Amendment I

CONGRESS SHALL MAKE NO LAW RESPECTING AN ESTABLISHMENT OF RELIGION, OR PROHIBITING THE FREE EXERCISE THEREOF; OR ABRIDGING THE FREEDOM OF SPEECH, OR OF THE PRESS; OR THE RIGHT OF THE PEOPLE PEACEABLY TO ASSEMBLE, AND TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES.

Amendment VI

IN ALL CRIMINAL PROSECUTIONS, THE ACCUSED SHALL ENJOY THE RIGHT TO A SPEEDY AND PUBLIC TRIAL, BY AN IMPARTIAL JURY OF THE STATE AND DISTRICT WHEREIN THE CRIME SHALL HAVE BEEN COMMITTED, WHICH DISTRICT SHALL HAVE BEEN PREVIOUSLY ASCERTAINED BY LAW, AND TO BE INFORMED OF THE NATURE AND CAUSE OF THE ACCUSATION; TO BE CONFRONTED WITH THE WITNESSES AGAINST HIM; TO HAVE COMPULSORY PROCESS FOR OBTAINING WITNESSES IN HIS FAVOR, AND TO HAVE THE ASSISTANCE OF COUNSEL FOR HIS DEFENSE.

9TH CIRCUIT STANDARDS OF REVIEW. 2005

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PRE-TRIAL ISSUES

Issues: U.S. Code Annotated Title 18 § 875(c).

Constitutionality:

Source: U.S.C.A. 18 USC, Ch. 41. § 875, et al.: Sec. 1. *Constitutionality.*
Law Cited: U.S. v. Jackson, S.D.N.Y.1997, 986 F.Supp. 829, vacated 180 F.3d 55. Issue: Constitutionality of 875 related to being Overbroad & a Jurisdiction Challenge.

Issue: This law above, in the U.S. Code, fails to address 875(c). Instead it deals with 875(a) and (b) and (d). It fails to define the offense with sufficient definiteness so that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary enforcement. Kolender v. Lawson, 461 U.S. 352, 357 (1983).

I preserved the issues above, and below, in pre-trail, trial, and post-trial hearings, through both oral and written motion(s).[1]

Constitutionality of Statutes:

The constitutionality of a statute is a question of law reviewed de novo. See **United States v. Naghani**, 361 F.3d 1255, 1259 (9th Cir. 2004); **United States v. Adams**, 343 F.3d 1024, 1027 (9th Cir. 2003), cert. denied, 124 S. Ct. 2871 (2004); **United States v. McCoy**, 323 F.3d 1114, 1117 (9th Cir.

1 Sentencing Transcript (ST) Pages 24-25.

2003); **United States v. Gonzales**, 307 F.3d 906, 909 (9th Cir. 2002); United States v. Stokes, 292 F.3d 964, 966 (9th Cir. 2002); **United States v. Carranza**, 289 F.3d 634, 643 (9th Cir. 2002); **United States v. Parks**, 285 F.3d 1133, 1142 (9th Cir. 2002); **United States v. Jones**, 231 F.3d 508, 513 (9th Cir. 2000); **Kaluna**, 192 F.3d at 1193; **Frega**, 179 F.3d at 802 n.6; **United States v. Mack**, 164 F.3d 467, 471 (9th Cir. 1999); **United States v. Hicks**, 103 F.3d 837, 847 (9th Cir. 1996); **United States v. Keys**, 103 F.3d 758, 761 (9th Cir. 1996); **United States v. Kim**, 94 F.3d 1247, 1249 (9th Cir. 1996); **United States v. Rambo**, 74 F.3d 948, 956 (9th Cir. 1996); **United States v. Sahhar**, 56 F.2d 1026, 1028 (9th Cir. 1995); see also **United States v. $129,727.00 U.S. Currency**, 129 F.3d 486, 489 (9th Cir. 1997) (civil forfeiture).

Whether a statute is void for vagueness is a question of law reviewed de novo. **United States v. Rodriguez**, 360 F.3d 949, 953 (9th Cir. 2004); **Naghani**, 361 F.3d at 1259; **United States v. Purdy**, 264 F.3d 809, 811 (9th Cir. 2001); **United States v. Cooper**, 173 F.3d 1192, 1202 (9th Cir. 1999); **United States v. Hockings**, 129 F.3d 1069, 1070 (9th Cir. 1997); **United States v. Woodley**, 9 F.3d 774, 778 (9th Cir. 1993). Whether a statute violates a defendant's right to due process is reviewed de novo. United States v. Hill, 279 F.3d 731, 736 (9th Cir. 2002); **United States v. Hanousek**, 176 F.3d 1116, 1121 (9th Cir. 1999).

Note that the construction or interpretation of a statute is reviewed de novo.
See **United States v. Cabaccang**, 332 F.3d 622, 624-25 (9th Cir. 2003) (en banc); **United States v. Auld**, 321 F.3d 861, 863 (9th Cir. 2003); **United States v. Carranza**, 289 F.3d 634, 642 (9th Cir. 2002); **United States v. Lincoln**, 277 F.3d 1112, 1113 (9th Cir. 2002); **United States v. Pluff**, 253 F.3d 490, 492 (9th Cir. 2001); **United States v. Davidson**, 246 F.3d 1240, 1246 (9th Cir. 2001); **United States v. Kakatin**, 214 F.3d 1049, 1051 (9th Cir. 2000); **United States v. Kaluna**, 192 F.3d 1188, 1193 (9th Cir. 1999) (en banc); **United States v. Frega**, 179 F.3d 793, 802 n.6 (9th Cir. 1999); **United States v. Doe**, 136 F.3d 631, 634 (9th Cir. 1998); **United States v. DeLaCorte**, 113 F.3d 154, 155 (9th Cir. 1997) (carjacking statute); **United States v. Hunter**, 101 F.3d 82, 84 (9th Cir. 1996). The applicability of a statute to a particular case is a question of law reviewed de novo. See **United States v. Villa-Gonzalez**, 208 F.3d 1160, 1165 (9th Cir. 2000) (AEDPA). **Above cited from the Ninth Circuit Review Standards Of Criminal Law, 2004**

Jurisdiction:

The Ninth circuit reviews the existence of subject matter jurisdiction de novo. See Chang v. United States, 327 F.3d 911, 922 (9th Cir. 2003)

A defendant who does not object to an indictment prior to trial waives all objections ***except jurisdiction*** and failure to charge an offense. **Echavarria-Olarte v. Reno**, 35 F.3d 395, 397 (9th Cir. 1994) (citations omitted), cert. denied, 514 U.S. 1090 (1995).

Today, any discussion of personal jurisdiction in cyberspace must begin with **Zippo Manufacturing Co. v. Zippo Dot Com, Inc**[2]. The *Zippo* decision, which was issued in January 1997, has been cited by virtually every court to subsequently address the issue of whether personal jurisdiction can be properly exercised as a result of Internet activities.[3]

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2 **952 F. Supp. 1119 (W.D. Pa. 1997)**

3 **See, e.g., Soma Med. Int'l v. Standard Chartered Bank, 196 F.3d 1292, 1297 (10th Cir. 1999) (finding the defendant's web site to be passive because the defendant "has simply posted information on an Internet Web site which is accessible to users in foreign jurisdiction"); Mink v. AAAA Dev. LLC, 190 F.3d 333 (5th Cir. 1999); Cybersell, Inc. v. Cybersell, Inc., 130 F.3d 414, 418 (9th Cir. 1997) (finding defendant's web site to**

An example of the arbitrariness permitted as a result of characterizing truly interactive web sites as passive can be found in **Cybersell, Inc. v. Cybersell, Inc.**[4]

TRANSCRIPTS IN SUPPORT OF ABOVE:

Commerce clause and interstate commerce.

Congress, pursuant to the Commerce Clause of the Constitution, art. I, § 8, cl. 3, may regulate "three broad categories of activity":

a. "the channels of interstate commerce;"

b. "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;" and

c. "those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce." **United States v. Cortes**, 299 F.3d 1030, 1033 (9th Cir. 2002) (quoting **United States v. Lopez**, 514 U.S. 549, 558–59 (1995)), cert. denied, 537 U.S. 1224 (2003).

U.S. v. Oxendine, 531 F.2d 957 (9th Cir. 1976)(Defendant could not be convicted…absent proof of transmission in interstate commerce).

"[t]he jurisdictional hook is absent in the case of intrastate pornography." **United States v. McCoy**, 323 F.3d 1114, 1115 (9th Cir. 2003).

TRANSCRIPTS IN SUPPORT OF ABOVE:

Instant Messenger Goes Interstate — United States v. Kammersell.

The facts in **United States v. Kammersell**[5] were not in dispute. Both the prosecution and the defense agreed that the defendant sent his girlfriend a bomb threat in hopes that she would be sent home from work, thereby freeing her up to go on a date.[6] Likewise, it was undisputed that the defendant accomplished the sending of this threat by using America Online's "Instant Messenger[7] service.[8] Finally, it was also undisputed that when the defendant sent the threat from his computer in Utah, it traveled to the AOL servers located in Virginia and then from Virginia back to Utah where it ultimately appeared on his girlfriend's computer screen.[9]

If the facts of Kammersell were agreed upon, the application of those facts to the operative law was hotly contested. The jurisdictional statute in question was 18 U.S.C. § 875(c), which provides:

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be essentially passive and jurisdiction, therefore, was inappropriate); Brown v. Ge ha-Werke GMBH, 69 F. Supp. 2d 770, 778 (D.S.C. 1999) (finding that the defendant's passive web site did not provide contacts sufficient for jurisdiction where no other contacts existed); Stomp, Inc. v. NeatO, LLC, 61 F. Supp. 2d 1074, 1078 (C.D. Cal. 1998) (finding defendant's web site to be active because it allowed provided customer service, technical support and the ability to purchase products online)

4 130 F.3d 414 (9th Cir. 1997).

5 196 F.3d 1137 (10th Cir. 1999).

6 Id. at 1138.

7 Instant Messenger is America Online's software that allows individuals to communicate by typing messages that when sent appear in a pop-up window on the recipients screen in more or less real time. See About AOL Instant Messenger (visited Feb. 23, 2000) <http://www.aol.com/aim/about.html>. Instant Messenger can be used by individuals who have AOL as their Internet Service Provider, as well as by those who do not have AOL as their ISP but who have downloaded the software from the AOL web site. Id.

8 Kammersell, 196 F.3d at 1138.

9 Id.

Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined under this title or imprisoned not more than five years, or both. [10]

Section 875(c) was enacted by Congress in 1934 and had its last significant amendment in 1939[11], which lead the defendant to argue that it should not be literally applied to communications sent via the Internet.[12]

The defendant specifically argued that the court must interpret section 875(c) in light of the "sweeping changes in technology over the past 60 years . . . ."[13] The prosecution counter argued that the plain meaning of section 875(c) was clear and that because the instant message in question was sent from Utah to Virginia and then back to Utah, it had been "transmitted in interstate commerce," which is all that is necessary to invoke jurisdiction based on a threatening communication.[14] The defense, however, pointed out that "[b]ecause so many . . . locally-sent Internet messages are routed out of state, under the government's interpretation, federal jurisdiction would exist to cover almost any communication made by . . . modem, no matter how much it would otherwise appear to be intrastate in nature."[15] While the court did agree that the defendant's position was compelling and that Congress should perhaps reconsider the scope of section 875(c) in light of Internet technologies, the defendant could not rely on the argument to escape criminal prosecution where the statutory language literally allows for such federal prosecution.[16] Source; **Jurisdiction in CyberSpace**[17]

A defendant who does not object to an indictment prior to trial waives all objections ***except jurisdiction*** and failure to charge an offense. **Echavarria-Olarte v. Reno**, 35 F.3d 395, 397 (9th Cir. 1994) (citations omitted), cert. denied, 514 U.S. 1090 (1995).

When Congress criminalizes conduct already denounced as criminal by the States, it effects a "`change in the sensitive relation between federal and state criminal jurisdiction.'" United States v. Enmons, **410 U.S. 396, 411** -412 (1973) (quoting United States v. Bass, **404 U.S. 336, 349** (1971)).[18] **U.S. v. Lopez, 514 US 549 (1995).**

Fed. R. Crim. P. 12(b)(2)[19] authorizes any party to "raise by pretrial motions any defense, objection, or request that the court can determine without a trial of the general issue." Under this rule, the court may decide such "matters as former jeopardy, former conviction, former acquittal, statute of limitations, immunity, [and] ***lack of jurisdiction***." United States v. Smith, 866 F.2d 1092, 1095–96 n.3 (9th Cir. 1989).

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10 18 U.S.C. § 875(c) (2000).

11 Kammersell, 196 F.3d at 1138.

12 See id. at 1139.

13 Id.

14 Id.

15 Id.

16 Id.

17 https://www.secure-session.com/files/13/6588/352168809/BAB0EF552E/i/JurisdictionInCyberspace.pdf
18 http://caselaw.lp.findlaw.com/scripts/getcase.pl?court=us&vol=000&invol=U10287
19 https://www.secure-session.com/files/13/6588/353222137/DD8AE8A290/i/_FRcrimP2004.pdf

Arraignment

Nature and Cause Clause:

It is the most "universally recognized" requirement[s] "of due process." is the right to be informed of the "true nature of the charge against him." **Henderson v. Morgan**, 426 U.S. 637, 645 (1976). See also **Bousley v. United States**, 523 U.S. 614.

*[20]**United States v. Smith**, 60 F.3d 595 (9th Cir. 1995) (Court failed to explain the nature of the charges to the defendant).

It is the court's responsibility to provide the defendant with the requisite information regarding the **nature of the charges**, the possible penalties, and the dangers and disadvantages of self-representation. **United States v. Hernandez**, 203 F.3d 614 (9th Cir. 2000); **Lincoln v Sunn**, 807 F.2d 805 (9th Cir. 1986); **Givens v. Housewright**, 786 F.2d 1378 (9th Cir. 1986).

It is also the duty of the court and government to insure that it is explained to the defendant, in the indictment, what is sufficient and that it "set[s] forth the offense in the words of the statute itself, as long as *those words … fully, directly, and expressly … set forth all the elements necessary to constitute the offense intended to be punished*." **United States v. DeAidino**, 957 F.2d 146, 147 (6th Cir. 1992) (quoting **Hamling v. United States**, 418 U.S. 87, 117 (1974)

TRANSCRIPT IN SUPPORT OF ABOVE:

Recusel

See **Recusal**

Stay Of Proceedings: (General Order 224)

See **Christo v. Padgett**, 223 F.3d 1324, 1333 (11th Cir.2000); **U.S. v. Sykes**, 7 F.3d 1331, 1339 (7th Cir.1993)

TRANSCRIPT IN SUPPORT OF ABOVE:

Overbroad/Vagueness Case Law:

In order to survive a vagueness challenge, 875(c) must define the offense with sufficient definiteness so that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary enforcement. **Kolender v. Lawson**, 461 U.S. 352, 357 (1983).

The doctrine of facial overbreadth is normally associated with constitutional attacks based on First Amendment violations. See **Broadrick v. Oklahoma**, 413 U.S. 601, 611-12 (1973). Under the doctrine, a law may be facially overbroad if its existence may cause individuals to refrain from engaging in forms of constitutionally protected speech or conduct. Id. A statute is generally considered overbroads if

20 Needs to be Shepardized

it sweeps within its prohibitions activities that are constitutionally protected. **Simon & Schuster v. Members of the New York State Crime Victims Board**, 502 U.S. 105 (1991); **Grayned v. City of Rockford**, 408 U.S. 104, 114-15 (1972).

The basic approach to challenging any statute as constitutionally overbroad was set forth in **Hoffman Estates v. Flipside**, 455 U.S. 489, 494-95 (1982). "A court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and should uphold such challenge only if the enactment is impermissibly vague in all of its applications." Id. at 494. See infra section, below (Vagueness challenges).

If the statute under which a defendant is convicted is struck down as being overbroad, defendant's conviction is automatically overturned, even if the statute in question is subsequently amended in a manner enabling it to pass Constitutional muster. **Massachusetts v. Oakes**, 491 U.S. 576 (1989). In Oakes, the defendant challenged a Massachusetts pornography statute as overbroad. After the time of the alleged crime, the state legislature amended the statute, curing the problem of overbreadth. In separate opinions, five justices agreed that the state legislature could not cure the potential overbreadth problem through subsequent legislation. See Oakes, 491 at 585-86 (Scalia, J., concurring). Thus, Oakes' conviction was overturned despite the fact that the conduct in which he engaged would have been prohibited under the new, permissible statute. However, Oakes does not preclude a state supreme court from relying on a narrowed judicial construction of an existing statute when faced with an overbreadth challenge. See **Osborne v. Ohio**, 495 U.S. 103, 115-22 (1990). In Osbourne, the state supreme court narrowed the statute so that it passed Constitutional muster, thus enabling defendant's conviction to be upheld. Id. at 122.

(Vagueness challenges)

If a statute is not overbroad, the court should then examine the statute for vagueness. **Flipside**, 455 U.S. 489. Generally, a statute is void for vagueness under the Due Process Clause if it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. **Colautti v. Franklin**, 439 U.S. 379, 390 (1979).

The standards for evaluating vagueness were enunciated in **Grayned v. City of Rockford**, 408 U.S. 104, 108-09 (1972) (footnotes omitted):

Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. (emphasis added).

In **Smith v. Goguen**, 415 U.S. 566, 574 (1974), the Court noted that the more important aspect of the vagueness doctrine "is not actual notice, but the other principal element of the doctrine -- the requirement that a legislature establish minimal guidelines to govern law enforcement." A criminal statute is void for vagueness if it encourages arbitrary and discriminatory enforcement of the law. **Papachristou v. City of Jacksonville**, 405 U.S. 156, 162 (1972); **Chalmers v. City of Los Angeles**, 762 F.2d 753, 757 (9th Cir. 1985). However, the trend in modern case law is that a statute -- even a criminal statute -- must violate both prongs of vagueness in order to be found unconstitutional. **U.S. v. Ayala**, 35 F.3d 423, 424-25 (9th Cir. 1994). Under Ayala, a statute is unconstitutionally vague only if a defendant can show that

the statute "(1) does not define the conduct it prohibits with sufficient definitiveness, and (2) does not establish minimal guidelines to govern law enforcement." Id. at 424. In addition, if the defendant's claim does not implicate First Amendment values, the defendant must show that the statute is vague as applied. **Maynard v. Cartwright**, 486 U.S. 356, 361 (1988).

In short, always bear in mind that laws may be void for vagueness for three reasons: (1) to avoid punishing people for behavior that they could not have known was illegal; (2) to avoid subjective enforcement of the laws based on arbitrary or discriminatory interpretations by government officers; and (3) to avoid any chilling effect on the exercise of First Amendment freedoms. **U.S. v. Wunsch**, 84 F.3d 1110 (9th Cir. 1996).

When the terms of a statute and the words defining them are of general usage, commonly known and understood by the public, they are sufficient to meet constitutional requirements. **Panther v. Hames**, 991 F.2d 576, 579 (9th Cir. 1993) (citations omitted). However, in **U.S. v. Weitzenhoff**, 35 F.3d 1275, 1289 (9th Cir. 1993) the court held that if the statutory prohibition: involves conduct of a select group of persons having specialized knowledge, and the challenged phraseology is indigenous to the idiom of that class, the standard is lowered and a court may uphold a statute which "uses words having a technical or other special meaning, well enough known to enable those within its reach to correctly apply them."

In **Weitzenhoff**, defendants challenged as vague an environmental statute that prohibited dumping sewage in the ocean. Id. at 1289. In rejecting defendants' vagueness argument, the court held the defendants to a higher standard than a 'reasonable person' because they were knowledgeable in the wastewater field and should have known that they were prohibited from dumping thousands of gallons of partially treated sewage into the ocean. Id.

Once a court determines that a statute is unconstitutionally vague, the entire statute is stricken. See **Kolender v. Lawson**, 461 U.S. 352 (1983). The Supreme Court has invalidated a criminal statute on its face even when the statute could conceivably have had some valid application. See **Kolender,** 461 U.S. at 358-59 n.8; **Colautti v. Franklin**, 439 U.S. 379, 394-401 (1979); **Lanzetta v. New Jersey**, 306 U.S. 451 (1939); see also **Schwartzmiller v. Gardner**, 752 F.2d 1341, 1346 (9th Cir. 1984) (court determined that Kolender did not change the analytical approach to attacking criminal statutes on vagueness grounds).

The degree of vagueness that is constitutionally permissible, as well as the relative importance of fair notice and fair enforcement, depends in part on the nature of the statute in question. Economic regulations are subject to a less strict vagueness test and courts have permitted greater tolerance of enactments with civil rather than criminal penalties "because the consequences of imprecision are qualitatively less severe." **Hoffman Estates v. Flipside**, 455 U.S. at 498-99. Where a statute imposes criminal penalties, however, the standard of certainty required is higher. **Kolender v. Lawson**, 461 U.S. at 358-59 n.8; **Winters v. New York** , 333 U.S. 507, 515 (1948). In Flipside, which involved a commercial regulation statute, the Supreme Court noted that a scienter requirement may mitigate a law's vagueness with respect to the adequacy of notice. **Flipside**, 455 U.S. at 498-99; see also **Amusement Devices Association v. State of Ohio**, 443 F. Supp. 1040, (S.D. Oh. 1977) (observing that the Supreme Court has never held that a scienter element alone necessarily renders the statute's prohibitions sufficiently precise to withstand a vagueness challenge); **State v. Young**, 406 N.E. 2d 499, 504 n.4 (1980); **U.S. v. Corrow**, 119 F. 3d 796, 804 n. 11 (10th Cir. 1997).

Courts have struck down criminal statutes where they were devoid of a scienter or mens rea requirement. See **Colautti v. Franklin**, 439 U.S. 379, 394-97 (1979); **U.S. v. U.S. Gypsum Co**., 438 U.S. 422, 434-46 (1978); **Lambert v. California**, 355 U.S. 225 (1957); **Morissette v. U.S**., 342 U.S. 246 (1952). However, a "statute is not presumptively vague because it does not have a specific intent

requirement." **U.S. v. Wicker**, 933 F.2d 284, 288 (5th Cir. 1991).
Further, a criminal statute or the phrasing of an indictment must not shift or lessen the prosecution's burden of proof. A reduction of the scienter requirement of penal statutes to one of mere negligence violates the defendant's rights to the presumption of innocence and the proof of mens rea. See Speiser v. Randall, 357 U.S. 513, 525-29 (1958) (tax statute in purported civil context must not place burden of persuasion on defendant thereby putting defendant in a position of facing what are truly criminal sanctions).

R. A. V. v. City of St. Paul (90-7675), 505 U.S. 377 (1992). Issue: The Defendant contended that the ordinance violated the First Amendment in two respects: (1) it was substantially overbroad; and (2) it was impermissibly content-based. Majority Opinion (a bitter 5-4 vote). Justice Scalia, joined by four other Justices (Rehnquist, Kennedy, Souter and Thomas), wrote the opinion for the Court. Scalia concluded that the law was impermissibly content-based, because "it prohibits otherwise permitted speech solely on the basis of the subjects the speech addresses." See the **file located here** for discussion of how the court voted.

TRANSCRIPT IN SUPPORT OF ABOVE:

Waiver Of Counsel

See also **6th Amendment right for the Assistance of Counsel**

Whether a waiver of the right to counsel was made knowingly, intelligently, and voluntarily is a mixed question of law and fact, which we review de novo. **United States v. Robinson**, 913 F.2d 712, 714 (9th Cir. 1990).

"**Gideon v. Wainwright**, **372 U.S. 335** (1963), involved the total deprivation of the right to counsel at trial. The other, **Tumey v. Ohio**, **273 U.S. 510** (1927), involved a judge who was not impartial. These are structural defects in the constitution of the trial mechanism, which defy analysis by "harmless error" standards. The entire conduct of the trial, from beginning to end, is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial.[21] **Arizona v. Fulminate**, 499 U.S. 279 (1991)

The Sixth Amendment grants a criminal defendant the right to refuse the assistance of counsel and to represent himself in criminal proceedings. See **Faretta v. California** , 422 U.S. 806 (1975). Despite this general rule, the Supreme Court has identified two instances in which an accused's right to represent himself may be overridden by other concerns. First, the defendant must "knowingly and intelligently forgo[ ] his right to counsel." **McKaskle v. Wiggins**, 465 U.S. 168, 173 (1984).

TRANSCRIPT IN SUPPORT OF ABOVE: 01.14.03

A Knowing and Intelligent Waiver of Counsel: In order for a waiver of the right to counsel to be knowing and intelligent, the defendant must be made aware of the "three elements" of self-representation: "(1) the nature of the charges against him; (2) the possible penalties; and (3) the dangers and disadvantages of self-representation. " **United States v. Hernandez**, 203 F.3d 614, 623-24 (9th Cir. 2000).

TRANSCRIPT IN SUPPORT OF ABOVE:

[21] **http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=499&invol=279**

The Ninth Court has refrained from requiring the district court to use a particular script when conducting an inquiry into whether a defendant knowingly and intelligently waived the right to counsel. See Hernandez, 203 F.3d at 623. Indeed, they have stated that the focus should be on what the defendant understood, rather than on what the court said or understood. See **United States v. Kimmel**, 672 F.2d 720, 722 (9th Cir. 1982). The district court's conversations with Sutcliffe at several hearings indicated that **Sutcliffe didn't understand the nature of charges** for which he was to be tried. Sutcliffe repeatedly requested the court's to explain and inform him. [22]

TRANSCRIPT IN SUPPORT OF ABOVE:

Representation of Defendant

A. Pro Se Representation

A defendant in a criminal prosecution has the right to counsel. If the defendant cannot afford to employ counsel, counsel must be appointed by the court. The defendant has the absolute right, however, to waive the right to counsel and proceed pro se. **Faretta v. California**, 422 U.S. 806 (1975)

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

In order to proceed pro se, the defendant must knowingly and intelligently waive his or her right to counsel. **Faretta v. California**, 422 U.S. 806 (1975) **Adams v. Carroll**, 875 F.2d 1441 (9th Cir. 1989) **United States v. Salerno**, 61 F.3d 214 (3d Cir. 1995) **United States v. Kneeland**, 148 F.3d 6 (1st Cir. 1998)

The touchstone in determining whether the waiver was voluntary is what the defendant, not the district court, reasonably believed. United States v. Proctor, 166 F.3d 396 (1st Cir. 1999) In the face of ambiguity, the court must favor the right to counsel. Truitt v. Fair, 822 F.2d 166 (1st Cir. 1987) The judge must interrogate the defendant to be sure that he or she understands the disadvantages of self-representation; the nature of the charge; the range of penalties; that the defendant will be proceeding alone in a complex area where experience and professional training are greatly to be desired; that an attorney might be aware of possible defenses to the charge; and that the judge believes it would be in the best interests of the defendant to be represented by an attorney. **Von Moltke v. Gillies**, 332 U.S. 708 (1948); **Faretta v. California**, 422 U.S. 806 (1975); **Patterson v. United States**, 487 U.S. 285 (1988); **United States v. Chaney**, 662 F.2d 1148 (5th Cir. 1981); **United States v. Harris**, 683 F.2d 322 (9th Cir. 1982). **But see United States v. Kimmel**, 672 F.2d 720 (9th Cir. 1982) **United States v. Welty**, 674 F.2d 185 (3d Cir. 1982); **United States v. Edwards**, 716 F.2d 822 (11th Cir. 1983); **Williams v. Bartlett**, 44 F.3d 95 (2d Cir. 1994); **United States v. Kneeland**, 148 F.3d 6 (1st Cir. 1998).

A defendant's technical knowledge is not relevant to an assessment of his or her knowing exercise of the right to defend himself or herself. **Faretta v. California**, 422 U.S. 806 (1975). See **Martinez v. Court of Appeal of California**, 120 S. Ct. 684 (2000).

A determination that a defendant lacks expertise or professional capabilities does not justify denying him or her the right of self-representation. **Peters v. Gunn**, 33 F.3d 1190 (9th Cir. 1994) **Williams v. Bartlett**, 44 F.3d 95 (2d Cir. 1994) **United States v. McKinley**, 58 F.3d 1475 (10th Cir. 1995)

In assessing a defendant's waiver of counsel, the trial judge is required to focus on the defendant's understanding of the importance of counsel, not of substantive law or procedural details. **Lopez v. Thompson**, 202 F.3d 1110 (9th Cir. 2000).

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

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22 **Defendant was repeatedly mocked by the court while being denied his right to be informed of the nature and cause of the charges.**

Several circuits have taken the position that no specific inquiries or special hearings must be conducted to determine whether the defendant has knowingly and intelligently waived the right to counsel.
United States v. Tompkins, 623 F.2d 824 (2d Cir. 1980)
United States v. Kimmel, 672 F.2d 720 (9th Cir. 1982)
United States v. Campbell, 874 F.2d 838 (1st Cir. 1989)
United States v. Bell, 901 F.2d 574 (7th Cir. 1990) (judge must make sufficient inquiry to determine that the defendant in fact understands the dangers involved in self-representation) A generic waiver form cannot replace the colloquy between judge and defendant set forth for the record. **Henderson v. Frank**, 155 F.3d 159 (3d Cir. 1998).

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

It is the court's responsibility to provide the defendant with the requisite information regarding the **nature of the charges**, the possible penalties, and the dangers and disadvantages of self-representation. **United States v. Hernandez**, 203 F.3d 614 (9th Cir. 2000)

Selective Prosecution:

Government officials may not enforce criminal statutes in a discriminatory or selective fashion. The basic principle was stated long ago in **Yick Wo v. Hopkins**, 118 U.S. 356, 373-74 (1886): "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." The city ordinance which Defendant Wo was convicted of violating made it unlawful for any person to maintain a laundry in the city of San Francisco, without first obtaining the permission of the board of supervisors, unless the laundry was located in a building constructed of brick or stone. Although the statute, on its face, was a fair and reasonable exercise of the police power, the facts showed that it was enforced predominantly against individuals of Chinese origins. In a landmark decision, the Supreme Court held that such selective prosecution of an otherwise lawful ordinance was unconstitutional. See also **Two Guys from Harrison-Allentown, Inc. v. McGinley, District Attorney**, 366 U.S. 582 (1961).

Generally, courts are reluctant to second-guess a prosecutor's discretion in choosing which cases to prosecute. **U.S. v. Armstrong**, 517 U.S. 456, 464-65 (1996). Therefore, the defendant bears the burden of showing through "clear evidence" that (1) other persons similarly situated are not being prosecuted; and (2) that the prosecution is based on an impermissible motive, such as invidious discrimination or the violation of a constitutional right. Id.; see also **Wayte v. U.S.**, 470 U.S. 598, 608-09 (1985) (holding that it is appropriate to judge selective prosecution claims according to ordinary equal protection standards). Where the allegation is that certain defendants are being improperly selected for federal rather than state prosecution, a mere showing that federal penalties are higher does not meet the required threshold. **U.S. v. Davis**, 15 F.3d 526, 530 (6th Cir. 1994). See also U.S. v. Reyes, 966 F.2d 508 (9th Cir. 1992).

To establish entitlement to discovery on a claim of selective prosecution based on race, the defense must produce credible evidence that similarly situated defendants of other races could have been

prosecuted, but were not. **Armstrong**, 517 U.S. at 465. In Armstrong, the defense cited to a study dealing with the rates at which defendants of various races were charged in federal, rather than state, court. Id. at 459. However, the Court held that the study did not constitute sufficient evidence to support defendants' claim that blacks were being unconstitutionally singled out for prosecution on crack offenses. Id. at 470-71.

Vindictive Prosecution[23]

The Due Process Clause protects defendants from vindictive treatment based on the exercise of their constitutional and statutory rights. U.S. v. Goodwin, 457 U.S. 368, 372 (1982). However, a district court's denial of a defendant's motion to dismiss for vindictive prosecution is not appealable prior to trial. U.S. v. Hollywood Motor Car Co., 458 U.S. 263 (1982). The cases pertaining to motions to dismiss for vindictive prosecution fall into three basic categories.[24]

The first category occurs generally in state practice and involves the prosecution's attempt to increase charges after the defendant has been convicted of misdemeanor or petty offenses and attempts to appeal. See Thigpen v. Roberts, 468 U.S. 27 (1984) (Court held that where defendant is indicted on more serious charges while pursing collateral relief on original charges, a presumption of prosecutorial vindictiveness arises). To support a vindictive prosecution claim in such cases, both the original and subsequent offenses must arise from same incident. Humphrey v. U.S., 888 F.2d 1546, 1549 (11th Cir. 1989). Moreover, prosecution by different sovereigns, e.g., by federal and state prosecutors, tends to negate the question of vindictiveness. U.S. v. Dickerson, 975 F.2d 1245, 1251-52 (7th Cir.1992).

The second category of cases involves defendants who have successfully appealed their first conviction and, after retrial and a second conviction, receive a harsher penalty than originally imposed. Alabama v. Smith, 490 U.S. 794 (1989) (no vindictiveness when the first sentence was based upon a guilty plea, and the second sentence followed a trial).

The third category involves a pretrial threat by the prosecution to increase charges if the defendant insists on exercising a constitutional right, such as the right to a jury trial. See Goodwin 457 U.S. at 368.

In examining whether there have been independent and intervening circumstances, courts have traditionally looked at whether the second indictment is based upon facts and circumstances known to the prosecution at the time it filed the first indictment. See U.S. v. Esposito, 968 F.2d 300, 306 (3d Cir. 1992) (no presumption where prosecutor's action based on new facts).

Discovery Issues:

See also "Meaningful Access to the Courts" and Law Libraries

"**Criminal discovery is not a game**.[25] It is integral to the quest for truth and the fair adjudication of guilt or innocence." **Taylor v. Illinois**, 484 U.S. 400, 419 (1988) (Brennan, J., dissenting)

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23 **It should be noted that the prosecutor continues to lie to the court in a flagrant attempt to continue to disparage the defendant and falsify the record. She must believe that if you tell a lie enough times the people will believe it is true. See Government's Opposition To Defendant's Motion For A Stay Of Impositions Of Certain Terms And Conditions Of His Supervised Release, Page 8, Lines 8-13. "Defendant…'stole information…'" The record at sentencing clearly reflected the judge's findings that there was no evidence at any time that Sutcliffe "stole" anything. (April 15th, 2004, Sentencing Transcript.) At the hearing, ibid, neither the prosecutor, counsel, or the judge especially, made any effort to correct this lie.**

24 **In addition to these three categories, there is a fourth scenario exemplified by the case of U.S. v. Hooton, 662 F.2d 628 (9th Cir. 1981). Hooton held that if the defendant can establish an appearance of vindictiveness by those who made the decision to prosecute, the mere filing of the original indictment can support a claim of vindictive prosecution. Id. at 634.**

25 **https://www.secure-session.com/files/13/6588/353454670/EC83421ECA/i/Discovery_Violations.pdf**

Substantive exculpatory evidence

"[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." **Brady v. Maryland**, 373 U.S. 83, 87 (1963) "[T]he Brady doctrine, in its purest form, is the rule of law that the Due Process Clause is violated when the government achieves a conviction through the use of perjured testimony, or by withholding a confession of guilt by someone other than the accused, or by withholding evidence 'so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce.'" **United States v. Presser**, 844 F.2d 1275, 1281 (6th Cir. 1988) "The individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." **Kyles v. Whitley**, 514 U.S. 419, 437 (1995)

Impeachment material

"When the 'reliability of a given witness may be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within th[e] general rule" of Brady. **Giglio v. United States**, 405 U.S. 150, 154 (1972) "Impeachment evidence, as well as exculpatory evidence, falls within the Brady rule. Such evidence is 'evidence favorable to an accused,' so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." **United States v. Bagley**, 473 U.S. 667, 676 (1985)

Continuing duty to disclose

"A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court if:
(1) the evidence or material is subject to discovery or inspection under this rule; and
(2) the other party previously requested, or the court ordered, its production." Fed. R. Crim. P. 16(c)

Proceedings where the right to discovery applies

F.R.Crim.P, Rule 26.2 "applies at trial, at a suppression hearing under Rule 12, and to the extent specified in the following rules:
(1) Rule 5.1(h) (preliminary hearing);
(2) Rule 32(i)(2) (**sentencing**);

Loss Of Evidence/Testimony

The prosecution must disclose any exculpatory material or witnesses to the defense. Brady v. Maryland, 373 U.S. 83 (1963). However, what remedies are available to defendant when potentially exculpatory evidence is lost or destroyed? The Supreme Court has offered guidance in three cases: U.S. v. Valenzuela-Bernal, 458 U.S. 858 (1982), California v. Trombetta, 467 U.S. 479, 484 (1984), and Arizona v. Youngblood, 488 U.S. 51 (1988). As discussed below, the lynchpin to each holding is that the defendant must show bad faith on the part of the government.

Where the government deports or otherwise makes unavailable a material witness to a crime, counsel may file a motion to dismiss under U.S. v. Valenzuela-Bernal, 458 U.S. 858 (1982). Again, the essential hurdle is proving bad faith. Because of its duty to execute the immigration policy, the government may deport undocumented alien witnesses upon a good-faith determination that they possess no information favorable to a criminal defendant. Id. To establish a due process violation, defendant must make a "plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available

witnesses." Id. at 873. The sanction of dismissal is warranted "only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact." Id. at 873-74. See also U.S. v. Perez, 217 F.3d 323, 326 (5th Cir. 2000).

With respect to the loss of evidence, the courts have established a tripartite test. The defense must show that, in failing to preserve the evidence, the government: (1) acted in bad faith when it destroyed evidence, (2) the evidence possessed an apparent exculpatory value, and (3) the evidence is to some extent irreplaceable. Trombetta, 467 U.S. at 488-89; Youngblood, 488 U.S. at 58; U.S. v. Dumas, 207 F.3d 11, 15 (1st Cir. 2000). Remedies for destruction of evidence include dismissal, U.S. v. Cooper, 983 F.2d 928 (9th Cir. 1993), or, in less egregious cases, an adverse inference instruction where evidence is lost or destroyed. See Youngblood at 51; U.S. v. Wise, 221 F.3d 140, 156 (5th Cir. 2000) (district court has discretion to admit evidence of spoliation and to instruct the jury on adverse inferences).

In assessing the government's conduct, the court should examine the following factors: (1) whether the evidence was lost or destroyed while in the government's custody; (2) whether the government acted without regard for the accused; (3) whether the government was negligent in failing to adhere to established and reasonable standards of care for police and prosecutorial functions; (4) whether the acts leading to the destruction of evidence were deliberate or in good faith or with a justification; (5) whether, and to what degree, federal officers were involved; and (6) whether the prosecuting government attorneys participated in the events leading to the loss or destruction of the evidence. **U.S. v. Loud Hawk**, 628 F.2d 1139, 1152-53 (9th Cir. 1979) (en banc).

Competency

Substantive Standard

The substantive standard for determining competence to stand trial is whether Torres had " `sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . .[and] a rational as well as factual understanding of the proceedings against him.' " Dusky v. United States, 362 U.S. 402, 402 (1960) (per curiam). **Torres v. Prunty**, Case Number: 99-55662, (9th.Cir. 09/08/00)

Competency to Stand Trial

A district court's determination that a defendant is competent to stand trial is reviewed for **clear error.**
See **United States v. Friedman**, 366 F.3d 975, 980 (9th Cir. 2004); **United States v. Gastelum-Almeida,** 298 F.3d 1167, 1171 (9th Cir. 2002); **United States v. Timbana**, 222 F.3d 688, 700 (9th Cir. 2000); **United States v. Chischilly**, 30 F.3d 1144, 1150 (9th Cir. 1994); **United States v. Hoskie**, 950 F.2d 1388, 1391 (9th Cir. 1991); **Guam v. Taita**no, 849 F.2d 431, 432 (9th Cir. 1988). The test for competency to stand trial is whether the defendant "has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . and a rational as well as factual understanding of the proceedings against him." **Cooper v. Oklahoma**, 517 U.S. 348, 354 (1996).
TRANSCRIPT IN SUPPORT OF ABOVE: 01.14.03

A finding of competency will be overturned only if it is not fairly supported by the record. **Moran v. Godinez**, 57 F.3d 690, 696 (9th Cir. 1994).

A court's decision to order a psychiatric or psychological examination is reviewed for an abuse of discretion. **United States v. George**, 85 F.3d 1433, 1347 (9th Cir. 1996). The court's decision whether to release a copy of the competency report to the media is also reviewed for an abuse of discretion. See **United States v. Kaczynski**, 154 F.3d 930, 931 (9th Cir. 1998). Whether a court is permitted under 18 U.S.C. § 4243(f) to order a psychiatric evaluation of an insanity acquittee is a question of statutory construction reviewed de novo. **United States v. Phelps**, 955 F.2d 1258, 1264 (9th Cir. 1992).

Failure Of Court To Insure Certificate Of Competency Was Filed.

Due Process Issues:

"[w]hether a federal prisoner was properly committed to [a]mental hospital without being present **was not moot**…" **U.S. v. Frierson**, 208 F.3d 282, 286 (1st Cir. 2000) (emphasis added).

"The first step of the procedure [of a competency hearing is that **there must be a certification**…" **U.S. v. Trillo-Cerda**, 244 F.Supp.2d 1065, 1067 (9th Cir). "FMC filed a Certificate of Competency." **U.S. v. Timmins,** 301 F.3d 974, 977 (9th Cir. 2002).

"**Gideon v. Wainwright**, 372 U.S. 335 (1963), involved the total deprivation of the right to counsel at trial. The other, **Tumey v. Ohio**, 273 U.S. 510 (1927), involved a judge who was not impartial. These are structural defects in the constitution of the trial mechanism, which defy analysis by "harmless error" standards. The entire conduct of the trial, from beginning to end, is obviously affected by the absence of counsel for a criminal defendant, just as it is by the presence on the bench of a judge who is not impartial.[26] **Arizona v. Fulminate**, 499 U.S. 279 (1991)

Initial Competency Hearing in March 2003

In an appropriate case, *Strickland*'s prejudice prong may be presumed. **United States v. Cronic**, 466 U.S. 648 (1984).

> The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing . . . . But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated.

Id. at 656-57.

Brady Violation

The government has a duty to disclose all evidence favorable to the defendant which is "material either to guilt or punishment." **Brady v. Maryland**, 373 U.S. 83, 87 (1963); **U.S. v. Agurs**, 427 U.S.97 (1976). Defense counsel should always make a motion or written request for production of Brady evidence. If the government fails to provide such evidence, due process is violated "irrespective of the good faith or bad faith of the prosecution." Id. The government's suppression of exculpatory evidence can serve as a basis for dismissal, reversal on appeal, or other appropriate relief, such as striking a witness' testimony or declaring a mistrial. See **Agurs**, 427 U.S. 97; **Brady**, 373 U.S. 83.

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26 **http://caselaw.lp.findlaw.com/cgi-bin/getcase.pl?court=us&vol=499&invol=279**

In Agurs, the Court addressed the withholding of exculpatory evidence in a case in the which the defendant had not specifically requested the evidence at issue. [27] 427 U.S. at 99. The Court acknowledged that "there are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request." Id. at 110.
With regard to the materiality standard, the Agurs Court held that "the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in reversal." Id. at 111. Instead, the omission must be evaluated in the context of the entire record. Id. at 112. If the withheld evidence "creates a reasonable doubt that did not otherwise exist, constitutional error has been created." Id. at 112.

In **U.S. v. Bagley**, 473 U.S. 667, 676 (1985), the Court held that the government's duty of disclosure includes impeachment evidence. The Court also clarified the materiality standard, stating that constitutional error results from the government's suppression of evidence favorable to the defense "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Id. at 682.

In **Kyles v. Whitley**, 514 U.S. 419, 434 (1995), the Court explained the Bagley standard as follows: Bagley's touchstone of materiality is a "reasonable probability" of a different result, and the adjective is important. The question is not whether the defendant would more likely than not have received a different verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the government's evidentiary suppression "undermines confidence in the outcome of the trial."

The Court emphasized that in applying the materiality standard, the evidence must be considered collectively, not item by item. **Kyles**, 514 U.S. at 436. Once Brady/Bagley error has been found, by definition, the error cannot be treated as harmless. Id. at 435. However, although evidence need not be admissible at trial to be "material," it must at least lead to admissible evidence or be useful for impeachment purposes. See **U.S. v. Dimas**, 3 F.3d 1015, 1018 (7th Cir. 1993); **U.S. v. Phillip**, 948 F.2d 241, 249 (6th Cir. 1991); **U.S. v. Kennedy**, 890 F.2d 1056, 1059 (9th Cir. 1989).

In addition, the Kyles Court further broadened the scope of the government's obligations under Brady to disclose to the defense evidence known only to police investigators. **Kyles**, 514 U.S. at 438; see also **Strickler v. Greene**, 527 U.S. 263, 279 (1999). Counsel should also be cognizant that federal prosecutors' Brady obligations do not stop at the district line. For example, if a prosecutor has knowledge of exculpatory material in the hands of any federal agency in another district, he has control over it and, therefore, is obligated to disclose it. **U.S. v. Bryan**, 868 F.2d 1032, 1037 (9th Cir. 1989).
An important subcategory of Brady law involves the failure to disclose impeachment information about government witnesses. See **Bagley**, 473 U.S. at 676 (impeachment evidence showing witness' bias or interest must be disclosed); **Giglio v. U.S.**, 405 U.S. 150 (1972) (consideration given to witness); **Napue v. Illinois**, 360 U.S. 264 (1959) (same). The more central the witness to the government's case, the greater the likelihood that undisclosed impeachment information will be held to be "material" on appeal. See **U.S. v. Bernal-Obeso**, 989 F.2d 331 (9th Cir. 1993) (remanding for inquiry whether informant lied at trial with government's knowledge); **U.S. v. Williams**, 954 F.2d 668, 672 (11th Cir. 1992); **Ouimette v. Moran**, 942 F.2d 1 (1st Cir. 1991) (affirming grant of habeas relief where State failed to disclose witness's criminal record). Finally, counsel should also raise a Confrontation Clause argument when failure to disclose impeachment information threatens to impair cross-examination. See **Davis v. Alaska**, 415 U.S. 308 (1974).

With respect to Brady claims based on the government's loss or destruction of evidence, **see section 6.18**.[28]

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27 **In Brady, unlike Agurs, the defendant specifically requested the material in question. Brady, 373 U.S. at 83.**

Issues: U.S. Code Annotated Title 18 § 1028

The First:???

A federal jury in Los Angeles on December 4, 2003, found a former Global Crossing computer technician guilty of eight felony counts related to a web site where he posted Social Security numbers and other personal information of thousands of Global Crossing employees. U.S. v. Sutcliffe, C.D. Cal., No. CR 02-350(A)-AHM, 12/4/03. **It may be the first conviction under the federal statute**[29], 18 U.S.C. § 1028(a)(7), prohibiting online posting of Social Security numbers with the intent to aid and abet identity theft. Sentencing is scheduled for March 22, 2004. As a result of the guilty verdicts on the eight counts, he faces a ***maximum possible penalty of 30 year***s in federal prison.[30]

The Seconds:???

See: **United States v. Anthony Jerome Johnson**, CR 99-926 (C.D.Ca. Jan. 31, 2000). United States v. Lamar Christian, CR 00-3-1 (D. Del. Aug. 9, 2000); **United States v. Ronald Nevison Stevens**, CR 00-3-2 (D.Del. Aug. 9, 2000).

In the District of Oregon, seven defendants have been sentenced to imprisonment for their roles in a heroin/methamphetamine trafficking organization, which included entering the United States illegally from Mexico and obtaining SSNs of other persons. The SSNs were then used to obtain temporary employment and identification documents in order to facilitate the distribution of heroin and methamphetamine. In obtaining employment, the defendants used false alien registration receipt cards, in addition to the fraudulently obtained SSNs, which provided employers enough documentation to complete employment verification forms. Some of the defendants also used the fraudulently obtained SSNs to obtain earned income credits on tax returns fraudulently filed with the Internal Revenue Service. Some relatives of narcotics traffickers were arrested in possession of false documents and were charged with possessing false alien registration receipt cards and with using the fraudulently obtained SSNs to obtain employment.

A total of twenty-seven defendants have been convicted in the case to date, fifteen federally and twelve at the state level. **United States v. Jose Manuel Acevez Diaz**, CR 00-60038-01-HO (D.Or. Aug. 10, 2000); **United States v. Pedro Amaral Avila**, CR 00-60044-01-HO (D.Or. Nov. 7, 2000); **United States v. Jose Arevalo Sanchez**; CR 00-60040-01-HO (D.Or. Nov. 21, 2000); **United States v. Maria Mersedes Calderon**, CR 00-60046-01-HO (D.Or. May 10, 2000); **United States v. Victor Manuel Carrillo**, CR 00-60045-01-HO (D.Or. Oct. 24, 2000); **United States v. Alfonso Flores Ramirez**, CR 00-60043-01-HO (D.Or. Aug. 30, 2000); **United States v. Cleotilde Fregoso Rios**, CR 00-60035-01-HO (D.Or. Nov. 7, 2000); **United States v. Javier Hernandez Lopez**, CR 00-60038-01-HO (D.Or. Aug. 10, 2000); **United States v. Ranulfo Salgado**, CR 00-60039-01-HO (D.Or. Jan. 18, 2001); **United**

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28 https://www.secure-session.com/files/13/6588/353226650/9D622A8259/i/_DefendingAfederalCriminaCase.pdf

29 **https://www.secure-session.com/files/13/6588/352287241/7B2F4687A5/i/BlackSept05.pdf**

30 **Presented By: G. Patrick Black, Federal Public Defender, Eastern District of Texas 110 N. College, Suite 1122, Tyler, Texas 75702. (903) 531-9233. TCDLA Seminar September 8 – 9, 2005.**

States v. Angel Sanchez, CR 00-60080-01-HO (D.Or. Aug. 31, 2000); **United States v. Cresencio Sanchez**, CR 00-60143-01-HO (D.Or. Dec. 13, 2000); **United States v. Piedad Sanchez**, CR 00-60131-01-HO (D.Or. Jan. 9, 2001); **United States v. Noel Sanchez Gomez**, CR 00-60034-01-HO (D.Or. Dec. 12, 2000); **United States v. Kelly Wayne Talbot**, CR 00-60081-01-HO (D.Or. Dec. 31, 2000); **United States v. Jose Venegas Guerrero**, CR 00-60037-01-HO (D.Or. Nov. 21, 2000).

Presence of Defendant [31]

A defendant has the right to be present at every stage of the trial.[32] The right is both constitutional and statutory. The constitutional right is based on the Fifth Amendment due process clause and the Sixth Amendment right to confrontation. Under the Constitution, the defendant's presence "is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." **United States v. Gagnon**, 470 U.S. 522, 526 (1985)(quoting **Snyder v. Massachusetts**, 291 U.S. 97, 108 (1934)). Thus, the Constitution does not guarantee that a criminal defendant be present at all stages of the trial but rather only at "critical stage[s]." **La Crosse v. Kernan**, 244 F.3d 702, 707-08 (9th Cir. 2001).

In **Faretta v. California**, 422 U.S. 806, 819 n.15 (1975), the Supreme Court stated that a defendant has the "right to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings." See also **Fisher v. Roe**, 263 F.3d 906, 914-15 (9th Cir. 2001) (citing Snyder, 291 U.S. at 105-06) (defendant has a right to be present if his presence "has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge").

Rule 43(a), Fed. R. Crim. P., provides in part that a defendant must be present at every trial stage, including the jury impanelment and the return of the verdict and sentencing, unless otherwise provided by the rules.

Rule 43(b)(3), Fed. R. Crim. P., provides in part that a defendant need not be present where the "proceeding involves only a conference or hearing on a question of law." Rule 43(c), Fed. R. Crim. P. governs circumstances under which a defendant has waived the right to be present at trial or sentencing:

"[w]hether a federal prisoner was properly committed to [a]mental hospital without being present **was not moot**…" **U.S. v. Frierson**, 208 F.3d 282, 286 (1st Cir. 2000) (emphasis added).

Waiving Continued Presence.

(1) **In General**. A defendant who was initially present at trial, or who has pleaded guilty or nolo contendere, waives the right to be present under the following circumstances:
(A) when the defendant is voluntarily absent after the trial has begun, regardless of whether the court informed the defendant of an obligation to remain during trial;
(B) in a noncapital case, when the defendant is voluntarily absent during sentencing; or
(C) when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal from the courtroom.

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31 Court Docket # 158, 4/7/2003

32 A MANUAL ON JURY TRIAL PROCEDURES. Prepared by The Jury Instructions Committee of the Ninth Circuit Members: Judge George H. King, Chair; Judge Roger L. Hunt; Judge Lawrence K. Karlton; Judge A. Howard Matz; Judge Jeffrey T. Miller; Judge Marsha J. Pechman; Magistrate Judge John Jelderks. (2004)

(2) Waiver's Effect. If the defendant waives the right to be present, the trial may proceed to completion, including the verdicts return and sentencing, during the defendant's absence.

Case law does not offer precise answers as to all circumstances under which a defendant is entitled to be present. The safer and better practice is to have the defendant present at all times unless the defendant waives the right to be present. See, e.g., **United States v. Gagnon**, 470 U.S. at 528 (although district judge's in camera contact with juror constituted critical stage, waiver inferred from defendant's failure to request to be present after having been advised that judge intervened to talk to juror); **Egger v. United States**, 509 F.2d 745, 747-48 (9th Cir.) (under circumstances presented, any error resulting from defendant's absence at sidebar conferences was harmless), cert. denied, 423 U.S. 842 (1975); **Stein v. United States**, 313 F.2d 518, 522 (9th Cir. 1962) (defendant's absence from conference between court and counsel regarding admissibility of recordings not reversible error on facts presented), cert. denied, 373 U.S. 918 (1963). [33]

Standards for Fact Findings of Competency and Related Issues, et seq

Clearly Erroneous[34]

1. Definitions

Review under the clearly erroneous standard is significantly deferential, requiring a "definite and firm conviction that a mistake has been committed." See Easley v. Cromartie, 532 U.S. 234, 242 (2001); Concrete Pipe & Prods. v. Construction Laborers Pension Trust, 508 U.S. 602, 623 (1993); Lentini v. California Center for the Arts, Escondido, 370 F.3d 837, 843 (9th Cir. 2004); Mathews v. Chevron Corp., 362 F.3d 1172, 1180 (9th Cir. 2004); SEC v. Rubera, 350 F.3d 1084, 1094 (9th Cir. 2003); McClure v. Thompson, 323 F.3d 1233, 1240 (9th Cir.), cert. denied, 124 S. Ct. 804 (2003); United States v. Elliott, 322 F.3d 710, 714 (9th Cir.), cert. denied, 124 S. Ct. 169 (2003); United States v. Syrax, 235 F.3d 422, 427 (9th Cir. 2000); United States v. Maldonado, 215 F.3d 1046, 1050 (9th Cir. 2000); United States v. Palafox-Mazon, 198 F.3d 1182, 1186 (9th Cir. 2000); see also United States v. Doe, 155 F.3d 1070, 1074 (9th Cir. 1998) (en banc) ("We accept the lower court's findings of fact unless upon review we are left with the definite and firm conviction that a mistake has been committed."); United States v. Hughes Aircraft Co., 162 F.3d 1027, 1030 (9th Cir. 1999) ("We will not disturb a district court's findings of fact unless we are left with a definite and firm conviction that a mistake has been made.").

Thus, an appellate court must accept the lower court's findings of fact unless upon review the appellate court is left with the definite and firm conviction that a mistake has been committed. See Sawyer v. Whitley, 505 U.S. 333, 346 n.14 (1992); Leavitt v. Arave, 371 F.3d 663, 669 (9th Cir. 2004) (habeas); Rubera, 350 F.3d at

33 **https://www.secure-session.com/files/13/6588/353344714/4B6BF6C985/i/_Steven_2004%20Jury%20Trial%20Manual.pdf**

34 **http://www.ce9.uscourts.gov/web/newopinions.nsf/0/ad54853bb626f10188256954005fe455?OpenDocument**

1094; In re Jan Weilert RV, Inc., 315 F.3d 1192, 1196 (9th Cir.), amended by 326 F.3d 1028 (9th Cir. 2003); In re Banks, 263 F.3d 862, 869 (9th Cir. 2001) (BAP); Gonzalez-Caballero v. Mena, 251 F.3d 789, 792 (9th Cir. 2001); Alder v. Federal Republic of Nigeria, 219 F.3d 869, 876 (9th Cir. 2000). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. See Rubera, 350 F.3d at 1094; Husain v. Olympic Airways, 316 F.3d 829, 835 (9th Cir. 2002), aff'd, 124 S. Ct. 1221 (2004); Phoenix Eng'g & Supply Inc. v. Universal Elec. Co., 104 F.3d 1137, 1141 (9th Cir. 1997); see also United States v. Working, 224 F.3d 1093, 1102 (9th Cir. 2000) (en banc) (applying standard). Thus, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Elliott, 322 F.3d at 714; Working, 224 F.3d at 1102; Duckett v. Godinez, 109 F.3d 533, 535 (9th Cir. 1997). As this court has graphically described, "[t]o be clearly erroneous, a decision must strike us as more than just maybe or probably wrong; it must . . . strike us as wrong with the force of a five-week-old unrefrigerated dead fish." Hayes v. Woodford, 301 F.3d 1054, 1067 n.8 (9th Cir. 2002) (internal quotation omitted).

2. Applications

A district court's findings of fact are reviewed under the clearly erroneous standard. Fed. R. Civ. P. 52(a); Easley v. Cromartie, 532 U.S. 234, 242 (2001); Lawyer v. Department of Justice, 521 U.S. 567, 580 (1997); Chevron USA Inc. v. Bronster, 363 F.3d 846, 855 (9th Cir. 2004); SEC v. Rubera, 350 F.3d 1084, 1091 (9th Cir. 2003); United States v. Fernandez-Castillo, 324 F.3d 1114, 1117 (9th Cir.), cert. denied, 124 S. Ct. 418 (2003); McClure v. Thompson, 323 F.3d 1233, 1240 (9th Cir.), cert. denied, 124 S. Ct. 804 (2003); Freeman v. Allstate Life Ins. Co., 253 F.3d 533, 536 (9th Cir. 2001); United States v. Lam, 251 F.3d 852, 855 (9th Cir.), amended by 262 F.3d 1033 (9th Cir. 2001); Diamond v. City of Taft, 215 F.3d 1052, 1055 (9th Cir. 2000); Stewart v. Thorpe Holding Co. Profit Sharing Plan, 207 F.3d 1143, 1149 (9th Cir. 2000). That standard is applied in both civil and criminal proceedings. See United States v. Cazares, 121 F.3d 1241, 1245 (9th Cir. 1997); United States v. Lester, 85 F.3d 1409, 1410-11 (9th Cir. 1996); United States v. McConney, 728 F.2d 1195, 1200 n.5 (9th Cir. 1984) (en banc).

"Findings of fact are made on the basis of evidentiary hearings and usually involve credibility determinations, which explains why they are reviewed deferentially under the clearly erroneous standard." Rand v. Rowland, 154 F.3d 952, 957 n.4 (9th Cir. 1998) (en banc). The standard applies to findings the district court adopts from proposed findings submitted by the parties. Anderson v. Bessemer City, 470 U.S. 564, 571-73 (1985); Russian River Watershed Protection Comm. v. City of Santa Rosa, 142 F.3d 1136, 1141 (9th Cir. 1998); Phoenix Eng'g & Supply Inc. v. Universal Elec. Co., 104 F.3d 1137, 1140 (9th Cir. 1997); Saltarelli v. Bob Baker Group Med. Trust, 35 F.3d 382, 384 (9th Cir. 1994); but see Commodity Futures Trading Comm'n v. Topworth Int'l, Ltd., 205 F.3d 1107, 1112 (9th Cir. 2000) (noting while review is for clear error, the reviewing court will review with "particularly

close scrutiny" when findings are adopted). The clear error standard also applies when the trial court relies solely on a written record. Amanda J. ex rel. Annette J. v. Clark County Sch. Dist., 267 F.3d 877, 887 (9th Cir. 2001); Green v. Hall, 8 F.3d 695, 698 n.1 (9th Cir. 1993); Phonetele, Inc. v. American Tel. & Tel. Co., 889 F.2d 224, 229 (9th Cir. 1989); Wardley Int'l Bank, Inc. v. Nasipit Bay Vessel, 841 F.2d 259, 261 n.1 (9th Cir. 1988). Findings of fact based on stipulations are also reviewed for clear error. See Smith v. Commissioner, 300 F.3d 1023, 1028 (9th Cir. 2002); United States v. Bazuaye, 240 F.3d 861, 864 (9th Cir. 2001).

The district court's findings of fact following a bench trial are reviewed for clear error. See Friends of Yosemite Valley v. Norton, 348 F.3d 789, 793 (9th Cir. 2003); Schnabel v. Lui, 302 F.3d 1023, 1029 (9th Cir. 2002); Dubner v. City and County of San Francisco, 266 F.3d 959, 964 (9th Cir. 2001); Troutt v. Colorado Western Ins. Co., 246 F.3d 1150, 1156 (9th Cir. 2001); Ambassador Hotel Co. v. Wei-Chuan Inv., 189 F.3d 1017, 1024 (9th Cir. 1999); Dolman v. Agee, 157 F.3d 708, 711 (9th Cir. 1998); see also Saltarelli, 35 F.3d at 384("In reviewing a bench trial, this court shall not set aside the district court's findings of fact, whether based on oral or documentary evidence, unless they are clearly erroneous.").

Special deference is paid to a trial court's credibility findings. Anderson v. City of Bessemer, 470 U.S. 564, 573 (1985); McClure v. Thompson, 323 F.3d 1233, 1241 (9th Cir.), cert. denied, 124 S. Ct. 804 (2003); United States v. Elliott, 322 F.3d 710, 715 (9th Cir.), cert. denied, 124 S. Ct. 169 (2003); Allen v. Iranon, 283 F.3d 1070, 1078 n.8 (9th Cir. 2002); Caro v. Woodford, 280 F.3d 1247, 1252 (9th Cir. 2002); Hernandez v. City of El Monte, 138 F.3d 393, 398 (9th Cir. 1998). Thus, the trial court's ruling on the credibility of a witness is reviewed for clear error. See McClure, 323 F.3d at 1241; Williams v. Woodford, 306 F.3d 665, 706 (9th Cir. 2002); United States v. Saya, 247 F.3d 929, 935 (9th Cir. 2001); United States v. Matta-Ballesteros, 71 F.3d 754, 766 (9th Cir. 1995), amended by 98 F.3d 1100 (9th Cir. 1996).

TRIAL ISSUES

DENIAL OF COUNSEL

See also **6th Amendment Issues**

"In Argersinger we held that '**absent a knowing and intelligent waiver, no person may be imprisoned for any offense . . . unless he was represented by counsel at his trial**.' (Emphasis added.) Although, we said, the 'run of misdemeanors will not be affected' by this rule, 'in **those that end up in the actual deprivation of a person's liberty**, the accused will receive the benefit' of appointed counsel." (emphasis added). **Alabama v. Shelton, 535 U.S. 654 (2002)**

Defendant argues that this case is one of the complete denial of counsel, which the Supreme Court has referred to as so likely to prejudice the accused that prejudice should be presumed. This applies whenever an accused is denied the presence of counsel at "a critical stage," **Bell v. Cone**, 535 U.S. 685, 695-96 (2002) (discussing **United States v. Cronic, 466 U.S. 648 (1984)**). [YOU MUST

OFFER SUPPORT THAT "THIS" WAS A "CRITICAL STAGE" AT WHICH THE ASSISTANCE OF COUNSEL WAS REQUIRED BY THE CONSTITUTION.]

In **Bell v. Cone, 535 U.S. 685 (2002),** the Supreme Court identified three situations implicating the right to counsel where the Court will apply Cronic's presumption that the petitioner has been prejudiced. The second of the three encompasses situations in which a petitioner is represented by counsel at trial, but his or her counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." **Id. at 696**.