THE ROLE OF THE PROSECUTOR IN THE AMERICAN FEDERAL CRIMINAL JUSTICE SYSTEM

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I. AN OVERVIEW OF PRE-INDICTMENT, INDICTMENT AND TRIAL PROCEEDINGS

A. Pre-indictment Proceedings

Prior to the return of an indictment by a Federal Grand Jury, a defendant may be arraigned and held pursuant to the filing of a criminal complaint issued by a United States Magistrate Judge. The complaint is a statement of the essential facts constituting the charge. It must be supported by an affidavit sworn to under oath by a federal law enforcement officer. The affidavit must set forth facts to establish "probable cause;" that is, reasonable cause to believe that a crime has been committed and that the defendant committed the crime. The affidavit must be sufficiently detailed to establish the source of the officer's information and the reliability of the information.

A complaint may be issued by a Magistrate Judge before or after a defendant has been arrested. If the complaint is issued before the defendant has been arrested, the Magistrate Judge also issues an arrest warrant authorizing the arrest of the defendant. A federal officer may arrest a defendant for any federal offense pursuant to an arrest warrant issued by a Magistrate Judge. The officer may also arrest a defendant for a felony offense without an arrest warrant if the officer has probable cause to believe the defendant committed the felony offense. However, the officer may arrest a defendant for a misdemeanor offense without a warrant only if the misdemeanor offense was committed in the officer's presence.

A defendant who has been arrested for a federal offense must be arraigned before the nearest Magistrate Judge without unnecessary delay, usually the same day as the arrest and no more than 48 hours after the arrest. At the initial arraignment, the defendant is informed by the Magistrate Judge of the charges and of his or her right to counsel. If the defendant is unable to afford counsel, the Magistrate Judge appoints counsel paid by the government to represent the defendant.

At the initial appearance, the Magistrate Judge sets bail for the defendant's release from custody while the criminal proceedings are pending. The Magistrate Judge determines the amount of bail necessary to secure the defendant's appearance at future court appearances, including trial and sentencing if the defendant is convicted, taking into consideration the danger to the community and the likelihood the defendant will return to court if released. The Magistrate Judge can order the defendant to post an appearance bond—which is a promise by the defendant to pay a specified amount if he or she fails to appear in court—or a secured bond, which is cash or property that may be forfeited to the government if the defendant fails to appear. A defendant may be detained pending criminal proceedings, if the Magistrate Judge determines that no amount of money or other conditions can assure the defendant's return to court or can adequately protect the safety of the community if the defendant is at large.

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A defendant is entitled to a preliminary hearing before a Magistrate Judge to determine if there is probable cause to continue to charge the defendant. The preliminary hearing must be held within 10 days of the defendant's initial arraignment if the defendant is still in custody, or within 20 days if the defendant has posted bail and been released from custody. The defendant is not entitled to a preliminary hearing if an indictment is returned by a grand jury prior to the date set for the preliminary hearing. Because under the Fifth Amendment of the United States Constitution, all serious federal crimes must be charged by an indictment. Indictments are almost always returned prior to the date set for the preliminary hearing. As a result, preliminary hearings are rarely held in federal court.

B. Plea Bargaining

Under the Federal Rules of Criminal Procedure, the government and the defendant can engage in negotiations, sometimes referred to a "plea bargaining," to resolve criminal charges that may be filed or are pending against the defendant. The rules expressly prohibit the trial judge from participating in these negotiations.

The rules permit the parties to negotiate over the charges to which the defendant will plead guilty, known as "charge bargaining," and the sentence that will be imposed, referred to as "sentencing bargaining." Charge bargaining may involve negotiations over what specific charges the government will file, the reduction of pending charges to lesser charges, or the dismissal of some of the pending charges. The defendant then pleads guilty to the agreed upon charges.

Sentencing bargaining may result in an agreement by the government to recommend a particular sentence. This recommendation is not, however, binding on the judge, who may impose any lawful sentence consistent with the Federal Sentencing Guidelines that the judge determines to be appropriate. Sentencing bargaining may also result in a firm agreement by the government and the defendant as to what the appropriate sentence should be. In this circumstance, the judge must either impose the agreed-upon sentence or reject the plea agreement entirely. Finally, sentencing bargaining may result in an agreement by the defendant and the government regarding certain factors relevant to sentencing—such as the defendant's role in the offense or the amount of the monetary loss—that the judge will consider in determining the appropriate sentencing under the Federal Sentencing Guidelines. The judge is not, however, required to agree to these factors and may make his or her independent determination of the sentencing factors.

C. Post-indictment Proceedings

1. Post-indictment Arraignment

Following an indictment, the defendant is arraigned before a United States District Judge. At the arraignment, the defendant enters a plea, usually "Not Guilty" unless there is a pre-indictment plea bargain whereby the defendant has agreed to plead guilty. The judge also appoints counsel paid for by the government if the defendant is not already represented by counsel and cannot afford counsel. The judge also sets the case for trial, usually within 70 days of the earlier of the date of the indictment or the defendant's first appearance before a judge. The judge may also set a schedule for pre-trial motions.

2. Pre-trial Motions

Prior to trial, the parties, usually the defendant, may file certain motions seeking relief from the judge. The defendant may file a motion seeking discovery from the government's files, including information that tends to exculpate the defendant, any statements the government contends the defendant made about the offense,

documents and items the government intends to introduce into evidence at trial, reports of examinations or tests the government intends to introduce at trial, information about the government's expert witnesses and informants, and statements of the government's witnesses. The government may also file a motion seeking reciprocal discovery of the defendant's evidence, including reports, names of experts, examination results, and witness statements. The government may also require the defendant to give notice of an intention to offer an alibi defense, a defense of insanity, or any other defense based upon the defendant's mental condition.

The defendant may also file motions prior to trial seeking to have the indictment dismissed. These include motions to dismiss because the court lacks jurisdiction, the indictment fails to allege an offense, the prosecutors engaged in misconduct before the grand jury, the prosecutors selected the defendant for prosecution based upon an impermissible reason, such as the defendant's race, religion, or ethnic origins, the prosecutor filed the charges in retaliation for the defendant's exercise of a constitutional right, the prosecutor waited too long before filing the charges, or the court took too long to bring the case to trial after the defendant was charged.

The defendant may also file motions prior to trial seeking to have the government's evidence "suppressed," that is, to bar the government from introducing certain evidence at the trial. Thus, a defendant may seek to suppress documents and tangible items based upon an illegal search or seizure, evidence obtained by an illegal wiretap, or the defendant's statements to a law enforcement officer if the officer failed to advise the defendant of his or her right to remain silent and to consult with an attorney after being arrested.

Both the government and the defendant may file "in limine" motions prior to trial seeking to preclude the other side from introducing certain evidence on the grounds that it is not relevant, is unduly prejudicial, or is otherwise inadmissible under the Federal Rules of Evidence. The government may seek to preclude a defendant from offering evidence of "duress" unless the evidence to be offered by the defense meets the legal standards of a duress defense. A defendant may seek to preclude introduction by the government of the defendant's prior criminal convictions on the grounds that such evidence would be unduly prejudicial.

3. Trial Proceedings

Every defendant has a right to a speedy and public trial under the Sixth Amendment to the United States Constitution and the Federal Speedy Trial Act. Based upon the length of the delay between the filing of the charges and the start of the trial, the reasons for the delay, and the prejudice to the defendant resulting from the delay, the District Judge may dismiss the charges against the defendant with prejudice for a violation of the Sixth Amendment's right to a speedy trial. The judge may also dismiss the charges with or without prejudice under the Speedy Trial Act if the trial is not held within the earlier of 70 days from the indictment or the defendant's initial appearance, unless the court finds that the case is complex, motions need to be resolved, or the attorneys need additional time to prepare for the trial.

The questioning of jurors to determine if they are qualified to sit as jurors in a particular case is known as "voir dire." In federal court, the judge usually conducts the voir dire, although the judge may permit the prosecutor and defense counsel to question the jurors. Both the prosecution and defense may challenge a prospective juror for "cause," that is, based upon

evidence that the juror is biased in favor of one side or the other. Each side has an unlimited number of challenges for cause. Each side also has a limited number of "peremptory" challenges which a party may exercise to excuse a juror for any reason. The reason need not be stated in open court. However, no party may exercise a peremptory challenge to excuse a juror based upon impermissible discrimination, such as the juror's race, religion, national origins, or gender.

The trial begins with the prosecutor making an "opening statement"—a summary of what the prosecutor expects the evidence to prove. The defense attorney may also make an opening statement following the prosecutor's, or wait until the prosecution completes its case before making an opening statement. The judge commonly advises the jury that opening statements are not evidence, but merely the attorneys' opportunity to summarize what they expect the evidence will show.

The prosecution, which has the burden of proving the defendant's guilt beyond a reasonable doubt, presents its case first. The prosecution may present witnesses with knowledge of the crime as well as documents and tangible evidence. The prosecution may also offer opinion testimony from experts qualified in specialized areas such as fingerprint analysis and forensic accountants. The prosecution may also offer statements made by the defendant to law enforcement officers, provided that the judge finds that the statements were voluntarily made after the defendant had been advised of his or her rights to remain silent and to consult with an attorney. Each of the prosecution's witnesses is subject to cross-examination by the defense attorney, who may seek to establish that the witnesses are biased or honestly mistaken, or may seek to elicit from the government's witnesses information helpful to the defense.

After the prosecution presents its evidence, the defendant may offer evidence on his or her behalf. However, the defendant has no obligation to present evidence or to testify at trial, and the prosecutor cannot comment to the jury on the defendant's failure to present evidence or to testify. Following the defendant's presentation of evidence, the prosecution may offer additional evidence to rebut any evidence offered by the defendant.

Following the presentation of the evidence, the prosecutor and defense attorney give their "closing arguments". Because the prosecution has the burden of proof, the prosecution gives an "opening summation" before and a "rebuttal argument" after the defense attorney's closing argument. Although closing arguments, like opening statements, are not evidence, both sides have greater leeway in closing arguments to argue to the jury that the evidence previously introduced in the trial supports their respective positions.

Following the lawyers' closing arguments, the judge instructs the jury on the law, and the jury retires to deliberate and render its verdict. Jury instructions are submitted by the parties to the court, and usually agreed upon before the judge reads them to the jury. Any disputes as to the applicable law are resolved by the judge. For most federal offenses, there are standard jury instructions explaining the elements of the offense, though parties often submit instructions tailored to the facts of a particular case to facilitate the jurors' application of the law to those facts. Any questions the jurors may have about the meaning of the instructions are directed to the judge. The role of the jury is to decide the facts and to apply the law—as instructed by the judge—to those facts.

4. Jury's Return of Verdicts

A jury's guilty verdict in a federal criminal trial must be unanimous, i.e., all

twelve jurors must agree that the defendant is guilty of the crime charged beyond a reasonable doubt. If even a single juror is not convinced of the defendant's guilt, no guilty verdict can be returned. Similarly, if only a single juror is convinced of the defendant's guilt beyond a reasonable doubt, but the remaining 11 jurors are not, no verdict may be returned. The failure of a jury to reach a unanimous decision is commonly called a "hung jury." Where the jury fails to reach a unanimous verdict of guilty or not guilty, the government may retry the case.

If the defendant is acquitted at trial—i.e., all 12 jurors agree the government has failed to prove the defendant's guilt beyond a reasonable doubt—the defendant is released, and the government may not bring the same charges again. If the defendant is found guilty by all 12 jurors, he or she may appeal the conviction to the U.S. Court of Appeals in the district where the case was tried.

II. PROSECUTORIAL DECISION-MAKING

A. Whom to Charge

1. Charging Individuals

Federal prosecutors seek to charge the leaders and organizers of criminal activity whenever possible. Stated otherwise, prosecutors seek to prosecute the ultimate source of the criminal activity, whether it is a corporate president who initiates or approves fraudulent activity for the benefit of the corporation, or the head of a narcotics manufacturing and distribution organization. This fundamental principle guides prosecutive decisions regarding whom to charge, what to charge, and to whom to grant immunity.

In a corporate or business context, federal prosecutors seek to identify and charge managers who have knowledge of the criminal conduct and discretionary authority over the subject matter of the criminal conduct or supervisory responsibility over the employees engaged in the criminal conduct. Mere knowledge of the illegal activity is not sufficient to warrant the filing of criminal charges; the corporate officer must have either directed the illegal activity or had the authority or responsibility to prevent it. Ultimately, federal prosecutors seek to hold criminally responsible the highest level managers with both knowledge of and authority over the criminal conduct.

In pursuit of these managers, prosecutors seek the cooperation of lower level individuals or employees who have knowledge of illegal activity or participate in or carry out the criminal conduct. With respect to these employees who have criminal culpability, such cooperation usually results from plea agreements or grants of immunity from prosecution. Lower-level employees who are prosecuted for their criminal activities may enter into plea agreements whereby they agree to plead guilty to certain charges and cooperate with the government's investigation in exchange for immunity from further prosecution or favorable sentencing recommendations by the prosecutor. On occasion, the employee agrees to cooperate in exchange for such consideration at sentencing after the employee has been prosecuted and convicted at trial.

Based upon the nature of the employee's knowledge and information about the criminal conduct and the nature and scope of his or her own criminal conduct, prosecutors may decide to provide the employee with immunity rather than file criminal charges against the employee. The immunity can be in the form of an agreement not to prosecute the employee for certain criminal conduct. This immunity, which is known as "transactional immunity," is generally disfavored by federal prosecutors. Accordingly, prosecutors usually provide employees with "use immunity," which bars

the government from using the employee's statements against the employee if the employee is ever prosecuted ("direct" use immunity). Significantly, "use" immunity also bars the prosecution from using the employee's statements to develop evidence against the employee ("derivative" use immunity). "Use" immunity does not, however, bar the prosecution from introducing the statements into evidence against the employee if the employee is ever prosecuted for making a false statement or for perjury based upon the immunized statement. Because the courts have placed a high burden on the prosecution to prove that evidence against a defendant who has received use immunity was not derived, directly or indirectly, from the defendant's statements, "use" immunity is almost always tantamount to "transactional" immunity from prosecution. Further, such limitations on prosecutorial use of the statements apply to any future prosecution, not just one based upon the subject matter of the investigation that resulted in the "use" immunity. Accordingly, defense attorneys almost always recommend that their clients accept "use" immunity in lieu of transactional immunity.

"Use" immunity can be provided informally though a letter agreement or formally through a court order. Informal "use" immunity generally results from negotiations between the prosecutor and the employee's counsel, in which the employee's counsel initially "proffers" (orally or in writing) what the employees could testify to if provided immunity. If the prosecutor indicates a willingness to provide immunity based upon the proffer, the prosecutor may then interview the employee, subject to an agreement that the prosecutor will not directly use the interview against the employee, before deciding whether to enter into a letter agreement providing for full use immunity.

If a lower level employee is unwilling to accept informal use immunity, the prosecutor can compel the employee to testify by obtaining statutory use immunity. Title 18 of the United States Code § 6001, et. seq., provides that the United States Attorney, with the approval of the Assistant Attorney General in charge of the Criminal Division of the Department of Justice, can obtain an order from a District Court Judge compelling the employee to testify. As a result of the "compulsion" order, the employee is afforded full use immunity (direct and derivative) for his or her testimony. If the employee refuses to testify after having been compelled by a court order, the employee may be held in contempt by the court. This may subject the employee to imprisonment or a fine.

2. Charging Corporations

Under federal criminal law, a corporation may be held criminally liable for any acts of its officers, employees, or agents done in the course and scope of their employment that are for the benefit of the corporation. Under this broad doctrine of corporate liability, the corporation may be held liable even if the acts are contrary to the corporation's policies. For example, a corporation may be held liable for the actions of an employee who illegally disposes of hazardous waste that the corporation must dispose of, even if the corporation specifically requires its employees to comply with all applicable laws and regulations in disposing of the waste. The theory is that the employee is intending to benefit the corporation because the corporation needs to dispose of the waste.

In prosecuting a corporation, the government need not prove that a single corporate officer or agent had the required knowledge and intent to violate the law. Rather, the prosecution can rely on the "collective knowledge" of the officers and

employees. This collective knowledge doctrine is useful when the corporate responsibility is divided among several individuals, such that no one individual has knowledge of all the relevant facts and law. For example, certain corporate employees may be responsible for testing products being supplied to the government, while other employees may be responsible for certifying to the government that all the required tests were performed. If the latter were unaware that the former had failed to perform the required tests, they may have falsely certified that the tests had been performed, but lacked the knowledge and intent to commit a criminal violation. Similarly, if the former did not know that certifications would be made claiming the tests had been performed, they too would lack the necessary knowledge and intent to be guilty of a criminal offense. Under these circumstances, no individual employees would be criminally responsible, but a criminal violation would nonetheless have occurred when the employees of the corporation submitted a certification to the government falsely representing that the required tests had been performed.

B. What to Charge

Federal prosecutors usually seek to file the most serious readily provable charge determined by the nature of the charge and the sentencing range for the particular charge. Prosecutors also seek to file charges that encompass the scope of the defendant's criminal conduct. Thus, they include multiple similar counts for identical or similar crimes committed by the defendant, such as multiple bank robbery charges for a series of robberies. They also include different offenses based upon the same act or transaction or series of acts or transactions that are parts of a common scheme or plan. For example, an indictment may include charges such as securities fraud, money laundering, and false statements to an agency of the government where defendants engaged in a scheme to defraud buyers of securities based upon the filing of false reports with the Securities and Exchange Commission.

Conspiracy charges are often filed to encompass the full scope of the criminal activity where two or more individuals agreed to commit offenses against the United States or to defraud the United States, and one or more of these individuals committed an overt act in furtherance of the conspiracy. Prosecutors may also file charges under the Racketeering Influenced Corrupt Organizations ("RICO") Act, 18 U.S.C. § 1961, et. seq., where the defendants conducted the affairs of an enterprise—which may be either a formal entity such as a corporation or an informal association among individuals—through a pattern of illegal activity. The illegal activity may be violent crimes, narcotics activity, or white collar crime, such as mail and wire fraud. Both conspiracy and RICO charges enable prosecutors to include a series of crimes in a single indictment.

C. Department of Justice Standards and Procedures

Under United States Department of Justice standards set forth in the United States Attorneys Manual, a federal prosecutor must satisfy a two-part test before seeking an indictment from a federal grand jury. First, the prosecutor must personally believe the defendant is guilty. Second, the prosecutor must believe there is a reasonable likelihood of obtaining a conviction at trial before an impartial jury.

Within the Department of Justice, the authority for filing most criminal charges rests with the United States Attorney's Office in each district. Certain kinds of offenses, however, require approval of the divisions or sections in the Department with primary responsibility for specific substantive areas. Thus, the Civil Rights, Antitrust, Tax, and Lands and Natural Resources Divisions must approve

indictments in cases falling in these substantive areas. Similarly, the Organized Crime Section in the Criminal Division must approve organized crime and RICO cases, and the Public Integrity Sections must be consulted regarding corruption charges against elected public officials and election crimes.

Within the United States Attorney's Offices, individual prosecutors are responsible for recommending what charges to present to the grand jury. The recommendations are reviewed and approved (or on occasion disapproved) by a committee of prosecutors and supervisory attorneys. The prosecutive decision in most cases rests with the Chief of the Criminal Division in the U.S. Attorney's Office. The final prosecutive authority for all cases filed by the office rests with the United States Attorney, though as a practical matter, he or she generally makes the final decisions only in the most significant, controversial or difficult cases in the office.

III. PROSECUTORS' USE OF THE GRAND JURY IN CRIMINAL INVESTIGATIONS

A. Composition and Purpose of the Grand Jury

In many respects, the grand jury is the cornerstone of federal criminal investigations and federal criminal process. A grand jury comprises 23 ordinary citizens, selected at random, who sit for a term of one year (although the term may be extended). At least 16 members of the grand jury must be present for the panel to conduct business, and in order to return an indictment, at least 12 members of the grand jury must vote to indict.

The grand jury serves a dual function. First, it serves to protect innocent citizens from improper governmental action by having a panel of ordinary citizens determine whether there is "probable cause" to believe that a crime has been committed and that the accused committed the crime. The requirement that any person accused of a felony be indicted by the grand jury is set forth in the United States Constitution.

The grand jury serves a second, equally important, function of investigating whether crimes have been committed. The United States Supreme Court has repeatedly noted that the law provides the grand jury with broad powers in order to fulfill its investigatory function and "wide latitude" in exercising those powers.

To carry out its investigatory function, the grand jury is provided with subpoena power to compel the attendance of witnesses and the production of documents and records. The grand jury's subpoena power extends throughout the United States. In addition, the grand jury's power to investigate crimes is not restrained by the same technical, procedural and evidentiary rules that govern the conduct of criminal trials. Hence, in determining whether there is probable cause to believe a crime has been committed, the grand jury may consider any evidence, regardless of whether that evidence may ultimately be admissible at trial.

B. Interaction between Prosecutors and the Grand Jury

The grand jury functions as a separate entity, independent in large part from the court and the prosecution. This allows the grand jury to render an independent judgment as to whether an individual should be indicted.

Nevertheless, federal prosecutors play an integral role in the functioning of the grand jury. First, in addition to investigating whether crimes have occurred, prosecutors serve as "legal advisors" to the grand jury. In this capacity, a prosecutor serves to explain and answer questions pertaining to the law. For example, a prosecutor is responsible for advising the grand jury of the elements of

any crimes under investigation by the grand jury. Virtually all proceedings occurring before the grand jury are conducted by a prosecutor, including the questioning of witnesses who appear before the grand jury (although grand jurors are permitted to ask questions themselves). Prosecutors are also responsible for drafting and presenting any indictment the grand jury is asked to return. Thus, as a practical matter, until a prosecutor has concluded that there is probable cause to indict an individual, the grand jury will not be presented with an indictment. In short, although the grand jury is an independent entity, to carry out its investigative function, it works closely with government prosecutors and law enforcement investigators charged with serving subpoenas issued by the grand jury.

Because of the unique, and often close, relationship between prosecutors and the grand jury, courts have admonished prosecutors to remember that the object of any investigation is to see that justice is done. Likewise, the U.S. Department of Justice has issued regulations designed to ensure that prosecutors treat the grand jury as an independent body and to further ensure that prosecutors do nothing that would improperly inflame or influence the grand jury.

C. Grand Jury Secrecy

Federal law mandates that grand jury proceedings be conducted in secret. To ensure the secrecy of grand jury proceedings, federal law prohibits prosecutors, as well as grand jurors, from disclosing any matters occurring before the grand jury.[1]

The Supreme Court has articulated a number of reasons for requiring that grand jury proceedings be conducted in secret, including: (1) to prevent the escape of those whose indictment may be contemplated; (2) to ensure the utmost freedom to the grand jury in its deliberations by preventing persons under investigation or their representatives from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with witnesses who may testify before the grand jury and later appear at trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information concerning the commission of crimes; (5) to protect the target of a grand jury investigation who is ultimately exonerated from disclosure of the fact that he or she was under investigation; and (6) to protect the target of a grand jury investigation from the expense of standing trial where there is insufficient evidence of guilt. Taken together, the rationales for grand jury secrecy reflect a balance between ensuring that the grand jury obtains all possible evidence, while at the same time protecting innocent citizens.

D. Grand Jury Subpoena Power

The grand jury's principal power lies in its subpoena authority, i.e., the ability to compel the attendance of witnesses and the production of documents and records. This power is quite broad, and includes the ability to require a target of an investigation to provide nontestimonial evidence, such as fingerprint and handwriting exemplars to assist the grand jury in determining whether a suspect has committed the crime under investigation.

The grand jury's ability to subpoena records and compel witness testimony is particularly vital to the proactive investigation of more complicated economic crimes. Most evidence in long-term investigations is obtained through the issuance of grand jury subpoenas. This is true for several reasons. First, the grand jury need not obtain court approval to issue a subpoena. In contrast, search warrants

[1] Under certain limited circumstances, prosecutors may obtain court orders allowing disclosure of grand jury proceedings as directed by a court.

require court approval and some showing to justify a belief that the documents sought are evidence of a crime and will be located at the premises to be searched. Second, much documentary evidence is obtained from innocent third parties who are not suspected of criminal wrongdoing and should be protected from the inevitable disruption occasioned by a search for records. For example, bank records that would permit the tracing of funds obtained and/or laundered by a target are virtually always obtained through the issuance of grand jury subpoenas, absent some reason to believe that the bank or its officials are in collusion with the target of the investigation.

E. Bases for Refusing to Comply with Grand Jury Subpoenas

In most instances, there is no basis to resist the production of records to the grand jury or to refuse to testify before the grand jury. The most notable exception, the privilege against self-incrimination, is rooted in the Fifth Amendment of the United States Constitution, which provides that no individual may "be compelled in any criminal case to be a witness against himself." Thus, an individual may refuse to testify before the grand jury if he/she honestly and truly believes that his/her answers would incriminate him/her or could lead to evidence of a crime for which he/she may be prosecuted. Because the privilege against self-incrimination is contained in the Fifth Amendment of the U.S. Constitution, invoking the privilege is commonly referred to as "taking the Fifth."

An individual may also refuse to produce records in response to a grand jury subpoena if he/she can demonstrate that the "act of producing" the documents would be tantamount to testifying against himself/herself. However, the Supreme Court has determined that the act of providing handwriting samples or fingerprint exemplars is not "testimonial" in nature, and, therefore, does not run afoul of the prohibition against compelling an individual to testify against himself/herself.

F. Prosecutors' Enforcement of Grand Jury Subpoenas

If the recipient of a subpoena refuses to comply, a prosecutor has two options. First, if the prosecutor believes the individual's refusal to comply is proper because of a valid privilege, such as the privilege against self-incrimination, the prosecutor may, nevertheless, seek to compel compliance with the subpoena by seeking an order granting the recipient immunity. Federal law provides that the government may seek an order compelling a witness to testify or produce records notwithstanding a valid privilege, provided the government agrees not to prosecute the individual for any crimes about which the witness is forced to testify. The authority to immunize a witness is a powerful tool available to prosecutors to assist them in investigating and prosecuting crimes. However, grants of immunity are sought sparingly, and only after careful consideration of a number of factors, including whether there is any alternative means available to obtain the evidence sought.

If the prosecutor does not believe the witness's refusal to comply with a subpoena is premised on a valid privilege, he/she may then apply to a court for an order compelling compliance. At that time, the recipient of the subpoena bears the burden of proving that he/she has a valid basis for refusing to comply with the subpoena. If the court orders the recipient to comply with the subpoena, and the recipient fails to do so, he/she may be held in contempt of court. A contempt citation carries penalties separate and apart from any crime under investigation by the grand jury. These penalties may include monetary fines and incarceration.

IV. SEARCH AND SEIZURE: WHAT EVERY PROSECUTOR MUST KNOW

A. Overview of the Fourth Amendment

The Fourth Amendment, like the Fifth Amendment mentioned above, is part of the Bill of Rights, the first ten amendments to the United States Constitution. Following the American Revolution, the newly independent colonies were determined to protect citizens against infringements of their individual rights. Thus, the First Amendment guaranteed citizens the freedom of speech, the freedom of assembly, and the freedom of religion. The Fourth Amendment guaranteed citizens freedom from indiscriminate searches and seizures by government agents.

The Fourth Amendment contains two basic requirements. The first is a prohibition against "unreasonable" searches and seizures. The second is the requirement that any warrant authorizing a search or seizure of persons or property be based upon "probable cause." In the case of a search, this has generally been interpreted to mean probable cause to believe evidence of a crime is to be found at the location to be searched. In the case of an arrest or seizure, this has generally been interpreted to mean probable cause to believe the person has committed a crime.

B. The Warrant Requirement

Though in practice many searches and seizures are conducted without a warrant, in the absence of one of the recognized exceptions to the warrant requirement (see infra), a search or seizure must be authorized by a warrant issued by a Magistrate Judge, based on a determination that probable cause exists to support the issuance of the warrant.

The failure to secure a warrant in the absence of any recognized exception to the warrant requirement will lead to the suppression, or exclusion, or any evidence obtained as the result of the unlawful search or seizure. This is commonly known as the "Exclusionary Rule." In contrast, evidence seized pursuant to a warrant that is later found to be defective may still be admissible, if a District Judge determines that officers acted in good faith in relying on the issuance of the warrant. This is known as the "good faith" exception to the Exclusionary Rule.

As noted above, even a warrant issued by a Magistrate may be found invalid. Common reasons for invalidating search warrants include a judicial determination that the warrant was overbroad or lacked specificity in naming the items to be searched for. A warrant may also be invalidated if the information upon which the Magistrate found probable cause was so old, or "stale" as to make the Magistrate's reliance on the information unreasonable. Finally, if it can be shown that the warrant was based on misinformation intentionally supplied by law enforcement officers, the "good faith" exception will not apply and the evidence will be excluded from trial.

Customarily, a warrant is obtained by a federal law enforcement agent, who swears out an affidavit, written in the first person, describing the information he/she is aware of and how he/she became aware of it. A federal prosecutor reviews the warrant to ensure the facts and sources meet the legal requirements for securing a warrant. The Magistrate reviews the affidavit to determine whether, in the Magistrate's judgment, the facts alleged in the complaint provide the requisite "probable cause." If so, the Magistrate issues the warrant to search the location and seize the items specified in the warrant or to arrest the person named.

C. Warrantless Searches

A prosecutor must be well versed in the law of search and seizure. Thousands of

cases by hundreds of federal courts have attempted to resolve recurring issues of search and seizure law by delineating the scope of Fourth Amendment protections and articulating the circumstances in which, despite the absence of a warrant, a search or seizure may nevertheless comply with the Fourth Amendment's "reasonableness" requirement. In assessing the validity of a warrantless search, courts have attempted to balance the highly valued privacy rights of individuals with the legitimate needs of law enforcement authorities to investigate, expose and prevent criminal activity. The following ten areas have been judicially recognized as exceptions to the warrant requirement of the Fourth Amendment.

1. Investigatory Detention of a Person

This exception permits a "brief detention," based upon reasonably articulable suspicion (general hunches are insufficient) of criminal activity. This reasonable suspicion should be based upon the officer's personal observations or upon the collective knowledge of several officers. The detention must be reasonable in scope and conducted for a legitimate investigatory purpose.

Example: Police briefly detain a woman with red hair, wearing a green dinner dress and a white fur coat moments after that hearing a police broadcast that a tall red-headed woman in a green dress has just stolen a white fur coat from a store in the mall. The detention is lawful.

2. Investigatory Detention of Property

An investigatory detention of property is subject to the same constraints as the detention of a person: the detention must be brief and reasonably related to a legitimate investigation.

Example: A passenger on a bus is waiting to have his luggage removed. As it is being lowered to the ground, the bag falls to the cement. A fine white powder is visible on the ground directly beneath the bag. Detectives may pick up the bag and detain it briefly to allow a drug dog to sniff the bag for the odor of narcotics.

3. Search Incident to Valid Arrest

Following a lawful arrest, officers may conduct a complete search of the defendant. As long as probable cause exists for the arrest, no additional probable cause is needed for the search. The post-arrest search must be conducted within a reasonably short time of the arrest itself in order to be found "incident" to the arrest. The search is not limited to a pat-down for weapons and may include any areas within the defendant's control.

Example: A defendant is arrested on a state arrest warrant for failing to appear in court for a traffic violation. The arresting officers conduct a search of the defendant's pockets and locate 10 counterfeit $100 bills. The counterfeit bills are admissible in a trial for possession of counterfeit currency, because they were seized during a search incident to lawful arrest.

4. Seizure of Items in Plain View

In certain situations, evidence in plain view may be seized without the necessity of obtaining a search warrant. The incriminating character of the evidence must be readily apparent, and the officer may not improperly place himself in a position to make the observation. In addition to plain view, courts have also applied the doctrine to the senses of smell, feel and hearing.

Example: Police officers respond to a complaint of loud music and disorderly conduct. They knock on the door to the apartment. As the door is opened, they see a stack of blank credit cards and a machine used to imprint bogus credit cards. The officers may enter the apartment and seize the evidence.

Example: Coast Guard officers board a boat headed for a U.S. port in order to determine that the boat's paperwork is in order. Once on board, the officers smell a strong odor of marijuana emanating from the hold. The officers may "follow their noses" to the source of the smell.

The marijuana may be introduced at trial charging the ship's crew with attempted narcotics importation because the evidence of the illegal drugs—the odor of it—was readily apparent.

5. Exigent Circumstances

A warrantless search and seizure may be justified when exigent circumstances exist. In order to conduct a search based upon exigent circumstances, the officers must possess probable cause to search, and at least one of the following additional factors must be present:

a. evidence is in imminent danger of destruction;
b. officers' safety or the safety of the public is threatened;
c. the suspect is likely to flee; or
d. the police are in hot pursuit of a fleeing fugitive.

In determining whether an exigency existed, courts will examine the totality of circumstances at the time immediately preceding the search. Courts will not allow the officers to create the exigency which allows them to conduct the search.

Example: An art theft suspect is tracked to his hideaway, a warehouse in downtown. Officers look through the windows and see the suspect loading identifiably stolen pictures into a truck. They may enter and seize both the suspect and the stolen property.

Example: A bank robber flees the bank and is identified by a series of eyewitnesses as he runs several blocks before leaping a fence to the backyard of a residence. Officers may enter the backyard of the private residence to apprehend the fleeing suspect and search the area for evidence of the robbery.

6. Consent Searches

Probable cause to search is not necessary if a person having custody or control of the dwelling voluntarily consents to a search. Courts will examine the totality of circumstances, including a person's knowledge of his/her right to refuse to consent, the person's age, intelligence and education, degree of cooperation with police, attitude about the likelihood of discovery of contraband, length of detention, nature of questioning, and the use of coercive behavior to induce the consent.

Example: Police arrive at the house of a suspected drug dealer and knock on the door. The suspect's wife answers the door, holding an infant. The officers ask to search the house and the wife refuses. The officers then tell her that, if necessary, they will get a warrant. They also tell her that they think she is a drug dealer and they will ensure that her baby is put in a foster home after her conviction. They continue that, if she cooperates and lets them search, they will talk to the judge and help her keep her baby. She relents and they find drugs inside. Based on this scenario, the court would likely suppress the evidence on the basis that the wife did not voluntarily consent to the search.

7. Vehicle Searches

Because of vehicles' configuration and inherent mobility, courts have held that there is a diminished expectation of privacy in the area of a vehicle. Accordingly, the search of an automobile requires only that there be probable cause to believe evidence is contained within the vehicle.

Example: A traffic officer stops a car after observing erratic driving. As he approaches, the driver takes a plastic

baggie with several small rocks and stuffs it in between the seats.

The driver appears glassy-eyed and disoriented. The officer reaches between the seats and removes a bag of what appears to be rock cocaine. The contraband is admissible in a trial charging the defendant with driving under the influence and possessing narcotics.

8. Inventory Searches

After lawfully seizing an item, such as an automobile, boat or piece of personal property such as a wallet, police may lawfully conduct an inventory of the contents. This warrantless search is permitted because it satisfies three legitimate purposes: protection of the owner's property while it is in police custody; protection of the police against claims of lost or stolen property; and protection of the police from potential danger. An inventory search may not be conducted solely for investigatory purposes.

Example: Police arrest a drunken driver, who is taken to the station and booked. The car is towed to the police impound lot, where the contents are inventoried. Inside the trunk is a machine gun. The machine gun is seized and bullets are compared with those taken from a recent murder. They match. The gun will be admissible because it was seized during a lawful inventory search.

9. Border Searches

During a routine Customs search at an international border, no search warrant is required. The traveler and any accompanying baggage are subject to a full and complete inspection. Detention beyond a routine Customs stop requires at least reasonable suspicion of smuggling or other wrongdoing.

Example: A passenger arrives on the midnight flight from a South American country known to be a source of cocaine. During routine questioning, the passenger claims to be coming to the U.S. as part of his shoe-selling business, but can produce no documents, samples, brochures or names of business contacts he intends to meet. He is nervous and perspiring. Customs officials may refer him to secondary inspection for further questioning.

10. Abandoned Property

Warrantless searches and seizures of abandoned property do not violate the Fourth Amendment because there is no reasonable expectation of privacy in abandoned property.

Example: A narcotics agent sees a traveler retrieve a suitcase from a baggage carousel and walk towards the exit. When he sees a police officer enter the area, he drops the suitcase and goes into a restroom. When the traveler emerges from the restroom, he ignores the suitcase and runs out the door. A later examination of the bag reveals no name or address tag. The luggage is subsequently opened and found to contain 10 pounds of heroin. The narcotics would be admissible in a trial because the suspect abandoned the suitcase and its contents.

D. Prosecutorial Expertise in Search and Seizure Issues

As the above discussion demonstrates, the ability to defeat a challenge to the validity of a search—with or without a warrant—is crucial to a prosecutor's ability to introduce what may be dispositive evidence of the defendant's guilt. In some cases, the search or seizure will have taken place before the prosecutor becomes involved. In such cases, the prosecutor's familiarity with controlling case authority will enable him/her to determine whether the search can be defended.

In many cases, however, the prosecutor is involved in an investigation at the earliest stages, when a decision to seek a search warrant is made. In these

instances, it is critical for the prosecutor to know what pitfalls to avoid to ensure a warrant will pass judicial scrutiny after the search has been conducted. A prosecutor must be able to make an informed decision whether the evidence marshalled by law enforcement agents will be sufficient to obtain a warrant or to defeat a challenge to the sufficiency of any warrant obtained. A prosecutor must also be sufficiently familiar with search and seizure law to advise law enforcement authorities of what additional information, if any, must be obtained to ensure the warrant will pass constitutional muster.

V. PROSECUTORS' USE OF WIRETAPS AND OTHER ELECTRONIC SURVEILLANCE

A. Legal Requirements for Wiretaps and Electronic Surveillance

Law enforcement has a wide range of tools available to conduct electronic surveillance of criminal activity. The term "electronic surveillance" includes techniques ranging from wiretaps to mobile tracking devices. Because electronic surveillance is highly intrusive, there are statutory as well as constitutional limits on such surveillance.

Wiretaps include live interceptions of wire communications (telephones, cordless telephones, cellular telephones, and electronic pagers), oral communications (uttered in a location where there is an expectation of privacy), and electronic communications (for example, facsimile machines and digital pagers).

Because of the highly intrusive nature of wiretaps, Congress enacted a statutory scheme requiring an application by a government lawyer, supported by a factual affidavit of a law enforcement officer, and an order by a Federal District Court Judge, to obtain a wiretap. In addition, except for digital pagers, all such applications must be approved by a high-level official of the United States Department of Justice. The affidavit must establish the following: (1) probable cause to believe an individual is committing, or is about to commit, a statutorily enumerated offense; (2) probable cause to believe the particular communications concerning that offense will be obtained through such interception; (3) a showing that normal investigative procedures have been tried and have failed, or appear to be unlikely to succeed if tried or to be too dangerous (also known as "necessity"); and (4) probable cause to believe that the facilities or location where the communications are to be intercepted are being used, or are about to be used, in connection with the commission of the specified offense. There is a 30-day maximum interception period, plus extensions, for each wiretap order, and the order must provide that the interception be conducted in a manner to minimize the interception of communications not subject to interception ("minimization").

The wiretap statute does not include silent video surveillance. Such video surveillance is regulated by the Fourth Amendment to the United States Constitution, which prohibits unreasonable searches and seizures. If the video camera is in a location where there is no expectation of privacy (normally exterior premises), no court authorization is required to videotape activities within view of the camera. If the camera is directed to view an area where there is an expectation of privacy, such as behind closed curtains, over a fence, or in a room of a residence, a search warrant is required. There must be a showing of probable cause, necessity, a particular description of the activity to be videotaped, and a statement of the offense to which it relates. The 30-day interception period and minimization requirements apply.

Similarly, mobile tracking devices ("transponders" or "beepers") used to follow

a vehicle or package are not regulated by wiretap provisions, but by the Fourth Amendment. There is no privacy right in one's location on the high seas, in public airspace, or on a public road where a vehicle or package may be transported. Accordingly, government agents may use a transponder without a court order. However, if a vehicle or package goes inside an area which carries a legitimate expectation of privacy, or surreptitious entry is necessary to retrieve it, a court order signed by a Magistrate is necessary.

Other commonly used types of electronic surveillance are pen registers and trap and trace devices. A pen register is a device which records or decodes electronic (or other) impulses which identify the numbers dialed or transmitted on a telephone line. A trap and trace device is a device which captures the incoming electronic (or other) impulses which identify the originating number of an instrument (normally a telephone) from which a wire or electronic communication was transmitted. A pen register or trap and trace order can be obtained upon an ex parte application to a Magistrate Judge, with a certification to the court that the information likely to be obtained is relevant to an ongoing criminal investigation.

B. Electronic Surveillance Authorized by Consent of a Party

Not all intrusive electronic surveillance need be authorized in advance by a court. Under federal law, when one party consents to have a conversation or meeting monitored, it may be audiotaped or videotaped, regardless of the fact that other parties do not know they are being taped. Prosecutors often rely on such consensual recordings.

Thus, is it not uncommon to record phone conversations between a confidential informant and the target of an investigation when the former is working for the government and the latter is unaware of that fact. Similarly, when undercover law enforcement agents set up a "sting" operation in a hotel room, warehouse, or other location that has been wired to videotape and record meetings and conversations, undisclosed videotaping may take place with the consent of the law enforcement officers, even though the criminals doing business with the undercover officers are unaware of the hidden cameras, and unaware that their conversations are being recorded. However, such electronic taping can take place only when law enforcement agents or informants working for the government are present in the room and thus "consenting" to the electronic monitoring.

C. Prosecutors' Role in Securing and Monitoring Electronic Surveillance

In any type of electronic surveillance for which court approval is necessary, prosecutors are intimately involved in the process of obtaining the court order, monitoring the surveillance, and reporting to the court on the results of the surveillance. Indeed, in order to obtain a court order authorizing a wiretap, a federal prosecutor must obtain the approval of an Assistant Attorney General in the Department of Justice.

While the affidavit setting forth the requirements outlined above is signed by the law enforcement agent, the prosecutor is intimately involved in the drafting of the application, and it is the prosecutor who signs the application submitted to the District Court Judge. It is also the prosecutor who must report to the court every ten days on the results of the wiretap and must ensure that interceptions are being properly "minimized." Finally, it is the prosecutor who must apply to the court for additional extensions of the wiretap authorization order by demonstrating that the evidence obtained to date warrants continued interceptions.

VI. PROSECUTORS' OBLIGATION TO PROVIDE DISCOVERY

A. The Premise of Discovery in Criminal Cases

Discovery is based on the premise that pre-trial disclosure of evidence contributes to the accuracy and efficiency of criminal trials by avoiding unfair surprise and encouraging pre-trial resolution of important issues. The American criminal justice is an adversarial system, but certain concepts of fairness override the idea that each advocate is obligated solely to its own cause. For example, prosecutors are charged with seeking the truth, not just winning a conviction. In order to advance the pursuit of truth and fairness, courts and the Congress have developed disclosure requirements, called "discovery." In the discovery process, the defendant is effectively given access to much of the evidence the government intends to use to prove the defendant's guilt. The government is not expected to win its case through surprise, and the defendant is expected to have ample opportunity to challenge the evidence the government intends to present against him/her.

In addition to ensuring fairness by avoiding surprise, pre-trial disclosure of evidence can simplify or eliminate trials by permitting pretrial resolution of the admissibility of evidence, and by prompting guilty pleas in cases with very strong evidence. Disclosure of evidence may persuade a defendant to enter a guilty plea upon the realization that he cannot effectively defend against the government's case. Similarly, a pretrial ruling that certain evidence provided in discovery is or is not admissible will assist both the government and the defense in assessing the relative strengths and weaknesses of their respective cases. Suppression of evidence to be offered by the government may result in dismissal of the charges entirely, or a plea bargain to lesser charges. Conversely the trial court's rejection of a defendant's challenge to the admissibility of evidence may prompt a guilty plea that will save the court and the public the cost of a trial whose outcome appears obvious to both parties.

B. Prosecutors' Obligation to Provide Discovery

The prosecutor, as the government's representative, is responsible for what is known by all members of the prosecution team, including law enforcement officers and the agencies for which they work. Whether or not evidence is actually revealed to the individual prosecutor, the government is obligated to turn over discoverable evidence. With such a broad scope of responsibility, the prosecutor may accept the reports of law enforcement officers or undertake personally to review the files of any officer or agency participating in the investigation of the case, including personnel files of the officers.

Discovery concerns all evidence which the government intends to use in its case-in-chief or which is favorable to the defense, either because it might exculpate the defendant or because it might lead to the impeachment of a government witness. This includes evidence of relevant statements made by the defendant whether before or after arrest. Documents or other objects of tangible evidence must be made accessible to the defense if they will be used in the government's case-in-chief or if they concern a defense. The results of any tests or examinations of evidence, such as the comparison of fingerprints or handwriting, the review of accounting procedures, or the results of DNA testing must be disclosed. In addition, the identity of any expert who will testify to the tests and the conclusions reached by such expert must be provided the defense.

C. When Discovery Begins

Although there is no general constitutional right to discovery in criminal proceedings, the Supreme Court has established rules for the disclosure of certain types of evidence based on the defendant's right to due process found in the Fifth Amendment. The due process protection of the right to a fair trial has been interpreted to require similar protections in pre-trial proceedings, such as suppression hearings, and in post-trial proceedings, such as sentencings. Such rights do not apply before criminal charges have been made in the form of a complaint, indictment or information. Formal charges are generally recognized as the beginning of criminal proceedings and the point at which the government's discovery obligations begin.

D. When Discovery Ends

The obligation to give discovery continues through trial. For example, the government must give the defense any statements made by witnesses called by the government as soon as the witness has testified on direct examination. In practice, prosecutors often turn over such statements before the trial, in order to avoid the loss of time which would result from delaying the trial to permit defense counsel to review the material before cross-examining the witness.

Even after a trial or guilty plea, the government must disclose evidence which favors the defense if that evidence undermines confidence in the conviction. The prosecutor, no less than the court itself, is responsible for ensuring that no conviction is obtained on false, improper, or insufficient evidence.

E. Discovery from the Defendant

Because of the privilege against self-incrimination, the defendant cannot be compelled to disclose his defense. Certain defenses, however, involve a high risk of unfair surprise to the government. In order to allow the government a fair opportunity to prepare to respond to defenses of alibi or insanity, the Federal Rules of Criminal Procedure require the defense to give notice of an intention to assert such a defense and of the witnesses who will testify in support of that defense. Such notice is made meaningful by the disclosure of the names of witnesses and the substance of their testimony.

In contrast to compelled disclosure, a defendant may agree to reveal some or all evidence as part of an exchange with the prosecution. For example, in lengthy and complex cases, the government may offer to make some or all of its disclosures by a specific date in advance of trial, if the defense also commits to disclose its evidence before trial.

F. Court Supervision of Discovery

The court has authority to control discovery by denying, restricting, or deferring any discovery based on the request of either the government or the defense, as long as the request is supported by sufficient good cause. The request can be made without disclosure to the opposing party, if the court permits. The judge's decision may include any appropriate order, but the entire submission must be preserved so that it can be reviewed by a Court of Appeals.

Judges frequently become involved in enforcing discovery requirements. If one party demonstrates that the other has violated its discovery obligations, the court has the power to compel the discovery or to preclude use at trial of the withheld evidence. Some judges issue standardized orders for the government to provide discovery within a specified schedule, to confer with the defense about disputed discovery matters, and to then report in writing and in person to the court. Even judges who do not maintain such a practice also have to resolve disputed discovery

matters. Occasionally, the defense will contend that the government is deliberately withholding discoverable material or that the government has not undertaken a thorough enough review of the evidence. When the parties cannot agree, that contention is presented to the court for decision.

The government, in answering allegations concerning its compliance with discovery requirements, may respond in open court, in a publicly filed pleading, or ex parte and in camera (that is, without notice to the defense, for the judge to consider exclusively) or under seal (that is, a matter of record with the court that is not accessible to the public, but is accessible to the defense), depending upon the sensitivity of the subject. For example, the defense may wish to know the identity of a confidential informant, but the government may assert its privilege not to reveal the identity of informants who merely supplied information, as opposed to those who dealt directly with the defendant in an undercover capacity. In that case, the government might submit a pleading ex parte, in camera and under seal, in which the informant is identified, the limits of the informant's participation in any charged criminal conduct are detailed, and the court is apprised of any reasons the informant might have for fearing retaliation if his/her identity were revealed to the defense. The court will then have a full record on which to decide whether the defense's claims have merit.

VII. FEDERAL SENTENCING

A. General Sentencing Procedures and Provisions

Federal sentencing is governed both by statutory provisions and by a body of rules known as the "Sentencing Guidelines." In most instances, the federal statutes defining particular violations of federal law specify the maximum term of imprisonment that the sentencing court can impose following a defendant's conviction of that offense. On rare occasion, a statute might also provide for a mandatory minimum term of imprisonment. These minimum terms of imprisonment are more common in the context of narcotics offenses and violent felonies.

The sentencing guidelines establish a sentencing range, in months, within which the sentence must be imposed absent some legal ground for departure upward or downward from that range. The use of the term "guidelines" is somewhat of a misnomer; these provisions are mandatory in nature.

The statutory penalty always "trumps" the guidelines; in other words, whenever the guideline range is more than the statutory maximum or less than the statutorily proscribed minimum sentence, the statutory penalty governs.

Federal sentencing can include some (or all) of the following penalties following the commission of a crime:

- Imprisonment: Required for most federal offenses under the sentencing guidelines. Only minor offenses in the lowest guideline ranges are eligible for the imposition of a term of imprisonment in lieu of imprisonment.
- Fines: Many federal sentences include the payment of a monetary "fine" or penalty to the federal government as part of the overall punishment for the commission of the crime.
- Restitution: In those instances where the federal offense resulted in monetary injury to a victim, the sentence will include mandatory restitution repayments to the aggrieved victim.

- Supervised Release and Probation: Most federal sentences include imposition of a term of either supervised release (imposed when prison time results) or probation (a substitute for a term of imprisonment for the more minor offenses). In short, these constitute periods during which defendants are under the supervision of the court and are required to abide by various terms and conditions. Violations of those terms can result in additional sanctions.

B. The Sentencing Guidelines

1. Purposes and History Underlying the Guidelines

The sentencing guidelines were enacted to address three perceived deficiencies in federal sentencing practices. First, before the guidelines, sentencing was left entirely to the discretion of the judge, with no appellate review as long as the sentence did not run afoul of the statutory penalty. Not surprisingly, the sentence imposed depended, in large part, on which judge happened to be assigned the case. The guidelines sought to reduce this disparity by narrowing the possible sentencing range for similar criminal conduct committed by similar defendants, thereby rendering sentences more uniform and more predictable. The guidelines further seek proportionality in sentencing, by imposing "appropriately different sentences for criminal conduct of different severity."

Second, Congress sought to achieve "honesty" in federal sentencing. Before the guidelines, the sentence imposed by the judge rarely turned out to be the sentence the defendant served. Most defendants became eligible for parole after serving one-third of their sentence, and almost all had to be released after serving two-thirds. Concurrently with the creation of the guidelines, Congress abolished the Parole Commission, and declared that the sentence imposed was the sentence to be served with minor reductions for good behavior in prison. Thus, under the new regime, defendants who receive full credit for "good time" while incarcerated nonetheless serve 85 percent of the guidelines sentence. There is no parole under the guidelines.

Third, Congress felt that the prosecutor, like the judge, had too much discretion pre-guidelines. The prosecutor conceivably could charge one criminal act many different ways and, in so doing, could make the conduct appear comparatively more or less severe. In order to reduce the power of the prosecutor, the guidelines sought to link the punishment imposed to the underlying criminal conduct, not simply the counts of conviction.

As a result of these concerns, a uniquely bipartisan Congressional effort adopted in 1984 the Sentencing Reform Act (sometimes referred to as the "SRA"). The SRA generally provided for the development of a federal sentencing scheme that would further certain enumerated purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation.

To that end, the SRA delegated broad authority to the Sentencing Commission (the "Commission")—an independent agency composed of seven voting members, at least three of whom must be federal judges—to establish sentencing policies and practices consistent with certain statutory directives. The Commission was also charged with periodic review and reform of the guidelines system over time.

The Commission's initial guidelines were submitted to Congress on April 13, 1987, and after a prescribed period of Congressional review, became effective on November 1, 1987. Thereafter, the Commission promulgated a steady stream of yearly amendments to the guidelines, that take effect automatically absent Congressional disapproval.

The initial reaction to the guidelines was mixed, at best. Hostility to the new guidelines scheme resulted in a host of legal challenges, including attacks on the constitutionality of the Commission itself. In 1989, the Supreme Court ended any uncertainty regarding the constitutionality of the guidelines, holding in *Mistretta v. United States*, 488 U.S. 361 (1989), that the composition and duties of the Commission did not violate the doctrine of separation of powers.

2. How the Guidelines Work

The guidelines are premised on the notion that federal sentencing should depend on two factors alone: the severity of the defendant's overall criminal conduct (not simply the count or counts of conviction) and the defendant's criminal past. In accordance with that approach, the guidelines set forth a litany of computations designed to determine: (a) the severity of the defendant's criminal conduct in the case in which he/she is to be sentenced (the "offense level"), and (b) the past criminal conduct of the defendant (the "criminal history category"). Those two factors are then plotted on a chart to determine a "sentencing range," a range of months within which the court must impose a sentence absent a specific and appropriate basis for departing from the range. The intersection of the offense level (the vertical axis of the chart) and the criminal history category (the horizontal axis) determines the applicable guideline range.

The guidelines employ what is referred to as a "modified real offense" system of sentencing. A defendant's sentence is not contingent on the offense of conviction alone; a sentencing judge is empowered to look at the totality of a defendant's "relevant" criminal conduct. However, the offense of conviction provides the starting point for the calculus. The guidelines' relevant conduct provision defines when the court can consider conduct beyond the count of conviction in determining the sentence.

It is well settled that facts at sentencing—unlike facts at trial—need only be proven by a preponderance of the evidence. Indeed, even conduct for which a defendant has been acquitted can be considered at sentencing, if the court finds proof of that conduct has been established by a preponderance of the evidence. The court may consider at sentencing evidence which does not comply with the Federal Rules of Evidence and which is not subject to confrontation, as long as the evidence meets minimal standards of reliability. Accordingly, sentencing hearings tend to be more relaxed than trials, and generally do not involve the presentation of witnesses. Evidence is proffered, if at all, through hearsay declarations.

3. Departures

The guidelines are designed to encompass almost all cases. Accordingly, sentences outside the applicable guideline range, known as "departures," should be rare.

In general, the court may depart from the guidelines if it finds "that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately take into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described." The guidelines explain that departures are designed to account for cases outside the "heartland" of the proscribed guidelines.

The most common departure basis arises when a defendant cooperates with prosecutors in the investigation or prosecution of others. In those instances, the law empowers federal prosecutors to seek a reduction in sentence. The decision to seek a sentencing reduction based on a defendant's assistance to law enforcement rests solely with the prosecution.

VIII. PROSECUTORS' ETHICAL OBLIGATIONS

Federal prosecutors are entrusted with tremendous authority and responsibility, often at a relatively young age. The manner in which they exercise that authority has significant implications for individuals, institutions, and society at large. The decision to seek an indictment against an individual or organization will have far reaching consequences, regardless of the ultimate outcome of any criminal proceeding.

For all the limitations imposed by statute, the Constitution, and rules of court, it is a prosecutor's recognition of the importance of his/her role in the criminal justice system and of the need to exercise that role with the utmost integrity that guarantees the fairness of the criminal justice process. Unlike criminal defense counsel, who are obligated to defend the guilty as vigorously as the innocent, federal prosecutors have an independent obligation to see justice is done.

At any stage of the proceedings, the prosecutor must be receptive to evidence that may affect the reliability of witnesses or have a potential impact on the trier of fact's assessment of the defendant's probable guilt. Moreover, even before making a decision to pursue criminal charges, a prosecutor must examine all the facts and circumstances to determine what charges, if any, best reflect the defendant's criminal behavior and its consequences. Finally, at sentencing, a prosecutor's role is not to seek the heaviest possible penalty, but to urge the court to impost a sentence that best reflects the severity of the defendant's conduct, taking into account the nature of the offense, its consequences to the victim(s), the defendant's criminal history, and the defendant's cooperation with government authorities.

Ultimately, a prosecutor's credibility is his/her most valuable currency. A good prosecutor knows that he/she must earn the trust of the judge, the jury and opposing counsel.

A prosecutor who overstates his/her case, strains to interpret a precedent in a way that favors the government's case, or advocates unreasonable positions, squanders the precious commodity of credibility. When even one prosecutor loses that trust, all prosecutors are tarnished in the eyes of the court and the community.

Most citizens believe in their criminal justice system because years of experience have demonstrated that federal prosecutors use their authority judiciously and appropriately. Only by continuing to adhere to the highest standards of ethical behavior can prosecutors maintain that hard-earned trust.