process matters with detention decisions precisely because it protects the liberty interest of persons presumed innocent under the Constitution."); United States v. Coonan, 826 F.2d 1180, 1182 (2d Cir. 1987) ("The act contains strict procedural requirements, designed to ensure that defendants are not held pretrial without due process.").

3. As is discussed in section IV and Appendix B, *infra*, the burden of proof remains with the government even when there is a presumption for detention under § 3142(e)(2) or (3). *See* Jefri Wood, The Bail Reform Act of 1984 at 37 & n.173 (Federal Judicial Center, 4th ed. 2022) (citing cases) [hereinafter Bail Reform Act, 4th ed.], https://www.fjc.gov/content/373297/bail-reform-act-1984-fourth-edition.

4. 18 U.S.C. § 3771(a)(2)–(4). *See also* discussion of the Crime Victims' Rights Act *in* Bail Reform Act, 4th ed., *supra* note 3, at 49–50.

# I. Initial Procedure, Statutory Requirements

## *A. Presumption of Release*

Upon the appearance before a judicial officer of a person charged with an offense, the judicial officer shall issue an order that, pending trial, the person be:

1. released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section;
2. released on a condition or combination of conditions under subsection (c) of this section;
3. temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or
4. detained under subsection (e) of this section.

18 U.S.C. § 3142(a). The BRA thus presumes that a defendant "shall" be released under subsections (b) or (c) *unless* the defendant may be temporarily detained under subsection (d), or detained after a detention hearing under subsection (f) if the government proves per subsection (e)(1) "that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community."

Therefore, if the defendant is not subject to temporary detention[5] and a detention hearing is not authorized by subsection (f), the defendant *must* be released under § 3142(b) or (c).

Note that, except for the limited circumstance in which § 3142(d)(1)(B) applies, noncitizens are to be treated the same as citizens under the other release and detention provisions of § 3142. See discussion in section 1.01: Initial Appearance, *supra*, at II.D.7 & n.33.

## *B. Motion for Detention Hearing During the initial Appearance*

If the government moves for a detention hearing under § 3142(f)(1) or (f)(2), the court must determine at the initial appearance hearing whether the requirements of that section have been met. If not, the defendant must be released at the initial appearance hearing. If the requirements of 3142(f)(1) or (f)(2) are met, a detention hearing should be scheduled. See section 1.01: Initial Appearance, *supra*, at III, Release at Initial Appearance Unless a Detention Hearing is Authorized.

# II. Release: Procedure and Requirements

A defendant must be released at the initial appearance when there is no basis for holding a detention hearing. A defendant will also be released when the government consents to release or after a detention hearing at which the government failed to prove that there were no conditions

5. The term "temporary detention" as used in § 3142(d) applies only when a defendant is subject to revocation of a prior release, to deportation, or exclusion. The defendant may be held for up to ten days to allow another authority to take custody. When a defendant is subject to a detention hearing under § 3142(f) and there is a continuance before the hearing, that time is sometimes referred to as temporary detention, or the defendant is considered to be temporarily detained. However, the two situations are distinct, with each having its own procedural requirements and burden of proof. *See also* Form AO 471, Order to Detain a Defendant Temporarily Under 18 U.S.C. § 3142(d).

of release that would reasonably assure appearance and public safety. In either case, the release procedure and requirements are the same.

## *A. Mandatory Conditions*

All defendants who are released are subject to a mandatory condition that they "not commit a Federal, State, or local crime during the period of release" and, if a DNA sample "is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000,"[6] cooperate in the collection of that sample. 18 U.S.C. § 3142(b) & (c).

## *B. Release on Personal Recognizance*

The court should first determine whether the defendant may be released, under § 3142(b), "on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court," along with the mandatory conditions for all releasees noted above. Subsection (b) "emphasizes release on personal recognizance or unsecured appearance bond for persons who are deemed to be good pretrial release risks."[7]

If the court determines that release on personal recognizance or unsecured bond under § 3142(b) "will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community," the defendant must be released in accordance with subsection (c).

## *C. Release with Conditions*

1. Section 3142(c)(1) requires that, in addition to the same mandatory conditions, a defendant be released "(B) subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community." Subsection (c)(1)(B) lists thirteen possible conditions of release, plus a "catch-all" provision that allows the court to impose "any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community." 18 U.S.C. § 3142(c)(1)(B)(i)–(xiv).
2. If the defendant's alleged offense "involves a minor victim" under any of the twenty offenses listed at the end of § 3142(c)(1), or a failure to register as a sex offender under 18 U.S.C. § 2250, "any release order shall contain, at a minimum, a condition of electronic monitoring and each of the conditions specified at subparagraphs (iv), (v), (vi), (vii), and (viii)."[8]
3. Under § 3142(c)(2), the court "may not impose a financial condition that results in the pretrial detention of the person." The use of financial conditions under § 3142(c)(1)(xi)

6. Although §§ 3142(b) and (c) still cite 42 U.S.C. § 14135a, that statute was transferred to 34 U.S.C. § 40702, effective Sept. 1, 2017. Section 40702(d) lists as qualifying offenses: any felony; any sexual abuse offense in §§ 2241–2245; any crime of violence as defined in 18 U.S.C. § 16; and any attempt or conspiracy to commit any of the above offenses.

7. Senate Report, *supra* note 1, at 13.

8. *See* Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587.

and (xii) "is specifically limited to the purpose of assuring the appearance of the defendant."[9]

If the court concludes that a bond of a certain amount "is the only means, short of detention, of assuring the appearance of a defendant who poses a serious risk of flight, and the defendant asserts that, despite the judicial officer's finding to the contrary, he cannot meet the bond," the court should reconsider the amount of the bond.[10] If the court finds that the initial amount "is reasonable and necessary" *and* there is no other condition or combination of conditions that would reasonably assure the appearance of the defendant, "the judge may proceed with a detention hearing pursuant to section 3142(f) and order the defendant detained, if appropriate," setting forth the court's reasons "in the detention order as provided in section 3142(i)(1)."[11]

4. *Impose the least restrictive conditions after an individualized assessment.* Section 3142(c)(1)(B) *requires* the court to choose "the least restrictive further condition, or combination of conditions, that . . . will reasonably assure" appearance and safety.[12] The statute also requires an individualized assessment of each defendant and prohibits imposing more, or more restrictive, conditions than are needed to reasonably assure appearance and safety in each case. The legislative history highlights this point:

> It must be emphasized that all conditions are not appropriate to every defendant and that the committee does not intend that any of these conditions be imposed on all defendants, except for the mandatory condition[s] set out in subsection (c)(1). The committee intends that the judicial officer *weigh each of the discretionary conditions separately with reference to the characteristics and circumstances of the defendant before him* and to the offense charged, and with specific reference to the factors set forth in subsection (g).[13]

After making an individualized assessment of the defendant, the court should not impose any conditions that are greater than needed to "reasonably assure" the

9. Senate Report, *supra* note 1, at 16 (note that the Senate Report refers to subsections (2)(k) and (l), but those were changed to (1)(xi) and (xii) in the statute). *See also* Bail Reform Act, 4th ed., *supra* note 3, at 8–9 (citing cases).

10. Senate Report, *supra* note 1, at 16.

11. *Id.* (subsection (c)(2) "does not necessarily require the release of a person who says he is unable to meet a financial condition of release which the judge has determined is the only form of conditional release that will assure the person's future appearance"). *See also* Bail Reform Act, 4th ed., *supra* note 3, at 8–9.

12. *See also* U.S. Dep't of Just., Criminal Resource Manual, ch. 26: Release and Detention Pending Judicial Proceedings 3, https://www.justice.gov/archives/jm/criminal-resource-manual-26-release-and-detention-pending-judicial-proceedings-18-usc-3141-et ("the judicial officer *must impose the least restrictive condition or combination of conditions* necessary to 'reasonably assure' the defendant's appearance as required and to 'reasonably assure' the safety of any person and the community") (emphasis in original) ; Admin. Office of the U.S. Courts, Guide to Judiciary Policy vol. 8, pt. A at § 210(f) ("An officer must recommend, and the court must impose, the least restrictive conditions to reasonably [as]sure defendants' appearance in court and the safety of any other person or the community.").

13. Senate Report, *supra* note 1, at 13–14 (emphasis added).

defendant's future appearances and the safety of the community.[14] As such, the conditions of release must be related to the purpose of assuring appearance or public safety.[15]

Courts should also not use a set of "standard" conditions of release that are applied to all cases—that is not an individualized determination that accounts for the "characteristics and circumstances" of each defendant and will not be the "least restrictive" conditions for some defendants.[16] Furthermore, excessive and unnecessary conditions may also be counterproductive—studies indicate that they increase failure rates for low-risk defendants during pretrial release.[17] This is especially true for what are termed

14. *See, e.g.*, *Holloway*, 781 F.2d at 125 (statute's "broad range of pre-trial release options . . . are to be considered sequentially, in order of severity, and the judicial officer is directed to select the option which is the least restrictive of the defendant but which will adequately assure" appearance and safety); United States v. Orta, 760 F.2d 887, 892 (8th Cir. 1985) (en banc) ("The structure of the statute mandates every form of release be considered before detention may be imposed.").

15. *See, e.g.*, United States v. Scott, 450 F.3d 863, 871–75 (9th Cir. 2006) (condition allowing warrantless searches of home and random drug testing invalid without finding that it was necessary for public safety or defendant's appearance); United States v. Goosens, 84 F.3d 697, 703 (4th Cir. 1996) (error to prohibit cooperation with law enforcement officers without finding it "truly necessary to assure a defendant's appearance or to protect the public safety"); United States v. Brown, 870 F.2d 1354, 1358 n.5 (7th Cir. 1989) (error to require defendant to accept court-appointed counsel or to remain in forum district "in order to ensure a fair and orderly trial. . . . [S]uch concerns do not have . . . roots in the Bail Reform Act."); United States v. Rose, 791 F.2d 1477, 1480 (11th Cir. 1986) (condition that bail bond be retained by the clerk to pay any fine imposed was irrelevant to purpose of assuring appearance).

16. See John L. Weinberg & Evelyn J. Furse, Federal Bail and Detention Handbook § 5:3 (Practising Law Institute 2023); Bail Reform Act, 4th ed., *supra* note 3, at 3–7. *See also* Admin. Office of the U.S. Courts, Guide to Judiciary Policy vol. 8, pt. B at § 320.70 ("the imposition of supervision, absent any risk to community safety or of nonappearance, is an inefficient use of resources (i.e., pretrial services staff and public funding)").

17. *See* Admin. Office of the U.S. Courts, Guide to Judiciary Policy vol. 8, pt. C at § 310(b) ("Research indicates that when unnecessary conditions of release are applied to low-risk defendants, the likelihood of pretrial success diminishes."); Bail Reform Act, 4th ed., *supra* note 3, at 7 & nn.31–32; Thomas H. Cohen and William Hicks, Jr., *The Imposition of Pretrial Conditions on Released Federal Defendants: The Overuse of Conditions Without Providing any Measurable Benefits*, 50 Criminal Justice and Behavior 1823, 1865–69 (Dec. 2023) (finding, *inter alia*, that "defendants with more conditions . . . were generally no more or less likely to be rearrested or [fail to appear] than defendants with fewer conditions but had higher rates of revocations," and lower risk defendants "with more conditions were more likely to garner an arrest than their lower risk counterparts with fewer conditions").

"alternatives to detention," conditions of release that "are generally more intrusive"[18] and have been found to be more appropriate for moderate to high risk defendants.[19]

Nor should the court compare a defendant to codefendants or to others who committed similar offenses: "each defendant is entitled to an individualized determination of bail eligibility."[20] Every release or detention decision "is highly dependent on the specific facts and circumstances of each case," and "whether a defendant poses a particular threat depends on the nature of the threat identified and the resources and capabilities of the defendant."[21]

5. "Reasonably assure"

The BRA does not define "reasonably assure." The courts have, however, consistently stressed that the term does *not* mean "guarantee"—"the safety of the community can be reasonably assured without being absolutely guaranteed. . . . Requiring that

18. Admin. Office of the U.S. Courts, Guide to Judiciary Policy vol. 8, pt. B at § 150:

> [E]ach alternative to detention is meant to address a specific, thematic need (e.g., mental illness and/or substance abuse) within the life of the defendant, whereas the conditions of release are more general parameters and are intended to address episodic or more easily corrected behavior (e.g., carrying a weapon and/or unemployment.

*See also id.*, pt. C at § 240(b)(1) ("Lower-risk defendants released with alternatives to detention conditions were more likely to experience pretrial failure (e.g., failure to appear, new criminal activity, technical violations resulting in revocation) when compared to defendants released without these conditions.") (citing research). Alternatives to detention include: third-party custodian, substance abuse testing, substance abuse treatment, location monitoring, halfway house, community housing or shelter, mental health treatment, sex offender treatment, and computer monitoring.

19. *See, e.g.*, Marie VanNostrand, *Alternatives to Pretrial Detention: Southern District of Iowa, a Case Study*, 74 Fed. Prob. 11, 13 (Dec. 2010) ("Alternatives to pretrial detention are most appropriate for moderate- and higher-risk defendants, as it allows for pretrial release while generally increasing pretrial success."); Timothy P. Cadigan, *Implementing Evidence-Based Practices in Federal Pretrial Services*, 73 Fed. Prob. 30, 30 (Sept. 2009) ("research now shows that it can and does hurt when unnecessary alternatives to detention are placed on low-risk federal defendants"); Christopher Lowenkamp, Richard Lemke & Edward Latessa, *The Development and Validation of a Pretrial Screening Tool*, 72 Fed. Prob. 2, 8 (Dec. 2008) ("assigning intense supervision or preventative detention to low-risk defendants either removes the individual from pro-social aspects of their life or exposes them to risk factors that were previously nonexistent in the defendant's life. Either way, these actions put the defendant at greater risk of recidivism or negative supervision outcomes.").

20. United States v. Stone, 608 F.3d 939, 946 (6th Cir. 2010). *See also* United States v. Hir, 517 F.3d 1081, 1091 n.8 (9th Cir. 2008) ("each case requires a fact-specific inquiry into the potential danger posed by the individual defendant"); United States v. Tortora, 922 F.2d 880, 888 (1st Cir. 1990) ("Detention determinations must be made individually and . . . must be based on the evidence which is before the court regarding the particular defendant."); United States v. Spilotro, 786 F.2d 808, 816 (8th Cir. 1986) (applying same condition of release to all defendants in district was abuse of discretion).

21. United States v. Munchel, 991 F.3d 1273, 1283–84 (D.C. Cir. 2021). *See also* United States v. Patriarca, 948 F.2d 789, 794 (1st Cir. 1991) (rejecting government's argument that because a defendant is a member of the same organized crime family as another defendant he should be "painted with the same brush and merit[s] the same treatment").

> release conditions *guarantee* the community's safety would fly in the teeth of Congress's clear intent that only a limited number of defendants be subject to pretrial detention."[22]

This is also the view of the Judicial Conference of the United States:

> Neither the alternatives to detention nor the conditions of release can guarantee the presence of the defendant as required or the safety of the community. However, when used individually and in combination to address identified risks, both have been shown to enhance the likelihood of appearance and community safety.[23]

6. Factors to Consider

Section 3142(g) states that the court "shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning":

> (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, a violation of section 1591, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;
>
> (2) the weight of the evidence against the person;
>
> (3) the history and characteristics of the person, including—
>
> > (A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and
> >
> > (B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and
>
> (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

These subsection (g) factors

> are to be considered by the judicial officer in determining whether there are conditions of release that will reasonably assure the appearance of the person and the safety of any other person and the community. *Since this determination is to be made whenever a person is to be released or detained under this chapter,*

22. *Tortora*, 922 F.2d at 884 (emphasis in original). *See also Munchel*, 991 F.3d at 1283 (statute "does not demand absolute certainty" that the defendant will not violate release conditions); *Hir*, 517 F.3d at 1092 n.9 ("the Bail Reform Act contemplates only that a court be able to 'reasonably assure,' rather than guarantee, the safety of the community"); United States v. Fortna, 769 F.2d 243, 249 (5th Cir. 1985) ("the standard is *reasonably assure* appearance, not 'guarantee' appearance") (emphasis in original); United States v. Orta, 760 F.2d 887, 891–92 (8th Cir. 1985) (en banc) (error to require release conditions that would "guarantee" appearance and safety: "The judicial officer cannot require more than an objectively reasonable assurance of community safety and the defendant's appearance at trial."). *Cf.* United States v. Torres, 929 F.2d 291, 291 (7th Cir. 1991) ("Even the strongest affection for one's family does not *assure* appearance at trial, but the judge is supposed to consider probabilities.") (emphasis in original).

23. Admin. Office of the U.S. Courts, Guide to Judiciary Policy vol. 8, pt. B at § 150. *See also* Criminal Resource Manual, *supra* note 12, at 3, Release on Conditions ("It is important to note that 'Section 3142 speaks only of conditions that will "reasonably" assure appearance, not guarantee it'. *United States v. Xulum*, 84 F.3d 441, 443 (D.C. Cir. 1996) (per curiam).").

> *consideration of these factors is required* . . . in proceedings concerning the pretrial release or detention of the defendant under section 3142.[24]

The court "is expected to weigh all the factors in the case before making its decision as to risk of flight and danger to the community."[25] Note that subsections (1) and (3) tell the court to consider certain factors "including" specific examples of those factors, but does not limit the court to considering only those examples of those factors.

Subsection (g) also allows the court, on its own motion or the government's motion, to

> conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.[26]

7. Crime Victims' Rights

If there are victims of the offense, they have the right to be present and "to be reasonably heard" at any public court proceeding that involves the release of the accused. 18 U.S.C. § 3771(a)(2)–(4).

Also, if the case involves domestic violence, stalking, or violation of a protective order, the alleged victim must be given an opportunity to be heard regarding the danger posed by the defendant. 18 U.S.C. § 2263.

## *D. The Pretrial Services Report ("Bail Report")*

1. Under 18 U.S.C. § 3154(1), a pretrial services officer shall:

> Collect, verify, and report to the judicial officer, prior to the pretrial release hearing, information pertaining to the pretrial release of each individual charged with an offense, including information relating to any danger that the release of such person may pose to any other person or the community, and, where appropriate, include a recommendation as to whether such individual should be released or detained and, if release is recommended, recommend appropriate conditions of release . . . .

The officer conducts a pretrial services interview with a defendant ("the primary vehicle through which defendants provide information about themselves to the court"), interviews others who may have information about the defendant, and conducts an investigation in order "to provide the judge with a more complete and accurate assessment of the defendant's risk factors as they relate to pretrial release."[27]

2. In making the report and recommendation to the court, the pretrial services officer is limited, like the court, by the requirements of § 3142. For example, the report should

24. Senate Report, *supra* note 1, at 23 (emphasis added).

25. *Id.* at 24–25.

26. 18 U.S.C. § 3142(g)(4). Congress was concerned that,

> when the proceeds of crime are used to post bond . . . [by] those engaged in highly lucrative criminal activities such as drug trafficking, . . . forfeiture of bond is simply a cost of doing business, and it appears that there is a growing practice of reserving a portion of crime income to cover this cost of avoiding prosecution.

Senate Report, *supra* note 1, at 23–24.

27. Admin. Office of the U.S. Courts, Guide to Judiciary Policy vol. 8A, ch. 1 at § 130(c), (d).

contain "only information relevant to the risks associated with: (1) the defendant's appearance in court as required; and (2) any danger that the release of the defendant may pose to any other person or the community."[28] Additionally, the officer "must recommend, and the court must impose, the least restrictive conditions to reasonably [assure] defendants' appearance in court and the safety of any other person or the community."[29]

The officer is also required, with a few significant exceptions, to consider the same § 3142(g) factors as the court. The officer does *not* consider the following factors which "fall solely within the judge's province":

a. the "circumstances of the offense charged" (§ 3142(g)(1));

b. "the weight of the evidence against the person" (§ 3142(g)(2));

c. whether a presumption under § 3142(e)(2) or (3) applies;

d. the potential penalty for the charged offense.[30]

3. One item that is considered by the officer but not usually included in the report and recommendation, and therefore not considered by the court, is the Pretrial Risk Assessment, or PTRA. The PTRA is a tool, developed by the Administrative Office and approved by the Judicial Conference of the United States, "that provides evidence-based guidance on the risk of:

   - failure to appear,
   - a new criminal arrest, or
   - revocations due to technical violations while on pretrial release."[31]

   The PTRA is an aid to the officer's evaluation of a defendant, indicating the risk of releasing defendants who fall into a particular category. It is not designed or intended to replace the officer's—or the court's— judgment and experience or the individualized assessment of each defendant required under § 3142.[32]

   Judges are not required to give the PTRA any consideration. However, they are not prohibited from doing so. In some situations, it could provide useful information about the factors that judges must consider under subsection (g) when deciding between release or detention or which conditions of release to impose. See the discussion of the PTRA in Appendix C of this section.

28. *Id.*, ch. 2 at § 210(i).

29. *Id.* at § 210(f).

30. *See id.* at § 230(a)–(c). *See also* Administrative Office of the U.S. Courts, Office of the General Counsel memorandum, March 5, 2000, Consideration of Offense Charged ("the pretrial services officer should not consider the circumstances of the offense since such consideration inevitably involves weighing the evidence against the defendant").

31. Admin. Office of the U.S. Courts, Guide to Judiciary Policy vol. 8A, ch. 2 at § 250(a).

32. *See id.* at § 250(b) ("Assessment results should be used in conjunction with the pretrial services investigation and the officer's professional judgment."). *See also* Sara J. Valdez Hoffer, *Federal Pretrial Release and the Detention Reduction Outreach Program (DROP)*, 82 Fed. Prob. 46, 48 (Sept. 2018) (the PTRA is only one part of the required assessment and "should always be used in combination with a thorough pretrial investigation and the officer's professional judgment"); James L. Johnson & Laura M. Baber, *State of the System: Federal Probation and Pretrial Services*, 79 Fed. Prob. 34, 34 (Sept. 2015) ("Coupled with officers' professional judgment, the PTRA provides officers with statistically valid and unbiased information to help the officer make a sounder recommendation to the court.").

## *E. Contents of Release Order, 18 U.S.C. § 3142(h)*

1. Under § 3142(h), the court is required to do two things:

   (1) include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct; and

   (2) advise the person of—

   (A) the penalties for violating a condition of release, including the penalties for committing an offense while on pretrial release;

   (B) the consequences of violating a condition of release, including the immediate issuance of a warrant for the person's arrest; and

   (C) sections 1503 of this title (relating to intimidation of witnesses, jurors, and officers of the court), 1510 (relating to obstruction of criminal investigations), 1512 (tampering with a witness, victim, or an informant), and 1513 (retaliating against a witness, victim, or an informant).

   The court may use Forms AO 199A, Order Setting Conditions of Release, and 199B, Additional Conditions of Release,[33] to satisfy subsection (h)(1)'s written statement requirement. Form AO 199C, Advice of Penalties and Sanctions, contains the warnings required by subsection (h)(2). The purpose of the advice in subsection (h)(2) is "to impress upon the person the seriousness of failing to appear when required," and the seriousness of violating the listed statutes.[34]

   See also *Bail Reform Act, 4th ed.* at 11–12.

2. In addition to the requirements of § 3142(h), Federal Rule of Appellate Procedure 9(a)(1) requires the court to "state in writing, or orally on the record, the reasons for an order regarding the release or detention of a defendant in a criminal case." Forms 199A and 199B list the conditions of release, but do not cover the *reasons* for the order. Failure to provide such a statement may result in a remand.[35] Conversely, clearly explaining how

33. Note that Form AO 199B is a national form, approved by the Judicial Conference of the United States. The form is updated as needed when policy changes are made, national contracts are awarded that impact the language, or advancements in technology or other areas occur. Individual districts may modify the form to reflect district preferences, but should ensure that their form complies with national policy and any future revisions to Form AO 199B. *See, e.g.*, Memorandum, "Amendments to AO Form 199B—Additional Conditions of Release," Administrative Office of the United States Courts, February 24, 2021, https://jnet.ao.dcn/sites/default/files/pdf/DIR21-026.pdf.

34. *See* Senate Report, *supra* note 1, at 25 (noting that failure to give these warnings does not preclude the imposition of penalties for failure to appear (§ 3146) or sanctions for violating a release condition (§ 3148), or prosecution for violating the listed statutes).

35. *See* Fed. R. App. P. 9, advisory committee's notes to 1994 amendment (because appeals must be decided "promptly" and "lack of pertinent information can cause delays," a court "must state its reasons for the order"); United States v. Blasini-Lluberas, 144 F.3d 881, 881 (1st Cir. 1998) (per curiam) ("Rule 9(a) requires unambiguously, that the district court 'must' state its reasons."). *See also* United States v. Swanquist, 125 F.3d 573, 575 (7th Cir. 1997) (per curiam) ("Where a district court fails to comply with Rule 9(a), it is appropriate to remand the case to the district court," and "a statement of reasons encompasses more than a mere recitation of the statutory language followed by nothing more than a conclusory statement that the applicable factors have (or have not) been met"); United States v. Wheeler, 795 F.2d 839, 841 (9th Cir. 1986) (reason for the order "must be adequately explained; conclusory statements are insufficient"); United States v. Wong-Alvarez, 779 F.2d 583, 584 (11th Cir. 1985) ("neither magistrate nor district court has stated in writing the reasons for requiring a bond with the types and amounts of surety described above, as commanded by Rule 9 FRAP. We must remand the case for entry of such an order, which should be entered promptly.").

the court reached its decision, based upon the statutory requirements, and providing the reasons for the specific release conditions it imposed, may improve the chances of the order being upheld upon review or appeal.

3. Although not required, after giving the above warnings about the possible penalties for violating any conditions of release, consider informing the defendant of the advantages of complying with court ordered pretrial release conditions. Pretrial release serves as an opportunity for defendants to provide evidence of their ability to follow the law, cooperate with pretrial services, and demonstrate stability in the community.[36] At sentencing, a defendant's pretrial conduct is included in the presentence investigation report and success on pretrial release could lead to a sentence at the low end of the guideline range or a downward variance based on such post-offense rehabilitative efforts.[37] In fact, the Statement of Reasons form specifically lists "Pre-sentence Rehabilitation/Potential for Future Rehabilitation" and "Conduct Pre-trial/On Bond" as reasons for a variance,[38] and a 2010 survey found that "the defendant's post-offense rehabilitative effort was one of the factors about which federal judges reported caring the most in sentencing."[39]

   At the very least, a successful period of pretrial release would help to avoid a higher sentence that might result from violating conditions of release or having release revoked. It may also influence the number and type of conditions imposed on probation or supervised release. See also section 2.01: Taking Pleas of Guilty or Nolo Contendere, *infra*, at V.3, offering similar advice to defendants who will be on release after pleading guilty.

36. *See* James G. Carr, *Why Pretrial Release Really Matters*, 29 Fed. Sent'g Rep. 217, 218 (April 2017) ("defendants, if not detained, have the opportunity to stand on the best, most upright footing of all when before the judge for sentencing. . . . [A]ny defendant, regardless of charged crime, criminal history, or guideline range, who can show a court, often for the first time in his or her life, that he or she can be law-abiding offers the court the best of all possible records and reasons to consider leniency."). *See also* Christine S. Scott-Hayward and Connie Ireland, *Reducing the Federal Prison Population: The Role of Pretrial Community Supervision*, 34 Fed. Sent'g Rep. 327, 331 (June 2022) (based on a survey of 241 federal cases in 2020, finding that "pretrial performance is an essential mitigation—arguably as important as, if not more important than, other mitigating factors considered by the court. In particular, judges seemed to respond positively to evidence that defendants have demonstrated rehabilitation while on pretrial supervision.").

37. *See, e.g.*, United States v. Sayad, 589 F.3d 1110, 1119 (10th Cir. 2009) (affirming downward variance to probation in part because the defendant had "been fully compliant while on [pretrial] release" and "rehabilitated himself after his release from custody"); United States v. Munoz-Nava, 524 F.3d 1137, 1149 (10th Cir. 2008) (affirming significant downward variance based in part on defendant's "exemplary" conduct during year-and-a-half pretrial release); Bail Reform Act, 4th ed., *supra* note 3, at 15–17 & nn.71–76 (citing articles comparing the effects of release or detention). *See also* Statement of U.S. District Judge Esther Salas at 0:49:40, Program Session: *Judicial Practice Perspectives*, National Sentencing Policy Institute (Oct. 18, 2022) ("When I see a defendant that's been on pretrial release, I'm going to . . . look at that presentence report" to see how the defendant did on release, whether they showed "that they are receptive to rehabilitation."), https://fjc.dcn/content/373540/pretrial-decision-making-disparities-releasedetention-and-alternatives-detention.

38. Form AO 245B: Judgment in a Criminal Case (revised Nov. 2025), Statement of Reasons attachment at "VI. Court Reasons for Imposing a Sentence Outside the Guideline Range." *See also* Concepcion v. United States, 597 U.S. 481, 486 (2022) ("When a defendant appears for sentencing, the sentencing court considers the defendant on that day, not on the date of his offense or the date of his conviction.").

39. Stephanie Holmes Didwania, *The Immediate Consequences of Pretrial Detention: Evidence from Federal Criminal Cases*, 22 Am. L. & Econ. Rev. 24, 26 (Spring 2020) (citing survey conducted by the United States Sentencing Commission). *See also* Statement of Judge Salas, *supra* note 37 (when taking a plea for defendants who are on pretrial release, telling them: "You have the ability to make or break your sentence, your future," with how you perform on release. "The good stuff's going to help you. And the bad stuff is not."); Nancy Gertner et al., *Supporting Responsive Federal Drug Sentencing Through Education in the Workshop on Science-Informed Decision Making*, 34 Fed. Sent'g Rep. 12, 19 (2021) (a defendant's behavior during pretrial release can "make or break a sentencing judge's assessment of the individual's prospects at sentencing").

Cooperation with pretrial services is critical during the period of pretrial release. The statutory mandate of pretrial services is not simply to monitor defendants for compliance with the conditions of release and report violations.[40] "The purpose of pretrial services supervision is to assure compliance with conditions of release *and to provide the defendant with services as needed*."[41] Officers are "expected to clarify all court orders, develop and thoroughly explain reporting expectations based on the orders of the court,"[42] and to help defendants comply with their conditions of release while assisting them "in securing any necessary employment, medical, legal, or social services."[43] Pretrial services can provide many benefits to their supervisees if given the opportunity.[44]

### *F. Amendment, Review, or Appeal of Release Order*

Section 3142(c)(3) provides that the court "may at any time amend the order to impose additional or different conditions of release." The legislative history clarifies that "either the defendant or the government may move for an amendment of conditions, or the court may do so on its own motion."[45] Either party may move to have a release order reviewed by a district court under § 3145(a) or may appeal from a release order under § 3145(c).

## III. Detention Hearing Procedures and Legal Standards

### *A. Procedural Requirements*

The procedural requirements for a detention hearing are set forth in what is sometimes called "the long paragraph" that follows § 3142(f)(2):

1. "The hearing shall be held immediately upon the person's first appearance before the judicial officer unless that person, or the attorney for the Government, seeks a continuance."

40. 18 U.S.C. § 3154(3), (12)(B) (duties of pretrial services include: "Supervise persons released into its custody under this chapter. . . . Any violations of the conditions of release shall immediately be reported to the court and the Attorney General.").

41. Admin. Office of the U.S. Courts, Guide to Judiciary Policy vol. 8, pt. B at § 320.20 (emphasis added).

42. *Id.* at § 320.40.

43. 18 U.S.C. § 3154(7). *See also id.* at (4) ("Pretrial services functions shall include the following: . . . monitor and provide treatment as well as nontreatment services to any such persons released in the community, including equipment and emergency housing, corrective and preventative guidance and training, and other services reasonably deemed necessary to protect the public and ensure that such persons appear in court as required.").

44. *See, e.g.*, Probation and Pretrial Services Office, Administrative Office of the U.S. Courts, *News and Views*, "Understanding Risk, Need, and Responsivity" (February 27, 2023) (In one case, a person under supervision was failing to attend ordered treatment. The pretrial services officer "learned that these failures to appear were not caused by willful noncompliance. Rather, the person was experiencing sudden housing instability and could not afford basic necessities like food and hygiene products. The root cause of these problems was a temporary interruption to his disability benefits. When faced with those immediate barriers, getting himself to treatment was beyond his wherewithal in the moment. The officer helped him secure food from a local food bank and basic necessities from another community partner. The officer was also able to tap into funds through the Second Chance Act to temporarily assist the person with rent until disability benefits resumed. With the barriers to his basic needs addressed, the person was able to better engage with treatment.").

45. Senate Report, *supra* note 1, at 16–17.

Courts have generally agreed that "first appearance" means the initial appearance hearing, but the statute does not provide a remedy if a detention hearing is not held "immediately." The Supreme Court has indicated that if the time limit is violated a hearing should be held promptly but, absent very unusual circumstances, "[n]either the timing requirements nor any other part of the Act can be read to require, or even suggest, that a timing error must result in release of a person who should otherwise be detained."[46] Nevertheless, courts should endeavor to adhere to the statute's timing requirements.

2. "Except for good cause, a continuance on motion of such person may not exceed five days (not including any intermediate Saturday, Sunday, or legal holiday), and a continuance on motion of the attorney for the Government may not exceed three days" (not including weekends or legal holidays). "During a continuance, such person shall be detained."

   Keep in mind that a three-day continuance could be five or six days if it covers a weekend and holiday. The court should consider requiring the government to justify a delay that could last that long.[47]

3. The court, "on motion of the attorney for the Government or sua sponte, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether such person is an addict."

   Neither the statute nor the legislative history elaborates on this clause. It appears that it is limited to the specified purpose of determining whether the defendant is a drug addict and does not provide authority to order a more generalized medical or psychological examination for other purposes.[48] Under § 3142(c)(1)(B)(x), however, the court may order as a condition of release that the defendant "undergo available medical, psychological, or psychiatric treatment."

4. "At the hearing, such person has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed."

   As noted previously in this section and in section 1.01: Initial Appearance, *supra*, a defendant should have been afforded the opportunity to consult with counsel—and, if qualified, have counsel appointed—from the start of the initial appearance hearing at the latest. If the defendant does not have counsel and has not waived the right, do not proceed with the detention hearing until defendant is represented by counsel.[49]

46. United States v. Montalvo-Murillo, 495 U.S. 711, 716–721 (1990). *See also* Bail Reform Act, 4th ed., *supra* note 3, at 31–32 (discussing *Montalvo-Murillo* and appellate cases).

47. *See* Bail Reform Act, 4th ed., *supra* note 3, at 15–16 & nn.71–72 (detention for as little as three days can disrupt employment and family life and increase the likelihood of recidivism). *See also* section 1.01: Initial Appearance, *infra*, at III.B.9 and nn.46–48.

48. There is a lack of appellate case law on this issue, but one court held that "the Bail Reform Act of 1984, 18 U.S.C. §§ 3141–3156, does not authorize a judicial officer to order as a condition of pretrial release a psychiatric examination to determine a defendant's dangerousness"). United States v. Martin-Trigona, 767 F.2d 35, 36–38 (2d Cir. 1985).

49. *See, e.g.*, United States v. Fortna, 769 F.2d 243, 249 (5th Cir. 1985) (because the defendant "did not have counsel present and had not retained counsel but stated his intention to do so, it was impossible to legally hold the hearing at that time consistent with the Act's provision that the accused is entitled to counsel at the hearing").

5. "The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise."

   Courts should be aware of possible Fifth Amendment issues if the defendant chooses to testify at the detention hearing, especially if the defendant has chosen to proceed without an attorney. Although the statute only specifies that defendants may present information by proffer, several circuits have allowed the government to do so.[50]

   The defendant is also entitled to the production of witness statements under Fed. R. Crim. P. 26.2, after a 1993 amendment to Fed. R. Crim. P. 46 made Rule 26.2 applicable to detention hearings. The Advisory Committee Notes to that amendment stated that the *Salerno* Court

   > stressed the existence of procedural safeguards in the Bail Reform Act. The Act provides for the right to counsel and the right to cross-examine adverse witnesses. . . . Those safeguards, said the Court, are "specifically designed to further the accuracy of that determination." 481 U.S. at 751. The Committee believes that requiring the production of a witness's statement will further enhance the fact-finding process.

   For further information on evidentiary issues at a detention hearing, see Weinberg & Furse, *supra* note 16, at §§ 6.8.1–6.8.10.

6. "The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing."

   However, a court should assess the reliability of otherwise inadmissible evidence and require corroboration when necessary.[51]

7. "The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence."

   The legislative history emphasized this point:

   > Because of the importance of the interests of the defendant which are implicated in a pretrial detention hearing, the committee has specifically provided that the facts on which the judicial officer bases a finding that no form of conditional release is adequate reasonably to assure the safety of any other person and the community, must be supported by clear and convincing evidence.[52]

   This requirement applies to every such finding, even if there is an unrebutted presumption for detention.

50. *See Stone*, 608 F.3d at 940 ("conducting a bail hearing by proffer is acceptable under the law and at the discretion of the district court"); United States v. Smith, 79 F.3d 1208, 1210 (D.C. Cir. 1996) ("Every circuit to have considered the matter [has] permitted the Government to proceed by way of proffer."); United States v. Gaviria, 828 F.2d 667, 669 (11th Cir. 1987); United States v. Winsor, 785 F.2d 755, 756 (9th Cir. 1986); United States v. Martir, 782 F.2d 1141, 1145–47 (2d Cir. 1986).

51. *See, e.g.*, United States v. Accetturo, 783 F.2d 382, 389 (3d Cir. 1986) ("[A] judicial officer should be sensitive to the fact that Congress' authorization of hearsay evidence does not represent a determination that such evidence is always appropriate. Nor does it relieve the judicial officer of his duty to require more when tendered hearsay evidence does not rise to the required level of reliability."); United States v. Acevedo-Ramos, 755 F.2d 203, 207 (1st Cir. 1985) (the court "possesses adequate power to reconcile the competing demands of speed and of reliability, by selectively insisting upon the production of the underlying evidence or evidentiary sources where their accuracy is in question").

52. Senate Report, *supra* note 1, at 22.

8. "The person may be detained pending completion of the hearing."
9. "The hearing may be reopened before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community."

   Some courts have interpreted this provision strictly, holding that detention hearings should not be reopened if the evidence was available at the time of the hearing.[53] Note that, under § 3145(b), once a detention order is filed the defendant may move for amendment or revocation of the order. That review by the district court is de novo, the court need not defer to the magistrate judge's findings or conclusion, and the court may accept additional evidence.[54]

## *B. Required Findings and Legal Standard for Detention*

1. Section 3142(e)(1) sets forth the basic legal standard that applies at a detention hearing and the requirements for a finding that detention is warranted:

   > If, after a hearing pursuant to the provisions of subsection (f) of this section, the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such judicial officer shall order the detention of the person before trial.

   The question is not whether the defendant poses a danger or a risk of nonappearance in the abstract. Rather, consistent with the plain language of subsection (e)(1), the question is whether the government proved that there is no condition or combination of conditions that would reasonably assure both appearance and safety.

   As with setting conditions of release, the court must consider the factors in § 3142(g) to determine, under subsection (e)(1), whether there are no conditions of release that will reasonably assure appearance and safety so that detention would be warranted. "Since this determination is to be made *whenever a person is to be released or detained* under this chapter, *consideration of these factors is required* . . . in proceedings concerning the pretrial release or detention of the defendant."[55]

   In addition, the court must make an individualized assessment of each defendant on a case-by-case basis:

   > The offense and offender characteristics that will support the required finding for pretrial detention under subsection (e) will vary considerably in each case. Thus the committee has, for the most part, refrained from specifying what

53. *See, e.g.*, United States v. Dillon, 938 F.2d 1412, 1415 (1st Cir. 1991) (court's refusal to reopen detention hearing not in error where information in affidavits and letters appellant sought to present was available to him at time of hearing); United States v. Hare, 873 F.2d 796, 799 (5th Cir. 1989) (affirming refusal to reopen hearing because "testimony of Hare's family and friends is not new evidence").

54. *See* Bail Reform Act, 4th ed., *supra* note 3, at 56 & nn.283–86 (citing cases). *See also* Inventory of Magistrate Judge Duties, Appendix A: Standards of Review in Bail and Detention Proceedings Under the Bail Reform Act (Dec. 2013) (listing cases discussing the district court's standard of review of a magistrate judge's detention decisions), https://jnet.ao.dcn/sites/default/files/pdf/Inventory-of-Magistrate-Judge-Duties.December-2013.pdf.

55. Senate Report, *supra* note 1, at 23 (emphasis added).

> kinds of information are a sufficient basis for the denial of release, and has chosen to leave the resolution of this question to the sound judgment of the courts acting on a case-by-case basis.[56]

Therefore, the court "is expected to weigh all the factors in the case before making its decision as to risk of flight and danger to the community."[57]

The court will also consider the information and recommendation in the pretrial services report. See section II.D, The Pretrial Services Report, *supra*.

If, after the hearing, the court concludes that the defendant will be released rather than detained, go to section II.C, Release with Conditions, *supra*, for the procedure to determine the conditions of release.

2. "Clear and convincing evidence"

As noted above, the facts that support a finding that detention is required because no condition or combination of conditions will reasonably assure *safety* must be based on clear and convincing evidence. While it is intended that "the concern about safety be given a broader construction than merely danger of harm involving physical violence,"[58] the clear and convincing evidence standard

> emphasizes the requirement that there be an evidentiary basis for the facts that lead the judicial officer to conclude that a pretrial detention is necessary. Thus, for example, if the criminal history of the defendant is one of the factors to be relied upon, clear evidence such as records of arrest and conviction should be presented. . . . Similarly, if the dangerous nature of the current offense is to be a basis of detention, then there should be evidence of the specific elements or circumstances of the offense, such as possession or use of a weapon or threats to a witness, that tend to indicate that the defendant will pose a danger to the safety of the community if released.[59]

In determining what the clear and convincing evidence standard requires, one court found it "most akin to the process of evaluating testimony 'in a light most favorable to the defendant'; the fact finder must recognize the evidence with respect to which he or she is uncertain, and put that evidence in the defendant's pile," thus giving "the benefit of the doubt to the defendant."[60]

56. *Id*. at 18–19. *See also* United States v. Scott, 450 F.3d 863, 874 (9th Cir. 2006) (*Salerno* "upheld the constitutionality of a bail system where pretrial defendants could be detained only if the need to detain them was demonstrated on an individualized basis"); *Tortora*, 922 F.2d at 888 ("Detention determinations must be made individually and, in the final analysis, must be based on the evidence which is before the court regarding the particular defendant. . . . The inquiry is factbound.").

57. Senate Report, *supra* note 1, at 24–25.

58. *Id.* at 12–13 (for example, "the risk that a defendant will continue to engage in drug trafficking constitutes a danger to the 'safety of any other person or the community'").

59. *Id.* at 22. *See also Salerno*, 481 U.S. at 751 (pretrial detention allowed if "the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community"); *Munchel*, 991 F.3d at 1283 ("whether a defendant poses a particular threat depends on the nature of the threat identified and the resources and capabilities of the defendant").

60. United States v. Montague, 40 F.3d 1251, 1255 (D.C. Cir. 1994). *Accord* United States v. Arnold, 106 F.3d 37, 43 (3d Cir. 1997). *See also* United States v. Gebro, 948 F.2d 1118, 1121 (9th Cir. 1991) ("doubts regarding the propriety of release should be resolved in the defendant's favor.").

3. "The appearance of the person as required"

   Unlike for safety, neither the statute nor the legislative history specifies the evidentiary standard required for a finding under § 3142(e)(1) that "no condition or combination of conditions will reasonably assure the appearance of the person as required." Every appellate court to rule on the issue held that such a finding must be supported by a preponderance of the evidence.[61]

   As with detention decisions based on safety, the court must examine each case and each defendant individually and find specific reasons that this particular defendant is such a risk of nonappearance that no conditions of release can reasonably assure appearance. See section B.1 above and note 56.

## *C. Applying a Presumption at the Detention Hearing*

There are two presumptions in § 3142(e), the "previous-violator" presumption in subsection (e)(2) and the "drug-and-firearm offender" presumption in subsection (e)(3). The first presumption references only "the safety of any other person and the community" and not appearance, applies only if the charged offense falls within § 3142(f)(1) *and* the defendant was previously convicted of such an offense or a similar state offense *and* committed that prior offense while on release pending trial for another offense *and* not more than five years has passed since the date of conviction for that prior offense or when defendant was released from prison. With this very limited application, the previous-violator presumption is hardly ever applied and will not be specifically discussed here. If it is invoked, the same principles apply to it as to the second presumption.

The second presumption, which is "subject to rebuttal by the person," states: "it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community" if the court finds there is probable cause to believe that the defendant committed one of the offenses listed in § 3142(e)(3).[62] Some of these offenses are also listed in § 3142(f)(1) as offenses that initially authorize a detention

61. *See* United States v. Cisneros, 328 F.3d 610, 616 (10th Cir. 2003); United States v. Patriarca, 948 F.2d 789, 793 (1st Cir. 1991); United States v. Aitken, 898 F.2d 104, 107 (9th Cir. 1990); United States v. King, 849 F.2d 485, 489 (11th Cir. 1988); United States v. McConnell, 842 F.2d 105, 110 (5th Cir. 1988) (en banc); United States v. Jackson, 823 F.2d 4, 5 (2d Cir. 1987); United States v. Himler, 797 F.2d 156, 161 (3d Cir. 1986); United States v. Vortis, 785 F.2d 327, 328–29 (D.C. Cir. 1986); United States v. Portes, 786 F.2d 758, 765 (7th Cir. 1985); United States v. Orta, 760 F.2d 887, 891 n.20 (8th Cir. 1985) (en banc).

62. *See* 18 U.S.C. § 3142(e)(3) (listing: (A) various controlled substance offenses when the maximum penalty is ten years or more imprisonment; (B) an offense under 18 U.S.C. § 924(c), 956(a), or 2332b; (C) an offense under 18 U.S.C. § 2332b(g)(5)(B) if the maximum penalty is ten years or more; (D) offenses in Chapter 77 of Title 18, Peonage, Slavery, and Trafficking in Persons, with a maximum prison term of 20 years or more; and (E) "an offense involving a minor victim under" twenty listed Title 18 sections and subsections).

hearing. Nearly every controlled substance case is subject to this rebuttable presumption for detention, regardless of the severity of the defendant's offense conduct or criminal history.[63]

The statute does not, however, provide any guidance beyond that. To understand how to apply the presumptions, to determine their role in the evaluation of the defendant for release or detention, requires looking at the presumptions with reference to the rest of the statute, legislative history, and case law. Following is a summary of the proper treatment of a presumption for detention. For a more detailed discussion, see Appendix B, *infra*.

### 1. *The burden of proof remains on the government*

There is no mention of the burden of proof in the presumption section, and nothing in the rest of the statute indicates that a presumption removes the burden of proof required to detain a defendant that the statute imposes on the government. All the circuits to decide the issue agree that the burden of proof (or "burden of persuasion") in presumption cases remains on the government to show that there are no conditions of release that will reasonably assure safety and appearance.[64]

Contrast § 3142(e) with § 3143, which does impose the burden of persuasion on a defendant after conviction:

> Section 3143 creates a presumption that a defendant who has been convicted of a crime may not be released pending his appeal or sentencing unless he shows "by clear and convincing evidence that [he] is not likely to flee or pose a danger to the safety of any other person or the community." § 3143(a), (b). . . . The Judiciary Committee Report notes that "The Committee intends that in overcoming the presumption in favor of detention [in § 3143] *the burden of proof* rests with the defendant." . . . Congress could have used language similar to that of § 3143, or Report language similar to that just quoted, if it had intended § 3142(e) to impose a similar burden of persuasion. The absence of such language, and the proximity of §§ 3142 and 3143, reinforces our conclusion that § 3142 was meant to impose only a burden of production.[65]

In presumption cases, therefore, the burden of persuasion *always* remains on the government to prove, under § 3142(e)(1), that no condition or combination of conditions will reasonably

63. *See* Amaryllis Austin, *The Presumption for Detention Statute's Relationship to Release Rates*, 81 Fed. Prob. 52, 55 (Sept. 2017) (in study commissioned by the Committee on Criminal Law of the Judicial Conference of the United States, "[p]resumption cases accounted for 93 percent of drug offenses" for fiscal years 2005 to 2015, including 85.44% of defendants in PTRA category 1, who by definition have "minimal, if any, criminal history and a stable personal background in terms of employment, residence, education, and substance abuse history"); Amaryllis Austin, Sara J. Valdez Hoffer & Christopher T. Lowenkamp, *The Presumption for Detention Statute's Relationship to Release Rates Revisited: A Replication and Extension*, 88 Fed. Prob. 14, 16–18 (Sept. 2024) (finding similar results in a follow-up study of 345,844 defendants between fiscal years 2016 and 2022). *See also* U.S. Sent'g Comm'n, 2023 Sourcebook of Federal Sentencing Statistics, at tbls. D-7 (42.5% of "sentenced individuals in drug trafficking cases" for fiscal year 2023 were in criminal history category I), D-9 (for drug trafficking cases in fiscal year 2023, 18.3% of defendants received a mitigating role adjustment and 6.3% an aggravating role adjustment at sentencing), https://www.ussc.gov/research/sourcebook-2023.

64. *See Stone*, 608 F.3d at 945; *Hir*, 517 F.3d at 1086; *Stricklin*, 932 F.2d at 1354–55; United States v. Moss, 887 F.2d 333, 338 (1st Cir. 1989); *Hare*, 873 F.2d at 798; United States v. Perry, 788 F.2d 100, 115 (3d Cir. 1986); United States v. Dominguez, 783 F.2d 702, 707 (7th Cir. 1986); United States v. Hurtado, 779 F.2d 1467, 1470 n.4 (11th Cir. 1985); United States v. Alatishe, 768 F.2d 364, 371 n.14 (D.C. Cir. 1985); United States v. Chimurenga, 760 F.2d 400, 405 (2d Cir. 1985); *Orta*, 760 F.2d at 891 n.17.

65. United States v. Jessup, 757 F.2d 378, 382 (1st Cir. 1985) (citing Senate Report, *supra* note 1, at 27) (emphasis in opinion).

assure the appearance of the person as required (by a preponderance of the evidence), and the safety of any other person and the community (by clear and convincing evidence).[66]

### 2. Rebutting a presumption

It is generally agreed that, while the burden of *persuasion* never shifts, the *presumption* places a burden of production on the defendant to introduce evidence to rebut the presumption. The burden is "not heavy, but some evidence must be produced."[67] The introduction of

> [a]ny evidence favorable to a defendant that comes within a category listed in § 3142(g) can affect the operation of one or both of the presumptions, . . . including evidence of their marital, family and employment status, ties to and role in the community, clean criminal record and other types of evidence encompassed in § 3142(g)(3).[68]

For example, ties to the community alone could rebut the presumption.

The case law does not say that a defendant must produce "sufficient" evidence, or a particular quantum of evidence, in order to rebut a presumption for detention. Nor does a defendant have to prove that the presumption does not, or should not, apply to their case. A defendant must only produce "some" or "any" relevant mitigating evidence, "some credible evidence contrary to the statutory presumption," to consider the presumption rebutted.

Note also that, although the drug-and-firearm clause says, "subject to rebuttal by the person," the court is not limited to information that the defendant produces. If there is mitigating information that rebuts the presumption in the record, in the pretrial services report, presented at the hearing, or from some other source that is relevant to the presumption, the court should consider it.[69]

66. *See, e.g.*, United States v. Mercedes, 254 F.3d 433, 436 (2d Cir. 2001) ("Even in a presumption case, the government retains the ultimate burden of persuasion by clear and convincing evidence that the defendant presents a danger to the community . . . [or by] a preponderance of the evidence that the defendant presents a risk of flight."); *Stone*, 608 F.3d at 946 ("Regardless of whether the presumption applies, the government's ultimate burden is to prove that no conditions of release can assure that the defendant will appear and to assure the safety of the community."); *Dominguez*, 783 F.2d at 707 (holding that the BRA's presumptions do not "shift the burden of persuasion to the defendant").

67. *Stricklin*, 932 F.2d at 1355. *See also* United States v. Wilks, 15 F.4th 842, 846–47 (7th Cir. 2021) (the defense bears "a light burden of production" to rebut the presumption); *Stone*, 608 F.3d at 945 (defendant "must introduce at least some evidence" regarding risk of flight and danger to community); United States v. Rodriguez, 950 F.2d 85, 88 (2d Cir. 1991) ("a defendant must introduce some evidence contrary to the presumed fact in order to rebut the presumption"); *Alatishe*, 768 F.2d at 371 ("a burden of production [is] on the defendant to offer some credible evidence contrary to the statutory presumption"); *Jessup*, 757 F.2d at 381 ("must produce only "some [relevant] evidence").

68. *Dominguez*, 783 F.2d at 707 (defendants "could also show that the specific nature of the crimes charged, or that something about their individual circumstances, suggests that 'what is true in general is not true in the particular case'") (citation omitted). *See also* United States v. Carbone, 793 F.2d 559, 561 (3d Cir. 1986) (evidence related to § 3142(g) factors may rebut presumption); *Perry*, 788 F.2d at 1015 ("[A]side from his own testimony about his future intention to refrain from dealing in drugs or using guns in crimes of violence, there may be several types of evidence available, *e.g.*, testimony by co-workers, neighbors, family physician, friends, or other associates concerning the arrestee's character, health, or family situation.").

69. *See* 18 U.S.C. § 3142(g) ("The judicial officer shall . . . take into account the available information" related to the listed factors.); Senate Report, *supra* note 1, at 24–25 ("court is expected to weigh *all the factors in the case* before making its decision as to risk of flight and danger to the community") (emphasis added). *See also* Admin. Office of the U.S. Courts, Guide to Judiciary Policy vol. 8A, ch. 1 at § 130(c) (the pretrial services interview "is the primary vehicle through which defendants provide information about themselves to the court").

### 3. How to consider a rebutted presumption

Case law also holds that after a presumption is rebutted, it does not disappear entirely like a "bursting bubble." Rather, the rebutted presumption is to be considered along with the subsection (g) factors that a court is required to consider.[70] In deciding how much weight to give the rebutted presumption, some courts have held it is useful to compare how closely the defendant resembles the types of offenders that Congress was concerned about when it created the presumptions—those who are charged with "a seriously dangerous offense" who have already committed a similar serious crime while on release, "major drug traffickers" who are charged with "a grave drug offense," or those charged with "serious and dangerous federal offenses," such as using a firearm to commit a felony.[71] The less the defendant resembles such offenders, the less weight the presumption should be given.[72]

### 4. When the presumption is not rebutted

If a presumption is not rebutted, detention cannot be based solely on the presumption.[73] Nothing in the statute or the legislative history negates the requirement for the government to prove under § 3142(e)(1) that no conditions of release will reasonably assure appearance and safety, or the requirement that the court consider the factors set out in § 3142(g) in deciding between release and detention.

Also, both presumptions depend upon the type or severity of the offense charged in the indictment.[74] The standard for an indictment, however, is only probable cause, a lesser standard than clear and convincing evidence or the preponderance of the evidence. Imposing detention based on no more than the alleged offense, then, would directly conflict with the clear language of the statute and legislative history that requires the government, before detention may be imposed, to prove by clear and convincing evidence that no conditions of release will reasonably

70. The leading case on this is *United States v. Jessup*, 757 F.2d 378, 382–84 (1st Cir. 1985) (court should consider concerns of Congress behind the presumptions, the evidence produced by the defendant and the government, and weigh that along with the factors in subsection (g)). Every circuit to consider the issue agrees that a rebutted presumption does not disappear but remains a factor to consider. *See, e.g.*, *Stone*, 608 F.3d at 945; United States v. Abad, 350 F.3d 793, 797 (8th Cir. 2003); *Stricklin*, 932 F.2d at 1355; United States v. Cook, 849 F.2d 485, 488 (11th Cir. 1988); *Hare*, 873 F.2d at 798; *Dominguez*, 783 F.2d at 707; United States v. Martir, 782 F.2d 1141, 1144 (2d Cir. 1986). *See also* United States v. Gamble, 810 F. App'x 7, 8 (D.C. Cir. 2020) (citing *Jessup* and *Stone*).

71. *See* Senate Report, *supra* note 1, at 19–20 (describing the types of cases that warrant a presumption for detention).

72. *See, e.g.*, *Jessup*, 757 F.2d at 387 ("The defendant can provide argument and evidence suggesting that he is not involved in the 'highly lucrative' drug operations at the center of congressional concern. . . . The less th[e] features [of his case] resemble the congressional paradigm, the less weight the magistrate will likely give to Congress's concern for flight."); *Fortna*, 769 F.2d at 251–52 (citing *Jessup*).

73. *See Wilks*, 15 F.4th at 846–47 ("the burden of persuasion always rests with the government and an unrebutted presumption is not, by itself, an adequate reason to order detention"); United States v. Jackson, 845 F.2d 1262, 1266 (5th Cir. 1988) ("the government cannot reasonably argue that the § 3142(e) presumption, coupled with the allegations of the indictment against Jackson, are alone sufficient to satisfy § 3142(g)"). *But see Perry*, 788 F.2d at 115 (affirming order of detention where defendant chose not to present any evidence to rebut the presumption and his other arguments against detention failed); *Alatishe*, 768 F.2d at 371–72 (same). See also discussion in Appendix B at notes 96–97 and accompanying text.

74. The presumption in § 3142(e)(2) only applies if the defendant is charged with an offense listed in § 3142(f)(1). The presumption in § 3142(e)(3) is based on "probable cause to believe that the person committed" one of the listed offenses.

assure the safety of individuals and the community, and the case law that requires the government to prove risk of nonappearance by a preponderance of the evidence.[75]

However, as with a rebutted presumption, an unrebutted presumption is to be considered by the court along with the required factors in § 3142(g) "in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community."[76] Whether or not a defendant rebuts the presumption, the burden of persuasion remains on the government to prove that detention is warranted.

Under the statute and legislative history, therefore, it is not appropriate for a court to find, for example, that detention is warranted because the defendant "failed to rebut the presumption," or did not present "sufficient evidence to rebut the presumption." To do so would impermissibly shift the burden of persuasion to the defendant.[77] A defendant never has to prove that there *are* any conditions of release that will reasonably assure appearance and safety—instead, the government always must prove that there *are not* any such conditions.

Similarly, it would be improper to state that detention is warranted because the evidence does not support a finding that the defendant is not a danger to the community or will not fail to appear. *The defendant does not have the burden of proving that they are not a danger and not a risk to flee or fail to appear*. The standard for detention under § 3142(e)(1) is whether *the government* has shown by clear and convincing evidence (for safety) or a preponderance of the evidence (for appearance) "that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community."

For a more extensive discussion of presumptions for detention, see Appendix B, *infra*.

## *D. Contents of a Detention Order, 18 U.S.C. § 3142(i)*

1. *Written findings of fact and statement of reasons:* A court must, under § 3142(i)(1), include in the detention order "written findings of fact and a written statement of the reasons for detention." The reasons for release or detention may, per Fed. R. App. P. 9(a)(1), be stated "orally on the record." Some circuits have held that the requirement in § 3142(i)(1) for written findings is satisfied "where the court's findings and reasons for issuing a detention order are clearly set out in the written transcript of the hearing."[78]

75. 18 U.S.C. § 3142(f) ("The facts the judicial officer uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence."). *See also* note 61 and accompanying text, *supra* (regarding appearance and the preponderance standard).

76. *Wilks*, 15 F.4th at 847 ("the presumption is considered together with the factors listed in § 3142(g)."); *Jackson*, 845 F.2d at 1266 (even if presumption not rebutted, "the language of § 3142(g) mandates district court review of certain factors ('The judicial officer *shall* . . . take into account the available information . . .') (emphasis added)").

77. *See* notes 64–66 and accompanying text, *supra*.

78. United States v. English, 629 F.3d 311, 320–21 (2d Cir. 2011). *Accord Cisneros*, 328 F.3d at 617 (citing Rule 9(a)(1)); United States v. Peralta, 849 F.2d 625, 626 (D.C. Cir. 1988) (per curiam) ("the transcription of a detention hearing, if it evinces a clear and legally sufficient basis for the court's determination, will satisfy the requirements of section 3142(i)").

Courts should consider explaining what alternatives to detention were considered and why they were not adequate.[79]

In a presumption case, it is not sufficient to simply state, for example, that "the defendant has not rebutted the presumption."[80] The court must show that, after considering the presumption *and* the subsection (g) factors as applied to *this* defendant, the government proved there are no conditions of release that will reasonably assure appearance and safety as § 3142(e)(1) requires.

2. Order that the person be committed to the custody of the Attorney General for confinement in a facility that is separate from persons who have been convicted of an offense. 18 U.S.C. § 3142(i)(2).
3. Order that the defendant "be afforded reasonable opportunity for private consultation with counsel." 18 U.S.C. § 3142(i)(3).
4. Direct that the person in charge of the corrections facility in which the defendant will be confined deliver the defendant, upon order of a federal court or request of a government attorney, to a United States marshal for the purpose of an appearance in connection with a court proceeding. 18 U.S.C. § 3142(i)(4).
5. The court may, under § 3142(i), permit the temporary release of the defendant if such release is determined to be "necessary for preparation of his defense or for other compelling reasons."[81]

## *E. Reopening, Review, and Appeal*

1. *Reopening the detention hearing*: The last sentence in § 3142(f) allows either party to move to reopen the detention hearing, but only if there is relevant information that was previously unknown to the movant:

> The hearing may be reopened before or after a determination by the judicial officer, at any time before trial if the judicial officer finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community.

The movant should specify what the new information is and how it could materially affect the detention decision. Note that the limitation of new information does not apply

79. *See, e.g.*, United States v. Berrios-Berrios, 791 F.2d 246, 251 (2d Cir. 1986) ("court's failure to explain on the record the extent to which it considered any alternatives to incarceration and, if so, on what basis they were rejected," required remand to "enable us to fulfill our obligation of reviewing the district court's application to its factual findings of the pertinent legal standards contained in the 1984 Act"). *See also* United States v. Nwokoro, 651 F.3d 108, 110–11 (D.C. Cir. 2011) (remanded: court failed to adequately assess alternatives to detention and factors that favored release or to explain why it found that the government met "its burden of proving that no condition or combination of conditions could reasonably assure the appearance of appellant at trial").

80. *See Moss*, 887 F.2d at 338 (detention order "contain[ing] only the conclusory statement that the defendant had failed to rebut the presumption" required remand for "written statement of the reasons for the detention as required by 18 U.S.C. § 3142(i)").

81. Senate Report, *supra* note 1, at 25.

to a motion under § 3145 for review of a release or detention order by a district court. That review is de novo, and the district court may accept new evidence as appropriate.[82]

2. *Review and Appeal*: Under § 3145(a) and (b), either party may file with the district court a motion for revocation or amendment of the magistrate judge's order, which is essentially an "appeal" to the district court. As noted above, the district court's review of a detention order under § 3145(b) is de novo. "The district court must state in writing, or orally on the record, the reasons for an order regarding . . . release or detention." Fed. R. App. P. 9(a)(1).

   Under § 3145(c), either party may appeal from a release or detention order or the denial of a request to amend or revoke that order, subject to the provisions of 28 U.S.C. § 1291 and 18 U.S.C. § 3731.

# IV. Suggested Colloquies[83]

## *A. For Release*

[Note: This colloquy assumes that release will be discussed either as part of the initial appearance hearing or at the end of a detention hearing, and that the court has already gotten basic information from the defendant, explained the nature of the proceedings and the defendant's rights to release, and allowed the defendant adequate opportunity to consult with counsel. See, e.g., section 1.01: Initial Appearance, *supra*, at IV, Suggested Colloquy.]

1. Explain that the defendant will be released:

   (a) On personal recognizance or upon execution of an unsecured appearance bond, 18 U.S.C. § 3142(b), or

   (b) Upon specified conditions if the court determines "that the release described in subsection (b) . . . will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community." 18 U.S.C. § 3142(c)(1).

2. Explain that the defendant will be subject to the condition that they "not commit a Federal, State, or local crime during the period of release" and, if applicable, that the defendant must also cooperate in the collection of a DNA sample. 18 U.S.C. § 3142(b) & (c)(1)(A).
3. If specific conditions of release are required under § 3142(c)(1)(B) in order to "reasonably assure the appearance of the person as required and the safety of any other person and the community," explain each condition to the defendant. Allow the defendant to consult with counsel.
4. Allow an opportunity for the government and the defendant to question whether the proposed conditions are "the least restrictive" conditions that will reasonably assure appearance and safety, as specified in § 3142(c)(1)(B).

82. *See* Bail Reform Act, 4th ed., *supra* note 3, at 55–57.

83. The following colloquies were developed in part from those in the Procedures Manual for United States Magistrate Judges, § 5: Initial Appearances, and § 7: Detention Hearings and Bail (March 2014), https://jnet.ao.dcn/court-services/judges-corner/magistrate-judges/procedures-manual-united-states-magistrate-judges.

5. Allow any victims of the offense "to be reasonably heard" about the release of the defendant. 18 U.S.C. § 3771(a)(2)–(4). If the case involves domestic violence, stalking, or violation of a protective order, allow the alleged victim to be heard regarding the danger posed by the defendant. 18 U.S.C. § 2263.
6. After hearing from all parties, announce the court's decision as to the conditions of release. If the government and defense counsel have agreed upon a set of conditions, the court may adopt the agreement but should determine, as the statute requires, that it is "the least restrictive . . . combination of conditions" that "will reasonably assure the appearance of the person as required and the safety of any other person and the community."
7. Explain to the defendant, as § 3142(h)(2) requires,
    (a) that failing to appear in court as required is a crime for which the defendant can be sentenced to imprisonment (18 U.S.C. § 3146);
    (b) that if the defendant violates any condition of release, a warrant for arrest may be issued, and the defendant may be jailed until trial and may also be prosecuted for contempt of court (18 U.S.C. § 3148);
    (c) that committing a crime while on release may lead to more severe punishment than the defendant would receive for committing the same crime at any other time (18 U.S.C. § 3147); and
    (d) that it is a crime to try to influence a juror, to threaten or attempt to bribe a witness or other person who may have information about this case, to retaliate against anyone for providing information about the case, or to otherwise obstruct the administration of justice (18 U.S.C. §§ 1503, 1510, 1512, 1513).
8. [*Optional*] After explaining the consequences of violating any release conditions, consider informing the defendant of the possible *benefit* that complying with those conditions could bring at sentencing:

> Pretrial release is an opportunity to demonstrate your ability to follow the law, cooperate with pretrial services, and otherwise provide to a sentencing judge, if you are convicted, mitigating evidence that might lead to the imposition of a shorter sentence. At the very least, a successful period of pretrial release will avoid having your release revoked or the imposition of stricter or additional conditions of release. And if convicted, it would help you avoid a longer sentence that might be imposed if you commit even minor violations of your conditions of release.

Along these lines, consider also telling the defendant:

> I encourage you to cooperate with Pretrial Services during your period of release. Part of their job is to monitor you for compliance with the conditions of release, and they are required by statute to report any violations. However, it is also their duty to help you comply with those conditions and to assist you in other ways, such as finding employment or getting needed medical, legal, or

social services. You could benefit greatly from their assistance if you work with them.

See also section II.E.3, *supra*.

9. Advise the defendant of the right to seek review of the release order or to make a motion to amend the order to change the conditions.
10. Pursuant to 18 U.S.C. § 3142(h), include in the release order "a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person's conduct."[84] Obtain the defendant's written acknowledgment of the conditions of release and the consequences of violating them. Forms AO 199A and 199B may be used as the written statement, and Form AO 199C may be used for the defendant's acknowledgment of the court's advice on the potential "penalties and sanctions" for violating any of the conditions of release.
11. Advise the defendant of any scheduled court appearances and explain how the defendant will be notified about future appearances.

## *B. At the Detention Hearing*

- This hearing, requested by the government, is to determine whether the defendant, _____, will be detained or released pending trial.
- This hearing is authorized under 18 U.S.C. § 3142(f)(1) because the defendant is charged with _____.

  or
- This hearing is authorized under 18 U.S.C. § 3142(f)(2) because the case involves a "serious risk" that _____.
- During this hearing, you have the right to be represented by counsel.

  [If the defendant does not have counsel and has not knowingly and voluntarily waived the right, explain the right to appointed counsel. If requested and the defendant qualifies, appoint counsel before proceeding further.]
- There is a presumption of release under the Bail Reform Act of 1984. The defendant must be released unless the government proves that no condition or combination of conditions will reasonably assure future appearances of the defendant or the safety of any individual or the community.
- The government must prove risk of nonappearance by a preponderance of the evidence, and danger to any individual or the community must be proved by clear and convincing evidence.
- I must consider all conditions of release in § 3142(c)(1) to determine if there is any condition or combination of conditions that will reasonably assure appearance

84. Note that Fed. R. App. P. 9(a)(1) requires the court to "state in writing, or orally on the record, the reasons for an order regarding the release or detention of a defendant." *See also* section II.E, Contents of Release Order, 18 U.S.C. § 3142(h), *supra*, and nn.34 & 35.

and safety. If I find that the government has proved that there are no conditions that will reasonably assure either the appearance of the defendant as required or the safety of the community, I am required by the Act to order the defendant to be held in custody until trial.

- In evaluating whether the government has proved that the defendant should be detained, I must consider several factors under § 3142(g):

  (1) the nature and circumstances of the offense charged, including whether the offense is a crime of violence, . . . a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;

  (2) the weight of the evidence against the person;

  (3) the history and characteristics of the person, including—

  (A) the person's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

  (B) whether, at the time of the current offense or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an offense under Federal, State, or local law; and

  (4) the nature and seriousness of the danger to any person or the community that would be posed by the person's release.

[*If applicable:*

- There is a rebuttable presumption for detention in this case under § 3142(e) that I must also consider. The defendant can rebut the presumption by producing some favorable evidence under § 3142(g). Rebutting the presumption will not completely remove the presumption but will lessen the weight it is given when considered with the other factors I have mentioned.

  If no evidence is produced to rebut the presumption, that does not by itself warrant detention, but the presumption will be taken into account when I am considering those other factors in deciding whether the government has met the burden of proof required for detention.]

- You will have the opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or other means. The government may also present witnesses and evidence and cross-examine any of your witnesses.

- The stricter rules that govern the admissibility of evidence in criminal trials do not apply to this hearing. However, I will assess the reliability of evidence that

would normally be inadmissible and may require corroborating evidence before I will consider it in my decision.

[*If applicable:*

1. Before making a decision, I must also allow any victims of the offense "to be reasonably heard" about the release of the defendant. (18 U.S.C. § 3771(a)(2)–(4).)
2. Because this case involves domestic violence, stalking, or violation of a protective order, I must allow the alleged victim to be heard regarding the danger posed by the defendant. (18 U.S.C. § 2263.)]

[If the parties are ready, proceed with the hearing.]

- When the hearing is concluded, announce your decision, stating the reasons for the record:

  Based on the evidence presented at this hearing, previous filings by the parties, and the report and recommendation from pretrial services—

[*If the defendant will be released:*]

I find that detention is not warranted because the government has not met its burden of proving that there is no condition or combination of conditions that will reasonably assure the appearance of the defendant as required and the safety of any other person and the community. In particular I find that—

[List reasons.]

Therefore, the defendant will be released with conditions.

[At this point, stop and go to the sample colloquy for release at section V.A, *supra*.]

[*If the defendant will be detained:*]

I find that detention is warranted because the government has proved:

1. By the preponderance of the evidence, that there is no condition or combination of conditions that will reasonably assure the appearance of the defendant as required.

   and/or

2. By clear and convincing evidence, that there is no condition or combination of conditions that will reasonably assure the safety of any other person and the community.

- List the reasons for the decision.
- Inform the defendant of the right to review and appeal:

1. You have the right to have this detention order reviewed by the district court by filing a motion for revocation or amendment of this order.

2. You also have the right to appeal this detention order, or to appeal from a decision that denies revocation or amendment of the order.
3. You may also make a motion to reopen this hearing if there is information that was not previously known to you at the time of this hearing that has a material bearing on the issue of whether there are conditions of release that will reasonably assure your appearance as required and the safety of any other person and the community.

- Prepare the written order pursuant to the requirements of 18 U.S.C. § 3142(i). Ensure that the order includes written findings of fact and a written statement of reasons for the detention and directs:
    - that the defendant be committed to the custody of the Attorney General for confinement in a corrections facility and kept separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;
    - that the defendant be given reasonable opportunity for private consultation with counsel; and
    - that, on order of the court or request by the government, the person in charge of the corrections facility where the defendant is detained shall deliver the defendant to the U.S. Marshal for future court proceedings.

The court may use Form AO 472: Order of Detention Pending Trial (revised Jan. 2025), for this purpose. https://www.uscourts.gov/forms-rules/forms/order-detention-pending-trial

# Appendix A

## *Checklist: Bail Reform Act of 1984, 18 U.S.C. § 3142*

1. The defendant has the right to be represented by counsel during the initial appearance hearing and at the detention hearing. Because defendants have the right to counsel from the start of the initial appearance hearing, see section 1.01: Initial Appearance, *supra*, no discussions or decisions about pretrial release or detention at either hearing should occur unless the defendant has the opportunity to consult with counsel.
2. Release
    a. There is a presumption for *release* of defendants before trial, unless the government proves that detention is warranted.
    b. A defendant's release, whether at the initial appearance or after a detention hearing, must be "subject to the least restrictive further condition, or combination of conditions, that such judicial officer determines will reasonably assure the appearance of the person as required and the safety of any other person and the community." 18 U.S.C. § 3142(c)(1)(B).

3. Motion for detention at the initial appearance hearing

    a. A detention hearing is *only* authorized if there is probable cause to believe that the defendant committed one of the offenses listed in § 3142(f)(1) or, under § 3142(f)(2), that the defendant presents a "serious risk" to flee, to obstruct or attempt to obstruct justice, or to threaten, injure, or intimidate a prospective witness or juror or attempt to do so. Allegations of "dangerousness" or "danger to the community," or a general risk to flee, obstruct justice, etc., are not sufficient grounds for a detention hearing.

    b. If a detention hearing is not authorized, the defendant must be released at the conclusion of the initial appearance hearing.[85]

    c. A continuance between the initial appearance hearing and the detention hearing is only allowed if a detention hearing is authorized. Any continuance should be no longer than necessary for the moving party to prepare for the detention hearing.

    d. Except for temporary detention under 18 U.S.C. § 3142(d), a defendant may only be detained under § 3142(e)(1) after a detention hearing.

4. Detention hearing procedure and required findings

    a. At the detention hearing, the defendant may testify, present witnesses, cross-examine witnesses, and present information by proffer or otherwise.

    b. The burden of proof or persuasion is *always* on the government to show "that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community."

    c. The government must show that there are no conditions that will reasonably assure appearance under the preponderance of the evidence standard, and no conditions to reasonably assure safety by clear and convincing evidence.

    d. A defendant never has to prove that there *are* conditions of release that will reasonably assure appearance and safety—the government always has to prove that there *are not* any such conditions.

    e. The court is required to consider the factors in § 3142(g) in every decision to release or detain a defendant and the court must make an individualized assessment of each defendant.

5. Presumptions for detention at the detention hearing

    a. A defendant has the burden of *producing* "some" or "any" mitigating information to rebut a presumption for detention. The ultimate burden of persuasion remains with the government.

    b. Even if the defendant does not produce evidence to rebut a presumption, detention is not authorized. The burden of persuasion does not change—the

85. Note: In some cases, the defendant may waive the right to a detention hearing or otherwise consent to detention. While this practice is not specifically authorized by the Bail Reform Act of 1984, neither is it prohibited. For a discussion of this issue, see Bail Reform Act, 4th ed., *supra* note 3, at 33–34, and Weinberg & Furse, *supra* note 16, at § 6:5.6. In such cases, the right to consult with counsel is especially critical.

government still must prove that there is no condition or combination of conditions of release that will reasonably assure appearance and safety.

c. The court shall consider a presumption along with the required subsection (g) factors in the release or detention decision, giving more weight to an unrebutted presumption and less weight to a rebutted presumption, and must base its decision on all the evidence presented.

6. If the defendant is to be released, the court must issue an order that includes a written statement setting forth the release "in a manner sufficiently clear and specific to serve as a guide" for the defendant, and must advise the defendant of the potential penalties for and consequences of violating any of the conditions. 18 U.S.C. § 3142(h).

7. If the defendant is detained, the court's order of detention must contain "written findings of fact and a written statement of the reasons for the detention." 18 U.S.C. § 3142(i). The court should state how the government met its burden of proof. It is never appropriate to give as a reason for detention that the defendant, for example, "did not rebut the presumption," "did not produce sufficient evidence to rebut the presumption," or "did not prove that there are conditions of release that will reasonably assure appearance and safety."

# Appendix B

## *Treatment of Presumptions for Detention*

As noted at the beginning of this section, 18 U.S.C. § 3142 is a lengthy and complex statute. Courts must very carefully follow what are often very specific requirements and procedures. The presumption for detention provisions, however, provide almost no guidance to courts on how they are to be applied.

Rarely used subsection (e)(2) states that "a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community" under certain circumstances. The far more common presumption in subsection (e)(3) states that, "[s]ubject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community" if there is probable cause to believe that the defendant committed one of the listed offenses.

Section 3142(e) provides no other instruction on presumptions. There is no direction to defendants on how to rebut a presumption, and no instruction to courts on how to treat a presumption—whether or not it is rebutted—when deciding on release or detention. Proper application of the presumptions for detention requires an examination of the rest of § 3142, the legislative history, and case law.

## *I. Rebutting a Presumption*

### A. Evidence that Will Rebut a Presumption

The presumption provisions in § 3142(e)(2) and (3) are silent on what types of evidence will rebut a presumption, as is the legislative history. See Senate Report at 19–20. It has, therefore,

been left to the courts to determine how a defendant may rebut a presumption based on the other provisions of the statute and the legislative history.

Section 3142(e)(1) clearly states the finding that is required before a defendant can be detained—there must be "no condition or combination of conditions [that] will reasonably assure the appearance of the person as required and the safety of any other person and the community." To determine whether this requirement has been met, section 3142(g) states that the court "shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning" the factors listed in subsections (g)(1)–(4).

This imperative is reiterated in the legislative history: "In determining whether any form of conditional release will reasonably assure the appearance of the defendant and the safety of other persons and the community, the judicial officer is required to consider the factors set out in section 3142(g)." Senate Report at 18.[86] Apart from that directive, and describing the presumptions as "two sets of circumstances under which a strong probability arises that no form of conditional release will be adequate," the Senate committee "refrained from specifying what kinds of information are a sufficient basis for the denial of release, and has chosen to leave the resolution of this question to the sound judgment of the courts acting on a case-by-case basis."[87]

After reviewing the statute and legislative history, all appellate courts to decide the issue have held that any evidence that falls within § 3142(g), including evidence that indicates that there are conditions of release that will reasonably assure appearance or safety, rebuts a presumption: "Any evidence favorable to a defendant that comes within a category listed in § 3142(g) can affect the operation of one or both of the presumptions, . . . including evidence of their marital, family and employment status, ties to and role in the community, clean criminal record and other types of evidence encompassed in § 3142(g)(3)."[88]

Therefore, "any" or "some" favorable evidence that is relevant to the release or detention decision rebuts a presumption. The court will then weigh the rebutted presumption along with the other factors it must consider under § 3142(g).

86. *See also* Senate Report, *supra* note 1, at 23 ("Since this determination is to be made whenever a person is to be released or detained under this chapter, consideration of these factors is required . . . in proceedings concerning the pretrial release or detention of the defendant.").

87. *Id.* at 18–19.

88. United States v. Dominguez, 783 F.2d 702, 707 (7th Cir. 1986) (a defendant rebuts a presumption "by coming forward with some evidence that he will not flee or endanger the community if released"). *Accord* United States v. Jackson, 845 F.2d 1262, 1266 (5th Cir. 1988) ("where the defendant has presented considerable evidence of his long-standing ties to the locality in which he faces trial, . . . the presumption contained in § 3142(e) has been rebutted"). *See also* United States v. Stone, 608 F.3d 939, 945 (6th Cir. 2010) (defendant "must introduce at least some evidence" regarding risk of flight and danger to community); United States v. Rodriguez, 950 F.2d 85, 88 (2d Cir. 1991) ("a defendant must introduce some evidence contrary to the presumed fact in order to rebut the presumption"); United States v. Stricklin, 932 F.2d 1353, 1355 (10th Cir. 1991) ("some evidence must be produced"); United States v. Carbone, 793 F.2d 559, 561 (3d Cir. 1986) (evidence related to § 3142(g) factors may rebut presumption); United States v. Alatishe, 768 F.2d 364, 371 (D.C. Cir. 1985) ("a burden of production [is] on the defendant to offer some credible evidence contrary to the statutory presumption"); United States v. Jessup, 757 F.2d 378, 381 (1st Cir. 1985) (must produce only "some [relevant] evidence").

### B. Other Sources of Rebuttal Evidence

Although the § 3142(e)(3) presumption states that it is "[s]ubject to rebuttal by the person,"[89] it does not say that the presumption is subject to rebuttal *only* by the defendant or by evidence provided by the defendant. Section 3142(g) states that the court must take into account the "available information" concerning the factors in subsection (g)(1)–(4), without specifying the source of the information. Similarly, "a court is expected to weigh all the factors in the case before making its decision as to risk of flight and danger to the community."[90]

Accordingly, in determining whether a presumption has been rebutted and what weight to give to the presumption, a court is not limited to evidence produced by the defendant. It may consider, for example, the pretrial services report,[91] evidence presented at the hearing, or evidence from any other source[92] that is relevant to how a presumption applies—or does not apply—to the defendant.

## *II. Effect of Rebutting—or Not Rebutting—a Presumption*

### A. Rebuttal Does Not Completely Extinguish a Presumption

Neither the statute nor the Senate Report indicate what the effect is of the successful rebuttal of a presumption. While the plain meaning of "rebut" would indicate that the presumption is then cancelled entirely, case law holds that the presumption does not disappear like a "bursting bubble" but remains a factor in the court's decision to release or detain the defendant. See text at section III.C.3. How to consider a rebutted presumption, *infra*, and accompanying footnotes for a summary of the case law.

The court must then determine how much weight to give to the presumption in light of the rebuttal. Some courts have indicated that if, for example, the defendant can show that the "nature and circumstances of the offense charged," or "the history and characteristics" of the

89. Note that subsection (e)(2) states that "a rebuttable presumption arises" without indicating that it is up to the defendant to rebut it.

90. Senate Report, *supra* note 1, at 24–25. In addition: "Thus the committee has, for the most part, refrained from specifying what kinds of information are a sufficient basis for the denial of release, and has chosen to leave the resolution of this question to the sound judgment of the courts acting on a case-by-case basis." *Id.* at 18–19.

91. Note that the pretrial services interview with a defendant is, in any event, "the primary vehicle through which defendants provide information about themselves to the court." The pretrial services officer also interviews others who may have information about the defendant and conducts an investigation in order "to provide the judge with a more complete and accurate assessment of the defendant's risk factors as they relate to pretrial release." Admin. Office of the U.S. Courts, Guide to Judiciary Policy vol. 8A, ch. 1 at § 130(c), (d).

92. For example, statistics from the United States Sentencing Commission for fiscal year 2023 indicate that 42.5% of defendants convicted of drug trafficking offenses were in Criminal History Category 1 and 11.9% in Category II. For all drug trafficking defendants, only 6.3% received an aggravating role adjustment for being, under U.S.S.G. § 3B1.1, an "organizer, leader, manager, or supervisor," indicating that the majority of drug defendants are not the "major drug traffickers" targeted by the subsection (e)(3) presumption. On the other hand, 18.3% of such defendants received a *mitigating* role adjustment at sentencing. *See* U.S. Sent'g Comm'n, 2023 Sourcebook, *supra* note 63, at tbls. D-7 & D-9. Evidence indicating that the defendant has little criminal history, is not an organizer, leader, manager, or supervisor, or had a minor role in the offense, could be viewed as "some" evidence to rebut a presumption based on a drug offense. *See also id.* at tbl. 21 (for all defendants sentenced in fiscal 2023, only 4.2% received any aggravating role adjustment under U.S.S.G. §3B1.1).

defendant, do not "resemble the Congressional paradigm," the rebutted presumption would carry less weight.[93]

## B. An Unrebutted Presumption, Without More, Does Not Authorize Detention

Based on the statute, legislative history, and case law, an unrebutted presumption, standing alone, does not require or authorize detention, is to be weighed along with the other factors, and the government still must prove that there are no conditions of release that will reasonably assure appearance and safety.

1. Section 3142(e)(1) states that detention shall be ordered *if* the court "finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community." There is nothing in subsections (e)(2) or (e)(3) that alters the requirement for this finding.

2. Section 3142(f) states that, in deciding at the detention hearing "whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community," the facts the court "uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence." Case law holds that facts supporting a finding of risk of nonappearance must be supported by a preponderance of the evidence.

3. Section 3142(g) states that the court "shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning" the four categories of factors listed in that provision.

4. As noted elsewhere in this section, the Senate Report repeatedly reaffirmed these requirements, emphasizing that the findings and procedures in subsections (e) and (f) must be followed, "the judicial officer is required to consider the factors set out in section 3142(g)," the factors in subsection (g) must be considered "whenever a person is to be released or detained under" § 3142, and "a court is expected to weigh all the factors in the case before making its decision as to risk of flight and danger to the community."[94]

93. *See, e.g.*, *Jessup*, 757 F.2d at 387 ("The defendant can provide argument and evidence suggesting that he is not involved in the 'highly lucrative' drug operations at the center of congressional concern. . . . The less th[e] features [of his case] resemble the congressional paradigm, the less weight the magistrate will likely give to Congress's concern for flight. The individual characteristics of a case and the precise weight to be given the presumption are matters for a magistrate to take into account within the framework of factors set out in § 3142(g)."). *See also* Senate Report, *supra* note 1, at 20 (expressing concern about "the extremely lucrative nature of drug trafficking, and the fact that drug traffickers often have established substantial ties outside the United States . . . , have both the resources and foreign contacts to escape to other countries with relative ease in order to avoid prosecution for offenses punishable by lengthy prison sentences," and that forfeiture of bond amounts "in the hundreds of thousands of dollars" is not effective in assuring appearance). *Cf. Fortna*, 769 F.2d at 251–52 (citing *Jessup* and Senate Report, *supra* note 1, in affirming detention for drug defendant in case with "essentially unrebutted showing that massive amounts of cocaine, and vast sums of money, were involved, along with substantial foreign contacts and the ability to clandestinely fly to South America").

94. *See* Senate Report, *supra* note 1, at 18, 23, 24–25. *See also* United States v. Salerno, 481 U.S. 739, 751–52 (1987):

> The judicial officer charged with the responsibility of determining the appropriateness of detention is guided by statutorily enumerated factors, which include the nature and the circumstances of the charges, the weight of the evidence, the history and characteristics of the putative offender, and the danger to the community. § 3142(g). The Government must prove its case by clear and convincing evidence.

5. The Bail Reform Act presumes that a defendant will be released *unless* the government proves that *no* condition or set of conditions of release will reasonably assure appearance or safety. All circuit courts of appeals to decide the issue have found that the government *always* has this burden of proof, even if a presumption is involved.

6. Nothing in the statute or the legislative history allows a court to ignore any of these required procedures and findings if a presumption is not rebutted. To the contrary, the language of the statute and the legislative history clearly indicate that all presumption cases—rebutted or not rebutted—are subject to the same requirements as nonpresumption cases.

7. Allowing a defendant to be detained based on an unrebutted presumption, without requiring the government to meet the burden of proof set out in the statute and case law, would effectively allow detention based on probable cause. Each presumption is based, wholly or in part, on the charged offense,[95] which only requires a showing of probable cause for indictment. As stated above, the statute requires detention to be based on clear and convincing evidence or by a preponderance of the evidence. No provision of the statute, nothing in the legislative history, and no case law, supports detention based on probable cause.

8. The presumptions are based on *categories* of defendants, grouping together defendants who may be very different. Basing detention on a category would violate the statute's requirement, expressed repeatedly in the legislative history, to consider the facts and circumstances of each individual defendant when deciding between release or detention.

9. In the limited appellate case law on this issue, the two circuits that analyzed the statute concluded that an unrebutted presumption does not relieve the government of the burden of proving that there are no conditions of release that will reasonably assure appearance and safety after considering the factors in subsection (g).[96] However, two circuits have affirmed a detention order based on an unrebutted presumption where the defendants deliberately chose not to attempt to rebut the presumption but instead argued that constitutional or procedural issues prohibited detention in their case.[97]

10. The Senate Report and the Supreme Court in *Salerno* emphasized that a defendant's liberty interests must be protected by scrupulously following the procedures as laid out in the act and expressed in § 3142(j): "Presumption of innocence.—Nothing in this section shall be construed as modifying or limiting the presumption of innocence." Allowing detention effectively based on probable cause would certainly "limit" the presumption of innocence.

95. Although the "previous violator" presumption in subsection (e)(2) involves previous convictions, it only applies if the defendant has been charged with an offense listed in subsection (f)(1).

96. *See* United States v. Wilks, 15 F.4th 842, 846–47 (7th Cir. 2021) ("the burden of persuasion always rests with the government and an unrebutted presumption is not, by itself, an adequate reason to order detention. . . . Rather, the presumption is considered together with the factors listed in § 3142(g)."); *Jackson*, 845 F.2d at 1266 (noting "that the language of § 3142(g) mandates district court review of certain factors," holding that "the government cannot reasonably argue that the § 3142(e) presumption, coupled with the allegations of the indictment against Jackson, are alone sufficient to satisfy § 3142(g)"). *See also Dominguez*, 783 F.2d at 706–07 ("A defendant cannot be detained as dangerous under § 3142(e), even if the presumption is not rebutted, unless a finding is made that no release conditions '*will* reasonably assure . . . the safety of the community . . . .'").

97. *See* United States v. Perry, 788 F.2d 100, 115 (3d Cir. 1986) (defendant argued that the BRA was invalid for failing to protect him from possible self-incrimination if he testified in an attempt to rebut the presumption); United States v. Alatishe, 768 F.2d 364, 371–72 (D.C. Cir. 1985) (defendant argued that the government had not timely filed for a detention hearing and therefore had waived its right to seek detention).

### C. Conclusion

All the appellate courts that have ruled on the issue have held that, whether or not a presumption applies, the government always has the burden of proving there is no condition or set of conditions that will reasonably assure a defendant's future appearances by a preponderance of the evidence, or will reasonably assure the safety of the community by clear and convincing evidence. Subsections (e), (f) and (g) of § 3142, read together and with the legislative history, clearly indicate that an unrebutted presumption, standing alone, does not satisfy that burden of proof. The court must also look to the factors in § 3142(g), as is required in all release and detention decisions, to determine whether the government has met its burden of proof before any defendant may be detained prior to trial.

# Appendix C

## *Pretrial Risk Assessment*

Although the Pretrial Risk Assessment (PTRA) is a tool that was developed for use by pretrial services officers, some districts now include PTRA information in the bail report and other districts are considering it. Following is a summary of how the PTRA was developed, what it does, what it does *not* do, and how it might inform the court's analysis required by 18 U.S.C. § 3142.

### A. PTRA Frequently Asked Questions

*1. What is the PTRA?*

"The PTRA is an actuarial risk assessment instrument used by federal officers to assess a defendant's likelihood of engaging in several forms of pretrial misconduct, including failing to make court appearances, committing criminal activity that results in a new rearrest, or having a revocation [for a technical violation] while on pretrial release."[98]

*2. What is an "actuarial risk assessment"?*

Generally speaking, an actuary is "a professional who uses mathematical skills and statistical analysis to assess financial risks," and their services are commonly sought, for example, by insurance companies when deciding whether to insure someone and at what cost.[99] For the PTRA, data was collected on the conduct of federal defendants who had been released before trial and then analyzed to determine the factors that most influenced whether they violated their conditions of release. This allowed for an estimation of the risk of violations by future defendants who share similar characteristics.

*3. How was the PTRA developed?*

The PTRA is based upon studies of large groups of previously released federal defendants and their conduct during pretrial release. Using information about those defendants from

98. Thomas H. Cohen, Christopher T. Lowenkamp & William E. Hicks, *Revalidating the Federal Pretrial Risk Assessment Instrument (PTRA): A Research Summary*, 82 Fed. Prob. 23, 23 (Sept. 2018).

99. From https://proactuary.com/resources/actuary-job-description. Consider auto insurance—data has been collected on a large number of drivers to analyze how factors such as age, miles driven per year, location, and driving record correlate to accidents or other insurable events. From that information, insurance companies develop risk categories for groups of drivers with similar characteristics in order to estimate the risk of insuring individual drivers who are in those risk categories.

pretrial investigation reports and other sources, researchers were able to determine which factors were most closely associated with three types of violations of the conditions of pretrial release—failures to appear, arrests for new criminal conduct, and technical violations leading to revocation.[100] By assigning points to particular factors, they constructed a scoring system that, based on the total score, placed defendants into one of five categories that reflected increasing levels of risk. A later study of a different group of defendants who had been on pretrial release, and for whom a PTRA score was calculated during their pretrial investigation, confirmed that the categories accurately estimated the type and number of violations that actually occurred in this group.

Note that the PTRA is not a single number, or "score." An officer first computes a "raw score," between zero and 15, based on the points assigned to the relevant factors that apply to the defendant. The score determines the risk category. For example, defendants with a score of zero to four points are placed in Category 1, while a defendant with 11 or more points is put in Category 5. For each category, risk figures are given in terms of the percentage of defendants in that category who are predicted to commit any violation, and separate figures are provided for failures to appear, new criminal arrests, and technical violations leading to revocation. These are the figures that represent the estimated risk for groups of defendants in their respective categories.

*4. Does the PTRA predict the risk of release for individual defendants?*

No. The PTRA predicts risk for five categories of defendants. The figures given for the percentage of defendants who will commit some type of violation apply to the category's defendants as a group, not to any individual defendant.[101] It would be appropriate to say, for example, that a defendant is in Category 1 and that group of defendants, as a whole, has been found to commit some type of release violation in only three percent of cases. It would not be appropriate to argue that, because a defendant is in Category 1, there is only a three percent risk that this specific defendant will violate any conditions of release.[102]

*5. Does the PTRA interfere with or replace a judge's discretion?*

No. While pretrial services officers are obligated by Judicial Conference policy to consider the PTRA in their pretrial investigation, judges have no such requirement. Considering the PTRA is entirely at the court's discretion.[103]

100. See sections C and D, *infra*, for a detailed explanation of the development of the PTRA.

101. Just as with car insurance, the risk that any one individual will or will not "fail" cannot be accurately predicted. Like the PTRA, an insurance company's risk assessment is based on the risk category that the driver is in, plus an individualized evaluation of all relevant factors, to estimate an individual's level of risk.

102. *See also* Timothy P. Cadigan & Christopher T. Lowenkamp, *Implementing Risk Assessment in the Federal Pretrial Services System*, 75 Fed. Prob. 30, 31 (Sept. 2011) ("Risk tools . . . are good at identifying groups of defendants who present various risks, but they cannot be totally accurate at the individual level. . . . Therefore, agencies need to convey to line staff, as the federal system has done, that the tool should not be followed blindly.").

103. *See* Thomas H. Cohen & Amaryllis Austin, *Examining Federal Pretrial Release Trends Over the Last Decade*, 82 Fed. Prob. 3, 9–11 (Sept. 2018):

> Although the PTRA was developed to bring evidence-based practices into the federal pretrial system, federal judges . . . are not required to consider this instrument when making release decisions. . . . [T]he Bail Reform Act of 1984 and federal statutes detail specific processes and elements judges must take into consideration when making pretrial release decisions, none of which involve the PTRA.

*6. Would the discretionary use of the PTRA by judges be inconsistent with or conflict with 18 U.S.C. § 3142?*

No. The analysis that resulted in categorizing defendants according to risk was based on factors that are either specifically included in § 3142(g) or related to the general history and characteristics of a defendant. The PTRA provides another way of evaluating those factors, primarily by estimating the risk for a given category of defendants and distinguishing defendants by their risk category. Also, the Senate Report, at 24–25, emphasizes that the court "is expected to weigh all the factors in the case before making its decision as to risk of flight and danger to the community." The PTRA score can be considered as one such factor.[104]

*7. How could the PTRA information be useful to judges?*

First, the risk statistics provide the court with an approximation of the risk for a defendant, based on the defendant's risk category, to commit certain types of violations during release. This also serves to differentiate defendants by risk level. That, in turn, may influence what kinds of conditions of release are appropriate, with fewer and less stringent conditions imposed on low-risk defendants and more intensive supervision for defendants in the higher categories.[105]

Also, if a defendant is subject to a presumption for detention, a low PTRA category could be considered as evidence that this defendant is not a "major drug trafficker" charged with "a grave drug offense," a repeat offender, or one charged with other "serious and dangerous federal offenses," that the presumption was intended to target.[106]

## B. Background—Recommendation to Create a Risk Assessment Tool

The PTRA was developed by the Probation and Pretrial Services Office in the Administrative Office of the United States Courts (AO). It was based on a study that was sponsored by the former Office of the Federal Detention Trustee (OFDT), part of the Department of Justice,[107] with the assistance of the AO. The main research goal of that study was to "identify statistically significant and policy relevant predictors of pretrial outcome to identify federal criminal defendants who are most suited for pretrial release without jeopardizing the integrity of the judicial process or the safety of the community."[108] The OFTD study analyzed outcomes for more than 180,000 federal defendants who had been released pretrial from 2001 to 2007. The authors used information about those defendants to identify nine factors that were "statistically significant predictors" of failure to appear or new criminal arrest.[109]

104. *See also* 18 U.S.C. § 3154 (pretrial services functions include: "(9) Develop and implement a system to monitor and evaluate bail activities, provide information to judicial officers on the results of bail decisions, and prepare periodic reports to assist in the improvement of the bail process.").

105. *See* discussion of conditions of pretrial release at II.C.4, *supra*.

106. *See* Senate Report, *supra* note 1, at 19–20 (describing the types of cases that warrant a presumption for detention). *See also* note 92, *supra*.

107. The OFDT, which reported "directly to the Deputy Attorney General, . . . merged with the United States Marshals Service (USMS) on October 1, 2012, at which time [the] USMS Director . . . assumed the duties as the Federal Detention Trustee." For more information see the archived OFDT web page at https://www.justice.gov/archive/ofdt.

108. Marie VanNostrand & Gena Keebler, Office of the Federal Detention Trustee, U.S. Department of Justice, *Pretrial Risk Assessment in the Federal Court* (Apr. 2009), *reprinted at* 73 Fed. Prob. 3 (Sept. 2009).

109. VanNostrand & Keebler, 73 Fed. Prob. at 5 (the factors were: (1) other charges pending at the time of arrest, (2) number of prior misdemeanor arrests, (3) number of prior felony arrests, (4) number of prior failures to appear, (5) employment at time of arrest, (6) residency status, (7) substance abuse problems, (8) nature of primary charge, and (9) whether primary charge was a misdemeanor or felony).

Based on these defendants' actual rates of failure to appear (FTA) and new criminal arrests (NCA), the report classified the defendants into five risk levels, using a scoring system that assigned points to the nine factors. The least risky level, Category 1, had the lowest rate of both detention (13 percent) and FTA or NCA (two percent each), and the rates increased incrementally up to Category 5 (72 percent were detained while 16 percent of those who were released had an FTA or NCA). For all categories combined, defendants who were released before trial "had a 93 percent success rate (failure to appear 3.5 percent and [new criminal arrests] 3.5 percent). These rates remained relatively constant across the years" that were covered by the study.[110] Because this "classification scheme correctly classifies defendants by their risk of failure to appear and danger to the community," the report recommended that the study's results

> should be utilized to develop a standardized empirically-based risk assessment instrument to be used by all federal pretrial services. The use of a standardized empirically-based instrument will assist in reducing the disparity in risk assessment practices and provide a foundation for evidence-based practices relating to release and detention recommendations and the administration of the alternatives to detention program.[111]

As a result, the AO's Probation and Pretrial Services Office (PPSO) constructed, validated, and began using the Pretrial Risk Assessment (PTRA) to help inform pretrial services officers' pretrial release and detention recommendations.

## C. Initial Development of the PTRA

"The Pretrial Services Risk Assessment tool was constructed using the same data employed in the Office of Federal Detention Trustee research."[112] A different type of analysis was used and the factors that were found to correlate most closely with success or failure on release were similar to those used in the OFTD study, but varied slightly in kind and number.[113] In addition to the risk of FTA and NCA, the PTRA included the risk of technical violations that led to revocation (TV). Although technical violations are not relevant to the § 3142 release or detention decision, which is based only on reasonably assuring appearance and safety of the community, that risk may be useful to officers when considering what conditions of release are appropriate and how to supervise defendants on release.

Using the same five risk categories as the OFTD study, PPSO's analysis produced similar results. For defendants in Category 1, the likelihood of either an FTA or NCA (or a TV) was only one percent. The rates rose incrementally through the categories, with Category 5 showing that six percent of those defendants were likely to FTA, ten percent to have an NCA, and nineteen percent a technical violation.[114]

110. *Id.* at 5, 16.

111. *Id.* at 27.

112. Cadigan & Lowenkamp, *supra* note 102, at 32.

113. *See* Christopher T. Lowenkamp & Jay Whetzel, *The Development of an Actuarial Risk Assessment Instrument for U.S. Pretrial Services*, 73 Fed. Prob. 33, 35 (Sept. 2009) ("The specific measures used . . . were: number of prior felony convictions, number of prior failure-to-appears, pending charges, current offense type, current offense level, age at interview, highest educational level, employment status, home ownership, and substance use."). Note: Citizenship status was later added as an eleventh factor.

114. Cadigan & Lowenkamp, *supra* note 102, at 32, Table A.

## D. Reassessment of the PTRA

First introduced in 2009, the PTRA was implemented nationally in 2011. After several years a new study was undertaken to reassess the tool's performance, this time on more than 85,000 federal criminal defendants who were followed from release to the conclusion of release between November 2009 and September 2015, *and* had been scored on the PTRA during their pretrial investigations.[115] Approximately eighty-five percent of these defendants were in Categories 1–3, with fifteen percent in Categories 4–5. The study examined how well the defendants' PTRA categories reflected their actual rates of FTA, NCA, and TV. The study also examined the rate of violent offenses by category.

The results were consistent with previous studies:

- *Failure to appear*: For all defendants, 1.7 percent failed to appear, increasing incrementally from 0.7 percent for Category 1 defendants to 4.6 percent for Category 5.
- *Rearrest*: Arrests for any type of offense by all defendants was 6.4 percent, ranging from 2.6 percent for Category 1 to 16.5 percent for Category 5.
- *Violent offense*: The rearrest rate for a violent offense was 1.0 percent for all defendants, going from 0.3 percent in Category 1 to 2.9 percent in Category 5.

These are the rates that are relevant to risk of nonappearance and safety of the community under 18 U.S.C. § 3142. If technical violations are included, the percentage of *any* adverse events for all defendants was 13.8 percent and "increased in the following incremental fashion by PTRA risk category: 5 percent (PTRA ones), 11 percent (PTRA twos), 20 percent (PTRA threes), 29 percent (PTRA fours), and 36 percent (PTRA fives)."[116] Looked at another way, 95 percent of PTRA ones, 89 percent of twos, 80 percent of threes, 71 percent of fours, and 64 percent of fives had *no* adverse events during pretrial release.

It should be noted that the PTRA's predicted rates of violations, especially the low levels of FTA and violent offenses, are generally consistent with the actual rates of violations for all released defendants as reported in the Pretrial Caseload Tables, Table H-15: U.S. District Courts—Pretrial Services Violations Summary Report.[117] For the 12-month period ending September 30, 2024, for example, Table H-15 shows there were 51,606 "Cases in Release Status" and 8,434 "Cases with Violations" (16.3 percent). Of those violations, 570 were rearrests for felonies (1.1 percent of all cases) and 485 were FTAs (<1 percent of all cases). Rearrests for any type of offense totaled

115. Cohen, Lowenkamp & Hicks, *supra* note 98, at 24–25 (Note: "The majority of defendants in the study population (93 percent) were either U.S. born or naturalized citizens; a fact that should not be too surprising given that nearly all non-citizens are detained pretrial").

116. *Id.* at 26–27.

117. https://jnet.ao.dcn/resources/data-analysis/caseload-data/pretrial-caseload-tables ("for Internal Judiciary use only"). Note that the PTRA and Table figures will not exactly match because they were compiled from different sets of defendants—the caseload tables cover *all* defendants on release, and the revalidation research only covered defendants whose PTRA score had been calculated during the pretrial investigation.

1228, or 2.4 percent. The vast majority of violations were "Technical Violations"—7,703 (14.9 percent of all cases).[118]

In 2019, following the revalidation report, the Judicial Conference of the United States revised the *Pretrial Services Investigation and Report* monograph in the *Guide to Judiciary Policy* to recommend "that the Federal Pretrial Risk Assessment be completed prior to completion of the pretrial services report."[119]

## E. Summary

As described above, the PTRA reflects the actual results of pretrial release for over 265,000 federal criminal defendants. Their "failures"—new criminal activity, failure to appear, technical violations leading to revocation of release—were analyzed to determine what factors were most closely associated with those failures. The PTRA uses eleven factors which are scored depending on the specific circumstances of each factor, and the total score places a defendant in one of five risk categories, with Category 1 the lowest risk.

It must be emphasized that the PTRA does not assess the risk level for an *individual* defendant. Its scores indicate the risk level for a given *group* of defendants who are in the same category based on factors shown to be associated with success or failure on pretrial release. While the PTRA can accurately predict, for example, that only one percent of defendants in Category 1 will fail to appear or commit a violent offense, it cannot predict which individual defendants are in that one percent. Even though the PTRA provides a clear indication that Category 1 defendants in general are at extremely low risk of violating their conditions of release, the pretrial services officer and the court must make an individualized assessment of each defendant under § 3142(g) to determine whether to release or detain the defendant.

In this way, the PTRA is similar to the presumption for detention, which assesses a higher level of risk by grouping some defendants in the presumption category based on one of the circumstances listed in § 3142(e)(2) or (3). Both require a further, individualized assessment of each defendant—by pretrial services in writing a report and recommendation after a thorough investigation, and by the court in determining, based on the required analysis under § 3142(g), whether the defendant should be released or detained.

The PTRA differs from presumptions, however, in two ways. First, it is calculated from eleven different factors, most of which are also part of the § 3142(g) factors that pretrial services

118. Although Table H-15 covers only a one-year period, the violation percentages have remained fairly consistent for almost 30 years. *See* Thomas H. Cohen, Pretrial Detention and Misconduct in Federal District Courts, 1995–2010 at 8, Table 4 (Bureau of Justice Statistics Feb. 2013) (percentage of defendants committing any violation varied between 16 and 22 percent; failures to appear were between one and three percent; rearrests for a felony or misdemeanor offense averaged two percent each); George E. Browne & Suzanne M. Strong, Pretrial Release and Misconduct in Federal District Courts, Fiscal Years 2011–2018 at 9 and Tables 7–10 (Bureau of Justice Statistics March 2022) ("Nineteen percent of defendants released pretrial committed at least one violation of their pretrial release during FYs 2011–18 . . . . The most common form of pretrial misconduct was a technical violation (17% of released defendants), such as a failed drug test, failure to maintain employment, or any other violation of conditional release. . . . Failing to appear in court (1%) and being rearrested for a new offense (2%) were the least common release violations.").

119. Report of the Proceedings of the Judicial Conference of the United States, Sept. 2019, at 12.

officers are to consider.[120] A presumption is usually based on just one factor—the charged offense. Second, while presumptions assign a higher level of risk to just one group, the PTRA groups defendants into five different levels of risk based on extensive data.

But just as a presumption is only one piece of the information that judges must consider under § 3142, the PTRA is only one piece of information that pretrial services officers must consider when evaluating a defendant and making a recommendation to the court. It is not meant to replace the officer's—or the court's—judgment and experience or the individual analysis that is required for every defendant.[121]

The PTRA provides at least two pieces of information relevant to a court's release or detention decision. First, the very low rates of failure for defendants in Category 1 indicate that they can be considered good candidates for a successful release, with Category 2 and 3 defendants only marginally less promising. Their rates of "success" for purposes of release or detention under § 3142—not failing to appear and not committing new offenses—range from 89 to 97 percent. By this measure, even Category 4 and 5 defendants succeed 84 and 80 percent of the time. As noted above, these estimates are supported by the actual rates of violation shown in Table H-15 and other statistical reports.

Second, knowing a defendant's PTRA category can help the officer and the court differentiate between defendants when determining under § 3142 whether to detain or release and the number and type of conditions to impose upon defendants who are released. Defendants who are in PTRA Category 1 or 2, for example, are on a very different footing than those in Category 4 or 5. They are, on average, more likely to succeed on release, and should not be subject to the same number and type of conditions as the Category 4 or 5 defendants. "The instrument can be used to identify higher-risk defendants for enhanced services . . . and also to reduce services to low-risk defendants, conserving those resources for higher-risk defendants."[122]

It is up to the pretrial services officer and the court, using their knowledge and experience and considering the factors required under § 3142, to determine whether the defendant in each case is a risk for failure to appear or a risk to the safety of the community *and* whether there "is no condition or combination of conditions that will reasonably assure the appearance of the person as required and the safety of any other person and the community." The court, in its discretion, may consider the PTRA as part of this analysis.

120. The PTRA factors are: felony convictions, pending felonies or misdemeanors, prior failures to appear, current charge, seriousness of current charge, employment, substance abuse, age, citizenship, education level, and home ownership. The first five fall under the nature of the current charge and the defendant's past conduct; the other factors are either specifically referenced in or related to § 3142(g)(3)'s "history and characteristics of the person." For more on the PTRA factors, see Office of Probation and Pretrial Services, "Federal Pretrial Risk Assessment Scoring Guide" (revised Mar. 27, 2013), https://jnet.ao.dcn/sites/default/files/pdf/Pretrial_Risk_Assessment_Users_Manual_and_Scoring_Guide.pdf.

121. *See* Admin. Office of the U.S. Courts, Guide to Judiciary Policy vol. 8, pt. A: Pretrial Services Investigation and Report, at § 250(b) ("Assessment results should be used in conjunction with the pretrial services investigation and the officer's professional judgment.").

122. Timothy P. Cadigan, James L. Johnson & Christopher T. Lowenkamp, *The Re-validation of the Federal Pretrial Services Risk Assessment (PTRA)*, 76 Fed. Prob. 3, 9 (Sept. 2012). *See also* section II.C.4, *supra*, regarding the requirement to impose the least restrictive conditions of release and discussion of alternatives to detention.

# 1.04 Offense Committed in Another District

*Fed. R. Crim. P. 5(c)(3), 20*

The following procedure applies if the defendant and the government consent to transfer the prosecution of an offense committed in another district to the district where the defendant was arrested or is being held. Fed. R. Crim. P. 20(a).

Before asking any questions, inform the defendant:

> If you are not a United States citizen, you may request that the government notify a consular officer from your country of nationality that you have been arrested. Even without your request, such notification is required for some countries.

Fed. R. Crim. P. 5(d)(1)(F).

A. Preliminary Questions

Have the oath administered and ask the defendant:

1. What is your full name?
2. How old are you?
3. How far did you go in school? What is your employment experience?

[If you are not sure the defendant understands English, ask the defendant:]

4. Are you able to speak and understand English?

[If the defendant has an attorney, ask if counsel has been able to communicate with the defendant in English. If you doubt the defendant's capacity to understand English, use a certified interpreter. See 28 U.S.C. § 1827.]

5. Are you currently or have you recently been under the care of a physician or a psychiatrist, or been hospitalized or treated for narcotics addiction? Have you taken any drugs, medicine, or pills or drunk any alcoholic beverage in the past twenty-four hours?

[If the answer to either question is yes, pursue the subject with the defendant and with counsel to determine that the defendant is currently competent to waive proceedings in the district where the offense was committed.]

6. Do you have an attorney?

[If they do not have an attorney, inform the defendant of the right to counsel and appoint counsel if the defendant qualifies. See *supra* section 1.02: Appointment of Counsel or Pro Se Representation.]

B. Obtain a waiver of indictment if one is required (see *infra* section 1.06: Waiver of Indictment; Form AO 455: Waiver of an Indictment).

C. Explain that the defendant's case cannot be handled in this court unless the defendant wishes to plead guilty or nolo contendere. [*Note:* For juveniles, see 18 U.S.C. § 5031, Fed. R. Crim. P. 20(d), and section 1.11: Delinquency Proceedings, *infra*.]

D. Question the defendant to ascertain on the record that the defendant understands they are agreeing to

1. plead guilty or nolo contendere;
2. waive proceedings in the district in which the crime was allegedly committed; and
3. be proceeded against in this court.

E. Explain to the defendant and ask if the defendant understands that

1. you have a right to be tried in the district where the crime is alleged to have been committed;
2. you cannot be convicted or sentenced in this court unless you consent freely; and
3. if you do not consent to be proceeded against in this court, you may be proceeded against in the district in which the crime was allegedly committed.

F. Obtain the defendant's written statement incorporating the understanding described above.

G. Obtain the written consents of the U.S. attorneys.

H. Take the defendant's plea. [*Note:* All points should be covered in taking the plea, as in an ordinary arraignment. See relevant portions of *infra* sections 1.07: Arraignment and Plea and 2.01: Taking Pleas of Guilty or Nolo Contendere.]

I. If the defendant or the government does not consent to proceedings in this court, follow the procedures in Fed. R. Crim. P. 5(c)(3) for transfer to another district. See also *infra* section 1.05: Commitment to Another District (Removal Proceedings).

# 1.05 Commitment to Another District (Removal Proceedings)

*Fed. R. Crim. P. 5, 32.1, 40*

A. Arrest of an individual in this district for an alleged offense committed in another district (U.S. attorney will have filed a Petition for Removal) Fed. R. Crim. P. 5(c).

1. Ascertain from the U.S. attorney or arresting officer, or from court file materials received from the charging district,

   (a) where the alleged offense was committed;

   (b) when the defendant was arrested and whether the arrest was with or without a warrant; and

   (c) whether an indictment has been returned or an information or complaint filed.

2. If the arrest in this district was without a warrant (which rarely occurs):

   (a) The defendant cannot be ordered transferred until a complaint and warrant are issued in the charging district.

   (b) The complaint must be filed promptly. See Fed. R. Crim. P. 5(b).

3. If it is not evident, ask if the defendant can speak and understand English. If the defendant has an attorney, ask if counsel has been able to communicate with the defendant in English. If you doubt the defendant's capacity to understand English, use a certified interpreter. See 28 U.S.C. § 1827.

   Advise the defendant of the right to consular notification, that a defendant who is not a citizen of the United States may request that the consular office of the defendant's country of nationality be notified of the defendant's arrest, and that treaty obligations may require such notification even without a request by the defendant. Fed. R. Crim. P. 5(d)(1)(F). See also section 1.01, *supra*, at I.C, Right to Consular Notification.

4. Without asking for the defendant's name or other identifying information at this time, advise the defendant of the

   (a) general rights under Fed. R. Crim. P. 5 (nature of charge, right to counsel, right to remain silent—see *supra* section 1.01: Initial Appearance);

   (b) right to waive removal and voluntarily return to the district where charges are pending;

   (c) right, if charges are based on complaint and warrant, to

      (i) have a preliminary hearing in this district;

      (ii) have a preliminary hearing in the district where the charges are pending; or

      (iii) waive preliminary hearing;

   (d) right to an identity hearing and the right to waive that hearing;

(e) right under Fed. R. Crim. P. 20 to plead guilty or nolo contendere in this district if both U.S. attorneys consent.

5. If the defendant appears without counsel, appoint counsel or allow time for the defendant to retain counsel; set appropriate hearing dates to allow counsel time to confer and elect options.
6. If the defendant appears with counsel or after counsel has been appointed or retained, ascertain which of the above options (4(b)–4(d) of this section) the defendant desires, then sign an Order of Removal (whereby the defendant returns voluntarily) or set appropriate hearing dates. See Form AO 466A Waiver of Rule 5 and 5.1 Hearings and Form AO 467 Order Requiring a Defendant to Appear in the District Where Charges are Pending and Transferring Bail.
   (a) If the defendant waives the right to an identity hearing, have the defendant state their full name and age for the record.
   (b) Set the date of the hearings to allow time for inquiry into possible Fed. R. Crim. P. 20 transfer.
   (c) Keep in mind Speedy Trial Act requirements (see *infra* section 1.10: Speedy Trial Act).
7. Determine whether to release or detain the defendant pending further proceedings. A request for detention or the amount of bail previously fixed in the district where charges are pending must be taken into account but is not binding. A different action, however, requires reasons in writing.

   [*Note:* If there are any victims of the offense present, give them an "opportunity to be reasonably heard" regarding the defendant's possible release. 18 U.S.C. § 3771(a)(4).]
8. Conduct hearings:
   (a) Preliminary hearing (Fed. R. Crim. P. 5.1).
   (b) Identity hearing (Fed. R. Crim. P. 5(c)(3)(D)(ii))
      (i) Hear evidence as to physical descriptions, fingerprints, handwriting, hearsay statements, telephone checks with charging district, photographs, probation officer's testimony, etc.
      (ii) The government has the burden of proof to show probable cause that the person arrested is the person named in the charging instrument.
   (c) Fed. R. Crim. P. 20 transfer plea (see *supra* section 1.04: Offense Committed in Another District).
9. Order the defendant held and transferred (Order of Removal, see Form AO 94: Commitment to Another District), or discharged; transmit papers and any bail to the clerk of the charging district.

B. Arrest of a probationer or a supervised releasee in a district other than the district of supervision (Fed. R. Crim. P. 32.1(a)(5)).[1]

1. Determine the time and place of, and authority for, the arrest; inform the defendant of the charges; and advise the defendant of general rights (nature of charge, right to counsel, right to remain silent).
2. Ascertain if jurisdiction has been or will be transferred to this district pursuant to 18 U.S.C. § 3605 (made applicable to supervised releasees by 18 U.S.C. § 3586). If so, proceed under Fed. R. Crim. P. 32.1 as a normal revocation case in this district.
3. If the alleged violation occurred in this district and if jurisdiction is not transferred, schedule and hold a prompt preliminary hearing after counsel has been secured.
   (a) If probable cause is found, hold the defendant to answer in the supervising district, and order the defendant transferred there.
   (b) If no probable cause is found, dismiss the proceedings and notify the supervising court.
4. If the alleged violation occurred in a district other than this one, schedule and hold a prompt identity hearing (unless waived) after counsel has been secured.
   (a) If, upon production of certified copies of the probation order, warrant, and application for warrant, the defendant is found to be the person named in the warrant, hold the defendant to answer in the supervising district and order the defendant transferred there.

   Or

   (b) Dismiss the proceedings and notify the supervising court if you find the defendant is not the person so named.

[*Note:* Fed. R. Crim. P. 40(a) specifically authorizes magistrate judges to set release conditions for persons arrested under a warrant issued in another district for violating conditions of release set in that district.]

C. Arrest for failure to appear in another district (bench warrant) (Fed. R. Crim. P. 40(a) and (b)).[2]

When the person has been arrested in this district on a warrant issued in another district for failure to appear, pursuant to a subpoena or the terms of the person's release:

1. Determine the time and place of, and authority for, the arrest; inform the defendant of the charges; and advise the defendant of general rights (nature of charges, right to counsel, right to remain silent).
2. Schedule and hold an identity hearing (unless waived) after counsel has been secured.

1. Note that the Crime Victims' Rights Act, 18 U.S.C. § 3771, may apply if the violation that caused the arrest involved the commission of a federal crime. It is not clear whether the rights of victims of the *original* offense carry over to court proceedings for violations of probation or supervised release.

2. Note: Rule 40(d) allows an appearance under Rule 40 to be conducted by video teleconference, with the defendant's consent, in conformity with Rule 5(f).

(a) If, upon production of the warrant or a certified copy, you find that the person before the court is the person named in the warrant, hold the defendant to answer in the district where the warrant was issued and order the defendant transferred there.

Or

(b) Dismiss the proceedings and notify the district where the warrant was issued if you find the defendant is not the person so named.

3. The court may modify any previous release or detention order issued by the other district, but must state in writing the reasons for doing so. Fed. R. Crim. P. 40(c).
4. Note that the Crime Victims' Rights Act, 18 U.S.C. § 3771, may be applicable to this hearing.

# 1.06 Waiver of Indictment

*Fed. R. Crim. P. 6, 7*

Note: An offense that may be punishable by death must be prosecuted by indictment and therefore precludes waiver of indictment. Fed. R. Crim. P. 7(a) and (b).

A. Preliminary Questions

Have the oath administered and ask the defendant:

1. What is your full name?
2. How old are you?
3. How far did you go in school? What is your employment experience?

   [If you are not sure the defendant can understand English, ask:]

4. Are you able to speak and understand English?

   [If the defendant has an attorney, ask if counsel has been able to communicate with the defendant. If you doubt the defendant's capacity to understand English, use a certified interpreter. See 28 U.S.C. § 1827.]

5. Are you currently or have you recently been under the care of a physician or a psychiatrist or been hospitalized or treated for narcotics addiction? Have you taken any drugs, medicine, or pills or drunk any alcoholic beverage in the past twenty-four hours?

   [If the answer to either question is yes, pursue the subject with the defendant and with counsel to determine that the defendant is currently competent to waive indictment.]

6. Do you have an attorney?

   [If the defendant does not have an attorney, inform the defendant of the right to counsel and appoint counsel if the defendant qualifies (see *supra* section 1.02: Appointment of Counsel or Pro Se Representation).]

B. Ask the defendant:

Have you been furnished with a copy of the charge(s) against you?

C. Explain in detail the charge(s) against the defendant and make clear that the defendant is charged with committing a felony.

D. Ask the defendant:

Do you understand the charge(s) against you?

E. Inform the defendant:

1. You have a constitutional right to be charged by an indictment of a grand jury, but you can waive that right and consent to being charged by information of the U.S. attorney.
2. Instead of an indictment, these felony charges against you have been brought by the U.S. attorney by the filing of an information.
3. Unless you waive indictment, you may not be charged with a felony unless a grand jury finds by return of an indictment that there is probable cause to believe that a crime has been committed and that you committed it.
4. If you do not waive indictment, the government may present the case to the grand jury and ask it to indict you.
5. A grand jury is composed of at least sixteen and not more than twenty-three persons, and at least twelve grand jurors must find that there is probable cause to believe you committed the crime with which you are charged before you may be indicted.

   [Fed. R. Crim. P. 6(a) and 6(f).]

6. The grand jury might or might not indict you.
7. If you waive indictment by the grand jury, the case will proceed against you on the U.S. attorney's information just as though you had been indicted.

F. Ask the defendant:

1. Have you discussed waiving your right to indictment by the grand jury with your attorney?
2. Do you understand your right to indictment by a grand jury?
3. Have any threats or promises been made to induce you to waive indictment?
4. Do you wish to waive your right to indictment by a grand jury?

[Fed. R. Crim. P. 7(b).]

G. Ask defense counsel if there is any reason the defendant should not waive indictment.

H. If the defendant waives indictment

1. Have the defendant sign the waiver of indictment form in open court, state that the court finds that the waiver is knowingly and voluntarily made by the defendant and is accepted by the court, and enter an order and finding to that effect.[1] Form AO 455 may be used for this purpose.
2. Proceed to arraignment on information (see *infra* section 1.07: Arraignment and Plea).

1. If the waiver was signed before the hearing, the court should examine the signatures on the form and have the defendant and defendant's counsel verify that the signatures are theirs.

I. If the defendant does not waive indictment:

Ask the U.S. attorney whether the government intends to present the matter to the grand jury.

(a) If so, detain the defendant pending indictment or continue or reset bail (see *supra* section 1.03: Release or Detention Pending Trial).

(b) If not, discharge the defendant.

[*Note:* Because discharge entails a "release" of the defendant, the Crime Victims' Rights Act, 18 U.S.C. § 3771(a)(4), and 18 U.S.C. § 2263, may require allowing any victims of the offense to be "reasonably heard."]

# 1.07 Arraignment and Plea

*Fed. R. Crim. P. 10*

A defendant who was charged by indictment or misdemeanor information may waive appearance at the arraignment if a written waiver is signed by the defendant and defense counsel, the defendant affirms that a copy of the indictment or information was received, the plea is not guilty, and the court accepts the waiver. Fed R. Crim. P. 10(b).

The following procedure may be used whether the defendant appears in person or has consented to video teleconference under Fed R. Crim. P. 10(c). If the arraignment is by video teleconferencing and there is no prior written consent, begin the arraignment by having the defendant explicitly consent to conduct the arraignment by video teleconference and waive the right to appear in person.

A. Preliminary Questions

[If proceeding directly from a preliminary hearing or waiver of indictment, skip to B.]

Have oath administered and ask the defendant:

1. What is your full name?
2. How old are you?
3. How far did you go in school? What is your employment experience?

   [If you are not sure the defendant can understand English, ask:]

4. Are you able to speak and understand English?

   [If the defendant has an attorney, ask if counsel has been able to communicate with the defendant. If you doubt the defendant's capacity to understand English, use a certified interpreter. See 28 U.S.C. § 1827.]

5. Are you currently or have you recently been under the care of a physician or a psychiatrist or been hospitalized or treated for narcotics addiction? Have you taken any drugs, medicine, or pills or drunk any alcoholic beverage in the past twenty-four hours?

   [If the answer to either question is yes, pursue the subject with the defendant and with counsel to determine that the defendant is currently competent to enter a plea.]

6. Do you have an attorney?

   [If not, see *supra* section 1.02: Appointment of Counsel or Pro Se Representation.]

B. Ask the defendant:

1. Have you received a copy of the indictment [information]?
2. Have you had time to consult with your attorney?

3. [Read the indictment (or have it read) to the defendant *or* summarize the charges for the defendant.]

   [Consider informing the defendant of the maximum statutory penalty and any applicable statutory minimum sentence.]

4. How do you plead to the charges?

C. If the defendant's plea is not guilty:

[Note: If the defendant refuses to enter a plea, enter a plea of not guilty. Fed. R. Crim. P. 11(a)(4).]

1. Set motion and/or trial dates according to your local Speedy Trial Act plan.
2. Continue or reset bail (see *supra* section 1.03: Release or Detention Pending Trial).

D. If the defendant indicates a desire to plead guilty or nolo contendere, see *infra* section 2.01: Taking Pleas of Guilty or Nolo Contendere.

# 1.08 Joint Representation of Codefendants

*Fed. R. Crim. P. 44(c)(2)*

## Introduction

Fed. R. Crim. P. 44(c)(2) provides as follows in cases of joint representation:

> The court must promptly inquire about the propriety of joint representation and must personally advise each defendant of the right to effective assistance of counsel, including separate representation. Unless there is good cause to believe that no conflict of interest is likely to arise, the court must take appropriate measures to protect each defendant's right to counsel.

When a trial court becomes aware of a potential conflict of interest, it must pursue the matter, even if counsel does not. Judges should strongly recommend to codefendants that they avoid dual representation and should make clear that a court-appointed attorney is available to represent each defendant or to consult with each defendant concerning dual representation. This section is a hearing procedure for so advising defendants and for obtaining a waiver of the right to separate counsel. Note, however, that in certain situations, a district court may disqualify an attorney, despite a defendant's voluntary, knowing, and intelligent waiver of the right to conflict-free counsel. See *Wheat v. United States*, 486 U.S. 153, 163 (1988):

> [D]istrict court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses.

## Procedure

A. Determine if the defendant is competent.

1. Ask the defendant:

   (a) Mr., Ms., Mrs., Miss _____, how old are you?

   (b) How far did you go in school?

   [If you are not sure the defendant can understand English, ask:]

   (c) Are you able to speak and understand English?

   [Ask defense counsel if they have been able to communicate with the defendant in English. If you doubt the defendant's capacity to understand English, use a certified interpreter. See 28 U.S.C. § 1827.]

   (d) Have you taken any drugs, medicine, or pills or drunk any alcoholic beverage in the past twenty-four hours? Do you understand what is happening today?

2. Then ask defense counsel and prosecutor:

   Do either of you have any doubt as to the defendant's competence at this time?

3. State your finding on the record of the defendant's competence.

B. Emphasize the seriousness of the charges. Inform the defendant of the maximum punishment for each count and any applicable mandatory minimum sentence.

C. Tell the defendant:

1. If at any time you do not understand something or have a question, consult your lawyer or ask me any questions.
2. This proceeding can be continued to another day if you wish to consult another lawyer.

D. Advise the defendant about the apparent conflict of interest in their lawyer's representation. For example, state:

> The United States Constitution gives every defendant the right to effective assistance of counsel. When one lawyer represents two or more defendants in a case, the lawyer may have trouble representing all of the defendants with the same fairness. This is a conflict of interest that denies the defendant the right to effective assistance of counsel. Such conflicts are always a potential problem because different defendants may have different degrees of involvement. Each defendant has the right to a lawyer who represents only that defendant.

E. Point out the various ways in which dual representation might work to the defendant's disadvantage. This may be done by giving the defendant a form to read or by advising the defendant in the following way:

1. Dual representation may inhibit or prevent counsel from conducting an independent investigation in support of each defendant's case. For example, the attorney–client privilege may prevent your lawyer from communicating to you information gathered from another defendant.
2. The government may offer immunity or offer to recommend a lesser sentence to one defendant for cooperating with the government. Should you receive such an offer, your lawyer ought to advise you whether or not to accept it. But if your lawyer advises you to accept the offer, it may harm the cases of the other defendants represented by that lawyer.
3. The government may let a defendant who is not as involved as other defendants plead guilty to lesser charges than the other defendants. After the guilty plea, however, the government may require the defendant to testify. A lawyer who represents more than one defendant might recommend that the first defendant not plead guilty in order to protect the other defendants that the lawyer represents. On the other hand, the lawyer might recommend that the first defendant plead guilty, which might harm the cases of the other defendants.

4. Dual representation may affect how your lawyer exercises peremptory challenges or challenges for cause during jury selection. Potential jurors who may be perceived as favorable to you may be perceived as harmful to another defendant, or jurors who may be perceived as favorable to other defendants may be harmful to you.
5. Sometimes one of the defendants represented by a lawyer will take the stand to testify in their own behalf. In order to represent the other defendants fairly, the lawyer should question the defendant on the stand as completely as possible. However, the lawyer may not be able to do that because they cannot ask the defendant as a witness about anything that the defendant has told the lawyer in confidence.
6. The best defense for a single defendant often is the argument that while the other defendants may be guilty, this defendant is not. A lawyer representing two or more defendants cannot effectively make such an argument.
7. Evidence that helps one defendant might harm another defendant's case. When one lawyer represents two or more defendants, the lawyer might offer or object to evidence that could help one defendant but harm another.
8. Regarding sentencing, dual representation would prohibit the lawyer from engaging in post-trial negotiations with the government as to full disclosure by one defendant against the other. It would also prohibit the lawyer from arguing the relative culpability of the defendants to the sentencing judge.

F. An attorney proposing to represent codefendants should be required to assure the court that there will be no conflict that could result in a lack of effective assistance of counsel or other prejudice to any defendant. Advise the attorney that the court should be notified immediately if the attorney becomes aware of anything that may negatively affect or harm either client's case.

G. Consider recommending that the defendant consult with other, independent counsel about the wisdom of waiving the right to separate counsel. Offer to make CJA counsel available (if appropriate) and allow adjournment for that purpose. If the defendant decides to have separate counsel, appoint counsel. See section 1.02: Appointment of Counsel or Pro Se Representation, *supra*.

H. If the defendant wants to waive the right to separate counsel, get a clear, on-the-record oral waiver of the right to separate counsel. In addition, you may want the defendant to sign a written waiver.

I. Ask the defendant:

1. Based on what I have told you, do you still want to waive your right to be represented by separate counsel?

[If yes:]

2. Based on your statements here that you understand and accept the risks of dual representation, I find that you have knowingly, voluntarily, and intentionally

waived your right to separate counsel. I hereby authorize _____ [name of attorney] to represent both you and _____ [name of other defendant(s)].

3. In the event that you believe that dual representation may negatively affect your case, notify this court immediately. After the pretrial portion of your case has concluded, if you believe that dual representation is harming your case, raise the issue with the district judge who is assigned to your case.

[If no:]

J. If you determine that the defendant has not shown a knowing, voluntary, and intentional waiver of separate counsel, state your findings on the record and appoint separate counsel.

# 1.09 Waiver of Jury Trial (Suggested Procedures, Questions, and Statements)

*Fed. R. Crim. P. 23*

## Introduction

Trial by jury is a fundamental constitutional right, and waiver of the right to a jury trial should be accepted by a trial judge only when three requirements are satisfied:

1. the procedures of Fed. R. Crim. P. 23(a) have been followed;
2. the waiver is knowing and voluntary; and
3. the defendant is competent to waive a constitutional right.

Fed. R. Crim. P. 23(a) requires that the accused's waiver of the right to trial by jury be

1. made in writing;
2. consented to by the government; and
3. approved by the court.

Following this rule alone does not satisfy the requirement that the waiver be knowing and voluntary, however.

The trial judge should ascertain on the record

1. whether the accused understands that they have a right to be tried by a jury;
2. whether the accused understands the difference between a jury trial and a nonjury trial; and
3. whether the accused has been made to understand the advantages and disadvantages of a jury trial.

Before approving the waiver, a trial judge must consider a defendant's mental capacity to waive a jury trial. A defendant is not competent to waive a constitutional right if mental incapacity or illness substantially impairs the defendant's ability to make a reasoned choice among the alternatives presented and to understand the nature and consequences of the waiver.

When information available from any source presents a question as to the defendant's competence to waive a jury trial, sua sponte inquiry into that competence must be made.

In any psychiatric examination ordered under the inherent power of the court or under 18 U.S.C. § 4241, the examining psychiatrist should be directed to give an opinion on the defendant's competence to make an intelligent waiver. Whenever any question as to the defendant's competence arises, a specific finding of competence or incompetence should be made.

Finally, if any doubt of competence exists, the judge should order a jury trial.

## Suggested Procedures and Questions

A. Preliminary Questions for the Defendant

1. The court is informed that you desire to waive your right to a jury trial. Is that correct?
2. Before accepting your waiver to a jury trial, there are a number of questions I will ask you to ensure that it is a valid waiver. If you do not understand any of the questions or at any time wish to interrupt the proceeding to consult further with your attorney, please say so, since it is essential to a valid waiver that you understand each question before you answer. Do you understand?
3. What is your full name?
4. How old are you?
5. How far did you go in school?

   [If you are not sure the defendant understands English, ask:]

6. Are you able to speak and understand English?

   [Ask defense counsel if they have been able to communicate with the defendant in English. If you doubt the defendant's capacity to understand English, use a certified interpreter. See 28 U.S.C. § 1827.]

7. What is your employment background?
8. Have you taken any drugs, medicine, or pills, or drunk any alcoholic beverage in the past twenty-four hours?
9. Do you understand that you are entitled to a trial by jury on the charges filed against you?
10. Do you understand that a jury trial means that you will be tried by a jury consisting of twelve people and that all of the jurors must agree on the verdict?
11. Do you understand that you have the right to participate in the selection of the jury?
12. Do you understand that if I approve your waiver of a jury trial, the court will try the case and determine your innocence or guilt?
13. Have you discussed with your attorney your right to a jury trial?
14. Have you discussed with your attorney the advantages and disadvantages of a jury trial? Do you want to discuss this issue further with your attorney?

B. Questions for counsel

In determining whether the accused has made a "knowing and voluntary" waiver and is competent to waive the right to a jury trial, the judge should question both the defense counsel and the prosecutor.

1. Ask the defense counsel:

   (a) Have you discussed with the defendant the advantages and disadvantages of a jury trial?

   (b) Do you have any doubt that the defendant is making a "knowing and voluntary" waiver of the right to a jury trial?

   (c) Has anything come to your attention suggesting that the defendant may not be competent to waive a jury trial?

2. Ask the prosecutor:

   Has anything come to your attention suggesting that the defendant may not be competent to waive a jury trial?

C. Form of waiver and oral finding

1. A written waiver of a jury trial must be signed by the defendant, approved by the defendant's attorney, consented to by the government, and approved by the court.
2. It is suggested that the judge state orally:

   This court finds that the defendant has knowingly and voluntarily waived the right to a jury trial, and I approve that waiver.

3. An appropriate written waiver of jury trial may take the form of the one shown on the next page. Note that the defendant may also waive the right to request specific findings of fact under Fed. R. Crim. P. 23(c).

## Other FJC Sources

- Manual on Recurring Problems in Criminal Trials 9–10 (Tucker Carrington & Kris Markarian eds., 6th ed. 2010)

**In the U.S. District Court**

**for the [ ] District of [ ]**

| | | |
|---|---|---|
| United States of America | ) | |
| | ) | No. Cr _____ |
| v. | ) | Waiver of trial |
| | ) | by jury |
| [Defendant] | ) | |

I acknowledge that I was fully informed of my right to trial by jury in this cause. I hereby waive that right and request the court to try all issues of fact and law without a jury.

[Option: I also waive my right to request specific findings of fact.]

Dated at _____, this___day of _____, 20____.

_____

Defendant

APPROVED:

_____

Attorney for Defendant

The United States of America consents to the defendant's waiver of a jury trial.

[Option: and waives its right to request specific findings of fact.]

_____

Assistant U.S. Attorney

I find that the defendant has knowingly and voluntarily waived the right to a jury trial [Option: and to request specific findings of fact]. I approve the waiver.

_____

Judge

# 1.10 Speedy Trial Act

*18 U.S.C. §§ 3161–3166*

Title I of the Speedy Trial Act of 1974 (18 U.S.C. § 3161) imposes time limits within which criminal defendants must be brought to trial. The time limits are expressed as numbers of days from certain events, but the statute provides that certain periods of time be "excluded" in computing these limits, thereby extending the deadlines. The statute applies to offenses other than petty offenses.[1] This section is offered as a general guide to the time limits and exceptions in the Speedy Trial Act. Judges should be aware that circuit law may differ on specific issues.

Judges should also be aware of the possible effect of the Crime Victims' Rights Act. Any victims of the offense have the right to be notified by the government of, and not be excluded from, any public proceeding. They also have a right to "proceedings free from unreasonable delay," which may need to be considered if exceptions to the Speedy Trial Act's time limits are requested. See 18 U.S.C. § 3771(a)(2), (3), and (7).

*Testimony by a child:* "In a proceeding in which a child is called to give testimony, on motion by the attorney for the Government or a guardian ad litem, or on its own motion, the court may designate the case as being of special public importance." In such cases, "the court shall . . . expedite the proceeding and ensure that it takes precedence over any other. The court shall ensure a speedy trial in order to minimize the length of time the child must endure the stress of involvement with the criminal process." 18 U.S.C. § 3509(j).

## *A. Dismissal*

Failure to comply with the time limits, as extended by periods of excludable delay under § 3161(h), generally requires that a cause be dismissed, although not necessarily with prejudice. In deciding whether to dismiss with or without prejudice, the court should consider the seriousness of the offense, the facts and circumstances that led to the dismissal, and the impact of a reprosecution on the administration of the Speedy Trial Act and the administration of justice. See 18 U.S.C. § 3162(a)(1) and (2). If the defendant may be released, victims should be given an "opportunity to be reasonably heard" at any public proceeding on the issue. 18 U.S.C. § 3771(a)(4).

## *B. Waiver by Defendant*

Although a defendant's failure to make a timely motion for dismissal on speedy trial grounds is deemed a waiver of the right to dismissal,[2] courts should not rely solely on defendants' agreements to delay their trials beyond the statutory time limits. As the Supreme Court concluded,

> § 3161(h) has no provision excluding periods of delay during which a defendant waives the application of the Act, and it is apparent from the terms of the Act that this omission was a considered one. Instead of simply allowing defendants to opt out of the Act, the Act

1. "Petty offense" means an offense that is punishable by imprisonment of six months or less and for which the maximum fine (including any "alternative fine" under 18 U.S.C. § 3571(d)) is no more than $5,000 for individuals or $10,000 for organizations. 18 U.S.C. §§ 19 and 3581.

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

> demands that defense continuance requests fit within one of the specific exclusions set out in subsection (h).

*Zedner v. United States*, 547 U.S. 489, 500–03 (2006) (holding that "a defendant may not prospectively waive the application of the Act" and that "petitioner's waiver 'for all time' was ineffective").

## C. Basic Time Limits

*Indictment or Information*

An indictment or information must be filed within thirty days after arrest or service of a summons. However, if a defendant is charged with a felony in a district in which no grand jury has been in session during the thirty-day period, the time for filing an indictment shall be extended an additional thirty days. See 18 U.S.C. § 3161(b). If an indictment or information is dismissed or otherwise dropped and if charges based on or arising from the same conduct are later refiled, "the provisions of subsections (b) and (c) of this section shall be applicable with respect to such subsequent complaint, indictment, or information." 18 U.S.C. § 3161(d)(1).

## D. Trial

A trial must commence within seventy days after the *later* of (a) the date of the indictment or information or (b) the date of the defendant's initial appearance before a judicial officer in the district in which charges were brought. See 18 U.S.C. § 3161(c). In some circumstances, the deadline for trial on a superseding indictment relates back to the original indictment.

## E. Trial, Defendant in Custody

A trial of a defendant held in pretrial detention must also commence within ninety days of the beginning of continuous custody. This deadline may in some cases be earlier than the seventy-day deadline referred to above. Periods of excludable release under § 3161(h) are not counted. See 18 U.S.C. § 3164(b). The sanction is release from custody rather than dismissal of the case. See 18 U.S.C. § 3164(c). If the defendant's release involves a "public hearing," a victim has the right to be heard. See 18 U.S.C. § 3771(a)(4).

## F. Retrial

A retrial following a mistrial or order for a new trial must commence within seventy days after the date the action occasioning the retrial becomes final. 18 U.S.C. § 3161(e). Retrial following a dismissal by the trial court and reinstatement after appeal, or following an appeal or collateral attack, must also commence within seventy days, but an extension of up to 180 days may be allowed if trial within seventy days is impractical. 18 U.S.C. § 3161(d) and (e).

## G. Trial Commencement Limitations

The Act requires that the trial date be determined at the earliest practicable time, after consultation with counsel. See 18 U.S.C. § 3161(a). A trial may not commence less than thirty days after

the defendant first appears through counsel or expressly waives counsel and elects to proceed pro se, unless the defendant consents in writing. See 18 U.S.C. § 3161(c)(2).

## *H. Excludable Periods*

There are several periods of delay that "shall be excluded" from the time limits for filing an indictment or information or for commencing trial. See 18 U.S.C. § 3161(h)(1)–(8). Among these are periods of delay resulting "from other proceedings concerning the defendant,"[3] "from the absence or unavailability of the defendant or an essential witness," and "from the fact that the defendant is mentally incompetent or physically unable to stand trial."

A period of delay resulting from the granting of a continuance may also be excluded if the continuance was granted on the basis of a finding that "the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial." The court must put on the record, "either orally or in writing, its reasons for [that] finding."[4] See 18 U.S.C. § 3161(h)(7)(A) & (B) (listing some of the factors a judge should consider in determining whether to grant a continuance).[5] The Supreme Court held that

> if a judge fails to make the requisite findings regarding the need for an ends-of-justice continuance, the delay resulting from the continuance must be counted, and if as a result the trial does not begin on time, the indictment or information must be dismissed. . . . [W]e leave it to the District Court to determine in the first instance whether dismissal should be with or without prejudice."[6]

*Zedner*, 547 U.S. at 507–09 (the Court added that "at the very least the Act implies that those findings must be put on the record by the time a district court rules on a defendant's motion to dismiss under § 3162(a)(2)").

3. Section 3161(h)(1)(D) excludes periods of "delay resulting from any pretrial motion, from the filing of the motion through the conclusion of the hearing on, or other prompt disposition of, such motion." However, the Supreme Court has held that any time granted to *prepare* such motions is not automatically excluded, and is only excludable if, following § 3161(h)(7), "the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial." Bloate v. United States, 559 U.S. 196, 203–15 (2010). Note that once a motion is actually filed, it falls within subsection (D) "irrespective of whether it actually causes, or is expected to cause, delay in starting a trial." United States v. Tinklenberg, 563 U.S. 647, 650 (2011).

4. Consider asking the U.S. attorney to prepare the form of the order.

5. *See, e.g.*, United States v. Sutcliffe, 505 F.3d 944, 956–57 (9th Cir. 2007) ("ends of justice" continuance properly granted "to allow [newly] appointed defense counsel time to prepare for trial given the complexity of the case, the large amount of electronic evidence, and the repeated changes in Defendant's representation"); United States v. Gardner, 488 F.3d 700, 718–19 (6th Cir. 2007) (same, where three codefendants all requested extra time to reconcile trial dates and prepare for trial); United States v. Apperson, 441 F.3d 1162, 1183–84 (10th Cir. 2006) (same, for medical problems of defendant's attorney); United States v. Ruth, 65 F.3d 599, 606 (7th Cir. 1995) (same, for delay caused by defendant's refusal to provide handwriting exemplars); United States v. Drapeau, 978 F.2d 1072, 1072–73 (8th Cir. 1992) (same, to allow time for DNA test that would either exculpate or inculpate defendant); United States v. Sarro, 742 F.2d 1286, 1300 (11th Cir. 1984) (same, where one codefendant's attorney had other trial scheduled at same time and another codefendant's brother had recently died).

6. *See* § 3162(a)(2):

> In determining whether to dismiss the case with or without prejudice, the court shall consider, among others, each of the following factors: the seriousness of the offense; the facts and circumstances of the case which led to the dismissal; and the impact of a reprosecution on the administration of this chapter and on the administration of justice..

Note that a continuance under this section may not be granted "because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government." 18 U.S.C. § 3161(h)(7)(C). The right of crime victims to "proceedings free from unreasonable delay" may also have to be considered. See 18 U.S.C. § 3771(a)(7).

## Other Aids to Interpretation

- The speedy trial plan adopted by each district court pursuant to 18 U.S.C. §§ 3165 & 3166
- Administrative Office of the U.S. Courts, District Clerks' Manual § 6.13 (2019)
- Judicial Conference Committee on the Administration of the Criminal Law, Guidelines to the Administration of the Speedy Trial Act of 1974 (rev. ed. October 1984), 106 F.R.D. 271 (1984)

## Other FJC Sources

- Anthony Partridge, Legislative History of Title I of the Speedy Trial Act of 1974 (1980).
- Anthony J. Battaglia, "Navigating the Intersection of the Speedy Trial Act and The Mental Competency Statutes" (2013), https://fjc.dcn/sites/default/files/2012/MagJ1355.pdf
- Irma Gonzalez, D. Brock Hornby & Loretta Preska, "Criminal Pretrial Proceedings" 12–14 (Federal Judicial Center 2012), https://fjc.dcn/sites/default/files/2015/criminal-pretrial.pdf

# 1.11 Delinquency Proceedings

*18 U.S.C. §§ 5031 et seq.*

## *A. Proceeding as an Adult or a Juvenile*

1. Jurisdiction

   (a) The district court has jurisdiction over a juvenile who is alleged to have committed a violation of law in the court's special maritime and territorial jurisdiction for which the maximum authorized term of imprisonment is six months or less.

   (b) In other cases, the district court has jurisdiction only if the Attorney General, after investigation, certifies one of the following[1]:

      (i) that a juvenile court or other appropriate state court does not have jurisdiction or refuses to assume jurisdiction over a juvenile with respect to the alleged act of juvenile delinquency;

      (ii) that the state does not have available programs and services adequate for the needs of juveniles; or

      (iii) that the offense charged is a crime of violence that is a felony, or is an offense described in certain sections of title 21, *and* that there is a substantial federal interest in the case or the offense.

   If jurisdiction is not established under paragraph (a) or (b) above, the juvenile must be surrendered to appropriate state authorities. If jurisdiction is established, the prosecution proceeds by information or by violation notice or complaint under 18 U.S.C. § 3401(g). See 18 U.S.C. § 5032. See also the Calendar of Events at the end of this section.

2. Arrest and Arraignment

   When a juvenile is taken into federal custody for violation of federal law, the juvenile must be advised of their legal rights immediately—"in language comprehensive to a juvenile"—and the juvenile's parents or guardian must be notified immediately. Parental notification should include advice as to the juvenile's rights. If the juvenile's parents reside outside of the United States, parental notification may be accomplished through

1. *See* U.S. Dep't of Just., Justice Manual at § 9-8.110 ("The authority to proceed with this certification was delegated to the United States Attorneys . . . in a Memorandum dated July 20, 1995."). *See also* Charles Doyle, "Juvenile Delinquents and Federal Criminal Law: The Federal Juvenile Delinquency Act and Related Matters," Cong. Rsch. Serv., RL30822 at 8 (2023) ("A facially adequate certification is generally thought to be beyond judicial review in the absence of evidence of bad faith."), https://crsreports.congress.gov/product/pdf/RL/RL30822.

the offices of an appropriate foreign consulate. The juvenile should be immediately brought before the magistrate. 18 U.S.C. § 5033. See B, Arraignment of a Juvenile, *infra*.[2]

3. Preliminary procedures

   (a) Clear the courtroom of all persons except those associated with the case. Close the outside and inside doors and instruct the marshal not to open them during the proceedings.

   (b) Take the appearances of counsel.

   (c) Explain to the parties that the hearing will be divided into two parts as follows:

      (i) the court determines if the juvenile should proceed as an adult or a juvenile;

      (ii) the juvenile admits or denies the charges against them (see *infra* subsection B of this section).

   (d) Ensure that the juvenile can speak and understand English and that defense counsel has been able to communicate with the juvenile in English. If there is any doubt about the juvenile's ability to understand English, use a certified interpreter. See 28 U.S.C. § 1827.

4. Explain the rights of an adult:

   (a) to an initial appearance before the magistrate judge;

   (b) to counsel;

   (c) to a bail hearing;

   (d) to an indictment, if applicable;

   (e) to a preliminary hearing to determine probable cause if the defendant is not indicted; and

   (f) to a trial by jury (explain composition of jury) in which the government will have to prove that the defendant is guilty beyond a reasonable doubt and in which the defendant has the right

      (i) to confront and cross-examine witnesses; and

      (ii) to remain silent, testify, or call witnesses.

5. Explain the rights of a juvenile:

   (a) to an initial appearance before the magistrate judge;

   (b) to counsel;[3]

2. *See, e.g.*, United States v. C.M., 485 F.3d 492, 499–505 (9th Cir. 2007) (reversing adjudication of delinquency and dismissing juvenile information because the government violated § 5033 by its failure to immediately advise the defendant of his rights, failure to notify his parents, failure to notify the Mexican consulate, failure to comply with the defendant's requests to contact the consulate, and failure to bring defendant "forthwith" before a magistrate judge). *Cf.* United States v. Burrous, 147 F.3d 111, 116 (2d Cir. 1998) (juvenile's statements made before parents were notified need not be suppressed where juvenile's lack of cooperation hindered government's repeated good faith attempts to locate the detained juvenile's parents).

3. As with adult defendants, counsel shall be appointed "when the juvenile and his parents, guardian, or custodian are financially unable to obtain adequate representation," or when able to afford counsel but have not yet retained counsel, in which case payment may be ordered. 18 U.S.C. § 5034.

(c) to an information, violation notice, or complaint, as opposed to an indictment by grand jury;[4]

(d) to a hearing before the court to determine delinquency,[5] during which the defendant has the right

(i) to confront and cross-examine witnesses;[6]

(ii) to remain silent, testify, or call witnesses;[7] and

(iii) to have the government prove guilt beyond a reasonable doubt;[8]

and

(e) to have their name and picture withheld from the media.[9]

6. Election to proceed as an adult or a juvenile

(a) Explain the maximum penalties under the applicable statute if the juvenile elects to proceed as an adult.

(b) Explain the disposition under the Federal Juvenile Delinquency Act (FJDA), which gives the court the following options:

(i) to suspend the findings of delinquency;

(ii) to require that the juvenile make restitution to the victim(s) of the delinquent conduct;

(iii) to place the juvenile on probation; or

(iv) to commit the juvenile to official detention, which may be followed by a term of juvenile delinquent supervision.

18 U.S.C. § 5037(a)

(c) Explain that if the juvenile elects to proceed as an adult,

(i) the request must be in writing and upon the advice of counsel.[10]

(ii) the juvenile may plead not guilty and force the government to trial by jury under an indictment, if applicable.

(iii) the juvenile may plead guilty and forgo trial.

(d) Explain that if the juvenile elects to proceed as a juvenile,

(i) the request may be oral.

(ii) the juvenile may deny the charges against them and force the government to try the case before the judge.

4. 18 U.S.C. § 5032; United States v. Hill, 538 F.2d 1072 (4th Cir. 1976).

5. McKeiver v. Pennsylvania, 403 U.S. 528 (1971); United States v. Hill, 538 F.2d 1072 (4th Cir. 1976).

6. *In re* Gault, 387 U.S. 1 (1967); United States v. Costanzo, 395 F.2d 441 (4th Cir. 1968).

7. *In re* Gault, 387 U.S. 1 (1967); United States v. Hill, 538 F.2d 1072 (4th Cir. 1976); West v. United States, 399 F.2d 467 (5th Cir. 1968) (factors in deciding if juvenile has waived privilege against self-incrimination).

8. *In re* Gault, 387 U.S. 1 (1967); United States v. Hill, 538 F.2d 1072 (4th Cir. 1976); United States v. Costanzo, 395 F.2d 441 (4th Cir. 1968).

9. 18 U.S.C. § 5038(e).

10. 18 U.S.C. § 5032.

(iii) the juvenile may admit the charges filed in the information, violation notice, or complaint, forgoing trial.

(e) Ask counsel

(i) if proceeding as a juvenile is in the individual's best interests; and

(ii) if family members present in the courtroom have discussed the individual's election with counsel.

(f) Ask the juvenile:

Do you elect to proceed as an adult or as a juvenile?

(i) If the juvenile elects to proceed as an adult, proceed to arraignment as an adult (see *infra* section 1.07: Arraignment and Plea).

(ii) If the juvenile elects to proceed as a juvenile, proceed to arraignment of a juvenile (see *infra* subsection B of this section).

7. Motion by Attorney General to proceed against the juvenile as an adult

(a) The Attorney General may make a motion to transfer the juvenile to adult prosecution if the juvenile

(i) committed an act that if committed by an adult would be a felony that is a crime of violence or a specified drug offense from title 21; and

(ii) committed the act after their fifteenth birthday.

(b) The court may grant the motion if, after a hearing and after considering and making findings in the record on the following statutory factors, it finds that the transfer would be "in the interest of justice":

- the age and social background of the juvenile;
- the nature of the alleged offense;
- the extent and nature of the juvenile's prior delinquency record;
- the juvenile's present intellectual development and psychological maturity;
- the nature of past treatment efforts and the juvenile's response to such efforts;
- the availability of programs designed to treat the juvenile's behavioral problems.

If the alleged offense involved the use or distribution of controlled substances or firearms, the court shall consider the extent to which the juvenile played a leadership role in an organization, or otherwise influenced others to take part.[11]

(c) The age limit for committing the act is lowered to after the thirteenth birthday for certain crimes of violence or if the juvenile possessed a firearm during the offense.

(d) Reasonable notice of a transfer hearing must be given to the juvenile; the juvenile's parents, guardian, or custodian; and counsel. The juvenile shall be assisted by counsel, and any statements the juvenile makes before or during the transfer hearing are not admissible at subsequent criminal prosecutions.

See 18 U.S.C. § 5032.

11. 18 U.S.C. § 5032. *See also* Benjamin D. Traster & Joshua Satte, *Navigating Juvenile Transfers: Investigation, Discovery, and Strategy*, 71 J. Fed. L. & Prac. 125, 127–29 (Apr. 2023), https://www.justice.gov/usao/file/1292096/dl?inline.

8. Mandatory proceeding as an adult

   The juvenile shall be transferred to district court for prosecution as an adult if the juvenile

   (a) committed an act after their sixteenth birthday that if committed by an adult would be a felony offense that is a crime of violence, or a drug offense or other serious crime as described in the statute; and

   (b) has been previously found guilty of an act that if committed by an adult would have been one of the offenses described above or in paragraph 6 above, or found guilty of a violation of a state felony statute that would have been such an offense if committed under federal jurisdiction.

See 18 U.S.C. § 5032.

## *B. Arraignment of a Juvenile*

1. Administer oath and make sure the juvenile understands that to lie under oath is to commit the crime of perjury.
2. Direct the U.S. attorney to read the charge(s) against the juvenile.

   (a) The charge(s) must

   (i) reflect that the individual committed an act of juvenile delinquency;

   (ii) cite the statute allegedly violated; and

   (iii) cite 18 U.S.C. § 5032.

   (b) The court should direct the following questions to the juvenile:

   (1) Have you been given a copy of the charge(s)?

   (2) Have you talked to counsel about the charge(s) filed against you?

   [Explain the charge(s) and inquire:]

   (3) Do you understand the charge(s) against you?

   [Explain the penalty and inquire:]

   (4) Do you understand the maximum penalty that could be assessed against you if you are found guilty of the charge(s)?

   (5) Do you understand that you are entitled to have counsel present with you at all times during these proceedings?

   (6) Are you satisfied with your representation (counsel)?

   (7) Do you understand that you have a right to deny the charge(s) that has (have) just been read?

   (8) Do you understand that if you deny the charge(s), the government will have to bring witnesses that your counsel can cross-examine, and the government will have to convince the court beyond a reasonable doubt

   (a) that you committed the crime with which you have been charged; and

   (b) that you committed this crime before you reached the age of eighteen?

3. Read the elements of the offense that the government will have to prove.
4. Determine the competence of the juvenile to understand the proceedings and to enter an admission or denial.
   (a) The court should ask the following questions:
      (1) Have you taken any drugs, medicines, or pills or drunk any alcoholic beverages in the past twenty-four hours?
      (2) Do you understand what is happening today?
   (b) The court should also ask the juvenile's counsel and the prosecutor this question:
      Do either of you have any doubt as to the juvenile's competence to admit or deny the charge(s) against them at this time?
   (c) If, after further interrogation of the juvenile and counsel, there is any question of the juvenile's understanding of the proceedings and of their competence to plead, continue the taking of the admission or denial to a later date.
5. Determine the juvenile's awareness of the consequences of an admission. Ask:
   (a) Are you aware that, if you admit the charge(s) against you, you are giving up your right:
      (1) to trial by the court?
      (2) to confront and cross-examine witnesses?
      (3) to remain silent, testify, and call witnesses?
      (4) to require the government to prove guilt beyond a reasonable doubt?
   (b) Are you aware that if you admit the charge(s) against you, you will lose the right to elect to proceed as an adult with the following rights:[12]
      (1) to an indictment, if applicable?
      (2) to a trial by jury?

   [See *supra* subsection A.4(f) of this section.]
6. Explain to the juvenile that if they admit to the act with which they have been charged, the government will then tell the court what it believes the facts to be and what it could prove if the case were to go to trial. Next, explain that the court would then ask the juvenile
   (a) if what the government says is true as far as they know;
   (b) if any part of what the government says is not true, and if so, what is not true;
   (c) if they believe that the government can prove what it says it can prove; and
   (d) if they committed [here, go through the elements of the offense].

12. *Cf.* United States v. Doe, 627 F.2d 181 (9th Cir. 1980) (discussing timing requirement for making request to proceed as an adult).

7. Determine the voluntariness of the admission:

   The court must be satisfied that if the juvenile admits to the charge(s) against them, this admission is voluntary and not the result of any force or threat or inducement. Suggested questions to ask the juvenile include the following:

   (a) Has anyone threatened you or anyone else or forced you in any way to admit to the charge(s)?

   [If the answer is yes, ascertain the facts and recess if necessary to permit the juvenile and counsel to confer, or postpone taking the admission.]

   (b) Do you understand that no one can compel you to admit anything?

8. Take the admission or denial. Ask the juvenile:

   Do you admit or deny that you are a juvenile delinquent as charged in the information?

   (a) If the juvenile denies the charge(s), set the case for trial.

   (b) If the juvenile admits to the charge(s):

   (1) Ask the U.S. attorney to state what they can prove at trial.

   (2) Ask the juvenile the following questions:

   (a) So far as you know, is what the government says true?

   (b) Is any part of what the government says not true, and if so, what is not true?

   (c) Do you believe that the government can prove what it says it can prove?

   (d) Did you [here, go through the elements of the offense]?

   **NOTE**

   Consider asking the juvenile to tell, in his or her own words, what they did.

   (3) Ask counsel for the juvenile if counsel is satisfied that the government can prove what it says it can prove.

9. Make findings for the record:

   (a) Find that all laws (18 U.S.C. § 5031 et seq.) have been complied with and that a basis for federal jurisdiction exists (see *supra* subsection A.1 of this section).

   (b) Find that the juvenile is competent.

   (c) Find that the juvenile understands their rights and has elected to give them up, except the right to counsel.

   (d) Find that the juvenile has voluntarily admitted to the charge(s) against them after fully knowing and understanding their constitutional rights as a juvenile.

   (e) Find that the juvenile is aware of the maximum penalty that could be imposed.

   (f) Find that the juvenile is aware that the government has sufficient facts to support an adjudication of juvenile delinquency.

   (g) Ask the juvenile if they want to change their mind and not proceed as a juvenile or not admit to the charge(s) against them.

(h) Adjudge that the juvenile is a juvenile delinquent.

10. Inform the juvenile and their parents or guardian, in writing, of the juvenile's rights relating to the confidentiality of juvenile records.[13]

## *C. Disposition (18 U.S.C. § 5037)*[14]

1. Detention prior to disposition (18 U.S.C. § 5035)

   (a) A juvenile alleged to be delinquent may be detained only in a juvenile facility or other suitable place designated by the Attorney General.

   (b) Detention shall be in a foster home or community-based facility located in or near the juvenile's home community whenever possible.

   (c) The juvenile shall not be detained or confined in any institution in which the juvenile would have regular contact with adults convicted of crimes or awaiting trial on criminal charges. Also, insofar as possible, *alleged* delinquents shall be kept separate from *adjudicated* delinquents.

   (d) Every juvenile in custody should be provided with adequate food, heat, light, sanitary facilities, bedding, clothing, recreation, education, and medical care, including necessary psychiatric, psychological, or other care and treatment.

2. Timing of hearing (18 U.S.C. § 5037(a))

   If the juvenile is adjudicated to be delinquent, the court must have a hearing disposing of the case within twenty court days after said adjudication unless the court has ordered further studies in accordance with 18 U.S.C. § 5037(d). (See *infra* paragraph C.5 of this section.)

3. Judgment following disposition hearing

   After the disposition hearing, the court may

   (a) suspend the findings of delinquency;

   (b) require the juvenile to make restitution pursuant to 18 U.S.C. § 3556;

   (c) place the juvenile on probation; or

   (d) commit the juvenile to official detention in the custody of the Attorney General.

4. Sentence

   A juvenile may not be placed on probation or committed for a term longer than the maximum probation or prison term that would have been authorized had the juvenile been sentenced as an adult under the Sentencing Guidelines. *United States v. R.L.C.*, 503 U.S. 291, 306 (1992). Subject to that limitation, the maximum terms applicable are as follows:

13. 18 U.S.C. § 5038(b). See 18 U.S.C. § 5038(a), (c), (d), and (f) for authority to release juvenile records.

14. The following outline is not intended as a procedure for conducting a dispositional hearing, but as supplemental material to be used in setting the dispositional hearing.

(a) For a juvenile under eighteen at the time of disposition, neither the probation term nor the detention term may extend beyond the juvenile's twenty-first birthday. 18 U.S.C. § 5037(b)(1), (c)(1).

(b) For a juvenile between eighteen and twenty-one at the time of disposition, the probation term may not exceed three years. 18 U.S.C. § 5037(b)(2). The detention term may not exceed five years if the act of delinquency was a Class A, B, or C felony; it may not exceed three years in other cases. 18 U.S.C. § 5037(c)(2).

5. Observation and study (§ 5037(e))

An alleged or adjudicated delinquent may be committed, after notice and a hearing at which the juvenile is represented by counsel, to the custody of the Attorney General for observation and study by an appropriate agency. This observation and study shall be conducted on an outpatient basis unless the court determines that inpatient observation and study are necessary to obtain the desired information. If the juvenile is only an alleged juvenile delinquent, inpatient study may be ordered only with the consent of the juvenile and the juvenile's attorney. The agency shall make a complete study of the alleged or adjudicated delinquent to ascertain the juvenile's personal traits, capabilities, and background; any previous delinquency or criminal experience; any mental or physical defects[15]; and any other relevant factors.

The Attorney General must submit a report on the observation and study to the court and "to the attorneys for the juvenile and the government" within thirty days after commitment unless the court grants additional time.

6. Post-detention supervision

If detention is ordered, the court may require that the juvenile be placed on a term of juvenile delinquent supervision to follow the official detention. See 18 U.S.C. § 5037(d)(1)–(6).

## Calendar of Events

*Prior to Initial Appearance*

If the juvenile has not been discharged before his initial appearance before the magistrate judge, the magistrate judge shall release the juvenile to his parents, guardian, custodian, or other responsible party . . . upon their promise to bring such juvenile before the appropriate court when requested by such court unless the magistrate judge determines, after hearing, at which the juvenile is represented by counsel, that the detention of such juvenile is required to secure his timely appearance before the appropriate court or to insure his safety or that of others.

18 U.S.C. § 5034.

15. *See* United States v. LKAV, 712 F.3d 436, 440 (9th Cir. 2013) (court must follow § 5037(e), not 18 U.S.C. § 4241(d), if it commits juvenile for study of competency to stand trial: "Because § 5037(e) expressly provides for commitment, study, and observation of alleged juvenile delinquents, it controls over conflicting provisions of § 4241(d), which is applicable to federal criminal defendants generally.").

*Juvenile in custody*

The juvenile must be brought to trial within thirty days from the date detention was begun. If not,

> the information shall be dismissed on motion of the alleged delinquent or at the direction of the court, unless the Attorney General shows that additional delay was caused by the juvenile or his counsel, or consented to by the juvenile and his counsel, or would be in the interest of justice in the particular case. Delays attributable solely to court calendar congestion may not be considered in the interest of justice. Except in extraordinary circumstances, an information dismissed under this section may not be reinstituted.

18 U.S.C. § 5036.

The dispositional hearing must occur within twenty court days after a juvenile is adjudicated delinquent. 18 U.S.C. § 5037(a).

*Juvenile not in custody*

The juvenile must be tried within seventy days from the date of filing of the charging information or from the date the juvenile appeared before a judicial officer of the court in which such charge is pending, whichever date occurs last. 18 U.S.C. §§ 3161 et seq.[16]

The dispositional hearing must occur within twenty court days after a juvenile is adjudicated delinquent. 18 U.S.C. § 5037(a).

## For Further Reference

- Charles Doyle, "Juvenile Delinquents and Federal Criminal Law: The Federal Juvenile Delinquency Act and Related Matters," Cong. Rsch. Serv., RL30822 (2023) (discussing application of the Act with extensive case citations), https://crsreports.congress.gov/product/pdf/RL/RL30822
- Department of Justice, Justice Manual at § 9-8.000—Juveniles, https://www.justice.gov/jm/jm-9-8000-juveniles
- Rachel Julagay & David Ness, "The Federal Juvenile Delinquency Act," (FJC PPT Presentation at the National Seminar for Federal Defenders May 30, 2024), https://fjc.dcn/sites/default/files/session/2024/The Federal Juvenile Delinquency Act - Copy.pdf

16. *But see* Model Statement of the Time Limits and Procedures for Achieving Prompt Disposition of Criminal Cases (Committee on the Administration of the Criminal Law of the Judicial Conference of the United States) (1979) (except as specifically provided, the time limits are not applicable to proceedings under the FJDA).

# 1.12 Mental Competency in Criminal Matters

*18 U.S.C. §§ 4241–4248; Fed. R. Crim. P. 12.2*

The mental competency of a defendant may come before the court in a number of different contexts. The most important are

- competency to stand trial;
- competency to plead guilty;
- competency to commit the crime with which the defendant is charged (e.g., ability to form the requisite intent);
- competency after acquittal by reason of insanity;
- competency to be sentenced;
- mental condition as it bears on the sentence to be imposed; and
- civil commitment of a convicted offender in need of care or treatment for a mental condition.

The Insanity Defense Reform Act of 1984, 18 U.S.C. §§ 4241–4248, is controlling with respect to most situations involving the mental competency of a defendant. It is a complex enactment, the provisions of which are spelled out in great detail. Its provisions must be read with care and complied with meticulously.

## *A. Competency to Stand Trial (18 U.S.C. § 4241)*

1. Section 4241(a) provides that after the commencement of a prosecution and prior to sentencing, either the U.S. attorney or defense counsel may move for a hearing to determine the defendant's mental competency. The court shall grant the motion, or shall order a hearing on its own motion, if there is reasonable cause to believe that the defendant is not mentally competent

   (a) to understand the nature and consequences of the proceedings against them; or

   (b) to assist properly in their defense.

2. Prior to the hearing the court may (and probably should) order that a psychiatric or psychological examination be conducted and that a report be filed with the court. 18 U.S.C. § 4241(b).

   (a) The examiner should be asked for their opinion as to whether the defendant is suffering from a mental disease or defect rendering the defendant mentally incompetent to understand the nature and consequences of the proceedings against them or to assist properly in their defense. The examiner's report must include all of the information required by 18 U.S.C. § 4247(c)(1) through (c)(4).

   (b) The psychiatrist or psychologist should not be asked to determine the defendant's mental competency at the time the alleged offense was committed.

(c) To secure a § 4241 examination, the court may, if necessary, order the defendant committed to a suitable hospital or facility for a reasonable period not to exceed thirty days, even if the defendant is not otherwise confined. For just cause this commitment may be extended by fifteen days. 18 U.S.C. § 4247(b).

3. The court shall then hold an evidentiary hearing, to be conducted pursuant to the provisions of 18 U.S.C. § 4247(d). The defendant "shall be represented by counsel" and "afforded an opportunity to testify, to present evidence, to subpoena witnesses . . . , and to confront and cross-examine witnesses." *Id.*
4. At the conclusion of the evidentiary hearing, the court shall make a finding by a preponderance of the evidence as to the accused's mental competency to stand trial. 18 U.S.C. § 4241(d).

   (a) A finding of mental competency to stand trial does not prejudice a plea of not guilty by reason of insanity, because the court's finding is not admissible in evidence on the issue of guilt or innocence. 18 U.S.C. § 4241(f).

   (b) If the defendant is found to be incompetent to stand trial, the court shall commit the defendant to the custody of the Attorney General. 18 U.S.C. § 4241(d). The trial court should receive periodic reports as to the defendant's mental condition.

   (c) The Attorney General shall hospitalize the defendant for a reasonable period not to exceed four months, to determine whether there is a substantial probability that the defendant will in the foreseeable future become competent to stand trial. 18 U.S.C. § 4241(d)(l).

   (d) The Attorney General may hospitalize the defendant for an additional reasonable period of time if the court finds that within that additional period there is a substantial probability that the defendant will become competent to stand trial. 18 U.S.C. § 4241(d)(2).

   (e) If, at the end of the time provided for by 18 U.S.C. § 4241(d), the defendant is still not competent to be tried, defendant is subject to further commitment under the provisions of § 4246 if the court finds by *clear and convincing evidence* that releasing the defendant would create a substantial risk of bodily injury to another or of serious damage to another's property. The provisions of § 4246 are detailed and complex. To avoid error the court must refer to those provisions and follow them with great care. The report of any § 4246 psychiatric or psychological examination must comply with the requirements of § 4247(c). Any hearing must be held pursuant to the provisions of § 4247(d).

   (f) When the director of the facility certifies to the court that the defendant is competent to stand trial, the court must hold a hearing, conducted pursuant to the requirements of 18 U.S.C. § 4247(d). If the court determines that the defendant is competent to stand trial, it shall order the defendant's discharge from the facility and set the matter for trial. 18 U.S.C. § 4241(e).

## *B. Competency to Plead Guilty*

Because a defendant is required to make a knowing and voluntary waiver of certain constitutional rights in entering a guilty plea, the court must, in accepting a Fed. R. Crim. P. 11 plea, be

satisfied that the defendant has sufficient mental competency to waive those rights, to make a reasoned choice among the alternatives presented to them, and to understand the nature and consequences of the guilty plea (see the plea colloquy in *infra* section 2.01: Taking pleas of guilty or nolo contendere).

If there is any question as to the defendant's mental competency to enter a guilty plea, an 18 U.S.C. § 4241 examination should be ordered and a hearing held prior to acceptance of the plea. In requesting such an examination, the court should spell out for the examiner the criteria that the examiner is to apply in determining whether the defendant is competent to enter a guilty plea. The examiner should be requested to furnish the information required by § 4247(c), along with an opinion as to the defendant's competency to enter a guilty plea.

## *C. Competency to Commit the Crime with Which the Defendant Is Charged (Fed. R. Crim. P. 12.2; 18 U.S.C. §§ 17, 4242)*

1. If the defendant intends to rely on the insanity defense or to introduce expert testimony relating to defendant's mental condition, the defendant must notify the government attorney in writing of that intention within the time provided for filing pretrial motions or at a later time if so ordered by the court. The court may allow late filing of the notice if good cause is shown. Fed. R. Crim. P. 12.2(a) and (b).

2. The court may order the defendant to submit to a competency examination under 18 U.S.C. § 4241. If the defendant has provided notice of a defense of insanity under Fed. R. Crim. P. 12(a), the court must order an examination under 18 U.S.C. § 4242 upon motion of the government. If the defendant provides notice of an intent to introduce expert evidence relating to the defendant's mental condition under Fed. R. Crim. P. 12(b), the court may, upon motion of the government, order the defendant examined under procedures ordered by the court. Fed. R. Crim. P. 12.2(c)(1).

   The examiner should be asked to give their opinion as to whether, at the time of the acts constituting the offense, the defendant was unable to appreciate the nature and quality or the wrongfulness of their acts as a result of a severe mental disease or defect. See 18 U.S.C. § 17(a). The examiner should be requested to include in their report all of the information required by § 4247(c).

   **NOTE**

   Serious due process and compulsory process issues may arise if the court excludes expert testimony concerning an insanity defense when a continuance of the trial would be feasible. See *Taliaferro v. Maryland*, 456 A.2d 29, *cert. denied*, 461 U.S. 948 (1983) (White, J., dissenting).

3. The defendant bears the burden of proving the defense of insanity by clear and convincing evidence. 18 U.S.C. § 17(b).

4. No statement made by the defendant during a court-ordered mental examination (whether the examination was with or without the defendant's consent), no testimony by the expert based on that statement, and no fruit of that statement may be admitted against the defendant in any criminal proceeding except with regard to an issue concerning mental condition on which the defendant has introduced testimony or, in a capital sentencing proceeding, has introduced expert evidence. Fed. R. Crim. P. 12.2(b)(2) and (c)(4).

5. Results and reports of any examination conducted for a capital sentencing hearing after notice under Fed. R. Crim. P. 12.2(b)(2) must be sealed and not disclosed to either party unless the defendant is found guilty of a capital crime and intends to offer at sentencing expert evidence on mental condition. Fed. R. Crim. P. 12.2(c)(2). Once the results and reports of the government's examination have been disclosed, the defendant must disclose to the government the results and reports of any examination on mental condition conducted by the defendant's expert about which the defendant intends to introduce expert evidence. Fed. R. Crim. P. 12.2(c)(2) and (3).
6. If the defendant fails to provide timely notice to the government attorney of their intent to introduce expert testimony relating to an insanity defense, or if they fail to submit to an examination, the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's mental condition at the time of the alleged criminal offense or on the issue of punishment in a capital case. Fed. R. Crim. P. 12.2(d).

## *D. Competency After Acquittal by Reason of Insanity (18 U.S.C. § 4243)*

If a defendant is found not guilty only by reason of insanity, defendant shall be committed to a suitable facility until such time as defendant is eligible for release under 18 U.S.C. § 4243(f). The provisions of § 4243(e) relating to the confinement and release of a defendant acquitted by reason of insanity are detailed and complex. Those provisions must be followed with meticulous care. Any hearing must comply with the provisions of § 4247(d). Any report of a psychiatric or psychological examination must comply with the requirements of § 4247(c).

## *E. Competency to be Sentenced*

Because the defendant has the right of allocution at sentencing, Fed. R. Crim. P. 32(i)(4)(A)(ii), and must be able to understand the nature of the proceedings, the defendant cannot be sentenced if they do not have the mental capacity to exercise the right of allocution or to understand the nature of the proceedings.

If there is any question as to the defendant's mental competency to be sentenced, an 18 U.S.C. § 4241 examination should be ordered and a hearing held before sentencing. The court should provide the examiner with the criteria the examiner is to apply in determining whether the defendant is competent to be sentenced. The court should request the examiner to include in their report all of the information required by § 4247(c). Any hearing must be held pursuant to the requirements of § 4247(d).

## *F. Mental Condition as it Bears on Sentence Imposed*

1. Adult offenders (18 U.S.C. § 3552(b))[1]
   (a) If the court determines that it needs more detailed information about the defendant's mental condition as a basis for determining the sentence to be imposed, the court "may order a study of the defendant."

1. Subsections (b) and (c) of § 3552 both authorize studies in aid of sentencing. Subsection (c) specifically authorizes a psychiatric or psychological exam, but it appears preferable to rely on the more flexible general authority of § 3552(b).

(b) "The study shall be conducted in the local community by qualified consultants" unless the court finds that there is a compelling reason to have the study done by the Bureau of Prisons or that there are no adequate professional resources in the local community to perform the study.

(i) If the study is to be done in the local community, the court should designate a consultant, usually a psychiatrist or psychologist, to conduct the study and order the defendant to submit to the examination. The probation office will assist in identifying people who are qualified and willing to perform such studies; the probation office can also provide funds for this purpose.

(ii) If the study is to be done by the Bureau of Prisons, the defendant should be committed under 18 U.S.C. § 3552(b) to the custody of the bureau to be studied. Imposing a provisional sentence is not necessary.

(c) The court order should specify the additional information the court needs before determining the sentence to be imposed and should inform the examiner of any guideline or policy statement that should be addressed by the study.

(d) The court order should specify a period for the study, not to exceed sixty days. The period may be extended, at the discretion of the court, for up to sixty more days.[2]

(e) To minimize delay if the study is to be done by the Bureau of Prisons, the court should consider directing the probation officer to secure immediate designation of the institution at which the study will be performed, and directing the marshal to transport the defendant to that institution by the most expeditious means available.

(f) After receiving the report of the study, the court should proceed to sentencing. The report must be included in the presentence report. See Fed. R. Crim. P. 32(d)(2)(E).

(g) See also U.S.S.G. §§ 5H1.3 and 5K2.13, which delineate the extent to which a defendant's mental or emotional condition may be taken into account under the Sentencing Guidelines.

2. Juvenile offenders (18 U.S.C. § 5037(e))

(a) If the court determines that it needs additional information concerning an alleged or adjudicated juvenile delinquent's mental condition, the court may commit the juvenile to the Attorney General's custody for observation and study after notice and a hearing at which the juvenile is represented by counsel.

(b) The observation and study of the juvenile must be performed on an outpatient basis, unless the court determines that inpatient observation is necessary to obtain the desired information. If the juvenile has not been adjudicated delinquent, inpatient study can be ordered only with the consent of the juvenile and the juvenile's attorney.

(c) The agency selected by the Attorney General shall make a complete study of the juvenile's mental health and other relevant factors.

(d) The Attorney General shall submit to the court and to the juvenile's attorney the results of the study. That report shall be submitted within thirty days of the juvenile's commitment, unless the time for reporting is extended by the court.

2. A court may also have to consider that, if there are victims of the offense, they have a right "to proceedings free from unreasonable delay." 18 U.S.C. § 3771(a)(7).

### *G. Civil Commitment of Convicted Offender in Need of Care or Treatment for Mental Condition (18 U.S.C. § 4244)*[3]

1. Upon motion of the defendant or the government or on its own motion, the court may, before sentencing, determine that there is reasonable cause to believe that the defendant may be suffering from a mental disease or defect that requires custody for treatment in a suitable facility. In that event the court shall order a hearing. 18 U.S.C. § 4244(a).
2. Before the hearing the court may order that a psychiatric or psychological examination of the defendant be conducted and that a report be filed with the court, pursuant to § 4247(b) and (c). If it is the opinion of the examiner that the defendant is suffering from a mental disease or defect but that the condition is not such as to require the defendant's custody for care or treatment, the examiner shall give their opinion concerning the sentencing alternatives that could best accord the defendant the kind of treatment they do need. 18 U.S.C. § 4244(b).
3. The hearing shall be conducted pursuant to the provisions of § 4247(d).
4. If, after the hearing, the court finds by a preponderance of the evidence that the defendant is suffering from a mental disease or defect and that, in lieu of being sentenced to imprisonment, the defendant should be committed to a suitable facility for care or treatment, the court shall commit the defendant to the custody of the Attorney General for care or treatment in a suitable facility. Such commitment shall constitute a provisional sentence of imprisonment to the maximum term authorized by law for the offense of which the defendant was found guilty. 18 U.S.C. § 4244(d).
5. When the director of the facility to which the defendant is sent certifies that the defendant is no longer in need of custody for care or treatment, the court shall proceed to sentencing, provided that the provisional sentence has not yet expired. 18 U.S.C. § 4244(e).

## For Further Reference

- Charles R. Pyle, Ten Practical Tips for Handling Mental Competency Cases (July 29, 2013), https://fjc.dcn/sites/default/files/2012/MagJ1358.pdf
- Anthony J. Battaglia, Navigating the Intersection of the Speedy Trial Act and The Mental Competency Statutes (2013), https://fjc.dcn/sites/default/files/2012/MagJ1355.pdf
- Anthony J. Battaglia, Mental Competency Outline (July 2013), https://fjc.dcn/sites/default/files/2012/MagJ1353.pdf
- Pattern Criminal Jury Instructions 67 (1987) (instruction for insanity defense), https://fjc.dcn/sites/default/files/2012/CrimJury.pdf

3. If the civil commitment hearing is considered a "public proceeding in the district court involving . . . sentencing," any victims of the offense have the rights to notification and attendance, plus the right "to be reasonably heard." 18 U.S.C. § 3771(a)(2)–(4).

# 1.13 Referrals to Magistrate Judges (Criminal Matters)

*Fed. R. Crim. P. 58, 59; 28 U.S.C. § 636*

## Procedure

The general procedure for referring criminal matters to magistrate judges is set forth in Fed. R. Crim. P. 59:

> **(a) Nondispositive Matters.** A district judge may refer to a magistrate judge for determination any matter that does not dispose of a charge or defense. The magistrate judge must promptly conduct the required proceedings and, when appropriate, enter on the record an oral or written order stating the determination. . . .
>
> **(b) Dispositive Matters.**
>
> (1) . . . A district judge may refer to a magistrate judge for recommendation a defendant's motion to dismiss or quash an indictment or information, a motion to suppress evidence, or any matter that may dispose of a charge or defense. The magistrate judge must promptly conduct the required proceedings. A record must be made of any evidentiary proceeding and of any proceeding if the magistrate judge considers it necessary. The magistrate judge must enter on the record a recommendation for disposing of the matter, including any proposed findings of fact.

In either case, the parties have fourteen days to object to the order or recommendation, unless the court sets a longer period. "Failure to object in accordance with this rule waives a party's right to review," Fed. R. Crim. P. 59(a) and (b)(2), although the district court retains discretion to review the decision. The Advisory Committee Notes to Rule 59 emphasize that, "[a]lthough the rule distinguishes between 'dispositive' and 'nondispositive' matters, it does not attempt to define or otherwise catalog motions that may fall within either category. Instead, that task is left to the case law."

Case law regarding dispositive and non-dispositive matters is covered in the *Inventory of United States Magistrate Judge Duties* at §§ 4 and 5.[1]

When considering referrals to magistrate judges, courts should consult the *Policies and Principles for Magistrate Judge Utilization*, prepared by the Committee on the Administration of the Magistrate Judges System of the Judicial Conference of the United States and available at https://jnet.ao.dcn/sites/default/files/pdf/Current_Policies_and_Principles.06.09.22_FINAL.pdf. One suggested practice: "Referring an entire civil or criminal case to a magistrate judge for pretrial case management is a more efficient use of judicial time and resources than assigning individual matters in a case on an ad hoc basis." *Policies* at 3.

1. Available only online, the *Inventory* includes case law for many of the other duties that may be assigned to magistrate judges. *See* https://jnet.ao.dcn/sites/default/files/pdf/Inventory-of-Magistrate-Judge-Duties.December-2013.pdf. The Administrative Office also provides an online web page with more recent decisions relating to the duties and authority of magistrate judges at https://jnet.ao.dcn/court-services/judges-corner/magistrate-judges/authority-magistrate-judges/recent-decisions.

## Specific Proceedings

Listed below are duties in criminal matters that are covered in sections 1, 2, and 4 of this *Benchbook* and that may be referred to magistrate judges. See also 28 U.S.C. § 636. Most districts have local rules or standing orders governing referrals to magistrate judges.

Under Fed. R. Crim. P. 5 and 5.1, magistrate judges generally preside over a defendant's initial appearance and preliminary hearing. A magistrate judge may also conduct

1. bail proceedings and detention hearings. 18 U.S.C. §§ 3041, 3141–3148; 28 U.S.C. § 636(a)(2). (See *supra* section 1.03: Release or Detention Pending Trial.)
2. arraignments, and may take not guilty pleas in felony cases.[2] 28 U.S.C. § 636(b)(1)(A). (See *supra* section 1.07: Arraignment and Plea.)
3. trial, judgment, and sentencing in a petty offense case; for other misdemeanors, the defendant's express consent to be tried before a magistrate judge in writing or orally on the record is required. The defendant must also specifically waive trial, judgment, and sentencing by a district judge. See Fed. R. Crim. P. 58(b)(2)(E)(ii) and (3)(A); 18 U.S.C. § 3401(b); 28 U.S.C. § 636(a)(3)–(5). A judgment of conviction or sentence by a magistrate judge may be appealed to the district court. 18 U.S.C. § 3402. Fed. R. Crim. P. 58 governs trials and appeals of misdemeanors and petty offenses. (See generally *infra* section 2.03: Trial Outline—Criminal.)
4. pretrial matters:

   (a) A magistrate judge may hear and determine non-dispositive pretrial matters in felony cases,[3] including discovery and appointment of counsel. A district court may reconsider a magistrate judge's ruling on a non-dispositive matter if it is "clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A) and Fed. R. Crim. P. 59(a).

   (b) A magistrate judge may hear and submit to the district court proposed findings of fact and recommended determinations of dispositive pretrial matters, such as a motion to suppress evidence or to dismiss an indictment. 28 U.S.C. § 636(b)(1)(B) and Fed. R. Crim. P. 58(b)(1). A district court must make a de novo determination of those portions of proposed findings and recommendations to which the parties object, 28 U.S.C. § 636(b)(1)(C) and Fed. R. Crim. P. 58(b)(3), but need not hold a de novo hearing of all the evidence, *United States v. Raddatz*, 447 U.S. 667 (1980).

   See generally *infra* section 2.03: Trial Outline—Criminal.

2. Note that your circuit may allow a magistrate judge to take a plea of guilty in a felony case if the defendant consents. *See* Inventory of United States Magistrate Judge Duties at § 7.B.3. *See also* Administrative Office of the United States Courts Judicial Services Office, Assigning Felony Guilty Plea Proceedings to Magistrate Judges (revised July 22, 2022), https://jnet.ao.dcn/court-services/judges-corner/magistrate-judge-resources/utilization-magistrate-judges-general/assigning-felony-guilty-plea-proceedings-magistrate-judges. It is recommended that this consent be in writing and expressly waive the right to enter the plea before an Article III judge. It is also advisable for the district court, at the start of the sentencing hearing, to state on the record that it, too, accepts the defendant's plea of guilty, based upon information provided at the plea hearing and contained in the presentence report. *See* section 2.01: Taking Pleas of Guilty or Nolo Contendere, *infra*, text at n.1.

3. The Supreme Court held that decisions touching the core trial features of a felony case may be delegated to a magistrate judge only if expressly authorized by statute. Gomez v. United States, 490 U.S. 858 (1989).

5. voir dire in a felony case, if the parties consent. *Peretz v. United States*, 501 U.S. 923, 933 (1991). Note that "express consent by counsel suffices to permit a magistrate judge to preside over jury selection in a felony trial"—express consent by the defendant is not required. *Gonzalez v. United States*, 553 U.S. 242, 250 (2008). A magistrate judge may not conduct voir dire in a felony trial if the defendant objects. *Gomez v. United States*, 490 U.S. 858 (1989). See also *Inventory*, *supra* note 1, at § 7.C.1.a. (See *infra* section 2.06: Standard Voir Dire Questions—Criminal.)
6. probation and supervised release modification hearings:

   (a) A magistrate judge may revoke, modify, or reinstate probation and modify, revoke, or terminate supervised release if any magistrate judge imposed the probation or supervised release in a misdemeanor case. 18 U.S.C. § 3401(d), (h).

   (b) In other cases, a district court judge may designate a magistrate judge to conduct hearings to modify, revoke, or terminate supervised release, and to submit to the district judge proposed findings of fact and recommend disposition under 18 U.S.C. § 3583(e). 18 U.S.C. § 3401(i).[4]

   See *Inventory*, *supra* note 1, at § 7.D.8. See generally *infra* section 4.02: Revocation or Modification of Probation and Supervised Release.

7. an omnibus hearing, subject to any right of review before a district court of dispositive matters. 28 U.S.C. § 636(b)(1)(A) and (B).
8. extradition hearings. 18 U.S.C. § 3184; *Ward v. Rutherford*, 921 F.2d 286 (D.C. Cir. 1990), *cert. dismissed sub nom Ward v. Attridge*, 501 U.S. 1225 (1991). (See *supra* section 7.05: Foreign Extradition Proceedings.)
9. "additional duties [that] are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3). For examples of additional duties and case law on § 636(b)(3), see *Inventory of United States Magistrate Judge Duties* at § 7.

For more information about magistrate judge matters, see the "Magistrate Judge Resources" page at https://jnet.ao.dcn/court-services/judges-corner/magistrate-judges-system.

4. The Ninth Circuit held that neither 28 U.S.C. § 636 nor 18 U.S.C. § 3401 authorizes a magistrate judge to conduct probation revocation hearings in a *felony* case without the defendant's consent. *See* United States v. Colacurcio, 84 F.3d 326, 329–34 (9th Cir. 1996) (reversed). *See also* United States v. Curry, 767 F.2d 328, 331 (7th Cir. 1985) (magistrate judge not authorized by 28 U.S.C. § 636(b)(3) to conduct probation revocation hearings without the defendant's consent); Banks v. United States, 614 F.2d 95, 97–98 (6th Cir. 1980) (same). However, the Sixth Circuit held that § 3401(i) does not require a defendant's consent when a magistrate judge is designated to conduct a hearing to revoke *supervised release* in a felony case. United States v. Waters, 158 F.3d 933, 938–39 (6th Cir. 1998) (declining to extend holding of *Colacurcio* to revocation of supervised release). *Cf.* United States v. Azure, 539 F.3d 904, 907–10 (8th Cir. 2008) (record must reflect that district court "designated" magistrate judge to conduct revocation hearings pursuant to § 3401(i), but defendant may waive right to challenge designation by failing to object); United States v. Sanchez-Sanchez, 333 F.3d 1065, 1069 (9th Cir. 2003) (§ 3401(i) "must be strictly adhered to" and requires order from district court).

# 2.01 Taking Pleas of Guilty or Nolo Contendere

*Fed. R. Crim. P. 11*

## Introduction

This section is intended to serve as a guide to district judges, and to magistrate judges who are authorized to conduct change of plea hearings by consent,[1] when they conduct the formal plea taking. The specific order and content of plea proceedings may vary from district to district, though all must follow Rule 11 and provide certain warnings and advice to defendants who are pleading guilty. Following this outline ensures that defendants make knowing, intelligent, and voluntary guilty pleas. Defendants must know of their constitutional rights, understand the charges against them as well as the potential penalties, understand the terms of the plea agreement, and finally, understand the consequences (beyond any custodial sentence, fine, or restitution) resulting from a conviction. As long as the plea colloquy covers these fundamental elements, judges should feel free to modify the outline—including the suggested colloquies—to fit their personal preferences or local practices.

Note that, while the plea of guilty is entered at the Rule 11 proceeding, the court may defer deciding whether to accept the terms of a plea agreement until after review of the presentence report.[2] If after review of the report the district court rejects the terms of a plea agreement made pursuant to Rule 11(c)(1)(A) or (C), the court shall give the defendant the option to withdraw the plea. In either event, the judge's goal in taking the plea must be to establish that the defendant is competent, that the plea is free and voluntary, that the defendant understands the charges and penalties, and that there is a factual basis for the plea.

This section is not intended to be all-inclusive. Circumstances may require that additional matters be established of record. In some cases, moreover, the court may find it necessary to resolve disputes about the presentence report before determining whether a plea agreement is acceptable. See *infra* section 4.01: Sentencing Procedure.

Taking pleas from defendants who do not speak English raises problems beyond the obvious language barrier. Judges should be mindful not only of the need to avoid using legalisms and other terms that interpreters may have difficulty translating, but also of the need to explain such concepts as the right not to testify and the right to question witnesses, which may not

1. If the defendant consents to entering a plea of guilty before a magistrate judge, it is recommended that the consent be in writing and expressly waive the defendant's right to enter the plea before an Article III judge. For more information and case law regarding magistrate judges conducting felony plea hearings, see Admin. Office of the U.S. Courts, Jud. Servs. Off., Assigning Felony Guilty Plea Proceedings to Magistrate Judges (2022), https://jnet.ao.dcn/court-services/judges-corner/magistrate-judge-resources/utilization-magistrate-judges-general/assigning-felony-guilty-plea-proceedings-magistrate-judges; Admin. Office of the U.S. Courts, Procedures Manual for United States Magistrate Judges, § 9: Arraignments and Taking Pleas 7–8 (May 2019), https://jnet.ao.dcn/court-services/judges-corner/magistrate-judges/procedures-manual-united-states-magistrate-judges; Admin. Office of the U.S. Courts, Inventory of Magistrate Judge Duties, § 7B at 14–17 (Dec. 2013) (listing cases), Inventory-of-Magistrate-Judge-Duties.December-2013.pdf.

2. Fed. R. Crim. P. 11(c)(3)(A); U.S. Sent'g Guidelines Manual § 6B1.1(c) (pol'y stmt.). *See also* United States v. Hyde, 520 U.S. 670, 674 (1997) ("guilty pleas can be accepted while plea agreements are deferred, and the acceptance of the two can be separated in time").

be familiar to persons from different cultures. See 28 U.S.C. § 1827 regarding use of certified interpreters. See also Admin. Office of the U.S. Courts, *Guide to Judiciary Policy*, vol. 5, ch. 5: Special Interpretation Services, https://jnet.ao.dcn/policy-guidance/guide-judiciary-policy/volume-5-court-interpreting/ch-5-special-interpretation-services, for information on the use of interpreters, including providing interpreter services in multi-defendant cases and translation of documents.

Some courts have developed Application for Permission to Enter Plea of Guilty forms and Written Plea Agreement forms. If used, such forms do not obviate the need for complete oral proceedings in open court that meet the requirements of Fed. R. Crim. P. 11.

Note: For information on taking a group guilty plea, see Appendix, *infra*.

## Outline

[*Note:* Before proceeding with the hearing, the court may want to ask the prosecutor if there are any victims of the offense and, if so, whether the government has fulfilled its duty to notify them of the hearing and their right to attend, and whether any victims want to be "reasonably heard." 18 U.S.C. § 3771(a)(2)–(4).[3]]

A. Determine, on the record, the purpose of the defendant's appearance, that is, obtain a statement from defense counsel[4] that the defendant wishes to enter a plea of guilty (or nolo contendere).

B. If it has not previously been established, determine whether the plea is being made pursuant to a plea agreement of any kind. If so, require disclosure of the terms of the agreement (or if the agreement is in writing, require that a copy be produced for your inspection and filing). See Fed. R. Crim. P. 11(c)(2).

C. Have the clerk administer the oath to the defendant.[5]

[*Note:* If you have any doubts about the defendant's ability to speak and understand English, consider appointing a certified interpreter in accordance with 28 U.S.C. § 1827.]

D. Ask the defendant:

1. Do you understand that you are now under oath and if you answer any of my questions falsely, your answers may later be used against you in another prosecution for perjury or making a false statement?

[See Fed. R. Crim. P. 11(b)(1)(A).]

2. What is your full name?
3. Where were you born?

3. If there are many victims who want to be heard, the court may need to "fashion a reasonable procedure to give effect to [their right to be heard] that does not unduly complicate or prolong the proceedings." 18 U.S.C. § 3771(d)(2).

4. If the defendant lacks counsel, you must advise the defendant of the right to an attorney. *See supra* section 1.02: Appointment of Counsel or Pro Se Representation; Fed. R. Crim. P. 11(b)(1)(D).

5. An oath (or affirmation) is not required by Fed. R. Crim. P. 11 but is strongly recommended to avoid any subsequent contention in a proceeding under 28 U.S.C. § 2255 that the defendant did not answer truthfully at the taking of the plea because they were not sworn.

[If the answer is not the United States or one of its territories, ask if the defendant is a United States citizen.]

4. How old are you?
5. How far did you go in school?
6. Have you been treated recently for any mental illness or addiction to narcotic drugs of any kind?

   [*Note:* If the answer to this question is yes, pursue the subject with the defendant and with counsel in order to determine whether the defendant is currently competent to plead.]

7. Are you currently under the influence of any drug, medication, or alcoholic beverage of any kind?

   [*Note:* Again, if the answer is yes, pursue the subject with the defendant and with counsel to determine whether the defendant is currently competent to plead.]

8. Have you received a copy of the indictment (information)[6] pending against you—that is, the written charges made against you in this case—and have you had an opportunity to review the indictment (information) and fully discuss those charges, and the case in general, with your counsel?
9. Are you fully satisfied with the counsel, representation, and advice given to you in this case by your attorney?

E. *If there is a plea agreement of any kind*, ask the defendant:

1. [If the agreement is written:]

   Did you have an opportunity to read and discuss the plea agreement with your lawyer before you signed it?

   [If yes, consider showing the defendant the signature page of the agreement and ask the defendant to identify his/her signature. Ask if the defendant read the agreement and discussed all the terms with counsel before signing.][7]

2. Does the plea agreement represent in its entirety any understanding you have with the government?
3. Do you understand the terms of the plea agreement?
4. Has anyone made any promise or assurance that is not in the plea agreement to persuade you to accept this agreement? Has anyone threatened you in any way to persuade you to accept this agreement?

6. If the case involves a felony offense being prosecuted by information rather than indictment, and if a waiver of indictment has not previously been obtained in open court, be sure that a waiver of indictment is obtained and filed. *See* Fed. R. Crim. P. 7(b); Section 1.06: Waiver of Indictment, *supra*. *See also* Form AO 455: Waiver of an Indictment.

7. For defendants who do not read English, ensure that they either receive a translation of the plea agreement or that someone reads the agreement to them in their native language.

5. [If the terms of the plea agreement are nonbinding recommendations pursuant to Rule 11(c)(1)(B):]

   Do you understand that the terms of the plea agreement are merely recommendations to the court—that I can reject the recommendations without permitting you to withdraw your plea of guilty and impose a sentence that is more severe than you may anticipate?

6. [If any or all of the terms of the plea agreement are pursuant to Rule 11(c)(1)(A) or (C):]

   Do you understand that if I choose not to follow the terms of the plea agreement [if some, but not all, terms are binding, identify those terms], I will give you the opportunity to withdraw your plea of guilty, and that if you choose not to withdraw your plea, I may impose a more severe sentence, without being bound by the plea agreement [or the specific terms rejected by the court]?

7. [Inquire of defense counsel] Were all formal plea offers by the government conveyed to the defendant? [If the answer is no, take a recess to allow time for counsel to consult with the defendant.][8]

F. *If there is no formal plea agreement*, ask the attorneys whether the prosecutor made any formal plea agreement offers and, if so, whether those offers were conveyed to the defendant. [If offers have not been conveyed, take a recess to allow time for counsel to consult with the defendant].[9]

G. Whether or not there is a plea agreement, ask the defendant:

- Has anyone attempted in any way to force you to plead guilty (nolo contendere) or otherwise threatened you?
- Has anyone made any promises or assurances of any kind to get you to plead guilty (other than those that are in the plea agreement)?
- Other than this plea agreement, are there any other agreements between you and the government that are causing you to plead guilty?
- Are you pleading guilty of your own free will because you are guilty?

[See Fed. R. Crim. P. 11(b)(2).]

8. *See* Missouri v. Frye, 566 U.S. 134, 145 (2012) ("defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused"); Lafler v. Cooper, 566 U.S. 156, 163–66 (2012) ("when inadequate assistance of counsel caused nonacceptance of a plea offer and further proceedings led to a less favorable outcome," defendant had claim for ineffective assistance of counsel). *See also* Padilla v. Kentucky, 559 U.S. 356, 373 (2010) ("the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel"). If a more favorable plea offer has lapsed, or defense counsel's advice to reject an offer will lead to "a less favorable outcome," defendants may "show prejudice from ineffective assistance of counsel . . . [by] demonstrat[ing] a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel" and demonstrating "a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it." Establishing prejudice requires showing "a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Frye*, 566 U.S. at 147.

9. *See supra* note 8 and accompanying text.

Tell the defendant:

> You do NOT have to plead guilty here today. You shouldn't plead guilty unless that is what you really want to do, and you are pleading guilty because you are guilty. I am explaining this because once we go through this plea and I explain all the rights and consequences of the plea and you enter your plea and we proceed to sentencing, at that point it becomes very difficult to withdraw your plea.

[See Fed. R. Crim. P. 11(d) & (e).]

H. Inform the defendant of possible consequences of pleading guilty:

1. [*If the plea relates to a felony offense, ask:*]

   Do you understand that the offense to which you are pleading guilty (nolo contendere) is a felony offense, that if your plea is accepted you will be adjudged guilty of that offense, and that such adjudication ***may*** deprive you of valuable civil rights, such as the right to vote, the right to hold public office, the right to serve on a jury, and the right to possess any kind of firearm? Do you understand that pleading guilty to a felony offense may also deprive you of certain federal benefits?[10]

2. Do you understand that if you are not a citizen of the United States, in addition to the other possible penalties you are facing, a plea of guilty or conviction after a trial may cause you to be removed from the United States, denied citizenship, and denied admission to the United States in the future?[11]

10. *See, e.g.*, 21 U.S.C. §§ 862, 862A.

11. Fed. R. Crim. P. 11(b)(1)(O). *See also id.*, advisory committee's note to 2013 amendment (this rule "mandates a generic warning, not specific advice concerning the defendant's individual situation." Many judges were already including a warning in the plea colloquy about immigration consequences, "and the amendment adopts this practice as good policy. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without attempting to determine the defendant's citizenship"). Note that the possibility of removal may also apply to naturalized citizens. *See* Farhane v. United States, 121 F.4th 353, 363 (2d Cir. 2024) (en banc) ("under *Padilla*, a naturalized U.S. citizen has a Sixth Amendment right to be advised by counsel that he may be denaturalized and deported as a result of his entry of a guilty plea").

3. [*If the defendant is not a citizen of the United States, ask*:]

> Have you discussed the possible immigration consequences of a guilty plea with your attorney?[12]

4. [*If the defendant is accused of a sex offense, ask:*]

> Do you understand that a conviction for this offense will likely result in substantial future restrictions on where you may live or work, with whom you may associate, whether or how you may use a computer and other electronic devices, and may require registration as a sex offender?[13]

I. Inform the defendant of the following:

1. The maximum possible penalty provided by law, and any mandatory minimum penalty:

   (a) *For drug offenses:* Determine whether the drug quantity involved or other aggravating factors will trigger application of a mandatory minimum sentence. Because this may not be known at the time the plea is taken, the court is advised to warn the defendant of any *possible* maximum and mandatory minimum sentences that may be imposed after a final determination of quantity and other aggravating factors.

   (b) Determine whether the defendant faces a mandatory minimum sentence or an increase in the statutory maximum sentence because of one or more prior firearms offenses, violent felonies, or drug offenses. If this is not known at the time of the plea, advise the defendant of the *possible* maximum sentence.

12. *See* Padilla v. Kentucky, 559 U.S. 356, 368–69 (2010) (a defense attorney has the duty to advise a defendant of the possible immigration consequences of a guilty plea). *See also* United States v. Rodriguez-Vega, 797 F.3d 781, 786–88 (9th Cir. 2015) (warning of the "potential" for deportation was ineffective assistance of counsel—following *Padilla*, "where the law is 'succinct, clear, and explicit' that the conviction renders removal virtually certain, counsel must advise his client that removal is a virtual certainty"); Kovacs v. United States, 744 F.3d 44, 50 (2d Cir. 2014) (defendant had valid *Padilla* claim based on defense attorney's repeated erroneous assurances that he was pleading to a non-deportable offense); Dat v. United States, 920 F.3d 1192, 1194 (8th Cir. 2019) (remanded for hearing on whether defense counsel's incorrect advice that the defendant would not be deported caused the defendant to plead guilty); United States v. Akinsade, 686 F.3d 248, 254 (4th Cir. 2012) (district court's "general and equivocal admonishment [was] insufficient to correct counsel's affirmative misadvice that Akinsade's crime was not categorically a deportable offense. More importantly, the admonishment did not 'properly inform' Akinsade of the consequence he faced by pleading guilty: mandatory deportation."); United States v. Bonilla, 637 F.3d 980, 983–86 (9th Cir. 2011) (defense counsel's failure to warn defendant that he faced deportation by pleading guilty until after defendant had done so was a "fair and just reason" under Rule 11(d)(2)(B) that would allow defendant to withdraw plea). *But cf.* United States v. Amendariz, 80 F.4th 546, 549 (5th Cir. 2023) ("when an offense makes an alien presumptively deportable, . . . a lawyer's warning of 'very likely' deportation" is sufficient under *Padilla*); United States v. Chezan, 829 F.3d 785, 787–88 (7th Cir. 2016) (affirming denial of motion to withdraw guilty plea: defense counsel's advice, that if defendant pled guilty there was only an unlikely chance of a successful defense to deportation, was not ineffective assistance).

13. In addition to various state and local laws that may place restrictions on convicted sex offenders, the Adam Walsh Child Protection and Safety Act of 2006 ("The Act"), Pub. L. No. 109-248, 120 Stat. 587, established a national sex offender registration system that requires certain sex offenders to register in their jurisdiction of residence after release from prison (or after sentencing if not incarcerated). *See* 34 U.S.C. §§ 20901–20902, 20911–20932 (the Sex Offender Registration and Notification Act). Failure to register or update registration can result in fines or imprisonment under 18 U.S.C. § 2250. The Act also provided for the possibility that, rather than being released at the conclusion of their sentence, some convicted sex offenders could be subject to civil commitment as a "sexually dangerous person" under 18 U.S.C. § 4248.

(c) Include the duration of any authorized or mandatory term of supervised release, and ask the defendant:

> Do you understand that if you violate the conditions of supervised release, you can be given additional time in prison?

(d) *If the offense carries a maximum sentence of twenty-five years or more, or the statute specifically prohibits probation*, include a reference to the unavailability of a probation sentence under 18 U.S.C. § 3561(a)(1) or (2).

(e) Inform the defendant of the maximum possible fine, if any.

2. *If applicable*, that the court may also order, or may be required to order under the Mandatory Victims Restitution Act, that the defendant make restitution to any victim of the offense. See 18 U.S.C. § 3663A. See also 18 U.S.C. § 3771(a)(6) (giving victims the right "to full and timely restitution as provided in law").
3. *If applicable*, that the court may require the defendant to forfeit certain property to the government.
4. *If the offense involved fraud or other intentionally deceptive practices*, that the court may order the defendant to provide notice of the conviction to victims of the offense. See 18 U.S.C. § 3555.
5. *If applicable*, that the court shall impose a $5,000 assessment on the defendant under the Justice for Victims of Trafficking Act, 18 U.S.C. § 3014.
6. *If applicable*, the court shall order restitution of no less than $3,000 under the Amy, Vicky, and Andy Child Pornography Victim Assistance Act of 2018, 18 U.S.C. § 2259.
7. *If applicable*, the court shall order a special assessment in child pornography cases. 18 U.S.C. § 2259A.
8. That for each offense, the defendant must pay a special assessment of $100 ($25 for a Class A misdemeanor, $10 for Class B, $5 for Class C or infraction) required by 18 U.S.C. § 3013.

Fed. R. Crim. P. 11(b)(1).

J. Ask the defendant:

> Do you understand those possible consequences of your plea that I have just gone over with you?

K. Inform the defendant that the sentence will be determined by a combination of advisory Sentencing Guidelines and other statutory sentencing factors that may result in a variance from the calculated guideline sentence. Fed. R. Crim. P. 11(b)(1)(M).

L. Ask the defendant:

1. Have you and your attorney talked about how these advisory Sentencing Guidelines might apply to your case?

[*Note: If there is a plea agreement that a specific sentence will be imposed* (Fed. R. Crim. P. 11(c)(1)(C)), skip to question 4.]

2. Do you understand that the court will not be able to determine the advisory guideline range for your case until after the presentence report has been completed and you and the government have had an opportunity to challenge the reported facts and the application of the guidelines recommended by the probation officer, and that the sentence ultimately imposed may be different from any estimate your attorney may have given you?

[*If applicable:* If the court gave an estimate of the advisory guideline range, tell the defendant that this, too, is only a preliminary estimate and that the sentence imposed may differ.]

3. Do you also understand that, after your advisory guideline range has been determined, the court will also examine other statutory sentencing factors under 18 U.S.C. § 3553(a), and that this may result in the imposition of a sentence that is either longer or shorter than the advisory guideline sentence but not greater than the statutory maximum?
4. If you are sentenced to something that is more severe than you expect but is within the statutory maximum, you will have no right to withdraw your guilty plea. Do you understand that?
5. Do you also understand that parole has been abolished and that if you are sentenced to prison you will not be released on parole?

M. Ask the defendant:

1. Do you also understand that under some circumstances you or the government may have the right to appeal any sentence that I impose?

[*If the plea agreement involves a waiver of the right to appeal the sentence*, ask the defendant:]

2. Do you understand that by entering into this plea agreement and entering a plea of guilty, you will have waived, or given up, your right to appeal or collaterally attack all or part of this sentence?

[The court should discuss the specific terms of the waiver with the defendant to ensure that the waiver is knowingly and voluntarily entered into and that the defendant understands the consequences. Fed. R. Crim. P. 11(b)(1)(N).[14]]

3. Inform the defendant that, even if the plea agreement includes a waiver of the right to appeal the sentence, the defendant has the right to appeal on the grounds of ineffective

14. Note that the waiver may not be enforceable if the sentence is not in accordance with the terms of the plea agreement. *See also In re* United States, 32 F.4th 584, 596 (6th Cir. 2022) ("That appeal waivers are enforceable does not mean that district courts lack the discretion to scrutinize them when deciding whether to accept a plea agreement. . . . [Nor does it] mean that district courts necessarily abuse their discretion when they reject what they reasonably perceive as an overly broad appeal waiver."); United States v. Melancon, 972 F.2d 566, 568 (5th Cir. 1992) (district courts have discretion "to determine whether plea waivers of the right to appeal are unacceptable").

assistance of counsel (unless that right has been specifically waived),[15] prosecutorial misconduct rising to a constitutional violation, or that there is a retroactive change in the law that may lower their sentence.

N. Ask the defendant:

1. Do you understand

   (a) that you have a right to plead not guilty to any offense charged against you and to persist in that plea;

   (b) that you would then have the right to a trial by jury;

   (c) that at trial you would be presumed to be innocent and the government would have to prove your guilt beyond a reasonable doubt;

   (d) that you would have the right to the assistance of counsel for your defense—appointed by the court if necessary—at trial and every other stage of the proceeding, the right to see and hear all the witnesses and have them cross-examined in your defense, the right on your own part to decline to testify unless you voluntarily elected to do so in your own defense, and the right to compel the attendance of witnesses to testify in your defense?[16]

   Do you understand that should you decide not to testify or put on any evidence, these facts cannot be used against you?

2. Do you further understand that by entering a plea of guilty (nolo contendere), if that plea is accepted by the court, there will be no trial and you will have waived, or given up, your right to a trial as well as those other rights associated with a trial as I just described them? Have you discussed these rights with your attorney?

[See Fed. R. Crim. P. 11(b(1)(B) to (F).]

O. Inform the defendant of the nature of the charge(s) to which the defendant is pleading guilty (nolo contendere) by reading or summarizing the indictment (information). Then

1. further explain the essential elements of the offense, i.e., what the government would be required to prove at trial;[17] and/or (except in pleas of nolo contendere)

15. Although come circuits allow waivers of appeal for ineffective assistance of counsel, the Department of Justice discourages them. *See* U.S. Dep't of Just., Justice Manual at § 9-16.330 ("Prosecutors may incorporate waivers of appeal rights and post-conviction rights into plea agreements. . . . However, prosecutors should not seek . . . to have a defendant waive claims of ineffective assistance of counsel, whether those claims are made on collateral attack or, when permitted by circuit law, made on direct appeal."), https://www.justice.gov/jm/jm-9-16000-pleas-federal-rule-criminal-procedure-11. Some circuits limit the exception to "ineffective assistance of counsel in connection with the negotiation of the plea agreement or the voluntariness of the plea." *See, e.g.*, United States v. Cockerham, 237 F.3d 1179, 1184 (10th Cir. 2001); Jones v. United States, 167 F.3d 1142, 1144–45 (7th Cir. 1999). *See also In re* Sealed Case, 901 F.3d 397, 404 (D.C. Cir. 2018) (noting it could be a conflict of interest for a defense attorney to advise a defendant to waive a possible claim of ineffective assistance of counsel).

16. Although it is not required as part of the Rule 11 colloquy, the court may inform the defendant of the right under Rule 17(c)(1) to compel the production of documents from witnesses by subpoena.

17. Reference may be made to the standard or pattern jury instructions normally used in your court.

2. have the defendant explain and assent to the facts constituting the crime(s) charged.

[See Fed. R. Crim. P. 11(b)(1)(G).]

P. Establish an independent basis for the plea.

1. *In the case of a plea of guilty (including an Alford plea[18])*:

   a. Have the government counsel make a representation concerning the facts the government would be prepared to prove at trial (to establish an independent factual basis for the plea).[19] See Fed. R. Crim. P. 11(b)(3). Advise the defendant to listen carefully because the court will ask the defendant if that information is true and correct.

   b. Following the government's presentation, for each count ask the defendant:

      Do you agree that the government has the evidence to prove those facts and what you are charged with in Count _____ of the indictment?

      [Consider asking the defendant to tell you in their own words what they did that is leading them to plead guilty. Allow the defendant to consult with counsel before speaking.]

      [*Note:* If the defendant does not agree to the entire factual basis, the court, with the assistance of counsel, will have to go through each element of the offense to make sure the defendant agrees that the government has the evidence to prove each and every element and that the defendant did in fact commit the acts charged in the indictment.]

2. *If the defendant's plea is nolo contendere*, the defendant is neither admitting nor denying guilt.[20] Fed. R. Crim P. 11(b)(3) is therefore not applicable. The court may allow the government to make a representation concerning the facts of the case.[21]

Q. If there is a plea agreement involving dismissal of other charges, or an agreement that a specific sentence will be imposed, and if consideration of the agreement is to be deferred, ask the defendant:

   Do you understand that if you plead guilty, a presentence report will be prepared, and I will then consider whether to accept the plea agreement, and that

18. North Carolina v. Alford, 400 U.S. 25 (1970). *See also* United States v. Tunning, 69 F.3d 107, 110–14 (6th Cir. 1995) (discussing establishment of factual basis for *Alford* plea and difference between *Alford* plea and plea of nolo contendere); Justice Manual, *supra* note 15, at § 916.015 (regarding *Alford* pleas: when a defendant "tenders a plea of guilty but denies that he or she has in fact committed the offense, the attorney for the Government should make an offer of proof of all facts known to the Government to support the conclusion that the defendant is in fact guilty.").

19. As the Government recites the facts of the case, the court should be reviewing them to make sure that the facts address each and every element of the offense that the government must prove so that later the court can make the finding that the plea is supported by an independent factual basis for each and every element of the offense.

20. The plea of nolo contendere is never entertained as a matter of course. Fed. R. Crim. P. 11(a)(1) provides that the plea may be entered "with the court's consent." Rule 11(a)(3) provides further that before accepting the plea "the court must consider the parties' views and the public interest in the effective administration of justice." In general, courts accept a plea of nolo contendere only in certain types of cases involving nonviolent crimes where civil implications may arise from a guilty plea.

21. *See* Justice Manual, *supra* note 15, at § 9-27.520 (for a plea of nolo contendere, "the government should make an offer of proof in open court of facts known to the government that support the conclusion that the defendant has in fact committed the offense charged [and] . . . should urge the court to require the defendant to admit publicly the facts underlying the criminal charges").

> if I decide to reject the plea agreement, you will then have an opportunity to withdraw your plea and change it to not guilty?

R. For each count, ask the defendant:

> For Count ___, charging you with _____, how do you plead—guilty or not guilty?

S. Before accepting the defendant's plea, if there are victims of the offense present, allow them the opportunity "to be reasonably heard." 18 U.S.C. § 3771(a)(4).

T. If you are satisfied with the responses given during the hearing, make the following finding on the record:

> It is the finding of the court in the case of United States v. _____ that the defendant is fully competent and capable of entering an informed plea, that the defendant is aware of the nature of the charges and the consequences of the plea, and that the plea of guilty [nolo contendere] is a knowing and voluntary plea supported by an independent basis in fact containing each of the essential elements of the offense. The plea is therefore accepted, and the defendant is now adjudged guilty of that offense.

U. If a presentence report has been reviewed before plea taking or is not required (see Fed. R. Crim. P. 32(c)(1)(A)), proceed to disposition. (See *infra* section 4.01: Sentencing Procedure.) Otherwise, inform the defendant:

1. that a written presentence report will be prepared by the probation office to assist the judge in sentencing;
2. that the defendant will be asked to give information for the report, and that the defendant's attorney may be present if the defendant wishes;
3. that the court shall permit the defendant and counsel to read the presentence report and file any objections to the report before the sentencing hearing (Fed. R. Crim. P. 32(e)(2) and (f));
4. that the defendant and their counsel shall have an opportunity to speak on behalf of the defendant at the sentencing hearing (Fed. R. Crim. P. 32(i)(4)(A)); and
5. that, if there are any victims of the offense, the victims shall be afforded an opportunity to be "reasonably heard" at the sentencing hearing. 18 U.S.C. § 3771(a)(4); Fed. R. Crim. P. 32(i)(4)(B).

V. Refer the defendant to the probation officer for a presentence investigation and report (pursuant to Fed. R. Crim. P. 32(c)(1); see also Form AO 246B: Order for a Presentence Investigation and Report), set the disposition date for sentencing, and determine bail or conditions of release pending sentencing. See *infra* section 2.11: Release or Detention Pending Sentence or Appeal.

1. If the defendant has been at liberty on bond or personal recognizance, invite defense counsel to argue for release pending sentencing. See 18 U.S.C. § 3143(a). Give the U.S. attorney an opportunity to respond. If any victims of the offense are present, allow them an opportunity "to be reasonably heard." 18 U.S.C. § 3771(a)(4).

2. If the defendant is to be released pending sentencing, advise the defendant

   (a) when and where the defendant is required to appear for sentencing;

   (b) that failure to appear as required is a criminal offense for which the defendant could be sentenced to imprisonment;

   (c) that all the conditions on which the defendant was released up to now continue to apply; and

   (d) that the penalties for violating those conditions can be severe.

3. If the defendant will be released, consider also advising the defendant that the defendant's conduct while on release, including complying with the conditions of release and cooperating with pretrial services, is a factor the court can take into account when considering whether to impose a sentence below the recommended guideline range.[22]

W. If appropriate, enter a preliminary order of forfeiture under Fed. R. Crim. P. 32.2(b). The preliminary order must be entered "sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final." Fed. R. Crim. P. 32.2(b)(2)(B).[23] The defendant must be provided notice and a reasonable opportunity to be heard on the timing and form of the order.

## Appendix—Group Guilty Pleas

In cases involving many defendants who are charged with the same offense, some circuits have affirmed the practice of taking guilty pleas from groups of defendants, rather than holding separate hearings for each individual, in order to save time and resources. This happens most frequently in illegal immigration cases but also in other cases involving group criminal activity, such as a drug conspiracy. The *Benchbook* Committee takes no position on whether this practice is advisable, but offers the following information and guidance from case law for courts that may consider taking group guilty pleas.

Rule 11(b)(1) requires a court to "address the defendant personally in open court" and to inform defendants of several listed items, including their rights, the nature of the charges, and possible penalties and other consequences of pleading guilty. The court must also "determine that the defendant understands" these rights and consequences before accepting a plea of guilty. Case law indicates that the information required by Rule 11(b)(1)(A)–(O) may be provided to defendants as a group, but under Rule 11(b)(2) courts must determine whether each defendant understands those rights and possible consequences so that the plea is voluntary.

Although Rule 11 requires the court to "personally" address a defendant, "this language was added to the rule to clarify that the court must address the defendant, rather than his counsel, in person. . . . [I]t does not strictly require the court to address each defendant *individually*."

22. *See* Form AO 245B: Judgment in a Criminal Case (revised Nov. 2025), Statement of Reasons attachment at "VI. Court Reasons for Imposing a Sentence Outside the Guideline Range" (listing "Pre-sentence Rehabilitation/Potential for Future Rehabilitation" and "Conduct Pre-trial/On Bond" as possible reasons for a variance). *See also* Section 1.03: Release or Detention Pending Trial, *supra*, at II.E.3 (recommending that the court advise the defendant of the potential benefits of complying with the conditions of release and cooperating with pretrial services) and at V.A.8 (suggested colloquy).

23. Note, however, that "Rule 32.2(b)(2)(B) is a time-related directive that, if missed, does not deprive the judge of her power to order forfeiture against the defendant." McIntosh v. United States, 601 U.S. 330, 342 (2024).

*United States v. Escamilla-Rojas*, 640 F.3d 1055, 1059 (9th Cir. 2011). However, while the court may advise a group of defendants "en masse of their rights and of the consequences of their charge," the appellate court will "look also to the court's *questioning* of the defendants to determine whether the court ensured 'personally' that each defendant understood the rights he was waiving by pleading guilty." *Id.* at 1060 (emphasis in opinion). As the court put it in a later case, "Rule 11(b)(1) serves to ensure that the defendant knows and understands the rights he is giving up and the consequences of entering a guilty plea. Rule 11(b)(2) serves to ensure that the defendant's waiver of his rights and acceptance of the consequences is wholly voluntary." *United States v. Aguilera-Vera*, 698 F.3d 1196, 1201 (9th Cir. 2012). See also *United States v. Arqueta-Ramos*, 730 F.3d 1133, 1138–39 (9th Cir. 2013) (Rule 11(b)(1) violated where judge, after explaining rights and consequences to large group, divided them into smaller groups of five but did not ask each defendant if they understood those rights and consequences and instead accepted interpreter's response of "all answer yes" or "all answer no").

The Eighth Circuit rejected a conspiracy defendant's claim that he was not "personally addressed" by the court because he was not individually questioned. "The court did not repeat for each defendant questions which applied to all the defendants, but it did explicitly require each defendant to respond individually." The court did note, however, that while "collective questioning of multiple defendants satisfies Rule 11, . . . it is not the preferred method." *United States v. Hobson*, 686 F.2d 628, 629–30 (8th Cir. 1982). *Accord United States v. Fels*, 599 F.2d 142, 146 (7th Cir. 1979) (per curiam) ("Although the district court's practice of addressing multiple defendants together was sufficient on the requirement that the court address the defendant personally, it is not the preferred method.").

The First Circuit, while affirming the simultaneous questioning of the defendant and a co-defendant, also expressed concerns about the "use of simultaneous colloquy, especially here when the aid of a language interpreter was necessary. Group-questioning not only increases the risk that individual defendants will not fully comprehend the court's inquiries, but it also makes determinations about a defendant's state of mind more difficult." *United States v. Martinez-Martinez*, 69 F.3d 1215, 1223 (1st Cir. 1995). *Cf. United States v. Salazar-Olivares*, 179 F.3d 228, 230 (5th Cir. 1999) ("We can envision dangers arising from a court's failure to attend to details in a group guilty plea setting, but there are two sure safeguards against error: careful judicial practice and vigilant counsel."). See also *United States v. Rene*, 577 F. App'x 316, 317 (5th Cir. 2014) (rejecting challenge to group plea procedure because "the record reflects that the magistrate judge addressed the defendants individually and was careful to obtain individual answers from each defendant").

# 2.02 Taking Pleas of Guilty or Nolo Contendere (Organization[1])

*Fed. R. Crim. P. 11*

[*Note:* Under the Crime Victims' Rights Act, 18 U.S.C. § 3771(a)(2) and (3), any victim of the offense has the right to notice of "any public court proceeding . . . involving the crime . . . of the accused," and to attend that proceeding. It may be advisable to ask the prosecutor if there are any victims and, if so, whether the government has fulfilled its duty to notify them. Also, any victims who are present at the plea hearing have a right "to be reasonably heard." § 3771(a)(4).][2]

A. Before accepting a plea of guilty or nolo contendere from the representative of an organization, the court should be satisfied that

1. the person appearing before the court is an officer or authorized employee of the organization;
2. the board of directors is empowered to authorize a person to enter a plea of guilty or nolo contendere to a charge brought against the organization;
3. the person before the court is authorized by a valid resolution to enter a plea of guilty or nolo contendere to the charge before the court; and
4. the organization is financially able to pay a substantial fine that could be imposed by the court for the charge involved in the plea of guilty or nolo contendere.

B. After the court receives the information set out above and ascertains that the plea can be taken from the person before the court, the person should be placed under oath and informed of the following:

1. the nature of the charge(s) to which the plea is offered;
2. the mandatory minimum penalty provided by law, if any;
3. the special assessment for each offense of $400 ($125 for a Class A misdemeanor, $50 for Class B, $25 for Class C or infraction) required by 18 U.S.C. § 3013;
4. the maximum possible penalty provided by law;
5. *if applicable*, that the court may also order the organization to make restitution to any victim of the offense;
6. *if applicable*, that the court may require the organization to forfeit certain property to the government;
7. *if the offense involved fraud or other intentionally deceptive practices*, that the court may order the organization to provide notice of the conviction to victims of the offense (see 18 U.S.C. § 3555);
8. if appropriate, the right to be represented by an attorney;

1. "Organization" is defined in 18 U.S.C. § 18 as "a person other than an individual."

2. If there are many victims who want to be heard, the court may need to "fashion a reasonable procedure to give effect to [their right to be heard] that does not unduly complicate or prolong the proceedings." 18 U.S.C. § 3771(d)(2).

9. that the organization has the right to plead not guilty or to persist in that plea if it has already been made;
10. that the organization has a right to be tried by a jury and at that trial has the right to

    (a) the assistance of counsel;

    (b) confront and cross-examine witnesses against the organization;

11. that if the organization pleads guilty, there will be no further trial of any kind;
12. that by pleading guilty for the organization, the representative of the organization waives the organization's right to trial;
13. that the court will ask the representative of the organization questions about the offense before the court and that if they answer these questions, under oath, on the record, and in the presence of counsel, the answers may later be used against the representative in a prosecution for perjury or false statement; and
14. the essential elements of the offense that are involved, and whether the representative understands what the government must prove.

C. The court will then inquire

1. whether the plea is voluntarily made on behalf of the organization and not as a result of force, threats, or promises apart from a plea agreement; and
2. whether there is a plea agreement and, if so, what the agreement is.

D. If the court is satisfied with the representative's responses, ask how they plead: guilty, not guilty, or nolo contendere.

E. If the plea is guilty, follow your normal Fed. R. Crim. P. 11 procedure for establishing the factual basis in the case. If the plea is nolo contendere, the court should have the government make a representation concerning the facts of the case and what the government could prove at trial.[3]

F. Make the required findings concerning the establishment of the plea, which should include findings concerning items A.1, A.2, A.3, and A.4 above, relating to the propriety of taking the plea from the representative of the organization. Allow any victims of the offense who are present to be "reasonably heard." 18 U.S.C. § 3771(a)(4).

G. Make a finding on the guilt of the organization after the guilty or nolo contendere plea.

H. Inform the representative

1. that a written presentence report will be prepared by the probation office to assist the court in sentencing (see Form AO 246B: Order for a Presentence Investigation and Report);
2. that the organization, the representative, or both will be required to give information for the report and that the organization's attorney may be present;

3. *See* U.S. Dep't of Just., Justice Manual at § 9-27.520 (for a plea of nolo contendere, "the government should make an offer of proof in open court of facts known to the government that support the conclusion that the defendant has in fact committed the offense charged [and] . . . should urge the court to require the defendant to admit publicly the facts underlying the criminal charges."), https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution.

3. that the representative and the organization's counsel shall be afforded the opportunity to speak on behalf of the organization at the sentencing hearing (Fed. R. Crim. P. 32(i)(4)(A));
4. that if there are any victims of the offense, the victims shall be afforded an opportunity to be heard at the sentencing hearing (18 U.S.C. § 3771(a)(4); Fed. R. Crim. P. 32(i)(4)(B)); and
5. that the court shall permit the representative and counsel to read the presentence report before the sentencing hearing (Fed. R. Crim. P. 32(e)(2): Form AO 246B: Order for a Presentence Investigation and Report).

I. Advise the representative of the date, time, and place of the sentencing hearing, and order them to appear.

# 2.03 Pretrial Checklist and Trial Outline—Criminal

The following outlines were developed from material provided by members of the *Benchbook* Committee (past and present) and materials that have been supplied over the years by mentor judges in FJC education programs.[1] They are offered as examples of matters that should be considered during the pretrial and trial phases of criminal proceedings to facilitate the progress of the case and adherence to statutes and rules. If a district's local rules or practices set forth more or different procedures, checklists, and deadlines, those should take precedence.

## *A. Pretrial Checklist*

1. Set the pretrial schedule, as early as arraignment. Adjust later as needed: "Be flexible if later developments require modification of the schedule." Also, "establish a trial date at or soon after the arraignment; it will focus everyone's attention."[2]
2. Establish deadlines for motions. Fed. R. Crim. P. 12(c). Under Rule 12(b)(3), certain motions, such as improper venue or failure to state an offense, must be made before trial. "The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling [and] deferral will not adversely affect a party's right to appeal." Fed. R. Crim. P. 12(d).[3]
3. Order the parties to hold a pretrial discovery conference, no later than 14 days after arraignment, in order to "confer and try to agree on a timetable and procedures for pretrial disclosure under Rule 16." Fed. R. Crim. P. 16.1(a).[4] Note that the rule requires no more than an initial contact, which can then be followed by additional meetings. The rule does not prescribe a deadline for seeking judicial assistance "to determine or modify the time, place, manner, or other aspects of disclosure." Fed. R. Crim. P. 16.1(b).

   The rule does not require the court to accept the parties' agreement or otherwise limit the court's discretion. The Advisory Committee Note states that Rule 16.1 "does not . . . displace local rules or standing orders that supplement and are consistent with its requirements, or . . . limit the authority of the district court to determine the timetable and procedures for disclosure."

1. The FJC has a number of pretrial and trial outlines and orders from experienced judges that were made available to education program participants over the years. These may be accessed by searching on fjc.dcn for "criminal pretrial" or "criminal trial" and using filters for "criminal litigation & procedure" and "case management." *See, e.g.*, https://fjc.dcn/content/387881/phase-i-orientation-seminar-newly-appointed-us-district-judges, Sept. 23–27, 2024.

2. Irma Gonzalez, D. Brock Hornby & Loretta Preska, "Criminal Pretrial Proceedings" 2 (Federal Judicial Center 2012), https://fjc.dcn/sites/default/files/session/2022/criminalpretrial.pdf.

3. *See also id.* at 3 ("Hear and decide motions prior to trial, unless they are too hypothetical or fact-dependent; your decision will influence plea discussions, trial preparation, and perhaps the length of trial.").

4. *See also* Fed. R. Crim. P. 16.1, advisory committee's note to 2019 adoption ("The new requirement is particularly important in cases involving electronically stored information (ESI) or other voluminous or complex discovery." Also, "counsel should be familiar with best practices," such as the "Recommendations for Electronically Stored Information (ESI) Discovery Production in Federal Criminal Cases."). The "Recommendations for ESI" are reprinted and discussed in Criminal e-Discovery: A Pocket Guide for Judges (Federal Judicial Center 2015), https://fjc.dcn/sites/default/files/materials/06/Criminal%20e-Discovery_First%20Edition_Third%20Printing_2019.pdf.

4. Consider holding a pretrial conference per Fed. R. Crim. P. 17.1: "On its own, or on a party's motion, the court may hold one or more pretrial conferences to promote a fair and expeditious trial. . . . When the conference ends, the court must prepare and file a memorandum of any matters agreed to during the conference."[5] After the initial pretrial conference, subsequent conferences may be held as needed "to ensure that discovery has been provided as requested, address defense requests for additional discovery, and set a motions schedule if that has not already been done."[6]
5. Set deadlines for discovery requests and responses under Fed. R. Crim. P. 16. If the defendant requests disclosure of any expert witness testimony that the government intends to use at trial, the court "must set a time for the government to make its disclosures . . . sufficiently before trial to provide a fair opportunity for the defendant to meet the government's evidence." Fed. R. Crim. P. 16(a)(1)(G)(i)–(ii). Similar requirements apply regarding expert testimony by defense witnesses under Rule 16(b).
6. Address any motions for producing a witness's statement from a pretrial proceeding, such as a suppression hearing, preliminary hearing, or detention hearing. Fed. R. Crim. P. 26.2(g).
7. Resolve any requests by the defendant for investigative or expert services. See 18 U.S.C. § 3006A(e) Services Other than Counsel ("Counsel for a person who is financially unable to obtain investigative, expert, or other services necessary for adequate representation may request them in an ex parte application.").[7]
8. Pretrial memoranda: Consider having each party submit a brief analysis of applicable law and any matters to be considered by the court before trial, plus a list of any questions they will request the court to ask prospective jurors during voir dire.
9. Set deadlines for filing and responding to motions *in limine*.
10. Set deadlines for any motion for deposition under Fed. R. Crim. P. 15(a)(1) ("A party may move that a prospective witness be deposed in order to preserve testimony for trial. The court may grant the motion because of exceptional circumstances and in the interest of justice.").
11. Reminder: Do not participate in plea negotiations. See Fed. R. Crim. P. 11(c)(1) ("The court must not participate in these discussions.").[8]
12. Keep track of Speedy Trial Act time limits. See *supra* section 1.10: Speedy Trial Act.

5. *See* "Criminal Trial Proceedings," *supra* note 2 at 22 (Although "Rule 17.1 sets forth a procedure for memorializing matters agreed to during a pretrial conference, . . . the better practice is to have the parties put all stipulations in writing.").

6. *Id.* at 20. Note that, although the rule originally excluded pro se defendants, a 2002 amendment "makes clear that a pretrial conference may be held in these circumstances. Moreover, the Committee believed that pretrial conferences might be particularly useful in those cases where the defendant is proceeding pro se." Fed. R. Crim. P. 17.1, advisory committee's note to 2002 amendment.

7. *See also* Admin. Office of the U.S. Courts, Guide to Judiciary Policy vol. 7, pt. A, ch. 3: Authorization and Payment for Investigative, Expert, or Other Services (provides forms and outlines procedures and standards for approving such requests and authorizing payment), https://www.uscourts.gov/sites/default/files/guide-vol07a-ch03.pdf.

8. *See also* "Criminal Pretrial Proceedings," *supra* note 2 at 19 (the court may encourage the parties to negotiate and may reject certain pleas, "such as a plea with a binding sentencing disposition under Rule 11(c)(1)(C) or a plea that dismisses counts under Rule 11(c)(1)(A). . . . Make clear on the record that even though you may announce that you will not accept a particular disposition, you will not participate in plea discussions.").

13. If the government intends to offer evidence of "other crimes, wrongs, or acts," set a deadline to provide notice to the defendant. Fed. R. Evid. 404(b)(3)(A) & (C) (government must "provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it," unless "the court, for good cause, excuses lack of pretrial notice.").
14. Remind the government of its obligations to disclose exculpatory and impeachment information to the defendant in time for the defense "to make effective use of the information in the preparation and presentation of its case at trial." Section 5.06: Duty to Disclose Information Favorable to Defendant, *infra*, at C.1.
15. Have each party submit to the court and to each other a list of exhibits they intend to offer at trial.
16. Determine whether to allow counsel to ask questions during voir dire and, if so, under what circumstances and limits.
17. Have the parties meet and confer to discuss proposed jury instructions and a verdict form and try to reach agreement. Have them submit instructions and form separately if they cannot agree.
18. Determine how many alternate jurors will be selected. "The court may impanel up to 6 alternate jurors." Fed. R. Crim. P. 24(c)(1).
19. Arrange for interpreter(s) if needed.
20. Final pretrial report: Have counsel meet and confer to make a good-faith effort to prepare a single final pretrial report, set deadline for filing it. The report should include, but is not limited to, such items as:
    a. Names and contact information of all attorneys trying the case.
    b. A concise agreed statement of the case.
    c. Separate lists of expected and possible government and defense witnesses.
    d. Lists and descriptions of exhibits from each party, asserted bases of admissibility, and whether there are objections to any items.
    e. Motions *in limine* and responses thereto.
    f. Proposed voir dire questions and any objections to them.
    g. Proposed jury instructions and verdict form.
21. If holding a final pretrial conference: Schedule the conference, order lead counsel to attend.[9]

9. *See id.* at 21 ("At the final pretrial conference, you will want to rule on motions in limine, address housekeeping matters, rule on requests for extra peremptory challenges, and ask about stipulations." The court may also resolve any remaining evidentiary issues and contested matters, discuss trial procedure, including the jury selection process, and set the trial schedule.).

## *B. Trial Outline*

1. Have the case called for trial.[10]
2. Jury is selected (see *infra* section 2.05: Jury Selection—Criminal).
3. Give preliminary instructions to the jury (see *infra* section 2.07: Preliminary Jury Instructions—Criminal case).
4. Ascertain whether any party wishes to invoke Fed. R. Evid. 615(a) to exclude from the courtroom witnesses scheduled to testify in the case. [But see 18 U.S.C. § 3510, stating that victims of the offense may not be excluded from trial merely because they may speak at the sentencing hearing. See also 18 U.S.C. § 3771(a)(3) and (b), giving any victim of the offense the right to attend "any public court proceeding . . . involving the crime" unless the court finds that "testimony by the victim would be materially altered if the victim heard other testimony at that proceeding." The court "shall make every effort to permit the fullest attendance possible by the victim."[11]]

   Also, Fed. R. Evid. 615(b), effective Dec. 1, 2023, allows the court "to prohibit disclosure of trial testimony to witnesses who are excluded from the courtroom" and to "prohibit excluded witnesses from accessing trial testimony."
5. Government counsel makes an opening statement.
6. Defense counsel makes an opening statement (unless counsel asked to reserve).
7. Government counsel calls witnesses. [*Note:* If there may be testimony by child victims or child witnesses, judges should be aware of the special procedures and safeguards in 18 U.S.C. § 3509 that may apply.][12]
8. Government rests.
9. Motion for judgment of acquittal. Fed. R. Crim. P. 29(a) (see *infra* section 2.10: Trial and Post-Trial Motions). The motion may also be made at the close of all the evidence or within 14 days after a guilty verdict or the jury is discharged, whichever is later. Fed. R. Crim. P. 29(a) & (c)(1).
10. Defense counsel makes an opening statement if they have asked to reserve.
11. Defense counsel calls witnesses for the defense.
12. Defense rests.
13. Counsel call rebuttal witnesses.
14. Government rests on its entire case.
15. Defense rests on its entire case.

10. Fed. R. Crim. P. 43(a) prohibits trial in absentia of a defendant who is not present at the beginning of trial. Crosby v. United States, 506 U.S. 255 (1993). However, under some circumstances a defendant may waive the right to be present for the remainder of a trial by voluntary absence or disruptive behavior. *See* Fed. R. Crim. P. 43(c).

11. Note also that Fed. R. Evid. 615(a)(4) does not authorize the exclusion of "a person authorized by statute to be present."

12. For additional information on protecting the rights of child victims and witnesses under 18 U.S.C. § 3509, see Court Web: Unique Issues Involved in Human Trafficking Cases: Victim Rights, Trial Issues, and Sentencing (Fed-eral Judicial Center Nov. 9, 2022), https://fjc.dcn/content/373450/court-web-unique-issues-involved-human-trafficking-cases-victim-rights-trial-issues.

16. Motion for judgment of acquittal. Fed. R. Crim. P. 29(a), (b) (see *infra* section 2.10: Trial and Post-Trial Motions).
17. Out of hearing of the jury, rule on counsel's requests for instructions and inform counsel as to the substance of the court's charge. Fed. R. Crim. P. 30(b).
18. Rule on objections to the charge and make any appropriate additional charge. Provide an opportunity for counsel to object out of the jury's hearing and, on request, out of the jury's presence. Fed. R. Crim. P. 30(d).
19. Charge the jury (see *infra* section 2.08: General Instructions to Jury at End of Criminal Case). In the court's discretion, the jury may be instructed before or after closing arguments, or both.[13] Fed. R. Crim. P. 30(c).
20. Closing argument by prosecution, closing argument by defense, rebuttal by prosecution. Fed. R. Crim. P. 29.1.
21. If you are going to discharge the alternate jurors, excuse and thank them.[14] If you plan to retain any alternate jurors, ensure that they do not discuss the case with any other person unless they replace a regular juror. If an alternate juror replaces a juror after deliberations have begun, instruct the jury to begin its deliberations anew. Fed. R. Crim. P. 24(c)(3).

    At any time before the verdict, the parties may stipulate, in writing and with the court's approval, that the jury may consist of fewer than 12 persons or that a verdict may be returned by fewer than 12 jurors if the court excuses a juror for good cause after the trial has begun. Fed. R. Crim. P. 23(b)(2).

    Even without a stipulation by the parties, once the jury has retired to deliberate the court may permit the return of a verdict by 11 jurors if it excuses a juror for good cause. Fed. R. Crim. P. 23(b)(3).
22. Instruct the jury to go to the jury room and commence its deliberations. It is recommended that judges consider providing each juror with a written set of instructions for use during deliberations.
23. Determine which exhibits are to be sent to the jury room.
24. Have the clerk give the exhibits and the verdict forms to the jury.
25. Recess court during the jury deliberations. Court staff should obtain contact information for counsel so that they can be reached easily in the event of jury questions or a verdict.
26. Before responding to any communications from the jury, consult with counsel on the record (see *infra* section 2.08: General Instructions to Jury at End of Criminal Case).
27. If the jury fails to arrive at a verdict before the conclusion of the first day's deliberations, either provide for their overnight sequestration or permit them to separate after instructing them as to their conduct and fixing the time for their return to resume deliberations. Provide for safekeeping of exhibits. Consider reinstructing the jury on their obligation to avoid discussing the case, listening to or viewing any news about the case,

13. Note that if the court charges the jury before closing arguments, counsel would be able to reference the instructions during their arguments.

14. In a case involving potentially lengthy jury deliberations, judges may wish to consider retaining at least one alternate juror.

or attempting to do their own research. See sections 2.07 and 2.08, *infra*, on jury instructions, especially the social media instruction.

28. If the jury reports that they cannot agree on a verdict, determine by questioning whether they are hopelessly deadlocked. Do not inquire as to the numerical split of the jury. If you are convinced that the jury is hopelessly deadlocked on one or more counts, consider declaring a mistrial as to those counts. See Fed. R. Crim. P. 31(b)(3). However, *before ordering a mistrial*, you "must give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives." Fed. R. Crim. P. 26.3. If you are not convinced that the jury is hopelessly deadlocked, direct them to resume their deliberations. Consider giving your circuit's approved *Allen*-type charge to the jury before declaring a mistrial.
29. When the jury has agreed on a verdict, reconvene court and take the verdict (see *infra* section 2.09: Verdict—Criminal).
30. Poll the jurors individually on the request of either party, or on your own motion (see *infra* section 2.09: Verdict—Criminal). Fed. R. Crim. P. 31(d).
31. Thank and discharge the jury.
32. If the verdict is "not guilty," discharge the defendant.
33. If the defendant has been found guilty, determine whether the defendant should be committed to the custody of the U.S. marshal or released on bail (see *infra* section 2.11: Release or Detention Pending Sentence or Appeal).
34. Fix a time for post-trial motions. See *infra* section 2.10: Trial and Post-Trial Motions.
35. Adjourn or recess court.

## Other FJC Sources

- Manual on Recurring Problems in Criminal Trials (Tucker Carrington & Kris Markarian eds., 6th ed. 2010)
- Trying Criminal Cases (video) (Federal Judicial Center 2018), https://fjc.dcn/content/328799/trying-criminal-cases
- Trying Criminal Cases (outline) (Federal Judicial Center 2006), https://fjc.dcn/sites/default/files/session/2022/Trying Criminal Cases Outline.pdf
- For a discussion of case-management techniques in civil trials, some of which may also be helpful in the management of criminal trials, see Civil Litigation Management Manual (Judicial Conference of the United States, 3d ed. 2022)
- For a discussion of trial management in complex civil litigation, some of which may be applicable to management of a criminal trial, see Manual for Complex Litigation, Fourth 131–66 (2004)

# 2.04 Findings of Fact and Conclusions of Law in Criminal Cases

*Fed. R. Crim. P. 12, 23*

A. When required

1. Fed. R. Crim. P. 23(c):

   In all cases tried without a jury, "the court must find the defendant guilty or not guilty. If a party requests before the finding of guilty or not guilty, the court must state its specific findings of fact in open court or in a written decision or opinion."

2. Fed. R. Crim. P. 12(d)—Ruling upon Motions:

   "The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. . . . When factual issues are involved in deciding a motion, the court must state its essential *findings* on the record." (Emphasis added.)

B. Form

1. Fed. R. Crim. P. 23(c) provides that, after a trial without a jury, "the court must state its specific findings of fact in open court or in a written decision or opinion."
2. Fed. R. Crim. P. 12(d) provides that "[w]hen factual issues are involved in deciding a motion, the court must state its essential findings on the record."
3. Fed. R. Crim. P. 12(f) provides that "[a]ll proceedings at a motion hearing, including any findings of fact or conclusions of law made orally by the court, must be recorded by a court reporter or a suitable recording device."

# 2.05 Jury Selection—Criminal

The *Benchbook* Committee recognizes that there is no uniform recommended procedure for selecting jurors to serve in criminal or civil cases and that judges will develop the patterns or procedures most appropriate for their districts and their courts. Section 2.06 *infra*, however, provides an outline of standard voir dire questions.[1] A discussion of *Batson* cases and anonymous juries is included below.

The 1982 Federal Judicial Center publication *Jury Selection Procedures in United States District Courts*, by Gordon Bermant, contains a detailed discussion of several different methods of jury selection (https://fjc.dcn/sites/default/files/2012/JurSelPro.pdf). See also William W Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 580–82 (1991) (jury selection and composition); James Robertson, "Voir Dire and Jury Selection" (Federal Judicial Center 2005) (outline that accompanies video, https://fjc.dcn/sites/default/files/session/2022/VoirDire.pdf).[2]

Note that any victims of the offense are entitled to be notified of and to attend "any public court proceeding . . . involving the crime," which would include jury selection. See 18 U.S.C. § 3771(a)(2) and (3).

## *A. Peremptory Challenges*

Judges should be aware of the cases, beginning with *Batson v. Kentucky*, 476 U.S. 79 (1986), that prohibit peremptory challenges based on race. *Batson* has been extended to cover a criminal defendant's peremptory challenges, *Georgia v. McCollum*, 505 U.S. 42 (1992), and a defendant may object to race-based exclusions whether or not they are the same race as the challenged juror, *Powers v. Ohio*, 499 U.S. 400 (1991). Peremptory strikes based on gender are also prohibited. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). "The Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Flowers v. Mississippi*, 588 U.S. 284, 303 (2019).

The Supreme Court has left it to the trial courts to develop rules of procedure and evidence for implementing these decisions. It has, however, set out a three-step inquiry for resolving a *Batson* challenge (see *Purkett v. Elem*, 514 U.S. 765, 767 (1995)):

1. At the first step of the *Batson* inquiry, the burden is on the opponent of a peremptory challenge to make out a prima facie case of discrimination. A prima facie case may be shown where (1) the prospective juror is a member of a cognizable group, (2) the prosecutor used a peremptory strike to remove the juror, and (3) the totality of the circumstances raises an inference that the strike was motivated by the juror's membership in the cognizable group. *Johnson v. California*, 545 U.S. 162, 170 (2005). The burden at this stage is low.[3]

1. For an example of a juror questionnaire, see sample forms under the "Trial" heading in Appendix A of the Civil Litigation Management Manual (Judicial Conference of the United States, 3d ed. 2022) (Appendix online only, https://fjc.dcn/content/366802/civil-litigation-management-manual-3ed-online-appendix).

2. The "Voir Dire and Jury Selection" video, produced in 2005 and revised in 2018, is available online at https://fjc.dcn/content/328797/voir-dire-and-jury-selection.

3. "[A] defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." The defendant does not have to show that it was "more likely than not" that discrimination occurred. *Johnson*, 545 U.S. at 170.

2. If the opponent of the peremptory challenge satisfies the step one prima facie showing, the burden then shifts to the proponent of the strike, who must come forward with a nondiscriminatory explanation of the strike.
3. If the court is satisfied with the neutral explanation offered, it must then proceed to the third step, to determine the ultimate question of intentional discrimination. *Hernandez v. New York*, 500 U.S. 352 (1991). The opponent of the strike has the ultimate burden to show purposeful discrimination. The court may not rest solely upon the neutral explanation offered by the proponent of the strike. Instead, the court must undertake a sensitive inquiry into the circumstantial and direct evidence of intent, *Batson*, 476 U.S. at 93, and evaluate the "persuasiveness of the justification" offered by the proponent of the strike. *Purkett*, 514 U.S. at 768.[4] One method of undertaking such an inquiry is to make a "side-by-side comparison" of the reasons given for striking panelists and the reasons for not striking those who were allowed to serve. *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005).

The *Benchbook* Committee suggests that judges

- conduct the above inquiry on the record but outside of the venire's hearing, to avoid "tainting" the venire by discussions of race, gender, or other characteristics of potential jurors; and
- use a method of jury selection which requires litigants to exercise challenges at sidebar or otherwise outside the venire's hearing and in which no venire members are dismissed until all of the challenges have been exercised. See Jury Selection Procedures in United States District Courts, *supra*.

These procedures should ensure that prospective jurors are never aware of *Batson* discussions or arguments about challenges and therefore can draw no adverse inferences by being temporarily dismissed from the venire and then recalled.[5]

Note that the Supreme Court has not stated a rule for *when* a *Batson* challenge must be made, although it did suggest that: "The requirement that any *Batson* claim be raised not only before trial, but in the period between the selection of the jurors and the administration of their oaths, is a sensible rule." *Ford v. Georgia*, 498 U.S. 411, 423 (1991). For a discussion of circuit law on timeliness requirements for *Batson* motions, see *United States v. Tomlinson*, 764 F.3d 535, 538 (6th Cir. 2014) (citing cases).

4. *See also* Snyder v. Louisiana, 552 U.S. 472, 478 (2008) ("all of the circumstances that bear upon the issue of racial animosity must be consulted").

5. For a summary of procedures that courts developed for criminal cases in the first two years after *Batson*, see Bench Comment, nos. 3 & 4 (1988), https://fjc.dcn/content/bench-comment-1981-1998-0. For a discussion of voir dire practices in light of *Batson*, see Chambers to Chambers, vol. 5, no. 2 ( Federal Judicial Center 1987), https://fjc.dcn/sites/default/files/2014/Chambers-to-Chambers-1983-1996.pdf.

## *B. Anonymous Juries*[6]

In rare cases, a district court may determine that a jury should be impaneled anonymously because of concerns about juror safety or tampering. The court may enter an order to prevent disclosure of names, addresses, places of employment, and other facts that might reveal the identity of jurors.[7] The *Benchbook* Committee neither advocates nor discourages use of an anonymous jury but notes that courts must be careful to take steps to minimize potential prejudice to defendants from this procedure. Listed below are the main "rules" that may be summarized from circuit court decisions on this issue.[8]

1. There must be a strong reason to believe the jury needs protection. For example, anonymous juries have been approved in cases involving organized crime figures who, currently or previously, attempted to or did influence, intimidate, or harm witnesses, jurors, or judges. Extensive media coverage may be considered in combination with other factors.
2. The court must take reasonable precautions to minimize any prejudicial effects on the defendant and ensure that fundamental rights to an impartial jury and fair trial are not infringed. For example, the court should
   (a) ensure that the voir dire allows the defendant to adequately assess the prospective jurors and uncover possible bias as to the defendant or the issues in the case. The court should conduct a thorough and searching voir dire, which could include use of written questionnaires.
   (b) give plausible and nonprejudicial reasons to ensure that the explanation for jury anonymity does not adversely reflect on the defendant. The court may, for example, assure jurors that this is a common practice or that it is to protect them from

6. Note that the defendant in a capital case must be given list of potential jurors and witnesses three days before trial, "except that such list of the veniremen and witnesses need not be furnished if the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person." 18 U.S.C. § 3432. *See* Section 3.01: Death Penalty Procedures, *infra*, at II, Jury Selection and Trial. *See also* United States v. Hager, 721 F.3d 167, 186–90 (4th Cir. 2013) (affirming use of anonymous jury in capital case); United States v. Peoples, 250 F.3d 630, 635–36 (8th Cir. 2001) (same).

7. The Third Circuit held that it is within the trial court's discretion to hold an evidentiary hearing on whether the facts warrant an anonymous jury. It also held that the court is not required to make findings and give reasons on the record for using an anonymous jury, but suggested that doing so is the "better practice." *See* United States v. Eufrasio, 935 F.2d 553 (3d Cir. 1991). *Accord* United States v. Dinkins, 691 F.3d 358, 374 (4th Cir. 2012) ("it is advisable for a district court deciding to empanel an anonymous jury to support its conclusion with express findings based on evidence of record, because a court's failure to state a basis for its decision sufficient to permit appellate review may constitute an abuse of discretion"); United States v. Morales, 655 F.3d 608, 621–22 (7th Cir. 2011) ("district court erred by granting the government's motion for an anonymous jury without stating its reasons for doing so on the record"; however, after reviewing the parties' "arguments, the government's written motion, and the entire record of the case, we conclude that the district court's error in failing to articulate its reasons for empaneling an anonymous jury was harmless").

8. Most circuits have approved the use of anonymous juries under appropriate circumstances. *See Dinkins*, 691 F.3d at 370–74; United States v. Shryock, 342 F.3d 948, 971 (9th Cir. 2003); United States v. Talley, 164 F.3d 989, 1001–02 (6th Cir. 1999); United States v. DeLuca, 137 F.3d 24, 31 (1st Cir. 1998); United States v. Darden, 70 F.3d 1507, 1532 (8th Cir. 1995); United States v. Krout, 66 F.3d 1420, 1426 (5th Cir. 1995); United States v. Edmond, 52 F.3d 1080, 1090–91 (D.C. Cir. 1995) (per curiam); United States v. Ross, 33 F.3d 1507, 1519–20 (11th Cir. 1994); United States v. Crockett, 979 F.2d 1204, 1215–16 (7th Cir. 1992); United States v. Paccione, 949 F.2d 1183, 1192 (2d Cir. 1991) (also discussing several prior Second Circuit cases); United States v. Scarfo, 850 F.2d 1015, 1021–22 (3d Cir. 1988).

unwanted media attention.[9] It may be advisable to repeat the explanation during jury instructions and before jury deliberation, to stress that the need for anonymity should have no effect on the verdict.

3. In the most serious cases, courts have the discretion to impose stronger security measures to protect jurors and others, such as having marshals escort jurors to and from the courthouse, metal detectors at the courthouse, and increased security in the courtroom.[10]

## Other FJC Sources

- For a discussion of techniques for selecting and assisting the jury in civil trials, some of which may also be helpful in criminal trials, see Civil Litigation Management Manual 102–03, 106–09 (Judicial Conference of the United States, 3d ed. 2022) and Manual for Complex Litigation, Fourth 150–53 (2004)
- Gordon Bermant, Jury Selection Procedures in United States District Courts (1982)
- James Robertson, "Voir Dire and Jury Selection" (Federal Judicial Center 2005), https://fjc.dcn/sites/default/files/session/2022/VoirDire.pdf
- Manual on Recurring Problems in Criminal Trials 19–22 (Tucker Carrington & Kris Markarian eds., 6th ed. 2010)

9. For examples of explanations, *see* United States v. Gutierrez, 963 F.3d 320, 330–31 (4th Cir. 2020); *Edmond*, 52 F.3d at 1093–94; *Ross*, 33 F.3d 1507, at n.27; United States v. Tutino, 883 F.2d 1125 (2d Cir. 1989); *Scarfo*, 850 F.2d 1015, at Appendix; United States v. Barnes, 604 F.2d 121 (2d Cir. 1979).

10. *See, e.g.*, United States. v. Savage, 970 F.3d 217, 270 (3d Cir. 2020) (noting that, for anonymous jury, "special security measures were to be taken in transporting jurors to and from court"); United States v. Portillo, 969 F.3d 144, 163 (5th Cir. 2020) (driving jurors to and from the courthouse from off-site parking location); United States v. McGill, 815 F.3d 846, 874 (D.C. Cir. 2016) (noting security measures taken for anonymous jury: "The jurors were seated behind a locked bulletproof wall during trial, and they were assembled and dropped off in private locations, escorted each way by the marshals."); *Darden*, 70 F.3d at 1533 (security measures in case with anonymous jury included "assembling of the jury in a secret location [and] the transportation of the jurors and the defendants to and from the Courthouse in vans operated by [U.S. Marshals], with additional security including armed guards along the street, a convoy of police vehicles, helicopter surveillance, and snipers on the roof of the United States Court and Custom House in St. Louis"); *Ross*, 33 F.3d at 1519 (court "ordered that the jurors, who were not sequestered, meet each morning in a central location to which federal marshals would return them at the close of the court day and that they remain in the custody of the marshals throughout the court day"); United States v. Ferguson, 758 F.2d 843, 854 (2d Cir. 1985) ("no prejudice arose from other security measures taken under the circumstances. As many as two dozen plainclothed marshals were sometimes present at trial, they drove the jurors home at night, and there was a metal-detecting device present at the entrance to the courtroom.").

# 2.06 Standard Voir Dire Questions—Criminal

A. The following outline for an initial in-depth voir dire examination of the entire panel by the court assumes that

1. if there are affirmative responses to any questions, follow-up questions will be addressed to the juror(s) (at sidebar, if such questions concern private or potentially embarrassing matters);
2. the court and counsel have been furnished with the name, address, age, and occupation of each prospective juror; and
3. any victims of the offense have been given notice of the proceeding and their right to attend. 18 U.S.C. § 3771(a)(2) & (3).

B. The court "may examine prospective jurors or may permit the attorneys for the parties to do so." Fed. R. Crim P. 24(a)(1). If the court conducts the entire examination, it should require counsel to submit proposed voir dire questions before trial to permit the court to incorporate additional questions at the appropriate places in this outline.

1. Have the jury panel sworn.
2. Explain to the jury panel that the purpose of the voir dire examination is
   (a) to enable the court to determine whether any prospective juror should be excused for cause; and
   (b) to enable counsel for the parties to exercise their individual judgment with respect to peremptory challenges—that is, challenges for which no reason need be given.

   [*Note:* Consider giving an unconscious bias instruction, such as the one at C, *infra*, at this time.]
3. Explain to prospective jurors that presenting the evidence is expected to take _____ days, and ask if this presents a special problem for any of them.
4. Read or summarize the indictment.[1]
5. Ask if any member of the panel has heard or read anything about the case.
6. Ask counsel for the government to introduce himself or herself and any other counsel associated with the trial. The court will then read, or have counsel read, a list of the witnesses who are expected to testify in the government's presentation of its case in chief. Ask if the jurors
   (a) know any of these persons;
   (b) had any business dealings with them or were represented by them or members of their firms; and
   (c) had any other similar relationship or business connection with any of them.

1. Alternatively, the court may also have the parties prepare a statement of the case and then read that to the prospective jurors.

7. Ask counsel for each defendant to introduce themselves. The court will then read, or have counsel read, a list of any witnesses that the defendant may choose to call. Ask if the jurors

   (a) know any of these persons;

   (b) had any business dealings with them or were represented by them or members of their firms; and

   (c) had any other similar relationship or business connection with any of them.

8. Ask prospective jurors:

   (a) Have you ever served as a juror in a criminal or civil case or as a member of a grand jury in either a federal or state court?

   (b) Have you, any member of your family, or any close friend ever been employed by a law enforcement agency?

   (c) If you answer yes to [either of] the following question[s], or if you do not understand the question[s], please come forward, be seated in the well of the courtroom, and be prepared to discuss your answer with the court and counsel at the bench.

      (1) Have you ever been involved, in any court, in a criminal matter that concerned yourself, any member of your family, or a close friend either as a defendant, a witness, or a victim?

      (2) [If the charged crime relates to conduct that may evoke strong opinions, such as drug distribution, child pornography, or illegal immigration, consider asking the jury panel:]

      The defendant in this case is charged with _____. It must be emphasized that this conduct is only alleged. No evidence has been presented, the defendant is entitled to a presumption of innocence, and the government must prove beyond a reasonable doubt that the defendant committed this offense.

      Does anyone have opinions about _____ offenses that would make it difficult to sit on a jury for a case involving such an alleged offense and render an impartial verdict based on the evidence and the court's instructions as to the law? Is there anything about the nature of these charges that would cause any prospective juror to go into the trial with any bias or prejudice, either one way or another?

      [If any panel member indicates concern, pursue the matter as needed.]

   (d) If you are selected to sit on this case, will you be able to render a verdict solely on the evidence presented at the trial and in the context of the law as I will give it to you in my instructions, disregarding any other ideas, notions, or beliefs about the law that you may have encountered in reaching your verdict?

   (e) There is a presumption of innocence for every defendant, and the government has the burden of proving a defendant's guilt beyond a reasonable doubt.

Defendants do not have to prove their innocence and do not have to testify. If the defendant in this case does not testify, would that affect your decision?

[If not given earlier, consider giving an unconscious bias instruction, such as that at C, *infra*, here.]

(f) Is there any member of the panel who has any special disability or problem that would make serving as a member of this jury difficult or impossible?

[At this point, if the court is conducting the entire examination, it should ask those questions suggested by counsel that in the opinion of the court are appropriate.

Or

If appropriate, permit counsel to conduct additional direct voir dire examination, subject to such time and subject matter limitations as the court deems proper, or state to counsel that if there are additional questions that should have been asked or were overlooked, counsel may approach the bench and discuss them with the court.]

9. Give the proposed model jury instruction on "The Use of Electronic Technology to Learn or Communicate about a Case,"[2] or a similar instruction, during voir dire of potential jurors:

If you are selected as a juror in this case, you cannot discuss the case with your fellow jurors before you are permitted to do so at the conclusion of the trial, or with anyone else until after a decision has been reached by the jury. Therefore, you cannot talk about the case or otherwise have any communications about the case with anyone, including your fellow jurors, until I tell you that such discussions may take place. Thus, in addition to not having face-to-face discussions with your fellow jurors or anyone else, you cannot communicate with anyone about the case in any way, whether in writing, or through email, text messaging, blogs, or comments, or on social media websites and apps (like X (formerly Twitter), Facebook, Instagram, LinkedIn, YouTube, WhatsApp, and Snapchat).

[OPTIONAL: If you feel that you cannot do this, then you cannot let yourself become a member of the jury in this case. Is there anyone who will not be able to comply with this restriction?]

You also cannot conduct any type of independent or personal research or investigation regarding any matters related to this case. Therefore, you cannot use your cellphones, iPads, computers, or any other device to do any research or investigation regarding this case, the matters in the case, the legal issues in the case, or the individuals or other entities involved in the case. And you must ignore any information about the case you might see, even accidentally, while browsing the internet or on your social media feeds. This is because you must base the decisions you will have to make in this case solely on what you hear and see in this courtroom.

2. Prepared by the Judicial Conference Committee on Court Administration and Case Management, updated June 2020, https://jnet.ao.dcn/sites/default/files/pdf/DIR20-163.pdf.

[OPTIONAL: If you feel that you cannot do this, then you cannot let yourself become a member of the jury in this case. Is there anyone who will not be able to comply with this restriction?]

10. Conclude by asking the panel members:

(a) Having heard the questions put to you by the court, does any other reason suggest itself to you as to why you could not sit on this jury and render a fair and neutral verdict based solely on the evidence presented to you and in the context of the court's instructions to you on the law?

(b) Is there anything that has not been asked that you think might be important for the Court to know about you in relation to this case that may affect your ability to neutrally evaluate the evidence or otherwise participate as a juror?

C. Optional Instruction on Bias, Conscious and Unconscious

If you are selected for the jury, it will be important to strictly follow instructions to consider only the evidence presented in court and the law as I explain it, even if you do not agree with that law. Nothing else should affect your decision, including any bias in favor of any person or cause, prejudice against any person or cause, or sympathy for any person or cause. You should not be influenced by any person's age, race, color, religious beliefs, national ancestry, sexual orientation, gender, gender identity, or economic circumstances. This applies not just to the defendant, but also to witnesses and attorneys.

It is especially important to be aware of any possible unconscious, or implicit, biases that we all have: instinctive feelings, assumptions, perceptions, fears, or stereotypes that we may not be consciously aware of. Any of these can lead us to jump to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, or biases of one kind or another. We may have preconceived ideas based on the way someone looks, the way they talk, the way they act, how they dress, even whether they have tattoos or piercings or brightly colored hair.

It will be your duty as a juror to not be influenced in your deliberations by any of these types of biases or preconceived ideas. Rather, you must commit to be fair, impartial, and neutral, to decide the case based only on the evidence presented here in court, and to follow the Court's instructions on the law.

If at any time during this process you feel that you may not be able to follow these requirements, please let us know so that we may discuss it with you.

[In addition to the above instructions, consider playing for the venire the video on unconscious bias produced by the Western District of Washington, https://www.wawd.uscourts.gov/jury/unconscious-bias (approx. 11 minutes). The Northern District of California offers an "Introductory Video for Potential Jurors," which includes part of the Western District of Washington's video on unconscious bias, https://cand.uscourts.gov/attorneys/attorney-practice-resources (approx. 20 minutes).]

## For Further Reference

- James Robertson, "Voir Dire and Jury Selection" (Federal Judicial Center 2005), https://fjc.dcn/sites/default/files/session/2022/VoirDire.pdf
- Manual on Recurring Problems in Criminal Trials 19–22 (Tucker Carrington & Kris Markarian eds., 6th ed. 2010)
- Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of* Batson*, and Proposed Solutions*, 4 Harv. L. & Pol'y Rev. 149 (Winter 2010)
- Court Web: *A Discussion of Implicit Bias* (Federal Judicial Center 2020), https://fjc.dcn/content/345454/court-web-discussion-implicit-bias
- Court Web: *Unconscious Bias, Equity, and Ethics in the Courtroom* (Federal Judicial Center 2019), https://fjc.dcn/content/337106/court-web-unconscious-bias-equity-and-ethics-courtroom

# 2.07 Preliminary Jury Instructions—Criminal Case

These suggested instructions are designed to be given following the swearing of the jury. They are general and may require modification in light of the nature of the particular case. They are intended to give the jury, briefly and in understandable language, information to make the trial more meaningful. Other instructions may be given, as the need arises, at appropriate points during the trial. Most circuits have developed model or pattern jury instructions, and judges should consult the instructions that have been prepared for their circuits.

Given the ubiquity of social media in its many forms, particular care should be given to instruct the jury to neither discuss nor research the case. This instruction may be given at relevant points throughout the trial, such as before recesses (in abbreviated form), and should be given again when the jury retires to deliberate. See instruction at E. Conduct of the Jury, *infra*.

Members of the jury: Now that you have been sworn, I will give you some preliminary instructions to guide you in your participation in the trial.

## *A. Duty of the Jury*

It will be your duty to find from the evidence what the facts are. You and you alone will be the judges of the facts. You will then have to apply to those facts the law as the court will give it to you. You must follow that law whether you agree with it or not.

Nothing the court may say or do during the course of the trial is intended to indicate, or should be taken by you as indicating, what your verdict should be.

## *B. Evidence*

The evidence from which you will find the facts will consist of the testimony of witnesses, documents and other things received into the record as exhibits, and any facts that the lawyers agree to or stipulate to or that the court may instruct you to find.

Certain things are not evidence and must not be considered by you. I will list them for you now.

1. Statements, arguments, and questions by lawyers are not evidence.
2. Objections to questions are not evidence. Lawyers have an obligation to their clients to make objections when they believe evidence being offered is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it. If the objection is sustained, ignore the question. If it is overruled, treat the answer like any other. If you are instructed that some item of evidence is received for a limited purpose only, you must follow that instruction.

3. Testimony that the court has excluded or told you to disregard is not evidence and must not be considered.
4. Anything you may have seen or heard outside the courtroom is not evidence and must be disregarded. You are to decide the case solely on the evidence presented here in the courtroom.

There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as the testimony of an eyewitness. Circumstantial evidence is proof of facts from which you may infer or conclude that other facts exist. I will give you further instructions on these as well as other matters at the end of the case, but keep in mind that you may consider both kinds of evidence.

It will be up to you to decide which witnesses to believe, which witnesses not to believe, and how much of any witness's testimony to accept or reject—you may believe everything a witness says, part of it, or none of it. I will give you some guidelines for determining the credibility of witnesses at the end of the case.

## *C. Rules for Criminal Cases*

As you know, this is a criminal case. There are three basic rules about a criminal case that you must keep in mind.

First, the defendant is presumed innocent until proven guilty. The indictment brought by the government against the defendant is only an accusation, nothing more. It is not proof of guilt or anything else. The defendant therefore starts out with a clean slate.

Second, the burden of proof is on the government until the very end of the case. The defendant has no burden to prove their innocence, or to present any evidence, or to testify. Since the defendant has the right to remain silent, the law prohibits you from arriving at your verdict by considering that the defendant may not have testified.

Third, the government must prove the defendant's guilt beyond a reasonable doubt. I will give you further instructions on this point later, but bear in mind that in this respect a criminal case is different from a civil case.

## *D. Summary of Applicable Law*

In this case the defendant is charged with _____. I will give you detailed instructions on the law at the end of the case, and those instructions will control your deliberations and decision. But in order to help you follow the evidence, I will now give you a brief summary of the elements of the offense that the government must prove to make its case.

[Summarize the elements of the offense.]

## *E. Conduct of the Jury*

Now, some things to keep in mind about your conduct as jurors.[1]

The Sixth Amendment of our Constitution guarantees a trial by an impartial jury. This means that, as jurors, you must decide this case based solely on the evidence and law presented to you here in this courtroom. Until all the evidence and arguments have been presented and you begin to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you start to deliberate, you may discuss the case, the evidence, and the law as it has been presented, but only with your fellow jurors. You cannot discuss it with anyone else until you have returned a verdict and the case has come to an end. I'll now walk through some specific examples of what this means.

First, this means that, during the trial, you must not conduct any independent research about this case, or the matters, legal issues, individuals, or other entities involved in this case. Just as you must not search or review any traditional sources of information about this case (such as dictionaries, reference materials, or television news or entertainment programs), you also must not search the internet or any other electronic resources for information about this case or the witnesses or parties involved in it. The bottom line for the important work you will be doing is that you must base your verdict only on the evidence presented in this courtroom, along with instructions on the law that I will provide.

Second, this means that you must not communicate about the case with anyone, including your family and friends, until deliberations, when you will discuss the case with only other jurors. During deliberations, you must continue not to communicate about the case with anyone else. Most of us use smartphones, tablets, or computers in our daily lives to access the internet, for information, and to participate in social media platforms. To remain impartial jurors, however, you must not communicate with anyone about this case, whether in person, in writing, or through email, text messaging, blogs, or social media websites and apps (like X (formerly Twitter), Facebook, Instagram, LinkedIn, YouTube, WhatsApp, and Snapchat).

[Consider reading here the suggested insert about *why* jurors should not do their own research that is provided at the end of this section, after paragraph H, *infra*.]

Please note that these restrictions apply to all kinds of communications about this case, even those that are not directed at any particular person or group. Communications like blog posts or tweets can be shared to an ever-expanding circle of people and can have an unexpected impact on this trial. For example, a post you make to your

1. The following instruction is from the "Proposed Model Jury Instructions: The Use of Electronic Technology to Learn or Communicate about a Case," prepared by the Judicial Conference Committee on Court Administration and Case Management (Updated June 2020). *See also* Memorandum, "Updated Model Jury Instructions on Social Media and Other Communications" from Judge Audrey G. Fleissig, Chair, Committee on Court Administration and Case Management (Sept. 1, 2020), https://jnet.ao.dcn/sites/default/files/pdf/DIR20-163.pdf; Meghan Dunn, Federal Judicial Center, *Strategies for Preventing Jurors' Use of Social Media During Trials and Deliberations*, *in* Jurors' Use of Social Media During Trials and Deliberations: A Report to the Judicial Conference Committee on Court Administration and Case Management 5–11 (2011), https://fjc.dcn/sites/default/files/2012/DunnJuror.pdf.

social media account might be viewable by a witness who is not supposed to know what has happened in this courtroom before the witness has testified. For these reasons, you must inform me immediately if you learn about or share any information about the case outside of this courtroom, even if by accident, or if you discover that another juror has done so.

Finally, a word about an even newer challenge for trials such as this one—persons, entities, and even foreign governments may seek to manipulate your opinions, or your impartiality during deliberations, using the communications I've already discussed or using fake social media accounts. But these misinformation efforts might also be undertaken through targeted advertising online or in social media. Many of the tools you use to access email, social media, and the internet display third-party notifications, pop-ups, or ads while you are using them. These communications may be intended to persuade you or your community on an issue, and could influence you in your service as a juror in this case. For example, while accessing your email, social media, or the internet, through no fault of your own, you might see popups containing information about this case or the matters, legal principles, individuals, or other entities involved in this case. Please be aware of this possibility, ignore any pop-ups or ads that might be relevant to what we are doing here, and certainly do not click through to learn more if these notifications or ads appear. If this happens, you must let me know.

Because it is so important to the parties' rights that you decide this case based solely on the evidence and my instructions on the law, at the beginning of each day, I may ask you whether you have learned about or shared any information outside of this courtroom. (I like to let the jury know in advance that I may be doing that, so you are prepared for the question.)

Remember that you must not form any opinion until all the evidence is in. Keep an open mind until you start your deliberations at the end of the case.

[If the court decides to allow note taking, state:]

If you want to take notes during the course of the trial, you may do so. However, it is difficult to take detailed notes and pay attention to what the witnesses are saying at the same time. If you do take notes, be sure that your note taking does not interfere with your listening to and considering all of the evidence. Also, if you do take notes, do not discuss them with anyone before you begin your deliberations. Do not take your notes with you at the end of the day—be sure to leave them in the jury room.

If you choose *not* to take notes, remember that it is your own individual responsibility to listen carefully to the evidence. You cannot give this responsibility to someone who is taking notes. We depend on the judgment of all members of the jury; you all must remember the evidence in this case.

[If the court decides to allow jurors to ask questions during the trial, see *infra* section 5.07: Juror Questions During Trial, for instructions and cautions.]

## *F. Course of the Trial*

The trial will now begin. First, the government will make an opening statement, which is simply an outline to help you understand the evidence as it comes in. Next, the defendant's attorney may, but does not have to, make an opening statement. Opening statements are neither evidence nor arguments.

The government will then present its witnesses, and counsel for the defendant may cross-examine them. Following the government's case, the defendant may, if he [she] wishes, present witnesses whom the government may cross-examine. After all the evidence is in, the attorneys will present their closing arguments to summarize and interpret the evidence for you, and the court will instruct you on the law.[2] After that, you will retire to deliberate on your verdict.

## *G. At the End of Each Day of the Case*[3]

As I indicated before this trial started, you as jurors will decide this case based solely on the evidence presented in this courtroom. This means that, after you leave here for the night, you must not conduct any independent research about this case, the matters in the case, the legal issues in the case, or the individuals or other entities involved in the case. This is important for the same reasons that jurors have long been instructed to limit their exposure to traditional forms of media and information such as television and newspapers. You also must not communicate with anyone, in any way, about this case. And you must ignore any information about the case that you might see while browsing the internet or your social media feeds.

## *H. At the Beginning of Each Day of the Case*[4]

As I reminded you last night and continue to emphasize to you today, it is important that you decide this case based solely on the evidence and the law presented here. So you must not learn any additional information about the case from sources outside the courtroom. To ensure fairness to all parties in this trial, I will now ask each of you whether you have learned about or shared any information about this case outside of this courtroom, even if it was accidental.

If you think you might have done so, please let me know now by raising your hand. [Wait for a show of hands.] I see no raised hands; however, if you would prefer to talk to a member of the court's staff privately in response to this question, please do so at the next break. Thank you for your careful adherence to my instructions.

[Suggested instruction to explain why jurors should not do their own research, to include in paragraph E, Conduct of the Jury, *supra*:]

2. Judges may provide instructions before or after closing arguments, or both. *See* Fed. R. Crim. P. 30(c).
3. *See* "Proposed Model Jury Instructions," *supra* note 1.
4. *Id.*

The parties have a right to have this case decided only on evidence they know about and that has been presented here in court. If you do some research, investigation, or experiment that we don't know about, then your verdict may be influenced by inaccurate, incomplete, or misleading information that has not been tested by the trial process. The information you will see and hear in this courtroom, on the other hand, has to meet rigorous standards for truthfulness and reliability. We have rules of evidence that are designed to "ascertain the truth and secure a just determination." Witnesses are sworn to tell the truth and may be punished for perjury if they do not. Experts must be qualified, evidence must be authenticated, and each party has the opportunity to challenge the other's claims and evidence. What you might see on the internet or learn from some other news source or social media has few, if any, of these measures of trustworthiness. This includes anything said or written by the parties in this case outside of the courtroom, before or during the trial. Any such statements or writings are not made under oath, are not subject to cross-examination, verification, or the rules of evidence, may even be intentionally untruthful, and must not be considered during your deliberations.

If you decide a case based on information not presented in court, you will have denied the parties a fair trial in accordance with the rules of this country and you will have done an injustice. The parties understand what evidence I will allow during the trial before the trial starts and they have worked hard to prepare for trial, including addressing how this evidence may affect their case. If you do outside research, the parties will have no idea what you have found and will have no ability to help you to properly assess this information. That removes the level playing field that the parties and society expect during a trial. It is very important that you abide by these rules. Failure to follow these instructions could result in an unjust verdict or the case having to be retried.

## For Further Reference

- Pattern Criminal Jury Instructions 1–10 (1987)
- For a discussion of techniques for assisting the jury in civil trials, some of which may also be helpful in criminal trials, see Civil Litigation Management Manual 106–09 (Judicial Conference of the United States, 3d ed. 2022) and Manual for Complex Litigation, Fourth 154–60 (2004)
- For a discussion of jury-related problems in criminal cases, see Manual on Recurring Problems in Criminal Trials 9–22 (Tucker Carrington & Kris Markarian eds., 6th ed. 2010)
- Amy J. St. Eve, Charles P. Burns & Michael A. Zuckerman, *More from the #Jury Box: The Latest on Juries and Social Media*, 12 Duke L. & Tech. Rev. 64, 89 (2014).
- Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 Duke L. & Tech. Rev. 1, 14 (2012).

# 2.08 General Instructions to Jury at End of Criminal Case

*Fed. R. Crim. P. 30*

## *Introductory Note*

Fed. R. Crim. P. 30 outlines the procedure for the submission and consideration of the parties' requests for specific jury instructions. It requires

1. that the court inform the parties before closing arguments of its proposed action upon the instructions requested by counsel; and
2. that the court give counsel adequate opportunity to object to the court's instructions outside the hearing of the jury or, if requested, outside the presence of the jury.

There is no prescribed method for the court to settle on its final set of instructions. Some courts hold an on-the-record charge conference with counsel during trial. At that conference the tendered instructions are discussed and are accepted, rejected, or modified by the court.

Other courts, without holding a charge conference, prepare a set of proposed instructions from those tendered by counsel. These courts then give a copy of the proposed instructions to all counsel and permit counsel to take exception to the instructions. Thereafter, the court may revise its instructions if convinced by counsel's objections that the instructions should be modified.

Still other courts require counsel to confer during trial and to agree, to the extent that they can, on the instructions that should be given. The court then considers only those instructions upon which the parties cannot agree.

The court may, of course, give an instruction to the jury that neither party has tendered.

While the court is free to ignore tendered instructions and to instruct the jury sua sponte, the usual practice is for the court to formulate the final instructions with the assistance of counsel and principally from the instructions counsel tendered.

Local practice varies as to whether a written copy of the instructions is given to the jury for use during its deliberations. Many courts always give the jury a written copy of the instructions. Some courts have the instructions recorded as they are given in court and permit the jury to play them back in the jury room. Some courts do neither but will repeat some or all of the instructions in response to a request from the jury.

Note that the court may instruct the jury either before or after closing arguments, or at both times. Fed. R. Crim. P. 30(c).

## *Outline of Instructions*

Instructions delivered at the end of a case consist of three parts: first, general rules that define and control the jury's duties in a criminal case; second, definitions of the elements of the offenses charged in the indictment (information); third, rules and guidelines for jury deliberation and return of verdict. Many circuits have developed model or pattern jury instructions, and judges should consult the instructions that have been prepared for use in their circuits.

A. General rules

1. Outline the duty of the jury:

(a) to find the facts from admitted evidence;

(b) to apply the law as given by the court to facts as found by the jury; and

(c) to decide the case on the evidence and the law, regardless of personal opinions and without bias, prejudice, or sympathy.

2. Clearly enunciate the three basic rules in a criminal case:

(a) presumption of innocence;

(b) burden of proof on government; and

(c) proof beyond a reasonable doubt.

3. Indicate the evidence to be considered:

(a) sworn testimony of witnesses;

(b) exhibits;

(c) stipulations; and

(d) facts judicially noticed.

4. Indicate what is not evidence:

(a) arguments and statements of counsel;

(b) questions to witnesses;

(c) evidence excluded by rulings of the court; and

(d) indictment (information).

B. Define with precision and with specific consideration of the law of your circuit the elements of each offense to be submitted to the jury and of each defense the jury is to consider.

C. Jury procedure

1. Explain the selection and duty of the foreperson.

2. Explain the process of jury deliberation:

(a) rational discussion of the evidence by all jurors for the purpose of reaching a unanimous verdict;

(b) each juror is to decide the case for himself or herself in the context of the evidence and the law, with proper consideration of other jurors' views;

(c) jurors may reconsider their views if persuaded by rational discussion but not solely for the sake of reaching a unanimous verdict.

3. The verdict must be unanimous on each count (explain verdict form if used).[1]

4. The jury's communications with the court during deliberations must be in writing and signed by the foreperson.

1. If special verdict forms or jury interrogatories are used, instruct the jury on how to answer them. Such devices should be used with caution, but they may be useful in multidefendant or other complex cases, or where jury findings (e.g., drug weights) affect statutory maximums. Note that special verdicts and jury interrogatories in criminal cases are not covered by the criminal rules of procedure or by statute, so the court should be familiar with the law of its circuit.

5. The jury must not disclose how it stands numerically or otherwise on the question of guilt or innocence.

6. Consider giving the jury the following instruction at the close of the case[2]:

> Throughout your deliberations, you may discuss with each other the evidence and the law that has been presented in this case, but you must not communicate with anyone else by any means about the case. You also cannot learn from outside sources about the case, the matters in the case, the legal issues in the case, or individuals or other entities involved in the case. This means you may not use any electronic device or media (such as a phone, computer, or tablet), the internet, any text or instant messaging service, or any social media apps (such as X (formerly Twitter), Facebook, Instagram, LinkedIn, YouTube, WhatsApp, and Snapchat) to research or communicate about what you've seen and heard in this courtroom.
>
> These restrictions continue during deliberations because it is essential, under our Constitution, that you decide this case based solely on the evidence and law presented in this courtroom. Information you find on the internet or through social media might be incomplete, misleading, or inaccurate. And, as I noted in my instructions at the start of the trial, even using your smartphones, tablets, and computers—and the news and social media apps on those devices—may inadvertently expose you to certain notices, such as pop-ups or advertisements, that could influence your consideration of the matters you've heard about in this courtroom.
>
> You are permitted to discuss the case with only your fellow jurors during deliberations because they have seen and heard the same evidence and instructions on the law that you have, and it is important that you decide this case solely on the evidence presented during the trial, without undue influence by anything or anyone outside of the courtroom. For this reason, I expect you to inform me at the earliest opportunity, should you learn about or share any information about this case outside of this courtroom or the jury room, or learn that another juror has done so.
>
> Any juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result, which would require the entire trial process to start over.

D. Consider providing the jury with a written copy or transcript of the jury instructions.

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2. The following instruction is from the "Proposed Model Jury Instructions: The Use of Electronic Technology to Learn or Communicate about a Case," prepared by the Judicial Conference Committee on Court Administration and Case Management (Updated June 2020). *See also* Memorandum, "Updated Model Jury Instructions on Social Media and Other Communications" from Judge Audrey G. Fleissig, Chair, Committee on Court Administration and Case Management (Sept. 1, 2020), https://jnet.ao.dcn/sites/default/files/pdf/DIR20-163.pdf; Meghan Dunn, Federal Judicial Center, *Strategies for Preventing Jurors' Use of Social Media During Trials and Deliberations*, *in* Jurors' Use of Social Media During Trials and Deliberations: A Report to the Judicial Conference Committee on Court Administration and Case Management 5–11 (2011), https://fjc.dcn/sites/default/files/2012/DunnJuror.pdf..

## Other FJC Sources

- Pattern Criminal Jury Instructions (1987)
- For a discussion of techniques for assisting the jury in civil trials, some of which may also be helpful in criminal trials, see Civil Litigation Management Manual 106–09 (Judicial Conference of the United States, 3d ed. 2022) and Manual for Complex Litigation, Fourth 154–60 (2004)
- For a discussion of jury-related issues in criminal cases, see Manual on Recurring Problems in Criminal Trials 9–22 (Tucker Carrington & Kris Markarian eds., 6th ed. 2010)

# 2.09 Verdict—Criminal

*Fed. R. Crim. P. 31, 43*

A. Reception of unsealed verdict

1. Upon announcement by the jury that it has reached a verdict, have all interested parties convene in open court to receive the verdict. The presence of the defendant(s) is required under Fed. R. Crim. P. 43(a), unless one of the exceptions in Fed. R. Crim. P. 43(b) or (c) applies. Any victims of the offense should be given "reasonable, accurate, and timely notice" of the return of verdict so that they can be present. See 18 U.S.C. § 3771(a)(2) and (3).
2. When court is convened, announce that the jury is ready to return its verdict(s), and instruct the deputy marshal (or bailiff) to have the jurors enter and assume their seats in the jury box.
3. If not already known, inquire of the jury who speaks as its foreperson.
4. Ask the foreperson if the jury has unanimously agreed on its verdict. [*Note:* If the response is anything other than an unqualified yes, the jury should be returned without further inquiry to continue its deliberations.]
5. Instruct the foreperson to hand the verdict form(s) to the clerk to be delivered to you for inspection before publication.
6. Inspect the verdict form(s) carefully to ensure regularity. [*Note:* If the verdict form(s) is (are) not properly completed, take appropriate corrective action before publication.][1]

1. If the jury returns an improper verdict, such as an incorrect or incomplete verdict form or an inconsistent verdict, and the jury has not been discharged or, if discharged, has not dispersed and has had "no opportunity to mingle with or discuss the case with others," the court may instruct the jury to correct the form, reinstruct the jury as to proper procedure, poll the jurors, and if necessary order the jury to deliberate further: "Until the jury is actually discharged by separating or dispersing (not merely being declared discharged), the verdict remains subject to review." United States v. Marinari, 32 F.3d 1209, 1214 (7th Cir. 1994). *See also* United States v. Figueroa, 683 F.3d 69, 72–73 (3d Cir. 2012) (jurors reached a decision on three counts but count 4 was never presented to them before their dismissal; because jurors had not yet dispersed or become "subject . . . to outside influence," court could rescind the dismissal, reconvene the jury, and instruct it to consider count 4); United States v. Rojas, 617 F.3d 669, 677–78 (2d Cir. 2010) (court may recall a jury "that has been declared 'discharged,' but which has not dispersed," and return it "to the courtroom to correct a technical error that occurred during the initial reading of its written verdict"). In such cases, the court should "evaluate the specific scenario presented in order to determine whether recalling the jury would result in prejudice to the defendant or undermine the confidence of the court—or of the public—in the verdict." *Id.* at 677.

However, if the jury returns an inconsistent verdict that includes an acquittal: "An acquittal is an acquittal [and] our cases prohibit *any* speculation about the reasons for a jury's verdict—even when there are specific jury findings that provide a factual basis for such speculation." McElrath v. Georgia, 601 U.S. 87, 97 (2024) (emphasis in original). *But cf.* United States v. McCaleb, 552 F.3d 1053, 1058 (9th Cir. 2009) (where verdict is ambiguous, here convicting defendant on Count 1 *and* its lesser-included offense, the court may either "treat the guilty verdict on the lesser-included offense as surplusage" or "ask[] the jury to clarify its verdict"—district courts "'may ask the jury to clarify an inconsistent or ambiguous verdict'") (citation omitted). Note that the discussion of these matters should be on the record. Note also that, although the Supreme Court held in a civil case that courts have "the inherent power to rescind a jury discharge order and recall a jury for further deliberations after identifying an error in the jury's verdict," it did "not address here whether it would be appropriate to recall a jury after discharge in a criminal case." *Dietz v. Bouldin*, 579 U.S. 40, 42, 51 (2016).

7. Explain to the jurors that their verdict(s) will now be "published"—that is, read aloud in open court.
8. Instruct the jury to pay close attention as the verdict(s) is (are) published; explain that, following publication, the jury may be "polled"—that each juror may be asked, individually, whether the verdict(s) as published constituted the juror's individual verdict(s) in all respects.
9. Publish the verdict(s) by reading it (them) aloud (or by having the clerk do so).
10. If either party requests, or on your own motion, poll the jury by asking (or by having the clerk ask) each juror, by name or number, whether the verdict(s) as published constituted the juror's individual verdict(s) in all respects. (Fed. R. Crim. P. 31(d) requires polling upon request.)
11. If polling verifies unanimity, direct the clerk to file and record the verdict, and discharge the jurors with appropriate instructions concerning their future service, if any.
12. If polling results in any doubt as to unanimity, make no further inquiry and have no further discussions with the jury; rather, confer privately, on the record, with counsel and determine whether the jury should be returned for further deliberations or a mistrial should be declared. See Fed. R. Crim. P. 26.3 (must allow parties to comment on possibility of mistrial and suggest alternatives).

B. Reception of sealed verdict

In some cases, a sealed verdict may be delivered to the clerk for subsequent "reception" and publication in open court when the jury, the judge, and all necessary parties are present. For example, on some occasions an indispensable party may not be available to receive a verdict when the jury reaches agreement. This may occur when the jury reaches its verdict late in the evening, a defendant is absent from the courtroom because of illness, or the judge is unavailable. In these instances, the verdict may be sealed and the jurors allowed to return home. A sealed verdict may also be appropriate when the jury reaches a verdict as to one defendant but not as to another or when the jury wishes to return a partial verdict.

1. Upon announcement by the jury that it has reached a verdict, have all interested and available parties convene in open court and on the record. The presence of the defendant(s) is required under Fed. R. Crim. P. 43(a), unless one of the exceptions in Fed. R. Crim. P. 43(b) or (c) applies. Any victims of the offense should be given "reasonable, accurate, and timely notice" of the return of verdict so that they can be present. See 18 U.S.C. § 3771(a)(2) and (3).
2. When court is thus convened, announce that the jury is ready to return its verdict(s) and explain that a sealed verdict will be taken in accordance with the following procedure:
   (a) Instruct the deputy marshal (or bailiff) to usher the jurors into the courtroom to assume their seats in the jury box.
   (b) If not already known, inquire of the jury who speaks for it as its foreperson.
   (c) Ask the foreperson if the jury has unanimously agreed on its verdict.

   [*Note:* If the response is anything other than an unqualified yes, the jury should be returned without further inquiry to continue its deliberations.]

   (d) Poll the jurors individually on the record.

(e) Explain to the jury that a sealed verdict will be taken, and further explain why that procedure has become necessary in the case.

(f) Direct the clerk to hand a suitable envelope to the foreperson. Instruct the foreperson to place the verdict form(s) in the envelope, to seal the envelope, and to hand it to the clerk for safekeeping.

[*Note:* In the event the jury will not be present at the opening of the verdict, it is recommended that each juror sign the verdict form(s).]

(g) Recess the proceedings, instructing the jury and all interested parties to return at a fixed time for the opening and formal reception of the verdict. Instruct that, in the interim, no member of the jury should have any conversation with any other person, including any other juror, concerning the verdict or any other aspect of the case.

(h) When court is again convened for reception of the verdict, have the clerk hand the sealed envelope to the jury foreperson.

(i) Instruct the foreperson to open the envelope and verify that the contents consist of the jury's verdict form(s) without modification or alteration of any kind.

(j) Follow the steps or procedures outlined in paragraphs A.5 through A.12, *supra*.

## Other FJC Sources

- Manual on Recurring Problems in Criminal Trials 72–74 (Tucker Carrington & Kris Markarian eds., 6th ed. 2010)

# 2.10 Trial and Post-Trial Motions

*Fed. R. Crim. P. 29, 33, 34, 45(b)*

Motions for extending the time to file under these rules are now covered by Fed. R. Crim. P. 45(b). Previously, Rules 29, 33, and 34 allowed a court to extend the time to make a motion under these rules only if it acted within the seven-day period the defendant had to file the motion or seek an extension. Under Rules 29, 32, and 33, defendants may file these motions within 14 days following a guilty verdict or the jury is discharged, whichever is later.

Also note that if the motion occurs during a "public court proceeding," any victims of the offense must be notified and allowed to attend. If the motion is granted and the defendant might be released, victims would have the right to "be reasonably heard." See 18 U.S.C. § 3771(a)(2)–(4).

The case law on this subject will vary from circuit to circuit. The procedure suggested here may be varied to conform with the law of the circuit, the practice of the district, and the preferences of the individual judge.

## *A. Fed. R. Crim. P. 29—Motion for Judgment of Acquittal*

1. Timing

   (a) The motion may be made by the defendant or the court before submission to the jury, after the evidence on either side is closed. Fed. R. Crim. P. 29(a).

   (b) The motion may also be made or renewed (if the court earlier reserved decision under Fed. R. Crim. P. 29(b)) within 14 days of a guilty verdict or discharge of the jury, whichever is later, or within such further time as the court may fix. Fed. R. Crim. P. 29(c)(1) and 45(b); *Carlisle v. United States*, 517 U.S. 416 (1996).

   (c) Failure to make a Rule 29 motion prior to submission of the case to the jury does not waive the defendant's right to move after the jury returns a guilty verdict or is discharged without reaching a verdict. Fed. R. Crim. P. 29(c)(3).

2. Procedure

   (a) The motion should be heard out of the presence of the jury. Whether an oral hearing will be held or the motion will be decided on written submissions alone is a matter within the court's discretion. If the court reserved decision on a motion that is later renewed, "it must decide the motion on the basis of the evidence at the time the ruling was reserved." Fed. R. Crim. P. 29(b).

   (b) If the defendant moves for a judgment of acquittal, but not for a new trial under Fed. R. Crim. P. 33, the district court may not grant a new trial in lieu of granting the motion for judgment of acquittal. If the motion for acquittal is granted and the defendant has moved for a new trial, the court must conditionally determine whether any motion for new trial should be granted in case the judgment of acquittal is vacated or reversed on appeal. The reasons for that determination must be specified. See Fed. R. Crim. P. 29(d)(1).

   (c) When the court grants a motion for judgment of acquittal, it should consider whether the evidence was sufficient to sustain conviction of a lesser offense necessarily included in the offense charged.

3. Standard

(a) The motion shall be granted for "any offense for which the evidence is insufficient to sustain a conviction." Fed. R. Crim. P. 29(a).

(b) In resolving the motion, the court should not assess the credibility of witnesses, weigh the evidence, or draw inferences of fact from the evidence.[1] The role of the court is simply to decide whether the evidence viewed in the light most favorable to the government was sufficient for any rational trier of fact to find guilt beyond a reasonable doubt.

*Caution:* Consult your circuit's law for any special rules governing consideration of the evidence.

## *B. Fed. R. Crim. P. 33—Motion for New Trial*

1. Timing

Except as noted below with respect to newly discovered evidence, the motion must be made within 14 days after a verdict or finding of guilty, *unless* the court fixes a longer period. Fed. R. Crim. P. 33(b)(2).

*Exception:* A motion for a new trial based on newly discovered evidence may be made only within three years after the verdict or finding of guilty. If made during the pendency of an appeal, the motion may be granted only if the case is remanded. Fed. R. Crim. P. 33(b)(1).

2. Procedure

Whether an oral hearing will be held or the motion will be decided on written submissions alone is a matter within the discretion of the court. The propriety of holding a hearing will depend necessarily on the grounds invoked. This motion may be made only by the defendant and cannot be granted by the court sua sponte. Fed. R. Crim. P. 33(a).

3. Standard

(a) Any alleged error in the trial that could be raised on appeal may be raised on a motion for a new trial, and the motion may be granted "if the interest of justice so requires," that is, if letting the verdict stand would result in a miscarriage of justice. Fed. R. Crim. P. 33(a).

(b) When the motion for a new trial is made on the ground that the verdict is contrary to the weight of the evidence, the motion should be granted only in exceptional cases where the evidence preponderates heavily against the verdict. Unlike a motion for judgment of acquittal, a motion for a new trial does not require the court to view the evidence in the light most favorable to the government. Some circuits hold that the court has broad power to weigh the evidence and consider the credibility of witnesses. However, other circuits reject the idea of the court as a "thirteenth juror" and limit the extent to which courts may reweigh the evidence. Courts should look to the law of their circuit on this issue.

(c) For a motion based on newly discovered evidence, a defendant must show that the evidence is newly discovered and was unknown to the defendant at the time of trial;

1. Of course, these restrictions do not apply in a bench trial. However, the standard for deciding the motion remains the same.

failure to discover the evidence sooner was not due to lack of diligence by the defendant; the evidence is material, not merely cumulative or impeaching; and the new evidence would likely lead to acquittal at a new trial. Many circuits have held that such motions are disfavored and should be granted with caution.

4. Findings and conclusions

The court's findings and conclusions should be placed on the record. An order denying a new trial is appealable as a final decision under 28 U.S.C. § 1291. An order granting a new trial may be appealed by the government under 18 U.S.C. § 3731.

### *C. Fed. R. Crim. P. 34—Motion for Arrest of Judgment*

1. Timing

The motion must be made within 14 days after a verdict or finding of guilty, or after a plea of guilty or nolo contendere, *unless* the court fixes a longer period.

2. Procedure

Whether an oral hearing will be held or the motion will be decided on written submissions alone is a matter within the discretion of the court. Despite the fact that this motion raises jurisdictional issues, after trial it cannot be granted by the court sua sponte but may only be made by the defendant. Compare Fed. R. Crim. P. 12(b)(2) (same issues raised here may be raised pretrial by either the defendant *or* the court).

3. Standard

The motion is resolved upon examination of the "record" (i.e., the indictment or information, the plea or the verdict, and the sentence). The court does not consider the evidence produced at trial. A motion for arrest of judgment is based only on a claim that the court was without jurisdiction over the offense charged. Fed. R. Crim. P. 34(a)(1). Previously, Rule 34 included claims that the indictment or information does not charge an offense, but after 2014 amendments that motion is now under Rule 29(b)(3)(B) and must be made before trial.

## Other FJC Sources

- For a discussion of techniques in managing motions in civil trials, some of which may be helpful in criminal trials, see Civil Litigation Management Manual 49–69 (Judicial Conference of the United States, 3d ed. 2022)
- Manual on Recurring Problems in Criminal Trials 73 (Tucker Carrington & Kris Markarian eds., 6th ed. 2010)

# 2.11 Release or Detention Pending Sentence or Appeal

*18 U.S.C. §§ 3142, 3143, 3145; Fed. R. Crim. P. 46; Fed. R. App. P. 9*

## *A. Release or Detention Pending Imposition or Execution of Sentence*

1. If the defendant was in custody at the time of sentencing, there will ordinarily be no question of release after sentencing to a term of imprisonment.
2. If the defendant was at liberty at the time of sentencing, invite counsel for the defendant to address the question of whether continued release is appropriate. Invite counsel for the government to respond. If any victims of the offense are present, give them the opportunity "to be reasonably heard." 18 U.S.C. § 3771(a)(4).
3. Except for those individuals subject to paragraph 4 below, a person may be released while awaiting imposition or execution of sentence only if the judge finds "by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community." 18 U.S.C. § 3143(a)(1). "The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant." Fed. R. Crim. P. 46(c).

   A defendant's successful period of pretrial release, especially a lengthy period,[1] and evidence of pretrial rehabilitative efforts,[2] may be considered by the court when determining whether the defendant represents a risk of nonappearance or danger to the community.

   Release shall be in accordance with the provisions of 18 U.S.C. § 3142(b) or (c) (governing release pending trial). See section 1.03, *supra*, at II, Release: Procedure and Requirements. This authority may be used to permit an offender to surrender at a Bureau of Prisons institution as well as to permit a delay before a defendant begins to serve the sentence.[3]
4. Persons convicted of an offense listed in 18 U.S.C. § 3142(f)(1)(A)–(C)—a crime of violence or a drug offense for which the maximum term of imprisonment is ten years or

1. Note that as of September 30, 2024, the *average* length of pretrial detention was 353 days. *See* Admin. Office of the U.S. Courts, Table H-9A, U.S. District Courts—Pretrial Services Detention Summary: Days, Average and Median for the 12-Month Period Ending September 30, 2024, https://www.uscourts.gov/data-news/data-tables/2024/09/30/judicial-business/h-9a.

2. Under 18 U.S.C. § 3553(a), "Pre-sentence Rehabilitation/Potential for Future Rehabilitation" and "Conduct Pre-trial/On Bond" may be considered as reasons for a non-guidelines sentence. *See* Form AO 245B: Judgment in a Criminal Case (revised Nov. 2025), Statement of Reasons attachment at "VI. Court Reasons for Imposing a Sentence Outside the Guideline Range." Section 3143(a) has not been revised since the Sentencing Guidelines became advisory rather than mandatory, and only includes an exception when "the applicable guideline . . . does not recommend a sentence of imprisonment." However, courts should consider the possibility that some defendants may avoid a sentence of imprisonment because successful pretrial release could allow for a downward variance to a sentence of probation or home confinement, a possibility that § 3143(a) does not account for.

3. *See also* S. Rep. No. 98-225, at 26 (1983), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3209 (under § 3143(a), a defendant awaiting execution of sentence "may be released in appropriate circumstances for short periods of time after sentence, when there is no appeal pending, for such matters as getting his affairs in order prior to surrendering for service of sentence").

more, or an offense punishable by life imprisonment or death—shall not be released pending imposition or execution of sentence unless the judge finds by clear and convincing evidence that the person is not likely to flee or to pose a danger to any other person or the community, *and* (i) there is a substantial likelihood that a motion for acquittal or new trial will be granted or (ii) an attorney for the government has recommended that no sentence of imprisonment be imposed upon the person. 18 U.S.C. § 3143(a)(2). Release with "appropriate conditions" may also be authorized "if it is clearly shown that there are exceptional reasons why such person's detention would not be appropriate." See 18 U.S.C. § 3145(c).[4]

## *B. Release or Detention Pending Appeal by the Defendant*

1. Except for those individuals subject to paragraph 2 below, if the defendant appeals, they may be released pending appeal *only* if the judge finds

   (A) by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released under section 3142(b) or (c) of this title; and

   (B) that the appeal is not for purpose of delay and raises a substantial question[5] of law or fact likely to result[6] in—

   (i) reversal,

   (ii) an order for a new trial,

   (iii) a sentence that does not include a term of imprisonment, or

   (iv) a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process.

   18 U.S.C. § 3143(b).

   Release under § 3143(b) shall be in accordance with the provisions of 18 U.S.C. § 3142(b) or (c) (governing release pending trial). See *supra* section 1.03: Release or Detention Pending Trial at II, Release: Procedure and Requirements. If the defendant is to

4. *See* Jefri Wood, The Bail Reform Act of 1984 64–65 (Federal Judicial Center, 4th ed. 2022) (discussing "exceptional reasons" and citing cases).

5. A "substantial question" has been defined differently by different circuits. *Compare* United States v. Giancola, 754 F.2d 898, 900–01 (11th Cir. 1985) (per curiam) ("a 'close' question or one that very well could be decided the other way"), *with* United States v. Handy, 761 F.2d 1279, 1281–83 (9th Cir. 1985) ("fairly debatable"). Most circuits that have considered the issue have followed *Giancola:* United States v. Steinhorn, 927 F.2d 195, 196 (4th Cir. 1991); United States v. Perholtz, 836 F.2d 554, 555 (D.C. Cir. 1987) (per curiam); United States v. Shoffner, 791 F.2d 586, 589–90 (7th Cir. 1986) (per curiam); United States v. Pollard, 778 F.2d 1177, 1182 (6th Cir. 1985); United States v. Bayko, 774 F.2d 516, 523 (1st Cir. 1985); United States v. Powell, 761 F.2d 1227, 1231–34 (8th Cir. 1985) (en banc); United States v. Valera-Elizondo, 761 F.2d 1020, 1024–25 (5th Cir. 1985); United States v. Affleck, 765 F.2d 944, 952 (10th Cir. 1985) (en banc). The Third Circuit has followed *Handy*, which is generally regarded as posing less of a barrier to the appellant seeking release. United States v. Smith, 793 F.2d 85, 89–90 (3d Cir. 1986). The Second Circuit has expressed the view that the two standards are not significantly different but has indicated a preference for the *Giancola* formulation. United States v. Randell, 761 F.2d 122, 125 (2d Cir. 1985).

6. "Likely to result" means likely to result if the defendant prevails on the substantial question. United States v. Miller, 753 F.2d 19, 23 (3d Cir. 1985), and cases cited *supra* note 5. A substantial question concerning only harmless error would not meet this requirement. "Likely" has been defined by some circuits as "more probable than not." *Bayko*, 774 F.2d at 522; *Valera-Elizondo*, 761 F.2d at 1024–25; *Pollard*, 778 F.2d at 1182; United States v. Bilanzich, 771 F.2d 292, 299 (7th Cir. 1985); *Powell*, 761 F.2d at 1232–34. *See also* discussion in The Bail Reform Act of 1984, 4th ed., *supra* note 4, at 63–64.

be released because of the likelihood of a reduced sentence under § 3143(b)(1)(B)(iv), "the judicial officer shall order the detention terminated at the expiration of the likely reduced sentence."

If any victims of the offense are present, they must be given the opportunity "to be reasonably heard" regarding the release of the defendant. 18 U.S.C. § 3771(a)(4).

2. Detention is mandatory for persons appealing from a sentence to a term of imprisonment for an offense listed in 18 U.S.C. § 3142(f)(1)(A)–(C), i.e., a crime of violence or a drug offense for which the maximum term of imprisonment is ten years or more, or an offense punishable by life imprisonment or death. 18 U.S.C. § 3143(b)(2). Release with "appropriate conditions" may be authorized, however, for "exceptional reasons." See 18 U.S.C. § 3145(c).

### *C. Release or Detention Pending Appeal by the Government*

1. After sentence of imprisonment: If the defendant does not appeal and the government appeals a sentence pursuant to 18 U.S.C. § 3742(b), release pending appeal may not be granted. 18 U.S.C. § 3143(c)(1).
2. After sentence not including imprisonment: If the government appeals pursuant to 18 U.S.C. § 3742(b) from a nonprison sentence, the government should move for a redetermination of the defendant's status. Release or detention is to be determined in accordance with 18 U.S.C. § 3142 (governing release or detention pending trial). 18 U.S.C. § 3143(c)(2); see *supra* section 1.03: Release or Detention Pending Trial. Place the reasons for the determination on the record. If any victims of the offense are in the courtroom, they must be given the opportunity "to be reasonably heard" regarding the release of the defendant. 18 U.S.C. § 3771(a)(4).
3. Note that, except for a sentence imposed by a magistrate judge, the government's appeal must be approved personally by the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General. 18 U.S.C. § 3742(b) and (h).

### *D. Burden of Proof*

"The burden of establishing that the defendant will not flee or pose a danger to any other person or to the community rests with the defendant." Fed. R. Crim. P. 46(c). The rules of evidence do not apply. Fed. R. Evid. 1101(d)(3). A testimonial hearing may be required. If there are any victims of the offense, they must be provided notice of such a hearing, allowed to attend, and be given an opportunity "to be reasonably heard." 18 U.S.C. § 3771(a)(2)–(4).

### *E. Written Order Required*

If the defendant is detained or conditions of release are imposed, the reasons must be stated in writing or on the record. Fed. R. App. P. 9(b). See also 18 U.S.C. § 3142(h) (court must include a written statement of all conditions of release). If the defendant is released over the government's objection, reasons should be placed on the record to facilitate appellate review.

## Other FJC Sources

- Jefri Wood, *The Bail Reform Act of 1984* 59–65 (Federal Judicial Center, 4th ed. 2022).

# 3.01 Death Penalty Procedures

*18 U.S.C. §§ 3005, 3591–3599*

The Federal Death Penalty Act of 1994 (FDPA) established procedures for imposing any death penalty under federal law (except for prosecutions under the Uniform Code of Military Justice). See 18 U.S.C. §§ 3591–3599. This section provides an outline of procedures applicable to cases where the death penalty could be imposed. Capital cases are highly specialized, extraordinarily demanding, and known to raise numerous complex issues that require skilled attorneys and careful analysis. However, as the Cardone Report found, "[m]any federal judges are not familiar with the nature of criminal defense and are even less knowledgeable about what it takes to provide a strong defense in a death penalty case, because these cases are relatively rare."[1] As a result:

> Lacking capital experience, many judges may also be unaware of the need for extensive investigative, mitigation, and other expert assistance in both capital prosecutions and habeas petitions. The same lack of experience also hampers a judge's ability to evaluate requests to fund these services, sometimes resulting in significant delays. . . . Lack of knowledge among federal judges can have serious consequences when it leads to appointment of poorly-qualified counsel or failure to approve adequate expert assistance or to do so in a timely fashion.[2]

The following outline provides basic guidance for judges presiding over capital cases regarding the appointment and compensation of counsel, the Department of Justice (DOJ) Death Penalty Authorization Protocol, jury selection and instruction, statutory requirements, and case law, and also offers links to additional reference materials that cover these and other matters judges may face in a capital prosecution. Note: This section does not cover federal death penalty appeals or habeas corpus review of state[3] or federal capital convictions.

## Guidance and Resources

Judges who have a potential death penalty case must familiarize themselves with the *Guide to Judiciary Policy* Vol. 7A: Defender Services, Ch. 6: Federal Death Penalty and Capital Habeas Corpus Representations. This chapter of Volume 7A contains federal judicial policy and recommendations of the Judicial Conference of the United States on the appointment and compensation of counsel in federal death penalty cases. Appendix 2A of Volume 7A sets forth the "Model Plan for Implementation and Administration of the Criminal Justice Act" [hereinafter

1. 2017 Report of the Ad Hoc Committee to Review the Criminal Justice Act 195 (2018) [hereinafter Cardone Report], https://cjastudy.fd.org.

2. *Id*. at 195–96. Chief Justice John G. Roberts tasked the Ad Hoc Committee, which was chaired by the Hon. Kathleen Cardone (W.D. Tex.), with "studying the current quality of public defense in federal courts nationwide provided under the auspices of the Criminal Justice Act." Following seven hearings around the United States with more than 200 witnesses and over 2,300 pages of written testimony, the Committee made a series of recommendations for the more effective delivery of representation under the Sixth Amendment and the Criminal Justice Act, including in capital cases. *See* the Committee's Executive Summary, https://cjastudy.fd.org/sites/default/files/public-resources/2017-final-report-ad-hoc-committee-review-cja/ad-hoc-report-exec-summary2018.pdf.

3. For information on federal habeas review of state capital cases, see Asifa Quraishi, Resource Guide for Managing Capital Cases, Volume II: Habeas Corpus Review of Capital Convictions (Federal Judicial Center 2010), https://fjc.dcn/sites/default/files/2012/Hab10-00.pdf, and Kristine M. Fox, Capital § 2254 Habeas Cases: A Pocket Guide for Judges (Federal Judicial Center 2012), https://fjc.dcn/sites/default/files/2012/Cap2254Hab.pdf.

referred to as Model Plan], which "is intended to provide guidance in the implementation and administration of the Criminal Justice Act, as required under 18 U.S.C. § 3006A(b). This reflects the policies of the Judicial Conference of the United States provided in *Guide to Judiciary Policy*, Vol. 7A."[4] Section XIV of the Model Plan covers "Appointment of Counsel and Case Management in CJA Capital Cases," and advises courts to make use of the federal judiciary's resource counsel, who provide specialized expert services in capital cases:

> Given the complex and demanding nature of capital cases, where appropriate, the court will utilize the expert services available through the Administrative Office of the U.S. Courts (AO), Defender Services Death Penalty Resource Counsel projects ("Resource Counsel projects"), which include: (1) Federal Death Penalty Resource Counsel and Capital Resource Counsel Projects (for federal capital trials), (2) Federal Capital Appellate Resource Counsel Project, (3) Federal Capital Habeas § 2255 Project, and (4) National and Regional Habeas Assistance and Training Counsel Projects (§ 2254). *These counsel are death penalty experts who may be relied upon by the court for assistance with selection and appointment of counsel, case budgeting, and legal, practical, and other matters arising in federal capital cases.*[5]

The Model Plan also states that "capital cases should be budgeted with the assistance of case-budgeting attorneys and/or resource counsel where appropriate," and that "[q]uestions about the appointment and compensation of counsel and the authorization and payment of investigative, expert, and other service providers in federal capital cases should be directed to the AO's Defender Services Office."[6]

Volume 7A of the *Guide to Judiciary Policy* also contains Appendix 6A: "Recommendations & Commentary Concerning the Cost and Quality of Defense Representation (Updated Spencer Report, September 2010)" [hereinafter Spencer Report Update]. This Appendix includes the eleven recommendations from the May 1998 Spencer Report that were adopted by the Judicial Conference, plus revised commentary from a 2010 update of the report.[7] The Spencer Report provides "[d]etailed recommendations on the appointment and compensation of counsel in federal death penalty cases," while the revised commentary "provides practical information that is useful to judges and appointed counsel in the management of a federal death penalty case."[8]

Judges should also consider reviewing Section 9: Capital Representation, of the Cardone Report,[9] and the chapter on capital cases in the Federal Judicial Center's study of the Cardone

4. *See* Admin. Office of the U.S. Courts, Guide to Judiciary Policy vol. 7A, https://www.uscourts.gov/sites/default/files/guide-vol07a.pdf. The Model Plan is available separately at https://www.uscourts.gov/file/2795/download.

5. Model Plan, *supra* note 4, at § XIV.B.4 (emphasis added). *See also* Blair Perilman & Cari Dangerfield Waters, Presiding Over District Court Cases with Appointed Criminal Justice Act (CJA) Counsel: A Handbook for New Judges 11 (June 2019) (see section IV, Additional Information Regarding Capital Representations, discussing resources for judges), https://fjc.dcn/sites/default/files/session/2023/New%20Judges%20CJA%20Handbook.pdf.

6. Model Plan, *supra* note 4, at § XIV.B.13–14. The Legal and Policy Division Duty Attorney of the Defenders Services Office may be reached at 202-502-3030 or by email at dso_lpd@ao.uscourts.gov.

7. Guide to Judiciary Policy vol. 7A, *supra* note 4, app. 6A (Updated Spencer Report) at 1–2 (introductory note), https://www.uscourts.gov/file/vol07a-ch06-appx6apdf. The original Spencer Report was produced in 1998 by a subcommittee of the U.S. Judicial Conference Committee on Defender Services: Judges James R. Spencer (E.D. Va.), Chair; Robin J. Cauthron (W.D. Okla.); and Nancy G. Edmunds (E.D. Mich.), and is available at https://www.uscourts.gov/sites/default/files/original_spencer_report.pdf. The report's recommendations were adopted by the Judicial Conference as official policy on September 15, 1998, and remain in effect. *See* Report of the Proceedings of the Judicial Conference of the United States, Sept. 1998, at 67–74. A comprehensive update of the Spencer Report in 2010, with revised commentary to the 1998 recommendations, was endorsed by the Defender Services Committee. The recommendations themselves, as adopted by the Judicial Conference in 1998, remain unchanged.

8. Guide to Judiciary Policy vol. 7A, app. 6A, *supra* note 7, at 1–2.

9. *See* Cardone Report, *supra* note 1, at 189.

Report's recommendations. See Margaret S. Williams et al., Federal Judicial Center, *Evaluation of the Interim Recommendations from the Cardone Report* ch. 6: Capital Representation (Recommendations 24–29) (2023).[10] Both volumes discuss issues and concerns related to appointment of counsel and providing adequate resources for the defense in federal capital cases. The six recommendations for capital cases in the Cardone Report were approved, or approved as modified, by the Judicial Conference.[11]

The Crime Victims' Rights Act, 18 U.S.C. § 3771(e), specifies that when the victim of a crime is deceased, "the representatives of the crime victim's estate, family members, or any other persons appointed as suitable by the court, may assume the crime victim's rights." The court may want to consult with the prosecution about who will assume the victim's rights under the CVRA, especially if there are a large number of persons who want to do so.

# I. Pretrial Matters

## *A. Appointment of Counsel*

Under 18 U.S.C. § 3005, when a defendant is indicted for a federal capital offense, the court "shall promptly, upon the defendant's request, assign 2 [defense] counsel, of whom at least 1 shall be learned in the law applicable to capital cases." In addition, the statute provides that "the court shall consider the recommendation of the Federal Public Defender organization, or, if no such organization exists in the district, of the Administrative Office of the United States Courts." The prompt appointment of counsel, and the choice of qualified counsel, are crucial steps.

### 1. *"Promptly"*

Although the appointment of qualified trial counsel "must occur no later than when a defendant is charged with a federal criminal offense where the penalty of death is possible,"[12] courts have the discretion to appoint counsel before indictment, even before a defendant has been charged with a capital offense: "To protect the rights of an individual who, although uncharged, is the subject of an investigation in a federal death-eligible case, the court may appoint capitally qualified counsel upon request . . . ,"[13] before an indictment or formal charge:

> Courts should not wait to see whether the government will seek capital prosecution before appointing appropriately qualified counsel and granting them the resources necessary for a preliminary investigation. The goals of efficiency and quality of representation are achieved by early appointment of learned counsel in cases where capital indictment may be sought. Virtually all aspects of the defense of a federal death penalty case, beginning with decisions made at the earliest stages of the litigation, are affected by the complexities of the penalty phase.[14]

10. The FJC report is available at https://fjc.dcn/content/380873/evaluation-interim-recommendations-cardone-report.

11. *See* Report of the Proceedings of the Judicial Conference of the United States, March 2019, at 18–20, https://www.uscourts.gov/sites/default/files/2019-03_proceedings_0.pdf.

12. Model Plan, *supra* note 4, at § XIV.C.1.a.

13. *Id.* at XIV.C.1.b. "The goals of efficiency and quality of representation are achieved by early appointment of learned counsel in cases where capital indictment may be sought." Updated Spencer Report, *supra* note 7, at 93 (Commentary).

14. Guide to Judiciary Policy vol. 7A, app. 6A, *supra* note 7, at 93.

It is common, for example, for district courts to appoint counsel pre-charge for a defendant who is already in Bureau of Prisons (BOP) custody and is being investigated for a federal capital offense.[15]

One important reason for appointing counsel as soon as possible is that the Department of Justice cannot seek the death penalty unless defense counsel has been given the opportunity to present mitigating evidence and argument against pursuing the death penalty:

> In any case in which the United States Attorney or Assistant Attorney General is contemplating requesting authorization to seek the death penalty or otherwise believes it would be useful to the decision-making process to receive a submission from defense counsel, the United States Attorney or Assistant Attorney General shall give counsel for the defendant a reasonable opportunity to present information for the consideration of the United States Attorney or Assistant Attorney General which may bear on the decision whether to seek the death penalty. . . . No final decision to seek the death penalty shall be made if defense counsel has not been afforded an opportunity to present evidence and argument in mitigation.[16]

Having defense attorneys appointed promptly "is likely to be especially useful in making and supporting arguments about mitigating and aggravating factors, primarily made at the stage when the Attorney General is determining whether or not to seek the death penalty."[17]

### 2. *"Assign 2 counsel"*

As one court put it, "the purpose of the second lawyer is to provide additional support and expertise to defendants facing the possibility of the death penalty, precisely because defending those cases requires a separate and unique base of knowledge, training, and experience."[18] That additional support is crucial not just during the trial and penalty phases but also the early stages when the government is still deciding whether it will seek the death penalty. "[T]he appointment

15. Numerous courts have recognized the inherent authority to appoint counsel before federal indictment. *See, e.g.*, U. S. v. Bowe, 698 F.2d 560, 567 (2d Cir. 1983) (concluding that court could appoint counsel for witness invoking the Fifth Amendment either "under its inherent authority to insure the fair and effective administration of justice or under the Criminal Justice Act"); Doe v. Harris, 696 F.2d 109, 110 (D.C. Cir. 1982) (counsel appointed for target whose cooperation government sought); Jett v. Castaneda, 578 F.2d 842, 844 (9th Cir. 1978) (counsel appointed for suspect during investigation of prison stabbing). *See also* United States v. Hayes, 231 F.3d 663, 675 (9th Cir. 2000) (noting that, although Sixth Amendment *right* to counsel does not apply before indictment or formal charge, "there are many different reasons counsel might be appointed, some of which are not constitutionally compelled").

16. U.S. Dep't of Just., Justice Manual at 9-10.080 & 10.130, https://www.justice.gov/jm/jm-9-10000-capital-crimes. *See also* United States v. Cordova, 806 F.3d 1085, 1101 (D.C. Cir. 2015) (per curiam) ("'prompt' means promptly after indictment, and not later. This is because the goal of the defense in this early stage of the proceedings is to convince the Attorney General not to seek the death penalty in the first place."); *In re* Sterling-Suarez, 306 F.3d 1170, 1173 (1st Cir. 2002) ("learned counsel is to be appointed reasonably soon after the indictment and prior to the time that submissions are to be made to persuade the Attorney General not to seek the death penalty").

17. *Sterling-Suarez*, 306 F.3d at 1173 ("the early appointment of learned counsel . . . may well make the difference as to whether the Attorney General seeks the death penalty"). *See also* Guide to Judiciary Policy vol. 7A, app. 6A, *supra* note 7, at 106:

> A decision not to seek the death penalty against a defendant has large and immediate cost-saving consequences. The sooner that decision is made, the larger the savings. Since the death penalty ultimately is sought against only a small number of the defendants charged with death-eligible offenses, the process for identifying those defendants should be expeditious in order to preserve funding and minimize the unnecessary expenditure of resources.

18. *Cordova*, 806 F.3d at 1100.

of a second lawyer helps the defendant during this preliminary process when that investigation into relevant factors and presentment of information to the United States Attorney occurs. Surely, if the government decides not to seek the death penalty, then the penalty phase is won before trial, and a second lawyer has proven his worth."[19]

Section 3005 states that two counsel shall be assigned, but district courts have the statutory authority to appoint more than two attorneys in a federal capital case,[20] and judiciary policy provides that "[i]f necessary for adequate representation, more than two attorneys may be appointed to represent a defendant in a capital case."[21]

If the government stipulates or otherwise announces that it will not seek the death penalty, the *Guide to Judiciary Policy* states that "the court should consider the questions of the number of counsel and the rate of compensation needed for the duration of the proceeding."[22] "Once the government has decided not to seek the death penalty, the trial court retains the discretion to keep or dismiss the second attorney, but it is not per se error for the court to choose dismissal."[23] Although not specified in the statute, most appellate courts to decide the issue have held that the district court may discontinue the appointment of the second attorney once the death penalty is no longer sought.[24]

### 3. "Learned in the law"

"High quality legal representation is essential to assure fair and final verdicts, as well as cost-effective case management:"[25]

> The court's selection of defense counsel will often prove to be the single most important decision that a federal judge makes in a capital case.
>
> . . . In addition to the obvious value of competent counsel to the fairness of the proceedings, truly expert and experienced counsel—
>
> 1. will conserve CJA resources by not having to re-invent the wheel on many legal and factual issues;
> 2. will value and utilize available resources and support;
> 3. will increase the likelihood of an early, negotiated non-capital disposition; and

19. United States v. Boone, 245 F.3d 352, 360 (4th Cir. 2001). Note that the Cardone Report found that the majority of capital cases eventually are *not* authorized by the Attorney General for the death penalty. Cardone Report, *supra* note 1, at 195 n.922.

20. *See* 18 U.S.C. § 3599(a)(1) (capital defendants "shall be entitled to the appointment of one or more attorneys").

21. Guide to Judiciary Policy vol. 7A, *supra* note 4, at § 620.10.10(b); Model Plan, *supra* note 4, at § XIV.C.1.c.

22. Guide to Judiciary Policy vol. 7A, *supra* note 4, at § 630.30.10.

23. *Cordova*, 806 F.3d at 1101–02.

24. *See, e.g.*, *id.* at 1099–1101; United States v. Douglas, 525 F.3d 225, 235–37 (2d Cir. 2008); United States v. Waggoner, 339 F.3d 915, 917–19 (9th Cir. 2003); *Sterling-Suarez*, 306 F.3d at 1174–75; United States v. Casseus, 282 F.3d 253, 256 (3d Cir. 2002); United States v. Grimes, 142 F.3d 1342, 1347 (11th Cir. 1998). *Contra Boone*, 245 F.3d at 359 ("the text is clear that the statute becomes applicable upon *indictment* for a capital crime and not upon the later decision by the government to seek or not to seek the death penalty").

25. *See* Guide to Judiciary Policy vol. 7A, app. 6A, *supra* note 7, at 90, Recommendation 1A.

> 4. will minimize the risk of an unwarranted capital sentence, and the attendant costs in public resources and confidence that such sentences entail.[26]

The *Guide to Judiciary Policy* states that "'learned counsel' . . . should have distinguished prior experience in the trial, appeal, or post-conviction review of federal death penalty cases, or distinguished prior experience in state death penalty trials, appeals, or post-conviction review that, in combination with co-counsel, will assure high-quality representation."[27] "'[D]istinguished prior experience' contemplates excellence, not simply prior experience."[28] In appointing counsel, section 3005 requires the court to "consider the recommendations of the Federal Public Defender organization" or the Administrative Office of the U.S. Courts if the district has no such organization. Judiciary policy not only requires "judges [to] consider and give due weight to the recommendations by federal defenders and resource counsel," but also to "articulate reasons for not doing so."[29]

The court and the federal defender should consult "regarding the facts and circumstances of the case to determine the qualifications which may be required to provide effective representation."[30] Additionally, "recommendations concerning appointment of counsel are best obtained on an individualized, case-by-case basis."[31] Courts should not rely on a list of generally qualified counsel "because selection of trial counsel should account for the particular needs of the case and the defendant, and be based on individualized recommendations from the [federal defender] in conjunction with the Federal Death Penalty Resource Counsel and Capital Resource Counsel projects."[32] The attorneys "must have sufficient time and resources to devote to the representation, taking into account their current caseloads and the extraordinary demands of federal capital cases."[33]

Because it may be difficult to find counsel within the court's district who both meet the standard required for "learned counsel" *and* are willing and able to take a particular case, courts must be prepared to look outside their district: "Out-of-district counsel, including federal defender organization staff, who possess the requisite expertise may be considered for appointment in capital trials to achieve high quality representation together with cost and other efficiencies. . . . Counsel with distinguished prior experience should be appointed even if meeting this standard

26. Managing the Defense Function in Federal Capital Cases, David Bruck, Federal Death Penalty Resource Counsel, August 11–12, 2009, Death Penalty Workshop for U.S. District Judges, https://fjc.dcn/sites/default/files/2012/DP090021.pdf. *See also Sterling-Suarez*, 306 F.3d at 1174 (in cases where the defense "succeeds in persuading the Attorney General not to seek the death penalty, a substantial additional expenditure on the trial and sentencing phase of a capital case is likely to be avoided").

27. Guide to Judiciary Policy vol. 7A, *supra* note 4, at § 620.30(b)(2).

28. Model Plan, *supra* note 4, at § XIV.C.2.d.; Guide to Judiciary Policy vol. 7A, app. 6A, *supra* note 7, at 94.

29. Guide to Judiciary Policy vol. 7A, *supra* note 4, at § 620.40(a). *See also* Model Plan, *supra* note 4, at § XIV.B.4 ("To effectuate the intent of 18 U.S.C. § 3005 that the [federal defender's] recommendation be provided to the court, the judge should ensure the [federal defender] has been notified of the need to appoint capitally qualified counsel.").

30. Guide to Judiciary Policy vol. 7A, *supra* note 4, at § 620.30(a)(2).

31. *Id*. at app. 6A, *supra* note 7, at 99 ("individualized recommendations help to ensure that counsel are well-suited to the demands of a particular case and compatible with one another and the defendant. Whether at trial, on appeal, or in post-conviction, the federal defender and Resource Counsel are likely to have access to information that the court lacks.").

32. Model Plan, *supra* note 4, at § XIV.C.1.g. *See also* Guide to Judiciary Policy vol. 7A, app. 6A, *supra* note 7, at 99 & n.97 ("The distinction between being qualified to serve and willing to do so is significant. Many defense counsel would not be willing to accept appointment to more than one federal death penalty case at a time," or may not be able to commit to the time required for a particular case.).

33. Model Plan, *supra* note 4, at § XIV.B.9.

requires appointing counsel from outside the district where the matter arises."[34] Whether from within or outside the district, courts must "ensure that all attorneys appointed in federal death penalty cases are well qualified, by virtue of their prior defense experience, training and commitment, to serve as counsel in this highly specialized and demanding type of litigation."[35]

## *B. Compensation of Appointed Counsel and Case Budgeting*[36]

Although the specifics of compensation and budgeting are beyond the scope of the *Benchbook*, judges should be aware of some general principles and how capital cases differ from non-capital cases. One thing to keep in mind is that funds for capital cases do not come from a district court's budget or the circuit court's budget but come out of the national Defender Services appropriation. This is true with respect to both federal defender organization costs and the costs of private CJA panel attorneys.

Capital cases have different rules governing compensation of appointed CJA panel attorneys and the approval and compensation of experts, investigators, and other service providers.[37] One important distinction is that there is no statutory cap on attorney's fees in capital cases.[38] "There is neither a statutory case compensation maximum for appointed counsel nor provision for review and approval by the chief judge of the circuit of the case compensation amount in capital cases," and there should also not be any "formal or informal non-statutory budgetary caps on capital cases, whether in a capital trial, direct appeal, or habeas matter."[39] Note, however, that fees and expenses over $7,500 for investigative, expert, and other services must be approved by the presiding judge and the chief judge of the circuit.[40]

In addition, the use of case budgeting is standard in capital cases: "All capital cases should be budgeted with the assistance of case-budgeting attorneys and/or resource counsel where appropriate. . . . Courts are encouraged to require appointed counsel to submit a proposed initial litigation budget for court approval that will be subject to modification in light of facts and developments that emerge as the case proceeds."[41] Note that case budgets are confidential and

34. *Id.* at § XIV.C.1.h, 2.d. *See also id.* at 2.a ("Appointment of counsel from outside the jurisdiction is common in federal capital cases."); Margaret S. Williams et al., Federal Judicial Center, Evaluation of the Interim Recommendations from the Cardone Report 125 (2023) ("Appointing local counsel quickly does not ensure quality representation because they may not be qualified to receive such appointments.").

35. Model Plan, *supra* note 4, at § XIV.B.8.

36. The compensation and case budgeting rules discussed in this section apply only to CJA panel attorneys; federal defender organizations (FDOs) are funded separately and are subject to different oversight rules and procedures. Capital cases can frequently have both an FDO and CJA panel attorney appointed in the case and these compensation and budgeting rules apply only to the CJA panel attorney portion of the representation.

37. *See* 18 U.S.C. § 3599(f)–(g); Guide to Judiciary Policy vol. 7A, *supra* note 4, at §§ 630, 640, 660. The compensation maximum amounts for investigative, expert, and other services in Chapter 3 of the Guide are inapplicable to all capital cases. *See id.* at § 660.20.10.

38. *Compare* 18 U.S.C. § 3006A(d)(2)–(3) *with* 18 U.S.C. § 3599(g).

39. Guide to Judiciary Policy vol. 7A, *supra* note 4, at §§ 630.10.20, 635.

40. *Id.* at § 660.20.20; 18 U.S.C. § 3599(g)(2).

41. Guide to Judiciary Policy vol. 7A, *supra* note 4, at § 640.10(a), (b). *See also id.* at app. 6A, *supra* note 7, at 115, Recommendation 9(f) ("An approved budget should guide counsel's use of time and resources by indicating the services for which compensation is authorized. Case budgets should be re-evaluated when justified by changed or unexpected circumstances, and should be modified by the court where good cause is shown.").

should be submitted *ex parte* and filed and maintained under seal.[42] Courts are also encouraged to permit interim payments to counsel and other service providers.[43]

For more information on payments in CJA panel attorney representations for experts, investigators, and other service providers, see the *Guide to Judiciary Policy*, Vol. 7A at § 660: Authorization and Payment for Investigative, Expert, and Other Services in Capital Cases. See also Helen G. Berrigan, *The Indispensable Role of the Mitigation Specialist in a Capital Case: A View From the Federal Bench*, 36 Hofstra L. Rev. 819, 821 (Summer 2008) ("The primary purpose of this Article is to hopefully dispel judicial misgivings about the crucial importance of mitigation development in the trial of a capital case."); Russell Stetler, Maria McLaughlin, and Dana Cook, *Mitigation Works: Empirical Evidence of Highly Aggravated Cases Where the Death Penalty was Rejected at Sentencing*, 51 Hofstra L. Rev. 89, 90 (2022) (documenting cases that indicate "effective investigation and presentation of mitigating evidence can forestall a death sentence no matter how death-worthy the crime facts may appear at first glance").

## *C. Government's Decision to Seek or Not Seek the Death Penalty*

The Department of Justice does not permit a federal prosecutor to seek the death penalty unless specifically authorized to do so by the Attorney General. Before the government can pursue a capital sentence in any federal death-eligible case, the Attorney General must affirmatively decide to seek the death penalty against the defendant;[44] after the Attorney General provides this approval, the case is considered "authorized."

Defense counsel must be given the opportunity to present mitigating evidence and argument in an effort to persuade the government not to seek the death penalty at the local U.S. Attorney and/or Main Justice levels before the government may pursue the death penalty.[45]

1. Whether or not the government ultimately chooses to seek the death penalty, capital counsel and appropriate funding for experts, investigators, and other service providers remain necessary unless and until the Department of Justice formally notifies the court and defense counsel that it has decided not to seek the death penalty. In determining whether to request authorization to seek the death penalty, the DOJ *Justice Manual* directs prosecutors to consider, along with a number of other factors, all applicable statutory and non-statutory mitigating factors.[46] The Constitution requires that a capital sentencer may 'not be precluded from considering, as a *mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"[47] (emphasis in original).

Because defense counsel plays such a critical role in the government's process for deciding whether to seek the death penalty, counsel must undertake a mitigation investigation at the

42. Guide to Judiciary Policy vol. 7A, *supra* note 4, at § 640.20(b); *id.* at app. 6A, *supra* note 7, at 115, Recommendation 9(e).

43. Guide to Judiciary Policy vol. 7A, *supra* note 4, at §§ 630.40, 660.40.10.

44. Justice Manual, *supra* note 16, at §§ 9-10.050, 9-10.130.

45. *Id.* at §§ 9-10.080 & 9-10-130.

46. *Id.* at § 9-10.140 (prosecutors must carefully consider, among other things, "whether the applicable aggravating factors sufficiently outweigh the mitigating factors to justify a sentence of death").

47. Lockett v. Ohio, 438 U.S. 586, 604–05 (1978).

very beginning of the representation and continue until the government formally notifies the court and counsel that it will not seek the death penalty.[48] See discussion at I.A.1, *supra*.

2. The Department of Justice has internal time frames for its review and provides for expedited consideration in some cases, but it is recommended that courts should discuss with counsel "establish[ing] a schedule for resolution of whether the government will seek the death penalty."[49] The schedule should set time frames and deadlines for:

- a submission by the defendant to the U.S. Attorney of reasons the government should not seek the death penalty;
- the recommendation by the U.S. Attorney to DOJ, with supporting documentation, regarding whether the death penalty should be sought; and
- either filing the required notice under 18 U.S.C. § 3593(a) that the government will seek the death penalty or notifying the court and the defendant that it will not.[50]

"The schedule should be flexible and subject to extension for good cause at the request of either party," and should allow, in light of the particular circumstances of the case, "reasonable time for counsel for the parties to discharge their respective duties with respect to the question of whether the death penalty should be sought."[51]

Note that, even if the local U.S. Attorney recommends against seeking the death penalty, that decision can be overruled, which has occurred from time to time. Therefore, as noted above, the defense must be allowed to continue its work unless and until DOJ officially notifies the court that it will not seek the death penalty.

3. If the Attorney General decides to seek the death penalty, the government must provide written notice to the court and the defendant—"a reasonable time before the trial or before acceptance by the court of a plea of guilty"—and must identify which statutory and non-statutory aggravating factors it intends to prove.[52] The court may permit the government to amend the notice upon a showing of good cause.[53]

48. *See* Cardone Report, *supra* note 1, at XL (recommendation 29, which was approved by the Judicial Conference, stressed the importance of "the funding of mitigation, investigation, and expert services in death-eligible cases at the earliest possible moment, allowing for the presentation of mitigating information to the Attorney General"). Judicial Conference Defender Services Committee policy stresses the importance of defense counsel undertaking a mitigation investigation at the very beginning of a federal capital case, including cases in which the local U.S. Attorney's recommendation to Main Justice is not to pursue the death penalty:

> Since an early decision not to seek death is the least costly way to resolve a potential capital charge, a prompt preliminary mitigation investigation leading to effective advocacy with the local U.S. Attorney and with the Justice Department is critical both to a defendant's interests and to sound fiscal management of public funds.

Guide to Judiciary Policy vol. 7A, app. 6A, *supra* note 7, at 93.

49. *See* Guide to Judiciary Policy vol. 7A, *supra* note 4, at § 670(a).

50. *Id.* at § 670(b).

51. *Id.* at § 670(c), (d).

52. 18 U.S.C. § 3593(a). In addition, to satisfy *Ring v. Arizona*, 536 U.S. 584, 600 (2002), a federal indictment in a potential capital case must include special allegations of the statutory factors required for a defendant to be eligible for the death penalty under 18 U.S.C. §§ 3591 and 3592. *See, e.g.*, United States v. Rodriguez, 581 F.3d 775, 816 (8th Cir. 2009); United States v. Mikos, 539 F.3d 706, 715 (7th Cir. 2008); United States v. Sampson, 486 F.3d 13, 21 (1st Cir. 2007).

53. 18 U.S.C. § 3593(a).

## For Further Reference

- Helen G. Berrigan, "Death Penalty Cases" (outline provided for the National Workshop for District Judges I, March 2008), https://fjc.dcn/sites/default/files/2012/Dist8002.pdf
- Mark W. Bennett, *Sudden Death: A Federal Trial Judge's Reflections on the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 42 Hofstra. L. Rev. 391 (2013)
- Russell Stetler, *The Past, Present, and Future of the Mitigation Profession: Fulfilling the Constitutional Requirement of Individualized Sentencing in Capital Cases*, 46 Hofstra L. Rev. 1161 (2018)

# II. Jury Selection and Trial

At least three business days before commencement of trial, the defendant must receive a copy of the indictment and a list of the names and addresses of venire members and witnesses, unless the court finds by a preponderance of the evidence that providing the list may endanger any person. 18 U.S.C. § 3432.[54] Note that by saying "at least" three days, the statute leaves a court the discretion to require the government to provide this information sooner.

## *A. Jury Venire and Voir Dire*

1. In capital cases, courts often arrange for lengthier[55] and more extensive voir dire[56] (frequently including at least some conducted by the attorneys[57]) and a significantly larger jury pool,

54. For purposes of § 3432, the trial commences with jury selection. United States v. Young, 533 F.3d 453, 461 (6th Cir. 2008); United States v. Barrett, 496 F.3d 1079, 1116–17 (10th Cir. 2007). For a capital case that affirmed the use of an anonymous jury for safety reasons, see United States v. Hager, 721 F.3d 167, 186–90 (4th Cir. 2013); United States v. Peoples, 250 F.3d 630, 635–36 (8th Cir. 2001). *See also* United States v. Lee, 374 F.3d 637, 652 (8th Cir. 2004) (affirming order to limit defendant's access to discovery materials and witness lists based on finding that defendant posed a danger to potential witnesses—section 3432 "only requires disclosure of witness and juror names to the defense but not to the defendant personally"). *See also* section 2.05: Jury Selection—Criminal, *supra*, at B. Anonymous Juries.

55. Jury selection can take as long as several weeks in capital cases. In some courts, judges handling a high-profile trial will have hundreds or, in rare instances, even thousands of potential jurors fill out an extensive questionnaire. A manageable number of eligible jurors are then called in each day to be questioned individually.

56. United States v. Chanthadara, 230 F.3d 1237, 1269 (10th Cir. 2000) ("because the jurors are vested with greater discretion in capital cases, the examination of prospective jurors must be more careful than in non-capital cases").

57. In the vast majority of federal capital trials, attorneys are permitted to ask the jurors questions during voir dire. There were 11 federal capital jury trials (involving 12 defendants) from 2015 to 2024. Attorney questioning of potential jurors was allowed in at least nine of those cases, or 82 percent of the time. *See, e.g.*, United States v. Council, 77 F.4th 240, 253–54 (4th Cir. 2023) ("the district court allowed defense counsel to question prospective jurors, thus giving Council a chance to explore matters he believed were not adequately captured by the supplemental questionnaire or the court's questions"); see also id. at 251 ("the court conducted multiple days of individualized voir dire, during which both the court and the parties asked questions"). However, it is up to the court's discretion whether to allow such attorney questioning. *See* United States v. Tsarnaev, 595 U.S. 302, 316 (2022) ("This Court has held many times that a district court enjoys broad discretion to manage jury selection, including what questions to ask prospective jurors."); Fed. R. Crim. P. 24(a) (court "may" permit parties to examine prospective jurors).

compared to the typical non-capital felony trial.[58] This will help accommodate the additional peremptory challenges allowed in capital cases (20 per side under Fed. R. Crim. P. 24(b)(1)), a potentially greater number of excusals for cause, a greater number of hardship excusals necessary given the lengthier trial involving a potential penalty phase, and a greater number of alternate jurors.

2. It is common practice for courts to utilize a written jury questionnaire customized to the case, with additional questions beyond those found in standard questionnaires,[59] and to build in adequate time for attorneys to review the completed questionnaires and raise with the court stipulated hardship and cause excusals before voir dire commences.[60]

3. After the prospective jurors have filled out the questionnaires and the parties have had an opportunity to present the court with stipulated hardship and cause excusals, courts often try to minimize the number of days the prospective jurors must appear for jury selection by dividing the remaining prospective jurors into groups that appear in court each day. It is common practice for the prospective jurors to be questioned individually, outside the presence of other jurors—studies have shown that jurors tend to be more forthcoming when questioned individually.[61] It is also common practice to give an instruction to each panel of prospective jurors to provide an introduction to and overview of the case and the capital trial process.[62]

58. *See, e.g.*, *Tsarnaev*, 595 U.S. at 309, 314 (over 1,300 potential jurors were called for the first round of jury selection and the court held three weeks of voir dire); United States v. Savage, 970 F.3d 217, 236 (3d Cir. 2020) (hundreds of potential jurors were brought in and the court held thirty days of voir dire); United States v. Whitten, 610 F.3d 168, 176 (2d Cir. 2010) (600 potential jurors were brought to court and 260 jurors were individually questioned in voir dire).

59. *See, e.g.*, *Tsarnaev*, 595 U.S. at 308–09 ("the parties jointly proposed a 100-question" questionnaire); *Whitten*, 610 F.3d at 176, 185 (600 jurors each completed fifty-four-page questionnaire).

Samples of comprehensive juror questionnaires used in recent federal capital trials may be obtained from the Administrative Office of the U.S. Courts, Defender Services Office. Please contact Judy Gallant, Senior Attorney Advisor (Judy_Gallant@ao.uscourts.gov, (202) 502-3030), to obtain these samples.

60. *See, e.g.*, United States v. Tsarnaev, 968 F.3d 24, 47 (1st Cir. 2020) (noting the parties agreed to excuse many of the 1,373 potential jurors who filled out the Special Juror Questionnaire prior to the commencement of voir dire), *rev'd on other grounds*, 595 U.S. 302 (2022). *See also* Valerie P. Hans & Alayna Jehl, *Avoid Bald Men and wPeople with Green Socks? Other Ways to Improve the Voir Dire Process in Jury Selection*, 78 Chi-Kent L. Rev. 1179, 1198 (2003) (recommending increased use of juror questionnaires, which "are efficient in that they can quickly pinpoint for the court and the attorneys the specific areas that require individual follow-up questioning" while providing jurors with "a relatively comfortable way to reveal sensitive information" and "encourag[ing] completeness").

61. Voir dire of prospective jurors in a group setting inhibits rather than facilitates honest self-disclosure. Individuals who are exposed to the views of others and are required to state their own views before a group tend to conform their views to those of the majority. *See* David Suggs & Bruce D. Sales, *Juror Self Disclosure in the Voir Dire: A Social Science Analysis*, 56 Ind. L.J. (1980) 245, 259–61 (Winter 1980). They are also able to hear others' responses, and thus learn which answers are accepted at face value and which result in follow-up questions. Jurors can thereby reach conclusions about the "right" and "wrong" answers and conform their statements accordingly. *Id.* at 261. *See also* Hans & Jehl, *supra* note 60 at 1195–96 (outlining the shortcomings of group voir dire: "The desire to appear favorably is a main concern of prospective jurors, and that shapes the attitudes and opinions that they disclose during [group] voir dire." In addition, they may be "hesitant to share embarrassing experiences and beliefs because of the broad audience that can learn of their responses.").

In addition, questioning jurors individually will prevent the spread of prejudicial information. *See* Skilling v. United States, 561 U.S. 358, 389 (2010) (noting with approval that, "aware of the greater-than-normal need, due to pretrial publicity, to ensure against jury bias, . . . the court examined each prospective juror individually, thus preventing the spread of any prejudicial information to other venire members").

62. Samples of instructions read to the daily panels of prospective jurors in recent federal capital trials may be obtained from the Administrative Office of the U.S. Courts, Defender Services Office. Please contact Judy Gallant, Senior Attorney Advisor (Judy_Gallant@ao.uscourts.gov, (202) 502-3030), to obtain these samples.

[Suggested explanation of the trial process:]

### Statement to the Daily Panels of Prospective Jurors Prior to Individual Voir Dire[63]

After greeting the prospective jurors and, if necessary, introducing or reintroducing yourself, provide the following—or similar—explanation of the jury selection process:

> I want to thank you for coming in this morning. Your presence reflects your serious commitment to your civic responsibilities. Jury service is one of the highest and most important duties of a citizen of the United States.
>
> Each of you is a potential juror in the case of *United States versus* _____. As you know, you already completed the first portion of the jury selection process when you came in and filled out the juror questionnaire.
>
> In a few minutes, you will be asked to make your way to an adjacent room to wait until your name is called to return to this courtroom for individual questioning. Before you head to the waiting room, you will be given a copy of your juror questionnaire so that you have an opportunity to review it. When you return for individual questioning, please bring the juror questionnaire with you. If we have some questions about certain answers in the questionnaire, you can review it.
>
> While you are waiting—before or after you are individually questioned—please do not talk with each other about any aspects of this case, the juror questionnaire, or about questions that were asked of you or your answers. I wish to make this very clear; you may not have any discussions at all about the case, the juror questionnaire, or the questioning process with anyone, including other prospective jurors.
>
> Before we begin, I would like to explain that there are no 'right' or 'wrong' answers to any of the questions that will be posed to you today.
>
> Citizens in our community have and are entitled to hold a wide variety of different views and have had different life experiences that inform their feelings and views on different topics. Of course, this is also true of prospective jurors. We are genuinely interested in learning your views on issues related to this case, and because you may be called upon to determine punishment, we are interested in learning about your views and feelings about life imprisonment without the possibility of release and the death penalty. The integrity of the process depends on your truthfulness. You will all be treated with dignity and respect, and we simply ask you to provide honest and complete answers. Please don't answer based on what you think you should say, on what you think is a socially desirable

63. This suggested explanation was derived from those given in 15 capital cases between 2009 and 2023, including United States v. Saipov, No. 17-cr-722 (S.D.N.Y.), in 2023. Examples of these instructions are available upon request from the Administrative Office of the U.S. Courts, Defender Services Office. Please contact Judy Gallant, Senior Attorney Advisor (Judy_Gallant@ao.uscourts.gov, (202) 502-3030).

and acceptable response, or what you believe I expect or wish you to say. Simply relax and answer our questions as honestly as you can.

The defendant in this case, _____, is charged in an indictment with the criminal offenses outlined in the Case Summary on page ___ of the juror questionnaire. Please review this summary before you return to this courtroom. I want you to have enough information about this case so that you are in a position to be able to make honest, accurate and informed assessments as you are responding to the questions today.

The charges contained in the Indictment stem from allegations that _____. As you know from my prior remarks and the jury questionnaire, this trial may proceed in two phases. The first is the trial phase in which the jury determines whether the defendant is guilty of the crimes charged. The second is the penalty phase, which only occurs if the defendant is found guilty of certain capital charges. In the trial phase, your job will be to determine, according to my instructions, whether or not the Government has proven the defendant guilty of the charges in the Indictment beyond a reasonable doubt. If you find that the defendant is guilty of one or more of the capital charges as I will define them for you at the conclusion of trial, there will be a penalty phase of the trial in which the same jurors will have the responsibility to decide whether the defendant is sentenced to life in prison without the possibility of release or, instead, sentenced to death. In the federal system there is no parole; therefore, if the defendant is sentenced to life imprisonment, they will spend the rest of their life in prison and never be released. A death sentence means that the defendant will be executed.

During a penalty phase, jurors consider certain evidence referred to in the law as "aggravating factors," and "mitigating factors." These factors have to do with the circumstances of the crime, or the personal traits, character, or background of the defendant, or anything else relevant to the sentencing decision. Aggravating factors are certain specified factors that could support a death sentence. In order for an aggravating factor to be considered, *all twelve jurors* must agree that the factor has been proved by the government beyond a reasonable doubt. Jurors may not consider anything else as an aggravating factor.

"Mitigating factors" are any circumstances or factors that would suggest, for *any individual juror*, that life imprisonment without possibility of release is an appropriate punishment. A mitigating factor is not offered to justify or excuse the defendant's conduct, and the law does not require that there be a connection between a mitigating factor and the crime committed. There are three important distinctions that I want to highlight for you with respect to mitigating factors as compared to aggravating factors. First, the defendant is not required to prove the existence of a mitigating factor beyond a reasonable doubt, but only to establish its existence by a preponderance of the evidence. That is to say, you

need only be convinced that a mitigating factor is more likely true than not true in order to find that the mitigating factor exists.

Second, each juror independently considers the mitigating factors; *a unanimous finding is not required*. Any juror may, individually and independently, find the existence of a mitigating factor, regardless of the number of other jurors who may agree, and any juror who so finds must give that mitigating factor whatever weight they think it deserves. Thus, if even a single member of the jury finds that a mitigating factor has been proved, that member of the jury is required to weigh that factor in making up their own mind on whether to vote for a death sentence or a sentence of life imprisonment without the possibility of release.

Third and finally, unlike with aggravating factors, jurors are not limited in their consideration to the specific mitigating factors submitted to the jury. If, in addition to those specific mitigating factors, there is anything about the circumstances of the offense, the defendant's personal traits, character, or background, or anything else relevant that you individually believe mitigates against the imposition of the death penalty or supports a sentence of life imprisonment without the possibility of release, you are free to consider that factor in the balance as well.

In a penalty phase, the jurors' task is not simply to decide what aggravating and mitigating factors exist, if any. Rather, in addition to evaluating those factors, the jurors are called upon to make a unique, individualized moral decision between the death penalty and life in prison without the possibility of release. It is important that you understand the law never requires the imposition of a sentence of death and never assumes that any defendant found guilty of committing capital murder must be sentenced to death. The government must persuade each and every juror beyond a reasonable doubt that the aggravating factor or factors exist. You will then determine whether all of the aggravating factors found to exist sufficiently outweigh the mitigating factors to justify a sentence of death. Each juror must ultimately make a unique individual moral judgment about whether to sentence a defendant convicted of a capital crime to life imprisonment without the possibility of release or to death.

At the conclusion of a penalty phase, if all 12 jurors unanimously find that life imprisonment without the possibility of release is appropriate, then a sentence of life imprisonment without the possibility of release will be imposed. If, and only if, all twelve jurors unanimously find that death is the only appropriate sentence, will a death sentence be imposed. If one or more jurors finds that a sentence of life imprisonment without the possibility of release is the appropriate sentence, and the jury is not unanimous in its decision regarding punishment, then the Court will impose a sentence of life imprisonment without the possibility of release. The sentence imposed by the jury, whether a unanimous vote for life imprisonment, a unanimous vote for death, or a non-unanimous vote for life is final. I must follow the jury's sentencing determination.

This is only an overview of the law to provide you some context to answer our questions today. At trial, I will instruct jurors in greater detail about their duties.

I want to thank you again for your taking part in this important process, and for returning to the Courthouse today.

This completes my preliminary remarks. I will now ask my Deputy Clerk, _____, to re-administer the oath that will govern your participation in the jury-selection process.

[OATH ADMINISTERED]

**Introductory General Questions**

(Ask the jurors to raise their hand if they have information relevant to the question asked. Their answers will be elicited when they return to the courtroom for individual questioning.)

Please remember that you are under oath to provide honest answers and that there are no right or wrong answers.

A. Since you were here last, have you read, seen, or heard anything about this case or _____ [defendant's name] from any source?

B. Have you done any kind of research, internet or otherwise, about this case, the defendant, or the people involved in this trial, or posted anything online about this case or your jury service?

C. Have you spoken to anyone or has anyone spoken to you about this case or the defendant, including discussions with fellow prospective jurors?

D. Have you overheard any discussion about this case or the defendant, including discussions among fellow jurors?

E. As prospective jurors, you are to avoid all media associated with this case, you cannot research the case in any way, and you cannot talk or post about your jury service in this case until you have been formally excused from jury duty. Do you think you may have difficulty, for any reason, following those instructions?

F. Has anything changed about your ability to serve as a juror in this case, that is, something you have not already indicated in your questionnaire?

G. Do you know any person introduced here today or anyone else you think might be connected to this case in any way, including but not limited to any witnesses, investigators, rescue workers, law enforcement officers or agents?

H. We have provided you with a copy of your juror questionnaire. Would you like to change or amend any of your answers?

4. Because the jury in a capital case is responsible for determining both guilt and—upon conviction for a capital offense—punishment at a second, separate penalty phase of the trial, prospective jurors must be questioned at the outset about their attitudes and opinions regarding the death penalty and life imprisonment without release. It is recommended that this be done

by careful individual voir dire of each prospective juror, outside the presence of others.[64] The standard for excusal for cause is whether a juror's views about the death penalty or life imprisonment would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath."[65]

5. Representatives of the deceased victim may not be excluded from the trial just because they may testify at the capital sentencing hearing.[66]

6. When the jury retires to consider its verdict in the guilt phase, consider retaining the alternate jurors.[67] Instruct the alternates to avoid discussing the case with anyone. If an alternate juror replaces a juror after deliberations have begun, instruct the jury to begin its deliberations anew. Fed. R. Crim. P. 24(c)(3).

## *B. Penalty Phase Proceedings After a Guilty Verdict or Plea*

1. No presentence report should be prepared. 18 U.S.C. § 3593(c).

2. Unless the defendant moves for a hearing without a jury and the government consents, the hearing must be before a jury.

(a) If the defendant was convicted after a jury trial, the hearing should be before the jury that determined guilt, unless such jury has been discharged for good cause.[68]

(b) If the defendant was convicted upon a plea or after a bench trial, a jury and alternates should be impaneled.[69]

64. *See, e.g.*, *Council*, 77 F.4th at 251 ("the court conducted multiple days of individualized voir dire, during which both the court and the parties asked questions"). *See also* note 61, *supra*, and accompanying text.

65. Wainwright v. Witt, 469 U.S. 412, 424 (1985) (pro-life penalty biased jurors). *See also* Morgan v. Illinois, 504 U.S. 719, 729, 736–38 (1992) (pro-death penalty biased jurors). For examples of circuit decisions on "death-qualifying" and "life-qualifying" a federal jury, see, e.g., *Tsarnaev*, 968 F.3d at 46 (pro-death penalty biased jurors); *Whitten*, 610 F.3d at 185 (pro-death penalty biased jurors); and *United States v. Barnette*, 390 F.3d 775, 790 (4th Cir. 2004), *vacated on other grounds*, 546 U.S. 803 (2005) (pro-life penalty and pro-death penalty biased jurors).

66. *See* 18 U.S.C. § 3771(a)(3) & (e)(2)(B); 18 U.S.C. § 3510(b).

67. Fed. R. Crim. P. 24(c)(3) gives district courts the discretion to retain alternate jurors when the jury retires and to replace a juror "after deliberations have begun." Note that section 3593(b) does not allow a jury of fewer than twelve members during the sentencing phase unless the parties stipulate to a lesser number before the conclusion of the sentencing hearing. Also, it has been held that an alternate juror who did not participate in guilt deliberations can be substituted in during the sentencing phase. *See, e.g.*, United States v. Honken, 541 F.3d 1146, 1165–66 (8th Cir. 2008) (interpreting same language in 21 U.S.C. § 848(i)); Battle v. United States, 419 F.3d 1292, 1301–02 (11th Cir. 2005); United States v. Johnson, 223 F.3d 665, 669–71 (7th Cir. 2000).

68. 18 U.S.C. § 3593(b)(2).

69. *Id.*

3. Courts should provide the jury with preliminary instructions about the purpose of the sentencing hearing.[70]

(a) Courts should inform the jurors that they will be required to make findings about whether the government has met its burden of proving that the defendant is eligible for a death sentence,[71] and if so, additional findings about alleged aggravating factors and mitigating factors. The jury will then decide whether the defendant should be sentenced to death or life imprisonment without release.[72]

(b) Courts should instruct the jurors that, in considering whether a sentence of death is justified, they shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or of any victim, and shall not return a verdict of a sentence of death unless and until they have concluded they would return such a verdict for the crime in question no matter what the race, color, religious beliefs, national origin, or sex of the defendant or of any victim may be. Also instruct the jurors that each of them will be required to certify this in writing upon return of a sentencing verdict. 18 U.S.C. § 3593(f).

4. Proceed with the hearing in the manner set forth in 18 U.S.C. § 3593(c). Note that:

(a) the government may seek to prove only those aggravating factors of which it gave notice;

(b) the rules of evidence do not apply, but information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury;[73]

(c) the trial transcript and exhibits may be used, particularly if a new jury has been impaneled for the sentencing stage;

(d) the government argues first in summation, the defendant argues in reply, and the government may then argue in rebuttal; and

(e) victim impact evidence may be presented during the penalty phase when the government has noticed it as a non-statutory aggravating factor. Victim impact testimony is

70. Samples of preliminary and final jury instructions that have been used in the penalty phase of federal capital cases may be obtained from the Administrative Office of the U.S. Courts, Defender Services Office. Please contact Judy Gallant, Senior Attorney Advisor (Judy_Gallant@ao.uscourts.gov, (202) 502-3030), to obtain these samples. Courts may also wish to consult the sections on capital sentencing in the leading treatise on federal jury instructions, 1 Leonard B. Sand, et al., Modern Federal Jury Instructions, 9A-0.1 to 9A-0.5 (2022), and pattern instructions for capital sentencing from the two circuits that have promulgated them, the Eighth Circuit's Model Jury Instructions 743 (see 12.00: Homicide—Death Penalty—Sentencing (18 U.S.C. §§ 3591 et seq.)) (2023), https://juryinstructions.ca8.uscourts.gov/instructions/criminal/Criminal-Jury-Instructions.pdf, and the Tenth Circuit's Criminal Pattern Jury Instructions 345 (revised Feb. 2025) (Death Penalty Instructions, 3.01 et seq.), https://www.ca10.uscourts.gov/form/criminal-pattern-jury-instructions.

71. See paragraph 5(a), *infra*, for the three required findings in the eligibility determination.

72. 18 U.S.C. § 3593(d)–(e). In many capital cases, the statute of conviction makes life imprisonment the minimum sentence and the only alternative to a death sentence. *See, e.g.*, 18 U.S.C. § 201(a) (kidnapping resulting in death). And although the FDPA allows for a lesser sentence than life imprisonment when permitted by the statute of conviction, *see* 18 U.S.C. § 3594, federal capital defendants usually waive that option so that the jury is instructed on only two sentencing options, death or life imprisonment without release. Courts have approved such waivers. *See, e.g.*, United States v. Moussaoui, 591 F.3d 263, 304–05 (4th Cir. 2010); United States v. Quinones, 511 F.3d 289, 321–22 (2d Cir. 2007) ("a defendant might reasonably conclude that he can best avoid a death sentence by agreeing to life imprisonment as the single alternative punishment").

73. For a discussion of the standards for admitting evidence at a federal capital sentencing, see *Tsarnaev*, 595 U.S. at 317–24. *See also* United States v. Jacques, 684 F.3d 324, 328 (2d Cir. 2012); United States v. Lujan, 603 F.3d 850, 858–59 (10th Cir. 2010); United States v. Pepin, 514 F.3d 193, 205–09 (2d Cir. 2008); United States v. Sampson, 486 F.3d 13, 42–44 (1st Cir. 2007); United States v. Fields, 483 F.3d 313, 324–26 (5th Cir. 2007).

limited, however, to evidence "concerning the effect of the offense on the victim and the victim's family, . . . the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information."[74]

5. Give the jury final instructions and be sure to cover the following points:

(a) The jury must first determine if the defendant is eligible for the death penalty. To do so, the jury must assess whether or not the government has proven beyond a reasonable doubt three requirements:

- first, the defendant was 18 or older at the time of the offense;
- second, the existence of at least one of the statutory factors involving the defendant's mental state and role in the killing; and
- third, the existence of at least one statutory aggravating factor.

If the jury determines the government has failed to prove any one of these three requirements unanimously and beyond a reasonable doubt, its deliberations are over, it must report its verdict, and the court is required to impose a sentence less than death.[75]

(b) If, on the other hand, the jury finds all three of these requirements unanimously and beyond a reasonable doubt, the jury must next consider whether the government has unanimously proven beyond a reasonable doubt any *non*-statutory aggravating factors of which the government gave notice. 18 U.S.C. § 3593(c) and (d).

(c) Next, the jurors must consider whether the defendant has proven the existence of any mitigating factors. A mitigating factor includes those listed in the statute, as well as any "[o]ther factors in the defendant's background, record, or character or any other circumstance of the offense that mitigate against imposition of the death sentence." 18 U.S.C. § 3592(a)(1)–(8).

"The sentencer . . . may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration."[76] "Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a factfinder could reasonably deem to have mitigating value."[77] Evidence need not have a nexus to the crime to be mitigating.[78]

(d) List the mitigating factors submitted by the defendant, which the jury must consider. Each juror should also consider whether there may be other circumstances, not listed in the instructions or the verdict form or even identified by defense counsel, that constitute a mitigating factor or factors.[79]

74. 18 U.S.C. § 3593(a). Victim impact evidence may not include "characterizations and opinions from a victim's family members about the crime, the defendant, and the appropriate sentence." Bosse v. Oklahoma, 580 U.S. 1, 3 (2016). Note also that, because the victim is deceased, family members or certain other representatives of the victim "may assume the crime victim's rights." 18 U.S.C. § 3771(e)(2)(B). These rights include "[t]he right not to be excluded from any . . . public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding." 18 U.S.C. § 3771(a)(3).

75. 18 U.S.C. §§ 3591(a)(2), (c); 3592(c); 3593(d); 3594.

76. Eddings v. Oklahoma, 455 U.S. 104, 114–15 (1982).

77. Tennard v. Dretke, 542 U.S. 274, 284–85 (2004).

78. United States v. Fell, 531 F.3d 197, 224 (2d Cir. 2008).

79. *See, e.g.*, *id.* ("ten individual jurors found additional mitigating factors not expressly provided by the defense . . .").

(e) A mitigating factor should be taken as true if it has been established by a preponderance of the evidence. Distinguish between the reasonable doubt and preponderance standards. 18 U.S.C. § 3593(c).

(f) The jurors are not required to reach a unanimous decision in finding specific mitigating factors. A finding of a mitigating factor may be made by only one or more jurors, and any member of the jury who finds the existence of a mitigating factor by a preponderance of the evidence may consider such a factor established, regardless of whether any other juror agrees. 18 U.S.C. § 3593(d).

(g) Next, the jury members proceed to weigh the aggravating and mitigating factors. Each juror should consider only those aggravating factors that have been found to exist beyond a reasonable doubt by unanimous vote, and each juror must consider any mitigating factors that have been proved by a preponderance of the evidence to the juror's own satisfaction.[80]

(h) The jury should then:

1. consider whether the aggravating factor(s) sufficiently outweigh the mitigating factor(s) to justify a sentence of death rather than one of life imprisonment without possibility of release or, in the absence of a mitigating factor, whether the aggravating factor(s) alone are sufficient to justify a sentence of death rather than one of life imprisonment without possibility of release, and
2. determine whether the defendant should be sentenced to death or to life imprisonment without possibility of release.

18 U.S.C. § 3593(e).

Note that the jury must find that the aggravating factors "sufficiently" outweigh the mitigating factors to justify a death sentence, not that they outweigh the mitigating factors beyond a reasonable doubt.[81]

(i) Regardless of their findings about aggravating and mitigating factors, a juror is never required to vote to impose a sentence of death.[82]

(j) The jury shall not consider the race, color, religious beliefs, national origin, or sex of the defendant or any victim in considering whether a sentence of death is justified and must not impose a death sentence unless it would do so no matter what the race, color, religious beliefs, national origin, or sex of the defendant or of any victim. The jurors must sign a certificate to this effect when a death sentence is returned. 18 U.S.C. § 3593(f).

80. 18 U.S.C. § 3593(c) & (d); United States v. Jackson, 327 F.3d 273, 301 (4th Cir. 2003) (approving instruction that "[a]ny juror who is persuaded of the existence of a mitigating factor must consider it").

81. *See* United States v. Gabrion, 719 F.3d 511, 531–33 (6th Cir. 2013) (en banc) (also citing the six other circuits that have held the same).

82. Jones v. United States, 527 U.S. 373, 385 (1999) (jury instructed that "regardless of your findings with respect to aggravating and mitigating factors, you are never required to recommend a death sentence").

6. If the jury unanimously finds in favor of a death sentence, the court must impose such a sentence. If the jury unanimously finds in favor of life imprisonment without the possibility of release, the court must impose that sentence.[83] 18 U.S.C. § 3594.

7. If the jurors do not unanimously agree on either a death sentence or a sentence of life imprisonment without the possibility of release, the court will impose a sentence of life imprisonment without the possibility of release.[84]

Some statutes allow for a sentence of death, life imprisonment, or a term of years, see, e.g., 18 U.S.C. § 924(j) (murder through use of a firearm during crime of violence or drug trafficking crime), while others allow only life imprisonment or death, see, e.g., 18 U.S.C. § 1201(a) (kidnapping resulting in death). However, even where the third option of a "lesser sentence" is statutorily available, district courts have consistently agreed, at the defendant's request, not to instruct the jury on it, but rather to limit jurors to death or life imprisonment without release.[85] As one court put it, "a defendant might reasonably conclude that he can best avoid a death sentence by agreeing to life imprisonment as the single alternative punishment."[86]

In the rare case where a sentence of less than life without the possibility of release is an option, the adjustments to the instructions and verdict form "necessary to accommodate other sentencing choices, though unwieldy and impractical for pattern instructions, should be a straightforward matter in any particular case."[87]

8. The Supreme Court held that when a defendant's future dangerousness is an issue and the only alternative sentence to death is life with no possibility of parole, due process entitles the

83. Note: Although the term "recommend" is used in the FDPA, *see* 18 U.S.C. § 3593(e) (jury "shall recommend whether the defendant should be sentenced to death"), it should not be used with jurors as it is potentially misleading—the court does not have the authority to reject the jury's sentencing verdict. Section 3594 states that "the court *shall* sentence the defendant" according to the jury's recommendation (emphasis added). *See also* Caldwell v. Mississippi, 472 U.S. 320, 329–33 (1985) (improper to indicate to the jury that the "ultimate determination of death" will be decided by the courts).

84. *See* 18 U.S.C. § 3594; *Jones v. United States*, 527 U.S. at 380–81. *See also* United States v. Candelario-Santana, 977 F.3d 146, 159 (1st Cir. 2020):

> Though the verdict form included a so-called "third option" if the jury was not unanimous, the district court's comments (and the verdict form itself) also made clear to the jury that, if it could not reach a unanimous decision on the appropriate punishment, Candelario would be sentenced to life imprisonment. These instructions are not erroneous; the district court is permitted, though not required, to instruct the jury as to the consequences of its decision. *See Jones*, 527 U.S. at 383 . . . ; *Tsarnaev*, 968 F.3d at 92–93.

85. *See e.g.*, United States v. Quinones, 511 F.3d 289, 320–22 (2d Cir. 2007) ("it was a tactical decision for defendants, at the penalty phase of this case, to agree that a life sentence was the only alternative to death" in summation arguments and in instructions they successfully sought from the district court, even though the statute of conviction permitted death, life, or a term of years: "The singular alternative of life imprisonment was thus plainly critical to defendants' arguments to the jury that justice did not require imposition of the death penalty."); United States v. Moussaoui, 591 F.3d 263, 304–05 (4th Cir. 2009) (same, agreeing with *Quinones*: "counsel for Moussaoui repeatedly argued to the jury that Moussaoui would spend the rest of his life in prison if the jury did not sentence him to death, and counsel specifically requested that the jury *not* be asked to recommend, as provided for in § 3593, life imprisonment or a lesser sentence"). *Cf.* United States v. Flores, 63 F.3d 1342, 1368–1369 (5th Cir. 1995) (district courts should not "allow the government to hammer away on the theme that the defendant could some day get out of prison if that eventuality is legally possible but actually improbable").

86. *Quinones*, 511 F.3d at 322.

87. *See* Tenth Circuit, Pattern Criminal Jury Instructions, *supra* note 70, at 346. See also the jury instructions noting the possibility in some circumstances of "a lesser sentence" in the Eighth Circuit's Model Jury Instructions, *supra* note 70, at Instructions 12.11 ("to be determined by the court" or "as provided by law") and 12.12 ("a term of imprisonment without parole and may be up to life imprisonment without the possibility of release").

defendant to tell the jury that the defendant will never be released from prison. *Simmons v. South Carolina*, 512 U.S. 154, 168–78 (1994). The Court later held that such an instruction should have been given where the prosecution introduced evidence of the defendant's future dangerousness, even though the prosecutor did not specifically argue future dangerousness as a reason to impose the death penalty. *Kelly v. South Carolina*, 534 U.S. 246, 252–57 (2002).

## *C. Sentencing Verdict Form*

While the sentencing verdict form will be tailored to the specific capital counts of conviction, including the list of the gateway intent factors,[88] the statutory and non-statutory aggravating factors[89] contained in the government's *Notice of Intent to Seek the Death Penalty*, and the defendant's list of mitigating factors,[90] the information below outlines the issues that are normally addressed in a sentencing verdict form.

A capital defendant normally stipulates to the fact that the defendant was eighteen years of age or older at the time of the offense.

The first issue the jury must determine is whether the government has proven unanimously and beyond a reasonable doubt one or more gateway or threshold "intent" factors.[91] These may be framed in the following manner:

> SECTION I. GATEWAY ("INTENT") FACTORS
>
> In this section, please indicate which, if any, of the following gateway factors you unanimously find that the Government has proven beyond a reasonable doubt.
>
> [List Gateway ("Intent") factors here.]
>
> (Please check one box.)
>
> [ ] We, the jury, unanimously find that the government has proven this factor beyond a reasonable doubt.
>
> [ ] We, the jury, do not unanimously find that the government has proven this factor beyond a reasonable doubt.

If there is no capital count for which the jury unanimously found a gateway intent factor, then the jury is directed to skip ahead in the verdict form to the non-discrimination certification (Section VI below), to conclude their deliberations, and told that the Court will impose a sentence of life imprisonment without the possibility of release.[92]

88. 18 U.S.C. § 3591(a)(2)(A)–(D).

89. *Id.* § 3593(a).

90. *Id.* § 3592(a).

91. These factors are:

> (A) intentionally killed the victim; (B) intentionally inflicted serious bodily injury that resulted in the death of the victim; (C) intentionally participated in an act, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person, other than one of the participants in the offense, and the victim died as a direct result of the act; or (D) intentionally and specifically engaged in an act of violence, knowing that the act created a grave risk of death to a person, other than one of the participants in the offense, such that participation in the act constituted a reckless disregard for human life and the victim died as a direct result of the act[.]

18 U.S.C. § 3591(a)(2)(A)–(D).

92. 18 U.S.C. § 3591(a).

If the jury finds at least one gateway intent factor with regard to one or more capital counts, the jury then proceeds to consider whether the government has proven unanimously and beyond a reasonable doubt one or more statutory aggravating factors.[93] These may be framed in the following manner:

> SECTION II. STATUTORY AGGRAVATING FACTORS
>
> In this section, please indicate which, if any, of the following statutory aggravating factors you unanimously find that the Government has proven beyond a reasonable doubt.
>
> [List Statutory Aggravating factors here.]
>
> (Please check one box.)
>
> [ ] We, the jury, unanimously find that the government has proven this factor beyond a reasonable doubt.
>
> [ ] We, the jury, do not unanimously find that the government has proven this factor beyond a reasonable doubt.

If the jury does not unanimously find that the Government has proven beyond a reasonable doubt at least one of the statutory aggravating factors with respect to a particular capital count,[94] then direct the jury to cease deliberations on that capital count. If the jury does not unanimously find that the Government has proven beyond a reasonable doubt at least one of the statutory aggravating factors with respect to any of the capital counts, then the jury is directed to skip ahead in the verdict form to the non-discrimination certification (Section VI below), to conclude their deliberations, and told that the Court will impose a sentence of life imprisonment without the possibility of release.[95]

If the jury finds one or more statutory aggravating factors with regard to one or more capital counts, then the jury will ultimately decide between the death penalty and life imprisonment without the possibility of release for those capital counts.[96] In this event, the jury proceeds to consider whether the government has proven unanimously and beyond a reasonable doubt one or more non-statutory aggravating factors[97] for those capital counts. These may be framed in the following manner:

93. *Id.* § 3592(b)–(d).

94. *Id.* § 3593(d).

95. *Id.* ("If no aggravating factor set forth in section 3592 is found to exist, the court shall impose a sentence other than death authorized by law.").

96. *Id.* § 3593(e).

97. *Id.* § 3593(a), (c).

SECTION III. NON-STATUTORY AGGRAVATING FACTORS

In this section, please indicate which, if any, of the following non-statutory aggravating factors you unanimously find that the Government has proven beyond a reasonable doubt.

[Non-Statutory Aggravating factors listed here.]

(Please check one box.)

[ ] We, the jury, unanimously find that the government has proven this factor beyond a reasonable doubt.

[ ] We, the jury, do not unanimously find that the government has proven this factor beyond a reasonable doubt.

The verdict form then directs the jury to consider the mitigating factors[98] for the capital counts for which the jury found at least one gateway intent factor in Section I and at least one statutory aggravating factor in Section II. These may be framed in the following manner:

SECTION IV. MITIGATING FACTORS

As to the mitigating factors which are listed below, please indicate which factors have been proven by a preponderance of the evidence, which is a lesser burden than beyond a reasonable doubt.

Recall that your vote as a jury need not be unanimous with regard to the mitigating factors in this section. A finding with respect to a mitigating factor may be made by one or more of the members of the jury. Any member of the jury who finds the existence of a mitigating factor may consider such a factor in making their individual determination of whether to vote for a sentence of life imprisonment without the possibility of release or a sentence of death, regardless of the number of other jurors who agree that the factor has been established, and even if no other jurors agree that the factor has been established. In the space provided, please indicate the number of jurors who have found the existence of that mitigating factor to be proven by a preponderance of the evidence with regard to each of the capital counts.

[List Mitigating factors here]

[For each factor:]

Number of Jurors Who So Find: _____

When it comes to mitigating factors, you are not limited to those mitigating circumstances specified on the verdict sheet, or even those identified by defense counsel. You may also consider any other factor or factors in the defendant's background, record, character, or any circumstance of the offense that any individual juror believes supports voting for life imprisonment without the possibility of release rather than death. In the space provided below, please write in any additional mitigating factors that have been found to be proven by a preponderance of the evidence with regard to each of the capital counts and indicate the number of jurors who agree.

[Provide space for juror(s) to write mitigating factor(s)]

98. *Id.* § 3593(c), (d).

The verdict form then directs the jury to determine the sentence for the capital counts for which the jury found at least one gateway intent factor in Section I and at least one statutory aggravating factor in Section II.[99]

The jury is instructed that in determining the appropriate sentence for the capital count they are considering, the jurors must each independently weigh the aggravating factor or factors that were unanimously found to exist beyond a reasonable doubt with regard to that count, whether statutory or non-statutory, and independently weigh the mitigating factors that the jurors individually or with others found to exist by a preponderance of the evidence.[100] The jurors are not to weigh any of the four preliminary gateway intent factors from Section I as part of this process.[101] This determination may be framed in the following manner:

> SECTION V. DETERMINATION OF SENTENCE
>
> Based upon consideration of whether the aggravating factor or factors found to exist sufficiently outweigh any mitigating factor or factors found to exist to justify a sentence of death rather than life imprisonment without the possibility of release, or, in the absence of any mitigating factors, whether the aggravating factor or factors are alone sufficient to justify a sentence of death rather than life imprisonment without the possibility of release:[102]
>
> [ ] We determine, by unanimous vote, that a sentence of life imprisonment without the possibility of release shall be imposed.
>
> [ ] We determine, by unanimous vote, that a sentence of death shall be imposed.
>
> [ ] We are not unanimous on the issue of punishment. We understand that the Court will impose a sentence of life imprisonment without the possibility of release.

Finally, after the jury has completed the sentence determination in the above section, direct the jury to review and sign a non-discrimination certification:[103]

> SECTION VI. CERTIFICATION
>
> If you sign below, you will be individually certifying that consideration of the race, color, religious beliefs, national origin, or sex of the defendant or the victims was not involved in reaching your individual decision. The certificate also states that you, as an individual, would have made the same recommendation regarding a sentence for the crime in question regardless of the race, color, religious beliefs, national origin, or sex of the defendant, or the victims.
>
> [Each juror must sign this certification.]

99. *Id.* § 3593(d), (e).
100. *Id.* § 3593(d).
101. *Id.* § 3593(e).
102. *Id.*
103. *Id.* § 3593(f).

# 4.01 Sentencing Procedure

*Fed. R. Crim. P. 32; 18 U.S.C. § § 3553(a), 3661, 3583*

## I. Introduction: The Sentencing Guidelines

### *A. History*

The United States Sentencing Guidelines (U.S.S.G.) went into effect on November 1, 1987. Sentencing courts were required to follow the Guidelines by calculating a defendant's offense level and criminal history score and then sentencing the defendant within the resulting guideline range unless a departure was permitted. However, in *United States v. Booker*, 543 U.S. 220 (2005), the Supreme Court held that the mandatory nature of the Sentencing Guidelines violated the Sixth Amendment, and the remedy was to excise the portion of the sentencing statute that required courts to impose a sentence within the applicable guideline range (unless a departure was authorized). *Id.* at 259. *Booker*, supplemented by subsequent Supreme Court decisions,[1] changed the sentencing process by making the Sentencing Guidelines advisory rather than mandatory.

Although the Guidelines were no longer mandatory, *Booker* required courts to continue considering them as part of a three-step process: (1) calculate the ap-plicable guideline range; (2) consider whether a departure from the guideline range may be warranted; and (3) consider the factors set forth in 18 U.S.C. § 3553(a)(2) in order to impose a sentence "sufficient, but not greater than nec-essary, to comply with the purposes" of sentencing.

Effective November 1, 2025, however, an amendment to the Guidelines changed the three-step process to two-steps, primarily by eliminating departures as a separate consideration. Although the term "departures" has been deleted and they will no longer be included in the calculation of the advisory guideline sentence, "judges who would have relied upon facts previously identified as a basis for a departure w[ill] continue to have the authority to rely upon such facts to impose a sentence outside of the applicable guideline range as a variance un-der 18 U.S.C. § 3553(a)."[2] Two departure provisions have been kept: U.S.S.G. § 5K3.1. p.s. (Early Disposition Programs), which is moved to new U.S.S.G. § 3F1.1, p.s. and will now be considered in the first step as part of the guideline calculations; and U.S.S.G. § 5K1.1, p.s. (Substantial Assistance to Authorities), which will be considered in the second step as part of the § 3553(a) analysis.

### *B. Procedure*

The first step remains the same and is set forth in U.S.S.G. § 1B1.1(a): "The court shall determine the kinds of sentence and the guideline range as set forth in the guidelines . . . by applying the provisions of this manual" in the order specified in § 1B1.1(a)(1)–(9). The advisory status of the Guidelines notwithstanding, the first step requires judges to accurately determine the applicable

1. For a compilation of significant Supreme Court cases on the Sentencing Guidelines and other sentencing matters, see United States Sentencing Commission, Selected Supreme Court Cases on Sentencing Issues (Aug. 2025), https://www.ussc.gov/education/training-resources/supreme-court-case-law.

2. U.S.S.G. ch. 1, pt. A, intro. cmt. ("The removal of departures from the Guidelines Manual does not limit the information courts may consider in imposing a sentence nor does it reflect a view from the Commission that such facts should no longer inform a court for purposes of determining the appro-priate sentence."). The departure provisions that were last provided in the 2024 Guidelines Manual will be provided in Appendix B of the Manual.

sentencing range under the guidelines—using an inaccurate guideline range may result in a remand for resentencing.[3]

At step two, "the court shall consider the other applicable factors in 18 U.S.C. § 3553(a) to determine a sentence that is sufficient, but not greater than neces-sary, to comply with the purposes of sentencing."[4] The court is "required to fully and carefully consider the additional factors in 18 U.S.C. § 3553(a)." U.S.S.G. § 1B1.1(b), cmt. background.

References in this section to a "variance" refers to a sentence that is outside of the advisory guideline range based on the application of the § 3553(a) factors, as authorized by *Booker* and the Sentencing Guidelines.[5]

## *C. Selected Recent Amendments*

1. Effective Nov. 1, 2025:

- *Two-Step Procedure and Departures:* Amendment 836 changed the three-step sentencing procedure to two steps, essentially by eliminating departures as a separate consideration:

> All provisions previously contained in Chapter Five, Part H (Specific Offender Characteristics), and most of the provisions in Chapter Five, Part K (Departures), are deleted. Only the provisions pertaining to substantial assistance are retained under § 5K1.1, and the provision pertaining to early disposition programs is moved from § 5K3.1 to Chapter Three, Part F.

  See "Official Text" of Amendments to the Sentencing Guidelines at 161, https://www.ussc.gov/guidelines/amendments/adopted-amendments-effective-november-1-2025. Criminal history departures under U.S.S.G. § 4A1.3 are also deleted, as are references to departures in other sections and commentary. As noted above, courts may still look to factors that previously provided grounds for departure when considering the appropriate sentence under 18 U.S.C. § 3553(a).

- *Supervised Release:* Amendment 835 makes several significant changes to the sections on supervised release, and emphasizes that the purpose of supervised release is rehabilitation, not punishment. Subject to statutory requirements, sentencing courts must conduct an individualized assessment of a defendant before deciding whether to impose a term of supervised release, the length of any such term, and the conditions of release. The amendment adds new § 5D1.4 on the modification, early termination, and extension of supervised release. Violations and revocation of supervised release, currently covered with probation in Chapter Seven, Part B, are instead separately treated in new

3. *See* Molina-Martinez v. United States, 578 U.S. 189, 193 (2016) ("At the outset of the sentencing proceedings, the district court must determine the applicable Guidelines range." Even on review for plain error, "in the ordinary case a defendant will satisfy his burden to show prejudice by pointing to the application of an incorrect, higher Guidelines range and the sentence he received thereunder. Absent unusual circumstances, he will not be required to show more").

4. *See* U.S.S.G. § 1B1.1(b). The required § 3553(a) factors are listed in § 1B1.1(b)(1)–(5). For a discussion of the relationship between the manner in which a sentencing hearing is conducted and the interests of the parties involved, see D. Brock Hornby, *Speaking in Sentences*, 14 Green Bag 2D 147 (2011), https://fjc.dcn/sites/default/files/2016/5200-V-12%20Speaking.pdf. A video on this subject with Judge Hornby is available at https://fjc.dcn/content/speaking-sentences-remarks-hon-d-brock-hornby-d-me-0.

5. A court may also base a variance on a disagreement with the policy underpinning a guideline. *See* Spears v. United States, 555 U.S. 261, 264 (2009); Kimbrough v. United States, 552 U.S. 85, 109–11 (2007).

Part C. See also the discussions in II, Preliminary Matters at D, Supervised Release, and section 4.02: Revocation of Probation and Supervised Release, *infra*.

2. Effective Nov. 1, 2024:

• *Acquitted Conduct:* Amendment 826 added a new subsection (c) to § 1B1.3:

> *Acquitted Conduct*.—Relevant conduct does not include conduct for which the defendant was criminally charged and acquitted in federal court, unless such conduct also establishes, in whole or in part, the instant offense of conviction.

The Commentary to § 1B1.3 was also amended by new Note 10, which states that for "cases in which certain conduct underlies both an acquitted charge and the instant offense of conviction . . . , the court is in the best position to determine whether such overlapping conduct establishes, in whole or in part, the instant offense of conviction and therefore qualifies as relevant conduct."

At the same time, the Commentary to § 6A1.3, p.s. was amended to state that, while acquitted conduct "is not relevant conduct for purposes of determining the guideline range . . . , nothing in the Guidelines Manual abrogates a court's authority under 18 U.S.C. § 3661." Section 3661 allows sentencing courts to consider any "information concerning the background, character, and conduct" of the defendant "for the purpose of imposing an appropriate sentence." None of these amendments affects the use of uncharged, dismissed, or other relevant conduct as defined in § 1B1.3.

- *Youthful Individuals:* Amendment 829 simplified the policy statement at § 5H1.1 on age to read: "Age may be relevant in determining whether a departure is warranted." More specifically:

> A downward departure also may be warranted due to the defendant's youthfulness at the time of the offense or prior offenses. Certain risk factors may affect a youthful individual's development into the mid-20's and contribute to involvement in criminal justice systems, including environment, adverse childhood experiences, substance use, lack of educational opportunities, and familial relationships. In addition, youthful individuals generally are more impulsive, risk-seeking, and susceptible to outside influence as their brains continue to develop into young adulthood. Youthful individuals also are more amenable to rehabilitation.

In its "reason for amendment," the Sentencing Commission noted that "this amendment reflects the evolving science and data surrounding youthful individuals, including recognition of the age-crime curve and that cognitive changes lasting into the mid-20s affect individual behavior and culpability." Although the 2025 amendments eliminated departures, including § 5H1.1, p.s., "youthfulness" may be considered as the basis for a downward variance under 18 U.S.C. § 3553(a).

3. Effective Nov. 1, 2023:

- *Acceptance of Responsibility:* For the additional one-level reduction for "timely" acceptance of responsibility at § 3E1.1(b), Amendment 820 clarified that the term "'preparing for trial' means substantive preparations taken to present the government's case against the defendant to a jury (or judge, in the case of a bench trial) at trial." The amendment further explained that:

> "Preparing for trial" is ordinarily indicated by actions taken close to trial, such as preparing witnesses for trial, in limine motions, proposed voir dire questions and jury instructions, and witness and exhibit lists. Preparations for pretrial proceedings (such as litigation related to a charging document, discovery motions, and suppression motions) ordinarily are not considered "preparing for trial" under this subsection. Post-conviction matters (such as sentencing objections, appeal waivers, and related issues) are not considered "preparing for trial."

In the "reason for amendment," the Sentencing Commission explained that one of the purposes of the amendment was to resolve a circuit conflict and make it clear that the reduction cannot be "withheld or denied if a defendant moves to suppress evidence or raises sentencing challenges." The amendment is also intended "to decrease variation between jurisdictions in applying § 3E1.1(b). The amendment also aims to minimize any deterrent effect on defendants' ability to exercise their constitutional rights."

- *Criminal History:* Amendment 821 made a number of changes to how prior offenses are scored in the criminal history calculation. The changes are too numerous and involved to explain here, but note that the amendment "makes targeted changes to reduce the impact of providing additional criminal history points for offenders under a criminal justice sentence (commonly known as 'status points'), to reduce recommended guideline ranges for offenders with zero criminal history points under the guidelines ('zero-point offenders'), and to acknowledge "the changing legal landscape as it pertains to simple possession of marihuana offenses." The amendment provides that "a downward departure may be warranted for a defendant who "received criminal history points from a sentence for possession of marihuana for personal use, without an intent to sell or distribute it to another person." U.S.S.G. § 4A1.3, cmt. n3(A)(ii).[6]

# II. Preliminary Matters

Sentencing can be a long and complicated process. Consideration of the following matters beforehand may make the hearing proceed more efficiently/expeditiously while reducing the chance of error, dispute, or remand.

## *A. Presentence Report*

Federal Rule of Criminal Procedure 32(e)(2) requires that the presentence report be disclosed[7] to the defendant, defense counsel, and the attorney for the government not less than thirty-five

6. The changes regarding "status points" and "zero-point offenders" were made retroactive by amendment to U.S.S.G. § 1B1.10(d), cmt. n.7.

7. Note that the presentence report shall not include any diagnostic opinions that if disclosed may disrupt a program of rehabilitation, sources of information obtained upon a promise of confidentiality, or any other information that may result in harm to the defendant or others if disclosed. Fed. R. Crim. P. 32(d)(3). The probation officer's final recommendation as to sentence, previously withheld, may now be disclosed pursuant to local rule or at the court's discretion. Fed. R. Crim. P. 32(e)(3).

days before the sentencing hearing, unless this period is waived by the defendant.[8] Each party has fourteen days to provide to the opposing party and the probation officer a written copy of any objections to the presentence report. Fed. R. Crim. P. 32(f)(1)–(2). The probation officer must then submit the presentence report to the court and the parties at least seven days before sentencing, along with "an addendum containing any unresolved objections, the grounds for those objections, and the probation officer's comments on them." Fed. R. Crim. P. 32(g).

Although not specifically required by Rule 32(d), some judges require probation to include in the presentence report the recommended terms and conditions of supervised release and a brief explanation for each recommendation. The judge is required by 18 U.S.C. § 3553(c) to state in open court the reasons for the sentence, including any terms and conditions of supervised release. Having this in the presentence report would allow the parties to raise objections that the court can resolve before the hearing, thus saving time at the sentencing hearing and reducing the likelihood of unnecessary appeals and remands. See also section II.D, Supervised Release, *infra*, on the advantages of a discussion with the parties before the sentencing hearing "regarding whether to impose supervised release, the appropriate length of the term, and any non-mandatory conditions."

In multidefendant cases that have facts common to all defendants, such as amount of loss, restitution, or drug quantity, consider ordering the government and defense attorneys to meet and confer to try to resolve such issues before the sentencing hearing. If the parties cannot agree, consider holding a joint presentencing hearing—resolution of these factual disputes in advance may avoid having to adjudicate the same material at multiple sentencing hearings.

*Pretrial release*. If the defendant has been on pretrial release, consider directing the probation officer to prepare a summary of the defendant's conduct while on release either in the presentence report or for the court's use at the sentencing hearing. Form AO 245 SOR: Statement of Reasons at VI.B (rev'd 11/2025) specifically lists "Pre-sentence Rehabilitation/Potential for Future Rehabilitation" and "Conduct Pre-trial/On Bond" as possible reasons for a variance. See also *Concepcion v. United States*, 597 U.S. 481, 486 (2022) ("When a defendant appears for sentencing, the sentencing court considers the defendant on that day, not on the date of his offense or the date of his conviction.").

*Brady/Giglio information*. Although exculpatory information under *Brady v. Maryland*, 373 U.S. 83 (1963), and impeachment information under *Giglio v. United States*, 405 U.S. 150 (1972), are normally considered in the context of a trial, such information is also relevant to sentencing: "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt *or to punishment*." *Brady*, 373 U.S. at 87 (emphasis added). The Department of Justice has recognized the government's obligation to disclose favorable evidence in time for sentencing: "Exculpatory and impeachment information that casts doubt upon proof of an aggravating factor at sentencing, but that does not relate to proof of guilt, must be disclosed *no later than the court's initial presentence investigation*."[9] Whether or not the defendant requests such information, the court has the discretionary authority to order

8. Note that a defendant also has the option to waive preparation of the presentence report. While unusual, it may be to a defendant's advantage if, for example, the likely sentence would end before the sentencing hearing because the pretrial detention period was so long. Any such waiver must be knowing and intelligent and supported by findings on the record. *See also* Fed. R. Crim. P. 32(c)(1)(A)(ii) ("a presentence investigation and report are required "unless . . . the court finds that the information in the record enables it to meaningfully exercise its sentencing authority under 18 U.S.C. § 3553, and the court explains its finding on the record.").

9. U.S. Dep't of Just., Justice Manual, § 9-5.001 - Policy Regarding Disclosure of Exculpatory and Impeachment Information, at D.3 (emphasis added).

the government to produce exculpatory information—including evidence that may support *mitigating* factors—related to sentencing and to set a deadline for such disclosure.[10]

## *B. Notice of Other Sentencing Information to be Used at Sentencing*

Before the Guidelines were amended to delete departures, the presentence report must "identify any basis for departing from the applicable sentencing range." Fed. R. Crim. P. 32(d)(1)(E). If the court was considering a departure from the advisory guideline range on a ground not identified as such either in the presentence report or in a prehearing submission, it had to provide "reasonable notice" to the parties and identify the departure grounds. Fed. R. Crim. P. 32(h); *Burns v. United States*, 501 U.S. 129 (1991). For variances, however, the Supreme Court held that Rule 32(h)'s notice re-quirement did not apply. Although such notice is not required, the Court added that it may be advisable:

> Sound practice dictates that judges in all cases should make sure that the information provided to the parties in advance of the hearing, and in the hearing itself, has given them an adequate oppor-tunity to confront and debate the relevant issues. We recognize that there will be some cases in which the factual basis for a particular sentence will come as a surprise to a defendant or the Gov-ernment. The more appropriate response to such a problem is not to extend the reach of Rule 32(h)'s notice requirement categorically, but rather for a district judge to consider granting a con-tinuance when a party has a legitimate basis for claiming that the surprise was prejudicial.[11]

For similar reasons, it may be advisable to include in the presentence report any proposed conditions of supervised release that are not mandated by statute. Ten circuits "have held that sentencing courts are required to orally pronounce (either expressly or by reference) all non-mandatory—or, put differently, discretionary—conditions of supervised release."[12] If the court does not orally pronounce discretionary conditions during the sentencing hearing, and does not "expressly adopt or specifically incorporate by reference particular conditions that have been set forth in writing and made available to the defendant in the PSR, the Guidelines, or a notice adopted by the court," thereby giving defendant no opportunity to object, such conditions may not later be added to the written judgment.[13] There is, however,

> an easy way to ensure that a defendant has notice of and an opportunity to object to all proposed conditions: Include them in the PSR. . . . If all proposed discretionary conditions are listed in the PSR, that would assure a sentencing court (and a review-ing court) that a defendant has received notice of all such conditions and had a meaningful opportunity to object. That practice—while not required—would effi-ciently avoid most challenges of the sort raised here.[14]

10. *See* Section 5.06: Duty to Disclose Information Favorable to Defendant, *infra*, at C.5, Supervisory Authority of District Court.

11. Irizarry v. United States, 553 U.S. 708, 714 (2008). The Court further noted that, "at sentencing, the parties must be allowed to comment on 'matters relating to an appropriate sentence,' Rule 32(i)(1)(C), and the defendant must be given an opportunity to speak and present mitigation testimony, Rule 32(i)(4)(A)(ii)." *Id.* at 715–16 & n.2. *See also* U.S. Sent'g Comm'n, "Sentencing Procedure at a Glance" (although notice is not required for a variance per *Irizarry*, "Best practice? Give the parties an adequate opportunity to re-spond to any intended variance."), https://fjc.dcn/content/378017/sentencing-guidelines-imposing-sentence-part-i.

12. *See* United States v. Maiorana, 153 F.4th 306, 311–12 (2d Cir. 2025) (citing cases).

13. *Id.* at 315 (remanding for district court to either strike the improperly imposed conditions or provide notice to the defendant of the proposed conditions and an opportunity to object).

14. *Id.* at 314 n.12 (defendants must be given an opportunity to object to the PSR under Rule 32(f), and at sentencing the court must, under Rule 32(i)(1)(A), "verify that the defendant and the defendant's attorney have read and discussed the presentence report").

Note that amended U.S.S.G. § 5D1.3(b) specifies that all conditions of supervised release that are not required by statute are "discretionary" and the court "should conduct an individualized assessment to determine what, if any, other conditions of supervised release are warranted."

Department of Justice policy also requires the government attorney to "disclose to defense counsel, reasonably in advance of the sentencing hearing, any factual material not reflected in the presentence investigation report that he/she intends to bring to the attention of the court. . . . Due process requires that the sentence in a criminal case be based on accurate information." Therefore, the government should provide to the defense "access to all material relied upon by the sentencing judge, including memoranda from the prosecution (to the extent that considerations of informant safety permit), as well as sufficient time to review such material and an opportunity to present any refutation that can be mustered."[15]

## *C. Concurrent or Consecutive Sentences*

Determine whether you will need to decide between concurrent, consecutive, or partially consecutive sentences, such as when the defendant was convicted on multiple counts, is subject to an undischarged term of imprisonment, or faces sentencing in a state court. See U.S.S.G. § § 5G1.2 and 5G1.3 (delineating different circumstances where concurrent or consecutive sentences may be either required or optional); 18 U.S.C. § 3584(a) ("Imposition of concurrent or consecutive terms"). See also *Setser v. United States*, 566 U.S. 231, 235–39 (2012) (district court has discretion to order federal sentence to run consecutively to anticipated state sentence).

## *D. Supervised Release*

Amendments to the sentencing guidelines that took effect Nov. 1, 2025, significantly changed the supervised release provisions in Chapter 5, Part D. The general principles of the amended guidelines for the imposition of supervised release are:

- absent a statutory mandate, the court has the discretion—after making an individualized assessment of the defendant—as to whether to impose supervised release, under what conditions, and for how long;
- the goal of supervised release is rehabilitation, not punishment;
- the length of the term of release and the conditions imposed should be sufficient, but not greater than necessary, to achieve the purposes of supervised release; and,
- the court must provide a statement of reasons when imposing supervised release.

### 1. Discretion of the Court

Under 18 U.S.C. § 3583(a), when a defendant is sentenced to a term of imprisonment the court is required to impose a term of supervised release only if required by statute, plus any mandatory conditions. Otherwise, the court "may include . . . a term of supervised release." Amended U.S.S.G. § 5D1.1(b) is now consistent with § 3583(a), stating that unless required by statute, "the court should order a term of supervised release to follow imprisonment when warranted by an individualized assessment of the need for supervision." Previously, U.S.S.G. § 5D1.1(a)(2) had stated that, except for a defendant who is a deportable alien, a court "*shall* order a term of

15. Justice Manual, *supra* note 9, at § 9-27.750.

supervised release . . . when a term of imprisonment of more than one year is imposed" (emphasis added).

The Supreme Court stated that supervised release differs "from the parole sys-tem it replaced by giving district courts the freedom to provide postrelease su-pervision for those, and only those, who needed it. . . . Congress aimed, then, to use the district courts' discretionary judgment to allocate supervision to those releasees who needed it most."[16] Therefore, the individualized assessment that is required under the amended guidelines is designed "to make the imposition and scope of supervised release 'dependent on the needs of the defendant for supervision.'" U.S.S.G. Ch. 5, Part D, intro. cmt. (citing S. Rep. No. 225, 98th Cong., 1st Sess. 124 (1983)).

Even though the supervised release guidelines, like all guidelines, have been advisory rather than mandatory since *Booker*,[17] they may have influenced the decisions of whether to impose supervised release and for how long a term. In fiscal year 2024, for example, supervised release was imposed in 90.1% of eligible cases but was only "required by statute in 23.1% of cases in which it was imposed."[18] "Supervised release is required by statute in fewer than half of cases subject to the sentencing guidelines. . . . In the other cases the sentencing judge has discretion to order or not order it, . . . but almost always the judge orders it in those cases too, . . . often without explaining why."[19] The changes to U.S.S.G. § 5D1.1 are, in part, a response "to widespread concern that supervised release often is ordered reflexively, potentially diverting supervision resources from individuals who most need them." U.S.S.G. App. C, amend. 835 (reason for amend.).

Note that U.S.S.G. § 5D1.2(a) has also been amended to remove minimum terms of "at least two years" if the defendant was convicted of a Class A or B felony, "at least one year" for a Class C or D felony, and "one year" for a Class E felony or Class A misdemeanor. Instead, § 5D1.1(a) lists only the maximum terms for each class of offense while instructing that "the court shall conduct an individualized assessment to determine the length of the term."

### 2. Purpose of Supervised Release is Rehabilitation, not Punishment

A term of supervised release "does not replace a portion of the sentence of imprisonment, but rather is an order of supervision in addition to any term of imprisonment imposed by the court."[20] The goal of supervised release is not punishment, but "to assist individuals in their

16. Johnson v. United States, 529 U.S. 694, 709 (2000).

17. *See, e.g.*, United States v. Parker, 508 F.3d 434, 442 (7th Cir. 2007) ("*Booker* is applicable in this context; supervised release is discretionary absent a separate statutory provision making it mandatory."). *See also* U.S. Sent'g Comm'n, Federal Offenders Sentenced to Supervised Release 6 n.25 (July 2010) (the supervised release provisions in the Guidelines Manual, "(e.g., USSG §5D1.1(a)), are guidelines—which were mandatory before the Supreme Court's decision in [*Booker*], and advisory thereafter"), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2010/20100722_Supervised_Release.pdf.

18. U.S. Sent'g Comm'n, "Quick Facts: Supervised Release" (2024), https://www.ussc.gov/research/quick-facts/supervised-release. *See also* Federal Offenders Sentenced to Supervised Release, *supra* note 17, at 3–4 ("A statute requires imposition of a term of supervised release in less than half of federal cases subject to the sentencing guidelines. . . . From 2005 through 2009, sentencing courts imposed supervised release terms in 99.1 percent of . . . federal cases where supervised release was not statutorily required."); U.S. Sent'g Comm'n, 2024 Sourcebook of Federal Sentencing Statistics at Table 18 (of 61,678 defendants sentenced in fiscal year 2024, supervised release was ordered in 82.5% of cases with a mean length of 47 months, median length 36 months), https://www.ussc.gov/research/sourcebook-2024.

19. United States v. Thompson, 777 F.3d 368, 372 (7th Cir. 2015).

20. U.S.S.G. Manual ch. 7, pt. A, subpt. 2(b) (Nov. 2024). *See also* U.S. Sent'g Comm'n, Primer on Supervised Release 1–3 (2024), https://www.ussc.gov/guidelines/primers/supervised-release.

transition to community life. Supervised release fulfills rehabilitative ends, distinct from those served by incarceration."[21] The "primary goal" of supervised release "is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who spent a fairly short period in prison . . . but still needs supervision and training programs after release."[22] Therefore, "a court should consider whether the defendant needs supervision in order to ease transition into the community or to provide further rehabilitation and whether supervision will promote public safety." U.S.S.G. ch. 5, pt. D, intro. cmt.

When "determining the length of the term and the conditions of supervised release" under section 3583(c), the court must consider certain factors from section 3553(a), including "the need for the sentence imposed . . . to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner." 18 U.S.C. § 3553(a)(2)(D). Not all § 3553(a) factors apply:

> Notably, the only section 3553(a) factor *not* relevant to a court's decision of whether to impose supervised release (and, if so, how long the term should be) is "the need for the sentence imposed to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense." The legislative history indicates that section 3553(a)(2)(A) was not included for consideration under 18 U.S.C. § 3583(c) because the primary purpose of supervised release is to facilitate the integration of offenders back into the community rather than to punish them.[23]

See also *Esteras v. United States*, 606 U.S. 185, 192–93 (2025) (in holding that a court "cannot consider § 3553(a)(2)(A) when revoking supervised release," noting that when deciding whether to impose a term of supervised release a court must consider only the specific section 3553(a) factors that are listed in section 3583(c) and that section 3553(a)(2)(A) is "absent from this list").

### 3. Individualized Assessment

The amended guidelines direct courts to make an "individualized assessment" of a defendant when determining whether to impose a term of supervised release, the length of the term, and any discretionary conditions; the factors to be considered are those listed in 18 U.S.C. § 3583(c).[24] In addition, 18 U.S.C. § 3583(d)(2) states that discretionary conditions must "in-

21. United States v. Johnson, 529 U.S. 53, 59 (2000).

22. *Id.* (citing and quoting S. Rep. No. 98-225 at 124 (1983)).

23. Federal Offenders Sentenced to Supervised Release, *supra* note 17, at 8–9 (citing and quoting S. Rep. No. 98-225 at 124 (1983)). *See also* United States v. Murray, 692 F.3d 273, 280 (3d Cir. 2012) (omission of section 3553(a)(2)(A) indicates "that the primary purpose of supervised release is to facilitate the reentry of offenders into their communities, rather than to inflict punishment"). *Accord Thompson*, 777 F.3d at 374 (citing *Murray*).

24. U.S.S.G. § 5D1.1(b) & cmt. n.1; § 5D1.2(a) & cmt. n.1; § 5D1.3(b)(1) & cmt. n.1.

volve[] no greater deprivation of liberty than is reasonably necessary for the purposes set forth in" 18 U.S.C. § 3553(a)(2)(B)–(D).[25]

The requirement of an individualized assessment precludes a court from using a "standard set" of conditions that it imposes on all defendants or categories of defendants, as several appellate courts have previously held.[26] The amendment "emphasize[s] that any standard, special, or other discretionary conditions of supervised release—i.e., those not required by statute—should be imposed only when warranted by an individualized assessment, reflecting the requirements of 18 U.S.C. § 3583(d) and [concern] that certain conditions are at times imposed by default." U.S.S.G. App. C, amend. 835 (reason for amend.).[27]

### 4. Statement of Reasons

Under 18 U.S.C. § 3553(c), at the time of sentencing the court "shall state in open court the reasons for the imposition of the particular sentence." Because § 3583(a) states that supervised release is "a part of the sentence," the amended guidelines apply the statement of reasons requirement to the decision "for imposing or not imposing a term of supervised release (U.S.S.G. § 5D1.1(d)), and "the length of the term imposed" (U.S.S.G. § 5D1.2(b)).

Although the guideline does not specifically require that courts state the reasons for imposing discretionary conditions, appellate courts have already held that such conditions should be explained. See note 26, *supra*.

25. *See also* United States v. Duke, 788 F.3d 392, 399 (5th Cir. 2015) (remanding condition for court's failure to explain how it "satisf[ied] § 3583(d)'s requirement that a condition be narrowly tailored to avoid imposing a greater deprivation than reasonably necessary"); United States v. Goodwin, 717 F.3d 511, 525 (7th Cir. 2013) ("special conditions must . . . involve no greater deprivation of liberty than is reasonably necessary to achieve the goals of deterrence, protection of the public, and rehabilitation"); *Murray*, 692 F.3d at 283 (court should "impose only those . . . requested supervised release conditions that involve no greater deprivation of liberty than is reasonably necessary to achieve the purposes set forth in section 3553(a)"); Admin. Office of the U.S. Courts, Overview of Probation and Supervised Release Conditions 8 (July 2024) ("Special conditions are to be recommended by probation officers only when the deprivation of liberty or property they entail is tailored specifically to address the issues presented in the individual case."), https://www.uscourts.gov/sites/default/files/overview_of_probation_and_supervised_release_conditions_0.pdf.

26. *See, e.g.*, United States v. Miller, 954 F.3d 670, 676 (4th Cir. 2020) ("a sentencing court's duty to provide an explanation for the sentence imposed also requires that the court explain any special conditions of supervised release. . . . [I]mportantly, this duty cannot be satisfied or circumvented through the adoption of a standing order purporting to impose special conditions of supervised release across broad categories of cases or defendants."); United States v. Bell, 915 F.3d 574, 577–78 (8th Cir. 2019) (court must make an "individualized assessment" and "sufficient findings on the record" that a condition "satisfies the statutory requirements," and "may not impose a special condition on all those found guilty of a particular offense") (internal quotation marks omitted); United States v. Caravalo, 809 F.3d 269, 276 (5th Cir. 2015) ("special conditions must be tailored to the individual defendant and may not be based on boilerplate conditions imposed as a matter of course in a particular district"); *Goodwin*, 717 F.3d at 525 ("each special condition imposed must be tailored to [the defendant] and his needs"); United States v. Zanghi, 209 F.3d 1201, 1205 (10th Cir. 2000) (remanding because "court failed . . . to give any indication as to why it elected to impose . . . a three-year term of supervised release when none is required by the statute or why it decided the defendant must serve the first six months of that release in home confinement").

27. *See also* U.S. Dep't of Just., Department of Justice Report on Resources and Demographic Data for Individuals on Federal Probation or Supervised Release 1 (2023) (warning of "the risk of imposing overly lengthy supervision terms, numerous and potentially burdensome requirements, and fre-quent surveillance, which, if too restrictive, can lead to unnecessary violations and reincarceration"), https://perma.cc/24PT-WJG5.

### 5. Pre-Hearing Consultation

In light of the statutory and guideline requirements, consider consulting with the prosecutor, defense attorney, and probation officer regarding whether to impose supervised release, the appropriate length of the term, and any non-mandatory conditions that are being considered. The Seventh Circuit has "suggested, as a matter of 'best practices,'" that sentencing judges "(a) send a list of the [non-mandatory] conditions that the judge is contemplating (including the reasons) to the parties prior to the sentencing hearing; and/or (b) explain at the sentencing hearing what conditions the judge is inclined to impose and why." The court can "then ask the parties whether they object to any of them or have a reasonable need for more time to decide whether to object, and adjourn the hearing if necessary."[28] Doing this before the hearing not only allows the court to resolve any objections but also helps with the requirement under 18 U.S.C. § 3553(c) that the court state the reasons for the length of term and specific conditions imposed.[29] This can be accomplished by a pretrial conference or through written submissions as part of the parties' responses to the presentence report. "It is our hope that the combination of advance notice, timely objections, and appropriate judicial response to the objections will result in conditions better tailored to fulfill the purposes of supervised release, less confusion and uncertainty, and perhaps . . . fewer appeals."[30]

Resolving disputes and setting the conditions of release before the hearing may also assist the probation officer, who must provide to the defendant "a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required." 18 U.S.C. § 3583(f).

See also section 4.02: Probation and Supervised Release, *infra*, for modification, early termination, extension, and revocation of supervised release.

## *E. Forfeiture*

The presentence report must contain "a statement of whether the government seeks forfeiture under Rule 32.2 or any other law." Fed. R. Crim. P. 32(d)(2)(F).[31] Under Rule 32.2, the court must

28. United States v. Kappes, 782 F.3d 828, 843 (7th Cir. 2015) (adding that "we have suggested that sentencing judges require the probation office to include any recommended conditions of supervised release—and the reasons for the recommendations—in the presentence report that is disclosed to the parties prior to the sentencing hearing"). *See also* discussion of *Maiorana*, recommending inclusion of discretionary conditions in the PSR, at section II.B, Notice of Sentencing Information, and notes 12–14, *supra*.

29. *See, e.g.*, United States v. Sims, 94 F.4th 115, 123 (2d Cir. 2024) ("court is required to make findings specific to the defendant, connecting those findings to the applicable § 3553(a) factors that would justify including the special condition in this case"); United States v. Boyd, 5 F.4th 550, 57 (4th Cir. 2021) ("Unless a court adequately explains its reasons for imposing certain conditions, we can't judge whether the § 3583(d) factors have been met."); United States v. Solano-Rosales, 781 F.3d 345, 351–55 (6th Cir. 2015) ("We have made clear that the requirement of an adequate explanation applies to the district court's determination to impose supervised release to the same extent that it applies to a determination regarding the length of a custodial term."); *Thompson*, 777 F.3d at 377 (if a judge is "leaning toward imposing particular conditions, he should inform the parties of the conditions and the possible reasons for imposing them, so that they can develop arguments pro or con to present at the sentencing hearing"); *Murray*, 692 F.3d at 283 (court "should provide explanations for its conclusions").

30. *Kappes*, 782 F.3d at 843.

31. The requirement that the indictment or information and the presentence report provide notice to the defendant that the government will seek forfeiture "will ensure timely consideration of the issues concerning forfeiture as part of the sentencing process." *See* Fed. R. Crim. P. 32(d)(2)(F), advisory committee's note on 2009 amendment.

determine what property is subject to forfeiture, conduct a hearing if the forfeiture is contested and a party requests it, enter a preliminary order of forfeiture if it finds the property is subject to forfeiture, and do so "sufficiently in advance of sentencing to allow the parties to suggest revisions or modifications before the order becomes final." Fed. R. Crim. P. 32.2(b)(1)(A)–(B) and (b)(2)(A)–(B).

### *F. Crime Victims' Rights*

If there are any victims of the offense, consider asking the government if the victims have been notified of their right to attend the hearing and if any wish to speak. 18 U.S.C. § 3771(a)(2)–(4).[32] See also Fed. R. Crim. P. 32(i)(4)(B)–(C) ("Before imposing sentence, the court must address any victim of the crime who is present at sentencing and must permit the victim to be reasonably heard," and the victim may be heard in camera.). If "the number of crime victims makes it impracticable to accord all of the crime victims" their rights, "the court shall fashion a reasonable procedure . . . that does not unduly complicate or prolong the proceedings." 18 U.S.C. § 3771(d)(2).

### *G. If Guilty Plea Was Before a Magistrate Judge*

At the beginning of the sentencing hearing, if the defendant had previously consented to plead guilty before a magistrate judge, state on the record that, based on the information provided by the defendant at the plea hearing and contained in the presentence report, you accept the defendant's guilty plea. See *supra* section 1.13: Referrals to Magistrate Judges (Criminal Matters), at note 2.

## III. The Sentencing Hearing

The following is a suggested outline for the sentencing hearing that is designed to ensure that judges cover the information required by statute, rule, or case law. This outline is only a guide and does not have to be followed precisely.

### *A. Opening*

1. Ask:

    (a) Will counsel for the government introduce yourself?

    (b) Will counsel for the defendant introduce yourself?

    (c) Will the probation officer introduce yourself?

    (d) [If applicable] Will the interpreter introduce yourself?

32. *See also* U.S. Sent'g Comm'n, Primer on Crime Victims Rights at 20 (2025) (As the sentencing hearing approaches, "the government should, in accordance with any local rules of procedure or practice, give advance notice to the court of any known victims who seek to be heard at the hearing so that the court is able to exercise its independent obligation to 'reasonably hear' any victims," especially if there may be many. In addition, "advance notice of victim participation permits a sentencing court to ensure it complies with the victims' CVRA right to a sentencing proceeding 'free from unreasonable delay.'"), https://www.ussc.gov/sites/default/files/pdf/training/primers/2021_Primer_Crime_Victims.pdf.

The courtroom deputy shall swear in the interpreter. See section 7.08: Oaths, *infra*, at "Oath to Interpreter."

2. To both counsel:

   (a) I have received the following documents submitted by counsel in advance of the hearing: (list the documents: e.g., sentencing memoranda, letters, expert reports).

   (b) Do you have any other documents or letters for the court?

3. Ask the prosecutor:

   (a) Do you have any witnesses or victims present in the courtroom?

   (b) Are you expecting an evidentiary hearing?

   (c) [If applicable] Will the victim(s) be making a statement?

4. Ask the defense counsel:

   (a) Have you and your client read and discussed the presentence report (PSR)?

   (b) Have you discussed the objections?

   (c) Are you expecting an evidentiary hearing?

   (d) Do you have any witnesses present in the courtroom?

## *B. Calculation of the Advisory Guideline Range*

1. Ask both counsel:

   (a) I have read the objections to the presentence report. Do counsel want oral argument on the objections?

   (b) If there are fact disputes, do counsel want to make a proffer or is an evidentiary hearing necessary?[33]

2. After hearing, make the following findings:[34]

   (a) I adopt the PSR without objections.

   [or]

   (b) I resolve the objections as follows:[35]

      (i) With respect to [describe issue], the court finds _____.

      (ii) The remaining disputed issues will not affect sentencing, or will not be taken into account at sentencing, so no finding is necessary.

33. The court has discretion to permit the introduction of evidence. Fed. R. Crim. P. 32(i)(2). Evidentiary hearings should be reserved for occasions in which there is a disputed issue of fact in the proffer. There is some disagreement among the circuits as to the burden of production with respect to evidence germane to disputed portions of the PSR.

34. If information that will be relied on in determining the sentence has been withheld from the presentence report (PSR) pursuant to Fed. R. Crim. P. 32(d)(3), and the summary has not yet been provided, orally summarize the withheld information (in camera if necessary). *See* Fed. R. Crim. P. 32(i)(1)(B).

35. *See* Fed. R. Crim. P. 32(i)(3)(B). Even if disputed issues will not affect sentencing, it may be important to resolve them and attach the court's findings to the PSR because the Bureau of Prisons bases classification decisions on the PSR.

3. [If the government had filed notice under 21 U.S.C. § 851(a)(1)) of increased punishment based on prior convictions, ask the defendant:]

   Do you affirm or deny that you were previously convicted as alleged in the information by the government? If you do not challenge the existence of a previous conviction before I sentence you, you cannot challenge the existence of those previous convictions on appeal or in a post-conviction proceeding. [21 U.S.C. § 851(b).]

4. [If, under Rule 11(c)(3)(A), the court had deferred its decision whether to accept a plea agreement that requires dismissal of charges (Rule 11(c)(1)(A)) or that would bind it to a specific sentence or specific sentencing terms (Rule 11(c)(1)(C), state:]

   (a) I accept the provisions of the plea agreement (and upon the motion of the government the following charges are dismissed _____).[36]

   [or]

   (b) I reject the provisions of the plea agreement, and the defendant may withdraw the plea. If you do not withdraw your plea, I may decide the case less favorably than the plea agreement would have required.[37]

5. After making the preceding findings and calculations, state:

   (a) After resolving the objections (if any), I calculate the following advisory guideline range: the defendant's offense level is _____, and the defendant's criminal history category is _____. This produces a guidelines range of _____ to _____ months imprisonment (or probation); a supervised release range following imprisonment of ____ to ____ years; and a fine range of _____ to _____. The special assessment is _____.

   (b) Are there any objections for the record?

## *C. Departure*

[*Note:* Because amendments to the Sentencing Guidelines, effective November 1, 2025, eliminated departures, this section has been deleted. However, facts previously identified as a basis for departure may be considered when deciding whether to impose a sentence outside of the applicable guideline range as a variance under 18 U.S.C. § 3553(a). See D, Section 3553(a) Factors/Variances, *infra*.]

## *D. Section 3553(a) Factors/Variances*

1. State:

   After calculating the guidelines and departures, and hearing argument, I must now consider the relevant factors set out by Congress at 18 U.S.C. § 3553(a) and ensure that I impose a sentence "sufficient, but not greater than necessary,

36. Fed. R. Crim. P. 11(c)(4).

37. Fed. R. Crim. P. 11 (c)(5)(A)–(C) (the court must "advise the defendant personally" of the right to withdraw the plea and that the sentence may be less favorable than the plea agreement outlined).

to comply with the purposes" of sentencing. These purposes include the need for the sentence to reflect the seriousness of the crime, to promote respect for the law, and to provide just punishment for the offense. The sentence should also deter criminal conduct, protect the public from future crime by the defendant, and promote rehabilitation. In addition to the guidelines and policy statements, I must consider

(a) "the nature and circumstances of the offense";

(b) "the history and characteristics of the defendant";

(c) the need to avoid unwarranted sentence disparities among similarly situated defendants; and

(d) the types of sentences available.

2. Does the prosecutor wish to argue about the application of the factors set forth in section 3553(a), request a variance, or otherwise make a sentencing recommendation?

[If a motion pursuant to U.S.S.G. § 5K1.1 has been filed, you may wish to call the parties to sidebar to determine whether to close the courtroom and seal the transcripts, or to consider the motion in chambers. See U.S.S.G. § 5K1.1, cmt. (backg'd).]

[If applicable:]

The government has filed a motion for a reduced sentence based on substantial assistance to authorities pursuant to U.S.S.G. § 5K1.1 and/or 18 U.S.C. § 3553(e). Will the government please set forth the facts supporting its motion?

Does the defendant have any comment on the government's statement?

3. Does the defense counsel wish to argue about the application of the factors set forth in section 3553(a), request a variance, or otherwise make a sentencing recommendation?

4. The court is considering a downward [an upward] variance of _____ months for the following reasons [state reasons]. Does either party wish to comment or object?

## *E. Final Statements*

(See Fed. R. Crim. P. 32(i)(4). Note that, upon motion and for good cause, any statements made under Rule 32(i)(4) may be heard in camera.)

1. [If any victims are present, for each one ask:][38]

Does the victim, [name], wish to make a statement?

38. "All victim statements to the sentencing court should be concluded before a defendant exercises the right to allocution in order to permit the opportunity to respond to the statement if so desired." Primer on Crime Victims' Rights, *supra* note 32, at 21.

2. The defendant has the right to make a statement "or present any information to mitigate the sentence." Does the defendant wish to make a statement?
3. Does the defense counsel have anything to add on behalf of the defendant?
4. Does the prosecutor wish to make a final statement?

## *F. The Court's Pronouncement of Sentence*

1. Based on these factors and the Sentencing Guidelines, I sentence the defendant to _____, which is within the guideline range.

   [If the guideline range exceeds 24 months, state the reason for imposing the sentence at that particular point within the range. 18 U.S.C. § 3553(c)(1).]

[or]

2. After assessing the particular facts of this case in light of the relevant § 3553(a) factors, including the Sentencing Guidelines, I conclude that a sentence outside of the advisory guideline range is warranted and sentence the defendant to _____, representing a ____ month [upward/downward] variance from the guidelines range. [Explain the particular factors that influenced your decision and the extent of the variance. 18 U.S.C. § 3553(c)(2). If either party requested a non-guidelines sentence, explain why you will grant or deny the request and directly address the arguments made by each party.]
3. [If the sentence includes a term of probation, state the length of the term and ask counsel to suggest appropriate conditions. See U.S.S.G. § 5B1.1–1.3; 18 U.S.C. § § 3561–3564.][39]
4. [If a sentence of imprisonment is imposed:] I must also consider whether to impose a term of supervised release.

   [Ask counsel and probation for appropriate conditions of supervised release. See U.S.S.G. § 5D1.3; 18 U.S.C. § 3583(d).][40]

39. For a comprehensive discussion of conditions of probation and supervised release, see Overview of Probation and Supervised Release Conditions, *supra* note 25. *See also* Stephen E. Vance, Supervising Cybercrime Offenders Through Computer-Related Conditions: A Guide for Judges (Federal Judicial Center 2015), https://fjc.dcn/content/308943/supervising-cybercrime-offenders-through-computer-related-conditions-guide-judges.

40. Note that, although a term of supervised release is imposed at the time of sentencing, its primary purpose is not punitive:

> Congress intended supervised release to assist individuals in their transition to community life. Supervised release fulfills rehabilitative ends, distinct from those served by incarceration. *See* § 3553(a)(2)(D); United States Sentencing Commission, Guidelines Manual § § 5D1.3(c), (d), (e) (Nov. 1998); *see also* S.Rep. No. 98-225, p. 124 (1983) (declaring that the "primary goal of [supervised release] is to ease the defendant's transition into the community after the service of a long prison term for a particularly serious offense, or to provide rehabilitation to a defendant who spent a fairly short period in prison for punishment or other purposes but still needs supervision and training programs after release").

United States v. Johnson, 529 U.S. 53, 59 (2000). *See also* discussion at II.D, Supervised Release, *supra*.

## *G. Imposition of Sentence*

State:

I will now impose the sentence.

1. [If sentencing to a term of imprisonment:]

   (a) The defendant is hereby committed to the custody of the Bureau of Prisons for a term of _____ months. [Ask counsel if there is a requested BOP institution.]

   [or]

   (b) The defendant is hereby committed to the custody of the Bureau of Prisons for a term of _____ months and then to community confinement/home detention for a term of _____ months.

   [If applicable, specify whether the sentence imposed on any count should run concurrently with, consecutive to, or partially consecutive to any other sentence that will be imposed, that defendant is already subject to, or that defendant may be facing in another court. See *supra* subsection II.C.]

   (c) [If applicable:] The Court recommends to the Bureau of Prisons that the defendant be placed in an institution with the following programs: [substance abuse treatment, mental health counseling, vocational training, etc.]

2. Upon release from imprisonment, the defendant is to be placed on supervised release for a term of _____ years.[41] While on supervised release, the defendant is subject to the following mandatory and discretionary conditions: _____.[42]

3. [If sentencing to probation:[43]]

   The defendant is placed on probation for a term of _____ years. While on probation the defendant is subject to the following conditions _____ _____.

41. Supervised release may be required by specific statute. Otherwise, it may be imposed at the court's discretion. U.S.S.G. § 5D1.1(b). *See also* section II.D, *supra*, at 1, Discretion of the Court.

Note that a court may terminate a term of supervised release after one year if it is "warranted by the conduct of the defendant released and the interest of justice." 18 U.S.C. § 3583(e)(1). "Some courts have held that supervised release may be terminated early even if the statute of conviction originally required a particular term of supervised release." Primer on Supervised Release, *supra* note 20, at 13 & n.77. The court must consider the factors listed in 18 U.S.C. § 3553(a)(1), (a)(2)(B)–(D), and (a)(4)–(7), and follow the procedure outlined in Fed. R. Crim. P. 32.1(c) for the modification of terms of probation and supervised release. *See also* U.S.S.G. § 5D1.4(b) & cmt. n.1 (listing factors the court may consider when determining if a defendant qualifies for early termination).

42. See discretionary conditions of supervised release at U.S.S.G. § 5D1.3(b) and Overview of Probation and Supervised Release Conditions at note 25, *supra*. The court may recommend that the defendant receive residential substance abuse treatment pursuant to the provisions of 18 U.S.C. § 3621(b). Note that the court may suspend the mandatory drug testing provision if the defendant poses a low risk of future substance abuse. 18 U.S.C. § 3583(d).

43. Probation is statutorily prohibited for defendants convicted of certain offenses, e.g., Class A felonies. See U.S.S.G. § 5B1.3 for the mandatory, recommended, and discretionary conditions of probation. Under 18 U.S.C. § 3564(c), a court may terminate probation at any time for a misdemeanor and after one year for a felony if it is "warranted by the conduct of the defendant and the interest of justice." The court must consider the applicable factors of section 3553(a) and follow the procedure outlined in Fed. R. Crim. P. 32.1(c).

4. [If restitution, a fine, or forfeiture is called for:]

   (a) The defendant must make restitution as follows _____. This restitution is due on the following schedule: _____.[44] If the defendant fails to pay the full restitution owed, each recipient is to receive an approximately proportional allotment of the restitution paid. This restitution obligation is joint and several with any other obligated defendants.[45]

   (b) The court orders that the defendant pay to the United States a fine of _____.[46]

   [or]

   The fine (and/or interest on the fine) owed by the defendant is waived/below the guideline range because of the defendant's inability to pay.

   (c) Forfeiture of the property described in count(s) _____ of the indictment/information is hereby ordered.[47]

5. It is ordered that the defendant pay to the United States a special assessment in the amount of _____.[48]

## *H. Notification of Right to Appeal*[49]

1. Notify the defendant:

   (a) [If the defendant was convicted after a trial:]

   > You have the right to appeal your conviction(s), and the right to appeal a sentence you believe was illegally or incorrectly imposed.

   (b) [After conviction by guilty plea, advise the defendant:]

   > You can appeal your conviction if you believe that your guilty plea was somehow unlawful or involuntary, that the statute of conviction is

44. *See* 18 U.S.C. § 3664(f) (outlining the manner and schedule of restitution payments). If restitution is not ordered, or only partial restitution is ordered, the court must state the reasons for that decision. 18 U.S.C. § 3553(c). Note that 18 U.S.C. § 3572 states that any schedule of payments for restitution or fines "shall be set by the court," and some circuits have held that this authority may not be delegated. Fines and restitution of more than $2,500 bear interest if not paid within 15 days after the judgment. 18 U.S.C. § 3612(f)(1). If the court finds that the defendant is unable to pay interest, this requirement may be waived or modified. *Id*. § 3612(f)(3). *See* U.S.S.G. § 5E1.1.

45. Alternatively, the court may provide a different payment schedule for each victim, 18 U.S.C. § 3664(i), and may apportion liability among the defendants, 18 U.S.C. § 3664(h).

46. 18 U.S.C. § 3572(a); U.S.S.G. § 5E1.2. *See supra* note 35 regarding interest on fines. Note that the maximum amount of a fine is limited to that which is authorized by the jury's verdict. Southern Union Co. v. United States, 567 U.S. 343, 349–52 (2012) (rule of *Apprendi* applies to criminal fines).

47. Fed. R. Crim. P. 32.2.

48. U.S.S.G. § 5E1.3 & cmt. n.2.

49. In misdemeanor and petty offense trials, magistrate judges must notify defendants of their right to appeal. Fed. R. Crim. P. 58(c)(4). Note also that an appeal from a judgment of conviction or sentence by a magistrate judge is to the district court. Fed. R. Crim. P. 58(g)(2)(B).

unconstitutional,[50] or if there is some other fundamental defect in the proceedings that was not waived by your guilty plea.

(c) [If the defendant has not waived the right to appeal, advise the defendant:]

You also have a statutory right to appeal your *sentence* under certain circumstances, particularly if you think the sentence is contrary to law.

[or]

[If there is a waiver of the right to appeal, advise the defendant:]

Under some circumstances, a defendant also has the right to appeal the sentence. However, a defendant may waive that right as part of a plea agreement, and you have entered into a plea agreement which waives some or all of your rights to appeal the sentence itself. Such waivers are generally enforceable, but if you believe the waiver itself is not valid, you can present that theory to the appellate court.[51]

2. Notify the defendant:

Any notice of appeal must be filed within fourteen days of the entry of judgment or within fourteen days of the filing of a notice of appeal by the government. If requested, the clerk will prepare and file a notice of appeal on your behalf. If you cannot afford to pay the cost of an appeal or for appellate counsel, you have the right to apply for leave to appeal in forma pauperis, which means you can apply to have the court waive the filing fee. On appeal, you may also apply for court-appointed counsel.[52]

Consider directing counsel for the defendant to file a notice with the court, after the fourteen-day period has passed for filing a notice of appeal, confirming that counsel had again conferred with the defendant regarding the defendant's appellate rights and, if the defendant chose not to file a notice of appeal, indicating such in the notice. This may avoid a later disagreement as to whether a notice of appeal should have been filed but was not. If a notice of appeal has been filed, counsel need not file this information with the court.

## *I. Conclusion*

1. Ask the counselors:

Are there any additional arguments or issues you would like addressed that I have not resolved?

50. Class v. United States, 583 U.S. 174, 178 (2018) ("The question is whether a guilty plea by itself bars a federal criminal defendant from challenging the constitutionality of the statute of conviction on direct appeal. We hold that it does not.").

51. The specific terms of the waiver should have been reviewed with the defendant during the plea colloquy. If they were not, review them here to ensure that the defendant's waiver is knowing and voluntary. Even if there was a thorough discussion at the plea hearing, it may be advisable to quickly summarize the relevant terms of the agreement and confirm that the defendant is being sentenced in accordance with those terms.

52. *See* Fed. R. App. P. 4(b)(1)(A) and 24(a); Fed. R. Crim. P. 32(j)(1)–(2); 18 U.S.C. § 3006A.

2. [If the defendant has been sentenced to a term of imprisonment and was at liberty pending sentencing, ask:]

    (a) Does defense counsel request voluntary surrender?[53]

    (b) Does government counsel oppose voluntary surrender?

3. If a term of supervised release is imposed:

    - Consider confirming that the defendant has reviewed the proposed conditions of release with counsel and has no additional objections.
    - As required by 18 U.S.C. § 3583(f), direct the probation officer to provide the defendant with "a written statement that sets forth all the conditions to which the term of supervised release is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required."[54]

4. State:

    (a) The defendant is remanded to the custody of the marshal;

    [or]

    (b) The defendant is to report for service of sentence in the future. Release conditions previously established continue to apply. Failure to report for service of sentence is a criminal offense.[55]

Adjourn.

53. Whether the defendant was permitted to voluntarily surrender affects the defendant's Bureau of Prisons security designation. *See also supra* section 2.11: Release or Detention Pending Sentence or Appeal.

54. *See also* United States v. Thompson, 777 F.3d 368, 380 (7th Cir. 2015) ("Like any other part of a criminal sentence, the conditions of supervised release that are imposed should be clear.").

55. 18 U.S.C. § 3146(a)(2) ("Whoever . . . knowingly . . . fails to surrender for service of sentence pursuant to a court order shall be punished as provided" in the statute.).

# IV. Final Matters

## *A. Entry of Judgment*

A judgment of the conviction should promptly be prepared on the form required by the Sentencing Commission and issued by the Judicial Conference of the United States, Form AO 245B, "Judgment in a Criminal Case" (as revised November 2025).[56] Include a copy of the final order of forfeiture, if any.

## *B. Statement of Reasons*

"[A] transcription or other appropriate public record of the court's statement of reasons, together with the order of judgment and commitment," must be provided to the probation office, to the Sentencing Commission, and, if the sentence includes a prison term, to the Bureau of Prisons. 18 U.S.C. § 3553(c). Under 28 U.S.C. § 994(w)(1), as amended March 9, 2006, courts must send to the Sentencing Commission a report containing several documents, including AO Form 245B (Judgment in a Criminal Case), which includes the statement of reasons and satisfies the requirements of section 3553(c). If there was a non-guidelines sentence, include in the written order of judgment and commitment the specific reasons for sentencing outside of the advisory guideline range.[57]

## *C. Administrative and Research Documentation*

Order that the U.S. Sentencing Commission be sent copies of the charging documents, plea agreement (if any), written proffer or stipulation of facts or law, presentence report, and judgment of conviction (with statement of reasons), and any other information required under 28 U.S.C. § 994(w)(1).

56. Pursuant to the authority granted in 28 U.S.C. § 994(w)(1), the Sentencing Commission approved Form AO 245B (or 245C for an amended judgment; 245D for revocations; 245E for organizational defendants) as the format courts must use to submit sentencing information. As amended March 9, 2006, section 994(w)(1) states:

> The Chief Judge of each district court shall ensure that, within 30 days following entry of judgment in every criminal case, the sentencing court submits to the Commission, in a format approved and required by the Commission, a written report of the sentence, the offense for which it is imposed, the age, race, sex of the offender, and information regarding factors made relevant by the guidelines. The report shall also include—
>
> (A) the judgment and commitment order;
>
> (B) the written statement of reasons for the sentence imposed (which shall include the reason for any departure from the otherwise applicable guideline range and which shall be stated on the written statement of reasons form issued by the Judicial Conference and approved by the United States Sentencing Commission);
>
> (C) any plea agreement;
>
> (D) the indictment or other charging document;
>
> (E) the presentence report; and
>
> (F) any other information as the Commission finds appropriate.
>
> The information referred to in subparagraphs (A) through (F) shall be submitted by the sentencing court in a format approved and required by the Commission.

57. 18 U.S.C. § 3553(c)(2).

## Other FJC Sources

- James B. Eaglin, Sentencing Federal Offenders for Crimes Committed Before November 1, 1987 (1991)
- Jefri Wood, Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues (Federal Judicial Center 2002)

# 4.02 Revocation or Modification of Probation and Supervised Release

*Fed. R. Crim. P. 32.1; 18 U.S.C. § § 3565 and 3583*

## I. Introduction

Effective November 1, 2025, the United States Sentencing Commission made significant changes to the probation and supervised release guidelines. The amendments regarding the imposition of supervised release, including whether to impose a term of release, the length of the term, and the conditions of release, are included in section 4.01: Sentencing Procedure, *supra*. This section will discuss what may follow a sentence of probation or the imposition of supervised release, namely: modification, extension, early termination, and revocation.

*Probation:* The guidelines for the imposition of a term of probation, the length of the term, and the conditions of probation, are largely unchanged. See U.S.S.G. §§5B1.1 to 5B1.3, p.s. The guidelines do not provide instruction for the modification, extension, or early termination of probation.[1] Those actions are governed by Fed. R. Crim. P. 32.1 and 18 U.S.C. §§ 3563(c) (modification) and 3564(c) & (d) (early termination and extension).

*Supervised Release:* The guidelines for the imposition of supervised release were significantly changed by the 2025 amendments and are discussed in section 4.01, *supra*. Modification, early termination, and extension of supervised release are now covered by new U.S.S.G. § 5D1.4, which is based on 18 U.S.C. § 3583(e) and provides additional guidance to courts.

*Revocation:* Previously, violations and revocation of probation and supervised release were both in U.S.S.G. §§ 7B1.1 to 7B1.3. Supervised release is now covered in a new Part C—Violations of Supervised Release (U.S.S.G. §§ 7C1.1 to 7C1.6). The Commission explained that

> violations of probation and supervised release should be addressed separately to reflect their different purposes. While probation serves all the goals of sentencing, including punishment, supervised release primarily "fulfills rehabilitative ends, distinct from those served by incarceration." *United States v. Johnson*, 529 U.S. 53, 59 (2000). In light of these differences, Part B continues to recommend revocation for most probation violations. Part C encourages courts to consider a graduated response to a violation of supervised release, including considering all available options focused on facilitating a defendant's transition into the community and promoting public safety. Parts B and C both recognize the important role of the court, which is best situated to consider the individual defendant's risks and needs and respond accordingly within its broad discretion.

U.S.S.G. ch. 7, pt. A.5 (2025). As with the initial imposition of supervised release, courts should conduct "an individualized assessment" when determining the appropriate response to a violation. U.S.S.G. § 7C1.3(a) & (b).

1. U.S.S.G. § 7B1.3(a)(2) does state that, for a Grade C violation, "the court may (A) revoke probation; or (B) extend the term of probation and/ or modify the conditions thereof."

# II. General Procedure

## *A. Revocation*

Whenever a probationer or a person on supervised release fails to abide by the conditions of supervision or is arrested for another offense, a revocation hearing may be ordered. Revocation is mandatory if a probationer or supervisee possesses a firearm (including a destructive device) or a controlled substance, refuses to comply with required drug testing, or fails three drug tests in a year.[2] See 18 U.S.C. §§ 3565(b), 3583(g). The statutes otherwise leave the decision of whether to revoke to the court's discretion.[3] Revocation of probation is still called for under U.S.S.G. §§ 7B1.1 and 7B1.3, p.s., for conduct that constitutes certain serious offenses, and courts must consider those guidelines, but like all guidelines they are advisory, not mandatory.

## *B. Supervised Release*

As noted above, revocation of supervised release has been separated from probation in a new guideline. Unless revocation is required by statute, "the court should conduct an individualized assessment, taking into consideration the grade of the violation, to determine whether to revoke supervised release." U.S.S.G. § 7C1.3(b), p.s. The Introductory Commentary to Chapter 7, Part C "encourages courts—where possible—to consider a wide array of options to respond to non-compliant behavior and violations of the conditions of supervised release. These interim steps before revocation are intended to allow courts to address the defendant's failure to comply with court-imposed conditions and to better address the needs of the defendant while also maintaining public safety."

## *C. Revocation Procedure: Fed. R. Crim. P. 32.1*

If revocation and incarceration are a possibility, particular attention must be given to ensuring that the probationer or releasee receives substantive and procedural due process. Courts must follow the procedures in Fed. R. Crim. P. 32.1: Revoking or Modifying Probation or Supervised Release. The revocation procedure may be initiated by the court or at the request of the probation office or the office of the U.S. attorney. An Order to Show Cause why probation or supervised release should not be revoked is effective for this purpose.

2. The mandatory drug testing and revocation for refusal to comply provisions became effective September 13, 1994; revocation for failing three drug tests took effect Nov. 2, 2002. The ex post facto prohibition may prevent the application of those provisions to defendants who committed their offenses before the effective dates of the provisions.

3. *See* 18 U.S.C. 3565(a) (if a defendant violates a condition of probation, "the court may (1) continue him on probation, with or without extending the term or modifying or enlarging the conditions; or (2) revoke the sentence of probation and resentence the defendant"); 18 U.S.C. § 3583(e)(3) (after finding "that the defendant violated a condition of supervised release," the court "may" revoke release).

## *D. Initial Appearance*

Rule 32.1(a) requires an initial appearance before a magistrate judge, whether the person is held in custody or appears in response to a summons.[4] Under Rule 32.1(a)(1), the procedures applied at the initial appearance differ depending on whether the district where the person appears is or is not the district where the alleged violation occurred or is one that has jurisdiction to hold the revocation hearing.

"If a person is in custody for violating a condition of probation or supervised release, a magistrate judge must promptly conduct a hearing to determine whether there is probable cause to believe that a violation occurred. The person may waive the hearing." Fed. R. Crim. P. 32.1(b)(1)(A). The Advisory Committee Notes to the 2002 amendments state that, if the initial appearance would not be unnecessarily delayed, it may be combined with the preliminary hearing.

## *E. Preliminary Hearing*

If the probationer or releasee is in custody, Fed. R. Crim. P. 32.1(b)(1) requires a preliminary hearing before a magistrate judge to determine whether there is probable cause to believe that a violation occurred. A probable cause hearing is not required if the probationer or releasee is arrested after the issuance of an Order to Show Cause and brought before the court for an immediate revocation hearing without being held in custody, or if he or she appears voluntarily in response to an Order to Show Cause or other notice. Fed. R. Crim. P. 32.1 and Advisory Committee Notes (1979).

## *F. Right to Counsel*

At all stages of the proceedings, the probationer or releasee must be informed of the right to retain counsel or to request that one be appointed. Fed. R. Crim. P. 32.1(a)(3)(B), (b)(1)(B)(i), (b)(2)(D), and (c)(1). See also 18 U.S.C. § 3006A(a)(1)(E) (each district court shall have a plan to furnish representation for financially eligible persons charged with a violation of supervised release). A defendant may waive that right and,

> [a]lthough] the source of a defendant's right to counsel is different in the revocation context, his waiver of that right, like his waiver of any of the other procedural rights granted by Rule 32.1, still must be both knowing and voluntary. . . . Sixth Amendment cases which elaborate on the requirements for a knowing and voluntary waiver of one's right to an attorney thus remain relevant in the revocation context."[5]

See discussion of right to counsel in section 1.02: Appointment of Counsel or Pro Se Representation, *supra*.

4. "If the defendant's presence in court is required to address a report of non-compliance, the court should consider issuing a summons rather than an arrest warrant where appropriate." U.S.S.G. § 7C1.3, p.s., cmt. n.3. *See also* U.S.S.G. ch. 7, pt. C, introductory cmt. ("New Application Note 3 encourages the court to consider issuing a summons, rather than an arrest warrant, when appropriate, reflecting concerns that an arrest may result in unnecessary collateral consequences.").

5. United States v. Boltinghouse, 784 F.3d 1163, 1172 (7th Cir. 2015). *Accord* United States v. Ivers, 44 F.4th 753, 756 (8th Cir. 2022); United States v. Manuel, 732 F.3d 283, 291 (3d Cir. 2013); United States v. Hodges, 460 F.3d 646, 651–52 (5th Cir. 2006); United States v. Correa-Torres, 326 F.3d 18, 22 (1st Cir. 2003); United States v. Pelensky, 129 F.3d 63, 68 & n.9 (1997). *See also* United States v. Tolbert, 373 F. App'x 363, 364 (4th Cir. 2010) (citing holding in *Hodges* that a waiver of counsel in revocation proceedings "must be knowing and voluntary").

### *G. Crime Victims' Rights*

It is unclear whether, at a revocation hearing, the rights accorded by the Crime Victims' Rights Act, 18 U.S.C. § 3771, should be accorded to a victim of the conduct that caused the violation of probation or release. Neither the relevant statutes nor guidelines address this issue. Application Note 2 in U.S.S.G. § 5D1.4 "encourages the court, in coordination with the government," to provide notice to victims and a reasonable opportunity to be heard when the court is "determining whether to modify any condition of supervised release that would be relevant to a victim or to terminate the remaining term of supervised release." If the conduct constituted a federal offense, the CVRA may apply whether or not there is a separate prosecution.[6] Or, if the revocation hearing is considered a "public court proceeding . . . involving the crime or . . . any release . . . of the accused," *see* § 3771(a)(2), the CVRA may apply. If it is determined that the CVRA applies, ensure that any victims receive the required notice of the hearing and the right to attend, as well as the opportunity "to be reasonably heard" at any proceeding involving sentencing or release.

## III. Modification, Extension, Early Termination

### *A. Probation*

As noted at the beginning of this section, the sentencing guidelines provide little instruction for the modification, extension, or early termination of probation. Courts must look to the relevant statutes and rule.

#### 1. Modification

Modification of probation is governed by 18 U.S.C. § 3563(e):

> The court may modify, reduce, or enlarge the conditions of a sentence of probation at any time prior to the expiration or termination of the term of probation, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation and the provisions applicable to the initial setting of the conditions of probation.

Under Fed. R. Crim. P. 32.1(c)(1), "[b]efore modifying the conditions of probation or supervised release, the court must hold a hearing, at which the person has the right to counsel and an opportunity to make a statement and present any information in mitigation." However, a hearing is not required if (1) the person waives the right to a hearing, or (2) the modification is favorable and does not extend the term of probation *and* the government has not objected after receiving notice. Fed. R. Crim. P. 32.1(c)(2).

#### 2. Early Termination

The procedure for early termination of probation is outlined in 18 U.S.C. § 3564(c):

> The court, after considering the factors set forth in section 3553(a) to the extent that they are applicable, may, pursuant to the provisions of the Federal Rules of Criminal Procedure relating to the modification of probation, terminate a term of probation previously

6. Under § 3771(e), *crime victim* is defined as "a person directly and proximately harmed as a result of the commission of a Federal offense." The rights to notification and attendance apply to any public court proceeding "involving the crime," § 3771(a)(1) & (2), and the right to be heard at such a proceeding applies if it "involv[es] release, plea, [or] sentencing," § 3771(a)(4). No provision of the CVRA limits its application to an offense that is prosecuted.

> ordered and discharge the defendant at any time in the case of a misdemeanor or an infraction or at any time after the expiration of one year of probation in the case of a felony, if it is satisfied that such action is warranted by the conduct of the defendant and the interest of justice.

The decision to grant or deny a request for early termination of probation is reviewed for abuse of discretion.[7] A blanket policy of denying motions to terminate probation, rather than "considering the factors set forth in section 3553(a) to the extent they are applicable," was held to be an abuse of discretion.[8]

### 3. Extension

Under 18 U.S.C. § 3564(d), a court must hold a hearing required by Fed. R. Crim. P. 32.1(c)(1) before extending term of probation: "The court may, after a hearing, extend a term of probation, if less than the maximum authorized term was previously imposed, at any time prior to the expiration or termination of the term of probation, pursuant to the provisions applicable to the initial setting of the term of probation."[9] The defendant may, however, waive the right to a hearing under Rule 32.1(c)(2)(A). The court should ensure that any such waiver is both knowing and voluntary and that the defendant had the opportunity to consult with counsel. See section II.F. Right to Counsel, *supra*.

## *B. Supervised Release*

### 1. Modification of Conditions

In general:

> At any time prior to the expiration or termination of the term of supervised release, the court may modify, reduce, or enlarge the conditions of supervised release whenever warranted by an individualized assessment of the appropriateness of existing conditions. *See* 18 U.S.C. § 3583(e)(2). The court is encouraged to conduct such an assessment in consultation with the probation officer after the defendant's release from imprisonment.

U.S.S.G. 5D1.4(a), p.s. When making the individualized assessment, Application Note 1(a) states that "the factors to be considered are the same factors used to determine whether to impose a term of supervised release. See 18 U.S.C. § 3583(c), (e); Application Note 1 to §5D1.1 (Imposition of a Term of Supervised Release)."

As with the initial imposition of supervised release, if the court modifies or enlarges any discretionary conditions of release, any such conditions must be "reasonably related to the factors set forth in section 3553(a)(1), (a)(2)(B), (a)(2)(C), and (a)(2)(D)," and involve

7. United States v. Hartley, 34 F.4th 919, 928 (10th Cir. 2022).

8. *Id.* at 928–31 ("when a district court imposes or is asked to modify a sentence, it must make individualized determinations based on the applicable statutory criteria rather than rely on a blanket policy"; also citing "cases from other circuits [that] require individualized determinations based on the applicable statutory criteria before imposing a sentence or responding to a request to modify a sentence"). *See also* United States v. Floyd, 491 F. App'x 331, 333 (3d Cir. 2012) ("statutes governing the early termination of probation, 18 U.S.C. § 3564(c), and the modification of supervised release, 18 U.S.C. § 3583(e), do expressly require consideration of 3553(a) factors").

9. *See also* 3 Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Crim. § 564 (5th ed. Sept. 2025 update) ("An extension of the term of probation or supervised release is not favorable to the defendant and thus always requires a hearing.").

"no greater deprivation of liberty than is reasonably necessary for the purposes set forth in section 3553(a)(2)(B), (a)(2)(C), and (a)(2)(D)." 18 U.S.C. § 3583(d)(1) & (2).[10]

When considering "whether to modify any condition of supervised release that would be relevant to a victim or to terminate the remaining term of supervised release," the court is "encouraged" to work with the government "to ensure that any victim of the offense is reasonably, accurately, and timely notified, and provided, to the extent practicable, with an opportunity to be reasonably heard, unless any such victim previously requested not to be notified." U.S.S.G. § 5D1.4, cmt. n.2.

## 2. Early Termination

In accordance with the rules "relating to the modification of probation," the court may "terminate a term of supervised release and discharge the defendant released at any time after the expiration of one year of supervised release, . . . if it is satisfied that such action is warranted by the conduct of the defendant released and the interest of justice." 18 U.S.C. § 3583(e)(1). The guideline provides further instruction:

> Any time after the expiration of one year of supervised release and after an individualized assessment of the need for ongoing supervision, the court may terminate the remaining term of supervision and discharge the defendant if the court determines, following consultation with the government and the probation officer, that the termination is warranted by the conduct of the defendant and in the interest of justice.

U.S.S.G. § 5D1.4(b), p.s.

Note that the requirements for early termination under the statute and the guideline are limited to these:

- after one year on release
- after an individualized assessment
- following consultation with the government and probation officer
- if warranted by the defendant's conduct
- and in the interest of justice

Some courts, however, have required evidence of some sort of significantly changed circumstances in order to grant a motion for early termination. Courts may *consider* such circumstances, but *requiring* them "finds no support in the statutory text. We therefore hold that a district court need not find that an exceptional, extraordinary, new, or unforeseen circumstance warrants early termination of a term of supervised release before granting a motion under

10. *See also* U.S. Sent'g Comm'n, Primer on Supervised Release 23–24 & nn. 134–36 (2025) ("Circuit courts have criticized and struck down discretionary conditions imposed because they were vague and overbroad, not reasonably related to relevant statutory sentencing factors, or constituted a greater deprivation of liberty than reasonably necessary.") (citing cases), https://www.ussc.gov/guidelines/primers/supervised-release.

8 U.S.C. § 3583(e)(1)."[11] Note that while there must be "extraordinary and compelling reasons" to warrant the reduction of a sentence of *imprisonment* under 18 U.S.C. § 3582(c)(1)(A)(i), early termination of supervised release under § 3583 has no similar requirement.

The *Guide to Judiciary Policy* directs probations officers to "consider early termination for all persons who have been supervised for 12 months under low-risk supervision standards and who otherwise meet the eligibility criteria." For defendants who have been on release for 18 months and meet certain criteria, "there is a presumption in favor of recommending early termination."[12] Recent research "demonstrate[s] that supervisees granted early termination under current policies pose no greater risk to the community than those who serve a full term of supervision."[13]

### 3. Extension

A court may, subject to the relevant statutes and rules regarding the imposition or modification of supervised release, "extend a term of supervised release if less than the maximum authorized term was previously imposed, . . . at any time prior to the expiration or termination of the term of supervised release." 18 U.S.C. § 3583(e)(2). Under U.S.S.G. § 5D1.4(c), p.s., the extension should be "warranted by an individualized assessment of the need for further supervision." Application Note 3 of § 5D1.4 adds that "extending a term may be more appropriate than taking other measures, such as revoking a term of release."

Although neither the statute nor the guideline indicate a hearing is required before the court may extend a term of supervised release, Fed. R. Crim. P. 32.1(c)(1) does: "Before modifying the conditions of probation or supervised release, the court must hold a hearing, at which

11. United States v. Melvin, 978 F.3d 49, 53 (3d Cir. 2020) ("extraordinary circumstances may be *sufficient* to justify early termination of a term of supervised release, but they are not *necessary* for such termination") (emphasis in original). *See also* United States v. Hale, 127 F.4th 638, 642 (6th Cir. 2025) (section 3583(e)(1) "does not require a finding of exceptionally good behavior before a district court may grant a motion for early termination of supervised release, though such behavior remains a relevant consideration"); United States v. Ponce, 22 F.4th 1045, 1047 (9th Cir. 2022) (requiring "exceptional behavior" for early termination under § 3583(e)(1) "is incorrect as a matter of law"). *Cf.* United States v. Parisi, 821 F.3d 343, 347 (2d Cir. 2016) ("So long as the court, when modifying supervised release conditions, considers the relevant 18 U.S.C. § 3553(a) sentencing factors, there is no additional requirement that it make a finding of new or changed circumstances with respect to the defendant."); United States v. Davies, 380 F.3d 329, 332 (8th Cir. 2004) ("the statute that authorizes district courts to modify the conditions of supervised release does not require new evidence, nor even changed circumstances in the defendant's life," citing § 3583(e)(2)).

12. Admin. Office of the U.S. Courts, Guide to Judiciary Policy, vol. 8, pt. E, ch. 3: Framework for Effective Supervision, at § 360.20(c) & (f), https://www.uscourts.gov/administration-policies/judiciary-policies/post-conviction-supervision-policies.

13. *See, e.g.*, Thomas H. Cohen, *Early Termination: Shortening Federal Supervision Terms Without Endangering Public Safety*, 88 Fed. Prob. J. 3, 5–12, (Dec. 2024) (In a study of "296,023 federal supervisees with successful case closures between fiscal years 2014 and 2023," who were "matched on a range of criteria associated with the risk of recidivism, supervisees with early terminations manifested post-supervision arrest rates that were two percentage points lower for any offenses than those of their regular-termed counterparts." Also, "the post-supervision rearrest rates for violent offenses were relatively similar for the early- and regular-termed groups."); U.S. Sent'g Comm'n Public Hearing, Mar. 12, 2025 at 255: Testimony of Hon. Edmond E. Chang, Chair, Committee on Criminal Law of the Judicial Conference of the United States ("the data does support that those who are early terminated do not recidivate at any higher rate than those who complete their full term of supervised release"), https://www.ussc.gov/policymaking/meetings-hearings (Day One Transcript at Public Hearing—March 12–13, 2025). *See also* Hon. Richard M. Berman, Court Involved Supervised Release 18 & 21 (June 10, 2024) ("Early termination is an important incentive for supervisees [and] . . . saves taxpayer money in addition to incentivizing successful re-entry."), https://nys-fjc.ca2.uscourts.gov/reports/2024/Court-Involved-Supervised-Release-Report-6-10-2024.pdf.

the person has the right to counsel and an opportunity to make a statement and present any information in mitigation." The releasee may waive the hearing, in which case the court should ensure that any such waiver is both knowing and voluntary and that the defendant had the opportunity to consult with counsel. See section II.F, Right to Counsel, *supra*.

As with modification of supervised release, if the term is extended "[t]he court should ensure that the term imposed on the defendant is sufficient, but not greater than necessary, to address the purposes of imposing supervised release on the defendant." U.S.S.G § 5D1.2, cmt. n.1.

## IV. Suggested Procedure at the Violation Hearing[14]

As noted in section I, Introduction, *supra*, the 2025 guideline amendments emphasize "that violations of probation and supervised release should be addressed separately to reflect their different purposes." The hearing procedures under Fed. R. Crim. P. 32.1, however, treat probation and supervised release together. It is at the end of the hearing, when the court must decide if a violation has occurred and, if so, what the remedy is, that the two must be treated separately. Until that point, the procedure below applies to hearings for violations of either probation and supervised release.

A. Establish for the record that the probationer or releasee, defense counsel, a U.S. attorney, and a probation officer are present.

B. Advise the probationer or releasee of the alleged violations by reading or summarizing the revocation motion. If applicable, include advice that the alleged violation is of a kind that makes revocation mandatory under 18 U.S.C. § 3565(b) or § 3583(g) (possession of a firearm, destructive device, or controlled substance, refusal to comply with a drug test, or testing positive for a controlled substance for the third time in the course of one year[15]), or that U.S.S.G. § 7B1.3(a)(1), p.s. advises revocation of probation for a Grade A or B violation. Note: U.S.S.G. § 7C1.3(b), p.s., states that revocation of supervised release "is generally appropriate for a Grade A violation."

C. Ascertain whether the alleged violations are admitted or denied by the probationer or releasee.

   1. If the violations are admitted:

      (a) Ask the U.S. attorney to present the factual basis showing the violations of the terms of supervision.

      (b) Permit the probationer or releasee, his or her counsel, the U.S. attorney, and the probation officer to be heard concerning whether supervision should be revoked.

   2. If the violations are denied:

      (a) Receive evidence presented by the U.S. attorney and the probationer or releasee.

14. Note that under the Federal Courts Administration Act of 1992, a magistrate judge may revoke, modify, or reinstate probation and modify, revoke, or terminate supervised release if any magistrate judge imposed the probation or supervised release. 18 U.S.C. § 3401(d), (h) (eff. Jan. 1, 1993).

Also under the Act, a district judge may designate a magistrate judge to conduct hearings to modify, revoke, or terminate supervised release; to submit proposed findings of fact; and to recommend a disposition. 18 U.S.C. § 3401(i).

15. The statutory provisions for mandatory revocation for refusal to comply with drug testing and, for supervised releasees, possession of a firearm, were enacted September 13, 1994; mandatory revocation for failing three drug tests was added Nov. 2, 2002. Ex post facto considerations may prohibit the application of those provisions to defendants whose original offenses were committed before the effective dates of the provisions.

(b) The revocation hearing is not a formal trial and the Federal Rules of Evidence do not apply. Fed. R. Evid. 1101(d)(3).

(c) Fed. R. Crim. P. 26.2: Producing a Witness's Statement, applies to a hearing to revoke or modify probation or pretrial release. Fed. R. Crim. P. 32.1(e). "If a party fails to comply with a Rule 26.2 order to produce a witness's statement, the court must not consider that witness's testimony." *Id.*

(d) Proof beyond a reasonable doubt is not required. To revoke probation, the court must be "reasonably satisfied" that the probationer has not met the conditions of probation. *United States v. Francischine*, 512 F.2d 827 (5th Cir. 1975).[16] A violation of supervised release must be found by a preponderance of the evidence. 18 U.S.C. § 3583(e)(3).

# V. Decision and Disposition

*Note*: In a hearing to determine whether to modify or revoke probation or supervised release, before the court makes its decision,[17] the defendant must be given "an opportunity to make a statement and present any information in mitigation." See Fed. R. Crim. P. 32.1(b)(2)(E) and (c)(1).

When determining whether to revoke supervised release, the court may not consider the factors listed in 18 U.S.C. § 3553(a)(2)(A). *Esteras v. United States*, 606 U.S. 185, 195–97 (2025).

## *A. Probation*

1. If a determination is made not to revoke probation:

   (a) The original term of probation may be extended up to the maximum term of probation that could have been imposed originally. 18 U.S.C. §§ 3564(d), 3565(a)(1); U.S.S.G. § 7B1.3(a)(2), p.s.

   (b) Conditions of probation may be modified, enlarged, or reduced. 18 U.S.C. §§ 3563(c), 3565(a)(1); U.S.S.G. § 7B1.3(a)(2), p.s.

   (c) Unless otherwise required by statute, any modification of conditions must "involve only such deprivations of liberty or property as are reasonably necessary for the purposes indicated in section 3553(a)(2)." 18 U.S.C. § 3563(b).

16. The Advisory Committee Notes for the creation of Rule 32.1 in 1979 cited *Francischine* for this proposition. *See also* United States v. Gordon, 961 F.2d 426, 429 (3d Cir. 1992) ("a court can revoke probation when it is reasonably satisfied that the probation conditions have been violated, without the government being required to present proof beyond a reasonable doubt that the defendant committed the alleged acts"); United States v. Verbeke, 853 F.2d 537, 539 (7th Cir. 1988) ("The judge has broad discretion at a probation revocation hearing and must only be satisfied that the conduct of the probationer has not been as good as required by the conditions of probation.") (citing *Francischine*).

17. *See* United States v. Abney, 957 F.3d 241, 250–51 (D.C. Cir. 2020):

> [W]e hold that the same allocution right applies whether the context is initial or revocation sentencing. The timing of the opportunity to allocute—*before* the sentence is imposed—is widely and appropriately recognized as essential both to the reality and public perception that the judge will fairly consider it before deciding on the sentence. . . . If allocution is to serve its purposes, the opportunity to allocute must in either context precede the sentencing decision.

*See also* United States v. Dill, 799 F.3d 821, 825 (7th Cir. 2015) ("judges must approach revocation and sentencing hearings with an open mind and consider the evidence and arguments presented before imposing punishment").

2. If a determination is made to revoke probation:

   (a) Resentence the defendant under the provisions of 18 U.S.C. §§ 3551–3559 if the defendant is subject to 18 U.S.C. § 3565(a)(2). The court must also consider the provisions of U.S.S.G. § 7B1.3–1.4, p.s.

   (b) If probation is revoked for possession of drugs or firearms, for refusal of required drug testing, or for failing three drug tests in one year, sentence the defendant to a term of imprisonment. 18 U.S.C. § 3565(b).[18]

   (c) When resentencing the defendant, the court must "state in open court the reasons for its imposition of the particular sentence." 18 U.S.C. § 3553(c). Also, direct the probation officer to "provide the defendant with a written statement that sets forth all the conditions to which the sentence is subject, and that is sufficiently clear and specific to serve as a guide for the defendant's conduct and for such supervision as is required." 18 U.S.C. § 3563(d).

## *B. Supervised Release*

As part of the 2025 guideline amendments, there are new sections that apply to violations of supervised release that courts must consider. See U.S.S.G. §§ 7C1.1 to 7C1.6, p.s. The purpose of the amendments reflects the Sentencing Commission's intention that courts take a graduated, flexible approach to violations of the conditions of supervised release, while keeping in mind that the purpose of supervised release is rehabilitation, not punishment:

> If the court finds that the defendant violated a condition of supervised release, it may continue the defendant on supervised release under existing conditions, modify the conditions, extend the term, or revoke supervised release and impose a term of imprisonment. *See* 18 U.S.C. § 3583(e)(3). . . .
>
> Because supervised release is intended to promote rehabilitation and ease the defendant's transition back into the community, the Commission encourages courts—where possible—to consider a wide array of options to respond to non-compliant behavior and violations of the conditions of supervised release. These interim steps before revocation are intended to allow courts to address the defendant's failure to comply with court-imposed conditions and to better address the needs of the defendant while also maintaining public safety. If revocation is mandated by statute or the court otherwise determines revocation to be appropriate, the sentence imposed upon revocation should be tailored to address the failure to abide by the conditions of the court-ordered supervision; imposition of an appropriate punishment for new criminal conduct is not the primary goal of a revocation sentence. The determination of the appropriate sentence on any new criminal conviction that is also a basis of the violation should be a separate determination for the court having jurisdiction over such conviction.

U.S.S.G. ch. 7, pt. C, introductory cmt. (Nov. 1, 2025). The Commission also emphasized that, when addressing violations of supervised release conditions, courts "should conduct the same kind of individualized assessment used" during the initial determination under §§ 5D1.1 to 5D1.3, p.s., of whether to impose supervised release, for how long, and under what conditions. *Id.*

1. If the court finds a violation of the conditions of supervised release:

   (a) When it is "a violation for which revocation is required by statute (see 18 U.S.C. § 3583(g)), the court shall revoke supervised release."

18. Note: The provision on revocation for failing three drug tests was not added until Nov. 2, 2002.

(b) "Upon a finding of any other violation, the court should conduct an individualized assessment, taking into consideration the grade of the violation, to determine whether to revoke supervised release. Revocation is generally appropriate for a Grade A violation, often appropriate for a Grade B violation, and may be appropriate for a Grade C violation."

U.S.S.G. § 7C1.3, p.s.

(c) If revocation is not required, "the court may also consider an informal response, such as issuing a warning while maintaining supervised release without modification, continuing the violation hearing to provide the defendant time to come into compliance, or directing the defendant to additional resources needed to come into compliance." *Id.* at cmt. n.1.[19]

2. If a determination is made to revoke supervised release:

(a) Require the person to serve in prison[20] all or part of the term of supervised release without credit for time previously served on post-release supervision, except that the person may not be required to serve more than five years in prison if the person was convicted of a Class A felony, more than three years if convicted of a Class B felony, more than two years if convicted of a Class C or D felony, or more than one year in any other case. 18 U.S.C. § 3583(e)(3). See U.S.S.G. § 7C1.5, p.s., for a table with "the recommended range of imprisonment applicable upon revocation," based on Criminal History Category and Grade of Violation.

(b) Require the person to serve a term of imprisonment when revocation is for possession of drugs or firearms, for refusal of required drug testing, or for failing three drug tests in one year. 18 U.S.C. § 3583(g)[21] and U.S.S.G. § 7C1.5, p.s., cmt. n.5.

(c) If the term of imprisonment imposed is less than the statutorily authorized maximum, determine whether to reimpose a term of supervised release. The length of the reimposed term may not exceed the term of supervised release authorized by statute for the original offense, less the term of imprisonment imposed upon revocation of release. 18 U.S.C. § 3583(h) (added Sept. 13, 1994); U.S.S.G. § 7C1.4(c), p.s.

## VI. Judgment or Order

Enter the appropriate order or judgment. Note that for sentences imposed pursuant to U.S.S.G. § 7B1, p.s., the court should include "the reasons for its imposition of the particular sentence." 18 U.S.C. § 3553(c). For a sentence outside the range resulting from the application of § 7B1 or § 7C1, it may be advisable to follow § 3553(c)(2) and state "with specificity in the written order of judgment and commitment" the reasons "for the imposition of a sentence different from" the recommended range.

19. *See also* Court Involved Supervised Release, *supra* note 13, at 44 (The court has been able to avoid revocation in most cases of violations "by adjusting or supplementing supervised release conditions rather than resorting to re-incarceration. We do as best we can to work collectively with the supervisee, his probation officer, and his treatment providers, even if that means additional supervision, to avoid sending supervisees back to jail." As a result, "we have found that supervisees who have faced revocation have been able . . . to successfully complete supervised release.").

20. Home confinement may also be imposed "as an alternative" to incarceration. *See* 18 U.S.C. § 3583(e)(4); U.S.S.G. § 5F1.2.

21. The provision on revocation for failing three drug tests was not added until Nov. 2, 2002.

## For Further Reference

- Richard M. Berman, *Court-Involved Supervised Release*, 108 Judicature 43 (2025)
- Jefri Wood, Guideline Sentencing: An Outline of Appellate Case Law on Selected Issues 453–67 (Federal Judicial Center 2002)

# 5.01 Handling a Disruptive or Dangerous Defendant

*Fed. R. Crim. P. 43(c)*

## *A. Removal of Defendant*

> A defendant who was initially present at trial, or who had pleaded guilty or nolo contendere, waives the right to be present . . . when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom. . . . If the defendant waives the right to be present, the trial may proceed to completion, including the verdict's return and sentencing, during the defendant's absence.

Fed. R. Crim. P. 43(c)(1)(C), (c)(2).

The Supreme Court held that a disruptive defendant, after appropriate warning, may be removed from the courtroom. *Illinois v. Allen*, 397 U.S. 337, 344 (1970). (The Court also stated that a defendant may be cited for contempt or, "as a last resort," allowed to remain in the courtroom bound and gagged. See *infra* B, Restraint of Defendant.) "Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." *Id.* at 343.

When the court is faced with a disruptive defendant:

1. The court should warn the defendant that continuation of the disruptive conduct will lead to removal of the defendant from the courtroom.[1]
2. If the disruptive conduct continues, the court should determine whether it warrants removal of the defendant.[2] Note that some circuits have held that a court does not have to "try its luck with other sanctions before excluding a disruptive defendant, and we give great deference to the district court's decision that exclusion was necessary."[3]
3. At the beginning of each session, the court should advise the defendant that they may return to the courtroom if the defendant assures the court that there will be no further disturbances.

1. One circuit held that, in a multidefendant case, "[n]otice to one defendant is notice to all present in the courtroom for purposes of Rule 43." United States v. West, 877 F.2d 281, 287 (4th Cir. 1989). *Cf.* United States v. Beasley, 72 F.3d 1518, 1530 (11th Cir. 1996) (although court may not have personally warned defendant that he might be removed, it was sufficient that the court "at the very least stated in [his] presence, that he would be removed . . . if he continued his disruptive behavior. In our view, this warning was sufficient to put [the defendant] on notice of what might happen if he did not behave.").

2. Whether the conduct is serious enough to warrant the defendant's removal is generally in the discretion of the trial judge. Rule 43(c)(1)(C) simply states that it must be "conduct that justifies removal from the courtroom," and the Supreme Court described it as conduct that is "so disorderly, disruptive, and disrespectful of the court that [defendant's] trial cannot be carried on with him in the courtroom." Illinois v. Allen, 397 U.S. 337, 343 (1970).

3. *Beasley*, 72 F.3d at 1529–30. *See also* United States v. Benabe, 654 F.3d 753, 770 (7th Cir. 2011) ("the [*Allen*] Court did not make removal a last resort. Instead, the Court put its faith in trial courts to choose the best method to maintain the dignity and decorum of the proceedings in a case-by-case fashion, based on the unique circumstances presented by the defendant and the trial."); United States v. Hill, 63 F.4th 335, 348 (5th Cir. 2023) ("*Allen* does not make 'removal a last resort' or require a district court to 'exhaust every other possible cure' before ordering removal") (quoting *Benabe*).

4. The court should consider ways to allow the defendant to communicate with counsel to keep apprised of the progress of the trial. The court should also consider making arrangements to allow the defendant to hear or see the proceedings via electronic means, if available.
5. The court should consider any other factors required by circuit law.[4]

If the defendant is appearing pro se and standby counsel is present, the court should first warn the defendant that pro se status will be denied and that standby counsel will take over if there is further disruption. If pro se status is denied and standby counsel takes over, the defendant may be removed from the courtroom for any further disruption.

## *B. Restraint of Defendant ("Shackling")*

As the Supreme Court stated in *Allen*, disruptive defendants may, under certain circumstances, be physically restrained. The Court later expanded upon that holding in reference to defendants who are not merely disruptive but potentially dangerous. "Courts and commentators share close to a consensus that, during the guilt phase of a trial, a criminal defendant has a right to remain free of physical restraints that are visible to the jury; that the right has a constitutional dimension; but that the right may be overcome in a particular instance by essential state interests such as physical security, escape prevention, or courtroom decorum." *Deck v. Missouri*, 544 U.S. 622, 629 (2005). Before a defendant can be visibly restrained in front of the jury, the court must "take account of special circumstances, including security concerns, that may call for shackling. . . . [A]ny such determination must be case specific; that is to say, it should reflect particular concerns, say, special security needs or escape risks, related to the defendant on trial." *Id.* at 633.

*Deck* also held that the "considerations that militate against the routine use of visible shackles during the guilt phase of a criminal trial apply with like force to penalty proceedings in capital cases. . . . [C]ourts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding." 544 U.S. at 632–33.

*When the court is faced with a potentially dangerous defendant:*[5]

1. Consider less intrusive protective measures that are less likely to prejudice the jury against the defendant, such as putting extra law enforcement officers in the courtroom.[6]
2. Courts should employ measures, such as draping the defense table so that leg shackles cannot be seen, or using "stun belts" that can be worn underneath a defendant's clothes,

4. For example, the Eleventh Circuit requires courts to consider the potential prejudice to the defense of the defendant's absence in addition to the adequacy of the warning and degree of misconduct. *See* Foster v. Wainwright, 686 F.2d 1382, 1388 (11th Cir. 1982).

5. The Court in *Deck* stated that the "[l]ower courts have disagreed about the specific procedural steps a trial court must take prior to shackling [and] about the amount and type of evidence needed to justify restraints," 544 U.S. at 629, but the common practices listed here may provide guidance to courts that are considering restraining a defendant.

6. Holbrook v. Flynn, 475 U.S. 560, 569 (1986) (although it must be determined on a case-by-case basis, compared with shackling, "the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable").

whenever possible.[7] The Court in *Deck* indicated that restraints should not be visible to the jury unless necessary under the particular circumstances of the case.

3. Allow defense counsel (or the defendant if pro se) the opportunity to respond to the court's concerns.[8]
4. If the factual basis for restraint is disputed, consider holding an evidentiary hearing and making findings on the record.[9]
5. Make an independent evaluation based on the circumstances of the case and the individual defendant.[10]
6. If the court concludes that physical restraint is advisable, "impose no greater restraints than necessary to secure the courtroom . . . [and] take all practical measures, including

7. *See, e.g.*, United States v. Wardell, 591 F.3d 1279, 1294 (10th Cir. 2009) ("district court's decision to require a defendant to wear a stun belt during a criminal trial would appear ordinarily to pose no constitutional problem when: (1) the court makes a defendant-specific determination of necessity resulting from security concerns; and (2) it minimizes the risk of prejudice by, for instance, concealing the stun belt from the jury"); United States v. Brazel, 102 F.3d 1120, 1158 (11th Cir. 1997) ("The court's use of cloths to cover all counsels' tables so that the leg shackles were not visible significantly reduced the possibility of prejudice."); United States v. Collins, 109 F.3d 1413, 1418 (9th Cir. 1997) (same).

8. *See* Sides v. Cherry, 609 F.3d 576, 586 (3d Cir. 2010) ("district courts should hold a proceeding [outside the presence of the jury] that allows the parties to offer argument bearing on the need for restraints as well as the extent of the restraints deemed necessary (if any)"); United States v. Theriault, 531 F.2d 281, 285 (5th Cir. 1976) ("Counsel, or the defendant himself in appropriate cases, should be given an opportunity both to respond to the reasons presented and to persuade the judge that such measures are unnecessary."); United States v. Samuel, 431 F.2d 610, 615 (4th Cir. 1970) ("Whenever unusual visible security measures in jury cases are to be employed, we will require the district judge to state for the record, out of the presence of the jury, the reasons therefor and give counsel an opportunity to comment thereon, as well as to persuade him that such measures are unnecessary.").

9. *Theriault*, 531 F.2d at 285:

> [W]hen unusual visible security measures are utilized before a jury, we will require that the district judge state for the record, outside the jury's presence, the reasons for such action. . . . A formal evidentiary hearing may not be required, but if the factual basis for the extraordinary security is controverted, the taking of evidence and finding of facts may be necessary.

*Accord* United States v. Moore, 651 F.3d 30, 46 (D.C. Cir. 2011) (citing *Theriault* regarding whether evidentiary hearing is required). *See also* United States v. Haynes, 729 F.3d 178, 191 (2d Cir. 2013) ("the trial court erred in permitting the defendant to be tried in shackles without a finding on the record that there was a compelling reason to do so that could not be achieved by less onerous means").

10. *See, e.g.*, *Moore*, 651 F.3d at 46 (affirming, in part, because the district court "considered the security concerns presented by the particular defendants at trial before making the determination that stun belts were appropriate. It thoroughly examined factors relevant to each defendant and . . . made a determination based on those factors."); United States v. Baker, 432 F.3d 1189, 1244 (11th Cir. 2005) ("if a judge intends to shackle a defendant, he must make a case specific and individualized assessment of each defendant in that particular trial"); United States v. Zuber, 118 F.3d 101, 103 (2d Cir. 1997) ("a presiding judge may not approve the use of physical restraints, in court, on a party to a jury trial unless the judge has first performed an independent evaluation—including an evidentiary hearing, where necessary—of the need to restrain the party"); United States v. Hack, 782 F.2d 862, 868 (10th Cir. 1986) ("The extent to which the security measures are needed should be determined by the trial judge on a case-by-case basis by 'considering the person's record, the crime charged, his physical condition, and other available security measures.'") (citation omitted). *See also* United States v. Banegas, 600 F.3d 342, 346 (5th Cir. 2010) (because a court must articulate specific reasons why shackling a defendant is necessary for safety, vacating conviction where "the only reason articulated by the court for shackling Banegas was that, in that court, every incarcerated *pro se* defendant is shackled").

> a cautionary instruction, to minimize the prejudice resulting from a party appearing in physical restraints."[11]

*Other factors to consider:*

1. Do not defer to law enforcement officials—make an independent evaluation.

Although a court may consider the recommendation of a U.S. marshal or other law enforcement official in deciding whether shackling is warranted, "trial judges should not blindly defer to the recommendation of law enforcement officials as to the appropriateness of shackling without independently reviewing the facts and circumstances thought to warrant such a security measure and carefully considering the legal ramifications of that decision."[12]

2. Witnesses and civil trials

Some circuits have concluded that the concerns about restraints also apply to parties in civil suits:

> The principles consistently applied are that the trial court has discretion to order physical restraints on a party or witness when the court has found those restraints to be necessary to maintain safety or security; but the court must impose no greater restraints than are necessary, and it must take steps to minimize the prejudice resulting from the presence of the restraints.[13]

11. *Sides*, 609 F.3d at 586. *See also Haynes*, 729 F.3d at 188 ("a defendant may not be tried in shackles unless the trial judge finds on the record that it is necessary to use such a restraint as a last resort to satisfy a compelling interest such as preserving the safety of persons in the courtroom"); Woodard v. Perrin, 692 F.2d 220, 221 (1st Cir. 1982) ("a judge should consider less restrictive measures before deciding that a defendant should be shackled").

12. United States v. Mays, 158 F.3d 1215, 1226 (11th Cir. 1998). *See also Sides*, 609 F.3d at 582 ("though a district court may rely 'heavily' on advice from court security officers, it 'bears the ultimate responsibility' of determining what restraints are necessary") (citation omitted); Lakin v. Stine, 431 F.3d 959, 964 (6th Cir. 2005) (error to "simply defer[] to the corrections officer's request. Although a trial court might find a corrections officer's opinion highly relevant to answering the ultimate inquiry as to whether shackling is necessary in a particular case, an individualized determination under the due process clause requires more than rubber stamping that request."); Gonzalez v. Pliler, 341 F.3d 897, 902 (9th Cir. 2003) ("It is the duty of the trial court, not correctional officers, to make the affirmative determination, in conformance with constitutional standards, to order the physical restraint of a defendant."); Davidson v. Riley, 44 F.3d 1118, 1124 (2d Cir. 1995) ("If the court has deferred entirely to those guarding the prisoner, . . . it has failed to exercise its discretion."); Woods v. Theiret, 5 F.3d 244, 248 (7th Cir. 1993) ("While the trial court may rely 'heavily' on the marshals in evaluating the appropriate security measures to take with a given prisoner, the court bears the ultimate responsibility for that determination and may not delegate the decision to shackle an inmate to the marshals."); *Samuel*, 431 F.2d at 615 ("the discretion is that of the district judge. He may not . . . delegate that discretion to the Marshal."). *Cf.* United States v. Hill, 63 F.4th 335, 345–46 (5th Cir. 2023) (finding that *Deck* "did not hold that the court could not rely on an assessment of the trial's specific factors made by the U.S. Marshals," and that "courts may rely heavily on the recommendation of the Marshals" that restraint is necessary).

13. *Davidson*, 44 F.3d at 1122–23. *Accord* Claiborne v. Blauser, 934 F.3d 885, 895 (9th Cir. 2019) ("we have long recognized that the prohibition against routine visible shackling applies even when the presumption of innocence does not, including in the civil context"); *Sides*, 609 F.3d at 581 (agreeing with other circuits "that the concerns expressed in *Allen* also apply in the context of civil trials"); *Woods*, 5 F.3d at 246–47 ("analysis used to determine when restraints are necessary in criminal cases is also applicable in civil cases"). *See also* Lemons v. Skidmore, 985 F.2d 354, 357 (7th Cir. 1993) ("shackles suggest to the jury in a civil case that the plaintiff is a violent person. Since plaintiff's tendency towards violence was at issue in this case, shackles inevitably prejudiced the jury."); Holloway v. Alexander, 957 F.2d 529, 530 (8th Cir. 1992) (in prisoner civil rights cases, court must make "reasonable efforts . . . to permit the inmate and the inmate's witnesses to appear without shackles during proceedings before the jury"; if restraints are used, "court should take appropriate action to minimize the use of shackles, to cover shackles from the jury's view, and to mitigate any potential prejudice through cautionary instructions"); Wilson v. McCarthy, 770 F.2d 1482, 1485 (9th Cir. 1985) ("federal courts use the same standard of review in both defendant shackling and witness shackling cases"); Harrell v. Israel, 672 F.2d 632, 635 (7th Cir. 1982) ("the general rule against the use of physical restraints in the courtroom applies to defense witnesses as well as the defendant himself").

This issue may arise mostly in civil rights suits brought by prisoners, but also applies to a witness in a criminal trial if the court determines there is a need for some form of restraint.

3. Use of stun belts

Some circuits have found that, although often concealed and thereby not visible to the jury, "stun belts plainly pose many of the same constitutional concerns as do other physical restraints," and "a decision to use a stun belt must be subjected to at least the same 'close judicial scrutiny' required for the imposition of other physical restraints."[14]

4. When the defendant will be physically restrained:[15]

Make sure that the restraints are not visible to the jury and do not create noise. The defendant "should *never* be brought in or out of the courtroom while the jury is present." If the defendant is unable to stand because of restraints, have everyone in court remain seated when you leave or enter the courtroom. "Having everyone else stand while the defendants remain seated will suggest to the jury that the defendants are shackled or will make the defendants appear disrespectful. Instruct attorneys to remain seated even during pretrial hearings, to condition the behavior."

## Other FJC Sources

- Manual on Recurring Problems in Criminal Trials 41–43 (Tucker Carrington & Kris Markarian eds., 6th ed. 2010)

14. United States v. Durham, 287 F.3d 1297, 1306 (11th Cir. 2002) (also noting that "[d]ue to the novelty of this technology, a court contemplating its use will likely need to make factual findings about the operation of the stun belt, addressing issues such as the criteria for triggering the belt and the possibility of accidental discharge"). *See also Wardell*, 591 F.3d at 1293–94 (principles that apply to physical restraints "should apply to stun belts . . . . If seen or activated, a stun belt 'might have a significant effect on the jury's feelings about the defendant.'") (citations omitted); United States v. Miller, 531 F.3d 340, 344–45 (6th Cir. 2008) (*Deck* applies to use of "stun belt" on defendant during trial); *Gonzalez*, 341 F.3d at 900 ("The use of stun belts, depending somewhat on their method of deployment, raises all of the traditional concerns about the imposition of physical restraints."). *Cf.* Chavez v. Cockrell, 310 F.3d 805, 809 (5th Cir. 2002) (where judge immediately "took steps to mitigate any prejudicial influence on the jury," accidental activation of stun belt on first day of trial did not deny defendant the presumption of innocence).

15. The following suggestions are from: David O. Carter, Managing Federal Death Penalty Cases: A Practice-Oriented Guide to Complex Death Penalty Litigation 30–31 (2008), https://cjastudy.fd.org/sites/default/files/hearing-archives/san-francisco-california/pdf/judgedavidcartersan-frana-pracitice-oriented-guide-complex-death-penalty-litigation.pdf.

# 5.02 Grants of Immunity

*18 U.S.C. § 6002, 6003; 21 U.S.C. § 884; 28 C.F.R. § 0.175.*

The cited statutes provide for the entry of an order requiring an individual to give testimony or provide other information at any proceeding before or ancillary to a court or a grand jury of the United States after the court ensures compliance with the requirements of 18 U.S.C. §§ 6002, 6003, and 28 C.F.R. § 0.175, or, in the case of testimony or information concerning controlled substances, compliance with 21 U.S.C. § 884 and 28 C.F.R. § 0.175.

## Procedure

A. Review the motion of the U.S. attorney to satisfy yourself that

1. the motion is made with the approval of the Attorney General, the Deputy Attorney General, or any designated assistant attorney general of the United States Department of Justice;
2. the motion asserts that the testimony or other information from the individual may be necessary to the public interest; and
3. the motion asserts that the individual has refused or is likely to refuse to testify or provide other information on the basis of the privilege against self-incrimination.

B. If the above requirements have been met, enter an order reflecting the court's satisfaction that the prerequisites have been met and ordering, pursuant to 18 U.S.C. § 6003 or 21 U.S.C. § 884, that

1. the person shall give testimony or provide other information as to all matters about which the person may be interrogated before the court or the grand jury, testimony that they have refused to give or to provide on the basis of the privilege against self-incrimination;
2. the order shall become effective only if, after the date of the order, the person refuses to testify or provide other information on the basis of their privilege against self-incrimination;
3. no testimony or other information compelled from the person under the order, or any information directly or indirectly derived from such testimony or other information, may be used against the person in any criminal case except in a prosecution for perjury, for giving a false statement, or for otherwise failing to comply with the order; and
4. the motion and order are to be sealed, if appropriate.

C. If the motion and order are to be sealed:

1. There must be a judicial determination that sealing is appropriate and an articulated justification for sealing. Sealing should be targeted, affecting only those matters or materials that are appropriate for sealing.
2. If possible, the order should include a sunset date for the sealing. Some courts have developed sealing schedules or best practices on length of sealing.

D. Cause the (sealed) motion and order to be delivered to the clerk of court.

## Other FJC Sources

- Robert Timothy Reagan, Confidential Discovery: A Pocket Guide on Protective Orders (Federal Judicial Center 2012), https://fjc.dcn/sites/default/files/2012/ConfidentialDisc.pdf
- Robert Timothy Reagan, Sealing Court Records and Proceedings: A Pocket Guide (Federal Judicial Center 2010), https://fjc.dcn/sites/default/files/2012/Sealing_Guide.pdf
- Judicial Conference of the United States, Guide to Judiciary Policy, Vol. 4, Ch. 7: Sealed Case Files and Records (revised Feb. 26, 2024), https://jnet.ao.dcn/sites/default/files/pdf/Vol4_Ch7.pdf
- Robert Timothy Reagan, et al, Sealed Settlement Agreements in Federal District Court (Federal Judicial Center 2004), https://fjc.dcn/content/sealed-settlement-agreements-federal-district-court-0
- Manual for Complex Litigation, Fourth 228 n.683 (2004)
- Pattern Criminal Jury Instructions 32 (1987), https://fjc.dcn/sites/default/files/2012/CrimJury.pdf

# 5.03 Invoking the Fifth Amendment

The case law on this subject varies from circuit to circuit. The suggested procedure may be altered to conform with the law of the circuit, the practice of the district, and the preferences of the individual judge.

The judge should apprise the parties that they must, if at all possible, advise the court if a witness has indicated that they will invoke the Fifth Amendment, and do so before the witness is called to testify, so that the court can have a hearing on the issue before the witness takes the stand and outside of the hearing of the jury.

A. If a witness refuses to answer a proper question and invokes the Fifth Amendment privilege to justify that refusal, the trial court must determine whether the privilege has been properly claimed. The Fifth Amendment privilege extends to

   1. answers that would support a conviction of the witness for violating a federal or state criminal statute; or
   2. answers that would furnish a link in the chain of evidence needed to prosecute the witness for violating a federal or state criminal statute.

B. The following suggested procedure may be used when a witness claims the Fifth Amendment privilege:

   1. Excuse the jury.
   2. Explain to the witness the nature of the Fifth Amendment privilege. Ask the witness if they wish to consult counsel. Consider the appointment of counsel.
   3. Have the question repeated to the witness, and ask the witness if they still refuse to answer the question.
   4. If the witness still refuses on the ground of the Fifth Amendment, the court should determine whether the claim of the privilege is appropriate. Be careful not to interrogate the witness about the claim in such a way as to force the witness to surrender the privilege in order to claim it.
   5. If the witness makes a prima facie showing of the validity of their claim, the party seeking the answer then has the burden to demonstrate that the answer could not possibly tend to incriminate the witness.
   6. Sustain the Fifth Amendment claim if you find that the witness has reasonable cause to believe that answering the particular question might tend to incriminate the witness. The criterion to be applied in making this determination is the *possibility* of prosecution, not the *likelihood* of prosecution.

      As the Supreme Court found in *Hoffman v. United States*, 341 U.S. 479, 486 (1951):

      > To sustain the privilege it need only be evident from the implication of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result. The trial judge in appraising the claim must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence.

   7. The witness may not assert a blanket claim of the privilege as to all questions. For each question, the witness must assert or not assert the privilege. Out of the jury's presence,

the court must rule as to each question whether the witness's claim of privilege is sustained or overruled. The court may sustain a blanket assertion of the privilege only if it concludes, after inquiry, that the witness could legitimately refuse to answer all relevant questions.

## Other FJC Sources

- Manual for Complex Litigation, Fourth 101, 228, 525 (2004)

# 5.04 Handling the Recalcitrant Witness

*Fed. R. Crim. P. 42; 18 U.S.C. § 1826*

The case law on this subject varies from circuit to circuit. The suggested procedure may be varied to conform with the law of the circuit, the practice of the district, and the preferences of the individual judge.

Refusal by a witness during trial or before a grand jury to answer a proper question, after having been ordered to do so by the court, constitutes contempt of court, and the witness may be subject to both civil and criminal contempt sanctions. See 18 U.S.C. § 401(3); 28 U.S.C. § 1826(a). See also *infra* sections 7.01: Contempt—Criminal and 7.02: Contempt—Civil.

## *A. Recalcitrant Witness During Trial*

When a witness refuses to answer a proper question during trial, consider the following procedure:

1. Excuse the jury.
2. Determine the reason for the refusal. (If the witness claims the Fifth Amendment privilege, see *supra* section 5.03: Invoking the Fifth Amendment.)
3. If no valid Fifth Amendment claim or other good cause is shown, advise the witness
   (a) that the jury will be recalled and that the witness will be ordered to answer the question.
   (b) that if the witness persists in refusing to answer, the witness will be cited for civil contempt, and if found guilty, will be confined until they answer the question or until the trial ends. Advise the witness that they may be fined in addition to being confined.
   (c) that if the witness has not answered the question before the trial ends, they may then be cited for criminal contempt and, if found guilty, fined *or* imprisoned; that if the witness is found guilty of criminal contempt at a bench trial, they may be imprisoned for as much as six months; and that if a jury finds the witness guilty of criminal contempt, they may be imprisoned for as long as the court in its discretion determines. (If the witness is currently serving another sentence, advise the witness that if they are confined for civil or criminal contempt, the confinement will be in addition to the sentence already being served.)
4. The jury should then be recalled, the question re-asked, and the witness ordered to answer.
5. If the witness refuses to answer, counsel should be permitted to examine the witness concerning other subject matter about which the witness is willing to testify.
6. After the witness has been examined
   (a) direct the witness to remain in court until the next recess; or
   (b) excuse the jury so that a time can be set for a hearing to determine if the witness should be found in civil contempt.

[*Note:* The witness should be given a reasonable time to prepare for the hearing, but this time depends on the need for prompt action. If the trial is expected to be short, set an early hearing so that effective pressure to testify can be exerted on the witness before the trial ends. If the trial is expected to be lengthy, the hearing need not be held so promptly. (If, but only if, there is need for immediate action, the witness can be held in summary criminal contempt under Fed. R. Crim. P. 42(b)) and committed at once for criminal contempt that occurred in the presence of the court. If committed for criminal contempt, the witness should be committed for a stated period of time but should be advised that the court would reconsider that sentence if the witness decided to testify during the trial. See, e.g., *United States v. Wilson*, 421 U.S. 309 (1975) (summary contempt under former Rule 42(a) appropriate for already imprisoned witnesses who refused to testify despite grant of immunity).[1]) Advise the witness that they may be represented by an attorney at the hearing on the civil contempt citation and that if the witness cannot afford an attorney, one will be appointed.]

7. If, at the hearing, the witness fails to show good cause why they should not be compelled to answer the question that the court ordered the witness to answer, the witness should be found in civil contempt and remanded into the marshal's custody. Advise the witness that they may purge themselves of contempt and secure release by answering the question.
8. Direct the marshal to return the witness to the courtroom before court convenes the next day. At that time ask the witness if they are prepared to answer the question which was asked of them. If the witness is not prepared to answer, again remand the witness into the marshal's custody. Advise the witness to notify the marshal at once if they decide to answer the question, so that the witness can be returned to court and permitted to purge themselves of contempt.
9. If the witness has not purged themselves of contempt by the time the trial ends, have them brought back into court.
10. Pursuant to the procedure outlined in Fed. R. Crim. P. 42(a), advise the witness that they are being cited for criminal contempt for refusing to obey the court's order.
11. Set the matter down for hearing at a certain place and time to determine if the witness is guilty of criminal contempt. (Bear in mind that the maximum prison sentence that can be imposed after a bench trial is six months. For a prison sentence of more than six months, there must be a jury trial.)
12. Advise the witness that they have a right to be represented by counsel at that hearing and that if the witness cannot afford counsel, the court will appoint an attorney.
13. Release the witness from custody. Bail may be set to ensure the witness's appearance at the hearing.

## *B. Recalcitrant Witness Before Grand Jury*

When a witness refuses to answer a proper question before a grand jury, consider the following procedure:

1. Note that *Wilson* applies only to witnesses during a criminal trial. Witnesses before a grand jury should be given notice and a hearing under current Rule 42(a). *See* Harris v. United States, 382 U.S. 162 (1965).

1. Have the witness appear before the court out of the presence of the grand jury.
2. Determine the reason for the refusal. (If the witness claims the Fifth Amendment privilege, see *supra* section 5.03: Invoking the Fifth Amendment.)
3. If no valid Fifth Amendment claim or other good cause is shown, advise the witness
   (a) that they will be returned to the presence of the grand jury and that the court is ordering the witness to answer the question that they had previously refused to answer.
   (b) that if the witness persists in refusing, they will be cited for civil contempt and, if found guilty, may be confined for the term of the grand jury, including extensions, or for a period of eighteen months, or until the witness answers the question, whichever occurs first. Advise the witness that they may be fined in addition to being confined.
   (c) that if the witness has not answered the question before the term of the grand jury and its extensions expire, or after eighteen months have passed, whichever occurs first, the witness will be released from custody but may then be cited for criminal contempt, and if found guilty, may be fined or imprisoned; that if the witness is found guilty of criminal contempt at a bench trial, they may be imprisoned for as much as six months; and that if a jury finds the witness guilty of criminal contempt, they may be imprisoned for as long as the court in its discretion determines. (If the witness is currently serving another sentence, advise the witness that the confinement for criminal contempt would be in addition to the sentence currently being served.)
4. Return the witness to the grand jury room.[2]
5. If the witness persists in refusing to answer the question before the grand jury, have the witness brought before the court and at that time advise the witness that they are being cited for civil contempt. Do not summarily adjudge the witness to be in contempt pursuant to Fed. R. Crim. P. 42(b). Rather, advise the witness when and where a hearing will be held on the civil contempt citation. Advise the witness that they may be represented by counsel at that hearing and that if the witness cannot afford counsel, the court will appoint an attorney.
6. If the evidence warrants, adjudge the witness to be in civil contempt and order the witness committed for the term of the grand jury and its extensions, for eighteen months, or until the witness answers the question, whichever occurs first. 28 U.S.C. § 1826(a).
7. Advise the witness that they will be released as soon as they have purged themselves of contempt by answering the question and that the witness should advise the marshal at once if they decide to answer the question.
8. If the witness has not purged themselves of civil contempt before the term of the grand jury and its extensions expire or eighteen months have passed, whichever occurs first, the witness may be cited for criminal contempt pursuant to Fed. R. Crim. P. 42(a).
9. If you decide to cite the witness for criminal contempt, advise the witness when and where the hearing will be held to determine if they should be punished for criminal contempt. (Bear in mind that the maximum prison sentence that can be imposed after a bench trial is six months. For a prison sentence of more than six months, there must be a jury trial.)

2. This step may be unnecessary if the witness declares during the court proceeding that they will persist in refusing and that another opportunity to answer would be pointless.

10. Advise the witness that they have a right to be represented by counsel at the hearing and that if the witness cannot afford counsel, the court will appoint an attorney.
11. Release the witness from custody. If necessary, set bail to ensure that the witness appears at the hearing on the criminal contempt citation.

## Other FJC Sources

- Manual for Complex Litigation, Fourth 20 (2004)
- Manual on Recurring Problems in Criminal Trials 38–41 (Tucker Carrington & Kris Markarian eds., 6th ed. 2010)

# 5.05 Criminal Defendant's Motion for Mistrial

*Fed. R. Crim. P. 26.3*

## General Guidelines

When a criminal defendant moves for a mistrial, the general rule is that retrial is not barred by double jeopardy concerns. See *United States v. Scott*, 437 U.S. 82, 93–94 (1978). However, there is one important exception to this rule: Retrial is barred if the motion was provoked by intentional government misconduct.

> Only where the governmental conduct in question is intended to "goad" the defendant into moving for a mistrial may a defendant raise the bar of double jeopardy to a second trial after having successfully aborted the first on his own motion.

*Oregon v. Kennedy*, 456 U.S. 667, 676 (1982).

The court must find that the *intent* of the government was to deliberately provoke a mistrial, not merely that the conduct was harassing or in bad faith.

> Prosecutorial conduct that might be viewed as harassment or overreaching, even if sufficient to justify a mistrial on defendant's motion, . . . does not bar retrial absent intent on the part of the prosecutor to subvert the protections afforded by the Double Jeopardy Clause.

*Id.* at 675–76.

Note that mistake or carelessness is not sufficient to support a double jeopardy claim. See, e.g., *United States v. Johnson*, 55 F.3d 976, 978 (4th Cir. 1995); *United States v. Powell*, 982 F.2d 1422, 1429 (10th Cir. 1992). Nor is "[n]egligence, even if gross." *United States v. Huang*, 960 F.2d 1128, 1133 (2d Cir. 1992). Even a deliberate improper act that causes a mistrial does not prevent retrial if it was not *intended* to provoke a mistrial. *United States v. White*, 914 F.2d 747, 752 (6th Cir. 1990) (although prosecutor deliberately attempted to elicit from witness evidence that court had ruled inadmissible, court found that conduct was motivated by "prosecutorial inexperience").

If the defendant moves for a mistrial with jeopardy attached on the specific ground of prosecutorial misconduct, the court should not deny a mistrial on that ground and then declare a mistrial without prejudice over the defendant's objection unless the defendant consents or there is "manifest necessity" for a mistrial. See *Weston v. Kernan*, 50 F.3d 633, 636–38 (9th Cir. 1995). See also *Corey v. District Court of Vermont, Unit #1, Rutland Circuit*, 917 F.2d 88, 90–92 (2d Cir. 1990) (retrial prohibited where the defendant consented to mistrial only if jeopardy attached but court declared mistrial without prejudice).

Before a court may order a mistrial, Fed. R. Crim. P. 26.3 requires it to "give each defendant and the government an opportunity to comment on the propriety of the order, to state whether that party consents or objects, and to suggest alternatives."

## Multidefendant Cases

If only one or some of the defendants in a multidefendant case move successfully for mistrial, the court should give the other defendants an opportunity to object. Unless the nonmoving

defendants join the motion or acquiesce to the decision,[1] the court should sever their cases or must find that there are grounds to declare a mistrial for those defendants, too. See, e.g., *White*, 914 F.2d at 753–55 (conviction must be vacated on double jeopardy grounds where the defendant did not have sufficient opportunity to object to other defendant's mistrial motion at initial trial, the record did not indicate he joined the motion or otherwise consented to mistrial, and "there was no manifest necessity for declaring a mistrial in regard to him").

Courts should be particularly careful in multidefendant cases where some defendants would agree to a mistrial with prejudice but would object to mistrial without prejudice. See, e.g., *Huang*, 960 F.2d at 1134–36 (where all four defendants moved for mistrial, but two specifically moved for mistrial with prejudice and objected to granting of mistrial without prejudice, double jeopardy prevented retrial because there was no manifest necessity to declare mistrial rather than sever the cases and proceed with original trial for them).

## Other FJC Sources

- Manual on Recurring Problems in Criminal Trials 73–74 (Tucker Carrington & Kris Markarian eds., 6th ed. 2010)

1. If the defendant has a reasonable opportunity to object to the granting of a mistrial but does not, consent to the mistrial may be implied. *See, e.g.*, United States v. DiPietro, 936 F.2d 6, 10–11 (1st Cir. 1991). *See also* United States v. You, 382 F.3d 958, 965 (9th Cir. 2004) ("Where one defendant moves for a mistrial, and the other defendant, despite adequate opportunity to object, remains silent, the silent defendant impliedly consents by that silence to the mistrial and waives the right to claim a double jeopardy bar to retrial.").

# 5.06 Duty to Disclose Information Favorable to Defendant (*Brady* and *Giglio* Material)



## Introduction

Federal criminal discovery is governed by Rule 16 of the Federal Rules of Criminal Procedure and for certain specified matters by portions of Rules 12, 12.1, 12.2, and 12.3.[1] The Jencks Act, 18 U.S.C. § 3500, and Rule 26.2 govern the disclosure of witness statements at trial, and the Classified Information Procedures Act, 18 U.S.C. App. 3, governs discovery and disclosure when classified information related to national security is implicated. Prosecutors and defense lawyers should be familiar with these authorities, and judges typically know where to find the relevant law in deciding most discovery issues.

However, it sometimes is more challenging to understand the full scope of a prosecutor's obligations with respect to a defendant's constitutional right to exculpatory information under

1. *See also* Rule 15, governing depositions for those limited circumstances in which depositions are permitted in criminal cases, and Rule 17, governing subpoenas.

*Brady v. Maryland*, 373 U.S. 83 (1963), and impeachment material under *Giglio v. United States*, 405 U.S. 150 (1972), and to deal effectively with related disclosure disputes. Applying *Brady* and *Giglio* in particular cases can be difficult; it requires familiarity with Supreme Court precedent, circuit law, and relevant local rules and practices.

This section of the *Benchbook* is intended to give judges general guidance on the requirements of *Brady* and *Giglio* by providing a basic summary of the case law interpreting and applying these decisions. For further reference, the appendices provide three other sources of information: a link to the Federal Judicial Center's report summarizing a national survey of Rule 16 and disclosure practices in the district courts; a link to the "Policy Regarding Disclosure of Exculpatory and Impeachment Information" in the *Justice Manual* of the Department of Justice; and, examples of various types of exculpatory or impeachment information that the government may be required to disclose under *Brady* or *Giglio*.

Because every *Brady* or *Giglio* inquiry is fact-specific, the depth of such an inquiry can vary considerably from case to case. Judges are encouraged, as part of efficient case management, to be mindful of the particular disclosure requirements in each case and to resolve disclosure disputes quickly to avoid unnecessary delay and expense later. The material provided in this section is for informational purposes only; it is not meant to recommend a particular course of action when disclosure issues arise.

Note that courts are required by Fed. R. Crim. P. 5(f)(1) to "issue an oral and written order to prosecution and defense counsel that confirms the disclosure obligation of the prosecutor under Brady v. Maryland, 373 U.S. 83 (1963) and its progeny, and the possible consequences of violating such order under applicable law." This must occur "on the first scheduled court date when both prosecutor and defense counsel are present," and each district is required to "promulgate a model order" for its courts to use. See section 1.01: Initial Appearance, *supra*, at I.D.

Although *Brady* exculpatory material and *Giglio* impeachment material are sometimes distinguished, courts often refer to them together as "*Brady* material" or "exculpatory material," and this section generally follows that practice.

## *A. Duty to Disclose Exculpatory Information*

### 1. In General

In *Brady*, the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The Court later held that the prosecution has an obligation to disclose such information even in the absence of a defense request. See *Banks v. Dretke*, 540 U.S. 668, 695–96 (2004); *Kyles v. Whitley*, 514 U.S. 419, 433 (1995); *United States v. Agurs*, 427 U.S. 97, 107, 110–11 (1976).

In *Giglio*, the Supreme Court extended the prosecution's obligations to include the disclosure of information affecting the credibility of a government witness. See 405 U.S. at 154–55. As the Court later explained, "[i]mpeachment evidence, . . . as well as exculpatory evidence, falls within the *Brady* rule" because it is "evidence favorable to an accused, . . . so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." *United States v. Bagley*, 473 U.S. 667, 676 (1985) (quotations omitted).

## 2. Information from Law Enforcement Agencies

Under *Brady*, the prosecutor is required to find and disclose favorable evidence initially known only to law enforcement officers and not to the prosecutor. The individual prosecutor in a specific case has an affirmative "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley*, 514 U.S. at 437. See also *Youngblood v. West Virginia*, 547 U.S. 867, 869–70 (2006) (per curiam) ("*Brady* suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor'") (quoting *Kyles*, 514 U.S. at 438).

The government has acknowledged its obligations under *Kyles*:

> It is the obligation of federal prosecutors, in preparing for trial, to seek all exculpatory and impeachment information from all the members of the prosecution team. Members of the prosecution team include federal, state, and local law enforcement officers and other government officials participating in the investigation and prosecution of the criminal case against the defendant.[2]

## 3. Ongoing Duty

A prosecutor's disclosure obligations under *Brady* are ongoing: they begin as soon as the case is brought and continue throughout the pretrial and trial phases of the case.[3] See *Pennsylvania v. Ritchie*, 480 U.S. 39, 60 (1987) ("the duty to disclose is ongoing; information that may be deemed immaterial upon original examination may become important as the proceedings progress"). As *Brady* itself held, disclosure is required for information material to guilt "*or to punishment*," so the obligation extends to the sentencing phase and possibly to the appeal process.[4] If *Brady* information is known to persons on the prosecution team, including law enforcement officers, it should be disclosed to the defendant as soon as reasonably possible after its existence is recognized. See also Fed. R. Crim. P. 16(c) (if either party "discovers additional evidence or material before or during trial," they "must promptly disclose its existence to the other party or the court

2. U.S. Dep't of Just., Justice Manual, § 9-5.001: Policy Regarding Disclosure of Exculpatory and Impeachment Information, at B.2 (2020), https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings#9-5.001.

3. The Supreme Court has declined to extend *Brady* disclosure obligations to evidence that the government did not possess during the trial but only became available "after the defendant was convicted and the case was closed." *See* District Attorney's Office for Third Judicial District v. Osborne, 557 U.S. 52, 68–69 (2009) ("*Brady* is the wrong framework" for prisoner's post-conviction attempt to retest DNA evidence using a newer test that was not available when he was tried). "[A] post-conviction claim for DNA testing is properly pursued in a [42 U.S.C.] § 1983 action." Skinner v. Switzer, 562 U.S. 521, 525, 536 (2011) (also noting that "*Brady* claims have ranked within the traditional core of habeas corpus and outside the province of § 1983"). *Cf.* Whitlock v. Brueggemann, 682 F.3d 567, 587–88 (7th Cir. 2012) (distinguishing *Osborne*: "*Brady* continues to apply [in a post-trial action] to an assertion that one did not receive a fair trial because of the concealment of exculpatory evidence known and in existence at the time of that trial").

4. In fact, *Brady* involved a "question of punishment, not the question of guilt," and the evidence that "was withheld by the prosecution . . . did not come to petitioner's notice until after he had been tried, convicted, and sentenced, and after his conviction had been affirmed." 373 U.S. at 84–85 (withheld evidence could be the difference between a death sentence or life imprisonment). *See also* Steidl v. Fermon, 494 F.3d 623, 630 (7th Cir. 2007) ("For evidence known to the state at the time of the trial, the duty to disclose extends throughout the legal proceedings that may affect either guilt or punishment, including post-conviction proceedings."); Leka v. Portuondo, 257 F.3d 89, 100 (2d Cir. 2001) ("*Brady* requires disclosure of information that the prosecution acquires during the trial itself, or even afterward"); Smith v. Roberts, 115 F.3d 818, 819–20 (10th Cir. 1997) (same, applying *Brady* to impeachment evidence that prosecutor did not learn of until "[a]fter trial and sentencing but while the conviction was on direct appeal. . . . [T]he duty to disclose is ongoing and extends to all stages of the judicial process.").

if: (1) the evidence or material is subject to discovery or inspection under this rule; and (2) the other party previously requested, or the court ordered, its production").

### 4. Disclosure Favored

When it is uncertain whether information is favorable or useful to a defendant, "the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure." *Cone v. Bell*, 556 U.S. 449, 470 n.15 (2009). See also *Kyles*, 514 U.S. at 439–40; *Agurs*, 427 U.S. at 108.[5] This is also the policy of the Department of Justice:

> Recognizing that it is sometimes difficult to assess the materiality of evidence before trial, prosecutors generally must take a broad view of materiality and err on the side of disclosing exculpatory and impeaching evidence. *Kyles*, 514 U.S. at 439. While ordinarily, evidence that would not be admissible at trial need not be disclosed, this policy encourages prosecutors to err on the side of disclosure if admissibility is a close question.[6]

Prosecutors are encouraged to provide

> greater disclosure in advance of trial through the production of exculpatory information that is inconsistent with any element of any charged crime and impeachment information that casts a substantial doubt upon either the accuracy of any evidence the government intends to rely on to prove an element of any charged crime or that might have a significant bearing on the admissibility of prosecution evidence. . . . Where it is unclear whether evidence or information should be disclosed, prosecutors are encouraged to reveal such information to defendants or to the court for inspection *in camera* and, where applicable, seek a protective order from the court. By doing so, prosecutors will ensure confidence in fair trials and verdicts.[7]

The DOJ policy also "recognizes that a fair trial will often include examination of relevant exculpatory or impeachment information that is significantly probative of the issues before the court but that may not, on its own, result in an acquittal or . . . make the difference between guilt and innocence."[8]

## *B. Elements of a Violation*

There are three elements of a *Brady* violation: (1) the information must be favorable to the accused; (2) the information must be suppressed—that is, not disclosed—by the government, either willfully or inadvertently; and (3) the information must be "material" to guilt or to punishment. See *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999).

### 1. Favorable to the Accused

Information is "favorable to the accused either because it is exculpatory, or because it is impeaching." *Strickler*, 527 U.S. at 281–82. Most circuits that have ruled on the issue have held that information may be favorable even if it is not admissible as evidence itself, as long as it

5. *Cf.* United States v. Moore, 651 F.3d 30, 99–100 (D.C. Cir. 2011) ("This is particularly true where the defendant brings the existence of what he believes to be exculpatory or impeaching evidence or information to the attention of the prosecutor and the district court, in contrast to a general request for *Brady* material.").

6. Justice Manual, *supra* note 2, § 9-5.001 at B.2.

7. *Id.* at F.

8. *Id.* at C ("this policy requires disclosure by prosecutors of information beyond that which is 'material' to guilt as articulated in Kyles v. Whitley, 514 U.S. 419 (1995), and Strickler v. Greene, 527 U.S. 263, 280–81 (1999)").

reasonably could lead to admissible evidence. See, e.g., *United States v. Triumph Capital Group, Inc.*, 544 F.3d 149, 162–63 (2d Cir. 2008) (*Brady* information "need not be admissible if it 'could lead to admissible evidence' or 'would be an effective tool in disciplining witnesses during cross-examination by refreshment of recollection or otherwise'") (quoting *United States v. Gil*, 297 F.3d 93, 104 (2d Cir. 2002)).[9]

The Department of Justice follows this policy in requiring prosecutors to disclose, for example, information that is "inconsistent with any element of any crime charged against the defendant or that establishes a recognized affirmative defense," that "casts a substantial doubt upon the accuracy of any evidence . . . the prosecutor intends to rely on to prove an element of any crime charged," or that "might have a significant bearing on the admissibility of prosecution evidence. . . . [T]he disclosure requirement of this section applies to information regardless of whether the information subject to disclosure would itself constitute admissible evidence."[10]

## 2. Suppression, Willful or Inadvertent

Whether exculpatory information has been suppressed by the government is a matter for inquiry first by defense counsel making a request of the prosecutor. If defense counsel remains unsatisfied, the trial court may make its own inquiry and, if appropriate, require the government to produce the undisclosed information for in camera inspection by the court. See also discussion *infra* at D, Disputed Disclosure.

It does not matter whether a failure to disclose is intentional or inadvertent, since "under *Brady* an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment." *Strickler*, 527 U.S. at 288; *Agurs*, 427 U.S. at 110 ("Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the

9. *See also* Johnson v. Folino, 705 F.3d 117, 130 (3d Cir. 2013) ("inadmissible evidence may be material if it could have led to the discovery of admissible evidence"); Ellsworth v. Warden, 333 F.3d 1, 5 (1st Cir. 2003) ("we think it plain that evidence itself inadmissible *could* be so promising a lead to strong exculpatory evidence that there could be no justification for withholding it"); Spence v. Johnson, 80 F.3d 989, 1005 at n.14 (5th Cir. 1996) ("inadmissible evidence may be material under *Brady*"); Spaziano v. Singletary, 36 F.3d 1028, 1044 (11th Cir. 1994) ("A reasonable probability of a different result is possible only if the suppressed information is itself admissible evidence or would have led to admissible evidence."); United States v. Phillip, 948 F.2d 241, 249 (6th Cir. 1991) ("information withheld by the prosecution is not material unless the information consists of, or would lead directly to, evidence admissible at trial for either substantive or impeachment purposes"). *Cf.* Wood v. Bartholomew, 516 U.S. 1, 6 (1995) (per curiam) (where it was "mere speculation" that inadmissible materials might lead to the discovery of admissible exculpatory evidence, those materials are not subject to disclosure under *Brady*); United States v. Wilson, 605 F.3d 985, 1005 (D.C. Cir. 2010) (no *Brady* violation because undisclosed information was not admissible nor would it have led to admissible evidence or effective impeachment); United States v. Velarde, 485 F.3d 553, 560 (10th Cir. 2007) (if defendant "is able to make a showing that further investigation under the court's subpoena power very likely would lead to the discovery of [admissible material] evidence," defendant may "request leave to conduct discovery"); Madsen v. Dormire, 137 F.3d 602, 604 (8th Cir. 1998) (citing *Wood*, there was no *Brady* violation where undisclosed information was not admissible and could not be used to impeach; court did not address whether it could lead to admissible evidence). *But cf.* Hoke v. Netherland, 92 F.3d 1350, 1356 at n.3 (4th Cir. 1996) (reading *Wood* to hold inadmissible evidence is, "as a matter of law, 'immaterial' for *Brady* purposes").

10. Justice Manual, *supra* note 2, § 9-5.001 at C.1–3.

prosecutor. . . . If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.").[11]

Information will not be considered "suppressed" for *Brady* purposes if the defendant already knew about it[12] or could have obtained it with reasonable effort.[13] However, suppression still may be found in this situation if a defendant did not investigate further because the prosecution represented that it had turned over all disclosable information or that there was no disclosable material. In *Strickler*, the prosecutor had an "open file" policy, but exculpatory information had been kept out of the files. The Supreme Court held that the "petitioner has established cause for failing to raise a *Brady* claim prior to federal habeas because (a) the prosecution withheld exculpatory evidence; (b) petitioner reasonably relied on the prosecution's open file policy as fulfilling the prosecution's duty to disclose such evidence; and (c) the Commonwealth confirmed petitioner's reliance on the open file policy by asserting during state habeas proceedings that petitioner had already received 'everything known to the government.'" 527 U.S. at 283–89.[14] The

11. *See also Brady*, 373 U.S. at 87 ("the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution"); Porter v. White, 483 F.3d 1294, 1305 (11th Cir. 2007) ("The *Brady* rule thus imposes a no-fault standard of care on the prosecutor. If favorable, material evidence exclusively in the hands of the prosecution team fails to reach the defense—for whatever reason—and the defendant is subsequently convicted, the prosecution is charged with a *Brady* violation, and the defendant is entitled to a new trial."); *Gantt v. Roe*, 389 F.3d 908, 912 (9th Cir. 2004) ("*Brady* has no good faith or inadvertence defense").

12. *See, e.g.*, Parker v. Allen, 565 F.3d 1258, 1277 (11th Cir. 2009) ("there is no suppression if the defendant knew of the information or had equal access to obtaining it"); United States v. Zichittello, 208 F.3d 72, 103 (2d Cir. 2000) ("Even if evidence is material and exculpatory, it 'is not "suppressed"' by the government within the meaning of *Brady* 'if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence.'") (citations omitted); Rector v. Johnson, 120 F.3d 551, 558–59 (5th Cir. 1997) (same); United States v. Clark, 928 F.2d 733, 738 (6th Cir. 1991) ("No *Brady* violation exists where a defendant 'knew or should have known the essential facts permitting him to take advantage of any exculpatory information,' . . . or where the evidence is available to defendant from another source.") (citations omitted). *Cf.* United States v. Quintanilla, 193 F.3d 1139, 1149 (10th Cir. 1999) ("a defendant's independent awareness of the exculpatory evidence is critical in determining whether a *Brady* violation has occurred. If a defendant already has a particular piece of evidence, the prosecution's disclosure of that evidence is considered cumulative, rendering the suppressed evidence immaterial.").

13. United States v. Rodriguez, 162 F.3d 135, 147 (1st Cir. 1998) ("government has no *Brady* burden when the necessary facts for impeachment are readily available to a diligent defender"); *Hoke*, 92 F.3d at 1355 ("The strictures of *Brady* are not violated, however, if the information allegedly withheld by the prosecution was reasonably available to the defendant."); United States v. Dimas, 3 F.3d 1015, 1019 (7th Cir. 1993) (when "the defendants might have obtained the evidence themselves with reasonable diligence . . . , then the evidence was not 'suppressed' under *Brady* and they would have no claim").

14. The Court cautioned, however, that "[w]e do not reach, because it is not raised in this case, the impact of a showing by the State that the defendant was aware of the existence of the documents in question and knew, or could reasonably discover, how to obtain them." *Id.* at 288 n.33. *See also* Carr v. Schofield, 364 F.3d 1246, 1255 (11th Cir. 2004) (citing and quoting *Strickler* for proposition that "if a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*").

Court reached the same conclusion in a later case in which the prosecution withheld disclosable information after having "asserted, on the eve of trial, that it would disclose all *Brady* material."[15]

Suppression may also be found when disclosure is so late that the defense is unable to make effective use of the information at trial. See discussion in *infra* section C, Timing of Disclosure.

### 3. Materiality

(a) Definition

The most problematic aspect of *Brady* for prosecutors and trial judges is the third element: the requirement that the favorable information suppressed by the government be "material." Under *Brady*, information is considered "material" "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Smith v. Cain*, 565 U.S. 73, 75 (2012) (quotations omitted). "A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.'" *Id.* at 75–76 (quoting *Kyles v. Whitley*, 514 U.S. at 434) (alteration in original).[16]

The D.C. Circuit stated that the "reasonable probability" standard "is not a particularly demanding one." Because the government must convince all twelve jurors to find the defendant guilty beyond a reasonable doubt, if the withheld information could have caused "even one juror [to harbor] a reasonable doubt as to the defendant's guilt on any count, the guilty verdict on that count could not have been returned."[17]

This definition of "materiality" necessarily is retrospective. It is used by an appellate court after trial to review whether a failure to disclose on the part of the government was so prejudicial that the defendant is entitled to a new trial. While *Brady* requires that materiality be considered even before or during trial, obviously it may not always be apparent in advance whether the suppression of a particular piece of information ultimately might "undermine [] confidence in

15. Banks v. Dretke, 540 U.S. 668, 693–96 (2004) ("Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed. As we observed in *Strickler*, defense counsel has no 'procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred.' 527 U.S. at 286–287"). *See also* Gantt v. Roe, 389 F.3d at 912–13 ("While the defense could have been more diligent, . . . this does not absolve the prosecution of its *Brady* responsibilities. . . . Though defense counsel could have conducted his own investigation, he was surely entitled to rely on the prosecution's representation that it was sharing the fruits of the police investigation."). *Cf.* Bell v. Bell, 512 F.3d 223, 236 (6th Cir. 2008) (distinguishing *Banks* from instant case, in which the facts known to defendant "strongly suggested that further inquiry was in order, whether or not the prosecutor said he had turned over all the discoverable evidence in his file, and the information was a matter of public record").

16. *See also* Banks v. Dretke, 540 U.S. at 698–99 ("[o]ur touchstone on materiality is *Kyles v. Whitley*"); *Kyles v. Whitley*, 514 U.S. at 434 ("The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."); United States v. Bagley, 473 U.S. 667, 682 (1985) ("A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.").

17. United States v. Robinson, 68 F.4th 1340, 1348 (D.C. Cir. 2023) ("To uphold a verdict in light of a *Brady* violation, the evidence must be sufficient to show that there is no reasonable probability that the verdict would have been different. . . . Since it would have taken only one juror harboring a doubt to change the result, we cannot say that the record [in this case] survives *Brady* analysis.").

the outcome of the trial."[18] For this reason, as noted earlier, the Supreme Court explicitly has recommended erring on the side of disclosure when there is uncertainty before or during trial about an item's materiality: "[T]here is a significant practical difference between the pretrial decision of the prosecutor and the post-trial decision of the judge. Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure."[19] At the same time, the Court reiterated the "critical point" that "the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial."[20] But see also discussion at A.4, *supra*, regarding "resolving doubtful questions in favor of disclosure" and DOJ policy.

(b) Cumulative effect of suppressed evidence

Although each instance of nondisclosure is examined separately, the "suppressed evidence [is] considered collectively, not item by item" in determining materiality. *Kyles*, 514 U.S. at 436–37 & n.10 ("showing that the prosecution knew of an item of favorable evidence unknown to the

18. Smith v. Cain, 565 U.S. at 75–76. *See also* United States v. Cloud, 102 F.4th 968, 980 (9th Cir. 2024) ("when favorable suppressed evidence is discovered mid-trial, the materiality standard is benchmarked against the relative value of the evidence in light of the proceedings to date—not as a retrospective evaluation of how the disclosure may have impacted the outcome of a trial that has not yet concluded"); United States v. Jordan, 316 F.3d 1215, 1252 n.79 (11th Cir. 2003) ("In the case at hand, . . . the defendants' *Brady* claims involve material that was produced both before and during the defendants' trial. In such a scenario, because the trial has just begun, the determination of prejudice is inherently problematical.").

19. United States v. Agurs, 427 U.S. 97, 108 (1976). *See also* Cone v. Bell, 556 U.S. at 470 n.15 ("As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure."); United States v. Starusko, 729 F.2d 256, 261 (3d Cir. 1984) ("it is difficult to analyze, prior to trial, whether potential impeachment evidence falls within *Brady* without knowing what role a certain witness will play in the government's case"). *Cf. Jordan*, 316 F.3d at 1251 ("under *Brady*, the government need only disclose during pretrial discovery (or later, at the trial) evidence which, in the eyes of a neutral and objective observer, could alter the outcome of the proceedings. Not infrequently, what constitutes *Brady* material is fairly debatable. In such cases, the prosecutor should mark the material as a court exhibit and submit it to the court for in camera inspection."); United States v. Cadet, 727 F.2d 1453, 1469 (9th Cir. 1984) ("Any doubt concerning the applicability of *Brady* to any specific document . . . should have been submitted to the court for an in camera review.").

Some district courts have enacted local rules that eliminate the *Brady* materiality requirement for pretrial disclosure of exculpatory information. *See* discussion in Laural Hooper et al., A Summary of Responses to a National Survey of Rule 16 of the Federal Rules of Criminal Procedure and Disclosure Practices in Criminal Cases 16–17 (Federal Judicial Center 2011). *See also* United States v. Price, 566 F.3d 900, 913 n.14 (9th Cir. 2009) ("[f]or the benefit of trial prosecutors who must regularly decide what material to turn over, we note favorably the thoughtful analysis" of two district courts that held that "the 'materiality' standard usually associated with *Brady* . . . should not be applied to pretrial discovery of exculpatory materials").

20. *Agurs*, 427 U.S. at 109–10 (also cautioning that "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense"). *See also* United States v. Lemmerer, 277 F.3d 579, 588 (1st Cir. 2002) ("The same standard applies when the claim is one of delayed disclosure rather than complete suppression. However, in delayed disclosure cases, we need not reach the question whether the evidence at issue was 'material' under *Brady* unless the defendant first can show that defense counsel was 'prevented by the delay from using the disclosed material effectively in preparing and presenting the defendant's case.'"); United States v. Coppa, 267 F.3d 132, 140 (2d Cir. 2001) ("Although the government's obligations under *Brady* may be thought of as a constitutional duty arising before or during the trial of a defendant, the scope of the government's constitutional duty—and, concomitantly, the scope of a defendant's constitutional right—is ultimately defined retrospectively, by reference to the likely effect that the suppression of particular evidence had on the outcome of the trial. . . . The government therefore has a so-called '*Brady* obligation' only where non-disclosure of a particular piece of evidence would deprive a defendant of a fair trial."); *Starusko*, 729 F.2d at 261 (there is "no violation of *Brady* unless the government's nondisclosure infringes the defendant's fair trial right").

defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached").[21] The undisclosed evidence "must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Agurs*, 427 U.S. at 112.[22]

DOJ policy also requires prosecutors to consider the "[c]umulative impact of items of information. While items of information viewed in isolation may not reasonably be seen as meeting the standards [for individual items], several items together can have such an effect. If this is the case, all such items must be disclosed."[23]

## *C. Timing of Disclosure*

### 1. In Time for Effective Use at Trial

As noted earlier, information may be considered "suppressed" for *Brady* purposes if disclosure is delayed to the extent that the defense is not able to make effective use of the information in the preparation and presentation of its case at trial. How much preparation a defendant needs in order to use *Brady* material effectively—which determines how early disclosure must be made by the prosecution—depends upon the circumstances of each case. Disclosure before trial (and often well before trial) is always preferable and may be required if the material is significant,

21. *See also* Jackson v. Brown, 513 F.3d 1057, 1071–72 (9th Cir. 2008) ("The materiality of suppressed evidence is 'considered collectively, not item by item.' . . . [E]ach additional . . . *Brady* violation further undermines our confidence in the decision-making process.") (quoting *Kyles*); Maharaj v. Sec'y for Dept. of Corrections, 432 F.3d 1292, 1310 (11th Cir. 2005) ("the district court followed the appropriate methodology, considering each *Brady* item individually, and only then making a determination about the cumulative impact"); United States v. Sipe, 388 F.3d 471, 477 (5th Cir. 2004) ("Even if none of the nondisclosures standing alone could have affected the outcome, when viewed cumulatively in the context of the full array of facts, we cannot disagree with the conclusion of the district judge that the government's nondisclosures undermined confidence in the jury's verdict.").

22. *See also* Wearry v. Cain, 577 U.S. 385, 394 (2016) (state court erred when it "improperly evaluated the materiality of each piece of evidence in isolation rather than cumulatively"); United States v. Bowie, 198 F.3d 905, 912 (D.C. Cir. 1999) (court must "evaluate the impact of the undisclosed evidence not in isolation, but in light of the rest of the trial record"); Porretto v. Stalder, 834 F.2d 461, 464 (5th Cir. 1987) ("Omitted evidence is deemed material when, viewed in the context of the entire record, it creates a reasonable doubt as to the defendant's guilt that did not otherwise exist.").

23. Justice Manual, *supra* note 2, § 9-5.001 at C.4.

complex, or voluminous, or may lead to other exculpatory material after further investigation.[24] In some circumstances, however, disclosure right before, or even during, trial has been found to be sufficient.[25] "It is not feasible or desirable to specify the extent or timing of disclosure Brady and its progeny require, except in terms of the sufficiency, under the circumstances, of the defense's opportunity to use the evidence when disclosure is made. Thus, disclosure prior to trial is not [always] mandated. . . . At the same time, however, the longer the prosecution withholds information, or (more particularly) the closer to trial the disclosure is made, the less opportunity there is for use." *Leka v. Portuondo*, 257 F.3d 89, 100 (2d Cir. 2001).[26]

24. *See* DiSimone v. Phillips, 461 F.3d 181, 197 (2d Cir. 2006) ("The more a piece of evidence is valuable and rich with potential leads, the less likely it will be that late disclosure provides the defense an 'opportunity for use.'"); Leka v. Portuondo, 257 F.3d 89, 101 (2d Cir. 2001) ("When such a disclosure is first made on the eve of trial, or when trial is under way, the opportunity to use it may be impaired. The defense may be unable to divert resources from other initiatives and obligations that are or may seem more pressing. And the defense may be unable to assimilate the information into its case. . . . Moreover, new witnesses or developments tend to throw existing strategies and preparation into disarray."). *See also* United States v. Garner, 507 F.3d 399, 405–07 (6th Cir. 2007) (defendant "did not receive a fair trial" where cell phone records that would have allowed impeachment of critical prosecution witness were not disclosed until the morning of trial and the defense was not given sufficient time to investigate records: "The importance of the denial of an opportunity to impeach this witness cannot be overstated."); United States v. Fisher, 106 F.3d 622, 634–35 (5th Cir. 1997) (new trial warranted where government did not disclose until last day of trial an FBI report containing impeachment evidence that directly contradicted testimony of key witness and defense was not able to make meaningful use of evidence), *abrogated on other grounds by* Ohler v. United States, 529 U.S. 753, 758–59 (2000); United States v. Devin, 918 F.2d 280, 290 (1st Cir. 1992) ("in cases of delayed disclosure, a court's principal concern must be whether learning the information altered the subsequent defense strategy, and whether, given timeous disclosure, a more effective strategy would likely have resulted").

25. A majority of the circuits that have addressed this point have held that disclosure may be deemed timely, at least in some circumstances, when the defendant is able to effectively use the information at trial, even if disclosure occurs after the trial has begun. *See, e.g.*, United States v. Houston, 648 F.3d 806, 813 (9th Cir. 2011) ("there is no *Brady* violation so long as the exculpatory or impeaching evidence is disclosed at a time when it still has value"); United States v. Celis, 608 F.3d 818, 836 (D.C. Cir. (2010) ("the critical point is that disclosure must occur in sufficient time for defense counsel to be able to make effective use of the disclosed evidence"); Powell v. Quarterman, 536 F.3d 325, 335 (5th Cir. 2008) ("a defendant is not prejudiced [by untimely disclosure] if the evidence is received in time for its effective use at trial"); United States v. Rodriguez, 496 F.3d 221, 226 (2d Cir. 2007) ("the Government must make disclosures in sufficient time that the defendant will have a reasonable opportunity to act upon the information efficaciously," that is, "in a manner that gives the defendant a reasonable opportunity either to use the evidence in the trial or to use the information to obtain evidence for use in the trial"); Blake v. Kemp, 758 F.2d 523, 532 n.10 (11th Cir. 1985) ("In some instances [disclosure of potential *Brady* material the day before trial] may be sufficient. . . . However, . . . some material must be disclosed earlier. . . . This is because of the importance of some information to adequate trial preparation.") (citations omitted).

26. *See also* Gantt v. Roe, 389 F.3d at 912 ("That [relevant] pieces of information were found (or their relevance discovered) only in time for the last day of testimony underscores that disclosure should have been *immediate:* Disclosure must be made 'at a time when [it] would be of value to the accused.'") (citation omitted); United States v. McKinney, 758 F.2d 1036, 1049–50 (5th Cir. 1985) ("If the defendant received the material in time to put it to effective use at trial, his conviction should not be reversed simply because it was not disclosed as early as it might have and, indeed, should have been."); United States v. Pollack, 534 F.2d 964, 973–74 (D.C. Cir. 1976) ("Disclosure by the government must be made at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case, even if satisfaction of this criterion requires pre-trial disclosure. . . . The trial judge must be given a wide measure of discretion to ensure satisfaction of this standard. . . . Courts can do little more in determining the proper timing for disclosure than balance in each case the potential dangers of early discovery against the need that *Brady* purports to serve of avoiding wrongful convictions."); Grant v. Alldredge, 498 F.2d 376, 382 (2d Cir. 1976) ("Although it well may be that marginal *Brady* material need not always be disclosed upon request prior to trial," evidence indicating that another suspect may have committed the crime "was without question 'specific, concrete evidence' of a nature requiring pretrial disclosure to allow for full exploration and exploitation by the defense" that "would have had a 'material bearing on defense preparation' . . . and therefore should have been revealed well before the commencement of the trial.") (citations omitted).

The Department of Justice guidelines for prosecutors also encourage reasonably prompt disclosure: "Exculpatory information must be disclosed reasonably promptly after it is discovered. . . . Impeachment information, which depends on the prosecutor's decision on who is or may be called as a government witness, will typically be disclosed at a reasonable time before trial to allow the trial to proceed efficiently." This policy also applies to information that may affect *sentencing*: "Exculpatory and impeachment information that casts doubt upon proof of an aggravating factor at sentencing, but that does not relate to proof of guilt, must be disclosed no later than the court's initial presentence investigation."[27]

In light of these considerations, and because the effect of suppression usually cannot be evaluated fully until after trial, potential *Brady* material ordinarily should be disclosed as soon as reasonably possible after its existence is known by the government, and disclosures on the eve of or during trial should be avoided unless there is no other reasonable alternative. Consider granting a continuance to provide defense counsel sufficient time to make effective use of the belatedly disclosed information.[28]

### 2. Prior to a Guilty Plea?

The Supreme Court has held that disclosure of *impeachment* information is not required before a guilty plea is negotiated or accepted. See *United States v. Ruiz*, 536 U.S. 622, 629–30 (2002) ("impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary*," and due process does not require disclosure of such impeachment information before a plea) (emphasis in original). The holding in *Ruiz* was limited to impeachment material because "the proposed plea agreement at issue . . . specifie[d that] the Government [would] provide 'any information establishing the factual innocence of the defendant,'" *Id.* at 631. The Court "has not addressed the question of whether the *Brady* right to *exculpatory* information, in contrast to *impeachment* information, might be extended to the guilty plea context." *United States v. Moussaoui*, 591 F.3d 263, 286 (4th Cir. 2010) (emphasis in original). Some

27. Justice Manual, *supra* note 2, Section 9-5.001 at D.1–3.

28. *See, e.g.*, United States v. O'Hara, 301 F.3d 563, 569 (7th Cir. 2002) (although relevant information was not discovered by prosecutor and disclosed until during trial, there was no *Brady* violation, in part, because court granted a continuance that gave defense counsel "plenty of time for him to make use of the information"). *See also* Joseph v. Coyle, 469 F.3d 441, 472 (6th Cir. 2006) (rejecting *Brady* claim, in part, because "if the defense needed more time, it could have asked for a continuance"); Lawrence v. Lensing, 42 F.3d 255, 258 (5th Cir. 1994) (same, because defense counsel "could have moved for a recess or continuance in order to prepare his impeachment of the victim" but made a "tactical decision not to seek [either]"); United States v. Osorio, 929 F.2d 753, 758 (1st Cir. 1991) ("we have viewed the failure to ask for a continuance as an indication that defense counsel was himself satisfied he had sufficient opportunity to use the evidence advantageously"; although belatedly disclosed impeachment evidence fell under *Brady*, "defense counsel made no objection, motion for dismissal, or motion for a continuance, either at the time he first became aware of it or the next day when it was brought to the court's attention").

appellate courts have, however, held or indicated that "a defendant challenging the voluntariness of a guilty plea may assert a *Brady* claim,"[29] so it is important for judges to be aware of the law in their circuit.

### 3. Remedies for Untimely Disclosure

Untimely disclosure that effectively suppresses *Brady* information may result in sanctions. The decision whether to impose sanctions is within the sound discretion of the trial judge: "Where the district court concludes that the government was dilatory in its compliance with *Brady*, to the prejudice of the defendant, the district court has discretion to determine an appropriate remedy, whether it be exclusion of the witness, limitations on the scope of permitted testimony, instructions to the jury, or even mistrial. The choice of remedy also is within the sound discretion of the district court. Fed. R. Crim. P. 16(d)(2) authorizes the district court in cases of non-compliance with discovery obligations to 'permit the discovery or inspection,' 'grant a continuance,' 'prohibit the party from introducing the evidence not disclosed,' or 'enter any other order that is just under the circumstances.'"[30]

In most cases, "[t]he customary remedy for a *Brady* violation that surfaces mid-trial is a continuance and a concomitant opportunity to analyze the new information and, if necessary,

29. Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir. 1995) ("if a defendant may not raise a *Brady* claim after a guilty plea, prosecutors may be tempted to deliberately withhold exculpatory information as part of an attempt to elicit guilty pleas"). *See also* McCann v. Mangialardi, 337 F.3d 782, 787–88 (7th Cir. 2003) ("*Ruiz* indicates a significant distinction between impeachment information and exculpatory evidence of actual innocence. Given this distinction, it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea."); United States v. Ohiri, 133 F. App'x 555, 562 (10th Cir. 2005) (*Ruiz* "did not imply that the government may avoid the consequence of a *Brady* violation if the defendant accepts an eleventh-hour plea agreement while ignorant of withheld exculpatory evidence"); United States v. Persico, 164 F.3d 796, 804–05 (2d Cir. 1999) (in pre-*Ruiz* case: "The Government's obligation to disclose *Brady* materials is pertinent to the accused's decision to plead guilty; the defendant is entitled to make that decision with full awareness of favorable (exculpatory and impeachment) evidence known to the Government."); United States v. Wright, 43 F.3d 491, 496 (10th Cir. 1994) ("under certain limited circumstances, the prosecution's violation of *Brady* can render a defendant's plea involuntary"). *But cf.* United States v. Mathur, 624 F.3d 498, 504–07 (1st Cir. 2010) (rejecting defendant's claim that "potentially exculpatory" information and impeachment information should have been disclosed before his plea, court held that the information was not material and added, "Although we recognize that plea negotiations are important, that fact provides no support for an unprecedented expansion of *Brady.*"); United States v. Conroy, 567 F.3d 174, 179 (5th Cir. 2009) (rejecting defendant's argument that the limitation on the Supreme Court's discussion in *Ruiz* "to impeachment evidence implies that exculpatory evidence is different and must be turned over before entry of a plea"); Jones v. Cooper, 311 F.3d 306, 315 n.5 (4th Cir. 2002) (in a death penalty case, "[t]o the extent that appellant contends that he would not have pled guilty had he been provided the [potentially mitigating] information held by the jailor, this claim is foreclosed by" *Ruiz*). *Cf.* Ferrara v. United States, 456 F.3d 278, 293 (1st Cir. 2006) (prosecution's "blatant misconduct" and "affirmative misrepresentations" in withholding material exculpatory information—which it was obligated to disclose not only under *Brady v. Maryland* but also under local court rules and a court order—rendered defendant's guilty plea involuntary under *Brady v. United States*, 397 U.S. 742 (1970)).

30. United States v. Burke, 571 F.3d 1048, 1054 (10th Cir. 2009). *See also* United States v. Pasha, 797 F.3d 1122, 1140–41 (D.C. Cir. 2015) ("if a remedy is available that gives the defendant a fair trial—such as precluding cross-examination completely or precluding impeachment with a prior statement—that remedy is preferable to dismissal of the indictment"); United States v. Johnston, 127 F.3d 380, 391 (5th Cir. 1997) (district court has "real latitude" to fashion appropriate remedy for alleged *Brady* errors, including delayed disclosure); United States v. Josleyn, 99 F.3d 1182, 1196 (1st Cir. 1996) ("The district court has broad discretion to redress discovery violations in light of their seriousness and any prejudice occasioned the defendant," and court properly refused to dismiss indictment for delay in disclosing *Brady* material).

recall witnesses."[31] However, failure to request a continuance, or an "outright rejection of a proffered continuance," may be taken as an indication that the defendant is able to use the information effectively despite the delay.[32]

In an extreme case, dismissal may be warranted: "*Brady* violations are just like other constitutional violations. Although the appropriate remedy will usually be a new trial, . . . a district court may dismiss the indictment when the prosecution's actions rise . . . to the level of flagrant prosecutorial misconduct."[33]

### 4. Jencks Act

There is no consensus among the circuits as to whether the government's constitutional obligation to produce *Brady* information in a timely manner supersedes the timing requirements of the Jencks Act, 18 U.S.C. § 3500.[34] Some courts have attempted to harmonize the two rules, usually by finding that the timing of disclosure was sufficient under either standard to allow the defendant to make effective use of the information.[35]

There may be instances in which the nature of impeaching information warrants a delay in disclosure by the government. Even if the information might be helpful to a defendant in impeaching a witness's testimony, the government might not determine whether it actually will

31. *Mathur*, 624 F.3d at 506. *See also* United States v. Collins, 415 F.3d 304, 311 (4th Cir. 2005) (continuance is preferable to motion to dismiss as remedy for late disclosure); United States v. Kelly, 14 F.3d 1169, 1176 (7th Cir. 1994) (when "a *Brady* disclosure is made during trial, the defendant can seek a continuance of the trial to allow the defense to examine or investigate, if the nature or quantity of the disclosed *Brady* material makes an investigation necessary").

32. *Mathur*, 624 F.3d at 506. *See also* United States v. Adams, 834 F.2d 632, 635 (7th Cir. 1987) (holding that delayed disclosure did not prejudice defendant partly based on fact that defendant did not request continuance or recess); United States v. Holloway, 740 F.2d 1373, 1381 (6th Cir. 1984) (where defense counsel made no request for a continuance after delayed disclosure, "we conclude that the timing of the disclosure did not prejudice" the defendant). *See also* cases cited in note 28, *supra*.

33. United States v. Chapman, 524 F.3d 1073, 1086 (9th Cir. 2008) ("Because the district court did not clearly err in finding that the government recklessly violated its discovery obligations and made flagrant misrepresentations to the court, we hold that the dismissal was not an abuse of discretion."). *Accord* Government of Virgin Islands v. Fahie, 419 F.3d 249, 255 (3d Cir. 2005) ("While retrial is normally the most severe sanction available for a *Brady* violation, where a defendant can show both willful misconduct by the government, and prejudice, dismissal may be proper.").

34. *Compare, e.g.*, United States v. Rittweger, 524 F.3d 171, 181 n.4 (2d Cir. 2008) ("Complying with the Jencks Act, of course, does not shield the government from its independent obligation to timely produce exculpatory material under *Brady*—a constitutional requirement that trumps the statutory power of 18 U.S.C. § 3500."), *with* United States v. Presser, 844 F.2d 1275, 1283–84 (6th Cir. 1988) ("If impeachment evidence is within the ambit of the Jencks Act, then the express provisions of the Jencks Act control discovery of that kind of evidence. The clear and consistent rule of this circuit is that the intent of Congress expressed in the Act must be adhered to and, thus, the government may not be compelled to disclose Jencks Act material before trial. . . . Accordingly, neither *Giglio* nor *Bagley* alter the statutory mandate.").

35. *See, e.g.*, *Presser*, 844 F.2d at 1283–84 ("so long as the defendant is given impeachment material, even exculpatory impeachment material, in time for use at trial, we fail to see how the Constitution is violated. Any prejudice the defendant may suffer as a result of disclosure of the impeachment evidence during trial can be eliminated by the trial court ordering a recess in the proceedings in order to allow the defendant time to examine the material and decide how to use it."); United States v. Kopituk, 690 F.2d 1289, 1339 n.47 (11th Cir. 1982) ("It has been held that 'when alleged *Brady* material is contained in Jencks Act material, disclosure is generally timely if the government complies with the Jencks Act.'") (citations omitted).

call the witness until shortly before, or even during, the trial. There is also the chance that a witness will choose not to cooperate or could be put in jeopardy by early disclosure.[36]

*Brady* and the Jencks Act serve different purposes, and although their disclosure obligations often overlap, they are not always coextensive, and there may or may not be a conflict between their respective timing requirements.

> All Jencks Act statements are not necessarily *Brady* material. The Jencks Act requires that any statement in the possession of the government—exculpatory or not—that is made by a government witness must be produced by the government during trial at the time specified by the statute. *Brady* material is not limited to *statements* of witnesses but is defined as exculpatory *material*; the precise time within which the government must produce such material is not limited by specific statutory language but is governed by existing case law. Definitions of the two types of investigatory reports differ, the timing of production differs, and compliance with the statutory requirements of the Jencks Act does not necessarily satisfy the due process concerns of *Brady*.

*United States v. Starusko*, 729 F.2d 256, 263 (3d Cir. 1984) (emphasis in original).[37]

## 5. Supervisory Authority of District Court

"[I]t must be remembered that *Brady* is a constitutional mandate. It exacts the *minimum* that the prosecutor, state or federal, must do" to avoid violating a defendant's due process rights.

36. *See* United States v. Rodriguez, 496 F.3d 221, 228 n.6 (2d Cir. 2007):

> We recognize that in many instances the Government will have good reason to defer disclosure until the time of the witness's testimony, particularly of material whose only value to the defense is as impeachment of the witness by reference to prior false statements. In some instances, earlier disclosure could put the witness's life in jeopardy, or risk the destruction of evidence. Also at times, the Government does not know until the time of trial whether a potential cooperator will plead guilty and testify for the Government or go to trial as a defendant.

*See also* United States v. Pollack, 534 F.2d 964, 973–74 (D.C. Cir. 1976), noting that there can be

> situations in which premature disclosure would unnecessarily encourage those dangers that militate against extensive discovery in criminal cases, *e.g.,* potential for manufacture of defense evidence or bribing of witnesses. Courts can do little more in determining the proper timing for disclosure than balance in each case the potential dangers of early discovery against the need that *Brady* purports to serve of avoiding wrongful convictions.

*Cf.* United States v. Starusko, 729 F.2d 256, 261 (3d Cir. 1984) ("We recognize that, generally, it is difficult to analyze, prior to trial, whether potential impeachment evidence falls within *Brady* without knowing what role a certain witness will play in the government's case.").

37. *See also* United States v. Phibbs, 999 F.2d 1053, 1088 (6th Cir. 1993) ("Unlike the Jencks Act, the force of *Brady* and its progeny is not limited to the statements and reports of witnesses."); *Rodriguez*, 496 F.3d at 224–26 (oral statements by witness that were never written down or recorded did not fall under Jencks Act but could be disclosable under *Brady/Giglio*):

> The Jencks Act requires the Government to produce to the defendant any 'statement' by the witness that 'relates to the subject matter as to which the witness has testified.' 18 U.S.C. § 3500(b); *see id.* § 3500(e) (defining 'statement'). The term 'statement,' however, is defined to include only statements that have been memorialized in some concrete form, whether in a written document or electrical recording. . . . The obligation to disclose information covered by the *Brady* and *Giglio* rules exists without regard to whether that information has been recorded in tangible form.

*Cf.* United States v. Coppa, 267 F.3d 132, 146 (2d Cir. 2001) ("a District Court's power to order pretrial disclosure is constrained by the Jencks Act," and the district court exceeded its authority in ordering disclosure "of not only those witness statements that fall within the ambit of *Brady*/*Giglio,* and thus may be required to be produced in advance of trial despite the Jencks Act, but also those witness statements that, although they might indeed contain impeachment evidence, do not rise to the level of materiality prescribed by *Agurs* and *Bagley* for mandated production").

*United States v. Beasley*, 576 F.2d 626, 630 (5th Cir. 1978) (emphasis added). As it is not otherwise specified by rule or case law, district courts have the discretionary authority "to dictate by court order when *Brady* material must be disclosed." *Starusko*, 729 F.2d at 261 ("the district court has general discretionary authority to order the pretrial disclosure of *Brady* material 'to ensure the effective administration of the criminal justice system.'") (citation omitted).[38] Some districts have done this through local rules, setting pretrial deadlines for disclosure of *Brady* and *Giglio* material.[39] Otherwise, "[h]ow the trial court proceeds to enforce disclosure requirements is largely a matter of discretion to be exercised in light of the facts of each case." *United States v. Valera*, 845 F.2d 923, 927 (11th Cir. 1988).[40]

## *D. Disputed Disclosure*

If a defendant requests disclosure of materials that the government contends are not discoverable under *Brady*, the trial court may conduct an in camera review of the disputed materials.[41] "To justify such a review, the defendant must make some showing that the materials in question could contain favorable, material evidence. . . . This showing cannot consist of mere speculation. . . . Rather, the defendant should be able to articulate with some specificity what evidence

38. *See generally* United States v. Hasting, 461 U.S. 499, 505 (1983):

> [I]n the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress. The purposes underlying use of the supervisory powers are threefold: to implement a remedy for violation of recognized rights . . . ; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury . . . ; and finally, as a remedy designed to deter illegal conduct.

(citations omitted); United States v. W.R. Grace, 526 F.3d 499, 508–09 (9th Cir. 2008) (en banc):

> We begin with the principle that the district court is charged with effectuating the speedy and orderly administration of justice. There is universal acceptance in the federal courts that, in carrying out this mandate, a district court has the authority to enter pretrial case management and discovery orders designed to ensure that the relevant issues to be tried are identified, that the parties have an opportunity to engage in appropriate discovery and that the parties are adequately and timely prepared so that the trial can proceed efficiently and intelligibly

*See also* Fed. R. Crim. P. 57(b) ("Procedure when there is no controlling law: A judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district.").

39. *See* discussion of local rules in Laural Hooper et al., Fed. Judicial Ctr., A Summary of Responses to a National Survey of Rule 16 of the Federal Rules of Criminal Procedure and Disclosure Practices in Criminal Cases 11–18 (2011), https://fjc.dcn/sites/default/files/2014/Rule16Rep.pdf.

40. *See also* United States v. Caro-Muniz, 406 F.3d 22, 29 (1st Cir. 2005) ("methods of enforcing disclosure requirements in criminal trials are generally left to the discretion of the trial court"); United States v. Runyan, 290 F.3d 223, 245 (5th Cir. 2002) (same); United States v. Campagnuolo, 592 F.2d 852, 857 n.2 (5th Cir. 1979) ("The government argues that it was not required to follow certain provisions of . . . the standing discovery order because those provisions were broader in scope than the requirements adopted by the Supreme Court in *Brady*. This argument is without merit. It is within the sound discretion of the district judge to make any discovery order that is not barred by higher authority.").

41. *See, e.g.*, United States v. Prochilo, 629 F.3d 264, 268 (1st Cir. 2011).

he hopes to find in the requested materials, why he thinks the materials contain this evidence, and finally, why this evidence would be both favorable to him and material."[42]

### *E. Protective Orders*

For good cause, such as considerations of witness safety or national security, a trial judge may fashion an appropriate protective order to the extent necessary in a particular case, consistent with the defendant's constitutional rights. See, e.g., *United States v. Williams Companies, Inc.*, 562 F.3d 387, 396 (D.C. Cir. 2009) (discussing balancing of "the prosecution's affirmative duty to disclose material evidence 'favorable to an accused,'" Rule 16(d)(1)'s provision that, "'for good cause,' the district court may 'deny, restrict, or defer discovery or inspection or grant other appropriate relief,'" and defendant's right to fair trial). See also the Classified Information Procedures Act, 18 U.S.C. App. 3, for procedures regarding protective orders for classified information; Robert Timothy Reagan, *Keeping Government Secrets: A Pocket Guide on the State-Secrets Privilege, the Classified Information Procedures Act, and Classified Information Security Officers* (Federal Judicial Center, 2d ed. 2013).

### *F. Summary*

This section of the *Benchbook* is meant to provide a general guide to the *Brady* line of case law. Every case is different, however, and presents its own particular facts and circumstances that will affect the types of *Brady/Giglio* disclosure issues (if any) that may arise and how such issues may be handled most appropriately. Ideally, both prosecutors and defense attorneys will know and fulfill their respective responsibilities without significant judicial intervention. However, even if things appear to be going smoothly, a judge may want to monitor the situation, perhaps using status conferences to ask if information is being fully and timely exchanged. A district's particular legal culture is important. In districts where there is a history of poor cooperation between prosecutors and the defense bar, judges may need to take a more active role in ensuring *Brady* compliance than they might in districts where there is an "open file" discovery policy and a history of trust. A district's local rules or standing orders also may provide specific rules for handling disclosure.

## Appendix A. FJC Survey

The Federal Judicial Center conducted a comprehensive review of *Brady* practices in federal courts, surveying "all federal district and magistrate judges, U.S. Attorneys' Offices, and federal defenders, and a sample of defense attorneys in criminal cases that terminated during calendar year 2009. The surveys collected empirical data on whether to amend Rule 16 and collected views regarding issues, concerns, or problems surrounding pretrial discovery and disclosure

42. *Id.* at 268–69 (citing Pennsylvania v. Ritchie, 480 U.S. 39, 58 n.15 (1987)). *See also* Riley v. Taylor, 277 F.3d 261, 301 (3d Cir. 2001) ("A defendant seeking an in camera inspection to determine whether files contain *Brady* material must at least make a 'plausible showing' that the inspection will reveal material evidence. . . . Mere speculation is not enough."); United States v. Lowder, 148 F.3d 548, 551 (5th Cir. 1998) (same); Love v. Johnson, 57 F.3d 1305, 1313 (4th Cir. 1995) (same); United States v. Navarro, 737 F.2d 625, 631 (7th Cir. 1984) ("Mere speculation that a government file may contain *Brady* material is not sufficient to require a remand for *in camera* inspection, much less reversal for a new trial. A due process standard which is satisfied by mere speculation would convert *Brady* into a discovery device and impose an undue burden upon the district court.").

in the federal district courts." Laural Hooper et al., Federal Judicial Center, A Summary of Responses to a National Survey of Rule 16 of the Federal Rules of Criminal Procedure and Disclosure Practices in Criminal Cases 7 (2011).

In addition to the survey results, the FJC report contains an analysis of district court rules and standing orders that cover disclosure requirements under *Brady* and *Giglio*. A separate appendix reprints the rules and orders from thirty-eight districts. The rules range from basic reiterations of *Brady* and *Giglio* to very detailed instructions and deadlines. The report and the appendices can be accessed at https://fjc.dcn/content/summary-responses-national-survey-rule-16-federal-rules-criminal-procedure-and-disclosure-0.

## Appendix B. Justice Department Policies and Guidance

Two documents set forth the current criminal discovery policies of the Department of Justice. The first is Section 9-5.001 of the *Justice Manual* (replacing the *United States Attorney's Manual*), titled "Policy Regarding Disclosure of Exculpatory and Impeachment Information" (as updated January 2020), which largely follows established case law in outlining a prosecutor's responsibilities to disclose exculpatory information, though in some instances it goes beyond what is required:

> Under this policy, the government's disclosure will exceed its constitutional obligations. Thus, this policy encourages prosecutors to err on the side of disclosure in close questions of materiality and identifies standards that favor greater disclosure in advance of trial through the production of exculpatory information that is inconsistent with any element of any charged crime and impeachment information that casts a substantial doubt upon either the accuracy of any evidence the government intends to rely on to prove an element of any charged crime or that might have a significant bearing on the admissibility of prosecution evidence.

*Id.* at F. The policy can be accessed at https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings.

The second document is a memorandum issued by Deputy Attorney General David Ogden on January 4, 2010, which provides "Guidance for Prosecutors Regarding Criminal Discovery." It goes beyond *Brady* and *Giglio* and also outlines a prosecutor's obligations under Rules 16 and 26.2, as well as the Jencks Act, 18 U.S.C. § 3500. Usually called "The Ogden Memorandum," it is "intended to assist Department prosecutors to understand their obligations and to manage the discovery process." Available at https://www.justice.gov/archives/jm/criminal-resource-manual-165-guidance-prosecutors-regarding-criminal-discovery.

Note that these documents are internal policy guidelines. They do not, as the "Policy" states, "provide defendants with any additional rights or remedies," and they are "not intended to have the force of law or to create or confer any rights, privileges, or benefits." While it may be useful to know what information prosecutors are gathering and should be disclosing,[43] these guidelines are not legal obligations to be enforced by a court. Unlike a violation of *Brady* or *Giglio*, a failure

43. *See* Public Defender Service for the District of Columbia, *Brady v. Maryland* Outline 4–5 (revised July 2016), https://www.pdsdc.org/docs/default-source/legal-resources/brady-outline-july-2016.pdf?sfvrsn=4ef4db45_1:

> Defense counsel should be prepared to (1) remind government counsel about their obligations under these policies, (2) call on the government to explain why it cannot or will not comply with its own policies . . . , and (3) urge trial courts that any display of ignorance of or disregard for these policies by government counsel simply reinforces the need for courts to act to regulate the government's *Brady* disclosures.

to follow DOJ policies is not by itself a basis for a trial judge to impose sanctions, exclude evidence, or declare a mistrial, or for an appellate court to reverse a conviction.

# Appendix C. Potential *Brady* or *Giglio* Information

The following is a list of the types of material that may be discoverable under *Brady* or *Giglio*. The examples are culled from case law, district court local rules, and Department of Justice guidelines for prosecutors. Citations from Supreme Court and appellate cases are provided to assist judges who may be faced with similar situations. The list is not exhaustive, and whether the disclosure of any item is or is not required must be determined in light of the specific facts and circumstances of each case.

## 1. Exculpatory Information Under *Brady*

(a) information that is inconsistent with any element of any crime charged in the indictment or that tends to negate the defendant's guilt of any of the crimes charged (e.g., an affirmative defense)

*Brady v. Maryland*, 373 U.S. 83, 84 (1963) (confession by codefendant); *Finley v. Johnson*, 243 F.3d 215, 221–22 (5th Cir. 2001) (affirmative defense: necessity); *United States v. Udechukwu*, 11 F.3d 1101, 1106 (1st Cir. 1993) (prosecution had independently corroborated information that would have strengthened defendant's credibility in claiming duress); *United States v. Spagnoulo*, 960 F.2d 990, 993–95 (11th Cir. 1992) (psychiatric evaluation done during pretrial detention could have strengthened insanity defense).

(b) failure of any person who participated in an identification procedure to make a positive identification of the defendant, whether or not the government anticipates calling the person as a witness at trial

*Smith v. Cain*, 565 U.S. 73, 74–76 (2012) (the only eyewitness told police on night of murder and a few days later that he could not make an identification); *Kyles v. Whitley*, 514 U.S. 419, 423–25 (1995) (six eyewitness statements contained physical details that were inconsistent with defendant and more closely resembled state's key witness).

(c) any information that links someone other than the defendant to the crime (e.g., a positive identification of someone other than the defendant)

*Trammell v. McKune*, 485 F.3d 546, 551–52 (10th Cir. 2007) (physical evidence linking other person to theft); *DiSimone v. Phillips*, 461 F.3d 181, 195 (2d Cir. 2006) (evidence that another person confessed to stabbing the victim); *Monroe v. Angelone*, 323 F.3d 286, 313, 316 n.20 (4th Cir. 2003) (undisclosed evidence that car driven by someone other than defendant was seen speeding away from murder scene); *Clemmons v. Delo*, 124 F.3d 944, 949–50 (8th Cir. 1997) (witness statement indicating another prisoner committed stabbing); *United States v. Robinson*, 39 F.3d 1115, 1116–19 (10th Cir. 1994) (description by eyewitness of person who picked up cocaine closely matched another witness rather than defendant).

(d) information that casts doubt on the accuracy of any evidence—including witness testimony—that the prosecutor intends to rely on to prove an element of any of the crimes charged in the indictment, or that might have a significant bearing on the admissibility of that evidence in the case-in-chief

*United States v. Triumph Capital Group, Inc.*, 544 F.3d 149, 162–65 (2d Cir. 2008) (suppressed notes of FBI agent cast doubt on whether defendant had intent to commit offense); *Benn v. Lambert*, 283 F.3d 1040, 1060–62 (9th Cir. 2002) (investigative report concluding that fire was accidental and not arson, which prosecution had used as aggravating factor in murder case); *United States v. Gamez-Orduno*, 235 F.3d 453, 461 (9th Cir. 2000) (suppression of report that would have demonstrated defendants had Fourth Amendment standing to challenge search); *Ballinger v. Kerby*, 3 F.3d 1371, 1376 (10th Cir. 1993) (undisclosed photograph most likely would have "destroyed" credibility of key prosecution witness); *Smith v. Black*, 904 F.2d 950, 965–66 (5th Cir. 1990) (nondisclosure of *Brady* information may have affected court's findings at suppression hearing); *United States ex rel. Smith v. Fairman*, 769 F.2d 386, 391 (7th Cir. 1985) (evidence that the gun defendant allegedly fired at police was inoperable).

(e) any classified or otherwise sensitive national security material disclosed to defense counsel or made available to the court in camera that tends directly to negate the defendant's guilt

*United States v. Amawi*, 695 F.3d 457, 471 (6th Cir. 2012) (standard for discovery under Classified Information Procedures Act is whether evidence is "relevant and helpful" to defense, not *Brady*'s stricter materiality standard); *United States v. Mejia*, 448 F.3d 436, 456–57 (D.C. Cir. 2006) (same). See also *United States v. Aref*, 533 F.3d 72, 79–80 (2d Cir. 2008) (classified information must be "relevant and helpful," interpreted by the court as "material to the defense," but to be "helpful or material to the defense, evidence need not rise to the level that would trigger the Government's obligation under *Brady*"; information can be "helpful" without being "'favorable' in the *Brady* sense").

(f) any information favorable and material to the defendant in the sentencing phase

*Brady v. Maryland*, 373 U.S. 83, 85–86 (1963) (defendant's sentence of death could have been affected by codefendant's admission that he, rather than defendant, committed actual killing during robbery); *Cone v. Bell*, 556 U.S. 449, 474–75 (2009) (death sentence could have been affected by evidence that defendant may have been drunk or high when committing murders); *United States v. Weintraub*, 871 F.2d 1257, 1261–65 (5th Cir. 1989) (prior inconsistent statement by key witness describing lower amount of drugs sold by defendant that could affect his sentence).

## 2. Impeachment Information Under *Giglio*

*Note:* DOJ's *Justice Manual*, Section 9-5.002: Criminal Discovery, at B.7, contains examples of "potential *Giglio* information relating to law enforcement witnesses." It is available at: https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings.

(a) all statements made orally or in writing by any witness the prosecution intends to call in its case-in-chief that are inconsistent with other statements made by that same witness

*Youngblood v. West Virginia*, 547 U.S. 867, 868–70 (2006) (per curiam) (note written by two victim witnesses that contradicted testimony); *Strickler v. Greene*, 527 U.S. 263, 282 (1999) (undisclosed witness statements inconsistent with trial testimony); *Kyles v. Whitley*, 514 U.S. 419, 441–46 (1995) (same); *Slutzker v. Johnson*, 393 F.3d 373, 387–88 (3d Cir. 2004) (withheld witness statement that a man other than defendant was at scene of murder, contradicting her trial testimony); *Boyette v. LeFevre*, 246 F.3d 76, 91 (2d Cir. 2001) (interview notes showing victim could not identify attacker inconsistent with trial testimony).

(b) all plea agreements entered into by the government in this case or related cases with any witness the government intends to call

*Douglas v. Workman*, 560 F.3d 1156, 1174–75 (10th Cir. 2009) (undisclosed deal between prosecutor and key witness); *Silva v. Brown*, 416 F.3d 980, 986–87 (9th Cir. 2005) (as part of his plea deal reducing charges against him and limiting his sentence in return for testifying, one of three murder suspects agreed to refrain from undergoing psychiatric evaluation so as to avoid questions about his mental capacity).

(c) any favorable dispositions of criminal charges pending against witnesses the prosecutor intends to call

*Akrawi v. Booker*, 572 F.3d 252, 263 (6th Cir. 2009) (informal agreement to reduce charges against witness in different case in return for his testimony against defendant); *Douglas v. Workman*, 560 F.3d 1156, 1166–67 (10th Cir. 2009) (several instances of prosecutor dropping charges in other cases against witness in exchange for testimony against defendant); *Singh v. Prunty*, 142 F.3d 1157, 1162 (9th Cir. 1998) (key witness had several pending charges against him dropped during prosecution of defendant).

(d) offers or promises made or other benefits provided, directly or indirectly, to any witness in exchange for cooperation or testimony, including:

(1) dismissed or reduced charges

*Wolfe v. Clarke*, 691 F.3d 410, 417–18 (4th Cir. 2012) (witness who actually killed drug supplier was told he might have capital murder charges reduced if he testified that defendant drug dealer hired him to do the shooting); *United States v. Smith*, 77 F.3d 511, 513–16 (D.C. Cir. 1996) (key prosecution witness, who was originally charged as codefendant, had other felony charges dismissed); *Blankenship v. Estelle*, 545 F.2d 510, 513–14 (5th Cir. 1977) (promise to drop all charges against two witnesses in exchange for testimony against defendant);

(2) immunity or offer of immunity

*Horton v. Mayle*, 408 F.3d 570, 578–81 (9th Cir. 2005) (alleged promise of immunity to key witness); *Haber v. Wainwright*, 756 F.2d 1520, 1523 (11th Cir. 1985) (alleged promise by state attorney to grant immunity from prosecution on numerous prior offenses in exchange for testimony);

(3) expectation of downward departure or variance, reduction of sentence, or specific sentencing recommendation by the government

*Douglas v. Workman*, 560 F.3d 1156, 1174–75 (10th Cir. 2009) (assistance to key witness with pre-parole release and reinstatement of lost good-time credits); *Tassin v. Cain*, 517 F.3d 770, 778–79 (5th Cir. 2008) (key witness led to believe she would receive reduced sentence in her case if she testified against husband in his case); *Reutter v. Solem*, 888 F.2d 578, 581–82 (8th Cir. 1989) (state's key witness was scheduled to go before parole board—of which prosecutor was a member—seeking a sentence commutation just a few days after he was to testify against defendant); *United States v. Gerard*, 491 F.2d 1300, 1303–04 (9th Cir. 1974) (promise to testifying codefendant, who earlier pled guilty, to recommend probation);

(4) assistance in other criminal proceedings—federal, state, or local

*Bell v. Bell*, 512 F.3d 223, 233 (6th Cir. 2008) (district attorney's office dropped four pending charges after witness met with prosecutor with offer to testify); *United States v.*

*Risha*, 445 F.3d 298, 299–302 (3d Cir. 2006) (key witness expected, and later received, "an extremely favorable plea agreement" on unrelated state charges); *Benn v. Lambert*, 283 F.3d 1040, 1057 (9th Cir. 2002) (prosecutor arranged for informant to be released without being charged after stop for traffic offense led to arrest on outstanding warrants);

(5) considerations regarding forfeiture of assets, forbearance in seeking revocation of professional licenses or public benefits, waiver of tax liability, or promises not to suspend or debar a government contractor

*United States v. Shaffer*, 789 F.2d 682, 688–89 (9th Cir. 1986) (government's failure to initiate asset forfeiture proceedings or enforce civil liability for unpaid taxes related to key witness's former drug dealing indicated leniency in return for cooperation);

(6) stays of deportation or other immigration benefits

*United States v. Blanco*, 392 F.3d 382 (9th Cir. 2004) (undocumented alien working as paid confidential informant was given "special parole visa through INS" in return for cooperation with DEA); *United States v. Sipe*, 388 F.3d 471, 488–89 (5th Cir. 2004) (while waiting to testify against defendant, illegal aliens who were caught trying to enter the United States received "significant benefits, including Social Security cards, witness fees, permits allowing travel to and from Mexico, travel expenses, living expenses, some phone expenses, and other benefits");

(7) monetary or other benefits, paid or promised

*United States v. Bagley*, 473 U.S. 667, 683–84 (1985) (payments to witnesses for assistance in undercover drug operation and testimony in court); *Robinson v. Mills*, 592 F.3d 730, 737–38 (6th Cir. 2010) (witness who provided the only evidence contradicting defendant's self-defense claim worked as paid confidential informant for local authorities before and after defendant's trial); *United States v. Boyd*, 55 F.3d 239, 244–45 (7th Cir. 1995) (witness gang members "received a continuous stream of unlawful, indeed scandalous, favors from staff at the U.S. Attorney's office while jailed [and] awaiting the trial of the defendants," including lax supervision that allowed drug use and drug dealing, long distance telephone calls, and sexual contact with visitors); *United States v. Librach*, 520 F.2d 550, 553 (8th Cir. 1975) ("Government's failure to disclose protective custody and its substantial payment of almost $10,000 to" primary witness). *Cf. Wilson v. Beard*, 589 F.3d 651, 662 (3d Cir. 2009) (officer "loaned money, interest free, to [witness] during the time period when [witness] acted as a police informant");

(8) non-prosecution agreements

*Giglio v. United States*, 405 U.S. 150, 152–55 (1972) (promise to key witness—and alleged coconspirator—that he would not be prosecuted if he testified against defendant); *Monroe v. Angelone*, 323 F.3d 286, 312–14 (4th Cir. 2003) (prosecution promised not to prosecute key witness—a convicted felon—for possession of a firearm); *United States v. Sanfilippo*, 564 F.2d 176, 177–79 (5th Cir. 1977) (witness was promised he would not be prosecuted in a separate case if he testified);

(9) letters to other law enforcement officials setting forth the extent of a witness's assistance or making recommendations on the witness's behalf

*Jackson v. Brown*, 513 F.3d 1057, 1070–72 (9th Cir. 2008) (law enforcement personnel promised prisoner-witness to bring his cooperation to attention of judges and prosecutors in other cases to help him get reduced sentences); *United States v. Bigeleisen*, 625 F.2d 203, 208 (8th Cir. 1980) (in exchange for testimony, government agreed to write

letter to Parole Commission outlining cooperation of witness who was imprisoned for other offense);

(10) relocation assistance or more favorable conditions of confinement

*Quezada v. Scribner*, 611 F.3d 1165, 1168–69 (9th Cir. 2010) (question whether relocation payments witness received were sufficient to warrant evidentiary hearing for *Brady* violation); *Jackson v. Brown*, 513 F.3d 1057, 1070–71 (9th Cir. 2008) (promise to recommend that witness be allowed to serve California sentence in Arizona to be closer to his family); *Bell v. Bell*, 512 F.3d 223, 232–33 (6th Cir. 2008) (in exchange for testifying, witness who was in jail for other offenses sought placement in different building and participation in work-release program). *Cf. United States v. Talley*, 164 F.3d 989, 1003 (6th Cir. 1999) (where witness "was the government's key witness and his credibility was at issue throughout the trial, failure to disclose a relocation benefit to the jury would have violated the rule set forth in *Giglio*");

(11) consideration or benefits to culpable or at-risk third parties

*LaCaze v. Warden Louisiana Correctional Institute for Women*, 645 F.3d 728, 735–36 (5th Cir.) (before admitting to shooting victim and implicating defendant, witness received assurances from prosecutor that his 14-year-old son would not be prosecuted), *opinion amended on denial of reh'g en banc*, 647 F.3d 1175 (2011); *Harris v. Lafler*, 553 F.3d 1028, 1033–35 (6th Cir. 2009) (key witness was promised his girlfriend would be released from custody if he incriminated defendant). *Cf. Graves v. Dretke*, 442 F.3d 334, 342–44 (5th Cir. 2006) (prosecution did not reveal that the key witness—himself a possible suspect in murder case—tried to protect his wife from prosecution but had earlier made statement that she was present during crime).

(e) prior convictions of witnesses the prosecutor intends to call

*United States v. Bernal-Obeso*, 989 F.2d 331, 332–33 (9th Cir. 1993) (misinformation about criminal record of key government witness who was confidential informant); *Ouimette v. Moran*, 942 F.2d 1, 10–11 (1st Cir. 1991) (prosecution failed to disclose main witness's numerous convictions and deals he made with prosecution to testify); *United States v. Auten*, 632 F.2d 478, 481–82 (5th Cir. 1980) (codefendant granted immunity for testimony had prior criminal record).

(f) pending criminal charges against any witness known to the government

*Sivak v. Hardison*, 658 F.3d 898, 909–11 (9th Cir. 2011) (letters to other county prosecutor urging dismissal of pending charge against witness); *United States v. Kohring*, 637 F.3d 895, 903–04 (9th Cir. 2010) (key witness faced charges of sexual misconduct with minor); *Cargall v. Mullin*, 317 F.3d 1196, 1215–16 (10th Cir. 2003) ("forbearance on potential charges . . . to secure the cooperation of a witness" must be disclosed to defense).

(g) prior specific instances of conduct by any witness known to the government that could be used to impeach the witness under Rule 608 of the Federal Rules of Evidence, including any finding of misconduct that reflects upon truthfulness

*United States v. Kohring*, 637 F.3d 895, 906 (9th Cir. 2010) (alleged attempts by key witness to suborn perjurious testimony in different case); *United States v. Torres*, 569 F.3d 1277, 1282–83 (10th Cir. 2009) (evidence that confidential informant breached prior agreement with DEA and continued to use illegal drugs despite testifying that she had stopped); *United States v. Velarde*, 485 F.3d 553, 561–63 (10th Cir. 2007) (information that victim had made false accusations of similar nature); *Benn v. Lambert*, 283 F.3d 1040,

1054–56 (9th Cir. 2002) (informant's history of committing crimes and "regularly" lying while acting as informant); *Nuckols v. Gibson*, 233 F.3d 1261, 1266–67 (10th Cir. 2000) (government failed to disclose allegations of theft and sleeping on the job of police officer whose testimony was crucial to the issue of whether a *Miranda* violation had occurred and thus crucial to the admissibility of the confession); *United States v. O'Conner*, 64 F.3d 355, 357–59 (8th Cir. 1995) (per curiam) (two witnesses attempted to influence testimony of another witness by threatening him and his family).

(h) substance abuse, mental health issues, or physical or other impairments known to the government that could affect any witness's ability to perceive and recall events

*Gonzalez v. Wong*, 667 F.3d 965, 983–84 (9th Cir. 2011) (medical reports indicating "jailhouse informant" witness was schizophrenic and had history of lying); *Wilson v. Beard*, 589 F.3d 651, 660–62 (3d Cir. 2009) (government witness's history of severe mental problems which showed witness was prescribed psychotropic drugs during relevant time period; another witness also had undisclosed mental issues); *Benn v. Lambert*, 283 F.3d 1040, 1056 (9th Cir. 2002) (evidence that key witness was using drugs during trial).

(i) information known to the government that could affect any witness's bias, such as:

(1) animosity toward the defendant

*United States v. Aviles-Colon*, 536 F.3d 1, 19–21 (1st Cir. 2008) (evidence that defendant and codefendant were "at war" would have advanced defendant's claim that he was not part of charged drug conspiracy); *United States v. Sipe*, 388 F.3d 471, 477 (9th Cir. 2004) (evidence not revealed until presentence report that key witness "personally disliked" defendant). *Cf. Schledwitz v. United States*, 169 F.3d 1003, 1014–15 (6th Cir. 1999) (key witness, portrayed as "neutral and disinterested expert" during petitioner's fraud prosecution, actually had for years been actively involved in investigating petitioner and interviewing witnesses against him); *United States v. Steinberg*, 99 F.3d 1486, 1491 (9th Cir. 1996) (informant, who was key witness, owed defendant money, thus giving him incentive to send defendant to prison).

(2) previous relationship with law enforcement authorities

*Robinson v. Mills*, 592 F.3d 730, 737 (6th Cir. 2010) (key government witness worked as paid informant in other criminal cases before and after defendant's trial); *United States v. Torres*, 569 F.3d 1277, 1282–83 (10th Cir. 2009) (two prior undisclosed contracts between confidential informant witness and DEA); *United States v. Shaffer*, 789 F.2d 682, 688–89 (9th Cir. 1986) (key witness was informant for government in earlier, different drug investigation).

(j) Prosecutorial misconduct

*United States v. Bundy*, 968 F.3d 1019, 1037–45 (9th Cir. 2020) (government's "flagrant misconduct" in withholding evidence "substantially prejudiced" defendants and warranted dismissal with prejudice); *United States v. Scheer*, 168 F.3d 445, 449–53 (11th Cir. 1999) (threatening remark by prosecutor to "critical" prosecution witness who was on probation that if he did not "come through for us" he would be sent back to jail); *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995) (prosecutor failed to correct representations he made to jury which were damaging to defendant's duress defense, despite learning before trial ended that they were actually false); *United States v. Kojayan*, 8 F.3d 1315, 1318–19 (9th Cir. 1993) (prosecution refused to reveal that a witness it chose not to call had signed a cooperation agreement to testify truthfully if requested

and instead falsely claimed at trial that witness had invoked Fifth Amendment right to refuse to testify). *Cf. Douglas v. Workman*, 560 F.3d 1156, 1192–94 (10th Cir. 2009) (prosecutor's "active concealment" of *Brady* violation that prevented defendant from presenting claim in timely fashion warranted allowing claim as a second or successive request for habeas relief).

# 5.07 Juror Questions During Trial

*Fed. R. Evid. 611*

[*Note:* This section has been added at the request of the Advisory Committee on Evidence Rules. Its purpose is to recommend a set of minimum procedural safeguards in the event a court allows jurors to ask questions of witnesses during a trial. The Advisory Committee and the *Benchbook* Committee neither endorse nor oppose the practice. Whether and how to allow juror questions is a matter of judicial discretion in light of the particular circumstances of each case and the case law and policy of each circuit.]

## *A. Introduction*

While not as common as taking questions from a jury during its deliberations, the practice of allowing individual jurors to ask questions during trial is allowed—to varying extent—by every circuit court.[1] It is considered to be part of the inherent authority of a judge to manage a trial, as well as within the scope of Fed. R. Crim. P. 611(a): "The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence." Courts have recognized the possible benefits of allowing jurors to ask questions:

> [I]t helps jurors clarify and understand factual issues, especially in complex or lengthy trials that involve expert witness testimony or financial or technical evidence. If there is confusion in a juror's mind about factual testimony, it makes good common sense to allow a question to be asked about it. Juror-inspired questions may serve to advance the search for truth by alleviating uncertainties in the jurors' minds, clearing up confusion, or alerting the attorneys to points that bear further elaboration. Indeed, there may be cases in which the facts are so complicated that jurors should be allowed to ask questions in order to perform their duties as fact-finders. Moreover, juror questioning leads to more attentive jurors and thereby leads to a more informed verdict.[2]

The courts also recognize the potential pitfalls:

> [J]urors can find themselves removed from their appropriate role as neutral fact-finders; jurors may prematurely evaluate the evidence and adopt a particular position as to the weight of that evidence before considering all the facts; the pace of trial may be delayed; there is a certain awkwardness for lawyers wishing to object to juror-inspired questions; and there is a risk of undermining litigation strategies. In light of jurors' lack of knowledge of the rules of evidence, a juror question may be improper or prejudicial. When a court declines to ask a question, the questioning juror may feel that her pursuit of truth has been thwarted by rules she does not understand. Concern has also been expressed over a

1. *See* United States v. Rawlings, 522 F.3d 403, 407 (D.C. Cir. 2008) (agreeing "with our sister circuits" that questions are allowed, citing cases from all other circuits except the Tenth). The Tenth Circuit, in its Criminal Pattern Jury Instructions, Instruction 1.01 at 4 (revised July 14, 2023), provides an optional instruction telling the jury that, "in rare situations, a juror may believe a question is critical to reaching a decision on a necessary element of the case. In that exceptional circumstance, you may write out a question and provide it to the courtroom deputy while the witness is on the stand." The court will then determine whether it is "a proper and necessary question" to ask the witness. https://www.ca10.uscourts.gov/sites/ca10/files/documents/downloads/Jury%20Instructions%202021%20revised%207-14-23.pdf.

2. United States v. Richardson, 233 F.3d 1285, 1290 (11th Cir. 2000).

> risk that a sense of camaraderie among jurors may lead them to attach more significance to questions propounded by fellow jurors than those posed by counsel.[3]

In criminal trials, it may complicate a defendant's decision whether to testify if there is the possibility of jurors asking questions.

"To minimize these risks, a district judge who decides to permit questioning by jurors in a given case should implement specific precautionary procedures."[4] Jurors should be instructed, for example, that any questions must be submitted in writing, and warned that their question may have to be rephrased by the judge—or perhaps cannot be asked—for legal or other reasons.

## *B. Advisory Standards and Jury Instructions*

The following procedures are recommended when a court chooses to allow questions from jurors during a trial, whether civil or criminal.[5] They represent the minimum safeguards that should be employed and are not meant to be exclusive: Courts are free to impose additional safeguards, or to provide additional instructions, when necessary to protect the parties from prejudice, especially in criminal cases, or to assure that the jurors maintain their neutral role. Before any trial, judges should weigh the benefits of allowing juror questions in that particular case against the potential harm that it might cause. The court should also notify the parties in advance that it may allow juror questions and give them an opportunity to be heard in opposition to the practice or to suggest particular methods, limits, and safeguards.

### (1) Instructions to Jurors If Questions Are Allowed

If the court allows jurors to submit questions for witnesses during trial, then the court should instruct the jury that:

(a) any question must be submitted to the court in writing;

(b) a juror must not disclose a question's content to any other juror;

(c) the court may rephrase or decline to ask a question submitted by a juror;

(d) a juror must draw no inference from the fact that a juror's question is asked, rephrased, or not asked;

(e) an answer to a juror's question should not be given any greater weight than an answer to any other question;

(f) juror questions should be for purposes of clarifying factual matters, and are not to be argumentative;

(g) while the court is permitting juror questions, it is not encouraging them; and

3. *Rawlings*, 522 F.3d at 408. Most of the other circuits have expressed similar concerns. *See, e.g.*, United States v. Feinberg, 89 F.3d 333, 337 (3d Cir. 1996) ("implicit in [the] exercise of discretion is an obligation to weigh the potential benefit to the jurors against the potential harm to the parties, especially when one of those parties is a criminal defendant. . . . In the vast majority of cases the risks outweigh the benefits."); United States v. Sutton, 970 F.2d 1001, 1005 (1st Cir. 1992) ("Allowing jurors to pose questions during a criminal trial is a procedure fraught with perils.").

4. *Rawlings*, 522 F.3d at 408. *See also Richardson*, 233 F.3d at 1290 ("district courts have been directed to employ measures that will protect against these risks").

5. These procedures are derived from recommendations that were prepared for the Advisory Committee on Evidence Rules with the assistance of Professor Daniel J. Capra, Reporter to the Committee, and which were based on case law and studies and surveys of the practice of allowing juror questions in both federal and state courts.

(h) as the trial progresses, the court may decide to prohibit jury questions if they become excessive in number.

### (2) Procedure If a Question Is Submitted

If a question is submitted by a juror, the court must, outside the jury's hearing:

(a) review the question with counsel to determine whether it should be asked, rephrased, or not asked; and

(b) allow a party to object to it.

### (3) Posing the Question to a Witness

If the court allows a juror's question to be asked, the court must pose it to the witness or permit one of the parties to do so. The court may then allow counsel to re-examine witnesses after a juror's question is answered by the witness.

### (4) Record

All questions submitted by the jurors must be entered into the record.

## For Further Reference

- Seventh Cir. Bar Ass'n Am. Jury Project, Seventh Circuit American Jury Project: Final Report 13–24, 60–62 (September 2008), https://www.uscourts.gov/sites/default/files/seventh_circuit_american_jury_project_final_report.pdf
- Mark W. Bennett, *Reinvigorating and Enhancing Jury Trials Through an Overdue Juror Bill of Rights: A Federal Trial Judge's View*, 48 Ariz. St. L.J. 481, 511–15 (2016)
- Marina Garcia Marmolejo, *Jack of All Trades, Masters of None: Giving Jurors the Tools They Need to Reach the Right Verdict*, 28 Geo. Mason L. Rev. 149 (2020) (includes sample "Cautionary Instructions" in the Appendix)
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# 6.01 Civil Case Management

*Fed. R. Civ. P. 16, 16.1, 26, 37; 18 U.S.C. § 636*



## Introduction

This section is designed to provide guidance for managing both simple and complex civil cases. It includes actions that are required by rule along with factors to consider, alternative methods, and recommendations that experienced judges have found to be helpful. Not all of the recommendations given will be appropriate for every case, and judges should tailor the advice to the needs of the case at hand. Also, a district's local rules may recommend or require a different practice or procedure, or even use different terminology, and "many courts have adopted standardized case-management procedures for all civil cases within a district," which may include "standing orders or guidelines for civil practice, and . . . standard orders for judges to use in all civil cases."[1]

The *Civil Litigation Management Manual* is a valuable resource for judges, providing a wide array of case management techniques from early case screening through trial and final disposition. The *Manual* emphasizes that "early, active case-management results in greater efficiency, reduced costs, and a shorter time from filing to disposition."[2] For pro se cases, where early and active case management is even more important, the Federal Judicial Center offers a separate guide specifically for managing nonprisoner civil pro se litigation. The guide offers practical steps courts can take to manage such cases more efficiently while also helping pro se litigants better navigate the complexities of civil litigation.[3]

In multidistrict litigation cases, transferee courts should follow Fed. R. Civ. P. 16.1, which provides a framework for the initial management of MDL proceedings. In other, non-MDL multiparty litigation, "courts may find it useful to employ procedures similar to those Rule 16.1

1. Civil Litigation Management Manual 2 (Judicial Conference of the United States, 3d ed. 2022), https://fjc.dcn/content/369994/civil-litigation-management-manual-third-edition. The online appendix to the Manual provides many examples of orders, forms, and outlines used by district courts for case management, https://fjc.dcn/content/366802/civil-litigation-management-manual-3ed-online-appendix.

2. Civil Litigation Management Manual at 2.

3. Jefri Wood, Pro Se Case Management for Nonprisoner Civil Litigation (Federal Judicial Center 2016) (also discussing procedural fairness and access to justice issues, plus the scope of judges' authority and discretion in pro se matters), https://fjc.dcn/content/315899/pro-se-case-management-nonprisoner-civil-litigation.

identifies in handling those multiparty proceedings. In both MDL proceedings and other multiparty litigation, the Manual for Complex Litigation also may be a source of guidance."[4]

Note that, because magistrate judges routinely handle many of the pretrial functions referred to in this section, references to "judge" or "court" are meant to include both district and magistrate judges.

## I. The Judge's Role: Active Case Management

The Federal Rules of Civil Procedure contemplate that the judge will be an active case manager. The rules apply across case types and sizes, but different cases have different pretrial needs. Some cases may require extensive discovery and motions practice, while others may involve little or no discovery or pretrial motions. The Civil Rules provide a flexible template to be tailored to the needs of each case.

The judge and the parties share case-management responsibility—Fed. R. Civ. P. 1 states that the Rules "should be construed, administered, and employed *by the court and the parties* to secure the just, speedy, and inexpensive determination of every action and proceeding" (emphasis added). As stated by the Chief Justice, several amendments to the Federal Rules of Civil Procedure in 2015 "emphasize the crucial role of federal judges in engaging in early and effective case management."[5] Although the parties exercise first-level control and are the principal managers of their cases, they do so under a schedule and other limits established by the judge. Many parties will not effectively manage their case, or will manage in ways that are disproportionate to the needs of the case, or will otherwise frustrate the "just, speedy, and inexpensive determination" of the action. Judges must meet their own responsibility for the efficient resolution of cases both by guiding the parties to sound self-management and by intervening to impose effective management when necessary.[6]

Active judicial case management is an essential part of the civil pretrial process. No party has the right to impose disproportionate or unnecessary costs on the court or the other side. Many parties and lawyers want and welcome active judicial case management, viewing it as key to controlling unnecessary cost and delay.

Active case management does involve additional judge time at the start of the case, but it pays valuable dividends.[7] It ensures that the case will proceed under an efficient but reason-

4. *See* Fed. R. Civ. P. 16.1, advisory committee's notes to 2025 adoption (rule effective Dec. 1, 2025). It should be noted that Fed. R. Civ. P. 16 was amended effective Dec. 1, 2025, along with the adoption of the new Rule 16.1. Further, a new edition of the Manual for Complex Litigation is in preparation.

5. Chief Justice John G. Roberts, Jr., 2015 Year-End Report on the Federal Judiciary 7 (Dec. 31, 2015).

6. This applies to all civil actions that occur in district courts. *See, e.g.*, Judicial Conference of the United States, Committee on the Administration of the Bankruptcy System, Case Management Manual for United States Bankruptcy Judges xxxvi (2d ed. 2012) ("Effective case management depends upon a number of factors, including: early involvement by the judge; management tailored to the needs of the particular case or proceeding; . . . regular communication between the judge and the attorneys at all phases of the case or proceeding; [and] clear direction to the attorneys and parties regarding the court's expectations."); Laura B. Bartell, A Guide to the Judicial Management of Bankruptcy Mega-Cases 59 (Federal Judicial Center, 2d ed. 2009) ("The bankruptcy judge must maintain control over the litigation process to ensure that each matter is resolved efficiently at the lowest cost possible.").

7. *See* William W Schwarzer, Alan Hirsch & Jeremy D. Fogel, The Elements of Case Management (Federal Judicial Center, 3d ed. 2017) ("Faced with busy dockets, some federal judges say that they simply don't have time to meet with lawyers to discuss case management. In fact, however, a relatively modest amount of a judge's time devoted to case management early in a case can save very significant amounts of time later on. . . . Judges who think they are too busy to manage cases probably are too busy not to.").

able schedule, that time and expense will not be wasted on unnecessary discovery or motions practice, and that court and lawyer time will be devoted to the issues most important to the resolution of the case. When lawyers know the judge will be actively managing them, they are more likely to engage in sound self-management. Early attention to case management may also identify potential problems before they arise or address them before they worsen. Active case management promotes justice by focusing the parties and the court on what is truly in dispute and by reducing undue cost and delay.

There are three stages of pretrial case management:

1. activities before the Rule 16 conference and/or order;
2. holding a Rule 16 case-management conference and issuing a case-management order; and
3. ongoing case management.

## *Magistrate Judges*

Magistrate judges play a vital role in civil litigation, especially in the pretrial phase:

> Any nondispositive pretrial matter may be referred to a magistrate judge for hearing and determination. These matters include conducting Rule 16 case management conferences, supervising discovery, resolving discovery disputes, and ruling on motions that do not dispose of claims or defenses . . . . Keep in mind, however, that a magistrate judge's decision on these matters is appealable to the district judge who referred the matter, which could result in delay and potentially give the parties two bites of the apple. Moreover, some district judges prefer to decide nondispositive matters themselves so that they can exercise greater oversight and better familiarize themselves with the parties, attorneys, and issues in the case.[8]

A magistrate judge may be designated "to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition."[9] Whatever the scope of their duties, it is important for magistrate judges to have "the assigned district judge's backing. The district judge and magistrate judge should reach a general understanding about the management of the case at the outset and coordinate periodically. Lawyers should not get the impression that appealing the magistrate judge's case-management rulings is likely to be advantageous."[10]

Magistrate judges may also play a significant role in settlement and mediation:

> In many districts, magistrate judges serve as the court's primary settlement neutrals. Magistrate judges are highly effective as settlement judges because they can offer the litigants a perspective of how the presiding judge might view a party's argument or position. Having magistrate judges serve as neutrals also helps avoid the cost of compensating

8. Civil Litigation Management Manual, *supra* note 1, at 154–55. *See also* Douglas A. Lee & Thomas E. Davis, *"Nothing Less than Indispensable": The Expansion of Federal Magistrate Judge Authority and Utilization in the Past Quarter Century*, 16 Nev. L.J. 845 (2016), https://perma.cc/RYX2-W4W5.

9. 28 U.S.C. § 636(b)(1)(B). *See also* Civil Litigation Management Manual, *supra* note 1, at 155 ("These matters may include motions for injunctions, for judgment on the pleadings, for summary judgment, or for class certification, as well as social security appeals, petitions for habeas corpus, and civil rights cases.").

10. Elements of Case Management, *supra* note 7, at 3.

> a private neutral, and magistrate judges can often accommodate emergency settlement conferences sooner than outside mediators.[11]

If the parties consent, a magistrate judge may be designated by the district court to "conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case." 28 U.S.C. § 636(c)(1). Consent should be in writing, and the parties must be advised "that they are free to withhold consent without adverse substantive consequences."[12]

Courts may wish to consult the *Policies and Principles for Magistrate Judge Utilization*,[13] which is provided by the Judicial Conference Committee on the Administration of the Magistrate Judges System to "identify practices that promote the effective and efficient utilization of magistrate judges . . . [and] also identify practices that are inconsistent with those goals or violate Judicial Conference policy." The *Policies and Principles* cover both specific assignments that are—or are not—appropriate for magistrate judges, and more general principles for making assignments. It also encourages districts to institute "court-wide policies on magistrate judge utilization." Some districts have created such a court-wide plan for magistrate judge assignments,[14] and judges should be aware of what is allowed or required by their court's policies.

Judges are also advised to look at the Magistrate Judge Resources page on the JNet, which is available at https://jnet.ao.dcn/court-services/judges-corner/magistrate-judges-system. It contains links to a wide variety of materials, both administrative and substantive, including the *Inventory of Magistrate Judge Duties* and the *Procedures Manual for U.S. Magistrate Judges*. For additional information on a magistrate judge's role in civil cases, see section 6.09: Referrals to Magistrate Judges (Civil Matters), *infra*.

## II. Initial Case Management (Pre-Rule 16 Conference)

The Rule 16 case-management conference between the lawyers and the judge presents a prime opportunity for the judge to assess the pretrial needs of the case in time to craft an appropriately tailored case-management order. The effectiveness of the Rule 16 conference depends in large part on the information the parties provide. Rule 26(f) requires the parties to confer and prepare a discovery planning report to use in the Rule 16 conference with the court. The judge can take steps to promote the parties' effective use of Rule 26(f).[15]

11. Civil Litigation Management Manual, *supra* note 1, at 82. *See also* Administrative Office of the United States Courts Judicial Services Office, Utilization of Magistrate Judges to Conduct Settlement Conferences (revised July 27, 2021), https://jnet.ao.dcn/court-services/judges-corner/magistrate-judges/utilization-magistrate-judges-general/utilization-magistrate-judges-conduct-settlement-conferences.

12. 28 U.S.C. § 636(c)(2). For more information on consent to magistrate judge jurisdiction in civil cases, see Administrative Office of the United States Courts, Improving Magistrate Judge Utilization Through Facilitating Consent in Civil Cases (July 2023), https://jnet.ao.dcn/court-services/judges-corner/magistrate-judges-system/improving-magistrate-judge-utilization-through-facilitating-consent-civil-cases t.

13. https://jnet.ao.dcn/sites/default/files/pdf/Current_Policies_and_Principles.06.09.22_FINAL.pdf.

14. *See, e.g.*, Please Proceed: *One Court's Approach to Magistrate Judge Utilization with Judge David Nuffer, D. Utah* (Mar. 18, 2021) (video presentation plus a pdf of the court's plan), https://fjc.dcn/content/351402/please-proceed--one-courts-approach-to-magistrate-judge-utilization.

15. *See* Steven S. Gensler, Federal Rules of Civil Procedure, Rules and Commentary, Rule 26 Practice Commentary (2024) ("Rule 26(f) illustrates how critical it is that the parties communicate with each other and with the court. Experience shows that discovery proceeds most smoothly when the parties and the court work together and use their collective common sense to work out the 'what,' 'when,' and 'how' of discovery.") (available on Westlaw). Rules 16 and 26 were amended in tandem effective Dec. 1, 2025; see advisory committee notes to both for details.

In cases involving multidistrict litigation, courts should look to Fed. R. Civ. P. 16.1 (effective December 1, 2025). Rule 16.1 provides guidance for the initial management of MDL proceedings. In other multiparty proceedings, courts may find it useful to use procedures similar to those set forth in Rule 16.1. The *Manual for Complex Litigation* (new edition expected soon) may also be a source of guidance in both MDL proceedings and other multiparty litigation.

A. Rule 26(f) Discovery Planning Conference and Report

1. Fed. R. Civ. P. 26(f) requires the parties to confer at least 21 days before the scheduling conference is to be held or a scheduling order is due under Rule 16(b), except in proceedings exempted from the Rule 26(a)(1)(B) initial disclosures or when the court orders otherwise.
2. Under Rule 26(f)(2), the parties must, among other things, consider the nature and basis of their claims, discuss their expected discovery needs, make a good-faith effort to agree on a proposed discovery plan, and submit a written report outlining the plan to the court within 14 days after the conference. The required contents of the proposed discovery plan are listed in Rule 26(f)(3).
3. The Rule 26(f) conference and report serve two purposes. One is to have the parties discuss discovery before engaging in it, to prevent a "shoot first, ask questions later" approach. The second is to generate information for the court to consider at the Rule 16 conference in determining the reasonable pretrial needs of the case.
4. *Protective orders:* Consider directing the parties to discuss whether a protective order may be sought to prevent the disclosure of confidential, proprietary, or private information. "In many cases, entry of a protective order is common practice, and the attorneys may be prepared to stipulate to an agreed order. . . . If the case will involve confidentiality concerns, the most efficient way to resolve them is before discovery begins, by discussing the need for a protective order at the initial pretrial conference."[16]

B. Initial Case-Management Orders (Pre-Rule 16 Conference)

1. Too often, the lawyers' Rule 26(f) conferences are perfunctory. As a result, the reports supply little useful information to the court. To improve the quality of the Rule 26(f) process, some judges issue initial case-management orders that spell out the topics the judge expects the parties to discuss at their Rule 26(f) conferences and address in their Rule 26(f) report. The order can also make clear that the judge will be asking about these topics at the Rule 16 case-management conference, creating an incentive for the lawyers to carry out their Rule 26(f) obligations responsibly.
2. Consider issuing an order (or developing case-management guidelines) that structures the parties' initial planning activities in order to facilitate an effective and efficient case-management conference with you later. The order or guidelines can be a standardized form issued by your staff when the Rule 16 case-management conference is scheduled.[17]

16. Civil Litigation Management Manual, *supra* note 1, at 44. *See also* Robert Timothy Reagan, Confidential Discovery: A Pocket Guide on Protective Orders (Federal Judicial Center 2012), https://fjc.dcn/content/confidential-discovery-pocket-guide-protective-orders-0.

17. Examples of such orders and plans may be found in the online appendix to the Civil Litigation Management Manual, *supra* note 1.

3. Consider reminding the parties that Rule 26(f) requires them to discuss issues relating to discovery of electronically stored information and advising them that you will ask about such issues at the Rule 16(b) case-management conference. See section III.D.4. Electronic Discovery, *infra*.
4. Consider reminding the parties that Rule 26(b) requires their discovery activities to be proportional to the needs of the case, that Rule 26(g) requires that an attorney of record attest to that in writing, and that you will ask about proportionality at the Rule 16(b) case-management conference.

C. Supplementing the Rule 26(f) Agenda for the Parties

1. Your order or guidelines can also direct the parties to discuss at their Rule 26(f) conference matters that go beyond those listed in Rule 26(f), and to address those matters in their Rule 26(f) report or in a separate pre-Rule 16 conference submission. A district's local rules may have specific requirements for the conference.
2. Possible topics—for discussion or report or both—could be anything that will aid in your assessing and managing the case, including

   (a) the basis for federal-court subject-matter jurisdiction;

   (b) a brief description of the facts and issues in the case;

   (c) the status of any initial settlement discussions or a statement of whether the parties will engage in initial settlement discussions; and

   (d) any other case-management topics listed in Rule 16(c)(2).

3. One factor to consider is that supplemental discussions or supplemental pre-Rule 16 conference reports will increase the parties' up-front costs and burdens of litigation. While some judges effectively use supplemental submissions, other judges prefer to raise these topics at the Rule 16(b) conference if appropriate for the case. Each judge must determine how best to balance the costs and benefits of additional pre-Rule 16 conference requirements in different types of cases.

# III. Rule 16 Case-Management Conferences and Orders

Before issuing a scheduling order under Rule 16(b), most judges find it advisable to hold a case-management conference with the lawyers—and sometimes the parties—to learn more about the case. The exchange with the lawyers, preferably face-to-face but by telephonic or other electronic conference if circumstances require, is usually much more valuable for the court and the lawyers than just reviewing the parties' report.[18] The exchange provides the court with the information it needs to develop a scheduling order or case-management order that is tailored to the needs of the case. A live dialogue, in which a judge asks questions, probes behind the parties' representations, and fills in gaps, can be more effective than even a thorough Rule 26(f) report.

18. *See also* Fed. R. Civ. P. 16, advisory committee's notes to 2015 amendment ("A scheduling conference is more effective if the court and parties engage in direct simultaneous communication. The conference may be held in person, by telephone, or by more sophisticated electronic means."); Elements of Case Management, *supra* note 7, at 4 ("there is much to be said for having the case's first conference in person . . . . Quite often, lawyers will not have talked to each other about the case beforehand. Bringing them together to engage with the litigation early on is one of the most useful aspects of case management.").

Note, however, that Rule 16(a) states that a judge "may" hold one or more pretrial conferences—a pretrial conference is optional. Although in many instances the judge and the parties may, as indicated above and elsewhere in this section, benefit from an in-person meeting or other method of "live dialogue," that might not be feasible or desirable for some judges and cases. The overriding objective is to have active, effective case management, and that can be accomplished by appropriate standing orders, scheduling orders, and trial preparation orders, along with prompt attention to motions by and disputes between the parties, setting and enforcing deadlines, and adapting the case-management order to the particular circumstances of the case as needed.[19]

A tailored case-management order can address several critical areas:

1. the issues to be resolved and the best methods for resolving them in a timely and efficient manner;
2. the scope of discovery, the best methods for the timely and cost-effective exchange of information, and limits on the amount and type of discovery allowed in the case;
3. the disclosure, discovery, or preservation of electronically stored information;
4. procedures the parties must follow in the case, such as procedures for obtaining the court's assistance in resolving discovery disputes, including an order that, "before moving for an order relating to discovery, the movant must request a conference with the court"[20];
5. whether and when the parties might participate in processes designed to facilitate settlement; and
6. a schedule for the topics addressed below.

A. Rule 16(b) Minimum Requirements

1. The district judge—or a magistrate judge when authorized by local rule—must issue a basic scheduling order in every civil case unless it is in a category of cases exempted by local rule.
2. The basic scheduling order must set four deadlines:[21]

   (a) to join new parties;

   (b) to amend the pleadings;

   (c) to complete discovery; and

   (d) to file motions.

19. *See, e.g.*, Civil Litigation Management Manual, *supra* note 1, at 16 ("Some judges elect not to hold a conference at all . . . . [Instead], the judge considers the parties' proposed schedule and modifies the discovery and motion deadlines, hearing dates, and trial date, as appropriate. The judge then sets the case schedule and provides other pertinent information in the scheduling order.").

20. Fed. R. Civ. P. 16(b)(3)(B)(v). *See also id.*, advisory committee's notes to 2015 amendment ("Many judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion, but the decision whether to require such conferences is left to the discretion of the judge in each case."); 2015 Year-End Report, *supra* note 5, at 7 ("Such conferences can often obviate the need for a formal motion—a well-timed scowl from a trial judge can go a long way in moving things along crisply.").

21. *See* Elements of Case Management, *supra* note 7, at 7 ("Judges should always set a firm date for the next event in the case, be it another conference, the filing of a motion, or any date requiring action by the lawyers. Every case in a judge's inventory should have a specific date calendared that will bring it to the court's attention.").

3. The judge must issue the scheduling order as soon as practicable, but in any event within 90 days after any defendant has been served or 60 days after any defendant has appeared, whichever occurs earlier.

B. Rule 16(b) Case-Management Orders; Case-Management Conferences

1. *Scope.* Most judges issue orders that go well beyond the minimum basic deadlines required by Rule 16(b). A Rule 16(b) order that provides extensive case management may be styled as a scheduling order; the label used is not controlling.[22]
2. *Format.* As noted earlier, most judges hold a Rule 16 conference with the lawyers, either face-to-face or by conference call, to learn about the case in order to issue a scheduling order/case-management order tailored to the case. In some cases, it will be clear in advance that such a conference is not necessary. In some categories of suits, the pretrial needs do not vary by case. In that event, the court can issue a scheduling order based on established practice as informed by the parties' Rule 26(f) submissions. In general, however, it can be better to hold a case-management conference, either in person, by telephone, or by other electronic means, even if the parties agree on deadlines and no motions are pending. The conference often reveals information and issues not apparent to the parties or the judge in the submissions. That information and those issues are often important in preparing a tailored case-management order.
3. *Length.* The length of the conference will depend on the complexity of the case and the scope of the matters to be addressed. In many cases, 20 to 30 minutes should be adequate to explore the matters discussed below. More complicated cases will probably require more time. Cases that might seem simple and organized often turn out to have unforeseen complications and call for a longer conference to get them on a productive and efficient path. Allotting enough time for every conference maximizes the benefits of early case management.
4. *Judge participation.* The judge who is conducting the pretrial activities should lead the conference.
5. *Party participation.* Consider whether represented parties should be present at the case-management conference. Having the parties present can make it easier to identify the issues and can greatly add to a meaningful discussion of the litigation costs and the importance of limiting pretrial work to what is reasonable and proportional to the case. Note that some districts have a local rule that requires the parties to meet and discuss settlement or ADR before the pretrial conference.

C. Addressing Merits Issues

1. *Narrowing the issues.* The pleadings often fail to clearly identify what claims or defenses—or elements of claims or defenses—are genuinely in dispute. The case-management conference is an ideal time to probe the parties' contentions to determine what issues actually need to be resolved.

22. *See* Gensler, *supra* note 15, at Rule 16 Practice Commentary ("Rule 16 has a much broader scope than just setting pretrial deadlines—it supplies a firm rules-based foundation for judges to actively manage almost all aspects of the case through trial. For the most part, however, Rule 16 still leaves it to each judge to determine how actively to manage any particular case.").

2. *Initial disclosures.* Because initial disclosures are required in most cases, it is useful to ask counsel whether initial disclosures have been exchanged and, if not, include that in the scheduling order.
3. *Motions to dismiss.* The case-management conference is an important opportunity to address any pending motions to dismiss and determine whether the plaintiff intends to file an amended complaint that might moot the need to resolve a pending motion. Consider discussing with counsel other ways of limiting dismissal motions and whether it may be better to address the issues by summary judgment than by pleading challenges. For example, if a party wishes to raise a statute of limitations issue, it may be better to address that in a summary judgment motion after some discovery rather than by a motion to dismiss.[23]
4. *Staging motions.* Explore whether there are any threshold issues that should be resolved first. Where appropriate, phase the pretrial process (including discovery) so that critical or case-dispositive threshold issues are resolved before the parties begin work on other issues.
5. *Stipulations.* Consider asking counsel whether they will stipulate to facts that do not appear to be genuinely contested. Such stipulations can streamline the issues to be resolved and can eliminate the need for costly discovery on uncontested issues. Also, "requir[ing] the parties to attend the initial case management conference . . . may facilitate making stipulations."[24]
6. *Experts.* Explore the need for experts. Counsel often say they need experts in cases or on issues but, on examination, it is apparent that experts are neither needed nor appropriate. If experts are needed, deadlines should be included in the case-management order for expert disclosures, reports, and discovery, and for the filing of motions raising *Daubert* challenges under Rule 702 of the Federal Rules of Evidence if those are expected. Such motions should not be deferred until the final pretrial conference. See also Rule 26(b)(4) regarding trial preparation for potential expert witnesses.
7. *Class actions.* If the case is styled as a class action, the conference is often the best time to set dates for class certification motions and to establish a process for any certification discovery that may be needed. The conference provides an effective opportunity to explore with counsel the relationship between, and possible overlap of, discovery on class certification and on the merits, the limits that should be imposed on class-certification discovery, and staging discovery to decide the certification motion before proceeding to other merits discovery.

D. Addressing Discovery Issues

1. *Managing discovery.* Excessive discovery is one of the chief causes of undue cost and delay in the pretrial process. The case-management conference can help ensure that discovery proceeds fairly and efficiently in light of the needs of the case. Although you should ask the parties what discovery they need and how much time they will need to

23. Consider establishing a process for the submission of premotion letters or for premotion conferences before a party can file a motion to dismiss or for summary judgment. Such motions can be expensive and time-consuming for both the parties and the court. Some judges have found that a premotion letter or conference requirement avoids or limits motions to dismiss or for summary judgment without the need for full briefing, or clarifies and focuses the issues for those motions that do proceed to full briefing.

24. Civil Litigation Management Manual, *supra* note 1, at 23.

do it, do not rely solely on what the parties say in the Rule 26(f) discovery plan. Even if the parties agree, that does not guarantee that discovery will be proportional or proceed on a timely basis.

Remember that parties are not entitled to all discovery that is relevant to the claims and defenses. The judge has a duty to ensure that discovery is proportional to the needs of the case. Courts must limit discovery that would be "unreasonably cumulative or duplicative," Rule 26(b)(2)(C), after considering "the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit," Rule 26(b)(1).[25]

2. *Proportionality.* When needed, consider these techniques for imposing proportionality limits on discovery:
   (a) limiting the number of depositions (or their length), interrogatories, document requests, and/or requests for admission;
   (b) identifying whether discovery should initially focus on particular issues that are most important to resolving the case;
   (c) phasing discovery so that the parties initially focus on the sources of information that are most readily available and/or most likely to yield key information. Guide the parties to go after the "low hanging fruit" first;
   (d) limiting the number of custodians and sources of information to be searched;
   (e) delaying contention interrogatories until the end of the case, after discovery is substantially completed; and
   (f) otherwise modifying the type, amount, or timing of discovery to achieve proportionality.

3. *Evidence Rule 502 non-waiver order.* Consider whether to enter a "non-waiver order" under Federal Rule of Evidence 502(d). This order, which does not require party agreement, precludes the assertion of a waiver claim based on production in the litigation. It avoids the need to litigate whether an inadvertent production was reasonable. By reducing the risk of waiver, the order removes one reason parties conduct exhaustive and expensive preproduction review. Many parties still are not aware of this rule, enacted in 2008, and the opportunity for reducing the cost of discovery by reducing privilege review.
4. *Electronic discovery.* Because electronic discovery is often a source of dispute, excessive costs, and delays, it can be important to ask whether the parties have considered any issues on discovery of electronically stored information (ESI). While the parties have a duty to discuss the discovery of ESI at their Rule 26(f) conference and include it in their Rule 26(f) report, experience shows that many lawyers do not. Following the 2015 amendments, Rule 26(f)(3)(C) requires a discovery plan to "state the parties' views and

25. *See also* Fed. R. Civ. P. 26(b)(1), advisory committee's notes to 2015 amendment (stressing that this amendment "reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections").

proposals on . . . . any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced."

Courts are advised to address ESI from the beginning of the case:

> Judges should actively manage cases that involve ESI through early intervention and sustained supervision. Judges should raise issues for the parties to consider rather than wait for the issues to be presented as full-blown disputes. They should use the many tools available to them—case-management conferences and orders, limits on discovery, tiered or phased discovery, sampling, cost shifting, and, if necessary, sanctions—to encourage cooperation among opposing lawyers and to ensure that discovery is fair, reasonable, and proportional to each case.[26]

If they have not already done so, see if the parties can reach agreement on basic electronic discovery issues, including the following:

(a) the form in which ESI will be produced (i.e., native format, PDF, paper, etc.). The form of production can affect whether the material produced will include metadata and whether it will be computer searchable;

(b) whether to limit discovery of ESI to particular sources or custodians, at least as an initial matter (see the "low hanging fruit" principle above); and

(c) whether to seek agreement on search terms or methods before conducting computer searches to identify responsive materials.

For more information on managing discovery of ESI, see the *Civil Litigation Management Manual* at 41–44. See also Timothy T. Lau & Emery G. Lee, *Technology-Assisted Review for Discovery Requests: A Pocket Guide for Judges* (Federal Judicial Center 2017) ("TAR may be complex and difficult, but standard case-management strategies are still effective. Judges managing complex cases involving TAR should take a proactive approach . . . early in the case, preferably at the first scheduling conference, requiring the parties to negotiate a workable plan for discovery.").

5. *Preservation.* Explore whether the parties have discussed the preservation of discoverable information, especially ESI. See if the parties can reach agreement on what will be preserved. If there are disputes, it is important to resolve them quickly to keep the case on track and avoid spoliation issues later. The principles of reasonableness and proportionality that guide discovery generally apply.[27]

6. *Resolving discovery disputes*

Consider requiring the parties to present discovery disputes informally (e.g., via a telephone conference or a short letter) before allowing the parties to file formal discovery motions and briefs. Many courts have found that they are able to resolve most discovery disputes using these less formal—and considerably less expensive and less

26. Ronald J. Hedges, Barbara Jacobs Rothstein & Elizabeth C. Wiggins, Managing Discovery of Electronic Information 2 (Federal Judicial Center, 3d ed. 2017), https://fjc.dcn/content/323370/managing-discovery-electronic-information-third-edition.

27. *See also* Fed. R. Civ. P. 26, advisory committee's notes to 2015 amendment ("The volume and dynamic nature of electronically stored information may complicate preservation obligations. . . . Failure to address preservation issues early in the litigation increases uncertainty and raises a risk of disputes." The committee also noted that "[t]he requirement that the parties discuss preservation does not imply that courts should routinely enter preservation orders. A preservation order entered over objections should be narrowly tailored. Ex parte preservation orders should issue only in exceptional circumstances.").

time-consuming—methods. These courts do not allow counsel to file motions to compel or for sanctions before getting the judge on the phone (with a court reporter or a tape machine) to discuss the issue. Many courts find that they are able to resolve most discovery disputes over the telephone and that simply being available encourages the parties to resolve many disputes on their own.

This "meet and confer" policy has been incorporated into the civil rules: If a party files a motion to compel disclosure or discovery, Rule 37(a)(1) requires the motion to "include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." In keeping with this rule, "many judges require counsel to meet and confer before submitting written materials or contacting chambers about a discovery dispute. The requirement makes it more likely that counsel are truly at an impasse before seeking intervention."[28] Note that Rule 37(a)(5) specifically allows for awarding expenses to the prevailing party, providing additional incentive to settle the dispute without filing a motion.

7. *Cooperation.* The discovery process is adversarial in the sense that the parties may disagree about what information to seek and how to seek it. But that does not mean that lawyers cannot cooperate or that they must act in a hostile and contentious manner while conducting discovery. It is helpful to let the parties know that you expect them to be civil, to find ways to streamline the discovery process where possible, to avoid needless cost and delay, and that sanctions may be imposed if warranted.[29]

For additional approaches to handling discovery disputes, see the *Civil Litigation Management Manual* at 38–40.

E. Addressing Settlement or Other Means of Alternative Dispute Resolution

1. Most courts will ask about the prospects of settlement and whether it would be useful for the parties to have an early settlement conference before the magistrate judge or another adjunct of the court.[30]
2. Some judges set a deadline in the scheduling order by which parties must engage in face-to-face settlement talks (whether assisted by a neutral or not) and require the parties to file a short status report on settlement talks after the deadline. This may prompt the parties to address settlement sooner than would otherwise occur. However, judges should be attuned to the parties' views on settlement discussions. Sometimes counsel

28. Civil Litigation Management Manual, *supra* note 1, at 39 ("Some judges have found that requiring lead trial counsel (rather than an associate) to participate may facilitate resolution of the dispute. If practical, requiring that the lawyers meet in person may also be useful.").

29. *See id.* at 65 ("you should convey your expectation that counsel will cooperate . . . to expeditiously and efficiently resolve their action, and abide by your orders in the case. . . . [R]epeated violations of the rules or your orders, or bad faith conduct by counsel or a party, will warrant some form of sanctions.").

30. *See* Elements of Case Management, *supra* note 7, at 8 ("It is useful for a judge to inquire about settlement whenever meeting with the lawyers. Lawyers are often interested in settling (particularly in view of the rising cost of litigation), but may consider raising the subject an admission of weakness. A judge's questions offer a graceful opening.").

are prepared for early settlement discussion. But at other times, counsel will want to hold off discussing settlement until they have learned more about the case.[31]

3. Consider discussing whether the parties would be interested in pursuing other forms of alternative dispute resolution, such as early neutral evaluation, private mediation, nonbinding arbitration, or a summary jury trial:

> Under the Alternative Dispute Resolution Act of 1998 (the ADR Act), all district courts must provide at least one form of ADR to litigants in civil cases and must, by local rule, require that litigants in all civil cases consider using an ADR process at an appropriate stage in the litigation. Further, the ADR Act authorizes courts to require litigants to use mediation, ENE, and—if all parties consent—arbitration.[32]

See also I.B, *supra*, regarding use of magistrate judges in mediation.

F. Trial Date and Joint Pretrial Order

1. Most courts set a trial date in the scheduling order and try to adhere to it. Empirical data show that setting a firm trial date and sticking to it when possible is one of the best ways to ensure that the case moves forward without undue cost or delay. For example, "setting a firm and credible trial date" may "facilitate settlement negotiations."[33]
2. Consider whether a simpler and less costly joint pretrial order would suffice for the case. For some cases, it is sufficient to have the parties submit exhibit and witness lists, proposed voir dire questions, and proposed jury instructions.

## IV. Ongoing Case Management

Case management does not end when the case-management order is entered:

> The need for active case management continues through trial. Having trial guidelines in place and holding a final pretrial conference can help ensure that counsel are prepared and that the trial proceeds fairly and efficiently. . . . Some judges include basic information about trial procedures in their case management guidelines. Others have separate guidelines for jury and bench trials that they either post on the court's website or provide to counsel before the final pretrial conference. Judges typically include information about how trials are scheduled, courtroom protocol, how exhibits should be submitted and marked, and how voir dire is conducted. . . . Having an early understanding of how you conduct trials can help counsel plan and prepare their case should it advance to that stage.[34]

Not all cases will require active ongoing case management, but many will. It is helpful to make clear up front that you stand prepared to re-engage when needed.

31. *See also id.* at 9 (judges should be aware, however, that the parties may have valid reasons for not wanting to pursue settlement, or for not doing so until later in the case, and thus "should avoid using their position of authority to apply undue pressure on parties to settle. Judges should facilitate, not coerce, settlement.").

32. Civil Litigation Management Manual, *supra* note 1, at 72 (also outlining different options for ADR and settlement).

33. *Id.* at 86.

34. *Id.* at 93–94 (the Manual's online Appendix, *supra* note 1, includes examples of judges' trial guidelines).

A. Scheduling Future Conferences

1. At the initial case-management conference, consider whether to schedule one or more follow-up conferences. These may include interim pretrial conferences to manage discovery and resolve any disputes, schedule deadlines for potential summary judgment motions, or narrow the issues. These may also include a conference at the end of discovery to identify remaining issues, hear oral argument on motions if that would be helpful, and address any problems that presenting proof at trial may raise.
2. In cases with heavy or contentious discovery, some judges schedule a standing discovery conference at set periods (e.g., once a month). This ensures that time is available to address any issues. Experience shows that the lawyers often call shortly before the regularly scheduled conference date to cancel it, as the impending conference date motivates them to resolve the issues on their own.
3. In cases with extensive electronic discovery, the judge and the parties often adopt an iterative, or step-by-step approach, in which the parties initially limit discovery to specific sources or custodians, deferring until later the decision whether to pursue further discovery. In cases that follow that approach, it is advisable to schedule a follow-up discovery management conference in advance, subject to cancellation if it is not needed.
4. If you have deferred exploring settlement or other alternative dispute resolution activities until the parties have conducted discovery, it may be advisable to schedule a conference after the initial discovery to reassess the prospects of settlement or other resolution activity, such as narrowing the issues in dispute, stipulating facts, and obtaining admissions.

B. Modifying the Litigation Schedule

1. In some cases, it may be necessary to modify the schedule set in the initial case-management order. Under Rule 16(b)(4), any modification requires an order and a finding of good cause.
2. Only the judge can modify the case-management order. The parties cannot extend the schedule on their own, even by agreement. It is common for the parties to seek a modification by stipulation, but the stipulation has no force of its own and should not be adopted automatically because of the need to determine whether there is good cause for the proposed modification.
3. Modifying the case-management order requires a good-cause showing. The dominant factor is whether the existing schedule cannot reasonably be met despite the diligence of the party seeking extension. If that party has not been diligent in meeting the schedule, good cause to extend it may be lacking.
4. Effective case management requires holding the parties and their lawyers to reasonable schedules. Parties and lawyers who disregard reasonable deadlines interfere with the "just, speedy, and inexpensive determination of every action and proceeding." Fed. R. Civ. P. 1. When judges adhere to the schedules they have imposed and enforce the good-cause requirement for modification, cases tend to be resolved more efficiently.

C. Addressing Issues Promptly

1. Addressing disputed issues promptly is the key to capitalizing on early case-management work and keeping the case moving. If the parties contact chambers with an issue, prompt attention—whether by conference call, a quickly scheduled case-management conference, or other means—can help keep the parties and the schedule on track.
2. The way a dispute or motion is decided will often define or limit the pretrial activities to follow. For example, the way a motion for summary judgment is decided might dramatically narrow the issues in the case and therefore affect the scope of discovery.[35] The way a discovery dispute is resolved also affects the cost, burden, and time of discovery. The prompt resolution of motions and disputes that intersect with the management of the case can be critical to reducing costs and delays.
3. Rule 16(f) provides tools—including sanctions and the imposition of fees and costs—for promoting the purposes of Rule 16 and for enforcing the court's case-management order.

## V. Final Pretrial Conference

A. A Valuable Case-Management Tool

Rule 16(e) states that a court may hold a final pretrial conference to "formulate a trial plan." While not mandatory, a final pretrial conference is strongly encouraged. It is the judge's primary way to ensure that the lawyers and the parties are prepared to try the case and that the trial starts and ends on time, and to avoid surprises. The final pretrial conference allows the judge, with the parties and counsel, to identify the legal issues that still need to be resolved. It also provides an opportunity to identify and address problems that otherwise might disrupt, delay, or unnecessarily complicate the trial.[36]

B. Scheduling the Conference and Setting the Agenda

1. *Timing and participation.* The purpose of the final pretrial conference is to plan the trial. Rule 16(e) provides that it must be held "as close to the start of trial as is reasonable." Rule 16(e) also addresses who should be in attendance, stating that each party must be represented at the conference by at least one attorney who will conduct the trial, or by the party if unrepresented. Many judges require the attorneys who will take the lead at the trial to be present.
2. *Final pretrial conference orders.* For a final pretrial conference to be effective, the lawyers and parties must prepare in advance. To facilitate that, many judges issue final pretrial conference orders that identify the specific steps the lawyers and parties must complete and the documents they must file before the conference. These steps and documents are designed to make the lawyers focus on what is actually needed to try the case. The final pretrial conference order does not have to be one-size-fits-all. The court can tailor or adapt the order to be sure that the steps the lawyers and parties are required to take

35. *See* Civil Litigation Management Manual, *supra* note 1, at 63 ("Motions for summary judgment are typically the most time-intensive motion . . . to review and the most expensive for the parties to litigate. When properly timed and briefed, however, motions for summary judgment are effective for disposing of claims and defenses that should not proceed to trial, or to resolve the case altogether.").

36. *See also id.* at 96–105 (outlining conference procedures, matters to be discussed, and the trial schedule); Elements of Case Management, *supra* note 7, at 13–15 (outlining potential benefits of a final pretrial conference).

are appropriate for the case, address the information needed for the trial, and do not unnecessarily increase the expense and burden of trial preparation.

C. Requiring the Parties to Submit Materials Before the Conference

Most judges require the parties to prepare and submit materials in advance of the final pretrial conference, although specific practices vary both by district and by judge. Some districts have local rules, while others leave the matter to each judge. When local rules exist, they typically still allow for tailoring by the judge who will try the case. The two most important things to decide are what matters the judge wants the parties to address and the form the submissions should take.

1. *Matters to be addressed in the preconference submissions.* The judge may ask the parties to address any matters that will help in planning the trial. The following items illustrate the types of matters judges often ask the parties to address in preconference submissions:

   (a) *Factual issues.* Require the parties to identify the factual issues to be resolved at trial and to provide a brief summary of the party's position on each issue. This requires the parties to think through the trial ahead of time and enables the judge to discuss the nature and length of the trial and resolve issues that may simplify the trial.

   (b) *Legal issues.* Require the parties to identify disputed legal issues that must be resolved in connection with the trial. This prepares the judge to address those issues and, if possible, to decide them before trial.

   (c) *Rule 26(a)(3)(A) disclosures.* Rule 26(a)(3)(A) requires the parties to make pretrial disclosures on three topics. The parties must

      (i) identify their trial witnesses, separately identifying those they expect to present and those they may call if the need arises;

      (ii) designate any witness that will be presented by deposition transcript or videotape; and

      (iii) identify their documents and trial exhibits, separately identifying those they expect to offer and those they may offer if the need arises.

   Rule 26(a)(3)(B) provides that these disclosures are due 30 days before trial unless the court sets a different due date. Many judges alter the deadline by ordering the parties to make their disclosures as part of the preconference submissions.

   (d) *Marking exhibits.* To ensure that the evidence is ready for trial and to minimize surprises, consider requiring the parties to exchange not only lists of exhibits, but actual copies of exhibits marked for introduction into evidence.

   (e) *Objections.* Rule 26(a)(3)(B) requires opposing parties to list objections to the use of a deposition under Rule 32(a), as well as any objection—together with the grounds for it—to the admissibility of trial exhibits. With the exception of objections under Federal Rules of Evidence 402 and 403, objections not so made are waived unless excused by the court for good cause.

These objections are due 14 days after the pretrial disclosures are made unless the court sets a different deadline. Consider including in the final pretrial conference order instructions on how the parties should make any such objections.

(f) *Motions in limine.* Many judges require parties to file and brief motions in limine before the final pretrial conference. The judge has discretion to place page or number limits on the motions in limine that are filed. Resolving motions in limine at the final pretrial conference defines the issues and evidence to be presented at trial.

(g) *Voir dire.* Consider requiring the parties to submit proposed voir dire questions and a joint statement of the case to be read to the jury panel during voir dire.

(h) *Jury instructions.* Consider requiring the parties to submit proposed preliminary and final jury instructions.

(i) *Verdict*. Consider requiring the parties to submit proposed verdict forms or jury interrogatories.

(j) *Findings of fact and conclusions of law.* In a bench trial, consider requiring the parties to submit proposed findings of fact and conclusions of law.

As noted earlier, there is no one-size-fits-all requirement. In cases that are simple or straightforward or in which the stakes are small, an elaborate joint proposed pretrial order may not be needed. In such cases, consider conferring with the lawyers about tailoring the preconference submissions, including any joint proposed pretrial order, so that they are limited to what the court and parties reasonably need for a fair and efficient trial.

2. *Form of the preconference submissions.* Many judges require the parties to prepare and submit a joint proposed pretrial order that incorporates all of the matters they are required to address. Some judges prefer a shorter joint proposed pretrial order and additional matters, such as motions in limine, proposed voir dire questions, or proposed jury instructions, to be addressed separately, either in attachments or as freestanding submissions.

The deadlines for submission should allow time for the parties to prepare and submit any materials that respond to other submitted materials. For example, time is needed to see and review the other side's exhibits and deposition designations before submitting objections to those exhibits and designations.

D. Conducting the Final Pretrial Conference[37]

1. *Narrowing and refining issues; ruling on motions in limine.* With the parties' preconference submissions, the judge works with the parties to narrow and refine the issues for trial. Ruling on motions in limine may be an important part of this work. Narrowing and refining the issues and ruling in advance on as many issues as the record permits allow the court and parties to conduct the trial more efficiently and within the time allotted on the court's calendar.

37. For additional information on the structure and content of the final pretrial conference, including the final pretrial order, see the Civil Litigation Management Manual, *supra* note 1, at 93–105.

2. *Resolving other evidentiary issues*

   (a) The final pretrial conference provides an opportunity to preadmit exhibits if there will be no objections or if the court is able to resolve the objections and rule on admissibility under Federal Rule of Evidence 104.

   (b) The final pretrial conference can also be used to address evidence-related matters, such as which witnesses may be in the courtroom during the trial under Federal Rule of Evidence 615, the mode of questioning under Rule 611, and identifying exhibits suitable for summaries under Rule 1006.

3. *Other issues related to conducting the trial*. The final pretrial conference can address any other issues regarding the conduct of the trial, including

   (a) the order of presenting evidence, particularly if multiple parties are involved;

   (b) possible bifurcation of the trial;

   (c) witness-scheduling issues, such as calling witnesses out of order;

   (d) how to present depositions or electronic evidence;

   (e) the need for interpreters;

   (f) special equipment needs; and

   (g) jury questions, including the number of jurors to be seated.

4. *Firm trial dates and fixed trial times.* If the court has not previously set a firm trial date, that date should be set at the final pretrial conference. The order scheduling the conference can advise attorneys to come with their calendars and with information on the availability of their witnesses and clients. Once the issues and evidence have been identified, the judge, in consultation with the parties, can determine the length of the trial. Consider entering an order limiting the time for the trial, such as by allotting a specific number of trial hours to each party. The adage that work expands to fill the time available applies fully to trials. Trials with established time limits tend to be more focused and more efficient.

5. *Educating parties on the court's trial practices.* Many judges use the final pretrial conference to educate lawyers and parties on the court's trial practices, such as the extent of lawyer participation in jury voir dire; whether re-cross-examination generally is allowed; or whether jurors are permitted to take notes, to have copies of exhibits, or to submit questions to witnesses.[38] It may also be helpful to educate the lawyers about the court's expectations for the conduct of trial counsel. For example, the judge can educate the parties about proper practice for marking and presenting exhibits, for approaching witnesses, or for the use of courtroom equipment. Such an education can be particularly valuable for trials involving pro se litigants.[39]

6. *Promoting settlement.* If a final pretrial conference covers the kinds of issues identified above, parties leaving such a conference will never know more about their dispute, short of trial, than they do at that moment. The final pretrial conference may provide

38. *See* Section 5.07: Juror Questions During Trial, *supra*, if you are considering allowing individual jurors to pose questions to witnesses during the trial.

39. *See* Pro Se Case Management for Nonprisoner Civil Litigation, *supra* note 3, at 68–88 (outlining steps to educate pro se litigants about trial practice and procedure).

a valuable opportunity for settlement. Some judges encourage the parties to engage in settlement talks after the final pretrial conference and before trial: "Now that the parties are completely familiar with the case, they may be ready to settle if the judge provides the opening."[40]

E. The Final Pretrial Order

1. *Issuing the final pretrial order.* After the final pretrial conference, the judge should issue a final pretrial order that reflects the decisions made during the conference. The final pretrial order should clearly identify the issues to be decided at trial, the witnesses to be called, the exhibits to be offered in evidence, and objections preserved for trial. The order should also reflect evidentiary or other rulings made by the judge for trial. A firm trial date should be fixed, as should the length of the trial, where appropriate. Judges may use a proposed final pretrial order submitted jointly by the parties, as modified by the judge, or an order written or dictated specifically for a particular case.
2. *Modifying the final pretrial order*
   (a) By adhering to the final pretrial order—that is, by holding the parties to the issues, evidence, objections, and schedule identified at the final pretrial conference—the judge can help avoid surprises and ensure that the trial will be completed in the time allotted.
   (b) Rule 16(e) provides that "[t]he court may modify the order issued after a final pretrial conference only to prevent manifest injustice." This is a higher standard than the "good cause" test found elsewhere in Rule 16 and is intended to reflect the relative finality of the final pretrial order. It may be useful to restate this standard in the final pretrial order itself.

For suggestions on managing the trial, including a bench trial, see *The Elements of Case Management*, *supra* note 7, at 16–20. See also *Civil Litigation Management Manual* at 109–11 (discussing bench trials); *Pro Se Case Management*, *supra* note 3, at 68–88 (discussing the final pretrial conference and trial in pro se cases).

## VI. Conclusion

Case management, beginning early, is essential to controlling costs and burdens of discovery and motions practice, particularly given the challenges of electronic discovery issues. Ongoing judicial management as the case develops, which ends in a careful and thorough final pretrial conference, will reduce delays and unnecessary costs and increase the likelihood that the case will be resolved on terms that reflect the strength and weaknesses of the merits, rather than the desire to avoid disproportionate discovery or the costs of an unnecessarily protracted trial. Effective case management is a critical part of achieving "just, speedy, and inexpensive" case resolutions.

40. Elements of Case Management, *supra* note 7, at 15.

## For Further Reference

- Civil Litigation Management Manual (Judicial Conference of the United States, 3d ed. 2022)
- William W Schwarzer, Alan Hirsch & Jeremy D. Fogel, The Elements of Case Management (Federal Judicial Center, 3d ed. 2017)
- Jefri Wood, Pro Se Case Management for Nonprisoner Civil Litigation (Federal Judicial Center 2016)
- Robert Timothy Reagan, Confidential Discovery: A Pocket Guide on Protective Orders (Federal Judicial Center 2012)
- Steven S. Gensler, Federal Rules of Civil Procedure, Rules and Commentary (2024) (available on Westlaw)
- Ronald J. Hedges, Barbara Jacobs Rothstein & Elizabeth C. Wiggins, Managing Discovery of Electronic Information (Federal Judicial Center, 3d ed. 2017)
- Manual for Complex Litigation, Fourth (Federal Judicial Center 2004)
- Barbara J. Rothstein & Thomas E. Willging, Managing Class Action Litigation: A Pocket Guide for Judges (Federal Judicial Center, 3d ed. 2010)
- Timothy T. Lau & Emery G. Lee, Technology-Assisted Review for Discovery Requests: A Pocket Guide for Judges (Federal Judicial Center 2017)

[*Note:* All of the above except Gensler available at https://fjc.dcn.]

# 6.02 Trial Outline—Civil

1. Have the case called for trial.
2. Jury is selected (see *infra* section 6.04: Jury Selection—Civil).
3. Give preliminary instructions to the jury (see *infra* section 6.06: Preliminary Jury Instructions—Civil Case).
4. Ascertain whether any party wishes to invoke Fed. R. Evid. 615 to exclude from the courtroom witnesses scheduled to testify in the case or to prohibit disclosure of trial testimony to—or access to that testimony by—excluded witnesses.
5. Plaintiff's counsel makes an opening statement.
6. Defense counsel makes an opening statement (unless permitted to reserve).
7. Plaintiff's counsel calls witnesses for the plaintiff.
8. Plaintiff rests.
9. Hear appropriate motions.
10. Defense counsel makes an opening statement if they have been permitted to reserve.
11. Defense counsel calls witnesses for the defense.
12. Defense rests.
13. Counsel call rebuttal witnesses.
14. Plaintiff rests on its entire case.
15. Defense rests on its entire case.
16. Consider appropriate motions.
17. Out of the hearing of the jury, rule on counsel's requests for instructions and inform counsel as to the substance of the court's charge. Fed. R. Civ. P. 51(b).
18. Counsel give closing arguments.
19. Charge the jury (see *infra* section 6.07: General Instructions to Jury at End of Civil Case). Fed. R. Civ. P. 51.
20. Rule on objections to the charge and make any additional appropriate charge.
21. Instruct the jury to go to the jury room and commence its deliberations.
22. Determine which exhibits are to be sent to the jury room.
23. Have the clerk give the exhibits and the verdict forms to the jury.
24. Recess court during the jury deliberations.
25. Before responding to any communications from the jury, consult with counsel on the record (see *infra* section 6.07: General Instructions to Jury at End of Civil Case).
26. If the jury fails to arrive at a verdict before the conclusion of the first day's deliberations, provide for the jurors' overnight sequestration or permit them to separate after instructing them as to their conduct and fixing the time for their return to resume deliberations. Provide for safekeeping of exhibits.

27. If the jurors report that they cannot agree on a verdict, determine by questioning whether they are hopelessly deadlocked. Do not inquire as to the numerical split of the jury. If you are convinced that the jury is hopelessly deadlocked, declare a mistrial. If you are not so convinced, direct the jury to resume its deliberations.
28. When the jury has agreed on a verdict, reconvene court and take the verdict (see *infra* section 6.08: Verdict—Civil).
29. Poll the jury on the request of either party or on the court's own motion. Fed. R. Civ. P. 48(c).
30. Before discharging the jury, inspect the verdict form(s) to ensure that the jury returned a proper verdict. If the jury returned an inconsistent or otherwise improper verdict and has not been discharged, "give the jury a curative instruction and order them to continue deliberating."[1] Once the jury is discharged, the court has a limited window to recall the jury to correct an improper verdict.[2]
31. Thank and discharge the jury.
32. Enter judgment upon the verdict. Fed. R. Civ. P. 58.
33. Fix a time for post-trial motions.
34. Adjourn or recess court.

## Other FJC Sources

- Civil Litigation Management Manual 106–09 (Judicial Conference of the United States, 3d ed. 2022)
- Effective Use of Courtroom Technology: A Judge's Guide to Pretrial and Trial 137–216 (Federal Judicial Center 2001)
- Manual for Complex Litigation, Fourth 131–66 (2004)
- William W Schwarzer, Alan Hirsch & Jeremy D. Fogel, The Elements of Case Management 16–19 (Federal Judicial Center, 3d ed. 2017)
- Jefri Wood, Pro Se Case Management for Nonprisoner Civil Litigation 68–88 (Federal Judicial Center 2016)

[*Note:* All of the above are available at https://fjc.dcn.]

1. Dietz v. Bouldin, 579 U.S. 40, 46 (2016).

2. *See id.* at 42 (although "a federal district court has the inherent power to rescind a jury discharge order and recall a jury for further deliberations after identifying an error in the jury's verdict . . . , this power is limited in duration and scope, and must be exercised carefully to avoid any potential prejudice"; listing several factors for courts to consider). See also cases cited at section 2.09: Verdict—Criminal, *supra*, at n.1.

# 6.03 Findings of Fact and Conclusions of Law in Civil Cases and Motions

*Fed. R. Civ. P. 41, 52, and 65(d)*

## A. When Required

1. Fed. R. Civ. P. 52(a)(1) & (2)

   (a) *In all cases tried without a jury or with an advisory jury*, "the court must find the facts specially and state its conclusions of law separately."

   (b) *In granting or refusing interlocutory injunctions*, "the court must similarly state the findings and conclusions that support its action."

   Note that this is in addition to the requirements of Fed. R. Civ. P. 65(d)(1): "Every order granting an injunction and every restraining order must: (A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required."

2. Fed. R. Civ. P. 52(c)—Judgment on Partial Findings

   > If a party has been fully heard on an issue during a nonjury trial and the court finds against the party on that issue, the court may enter judgment against the party . . . on that issue. . . . The court may, however, decline to render any judgment until the close of the evidence. A judgment on partial findings must be supported by findings of fact and conclusions of law as required by Rule 52(a).

3. Fed. R. Civ. P. 41(a)—Voluntary Dismissal

   Under Rule 41(a)(1), the plaintiff may dismiss an action without a court order if the notice of dismissal is filed before the opposing party files an answer or motion for summary judgment or if all parties file a stipulation of dismissal.

   Otherwise, under Rule 41(a)(2), a plaintiff's motion for voluntary dismissal may be granted "only by court order, on terms that the court considers proper." If a defendant has already filed a counterclaim, "the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication."

## B. When Not Required

1. *On any motions* (other than those under Fed. R. Civ. P. 52(c)).

   (a) Fed. R. Civ. P. 52(a)(3) states that findings of fact and conclusions of law are "not required . . . when ruling on a motion under Rule 12 or 56 or, unless these rules provide otherwise, on any other motion."

   (b) Fed. R. Civ. P. 12 covers instances when defenses and objections to the pleadings are made and how they are presented—by pleading or motion. Fed. R. Civ. P. 12(c) pertains to a motion for judgment on the pleadings. Rule 12(d) concerns motions for

judgment involving "matters outside the pleadings" and refers to Fed. R. Civ. P. 56, which covers summary judgment.

(c) The exemption of motions, particularly those under Fed. R. Civ. P. 12 and 56, from the requirement of making findings and conclusions means that most motions that are filed can be disposed of by simply stating "granted" or "denied."

However, some circuits prefer findings and conclusions on dispositive motions, particularly on motions for summary judgment, and may vacate and remand orders if the district court fails to provide any reasoning on the record for its decision and review of the record does not reveal the basis for the decision. Judges should be aware that circuit law may require, or strongly urge, detailed findings on some motions to allow for effective appellate review:

> While Rules 52 and 56 . . . do not absolutely require a lower court to issue findings of fact and conclusions of law, or even any reasons, when deciding a motion for summary judgment, district courts should generally set out the reasons for their decisions with some specificity, in clear though brief language, rather than simply tracking the language of the rule in their orders. When a motion for summary judgment is granted . . . without any indication as to the specific facts and rules of law supporting the court's decision, it is difficult, except in the simplest of cases, for an appellate court to review such a decision.[1]

This practice was incorporated into Rule 56(a), which states that courts "should state on the record the reasons for granting or denying the motion" for summary judgment. The advisory committee's note to this 2010 amendment states:

> Most courts recognize this practice. Among other advantages, a statement of reasons can facilitate an appeal or subsequent trial-court proceedings. It is particularly important to state the reasons for granting summary judgment. The form and detail of the statement of reasons are left to the court's discretion.
>
> The statement on denying summary judgment need not address every available reason. But identification of central issues may help the parties to focus further proceedings.

Failure to disclose the reasons for a decision "also increases the danger that litigants, whether they win or lose, will perceive the judicial process to be arbitrary and capricious."[2] It is especially important to avoid this perception when pro se litigants are involved.

## C. Cases Involving Pro Se Litigants

Courts should consider taking the time to explain the reasons for denying motions by or granting motions against pro se litigants, especially if it may result in dismissal or judgment against them. Failure to explain the reason why a motion was decided unfavorably will often lead a pro

1. United States v. Woods, 885 F.2d 352, 353–54 (6th Cir. 1989). *See also* Durant v. D.C. Gov't, 875 F.3d 685, 694 (D.C. Cir. 2017); Brewster of Lynchburg, Inc. v. Dial Corp., 33 F.3d 355, 366–67 (4th Cir. 1994); Pasquino v. Prather, 13 F.3d 1049, 1050–51 (7th Cir. 1994); Thomas v. N.A. Chase Manhattan Bank, 994 F.2d 236, 241 n.6 (5th Cir. 1993); Telectronics Pacing Sys. v. Ventritex, Inc., 982 F.2d 1520, 1526–27 (Fed. Cir. 1992); Vadino v. A. Valey Engineers, 903 F.2d 253, 259 (3d Cir. 1990); Clay v. Equifax, Inc., 762 F.2d 952, 957 (11th Cir. 1985).

2. Couveau v. Am. Airlines, Inc., 218 F.3d 1078, 1081 (9th Cir. 2000). *See also* DiLeo v. Ernst & Young, 901 F.2d 624, 626 (7th Cir. 1990) (circuit rule requiring district judge to give reasons for dismissing a complaint serves, in part, "to assure the parties that the court has considered the important arguments").

se litigant to attempt to refile, or to file an appeal, when a simple explanation could avoid wasting court time and making the litigant feel that they were treated unfairly:

> even if a court follows legal procedural rules to the letter and applies them equally to both sides, litigants will not view the process as a fair one if they believe that their lack of knowledge of those rules and the consequences of not following them prevented the litigants from adequately voicing their concerns.[3]

The objective is "to make sure the pro se litigant understands the reasons behind a decision or order so that it is clear how the decision was reached and that his or her concerns were listened to."[4] See also Fed. R. Civ. P. 56, advisory committee's notes to 2010 amendments ("Many courts take extra care with pro se litigants, advising them of the need to respond and the risk of losing by summary judgment if an adequate response is not filed.").[5]

## D. Form and Substance

1. No particular format is required if an opinion or memorandum is filed.

   "The findings and conclusions . . . may appear in an opinion or a memorandum of decision filed by the court." Fed. R. Civ. P. 52(a)(1). A memorandum that contains only a list of findings and conclusions is adequate. The findings and conclusions need not be listed separately in an opinion.

2. From the bench

   "The findings and conclusions may be stated on the record after the close of the evidence . . . ." Fed. R. Civ. P. 52(a)(1). It is always quicker and sometimes just as easy to make the findings and conclusions from the bench at the end of the case as it is to take the matter under submission. Be sure that they are put in the record.

3. Requested findings and conclusions submitted by counsel

   Specifically adopting or denying the requested findings and conclusions submitted by counsel is not necessary, as it is in some state courts. Some courts of appeals look with a jaundiced eye on district court findings or conclusions that follow counsel's requests verbatim.

3. Jefri Wood, Pro Se Case Management for Nonprisoner Civil Litigation 5 (Federal Judicial Center 2016) ("Achieving procedural fairness, then, relies heavily on good communication, in one form or another, between the judge and litigant."). *See also id.* at 9 (procedural fairness calls for courts to provide "clear explanations of the process and the [pro se] litigant's obligations").

4. *Id.* at 10–11 (It is also important to use "plain English" when explaining a decision. This "may be even more important when writing decisions or orders, not to 'use legal jargon, abbreviations, acronyms, shorthand, or slang' but to write 'in plain English explaining the decision, addressing all material issues raised, resolving contested issues of fact, and announcing conclusions of law.'") (citations omitted).

5. *See also id.* at 62–68 (discussing summary judgment issues in pro se cases and the flexibility courts have to help pro se litigants understand the need to respond and how to do so); Civil Litigation Management Manual, *supra* note 1, at 127 ("Cases involving pro se litigants present special challenges for several reasons, not the least of which is your obligation to ensure equal justice for litigants who may have little understanding of legal procedures or the law. At each stage in the case, you may need to take actions not required in cases in which all parties are represented by counsel.").

4. Stipulations

Stipulations by counsel as to the facts are always helpful. Unlike requests, they should be used verbatim. Of course, counsel cannot stipulate as to the applicable law; they can only suggest.

5. Length and style of opinion

The length and style of the opinion are left to the individual judge, but from the viewpoint of an appellate court, there are certain basic elements that should be included:

(a) *Jurisdiction.* This is elementary, but sometimes overlooked. The statutory basis should be stated.

(b) *The issues.* It is helpful if the issues are stated at the beginning of the opinion.

(c) *Credibility findings.* These are the exclusive province of the district court. They should be clearly stated. If you do not believe a witness, say so.

(d) *The facts.* If you have a transcript, refer to the pages that contain the evidence on which you rely. If there is no transcript and your opinion is based on your trial notes, say so. Some appellate courts forget that district court judges do not always have the benefit of a written record.

(e) *The law.* There are three basic situations that you will face:

(i) the law is well settled;

(ii) the law is unsettled; or

(iii) there is no applicable law—the case is one of first impression.

The first situation poses no problem; the second and third may create a fear-of-reversal syndrome. Do not worry about whether you may be reversed. No judge has been impeached for having been reversed. Get on with the opinion and do the best you can. The court of appeals or the Supreme Court is going to have the last word anyhow.

Be sure that someone checks the subsequent history of the cases. It is not a sin to be overruled except for relying on a case that was overruled.

## Other FJC Sources

- Civil Litigation Management Manual 109–11 (Judicial Conference of the United States, 3d ed. 2022)
- Manual for Complex Litigation, Fourth 165 (2004)
- Jefri Wood, Pro Se Case Management for Nonprisoner Civil Litigation 62–68 (Federal Judicial Center 2016)

# 6.04 Jury Selection—Civil

The *Benchbook* Committee recognizes that there is no uniform recommended procedure for selecting jurors to serve in criminal or civil cases and that trial judges will develop the patterns or procedures most appropriate for their districts and their courts. Section 6.05, *infra*, however, provides an outline of standard voir dire questions for civil cases.

The 1982 Federal Judicial Center publication *Jury Selection Procedures in United States District Courts*, by Gordon Bermant, contains a detailed discussion of several different methods of jury selection (available online only at https://fjc.dcn/sites/default/files/2012/JurSelPro.pdf). See also William W Schwarzer, *Reforming Jury Trials*, 132 F.R.D. 575, 580–82 (1991) (jury selection and composition); James Robertson, "Voir Dire and Jury Selection" (Federal Judicial Center 2005) (outline that accompanies video, available at https://fjc.dcn/sites/default/files/session/2022/VoirDire.pdf).[1]

Judges should be aware of the cases, beginning with *Batson v. Kentucky*, 476 U.S. 79 (1986), that prohibit peremptory challenges based on race. In *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614 (1991), the Supreme Court extended *Batson* to prohibit private litigants in civil cases from using peremptory challenges to exclude jurors on account of race. Peremptory strikes on the basis of gender are also prohibited. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994).

The Supreme Court has left it to the trial courts to develop rules of procedure and evidence for implementing these decisions. It has, however, set out a three-step inquiry for resolving a *Batson* challenge (see *Purkett v. Elem*, 514 U.S. 765, 767–68 (1995):

1. At the first step of the *Batson* inquiry, the burden is on the opponent of a peremptory challenge to make out a prima facie case of discrimination. A prima facie case may be shown where (1) the prospective juror is a member of a cognizable group, (2) the prosecutor used a peremptory strike to remove the juror, and (3) the totality of the circumstances raises an inference that the strike was motivated by the juror's membership in the cognizable group. *Johnson v. California*, 545 U.S. 162, 170 (2005). The burden at this stage is low.[2]
2. If the opponent of the peremptory challenge satisfies the step one prima facie showing, the burden then shifts to the proponent of the strike, who must come forward with a nondiscriminatory explanation of the strike.
3. If the court is satisfied with the neutral explanation offered, it must then proceed to the third step, to determine the ultimate question of intentional discrimination. *Hernandez v. New York*, 500 U.S. 352 (1991). The opponent of the strike has the ultimate burden to show purposeful discrimination. The court may not rest solely upon the neutral explanation offered by the proponent of the strike. Instead, the court must undertake a sensitive inquiry into the circumstantial and direct evidence of intent, *Batson*, 476 U.S. at 93, and evaluate the "persuasiveness of the justification" offered by the proponent of

1. The "Voir Dire and Jury Selection" video, produced in 2005 and revised in 2018, is available online at https://fjc.dcn/content/328797/voir-dire-and-jury-selection.

2. "[A] defendant satisfies the requirements of *Batson*'s first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." The defendant does not have to show that it was "more likely than not" that discrimination occurred. *Johnson*, 545 U.S. at 170.

the strike. *Purkett*, 514 U.S. at 768.[3] One method of undertaking such inquiry is to make a "side-by-side comparison" of the reasons given for striking panelists vis-à-vis those who were allowed to serve. *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005).

The *Benchbook* Committee suggests that judges

- conduct the above inquiry on the record but outside of the venire's hearing, to avoid "tainting" the venire by discussions of race, gender, or other characteristics of potential jurors; and
- use a method of jury selection which requires litigants to exercise challenges at sidebar or otherwise outside of the venire's hearing and in which no venire members are dismissed until all of the challenges have been exercised. See *Jury Selection Procedures in United States District Courts*, *supra*.

These procedures should ensure that prospective jurors are never aware of *Batson* discussions or arguments about challenges, and therefore can draw no adverse inferences by being temporarily dismissed from the venire and then recalled.

The Supreme Court has not stated a rule for *when* a *Batson* challenge must be made, although it did suggest that: "The requirement that any *Batson* claim be raised not only before trial, but in the period between the selection of the jurors and the administration of their oaths, is a sensible rule." *Ford v. Georgia*, 498 U.S. 411, 423 (1991). For a discussion of circuit law on timeliness requirements for *Batson* motions, see *United States v. Tomlinson*, 764 F.3d 535, 538 (6th Cir. 2014) (citing cases).

## Other FJC Sources

- Civil Litigation Management Manual 102–03, 106–09 (Judicial Conference of the United States, 3d ed. 2022)
- Manual for Complex Litigation, Fourth 150–53 (2004)

3. *See also* Snyder v. Louisiana, 552 U.S. 472, 478 (2008) ("all of the circumstances that bear upon the issue of racial animosity must be consulted").

# 6.05 Standard Voir Dire Questions—Civil

Fed. R. Civ. P. 47(a) provides that the court "may permit the parties or their attorneys to examine prospective jurors or may itself do so." The following outline for an initial in-depth voir dire examination of the entire panel by the court assumes that

1. if there are affirmative responses to any questions, follow-up questions will be addressed to the juror(s) (at sidebar, if such questions concern private or potentially embarrassing matters); and
2. the court and counsel have been furnished with the name, address, age, and occupation of each prospective juror.

If the court conducts the entire examination, it should require counsel to submit proposed voir dire questions before trial to permit the court to incorporate additional questions at the appropriate places in this outline.

## Outline

A. Have the jury panel sworn.

B. Explain to the jury panel that the purpose of the voir dire examination is

1. to enable the court to determine whether any prospective juror should be excused for cause; and
2. to enable counsel for the parties to exercise their individual judgment with respect to peremptory challenges—that is, challenges for which counsel need not give a reason.

C. Indicate that the case is expected to take ___ days to try, and ask if this fact presents a special problem to any member of the panel.

D. Briefly describe the case that is about to be tried.

E. Ask if any member of the panel has heard or read anything about the case.

F. Introduce counsel (or have counsel introduce themselves) and ask if any member of the panel or their immediate family knows or has had any business dealings with any of the counsel or their law firms.

G. Introduce the parties (or have counsel introduce the parties) and ask if any member of the panel or their immediate family

1. is personally acquainted with,
2. is related to,
3. has had business dealings with,
4. is currently or was formerly employed by,
5. has had any other relationship or business connection with, or
6. is a stockholder of any party in the case.

H. Introduce or identify by name, address, and occupation all prospective witnesses (or have counsel do so). Ask if any member of the panel knows any of the prospective witnesses.

I. Ask prospective jurors:

1. Have you ever served as a juror in a criminal or civil case or as a member of a grand jury in either a federal or state court?
2. Have you or has anyone in your immediate family ever participated in a lawsuit as a party or in any other capacity?
3. If you are selected to sit on this case, will you be able to render a verdict solely on the evidence presented at the trial and in the context of the law as I will give it to you in my instructions, disregarding any other ideas, notions, or beliefs about the law that you may have encountered in reaching your verdict?
4. Is there any member of the panel who has any special disability or problem that would make serving as a member of the jury difficult or impossible?
5. [At this point, if the court is conducting the entire examination, ask those questions submitted by counsel that you feel should be propounded. If the questions elicit affirmative responses, ask appropriate follow-up questions.]
6. Having heard the questions put to you by the court, does any other reason suggest itself to you as to why you could not sit on this jury and render a fair verdict based on the evidence presented to you and in the context of the court's instructions to you on the law?

J. If appropriate,

1. permit counsel to conduct additional direct voir dire examination, subject to such time and subject matter limitations as the court deems proper; or
2. direct counsel to come to the bench, and consult with them as to whether any additional questions should have been asked or whether any were overlooked.

K. Give the proposed model jury instruction on "The Use of Electronic Technology to Learn or Communicate about a Case,"[1] or a similar instruction, during voir dire of potential jurors:

> If you are selected as a juror in this case, you cannot discuss the case with your fellow jurors before you are permitted to do so at the conclusion of the trial, or with anyone else until after a decision has been reached by the jury. Therefore, you cannot talk about the case or otherwise have any communications about the case with anyone, including your fellow jurors, until I tell you that such discussions may take place. Thus, in addition to not having face-to-face discussions with your fellow jurors or anyone else, you cannot communicate with anyone about the case in any way, whether in writing, or through email, text messaging,

1. Prepared by the Judicial Conference Committee on Court Administration and Case Management, updated June 2020, https://jnet.ao.dcn/sites/default/files/pdf/DIR20-163.pdf.

blogs, or comments, or on social media websites and apps (like X (formerly Twitter), Facebook, Instagram, LinkedIn, YouTube, WhatsApp, and Snapchat).

[OPTIONAL: If you feel that you cannot do this, then you cannot let yourself become a member of the jury in this case. Is there anyone who will not be able to comply with this restriction?]

You also cannot conduct any type of independent or personal research or investigation regarding any matters related to this case. Therefore, you cannot use your cellphones, iPads, computers, or any other device to do any research or investigation regarding this case, the matters in the case, the legal issues in the case, or the individuals or other entities involved in the case. And you must ignore any information about the case you might see, even accidentally, while browsing the internet or on your social media feeds. This is because you must base the decisions you will have to make in this case solely on what you hear and see in this courtroom.

[OPTIONAL: If you feel that you cannot do this, then you cannot let yourself become a member of the jury in this case. Is there anyone who will not be able to comply with this restriction?]

Conclude by asking the panel members:

(a) Having heard the questions put to you by the court, does any other reason suggest itself to you as to why you could not sit on this jury and render an impartial verdict based solely on the evidence presented to you and in the context of the court's instructions to you on the law?

(b) Is there anything that has not been asked that you think might be important for the Court to know about you in relation to this case that may affect your ability to neutrally evaluate the evidence or otherwise participate as a juror?

## *Optional Instruction on Bias, Conscious and Unconscious*

If you are selected for the jury, it will be important to strictly follow instructions to consider only the evidence presented in court and the law as I explain it, even if you do not agree with that law. Nothing else should affect your decision, including any bias in favor of any person or cause, prejudice against any person or cause, or sympathy for any person or cause. You should not be influenced by any person's age, race, color, religious beliefs, national ancestry, sexual orientation, gender, gender identity, or economic circumstances. This applies not just to the defendant, but also to witnesses and attorneys.

It is especially important to be aware of any possible unconscious, or implicit, biases that we all have: instinctive feelings, assumptions, perceptions, fears, or stereotypes that we may not be consciously aware of. Any of these can lead us to jump to conclusions based on personal likes or dislikes, generalizations, gut feelings, prejudices, sympathies, or biases of one kind or another. We may have

> preconceived ideas based on the way someone looks, the way they talk, the way they act, how they dress, even whether they have tattoos or piercings or brightly colored hair.
>
> It will be your duty as a juror to not be influenced in your deliberations by any of these types of biases or preconceived ideas. Rather, you must commit to be fair, impartial, and neutral, to decide the case based only on the evidence presented here in court, and to follow the Court's instructions on the law.
>
> If at any time during this process you feel that you may not be able to follow these requirements, please let us know so that we may discuss it with you.

[In addition to the above instructions, consider playing for the venire the video on unconscious bias produced by the Western District of Washington, available at https://www.wawd.uscourts.gov/jury/unconscious-bias (approx. 11 minutes). The Northern District of California offers an "Introductory Video for Potential Jurors," which includes part of the Western District of Washington's video on unconscious bias, and is available at https://cand.uscourts.gov/attorneys/attorney-practice-resources.]

## For Further Reference

- Gordon Bermant, Jury Selection Procedures in United States District Courts (1982)
- Civil Litigation Management Manual 102–03 (Judicial Conference of the United States, 3d ed. 2022) (see also the Manual's online Appendix under "Trial" for examples of jury instructions, https://fjc.dcn/content/366802/civil-litigation-management-manual-3ed-online-appendix)
- Manual for Complex Litigation, Fourth 151–52 (2004)
- James Robertson, "Voir Dire and Jury Selection" (Federal Judicial Center 2005), https://fjc.dcn/sites/default/files/session/2022/VoirDire.pdf
- Mark W. Bennett, *Unraveling the Gordian Knot of Implicit Bias in Jury Selection: The Problems of Judge-Dominated Voir Dire, the Failed Promise of Batson, and Proposed Solutions*, 4 Harv. L. & Policy Rev. 149 (Winter 2010), https://journals.law.harvard.edu/lpr/wp-content/uploads/sites/89/2013/05/4.1_8_Bennett.pdf
- Court Web: *A Discussion of Implicit Bias* (Federal Judicial Center 2020), https://fjc.dcn/content/345454/court-web-discussion-implicit-bias
- Court Web: *Unconscious Bias, Equity, and Ethics in the Courtroom* (Federal Judicial Center 2019), https://fjc.dcn/content/337106/court-web-unconscious-bias-equity-and-ethics-courtroom

# 6.06 Preliminary Jury Instructions—Civil Case

These suggested instructions are designed to be given following the swearing of the jury. They are general and may require modification in light of the nature of the particular case. They are intended to give the jury, briefly and in understandable language, information to make the trial more meaningful. Other instructions, such as explanations of depositions, interrogatories, and the hearsay rule, may be given at appropriate points during the trial. Most circuits have developed model or pattern jury instructions, and judges should consult the instructions that have been prepared for their circuits.

Given the ubiquity of social media in its many forms, particular care should be given to instruct the jury to neither discuss nor research the case. This instruction may be given at relevant points throughout the trial, such as before recesses (in abbreviated form), and should be given again when the jury retires to deliberate.

## I. Preliminary Instructions

Members of the jury: Now that you have been sworn, I will give you some preliminary instructions to guide you in your participation in the trial.

### *A. Duty of the Jury*

It will be your duty to find from the evidence what the facts are. You and you alone will be the judges of the facts. You will then have to apply to those facts the law as the court will give it to you. You must follow that law whether you agree with it or not.

Nothing the court may say or do during the course of the trial is intended to indicate, or should be taken by you as indicating, what your verdict should be.

### *B. Evidence*

The evidence from which you will find the facts will consist of the testimony of witnesses, documents and other things received into the record as exhibits, and any facts that the lawyers agree to or stipulate to or that the court may instruct you to find.

Certain things are not evidence and must not be considered by you. I will list them for you now.

1. Statements, arguments, and questions by lawyers are not evidence.
2. Objections to questions are not evidence. Lawyers have an obligation to their clients to make objections when they believe evidence being offered is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it. If the objection is sustained, ignore the question. If it is

overruled, treat the answer like any other. If you are instructed that some item of evidence is received for a limited purpose only, you must follow that instruction.

3. Testimony that the court has excluded or told you to disregard is not evidence and must not be considered.
4. Anything you may have seen or heard outside the courtroom is not evidence and must be disregarded. You are to decide the case solely on the evidence presented here in the courtroom.

There are two kinds of evidence: direct and circumstantial. Direct evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is proof of facts from which you may infer or conclude that other facts exist. I will give you further instructions on these as well as other matters at the end of the case, but keep in mind that you may consider both kinds of evidence.

It will be up to you to decide which witnesses to believe, which witnesses not to believe, and how much of any witness's testimony to accept or reject. I will give you some guidelines for determining the credibility of witnesses at the end of the case.

## *C. Burden of Proof*

This is a civil case. The plaintiff has the burden of proving his [her] case by what is called the preponderance of the evidence. That means the plaintiff has to produce evidence which, considered in the light of all the facts, leads you to believe that what the plaintiff claims is more likely true than not. To put it differently, if you were to put the plaintiff's and the defendant's evidence on opposite sides of the scales, the plaintiff would have to make the scales tip somewhat on his [her] side. If the plaintiff fails to meet this burden, the verdict must be for the defendant.

Those of you who have sat on criminal cases will have heard of proof beyond a reasonable doubt. That requirement does not apply to a civil case; therefore, you should put it out of your mind.

## *D. Summary of Applicable Law*

[*Note:* A summary of the elements may not be appropriate in some cases.]

In this case, the plaintiff claims that _____; the defendant claims that _____. I will give you detailed instructions on the law at the end of the case, and those instructions will control your deliberations and decision. But in order to help you follow the evidence, I will now give you a brief summary of the elements which the plaintiff must prove to make his [her] case: [here summarize the elements].

## *E. Conduct of the Jury*

Now, a few words about your conduct as jurors.

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, or blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom.

Until you retire to deliberate, you may not discuss this case with anyone, even your fellow jurors. After you retire to deliberate, you may begin discussing the case with your fellow jurors, but you cannot discuss the case with anyone else until you have returned a verdict and the case is at an end.

First,[1] this means that, during the trial, you must not conduct any independent research about this case, or the matters, legal issues, individuals, or other entities involved in this case. Just as you must not search or review any traditional sources of information about this case (such as dictionaries, reference materials, or television news or entertainment programs), you also must not search the internet or any other electronic resources for information about this case or the witnesses or parties involved in it. The bottom line for the important work you will be doing is that you must base your verdict only on the evidence presented in this courtroom, along with instructions on the law that I will provide.

Second, this means that you must not communicate about the case with anyone, including your family and friends, until deliberations, when you will discuss the case with only other jurors. During deliberations, you must continue not to communicate about the case with anyone else. Most of us use smartphones, tablets, or computers in our daily lives to access the internet, for information, and to participate in social media platforms. To remain impartial jurors, however, you must not communicate with anyone about this case, whether in person, in writing, or through email, text messaging, blogs, or social media websites and apps (like X (formerly Twitter), Facebook, Instagram, LinkedIn, YouTube, WhatsApp, and Snapchat).

[Consider reading here the suggested insert about *why* jurors should not do their own research that is provided at the end of this section, after paragraph H, *infra*.]

Please note that these restrictions apply to ***all*** kinds of communications about this case, even those that are not directed at any particular person or group. Communications like blog posts or tweets can be shared to an ever-expanding circle of people

1. The next five paragraphs are from the Proposed Model Jury Instructions: The Use of Electronic Technology to Learn or Communicate about a Case, prepared by the Judicial Conference Committee on Court Administration and Case Management (2020). *See also* Memorandum, "Updated Model Jury Instructions on Social Media and Other Communications" from Judge Audrey G. Fleissig, Chair, Committee on Court Administration and Case Management (Sept. 1, 2020), https://jnet.ao.dcn/sites/default/files/pdf/DIR20-163.pdf. *See also* Meghan Dunn, Federal Judicial Center, *Strategies for Preventing Jurors' Use of Social Media During Trials and Deliberations*, *in* Jurors' Use of Social Media During Trials and Deliberations: A Report to the Judicial Conference Committee on Court Administration and Case Management 5–11 (2011), https://fjc.dcn/sites/default/files/2012/DunnJuror.pdf.

and can have an unexpected impact on this trial. For example, a post you make to your social media account might be viewable by a witness who is not supposed to know what has happened in this courtroom before the witness has testified. For these reasons, you must inform me immediately if you learn about or share any information about the case outside of this courtroom, even if by accident, or if you discover that another juror has done so.

Finally, a word about an even newer challenge for trials such as this one—persons, entities, and even foreign governments may seek to manipulate your opinions, or your impartiality during deliberations, using the communications I've already discussed or using fake social media accounts. But these misinformation efforts might also be undertaken through targeted advertising online or in social media. Many of the tools you use to access email, social media, and the internet display third-party notifications, pop-ups, or ads while you are using them. These communications may be intended to persuade you or your community on an issue, and could influence you in your service as a juror in this case. For example, while accessing your email, social media, or the internet, through no fault of your own, you might see popups containing information about this case or the matters, legal principles, individuals, or other entities involved in this case. Please be aware of this possibility, ignore any pop-ups or ads that might be relevant to what we are doing here, and certainly do not click through to learn more if these notifications or ads appear. If this happens, you must let me know.

Because it is so important to the parties' rights that you decide this case based solely on the evidence and my instructions on the law, at the beginning of each day, I may ask you whether you have learned about or shared any information outside of this courtroom. (I like to let the jury know in advance that I may be doing that, so you are prepared for the question.)

Remember that you must not form any opinion until all the evidence is in. Keep an open mind until you start your deliberations at the end of the case.

[If the court decides to allow note taking, add:]

If you want to take notes during the course of the trial, you may do so. However, it is difficult to take detailed notes and pay attention to what the witnesses are saying at the same time. If you do take notes, be sure that your note taking does not interfere with your listening to and considering all of the evidence. Also, if you do take notes, do not discuss them with anyone before you begin your deliberations. Do not take your notes with you at the end of the day—be sure to leave them in the jury room.

If you choose *not* to take notes, remember that it is your own individual responsibility to listen carefully to the evidence. You cannot give this responsibility to someone who is taking notes. We depend on the judgment of all members of the jury; you all must remember the evidence in this case.

[If the court decides to allow jurors to ask questions during the trial, see *infra* section 5.07: Juror Questions During Trial, for instructions and cautions.]

## *F. Course of the Trial*

The trial will now begin. First, each side may make an opening statement. An opening statement is neither evidence nor argument; it is an outline of what that party intends to prove, offered to help you follow the evidence.

Next, the plaintiff will present his [her] witnesses, and the defendant may cross-examine them. Then the defendant will present his [her] witnesses, and the plaintiff may cross-examine them.

After all the evidence is in, the parties will present their closing arguments to summarize and interpret the evidence for you, and the court will give you instructions on the law.

[*Note:* Some judges may wish to give some instructions before closing arguments. See Fed. R. Civ. P. 51(b)(3).]

You will then retire to deliberate on your verdict.

## *G. At the End of Each Day of the Case*[2]

As I indicated before this trial started, you as jurors will decide this case based solely on the evidence presented in this courtroom. This means that, after you leave here for the night, you must not conduct any independent research about this case, the matters in the case, the legal issues in the case, or the individuals or other entities involved in the case. This is important for the same reasons that jurors have long been instructed to limit their exposure to traditional forms of media and information such as television and newspapers. You also must not communicate with anyone, in any way, about this case. And you must ignore any information about the case that you might see while browsing the internet or your social media feeds.

## *H. At the Beginning of Each Day of the Case*[3]

As I reminded you last night and continue to emphasize to you today, it is important that you decide this case based solely on the evidence and the law presented here. So you must not learn any additional information about the case from sources outside the courtroom. To ensure fairness to all parties in this trial, I will now ask each of you whether you have learned about or shared any information about this case outside of this courtroom, even if it was accidental.

If you think you might have done so, please let me know now by raising your hand. [Wait for a show of hands.] I see no raised hands; however, if you would prefer to talk to a member of the court's staff privately in response to this question, please do so at the next break. Thank you for your careful adherence to my instructions.

2. *See* Proposed Model Jury Instructions, *supra* note 1.
3. *Id.*

**Suggested instruction to explain why jurors should not do their own research, to include in paragraph E, Conduct of the Jury, *supra*:**

The parties have a right to have this case decided only on evidence they know about and that has been presented here in court. If you do some research, investigation, or experiment that we don't know about, then your verdict may be influenced by inaccurate, incomplete, or misleading information that has not been tested by the trial process. The information you will see and hear in this courtroom, on the other hand, has to meet rigorous standards for truthfulness and reliability. We have rules of evidence that are designed to "ascertain the truth and secure a just determination." Witnesses are sworn to tell the truth and may be punished for perjury if they do not. Experts must be qualified, evidence must be authenticated, and each party has the opportunity to challenge the other's claims and evidence. What you might see on the internet or learn from some other news source or social media has few, if any, of these measures of trustworthiness. This includes anything said or written by the parties in this case outside of the courtroom, before or during the trial. Any such statements or writings are not made under oath, are not subject to cross-examination, verification, or the rules of evidence, may even be intentionally untruthful, and must not be considered during your deliberations.

If you decide a case based on information not presented in court, you will have denied the parties a fair trial in accordance with the rules of this country and you will have done an injustice. The parties understand what evidence I will allow during the trial before the trial starts and they have worked hard to prepare for trial, including addressing how this evidence may affect their case. If you do outside research, the parties will have no idea what you have found and will have no ability to help you to properly assess this information. That removes the level playing field that the parties and society expect during a trial. It is very important that you abide by these rules. Failure to follow these instructions could result in an unjust verdict or the case having to be retried.

## Other FJC Sources

- Civil Litigation Management Manual 106–09 (Judicial Conference of the United States, 3d ed. 2022)
- Manual for Complex Litigation, Fourth 154–56 (2004)
- Amy J. St. Eve, Charles P. Burns & Michael A. Zuckerman, *More from the #Jury Box: The Latest on Juries and Social Media*, 12 Duke L. & Tech. Rev. 64, 89 (2014)
- Amy J. St. Eve & Michael A. Zuckerman, *Ensuring an Impartial Jury in the Age of Social Media*, 11 Duke L. & Tech. Rev. 1, 14 (2012)

# 6.07 General Instructions to Jury at End of Civil Case

## Introductory Note

Fed. R. Civ. P. 51(b) outlines the procedure for the submission and consideration of requests by the parties for specific jury instructions. It requires

1. that the court inform counsel before closing arguments of its proposed instructions and its proposed action upon the instructions requested by counsel; and
2. that the court give counsel adequate opportunity outside the hearing of the jury to object to the court's instructions.

There is no prescribed method for the court to settle on its final set of instructions. Some courts hold an on-the-record charge conference with counsel during trial. At that conference, the tendered instructions are discussed and are accepted, rejected, or modified by the court.

Other courts, without holding a charge conference, prepare a set of proposed instructions from those tendered by counsel. These courts then give a copy of the proposed instructions to all counsel and permit counsel to take exception to the instructions. Thereafter, the court may revise its instructions if convinced by counsel in their objections that the instructions should be modified.

Still other courts require counsel to confer during trial and to agree, to the extent that they can, on the instructions that should be given. The court then considers only those instructions upon which the parties cannot agree.

The court may, of course, give an instruction to the jury that neither party has tendered. Additionally, Rule 51(b)(3) states that the court "may instruct the jury at any time before the jury is discharged."

While the court is free to ignore tendered instructions and to instruct the jury sua sponte, the usual practice is for the court to formulate the final instructions with the assistance of counsel and principally from the instructions counsel tendered.

Local practice varies as to whether a written copy of the instructions is given to the jury for use during its deliberations. Many courts always give the jury a written copy of the instructions. Some courts have the instructions recorded as they are given in court and permit the jury to play them back in the jury room. Some courts do neither but will repeat some or all of the instructions in response to a request from the jury.

## Outline of Instructions

Instructions delivered at the end of a case consist of three parts: Instructions on general rules that define and control the jury's duties; statement of rules of law that the jury must apply; and rules and guidelines for jury deliberation and return of verdict. Many circuits have developed model or pattern jury instructions, and judges should consult the instructions that have been prepared for use in their circuits.

A. General Rules

1. Outline the duty of the jury

   (a) to find facts from admitted evidence;

   (b) to apply law as given by the court to the facts as found by the jury; and

   (c) to decide the case on the evidence and the law regardless of personal opinions and without bias, prejudice, or sympathy.

2. Discuss the burden of proof in civil trials and explain how it differs from the burden of proof in criminal trials.

3. Indicate the evidence to be considered:

   (a) sworn testimony of witnesses;

   (b) exhibits;

   (c) stipulations; and

   (d) facts judicially noticed.

4. Indicate what is not evidence:

   (a) arguments and statements of counsel;

   (b) questions to witnesses;

   (c) evidence excluded by rulings of the court.

B. Delineate with precision and with specific consideration of the law of your circuit each claim and defense of the parties that is to be submitted to the jury for their consideration.

C. Jury Procedure

1. Selection and duty of the foreperson.
2. Process of jury deliberation:
   (a) rational discussion of the evidence by all jurors for the purpose of reaching a unanimous verdict;
   (b) each juror is to decide the case for themselves in the context of the evidence and the law, with proper consideration of other jurors' views; and
   (c) jurors may reconsider their views if persuaded by rational discussion but not solely for the sake of reaching a unanimous verdict.
3. Absent a stipulation, the verdict must be unanimous on the issue submitted (Fed. R. Civ. P. 48(b)).
4. Explain the verdict form, if used.[1]
5. Jury communications with the court during deliberations must be in writing and signed by the foreperson.
6. The jury must not disclose how it stands numerically or otherwise on the issues submitted.
7. Consider giving the jury the following instruction[2]:

Throughout your deliberations, you may discuss with each other the evidence and the law that has been presented in this case, but you must not communicate with anyone else by any means about the case. You also cannot learn from outside sources about the case, the matters in the case, the legal issues in the case, or individuals or other entities involved in the case. This means you may not use any electronic device or media (such as a phone, computer, or tablet), the internet, any text or instant messaging service, or any social media apps (such as X (formerly Twitter), Facebook, Instagram, LinkedIn, YouTube, WhatsApp, and Snapchat) to research or communicate about what you've seen and heard in this courtroom.

These restrictions continue during deliberations because it is essential, under our Constitution, that you decide this case based solely on the evidence and law presented in this courtroom. Information you find on the internet or through social media might be incomplete, misleading, or inaccurate. And, as I noted in my instructions at the start of the trial, even using your smartphones, tablets, and computers—and the news and social media apps on those devices—may

1. Consider whether to use a special verdict (Fed. R. Civ. P. 49(a)). It can be a useful device to reduce the risk of having to retry the entire case.

2. The following instruction is from the Proposed Model Jury Instructions: The Use of Electronic Technology to Learn or Communicate about a Case, prepared by the Judicial Conference Committee on Court Administration and Case Management (Updated June 2020). *See also* Memorandum, Updated Model Jury Instructions on Social Media and Other Communications, from Judge Audrey G. Fleissig, Chair, Committee on Court Administration and Case Management (Sept. 1, 2020), https://jnet.ao.dcn/sites/default/files/pdf/DIR20-163.pdf. *See also* Meghan Dunn, Federal Judicial Center, *Strategies for Preventing Jurors' Use of Social Media During Trials and Deliberations*, *in* Jurors' Use of Social Media During Trials and Deliberations: A Report to the Judicial Conference Committee on Court Administration and Case Management 5–11 (2011), https://fjc.dcn/sites/default/files/2012/DunnJuror.pdf.

inadvertently expose you to certain notices, such as pop-ups or advertisements, that could influence your consideration of the matters you've heard about in this courtroom.

You are permitted to discuss the case with only your fellow jurors during deliberations because they have seen and heard the same evidence and instructions on the law that you have, and it is important that you decide this case solely on the evidence presented during the trial, without undue influence by anything or anyone outside of the courtroom. For this reason, I expect you to inform me at the earliest opportunity, should you learn about or share any information about this case outside of this courtroom or the jury room, or learn that another juror has done so.

Any juror who violates these restrictions jeopardizes the fairness of these proceedings, and a mistrial could result, which would require the entire trial process to start over.

D. Consider providing the jury with a written copy or transcript of the jury instructions.

## Other FJC Sources

- Civil Litigation Management Manual 106–09 (Judicial Conference of the United States, 3d ed. 2022)
- Manual for Complex Litigation, Fourth 154–60 (2004)

# 6.08 Verdict—Civil

*Fed. R. Civ. P. 48*

## *A. Reception of an Unsealed Verdict*

1. Upon announcement by the jury that it has reached a verdict, have all interested parties convene in open court to receive the verdict.
2. When court is convened, announce that the jury is ready to return its verdict(s), and instruct the deputy marshal (or bailiff) to have the jurors enter and assume their seats in the jury box.
3. If not already known, inquire of the jury who speaks as its foreperson.
4. Ask the foreperson if the jury has unanimously agreed upon its verdict(s). [*Note:* If the response is anything other than an unqualified yes, the jury should be returned without further inquiry to continue its deliberations.]
5. Instruct the foreperson to hand the verdict form(s) to the clerk to be delivered to you for inspection before publication.
6. Inspect the verdict(s) to ensure regularity of form. [*Note:* If the verdict form(s) is (are) not properly completed, take appropriate corrective action before publication, including recalling the jury if possible.[1]]
7. Explain to the jurors that their verdict(s) will now be "published"—that is, read aloud in open court.
8. Instruct the jury to pay close attention as the verdict(s) is (are) published; and explain that, following publication, the jury may be "polled"—that each juror may be asked, individually, whether the verdict(s) as published constituted the juror's individual verdict(s) in all respects. Fed. R. Civ. P. 48(c).
9. Publish the verdict(s) by reading it (them) aloud (or by having the clerk do so).
10. Upon request of any party, or on your own motion, poll the jury by asking (or by having the clerk ask) each individual juror, by name or number, whether the verdict(s) as published constituted the juror's individual verdict(s) in all respects.
11. If polling verifies unanimity, direct the clerk to file and record the verdict(s), and discharge the jurors with appropriate instructions concerning their future service, if any.
12. If polling results in any doubt as to unanimity, or if there are inconsistent answers to a special verdict, make no further inquiry and have no further discussions with the jury; rather, confer privately with counsel and determine whether the jury should be returned for further deliberations or a mistrial should be declared.[2]

1. *See* Dietz v. Bouldin, 579 U.S. 40, 46 (2016) (If the jury returned an inconsistent or otherwise improper verdict and has not been discharged, "give the jury a curative instruction and order them to continue deliberating." Even if the jury is discharged, the court has "the inherent power to rescind a jury discharge order" to recall the jury to correct an improper verdict, but the court's "power is limited in duration and scope, and must be exercised carefully to avoid any potential prejudice."). *See also* Fed. R. Civ. P. 49(b) (outlining procedure if jury's answers to any written questions are inconsistent with the general verdict).

2. Fed. R. Civ. P. 48(c) ("If the poll reveals a lack of unanimity or lack of assent by the number of jurors that the parties stipulated to, the court may direct the jury to deliberate further or may order a new trial.").

### *B. Reception of a Sealed Verdict*

[*Note:* On some occasions an indispensable party may not be available to receive a verdict when the jury reaches agreement. In such cases a sealed verdict may be delivered to the clerk for subsequent "reception" and publication in open court when the jury, the judge, and all necessary parties are present.]

1. Upon announcement by the jury that it has reached a verdict, have all interested and available parties convene in open court and on the record.
2. When court is thus convened, announce that the jury is ready to return its verdict(s), and explain that a sealed verdict will be taken in accordance with the following procedure:
   (a) Instruct the deputy marshal (or bailiff) to usher the jurors into the courtroom to assume their seats in the jury box.
   (b) If not already known, inquire of the jury who speaks as its foreperson.
   (c) Ask the foreperson if the jury has unanimously agreed on its verdict. [*Note:* If the response is anything other than an unqualified yes, the jury should be returned without further inquiry to continue its deliberations.]
   (d) Explain to the jury that a sealed verdict will be taken, and further explain why that procedure has become necessary in the case.
   (e) Poll the jury on the record.
   (f) Direct the clerk to hand a suitable envelope to the foreperson. Instruct the foreperson to place the verdict form(s) in the envelope, to seal the envelope, and to hand it to the clerk for safekeeping. In the event the jury will not be present at the opening of the verdict, it is recommended that each juror sign the verdict form(s).
   (g) Recess the proceedings, instructing the jury and all interested parties to return at a fixed time for the opening and formal reception of the verdict. Instruct that, in the interim, no member of the jury should have any conversation with any other person, including any other juror, concerning the verdict or any other aspect of the case.
   (h) When court is again convened for reception of the verdict, have the clerk hand the sealed envelope to the jury foreperson.
   (i) Instruct the foreperson to open the envelope and verify that the contents consist of the jury's verdict form(s) without modification or alteration of any kind.
   (j) Follow the steps or procedures outlined in paragraphs A.5 through A.12 *supra*.

## Other FJC Sources

- Manual for Complex Litigation, Fourth 160–63 (2004)

# 6.09 Referrals to Magistrate Judges (Civil Matters)

*Fed. R. Civ. P. 72, 73; 28 U.S.C. § 636*

Listed below are duties in civil matters that may be referred to magistrate judges. Most districts have local rules or standing orders governing referrals to magistrate judges.

When considering referrals to magistrate judges, courts may consult the *Policies and Principles for Magistrate Judge Utilization*, prepared by the Committee on the Administration of the Magistrate Judges System of the Judicial Conference of the United States. One suggested practice: "Referring an entire civil or criminal case to a magistrate judge for pretrial case management is a more efficient use of judicial time and resources than assigning individual matters in a case on an ad hoc basis." *Policies* at 3. The *Policies and Principles* are available at https://jnet.ao.dcn/sites/default/files/pdf/Current_Policies_and_Principles.06.09.22_FINAL.pdf.

For a more comprehensive listing of the duties magistrate judges may perform, see the *Inventory of United States Magistrate Judge Duties* (December 2013).[1] For more information about magistrate judge matters, see the "Magistrate Judge Resources" page at https://jnet.ao.dcn/court-services/judges-corner/magistrate-judges-system.

See also the discussion in section 6.01: Civil Case Management, *supra*, at I.B, outlining the extensive role magistrate judges may play in civil litigation.

A magistrate judge may conduct:

1. All phases of a civil case, with the written consent of the parties.[2] 28 U.S.C. § 636(c)(1); Fed. R. Civ. P. 73. See also Form AO 85: Notice, Consent, and Reference of a Civil Action to a Magistrate Judge, https://fjc.dcn/content/367156/consent-magistrate-judge-disposition-ao-form-85, and Form AO 85A: Notice, Consent, and Reference of a Dispositive Motion to a Magistrate Judge, https://fjc.dcn/content/367157/consent-magistrate-judge-dispositive-motion-ao-form-85a.

   Appeal is to the court of appeals, as in any other civil case. 28 U.S.C. § 636(c)(3); Fed. R. Civ. P. 73(c). See generally *supra* section 6.02: Trial Outline—Civil.[3]

1. The *Inventory* is available only online at https://jnet.ao.dcn/court-services/judges-corner/magistrate-judges/authority-magistrate-judges/inventory-united-states-magistrate-judge-duties. More recent decisions relating to the duties and authority of magistrate judges are available at https://jnet.ao.dcn/court-services/judges-corner/magistrate-judges/authority-magistrate-judges/recent-decisions.

2. The Supreme Court held that lack of written or express consent might not deprive the magistrate judge of jurisdiction—implied consent was sufficient in a case in which, after being informed of the right to trial before a district judge, a party voluntarily appeared before a magistrate judge and tried the case to conclusion. "[T]he better rule is to accept implied consent where, as here, the litigant or counsel was made aware of the need for consent and the right to refuse it, and still voluntarily appeared to try the case before the Magistrate Judge. Inferring consent in these circumstances thus checks the risk of gamesmanship by depriving parties of the luxury of waiting for the outcome before denying the magistrate judge's authority." Roell v. Withrow, 538 U.S. 580, 586–90 (2003). For a discussion of *Roell* and subsequent case law, see Inventory of Magistrate Judge Duties, § 8. Civil Consent Authority Under 28 U.S.C. § 636(c) at B. Sufficiency of Parties Consent.

3. For an illustrative consent form and order of reference to a magistrate judge, see the Appendix to the Civil Litigation Management Manual at "Magistrate Judges—Consent and Referral," https://fjc.dcn/content/366802/civil-litigation-management-manual-3ed-online-appendix.

2. Pretrial matters:

   (a) A magistrate judge may conduct a Rule 16 pretrial conference and hear and determine nondispositive pretrial matters, such as discovery disputes and requests for bifurcation or consolidation. Upon timely objection by a party, a district court shall consider such objections and modify or set aside any portion of the magistrate judge's order found to be clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a).

   (b) A magistrate judge may hear and submit to the district court proposed findings of fact and recommended determinations of dispositive pretrial matters, such as summary judgment motions. A district court must make a de novo determination of those portions of proposed findings and recommendations to which the parties object. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b).

   See generally *supra* section 6.02: Trial Outline—Civil.

3. Voir dire, if the parties consent. 28 U.S.C. § 636(c)(1); *Thomas v. Whitworth*, 136 F.3d 756, 759 (11th Cir. 1998); *Stockler v. Garratt*, 974 F.2d 730, 732 (6th Cir. 1992); *Olympia Hotels Corp. v. Johnson Wax Development Corp.*, 908 F.2d 1363, 1368–69 (7th Cir. 1990). See *supra* section 6.05: Standard Voir Dire Questions—Civil.

4. "[A]dditional duties [that] are not inconsistent with the Constitution and laws of the United States." 28 U.S.C. § 636(b)(3). For examples of additional duties and case law on § 636(b)(3), see the *Inventory of United States Magistrate Judge Duties* at § 7.

## Other FJC Sources

- Civil Litigation Management Manual 154–58 (Judicial Conference of the United States, 3d ed. 2022)
- Manual for Complex Litigation, Fourth 117 (2004)

# 7.01 Contempt—Criminal

*Fed. R. Crim. P. 42; 18 U.S.C. § 401*

## I. Background

The purpose, procedure, and penalty for criminal contempt differ from those for civil contempt. It is essential that the trial judge make clear on the record whether the proceeding is for civil or criminal contempt.

The purpose of criminal contempt is to punish a person for a past act of contempt. Criminal contempt has the characteristics of a crime, and the contemnor is cloaked with the safeguards of one accused of a crime. The purpose of civil contempt is to compel someone to do or not do a certain act. See section 7.02: Contempt—Civil, *infra*.

Case law makes clear that the contempt power is one to be exercised with the greatest restraint and that, in exercising that power, a court should exert only the power needed to achieve the desired end.

## II. Controlling Statute and Rule

The controlling statute for criminal contempt is 18 U.S.C. § 401. It provides as follows:

> A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as—
>
> (1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;
>
> (2) Misbehavior of any of its officers in their official transactions;
>
> (3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command.

The applicable rule of procedure is Fed. R. Crim. P. 42. That rule, as amended December 1, 2002, provides as follows:

> (a) Disposition After Notice. Any person who commits criminal contempt may be punished for that contempt after prosecution on notice.
>
> (1) Notice. The court must give the person notice in open court, in an order to show cause, or in an arrest order. The notice must:
>
> (A) state the time and place of the trial;
>
> (B) allow the defendant a reasonable time to prepare a defense; and
>
> (C) state the essential facts constituting the charged criminal contempt and describe it as such.
>
> (2) Appointing a Prosecutor. The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines the request, the court must appoint another attorney to prosecute the attempt.
>
> (3) Trial and Disposition. A person being prosecuted for criminal contempt is entitled to a jury trial in any case in which federal law so provides and must be released or detained as Rule 46 provides. If the criminal contempt involves disrespect toward or criticism of a judge, that judge is disqualified from presiding at the contempt

> trial or hearing unless the defendant consents. Upon a finding or verdict of guilty, the court must impose the punishment.
>
> (b) Summary Disposition. Notwithstanding any other provision of these rules, the court (other than a magistrate judge) may summarily punish a person who commits criminal contempt in its presence if the judge saw or heard the contemptuous conduct and so certifies; a magistrate judge may summarily punish a person as provided in 28 U.S.C. § 636(e). The contempt order must recite the facts, be signed by the judge, and be filed with the clerk.

# III. Criminal Contempt Procedures

Fed. R. Crim. P. 42 prescribes two different procedures, depending on whether the judge personally observes the contemptuous conduct and whether immediate action is required.

## *A. Procedure When Contemptuous Conduct is Personally Observed by the Judge and Immediate Action is Required*

When you see or hear contemptuous conduct, you may, but are not compelled to, proceed under Fed. R. Crim. P. 42(b).

This summary procedure is appropriate only when immediate action is needed. It is reserved for conduct that actually disrupts or obstructs court proceedings and for situations in which immediate action is necessary to restore the court's authority. The conduct must be more flagrant than mere disrespect to the judge or an affront to the judge's sense of dignity.[1]

If the conduct (such as shouting in the courtroom) does interfere with court proceedings, proceed as follows:

1. First, warn the person that if a repetition occurs, they may be removed from the courtroom or may be found in criminal contempt.
2. If marshals are not already in the courtroom, summon them, so that they will be present if the disruptive conduct is repeated.
3. If the offender repeats the disruptive conduct, order the person removed from the courtroom.
4. If the conduct is so disruptive that removing the offender is inadequate to reestablish the authority and dignity of the court, follow the Fed. R. Crim. P. 42(b) procedure.

In summary proceedings under Rule 42(b), the court may impose a sentence that does not exceed the punishment authorized for a petty offense, i.e., imprisonment of no more than six months or a fine of no more than $5,000 if the contemnor is an individual, $10,000 if the contemnor is an organization. If more severe punishment seems appropriate, the court must proceed by notice under Rule 42(a) and accord the contemnor the right to a jury trial.

*Note:* Contempt fines exceeding the petty offense limit on organizations have been imposed without the right to a jury trial. See *Muniz v. Hoffman*, 422 U.S. 454, 477 (1975); *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 663 (2d Cir. 1989); *United States v. Troxler Hosiery*

1. Summary procedure may also be appropriate when an already imprisoned witness refuses to testify during a criminal trial despite a grant of immunity. *See* United States v. Wilson, 421 U.S. 309 (1975). *See also supra* section 5.04: Handling the Recalcitrant Witness.

*Co.*, 681 F.2d 934, 936–37 (4th Cir. 1982). These cases "suggest" that the "seriousness of the offense for purposes of a possible right to a jury would turn on the burden of the fine upon the particular contemnor." *Twentieth Century Fox*, 882 F.2d at 663–65 (but also holding that "there is an absolute dollar amount of fines above which the Sixth Amendment entitles all corporations and other organizations to a jury trial for criminal contempts, regardless of the contemnor's financial resources, and that this amount is $100,000"). The cases above did not, however, involve summary proceedings under Rule 42(a) (now 42(b)).

5. Before proceeding, be sure that an adequate number of marshals are in the courtroom.
6. Retire the jury. Have the offender brought before you. (The offender is not entitled to counsel in a summary proceeding.)
7. Advise the offender that you intend to find them in criminal contempt for obstructing the administration of justice by reason of [here describe the conduct].
8. Ask if the offender would care to say anything in mitigation.
9. After hearing the offender out, impose sentence in words to this effect:

   I find you in criminal contempt for so conducting yourself in this courtroom that you obstructed the administration of justice. The conduct for which I find you in criminal contempt was [here describe the conduct observed by you]. I sentence you to ____ hour(s) [day(s)] in jail [*or* I fine you $_____] for that conduct. [In criminal contempt you cannot both imprison and fine.] The serving of this sentence shall commence at once [*or* shall commence at the conclusion of this trial].

   (a) No sentencing guideline has been prescribed for contempt because of the variety of behaviors covered. See U.S.S.G. § 2J1.1, Application Note 1.[2] In the absence of a guideline, the court is to "impose an appropriate sentence, having due regard for the purposes set forth in [18 U.S.C. § 3553(a)(2),] . . . for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission." 18 U.S.C. § 3553(b).

   (b) It is possible for the court to find a person in summary criminal contempt but to defer commencement of the sentence until the trial ends. In this case, however, using the Fed. R. Crim. P. 42(a) procedure rather than the summary procedure of 42(b) is probably best.

10. You must prepare, sign, and file an order of contempt. This order is intended to permit informed appellate review. The order must contain all that you saw or heard that obstructed the proceedings and by reason of which you found the defendant in contempt. Remember, for your action to be sustained on appeal, the conduct described in your order must constitute an obstruction to the administration of justice. Be sure, therefore, that the order fully and accurately recites all of the obstructive conduct that you saw or heard. The order of contempt must contain your certification that the described

2. The application notes do, however, provide cross-references to other guidelines for when the contemptuous conduct involves obstruction of justice, willful failure to pay court-ordered child support, or violation of a judicial order enjoining fraudulent behavior.

conduct was seen or heard by you and was committed in your presence. The form of the order of contempt may be as follows:

> In conformity with Rule 42(b), Federal Rules of Criminal Procedure, I hereby certify that the following was committed in my presence and was seen or heard by me: [Here insert a detailed recital of the acts constituting the contemptuous conduct.]
>
> Because of the foregoing conduct, which obstructed and disrupted the court in its administration of justice, I sentenced [name of contemnor] to __ hours/days in jail, the said jail sentence to commence [at once/at the conclusion of the trial] [*or* I fined [name of contemnor] $ _____].

11. You must date and sign the order of contempt and file it without delay.

## *B. Procedure When Contemptuous Conduct Is Not Personally Observed by the Judge or When the Conduct Is Observed by the Judge but Requires No Immediate Action*

If you become aware of conduct that is within the contemplation of 18 U.S.C. § 401 but did not occur in your presence, or if you observed contemptuous conduct but it did not actually disrupt court proceedings, you must proceed under Fed. R. Crim. P. 42(a), which requires that the contempt be prosecuted by notice rather than summarily.

Under Fed. R. Crim. P. 42(a):

1. The notice may be given

   (a) orally by you in open court in the defendant's presence; or

   (b) by an order to show cause; or

   (c) by an order of arrest.

2. If giving oral notice to the defendant in open court is not possible, you should ask the U.S. attorney to prepare for your signature an order to show cause directed to the defendant and ordering the defendant to show cause why the defendant should not be found in criminal contempt because of the offending conduct.

3. The notice, whether oral or written, must set down a definite time and place for the hearing and must describe the conduct constituting the charged contempt and describe it as being criminal contempt. You must accord the defendant a reasonable period in which to engage an attorney and prepare a defense.

   Remember that under the rule, another judge must conduct the trial if the contemptuous conduct involved criticism of or disrespect for you, unless the defendant expressly waives the right to trial by another judge.

4. Because a person found guilty of criminal contempt may be imprisoned, the defendant has a right to counsel. If the defendant cannot afford counsel, you must appoint an attorney. See section 1.02: Appointment of Counsel or Pro Se Representation, *supra*.

5. The defendant has a right to a jury trial unless, before trial, you, on your own motion or on the government's motion, limit the maximum sentence that you will impose to the maximum authorized for a petty offense, that is, imprisonment for six months or a fine

of $5,000 (for an individual; the fine limit on organizations for petty offenses is $10,000) (but see discussion in III.A.4, *supra*, of *Muniz v. Hoffman*, 422 U.S. 454 (1975); *Twentieth Century Fox*, 882 F.2d 656; *United States v. Troxler Hosiery Co.*, 681 F.2d 934 (4th Cir. 1982), allowing contempt fines on organizations in excess of those authorized for petty offenses, without the right to a jury trial).

6. At trial, whether a bench or jury trial, remember that the defendant is being tried for a crime and is entitled to all the protections to which anyone accused of a crime is entitled. The defendant has a right to testify and to call witnesses but cannot be compelled to testify. The defendant is to be found guilty only if guilt is proven beyond a reasonable doubt.
7. If found guilty, the defendant should be sentenced in the same manner as any defendant convicted of a crime. You may wish to order a presentence report and to set down the sentencing for a later date.
8. If the defendant has been afforded the right to a jury trial, there is no statutory maximum to the fine or imprisonment that may be imposed. However, you may not impose both imprisonment and a fine. Because of the variety of behaviors covered, no sentencing guideline has been prescribed for contempt. See U.S.S.G. § 2J1.1, Application Note 1.[3] In the absence of a guideline, the court is to "impose an appropriate sentence, having due regard for the purposes set forth in [18 U.S.C. § 3553(a)(2),] . . . for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission." 18 U.S.C. § 3553(b)(1).

## Other FJC Sources

- Manual on Recurring Problems in Criminal Trials 30–43 (Tucker Carrington & Kris Markarian eds., 6th ed. 2010)

3. The application notes do, however, provide cross-references to other guidelines for when the contemptuous conduct involves obstruction of justice, willful failure to pay court-ordered child support, or violation of a judicial order enjoining fraudulent behavior.

# 7.02 Contempt—Civil

*Fed. R. Crim. P. 42; 18 U.S.C. § 401*

## I. Background

The purpose, procedure, and penalty for civil contempt differ from those for criminal contempt. It is essential that the trial judge make clear on the record whether the proceeding is for civil or criminal contempt.

The purpose of criminal contempt is to punish a person for a past act of contempt. Criminal contempt has the characteristics of a crime, and the contemnor is cloaked with the safeguards of one accused of a crime. See section 7.01: Contempt—Criminal, *supra*. The primary purpose of civil contempt is to compel someone to do or not do a certain act.

Case law makes clear that the contempt power is one to be exercised with the greatest restraint and that, in exercising that power, a court should exert only the power needed to achieve the desired end.[1]

Civil contempt serves one or both of the following purposes:

1. to coerce the contemnor into complying in the future with a court order; or
2. to compensate the complainant for damages resulting from the contemnor's past noncompliance.

*Note:* If you are dealing with a recalcitrant witness, see *supra* section 5.04: Handling the Recalcitrant Witness.

## II. Controlling Statute and Rule

The only statute applying directly to civil contempt is 28 U.S.C. § 1826(a), for recalcitrant witnesses (see *supra* section 5.04: Handling the Recalcitrant Witness). However, 18 U.S.C. § 401 does not distinguish between civil and criminal contempt, thus providing courts with statutory authority to punish certain misbehavior and disobedience in civil as well as criminal contempt proceedings:

> A court of the United States shall have power to 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.

1. Spallone v. United States, 493 U.S. 265, 276 (1990) ("in selecting contempt sanctions, a court is obliged to use the 'least possible power adequate to the end proposed.") (citations omitted). *See also In re* First City Bancorporation of Texas, Inc., 282 F.3d 864, 867 (5th Cir. 2002) ("the sanctioning court must use the least restrictive sanction necessary to deter the inappropriate behavior").

While both civil and criminal contempt powers are based on statutory—as well as a court's inherent—authority, there is no civil rule comparable to Fed. R. Crim. P. 42.[2] In a civil contempt proceeding, you should follow the procedure outlined in Fed. R. Crim. P. 42(a) to the extent that it applies, as follows:

> (a) Disposition After Notice. Any person who commits criminal contempt may be punished for that contempt after prosecution on notice.
>
> (1) Notice. The court must give the person notice in open court, in an order to show cause, or in an arrest order. The notice must:
>
> (A) state the time and place of the trial;
>
> (B) allow the defendant a reasonable time to prepare a defense; and
>
> (C) state the essential facts constituting the charged criminal contempt and describe it as such.
>
> (2) Appointing a Prosecutor. The court must request that the contempt be prosecuted by an attorney for the government, unless the interest of justice requires the appointment of another attorney. If the government declines the request, the court must appoint another attorney to prosecute the attempt.
>
> (3) Trial and Disposition. A person being prosecuted for criminal contempt is entitled to a jury trial in any case in which federal law so provides and must be released or detained as Rule 46 provides. If the criminal contempt involves disrespect toward or criticism of a judge, that judge is disqualified from presiding at the contempt trial or hearing unless the defendant consents. Upon a finding or verdict of guilty, the court must impose the punishment.

## III. Civil Contempt Procedure

The contempt will normally come before you on the petition of a civil litigant seeking the imposition of sanctions by reason of another party's failure to comply with a court order.

When one party petitions to have another found in civil contempt, you should proceed as follows:

1. Set down a time and place for a hearing on the petition. The respondent must be accorded a reasonable period in which to engage an attorney and prepare a defense.
2. Because a person found in civil contempt may be imprisoned, the respondent has a right to counsel. If the respondent desires an attorney but cannot afford one, you must appoint counsel unless the right is waived (see *supra* section 1.02: Appointment of Counsel or Pro Se Representation).

2. Criminal contempt proceedings require "significantly greater procedural protections" than civil contempt proceedings. Topletz v. Skinner, 7 F.4th 284, 294 (5th Cir. 2021) (citing *Turner v. Rogers*, 564 U.S. 431, 441–43 (2011)). Fed. R. Crim. P. 42 thus codifies these more stringent protections—notice and a reasonable time to prepare a defense, appointment of a prosecutor, and, in some instances, a jury trial or recusal of the presiding judge. Given the absence of such exacting prerequisites for a finding of civil contempt, the lack of a similar provision in the civil rules is unsurprising. While there is no similar procedural rule for civil contempt, note that some civil rules specify that a misbehaving party may be held in contempt in certain circumstances. *See, e.g.*, Fed. R. Civ. P. 37(b)(1) (if a deponent is ordered "to be sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court"); Fed. R. Civ. P. 56(h) (party submitting affidavit or declaration "in bad faith or solely for delay" may be held in contempt); Fed. R. Civ. P. 70 (court may hold disobedient parties in contempt for refusal to obey a judgment that required them to convey land, deliver a deed or other document, or "perform any other specific act and the party fails to comply within the time specified").

3. The respondent in a civil contempt proceeding has no right to a jury trial because the respondent, if imprisoned, can secure immediate release by complying with the court's order.
4. The hearing is to be by way of the live testimony of witnesses, not by way of affidavit. Note that the Federal Rules of Evidence apply to contempt proceedings. See Fed. R. Evid. 1101(b).
5. The respondent is to be found in civil contempt only if the contempt is established by clear and convincing evidence. In contrast with the procedure for criminal contempt, the respondent's guilt need not be proved beyond a reasonable doubt.
6. If the respondent is found guilty of civil contempt, you have wide discretion in fashioning a remedy.
   (a) You may imprison the contemnor until the contempt is purged by complying with the court's order, you may impose a prospective conditional fine (such as a certain monetary amount per day) until the contemnor complies with the court's order, or you may both incarcerate the contemnor *and* impose a conditional fine. (There is no statutory ceiling on a conditional fine. You must, however, weigh the financial circumstances of the contemnor in fixing a conditional fine.)
   (b) You may in addition impose a fine on the contemnor to be paid to the aggrieved party, to reimburse the party for damages suffered because of the contemnor's conduct. This fine may not, however, exceed the actual damages suffered by the aggrieved party. It may, under certain circumstances, include an award to the aggrieved party of the attorney's fees and costs in bringing the contempt proceeding.
7. If you incarcerate the contemnor or impose a conditional fine, advise the contemnor that the contempt may be purged by complying with the court's order and that, upon complying, the contemnor will be released from jail and the fine, if one was imposed, will stop accumulating.
8. Prepare, sign, and file an Order in Civil Contempt, setting forth your findings of fact, your conclusions of law, and the precise sanctions you have imposed.

## Other FJC Sources

- Manual on Recurring Problems in Criminal Trials 30–33 (Tucker Carrington & Kris Markarian eds., 6th ed. 2010)

# 7.03 Injunctions

*Fed. R. Civ. P. 65*

## I. Temporary Restraining Orders

### *A. Background*

Considering an application for a temporary restraining order (TRO) is, by definition, an emergency proceeding of such urgency that relief may be granted ex parte. At the outset, the court should be satisfied that there is truly an emergency and decline to consider the application if there is not. The court should also verify that it has jurisdiction over the matter.

Note that whether or not the TRO is granted, Fed. R. Civ. P. 52(a)(1) & (2) requires the court to "state the findings [of fact] and conclusions [of law] that support its action," and the court's "findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court."

### *B. TRO Without Notice*

Fed. R. Civ. P. 65(b)(1) permits granting a TRO *without written or oral notice* to the adverse party or the party's attorney[1] *only if*

1. there are specific facts, shown by affidavit or verified complaint, clearly indicating that *immediate and irreparable* injury, loss, or damage will result to the applicant before the adverse party or their attorney can be heard in opposition; and
2. there is a written certification of the attorney's attempts, if any, to give notice, and an explanation of why notice should not be required.

Other factors the court may consider are

1. probability of success on the merits;
2. balance of harm to other interested parties if the TRO is issued against the harm to the applicant if relief is denied; and
3. the public interest.

### *C. TRO with Notice*

1. If notice is given, the standards governing issuance of a preliminary injunction are applicable.
2. The petition may be treated like one for a preliminary injunction if there is notice and a hearing, and adequate opportunity is provided for developing legal and factual issues. The court should, however, consider the applicability of Fed. R. Civ. P. 6(c)(1) (requiring fourteen days' notice before hearing on motion, but granting court discretion to modify the time period).

1. The advisory committee notes stress that "informal notice, which may be communicated to the attorney rather than the adverse party, is to be preferred to no notice at all." Note to 1966 amendment to Fed. R. Civ. P. 65(b).

3. If there is notice but no hearing, or a hearing that does not permit adequate opportunity for the development of legal and factual issues, no preliminary injunction may issue.

## *D. Contents of Order*

Fed. R. Civ. P. 65(b)(2) provides that if the TRO is granted without notice, the order shall

1. be endorsed with the date and hour of the issuance;
2. be filed forthwith in the clerk's office and entered on the record;
3. define the injury and state why it is irreparable and why the order was granted without notice; and
4. expire by its terms within such time after entry as the court fixes (but no more than fourteen days), unless within the time fixed by the court good cause is shown to extend the order for a like period, or unless the party against whom the order is directed consents to a longer period.

These requirements, particularly with regard to a restraining order's duration, should be applied to a TRO even when notice has been given. In addition, Fed. R. Civ. P. 65(d) provides that every restraining order shall

1. set forth the reasons for its issuance;
2. be specific in terms;
3. describe in reasonable detail, and not by reference to the complaint or other documents, the act or acts to be restrained[2]; and
4. bind only the parties to the action; the parties' officers, agents, servants, employees, and attorneys; and persons in active concert or participation with the parties who receive actual notice of the order.

## *E. Motion for Dissolution After Notice*

On two days' notice to the party that obtained the TRO without notice, or on such shorter notice as the court may prescribe, the adverse party may appear and contest a TRO that was issued without notice. Fed. R. Civ. P. 65(b)(4).

## *F. Security*

Under Rule 65(c), a TRO may not be issued unless the applicant gives such security as the court fixes. The movant must give "security in an amount that the court considers proper *to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained*" (emphasis added). "In view of the possibly drastic consequence of a temporary restraining order," it is especially important to ensure that sufficient security is provided when the movant

2. Care should be taken to ensure that the terms of the order are clear and specific. As one court phrased it, "a court must craft its orders so that those who seek to obey may know precisely what the court intends to forbid." American Red Cross v. Palm Beach Blood Bank, Inc., 143 F.3d 1407, 1411 (11th Cir. 1998). See also cases cited at n.6, *infra*.

seeks a TRO without notice under Rule 65(b)(1) and the other party may incur damages before they can respond, especially if those damages may be severe or irreparable.[3]

Courts should take into account that

> the consequences of wrongfully enjoining a defendant could be dire if a district court were to significantly underestimate the economic impact of an injunction it issues. While that risk is offset to a degree by the high burden placed on the moving party to establish that an injunction is warranted, . . . the risk remains, especially if the scope of the injunction is far-reaching. District courts are therefore tasked with the responsibility of accounting for the factual circumstances of the parties and tying the scope of the injunction to the bond amount it decides to set.
>
> . . . District courts should engage in a case-specific analysis that accounts for the factual circumstances of the parties, the nature of the case and competing harms, and the scope and potential impact of the injunction, and they should place on the record their reasons for setting a bond amount, so as to provide a meaningful basis for appellate review.[4]

The Seventh Circuit has stated that courts should "err on the high side" when setting bond under Rule 65(c). Because a defendant can only recover actual damages, "an error in setting the bond too high thus is not serious. . . . Unfortunately, an error in the other direction produces irreparable injury, because the damages for an erroneous preliminary injunction cannot exceed the amount of the bond."[5]

Note that the security requirement of Rule 65(c) does not apply to the United States.

## *G. The Hearing Record*

The hearing on an application for a TRO, including pleadings and evidence taken, becomes a part of the record in the later injunction hearing and need not be repeated.

Whether or not the TRO is granted, Fed. R. Civ. P. 52(a)(1) & (2) requires the court to "state the findings [of fact] and conclusions [of law] that support its action." The court's "findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court."

3. *See* Fed. R. Civ. P. 65(b), advisory committee note to 1966 amendment (adding that "the opposition should be heard, if feasible, before the order is granted. Many judges have properly insisted that, when time does not permit of formal notice of the application to the adverse party, some expedient, such as telephonic notice . . . , be resorted to if this can reasonably be done."). *See also* Mallet and Company Inc. v. Lacayo, 16 F.4th 364, 390–91 (3d Cir. 2021) ("Rule 65(c)'s bond requirement . . . ensures at least some protection for the defendant in the event its conduct was wrongfully enjoined." It also "serves as a deterrent to 'rash applications for interlocutory orders; the bond premium and the chance of liability on it causes plaintiff to think carefully beforehand.' . . . It is also the only recourse for a wrongfully enjoined party.") (citation omitted).

4. *Mallet*, 16 F.4th at 391.

5. Mead Johnson & Co. v. Abbot Lab'ys, 201 F.3d 883, 888 (7th Cir. 2000). *See also* Axia NetMedia Corp. v. Massachusetts Technology Park Corp., 889 F.3d 1, 11 (1st Cir. 2018) ("The purpose of [the Rule 65(c)] bond is to ensure that the enjoined party may readily be compensated for the costs incurred as a result of the injunction should it later be determined that it was wrongfully enjoined.").

# II. Preliminary Injunctions

## *A. Notice and Hearing*

A preliminary injunction may not be issued without notice. Fed. R. Civ. P. 65(a)(1). The rule does not specify the form of notice or how much notice is required. However, Fed. R. Civ. P. 6(c)(1) requires that notice of a hearing, and affidavits that support a motion, be provided "at least 14 days before the time specified for the hearing" unless the court provides otherwise. For shorter time periods, and for the form of notice, general considerations of due process and fairness should be applied.

Generally, some kind of hearing will be held, although the form of the hearing will depend upon the record before the court. For example, if there is no disputed issue of fact, the determination of whether to issue the injunction may be made on the papers alone, with or without oral argument. Even if there is a disputed issue of fact, a witness's direct testimony may be presented by way of affidavit and the witness may be subject to cross-examination.

## *B. Burden of Proof*

The moving party has the burden of demonstrating entitlement to relief. Rule 65 does not specify the requirements for a preliminary injunction, and they vary from circuit to circuit, but the courts generally consider

1. the likelihood that the moving party will suffer irreparable injury in the absence of a preliminary injunction;
2. the moving party's likelihood of success on the merits;
3. the balance of hardships between the parties (and any relevant non-parties); and
4. the effect on public policy of granting or denying the preliminary injunction.

Absent extraordinary circumstances, a preliminary injunction will not be issued where an adequate remedy at law exists, that is, where the moving party could be compensated by money damages. An exception to this general rule exists when it is shown that a money judgment will go unsatisfied absent equitable relief, such as when the target of the injunction is insolvent or is likely to transfer or dissipate assets to avoid payment.

## *C. Preparing for the Hearing*

Because a decision must be reached quickly and the time to prepare for the hearing may be brief, it may help the parties and the court if some matters are addressed before the hearing. The court may, for example,

1. narrow the legal scope of the hearing by eliminating claims, defenses, and counterclaims that do not relate directly to the decision of whether to issue a preliminary injunction;
2. narrow the factual scope of the hearing by directing the parties to submit statements of undisputed facts or requests for admission;
3. direct counsel to identify any witnesses in advance, along with the substance of their testimony and the exhibits they will sponsor;

4. require that direct testimony be offered in the form of adopted narrative statements, exchanged in advance, which will be subject to motions to strike, to cross-examination, and to redirect at the hearing if issues of credibility are presented;
5. direct counsel to exchange proposed exhibits in advance, give notice that objections may be treated as waived if not made in writing in advance of the hearing, and resolve objections to foundation before the hearing;
6. direct counsel to present stipulated summaries or extracts of any deposition testimony to be used in lieu of lengthy readings of transcripts; and
7. direct counsel to submit briefs in advance of the hearing, along with proposed findings of fact and conclusions of law.

If the court determines that no substantial factual disputes exist, consider holding the hearing only on the affidavits.

## *D. Advancing Trial on the Merits*

At any time before or during the hearing on the motion, trial on the merits may be advanced and consolidated with the preliminary injunction motion, on motion or by the court sua sponte. Fed. R. Civ. P. 65(a)(2). It should be done on notice and might be appropriate when, for example, expedited discovery has produced virtually all of the discovery that would be produced for trial on the merits. Adequate notice must be provided to allow sufficient preparation for trial, and the court should consider whether the case is sufficiently urgent to give it preference over others. Note that the rule provides that consolidation "must preserve any party's right to a jury trial."

Whether or not consolidation is ordered, "evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. Fed. R. Civ. P. 65(a)(2). However, the court's findings of fact and conclusions of law made in connection with the motion for preliminary injunction are not binding at the trial and the decision on the merits.

## *E. Decision and Findings*

As with a TRO, see *supra* section I.D, Rule 65(d)(1) sets out the form and scope of the order granting an injunction (or restraining order) and notes, inter alia, that such orders shall

1. set forth the reasons for issuance (which should, of course, include a finding of no adequate remedy at law); and
2. describe in reasonable detail and not by reference to other documents the acts to be restrained or compelled. Thus, such an order should adequately inform the reader of the acts that are enjoined or compelled.[6]

6. *See, e.g.*, M.G. through Garcia v. Armijo, 117 F.4th 1230, 1249 (10th Cir. 2024) ("Injunctions simply requiring defendants to obey the law are too vague. . . . To satisfy Rule 65(d), the language of a preliminary injunction must be specific enough for the court to determine whether the defendant is complying."); Matter of Highland Capital Management, L.P., 105 F.4th 830, 836 (5th Cir. 2024) ("The purpose of the rule is to 'prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood.'") (citation omitted). *See also* 11A Charles Alan Wright & Arthur R. Miller, Fed. Prac. & Proc. Civ. § 2955 (3d ed. 2024) ("The drafting standard established by Rule 65(d) is that an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed.").

In addition, Fed. R. Civ. P. 52(a)(1) & (2) states that when "granting or refusing an interlocutory injunction, the court must . . . state the findings [of fact] and conclusions [of law] that support its action." The court's "findings and conclusions may be stated on the record after the close of the evidence or may appear in an opinion or a memorandum of decision filed by the court."

If the motion is granted, courts "must closely tailor injunctive relief to the specific harm alleged."[7]

Note that a preliminary injunction is binding "only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order of personal service or otherwise." Fed. R. Civ. P. 65(d)(2).

## *F. Security*

As with a temporary restraining order, a preliminary injunction generally may not be issued unless the applicant posts security in an amount deemed appropriate by the court in its discretion, although a nominal amount may be required. Fed. R. Civ. P. 65(c).[8] The court may also dispense with security when, for example, the movant has adequate resources to pay damages for a wrongfully issued injunction. If nominal or no security is ordered, the court should explain its reasons. The rule provides that no security shall be required of the government or its officers or agencies.

7. DraftKings v. Hermalyn, 118 F.4th 416, 423 (1st Cir. 2024). *See also* Commonwealth v. Biden, 57 F.4th 545, 556 (6th Cir. 2023) ("federal courts should not issue relief that extends further than necessary to remedy the plaintiff's injury"); California v. Azar, 911 F.3d 558, 584 (9th Cir. 2018) ("The scope of the remedy must be no broader and no narrower than necessary to redress the injury.").

8. *See* discussion at paragraph I.F, *supra*.

# 7.04 Grand Jury Selection and Instructions

*Fed. R. Crim. P. 6; 18 U.S.C. §§ 3321, 3331–3333*

## *A. Procedure*

The Jury Act, 28 U.S.C. § 1863(b)(7), states that the district jury plans required by that section may provide that the names of persons summoned for possible grand jury service be kept confidential. In addition, the Judicial Conference of the United States recommended at its session in September 1981 "that the district courts reexamine their jury selection plans . . . to consider whether the names of grand jurors should be excluded from public records." *Report of the Proceedings of the Judicial Conference of the United States* 39–40 (1981). The jury plans of many of the district courts now provide, therefore, that the names of grand jurors be kept confidential. Accordingly, the grand jury must be selected in closed session with only necessary court personnel and attorneys for the government in attendance so that the jurors' names will not be revealed in open court. Fed. R. Crim. P. 6(d) and (e)(5).

The grand jury consists of not fewer than sixteen persons (a quorum) and not more than twenty-three persons. 18 U.S.C. § 3321; Fed. R. Crim. P. 6(a)(1). Alternate grand jurors may be selected. Fed. R. Crim. P. 6(a)(2). After twenty-three persons have been selected as regular members of the grand jury, the usual practice in some districts is to call four to six alternates, who are sworn and instructed with the regular members. These alternates are then excused with the explanation that they will be subject to call, in the order in which they were selected, if it subsequently becomes necessary to excuse one of the regular members and replace that person with an alternate (to facilitate the assemblage of a quorum during the remaining life of the grand jury).

To accommodate the selection of alternates and the possibility of a few excusals for cause, the panel summoned to the courtroom for grand jury selection should consist of thirty to thirty-five persons.

A regular grand jury may serve up to eighteen months, followed by one extension, if that is determined to be in the public interest, for up to six months. Fed. R. Crim. P. 6(g). The usual term varies from district to district. Special grand juries formed pursuant to 18 U.S.C. §§ 3331–3333 may serve, with extensions, up to thirty-six months, and they have the added power of making certain reports under § 3333.

## *B. Opening Statement to the Venire Panel*

It is a pleasure to welcome you on behalf of the judges of the United States District Court for _____, as potential members of the grand jury for the period _____ through _____.

Although my welcoming remarks are intended for all, only twenty-three of you, plus ____ alternates, will be selected to form this new grand jury. Also, although your term will be for the next ____ months, you will sit as a jury from time to time only when called on by the Office of the U.S. Attorney. I cannot tell you in advance how much time will

be involved, but normally you can expect to be called an average of ____ days a month during your term of office.

Federal law requires that we select the grand jury from a pool of persons chosen at random from a fair cross section of the district in which the grand jury is convened. At this time, you are the pool of persons from which that selection is to be made.

The grand jury is involved with criminal matters. It does not concern itself with civil matters. Generally speaking, a criminal matter is one in which the government seeks to enforce a criminal law. By contrast, a civil matter is a court proceeding in which one party seeks to recover money damages or other relief from another party. The trial jury in a criminal matter listens to the evidence offered by the prosecution and defense during trial and renders a verdict of guilty or not guilty. The functions of a grand jury are quite different from those of a trial jury. A grand jury does not determine guilt or innocence. Its sole function is to decide, after hearing the government's evidence and usually without hearing evidence from the defense, whether a person should be indicted and stand trial for a federal crime.

Since the grand jury performs such an important role in protecting rights guaranteed by the Constitution, you should view it as a real privilege and honor to have an opportunity to serve.

We will now proceed with the selection of the grand jury. As the first step in the process, I am going to ask the clerk to call you forward in groups of ___ [usually 12] persons at a time so that I might ask each of you a few questions concerning your possible service as members of the grand jury.

## *C. Voir Dire Examination of the Panel*

1. Please state your name, occupation, and employer.

   [This information may assist you later in choosing and designating a foreperson and deputy foreperson pursuant to Fed. R. Crim. P. 6(c).]

2. Have any of you ever had, or are any of you currently having, any experience with a grand jury or with other aspects of the criminal justice system—as a witness, a victim, or an indicted person, for example—which might now make it difficult for you to serve impartially if you are selected?

3. Do any of you have any other reason why you cannot or should not serve on the grand jury?

   [Excuse any members of the panel whose responses to the voir dire questions dictate that they should be excused for cause.]

## *D. Selection and Oath*

1. Have the clerk call at random the names of twenty-three to twenty-nine persons from the remaining members of the panel. The first twenty-three shall constitute the regular

members of the grand jury, and the others (one to six) shall constitute the alternates. After the grand jury and alternates have been chosen, excuse the remaining members of the panel.

2. Designate and appoint a foreperson and deputy foreperson under Fed. R. Crim. P. 6(c).
3. Have the clerk administer the oath:

> Do each of you solemnly swear [affirm] to diligently inquire into and make true presentment or indictment of all such matters and things touching your present grand jury service that are given to you in charge or otherwise come to your knowledge; to keep secret the counsel of the United States, your fellows, and yourselves; and not to present or indict any person through hatred, malice, or ill will, nor to leave any person unpresented or unindicted through fear, favor, or affection or for any reward or hope or promise thereof, but in all your presentments and indictments to present the truth, the whole truth, and nothing but the truth to the best of your skill and understanding? If so, answer "I do."

## *E. Grand Jury Charge*[1]

Give the court's charge or instructions to the grand jury (including the alternates):

> Ladies and gentlemen:
>
> 1. Now that you have been empaneled and sworn as a grand jury, it is the court's responsibility to instruct you as to the law which should govern your actions and your deliberations as grand jurors.
> 2. The framers of our Federal Constitution deemed the grand jury so important for the administration of justice, they included it in the Bill of Rights. The Fifth Amendment to the United States Constitution provides in part that no person shall be held to answer for a capital or otherwise infamous crime without action by a grand jury. An infamous crime is a serious crime which may be punished by imprisonment for more than one year. The purpose of the grand jury is to determine whether there is sufficient evidence to justify a formal accusation against a person—that is, to determine if there is "probable cause" to believe the person committed a crime. If law enforcement officials were not required to submit to an impartial grand jury proof of guilt as to a proposed charge against a person suspected of having committed a crime, they would be free to arrest a suspect and bring that suspect to trial no matter how little evidence existed to support the charge.
> 3. The grand jury is an independent body and does not belong to any branch of the government. As members of the grand jury, you, in a very real sense, stand

1. This grand jury charge was written by the *Benchbook* Committee of the Federal Judicial Center and the Court Administration and Case Management Committee of the Judicial Conference of the United States. It was approved by the Judicial Conference as a replacement for each group's earlier grand jury charge, and is also available at https://jnet.ao.dcn/court-services/district-clerks-offices/jury-management/model-grand-jury-charge.

between the government and the person being investigated by the government. A federal grand jury must never be made an instrument of private prejudice, vengeance, or malice. It is your duty to see to it that indictments are returned only against those who you find probable cause to believe are guilty and to see to it that the innocent are not compelled to go to trial.

4. A member of the grand jury who is related by blood or marriage to a person under investigation, or who knows that person well enough to have a biased state of mind as to that person, or is biased for any reason, should not participate in the investigation of that person or in the return of the indictment. This does not mean that if you have an opinion you should not participate in the investigation. However, it does mean that if you have a fixed opinion before you hear any evidence, either on a basis of friendship or ill will or some other similar motivation, you should not participate in that investigation and in voting on the indictment.
5. Sixteen of the twenty-three members of the grand jury constitute a quorum and must be present for the transaction of any business. If fewer than this number are present, even for a moment, the proceedings of the grand jury must stop.

**Limitation on the powers of the grand jury**

6. Although as grand jurors, you have extensive powers, they are limited in several important respects.
7. You can only investigate conduct which violates federal criminal laws. Criminal activity which violates state law is outside your inquiry. Sometimes, though, the same conduct violates both federal and state law, and this you may properly consider.
8. There is also a geographic limitation on the scope of your inquiries in the exercise of your power. You may inquire only as to federal offenses committed in this district.
9. You cannot judge the wisdom of the criminal laws enacted by Congress, that is, whether or not there should or should not be a federal law designating certain activity as criminal. That is to be determined by Congress and not by you.
10. Furthermore, when deciding whether or not to indict, you should not consider punishment in the event of conviction.

**The grand jury's tasks and procedures**

11. The cases which you will hear will come before you in various ways. Frequently, suspects are arrested during or shortly after the commission of an alleged crime, and they are taken before a magistrate judge, who then holds a preliminary hearing to determine whether there is probable cause to believe that the person has committed a crime. If the magistrate judge finds such probable cause, they

will direct that the person be held for the action of the grand jury so that you can independently consider whether there should be an indictment.

12. Other cases will be brought before you by a government attorney—the U.S. attorney or an assistant U.S. attorney—before an arrest but after an investigation has been conducted by a governmental agency, such as the Federal Bureau of Investigation, the Treasury Department, the Drug Enforcement Administration, Postal Authorities, or other federal law enforcement officials.
13. Since the government attorney has the duty of prosecuting persons charged with the commission of federal crimes, the government attorney will present the matters which the government wants you to consider. The government will point out to you the laws which it believes have been violated, and will subpoena for testimony before you such witnesses as the government attorney may consider important and necessary and also any other witnesses that you may request or direct be called before you.
14. If during the course of your hearings, a different crime other than the one you are investigating surfaces, you have the right to pursue this new crime. Although you can subpoena new witnesses and documents, you have no power to employ investigators or to expend federal funds for investigative purposes. If the government attorney refuses to assist you or if you believe the attorney is not acting impartially, you may take it up with me or any judge of this court. You may use this power even over the active opposition of the government's attorneys, if you believe it is necessary to do so in the interest of justice.

**Evidence**

15. The evidence you will consider will normally consist of oral testimony of witnesses and written documents. Each witness will appear before you separately. When the witness first appears before you, the grand jury foreperson will administer to the witness an oath or affirmation to testify truthfully. After this has been accomplished, the witness may be questioned. Ordinarily, the government attorney questions the witness first. Next, the foreperson may question the witness, and then any other members of the grand jury may ask questions. In the event a witness does not speak or understand the English language, an interpreter may be brought into the grand jury room to assist in the questioning.
16. Witnesses should be treated courteously and questions put to them in an orderly fashion. If you have any doubt whether it is proper to ask a particular question, ask the government attorney for advice. If necessary, a ruling may be obtained from the court.
17. You alone decide how many witnesses you want to hear. You can subpoena witnesses from anywhere in the country, directing the government attorney to issue necessary subpoenas. However, persons should not ordinarily be subjected to disruption of their daily lives, harassed, annoyed, or inconvenienced, nor should

public funds be expended to bring in witnesses unless you believe they can provide meaningful evidence which will assist you in your investigation.

18. Every witness has certain rights when appearing before a grand jury. Witnesses have the right to refuse to answer any question if the answer would tend to incriminate them and the right to know that anything they say may be used against them. The grand jury should hold no prejudice against a witness who exercises the right against compulsory self-incrimination, and this can play no part in the return of any indictment.
19. Although witnesses are not permitted to have a lawyer present with them in the grand jury room, the law permits witnesses to confer with their lawyer outside of the grand jury room. Since an appearance before a grand jury may present complex legal problems requiring the assistance of a lawyer, you also cannot hold it against a witness if a witness chooses to exercise this right and leaves the grand jury room to confer with an attorney.
20. Ordinarily, neither the person being investigated by the government nor any witnesses on behalf of that person will testify before the grand jury. Upon their request, preferably in writing, you may afford that person an opportunity to appear before you. Because the appearance of the person being investigated before you may raise complicated legal problems, you should seek the government attorney's advice and, if necessary, the court's ruling before their appearance is permitted. Before that person testifies, they must be advised of their rights and required to sign a formal waiver. You should be completely satisfied that the person being investigated understands what they are doing. You are not required to summon witnesses which that person may wish to have examined unless probable cause for an indictment may be explained away by their testimony.
21. The determination of whether a witness is telling the truth is something that you must decide. Neither the court nor the prosecutors nor any officers of the court may make this determination for you.

    As you listen to witnesses presented to you in the grand jury room and hear their testimony, remember that you are the judge of each witness's credibility. You may believe the witness's testimony, or you may not believe it, in whole or in part. Determining the credibility of a witness involves a question of fact, not a question of law. It is for you to decide whether you believe the person's testimony. You may consider in that regard whether the witnesses are personally interested in the outcome of the investigation, whether their testimony has been corroborated or supported by other witnesses or circumstances, what opportunity they have had for observing or acquiring knowledge concerning the matters about which they testify, the reasonableness or probability of the testimony they relate to you, and their manner and demeanor in testifying before you.

22. Hearsay is testimony as to facts which are not personally known by the witness but which have been told or related to the witness by persons other than the person being investigated. Hearsay testimony, if deemed by you to be persuasive, may in itself provide a basis for returning an indictment. You must be satisfied only that there is evidence against the accused showing probable cause, even if such evidence is composed of hearsay testimony that might or might not be admissible in evidence at a trial.
23. Frequently, charges are made against more than one person. It will be your duty to examine the evidence as it relates to each person, and to make your finding as to each person. In other words, where charges are made against more than one person, you may indict only those persons who you believe properly deserve indictment. You must remember to consider the charges against each person separately.

**Deliberation and vote**

24. After you have heard all the evidence you wish to hear in a particular matter, you will then proceed to deliberate as to whether the person being investigated should be indicted. No one other than your own members or an interpreter necessary to assist a juror who is hearing or speech impaired is to be present while you are deliberating or voting.
25. To return an indictment charging an individual with an offense, it is not necessary that you find that individual guilty beyond a reasonable doubt. You are not a trial jury, and your task is not to decide the guilt or innocence of the person charged. Your task is to determine whether the government's evidence as presented to you is sufficient to cause you to conclude that there is probable cause to believe that the person being investigated committed the offense charged. To put it another way, you should vote to indict where the evidence presented to you is sufficiently strong to warrant a reasonable person's belief that the person being investigated is probably guilty of the offense charged.
26. Each juror has the right to express their view of the matter under consideration. Only after all grand jurors have been given full opportunity to be heard will a vote be taken. You may decide after deliberation among yourselves that further evidence should be considered before a vote is taken. In such case you may direct the government attorney to subpoena the additional documents or witnesses you want to consider.
27. When you have decided to vote, the foreperson shall designate a juror as secretary, who will keep a record of the vote, which shall be filed with the clerk of court. The record does not include the names of the jurors but only the number of those voting for the indictment. Remember, at least sixteen jurors must be present at all times, and at least twelve members must vote in favor of an indictment before one may be returned.

28. If twelve or more members of the grand jury, after deliberation, believe that an indictment is warranted, then you will request that the government attorney prepare the formal written indictment if one has not already been prepared and presented to you. The indictment will set forth the date and place of the alleged offense, will assert the circumstances making the alleged conduct criminal, and will identify the criminal statute violated. The foreperson will sign the indictment as a true bill in the space followed by the word "foreperson." It is the duty of the foreperson to sign every indictment, whether the foreperson voted for or against. If fewer than twelve members of the grand jury vote in favor of an indictment which has been submitted to you for your consideration, the foreperson will endorse the indictment "Not a True Bill" and return it to the court and the court will impound it.
29. Indictments which have been signed as a true bill will be presented to a judge [or a magistrate judge] in open court by your foreperson at the conclusion of each deliberative session of the grand jury. In the absence of the foreperson, a deputy foreperson may act in place of the foreperson and perform all functions and duties of the foreperson.

**Independence of the grand jury**

30. It is extremely important for you to realize that under the United States Constitution, the grand jury is independent of the United States attorney and is not an arm or agent of the Federal Bureau of Investigation, the Drug Enforcement Administration, the Internal Revenue Service, or any governmental agency charged with prosecuting a crime. Simply put, as I have already told you, the grand jury is an independent body and does not belong to any branch of the government.
31. However, as a practical matter, you must work closely with the government attorneys. They will provide you with important service in helping you to find your way when confronted with complex legal matters. It is entirely proper that you should receive this assistance. If past experience is any indication of what to expect in the future, then you can expect candor, honesty, and good faith in matters presented by the government attorneys. However, ultimately, you must depend on your own independent judgment, never becoming an arm of the United States Attorney's Office. The government attorneys are prosecutors. You are not. If the facts suggest that you should not indict, then you should not do so, even in the face of the opposition or statements of the government attorney. You would violate your oath if you merely "rubber-stamped" indictments brought before you by the government representatives.
32. Just as you must maintain your independence in your dealings with the government attorneys, so should your dealings with the court be on a formal basis. If you have a question for the court or desire to make a presentment or return an indictment to the court, you will assemble in the courtroom for these purposes.

Moreover, each juror is directed to report immediately to the court any attempt by any person who under any pretense whatsoever addresses or contacts the juror for the purpose gaining or with the intent to gain any information of any kind concerning the proceedings of the grand jury, or to influence a juror in any manner or for any purpose.

**The obligation of secrecy**

33. Your proceedings are secret and must remain secret permanently unless and until the court decrees otherwise. You cannot relate to your family, to the news or television reporters, or to anyone that which transpired in the grand jury room. There are several important reasons for this requirement. First, a premature disclosure of grand jury action may frustrate the ends of justice by giving an opportunity to the person being investigated to escape and become a fugitive or to destroy evidence. Second, if the testimony of a witness is disclosed, the witness may be subject to intimidation, retaliation, bodily injury, or other tampering before testifying at trial. Third, the requirement of secrecy protects an innocent person who may have come under investigation but has been cleared by the actions of the grand jury. In the eyes of some, investigation by a grand jury alone carries with it a suggestion of guilt. Thus, great injury can be done to a person's good name even though the person is not indicted. And fourth, the secrecy requirement helps to protect the members of the grand jury themselves from improper contacts by those under investigation. For all these reasons, therefore, the secrecy requirement is of the utmost importance and must be regarded by you as an absolute duty. If you violate your oath of secrecy, you may be subject to punishment.
34. To ensure the secrecy of grand jury proceedings, the law provides that only authorized persons may be in the grand jury room while evidence is being presented. Only the members of the grand jury, the government attorney, the witness under examination, the court reporter, and an interpreter, if required, may be present.
35. If you ultimately vote to return an indictment, the presence of unauthorized persons in the grand jury room could invalidate it. Particularly remember that no person other than the grand jury members themselves or an interpreter necessary to assist a juror who is hearing or speech impaired may be present in the grand jury room while the jurors are deliberating and voting. Although you may disclose matters which occur before the grand jury to attorneys for the government for use by such attorneys in the performance of their duties, you may not disclose the contents of your deliberations and the vote of any juror even to a government attorney.

### Conclusion

36. The importance of the service you will perform is demonstrated by the very comprehensive and important oath which you took a short while ago. It is an oath rooted in history, and thousands of your forebears have taken similar oaths. Therefore, as good citizens, you should be proud to have been selected to assist in the administration of the American system of justice.
37. The government attorney will now accompany you and will assist you in getting organized, after which you may proceed with the business to come before you.
38. The United States marshal and deputy United States marshals will attend to you and be subject to your appropriate orders.
39. You may now retire.

[*Note:* It is suggested that grand jurors be provided with a written copy of the charge and the *Handbook for Federal Grand Jurors* (Judicial Conference of the United States and Administrative Office of the U.S. Courts 2012), which is available at https://www.uscourts.gov/sites/default/files/grand-handbook.pdf.]

[The next charge should be given only if the grand jury is a special grand jury being impaneled pursuant to 18 U.S.C. §§ 3331–3334.]

### Additional powers of a special grand jury

As stated to you earlier, you are being impaneled as a special grand jury, as distinguished from a regular grand jury.

A regular grand jury is subject to two important restrictions: (1) its term or life is limited to a period of eighteen months, and (2) it can indict someone, on a finding of probable cause, or vote not to indict, but that is the extent of the action it can take; it cannot issue a report concerning its findings.

You, as a special grand jury, will be governed by a different set of rules or laws. First, while your term of service is also fixed at eighteen months (unless a majority of the jury determines sooner that your work has been completed), that term may be extended by the court for up to eighteen additional months. Second, unlike a regular grand jury, you are authorized under certain conditions at the end of your term to submit to the court, if a majority of you so desire, a report concerning your findings as to certain matters.

Specifically, the United States Code, title 18, section 3333, provides as follows:

> (a) A special grand jury impaneled by any district court, with the concurrence of a majority of its members, may, upon completion of its original term, or each extension thereof, submit to the court a report—
>
> (1) concerning noncriminal misconduct, malfeasance, or misfeasance in office involving organized criminal activity by an appointed public officer

or employee as the basis for a recommendation of removal or disciplinary action; or

(2) regarding organized crime conditions in the district.

The U.S. attorney will explain to you in more detail your powers and duties under this law. As you approach the end of your term the court will give you additional instructions if you request, or answer any questions you might have.

## *F. Indictment and Return*

### Accepting the Return

1. Under Fed. R. Crim. P. 6(f), the grand jury must return any indictment to a magistrate judge in open court. However, Rule 6(f) allows "the magistrate judge [to] take the return by video teleconference from the court where the grand jury sits" if that would avoid "unnecessary cost and delay." 2
2. At least twelve jurors must concur to return an indictment.
3. If fewer than twelve jurors concur, "the foreperson must promptly and in writing report the lack of concurrence to the magistrate judge."
4. Ask the government whether the indictment should remain sealed until the defendant is in custody or is released pending trial. Fed. R. Crim. P. 6(e)(4).
5. Discharge the jury.
6. The court may use Form AO 190, Record of the Number of Grand Jurors Concurring in an Indictment, https://jnet.ao.dcn/sites/default/files/pdf/AO_190.pdf, and Form AO 191, Report of a Grand Jury's Failure to Concur in an Indictment, https://jnet.ao.dcn/sites/default/files/pdf/AO_191.pdf.

For a suggested checklist and script for accepting the grand jury return, see the *Procedures Manual for United States Magistrate Judges*, Section 4: Grand Jury Proceedings at B & C (Jan. 2016), https://jnet.ao.dcn/sites/default/files/pdf/Grand.Jury_.Section4.final_.2.pdf.

2. The advisory committee note to this 2011 amendment states that receiving the return in court "remains the preferred practice because it promotes the public's confidence in the integrity and solemnity of a federal criminal proceeding." If video teleconference is used, "the grand jury (or the foreperson) would appear in a courtroom in the United States courthouse where the grand jury sits. . . . [T]he judge could participate by video from a remote location, convene court, and take the return."

# 7.05 Foreign Extradition Proceedings

*18 U.S.C. §§ 3181–3196*

A. Ascertain

1. the identity of the detainee as the individual being demanded by a foreign nation; and
2. whether the detainee is represented by counsel (see *supra* section 1.02: Appointment of Counsel or Pro Se Representation). 18 U.S.C. § 3006A(b).

B. Inform the detainee

1. of the charge or charges upon which extradition is sought and by which foreign nation;
2. of the right to a public extradition hearing, 18 U.S.C. § 3189;
3. under what circumstances the United States will pay the costs for subpoenaing material witnesses for the detainee's defense to extradition, 18 U.S.C. § 3191;
4. that at the hearing it will be determined:
   (a) whether the detainee is charged with a crime or crimes for which there is a treaty or convention for extradition between the United States and the demanding country, 18 U.S.C. §§ 3181, 3184; see also *Collins v. Loisel*, 259 U.S. 309 (1922);
   (b) whether the warrants and documents demanding the prisoner's surrender are properly and legally authenticated, 18 U.S.C. § 3190; and
   (c) whether the commission of the crime alleged is established by probable cause such as would justify commitment for trial if the offense had been committed in the United States, 18 U.S.C. § 3184.

**NOTE**

The Federal Rules of Criminal Procedure are not applicable to extradition proceedings. Fed. R. Crim. P. 1(a)(5)(A).

C. Obtain a waiver of hearing, hold the hearing, or grant a continuance if necessary (see *supra* section 1.03: Release or detention pending trial).

D. If a hearing is held, determine whether the detainee is extraditable.

E. If the detainee is found extraditable:

1. Commit the detainee to jail under surrender to the demanding nation, unless "special circumstances" justify their release on bail. *Wright v. Henkel*, 190 U.S. 40, 63 (1903); *Hu Yau-Leung v. Soscia*, 649 F.2d 914, 920 (2d Cir. 1981) ("We recognize that, because of the treaty obligations of the United States, there is a presumption against bail in [extradition proceedings], and only 'special circumstances' will justify bail.").
2. Notify the Secretary of State by filing a certified copy of your findings and a transcript of the proceedings.

F. If the detainee is found not extraditable, notify the Secretary of State by filing an appropriate report certifying to that effect.

# 7.06 Naturalization Proceedings

*8 U.S.C. §§ 1421, 1443–1448*

The Immigration Act of 1990 changed the naturalization process from a judicial proceeding to an administrative proceeding. The following is a brief outline of current naturalization practice. Note that the role of the district court has been curtailed.

## Procedure

1. The applicant for naturalization commences the proceeding by filing an application for naturalization with the Attorney General. 8 U.S.C. § 1445.
2. An employee of the Immigration and Naturalization Service (INS) examines the applicant and determines whether to grant or deny the application. The INS employee may invoke the aid of a district court in subpoenaing the attendance and testimony of witnesses and the production of books, papers, and documents. 8 U.S.C. § 1446(b), (d).
3. If the INS denies the application, the applicant may request a hearing before an immigration officer. 8 U.S.C. § 1447(a).
4. If the immigration officer denies the application, the applicant may seek de novo review in the federal district court. 8 U.S.C. § 1421(c).
5. If the INS fails to make a determination on the application within 120 days of the applicant's interview, the applicant may apply to a district court for a naturalization hearing. The court may determine the matter or remand the matter to the INS with appropriate instructions. 8 U.S.C. § 1447(b).
6. If an application is approved, a district court with jurisdiction under 8 U.S.C. § 1421(b) may administer the oath of allegiance.

## Oath of Allegiance

The following oath, based on the requirements listed in 8 U.S.C. § 1448(a), is designed for use with groups of applicants and includes various alternatives to bearing arms.

> Do you solemnly swear [affirm] to support the Constitution of the United States; to renounce and abjure absolutely and entirely all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty of which you have previously been a citizen or subject; to support and defend the Constitution and the laws of the United States against all enemies, foreign and domestic; to bear true faith and allegiance to the same; and to bear arms on behalf of the United States when required by law [*or* to perform noncombatant service in the Armed Forces of the United States when required by law, *or* to perform work of national importance under civilian direction when required by law]? Do you take this obligation freely without any mental reservation or purpose of evasion?

See also the oath provided at 8 C.F.R. § 337.1(a):

> I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely, without any mental reservation or purpose of evasion; so help me God.

If the petitioner cannot take the oath "with the words 'on oath' and 'so help me God' included, the words 'and solemnly affirm' shall be substituted for the words 'on oath,' the words 'so help me God' shall be deleted, and the oath shall be taken in such modified form." 8 C.F.R. § 337.1(b).

[*Note:* If the applicant refuses to bear arms or do noncombatant service in the armed forces, ascertain whether there is "clear and convincing evidence" that the refusal is based on "religious training and belief." 8 U.S.C. § 1448(a).]

An individual may be granted an expedited judicial oath administration ceremony upon demonstrating sufficient cause.

> In determining whether to grant an expedited judicial oath administration ceremony, a court shall consider special circumstances (such as serious illness of the applicant or a member of the applicant's immediate family, permanent disability sufficiently incapacitating as to prevent the applicant's personal appearance at the scheduled ceremony, developmental disability or advanced age, or exigent circumstances relating to travel or employment).

8 U.S.C. § 1448(c).

If the applicant possesses any hereditary title or orders of nobility in any foreign state, they must expressly renounce such title or orders of nobility in open court. 8 U.S.C. § 1448(b).

Address (or designate some member of the community to address or invite some of the newly naturalized citizens to address) the naturalized citizens on the general topic of the meaning of U.S. citizenship and the importance of each citizen's participation in the workings of a democracy. 36 U.S.C. § 154.

# 7.07 Excluding the Public from Court Proceedings

*18 U.S.C. § 3509; 28 C.F.R. § 50.9*

A. Closing of the courtroom is appropriate upon the court's own motion

1. in proceedings other than an actual trial, for the court to receive testimony from or about grand jury proceedings, argument using such testimony, or discussions of such testimony;
2. when the court receives testimony or argument on grand jury evidence or other sensitive information that is the subject matter of the closure motion;
3. when the court determines it is necessary to protect a child witness from "substantial psychological harm" or when it would "result in the child's inability to effectively communicate," 18 U.S.C. § 3509(e); or
4. when the law requires closure to protect some phase of a juvenile delinquency proceeding (18 U.S.C. § 5038).

B. The steps in closing trial or pretrial proceedings upon motion by a party are as follows:

1. Notice of motion

   Ensure that interested parties, including the media and crime victims,[1] are given notice and an opportunity to defend against the motion in court. If public notice was given of a scheduled hearing, further notice is not necessarily required. If the motion is ex parte or at an unusual time, the court should delay the hearing until interested parties have been notified.

2. The hearing

   The burden is on the movant seeking closure to show

   (a) that an overriding interest is likely to be prejudiced if closure is *not* granted. Such interests include

      (i) the defendant's right to a fair trial; and

      (ii) the government's interest in inhibiting disclosure of sensitive information (the court may, sua sponte, close the hearing to receive the preliminary information or proffer);

   (b) that alternatives to closure cannot adequately protect the overriding interest the movant is seeking to protect; and

   (c) that closure will probably be effective in protecting against the perceived danger.

1. Under 18 U.S.C. § 3771(a)(3), crime victims have the right "not to be excluded from any . . . public proceeding [involving the crime] unless . . . testimony by the victim would be materially altered if the victim heard other testimony at that proceeding."

3. Decision by the court

(a) In a pretrial proceeding, when the moving party asserts that the defendant's right to a fair trial will be prejudiced if hearings are conducted publicly, the court should consider

(i) the nature and extent of the publicity to date;

(ii) the size of the jury pool;

(iii) the ease of a change of venue;

(iv) the ability to cure any harm through voir dire;

(v) whether the public already has the information; and

(vi) the impact of further publicity on the publicity that has already occurred.

(b) In deciding whether alternatives to closure can adequately protect the overriding interest that the movant seeks to protect, the court should consider the following alternatives:

(i) granting a continuance;

(ii) granting severance;

(iii) changing the venue;

(iv) changing the venire;

(v) engaging in further voir dire questioning;

(vi) permitting additional peremptory challenges;

(vii) sequestering the jury; and

(viii) instructing the jury.

4. Findings and order

(a) If the court decides to order closure

(i) it must make findings that

(a) without closure, there is a substantial probability that the defendant's right to a fair trial would be impaired;

(b) steps less drastic than closure would be ineffective in preserving the defendant's right to a fair trial; and

(c) closure would achieve the desired goal of protecting the defendant's right to a fair trial.

(ii) the closure must be as narrow as possible;

(iii) the findings must be on the record; and

(iv) the findings must be adequate to support an order of closure.

(b) The order must

(i) be no broader than is necessary to protect the interest asserted by the moving party; and

(ii) be tailored to ensure that proceedings that are closed encompass no more than is actually necessary to protect the interest asserted by the moving party.

(c) Determine whether the order itself should be sealed.

C. Department of Justice Policy

> There is a strong presumption against closing proceedings, and the Department foresees very few cases in which closure would be warranted. Only when a closed proceeding is plainly essential to the interests of justice should a Government attorney seek authorization from the Deputy Attorney General to move for or consent to closure of a judicial proceeding. Government attorneys should be mindful of the right of the public to attend judicial proceedings and of the Department's obligation to the fair administration of justice.[2]

Government attorneys who seek authorization to move for closure, or to consent to closure, "should include a detailed explanation of the need for closure, addressing each of the factors set forth in 28 C.F.R. § 50.9(c)(1)-(6)." Among those factors are whether: there is a substantial likelihood of danger to specified individuals; ongoing investigations may be jeopardized; or a person's right to a fair trial may be impaired. "The request must also consider reasonable alternatives to closure, such as delaying the proceeding, if possible, until the reasons justifying closure cease to exist. . . . As soon as the justification for closure ceases to exist, the Government must file an appropriate motion to have the records unsealed. See 28 C.F.R. § 50.9(f)."[3]

## Other FJC Sources

- Robert Timothy Reagan, Sealing Court Records and Proceedings: A Pocket Guide (Federal Judicial Center 2010), https://fjc.dcn/content/sealing-court-records-and-proceedings-pocket-guide-0
- Catherine C. Eagles, Selected Cases & Authorities: Open Courts & Jury Issues (Nov. 1, 2024) (collection of Supreme Court and appellate cases on keeping courts open to the public and when the proceedings may be closed, provided at the FJC's Phase II Orientation for U.S. District Judges, Dec. 4, 2024, program session "Managing a High Profile Case"), https://fjc.dcn/sites/default/files/session/2025/2024%20Open%20Courts%20and%20Transparent%20Justice%20Selected%20Cases%20.pdf
- Recent Developments Regarding Standards and Procedures for Barring the Public from the Courtroom During a Criminal Trial, Bench Comment 1984, no. 2, https://fjc.dcn/content/bench-comment-1981-1998-0.

2. U.S. Dep't of Just., Justice Manual, § 9-5.150 – Authorization to Close Judicial Proceedings to Members of the Press and Public (January 2020), https://www.justice.gov/jm/jm-9-5000-issues-related-trials-and-other-court-proceedings. This section is based, in part, on 28 C.F.R. § 50.9: Policy with Regard to Open Judicial Proceedings.

3. Justice Manual at § 9-5.150.

# 7.08 Oaths

## Affirmation in lieu of oath

Any person who has conscientious scruples about taking an oath may be allowed to make an affirmation. See, e.g., Fed. R. Civ. P. 43(b); Fed. R. Crim. P. 1(b)(6). Substitute the words "solemnly affirm" for the words "solemnly swear" at the beginning of the oath and delete the words "so help me God" at the end. (If appropriate, courts may wish to substitute "this I do affirm under the pain and penalties of perjury" for "so help me God" at the end.)

## Sample oaths

The following are suggested oaths for several situations. A statutory cite after an oath indicates that the oath is taken directly from the statute.

If the person taking an oath or making an affirmation does not understand English, the oath or affirmation should be in a language they understand.

### *Oath to attorneys*

(admission to practice before the court)

I, _____, do solemnly swear [*or* affirm] that to the best of my knowledge and ability I will support and defend the Constitution of the United States against all enemies, foreign and domestic, and that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will demean myself as an attorney, proctor, and solicitor of this court uprightly and according to law, so help me God.

### *Oath to clerks and deputies*

(to be made by each clerk of court and all deputies before they assume their duties)

I, _____, having been appointed _____, do solemnly swear [*or* affirm] that I will truly and faithfully enter and record all orders, decrees, judgments, and proceedings of such court, and will faithfully and impartially discharge all other duties of my office according to the best of my abilities and understanding. So help me God.

[28 U.S.C. § 951]

### *Oath to crier (bailiff)*

(may be administered in those districts that employ a temporary court crier)

Do you solemnly swear [*or* affirm] that you will faithfully, impartially, and to the best of your ability discharge the duties of crier [bailiff] of this court, to which office you have

been appointed, and will strictly obey all orders of the court and your superiors as crier [bailiff] during the session now being held, so help you God?

*Oath to crier (bailiff) to conduct jury to view place*

Do you solemnly swear [*or* affirm] that you will, together with the United States Marshal, keep these jurors together and permit no one to talk to them, aside from the guides, nor talk to them yourself regarding the case under consideration, until discharged by the court, so help you God?

*Oath to guides to conduct jury to view place*

Do each of you solemnly swear [*or* affirm] that you will guide these jurors on an inspection of the _____ involved in this action and that you will permit no one to talk to them, nor talk to them yourselves, regarding the case under consideration, except as instructed by the court, so help you God?

*Oath to crier (bailiff) to keep jury during adjournment*

Do you solemnly swear [*or* affirm] that you will keep the jurors composing this panel together until the next meeting of this court, and during all other adjournments of the court during the trial of this case; that you will permit no person to speak or communicate with them, nor do so yourself, on any subject connected with the trial; and that you will return them to court at the next meeting thereof, so help you God?

*Oath to crier (bailiff) and marshal after cause is submitted*

Do you solemnly swear [*or* affirm] that you will keep these jurors together in some private and convenient place and not permit any person to speak to or communicate with them, nor do so yourself unless by order of the court, nor ask whether they have agreed on a verdict, and that you will return them to court when they have so agreed, or when ordered by the court, so help you God?

*Oath to defendant*

(as to defendant's financial ability to employ counsel)

Do you solemnly swear [*or* affirm] that all of the statements you are about to make relative to your financial ability to employ counsel will be the truth, the whole truth, and nothing but the truth, so help you God?

*Oath for deposition*

Do you solemnly swear [*or* affirm] that all the testimony you are about to give in the matter now in hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

*Oath to grand jury foreperson and deputy foreperson*

Do you, as foreperson and deputy foreperson of this grand jury, solemnly swear [*or* affirm] that you will diligently inquire into and make true presentment or indictment of all public offenses against the United States committed or triable within this district of which you shall have or can obtain legal evidence; that you will keep your own counsel and that of your fellows and of the United States and will not, except when required in the due course of judicial proceedings, disclose the testimony of any witness examined before you, or anything which you or any other grand juror may have voted on in any matter before you; that you shall present or indict no person through malice, hatred, or ill will, nor leave any person unpresented or unindicted through fear, favor, or affection, or for any reward or for the promise or hope thereof; and that in all your presentments or indictments you shall present the truth, the whole truth, and nothing but the truth to the best of your skill and understanding, so help you God?

*Oath to other grand jurors*

Do each of you solemnly swear [*or* affirm] that you shall diligently inquire into and make true presentment or indictment of all such matters and things touching your present grand jury service that are given to you in charge or that otherwise come to your knowledge; that you shall keep secret the counsel of the United States, your fellows, and yourselves; that you shall not present or indict any person through hatred, malice, or ill will, or leave any person unpresented or unindicted through fear, favor, or affection or for any reward or for the hope or promise thereof; and that in all your presentments and indictments you shall present the truth, the whole truth, and nothing but the truth to the best of your skill and understanding, so help you God?

*or*

Do each of you solemnly swear [*or* affirm] that you will well and truly observe on your part the same oath that your foreperson and deputy foreperson have now taken before you on their part, so help you God?

*Oath to venirepersons*

(to be administered at juror qualification or voir dire)

Do you solemnly swear [*or* affirm] that you will truthfully answer all questions that shall be asked of you regarding your qualifications as a juror in the case now called for trial, so help you God?

### *Oath to interpreter*

(The interpreter's duties include interpreting the oath to the witness, the verbatim questions of the court and counsel, and the answers thereto.)

Do you solemnly swear [*or* affirm] that you will justly, truly, fairly, and impartially act as an interpreter in the case now before the court, so help you God?

[*Note:* In addition to the initial oath, the Tenth Circuit has stated that "before the verdict is announced, [the court] should inquire . . . whether the interpreter abided by her oath to act strictly as an interpreter and not to participate in the deliberations. Ideally, the judge should then question the jurors to the same effect." *United States v. Dempsey*, 830 F.2d 1084, 1092 (10th Cir. 1987) (note, however, that "absent any indication of misbehavior this failure to inquire does not" warrant a new trial).]

### *Oath to interpreter for a deaf juror*[1]

Do you solemnly swear [*or* affirm] that you will accurately interpret from the English language into the sign language understood by the juror, who is deaf, and from that language as used by the juror into the English language; that, while you are present in the jury room during the jury's deliberations, your communications with that juror and the other jurors will be limited to translating for the deaf juror what the other jurors say and for the others what the deaf juror says, so that you will not express any of your own ideas, opinions, or observations or otherwise participate yourself in the jury's deliberations; and that you will keep secret all that you hear in the jury room and will not discuss with anyone the testimony or merits of the case unless ordered differently by the court or authorized by the deaf juror after the trial is finished to disclose anything that juror said during the deliberations, so help you God?

### *Oath to jurors in civil cases (including condemnation cases)*

Do each of you solemnly swear [*or* affirm] that you will well and truly try the matters in issue now on trial and render a true verdict according to the law and the evidence, so help you God?

### *Oath to jurors in criminal cases*

(This oath may also be administered to alternate jurors by substituting for the first line: "Do you, as an alternate juror.")

Do each of you solemnly swear [*or* affirm] that you will well and truly try, and a true deliverance make in, the case now on trial, and render a true verdict according to the law and the evidence, so help you God?

1. This sample oath is based on one given to an interpreter in *New York v. Green*, 561 N.Y.S. 2d 130 (N.Y. County Ct. 1990). It is provided as one example of the form for such an oath.

*Oath to master*

Do you solemnly swear [*or* affirm] that you will well and truly hear and determine the facts and true findings according to the evidence, so help you God?

*Oath to reporter or stenographer*

(for grand jury proceedings, to be administered by the grand jury foreperson)

Do you solemnly swear [*or* affirm] that you will well and truly take and record the evidence about to be presented to this grand jury; that you will translate such testimony as required; and that you will keep secret all information you receive as reported at these grand jury proceedings, except on order of the court, so help you God?

*Oath to witness*

Do you solemnly swear [*or* affirm] that all the testimony you are about to give in the case now before the court will be the truth, the whole truth, and nothing but the truth, so help you God?

*Oath of allegiance*

(naturalization proceedings)

I hereby declare, on oath, that I absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, of whom or which I have heretofore been a subject or citizen; that I will support and defend the Constitution and laws of the United States of America against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I will bear arms on behalf of the United States when required by the law; that I will perform noncombatant service in the Armed Forces of the United States when required by the law; that I will perform work of national importance under civilian direction when required by the law; and that I take this obligation freely, without any mental reservation or purpose of evasion; so help me God.

[8 C.F.R. § 337.1(a)]

[*Note:* If the petitioner refuses to bear arms, ascertain whether there is "clear and convincing evidence" that the refusal is based on "religious training and belief." If so, the petitioner should be required to take the remainder of the oath, including at least one of the alternatives to bearing arms. 8 U.S.C. § 1448(a). See also 8 C.F.R. § 337.1(b) (may substitute "and solemnly affirm" for "on oath").]

*Oath to justices, judges, and magistrate judges*

I, _____, do solemnly swear [or affirm] that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I

will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God.

[28 U.S.C. § 453]

*Oath to public officials*

(given to all individuals, except the President, who are "elected or appointed to an office of honor or profit in the civil service or uniformed services," 5 U.S.C. § 3331)

I, _____, do solemnly swear [***or*** affirm] that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

## Table of Authorities

The following is a brief compilation of authorities with respect to taking an oath or making an affirmation.

| | |
|---|---|
| **affirmation**— | |
| in lieu of oath | Fed. R. Civ. P. 43(b)<br>Fed. R. Crim. P. 1(b)(6) |
| **bankruptcy**— | |
| authority to administer | 11 U.S.C. § 343 |
| **clerks and deputies**— | |
| oath of office | 28 U.S.C. § 951 |
| authority to administer oaths | 28 U.S.C. § 953 |
| **deposition**— | |
| taken before an officer or other person so appointed | Fed. R. Civ. P. 28(a) |
| **grand jury foreperson**— | |
| authority to administer oaths | Fed. R. Crim. P. 6(c) |
| **interpreter**—to take oath | Fed. R. Evid. 604 |
| **interrogatories**— | |
| to answer under oath | Fed. R. Civ. P. 33(b)(3) |
| **jurors, alternate**— | |
| to take same oath as regular jurors | Fed. R. Crim. P. 24(c)(2)(A) |

# Table of Authorities

## The Federal Judicial Center



**About the Federal Judicial Center**

The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629) on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The organization of the Center reflects its primary statutory mandates. The Education Division plans and produces education and training for judges and court staff, including in-person and virtual programs, videos and podcasts, publications, curriculum packages for in-district training, and web-based resources. The Research Division examines and evaluates current and alternative federal court practices and policies. This research assists Judicial Conference committees, who request most Center research, in developing policy recommendations. The Center's research also contributes substantially to its educational programs. The Federal Judicial History Office helps courts and others study and preserve federal judicial history. The International Office provides information to judicial and legal officials from foreign countries and informs federal judicial personnel of developments in international law and other court systems that may affect their work. Three units of the Director's Office—the Information Technology Office, the Office of Administration, and the Editorial & Information Services Office—support Center missions through technology, editorial and design assistance, and organization and dissemination of Center resources.