Manual on Recurring Issues in Criminal Trials

Seventh Edition

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Note to Readers

Citations to the U.S. Code are to the 2018 edition. All citations to rules are to the Federal Rules of Criminal Procedure unless otherwise noted. Case summaries should not be considered substitutes for the judicial opinions they reference.

Contents

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Sixth Amendment Rights

The Sixth Amendment to the U.S. Constitution guarantees all defendants in a criminal trial the right to counsel, the right to a fair trial, and the right to present a defense. Yet the United States Supreme Court also recognizes that trial courts may restrict or revoke these rights in some circumstances, such as when a defendant waives the right to counsel, or when the court must protect the interests of jurors or witnesses, or when the defendant's conduct disrupts the proceedings.

I

The Right to Counsel

The Sixth Amendment right to counsel is one of the most fundamental rights guaranteed by the Constitution. The entitlement of a criminal defendant to representation by counsel encompasses several rights: (1) the right to be represented by counsel or to choose to represent oneself (i.e., to proceed pro se), (2) the right to have the government pay for counsel where a defendant cannot afford a lawyer (i.e., the right to appointment of counsel), and (3) the right to select the particular counsel who provides the representation. Although a defendant normally has the right to select counsel, that right is not absolute. In addition, courts have the power to find that a defendant has forfeited the right to counsel as a result of misconduct.

II

The Right to Pro Se (Self) Representation

The Sixth Amendment right to representation also includes the right to self-representation. Faretta v. California, 422 U.S. 806 (1975). Self-represented defendants are said to proceed pro se. *See id.* at 817 ("[F]orcing a lawyer upon an unwilling defendant" would violate the accused's constitutional rights.). "The right to self-representation extends to both guilt and sentencing proceedings." United States v. Tate, 535 F. App'x 359, 361 (5th Cir. 2013) (citing United States v. Davis, 285 F.3d 378, 385 (5th Cir. 2002)); *see also* United States v. Salerno, 61 F.3d 214, 219–21 (3d Cir. 1995). However, the Sixth Amendment right to self-representation is not absolute. The court may not permit defendants to represent themselves unless they possesses the necessary mental competence. Indiana v. Edwards, 554 U.S. 164, 177–78 (2008). In addition, a defendant's choice to proceed pro se must be made knowingly (with sufficient understanding of the consequences of the choice) and voluntarily (without undue force by the court or unavoidable circumstances) for waiver of counsel to be effective. *See Faretta*, 422 U.S. at 835; United States v. Gewin, 471 F.3d 197, 198–99 (D.C. Cir. 2006); *Tate*, 535 F. App'x at 361–62. *See also* United States v. Robinson, 753 F.3d 31 (1st Cir. 2014); United States v. Owen, 963 F.3d 1040 (11th Cir. 2020). Even where defendants' desire to represent themselves is knowing and voluntary, their choice to proceed pro se without appointed (or retained) counsel must be communicated in an unequivocal and timely waiver of the Sixth Amendment right to counsel. *See* United States v. Frazier-El, 204 F.3d 553 (4th Cir. 2000); United States v. Farias, 618 F.3d 1049 (9th Cir. 2010). *See also* United States v. Brown, 956 F.3d 522 (8th Cir. 2020).

The trial court may always exercise discretion to refuse or revoke the right to proceed pro se if the necessary foundation for waiver of counsel has not been established. *See Faretta*, 422 U.S. at 835 (holding that defendant's request to forgo benefits of counsel must be honored only if it is knowing and intelligent). *See also* Wheat v. United States, 486 U.S. 153, 164 (1988) (affirming district court's refusal to permit substitution of counsel as within that court's discretion).

II.A

Mental Competency to Proceed Pro Se

A court's determination of whether a criminal defendant is competent to exercise the right of self-representation in a way that ensures a fair trial should not be confused with the mental fitness to stand trial (by consulting with counsel and assisting in the defense). Indiana v. Edwards, 554 U.S. 164, 175 (2008) (cautioning courts "against the use of a single mental competency standard"). While it seems apparent that a higher level of competency is required to represent oneself than merely to be able to stand trial while represented by counsel, the *Edwards* decision has not been read by federal courts to establish a separate, independent standard for assessing mental competency to act pro se and to stand trial under the Sixth Amendment.

The issue in *Edwards* was whether the U.S. Constitution and the Sixth Amendment permitted a state trial court to force counsel on a criminal defendant who, although mentally ill, was nonetheless competent to stand trial. The Supreme Court concluded that

> the Constitution permits judges to take realistic account of the . . . defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits States 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.

Edwards, 554 U.S. at 177–78.

Although the *Edwards* Court specifically addressed whether state trial judges may impose a higher standard of competence to permit self-representation, federal courts have extended the *Edwards* principles to criminal defendants in federal trials. *See* United States v. Berry, 565 F.3d 385, 392 (7th Cir. 2009) ("[E]very court to consider *Edwards* in the context of a federal criminal trial has thus far taken it for granted that its holding controls.") (citing cases).

In general, federal courts read *Edwards* to mean that in a federal criminal trial, the trial court is in the best position to make an individualized assessment of whether a criminal defendant "who is otherwise able to satisfy the competence standard may nevertheless be 'unable to carry out the basic tasks needed to present his own defense without the help of counsel.'" United States v. Bernard, 708 F.3d 583, 589–90 (4th Cir. 2013) (quoting *Edwards*, 554 U.S. at 175–76). Decisions from several federal courts of appeals have since read *Edwards* the same way. *See* United States v. Nichols, 77 F.4th 490, 498 (7th Cir. 2023) ("*Edwards* is a rule of permission, not requirement: Courts may restrict a defendant's right to represent himself if, and only if, he falls into a 'grey area' of competence—where the defendant understands the proceedings against him but labors under serious delusions or suffers from otherwise debilitating mental infirmities.") (citing *Edwards*, 554 U.S. at 175–78)). *See also* Holland v. Florida, 775 F.3d 1294, 1310–11 (11th Cir. 2014).

The standards for determining competency to stand trial and mental competency to waive counsel therefore may differ depending on the jurisdiction; but there is no basis in the law to presume that a dual standard of competency for trial exists. The only bright line appears to be that when the criminal defendant has a severe mental illness, the defendant's right to self-defense should be weighed against the ability to conduct a fair trial without the assistance of counsel. That said, a defendant whose competence to stand trial is in question cannot legally waive his or her right to counsel. *See* United States v. Ross, 703 F.3d 856, 871 (6th Cir. 2012) ("[T]he Constitution requires a defendant to be represented by counsel at his own competency hearing, even if he has previously made a knowing and voluntary waiver of counsel.").

II.B

Knowing and Voluntary Waiver of Counsel

Before a criminal defendant may waive the Sixth Amendment right to counsel and proceed pro se, the court must ensure that the defendant's "eyes are wide open." *See Faretta*, 422 U.S. at 835. To do this, trial courts conduct a *Faretta* hearing, during which the court engages with the defendant (and all interested parties) to establish that the defendant's choice to waive counsel is made with free will and a concrete understanding of the consequences of the decision. United States v. Boultinghouse, 784 F.3d 1163, 1171 (7th Cir. 2015). Waiver of the Sixth Amendment right to counsel is permissible even though defendants "may ultimately conduct [their] own defense to [their] detriment." United States v. Avery, 208 F.3d 597, 601 (7th Cir. 2000).

During the *Faretta* hearing, a trial court questions all interested parties (including appointed counsel) on the record about whether the defendant's proposed waiver is made (1) knowingly and intelligently and (2) voluntarily. *Faretta*, 422 U.S. at 835. *See also* McKaskle v. Wiggins, 465 U.S. 168, 173 (1984) (summarizing *Faretta*). Because the validity of the waiver of counsel can have a critical impact on the viability of a conviction, the prosecutor should be present during the *Faretta* hearing. Determining whether a waiver is knowing or voluntary depends on whether the defendant appreciates the dangers and disadvantages of self-representation. *See* United States v. Barnes, 693 F.3d 261, 271 (2d Cir. 2012). *See also* United States v. Harrington, 814 F.3d 896, 899 (7th Cir. 2016) (outlining four factors to be evaluated when determining whether a waiver of counsel is "knowing and intelligent": (1) "the extent of the district court's 'formal' inquiry into the defendant's decision" to proceed pro se, (2) "whether other evidence in the record shows that 'the defendant understood the dangers and disadvantages of self-representation,'" (3) "the defendant's experience and background," and (4) "the context of the defendant's choice" to self-represent (citations omitted)). The court should therefore review the charges, penalties, and possible defenses with the defendant. United States v. Hansen, 929 F.3d 1238, 1249 (10th Cir. 2019). Two other relevant, "case-specific factors" are "the complex or easily grasped nature of the charge" and "the stage of the proceeding." Iowa v. Tovar, 541 U.S. 77, 88 (2004). A defendant who proceeds pro se, but is later convicted, may claim that the Sixth Amendment waiver was involuntary because the decision was forced by the inadequacy (perceived or actual) of appointed counsel. Where the record does not reflect a voluntary release with full knowledge of the consequences of proceeding pro se, the appellate courts are likely to reverse. *See, e.g.*, United States v. Culbertson, 670 F.3d 183, 193 (2d Cir. 2012) ("the District Court did not apprise [defendant] of the consequences of proceeding pro se or assess his capacity to make an informed choice [in a full *Farett*a hearing].").

In general a defendant may make a knowing decision to proceed pro se without technical legal knowledge. *Faretta*, 422 U.S. at 836. *See also* United States v. O'Neal, 844 F.3d 271, 279 (D.C. Cir. 2016) (defendant does not need technical legal knowledge); Freeman v. Pierce, 878 F.3d 580, 586 (7th Cir. 2017) (holding that judge's inquiry into technical legal knowledge was "not relevant to an assessment of his knowing exercise of the right to defend himself.") (citing *Faretta*, 422 U.S. at 836). But it is appropriate and desirable for the court to inquire about and consider the defendant's intelligence and knowledge. *See Hansen*, 929 F.3d at 1249 (courts should consider defendant's education, sophistication, experience, and totality of circumstances). "The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

II.C

Unequivocal Waivers

Defendants who wish to proceed pro se must clearly and unequivocally assert their intention to represent themselves. United States v. Mackovich, 209 F.3d 1227, 1236 (10th Cir. 2000). Requiring a clear and unequivocal waiver protects a defendant from inadvertently or unintentionally relinquishing counsel. *Id.* An unequivocal waiver "also prevents a defendant from taking advantage of and manipulating the mutual exclusivity of the rights to counsel and self-representation." *Id.* (internal quotation marks omitted). *See also* United States v. Hansen, 929 F.3d 1238 (10th Cir. 2019); United States v. Stanley, 739 F.3d 633 (11th Cir. 2014).

Courts presume that a defendant who vacillates between asserting the right to proceed pro se and asserting the right to counsel is requesting the assistance of counsel. United States v. Barnes, 693 F.3d 261 (2d Cir. 2012); United States v. Mendez-Sanchez, 563 F.3d 935 (9th Cir. 2009). The defendant may not delay the proceedings by placing the judge "in a position where, in moving along with the business of the court, the judge appears to be arbitrarily depriving the defendant of counsel." United States v. Allen, 895 F.2d 1577, 1578 (10th Cir. 1990) (internal quotation marks omitted).

II.D

Timely Waivers

A request for waiver of counsel must be timely. And a waiver request asserted in a timely manner must be honored. Martinez v. Ct. of Appeal of Cal., 528 U.S. 152, 156, 162 (2000) (noting that "most courts" require a defendant to assert the right to self-representation "in a timely manner"). The commencement of trial is critical to the timeliness of a request to waive counsel, as waivers are evaluated quite differently before and during trial. *See* United States v. Simpson, 845 F.3d 1039, 1053 (10th Cir. 2017); Hill v. Curtin, 792 F.3d 670, 678 (6th Cir. 2015) (*Faretta* established that a request to proceed pro se is timely if made "weeks before trial."). In many federal circuits, a motion to proceed pro se is timely if made before the jury is empaneled, unless the action is shown to be a delaying tactic. *See Simpson*, 845 F.3d at 1039; United States v. Bankoff, 613 F.3d 358, 373 (3d Cir. 2010) (pro se request may be found timely even if made on the eve of trial); United States v. Smith, 830 F.3d 803, 809–12 (8th Cir. 2016); United States v. Vernier, 381 F. App'x 325, 328 (5th Cir. 2010); United States v. Young, 287 F.3d 1352, 1353 (11th Cir. 2002); United States v. Matsushita, 794 F.2d 46, 51 (2d Cir. 1986) (right to proceed pro se is unqualified only if exercised before trial starts). *But see* Robards v. Rees, 789 F.2d 379, 384 (6th Cir. 1986) (recognizing cases so holding but denying a request to proceed pro se not made until jurors had been called to court, where request was found to be delaying tactic). In contrast, once a trial is underway, the defendant's right to discharge appointed counsel and appear pro se is sharply curtailed. *See, e.g.*, United States v. Washington, 353 F.3d 42, 46 (D.C. Cir. 2004) (denying a request to proceed pro se made just before closing argument); *Matsushita*, 794 F.2d at 51 (denying a request to proceed pro se after the defense rested case-in-chief).

II.E

Express and Implicit Waivers

The Supreme Court has not held that *Faretta* requires a waiver of counsel to proceed pro se at trial to be made expressly. *See* Vreeland v. Zupan, 906 F.3d 866, 877 (10th Cir. 2018). As a result, most courts have found that the right to counsel may be waived by conduct. *See, e.g.*, United States v. Turner, 897 F.3d 1084, 1103 (9th Cir. 2018); United States v. Oreye, 263 F.3d 669, 670 (7th Cir. 2001). *But see* United States v. Ductan, 800 F.3d 642, 650 (4th Cir. 2015) (representation by counsel is default position until defendant waives that right expressly; waiver by conduct precluded in Fourth Circuit). Parts 1.III.B and 1.III.C below discuss in more detail the types of conduct by which a defendant may be found to have implicitly waived the right to counsel. However, a court should exercise great caution in excusing counsel in the absence of an express waiver. Absent extreme misconduct, the court should engage in a *Faretta* colloquy (as described below in Part 1.II.K: *Faretta* Hearing/Colloquy) and directly inquire whether the defendant wants to waive counsel. *See* United States v. Goldberg, 67 F.3d 1092, 1101 (3d Cir. 1995) (while defendants may forfeit the right to counsel when they engage in misconduct after being warned by the court that they could lose counsel, a court is on "tenuous ground" if it relies merely on "waiver by conduct" without any warning or without conducting a *Faretta* colloquy); *Turner*, 897 F.3d at 1104 (waiver by conduct strengthened when defendant warned that further misconduct could lead to loss of counsel).

II.F

Appointment of Standby Counsel

While pro se defendants have no constitutional right to be advised by standby counsel while representing themselves, if a criminal defendant proceeds pro se, it is generally advisable for the court to appoint standby or "shadow" counsel to assist the defendant as needed. Faretta v. California, 422 U.S. 806, 834 n.46 (1975). *See also* United States v. Bova, 350 F.3d 224, 226–27 (1st Cir. 2003) (although standby counsel is preferred, it is not constitutionally required); United States v. Irorere, 228 F.3d 816, 828 n.2 (7th Cir. 2000).[1] Standby counsel can help make the trial more manageable. And standby counsel can be particularly useful in situations where a defendant's choice to proceed pro se is motivated in part by dissatisfaction with counsel, since it will help to rebut claims that the defendant was compelled to self-represent, rather than having voluntarily chosen to do so. *See* United States v. Owen, 854 F.3d 536, 543 (8th Cir. 2017). Alternatively, the court may appoint substitute counsel to avoid forcing the defendant to proceed pro se. *See, e.g.*, United States v. Culbertson, 670 F.3d 183, 193 (2d Cir. 2012). If the court determines that appointed counsel is competent but refused by an indigent defendant—once or multiple times—then the only other option is to require the defendant to proceed pro se (see below Part 1.III.B regarding a Hobson's choice). Appointment of standby counsel is within the court's discretion. United States v. Mamoth, 47 F.4th 394 (5th Cir. 2022).

The Sixth Amendment requires that pro se defendants be allowed to control the organization and content of their defense. McKaskle v. Wiggins, 465 U.S. 168,

1. Use of standby counsel will help the court refrain from improperly providing strategy advice to a pro se defendant during trial. *See, e.g.*, United States v. Francois, 715 F.3d 21, 30–31 (1st Cir. 2013). *See also id.* at 28–29 (rejecting "Hobson's choice" argument).

178 (1984). A pro se defendant has a right to use the advice of standby counsel however the defendant chooses. *Id.* at 178, 184. Standby counsel's role is typically to assist defendants with procedural and technical issues and to step in if defendants cannot continue representing himself. Standby counsel may assist a pro se defendant to complete certain tasks before the jury, such as introducing evidence and objecting to testimony. *Id.* at 183–84. Standby counsel may also help ensure the defendant's compliance with the basic rules of courtroom protocol and procedure.

In *McKaskle*, the Supreme Court recognized that "the objectives underlying the right to proceed pro se may be undermined by unsolicited and excessively intrusive participation by standby counsel." *Id.* at 176–77 (emphasis omitted). In other words, the standby counsel's participation might be so intrusive that the jury could think that the pro se defendant is actually represented by appointed counsel. *Id.* at 178, 187. To distinguish between permissible and impermissible interference, the Court imposed two limits on standby counsel's participation: "First, the pro se defendant is entitled to preserve actual control over the case he chooses to present to the jury. . . . Second, participation by standby counsel without the defendant's consent should not be allowed to destroy the jury's perception that the defendant is representing himself." *Id.* at 178 (emphasis omitted). While the court must take care to maintain the jury's perception that the defendant is self-represented, rather than being represented by standby counsel, standby counsel may take a more active role in presenting a pro se defendant's case during proceedings that occur outside the presence of the jury. *See id.* at 178–79. *See also* United States v. Isaac, 655 F.3d 148, 153 (3d Cir. 2011) (sidebar conferences). But even when the parties are outside of the jury's presence, the pro se defendant must be allowed to address the judge freely on behalf of the defense, and disputes between counsel and the pro se defendant must be resolved in the defendant's favor for matters usually left to counsel's discretion. *McKaskle*, 465 U.S. at 179.

As with appointed counsel, an indigent pro se defendant does not have a right to choose a particular standby counsel. United States v. Webster, 84 F.3d 1056, 1062–63 (8th Cir. 1996); United States v. Mills, 895 F.2d 897, 904 (2d Cir. 1990). A court may appoint standby counsel even over the defendant's objection, but the defendant's right to self-representation limits the extent of standby counsel's participation. *McKaskle*, 465 U.S. at 184 (holding that appointing standby counsel to represent a defendant does not violate the Sixth Amendment right to proceed pro se, even if the defendant objects). In *United States v. Smith*, 895 F.3d 410 (5th Cir. 2018), the Fifth Circuit noted that the postwaiver right to counsel is not unqualified and that a defendant is not entitled to "choreograph special appearances by counsel" to delay the trial or obstruct justice. *Id.* at 421.

II.G

Hybrid Representation

Defendants are generally prohibited from simultaneously proceeding pro se and being represented by counsel. But courts can allow "hybrid representation" in limited circumstances. Hybrid representation refers to situations in which a pro se defendant conducts some portions of the trial while standby counsel performs others, such as when a defendant knowingly and intelligently waives the right to counsel for specific motions or proceedings. There is no constitutional right to hybrid representation. McKaskle v. Wiggins, 465 U.S. 168, 183 (1984) ("*Faretta* does not require a trial judge to permit 'hybrid' representation" and "[a] defendant does not have a constitutional right to choreograph special appearances by counsel") (internal citation omitted).

The court should exercise its discretion to permit this method sparingly. Some courts hold that "in the case of hybrid representation . . . the *Faretta* inquiry is only necessary once the defendant has made an articulate and unmistakable demand to proceed pro se." United States v. Cromer, 389 F.3d 662, 681 (6th Cir. 2004) (internal quotation marks and citation omitted). However, in other cases courts have held that in the instance of hybrid representation, *Faretta* warnings must be given whenever the defendant assumes any of the "core functions" of counsel. United States v. Davis, 269 F.3d 514, 519–20 (5th Cir. 2001); United States v. Turnbull, 888 F.2d 636, 638 (9th Cir. 1989).

There is another kind of "hybrid representation" in which defendants who are represented by counsel throughout their case, not proceeding pro se, nevertheless seek to conduct one or more parts of the proceeding by themselves instead of having the tasks performed by counsel. The district court has discretion to permit a defendant to engage in this type of hybrid representation by participating in the defense without requiring the defendant to also waive counsel and proceed pro se. United States v. Cromer, 389 F.3d 662, 682 n.12 (6th Cir. 2004).

II.H

Nonlawyer as Assisting Counsel

A pro se defendant does not have the right to be represented by a nonlawyer. Wheat v. United States, 486 U.S. 153, 159–60 (1988) (only members of the bar may represent clients); United States v. Kelley, 539 F.2d 1199, 1202–03 (9th Cir. 1976) (refusal to allow unlicensed lawyer to serve as counsel is not error); Luis v. United States, 578 U.S. 5, 11–12 (2016) ("A [criminal] defendant has no right . . .

to an attorney who is not a member of the bar.").[2] *Cf.* United States v. French, 748 F.3d 922, 931–34 (9th Cir. 2014) (while allowing pro se codefendant to examine testifying pro se defendant did not violate *Faretta* because pro se defendant chose to proceed in that manner, it is likely erroneous nevertheless because it would violate the rule against lay representation).

II.I

Unchanged Role of Court When Defendant Appears Pro Se

A trial judge has no duty to provide legal advice or personal instruction on courtroom procedures to a pro se defendant. Martinez v. Ct. of Appeal of Cal., 528 U.S. 152, 162 (2000); McKaskle v. Wiggins, 465 U.S. 168, 183–84 (1984). When the accused proceeds pro se, the court's role does not change, and the trial judge has no new obligations. *See* United States v. Trapnell, 512 F.2d 10, 12 (9th Cir. 1975). A litigant who proceeds pro se has no more rights than a litigant represented by a lawyer, and the trial court need not become an advocate for pro se defendants or assist and guide them. United States v. Pinkey, 548 F.2d 305, 311 (10th Cir. 1977); Birl v. Estelle, 660 F.2d 592, 593 (5th Cir. 1981); United States v. Merrill, 746 F.2d 458, 465 (9th Cir. 1984). Nonetheless in some circumstances the trial judge may prudently intervene to prevent the pro se defendant from provoking a mistrial.

II.J

Multidefendant Cases

When one codefendant elects to proceed pro se, the court must take appropriate steps before and during the trial to ensure that the pro se defendant's actions do not prejudice any other codefendants. United States v. Sacco, 563 F.2d 552, 556–57 (2d Cir. 1977). These measures may include appointing standby counsel; instructing the jury, when necessary, that the remarks of the pro se defendant, while acting in the role of attorney, are not evidence; and warning the defendant that the defendant will be held to the rules of law and evidence and must refrain from

2. In addition to the absence of a right of a defendant to be represented by a nonlawyer, the court also should not allow a defendant to be represented by a nonlawyer because it would likely violate the applicable Rules of Professional Conduct and laws of the relevant jurisdiction. *See* Model Rules of Pro. Conduct r. 5.5 (prohibiting unauthorized practice of law) & 8.4(a) (prohibiting assisting or inducing another to violate a rule of professional conduct) (A.B.A. 1983). *See, e.g.*, California Business & Professions Code § 6125 (barring practice of law by anyone who is not licensed by state bar).

speaking in the first person when commenting on the evidence. United States v. Knowles, 66 F.3d 1146, 1160 (11th Cir. 1995) (citing *Sacco*, 563 F.2d at 556–57).

II.K

Faretta Hearing/Colloquy

"In determining whether there is a competent waiver of the right to counsel, the judge 'must investigate as long and as thoroughly as the circumstances of the case before him demand.'" United States v. Woodard, 291 F.3d 95, 109 (1st Cir. 2002) (quoting Von Moltke v. Gillies, 332 U.S. 708, 723–24 (1948)). A trial court should be guided by the principle that courts "must indulge in every reasonable presumption against waiver of the right to counsel." *Gillies*, 332 U.S. at 723–24. In a *Faretta* hearing/colloquy, judges need not ask specific questions. Iowa v. Tovar, 541 U.S. 77, 88 (2004). Still, many courts have developed pattern questions to "assist[] in establishing [during] review that the waiver of counsel was knowing and intelligent." *See, e.g.*, United States v. Akins, 243 F.3d 1199, 1203 (9th Cir. 2001), *amended by* 276 F.3d 1141, 1146 (9th Cir. 2002). Nevertheless, it is particularly important for the court to inquire whether the defendant appreciates the nature of the charges and possible penalties for a conviction. Other questions commonly asked seek to determine whether "the dangers and disadvantages of self-representation" are fully known to the defendant. *See, e.g.*, Faretta v. California, 422 U.S. 806, 835 (1975). *See also* United States v. Balsiger, 910 F.3d 942, 953 (7th Cir. 2018) (considering the background and experience of the defendant, the context of his decision, whether the district court conducted a formal hearing, and any other evidence that establishes that the defendant understood the dangers and disadvantages of proceeding pro se). *Accord* United States v. Volpentesta, 727 F.3d 666, 677 (7th Cir. 2013). *See also* United States v. Hansen, 929 F.3d 1238, 1249–52 (10th Cir. 2019). The colloquy is best viewed as a conversation with general, open-ended questions as opposed to a scripted interrogation.

Consider, as an example, the following set of questions.

Faretta Hearing Colloquy Example

Introduction

[*Defendant's name*],

Before I consider whether you may be permitted to waive the right to counsel, I need to determine if you indeed wish to represent yourself without any attorney or whether you instead have serious concerns about your counsel's ability to represent you fairly and provide a competent legal defense. If you have such concerns, you must explain those concerns in detail on the record so that I may consider whether you may be permitted to substitute counsel.

[*If represented by retained counsel:*]

You may be permitted to retain new counsel at this stage in the case if the attorney you hired to represent you cannot mount a legally adequate defense on your behalf. It is my decision whether to permit you to retain new counsel at this stage of the proceeding.

[*If represented by appointed counsel:*]

Substitute counsel may be available if, in the court's judgment, the appointed counsel designated to represent you cannot mount a legally adequate defense on your behalf. It is my decision whether to appoint new counsel for you.

- Do you understand?

[*The trial judge should now engage in an appropriate inquiry to determine if the defendant will be permitted to substitute counsel, based on the considerations discussed below.*]

[*If the defendant actually desires to proceed pro se, not merely to get a new attorney, the trial judge should proceed with a* Faretta *inquiry:*]

When a person accused of a crime, such as yourself, appears in this court to be tried for charges brought by the government and asks me to allow them to waive their guaranteed Sixth Amendment right to counsel and instead to exercise their Sixth Amendment right to self-representation (a procedure the court calls "pro se representation" or "proceeding pro se"), it is my duty as the trial judge to be sure that the accused (specifically, you) understands the choice you are making and the consequences of that choice for your defense and any possible legal penalties imposed on you after this trial. Do you understand what I am saying?

[*The trial judge should now indicate that the defendant will be asked a series of questions. These questions must be completed and adapted based on the individual case. Other questions may be posed to counsel, as well. The government may also wish to be heard.*]

Education

- Did you study in formal school institutions? At home? Online?
- How many years of formal education do you have in reading, writing, math, and history? [*If the defendant has a high school degree or G.E.D., ask about higher education, such as associate, college, or graduate degrees.*]
- Have you ever studied the law? [*If yes:*] Please explain.
- Have you gone to law school? [*If yes:*] Please state whether the defendant graduated with a J.D. and if so, passed a state bar exam and obtained a license to practice.

Courtroom Experience

- Have you been a criminal defendant in another case (state or federal)?
    - [*If no:*] Have you ever observed a criminal trial before?
    - [*If yes:*] Have you represented yourself in another criminal case?

You do not need technical or formal legal training or knowledge to represent yourself, but my duty as your trial judge is to ensure you can give yourself a fair trial. That said,

- Are you familiar with the Federal Rules of Evidence?
    - [*If yes:*] Please describe some of what you know about these rules and whether you have access to the current versions.
    - [*If no:*] Please describe why you believe you are competent to master the rules necessary to provide your criminal defense to the charges asserted by the government against you.
    - Do you understand that there are rules of evidence, such as hearsay and the like?
    - And you understand what it is to lay the foundation for the admission of testimony?

  - Do you understand that under the rules of evidence, some provisions would prevent evidence from being admitted or would allow evidence to be accepted?
  - Do you also understand that these rules will not be relaxed for your benefit and that you will be required to follow the same rules of evidence that apply to a lawyer?
  - Do you also understand that I will follow those rules even if you do not make any appropriate objections?

- Are you familiar with the Federal Rules of Criminal Procedure?
  - And do you understand that those rules of procedure govern how this case will be tried in court here?
  - Do you also understand that these rules will not be relaxed for your benefit and that you will be required to follow the same rules of procedure that apply to a lawyer?

- Do you understand that it is not my role to perform any legal tasks for you that your counsel would normally carry out, that I am not required to give you any personal instruction on the rules of evidence and procedure that you will have to follow, and that I will apply those rules to you in the same manner as I would to a lawyer?

Charges and Potential Penalties

[*Ask the government to summarize the charges and the potential penalties regardless of the defendant's answer.*]

- Do you understand the nature of the charges you face?
- Do you understand the nature of the penalties that may be imposed if you are found guilty of one or more of these charges?

[*The trial court should restate the charges and potential penalties (including custodial and financial). After each charge and penalty, the defendant should be asked to answer the questions below to ensure the defendant understands each one. THIS IS VERY IMPORTANT.*]

- Do you understand these charges?
- Do you understand that if you are found guilty, I can impose a sentence of [*maximum sentence*] [on each count]?

[*The questions below are advised if the ability of the defendant to understand or speak the English language is in question. A translator may need to be present.*]

- Please tell me in your own words and on the record what you understand about the charges read to you and the potential penalties for each charge.
- Please also tell me in your own words and on the record what you understand about the possible sentence range and penalties, should you be convicted of the charge(s) brought against you.

[*Allow the defendant to summarize the defendant's understanding of the charges, penalties, and possible sentence.*]

- Do you understand that, at any time during this trial proceeding, if I believe you do not understand the charges, penalties, or consequences of the choice to proceed pro se or for any reason cannot fairly represent yourself, I may revoke the decision to allow you to represent yourself and waive assistance of counsel?
- Do you also understand that I may appoint standby counsel to assist you?

Highlight the Risk

In my view, criminal defendants need legal representation by a trained lawyer. In the court's opinion, [the lawyer who you have retained/the lawyer who has been appointed to serve as counsel] is competent to provide you with the defense needed for a fair trial.

The court must now advise you on the legal risks you agree to accept and the consequences of that choice.

- Do you understand that, by not having a lawyer who understands the rules of evidence and the rules of criminal procedure, you risk making legal errors of judgment that may result in a conviction you cannot appeal?
- Have you made this decision even though the lawyer(s) here now are competent and prepared to defend you against all legal charges brought by the government?
- Is your decision to proceed pro se in this trial entirely voluntary?
    - Do you understand that "voluntary" means that, at a minimum, you choose to represent yourself without the help of counsel?

- Are you being forced by anyone or anything to decide to represent yourself at trial, without help from legal counsel?

[*If the answers given on the record signify a knowing and voluntary choice to proceed pro se and the court is satisfied that the defendant is mentally fit to proceed without counsel, then the following determination language by the trial judge is suggested:*]

Determination

After considering the answers given by [*defendant's name*], I find as follows:

1. [*Defendant's name*] has knowingly and voluntarily waived the Sixth Amendment right to counsel and elected, instead, to assert the Sixth Amendment's implied right to self-representation.
2. The defendant will be permitted to proceed pro se unless the court finds otherwise.
3. The defendant is advised further that the Sixth Amendment right to proceed pro se now granted [may be/is] limited by the following conditions.

- [*Insert as needed.*][3]
- [*For example: following local rules, standing orders, courtroom procedures and conditions and other conditions specific to the case and defendant*].

[*If the defendant's access to law library materials or any other means necessary to defend against the charges is limited, instructions advising the defendant are also recommended. If the defendant is indigent and has appointed counsel, consider also whether to ask appointed counsel to serve as standby counsel.*]

3. Where a defendant seeking to proceed pro se will be shackled during trial, the court should consider whether to make appropriate accommodations and to review the issue with defendant during the *Faretta* colloquy. *See* Lefevre v. Cain, 586 F.3d 349, 357–58 (5th Cir. 2009) (discussing possible restrictions on government counsel's movements to shield defendant's restraint from the jury). Judges should review the Supreme Court's acknowledgment in *Illinois v. Allen*, 397 U.S. 337, 344 (1970), that the appearance of a defendant in shackles may result in an unfair trial, as well as the Supreme Court cases *Holbrook v. Flynn*, 475 U.S. 560, 568–69 (1986), and *Deck v. Missouri*, 544 U.S. 622, 633 (2005), which hold that shackling is an inherently prejudicial practice that should be permitted only when justified by a state interest specific to the trial. Judges may also wish to consult *Claiborne v. Blauser*, 934 F.3d 885, 893 (9th Cir. 2019) (reviewing case law on visible shackling). *See generally* United States v. Hill, 63 F.4th 335, 346 (5th Cir. 2023). *See infra* Part 2.III.O. Administrative Issues & Part 4.VI. Disruptive Defendants.

Certain contexts make waiver of the Sixth Amendment right to counsel more perilous for the defendant and require more scrutiny by the court. In *Richardson v. Superintendent Coal Township SCI*, 905 F.3d 750, 765 (3d Cir. 2018), the court noted that Pennsylvania state law provides that post-sentencing motions are a critical stage under the Sixth Amendment, entitling defendants to counsel. The court also held that the district judge must ensure through a colloquy that waiver of counsel at this stage of the proceedings is voluntary, knowing, and intelligent.

III

Choice of Counsel and Substituting Counsel

As discussed above, the Sixth Amendment guarantees criminal defendants the right to counsel, a right that has been interpreted by the Supreme Court to require more than legal assistance. Accused defendants must also have a fair opportunity to secure counsel of their own choice, "to wit, . . . the counsel he believes to be best." United States v. Gonzalez-Lopez, 548 U.S. 140, 146 (2006). *See also* Powell v. Alabama, 287 U.S. 45, 53 (1932). Retaining chosen counsel is a fundamental right to fairness, and denying this right may be a constitutional violation. *See* Strickland v. Washington, 466 U.S. 668, 684 (1984); Caplin & Drysdale Chartered LLC v. United States, 491 U.S. 617, 624 (1989). Wrongful denial of the right to retain counsel of choice violates the Sixth Amendment; no other showing of prejudice or examination of the quality of the representation that the defendant received is required. *Gonzalez-Lopez*, 548 U.S. at 146–47. Even though defendants have a broad right to retain counsel of their choice, the right to choose one's counsel is not absolute. A court may balance the interests of judicial integrity and efficiency with the rights of a defendant to choose counsel. *See* United States v. Rivera-Corona, 618 F.3d 976, 979 (9th Cir. 2010); United States v. Krzyske, 836 F.2d 1013, 1017 (6th Cir. 1988).

This right to choose counsel, however, is dependent on having financial means. *Caplin & Drysdale*, 491 U.S. at 624. The Constitution does not require the government to pay for an accused to secure counsel of choice. *See* Wheat v. United States, 486 U.S. 153, 159 (1988); *Caplin & Drysdale*, 491 U.S. at 623–24 (citing and following *Wheat*); Luis v. United States, 578 U.S. 5, 12 (2016) ("an indigent defendant, while entitled to adequate representation, has no right to have the Government pay for his preferred representational choice"). The Sixth Amendment aims to guarantee an adequate and effective advocate, not necessarily the advocate preferred by an indigent defendant. *See Luis*, 578 U.S. at 12. Indigent defendants have the right to court-appointed counsel but not the right to select among available appointed counsel. *See Wheat*, 486 U.S. at 158–59 (Sixth Amendment guarantees appointment of counsel when necessary but "defendant may not insist on representation by an attorney he cannot afford"); United States v. Myers, 294 F.3d 203, 206 (1st Cir. 2002) (the right to counsel of choice does not afford indigent defendants "carte blanche in the selection of appointed counsel"). *See also* United States v. Rivera-Corona, 618 F.3d 976, 979 (9th Cir. 2010) ("Indigent defendants have a constitutional right to effective counsel, but not to have a specific lawyer appointed by the court and paid for by the public.").

Because the right to choose one's retained counsel is rooted in the Sixth Amendment, a defendant is free to substitute retained counsel without having to show good cause, as long as the substitution will not harm the fair, efficient, and orderly administration of justice. *Rivera-Corona*, 618 F.3d at 979; United States v. Jimenez-Antunez, 820 F.3d 1267, 1271 (11th Cir. 2016) (no showing of good cause required when defendant exercises Sixth Amendment right to counsel of choice by hiring or firing retained counsel promptly); United States v. Brown, 785 F.3d 1337, 1344 (9th Cir. 2015) (denial of defendant's motion to fire retained counsel was erroneous, even though no adequate reason was given and trial would be delayed). Under certain circumstances, a defendant must satisfy the court before being permitted to substitute retained counsel. *See, e.g.*, United States v. Mota-Santana, 391 F.3d 42, 48 (1st Cir. 2004) (motion to replace retained counsel with appointed counsel requires showing of profound conflict between lawyer and client and may be denied for lack of evidence); United States v. Diaz-Rodriguez, 745 F.3d 586, 590 (1st Cir. 2014) (denying a request to retain new counsel without first investigating the conflict with the current counsel violates the right to counsel of choice). When a defendant who qualifies for appointed counsel requests to have retained counsel replaced with a new attorney chosen and appointed by the court, the request is granted the same deference as substituting a new retained attorney. *Rivera-Corona*, 618 F.3d at 979–83. Therefore, a careful evaluation of the facts surrounding the requested substitution of counsel is critical.

As emphasized above, an indigent defendant represented by appointed counsel does not have the right to a particular lawyer but is entitled only to effective and adequate representation by an attorney appointed by the court. *Rivera-Corona*, 618 F.3d at 979–83. An indigent defendant requesting substitution of counsel must therefore demonstrate good cause resulting from a "conflict between the defendant and his attorney [that] was so great that it prevented an adequate defense." *Id.* at 978. "Good cause for substitution of counsel consists of more than a mere strategic disagreement between a defendant and his attorney; rather, there must be a total breakdown in communications." United States v. Lott, 310 F.3d 1231, 1249 (10th Cir. 2002) (citations omitted). "[T]o prove a total breakdown in communication, a defendant must put forth evidence of a severe and pervasive conflict with his attorney or evidence that he had such minimal contact with the attorney that meaningful communication was not possible." *Id.*

> In reviewing a district court's denial of a motion to substitute counsel, we consider whether: (1) the defendant's request was timely; (2) the trial court adequately inquired into the reasons for making the request; (3) the defendant–attorney conflict was so great that it led to a total lack of communications precluding an adequate defense; and (4) the defendant substantially and unreasonably contributed to the breakdown in communications.

United States v. Williamson, 859 F.3d 843, 860 (10th Cir. 2017). The "good cause" standard for substitution of counsel is analogous to the "good cause" requirement for waiving counsel. *Id.* Substitution of counsel for an indigent defendant is a matter committed to the trial court's discretion. *See* United States v. Senke, 986 F.3d 300, 315–16 (3d Cir. 2021). Countervailing government interests are relevant in the good cause analysis. United States v. Goldberg, 67 F.3d 1092, 1098 (3d Cir. 1995). Such interests include "the efficient administration of criminal justice" and "the accused's rights, including the opportunity to prepare a defense; . . . the rights of other defendants awaiting trial who may be prejudiced by a continuance," and whether the request is "made in bad faith" or to delay the proceeding. *Id.* (internal citations omitted).

"When an indigent defendant makes a timely and good faith motion requesting that appointed counsel be discharged and new counsel appointed, the trial court has a responsibility to determine the reasons for defendant's dissatisfaction with his current counsel." 3 Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 11 (4th ed. 2021) (citing McMahon v. Fulcomer, 821 F.2d 934, 942 (3d Cir. 1987)). Ultimately, the legitimacy of the defendant's reasons for seeking new counsel depends on each case. United States v. Naseer, 775 F. App'x 28, 30 (2d Cir. 2019) ("The totality of the circumstances surrounding [the defendant's] waiver confirm that he fully understood the ramifications of his decision to waive his Sixth Amendment right to counsel at trial."). The court must also take evidence and argument as needed. *McMahon*, 821 F.2d at 942 (finding that the court must make a "thorough and searching inquiry"). *See also* United States v. Chapman, 796 F. App'x 873, 878–79 (6th Cir. 2019). When so doing, the court should take care to protect the defendant's attorney–client privilege and attorney work product. Government counsel should therefore be excused from the hearing at appropriate times when necessary to maintain the defendant's confidentiality. *See, e.g.*, United States v. Cooks, No. 5:22-CR-711, 2023 WL 6392783, at *3 & n.7 (N.D. Ohio Oct. 2, 2023) (government counsel excused from hearing on defendant's request to substitute counsel due to conflicts with attorney so as to avoid exposing a defense position).

However, before releasing appointed counsel, the trial court must determine whether the defendant wants substitute counsel appointed or intends to waive the right to appointed counsel altogether and proceed pro se. Although self-representation by pro se status is not always the preferred choice, it is an option for defendants who do not want defense-appointed counsel.

III.A

Timeliness of Requests to Substitute Counsel

As a trial approaches, the court must balance the defendant's interest in retaining counsel of choice against the public's interest in the prompt and fair administration of justice. Because untimely requests to substitute counsel are likely to disrupt the court's schedule and require a continuance, courts will require that the defendant show good cause for the substitution. *See, e.g.*, United States v. Peppers, 302 F.3d 120, 132 (3d Cir. 2002). In doing so, the court must conduct an appropriate inquiry into the reasons for the defendant's dissatisfaction with current counsel. United States v. Marrero, 651 F.3d 453, 464 (6th Cir. 2011); United States v. Woodard, 291 F.3d 95, 106, 107 (1st Cir. 2002). For example, when a defendant's dissatisfaction with counsel stems from ideological or religious opposition to a member of a particular group serving as the defendant's counsel, the court may face a dilemma. The court must weigh constitutional principles of equality against the defendant's ability to participate in their defense meaningfully. United States v. Vizcarra-Millan, 15 F.4th 473, 486 (7th Cir. 2021) (Seventh Circuit does not closely police details of *Faretta* hearing because "the district judge 'is on the razor's edge in assisting a defendant to make an informed choice between representation by counsel with whom the defendant is irrationally dissatisfied and self-representation.'") (citing and quoting United States v. Oreye, 263 F.3d 669, 672 (7th Cir. 2001)). *See also* United States v. Johnson, 980 F.3d 570, 577 (7th Cir. 2020) (judges are encouraged to "engage in a 'thorough and formal inquiry'" that probes the defendant's "age, education level, and understanding of the criminal charges and possible sentences").

A timely motion to substitute counsel denied on the eve of trial, where an attorney–client conflict is asserted, may be reversed absent an inquiry into the nature and extent of the disagreement. *See* Daniels v. Woodford, 428 F.3d 1181 (9th Cir. 2005) (defendant presumed prejudiced by inability to communicate with counsel). *Compare* United States v. Moore, 159 F.3d 1154, 1158–59 (9th Cir. 1998) (holding that denial of motion to substitute was erroneous based on irreparable conflict between attorney and client), *with Marrero*, 651 F.3d at 467 (reasonable to deny substitution motion where battle was over strategy and would not prevent an adequate defense). *See also* United States v. Pierce, 60 F.3d 886, 891 (1st Cir.

1995) (upholding denial of substitution of counsel because the request for continuance two days before opening statements was untimely and conflict between defendant and counsel did not result in total lack of communication preventing adequate defense); United States v. Garrett, 179 F.3d 1143, 1146–47 (9th Cir. 1999) (en banc) (denial of pro se defendant's request for continuance to retain counsel one day before trial—after defendant rejected two prior appointed attorneys—not an abuse of discretion where substitution would delay trial).

A midtrial motion to substitute counsel requires balancing the accused's right to chosen counsel with the public interest in prompt and efficient administration of justice. Wilson v. Mintzes, 761 F.2d 275, 280–81 (6th Cir. 1985). The balance depends on the nature of the defendant's conflict with counsel juxtaposed against timing factors such as the public's interest in speedy trials. *See* United States v. Sullivan, 431 F.3d 976, 980 (6th Cir. 2005). For the court to permit a midtrial substitution, good cause must exist. A defendant's disagreement with counsel on matters of strategy will not suffice. *Id.* at 980–82 (holding denial of substitution after the government rested not abuse of discretion; court's inquiry was adequate, and public's interest in prompt administration of justice was a significant factor). But good cause may exist where there is a complete breakdown of communications or an irreconcilable conflict between counsel and defendant that could lead to an unjust verdict. The district court can consider its trial calendar in deciding motions for substitution and continuance. *See Garrett*, 179 F.3d at 1147. But it "cannot arbitrarily and unreasonably interfere with [the defendant's] right to be represented by the attorney he has selected" "in the name of calendar control." Linton v. Perini, 656 F.2d 207, 209 (6th Cir. 1981).

III.B

Finding of Unwarranted Request for Substitution and a Hobson's Choice Between Unwanted Counsel and Pro Se Representation

When substitute counsel is unwarranted, the trial court can insist that the defendant choose between waiver of appointed counsel and self-representation. A defendant's prior misconduct, silence, or desire to proceed without appointed counsel may constitute a knowing and intelligent waiver of the right to the assistance of counsel. *See* United States v. Kar, 851 F.3d 59, 66–67 (1st Cir. 2017); United States v. Sanchez-Garcia, 685 F.3d 745, 751–52 (8th Cir. 2012). *See also* United States v. Culbertson, 670 F.3d 183, 193 (2d Cir. 2012) (holding that if the court has replaced counsel more than once, it may reasonably require the defendant either to proceed with a current court-appointed attorney or to proceed pro se);

United States v. Irorere, 228 F.3d 816, 826–28 (7th Cir. 2000) (holding that defendant's conduct frustrated court's four attempts to provide representation and amounted to a waiver of the right to counsel); United States v. Gallop, 838 F.2d 105, 109 (4th Cir. 1988) (defendant's refusal to proceed with second appointed counsel five days before trial declared voluntary waiver of counsel); Meyer v. Sargent, 854 F.2d 1110, 1114 (8th Cir. 1988) (after denying defendant's request for midtrial substitution, court held that defendant's request to remove able counsel waived the right to counsel and ordered defendant to proceed pro se).

This scenario where a trial court forces a defendant to choose between accepting a court-appointed attorney or self-representation is a common example of a situation referred to as a "Hobson's choice." In the context of a criminal defendant's Sixth Amendment right to counsel, a Hobson's choice refers to a predicament where the defendant appears to be presented with options, but there is only one viable path forward or no good choices at all. If the defendant considers the court-appointed attorney unsatisfactory or unprepared—while at the same time feeling the lack of knowledge or skill to proceed pro se effectively—then the defendant faces a Hobson's choice. Simply put, a criminal defendant in this situation must make the undesirable decision between counsel believed to be incompetent and self-representation that the defendant knows will not be adequate.

As discussed, the Sixth Amendment does not give criminal defendants the right to choose their own counsel unless they are able to pay for this choice. The constitutional right to appointed counsel is limited to the competency and unbiased assistance of a lawyer the court selects to represent the defendant. If counsel appointed for a criminal defendant proves in fact to be incompetent or has a conflict of interest that prevents unbiased representation, then the trial court must make every effort to replace appointed counsel with someone who can do the job properly.

Courts should "'indulge every reasonable presumption against waiver' of fundamental constitutional rights." Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (citations omitted). Thus, a criminal defendant's request to dismiss appointed counsel—once or several times—is not necessarily a waiver of the right to legal counsel or a request to proceed pro se. To determine whether a criminal defendant's choice to accept appointed counsel or risk self-defense presents a Hobson's choice, the trial court should measure the voluntariness of the defendant's waiver of counsel in the context of the circumstances presented. In general, "[a]sking a defendant to make a 'Hobson's Choice' between accepting appointed counsel'" the defendant feels is "'not prepared for trial and representing himself' calls into question whether his waiver of the right to counsel is voluntary" (internal citations omitted). United States v. Wright, 923 F.3d 183, 189 (D.C. Cir. 2019). Whether this choice is a Hobson's choice depends on whether the defendant's qualms about appointed counsel lack merit or are purely subjective. A defendant's belief—although subjective—that appointed counsel is unprepared may also be grounded in objective facts that can be determined by the court through inquiry of appointed counsel, the prosecution, and the criminal defendant. *See id.*

If appointed counsel is truly unprepared or manifests a conflict of interest, then "the choice between unprepared counsel and self-representation is no choice at all." Fowler v. Collins, 253 F.3d 244, 249–50 (6th Cir. 2001). *See also* Pouncy v. Palmer, 846 F.3d 144, 161 (6th Cir. 2017). *And see* Savickas v. Rewerts, No. 1:18-cv-1131, 2018 WL 5629726, at *10 (W.D. Mich. Oct. 31, 2018) (concluding that "*Pouncy* . . . stands for the proposition that a defendant can establish that his decision to represent himself was involuntary where he shows that his counsel was incompetent").

Trial delay caused by a criminal defendant's request to dismiss appointed counsel can be viewed differently in different situations. The Supreme Court has recognized that a trial court has "wide latitude in balancing the right to counsel of choice against the needs of fairness, and against the demands of its calendar." United States v. Gonzalez-Lopez, 548 U.S. 140, 152 (2006) (citations omitted). In *United States v. Marrero*, 651 F.3d 453 (6th Cir. 2011), the Sixth Circuit considered and rejected a defendant's claim "that the district court violated his Sixth Amendment right to counsel by refusing to appoint him substitute counsel, essentially forcing" the defendant "into the Hobson's choice of proceeding to trial with a counsel he mistrusted or representing himself." *Id.* at 463. In rejecting Marrero's claim that he faced a Hobson's choice to involuntarily waive counsel and represent himself, the Sixth Circuit wrote that the trial court "conducted the model inquiry recommended by this Court whenever a defendant seeks to represent himself, and made an express finding that Marrero had knowingly and voluntarily waived his right to counsel[.]" *Id.* The Sixth Circuit reasoned that the district court did not err in allowing the defendant to dismiss original counsel and proceed pro se, despite the defendant's protestations that he did not want to represent himself, because his objections to dismissed counsel did not have sufficient merit to "entitle [him] to have new counsel appointed." *Id.* at 464 (quoting United States v. Schmidt, 105 F.3d 82, 89 (2d Cir. 1997)). *See also* United States v. Green, 388 F.3d 918, 921 (6th Cir. 2004) ("[A] 'persistent, unreasonable demand for dismissal of counsel and appointment of new counsel . . . is the functional equivalent of a valid waiver of counsel.'" (citation omitted)); King v. Bobby, 433 F.3d 483, 492 (6th Cir. 2006) ("[B]y rejecting all of his options except self-representation, [the defendant] necessarily chose self-representation."); *cf.* United States v. Jackson, 662 F. App'x 416, 423 (6th Cir. 2016) (trial court's denial of substitute counsel affirmed because motion made on day of trial was untimely; collecting cases). The

Sixth Circuit also concluded that the district court's decision that Marrero, an indigent defendant, failed to demonstrate good cause for substitute counsel was not an abuse of discretion under the four-factor test, for which it cited *United States v. Jennings*, 83 F.3d 145, 148 (6th Cir. 1996). *Marrero*, 651 F.3d at 464. The *Marrero* court expressly noted that the district court had conducted a model inquiry with the defendant with respect to his motion to substitute counsel.

III.C

More Considerations

Each case presents unique circumstances, but the following are additional considerations that should be weighed when evaluating requests to substitute counsel or proceed pro se. This is not an exhaustive list.

1. If a pro se defendant will be shackled in the courtroom, *Faretta* requires the trial judge to advise the defendant that shackling will limit the ability to self-represent. Abdullah v. Groose, 44 F.3d 692, 695 (8th Cir. 1995), *rev'd on other grounds*, 75 F.3d 408 (8th Cir. 1996); *cf.* Davidson v. Riley, 44 F.3d 1118, 1124–26 (2d Cir. 1995).
2. Trial courts are advised to warn defendants who choose to proceed pro se that access to law libraries or legal materials is limited for incarcerated prisoners even after waiver of the right to counsel. United States v. Pina, 844 F.2d 1 (1st Cir. 1988).
3. A defendant deserves a hearing on the appointed counsel's effectiveness during plea negotiations. Brock-Miller v. United States, 887 F.3d 298, 307–08 (7th Cir. 2018).
4. To establish a Sixth Amendment violation based on denying a motion to continue, a defendant must show that the trial court abused its discretion through an "unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay." Morris v. Slappy, 461 U.S. 1, 11–12 (1983) (internal quotation marks and citation omitted).
5. Even when a defendant seeks to waive a conflict of interest with appointed counsel, a district court may reject the proffered waiver to preserve ethical standards and ensure a fair trial. United States v. Evanson, 584 F.3d 904, 909 (10th Cir. 2009).

IV

Mental Competency to Stand Trial

The contrast between sufficient competency to proceed pro se and to engage in the simpler effort of merely standing for trial while being represented by counsel is discussed in *Indiana v. Edwards*, 554 U.S. 164 (2008). "In certain instances," the Court wrote, "an individual may well be able to . . . work with counsel at trial, yet at the same time, be unable to carry out the basic tasks needed to present [a] defense without the help of counsel." *Id.* at 175–76 (citing McKaskle v. Wiggins, 465 U.S. 168, 174 (1984) (describing trial tasks as including organization of defense, making motions, arguing points of law, participating in voir dire, questioning witnesses, and addressing the court and jury)). Even if the parties do not raise a question of the defendant's competency, the trial judge may sua sponte order an evaluation of the defendant's mental capacity to stand trial and cooperate with his counsel.

The test for competency to stand trial is whether the defendant has both "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding" and "a rational as well as a factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402, 402 (1960) (*quoted in* United States v. Nichols, 77 F.4th 490, 498 (7th Cir. 2023)). *See also* United States v. Wessel, 2 F.4th 1043, 1053 (7th Cir. 2021) (quoting *Dusky*, 362 U.S. at 402). *See also* Drope v. Missouri, 420 U.S. 162, 171 (1975) ("A person whose mental condition" does not permit understanding "the nature and object of the proceedings" or the need to "consult with counsel, and . . . assist in preparing [a] defense may not be subjected to a trial.").

V

Additional Sixth Amendment Considerations

V.A

Defendant's Misconduct

A criminal defendant's misconduct at trial may lead to waiver or revocation of the Sixth Amendment right asserted earlier in the proceedings. Faretta v. California, 422 U.S. 806, 834 n. 46 (1975). For instance, a trial court may deny a criminal defendant the right to continued representation of appointed counsel when the defendant refuses the offer of competent counsel multiple times yet still asserts the Sixth Amendment right to counsel. *See* United States v. Turner, 897 F.3d 1084 (9th Cir. 2018). Additional factors influencing whether a trial court denies the right to appointed counsel include (1) abusive, threatening, obstructionist, or uncooperative behavior; or (2) dilatory behavior, as discussed in the next sections. While some courts have found that the right to counsel may be intentionally relinquished (by waiver) or unintentionally lost (by misconduct, referred to as forfeiture)—*see, e.g.*, United States v. Leggett, 162 F.3d 237, 249–50 (3d Cir. 1998), and United States v. McLeod, 53 F.3d 322, 325 (11th Cir. 1995) (citing cases)—other courts have concluded that the right to counsel cannot be forfeited and only permit it to be relinquished by waiver, in order to "'indulge in every reasonable presumption' against the relinquishment of the right to counsel." United States v. Ductan, 800 F.3d 642, 649 (4th Cir. 2015) (noting that representation by counsel is the "default" position).

V.A.1

Abusive, Threatening, Obstructionist, or Uncooperative Behavior

Courts have various options for handling a defendant's abusive, threatening, obstructionist, or uncooperative behavior at trial. They may terminate a defendant's representation by counsel or right to self-representation, exclude the defendant from the courtroom, or take other measures to maintain order and decorum. When a defendant is proceeding pro se and is unduly misbehaving, the court may terminate the defendant's right to self-representation. When a defendant is represented but is abusive to counsel, the right to counsel may also be forfeited. *See, e.g.*, United States v. Sutcliffe, 505 F.3d 944, 955–56 (9th Cir. 2007) (threats, rudeness, hostility, "outbursts and harangues," and "defiant refusals to cooperate" with five appointed lawyers); *Leggett*, 162 F.3d at 249–50 (unprovoked physical battery; contrasting waiver and forfeiture of the right to counsel); *McLeod*, 53 F.3d at 325–26 (verbal abuse and threats to harm attorney).

As the Eighth Circuit reiterated in *United States v. Luscombe*, 950 F.3d 1021, 1029–30 (8th Cir. 2020), forfeiture of pro se status is permissible "when the defendant engages in serious obstructionist misconduct" (citing United States v. Mosley, 607 F.3d 555, 558 (8th Cir. 2010)). *See also* United States v. Smith, 830 F.3d 803, 809 (8th Cir. 2016). *And see* United States v. Krug, 822 F.3d 994, 1000 (8th Cir. 2016) (defendant's refusal to answer questions during the court's attempt to determine whether a waiver of the right to counsel was knowing and voluntary was obstructionist); United States v. Hilton, 701 F.3d 959, 965 (4th Cir. 2012) (request to self-represent during jury selection process denied as an attempt to delay proceedings improperly); United States v. Long, 597 F.3d 720, 726–27 (5th Cir. 2010) (defendant effectively waived right to self-representation by trying to fire appointed attorneys while refusing to answer whether he wanted to represent himself); United States v. Brock, 159 F.3d 1077, 1080 (7th Cir. 1998) (appointing counsel after defendant refused to answer court's questions during pretrial and repeatedly obstructed proceedings). *Cf. Smith*, 830 F.3d at 810 (defendant's "failure to respond to a proposed plea agreement, to submit a statement of the case, or to confer with government counsel" were not "serious obstructionist misconduct" and thus did not warrant denial of pro se request).

Another option for courts is to exclude the defendant from the courtroom. As the Federal Rules of Criminal Procedure make clear in Rule 43(c)(1)(C), this is permissible when the defendant is disruptive or obstreperous.

The court also may direct standby counsel to take over representation when a pro se defendant persists in unruly or obstructive behavior. Examples include refusing to obey the court's directions or injecting extraneous and irrelevant matters into the record. *See* United States v. Weast, 811 F.3d 743, 749 (5th Cir. 2016); *Brock*, 159 F.3d at 1079–80; United States v. Dougherty, 473 F.2d 1113, 1125 (D.C. Cir. 1972).

V.A.2

Dilatory Behavior

Courts generally have the discretion to grant or deny requests for substitute counsel, and they may force a defendant to proceed pro se if the defendant's conduct is dilatory or hinders the efficient administration of justice. United States v. Schaefer, 13 F.4th 875 (9th Cir. 2021). *See also* United States v. Harlan, 960 F.3d 1089, 1091 (8th Cir. 2020); United States v. Barton, 712 F.3d 111, 118–19 (2d Cir. 2013); United States v. Kelm, 827 F.2d 1319, 1322 (9th Cir. 1987). A defendant who refuses to choose or delays choosing between appointed counsel and self-representation may be deemed to have waived the right to counsel and to proceed pro se. United States v. Garey, 540 F.3d 1253, 1265 (11th Cir. 2008) (en banc); King v. Bobby, 433 F.3d 483, 492 (6th Cir. 2006); United States v. Massey, 419 F.3d 1008, 1010 (9th Cir. 2005); United States v. Oreye, 263 F.3d 669, 670–71 (7th Cir. 2001);. *cf. Ductan*, 800 F.3d at 650. And when a defendant persistently and unreasonably demands dismissal of successively appointed counsel, this conduct may be treated as the "functional equivalent of a knowing and voluntary waiver of counsel." United States v. Moore, 706 F.2d 538, 540 (5th Cir. 1983). *See also* United States v. Coles, 695 F.3d 559, 561–63 (6th Cir. 2012); United States v. Egwaoje, 335 F.3d 579, 586 (7th Cir. 2003); United States v. Kneeland, 148 F.3d 6, 11–13 (1st Cir. 1998);

United States v. Harris, 2 F.3d 1452, 1455 (7th Cir. 1993). Conversely, a court may deny a self-representation request when it is a delaying tactic rather than being made in good faith. *See, e.g.*, United States v. Powell, 847 F.3d 760, 777 (6th Cir. 2017).

Proof of the dilatory tactics that a court considers egregious enough to warrant waiver of the Sixth Amendment right to counsel must appear in the record. United States v. Wadsworth, 830 F.2d 1500, 1504–05 (9th Cir. 1987). Indeed, "[w]hen faced with a motion to appoint substitute counsel, the district court must balance several factors, including the need to ensure effective legal representation, the need to thwart abusive delay tactics, and the reality that a person accused of crime is often genuinely unhappy with an appointed counsel who is nonetheless doing a good job." United States v. Barrow, 287 F.3d 733, 738 (8th Cir. 2002) (internal quotation marks omitted). Consider the following cases:

- In *United States v. Powell*, 847 F.3d 760 (6th Cir. 2017), the court found that the defendant's dilatory intent in seeking to represent himself to delay trial was evident from the timing and circumstances of his request. The court held that the district court did not err in finding that the defendant's assertion of his right to self-representation was not made in good faith.
- On the other hand, in *Freza v. Attorney General*, 49 F.4th 293 (3d Cir. 2022), the court discussed the importance of a defendant's right to counsel and the circumstances under which a continuance should be granted to allow for adequate representation. Yet the court also cautioned against "unnecessary delay or dilatory tactics through the ruse of counsel's unavailability." *Id.* at 300.
- In *United States v. Roof*, 225 F. Supp. 3d 394 (D.S.C. 2016), the court emphasized avoiding disruptions to the trial process and specifically addressed the issue of a defendant trying to manipulate the system by vacillating between self-representation and representation by counsel.
- In *United States v. Turner*, 897 F.3d 1084 (9th Cir. 2018), the court discussed how a defendant could waive the right to counsel by engaging in dilatory behavior. The court noted that a defendant's actions that deprive him of appointed counsel could establish a knowing and intentional choice to waive the right to counsel.
- Finally, in *State v. Nicholson*, 2021 Ohio 1300 (Ohio Ct. App. 2021), the court discussed the presumption of bad faith when a defendant requests new counsel on the day of trial.

VI

Joint Representation of Codefendants

The potential for conflict of interest is high when a single attorney, law firm, or partnership represents codefendants. Where substitution of counsel is sought by one defendant in a multidefendant case, the court must be cognizant of potential conflicts. Luis v. United States, 578 U.S. 5, 11–12 (2016) ("[a] [criminal] defendant has no right . . . to an attorney . . . who has a conflict of interest due to a relationship with an opposing party."). In such cases, Federal Rule of Criminal Procedure 44(c)(2) advises the court to "promptly inquire about the propriety of joint representation." Rule 44(c)(2) also asks the court to personally alert each defendant that the right to practical assistance of counsel includes the right to separate representation by each defendant's attorney. In some cases, the court may disqualify an attorney despite a defendant's voluntary, knowing, and intelligent waiver of the right to conflict-free counsel.

In *Wheat v. United States*, 486 U.S. 153 (1988), the Supreme Court explained that it is hard for an attorney representing codefendants to evaluate the risks of a conflict of interest because unforeseen testimony or evidence can significantly shift the relationship between multiple defendants. *Id.* at 163. Thus trial courts have "substantial latitude in refusing waivers of conflicts of interest." *Id.*

2

Jury Issues

I

Waiver of Right to Jury Trial

The Sixth Amendment guarantees every defendant accused of a crime the right to a fair trial by an impartial jury of one's peers. However, the reverse is not true: a defendant does not have the constitutional right to waive a jury trial and be tried by the court. *See* Singer v. United States, 380 U.S. 24, 34 (1965). Even so, under Rule 23(a), criminal defendants may waive their right to a jury trial in writing, provided the government consents and the court approves. *See id.* at 36–37; Patton v. United States, 281 U.S. 276, 312 (1930).

I.A

"Knowing," "Voluntary," and "Intelligent" Waivers

Rule 23(a) requires a written waiver by the defendant and consent by the government and the court for a criminal defendant to waive the Sixth Amendment right to a jury trial. Without consent by the court and prosecution and a written waiver by the defendant, there is no constitutional right to waive a jury trial. *Singer*, 380 U.S. at 36. Upholding the validity of Federal Rule of Criminal Procedure 23(a), the Supreme Court held that a defendant cannot waive a jury trial without the consent of the prosecutor and the judge because of the substantial public interest in jury trials as the preferred mode of fact-finding in criminal cases. *Id.* at 37–38. *See also* United States v. U.S. Dist. Ct. for N.D. Cal., 464 F.3d 1065, 1071–72 (9th Cir. 2006) (holding that under Fed. R. Crim. P. 23(a), grant of defendant's request for nonjury trial without government consent to waiver was erroneous).

Courts generally presume that a written waiver is knowing and intelligent, absent a claim of prejudice. *See* United States v. Johnson, 841 F.3d 299, 303 (5th Cir. 2016). A district court, however, should conduct a colloquy on the record before accepting the waiver. *See Singer*, 380 U.S. at 34 (a written release, notwithstanding its contents, does not obviate the need for an oral colloquy). Accordingly, most federal circuit courts recommend that the district court engage in a colloquy with the defendant to ensure that the waiver is made with the intelligence necessary to conclude that it is knowing and voluntary. *See, e.g.*, United States v. Carmenate, 544 F.3d 105, 107 (2d Cir. 2008); *see also* United States v. Lilly, 536 F.3d 190, 197 (3d Cir. 2008) (listing nine circuits that have endorsed a colloquy to ensure that waiver of a jury trial is "knowing, voluntary, and intelligent").

Despite the desirability of a colloquy, courts have found waivers to be effective even in its absence. In *United States v. Pasha*, 797 F.3d 1122, 1129 (D.C. Cir. 2015), the court noted that an oral colloquy "is always well-advised," but explained that a thorough written waiver and explanation on the record from counsel can provide the necessary basis for a waiver. Since courts have generally presumed that a written waiver is knowing and intelligent absent a claim of prejudice, *United States v. Igbinosun*, 528 F.3d 387, 390–91 (5th Cir. 2008), held that the government carried its burden to show adequate waiver under Rule 23(a) and that the defendant could not overcome the presumption that her written waiver was knowing and intelligent although the district court did not orally examine the defendant. *See also* United States v. Dailey, Nos. 3:09-CR-233-3 & 3:12-cv-362, 2013 WL 1768053, at *8–9 (E.D. Va. Apr. 24, 2013) (thorough written waiver supported finding that defendant voluntarily chose to waive jury). *See also* United States v. Tamman, 782 F.3d 543, 551–52 (9th Cir. 2015) (addressing both the adequacy of the inquiry and the sufficiency of the colloquy). The Sixth Circuit has indicated that the suggested outline will generally constitute an adequate colloquy. Sowell v. Bradshaw, 372 F.3d 821, 832–33 (6th Cir. 2004).

Sometimes there may be acceptable substitutes for a written waiver. For example, the Second Circuit accepted a waiver signed by the defendant's lawyer when the defendant made clear that the decision to waive a jury trial was his own. *See Carmenate*, 544 F.3d at 108. *But see* United States v. Laney, 881 F.3d 1100, 1107–08 (9th Cir. 2018) ("[W]e hold that the proper practice under Rule 23(a) is for the defendant to personally execute the written waiver; a written stipulation signed by defense counsel alone—like the stipulations at issue in this case—will not raise a presumption of validity. Nevertheless, the absence of a defendant's signature will not constitute reversible error if the record otherwise shows that the defendant's waiver was voluntary, knowing, and intelligent."). But a written waiver executed by the defendant is the better course.

I.B

Special Circumstances

Capital punishment can present a special circumstance in which defendants may argue that they have been improperly induced to waive the right to jury trial in order to avoid the death penalty. Cases addressing this situation have held that an adequately informed waiver of the right to a jury trial is voluntary—even where the defendant agreed to it in order to avoid execution—as long as it was the product of an intelligent choice among alternatives, did not result from a threat of prosecution on an unjustified charge, and did not stem from the government's seeking to obtain an unfair advantage by threatening a more onerous penalty than that supported by the facts. Parrish v. Fulcomer, 150 F.3d 326, 328 (3d Cir. 1998). *Parrish* relied on cases involving guilty pleas, rather than waivers of jury before a trial, explaining that a guilty plea also entails a waiver of the right to a jury trial. *Id.* (citing Brady v. United States, 397 U.S. 742, 755 (1970) (holding a guilty plea, which involves a waiver of the right to a jury trial, not invalid because it was entered to avoid the possibility of the death penalty)). *See also* McMahon v. Hodges, 382 F.3d 284, 290 (2d Cir. 2004) ("An otherwise-valid plea agreement in which the accused gives up [the] right to a jury trial is not rendered involuntary by the fact that, for example, it was induced by an appeal to the defendant's desire to limit . . . exposure to penalty.") (citing Parker v. North Carolina, 397 U.S. 790, 795 (1970)). *But see* Machibroda v. United States, 368 U.S. 487, 493 (1962) ("[a] guilty plea, if induced by promises or threats which deprive it of the character of a voluntary act, is void.").

II

Waiver of Twelve-Person Jury

Federal Rule of Criminal Procedure 23(b)(2) ("Stipulation for a Smaller Jury") provides that at any time before the verdict, the parties may stipulate in writing, with the court's approval, that the jury will consist of any number fewer than twelve jurors. When this stipulation is proffered, the court must determine whether the waiver is being made with the "express and intelligent consent of the defendant." Patton v. United States, 281 U.S. 276, 312 (1930). *See also* United States v. Smith, 523 F.2d 788, 791 (5th Cir. 1975) (citing *Patton*). Even though Rule 23(b) expressly requires a writing, courts have generally been willing to uphold oral agreements to fewer than twelve jurors when the defendant personally and intelligently consents. *See id.* at 791; United States v. Farris, 77 F.3d 391, 396 n.6 (11th Cir. 1996).

Even without such a stipulation, after the jury retires to consider its verdict, the court may exercise discretion under Rule 23(b)(3) to excuse a juror if it finds good cause and may allow the remaining eleven jurors to deliver a verdict. *See, e.g.*, United States v. Depue, 879 F.3d 1021, 1027–28 (9th Cir. 2018) (upholding dismissal of a juror who was physically unwell). *See also* United States v. Ozomaro, 44 F.4th 538, 543–44 (6th Cir. 2022); United States v. Ginyard, 444 F.3d 648, 654 (D.C. Cir. 2006).

III

Miscellaneous Jury-Related Issues

III.A

Venue

Under Article III, § 2, Clause 3 of the Constitution, a defendant's trial will occur "in the State where the . . . Crimes . . . have been committed." But a defendant may request to transfer their trial to a different district if extraordinary local prejudice will prevent a fair trial. Skilling v. United States, 561 U.S. 358, 377–78 (2010). *See also* Fed. R. Crim. P. 21.

III.B

Excusing Jurors

A juror may be excused from being summoned for jury service due to disqualification, exemption, or self-exclusion. Some persons must be disqualified from serving as jurors, such as noncitizens, those with insufficient English language skills, and felons whose rights have yet to be restored. 28 U.S.C. § 1865(b). Some are exempt from jury service, including members of the armed forces; police, fire, and other public-safety employees; and certain public officials. *Id.* § 1863(b)(6). Also, district jury plans are required to provide that various volunteer safety personnel shall be excused from jury service on request and may provide that people for whom service would entail undue hardship or extreme inconvenience—such as elderly persons for whom service would be difficult—shall be excused upon request. *Id.* § 1863(b)(5).

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

III.C

Defendant's Right to a Public Trial

Whether and to what extent exceptions to a defendant's constitutional right to a public trial may be made have arisen mainly (though not exclusively) in the context of jury selection. The Supreme Court has held that there are exceptions to the general rule, such as when necessary to protect "the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information . . . [but] [s]uch circumstances will be rare." Pressley v. Georgia, 558 U.S. 209, 213 (2010). *Pressley* found that the right to a public trial applied equally to voir dire and that space limitations were insufficient—without consideration of alternatives—to warrant closing a courtroom to the public. *Id.* at 214–16. *See also* United States v. Bucci, 662 F.3d 18, 26–27 (1st Cir. 2011) (although space limitations can constitute a justification for closure, alternative methods must be used if reasonable).

III.D

Voir Dire

The purpose of voir dire is to help select an impartial jury. In legal parlance, the term means "to speak the truth." During an in-person jury selection process, the same general questions are asked of each juror and follow-up questioning may be asked of individual jurors. The presiding judge needs to decide whether a prospective juror should be challenged for cause based on the juror's answers. Attorneys may exercise their for-cause and peremptory challenges. Mu'Min v. Virginia, 500 U.S. 415, 431 (1991). Trial judges have broad discretion in conducting all aspects of voir dire. *See* United States v. Tsarnaev, 595 U.S. 302, 312–13 (2022).

III.D.1

Form of Questioning

The trial court conducts voir dire with broad discretion. Typically the presiding judge will have some routine questions that are used in every case. Additionally, the judge may tailor some case-specific questions to the circumstances of the case at hand. Commonly, the judge invites the parties to request particular additional questions. Depending on the nature of the case on trial, the jurors may be given written questionnaires to fill out. In other circumstances, the judge may address the prospective jurors orally, asking the jurors to signal—such as by raising their hand or standing up in the courtroom—that they have pertinent information in response to a particular question. The court and lawyers typically follow up by questioning the jurors individually concerning their responses to various questions.

III.D.2

Group vs. Individual Questioning

A trial court has the discretion to decide whether to question jurors collectively or individually. *See, e.g.*, United States v. Parker, 872 F.3d 1, 7–8 (1st Cir. 2017). Typically, a judge conducts voir dire with a group. *See, e.g.*, United States v. Casanova, 886 F.3d 55, 60–61 (1st Cir. 2018); *Parker*, 872 F.3d at 9; United States v. Hosseini, 679 F.3d 544, 555 (7th Cir. 2012). But the Supreme Court has taken care not to prescribe a rigid method for voir dire. For example, individual questioning of jurors for racial bias is not required. *Mu'Min*, 500 U.S. at 431.

Individual questioning of jurors may—and commonly does—occur at the bench. But other logistical solutions are also possible, such as excusing the venire from the courtroom and conducting the voir dire of jurors individually in open court. Specific strategies can be devised for individual cases. Any such procedures must accommodate the presence of the defendant, participation by counsel for the parties, and maintaining public access to the trial.

III.D.3

Challenges for Cause: Bias

A prospective juror who exhibits actual bias during voir dire must be excused by the court for cause. *See* United States v. Nieves, 58 F.4th 623, 632 (2d Cir. 2023). Challenges for a cause can be based on actual bias or implied bias. *Id.* at 632–33. In ruling on challenges for cause, the judge must make an independent determination of the partiality or impartiality of each juror and not simply accept the juror's own assessment of their ability to be fair. *See* United States v. Kechedzian, 902 F.3d 1023, 1027–28 (9th Cir. 2018).

III.D.4

Pretrial Publicity

Juror exposure to news accounts of a crime does not presumptively deprive a defendant of due process. Skilling v. United States, 561 U.S. 358, 380 (2010). Jurors need not be "totally ignorant of the facts and [crimes] involved." Irvin v. Dowd, 366 U.S. 717, 722 (1961). A presumption of prejudice arises only in "the extreme case." *Skilling*, 561 U.S. at 381. *Cf.* Rideau v. Louisiana, 373 U.S. 723, 724–26 (1963).

The trial court has considerable discretion in conducting voir dire when pretrial publicity is at issue, as it sits in the locale where the publicity occurred. The selection process provides a basis for assessing each venire member's fitness for service despite the existence of extensive publicity. *See Skilling*, 561 U.S. at 386; *Mu'Min*, 500 U.S. at 427. Comprehensive juror questionnaires, individual examination of prospective jurors at the bench (including questioning on pretrial publicity), and follow-up questions by the court and counsel can help identify jurors who may be prejudiced by pretrial publicity. *Skilling*, 561 U.S. at 388–92.

III.D.5

Written Jury Questionnaires

"Written questionnaires are now a common complement to oral examination when selecting an effective and impartial jury." United States v. Isaacson, 752 F.3d 1291, 1301 (11th Cir. 2014). Courts "routinely employ questionnaires to facilitate voir dire in a number of circumstances." United States v. Quinones, 511 F.3d 289, 299 (2d Cir. 2007) (finding written questionnaires can be used as part of the voir dire process). "As a practical matter, written questionnaires pose questions commonly asked, and materially indistinguishable from, what we expect to see during oral examination in the courtroom. Beyond that, the expectation that jurors will tell the truth is the same whether their answers are spoken or written." *Isaacson*, 752 F.3d at 1302.

"District courts routinely use written questionnaires in the voir dire process in high profile cases and certainly when the government seeks the death penalty." United States v. Barnette, 644 F.3d 192, 209 (4th Cir. 2011) (citing *Quinones*, 511 F.3d at 299). *See also* United States v. Tsarnaev, 595 U.S. 302, 314 (2022) (noting that 1373 prospective jurors were summoned in a capital trial before voir dire to fill out a written questionnaire that posed 100 questions).

Written questionnaires are used to supplement voir dire, not to replace it. The use of written questions and answers often expedites the oral, in-person voir dire process and allows trial judges to ask specific follow-up questions targeted to the issues in the case. Sometimes, trial judges will send out written questionnaires before formal voir dire. *See, e.g.*, United States v. Finley, 56 F.4th 1159, 1164 (8th Cir. 2023) ("In the district court's view, 'a jury questionnaire is a good thing to have [during the Covid-19 pandemic], because it becomes helpful to [the parties], it becomes helpful to everybody . . . in the matter, including what can lead to some very obvious cause strikes.' The district court provided the parties with its proposed questionnaire and allowed the parties to propose changes to the questions, some of which were adopted." (footnotes omitted)).

The Supreme Court has not decided whether the First Amendment includes a right to juror questionnaires. Federal courts considering the issue, however, usually assume or decide that issues about the First Amendment right of access dovetail into using written questionnaires. *See, e.g.*, United States v. Sittenfeld, No. 1:20-cr-142, 2022 WL 3097510, at *3 (S.D. Ohio Aug. 3, 2022) (citing published and unpublished federal cases). *See also In re* S.C. Press Ass'n, 946 F.2d 1037, 1040–42 (4th Cir. 1991). In *Sittenfeld*, however, the district court denied the public a right of access to juror questionnaires, holding that continuing to maintain the confidentiality of the questionnaires was appropriate because (a) the court provided aggregate information about the jurors taken from the juror questionnaires; (b) voir dire was in open court; and (c) the public already had substantial information about the jurors, and the requested information would not materially add to the public's ability to understand or appreciate the criminal process or the case.

For further discussion about the First Amendment rights of the public and press to have access to criminal trial proceedings, see below Part 2.V: First Amendment Access to Criminal Trial Proceedings.

III.D.6

Questioning on Racial Attitudes

Under the Due Process Clause, a defendant must be allowed to question jurors about racial bias when the case facts raise race issues. United States v. Hosseini, 679 F.3d 544, 555 (7th Cir. 2012) (citing Ham v. South Carolina, 409 U.S. 524, 526–27 (1973)). When there is a "reasonable possibility" that racial prejudice will influence the jury, federal trial courts must inquire into racial discrimination on voir dire. United States v. Dotson, No. 21-2826, 2022 WL 6973397, at *3–4 (6th Cir. Oct. 12, 2022) (citing Daniels v. Burke, 83 F.3d 760, 766 (6th Cir. 1996), and Rosales-Lopez v. United States, 451 U.S. 182, 189–90 (1981)). Even when "[v]oir dire questioning directed to racial prejudice [is] not constitutionally required, the wiser course generally is to propound appropriate questions designed to identify racial prejudice if requested by the defendant." Ristaino v. Ross, 424 U.S. 589, 597 n.9 (1976). *See also* Batson v. Kentucky, 476 U.S. 79 (1986).

III.E

Peremptory Challenges

Counsel may strike potential jurors without showing cause. Federal Rule 24(b) bases the number of peremptory strikes on the seriousness of the charged offense. When there are multiple defendants, it is in the trial court's discretion to allow them to exercise those challenges separately or jointly—or to provide the defendants with additional challenges. *See* United States v. Castro, 795 F. App'x 635, 648 (11th Cir. 2019). See below Part 2.IV for a discussion of *Batson* issues.

III.F

Jury Impartiality: Special Issues

The Sixth Amendment guarantees a defendant the right to a trial by an impartial jury. The court should pay particular attention to administrative aspects to ensure that a jury remains neutral throughout the trial and deliberations. Cautioning the jury repeatedly about permissible conduct and conversations outside the jury room is essential to a fair trial, civil or criminal. This admonition is especially important before jurors recess for the night, when they could talk to friends and relatives or watch the news. Giving cautionary instructions at the beginning of—and generally throughout—the trial to avoid wrongful and sometimes subtle suggestions offered by outsiders is a good practice. *See* United States v. Barth, 424 F.3d 752, 763 (8th Cir. 2005).

III.F.1

Jury Sequestration

The decision to sequester a jury is within the trial court's discretion. *See* United States v. Goin, 146 F. App'x 41, 47 (6th Cir. 2005); United States v. Napout, 963 F.3d 163, 188–90 (2d Cir. 2020). Sequestration, however, is a burdensome tool for ensuring a fair trial. It should be ordered only if no other means is available or practical. *See* Dietz v. Bouldin, 579 U.S. 40, 52 (2016) (describing the common-law history of sequestering juries and the burden on jurors). The trial court may sequester the jury during the trial to avoid the risk that the jury might become exposed to some prejudicial influence if not sequestered. United States v. Brown, 250 F.3d 907, 916–17 (5th Cir. 2001).

III.F.2

Electronic Media

Concern with juror use of electronic media flows from the fundamental principle that jurors must decide a case based solely on the evidence presented in the courtroom after deliberation with fellow jurors. A new trial is warranted if the defendant suffers substantial prejudice due to a jury's exposure to extraneous information. United States v. Massimino, 641 F. App'x 153, 163 (3d Cir. 2016). Thus "[a] juror who 'friends' his fellow jurors on Facebook, or who posts comments about the trial on Facebook, may, in certain circumstances, threaten a defendant's Sixth Amendment right to an impartial jury." United States v. Ganias, 755 F.3d 125, 132 (2d Cir. 2014). In *Ganias*, the Second Circuit joined the Third Circuit in endorsing the Judicial Conference's model instruction prohibiting juror use of the internet (including social media), cell phones, email, or text messaging to communicate electronically with anyone about the case at the start of the trial and before deliberations begin; and urged "trial judges to be proactive" by issuing "similar reminders throughout the trial" and "before dismissing the jury each day." *Id.* at 132–33. *See also* United States v. Fumo, 655 F.3d 288, 305 (3d Cir. 2011); United States v. Juror No. One, 866 F. Supp. 2d 442, 451–52 (E.D. Pa. 2011). The Ninth Circuit adopted such a model jury instruction in 2020. Ninth Circuit Model Criminal Jury Instruction 1.8. Violation of these restrictions may result in a mistrial. *See* 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, https://www.uscourts.gov/sites/default/files/proposed_model_jury_instructions.pdf (updated June 2020).

Specific instructions should be given to jurors to avoid any material related to the case found in any form of social media and other media coverage, like newspapers, radio, and television. United States v. Loughry, 983 F.3d 698, 706–08 (4th Cir. 2020). *Loughry* considered and rejected an argument that the district court's instructions should have been construed to prohibit any use of social or other electronic media. The Fourth Circuit also stated that courts need to make an accommodation to allow jurors to use electronic media for activities not related to the case.

Nonetheless the trial court should investigate any colorable claim by a defendant that the defendant's constitutional right to a fair trial with an impartial jury has been violated by extraneous influence(s) from a juror's use of social media. The Supreme Court has held that the trial court must hold a *Remmer* hearing, which is "a hearing to determine whether the incident complained of was harmful to the petitioner, and if after hearing it is found to have been harmful, to grant a new trial." Remmer v. United States, 347 U.S. 227, 229–30 (1954).

III.F.3

Handling of Deliberating Jurors

The trial court has the discretion to let deliberating jurors separate overnight. Powell v. Spalding, 679 F.2d 163 (9th Cir. 1982); United States v. Arciniega, 574 F.2d 931 (7th Cir. 1978). If the court permits jurors to separate overnight, it should admonish them to wait to speak about the case until the trial ends. And the next day, the court should interrogate the jury to be sure that each juror followed the court's instructions to refrain from talking to anyone about the case (including each other) and from reading or hearing anything about the case. United States v. Piancone, 506 F.2d 748 (3d Cir. 1974).

III.G

Simultaneous Use of Two Juries

Special problems may arise when there are codefendants being tried together. When the testimony is admissible against one codefendant but not against the other, the two codefendants may be tried simultaneously before two juries. Only the jury trying the codefendant against whom the testimony is admissible will hear that testimony. Brown v. Simons, 515 F.3d 1072, 1078 (10th Cir. 2008); Lambright v. Stewart, 191 F.3d 1181, 1186 (9th Cir. 1999) (en banc); Smith v. DeRobertis, 758 F.2d 1151, 1152 (7th Cir. 1985); United States v. Lewis, 716 F.2d 16, 19 (D.C. Cir. 1983); United States v. Hayes, 676 F.2d 1359, 1366 (11th Cir. 1982). If multiple juries are used, the trial judge should carefully explain their functions and instruct them not to talk about the case to anyone on the other jury. *Hayes*, 676 F.2d at 1366–67. *See also* Mack v. Peters, 80 F.3d 230, 236–38 (7th Cir. 1996) (holding that defendants in simultaneous trials have no more right to a particular trial sequence than they would in separate trials).

III.H

Anonymous Jury

An anonymous jury does not reveal any identifying juror information—names, addresses, places of employment—to counsel or others during voir dire or any other portion of the trial. Under 28 U.S.C. § 1863(b)(7), in a non-capital case, the court can empanel an anonymous jury whenever "the interests of justice so require." If necessary, the court may sua sponte empanel an anonymous jury to protect the jurors' safety and "to safeguard the integrity of the justice system, so that the jury can perform its factfinding function." United States v. Shryock, 342 F.3d 948, 971 (9th Cir. 2003). *See also* United States v. Portillo, 969 F.3d 144, 162–64 (5th Cir. 2020) (providing examples of justifications).

A district court need not conduct an evidentiary hearing before deciding to empanel an anonymous jury. United States v. Dinkins, 691 F.3d 358, 374 (3d Cir. 2012). It is advisable, however, for the court to support its conclusion with express findings based on evidence of record. *Id.* The court must consider safeguards to minimize infringing on the accused's fundamental rights, including the right to trial by an impartial jury, and must seek to mitigate the difficulties of uncovering juror bias by engaging in a careful and thorough voir dire. *Dinkins*, 691 F.3d at 378–79; *Shryock*, 342 F.3d at 971.

To ensure that anonymity does not adversely reflect on the defendant, the court should also provide jurors with plausible, nonprejudicial reasons for their anonymity. *See, e.g.*, *Shryock*, 342 F.3d at 972 (anonymity intended to protect jurors from curiosity-seekers); United States v. Darden, 70 F.3d 1507, 1532 (8th Cir. 1995) (anonymity intended to avoid harassment by media); United States v. Edwards, 303 F.3d 606, 612–15 (5th Cir. 2002) (upholding empaneling of the anonymous jury because of intense media coverage and the fact that defendant gained access to juror information); *Portillo*, 969 F.3d at 163 ("[T]he district court took care to provide a 'neutral explanation' for the anonymity procedures, thus minimizing the risk of potential prejudice").

In capital cases, the names and "places of abode" of members of the venire (as well as government witnesses) must be provided to the defendant at least three days before the start of the trial. *See* 18 U.S.C. § 3432. Additionally, the question may not be an all-or-nothing proposition. The identity of the jurors can be known to the parties, for example, but not published generally.

III.I

Jury Instructions

The various circuit courts of appeal have promulgated pattern criminal jury instructions, based on the relevant decided cases. Using the pertinent pattern instructions will help to avoid the likelihood of reversible error.

The common practice for trial judges is to share the court's proposed instructions to be given in the case on trial with counsel for all parties. The parties will have the opportunity to suggest additional instructions or to contest the propriety or suitability of particularly proposed instructions. If the court declines to give requested instructions, the propriety of that ruling is preserved for appeal.

In cases with complex issues, both factual and legal, it is common for the trial judge to give the deliberating jurors a transcript of the oral instructions the court has given. This practice enables the jurors to consult the transcript to resolve any doubts they may have about the applicability of particular instructions.

III.J

Use of Alternate Jurors

Federal Rule of Criminal Procedure 24 covers the basic rules for alternate jurors. Generally, it permits a court to empanel up to six alternate jurors. Rule 24(c)(1) allows substituting an alternate juror for a juror who can no longer perform their duties or becomes disqualified. The decision to replace a juror with an alternate juror is within the trial court's discretion. United States v. Cabada, 593 F. App'x 613, 615 (9th Cir. 2014); United States v. Penn, 870 F.3d 164, 170–71 (3d Cir. 2017); United States v. Bravata, 636 F. App'x 277, 292 (6th Cir. 2016).

The first twelve jurors who are not challenged or excused constitute the deliberating jurors. Alternate jurors replace jurors in the same sequence in which the alternates were selected. Fed. R. Crim. P. 24(c)(2)(B).

III.J.1

Replacement for Illness or Intoxication

Federal Rule of Criminal Procedure 24(c)(1) permits the court "to replace any jurors who are unable to perform . . . their duties." For example, a sitting juror may be replaced because of illness or illness of the juror's family member. *See Bravata*, 636 F. App'x at 292 (citing United States v. Franks, 511 F.2d 25, 37–38 & n.19 (6th Cir. 1975)). An intoxicated juror also may be substituted. *See* United States v. Jones, 534 F.2d 1344 (9th Cir. 1976).

III.J.2

Use of Alternate After Deliberations Have Started

- **Eleven-Juror Verdict**—Rule 23(b)(3) allows an eleven-juror verdict without the parties' consent if the court finds it necessary to excuse a juror for a good cause after the jury has begun deliberations.
- **Retaining Alternate Jurors**—Under Rule 24(c)(3), the court can control alternate jurors during deliberations. The court must ensure that the alternate jurors do not discuss the case with anyone else. If an alternate replaces a juror, the court must instruct the jury to begin deliberations anew.
- **Dismissing Juror or Alternate During Deliberations**—The trial court has broad discretion in determining whether to remove a juror after the jury has begun deliberating.

- **Temporary Disability of Deliberating Juror**—If a juror becomes temporarily incapacitated during deliberations, deliberations may be suspended for a short time to permit the possible recovery of the juror. United States v. Diggs, 649 F.2d 731 (9th Cir. 1981); United States v. Hall, 536 F.2d 313 (10th Cir. 1976). *Cf.* United States v. Hay, 122 F.3d 1233 (9th Cir. 1997) (48-day recess is an abuse of discretion); Clemmons v. Sowders, 34 F.3d 352 (6th Cir. 1994) (permissible to postpone sentencing phase for a few weeks).

III.K

Communication Between Trial Court and Jury

Communications between the trial court and members of the jury are not categorically banned by the Sixth Amendment or Federal Rule of Criminal Procedure 43. However, a judge's failure to show jurors' notes to counsel and allow them to comment before responding violates Rule 43(a).

Federal Rule of Criminal Procedure 43(a)(1)–(3) requires the defendant's presence during every stage of a criminal trial, including jury empanelment and return of the verdict, as well as during the initial appearance, arraignment, and plea, and during sentencing. Rule 43's presence requirement, however, is not absolute. A defendant is not required to be present, for example, during a conference or hearing on a question of law or where circumstances support a finding of voluntary waiver. Fed. R. Crim. P. 43(b) and (c).

The defendant's right to presence "is rooted . . . in the Confrontation Clause of the Sixth Amendment," and "is protected by the Due Process Clause [of the Fifth Amendment] in some situations where the defendant is not . . . confronting witnesses or evidence against him." United States v. Gagnon, 470 U.S. 522, 526 (1985). But a defendant's presence is only protected by the Constitution "to the extent that a fair and just hearing would be thwarted by his absence." *Id.* (quoting Snyder v. Massachusetts, 291 U.S. 97, 105–06, 108 (1934)).

In general, communication between the trial court and jury members after voir dire has ended should be in open court, with notice to all parties and counsel, and on the record. *See* United States v. Allen, 788 F.3d 61, 73–75 (2d Cir. 2015); Ross v. Dist. Att'y Cnty. of Allegheny, 672 F.3d 198, 211–12 (3d Cir. 2012). But there are practical circumstances when a defendant or defense counsel is not constitutionally required. For example, a juror may wish to consult with the court about the administrative aspects of jury trial service. The absence of the defendant in the courtroom during such an exchange would not violate the defendant's constitutional rights. Although the trial judge has discretion in replying to inquiries, the judge typically should (a) consult counsel before responding to any jury communication and (b) respond only in the presence of both parties in open court. But a deviation from this general approach does not necessarily constitute prejudicial error depriving a defendant of Fifth or Sixth Amendment rights.

> [The] mere occurrence of an ex parte conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right. The defense has no constitutional right to be present at every interaction between a judge and a juror, nor is there a constitutional right to have a court reporter transcribe every such communication.

Gagnon, 470 U.S. at 526 (quoting Rushen v. Spain, 464 U.S. 114, 125–26 (1983) (Stevens, J., concurring). Thus, the Sixth Amendment right to an impartial jury and a defendant's right under Rule 43 to be present during all stages of the trial are not implicated by every communication between the court and the jury.

III.K.1

Communication Between Court and Foreperson or Other Individual Juror

It is an error for the trial court to confer with the foreperson of a jury outside the presence of counsel and the defendant. The Supreme Court pointed out the pitfalls of informal communication with a deliberating jury (or its foreman) in *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978). In *Gypsum*, at the trial court level, the foreperson requested and received a conference with the trial judge to describe his difficulties with the deliberating jurors and to seek more guidance from the court. In reversing, the Supreme Court noted that the ex parte conference was improper because such meetings may mislead jurors by giving false impressions of the judge's views, which counsel cannot challenge. In short, ex parte conferences between judge and juror inevitably raise the risk that jurors will misinterpret or misstate the law in later discussions with the entire panel. *See id.* at 460.

Thus, any ex parte communication between the trial judge and an individual juror is prohibited. *See* United States v. Mejia, 356 F.3d 470 (2d Cir. 2014) (holding that ex parte response to note on the numerical split of deadlocked jury was erroneous); United States v. Collins, 665 F.3d 454 (2d Cir. 2012) (holding that ex parte discussion with a juror about the importance of resolving the case was erroneous). *See also* United States v. Zabriskie, 415 F.3d 1139 (10th Cir. 2005) (holding ex parte *Allen* charge to holdout juror was erroneous). Any supplemental instruction given ex parte violates the defendant's right to be present at every trial stage. United States v. Rogers, 422 U.S. 35 (1975). Compare this specific instance to the broader point made above, Part 2.III.K: Communication Between Trial Court and Jury (presence of the defendant under Rule 43(a)).

Only the trial judge should respond to a jury inquiry. A magistrate judge may not respond to a jury inquiry. United States v. Desir, 257 F.3d 1233, 1237–38 (11th Cir. 2001). The court clerk may wait to respond to a jury inquiry. *See* United States v. Patterson, 644 F.2d 890, 897–98 (1st Cir. 1981). *But see* United States v. Lynch, 903 F.3d 1061, 1082 (9th Cir. 2018) (finding no improper communication between jury and court clerk where clerk merely received a note from the jury and passed it on to judge).

III.K.2

Limits on Trial Court Discretion in Providing Guidance to a Deliberating Jury

When presented with factual questions from a deliberating jury, the trial judge must not try to "override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused." United States v. Martin Linen Supply Co., 430 U.S. 564, 573 (1977). The court's discretion to respond to jury inquiries does not extend to directing the jury to evidence that supports a charged count, which may unwittingly mandate that facts central to the prosecutor's case be taken as accurate. *See* United States v. Miller, 738 F.3d 361 (D.C. Cir. 2013).

III.K.3

Requests for Testimony

The trial court has broad discretion in responding to jury questions generally. United States v. Harris, 7 F.4th 1276, 1298 (11th Cir. 2021). The trial court has broad discretion, "especially in deciding whether to provide requested testimony [to the jury] either in written form, or as read by a court reporter." *Id.* (quoting United States v. Boyd, 54 F.3d 868, 872 (D.C. Cir. 1995)). The defendant and defense counsel should be present during any read-backs. Fed. R. Crim. P. 43; Fisher v. Roe, 263 F.3d 906, 917 (9th Cir. 2001).

III.K.4

Jury Instructions

"A district court enjoys 'considerable discretion in how it formulates, structures, and words its jury instructions.'" United States v. Correia, 55 F.4th 12, 42 (1st Cir. 2022) (quoting United States v. Prigmore, 243 F.3d 1, 17 (1st Cir. 2001)). "When a jury makes explicit its difficulties" with the court's instructions, the court must clear away those difficulties "with concrete accuracy." Bollenbach v. United States, 326 U.S. 607, 612–13 (1946). The court has the discretion to give more instructions to the jury after it has retired. *See* United States v. Graham, 484 F.3d 413, 420

(6th Cir. 2007). Additional instruction should be given only after conferring with counsel and providing an opportunity to object. Under ordinary circumstances and when it is practicable to do so, the jury should be recalled to the courtroom to receive the additional instruction from the court. Fillippon v. Albion Vein Slate Co., 250 U.S. 76, 81 (1919).

III.L

Juror Misconduct

When faced with a claim of juror misconduct, the court must determine whether the alleged misconduct has prejudiced the defendant such that the defendant cannot receive a fair trial. *See* United States v. Wheaton, 517 F.3d 350 (6th Cir. 2008). The scope of an investigation into juror misconduct is within the court's discretion. *Id. See also* United States v. Sherrill, 388 F.3d 535, 537 (6th Cir. 2004); United States v. Lanier, 988 F.3d 284, 294 (6th Cir. 2021) (quoting Williams v. Bagley, 380 F.3d 932, 944 (6th Cir. 2004) ("The presence of even a single biased juror deprives a defendant of [their] right to an impartial jury.")). *Compare* United States v. Robinson, 872 F.3d 760, 782 (6th Cir. 2017) (concurring and dissenting opinion) (regarding the effect of possible juror bias). Appellate review of trial court determinations of colorable jury misconduct is based on abuse of discretion. *Lanier*, 988 F.3d at 295.

III.M

Juror Bias

In *Peña-Rodriguez v. Colorado*, 580 U.S. 206 (2017), the Supreme Court addressed the question of whether a jury verdict may be impeached as an exception to Federal Rule of Evidence 606(b) when one of the deliberating jurors alleges that juror bias by one or more deliberating jurors plays a role in the ultimate verdict. In *Peña-Rodriguez*, a jury convicted the criminal defendant for sexually assaulting two teenage sisters. After the trial court discharged the jury, two jurors told defense counsel that another juror had expressed anti-Hispanic bias against the defendant and the defendant's alibi witness during deliberations. According to the jurors' affidavits, the biased juror thought the defendant was guilty because "Mexican men had a bravado that caused them to believe they could do whatever they wanted with women" and made similar statements reflecting racial prejudice. *Id.* at 212–13.

The trial court denied the prisoner's motion for a new trial, finding the affidavits would be inadmissible under Federal Rule of Evidence 606(b). The Supreme

Court reversed, holding that the Sixth Amendment guarantee of an impartial jury required the admission of evidence of juror racial bias. The Court held that racial bias is a "familiar and recurring evil that, if left unaddressed, would risk systemic injury to the administration of justice." *Peña-Rodriguez*, 580 U.S. at 224. According to the Court, "racial bias implicates unique historical, constitutional, and institutional concerns." *Id.* Further, "[a] constitutional rule that racial bias in the justice system must be addressed—including, in some instances, after the verdict has been entered—is necessary to prevent a systemic loss of confidence in jury verdicts, a confidence that is a central premise of the Sixth Amendment trial right." *Id.* at 225.

Accordingly, the Court held that "where a juror makes a clear statement" indicating reliance on "racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee." *Id.* at 225.

The *Peña-Rodriguez* case established a constitutional exception to Rule 606(b) that is distinct from the narrow statutory exceptions in Rule 606(b)(2). The constitutional exception announced in *Peña-Rodriguez*, however, has limits:

> Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

Id. at 225–26.[4]

4. Some federal circuits have had occasion to comment on the challenges posed by the *Peña-Rodriguez* holding. *See* United States v. Birchette, 908 F.3d 50, 57 (4th Cir. 2018) ("There are sound reasons to read *Peña-Rodriguez* as a narrow exception."); United States v. Baker, 899 F.3d 123, 133–34 (2d Cir. 2018) (*Peña-Rodriguez* creates a "narrow exception"); United States v. Robinson, 872 F.3d 760, 764 (6th Cir. 2017) (exception applies "in very limited circumstances"); Young v. Davis, 860 F.3d 318, 333 (5th Cir. 2017) (exception applies "narrowly"). *See also* United States v. Maurival, 861 F. App'x 388 (11th Cir. 2021) (denial of motion for new trial affirmed although two juror statements about deliberations met threshold *Peña-Rodriguez* test); *Baker*, 899 F.3d at 133 (speculation about a juror's comment—which "could possibly indicate that the juror determined" guilt based on racial animus—did not meet the "narrow exception to the no-impeachment rule" in *Peña-Rodriguez*).

The Supreme Court explained that each district's local juror-access rules may limit the exception to Rule 606(b). *See, e.g.*, Mitchell v. United States, 958 F.3d 775 (9th Cir. 2020). See below Part 2.V: First Amendment Access to Criminal Trial Proceedings. *Peña-Rodriguez* explicitly stated,

> The practical mechanics of acquiring and presenting such evidence will no doubt be shaped and guided by state rules of professional ethics and local court rules, both of which often limit counsel's post-trial contact with jurors. *See* 27 C. Wright & V. Gold, Federal Practice and Procedure: Evidence § 6076, pp. 580–583 (2d ed. 2007) (Wright); *see also* Variations of ABA Model Rules of Professional Conduct, Rule 3.5 (Sept. 15, 2016) (overview of state ethics rules); 2 Jurywork Systematic Techniques § 13:18 (2016–2017) (overview of Federal District Court rules). These limits seek to provide jurors some protection when they return to their daily affairs after the verdict has been entered. But while a juror can always tell counsel they do not wish to discuss the case, jurors in some instances may come forward of their own accord.

Peña-Rodriguez, 580 U.S. at 226.

III.N

Extraneous Influences on Jury

Extraneous or external influences on the jury are influences that occur outside of the trial proceedings. In *Remmer v. United States*, 347 U.S. 227, 229 (1954), the Supreme Court ruled that any private, off-the-record contact or tampering with a juror raises a presumption of prejudice to the defendant. The Court stated that the government bears the heavy burden of proving that any such contact was harmless to the defendant. Supplementing its holding in a second *Remmer* decision, the Supreme Court admonished that a court must examine the "entire picture," including the factual circumstances and impact on the juror. Remmer v. United States, 350 U.S. 377, 379 (1956). But in *Smith v. Phillips*, 455 U.S. 209, 215 (1982), after referring to *Remmer*'s presumptive-prejudice standard, the Supreme Court said that "the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias."

Whether *Remmer*'s presumption of prejudice survived *Phillips* is unsettled among the circuits. *Compare* Sims v. Rowland, 414 F.3d 1148 (9th Cir. 2005) (holding that *Remmer* and *Phillips* require a hearing in every case of potential juror bias), *with* Barnes v. Joyner, 751 F.3d 229, 243 (4th Cir. 2014) (stating *Remmer*'s "rebuttable presumption" is established federal law even after *Phillips*), *and* Brooks v. Dretke, 418 F.3d 430, 433–35 (5th Cir. 2005) (finding *Remmer* and *Phillips* remain relevant as to implicit bias and acknowledging that situations of extreme juror bias may not be simply ameliorated by a *Remmer* hearing). *See also*

Parker v. Head, 244 F.3d 831, 839 n.6 (11th Cir. 2001) (collecting cases); United States v. Butler, 822 F.2d 1191, 1195 n.2 (D.C. Cir. 1987) (citing Fourth, Fifth, Seventh, Eighth, and Tenth Circuits as continuing to apply *Remmer*).

The defendant's Sixth Amendment right to a fair trial requires a jury that always remains impartial and objective during the trial and deliberations on the verdict.[5]

> In deciphering what due process requires, this Court has distinguished between an extraneous contact that may have affected a jury's ability to remain fair and impartial and an intrinsic influence from a juror's pre-existing bias. If outside contacts may have affected the jury, due process requires some form of hearing.

United States v. McClinton, 135 F.3d 1178, 1186 (7th Cir. 1998)[6] (citing Willard v. Pearson, 823 F.2d 1141, 1148 (7th Cir. 1987) (citing *Phillips*, 455 U.S. at 215)).

Thus, courts must monitor (1) the effect of external influences on jury deliberations and (2) the potential for jury bias or prejudice due to the conduct of the prosecution, the defense, or even the court itself. The Supreme Court has held "that the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Phillips*, 455 U.S. at 215.

An external influence is "any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury" and "is, for obvious reasons, deemed presumptively prejudicial."

5. The Seventh Circuit wrote, "The Fifth and Sixth Amendments protect a criminal defendant from a jury's lynch mob mentality through the guarantees of due process of law and trial by an impartial jury." United States v. McClinton, 135 F.3d 1178, 1185 (7th Cir. 1998) (citing U.S. Const. amends. V and VI). The court went on to explain the concept of impartiality:

> "Impartiality is not a technical conception. It is a state of mind." United States v. Wood, 299 U.S. 123, 145–46 (1936) (Hughes, C.J.). The test for determining impartiality in a prospective juror is whether he can "'lay aside his impression or opinion and render a verdict based on the evidence presented in court.'" Murphy v. Florida, 421 U.S. 794, 800 (1975) (quoting Irvin v. Dowd, 366 U.S. 717, 723 (1961)). Due process, however, does not require a new trial "every time a juror has been placed in a potentially compromising situation. Were that the rule, few trials would be constitutionally acceptable." Smith v. Phillips, 455 U.S. 209, 217 (1982). Rather, due process consists of a jury able to decide the case solely on the evidence before it and a trial judge "ever watchful to prevent prejudicial occurrences and to determine the effect of such occurrences when they happen." *Id.* at 217.

McClinton, 135 F.3d at 1185–86 (parallel citations omitted).

6. Internal influences do not require judicial inquiry or a hearing. *See* Porter v. Gilmore, 479 F. Supp. 3d 252, 279–80 (E.D. Va. 2020). Internal influences arise from a juror's preexisting biases and should be ferreted out, to the extent they would be prejudicial, at the voir dire stage of the trial. *Id.* (citing *McClinton*, 135 F.3d at 1186).

Remmer v. United States, 347 U.S. 227, 229 (1954). In order "to be entitled to the . . . presumption [of prejudice] and a . . . hearing, a 'defendant must first establish both that an unauthorized contact was made and that it was of such a character as to reasonably draw into question the integrity of the verdict.'" Barnes v. Joyner, 751 F.3d 229, 244 (4th Cir. 2014) (citations omitted). *See also* United States v. Cheek, 94 F.3d 136, 141 (4th Cir. 1996) ("The party who is attacking the verdict bears the initial burden of introducing competent evidence that the extrajudicial communications or contacts were 'more than innocuous interventions.'"); Porter v. Gilmore, 479 F. Supp. 3d 252, 279–80 (E.D. Va. 2020).

Examples of external bias include "an attempt to bribe a juror, a juror's application for a job in the district attorney's office, and newspaper articles and media attention." Williams v. Bagley, 380 F.3d 932, 945 (6th Cir. 2004) (citation omitted). *Cf. Porter*, 479 F. Supp. at 280 n.13 (noting that in *Robinson v. Polk*, 438 F.3d 350, 363–64 (4th Cir. 2006), the Fourth Circuit "concluded that no evidentiary hearing was warranted when one juror read passages from the Bible to other jurors because the Bible was not deemed to be an external influence.").

Courts have held that an external influence on jury deliberations violates a defendant's right to an impartial jury when the defendant establishes that an unauthorized contact was made, which reasonably casts doubt on the integrity of the verdict. For example, a juror's decision to violate the court's instruction to refrain from reading social media reports about the trial during the trial or deliberations may undermine the defendant's right to a fair trial by inflaming the passions and prejudices of the jury.

III.0

Administrative Issues

III.0.1

Visible Security Measures

In the Courtroom

The Fifth Amendment prohibits the use of physical restraints visible to a jury in the courtroom, absent a determination by the court, in the exercise of its discretion, that a security interest specific to a particular trial justifies the restraints. *See* Deck v. Missouri, 544 U.S. 622, 624 (2005). Risk of escape, or a courtroom security issue specific to the defendant, may justify using physical restraints during trials. *Id.* at 633–34.

Although *Deck* involved the penalty phase of a capital case, the Supreme Court said that its reasoning applied equally to jury trials. The Court also noted that "[t]here will be cases . . . where these perils of shackling are unavoidable." *Id.* at 632 (citing Illinois v. Allen, 397 U.S. 337, 344 (1970)). It recognized "the need to give trial courts latitude in making individualized security determinations" that will "protect themselves and their courtrooms." *Deck*, 544 U.S. 632.

Without a particularized security determination, visible shackling in the courtroom is inherently prejudicial. The prejudice stems from the adverse effect of the shackles on the presumption of innocence, the defendant's ability to help counsel, and the formal dignity of the courtroom. *Deck*, 544 U.S. at 630–31.

The court can use physical restraints (including binding and gagging the defendant) as a last resort to control abusive or violent defendants. *Allen*, 397 U.S. at 343–44. In deciding whether less restrictive alternatives to shackling exist, a trial court must assess the disadvantages and limitations if shackles are applied to a defendant. *See* United States v. Cazares, 788 F.3d 956, 965 (9th Cir. 2015). Such disadvantages and limitations include (1) reversal of the presumption of innocence, (2) impairment of the defendant's mental ability, (3) impeding communication between the defendant and his counsel, (4) detraction from the decorum of the trial, and (5) pain. *Id.* "After considering these factors, the trial judge 'must weigh the benefits and [these] burdens of shackling against other possible alternatives.'" *Id.* (internal citations omitted). Prejudice must be minimized, and the restraints should be unobtrusive to the jury. *See, e.g.*, DeLeon v. Strack, 234 F.3d 84, 88 (2d Cir. 2000) (holding no abuse of discretion in handcuffing defendant during the trial because necessary to ensure security; the court did not improperly delegate the handcuffing to corrections officials; and efforts were made to conceal handcuffs from the jury).

Outside the Courtroom

Jurors' "brief and accidental" viewing of visible shackling outside the courtroom is not inherently prejudicial. *See* Wharton v. Chappell, 765 F.3d 953, 964 (9th Cir. 2014). Suppose jurors inadvertently see the defendant in handcuffs or any other security measure. In that case, the court should discuss with counsel the need for a jury instruction that no inferences are to be drawn from the fact.[7] Dupont v. Hall, 555 F.2d 15, 17 (1st Cir. 1977); United States v. Halliburton, 870 F.2d 557, 559–60 (9th Cir. 1989). *Cf.* United States v. Rutledge, 40 F.3d 879, 884 (7th Cir. 1994), *rev'd on other grounds*, 517 U.S. 292 (1996) (no instruction required when the defendant refused it).

Other visible security measures for the defendant (like the presence of state troopers in the courtroom) do not necessarily impair juror impartiality. Holbrook v. Flynn, 475 U.S. 560, 568–69 (1986) (noting that the court should still assess extra security measures case-by-case). *See also DeLeon*, 234 F.3d at 88 (citing United States v. Zuber, 118 F.3d 101, 103–04 (2d Cir. 1997)).

For a more comprehensive discussion on securing defendants, see Part 4.VI: Disruptive Defendants.

III.O.2

Jury Questioning of Witnesses

District courts have discretion over the proper handling of juror questions. United States v. Kieffer, 991 F.3d 630, 636 (5th Cir. 2021). But this practice has been characterized as "a procedure fraught with peril." United States v. Sutton, 970 F.2d 1001, 1005 (1st Cir. 1992). Trial judges must take prophylactic measures to ensure fairness and regard for the defendant's rights. United States v. Hernandez, 176 F.3d 719 (3d Cir. 1999). The jurors' questions should be submitted to the court in writing, and then the court must consult counsel about the propriety of the questions. If the court finds the questions proper, it may pose them in their original form or restate them. *Kieffer*, 991 F.3d at 636–37 (describing the procedure for posing juror questions). *See also* United States v. Ajmal, 67 F.3d 12 (2d Cir. 1995) (finding abuse of discretion where extensive questioning resulted from the trial court's encouragement of jurors to question all witnesses, including the defendant).

7. If the court believes that one or more jurors may have observed physical restraints, it has a difficult choice when weighing the appropriate remedy, particularly when involved in a lengthy trial. One option is to voir dire the jury. Individual voir dire, if undertaken quickly, may prevent the spread of information among the jurors about a particular juror's observation of the restraints. If one juror has seen the defendant's shackles or handcuffs and has not spoken to any other jurors about them, removal of that juror is possible. Also, curative instruction may resolve the issue. *See, e.g.*, United States v. Cazares, 788 F.3d 956, 965–66 (9th Cir. 2015) ("To reduce the risk of prejudice from the shackling, the district court judge carefully questioned the potential jurors during voir dire to preclude seating jurors who had seen any defendants in shackles on the monitor.").

III.P

Deadlocked Jury

The trial court can admonish a deadlocked jury to make further efforts to reach a verdict. Allen v. United States, 164 U.S. 492, 501–02 (1896). Federal courts are prohibited from asking a deliberating jury about its numerical division. *See* Brasfield v. United States, 272 U.S. 448, 450 (1926).

The *Allen* instruction is a charge a trial court gives to encourage the jury to reach a unanimous verdict to avoid a mistrial. United States v. Coulter, 57 F.4th 1168, 1192 (10th Cir. 2023). An *Allen* instruction must not be improperly coercive. *Id.* The Tenth Circuit requires that the *Allen* charge include cautionary language that reduces its potential coercive effect on the jury. *Id.* at 1192–93. It noted that an *Allen* charge must consist of instructions that no juror should relinquish conscientiously held convictions to reach a verdict; that primary education on the presumption of innocence and the government's burden of proof should be repeated; and that every juror should reconsider their views, not just those in the majority or minority.

Most circuits have upheld the *Allen* charge if given in a noncoercive manner. *See, e.g.*, United States v. Amaro-Santiago, 824 F.3d 154, 163 (1st Cir. 2016); United States v. Hylton, 349 F.3d 781, 788 (4th Cir. 2003); United States v. Fieldo, 483 F.3d 313, 340 (5th Cir. 2007); United States v. Tevis, 593 F. App'x 473, 478 (6th Cir. 2014); United States v. Evans, 431 F.3d 342, 347 (8th Cir. 2005); United States v. Berger, 473 F.3d 1080, 1089 (9th Cir. 2007); United States v. Woodard, 531 F.3d 1352, 1364 (11th Cir. 2008). Many trial judges use a variation of the *Allen* charge. United States v. McElhiney, 275 F.3d 928, 936–38 (10th Cir. 2001).

Rather than *Allen*, the *Thomas* and *Brown* courts require conformity with the American Bar Association's Criminal Justice Standard 15-5.4 (Length of deliberations; deadlocked jury). *See also McElhiney*, 275 F.3d at 949. Judges should learn about local practices and customs and proceed accordingly.

IV

Peremptory Challenges Based on Race, Gender, and Other Class-Based Bias: *Batson* Issues

Prosecutorial use of peremptory challenges to exclude persons from the jury based on their race or gender violates the Equal Protection Clause of the Fourteenth Amendment. Batson v. Kentucky, 476 U.S. 79 (1986); J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127 (1994).[8] Likewise, a criminal defendant is prohibited from exercising these impermissible challenges. Georgia v. McCollum, 505 U.S. 42, 55–56 (1992). *Batson* established a three-step process for determining whether a prosecutor's peremptory challenges violated the Equal Protection Clause: (1) the defendant must make a prima facie showing that the challenge was based on race; (2) "the prosecution must offer a race-neutral basis for striking the juror in question"; and (3) "in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." Miller-El v. Cockrell (*Miller-El I*), 537 U.S. 322, 328–29, 338 (2003); Purkett v. Elem, 514 U.S. 765, 767–68 (1995).

IV.A

Criteria for Prima Facie Case

The objecting party can make out a prima-facie case that a peremptory challenge violated the Equal Protection Clause "by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose." Johnson v. California, 545 U.S. 162, 168 (2005);[9] *Miller-El I*, 537 U.S. at 328–29.

The burden of showing a prima facie case of discrimination in jury selection "is not meant to be onerous." Sorto v. Herbert, 497 F.3d 163, 170 (2d Cir. 2007) (citing *Johnson*, 545 U.S. at 170). A prima facie case may be made by showing that

8. The status of *Batson*'s application to religion-based peremptory challenges remains unsettled. *See* United States v. Mahbub, 818 F.3d 213, 225 (6th Cir. 2016). *See also J.E.B.*, 511 U.S. at 128 (providing that gender and race are unconstitutional proxies for juror impartiality and reaffirming the Court's commitment to jury selection procedures "free . . . from group stereotypes rooted in . . . historical prejudice.")

9. *Powers v. Ohio*, 499 U.S. 400, 416 (1991), broadened the original formulation of the *Batson* holding by eliminating the need for a defendant to be a member of the same group (race or sex) as the peremptorily challenged jurors.

either the prosecution or the defense exercised a peremptory challenge in a racially discriminatory manner or that it has engaged in a pattern of strikes against jurors of a particular race. *Batson*, 476 U.S. at 96–97. *See also* Seals v. Vannoy, 1 F.4th 362, 368 (5th Cir. 2021).

IV.A.1

Defendant Need Not Be a Member of the Same Cognizable Racial Group as Struck Juror(s)

An Equal Protection Clause violation can arise from improper use of peremptory challenges by the prosecutor or the defendant. Thus, a litigant—either the government or a criminal defendant—can challenge peremptory strikes exercised against jurors whether they are of the same race as the litigant or are of a different race. *See* Powers v. Ohio, 499 U.S. 400 (1991). A litigant has third-party standing to raise the equal protection claims of venire persons who have been peremptorily excused from a jury because of purposeful racial discrimination, even if the litigant and the peremptorily excluded venire persons are not of the same race. *Id.* at 415–16. Thus, a litigant raising a *Batson* challenge must show only that a venire member was peremptorily challenged for being a member of a cognizable racial group—not that all venire members who were peremptorily excused belong to the same, cognizable racial group. *See* Green v. Travis, 414 F.3d 288 (2d Cir. 2005).

Powers also established that the racially discriminatory peremptory challenge of even one juror, standing alone, violates the equal protection clause. *See Powers*, 499 U.S. at 409. *See also* Snyder v. Louisiana, 552 U.S. 472, 478 (2008).

IV.A.2

Circumstances Raising an Inference of Discrimination

A criminal defendant may rely on "all relevant circumstances" in making the prima facie discrimination case. Batson v. Kentucky, 476 U.S. 79, 96–97 (1986). "All relevant circumstances" include a showing that the defendant "is a member of a cognizable racial group"; "that the prosecutor . . . exercised peremptory challenges to remove" one or more "members of the defendant's race" from the venire; and any other facts or circumstances supporting "an inference that the prosecutor" challenged members of the defendant's racial group because of their race. *See id.* at 96. Factors in the last category may include a "pattern" of strikes against members of the defendant's racial group or statements and questions posed by the prosecutor during the voir dire. *Id.* at 97. "All relevant circumstances" means "all of the circumstances that bear upon the issue of racial animosity." *Snyder*, 552 U.S. at 478 (citing Miller-El v. Dretke (*Miller-El II*), 545 U.S. 231, 239 (2005)). Sometimes, the trial court may need to look beyond "the four corners of a given case" in deciding whether the prosecution's neutral explanation for a peremptory challenge is pretextual. *Miller-El II*, 545 U.S. at 240.

Thus, together with the *Batson* factors, *Miller-El II* makes clear that evidence of discriminatory purpose in exercising peremptory strikes may be found for these reasons:

1. "[C]ontrasting voir dire questions posed" to minority and nonminority panel members. *Id.* at 255–63.
2. Instances where the prosecutor's proffered reason for striking a member of a cognizable (e.g., black) racial group applies just as well to others (e.g., whites) who are members of the panel. *Id.* at 252.
3. Suspect jury selection practices (such as "shuffling") that limit the number of minority jurors likely to sit on the prospective jury. *Id.* at 253–55.
4. Historical policies of racial discrimination used by the prosecuting authority in the jurisdiction. *Id.* at 263–64.

See also Snyder, 552 U.S. at 477, 479–82 (record shows trial court addressed and mitigated juror's issue that prosecutor claimed to have motivated strike).

IV.B

Procedure After Prima Facie Case of Discrimination Has Been Made

Once a party has made out a prima facie case of discrimination, the burden shifts to the proponent to present a race-neutral explanation for its challenges. *Batson*, 476 U.S. at 97. Some circuits require the court to hold an adversarial hearing to consider the challenged party's reasons and permit rebuttal by the challenging party. United States v. Wilson, 816 F.2d 421, 422–23 (8th Cir. 1987); United States v. Alcantar, 897 F.2d 436, 437 (9th Cir. 1990).

IV.C

Determining Whether Strikes Were Made with Discriminatory Intent

In *Snyder v. Louisiana*, 552 U.S. 472 (2008), the Supreme Court clarified the trial court's role in a *Batson* inquiry's third and decisive step: determining whether the peremptory challenges were exercised with discriminatory intent. *See also Miller-El I*, 537 U.S. 322, 328–29 (2003) (question posed at the third step of the inquiry is "whether the defendant has shown purposeful discrimination"); Foster v. Chatman, 578 U.S. 488 (2016) (holding step three turns on trial court's factual determinations).

In resolving the step-three inquiry, the trial court must assess the credibility of the prosecutor's race-neutral reasons for making the challenge at issue, which often will involve an evaluation of the demeanor of the prosecutor and/or the challenged juror. *Snyder*, 552 U.S. at 477. Where the prosecutor cites the juror's demeanor, the court must decide "whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor." *Id.* at 477.

In *Hernandez v. New York*, 500 U.S. 352, 365 (1991) (plurality opinion), the Court stated that "[i]n the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." Thus "[t]he prosecution's proffer of [a] pretextual explanation naturally gives rise to an inference of discriminatory intent." *Snyder*, 552 U.S. at 485. *See also Miller-El II*, 545 U.S. 231, 252 (2005) (noting the "pretextual significance" of a "stated reason [that] does not hold up"); Purkett v. Elem, 514 U.S. 765, 768 (1995) (per curiam) ("At [the third] stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination").

A trial judge's first-hand observations of a juror's demeanor "are of great importance" when a peremptory strike is based on a claim of juror demeanor. However, a judge need not personally observe a potential juror's behavior to evaluate a claimed *Batson* violation based on demeanor. *See* Thaler v. Haynes, 559 U.S. 43, 47–49 (2010).

IV.D

Timeliness of Objection

The rules for assessing the timeliness of *Batson* objections vary depending on the circuits. *See* United States v. Tomlinson, 764 F.3d 535, 538 (6th Cir. 2014). The *Batson* challenge is timely "if it is made as soon as possible or by the close of voir dire . . . [Third and Eleventh Circuits]. Other courts find a *Batson* challenge timely if it is raised before the jury venire is dismissed and before the trial commences . . . [Fourth, Fifth, and Eighth Circuits]. Still other courts [find] . . . a *Batson* challenge . . . timely if it is 'made as soon as possible and preferably before the jury is sworn . . .' [Ninth Circuit]." *Id.*

V

First Amendment Access to Criminal Trial Proceedings

Well-settled First Amendment law gives the press and public a constitutional right to access criminal trials. Globe Newspaper Co. v. Super. Ct. for Norfolk Cnty., 457 U.S. 596, 604 (1982) ("Underlying the First Amendment right of access to criminal trials is the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs'"). Thus, as much as the First Amendment embraces a right of access to criminal trials, it ensures that this constitutionally protected discussion of governmental affairs is informed. *Id.* at 604–05.

In fact, the First Amendment's right of access "may give way in certain cases to other rights or interests, such as the defendant's right to a fair trial or the government's interest in inhibiting disclosure of sensitive information." Waller v. Georgia, 467 U.S. 39, 45 (1984). Indeed, "[n]o right ranks higher than the right of the accused to a fair trial." Press-Enterprise Co. v. Super. Ct. of Cal., 464 U.S. 501, 508 (1984). *See also* Neder v. United States, 527 U.S. 1, 30 (1999) (Scalia, J., concurring in part and dissenting in part) ("When this Court deals with the content of th[e] guarantee [to a trial by impartial jury]—the only one to appear in both the body of the Constitution and the Bill of Rights—it is operating upon the spinal column of American democracy.").

V.A

Juror Names: Voir Dire

Public access to court proceedings such as voir dire ensures fairness; because jurors' names are typically revealed during voir dire, such access will, by definition, encompass the names of those in the jury venire. *See In re* Globe Newspaper Co., 920 F.2d 88, 94, 98 (1st Cir. 1990) ("The Supreme Court has identified the following purposes which open justice serves: assuring that proceedings are conducted fairly; discouraging perjury, misconduct of participants, and biased decisions; prophylaxis as an outlet for community hostility and emotion; ensuring public confidence in a trial's results through the appearance of fairness; inspiring confidence in judicial proceedings through education regarding the methods of government and judicial remedies."); United States v. Gurney, 558 F.2d 1202, 1210 n.12 (5th Cir. 1977) (although affirming court's denial of request for later disclosure of list of jurors, pointing out that the public had access to jurors' identities during voir dire because their names were called in open court at that time and there were no restrictions on their publication). *Cf. Press-Enterprise*, 464 U.S. at 510–11 (voir dire is presumptively public, implying that juror names will become public during voir dire by noting that special circumstances can sometimes support an order withholding the name of a juror); Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 559, 598 (1980) (the public and press have a constitutional right to attend criminal trials).

The public right of access to voir dire, however, is not unlimited. Limiting access may be appropriate when necessary to preserve higher interests. *See, e.g.*, United States v. Marzook, 412 F. Supp. 2d 913 (N.D. Ill. 2006) (closure appropriate to protect the release of classified information). *See also* ABC, Inc. v. Stewart, 360 F.3d 90, 100 (2d Cir. 2004) ("We do not mean to suggest that providing documentary, in lieu of concurrent, access is never an appropriate result. Where, applying the constitutionally mandated balancing test, a court has found that concurrent access must be denied, the provision of a transcript may well be the best available substitute.").

V.B

Juror Names: During Trial and Deliberations

"[T]he press and public maintain a qualified right to attend voir dire proceedings," but that "does not necessarily mean that they also maintain a right to access juror names. The two issues are analytically distinct." United States v. Black, 483 F. Supp. 2d 618, 628 n.12 (N.D. Ill. 2007). *See also* Sheppard v. Maxwell, 384 U.S. 333, 342, 353 (1966). In *Black*, 483 F. Supp. 2d at 628, the court said: "[O]pen access to juror names during the pendency of trial . . . enhances the risk that the jury will not be able to function as it should, in secrecy and free of any outside influence" (citing United States v. Doherty, 675 F. Supp. 719, 725 n.7 (D. Mass. 1987) (discussing trial court's rationale for denying access to juror names)).

The danger of disclosing juror identities during trial and deliberations is grave in cases that generate significant media and public attention. As the court explained in *Black*, 483 F. Supp. 2d at 628, "releasing juror names during the pendency of trial threatens the integrity of the jurors' ability to absorb the evidence and later to render a verdict based only on that evidence. This is the case because disclosure increases the risk of third-party contact by the press or by non-parties who are monitoring these proceedings." Moreover, "[a]ny such contact is presumptively prejudicial to Defendants' right to a fair trial, United States v. Harbin, 250 F.3d 532, 544 (7th Cir. 2001) (communications with jurors during the pendency of trial are presumptively prejudicial (citing Remmer v. United States, 347 U.S. 227, 229 (1954)))—and could give rise to jury tampering." *Black*, 483 F. Supp. 2d at 628.

Another significant concern about releasing jurors' names during trial is the risk of undermining a defendant's right to a fair trial. *See Press-Enterprise*, 464 U.S. at 508. "To disclose the jurors' names in a high-profile trial[s] . . . would create the unnecessary risk that, during the trial, jurors will be subjected to improper and presumptively prejudicial contact." *Black*, 483 F. Supp. 2d at 630 (citing *Sheppard*, 384 U.S. at 362 ("Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.")).

V.C

Juror Names: Post-Trial and Verdict

The rules governing the release of juror names post-trial—after a verdict has been reached, delivered to the court, and entered into the record—are different. At this stage of the proceedings, well-settled First Amendment law allows jurors' identities to be revealed to the press so reporters can seek to interview them. But not all federal circuits are keen on this idea. Post-verdict interviewing of juries—or individual jurors—is allowed in some circuits, prohibited in others, and allowed in some with restrictions. Most appellate decisions tend to uphold limited post-trial contact with jurors. *See, e.g.*, United States v. Atar, 38 F.3d 1348 (3d Cir. 1994); Mitchell v. United States, 958 F.3d 775 (9th Cir. 2020).

Without compelling circumstances, appellate courts have rejected blanket prohibitions against post-trial juror contact but have upheld restrictions on that contact if the trial court enunciates the appropriate rationale for the tailored regulation. *See, e.g.*, Journal Publ'g Co. v. Mechem, 801 F.2d 1233 (10th Cir. 1986); *In re* Express-News, 695 F.2d 807 (5th Cir. 1982). *Cf.* United States v. Wecht, 537 F.3d 222 (3d Cir. 2008) (finding that the media has presumptive First Amendment right of access to names of prospective and selected jurors in trial with an anonymous jury; prospect that the press might publish background stories about jurors not a legally sufficient reason to withhold jurors' names from the public). Even so, jurors are routinely told at the end of a trial that they can speak to the press but do not have to do so; the decision belongs to the individual juror alone.[10]

In contrast, courts may make it harder for counsel in the completed case to talk with jurors. Some courts freely permit it; some restrict it. For example, in the First Circuit post-verdict interviews of jurors by counsel, litigants, or their agents are forbidden except under the district court's supervision. *See* United States v. Zimny, 857 F.3d 97, 100 (1st Cir. 2017). These restrictions do not apply to the press.

10. This discussion, however, has no bearing on a juror's competence or ability to testify about deliberations or before another juror under Fed. R. Evid. 606(b), especially given the holding in *Peña-Rodriguez v. Colorado*, 580 U.S. 206, 221 (2017) (recognizing a rare exception to the no-impeachment rule of Rule 606(b) based on the gravity and importance of eradicating racial bias from the jury's verdict "when a juror's statements indicate that racial animus was a significant motivating factor in his or her finding of guilt.").

3

Witness Statements and Exculpatory Evidence

I

Witness Statements: The Jencks Act and Federal Rule of Criminal Procedure 26.2

In 1957, before the Supreme Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1963),[11] Congress enacted the Jencks Act, 18 U.S.C. § 3500. The Jencks Act provides that statements of a government witness are discoverable by a defendant after that witness has testified on direct examination at trial if the statements are in the government's possession and relate to the subject matter of the witness's testimony.

The Jencks Act defines a "statement" as

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

18 U.S.C. § 3500(e).

The substance of the Jencks Act is incorporated into Federal Rule of Criminal Procedure 26.2 (Producing a Witness's Statement). *See* Notes of Advisory

11. In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court addressed the government's affirmative duty to disclose exculpatory evidence. The Court held that suppression of evidence favorable to the accused violated due process when the evidence was material to guilt or punishment. *Brady* is discussed *infra* Part 3.II: *Brady* Material.

Committee on Rules (1979). Rule 26.2 reflects the Supreme Court's reasoning in *United States v. Nobles*, 422 U.S. 225 (1975), where the Court held that the trial court could compel the defendant to disclose impeachment evidence to the prosecution for cross-examination. *See id.* at 227. Rule 26.2 is designed to place the disclosure of a defense witness's prior relevant statements in the defense's possession on the same legal footing as the disclosure of a prosecution witness's previous statements in the hands of the government.

Nobles held that trial courts have an inherent right to require the defense to provide the prosecution with prior relevant, recorded statements of a testifying defense investigator for inspection and potential use in cross-examination. *Id.* at 227. Neither the Fifth and Sixth Amendments nor the attorney work-product doctrine prevented disclosure of these statements at trial. *Id.* at 233–34, 239–40 & n.15. *See also* United States v. Wallace, 326 F.3d 881, 884–85 (7th Cir. 2003).

Together, the Jencks Act and Rule 26.2 require that after a witness other than the defendant testifies on direct examination, the court must order the opposing attorney to produce any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony. The Court must order this on motion of the party who did not call the witness, and the opposing attorney may examine and use these statements.

The purpose of Rule 26.2 is to ensure that each side can examine the statements made by witnesses of the other side and use them in cross-examination. "The rule is not intended to discourage the practice of voluntary disclosure at an earlier time to avoid delays at trial." Notes of Advisory Committee on Rules (1979).

Even though most of the case law on witness-statement disclosure issues was developed in the years following the passage of the Jencks Act in 1957, the fundamental rationale of the Jencks Act cases cited below aligns with the disclosure requirements of Rule 26.2.

I.A

Mechanics of Producing Jencks Act Statements

Production of statements covered by the Jencks Act is not automatic. It only applies where the requesting party has made a timely motion for disclosure. Fed. R. Crim. P 26.2(a); United States v. Jonassen, 759 F.3d 653, 663 (7th Cir. 2014). The court may only compel the government to produce Jencks Act material once a witness has testified directly. *See* United States v. Coppa, 267 F.3d 132, 146 (2d Cir. 2001) (a court may not order pretrial disclosure of Jencks material). The government is allowed to produce Jencks materials early. *See, e.g.*, United States v.

Maury, 695 F.3d 227, 248 n.18 (3d Cir. 2012); United States v. Jordan, 316 F.3d 1215, 1251 n.78 (11th Cir. 2003). Many prosecutors will voluntarily produce those materials before trial or, at the latest, on the first day of trial. Some circuits promote this practice. *Maury*, 695 F.3d at 248 n.18. *See also Jordan*, 316 F.3d at 1251 n.78.

Production timing may also be regulated by a district court's local rules or a judge's standing order. Early production of Jencks material makes the case more efficient because it gives a defendant's counsel a better opportunity to raise potential issues with the court in a timely manner. Early production similarly may provide all parties with an earlier glimpse into issues that may affect how the trial is conducted. United States v. Holmes, 722 F.2d 37, 40 (4th Cir. 1983).

Where the defense makes a colorable claim that documents qualify as Jencks Act material and the government objects to production, courts have found that they may not simply rely on a prosecutor's statement that the documents are not Jencks Act material and should instead independently investigate the claim. United States v. Moore, 651 F.3d 30, 75 (D.C. Cir. 2011); United States v. Gonzalez-Melendez, 570 F.3d 1, 3 (1st Cir. 2009); United States v. Johnson, 200 F.3d 529, 536 (7th Cir. 2000). When doing so, the court can conduct a hearing or order the government to provide the material for in camera inspection.

I.B

Types of Jencks Act Statements

Witness statements are generally in the form of grand jury testimony or documents, emails, text messages, or other electronic communications written by witnesses. Although other written materials—like reports by government agents investigating the case and notes from witness interviews—generally do not qualify as Jencks Act statements of the interviewed witness, *Moore*, 651 F.3d at 75, such secondary material not actually written by the witness can become a Jencks Act statement when it has been adopted by the witness, such as where an agent reads it back to the witness to confirm its accuracy, *Gonzalez-Melendez*, 570 F.3d at 4. But radio transmissions, phone calls, tape recordings, and statements made or obtained through electronic technology during an investigation may also qualify as producible material under the Jencks Act. *See, e.g.*, United States v. Ramirez, 174 F.3d 584, 587–88 (5th Cir. 1999) (Bureau of Prisons tape-recordings of witness conversations contained Jencks statements).

I.B.1
Witness Interview Notes

Three categories of documents prepared by government agents interviewing witnesses could be Jencks Act statements of the agent or the witness: "(1) contemporaneous rough notes taken by a government agent of meetings, conversation, or interviews during the course of his or her investigation; (2) the agent's subsequently prepared drafts of his reports of these incidents; and (3) the final report signed by the agent." United States v. Ammar, 714 F.2d 238, 258 (3d Cir. 1983).

Rough interview notes to prepare formal witness reports should be preserved so that they will be available if they need to be produced. *See* United States v. Vella, 562 F.2d 275, 276 (3d Cir. 1977) (per curiam); United States v. Parker, 549 F.2d 1217, 1223–25 (9th Cir. 1977). Yet if the notes are destroyed without evidence of bad faith, such an error may be harmless. *See* United States v. Reed, 575 F.3d 900, 921 (9th Cir. 2009) (no Jencks violation where agent's notes used to prepare formal report were destroyed in good faith and no prejudice to defendant); United States v. Brown, 303 F.3d 582, 592 (5th Cir. 2002) (rejecting defendant's contention that Fed. R. Crim. P. 16(a)(1)(A) entitles a criminal defendant to preparatory interview notes in cases where the government satisfies its obligation by disclosing a 302 report that contains all information from the interview notes). *See also* United States v. Coe, 220 F.3d 573, 583 (7th Cir. 2000) (holding that refusal to order disclosure of handwritten interview notes was not an abuse of discretion despite "minor discrepancies" between the handwritten notes and the disclosed, typewritten reports); United States v. Niederberger, 580 F.2d 63, 71 (3d Cir. 1978) (destruction of rough interview notes was harmless error where no bad faith was present).

Raw notes by an agent are not producible statements of the agent unless signed or otherwise adopted by the agent. *See* United States v. Jordan, 316 F.3d 1215, 1252 (11th Cir. 2003). On the other hand, a handwritten draft of a report that is "in a form sufficiently acceptable to the agent that he allowed it to be reviewed by his superior" might have been adopted or approved by the agent and thus fall within the Jencks Act even if the entire contents of the draft were incorporated into a final, typed report. In this case, the report must be preserved to facilitate the court's determination whether it has to be produced as a Jencks Act statement. United States v. Walden, 578 F.2d 966, 969–70 (3d Cir. 1978). On remand, *see* 465 F. Supp. 255 (E.D. Pa. 1978), *aff'd*, 590 F.2d 85 (3d Cir. 1979) (per curiam). *See also Ammar*, 714 F.2d at 259–60.

Although the Ninth Circuit set forth a similar rule in an early decision, *United States v. Johnson*, 521 F.2d 1318, 1320 (9th Cir. 1975) (holding the that trial court needed to conduct a hearing to determine if testifying agent's notes were adopted or approved by the agent, even if all of the information in the notes was included in the agent's subsequent report), many subsequent decisions have pointed out that rough notes will rarely have the completeness, finality, or communicative intent necessary to qualify as Jencks Act statements. As the court explained in *United States v. Griffin*, 659 F.2d 932, 937–38 & n.4 (9th Cir. 1982),

> It is highly unlikely that the agents' rough notes could be considered Jencks Act statements. . . . [They] usually are considered too cryptic and incomplete to constitute the full statement envisioned by the Jencks Act. . . . [A]n agent's rough notes will not be Jenks Act statements when they "are not complete, are truncated in nature, or have become an unsiftable mix of witness testimony, investigator's selections, interpretations, and interpolations. . . ." [An agent's] approval is likely to attach more to his completed formal report than to the "jottings" from which the agent drafts the report. . . . [I]t is the final report which becomes the Jencks Act statement and not the rough notes. . . . [I]n an interview context, an agent's own thoughts and observations . . . may be recorded in a brief and incomplete manner. . . . Only . . . [in] his formal interview report, will the agent make the complete statement envisioned by the Jencks Act. . . . Thus, it will be the very unusual case where an agent's own thoughts will be recorded in rough interview notes with sufficient completeness or intent to communicate to be a Jencks Act statement. In the more typical case, only the formal interview report, through which the agent intends to communicate to others, will be a "statement" under the Jencks Act.

See also United States v. Simtob, 901 F.2d 799, 809 (9th Cir. 1990) (following *Griffin* and pointing out that the agent's "notes were merely bits and pieces of information which he collected and reduced to writing to refresh his recollection").

The Ninth Circuit later distinguished *Johnson* by explaining that it was undisputed in *Johnson* that the agent's notes could qualify as a Jencks Act statement so that the district court erred by not reviewing the notes to confirm whether production was required. United States v. Robertson, 895 F.3d 1206, 1216–18 (9th Cir. 2018). In the more common situation where evidence is lacking that the agent adopted rough notes as his or her statement, the court may deny a production request without the need to review the notes. *Id.* at 1217–18. *Robertson* found that such evidence was lacking and that the district court properly refused to order production of the agent's handwritten document, which lacked "any substance," and contained "fragmentary writings" and "incomplete . . . rough notes." *Id.* at 1216–18.

I.B.2
Whether an Agent's Notes Constitute a Jencks' Statement of a Witness or an Agent

Determining whether the notes at issue are Jencks statements by the agent or the witness interviewed must be made case by case after the court reviews the notes and related factors. An agent's notes of an interview with a witness, or a report that incorporates the information contained in the notes, qualifies as a Jencks statement of the witness if it has been read to or by the witness and has thus been adopted or approved by the witness. *See* Campbell v. United States, 373 U.S. 487, 491–92 (1963) (agent's report, based on interview notes, that was read back to and adopted by the witness was producible as Jencks statements of witness). Furthermore, notes that are "a substantially verbatim recital" may qualify as witness statements of the interviewed witness under Rule 26.2(f). United States v. Scotti, 47 F.3d 1237, 1249 (2d Cir. 1995). And if they "'reflect fully and without distortion what had been said to the government agent,'" such notes may "thus be used to impeach the witness's testimony at trial." *Id.* (quoting Palermo v. United States, 360 U.S. 343, 353 (1959)) (citations omitted).

An FBI agent's handwritten notes from a witness interview generally are not considered statements of the agent and thus are not subject to disclosure under the Jencks Act or Rule 26.2, unless the agent "signs, adopts, vouches for, or intends to be accountable for the contents of the notes." *Scotti*, 47 F.3d at 1249 (citing United States v. Gotchis, 803 F.2d 74, 77–78 (2d Cir. 1986)). See above Part 3.I.B.1: Witness Interview Notes for a discussion of when rough notes can qualify as Jencks statements.

I.B.3
Grand Jury Testimony

Transcripts of grand jury testimony relating to a witness's in-court testimony must be produced. Fed. R. Crim. P. 26.2(f)(3). *See also* United States v. Montgomery, 210 F.3d 446, 450–51 (5th Cir. 2000).

I.B.4
Prosecutors' Interview Notes

A prosecutor's notes of a witness interview can be considered a Jencks Act statement of the witness if the lawyer reads back, or the witness reads, what the lawyer has written and the notes are signed or otherwise adopted or approved by the witness. Goldberg v. United States, 425 U.S. 94, 98–99, 110 n.19 (1976). In that circumstance, the prosecutor's notes can become producible as Jencks material. *Id.* at 98–99. Under the Jencks Act, such writings are discoverable; they are not protected as "work product." *Id.* at 102.

However, discussion of the "general substance" of what the witness said does not constitute adoption and approval of the notes by the witness. *See id.* at 110 n.19. *See also* United States v. Barndt, 533 F. App'x 92, 97–98 (3d Cir. 2013) (holding that prosecutor's notes made while preparing witnesses for trial, consisting of questions to be asked at trial, were not subject to disclosure).

I.C

Statements Must Be in the Prosecution's Possession

Only statements in the possession of the prosecutorial arm of the federal government must be produced under the Jencks Act. United States v. Trevino, 556 F.2d 1265, 1271 (5th Cir. 1977). *See also* United States v. Bailey, 762 F. App'x 698, 702 (11th Cir. 2019) (possession of the "government" does not include documents possessed by a "federal or state court, probation officers, or local law enforcement officers"); United States v. Barnett, 727 F. App'x 712, 714–15 (2d Cir. 2018) (government did not possess documents that were in custody of counsel for defendant's employer). But statements need not be in the possession of the U.S. Attorney's Office to be producible under the Jencks Act. Possession by any federal investigative agency satisfies the requirement that the statement is in the control of the prosecutorial arm of the federal government. United States v. Naranjo, 634 F.3d 1198, 1211–12 (11th Cir. 2011).

I.D

Subject Matter of the Government Witness's Testimony

After a government witness has testified on direct examination, the government must produce, on request, any statement of that witness in its possession that relates to the subject matter of the witness's testimony. The prosecution must produce only statements that generally relate to the events and activities testified to by the witness. United States v. Primm, 63 F.4th 1186, 1191 (8th Cir. 2023); United States v. Snyder, 740 F. App'x 727, 729 (2d Cir. 2018). The defendant is not entitled to a statement that does not relate to the witness's testimony, even though the statement does relate to the subject matter of the indictment, information, or investigation. United States v. Butenko, 384 F.2d 554, 568 (3d Cir. 1967), *vacated on other grounds*, Alderman v. United States, 394 U.S. 165 (1969). *See also Primm*, 63 F.4th at 1191 ("We have held that the government need not turn over collateral or background information.").

I.E

Role of the Court

I.E.1

Prima Facie Showing

If there is a dispute about whether a document or a portion of it must be produced under the Jencks Act, and the opposing party makes a prima facie showing that it is producible, the trial court must review the information in camera to determine whether a statement must be produced. *See, e.g.*, United States v. Robertson, 895 F.3d 1206, 1216–18 (9th Cir. 2018). The court may also conduct a hearing and interrogate witnesses or government representatives who might know about evidence relevant to the document's qualification as a Jencks Act statement. Palermo v. United States, 360 U.S. 343, 354 (1959); Campbell v. United States, 365 U.S. 85, 92–93, 96–98 (1961); United States v. Stanfield, 360 F.3d 1346, 1355 (D.C. Cir. 2004); United States v. Padilla-Galarza, 990 F.3d 60, 79 (1st Cir. 2021). *See also* United States v. Bramble, 103 F.3d 1475, 1479 (9th Cir. 1996) (en banc); United States v. Scotti, 47 F.3d 1237, 1249–50 (2d Cir. 1995); Anderson v. United States, 788 F.2d 517, 519–20 (8th Cir. 1986).

Suppose the government objects to production, but the defendant makes a prima facie showing that the statements should be disclosed. In that case, it is an error for the court to refuse to inspect the comments or to leave it to the government's discretion to determine which parts of the information should be disclosed. *Robertson*, 895 F.3d at 1218. The defendant does not bear the burden of proving that the Jencks Act statements exist; the defendant need only "establish by probative evidence—usually on cross-examination of the witness . . . that there is reason to believe that [a Jencks] 'statement' may exist." Goldberg v. United States, 425 U.S. 94, 124 (1976) (Powell, J., concurring); *Robertson*, 895 F.3d at 1218. Depending on the circumstances, the trial judge's inquiry may involve an interrogation of witnesses or an in camera examination of the statement. *See* United States v. Landron-Class, 696 F.3d 62, 73 (1st Cir. 2012).

I.E.2

Deletions

Suppose the government deletes or redacts any portion of a statement it produces. In that case, the trial court must, on the defendant's motion, examine the redacted part in camera and determine whether the deleted material should be produced. *See* United States v. Maury, 695 F.3d 227, 248–49 (3d Cir. 2012). Redacted material the court determines is not producible under the Jencks Act should be sealed and filed with the clerk for later appellate review.

I.E.3

Reasonable Time for Review

A trial court should permit the defendant a reasonable amount of time to review documents produced by the government following its Jencks Act disclosure obligations. *See* United States v. Williams, 375 F. App'x 682, 685 (9th Cir. 2010). The court's decision to grant a continuance to review Jencks Act statements is reviewed for abuse of discretion, and the court does not abuse its discretion when it chooses to allow multiple witnesses to testify on direct examination before any witnesses are cross-examined, in order to provide time to the defense. *Id.* at 685–86; United States v. Celis, 608 F.3d 818, 839–40 (D.C. Cir. 2010). *See also Stanfield*, 360 F.3d at 1356–58 (finding court has broad discretion to determine how much time should be provided to review Jencks material). *Cf.* Gregory v. United States, 369 F.2d 185 (D.C. Cir. 1966) (requiring Jencks statements to be received before a jury is a reversible error).

I.F

Sanctions for Noncompliance

If a party, for whatever reason, is unable or unwilling to provide Jencks material for a given witness to the requesting party, the Jencks Act states that the appropriate sanction is to strike the testimony of the witness "unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared." 18 U.S.C. § 3500(d). If the notes of a government witness have intentionally been destroyed, the appropriate sanction is to strike the witness's testimony. *See, e.g.*, United States v. Cardenas-Mendoza, 579 F.3d 1024, 1032 (9th Cir. 2009). In considering whether to impose sanctions for failure to produce lost or destroyed statements, the court must determine whether the loss or destruction involved negligence or bad faith. *See, e.g.*, United States v. Moore, 452 F.3d 382, 389 (5th Cir. 2006) (finding that destruction of tapes was done in good faith under standard recycling policy).

II

Brady Material

In *Brady v. Maryland*, 373 U.S. 83 (1963), the Supreme Court held that the government must disclose all exculpatory evidence relevant to guilt and punishment to the defense for practical use at trial. Subsequent cases clarified and expanded on the *Brady* rule. For example, the duty to disclose exculpatory evidence also includes impeachment evidence. United States v. Bagley, 473 U.S. 667, 676–77 (1985). *See also* Giglio v. United States, 405 U.S. 150, 154–55 (1972).

As expanded, the *Brady* rule is a constitutional mandate that imposes an ongoing, affirmative duty of disclosure on the government. *See* Pennsylvania v. Ritchie, 480 U.S. 39, 60 (1987). Failure to disclose material and favorable evidence violates due process even when the defendant does not request the material. *See* United States v. Agurs, 427 U.S. 97, 106–07 (1976).

To establish a *Brady* violation, the defendant must show three elements: (1) the evidence favored the accused, (2) the state suppressed the evidence, and (3) the failure to disclose the evidence resulted in prejudice to the defendant. Strickler v. Greene, 527 U.S. 263, 281–82 (1999). Prejudice is established if there is a reasonable probability that the trial's outcome would have differed had the evidence been disclosed. Poventud v. City of N.Y., 750 F.3d 121, 133 (2d Cir. 2014).

The timing of disclosure is also essential. Generally, the government must disclose exculpatory evidence in time for practical use at trial. United States v. Coppa, 267 F.3d 132, 140, 146 (2d Cir. 2001) (rejecting the approach in *United States v. Shvarts*, 90 F. Supp. 2d 219 (E.D.N.Y. 2000), which had held that the Constitution requires production immediately upon request by a defendant even if far in advance of trial). If the government fails to do so, the defendant may be entitled to a new trial. Giglio v. United States, 405 U.S. 150, 151 (1972).

II.A

The *Brady* Rule's Impact on the Jencks Act Disclosure Requirements

However, the Jencks Act puts limitations on the time frame required for the government's disclosure that may conflict with the requirements of *Brady*.[12] This interplay is complicated by the fact that the *Brady* rule is a constitutional mandate, independent of the government's obligations under the Jencks Act. *See* United States v. Ferguson, 844 F. Supp. 2d 810, 830 (E.D. Mich. 2012) (when the government interposes the Jencks Act to resist pretrial discovery of exculpatory or impeaching *Brady* material, the issue is one of timing) (citing United States v. Presser, 844 F.2d 1275, 1283 (6th Cir. 1988)). *See also* 18 U.S.C. § 3500(a) (Jencks Act disclosure not required until witness testifies on direct examination at trial); Fed. R. Crim. P. 16(a)(1)(A) & (a)(2) (disclosure of defendant's oral statements that are required in response to government agent's interrogation— if government intends to use statements at trial—is limited to the Jencks Act as related to prospective government witnesses). *See also* United States v. Frazier, 465 F. Supp. 3d 791 (M.D. Tenn. 2020). *United States v. Beckford*, 962 F. Supp. 780 (E.D. Va. 1997), contains a lengthy discussion of the potential timing conflict between *Brady* and the Jencks Act and the varying approaches that courts have taken to resolve it:

> There is undoubtedly a tension between *Brady* and the Jencks Act with respect to the timing of production, because: "it is conceivable that disclosure of material covered by the Jencks Act may be required, under *Brady* and the due process clause, to be made to the defendant before trial in order that the defendant might prepare and present an effective defense."

Id. at 789 (quoting United States v. Ruiz, 702 F. Supp. 1066, 1069 (S.D.N.Y. 1989), *aff'd*, 894 F.2d 501 (2d Cir. 1990)). The Jencks Act, however, "allows statements made by Government witnesses to be withheld until after they have testified on direct examination." *Beckford*, 962 F. Supp. at 789. *Beckford* observed that courts have reached varying resolutions of this conflict—with some courts finding that *Brady*, as a constitutional obligation, is superior to the statutory command of the Jencks Act, while other courts have ruled that the Jencks Act, which, unlike

12. *Compare* United States v. Brazil, 395 F. App'x 205, 215 (6th Cir. 2010) ("the Jencks Act trumps *Brady* where impeachment evidence is Jencks Act material"), *with* United States v. Farley, 2 F.3d 645, 654 (6th Cir. 1993) ("due process requires only that disclosure of exculpatory material be made in sufficient time to permit the defendant to make effective use of that material at trial") (citing *Presser*, 844 F.2d at 1284).

Brady, is a rule of discovery that contains a specific timing requirement, controls. *Id.* at 790–91. Furthermore, *Beckford* noted that some courts have taken a middle approach, using a balancing test. *Id.* at 791–92. Because *Brady* requires the disclosure of information—not of any particular document in which that information is contained[13]—one method of harmonizing the rules may be for the government to disclose exculpatory information at a time when effective use of it can be made, but to defer production of the witness statement itself until the time required by the Jencks Act.

II.B

Materiality

Materiality is the touchstone in determining whether specific evidence qualifies as exculpatory or "*Brady* material." "[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 682 (1985). In other words, the undisclosed evidence must raise a "probability sufficient to undermine confidence in the outcome." *Id.*

But "[a] reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence.'" Smith v. Cain, 565 U.S. 73, 75–76 (2012) (quoting Kyles v. Whitley, 514 U.S. 419, 434 (1995)). *See also* Turner v. United States, 582 U.S. 313 (2017) (holding that withheld evidence was not material based on the facts of the case, which were notably complex); Wearry v. Cain, 577 U.S. 385 (2016) (holding that withheld impeachment evidence was immaterial as to witness who was already impeached with other evidence).

In some cases, the prosecutor's conduct can be considered when determining the materiality of the nondisclosed evidence. *See, e.g.*, United States v. Gil, 297 F.3d 93, 106–07 (2d Cir. 2002) (finding prosecution's failure to turn over exculpatory memo before trial was not excused when the government possessed message long before trial).

13. *See* United States v. Henderson, 250 F. App'x 34, 38–39 (5th Cir. 2007) (production of contents of email in letter to defense counsel constituted disclosure of *Brady* material); United States v. Peitz, No. 01CR852, 2002 WL 31101681, at *8 (N.D. Ill. Sept. 20, 2002) (government only obligated by *Brady* to disclose facts favorable to defense, "not necessarily the . . . document itself" in which facts are contained).

II.C

Erring on Side of Disclosure

The definitions of "materiality" used by appellate courts to review whether the government's failure to disclose exculpatory evidence was so prejudicial that the defendant is entitled to a new trial are necessarily retrospective. For this reason, the Supreme Court explicitly recommends erring on the side of disclosure when there is uncertainty before or during the trial about an item's materiality: "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." United States v. Agurs, 427 U.S. 97, 108 (1976); *see also* Cone v. Bell, 556 U.S. 449, 470 n.15 (2009); *Kyles*, 514 U.S. at 439–40. When a defendant brings specific, potentially exculpatory *Brady* material to the prosecutor's attention, doubts should be resolved in favor of disclosure. United States v. Moore, 651 F.3d 30, 99–100 (D.C. Cir. 2011).

II.D

Elements of a *Brady* Violation

In *Strickler v. Greene*, 527 U.S. 263, 281–82 (1999), the Supreme Court reiterated the three elements of a *Brady* violation: evidence favorable to the accused, suppression by the government, and resulting prejudice.

II.D.1

Evidence Favorable to the Accused

For evidence to favor the accused, it must be either exculpatory or impeaching. *Strickler*, 527 U.S. at 281–82. Information may favor the defense even if it is not admissible as evidence. But if information could reasonably lead to admissible evidence, it is considered advantageous. *See, e.g.*, United States v. Triumph Cap. Grp., Inc., 544 F.3d 149, 162–63 (2d Cir. 2008). *See also* United States v. Gil, 297 F.3d 93, 104 (2d Cir. 2002); United States v. Bundy, 968 F.3d 1019, 1034 (9th Cir. 2020) (preventing "the defense from gathering as much evidence as possible to show that there was a reasonable basis" for their assertions which the government claimed were false "was itself harmful").

II.D.2
Willful or Inadvertent Suppression

Whether the prosecution's failure to disclose evidence is intentional or inadvertent does not matter because "under *Brady*[,] . . . the . . . impact on the fairness of the proceedings" is the same. *Strickler*, 527 U.S. at 288. Even so, there is no *Brady* violation when a defendant knew or should have known the essential facts that would allow the defendant to benefit from any exculpatory information. *See* United States v. Paulus, 953 F.3d 717, 724 (6th Cir. 2020). But the defense has a right to believe the prosecution's representation that it has turned over all disclosable material. Banks v. Dretke, 540 U.S. 668, 698 (2004).

Brady does not require that the government implement an "open file" policy. *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995). However, if a prosecutor's office chooses to have an "open file" policy, the policy is relevant and may be considered when determining whether a *Brady* violation occurred. But an "open file" policy alone does not relieve the government from providing all *Brady* material. *See Strickler*, 527 U.S. at 283–89. *See also* Fontenot v. Crow, 4 F.4th 982, 1063–65 (10th Cir. 2021).

II.D.3
Prejudice

Suppression of favorable evidence within the meaning of *Brady* is, by its nature, prejudicial to the defendant. The terms "prejudicial" and "material" "have come to have the same meaning" in the *Brady* context. *See* Benn v. Lambert, 283 F.3d 1040, 1053 n.9 (9th Cir. 2002). If suppressed evidence favorable to the accused is "material," it is also prejudicial. *Id.* When *Brady* violations surface just before or during the trial, the trial court must determine the extent of their impact on the defendant's right to or the possibility of obtaining a fair trial. *Cf.* United States v. Coppa, 267 F.3d 132, 140 (2d Cir. 2001); United States v. Starusko, 729 F.2d 256, 263 (3d Cir. 1984).

II.E
When the Court Has a Duty to Discover or Compel Production of *Brady* Material

Criminal defendants have no constitutional right to know the contents of government files to present arguments in favor of disclosure. *See* Pennsylvania v. Ritchie, 480 U.S. 39, 59–60 (1987). Speculation that the government may possess

Brady material does not require the court to do an in camera search or to direct the production of government files for inspection by defense counsel. *See* United States v. Savage, 885 F.3d 212, 221 (4th Cir. 2018).

Typically, the prosecution makes the initial determination on what evidence must be disclosed to the defense. *See Ritchie*, 480 U.S. at 59. *See also* United States v. Agurs, 427 U.S. 97, 103 (1976). Sometimes, however, the court may undertake an in camera investigation rather than accept the government's assurance that there are no *Brady* materials or that contested materials are not exculpatory under *Brady*. *Ritchie*, 480 U.S. at 60–61. *See also* Contreras v. Artus, 778 F.3d 97, 114 (2d Cir. 2015). In some circumstances, the government may not know whether certain information should be disclosed to the defendant as *Brady* material, and it may ask the court for guidance ex parte.

II.F

Timing of Disclosure

Much pretrial litigation is spawned over the timing for disclosure of *Brady* material. *Brady* requires that exculpatory information be disclosed to the defense at a time when defendant and defense counsel can make effective use of the information in preparing and presenting the defense's case. *See, e.g.*, United States v. Van Anh, 523 F.3d 43, 51 (1st Cir. 2008). The district court may order that *Brady* material is to be disclosed by a specific date. *See* United States v. Higgs, 713 F.2d 39, 44 n.6 (3d Cir. 1983) (citing authority from most circuits). The government can better protect itself from violating *Brady* by disclosing material sooner rather than later, as earlier disclosure tends to avoid prejudice to the defendant and lessens the chance of delays during the trial or the need for a new trial in case of a significant *Brady* violation. *See Coppa*, 267 F.3d at 142.

In *United States v. Ruiz*, 536 U.S. 622, 633 (2002), the Supreme Court held that the government is not required to disclose material impeachment information to the defense before a guilty plea. The Court explained that a defendant has the right to obtain impeachment information in order to receive a fair trial but that because a defendant who pleads guilty is waiving trial, production of such material is unnecessary. *Id.* at 628–29.

II.F.1

Untimely Disclosure

If disclosure is delayed such that a defendant, or the defendant's attorney, cannot effectively use the information in the preparation and defense at trial, then the information may be considered "suppressed" for *Brady* purposes. United States v. Rodriguez, 496 F.3d 221, 226 (2d Cir. 2007); United States v. Garner, 507 F.3d 399, 405–07 (6th Cir. 2007); United States v. Gil, 297 F.3d 93, 106 (2d Cir. 2002); Leka v. Portuondo, 257 F.3d 89, 100 (2d Cir. 2001). *See also* DiSimone v. Phillips, 461 F.3d 181, 197 (2d Cir. 2006). The defendant must show that failure to supply the information in a timely fashion caused the defense to change its trial strategy and that given proper disclosure a more practical approach would have likely resulted. *See* United States v. Lemmerer, 277 F.3d 579, 588 (1st Cir. 2002) (no showing that delays foreclosed plausible strategic option).

Disclosure of *Brady* material on the eve of trial—or even after the trial has begun—will not be considered prejudicial if the defense can use it effectively during the trial. United States v. Houston, 648 F.3d 806, 813 (9th Cir. 2011); United States v. Celis, 608 F.3d 818, 836 (D.C. Cir. 2010); Powell v. Quarterman, 536 F.3d 325, 335 (5th Cir. 2008). *But see Leka*, 257 F.3d at 103 (disclosure of favorable eyewitness testimony on the eve of trial too late to allow the defense to use it).

II.F.2

Remedies for Untimely Disclosure

Sanctions for untimely disclosure of *Brady*-qualified information are within the trial court's sound discretion. Depending on the circumstances—including the extent of prejudice suffered by the defendant and the existence and nature of government misconduct—the following remedies may be granted:

- a continuance
- exclusion or recall of a witness
- limitation on the scope of permitted testimony
- prohibition of the introduction of evidence
- jury instructions
- declaration of a mistrial
- dismissal of the case

See United States v. Burke, 571 F.3d 1048, 1054 (10th Cir. 2009); United States v. Chapman, 524 F.3d 1073, 1086 (9th Cir. 2008); United States v. Collins, 415 F.3d 304, 311 (4th Cir. 2005); Gov't of Virgin Islands v. Fahie, 419 F.3d 249, 255 (3d Cir. 2005); United States v. O'Hara, 301 F.3d 563, 569 (7th Cir. 2002). *See also Gil*, 297 F.3d at 106–07 (vacating and remanding for a new trial because on the eve of trial, prosecution disclosed exculpatory memo in its possession for months).

An assessment of the effect of nondisclosure of exculpatory evidence must consider the effect of the nondisclosure rather than develop a discrete, item-by-item review. Kyles v. Whitley, 514 U.S. 419, 436 (1995). *See* Wearry v. Cain, 577 U.S. 385, 394 (2016) (per curiam).

A defendant's failure to request a continuance or rejection of the court's offer to continue the trial may raise an inference that the defendant can use the *Brady* information effectively despite a delay in disclosure. *See* United States v. Mathur, 624 F.3d 498, 506 (1st Cir. 2010).

4

Enforcement of Trial Orders

"[C]ourts have inherent power to enforce compliance with their lawful orders through civil contempt." Shillitani v. United States, 384 U.S. 364, 370 (1966). Courts also are given statutory power to impose criminal sanctions on parties and witnesses through contempt proceedings. *See, e.g.*, 18 U.S.C. §§ 401–402 (granting court contempt power over officers of court and parties to litigation); 28 U.S.C. § 1826(a) (giving court contempt power over witnesses).

"The same conduct may result in citations for both civil and criminal contempt." United States v. Rylander, 714 F.2d 996, 1001 (9th Cir. 1993) (citing United States v. UMWA, 330 U.S. 258 (1947)). Complicating matters is that proper characterization of the contempt requires a court to look at the purpose of the contempt at the time it is enforced rather than at the time it is imposed. A court's power to impose coercive civil contempt "depends upon the ability of the contemnor to comply with the court's order," which may change over time. *Shillitani*, 384 U.S. at 371.

Contempt issues are often complex and challenging for trial judges to resolve. For one, the law surrounding contempt is only sometimes clear, and judges must often weigh competing interests. Additionally, contempt proceedings can involve a wide range of conduct, so judges must consider the specific facts of each case to make a fair ruling.

I

Overview of Civil and Criminal Contempt

When trial orders are not obeyed, judges may consider holding the offending party or witness in contempt of court. At the earliest possible time, a court should determine and make known whether the contempt will be civil or criminal so that the appropriate rules of procedure are followed.

The distinction between civil and criminal contempt proceedings lies in the sanction's "character and purpose." Int'l Union, UMWA v. Bagwell, 512 U.S. 821, 827 (1994). Civil contempt is coercive or compensatory, while criminal contempt is punitive. *Id.* at 828. The civil contemnor is said to "carr[y] the keys of his prison in his own pocket," whereas the criminal contemnor "is furnished no key, and . . . cannot shorten the term by promising not to repeat the offense." *Id.* at 828–29 (internal citations and quotations omitted). *See also* Shell Offshore Inc. v. Greenpeace, Inc., 815 F.3d 623, 629 (9th Cir. 2016).

Other cases echo this distinction. In *United States v. Price*, No. 4:16-CR-061(1), 2023 WL 4004171 (E.D. Tex. June 14, 2023), the court noted that civil contempt is intended to compel obedience to a court order, while criminal contempt is intended to punish the contemnor and vindicate the authority of the court. In *United States v. Emerson*, No. 22-CR-96, 2023 U.S. Dist. LEXIS 72514 (E.D. Wis. Apr. 26, 2023), the court reiterated that criminal contempt is intended to punish, while civil contempt is intended to coerce compliance. Some cases also discuss the evidentiary standards required to prove civil or criminal contempt. For example, in *American Registry of Radiologic Technologists v. Moultry*, No. 3:16-CV-1322-JAH-KSC, 2022 WL 816794 (S.D. Cal. Mar. 17, 2022), the court noted that to prove civil contempt, the moving party must show by clear and convincing evidence that the alleged contemnor violated a definite and specific court order. In contrast, to establish criminal contempt, the prosecutor must demonstrate by proof beyond a reasonable doubt that the alleged contemnor violated a reasonably specific order with willful intent.

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

Hicks v. Feiock, 485 U.S. 624, 632 (1988) (internal citations omitted). *See also* United States v. Dowell, 257 F.3d 694, 699–700 (7th Cir. 2001) (finding contempt was remedial where the fine amount matched the damages caused by a contemnor's conduct).

In short, civil contempt sanctions are typically designed to compel obedience to a court order, while criminal contempt sanctions are meant to punish the contemnor for disrespecting the court's authority. As the cases demonstrate, this distinction can be challenging to apply in practice.

The test for civil contempt on appeal is whether the contemnor has the present ability to comply, not whether it could have complied before. United States v. Rylander, 460 U.S. 752, 757 (1983). The test for criminal contempt in a federal criminal trial generally requires proof that (1) a clear and specific order was violated, (2) the violation was willful, and (3) the contemnor had actual knowledge of the order. Sometimes, a jury trial may be required, depending on potential penalty.

II

Civil Contempt

Civil contempt sanctions may be imposed for conduct outside and inside the courtroom. *See, e.g.*, Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 798 (1987) (stating that the underlying basis for contempt power is not only disruption of court proceedings but also disobedience of court orders generally); Brown v. City of Upper Arlington, 637 F.3d 668, 672–73 (6th Cir. 2011) (holding that, absent violation of a court order, the court cannot base contempt sanction on its "inherent power").

"A court may wield its civil contempt powers for two separate and independent purposes: (1) 'to coerce the defendant into compliance with the court's order'; and (2) 'to compensate the complainant for losses sustained.'" Shell Offshore Inc. v. Greenpeace, Inc., 815 F.3d 623, 629 (9th Cir. 2016) (citing United States v. UMWA, 330 U.S. 258, 303–04 (1947)) (collecting cases). "The test . . . is 'what does the court primarily seek to accomplish by imposing the sanction?'" *Greenpeace*, 815 F.3d at 629 (quoting Falstaff Brewing Corp. v. Miller Brewing Co., 702 F.2d 770, 778 (9th Cir. 1983) (additional citation and internal quotation marks omitted)).

Because civil compensatory sanctions are remedial, they typically take the form of unconditional monetary sanctions, but coercive civil sanctions intended to deter generally take the form of conditional fines.[14] *See Greenpeace, 815 F.3d*

14. *See Greenpeace*, 815 F.3d at 629 n.4:

> Whether fines are payable to the opposing party or to the court may also be a factor in deciding whether they are coercive or compensatory. This factor alone, however, is not determinative. *Cf.* Lasar v. Ford Motor Co., 399 F.3d 1101, 1111 (9th Cir. 2005) (not determinative as between civil and criminal contempt); F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc., 244 F.3d 1128, 1138 n. 7 (9th Cir. 2001) ("Whether a fine is payable to the court . . . as opposed to the complainant is a relevant, although not necessarily determinative, factor in determining whether a sanction is punitive.") (citing, inter alia, Hicks v. Feiock, 485 U.S. 624, 631–32 (1988)).

at 629 (citing *Falstaff Brewing*, 702 F.2d at 780 (citing Gompers v. Buck's Stove & Range Co., 221 U.S. 418, 444 (1911))).

A defendant can purge civil contempt by complying with the court's order and thus avoid more sanctions. *See* Shillitani v. United States, 384 U.S. 364, 371 (1966); *Hicks*, 485 U.S. at 633–34. *See also Bagwell*, 512 U.S. at 829 ("Where a fine is not compensatory, it is civil only if the contemnor is afforded an opportunity to purge."). *And see* Lasar v. Ford Motor Co., 399 F.3d 1101, 1110 (9th Cir. 2005).

II.A

Due Process

There is no constitutional requirement of an indictment or a jury trial for a charge of civil contempt, because the contempt charge and penalty are conditional. *See Shillitani*, 384 U.S. at 370–71. All the same, persons found in contempt of court (called "contemnors") are afforded certain due process protections. Sec'y U.S. Dep't of Labor v. Koresko, 726 F. App'x 127, 133 (3d Cir. 2018) (holding that due process in civil contempt proceeding requires notice and hearing). For example, a civil contemnor who faces incarceration should be provided an "uninhibited adversary hearing" where he can "probe all nonfrivolous defenses to the contempt charge." *See, e.g.*, United States v. Doe (*In re* Grand Jury Proceeding), 13 F.3d 459, 461 (1st Cir. 1994) (per curiam).[15] That said, the right to counsel is not automatic, even in a civil contempt proceeding with a threat of incarceration. *See* Turner v. Rogers, 564 U.S. 431 (2011) (holding that the Due Process Clause does not automatically require the provision of counsel at civil contempt proceedings to an indigent defendant subject to a child-support order, even if the individual faces incarceration for up to a year).

II.B

Proof

The elements for civil contempt must be proven by clear and convincing evidence. Ashcraft v. Conoco, Inc., 218 F.3d 288, 301 (4th Cir. 2000); Goya Foods, Inc. v. Wallack Mgmt. Co., 290 F.3d 63, 77 (1st Cir. 2002); Levin v. Tiber Holding Corp., 277 F.3d 243, 250 (2d Cir. 2002); John T. v. Delaware Cnty. Intermediate Unit, 318

15. No matter how "uninhibited" the due process right to an adversary hearing may be, the hearing is still subject to reasonable limitations depending on the circumstances involved. *In re* Grand Jury Proceeding, 13 F.3d at 461. For example, if there is no factual dispute, or if third-party testimony would be repetitive or marginally relevant, a court may call for offers of proof or restrict the ability to call witnesses. *Id.* "The court's discretion in this regard is 'very broad.'" *Id.* at 462 (citation omitted).

F.3d 545, 552 (3d Cir. 2003) (elements to prove civil contempt—(1) a valid court order existed, (2) defendant knew about the order, and (3) defendant disobeyed the order—must be proved by clear and convincing evidence). *See also In re* Dyer, 322 F.3d 1178, 1190–91 (9th Cir. 2003); Riccard v. Prudential Ins. Co., 307 F.3d 1277, 1296 (11th Cir. 2002).

A sanction for civil contempt may be levied without a finding of willfulness. Since the purpose of civil contempt is remedial, the defendant's intent in committing the contumacious act is irrelevant. *See* McComb v. Jacksonville Paper Mill, 336 U.S. 187, 191 (1949). *See also In re* Sealed Case, 932 F.3d 915, 940 (D.C. Cir. 2019); PlayNation Play Sys., Inc. v. Velex Corp., 939 F.3d 1205, 1215 (11th Cir. 2019); *In re* Fina, 550 F. App'x 150, 155 (4th Cir. 2014); *John T.*, 318 F.3d at 552 (evidence of good faith does not bar a conclusion that the defendant acted with contempt).

II.C

Remedies

The district court has broad discretion in fashioning a concise remedy for civil contempt, but the sanctions must be remedial and compensatory, not punitive. United States v. UMWA, 330 U.S. 258, 302–04 (1947); Ravago Ams. LLC v. Vinmar Int'l Ltd., 832 F. App'x 249, 254 (5th Cir. 2020). When selecting sanctions for contempt, a court must choose "the least possible power adequate to the end proposed." Spallone v. United States, 493 U.S. 265, 280 (1990) (internal quotation marks and citations omitted). A few examples follow.

- **Coercive Sanctions.** Sanctions are civil only if the contemnor is allowed to purge. Int'l Union, UMWA v. Bagwell, 512 U.S. 821, 829–30 (1994).
- **Imprisonment.** To compel compliance with a court order, the court may order imprisonment for an indefinite period or impose a repetitive fine. Confinement for contempt may continue until the court is satisfied that the confinement might produce the intended result. Armstrong v. Guccione, 470 F.3d 89, 110, 113 (2d Cir. 2006). If, after a conscientious consideration of the circumstances, the court is persuaded that the custody no longer has the desired coercive effect and will not have that effect, the detention should be terminated.
- **Monetary Reimbursement.** The court may order a contemnor to reimburse an injured party for losses sustained, in fact, from noncompliance and for expenses reasonably and necessarily incurred in trying to enforce compliance. FTC v. Trudeau, 579 F.3d 754 (7th Cir. 2009); Marshak v. Treadwell, 595 F.3d 478, 494 (3d Cir. 2009); Chaganti & Assocs., PC v.

Nowotny, 470 F.3d 1215, 1224 (8th Cir. 2006). But if a "monetary assessment of a specific amount is neither compensatory nor conditioned on the occurrence of future violation of court orders, it raises a presumption that the fine is punitive in nature." *In re* Kave, 760 F.2d 343, 351–52 (1st Cir. 1985). The court can award attorneys' fees reasonably and necessarily incurred by the injured party to force compliance with a court order. Nat'l Comm'n for Certification of Crane Operators, Inc. v. Cal. Crane Sch., Inc., 470 F. App'x 698, 700 (9th Cir. 2012); Belize Telecom, Ltd. v. Gov't of Belize, 528 F.3d 1298, 1310 (11th Cir. 2008).

III

Criminal Contempt

The purpose of criminal contempt is punishment—to punish an individual for past disobedience of a court order. Criminal contempt is thus distinguishable from the underlying matter that gave rise to the alleged contemptuous conduct. Criminal contempt sanctions may be imposed even after the underlying issue has been disposed of. Under 18 U.S.C. § 401, courts have the power to hold a party in criminal contempt.

> A court of the United States will have power to punish by fine or imprisonment, or both, 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.

Id.

Unlike civil contempt sanctions, which generally end when the contemnors have complied, criminal contempt sanctions are characterized by unconditional sentences or fines. A conviction for criminal contempt often results in severe penalties, and the criminal contempt power is best exercised with restraint. A judge should resort to criminal contempt only after determining that holding the contemnor in civil contempt would be inappropriate or fruitless. Shillitani v. United States, 384 U.S. 364, 371 n.9 (1966). Purging is impossible for criminal contempt. *See* Oberlander v. United States (*In re* Grand Jury Proceedings), 971 F.3d 40, 53 (2d Cir. 2020) ("Whereas civil contempt seeks to compel compliance with the court's orders for the benefit of the complainant, the purpose of criminal contempt 'is punitive, to vindicate the authority of the court.'". . . As explained above, the district court here could not hold Oberlander in civil contempt because he would be unable to purge himself of that contempt. But that inability is irrelevant in a criminal contempt action, which is punitive in nature." (internal citations omitted)).

III.A

Elements of Criminal Contempt

There are three elements for a finding of criminal contempt, each of which must be proven beyond a reasonable doubt: (1) the court entered a lawful order of reasonable specificity; (2) the defendant violated that order; and (3) the violation was willful or intentional. United States v. Beaulieu, 973 F.3d 354, 358 (5th Cir. 2020).

Misconduct outside the presence of the judge and the courtroom is punishable only after certain due process rights have been afforded the contemnor. The contemnor must be provided sufficient notice and time to prepare a defense (*see* Fed. R. Crim. P. 42(a)), as well as the right to bail and a jury trial.

III.B

Sentencing

Neither 18 U.S.C. § 401 nor Federal Rule of Criminal Procedure 42 sets a maximum sentence for criminal contempt. There is disagreement about whether the law establishes a maximum sentence for criminal contempt and if so, what it might be. The First and Seventh Circuits hold that because § 401 does not classify criminal contempt by a letter grade, 18 U.S.C. § 3559(a) applies, which requires that all criminal contempt be treated as a Class A felony, punishable by a maximum term of life imprisonment. United States v. Wright, 812 F.3d 27, 32–33 (1st Cir. 2016); United States v. Ashqar, 582 F.3d 819, 825 (7th Cir. 2009). Other circuits disagree. In *United States v. Cohn*, 586 F.3d 844, 848–49 (11th Cir. 2009) (per curiam), the Eleventh Circuit held that "criminal contempt is a sui generis offense" "that cannot be classified" under § 3559(a). So too with the Fourth Circuit. United States v. McCoy, 828 F. App'x 910, 911–12 (4th Cir. 2020) ("Criminal contempt has no statutory maximum and can be treated as either a felony or as [a] misdemeanor.") (citing Cheff v. Schnackenberg, 384 U.S. 373, 380 (1966)). Yet the Ninth Circuit holds that the statutory maximum for contempt is defined by the offense most nearly analogous to the contempt conduct. United States v. Broussard, 611 F.3d 1069, 1072–73 (9th Cir. 2010). *See also* United States v. Sanders, No. 22-2175, 2023 WL 2810922, at *1 (3d Cir. Apr. 6, 2023) (unpublished opinion) (holding that the contempt charge carried a maximum sentence of six months' imprisonment because the parties agreed to treat the charge as a petty offense).

It is also true that no specific guideline applies to criminal contempt convictions. United States v. Hendrickson, 822 F.3d 812, 828 (6th Cir. 2016). Instead, the advisory guidelines refer the sentencing court to apply the most analogous guideline. *Id.* If there is no sufficiently analogous guideline, U.S.S.G. § 2X5.1 advises the court to "apply the most analogous offense guideline." If there still "is not a sufficiently analogous guideline, the provisions of 18 U.S.C. § 3553 shall control." U.S.S.G. § 2X5.1. *See also* United States v. Allen, 335 F. App'x 217, 219 (3d Cir. 2009) (unpublished opinion) (finding Obstruction of Justice guideline U.S.S.G. § 2J1.2 the most analogous for contempt conviction). In *Booker v. United States*, 543 U.S. 220 (2005), the Supreme Court rendered the Sentencing Guidelines as advisory. The Ninth Circuit has held that although the guidelines are to be respectfully consulted as one among the several sentencing factors under § 3553(b), the maximum sentence the court can impose is the applicable statutory maximum, not the applicable guideline maximum. *Broussard*, 611 F.3d at 1072.

III.C

Right to Jury Trial

The right to a jury trial in a criminal contempt action depends on the potential sentence. In sum, the Sixth Amendment right to a jury trial applies to criminal contempt proceedings just as it applies to every other criminal proceeding. A criminal contempt considered a petty offense may be tried without a jury. But if the contempt is regarded as a serious offense, there is a right to a jury trial. United States v. Marshall, 371 F.3d 42, 48–49 (2d Cir. 2004) (imprisonment for more than six months requires jury trial); United States v. Hawkins, 76 F.3d 545, 549–50 (4th Cir. 1996) (one-year jail term requires jury trial).

III.D

Trial by Another Judge

Under Federal Rule of Criminal Procedure 42(a)(3), 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. A judge who has been the subject of contumacious personal attacks throughout the trial should not preside at a post-trial contempt proceeding. Mayberry v. Pennsylvania, 400 U.S. 455, 465–66 (1971); United States v. Pina, 844 F.2d 1, 13–14 (1st Cir. 1988).

III.E

Cautionary Note

As amended in 2002, Federal Rule of Criminal Procedure 42 contains two subparts. Rule 42(a), Disposition After Notice, has essential due process requirements for criminal contempt prosecutions, including notice and an opportunity to prepare a defense. Rule 42(b), Summary Disposition, provides that the court may summarily punish a person who commits criminal contempt in the court's presence if the judge saw or heard the contemptuous conduct. Before the amendments, subparts (a) and (b) were in reverse order, with subpart (a) addressing summary contempt and subpart (b) addressing criminal contempt prosecutions following notice and an opportunity to prepare.

IV

Summary Contempt

Rule 42 of the Federal Rules of Criminal Procedure governs criminal contempt. Subpart (b) provides,

> (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.

Trial judges must be on guard against confusing behavior that offends their sensibilities with conduct that obstructs the administration of justice. The contemnor must intend to obstruct, disrupt, or interfere with the administration of justice. *Marshall*, 371 F.3d at 46.

Under 18 U.S.C. § 401, courts can punish acts of contempt by fine, imprisonment, or both. For a summary criminal contempt judgment under § 401, four elements must be shown beyond a reasonable doubt: (1) misbehavior; (2) in or near the presence of the court; (3) with criminal intent; (4) that obstructed the administration of justice. United States v. Peoples, 698 F.3d 185, 189 (4th Cir. 2012). Summary contempt under Rule 42(b) is a narrow category based on necessity and reserved for exceptional circumstances. *See* United States v. Glass, 361 F.3d 580, 586 (9th Cir. 2004); United States v. Arredondo, 349 F.3d 310, 316 (6th Cir. 2003).

IV.A

Nature of Conduct Punishable as Summary Contempt

Instant action may be necessary where immediate corrective steps are needed to restore order and maintain the dignity and authority of the court. Johnson v. Mississippi, 403 U.S. 212, 214–15 (1971); Codispoti v. Pennsylvania, 418 U.S. 506, 513–14 (1974).

IV.B

Summary Contempt Procedure

IV.B.1

Required Warnings

If a "reasonable person" would not consider their conduct contumacious, the court must give a warning and an opportunity to be heard before a summary contempt conviction is issued. *See In re* Pilsbury, 866 F.2d 22, 27 (2d Cir. 1989). *See also* United States v. Glass, 361 F.3d 580, 589 (9th Cir. 2004); Doral Produce Corp. v. Paul Steinberg Assocs., Inc., 347 F.3d 36, 44 (2d Cir. 2003).

IV.B.2

Due Process Issues

In *Taylor v. Hayes*, 418 U.S. 488 (1974), the Supreme Court held that petty contempt may be tried without a jury but that the accused contemnor must be given reasonable notice of the charges and an opportunity to be heard in their defense. Affirming the Kentucky Court of Appeals' finding that the petitioner was guilty of each contempt charge, the Court held that the eight contempt citations constituted petty offenses. Therefore, trial by jury was not required. The Court emphasized that criminal contempt is not a crime that requires the right to jury trial regardless of the penalty involved. Yet the Court set aside the contempt judgment because the petitioner was not given reasonable notice of the charges or an opportunity to be heard in their defense.

Other authorities provide more context and guidance. For example, *Lewis v. United States*, 518 U.S. 322 (1996), clarifies that the defendant in *Taylor* was not entitled to a jury trial because the sentence imposed for criminal contempt did not exceed six months. In *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1981), the Court discusses the inherent power of courts to punish for contempt and the need for this power for the independence of the judiciary. And in *Ex Parte Wall*, 107 U.S. 265 (1882), the Court discusses the general rule that a previous conviction should be had before striking an attorney from the roll for an indictable offense. Still, the Court noted that the government is not inflexible and that there are exceptions. Finally, in *Turner v. Rogers*, 564 U.S. 431 (2011), the Court discusses whether the Due Process Clause grants an indigent defendant a right to state-appointed counsel in a civil contempt proceeding. Additional examples of specific due process issues include the following matters:

- **Timing of Contempt Citation and Sentencing.** A trial court may cite an individual in summary contempt and file a certificate but defer sentencing until the conclusion of the trial. If, however, the court does not think that an immediate sanction is necessary, it should proceed under Rule 42(a), not 42(b). *See* United States v. Perry, 116 F.3d 952, 956 (1st Cir. 1997); Gordon v. United States, 592 F.2d 1215, 1218–19 (1st Cir. 1979); Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs, 552 F.2d 498, 512–14 (3d Cir. 1977).
- **Summary Contempt at Conclusion of Trial.** The court also can cite a person for summary contempt during the trial, when the contempt occurs, or after the trial ends. Sacher v. United States, 343 U.S. 1, 11 (1952). *See also* United States v. Schiffer, 351 F.2d 91, 94–95 (6th Cir. 1965).
- **Preparation, Signature, and Filing.** Rule 42(b) requires the court to enter an order of contempt and certify that it saw or heard the conduct constituting the contempt and that it took place in the court's presence, so that there may be informed appellate review. A criminal contempt order stands or falls on the specifications of wrongdoing on which it is based. Therefore, the contempt order must accurately recite the conduct that caused the court to find summary contempt. Trial courts must remain aware that the appellate court will be reading from a record that, unless included, may not contain the atmospherics that led to the contempt. FTC v. Trudeau, 606 F.3d 382, 390 (7th Cir. 2010). It may be advisable to incorporate the relevant portion of the trial record into the order as an adjunct to the specific charges. However, incorporation of the record is not a substitute for a particular recital by the court of the facts that led to the contempt citation. The contempt order must be signed and dated by the judge. It need not be sworn.
- **Punishment That May Be Imposed.** In imposing punishment, the judge may properly consider the willfulness and deliberateness of the defiance of the court's order; the seriousness of the consequences of the contumacious behavior; the need to effectively terminate the defendant's

defiance as required by the public interest; and the importance of deterring such acts again. United States v. UMWA, 330 U.S. 258, 303 (1947); United States v. Trudell, 563 F.2d 889, 893 (8th Cir. 1977); United States v. McCargo, 783 F.2d 507, 510 (5th Cir. 1986).

The court may not summarily impose a sentence of imprisonment over six months. Taylor v. Hayes, 418 U.S. 488, 498–99 (1974). If the court believes a sentence above six months would be appropriate, it must proceed by notice under Federal Rule of Criminal Procedure 42(a) and afford the contemnor a jury trial.

The judge may impose summary contempt sanctions repeatedly during the trial. But if a single hearing is held for multiple incidents of contempt after trial, the sentence imposed at the hearing may be at most six months. Codispoti v. Pennsylvania, 418 U.S. 506, 515–17 (1974); United States v. Pina, 844 F.2d 1, 10–11 (1st Cir. 1988); United States v. Cohen, 510 F.3d 1114, 1120 (9th Cir. 2007).

IV.C

Attorneys Cited for Summary Contempt

If an attorney is cited, a finding of summary contempt requires a showing that the attorney knew or reasonably should have known that the conduct was exceeding the outermost limits of an attorney's proper role and hindering rather than facilitating the search for truth. United States v. Outlieb, 274 F.3d 871, 876 (5th Cir. 2001). Due process requires evidence of some actual damaging effect on judicial order before an attorney may be held in criminal contempt. Hawk v. Cardoza, 575 F.2d 732, 735 (9th Cir. 1978); *In re* Dellinger, 461 F.2d 389, 397–98 (7th Cir. 1972).

Although citations of attorneys for summary contempt have been affirmed on appeal, the appeals courts have stated that where the line between vigorous advocacy and actual obstruction defies strict delineation, doubts should be resolved in favor of solid advocacy. *Dellinger*, 461 F.2d at 397–98; Pennsylvania v. Local Union 542, Int'l Union of Operating Eng'rs, 552 F.2d 498, 509 (3d Cir. 1977).

V

Due Process Issues with a Recalcitrant Witness

A criminal defendant has a right to “a fair opportunity to defend against the State’s accusations.” Chambers v. Mississippi, 410 U.S. 284, 294 (1973). The constitutional guarantee of a “meaningful opportunity to present a complete defense,” is “rooted directly in the Due Process Clause of the Fourteenth Amendment . . . or in the Compulsory Process or Confrontation clauses of the Sixth Amendment.” Crane v. Kentucky, 476 U.S. 683, 690 (1996) (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)). Due process issues related to recalcitrant witnesses in federal criminal trials can arise in several ways.

V.A

A Witness’s Refusal to Testify

Sworn witnesses who refuse to testify at trial or during a grand jury proceeding without a recognized legal privilege are referred to generally as recalcitrant witnesses. *See* United States v. Dionisio, 410 U.S. 1, 10–11 (1973) (grand jury is entitled to every person’s testimony as evidence except when protected by a constitutional, common law, or statutory privilege) (reversing *In re* Dionisio, 442 F.2d 276 (7th Cir. 1971)). A district court’s response to recalcitrant witnesses varies based on the circumstances presented. Generally, a witness must be given unambiguous and explicit instructions to answer the questions presented. The trial court also must explicitly warn the witness of the consequences of continued refusal to answer a fair question. United States v. Gonzales, No. 10-cr-107, 2011 WL 671751, at *2 (D. Ariz. Jan. 24, 2011) (citing United States v. Doe, 125 F.3d 1249, 1254 (9th Cir. 1997)). If the witness still refuses to answer the question, an opportunity to present reasons for refusing to testify must be offered. United States v. Index Newspapers LLC, 766 F.3d 1072, 1090 (9th Cir. 2014).

The federal Recalcitrant Witness Statute provides that whenever a witness in any proceeding before a court or grand jury refuses, without cause, to comply with an order of the court to testify, the court may summarily order the witness confined until they are willing to comply with the court’s order. 28 U.S.C. § 1826(a) (“confinement at a suitable place until such time as the witness is willing to give [required] testimony or provide . . . information”). Gill v. United States, 516 F. Supp. 3d 64 (D. Mass. 2021). *See also* United States v. Apple MacPro Computs., 949 F.3d 102, 106–08 (3d Cir. 2020) (discussing the definition of a "witness" and the eighteen-month limit on confinement); *In re* Grand Jury, 640 F.3d 385, 387 (1st Cir. 2011) (noting that Congress's explicit purpose in enacting § 1826 was to secure the witness's testimony through a sanction). The confinement may not exceed the life of the court proceeding or the grand jury's term. In no event may the confinement last longer than eighteen months. Confinement under § 1826(a) is coercive, not punitive. Its sole purpose is to compel the contemnor to provide the requested testimony. Invesco High Yield Fund v. Jecklin, 10 F.4th 900, 904 (9th Cir. 2021).

In some cases, the recalcitrance of a trial witness to testify at trial against a criminal defendant may be less than all or nothing. If the witness answers some questions but refuses to answer other questions in the presence of the jury, a contempt citation (or confinement in extreme cases) is not the only or automatic option for refusal to comply with a court's unambiguous order to answer the question. *See, e.g.*, Burns v. Warren, No. 13-1929 (RBK), 2016 WL 1117946 (D.N.J. Mar. 22, 2016).

V.B

Double Jeopardy Issues

The Double Jeopardy Clause of the Fifth Amendment also raises due process issues for recalcitrant witnesses. In *United States v. Farah*, 766 F.3d 599 (6th Cir. 2014), the Sixth Circuit discussed the clause prohibiting a person from being tried twice for the same offense. The court held that the prosecution could not multiply contempt by repeated questioning on the same subject of inquiry.

V.C

Witness Immunity

The issue of witness immunity also involves due process considerations. The federal witness immunity statute, 18 U.S.C. § 6002, gives the attorney general (through the executive branch) the authority to exchange the protection of immunity for otherwise incriminating testimony when that testimony "may be necessary to the public interest" in the judgment of a prosecutor. *Id.* § 6003(b). (§ 6003, Court and grand jury proceedings). Under § 6002 (Immunity generally), "no testimony or other information compelled . . . (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

The protection granted under § 6002 "is coextensive with the . . . [Fifth Amendment] privilege against self-incrimination," so "a Court can hold an immunized witness in contempt for refusal to testify." United States v. Quinn, 728 F.3d 243, 253 (3d Cir. 2013) (quoting Kastigar v. United States, 406 U.S. 441, 453 (1972)). However, Congress has not authorized the federal courts (or defendants) to decide that a witness should receive statutory "use" immunity. United States v. Taylor, 728 F.2d 930, 934 (7th Cir. 1984) ("Congress has delegated the authority to grant use immunity solely to the executive branch of government."). The court's role is "ministerial" and limited to reviewing whether the government's grant of immunity to a witness complied with the procedures of § 6003. *Id.* The court may not pass on whether the government has correctly determined that immunity is in the public interest. *See* Pillsbury Co. v. Conboy, 459 U.S. 248, 254 n.11 (1983).

Many courts have recognized a narrow exception to the prohibition, created by the separation of powers, against a court compelling immunity. *See Quinn*, 728 F.3d at 251–52 (citing cases from all other circuits besides the Tenth). *Quinn* observed that the exception recognized by those courts is not "judicial immunity," but rather involves a constitutional remedy for prosecutorial misconduct, in which the court may require the government to exercise its statutory immunity power if it wishes to proceed with a case, but does not "authorize[ ] a district court to grant immunity on its own authority." *Id.* at 251. Courts "must be extremely hesitant to intrude on the Executive's discretion . . . to grant immunity," and as a result, this exception should only be invoked in "exceptional cases . . . [where] the defendant's due process right to a fair trial is violated." United States v. Straub, 538 F.3d 1147, 1166 (9th Cir. 2008). In those limited situations where the court finds this measure necessary, the court still does not grant immunity itself; rather, the court can take actions such as ordering a judgment of acquittal or a new trial unless the government grants statutory use immunity. *Id.*; *Quinn*, 728 F.3d at 265.

V.D

Use of Criminal and Civil Contempt

The court should first apply coercive pressure with civil contempt and use the more drastic criminal sanctions only if the disobedience continues. *See* Save Domestic Oil, Inc. v. United States, 53 F. App'x 72, 75 (Fed. Cir. 2002); NLRB v. Atlanticare Mgmt. LLC, No. 1:22-mc-00003 (SDA), 2023 WL 2664298, at *8 (S.D.N.Y. Feb. 10, 2023) (citing Shillitani v. United States, 384 U.S. 364, 371 (1966)); United States v. Alvarez, 489 F. Supp. 2d 714, 719 (W.D. Tex. 2007). Suppose there is a compelling reason for immediate, strong action. In that case, a trial court may summarily hold in criminal contempt a witness who has refused to comply with the court's order to testify at trial (contrasted with refusing to testify before a grand jury) and may summarily order the witness's imprisonment under Federal Rule of Criminal Procedure 42(b) (formerly Rule 42(a)). *See* United States v. Rangolan, 464 F.3d 321, 324 (2d Cir. 2006).

A recalcitrant witness held in civil contempt should be advised that if they do not purge that contempt, they may later be prosecuted for criminal contempt and punished by a fine or commitment for that criminal contempt. United States v. Gonzales, No. 10-cr-107, 2011 WL 671751, at *2 (D. Ariz. Jan. 24, 2011) (citing United States v. Doe, 125 F.3d 1249, 1254 (9th Cir. 1997)).

V.E

Procedure Upon Completion of Trial

At the end of the trial, a witness held in civil contempt should be released from custody, as imprisonment cannot be used to coerce evidence after a trial is terminated. Yates v. United States, 355 U.S. 66, 72 (1957). At the same time, the court may start a proceeding under Federal Rule of Criminal Procedure 42(a) to cite the witness for criminal contempt. *See* United States v. Concord Mgmt. & Consulting LLC, No. 18-cr-32-2(DLF), 2019 WL 7758635, at *6 (D.D.C. July 1, 2019). If the court institutes action after the trial ends, it must proceed under Rule 42(a), because the defendant's refusal to answer the question no longer obstructs the trial's progress. *See* United States v. Wilson, 421 U.S. 309 (1975); United States v. Brannon, 546 F.2d 1242 (5th Cir. 1977).

V.F

Grand Jury Procedure

A witness who refuses to answer a question before a grand jury may not be cited for criminal contempt under Rule 42(b) because the misbehavior is not in the court's presence. The proper procedure for criminal contempt under these circumstances is under Rule 42(a), in which the witness is given notice and a reasonable time to prepare their defense. *See* Harris v. United States, 382 U.S. 162, 164–65 (1965); FTC v. Trudeau, 606 F.3d 382, 386–87 (7th Cir. 2010).

A civil contempt order for refusal to testify before a grand jury loses effect after the grand jury's term expires or the contempt is purged. *Shillitani*, 384 U.S. at 371. *See also In re* Grand Jury Proceedings, 863 F.2d 667, 668 (9th Cir. 1988).

The circuits disagree over whether a subpoena duces tecum, which compels the production of documents to a grand jury whose term has expired, can be enforced by civil contempt sanctions before a successor grand jury. *Compare In re* Grand Jury Proceedings, 744 F.3d 211, 217–18 (1st Cir. 2014) (subpoena cannot be enforced by contempt order issued by successor grand jury), and Oberlander v. United States (*In re* Grand Jury Proceedings), 971 F.3d 40, 50 (2d Cir. 2020) (the April 2017 subpoena was invalid from inception), *with In re* Sealed Case, 223 F.3d 775, 778 (D.C. Cir. 2000) (first grand jury's subpoena can be enforced during the term of successor grand jury).

V.G

Procedure If Recalcitrant Witness Claims Inability to Remember

A witness's equivocal response, evasive answer, or false disclaimer of knowledge or memory may amount to contemptuous conduct. United States v. Arredondo, 349 F.3d 310, 319 (6th Cir. 2003) (citing *In re* Weiss, 703 F.2d 653, 660 (2d Cir. 1983)). The party seeking to have the witness answer must prove the three elements of contempt (listed below) with clear and convincing evidence. *Weiss*, 703 F.2d at 667. Evidence may be either extrinsic or intrinsic. *In re* Kitchen, 706 F.2d 1266, 1275 (2d Cir. 1983).

"A civil contempt proceeding on" an "asserted memory loss requires a three-step analysis":

1. "[T]he government must make a prima facie showing of contempt."
2. The recalcitrant "witness must provide some explanation on the record for" failing to respond to a valid question.
3. If the recalcitrant "witness meets [the] burden of production by claiming a loss of memory, the government must carry its burden of proof . . . by demonstrating that the witness in fact did remember the events in question."

In re Battaglia, 653 F.2d 419, 422–23 (9th Cir. 1981). The evidence may include extrinsic proof, such as tape recordings or documents, or it may be in the witness's demeanor and answers. *In re* Bongiorno, 694 F.2d 917, 922 (2d Cir. 1982).

A recalcitrant witness who refuses to answer a pertinent question at trial by claiming not to remember may not be confined for civil contempt beyond the duration of the trial. United States v. Powers, 629 F.3d 619, 627 (9th Cir. 1980). A recalcitrant witness who refuses to answer a proper question before a grand jury may not be confined for civil contempt beyond the grand jury's term and in no event longer than eighteen months. *See* 28 U.S.C. § 1826(a).

Courts have held that a federal court can suspend the service of a federal criminal sentence to sandwich within that sentence a federal sentence for civil contempt. *In re* Grand Jury, 640 F.3d 385, 386–88 (1st Cir. 2011); United States v. Dien, 598 F.2d 743, 745 (2d Cir. 1979). *See also In re* Garmon, 572 F.2d 1373, 1375 (9th Cir. 1978). The circuits conflict about whether a federal district court has authority under § 1826(a) to interrupt a contemnor's preexisting state sentence for service of a federal civil contempt sentence. *Compare Grand Jury*, 640 F.3d at 387–88, and *In re* Grand Jury Investigation, 865 F.2d 578, 581–82 (3d Cir. 1989) (both holding that federal tolling of state sentence is permissible), *with In re* Liberatore, 574 F.2d 78, 87–88 (2d Cir. 1978) (holding federal tolling of state sentence intrudes on sovereignty of state court).

VI

Disruptive Defendants

A disruptive defendant may not be permitted to obstruct the orderly progress of a trial. A defendant whose conduct disrupts the court proceedings can lose the Sixth Amendment right to be present at trial if, after a warning from the judge about possible removal, the defendant continues to behave in a disorderly manner during the trial. Illinois v. Allen, 397 U.S. 337, 343 (1970). *See also* Fed. R. Crim. P. 43 (as amended, Rule 43 is designed to make clear that the trial court has the power to exclude the defendant from the courtroom when circumstances warrant removal). When confronted with disruptive, contumacious, stubbornly defiant defendants, a court must be given sufficient discretion to meet the needs of each case. *Allen*, 397 U.S. at 343. Such discretion includes the authority to hold a defendant in contempt for disorderly conduct. *See* 38 U.S.C. § 7265.

The seminal authority on the issue of how to handle a disruptive defendant in a criminal trial is *Allen*, 397 U.S. 337. In *Allen*, the Supreme Court said that the removal of defendants from their own trials is "not pleasant" and even "[d]eplorable," but the court has the discretion to remove defendants for egregious misconduct. *Id.* at 346–47. *See also* United States v. Ductan, 800 F.3d 642, 653–54 (4th Cir. 2015) (Diaz, J., concurring) (defendant was "disruptive, refused to obey the court's instructions, and repeatedly interrupted the court as it attempted to begin jury selection. Under those circumstances, the court had [the] discretion to address [the defendant's] 'disruptive, contumacious, [and] stubbornly defiant' conduct by removing him from the courtroom") (internal citations omitted).[16]

The *Allen* Court outlined three constitutionally acceptable methods for a trial judge to deal with an obstreperous defendant: (1) bind and gag the defendant (thereby keeping him present); (2) cite the defendant for contempt of court; or (3) take the defendant out of the courtroom until a promise of proper conduct is secured. *Allen*, 397 U.S. at 343–44.

The first option—binding and gagging the defendant—should be a last resort. *Id.* at 344–45. The image could be prejudicial to the jury and could hinder the defendant's ability to communicate with his counsel, and the technique is an "affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold." *Id.* at 344. If the court orders that a defendant be shackled or shackled and gagged, it must state the justification for that action on the record. Deck v. Missouri, 544 U.S. 622, 629–31, 633 (2005). *See also* United States v. Durham, 287 F.3d 1297, 1307 (D.C. Cir. 2002) (stun belt); United States v. Apodaca, 843 F.2d 421, 431 (10th Cir. 1988) (leg chain); United States v. Theriault, 531 F.2d 281, 285 (5th Cir. 1976) (shackles). The defendant and defense counsel should be allowed to respond to the reasons presented by the court. *Deck*, 544 U.S. at 629–31. Even if physical restraints on the defendant are not visible to the jury, they may still burden aspects of a defendant's right to a fair trial and pose an affront to the decorum of judicial proceedings. United States v. Moore, 651 F.3d 30, 47 (D.C. Cir. 2011) (stun belts); *Durham*, 287 F.3d at 1304 (same). *See also* United States v. Hill, 35 F.4th 366 (5th Cir. 2022), *rev'd*, 63 F.4th 335 (5th Cir. 2023) (on a petition for reh'g) (discussing shackling, termination of pro se status and removal issues).

The second option—citing the defendant for criminal contempt—has obvious limitations as a sanction when the defendant is charged with a crime so serious that a very severe sentence such as death or life imprisonment is likely to be imposed." *Allen*, 397 U.S. at 345. But a finding of civil contempt, coupled with imprisonment of the defendant until they agree to cooperate, requires continuance of the trial because the defendant has a right to be present. So although this procedure avoids the use of shackles and gags, exercising this second option may allow a defendant "to profit from his own wrong" by delaying trial until "adverse witnesses might be unavailable." *Id.*

16. Note, however, that in a concurring opinion, a member of the Fourth Circuit panel in *Ductan* agreed with the defendant's contention that the trial judge plainly erred in failing to appoint counsel in his place after the removal and prior to jury selection. *See Ductan*, 800 F.3d at 654 ("It is well established that jury selection is a 'critical stage' of a criminal trial to which the right to counsel attaches," so the absence of any representation, by appointed counsel or pro se would represent a "breakdown in the adversarial process.") (quoting Gomez v. United States, 490 U.S. 858, 873 (1989), and James v. Harrison, 389 F.3d 450, 456 (4th Cir. 2004)).

The third option—removing the defendant from the courtroom—occurs more often. *See Ductan*, 800 F.3d at 642. *See also* United States v. Hill, 63 F.4th 335 (5th Cir. 2023); Williams v. Korines, 966 F.3d 133 (2d Cir. 2020); United States v. Hellems, 866 F.3d 856 (8th Cir. 2017); United States v. Gillenwater, 717 F.3d 1070 (9th Cir. 2013). *See also* Fed. R. Crim. P. 43(c)(1)(c) (a court may exclude a defendant from being present even at trial when persisting in disruptive conduct that justifies exclusion from the courtroom).

Allen does not make "removal a last resort" or require a district court to "exhaust every other possible cure" before ordering removal. United States v. Benabe, 654 F.3d 753, 770 (7th Cir. 2011). The *Allen* Court, however, noted that "[o]nce 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." *Allen*, 397 U.S. at 343 (footnotes omitted). *See also Hill*, 63 F.4th at 348.

If the court chooses the third option—to remove the defendant from the courtroom—it should arrange other ways to participate in a trial, for example, by placing the defendant in another room with an audio and video feed. *See* United States v. Weast, 811 F.3d 743 (5th Cir. 2016). In that event, the court is advised to take frequent recesses during the trial to allow counsel and the defendant to confer—particularly before counsel cross-examines a witness—to enable the defendant to participate in the defense.

It is an error to order the removal of a disruptive defendant from the courtroom without first warning the defendant of the possible consequences. *See* Gray v. Moore, 520 F.3d 616, 623 (6th Cir. 2008). The court should state that the defendant may return after assuring the court that there will be no more disturbance. United States v. Kizer, 569 F.2d 504, 506–07 (9th Cir. 1978); Scurr v. Moore, 647 F.2d 854, 858–59 (8th Cir. 1981). *But see* United States v. Shanks, 962 F.3d 317 (7th Cir. 2020) (per curiam) (district court found that defendant waived the right to be present at trial by disruptive conduct in circumstances when the defendant refused trial judge's order to attend trial proceedings).

Recent district-court cases that involve removing defendants from the courtroom suggest additional options for disruptive defendants. One trial court used its discretion to terminate the right to Sixth Amendment self-representation and appoint counsel for the disruptive defendant instead. *See* United States v. Easley, No. 2:20-cr-000270-MHH-SGC-1, 2022 WL 3638171 (N.D. Ala. Aug. 23, 2022). Another trial court used its discretion to terminate the defendant's self-representation and appoint an attorney for the defendant. *See* United States v. Lusk, No. 21-cr-20307-GAD-KGA-1, 2022 WL 17340466 (E.D. Mich. Nov. 30, 2022).

In *Easley*, the district court relied on *Faretta v. California*, 422 U.S. 806 (1975), to permit the termination of the defendant's right to self-representation for deliberately engaging in serious and obstructionist misconduct. In *Lusk*, the district court similarly noted that if the defendant continues to act disruptively, the court will interpret the defendant's behavior as waiving the right to self-representation. After noticing the defendant's disruptive behavior during a preliminary hearing, the *Lusk* court ordered a psychological evaluation to determine his competency to stand trial and represent himself. Although the test results led to granting the motion to proceed pro se, the court warned the defendant that further disruptions would constitute grounds for waiver and termination of the Sixth Amendment right to self-representation. The court then appointed stand-by counsel. *See Lusk*, 2022 WL 17340466, at *2–3.

VII

Double Jeopardy Issues

Civil contempt followed by criminal contempt for the same act does not subject the contemnor to double jeopardy. The court could bring an action in criminal contempt after acting on civil contempt. United States v. UMWA, 330 U.S. 258 (1947); Yates v. United States, 355 U.S. 66 (1957). *See also* United States v. Petito, 671 F.2d 68 (2d Cir. 1982).

Double jeopardy protection does attach in nonsummary criminal contempt prosecutions just as in other criminal prosecutions. United States v. Dixon, 509 U.S. 688 (1993). An individual may not be prosecuted for an underlying, substantive offense and criminal contempt in temporally separate proceedings. *Id.* at 712. But double jeopardy protection does not attach if the punishments for contempt and for the underlying crime from which the contempt order is derived are administered in a single proceeding. United States v. Henry, 519 F.3d 68 (1st Cir. 2008). In *Henry*, the court assumed that the contempt charges and the underlying drug trafficking crime constituted the "same offense" for double jeopardy purposes because proving the contempt violation required proof of the underlying drug trafficking offense. *Id.* at 71–72. This assumption would not necessarily be involved in every case. For example, the basis of the contempt might relate to witness tampering, but the underlying offense is drug trafficking. Double jeopardy would not be an available claim because the "same offense" element is missing. Although *Henry* "postulated that there is room for reasonable minds to disagree whether double jeopardy concerns arise under the[ ] circumstances," he did not meet his burden of proving that the trial court committed plain error. *Id.* at 74.

5

Trial Performance of Counsel

I

Opening Statement

I.A

Overview

An opening statement aims to give the jury a broad case outline to help them understand the case. *See* United States v. DeRosa, 548 F.2d 464, 470 (3d Cir. 1977). Counsel should avoid overly dramatic, unnecessary characterizations or overstatements in the opening statement. *See* United States v. Moore, 651 F.3d 30, 52 (D.C. Cir. 2011). Counsel also must not recite items of highly questionable evidence, *id.* at 51, and must limit discussion of evidence to what counsel has a good-faith, reasonable basis for believing will be tendered and admitted. *See* ABA Standards for Criminal Justice: Prosecution and Defense Function (ABA 4th ed. 2021).

Many kinds of improper statements are made at this stage of the trial. The sections below describe some of the more commonplace statements.

I.B

Government Opening Statement

In its opening statement, the government must present a view of the facts as it expects the proof to show them. The opening should not be used "to poison the jury's mind against the defendant." *Moore*, 651 F.3d at 51.

The prosecutor may not try to arouse undue sympathy for the victim of a crime or put the jurors in the victim's shoes. *See, e.g.*, United States v. Newton, 369 F.3d 659, 681 (2d Cir. 2004). The prosecutor also may not appeal to the jurors' passions and prejudices, United States v. Spivack, 376 F. App'x 144, 145 (2d Cir.

2010), or characterize the defendant impermissibly, United States v. Heibling, 209 F.3d 226, 240–41 (3d Cir. 2000).

I.C

Defense Opening Statement

An opening statement tells the court and jury what the party giving it expects the evidence to show. Like the prosecution, the defense is entitled but not required to make an opening statement, even if it intends not to put on any evidence in its case-in-chief. If the defense elects to make an opening statement, then there are two times during the trial to do so: (1) just after the government's opening statement and before the presentation of any evidence; or (2) after the close of the government's case and before the presentation of defense evidence. *See* United States v. Hershenow, 680 F.2d 847, 858 (1st Cir. 1982). The importance of this function is not diminished by the fact that the defense counsel expects to prove the defense's theory through cross-examination of government witnesses or to comment on the lack of expected evidence. *See id.* The defense has a right to make an opening statement at the close of the government's case. *Id.*

II

Closing Argument

II.A

Overview

The court's primary concern during closing arguments should be avoiding improper disputes and misconduct by counsel. Before allowing a closing argument, the court should seek to anticipate, and if necessary discuss, areas of concern. *See* ABA Standards for Criminal Justice: Special Functions of the Trial Judge § 6-2.4 (Duty of judge on counsel's objections and requests for rulings) (ABA 4th ed. 2021). The judge "is the governor of the trial . . . [to assure] its proper conduct." Quercia v. United States, 289 U.S. 466, 469 (1933). The trial judge is responsible for "maintain[ing] decorum." United States v. Young, 470 U.S. 1, 10 (1985). *See also* ABA Standards for Criminal Justice § 6-3.5 (Judge's use of powers to maintain order).

Although the prosecutor and defense counsel have considerable latitude in presenting arguments to a jury, both advocates must "refrain from interjecting personal beliefs into the presentation of [the] case." *Young*, 470 U.S. at 8–9. The trial court "should deal promptly" with "unfounded and inflammatory attacks on the opposing advocate." *Id.* at 9. *See also* Viereck v. United States, 318 U.S. 236, 248 (1943). If the prosecution makes such personal or unsubstantiated accusations during closing argument, the trial judge must determine whether the improper remarks "deprived the defendant of a fair trial by examining the 'cumulative effect of such misconduct,' the 'strength of the properly admitted evidence of the defendant's guilt,' and the 'curative actions taken by the trial court.'" United States v. Holmes, 413 F.3d 770, 775 (7th Cir. 2005) (quoting United States v. Hernandez, 779 F.2d 456, 460 (8th Cir. 1985)).

"[I]nterruptions of arguments, either by an opposing counsel or the presiding judge, are matters to be approached cautiously." *Young*, 470 U.S. at 13. *See also* United States v. Rivera-Rodriguez, 761 F.3d 105, 119 (1st Cir. 2014) (after overruling the defense's objection during the government's closing argument, the judge improperly remarked, "That's exactly what he said," thereby helping the government with its case and resolving an issue of fact that should have been left to a jury).

II.B

Specific Misconduct and Curative Intervention

In reviewing improper closing arguments, courts of appeals generally seek to balance the gravity of the misconduct, its direct relationship to the issue of guilt or innocence, and the effect of specific corrective instructions by the trial court, if any, against the weight of the evidence of a defendant's guilt. Many issues discussed below apply with equal force to both the defense and the government, but it is the government that, because it bears the burden of proof, often is the source of the violation.

II.B.1

Commenting on the Exercise of Constitutional Rights

The Defendant's Decision Not to Testify

The government may not explicitly or implicitly comment on the defendant's failure to testify. *See* Griffin v. California, 380 U.S. 609 (1965). *See also* Moore v. Mitchell, 708 F.3d 760, 806 (6th Cir. 2013). *But see* United States v. Robinson, 485 U.S. 25 (1988) (prosecutor's comment allowed as a fair response to defense closing argument).

When a defendant testifies after presenting other trial evidence, and the prosecutor comments about the defendant's ability to tailor testimony considering additional evidence, that comment does not violate the Fifth or Sixth Amendment. *See* Portuondo v. Agard, 529 U.S. 61, 65–66 (2000).

The Defendant's Decision to Consult Counsel (Before or After Arrest)

In *United States ex rel. Macon v. Yeager*, 476 F.2d 613, 615–17 (3d Cir. 1973), the Third Circuit explained that the government should not comment on a defendant's decision to consult with counsel.

The Defendant's Pre-Arrest Silence

In *Salinas v. Texas*, 570 U.S. 178 (2013), the Supreme Court held that the government's use of the defendant's "noncustodial silence did not violate the Fifth Amendment." *Id.* at 186. After voluntarily answering initial questions at the police station, the defendant remained silent in response to further questions. Because he did not expressly invoke the privilege against self-incrimination, the Court said this situation falls "outside the scope of *Miranda*." *Id.* at 185. *See also* Jenkins v. Anderson, 447 U.S. 231, 240–41 (1980) (noting that using pre-arrest, pre-*Miranda*-warning silence to impeach a defendant's credibility is not a constitutional violation per se).

The Defendant's Post-Arrest, Pre-Miranda Warnings Silence

The circuits are split on whether a defendant's post-arrest, pre-*Miranda* silence may be admitted in the government's case-in-chief and commented on by the prosecutor in closing. *See* United States v. Wilchcombe, 838 F.3d 1179, 1190–91 (11th Cir. 2016). The Eleventh Circuit described the circuit split and noted that the First, Second, Sixth, and Seventh Circuits prohibit the use of even pre-arrest silence as substantive evidence of guilt; the Ninth, Tenth, and D.C. Circuits prohibit using post-arrest silence; and the Fourth, Eighth, and Eleventh Circuits allow comment on silence at any time prior to *Miranda* rights having been read. The court in *Wilchcombe* also noted that the Supreme Court had granted certiorari to resolve the conflict but ultimately decided that case on other grounds.

II.B.2

Arguing Beliefs and Opinions

When recounting the evidence or commenting on its implications, neither the prosecution nor defense counsel should express beliefs or use expressions like "I think" or "I don't believe." *See* United States v. Young, 470 U.S. 1, 16–19 (1985). Instead, prefacing comments on the implications of evidence with the expression

"I submit" is recommended. *See* United States v. Crawford, 498 F. App'x 163, 167 (3d Cir. 2012).

II.B.3

Inflaming Passions and Prejudices of a Jury

The cases generally hold that comments or conduct by the prosecution or by the court may constitute reversible error if they mislead the jury or prejudice the defendant. But the defendant must show that the conduct was flagrant or that the evidence against the defendant was too weak to overcome the prejudice. For example, in *United States v. Hall*, 979 F.3d 1107 (6th Cir. 2020), the court discussed the flagrancy analysis for determining whether a prosecutor's conduct or remarks misled the jury or prejudiced the defendant. The court also addressed the impropriety of "Golden Rule" arguments that ask jurors to place themselves in the victim's shoes.

Other arguments where possible prejudice may undermine a defendant's due process right to a fair trial by an impartial jury include the following:

1. **Appeals for sympathy or help to maintain law and order.** United States v. Shalash, 108 F. App'x 269, 280 (6th Cir. 2004) (holding that such appeals are impermissible).
2. **Race-conscious or racially biased arguments by the government.** *See, e.g.*, United States v. Nobari, 574 F.3d 1065, 1072 (9th Cir. 2009) (prosecutor used ethnic generalizations about defendants of Middle Eastern descent); Cudjo v. Avers, 698 F.3d 752, 769–70 (9th Cir. 2012) (improper for the prosecutor to say during closing argument that "this woman is going to have intercourse with a strange man—frankly any man—a black man, on her living room couch with her five-year-old in the house"); United States v. Dukes, 736 F. App'x 807, 810 (11th Cir. 2018) ("there is no place in a criminal prosecution for gratuitous references to race," and "[e]lementary concepts of equal protection and due process alike forbid a prosecutor to seek to procure a verdict based on the basis of racial animosity") (quotations and citations omitted). *Cf.* Peña-Rodriguez v. Colorado, 580 U.S. 206, 225 (2017) (evidence of racial bias by a juror is a constitutional exception to the "no impeachment of a jury verdict" rule).
3. **Emotional displays by a witness**, such as a witness's testimony of harrowing events during the alleged crime. Because these kinds of displays may also inflame the passions and prejudices of a jury, a court must assess, under Federal Rule of Evidence 403(b), whether such testimony is admissible. *See* United States v. Thompson, 545 F. Supp. 3d 1033

(D.N.M. 2021). *See also* United States v. Caraway, 534 F.3d 1290, 1301 (10th Cir. 2008) (evidence is unfairly prejudicial under Rule 403 when it has an "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one").

4. **Arguing Facts Not in Evidence.** Closing arguments of both prosecutor and defense counsel must derive from the trial record. United States v. Overton, 971 F.3d 756, 768 (8th Cir. 2020). *Cf.* United States v. Tucker, 641 F.3d 1110, 1120 (9th Cir. 2011) ("Prosecutors can argue reasonable inferences based on the record.") (internal citation omitted).

5. **Arguing Defendant's Prior Convictions.** Although the prosecution may introduce evidence of a testifying defendant's prior convictions to impeach credibility, it may not argue or present the evidence to imply general criminal predisposition or guilt of a charge at issue. United States v. Mendoza-Prado, 314 F. 3d 1099, 1103–04 (9th Cir. 2002).

6. **Commenting on Codefendant's Failure to Testify.** Comments by a defendant implicitly or explicitly asking the jury to infer the guilt of a codefendant who has not testified are improper. United States v. Spencer, 592 F.3d 866, 880 (8th Cir. 2010). *Cf.* United States v. Morris, 817 F.3d 1116, 1121–22 (8th Cir. 2016) (prosecutor's closing remark (in rebuttal) that coconspirator took the stand and said, "this is what it was about," did not amount to impermissible comment on defendant's failure to testify in violation of Fifth Amendment).

7. **Vouching for the Witness.** It is improper for the prosecution to vouch for the credibility of a government witness. United States v. Young, 470 U.S. 1, 18–19 (1985). Vouching for a government witness often consists of a suggestion that "there is additional evidence, not introduced at trial but known to the prosecutor, that supports the witness's credibility." United States v. Newton, 369 F.3d 659, 681 (2d Cir. 2004). Vouching may also occur when the prosecutor states a personal belief in a witness's credibility. United States v. Henry, 545 F.3d 367, 378 (6th Cir. 2008). It is improper for the prosecutor to put the government's prestige behind a witness by making personal assurances of that witness's veracity. United States v. Coulter, 57 F.4th 1168, 1186 (10th Cir. 2023). In contrast to such inappropriate assertions of personal belief or references to evidence outside the record, the prosecutor is "entitled to argue forcefully and vigorously . . . in support of her witness's credibility" as long as it is "based on evidence in the record. United States v. Spinelli, 551 F.3d 159, 169 (2d Cir. 2008) ("[T]he AUSA was perfectly entitled to argue to the jury that [the witness's] self-interest would lead him to testify truthfully" or that other

testimony "corroborated [the witness's] description . . . and that the testimony of each [witness] showed that the other was telling the truth.").

When can the government present evidence of the truthfulness provisions of a witness's plea agreement or cooperation agreement with the government? Courts are divided on whether the "truthfulness provisions" of a plea agreement can be admitted into evidence before a challenge to the credibility of a criminal witness on cross-examination. The sticking point stems from Federal Rule of Evidence 608(a), which states that evidence of a witness's truthful character is admissible only after the witness's character for truthfulness has been attacked.

The majority of circuits (D.C., First, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Tenth) allow the government to admit evidence of the truthfulness provisions of a plea agreement on direct examination, even before any challenge to the witness's credibility. This approach is based on the rationale that such evidence helps the jury to fully assess the witness's credibility by understanding the potential motivations behind their testimony. *See, e.g.*, United States v. Lord, 907 F.2d 1028, 1030 (10th Cir. 1990) (citing cases from the majority circuits). *See also* United States v. McClellon, 578 F.3d 846, 859 (8th Cir. 2009); United States v. Harlow, 444 F.3d 1255, 1264 (10th Cir. 2006); and United States v. Henderson, 717 F.2d 135, 137–38 (4th Cir. 1983).

The Second and Eleventh Circuits, however, hold that it is erroneous for the government to introduce the truthfulness provisions of a plea agreement before the defense has attacked the witness's credibility. These courts argue that such provisions primarily serve to improperly bolster the witness's credibility and should only be introduced to rehabilitate the witness after a credibility attack. *See, e.g.*, United States v. Certified Env't Servs., Inc., 753 F.3d 72, 85–86 (2d Cir. 2014); United States v. Cosentino, 844 F.2d 30, 32–35 (2d Cir. 1988). The Eleventh Circuit also prohibits the introduction of truthfulness provisions in an agreement until the defense challenges the witness's credibility. *See* United States v. Cruz, 805 F.2d 1464, 1479–80 (11th Cir. 1986). The Eleventh Circuit has a nuanced position, allowing the introduction of truthfulness provisions on direct examination if the defense attacks the witness's credibility in its opening statement. *See* United States v. Cohen, 888 F.2d 770, 773–774 (11th Cir. 1989).

To sum up, unless the prosecution is responding to a challenge to the witness's credibility, whether due process has been violated by the prosecution's statements about the truthfulness provisions in a plea agreement on direct examination depends on whether the jury can fairly interpret the government's statements as the government putting its weight and confidence behind the witness statements or simply as describing that the witness was advised to tell the truth.

Using a cooperation agreement's truthfulness provisions "becomes impermissible only when the prosecutors explicitly or implicitly indicate that they can monitor and accurately verify the truthfulness of the witness's testimony." *Harlow*, 444 F.3d at 1262 (citing United States v. Bowie, 892 F.2d 1494, 1498 (10th Cir. 1996)). A prosecutor may not argue that testifying government agents have extensive experience and are experts, or that they and the prosecutors come from the local community. *Certified Env't Servs., Inc.*, 753 F.3d at 94–95.

6

Multiple Defendants

Criminal trials with codefendants present unique challenges. Many issues can be handled before trial, particularly the propriety of joinder of offenses and defendants. The use of codefendant statements can be handled at a joint trial.

I

Joinder

The issue of whether the joinder of offenses and defendants is proper and whether codefendant statements may be used during a joint trial arises frequently.

I.A

Federal Rule of Criminal Procedure 8(a) and (b)

Federal Rule of Criminal Procedure 8 governs the joinder of offenses or defendants in the same indictment or information. Rule 8(a) regulates offenses where only a single defendant is charged. United States v. Mann, 701 F.3d 274, 290 (8th Cir. 2012) (improperly joining unrelated crimes). Rule 8(b) governs improper joinder of defendants. It allows the joinder of defendants in an indictment or information when they "are alleged to have participated in the same act or transactions, or the same series of acts or transactions, constituting an offense or offenses."

Unlike Rule 8(a), Rule 8(b) does not permit a joinder just because the offenses are of the same or similar character. Though each defendant need not be charged with each act in the series, there must be a logical relationship between the joined defendants. *See, e.g.*, United States v. De La Paz-Rentas, 613 F.3d 18, 23 (1st Cir. 2010) (noting the common practice of trying together defendants charged with crimes arising out of a common core of facts). *See* United States v. Abegunde, 841 F. App'x 867, 873 (6th Cir. 2021) (holding joinder of defendants was proper where it was reasonable to infer that defendant used his marriage to further a conspiracy with his wife).

I.B

Conspiracy Laws for Unrelated Crimes

Defendants charged with unrelated crimes may be appropriately joined if the indictment includes both a conspiracy and substantive offenses arising out of separate events that fall within the scope of the conspiracy or were the objects of the conspiracy. United States v. Gentile, 495 F.2d 626, 630–31 (5th Cir. 1974); Gordon v. United States, 438 F.2d 858, 878 (5th Cir. 1971). The same holds true under conspiracy laws—such as the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. §§ 1961–1968—if each offense or conspiracy furthered the RICO criminal enterprise. United States v. Mouzone, 687 F.3d 207, 219 (4th Cir. 2012). But a joinder is not permitted in conspiracy cases in which the substantive crimes alleged in the indictment fall outside the scope of the conspiracy with which the defendant is charged. United States v. Shellef, 507 F.3d 82, 103 (2d Cir. 2007) (improper joinder under Rule 8(b)).

If the court cannot join every codefendant in cases involving a criminal enterprise due to resource constraints, it must consider the order in which it will hold trials. The court should aim to join defendants charged with similar types of conduct.

I.C

Criminal Organizations

In multidefendant cases involving criminal organizations, including death-qualified trials, the court should consider the top-down approach—starting with defendants higher up in the organization. This approach may conserve judicial resources. If higher-up defendants are acquitted or convicted of lesser charges, trials for defendants lower in the organization may be resolved or streamlined. In capital cases, if the jury does not return the death penalty on higher-up defendants, then defendants lower in the organization are unlikely to be brought to trial facing the death penalty.

I.D

Codefendant Motion to Discharge Counsel

In order to avoid problematic midtrial motions to discharge counsel, especially in multidefendant cases, the court should require defense counsel to maintain regular pretrial contact with their clients prior to trial. Too often, requests to dismiss counsel at or near trial arise because defense counsel hasn't maintained steady contact with the client. At the first appearance, the court can ask counsel and the client what would be satisfactory regarding visits and ask them to let the court know if any problems arise. This approach can effectively limit how often defendants request to discharge their counsel once the trial has begun.

II

Severance

The general rule regarding potential severance in multiple-defendant cases is that "defendants who have been jointly indicted should be tried together," particularly in conspiracy cases. United States v. Cross, 928 F.2d 1030, 1037 (11th Cir. 1991). *See also, e.g.*, United States v. Boykins, 9 F.3d 1278 (7th Cir. 1993). This is particularly so "when the indictment charges a conspiracy or a crime which may be proved against all the defendants by the same evidence and which results from the same or a similar series of acts." United States v. Brandon, No. 2:04-CR-80, 2005 U.S. Dist. LEXIS 37801, at *3 (N.D. Ind. Sept. 2, 2005) (citing United States v. Echeles, 352 F.2d 892, 896 (7th Cir. 1965)) (citations omitted). Similarly,"[t]he objective of both Rules [8 and 14] is to balance the prejudice inherent in joint trials against the interests in judicial economy." United States v. Jones, 880 F.2d 55, 60 (8th Cir. 1989).

The cases also make clear that a court may grant a severance motion if the defendant shows actual prejudice from a joint trial. In *United States v. Percival*, 756 F.2d 600 (7th Cir. 1985), the court noted that "[i]n order to obtain a severance, defendants must show actual prejudice from their joinder, 'i.e., that [they] will be unable to obtain a fair trial without severance, not merely that a separate trial will offer a better chance of acquittal.'" *Id.* at 610 (citations omitted).

The Supreme Court's decision in *Zafiro v. United States*, 506 U.S. 534 (1993), sets forth the standard for when severance should be granted. *Zafiro* held that severance should be granted "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at 539. This standard is cited in multiple cases, including *United States v. Tarango*, 396 F.3d 666 (5th Cir. 2005). All the same, a court may grant a severance motion if the defendant establishes actual prejudice from a joint trial. But even though the joinder under Rule 8(b) may be proper, a trial court may nonetheless order severance if sufficient prejudice exists regarding one or more defendants. *See* Fed. R. Crim. P. 14.

Rule 14 prejudice may result from (1) antagonistic defenses between or among defendants, (2) a codefendant's refusal to testify and present exculpatory testimony about another defendant, (3) the defendant's desire to testify on one charge but not another, and (4) a codefendant's inculpatory statements, even if introduced only against the codefendant.

A codefendant might engage in conduct during the trial that may disrupt the trial and prejudice other codefendants, including behavior as extreme as stabbing another codefendant in the courtroom. In general, the court should evaluate whether a disruption was intentional or unintentional and whether it was designed to cause a mistrial or severance. The court should spend significant time developing a good record. The court should consider the possibility that an intentional disruption may recur if the court severs the disruptive defendant and proceeds to a new trial with the remaining codefendants. See above Part 4.VI: Disruptive Defendants for more on how to handle disruptive defendants.

II.A

Antagonistic Defenses

Rule 14 does not require severance when codefendants present "[m]utually antagonistic defenses." *Zafiro*, 506 U.S. at 538. For severance based on antagonistic defenses to be warranted, the reasons must be hostile to the point of being irreconcilable and mutually exclusive. They must be so aggressive that the jury, to believe one defendant's defense, must disbelieve the protection of the other defendant. United States v. Watkins, 66 F.4th 1179, 1186 (8th Cir. 2023); United States v. Hankton, 51 F.4th 578, 608 (5th Cir. 2022); United States v. Perez-Vasquez, 6 F.4th 180, 201 (1st Cir. 2021); United States v. Chavez, 894 F.3d 593, 606 (4th Cir. 2018); United States v. Pursley, 474 F.3d 757, 765–66 (10th Cir. 2007).

Situations may also arise where prejudicial conduct by a codefendant's attorney may create antagonism. In many such instances, the codefendant's attorney may become a "second prosecutor" and complete the possibility that comments made or evidence adduced establish grounds for severance. *See, e.g.*, United States v. Odom, 888 F.2d 1014, 1018 (4th Cir. 1989).

II.B

Need for Codefendant's Exculpatory Testimony

When a defendant seeks severance to secure the testimony of a codefendant, the defendant must show: (1) a bona fide need for the testimony; (2) the substance of the testimony; (3) its exculpatory nature and effect; and (4) that the codefendant will testify if the cases are severed. *See, e.g.*, United States v. Clark, 717 F.3d 790, 818–19 (10th Cir. 2013). Conclusory statements by counsel moving for severance cannot establish that a codefendant's testimony at a separate trial would exculpate counsel's client. *Id.* The defendant moving for severance must proffer facts that are detailed enough to allow the court to conclude that the codefendant's testimony would be substantially exculpatory of the defendant at trial. *See* United States v. Hall, 473 F.3d 1295, 1302 (10th Cir. 2007).

II.C

Defendant Wants to Testify on One Count but Not Another

Granting a motion to sever one count of the indictment from the trial but not another is not mandatory. United States v. Freland, 141 F.3d 1223, 1227 (7th Cir. 1998). "If that were the law, a court would be divested of all control over the matter of severance and the choice would be entrusted to the defendant." United States v. Alexander, 135 F.3d 470, 477 (7th Cir. 1998) (internal quotation marks and citations omitted).

Severance is warranted only "if the defendant makes a convincing showing that he has both important testimony to give concerning one count and a strong need to refrain from testifying as to the other counts." *Freland*, 141 F.3d at 1227 (citing United States v. Archer, 843 F.2d 1019, 1022 (7th Cir. 1998)). *See also* Collins v. Green, 838 F. App'x 161 (6th Cir. 2020) (defendant claimed prejudicial joinder when forced to choose between Sixth Amendment right to testify in own defense on one murder charge and Fifth Amendment right to remain silent on the other charge) (citing United States v. Bowker, 372 F.3d 365, 383–85 (6th Cir. 2004), *as modified on other grounds by* United States v. Bowker, 125 F. App'x 701 (6th Cir. 2005)); United States v. Reicherter, 647 F.2d 397, 399–401 (3d Cir. 1981); United States v. Hayes, 861 F.2d 1225, 1231–32 (10th Cir. 1988). *Cf.* 1A Charles Alan Wright et al., Federal Practice & Procedure § 223 (5th ed. 2020) (joinder may prejudice a defendant who "wish[es] to testify in his defense on one charge but not testify on another.").

A "specific and compelling" showing of prejudice resulting from failing to sever a defendant's counts is required. *See* United States v. Sharp, 6 F.4th 573, 580 (5th Cir. 2021).[17] *See also* United States v. McCarther, 596 F.3d 438, 443 (8th

17. Practice Tip: In *Sharp*, the trial court preempted the defendant's claim of prejudice from taking the witness stand by limiting cross-examination to "the matters that [*Sharp*] presented in his narrative testimony." *Sharp*, 6 F.4th at 581. The district court thus acted within its discretion by denying his motion to sever. *Id.*

Cir. 2010) (defendant "must make a 'persuasive and detailed showing regarding the testimony he would give on the one count he wishes severed and the reason he cannot testify on the other counts.'") (citation omitted). The defendant must proffer "specific examples of the exculpatory testimony" that would be given but for the joinder of the counts. United States v. Ervin, 540 F.3d 623, 629 (7th Cir. 2008) (citing *Alexander*, 135 F.3d at 477). "True, joinder can be prejudicial if it improperly coerces a defendant into testifying about a count on which [the defendant] wish[es] to remain silent." United States v. Berg, 714 F.3d 490, 496 (7th Cir. 2013) (citing *Ervin*, 540 F.3d at 628). But a defendant's "general assertions about the testimony he seeks to offer will not suffice." *Ervin*, 540 F.3d at 629.

A defendant "fails to make a convincing demonstration of a 'strong need to refrain from testifying' on particular counts when 'without [the defendant's] testimony, the government offered sufficient evidence to support the jury's verdict' on these counts." United States v. Balzano, 916 F.2d 1273, 1283 (7th Cir. 1990) (citing *Archer*, 843 F.2d at 1022). *See also Freland*, 141 F.3d at 1227.

II.D

Codefendant's Inculpatory Statements

The prevailing federal law concerning the admissibility of a codefendant's statements that are inculpatory of the defendant is primarily governed by three Supreme Court decisions applying the Confrontation Clause: *Crawford v. Washington*, 541 U.S. 36 (2004), *Richardson v. Marsh*, 481 U.S. 200 (1987), and *Bruton v. United States*, 391 U.S. 123 (1968). The admissibility of such statements generally turns on the circumstances in which those statements were made. Admissibility is most limited where the statement is "testimonial," whether it was given in an actual court proceeding or was provided to law enforcement with a purpose of proving events relevant to later prosecution. At the other extreme are statements made among co-conspirators while the crime was underway, which are both non-testimonial and non-hearsay. Statements that are made outside of a testimonial setting but that occurred after the offense was completed require a fact-specific assessment using the hearsay rules.

III

Nontestimonial Statements: The *Bruton* Rule and Subsequent Case Law

In multidefendant cases, the government may offer into evidence a pretrial confession by one of the codefendants, so courts should be alert to the possibility of a *Bruton* problem before the jury is sworn in. In *Bruton v. United States*, 391 U.S. 123 (1968), the Supreme Court held that the Confrontation Clause of the Sixth Amendment was violated when one defendant's confession, implicating another defendant, was placed before the jury at the defendants' joint trial. The confessing defendant did not take the witness stand and was therefore not subject to cross-examination. The trial court's cautionary instruction—that the jury should consider the confession only as evidence against the confessing defendant—did not cure the constitutional violation.

In *Richardson v. Marsh*, 481 U.S. 200 (1987), the Supreme Court limited the *Bruton* rule. The Court held that the admission of a nontestifying codefendant's confession—redacted to eliminate the defendant's name and any other reference to the defendant's existence—accompanied by a "proper limiting instruction" did not violate the Confrontation Clause. The Court "express[ed] no opinion on the admissibility of a confession in which the defendant's name has been replaced with a symbol or neutral pronoun." *Id.* at 211 n.5. But in *Gray v. Maryland*, 523 U.S. 185 (1998), the Court decided this issue, holding that *Bruton* applies to a "redaction that replaces a defendant's name with an obvious indication of deletion, such as a blank space, the word 'deleted,' or a similar symbol." *Id.* at 192.

Admissibility of Nontestimonial Statements

In *Crawford v. Washington*, 541 U.S. 36, 51 (2004), the Supreme Court distinguished "a casual remark to an acquaintance," which it found to be nontestimonial, from a person's "formal statement to government officers," which it found to "bear[] testimony." *Crawford* held that the Confrontation Clause barred the government's introduction, against a defendant, of testimonial statements of witnesses who do not appear for cross-examination at trial. *Id.* at 67–69. In *Davis v. Washington*, 547 U.S. 813 (2006), the Court limited *Crawford*'s holding by defining "testimonial" as follows:

> Statements are nontestimonial when made [during] police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate

> that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 822.

As noted in *Bruton*, a codefendant who is not a cooperating government witness is generally unavailable for cross-examination because the Fifth Amendment prevents the government from calling the codefendant to testify. A “confession” as that term is used in *Bruton* is, by definition, testimonial under *Crawford*. *See* Lucero v. Holland, 902 F.3d 979, 983–84 (9th Cir. 2018) (noting agreement of most other circuits). *Accord* United States v. Hano, 922 F.3d 1272, 1287 (11th Cir. 2019).

If a codefendant’s statement was made in circumstances that cause it to be nontestimonial, such as in a casual conversation with an associate rather than with law enforcement, *Bruton* and *Crawford* do not apply, and hearsay principles are considered. *See, e.g.*, United States v. Brown, 627 F. Supp. 3d 206 (E.D.N.Y. 2022) (discussing the implications of a codefendant’s inculpatory statements on a defendant’s right to confrontation and cross-examination); United States v. Hansend, No. 21-cr-20307-GAD-KGA-2, 2022 WL 17832698 (E.D. Mich. Dec. 21, 2022) (discussing the legal standard for severing defendants in a criminal trial, which is relevant because it addresses the potential prejudice that can arise from a codefendant’s inculpatory statements); United States v. Franklin, 415 F.3d 537 (6th Cir. 2005) (discussing the admissibility of a codefendant’s inculpatory statements, including the impact of the *Crawford* decision and the importance of the statement’s trustworthiness); United States v. Mussare, 405 F.3d 161 (3d Cir. 2005) (discussing the admissibility of a codefendant’s inculpatory statements under the hearsay exception for statements of a co-conspirator).

If the nontestifying codefendant’s confession is introduced in rebuttal to impeach a testifying defendant’s explanation of their confession, and the jury is correctly instructed that the nontestifying codefendant’s admission is not to be considered for its truth, then the Confrontation Clause is not violated, and *Bruton* does not apply. Tennessee v. Street, 471 U.S. 409, 413–14 (1985). Some courts have found a codefendant’s hearsay statement implicating the defendant to be admissible against the defendant—notwithstanding a *Bruton* challenge—if the information is deemed nontestimonial and is acceptable as an exception to the hearsay rule under Federal Rule of Evidence 804. *See, e.g.*, United States v. Dargan, 738 F.3d 643, 650–51 (4th Cir. 2013) (codefendant’s statement-against-interest to a cellmate, implicating defendant in robbery, was nontestimonial and qualified as admissible hearsay under Rule 804(b)(3)); United States v. Clark, 717 F.3d 790, 814–17 (10th Cir. 2013) (codefendant’s out-of-court statements to co-conspirator in furtherance of conspiracy were not testimonial, and thus were not prohibited by *Crawford* or *Bruton*); United States v. Figueroa-Cartagena, 612 F.3d 69, 85 (1st Cir. 2010) (codefendant's recorded statement to mother admissible as non-testimonial). Also consider the pre-*Crawford* cases holding that *Bruton* does not apply to out-of-court information admissible as a statement against penal interest or an excited utterance. United States v. Hamilton, 19 F.3d 350, 355–57 (7th Cir. 1994) (codefendant's statement against penal interest admissible under Rule 804(b)(3)); United States v. Vazquez, 857 F.2d 857, 864–65 (1st Cir. 1988) (co-defendant's statement admissible as excited utterance under Rule 803(2)).

If the statement was made during and in furtherance of the conspiracy, it is nontestimonial and so its admission is not barred by *Crawford*. United States v. Mayfield, 909 F.3d 956, 962 (8th Cir. 2018). Similarly, *Bruton* is inapplicable, so such statements of a codefendant may be introduced against the defendant. United States v. Shores, 33 F.3d 438, 442 (4th Cir. 1994).

7

Jury Verdicts

Requirement of Formal and Final Judgment

The requirement of a formal verdict in a federal criminal trial generally means that the jury must reach a unanimous verdict to convict or acquit. To be final, the judgment must be unqualified and unambiguous, and it must be rendered in open court and accepted by the court.

The requirement of a formal verdict in a federal criminal trial matters to deliberating juries. First, as the Supreme Court made clear in *Ramos v. Louisiana*, 590 U.S. 83, 93 (2020), "There can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally." Second, as the Third Circuit held in *United States v. Lee*, 532 F.2d 911 (3d Cir. 1976), a verdict must be unqualified and unambiguous. This means that the jury must state whether the defendant is guilty or not guilty without any qualifications or conditions. If there is any doubt about the unanimity of the verdict, the trial judge has the option to either direct the jury to retire for further deliberation or declare a mistrial. Third, as the Ninth Circuit held in *Gouveia v. Espinda*, 926 F.3d 1102 (9th Cir. 2019), a verdict must be rendered in open court and accepted by the court to be final. A preliminary report on the jurors' votes cannot constitute an acquittal, even if the jury is unanimous. Finally, as the Eighth Circuit held in *Jacobs v. United States*, 279 F.2d 826 (8th Cir. 1960), the trial court may inquire into the jury's division and provide supplemental instructions to facilitate deliberations. But the court must be careful not to influence the jury improperly.

I.A

Double Jeopardy Issues

The Supreme Court has held that the Double Jeopardy Clause does not prevent a retrial when a jury deadlocks on one count but reaches a verdict on another. The Court has also ruled that a jury's report that it was unanimous on some counts but deadlocked on others is not a verdict when the jury then continues to deliberate and subsequently fails to return a verdict on any counts. Blueford v. Arkansas, 566 U.S. 599 (2012).

An apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts does not affect the preclusive force of the Double Jeopardy Clause of the Fifth Amendment. Yeager v. United States, 557 U.S. 110 (2009).

I.B

Additional Guidance on Double Jeopardy

In *Sattazahn v. Pennsylvania*, 537 U.S. 101 (2003), the Supreme Court discussed the applicability of the Double Jeopardy Clause in the context of capital-sentencing proceedings, explicitly addressing the situation where a jury deadlocks on one count but reaches a verdict on another. The dissent noted that a hung jury meets the "manifest necessity" criterion, which justifies a trial court's declaration of a mistrial and the defendant's subsequent re-prosecution.

In *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), the Court discussed the implications of the Double Jeopardy Clause when a jury fails to reach a verdict, and the trial court then enters a judgment of acquittal. The Court emphasized that the Double Jeopardy Clause barred appeal of a judgment of acquittal entered by the court just as it did a jury's verdict of acquittal, regardless of whether the judgment followed the jury's failure to reach a verdict. *Id.* at 575–76.

II

Special Interrogatories

Special interrogatories were historically disfavored in federal criminal trials, but this aversion has lessened in recent years so that their use is more generally accepted. United States v. Gonzales, 841 F.3d 339, 347–48 (5th Cir. 2016). This disfavor arose from a concern that special interrogatories would pressure the jury and impair its ability to exercise its power of lenity. *Id.* at 346–47. One reason for the change is the increasing complexity of the federal criminal law. *Id.* at 347. Trial courts use special interrogatories to clarify a verdict, aid in sentencing, or ensure unanimity.

II.A

General Rules

The *Apprendi* and *Alleyne* doctrines are rooted in the Sixth Amendment jury trial right. *See* Apprendi v. New Jersey, 530 U.S. 466 (2000); Alleyne v. United States, 570 U.S. 99 (2013). In *Apprendi*, the Supreme Court held that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. In *Alleyne*, the Court extended this rule to include facts that increase the mandatory minimum sentence. *See also* United States v. Rabb, 5 F.4th 95, 103–04 (1st Cir. 2021) (explaining that any facts that increase a sentence must be submitted to a jury and proved beyond a reasonable doubt). In *United States v. Haymond*, 588 U.S. 634 (2019), the Supreme Court also discussed the implications of judicial factfinding on sentencing enhancements.

The Federal Rules of Criminal Procedure do not specifically address using special interrogatories to a jury in criminal prosecutions. *See* Black v. United States, 561 U.S. 465, 472–73 (2010). A jury can render a general verdict without being compelled to return several subsidiary findings to support that verdict. United States v. Blackwell, 459 F.3d 739, 766 (6th Cir. 2006); *Gonzales*, 841 F.3d at 346–47.

When a jury instructed on a lesser included offense returns a general guilty verdict, the verdict is fatally ambiguous because the court cannot determine whether the jury voted to convict on the greater or lesser offense. Special interrogatories will not cure the ambiguity. *See* United States v. Hedgepeth, 434 F.3d 609, 613 (3d Cir. 2006) (citing United States v. Barrett, 870 F.2d 953, 954–55 (3d Cir. 1989)). In contrast, where the jury is not instructed on a lesser included offense, a general verdict is properly interpreted as a conviction of the charged greater offense even though all indictments are deemed to encompass any applicable, lesser included offense as a matter of law. United States v. Jiminez-Torres, 435 F.3d 3, 10 (1st Cir. 2006).

Special interrogatories are proper in conspiracy cases to establish facts that must be used in sentencing. The necessary facts may be obtained by submitting interrogatories to the jury after it has returned a guilty verdict. United States v. Hernandez, 894 F.3d 496, 505 (2d Cir. 2018).

The following cases provide examples of how special interrogatories are put to good use:

- In *United States v. Coonan*, 839 F.2d 886 (2d Cir. 1988), the Second Circuit discussed the use of special interrogatories to the jury in a RICO case, noting that they can be used to separate the jury's findings on the commission of predicate acts from the general verdicts on the RICO counts.
- Similarly, in *Floyd v. Laws*, 929 F.2d 1390, 1394–1400 (9th Cir. 1991), the Ninth Circuit distinguished between "special verdicts" and "general verdicts with interrogatories." It explained that both are used to establish a factual basis for testing the correctness of verdicts.
- In *United States v. Barrett*, 870 F.2d 953, 956 (3d Cir. 1989) (Stapleton, J., concurring), the concurrence noted that special interrogatories could clarify a verdict or aid in sentencing.
- In *Bates v. Jean*, 745 F.2d 1146 (7th Cir. 1984), the Seventh Circuit discussed the process of submitting special interrogatories to the jury and the implications of inconsistent answers.

II.B

Exceptions

There are exceptions to the *Apprendi* and *Alleyne* doctrines. *Apprendi* recognized that its rule did not apply to the fact of a prior conviction, which is not an "element" of an offense that must be submitted to a jury. *Apprendi*, 530 U.S. at 487–88 (citing its prior decision in Almendarez-Torres v. United States, 523 U.S. 224, 247 (1998)). Courts applying *Almendarez-Torres* use prior convictions to enhance a sentence without being submitted to a jury. *See, e.g.*, United States v. Harris, 741 F.3d 1245 (11th Cir. 2014); United States v. Pineda-Arrellano, 492 F.3d 624 (5th Cir. 2007).

Apprendi and *Alleyne* errors are generally not considered to be structural. United States v. Lewis, 802 F.3d 449, 453 n.2 (3d Cir. 2015). In *Lewis*, the indictment did not charge—and the court did not instruct the jury—as to the more serious offense. As a result, the court's error in sentencing the defendant based on that greater offense was merely a sentencing error, as it did not cause anything to be wrong with the defendant's trial and was subject to harmless-error review. *Id.* at 452, 455.

Finally, some cases address the retroactivity of the *Apprendi* and *Alleyne* doctrines. In *Butterworth v. United States*, 775 F.3d 459 (1st Cir. 2015), the court held that *Alleyne* does not apply retroactively to sentences challenged on an initial petition for collateral review.

II.C

Developing Trends

There are some disagreements among the circuits on related issues. For example, in *United States v. Baker*, 912 F.3d 297, 312–15 (5th Cir. 2019), the Fifth Circuit discusses the disagreement among the circuits on whether an "advance knowledge" instruction is necessary for all offenses or only for "combination offenses."

The Seventh Circuit, in *Crayton v. United States*, 799 F.3d 623 (7th Cir. 2015), discussed the retroactivity of the *Alleyne* decision. It noted that every court of appeals concluded that *Alleyne* is not retroactive on collateral review. Still, the court did not mention any circuit split on this issue.

III

Federal Rule of Criminal Procedure 29 and Directed Verdicts

The Sixth Amendment guarantees defendants the opportunity to have a jury determine their guilt. The court may not direct a verdict of guilty in a jury trial, no matter how conclusive the evidence is against the defendant. Sullivan v. Louisiana, 508 U.S. 275, 277–78 (1993). However, where the evidence is legally insufficient to establish guilt, the court may enter a judgment of acquittal. *Id.* at 277; Fed. R. Crim. P. 29.

III.A

Directed Verdicts

Rule 29 abolished motions for directed verdicts in criminal trials. As the Supreme Court has made clear, a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, no matter how overwhelming the evidence may be. *See Sullivan*, 508 U.S. at 277 ("although a judge may direct a verdict for the defendant if the evidence is legally insufficient to establish guilt, he may not direct a verdict for the State, no matter how overwhelming the evidence.").[18]

III.B

Federal Rule of Criminal Procedure 29

Federal Rule of Criminal Procedure 29(a) requires a court to enter a judgment of acquittal at the close of the government's evidence and before the case is submitted to the jury if the "evidence is insufficient to sustain a conviction." United States v. Filer, 56 F.4th 421, 425 (7th Cir. 2022) (citing United States v. Jones, 713 F.3d 336, 339–40 (7th Cir. 2013) (quoting Fed. R. Crim. P. 29(a) & (c))). The district court errs in denying a motion of acquittal only if "there is no interpretation of the evidence that would allow a reasonable jury to find the defendant guilty beyond a reasonable doubt." United States v. Gonzalez, 826 F.3d 1122, 1126 (8th Cir. 2016) (quoting United States v. Cacioppo, 460 F.3d 1012, 1021 (8th Cir. 2006)). A motion for acquittal must be granted when the evidence, viewed in the light most favorable to the government, is such that a reasonable juror must have a reasonable doubt about any essential element of the crime charged. United States v. Graham, 622 F.3d 445, 448 (6th Cir. 2010); United States v. Law, 528 F.3d 888, 895 (D.C. Cir. 2008); Valdez v. United States, 475 F.3d 1319, 1322 (D.C. Cir. 2007) (en banc). The question is whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jones*, 713 F.3d at 340 (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979)) (emphasis added); United States v. Dykes, 406 F.3d 717, 721 (D.C. Cir. 2005) (quoting United States v. Arrington, 309 F.3d 40, 48 (D.C. Cir. 2002)). *See also* United States v. Garcia, 919 F.3d 489 (7th Cir. 2019) (discussing the application of Fed. R. Crim. P. 29, which allows for a judgment of acquittal when evidence cannot sustain a conviction).[19]

A federal trial court does not have an affirmative duty to assess the strength of the government's evidence before submitting the case to the jury if the defendant does not move to acquit. Nevertheless, the court has the discretion to grant a judgment of acquittal without a defense motion if it so chooses. Fed. R. Crim P. 29(a). The court does have a duty to assess the sufficiency of the evidence when a

18. While the rule against directing a verdict for the State is clear, the Supreme Court has held that a trial judge may direct a verdict in a civil case when the evidence is clear. Herron v. Southern Pacific Co., 283 U.S. 91 (1931) (holding that the judge has the right and duty to direct a verdict when the evidence is clear). However, this rule in *Herron* does not apply in criminal cases, where the defendant's right to have the jury determine the defendant's fate is paramount.

19. This standard is like the standards for summary judgment and judgment as a matter of law in civil cases. *See* United States v. Garcia, 919 F.3d 489 (7th Cir. 2019).

defendant moves for acquittal, and it must consider the evidence in the light most favorable to the government.

A defendant generally must renew a motion for acquittal at the close of all evidence to preserve the right to challenge the sufficiency of the evidence on appeal. United States v. McIntosh, 280 F.3d 479, 483 (5th Cir. 2002) ("When the defendant moves for judgment of acquittal at the close of the government's case in chief, and defense evidence is thereafter presented but the defendant fails to renew the motion [after] all of the evidence, he waives objection to the denial of his earlier motion." (quotation omitted)). For example, in *United States v. Patton*, 771 F.2d 1240 (9th Cir. 1985), the Ninth Circuit held that if a defendant moves for acquittal at the close of the government's evidence, but then presents evidence for the defense and does not renew the motion, the defendant waives the benefit of the motion. Similarly, in *United States v. Yusuf*, 57 F.4th 440 (5th Cir. 2023), the Fifth Circuit cited a prior case holding that a defendant must renew a motion for acquittal after all evidence, to preserve the challenge. But renewal is not required if the defendant does not present evidence after making the motion. *McIntosh*, 280 F.3d at 483. Yet the district court's latitude to grant a motion and enter a judgment of acquittal without a jury verdict is limited. United States v. Armbruster, 48 F.4th 527, 531 (7th Cir. 2022). Indeed, "the height of the hurdle depends directly on the strength of the government's evidence." United States v. Filer, 56 F.4th 421, 425 (7th Cir. 2022) (quoting United States v. Garcia, 919 F.3d 489, 496–97 (7th Cir. 2019)).

The trial court must presume that the jury correctly discharged its duty to evaluate the credibility of witnesses, find facts, and draw justifiable inferences. *See* United States v. Campbell, 702 F.2d 262, 264 (D.C. Cir. 1983). *See also* United States v. Benton, No. 1:21-cr-00569 (TNM), 2023 WL 1070563, at *2 (D.D.C. Jan. 27, 2023). When applying Rule 29, "[t]he court is not at liberty to 'assess witness credibility or weigh evidence, and the evidence must be viewed in a light most favorable to the Government.'" United States v. Roubideaux, No. 4:22-cr-40033, 2023 WL 3764726, at *4 (D.S.D. June 1, 2023) (citing United States v. Hassan, 844 F.3d 723, 725 (8th Cir. 2016)). *See also* United States v. Frommelt, 971 F.3d 823, 827 (8th Cir. 2020).

A motion to acquit under Rule 29 should be distinct from a motion for a new trial under Federal Rule of Criminal Procedure 33. *See* United States v. Bird, No. 1:20-10012-CBK, 2022 WL 158935, at *2–5 (D.S.D. Jan. 10, 2022) (discussing that trial court has greater discretion to grant a motion for a new trial than a motion for acquittal). Rule 29 also allows for reserving a motion for a judgment of acquittal made at the close of the government's case. It permits the court to render judgment for the defendant, notwithstanding a guilty verdict.

III.B.1

Reservation of Ruling on Motion for Judgment of Acquittal

Under Federal Rule of Criminal Procedure 29(b), a court has these options when ruling on a motion for judgment of acquittal. It may

- Reserve its ruling on a motion made before the close of all the evidence.
- Submit the case to the jury.
- Decide the motion—
    - before the jury returns its verdict
    - after the jury returns a verdict of guilty
    - or after the jury is discharged without having produced a verdict.

If a court reserves a decision, it must decide the motion based on the trial evidence at the point when the motion was made.

III.B.2

Double Jeopardy Implications of Court's Judgment of Acquittal

A midtrial judgment of acquittal, based on a court's ruling that the prosecution has not provided sufficient evidence to prove one or more elements of an offense, is an acquittal for the purposes of double jeopardy. United States v. Scott, 437 U.S. 82, 98 (1978). This is so even if the court has misconstrued the elements of the offense or mistakenly added a so-called "element" to the crime and granted the motion for acquittal based on its finding that the state has not provided sufficient evidence of that "element." Evans v. Michigan, 568 U.S. 313 (2013); Smith v. Massachusetts, 543 U.S. 462 (2005) (motion for judgment of acquittal); Arizona v. Rumsey, 467 U.S. 203 (1984); Fong Foo v. United States, 369 U.S. 141 (1962) (per curiam) (directed verdict).

If a court grants a motion to acquit after the jury has convicted, double jeopardy does not block an appeal by the government from the court's acquittal, because reversal would result in reinstatement of the jury verdict of guilt, not a new trial. United States v. Wilson, 420 U.S. 332 (1975).

IV

Double Jeopardy and the Court's Power to Declare a Mistrial

IV.A

Mistrial

In criminal prosecutions, the court's power to declare a mistrial must be exercised with extreme caution. The bar on double jeopardy embraces the defendant's valued "right to have his trial completed by a particular tribunal." Wade v. Hunter, 336 U.S. 684, 689 (1949). An improvidently declared mistrial may bar the defendant's retrial on double jeopardy grounds.

The Double Jeopardy Clause "unequivocally prohibits a second trial following an acquittal." Arizona v. Washington, 434 U.S. 497, 503 (1978). A trial judge may not violate a defendant's entitlement to "the verdict of a tribunal [the defendant] might believe to be favorably disposed to his fate." United States v. Jorn, 400 U.S. 470, 486 (1971) (plurality opinion). Absent a "defendant's consent" or a "manifest necessity" to do so, a trial judge should not discharge a jury and declare a mistrial before deliberations end. *Id.* at 487. A trial can be discontinued, however, without barring a subsequent trial for the same offense when "unforeseeable circumstances . . . arise during a trial[,] making its completion impossible." *Wade*, 336 U.S. at 689. If "the ends of substantial justice cannot be attained without discontinuing the trial," the trial court may declare a mistrial "without the defendant's consent," and the defendant "may be retried" without violating the Fifth Amendment's bar on double jeopardy. Gori v. United States, 367 U.S. 364, 368 (1961) (trial judge declared mistrial sua sponte during government's case without approval or objection of defendant).

IV.B

Failure to Reach a Verdict

A jury's inability to reach a verdict has "long [been] considered the classic basis" for establishing "manifest necessity" to declare a mistrial. *Washington*, 434 U.S. at 509. *See also* Blueford v. Arkansas, 566 U.S. 599, 609 (2012); Downum v. United States, 372 U.S. 734, 736 (1963); Keerl v. Montana, 213 U.S. 135, 137–38 (1909); Dreyer v. Illinois, 187 U.S. 71, 85–86 (1902). So long as the trial judge has not abused discretion, a mistrial because of the inability to reach a verdict will not bar a second trial.

In *Renico v. Lett*, 559 U.S. 766, 773–74 (2010), the Supreme Court discussed the circumstances under which a trial judge may declare a mistrial due to a deadlocked jury. In general, the trial judge has discretion whether to grant a mistrial. *Id.* at 767. The Court held that the federal court did not give enough deference to the state trial court's judgment about whether the first jury was deadlocked and that the state supreme court's decision upholding the trial judge's exercise of discretion in declaring a mistrial was not objectively unreasonable. *Id.* at 779.

Courts have isolated several relevant factors for determining whether a judge has adequately exercised discretion to declare a deadlocked jury. These include (1) a timely objection by the defendant; (2) the jurors' collective opinion that they cannot agree; (3) the length of the deliberations; (4) the length of the trial; (5) the complexity of the issues presented to the jury; (6) any proper communications that the judge has had with the jury; (7) the effects of possible exhaustion and the effect of coercion of further deliberations on the jury; (8) whether the court provided counsel an opportunity to be heard; (9) whether the court considered alternatives to a mistrial; and (10) whether the court's decision was made after adequate reflection. United States v. Wecht, 541 F.3d 493, 506 (3d Cir. 2008). The most critical factor is the jury's statement that it cannot reach a verdict. *See* United States v. Baca, 762 F. App'x 724, 727 (9th Cir. 2019) (citing United States v. Hernandez-Guardado, 228 F.3d 1017, 1028 (9th Cir. 2000)).

IV.C

Opportunity for Parties to Comment on Propriety of Mistrial

Federal Rule of Criminal Procedure 26.3 requires a court to provide an opportunity for all parties to comment on the propriety of an order of mistrial, including whether each party consents or objects to a mistrial, and to suggest other alternatives.

IV.D

Double Jeopardy Does Not Bar Retrial When Defendant Requests Mistrial

The Double Jeopardy Clause does not ordinarily bar the retrial of a defendant who asks the court to declare a mistrial. Oregon v. Kennedy, 456 U.S. 667 (1982);

United States v. Dinitz, 424 U.S. 600 (1976). *See also* United States v. El-Mezain, 664 F.3d 467, 559 (5th Cir. 2011); United States v. Lopez-Avila, 678 F.3d 955, 962 (9th Cir. 2012). Even so, the Double Jeopardy Clause would bar retrial of a defendant who asked for a mistrial if the prosecutor, through bad faith or overreaching, "goads" the defendant into requesting a mistrial. *Kennedy*, 456 U.S. 667; Yeager v. United States, 557 U.S. 110 (2009). *See also* United States v. McCallum, 721 F.3d 706, 710 (D.C. Cir. 2013).

V

Statements Made During Jury Deliberations May Be Used to Overturn or Impeach the Verdict

Federal Rule of Evidence 606(b) provides that juror testimony about events in the jury room generally is not admissible "during an inquiry into the validity of a verdict." The rule precludes a party seeking a new trial from using one juror's affidavit of what another juror said in deliberations to show the other juror's dishonesty during voir dire. Warger v. Shauers, 574 U.S. 40 (2014).

However, in *Shauers* the Court observed, "There may be cases of juror bias so extreme that, almost by definition, the jury trial right has been abridged. If and when such a case arises, the Court can consider whether the usual safeguards are or are not sufficient to protect the integrity of the process." *Id.* at 51 n.3. *See also* Peña-Rodriguez v. Colorado, 580 U.S. 206, 218 (2017) (discussing Rule 606(b)'s no-impeachment rule).

> [W]here a juror makes a clear statement that indicates that [the juror] relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the no-impeachment rule give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee.

Id. at 225.

The juror's "statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict." *Id.* at 225–26. The trial court can determine whether the juror's testimony on the statements at issue meets that test. *Id.* at 226.

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Judge Rubén Castillo (retired) served as a federal district judge for the Northern District of Illinois for twenty-five years (1994 to 2019), including service as Chief Judge for six years (2013 to 2019). He also served as Vice Chair of the U.S. Sentencing Commission for more than a decade (1999 to 2011). Judge Castillo's distinguished career in public service also includes his work as Assistant U.S. Attorney in the Special Criminal Prosecution Unit (N.D. Ill. 1984–1988).

For thirty years (1990 to 2020), Judge Castillo was an Adjunct Professor at Northwestern Law School, where he taught trial advocacy. He also practiced private law at two firms and served as regional counsel for the Mexican American Legal Defense Fund.

Upon his retirement from the judiciary, Judge Castillo entered private practice with an emphasis on trial litigation and mediation.

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